THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 636/11

In the matter between:

Alex Roux Appellant

and

Ryand Karel Hattingh Respondent

Neutral citation:	*Alex Roux v Ryand Karel Hattingh* (636/11) [2012] ZASCA132 (27 September2012)
Coram:	BRAND, THERON, PILLAY JJA AND SOUTHWOOD AND PLASKET AJJA
Heard:	**11 September 2012**
Delivered:	**27 September 2012**
Summary:	**Delict – plaintiff injured during a game of rugby – factual findings of trial court assumed to be correct where no misdirection on part of trial court – intentional infliction of injury by defendant on plaintiff established – such conduct wrongful – element of wrongfulness in context of sport discussed.**

ORDER

On appeal from: Western Cape High Court, Cape Town (Fourie J sitting as court of first instance).

The appeal is dismissed with costs, including the costs of two counsel.

JUDGMENT

PLASKET AJA (BRAND, THERON, PILLAY JJA and SOUTHWOOD AJA concurring)

[1] Rugby is a contact sport.[1] As a result injuries, some serious, occur during rugby games even when the game is played in accordance with its spirit and within its rules. The central issue to be decided in this appeal is whether the conclusion reached by Fourie J in the court below, the Western Cape High Court, Cape Town, that the serious neck injuries suffered by the respondent (whom I shall refer to as Ryand, as the court below did) during the course of a game of rugby was deliberately inflicted by the appellant (whom I shall refer to as Alex, again as the court below did) acting contrary to the rules of the game.

[2] Ryand suffered his injuries on 30 July 2005 during a match between the first teams of Laborie High School (Laborie) and Stellenbosch High School (Stellenbosch). (These teams are also referred to as the schools' respective under

1 For the benefit of the uninitiated, rugby is defined in the *Concise Oxford English Dictionary* (12 ed) as 'a team game played with an oval ball that may be kicked, carried, and passed by hand, in which points are won by scoring a try or by kicking the ball over the crossbar of the opponents' goal'. In this case, the game concerned was rugby union, as opposed to rugby league. According to Wikipedia: **'Rugby union**, often simply referred to as **rugby**, is a full contact team sport which originated in England in the early 19th century. One of the two codes of rugby football, it is based on running with the ball in hand. It is played with an oval-shaped ball with a maximum width and length of 30 centimetres (12 in) and 62 centimetres (24 in) respectively. It is played on a field up to 100 metres (330 ft) long and 70 metres (230 ft) wide with H-shaped goal posts on each goal line.'

19A sides.) The injuries occurred during the course of a scrum in which Ryand was the hooker for the Laborie team while Alex was the hooker for the Stellenbosch team.[2]

The facts and the findings of the court below

[3] The game between Laborie and Stellenbosch was played in good underfoot conditions. After one of the first scrums of the match, Ryand complained to the captain of Laborie, Jan Louis Marais, that Alex had been guilty of 'hanging' in the scrum, which is contrary to the rules of the game.[3] The scrum in which Ryand was injured occurred soon after this. It was the fourth or fifth scrum of the match and took place about ten to 15 minutes after kick-off.

[4] Ryand testified that as the forwards were forming for the scrum, Alex shouted the word 'jack-knife'. His evidence is supported by two of his teammates who testified at the trial. They were adamant that nothing else was said apart from the word 'jack-knife'. Alex and two of his teammates testified that the code 'jack-knife' was a signal to wheel the scrum and something else was called to indicate to the forwards that they should wheel the scrum to the left or the right. This evidence will be dealt with below.

[5] Ryand testified that when the front rows crouched prior to engaging each other, he saw Alex move to his (Alex's) right. This had the effect of blocking the channel into which Ryand's head was meant to go. (This channel should have been created by the gap between the head of the Stellenbosch tight head prop to Ryand's

2 In terms of rule 20 of the rules of rugby, the purpose of a scrum is to 'restart play quickly, safely and fairly, after a minor infringement or stoppage'. The rule describes a scrum as follows: 'A scrum is formed in the field of play when eight players from each team, bound together in three rows for each team, close up with their opponents so that the heads of the front row are interlocked. This creates a tunnel into which a scrum half throws in the ball so that front row players can compete for possession by hooking the ball with either of their feet.' Each front row is made up of three players. The player in the middle of the front row is the hooker. The players on either side of the hooker are called props and the prop to the left of the hooker is called the loose head prop while the prop to the hooker's right is called the tight head prop.

3 Rule 20.2(c) regulates the position of the hooker in the scrum. It provides: 'Until the ball is thrown in, the hooker must be in a position to hook the ball. The hookers must have both feet on the ground, with their weight firmly on at least one foot. A hooker's foremost foot must not be in front of the foremost foot of that team's props.' Rule 20.3(b) provides that the props 'must not support the hooker so that the hooker has no weight on either foot'.

left and Alex's head, to his right.[4]) He realised that he was in trouble and closed his eyes when the forward packs engaged. Because his channel had been blocked, Ryand's head was forced down and under Alex. On the other hand, Alex testified that he was in his correct channel and nothing prevented him from entering his channel. He experienced no pressure from the left to force him out of his channel. He later changed his version and said that because the Laborie tight head prop had scrummed at an inward angle, this had forced him out of his channel.

[6] The pressure of Alex (and the weight of the Stellenbosch pack behind him) on Ryand's neck caused Ryand to scream in pain. The scrum collapsed and he was left lying on the ground, seriously injured. After the ambulance arrived, some 20 to 30 minutes later, and Ryand was taken to hospital, a replacement hooker took the field for Laborie and the game continued where it had left off – with another scrum.

[7] The replacement hooker, Gabriel (Gawie) Alberts, complained to Marais after the scrum that Alex had closed his channel and that he had had difficulty entering it. In fact, he had suffered abrasions to his face as a result. So seriously did Marais take this, that when he spoke to the referee, he said that the referee should 'hou net vir ons asseblief dop, ons wil nie hê nog 'n ou moet seerkry nie'. Soon after this Alex changed positions from hooker to prop and the referee decided that from then on all of the scrums would be uncontested scrums.

[8] In addition to Ryand, Alex and members of their teams giving evidence, the coach of the Stellenbosch team, Mr Ben Malan, and three well-known experts also testified. They were Mr Balie Swart, a former Springbok prop forward and forwards coach who was, at the time of the trial, the scrum consultant for the South African Rugby Union (SARU); Mr Andre Watson, an international referee widely regarded before his retirement as one of the best referees in the world, and then, at the time of the trial, the manager of SARU's referees; and Mr Matthew Proudfoot, who represented Scotland as a prop forward, played for various provincial teams in South

4 Rule 20.1(f) deals with how the front rows are meant to come together for a scrum. It provides: '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 front row must interlock so that no player's head is next to the head of a team-mate.'

Africa and then, after his retirement, turned to coaching. Reliance was also placed on various photographs of the scrum in which Ryand was injured as well as a video of it (from which the photographs were taken).

[9] Fourie J was confronted with Ryand's version, on the one hand, that was to the effect that Alex had deliberately moved to his (Alex's) right prior to the forward packs engaging so that he would scrum over Ryand with the almost inevitable consequence of injuring him, and Alex's versions, on the other, amounting to him having engaged in that scrum in accordance with the rules and with no difficulty whatsoever or him having been forced to his right by Laborie's tight head prop having scrummed in on an angle towards the centre of the scrum. Ryand's version establishes fault on the part of Alex, in the form of intention, while both of Alex's versions show no fault on his part. Fourie J, in resolving this factual conflict, found Ryand's evidence of what had occurred to be the more credible version.[5] He stated:

'[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 events. I have also pointed to the respects in which his evidence is gainsaid by the objective facts.'

In rejecting Alex's alternative version that he was dislodged from his channel by the Laborie tight head prop, and forced to his right, Fourie J held that this was 'a

5 In reaching this conclusion, Fourie J relied on and applied *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; *National Employers' General Insurance Co Ltd v Jagers* 1984 (4) SA 437 (E) at 440D-G.

reconstructed afterthought' and that there was no 'acceptable factual basis for this version proffered by Alex'.

[10] Fourie J held that Alex had acted intentionally when he first called the code 'jack-knife' before moving to his right before the scrum engaged, thereby making it impossible for Ryand to enter the correct channel with the result that Ryand's head was forced under that of Alex and the pressure exerted on it had the effect of breaking Ryand's neck. He held too that despite the fact that when a person decides to play a game like rugby, he (or she) consents to the risk of certain injuries, the conduct in question was of such a nature that Ryand did not voluntarily accept the risk of this form of harm. The conduct of Alex was wrongful as it was deliberate, extremely dangerous and a serious violation of the rules of the game.

[11] The issues that we are required to determine in this appeal are whether the credibility and other factual findings made by Fourie J can be assailed; whether all of Ryand's injuries were caused by Alex (in the event of the court below's factual findings being accepted and on the assumption that the conduct was intentional and wrongful); and whether Alex's conduct was indeed wrongful. In the course of this discussion, I shall also deal with the weight that can be attached to the opinions of the expert witnesses.

The disputed factual findings

[12] It is a well-known principle of our law that the factual findings of a trial court are presumed to be correct unless a misdirection on the part of the trial judge can be pointed to in order to justify interference with those findings on appeal.[6] So, for instance, in *Santam Bpk v Biddulph*[7] Zulman JA expressed the approach as being that while an appeal court 'is generally reluctant to disturb findings which depend on credibility it is trite that it will do so where such findings are plainly wrong'.

[13] At the outset of his argument, Mr Van Riet, who appeared together with Mr Stelzner for the appellant, conceded that Fourie J's credibility findings in favour of

6 *R v Dhlumayo & another* 1948 (2) SA 677 (A) at 705-706.
7 *Santam Bpk v Biddulph* 2004 (5) SA 586 (SCA) para 5.

Ryand and against Alex could not be challenged. That concession, in the light of the careful analysis of the facts and probabilities by Fourie J, was correctly made. Those findings could not be categorised as being 'plainly wrong'. He argued, however, that this was not the end of the matter as the issue as to what the code 'jack-knife' meant was not decided on the basis of credibility findings but on probabilities. I am not sure that he is correct in that submission but I shall proceed on the basis that he is and that we are in as good a position as Fourie J was to determine the issue. It is important to bear in mind, however, that the 'jack-knife' issue does not stand alone: it is part of the factual matrix and it draws its context from those facts.

[14] That context is that, shortly before he bound with his props for the scrum in which Ryand was injured, Alex shouted the word 'jack-knife'. He then loosened his bind on his loose head prop to enable him to move to the right and block Ryand's channel shortly before the two packs of forwards engaged.

[15] The evidence of Ryand and his teammates was that only the word 'jack-knife' was spoken. The evidence of Alex and his teammates was that it was their code to signal a wheeling of the scrum, either to the left or the right. They encountered great difficulties in trying to justify their evidence. On this version, various suggestions were put forward as to how the code would signify that the scrum should be wheeled in a particular direction. One was that the code would be accompanied by the words 'left shoulder' or 'right shoulder' or 'left' and 'right' or that the names of the Stellenbosch props would be used as in 'jack-knife Bossie' or 'jack-knife Carlo', or that the decision to wheel the scrum was taken in a huddle prior to getting ready to form up for the scrum.

[16] It would obviously serve no purpose to call the 'jack-knife' code and then announce 'left shoulder' or 'right shoulder' because even the slowest-thinking of opponents would realise what was to come: calling the direction of the wheel would surely give the game away. The evidence of the Laborie players was that they knew the names and nick-names of the Stellenbosch team, so calling the name of one of the props would also be pointless and enable the opposition to work out what was planned. If it had been decided to wheel the scrum in a particular direction in a

huddle before packing down, there would have been no need for the code to have been called at all. Obviously, the word ‘jack-knife’ on its own could not relate to wheeling the scrum because none of the forwards, apart from the person who called it, would know the direction in which it was to be wheeled. Finally, Malan, the coach of the Stellenbosch team, had never heard the code before and did not know what it signified. Even though he said that, when he taught the team a tactic, he left it to the team to give it a code name, it is highly improbable that if ‘jack-knife’ was a signal for the scrum to be wheeled, he would not have heard it during games and more importantly, he would not have heard it called in practices.

[17] From the credibility findings made in favour of Ryand’s version, which included the evidence that the word ‘jack-knife’ was called by Alex and he only uttered that word, as well as the illogical explanations of Alex and his teammates that it related to the wheeling of the scrum, it seems to me that the probabilities are overwhelming that it related to the manoeuvre in terms of which Alex was to change his position in the scrum in order to close Ryand’s channel and then scrum over him. Fourie J’s finding that it denoted a ‘manoeuvre which would cause the scrum to “jack-knife”, ie to collapse due to the opposition hooker being forced into a bent or doubled-up position’ cannot be faulted.

[18] That being so, his conclusion that Alex acted deliberately in injuring Ryand is unimpeachable. The result was that Alex’s fault, in the form of intention, had been established.

[19] Much time and effort was taken up with the expert opinions of Swart, Watson and Proudfoot being led, cross-examined and re-examined. None of them were present when Ryand was injured and so they speculated on what may or may not have happened based largely on the video clip of the scrum and photographs distilled from the video clip. While Fourie J acknowledged that he had obtained valuable assistance from the expert witnesses on technical aspects of the game, particularly when considered ‘alongside the eye-witness and objective and common cause facts’, the place of expert evidence, when credible direct evidence is available, must be borne in mind.

[20] In *Motor Vehicle Assurance Fund v Kenny*[8] Eksteen J held, in the context of a motor collision that '[d]irect or credible evidence of what happened in a collision, must, to my mind, generally carry greater weight than the opinion of an expert, however experienced he may be, seeking to reconstruct the events from his experience and scientific training'; that the view of an expert witness as to what might probably have occurred should generally 'give way to the assertions of the direct and credible evidence of an eye witness'; and that it is 'only where such direct evidence is so improbable that its very credibility is impugned that an expert's opinion as to what may or may not have occurred can persuade the Court to his view'. This is such a case: despite the undoubted experience and expertise of the three experts, and their useful contribution that was acknowledged by Fourie J, the direct, eyewitness evidence of Ryand as to what happened in the fateful scrum, rather than the speculation of the experts as to what may have occurred, drawn from their viewing of the video clip and the photographs, must surely carry the day, as Fourie J concluded.

The injuries

[21] During the trial, the reports of two neurosurgeons, Dr Zayne Domingo and Dr Gerrit Coetzee, were handed in by consent. The agreement between the parties was that the content of these reports was admitted, save to the extent of any disagreement between the two. The specialists ultimately agreed that Ryand had suffered two neck injuries – what they described as a bilateral facet dislocation. Dr Coetzee was asked to give an opinion on whether the injuries were caused solely by Alex positioning himself in the incorrect place in the scrum. During the course of his report, he stated that '[o]ne should also consider that further damage to the spine may have taken place after the initial injury when the pack collapsed' but he found himself unable to give an answer to the problem that he posed.

[22] It was argued on behalf of Alex, on the basis of Dr Coetzee's report, that by holding Alex liable for all of Ryand's injuries, Fourie J had failed to take into account

8 *Motor Vehicle Assurance Fund v Kenny* 1984 (4) SA 432 (E) at 436H-437B. See too *Representative of Lloyds & others v Classic Sailing Adventures (Pty) Ltd* 2010 (5) SA 90 (SCA) para 60; *MV Banglar Mookh: Owners of MV Banglar Mookh v Transnet Ltd* 2012 (4) SA 300 (SCA) para 50.

evidence that demonstrated that Ryand could have suffered injuries to his neck when the scrum collapsed, and that Alex could not be held to have caused those injuries.

[23] Fourie J dealt with this issue in two places in his judgment. First, he found that Ryand was injured when the front rows engaged for the scrum and that the 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'. He added that the evidence of Swart, Watson and Proudfoot supported the evidence that 'Ryand was injured upon engagement'. Later in his judgment, he concluded as to the question of causation as follows:

'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.'

[24] From the above, it is clear that Fourie J was alive to the point raised by Dr Coetzee, he considered it and decided, on the totality of the evidence before him, that it had no factual foundation. I agree. It is speculative in the extreme and Dr Coetzee appears to have recognised this when he said in the next sentence of his report that 'the only statement that can be made with confidence is that the patient suffered a flexion distraction injury'. In any event, on the evidence accepted by Fourie J, the scrum collapsed because of the manoeuvre executed by Alex. We can only speculate as to what may have happened but for the execution of the 'jack-knife' manoeuvre.

Wrongfulness

[25] Not every act or omission resulting in harm is actionable. This point was made by Harms JA in *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* [9] when he said:

'The first principle of the law of delict, which is so easily forgotten and hardly appears in any

9 *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 12. See too *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 12.

local text on the subject, is, as the Dutch author *Asser* points out, that everyone has to bear the loss he or she suffers. The Afrikaans aphorism is that "skade rus waar dit val". Aquilian liability provides for an exception to the rule and, in order to be liable for the loss of someone else, the act or omission of the defendant must have been wrongful and negligent and have caused the loss.'

[26] In this case we have confirmed the finding of the trial court that Alex acted intentionally (as opposed to negligently) when he executed the 'jack-knife' manoeuvre that blocked Ryand's channel in the scrum, thereby injuring Ryand. That means that the fault element of the Acquilian action has been established, as has the element of causation. It is now necessary to consider the element of wrongfulness. In the light of my brother Brand JA's separate discussion of the question, in the specific context of the game of rugby, I shall deal briefly with the facts from which a finding that Alex's conduct was wrongful follows as a matter of inevitability.

[27] In my view, a number of factors, taken together lead me to the conclusion that Alex's conduct was wrongful. First, the 'jack-knife' manoeuvre executed by Alex was in contravention of the rules of the game. It was also contrary to the spirit and conventions of the game. Secondly, because it had a code-name, the manoeuvre must have been pre-planned and it was consequently also executed deliberately. Thirdly, while one of its objects may have been to gain an advantage in the scrum, and another may have been to intimidate the opposition, particularly Ryand, it was also extremely dangerous. Alex knew this, describing it as 'krities gevaarlik'. The danger for an opponent inherent in the manoeuvre was confirmed by Swart, Watson and Proudfoot. Fourthly, Alex must have foreseen that the manoeuvre was likely to cause injury to Ryand – and serious injury, to boot – and he proceeded to execute it nonetheless.

[28] The egregious nature of Alex's conduct places it beyond the pale. Public and legal policy, I have no doubt, require such conduct to be stigmatised as wrongful. I also take the view, along with Fourie J in the court below, that because this conduct amounted to such a serious violation of the rules, it is not normally associated with the game of rugby and is extremely dangerous, 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'. In the result, the conduct is wrongful and the justification of consent cannot avail Alex.

Conclusion

[29] It follows from what I have said above that the trial court's findings that Alex intentionally injured Ryand in the manner described by him, thereby causing him serious harm, and that his conduct in doing so was wrongful, were correct. The appeal therefore cannot succeed.

[30] In the result, the following order is made:
The appeal is dismissed with costs, including the costs of two counsel.

C Plasket
Acting Judge of Appeal

BRAND JA (THERON and PILLAY JJA, SOUTHWOOD and PLASKET AJJA concurring)

[31] I have read the judgment of my brother Plasket AJA in this matter and I agree with his reasoning in every respect. It follows that I also agree with his conclusion that the appeal cannot succeed. That notwithstanding, I believe that I should say something about the legal principles involved. As it turned out, the law presented little difficulty in this case. But it appears that in granting leave to appeal, the court a quo was swayed by the consideration that this court could conceivably be of assistance in reaching some uniformity in the approach to the enquiry as to when a participant in a rugby game could be held liable in delict for damages resulting from injuries sustained by an opponent. Moreover, it appears from the authorities quoted in the judgment of the court a quo that there is clearly some confusion with regard to the approach that courts should adopt in matters of this kind. So, mindful of the risk of creating even greater confusion, I venture to suggest the general approach that follows.

[32] A participant in a rugby game can, of course, only be held liable for injuries suffered by his or her – in the nature of a rugby game, mostly 'his' – opponent if he acted negligently or with intent. The problem is, of course, that rugby injuries are often caused with intent, at least in the sense of *dolus eventualis*. It must therefore be of some relief to rugby players that, despite the presence of fault, liability will only follow if the negligent or intentional conduct causing the injury is also held to be wrongful. In the relatively recent past the element of Aquillian liability known as wrongfulness frequently attracted the attention of this court, particularly in decisions dealing with liability for omissions and pure economic loss. Where the loss resulted from a positive act giving rise to physical damage to the person or property of the plaintiff, so it was pointed out in those decisions, the defendant's conduct is regarded as prima facie wrongful (see eg *Gouda Boerdery BK v Transnet* 2005 (5) SA 490 (SCA) para 12; *Telematrix (Pty) Ltd t/a Matrix Vehicle Tracking v Advertising Standards Authority SA* 2006 (1) SA 461 (SCA) para 13). Indeed, it is settled law that

in these instances the onus is on the defendant to rebut the inference of wrongfulness that arises from the physical harm (see eg *Mabaso v Felix* 1981 (3) SA 865 (A) at 871-874; *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) at 780-781).

[33] Despite these differences, the basic principles underlying the element of wrongfulness remain the same in all instances. These principles have been summarised thus by the Constitutional Court in *Le Roux v Dey* 2011 (3) SA 274 (CC) para 122:

'In the more recent past our courts have come to recognise, however, that in the context of the law of delict: (a) the criterion of wrongfulness ultimately depends on a judicial determination of whether – assuming all the other elements of delictual liability to be present – it would be reasonable to impose liability on a defendant for the damages flowing from specific conduct; and (b) that the judicial determination of that reasonableness would in turn depend on considerations of public and legal policy in accordance with constitutional norms. Incidentally, to avoid confusion it should be borne in mind that, what is meant by reasonableness in the context of wrongfulness has nothing to do with the reasonableness of the defendant's conduct [which is part of the element of negligence], but it concerns the reasonableness of imposing liability on the defendant for the harm resulting from that conduct.'

(See also *F v Minister of Safety and Security* 2012 (1) SA 536 (CC) paras 117-124; *Trustees, Two Oceans Aquarium Trust v Kantey & Templer (Pty) Ltd* 2006 (3) SA 138 (SCA) para 11; *Mthembi-Mahanyele v Mail & Guardian Ltd* 2004 (6) SA 329 (SCA) para 44; Anton Fagan 'Rethinking wrongfulness in the law of delict' (2005) 122 *SALJ* 90 at 109.)

[34] The confusion cautioned against in the quotation from *Le Roux* seems to have materialised in a statement by Basson & Loubser *Sport and the Law in South Africa*, 7 ed chapter 5 at 13-14 which was relied upon in the judgment of the court a quo. That statement reads as follows:

'Both unlawfulness [or wrongfulness] and fault in respect of a sports injury essentially

involves the question whether the defendant acted reasonably or unreasonably; and these two elements of the delict are mostly telescoped into one when the courts examine the reasonableness of the defendant's conduct. 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.'

[35] It is clear to me that the confusion thus displayed does not only offend the sensitivities of the purists. It has practical consequences. In the law of delict in general and in the present context in particular, the element of wrongfulness introduces a measure of control. It serves as a 'long-stop' to exclude liability in situations where most right minded people, including judges, will regard the imposition of liability as untenable, despite the presence of all other elements of Aquillian action (see eg *Fourway Haulage SA (Pty) Ltd v S A National Roads Agency Ltd* 2009 (2) SA 150 (SCA) para 31). If the test for negligence and wrongfulness is telescoped into one, the function of the latter element as a measure of control is lost completely. Whenever the conduct of a participant in a rugby game which led to the injury of his opponent is found to be negligent, liability for the loss resulting from the injury will follow as a matter of course. In addition, logic dictates that if the injury was caused intentionally, the participant's position can only be worse. I find this outcome untenable and I believe it to be self-evidently so.

[36] In the context of physical injuries resulting from positive conduct, the defendant more often than not seeks to rebut the presumption of wrongfulness by establishing one of the well settled defences which have become known as grounds of justification. Included amongst these are private defence, necessity, statutory authority, *volenti non fit iniuria* (or consent) and so forth (see eg J Neethling & J M Potgieter *Neethling-Potgieter-Visser Law of Delict* 6 ed 82 *et seq*; Max Loubser & Rob Midgley (Eds) *The Law of Delict in South Africa* chapter 9). Some of these grounds of justification have become so standardised that they have developed their

own subrules. Nonetheless, there is no closed list or *numerus clausus* of grounds of justification. This is so because these grounds constitute no more than typical factual situations occurring in practice where it had become settled law that liability will not follow.

[37] But the fundamental approach to the determination of wrongfulness will always find application in novel or borderline situations not catered for by the subrules of these grounds (see J C van der Walt & J R Midgley *Principles of Delict* 3 ed para 85). In those situations the question will therefore be whether considerations of public or legal policy, in accordance with constitutional norms, dictate that legal liability should be imposed. With regard to these considerations of policy this court was at pains in the past to point out that the considerations do not depend on a collection of arbitrary factors or on the idiosyncratic view of an individual judge, but rather on the balancing against one another of identifiable norms (see eg *Minister of Safety and Security v Van Duivenboden* 2002 (6) SA 431 (SCA) para 21; *Telematrix* paras 15-16; *Fourway Haulage* paras 21-22). Some of these norms have been enumerated in a useful discussion by Loubser & Midgley *op cit* chapter 8.

[38] Amongst the considerations that may influence the policy decision whether or not to impose liability, is the nature of the fault that is proved, as well as other fault related factors. Accordingly, while intentional conduct may sometimes attract legal liability, the same conduct may not be regarded as wrongful if the degree of fault established was no more than negligence. In other factual situations conduct may not even be regarded as wrongful when it was intentional, but only when it was accompanied by a motive to cause harm or by a particular awareness of the risk of serious harm that may follow. I find these propositions of particular significance in determining wrongfulness in the context of a rugby game. Yet they are not unanimously supported by academic authors in the field. They are opposed in the main by those who subscribe to the thesis that wrongfulness is determined by the objective, *ex post facto* criterion of reasonableness and that the perpetrator's subjective mental disposition is therefore of no relevance at all (see eg Van der Walt & Midgley *op cit* para 60; eg Neethling & Potgieter *op cit* 43-44).

[39] Despite this opposition, these propositions have become fairly well established in the decisions of this court. That appears, for instance, from the following statement in *Minister of Finance v Gore NO* 2007 (1) SA 111 (SCA) para 86:

'We do not think that it can be stated as a general rule that, in the context of delictual liability, state of mind has nothing to do with wrongfulness. Clear instances of the contrary are those cases where intent, as opposed to mere negligence, is itself an essential element of wrongfulness. These include intentional interference with contractual rights (see eg *Dantex Investment Holdings (Pty) Ltd v Brenner and Others NNO* 1989 (1) SA 390 (A)) and unlawful competition (see eg *Geary & Son (Pty) Ltd v Gove* 1964 (1) SA 434 (A)). . . .'

[40] Since then this statement in *Gore* has been confirmed by this court in *mCubed International (Pty) Ltd v Singer* 2009 (4) SA 471 (SCA) para 34; *South African Post Office v De Lacy* 2009 (5) 255 (SCA) para 5; *Mediterranean Shipping Co (Pty) Ltd v Tebe Trading (Pty) Ltd* 2008 (6) SA 595 (SCA) para 14, *Le Roux v Dey* 2010 (4) SA 210 (SCA) para 35. (See also Boberg *The Law of Delict* vol 1 (Aquillian Liability) at 33; Loubser & Midgley paras 8.13.2-3.)

[41] The ground of justification normally raised by the participant in a rugby game whose conduct led to the physical injury of an opponent, is the one already known in Roman and Roman Dutch law under the maxim *volenti non fit iniuria* (he who consents cannot be injured). Consent to suffer physical injury takes two forms: (a) consent to specific harm, as in the case of a surgical procedure, and (b) consent to assume the risk of injury, as in the case of a participant in a sport assuming the risk of injury that may occur in that sport (see eg Neethling & Potgieter *op cit* at 103 *et seq*; Loubser & Midgley para 9.3). In the assumption of risk situation it is generally accepted that the participant assented to the risks inherent in that particular activity. (See eg *Santam Insurance Co Ltd v Vorster* 1973 (4) SA 764 (A) at 779-781). These principles are fairly clear. The difficulty lies in their application – in deciding in every factual situation whether or not the harm that actually eventuated can be said to fall within the ambit of the inherent risk associated with the activity, like a rugby game.

[42] From the nature of things, it is impossible to obtain certainty by formulating rules that will readily provide the answer in every case. As I see it, the best we can do is to indicate broad parameters that will hopefully assist in the factual inquiry that will have to be undertaken in every situation. Proceeding from this premise, the first principle is that wrongfulness ultimately depends on considerations of public and legal policy. Since public policy regards the game of rugby as socially acceptable, despite the likelihood of serious injury inherent in the very nature of the game, it seems to me that conduct causing even serious injury cannot be regarded as wrongful if it falls within the rules of the game. And it matters not, I believe, whether the conduct was negligent or intentional. But the converse does not necessarily hold true. The mere fact that the conduct causing the injury was in contravention of the rules of the game, will not automatically result in the imposition of legal liability. The late tackle of an opponent after he has parted with the ball or a tackle from an offside position or running into the opponent in a dangerous way, may break the rules of rugby and may result in a penalty, but it will not necessarily lead to the imposition of delictual liability, even if that conduct was intentional. This is so, I believe, because public and legal policy will accept this kind of conduct as a normal incident of the rugby game or inherent in the game (see eg S A Strauss '*Bodily injury and the defence of consent*' (1964) 81 *SALJ* 332 at 335; J M T Labuschagne '*Straf- en Delikregtelike Aanspreeklikheid vir Sportbeserings*' Stell LR 1998 1 72 at 87).

[43] At the other end of the scale, I believe that conduct which constitutes a flagrant contravention of the rules of rugby and which is aimed at causing serious injury or which is accompanied by full awareness that serious injury may ensue, will be regarded as wrongful and hence attract legal liability for the resulting harm. To illustrate this point, Labuschagne (*op cit* 87-8) borrowed an example from the English case of *R v Billinghurst* 1978 Crim LR 553 where it was held that a scrumhalf who hit his counterpart with a fist in an off the ball incident and broke his jaw, was liable for the resulting damages. Another example given by Labuschagne of conduct which, in his view, should be described as wrongful, is that of the rugby player biting his opponent. I have little doubt that in these situations our courts can be expected to impose delictual liability.

[44] Since I agree with my brother Plasket AJA that the conduct of the appellant in

this case falls squarely within the last mentioned category of an injury resulting from a flagrant contravention of the rules, accompanied by full awareness on his part of the seriousness of the potential injury that could ensue, I have no difficulty in endorsing his finding of wrongfulness.

F D J BRAND

JUDGE OF APPEAL

APPEARANCES:

For the Appellant: R van Riet SC (with him R G L Stelzner SC)

Instructed by: Visagie Vos; Cape Town

E G Cooper Majiedt Inc, Bloemfontein

For the Respondents: J W Olivier SC (with him A Blommaert)

Instructed by: Allan G Jones Inc., Cape Town

McIntyre & Van Der Post, Bloemfontein