IN THE HIGH COURT OF SOUTH AFRICA
NORTH WEST DIVISION, MAHIKENG

CASE NO. RAF352/2016

In the matter between:

C[…] M[…] **Plaintiff**

and

ROAD ACCIDENT FUND **Defendant**

CIVIL TRIAL

GURA J

DATE OF HEARING : 26 JULY 2019

DATE OF JUDGMENT : 29 JANUARY 2020

FOR THE PLAINTIFF : ADV N. MTHEMBU

FOR THE DEFENDANT : ADV M. MAKOTI

JUDGMENT

GURA J.

Introduction.

[1] In November 2016, the plaintiff instituted an action against the defendant (RAF) for damages arising from injuries he sustained during a motor vehicle collision that occurred on October 6, 2007, at about 16h45 near Bray road, Unit 14 in Mmabatho, North West Province. The collision occurred between a vehicle driven by the plaintiff's father in which the plaintiff was a passenger

and another vehicle driven by the insured. The vehicle in which the plaintiff was travelling was hit on the right-hand passenger door by the insured's vehicle. The plaintiff was occupying the far rear door at its right-hand side. The plaintiff claims that as a result of the collision he sustained serious bodily injuries consisting of lacerations in the occipital area and a head injury.

Background.

[2] The issues of the negligence, and therefore liability for the proven damages, of the insured driver has been conceded by the RAF. What remains to be determined by this Court is whether the accident was indeed the cause of the plaintiff's medical conditions.

[3] The plaintiff claims that he suffers from epilepsy, loss of memory as well as headaches. As a result, the plaintiff is claiming from the RAF for past and future medical expenses, future loss of earnings as well as general damages. Both parties have engaged medical expert witnesses to assist the court with the determination of the causal link between the plaintiff's injuries and the accident. The parties have each lead expert evidence of a neurologist, Professor Lekgwara and Dr. Miller respectively.

[4] What is in dispute is whether the epilepsy, which the plaintiff suffers from, and the neurological impairment are as a result of the injuries suffered in the accident. The plaintiff is of the view that the epilepsy and neurological impairments stem from the injuries suffered due to the accident and that all his ailments are attributed to the accident. The defendant contends that the plaintiff's medical condition was not caused by the accident.

The evidence.

[5] The plaintiff's first two witness was Mrs. M[…], the plaintiff's mother. She testified as follows: she and C[…] were passengers in the motor vehicle on the day of the accident. The plaintiff's father was their driver. The driver then switched on his right indicator to signal his intention to turn to the right. He

was driving slowly so that he could give the oncoming traffic the right of way to pass before he could turn.

[6] Just before he could turn, at that time the vehicle was close to the centre line of the tarred road, a motor vehicle emerged from behind them. It appears that this insured vehicle was in the process of overtaking all the vehicles behind them. It then collided with their car. The point of impact is on the right-hand rear side of the back door. That very same door (rear seat right door) bent to the inside of their car as a result of the impact.

[7] Chinoya was seated at the rear seat on the far right before the accident. He was therefore the nearest person to the point of impact. The force of the collision flung C[…]'s vehicle from the centre line of the tarred surface of the road, way up to beyond the shoulders of the road. In brief, it landed outside the road in a ditch. She (Mrs. M[…]) was dizzy at the accident scene but she could see that C[….] was bleeding. She could not say whether or not C[…] was unconscious at any stage at the scene of the accident. When the paramedics arrived at the scene, they found C[…] who was still trapped inside their damaged vehicle. They took him out of the car and all of them were conveyed to hospital.

[8] At the hospital, she and C[…] were separated. She was informed by the hospital staff that C[…] was fitting and was informed by the doctors that he was unconscious. When she was finally reunited with C[…], he had been stitched on his head. She and C[…] were discharged on the same day and sent home.

[9] Mrs. M[…] testified that C[…] started having epileptic fits a few weeks after the accident specifically on 12 November 2007. Nothing had happened to C[…] between the day of the accident and the day of having had epileptic fit; i.e. there is no other incident, which could have prompted the epileptic fits. Thus, according to her, the accident must be the cause of the epilepsy suffered by C[…].

[10] C[…] was born without any physical or mental defects. The child was born normal and healthy. He attended crèche at the age of four and there were no reports of any problems about him from the crèche. He later started schooling at the age of seven. He (C[…]) performed well at school from the start of grade 1 to 3. The accident occurred when he was in grade 4. Thereafter, he still progressed well at school passing grade 4 to 7 without any difficulty. Only in grade 8, when he started attending school at Batswana School, he started to have problems.

[11] C[…] failed grades 8, 9 and 10 respectively and had to repeat all those grades. When asked about what he thought was the reason for him failing at school, Mrs. M[…] said that he was failing because he has epileptic fits and he is forgetful. She also testified that she noticed some changes in C[…] when he was in grade 4, that is, after the accident had happened. About this, she said that C[…] started slanting his head when he was looking at a book when asked to read.

[12] Mrs. M[…] was cross-examined about information on the medical records relating to C[…]'s condition when the paramedics arrived at the accident scene and about his condition upon arrival at the casualty section of the hospital. Her response was that at the scene of the accident, she couldn't say whether or not C[…] was unconscious because she herself was scared and she had to get cover for her own safety.

[13] The plaintiff's second witness was Professor Lekgwara, a specialist neurosurgeon. He interviewed C[…] twice, first on the 22 March 2017 and finally on 3 July 2018. The latter report constitutes his addendum report. On page 130/1 of his addendum report, he makes the following comments:

*"**Opinion.***

It is my opinion that C[…] sustained the following injuries:

1. Mild traumatic brain injury (Grade 3 concussion) (see below). He had loss of consciousness of more than 5 minutes. He is suffering from Post-concussion

headaches and memory problems which will need assessment and treatment.

Definition: Concussion is a complex pathophysiological process affecting the brain resulting in alteration of brain function, that is induced by nonpenetrating biomechanical forces, without identifiable abnormality in standard structural imaging.

A clinical diagnosis of concussion is made if there are abnormal findings in balance, coordination, memory/cognition, strength, reaction speed or alertness after a traumatic insult to the head. Clinical findings include confusion, amnesia, headache, drowsiness or loss of consciousness (LOC) LOC is not a requirement for diagnosing concussion. Patients themselves may be unaware whether or not they experienced LOC).

Concussion.

Cantu Grading System for Concussion.

Grade 1	*No loss of consciousness; posttraumatic amnesia less than 30 minutes*
Grade 2	*Loss of consciousness less than 5 minutes in duration or posttraumatic amnesia lasting longer than 300 minutes but less than 24 hours in duration*
Grade 3	*Loss of consciousness for more than 5 minutes or posttraumatic amnesia for more than 24 hours*

**Reprinted with permission of The McGraw-Hill Companies. Cantu RC, guidelines for return to contact sports after cerebral concussion. Physician Sportsmed, 1986; 14(10):75-83.*

ANN Practice Parameter (Kelly and Rosenberg) Grading System for Concussion

Grade 1	*Transient confusion; no loss of consciousness; concussion symptoms or mental status abnormalities on examination resolve in less than 15 minutes*

Grade 2 *Transient confusion; no loss of consciousness; concussion symptoms or mental status abnormalities on examination last more than 15 minutes*

Grade 3 *Any loss of consciousness, either brief (seconds) or prolonged (minutes)*

Reprinted with permission."

[14] Prof. Lekgwara is of the view that C[…] has some neuropsychological problems, which need to be assessed by a clinical psychologist. He (C[…]) is already suffering from the late onset posttraumatic epilepsy. His prognosis of C[…] is that:

- He is suffering from post-concussion headaches.
- It is well documented in the neurosurgical literature that +_ 80% of patients suffering from post-concussion headaches recover within 2 – 3 years. However, 20% of patients remain within the chronic symptoms.
- Since it is now over 9 years after the accident, spontaneous resolution of these headaches is not expected.

[15] Prof. Lekgwara testified that C[…] sustained a mild traumatic injury, which is evidenced by the blow he received on the head. His view is that:

"one does not need to have a loss of consciousness to sustain a concussion. The complications from this can include post- traumatic epilepsy. Chinoya suffers from post-traumatic epilepsy and also has post-concussion syndrome characterized by headaches. He suffers from neuropsychological problems like memory loss. The accident caused the traumatic brain injury and the fact that a normal GCS does not exclude that the injured sustained a mild traumatic brain injury."

[16] He testified that the note in the hospital records that the injured was stable relates to the general state of the patient and not the neurological system. The hospital asked for the X-Ray of the skull and particularly the right temporal

parietal bone. The MRI scan would show a functional abnormality and not a structural abnormality. Therefore, if nothing appears on the scan it does not mean that the injured did not sustain a brain injury. The Prof. was asked about the significance of a normal MRI scan. He explained by saying in a concussion, 25% of the MRI scans would show an abnormality and 75% would show a normality. The reason why the MRI level of detection is so low is because in a concussion you are dealing with a functional abnormality and not a structural abnormality. It is for this reason that the MRI scan did not pick up C[…]'s diffused brain injury or focal brain.

[17] He testified that continued seizures put the brain at risk. When the seizures occur, his brain cells die off each time he has a seizure. That is the reason he ends up with deteriorating memory and deterioration in higher functioning. He would then start dropping in school performance because of the poor memory. The probable cause of the epilepsy is the traumatic brain injury which he sustained in the motor vehicle accident whilst he was a minor. Dr. Miller's finding of the weakness or palsy on the left supports the notion of a traumatic brain injury. There is no other cause that is possible or that is probable except the motor vehicle accident said Prof. Lekgwara. He said that the presence of post traumatic amnesia also supports his opinion that it was not a minor brain injury that the injured sustained.

[18] A loss of consciousness of more than two minutes can result in a significant head injury which might result in the onset of late posttraumatic seizures. As it happened on plaintiff's case. Prof. Lekgwara referred to literature called "A handbook of Neurosurgery" by Mark S. Greenberg where it is stated on page 389 paragraph 17.2.2 that late onset of PTS (Posttraumatic seizures) can occur after a significant head trauma. Significant is described including a loss of consciousness of more than 2 minutes.

[19] Dr. Percy Miller, a neurosurgeon testified and was the only witness for the defendant. On page 138/9 of his addendum report, he made the following remarks:

"2. DISCUSSION & SUMMARY

On the other hand, it is possible that the patient developed seizures purely as a result of the accident. One can state this, because the patient seems to have started to have seizures literally within a month after the accident and injury. That could suggest a cause or relationship between the injury of October and the fact that the seizures started in November, and the seizures have never really ever stopped since then. The seizures could, of course, be coincidental to the injury, and just have started by chance at that stage, a month later, but of course, the whole situation could be related to the accident. Another fact which has to be considered, as per the first report, is that the injury was apparently on the right side of the head, and the patient has a very mild paresis of the face and arm, on the left side, which would suggest that the paresis itself may be related to some type of underlying brain injury, involving the right hemisphere. So that, theoretically, there could have been a depressed fracture skull, or a compound depressed fracture skull, not diagnosed at Bophelong Hospital, where the patient went there the afternoon of the injury, which had injured the underlying brain, and which could have produced seizures, into the bargain.

The patient is right-handed, so one would immediately estimate and evaluate that his dominant hemisphere would be the left hemisphere, which would be responsible for most memory and cognitive problems."

[20] The witness was asked about what he made of C[…]. His response was that he was not normal; that he was mentally challenged and that he could not remember anything and could not tell him anything, and hence he had terminated the first consultation with a request that they get a family member to come with C[…] the next time he consulted with him. Dr. Miller mentioned that C[…] could not remember him when they met again. He reiterated that again C[…] was challenged in all intellectual aspects, not just memory, but that he has a deficit of concentration and attention. He said that he could not relate what he termed a *'catastrophic intellectual picture'* to be the result of a minor head injury that he had suffered.

[21] The witness testified that C[…] did not know when the seizure activity or epilepsy started, or when the left arm and the left side of his face became weak; he did not know what tests were done or what doctors he had seen over time. Asked if he had said anything about the accident, his response was

that C[…] insisted that he remembered the circumstances surrounding the accident; that he did not remember the actual happening of the accident but remembered that the ambulance came and took him to Bophelong hospital; he remembered that there was a cut on his head which they stitched and that they put a collar on his neck; and that he also knew that he was not admitted.

[22] He did not mention being unconscious to Dr. Miller. The latter was asked to give his expert opinion and to explain to the Court the meaning of the Glasgow Coma Scale of 15/15. His answer was that the Glasgow Coma Scale grades a person's level of consciousness; so, for example we have a GSC of 15/15 because a patient in not only awake, but is fully orientated, knows what is happening, knows why he/she is at a particular place, and that the patient has full knowledge of the surrounding environment. He explained that, as one goes down in consciousness levels, things start to deteriorate, a patient starts to mumble, starts to become confused until he/she becomes completely unresponsive. By way of example, he testified that a score of 13/15 would mean that the patient is awake, but he is confused, he does not answer correctly, but a score of 15/15 means that the patient is not only awake, but he is conscious and talking properly.

[23] He was then asked to comment on the reliability of the GCS in medical practice in the light of the fact that Professor Lekgwara was quite critical of the GCS scale. He said that there were better scales than the GCS that could be used in adult patients but not so much in children. He said that in the case of children the only option they had to work with was the GCS. His view is that the reliability of the GCS could be difficult if there was a score of 12/15 or 8/15, or 9/15 or 10/15 but not with a score of 15/15 as at that was very reliable. The GCS has what is called inter observer variability in say in the middle or over parts of the score, in the top part the score of 15/15 was a very reliable score not affected by such inter observers.

[24] Considering that C[…] was a child at the time of the accident, the GCS would have been the only source of abstaining the type of information. The answer one could have also used a PTA scale which grades what the children can

remember, but it was not used in this case. Dr. Miller says he graded C[…] on the PTA scale and he passed it very well. The witness was asked to confirm if the two scales were congruent and the response was positive. Dr. Miller was asked to comment on the statement by Professor Lekgwara that the patient lost consciousness immediately and came to his senses at Bophelong hospital, in relation to what the patient told him. His answer was that we know that it is not so not because of what the patient told Dr. Miller but because of the GCS score of 15/15.

[25] When asked if there was any record of evidence by Professor Lekgwara of the Professor having done any assessment to prove that C[…] must have suffered the type of concussion, the answer was in the negative. The witness further stated that the classification used by the Professor to classify the patient as having suffered a grade 3 concussion is never used by neurological practitioners. This is completely foreign scale. Dr. Miller then dealt with Prof. Lekgwara's conclusion that C[…] had lost consciousness for more than 5 minutes and therefore he was suffering from post-concussion headaches and memory loss. His response was that if he had lost consciousness for 5 minutes or slightly more, the cut-off point is a few hours when you are trying to grade patients and categorize them, he would argue that minor brain injuries to not develop long term headaches 5 to 10 years down the line.

[26] Dr. Miller was asked by counsel to comment on what type of an injury and what condition Chinoya was in, particularly at the time when he was discharged after having been shown the hospital clinical records. His response was that he was in a good condition as his GCS score was 15/15, they have not written that he has a grade 3 concussion or something, they write the GCS scale for a reason, they are saying that it is 15/15 and that is giving them the assurance that they can discharge him literally as his mother says he was back come in the late afternoon. He confirmed: we are not dealing with minor head injury with minor cognitive changes or minor intellectual changes; we are dealing with disrupted personality here whom I very much doubt can never live on his own. He concluded that we are dealing with a severe problem and that has nothing to do with the minor head injury

sustained in the accident. The witness commented on the mild paralysis, which was not picked up by the professor on the two occasions that he examined the patient, and that the paralysis was still present at his second interaction with the patient.

[27] The paralysis meant that the patient had had some brain damage; we do not know what brain damage, he said it was incorrect for a neurosurgeon to examine a patient to say that the patient is neurologically normal, those statements were incorrect in reference to Professor's report. Although the Professor conceded that the patient was intellectually challenged, he had not stated that in his report. Instead, his report stated that C[…] was perfectly normal creating an impression that the patient was normal and therefore did not require a curator. Dr. Miller's opinion was that he thought the Professor had done a fast examination.

[28] Where Dr. Miller differed with Professor was in relation to the fact that he concluded that C[…] did not sustain a significant diffuse injury. He went into the classification on injuries as minor, moderate and severe head injuries according to conscious levels or in a child according to memory level. He explained that the word 'significant' means moderate or severe, not a significant head injury meant for a minor head injury. Even if the mother's version (that of passing out for say an hour or two, although that does not accord with the hospital version) the injury would still be classified under a minor injury. Based on that and a GCS score of 15/15, the patient could not have suffered a significant diffuse head injury that is s head injury to the whole brain. Besides a diffuse head injury, one can get a focal injury, that is an injury just to one part of the brain, but you will not lose consciousness, but you might still get seizures or if it was a big focal injury, you may become intellectually disabled. An MRI scan came back normal, there was no focal injury. If there was no focal injury, there will be no explanation of a diffuse injury that affects the whole brain.

[29] In response to the Professor's evidence that said that just because the MRI was normal, does not mean that the patient could not have the resultant

problems. His answer was that on simple logic, he had already said there was no diffuse head injury based on that the patient was awake and talking and normal, based on the evidence of the GCS from both the paramedics and the hospital. He did not suffer a focal injury either, if there was a focal injury that would have resulted in his problems, it would have been a big focal injury. Reason being; intelligence is not located in one small area of the brain; it is all over the place. It is like a network of connections, like a cell phone network all over the city, so knock out intelligence on the basis of a focal injury would require a big focal injury, and such an injury would be picked up by the MRI scan.

[30] The epilepsy and the incapacity started when he got to a later stage, for example, he passed all primary school grades even after the accident. It was not the accident that made him incapacitated, the incapacity was and as soon as he got to a heavier standard, a more complicated academic requirement, he started failing. This has nothing to do with the accident and the injury in question.

[31] The Professor had testified that C[…] suffered a generalized type head injury which you may not be able to pick on the MRI scan but can still cause the condition of C[…]. Dr. Miller's response was, if you argue on just epilepsy on its own, you might say maybe there was some tiny lesion in the brain and it got a little scar there that we cannot see on the MRI and it is causing epilepsy, but you cannot do that because you have to put things into context. It is not just epilepsy because he is intellectually disabled in a bad way. Therefore, it is not an epilepsy problem, that is one of the facets of the problem and the other problem is severe intellectual disability which is even bigger than the epilepsy. For a big intellectual disability, you must have got a big lesion, or you must have a severe diffuse injury of the whole head or a big focal injury and the patient has neither of these two.

Preliminary issues.

[32] Long before the commencement of the trial, at least two court orders were issued. The first was on 28 May and it reads:

"1. The defendant is liable for 100% of plaintiff's agreed or proven damages;

2. The issues of Quantum be and is hereby postponed to 31 July 2018 and 1 August 2018;

3. The defendant to pay plaintiff's taxed or agreed costs on the High Court scale as between party and party up to and the 28th;

4. In the event that the amount in respect of costs is not agreed on, then:

4.1 The plaintiff shall serve the notice of taxation on the defendant's attorney of record, and;

4.2 The plaintiff shall allow the defendant 14 court days to make payment of the taxed costs."

[33] Subsequent to the said Court order, another one was issued on 31 July 2018 by the same Judge. I quote:

"1. The matter be and is hereby postponed to the 26th, 27th and 28th day of November 2018 for trial on merits and/or merits and quantum;

2. The defendant to bring an application for rescission of the draft order dated the 28th day of May 2018, if any, on or before the 15th day of August 2018;

3. The plaintiff must file its opposing papers, if any, on or before the expiry of the 31st day of August 2018;

4. That in the event that the application for rescission is granted in favour of the defendant, the matter will proceed on both merits (nexus) and quantum;

5. In the event that the application for rescission is denied, the matter will proceed on quantum only;

6. The defendant to pay plaintiff's taxed or agreed costs on the High Court scale as between party and party up to and the 31st day of July 2018 and the 1st day of August 2018, which costs shall include the following:

6.1 Costs of counsel;

6.2 Preparation, reservation, travelling and attendance costs of expert as well as their reports, addendums and joint minutes, if any, as allowed by the Taxing Master;

…"

[34] The first question that arises in this matter is whether, by conceding the merits / liability, the defendant has also conceded that the plaintiff has suffered patrimonial loss arising out of this accident.

[35] It is worthy to note that the two court orders aforesaid were made per agreement between the parties. The defendant never applied for rescission of the court order of 28 May 2018. Before me, Counsel for the plaintiff made the following written submissions:

"4.2 <u>THE EFFECT OF COURT ORDER OF 31/07/2018 AND DEFENDANT'S FAILURE TO APPLY FOR RESCISSION.</u>

4.2.1 This court order was done after a decision by Justice Hendricks that the interpretation of the court order of 28/05/2018 is that Defendant has admitted liability and cannot raise nexus or causation. The only determination that remained was that of quantum.

4.2.2 He directed that there were two options. The first one was for the matter to proceed on quantum. The second was for the Defendant

to apply for rescission of the order of 28/05/2018. Defendant opted for the second option.

4.2.3 Pursuant to that a draft order was prepared and that the draft order was approved by Hendricks J and made an order of court.

4.2.4 The order, which is attached hereto and marked as Annexure "C", directs that the Defendant should bring an application for rescission of the draft order of 28/05/2018 before the 15th of August 2018.

4.2.5 It further provided that if the rescission is granted then the matter would proceed on merits (nexus) and quantum. If the rescission was denied, then the matter would proceed on quantum only.

4.2.6 Defendant did not comply with the order and did not make an application for rescission of the order of 28/05/2018.

4.2.7 It is submitted that an order of a court of law stands until set aside by a court of competent jurisdiction. Until such time that that is done, the court order must be obeyed even if it may be wrong. There is an assumption that a standing order is correct.

4.2.8 It has been held that a person may even be barred from approaching the court until he or she has obeyed an order of court that has not been properly set aside.

4.2.9 An order of court can only be set aside under Uniform Rules of Court Rule 42 or Rule 31(2)(b) or in common law grounds. Defendant has done neither.

4.2.10 It is submitted that both the court order still stands they have not been altered or rescinded by a competent

court. They have not been set aside. Defendant failed to comply with it and its timelines. If follows then that the issue of merits including nexus has been settled and the only determination that must be made is that of quantum.

4.2.11 Plaintiff submits that on just this basis alone, Defendant stands to fall in its defence as the matter has been settled by Justice Hendricks that conceding liability includes the issue of causation and nexus. He further held that if Defendant disputed same they would rescind the order of court. Defendant failed to do so."

[36] In **Road Accident Fund v Krawa**[1] where the defendant had conceded liability/merits, the court stated:

"Applied to the present mater, the question is then whether the defendant, by having divided the issues into merits and quantum, and thereafter conceding the merits, also conceded the plaintiff had suffered patrimonial loss. If not, then it follows that the question whether the deceased during her lifetime was under a legal duty to provide support to the plaintiff, remained in dispute. There exists in my view no reason to give the terminology employed by the defendant in the present matter a meaning other than the meaning that it has in the context in which it was used, namely that the plaintiff, must prove that he suffered loss or damage, and if so, the amount to be awarded to him as compensation. An admission of factual allegations has serious important consequences and must as a result appear clearly and unequivocally. An admission does not entail the admission of anything which cannot fairly be regarded as an inevitable consequence or a necessary implication. If the defendant's concession of the merits amounted to a compromise, as the Court a quo concluded, it is to be strictly interpreted and must not be understood to include anything which was not likely to have been contemplated by the parties at the time they reached the compromise. Further, where a compromise is raised as a defence, the onus is upon

[1] (CA 279/2010) [2011] ZAECGHC 61; 2012 (2) SA 346 (ECG) at para 47

him or her who relies on it to prove its existence and the terms thereof." ***(Emphasis added)***

[37] In this regard, I share the same view with Adv. Makoti for the defendant that:

"Two important considerations arise out of the above appeal judgment, and they are that:

105.1 A concession of the facts relating to causation may not be inferred but that they must appear unequivocally from the order in terms of which such concession of liability was recorded; and

105.2 The terms of the order should be interpreted restrictively, as opposed to generously, meaning that, unless it appears from the Court order to have been intended, the Court should not regard a concession of liability as an admission of all the facts."

[38] I am satisfied that the defendant never intended to admit that it had caused the plaintiff's infirmities when it admitted liability/merits. My own interpretation is that the defendant intended to admit all elements of this delict except the element of causation. The submission on behalf of the plaintiff that the court order on liability settled the whole case and that all which had to be done by the court in the subsequent trail was to adjudicate the issue of "how much should the defendant pay as damages" goes against the very conduct of the plaintiff. In this case, it is the plaintiff who called two witnesses to prove causation. All which the defendant did was to tender evidence in rebuttal through Dr. Miller.

[39] This Court therefore finds that the defendant was not precluded from proceeding with the trial on causation after judgment on liability had been taken against it. The evidence before Court clearly sets out the whole defence of the defendant – it denies that the accident is causally linked to the plaintiff's epileptic seizures and neuro-cognitive challenges. I now revert to the main issue in this case, causation.

Causation.

[40] For delictual liability to arise, there must be a causal nexus between the defendant's negligent conduct and the plaintiff's damages. In order to succeed in his claim for damages, the plaintiff must establish both the factual and legal causation. The reaction to the former is whether the defendant's negligent act or omission caused or materially contributed to the harm that gave rise to the claim. If it did, then the second question is whether the negligent act or omission is linked to the harm sufficiently closely for legal liability to ensure, or whether the harm is too remote[2].

[41] The SCA in **Grove v RAF[3]** said that the courts have grappled with choosing a criterion to be used to determine legal causation. Also, in **S v Mokgethi & Others[4], Van Heerden JA** held that there is no single and general criterion for legal causation which is applicable to all instances. He suggested a flexible approach where the court has the freedom in each case to apply a theory which serves reasonableness and justice, in the light of the circumstances, considering considerations of policy. The question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of the policy considerations and based on reasonableness and justice. See also **Duiveboden[5]** where **Nugent J** (as he then was), stated:

> *"plaintiff is not required to establish a causal link with certainty, but only to establish that the wrongful conduct was probably a cause of loss, which calls for sensible retrospective analysis of what would have probably occurred, based on the evidence and what can be expected to occur in the ordinary of human affairs rather than an exercise in metaphysics."*

---

[2] M v Road Accident Fund [2017] ZAGPPHC 352.

[3] Grove v The Road Accident Fund [2011] ZASCA 55 at para 12.

[4] 1990(1) SA 32(A) at page 40/1.

[5] Minister of Safety and Security v Duiveboden 2002 (6) SA 431 at 449E

[42] In the words of **Corbett CJ** in **International Shipping Co (Pty) Ltd v Bentley**[6] , there are two distinct inquiries which should be conducted:

> *"The first being a factual one that relates to the question of factual causation. The inquiry as to factual causation is generally conducted by applying the but for test, which is designed to determine whether a postulated cause can be identified as a causa sine qua non of the loss in question. The second enquiry then arises viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability or tenure or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution for which consideration of policy may apply. This is called a legal causation."*

Approach of Court to conflicting experts' opinion.

[43] The case of **Michael and Another**[7] provides a sound guide:

> *"that determination will not depend upon considerations of credibility but rather the examination of the opinions and the analysis of their essential reasoning, preparatory to the court's reaching its conclusion on the issues raised. In order to evaluate such evidence, the court has to determine whether and to what extent opinions advanced are founded on logical reasoning."*

Analysis of the facts.

[44] On 16 October 2007, when he was 9 years old, C[…] was involved in a car accident. At impact, their car skidded and went towards a culvert. The driver swerved away from the culvert. It went towards an electric pole. Again, the driver swerved to avoid the latter pole. The accident occurred on 6 October 2007 and the epilepsy started on the first week of the subsequent month, November 2007.

---

[6] International Shipping Co (Pty) Ltd v Bentley, 1990 (1) SA 680(A)

[7] Michael and Another v Linksfield Park Clinic (Pty) Ltd and Another 2001(3) SA 1184 (SCA).

[45] The accident occurred as the child was doing Grade 4 at school. From Grade 1 to Grade 7 he had no problem with the academic performance at school. He started to encounter problems when he was going to do Grade 8. In Grade 8, he started to be forgetful. This is the uncontested evidence of Mrs. Mathe.

[46] During the final examinations time in Grade 4, he started to look at the book, when reading, in a slunting position. This means, as the witness, Mrs. M[…] indicated, he looked at the book or text more with his left side of the face. This witness, Mrs. M[…], says he would always look at the text to read not directly but with the slunting towards the right. My understanding of this unusual way of reading is that the child was looking at the text as if he was reading more with the left eye instead of both eyes. This latest phenomenon (problem of slunting the face or the head) started to manifest itself within four to six weeks after the accident.

[47] Therefore, it is clear to this Court that shortly after the accident, the child developed at least two problems; epilepsy and reading a text with the face / head slunting towards the right. In my view therefore, in the absence of any other explanation for these two sudden challenges of C[…], these two medical conditions were caused by the accident.

[48] Dr. Miller accepted that the injured is not mentally normal. He is challenged on a mental basis. He testified that the injured has severe or significant memory problems and he is challenged in all aspects intellectually. His view is that the injured had transient loss of consciousness for a very short period of time. He stated that the GCS test has a problem of reliability. He testified that the injured sustained a minor head injury and minor head injuries recover fully 95% to 98% of all cases. He said the injured's condition cannot be attributed to the minor head injury that he sustained in the accident. He testified to a lot of what is not the cause but could not identify where the epilepsy emanates from. He admitted that he could not find anything congenital or any signs of abnormality that could have existed before the accident. He does not know what the cause of the injured's condition is. He does not know the cause of the seizures nor the cause of the significant intellectual and cognitive impairment that the injured is suffering from.

[49] Compared to Prof. Lekgwara, Dr. Miller was not such a helpful witness to the Court. He seems to suggest that the Court should place no significance to the challenges of C[…], especially those which developed soon after the car accident. All he could tell the Court was that the boy's neuro-cognitive disabilities were totally divorced from the accident. My view is that the conclusion and views of Dr. Miller are due to his failure to place any due weight on the evidence of a lay person, Mrs. M[…], about the behavior of the child prior to the accident. Dr. Miller has failed, as an expert, to honestly and impartially take the Court to the probable causes of C[…]'s challenges.

[50] Prof. Lekgwara as an expert, is also not free from criticism. He based his finding and conclusion initially on the assumption that C[…] lost consciousness after the impact. The bad news is that there is no evidence on record that the boy ever lost consciousness. However, it should be remembered that Prof. Lekgwara did not rely on the aspect of loosing consciousness only for his findings and recommendations.

[51] Unlike the two experts who testified, this Court is better placed to judge on the probable effect of the impact. The car which collided with the plaintiff's vehicle must have been at a high speed. The force of impact landed the C[…] vehicle out of the tarred surface of the road, out of the shoulders of the road, on the embankment, past the tarred road culvert mouth and beyond the electricity pole. It is my considered view that the force of impact was huge, to say the least. What is worse is that the offending vehicle hit C[…]'s car directly opposite the injured boy. The effect of the collision was to force the rear right door partly into the car thus occupying the place where C[…] originally was.

[52] In an accident of this nature, there is a high degree of probability that C[…] may have lost consciousness. The ambulance services officials were not there when the injured's car finally landed outside the road. It is therefore not correct to say that C[…] never lost consciousness. The fact is, no one saw him at that stage either conscious or unconscious. I say 'loss of consciousness' by C[…] cannot be excluded taking into account the force of the collision.

[53] It is therefore my view that the force of the collision had a high degree of probability to inflict long term neuro-cognitive and physical problems on the child. The fact that he sustained a minor cut on the head should never be used as a scarecrow against seeing far into the future about the real probable sequelae of the accident. I am generally impressed by Prof. Lekgwara, who did his best to explain to the Court the probable sequelae of this accident on C[…]. I do not agree with the defence therefore that Prof. Lekgwara was "loyal to his brief". The converse is that, I found in Prof. Lekgwara an unbiased, honest gentleman.

Conclusion.

[53] The Court finds that the epilepsy which C[…] suffers from and the neurological impairments are the sequelae of the accident of 6 October 2007. In brief, there is a nexus between the brain injury and the epilepsy and the resultant cognitive impairment of this boy.

Order.

[54] The following order is made:

54.1 The defendant is liable to pay 100% of C[…]'s damages;

54.2 The defendant is liable for payment of the applicant's costs including costs of 26 and 27 November 2018; 20 and 21 May 2019, and costs of Prof. Lekgwara.

SAMKELO GURA
JUDGE OF THE HIGH COURT

ATTORNEYS

For the Plaintiff : MAHLABEGOANE ATTORNEYS
54 Molopo Road

	Golf View MAHIKENG Tel/Fax: (018) 381 1059 Ref: MVA 00105
For the Respondent:	MAPONYA INCORPORATED Sekame Road, Off Dr. James Moroka Drive 1st Floor, Office 29C Mega City Shopping Complex MMABATHO Tel: (018) 384 2823 Ref: T. BALOYI / lrm / B2429 / 23 / 16