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

CASE NUMBER: 18694/14

In the matter between:

IZAK CORNELIUS RUST Plaintiff

and

JOHAN COETZEE Defendant

Date of Judgment: This judgment was handed down electronically by circulation to the parties' legal representatives by email and by release to SAFLII. The date and time of handing down judgment is deemed to be 10h00 on 24 May 2022.

JUDGMENT

DE WET, AJ:

INTRODUCTION:

1. On 8 July 2014 during the golden hour,[1] on a farm called Hoeksville in the Eastern Cape, an unfortunate hunting incident, which will haunt both parties for the remainder of their lives, occurred. The plaintiff, a professional hunter, was shot in the foot with his own high calibre hunting rifle (a Ruger M77 Mk 2 calibre 30-06

[1] According to the Cambridge Dictionary it is the period of the day before the sun sets or after it rises, when the light is redder and softer than usual.

Springfield, serial number [....], calibre converted to 30-06 Ackley Improved), whilst held by the defendant, a first-time hunter who had rented the rifled from the plaintiff. As a result of the gunshot wound, the plaintiff had to undergo a below the knee amputation.

2. Due to his injury, the plaintiff instituted a delictual claim for damages against the defendant.

3. The parties agreed to separate the issue of merits and quantum and such order was granted in terms of rule 33(4) during the pre-trial proceedings. The matter consequently proceeded on merits only.

4. It is the plaintiff's pleaded case that the defendant was negligent as he: handled the loaded rifle with reckless disregard for the plaintiff's safety; failed to adhere to the plaintiff's express instructions; closed the bolt of the loaded rifle before the tripod was fully set up and before the target was in his sight; failed to keep a proper lookout; failed to point the rifle in a safe direction; put his finger on the trigger before he was ready to fire; failed to ensure that he was positioned in front of the plaintiff when he closed the bolt of the rifle; and failed to avoid the incident when he could and should have done so.

5. The defendant pleaded that the rifle discharged due to an internal malfunction and/or that the particular round of ammunition involved in the incident, which was provided to him by the plaintiff, was defective. This cartridge was according to Mr du Preez (a witness for the defendant) removed by him and it is now lost. The defendant further pleaded that the incident was caused by the sole negligence of the plaintiff who was negligent in that he: gave the defendant an express instruction to load the rifle at a time when it was inopportune to do so; failed to take into account the defendant's inexperience with firearms; provided the defendant with a rifle that was not properly maintained and in a good and safe working order; provided the defendant with faulty ammunition; failed to give proper safety instructions to the defendant; failed to ensure that he was positioned behind the defendant when he gave instructions for him to close the bolt of the rifle; and failed to avoid the incident when he could and should have done so.

6. Finally, and in the alternative, the defendant relied on contributory negligence by the plaintiff, on the grounds set out above, should the court find that he was negligent.

7. It is not in dispute that the defendant was carrying the rifle in question at the time of the incident, nor that a shot went off which caused the injury to the plaintiff.

FACTUAL BACKGROUND:

8. The plaintiff's counsel succinctly summarised the evidence presented at trial in his heads of argument. The defendant's counsel was afforded an opportunity to address and dispute the summary presented by the plaintiff's counsel. I was advised that the defendant had nothing to add, nor did he dispute the summary of the evidence. I agree with the submission by the defendant's counsel that the factual disputes have little or no bearing on the determination of whether defendant pulled the trigger or not. Very briefly therefore, the relevant facts surrounding the incident in my view, are:

8.1. The defendant, his wife, and some friends, went to the farm in the Eastern Cape on a hunting trip during July 2014. The defendant had never hunted or handled a rifle previously.

8.2. At the time the plaintiff was employed on the farm as a professional hunter. He qualified in 2012 and had a valid licence at the time of the incident.

8.3. Upon the defendant's arrival on the farm, he entered into an agreement with the plaintiff to rent his rifle with 20 rounds of ammunition. A firearm rental agreement was signed between the plaintiff and the defendant on 6 July 2014 at Hoeksville. In terms of the agreement the defendant confirmed that he had inspected the rifle and accessories and had found them to be in good condition. He further confirmed that one shot was fired in his presence and that he found the rifle to be accurate. A handwritten note, purportedly

written by the plaintiff's wife, indicates that 19 cartridges were returned, and one was lost. He was charged for three day's rental of the rifle.

8.4. After the agreement was signed, the plaintiff gave the defendant a safety briefing.

8.5. The defendant went to the shooting range on the farm to familiarise himself with the rifle. According to the defendant he was assisted at the shooting range by Mr Hanekom. Prior to the incident the defendant on his version, had fired at least 6 shots with the rifle.

8.6. According to the defendant he shot a blesbok with the rifle on the day before the incident. The plaintiff could not remember that the defendant had shot a blesbok on the previous day.

8.7. On the day of the incident, one Bertie, wounded a swart wildebeest. The hunt was stopped to look for the animal. After lunch the plaintiff and the defendant proceeded with a walk and stalk hunt.

8.8. According to the defendant, he had shot at and missed a black wildebeest prior to the incident. The plaintiff denied that this ever happened.

8.9. At about 17h30 the plaintiff spotted a herd of black wildebeest and whilst making preparations for the defendant to take a shot of a tripod (also known as a "skietstok" in hunting terms), a shot went off (whilst the defendant held the rifle) which hit the plaintiff in his left foot.

9. It is the defendant's version that after he had missed the black wildebeest earlier on the day of the incident, he took out the spent cartridge and put it in his pocket. The plaintiff then chambered a round for him and handed the rifle back to him. He carried the chambered rifle with the bolt open. When the plaintiff spotted a herd of wildebeest, he instructed the defendant to "kap toe" (slam down) the bolt. At this stage the plaintiff was slightly in front and to the left of him. When he slammed down the bolt, a shot must have gone off. He denies pulling the trigger. In

furtherance of this version, it was the defendant's case the rifle had an internal malfunction.

10. The plaintiff testified that when he spotted a herd of wildebeest, he was on the defendant's left and he softly told him to "maak reg" (load or chamber a cartridge or round). He saw the defendant chamber a round and then stepped slightly forward to set up the tripod. A shot went off, he was not looking at the defendant when the shot went off. He did not and would never have chambered a round for a client to walk with on a hunt. He did not and would never have instructed a client to "kap toe" the rifle as it would scare the animals away and was simply not done that way.

11. The dispute between the parties is therefore how it happened that the plaintiff was injured and in this regard the court was faced with two mutually destructive versions.

THE EVIDENCE:

12. Both parties called experts to testify. The plaintiff called Mr Wolmarans ("Wolmarans"), a dedicated hunter and an independent and experienced forensic expert. The defendant called Mr Harrison ("Harrison"), a gunsmith.

13. The experts signed a joint minute, dated 14 November 2019. At this point in time Wolmarans had not inspected the actual rifle. In the joint minute the following was agreed and recorded (in summary):

13.1. Wolmarans had never in his personal experience come across a rifle of such high quality that would discharge without the bolt being fully secured and Harrison agreed that the rifle would not discharge with an open bolt;

13.2. a reloaded cartridge could make it more difficult to load and unload the firearm due to the cartridge case having expanded during a previous shot;

13.3. the rifle in question seemed safe given the "trigger pull" measured by Harrison;

13.4. no mention of a possible faulty sear[2] was made. I will return to this aspect later.

14. Wolmarans had the opportunity to inspect the rifle shortly before the trial commenced and found it to be in an excellent condition with a safe trigger pull of about 2 lb. He found it was difficult to disengage the trigger accidentally. He inserted a re-loaded cartridge in the chamber and closing and opening the bolt was not difficult. The rifle only fired when the bolt was fully closed. He also testified that in his opinion faulty ammunition will most likely not fire. When it was put to him that it was the defendant's version that the shot went off due to the defendant slamming down the bolt, he disagreed. In his view, it would make too much noise to slam down a bolt during a hunt. He also disagreed that it was likely that a worn sear could cause the trigger to disengage when slamming down. Neither he nor Harrison inspected the sear of the rifle. He was of the view that the most probable cause of the incident was the defendant's finger having pulled the trigger.

15. Harrison compiled an inspection report which was dated 7 October 2014. He conceded during his evidence that the date of the inspection may be incorrect as the defendant's attorneys' notice to inspect was dated 14 August 2015. It was common cause between the parties that the rifle was stored after the incident and then sold to a Mr Cloete in 2017. No modification has been made to the rifle (save that the bipod was removed) since the incident. During his evidence in court, Harrison for the first time proffered an opinion that a worn sear could cause a trigger to disengage. He however did not inspect the rifle's sear nor did he mention this possibility in his report. He further did not test whether the rifle would discharge if the bolt was slammed down.

16. The plaintiff testified about how he prepares a client for a hunt. He stated that he had been taking clients out for 15 years, had a particular pattern of doing things and did not deviate therefrom.

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[2] The sear is the part of the trigger mechanism that holds the hammer, striker, or bolt back until the correct amount of pressure has been applied to the trigger, at which point the hammer, striker, or bolt is released to discharge the weapon.

17. It was his testimony that when he sees a target (prey) during a walk and stalk hunt, he would instruct his client to get ready (“maak reg”). This means the client opens the bolt and inserts a bullet in the chamber, without closing the bolt. The rifle is then set up on a tripod (“skietstok”), which he carries and would set up for the client. The client will move forward once the tripod is set up and place the rifle on the tripod. Only when the target is in sight, he would instruct the client to close the bolt (“maak toe”). If the prey bolts he would instruct the client to open the bolt (“maak oop”) and the round of ammunition is removed from the rifle, until the next opportunity.

18. It was his testimony that he would never instruct a client to “slam down” the bolt (or, as the defendant testified “kap toe”), because the action needs to be done slowly and very quietly, in order not to startle the prey.

19. The defendant conceded during his testimony that he had received brief safety instructions and had been on the shooting range to become familiar with the rifle. Whether or not the plaintiff was on the shooting range when the defendant was familiarising himself with the rifle is in my view irrelevant. What is of significance is the fact that neither he nor Mr Hanekom nor the defendant’s wife, who also shot with the rifle on the shooting range, reported any difficulties with the rifle prior to the incident. The defendant further testified that Mr Hanekom told him to “hit” the bolt down. It was Mr Hanekom’s testimony that he struggled a little bit to open and close the bolt of the rifle as it was a little tighter than his own rifle. He did not think it made the rifle unsafe or that it needed reporting.

20. It was the defendant’s case in court that the rifle must have discharged when he had slammed the bolt down as instructed by the plaintiff. He initially testified that the plaintiff told him to “kap toe” but later stated that the plaintiff said something softly and then motioned to him to close the bolt.

21. He denied having his finger on the trigger or pulling the trigger.

LEGAL FRAMEWORK:

22. In the matter of *Telematrix (Pty) Ltd t/a Matrix Cechicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) the first principle in claims relating to delictual damages was expressed as follows:

> "[12] The first principle of the law of delict, which is so easily forgotten and hardly appears in any local text on the subject, is, as the Dutch author Asser points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss. But the fact that an act is negligent does not make it wrongful although foreseeability of damage may be a factor in establishing whether or not a particular act was wrongful. To elevate negligence to the determining factor confuses wrongfulness with negligence and leads to the absorption of the English law tort of negligence into our law, thereby distorting it."

23. More recently and in the matter of Van der Bijl and Another v Featherbrooke Estate Home Owners' Association[3], Unterhalter J formulated more specific considerations relevant to the determination of wrongfulness in matters concerning an omission or conduct causing pure economic loss *inter alia* as follows:

> 23.1 Firstly, the law proceeds from the precautionary premise of excluding liability for omissions and pure economic loss, unless there are good reasons to recognise liability;
>
> 23.2 Secondly, the question is whether the law has any reason to interfere with the residual principle that the loss should lie where it falls which requires a consideration of deference and the questions as to who might most efficiently have prevented the risk of loss; and

[3] (NPC) 2019 (1) SA 642 (GJ)

23.3 Thirdly, that delictual liability for omissions has standardly proceeded from the premise that we are free of any duty to avert harm suffered by others, absent some special public or private duty of assistance that differentiates a defendant from the general norm of permissible indifference.

24. The following legal principles are, in my view, relevant in respect of wrongfulness:

24.1 A negligent omission, unless wrongful, will not give rise to delictual liability. The wrongfulness of omissions depends on the existence of a legal duty to act without negligence and the breach of such a duty.[4] In the particulars of claim the conduct of the defendant relied upon by the plaintiff manifests itself as omissions. In his alternative claim for contributory negligence the defendant relies on both omissions and commissions allegedly committed by the plaintiff.

24.2 The imposition of a legal duty is a matter of judicial determination involving criteria of public and legal policy, consistent with constitutional norms, and will only be regarded as wrongful and actionable if public or legal policy considerations require that such omission, if negligent, should attract legal liability.[5]

24.3 The legal convictions of the community, or '*boni mores'* is an objective test based on the criterion of reasonableness. This requires the court to weigh the conflicting interests of the parties in the light of all the relevant circumstances and in view of all pertinent factors to decide whether the infringement of the victim's interest was reasonable or unreasonable.[6]

[4] Hattingh vs Roux NO 2011(5) SA 135 (WCC) para 12 and 13 at 139I – 140E
[5] Hawekwa Youth Camp and Another v Byrne 2010(6) SA 83 (SCA) para 22 at 90 I – 90 B and
[6] Roux v Hattingh 2012(6) SA 428 (SCA) para 33-38 at 439 A – 441 C

24.4 Control over a dangerous object or a dangerous situation, creates a legal duty resting upon the person in control to prevent someone from being injured by the particular situation.[7]

24.5 In particular instances the existence of a legal duty may be ascribed to a single factor but in other cases several factors play a part.[8]

24.6 The causing of damage by means of conduct in breach of a statutory duty is *prima facie* wrongful. In other words, non-compliance with a statutory duty is an indication that the violation of the plaintiff's interests took place wrongfully.[9]

24.7 Reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct, which is part of the element of negligence. It concerns the reasonableness of imposing liability on the defendant for the harm resulting from the conduct.[10]

24.8 "The role of foreseeability in the context of wrongfulness must be seen in its correct perspective. It might, depending on the circumstances, be a factor that can be taken into account but it is not a requirement of wrongfulness and it can never be decisive of this issue. If this was not so there would not have been any reason to distinguish between wrongfulness and negligence and since foreseeability also plays a role in determining legal causation, it would lead to the temptation to make liability dependent on the foreseeability of harm without anything more, which would be undesirable".[11]

24.9 A presumption of wrongfulness can be rebutted by establishing one of the well-settled defences which have become known as grounds of justification, such as *volenti non fit injuria.* A person consenting to injury must

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[7] Law of Delict: J Neethling and Others (Fifth Editiion) para 5.2.2 at page 56-58; Negligence in Delict: McIntosh and Scobel (Fifth Edition) page 203-206; Cape Town Municipality vs Bakkerud 2000(3) SA 1049 SCA and Roux vs Hattingh 2012(6) SA 428 SCA more particularly para 13-43 at 439A-442F.
[8] Neethling op.cit. para 5.2.8 at page 66
[9] Neethling op.cit. para 5.3 at page 69
[10] Le Roux v Dey 2011(3) SA 274 (CC) referred to in para 33 of Roux v Hattingh
[11] Steenkamp v Provisional Tender Board, Eastern Cape 2006(3) SA 151 (SCA) para 18 at 160 A-D

have full knowledge of the extent of the prejudice, must realise or appreciate fully what the nature and extent of the harm will be and must in fact subjectively consent to the prejudicial act.[12]

34. The criterion adopted by our law for negligence is the objective standard of the reasonable person. A defendant is negligent if a reasonable person would have acted differently in a situation where the unlawful causing of damage was reasonably foreseeable and preventable. Each case depends on its own particular circumstances.

35. As correctly pointed out by counsel for the plaintiff, a plaintiff is not required to establish the causal link with certainty, but needs only to establish that the wrongful conduct was probably the cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the ordinary course of human affairs rather than an exercise in metaphysics. This requires an assessment of where the probabilities lie on a conspectus of all the evidence adduced in the case.[13]

36. The test for negligence does not require that the precise nature and extent of the actual harm which occurred to have been reasonably foreseeable and it does not require reasonable foreseeability of the exact manner in which the harm actually occurred. Only the general nature of the harm that occurred and the general manner in which it occurred must have been reasonably foreseeable.[14]

37. The technique generally employed by courts in resolving factual disputes of the nature which arise in these cases, was summarised as follows, in the matter of Stellenbosch Farmers' Winery Group Ltd v Martell et Cie:

> *"To come to a conclusion on the disputed issues a court must make findings on (a) the credibility of the various factual witnesses; (b) their reliability; and (c) the probabilities. As to (a), the court's finding on the credibility of a*

[12] Law of Delict (Fifth Edition) J Neethling and Others sub-para (c), (d) and € of para 6.5.3 at 92-94. Roux v Hattingh (supra) para 36 at 440 B-D and para 41 at 441 F-H
[13] Minister of Safety and Security v Van Duivenboden 2002 (6) SA 431 (SCA) at para 25
[14] Meyers v MEC, Dept of Health, EC 2020 (3) SA 337 (SCA) at [68]

particular will depend on its impression about the veracity of the witness. That in turn will depend on a variety of subsidiary factors, not necessarily in order of importance, such as (i) the witness' candor and demeanor in the witness-box, (ii) his bias, latent and blatant, (iii) internal contradictions in his evidence, (iv) external contradictions with what was pleaded or put on his behalf, or with established fact or with his own extracurial statements or actions, (v) the probability or improbability of particular aspects of his version, (vi) the caliber and cogency of his performance compared to that of other witnesses testifying about the same incident or events. As to (b), a witness' reliability will depend, apart from the factors mentioned under (a)(ii), (iv) and (v) above, on (i) the opportunities he had to experience or observe the event in question and (ii) the quality, integrity and independence of his recall thereof. As to (c), this necessitates an analysis and evaluation of the probability or improbability of each party's version on each of the disputed issues. In the light of its assessment of (a), (b) and (c) the court will then, as a final step, determine whether the party burdened with the onus of proof has succeeded in discharging it. The hard case, which will doubtless be the rare one, occurs when a court's credibility findings compel it in one direction and its evaluation of the general probabilities in another. The more convincing the former, the less convincing will be the latter. But when all factors are equipoised probabilities prevail.[15]

38. When dealing with the question of onus and the probabilities, the approach as outlined by Eksteen JP in National Employers' General v Jagers 1984 (4) SA 437 (E) at 440E - 441A, finds application:

"It seems to me, with respect, that in any civil case, as in any criminal case, the onus can ordinarily only be discharged by adducing credible evidence to support the case of the party on whom the onus rests. In a civil case the onus is obviously not as heavy as it is in a criminal case, but nevertheless where the onus rests on the plaintiff as in the present case, and where there are two mutually destructive stories, he can only succeed if he

[15] 2003 (1) SA 11 (SCA)

satisfied the Court on a preponderance of probabilities that his version is true and accurate and therefore acceptable, and that the other version advanced by the defendant is therefore false or mistaken and falls to be rejected. In deciding whether that evidence is true or not the Court will weigh up and test the plaintiff's allegations against the general probabilities. The estimate of the credibility of a witness will therefore be inextricably bound up with a consideration of the probabilities of the case and, if the balance of probabilities favours the plaintiff, then the Court will accept his version as being probably true. If however the probabilities are evenly balanced in the sense that they do not favour the plaintiff's case any more than they do the defendant's, the plaintiff can only succeed if the Court nevertheless believes him and is satisfied that his evidence is true and that the defendant's version is false."

DISCUSSION

39. The plaintiff bears the onus of proof.

40. As a starting point a rifle will normally only discharge when the trigger is pulled. Despite the defendant's plea wherein he had contended that the plaintiff was *inter alia* negligent because he gave the defendant an express instruction to [load] the riffle at a time when it was inopportune to do so, his version in court was that the plaintiff had chambered the rifle. In his plea it was further stated that the defendant was negligent as he did not ensure that he was positioned behind the defendant when he gave instructions to close the bolt. His version in court was that the rifle discharged as he was instructed to slam it down. During argument counsel relied solely on the defendant's version that he was instructed to slam down the bolt and when he did so, the rifle discharged. This, it was argued, happened because of the rifle having a worn sear.

41. Pausing on the issue of a worn sear for a moment, the following facts are relevant. During cross-examination of Wolmarans, it was put to him that the plaintiff had instructed the defendant to slam down the bolt and that this could have caused the trigger to disengage if the rifle had a worn sear. This was the first time that

plaintiff and his expert was made aware of this defence. Wolmarans was of the view that the chances that a worn sear could have caused the trigger to disengage, whilst in theory possible, was highly unlikely. He further testified that in his opinion the chances that a sear would wear, is slim as it is made from very hard metal. He further pointed out that neither he nor Mr Harrison inspected or tested the sear.

42. Mr Harrison testified that the trigger pull weight of 2 lb seems safe and the rifle did not disengage when the bolt is closed on an empty chamber. It did however disengage on occasion when he dropped it on its butt from a height of 12 inches on a hard surface. He did not test whether the trigger would disengage if slammed down as alleged by the defendant during the court proceedings. His brief, as reflected in the title of his report was “Inspection of firearm for possible discharge on chambering of a live cartridge”. It was not the defendant’s case during the trial that the rifle discharged whilst chambering a live cartridge.

43. It was the evidence of Wolmarans, and Harrison, as recorded in the joint minute dated 4 November 2019, that the rifle would only discharge when the bolt is closed, that the trigger pull was safe and no mention is made of a worn sear.

44. In this regard it was held in Bee v Road Accident Fund 2018 (4) SA 366 (SCA) where Rogers AJA dealt with the effect of agreement between experts, as follows:

> *“[64] This raises the question as to the effect of an agreement recorded by experts in a joint minute. The appellant's counsel referred us to the judgment of Sutherland J in Thomas v BD Sarens (Pty) Ltd [2012] ZAGPJHC 161. The learned judge said that where certain facts are agreed between the parties in civil litigation, the court is bound by such agreement, even if it is sceptical about those facts (para 9). Where the parties engage experts who investigate the facts, and where those experts meet and agree upon those facts, a litigant may not repudiate the agreement 'unless it does so clearly and, at the very latest, at the outset of the trial' (para 11). In the absence of a timeous repudiation, the facts agreed by the experts enjoy the same status as facts which are common cause on the pleadings or facts agreed in a pre-*

trial conference (para 12). Where the experts reach agreement on a matter of opinion, the litigants are likewise not at liberty to repudiate the agreement. The trial court is not bound to adopt the opinion but the circumstances in which it would not do so are likely to be rare (para 13). Sutherland J's exposition has been approved in several subsequent cases, including in a decision of the full court of the Gauteng Division, Pretoria, in Malema v Road Accident Fund [2017] ZAGPJHC 275 para 92.

[65] In my view we should in general endorse Sutherland J's approach, subject to the qualifications which follow. A fundamental feature of case management, here and abroad, is that litigants are required to reach agreement on as many matters as possible so as to limit the issues to be tried. Where the matters in question fall within the realm of the experts rather than lay witnesses, it is entirely appropriate to insist that experts in like disciplines meet and sign joint minutes. Effective case management would be undermined if there were an unconstrained liberty to depart from agreements reached during the course of pre-trial procedures, including those reached by the litigants' respective experts. There would be no incentive for parties and experts to agree matters because, despite such agreement, a litigant would have to prepare as if all matters were in issue….

[66] Facts and opinions on which the litigants' experts agree are not quite the same as admissions by or agreements between the litigants themselves (whether directly or, more commonly, through their legal representatives) because a witness is not an agent of the litigant who engages him or her. Expert witnesses nevertheless stand on a different footing from other witnesses. A party cannot call an expert witness without furnishing a summary of the expert's opinions and reasons for the opinions. Since it is common for experts to agree on some matters and disagree on others, it is desirable, for efficient case management, that the experts should meet with a view to reaching sensible agreement on as much as possible so that the expert testimony can be confined to matters truly in dispute. Where, as here, the court has directed experts to meet and file joint minutes, and where the experts have done so, the joint minute will correctly be understood as limiting

the issues on which evidence is needed. If a litigant for any reason does not wish to be bound by the limitation, fair warning must be given. In the absence of repudiation (ie fair warning), the other litigant is entitled to run the case on the basis that the matters agreed between the experts are not in issue."

45. In the present instance, the plaintiff was not given any warning that Harrison intended to change his opinion as expressed in the joint minute, nor was plaintiff given any warning that Harrison wished to introduce further issues which were not canvassed in his expert summary and in the joint minute. This approach is contrary to the purpose of a joint summary and Harrison could not offer an explanation for his rather strange approach and even stranger comments in the witness box.

46. I find that the defendant's speculations that the rifle may have discharged when it was slammed down by him, are not supported by the evidence. The fact that the rifle discharged on occasion when Harrison dropped it from 12 inches, in my view provides no support for the defendant's belated version that the rifle discharged when he slammed down the bolt.

47. Further, and in considering the facts of this matter, I find it highly unlikely that:

47.1. the plaintiff would have instructed the defendant, assuming that the rifle was chambered, in circumstances where the defendant would have shot at an animal from a tripod, to slam down the bolt, whilst moving forward to put up the tripod. It simply does not make sense and in all probability would have scared the animals away.

47.2. if the defendant had slammed down the bolt before the rifle was placed on the tripod, the rifle would have discharged. Wolmarans testified that a shot could only be fired if the bolt was securely closed. As discussed earlier, this factual scenario as alleged by the defendant in court, was not even put to the defendant's expert, never tested, and contrary to the defendant's pleaded case.

48. The plaintiff was a credible witness and Wolmarans, a very enthusiastic witness, impressed as being dedicated and experienced. I accept the evidence of the plaintiff and Wolmarans that the bolt of the high quality hunting rifle in question, which was in an excellent condition, would close with little or no noise if softly pushed down and that is was not necessary to slam the bolt down. That is the norm in the hunting environment, where one stalks animals with exceptional hearing. Any unnatural sounds would make them bolt resulting in an unsuccessful hunt.

49. Harrison did not impress as an expert witness and there is no basis upon which to find that the rifle or the ammunition malfunctioned. The defendant's version of events is in my view also not probable. Whilst I do accept that it was not his intention to cause the plaintiff harm, the most probable conclusion on a balance of probabilities and considering the evidence, is that the defendant, who was tired and relatively inexperienced, after chambering a round as instructed by the plaintiff, closed the bolt, placed his finger on the trigger and pulled the trigger whilst pointing the rifle in the direction of the plaintiff who was busy setting up the tripod for him. Considering my factual findings, the plaintiff did not contribute to the harm

50. In the circumstances I make the following order:

50.1. the defendant is liable to compensate the plaintiff for such damages as the plaintiff may prove he has suffered as a result of the shooting incident on 8 July 2014;

50.2. the defendant is to pay the plaintiff's costs on the question of liability, including the costs of the plaintiff's expert witness;

50.3. the plaintiff and the expert witness are declared necessary witnesses and the defendant is liable for the reasonable costs of their travel to Cape Town and accommodation.

A De Wet

Acting Judge of the High Court

Coram:	De Wet AJ
Date of Hearing:	30 November 2021, further submissions received during December 2021
Date of Judgment:	24 May 2022
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