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

CASE NO: 6090/2007

In the matter between:

M.M.J. CONNOLLY Plaintiff

and

THE ROAD ACCIDENT FUND Defendant

Judgment handed down on 8 February 2012

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1. The plaintiff, Mr Martin Michael Joseph Connolly, is claiming damages from the defendant, the Road Accident Fund, arising from a motor vehicle accident which took place on 7 September 2005 when Mr Connolly, then 62 years of age, cycling home from work, was involved in a collision with the insured vehicle. Mr Connolly sustained a severe injury of his back as well as a minor injury of his upper limbs. The injury to the back - a compression fracture of the third lumber vertebra (L3) - is more fully described as a compression fracture of the superior endplate of the L3 vertebral body and a rupture of the disc in the body of L3.

2. The merits had been settled and only the issue of the quantum of the claim remained in dispute. The parties has settled the claim for past medical expenses in the sum of R 13 274,03. Mr Connolly also accepted the defendant's undertaking for future medical expenses in terms of section

17(4)(a) of the Road Accident Fund Act, Act 56 of 1996, which I was to incorporate into the order I would make at the end of the trial.

3. With regard to quantum the essential disputes between the parties were Mr Connolly's claim for future loss of earnings, his loss of earning capacity, general damages and, finally, costs.

4. It is Mr Connolly's case that the pain that he experienced since the accident is the result of the back injury that he sustained in the accident, and that his pain pattern since the accident has remained essentially the same. The increased physical activities expected of him as a contracted project manager caused an increase of his pain and a decrease of his pain endurance, to such an extent that it could not reasonably have been expected of him to carry on working as a contracted project manager at Rotek Engineering ("Rotek") when his two year contract came to an end on 30 November 2010.

5. The defendant, in summary, contended that

   (a) Mr Connolly's present pain and his alleged inability to work, was not factually or legally caused by the injury sustained in the accident. At a very late stage during the trial, the defendant introduced a causality-issue, which was raised for the first time in the third report of Dr Steyn, orthopaedic surgeon, dated 26 October 2010;

   (b) even if was so caused, that he had failed to mitigate his damages, and, had he taken reasonable steps to mitigate his damages, then he would not have suffered any damages. This defence was

introduced on 20 September 2010 by way of an amendment to the defendant's plea;

(c) any award of damages should be greatly reduced in view of the relevant contingencies, particularly in view of Mr Connolly's own evidence that there was only an even chance of him obtaining further contractual work in the future.

6. The trial commenced on 23 March 2010 with the evidence of Mr Connolly. As will be set out below, Mr Connolly returned to the witness stand on 15 February 2011. Mr Connolly was born in Birmingham, United Kingdom, and is of Irish descent. He was born in 1943 and he is at present 68. He will turn 70 in November 2013. He married on 26 June 1966. Mr and Mrs Connolly resides in Table View.

7. Mr Connolly was born on 6 November 1943. Mr Connolly was with the Royal Navy for 23 years, serving on nuclear submarines and gained his first exposure to nuclear technology whilst in its employ. He retired at the age of 40 years in 1983 as a chief petty officer and his charge was chief marine engineering artificer. During 1983 Mr Connolly immigrated to South Africa after he had been recruited by Eskom. At the time Eskom required nuclear expertise to establish and man the Koeberg nuclear facility. Mr Connolly commenced his employment, initially as a nuclear operator in the operating department where he completed two years in-service training in order to obtain his South African licence. He served five years in the operating department.

8. In 1988 he was deployed in the shutdown department, initially as a co-ordinator for shutdowns where he was involved in maintenance and refuelling. He became responsible for Koeberg unit 2 during 1988 and later assumed responsibility for both units 1 and 2 until approximately 1991.

9. In 1991 he was appointed as outage engineer at Koeberg. In approximately 2002 he accepted a position as a turbine project manager at Koeberg – this was, in essence, not a promotion but a sideways step. He was in this position at the time of the accident.

10. Subsequent to the accident, Mr Connolly was at home for six weeks recovering from his injuries. From November 2005 to November 2006 he resumed his position as project manager at Koeberg power station. He remained in this position until the end of 2006.

11. From December 2006 to November 2008 he was transferred to work at the Camden coal-fire power station in Mpumalanga that had been rebuilt and he was appointed as plant project manager. At the end of 2008 he managed 104 technicians and artisans, who were composed of a mixture of South African and French artisans.

12. At the end of November 2008 he officially retired at the age of 65. At the time Mr Connolly fulfilled a senior management role. His total *"cost to company"* package was more than R800 000,00 per annum.

13. Although Mr Connolly had taken leave for approximately a month, he was not ready to retire and in December 2008 he accepted a two-year contract

position with Rotek Engineering as a consultant project manager running to 30 November 2010. He was placed in charge of the turbine and generator maintenance at Koeberg power station.

14. Rotek is an affiliate of Eskom and is responsible for the maintenance of the totality of the Koeberg nuclear power station. Rotek Engineering also provides support services to Eskom and sees to shutdowns of power stations all over the country. Rotek has during past years increased the number of project managers and it is in the process of locating one project manager to each of the various sites. It is scaling down on contractors.

15. There are very few people with Mr Connolly's background and when Koeberg initially started, they had to source personnel from abroad. Mr Connolly was regarded by both Mr Labuschagne and Mr Rudman of Rotek as being a highly skilled individual.

16. Rotek had a need for his specific skills and thus he was appointed on a two-year contract. He was initially appointed at Koeberg, but later commissioned to other power stations, such as Ellisras.

17. Mr Connolly became part of the divisional safety health environment and quality team, which team deals with detailed inspections during shutdowns and adherence to all aspects of safety, health and quality assurance.

18. There were approximately 30 to 35 people reporting to Mr Connolly depending on the scope of work and the type of contract that they had been

engaged in. This would be people of different levels of skills and at times it could be as many as 124 people.

19. Work demands differed from plant to plant and at times some of the projects overlapped. Since he has been seconded to the divisional safety health environment and quality department he had to deal with detailed inspections during shutdowns and became even more physically involved. He was also required to drive up to approximately 4000 km per month, which he found very difficult.

20. The shutdowns are necessitated because the turbines can only carry a finite amount of fuel and every 15 months they have to be refuelled. The opportunity is then also used to do maintenance on the turbines. Mr Connolly thus remained involved in the maintenance of turbines and generators. He was still in a hands-on management role and often on site. He also attended to project administration and financial issues. His responsibilities fluctuated depending on the nature of the project in which he was involved. The scope of his work was also stipulated in the contract to include the preparation and presentation of tenders and the pre-planning of shutdowns.

21. Mr Connolly was responsible for co-ordinating the implementation of his shutdown. The shutdown may only be for part of the station and not necessarily the whole plant. Shutdowns necessitate a lot of planning and Mr Connolly was involved in that. The planning is a central aspect, as is the budgets and in the execution it must be ensured that it is done within the

planning. The execution is subject to penalties. The shutdown itself necessitates much more physical work, in particular going up and down stairs more frequently and also attending to different parts of the plant on a more occasional basis during the shutdowns.

22. Mr Connolly would have to do the pre-planning, and has to co-ordinate the whole shutdown process. This involves also arranging for the various contractors to be on site and execute certain functions. Once on site Mr Connolly would be responsible for co-ordinating and, since he has been seconded to the health and safety department, he also has to do quality control and, thus, he has been more physically involved than he used to be. He would also be required to do inspections during the shutdowns. Mr Connolly was also faced with the fact that the projects overlap.

23. The technical side of the work required of him to inspect the turbines often and see to their stripping – the casings of these turbines weigh 140 tonnes and they are 4,5 metres in diameter. No manual labour was required of him – his was an oversight function and that he was not required to carry any tools or do manual labour. He testified that he was required to move about on site and that that entailed climbing ladders as high as at Koeberg. This requirement is always the same on shutdowns. He often has to descend 6 metres below floor level to 15 metres above floor level, ie a difference of 21 metres.

24. He testified that during a shutdown he would work continuously for 13 to 17 hours a day, 7 days per week, until the shutdown work is completed. He

was required to ascend and descend on ladders with sustained periods of sitting in front of the computer, and at other times simply moving around.

25. On site the work would involve both office-based time and physical inspections which would require the climbing of steps and/or ladders.

26. A shutdown is generally demanding, not necessarily because of the speed with which it happens, but as a result of various multiple variables, including the long hours. Whether it happened slowly or quickly will depend on the actual nature of the particular case.

27. Mr Swart, industrial psychologist, stated in his report that a project manager, such as Mr Connolly, has a tremendous responsibility to plan a particular project in all its manifestations and also to ensure the proper and smooth implementation thereof. Subsequent to such a project or shutdown, the project manager has to ensure that all final reports are drafted and submitted to conclude the project. In the course of a project, a host of specialists are contracted and the project manager must ensure that the appropriately qualified and number of artisans and engineers are engaged. Mr Connolly has excelled as project manager.

28. His contract with Rotek Engineering reflected an estimated contract value for the 2008/2009 year of R1 350 120,00 and for the 2009/2010 year R1 431 127,20. Mr Connolly's hourly rate was R470,00 per hour in terms of the agreement, but had risen to R513,71 per hour – he was paid monthly.

29. It was put to him that his claim against the defendant was based on the probability that he would stop working, but it would seem that, otherwise, he would have kept working until the age of 70, and that he would only stop if the pain became unmanageable. He indicated that he wished to keep on working, that he enjoyed his work and the stimulation it brought. There were still several things to be done before he would throw in the towel. His health was otherwise quite good.

30. At the expiration of his contract in December 2010 he was hopeful that he would be in a position to accept a further two-year contract, either with Rotek Engineering or a similar concern. Mr Connolly testified that his colleagues worked well into their 70's, as did most of his family. Mr Connolly had testified that his skills were in demand and that he probably would not have a problem getting work, if he was able to work, at the end of his employment term with Rotek.

31. It was put to him by Mr Potgieter that he operated in a niche market and had a highly specialised qualification in turbines and generators. He testified that he would be able to get employment with another contractor if he was able to, even abroad. There certainly is enough work for a person with his qualifications.

32. Ms Hofmeyr, a counselling psychologist, testified that Mr Connolly was confident that there was sufficient work available either at Rotek or a similar concern to pursue further employment after the contract expired at the end of 2010. He is a technically skilled individual in a niche market and there is

a demand for his skills, which would be not only the case in South Africa where there is a significant shortage of technical skills, but also abroad. Ms Hofmeyr had confirmed with Mr Andrew Niche from Rotek that Mr Connolly was regarded as highly skilled and competent. Mr Niche could not confirm that he would definitely be re-employed. Mr Connolly had conveyed to Ms Hofmeyr that he had investigated a similar option with Alstom who had indicated that there was a contract available to run until 2016. He was not successful with an application made to Alstom. He also had options at Siemens, General Electric and specifically the division granite. There was also an Irish firm, Shanahans, and he was confident that he could pursue employment with them as he carried an Irish passport.

33. He was, when he first testified, working in Mpumalanga and the following year he was to be in Ellisras. The plants are exactly the same as at Koeberg, but they are, of course, fossil fuel plants. Since November 2009 he has been on fewer shutdowns and involved more with managerial work. His expertise, however, is in shutdowns.

34. By all accounts Mr Connolly is an active person. As at September 2005 he was able to cycle to and from work, 20 kilometres each way, on a daily basis; he was able to comfortably cycle distances of 100 kilometres and ran at least three times a week. The evidence was, as will be set out below, that since the accident he never got back to the same levels of activity.

35. The accident took place on 7 September 2005 whilst Mr Connolly was still employed at Koeberg. Mr Connolly was cycling home from work, which he

did on a daily basis. The insured vehicle suddenly turned left and collided with him. Although he did not lose consciousness, Mr Connolly confirmed that he was immediately aware of pain in his back and both legs and was transferred to Milnerton Medi-Clinic by ambulance.

36. He was hospitalised for five days and then spent six weeks at home recuperating. He was paid during his absence and did some administrative and technical work from his laptop at home. Accordingly, and during this period, he did not suffer any loss of income.

37. He experienced a great deal of pain and discomfort in the first six to eight weeks after the accident. Mr Connolly testified that since the accident he experienced lumber back pain and pain radiating predominantly in his left leg. His left leg sometimes gives way and he experiences a lack of sensation in that limb.

38. At the time that he testified for the first time (23 March 2010) (as will be set out below he returned to the witness stand on 15 February 2011) he stated that the back pain was then so bad that he experienced no quality of life and could only lie down after the day's work. He was able to honour his obligations in terms of his employment contract, but if the pain changes he may have to stop earlier. He stated that he had come to terms with the fact that he would not be able to carry on working as a result of the pain which has become worse. This was as a result of the back pain. A year earlier he was still of the view that he could continue. He testified that either his pain tolerance had decreased or the pain had increased, and that he could not

cope with it. He testified that the pain in his back seemed to him to be a progression of problems.

39. When he first testified he stated that at the end of the working day he was incapable of doing anything more. He likened the pain to a constant headache or toothache that he was learning to tolerate, provided he changed position regularly. He cannot sit for very long – for about 45 minutes when driving or sitting behind his desk. Thereafter he has to stop his work and get up or, when driving, stop and get out. He needs to move around during his rest periods. Pain is cumulative and intervals between rest periods decrease as the day progresses. If he is immobile for long periods, he becomes very stiff and has to straighten up slowly. Standing up is always painful, but worse when the pain is more severe. After the accident he returned to road running, but now has a problem with falling and stumbling when running cross-country. He has not seen a doctor about the weakness in his left leg or the fact that it collapsed. He was advised by a physiotherapist that there had been a weakening of the leg muscles.

40. He trains less frequently than he used to, but still managed to run a 21 kilometre half-marathon in 2007. In training he runs 8 kilometres, but focuses more on his cycling. He still tried to cycle to work one or two days a week. In preparation for the Pick 'n Pay Argus cycle tour he cycled 40 kilometres and, on one occasion, 100 kilometres. He completed the Argus cycle tour in 2008. He rode his best time of 3 hours 26 minutes after the accident. In 2009 he completed the Argus cycle tour in 4 hours 22 minutes, He was stiff after riding longer distances, but felt able to tolerate this.

Cycling causes less discomfort than sitting or driving, but does become uncomfortable after a while. Cycling places stress on the back, but the pain at work was unmanageable. When travelling by air he endeavours to get an aisle seat, and on long haul flights he is very uncomfortable and sleeps on the cabin floor.

41. It was also put to him that the work environment was not that different from normal life and that there was a whole array of "modalities" and procedures available to him, but he had not investigated any of those. He conceded that there may be a solution which would permit him to work beyond the age of 70. He has also not followed medical advice to undergo physiotherapy or see a biokineticist.

42. Dr Coetzee, a neurosurgeon, in his report suggested two procedures: radio frequency ablation, or a facet block. Mr Connolly accepts advice by neurosurgeons, but he only heard about these procedures when reading the report.

43. He has not discussed his injuries with his employers and he had implemented rest-breaks and adaptations without significantly decreasing his productivity. He generally spent his rest periods planning, thinking and engaged in some sort of productive activity to maintain efficiency.

44. He felt he was able to cope and did not think that the pain had to date impacted significantly on his career choices. This was the position at the

time of his interview with Ms Elke Carey, occupational therapist on 20 May 2009.

45. It transpired in cross-examination that Mr Connolly does not take any pain medication. He has an aversion to taking medication. He had a negative reaction to medication some years ago. He testified that he could take pain medication, but that there was some downside to taking medication. He had not taken any medical advice in this regard.

46. His wife testified that medication causes panic attacks in him which are very frightening. He reacts thereto as if on drugs and he has a fear of medication. He therefore seeks to receive natural treatment. On being questioned as to why he did not take any steps to manage his pain, she replied that he had been to see Dr Dippenaar. She testified that medication have a terrible effect on him.

47. He saw a biokineticist for a short while after the accident. He once had physiotherapy whilst on holiday in Thailand. He did not, otherwise visit any physiotherapist or biokineticist. He endeavours to keep fit, but cannot attain the same level as prior to the accident. He indicated that he did not require help from a biokineticist. He believed that physiotherapy could treat soft tissue injuries, to keep the core muscle strong which would help with the pain treatment. He has not taken a day's sick leave since the accident.

48. It was put to him that

(a) It would obviously be unfair if an award was made on the basis that he could not work, and he thereafter received treatment which would enable him to continue working. He answered that he was not contemplating this.

(b) all the medical experts were at *idem* that his was not a progressive condition, but a stable fracture. He has been able to work until now and there was no reason not to carry on. He responded that something was indeed changing, that his pain levels were rising, and it was becoming less and less tolerable.

(c) pain is subjective and an objective indication of pain was the fact that medication was being taken. Even with an aversion, he would seek treatment if the pain became unbearable. Mr Connolly agreed, but pointed out that as the pain increased in the course of the day, it was still bearable, but it impacted on the quality of his life.

(d) even if he stopped working, he would remain active and then still be in pain. He responded that it would be more manageable if he was not required to also work.

(e) then he ought to stay at home and not do anything. He answered that he had not considered that.

(f) It was finally put to him that he ought to investigate possibilities, to which he responded that he has an aversion to long-term medication and the adverse effects that it has.

49. In re-examination he testified that he was much better when on leave and experienced a lot less pain. His quality of life was also a lot better when on leave. The treatment by a biokineticist did not seem to make any difference. The pain seems to be the same pain as immediately after the accident.

50. Mrs Frances Connolly married the plaintiff on 25 June 1966 and three sons were born of the marriage.

51. She visited Mr Connolly in hospital. She testified that he was suffering from chronic pain and was doing a lot less sport than he did in the past. His quality of life was now such that he would lie on the settee and fell asleep, whereas in the past he would have been involved in sport activities. He was very fit and though still fit, not nearly to the same extent after the accident He is always in pain. He finds it difficult to sit and when driving in the car he suffers from his back. He was not handling pain as well as he did, particularly in the last year. When he comes home he does not seem to be himself and is a lot more tired.

52. She did not think that he would want to retire. For her it was worrying and upsetting to see him in pain though he hid it from her. She was also afraid of the cycling and other sporting activities he engaged in as it might add to his problems. With regard to his employment contract, she pointed out that he was quite proud and would feel compelled to see it through, even though he might not be managing at work. He was a lot better when they were on leave in December; he did not seem to be constantly tired, walked on the beach after supper which he did not do when he was working.

53. During shutdowns he would often not come home until 10 o'clock at night and also received phone calls during the night. He would become totally exhausted. He would leave again at 05h30 in the morning. He had not been working for the past few days and had been a lot better.

54. She agreed that he cannot be expected to carry on forever, he must slow down at some stage. He enjoyed working however.

55. Ms Lyall Mari Brink is a registered physiotherapist at Tygerberg Hospital since 2002 and obtained her B.Sc. degree in physiotherapy in 1992. She does mainly medico-legal work. She saw Mr Connolly twice. She prepared two reports, one on 21 May 2009 pursuant to a consultation on 23 April 2009, and a second report dated 21 January 2010 pursuant to a consultation held on 18 January 2010.

56. She established that he was diagnosed with a compression fracture of the third lumbar vertebra, and that he received physiotherapy treatment which was mainly acupressure, which is the same as acupuncture but with localised pressure and without needles. He had regular physiotherapy during the first few months after the accident.

57. The nature of the back pain was a dull aching pain that would make the back tired and he then has pins and needles in the leg. He reported to her that at the end of a working day he would not be able to do anything, and was totally exhausted. He struggles after sitting for a while and then standing up. He is in excruciating pain for about 2 minutes before he can actually bear

weight fully on the left leg. Sitting for longer than 30 minutes increases the pain and then he needs to move. Standing is still better and he tries to move as much as possible, but then at the end of the day he is unable to do anything. Driving is still a problem and he struggles when travelling in an airplane as his back pain increases after about 30 minutes. He now avoids any heavy lifting or carrying. At the end of the day he will just lie on the couch and wakes at night with a sharp shocking pain. He is unable to pick things up from the floor. He no longer does any gardening and employs a gardener. A big complaint is the left leg which gives way under Mr Connolly – he has had one fall and the leg feels weak and numb. Going down stairs is problematic as the leg wants to give way. He struggles with walking uphill.

58. He tries to avoid medication and rather lives with the pain. The pain is constant; it varies in intensity and is activity dependent. He does feel stiff in the mornings, but this decreases during the day. He finds that he has problems with concentration due to pain.

59. Ms Brink explained that the compression fracture in a wedge form, results in the facet joints being loaded and this increases the pain as the spine is already in extension – which is painful. It is a debilitating pain. He moves to the right to compensate for the pain. Movement increases pain. He has a very straight lumbar spine as a result of the accident. The symptom of *"stiffness"* of the ligaments, muscles and joint caps is in keeping with the type of injury. He also suffers from muscle weakness because of the pain inhibition. The pain causes inactivity and this becomes a vicious cycle. Mr

Connolly does not have the normal strength and this is also in keeping with the type of injury.

60. During the second examination she found a significant difference in the flexion of the lumbar spine. Coming out of flexion into extension would cause pain, and she observed that Mr Connolly was moving slightly to the right when bending in order to alleviate the pain. As extension is a movement that causes the joints to compress, with joint pain one would expect extension to be more painful than flexion. She expressed the opinion that, if it was a disc-type pain, one would actually expect flexion to be more painful and not extension.

61. During both examinations Ms Brink made objective evaluations by palpating the injured area of Mr Connolly's back. During the first examination she found tenderness from L1 to L5, with L3 the most painful and causing involuntary muscle spasm. During the second examinations she found tenderness from L1 to S1, with L3 the most painful and causing involuntary muscle spasm. During the first examination she found the facet joints on levels L3/4 and L4/5 stiffer and more painful on the left than the right, and on palpation those joints also caused involuntary muscle spasm. Except that facet joints on level L2/3 were also involved during the second examination, her findings were exactly the same as before. On both occasions the S1 joints were painful more on the left than on the right with pain radiating to the left buttock, as well as stiffness and thickening of the lumbar extensors more on the left than the right. During the second evaluation she also found atrophy of the larger lumbar extensor on the left. At that stage the two joints below the fracture area (L3/4 and L4/5)

were also affected, as expected with a flat lumbar spine that causes the weight to be shifted through all the joints.

62. Because of the atrophy of the extensor muscle, he is not able to strengthen the muscles as it results in pain which causes further muscle weakness (the circle of pain). When there is atrophy it becomes just about impossible to strengthen the muscle.

63. Ms Brink also found that Mr Connolly's injury has caused a decrease in his endurance, and she regards this as in keeping with his injury. The decrease in muscle endurance is not the same as a decrease in natural endurance. Although Mr Connolly has a good natural endurance, the increasing pain decreases his endurance. The pain would cause him to tire quicker, resulting *inter alia* in a loss of concentration. On testing she found weak endurance of his middle trapezius muscles (that is the lumbar and abdominal stabiliser muscles where there is weakness and decreased endurance). With the second examination she found more weakness and decreased endurance of the lumbar and abdominal stabiliser muscles, as well as weakness of the left hamstring and quadriceps muscles.

64. Mr Connolly's natural endurance is very good, but the pain inhibits movement and decreases his endurance. It also causes problems with concentration. The muscles also go into involuntary spasm in order to protect itself. The L2/L3 joints have fused and his endurance is getting less and less *"and that should continue".* Ms Brink is of the opinion that cycling

should be avoided because of the flex position of the back. However, because he is flexed, it is not as painful. The abdominal muscles try to stabilise the back and as soon as he gets off the cycle, there will be more pain.

65. The pain is immutable. The measurement of pain is subjective. Dr le Roux indicated pain at a scale of 6.5-9/10 on 20 April 2009, whilst in November 2009 the pain was indicated at 5-8/10. It is only at a level of 7/10 that treatment will be required (or be effective). Ms Brink testified that Mr Connolly will experience pain differently from day to day. He has to stop working in order to lessen the pain. This would make his retirement more comfortable.

66. It was put to her that it was clear that Mr Connolly had not received any treatment which could have relieved his symptoms. The physiotherapy would have alleviated pain and medication would have made the pain more bearable. Dr le Roux was dismissive of the benefits of physiotherapy. Ms Brink testified that she would not recommend either a biokineticist or pilates. She was of the opinion that a biokineticist would not have a beneficial effect as it would increase the pain and it was pain inhibition that led to the decreased endurance. Ms Brink further testified that she took into account the simple effects of degeneration – the joints do not present the same as with degeneration and, as it is specific to two vertebrae, she attributes it to the accident. It was pointed out to her that both Dr Steyn and Prof Vlok would point to the degeneration of the lower back. Her view was that the pain was accident related.

67. Mr Potgieter contested with Ms Brink what Mr Connolly did at work that would increase his pain levels above those compared to daily living when, for instance, retired. He also queried why Ms Brink did not recommend that the pain be addressed. Ms Brink replied that all the suggested options would decrease the pain slightly, but not in full. Medication will help with acute pain and flare ups.

68. The court adjourned to ultimately recommence on 27 September 2010. By then an additional report by Mr Hannes Swart was filed and the defendant had amended its plea to introduce a defence that the plaintiff had failed to mitigate his damages.

69. Ms Liza Hofmeyr is a registered counselling psychologist and human resources consultant in private practice. She established her own business in 2005. She qualified as a psychologist in 1998. She is specialised in career and organisational psychology and focuses on the individual's perspective. She has been in the industry for the last 15 years and was a director of PE Corporate Services, a leading consulting firm in terms of remuneration and job evaluations, for 5 years.

70. She prepared a report, dated 21 August 2009. Ms Hofmeyr, in her report, confirmed that the long hours Mr Connolly was working, was taking its toll (as indicated by his wife, Mrs Connolly). Mrs Connolly reported that he seemed exhausted after work and she was of the opinion that he was pushing himself to the limit. He also did not accept his functional restrictions, difficulties and less active lifestyle very well.

71. She is in agreement with Ms Elke Carey, the occupational therapist's, observation that Mr Connolly is an inherently resilient individual. Ms Hofmeyr pointed out that, although Mr Connolly is emotionally resilient, chronic pain has an impact on endurance, pain tolerance and energy over time and one's ability to cope with prolonged chronic pain is typically an issue that requires consideration from a psychological perspective.

72. Both Dr le Roux and Ms Brink were of the opinion that Mr Connolly's endurance has decreased over time and that he experiences more difficulty coping with the chronic pain he experiences.

73. Ms Hofmeyr and her counter-part, Mr Swart prepared a joint minute. Therein they recorded that had the accident not occurred at the time, they were both of the opinion that Mr Connolly would have continued working until age 70. Beyond that age employment prospects were speculative.

74. In the post-accident scenario Ms Hofmeyr was of the opinion that, although a stoic and competent individual, Mr Connolly's persistent residual symptoms do have an adverse impact on Mr Connolly's endurance and quality of life, which would impact on the likelihood of his pursuing another contract after 2010. In any event, early retirement would occur. Ms Hofmeyr deferred to medical opinion regarding Mr Connolly's ability to continue working until the age of 70 in his injured state. Mr Swart, however, was of the opinion that Mr Connolly had been quite successful in his position subsequent to the accident in question and saw no reason to suggest why

he would not be able to continue with this position until the age of 70. Mr Swart also deferred to the opinion of the orthopaedic surgeons.

75. Ms Hofmeyr testified that subsequent to her report she established that Mr Connolly's role became more demanding and August 2010 has been quite hectic. He drove more than 8 000kms during August and September. The driving aggravates his symptoms significantly. Ms Hofmeyr testified that Mr Connolly stated that he drives with great difficulty and that it is killing him. Though Mr Connolly was appointed primarily as a project manager, he was then also in the health department, which has different requirements in terms of the scope of project management.

76. Subsequent to her report he became more involved on a fulltime basis with shutdowns. It was both physically more demanding and also demanded extensive travelling. Personnel are required to work very long hours during shutdowns – 12 to 13 hours a day. This can be seven days a week for a month or two.

77. Ms Hofmeyr reiterated that shutdowns are physically demanding, emotionally demanding and also demanding in terms of the long work hours, even if this all takes place at a measured pace.

78. Rotek does not generally employ people beyond the general retirement age of 65, as there is pressure from the unions to make provision for younger employees in senior positions. Ms Hofmeyr pointed out that many companies in industry want to give younger people opportunities, but especially in key positions you could only do so if the individuals have the

necessary skills. Mr Labuschagne reiterated that the process of minimising contractors was a planned one some years ago and this plan is now coming to fruition. As a result of this, there would have been an even chance of re-employing Mr Connolly after the termination of his current contract, irrespective of the accident and Mr Connolly's health. Ms Hofmeyr responded that she never assumed that Mr Connolly would be re-employed by Rotek as a matter of certainty.

79. Though Mr Connolly's contract may not be renewed by the end of 2010, it is still possible that they may utilise his services at some time in the future. There are very few project managers within Rotek on nuclear plants. They do not have a totally sedentary position for Mr Connolly.

80. Ms Hofmeyr commented that Mr Connolly has an inherently good work ethic and then he is also a stoic individual who would sacrifice personal aims to get the job done.

81. Ms Hofmeyr conceded the physical demands outlined in the report by Mr Swart. She, however, emphasised that a significant part of any shutdown is the driving requirements and that this aspect needs to be explored with Ms Carey.

82. There are good support systems within Rotek. The project manager does not engage in any physical work, but conducts site visits at least twice a day. If there is a problem he may visit a specific site more regularly until the problem is solved.

83. Mr Connolly has a set lifestyle. He would have to adapt his lifestyle drastically if he does not have an income. He enjoys working, he enjoys the fruit of his labour and he enjoys a comfortable lifestyle. In his family people work for long, well past the age of 65. That is what he wants to do.

84. She testified that Mr Connolly told her that he has reduced his cycling and his jogging, and his lifestyle has become much more passive, whereas he used to be a very active individual. He is now dead tired when he gets home and he basically eats, sleeps and works.

85. It is put to her that Mr Connolly has now taken up mountain biking and that he has recently done a 40km mountain bike trip. She answered that he had told her that his symptoms were becoming worse, his pain tolerance was deteriorating and that he was now scared of cycling on the road.

86. Ms Elke Carey is a registered occupational therapist in private practice. She qualified in 1997 at UCT. She holds a BSc Occupational Therapy degree. She furnished a report in May 2009 and again on 17 May 2010.

87. She testified that Mr Connolly returned to work eight weeks after the accident and he wore a back brace for approximately three months. He was referred by Dr Coetzee for traction/inversion therapy. He attended the required appointments until he was discharged. He no longer uses pain medication and does not attend treatment. He tries to maintain his core muscle strength by cycling and engaging in home exercises. He presently experiences constant lumbar back pain, radiating into both legs, mainly into

his left leg. He always has discomfort on the left. With adaptations he is usually able to tolerate the pain. He complained that his pain was becoming less and less tolerable, that it was progressive during the day, and that it left him worn-out at the end of the day. At his second interview, the aforegoing was more of a problem for Mr Connolly. She has had regard to Mr Connolly's evidence in court. She reported that Mr Connolly needs to move around during his rest periods. The pain is cumulative and intervals between rest periods decrease as the day progresses. This is confirmed by Mr Connolly's evidence that the pain during the day tends to build up. He can only sit for shorter and shorter periods. Ms Carey testified that this is quite common with people suffering from pain that builds up. Their tolerance to the pain and endurance decreases and they need to rest more frequently than they would have had earlier in the day.

88. Ms Carey testified that Mr Connolly gave a clear account of the situation and that he presented as a pragmatic and stoic person, determined to remain as functional as possible. He appeared uncomfortable during the seated interview, changing position regularly. Ms Carey said that he was doing the usual things that people do to compensate for lower back pain and to accommodate it whilst sitting. With regard to his future career plans, he had informed her that he would continue working whilst he enjoyed it and the pain remained tolerable. He stated that he would stop working should his pain increase.

89. Ms Carey testified that Mr Connolly's muscle strength in his trunk was decreased both in his back and abdominal muscles. There was muscle

wasting of the left back and buttock. The hip strength on the left was decreased and the left knee flexion was decreased. Mr Connolly described his pain as lumbar back pain with referred pain into the left buttock and, when driving, pain referred into his left leg and sole of his foot. Pain was aggravated by sitting and driving. Running increased pain. Pain was managed mainly with frequent changes of position, avoidance of certain activities and exercise. On the Oswestry low back pain disability questionnaire he was rated by himself at a 24% functional disability. Ms Carey stated that this indicates a moderate disability. Mr Connolly reported restrictions mainly with lifting, sitting, travelling and his social life, which includes sport activities.

90. He informed Ms Carey that he implemented breaks and adaptations without significantly decreasing productivity. He spent his rest periods planning, thinking and engaged in some sort of productive activity to maintain efficiency. He felt able to cope and did not think that pain had to date impacted significantly on his career choices.

91. This, Ms Carey testified, had changed between the two interviews. He now has no quality of life and did not believe that he could continue working. He was no longer coping with the work and intended not to renew his contract. He reportedly also decided to retire despite the financial advantages of continued employment and hoped to regain increased quality of life, including exercising in a reduced capacity, if he was able to rest at will after exercise. He was at times woken by pain when he moved during sleep. At the second interview Mr Connolly reported increased subjective pain and

the intention to permanently retire at the end of November 2010 due to his chronic pain levels of increasing intensity. Physical work demands increased with extensive hours worked on a shift basis and sustained ambulatory requirements, including climbing stairs. He had discontinued his sport activities.

92. At the second interview he rated his pain as 7 out of 10 (against 4 out of 10 at the first interview). He had been working a nightshift and then had a long trip to Cape Town, including a delayed flight. He reported severe burning central back pain during the preceding week. On the Oswestry questionnaire he now rated 48% disabled. He had increased ratings in pain intensity, standing endurance, sleep and social life and pain was gradually worsening. He also had an increased paunch due to lack of exercise and weight gain.

93. She assessed Mr Connolly's pain and found that there was a central tenderness from L3 to S1, and she explained that he basically experiences pain in his left lumbar back, which included the spine and the muscles of the left lower back. He experiences pain from about the fracture area downwards into the sacral area, which was painful on the left.

94. Ms Carey testified that chronic pain wears down a person's endurance. It is a tiring experience. Eventually people tend to burn out and their resilience tends to decrease. They are forced to adapt their lifestyle according to their pain levels.

95. During the second examination he informed her that his physical demands at work had increased and that his work was largely ambulatory. According to him the pain was cumulative during the day when engaged in ambulatory work. He had to lie down and rest after hours, and he discontinued running and rarely cycled. He reported to have no quality of life due to his pain levels. Mr Connolly informed her that due to his pain levels and resultant poor quality of life, he would not renew his contract.

96. She concluded that Mr Connolly's pain tolerance to chronic back and left leg pain appeared to have decreased, and on assessment she found a further decrease of Mr Connolly's left hip strength and an increase of his balance difficulties on the left leg. She considered his decision not to renew his contract was reasonable. Ms Carey stated that the demands of his work exceeded his capacity. He was in too much pain and the physical demands were excessive for his condition and his pain tolerance. Ms Carey testified that she would *"obviously"* advise that he underwent multi-disciplinary treatment in *"the various modalities"*. To discontinue work would be part of this treatment.

97. Mr Potgieter put it to Ms Carey that the suggestion that Mr Connolly was to stop working entailed that he would go home and suffer pain at home. On the other hand, he might go to work and suffer pain there, and earn R1 000 000 per year. Ms Carey pointed out that it depended on what the work required of him – if you are being forced at work to perform a specific set of activities, you are not able to adapt and adjust to your body's comfort levels.

98. From this Mr Potgieter put it to Ms Carey that what was required was stopping doing those things that aggravate the pain. Mr Potgieter put it to Ms Carey that all the experts – Ms Carey, Ms Joan Andrews, and even towards the end of the year in September when Mr Hannes Swart saw him – were in agreement that Mr Connolly had pain and discomfort, but was coping with it and was enjoying his work and he did not then give any indication that he intended to stop working.

99. Ms Carey responded that Mr Connolly had conveyed to her during his first consultation with her that he would stop working when he could no longer tolerate the pain. Mr Potgieter taxed Ms Carey on whether she had exacted that response (even if inadvertently) – he pointed out to her that it is not to be found in any of the other expert reports. Ms Carey responded that she did not prompt the answer.

100. Mr Potgieter pointed out to her that, already in her first report, she made mention of the fact that on some days Mr Connolly would come home and lie down after work. Mrs Connolly had then already conveyed her concerns that Mr Connolly was pushing himself to remain as active as possible, however, with increased difficulty. She was concerned that he should not be doing what he was doing anymore.

101. What had changed – and Ms Carey agreed – was that the work was more ambulatory. His problems related to sitting down and driving. Ms Carey stated that his sitting was the predominant physical requirement and that aggravated the back pain due to the prolonged and continued cumulative

building up of the pain with sitting. When she saw him the second time, ambulation and the climbing of stairs and ladders were the predominant physical requirements at work. And that, again, was excessive. So both prolonged ambulation and prolonged sitting aggravates his back pain. Walking had become a factor and caused pain as much more walking is required of him and he does not have the (pain) capacity. The pain becomes too severe when walking the amount that he is now required to do. Ms Carey recommends physiotherapy for all sufferers of back pain. This is in conjunction with activity adaptations. A physiotherapist may also supervise the exercise rehabilitation – then a biokinethesist would not be needed. Others only focus on soft tissue mobilisation type techniques and prefer to refer the patient to a biokinethesist. Pilates exercises will assist with the correct abdominal back and muscle strengthening exercises. Ms Carey testified that physiotherapists are more thorough in examining soft tissue injuries than orthopaedic surgeons, who concentrate more on the *"bony issues"*.

102. Ms Carey stated that you cannot use medication on its own to control pain. Modifying your activities is an important ingredient in treatment. She conceded that the second interview took place under circumstances which would show Mr Connolly at his worst – at his most intense pain levels.

103. On 15 February 2011 Mr Botha applied to reopen the plaintiff's case and recall Mr Connolly and Dr le Roux. Mr Potgieter consented and I accordingly permitted the plaintiff to reopen his case.

104. Mr Connolly testified that he was involved in a motor vehicle accident in either 1999 or 2000, when, on a Sunday morning on his way to work, another vehicle crossed a red traffic light and collided with him. He was paid R18 000 to R20 000 of his claim against the Road Accident Fund. It was apparent that he had disclosed this fact to the various experts – so for instance the report by Ms Andrews records that in June 1999 he had suffered a whiplash injury which he considered to have been a minor problem. He had also reported both the fusion and the whiplash accident to Dr le Roux, to the late Mr Donovan Shaw as well as Dr Badenhorst, to Professor Vlok, as is recorded in their reports.

105. Those reports also record that Mr Connolly had undergone a neck fusion surgery in 1995. He underwent two further surgeries due to ongoing problems. Mr Connolly testified that in the initial operation by Dr Coetzee, the C6-C7 vertebrae were supported by a piece of hip bone. This subsequently collapsed and Dr Coetzee had to operate again. This operation also failed. A third operation was successful. His neck is still stiff because of the fusion.

106. With regard to the report by Dr Edelstein Mr Connolly testified that he could not recall having been to Dr Edelstein, nor could he recall what he had told Dr Edelstein. It was put to him that normally the reports would reflect – as does Dr Edelstein's report – what was told to him by a patient.

107. He testified that he is now no longer working for Rotek. His position had changed in August 2010 when he was transferred to the health, safety and

quality division. This division is particularly concerned with ensuring that no foreign objects remain behind when a generator has been opened up. His contract expired in November 2010. He was asked to extend it for a further 10 days in order to hand over to two successors.

108. Rotek had offered him to extend the contract for a further 12 months, but he could not accept the invitation. When Mr Connolly heard that they would extend his contract, he went to see Mr Paul Futana, who confirmed that he was preparing a written contract. Mr Connolly had now obtained a copy of this document. The contract escalation clause is contained in a separate document and reflects an hourly remuneration of R545,05 in 2010. Mr Connolly testified that he had worked a considerable amount of hours in the 10 days in December to hand over.

109. The following comments contained in the report by Mr Swart were common cause between the parties:

> *"A project manager, such as Mr. Connolly, has a tremendous responsibility to plan a particular project in all its manifestations and also ensure the proper and smooth implementation thereof. Subsequent to such a project or shutdown, the project manager has to ensure that all final reports are drafted and submitted to terminate the project. Both gentlemen were firm on the fact that Mr. Connolly has, to this very day, never caused any embarrassment on the part of any contract or project by virtue of being incompetent or lagging behind schedule. In the course of a project a host of specialists are contracted and the project manager must ensure the correct types of artisans, engineers and also the correct quantities thereof."*

110. Mr Connolly testified that there were frequent overlaps between shutdown projects. He also testified that physically the project manager would be on site, as his office would be there. He had, since August 2010, been required to drive a lot – approximately 4000kms per month. He simply could not drive that much. He disagreed that he misrepresented anything or that he was being opportunistic.

111. He confirmed the testimony of Ms Hofmeyr and that which she stated he told her.

112. With regard to the comments by Prof Vlok as to the mountain bike race, Mr Connolly testified that he had ridden a mountain bike on farm roads in the vicinity of the Grootvlei Power Station, approximately 40kms from Heidelberg. He had never taken part in any mountain bike races and he regarded the ride on the mountain bike as being more comfortable and not more stressful than an ordinary bike. He disagreed that the terrain would have been rougher on his mountain bike ride.

113. He has now decided to call it a day and testified that his son had commented in December 2010, *"it looks like you are on your last legs"*. Mr Connolly testified that he had no quality of life. After his retirement he was able to control the pain better. He was convinced that he would not have managed another year. The only reason he managed to work until December, was because of the obligations under the contract.

114. He confirmed that he followed Ms Carey's advice on adapting response to his pain. He feels a lot better now and is not as stiff.

115. He testified that he still has pain every day and that he rests every day, and that he is not taking any medication. He confirmed that he still has a weakness in his left leg.

116. He has also not consulted any expert and had therefore received no advice to use analgesics or physiotherapy. He confirms that he has not investigated or followed up on any of Dr Coetzee's suggestions. It was put to him that he would have been able to better cope had he accepted medical help. Mr Connolly responded that he did not know that, and that he did not investigate it.

117. It was put to him that he is effectively claiming this year's income from the defendant.

118. Mr Swart, who testified in Afrikaans, is an industrial psychologist who was called by the defendant. He prepared a report dated 18 October 2009 which he had prepared as a result of the death of Mr Shaw who had previously been engaged by the defendant. Mr Swart stated in his report that the matter had to be reassessed from a vocational point of view and to this end he conducted a comprehensive work visit.

119. He testified that he had relied to a great extent on the report already filed by Mr Shaw, but that he had confirmed the contents thereof with Mr Connolly. The work visit was at the Koeberg nuclear power station. He listed the

recent complaints by Mr Connolly during his assessment on 28 September 2009 as follows:

(a) He had chronic backache, specifically lower backache essentially radiating down the left leg. At times he would have pain in both legs. There was definite weakness of the left leg. He had pain in the back which was more profound in the event of sudden movements. He was unable to sit for long.

(b) He still cycled and jogged, but much less than before. He no longer did home maintenance;

(c) He was not as active in his job as he used to be, though he was required to move more up and down stairs than before;

(d) His wife held the opinion that he was grumpy.

120. Mr Connolly described his work as a 50-50 split in that he sits in front of his computer for half of the time, and walks around either on site or in his office for the other half of the time. The most difficult thing for him is spending time at his desk.

121. He had not experienced an increase in absenteeism as a result of his injury. There have been no complaints about his performance and his outputs have not changed much since the accident.

122. In his work visit, Mr Swart recorded that Mr Connolly worked 45 hours per week. Mr Connolly had stated that this was more during shutdown periods – there having been one in the period from January to May of 2009. The second shutdown was from June to July and was not planned. The last one started on 28 August and will continue until 25 October and is also a planned shutdown.

123. Mr Botha objected to the introduction of evidence of the conversation with Mr Niche of Rotek. I provisionally allowed the evidence. Mr Swart contacted Mr Niche on 23 September 2010. He confirmed that the shutdown process is the same at all power stations. They are all managed by the project manager who is not required to do any manual labour, but must oversee the execution of the project. He must be physically present at the project and should a problem occur he has to pay attention thereto and deal with it. Mr Connolly would be the strategic focal point of the project, planning and execution.

124. Mr Swart referred to Ms Hofmeyr's evidence, namely that:

> *"Mr Connolly was confident that there was sufficient work available either at Rotek or a similar concern to pursue further employment after the contract expired. One should also keep in mind that he is a technically skilled individual in a niche market and that there is a demand for his skills and that would be not only the case in South Africa where there is a sufficient shortage of technical skills, but also abroad. I also liaised with Andrew Niche from Rotek at the time who confirmed that he was regarded as highly skilled and competent. Mr Niche could not confirm that he would definitely be re-employed ...".*

125. This was confirmed by what Mr Connolly had conveyed to Mr Swart, namely that his experience in the Navy on the nuclear submarines made him an exceptionally sought after specialist and that there was an extreme shortage of people of his calibre all over the world. Mr Swart testified that there could be no doubt that Mr Connolly would probably have continued working until the age of 70 years. Mr Swart concluded that he was of the opinion that Mr Connolly was quite capable of working in his current capacity until the age of 70 years. *"It is essential to note that this gentleman is paid for his project engineering competence – not for his agility".*

126. His current remuneration of R513,71 per hour for 45 hours per week and then 35 hours per month overtime which is calculated at the general rate of 1,5 of R513,71 should be used as the basis for actuarial calculation. Increases will probably be in the range of 9 to 9,5% per annum and performance bonuses cannot be excluded.

127. Mr Swart also tabled an additional report, dated 25 August 2010. In this report he recorded as follows:

(a) Rotek undertakes maintenance projects on various power stations including Koeberg. Rotek operates within a rapidly changing environment.

(b) The number of project managers has increased of the past years and Rotek is in the process of locating these project managers to various sites. They intend locating a project manager at each site or

location. They have upcoming project managers as part of their affirmative action programme. They are scaling down on contractors.

(c) Mr Connolly was regarded as being a highly skilled individual – there are very few individuals with Mr Connolly's background.

(d) He was appointed on a two year contract because his skills were in demand, initially at Koeberg, but he was later appointed to other power stations, such as Ellisras.

(e) Mr Connolly became part of the divisional safety health environment and quality team. This team deals with detailed inspections during shutdowns and adherence to all aspects of safety health environment and quality.

(f) There is pressure from the unions not to employ people beyond the general retirement age of 65 years. This is to make provision for younger employees in senior positions.

(g) The process of minimising contractors was a planned one which is now coming to fruition. This resulted in only a 50% probability of Mr Connolly being re-employed after the termination of his current contract.

(h) As project manager Mr Connolly has tremendous responsibilities to plan a particular project in all its manifestations and also to ensure the proper and smooth implementation thereof. Subsequent to such shutdown, the project manager has to ensure that all final reports are drafted and submitted to terminate the project. Mr Connolly performed excellently. He is a very efficient person who takes his

responsibilities very seriously. He is regarded as stoic and able to get the work done.

(i) A shutdown can take anything from 4 – 8 weeks. The project manager must be on site most of the time which results in long working hours, i.e. 12 to 13 hours a day. The project manager does not engage in manual labour and he must conduct a site visit at least twice a day.

(j) There is an excellent support system within Rotek for project managers.

(k) Even if Mr Connolly's contract is not renewed by year end 2010, it is still possible that they might have use for his services at some time in the future.

128. Mr Swart concluded:

"The work visit has changed my opinion in the sense that whilst I am still of the opinion that the claimant, in general terms, might have worked until the age of 70 years, there cannot be any guarantee that he would have been fortunate to secure such positions. ... I am now of the opinion that the claimant's actual chances of securing further contract work beyond November 2010 must be seen as being 50-50 and this has nothing to do with the accident. The collateral evidence again suggested that the claimant's level of physical activity is not remotely as intense as he purports it to be and ... to pursue this line of argument in the face of these facts would really be opportunistic – to say the least".

129. Mr Swart testified that on 10 February 2011 Mr Labuschagne confirmed the offer made to Mr Connolly. Hofmeyr had testified that: *"I think one cannot assume that he would definitely have been re-employed by Rotek and that was not my assumption either".*

130. Central the disputes between the parties were the evidence of the expert orthopaedic witnesses, Dr le Roux for Mr Connolly and Dr Steyn and Prof Vlok for the defendant.

131. Both sides levelled criticism at the expert witnesses. It is perhaps appropriate to consider these criticisms before proceeding further. It is the Court's duty to draw inferences from the facts established by the evidence. If, on the proven facts, a judge can form his own conclusion without assistance then the opinion of the expert is unnecessary (*Holtzhauzen v Roodt* 1997 (4) SA 766 (WLD) at 772D). Where the Court lacks the special knowledge and skill to undertake this task it may receive the opinions of expert witnesses who are, by reason of their special knowledge and skill, better qualified than the trier of fact to draw inferences. *Coopers (South African) (Pty) Ltd v DG für S MbH 1976 (3) SA 352 (A)* at 370 E – G.

132. In Holtzhauzen v Roodt Satchwell J summarised the relevant principles applicable to the admissibility of expert opinion evidence, *inter alia*, that the expert witness must be called to give evidence on matters calling for specialised skill or knowledge. Evidence of opinions are matters which do not call for expertise is excluded, because it does not help the Court. At best, it is superfluous and, at worst, it could be a cause of confusion. The

facts upon which the expert opinion is based must be proved by admissible evidence. These facts are either within the personal knowledge of the expert or on the basis of facts proved by others. The expert must furnish criteria for testing the accuracy and objectivity of his/her conclusion and the Court must be told of the premises upon which the opinion is based. Since the testimony of an expert is likely to carry more weight, higher standards of accuracy and objectivity should be required. The guidance of it by the expert must be sufficiently relevant to the matter in issue which his to be determined by the Court. The opinion evidence must not usurp the function of the Court and the witness is not permitted to give an opinion on legal or general merits of the case.

133. In S v Kalogoropoulos 1993 (1) SACR 12 (A) at 22d-e the following was stated with regard to the drawing of inferences by the Courts:

> *"Drawing inferences as to the state of a normal man's mind from the objective facts relating to his conduct is an exercise which is not unique to the psychiatric or psychological professions. Courts of law perform the exercise daily, constantly. In the circumstances of this case I perceive no cause for this Court to have any hesitancy in considering the opinions of the experts on their merits in accordance with our own experience of, and insight into, human behaviour, and in deciding itself upon the inferences that are to be drawn from the objective facts relating to the appellant's actions."*

134. An expert witness should further "*never assume the role of an advocate*" and "*should not omit to consider material facts which could detract from his concluded opinion*" – Schneider v AA 2010 (5) SA 203 (WCC) at 211E-I and see also P v P [2007] 3 All SA 9 (SCA) at 13h-i.

135. The Court must be satisfied that the expert opinion has a logical basis, "*in other words that the expert has considered comparative risks and benefits and has reached 'a defensible conclusion'.*"

Michael and another v Linksfield Park Clinic and another 2001 (3) SA 1188 (SCA) at 1201B; see also at 120 D-E and *Louwrens v Oldwage* 2006 (2) SA 161 (SCA) at 175H

136. I also wish to add that an expert witness's function is to assist the Court in arriving at a decision – he or she should not be the witness of the one or the other side and should not be partisan in propagating the one or the other sides.

137. In *National Justice Company Naviera SA v Prudential Assurance Co Ltd ("The Ikarian Reefer")* [1993] 2 Lloyds Report 68, Cresswell J pointed out at 81 that

> "*1. Expert evidence presented to the Court should be, and should be seen to be, the independent product of the expert uninfluenced as to form or content by the exigencies of litigation.*
>
> *2. An expert witness should provide independent assistance to the court by way of objective unbiased opinion in relation to matters within his expertise. An expert witness in the High Court should never assume the role of an advocate.*
>
> *3. An expert witness should state the facts or assumption upon which his opinion is based. He should not omit to consider material facts which could detract from his concluded opinion."*
>
> (citations omitted)

138. Against this general background I turn to consider the evidence of the orthopaedic experts.

139. These experts attended a joint experts meeting on 19 March 2009. It is important to set out in full the minute of this meeting, which minute records as follows:

> *'Notule van konsultasie tussen professor Vlok, dr FJ Steyn en dr Theo le Roux op 19 Maart 2010 om 14h00 in die spreekkamer van dr FJD Steyn te Solway Straat 2, Bellville.*
>
> *Aangaande: Martin MJ Connolly versus Padongelukke Fonds.*
>
> *Daar word saamgestem oor die volgende:*
>
> *Die aard van die beserings opgedoen:*
>
> *Fraktuur van die eindplaat van L3 (derde lumbale werwel).*
>
> *Die behandeling wat ontvang is:*
>
> *Konserwatiewe behandeling met bedrus en 'n rugstut.*
>
> *Die huidige klagtes:*
>
> *Kroniese rugpyn wat afsprei in die linkerbeen tot in die tone en wissel volgens sy aktiwiteite.*
>
> *Kliniese beeld:*
>
> *Die bewegings van die torakolumbale rug is gering pynlik en gering ingekort.*
>
> *Radiologiese ondersoeke:*
>
> *Radiologiese ondersoeke bevestig die fraktuur van die eindplaat van L3 met die kompressie en angulasie na links. Geen onstabiliteit is aanwesig nie.*
>
> *Funksionele inkorting:*

Hy het simptome wat deur aktiwiteite vererger word. Omdat pyn in sy rug vererger kan hy nie langer as 45 minute sit nie. Staan en loop vererger nie pyn nie en is nie ingekort nie. Gebukkend werk en swaar voorwerpe optel en hanteer vererger die pyn en is ingekort. Die pyn in sy rug verhoed om nie om aan sport soos fietsry deel te neem nie. Dr Steyn en professor Vlok is van mening dat sy funksionele inkorting gering is. Dr le Roux is van mening dat sy funksionele inkorting matig is omdat hy aktiwiteite wat hy voorheen kon doen nou nie meer kan doen nie want hulle verergerdie pyn.

Toekomstige behandeling:

Ons bevel slegs konserwatiewe behandeling met medikasie en fisioterapie I biokinetika aan. Ons stem saam dat geen operatiewe behandeling in die toekoms nodig sal wees nie.

Werksbevoegdheid:

Dr Steyn en professor Vlok is van mening dat hy sy werk tot 70 jaar ouderdom of so lank as wat hy wil daarna sal kan verrig. Dr le Roux is van mening dat as gevolg van sy simptome wat deur aktiwiteite wat hy tydens sy werk moet uitvoer vererger word hy waarskynlik voordat hy 70 jaar oud is nie verder sal kans sien om met hierdie tipe van werk voort te gaan nie."

140. Dr Theo le Roux is an orthopaedic surgeon who has been in private practice since 1983. He qualified as a medical doctor at the University of Pretoria in 1965 and as an orthopaedic surgeon at the University of Stellenbosch in 1972. He worked as a specialist at the Tygerberg Hospital and lectured at the University of Stellenbosch for a period of eleven years. Dr le Roux filed three reports: a report dated 20 April 2009, an addendum thereto dated 19 November 2009 and a further addendum, after he had already testified (and before testifying again), dated 15 November 2010 (wherein he commented on the latest reports of Dr Steyn and Prof. Vlok). He, as did Mr Connolly, also testified twice.

141. He testified (and it is common cause) that Mr Connolly suffered a compression and rupture of the disc of the L3.

142. At the time of the injury, Mr Connolly already had degenerative change at the L4-L5 and L5-S1 intervertebral discs. Prior to the accident, however, he had experienced no back pain due to the degenerative changes. None of the experts at the meeting held on 19 March 2010 considered that these degenerative changes had any bearing on the pain suffered by Mr Connolly.

143. Dr Le Roux described the bony element of the injury as follows:

(a) The spine consists of various vertebral bodies. In between the vertebrae are discs, each of which consists of a hard bony outer layer, known as the annulus, and with a gelatinous substance in the central part, referred to as the nucleus.

(b) At the back of each vertebral body are two sets of facet joints, a set at the top-part that articulates with the set at the bottom-part of the vertebral body above, and a set at the bottom-part that articulates with the set at the top-part of the vertebral body below.

(c) Each vertebral body has end plates at the top (superior) and bottom (inferior), consisting of cortical bone as opposed to the spongy compressible bone between the end plates, referred to as the centre part.

(d) The force of the impact caused a compression fracture of the superior end plate of the L3 vertebral body with "*at least 50% height loss of the central aspect of the L3 vertebral body*". The compression of the spongy central part (or aspect) pressed the gelatinous nucleus of the disc through the fracture and into the vertebral body.

(e) In order to cause this type of fracture, a considerable compression-flexion force must have been applied on impact.

144. Dr Le Roux explained the nature of the soft tissue surrounding the vertebral bodies and facet joints and explained the damage to the soft tissue as follows:

> *"Ongelukkig is die meeste van ons, as daar 'n fraktuur is sien ons alleenlik die fraktuur. Ons vergeet dat daar sagteweefsel omringend tot hierdie been is. ... Nou wanneer die liggaam hierdie kompressie en fleksie, met ander woorde druk van bo af en fleksie ondergaan, word hierdie strukture aan die agterkant word gerek. Hierdie ligamente het egter nie geskeur nie. Die spiere het nie fisies geskeur nie, want hulle was sterker as die been, en die been het meegegee en dit is hoekom daar die fraktuur was, maar hierdie strukture was nogtans onder geweldige strek en rek blootgestel wat skade aan die ligamente, die prevertebrale gewrigte en aan die spiere aangerig het."*

145. Ms Carey, when she testified, had the following to say in this regard

> "*Well, yes, I find that the physiotherapists are usually more thorough if I may say that in examining soft tissue damage than many orthopaedic surgeons are. Many of them will tend to disregard the soft tissue injuries and focus on the bone injury.*"

146. Dr le Roux considered the fracture as a serious compression fracture with widespread damage to the surrounding tissue. It is serious because there was more than a 2-3mm compression of the vertebra.

147. The orthopaedic experts agreed that Mr Connolly's injury was a stable fracture without neurological fall-out. Such injuries usually stabilize within 2 to 3 years and do not create a progressive situation as Dr le Roux had conceded in cross-examination. He did, however, point out that certain activities would increase the constant chronic pain.

148. He conceded that the fracture was the least serious type of vertebra fracture. Where, however, there was a 50% compression of the vertebra it could not be considered to be a minor fracture. It was a stable fracture and the ligaments did not tear, though there was damage to the ligaments and the bone.

149. Dr le Roux pointed out that both Dr Steyn and Prof Vlok have reported that there is a scoliosis and that according to Dr Steyn *"die limbale rug se lordose afgeplat is weens 'n kifose op die L2/3 vlak".*

150. Dr le Roux pointed out that Dr Steyn had found a kyphosis, whilst both Dr Steyn and Prof Vlok had found scoliosis. Dr le Roux concluded as follows in his second report:

> *"Die wigvorming van L3 het die normale limbale lordose uitgewis en tot 'n plat rug aanduiding gegee. Hieruit is dit duidelik dat die belyning van die limbale rug nou abnormaal is. Dit is algemene*

ortopediese kennis dat weens 'n belyning afwyking die verspreiding van die gewig oor die betrokke gewrigte abnormaal is en dat dit lei tot degeneratiewe veranderinge. Degeneratiewe spondilose, spontaan en ouderdomsverwant, was reeds by die eiser teenwoordig. Weens die deformiteit van die abnormale gewig verspreiding, sal die bestaande spondilose simptomaties word. Die deformiteit met die wanbeleiding sal ook die normale degenerasie van die faset gewrigte versnel en tot simptome lei."

151. This he concluded was contradictory to the statement by both Dr Steyn and Prof Vlok that the accident had not influenced the degenerative process.

152. He considered that it was probable that Mr Connolly would not be able to work beyond the age of 70.

153. Mr Connolly complained of constant chronic pain of his lumbar back with pain radiating down his left leg into the sole of his foot. At that stage Mr Connolly had chronic lower back pain of varying intensity with tenderness over L3, a referred pain down the left leg, aggravated by certain activities, which pain would be permanent. Dr le Roux does not mention any expected worsening of the pain and contemplated that Mr Connolly would be able to manage his work as long as he could handle this pain.

154. During the second examination Mr Connolly reported a progressive increase of his constant pain and again indicated that the area of pain was on the left of and below the L3 body. The pain was still radiating through the left buttock into the left foot. The pain was permanently present, but endurable. The evidence as to the pain experienced by Mr Connolly and as related by Ms

Brink and Ms Carey, as set out above, was not disputed. Numbness in the left leg was ever present and there was tenderness of the soft tissue ("the spinous process") at the L3 level.

155. Dr le Roux was of the view that it was a soft tissue injury which has led to the lower back pain. Dr Le Roux stated that the pain was caused by the injury to the L3 body and the surrounding structures. The excess pain on the left and the referred pain into the left leg is probably due to the fact that there was more compression of the vertebral body on the left side

156. Dr le Roux, in particular, with regard to Mr Connolly's pain in his lower back, lower than the level of the injury, which radiated down his left leg, testified as follows:

(a) A discus injury *("diskus letsel")* accompanied with a disc bulge or anular tear places pressure on the nerve root which may or may not cause pain, but is always accompanied with pain down the back and down the leg producing sciatic pain in the lower limb. This is termed radiculopathy. This may be with or without sensory loss and neurological fallout. He pointed out that neither Dr Steyn, nor Prof Vlok had at any earlier stage mentioned radiculopathy. Dr Badenhorst, a neurologist, found no evidence of nerve damage or radiculopathy.

(b) Mechanical back pain, which was not present in the instant case, would result in pain in the back radiating around the buttocks to the back of the upper leg, but never to below the knees.

Mechanical back pain is the result of degeneration of the paravertebral joints. Dr le Roux, in this regard, pointed out that there was objective evidence of pain and loss of function as reported by Dr Steyn. Dr le Roux testified that he agreed with the evidence of Ms Brink where she testified as to Mr Connolly's experience of pain and her observations in that regard. Ms Brink had testified that Mr Connolly needs to move around and that he struggles to come up after sitting. She recorded that his situation had deteriorated between the two assessments.

(c) Discogenic pain, also known as discogenic sciatica, that is pain from the vertebra and its structures, which is conducted through the sinuvertebral nerves, is located deep in the back and is referred to one or both of the legs to under the knee. This pain in the back and the referred pain is vague as the sinuvertebral nerves pass over three vertebrae, in this case L3, and would also involve L2 and L4.

157. It was suggested to him that the source of the pain is at the L5/S1 level, to which Dr le Roux responded that when he consulted Mr Connolly the pain was at the L3/L4 level. The level may vary from day to day as would the extent of the pain.

158. Dr le Roux explained the presence of pain at the level lower than the fractured area. According to him, one theory is that it is caused by the subsiding of the haematoma caused by the bleeding of the injured tissue, which causes scar tissue to develop at that lower level. Dr le Roux believes, however, that it is caused by scar tissue that develops as a consequence of the micro-tearing (caused by the injury) of the fibrous tissue that joins that muscle to the bone.

159. It is the scar tissue which leads to the pain. The scar tissue impairs the movement which again causes pain. The pain assessment has a pain level of 5 out of 10 to 8 out of 10, but these are subjective measurements and are not reliable. He testified that certain activities would increase the constant chronic pain experienced by Mr Connolly. It does, however, fall within a significant range. Dr le Roux did not find it strange that Mr Connolly was considering giving up his work at this stage.

160. Dr le Roux testified that physiotherapy will not assist with chronic pain and will only help when there are inflammatory episodes. It was put to him that the effectiveness of physiotherapy can only be determined when it is, in fact, applied. Dr le Roux testified that medication is only a temporary measure and that there are many complications linked to the treatment of chronic pain. These include bleeding, and liver and kidney damage. It has to be undertaken under supervision of a doctor.

161. The defendant relied upon Dr Steyn and Prof Vlok, both of whom had also filed three reports each.

162. In his third report Dr le Roux relied upon, first, that Dr Steyn had recorded that Mr Connolly experienced pain and had difficulty in moving about after their consultation as he had been seated for a long period during that day (travelling). Dr Steyn had also recorded that certain activities aggravated the pain. Dr Steyn, however, questioned Mr Connolly's experience of pain. Dr le Roux commented that, although Mr Connolly's approach to continue with his normal activities and work was laudable, the question was: for how long would he be able to keep it up?

163. Dr Steyn had at first contended that the plaintiff suffers from *"mechanical"* back pain. In his third report Dr le Roux criticised Dr Steyn for completely changing his opinion by diagnosing a discus prolapse and a *"senuwee wortel beklemming"* (radiculopathy). Dr le Roux, in addition, emphasised that the plaintiff was examined by Dr Badenhorst, a neurologist, who found no neurological fallout. This, so it was contended, was destructive of the reliance, belatedly, on radiculopathy.

164. The contention by both Dr Steyn and Prof Vlok that the accident would not have accelerated or impacted upon existing degeneration, is contradicted by the magnetic resonance imaging scan taken on 8 September 2005, which reflected *"kneusing van die been van die naasliggende werwels"*.

165. Dr le Roux pointed out that the pain Mr Connolly experiences is not a pain related to radiculopathy. The evidence was that the pain was in the back and down the left leg. Dr le Roux contended that this was a sinuvertebral pain which originated from the disc and the vertebra itself. As the

sinuvertebral nerves overlapped, the pain is experienced as a vague pain, whereas a pain related to radiculopathy is more distinct. Prof Vlok, in his first report, recorded that *"Mnr Connolly kla steeds van rugpyn en ongemak in sy bene met vae distribusie"*.

166. Dr Le Roux disagreed that for pain to refer into the foot there has to be nerve irritation or lumbar radiculopathy and repeated his earlier evidence that an injury at the L3 level can cause pain radiating down the leg into the foot through the sinuvertebral nerve. He also stated:

> "*Die oorspronklike pyn wat hy gehad het volgens my mening is die gevolg – 'n gevolg van die fraktuur van die werwel, die beskadiging aan die diskus en die ander omliggende frakture en gedra deur hierdie een senu-vertebrale senuwee wat dan vir hom pyn in die been sou veroorsaak het.*"

167. Dr Steyn had only in his third report alluded to a disc injury (prolapse and radiculopathy). Dr le Roux conceded that L5/S1 is removed from L3, but he would not concede that pain at L5/S1 could not originate from L3. He conceded that there was spondiolosis at L5/S1, but contended that that was normal for most men above the age of 60.

168. Dr le Roux, in cross-examination the second time round, pointed out that Mr Connolly's complaint of back pain that radiates down his left leg has been consistent since the accident. He reiterated that the pain complained of by Mr Connolly was the same pain throughout, it has only increased lately. He conceded that inflammation could be caused by a disc prolapse where the disc nucleus is passed through an annular tear. It would then press against a

nerve. There was, however, no evidence of such prolapse and Mr Connolly's pain condition was consistent from the inception. Inflammation does not last that long and he disagreed that the pain is probably secondary to inflammatory changes at the nerve, not to nerve impingement. I pause to point out that Prof Vlok, when he testified, stated that there was no evidence of any tear in the discus which would explain the suggested inflammation.

169. Though there was some suggestion that Mr Connolly had not disclosed an earlier injury – a whiplash injury to the neck – it was clear from the evidence that, first, there was no such concealment, and second, that that injury had no impact with regard to his present complaints.

170. Dr le Roux disputed that the pain was related to the degeneration at other levels and would improve with treatment. He testified that the functional *"inkorting"* was moderate, but that the pain originated from the injured vertebra and the surrounding tissue and was chronic in nature.

171. Dr Steyn examined Mr Connolly on 9 February 2009 and again on 13 May 2010 (after Mr Connolly testified on 23 March 2010). He also filed a third report dated 26 October 2010.

172. At the first examination Dr Steyn found the posture of Mr Connolly's lumbar spine flatter than a normal lumbar lordosis, as well as a scoliosis convex to the right. Radiological examination showed a minimal kyphosis at the L2-3 junction, but no evidence of any intervertebral disc degeneration. Dr Steyn testified that the flattening of the lumbar lordosis was caused by muscle

spasm or by mal-alignment. Dr Steyn reported that Mr Connolly was suffering from fairly constant and persisting back pain as a consequence of the fracture of the L3 vertebral body and that the fracture could be considered stabilised in the sense that it would neither improve nor deteriorate with the passage of time.

173. In his second report, dated 13 May 2010, Dr Steyn noted as follows:

> *"The patient has developed facet degenerative changes at the L2-3 facets, secondary to mal-alignment, caused by the compression fracture. I am of the opinion that the present mechanical pain he experiences is the consequence of the facet pain he experienced at these levels."*
>
> *"However, I am not of the opinion that this facet degeneration will ever become such a significant source of functional impairment, that the patient will not be able to continue with his normal activities of daily living, including his present work related activities, for as long as he desires. To date, he has not received any treatment and certainly I am of the opinion that with adequate treatment of the conservative nature, this pain will be significantly improved, enabling him to function even more effectively than he does at present, with an improved quality of life."*

174. During this examination Mr Connolly reported constant lower back pain, aggravated by sitting. He recorded that Mr Connolly points to the L5/S1 level as where he experiences pain in his back and *"state that pain spreads down the back of the leg as far as the sole of the foot".* It was noted that Mr Connolly experienced pain when returning to the upright position from the flexed position. There was reduced sensation in the left leg in the dermatomes

L3-S1. Dr Steyn reported that Mr Connolly's pain experience "*obviously does have a negative impact on his quality of life*". According to the radiological report there was facet arthropathy present at the L2-3 level, but no evidence of disc degeneration or prolapse. Though the written report indicated that there is *"no evidence of disc degeneration or prolapse"*, Dr Steyn, when he testified, stated that the report was incorrect and that there was indeed evidence of disc degeneration or prolapse.

175. Dr Steyn reported that during both examinations, Mr Connolly pointed to the L5-S1 level as where he experienced pain.

176. Dr Steyn, in his third report, stated that Mr Connolly's pain would be entirely *"compatible with an intervertebral disc prolapse"*. He was of the opinion that *"lower lumbar back pain and the irritation of the L5 and possibly also the S1 nerve roots on the left hand side is much more likely cause of the lower lumbar back pain this patient now complains of."* This, it was explained to me, was a radicular pain.

177. He pointed out that pain arising from lumbar facet joints or soft tissues at the L5/S1 level will refer as far as the buttocks and possibly as far as mid-thigh, but never as far as the foot. *"For these reasons I entirely discount his (Dr le Roux's) theory that the pain this patient experiences in the lower back is arising from some injury sustained at the time of the accident."*

178. Dr Steyn continues: *"... This patient is suffering from L5/S1 intervertebral disc degeneration and that is the cause of his pain in the lower back, with referred pain down the left leg."*

179. Dr Steyn's theory of nerve root irritation (on the left) was introduced in his third report for the very first time and after the joint minute was signed on 19 March 2010, when all three orthopaedic surgeons agreed that the L3 vertebral body was the cause of Mr Connolly's pain experience, which included pain radiating down the left leg into the toes.

180. Dr Steyn, however, was taken to task in cross-examination for having overstated – somewhat inexplicably – the facts regarding Mr Connolly's level of activity. Mr Connolly, for instance, had not taken part in any mountain bike races, nor had he run marathons, he had run one half-marathon.

181. Prof Vlok recorded in his first report that Mr Connolly had complained about back pain and discomfort which extended to the left down to his toes. The back pain was more dominant with the leg, more periodically after activity. The constant discomfort in his left leg was becoming progressively worse. The discomfort was of a vague distribution. He found that there was degeneration at the L4/L5 level as well as the L5/S1 level.

182. In his second report dated 4 June 2010 he recorded that Mr Connolly had reported pain in his left leg down to the sole of his left foot, which became worse when he was tired. His left leg also felt *"dumb"*. He also complained

that his back was becoming progressively worse. With his physical examination of Mr Connolly, Prof Vlok found slight tenderness in the left posterior part of the lumbosacral area. Prof Vlok testified that there was no *kyphosis* present.

183. In his initial consultation Mr Connolly complained about discomfort in his legs, which gradually improved and that he became reasonably active again. On 10 June 2010 Mr Connolly complained about pain in his left leg which reached down to the sole of the left foot and became worse when he was tired.

184. Prof Vlok surmised in his report that as Mr Connolly also complained about pain in the lumbar sacral region the pain possibly originated from there. He explained in his evidence that the dermatome, which is linked to the sole of the foot, originates in L5/S1. It was for this reason that he had difficulty in explaining the link between the injury at L3 with the pain experienced by Mr Connolly stretching down to the sole of his left foot. He defined this pain as a radicular pain which is inconsistent with a pain originating from the fracture. He surmised in his third report of 7 September 2011 that this pain was the result of other degenerative changes in the lower back. Dr le Roux had sought to explain this with reference to the kyphosis and scoliosis. Prof Vlok persisted that there was no kyphosis present and that the scoliosis was not a *"true"* scoliosis as there was only a slight leaning to the left of the L3 vertebra. Dr Vlok, as did Dr le Roux, did not find any evidence of any ruptured disc. He conceded that the explanation postulated by Dr le Roux, namely the sinuvertebral nerves. He responded, however, that it was

speculation and that they were all really speculating. Mr Botha pointed out to him that in his report he referred to pain down to the toes. Mr Botha also reminded him that the uncontradicted evidence of Mr Connolly was that his pain experience had always been the same. He was also reminded that both he and Drs le Roux and Steyn were satisfied at their joint meeting that the pain was present immediately after the accident.

185. There was, so it was submitted, no clear explanation as to why the pain would have increased thereafter. Prof Vlok doubted where the pain comes from, and could not attribute the pain in the sole of Mr Connolly's left foot to the fracture at L3. He was of the opinion that it came from L4 – 5 or L5 – S1 (the lumbosacral area). Prof Vlok was of the view that it was not as a result of the injury, but because of degeneration.

186. Prof Vlok, however, he had to concede that on 19 March 2010 (before Mr Connolly testified and before his second examination of Mr Connolly) he had agreed with the other two orthopaedic surgeons that the pain went to Mr Connolly's toes (in the left leg) and that the experience of pain by Mr Connolly was a result of the injury sustained by him in the accident. He also conceded that it is so recorded in the joint minute signed by him .

187. Prof Vlok also could not dispute that Mr Connolly has experienced the same pain since the accident and that it was this pain that Prof Vlok, Dr le Roux and Dr Steyn were all satisfied on 19 March 2010 was caused by the injury as a result of the accident.

188. Dr Badenhorst is a qualified neurologist, consulted with with Mr Connolly on 23 September 2009. Dr Badenhorst testified with reference to his report that

> "*It is accepted that the patient did sustain an injury to the back, with compressive fracture of L3. Such fractures can certainly heal, without any residual symptoms. In the absence of any objective findings, assessment of the severity of symptoms is dependent on description by the patient and evaluation of the effect of such symptoms on his activities. Collateral information regarding the latter is of particular importance.*"

189. Dr Badenhorst testified that the probability of "*'n radikulêre oorsprong van pyn*" exists but this remains a theoretical speculation. He was of the opinion that the whole issue about the "*radikulêre oorsprong van pyn*" was actually pointless as it is just a route of pain. He stated that his orthopaedic colleagues must decide about the source of the pain.

Causation

190. I turn to consider the last defence introduced, namely that of causation. It was common cause that Mr Connolly bore the onus in this regard. Mr Connolly had to prove that factually and legally his present disablement was caused by the injury, *and* that he would have been able to do his present work if the accident had not happened.

191. With regard to the element of causation, it has by now become well established in the law of delict that it involves two distinct enquiries. First there is the enquiry into factual causation, which is generally conducted by

applying what has been described as the '*but for*' test. Lack of factual causation is the end of the matter. No legal liability can follow. But, if factual causation has been established, the second enquiry arises, namely, whether the wrongful act is linked sufficiently closely or directly to the loss concerned for legal liability to ensue. This issue is referred to by some as 'remoteness of damage' and by others as 'legal causation' (*mCubed International v Singer NNO 2009 (4) SA 471 (SCA)* at 479E – G).

192. But even if the Court was to find that factual causation has been proved, Mr Potgieter submitted that the claim should also fail at the legal causation stage. This is where elements such as foreseeability, *nova acta intervenientes,* proximity, etc come into play in a supple test that "*serves as a 'long-stop' where right-minded people, including judges, will regard the imposition of liability in a particular case as untenable, despite the presence of all other elements of delictual liability*" – *mCubed* at 481B – C.

(a) In this regard the SCA held in *Premier of the WCC and ano v J H Loots NO (214/2010) [2011] ZASCA 32 (25 March 2010)* at par [23] that the element of foreseeability in legal causation means "*foreseeability of the actual harm as opposed to harm of a general kind*".

(b) Mr Potgieter submitted that Mr Connolly has not proved that, but for the L3 fracture in 2005, he would have been able to cope with his workload in 2010 and beyond.

(c) He further submitted that Mr Connolly, taking into account the above arguments and principles, has not crossed the hurdle of factual causation.

(d) Even if factual causation had been established, he submitted that the eventual loss should not attract liability on the basis of a lack of legal causation for the following reasons:

(i) is too remote in time;

(ii) it is at least partially, and probably totally, caused by other factors, mainly drastically different work circumstances, degeneration of the spine and a blanket refusal to even consider medical help;

(iii) it was not reasonable foreseeable that Mr Connolly would, four years after the accident and in dramatically changed circumstances, become unable to carry on working.

193. Mr Potgieter's argument in this regard was that there was no explanation which linked Mr Connolly's inability to cope with his workload and which led to him abandoning any notion to continue working with the sequelae of the injury suffered by him. He placed great store in Mr Connolly's evidence that "*something had changed*". Mr Potgieter built on this to arrive at the proposition that there was indeed a change in Mr Connolly's position, that this change took place some four years after the accident and was unrelated to the injury suffered by him.

194. Mr Potgieter, in the first instance, contended that subsequent to the accident and until December 2009 Mr Connolly continued working and with his pre-accident activities such as cycling, but at reduced levels.

195. I pause to point out that Mr Connolly, however, had testified that this reduction was dramatic.

196. He further contended that despite residual difficulties Mr Connolly was able to cope with the demands of his position. He remained in a hands-on management position and still often attended work sites. He attended to project administration and all financial issues relating thereto.

197. This contention is also only partially correct. The evidence by Mr Connolly was that he had implemented breaks which he spent planning and being engaged in some form of productive activity in order to maintain efficiency. for himself during which he planned his next steps.

198. Though Mr Connolly was able to cope with the demands of his position without a significant decrease in his productivity he had to adapt to do so. These adaptations clearly, and logically, carried their own burden.

199. Mr Botha countered that the fact that an injury has stabilised, does not mean that certain activities would not increase pain levels suffered as part of permanent chronic pain. It also does not mean that there could not be a decrease in pain tolerance over time.

200. It is trite that pain, by itself, is not a disability. Many people work and carry on with their activities of daily living with a certain amount of pain. Mr Potgieter submitted that the examples above clearly indicate that from date of accident, even though the Mr Connolly suffered some form of discomfort and pain, he was carrying on as before for at least 4 years. He placed great store on the fact that the fracture was an uncomplicated fracture which had stablised and which would not deteriorate. The effect of the injury on Mr Connolly's working ability was therefore, so it was submitted, that it caused him to have pain and discomfort at times, but it had no impact on his earning capacity.

201. When Mr Connolly testified in March 2010 he indicated that from a pain perspective his symptoms had increased to such an extent that at the end of each day he could not do anything. He stated that the pain was progressive during the day and left him worn out at the end of the day. This was confirmed by Mrs Connolly.

202. Mr Connolly's evidence was that "*something is changing because the pain levels at the end of each day now are becoming less and less tolerable*".

203. Mr Potgieter pointed out that in his report to Mr Hannes Swart (29 September 2009) no mention made regarding increased levels of pain. Neither was there reporting to other experts of increasing levels of pain nor of the "*verkrummeling*" of his resistance to pain that Dr le Roux anticipated in his third report. There was also no indication in Mr Connolly's evidence that the pain and discomfort increased during these 4 years, at least so Mr

Potgieter submitted. I shall return to these contentions hereinbelow when I consider the evidence and reports made by Ms Brink, Ms Carey and Dr le Roux.

204. Mr Potgieter submitted that Dr le Roux did not provide any acceptable and sound medical reason for Mr Connolly's sudden increase in pain four years after the accident against the background of his stabilised and uncomplicated injury.

205. The explanation Dr le Roux apparently offers for the increase in pain leading to disability is simply that Mr Connolly has been exposed to pain for too long and that his resistance has started crumbling in view of the fact that he has had chronic pain for a long time.

206. Mr Potgieter contended that Dr le Roux's insurmountable problem with this theory is that it is not supported by the evidence and therefore not based on acceptable facts. This injury had stabilised and was not a progressive condition. On Mr Connolly's own evidence it was this *"change"*, not a crumbling of his resistance, which caused the deterioration. This, of course, begs the question as to what the 'change' was. There was no real explanation that an injury at L3 will cause pain at L5/S1. Even if Dr le Roux's sinuvertebral theory was correct, it still does not explain the sudden deterioration after 4 years – and does not take into account the possibility of degeneration and increased workload as a possible cause. Dr le Roux had, of course, in his evidence, expressly discounted disc degeneration (and he

was not challenged on that). The issue of the increased work load was also not debated with him.

207. Mr Potgieter submitted that the obvious question is why Mr Connolly suddenly experienced an increase in pain allegedly leading to total disablement at work when he had been fully functional for 4 years after the accident. Logically, he submitted, this cannot be caused by the L3 fracture in the accident which by medical agreement had stabilised and would not deteriorate.

208. This, he submitted, was the causation question I had to decide – was Mr Connolly's increase in pain and loss of ability to cope at work - somewhere at the end of 2009, beginning of 2010 - attributable to the accident of 7 September 2005?

209. Mr Potgieter submitted that his evidence is clear as to what had changed as from November 2009: it was the fact that Mr Connolly was involved just about full time with the hardest part of his work namely the shutdown phase itself. I pause to point out that this was not put to Mr Connolly when he was first cross-examined. He was only challenged on his subjective experience of pain.

210. It is clear, so Mr Potgieter submitted, that the reason why his pain levels had increased was simply because his job became vastly more strenuous with long hours of travelling – which Mr Connolly could not sustain and which caused constant back pain – and with shutdowns all the time, unlike before.

211. Mr Potgieter contended that the defendant's experts and the facts point to other clear possibilities for Mr Connolly's present symptoms: the pre-existing degeneration of and trauma to his lower spine, coupled with his intensely physical life-style, advanced age and vastly changed work circumstances.

212. It seems to me, however, that there was no clear evidence of a sudden increase in pain – what Mr Connolly testified to was that the pain levels became less and less tolerable and the end of each day. It seems from what was stated by everyone that this was a gradual acceleration (and it was not suggested to any witness that the increase only occurred after September 2009).

213. Moreover, the increase in workload already incurred in 2006 when Mr Connolly had to drive around a lot more when he was posted to the Camden power station. Admittedly he testified that it was *"now shutdowns all the time"*, but, in fairness to him, it should have been put to him that the reason he could not continue was because of the changed working conditions resulted in increased pain levels.

214. Mr Botha responded that the evidence of the collateral witnesses, Ms Brink, Ms Carey and Dr le Roux, were dispositive of these contentions. The facts put up in this regard were not seriously disputed and were as follows.

215. The objective evidence from Dr le Roux's scaling of the pain, (paragraph 65 above) and the decrease in his flexion, as measured by Ms Brink (paragraph 60 above) and increased stiffness observed by her, as well as

the decrease in endurance (paragraph 63 above) in my view, ineluctably points to the effect of the injury on Mr Connolly's ability to work.

216. Dr le Roux reported after the second examination on 19 November 2009, that

> *"Dit is algemene kennis dat chroniese en aanhoudende pyn jou moeg maak en dat dit jou weerstand vermurwe. Dit is dus alreeds duidelik dat mnr. Connolly se weerstand stadig besig is om te verkrummel omdat hy meld dat die pyn vererger. Dit is waarskynlik dat hy voordat hy 70 jaar oud is, nie verder sal kans sien om met hierdie tipe werk voort te gaan nie."*

217. When asked whether it was reasonable to expect of Mr Connolly to renew his contract after November 2010, he commented that it is "*nie vir my vreemd dat hy nou begin die handdoek ingooi en voel hy het genoeg gehad nie*".

218. Ms Brink had found that the injury caused a decrease in muscle strength (also due to inhibited mobility), changes of Mr Connolly's posture, and joint stiffness. It changed the normal biomechanics of his back, which in turn led to further damage to his back. On the second assessment it was clear that Mr Connolly's condition had deteriorated, with stiffness of the muscles and ligaments on more levels as well as weakening of the left leg. There was also an increase in his pain intensity. The muscle weakness and decreased endurance of the supporting musculature, resulting in a decreased stability at those levels, increases the chance of early degeneration of the soft tissue (not the vertebral bodies or discs) of the lumbar spine. The stiffness of the multiple facet joints (joint changes) also results in a change in the normal biomechanics due to the abnormal movement of the joint. Muscle weakness

and postural changes cause further damage. The fused joint is stable, but the ones beneath are being negatively affected and on palpation there was clear stiffness.

219. As far as Mr Connolly's functionality at work is concerned, she pointed out that there was a decrease of his endurance, which was expected to continue. Mr Connolly was clearly struggling to cope with his daily workload. The best way to alleviate his pain was for him to stop working, and Ms Brink's advice to him would be that he should stop working. That would give him more quality of life and make his retirement at least comfortable. In her second report Brink expressed the opinion that Mr Connolly should not continue working further than the period of his contract.

220. Ms Carey, in turn, opined that chronic pain sufferers who continue to function at their maximum capacity eventually tend to burn out and their resilience tends to decrease. After the first examination during March 2009 Carey was of the opinion that Mr Connolly might have considered retiring somewhat earlier than he would have uninjured due to chronic back pain.

221. She regarded Mr Connolly's decision not to renew his contract as reasonable in the circumstances. According to her, his work demands exceed his capacity and basically the physical demands of his work were excessive for his condition and his pain tolerance.

222. In my view this evidence establishes that the injury is the cause of the increased pain levels experienced by Mr Connolly and that it results in the

final instance in him not being able to renew the contract of employment offered to him.

223. It was submitted, that there are clearly other factors in Mr Connolly's life that could – and probably did – cause the deterioration in his pain experience. The two obvious ones are the pre-existing degeneration in his spine, coupled with his age and earlier injuries, and the vastly increased demands of his work from 2009 onwards.

224. The degeneration of Mr Connolly's spine was highlighted by Dr Steyn and Dr Vlok in their evidence. They regarded this as the main reason for his deteriorating condition. Dr le Roux agreed that Mr Connolly had pre-accident degeneration in his back and that this can cause mechanical back pain. He also confirms that trauma does not cause degeneration and that Mr Connolly's current pain could be caused by his degeneration .

225. Dr le Roux testified that it was unlikely that degeneration at L4, L5 or S1 could result in the pain experienced by Mr Connolly. In this regard he pointed out that Mr Connolly had not complained of mechanical back pain when he was first injured, even though there was degeneration (scoliosis) of the lower back.

226. Ms Carey testified that people suffering from pain eventually ends up in a situation where their tolerance and endurance decreases and they need to rest more frequently. Mr Potgieter contended that she gave no logical basis for this generalised opinion. She does not relate it specifically to the facts of the instant case and, in particular, to Mr Connolly's testimony.

227. She was, however, not challenged on this statement, and her testimony accords with that Ms Brink and De le Roux had to say about Mr Connolly's tolerance of pain. It also accords with Mrs Connolly's observations. It also seems to me to accord with logic.

228. Mr Potgieter submitted that Dr le Roux' explanation accounts for the pain in Mr Connolly's leg, but does not provide a logical medical basis for the sudden increase in Mr Connolly's pain four years after the accident. This is also the first time the sinu-vertebral nerve "theory" appears. Again, I have to point out, it seems to me that it was a case of a gradually changing situation. Mr Connolly also did not point to a reason for the change in his ability to cope.

229. Mr Potgieter submitted that Prof Vlok and Dr Steyn provided a logical and plausible reason for the Mr Connolly's increased pain. Prof Vlok also clearly explained why he was of the view that the distribution of pain the Mr Connolly feels comes from the L5/S1 level and not from further above. He confirmed that the clinical view he had is not one which can link Mr Connolly's pain to the L3 level. Looking at the injury and the nature thereof, he could not see any reason why it should have become worse. He did not agree with Dr le Roux's diagnosis and discussion of the "*sinu-vertebral*" nerve and confirmed that degeneration of the lower lumbar sacral area was more likely the cause in view of the Mr Connolly's age and his activity.

230. Professor Vlok, however, fairly summarised the tentative nature of his opinion:

"Omdat ek nie 'n vaste diagnose het nie, ek bespiegel, ek dink dit kom van laer af, daar word vir my gesê daar is L4/5 degeneratiewe veranders alreeds op 'n vorige MR en my kliniese beeld pas nie in by die fraktuur nie en ek is van mening dit moet van iets laer afkom."

231. Dr Steyn also confirmed that there is evidence of degenerative changes involving the L4/5 and L5/S1 vertebral discs. This is noted from X-rays and an MRI scan taken by Dr Gerrit Coetzee, a neuro-surgeon, shortly after the accident.

232. Dr Steyn confirmed that in his opinion the Mr Connolly's pain and discomfort was as a result of lower lumbar back pain and irritation of the L5 and possibly S1 nerve root on the left hand side and was the much more likely cause of the lower lumbar back pain Mr Connolly complained of as opposed to the L3 level. He stated that in his opinion the L3 level was not the source of pain any longer as the fracture has healed, there was no soft tissue injury in that direct area causing pain, and even though the Mr Connolly has suffered facet artropathy at that level it is free of pain. In view of the fact that Mr Connolly is suffering L5/S1 invertebral disc degeneration, and most likely root inflammation, this is effectively the cause of his pain in the lower back with referred pain down the left leg. However, in cross-examination he testified that the test (a straight leg raise) was negative for nerve root impairment. Dr Steyn reconsidered his clinical findings arising from Dr le Roux's evidence and as a result changed his opinion.

233. Dr le Roux was of the view that no annulus tear could be responsible for the Mr Connolly's pain in view of fluid leaking in the area. In response to Dr

Steyn's diagnosis, Dr le Roux stressed that they were not confirmed by the X-ray or MRI.

234. The preceding summary of the medical evidence highlights the areas of dispute and difference between the various medical opinions

235. Mr Potgieter submitted that

(a) both Prof Vlok and Dr Steyn provided expert opinions which has a logical basis. They addressed the real causation issue: why Mr Connolly's pain suddenly increased after four years. They considered other possibilities than just the injury of 2005 and reached a defensible conclusion. No reason exists why their view should be rejected.

(b) the article of Dr Gillard, on which Dr le Roux based his latest diagnosis, was substantially refuted by Dr Steyn's evidence and the articles he referred to in turn.

(c) Mr Connolly had failed to prove that the sudden deterioration in his condition 4 years after the accident was caused by the injury suffered in the accident.

(d) The factual evidence showed that Mr Connolly continued with his activities of daily living and his work for those 4 years, although with some pain and discomfort. He suffered no loss of income and did not foresee any. He rode the Argus in a personal best time. He travelled overseas. He intended working to 70.

(e) Then something changed leading to him becoming, on his own evidence, incapable of working. There is no acceptable medical expert evidence to indicate that this is the natural or expected result of a stabilized L3 fracture. The *onus* to prove this is on Mr Connolly. This is the crux of his case.

(f) In fact, there is the evidence of Prof Vlok and Dr Steyn indicating another source (degeneration) for the present pain. And there is the clear factual evidence that Mr Connolly, a man into his late sixties, had a substantially increased work load and activity in 2010. There is no expert evidence that he would have been able to cope with this better or adequately had the accident not happened.

236. Mr Botha submitted that Dr Steyn was not a reliable expert witness for the following reasons:

(a) For an expert whose task it is to assist the Court in an objective manner, Dr Steyn's attitude expressed in his third report is indeed unfortunate.

(b) In his third report, Dr Steyn decided to usurp the function of the Court regarding Mr Connolly's credibility, and he reported that Mr Connolly was a misleading witness. According to Dr Steyn, Mr Connolly's history of functional impairment is not reconcilable with his physical activities. He did so with reliance on the distances cycled and a mountain bike race.

(c) Ultimately Dr Steyn made the following concession:

> *"Dr Steyn die vraag is dit en ek wil hê u moet 'n toegewing oorweeg as u in staat is om dit te doen om 'n toegewing te maak, die getuienis waarna u verwys, die feite waarna u verwys in u verslag hier is ongegrond, u bronne staaf nie dit wat u stel as feite in hierdie verslag nie en u feite wat u stel as ons dit vergelyk met die bronne is oordrewe. --- Goed ek sal dit toegee."*

(d) Dr Steyn also had to concede that there was no evidence in this case that there was any swelling of a nerve as a result of inflammation and that this could not be seen on any of the MRI reports. However, he qualified his concession by stating that swelling would not necessarily show on the scan and that it depended on "*die graad van swelling*".

(e) Dr Steyn conceded that inflammation heals and goes away, which causes the pain to go away. However, he again qualifies this concession by saying that it depended on "*hoe erg die inflammasie is...*"

237. It was contended that the defendant's experts attempted to overemphasize Mr Connolly's past injuries, underemphasized his present symptoms and complaints and, finally, that they had changed their opinion regarding their diagnosis by later postulating a prolapsed L5/S1 discus with a radiculopathy, whilst Mr Connolly's symptoms remained constant since the accident.

238. In my view Dr Steyn seemed at times to forget his prime function as an expert witness and on more than one occasion appeared to be more of an advocate for the defendant's case. He unfortunately, in my view, overstepped the line when he sought to question Mr Connolly's credibility.

The factual assumptions underlying that supposition were wrong. The evidence of both Dr Steyn and Prof Vlok is therefore not as reliable of such a probative value as it may otherwise have been.

239. Prof Vlok readily conceded that the experts were speculating when addressing the cause of the pain experienced by Mr Connolly.

240. As set out above, and by virtue of the number of reports filed, it would seem to me that the debate among the experts became an introspective debate regarding what was observed regarding the patient, and how it was recorded.

241. As I understood the dispute between these experts it boiled down to a debate as to what causes the pain experienced by Mr Connolly – Dr le Roux ultimately contending that this was a sinuvertebral pain which originated from the disc and the vertebra itself, whilst Dr Steyn concluded that Mr Connolly suffers from radiculopathy back pain, arising from a L5/S1 disc degeneration, causing a referred pain down the left leg, and that the fracture at L3 can be considered as stabilised and will neither improve nor deteriorate in future. Prof Vlok concluded that he could not link the area of the pain and the radicular pain with the area of the fracture. I also understood that the outcome of this debate, to a large extent, is to be determined with reference to what was reported by Mr Connolly regarding his symptoms, and accordingly it became a debate between these expert witnesses as to how such report-back of symptoms were conveyed by Mr Connolly, recorded by each of them, and reported in their various reports.

242. It would also seem to me that much of this is determined by precisely how Mr Connolly was able to express himself regarding his experience of his pain and how the pain manifested itself. This, in my view, would be complicated an important factor. As already set out above, Mr Connolly presented himself as a person who is very active for his age, but, as I perceived him to be, perhaps stoic by nature. He clearly never sought any sympathy from his employer, his spouse or any of the medical practitioners.

243. In my view there was no such dramatic change in circumstances as was contended for by the defendant. It is clear on the evidence that the effect of the pain was a gradual progression, culminating in the inability of Mr Connolly to continue working. This was entirely foreseeable. The suggestion that was caused by the natural degeneration in his lower back is also not plausible. None of the three expert orthopaedic experts suggested this in any of their earlier reports or at the joint meeting. It seems to be a belated attempt at explaining away something which was otherwise common cause, namely that the pain was caused by the injury at L3.

244. In my view Mr Connolly has established that the injury is the cause of his pain, that the pain became so debilitating, and eroded his reserves that the he had no option but to cease working.

Mitigation

245. The defendant had pleaded that Mr Connolly had failed to mitigate his damages. It was common cause that the defendant bore the onus in this regard (Neethling *et al* *Deliktereg* LexisNexis 6th ed, 2010, at 246 and the

cases there cited). A plaintiff fails to mitigate his damages when he fails to take reasonable steps to limit his damages (*Sentrachem Ltd v Prinsloo 1997 (2) SA 1 (A)* at 21C). This involves a factual enquiry (*Swart v Provincial Ins Co Ltd 1963 (2) SA 630 (A)* at 633D). Once the defendant has proved such a failure *"the plaintiff's original proof has fallen away and it is then for the plaintiff to prove what its damages are, if any, in the light of the operation of the mitigation rule". (Jayber (Pty) Ltd v Miller and others 1980 (4) SA 280 (WLD)* at 286B - C).

246. Mr Connolly gave as his only reason for stopping working the fact that he has pain. He had various medical options, as suggested by all the medical experts, to alleviate his pain. Dr le Roux, stated that some of these options could take the pain away completely for up to months on end. Mr Connolly has not even sought advice on these options, let alone followed them.

247. Since pain was his only reason to stop working, and there were several suggested options available to remove the pain for substantial periods, it was submitted that he clearly failed to mitigate his damages.

248. Ms Brink explained that pain causes muscle inhibition, and muscle weakness, which complicates attempts to strengthen the muscle as activities increases the pain. This is a vicious cycle. It was for this reason that she doubted whether a biokineticist would be able to provide useful treatment. She came to the conclusion that the best way to alleviate pain was for Mr Connolly to stop working. Physiotherapy would assist alleviating the pain, but would not be a long-term solution. Ms Brink conceded that if

Mr Connolly's pain levels were lowered, it might have enabled him to have continued working for longer.

249. Ms Brink testified that: "*I believe all we as experts are going to be able to do for this gentleman is decrease his pain slightly. It is not going to take his pain away. He is still going to function through a full day with pain even with that that we can do, and I have the opinion that he is still not – with everything that we can give him, he is still not going to cope with a full day of work*".

250. Ms Brink testified that pain alleviation will only be a short-term solution. As soon as he returned to his normal routine activities the pain will revert. Physiotherapy will only bring the pain intensity down for a very short period of time.

251. Mr Connolly did not take any medication. Mr Connolly testified that he has an aversion to taking medication, and Mrs Connolly referred to Mr Connolly's experience in the past of panic attacks after he took medication.

252. Dr le Roux testified that *"medikasie kan pyn verlig en as die pyn nie te erg is nie, kan dit die pyn miskien heeltemal wegneem"*, but then only for a short period of time. He regarded medication as a temporary short term pain reliever. He had advised Mr Connolly to seek medical assistance with regard to taking medication as it may lead to complications. A facet block can take the pain away for up to *"'n paar weke"*. He accepted a suggestion that a combination of pain killers and anti-inflammatory medication may

assist, but then pointed out, when considering Mr Connolly's position, that it would not have made a difference. According to Dr le Roux, any future treatment would only be symptomatic.

253. Ms Carey pointed out that her experience was that most chronic back pain sufferers did not find that medication was a solution. Activity modification was their solution.

254. In his first report and with regard to treatment, Dr Steyn reported that Mr Connolly had received physiotherapeutic treatment and, at that time, he was not taking any analgesic medication for pain relief. In his second report, he reported that, in regard to facet pain, he was of the opinion that with adequate treatment of a conservative nature, that pain would be significantly improved. Dr Steyn reported that Mr Connolly would benefit from a course of exercises under the care of a biokineticist. He did not recommend physiotherapeutic treatment, as he regarded such treatment only of a short term symptomatic value. He also suggested that provision should be made for analgesic medication from time to time. In his third report Dr Steyn reported that Mr Connolly's "*regular cycling on a daily basis...is a far better exercise than he could ever obtain from any physiotherapist or biokineticist*".

255. In his first report, Prof Vlok expressed the opinion that Mr Connolly should only be treated symptomatically.

256. Mr Potgieter pointed out that Mr Connolly had not, up to the time the trial started on 23 March 2010, sought any medical assistance, taken any sick leave, or taken any analgesics.

257. These submissions are not entirely correct, Mr Connolly had taken medication – and it did not accord with him; he had been to physiotherapy, at least immediately after the accident. There was no evidence that he had benefitted from this physiotherapy.

258. The fact that the that various medical options, including analgesics, physiotherapy, biokinetics, anti-inflammatories, a facet block and a radio frequency ablation, were all procedures and/or treatments available to Mr Connolly that would have alleviated his pain, is not sufficient, there must be some evidence that any one of these would have had the desired effect. The evidence was that most of these remedies would only afford a temporary reprieve.

259. It is therefore quite clear, so it was submitted, that the Mr Connolly had failed to mitigate his damages, He has done absolutely nothing to address his pain and discomfort in order to continue working and/or be less affected regarding his activities of daily living, although he knew that this could assist him to work longer, possibly to 70.

260. Mr Potgieter submitted than any reasonable person would have done this and that Mr Connolly should have done this.

261. Mr Botha, in turn, submitted that the defendant failed to satisfy the onus of proving that Mr Connolly failed to mitigate his damages.

262. It seems to me that Mr Connolly had fully explained his difficulty in taking analgesics. His understated evidence is fully supported by the testimony of his wife. He also underwent physiotherapy shortly after the accident. Ms Brink and Ms Carey fully explained that the physiotherapy treatment would only be symptomatic and bring short term relief. The underlying causes of pain would remain. The same conditionality applied to biokinetic treatment and facet blocks.

263. Mr Connolly's own testimony of his pain experience and the explanation of the cumulative effect of the pain remains largely untouched and not in dispute. Even Dr Steyn, testifying for the defendant, doubted the efficacy of biokinetic treatment and physiotherapy.

264. In these premises I find that the defendant has not discharged the onus in respect of the plea of mitigation of loss.

The quantification of the loss of future earnings

265. Ms Hofmeyr testified to the fact that Mr Connolly is highly technically skilled and competent, and in a niche market. Mr Connolly specific skills are sought after as there are very few marine engineers that worked with different nuclear devices. She also regarded Mr Connolly as a person who took his work-related responsibilities very seriously and that he has an inherently good work ethic.

266. Initially when the trial started Mr Connolly's contract was due to end in November 2010. This trial had not been finalised by 2010 and the evidence by Mr Connolly towards the end of the trial was that he had indeed received an extension of one year, i e for the year 2011, which he had declined.

267. Mr Potgieter submitted that, based on the evidence tendered in this matter regarding Rotek's policy of black economic empowerment and training new people, Mr Connolly in any event had no more than a even chance of obtaining an extension of his contract for 2011. This was Mr Connolly's own evidence in examination-in-chief: "*They did offer me another contract. ... There was a 50/50 chance.*" He further accepted that the unions and the companies "*would rather employ younger people*". It was submitted that for the next two years the chances will be (and would have been) even smaller, with Mr Connolly is getting older and more competitors entering the market. Mr Potgieter submitted that, if Mr Connolly has proved a loss of earning capacity, it is at best for one year (2011), subject to contingencies.

268. Mr Swart conceded that he, Ms Hofmeyr and the late Mr Shaw accepted that Mr Connolly would have worked until the age of 70. It appears to be safe to assume that Mr Connolly would have worked until the age of at least 70 and, the evidence was, without any difficulty of securing contract work.

269. In view of the evidence that Mr Connolly's skills are highly sought after and that he intended to work till at least the age of 70, as had most persons in his family and in his line of work, I am of the view that it is more than likely that he would have worked till the age of 70.

270. Mr Connolly had secured a further one year contract with Rotek, which he declined to accept. The only period that may warrant a contingency deduction is the remaining two years up to the age of 70, that is for 2012 and 2013. The possibility of early death and/or difficulty in securing further contract work is, in my view, remote and warrants only a small contingency deduction (see for example *Nochomowitz v Santam Insurance Co Ltd* 1972 (1) SA 718 (TPD) at 722H – 723B). In my view a deduction of ten percent, as was suggested by Mr Botha, would be fair and reasonable.

271. By agreement the actuarial report of Munro Consulting dated 27 September 2010 was handed in on the basis that it be regarded as evidence and as if the actuary has given *viva voce* evidence. There is no dispute as to the actuarial method of calculating the value of Mr Connolly's loss in the amount of R R2,856,600,00.

272. Mr Connolly's calculated total loss of income amounts to the sum of R2,856,600 and with a 10% contingency deduction to R2,570,940.

General damages

273. The determination of an appropriate amount to be awarded for general damages is a matter of discretion. It is to be exercised with due regard to the *sequelae* of the injuries that Mr Connolly has suffered, and awards made in comparable matters. The sequelae of the injury have been set out in detail above, and I do not propose repeating them again. In summary, Mr Connolly sustained a severe back injury which has left him with permanent

chronic pain and suffering, a permanent loss of amenities of life, and some permanent disablement. I was referred to a number of cases.

274. Mr Botha referred me to the following cases.

275. In *RAF v Maasdorp 2002 5 C&B C4-31 (C)* the plaintiff, a 49 year old hawker and home mechanic, suffered a severe L5/S1 listhesis as well as a slight slip at level L3/L4. He experienced chronic lower backache and certain activities causing nerve root compression and "*typical sciatica*" in his leg. The plaintiff spent most nights twisting and turning in bed trying to find a position of comfort. Driving time and walking distance was curtailed. A fusion (with bone and screws) at level L5/S1 was immediately indicated, which could be expected to significantly alleviate the symptoms, including the pain down the leg and enable the plaintiff to walk further and sit and stand much longer but still unable to resume work as a mechanic. In the meantime the pain was kept under control by the avoidance of certain activities. In 2002 the plaintiff was awarded R110,000.00 in general damages, the present value of which amounts to R181,000.00.

276. In *Stemmet v Padongelukkefonds 2004 5 C&B C4-60* a 29 year old fresh produce manager employed by Pick 'n Pay suffered damage to his cervical spine (neck) at two levels, firstly damage to the disc of the level C4/5 with protrusion which involved the spinal cord, with narrowing of the foramina, and secondly a large rupture of the central disc at the level C5/6 which exerted pressure on the spinal cord and nerve-root. Both these injuries carried the risk of spinal cord damage, and an interior discectomy was

performed with double fusion at the levels C4/5 and C5/6. The fusion was further strengthened with a plate and screws and post operatively a metal brace preventing movement of the neck and head had to be worn. Claimant had also experienced pain in the back immediately after the accident. This pain in the back persisted and became chronic. X-rays taken in 2003 revealed degenerative changes in the lumbar region (L1/2) and on the basis of the medical evidence the arbitrator found that this pathology and the resultant pain was caused by the accident in question. As a result of the chronic pains (and loss of mobility) experienced on a daily basis, Claimant's life had been dramatically affected. His active sporting activities came to an end; at home he could no longer lift or play with his children or assist his wife with domestic chores, and his intimate life suffered; at work he was physically hampered and he worked slower, requiring extra hours and thus causing him to arrive home fatigued, but his productivity was nevertheless impaired, which caused frustration and rendered him ill-tempered and deprived him of his earlier job satisfaction. In 2004 Claimant was awarded general damages of R150,000.00, which equates to R231,000.00 today.

277. In *Marais v RAF 2000 5 C&B C3-12* a 36 year old female suffered a severe whiplash injury of her neck, fractures of the T7 and T8 vertebrae and a slip discs at C6 and C7. The plaintiff suffered acute chronic headaches and pain and stiffness even two years after accident. A fusion of C6-7 was carried out. She was awarded R95,000.00 in general damages in 2000, which equates to R181,000.00 today.

278. It was submitted that a fair award of general damages to Mr Connolly would be R200,000.00.

279. Mr Potgieter, in turn referred to the following cases, which he submitted were reasonably similar to those of the instant case and useful for purposes of comparison:

280. *Campbell v Van Niekerk 1967 (1) C&B 76 1967 (1) QOD 769 (D)* – In this matter the plaintiff suffered a compression fracture of the first lumbar vertebrae and a compound fracture of the tibia and fibula of the right leg. The *sequelae* were that he suffered acute pain in hospital and will suffer discomfort for the rest of his life. He was a 76 year old male and R1 700,00 was awarded in general damages, with a current value of R92 000,00.

281. *Engels v POF 2002 (5) QOD J2 – 34 T* – In this matter the plaintiff suffered damage to her right shoulder, injury to the back at L5/S1, a fracture of the first rib, slight injury to neck and injury to ankle. Regarding the sequelae the plaintiff needed an operation to the shoulder, suffered pain in the back after driving for a long time, but the rib, neck and ankle injury caused no further consequences. The plaintiff was a 20 year old male, self-employed salesman and R65 000,00 was awarded in general damages with a current value of R107 000,00.

282. *Dachmann v RAF 2005 (5) QOD C4 – 45 / AF* – In this matter the plaintiff allegedly suffered a serious back injury. He had a previous badly disabled back with major spinal fracture seven years earlier. These injuries became worse and he endured pain but any surgical procedures or degenerative

problems would be attributable to the previous spinal fracture he had suffered. The plaintiff was a 37 year old male auto-electrician and general damages in the amount of R80 000,00 with a current value of R123 000,00 was awarded.

283. He submitted further that was to be kept in mind that Mr Connolly has consistently failed to mitigate his pain and discomfort by refusing to seek any medical assistance. This he is entitled to do, but this failure must be reflected in the award for pain and suffering. A plaintiff cannot elect to suffer avoidable pain and then claim damages for that same pain.

284. Mr Potgieter submitted that an amount of R120 000,00 in general damages would be fair and reasonable as an award in this matter.

285. In my view, having had regard to the facts set out above, an award of R 180 000,00 would be fair and reasonable.

Costs

286. Mr Potgieter addressed the costs issue in detail.

The first trial date of the 8th September 2009:

287. The matter was due to commence on 8 September 2009, but on 3 September 2009 Mr Connolly's attorney served and filed a Notice of Amendment, in terms whereof the quantum of Mr Connolly's claim was substantially increased. This was the first time the defendant was told that Mr Connolly's situation had changed dramatically and that he will now not be able to continue working. The defendant clearly needed to investigate

these new averments and prepare for trial on the basis of the amended claim.

288. The defendant therefore requested a postponement of the matter, which request was refused by Mr Connolly. The nett result was that the defendant had to draft a formal application for postponement which was done on 7 September 2009 and handed to the Mr Connolly's attorneys on the morning of 8 September 2009, being the first trial date.

289. Eventually Mr Connolly's attorney, after receiving the formal application for postponement, agreed to the matter being postponed in the event of the Honourable Judge President providing an early date, which he was willing to do. The matter was then postponed to 23 November 2009 and costs stood over for later determination.

290. Mr Potgieter submitted that Mr Connolly was solely to blame for this postponement and also forced the defendant to draft a formal application for postponement before acceding to the totally reasonable request for a postponement on the condition as set out hereinabove. He asked that the wasted costs of the said postponement including the costs of drafting the formal application for postponement, be awarded to the defendant.

291. Mr Botha submitted that the mere fact that Mr Connolly increased its claim in the week before the trial does not per se warrant a postponement. In addition he submitted that the postponement application became academic as the parties were informed on the morning of 8 September 2009 by the

Judge President that no judge would be allocated to the matter and that the parties should attempt to settle.

292. Mr Botha stated that at no stage did Mr Connolly concede the need for a postponement. It was only after it became clear that the matter would not proceed on 8 September 2009 that Mr Connolly agreed to a postponement on the basis that the Judge President would provide an early date, which he was willing to do.

293. In the light of the non-allocation of a judge to hear the matter, Mr Botha submitted that the wasted costs occasioned by a postponement should be in the cause, alternatively that each party should bear their own costs.

294. Mr Botha pointed out that the only reason the matter did not proceed on 23 November 2009 was that no judge was available and the matter was again crowded out. I was furnished with a copy of Mr Connolly's attorney's file note dated 23 November 2009 which bears this out.

295. In the premises, Mr Botha submitted that the events that took place in the week prior to 23 November 2009 are irrelevant to the reason for the post-ponement.

296. Mr Botha submitted that an appropriate order would be costs in the cause, alternatively that each party bear their own costs.

297. It would seem to me that the conduct of the plaintiff was not the cause of the postponement. Costs, in my view, should therefore be costs in the cause.

29 September 2010

298. On the morning of 29 September 2010 the matter was postponed by agreement in view of the fact that the defendant had discovered and made available a medico-legal report of one Dr Charles Edelstein, relating to an earlier injury and RAF claim by Mr Connolly. Mr Connolly's attorneys in the current matter also represented him in the matter in which Dr Edelstein's report had been prepared. Mr Potgieter submitted that Dr Edelstein's report should have been discovered and made available by Mr Connolly's attorneys at the outset.

299. Had Mr Connolly's attorneys provided the said report timeously it would not have been necessary to postpone the matter on 29 September 2010. In view of the fact that the report was only obtained from the defendant's archived files after of 28 September 2010 the defendant had no choice but to provide the report to Mr Connolly's legal team at that stage which effectively meant that Mr Connolly had not had an opportunity to question all his medical witnesses on this report and the contents thereof when they testified. Mr Connolly therefore requested a postponement which was arranged by agreement.

300. Mr Potgieter submitted that Mr Connolly should be ordered to pay the wasted costs of this postponement in view of the fact that Mr Connolly knew

that he had been involved in a previous accident and should have made it known earlier.

301. Mr Botha submitted that

(a) Several of the experts' reports filed long before the commencement of the trial refer to Mr Connolly's earlier accident;

(b) Mr Connolly was not in a position to discover Dr Edelstein's report as Mr Connolly's attorneys had long since destroyed the file;

(c) Both orthopaedic surgeons called as expert witnesses by the defendant conceded that Dr Edelstein's report was irrelevant to the matter;

(d) The defendant requested the postponement in order to deal with Dr Edelstein's report and to consider the possibility of calling Dr Coetzee on the question of mitigation of damages.

302. In the premises, Mr Botha submitted that the wasted costs occasioned on 29 September 2010 should be borne by the defendant.

303. In my view both parties were obliged to discover the report by Dr Edelstein. I accept that Mr Connolly was no longer in possession thereof. The defendant knew about the report as a result of what was contained in the reports by a number of the experts.

304. In my view the defendant is liable for the costs resulting from the postponement.

305. Mr Potgieter thereafter in great detail analysed the manner in which Court time was used. He submitted that because Mr Connolly had not used the available court time in full, the defendant was not liable for the costs of two days. The analysis is set out below.

The trial date of 23 March 2010

306. The Court only commenced at 10h42. Mr Connolly and his wife testified on this day and after their evidence the legal team for Mr Connolly had no further witnesses to call. The Court adjourned at 12h38. This effectively means that only two hours of the total court day was utilised.

The trial date of 24 March 2010

307. The Court commenced at 10h04 on this date and after the evidence of Dr le Roux, Mr Connolly's orthopaedic surgeon, and Lyall Marie Brink, Mr Connolly's physiotherapist, the Court adjourned at 12h46, which means that only two hours and 42 minutes of the entire Court day was utilised.

308. The matter was then postponed to 14 June 2010, but did not commence as I was sitting in a matter which had run over and the trial could not proceed on that day.

27 September 2010

309. Counsel for Mr Connolly indicated at the start of proceedings on this day that only Ms Lisa Hofmeyr would be available to testify and the Court commenced at 09h59. Her testimony was concluded at 11h06, which effectively means that only 67 minutes of the total court day was utilised.

28 September 2010

310. The Court commenced at 10h01 and the day was only utilised till approximately 12h00 which means that approximately only two hours of the Court date was utilised.

16 February 2011

311. On 16 February 2011 the matter commenced at 10h00 for Mr Hannes Swart's evidence. The Court adjourned at 11h30 until 14h15, but the report of Ms Joan Andrews was then admitted by Mr Connolly, which meant that it was not necessary for the defendant to call Ms Andrews as a witness and the rest of the court day was not utilized..

312. Had Mr Connolly's legal team indicated timeously that Ms Joan Andrew's report would be admitted the defendant could have commenced with the evidence of Dr Steyn in order to utilise a full Court day which in the circumstances it could not do.

16 March 2011

313. The Court convened at 09h47 on this trial date. The Court postponed the matter at 14h32 to 17 March 2011. The reason was that Mr Connolly's

counsel was apparently not feeling well and would only commence with cross-examination on the next day.

314. Mr Potgieter conceded that it was true that Mr Botha wanted to take up issue with Dr le Roux about two medical articles which Dr Steyn had provided in his evidence in chief, but the fact remains is that had Mr Connolly commenced with cross-examination valuable time could have been utilised and even though the cross-examination most likely would not have been completed on 16 March 2011, yet another Court day was not utilised in full which was not due to the defendant's fault.

Submissions regarding the Court dates which were not utilised in full

315. Many of these days were not utilised in full and Mr Potgieter submitted that had all the relevant Court days been utilised to the fullest extent the total amount of Court days which the trial eventually ran would have been much less. I was requested in the event of the Mr Connolly being successful and entitled to costs, to make an order declaring that Mr Connolly should not be entitled to at least the costs of two full days in view of the above discussed days.

316. Mr Botha submitted that the defendant lost sight of the fact that in matters of this nature, it invariably occurs that court time is lost as a result of the vagaries in the scheduling of witnesses and the non-availability of witnesses, especially expert witnesses, who have professional or other court commitments.

317. Mr Botha, in addition, submitted that at no stage did the defendant's legal team object to the fact that the whole court day would be not utilised when the matter stood down or was adjourned early. At all material times the defendant agreed to these arrangements without demur. Mr Botha submitted that fairness dictates that the defendant's failure to object thereto at the time or to indicate to Mr Connolly that the defendant would raise this issue during argument precludes the defendant from raising the issue at such a late stage.

318. There is much to be said for this submission. Appearing before me were seasoned litigators who knew what they were about. Had Mr Potgieter objected from the start I may very well have insisted on the trial being run in more disciplined manner.

319. In the circumstances I do not accede to Mr Potgieter's request to disallow costs for two days as was suggested.

Conclusion

320. In conclusion, I make an order in the following terms:

(a) the defendant is ordered to pay to Mr Connolly the total sum of R2,784,226.00 (R13,286.00 for past medical and hospital expenses, R180,000.00 for general damages, and R2,570,940.00 for the loss of earnings/earning capacity).

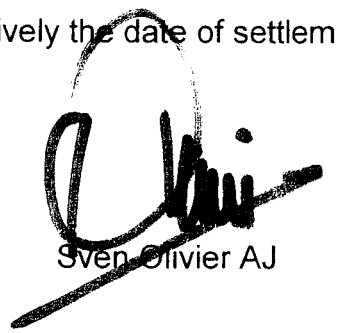
(b) Should payment of the aforesaid sum not be made within 14 days after the date of judgment, the defendant shall be liable to Mr Connolly for payment of interest on the said sum of R2,750,940.00 computed at 15,5% per annum from the 15th day after the date of judgment to date of payment.

(c) the defendant is directed to furnish Mr Connolly with an undertaking as contemplated in section 17(4)(a) of the Road Accident Fund Act, 56 of 1996, to pay the costs of the future accommodation of Mr Connolly in a hospital or nursing home, or treatment of or rendering a service or supplying of goods to Mr Connolly resulting from the injuries sustained by him in the collision in question, after such costs have been incurred and on proof thereof.

(d) the defendant is ordered to pay Mr Connolly's party and party costs of suit on a High Court scale, such costs to include the costs of two counsel, including the costs of preparing heads of argument and the reading of the record, the qualifying expenses of all expert witnesses who testified as witnesses in respect of whom Mr Connolly has filed notices and reports; and the costs of obtaining a running record.

(e) payment of the costs referred to above shall be effected within 14 days of the date of the Taxing Master's allocatur or of settlement of Mr Connolly's party and party bill of costs.

(f) Should the costs referred to above not be paid by due date, the defendant shall be liable to Mr Connolly for the payment of interest thereon computed at 15,5% per annum from the 15th day of the Taxing Master's allocator, alternatively the date of settlement of Mr Connolly's bill of costs.



Sven Olivier AJ

8 February 2012