39/95

Case No 535/93

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

R S NAPIER N.O.: Appellant

and

D E COLLETT: First Respondent

W J A LABUSCHAGNE: Second Respondent

CORAM: E M GROSSKOPF, VIVIER, EKSTEEN,

VAN DEN HEEVER, JJA et OLIVIER, AJA

HEARD: 17 MARCH 1995

DELIVERED: 30 MARCH 1995

J U D G M E N T

E M GROSSKOPF, JA

The appellant is the person appointed by the Committee of Lloyds to act on its behalf in the Republic of South Africa. The respondents are a syndicate of persons who own and run race horses. The respondents were the owners of a horse called "Shooting Party". This horse was insured under a Lloyds Bloodstock Insurance Policy. It died on 18 July 1991. The respondents sued the appellant under the policy for the value of the horse. This action succeeded before Plewman J in the Witwatersrand Local Division. With the leave of the court **a quo** the matter now comes on appeal before us.

The insuring clause of the policy reads as follows in so far as it is relevant to the present case:

> "NOW WE THE UNDERWRITERS hereby agree ... that in the event of the death during the period of this Insurance of any animal specified in the Schedule (or, for Insurances with an annual period only, in the event of the death of any such animal occurring within ninety days after the expiry of the Insurance as a result of any accident occurring ... during the currency hereof ...) we will indemnify the Assured in respect of the

> actual value of such animal at the time of the accident ... causing death, up to but not exceeding the limit of the Underwriter's liability specified in the Schedule in respect of such animal."

The policy was concluded for a period of one year from 10 April 1990 to 9 April 1991. In March 1991 the period of ninety days referred to in the insuring clause was extended to 120 days. Accordingly, if the death of Shooting Party on 18 July 1991 was the result of an accident which had occurred during the currency of the policy, the underwriters would **prima facie** be liable. It was common cause that Shooting Party was in fact injured in an accident on 27 September 1990. The main question argued before us was whether this accident was the cause of its death.

The issue is consequently one of causation. The law in this regard has been analysed by this court in recent years in a number of different contexts. See, in particular, **S v Mokgethi en Andere** 1990 (1) SA 32 (A) at 39D-47B (criminal law); **International Shipping Co**

(Pty) Ltd v Bentley 1990 (1) SA 680 (A) at 700E-701F (law of delict) and **Concord Insurance Co Ltd v Oelofsen N O** 1992 (4) SA 669 (A) at 673I-674B (law of insurance). Despite the differences between various branches of the law, the basic problem of causation is the same throughout. The theoretical consequences of an act stretch into infinity. Some means must be found to limit legal responsibility for such consequences in a reasonable, practical and just manner (**cf** the passage from Fleming **The Law of Torts** quoted at p 701 B-C of **Bentley's** case (**supra**)). Many criteria have been suggested for this purpose. See **Mokgethi's** case (**supra**) at p 39I-40C. The traditional view in insurance law is set out as follows in **Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries** 1987 (1) SA 842 (A) at p 862 C-D:

> "... when there are two or more possible causes ... the proximate or actual or effective cause (it matters not which term is used) must be ascertained, and that is a factual issue. ... an earlier event may be a dominant cause in producing

> the damage or loss; it may be the **causa sine qua non** but the issue is, is it the **causa causans?** ... [The] rule to be applied is **causa proxima non remota spectatur.**"

In the **Concord Insurance** case, **supra** at p 673I, the court again dealt with the complex legal questions which arise

> "where several factors concurrently or successively contribute to a single result and it is necessary to decide whether any particular one of them is to be regarded legally as a cause."

In this regard the court said (at p 674A-B):

> "In criminal law and the law of delict legal policy may provide an answer but in a **contractual** context, where policy considerations usually do not enter the enquiry, effect must be given to the parties' own perception of causality lest a result be imposed upon them which they did not intend."

This passage is not in conflict with what was said in **Shooter's** case, **supra**. The justification for the proximate cause rule is that it reflects the presumed intention of the parties to an insurance contract. See **Becker, Gray and Company v London Assurance Corporation** 1918 AC 101 at p 112-4.

The effect of these various authorities is, it seems to me, as follows. The general approach to questions of causation as laid down in authorities like **Mokgethi's** case and **Bentley's** case (both **supra**), based as it is on principle and logic, is equally applicable to insurance law. Its application will of course be subject to the provisions of the particular insurance policy in question. However, the particular policy will seldom affect the basic approach, and causation in insurance law will usually require much the same treatment as that accorded to it in other branches of the law.

The initial enquiry will normally be whether there is "factual causation." The nature of this enquiry was dealt with in **Bentley's** case, **supra**, at p 700E-H, and that exposition, with the necessary changes to apply it to an insurance claim rather than a claim in delict which was there in issue, is equally applicable to insurance law. If this initial enquiry leads to the

conclusion that the prior event was a **causa sine qua non** of the subsequent one, the further question arises, viz., whether there is a sufficiently close relationship between the two events to constitute the former the legal cause of the latter. As indicated above, various expressions have been used to describe this relationship. These expressions are all necessarily somewhat vague. In applying them in the context of insurance law one would have prime regard to the provisions of the insurance policy. Thus the policy may extend or limit the consequences covered by the policy, e g, by laying down exceptions. But in addition to any specific provisions, matters such as the type of policy, the nature of the risk insured against and the conditions of the policy may assist a court in deciding whether a factual cause should be regarded as the cause in law.

I turn now to the facts. They are largely undisputed.

On 27 September 1990 Shooting Party, while running in a race, sustained a compound fracture of the medial sesamoid bone of the near forelimb. After discussion between themselves, three veterinary surgeons, Drs Ross, Roberts and Meyer, agreed that surgical treatment of the animal's injury should be attempted. On 9 October 1990 the horse underwent surgery. Three fragments of the fractured sesamoid bone were removed.

A period of time to enable the horse to recuperate then passed and on 22 and 25 April 1991 Drs Ross and Roberts respectively examined the horse. Neither of them gave evidence, but their reports were before the court. At this stage the horse had recovered well in the sense that its life was not in danger from the accident or its sequelae. However, the veterinarians considered that Shooting Party was suffering from degenerative joint disease as a result of the accident and the surgery. Dr Ross, who had from the beginning considered that the prognosis for the operation was

"poor to guarded" and had recommended euthanasia, was in April 1991 still in favour of "destruction on humane grounds". Dr Roberts's view was slightly different. He recommended "euthanasia on economic grounds as this colt is only suitable to turn out to pasture and it is unlikely that he has any stud value."

The insurance policy contained special provisions relating to euthanasia. They read as follows:

> "This Insurance does not cover intentional slaughter ... except that Underwriters will not invoke this particular exclusion as a defence
> (a) where the Underwriters shall have expressly agreed to the destruction of the animal, or
> (b) where an insured animal suffers an injury or is afflicted with an excessively painful disease and a qualified Veterinary Surgeon appointed by the Underwriters shall first have given a certificate that the suffering of that animal is incurable and so excessive that immediate destruction is imperative for humane reasons, or
> (c) where an insured animal suffers an injury and a qualified Veterinary Surgeon appointed by the Assured shall first have given a certificate that the suffering of that animal is incurable and so excessive that immediate destruction is imperative for humane reasons without waiting for the appointment of a Veterinary Surgeon by the Underwriters."

Paragraphs (b) and (c) were clearly not applicable. There could be no suggestion that Shooting Party's suffering was so excessive that immediate euthanasia was imperative. The respondents were accordingly required to obtain the underwriters' consent in terms of paragraph (a) if they wished to destroy the horse and be covered under the policy.

The respondents obtained a further opinion from Dr M A J Azzie, a very experienced veterinarian. Dr Azzie examined Shooting Party on 21 May 1991. He concluded that the horse was suffering from degenerative changes in the fetlock joint complicated by osteo-arthritic changes. This condition was progressive and irrecoverable. Dr Azzie also recommended euthanasia.

The appellant was not satisfied with this and a further report was requested from Prof R Gottschalk of the University of Pretoria at Onderstepoort. Prof Gottschalk examined Shooting Party on 6 June 1991. His conclusions were stated as follows:

"1 The lameness present precludes this horse from taking part in athletic pursuits in the immediate future.

2 The radiographic signs are indicative of degenerative joint disease, which tends to be progressive in nature. Although the radiographic signs are not severe at present, the clinical signs indicate that more severe pathology may be present in the joint. To confirm this an arthroscopic investigation would be necessary.

3 If the horse is kept in an environment where he would not be forced to exercise (eg. paddock rest) I am of the opinion that he would not suffer unduly, and that the condition would probably improve with the passage of time.

4 Should the horse be forced to exercise, or be used for racing, he would suffer undue pain, this course of action should not be undertaken on humane grounds.

5 The fetlock condition would not preclude this horse's use for breeding purposes if sympathetically managed."

In his evidence Prof Gottschalk stated that he would not have recommended euthanasia on the strength of his examination. However, since he and Dr Azzie had a difference of opinion on this score, he advised

that it be resolved by way of an arthroscopic examination. This is a procedure whereby an instrument (an arthroscope) is inserted into the joint. This enables a veterinarian to see what is happening inside.

Before the arthroscopic procedure took place Prof Gottschalk undertook further radiographic and ultra-sound examinations of the affected joint. These confirmed his view that there was nothing seriously wrong with Shooting Party and that he would probably make a complete recovery in time. At that stage Prof Gottschalk was definitely of the view that euthanasia was not justified, and he would not have performed an arthroscopy to confirm his own diagnosis. However, he was "committed to investigate a colleague's feelings as well" and went ahead with the examination.

The arthroscopic examination took place on 18 July 1991. Shooting Party was first placed under general anaesthetic. Prof Gottschalk performed the operation. Dr Azzie was also present. The examination revealed

that Prof Gottschalk's diagnosis was correct - there was nothing seriously wrong with Shooting Party. Unfortunately, however, the horse died under anaesthetic. The medical cause of death was either heart failure or lung collapse or a combination of the two conditions precipitated by the anaesthetic.

The question now to be considered is whether Shooting Party died as a result of the accident on 27 September 1990. Purely as a matter of factual causation the answer must be yes. Had Shooting Party not suffered the accident he would not have undergone surgery, no dispute would have arisen about the seriousness of his condition after the operation, arthroscopy would not have been decided upon to resolve this dispute, and the fatal anaesthetic would not have been administered.

The question then is whether there was a sufficiently close relationship between the accident and the death to render one the legal cause of the other.

This question can best be examined, I consider, by working backwards from effect to cause. The direct physical cause of Shooting Party's death was heart failure or lung collapse or both. They were in turn caused by the administration of anaesthetic. This was necesssary for the arthroscopy, which was performed by Prof Gottschalk to show Dr Azzie that the latter's diagnosis was wrong, which in fact it was. Had there not been this incorrect diagnosis the arthroscopy would not have been performed and the horse would not have died.

The causal relationship between the accident and the death is accordingly an indirect and fortuitous one. The accident itself was not fatal. It caused an injury which was treated by surgery. Although veterinary opinion differed as to the success of the surgery, there was no suggestion that the horse's life was in danger. The only question in dispute was whether his injuries were serious enough to warrant euthanasia.

And it is this dispute that led to the death of Shooting Party.

In these circumstances, it seems to me, the effective cause of Shooting Party's death was the administration of anaesthetic which flowed from the attempts by the respondents, supported by a mistaken diagnosis, to secure the underwriters' consent to the destruction of the animal. In my view the horse did not, within the meaning of the policy, die as a result of the accident on 27 September 1990.

This conclusion disposes of the appeal and it is not necessary to consider a further submission by the appellant that in any event the death of Shooting Party fell within one of the exceptions in the policy.

The following order is made:

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

2. The order of the court **a quo** is set aside and the following substituted:

Judgment for the defendant with costs, such costs to include the costs of two counsel.

E M GROSSKOPF, JA

VIVIER, JA
EKSTEEN, JA
VAN DEN HEEVER, JA
OLIVIER, AJA
Concur