REPUBLIC OF SOUTH AFRICA

IN THE HIGH COURT OF SOUTH AFRICA

GAUTENG DIVISION, PRETORIA

CASE NO: 18518/10

(1) REPORTABLE: NO
(2) OF INTEREST TO OTHER JUDGES: NO
(3) REVISED

[redacted]

22 January 2021

C.J. COLLIS

In the matter between:

M.A.L. FRANTZEN **PLAINTIFF**

and

ROAD ACCIDENT FUND **DEFENDANT**

This judgment is issued by the Judge whose name is reflected herein and is submitted electronically to the parties/their legal representatives by email. The judgement is further uploaded to the

electronic file of this matter on Caselines by the Judge or his/her secretary. The date of this judgment is deemed to be 22 January 2021.

JUDGMENT

COLLIS J

INTRODUCTION

(1) On 8 April 2007, the plaintiff Mr. Merik Antoinette Ludo Frantzen was involved in an accident. As a result of the collision he has instituted a personal injury claim against the defendant.

(2) As per his Particulars of Claim, and specifically paragraph 5 thereof the plaintiff alleges as follows:

"As gevolg van die nalatigheid van die versekerde bestuurder en die ongeluk het die Eiser die volgende beserings opgedoen:
5.1 'n Sagte-weefsel besering van die nek en rug."

(3) On 12 May 2020 the proceedings commenced. At the hearing the parties informed the court that the issue the court was called upon to determine is the causation between the accident of 8 April 2007 and the plaintiff's current movement disorder.

(4) It was further agreed between the parties, that this issue is to be determined separately from all remaining issues and in terms of Rule 33(4) the court ordered such a separation.

(5) In short it was the plaintiff's case that the onset of dystonia was as a result of the collision which occurred on 8 April 2007, which has resulted in severely debilitating effects which the plaintiff alleges he should be compensated for by the defendant. The defendant holds the opposite view.

ONUS

(6) The plaintiff carried the *onus* to establish on a preponderance of probabilities, whether the plaintiff's dystonia was factually caused by the positive act or commission of the insured driver as a result of the collision which occurred on 8 April 2007. Differently put, whether there is a causal link between the collision which occurred on 8 April 2007 and the resultant harm.

(7) Causation as one of the five elements of delictual liability gives rise to two distinct enquiries. The first is a factual enquiry into whether the negligent act or omission caused the harm giving rise to the claim. If it did not, then it follows that this is the end of the matter. If it did, then the issue of legal causation comes into play.[1]

(8) In the decision De Klerk v Minister of Police [2019] ZACC 32 par 24 the 'but for' test is ordinarily applied to determine factual causation.

(9) In the case of 'positive' conduct or commission on the part of the defendant, it must be demonstrated that 'but for' the action (*negligent driving by the insured driver*), the harm (*dystonia*) would not have occurred.[2]

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[1] Lee v Minister of Correctional Services 2013 (2) SA 144 9 (CC) para 38.

[2] Lee judgment supra para 41; Mashongwa v Passenger Rail Agency of South Africa 2016 (3) SA 528 (CC) para 65.

(10) The plaintiff must as a result convince the court that it is more probable than not, but for the collision the harm (dystonia) would not have occurred.[3]

(11) In the present matter the opinion expressed by the various experts who testified will be instructive.

(12) As to the field where medical certainty is virtually impossible the following was stated at paragraph 15 in the Life Healthcare decision regarding statements made by experts:

'Judges must be careful not to accept too readily isolated statements by experts especially when dealing with a field where medical certainty is virtually impossible. Their evidence must be weighed as a whole and it is the exclusive duty of the court to make the final decision on the evaluation of expert opinion.' In Michael & Another v Linksfield Park Clinic (Pty) Ltd & Another [2002] 1 All SA 384 (A); 2001 (3) SA 1188 (SCA) paras 36-37, the court said:

'That being so, what is required in the evaluation of such evidence is to determine whether and to what extent their opinions advance is founded on logical reasoning. That is the thrust of the decision of the House of Lords in the medical negligence case of Bolitho v City and Hackney Health Authority [1997] UKHL 46 [1998] AC 232 (HL(E))'.

The court further expressed the view that:

'The court must be satisfied that such an opinion has a logical basis, in other words that the expert has reached a defensible conclusion.'

[3] Life Healthcare Group (Pty) Ltd v Suliman 2019 (2) SA 185 (SCA) para 16.

(13) It is therefore against this background that the plaintiff's case will be assessed and the conspectus of evidence presented before this court evaluated.

ISSUES NOT IN DISPUTE

(14) By agreement between the parties, the following issues remain common cause between them:

14.1 The *locus standi* and date of birth of the plaintiff;

14.2 Compliance with the statutory requirements by the plaintiff;

14.3 It was further common cause that the accident which occurred on 8 April 2007 was the sole cause and as a result of the negligence of the insured driver.

(15) In the present matter the plaintiff did not testify. The parties were in agreement that the facts giving rise to this dispute, are those facts as recorded in the defendants' neurosurgeons report prepared Dr Percy Miller dated 27 April 2020, and more specifically those facts recorded under paragraphs 1.1 to 1.6 of the report.[4] I will in due course return to those facts where necessary for the purposes of this judgment.

EVIDENCE

(16) On behalf of the plaintiff's case, only Dr Johannes Albertus Smuts testified. In a summary form the witness testified as follows:

16.1 He qualified as a General Medical Practitioner in 1984 and obtained his qualification as a Neurologist in 1993. Soon after qualifying he did a fellowship in America in Electro Psychology and it was during this time that he started using the Botox drug for the management of dystonia.

[44] Defendant's Medico-Legal Report Volume 2 p152-190

16.2 When he started his practice in 1995 his practice evolved into a movement disorder practice and he continued to practice in this field until 2012.

16.3 As to the membership which he holds, he testified that he is a member of the South African Neurology Association, he is a member of the Pain Association of South Africa and he used to previously hold membership of the International Movement Disorder Society.

16.4 During 1988-2004 he was also President of the Dystonia Society of South Africa.

16.5 He examined the plaintiff in order to compile a medico-legal report on 16 February 2009 some two years almost after the accident in question had occurred. Pursuant to such examination he compiled a report which was marked as Exhibit A1 before this court.[5] He also later complied two other further reports, which were marked as Exhibit A2 and A3 respectively.

16.6 During his initial examination of the plaintiff, he reported to him that shortly after the accident he developed spasms of his neck but was able to return back to work although he could no longer work for longer than two hours. Standing presented a major problem to him. Following these spasms, he received injections from an orthopaedic surgeon and he also received sessions from a physiotherapist.

16.7 Around January 2008 he had his "first attack" of spasms which left him unable to control his voluntary movements. Several experts of various disciplines were thereafter consulted and when the plaintiff returned to Dr Smuts, during April 2008, he observed that the plaintiff had a persistent abnormal position of his neck and some continuous movement at the corner of his mouth.

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[5] Plaintiff's Medico-Legal Reports Volume 1 p 43-52

16.8 Upon his examination of the plaintiff during this session he concluded that the plaintiff as a result of the impact had sustained an injury around the cervical region of the spinal cord. Furthermore, that it seems that the impact of the accident is related to the pain syndrome and from the history given it is clear that there is a temporal relationship (link) between the accident and the onset of pain symptoms.

16.9 In his report Dr Smuts as such concluded, that based on the history obtained from the plaintiff and his clinical observations, that the movement disorder is a form of tardive dyskinesia which resulted from medication used to treat the cervical problem as a result of the collision. In respect of his first report compiled, the doctor no longer had any clinical notes available to consult.

16.10 On 18 February 2016, Dr Smuts examined the plaintiff for a second occasion. Pursuant to this examination he compiled a report, which report was handed into the record and marked as Exhibit A2. [6]

16.11 At his disposal when he consulted the plaintiff he obtained collateral information from the plaintiff and also had at his disposal medico-legal reports from a physiotherapist and two neurosurgeon reports.

16.12 On examination, Dr Smuts observed that the plaintiff's attack currently happened about twice a week and that it is often triggered by menial activities. At the time the plaintiff was on no medication as he was of the view that it could precipitate or aggravate the attacks.

[6] Plaintiff's Medico-Legal Reports Volume 1 p 53-57

16.13 In his second report, Dr Smuts opined that given the fact that the plaintiff still presented with a long duration and the persistent nature of the disorder, that he as such suffered from a post traumatic dystonic disease which has rendered him severely impaired.

16.14 He thus diagnosed the plaintiff with a condition known as paroxysmal kinesigenic (meaning short and repetitive) dystonia.

16.15 On 28 January 2020, he examined the plaintiff for the third time and compiled Exhibit A3 pursuant thereto.[7] In this report he observed that the plaintiff's attacks are unaltered and that his functioning is severely compromised.

16.16 During this examination he diagnosed the plaintiff to be suffering from paroxysmal dyskinesia (which are rare disorders) and which may have a primary origin mostly genetic or present as secondary to underlying causes such as due to lesions of the central nervous system.

16.17 In this report Dr Smuts opined that proof of a link or not to the accident, is in his opinion more than the stated facts. It will remain pure speculation.

(17) During cross-examination Dr Smuts conceded the following:

17.1 In many cases dystonia is a very rare condition and it does not have a specific and clear cause (Idiopathic);

17.2 In some instances, it may be caused by genetics or classic dystonia which does not have a clear cause. Another classification is acquired dystonia such as those induced by serious brain trauma and the ganglia;

17.3 That the onset of dystonia can start rather spontaneous;

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[77] Plaintiff's Medico-Legal Report Volume 1 p 58-62.

17.4 That when he examined the plaintiff on the second occasion, he should have diagnosed the plaintiff to have presented with paroxysmal non kinesigenic dystonia (slow and persistent movement) and that his diagnosis made in his second report was incorrect.

17.5 When confronted with his conclusion that the plaintiff's dystonia onset was caused by the collision, he conceded that it was probable, but equally he could not exclude the probability that the plaintiff already had dystonia;

17.6 He opined that where symptoms of dystonia present closer to the trauma being inflicted, a causal relationship can be easily established.

17.7 The witness also conceded that reading the same literature and examining the same patient can only assist to a point. Beyond that point it now becomes a legal and statistical question and not a medical question.

17.8 He also conceded that in the event that the accident was to be eliminated it does not necessarily follow that the dystonia will disappear.

(18) This then the evidence presented by the plaintiff.

(19) Dr Percy Miller, a Neurosurgeon was the first witness to testify on behalf of defendant. He first examined the plaintiff 27 April 2020 in anticipation of the impending trial. Pursuant to his examination he compiled a report the contents of which he confirmed when he took the witness stand. The said report was handed into court and marked as Exhibit B. During his testimony Dr Miller testified as follows:

19.1 On his clinical examination of the plaintiff he could not find that the probabilities point that the 2007-accident is the cause of the dystonia suffered by the plaintiff. Differently put, if the accident did not occur, this would not have resulted in the plaintiff having presented with dystonia later on. The plaintiff in question had several accidents prior to his 2007 accident, and has also had four (4) other accidents since the 2007 accident.

19.2 That in his practice he has not come across a case where a patient who suffered a whiplash injury during the collision, presented with dystonia later on. He has been in practice for over 40 years and have seen thousands of patients over the years. This is more likely to occur where a patient sustained a head injury as oppose to a whiplash injury.

19.3 In the case of the plaintiff he was diagnosed with idiopathic dystonia, i.e. where the cause of the dystonia is unknown.

(20) On 6 May 2020, Dr Smuts and Dr Miller met and compiled a joint minute pursuant to such meeting. The said minute was handed into the record and marked as Exhibit C by the court.[8] As per this minute, the experts were in agreement as to the clinical history of the plaintiff and also the accident history. They were further in agreement that there existed some uncertainty about the medical treatment offered to the plaintiff in the initial stages after his collision. They further agreed on the clinical diagnosis of dystonia and that the cause of the dystonia does not relate to his brain injury. They however held divergent views as to whether the accident in question brought about the onset of the dystonia.

[8] Index Joint Minute p 22-29.

(21) In their joint minute, Dr Miller considered the onset of dystonia, following a cervical spine injury as being a highly improbable clinical existential situation. Furthermore, he raised concern with the finding made by Dr Smuts in his first medico-legal report wherein he concluded that any link between the accident and the onset of dystonia remained speculative, whereas at the time when he compiled his third report, he concluded that the association between the two is now well established. Dr Smuts in contrast opined that rarity of a condition cannot be the only ground on which causal relationship is excluded, and even where a causal relationship between the trauma and onset of dystonia is unclear, it cannot be dismissed.

(22) During cross-examination, Dr Miller agreed that he is a Neurosurgeon and as such not an expert on dystonia, such as Dr Smuts. He referred this court to articles[9] written by Dr Jankovic which was considered by himself and Dr Smuts when considering the link between movement disorders after peripheral trauma. In terms of these articles the author has adopted the following criteria for a diagnosis of peripherally induced movement disorders:

22.1 the injury must have been severe enough to cause local symptoms persisting for at least two weeks or requiring medical intervention within two weeks or requiring medical evaluation within two weeks after the peripheral injury;

22.2 the onset of movement disorder must have occurred within a few days or months (up to a year) after the injury; and

22.3 the onset of movement disorder must have been automatically related to the site of the injury.

[9] Neurology 1994; 44-2006-2014 from the Parkinson's Disease Centre and Movement Disorder Clinic, Department of Neurology, Baylor College of Medicine; Houston TX.

(23) In the very same article the author also recognises that even where the whole criteria is present in a patient, this does not prove that the movement disorder is caused solely by the trauma and that other factors may play a role in its pathogenesis.

(24) The defendant also presented the evidence of Dr Tony Birrell, an Orthopaedic Surgeon who examined the plaintiff on two occasions. Pursuant to his examination of the plaintiff he complied two reports, which contents he confirmed before the court.[10] He testified that he had been in practice for almost 50 years and over these years he has never come across a patient having presented with pure whiplash with dystonia.

(25) During cross-examination he confirmed having seen patients who suffered from spastic torticollis (a form of dystonia) arising from whiplash but conceded that it occurs in very few occasions and that patients usually recover well with treatment.

ANALYSIS

(26) Now, as I interpret the conspectus of the evidence presented before this court, what is common between the parties, is that the 2007-accident was not the first collision that the plaintiff was involved in and during this accident, the plaintiff sustained a mild whiplash injury.

(27) This injury the experts were *ad idem,* should be described as mild as the plaintiff following the accident was able to exit his vehicle and exchanged notes with the other driver. Approximately 30 minutes thereafter he began feeling nausea and went to hospital, but he was not admitted.

[10] Defendant's Medico-Legal Reports Volume 1 p 1-53.

(28) Thereafter and intermittently in the days and months that followed, the plaintiff started experiencing, pain and discomfort, stiffness of his neck for which he called in the interventions of experts of other disciplines.

(29) It is common cause that he presented with dystonia only approximately ten (10) months after this collision, which dystonia as per his own expert was spontaneous and could have been pre-existing and genetic prior to the 2007-accident.

(30) The onset of the dystonia approximately ten (10) months following the trauma is, as I understand the evidence of Dr Smuts, but one of the criteria which the doctor places reliance upon and which time delay he considers as the norm, rather than an exception.

(31) In applying the above criteria and the whiplash injury sustained by the plaintiff; post-accident the plaintiff would have presented with only post-whiplash dystonia, whereas in the case of the plaintiff he however suffers from a more generalized type of dystonia. Thus, on the criteria formulated by Dr Jankovic, it does not appear as if the onset of movement disorder is related to the site of the injury, i.e. his neck.

(32) Furthermore, the articles relied upon by Dr Smuts and also counsel for the plaintiff and having regard to the criteria as formulated by Dr Jankovic on the evidence presented, is not on a balance of probability proof of the cause-and-effect-relationship between peripheral injuries and subsequent movement disorder of the plaintiff. The three legs of the criteria as formulated by Dr Jankovic it appears is not even all present as in the case of the plaintiff.

(33) Dr Miller as mentioned, was of the view that there was no causal relationship between the plaintiff's whiplash injury and the onset of the dystonia with which the plaintiff now presents. He held the view, that if there was, it would be a very rare phenomenon.

(34) Dr Miller held the view, that the plaintiff having presented with the onset of dystonia only (10) months after the 2007-accident, it could hardly be said that there was a causal temporal connection between the two.

(35) Furthermore, the dystonia that the plaintiff presented with, was not only focussed on his neck, but was also facial, ophthalmic, laryngeal, truncal, brachial and thus is makes it exceedingly unlikely that this dystonia is related to whiplash injury as the plaintiff presented with a more generalized type of dystonia. Premised on the above, Dr Miller was sceptic of the criteria as set out in the articles written by Dr Jankovic and as argued by counsel for the defendant, it is more probable that the onset of the dystonia is not connected to the 2007-accident.

(36) The plaintiff carries the onus and must prove a factual causation on a preponderance of probabilities. Differently put, the plaintiff must convince this court, that it is more probable than not, but for the 2007-accident, the harm (dystonia) suffered by him would not have occurred.

(37) The initial diagnosis made by Dr Smuts, his own expert, in his first report and later in his subsequent reports, clearly shows that this *onus* carried by him, on the condition he presented with, is not as conclusive as to what brought about his dystonia and it must as a result then follow that the 2007-accident could not be said to have been the *condictio sine quo non* for his dystonia. His condition having regard to the testimony of his own expert could have been brought on by genetics, or it could have occurred even without the 2007-accident. This condition it was also conceded to by Dr Smuts could just as well have been purely coincidental.

(38) Furthermore, Dr Smuts having made the concession that in the present matter expert opinion can only be placed reliance upon to a point and beyond that point given the rarity of the dystonia it then becomes a statistical and legal question as opposed to a medical question, is furthermore indicative of the probabilities being rather against the plaintiff as opposed to pointing in favour of the plaintiff.

ORDER

(39) Therefore, in respect of the issue this court was called upon to determine:

39.1 In terms of rule 33(4) of the Uniform Rules of Court, the court finds that no causal link could be found between the collision which occurred on 8 April 2007 and the dystonia with which the plaintiff was subsequently diagnosed.

39.2 The defendant being the successful party is as a result awarded the costs of the proceedings, including the costs of counsel.

C.J. COLLIS
JUDGE OF THE HIGH COURT

Appearances

Counsel for the Plaintiff	: Adv. J.S.M. Güldenpfennig & Adv M. Upton
Attorney for the Plaintiff	: Van Der Merwe Attorneys
Counsel for the Defendant	: Adv. A.B. Rossouw
Attorney for the Defendant	: Mothle Jooma Sabdia Inc.
Date of Hearing	: 12-13 May 2020; 22 July 2020
Date of Judgment	: 22 January 2021

Judgment transmitted electronically.