



**IN THE HIGH COURT OF SOUTH AFRICA
WESTERN CAPE HIGH COURT, CAPE TOWN**

CASE NO: 8673/06

In the matter between:

GREGORY BRINK LOUW

Plaintiff

and

THE ROAD ACCIDENT FUND

First Defendant

JAMES FRANCIS MACKAY

Second Defendant

JUDGMENT : FRIDAY 23RD APRIL 2010

Riley, AJ:

[1] In this matter the plaintiff instituted action against the first defendant, the Road Accident Fund, the statutory body created in terms of the provisions of section 2(1) of the Road Accident Fund Act no. 56 of 1996, and against James Francis Mackay [hereinafter referred to as Mackay] the second defendant arising out of a motor vehicle accident which occurred in the early hours of the morning on Marine Drive, Bloubergstrand, Western Cape.

[2] It is common cause that Mackay was the driver of the vehicle, a Jeep Wrangler and

that plaintiff was a passenger in the said vehicle, when the vehicle left the road and collided with a low wall on the left-hand side of the road, before rolling a number of times and eventually coming to rest on its side on the road.

[3] The day before the trial commenced, the plaintiff filed a notice of withdrawal of the claim as against Mackay. I was advised that the insurers of the motor vehicle which was driven by Mackay had agreed to pay to plaintiff the sum of R2 million in settlement of plaintiff's claims against Mackay.

[4] The matter thus proceeded against the first defendant only.

[5] Plaintiff alleged that the accident was caused due to the sole negligence of an unidentified oncoming vehicle, alternatively due to the sole negligence of Mackay, alternatively due to the negligence of both drivers.

[6] Section 18 of the Road Accident Fund Act No. 56 of 1996 provides that the liability of the Fund is limited to R25 000.00 should the claim be based upon the negligence of the said Mackay as the driver in which the plaintiff was conveyed at the time of the accident. Thus in order to succeed in his claim against first defendant for the full quantum of his damages plaintiff is required to prove that the accident was caused or brought about in some or other way by the negligence of another driver (in this matter the driver of the alleged unidentified "oncoming" motor vehicle).

[7] The parties agreed that only the merits of the matter required adjudication, it having

been agreed between them that the merits and quantum be separated.

[8] It was plaintiff's case that the accident was caused by the sole negligence of the driver of the oncoming unidentified motor vehicle who was alleged to be negligent in the following respects as is succinctly summarised in plaintiff's heads of argument:

- 8.1 he failed to drive with the vehicle's headlights on so as to warn other road users of his approach;
- 8.2 he encroached into the path of travel of the motor vehicle in which plaintiff was being conveyed when it was dangerous and/or inopportune to do so;
- 8.3 he failed to keep a proper and/or adequate lookout;
- 8.4 he failed to exercise any and/or adequate control of the said vehicle;
- 8.5 he failed to apply the brakes of the said vehicle timeously, adequately or at all;
- 8.6 he failed to avoid a collision when by the exercise of due care and when in a position to do so, he could and should have done so.

[9] At the trial Mr Sher contended on behalf of the first defendant that:

- (1) in the light of the evidence and the prevailing circumstances at the time, the plaintiff has failed in discharging the onus of proving the existence of the second alleged unidentified motor vehicle;
- (2) in any event, plaintiff failed to prove that if such a motor vehicle was in fact present at the time of the accident, the driver of such motor vehicle was in fact negligent in any way whatsoever;
- (3) plaintiff has failed to prove any causal connection between the driving of such motor vehicle by the other driver and the resultant accident in which plaintiff was injured;
- (4) that the evidence demonstrates unequivocally that the accident was brought about solely by the negligence of the second defendant.

[10] Plaintiff called constable van der Merwe, Mackay, Andrew Gerald John (hereinafter referred to as John), Alan Louw and Candice Louw to testify on his behalf. The first defendant did not call any witnesses.

[11] The plaintiff himself did not testify. I was advised by Mr Corbett, counsel for plaintiff, that as a result of the aforesaid accident plaintiff has suffered a number of injuries, including a diffuse axonal brain injury as a result of which he did not recall the events which transpired on the night in question.

[12] The parties were in agreement as to the place where the accident took place. An accident report and plan (Exhibit "B") prepared by constable van der Merwe and photographs of the scene and the vehicle as well as a further sketch plan prepared by Alan Louw was accepted into evidence. I state at the outset that I could find no fault with the evidence of plaintiff's parents, Alan and Candice Louw in regard to the matters they testified about. They could however not assist me on the merits of the matter.

[13] It is not necessary for me to summarise the evidence of all the witnesses that testified at the trial. I agree with Mr Sher that the two material witnesses who were involved in the accident are Mackay (who after the withdrawal of the action against him testified for the plaintiff) and a passenger in the vehicle, John.

[14] In narrowing down the issues to be decided on in this matter Mr Sher correctly conceded that the first defendant had failed to show the existence of any contributory negligence on the part of the plaintiff as a result of any alleged failure on his part to wear a seat belt.

The merits:

Mackay's evidence:

[15] Mackay testified that on the night in question he had accompanied the plaintiff and John to a party in Bloubergstrand. He knew the plaintiff as a friend since standard 6 at school and John also attended school with him. They drove to the party in the Jeep Wrangler vehicle owned by John's father and it was driven by John. They were at the party for about 4 (four) hours and at about one o'clock in the morning they decided to return

home. Since John was not feeling well, he asked Mackay to drive the Jeep. Mackay agreed to do so.

[16] He testified that he consumed about 4 (four) beers and soft drinks in the course of the evening and that he was not under the influence of alcohol. According to him he felt comfortable to drive the vehicle home.

[17] When they set off for home John was in the front passenger seat and the plaintiff in the back seat.

[18] He testified that it was raining and that there was little traffic at that time of the morning. He explained that at the place where the accident occurred, Marine Drive consists of one lane in each direction. On the seaside of Marine Drive is a parking area which stretches for quite a distance. There are exit and entrance gaps to allow vehicles in and out of the parking area onto Marine Drive.

[19] He testified that he proceeded along Marine Drive towards Cape Town at a speed of between 60 to 70 kilometres per hour. He testified that he was coming up to a vehicle which he said was in the left lane and then decided to overtake the vehicle as it was travelling slower than he was. He testified that he saw that there were headlights of vehicles a safe distance away and he then proceeded to overtake what he thought was a red Mazda motor vehicle.

[20] When he reached a point where he had overtaken the Mazda and was preparing to

return to what he described as the left lane John screamed "watch out car" or words to this effect. In that split second he interpreted this to mean that there was danger immediately ahead of them.

[21] He testified that he immediately swerved left and in doing so lost control of the vehicle. He could not correct the vehicle which hit a low wall on the left side of the road and "flew into the air", hit the wall again and rolled and ended up on the left side of the road.

[22] Although he was uninjured he was very shocked.

[23] He saw John standing on the road 10 (ten) metres or so from him but John fell down. He went to the plaintiff who was laying face down on the road.

[24] The police and medical assistance arrived on the scene and he recalls CPR being administered on the plaintiff until the ambulance arrived on the scene.

[25] He was later told by John that John had shouted as he had seen another car coming from the opposite direction. He testified that he did not think the vehicle had its lights on and that this was the only reason why he could not have seen it.

[26] He explained that at the time the warning was shouted he was concentrating on the vehicle that he was busy overtaking as he intended to return to the left lane.

John's evidence:

[27] John testified that he had driven the vehicle to the party. He stated that at the party he had six or seven beers but that he was not drunk. He asked Mackay to drive the vehicle home as he was nauseas and as in his view, Mackay was more than capable of driving.

[28] He confirmed the weather and traffic conditions. He was seated in front and he remembers that their vehicle's lights were on.

[29] He testified that as they were driving they approached a red vehicle. According to him Mackay was looking ahead and as Mackay proceeded to overtake and just as he was about to get into the lane in which they were driving previously, he saw a vehicle coming from the opposite direction towards them with parking lights on. He testified that he shouted out at Mackay whose reaction was very quick. He testified that Mackay swerved hard to the left and then the vehicle they were in hit the wall.

[30] According to him the vehicle came out of the parking area and that Mackay's reaction time was quick.

[31] He testified that if he did not shout there would have been a head on collision.

[32] During cross-examination he conceded that he had had discussions with Mackay about his evidence and in particular the questions that Mackay had been asked.

[33] He further conceded that six to seven beers would have "put" him under the influence and that he could have got unwell due to the alcohol but that he also had a stomach bug.

[34] He agreed that he had attended with Mackay at the attorneys where they had spent an hour.

[35] He was adamant that Mackay was fine to drive the vehicle.

[36] He testified that since the vehicle that they were driving in was much higher than a normal vehicle they could see "over" the vehicle ahead of them. That he saw a vehicle coming on in the oncoming lane at a distance of a hundred metres or so.

[37] He stated that Mackay had a clear view ahead of him.

[38] That as Mackay was overtaking that he (John) saw a vehicle with park lights on, coming from the opposite direction. He first stated that he assumed that the car came from the parking area and later stated that he did not know where it came from.

[39] He denied that the vehicle that he saw when he shouted was the same vehicle he saw coming on in a distance.

[40] He was adamant that the vehicle he saw when he shouted, only had on its parking lights and not its full lights and compared it to a Mercedes motor vehicle that his mother

used to have.

[41] He denied that Mackay had decided to overtake the red vehicle in the face of oncoming traffic and he could not explain why Mackay did not see the vehicle approaching them.

[42] When cross-examined about the fact that Mackay had overreacted he said that Mackay's reaction was quick but that Mackay had overreacted and swerved too sharply and then hit the wall.

[43] When he saw the "unlit" vehicle for the first time it was about five metres or so from them.

[44] According to John, Mackay had told him that he did not see the "unlit" vehicle.

[45] He denied that he had manufactured the "unlit" vehicle to assist the plaintiff in his case.

The Law

[46] Negligence is the failure to exercise that care and skill which would be observed by a reasonable person. Thus a person drives a vehicle negligently if he fails to exercise reasonable care in the driving of a vehicle. In civil and criminal cases the test for negligence (culpa) is reasonable foresee-ability. If the reasonable driver would:

- (a) have foreseen the reasonable possibility of his conduct injuring another in his person or property; and
- (b) have taken reasonable steps to guard against the occurrence and he fails to take such steps his conduct amounts to negligent driving.

See in this regard Cooper's Motor Law Criminal liability Administrative Adjudication and Medico-Legal Aspects – Hootor second Edition B11 – 15

[47] Accordingly in cases of this nature the court must to the best of its ability, place itself in the position of the driver at the time of the occurrence and then decide whether the driver has exercised the care which the reasonable man in his position would have exercised in the circumstances. Caution should be exercised in not judging the conduct of a driver with hind sight, and examining his conduct in the "placid atmosphere" of the court in the light of after acquired knowledge.

See in this regard Cooper, Motor Law Volume II pages 48 to 49.

[48] It is trite law that the standard by which a driver's conduct is to be judged is an objective one.

[49] In this matter the parties are agreed that this case is concerned with a claim at the instance of an 'innocent' plaintiff such as a passenger. The law is clear that in such circumstances all that the plaintiff is required to do is to prove the proverbial "one percent" negligence on the part of the defendant in order to succeed.

[50] Accordingly plaintiff would succeed with his claim against first defendant if he succeeded in proving that the accident in which he was injured was caused by the negligence of another driver even if such negligence was minimal and even if there was also negligence on the part of his own driver i.e. on the part of Mackay.

[51] The law however requires that, in order to succeed plaintiff must also prove that there was an unidentified motor vehicle involved and that the driver of such unidentified motor vehicle was causally negligent in regard to the accident. Accordingly the onus is on the plaintiff to prove on a balance of probabilities that there was a "second so called unidentified motor vehicle" involved and that the driver of that vehicle was causally negligent in regard to the collision.

[52] Should I find that there was an unidentified vehicle involved I will out of necessity have to consider on the evidence of plaintiff's witnesses what impact the driving of such vehicle with only parking lights on, would have had on Mackay at the time that he decided to execute the overtaking manoeuvre.

[53] It is generally accepted that a motorist has a duty to ensure that his vehicle is properly illuminated at night when he/she uses the road, not only to illuminate the road ahead, but also to warn the road users of his presence on the road.

See in this regard Sauerman and Others v New Zealand Insurance Company Ltd 1958 (4) SA 289 (N).

[54] In Ntsala and Others v Mutual and Federal Insurance Company Limited 1996 (2) SA

184 (TPD) the court held that where a driver of a vehicle suddenly found himself in a situation of imminent danger, not of his own doing, and reacted thereto, and possibly took the wrong option, it could not be said that he was negligent unless it could be shown that no reasonable man would have so acted. The court further held that, in that case, if the defendant's driver had in fact acted in sudden emergency, he had taken proper and obvious steps by swerving to the left, if he had then lost control of his vehicle or if in a panic he had swerved back onto the tarmac and a collision had followed, he could not be faulted and held to be negligent.

See also in this regard Goode v SA Mutual Fire and General Insurance Co Ltd 1979 (4) SA 301 (W).

[55] The steps expected from a driver facing a sudden emergency are such as a reasonably careful driver would fairly be expected to take in the circumstances.

[56] I am therefore mindful that when dealing with cases where the so-called sudden emergency defence is involved that this defence only applies and is only available, if the person who seeks to rely there upon neither had the time, nor the opportunity to weigh up the pros and cons of a particular situation, and was not responsible for having brought about the alleged emergency.

[57] Mr Sher contended that had Mackay kept a proper lookout he should and would have seen the presence of the alleged unidentified motor vehicle in the oncoming lane and would, and should not have proceeded to overtake. In the alternative he contended that Mackay at the least should have immediately returned to the lane in which he had been

travelling in a safe manner, without over reacting.

[58] Our courts have in the past in a number of matters refused to allow a motorist to rely on the defence of sudden emergency where the motorist over reacted to the circumstances or situations even where those circumstances or situations were not caused by or brought about by their own actions.

See in this regard S v Claasen 1962 (3) SA 308 (O); S v Lombard 1964 (4) SA 346 (T); S v Crockart 1971 (2) SA 496 (RAD) and S v Erwin 1974 (3) SA 438 (C).

Evaluation of the evidence of the keywitnesses:

[59] When I analyse and evaluate the evidence of the two key witnesses for the purposes of deciding whether plaintiff should succeed with his claim, it is abundantly clear to me that everyone involved in the trial (and particularly plaintiff's witnesses) were aware that the negligence of the driver of the unidentified vehicle had to be the causative negligence that operated in order to make the plaintiff's case succeed.

[60] Mr Corbett contended that Mackay and John had made a good impression when they testified and that they presented their evidence in a clear and forthright manner. He contended that they were not shaken despite the searching cross-examination by Mr Sher and by the questions put to them by the court.

[61] I do not agree with Mr Corbett that Mackay and John made a good impression either when they testified and/or when they were cross-examined.

[62] In considering their evidence and deciding on whether their evidence is credible and reliable I have regard to their independence or bias as witnesses. It is common cause that plaintiff, Mackay and John are friends of long standing and that they went to school together. At the time of the trial it was clear to me that they were still friends. Shortly after the collision Mackay and John consulted a lawyer together when Mackay found himself in a situation where he was charged with negligent driving. From the evidence presented to me it appears that they were in each other's presence when they consulted with and made their statements to the attorney who represented Mackay at the time. At the time of his testimony on behalf of the plaintiff Mackay had as he put it been indemnified from any further claims against him. He therefore had nothing to lose, so to say. Notwithstanding my warnings to him that he should not discuss the evidence with other witnesses, McKay did in fact discuss the evidence with John. This fact was readily conceded by John.

[63] I am also not convinced that Mackay testified on the basis of his independent recollection of the events. I am further concerned that due to his relationship with the plaintiff and the fact that he was indemnified from further claims, that he may have had a motive to adjust his testimony to favour plaintiff's case.

[64] Due to their close relationship and the facts of this matter I am similarly not convinced that John's testimony can be regarded as independent and unbiased. Accordingly I cannot exclude the possibility that also his testimony was not affected by his allegiance to plaintiff and Mackay.

[65] Accordingly I have approached their evidence with caution.

[66] Based on the evidence presented to me and from the further reasons that appear below I am not persuaded that plaintiff has discharged the onus of proving that an unidentified vehicle caused and/or contributed to the accident that occurred:

- (1) Mackay was not a satisfactory witness at all;
- (2) It is common cause that he did consume beer at the party. Notwithstanding his attempts to persuade me that he was not under the influence of intoxicating liquor at the time that he drove the vehicle, he failed to convince me. I am not convinced that he was truthful about the amount of alcohol or beer that he consumed.
- (3) He was extremely evasive about the amount of alcohol that he had consumed;
- (4) He could not explain how he could remember that he had no more than four beers, taking into account that the incident had occurred almost seven years ago;
- (5) When questioned about the amount of alcohol he consumed he gave responses that it was at best "a guess" or "estimate" of what he had consumed on the night;
- (6) When it was suggested that he could have drank more alcohol than the four

beers he stated that he "sticks to" that amount and that "this was his version". He was however at great pains to point out that he had twenty soft drinks that night;

- (7) Although he initially stated that he did not say that the alcohol had no effect on him he later changed his version by stating that he denied that the alcohol that he had consumed had any effect on his ability to drive.

- (8) When he was questioned about why he used the words –

"... I was satisfied that I was sober enough to safely drive the vehicle..."

in his affidavit to his attorney, he could not give a satisfactory explanation;

- (9) He could not explain why he used the words "sober enough" i.e. with reference to his state or degree of intoxication as opposed to his evidence where he stated that the alcohol he had consumed, had absolutely no effect on him.

[67] There were also other contradictions and inconsistencies between his evidence and the contents of the affidavit he made to his attorney shortly after the incident.

[68] When he was cross-examined by Mr Sher about whether or not he was at any stage misled into believing that the parking area which was on the right hand side of the road

that he was travelling along that night; was a road for traffic in the opposite direction he repeatedly denied that he was so misled.

[69] He was at great pains to emphasize that when he first saw the parking area he immediately realised what it was and that he was never under the impression that it was a road for traffic in the opposite direction.

[70] This is of course contrary to and inconsistent with the contents of paragraph 15 of his affidavit where the following appears:

"...I recall being not quite sure whether the road was a dual carriage way with traffic in both directions, or whether it was a double lane carrying traffic in one direction only. With the benefit of hindsight, the tarred parking area next to the beach probably misled me to my right, into thinking that it was carrying traffic in one direction only..." (my underlining)

[71] I am more than satisfied that on the night of the accident and based *inter alia* on what is stated in the aforesaid paragraph that Mackay was in fact not sure whether the road was a dual carriage way with traffic in both directions or whether it was a double lane carrying traffic in one direction only. I agree with Mr Sher's contention that it is inconceivable and illogical that any of this confusion on his part would have been mentioned in the affidavit had it not in fact been present in his mind at the time and had he never been misled as to the status of the parking area to his right. The fact of the matter is that there would have been no reason to mention this in his affidavit at all.

[72] When I questioned him about this issue he claimed that he had never told his attorney that he had been misled, nor had he ever thought that the parking area was another road.

[73] According to him he told his attorney he saw the parking area, assessed the situation and was not confused at all.

[74] It is important to note here that eventhough the affidavit was signed on 17 October 2003 before a commissioner of oaths he had consulted his attorney within days of the accident. He also admitted that before signing the affidavit it was read to him and he agreed with its contents.

[75] It is inexplicable that Mackay did not see the "unidentified vehicle" as it approached him. I say this based on his own evidence that he was sitting high up in the Jeep Wrangler, he could look far ahead of him over the roof of the vehicle just ahead of him and he kept a proper lookout for oncoming traffic. Eventhough it was raining, his visibility was not affected and the surrounding road area was reasonably well lit up at the time. He was adamant that he would not have proceeded into the right hand lane (i.e. the lane for oncoming traffic) and would not have overtaken the red motor vehicle if there had been a problem with visibility.

[76] He could give no reasonable or plausible explanation for not seeing the vehicle. His version that he was not looking ahead of him and concentrating on the red car when overtaking is highly improbable. Any driver that executes an overtaking manoeuvre will

first look ahead of him for oncoming traffic (i.e from the opposite direction) as he is overtaking and to the car that he is overtaking to determine whether it is safe to execute and to complete the overtaking manoeuvre.

[77] In my view the simple explanation for not having seen the unidentified vehicle is because there was no unidentified vehicle.

[78] In any event if he was keeping a proper lookout as he said he did in the circumstances described by him, he at least ought to or should have seen this unidentified vehicle approaching even before he executed the overtaking manoeuvre. It follows therefore that on his own version he was not keeping a proper lookout. Accordingly I must conclude that even if I accept that there was an unidentified oncoming vehicle that Mackay ought to have or should have seen the vehicle and that he was therefore grossly negligent when he executed the overtaking manoeuvre in the face of oncoming traffic.

[79] In his evidence in chief he testified that the only reason he could think of why he had not seen the unidentified vehicle was because it did not have its lights on. When he was re-examined on the issue he changed his version and said that the reason for not seeing the vehicle is because it must have previously been in the "car park" i.e. with reference to the parking area next to the road he was travelling. He testified that in his view the car must have moved out or was in the process of "turning into the road ahead of him". It must be borne in mind that Mackay's evidence is that as he was travelling he saw the vehicles in the parking area. In my view it is inconceivable that he would then not have seen this vehicle as it drove on the parking area and then turned into the road ahead

of him. It will be recalled that it was also Mackay's evidence that he could see the lights of motor vehicles approaching him from hundreds of metres down the road.

[80] When questioned about how the accident could have occurred and why it did occur if he stated that he was at the point of proceeding back into the left hand lane, why he had not done so and then continued on his way, he said that he had "over-reacted" when he swung the steering wheel violently to the left. He described his conduct as a "knee-jerk reaction". He tried to justify what happened by saying that he was not used to the Jeep, that the wheels were high and that if he had executed such a violent swerve with his own motor vehicle, he would not have lost control. According to him he swerved violently to the left without even looking to see whether there was any danger ahead of him and that in swerving so violently on the wet road he lost control of the vehicle. Eventhough he braked, the vehicle nonetheless collided with the retaining wall.

[81] I am satisfied that on Mackay's own version he would not have lost control of the vehicle had he not over-reacted by swerving so violently to his left. In my view this conduct on his part amounts to negligence.

[82] His conduct also totally contradicts the fact that he states that he was in control of the vehicle, had kept a proper lookout and that he had made a conscious decision to overtake because it was safe to do so.

[83] It is inexplicable how he did not manage to pass the vehicle that he was overtaking with safety. I am further dismayed that notwithstanding the reckless manoeuvre that he

executed that the vehicle that he had overtaken did not collide with the vehicle he was driving or with the unidentified vehicle.

[84] When evaluating the evidence of the witness John I am particularly mindful of the fact that he is the only witness who allegedly saw the unidentified vehicle.

[85] He is therefore for all intent and purposes a single witness in regard to the alleged unidentified vehicle. I am not satisfied that he gave his evidence in a credible, clear and satisfactory manner. On his own admission he consumed approximately six to seven beers that night prior to the accident. I am inclined to accept that it is more than likely that he drank more beers than what he says he did. He conceded that the alcohol had affected him. In fact he states that the combination of the effects of the alcohol and the fact that he was nauseas caused him to ask Mackay to drive them home.

[86] I am not convinced that in the condition that he was in, that he was in a position to determine whether or not Mackay was in a fit state to drive them home. Due to the fact that John was affected by the alcohol and feeling unwell, I am not prepared to place any reliance on his evidence as a "back seat" driver, who was for some or other inexplicable reason more vigilant than Mackay when the incident occurred.

[87] According to John's evidence the vehicle was so high off the ground that they could see clearly ahead of them over the top of the red vehicle when they decided to overtake.

[88] According to him he kept a proper lookout for vehicles ahead of them. He testified

that also he saw the lights of a motor vehicle in a distance far ahead. According to him it was safe to overtake at the time Mackay decided to do so. He said that Mackay proceeded to overtake the vehicle and that as he was about to get into the lane they were driving in, he saw a vehicle in front coming in their direction with its parking lights on. This vehicle was travelling in the lane for oncoming traffic i.e. in the opposite direction in which they were travelling. As he saw the vehicle he yelled to Mackay to "watch out" and Mackay then reacted very quickly by swerving hard to the left and thereafter their vehicle collided with the wall.

[89] I was of course concerned that he had discussed Mackay's evidence with Mackay prior to his testifying in the matter. I concluded that he did this in an attempt to prepare himself for the questions which would be put to him when he was to testify.

[90] When he testified I observed John very carefully. John did not impress me at all as a witness. As the only eyewitness of the unidentified vehicle I found that on the totality of his evidence that it was unconvincing, lacked detail and was unpersuasive. I have already referred to certain aspects of his evidence when summarising his evidence above. I will now highlight the following problematic features of his evidence:

- (1) When he was asked in his evidence in chief where the vehicle with the "parking lights" on, had come from he was uncertain. He used words like "guess" that it "came out from one of the parking bays".
- (2) When cross-examined he stated that he assumed that the car had come out

of the parking area as it had its parking lights on.

- (3) When he was cross-examined about where the unidentified vehicle was when he first became aware of it, he said that it was at a distance of about five metres away from their vehicle.
- (4) He was unable to explain why he had only noticed it at that time, particularly since he, like Mackay, had testified that they were keeping a proper lookout.
- (5) When it was put to him that it was inconceivable, even ludicrous, that he would not have seen the unidentified vehicle as it came out of the parking area into Marine Drive, he responded by saying that he thought that it came from the parking area and later on said that he never saw it and that if it did come from the parking area that he would have seen it.
- (6) He was adamant that Mackay did not see the unidentified vehicle.
- (7) When he had difficulty explaining why he did not see the vehicle, he tried to justify this by saying that he could have looked away.
- (8) This is of course contrary to his evidence in chief that he was keeping a proper lookout on the road ahead of him and that according to him it was safe to execute the overtaking manoeuvre when Mackay did so.
- (9) He could not explain why Mackay never saw the unidentified vehicle. The

question that immediately arises is, that if he (in the state that he was in) could see the unidentified vehicle with its parking lights on, why did Mackay not likewise see it.

- (10) It is also surprising that John in fact saw the vehicle, since as he explained the parking lights were on the side of the vehicle and not easily visible.
- (11) John was also confronted with the contents of the affidavit that he made around the same time Mackay did to his attorney.
- (12) Eventhough he stated that the affidavit had been read over to him and that he understood its contents, he said that when it was drafted he should not have signed it since as his memory served him it was not correct.
- (13) He gave this response when the contradictions and inconsistencies between his evidence in court and what was contained in his affidavit was pointed out to him.

In his affidavit to his attorney he said in regard to the unidentified vehicle:

"6. I have a better recollection than James, it seems, of the approaching vehicle with its parking lights on. (hereinafter referred to as "the unlit vehicle")."

[91] In my view the contents of this paragraph entrenches the view that Mackay had no knowledge whatsoever of the unidentified vehicle. It further appears from this paragraph that at the time that the statements were being prepared that there existed some uncertainty about the unidentified vehicle.

[92] In paragraph 7 of the affidavit he stated that –

"I noticed the unlit vehicle as we overtook the red car which, I agree, might have been a Mazda 323."

[93] This in my view also indicates uncertainty on his part in regard to the identity of the vehicle they were allegedly overtaking.

[94] When Mr Sher referred him to paragraphs 8, 9, and 10 where he stated:

"...8. There was a third vehicle quite some distance ahead, I seem to recall approaching us with its headlights on dim. It was still too far away to pose any threat.

9. I did not immediately notice the unlit vehicle. I recall that I was not concerned, at all, as we started to overtake the Mazda ahead of us. I felt comfortable with James overtaking.

10. Suddenly ahead of us, the unlit vehicle appeared."

He was adamant that he had only seen a single vehicle coming on and no other vehicles.

[95] Eventhough he had given no description whatsoever of the "unlit unidentified motor vehicle" in his evidence in chief, or initially during cross-examination, when he was confronted with the contents of paragraph 11 of his affidavit, he said that the unidentified vehicle was white and that it was a Mercedes. He was able to remember this as according to him his mother had a similar vehicle with similar parking lights.

[96] I point out here that in his affidavit to the attorney shortly after the accident he was also not sure about the description of the unidentified vehicle as he stated the following:

"I suspect, although I cannot be certain that the unlit vehicle could have been a white Mercedes Benz." (my underlining)

I am satisfied that he was not certain about the description of the vehicle based on his use of the words "suspected" and "could have been". In my view he fabricated and adjusted his evidence in order to create the impression that he was certain about the identity of the vehicle when he stated that he identified the vehicle as similar to the one that his mother had with parking lights which were on the side of the vehicle and not part of the main lights.

[97] It is highly unlikely that in his state, bearing in mind that it was night, the fact that the car was almost on top of them, that the incident happened within split seconds, that he would have been able to remember that kind of detail. I am accordingly not persuaded that

he would have had the opportunity to make this kind of observation bearing in mind the prevailing circumstances.

[98] When I questioned him to obtain clarity regarding the unidentified vehicle he made some telling concessions namely:

- (1) That if the unidentified motor vehicle had approached them from the front, that both he and his driver ought to have seen it; as
 - (a) the road was lit;
 - (b) they could see right over the top of the vehicle which they proceeded to overtake;
 - (c) if the unidentified vehicle did indeed come out of the parking area ahead of the point of impact, and proceeded along the road towards them for quite some distance, both he and Mackay would have seen it;
- (2) He was unable to explain why he insisted that the vehicle must have come out of the parking area if he had not himself seen the vehicle proceed from the parking area.

[99] In my view his evidence in any event does not make sense, since had the vehicle in fact proceeded out of the parking area both he and Mackay would have seen it coming on

for quite some distance as is quite clear from the photographic exhibits. Should I accept that the vehicle did indeed come out of the parking area and had driven towards them for some distance, albeit with only parking lights, Mackay would be grossly negligent if he then decided to execute the overtaking manoeuvre in the face of oncoming traffic.

[100] His evidence is further not satisfactory and in fact is highly improbable when he testified about the distance between the vehicle he was in and the unidentified vehicle when Mackay was executing the overtaking manoeuvre.

[101] According to Cooper: Motor Law at page 434 –

"...Where events take place over much shorter distances and in much shorter times, as in traffic accidents, it is more appropriate, and more convenient for calculation, to express vehicle speed in units of metres per second. The conversion is as follows:

$$\text{Speed in metres per second} = \text{Speed in kilometres per hour} \div 3,6$$

It is seen therefore that at a speed of 72 km/h, a vehicle is travelling 20 metres in one second; a statement which gives a readily visualized, and at first a rather alarming, conception of the speed..."

"...An alternative method of conversion between kilometres per hour and metres per second is by using the chart on page 435. Any point on this line relates corresponding values of metres per second and kilometres per hour, these values being found by projecting horizontally and vertically respectively. Thus 90 km/h and 25 m/s are seen to be equivalent to each other, at the point shown..."

[102] Even if I accept that the vehicle that John was travelling in was travelling at a speed of 60 kilometres per hour, it would (according to Cooper's calculation) have covered a distance of 17 metres. At 80 kilometres per hour it would have covered a distance of about 22 metres. It is therefore clear that the distance pointed out by John in court cannot be correct.

[103] John could not explain why Mackay was not able to execute the overtaking manoeuvre with safety.

[104] If one considers the version of John it is highly unlikely and improbable that bearing in mind the fact that eventhough;

- (a) Mackay passed the red vehicle;
- (b) returned sharply into the lane he was travelling in;
- (c) collided with the retaining wall;
- (d) then rolled back into the road;

that neither the red motor vehicle nor the oncoming unidentified vehicle were involved in an accident with either their vehicle or the red vehicle.

Conclusion:

[105] Having regard to the unconvincing and unpersuasive evidence of Mackay and John of

and about the incident, and in particular regarding the existence of the unidentified vehicle

I find that –

- (1) there was no such unidentified vehicle;
- (2) the collision that took place in the early hours of the morning on Marine Drive was probably caused where Mackay, in the process of overtaking a motor vehicle at a speed that was inappropriate at the time, given the weather conditions, swerved too sharply to the left and thereby lost control of the vehicle causing it to collide with the retaining wall;
- (3) that it is likely that Mackay was affected by the consumption of alcohol and that by virtue of the natural ebullience that one can have by virtue of good company and the intake of alcohol there was less concentration by Mackay on his driving than there should have been;
- (4) for all the above reasons taken individually or in combination, in particular Mackay, by virtue of his sole negligence, lost control of the vehicle in circumstances where a normal and reasonable driver would not have lost control of the vehicle.

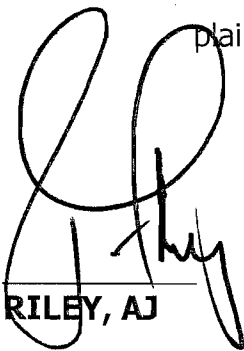
[106] The plaintiff has accordingly failed to discharge the onus of proving that the accident in which he was injured was caused or brought about by the negligence of the driver of any other motor vehicle, other than the one in which he was being conveyed at the time.

[107] In the result first defendant is only liable to plaintiff in the sum of R25 000.00 in terms of the provisions of the Road Accident Fund Act No. 56 of 1996.

[108] Accordingly I make the following order:

(1) First defendant is directed to make payment to the plaintiff of the sum of R25 000.00 (twenty five thousand rand) together with costs on a party and party basis up to and as at 4 March 2008.

(2) The costs subsequent to 4 March 2008 including the costs attendant upon the hearing of this matter on 23, 24 and 25 February 2010 are to be borne by the plaintiff.



RILEY, AJ