IN THE HIGH COURT OF SOUTH AFRICA
(WESTERN CAPE HIGH COURT, CAPE TOWN)

REPORTABLE

CASE NO. 6293/2008

In the matter between:

GERALDINE OCTOBER	**PLAINTIFF**
And	
THE ROAD ACCIDENT	**DEFENDANT**

Coram	:	**DLODLO, J**
Judgment by	:	**DLODLO, J**
Counsel for the Plaintiff	:	**ADV. I.J. TRENGOVE**
Instructed by	:	**Jonathan Cohen & Associates** 3rd Floor, Equity House 107 St George's Mall CAPE TOWN Tel. no. 021 422 5270 (Ref. J. Cohen)
Counsel for the Defendant	:	**ADV. C. BISSCHOFF**
Instructed by	:	**Z Abdurahman Attorneys** Ground Floor, Waalburg Building 28 Wale Street CAPE TOWN TEL. no. 021 424 2111 (Ref. Z. Abdurahman)
Date(s) of Hearing	:	**07, 8 & 9 SEPTEMBER 2010**
Judgment delivered on	:	**22 SEPTEMBER 2010**

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JUDGMENT DELIVERED ON WEDNESDAY, 22 SEPTEMBER 2010

DLODLO, J

[1] During the early hours of the afternoon of 9 September 2003 and on Angela Street, Valhalla Park in Cape Town area, an accident occurred when a motor vehicle (a truck) owned by Marlow Transport, driven at the time by one Marthinus Le Roux, hit and ran over a cyclist known as Bradley October. The latter was an eleven (11) year old boy at the time. The boy was seriously injured in the said accident. The trial before me concerns the merits only. At the start of the trial the parties stipulated that the records in Exhibit "A" (the Plaintiff's bundle of documents) would be admitted on the basis of that they were what they purported to be, without necessarily admitting the contents thereof. The Defendant in its Plea does not deny that the accident took place and that Bradley sustained serious injuries. The Defendant maintains that the collision was caused due

to the exclusive negligence of Bradley who is said to have been negligent in certain specified respects. In addition (as far as the injuries are concerned) the Defendant pleaded that such injuries were caused by Bradley himself in that he was under an obligation to wear a crash helmet but that he failed to do so in circumstances where he was able to do so and where the wearing of such crash helmet would have materially reduced the nature and severity of the injuries sustained by him. Mr. Trengove appeared for the Plaintiff and Mr. Bisschoff appeared for the Defendant. What appears hereafter represents a summary of evidence led in this matter.

PLAINTIFF'S CASE

MRS. GERALDINE OCTOBER

[2] The Plaintiff, Mrs. October, acts herein in her personal capacity and in her capacity as the natural guardian of her son, Bradley October, who was seriously injured in the motor vehicle collision on 9 September 2003. Mrs. October is the natural mother of Bradley. He was born on 9 May 1992, and his birth certificate was admitted as Exhibit "B". Mrs. October testified that Bradley had suffered serious injuries. He is no longer able to remember well, he becomes angry very easily, and he cannot handle his own business affairs even though he has turned 18. He dropped out of school because he cannot learn, and lives with his parents. (A *curator ad litem* will be appointed in due course.)

[3] Mrs. October identified photos of the accident scene in Exhibit "**A**", and testified that the collision occurred around the corner from their

house where Bradley lived. Neither she nor her husband, who is Bradley's father, was present when the collision occurred. The husband was visiting with friends and she was at work. She was called at 15h45 on the day of the collision, and went straight to the hospital from where she only returned four days later. When she came home, she saw Bradley's bicycle had been broken into two pieces, which were held together by the brake cable. Bradley's bicycle had been a present from his parents on his birthday in May 2003. It was a new bicycle which Mrs. October had purchased at a bicycle shop. As far as she knew, the brakes were working at the time of the collision. Mrs. October said that Bradley did not own a crash helmet, and that children in the neighbourhood did not wear crash helmets when riding their bicycles. She had taught Bradley to obey the rules of the road, and told him that she would remove the bicycle if he did not ride it safely. In her opinion, knowing Bradley as she did before the collision, it was unlikely that he would have driven through any stop sign at Andrew and Angela Streets, as the defendant alleges. Mrs. October identified the signatures on Bradley's statement (page 16 of Exhibit "A"), and confirmed that she had often discussed the collision with him but that he could not remember anything about it.

MR. OWEN MEYER

[4] Mr. Meyer was the only eye witness of the collision who testified. He is a middle-aged man, who watched the collision occur from approximately 35 metres away. He testified that he is trained in first aid, and that he works as a volunteer at St John's Ambulance Service.

On the day in question Mr. Meyer was visiting his parents, who live a few houses further along Angela Street from where the collision occurred. He was standing outside their house on the sidewalk, facing the street and speaking to a friend, Jonathan. He identified the parents' house on photos number 3 and 8 (at the second lamp pole; his father is visible on photo number 8). Mr. Meyer saw Bradley sitting on his bicycle at the corner of Angela and Andrew streets shortly before the collision. Mr. Meyer was about thirty five (35) paces away from where Bradley was. He marked with an "X" on photo 1 (Exhibit "A") where Bradley had been sitting on his bicycle, with his one foot on the kerb, when he was hit. Mr. Meyer said that there was not much traffic on the road at the relevant time.

[5] Mr. Meyer also identified photos showing a bicycle rider stationary at the same place where Bradley had been hit. They had been taken at an inspection of the scene when Mr. Meyer asked a man on a bicycle to sit on his bicycle exactly where Bradley had been when the truck hit him (Exhibit "A", photos numbers 6 – 17). Mr. Meyer said he saw Bradley sitting on his bicycle about a minute to one and a half minutes before he was hit by the truck. Mr. Meyer was closely cross-examined about his observations of Bradley during his conversation with Jonathan. Mr. Meyer said he looked towards the right (west) during the conversation, which defendant's counsel said he accepted. Just before the collision, Mr. Meyer saw the insured driver's truck approaching Bradley from behind, driving from east to west. He was driving a blue truck, similar to the type of truck on the pavement on photo 18. (This was very similar to the photos of similar trucks which

the insured driver identified – Exhibits "E" and "F").

[6] The truck was driving very near the kerb when the side of it hit Bradley. The bicycle was pulled under the wheels of the truck and Mr. Meyer saw Bradley rolling over and coming to rest in the street, in the opposite lane. Mr. Meyer went to where Bradley was lying and saw blood coming from his one leg. He fetched his first aid suitcase and told others to call other first aid workers to help him. Mr. Meyer said the insured driver stopped the truck further down Angela Street, at a speed bump visible on photos numbers 6 and 21 (near the large white house). People had screamed and signalled at the insured driver that he had run someone over. The insured driver (Mr. Le Roux) came to where Bradley was. Mr. Meyer spoke to him briefly and could tell by the way he spoke that "*hy het 'n drankie in, met sy uitspraak teenoor my*". Under cross-examination Mr. Meyer said he could also smell that. He said that he could not, however, state that Mr. Le Roux was under the influence of alcohol. Mr. Meyer thought that the truck had been moving fairly fast at the time of the collision, but he could not tell exactly how fast.

[7] At some point "law enforcement" arrived in a private car with a blue light on the roof, and told the insured driver to move the truck onto the pavement. They then escorted the ambulance to the hospital. The "law enforcement" were not members of the SA Police but City Council officers who check on illegal dumping, report burglaries etc. Mr. Meyer strenuously denied that the insured driver had driven a white "bussie en sleepwa", and insisted it had been a blue truck. (This

was confirmed by the insured driver's identification of Exhibits "E" and "F".) Mr. Meyer strenuously denied the insured driver's version that Bradley had driven into the side of the truck. Mr. Meyer could not confirm or deny that the insured driver had removed the bicycle from under the truck wheels. He said it was possible that the insured driver could have called the ambulance and police, but said it was also possible that they might have been called from public telephone at the shop in the house next to where Bradley had been hit.

MR. RALPH BESSICK

[8] Mr. Bessick was an eye witness of all the relevant events except the collision itself. He had worked as a driver's assistant for DHL for two years. Mr. Bessick said he lived in the area of the collision, and although he did not know Bradley before the collision he knew who he was "**van aansien**". At the time of the collision, Mr. Bessick was standing on Andrew Street talking to friends. He said it was about eleven (11) paces from where Bradley was sitting on his bicycle when he was hit. Mr. Bessick identified the place where he stood at the time of the collision, by an "X" on photo number 14. (He said he had measured the distance from where he stood at the request of the Plaintiff's attorney.) A few minutes before the collision, Bradley had come riding past Mr. Bessick on his bicycle, towards Angela Street. Mr. Bessick greeted (gestured) Bradley as he rode past. Mr. Bessick then saw Bradley stop and sit on his bicycle just around the corner in Angela Street. He marked the place where Bradley had stopped, at the place on photo number 6 where the man is visible on the bicycle. Shortly thereafter, Mr. Bessick heard "*die gedreun van die trok*". He

did not see Bradley being hit, but heard the people scream. He went to look and saw Bradley lie on the ground injured.

[9] The truck stopped some distance further along Angela road. The driver came to where Bradley was, and Mr. Bessick recognized him as a man known to him in the neighbourhood. Earlier, he had passed the man's house on Louise Street where he had seen the same truck and the man drinking beer outside his house. Mr. Bessick insisted under cross-examination that Bradley had not been hit by a white "bussie en sleepwa", and that it had been a blue truck similar to the truck on photos 18 and 19. When told that Mr. Le Roux denied he had been drinking, he said he had also smelled him at the scene of the collision. Mr. Bessick denied the insured driver's version that Bradley had driven into the side of the truck. Bradley had been sitting on his bicycle when he was hit. Mr. Bessick was asked in cross-examination why he had described the truck as white, in paragraph 5 of his statement (page 19 of Exhibit A). He said he had said the truck was blue. Under re-examination, Mr. Bessick said that he was Afrikaans speaking, that his English was poor, and that he had spoken in Afrikaans to the attorney who had drafted his statement. The statement, which was in English, was later mailed to Mrs. October's house, where Mr. Bessick signed it without reading it.

PROFESSOR TOM DREYER

[10] Professor Dreyer was the Plaintiff's fourth witness. He is a qualified accident reconstruction expert. He confirmed the two (2) reports he had drafted in this matter. Professor Dreyer explained that his first

report contained erroneous conclusions because he had made factual assumptions which later turned out to be inaccurate. They had partially been obtained from a police plan and report which were not accurate, and he had also misunderstood certain witness statements about the place where Bradley had stood when he was hit. He obtained the correct facts when he visited the scene of the collision and it was pointed out to him where Bradley had stood, and he took measurements at the scene.

[11] Professor Dreyer said that accident reconstruction testimony could not definitively resolve the issues before the Court, and that the essential issue was a factual one which depended on conflicting testimony by the parties' witnesses. He made the following observations:

(a) Dreyer itemized important differences in the insured driver's first and second statements.

(b) He and John Craig, the defendant's reconstruction expert, did not differ fundamentally in their conclusions.

(c) They also agreed that the police plan and report contained inaccuracies.

(d) Craig did not seem to give much weight to the insured driver's second statement, which differed materially from the first statement.

(e) He and Craig agreed that if Bradley had sat on his bicycle at the place which the plaintiff alleged, the insured driver should have avoided colliding with him.

(f) If Bradley had been sitting where the plaintiff alleges he did, his bicycle may have been pulled from under him and if he did not make contact with the side of the truck, he could have been expected to be found in the road (somewhat eastward from the point of impact as Mr. Meyer had described).

(g) If Bradley had driven into the truck, he would likely have come across the handle bars and "bounced back" because of the "restitusie koeffisiënt", or could have slipped down the side of the truck, and would in both cases have been found in the vicinity of the sidewalk where he had been sitting.

THE DEFENDANT'S CASE

MRS. AVRIL WANNENBERG

[12] Mrs. Wannenburg was Bradley's second grade teacher at Valpark Primary school. (Her testimony was interposed with leave of the court.) She testified that the rules of the road were taught to learners from grade 1, along with lessons on various types of safety including safety at home. Rules of the road included looking right, then left, then right again before crossing the street. Such lessons were continued every year up to grade 7. Under cross-examination, Mrs. Wannenburg said there were more than 40 pupils in Bradley's class, and they were taught the rules of the road every year up to grade 7 in the hope that the rules would eventually sink in.

MR. MARTHINUS LE ROUX (the insured driver)

[13] Mr. Le Roux testified that he drove a Iveco "bussie en trailer" in Angela Street at approximately 40 - 45 kmh. When he had passed

Andrew Street (*"**verby, effens verby Andrewstraat**"*), he heard a noise. The trailer was still in the middle of Andrew Street. He immediately stopped, but could not remember where, and found Bradley's bicycle under the wheels of the vehicle and Bradley lying next to the vehicle. The "bussie en trailer" were not damaged at all. Prior to the collision he saw no one at all on the corner where Bradley had allegedly been sitting on his bicycle. At the time of the collision he worked for Marlow Transport, and had come from his house at 8 Louise Street, Valhalla Park, immediately prior to the collision. He was on his way to make a delivery in Parow. The house was *"**nie te ver nie, omtrent 5 tot 6 kilometers**"* from the scene of the collision. He had lived in the area for over 20 years.

[14] He was delivering couches and other furniture which had been packed into the trailer. He was accompanied by two assistant employees of Marlow Transport, whose names he could not remember. The police arrived about 30 minutes later, and the ambulance 10 minutes after that. He was told to remove his vehicle from the road, and he pulled it off the road to the right, at the house with the green fence (photo 2, page 7 of Exhibit "A"). When asked if the police was the "law enforcement", he said *"Ek kan net onthou 'n polisiebeampte"*. He denied that he had drunk alcohol before the collision.

[15] Under cross-examination Mr. Le Roux agreed that the "bussie en trailer" looked like the vehicles portrayed in Exhibits "E" and "F". Mr. Le Roux had previously made two (2) contradictory statements

(Exhibit "A", pages 22 and 26). He first said that Bradley had failed to stop at the "stop sign" and that his bicycle did not have brakes. In the second statement he said that he never saw Bradley until after the collision. In the end, under cross-examination, he admitted that:

(i) He never saw Bradley before he was hit.

(ii) He had no idea where Bradley had been before he had been hit.

(iii) He had no idea what part of the vehicle had hit Bradley or his bicycle; and

(iv) His statement that Bradley must have driven through the "stop sign" was sheer speculation.

COMMON CAUSE FACTS

[16] The Defendant (as pointed out earlier on in this Judgment) admitted paragraph 4 of the Particulars of Claim, that is, the date and place of the collision, the identity of the insured driver and the vehicles involved. The Defendant's allegation that Bradley was negligent was based on the insured driver's first statement to the Road Accident Fund. It is common cause that Mr. Le Roux admitted in cross-examination that what is contained in that first statement was mere speculation.

[17] The Plaintiff's eye witnesses, Mr. Meyer and Mr. Bessick, placed Bradley as sitting on his bicycle around the corner in Angela Street (Exhibits "A1" and "A6"). The insured driver (Mr. Le Roux) placed Bradley at a very similar place, that is, the truck had just passed Andrew Street when he heard the sound of the impact. It was not denied that Mr. Meyer and Mr. Bessick had been on the scene and

that they were positioned as they testified and thus had (or must have had) clear views of the scene of the collision. Mr. Le Roux (the insured driver) admitted that he never saw Bradley before the collision and that he saw him for the first time only after he had stopped the truck and got out. Mr. Le Roux also admitted that he had no idea where Bradley was when he was run over. He also had no idea what part of the truck had hit Bradley or the bicycle. He admitted that his first report to the Road Accident Fund, that Bradley had failed to heed the "stop sign", was nothing but speculation on his part.

EVALUATION OF EVIDENCE AND APPLICATION OF RELEVANT LAW

[18] In the above regard one can do no better than setting out the legal formulation contained in ***Cooper, Motor Law: Volume Two – Principles of Liability (Delictual Liability in Motor Law)*** 1996 at 143 – 164. This formulation reads:

"A driver must leave a sufficiently wide berth between his vehicle and any other road-user he is passing. What is a reasonable clearance must depend on the circumstances of each case. A factor of importance is the degree of lateral movement to be expected from the vehicle being passed. In the case of two wheeled vehicles, and horse drawn vehicles a greater degree of lateral movement must be expected than in the case of four wheeled motor vehicle and the driver must make allowance therefor. Where the road surface is rough or the cyclist is a child, a pedal cycle should be allowed a greater clearance than otherwise. Clearance and speed are related

factors: the higher the speed, the greater should be the clearance; the smaller the clearance, the lower the speed should be..... Before overtaking another vehicle a driver is under the duty to satisfy himself that it is safe to do so. In discharging the duty the main concern of an overtaking driver travelling on an single carriage-way is for:

(a) .....

(b) .....

(c) traffic stationary or alongside the road"

Most certainly the insured driver had the duty to pass Bradley in such a manner that he did not place his safety in danger. Indeed, that included giving Bradley a sufficiently wide berth so as to ensure that the vehicle he drove did not hit Bradley at all.

[19] Bradley was but a child. Consequently, there existed an added duty on the insured driver. In this regard it is appropriate to refer to ***Oosthuizen v Standard General Versekeringsmaatskappy Bpk*** 1981 (1) SA 1032 (A) at 1039 E-H where the then Appellate Division explained the legal approach in this regard as follows:

"Daar is nog 'n ander faktor wat die redelike versigtige bestuurder in gedagte sou gehou het. Hy sou op grond van sy algemene ervaring besef het dat kinders – selfs al sou hulle redelik vertroud wees met die basiese verkeers- of padveiligheidsreëls – dikwels, skielik en onverwags, op 'n heeltemal onbesonne of onverskillige wyse optree, en dat dit van hom as bestuurder verwag word om, binne redelike perke, teen gebeurlikhede van hierdie aard te waak. Om voormelde redes, sou die redelike versigtige bestuurder in die onderhawige

geval ongetwyfeld die fietsryer betyds gewaarsku het dat hy in aantog is (soos Mev. Radowsky inderdaad gedoen het), en hy sou, daarbenewens, ook voldoende ruimte, na sy oordeel, tussen hom en die trapfiets gelaat het ten einde met redelike veiligheid verby te kan gaan.... Dus, as die redelike versigtige bestuurder dit nodig geag het om, in die heersende omstandighede, heelwat verder na regs by die fiets verby te gaan as wat Mev. Radowsky gedoen het, sou hy dit met gemak en met veiligheid kon gedoen het."

I need to emphasize that a driver who drives in a place where there is a likelihood of the presence of children whether on bicycles or on foot, must at all times be specially alert and exercise a special degree of care. This holds true even if the likelihood of the presence of children in that area is somewhat remote.

[20] Even if the child, Bradley, was somewhat hidden from the view of the driver, Mr. Le Roux still ought always to have foreseen the possibility of a child moving either across or into the road surface. This additional duty of care is not new. It has been part of our legal system for time immomerial. Hence the pronouncement by Holmes JA in ***Levy NO v Rondalia Assurance Corporation of SA Ltd.*** 1971 (2) SA 598 (A) at 599 H- 600 C:

"As a general proposition it is well settled, and it accords with humanity and common sense, that a motorist approaching young children near the edge of the road ought to drive with a degree of special care and vigilance because of their tendency sometimes to dash heedlessly across the road. To hold otherwise would be to put an old head on young shoulders, and to assume that they will look

before they leap. But the rule must not be applied as a fixed principle without reference to the facts. The foreseeability of reasonably possible collision, and the degree of special care required, will vary according to the particular circumstances of each case, for example, the visibility of the children; their apparent age; their proximity to the edge of the road and to the path of the vehicle; their immobility or liveliness; the indications, if any, of an intention to cross the road; the extent of their supervision by a responsible person; the apparent awareness of the latter, and of the children, of the approach of the motorist; the available width of the road; and the stopping power of the vehicle in relation to speed, brakes and road surface. Such factors (and the list is not exhaustive) are interrelated and not individually decisive. Their cumulative effect must be considered. Similarly, the particular circumstances will dictate the reasonable steps in relation to matters such as hooting, berth, swerving, slowing down or pulling up, with a view of guarding against the occurrence of collision, the reasonable possibility of which was forseeable. The decided cases are legion."

Similarly Corbett JA (as he then was) said the following in ***Santam Insurance Co Ltd. v Nkosi*** 1978 (2) SA 784 (A) at 791 F- 792 E:

"The true position, it seems to me, is that, depending on the circumstances, a motorist may be bound to exercise special care and vigilance not only towards children whom he sees, or ought reasonably to see, are present in or near the street but also towards hidden children whose presence there he ought reasonably to foresee or anticipate. Whether this duty towards hidden children arises and, if so, what particular steps, or course of action, the motorist will be

obliged to take to guard against injuring them must depend upon all the facts of the particular case. And because the children are hidden, the duty, when it arises, may demand even greater caution from the motorist by reason of the very fact that, possibly until a late stage, he cannot see them and consequently is unable to gauge such matters as their apparent age, their awareness of his approach, their future intention, etcetera.

The ultimate test in any such situation is to ask, in the first place, whether the reasonable man, ie the diligens paterfamilias, in the position of the motorist and endowed with his previous experience, would foresee or anticipate the possible presence of hidden children in a situation where, bearing in mind their propensity for heedless action, they could be endangered by his passing vehicle. In this connection it should be remembered that the diligens paterfamilias is not a 'timorous faintheart always in trepidation lest he or others suffer some injury' (Herschel v Mrupe 1954 (3) SA 464 (A) at 490F); nor is he 'given to anxious conjecture and morbid speculation' (South African Railways and Harbours v Reed 1965 (3) SA 439 (A) at 443A). On the other hand, the care which is expected of him: '...is not the care which the man takes in his own affairs, nor that which the ordinary or average man would take. It is higher than that. The law sets up as a standard to which everybody has to conform that degree of care which would be observed by a careful and prudent man, the father of a family and of substance, who would have to pay in case he fails in his duty. It will be observed that the standard of conduct is a high one.' (See Transvaal Provincial Adminstration v Coley 1925 AD 24 at 27-8 per DE VILLIERS JA). At the same time the law

recognises that life's possibilities are infinite and in general concerns itself only with those possibilities of harm to others which are sufficiently real or immediate to cause the diligens paterfamilias to take precautions against their happening (See Moubray v Syfret 1935 AD 199 at 209-30; Joffee and Co Ltd. v Hoskins and Another 1941 AD 431 at 451; Kruger v Coetzee 1966 (3) SA 428 (A) at 430 E-F; and compare remarks of LORD OAKSEY in Bolton v Stone 1951 AC 850 at 863). And, in deciding whether precautionary action is warranted, the diligens paterfamilias might have to weigh the seriousness of the harm, should it occur, against the chances of its happening (See Herschel v Mrupe 1954 (3) SA 464 (A) at 477 A-C). The next phase of the enquiry is, therefore, to ask whether the possibility of hidden children being present in a situation of potential danger is sufficiently real or immediate in the above-described sense to cause the diligens paterfamilias in the position of the motorist to take preventative precautions."

I fully associate myself with the above exposition of our law in this respect.

[21] In the instant case Bradley was not at all hidden, nor was he on the road. Mr. Le Roux was not a stranger in the area. He stayed in the same residential area and had so stayed for the period of over twenty (20) years. He clearly even knew that in that residential area there was a shop as well. He knew or ought to have known that children move around there either on foot or on bicycles. He knew or ought to have known that among other activities, children ordinarily frequented the shop. The foreseeability of the presence in the road of

the object or person with which or with whom the vehicle collides is always the key factor in determining whether or not it was negligent for the driver to drive at a speed from which he could not bring his vehicle to a standstill within the range of his vision thereby rendering it impossible that any other appropriate avoiding action can be taken. See: ***Seti v Multilateral Motor Vehicle Accidents Fund*** 1999 (4) SA 1062 (E) at 1066 H-J and **Cooper Delictual Liability in Motor Law** at 154. I do not necessarily accept that Mr. Le Roux drove in the speed he alleged he maintianed. It is clear that his speed appears to have been more than he would want this Court to know.

[22] Mr. Meyer and Mr. Bessick gave the Court a chronological account of what happened infront of their eyes. I did not get an impression that they came to Court to deceive the Court. These are lay persons who have no connection whatsoever with either the October family or Mr. Le Roux. They were credible and gave to the Court a reliable and logical account of what was within their knowlegde. Where they did not know, they said so. Scenarios they did not see, they told the court similarly. I was very much impressed with these eye witnesses. I can safely rely on what they told me as far as this accident is concerned.

[23] However, the same cannot be said about Mr. Le Roux (the insured driver). His testimony that the bicycle did not have brakes was not plausible. He allegedly saw the bicycle immediately after the collision, in a severely mangled condition. Mrs. October's testimony was that the bicycle had been purchased new in May 2003 that by all accounts it was in a good condition including the brakes, and that

after the collision she found the bicycle at home broken into two pieces held together by the brake cable. In any event, it is highly improbable that immediately after the accident Mr. Le Roux checked the brakes of a bicycle. He did not tell me how he did that and why would he do that. I would imagine that any reasonable man's mind at that stage would be occupied by trying to render assistance to the injured Bradley.

[24] Mr. Le Roux implausibly alleged that Bradley was lying next to the vehicle when he stopped. That would have meant Bradley would have to have been projected forward by the impact by at least some 30 metres. Mr. Meyer and Mr. Bessick testified that Mr. Le Roux had only come to a stop at the speed bump some 50 metres further down Angela Street. Mr. Le Roux denied that his vehicle had proceeded for at least 30 metres after the collision. Professor Dreyer testified (and confirmed John Craig's report paragraph 5.2) that at 45 kmh, if the driver had braked heavily it would have taken the vehicle a minimum of 32 metres to come to a stop. Professor Dreyer said if the trailer did not have its own brakes, the distance would have increased to 39 metres.

[25] Yet, Mr. Le Roux alleged that when he later removed the vehicle from the road, he pulled it forward to the right of the road to where the green fence is (photo 2, page A7). Photos 1 and 16 show that the green fence was very near to the collision, next to the building in front of which Bradley was hit (opposite the road from where Bradley was sitting on his bicycle). Mr. Le Roux further denied that

there were any pedestrians in the corner area where Bradley had been sitting. That was in contrast with Mr. Bessick's unchallenged testimony that Bradley had sat there on his bicycle talking to friends. Mr. Le Roux's version was also not plausible in the light of the fact that there was a shop where Bradley sat on his bicycle. Mr. Le Roux initially stated that he had left working at Marlow Transport after the collision because the owner, Mr. Redelinghuys, had left when the business was taken over by another owner. He was then confronted with a notice of a disciplinary hearing, dated 23 March 2004, under cover of a recent letter by Mr. Redelinghuys (Exhibit G). The 2004 notice contained eight charges of misconduct against Mr. Le Roux, and noted that he had not appeared at the hearing. He responded that by then he had been fired, yet admitted his signature on the notice.

[26] He admitted that he had been charged with some of the listed charges. He said that Marlow had been taken over by Trio Transport, but when the Trio Transport fax imprint was pointed out on the recent letter signed by Mr. Redelinghuys on a Marlow letterhead, Mr. Le Roux had no response. Mr. Le Roux had not been forthright about the circumstances of his leaving employment at Marlow Transport. Mr. Le Roux was then confronted with a Google map (Exhibit "H"), which showed that the distance from his house to the scene of the collision was less than one kilometre. He then said he had said it was not even a ten minute walk, yet he had testified earlier it was "*nie te ver nie, omtrent 5 tot 6 kilometers*". Mr. Le Roux admitted that he had been at his house shortly before the collision, as Mr. Bessick had testified. However, Mr. Le Roux said he had gone to the house with

his co-workers to "fetch bread", and did not drink beer there. (This was on the way to a delivery in Parow from the Marlow Transport offices in Salt River.) When asked why he had not bought bread at a café, Mr. Le Roux said he did not have money. He said Mr. Bessick must have seen him during the short while that he was at his house "to get bread". Apart from obvious inconsistencies, some of which have been enumerated above, his evidence was characterized by *"ek kan nie onthou nie."* His evidence was in truth implausible (to put it mildly). To put it forthrightly, Mr. Le Roux is a deliberate liar in all the facets of this case. He did not only tell lies before me, but he also deliberately presented a false account of this accident to the Defendant.

[27] Mr. Meyer and Mr. Bessick testified that they smelled alcohol on Mr. Le Roux at the scene of the collision. His response that the "policemen" made nothing of it is not a good answer. No such policeman testified, and by law a policeman would only have had the right to take action if Mr. Le Roux had been under the influence of alcohol, which Mr. Meyer said he could not tell. Nobody suggested that Mr. Le Roux was under the influence of alcohol. The length of time that Mr. Le Roux spent at his house is not consistent with just picking up bread. When Mr. Bessick walked past the house, Mr. Le Roux was already there. Mr. Bessick then walked all the way to the corner of Angela and Andrew (at least ten minutes), stood there talking for a further few minutes, and only then did Mr. Le Roux come driving along when it should have taken him but a minute or

two to drive from his house to the scene of the collision. Mr. Le Roux did not produce the names of any eye witnesses to the Road Accident Fund, to corroborate his version of events. If they could corroborate his version, the identities of the two (2) co-employees could easily have been obtained from Marlow Transport.

[28] It came as no surprise to me at all that Mr. Bisschoff conceded in his submissions that Mr. Le Roux was negligent. He is not at all the best of witnesses that ever testified before me. It is highly improbable that Mr. Le Roux, who was to do deliveries at Parow from Salt River, would deviate so much that he found himself at Valhalla Park merely to pick up bread. It was far after two o'clock in the afternoon. Even if he was hungry, it is reasonable to accept that the best in the circumstances was first to finish deliveries at Parow and then knock off duty. He could then proceed home where he would then get not only bread but a full dinner meal. One perhaps needs to mention that the driver of a motor vehicle, keeping a proper lookout, necessarily does more than merely look straight ahead. He, as a reasonable driver is aware or ought to be aware of what is happening in his immediate vicinity and he must continuously scan the road and pavements on either side for obstructions or possible obstructions. See also in this regard ***Nogude v Union and South-West Africa Insurance Co Ltd*** 1975 (3) SA 685 (A) at 688. Obviously Mr. Le Roux, the insured driver in the instant matter failed to do this. In ***Jones NO v Santam Bpk*** 1965 (2) SA 542 (AD) at 548 G-H the following important formulation with which I agree, appears:

"It has been emphasized in a number of decisions that a motorist approaching children who are near the site of a highway, is under a special duty to take care in relation to such children. This duty was restated recently in this Court in the case of South British Insurance Co. Ltd v Smit, 1962 (3) SA 826 (AD), in this form at p.837:

'The propensity of children – even though well versed in road safety – to rush heedlessly across the street is, of course, well-known. It is because of that very propensity that the law requires the driver of a vehicle who sees children upon or near his roadway to be specially upon the alert.'"

I have said above earlier on in this Judgment that our legal system has been consistent in this regard. The test is not the diligence of the supine man, but of the man who is alive to the probable dangers and takes the necessary steps to guard against them. See ***Transvaal Provincial Administration v Coley*** *supra.*

[29] It concerned me though when Mr. Bisschoff submitted that the Court must find the existence of contributory negligence on the part of Bradley. I find it strange, what more did Mr. Bisschoff expect from this child to have done? Bradley was not on the road, nor was he in the process of cycling on when the accident took place. On the contrary, he was stationary outside Angela Street with his foot on the kerb. I am of the view that Bradley took sufficient precautionary measures to ensure that he did not endanger his life. If Mr. Le Roux adhered to the duty of care imposed on him by our legal system, no accident would have occurred. It appears to me that Mr. Le Roux's mind was not at all in the driving of the truck. That is why he told the

Court that there were no persons in and around Angela Street. This he maintained despite the clear and uncontradicted evidence of Mr. Meyer and Mr. Bessick. There is a shop in the vicinity of the accident. Apart from the fact that ordinarily the residential area is ever busy with persons moving up and down the street, the presence of a shop around the area should ordinarily exacerbate the situation. It is my finding that Mr. Le Roux is not truthful in this regard either.

[30] It is our law that in each case in which negligence is alleged against the motorist such negligence must be decided on the facts of that particular case. It other words, the Court is enjoined to examine the facts of that particular case. This is better illustrated in ***Rondalia Assurance Corporation of SA Limited v Mtkombeni*** 1979 (3) SA 967 (A) at 972 B-D:

"Moreover, one does not draw inferences of negligence on a piecemeal approach. One must consider the totality of the facts and then decide whether the driver has exercised the standard of conduct which the law requires. The standard of care so required is that which a reasonable man would exercise in the circumstances and that degree of care will vary according to the circumstances. In all cases the question is whether the driver should reasonably in all the circumstances have foreseen the possibility of a collision."

The ultimate issue is whether the facts established negligence, not whether they show that the driver in question (Mr. Le Roux in the instant case) failed to keep his speed within the range of his visions. See: ***Seemane v AA Mutual Insurance Association Ltd*** 1975 (4) SA 767 (AD) at 772 F-H. Having had regard to the totality of the proved

facts in the instant matter, I come to the conclusion that Mr. Le Roux failed to exercise the standard of conduct required of him by the applicable legal principles.

[31] It is my finding that Mr. Le Roux's implausible testimony stands to be rejected and I hereby do. I have indicated above that I do not buy the idea that Bradley was at all negligent. It was not unreasonable for that child to sit on his stationary bicycle on the agreed position of the road. I agree with Professor Dreyer that Bradley could have expected not to be in danger where he was standing next to the kerb. The accepted evidence is that, in any event, there was little traffic on the road at that time. Nothing prevented Mr. Le Roux from using the rest of the road surface and driving past the child without encroaching onto where the child stood on his bicycle with his foot on the kerb. I find Mr. Le Roux (the insured driver) to have been exclusively negligent with regard to this accident. I am unable to find any negligence of any degree on the part of Bradley. Much has been made of failure to wear a crash helmet. I do not find it strange that Bradley did not wear a crash helmet in the circumstances of this matter. As pointed out earlier on in this Judgment, Bradley is but a child. He was on his bicycle presumably in the vicinity of his residence why should he have bothered himself with a helmet at all. I would imagine the wearing of a helmet is more appropriately applicable when a cyclist sets on a long journey on his bicycle. When a child merely leaves home and ride a bicycle for example to the shop at the corner of his house it would be expecting too much to have expected such a child to resort to wearing a crash helmet. In any

event the evidence tendered by Mrs. October (Bradley's mother) to the effect that ordinarily children do not wear crash helmets in the surrounding is of cardinal importance. I thus find nothing untoward that this particular child also wore no crash helmet. Mr. Le Roux, as a *diligens paterfamilias*, should clearly have foreseen the reasonable possibility of his conduct injuring another person or property and causing such person patrimonial loss and should have taken reasonable steps to guard against the occurrence. It is common cause that he failed to take such precautionary steps and *culpa* has thus been proved in this case. See: ***Kruger v Coetzee*** 1966 (2) SA 428 (A) at 430 E-F. It is well-known that what is reasonably foreseeable will always depend upon surrounding circumstances then prevailing.

ORDER

[32] In the circumstances, I make the following order:

(a) It was the insured driver's sole negligence that caused the accident in which Bradley sustained serious injuries.

(b) The Defendant is liable to compensate the Plaintiff by payment of those damages which the latter shall have proved.

(c) The Defendant shall pay the Plaintiff's costs of this action.

DLODLO, J