Republic of South Africa
In the Western Cape High Court of South Africa

Before: The Hon Mr Justice Louw
The Hon Mr Justice Le Grange
The Hon Mr Justice Binns-Ward

Case no: A111/2011
(Case no. in court a quo 13182/2005)

In the matter between:

NINHAM SHAND (PTY) LTD	
t/a NINHAM SHAND	First Appellant
ERBACON CONSTRUCTION CC	Second Appellant
MAURITZ DU TOIT	Third Appellant

and

RAYMOND LESLIE FABER	Respondent

JUDGMENTS DELIVERED ON 14 MARCH 2012

LOUW J:

[1] I have read the judgment prepared by Binns-Ward J on behalf of the majority. Save that I do not agree that the appeal by the third, fourth and fifth

defendants (hereafter, the defendants) should succeed, I agree with the judgment and reasons.

[2] Since this is a minority judgement I will briefly state my reasons for dissenting.

[3] I do not agree that the court a quo misdirected itself in the evaluation of the causal negligence of the plaintiff and that the court erred in concluding that the damage recoverable by the plaintiff should be reduced by no more than 20%. In my view the plaintiff was not proven to have negligently failed to avoid the collision after crossing the unbroken white line. However, even if it should be correct that the court a quo misdirected itself in the manner stated in the majority judgement and that the plaintiff indeed negligently failed to avoid the collision after he crossed the unbroken white line, I would not on a reassessment, reduce the damage recoverable by the plaintiff by more than the 20% found by the court a quo.

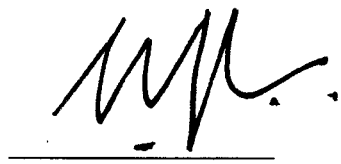
[4] The nature and kind of fault of the defendants was different from that of the plaintiff. The defendants consciously designed and implemented a deviation on a busy national highway which not only deviated from the prescribed and accepted design for such works in a number of significant respects, but was also as a result confusing and likely to mislead road users. The foreseeable harm to users of the road that might result from the defendants' fault was potentially catastrophic and the risk of such consequences occurring could easily and significantly be reduced or avoided by the defendants conforming to the known standard design for such a deviation. In addition, the defendants had a further opportunity to reflect on

their conduct. When the layout of the deviation caused vehicles to collide with the delineators on the oblique solid white line, the defendants did not reconsider their non-conforming layout of the deviation, but in my view exacerbated the situation by not redrawing the yellow line to run parallel to the oblique white line. Instead they removed the delineators over the last twenty to forty meters of the white line, thereby creating the offending 'gap' at the point where the yellow and white lines converged. The plaintiff in contrast was a legitimate user of the road who had entered the deviation at a safe speed and was confronted by a confusing situation through no fault of his own. Unlike the defendants who decided on and persisted in their course of conduct at their leisure, the plaintiff had but seconds within which to evaluate the situation, decide upon what was required to be done to avoid a collision and to execute the avoiding action, all in fading light and in overcast and rainy conditions.

[5] In the circumstances the plaintiff's deviation from the norm of the reasonable user of the road was much less than the defendants' deviation from the norm of the reasonable consulting engineer and professional road contractor. In my view, justice and equity demands no greater reduction than 20% in the plaintiff's recoverable damage.

[6] For these reasons I would, save for making the order set out in paragraph 2(a)(ii) of the order proposed by the majority, dismiss both the appeal and the cross-appeal and order that each party pay his own costs of

the appeal.



W.J. LOUW
Judge of the High Court

BINNS-WARD J:

[7] This matter concerns an appeal against the court a quo's determination of the appellants' liability to compensate the respondent for the damages sustained by him arising out of his injury in a motor vehicle collision. Pursuant to a ruling made in terms of rule 33(4) at the commencement of the trial, the issue of liability was heard and determined before and separately from the other issues in the case. The appeal was brought with the leave of the trial court. That court also granted leave to the respondent to cross-appeal against its reduction, in terms of the Apportionment of Damages Act 34 of 1956, of the damages that the respondent was able to recover. It is convenient to refer to the parties by their roles as the plaintiff and defendants, respectively, in the action.

[8] The collision occurred on 20 March 2003, at approximately 6:45 p.m., in late dusk conditions, on a road bridge on the N2 national road at Swartvlei. The road at this spot ordinarily carries bi-directional traffic, with one lane provided in each direction. The road over the bridge runs roughly east-west. It ordinarily provides a tarred emergency shoulder on the southern and

northern edges of its horizontal plane. Each of these shoulder areas is demarcated from the adjacent traffic lane by a yellow line.

[9] Ordinary traffic conditions did not obtain at the time of the collision, however, because road rehabilitation works were in progress on the bridge. Due to these works only the northern half of the bridge was open to traffic. The works-related closure of the southern half of the road necessitated the deviation of traffic that would ordinarily have proceeded in an easterly direction in the northern lane further to its left, onto the section of the road that would ordinarily have been the emergency shoulder. Traffic proceeding in a westerly direction, which would ordinarily have travelled in the southern lane, was deviated onto the northern lane. Thus the bi-directional flow of traffic across the bridge was diverted from its ordinary course across the central plane to the northern half of the structure.

[10] The vehicles involved in the collision were a motorcycle ridden by the plaintiff and a sedan motor car driven by Mr Alexander Foster. At the time of the collision Foster was driving across the bridge in a westerly direction. Conformably with the scheme of the deviation just described, he was travelling in the northerly lane of the road. The problem was that the plaintiff was simultaneously headed in an easterly direction in the same lane. According to the design of the deviation, the plaintiff, of course, should have been travelling on what would ordinarily have been the emergency shoulder area on the northern side of the bridge. The collision occurred in the lane in which Foster was driving. It follows that the plaintiff was at the time in the 'wrong lane'.

[11] The plaintiff's claim for compensation for the damages he allegedly sustained in the collision was prosecuted in an action instituted by him against five defendants. The first defendant was the Road Accident Fund, which was sued by reason of the provisions of s 17 of the Road Accident Fund Act 56 of 1996 on the basis of the alleged negligence of Mr Foster in causing the collision. The second defendant was the South African National Road Agency Limited, which was the body which, *qua* employer, had commissioned the roadworks on the bridge. The third defendant was a firm of consulting engineers which had been appointed by the second defendant as consulting engineers in respect of the roadworks project. The fourth defendant was the company contracted by the second defendant to carry out the roadworks. The fifth defendant is an employee of the fourth defendant, who, as the site engineer, was responsible on a daily basis for directly overseeing the execution of the roadworks contract on the bridge. The defendants were joined in the action severally, and in the alternative as alleged joint wrongdoers.

[12] The claim against the second defendant was withdrawn before the matter came to trial. The first defendant settled the plaintiff's claim against it on the basis of an agreement by it to accept liability for the payment of 25 per cent of the plaintiff's proven damages. The trial on the issue of liability thus proceeded only against the third, fourth and fifth defendants.

[13] In summary, the allegations of causal negligence against these defendants were that the design and layout of the deviation were defective and confusing to such an extent that the plaintiff was misled thereby to believe

that in travelling in the northern lane he was riding his motorcycle on the correct part of the road. In this regard it should be mentioned that the fourth defendant was responsible for designing the deviation, and that the third defendant was responsible for checking and approving the appropriateness of the design. The design work was done by the fifth defendant. As mentioned, he was also responsible for the execution of the work on site, which included the setting up and maintenance of the deviation. The third defendant was responsible as consulting engineer for generally overseeing the work executed on site.

[14] The defendants denied the allegations of causal negligence made against them and alleged that the plaintiff's negligence in the following respects caused the collision and any resultant damages sustained by him (again I summarise): he had failed to keep a proper lookout, and had failed to avoid the oncoming vehicle of Mr Foster in circumstances in which he reasonably could and should have done so.

[15] The trial court concluded on its assessment of the evidence that the plaintiff had been partly at fault in the causation of his damages and thus made an order in terms of s 1 of the Apportionment of Damages Act, 34 of 1956, reducing the amount which the plaintiff could recover in damages against the third, fourth and fifth defendants by 20 per cent. The trial judge held that these defendants were liable jointly and severally to compensate the plaintiff in respect of 80 per cent of such damages as he might subsequently prove. The learned judge's determination in this respect would appear to have been made in terms of s 2(8)(a)(i) of the Apportionment of Damages

Act.[1] Notwithstanding the absence of any express request therefor by any of the defendants,[2] the trial court also determined the degrees of contributory fault of the third, fourth and fifth defendants. For this purpose, with the agreement of counsel, it treated the fourth and fifth defendants as 'one unit' and determined causal fault between the parties as 20 per cent by the plaintiff, 40 per cent by the third defendant, and 40 per cent by the 'unit' comprised of the fourth and fifth defendants. The learned trial judge also determined that Foster had not been contributorily at fault in the causation of any damages sustained by the plaintiff. He summed up his apprehension of the effect of the aforementioned determination at para 62 of the judgment as follows: '*The practical effect of this apportionment is that third, fourth and fifth defendants are jointly and severally liable to plaintiff for 80% of his damages. The benefit derived from the agreement between plaintiff and first defendant enures to plaintiff only and not to the other defendants*'.

[16] It is appropriate, I think, before addressing the substance of the appeal, to clarify the actual effect of the judgment at first instance because it seems, with respect, in certain detail to have been premised on an incorrect

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[1] Section 2(8)(a)(i) provides: '*(a) If judgment is in any action given in favour of the plaintiff against two or more joint wrongdoers, the court may-*

(i) order that such joint wrongdoers pay the amount of the damages awarded jointly and severally, the one paying the other to be absolved;

(ii) ...'

[2] See s 2(8)(a)(iii) of the Apportionment of Damages Act, which provides: "*(a) If judgment is in any action given in favour of the plaintiff against two or more joint wrongdoers, the court may-*

*(iii) where it gives judgment against the joint wrongdoers jointly and severally as aforesaid, **at the request of any one of the joint wrongdoers**, apportion, for the purposes of paragraph (b), the damages payable by the joint wrongdoers inter se, amongst the joint wrongdoers, in such proportions as the court may deem just and equitable having regard to the degree in which each joint wrongdoer was at fault in relation to the damage suffered by the plaintiff;*

(iv) ...'

(The text of paragraph (b) is set out in note 3, below.)

application of some of the pertinent provisions of the Apportionment of Damages Act.

[17] Counsel were agreed, correctly in my view, that nothing turns on the making of an apportionment between the joint wrongdoers, ostensibly in terms of s 2(8)(a)(iii) of the Act, in the absence of any express request therefor. Mr *Newdigate* SC, who (together with Mr *Howie*) appeared on appeal for the third defendant, contended that an implied request for such apportionment had been made. This contention is indeed supported by the terms of the trial judge's description of the argument in the court a quo, especially at para 58 of the judgment. However, the object of an apportionment in terms of s 2(8)(a)(iii) of the Act is to determine liability *inter se* between joint wrongdoers who have been held jointly and severally liable in damages to '*a plaintiff*' (as defined in s 2(1)). On the basis of his finding that they were equally at fault, or to blame for the plaintiff's damages, the learned judge should therefore, for the purposes of paragraph (b) of s 2(8) of the Act,[3] have made an order apportioning the liability for the plaintiff's damages equally *inter se* between the third defendant of the one part and the fourth and fifth defendants of the other part.

[18] As mentioned, the trial court also purported to determine the question of Foster's fault. In my view, because neither Foster, nor the Road Accident Fund (by virtue of the aforementioned settlement agreement) were party to

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[3] Section 2(8)(b) of Act 34 of 1956 provides: '*Any joint wrongdoer who pays more than the amount apportioned to him under subparagraph (iii) of paragraph (a) may recover from any joint wrongdoer who has paid less than or nothing of the amount so apportioned to him, a contribution of an amount not exceeding so much of the amount so apportioned to the last mentioned joint wrongdoer as has not been paid by him, or so much of the amount paid by the firstmentioned joint wrongdoer as exceeds the amount so apportioned to him, whichever is less.*'

the proceedings at trial, and no notice as contemplated by s 2(2) of Act 34 of 1956 had been given to either of them by any of the remaining defendants after the Fund ceased to a party in the action in respect of liability, the causal fault of Foster was not a matter falling for determination by the trial court. When this proposition was put to counsel during argument of the appeal, because one of the grounds of appeal was that the trial court had erred in holding that that Foster had not been at fault in the collision, counsel on both sides appeared to agree that the settlement agreement between the plaintiff and the first defendant meant that legally only that portion of the plaintiff's damages not provided for in terms of the settlement remained in contention in the action. Counsel founded their opinion in this regard on the provisions of s 2(10) of the Apportionment of Damages Act. It is unnecessary to go into the issue in any detail, but in my view, s 2(10) has no bearing on the question.

[19] Section 2(10) of the Apportionment of Damages Act provides:

> If by reason of the terms of an agreement between a joint wrongdoer and the plaintiff the former is exempt from liability for the damage suffered by the plaintiff or his liability therefor is limited to an agreed amount, so much of that portion of the damages which, but for the said agreement and the provisions of paragraph (c) of subsection (6) or paragraph (b) of subsection (7), could have been recovered from the said joint wrongdoer in terms of subsection (6) or (7) or could have been apportioned to him in terms of subparagraph (ii) or (iii) of paragraph (a) of subsection (8), as exceeds the amount, if any, for which he is liable in terms of the said agreement, shall not be recoverable by the plaintiff from any other joint wrongdoer.

The subsection affords a basis for a joint wrongdoer to raise a partial defence to a plaintiff's claim in respect of quantum. If it were sought by the third to fifth defendants to rely on the provision to limit their liability to the plaintiff, the reliance should have been specially pleaded; cf. *Windrum v Neunborn*

1968(4) SA 286 (T) at 293A (per Trollip J, as he then was). The matters that would have to be pleaded in this regard would be the terms of the agreement in question and the extent of the portion of the damages which, but for the agreement, could have been recovered by the third, fourth or fifth defendants from the Fund (or Foster) as a joint wrongdoer. There is, however, no indication on the record that s 2(10) featured in any way in the trial proceedings.

[20] It is any event questionable whether, notwithstanding the provisions of s 3 of the Apportionment of Damages Act, the Road Accident Fund qualifies as a joint wrongdoer liable under the Act to make a contribution *inter se* to another wrongdoer who is severally liable for the damages in question; see *Smith v Road Accident Fund* 2006(4) SA 590 (SCA), especially at para 10, and *Mosholi v Putco (Pty) Ltd* 2011 (5) SA 38 (GNP), at 41 I – 47E; and contrast *Maphosa v Wilke & Andere* 1990(3) SA 789 (T) at 797 I – 799D. The issue has been the subject of debate because the Fund's liability arises statutorily and therefore, arguably, not '*in delict*' within the meaning of that term in s 2(1) of Act 34 of 1956. It is unnecessary, however, to determine that issue in this case. The only point that needs to be made for present purposes is that trial court's determination that Foster was not causally at fault in the collision addressed a question that did not arise for determination on the pleadings as they affected the claim against the third, fourth and fifth defendants; and therefore, assuming – without opining – that the purported determination was wrong, it is not an aspect of the judgment which in any manner bars any of the defendants from exercising any right to exact a contribution that they might contend that they enjoy under the Act in other

proceedings. Whether they in fact do enjoy such a right is a matter for determination in any such other proceedings.

[21] The only relevance of a determination of the causal fault, if any, of Foster would be to establish to what degree, if any, the third, fourth and fifth defendants might have been entitled to obtain a contribution from him or the Road Accident Fund after having themselves paid the plaintiff's damages. As I have emphasised, it was not a question that arose on the pleadings, and neither the Fund nor Foster was in any manner called upon to participate at the trial for the purpose. It was not a question that could properly be decided in their absence without appropriate prior notice to them. It is thus also not a matter falling to be decided by this court on appeal.

[22] It should, however, perhaps be made clear that notwithstanding my distinction of counsel's reliance on s 2(10) of the Act, the provisions of which apparently also founded a concession by the plaintiff's counsel that all that was in issue between the plaintiff and the third to fifth defendants was the damages which the plaintiff could not recover from the Road Accident Fund, I do not mean to suggest that the substance of that concession was not correctly made.[4] The Apportionment of Damages Act and the Road Accident Fund Act do not provide warrants for the recovery of double damages, and thus any amount received in compensation by the plaintiff in terms of the statutory indemnity falls to be taken into account in reduction of the amount that he is entitled to exact from the third to fifth defendants. He is not entitled by reason of the settlement with the Fund to recover more than the total

[4] We were informed of this concession, and the basis for it having been made, by the third defendant's counsel from the bar. The plaintiff's counsel did not demur.

amount in damages that he has actually sustained; see *Union Government (Minister of Railways) v Lee* 1927 AD 202 at 226 fin – 227, citing, *inter alios*, Grotius 3.34.6 and Voet 9.2.12. The legal policy considerations, founded in equity, that informed the departure from the Roman Law in this regard would apply, irrespective of whether or not the Road Accident Fund falls to be characterised a joint wrongdoer from whom the defendants could claim a contribution in terms of the Apportionment of Damages Act.[5]

[23] Thus to the extent that the trial court's judgment might be read to state that the effect of the settlement between the plaintiff and the first defendant is entirely incidental in the sense that any amount recovered by the plaintiff thereunder will not affect the amount recoverable from the third to fifth defendants, I would, with respect, disagree. If, however, the intended import of the remark was that the settlement was not a factor which the trial court had to take into account in making any apportionment of fault between the plaintiff and those defendants who were active parties in the trial on the issue of liability, it is unexceptionable. Some doubt attaches as to the intended meaning in consequence of the exercise undertaken by the trial court in purporting to determine the question of Foster's contributory negligence when it had not been called upon by pleaded issues in contention between the active parties in the action to do so.

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[5] At common law the defendants would be characterised as 'concurrent wrongdoers' rather than 'joint wrongdoers'. At common law joint wrongdoers '*are persons who, acting in concert or in furtherance of a common design, jointly commit a delict. They are jointly and severally liable. Concurrent wrongdoers, on the other hand, are persons whose independent or 'several' delictual acts (or omissions) combine to produce the same damage.*'; see *Nedcor Bank Ltd t/a Nedbank v Lloyd-Gray Lithographers (Pty) Ltd* 2000 (4) SA 915 (SCA) ([2000] 4 All SA 393) at para. 10. They were liable *in solidum* at common law. The effect of s 2(1) of the Apportionment of Damages Act is to treat concurrent wrongdoers as 'joint wrongdoers' within the meaning of the statute, with the result that in terms of s 2(8) they may be held jointly and severally liable in damages to a plaintiff together with any other wrongdoer(s) joined in the action.

[24] Returning then to the matters that are centrally relevant in the appeal. For that purpose I shall assume that any reader of this judgment will have access to, or be familiar with the judgment of the trial court, and therefore shall not repeat the factual detail more than is strictly necessary for narrative coherence.

[25] The trial court rejected the evidence of Mr De Souza and Ms Mandel, friends of the plaintiff, who had been riding their motorcycles some distance ahead of the plaintiff on the road from Wilderness to Knysna, that the line delineating the ordinary northern lane over the bridge - being used in the deviation for westbound traffic - from its adjacent emergency shoulder – temporarily being used for eastbound traffic - was yellow. (The plaintiff also testified that it had been his 'impression' that the line was yellow.) The court also rejected their evidence that there was no solid white line delineating the division between the two lanes of traffic at the entrance to the deviation, nor, after the conclusion transitional portion of the deviation for eastbound traffic, between the northern lane of the bridge and the emergency shoulder. The trial court found that the state of the road markings in the deviation was as depicted in the photographs taken by De Souza on the morning after the collision. De Souza's evidence was predicated on the information he said he had been given by an unidentified employee of the fourth defendant when he visited the scene on the morning of 21 March that the white lines had been painted earlier that morning.

[26] Having regard to the evidence as to the time that would have been required for the road painting allegedly reported to De Souza to be

undertaken by hand, and the unlikelihood of the fourth respondent having been able to obtain a road-painting machine for the purpose within the time necessary for this information to have been correct; and also considering the photographs taken by the fifth defendant depicting the condition of the road when the relevant part of the deviation had been set up some weeks earlier; I do not think that the trial judge's finding in this respect can be faulted. The finding also found support in the evidence of a local police officer who used the road frequently.

[27] The transitional section of the deviation, which, from the western approach, gradually diverted eastbound traffic over from the northern lane of the N2 to the northern emergency shoulder of the Swartvlei bridge, and took westbound traffic out of the deviation from the northern lane of the bridge onto the southern lane of the N2, was characterised by two lanes running at an angle of between 30° and 45° to the east-west line of the northern half of the bridge. Consistently with the design approved by the third defendant, the two lanes in the transitional section were separated by a tapering solid white line. From the perspective of an eastbound driver the tapering line ended at its junction with the straight white line painted over the middle of northern half bridge to demarcate the temporary lanes which ran over the structure. The yellow line which the fifth defendant left in place in the transitional section ran across the temporary eastbound lane at the end of the transitional section and merged with the aforementioned straight white line dividing the temporary lanes over the bridge. To the extent that the plaintiff and his travelling companions claimed to have themselves observed a yellow line demarcating the divide between the northern lane and the shoulder, I consider that this

might well be ascribed to the effect of the fourth respondent's failure to erase the original yellow line where it crossed the temporary eastbound lane at the end of the transitional portion of the western entrance to the deviation. The effect of this failure was to create a situation in which the yellow line ordinarily demarcating the northern lane and the northern emergency shoulder indistinguishably merged in a straight line with the replacement white line painted onto the roadway of the bridge itself to demarcate the temporary east and westbound lanes on the northern half of the bridge.

[28] The undisputed evidence of the fifth defendant was that it had been observed that eastbound traffic was entering the deviation at inappropriately high speeds, in disregard of the signs put up to reduce the applicable speed limit to 60 kph. Vehicles entering the transitional section of the deviation at high speed also appeared to overlook the intended effect of the tapering solid white line and endangered vehicles exiting the deviation from the opposite direction. It was therefore determined to place a line of reflective upstanding delineators on the tapering line to emphasise the route of the diverting lanes. Initially these delineators had been placed all along the tapering line right up to the end of transition at the junction of the tapering line with the aforementioned temporary straight white line over the northern half of the bridge (also being the place at which the unerased yellow line merged with the straight white line). While the line of delineators evidently succeeded in emphasising the intended purpose of the taper line, it was noted however that some of the vehicles coming into and out of the transitional section clipped against the delineators positioned close to the acute turning point created at the junction of the tapering and straight white lines. These delineators were

consequently frequently knocked into the path of other vehicles, creating a potentially dangerous situation. It was therefore decided to remove the last few delineators on the tapering line at the position close to where the tapering line made its junction with straight white line. The result of this removal was to create a gap less than a car's width in breadth between the end of the tapering line of delineators and the junction of the tapering line with the straight white line.

[29] The evidence of the plaintiff and the friends with whom he was riding on the evening of the collision suggested that they had believed that the last of the tapering line of delineators marked the end of the diversion and that consequently, immediately upon passing that delineator, they turned to their right while still on the southern side of the straight white line demarcating the temporary lanes across the bridge, and continued eastward. This manoeuvre put them on the northern lane of the bridge, which, it will be recalled, was being used for the purpose of westbound traffic. Had any of them glanced downwards to his or her left while making the turn, the un-erased yellow line would have caught the eye. The convergence of the yellow line with the straight white line could easily have been missed and the rider could understandably be left with the impression that the line to his or her left as he or she proceeded across the bridge in the darkness was a yellow one instead of a white one. This indeed was one of the confusing features of the set-up of the deviation which the trial court held contributed to the occurrence of the collision and the plaintiff's damages.

[30] Various other aspects of the deviation that did not comply with the applicable national guidelines were highlighted by an expert witness called by the plaintiff, Mr Els. Most of the opinion evidence given by Mr Els was confirmed by Mr Marius van der Vyver, who gave evidence as an expert on behalf of the third defendant. It was on the basis of his acceptance of that evidence that the learned trial judge found the defendants to be causally at fault in respect of the plaintiff's damages in the degree described earlier. In my view the defendants have not succeeded in showing that the trial court erred in its finding that the confusing characteristics of the transitional section of the deviation contributed significantly to the plaintiff proceeding in the wrong lane over the bridge.

[31] There is no substance in the argument pressed in the defendants' written heads of argument that the effect of the confusing characteristics of the transitional section of the deviation had entirely dissipated by the stage that the plaintiff reached the place of impact. It is clear that the confusing character of the transitional section, the effect of which was aggravated by the defendant's omission to place a two way traffic warning sign on the side of the bridge immediately after the transitional section of the deviation and their failure to complement the line of delineators on the centre of the bridge with delineating markers along the northern edge of the bridge, was a causally contributing factor in respect of the line of travel over the bridge taken by the plaintiff. The essential nature of the defects in the design and layout of the deviation was a failure to effectively guide road-users out of the transitional section and onto the straight stretch of the bridge in a manner that would clearly bring home the intended routing of bi-directional traffic on the northern

side of the bridge – features described by Mr Els as giving rise to an inadequate continuity of guidance. Nothing about the facts suggests that the demonstrated causative effect aforementioned was so remote to the ensuing collision and its consequences for the plaintiff to be disregarded for legal policy reasons. The legal causation requirement was thus also satisfied.

[32] The basis upon which the trial court reduced the plaintiff's entitlement to recoup his damages from the defendants was the failure by the plaintiff to exercise sufficient care when clearing the last of the delineators marking the transitional section of the deviation. As mentioned, the positioning of these left a gap of less than a car's width through which unwary eastbound traffic might slip into the lane intended, in terms of the deviation, for westbound traffic. This characteristic should have been evident to a reasonably alert driver and should have placed the plaintiff on his guard. In addition, in order to cut the corner in the manner in which he did, the plaintiff must have crossed a solid white line, which should have been evident to him had he been keeping a proper lookout. He was thus negligent in entering the northern lane over the bridge instead of being guided by the tapering white line onto the emergency shoulder. The learned trial judge's findings in this respect cannot be faulted.

[33] The apportionment of damages that followed on these findings entailed the making of a value judgment assessment by the trial court. The discretion involved is of the narrow or strict character described in *Knox D'Arcy Ltd and others v Jamieson and others* 1996 (4) SA 348 (A) at 361-2. This means that a court of appeal may not interfere unless the court of first instance had not

exercised its discretion judicially, or had been influenced by wrong principles or a misdirection on the facts, or had reached a decision which in the result could not reasonably have been made by a court properly directing itself to all the relevant facts and principles; cf *Transnet Ltd t/a Metrorail and another v Witter* 2008 (6) SA 549 (SCA), at para. 12 and the authorities cited in fn 5.

[34] The court a quo held that the plaintiff could not have avoided the collision by the exercise of reasonable care by veering to the side to avoid Foster's oncoming vehicle. The defendants contended that this finding was arrived at on a misdirected analysis of the evidence. If the contention is well-founded it would afford a proper basis for this court to interfere with the trial court's decision in respect of apportionment.

[35] The learned trial judge founded the determination under consideration on his understanding of part of the evidence of Mr van der Vyver. This evidence was understood to be to the effect that, accepting that he had kept a proper look out, the plaintiff would have between 1 and 1,5 seconds within which to avoid the collision by swerving to his left. In this regard the learned judge relied on a passage from van der Vyver's evidence set out *in extenso* at para. 39 of the judgment.

[36] The quality of the evidence given by Mr van der Vyver in the passage quoted by the learned judge was, however, palpably undermined by the fact that it was expressly offered by the witness as just guesswork. In seeking to answer the question as to how much time would be entailed in successfully executing the avoidance manoeuvre actually required of the plaintiff in order to avoid Foster's vehicle, van der Vyver stated '*To the extent of how much*

time is necessary for that I can't – I can give you a guess but I can't advise you from an expert point of view.' The evidence that ensued, and on which the trial court materially relied, followed on an exhortation by the trial judge '*Well guess for what it is worth.*' In the circumstances, the witness having essentially disqualified his opinion, it should have been appreciated, I think, that the evidence had to be treated with considerable circumspection. As I shall seek to demonstrate, it does not bear scrutiny on critical analysis.

[37] The opinion evidence of reconstruction experts must in any event be approached with some diffidence in reaching conclusions on matters of fact. It cannot displace the effect of acceptable direct evidence. As pointed out by van Zyl J, writing for a full bench in *Van Eck v Santam Insurance Co Ltd* 1996 (4) SA 1226 (C) (also a motor collision case) at 1229H:

> It is not unusual for parties to tender expert evidence in cases such as the present. Their evidence, however, is inevitably based on reconstruction and cannot conceivably bear the same weight as direct, eye-witness testimony of the event in question.

This passage was cited with approval by the Supreme Court of Appeal in *Representative of Lloyds and others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA), at para. 60, where Lewis JA remarked '*I must emphasise that where there is eyewitness or direct evidence of an occurrence, this may render the reconstructions of experts less relevant or even irrelevant...*'. (See also *Hattingh v Roux NO and Others* 2011 (5) SA 135 (WCC) (a rugby injury case) at para. 33.) This consideration is of significance in the context of the direct evidence given by the plaintiff and Ms Mandel, assessed against the essentially speculative basis for much of

van der Vyver's reconstruction (highlighted in some detail at note 110 to the plaintiff's heads of argument in this court).

[38] The plaintiff testified that he had reduced his speed to 60 kph to enter the deviation in compliance with the indicated reduced speed limit. He was travelling behind his friend, Ms Mandel, at a safe following distance, through the deviation. In this regard he conceded that two seconds' travelling time behind Ms Mandel might constitute a fair estimate of a safe following distance. (This translates to his having kept a following distance of approximately 35m behind Ms Mandel.) He testified that, relative to the plane of the road, Ms Mandel was '*riding in exactly the same position as I was*', which I understand to mean that he was travelling in the same line of travel across the bridge, directly behind her. The plaintiff testified that they were both travelling in the northern lane of the road close to the line which would demarcate the adjacent emergency shoulder. The plaintiff testified that he became aware of headlights approaching from the opposite direction apparently on a collision course with Ms Mandel. He was alarmed by this and noted Ms Mandel swerving to her left in a successful avoidance manoeuvre. He was therefore aware of the danger presented by the oncoming vehicle even before he saw Ms Mandel execute her avoiding manoeuvre.[6] He said that he started to execute a swerve to his left, but '*it was too late*'.

[39] The plaintiff sought to explain his failure to successfully avoid Mr Foster's oncoming vehicle when the motorcyclist travelling ahead of him had succeeded in doing so, saying '*...everybody else in my party also*

[6] The plaintiff confirmed this under cross-examination by counsel for the fourth and fifth defendants based on the content of a written statement he had made on 19 March 2004; record p. 867.

suffered the same confusion. And in my particular case it took me a couple of seconds in a state of shock and freezing to react because it was a situation that I had never been confronted with before'. Under cross-examination the plaintiff explained what he meant by '*freezing*', stating '*I momentarily took stock of the position before reacting.*'[7] He subsequently added that although he was aware of the approaching headlights it was difficult at first to '*estimate what is on your side and what is not on your side at a distance like that*'. This evidence falls to be contextualised with his earlier testimony that he thought the line of delineators along the centreline of the bridge demarcated the two lanes over the structure. It is impossible to reconcile his professed difficulty in discerning whether Foster was in what he thought was his lane with his evidence about his understanding of the function of the line of delineators over the bridge. If his evidence on the perceived function of the line of delineators is accepted - as I consider it must be, for it explains his path of travel in the northern lane - there can be no credence in his claim not to have been sure at first as to whether the oncoming vehicle was in the same lane as he was. There is no reason on a straight stretch of road, at a distance of less than 200m, to think that, had he been keeping a proper lookout, the plaintiff could not have been aware that the oncoming vehicle was on the same side of the line of delineators as he was.

[40] I also find it impossible to accept that the situation of finding a vehicle approaching on the wrong side of the road would have been unprecedented for a driver of many years experience. While there is authority to the effect that a reasonable driver is not expected to foresee or anticipate another

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[7] Record p.866-7.

vehicle approaching from the opposite direction on the wrong side of the road, the position does not exonerate a driver who has the opportunity to observe such a dangerous situation unfolding from taking avoidance measures if such can reasonably be effected. The extent to which a driver confronted with such a situation can reasonably be expected, if at all, to take avoiding measures depends on the circumstances of the given case, but the duty on a driver to exercise appropriate skill is a demanding one. As observed in WE Cooper, *Delictual Liability in Motor Law* (revised edition), 1996 (Juta), at p.276, in a discussion on sudden emergency, '*Driving is an operation which requires care, skill and courage, and a driver cannot attribute his apparent negligence to a sudden emergency if his judgment and courage fail him at the very moment these qualities are needed most to avert an accident or disaster. Thus being stung by a horse-fly or a bee has been held to be no justification for a driver panicking and losing control of his vehicle; likewise a burning match head (of a match struck by a passenger) and falling between a driver's feet. In each case the driver should have remained calm and continued to exercise control over his vehicle. His failure to do so was negligent.*'[8] In the current case, the evidence, as mentioned, is that the plaintiff was following Ms Mandel at a safe following distance. It is inherent in the very concept of a safe following distance that it is a space that allows a reasonable time to react effectively to the unexpected.

[41] The plaintiff's direct evidence demonstrates that he had more than enough time to turn to his left and avoid the collision. He had time to observe the unfolding situation more immediately confronting Ms Mandel in front of him

[8] Footnotes omitted.

and to observe her, in reacting to it, execute the manoeuvre that he would have to execute to put himself into safety. Added to that, he also had the opportunity in time and distance afforded by travelling behind Ms Mandel at a safe following distance.

[42] The plaintiff's evidence under cross-examination by the fourth and fifth defendant's counsel that it was only '*milliseconds*' before it would have collided with Ms Mandel, or only when Foster's car was '*virtually on top of her*' that he became aware that it was approaching in the lane in which he was travelling is not reconcilable with the observation of anyone in his position keeping a proper lookout of the road ahead. As mentioned, the collision occurred on a straight stretch of road across the bridge. Following behind Ms Mandel at a following distance probably of the order of about 35m there is no reason why the plaintiff should not have become conscious of the oncoming vehicle and the danger it presented at the same time as Ms Mandel was able to. The advantage he enjoyed over Ms Mandel was that he had approximately two seconds longer than she did after Foster's vehicle entered the straight stretch of road over the bridge from the transitional section at the eastern end of the deviation to note and react to the situation. His attempt to explain the position by stating[9] that he had noticed the oncoming vehicle at such a late stage because he had assumed that he had been '*in a safe space*' does not assist. While it is not expected of the reasonable driver to expect catastrophe to occur along every yard of the way, and to proceed like a 'timorous faintheart always in trepidation lest he or others suffer some

[9] At p. 865 of the record.

injury',[10] it is required of such a driver to be alert or aware and to keep a constant and proper watch on the road ahead (cf. e.g. *Neuhaus NO v Bastion Insurance Co Ltd* 1968 (1) SA 398 (A) at 405H-406A). The duty to keep an alert lookout is heightened at night, when the limited visibility ahead that darkness brings requires increased vigilance (cf. *Minister of Transport NO and another v Du Toit and another* 2007 (1) SA 322 (SCA), at 229I-J). His own evidence demonstrates that as a matter of probability he cannot have been keeping a proper look out, or failed unreasonably to use the time available to him to address the danger with which he was confronted. This resulted in his failure to take avoiding measures timeously and effectively.

[43] Ms Mandel's evidence indicates that she had Mr Foster's oncoming vehicle under observation coming towards her in what she considered to be her lane for some time, which she said she found '*confusing*'. She was also travelling at 60 kph over the bridge. It was only as the lights came closer that she realised that '*there was a problem*' and swerved to avoid a head-on collision. She stated that she narrowly avoided the car.

[44] Mr van der Vyver, who, as mentioned, gave evidence at the behest of the third defendant, had originally been engaged as an expert witness by the plaintiff. It appears from the summary of van der Vyver's expert evidence filed by the plaintiff consequent upon that engagement that the intention was rely on van der Vyver's opinion, based on his reconstruction of the occurrence of the collision, to establish causal negligence on the part of Foster. Van der Vyver opined that Foster had been driving in the northern lane over the bridge for a distance of approximately 90m before reaching the point of impact and

[10] *Herschel v Mrupe* 1954 (3) SA 464 (A) at 490F

that both the plaintiff and Foster would have been visible to each other throughout Foster's transit of that distance. On the basis of Foster's own estimate, given in an extracurial statement, that his speed was between 30 and 40 kph, and the consistency of this estimate with the positions in which the respective vehicles came to rest after the collision, van der Vyver assumed that Foster was travelling at approximately 35 kph, and thus deduced that Foster would have taken about eight seconds travelling up the straight section of the deviation to reach the point of impact.[11] Allowing for night conditions and the exigencies of an unexpected confrontation with a vehicle approaching in what the plaintiff had perceived was his own lane, van der Vyvfer opined that it would be reasonable to allow Foster '*a complex perception-reaction time of 2,5 secs....(as against say 1,0 – 1,5 secs for less complex daytime conditions)*'.

[45] Mr van der Vyver's evidence concerning perception and reaction time was broadly consistent with that accepted in a number of previous cases (see, for example the cases referred to in *Harrington NO and another v Transnet Ltd and others* 2007 (2) SA 228 (C), at para. 48).[12] It was not challenged, and there is no reason not to accept it. Its consequence, of course, is that the same considerations would apply in respect of the plaintiff.

[46] In his oral evidence Mr van der Vyver qualified what he meant by the aforementioned perception-reaction time. He explained that it comprised the time that he considered a person in the plaintiff's situation confronted with an emergency situation would need before commencing the execution of an

[11] A vehicle travelling at a constant speed of 35 kph takes 9,25 seconds to go 90 metres.
[12] Compare the somewhat more curtailed perception-reaction times accepted in the other cases cited in Cooper, op cit supra, at p. 477 at note 83.

avoiding swerve. He conceded he was not able to say how much time the plaintiff would have needed to actually execute the movement necessary to take himself out of the path of Foster's vehicle. The passage quoted at para 39 of the trial court's judgment, mentioned earlier, was van der Vyver's attempt at guessing the required time. The '2 seconds to 2½ seconds' that the witness ascribed for that purpose were, in his words, added '*for the sake of argument and reasonableness*'.

[47] Van der Vyver's evidence in this regard is unhelpful. Apart from the qualifications that were attached, it comprehended acceptance of the notion that a motorcyclist travelling at 60 kph would need between 33 and 41 metres of transit space in order to veer the motorcycle between one to one and a half metres across the plane of a tarmac-surfaced road. In my view that has only to be stated, for its untenability, as irreconcilable with common experience, to be apparent. Accepting the notion would imply that motorcycles must be exceptionally cumbersome and unresponsive vehicles. One only has to have the common experience of an everyday road-user to know that reality does not bear out that perception, nor does the direct evidence. It is impossible to conceive how the 'wiggle' manoeuvre executed by Ms Mandel, in which she was followed by the plaintiff, to cut through the one to one and a half meter gap at the end of the tapering line of delineators in order to enter the northern lane could have been undertaken successfully if changing course on a motorcycle were so time-and-space consuming.[13] All that can be said in mitigation of van der Vyver's evidence on this point is that it was given

[13] To put the distance entailed into a more objective context by comparison, a car with smooth tyres driven on wet smooth tarmac (in other words in extremely adverse conditions) at 60 kph could be brought to a complete standstill in less distance; cf. the tables set out in Cooper, op cit supra, at 498-9, sv '*Initial Speed V in Km/H*' and '*Coefficient of Friction*'.

confessedly as a guess, and evidently without proper consideration. The effect underscores the wisdom of the approach to the evidence enjoined in the authorities mentioned in para. [37], above, and exposes the misdirection of the court a quo in relying on this part of van der Vyver's evidence.

[48] The trial court erred, in my judgment, by failing to give sufficient consideration to the direct evidence. That evidence demonstrated that a motorcyclist in an equivalent position to the plaintiff on the road, but with a two seconds shorter opportunity for perception, reaction and avoidance execution was able to avert a collision. Even allowing in favour of the plaintiff that Ms Mandel might have been more agile and dextrous than the average motorcyclist, and that she was slighter and her motorcycle somewhat lighter than that of the plaintiff, the time and space advantage which the plaintiff demonstrably enjoyed over Ms Mandel was of sufficient magnitude to indicate that the probabilities are that he should have been able to avert the collision with the exercise of reasonable skill and care.

[49] I am therefore of the view that the defendants were successful in demonstrating that, had he exercised reasonable care, the plaintiff could have avoided the collision by veering onto the emergency shoulder before the occurrence of the impact, and that the trial court in holding to the contrary was misdirected on the evidence. This means that the apportionment of fault requires reconsideration on the basis that the plaintiff's fault played a greater role in the causation of his damages than the court a quo allowed.

[50] While it has been found that the plaintiff was at fault in entering the northern lane in disregard of the tapering solid white line demarcation at the

end of the transitional section of the western part of the deviation and that he could reasonably have taken effective avoidance measures to avert the occurrence of a collision, the effect of the negligently designed and implemented deviation layout was, in my view, nevertheless the predominant factor. In making the required value judgment I consider that the extent to which the conduct of the defendants deviated from the norm of the *bonus paterfamilias* exceeded that of the plaintiff, who, to an extent, had been put into an unusual and dangerous situation as a consequence of their negligence. In my judgment it would be just and equitable in the circumstances to hold that the amount in damages that the plaintiff should be able to recover from the defendants, jointly and severally, should be reduced by 40 per cent.

[51] In the result the following orders are made:

1. The appeal by the third, fourth and fifth defendants is upheld with costs, including the costs of two counsel where such were employed, which costs shall also include the costs of the application for leave to appeal.

2. Paragraph (a) of the order made by the court a quo is set aside and the following order is substituted therefor:

   (a)(i) It is declared, in terms of s 2(8)(a)(i) of the Apportionment of Damages Act 34 of 1956, that the third, fourth and fifth defendants shall be liable, jointly and severally, the one paying the others being absolved, to compensate the

plaintiff for 60 per cent of such damages as he may be awarded in the action.

(ii) It is further declared, in terms of s 2(8)(a)(iii) of the of the said Act, that the damages payable by the aforementioned defendants *inter se* shall be apportioned equally between the third defendant, of the one part, and the fourth and fifth defendants, jointly and severally, of the other part.

3. The cross-appeal by the plaintiff is dismissed with costs, including the costs of two counsel, which costs shall include the costs of the application for leave to cross-appeal.

A.G. BINNS-WARD
Judge of the High Court

LE GRANGE J:

I concur in the judgment of Binns-Ward J.

A. LE GRANGE
Judge of the High Court