

IN THE HIGH COURT OF SOUTH AFRICA
(ORANGE FREE STATE PROVINCIAL DIVISION)

Case No.: 1857/2001

In the matter between:

ANDREW HUGH ARTHUR DALY

Plaintiff

and

ROAD ACCIDENT FUND

Defendant

CORAM:

RAMPAI, J

HEARD ON:

5 FEBRUARY 2004

DELIVERED ON:

4 MARCH 2004

- [1] The hearing of this matter began on Tuesday, 16 September 2003. Adv. C. Ploos van Amstel SC appeared for the plaintiff and adv. A. Camp for the defendant. By agreement between the parties, I noted the following admissions: Firstly, that the road accident occurred at Welkom in the Free State Province on Sunday 1 June 1997 at or about 03h35 when two motor vehicles collided on the Klippan Road. Secondly, that the one motor vehicle with registration number OXV 47590 was driven by P.W.E. de Klerk, the insured driver. Thirdly, that the other motor vehicle with registration number OKE 18724 was driven by A.H.A. Daly, the injured

plaintiff.

I also ruled that the merits and the quantum of the plaintiff's case be separated. I made the ruling in terms of Rule 33(4) of the Uniformed Rules of Court.

- [2] Petrus Bernardus Nortje was called as the first witness for the plaintiff. He testified that he was a member of the South African Police Service, stationed at Welkom, attached to the local criminal record centre, an official draftsman and photographer, currently an inspector by rank, but a sergeant at the relevant time. On Sunday, 1 June 1997, at or about 04h25 he was on the scene of the accident. He found sergeant Du Plessis on the scene. At her request he took photographs of the deceased, the scene and the two vehicles. He drove away afterwards. He and sergeant Du Plessis returned to the scene at or about 12:00 noon on the same day. Again he took further photographs. By then the vehicles had already been towed away from the scene.

A photo album prepared by the plaintiff was shown to the witness. It consisted of 12 photographs. He confirmed that he took the photographs numbered 1 to 6. He read into the record the

description of the photographs as more fully set out in the covering index thereto. The plaintiff's album was then handed in as Exhibit "A".

- [3] A photo album prepared by the witness himself was shown to him. It consisted of four photographs. He confirmed that he took all the four photographs. He took photograph 1 at noon on Sunday, 1 June 1997 and marked four points thereon as "A", "B", "C" and "D". Photo number 1 depicted a portion of Klippan Road on which the accident took place. Sergeant Du Plessis did the pointing. Point "A" on the photograph shows the direction in which the red sedan Golf, OKE 18724, was travelling. It was travelling from east to west. It was driven by Daly, the plaintiff. Point "C" on the photograph shows the final rest position of the Golf after the collision. Point "B" of the photograph shows the direction in which the white sedan, Renault OXV 47590, was travelling. It was travelling from west to east. It was driven by De Klerk, the deceased. Point "D" on the photograph shows the final rest position of the Renault after the collision. A description of the three remaining photographs was read into the record. I deem it unnecessary to repeat it here. The photo album by the witness P.B.

Nortje was handed in as Exhibit “B”.

- [4] An accident plan was shown to him. He confirmed that he drew it up on 11 September 2003, on the basis of his earlier rough sketch. Klippan Road runs from the Ernest Oppenheimer Golf Course in the east and from Power Road in the west. It consisted of one traffic lane in each direction. It was a tarmac road with a solid white barrier line in the vicinity of the scene. There were no kerbs or gravel shoulders on both sides of the road. On the edges of the road were grassy fringes. The turn-off to the pan called Klippan was a dirt road on the southern side. This intersection was somewhere between the plantation of trees on the mine and the industria. The road was in a poor condition. The black surface was becoming white. The surface was uneven at places. He made no attempt to determine the point of impact. The accident plan dated 11 September 2003 was handed in as Exhibit “C”.

- [5] Wilna Badenhorst was called as the second witness for the plaintiff. She testified that she was a collision reconstruction expert. Her academic qualifications and her practical experience in collision investigations and collision reconstructions are given in

her written reconstruction report. She was practising as a private consultant in the field. She was approached by the plaintiff's legal team to reconstruct the accident. For the purpose she visited the scene, made certain observations, took photographs and compiled the reconstruction report. A 14-page document dated 29 August 2003 was shown to her. She confirmed she was the author thereof. She read her reconstruction report into the record. Her reconstruction report was handed in as Exhibit "D".

She came to the conclusion that the area of impact was probably on the correct traffic lane of the Golf sedan.

- [6] During cross-examination she answered that to determine a point of impact she considered all the physical evidence such as the vehicular damage, the angle of the collision as well as the final rest positions of the vehicles. She conceded that what she termed "oliekol" in her report could be brake fluid spillage. But she excluded the possibility that it could be a tar seepage or bitumen. The area of impact should be somewhere between the two final rest positions of the two sedans. Bitumen did not quickly evaporate or disappear. The oil patch probably had its origin in the collision we

are here concerned with. She had some doubt about the point of impact on the eastbound lane as given in the police accident plan, since that point was east of the final rest position of the Renault. She did not see any other oil patch on the scene besides the oil patch described in her report and shown in photo "A1". The popcorn of the road surface retained the oil despite mopping up the fluids and sweeping off debris on the scene.

- [7] She excluded glass and debris as reliable indicators of a possible point of impact, because debris normally travelled at the same velocity as the vehicle and became scattered over a wide area. However, fluid or oil normally reaches the road surface quite quickly because as it splatters it is forced downwards immediately. She conceded that when two vehicles collided, glass pieces of their shattered headlamps would fall to the ground the moment the vehicles separate through rotation. But she explained that glass debris would still be spread over a large area as the vehicles rotate away from each other to their final rest positions.

She made the point that the most reliable indicators of a point of impact were the gouge marks, in other words the scrape marks on

the road surface. Those were physical marks where vehicles metal part came into contact with the road surface. The order of preference was gouge marks, oil spillage and then debris. The physical contact of the vehicle was plus or minus 40% overlap of the width of each. Both were extensively damaged to their right. The marks on the right front door of the Renault were caused by a secondary impact as the Golf rotated quicker than the Renault.

- [8] There were no collision scrape marks, in other words, tyre marks. Sometimes tyres leave tyre marks on the road surface, but at times they do not. The latter scenario was often the case where the tyre did not press hard enough on the road surface at the time of the impact to generate enough heat to cause a tyre mark. A tyre mark on the road surface was not rubber but melted bitumen. She denied the suggestion that the Golf did not leave tyre marks on the road surface, because it lifted up and ended on its left side. She advanced the proposition that the gravel build-up on the edge of the road caused the Golf to topple over on its left side when it left the smooth road surface.

- [9] It was put to her that the driver of the Golf was approaching a

section of the road where the road was winding; that he entered the first curve to the right; that he failed to straighten out when entering the second curve to the left; that he moved over the solid barrier line; and that in doing so the Golf collided with the oncoming Renault on latter's correct side of the road. She disagreed with such a proposition.

[10] Giancarlo Bernieri was called as the third witness for the plaintiff.

He testified that he was a human resources manager in the employ of Anglogold (Pty) Limited at Carltonville. He previously lived in Welkom. At plus or minus 03h15 on Sunday, 1 June 1997, he was travelling from east to west on the Klippan Road. He was driving his sedan, Toyota Corolla, with registration number OKE 37966. He was alone in the car. He noticed the taillight of a vehicle about 200 to 300 metres ahead of him. The vehicle was travelling on the westbound lane. He then saw another vehicle travelling from west to east on the same road. The oncoming vehicle was travelling on the eastbound traffic lane. At one stage the headlamps of the oncoming vehicles disappeared. However, at that stage he could still see the red taillights of the vehicle he was following. Soon thereafter he saw no more lights whatsoever. He stopped his car on

the scene. He saw a Renault on the northern side of the road and a Golf on the southern side.

[11] From there he rushed to Sportman's Bar where he told his friends about the accident. One of his friends called the emergency services. Accompanied by two friends he returned to the scene. The police and the ambulance crew found them on the scene. He recognised the driver of the Golf as the plaintiff, Andrew Daly. He was rushed from the scene to Hydromed Hospital by the emergency services providers.

[12] During cross-examination he answered that he arrived at the Oppenheimer Golf Club at 23h15 on Saturday, 31 May 1997. He found the plaintiff already there. He too had attended the reunion function of Christian Brothers College. On his arrival the plaintiff was totally sober. By 23h00 the plaintiff would probably had consumed some alcoholic beverage. He was unable to say how much alcoholic drinks the plaintiff had taken from 23h30 until 03h15. He did not interact with the plaintiff but he saw him from a distance playing pool and chatting to ex-schoolmates. The plaintiff was one of the remaining 30 gentlemen out of a group of about 150

who decided to proceed to Sportman's Bar for the last shot. He could not explain why he stated in his second affidavit that the headlamps of the Golf were on a dim position. He conceded that he did not in fact see the headlamps of the Golf. It was suggested to him that the bend ahead required a driver first to steer to the right and then to the left and that if he was not quick enough it was possible his vehicle would fail to negotiate the second kink, move over the solid barrier and encroach onto the eastbound traffic lane after the second kink. He conceded that there was a slight possibility. He added that in his experience the vehicles travelling westwards rarely encroached, whereas the vehicles travelling eastwards frequently encroached. He could not say where the concentration of debris was, but there was debris all over the scene.

- [13] Andrew Hugh Arthur Daly was called as witness number 4 for the plaintiff. He testified that he was the plaintiff and that he lived in Welkom. On Saturday, 31 May 1997, he attended a school reunion function at the Ernest Oppenheimer Golf Course in Welkom. He was driving a red Golf with registration number OKE 18724. The next Friday on 6 June 1997 he regained his consciousness in the intensive care unit of the Hydromed Hospital in Welkom where he

was told that he had been involved in a road accident on the morning of Sunday, 1 June 1997. He had no independent recollection of the accident. He was hospitalised for approximately six weeks. He identified photograph “A2” as his car.

[14] During cross-examination he admitted that he did consume some beer at the reunion. He could not recollect how much beer he drank for the whole evening. He only drank Castle Lager. He could not recall that he had to go to Sportman’s Bar. He could not recall anything concerning his driving on the day in question. He suffered concussion in the accident which accounted for his blank memory. In his sworn statement dated 3 November 1999 he stated that he was wearing a safety-belt because by then he had been so told. He was charged with culpable homicide, but the case was withdrawn. In fact the prosecutor declined to prosecute. That concluded the case for the plaintiff. The defendant’s case was then opened.

[15] Pieter Dawid van Gorkom was called as the first witness for the defendant. He testified that he was a member of the South African Police Service stationed at Welkom attached to the housebreaking

unit of the detective branch. In the early hours of Sunday, 1 June 1997, he attended the scene of the accident on the Klippan Road. He found the police and the ambulance service crew on the scene. Among the police was sergeant Zelda du Plessis who drew up the police accident plan and the key thereto. The two vehicles involved were still on the scene. He could not say whether the scene was secured or preserved before his arrival. His observation led him form an opinion that the accident occurred on the correct lane of the Renault. The big oil patch he saw on the traffic lane of the Renault was the reason for his conclusion. The diameter thereof was about 35cm. He could not recall glass pieces or debris on the scene. He had no experience in investigating road accidents and determining points of impact. He was the investigating officer of this case. The oil patch was not visible or captured in photo “B1”. He was unable to confirm the point of impact as shown by sergeant Du Plessis.

- [16] During cross-examination he conceded that he did not in fact observe the vehicles colliding and that he merely expressed an opinion concerning the point of impact. He did a six months training course in general policing. He did not receive any training

in the investigation of collisions and reconstruction of the accident scenes at the police college, but he gained experience afterwards as a member of the uniform branch. He never had anything to do with Wilna Badenhorst who trained the police in this particular field. From 1991 until 2001 he visited and investigated approximately 600 serious cases of road accidents. The point of impact was difficult to determine even if you have physical pieces of evidence such as glass pieces, oil patches or gouge marks on the road surface, none of them necessarily will always indicate the precise point of impact. He conceded that glass pieces and oil patches as well as mud particles often become scattered over a large area when two vehicles collide. He made no statement or drew up no accident plan. He took no photographs of the scene. He visited the scene early at 04h20 on Sunday, 1 June 1997. He could not remember whether the scene was cordoned off or not. He conceded that there was nothing peculiar about this accident which distinguished it from hundreds of other accidents he had investigated. The oil patch, the loose bonnet and the plastic debris were all the things that he took into consideration in coming to the conclusion that the point of impact was on the correct traffic lane of the Renault.

[17] When he was confronted with photographs “A7” and “A8” which showed that the bonnet of the Renault was still attached and not detached from the Renault, he conceded that he had made a mistake. He explained the mistake by saying he could not remember everything about this accident clearly. The oil patch on photograph “A1” was not the oil patch he was talking about. At one stage he could not position the oil patch he saw. Later he said such oil patch was on the correct lane of the Renault. He conceded that sergeant Nortje would have photographed the oil patch if it was pointed out to him. He confirmed that there was a *nolle prosequi* in this matter and that the senior prosecutor directed that an inquest should be held. He also conceded that the magistrate who conducted the inquest had made no positive finding as to the cause of the death of De Klerk. He also conceded that on the instruction of the senior prosecutor he approached Mr Bernieri in an attempt to ascertain whether he could shed some light on the point of impact. He further conceded that there was never any mention of another oil patch outside photograph “A1”.

[18] The inquest was held on 16 August 2000 before magistrate M

Viljoen. The first two pages of the inquest record were handed in as Exhibit “F”. The affidavit of sergeant H.P. Minnie was handed in as Exhibit “G”. In it he confirmed that he had received a blood sample marked WDR703.97 from Dr Van Heusden and that he forwarded it to the chemical laboratory in Johannesburg. He later received the result and handed it to sergeant Van Gorkom. The result was that 0,12 grams per 100 millilitres of De Klerk’s blood was alcohol. Sergeant Minnie’s request for the examination of the blood specimen WDR307/97 addressed to the forensic chemical laboratory was handed in as Exhibit “H”. The certificate from the forensic chemical laboratory was handed in as Exhibit “I”. Sergeant Van Gorkom’s affidavit acknowledging receipt of the blood analysis result was handed in as Exhibit “J”.

- [19] Cornelius Susanna Potgieter was called as witness number 2 for the defendant. She testified that the deceased, De Klerk, was her brother. Her brother died on a Sunday in Welkom. The next day, on a Monday, she and her husband drove from Bloemfontein to Welkom to attend to the business of his passing away. Sergeant Van Gorkom of Welkom Police Station told her where this accident happened. They visited the scene. She had a strong

feeling of wanting to be closer to her brother which was why she visited the scene.

Finding the scene was easy because she and her husband knew the specific road and area reasonably well. She previously worked as a sales representative on the mines. Her husband previously worked on the mine as an engineer. She described the scene, she drew up a rough sketch which was then handed in as Exhibit “K”. They found the scene near a turn-off to the golf course. On the left-hand side of the road as one travelled towards Virginia, she found pieces of glass. Photograph “A1” was shown to her and she confirmed the scene and the spot where she saw the glass pieces.

- [20] During cross-examination she answered that she once worked for a company called Lifotech for two years as a sales representative on the mines. She said the landmark of the scene was a gate of the golf course on the right-hand side. The glass pieces were about 30 to 50 metres in front of the golf course gate. From there she could see the golf course gate. In the vicinity the road curved from left to right. The police told her and her husband on which traffic lane to look for the glass pieces. The police also told her which driver

was at fault. At the request of Mr Van Amstel the court adjourned. On resumption the witness confirmed that she stopped approximately 100 to 120 paces before the golf course gate. Her husband further saw the gouge marks on the road. She could not deny the suggestion that the golf course gate was far from the scene, plus minus 2 to 3 kilometres away. She was confronted with the plaintiff's rough sketch, Exhibit "L", and it was pointed out to her that the golf course gate was far from the scene. Her reply was, she did not believe it.

[21] Mr Camp requested an inspection *in loco* and reserved his right to re-examine Ms Potgieter after such an inspection. On Friday, 19 September 2003, accompanied by the parties, their legal teams and Ms Potgieter, the court travelled to Welkom. The notes of the inspection are on record. I deem it unnecessary to repeat them. Re-examined by Mr Camp after the inspection *in loco* she replied that she was mistaken about the position of the golf course gate.

[22] Zelda Elsabe du Plessis was called as witness number 3 for the defendant. She testified in Welkom that she was an inspector in the employ of the South African Police Service stationed in

Welkom and that her experience was just over 12 years. She was attached to the road accident unit since 1997. She was involved with the accident which occurred in Welkom on Klippan Road on Sunday, 1 June 1997. She attended the scene alone. From there she called inspector Nortje, inspector Van Gorkom and the ambulance crew led by sergeant Rothman. She arrived on the scene at about 03h50. The police and the emergency or rescue team were already on the scene. Exhibit “E” was shown to her. She confirmed that she drew up the police plan and the key thereto.

- [23] She observed an oil patch and glass pieces on the deceased’s correct lane. From there she came to the conclusion that the point of impact was on that lane. The oil patch was about half a metre in diameter. It was fresh and still thick on the surface of the tarmac. It was more or less in the middle of the deceased’s lane – see point “C” on p.27 of Exhibit “E”. The fine glass pieces were also on the deceased’s lane in the vicinity of the oil patch. They were scattered all over. On the plaintiff’s lane there was nothing to suggest that the point of impact could be somewhere there. The oil patch she was associating with the point of impact was not captured by photograph “B1”. The oil patch in question was further down the

photograph on the northern lane beyond the final rest position of the two vehicles. She suspected that the fire emergency crew had cleaned up the scene before the official photographer returned later on to take photograph "B1". She doubted very much any insinuation that the large black mark in the middle of the road was the oil patch she was referring to. She read into the record the description of how the accident took place according to the accident report Exhibit "E" which she compiled on the same day of the accident.

[24] During cross-examination she replied that she had six months experience at the time she attended the scene of this accident on Sunday, 1 June 1997. Since then she had acquired more experience. During busy times of the year 50 road accidents per month were reported to her unit and 20 accidents per month during quiet times. She had no independent recollection of this accident scene. But she remembered this accident reasonably well.

She could recall without reading her affidavit that the oil patch was on the deceased's lane. But she conceded that she had to look at her rough sketch in order to identify the exact spot of the oil patch.

Asked whether there was only one oil patch, she replied that there was only one which caught her attention. She confirmed that she did not show the oil patch in so many words in the rough sketch. She did not receive structured formal training for the work she was currently doing. There was no eyewitness to point out the point of impact. She agreed that the fine glass pieces were not reliable indicators of a point of impact, because they often spread all over the scene. She conceded that an experienced police photographer would never take a photograph of the scene without including the oil patch. This was the first case of a road accident where there was an oil patch on the scene but no photograph to show it all. She did not really know why she did not accompany inspector Nortje back to the scene to point out to him the oil patch.

- [25] This was the only fatal road accident that she knew of where the police photographer went to the scene on his own to take photographs. She denied that she pointed out certain points to inspector Nortje at 12h00 on the day in question. But later conceded that inspector Nortje could be right that she drew his attention to the points as shown in photograph “B1” which was taken during daytime on Sunday, 1 June 1997. She also conceded

that if she was on the scene at the time, she would have ensured that he took a photograph of the oil patch. She observed that on photograph “B1” there were repeated wheel imprints on the lane of vehicle “B” – that is Daly’s vehicle. She confirmed that neither the senior prosecutor nor the inquest magistrate could place any weight on the police sketch plan since they wanted to know where she came from with the point of impact. Two and a half years after the accident there was still no mention of the word “oil patch” anywhere in the police file. She could not explain why she did not see the oil patch on Daly’s lane. She differed with inspector Van Gorkom that the oil patch, as represented by the point of impact according to her, was beyond the confines of photograph “B1”. Her evidence was that the oil patch was at point “E” of Exhibit “B”. This point was inserted by the witness during the course of her cross-examination.

- [26] Bruce Allan Pound was called as witness number 4 for the defendant. He testified that he was a manager of a business enterprise called Paper Man CC, a paper recycling corporation in Welkom. He was previously in the employ of Welkom Emergency Services as a station officer. His primary duties were to attend

accident scene and fire scenes. On Sunday, 1 June 1997, he attended the accident scene on the Klippan Road in Welkom. The accident report had since gone missing. He recalled that there were two emergency vehicles on the scene – one rescue emergency vehicle and one ambulance.

The driver of the Renault was still in the car but the driver of the Golf was not when the emergency crew of four arrived on the scene. The Renault was on the northern side of the road and the Golf on the southern side. They illuminated the scene with a generator lamp, fitted to the rescue vehicle. The lamp was hoisted 2 metres high by the hydraulics of the rescue vehicle. They had to cut off the roof of the Renault to remove its driver. He was already dead. The driver of the Golf was nowhere on the scene to be seen.

[27] If the vehicles are on the road, it is the responsibility of the rescue crew to cordon off the road. He could not recall whether the road was cordoned off or not in this instance. The job of clearing up after a road accident was also their responsibility. They swept off glass pieces on the northern side of the road. There were no glass pieces on the southern side. They cleaned the entire road surface.

He could not recall dealing with any oil on the scene. They usually put sand on the oil patch and leave it for a while to absorb a bit and then sweep it off the road.

- [28] During cross-examination he replied that the glass pieces were by the cone on the northern side of the road. He encircled the spot where the said glass pieces were with a red pen on photograph “A1”. He had no independent recollection of his visit to the scene, but a very vague memory. He had no independent recollection of the positions of the vehicles. He had no independent recollection of having swept the glass pieces off the road. He conceded that on the northern side of the road there was a further patch on the shoulder of the road that could also have been glass pieces as well. The witness encircled the relevant spot on photograph “A1” with black ink. Both the red circle and the black circle could have been gravel and not glass due to the light colouring of the soil in the vicinity of the scene.

The rescue vehicles and the ambulances were maintained in a perfect roadworthy condition. He ruled out the possibility that either of the two vehicles would have been dripping oil or brake

fluid while they were on the scene.

- [29] Barry Grobbelaar was called as witness number 5 for the defendant. He testified that he was a qualified mechanical engineer with a master's degree which he obtained from University of Pretoria. His specific sphere of expertise over the past 20 years had been in the field of vehicle dynamics. He had prepared a reconstruction report concerning this accident. The reconstruction report was handed in as Exhibit "N". He had been doing accident reconstruction reports for the past 13 years. He visited the scene on 20 November 2003. On the road surface he found two marks which are identical to or the same as those on photograph "A1". He also found the remains of the windscreen. He took his own photographs of the scene. He came to the conclusion that the sedans collided with an offset frontal impact, in other words the right part of the front of the Renault collided with the right part of the front of the Golf; that it was not possible to determine the area of impact between the two vehicles by considering only their final positions of rest; that it was improbable that the dark marks on the westbound lane found on the scene as shown on photograph "A1" were oil patches which could be associated with the impact

between the vehicles involved in this accident; that it was probable that the Golf was travelling considerably faster than the Renault; and that the gouge marks found on the eastbound lane on the scene probably indicated the area of impact between the two sedans. He substantiated each of these conclusions in detail. In his opinion the accident probably occurred when the Golf ventured onto the incorrect side of the road.

[30] He disagreed with Ms Badenhorst's conclusions in several respects. He ended his evidence in chief by saying that if the gouge marks and the oil marks were eliminated or wished away – and only the final rest positions of the vehicles and their respective damage taken into account, it would not be possible to tell precisely where these vehicles had collided.

[31] During cross-examination he replied that on the strength of the gouge marks his conclusion was that the vehicles had collided on the correct lane of the Renault. Asked what his conclusion would be if the gouge marks were excluded from the equation, he replied that on the strength of the oil patch, as described by sergeant Z du Plessis, his conclusion would still be that the vehicles had collided

on the lane of the Renault. He disagreed that the dark patch on the southern lane to the left of the solid line was an oil patch. Among others, it could be bitumen, gearbox oil, engine oil, or brake fluid. He conceded that he did not read the entire transcript of the proceedings. He compiled his reconstruction report on 20 November 2003. He perused Ms Badenhorst's reconstruction report before he compiled his. He conceded that the probabilities could equally be that the accident occurred on the centre line or on the lane of the Golf or on that of the Renault. He agreed that none of the three police witnesses, Van Gorkom, Nortje and Du Plessis mentioned any gouge marks in their testimonies. He admitted that his opinion concerning the Golf venturing onto the lane of the Renault was speculation. He denied the suggestion that bitumen did not evaporate. The defendant's case was then closed.

- [32] All in all nine persons testified in this case – four for the plaintiff and five for the defendant. On the evidence before me two diametrically opposed submissions were made by the two counsels. On the one hand, Mr Ploos van Amstel's main submission was that the road accident in question was occasioned by the sole negligent driving of the insured driver. On the other hand, Mr Camp's main

submission was that the plaintiff failed to show that the accident in question was caused by any negligent driving on the part of the insured driver. It is incumbent upon the plaintiff, in order to succeed, to advance a reasonable and probable explanation of what happened. This *onus* rests on him throughout the proceedings.

“He will only succeed if he satisfies the Court upon a preponderance of probabilities that his version is probably true and thus acceptable, ...”

said Fischer AJ in **FOURIE v ROAD ACCIDENT FUND 1999**

(3) ALL SA 661 (OPD) at 667B.

[33] The parties are agreed that the accident took place in Welkom on Sunday, 1 June 1997, at or about 03h35 and that the scene of the accident was on the Klippan Road a short distance from Power Road. Two sedans were involved in the accident. The one, a white Renault with registration number OXV 47590 was insured by the defendant and driven by a certain P.W.E. de Klerk. The other, the red Golf with registration number OKE 18724 was driven by the plaintiff and owned by his wife.

[34] It was also not in dispute that immediately prior to the collision, the

Renault was travelling eastwards and the Golf westwards. The dispute revolved around the exact point of impact, or the area of impact, if you will. There were no passengers in any of the vehicles involved. The driver of the Renault, De Klerk, was instantly killed. The driver of the Golf, Daly, was rendered unconscious by the sheer force of the impact. He was comatose in the intensive care unit of the Welkom Hydromed Hospital where he regained his conscious state of mind about a week later. Today he apparently has no independent recollection of the circumstances of the accident. He cannot remember anything at the school reunion function after the speeches had been made. Mr Camp attacked the plaintiff's testimony on this point. He pointed out that there was no medical evidence in support of the alleged amnesia. He contended that the probability was that such loss of memory was attributable to intoxication induced by excessive intake of alcoholic drinks.

- [35] By midnight on Saturday, 31 May 1997, the plaintiff and his ex-schoolmates were still enjoying themselves at the school reunion held at the Oppenheimer Golf Club in Welkom. Among his former schoolmates was Bernieri. He saw the plaintiff drinking. The

plaintiff himself admitted this fact. There was no evidence of how much alcohol he consumed that particular night. But Bernieri testified that he saw the plaintiff during the course of the night interacting with some guests and also playing pool with others. What he saw was a sober man. From this witness' testimony I got the impression that on both occasions the plaintiff acquitted himself well in a socially acceptable manner and that his mind was not remarkably impaired by the strong drinks he had imbibed. I cannot, therefore, go along with the suggestion that his apparent loss of memory was probably caused by alcoholic intoxication. There is no evidence at all that the plaintiff was indeed intoxicated. The suspicion that he might have been is not far-fetched. On the other hand, there was undeniable evidence that the plaintiff was continuously in an unconscious state of mind for five days. Therefore, I accept that he had probably sustained mental injury which was the probable explanation of his difficulty to recall events.

- [36] Mr Camp also criticised the plaintiff by arguing that he could not explain the positive averment he had made in his subsequent affidavit where he had stated that he was wearing a seatbelt at the

time of the accident. I take it that by the subsequent affidavit counsel meant a statutory sworn statement the plaintiff had made in support of his mva claim and not a police warning statement. It seems to me the plaintiff made no such statement to the police. In his testimony the plaintiff explained that at the time he made the statutory sworn statement in question he had already been told that he was found on the scene still wearing the safety belt. I understood him to mean that the averment was not his own independent assertive recollection. In my view the explanation he gave was sound and understandable.

[37] In the absence of direct evidence, I now proceed to examine the available circumstantial evidence tendered by the parties. Was there any useful physical evidence on the scene on which the court can rely?

[38] Bernieri was the first person to arrive on the scene. Shortly before the accident he was on his way from the Oppenheimer Golf Club to Sportman's Bar in the city. His version briefly is that he was following the plaintiff. The latter's car was directly in front of him. It was travelling on the southern lane for the westbound traffic

stream. It kept to this correct side of the road. It never moved over the barrier line onto the incorrect side of the road. Its tail-lights were clearly visible ahead of him. He also saw the headlamps of an oncoming vehicle. The two vehicles involved were about to pass each other in the opposite directions when the headlights of the oncoming vehicle suddenly disappeared. The next moment the tail-lights of the plaintiff's vehicle abruptly went off. He brought his vehicle to a standstill between the two vehicles involved.

- [39] Bernieri made two statements in connection with this accident. The first was a three page document written in English and signed at Welkom on 7 October 1997. The second was a four page document written in Afrikaans purportedly made in Welkom on 20 March 2000.

In the sworn statement he stated that he was driving behind the plaintiff from the said golf club. In the unsworn statement he stated that he was driving behind an unknown vehicle. His oral testimony was consistent with the former, but inconsistent with the latter. Seeing that the former was made on oath whereas the latter was not, it cannot be logically argued that the contradiction

amounted to perjury.

In the unsworn statement he also stated that the headlamps of the vehicle he was following were on dim. But during cross-examination he admitted that he did not really see whether they were on bright or dim. Once again his sworn court testimony must be preferred to his unsworn statement made to an mva investigator appointed by the defendant.

In my view both contradictions were not of such a serious nature as to vitiate the entire testimony of this witness. Similarly, not much can be read into his failure on the scene to ascertain the condition of the driver of the Renault.

[40] I want to examine the evidence of the glass pieces first. Bernieri answered during cross-examination that he did not see glass debris on the road. He did not even think of that. He was in a state of shock. That was the position during his initial attendance on the scene. On his subsequent return to the scene he could feel glass pieces as he walked around between the two cars involved. He was unable to confirm where the concentration of the glass debris was.

He would not dispute the testimony of the police witnesses that the concentration of the glass debris was on the northern lane. In evaluating Bernieri's testimony it becomes clear to me that when he initially inspected the scene he did not have favourable conditions to make proper observation. His observation was impaired by darkness, shock and eagerness to seek help. It did not surprise me, therefore, when he said he saw no glass pieces. On his subsequent visit the conditions were comparatively better. The rescue team, the ambulance crew and the police were also on the scene. In addition, two of his ex-schoolmates were with him. By the time he drove away the scene was probably lit by the rescue team. His evidence was inconclusive as to on which traffic lane the concentration of the glass pieces was. He was steadfast, however, that all over the scene he could feel glass pieces. About that he was certain.

- [41] Van Gorkom also testified about the glass pieces. In his evidence his first answer was that he could not remember seeing pieces of glass on the scene. During cross-examination he conceded that in the majority of instances glass pieces spread over a very wide area when two vehicles collide. It then becomes difficult in such

circumstances to rely on glass pieces to determine the area of impact. In asserting that everything showed that the vehicles collided on the correct lane of the Renault, he based his assertion on the assortment of debris, which included the bonnet of the Renault, but excluding glass debris. In evaluating his evidence two aspects must be appreciated. Firstly, that the glass pieces played no role in the conclusion he reached concerning the probable area of impact. Secondly, that his admission that the bonnet of the Renault was in fact never detached as he had claimed in his chief evidence to form a major item of the debris assortment has seriously shaken the very foundation of his observation. His evidence has to be disregarded as unreliable and incredible.

- [42] Ms Potgieter visited the scene a day after the accident. She did not have any first-hand knowledge of where the scene was. Van Gorkom did not take her there. He directed her where the accident scene was. He told her, among others, so she testified, that she should be on the look-out for glass pieces on the road near the golf course turn-off. There on the left-hand side, in other words the northern traffic lane, she found some glass pieces. She indicated by means of the letter “D” on exhibit “K” the point where she saw

the glass pieces. She was emphatic that the road had not been cleaned up. She had occasion to revisit the scene during an inspection *in loco*. On that occasion she was unable to indicate the exact spot where she had seen the pieces of glass on the scene. She conceded that after six years she was very uncertain when she was asked to describe the scene. I find her evidence, for these reasons, unsatisfactory and inconclusive. How on earth Van Gorkom could have told her to be on the look-out for pieces of glass on the scene when he himself did not see such pieces of glass defies logic and impacts negatively on the testimony of Van Gorkom.

- [43] Ms Du Plessis also mentioned glass pieces in her evidence. She determined the area of impact on the strength of the glass pieces, among others. The glass pieces were on the traffic lane of the Renault according to her. She conceded that the glass pieces alone were not reliable indicators of a probable area of impact because they have the tendency of spreading during impact. She was the king-pin of the whole investigation, yet she did not ensure that the official photographer took the photograph showing the exact spot or area of the glass debris. She made no attempt to have the scene secured in order to preserve some useful evidential matters she

observed on the scene such as pieces of glass. Her evidence in this regard left much to be desired. I got the impression that lack of formal training and proper experience in the field of road accidents and not dereliction of duty on her part was the main reason for this. I am unable to accept her evidence of where the concentration of the pieces of glass was.

[44] Pound also testified about the glass pieces. There were pieces of glass on the northern traffic lane of the Renault, but none on the southern lane of the Golf. His emergency team was responsible for the job of clearing up the scene. The team would have swept the glass pieces off the entire road surface. They would not have pushed pieces of glass from the southern lane across the barrier line to the northern edge of the road. During cross-examination he conceded that he did not really have an independent recollection of sweeping the glass off the road in this instance. In his chief evidence he described one light patch on the northern shoulder of the road as the pieces of glass the rescue team would have swept off from the scene. Another light patch in that same vicinity was shown to him during cross-examination. He conceded that such light patch could also have been glass as well. But that was not the

end of his concession. In addition, and this is telling against his evidence, he also conceded that such light patches could also have been light soil and not necessarily glass pieces. When he was pertinently asked whether he had no independent recollection of his visit to the scene, his answer was “A vague memory sir, a very, very vague memory”. This frank answer characterised his testimony. In effect he was saying no reliance should be placed on his evidence. On his version I cannot find that there was glass debris on the road or find that his emergency team had cleaned up the scene. It is crystally clear that no positive credibility findings can be made in respect of this witness.

- [45] The plaintiff’s expert witness, Badenhorst, expressed the scientific view that glass debris was not always a good indicator of the area of impact. She said the reason for this was in accordance with Newton’s first law. The essence of that law of physics was that an object travels in the same direction until an unbalanced force acts on it. She explained further that the glass pieces or debris pieces in general were once part of a vehicle travelling at a certain velocity. Upon impact those debris pieces break off and continue travelling on a straight line at the same velocity of the vehicle prior to the

collision. They will carry on travelling independently until gravitational force pulls them down. By the time such debris pieces land on the ground, they might have travelled quite a distance away from the precise area of impact. The defendant's expert witness, Grobbelaar, agreed.

[46] Because debris often scatters over a large area, using it alone to deduce the area of impact sometimes leads to inaccurate results. Although the defendant's expert witness, Grobbelaar, agreed with Badenhorst on this point, he understood the evidence in this case to be that the concentration of the glass pieces was on the traffic lane on which the Renault was travelling. The significance of the glass concentration on that lane, he said, was that it gave an indication that the impact must have been more on the lane of the Renault than on the lane of the Golf.

[47] For the reasons I have advanced while I was evaluating the evidence of the various witnesses individually and comparatively I could find no conclusive evidence to support the conclusion that there was a greater concentration of glass pieces on the northern lane than there was on the southern lane. Therefore, I cannot accept Grobbelaar's conclusion. He said the following:

"I think the concentration of glass is there".

Perhaps this doubtful statement says it all. There is no

photographic material to depict such concentration. Those witnesses who alleged the exact lane on which it was were unimpressive.

“It is most unsatisfactory also that there is nothing on the plan even to suggest the existence of mud droppings or broken perspex, far less a depiction of where these crucial items of evidence were found. All that appears on the plan is a cross with the legend “point of impact”.”

remarked Baron, JA in **GUARDIAN ROYAL EXCHANGE ASSURANCE RHODESIA v JETI 1981 (2) SA 102 (ZA) at 106D-E.** All that can be said without any hesitation is that there were pieces of glass on the scene scattered on the road.

[48] Now I proceed to examine the evidence of the fluid spillage. Van Gorkom’s lay opinion was that the two vehicles had collided on the northern lane of the Renault because he noticed a big oil spillage on that lane. The oil spillage was not captured by the camera or photograph. During cross-examination the witness could hardly say where the oil spillage was in relation to the white barrier line. This was a material negation of his earlier testimony that he noticed a big oil spillage on the lane of the Renault. He could not give any sound explanation as to why an expert and experienced

photographer such as Nortje did not take a photograph of the one and only oil spillage which he, the investigating officer, regarded as an important indication of the area of impact. In **GUARDIAN ROYAL** (*supra*) at **106B**, Baron JA had this to say about the remissness of the police investigating officer:

“This Court has said repeatedly that it is of the utmost importance for investigating officers to examine the scene of an accident with meticulous care and to place before the Court the fullest possible factual information, including accurate measurements.”

It was not done in the instant case.

[49] As the investigating officer Van Gorkom was probably the first person to know about the senior prosecutor’s difficulty with the witness statement of his colleague, Du Plessis, concerning how she had determined a point of impact. Yet he did not deem it necessary to make a statement in support of the alleged big oil spillage on the northern lane. It seems to me that he made no further enquiries with Nortje to find out why if such an important oil spillage was shown to him he did not take a photo thereof. The senior prosecutor also asked him as the investigating officer to take the matter up with Bernieri. Again he did not grasp the second opportunity in order to explain how it all came about that Du

Plessis drew up the police accident plan as she did. He is the one police officer who should have told Du Plessis long before the senior prosecutor's queries that her statement was silent in respect of the big oil spillage which they had seen on the northern lane and which, in the circumstances of this accident, they both regarded as the most important indicator of the area of impact. I consider his evidence on this score as unreliable and untrustworthy account of what he saw and did not see.

[50] Potgieter's evidence has no direct bearing on the oil spillage. But it is of vital significance. It will be recalled that she visited the scene a day after the fatal accident. She was certain that the scene had not been cleaned up. This was in sharp contrast to Pound's testimony. She found pieces of glass not on the northern shoulder of the road but right on the trafficable surface of the road on the northern lane. Her testimony cast some serious doubt on any suggestion that the oil spillage could have been cleaned up by the emergency service team on the day of the accident.

[51] Pound said that any oil which his team might have found on the road would definitely have been covered with a bit of sand and

then pushed off the road. However, on this particular occasion, he could not recall cleaning up any oil from the road. The remarks I have previously made about this witness were as valid there and then as they are here and now. In a nutshell his evidence is incredible and unreliable. The rescue truck and the ambulance, he said, were in perfect roadworthy condition. He ruled out any possibility that any oil could have leaked from anyone of those vehicles while they were on the scene.

[52] About the oil spillage Du Plessis phrased her observation in the following manner:

“Daardie oggend op die toneel het ek ‘n oliekol in, ek kan nou maar sê, die oorledene se baan gesien ...”

Like her colleague Van Gorkom, she told the court that the specific oil patch she was talking about was not on the photograph “B1”, but she indicated on the same exhibit the spot where the oil patch was more or less. She differed with her colleague Van Gorkom somehow. She supposed that the rescue team had cleaned up the scene which was why the oil patch was no longer visible when Nortje returned to the scene during daytime to take the additional photographs. However, her supposition was negated by Potgieter

and nullified by Pound. There is absolutely nothing on her plan depicting precisely where such crucial piece of real evidence was. She made two affidavits in respect of the accident.

- [53] What emerged from the primary testimony of this witness was that she did not observe the sweeping or cleaning up of the scene by the rescue team. The leader of the rescue team cannot remember that his team ever cleaned up the scene. The deceased's sister is certain that the scene had not been cleaned up. She did not see any oil spillage. The rescue crew leader did not see the oil spillage. Could it be that the fresh and big oil spillage had evaporated into thin air overnight? Du Plessis made two affidavits in respect of the accident. In her contemporary statement she made no mention whatsoever of the oil spillage, but in her supplementary statement made over 2½ years later she mentioned the fresh big oil spillage for the very first time. During cross-examination she confirmed that if there were two or more fresh oil patches which had attracted her attention she would have highlighted them on the police accident plan, in other words her sketch plan. But she conceded that in this instance there was only one obvious oil spillage and that she failed to highlight its position on the police accident plan or to

make mention thereof. She conceded that she knew an oil spillage on the scene of the accident was a very important indicator of the possible area of impact. She conceded it was more reliable than glass pieces. She conceded that it was unthinkable that an experienced police photographer would take a photograph of a fatal scene of an accident but leave out an oil patch. In all her 13 years career as a police officer it was for the first time in this case that she ever came across a culpable homicide case where an oil spillage depicting a possible area of impact had not been photographed.

- [54] About two things she was adamant. The first was that she indicated all the important points, including the oil spillage, to the photographer on the scene while it was still dark. The second was that she did not return to the scene again during daytime with the photographer to indicate any points to him. What she said in effect boiled down to this: She showed the oil spillage to the photographer. The photographer did not immediately take a photo of the oil spillage although he took three photographs at dawn. During daytime the photographer returned to the scene without her. He took more photographs. Again the photographer did not shoot a

snapshot of the oil spillage for some unknown reasons.

[55] The version of Nortje was: that he returned to the scene during daytime with Du Plessis; that he took additional photographs including exhibit “B1” on the instructions of Du Plessis; that he highlighted four important points on “B1” as they were indicated to him by her. I pause to remark that none of the four points related to an oil spillage. At first she denied she ever returned to the scene with Nortje. Pressured during intense cross-examination she conceded that she was possibly wrong and that Nortje was possibly correct. Bearing in mind that it is customary procedure recognised in police circles that an official photographer has to be accompanied to the scene when photographs are taken and bearing in mind also that Nortje’s testimony was not at all challenged, his version that Du Plessis was with him on the scene at 12h00 on 1 June 1997 when he took photograph “B1” must be preferred to that of Du Plessis. Nortje captured with his camera what was pointed out to him by Du Plessis. No sound reason was advanced as to why he did not capture the oil spillage if there was one on the northern lane and if he had been instructed to.

[56] It must now be accepted that on the spot she regarded as a point of impact, there was no oil spillage or traces thereof. If there was, she would have instructed Nortje to take a photograph thereof, because she knew the importance thereof. No word was said, and no contemporary note was made about the oil spillage in question until 31 months later. Until then there was virtually no mention of an oil spillage on the northern lane in any witness statement. Notwithstanding Du Plessis' original affidavit which was later amplified by her supplementary affidavit neither the senior public prosecutor nor the inquest magistrate could place any significant weight on the accident sketch plan drawn by this witness. It appears to me improbable that there was such an oil spillage on the northern lane on the scene. It is a lame argument to contend that because the standards of proof in our criminal justice system differs with the standard of proof in our civil justice system, the attitudes of the prosecutor and the magistrate are irrelevant in these civil proceedings. The issue here is not about those standards. It is about the liability and the creditworthiness of the observations of the witness and the observations the witness failed to make on the scene.

[57] Badenhorst expressed a general view that the position of an oil patch was not in itself always an accurate indication of an area of impact. She visited the scene over six years later and saw no visible dark patch of what could be likened to the remnants or site of the oil spillage. She looked at the scenery photograph “B1” east of the final rest position of the Renault but could see no oil mark on the road. She propounded the opinion that after a motor collision, oil stays on the road surface for quite some time. Using the same photographic material, Grobbelaar pointed out a large darkish stain on the northern lane and said that it could possibly be the remains of an oil stain Du Plessis had seen. He also visited the scene more than six years later. It could not be. It simply did not tally with Du Plessis’ version. She saw that exhibit several times when she was giving evidence. She at no juncture associated the large darkish stain with the site of the oil spillage she was talking about. In fact she placed the alleged spot of the oil spillage beyond the boundaries of the photo. I deem it unnecessary to labour the point any further.

[58] So far I have dealt with the evidence relating to the alleged oil mark on the northern lane. I am mindful of the evidence relating to an alleged oil mark on the southern lane. I shall deal with it later.

[59] Now I turn to the gouge marks. Grobbelaar's evidence was that he did a site inspection on Thursday 20 November 2003. On the northern lane he found two scrape marks. Those two scrape marks were identical to the two marks which were depicted on photograph "A1". He came to the conclusion that it was probable the gouge marks he found on the tarmac on the scene indicated the area of impact between the two sedans. He advocated the proposition that the gouge marks were probably caused by the damaged metal components of either or both vehicles such as suspension, chassis, engine or gearbox which would have been forced downwards at the moment of impact to leave such gouge marks on the surface of the road. The forced downward displacement was due to the tremendous forces generated between the vehicles at impact.

[60] I have some difficulty with this evidence. The first problem was that the alleged gouge marks themselves were so tiny that they were almost invisible. The witness himself acknowledged in his chief evidence that it was very difficult to see those marks. The second problem was that virtually nobody, I mean no other witness

including the three police officers, Nortjie, Van Gorkom and Du Plessis, noticed such marks. The third critic is that there is no evidence that any of the aforesaid vehicle components were so damaged, forced downwards and scraped the tarmac as the witness assumed. My finding, therefore, is that I can find no causal nexus whatsoever between those minute scratches and the accident I am here dealing with. That being the case, it follows without saying that such marks have to be disregarded in this complex search for the probable site, area or point of impact. The witness' proposition is juridically invalid and untenable.

When I eliminate the three cardinal assumptions Grobbelaar had made concerning the precise sites of the glass debris concentration, the oil spillage and the gouge marks – all of which he assumed were on the northern lane, then the factual substratum or better still the scientific foundation of his reconstruction theory begins to crumble. I could find no acceptable objective facts underpinning his chief conclusions. In the English decision of CASWELL v POWELL DUFFRYN ASSOCIATED COLLIERIES LTD (1939) 3 All ER 722 at 733, Lord Wright said:

“My Lords, the precise manner in which the accident occurred cannot be ascertained as the unfortunate young man was alone when he was killed. The court therefore is left to inference or circumstantial evidence. Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some cases the other facts can be inferred with as much practical certainty as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture.”

I find those words of wisdom very instructive and apposite here.

[61] I return to the evidence of the black mark on the southern lane in search of the elusive probable area of impact. Van Gorkom did not see an oil spillage on the southern lane. He only saw one oil spillage on the scene but he could not recall whether the one oil spillage he saw was to the left-hand side or to the right-hand side of the white barrier line. His evidence was illogical and inconsistent. Logic tells us that if he saw one oil spillage and such oil spillage was not on the southern lane, then it follows that such oil spillage

must have been on the northern lane, the lane of the Renault, in other words, on the left-hand side of the white barrier as one drove from west to east on the Klippan Road. He came upon the scene shortly after the occurrence but saw nothing of any importance on the southern lane. He was manifestly not a careful observer for he did not see the obvious black mark.

[62] Du Plessis commented in her chief evidence that the black mark on the southern lane as depicted in photograph “B1” was, in her opinion, not an oil spillage but a tar mark. She saw only one oil spillage which caught her attention. The oil spillage she saw was on the northern lane. During intense cross-examination she backtracked and conceded that the black mark on the southern lane was an oil mark. About that she was 99% certain. The oil spillage on the southern lane did not catch her attention because it was small and the scene was dark. But she shortly conceded that she really could not explain why she missed such an obvious oil spillage. She also conceded that she could not, with responsibility or with conviction, describe such an oil spillage as an old oil mark which was not deposited on the road by any of the vehicles involved seeing that she did not even notice it on the scene. But she denied

the suggestion that the black mark on the southern lane was the only oil spillage on the scene. Nortje's photograph "B1" depicts the black mark very well.

[63] Badenhorst described the black mark on the southern lane as a definite oil spillage. During cross-examination, however, she conceded that it could have been a fluid of some kind, for example brake fluid spillage. But she denied the suggestion that the black mark could have been bitumen seepage from the tar. She expressed the view that bitumen does not evaporate or disappear. It can hold on for as long as six years. Her conclusion concerning the black mark on the southern lane was that it was an oil spillage and that it probably originated from this collision.

[64] Grobbelaar disagreed with Badenhorst about the nature of the black mark on the southern lane. In his opinion it was improbable that the black mark was an oil spillage which could be associated with impact between the vehicles involved in this accident. In the first place if the oil came from the damaged gearbox of either of the vehicles the shape of the black mark would have been an aerial splatter of oil and not a circular patch of oil. In the second place

such visible splash deposit would have a small trail of oil droplets leading to the final rest position of the vehicle with a damaged gearbox and not just a nicely defined single patch of oil. In the third place the oil patch deposited at impact would have exhibited some directional properties and not have an almost circular shape. He therefore disagreed with Badenhorst that the black mark could be related to this accident. In his opinion the black mark could also be the bleeding of the tar, the so-called bitumen.

- [65] In an attempt to find the probable source of the black mark, it must be remembered that no real forensic test was carried out in a science laboratory to ascertain whether the black mark was caused by an oil spillage from a car or bitumen bleeding from the tarmac itself; that a trail of a few smaller black dots imprinted on the surface of the road in a westerly direction from the original black mark can be seen; that those smaller black dots are approximately of equal distance apart; that the black dots gradually fade away the further one moves away from their original source; that they are in a straight line almost parallel to the white barrier line; that they were apparently brought about by the wheel of a vehicle which had uplifted the liquid substance from the original spot of the black

mark and repeatedly imprinted it on the surface of the road at regular intervals as it was rotating; that the defendant's two witnesses conceded that the indications were that the black mark could be an oil mark; that there was no concession on the plaintiff's side that the black mark could be tar bleeding. The concessions on the defendant's side fortified Badenhorst's conclusion that the black mark was probably not bitumen but one kind of fluid or another. The black mark in question, is a crucial item of real evidence or physical evidence which provided a factual foundation of Badenhorst's view. On the strength of the available evidence, I find Badenhorst's view preferable to Grobbelaar's view on the preponderance of probabilities.

- [66] The next question is: how did such liquid substance possibly land on the scene? We know that between 03h35 and 12h00 on Sunday, 1 June 1997 a few vehicles besides the two sedans involved were on the scene, among others, the ambulance, the rescue truck, the police vehicles and Bernieri's car. The defendant's witness ruled out the possibility that the substance could have leaked from the ambulance or the rescue truck. There was no suggestion it could have leaked from Bernieri's car or any police vehicle.

[67] Is there a chance that the black liquid substance came from an unknown vehicle before the accident occurred or sometime afterwards, but before Nortje returned to the scene at or about midday to take additional photographs including exhibit “B1”? The first scenario would mean that the Renault and the Golf collided on the spot where, by sheer coincidence, there was already a fluid spillage deposited prior to their collision. The second scenario would mean that the Renault and the Golf crashed into each other on the spot where there was no fluid spillage but that soon afterwards an unidentified vehicle, again by sheer coincidence, deposited a black fluid on the accident scene on the spot inside the ambit of the area suspected to be a probable area of impact. Implicit in each of these two scenarios is the conclusion that no droplet of a fluid whatsoever dripped from any of the two sedans concerned. That is a proposition I find very difficult to accept judging by the very extensive damage to the sedans. Although the scenarios may offer possible explanations of the origin of the black mark, they are highly improbable given the particular circumstances of this case. Notwithstanding Grobbelaar’s mighty reasons to the contrary, it must be kept in

mind that strange things often do happen when vehicles collide.

Eksteen, J as he then was, reminded us about it in the case of

MOTOR VEHICLE ACCIDENT FUND v KENNY 1984 (4)

SA 432 (ECD) at 436H-I:

“Direct or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training. Strange things often happen in a collision and, where two vehicles approaching each other from opposite directions collide, ...”

I have found, on a balance of probabilities, that the black mark on the southern lane was an oil spillage deposited at the moment of impact by either the Golf or the Renault.

- [68] The fact that meat-pie was found in the mouth of the driver of the Renault and a can of beer found between his legs immediately after the accident suggest that he was probably eating or drinking at the time of the accident. Several exhibits relating to the alcohol found in the blood sample extracted from the driver of the Renault were handed in by counsel for the plaintiff with the express consent of counsel for the defendant. Therefore the contention of the

latter that those exhibits were inadmissible evidence had no substance. I am inclined to say it seems to me that this belated bid by counsel to have the alcohol evidence excluded gives credence to Bernieri's testimony in much the same way as the beer on the lap and the pie in the mouth of the deceased do. Although this witness was unable to testify as to the area of impact and as to which vehicle had crossed the barrier line onto the incorrect side of the road, it can be deduced from his evidence that shortly prior to the accident the Renault was driven in a negligent manner. His testimony is the only direct evidence of any value we have of the accident in this case. He is the only witness who actually saw the two motor vehicles shortly before their collision and stopped on the scene. The excessive amount of alcohol, namely not 0,12 ml per 100 ml of his blood sample suggests that his mental faculties were probably impaired and his driving abilities somewhat diminished. While his driving abilities or skills were already compromised by the excessive amount of intoxicating alcohol he had already consumed, eating or drinking further while driving certainly made the already bad situation worse. Either of them probably had an adverse impact not only on his level of alertness or concentration, but also on his abilities to manipulate the car as is required of a driver.

[69] The final rest position of the plaintiff's vehicle was on the southern side of the road. The final rest position of the insured driver's vehicle was on the northern side of the road. It was contended on behalf of the defendant that the probable explanation of the

situation was that a south-westerly force should have struck the Renault from the front at an angle while the Renault was moving eastwards straight on its correct lane; that the Renault was stopped on its tracks and; that the Renault was then pushed backwards albeit diagonally across the northern lane to its final rest position. This first scenario implies that the Golf was the offending vehicle. On behalf of the plaintiff it was contended that the probable explanation of the situation was that a north-easterly force should have struck the Golf from the front at an angle while the Golf was moving westwards straight on its traffic lane; that the Golf continued in the same westerly direction albeit diagonally across the southern lane to its final rest position. This second situation implies that the Renault was the offending vehicle.

[70] I am persuaded by Grobbelaar's scientific opinion that both scenarios are equally possible, provided all other factors are neutral. But the objective facts strongly militate against the first scenario. There is virtually no objective fact let alone evidence to suggest that the Golf instead of taking the light bend to the left, moved over the barrier at the second kink and that as it was trying to move back to its correct lane, collided with the Renault. On the

other hand, the oil spillage on the southern lane is a crucial piece of physical evidence which objectively strengthens or favours the second scenario. From this reliable, invaluable and objective aid, I am able to determine the probable area of impact from which a court may be able to draw an appropriate inference of negligence.

(*Vide* **HULLEY v COX 1923 AD 234**). A court of law can decide an issue of negligence on probabilities provided it is able to weigh one set of probabilities against another set in order to ascertain the most probable cause of the accident. (See **HAMILTON v MACKINNON 1935 AD 114**).

In the case of **AA ONDERLINGE ASSURANSIE BPK v DE BEER 1982 (2) SA 603 (A)** the court held per Viljoen, JA at **604G** that:

“It is not necessary for a plaintiff invoking circumstantial evidence in a civil case to prove that the inference which he asks the Court to make is the only reasonable inference. He will discharge the onus which rests on him if he can convince the Court that the inference he advocates is the most readily apparent and acceptable inference from a number of possible

inferences.”

[71] The circumstantial evidence favours the inference which the plaintiff advocates for acceptance. Although the area of impact was on the lane of the plaintiff, the proximity of the relevant oil spillage to the barrier line seems to suggest that both vehicles were travelling close to the centre line when they collided. From this the most readily apparent and legitimate inference which I am inclined to draw from a few possible inferences is that the collision occurred more or less in the centre of the road. (See **JADEZWENI v SANTAM INSURANCE CO LTD AND ANOTHER** 1980 (4) SA 310 (CPD) per Watermeyer, JP at **311G-H** and **312C-H**). The objective facts suggest that the plaintiff was travelling at an excessive speed and that he took no evasive action. There were no brake marks or skid marks observed on his lane. Having considered all the relevant factors I am of the view that an apportionment of 70% - 30% in favour of the plaintiff is fair and equitable in the circumstances of this case.

[72] As regards the issue of costs I am in agreement with the decision of

BAPTISTA v STADSRAAD VAN WELKOM 1996 (3) SA 517

(O) per Lombard, J as well as **FAIGA v BODY CORPORATE**

OF DUMBARTUM OAKS AND ANOTHER 1977(?) (2) SA

651 (W). I am of the opinion that no special circumstances exists

why the plaintiff should not be entitled to the costs.

[73] Accordingly judgment on the merits is granted in favour of the plaintiff. The defendant is ordered to pay the costs of this case including the qualifying fees of his expert witness Ms Wilna Badenhorst.

M.H. RAMPAL, J

On behalf of Plaintiff:

Adv. C. Ploos van Amstel SC

Instructed by

Honey & Partners

On behalf of Defendant:

Adv. A. Camp

Instructed by

Webbers

/scd

