
SOUTH AFRICA / JUDGMENT

Merryweather and Another v Scholtz and Another (7965/2009) [2021] ZAWCHC 125 (22 June 2021) [2021] ZAWCHC 125

COURT

Western Cape High Court, Cape Town

BEFORE

Y S Meer

CASE / FILE NUMBER

7965/2009

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

Case

No: 7965/2009

Before the Honourable Ms

Justice Meer

Hearing: 04

November 2019 to 21 November 2019,

11 to 16 March 2020,

12 to 27 March 2021,

13 to 14 May 2021.

Judgment Delivered: 22

June 2021

In the matter between: ANDREW
 MERRYWEATHER
 First Plaintiff
 NICHOLAS
 MERRYWEATHER
 Second Plaintiff
 and
 OLIVER
 SCHOLTZ
 Third Defendant
 GERARD
 DAVID PETER
 SCHOLTZ
 Fourth Defendant

JUDGMENT

MEER J

Introduction

- [1] In the early hours of the morning of 9 September 2006 a group of schoolboys and three young men got into a fight after a night out and as a result one of them, the First Plaintiff, Andrew Merryweather (“Andrew”), ended up partially paralysed and wheelchair-bound. Andrew sustained a compression flexion type V fracture of the seventh cervical vertebrae after he was pushed by the Third Defendant, Oliver Scholtz (“Oliver”), and his head struck a stationary motor vehicle. Oliver’s version is that he pushed Andrew in self-defence. Andrew claims that Oliver intentionally spear tackled him by picking him up and throwing him against the motor vehicle. This judgment seeks to determine which of these two versions is more probable. In essence it is the movement which preceded Andrew’s fall and Oliver’s role in it which is in issue. Meaning no disrespect, and for convenience, the judgment has referred to some of the eye witnesses mostly by first name only.

History of Litigation

- [2] As a result of the incident Oliver and 6 of his friends who were part of his group were charged with attempted murder and assault in the Wynberg Regional Court. In March 2008 Oliver was acquitted of the charge of attempted murder of Andrew and assault of Nicholas Merryweather, the Second Plaintiff (“Nicholas”). His co-accused, save for Joel Thackwray (“Joel”), were also acquitted. Joel was convicted for the assault of Nicholas. His conviction was however set aside on appeal.

[3] On 7 September 2009 the Plaintiffs issued summons against Oliver and two others in the schoolboy group, Joel as First Defendant and Liam Hechter as Second Defendant. The Fourth Defendant, who is Oliver's father, was later joined. In the particulars of claim as amended Andrew claims payment of the sum of R11 068 200.00 in damages arising from a spinal cord injury he sustained on 9 September 2006. The Second Plaintiff, Nicholas, claims R25 000 as general damages for

assault.

[4] Pursuant to the summons, on 18 May 2010 default judgment was granted against Oliver as Third Defendant and his father as Fourth Defendant. They were ordered to pay Andrew such damages as are proved. On 14 June 2013 default judgment was entered in favour of Andrew against Oliver and his father in an amount of R10 291 100.00. The First and Second Defendants, Joel Thackwray and Liam Hechter, fell out of these proceedings once default judgment was granted against the Third and Fourth Defendants only.

[5] On 10 September 2013 Oliver applied to rescind both default judgments. On 1 August 2014 the rescission application was dismissed with costs. On 14 December 2015 Oliver and his father's appeal succeeded against the dismissal of their application to rescind default judgment in favour of the First Plaintiff. It was ordered that the cost of that appeal and any other costs not covered by a written tender by the Third and Fourth Defendants stand over for

determination

by the trial court. Leave was granted to the Defendants to enter appearances to defend and file a plea in the main action. Thereafter by agreement the claim of Nicholas as Second Plaintiff was postponed.

[6] The matter on trial before me is accordingly Andrew's claim as First Plaintiff in the main action that was instituted in 2009 and the determination of the aforementioned costs. Andrew, in addition to claiming costs of suit seeks a special costs order in terms of Rule 37(9)(a)(ii) against the Third and Fourth Defendants jointly and severally. These are attorney client costs for failing to a material degree to promote the effective disposal of the litigation.

Pleadings in this action

[7] The particulars of claim as amended state in relevant part as follows[1]:

"7. During the night of 8/9 September 2006 and at the Engen Garage, Vineyard Motors in Main Road, Newlands, Western Cape, the First, Second and Third Defendants,

- (a) wrongfully, unlawfully and provocatively referred to the First Plaintiff as a homosexual;
- (b) wrongfully, unlawfully and intentionally assaulted:

(i) The First Plaintiff by grabbing and pushing, kicking and punching him and throwing and/or spear tackling him against a stationary motor vehicle;

(ii) The Second Plaintiff by pushing him and throwing him to the ground and then punching and kicking him.

9. As a consequence of the assaults:

(a) the First Plaintiff sustained:

(i) dried epistaxis; and

(ii) reticular haemorrhaging; and

(iii) a compression flexion fracture of the C7 vertebra with an incomplete spinal cord injury.

(b) the First Plaintiff was hospitalised at Groote Schuur Hospital where, on 11 September, 2006 a C7 vertebral cortectomy was performed. This was followed by the insertion of a tricortical iliac graft and titanium plate;

(c) thereafter the First Plaintiff was transferred to UCT Private Academic Hospital for rehabilitation;

(d) the First Plaintiff has suffered the following sequelae:

(i) he has bilateral leg weakness;

(ii) the muscles of his left hand are weak;

(iii) he is a functional paraplegic and is wheelchair bound;

(iv) he has reduced sensation over his trunk and legs;

(v) he experiences chronic pain in and over the right scapula;

(vi) he has no control over his bladder and bowels;

(vii) his sexual function is non-existent;

(viii) he experiences social isolation and is depressed;

(e) the First Plaintiff will in the future incur hospital and medical expenses for regular and routine medical treatment and attention as he is, and will be, prone, in particular, to respiratory and urinary infection;

(f) the First Plaintiff requires, and will always require, certain mechanical aids and devices, an appropriately adapted motor vehicle, a specially designed and suitable residence and permanent attendant care;

(g) the First Plaintiff will in the future lose earnings;

- (h) the First Plaintiff has suffered and will in the future suffer severe pain, discomfort, inconvenience, disfigurement and disability;
- (i) the Second Plaintiff suffered bruises and abrasions to his lower back and kidney areas;
- (j) the Second Plaintiff experienced pain, shock and suffering and discomfort.
- 10. As a further consequence of being referred to as a homosexual and being assaulted, the First Plaintiff has suffered damages in the sum of R11 068 200.00.
- 11. As a further consequence of being assaulted the Second Plaintiff has suffered general damages for shock, pain and suffering and discomfort in the sum of R25 000.00.
- 12. In the premises the Defendants are liable to:
 - (a) the First Plaintiff in the sum of R11 068 200.00; and
 - (b) the Second Plaintiff in the sum of R25 000.00, as and for damages.”
- [8] In his amended plea, Oliver denies referring to Andrew as a homosexual and further denies wrongfully, unlawfully and intentionally assaulting him. In amplification of the denial he pleads that on 9 September 2006 the First and Second Plaintiffs and one Progress Mphande initiated a verbal and physical attack on the Third Defendant during which:
 - “1. First Plaintiff swore at and threatened the Third Defendant;
 - 2. First and Second Plaintiffs taunted and mocked the Third Defendant;
 - 3. Mphande prodded Third Defendant pushed against his chest and knocked him under his chin;
 - 4. Second Plaintiff swore at Third Defendant grabbed his shirt in a manner which was threatening;
 - 5. Third Defendant moved forward put his arms around Second Plaintiff to prevent him from attacking him further;
 - 6. First Plaintiff hit Third Defendant on his back and Third Defendant let go of Second Plaintiff;
 - 7. First Plaintiff grabbed Third Defendant who in turn grabbed him and pushed him to get First Plaintiff off him whereupon Third Defendant released First Plaintiff who staggered backwards;
 - 8. When Third Defendant was in the process of moving away from First Plaintiff, First Plaintiff moved toward Third Defendant as if to tackle him and to avoid being attacked, Third Defendant grabbed him at the side of his shoulders turned him and pushed him away whereupon First Plaintiff accidentally lost his footing and fell.”

Oliver moreover denies that he caused any injuries to Andrew and that he assaulted and injured Nicholas.

[9] In his plea, the Fourth Defendant denies that the Plaintiffs had made sufficient averments against him to sustain a cause of action for the damages claimed. The Fourth Defendant however admits that he was joined as a party to make him liable to pay the First Plaintiff's costs. He contends that the First Plaintiff has set out insufficient averments to support a costs order against him.

[10] By agreement the claim of Nicholas was postponed sine die. Therefore, the issues before me at this stage are:

10.1 The determination of the merits of Andrew's damages claim against Oliver;

10.2 The cost orders, namely costs of the appeal, untendered costs in the rescission application, the Fourth Respondent's liability for costs, and costs in terms of Rule 37(9)(a)(ii).

Duty to begin

[11] I was required to determine in terms of Rule 39(11) of the Uniform Rules of Court who bore the duty to begin. My finding in *Merryweather v Scholtz* 2020 (3) SA 230 (WCC) was that Oliver, who relied on self-defence, bore the duty to begin, in keeping with the principle in *Mabaso v Felix* 1981 (3) SA 865 (A) that in actions for damages for assault, a defendant claiming self-defence should ordinarily bear the onus of proving self-defence.

[12] The trial proceeded during 8 to 21 November 2019, 11 to 16 March 2020 and was thereafter postponed to April

2020. However due to the COVID-19 pandemic and the various lockdowns, the trial did not recommence during 2020. The parties declined an offer for a remote trial, deeming this unsuitable. The trial was consequently postponed to March 2021 in open court and continued during 12 to 27 March 2021 and 13 to 14 May 2021.

The Evidence

[13] Oliver Scholtz and Joel Thackwray were the eye witnesses for the Defendants. Andrew Merryweather, Nicholas Merryweather, Progress Mphande and ambulance paramedic Elizabeth Howes were the eye witnesses for the Plaintiffs. All the eyewitnesses expressed difficulty in remembering the details of the unfortunate incident 15 years ago and Andrew had amnesia about the incident. They were referred to the record of the criminal trial pursuant to the incident and in some instances to statements preceding that trial. Four expert witnesses testified. They were medical experts Professor Dunn and Dr Welsh and biomedical engineers, Mr Cloete and Mr De Jongh.

Eye witness testimony for the Defendants

Testimony of Oliver Bradley Scholtz

- [14] Oliver, currently aged 32, was born on 2 July 1988. He was 18 years old on 9 September 2006, the date of the incident, a Grade 12 student at Reddam House in Constantia, and lived with his father, the Fourth Defendant. At the time Oliver weighed approximately 73 kg and was 1.77 metres tall. Oliver has a degree in BA Sports Science from the University of Stellenbosch and as of 2019 was employed by a company, Body 20, which offers personal training. Oliver's testimony is set out below.
- [15] On the evening of 8 September 2009 Oliver and a group of friends went out to celebrate his friend Dale Killian's birthday. They started the evening at a Waterfront restaurant, Brauhaus House and then proceeded to Sobar, a club on Main Road in Claremont, opposite the Engen Garage.
- [16] Oliver consumed beer at the restaurant but could not recall what he had to drink at the club. There was very little drinking at Sobar, he said because they were in the midst of exams and also because he was supporting a girl who had broken up with her boyfriend. They arrived at Sobar at about 11:00 pm. It had been arranged that Killian's mother would fetch them from the Engen Garage at the corner of Main and Protea Road, Newlands.
- [17] Oliver estimated that he went to the Engen Garage at about 01:45 am, by then the early hours of 9 September. He was neither inebriated nor tipsy. He went into the Quick Shop where he ran into an old friend and had a chat. He next remembers picking up a packet outside the Quick Shop in the vicinity of the car parked in parking bay 1 or 2 immediately outside the entrance door to the shop. A map of the Engen Garage being Exhibit A, depicted the parking bays as well as other relevant places at the garage site referred to in his testimony. He was going to throw the packet in the bin to the right of the Quick Shop. He explained this to be a mundane exercise to keep him occupied while waiting.
- [18] Whilst he was on his way towards the brick wall where the bin was located next to the kiosk, he described the sequence of events resulting in the injury of Andrew. He recalls hearing the following words directed at him from someone he did not know:

"Watch out for my car it's a very expensive fucking car. I own a production company and have connections who will come fuck you up."

Oliver said he subsequently discovered that these words had been uttered by Andrew. It was a raised aggressive voice, threatening and unwarranted. He was facing the parked cars at the time but he does not have a specific recollection of seeing Andrew. His friends Joel Thackwray and Liam Hechter were in the more immediate area, roughly on the pavement near the car in parking bay one and the rest of his group were close by to the left of the shop entrance. Oliver recalled one of his friends retorting: "I am sleeping with a woman who owns Claremont," in response to Andrew's comment about owning a production company.

- [19] Oliver recalled trying to make sense of what Andrew was saying to him. As he moved close to the door of the shop, Andrew's friend, Progress Mphande, who Oliver did not know at the time, came towards him in a calm and amiable manner. He excused his friend, saying that he gets like this when he has too much to drink. Oliver thanked Progress for coming to make sense of the situation. In cross-examination Oliver denied that he and his friends started the verbal hostilities.
- [20] Oliver noticed that at some stage Andrew had been joined by Nicholas who he also did not know at the time. They were standing opposite him in the parking bay hurling insults as a combined force. Oliver only recalled one comment, "I don't believe you are 18 you look so young", and he was asked to show his ID. Oliver became sensitive and responded, "Who the fuck do you both think you are"?
- [21] Something was then said by one of Oliver's friends which upset Progress. During cross-examination it was put to Oliver that Progress would testify that he heard a comment, "look at those gay guys", Andrew lost his temper and said "you can't talk to us like that". Progress says thereafter all hell broke loose. Oliver denied making any homophobic comments but said Progress became angry and prodded Oliver. The latter raised his hands and arched his body back saying, "be calm". Next Oliver remembered the Merryweather brothers coming closer towards him in the area in front of the door. Oliver did not sense his friends were close by, and was isolated. Around that time, he saw the car of Mrs Killian, Dane Killian's mother.
- [22] A physical confrontation then ensued. Nicholas was fast approaching him aggressively and made contact with him on his chest. Oliver grabbed Nicholas with both arms around his body, the idea being that if he had him in that position he would limit his arm movements so Nicholas could not hit. The situation was not stagnant and in the ensuing scuffle Nicholas and Oliver moved towards the kiosk/ ATM area, with, at the time, Oliver's back turned towards Protea Road and his front facing the kiosk area.
- [23] The next thing Oliver remembered was a forceful push/smack from behind him on his back. He did not see who push/smacked him. However, from the transcript of the criminal trial, he realised this was Andrew. He walked towards the wall to steady himself, and let go of Nicholas.
- [24] He denied that he kicked Nicholas as alleged in the amended particulars of claim. He denied also that he kicked Andrew. Oliver did not see or hear Joel striking Nicholas with his fist and kicking him, actions as stated in Joel's plea. But after the incident Oliver became aware that Joel had been involved in the scuffle which he said would have happened behind his back. Oliver speculated that Nicholas must have landed up behind Oliver. Oliver estimated that the entire incident from the time he heard First Plaintiff's voice to the end of the physical confrontation would have taken about 5 minutes.

[25] He continued his account by saying after he regained his balance from the push/smack, he and Andrew wrestled opposite parking bay 2. His next memory was being free of the scuffle with Andrew near the ATM. He then attempted to go to Mrs Killian's car. Oliver's evidence thereafter on the crucial final push was confusing and the relevant extracts from the record on what happened while he was walking to the car, is best resorted to in setting this out:

"Oliver: and then Andrew came back round on my right and was in front of me , to my right, and then coming at me..... at a rapid speed, like a rapid explosive movement to me. And then when he was within grabbing distance I reached out and grabbed at his shoulders, because..... there was going to be a collision between me and him and I grabbed his shoulders. And then I stepped to the right and almost deflected him (page 83 lines 1 to 5)

.... And then holding on -and then with my hands on his shoulders, stepping to the side, almost deflecting so he had a trajectory, and based on his movement towards me, and then it just made- instinctively it made physical sense, in order to avoid the collision, to step to my right and almost deflect the movement, step to the side , and then push him away from me in order to avoid the collision. (page 83 line 20 to page 84 line 2)

Mr Whitehead: M'Lady, I'm sorry to interrupt. Can we put on the record that as on at least three occasions, as he says he pushed him, he's moving to the left. He's moving to the left of his left shoulder. (Page 84 lines 3 to 6)

Mr Scholtz: Yes, I moved to my right, and he moved to my left

Ms Gassner: Well, lets just take it – that we can get the right and left sorted out..... Where was his back facing to?

Mr Scholtz: His back was facing towards the sales-towards the building area.

So his front was facing towards Glenhoff/Main Road? (presumably the latter question is by Ms Gassner) (Page 84 lines 13 to 18)

Mr Sholtz: His front was facing Glenhoff and Main Road

Ms Gassner: at an angle?

.....

Court: Am I the only one who is confused? Is that possible- for my front to be facing both Glenhoff and Main Road? (Page 85 line 8)

Ms Gassner: Well I presume- is it at an angle?

Mr Scholtz: Yes, at an angle (Page 85 line 10)

.....

Ms Gassner: So he wasn't perpendicular with his shoulder to the....[intervenes] (Page 85 line 19)

Mr Whitehead: M’Lady, I’m sorry could the witness give his own evidence without leading questions and assisting him? It really is so important that we allow him to give his own evidence (Page 85 lines 21 to 24)

Court: Right. Let’s just- this is a very important... part of the evidence.... ... we’re all trying to understand it ...and you’ve got to tell us so that it makes sense (Page 85 line 25 to page 86 line 8)

Ms Gassner: Perhaps you can draw his shoulders.....

Oliver thereafter proceeded to indicate “y” by way of arrows on the map, indicating the direction Andrew’s head and shoulders were facing. The record continues:

Ms Gassner: And if you say you stepped to the right, where would you have been facing, in direction of which road, or between which roads? (Page 87 lines 10 to 16)

Mr Scholtz: Protea. Ja

Ms Gassner: So... your right shoulder turns towards Protea Road. Have I got it right? (Page 87 line 18)

Mr Scholtz: No. So if I’m facing more towards Protea Road, on the pavement, and then I step to my right. Is that what -am I explaining what you’re asking? (Page 87 lines20 to 22)

Ms Gassner: You need to explain (Page 87 line 23)

Mr Scholtz: Okay. So he was- as I’ve drawn on the arrow- on the layout, he was coming towards me in that manner and in that direction, and when he was within reaching distance, what made the most sense to me at that point in time to avoid the collision was to grab him by the shoulders and then step to the right, and then almost help him on his way, or use his momentum, and then a swivel, and it was a fast movement, and then I pushed him, and then released the shoulders. (Page87 line24 to 88 line 6)....

.... And then when he was in reaching distance moving towards me in the manner I expressed, I grabbed his shoulders, stepped to the right, right shoulder moved towards the white pillar, left shoulder opened up towards Protea road, and then swivelled with him. So my front turned, his back turned, and at a certain point I pushed him away from me. (Page 89 lines 13 to 20).

Ms Gassner: Can you comment on the force with which you pushed him? (Page 89 line 21)

Mr Scholtz: The force was – the force warranted, was what I needed to do in order to get him away from me. So seeing that he became a physical threat, imposing on my immediate space, in that moment I did what I needed to do in order to get him away, or relieve him from being an immediate threat, a physical threat.” (Page 89 line 22 to page 90 line 3)

- [26] During cross-examination Oliver further testified that his arms were nearly fully or relatively extended below shoulder level when he grabbed Andrew's shoulders and did not disagree when it was put to him that the force generated was "just the added extension of your arms from slightly angled to full force", as explained in the criminal trial. He moreover said that when he released Andrew his arms were at full length.
- [27] Oliver saw Andrew lose his footing and fall in the direction of the car parked in parking bay 3. In cross-examination he said he lost his footing because he was no longer steady on his feet. There was no object he tripped over. Oliver said the force he used warranted what was needed in order to get Andrew away. His intention when he pushed Andrew was to avoid a collision.
- [28] Oliver said he did not see Andrew hit the car and has no recollection of hearing him hit the car, but went on to say that he would have heard it. He turned towards Mrs Killian's car, a Chrysler Voyager which was parked roughly opposite the entrance door to the shop and parallel to the building, facing toward Glenhoff Road. He got into the car as quickly as possible to get away from the physical confrontation. The rest of his crowd were already in the car, he being the last to get in.
- [29] Oliver estimated the timespan from when the earlier physical confrontation with Nicholas started up to him pushing Andrew to be approximately 20 to 30 seconds. During cross-examination it was put to him that this was impossible. He was also asked why he had tried to give a time span when he could not remember so much else. He responded that the timespan was plausible and he was doing his best to give an accurate time frame.
- [30] It was difficult for him to remember precise details after he got into the car. Nicholas came to the driver's side banging on the window and shouting. The occupants of the car were also shouting. He could not remember what was said, save to say that Nicholas and Mrs Killian had a hostile verbal exchange. At some point a security guard came and Mrs Killian gave her details. Her mind-set was to leave because everybody was heated and there was a hostile situation.
- [31] Later on the morning of Saturday, 9 September 2006, Oliver learnt about Andrew's injury from Joel and his Dad. They had all gathered at the Killian's house later that day and there was talk about Mr William Booth becoming their lawyer.

Cross-examination of Oliver Scholtz

- [32] During cross-examination Mr Whitehead, Andrew's counsel, asked Oliver about his long pauses when answering straightforward questions. Oliver said he was struggling to remember. He was reconstructing based on memories and had to put together the pieces in between. He was trying to recall based on the record of the criminal trial and his reconstruction. He could not remember if he wrote everything down.

- [33] It was pointed out that Oliver's attorney did not put his version of self-defence to Andrew and Nicholas during the criminal trial. Oliver could not say why this was so. It was put to him by Mr Whitehead that he would argue that Oliver's self-defence version was made up and that is why his attorney had not put it to the Andrew and Nicholas during the criminal trial. It was further put to Oliver that self-defence only became his version when he testified in the criminal trial, and that the prosecutor had also questioned him about his attorney's omission. Oliver said he had no specific recollection of telling his attorney the whole version that he had presented in this court. He did not know why he had not told his attorney, Mr Booth, to inform the senior public prosecutor that the Merryweather brothers had assaulted him.
- [34] He estimated that when he pushed Andrew he was a meter away from him and the maximum distance he would have moved was half the width of parking bay 2, a distance measured to be 1.5 metres. It was put to him that on his version that Andrew fell when Andrew was a metre away from him and then fell a further 1.5 metres, that Andrew could not have sustained the injury to his head, given Andrew's height of 1.5 metres.
- [35] He could not say why the First Plaintiff would have lost his footing given that there were just bricks and no object that he tripped over. It was put to him that Mr De Jongh would testify that it was impossible for Oliver to have seen Andrew fall backwards and not see him hit the car. Oliver insisted that he had not seen him hit the car.
- [36] Oliver was asked how it was possible that he had not seen and heard Joel's confrontation with Nicholas. He said that he had no difficulty with seeing or hearing but could not explain why he had not seen this. He could also not explain why, after assaulting him, Nicholas would have come aggressively to the car as they were leaving.
- [37] He learnt from his legal team that Andrew had a blow on his face after the final incident with him but denied being responsible this. He said the only time he could have caused this was after he was pushed in the back and before the final push, at which time he was not near Andrew's face. On this aspect Oliver was cross-examined about the statements of Dane Killian and Liam Hechter which were provisionally admitted in terms of section 3(3) of the Law of Evidence Amendment Act 45 of 1998, on the basis that if those witnesses were not called to prove their hearsay evidence, the evidence would be disregarded. The Plaintiffs who relied on this evidence did not call them to testify. Their evidence is thus disregarded. I note that an adverse inference cannot in my view be drawn from the Defendants' failure to call them. There was no duty on the Defendants to call witnesses who did not corroborate Oliver's version.
- [38] When asked why, if he was under attack, he did not run to the car and shout out to his friends for help, given the danger he was in, he replied that in the speed with which the incident took place

“you don’t think of the best option... you do what you need to do to protect yourself. Perhaps it would have been best to call for help, but with the rate at which everything was happening I was trying to free myself from the imminent threat”.

He was unable to explain why his friends Liam and Joel, who knew he was in danger, would have abandoned him. Oliver had no recollection of any of his friends seeing him push Andrew away. It was put to him that it was strange that none of his friends who were there saw the push and were able to support him.

[39] Oliver denied that the cause of the incident was his group’s drinking too much and losing control. He said Andrew and Nicholas in their drunken state were the aggressors. Oliver however expressed deep regret for the fact that Andrew had ended up in a wheelchair.

Testimony of Joel Thackwray

[40] Joel Thackwray was born on 31 March 1988, and was part of Oliver’s group of friends at the incident in the early hours of 9 September

2006. Joel was 18 at the time and said he weighed 81 kg and was 1.88 metres in height. Joel was subpoenaed to testify by Oliver. Joel, at the time of testifying in 2019, worked as an accounts manager. In September 2006 he was a matric student at Wynberg Boys High. As aforementioned he was charged together with Oliver for the attempted murder of Andrew and assault, grievous bodily harm on Nicholas. He was acquitted on the former charge and convicted on the latter.

His conviction as aforementioned was later set aside on appeal. Joel did not testify at the criminal trial.

[41] Like Oliver, Joel testified about attending a birthday celebration at the Waterfront and thereafter going to the club Sobar in Claremont. Joel left the bar at 01:00 am and proceeded to the Engen garage. He waited for about 10 to 12 minutes for Mrs Killian to arrive. He had been drinking, he said, so his memory was quite patchy.

[42] While waiting he noticed Andrew standing on the pavement facing towards the Main Road. Andrew was quite aggressive. He stood in the middle of parking bay 2 close to the attendant’s kiosk. He recalled Andrew saying “I own a production company I will get guys to fuck you up”. Joel could not say who this was directed at. In Joel’s close proximity were three of his friends. Progress was with Andrew. Joel was on edge because this was unexpected. He could not remember if anybody from his group said anything. He himself could have said “shut-up”. Joel was in the parking area between parking bays 2 and 3 and Oliver at that stage was also there. Joel recalled from a statement he had made that Progress came up to them and said, “Don’t worry about my friend he gets aggressive when drunk.”

[43] When Mrs Killian arrived Joel made his way to her car a minute or two later. Her car was parked in front of parking bay 1 facing Glenhoff Road. On his way to the car, something caught his attention. He turned around and saw Oliver being wrestled by Nicholas on the

pavement between parking bays 2 and 3. Andrew was also there right in front of Oliver facing him, but more to his side. Nicholas was more engaged with Oliver than Andrew was. Joel felt protective toward Oliver and he moved quickly towards him. He remembered throwing a punch with his fist but he could not remember if his punch made contact. During cross-examination his attention was drawn to paragraph 9 of his plea where, contrary to his evidence in chief, it is stated that he punched Nicholas, making contact with him. Nicholas fell and Joel tried to kick him, just a reaction

he said, not malicious. Joel's focus at that stage was Nicholas. Andrew and Oliver moved out of his sight.

- [44] Joel said Oliver might not have been aware of his coming to Oliver's defence as he approached from behind. Joel fell backwards in the process of kicking Nicholas. He accepted that the fact that he had been drinking might have contributed to his losing his balance. He then got up and went to Mrs Killian's car. He did not know what happened to either Oliver or Andrew. He did not see Andrew when he got up. Nor did he see Oliver push Andrew or spear tackle him. He estimated that the time span from his getting involved with Nicholas to leaving the scene to be about 3 seconds.
- [45] When he entered the Killian car three or four boys were already inside and it took under a minute for the rest to get in. Nicholas came to the car and banged on the window and side door aggressively. At that time Joel did not know Andrew had been injured so he did not know why Nicholas was aggressive.
- [46] During cross-examination Joel was referred to the record in the criminal trial and various extracts therefrom. It was put to him that at the criminal trial his attorney, Mr Booth, at no stage put his version that he was acting in a protective capacity towards Oliver or in self-defence. It was pointed to him that Mr Booth referred to the incident as an altercation and a scuffle. When asked why he had not told Mr Booth that his very limited role was to protect Oliver, he said he regretted that he had not spoken more to the lawyer, explaining that his parents asked him not to talk too much about the incident.
- [47] He was pointed to the cross-examination of Nicholas during the criminal trial, referring to Nicholas being kicked repeatedly by someone wearing white takkies. He was further referred to an affidavit in the police docket by Nicholas to the effect that one of the people kicking him was wearing white shoes. He conceded this could have been him. He denied he had repeatedly kicked Nicholas. It was put to him that nowhere in cross-examination of Nicholas did his attorney put his version that he had come to protect Oliver and he had only kicked Nicholas once.

- [48] He was asked why if he was averting an attack on Oliver and being protective towards him, he did not look for Oliver before going to the car. He said his focus was more on Nicholas. When asked how it was possible that the student who testified at the criminal trial had heard a bang when Andrew hit the car and he had not, he offered as an explanation that the area was busy.
- [49] Mr Whitehead put to him that he would argue that Oliver's self-defence version was untrue that Joel was drunk, violent and not in full control of himself. He denied this to have been the case.
- [50] His attention was drawn to the criminal trial evidence of Shane Wolendorp,[2] one of his friends who turned state witness, to the effect that what he could see was not self-defence. It was further put to him that when the prosecutor cross-examined Oliver he said he did not know where his friends were and he was asked what kind of friends he had who did not help him[3]. Oliver also testified that he did not call for help. His only concern was to defend himself.

Eye witness Testimony for the Plaintiffs

Testimony of Nicholas Robert George Merryweather

- [51] Nicholas Merryweather, currently aged 34, is three years younger than his brother Andrew. Nicholas matriculated in 2004 and thereafter obtained a B Com and Marketing Management degree in 2011. He is employed in management. Nicholas testified at the criminal trial in 2010. Nicholas is 1.64 metres tall and weighed 65 kilograms when the incident occurred.
- [52] On the night of 8 September 2006 Nicholas attended at an old boys' function at Rondebosch Boys High School and then went clubbing. He had 4 beers at the school function but nothing to drink whilst clubbing, he said.
- [53] On his way home he received a phone call from Andrew to join him and Progress at the Engen garage in Claremont. When he arrived, he joined Progress and Andrew who were standing in the pavement area near the ATM. At some stage Andrew and Progress went to the bathroom around the corner and returned. Nicholas confirmed in cross-examination with reference to concessions he had made in the criminal trial that Andrew was tipsy and saying irrelevant stuff. Oliver and his friends were standing four to five metres away. His evidence concerning the events that followed culminating in Andrew's injury, is set out below.
- [54] A verbal altercation ensued between Andrew and Oliver. Nicholas confirmed his evidence in the criminal trial to the effect that he did not know who started the comments that evening, that the shouting continued for 3 minutes, that his brother was being a bit aggressive, that aggressive loud comments were exchanged, but Nicholas could not hear what was said. When Nicholas was asked in examination in chief if he had also taunted and mocked Oliver as testified by the latter, Nicholas said he did not recall that. Nicholas stepped in between

Andrew and Oliver to prevent anything further from happening. Oliver grabbed Nicholas's shirt and pushed him back. Nicholas confirmed his evidence in the criminal trial that he stumbled backwards after the push and then went forward and grabbed Oliver by the collar close to his neck. In response Oliver grabbed Nicholas. During the course of their scuffle they moved into the ATM area with Oliver's back towards Protea Road. Nicholas was then thrown to the ground and was kicked multiple times by a person wearing white shoes. He conceded in cross examination that it could have been someone other than Oliver who threw him to the ground. It all happened so quickly.

- [55] Nicholas ended up lying on his side in the alcove facing inward with his back towards the Main Road, his legs pointing towards Protea Road and his head towards Glenhoff Road. While on the ground he lost sight of Oliver, Andrew and Progress. He was helped up by Progress who was behind him in the alcove area. Within seconds after that, from where he was, he saw Andrew being thrown against a Ford Bantam vehicle hitting its fender or wheel. He heard a loud bang noise.
- [56] In demonstrating what happened to Andrew, Nicholas said Oliver, whilst facing his brother, picked him up with both hands from around his waist, and lifted him, with Andrew's feet about 30 centimetres off the ground. Andrew was then tilted backwards from that height, with his back towards the ground, nearly parallel to the ground and his face upwards facing Oliver. Thereafter Andrew was thrown, falling backwards against the vehicle in parking bay 3 with the back of his head hitting the wheel or fender of the passenger side. He described the manoeuvre as a rugby spear tackle. Nicholas confirmed his evidence at the criminal trial that it all happened very quickly.
- [57] After Andrew fell against the vehicle, the person who had tackled him left. Andrew was lying on the ground. Progress attended to him first. When Nicholas later went to check on Andrew he saw blood above his lip.
- [58] Immediately after Andrew's fall Nicholas followed the group of boys to Mrs Killian's car. He did not want the car to leave but to wait for the police to arrive. He was angry and hysterical and conceded he could have said "I am going to f... you all up". He said he was swearing a lot because Mrs Killian wanted to leave. He asked Mrs Killian if she had seen what happened. The hearsay evidence of Mrs Killian in response as testified by Nicholas, became an area of contestation and it is convenient to deal with it before continuing further with the evidence of Nicholas.
- [59] Ms Gassner called for the evidence to be disregarded if Mrs Killian was not called as a witness. Mr Whitehead submitted that an adverse inference should be drawn from Oliver's failure to call Mrs Killian as a witness. I am of the opinion that having regard to all of the factors set out at section 3(1)(c)(i) to (vii) of the Law of Evidence Amendment Act 45 of 1998, such evidence should not be admitted in the interests of justice. I note that whilst all these factors have a bearing, the evidence is peripheral to the disputed versions, does not go directly to proving either version and no reason is given as to why Mrs Killian was not called.

No adverse inference can be drawn from Oliver's failure to call Mrs Killian as a witness, given my finding. As this evidence is disregarded no reference shall be made to the cross-examination of Nicholas about various statements he made pertaining thereto.

- [60] To continue with the evidence of Nicholas, which was interrupted whilst he was at the Killian car, at that point one of the boys in the car said, "Come, come do you want some more?" Nicholas went to check on Andrew, and then to the shop to ask for a first aid kit and to call the police. He then had another interaction with Mrs Killian at her car which had moved closer to parking bay 3. She wagged her finger in his face. He was swearing at her. Nicholas took down her car's registration number before she drove away.
- [61] Nicholas denied Oliver's version that he, Nicholas, swore at Oliver and pointed out that he had grabbed Oliver's shirt only after Oliver had grabbed his. He moreover denied that Oliver had put his arms around him in a bear hug and that he, Nicholas, had literally disappeared from the scene, as testified by Oliver. He said he never left the vicinity at any stage. He furthermore disputed the testimony of Joel to the effect that he and Oliver were wrestling chest to chest and Oliver punched him, Nicholas.
- [62] During cross-examination, Nicholas was referred to Andrew's evidence in the criminal trial that Andrew saw Nicholas being kicked after Andrew had fallen against the car, and that from where Nicholas was lying he could not have seen Andrew. Nicholas conceded that if Andrew's version was correct he, Nicholas, would not have been able to see Andrew fall. He confirmed that during cross-examination in the criminal trial he had described the speed with which the fall happened as being so quick that it was difficult to register and that the manoeuvre had occurred in a split second.
- [63] Nicholas was also referred to his evidence in the criminal trial where he said his brother was picked up at the shoulders and thereafter gave a different version that he was picked up at the waist, adding he was not sure whether it was the waist, because it happened so quickly. He conceded that being picked by the shoulders and the waist are two different movements. He did not know why he would have said his brother was picked up by the shoulders and insisted that he had been picked up at the waist. It was put to him that what he saw pertaining to the shoulders was what happened and he said this could potentially have been so.
- [64] Nicholas confirmed that at an identity parade he was not able to identify Oliver. It was put to him that if he observed the manoeuvre fully he would have been able to identify Oliver as he had seen him before the manoeuvre face-to-face. He said he saw what happened to his brother but the details about what the person looked like was not in his memory.

Testimony of Progress Mphande

[65] Progress Mphande, born on 31 January 1975, has been working at the Theatre on the Bay in Camps Bay, Cape Town as a stage hand since February 2000. At the time of the incident Andrew was working with him there. Progress also testified in the criminal trial. He is 1.8 metres tall.

[66] Progress's testimony about the incident on 9 September 2006 was as follows:

He arrived with Andrew in his car at the Engen garage and Andrew parked in the parking bay directly in front of the ATM. They had arranged to meet Nicholas. They got out of the car, went around the corner of the petrol station to relieve themselves, returned and stood in front of the ATM to wait for Nicholas. Andrew was on the way to being drunk, but Progress did not have to hold onto him. His speech had slowed down. Earlier that evening Progress had three beers and Andrew had about five drinks, which included shooters.

[67] They stood near the shop door, chatting. There were 3 boys close by. One of them said, "Look at those gay guys". Andrew initially did not hear the comment and he and Progress continued chatting. When the same comment was repeated Andrew heard it. They approached the boys and Andrew said to them that they could not make accusations about people they did not know. One of the boys got aggressive and pushed Andrew. He stumbled backwards but managed to find his balance. Progress tried to stop the person who pushed Andrew because he could see the others wanted to join in.

[68] A fight ensued and whilst the commotion was going on Progress saw Nicolas who, by this time, had arrived. Nicholas also tried to stop the fight and also became embroiled. Progress heard a loud bash while he was pushing guys away from Andrew. He turned around and saw Andrew on the ground. He grabbed Andrew from behind and put him on his lap. Andrew said he felt like his neck was broken and his back was sore. Progress saw blood coming out of his nose and ears. Progress saw a golden Chrysler arrive to pick up the boys who had caused the commotion. He told Nicholas to get the registration of the car.

[69] Progress denied Oliver's version that Andrew was hurling abuse at him, was aggressive and that Progress had intervened and asked for his friend to be excused as he gets like this when he has too much to drink. He also denied Oliver's version that Nicholas arrived at the scene and joined the First Plaintiff in hurling insults. Furthermore, he denied that Andrew had said "be careful of my car I have connections and will fuck you up". Progress also denied that he had prodded Oliver.

[70] Unlike Oliver's testimony that at the time of the final incident with Andrew only the two of them were present, Progress said he was there all the time. However, he did not see what was happening to Andrew as he was pushing the others away from him. He also could not say what was happening to Nicholas.

[71] During cross-examination, Progress said that it was difficult for him to give an accurate account of the scuffle. It was many years ago and events had unfolded very quickly.

- [72] He was cross examined about Andrew's demeanour during the verbal exchange preceding the physical confrontation. He said Andrew's demeanour had been fine and he communicated in a normal speaking voice. His body language was also calm. With reference to the evidence of Nicholas at the criminal trial that his brother was shouting and that this continued for 3 minutes, he said he could not recall that happening. He said he did not know if Nicholas was wrong but he did not see that happening.
- [73] He confirmed that he did not see either of the Merryweather brothers being punched or kicked. He said his evidence during the default judgment application to the effect that Andrew staggered and then fell backwards was a mistake. He conceded that he did not see him fall.
- [74] It was pointed out to Progress that at the criminal trial he testified that Nicholas was very calm when he interacted with Mrs Killian at her car. The evidence of Nicholas however at the criminal trial was that he was swearing at Mrs Killian.

Testimony of Andrew Merryweather

- [75] Andrew Merryweather was born on 16 February 1982. He is currently 39 years of age and has been working as a financial planner since 2015. He testified at the criminal trial in 2007. At the time of the incident in 2006 he was working at Theatre on the Bay.
- [76] In the early hours of 9 September 2006, Andrew and Progress arrived at the Engen garage in Claremont in his car after a night of clubbing and parked in the front of the ATM. His brother Nicholas arrived soon thereafter. Andrew confirmed that he had 5 alcoholic drinks earlier and that he was tipsy on the way to being drunk when he arrived at the Engen garage. He too said that he and Progress went around the side of the building to relieve themselves. They returned and walked towards the entrance of the shop.
- [77] The last thing Andrew remembered before he was injured was seeing Oliver's blue eyes. Oliver made a face gesture which drew Andrew's attention to a group of boys and the next thing Andrew remembered was waking up in Progress's arms. Andrew thus has complete amnesia about his involvement in the verbal altercations and what happened to him in the physical fight thereafter. He could not remember his conversation with his brother Nicholas when the latter arrived at the Engen garage. Nor could he remember his exchange with Oliver or who had started it. He assumes there was aggression because of the level of his injury.
- [78] When he woke up in Progress's arms, he recalled being in tremendous pain and confusion and could not feel his legs. Very quickly he realised he could not move them. He was taken to hospital in excruciating and overwhelming pain. Whilst in hospital when he had his first shave he saw bruising on his left eye in the mirror. He spent several months in hospital. He was put in a metal brace to keep his head and neck rigid. This he described as agonising. He is in constant pain, on pain medication as well as medication for many ailments.

- [79] During cross-examination, Andrew was referred to his evidence in the default judgment application in May 2010 when he estimated his weight in 2006 to have been 60 kilograms. He corrected this testimony by saying he had since come to the view that his weight in 2006 would have been less than 60 kilograms, as from a Momentum insurance policy form dated 2015, his weight there is recorded as 57 kilograms in 2015 and his height as 1.72 metres. He reasoned that he would have put on weight after the incident by 2015, being sedentary and wheelchair-bound. He estimated that he would have weighed about 54 kilograms in 2006. During re-examination on the question of his weight he was referred to notes by a Professor Bonnici who examined him in April 2003 and recorded his weight then as 50 kilograms. He was also referred to the report of experts Lewis and Cloete which stated that his weight at the time of the accident was 55 kilograms. On the basis of Professor Bonnici recording his weight at 50 kilograms in April 2003, Andrew re-estimated his weight in 2006 to be about 52 kilograms. He considered Oliver's weight of 73 kilograms and height of 1.77 metres, being 5 centimetres taller than Andrew, to be a massive difference in comparison to him.
- [80] During cross-examination, Andrew was referred to two affidavits attested to by him. The first, dated 5 October 2006, was criticised at the criminal trial for being a thin statement. He was referred to his testimony in the criminal trial concerning that affidavit, in which he said after he woke up he was in and out of consciousness. He stated that he did not tell everything to the police when making that affidavit as he was still in hospital, in pain, not in a clear state and was not interested in giving an affidavit.
- [81] The second affidavit dated April 2007 was made when he was out of hospital and in a clearer state of mind and was drafted with the assistance of his attorney at the time. In this affidavit, he stated that he remembered lying on the ground and out of the corner of his eye he could see his brother Nicholas on the ground with 3 pairs of legs kicking him. This was also his testimony in the criminal trial where he described his brother being at the corner of the ATM, with his hands over his head not getting up. His brother could not see him. He could remember seeing his brother because he was looking for him. Notwithstanding this testimony and the contents of the affidavit, Andrew testified that he was wrong when he said this, as his memory orders were incorrect.
- [82] He explained that he had two memories. The first was Progress holding his head and the ATM behind him. It was not possible that from this position he could have seen his brother. The second separate memory was of his brother at the ATM, his arm guarding his face. He could not recall if his brother was being kicked. He could not say when precisely the memory of his brother was. He said that in the criminal trial and in his affidavit he incorrectly placed the two memories together. He realised he had made a mistake when he was going over his testimony in preparation for this trial.
- [83] During re-examination on this aspect, he was referred to the cross-examination during the criminal trial where he was asked whether he was 100% sure that he saw his brother lying on the ground when he woke up. The record does not complete his evidence indicating "I was going in and out of consciousness. – So the timeframe . . . might be . . .". He explained

what he was going to say was that the sequence of the order of his memory was incorrect and when lying in Progress's arms he did not see his brother and there was a memory reconstruction. He emphasised that he could not remember the sequence clearly. He did not explain this at the criminal trial because he was intimidated by Defendants' attorney, Mr Booth. He was referred moreover to his evidence in cross-examination to the effect that he and his brother can both not? remember things and the timing might not be exact. He said he was trying to tell the court the sequence of memories was not accurate.

[84] In cross-examination he was referred to Groote Schuur hospital patient notes dated 23 July 2002 which records that he was admitted on 23 July 2002 for psychiatric observation. The note records that he was acting weird, aggressive and had alcohol on his breath. He explained that this was when he had a break-up with a long-term girlfriend, he had been at a restaurant that night, finished a bottle of wine and as a result of the break-up had been admitted to hospital. He could not recall how long he remained in hospital on that occasion. He referred to it as an embarrassing night when he was heartbroken.

[85] With reference to the pleadings, he was asked in cross-examination whether it was his evidence that Oliver had grabbed, pushed, kicked, thrown him and or spear tackled him. He responded that it was his case that Oliver assaulted him and put him in the wheelchair and any fighting would have involved all of these acts. He himself did not see it.

Testimony of Elizabeth Howes

[86] Elizabeth Howes was employed by Netcare 911 as an intermediate life support practitioner. On the night in question, she arrived at the scene of the accident together with a colleague. She has an independent recollection of arriving at the garage where she encountered Andrew lying on his back, with his head being supported by an off-duty paramedic. She arrived at the scene at about 02:43 am and Andrew was taken to hospital at 02:45 am. She said her colleagues "did the vital signs" and she completed the ambulance report form. This was done once Andrew was stabilised and they were on their way to hospital.

[87] She recorded on the form inter alia: "Head and face: dried epistaxis reticular haemorrhaging." She explained that dried epistaxis meant a dried nose bleed and haemorrhaging meant that it was controlled i.e. not an active bleed. This meant that the nose bleed had stopped and there was still blood on his face. Reticular, to her, meant "around", explaining that in paramedics' services reticular haemorrhaging would have meant bruising around. In hindsight she doubted the correctness of the term.

[88] She assumed that Andrew had been assaulted and punched in his nose. If someone had cleaned Andrew's face and smeared blood on it, his appearance would have been different. She explained that a bruise-like appearance was different to that of smeared blood. She did not see bleeding out of the Plaintiffs ears or mouth nor did she see blood vessels in his eyes.

- [89] During cross-examination she was referred to the Groote Schuur patient notes for the 'GSH ASCI Unit' which indicated "no facial injuries". She was not in a position to explain why this record differed from her observation on the Plaintiff's face.
- [90] Commenting on her notes on the ambulance report form she indicated that the Plaintiff was fully conscious as indicated on the 'glasco coma scale' of 15 out of 15. The ambulance notes record the time until 03:10 am.
- [91] Ms Howes's qualifications are as follows: in January 2004 to April 2004 she completed an EMS course to learn to be a basic ambulance assistant. In January 2005 to November 2007 she did 2 years of a 3-year National Diploma course.

The Expert Witnesses

The Medical Witnesses

- [92] Professor Dunn, an orthopaedic surgeon, and Dr Welsh, a neurosurgeon, were called as medical experts on behalf of Oliver and Andrew respectively. Dr Welsh operated on Andrew after his injury, and was a state witness in the criminal trial. The medical experts had a meeting of experts and signed a minute on 13 April
2019. They agreed, based on the X-rays and MRI scans that Andrew had sustained a compression flexion type V injury of his 7th cervical vertebrae (C7), characterised by a teardrop fracture. They also agreed that the injury could have been caused either by falling backwards and striking the back of the head against a stationary object, or by Andrew being spear tackled. Dr Welsh however, stated the latter was more probable whilst Professor Dunn was of the view that the probabilities were equal. Their respective opinions are set out below.

Testimony of Professor Robert Neil Dunn

- [93] Professor Dunn is currently the head of orthopaedic surgery, University of Cape Town, Groote Schuur Hospital. Prior to this he was the head of the acute spinal cord injury unit and spinal services at Groote Schuur and Red Cross Hospitals since 2003. He has been an orthopaedic surgeon since 1999. He is chair of the orthopaedic surgery department at the University of Cape Town. He is also the director of the board of the University of Cape Town Private Academic Hospital and a consultant orthopaedic surgeon at Groote Schuur Hospital. Professor Dunn was a past president of the South African Spine Society and is an examiner at the College of Medicine, responsible for running exams for specialist qualifications. He is currently the second vice-president of the South African Orthopaedic Association which is internationally recognised. Professor Dunn's clinical practice is limited to spinal surgery, both paediatric and adult, with a specific interest in deformity. He has personally performed about 4086 spinal procedures. He teaches at UCT to both undergraduates and post-graduates. Professor Dunn has published extensively and presented at congresses nationally and internationally.

- [94] Professor Dunn was requested to express an opinion as to the possible mechanism which caused Andrew's injury. Professor Dunn had neither examined nor treated Andrew. His opinion was based on Andrew's X-rays and MRI imaging from the time of his injury. Professor Dunn also had access to the Groote Schuur Hospital and trauma unit records of 9 September 2006.
- [95] In his view it is not possible to infer from the injuries depicted on the MRI and X-ray scans what mechanism caused Andrew's head to be pushed, what happened and which of the two injury scenarios was more probable. All one could see from the imaging was that a significant amount of force was applied. With his understanding of the bio-mechanics, both scenarios could have created that force. On the imaging the probabilities are equal that both scenarios, namely the Defendants' version that the injury arose as a result of falling backwards, losing balance and hitting the head, and the Plaintiffs' version that the injury was caused by a spear tackle, could have caused this particular injury. During cross-examination Professor Dunn qualified that both mechanisms are possible but it is not possible to work out which one is more probable. However, he stated the fact that Andrew was supine on his back, face upward after the incident, would suggest he had fallen backwards as he was unlikely to have turned himself around as paralysis would have been instantaneous upon striking. He added that both he and Professor Welsh accepted that Andrew did not have compromised bone strength in 2006.
- [96] Professor Dunn said that the reference on the report to "ethanol plus plus" would be the interpretation of the doctor assessing the patient that he had been drinking. The reference to "GCS 15 out of 15" meant that the patient was conscious.
- [97] With reference to the trauma and ambulance records stating "head and face" and "dried epistaxis", Professor Dunn explained that epistaxis is a nose bleed and dried would imply dried blood near the nose. Professor Dunn speculated that Andrew could have been punched on the nose or he could have landed on his nose during the scuffle. The fact that the Groote Schuur records indicated "no facial injury" suggests Andrew had been cleaned up, and there might not have been external evidence of an internal nose bleed.
- [98] Professor Dunn was further referred to the evidence in the criminal trial of witnesses Mr Tollie Badi, a petrol attendant; Mrs Ross, the supervisor at the petrol station; and Constable Dreyton, that Andrew's face was covered in blood. He accepted it was quite clear there was blood, from epistaxis, a bleeding nose, which would have resulted from trauma to his face. With reference to the medical notes recording bruises to his lips and face and "sore on lips", Professor Dunn said this would be consistent with blood that the witnesses testified about. He would imagine that a blow to the nose would reach the lips.
- [99] Professor Dunn accepted during cross-examination that if you are at least one and a half metres tall, as it was suggested Andrew was, and the distance between your feet and the object you strike is a metre, you would not strike your head, but he qualified that it is unclear how Andrew fell against the car.

Testimony of Dr David Glynne Welsh

- [100] Dr Welsh is a specialist neurosurgeon practising at Vincent Palotti Hospital and a consultant at the Neurosurgery Division, Groote Schuur Hospital. He was previously a consultant at the acute spinal cord centre at Groote Schuur Hospital. He has worked in neurosurgery and as a general surgeon since 1993 both locally and in the UK. Dr Welsh has an impressive list of presentations at several neurosurgery and other congresses.
- [101] On 11 September 2006 he performed the operation on Andrew after his injury. In March 2006, four to five months before the injury, Andrew had consulted Dr Welsh with lower back pain. The X-rays showed that the back was normal and the problem resolved itself. Dr Welsh was a witness for the state in the criminal trial.
- [102] Commenting on Oliver's "falling back" version, Dr Welsh said in his report that the Plaintiff is lightly built and if he had fallen backwards over a short distance, it is improbable that his weight would have generated sufficient force to cause a burst of the seventh cervical vertebrae. Considerable force was the most likely cause of the injury. The spear tackle scenario, he said, provides far more directive compressive force. Dr Welsh favoured that scenario, which he explained as Andrew being lifted up and his head pushed against the car.
- [103] Dr Welsh was referred to his evidence at the criminal trial where he said the force could have been to the back or the top of his head. It was put to him that at the criminal trial he did not at any stage say that falling backwards was not a probable scenario. He replied that it was more complicated than that, he was asked in the criminal trial about wrestling and falling back in that context. He clarified that he was a factual and not an expert witness at the criminal trial. He had not prepared a report but had commented on the hospital records and the trauma report.
- [104] The trauma unit notes which recorded at various points "assaulted this evening and smashed against vehicle" and "assaulted tonight and thrown against a stationary vehicle", he said, were not inconsistent with a spear tackle scenario.

The Biomedical Experts

- [105] Mechanical engineers, Mr Trevor Cloete and Mr Cornel De Jongh testified as experts for the Defendants and Plaintiffs respectively. Their joint minute records their respective mandates and agreement as follows at paragraphs 12 and 13:

"12. The experts note that they were working according to differing briefs. CDJ [Mr Cornel de Jongh] conducted a comparative analysis seeking to compare probabilities of the 2 loading scenarios whereas TJC [Mr Trevor Cloete] sought to show that the Defendant's loading scenario was possible in principle.

13. The experts agree that the analysis of CDJ shows that a spear tackle type scenario is more likely to result in the observed injury. However, there is a smaller, but not zero probability that the observed injury could result due to a fall as described by the Defendant. Both reports concur on this point.”

Their respective opinions are set out below.

Testimony of Trevor John Cloete

[106] Mr Cloete is a senior lecturer in mechanical engineering at the University of Cape Town, a post he has occupied since

2006. He has a special interest in dynamic bone mechanics which involves the testing of bone at high speed, and has been engaged in bone studies for 10 years. He has a Master of Engineering degree from the University of Stellenbosch and is currently reading for a PhD. He supervises Master’s students at the University of Cape Town, has a number of publications and reviews articles for journals on bone testing.

[107] Mr Cloete was called upon by the Defendants to express an opinion on the mechanism of injury sustained by Andrew and whether Andrew’s injury could possibly have been caused by falling backwards and striking his head against a stationary motor vehicle. His report was co-authored by Claire Lewis, who provided confirmation for issues pertaining to anatomy.

[108] Mr Cloete did not simulate Andrew’s fall. He explained he could not do so as he did not have sufficient information about velocity, elasticity or the surface with which Andrew contacted. For this reason, he performed “a simple quasi static limit analysis to assess whether a teardrop fracture is possible in principle.”

[109] Oliver’s attorneys took four months to respond to a request to provide a detailed drawing and layout depicting the design of Mr Cloete’s and Ms Lewis’s quasi static analysis. Belatedly, a stickman diagram was provided which was described as “a visual representation of the situation considered in the quasi static limit analysis”. A supplementary report in response filed thereafter by Mr De Jongh, Andrew’s expert, criticized in detail the stickman diagram inter alia for providing a crude analysis and containing errors of simplistic mathematical calculations, which ought not to have occurred. The criticism was neither challenged nor responded to by Mr Cloete, although Mr De Jongh was cross-examined at length about it.

[110] Mr Cloete concluded on the basis of his quasi static analysis that a compression force could be generated under quasi static conditions to cause a teardrop fracture and there appeared to be no mechanical reason to exclude the falling back scenario as impossible.

[111] With regard to paragraph 13 of the joint minute, which records that the experts agree “that the analysis of CDJ shows that a spear tackle type scenario is more likely to result in the observed injury”, Mr Cloete initially testified that it was not his understanding that this

confirmed the view that it was more likely that the injury was sustained due to a spear tackle. His explanation as to why paragraph 13 does not mean what it records was somewhat incomprehensible and perhaps an attempt to extricate himself from the agreement recorded in paragraph 13. In this regard he testified:

“The fact that a certain action is more likely to result in a certain injury, does not mean that the injury has more likely occurred

because of a certain action, that is the bit I disagree with...”

[112] But then when asked if he agreed with the analysis of Mr De Jongh that a spear tackle scenario was more likely to result in the injury, he unequivocally answered “yes”. He also said he could see no reason to doubt Mr De Jongh’s analysis or conclusions.

[113] Oddly, he then went on to say that whilst the data reveals that a spear tackle is more likely to cause the injury, one cannot deduct from the injury that it came from a spear tackle, a view that Mr De Jongh debunked with reference to an article, “A mechanistic classification of closed, indirect fractures and dislocations of the lower cervical spine”, [4] which he described as the gold standard in mechanistical classifications. The article refers to classifications of injuries generated from a critical retrospective analysis from X-rays of 165 fractures, confirming that one can ascertain the likelihood of the injury mechanism from an observation of an injury.

[114] Mr Cloete’s evidence on what was agreed between the experts in paragraph 13 of the joint minute was confusing and his ultimate concession was obtained after he was recalled by Mr Whitehead to test if he had been dishonest in testifying what had been agreed between the experts, which Mr Whitehead ultimately concluded he was not. Mr Cloete denied that he was “out of his biomechanical depth” as was put to him by Mr Whitehead.

Evidence of Cornelius Uys De Jongh

[115] Mr De Jongh is a biomedical engineering expert with 13 years’ experience in the field of injury biomechanics, analysing injury mechanics and causation. He has deposed as an expert in litigation in the USA and locally on numerous occasions. He has authored a number of research papers and journal articles, several on cervical spine injuries, and has presented at conferences locally and internationally. Mr De Jongh is co-inventor of 10 patents. Mr De Jongh is currently a senior lecturer in biomedical engineering at the University of Stellenbosch. He holds the degrees of B. Eng. Mechanical Engineering and MSc. Mechanical Engineering, Stellenbosch University (cum laude) and is currently reading for a PhD. Prior to joining the University of Stellenbosch, he worked as a biomedical engineering project

manager at Leatt Corporation, Cape Town between 2008 and 2019.

- [116] Mr De Jongh was approached on 2 October 2019 to give his opinion on the plausible and probable injury mechanism related to injuries sustained by Andrew. In particular, he was asked to opine on which impact (near vertex of the head or back of the head) was more likely in the causation of Andrew's confirmed C7 compression flexion grade V injury. Additionally, he was requested to give an opinion on "the axial compressive loads (and subsequent likelihood of CF related fractures), generated in the cervical spine during both impact types."
- [117] For the purposes of his report he was required to consider the two opposing versions of the incident by the Plaintiffs and the Defendants. For the purposes of his report, the materials reviewed by Mr De Jongh comprised the evidence of Nicholas and Oliver during the criminal trial, Andrew's medical records and reports as well as the expert medical reports of Professor Dunn and Dr Welsh, and the biomedical report of Mr Trevor Cloete and Ms Claire Lewis.
- [118] Mr De Jongh did not attempt to simulate the actual incident, given that there were many unknown variables. Instead, he carried out a generalised probability investigation on both the spear tackle and falling backwards versions. He conducted tests to illustrate the compression flexion injury mechanism on both versions using crash dummies weighing 78 kilograms and 1.79 metres in length. He compared the results of an impact to the top of the head with one to the back of the head to ascertain which point of impact was more likely to cause a compression flexion injury. For both versions, the dummies were exposed to the force under their own body weight.
- [119] He superimposed the data from the tests on a probability injury risk curve. This, he explained, was a statistical tool which gives the probability of the compression flexion neck injury occurring on the two versions. Applying the data from the crash dummy tests to the injury risk curve, Mr De Jongh concluded there was a 35% probability to sustain a compression flexion injury if the impact is to the top of the head and an 8% probability if the impact was to the back of the head. Mr De Jongh accepted that a compression flexion injury type V to C7 can be caused by striking the back of the head against an object. In this regard he stated in his report:
- "For the tests conducted representing the pure flexion or "back of the head" impact scenario the probability of injury is below 10% for both tests. If Mr Merryweather did indeed fall backwards under his own body weight with no constant driving force behind the impact in contrast to a spear tackle, it may very well be concluded that the realistic compressive neck force experienced by Mr Merryweather for this impact scenario is quite well represented by the test result presented above and hence the probability of injury occurring in this manner below 10% for a worst case scenario."*
- [120] Mr De Jongh concluded that it is therefore much more likely "that Mr Merryweather sustained his injuries due to a spear tackle or being driven head first into a stationary vehicle than being shoved and falling over backwards into a stationary vehicle."

[121] The unchallenged evidence of Mr De Jongh was that it was highly unlikely or improbable that Oliver could have moved out of earshot or far enough away to not see the impact subsequent to shoving Andrew. He explained why this was so in an aid memoire on the time taken to cover 1.5 metres[5] in distance if pushed backwards. His aid memoire states as follows:

“According to Defendants expert report:

A study by Fanta et al (?) (2012) determined that the velocity of the head of an individual falling backwards due to a force applied to their chest was 4965.3 mm/s (standard deviation = 202.6 mm/s) to 5716.5 mm/s (standard deviation = 290.3 mm/s) with the velocity of the left and right shoulders being within 106.6 to 903.6 mm/s of the head.”

By taking a velocity of 5000 mm/s (or 5 m/s) as head velocity, and assuming that Mr Merryweather’s head needs to cover roughly 2 metres to hit the car (due to the arc through which it needs to travel), it would take at the very most 400 m sec (0.4 seconds) for Mr Merryweather’s head to impact the car since being shoved. It is highly unlikely or improbable that Mr Scholtz could have moved out of earshot or far enough away to not see the impact subsequent to shoving Mr Merryweather, having only 400 m sec to do so.”

Mr De Jongh said that in 0.4 seconds one would not be able to turn one’s head away, but one could move one’s eyes. Mr De Jongh’s evidence pertaining to the above was unchallenged.

Space constraint in likelihood of flexion distraction impact mechanism

[122] Mr De Jongh testified that it is doubtful that there was enough space on the sidewalk between Oliver and the front wheel region of the stationary vehicle, which according to the testimony of Oliver, was approximately 1.5 metres, for Andrew, approximately 1.69-metre-tall, to fall over backwards and impact the back of his head on this region of the stationary vehicle. If Oliver, attacked by Andrew, grabbed him at the side of his shoulder, turned him and pushed him away it would make more sense that Oliver would hit the stationary vehicle somewhere other than his head, at his hips or lower back. It is reasonable, his report states, to assume that any person that is pushed backwards, would first stumble and then fall quickly covering the 1.5 metre distance (distance stumbled backwards plus body length would be greater than 1.5 metres), making it extremely unlikely for a head first impact. The only plausible explanation in this case would be that there was an immediate obstruction at Andrew’s feet when pushed backwards, and that he was standing right against Oliver when he was pushed backward, and that he had to start falling down (pivoting at feet) immediately, in order to only cover 1.5 metres and impact the stationary vehicle head first.

[123] During cross-examination, Mr De Jongh conceded that if the measurements on the map, being Exhibit “B”, were aligned with the photograph on Exhibit “A”, then the parking line between parking bays 2 and 3 was incorrectly positioned on the Engen garage diagram (Exhibit “B”). During lengthy cross-examination Ms Gassner put to him the somewhat confusing proposition that with the repositioning of the bay 2/3 parking line, the distance

between Oliver's estimated position and the intersection of the kerb and the bay 2/3 parking line should have been taken to be 2.7 metres and not 1.5 metres. This would have left sufficient room on Oliver's swivel push version for Andrew to have stumbled and lifted his feet approximately 1.5 metres from point of impact. Mr De Jongh did not concede this.

Finding

[124] The well-worn approach when determining which of two mutually destructive versions should be accepted, as set out in *Stellenbosch Farmers' Winery Group Ltd and another v Martell et Cie and Others* 2003 (1) SA 11 (SCA) at paragraph 5, is that to come to a conclusion on disputed issues, a court must make findings on the credibility of witnesses, their reliability and the probabilities.

"On the central issue, as to what the parties actually decided, there are two irreconcilable versions. So too on a number of peripheral areas of dispute which may have a bearing on the probabilities. The technique generally employed by courts in resolving factual disputes of this nature may conveniently be summarised as follows. 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."

See also *Minister of Safety and Security v WH* 2009 (4) SA 213 ECD at 216 J-217F.

[125] The eye witness testimony of events preceding Andrew's injury must be assessed in context. It is the recollection of witnesses of actions and events which occurred with speed, within minutes, fourteen to fifteen years before the witnesses testified. It is moreover the recollection of witnesses who have all admitted to having difficulty remembering. The fact that they were assisted by the transcript of the criminal proceedings does not detract from the fact that their independent recollections had dimmed significantly. This must be borne in mind in assessing their credibility, reliability and the probabilities as applied to the mutually destructive versions.

Oliver's Self-Defence Version

[126] Oliver's self-defence version requires me to accept that Andrew, unprovoked and with only Progress for support, picked a fight with Oliver, who not only was in a larger group, but was also physically bigger than him. This version has Andrew initiating the events of the night by swearing aggressively, relentlessly and in a threatening manner for absolutely no reason whatsoever at Oliver and his group. This simply does not make sense, Andrew's level of "tipsiness" notwithstanding. A more probable catalyst and one that appears to be borne out by the evidence is the "gay guys" comment, which Oliver did not dispute could have been made, his testimony being that something was said emanating from his friend group to which Progress reacted. Joel too conceded he did say something but could not remember exactly what he said. Oliver's attempt to dissociate himself from what was said, claiming not to have heard because he was enjoying a friendly conversation with Progress, is improbable, unconvincing and contrived. Events that night were anything but friendly.

- [127] The reliability of Progress's evidence on this aspect is not in my view tainted by the fact that there were inconsistencies between the evidence of Progress and that of Nicholas and Andrew. Despite these inconsistencies, Progress did not have the demeanour of an untruthful witness, but one who was struggling to remember many years after the event. Progress readily conceded this and that it was difficult for him to give an accurate account of events that evening and of the scuffle. This is hardly surprising given the time lapse. That he would have remembered the "gay guys" comment would not be surprising given that, for him, this started the unfortunate chain of events that night. The inconsistencies in my view therefore do not impugn Progress's credibility and memory on the "gay guys" comment, something which importantly was not challenged under cross-examination and should be accepted as correct.
- [128] As was said in *President of the Republic of South Africa v South African Rugby Football Union and others* 2000 (1) SA 1 (CC) at para 61, the rule adopted by our courts is that if a point in dispute is left unchallenged in cross-examination, the party calling the witness is entitled to assume that the unchallenged witness's testimony was correct. This applies to Progress's evidence, which certainly did not fall into the category of evidence "of so incredible and romancing a nature that the most effective cross-examination would be to ask him to leave the box", as referred to at paragraph 64 of the judgment. See also *Small v Smith* 1954 (3) SA 439 (SCA) at 438 G-H. The probabilities therefore support that the "gay guys" comment emanating from Oliver's group was the catalyst for the unfortunate events that ensued thereafter.
- [129] The evidence on the ensuing scuffle up to the time of the crucial push by Oliver is that of give and take on both sides. However, I note that the averment in the plea that Andrew and Nicholas taunted and mocked Oliver was not borne out in evidence. Nicholas did not recall this and was not challenged on this issue under cross-examination, perhaps rightly so as he did not pertinently dispute that he taunted Oliver. I note also apropos the averment in the plea that Nicholas swore and grabbed Oliver's chest in a threatening and aggressive manner, that Nicholas's evidence, that he grabbed Oliver's shirt after Oliver had grabbed his shirt and pushed him back, whereafter he was thrown to the ground and kicked, was not challenged, and prevails on the authority of *President of Republic of South Africa supra*. Nicholas moreover denied swearing at Oliver but thinks he said "back off". Progress's unchallenged evidence was
- that Nicholas was trying to stop the fight.
- [130] Joel's concession when referred to the criminal record that he could have kicked Nicholas, contrary to his earlier evidence to the effect that he did not make contact; Nicholas's evidence in the criminal trial that he was kicked repeatedly; Joel's attorney's failure to put to Nicholas that he was only kicked once; as well as Nicholas's testimony in this trial that he was kicked multiple times, is suggestive that Joel and Oliver's group were the aggressors and that the violence emanated from them. Mr Whitehead's submission that Joel was drunk, violent and out of control is understandable in the circumstances. I note also that it

is improbable that Oliver could not have heard Joel's confrontation with Nicholas, there being nothing wrong with his hearing.

[131] Turning to the crucial push, it is clear from the extracts of the record of this trial quoted above that Oliver struggled to explain simply and clearly on his own the issues of Andrew's approach, the alleged push/ smack, his response to it and why the minimal proportionate force employed resulted in the serious injury sustained. Mr Whitehead in argument questioned how, if Oliver was walking from the ATM area to the awaiting car, does Andrew come around behind on his right and how do we get the complicated left and right shoulder evidence? Ms Gassner's response that it was clear that Oliver was stepping to the right and swivel pushing to the left does not detract from Oliver's confusing evidence as per the extract from the record

above, and the confusion lingers.

[132] Then there is the fact, as referred to in argument by Mr Whitehead, of Oliver's evidence both in the rescission application and in the criminal trial to the effect that he pushed Andrew away to avoid him, Oliver, being smashed into a stationery car, evidence which did not feature in this trial. Whilst it is so that Oliver was not cross-examined on this aspect, it is unlikely that he would not have remembered that he was in danger of being smashed into a stationary vehicle, and testified about this, given its relevance to his self-defence version.

[133] On the unchallenged evidence of Mr De Jongh that it would have taken 0.4 of a second for Andrew's head to make impact with the car, during which time it would have been highly unlikely for Oliver to have moved out of earshot or far enough away not to have seen the impact of Andrew hitting the car, Oliver's evidence that he did not register or hear the impact cannot be accepted, especially given his evidence that there was nothing wrong with his hearing or sight.

[134] Oliver's self-defence version is not supported by experts Dr Welsh, Mr De Jongh and Mr Cloete, all of whom testified that a spear tackle was the more probable cause of the compression flexion injury Andrew sustained. Professor Dunn, in whose opinion the probabilities were equal on both versions, certainly did not reject the spear tackle version. The fact that the manoeuvre as demonstrated by Nicholas involved the back of the head being struck does not detract from the experts' support for a spear tackle scenario. None of the experts excluded a spear tackle with injury to the back of the head.

Oliver's version of pushing Andrew away with outstretched arms "relatively extended below shoulder level" when he grabbed Andrew's shoulders, as testified in this trial, or of releasing him as he testified in the criminal trial, would, according to Dr Welsh, have been unlikely to generate sufficient force for this type of injury. A spear tackle, in his view, would have generated the directive compressive force resulting in the injury.

[135] Nor is Oliver's version supported by the agreement of the biomechanical experts as recorded in paragraph 13 of their joint minute, namely, that a spear tackle type scenario is more likely to result in the observed injury. Here, it must be recalled that Mr Cloete's unsuccessful attempt to extricate himself from the plain meaning of paragraph 13 and his obfuscatory explanation as to why paragraph 13 was drafted as it was, was followed by him ultimately conceding that he agreed that a spear tackle type scenario was more likely to result in the injury.

Space constraints argument

[136] The evidence of Mr De Jongh that if Andrew, who is 1.69 metres tall, fell back at a distance of 1.5 metres from the car, as testified by Oliver, he would have hit the stationary vehicle somewhere other than his head, does not support Oliver's version. Ms Gassner's submission to Mr De Jongh during cross-examination of a hypothetical scenario based on the parking bay line between bays 2 and 3 being incorrectly positioned did not extract a concession from Mr De Jongh that the estimated distance of 1.5 metres, as testified by Oliver, was incorrect and should in fact be 2.7 metres. Oliver's evidence of the distance being 1.5 metres remains unsettled, and thus weakens the probabilities in his favour, given Mr De Jongh's evidence that Andrew would not have hit his head at this distance.

[137] The fact that during the criminal trial Oliver's self-defence version was not put by his attorney to Andrew and Nicholas in cross-examination also does not favour Oliver's self-defence version. Nor does Oliver's testimony that he did not know why he did not tell his attorney to inform the senior public prosecutor that Nicholas and Andrew had assaulted him. Both Mr Whitehead in this trial and the prosecutor in the earlier criminal trial took issue with the handling of the self-defence version in the criminal trial. Joel's evidence that he did not tell his attorney Mr Booth that he was acting in a protective capacity towards Oliver as his parents asked him not to talk too much about the incident does not assist the probabilities in favour of the self-defence version. Nor does the evidence of Shane Wolendorp in the criminal trial, to the effect that what he could see was not self-defence, favour the self-defence version.

[138] I note that in his answering affidavit in the rescission application, Andrew referred to the attempt to explain and justify why the self-defence version was not put to him or Nicholas as vague, imprecise and unacceptable. The submission was moreover made that Oliver, at the rescission application deliberately embellished his version to concoct a version of self-defence.

[139] Also not in sync with Oliver's self-defence version is his inability to explain why, if the Merryweather brothers had been the aggressors, Nicholas would have frantically tried to stop Mrs Killian's car from leaving. Nicholas's evidence that one of the boys in the car said "come, come do you want some more", which was unchallenged, supports the probabilities that Oliver's group could have been the aggressors and that Nicholas wanted to stop the perpetrator from leaving in the Killian car.

[140] In light of all of the above and, crucially, Oliver's inability to clearly explain Andrew's approach and threatened attack, the swivel push manoeuvre in self-defence, and how the catastrophic injury ensued if, on his version, he used only such force as was commensurate with the attack, the probabilities do not favour his version of self-defence. Oliver's confusing self-defence version does not have the ring of truth and thus impugns his credibility. Moreover, in the telling of his version he did not establish that the swivel push, as a means of defence, with sufficient force to generate the catastrophic compressive flexion injury, was commensurate with the danger of a push/ smack. He also failed to adequately explain why he did not simply avert the attack by running to and taking refuge in the awaiting car. Oliver in my view has thus failed to establish the requirements for a plea of self-defence to succeed as set out in *Ntsomi v Minister of Law and Order* 1990 (1) SA 512 (CPD) at 526 G-H:

"(1) There must have been an unlawful attack or threatened attack and the victim must have had reasonable grounds for believing that he was in physical danger.

(2) The means of defence must have been commensurate with the danger and dangerous means of defence must not have been adopted when the threatened injury could have been avoided in some other reasonable way."

See also *Mngomezulu v Ethekwini Metropolitan Municipality* [2019] ZASCA 91 at para 17.

Courts focus on two separate aspects in this respect: the reaction must be necessary and not excessive. The defender may only use the means and methods which are reasonably necessary to repel the wrongful attack and protect the threatened interest, which is tested objectively. This does not imply that the bounds of defence are exceeded if other effective methods were available or less dangerous actions could possibly have been taken, but the essential question is whether the particular method applied was, in view of the relevant circumstances, reasonable. If it was excessive and unreasonable, the bounds of defence were exceeded and the conduct was therefore wrongful.[6]

[141] Oliver's self-defence version accordingly does not pass muster. I now turn to consider whether the Plaintiff's spear tackle version does.

Evidence about the alleged spear tackle

[142] Nicholas's description of the spear tackle scenario was simple and clear as was his demonstration thereof. It involved Oliver picking Andrew up by the waist, tilting him backward and throwing him against the car with the impact to the back of his head. He was, as alluded to above, cross-examined robustly about his evidence in the criminal trial that he was not sure if his brother was picked up by the waist or by the shoulders. His response that he did not know why he said his brother was picked up by the shoulders and his insistence that he was picked up in the waist area is not in my view destructive of his spear tackle scenario, supported as it is by the expert evidence. Nor in my view does it impugn his credibility. In this regard he was willing to make concessions, as he did when he said the

shoulder lifting scenario could potentially have been the case. However, he insisted as aforementioned that his brother was picked up by the waist.

[143] Although Mr De Jongh's basic assumption that the spear tackle involved an impact to the vertex or top of head did not accord with Nicholas's evidence of a spear tackle with the impact to the back of the head, Mr De Jongh's tests did consider a back of head impact and are not irrelevant, as contended by Ms Gassner. On the basis of Mr De Jongh's crash dummy tests and the injury risk curve, an impact to the back of the head was not excluded from sustaining a compression flexion injury, but lowered the probability to about 8%. Here, it must be borne in mind that Mr De Jongh's spear tackle scenario did not assume additional force, unlike the situation which prevailed, even on Oliver's version. It must also be noted that

none of the experts rejected a spear tackle with a blow to the back of the head. Nor was it suggested that the spear tackle manoeuvre as demonstrated by Nicholas, which involved the back of the head being struck, made the manoeuvre any less a spear tackle.

[144] Ms Gassner submitted that Mr De Jongh's testimony was that the manoeuvre described by Nicholas was not easy to imagine. On an examination of the record however, it appeared, as pointed out by Mr Whitehead, that what Mr De Jongh had difficulty imagining was someone being thrown and flying through the air. That was not the manoeuvre Nicholas demonstrated. He demonstrated Andrew being picked up tilted backwards and then thrown against the car.

[145] Given the relative heights and weights of Oliver and Andrew, I do not accept, as submitted by Ms Gassner, that the spear tackle manoeuvre would have been difficult for Oliver to accomplish. Oliver's weight was 73 kilograms and his height 1.77 metres. Andrew's weight was estimated as somewhere between 52 and 60 kilograms and his height 1.69 metres. At the least Andrew would have been 13 kilograms lighter and at most 21 kilograms lighter. Here it must be noted that Andrew's testimony about his possible weight range did not discredit him as a witness, as suggested by Ms Gassner, but was yet another example of the difficulties of recalling details many years later.

Did Nicholas see Andrew fall?

[146] Ms Gassner submitted that Andrew's evidence in the criminal trial that immediately after his fall he saw Nicholas on the ground in the ATM alcove facing away from him is destructive of the single eye witness account on which the spear tackle rests. Her reasons for rejecting Andrew's explanation that he was incorrect when he said this at the criminal trial as he was getting his memory orders wrong, loses sight of the undisputed testimony of Andrew that he was in tremendous pain and confusion when he woke up immediately after the fall. He was in and out of consciousness. He said he was still in a state of confusion when he testified at the criminal trial and he referred to the incomplete record where he was trying to tell the court he was going in and out of consciousness. This, together with Andrew's general amnesia about what happened between the time he first noticed Oliver

and when he woke up in a confused state, calls into question the accuracy of his evidence as to where Nicholas was and whether he saw the fall. The evidence of Nicholas in contrast on this aspect was unconfused and clear, as was his demonstration of the spear tackle. Andrew's evidence is thus not destructive of the single eye witness evidence on which the spear tackle rests.

Trauma to Andrew's face

[147] Apropos trauma to Andrew's face during the fight, one can accept from the evidence of Professor Dunn and Ms Howes that there was trauma to Andrew's face from epistaxis, or a bleeding nose. Ms Howes assumed that Andrew had been assaulted and punched in the nose. The hospital notes refer to bruises to lips and face. The probabilities are that what Andrew perceived to be a black eye was the trauma which emanated from the scuffle. The probabilities do not exclude that it was either Oliver or Joel who caused the trauma to Andrew's face.

Inconsistencies and contradictions of Plaintiff's factual witnesses

[148] The inconsistencies and contradictions in the testimony of Andrew's factual witnesses have been alluded to above. These notwithstanding, Andrew's factual witnesses did not strike me as untruthful or unreliable. When confronted with discrepancies, be it Nicholas's shoulders versus waist spear tackle demonstration, Andrews's versus Nicholas's evidence on whether Nicholas saw the fall, or Progress's versus Nicholas's recall of events, or indeed peripheral issues, such as Nicholas being unable to identify Oliver at an identity parade, Andrew's testimony about his weight or Progress versus Nicholas as to when the latter arrived at the scene, they candidly admitted to mistakes when required, made concessions and offered plausible explanations. Their demeanour was not that of lying and unreliable witnesses. Then too, as aforementioned, their evidence and indeed that of all factual witnesses must be considered in the context of the obvious difficulties with memory recall so many years later. Their inconsistencies are understandable in witnesses who testify many years after an event. It would have been surprising if there were none.

[149] In *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) at paragraph 10 Zulman JA, commenting on a witness that was not satisfactory in all respects, aptly said,

"However, the proper test is not whether a witness is truthful or indeed reliable in all that he says, but whether on a balance of

probabilities the essential features of the story which he tells are true".

Notwithstanding inconsistencies, what can be said about the Plaintiff's factual witnesses is that on a balance of probabilities "the essential features of the story they tell are true". Importantly, their spear tackle version is supported by the expert evidence of the biomedical experts, Dr Welsh, and deemed equally probable with the Defendants' version by Professor Dunn. These factors tip the probabilities in favour of Andrew.

[150] Regard being had to all of the above in a balancing of the self-defence version of Oliver analysed above, as against the spear tackle version of Nicholas, the probabilities favour the spear tackle version.

[151] The basic ingredients for a plaintiff's cause of action in the case of an Aquilian action for damages for bodily injury as set out in *Evins v Shield Insurance Co Ltd* 1980 (2) SA 814 (A) at 838 H- 839 are

“(a) *wrongful act by the defendant causing bodily injury,*

(b) accompanied by fault in the sense of culpa or dolus on the part of the defendant, and

(c) damnum, ie loss to plaintiff's patrimony, caused by the bodily injury.”

See also *Roux v Hattingh* 2012 (6) SA 428 (SCA) at paras 17, 18 and 26.

[152] On a conspectus of all the evidence, Andrew has established these basic ingredients on a balance of probabilities. He has established that Oliver wrongfully spear tackled him causing bodily injury. Inherent in the spear tackle is fault in the sense of dolus, (which given all the circumstances resonates with dolus eventualis), or at the very least fault in the sense of culpa. Loss to Andrew's patrimony cannot but flow from the foregoing. On a determination of the merits of Andrew's damages claim, I accordingly find that the injuries sustained by Andrew were caused by his being spear tackled by Oliver, and that Oliver is liable for such injuries.

Costs

[153] Given that I have found in favour of Andrew on the merits, he is entitled to his costs in this trial including those of his expert witnesses and Professor Bonnici as agreed. The latter furnished a report. He is also entitled to the costs of the appeal and those costs as well as his costs in the appeal and those costs in the rescission application not covered by the “Third and Fourth Defendant's written tender”.

The Fourth Defendant's liability for costs

[154] Andrew seeks an order that the Fourth Defendant, Oliver's father, be directed to pay the costs of the suit jointly and severally with Oliver, including the costs of the appeal, as well as those costs in the rescission application not covered by the “Third and Fourth Defendant's written tender”. As aforementioned in this judgment the Fourth Defendant was joined as co-defendant in terms of an order granted at the hearing of the rescission application pursuant to a joinder application brought by the First Plaintiff. The Fourth Defendant, in his plea, disputes liability for costs on the claim against his son Oliver.

[155] When the default judgment was set aside, the appeal court ordered on 14 December 2015 that the costs tendered by the Third Defendant were made an order of court and that the costs of the appeal and any other costs not covered by the tender stood over for determination by the trial court. It is noted that the costs tender which was incorporated in

the appeal court order was a tender by the Third Defendant, Oliver, and not his father, the Fourth Defendant. The Fourth Defendant bound himself as surety and co-principle debtor for the due performance by the Third Defendant of the obligations arising out of the tender.

- [156] I note that the allegations in the First Plaintiff's affidavit in the joinder application in support of a costs order against the Fourth Defendant related solely to his involvement in the granting of the default judgment and in the rescission application. There is, as contended on behalf of the Fourth Defendant, no evidence before this Court regarding the Fourth Defendant's involvement in the action against his son Oliver, which Oliver subsequently defended. The fact that Oliver might have stated in cross-examination that he reported to the Fourth Defendant about the case does not in itself provide an evidentiary basis to infer that the Fourth Defendant was in control of the proceedings in this action.
- [157] There is also, as contended on behalf of the Fourth Defendant, no evidence before me that the Fourth Defendant will benefit financially if Oliver successfully resists Andrew's delictual claim.
- [158] In *EP Property Projects (Pty) Ltd v The Registrar of Deeds, Cape Town and another* and four related applications 2014 (1) SA 141 (WCC) it was accepted in principle that potentially a non-party funder could be liable, in the exercise of the court's discretion, for an adverse costs order made against the funded party. However, in that case, the court ordered the funder to pay the costs in circumstances where she was in full control of the litigation, the claim being ceded to her and she stood to benefit substantially financially if the funded party was successful. See also *Gold Fields Limited and Others v Motley Rice LLC* 2015 (4) SA 299 (GJ) at paras 44 – 49 and *Price Waterhouse Coopers Inc and Others v IMF (Australia) Ltd and Another* 2013 (6) SA 216 (GNP).
- [159] The circumstances of this case are distinguishable in that the funders in those cases were funding the Applicant or Plaintiff and stood to receive a share of the spoils.

The cases cited above are not authority for making a costs order against a father on the tenuous basis that he may be financially assisting his adult son in resisting a delictual damages claim.

- [160] Oliver is an adult. There is no evidence before me warranting a costs order against his father as opposed to against him and I am in the circumstances disinclined to grant the costs order against the Fourth Respondent as sought.
- [161] Oliver, as the Third Defendant, is accordingly liable for the costs of suit, the cost of the appeal and such untendered costs as there might be in the rescission application. He is also liable for the expert fees. The evidence does not however support an award of a special costs order against Oliver in terms of Rule 37(9)(a)(ii), being attorney client costs for failing to a material degree to promote the effective disposal of the litigation.

[162] I accordingly order as follows:

1. The First Plaintiff's claim against the Third Defendant succeeds on the merits.

2. The Third Defendant shall pay the First Plaintiff's costs in this action as well as the First Plaintiff's costs in the appeal on a scale as between party and party.
3. The Third Defendant shall pay those costs of the First Plaintiff as are not covered by the Third Defendant's tender in the rescission application, such costs to be on a scale as between party and party.
4. The Third Defendant shall pay the fees of the following experts:

Dr Welsh, Mr De Jongh and Professor Bonnici.

JUDGE Y S MEER

For the Plaintiffs: Adv B Gassner SC

As instructed by DSC Attorneys

For the Defendants Adv J Whitehead SC et Adv S Botha

As instructed by

Chennells Albertyn

- [1] Although the particulars as amended still refer to the First and Second Defendants, as aforementioned, they fell out of the proceedings once default judgment was granted against the Third and Fourth Defendants only.
- [2] Criminal trial record page 514 line 17.
- [3] Ibid page 1077 line 1.
- [4] Allen, Ferguson, Lehmann and O'Brien Spine Vol 7, no 1 (1982).
- [5] This, according to the evidence, was the estimated distance from the push to the point of impact.
- [6] JR Midgley in LAWSA vol 15 (3 ed) at 113.

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