7-8-71

G.P.-S.43575—1969-70—2,000 J 219 64/71

In the Supreme Court of South Africa
In die Hooggeregshof van Suid-Afrika

(APPELLATE Provincial Division)
(Provinsiale Afdeling)

Appeal in Civil Case
Appèl in Siviele Saak

H. SOLOMON N.O. & S. SOLOMON N.O. Appellant,

versus

MARLENE de WAAL Respondent

Appellant's Attorney
Prokureur vir Appellant Israel S. & S.

Respondent's Attorney
Prokureur vir Respondent

Appellant's Advocate
Advokaat vir Appellant W. Viviers

Respondent's Advocate
Advokaat vir Respondent

Set down for hearing on
Op die rol geplaas vir verhoor op 2-11-71

2-4-72

Coram: Rumpff JA, Wessels, Potgieter, Trollip and Muller, JJ.A.

(C.P.D.)

9.45 am – 11.00 am (Mr Viviers in chief)
11.15 am – 12.45 pm
2.15 pm – 3.20 pm
3.20 pm – 5.00 pm
5.00 pm – 5.15 pm

Potgieter JA – Judgment

3/12/71

Bills Taxed—Kosterekenings Getakseer

Date Datum	Amount Bedrag	Initials Paraaf

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:

HERSCHEL SOLOMON, N.O.
AND
SYLVIA SOLOMON, N.O. .....Appellants.

AND

MARLENE DE WAAL .....Respondent.

Coram: RUMPFF, WESSELS, POTGIETER, TROLLIP ET MULLER, JJ.A.

Heard: 2nd November, 1971. Delivered: 3rd December, 1971.

J U D G M E N T.

POTGIETER, J.A.:

This is an appeal against a judgment of Beyers, J.P., in the Cape of Good Hope Provincial Division in respondent's favour in the amount of R16.936-41 as and for damages suffered by her as a result of a severe injury sustained when she was attacked and savaged by a stallion in the vicinity of Eerste Rivier, Cape, on Sunday morning 19 October 1969. I will for the sake of convenience hereinafter refer to appellants as defendants and to respondent as plaintiff. The latter instituted an action for damages against four defendants and in her

2/ particulars ....

particulars of claim she averred that on the morning in question she was attacked by a stallion in an unnamed public road leading off the main Faure/Kuils River road while she was on horseback. As a result of the attack she sustained a degloving injury of her right thigh. It was further alleged that in so attacking plaintiff the stallion acted contrary to the nature of its class and from inward excitement or vice and that at the time of the occurrence the stallion belonged to one Abraham Wolf Solomon or to either the third or the fourth defendants. At the trial the matter was not pursued against these two defendants and I will, therefore, make no further reference to them.

The aforesaid Abraham Wolf Solomon (hereinafter referred to as "Solomon") has since the occurrence died and the first and second defendants (who are the appellants in this appeal) were sued in their capacities as executors testamentary in the estate of the late Solomon. The first defendant is the latter's son and the second defendant his daughter.

Alternatively to the allegation based on the actio de pauperie as set out above, it was averred by plaintiff

3/ that .....

that her injury was caused by the negligence of the said Solomon in whose care and control the said stallion was at the time of the attack, or by the negligence of the latter's servants acting within the scope of their employment, and in whose care and control the stallion was. The allegation of negligence was that, to the knowledge of Solomon or his servants, the said stallion was of a fierce and vicious nature and had a tendency to attack other horses and their riders, but that in spite thereof Solomon or his servants permitted the stallion to run free and unattended upon a public road which they knew or ought to have known was used by horse riders.

It is finally alleged that plaintiff suffered damages in the amount of R24.770-52 made up as follows:

(a) Past medical and hospital expenses R205-52
(b) Future medical and hospital expenses R3.000-00
(c) Past loss of earnings R1.565-00
(d) Loss of future earnings R8.000-00
(e) General damages for pain, suffering, shock, loss of amenities of life and disfigurement R12.000-00
R24.770-52

In their plea defendants denied all the allegations material to liability and damages.

4/ The .....

The matter was heard by the Judge President who found that the injury sustained by plaintiff was due to the negligence of Solomon or his servants and awarded the former damages in the amount of R16.936-41 and costs.

On 19 May 1971 plaintiff's attorneys filed a notice with the registrar of the Cape Provincial Division intimating that plaintiff abandoned the judgment to the extent of R3.455-32 and stating that she accordingly sought to enforce the judgment to the extent of R13.481-09. It is not specified in this notice to what head of damages the amount abandoned relates.

Defendants are now on appeal in this Court against the whole judgment of the Court a quo.

During the course of the trial a plan of the area where the accident had occurred, prepared by a land surveyor, was handed in by the latter. I proceed immediately to deal with certain relevant aspects of this plan in the light of the land surveyor's testimony and in the light of reference made thereto in the testimony of some of the other witnesses. The

5/ legend .....

legend on the plan indicates that it is drawn to scale in the ratio of 1 : 200. On the plan an hotel, which according to the evidence is the Woodlands Hotel belonging to Solomon, is indicated. At the back of this hotel is a shop, the hotel yard and certain other outbuildings. Further back are two small buildings and between them is a small camp where it is alleged Solomon's stallion used to be fed. This is the "klein kampie" mentioned by the witness Bezuidenhout. Still further back is a bigger camp in which the defendants' witness Wessels testified that he had parked a wrecked car. Just below the hotel another big fenced-in camp is depicted. At the trial certain photographs were handed in and on two of these photographs a little shed appears which is described in the evidence as a "lean-to". In front of the hotel there is a tarred road running between the hotel and the Eerste Rivier Station. On one of the photographs a gate is indicated leading from the tarred road into the camp where the lean-to is situated. Next to the tarred road and lower down from the hotel area is a fenced-in railway site and between these two properties a road, marked "unmade road".

6/ It .....

It terminates at the tarred road described above.

More or less to the south of the hotel a narrow gravel road leading from the Faure/Kuils River main road is depicted. This road terminates at the commencement of an irregular track which leads onto the aforementioned tarred road. The point where plaintiff was alleged to have been attacked is shown on the plan as being at the commencement of the track described above. This point appeared at the trial to be common cause, and if one has regard to the scale of the plan, this point is, as the crow flies, more or less 150 ft. from the southern fence of the camp where the lean-to, referred to in the evidence, is situated. Even if a horse proceeding from any of the camps adjacent to the Woodlands Hotel to the accident locality has to go round the railway site described above, it has to traverse no more than about 200 ft.

I proceed now to describe briefly the events leading up to and culminating in the attack of the stallion on plaintiff on Sunday morning, 19 October 1969. Early that morning plaintiff, accompanied by a number of other riders, eight in all,

7/ went .....

went for a ride on horseback from a riding school owned by one Fiedler. Plaintiff was riding a gelding and she and her companions crossed the main road and proceeded along the narrow gravel road. Those who testified, said that as they rode along they saw two or three mares accompanied by a stallion near the railway property indicated on the plan. When they arrived at the track, described above, the stallion darted away from the mares with its ears back and its teeth bared and approached the riders. It attacked the front horse ridden by one Brandt, plaintiff's husband, whom she has since divorced. It managed to get hold of the saddle cloth but was warded off by him with his riding crop. Thereafter it appeared to conduct a series of lunging attacks at other riders in the group and eventually attacked the plaintiff by getting hold of her by the right thigh, lifting her completely out of the saddle, holding her for a moment in its mouth while shaking its head and then dropping her. The stallion then ran off in the direction of the railway site. Plaintiff got up, ran a few yards and then collapsed. She was eventually removed to hospital by car. Plaintiff suffered a

8/ severe .....

severe injury as a result of this attack. I will revert to this aspect later in this judgment.

Before analysing the evidence in this case and dealing with the different issues raised on the pleadings, I have to mention a matter of a general complaint raised by counsel for the defendants concerning the conduct of the Judge a quo at the trial. He submitted that the frequent interventions during the course of the trial showed that he had associated himself too closely with the conduct thereof, "thereby denying himself the full advantage usually enjoyed by the trial Judge who, as the person holding the scale between the contending parties, is able to determine objectively and dispassionately, from his position of relative detachment, the way the balance tilts" - Wessels, J.A., in Hamman vs. Moolman, 1968(4) S.A. 340 (A.D.) at p. 344 E - F. Counsel submitted that the trial Judge's impressions of the defendants' witnesses and his findings as to credibility, should therefore not be accorded the weight normally given to the findings of a trial Judge.

It is regrettable that we have to consider a

complaint of this nature, but it is necessary to do so in the interests of justice.

A perusal of the record reveals that the learned trial Judge often and unfortunately, quite unwarrantedly, intervened in the proceedings while defendants' counsel was cross-examining plaintiff's witnesses and during the hearing of defendants' case. It is unnecessary to quote the numerous passages in question. Suffice it to say that during the hearing of plaintiff's case the learned Judge asked certain questions and made certain observations which reflected favourably upon plaintiff's case and adversely upon the evidence that defendants' counsel asserted would be adduced for the defendants. Furthermore, during the hearing of defendants' case, the learned Judge examined their witnesses in such a manner and made observations in the course thereof of such a nature as to evince his ostensible disbelief, or at any rate, his doubts about their credibility. Those and other interventions by the learned Judge must have been most harassing for defendants' counsel, but fortunately he did not allow the actual presentation of defendants'

10/ case .....

case to suffer thereby. However, by descending into the arena of the conflict between the parties in that manner the learned Judge might well have disabled himself from assessing with due impartiality the credibility of the witnesses, the probabilities relating to the issues, and the amount of the general damages sustained by plaintiff. Even if that were not so, such interventions might well have created the impression, at least in the minds of defendants, that he had so disabled himself and that he was favouring or promoting the plaintiff's cause and prejudging the case against defendants. In that regard it must be borne in mind that justice should not only be done but should manifestly and undoubtedly be seen to be done.

Consequently, in my view, it is necessary that this Court should itself determine the issues between the parties on the recorded evidence, without relying on the findings made by the learned trial Judge, and so dispel any possible impression that justice has not been done. Fortunately, that can be done without much difficulty, for, as will presently appear, the assessment of the demeanour of the witnesses is not essential

for a proper determination of their credibility. Otherwise, it might have been necessary to remit the case, with appropriate directions, for a complete re-hearing.

I now proceed to deal with the most important issue in the case, namely, the determination of the ownership of the stallion which attacked the plaintiff. I will first of all refer to the evidence adduced on behalf of plaintiff regarding the description of the horse which attacked her. Four persons who accompanied plaintiff on horseback that morning described this horse. Mrs. McMaster described it as "a very dark bay ... when looking at it one would think it was a black horse ..... it was a medium sized horse ..... a Flemish type of breed ... it was a well built horse ..... it had a very heavy neck ... a long black mane ..... the conformation was very much that of a stallion in that it had an enormously heavy neck which is a very deciding factor in a stallion." Miss Clarke's description was that it was a relatively tall horse, very well built, almost black and a Flemish type of horse. She noticed that it was very well built with a particularly thick strong neck. Mrs.

Arnold simply referred to the horse as "a big black brute - it was heavy, it had a thick neck and a very nice coat." Dr. Briggs, who has considerable experience of horses, described the horse as a large stallion of the Flemish type, practically black. It was about 16 hands and had a typical stallion's neck. It was not disputed at the trial that the attacking horse had the characteristics described by these witnesses.

That brings me to the evidence adduced on behalf of plaintiff in order to establish that the horse belonged to the late Solomon. At the outset I wish to make it clear that it was not disputed that the latter owned a Flemish type stallion which was kept by him at his hotel, close to the place where the attack occurred. As I will indicate hereunder, it was disputed that the stallion had the characteristics of the one described above. Mr. Fiedler, the owner of the riding school and a man who has considerable experience of horses, testified that a stallion had followed his horses back to his stables two weeks before the attack. This witness stated that he knew this horse because he had seen it previously in a camp at the

Woodlands Hotel. That is why he returned this horse to the hotel. He endeavoured to contact the owner but, on being unsuccessful, he put the horse into a paddock with the assistance of a coloured man, apparently employed at the hotel. There was no suggestion by this man that the horse was brought to the wrong place.

On the day of the accident the aforementioned Fiedler was informed thereof, and he immediately proceeded to the accident locality. He saw the plaintiff, and realising the seriousness of her condition, he requested one Tewy, who was one of the riders that morning, to take her to hospital in his car. The witness thereupon went back to the stable and whilst he was there Miss Clarke brought back some of the horses they had been riding that morning. Miss Clarke then accompanied him to the hotel. They parked their car on the tarred road passing along the front of the hotel and went into the camp where the lean-to was and which is shown on the plan. The time then must have been shortly after 10 a.m.. They entered that camp through an open gate, and according to Fiedler's evidence, he saw the stallion, that he had two weeks previously returned from

14/ his .....

his stables to the hotel. It was standing next to the broken shed, also described in the evidence as a lean-to. Fiedler was emphatic that the stallion he saw next to the lean-to was the same one that he had returned to the hotel two weeks prior to the accident. According to Miss Clarke's evidence she had also seen a stallion at Fiedler's stables two weeks before the accident. She was equally adamant that this was the same stallion that had attacked plaintiff and the same one she had seen in Fiedler's company later on the Sunday morning next to the lean-to in the camp adjacent to Solomon's hotel. On that same occasion Fiedler made a report to Solomon about the accident.

Dr. Briggs had also previously seen Solomon's stallion either in the camp at the hotel or in the vicinity of the hotel. He had no doubt that the stallion that had attacked plaintiff was the horse that he had seen at the hotel or in its immediate neighbourhood.

Mrs. Arnold also saw the stallion that had followed them to Fiedler's stable when they came back from a ride some

15/ two .....

two weeks before the attack on plaintiff. She also stated that that was the same horse that had attacked the plaintiff.

I proceed to deal with the evidence adduced on behalf of defendants. I refer firstly to the evidence regarding the description of the stallion which belonged to Solomon as deposed to by the witnesses. One Kemp gave evidence and stated that he knew Solomon's horse very well. He said that Solomon used to keep the horse in the camp behind the hotel which was referred to in the evidence as the "klein kampie". He described the horse as of a Flemish type, dark brown in colour; it had a mare's neck and not a stallion's neck; it was "n skraal perd" and not a well built horse. If this evidence is believed, then it could not have been Solomon's stallion which attacked plaintiff. His evidence is however open to serious criticism. He was in Court while plaintiff's witnesses gave evidence, yet it was never put to any of them that Solomon's stallion had a mare's neck and that it was not a well built horse. Furthermore, Lambrechts, who testified before Kemp, and who said that he knew Solomon's horse very well, did not suggest that the description given by

plaintiff's witnesses of the attacking horse was not an accurate description of Solomon's horse. The first suggestion to this effect was made by Kemp in his evidence. It is also noteworthy that neither the witness Bezuidenhout nor the witness Wessels, who both stated that they knew the horse well, described Solomon's stallion as being one with a mare's neck and one which was not well built. If Solomon's stallion had those characteristics, which were completely different from the description given by plaintiff's witnesses, one would have expected them to have given evidence to that effect.

Kemp's description on this issue was subsequently adopted by Miss Fielding, who also testified that Solomon's stallion was a very tame horse, about 15 hands high, and that it definitely did not have a thick neck. As in the case of Kemp, it was never put to any of the witnesses that she would testify that the horse did not have a thick neck.

Moreover, her evidence as to the description of Solomon's horse, was most unsatisfactory. She stated that during October, 1970, while she was out riding, a big black stallion

17/ approached .....

approached her and started following her. She said that she immediately thought that it was Solomon's stallion. She said in her evidence that Solomon's stallion was a tame horse of about 15 hands high and that it did not have a stallion's neck. She admitted that the horse which approached and followed her was very unlike Solomon's stallion, and yet she thought it was his horse. She proffered a rather unsatisfactory explanation by saying that she thought so because Solomon's horse was the only dark stallion in the Eerste Rivier vicinity. It seems to me quite incomprehensible that this witness would have thought that the big black horse with a thick neck, which followed her, would be Solomon's stallion if the latter's stallion was so unlike the one that followed her.

Miss Fielding's evidence as to her interest in the case is also utterly unsatisfactory. I can do no better than to quote her evidence as recorded in this regard:

> " Miss Fielding, are you giving evidence in this case as a completely impartial, disinterested person? — Well, I am interested because it is dealing with horses and I am

18/ a .....

a lover of horses.

Apart from your interest in horses, are you giving evidence in this case as a disinterested person in so far as the parties in this case are concerned, yes or no? — (No reply).

What are you thinking about? — I would not say I was interested in the other side.

No, of course not. You are interested in Mr. Herschel Solomon, aren't you? — (No reply).

Yes, or no? — Yes.

Yes. Have you been sitting in Court throughout the trial making notes? — No, I have been drawing.

Do you have a note pad in front of you? — Yes.

For what purpose? To draw? — I cannot sit with my hands still, I have to ...

Oh, I see, you brought a note pad to Court to sit here and draw. Is that your evidence? — I did not particularly want to draw. In case I wanted to make a point.

Did you make any notes? — I have.

.....

Court: Counsel did not suggest that you were full time on the job. He asked you whether you were helping Mr. Herschel Solomon about this case? And your answer was: I was not doing it all the time. What does that mean? — Well, I was helping him."

This evidence indicates that Miss Fielding was at the outset reluctant to admit her interest in the case but under pressure had to concede that she did have an interest because of her association with first defendant. Her evidence in this regard shows that she was not impartial.

The unsatisfactory features in her evidence referred to above drives one to the conclusion that Miss Fielding was not a truthful witness. I come to the conclusion, therefore, that the evidence of Kemp and Miss Fielding, regarding the description of Solomon's horse, should be rejected.

Defendants called three witnesses, viz., Lambrechts, Wessels and Bezuidenhout to show that Solomon's stallion was in its camp at the time of the attack, that it did not escape therefrom, and that consequently it could not have been that horse which attacked plaintiff.

Lambrechts testified that on the Sunday morning in question he went to the hotel to look for a missing cow. When he arrived at the hotel he met Solomon who told him that his stallion had bitten someone. He then pointed out to Solomon

20/ that .....

that the stallion was in its camp. The witness said in evidence that the stallion was in fact in the small camp where he used to be fed. According to his evidence this event occurred at between nine and ten o'clock on the Sunday morning. If Lambrecht's evidence is correct, then it could not have been Solomon's stallion that attacked the plaintiff, since her witnesses testified that the attack occurred between 9.30 and 9.45 a.m. approximately. But there is cogent evidence that Lambrecht cannot be correct as to the time he saw the stallion in the camp. According to Fiedler's evidence he proceeded to the scene of the accident after he had received a report thereof. He then arranged for the removal of plaintiff to the hospital. Thereupon he went back to his stables and waited for Miss Clarke to bring back some of the horses. The two of them went to the hotel and saw the stallion next to the lean-to in the hotel camp. Thereafter they endeavoured to contact Solomon. Fiedler knocked at all the doors without success and eventually Solomon appeared in his dressing gown. Fiedler informed him of the accident. Solomon must have got dressed thereafter because,

21/ when .....

when Lambrechts met him outside the hotel, he was already dressed. The probabilities are, therefore, that Lambrechts must have met Solomon well after 10 o'clock. It is quite possible, therefore, that the stallion could have attacked plaintiff at say about 9.30 a.m. or even 9.45 a.m.; that it returned to its camp and, therefore, could have been there after 10 a.m. when Lambrechts met Solomon.

Bezuidenhout's evidence was simply that the stallion was in its camp - "die klein kampie" - on the Sunday morning in question when he left to have his hair cut. When he returned to the hotel, he met someone who told him about the attack. When he arrived at the hotel the horses were still in the camp where they had been when he left. His evidence does not take defendants' case any further because he was not at the hotel at the time of the attack; the horses could have escaped from the camp and could have returned while he was away.

His evidence that the horses could not have escaped from the camp because the gate leading to the tarred road alongside the station was closed and the fences were such that the horses could not have escaped, is utterly unsatisfactory.

22/ Counsel .....

Counsel for defendants first put to Miss Clarke that the evidence of a coloured boy (referring obviously to Bezuidenhout) would be that the particular gate was locked by means of a chain and padlock. Later during the course of his cross-examination he put it to Miss Clarke that what he had put to her earlier was wrong and that the coloured boy's evidence would be that the gate was tied with a piece of wire. It was also put to Fiedler that the evidence would be that the gate was tied with a piece of wire. In his evidence Bezuidenhout however stated that the gate was locked with a chain and padlock and his evidence then proceeded as follows:

" Het daardie hek n ketting en n slot aangehad? -- Ja.

HOF: Ek het gedink u het later verander en gesê die hek het nie n ketting en n slot aangehad nie.

Mnr. VIVIER: Heeltemal reg. Ek het verander. Het al die hekke daar n ketting en n slot aangehad? -- Daardie hek daaronder het n slot aangehad, maar die ander het nie slotte aangehad nie.

Wat het die ander dan aangehad? -- Die ander is toegedraai met draad.

Ja, maar kyk, Albertus, ek wil jou nie deurmekaar maak nie. Vertel vir sy Edelagbare

23/ baie .....

baie mooi hoeveel groot hekke was daar gewees? — Daar is drie groot hekke.

Vertel vir sy Edelagbare watter van daardie hekke was n slot en n ketting aan gewees en watter van hulle het n draad aangehad? — Daardie ene by die stasie hy het n slot en n ketting aangehad, maar agter daai, toe het ons daai afgehaal en toe het ons hom net vasgedraai met die draad.

Jy sê agter dit het julle dit afgehaal en met n draad vasgedraai? — Met n draad vasgedraai.

HOF: Agter wat? — Die ene regoor die stasie.

Nee, jy sê „agter dit". Agter wat? — Ons het toe weer daardie ketting afgehaal en die slot.

Wanneer? — Dit was al lankal gewees.

Voor die perd die meisiekind gebyt het? — Na daai.

So, die dag toe die perd die meisiekind gebyt het, toe was daar nog n ketting en n slot om die hek? — Toe was dit om die hek gewees.

Mnr. VIVIER: Was daar n ketting en n slot op daardie dag sê jy? — Toe was daar nog n slot en n ketting om.

HOF: Wie het die sleutel van die slot gehad? — Oubaas.

Jy kon dit nie oopmaak nie al wou jy? — Nee.

.....

24/ Hierdie .....

Hierdie baas wat hierso sit, ken jy vir hom? Het jy hom al voor vandag gesien? Hierdie meneer wat hier sit, was jy by sy kantoor gewees? — Ja.

Het jy vir hom die hele storie vertel? Het jy hom vertel van die ketting en die slot? — Ek het gesê, ja.

HOF: Kan jy vir my help? Die tweede dag toe kom dié meneer hierso toe sê hy dat hy het 'n fout gemaak. Hy wil die fout nou regmaak. Daar was nooit 'n slot en 'n ketting aan die hek nie. Nou hoe het dit dan nou gekom? — Daar was 'n slot en 'n ketting aan."

These passages in his evidence, to my mind, cast serious doubts on his statement that the gate was closed on that Sunday morning. In view thereof I have no hestitation in accepting Miss Clarke's and Mr. Fiedler's evidence that the gate was open when they arrived at the hotel after the attack.

In any event, it seems clear from the evidence that the fences were such that a horse could easily have escaped. According to the evidence of Miss Clarke and Mr. Fiedler the condition of the fence round the camp where the lean-to was, was such that a horse could virtually step over it. A photograph

25/ was .....

was handed in which clearly indicates that, if the fences had been in the same condition at the time of the accident as depicted thereon, the evidence of Miss Clark[e] and Mr. Fiedler is correct. This photograph was shown to Bezuidenhout who stated that the fence had always been in the condition as depicted on that photograph. Bezuidenhout said, however, that the horses were never kept in that particular camp, but in view of the unsatisfactory features in his evidence, I consider that the evidence of Miss Clarke's and Mr. Fiedler's that they saw the stallion in that particular camp on that Sunday morning, must be accepted.

Wessels stated that he knew Solomon's stallion well. He stated that on a Saturday afternoon he fetched the key from Solomon in order to unlock a gate which gave access from Van Ryneveld Street, which runs approximately on the northern side of the hotel, to the big camp at the back of the hotel. He parked the wreck of an old car in that camp and removed the engine and wheels, which must have taken some time. He did not say when he returned the key to Solomon, but that could have happened the next day, Sunday. On a later Saturday afternoon

26/ he .....

he again fetched that key, and, on the Sunday morning at between 8.30 a.m. and 8.45 a.m., he left his house to go to the camp where the wreck was parked in order to remove a gearbox which he had sold to someone. He said that he and his son left their home before his other children departed for Sunday school. He said that he had already started removing the gearbox when his children walked past the camp on their way to the Sunday school. He stated that it took him about one hour to remove the gearbox and after its removal he proceeded to his house. He testified that, while he was busy in the camp, he saw Solomon's stallion and some other horses in the camp where he was working and that they remained there until he left. Later that morning he returned to the hotel and handed back the key to Solomon. He then learnt from the latter and others that a horse had bitten a girl that morning. The above evidence of Wessels seems to contradict the evidence for the plaintiff that it was Solomon's stallion that attacked the plaintiff on that Sunday morning.

Wessels came to testify as a result of reading a report of the trial in the press. He then recalled the occasion,

27/ so .....

so he said, and contacted Mr. Herschel Solomon. That means that, on recalling the occasion he had to cast his mind back for about two years to recollect the details. Consequently, his testimony that he remembers precise details about the times and duration of his visit to the camp on that Sunday morning and what he saw there during his visit, is suspect. Possibly he heard about the occurrence involving the stallion when he returned the key to Solomon on the prior occasion (which might also have been on a Sunday) and because of the lapse of two years, he has now confused the two Sundays. Some colour is lent to that possibility by the fact that, when he heard about the occurrence from Solomon on returning the key he obviously did not then and there exculpate Solomon's stallion, which he would have done had he seen it in the camp that particular Sunday morning at those particular times. (I say "obviously" because otherwise he would have been a witness for the Solomons from the beginning). When that difficulty in his testimony was put to him directly by the learned Judge he evaded it. Moreover, a short while after 10 a.m. on the Sunday of the occurrence

28/ Fiedler .....

Fiedler and Miss Clarke saw Solomon's stallion in another camp, the one just below the hotel. According to Bezuidenhout there were no means of access between these two camps. That means that if Wessels did see the stallion in the camp he worked in, it was probably not on the Sunday of the occurrence (which supports the possibility mentioned above) or, if it was, then the stallion, after Wessels had seen it there, must have got out and then returned to the other camp. In the latter event of course, it might have attacked the plaintiff while it was out.

His evidence was therefore, in my judgment, not reliable or cogent enough to disturb the clear, satisfactory and positive evidence of plaintiff's witnesses regarding the identity of the stallion.

Apart from this direct evidence adduced on behalf of plaintiff as to the identity of the stallion, the probabilities also strongly point to the fact that the stallion which attacked plaintiff belonged to Solomon. According to the evidence Solomon kept a Flemish stallion and two mares at his hotel. The riders who gave evidence saw the Flemish

29/ type .....

type stallion in the company of two or three mares near the hotel just before the attack which occurred about 200 ft. from the hotel premises. Although there was evidence that stray horses were sometimes seen in the Eerste Rivier area, there was no evidence that any Flemish stallion other than Solomon's was ever seen in the immediate vicinity of the accident locality.

For the aforegoing reasons I come to the conclusion that the plaintiff proved by a preponderance of probabilities that the stallion which had attacked her belonged to Solomon.

The learned Judge a quo found that the accident was due solely to the negligence of Solomon in that he ought to have known that his stallion was a potentially dangerous animal and did not take proper precautions to prevent it from escaping from its camp. There is much to be said for this view but I prefer to base defendants' liability simply on the actio de pauperie. In O'Callaghan vs. Chaplin, 1927 A.D. 313, after an exhaustive review of the authorities, Innes, C.J., concluded as follows at p. 329:

" By our law, therefore, the owner of a dog that attacks a person who was lawfully at the

> place where he was injured, and who neither provoked the attack nor by his negligence contributed to his own injury, is liable, as owner, to make good the resulting damage."

In the case of South African Railways vs. Edwards, 1930 A.D. 3 it was confirmed that the actio de pauperie was still part of our law, and at p. 9 in fine De Villiers, C.J., said:

> " The action lies against the owner in respect of harm (pauperies) done by domesticated animals, such for instance as horses, mules, dogs, acting from inward excitement (sponte feritate commota). If the animal does damage from inward excitement or, as it is also called, from vice, it is said to act contra naturam sui generis; its behaviour is not considered such as is usual with a well-behaved animal of the kind."

In that case the plaintiff was walking in a street in Johannesburg and passed a wagon to which four mules were harnassed. As he passed the mules he was kicked by one of them causing him injury. It was argued inter alia that the behaviour of the mule was not due to inward vice or excitement but was caused by the traffic noise. It was held, however, that a domesticated animal which become upset by such noise and kicks someone must be held

31/ to .....

to have acted from inward excitement. The learned Judge said that the cause of the injury was not the noise but the innate wildness of the animal because it had to be assumed that a draught mule would be accustomed to traffic noises.

What is meant by an animal acting contra naturam sui generis is set out by Voet 9-1-4 as follows:

> " Animals are said to do harm contrary to their nature when, though tame, they take on wildness; as when a horse kicks or an ox gores, albeit that a horse is apt to kick and an ox wont to gore. An ox and a horse, along with other animals which come under the term 'cattle', are wont to graze in a herd under the control of a shepherd without doing harm, and to that extent they are counted among tame fourfooted creatures. Hence it is correctly said that they do damage contrary to the nature of their kind when on their wildness being roused they kick or gore." (Gane's translation)

I agree with the following remarks of P.M.A. Hunt, the author of an article entitled "Bad Dogs" (1962) 79 S.A.L.J. 326 at p. 328:

> " The contra naturam concept seems, in fact, to have come to connote ferocious conduct ~~conduct~~ contrary to the gentle behaviour normally

32/ expected .....

> expected of domestic animals. This imports an objective standard suited to humans. It is far more refined than behaviour literally natural to that species of animal. It is what Voet 9-1-4 means when he speaks of animalia mansueta feritatem assumunt."

In the instant case plaintiff proved that she was bitten by a stallion, a domesticated animal, belonging to Solomon. She also proved that she was lawfully at the place where she was attacked. It was not disputed that the gravel road and the track were frequently and legitimately used by the public.

There was evidence to the effect that a stallion, when in the company of mares, may attack a strange male horse which comes near the mares. It does so, said the witnesses, in order to protect its interests in its female company. In principle, such conduct is, in my judgment, no different from that of a mule which kicks as a result of being upset by traffic noises (cf. Edward's case (supra)), or a dog which, because of hunger, catches fowls (cf. Maree vs. Diederichs, 1962(1) S.A. 231 (T) at p. 237), or an ox or bull which gores a person who comes near it.

33/ It .....

It is expected of such animals, because they have become domesticated, to be able to control themselves, and if they do not, they are regarded to have acted *contra naturam sui generis*. *A fortiori*, in my view, if a stallion attacks a person on horseback, it acts contrary to the nature of its class, and that is so despite the fact that the attack takes place while the stallion is in the company of mares.

There was no suggestion that plaintiff provoked the stallion or that it was in any way due to her fault that it behaved in the way it did.

I come to the conclusion, therefore, that defendants are liable to plaintiff on the *actio de pauperie*.

The learned trial Judge awarded an amount of R832-52 in respect of past medical and hospital expenses, and this amount was not attacked on appeal in this Court. For past loss of earnings the learned trial Judge awarded the sum of R4.971-39 stating that the latter amount was not seriously disputed. That, however, does not appear from the record, and the learned Judge *a quo* did not state at all how the figure

34/ was .....

was arrived at. Under this head the learned Judge awarded an additional amount of R1.132-50 for loss of tips. The record of the proceedings certainly does not reveal that plaintiff came near to proving either of these amounts. That may well be the reason which prompted her to abandon the amount of R3.455-32, although unfortunately she did not specify to which claims the abandonment related.

Before dealing with these awards, it may be apposite to set out briefly plaintiff's source of income before and after she had suffered the injuries complained of. Plaintiff was employed by a firm of exclusive men's hairdressers in the city of Cape Town. Inasmuch as the plaintiff was, according to the evidence, very popular and had a big clientele, she earned, in addition to her salary, a substantial amount in the way of tips.

Plaintiff's employer, one Rothchild, testified as to her loss of earnings as a result of the accident. According to him plaintiff was employed at a basic salary plus a commission which was calculated at 50% of her takings less double her salary. Rothchild handed in schedules indicating

the wages and commission that she had earned for the year immediately preceding the accident - i.e. from October 1968 to September 1969 - and secondly a schedule indicating her salary and commission from the date of the accident till approximately the date of the institution of the proceedings. It is necessary to set out these schedules:

MISS M. DE WAAL.

WAGES AND COMMISSIONS.

Month.	Remarks.	Wages.	Commission.
Oct. 1968	One weeks' leave	136-00	45-94
Nov. 1968		170-00	102-52
Dec. 1968		136-00	113-69
Jan. 1969	Two weeks' leave	136-00	-- --
Feb. 1969		136-00	91-32
Mar. 1969		170-00	127-22
Apr. 1969		136-00	164-54
May 1969		170-00	183-77
Jun. 1969		136-00	163-54
Jul. 1969		136-00	195-09
Aug. 1969		170-00	160-32
Sep. 1969		136-00	160-22
	Total for period Oct, 1968 - Sept. 1969 = R3.276-17	R1.768-00	R1.508-17

Month.	Remarks.	Wages.	Commission.
Oct. 1969	to 25th Oct.	85-07	102-28
Nov. 1969		--- ---	--- ---
Dec. 1969	worked part-time from 15th Dec.	68-00	--- ---
Jan. 1970	worked part-time	170-00	3-05
Feb. 1970	worked part time; one weeks' leave	136-00	--- ---
Mar. 1970	worked part-time, though a bit longer	147-33	55-97
Apr. 1970	worked part-time, though a bit longer	147-33	47-84
May 1970	Three weeks off for operation; one weeks' leave	45-33	--- ---
Jun. 1970		147-33	91-45
Jul. 1970		147-33	82-20
Aug. 1970	Two weeks and three days off for operation	53-33	12-12
Sep. 1970		173-33	82-29
	Total for period Oct, 1969 - Sept, 1970 = R1.695-30	R1.320-30	R374-92

Month.	Remarks.	Wages.	Commission.
Oct. 1970		173-33	78-62
Nov. 1970	One weeks' leave	173-33	29-79

37/ ...

Month.	Remarks.	Wages.	Commission.
Dec. 1970		173-33	103-74
Jan. 1971		173-33	81-17
Feb. 1971	Three weeks' minus one day off for operation	46-66	21-94
Mar. 1971		173-33	92-64
	Total for period Oct, 1970 - March, 1971 (6 months) = R1.321-21	R913-31	R407-90

According to this witness's evidence plaintiff was off work altogether from the date of the accident - i.e. from 20 October 1969 - until 14 December 1969. Thereafter she returned to work on a part time basis until June 1970 when she resumed full time employment. The evidence was that, although she resumed full time employment as from the beginning of June 1970, she had not fully regained her strength and moreover, as a result of a recurring pain at the injury site, her takings were less than they had been the year previous to the accident. She also stated that owing to her frequent absences as a result of

38/ operations .....

operations and leave, her customers became dissatisfied and she was not as much in demand as she had been previously. Her employer also handed in a schedule of her takings for the year prior to the accident which amounted to R6.532-00. Her takings for six months during that year would have been more or less half the amount, namely R3.266-00. Yet during the six months from October 1970 to 31 March 1971 her takings amounted only to R2.642-45 according to a schedule for that period, prepared by Rothchild, which was some R600 less than her takings during six months in the year prior to the accident. I consider that the facts mentioned above fully answer the argument of counsel for defendants that since September 1970 plaintiff had not suffered any loss in respect of earnings.

Having regard to the aforegoing factual situation, I proceed to determine plaintiff's loss of earnings from the time of the accident to the time the action was instituted. I consider that the only practical way of ~~deter~~ calculating this loss is to take as a starting point the wages and commission plaintiff had earned the year prior to the accident. According

39/ to .....

to Rothchild's schedule the wages and commission she had earned from October 1968 to September 1969 was R3.276. On this basis she probably would have earned R1.638 for six months. She should, therefore, but for the accident, have earned R4.914-00 for the period of eighteen months from October 1969 to March 1971. According to the schedules plaintiff in fact only earned R3.016-00 during that period which shows a loss of R1.898-00. The trial Judge should, therefore, have allowed this amount and not R4.971-39.

In respect of the award made for the loss of tips, plaintiff testified that she received an average of between R4 to R5 per day, including Saturdays. Although she only worked half days on Saturdays, the evidence was that more customers were received on Saturdays mornings than on week-day mornings, so that a Saturday morning could for practical purposes be regarded as a full day. The learned trial Judge briefly dealt with the claim in respect of tips in the following way:

> " The plaintiff put tips at R4.50 per day and defendants suggest R1 per day. I think a fair figure is the sum of R3 per day for the period 1 October, 1968 to 30th September, 1969.

For the period 1st October, 1969 to 30th September, 1970 I think R1-50 per day is fair. I accordingly under this head award the plaintiff the sum of R1.132-50."

The learned Judge's calculation was obviously incorrect. If the sum of R1.132-50 is divided by R1-50 the number of working days for the period in respect of which the calculation was made, would be 755 which is palpably wrong.

As pointed out above, plaintiff testified that she received an average of R4 - R5 per day in tips. Considering all the circumstances, I can see no reason why an average figure of R4 per day would not be fair. If then, one awards R4 per day for the periods that she was, as a result of the accident, wholly out of work and R2 per day during the periods she was part-time out of work and allows her nothing during the periods she was in full time employment after June 1970 (except for two periods during which she was out of work owing to operations she had to undergo), and if one leaves out of account Sundays and public holidays, the amount of R598-00 should be awarded for the loss of tips during the period October 1969 to March 1971. I arrive at this amount as set out hereunder

41/ and .....

and I base my calculations on the schedule prepared by Rothchild:

From 20 October to 14 December 1969 - i.e. 48 days - plaintiff was wholly out of work. At R4 per day this amounts to R192-00. From 15 December 1969 to 30 April 1970, plaintiff was in part-time employment for 103 days. Calculated at R2 per day a figure of R206-00 is arrived at. During the whole of May 1970, except for two days when she was part-time out of work, plaintiff had to undergo an operation which kept her out of work for 17 days - calculated at R4 per day for 17 days and R2 per day for two days - her loss in tips amounts to R72-00. During August she was off duty for 15 days at R4 per day which resulted in a loss of R60-00. During February 1971 she was again out of work for 17 days owing to an operation which resulted in a loss of R68-00. During the periods not mentioned above she was in full time employment and she has not proved that she suffered any loss in tips during that period. The total of the amounts mentioned above comes to R598-00. The learned Judge should, therefore, have allowed the amount of R2.496-00 for loss of earnings during the period 20 October 1969 to

42/ 31 March .....

31 March 1971.

I now proceed to deal with the award of general damages. The learned Judge a quo awarded an amount of R10.000-00 under this head. As I will show hereunder, the learned trial Judge misdirected himself in a material respect. In his judgment he said:

> " She has spent overall nine weeks in hospital during which time she suffered intense pain, mental distress which has left her understandably depressed and generally psychologically disturbed. When this case is behind her, her psychological position will undoubtedly improve."

I have no doubt that the learned Judge meant by this statement that after the accident, and right up till the date of trial, plaintiff was depressed and psychologically disturbed. It is to be observed that the trial Judge drew a distinction between depression and psychological disturbance. There was no evidence at all that plaintiff was ever psychologically disturbed as opposed to mere depression. Furthermore, although the evidence was that she was depressed just after the accident, and for some time thereafter, which is quite understandable, the evidence of

43/ both .....

both Dr. Engelbrecht, who examined her in February, 1970, and Dr. Binnewald, who examined her in April 1971, was that on these respective occasions plaintiff had recovered from her depression and seemed to be quite relaxed. In fact during the course of the trial plaintiff's counsel expressly disavowed that plaintiff was depressed at the date of the trial. The trial Judge in this respect, therefore clearly misdirected himself. And, in any event, for reasons already given in this judgment, it is preferable not to place any reliance on the learned trial Judge's assessment of general damages. Hence, we are at large on this particular issue.

According to the evidence the plaintiff, a divorcee, aged 29 years, is an attractive woman who had a figure of which she was very proud. The nature of her injury sufficiently appears from a series of photographs handed in. These photographs certainly show that the bite left a horrible scar on the plaintiff's thigh. The evidence of Dr. Binnewald, one of the medical men who examined plaintiff after the skingraft operations had been performed, was that the skingrafted scar

44/ which .....

which is situated over the posterior-medial and lateral aspect of the thigh is five inches in width and nine inches in length. On the lateral aspect of the leg the scar extends for a further ten inches in a tapering way downwards to a point immediately below the knee. The affected area, by reason of its size, its gross depression below the normal contour of the leg, and its alteration in texture and colour is certainly a most severe and unsightly cosmetic deformity especially having regard to the age and sex of the plaintiff. According to the medical evidence there is a lack of sensation in the affected area which may cause plaintiff to traumatise it in her normal duties or in normal social events. The evidence is also clear that, apart from this absence of sensation, the skin at this area is much weaker than normal skin. The result of all this is that plaintiff has constantly to be careful in her normal movements lest she injures this area, which injury, according to the medical evidence, will take a long time to heal.

Owing to the insensitivity of the skingraft area, the potential danger of injury to it and the cosmetic deformity,

45/ which .....

which is extremely unsightly, plaintiff had to give up basket ball, net ball, horse riding and swimming. As a result of this injury, she has, therefore, suffered and will in future suffer considerably in the way of loss of amenities of life.

I also bear in mind that she has had no less than four operations and that she has suffered intense pain and inconvenience during her periods in hospital, especially the excruciating pain she suffered during and immediately after the skingraft operation caused mainly by the removal of skin from the buttocks. I also take into consideration that immediately after the accident and for some months thereafter she was "terribly depressed." I have no doubt that all the aforegoing considerations called for a substantial award in respect of general damages.

On the other hand one must not lose sight of other factors which tend to diminish the seriousness of the injury. The main disability at the date of trial was a cosmetic one and although, bearing in mind the sex and age of the plaintiff, I do not wish to minimise the seriousness of this disability, nevertheless, plaintiff did not suffer any permanent functional

disability, inasmuch as the nature of her injury was such that, although the skin and underlying fat had been removed, no damage was sustained to the muscles or deeper structures of the leg. At the date of the trial she was, therefore, in that sense, as well off as she was before the accident. Her case is, therefore, not nearly as serious as a person who has lost a limb.

Plaintiff's counsel submitted that the Judge a quo, in his award for general damages, wrongly failed to take into consideration future medical expenses and future loss of earnings and asked this Court to take these two items into account in the assessment of general damages. As indicated above, plaintiff specifically claimed amounts under these two heads. These claims were, however, dismissed by the learned trial Judge and, as there is no cross-appeal against such dismissal, this Court cannot now consider these claims. (See, Giliomee v. Cilliers, 1958(3) S.A. 97 (A.D.) at p. 100).

Taking into consideration all the circumstances, as revealed by the evidence of the medical men as well as that of plaintiff, I am of opinion that the award of R10.000-00

47/ under .....

record relates to the question of damages. If, however, defendants' appeal had been directed only against the quantum of damages awarded, they would, in my view, have been justified in filing the whole of the record in order to substantiate their criticism of the conduct of the learned trial Judge, which criticism, as pointed out above, also had a bearing on the assessment of general damages. On the other hand, however, it would, I consider, be unjust to penalise the plaintiff for the learned Judge's conduct by holding her responsible for the costs of the whole record.

In so far as the incurrence of the costs of appeal is concerned, both parties are, in my judgment, at fault: the plaintiff for not having abandoned a larger amount of the damages awarded than she did, thereby causing the quantum of damages to be determined on appeal, and defendants for appealing on the merits, which resulted in costs being incurred by the plaintiff in order to secure judgment in her favour on that issue.

In this regard I wish to point out that roughly only one-quarter of the heads of argument and the time of the

hearing of the appeal were devoted to the issue of damages. In all the circumstances I consider that it will be equitable to award the defendants one-half of their costs of appeal.

The appeal is accordingly allowed. Respondent is ordered to pay one-half of appellants' costs of appeal. Part 1 of the order of the trial Court is altered to read: "Judgment for plaintiff in the sum of R10.828-52 with costs against first and second defendants in their capacities as executors testamentary in the estate of the late Abraham Wolf Solomon." Part 2 of the order stands.

POTGIETER, J.A.

RUMPFF, J.A.)
WESSELS, J.A.) concur.
TROLLIP, J.A.)
MULLER, J.A.)