

IN THE KWAZULU-NATAL HIGH COURT, DURBAN

REPUBLIC OF SOUTH AFRICA

Case Number: 11090/2006

In the matter between:-

PRAMESH BISHUNDAYAL

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

JUDGMENT

VAN ZÿL, J.:-

1. The plaintiff claims damages for personal injuries sustained in a motor collision which occurred on 13 December 2003 in Silverglen Drive, Chatsworth in the Durban area. At the time the plaintiff was the passenger occupying the left front seat of a motor vehicle bearing registration number HGH915GG. This was a Ford Cortina light delivery vehicle, commonly known as a bakkie, driven by one Rennie Naidoo. The other vehicle involved, bearing registration number ND518213, was a Volkswagen Jetta sedan driven by one Michael Naidoo.

2. For purposes of the decision which I am presently called upon to make, the issues have been considerably narrowed. This arises from the unusual circumstances prevailing at the time the matter came to trial. In order to place the issues in proper perspective I refer briefly to the pre-trial history of the matter.
3. The plaintiff is a young man born on 12 May 1984, so that he was some 19 years and 7 months of age at the time of the collision and 27 years and 2 months of age at the time when he gave evidence at the trial. During the collision the right front portions of the two vehicles collided with each other. Both the plaintiff, as well as Mr Rennie Naidoo, the driver of the Cortina bakkie, sustained injuries and were thereafter (the same evening) conveyed to the emergency section of the R K Khan provincial hospital by Mr Salayathim Reddy, at the time a stranger to them. The next day both the plaintiff and Mr Rennie Naidoo attended at the Chatsmed Garden Hospital for treatment. Subsequently on the 15th and 18th December 2003 the plaintiff was attended to by a Dr Rajesh Nagar, a general practitioner.
4. During or about November 2005 the plaintiff submitted a claim to the defendant which listed the injuries he claimed to have sustained in the course of the collision and during October 2006 the present litigation ensued. The injuries set out in the particulars of the plaintiff's claim included multiple lacerations of the forehead and nasal bridge, injury to the right eye which included a grazed cornea,

an injury to the right upper eyelid which became septic, injury to the right shoulder, a blunt force injury to the right chest and an injury to the right knee.

5. At the commencement of the trial however, what was to be sought by the parties is a ruling relevant to the causation of certain cognitive deficiencies suffered by the plaintiff. This was foreshadowed in the minutes of a pre-trial conference held between the representatives of the parties, apparently during or about the beginning of November 2010.
6. Therein the parties recorded that the defendant had conceded liability for one hundred percent of the plaintiff's damages proven to have resulted from the collision, so that what remained was a dispute upon the quantum of the plaintiff's damages. But it also appears from these minutes that an additional dispute had emerged, namely a dispute relating to how and when the plaintiff sustained a head injury which left him with a "Y" shaped depressed scar on the left parietal bone, where it was determined that a fracture had occurred and which gave rise to the cognitive deficiencies aforementioned.
7. This scar is situated roughly above and behind the plaintiff's left ear. According to the evidence of the neurosurgeon Dr Du Trevou, who was called by the plaintiff, he estimated the dimensions of the fracture site itself at approximately 2 cm wide, by 2 cm in length and being a

depressed fracture, at about 1 cm deep. He postulated that it had been caused by a focal impact with a hard object of about the same size as the fracture itself. Dr Du Trevou could not, however, say when the injury was sustained.

8. By consent at the commencement of the trial the particulars of the plaintiff's claim were amended, *inter alia*, by the addition of the aforementioned skull fracture as an alleged consequence of the collision, an allegation not conceded by the defendant.
9. The significance of this injury is that the plaintiff has apparently been found to suffer from certain cognitive deficiencies which are consistent with the expected consequences of a brain injury associated with the fracture site. If, therefore, it were to be held that the plaintiff sustained this injury in the course of the collision, the monetary value of his claims against the defendant would be significantly higher than would otherwise be the case.
10. As a result the hotly disputed issue upon which a ruling is by consent sought at this stage is concerned with whether the plaintiff sustained this injury in the course of the collision on 13 December 2003, or on some other occasion, whether before or after this collision. It is the plaintiff's case that the fracture injury was sustained at the time of the collision, but subsequently overlooked until its significance was only discovered much later. The defendant, on the other hand,

contents that this injury was sustained in circumstances entirely unrelated to the collision and consequently can form no part of the plaintiff's claims against it in relation to and arising out of the collision.

11. On behalf of the plaintiff five witnesses were called, including the plaintiff himself. The first witness was Mr Salayathim Reddy, a motor mechanic by trade, but unemployed at the time of giving evidence. He is also known as Gonseel. At the time of the collision he was a stranger to the plaintiff and Mr Rennie Naidoo, the driver of the Cortina bakkie in which the plaintiff was a passenger. According to him he was driving along when he observed the approaching Volkswagen Jetta encroaching onto his side of the road. He took evasive action and missed the Jetta, which then collided with the Cortina bakkie which was following immediately behind his vehicle. As a result he stopped to render assistance and later that same evening took the plaintiff and the driver Mr Rennie Naidoo to the emergency section of the R K Khan provincial hospital where he left them. He became involved in the present litigation when he was contacted by an investigator acting on behalf of the defendant, who obtained a written statement from him on 28 November 2005. By reason of such involvement he again met up with the plaintiff, with whom he was as admittedly on friendly terms by the time he gave evidence at the trial.

12. The significance of his evidence is to be found in his account of the

circumstances under which he rendered assistance at the scene. Visibility was not an issue because, according to him, it was a clear summer's night and the area was well lit with street lights. He described the damage to the Cortina bakkie as being smashed in at the right frontal area, with that area being bent and distorted upwards, but with the bonnet still closed. However, he recalled that the roof was pushed down and the windscreen had popped out. The right door to the cab was jammed, he thought because of the extensive damage on that side of the vehicle. People had gathered and several were apparently trying to render assistance to the driver.

13. He himself went to the left side of the vehicle, in order to render assistance to the passenger, namely the plaintiff. According to him the plaintiff managed to open the passenger door and emerged from the vehicle by himself. He was, however, bleeding heavily and the attention of the witness was in particular caught by the plaintiff's right eye which he described as "*having about popped out*" and as "*about hanging out*". Mr Reddy recounted how he looked the plaintiff over and asked him whether he was "OK", but he said the plaintiff was unsteady and unresponsive to questioning and he concluded that the plaintiff was suffering from shock. He conceded that the plaintiff may have mumbled a reply, but if he did then he, the witness, did not hear it.

14. Mr Reddy further described how he took out his handkerchief and

held it to the plaintiff's injured eye. At the time he noticed that the plaintiff was also bleeding heavily from an area behind his left ear. He described the area as about halfway between the plaintiff's left ear and the back of his head, but he did not investigate the source of the bleeding and could not comment upon the nature of the injury that gave rise to the flow of blood.

15. Mr Reddy said that the driver (a reference to Mr Rennie Naidoo) then emerged from the vehicle and came round to the left side where the witness was attending to the plaintiff. The driver of his own accord took off his T-shirt and used that to try and stem the flow of blood from the injury behind the plaintiff's ear. He said that, upon instruction, the plaintiff eventually himself held the handkerchief in place over his injured eye and the T-shirt over the injury behind his left ear. He estimated that he departed for the R K Khan provincial hospital with the plaintiff and Mr Naidoo within ten to fifteen minutes.

16. In the course of cross examination counsel for the defendant pointed out to the witness that the plaintiff attended at the Chatsmed Garden Hospital the following day, but that he was not treated for any injury at the back of the head. He further pointed out that a series of photographs subsequently taken at the instance of the plaintiff (exhibit "B" at pages 24 and 25) did not contain any photographic record of the left side of the plaintiff's head. In both instances the witness replied that he found that odd. Counsel then put it to the

witness that the defendant's contention was that the plaintiff had not suffered any injury to the left side of his head during the course of the collision, to which the witness replied words to the effect that "*The man was bleeding*". Upon further questioning he stressed that he had observed the flow of blood, but had not sought to examine the nature of the injury giving rise thereto.

17. The second witness for the plaintiff was the driver of the Cortina bakkie Mr Rennie Naidoo and who, when he gave evidence, was a tow truck operator in the employ of his wife. However, at the time of the collision he said that he was self employed operating a scrap metal business. He explained that he employed the plaintiff as his supervisor, in charge of a gang of 6 to 7 manual labourers and had so employed him at that stage for about one and a half years. Part of the plaintiff's duties entailed driving a truck and collecting scrap metal from customers. He described the plaintiff as hard working, well behaved and well liked. Although, at the time of the trial he no longer employed the plaintiff, he was still clearly sympathetic in relation to the plaintiff.

18. Mr Naidoo's account of the collision and its aftermath broadly corresponds with that of Mr Reddy and he confirmed that after he managed to alight, with some difficulty, from the damaged Cortina bakkie, he found Reddy attending to the plaintiff. According to him he also observed a flow of blood on the left side of the back of the

plaintiff's head, somewhere near the ear and as a result he removed his own T-shirt, wrapped it around his fist and applied direct pressure with the T-shirt to the source of the bleeding, which he referred to as a wound, in order to stem the flow of blood. He explained that he did so because he had attended a first aid course at the Red Cross in the late 1980's. Asked about the nature of the injury he explained that he did not observe the actual injury, but merely the area where the bleeding came from before running behind the plaintiff's ear and down his neck. He confirmed that after a while the plaintiff responded to instructions and also held the T-shirt in place over the injury and that Mr Reddy conveyed the two of them to the R K Khan provincial hospital and left them there at the emergency section for treatment.

19.Mr Naidoo's evidence of what followed at the R K Khan hospital has been the subject of criticism by the defendant. This is because he claimed not to have received satisfactory treatment with the result that he eventually he telephoned his wife. She then arrived and collected both the witness, as well as the plaintiff who had also not been treated. The latter was dropped off at his home and Mr and Mrs Naidoo then returned to their own home and retired for the night. The following morning at about 11h00 the Naidoo's collected the plaintiff and set off for the Chatsmed Garden Hospital, a private hospital where they received treatment for their injuries.

20.The defendant has been highly critical of the evidence of Mr Naidoo.

The criticism is directed at his claim to have received very little by way of treatment that evening at the R K Khan hospital. Initially his evidence suggested that he received no treatment, but later he admitted to a nurse examining him whilst he was sitting in a wheelchair and touching the back of his head where he had been injured. No witnesses associated with the R K Khan hospital gave evidence. However, copies of the hospital records were received by consent, as well as a copy of the plaintiff's claim form as submitted to the defendant and which contained a medical report subsequently compiled from such hospital records. The defendant drew attention to the disparities emerging between Mr Naidoo's account of them receiving no significant treatment at the R K Khan hospital and the records which indicated that they had been examined and assessed.

21. The records of the Chatsmed Garden Hospital, where he was examined the following day, recorded that he had been X-rayed at the R K Khan hospital the previous night and that no fractures were identified. According to Dr Shah, the medical practitioner called by the defendant and who identified the Chatsmed notes pertaining to Mr Naidoo as having been made by him, he would have obtained the information from the patient (Mr Naidoo) and not, as suggested by Mr Naidoo, upon enquiry from the R K Khan hospital.

22. The criticism directed at the evidence of Mr Naidoo suggested that he was unreliable, not only because of these apparent contradictions, but

also because he himself still had a pending claim against the defendant for his own injuries arising from the collision. In addition it was submitted that he was on friendly terms with the plaintiff and would be inclined to tailor his evidence to suit the needs of the plaintiff. These criticisms also need to be evaluated against the background of the other evidence relevant to the injuries suffered by the plaintiff and how the existence of the head fracture came to be introduced as an issue in the present litigation.

23. According to the plaintiff's version of events, at the time following the collision, little attention was paid to the injury behind his left ear. The plaintiff said that he himself was primarily if not exclusively concerned about the injury to his right eye and that he feared the prospect of losing this eye, or the sight thereof. This fear would probably have been exacerbated by the subsequent infection of the eyelid, but the effect of his evidence was that this fear was present from the outset. To the plaintiff the primarily visible injuries he sustained, his eye apart, were to his face. The injury above and behind his left ear would have been visible to him only indirectly by the use of a mirror.

24. Assuming for the moment that the plaintiff had indeed suffered the fracture in the collision, then it does not appear unreasonable that the focus of his attention would have been on his eye and other facial injuries and that, by comparison, he would not have had any compelling reason to be unduly concerned about an apparently small

area of injury behind the left ear. The position may have been different had he realised at the time that a fracture was present. But that is not his evidence and his witness Dr Du Trevou, a neurosurgeon, also confirmed that the fracture site would not have given rise to a degree of pain and discomfort which would necessarily have alerted the plaintiff to the fact of a fracture.

25. It is also not insignificant that the plaintiff's facial injuries and in particular the injured and protruding right eye, would have been the primary focus for attention, both at the time immediately following the collision, as well as in the aftermath thereof. Not only was that the effect of the testimony of both the lay witnesses Reddy and Naidoo, but also of the plaintiff himself.

26. As already indicated, the main dispute in regard to the fracture injury is whether it was sustained in the course of the collision, or on some other occasion. The defendant denies that the fracture resulted from the collision and relies on the fact that no independent record of its occurrence was recorded at the critical time following the collision, whether that night at the R K Khan hospital, or at the Chatsmed Garden Hospital the next day. In addition the defendant points to the fact that no reference was made to the alleged fracture injury in the plaintiff's original claim documents submitted to the defendant, or indeed in the original particulars of the plaintiff's claim, when the present action was instituted. The circumstances are indicative, so the

defendant asserts, of the fraudulent inclusion of the fracture claim only at a very late stage of the claim proceedings, in order to bolster the plaintiff's claim for compensation from the defendant.

27. Before turning to the defendant's evidence, it is convenient to pause for a moment to consider how the claim relating to the alleged fracture came to be included, by way of the amendment of the plaintiff's particulars of claim at the commencement of the trial, as the primary disputed issue presently under consideration.

28. Following the collision the plaintiff had been medically examined on a number of occasions over the years. However, in regard to the alleged discovery of the fracture injury, the evidence of the neurosurgeon Dr Du Trevou is of primary importance. He originally examined the plaintiff on 23 June 2010 at the request of the plaintiff's attorneys of record. By way of background information made available to him he was supplied with copies of a report dated 11 June 2010 relevant to the plaintiff and prepared by Professor T Lazarus, a neuropsychologist, as well as a report dated 21 May 2010 following an electroencephalogram (EEG) performed upon the plaintiff by Dr B Bhagwan, a neurologist. Copies of these reports are contained in the bundle marked as exhibit "D" before the court. It is apparent from the report by Prof. Lazarus that the plaintiff had complained to him of blackouts and that he had, as part of his investigations, called for the EEG. In his report Prof. Lazarus commented upon the fact that the

results of the EEG indicated some abnormality sited at the plaintiff's left temporal region.

29. As a result and in his initial report Dr Du Trevou called for further investigation to be undertaken by way of a magnetic resonance scan (commonly referred to as a MRI scan) of the plaintiff's brain, in order to determine whether there might be evidence that the plaintiff had suffered some brain injury. In evidence Dr Du Trevou explained that at that stage he was unaware of the fracture injury, there was no documented history of any brain injury and the plaintiff's symptoms were not readily reconcilable with the nature of the injuries he was reported to have sustained in the collision.

30. On 9 July 2010 Dr D D Royston, a specialist radiologist subjected the plaintiff to a magnetic resonance imaging (MRI) scan and reported evidence of an old united skull fracture of the left parietal bone with mild depression and distortion of the overlying scalp, as well as the presence of a small metallic artifact or fragment at the fracture site. In a subsequent report of 20 July 2010 Dr Royston reported on a computerised tomography (CT) scan, also known as a CAT scan, performed on the plaintiff in order to evaluate the fracture site and commented that the so-called ferromagnetic artifact does not show up on the skull X-ray or CT scan, but is only detectable by the sensitivity of the MRI scan. In evidence Dr Royston explained that an MRI scan employs magnetic and radio waves, as opposed to X-rays, resulting in

a blooming effect due to the artifact's distortion of the magnetic field. If the fragment had been anything but miniscule, it would have shown up on the CT scan. He placed it in the area of the fracture, but on the outside of the skull. According to Dr Royston the size of the fracture area was 25 mm and the depth of depression 5 mm. He was unable to age the fracture and speculated that the metal fragment could have resulted at the time when the injury was sustained, or from subsequent medical treatment to the site of the fracture, such as the tip of a staple separating.

31. In the light of the findings and reports by Dr Royston it appears that Dr Du Trevou concluded that the plaintiff had indeed suffered a brain injury as a result of the skull fracture, as expressed in his supplementary report. In evidence Dr Du Trevou was asked to comment upon the fact that he, as well as apparently other medical practitioners, had not picked up on the skull fracture. Dr Du Trevou said that when he first examined the plaintiff there was little to see of the injury at the site of the fracture and he failed to notice it because there was no obvious abnormality and no history of the fracture, so that he did not expect to find such an injury.

32. Questioned upon the situation which would have prevailed closer to the time of the collision, Dr Du Trevou expressed the opinion that there was likely to have been a laceration at the fracture site and that the presence of the metallic fragment was supportive of this

conclusion. He was of the view that the plaintiff should have been X-rayed immediately after the collision and that it was unfortunate that he was not. However, he pointed out that by the following day the bleeding would have stopped. This suggested that by then the fracture injury would have been less obvious. Whilst he had not himself examined the wound site, Dr Du Trevou stated that if the wound had been sutured, the suture marks would be visible upon subsequent examination, but that he was not aware of any having been applied to the area of the fracture. It was not suggested in the course of the trial before me that any such marks are to be found.

33. Under cross examination Dr Du Trevou confirmed that on the information he was given the plaintiff had not suffered any loss of consciousness at the time of the collision, but he expressed the view that with the type of focal impact involved in the fracture, a loss of consciousness would probably not have followed. Because there was no evidence of any blood clot or obvious injury to the brain underlying the fracture, he considered that the brain injury which resulted was of a subtle nature. He contrasted this type of focal impact with a general blow to the head, where the shock is to the brain as a whole and where a loss of consciousness was far more probable.

34. Dr Du Trevou was taxed in cross examination to express his views on the assumption that the plaintiff suffered the skull fracture in the course of the collision. He said that the injury in the area of the left

parietal bone may have given rise to considerable bleeding, depending upon the nature of the wound itself, because the scalp was very vascular. He pointed out, however, that a wound of this nature, whilst it should have been detected, investigated and treated, was in practice easily missed, particularly when it was obscured by hair and the focus of attention drawn to the frontal facial injuries, with particular emphasis upon the dramatic eye injury. In this regard it was pointed out to him that Dr Shah, at the trauma unit of the Chatsmed Garden Hospital, examined and treated the plaintiff during the day following the collision and had not recorded any scalp injury in the area of the plaintiff's left parietal bone. Dr Du Trevou responded that medical officers not infrequently fail to detect such injuries. He explained however that the reasons for such failures could be many and would include an incomplete physical examination, or the fact that the patient does not alert the practitioner to an injury in that area. He agreed that he would have expected the medical attendants at both the R K Khan hospital, as well as Dr Shah at the Chatsmed Garden Hospital the next day, to have detected the injury. However, in his view no criticism could in this regard be leveled at Dr Nagar, the general practitioner whom the plaintiff consulted on or about 15 and 18 December 2003. This was because in the absence of a specific complaint Dr Nagar would not have been expected to do a detailed scalp examination and in any event, by then the patient would have been cleaned up, the injury partly healed and hidden by hair. But even if the injury had been drawn to his attention, he would not have

expected Dr Nagar to do anything about it, where the patient otherwise appeared unaffected.

35. In the course of cross examination Dr Du Trevou confirmed that the plaintiff had not reported this head injury to him in the course of routine questioning when he first saw him and that the injury, as well as the underlying fracture, were discovered only as a result of the investigations made by reason of the symptoms which the plaintiff complained about. The sequence of the events giving rise to the discovery of the fracture started with the abnormality detected in the EEG result, which gave rise to the MRI scan and was then confirmed by the X-rays and CT scan. It appears that at no stage did the plaintiff complain or himself draw attention to the injury at the fracture site.

36. Contrasted with the evidence presented on behalf of the plaintiff in seeking to explain how he sustained the fracture in the collision, but how it then remained undetected until located by Dr Royston, is the evidence of Dr Shah, an experienced trauma unit practitioner, who was called by the defendant. He confirmed that he was on duty at the Chatsmed Garden Hospital on 14 December 2003 when both Mr Rennie Naidoo and the plaintiff presented at the casualty department for treatment. He took issue with the account of Mr Naidoo regarding the latter's alleged lack of treatment the previous evening at the R K Khan hospital.

37. With regard to the plaintiff Dr Shah was adamant that he would have thoroughly examined the plaintiff and if the plaintiff had indeed suffered the injury at the skull fracture site as he claimed, then the witness would have detected, noted, investigated and treated this injury. He explained how he habitually would have subjected the plaintiff to a head to toe physical examination, which would have included a detailed scalp investigation whereby he would have manually palpated the scalp looking for bleeding, lacerations, tenderness, indications of spinal fluid in the nose and signs of boggiess (a soft mass or swelling) on the scalp. In the absence of him having recorded such an injury he asserted that the plaintiff, at the time when he examined him, was not suffering from such an injury. He confirmed, despite being referred to colour photographs of the plaintiff taken about a week later and appearing in exhibit "B" at pages 24 and 25, that he had no independent recollection of having examined the plaintiff and relies for his evidence entirely upon his clinical notes, made at the time.

38. At the end of the day the parties therefore presented two conflicting versions of the condition of the plaintiff following the collision. On the plaintiff's version he had suffered, *inter alia*, a focal impact injury to the area of the left parietal bone, causing either a cut or a laceration of the scalp and unbeknown to him an underlying skull fracture. According to the defendant he could not have suffered such an injury in the collision because he had no such injury when examined by Dr

Shah the next day and did not alert anyone to such injury thereafter. It follows that it is the defendant's contention is that the injury now under consideration was suffered by the plaintiff on some unrelated occasion and is belatedly and dishonestly now claimed by him to be attributable to the collision in order to bolster his claim for compensation against the defendant.

39. In order to come to a conclusion in this matter I need to consider the totality of the evidence before me, including the quality of the witness testimony, their credibility and the probabilities that emerge. I have to bear in mind that it is the plaintiff who carries the burden of persuading me, on a preponderance of probabilities, of the truthfulness of his version and that if, at the end of the day the scales were evenly balanced, the plaintiff cannot succeed.

40. There is no serious attack upon the credibility of the plaintiff's medical witnesses Drs Du Trevou and Royston and deservedly so. Both of them gave their evidence in a forthright manner and it was not suggested to them that they had erred in any material respects. The position is different in respect of the plaintiff himself, as well as his lay witnesses Messrs Reddy and Naidoo. Plaintiff himself was questioned about this particular injury. He explained that his primary concern was with his facial injuries and that he feared the loss of his right eye at the time. He was not challenged on his evidence that he showered and that his late father cleaned his wounds when he arrived home the

evening of the collision. Nor was he challenged upon his evidence that his father cut his hair prior to the photographs appearing at pages 24 and 25 of exhibit “B” being taken, because his hair interfered with the treatment of his injuries.

41. Plaintiff is neither well educated, nor sophisticated. The same observation would apply to both Mr Reddy, as well as Mr Naidoo. I have been urged to disbelieve the evidence of the plaintiff and these two witnesses because, so counsel submitted, Naidoo in particular was dishonest about the alleged lack of treatment he and the plaintiff experienced at the R K Khan hospital the evening of the collision and because both witnesses are on friendly terms with the plaintiff. In Naidoo’s case he also still has a pending claim for damages against the defendant arising out of the same collision so that it was submitted he had a motive for exaggerating and/or falsifying both his own as well as the plaintiff’s injuries. To plaintiff the motive of bolstering his claim against the defendant was suggested as the reason for dishonesty. Heavy reliance was placed upon the evidence of Dr Shah to avoid the conclusion that the plaintiff suffered the skull fracture in the course of the collision.

42. I have some difficulty with these submission made on behalf of the defendant. Whilst Mr Naidoo’s evidence regarding the events at the R K Khan may appear less convincing in the light of the clinical notes made by Dr Shah at the time, the fact of the matter is that both he

and the plaintiff left the R K Khan hospital that evening and went to the Chatsmed Garden Hospital, a private institution, for attention and treatment the next day. This suggests that they were unhappy with the R K Khan hospital at the time.

43.Despite the entreaties of counsel for the defendant to the contrary, I did not gain the impression, by virtue of their demeanor, that the plaintiff, or Mr Reddy, or indeed even Mr Naidoo, were unreliable or deceitful witnesses. As already indicated, they were unsophisticated but came across as genuine and honest. Of course, I hasten to add that demeanor is a notoriously fallible measure of the reliability of a witness and needs to be employed with some caution.

44.Turning then to the probabilities emerging from the facts before me, the first matter to consider is whether the skull fracture injury claimed to have been suffered by the plaintiff in the course of the collision, could reasonably have occurred. We have undisputed evidence that the plaintiff was a passenger in the Cortina bakkie when it was involved in a front end collision with the Jetta, as a result of which the windscreen popped out and the roof of the cab of the Cortina partly collapsed. The plaintiff hit his head in being propelled forwards and suffered facial injuries. The question is whether it was possible for him to have suffered a focal impact injury to the area of his left upper parietal bone at the same time. The answer, it seems to me, is in the affirmative. The obvious culprit is the safety belt

mounting situated, according to the evidence, at approximately head height on the left rear cabin pillar. Mr Naidoo, apart from frontal injuries, suffered injury to the back of his head, which lends support for the conclusion that the occupants inside the Cortina were also thrown backwards as a result of the impact. In my view it is not unlikely that the plaintiff's head would have collided with some force with the seat belt mounting at the left rear pillar, thus causing the injury and the underlying skull fracture.

45. This conclusion is supported by various other aspects of the evidence.

These include the metal fragment detected by Dr Royston at the fracture site, the absence of any evidence that the wound was ever sutured or otherwise treated and the evidence of both Mr Reddy and Mr Naidoo that immediately after the collision the plaintiff was bleeding heavily from an injury behind his left ear. Their respective accounts of this were consistent and plausible, including that Mr Naidoo removed his T-shirt and used it to apply pressure to the injury in order to stem the flow of blood. This account also finds some support in the evidence of Dr Du Trevou to the effect that an injury to the scalp could bleed profusely.

46. The respective positions of Mr Naidoo and Mr Reddy should also be considered. Mr Naidoo is an older man and was, at the time of the collision, the plaintiff's employer. As such he was well disposed to the plaintiff and concerned about his welfare. Although he did not say so,

as the driver of the vehicle in which the plaintiff was a passenger when he was injured, he may also have experienced a feeling of responsibility for the plight of the plaintiff. But to say that he would, as a result, falsify his evidence appears less likely. The position of Mr Reddy is different. He was at the time the proverbial good Samaritan. He knew neither the plaintiff, nor Mr Naidoo, but stopped as a result of the collision to render assistance and transported the two of them to the R K Khan hospital because, as he explained, it was the closest hospital and he thought they urgently needed treatment. His involvement subsequently came to light as a result of investigations on the instructions of the defendant and thus he again met up with the plaintiff and ultimately became the latter's witness. He freely conceded that at the time of giving evidence he was on friendly terms with the plaintiff, but he denied falsifying his evidence to assist the plaintiff. As a motive for dishonesty, the fact that the witness was on friendly terms with the plaintiff, appears to me unconvincing.

47. In contrast to the plaintiff's evidence is the evidence of Dr Shah. It was not suggested by counsel for the plaintiff that Dr Shah was deliberately misleading or dishonest in his evidence, but merely that he was mistaken and had erroneously missed the skull fracture injury when he examined the plaintiff on 14 December 2003. The fact is that Dr Shah had no independent recollection of the examination and that his clinical notes, both in respect of Mr Naidoo as well as the plaintiff, erred on the side of brevity. From the facts already alluded to above

we know that when the plaintiff was examined by Dr Shah the day following the collision, he had showered, his late father had cleaned his wounds and his hair was longer than appears in the photographs contained at pages 24 and 25 of exhibit “B”. There is also the evidence of Dr Du Trevou, an experienced neurosurgeon, that it is not uncommon for such injuries to be missed by medical officers in casualty units, although this should not happen.

48. Then here is the manner in which the fracture injury eventually came to light. Had the plaintiff wished to mislead the court and to falsely include in his claim for injuries sustained in the collision, the skull fracture which he sustained on some other unrelated occasion, then in my view it is unlikely that he would have gone about it in such an oblique way. He complained about blackouts to Prof. Lazarus, but without any mention of a head injury or hint at a skull fracture. It was purely fortuitous that Prof. Lazarus commissioned the EEG, the abnormal results of which caused Dr Du Trevou to ask for the MRI scan, the results of which in turn gave rise to the X-ray and CT scan, by virtue of which the existence of the fracture was determined shortly before the trial and many years after the collision. Even for a sophisticated fraudster such a subtle way in which to introduce the fracture claim would have been remarkable. For a man with the lack of sophistication of the plaintiff, as well as his witnesses Messrs Reddy and Naidoo, that would, in my view, be quite astonishing.

49.The only evidence by the defendant which could seriously cast doubt upon the version of the plaintiff, is that of Dr Shah. Upon a consideration of the evidence as a whole I have come to the conclusion that Dr Shah probably missed the fracture injury at the time of examining the plaintiff, but was reluctant to concede of this possibility when he gave evidence. In saying so I do not wish to reflect adversely upon the honesty or integrity of Dr Shah. He may well honestly have held the view that his examination at the time would have been thorough and faultless, but he could be certain because he had no independent recollection of the event.

50.His account of the meticulous examination and palpation I find less than persuasive, especially in view if the evidence of Dr Du Trevou that mistakes of this nature happen not infrequently. Given the fact that the plaintiff had, by the time he was examined by Dr Shah, showered, his wounds had been cleaned and he was no doubt alarmed and preoccupied with his facial injuries and in particular the injuries to his right eye, Dr Shah's attention may well have been diverted from the possibility of any injury in the region of the left parietal bone. This is all the more so if the bleeding had stopped and the plaintiff's hair at the time was longer, so that the injury was obscured by hair.

51.Weighing up all the evidence before me, I have come to the conclusion that it is probable that the plaintiff sustained the skull fracture in the

course of the collision and failed thereafter to alert others to this fact in good time. I find it improbable to a considerable degree that the plaintiff hatched a scheme to falsely claim to have suffered a skull fracture in the collision, when in fact he suffered it on some unrelated occasion. This suggestion simply does not have the ring of truth, despite the unusual circumstances accompanying the plaintiff's account of how the injury only came to light at such a late stage.

52.I have been requested, at this stage, only to make a finding upon the manner in which the plaintiff's fracture injury was sustained. The consequences arising from such injury will be decided, together with any other issues remaining, including considerations of costs, at some future hearing of this matter.

53.That being so, the order which I make is therefore that:-

a. The plaintiff succeeds in establishing that the injury to the area of his left parietal bone and the underlying skull fracture were sustained in the course of the collision on 13 December 2003.

b. All issues of costs are reserved.

VAN ZÿL, J.

APPEARANCES:

For Plaintiff	:	Adv R B G CHOUDREE SC Instructed by Shashi Maharaj & Company of Chatsworth.
For Defendant	:	Adv I PILLAY Instructed by s d Moloi & Company of Durban.

Date argued : 13 October 2011

Delivered : 10 May 2012