

REPORTABLE

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

Case No: 18650/07

In the matter between:

**FERDI HATTINGH (in his personal capacity
and on behalf of RYAND KAREL HATTINGH)**

Plaintiff

and

MR ROUX N.O.

First Defendant

ALEX ROUX

Second Defendant

BEN MALAN

Third Respondent

DP VAN EMMENIS

Fourth Respondent

CAMERON DUGMORE N.O

Fifth Respondent

Advocate for Plaintiff

: Adv. JW Olivier (SC)

: Adv. AK Blommaert

Advocate for Defendant

: Adv. RGL Stelzner (SC)

Attorney for Plaintiff : Allan G. Jones of Allan G. Jones Inc.
Attorney for Defendant : A A Cuyler of Visagie Vos & Partners
Date of Hearing : 16-19 August 2010; 15 Oktober 2010 &
28 February 2011
Date of Judgment : 4 May 2011

REPORTABLE



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

Case No: 18650/07

In the matter between:

**FERDI HATTINGH (in his personal capacity
and on behalf of RYAND KAREL HATTINGH)**

Plaintiff

and

MR ROUX N.O.

First Defendant

ALEX ROUX

Second Defendant

BEN MALAN

Third Respondent

DP VAN EMMENIS

Fourth Respondent

CAMERON DUGMORE N.O

Fifth Respondent

JUDGMENT DELIVERED: 4 MAY 2011

FOURIE, J:

INTRODUCTION

[1] On 30 July 2005, the under 19A teams of Labori High School ("the Labori team") and Stellenbosch High School ("the Stellenbosch team") played a rugby match against each other at Stellenbosch, Western Cape. Ryand Karel Hattingh ("Ryand") represented the Labori team as hooker, while Alex Roux ("Alex") was the hooker of the Stellenbosch team. Approximately 10 to 15 minutes into the match, a scrum took place in which Ryand seriously injured his neck. This injury, Ryand alleges, was caused by an illegal and highly dangerous manoeuvre executed in the scrum by Alex.

[2] In 2008, Ryand instituted action against Alex (both duly assisted by their respective fathers as natural guardians) for the payment of damages allegedly suffered by Ryand as a consequence of this neck injury. Both Ryand and Alex have now attained majority. I should mention that the coach of the Stellenbosch team, as well as the principal of the Stellenbosch High School and the MEC: Education of the Western Cape Education Department, were initially joined as co-defendants in the action. At the commencement of the trial, I was informed that a settlement had been reached resulting in the withdrawal of the claim against these co-defendants. I also, at the request of the parties, made an

order in terms of Rule 33 (4), that the merits of the action be determined first and reserving the issue relating to the quantum of damages for later determination, if necessary.

THE PLEADINGS

[3] In the particulars of claim, it is alleged that the injury to Ryand's neck *"was caused by the breach of duty of care (sic), alternatively negligence, further alternatively deliberate action, of the second defendant (Alex)"*, in that he:

- (a) In accordance with an illegal and highly dangerous manoeuvre, apparently coded "jack-knife" by the Stellenbosch team, forcibly placed his head in the incorrect channel of the scrum, as a result of which Alex's head impacted directly and with force onto Ryand's neck, thereby causing the fracture of his neck;
- (b) Failed to ensure that Ryand and other players were not unreasonably placed at risk of serious injury in the course of the match;

- (c) Failed to ensure that the rules governing the scrum would be followed at all times to ensure the safety of Ryand and other players;
- (d) Failed to ensure that any scrum tactics or manoeuvres would not endanger Ryand or any other player in the scrum during the match; and
- (e) Failed to take all reasonable steps to ensure that play would not proceed in circumstances or in a manner which unreasonably exposed any player to a risk of serious injury in the course of the match.

[4] In his plea Alex denies the allegations underlying Ryand's cause of action and also raises a ground of justification, namely that Ryand, by participating in the rugby match as the hooker of the Labori team, accepted the risk of injury involved in such participation.

THE SCRUM

[5] A better understanding of the intricacies of a rugby scrum is gained by referring to the official laws of the game of rugby, particularly the

laws as they were in 2005 when this match was played. Law 20 states that the purpose of a scrum is to restart play quickly, safely and fairly, after a minor infringement or stoppage. The formation of a scrum, in which the eight forwards of each team participate, is described as follows:

“A scrum is formed in the field of play when eight players of each team, bound together in three rows for each team, close up with their opponents so that the heads of the front rows are interlocked. This creates a tunnel in which a scrumhalf throws in the ball so that front row players can compete for possession by hooking the ball with either of their feet...The middle player in each front row is the hooker. The players on either side of the hooker are the props. The left side props are the loose head props. The right side props are the tight head props. The two players in the second row who push on the props and the hooker are the locks. The outside players who bind onto the second or third row are the flankers. The player in the third row who usually pushes on both locks is the eighth man”.

[6] I also append to this judgment a copy of a diagram prepared by the parties, which graphically illustrates the formation of a scrum. The participants in the scrum are numbered as follows:

1- loose head props

2- hookers

3- tight head props

4 & 5 – locks

6 & 7 – flanks

8 – eighth men

[7] In the diagram the Stellenbosch forwards are presented in black and the Labori forwards in white. The position of Ryand in the scrum is indicated by means of the black arrow numbered 2, while Alex is depicted as the black No. 2.

[8] Law 20.1 (f) and (g) prescribes how the front rows should come together in a scrum, namely:

“First, the referee marks with a foot the place where the scrum is to be formed. Before the two front rows come together they must be standing not more than an arm’s length apart. The ball is in the scrum half’s hands, ready to be thrown in. The front rows must crouch so that when they meet, each player’s head and shoulders are no lower than the hips. The referee will call ‘crouch’ then ‘touch’: The front rows crouch and using their outside arm each prop touches the point of the opposing prop’s outside shoulder. The props then withdraw their arms. The referee will then call ‘pause’. Following a pause the referee will then call ‘engage’. The front rows may then engage. The front rows must interlock so that no player’s head is next to the head of a team-mate.”

[9] It will hopefully be clear from the foregoing, and with the assistance of the diagram annexed hereto, that, upon engagement of the two front rows, there is a gap or channel in which the two hookers have to place their respective heads, namely the gap between the head of the opposing hooker and the head of the opposing tight head prop. The tight head prop of each team has to place his head in the gap between the head of the opposing hooker and the head of the opposing loose head prop. The loose head prop of each team places his head on the outside of the head of the opposing tight head. In this manner the two front rows interlock so that no player's head is next to the head of a team-mate.

[10] Ryand's case is that, in executing the manoeuvre coded "jack-knife", Alex, immediately before the engagement of the two front rows in the fatal scrum, forcibly placed his head in the incorrect channel or gap, by moving his head to his right past Ryand's head (to Ryand's left) and placing it next to the head of his own tight head prop. This means that, instead of placing his head in the correct channel between Ryand's head and the head of the Labori tight head prop, Alex placed his head in the gap in which Ryand had to place his head upon engagement of the front rows. Ryand contends that, not only did this amount to a transgression of Law 20.1 (f) which requires front rows to interlock so that no player's head is next to the head of a team-mate, but it also constituted a highly

dangerous manoeuvre as the blocking of the channel or gap into which Ryand had to place his head, resulted in Alex's head impacting directly and with force onto Ryand's neck, thereby fracturing his neck.

THE LEGAL PRINCIPLES

[11] Rugby is a high-speed contact sport, so there will always be the risk of injury. The participants in a rugby game can expect to sustain injuries, even serious injuries, in the normal course of a game. The front row players, and in particular the hookers, whose arms are locked around the bodies of their prop forwards, probably find themselves in the most dangerous position when engaging in a scrum. It is well-known in the rugby world that serious neck injuries are frequently sustained by hookers while scrumming. This was confirmed by the experts who testified in this case. Notwithstanding this widely accepted inherent risk of injury, it would be legally offensive to deny an injured player a legal remedy in appropriate circumstances, merely because his injury has been sustained in a sporting contest such as a rugby game. However, the conundrum that presents itself to the arbiter is the determination of the "appropriate circumstances" in which the injured player should be afforded a legal remedy. This legal remedy will have to be found in our law of delict.

[12] As appears from paragraph 3 above, the plaintiffs' particulars of claim are rather inelegantly worded. I should mention that counsel appearing for Ryand and his father at the trial, were not the authors of the pleading. The allegation that the injury to Ryand's neck was caused by the breach of a duty of care, alternatively negligence, further alternatively deliberate action on the part of Alex, not only conflates the delictual elements of wrongfulness and culpability, but unnecessarily introduces the concept of "a duty of care" in determining delictual liability *in casu*.

[13] In **Hawekwa Youth Camp and Another v Byrne** 2010 (6) SA 83 (SCA), Brand JA warns, at para 21, of the confusion between the delictual elements of wrongfulness and culpability, and adds:

"This confusion in turn, so it seems, originated from a further confusion between the concept of 'a legal duty', which is associated in our law with the element of wrongfulness, and the concept of 'a duty of care' in English law, which is usually associated in that legal system with the element of negligence".

[14] The concept of the breach of a legal duty, is employed in cases where the conduct complained of manifests itself in an omission. The wrongfulness of the omission depends on the existence of a legal duty to act without negligence and the breach thereof by the defendant. It is accordingly unnecessary, in a case such as the present, where the plaintiff

relies on conduct in the form of a positive act which has caused physical harm, to employ the concept of the breach of a legal duty (or a duty of care as it is described in the particulars of claim). See **Gouda Boerdery BK v Transnet** 2005 (5) SA 490 (SCA) at 498-499 (para 12) and **Local Transitional Council of Delmas and Another v Boshoff** 2005 (5) SA 514 (SCA) at 521-522 (paras 18 and 19).

[15] For Ryand and his father to succeed, they will have to prove, on a balance of probabilities, that Alex executed the "jack-knife" manoeuvre, thereby causing the injury to Ryand's neck. They will further have to prove that Alex's conduct was wrongful and that he acted intentionally or negligently.

[16] As explained in Neethling, Potgieter and Visser, **Law of Delict**, 5th edition, page 33-34, the general norm or criterion to be employed in determining whether a particular infringement of interests is wrongful, is the legal convictions of the community: the *boni mores*. The *boni mores* test is an objective test based on the criterion of reasonableness. This requires the court to weigh the conflicting interests of the parties in the light of all the relevant circumstances and in view of all pertinent factors in order to decide whether the infringement of the victim's interests was reasonable or unreasonable.

[17] In **Smith Goldstein & Co (Pty) Ltd v Cathkin Park Hotel (Pty) Ltd and Another** 2000 (4) SA 1019 (SCA) at 1024F-G (para 7), Harms JA said that the test for determining whether conduct is wrongful *"involves a value judgment by applying in the light of all the circumstances the general criterion of reasonableness. The criterion is based on considerations of morality and policy and the court's perception of the legal convictions of the community"*.

[18] There are, however, special circumstances in which apparently wrongful conduct is in fact lawful because a violation of the law is absent. As explained by MW Prinsloo, **Liability in Sport and Recreation**, TSAR, 1991, page 43, examples of these special circumstances, known as grounds of justification, are self-defence, statutory authority, consent to the risk of harm and provocation. In the case of sports injuries which occur in the ordinary course of the practice of sport, wrongfulness is often excluded through consent to the risk of the harm. This ground of justification is expressed in the phrase *volenti non fit iniuria* (a willing person is not wronged), which has its origin in Roman Law and is also used in other Western legal systems. (See too SA Strauss, **Bodily Injury and the Defence of Consent**, SALJ, 1964, Volume 81, page 332; SK Parmanand, **Delictual Liability For Injuries in Sport: In Search of a Formula**, Obiter, 1986, page 51; A Van

Aswegen and J C Knobel, **Sportbaserings en Toestemming**, 1989 THRHR page 586; JMT Labuschagne, **Straf- en Delikteregtelike Aanspreeklikheid vir Sportbaserings**, STELL LR, 1998 (1), page 72 and Erna Viljoen, **The Legal Implications of Rugby Injuries**, LL.M Thesis, University of Port Elizabeth (2003) (www.nmmu.ac.za).

[19] Van der Walt and Midgley, **The Principles of Delict**, 3rd edition, para. 85, state that:

“Grounds of justification are practical examples of circumstances justifying a prima facie infringement of a recognised right or interest, according to the fundamental criterion of reasonableness. They indicate the circumstances in which society condones prima facie unlawful conduct. Grounds of justification are an expression of society’s legal convictions and therefore policy considerations underpin their existence. Although in practice they have developed to the full status of defences to an action in delict, they are in reality the expression of the boni mores test in typically recurring practical circumstances.”

[20] A convenient summary of the requirements for valid consent to the risk of harm to constitute a ground of justification, is provided by Neethling, Potgieter en Visser, **Law of Delict**, *supra*, at pages 92-94, namely:

- (a) Consent must be given freely or voluntarily;
- (b) The person giving the consent must be capable of volition;
- (c) The consenting person must have full knowledge of the nature and extent of the risk of possible prejudice;
- (d) The consenting party must also comprehend and understand the nature and extent of the harm or risk;
- (e) The person consenting must in fact subjectively consent to the prejudicial act. This consent has to be inferred from the proven facts; and
- (f) The consent must be permitted by the legal order; in other words, the consent must not be *contra bonos mores*.

[21] Consent to bodily injury or consent to the risk of such injury, is normally regarded as being *contra bonos mores*. Participation in lawful sport or consent to medical treatment, may, in appropriate circumstances, constitute lawful consent to bodily injury or at least to the risk of such injury. See **Boshoff v Boshoff** 1987 (2) SA 695 (O), where the plaintiff's claim for damages suffered as a consequence of an injury sustained during a squash match, was rejected. The court held that the plaintiff had lawfully consented to the risk of injury and that such consent was not *contra bonos mores*.

[22] The onus to prove the existence of a ground of justification rests on the defendant. The onus involves a full burden of proof and not merely an evidential burden. See **Mabaso v Felix** 1981 (3) SA 865 (A) at 871-874 and **Ferreira v Ntshingila** 1990 (4) SA 271 (A) at 273. In **Santam Insurance Company Ltd v Vorster** 1973 (4) SA 764 (A) at 780-781, it was stated that considerable obscurity surrounds the nature and extent of the proof required to establish a defence of consent. It was held that the view that such consent is to be inferred whenever a complainant has knowingly exposed himself or herself to danger, is too widely stated. On the other hand, the Appellate Division concluded that proof of an express or implied bargain, which connotes a bilateral consensus, places an unduly heavy onus on the defendant.

[23] Upon the establishment of the wrongfulness of a person's conduct, the question of his or her culpability arises, before delictual liability is imposed. As explained by Basson and Loubser: **Sport and The Law in South Africa**, 7th edition, Chapter 5-13, a person acts intentionally if his or her will is directed at causing injury and he or she is conscious of the unlawfulness of such conduct. On the other hand, there is negligence if a reasonable person in the circumstances would have foreseen the injury and would have taken steps to prevent the injury; and the defendant failed to take such steps. See **Dantex Investment Holdings (Pty) Ltd v**

Brenner 1989 (1) SA 390 (A) and **Kruger v Coetzee** 1966 (2) SA 428 (A) at 430 E-G. Upon proof of such wrongful intentional or negligent conduct causing patrimonial loss, delictual liability will be imposed.

[24] In considering the approach of the courts in determining liability, Professor Loubser (Basson and Loubser: **Sport and The Law in South Africa**, supra, at Chapter 5-13/14), concludes that both unlawfulness and fault in respect of a sports injury essentially involve the question whether the defendant acted reasonably or unreasonably. The learned author adds that these two elements of the delict are mostly telescoped into one when the courts examine the reasonableness of the defendant's conduct. He adds:

"Reasonableness is determined with reference to the rules and conventions of the sport concerned; the standards of care and skill that can be expected of a participant in the sport; and the circumstances of the incident. Injury caused by unreasonable conduct falls outside the ambit of consent to the risk of injury, because participants are taken to consent only to the normal and reasonable risks of the sport concerned."

[25] I agree with the approach adopted by the learned author and his conclusion at Chapter 5-15, that, for the purposes of liability for injury in sport, unlawfulness and fault are determined with reference to the rules

and conventions of the sport concerned and to the particular circumstances in which the injury occurred. The playing culture of a sport as constituted by such rules, conventions or customs may therefore assist in determining the unlawfulness or fault of the injury-causing conduct. It will determine what conduct players may expect from their fellow-players, which will normally include participation within the rules of that sport, as well as the acceptance of minor infractions of those rules as a part of playing the game. The playing culture may also assist the court in determining the limits of lawful conduct in the sport and the extent to which consent may justify certain common infractions of the rules of the sport.

[26] As far as a contact sport, such as rugby, is concerned, I believe that SA Strauss, **Bodily Injury and the Defence of Consent**, *supra*, at 334-5, recommends the correct approach, as follows:

"It is submitted that injuries resulting from actions which are, strictly speaking, forbidden by the rules of the game, can also be lawful where such actions occur normally in the course of the game. Thus the tackling of a rugby player after he has parted with the ball or an off-side tackle is a trespass according to the rules, but it is a normal incident and the penalty awarded for it is, as it were, part of the game. On the other hand, serious aggressions which are prohibited by the rules of the game and which do not normally occur in the game, e.g. blows with the fists in rugby, are unlawful despite the consent of the injured."

[27] Put differently, if the injuries result from actions which have been known reasonably to occur in a rugby game, same are to be regarded as lawful. However, if the injuries result from serious aggressions which are not normally associated with the game of rugby, same are to be regarded as unlawful and therefore actionable. In the latter regard, examples such as assaulting your opponent with the fists or intentionally dealing your supine opponent a kick to the head, come to mind. The injured player should not, by virtue of his participation in the game, be regarded as having consented to the risk of being injured as a result of serious aggressions which are not normally associated with the game of rugby.

THE CONDUCT

[28] In view of Alex's denial that he executed the alleged illegal and dangerous manoeuvre, it is necessary to decide this issue first. If it is found that Alex did execute such a manoeuvre, which caused the injury to Ryand's neck, it will then have to be decided whether his conduct was wrongful and culpable.

[29] The enquiry under this rubric is whether, immediately before the engagement of the two front rows in the fatal scrum, Alex forcibly placed his head in the incorrect channel or gap, as described above. A number of forwards who were involved in this match, were called as witnesses by

the respective parties. Three experts, well-known in the rugby world, provided the court with their opinions as to the cause of the injury suffered by Ryand. The experts are Mr. "Balie" Swart, who testified on behalf of Ryand, while Messrs. Andre Watson and Matthew Proudfoot testified on behalf of Alex. Mr. BJ Malan, the coach of the Stellenbosch team, who was present at the game, was also called as a witness by Alex.

[30] Balie Swart played rugby for the South African national side as a prop forward and was a member of the victorious team that won the Rugby World Cup in 1995. Presently he is a scrum consultant for the South African Rugby Union ("SARU"). Andre Watson was a world renowned rugby referee who officiated in 266 first class games, including two World Cup Finals. During his career he was widely regarded as the world's best rugby referee. He is now employed as the manager of SARU's referees. Matthew Proudfoot played international rugby for Scotland as a prop forward and represented several South African provincial teams. After retiring from the sport, he took up coaching and is presently the assistant coach of the Vodacom Stormers team.

[31] The knowledge and expertise of the three expert witnesses cannot be doubted. All of them have extensive knowledge of the laws of the game and the practical application thereof. In particular, they have

intimate knowledge and experience of the scrumming facet of the game of rugby. It should, however, be borne in mind that they were not present at the match, but formed their respective opinions on the strength of a video recording and photographic clips extracted from the video footage. The video was produced in evidence (Exhibit 1), but as the actual incident lasted only a few seconds, I found that the viewing thereof does not really prove helpful in establishing the course of events resulting in Ryand's injury. The video was recorded from the touch line on the opposite side of the scrum where the incident took place, which further reduces the value of the footage for deciding this case. I found the photographic clips extracted from the video footage (Exhibits B and C), far more helpful than the video recording itself.

[32] When considering the evidence of the expert witnesses, it has to be borne in mind that their respective opinions as to what actually happened in the scrum immediately prior to Ryand sustaining the neck injury, are, to a significant degree, reconstructions based solely on the available video footage and photographs which do not depict what actually happened in the heart of the scrum immediately prior to the engagement of the two packs of forwards. Andre Watson candidly stated “...ek dink ons almal is dit eens, ons sien hierdie spesifieke skrum net van een kant af. Ons kan nie 1 blou, 3 rooi sien nie. Ons moet op stadiums raai en

aanneem waar hulle is of waar hulle nie is nie.Wel, ons sien net die een kant van die skrum en dan moet ons 'n klomp aannames maak. Ek sien van foto 1 tot by foto 22, sien ek nie enige stadium dat ek my vinger op 'n ding kan druk en sê daardie man se kop is op 'n verkeerde plek en net so kan ek ook nie sê dat dit op 'n regte plek is nie."

[33] To the extent that the evidence of the experts amounts to a reconstruction, one has to bear in mind that their testimony would normally not bear the same weight as direct eye-witness testimony of the event in question. See **Representative of Lloyds and Others v Classic Sailing Adventures (Pty) Ltd** 2010 (5) SA 90 at 107 (para 60).

[34] After analysing the material at their disposal, the expert witnesses reached different conclusions as to the reason for Ryand sustaining the neck injury. Swart opined that, on impact, Alex's head was on the wrong side of Ryand's head, thereby blocking the channel or gap into which Ryand had to place his head. This, Swart says, resulted in Alex applying downward pressure directly onto Ryand's neck and caused his injury. According to Swart, this was achieved by Alex loosening the grip of his left hand which binds on his loose head prop (No.1), tilting his left shoulder and moving his head to the right (past the head of Ryand), thereby blocking the gap meant for Ryand's head.

[35] Generally speaking, the opinion of Watson and Proudfoot is that the Labori team's tighthead (No.3) was not positioned correctly, nor did he bind correctly, resulting in him going in on an angle (to his left towards Alex and Ryand). This, they say, caused Alex to move to his right and to collide with Ryand, whereafter the scrum disintegrated, resulting in the injury to Ryand's neck.

[36] Apart from Ryand, the following members of the Labori team testified, i.e Mr. JL Marais (no. 8 and captain of the side); Mr. N Hodgson (no. 7); Mr. T Gerber (no. 3) and Mr. GJ Alberts (reserve no. 2). Alex also testified and called his team-mate, Mr. HP Van Aswegen (no. 1), and his coach, Mr. Malan, as witnesses. At the outset I should mention that the witnesses Marais, Hodgson and Malan, who were not party to the contest between the front rows of the two teams, were unsighted to the extent that they could not really make meaningful contributions as to how Ryand was injured in the scrum. The witness Gerber (no.3 of the Labori team) was also not of much assistance in establishing what had actually happened in this scrum. He testified that he could not recall anything that had happened in this scrum, and it was clear from his evidence that the emotional trauma associated with the serious injury sustained by Ryand, contributed to the blanking out of the incident from his memory. He readily conceded that his evidence was based exclusively on what he saw

on the video and photographs. I should mention that he agreed that this material shows him scrumming in on an angle to his left.

[37] As mentioned in paragraph 10 above, Ryand's version is that, immediately before the engagement of the two front rows, Alex forcibly placed his head in the incorrect channel or gap, by moving his head past Ryand's head, thereby blocking the gap in which Ryand had to place his head upon engagement of the front rows. Alex emphatically denies having executed this manoeuvre. He says that he has an independent recollection that this was a normal scrum; that he was correctly positioned prior to the engagement; that upon engagement his head was placed in his correct channel between the heads of Ryand and the Labori team's No.3; that he had no difficulty in placing his head in his correct channel; that he went straight into his channel and that no player from either side shoved him out of his correct position. He further says that one or two seconds thereafter the scrum collapsed.

[38] Alex did testify that, upon engagement, he felt an impact to his left shoulder and neck, but reiterated that no player from either side caused him to be dislodged from his correct position, i.e. with his head firmly in the gap or channel between the heads of Ryand and the No.3 of the Labori team. It follows that, based on Alex's recollection of the fatal

scrum, he at no stage executed the manoeuvre described by Ryand, namely the placing of his head in the gap meant for Ryand's head, thereby blocking Ryand's channel and causing them to collide. Nor, as I have already alluded to, was there, according to his recollection, any external factor which could have caused him, upon engagement, to be pushed out of his channel to his right.

[39] It is, however, significant to note that, during his evidence, Alex adapted his version. This is best illustrated by the following recorded passage of his cross-examination:

"...indien die hof sou aanvaar dat Ryand getuig het dat jy het voor impak na regs beweeg, stem ons saam daar was geen rede vir jou – daar was nie iets wat veroorsaak het dat jy na regs beweeg soos iemand wat jou gestamp het of so iets nie, né?... Van my kennis soos ek onthou, is daar niks wat my kon beïnvloed nie. Maar wat ek van die foto's kan aflei, is iets heeltemaal anders.blou 3 het van die begin af ingeskrum. Dit sou die eksterne faktor gewees het vir my. Op foto 8 kan jy duidelik sien hoe die voorry no.3 inskrum en op foto 12 is hy heel weg in die skrum in. Dit is die eksterne faktor wat daartoe kon gelei het dat ek nie in my kanaal kon ingaan nie, waarin ek glo ek het ingegaan."

[40] Later, during cross-examination, Alex emphasised that, prior to the front rows engaging, there was no external factor which could have

caused him to move to his right. He stressed that he did not, of his own volition, move into a different channel. He reiterated that, upon engagement of the front rows, his head went into his correct channel or gap. He further explained, though, that after the front rows had engaged, the no.3 of the Labori team pushed him into the wrong channel, i.e the channel meant for Ryand's head. He described it as follows in his evidence:

"Met impak het die skrum gedisintegreer toe Ryand geval heten toe stoot sy voorry, no.3 blou, my in die verkeerde kanaal in. Dis hoe ek van kanaal verander het na aanleiding van die foto's. In watter verkeerde kanaal was jy?...Ek het bo-oor die blou 2 gegaan. Hy het geval mos. Toe gaan ek bo-oor hom in."

[41] It is clear that Alex's version as to how the no.3 of the Labori team would, after engagement of the front rows, have caused him to move into a different channel, is based solely on the photographic evidence. Be that as it may, the fact of the matter is that the court is faced with the mutually destructive versions of Ryand and his expert on the one hand, and Alex and his experts on the other. In view thereof, the onus is on Ryand to prove, on a balance of probabilities, that his version is the correct one. This requires the court, upon a conspectus of the evidence as a whole, and by balancing probabilities, to select a conclusion which seems to be the

more natural, or plausible (in the sense of acceptable, credible or suitable) conclusion, though that conclusion may not be the only reasonable one. If, however, the probabilities are evenly balanced, Ryand can only succeed if the court nevertheless believes him and is satisfied that his evidence is true and that Alex's version is false.

See: **Govan v Skidmore** 1952 (1) SA 732 (N) at 734C-D; **Ocean Accident and Guarantee Corporation Ltd v Koch** 1963 (4) SA 147 (A) at 159C-D and **National Employers General Insurance Co. Ltd v Jagers** 1984 (4) SA 437 (ECD) at 440 D-G.

[42] In analysing and weighing the evidence tendered by the parties, it appears that the following facts are either common cause or, at least, not seriously disputed:

- (a) The game was played on a sunny day and the underfoot was firm and not slippery.
- (b) After one of the earlier scrums, Ryand complained to his captain, Marais, that Alex was guilty of illegally hanging in the scrum.
- (c) The scrum in which Ryand was injured took place in the Labori team's half of the field, close to the touchline. This was the fourth or fifth scrum of the match.

- (d) While the two packs of forwards were forming up for this scrum Alex called out, "*jack-knife*".
- (e) Upon the engagement of the two packs in the scrum, Ryand shouted out in pain while the scrum collapsed.
- (f) Ryand was removed from the field of play to receive medical attention and he was replaced by Alberts, the reserve hooker of the Labori team. The match recommenced with a scrum. Immediately prior to the engagement of this scrum, Alberts noticed that Alex moved to his (Alex's) right. Alex moved his head so far across that Alberts had difficulty in forcing his head into the gap between the heads of Alex and the Stellenbosch team's no.3. This gap was, due to Alex having moved to his right, so narrow that, in forcing his head into it, Alberts sustained abrasions on the right side of his face.
- (g) Alberts informed his captain, Marais, that Alex "*besig is om weer anderste in te slaan*". Marais reported this to the referee, and Alex then changed his position to prop. Thereafter the referee only allowed uncontested scrums, in which the two packs of forwards were not allowed to shove against each other in competing for the ball.
- (h) Photo B8 shows the scrum in which Ryand was injured. It depicts the tunnel of the scrum at the moment when the front

rows of the two teams engaged in the scrum. The head of the no.1 of the Stellenbosch team is depicted in the foreground closest to the camera, while Ryand's head is visible next to the head of the Stellenbosch no.1, but deeper into the scrum. Alex's head is not visible in this photo. Had Alex been in his correct channel at the time of the engagement of this scrum, his head would have been visible in photo B8, i.e. in the position where Ryand's head is now depicted in the photo. Then Ryand's head would not have been visible as it would have been obscured by Alex's head.

- (i) I should add that Proudfoot suggested that, with the aid of his mobile computer, he could discern Alex's head (or the profile thereof) in photo B8. However, notwithstanding a thorough examination of photo B8, as well as photo C83 (which is an enlarged version of photo B8) and with the aid of Proudfoot's computer and a DVD containing all the photographs (Exhibit 2), Alex's head is not visible to me in any of the photographs. A further copy of this photograph, which was described by Alex's counsel as *"the very best copy that can be produced by a professional photographer"*, was subsequently produced (see the defendants' Rule 36 (4) notice dated 7 October 2010). I have carefully scrutinised this copy, but find no evidence

therein of the presence of Alex's head or even the profile thereof. Finally, it should be noted that Proudfoot's suggestion that he could discern Alex's head (or the profile thereof) in photoB8, was made rather hesitantly. He said *"I think I can see him on the top on my laptop then I could see his head but you know it could be behind the loose head of the red side"*. I accordingly find that, on the photographic evidence placed before the court, Alex's head, or even the profile thereof, is not visible in the tunnel of the scrum at the time when the front rows of the two teams engaged in the scrum in which Ryand was injured.

- (j) Photographs B1-3 show that Alex did initially bind properly with his left hand on the Stellenbosch team's no.1. However, photo B6 shows that, prior to engagement, Alex is releasing his grip on the Stellenbosch no.1, and moving his left hand and arm upwards along the left side of his team-mate. Photo B8 shows that, upon engagement, Alex's left hand had loosened and moved significantly towards the middle of the back of the Stellenbosch team's no.1.
- (k) Photographs B1-8 show that prior to, and at the engagement of the scrum, Ryand's right hand was correctly bound on the

Labori team's no.3. It is only thereafter that the photographs show his grip loosening and the scrum collapsing.

- (l) Photo B8 shows that, upon engagement, downward pressure is applied to Ryand's head. Given the relative positions of the front row players in the scrum, it could only have been Alex who pushed Ryand's head down, as depicted in photo B8, by exerting force on his neck. This was the consensus of Swart and Proudfoot, the former saying "*...so dit is die persoon (Alex) wat met sy linkerskouer afwaartse druk op die blou haker (Ryand) se kop of se nek druk.*"
- (m) Ryand scrummed straight ahead, as he was required to do in terms of the laws, but upon the engagement of the scrum, he was unable to place his head in the channel or gap which should normally have been available for this purpose. The reason was that his channel or gap was blocked. There was nothing that Ryand could have done to have caused the blocking of his channel or gap.
- (n) When, upon the engagement of a scrum, the hooker is properly interlocked in his correct channel, it is impossible for him to be knocked out of his channel by the other players.
- (o) The tight head prop (no.3) of the Labori team, Gerber, scrummed in on the angle (to his left), but he could not have

had any effect on Alex's position in the scrum prior to him making contact with Alex.

- (p) Had the tight head prop of the Labori team (No.3) engaged in his correct channel with his head between the Stellenbosch team's no.1 and no. 2, he would not have been able to move to his left or right, as he would have been locked in by these two players of the Stellenbosch team.
- (q) Ryand was injured when the two front rows engaged in this scrum. This is borne out by photo B8 and the fact that Ryand cried out in pain upon engagement. The agreed reports of the medical experts show that the injury was in all probability sustained upon engagement, although Dr. Coetzee suggests that it could have been worsened by the scrum thereafter collapsing on Ryand. The evidence of the three rugby experts also supports the conclusion that Ryand was injured upon engagement.
- (r) If Ryand saw Alex moving his head to his right past Ryand's head (to Ryand's left), it had to be before the engagement of the front row players in the scrum.

[43] Ryand testified that, when Alex executed the "jack-knife" manoeuvre immediately before the engagement of the front rows, he (Ryand) closed his eyes and is unable to say where and with whom he

made contact in the scrum. However, in my view, the overwhelming probability which emerges from the evidence which I have alluded to, is that, upon the engagement of the front rows, Alex made contact with the neck and head of Ryand, thereby pushing Ryand's head down, exerting force on his neck and causing the resultant injury. The question which remains, is whether the injury was caused by Alex executing the manoeuvre described by Ryand, or whether it was the result of the no. 3 of the Labori team scrumming inwards (to his left) at an acute angle.

[44] Ryand's evidence that Alex executed the alleged manoeuvre, is supported by the following objective evidence:

- (a) It is apparent from photo B8 that Ryand was unable to place his head in his designated channel or gap, viz. between the heads of Alex and the no.3 of the Stellenbosch team. In view of the undisputed evidence that Ryand scrummed straight ahead, his inability to place his head in his channel, supports his version that Alex had moved to his right thereby blocking Ryand's channel.
- (b) Alex's head is not visible in photo B8, whereas, had his head been in his (Alex's) correct channel at the time of the engagement of this scrum, it should have been visible. This

supports Ryand's version that Alex had moved his head to the right (to Ryand's left) with the result that it is not visible in photo B8.

- (c) Photographs B6-8 show that, prior to engagement, Alex released his grip on the player to his left (the no.1 of the Stellenbosch team) and moved his left hand and arm upwards along the left side of his team-mate. Photo B8 shows that, upon engagement, this loosening of the grip by Alex had progressed significantly. This supports Ryand's version, as it would indicate that, in so doing, Alex had moved to his right before the engagement of the front row forwards in the scrum, and, accordingly, before the Labori team's no.3 would have made any contact with Alex.
- (d) Photo B8 shows that, prior to the completion of the engagement of the two front rows, Alex came into contact with Ryand, thereby forcing the latter's head downwards. This means that Alex could not at that stage have been in his correct channel, as suggested by him during evidence.

[45] Alex testified that this was a normal scrum and he had no difficulty in placing his head in the correct channel. In fact, he says, that he went straight into his channel with his head firmly in the gap between the

heads of Ryand and the no.3 of the Labori team. He added that no player from either side shoved him out of his correct position. However, as mentioned earlier, Alex adapted his evidence by inferring from the photographs that the no.3 of the Labori team could have caused him to move to his right. His evidence in this regard is not only confusing, as appears from paragraphs 39 and 40 above, but also raises the following questions:

- (a) If Alex was in his correct channel upon engagement, why is his head not visible in photo B8? Had he been in his correct channel, his head ought to have been clearly visible.
- (b) If Alex was in his correct channel, the consensus is that he could not have been dislodged from it by any player from either side. How would the Labori team's no.3 have succeeded in dislodging him, as suggested later in his evidence by Alex? In fact, this suggestion of Alex is in direct conflict with the evidence of his expert, Watson, that, once the hooker is in his correct channel, he cannot be dislodged as he is then locked in (*"ingesluit"*).
- (c) How could the no.3 of the Labori team have dislodged Alex from his channel, when the consensus is that he (the Labori no.3) could not have had any influence on Alex's position in

the scrum prior to him making contact with Alex? Photo B8 shows that, upon engagement of the front rows in this scrum, there had not yet been sufficient physical contact between the Labori no.3 and Alex to have caused Alex to move to his right, or to have dislodged Alex from his channel.

- (d) Photo B8 shows that, upon engagement, Alex had already loosened his grip on his loose head prop (no.1) significantly, which is consistent with him moving to his right. How could a movement to Alex's right have occurred if he had he been firmly ensconced in his correct channel?

[46] It appears to me that Alex's version that he could have been dislodged from his channel by the Labori team's no.3, is a reconstructed afterthought. I find that, for the reasons already furnished, there is no acceptable factual basis for this version proffered by Alex.

[47] Van Aswegen, the no.1 of the Stellenbosch team, confirmed that Gerber, the no.3 of the Labori team, scrummed in on the angle towards Alex. He says that he could not bind properly on Gerber, which caused him to slide underneath Gerber. Thereupon the scrum collapsed. However, he testified that, upon the engagement of the front rows, he could not see what Alex was doing next to him, as his eyes were directed

towards the ground in front of him. It follows that, although Van Aswegen confirms the scrumming in at an angle by Gerber, he did not observe the manner in which Ryand was injured. He could also not assist the court in regard to the position of Alex immediately prior to the engagement of the two front rows in the scrum.

[48] There is accordingly no support in Van Aswegen's evidence for Alex's later version, i.e that Gerber had scrummed in at an angle to the extent that he somehow dislodged Alex from his channel, thereby causing him (Alex) to come into contact with Ryand.

[49] It is also necessary, in evaluating these mutually destructive versions of the parties, to consider the use of the word "jack-knife" by the Stellenbosch team. The evidence of Ryand, Marais and Hodgson is that, immediately before the engagement of the forwards in the scrum, Alex called out the word "jack-knife". This was the only word that he had called out. In his evidence, Alex said that he could not remember whether he had called out the word "jack-knife" or any other code before the engagement of the scrum. I should mention that, in the trial particulars furnished on Alex's behalf, it was alleged that when the Stellenbosch players in the scrum would attempt to collectively direct their forward pushing motion, after contact, fractionally to the left or to the right, the

code used by them for this manoeuvre, was “jack-knife left” or “jack-knife right”. It would accordingly not make any sense to merely use the code “jack-knife” without adding “left” or “right”.

[50] During cross-examination, Alex’s counsel put it to Ryand and Marais, that Van Aswegen would say that, to the best of his recollection, the no.3 of the Stellenbosch team shouted “Bossie” (Van Aswegen’s nickname) “jou skouer”. Thereafter, Van Aswegen would say, all three members of the Stellenbosch front row probably called out “jack-knife linkerskouer”. However, in his evidence Van Aswegen said that the code “jack-knife” was called by Carlo, the no.3 of the Stellenbosch team, prior to the formation of the scrum. Thereafter, he said, while the two packs of forwards were in the process of binding on each other, Alex repeated the code “jack-knife”, but added the nickname “Bossie” to it. This was an indication that the Stellenbosch pack of forwards would attempt to direct their forward pushing motion fractionally to the left. He added that the forwards in the Stellenbosch pack then called out the code “jack-knife Bossie” in unison.

[51] This evidence of Van Aswegen does not accord with the trial particulars that I have referred to, and it also differs from the evidence of Alex who testified that it would be stupid to add a name of one of their

players to the “jack-knife” code, as the Labori team knew most of the Stellenbosch players by name. This inconsistency regarding the code used, gains significance if it is borne in mind that the use of the word “jack-knife” only, would, according to Alex and Van Aswegen, make no sense at all, as the Stellenbosch team’s forwards would not know whether they should direct their forward pushing motion to the left or to the right. It rather seems that, if they used the code “jack-knife”, it would have signalled a different manoeuvre, other than a forward pushing motion to the left or to the right.

[52] It is also strange, if the code “jack-knife left” or “jack-knife right” was habitually used by the Stellenbosch team to indicate a forward pushing motion in the scrum to the left or to the right, that their coach, Mr. Malan, would be unaware that the code for this manoeuvre included the word “jack-knife”. According to the evidence, the tactic of moving the scrum to the left or to the right, had been used by the Stellenbosch team during matches and training sessions for a period of at least a year. However, Alex and Van Aswegen could not explain why Malan had never heard the word “jack-knife” being used by the members of the Stellenbosch team. Their evidence that codes for the various moves were chosen by the players, and not the coach, does not explain why, according to their coach, he had never heard it being used by the Stellenbosch team.

I cannot imagine that, if a striking word such as “jack-knife” was used as part of the code signalling a well-known manoeuvre to influence the direction of the movement of the scrum, it would not have been overheard by the Stellenbosch coach, either during matches or whilst training. Yet, he says, he never heard “jack-knife” being used as a code at all by the Stellenbosch team.

[53] In my opinion, the probabilities rather show that the Stellenbosch forwards did not use the code “jack-knife” when they intended to influence the direction of the movement of the scrum, but to signal a totally different manoeuvre of which their coach was unaware. It seems to me that the more acceptable explanation for the use of the “jack-knife” code, is to indicate a manoeuvre which would cause the scrum to “jack-knife”, i.e to collapse due to the opposition hooker being forced into a bent or doubled-up position. This would not have been disclosed to their coach as he did not appear to be a person who would have allowed his team to use an illegal and dangerous manoeuvre of this nature. On the evidence as a whole, I find it more probable that, at this scrum, the “jack-knife” code was used once only, as testified by Ryand, Marais and Hodgson, and that it had nothing to do with the influencing of the direction of the movement of the scrum, as suggested by Alex and Van Aswegen.

[54] It is also necessary, in deciding the present issue, to comment on the impression that Ryand and Alex made on me. I was favourably impressed by Ryand, who presented his version in a forthright manner without deviating from the essence thereof, notwithstanding thorough cross-examination. It was noticeable that he did not endeavour to pad his version, when stating that he did not see how and with whom his head collided when he was injured. Had he intended to strengthen his case, he could easily have said that he saw Alex's head in front of him immediately prior to engagement and that their heads collided. Ryand's consistency is underscored by the content of the letter written by his father some three weeks after the incident, detailing the events in a manner which accords with the evidence of Ryand and Alberts. Finally, I wish to stress that, for the reasons already furnished, Ryand's evidence is supported by the objective evidence tendered by the parties.

[55] Alex did not impress me to the extent that Ryand did. I should hasten to add that I do not suggest that he deliberately lied, but rather that his evidence was not of the same calibre as Ryand's. I have already illustrated that he was inconsistent in recounting his version of the events. I have also pointed to the respects in which his evidence is gainsaid by the objective facts.

[56] The impression that I gained, is that Alex is a tough young rugby player with an intimidating style of play. It will be recalled that Marais testified that, prior to Ryand's injury, there were complaints that Alex was hanging in the scrum. This amounts to a transgression of Law 20.2 (c). The evidence of Alberts, the reserve hooker of the Labori team, shows that in the scrum following upon the one in which Ryand was injured, Alex again moved to his right, thereby narrowing the gap in which Alberts had to place his head. This conduct did not, strictly speaking, constitute an infringement of the laws, but it shows an inclination on the part of Alex to move about in the scrum, thereby making life difficult for his opponents. It will be recalled that Alberts testified that he had great difficulty in forcing his head into the gap between Alex and the no.3 of the Stellenbosch team, thereby causing abrasions to the right side of his face. It was submitted on behalf of Alex that the evidence of Alberts is "totally irrelevant". I disagree. In my opinion this evidence is relevant as to Alex's habit or custom. See **Goldberg v Standard General Insurance Co. Ltd** 1980 (3) SA 200 (A) at 207A-G.

[57] Finally, reference can be made to the evidence of Marais, the captain of the Labori team, who described the manner in which Alex plays the game, in the following terms:

“(Hy is ’n) harde speler en lief daarvoor om-hoe kan ’n mens sê-in ’n ou se karakter in te klim om ’n mens vinnig van die wedstryd af te kry.”

This confirms the impression that I gained of Alex’s approach to the game of rugby and his style of play. I should add that this evidence of Marais was not disputed.

[58] In weighing the probabilities, I have to take into account the evidence of Alex and his coach, that the execution of the alleged manoeuvre, would hold no benefit for the Stellenbosch team, as it would only cause the scrum to collapse and may expose Alex to the risk of serious injury. In my view, this evidence fails to take proper account of the dynamic environment of a rugby scrum, as alluded to by the expert witnesses. The purpose of a scrum may, according to the laws, be to restart play after a minor infringement or stoppage, but traditionally it is the main arena where the sixteen forwards of two teams meet head-on in a contest of brute physical strength. Dominance in the scrums, more often than not, equates to dominance on the scoreboard. When asked about the contest of strength versus strength in a scrum, Andre Watson graphically responded:

"...dit is juis wat ons probeer behou... dit is belangrik dat die manne mekaar vat daar, want dit is waarom dit gaan. Ons moeders hou nie daarvan om dit te hoor nie, maar dit is waarom dit gaan....hulle (moet) mekaar vat en ek dink wat die mense nie besef nie, is dat daar is 'n geweldige inslaan by skrums. Dit is hard daar voor."

[59] It would not be strange, in my view, to find that, in order to dominate the scrums, a team with the stronger pack of forwards may resort to intimidatory tactics. In his evidence Balie Swart said that the purpose of executing the alleged manoeuvre would be to dominate the opposing pack of forwards. He put it as follows:

"Baie keer kry jy dit as 'n dominerende skrum rêrig waar 'n ander span wat wil totaal en al domineer of ek noem dit baie keer somer seermaak. Ek het dit al gereeld gesien. Ek was al in spanne gewees wat dit ook al gedoen het. ...(die hoofdoel daarvan sou wees) om te domineer en 'n sielkundige 'advantage' (te kry)".

When asked how the execution of a manoeuvre of this nature would contribute to the domination of the opposing scrum, Swart replied:

"Wel, dit is seer. Dit is fisies, dit is 'n 'fear factor'. Die volgende keer...as ons weer sak...dan word daar 'n ander 'call' gegee en daardie haker weet nie nou wat nou gaan gebeur nie."

[60] The evidence shows that the Stellenbosch pack of forwards probably had the physical edge over the Labori forwards in the scrums. In particular, it appears that Van Aswegen was much stronger than his direct opponent, Gerber. In view thereof, and having regard to Alex's approach to the game of rugby, as alluded to earlier, it seems likely that Alex would have employed the "jack-knife" manoeuvre to exert the Stellenbosch team's dominance in the scrum and thereby gain a psychological advantage over the Labori team.

[61] As far as the risk of injury to Alex is concerned, it should be borne in mind that, if Alex were to move his head to the right to block the gap in which Ryand had to place his head, Alex's left shoulder would, in all probability, first have come into contact with Ryand's neck. This was described by Swart during cross-examination and not questioned by Watson and Proudfoot in their evidence. It follows that Ryand would have been subjected to a greater risk of injury than Alex, upon the execution of the "jack-knife" manoeuvre by the latter.

[62] It was argued on behalf of Alex, that the referee was in a good position to have seen a transgression of this nature and would have awarded a penalty against the Stellenbosch team, had the transgression taken place. The referee was not called as a witness and Alex's counsel

submitted that Ryand's failure to call him, justifies the conclusion that no illegal manoeuvre had been executed by Alex. I do not believe that this conclusion is justified. The evidence suggests that the referee may not have been as observant as he should have been. Watson, the expert referee, said that, not only should the referee have seen an incident of this nature, had it occurred, but he should have seen that, even before engagement, the Labori team's no.3 was scrumming inwards, a transgression of the rules for which he ought to have been penalised by awarding a penalty to the Stellenbosch team. This did not happen. It is fair to conclude that the referee may not have been as vigilant as he was expected to be.

[63] In my evaluation of the evidence relevant to the question whether Alex had executed the alleged manoeuvre or not, I have dealt with the evidence of the experts Swart, Watson and Proudfoot. I should reiterate that they are at some disadvantage, for not being presented with direct evidence as to what had actually happened in this scrum. However, their evidence as to the technical aspects proved to be invaluable, particularly when it is considered together with the accounts of the eye-witnesses and the objective and common cause facts.

[64] When the body of evidence is considered as a whole, I am driven to the conclusion that the opinion of Watson and Proudfoot, that the scrumming in on the angle by the Labori team's no.3, caused Alex to move to his right and to make contact with Ryand, thereby injuring the latter, is without an acceptable factual basis. In particular, there is no explanation as to how this could have caused Alex to be dislodged from his correct channel (in which he say he was). Nor does it explain how the Labori no.3 could have dislodged Alex when photo B8 shows that, upon engagement of the front rows in the scrum, there had not yet been sufficient physical contact between the Labori no.3 and Alex, to have caused Alex to be dislodged.

[65] I am further of the view that, for the reasons furnished in paragraphs 37 to 62 above, the probabilities clearly favour Ryand's version of the events. At the very least, I have no doubt that Ryand's is the more acceptable and credible version of what had transpired in the scrum immediately before he sustained his neck injury. He is also supported, in material respects, by the evidence of Balie Swart and, as I have already indicated, by the objective and common cause facts. Alex's version, on the other hand, is improbable, particularly in view of its conflict with the objective and common cause facts. The evidence of

Alex's expert witnesses, Watson and Proudfoot, does not, in my opinion, provide an acceptable basis for doubting the veracity of Ryand's version.

[66] I therefore find that Ryand has proved, on a balance of probabilities, that Alex did execute the manoeuvre coded "jack-knife", by forcibly placing his head in the incorrect channel of the scrum, thereby making contact with Ryand's head and neck and causing the injury to his neck.

WRONGFULNESS

[67] Having found that Alex did execute the alleged manoeuvre, by forcibly placing his head in the incorrect channel of the scrum, thereby causing the injury to Ryand's neck, it is necessary to determine whether such conduct was wrongful.

[68] The players and expert witnesses who commented on the execution of such a manoeuvre in a rugby scrum, were mainly in agreement that it would not only be unexpected and extremely dangerous, but contrary to the spirit, laws and conventions of the game of rugby. Reference can be made to the following evidence:

- (a) According to Ryand he had never before in his rugby career as a hooker experienced a situation where the channel or gap in which he had to place his head, was blocked by his opponent. He put it thus:

“Ek was nog nooit in so 'n situasie geplaas nie, want as jy jou kanaal het, jy kan maar hoe hard inslaan, jou kanaal is daar en dis reguit....toe was ek nog nooit in so 'n situasie geplaas nie en nou 'basically' net voor ons kontak maak, toe maak ek my oë toe, want toe het ek nog nooit in so 'n situasie gewees nie, toe het ek nou maar vir myself maar vir die beste gehoop. Ek weet nie wat gaan anderkant uitkom, wat gaan gebeur nie”.

- (b) According to Alex he had also not experienced a manoeuvre of this nature being executed in a scrum. He described it as being *“krities gevaarlik”* for the opposing forwards, as it would be akin to *“'n pyl wat in 'n sagte ding inskiet.”*
- (c) When asked about the purpose of Law 20.1 (g) which requires the front rows in the scrum to interlock so that no player's head is next to the head of a team-mate, Balie Swart expressed himself as follows:

"Wel, dit is 'n helse 'safety' ding, want iemand gaan in 'n gat in wat daar nie veronderstel is om in te gaan nie en iewers is daar 'n hengse 'angle' wat iemand wat gaan seerkry..."

As mentioned previously, Swart testified that, although he had seen this manoeuvre being executed before, it is illegal and extremely dangerous and used in an effort to dominate the opposing team by disrupting their scrum.

- (d) Watson testified that, in his career as a rugby referee, he had never seen a manoeuvre of this nature being executed, but that it would be extremely dangerous and should be penalised by the referee. According to him it is not the type of manoeuvre that you would reasonably expect in a rugby game and compared it to *"n spies se punt"* which would bore in on the opponents.
- (e) Proudfoot testified that he has never seen a hooker change his channel in the manner described by Ryand. He added *"I have only heard of the manoeuvre occurring in folklore and have never seen it or heard about it in practice."*

[69] Swart and Proudfoot testified that in 2005, things were rather "chaotic" in rugby at schoolboy level, thereby suggesting that the laws of

the game were not always strictly adhered to. This notwithstanding, the evidence shows that a manoeuvre of this nature would not reasonably have been expected by anybody participating in a rugby game at that level, and, in particular, in this game between the Labori and Stellenbosch teams.

[70] It is interesting to note that Law 30.1 (g) only prescribes the award of a free kick, and not a penalty, when the heads of two members of the same team are placed next to each other in the scrum. However, this does not, in my view, detract from the extremely dangerous and unexpected nature of a manoeuvre of this kind. It may be that the unexpected nature of the transgression is the reason why it has not yet received the proper attention of the rugby authorities.

[71] I therefore conclude that this conduct of Alex was not only forbidden by the laws of the game, but constituted such a serious transgression, not normally associated with the game of rugby, that it would not reasonably have been expected to occur in a rugby game. Having regard to the extremely dangerous nature of the manoeuvre executed by Alex, it would not have constituted conduct which rugby players would accept as part and parcel of the normal risks inherent to their participation in a game of rugby. I accordingly find that Ryand has

proved, on a balance of probabilities, that this conduct of Alex was wrongful.

FAULT

[72] It will be clear from my findings above, that the manoeuvre executed by Alex was deliberate and intentional. The placing of his head in the wrong channel of the scrum was, judged on the evidence presented to the court, a planned move, deliberately executed, well-knowing that injury was a likely result thereof. The required fault on the part of Alex has accordingly been proved by Ryand.

CONSENT

[73] This brings me to the special defence raised by Alex, namely that, in participating in this game, Ryand had lawfully consented to the risk of being injured. The requirements for a defence of this nature, are set out in paragraph 20 above.

[74] In view of the evidence as to the unexpected and dangerous nature of a manoeuvre of this kind, it will be immediately apparent that this defence cannot succeed. No witness suggested that any participant in a rugby game would have appreciated the risk of being injured in this manner. It can therefore not be said that Ryand participated in this game

with full knowledge of the nature and extent of the risk of being injured by Alex's execution of the "jack-knife" manoeuvre. This is not the normal type of risk that a participant in a scrum would have consented to. There is accordingly no basis for a finding that Ryand did consent to the risk of being injured in this manner. It follows that Alex's defence based on consent as a ground of justification, has to fail.

CONCLUSION

[75] I therefore find that Ryand and his father are entitled to the relief sought in these proceedings, with costs. In my view the matter justified the employment of two counsel.

[77] In the result the following order is made:

- (1) It is declared that second defendant is liable to pay to plaintiff and his son, Ryand Karel Hattingh, such damages as they may prove they have suffered, as a consequence of the neck injury sustained by Ryand Karel Hattingh in the rugby match played between the under 19A teams of Labori High School and

Stellenbosch High School at Stellenbosch, Western Cape, on 30 July 2005.

- (2) The second defendant is to pay the plaintiff's costs of suit, including the costs of two counsel and the qualifying charges of the expert witnesses, Dr. Z. Domingo and Mr. I. S. De V. Swart.



P B Fourie, J

