IN THE EASTERN CAPE HIGH COURT, BHISHO

CASE NO. 343/07
DATE HEARD: 27/08/2010
DATE DELIVERED: 17/02/2011

In the matter between

NICO KITCHING **FIRST APPELLANT**

WILLIAM JOSEPH KITCHING **SECOND APPELLANT**

and

PREMIER OF THE EASTERN CAPE PROVINCE **RESPONDENT**

JUDGMENT

ROBERSON J

BACKGROUND AND ISSUES

[1] The first and second appellants are father and son respectively. I shall refer in this judgment to the first appellant as Nico and to the second appellant as William.

[2] On the night of 4 September 2006, on the road between Alexandria and Port

Elizabeth, William was severely injured when the vehicle he was driving left the road and overturned. Amongst the injuries he suffered were an unstable fracture dislocation of the spine at the T6/7 level, and four fractured ribs. Thereafter, on that same night, he was transported by ambulance and admitted to Livingstone Hospital in Port Elizabeth, a public hospital falling under the authority of the provincial department of health. On admission, his facial lacerations were stitched and his cervical spine and chest were x-rayed. A chest drain and a central venous pressure (cvp) line were then inserted, in order to treat a suspected haemo-pneumothorax, whereafter he was sent for further x-rays to ensure that the drain and the cvp line were in the correct position. The spinal fracture was visible in the first and second set of x-rays, but was not detected by the treating staff. On the morning of 5 September 2006, he was sent for, *inter alia*, thoracic x-rays, following which the fracture of his spine and paraplegia below the T7 level were diagnosed. The paraplegia is complete and permanent, and William is confined to a wheelchair.

[3] The appellants instituted an action for damages in the court *a quo*. They alleged that on admission to hospital William's spinal cord was not damaged and that he had retained neurological function, but that negligence on the part of the respondent and medical staff at the hospital caused damage to the cord, resulting in the paraplegia. Various grounds of negligence were alleged, but the trial focused specifically on the allegations that the medical staff failed to entertain a high level of suspicion of a spinal injury on admission, failed to

diagnose the fracture of the spine which was visible in the first and second set of x-rays, and failed to take the necessary precautions in order to prevent damage to the spinal cord.[1][1] Nico claimed certain medical expenses incurred in William's treatment, and William claimed under various heads of damages in accordance with his condition. The trial proceeded on the merits only, the issues of the merits and quantum having been separated, and the appellants' claims were ultimately dismissed with costs. The appellants appeal against that judgment, with the leave of the court *a quo*.

[4] Despite many days of expert medical evidence, which the parties had hoped would resolve the issue of whether William's spinal cord was damaged before or after admission to hospital, the decision on this issue depended on a factual finding: did William move his legs after admission to hospital? There was no dispute among the medical experts that such movement indicated normal neurological function of the spinal cord. If William did move his legs after admission, then there must have been a further insult to the spine, between the time of admission and the noted paraplegia the next morning, which resulted in the paraplegia. It is helpful and convenient at this stage to set out the minutes of a pre-trial conference between medical experts for the appellants and the respondent. The minutes were as follows:

1[1] According to the Advanced Trauma Life Support for Doctors, a manual of the American College of Surgeons Committee on Trauma, handed in as an exhibit at the trial, a patient with a suspected spinal injury should be immobilised and placed supine on a backboard without rotating or bending the spinal column, and log rolled if he has to be turned to be examined or taken off the backboard. Log-rolling usually involves four persons turning the patient so that neutral alignment of the entire spinal column is maintained. According to expert evidence at the trial movement of only a few millimetres can compromise the spinal cord if the spine is unstable.

"Reviewing the hospital records, we all agree that Mr. William Kitching had a motor vehicle accident and was first seen in the casualty department of the Livingstone Hospital on 4 September 2006 at 23h37.

Mr. Kitching was seen by the casualty officer and no reference to a spinal injury was made.

Mr. Kitching was then seen at 00h30 hours where it was noted that he was moving all limbs[2] which is usually an indication of normal neurological function of the spinal cord.

Some time during the course of the day on 5 September 2006 it is noted that Mr. Kitching is unable to move his toes, unable to pass urine and subsequently noted to be paraplegic indicating total loss of spinal cord function at that stage.

Accepting that the above is correct we accept that:

1. Mr. Kitching had an unstable fracture at T6-T7;
2. It is rare, but possible to have preservation of neurological function with this type of spinal fracture.[3]

From the documentation and the x-rays it appears that the level of suspicion of a spinal column injury did not meet acceptable standards, and this resulted in the failure to take spinal precautions and this in turn resulted in paraplegia.

Once neurological function had deteriorated we would have expected an attempt would have been made to expedite specific treatment (i.e. surgery). (This would depend on local resources.)"

[5] The appellants' initially alleged that the further insult to William's spine took place when the third set of x-rays were taken, in that he had allegedly got up from the hospital trolley and walked to the x-ray table, and after the x-rays were taken he was found to be paralysed. This version was not persisted with, and the appellants relied on alleged inappropriate movement of William and lack of spinal precautions during the whole period between admission and the diagnosis

[2] Noted by Dr. Leslie, the intern at Livingstone Hospital, who examined William at this time
[3] It was common cause that there is preservation of neurological function in 4% of such fractures

of paraplegia. It was submitted on their behalf that the fact that he was unable to move his toes on the morning of 5 September, indicated a gradual process of cord damage, as a result of pressure on the cord, which led to paralysis.

[6] In dismissing the appellants' claims, the court *a quo* not only found that the appellants had failed to discharge the onus on them to prove that Williams's legs had moved on admission, but found that the contrary had been proved.

EVIDENCE

[7] The expert medical evidence I referred to earlier mainly concerned the cause of the drastic drop in William's blood pressure between the time it was taken at the scene of the accident and the time of his admission to hospital at 23h37 that night. The paramedic who took William's blood pressure at the scene of the accident, Mr. Xoba, died before the trial, but it seems to have been accepted that it was a correct reading and expert opinions about the cause of the subsequent drop proceeded from that premise. It was not in dispute that the reading of 135/90 at the scene, a normal blood pressure, was inconsistent with spinal cord damage, unless it had been taken within minutes after the accident, which was unlikely. On admission the reading was 76/52, which is life threatening, and the blood pressure remained dangerously low until the next morning, despite the infusion of fluids. The experts were agreed that inadequate fluids were administered. However they disagreed about the cause of the drop in blood

pressure, the appellants' experts maintaining that it was attributable to haemorrhagic shock (caused by blood loss) and the respondent's experts maintaining that it was attributable to neurogenic shock (caused by damage to the spinal cord). Ultimately these opinions were inconclusive and no finding could be made about the cause of the drop in blood pressure.

[8] When the ambulance which transported William from the scene of the accident arrived at Livingstone Hospital, Nico, his wife Mrs. Julie Kitching (Julie), Mrs Marcelle Uys, a family friend of the Kitchings for some twenty years, and her daughter Madelie, were already at the hospital, waiting for his arrival. Nico and Julie had been spending the night at the home of Uys, when they received the news of the accident.

[9] Nico testified that he and Julie traveled in their own car, and Mrs. Uys in her car, to the hospital. When the ambulance door was opened, he saw William lying on a stretcher in the ambulance, not on a hard board (known as a trauma board) and not strapped in on the stretcher. He could not remember if there was a drip set up or if William was wearing a neck brace. He and the ambulance driver (a Mr. Zweni, who later testified) placed the stretcher on a hospital trolley and William was taken on the trolley to the casualty section, where another person assisted Zweni to remove the stretcher from underneath William, achieved by rolling him to one side and then to the other. Cuts on William's face were then stitched by a doctor. At this time William was very confused and spoke in a

confused manner, and his upper body and legs began to move. A porter then pushed William's trolley to the x-ray section, accompanied by Nico, Julie, Uys and Madelie (the family group). William was lying on his back on a thin mattress on the trolley. During this time William's upper body moved, he lifted his knees up, and his legs and feet moved. At the x-ray section there were two women, one of whom asked the porter to assist her to move William from the trolley onto the x-ray table. The porter held William under his armpits and the woman held his ankles, and in this fashion lifted him from the trolley onto the x-ray table. The family group was then asked to wait outside, but Nico heard William say that his back was hurting. After the x-rays were taken, William was lifted in the same fashion as before from the x-ray table back onto the trolley. They all returned to the casualty section from where Nico pushed William's trolley to the surgeon on call section ("SOC").

[10] At the SOC William was seen by a doctor (Dr. Leslie), who pushed William into a cubicle and drew the curtain. The family group remained outside the cubicle. The doctor later emerged and told them that William had broken four ribs, two of which had pierced his lung, and that he needed assistance to insert a tube to drain fluid. The insertion of the tube was carried out by the doctor and a colleague, behind the closed curtain. William was then sent for the second set of x-rays. The family group again accompanied William to the x-ray section, pushing the trolley themselves because no porter was available. The same two women were at the x-ray section and requested Nico to assist them in lifting

William from the trolley onto the x- ray table. Nico declined to assist, telling them that he did not have the medical experience to lift someone who had been involved in an accident. The two women themselves then lifted William from the trolley onto the x-ray table, in the same fashion as before, that is one holding him under the armpits and the other by his ankles, causing William's body to bend in a U shape. William again said that his back was hurting. The family group waited outside while the x-rays were taken and thereafter wheeled William back to the SOC. There the same two doctors looked at the x-rays and were satisfied that the drain was effective. At this stage William's whole body was shivering, and it appeared that he was very cold. No blankets were available from the hospital and Nico told Julie to go home to fetch blankets, which she did. William remained in the SOC section until morning because no beds were available. At no stage did Leslie ask anyone in the family group if William had moved his legs.

[11] At about 08h00 on 5 September Sulien Oosthuizen, William's then partner and mother of his two children, arrived at the hospital. A female doctor, Dr. Hattingh, then attended to William. She struck him with her fist on his chest and also asked if he had passed urine. She asked what x- rays had been taken and when told, made a telephone call and asked the person to whom she was speaking why full x-rays had not been taken.

[12] At that stage Nico went home to wash and to collect clothes for William. On his return at about 10h00, he found Sulien at the SOC section, crying and almost

hysterical. He asked her what was the matter and although she spoke in a confused manner, he was able to make out that she said that she had been told that William was paralysed. He did not ask her how this had happened because he was too shocked and she was hysterical. He also never at any stage made enquiries at Livingstone Hospital concerning the cause of the paraplegia.

[13] In a consultation prior to the trial on 2008, with Professor Fritz, a neurologist and one of the appellants' expert witnesses, Nico told Fritz that when he returned to the hospital on the morning of 5 September, Sulien had told him that in the x-ray section William had been made to get off the trolley and onto the x-ray table, and after the x-rays were taken he was unable to get off the x-ray table because he was paralysed. In his testimony at the trial, Nico said that Sulien had not told him that William had got off the trolley and onto the x-ray table, but had told him at a later stage that William had been asked to move from the trolley to the x-ray table and had twice unsuccessfully tried to do so. He did not tell Fritz about what he observed during the first and second set of x-rays, although he knew that it was important to give accurate information to Fritz because she was to be an expert witness at the trial, and that what he had observed during the first and second sets of x-rays was important for the case.

[14] After the accident Sulien continued to live with the Kitchings but her relationship with William ended about two months after the accident and she left the home. From that time until the consultation with Professor Fritz, Nico and

Sulien did not discuss the events at the hospital.

[15] Nico was subjected to detailed cross-examination about what had been said to him by Sulien at the hospital and what he had subsequently told Fritz. Cross-examination revealed that the only person who could have given Nico the information about William being asked to climb off the trolley was Sulien, and that the only occasion on which Sulien could have given Nico this information was at the hospital when he returned on the morning of 5 September. He said he could not clearly hear what she was saying and that she had mumbled but he made out that she said William had been told to climb off and walk, and that is what he thought she said. When reminded that he had said in evidence in chief that all Sulien told him was that William was paralysed, he agreed that this was so. When specifically asked about what was contained in Fritz's report concerning what Sulien had told him, he again said it sounded to him as if Sulien had said that William had been told to climb off the trolley, and that was how he understood her at the time. During the time Sulien lived with the family after the accident, he tried to talk to her about what happened at the hospital but to no avail because she would become emotional and say she did not want to talk about the incident. What had taken place during the third set of x-rays had remained unclear to him but all attempts to get clarity from Sulien were unsuccessful. He only found out what Sulien's account of events in the x-ray room would be when it was disclosed during the trial.

[16] Sulien testified and gave an account of what happened when x-rays were taken on 5 September. She had been informed of the accident but could not go to the hospital immediately because she had to wait for her child minder to arrive to take care of her children. During this time Julie arrived home to fetch blankets for William. Sulien arrived at the hospital on the morning of 5 September and met Dr. Hattingh who asked why x-rays of William's back had not been taken. Hattingh telephoned someone and complained about this omission and told Sulien that she should go with the porter to take William for further x- rays. Two men were in the x-ray room, and they lifted William on a sheet by his feet and arms onto the x-ray table. Sulien was given a protective jacket to wear and was asked to lift William's arm while certain x-rays were taken when he was lying on his side. William was moved in the same manner back onto the trolley and from there she and the porter took William to another x-ray room, where a young woman put the trolley next to the x-ray table and asked William if he was able to move himself onto the table. He managed twice to lift his shoulders about a centimetre by pressing his hands against the trolley, but could do no more. The woman said that William was too heavy for her to lift (he weighed 98 kilograms at the time) and went to get help. Sulien was then asked to wait outside but she could hear William saying that they were hurting him. Thereafter William was pushed back to the casualty section, the x-rays were given to Hattingh, and Hattingh informed Sulien that William was paralysed. Sulien met Nico in the ward to which William had been transferred and she remembered telling him that William was paralysed and was not going to walk. She was unable to remember

if Nico had asked her what had happened in the x-ray room. Sometime after the accident she and William separated in an atmosphere of animosity.

[17] Sulien too was subjected to detailed cross-examination concerning what was said by her to Nico at the hospital and what Nico had told Professor Fritz. She said that during the time she was living with the Kitchings after the accident they tried to talk about what happened when she was with William in the x-ray rooms, but she would always get upset and they would abandon the attempt. She acknowledged that Nico, as William's father, would have wanted to know what had happened in the x-ray rooms, and that very little had in fact happened in the x-ray rooms, but she had no idea why she did not tell him. When asked from whom else Nico could have heard that William had walked from the trolley to the x-ray table, she suggested more than once that Nico should be asked. She eventually said that she did not know where Nico had got this information, that he was wrong if he said he got this information from her, and that she had not given him such information.

[18] Mr. Zweni the ambulance driver testified that he found William at the scene of the accident and after examining him placed a cervical collar on him. He and his assistant and the driver of another vehicle then log-rolled William onto a trauma board and placed him on a stretcher in the ambulance. He was not strapped to the trauma board. Zweni's senior Xoba then arrived and examined William and put up a drip. The ambulance then proceeded to Livingstone

Hospital, where William, still on the trauma board, was placed on a trolley and taken to casualty.

[19] Uys testified that when news was received of the accident she and her daughter and the Kitchings traveled in her car to the hospital. When the ambulance arrived at the hospital she saw William inside the ambulance on a wooden board. She went to fetch a trolley and William was put on the trolley, still on the wooden board. Inside the hospital William was seen by two doctors and then sent for x-rays. After these x-rays William was taken into a cubicle and she could see into the cubicle because the curtain was open. She saw the tube being inserted into William's chest. One of the doctors placed William's leg flat and also stroked the sole of his foot with a thermometer or a pen, but there was no reaction or movement. She drew her daughter's attention to this lack of reaction and they both shook their heads. It appeared to her that William was paralysed. They could not communicate with him because he appeared to be semi-conscious. Except for the time that he was in the x-ray rooms, she was with William from the time he arrived at the hospital until she left at about 04h00, and during that time did not observe him moving his legs. She was certain that during this time Julie did not go home to fetch blankets. A few days later, Nico told her that Sulien had told him that the nurses had dropped William, or words to that effect, and that William had walked to the x-ray section. When Uys was approached by the respondent's attorneys to testify at the trial she did not tell the Kitchings because she was too busy at the time.

[20] As already mentioned, Dr. Leslie was one of the doctors who examined and treated William on the night of 4/5 September 2006. He testified that he qualified as a doctor in 2005, and in 2006 worked as a medical intern, in paediatrics, anaesthetics, and obstetrics, and on 1 September started his surgical internship at Livingstone Hospital. On 4 September he began working in the SOC unit at 20h00. He saw William for the first time at about 0h30 on 5 September, after the first set of x-rays had been taken. A drip had already been put up and the first set of x-rays was available. The notes of his examination, which he said he would have written up after the examination, reflected, *inter alia*, that William's airways were not obstructed, he was pale and cold to the touch, his Glasgow Coma Scale was 10 over 15, his blood pressure reading was 60 over 32, and he was moving all limbs. Leslie remembered very clearly why he had recorded that William was moving all limbs, not only because William was one of his first trauma patients, but also because when he found out the next day about the paraplegia, he wondered how he could have missed it. While examining William, he could see that William was moving his arms, and in order to examine his legs he squeezed William's toes to elicit a pain response. He did not remember William moving his legs at this test. His method of eliciting a pain response at that time was to put a needle under the nail bed but he did not want to do that because family members were present, and he did not want to upset them. He recalled a male and three females being present. He therefore asked the group if William was able to move his legs and a woman answered that he was able to.

William was still clothed at this stage. He said it was possible that William had moved his legs but he did not remember seeing him do so. He acknowledged that his conduct in asking the family this question justified criticism but said he did not have a high index of suspicion of a spinal injury, because William was able to move his arms easily and the x-rays revealed that the cervical spine was not damaged. He also acknowledged that he missed the spinal fracture which was apparent from the x-rays. His primary concern was William's critically low blood pressure and he thought that William was bleeding to death. He could see from the chest x-ray that there was air and blood in William's chest, and that there were four rib fractures, and accordingly diagnosed a haemo-pneumothorax, although he was not altogether satisfied with this diagnosis because he did not think that the blood loss from the chest was responsible for such a low blood pressure. His senior, Dr. Mohamed, inserted a cvp line in order to give fluids and blood more quickly, as well as an intercostal drain. While the cvp line and the drain were inserted, they rolled William in order to strap the drain around his chest and he observed an abrasion and a contusion on William's back. William was unclothed at this stage. Dr. Leslie acknowledged that these injuries should have led to a high index of suspicion of a spinal injury but at that stage he had made a diagnosis, which fitted William's symptoms of a low blood pressure and tachycardia, and were common features of motor vehicle accident victims. William was also moving his arms and he thought that William was able to move his legs. Leslie conceded that if he had suspected a spinal injury, he would have treated William appropriately. He had not ruled out a spinal injury, but did not

think it was likely.

[21] Dr. Hattingh was also an intern at Livingstone Hospital during 2006, having qualified as a doctor in 2005. On the morning of 5 September she was on duty in the SOC and she was asked by one of the sisters to look at William, because the family was concerned that he was not passing urine and he was confused. William was in one of the cubicles, lying on a trolley. She examined him and because he had not passed urine, she was concerned that he might have a fractured pelvis or a rupture of the bladder. She also asked him to move his toes but he was not able to do so, nor could he move his legs when she asked him. He also complained that his back hurt. In the notes of her examination she had only noted "unable to move toes" and said she recorded her observation in this way because he was not even able to move his toes. She also noted that there were bowel sounds, although she could not remember what type of bowel sounds she heard. She requested x-rays to be taken, including x-rays of the thoracic spine, and after they had been taken, she and the senior orthopaedic surgeon read them and saw the fracture dislocation of the thoracic spine.

[22] The radiographer who took the first two sets of x-rays was Mrs. Brink. She obtained her first qualification in 1984 and had been the chief radiographer at Livingstone Hospital since 1996. She was on duty on the night of 4 September, together with a student radiographer. She did not specifically recollect taking William's x-rays, and her evidence concerned standard procedures, and what

was apparent to her from the two sets of x-rays. The first set of x-rays were of William's head, cervical spine, and chest. If a patient had been in a motor vehicle accident, was semi-conscious, wearing a cervical collar, and weighed 98 kilograms, she would have left the patient on the trolley rather than move him onto the x-ray table, although the quality of the x-ray is better if the patient is on the table, and normally x-rays are taken with the patient on the table. If a patient was moved from the trolley to the x-ray table, the trolley would be put up against the table and the table would be adjusted to the height of the trolley. If the patient was on a trauma board, he would be moved onto the table on that board, and if he was not on a trauma board, slides would be placed under the patient and he would be moved on a sheet onto the table. If no slides were available, the patient would be moved across on a sheet. This process usually required three people, one to hold the trolley in case it moved and two to pull the patient across onto the table, but two people could move the patient on a sheet if the patient was not heavy. She could not tell from the x-rays if William was on the trolley or the x-ray table, but assumed it was more likely that William was on the trolley because of the quality of the x-rays. William was lying on his back (supine) for the first set of x-rays and would only have been moved in order to place the cassettes containing the film underneath him. This would be done by holding him under his shoulder blades and supporting his head and neck and raising him about one to one and a half centimetres, while his neck and head were supported. The cassette would be placed under him from the head down, as far as the small of his back. If the patient was x-rayed while on the table,

there would be no need to slide a cassette under him, because the table had a built in section in which to insert the cassette. It would not be necessary to remove the cervical collar in order to x-ray a patient. William was also supine for the second set of x-rays, which were taken of his chest in order to check that the drain was properly in position. A post-drain x-ray is normally taken with the patient upright but this one was taken with William supine because he was uncooperative. (She had made a note on the request form that William was uncooperative.) With regard to Nico's evidence of the manner in which William was lifted onto the table for both sets of x-rays, she said radiographers are not taught to move a patient in that fashion, nor would she have done so, especially if the patient was wearing a neck brace. If the porter had assisted in moving William, he would have been told how to do so. If there were no special instructions about precautions to be taken, she would still assume there was concern about the cervical spine if the patient was wearing a cervical collar.

[23] Mr. Mapalala was the radiographer who took the third set of x-rays. He too became a chief radiographer at Livingstone Hospital in 1996, and when he testified had been a radiographer there for twenty nine years. He was on duty at Livingstone Hospital on 5 September. He had no memory of William and his evidence too concerned standard procedure and what was apparent from the x-ray request form and the x-rays themselves. If the patient is a motor vehicle accident victim and there is a request for a spinal x-ray, that is an indication to take precautions. Even without a request, a motor vehicle accident victim is

treated as if he had a spinal injury. The x-rays he took were of William's pelvis, thoracic spine, and lumbar spine, and they were all taken in the same room. These x-rays cannot be taken on a trolley and the patient must be on the x-ray table. If the patient is on a trauma board he can be lifted onto the table on the trauma board. The standard procedure to move a patient referred for spinal x-rays is to put a perspex slide under the patient and pull the patient over on the slide. A motor vehicle accident patient who is lying on a trolley and not walking, especially when spinal x-rays are requested, would not be lifted onto the table on a sheet, nor would a family member be asked to assist by holding the patient while the x-rays are taken. In cases where a family member is anxious they will be allowed into the x-ray room and that person will be given protective clothing.

[24] William was supine for some of the x-rays, one of which was the so-called "swimmer's view", where one of the patient's arms is up and the other arm is down. For other x-rays William was log-rolled onto his side. About four people would be needed for this procedure, and it was not possible for only two persons to log-roll a patient properly. It was possible that when Sulien arrived at the x-ray section only he and another person were in the room but, although he could not remember how many people were on this particular shift in the x-ray department, he would have had to get assistance from others.

EVALUATION

[25] Nico was the only person who testified to seeing William move his legs after

admission to hospital. The court *a quo* found that it was probable that Nico's evidence about William's leg movement was false. It reached this conclusion by accepting the evidence of Uys that William had been on a trauma board and therefore it would have been unnecessary to move him from the trolley to the table. Uys' evidence was more reliable because she would have been less emotionally affected by events than Nico and her recollection was more likely to be accurate. It followed, according to this reasoning, that if William was on the trauma board, Nico's evidence about how William was lifted onto the table was false and that therefore his evidence about seeing William's legs move was false. With regard to Uys' evidence about not seeing William's legs move he found that Uys would have no motive to give false evidence against the plaintiff. It was not put to her that there was ill feeling between her and the Kitchings, and the only criticism of her was that she had not informed the Kitchings that she intended to testify for the respondent. Such conduct on her behalf was insufficient to infer that she had a motive to give false evidence.

[26] With regard to Leslie, the court *a quo* found that Leslie appeared to be an honest witness who had an impressive demeanour and whose evidence was frank and to the point, and he had readily admitted that he had missed the spinal fracture in the x- rays. If Leslie had asked the family if William was moving his legs, this meant that he did not observe William moving his legs. With regard to the submission that Leslie had reconstructed his evidence in an attempt to exculpate the respondent, the court *a quo* found that it was clear that this was not

so. Leslie had interrogated his memory the next day and had recalled that he had not seen William's legs move and had asked the family if he had moved his legs. Leslie's concession that it was possible that William had moved his legs had therefore to be seen in this context.

[27] The Court *a quo* also found that although Nico did not make a bad impression as a witness, it was an unavoidable conclusion that the version that William had walked from the trolley to the x-ray table, was a fabrication. It was difficult to understand how he had arrived at the interpretation of what Sulien had said to him, as related to Fritz, and to Uys in a slightly different version, when in his evidence at the trial he said Sulien had only told him that William was paralysed, and Sulien denied giving him such information.

[28] The court *a quo* found that, although Sulien had started off as a good witness, she later became unco-operative and even obstructive, but there was no reason to find that the information she said she gave to Nico on the morning of 5 September was incorrect.

[29] I cannot fault the court *a quo's* evaluation of the evidence and the findings on the probabilities. A court of appeal will also not readily interfere with the court *a quo's* findings on the credibility of witnesses, unless the content of the evidence dictates otherwise. In my view, the record does not disclose any reason for rejecting the evidence of Uys and Leslie. Apart from the court *a quo's*

impressions of them as witnesses, their evidence was in accordance with the probabilities. Uys had no reason to give unfavourable evidence against the appellants, and none was suggested. She had been a family friend for twenty years and had obviously accompanied Nico and Julie to the hospital to provide support. In particular, and this was not mentioned by the court *a quo*, Leslie's evidence that he had made a working diagnosis and that he thought that William was bleeding to death, coupled with his lack of a high index of suspicion of a spinal injury, which he acknowledged he should have had, lends probability to his evidence that he asked the family if William was moving his legs. Leslie indeed treated William for what he believed to be the diagnosis and this fact lends support to his evidence as a whole. With specific regard to whether or not Leslie asked the family group about movement of William's legs, the court *a quo* found that in the absence of evidence from Julie on this aspect, Leslie's evidence was unchallenged, and that the only reason he asked the question was because he had not seen William's legs move. Leslie's evidence was that a female person had answered that William was moving his legs. It was submitted on behalf of the appellants that because Uys did not testify that Leslie asked the question, it meant that he did not ask the question. In my view, this is an inference without foundation, because Uys might not have heard the question. In any event, if she had wanted to give false evidence against the appellants, she could easily have corroborated Leslie's evidence that he had asked the question.

[30] On the other hand, the court *a quo's* rejection of Nico's evidence was, in my

view, justified by the abandonment of the first version, the totality of the evidence, and the probabilities. Although it was submitted on behalf of the appellants that it had always been the appellants' case that William's legs had moved after admission to hospital, there was a significant difference between Nico's evidence at the trial and the account he gave to Fritz. The movement of William's legs described in Nico's evidence was never mentioned to Fritz, nor was the alleged improper lifting of William for the first and second sets of x-rays, on which the appellants relied to try to prove that a secondary insult occurred after admission to hospital. Nico had also only told Uys about what had happened during the third set of x-rays, but what he told Fritz and Uys was no longer part of the appellants' case. Nico's explanation for what he had understood Sulien to be saying to him was patently unacceptable, especially when both he and Sulien testified that all she had told him was that William was paralysed. Both their evidence that subsequent attempts by Nico to find out from Sulien what had happened during the third set of x-rays was also patently improbable. Up until at least January 2008, when he consulted with Fritz, and after summons had been issued, Nico apparently believed that William had walked from the trolley to the x-ray table, and was thereafter paralysed. From Sulien's point of view, there was not much to tell, and the inability between them to talk about what happened during the third set of x-rays was inexplicable. This mysterious behaviour surrounding such a vital event, in my view renders it probable that the original version was a fabrication. As submitted on behalf of the respondent, if William had walked to the x-ray table and after the x-rays were taken was paralysed,

such an event was, as respondent's counsel put it, "the single biggest event probably in their whole life, it is the difference between movement and paraplegia, it is the difference between culpability and no culpability, and it just gets left, it doesn't get discussed, it doesn't get followed up." The court *a quo's* finding that the first version was a fabrication was justified, and therefore, in my view, because of the materiality of such a fabrication, going as it did to the cause of William's paraplegia, Nico's credibility as a whole was seriously damaged. The most probable inference to draw from this scenario was that the belated version of movement of William's legs after admission, and inadequate precautions and improper lifting of William during the first and second sets of x-rays, was also a fabrication, in substitution of a version which could not succeed. Nico's denial that Leslie had asked the family group if William was moving his legs should also be viewed accordingly. This inference is supported by the fact that Nico did not mention to Fritz or Uys what he had allegedly observed during the first and second sets of x-rays, and only related to them what Sulien had allegedly told him. It turned out that what he said Sulien had told him not only was not said by Sulien but also did not happen. Sulien did not see William get up and walk to the x-ray table and she did not see the nursing staff drop him. Even if there was a fourth set of x-rays, as testified to by Sulien (there was no record of a fourth set at the hospital), her evidence of what took place during the taking of these x-rays did not indicate movement of William's legs. In spite of Mapalala's evidence that a family member would not be asked to assist during x-rays, it is more probable that Sulien did assist during the third set of x-rays, by holding

William's arm in position for the swimmer's view x-ray. It is improbable that she would have known about this procedure and then fabricated her evidence. However, even if her evidence in this regard is preferable to that of Mapalala, and even if William had been lifted onto the x-ray table on a sheet, such evidence does not assist the appellants in proving movement of William's legs after admission to hospital.

[31] The court *a quo*, as already mentioned, was of the view that if William was on a trauma board it would not have been necessary to move him onto the table. I do not believe that the evidence justified a finding that he was on a trauma board when the first and second x- rays were taken, or that he was not moved onto the x-ray table. Mrs. Brink did not remember the events and therefore could not say with certainty that William was on a trauma board or that he was not moved onto the table. However this does not mean that there was a probability that William was moved in the manner described by Nico. Nico's credibility as a whole was tainted, and Mrs. Brink was an experienced radiographer who testified that a patient such as William would not have been lifted in that manner. It is in any event improbable that she and another woman would have been able to lift William in the manner described, given his weight of 98 kilograms. It is also difficult to envisage William bending in a U shape if the trolley was alongside the x ray table, even if he was moved over on a sheet.

[32] There was expert evidence on behalf of the appellants that if William's

spinal cord had been damaged prior to admission, his legs would have been flaccid and that this flaccidity would have been obvious to anyone examining him, particularly when he was rolled. It was submitted that the fact that no such observation was recorded by any of the medical personnel was an indication that there was no such flaccidity and therefore that William had retained neurological function on admission. Leslie said that flaccidity is readily observable in a conscious patient but difficult to detect in an unconscious and uncooperative patient. I do not think that much weight can be placed on this lack of observation of flaccidity. It is certainly too tenuous a factor to prove that William was not paralysed when he was admitted to hospital.

[33] The same applies to the evidence of Uys that Leslie had placed William's leg flat. It was submitted that this meant that William had moved his leg into a bent position after admission. Such a submission is in my view speculative, when there is no evidence of how William's leg got into that position before Leslie placed it flat.

[34] The appellants also relied on the note of Hattingh that she had heard bowel sounds when examining William. Fritz testified that with a T7 lesion, about 80% of patients will have no bowel sounds. She also distinguished between sounds which indicate neurological function and "tinkling" sounds which merely indicate loose fluid. In the light of Hattingh's evidence that she could not say what type of sound she heard, the evidence of bowel sounds was of insufficient weight to

prove that at the time Hattingh examined William he still had neurological function.

[35] The Court *a quo* found that given William's normal blood pressure at the scene, which was inconsistent with neurogenic shock, and the very low blood pressure on admission to hospital, that an insult to the spine most probably occurred in the ambulance. This was also the view of two of the experts, Professor van der Spuy who testified on behalf of the appellants, and Dr. Loubser who testified on behalf of the respondent. However it was not the appellants' case that negligence on the part of the ambulance personnel caused the further injury to William's spine.

[36] There were certain contradictions between the evidence of Uys and Leslie, for example Uys said that the cubicle curtain was open when William's chest drain was inserted, whereas Leslie said he had closed it; Uys said that Leslie had stroked William's foot with a pen or a thermometer whereas Leslie only referred to squeezing William's toes. There were also disputes of fact regarding whether or not Julie returned home to fetch blankets and whether or not the family group traveled in one or two cars to the hospital, after they received the news of the accident. The court *a quo* did not place much significance on these discrepancies, ascribing them to the passage of time and the absence of any motive on the part of Uys to give false evidence. In my view, in the light of the totality of the evidence and the probabilities, they were immaterial.

[37] Overall I can find no grounds for interfering with the decision of the court *a quo*. Given the poor credibility of Nico, the appellants' strongest evidence was Leslie's note that William was moving all his limbs. The court *a quo* accepted Leslie's explanation for this note, and, given its finding on Leslie's credibility, which accorded with the probabilities, this court will not find otherwise.

[38] In my view, the appellants' case was a mixture of fabrication and speculation. Following the abandonment of the first version, namely cord damage during the third set of x-rays, the cause of the alleged secondary insult to the spine was a matter of conjecture. The alleged time frame within which the alleged secondary insult to William's spine occurred, shifted from the original case of an insult during the third set of x-rays to some time between admission and the third set of x-rays. It is significant that appellants' counsel, when asked whether or not the third set of x-rays was part of the time frame, submitted that it was impossible to determine when the second insult happened, that there was "stepwise" deterioration and that the third set of x-rays could have been "the final straw that broke the camel's back". However he submitted that it was more likely that the insult would have occurred as a result of the first and second sets of x-rays. These submissions illustrate in my view the speculative character of the appellants' claims.

CONCLUSION

[39] In the result, in my view the court *a quo* was correct in its conclusion that the respondent proved that William's legs had not moved following admission to Livingstone Hospital. The appellants therefore failed to prove that William had retained neurological function on admission to hospital, and that any negligent act or omission on the part of the respondent's servants caused the damage to his spinal cord which resulted in paraplegia.

COSTS

[40] The court *a quo* ordered that the costs of the action were to be paid by both appellants, jointly and severally, the one paying the other to be absolved. It was submitted on behalf of the first appellant that the court *a quo* misdirected itself in not ordering that only a small portion of the costs should be paid by Nico, given the small amount of his claim in comparison to that of William. Counsel for the respondent submitted that the same issues on the merits had to be decided in respect of both appellants, and that there was therefore no basis to distinguish between them with regard to costs. I agree with this submission.

[41] Mr. Bruinders SC appeared with Mr. Euijen for the respondent in the court *a quo*. The respondent's heads of argument were drawn by Mr. Bruinders and Mr. Euijen, but only Mr. Euijen appeared for the respondent at the hearing of the appeal. The costs of two counsel should therefore be allowed in respect of the

respondent's heads of argument.

ORDER

[42] The appeal is dismissed. The appellants are ordered to pay the respondent's costs, jointly and severally, the one paying the other to be absolved, such costs to include the costs of two counsel in respect of the respondent's heads of argument.

_____
pp J.M. ROBERSON
JUDGE OF THE HIGH COURT

EBRAHIM J:-

I agree, and it is so ordered

_____
Y. EBRAHIM
JUDGE OF THE HIGH COURT

DAMBUZA J:-

I agree

_____
pp N. DAMBUZA
JUDGE OF THE HIGH COURT

Appearances:

Appellants: Adv. J.N. de Vos SC, instructed by Joseph's Incorporated, c/o IC Clark Incorporated, East London.

Respondent: Adv. TMG Euijen, instructed by State Attorney, East London.