G.P.-S.59968—1970-71—2 500 J 219

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

MINISTER OF POLICE *Appellant,*

versus

MARIA NOMVULA SKOSANA *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Dep.S.A.(Bmftn.)

Respondent's Attorney / *Prokureur vir Respondent* Lovius,B.H. & S.

Appellant's Advocate / *Advokaat vir Appellant* L.F. Weyers

Respondent's Advocate / *Advokaat vir Respondent* D.A. Kuny

Set down for hearing on / *Op die rol geplaas vir verhoor op*

Coram: Wessels, Jansen, Corbett ARR Kotzé Viljoen

Weyers - 9.45 – 10.55, 12.15–12.30

Kuny – 10.55 – 11.00, 11.15 – 12.15

(T.P.D.)

The Court dismisses the said appeal with costs

(Judgment per Corbett JA)

27/9/76

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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE MINISTER OF POLICE ..... Appellant.

and

MARIA NOMVULA SKOSANA ..... Respondent.

Coram: Wessels, Jansen, Corbett, JJA., Kotzé et Viljoen AJJA.

Heard: 19 March 1976.

Delivered: 27 September 1976.

J U D G M E N T.

JANSEN JA :-

I have had the advantage of reading the judgments of my brothers CORBETT and VILJOEN. I am

in / ....

in respectful agreement with the order proposed by the latter.

On the assumption that Davel and Maila should have foreseen the risk of harm to Timothy Skosana and his dependants, particularly his death, and that they failed to act reasonably in the circumstances, the question remains whether, on a balance of probabilities, reasonable conduct on their part would have prevented Skosana's death (cf. S. v. Van As en 'n Ander, 1967 (4) SA 594 (A), 601 A, 602 D). Conversely, the question may be stated thus: would, on a balance of probabilities, Skosana have lived but for the unreasonable conduct of Davel and Maila? This appears to be the fundamental enquiry, and is, in the circumstances, tantamount to applying the sine qua non concept of causality. For the reasons stated by my brother VILJOEN it must, in my opinion,

be held / ....

be held that the respondent failed to discharge the onus in this regard. I do not find it necessary to express any opinion on the question of causality and delictual liability in general.

E. L. JANSEN,

Judge of Appeal.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF POLICE ..... Appellant

and

MARIA NOMVULA SKOSANA ..... Respondent.

Coram: Wessels, Jansen, Corbett, JJ.A., Kotzé et Viljoen, A.JJ.A.

Date of Hearing: 19 March 1976.

Date of Judgment: 27 Sept. 1976

J U D G M E N T

CORBETT, J.A.:

A full review of the facts of this matter and of the evidence placed before the Court a quo is contained in the judgment of my brother VILJOEN, which I have had the advantage of reading. For the reasons which follow I find

myself/.....

myself unable to concur in the eventual conclusion reached by him.

As I see the case, the basic issue is whether the harm suffered by the respondent and her children by reason of the death of the family breadwinner, viz. Timothy Skosana (hereafter referred to as "the deceased"), was caused by the negligence, or culpa, of constables Davel and Mahela, acting in the course of their duty and the scope of their employment as policemen. This issue gives rise to a two-pronged enquiry: (a) whether Davel and Mahela in the aforementioned capacity acted negligently towards the deceased, and (b) if so, whether their negligent conduct, or culpa, caused the death of the deceased.

As was stated by HOLMES, J.A., in Kruger v Coetzee (1966 (2) SA 428 (AD), at p 430) -

> "For the purposes of liability culpa arises if —
>
> (a) a diligens paterfamilias in the position of the defendant —
>
> (i) would foresee the reasonable possibility of his conduct injuring another in his person or property and causing him patrimonial loss; and
>
> (ii) would take reasonable steps to guard against such occurrence; and
>
> (b) the defendant failed to take such steps."

Although this formulation is directed rather to the position where the person injured suffers the patrimonial loss, it is also applicable, with slight adaptation, to the situation where, as in the present case, the loss is suffered by a dependant of the person injured.

Substantially for the reasons elaborated by VILJOEN, A.J.A., in his judgment I am of the opinion:

(1) That at (or shortly after) 7.45 a.m. on the morning of Sunday, 24 September 1972, a reasonable police officer in the position of Davel and Mahela would have realised that the deceased was in urgent need of medical attention and should immediately be examined by the district surgeon or, if he was not available, by some other medical practitioner.

(2) That had the deceased been brought before the district surgeon, Dr du Plooy, as soon as was reasonably possible in the circumstances, the latter would then have made substantially the same diagnosis as he in fact made later that morning and would have given the same

instructions for the deceased's immediate removal to hospital.

(3) That the same reasonable police officer would have foreseen, as a reasonable possibility, that undue delay in furnishing medical attention, i.e., firstly, in bringing the deceased before the district surgeon and/or, secondly, in taking him to hospital as instructed, might result in the death of the deceased.

(4) That in the circumstances and bearing in mind the fact that the deceased was a detainee in the custody of Davel and Mahela, a reasonable police officer in their position would have seen to it that such medical attention was furnished without delay.

(5) That in fact Davel and Mahela failed to furnish medical attention without delay: owing to dilatoriness on their part there was a substantial and avoidable delay. (I shall later enlarge upon the extent of this delay.)

It/.....

It follows from the aforegoing, in my opinion, that the failure of Davel and Mahela to act with reasonable expedition in having the deceased examined by the district surgeon and in arranging for his removal to hospital constituted negligence on their part. In this Court it was not disputed that such negligence, if established, occurred while Davel and Mahela were acting in the course of their duty and the scope of their employment as policemen; and that, consequently, if such negligence gives rise to legal liability, the appellant, in his capacity as Minister of Police, is obliged to compensate the respondent. The next prong of the enquiry is, however, whether this negligence caused the death of the deceased, for it is only causal negligence that can give rise to legal responsibility.

Causation in the law of delict gives rise to two rather distinct problems. The first is a factual one and relates to the question as to whether the negligent act or omission in question caused or materially contributed to (see Silva's Fishing Corporation (Pty.) Ltd. v Maweza,

1957 (2) SA 256 (AD), at p 264; Kakamas Bestuursraad v Louw, 1960 (2) SA 202 (AD), at p 222) the harm giving rise to the claim. If it did not, then no legal liability can arise and cadit quaestio. If it did, then the second problem becomes relevant, viz. whether the negligent act or omission is linked to the harm sufficiently closely or directly for legal liability to ensue or whether, as it is said, the harm is too remote. This is basically a juridical problem in which considerations of legal policy may play a part. The distinction between these two enquiries is well explained by Prof. Fleming (The Law of Torts, 4th ed., p. 169) as follows:

> "The first involves what may broadly be called the 'factual' question whether the relation between the defendant's breach of duty and the plaintiff's injury is one of cause and effect in accordance with 'scientific' or 'objective' notions of physical sequence. If such a causal relation does not exist, that puts an end to the plaintiff's case, because no policy can be strong enough to warrant the imposition of liability for loss to which the defendant's conduct has not in fact contributed.
>
> The second problem involves the question whether, or to what extent, the defendant should have to answer for the consequences which his conduct has actually helped to produce. There must be a reasonable con-

nection/.....

> nection between the harm threatened and the harm done. As a matter of practical politics, some limitation must be placed upon legal responsibility, because the consequences of an act theoretically stretch into infinity. The task is to select those factors which are of sufficient significance to justify the imposition of liability and to draw a boundary along the line of consequences beyond which the injured party must either shoulder the loss himself or seek reparation from another source."

(See also Hart and Honoré, Causation in the Law, p 104; American Restatement (Torts) 2nd ed., secs. 430-3).

The present case turns on the first of these problems, viz. causation in fact, for it could hardly be contended that, if the negligence of Davel and Mahela in fact caused or contributed to the death of the deceased, this was too remote a consequence to give rise to legal liability. Of a "cause" in this sense Prosser (Law of Torts, 4th ed., at p 237) states:

> "A cause is a necessary antecedent: in a very real and practical sense, the term embraces all things which have so far contributed to the result that without them it would not have occurred. It covers not only positive acts and active physical

forces/....

> forces, but also pre-existing passive conditions which have played a material part in bringing about the event. In particular it covers the defendant's omissions as well as his acts."

The test is thus whether but for the negligent act or omission of the defendant the event giving rise to the harm in question would have occurred. This test is otherwise known as that of the causa (conditio) sine qua non and I agree with my brother VILJOEN that generally speaking (there may be exceptions - see Portwood v Svamvur, 1970 (4) SA 8 (R,AD), at p 14) no act, condition or omission can be regarded as a cause in fact unless it passes this test (see Da Silva and Another v Coutinho, 1971 (3) SA 123 (AD), at p 147).

Now, the prime cause of the death of the deceased was the occurrence (whatever it may have been) in which he sustained the injury to his bowel which in turn resulted in peritonitis. The negligent delay in furnishing the deceased with medical aid and treatment, for which Davel and Mahela were responsible, can only be regarded as

having/.....

having caused or materially contributed to his death if the deceased would have survived but for the delay. This is the crucial question and it necessarily involves a hypothetical inquiry into what would have happened had the delay not occurred. Generally, the onus is on the respondent to establish this proposition on a balance of probabilities (cf. Bonnington Castings Ltd. v Wardlaw, 1956 A.C. 613; and see Barnett v Chelsea and Kensington Hospital Management Committee, 1969 (1) QB 428, the facts of which show a distinct similarity to the present case, save that there a doctor was negligent).

This hypothetical inquiry as to what probably would have occurred had Davel and Mahela reacted to the situation with reasonable promptitude and efficiency has been fully conducted by my brother VILJOEN. I agree, with respect, with his analysis of the evidence showing the actual sequence of events. In brief, this was probably as follows:

23 September/.....

23 September 1972

10.00 - 10.45 p.m.	- first examination by Dr du Plooy
11.15 p.m.	- deceased placed in cell at police station.

24 September 1972

7.45 a.m.	- cell opened by Mahela
9.30 a.m.	- second examination by Dr du Plooy
11.30 a.m.	- deceased released on bail and sent to hospital
12.30 p.m.	- deceased arrived at hospital
1.50 p.m.	- deceased admitted to ward
2.00 p.m.	- deceased examined by anaesthetist
2.00 - 4.25 p.m.	- period of resuscitation
4.25 p.m.	- operation commenced
5.45 p.m.	- deceased died.

As to the hypothetical sequence of events I am of the opinion that but for the negligence of Davel and Mahela the deceased would probably have arrived at the hospital at about 9.30 a.m., or very shortly thereafter. This conclusion is based upon the view that had the policemen acted promptly the deceased would have been examined by Dr. du Plooy at about 8 a.m. Dr du Plooy's residence was

situated/....

situated about 150 metres from the police station and his consulting rooms about 50 metres from the police station. On the morning in question the doctor commenced seeing patients in his consulting rooms at about 8.30 a.m. Prior to that he was at home, where he has a telephone. He stated in evidence that had he been telephoned on Sunday morning about the deceased he would have gone to see him; and that had he seen him at 8 a.m. he would have sent him to hospital. Although he preferred examining patients at his consulting rooms, there were occasions when he had been to the police cells for this purpose. Had he inquired, and had been told, over the telephone about the deceased's symptoms I have no doubt that he would immediately have come to the police station to see him. In the circumstances I consider that it could reasonably be expected that Dr du Plooy would have been telephoned a few minutes after 7.45 a.m. and that he would have been there to examine the deceased at about 8 a.m. The examination and diagnosis would have lasted a matter of a few minutes (as did the actual examination at 9.30 a.m.).

Allowing between 15 and 30 minutes for the summoning and arrival of the ambulance and the release of the deceased on bail (these operations could have taken place simultaneously), it seems probable that, with reasonable efficiency, the deceased could have commenced the journey to hospital at about 8.30 a.m. The evidence shows that the journey would have taken approximately an hour. This would have brought him to hospital at 9.30 a.m.

The probable sequence of events at the hospital is, perhaps, less easy to determine. It is, nevertheless, reasonable to infer that there would probably have been the same lapse of time between arrival at the hospital and examination by the anaesthetist in the ward as in fact occurred. This examination would then have taken place at about 11 a.m. Although there is no direct evidence on this point, the probabilities, in my view, point to the conclusion that at that time there would not have been a need for a protracted period

of/.....

of resuscitation, as was in fact the case; or that, at any rate, what resuscitation was required could have been performed during the period of about half an hour while preparations were being made for the operation. On this basis the operation would have commenced at approximately 11.30 a.m. This is nearly 5 hours earlier than the actual time of commencement.

The vital question, thus, is whether, as a matter of probability, the deceased would have survived if the operation had been performed at approximately 11.30 a.m. The medical evidence was unfortunately not directed to this specific question but I am satisfied that there is sufficient expert evidence on record for a positive answer to be given to it. Of the three medical witnesses called, Dr du Plooy was best placed to express an opinion as to the deceased's chances of survival. He examined the deceased twice and actually saw him at 9.30 a.m., which is the time when on this hypothetical reconstruction the deceased would have arrived at the hospital.

Dr Lotzof, a specialist general surgeon, never saw or examined the deceased. He gave expert evidence about peritonitis - how it occurs and how it should be treated. He did not give very pertinent evidence as to the chances of survival in the deceased's specific case and some of the opinions expressed by him appear to be founded upon unproven hypotheses. For example at one stage of his evidence he stated:

> "In this particular patient, if I have the story correct, you have a history here of an accident, progressing to death with a period of 22 hours, so it shows that from the maximal period of the accident, with a complete rupture at the time of accident, to the time that he died after the operation, was approximately 22 hours. Now it just shows the virulence of the progression, the first few hours the patient has pain, and now the chemical process is changed over into a true effective peritonitis, with the absorption of the toxin."

Assuming that the record is correct, it would seem to show that the witness assumed a complete rupture at the time of the accident. This is contrary to point 4 of the list of points of agreement between the doctors and does not appear to be in accordance with the evidence. It is true that at

a later stage in his evidence Dr Lotzof said that the deceased's -

> "... pathogenises at the maximum could have been 22 hours, if anything, less, because the actual time of rupture is after 11 o'clock that night. So in actual fact we are talking in terms of from 11 o'clock that night until .... 5 o'clock that afternoon, so it is approximately 18 hours, so we can reduce the period to 18 hours or less."

But even these hypotheses as to the actual time of rupture are not supported by the evidence. All that the doctors could agree upon (in point 4) was that complete rupture occurred between Dr du Plooy's first and second examinations. I think that the time can be fixed more closely than that. The evidence of Simon Ndaba, a cell mate of the deceased, that when he saw the deceased for the first time early on Sunday morning the latter was groaning and in pain, shows that by then complete rupture must have occurred and peritonitis set in. Unfortunately the time was not fixed apart from being described as "before sunrise". I might just add that upon the hypotheses contained in the second of the two

quoted/.....

quoted passages from Dr Lotzof's evidence the witness expressed the view that a delay of an hour and a half in treating the deceased's condition was "very very serious". He added -

> "If this man would have died in four days, then an hour and a half would not really have been a significant proportion of the time that it took from pop, from the time of rupturing to the point of death, the percentage would not have been as significant as it is here, one and a half in eighteen as opposed to one and a half in 96. So time is of the essence here, and proven in this case in particular, in general it is a factor."

The remaining medical witness, Dr Mellet, performed the operation on the deceased. It is not clear when he first saw the deceased but it seems probable that this occurred just before the operation. Although Dr Mellet was able to depose to the deceased's condition at that stage and as to what he found when the operation was performed, most of his evidence was of a theoretical nature. This included the general prognosis based upon six-hourly periods commencing from the perforation. In regard to delay in treating such a condition he said —

> "Well I think from what I have just said, it is quite clear that the longer you wait, and it is a question of hours which decides of your patient surviving such an operation. The earlier you can get that patient to hospital , to theatre, after he has been resuscitated, treated for shock, the better are your chances of that patient recovering from the operation. It is a question here of hours being of vital importance, every hour that is lost in dealing with a case of a perforated bowel, is very very serious."

Generally, as I read Dr Mellet's evidence, the six-hourly time-table in the progression of the condition is not a hard-and-fast rule but merely a rough guide.

In the Court a quo the learned trial Judge found that had the police reacted timeously to the deceased's request for medical attention the deceased would probably have arrived at the hospital some three hours earlier than he in fact did arrive. This finding accords with my own reconstruction and is, I think, unassailable. Relying chiefly on the evidence of Dr du Plooy - who it is important to note was called on behalf of the appellant - the trial Judge held:

> "In my view Dr du Plooy's evidence supports the probability that the deceased would have lived had he reached the hospital at some time between 9.30 and 10 o'clock.

> I am also satisfied on the probabilities that the police's failure to ensure that the deceased reached the hospital at that hour caused his death."

I do not propose to examine Dr du Plooy's evidence in great detail. It is fully discussed in the judgment a quo and in the judgment of my brother VILJOEN. In essence he expressed the view that had the deceased arrived at the hospital one and a half hours earlier than he did, he would have had more than a 50% chance of survival. Admittedly, it is not clear whether Dr du Plooy had in mind the period of delay (amounting to 1½ hours) before he was seen by an anaesthetist or the further period of resuscitation. I incline to the view that he probably visualized reasonably prompt operative treatment. An hour and a half before the time of the deceased's actual arrival takes one back to 11 a.m. On the hypothetical reconstruction the operation would have commenced at 11.30 a.m. This conforms to Dr du Plooy's postulate for survival.

Apart from the heavy emphasis upon time being of the essence, I do not think that very much assistance can be derived from the evidence of Drs Lotzof and Mellet. In each case it is virtually impossible to apply the witness's

general observations to the facts of this case without knowing more or less exactly when the complete rupture occurred. To my mind, this cannot be established with any greater certainty than to say that it occurred some time between 11 p.m. on the 23rd and the early hours of the 24th. There could thus be a possible variation of up to 6 or 7 hours in this regard. In the circumstances the six-hourly time-table can hardly be utilised. Dr Mellet seemed to think that because of the deceased's condition when he operated, he could "surmise" that his bowel was perforated 18 to 24 hours previously. This statement was made merely as a basis for expressing an opinion as to what his condition would have been at 9 a.m. I do not think it can be taken as a positive view as to when perforation took place. Indeed, I do not understand this witness to be prepared to say when the perforation occurred. Moreover, even if one were to attempt to apply the six-hourly time-table it seems likely that an operation commenced at 11.30 a.m. would have been within 12 hours of complete rupture, and would, therefore, have held

out/.....

out the likelihood of survival.

I have already referred to the emphasis placed by all three medical witnesses on the time factor. Viewing all the evidence and adopting a common sense approach, it seems to me that if the operation had been performed 5 hours earlier than it was, the probabilities are that the result would have been different and that the deceased would have survived. At all events, I am not prepared to say that in concluding that without the delay caused by Davel and Mahela the deceased's life would have been saved the Court a quo came to an incorrect conclusion.

The appeal is dismissed with costs.

WESSELS, J.A.)
KOTZÉ, J.A.) Concur.

M.M. CORBETT.

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

THE MINISTER OF POLICE — APPELLANT

and

MARIA NOMVULA SKOSANA — RESPONDENT

Coram: Wessels, Jansen, Corbett, JJ.A., Kotzé et Viljoen, A.JJ.A.

Heard: 19 March 1976

Delivered: 27 September 1976

J U D G M E N T

VILJOEN, A.J.A.:

On Saturday night 23 September 1972 Timothy Skosana, with three passengers, namely his wife Maria Nomvula Skosana, his sister Elizabeth Skosana and one Lettie Myesa, drove his motor vehicle from Daveyton to

Leslie. On the Kamferspruit road near Leslie the car left the road and landed in a ditch, as a result of which Timothy and his passengers sustained certain injuries. Timothy's uncle, Seeland Skosana, arrived on the scene in his own vehicle, assisted Timothy to get out of the car and left in his vehicle to summon the police and the ambulance at Leslie. Seeland returned to the scene in a vehicle driven by Sergeant Leonard Dubekwane. A police van driven by constable Davel and an ambulance also arrived on the scene. Timothy's three passengers were removed from the scene in the ambulance but Timothy himself, who was suspected of being under the influence of liquor, was removed in the police van to the charge office at Leslie and from there to the consulting rooms of Dr. du Plooy, who examined him. The clinical examination lasted from 22h0 to 22h45. A blood sample which was taken by the doctor showed, upon analysis, a percentage of ,24 of alcohol (grams per millilitre) to have been in his blood

stream ...../3

stream. This result, which was consistent with the doctor's findings during the clinical examination, proved that Timothy was heavily under the influence of liquor. According to the evidence of Dr. du Plooy, Timothy, upon being questioned as to what injuries he had sustained, complained of a pain in his chest. The doctor examined him thoroughly but could not detect any sign of an internal injury. From the doctor Timothy was taken to the police station and at 23h15 he was placed in a cell with nine others, two of whom were convicted prisoners. The others were awaiting trial prisoners.

During the night Timothy must have sobered up. In the morning he had quite a severe pain over the region of his abdomen, the evidence being that he groaned and sat hunched upon his blanket pile with his arms crossed over his stomach area. This position was obviously adopted in an endeavour to ease the pain. When the cells were opened at 7h45 by constable Davel and constable Maila he complained of severe pains over his

abdomen ..../4

abdomen and his ribs and requested to be taken to a doctor. For various reasons which will be analysed at a later stage he was not taken immediately to the district surgeon, Dr. du Plooy, who had examined him the previous night. At about 9h30 he and constable Maila walked to the doctor's consulting rooms which were approximately 50 paces from the police station. When he entered the consulting rooms Dr. du Plooy noticed that he was in pain and examined him immediately. He found that he was suffering from "an acute abdomen". Dr. du Plooy there and then wrote a note to the doctor in charge at the Far East Rand Hospital, Springs:-

> „Beste dokter, die Bantoe was gisteraand in 'n motorongeluk betrokke. Hy het vanoggend 'n akute buik. Kan u hom asseblief opneem en behandel".

Dr. du Plooy handed this letter to Maila and according to Dr. du Plooy he instructed Maila as follows:-

> „Ja, ek het hom meegedeel dat hulle die pasiënt dadelik na die hospitaal moet neem, ek kan niks vir hom hier doen nie".

Maila's ...../5

Maila's evidence was that he could not remember whether Dr. du Plooy told him Timothy had to be taken to the hospital immediately. He told Davel that the doctor had said Timothy should go to hospital. He did not add that he had to be taken immediately. Under cross-examination he testified that if the doctor did tell him that Timothy had to be removed to hospital immediately, he would have told Davel that.

There was a further delay summoning the ambulance. In the meantime Timothy was waiting either in the cells or in the charge office. At 11h30 Timothy was released on bail of R10 which either he or one of his relatives paid. He was released on bail because otherwise a guard to accompany him to the hospital had to be found and there was no guard available. Soon after his having been released on bail the ambulance arrived at the police station and he was transported to the Far East Rand Hospital, Springs, where he arrived at approximately 12h30. He was

admitted ..../6

admitted to the ward at 13h50. After admission, at approximately 14h00, he was examined by an anaesthetist and presumably by one or more interns and found to be in a very serious condition. After consultation with the surgeon, Dr. Mellet, it was decided to try and resuscitate him for purposes of surgery. At 16h25 Dr. Mellet started operating on him. Although at that stage Timothy's condition was still poor Dr. Mellet considered that it was useless trying to delay the operation further as it was impossible to improve his condition for surgery. Dr. Mellet performed a laparotomy on him. A ruptured viscus was found to be present. The whole stomach was filled with stomach and bowel contents which had set up a severe generalised peritonitis. The ruptured small bowel was sutured and a drain inserted into the peritoneal cavity. For purposes of the operation a very light anaesthetic had been administered but after the operation, alarmingly, Timothy did

not ...../7

not "wake up". Considering the very light nature of the anaesthetic and the fact that it was terminated a considerable time before the operation was concluded this was surprising. Because Timothy was not fully awake after the operation the endotracheal tube which had been inserted for purposes of the operation was left in place with the instruction that it should only be removed when Timothy was fully awake. He was removed from the theatre but before the anaesthetist had left the theatre premises, Timothy was rushed back dead.

Timothy's wife, the present respondent, claiming damages on her own behalf and that of her minor children, was the successful plaintiff in the court a quo, the learned Judge who heard the matter holding that Maila and Davel, acting within the course of their duty and the scope of their employment as policemen, were negligently dilatory in two respects, viz. in not immediately summoning Dr. du Plooy to examine Timothy when he complained about the pain he suffered and requested to be taken to a doctor and in not causing Timothy to be transported to

hospital ..../8

hospital "immediately" as Dr. du Plooy advised after having made his diagnosis, as a result of which negligence Timothy died. The amount of R11 455 had been agreed upon as damages and the only issue the court a quo had to decide, and in fact decided, was the question of liability. The appellant having appealed, this is likewise the only issue to be determined by this Court.

It is clear from the evidence, to which I shall revert and which I propose to examine in some detail in due course when I come to deal with the aspect of causation, that Timothy's death was due to a series of delays which caused him to be operated on at a stage when his chances of survival were almost nil. The issues which call for decision in the present case are:-

(1) whether the two police officials, Maila and Davel, were jointly and severally negligent in respect of all or any of the delays which occurred;

(2) whether they ought reasonably to have foreseen that as a result of their negligent acts or omissions Timothy might die; and

(3) ...../9

(3) whether such negligent acts or omissions constituted a cause of Timothy's death and, if so, whether it is a cause to such extent or bearing such attributes as to render the appellant liable in law.

The period which elapsed between the termination of the examination by Dr. du Plooy on the night of 23 September 1972 and the commencement of the operation on Timothy may be broken up into the following periods:-

(a) 22h45 on 23.9.72 (termination of the examination for drunken driving) to 7h45 on 24.9.72 (when the cells were opened);

(b) 7h45 to 9h30 (when Timothy was taken to Dr. du Plooy);

(c) 9h30 to 11h30 (when Timothy was released on bail and the ambulance arrived);

(d) 11h30 to 12h30 (the time consumed by the drive to the Far East Rand Hospital);

(e) 12h30 to 13h50 (when Timothy was admitted to a ward);

(f) 13h50 to 14h00 (when Timothy was examined by the

anaesthetist ..../10

anaesthetist and found to be so weak and so poor a surgical risk as to require resuscitation);

(g) 14h00 to 16h25 (when the operation commenced).

As far as Timothy's sojourn in the cell during the night is concerned Maila and Davel cannot, in my view, be held to have been negligent. The examination by Dr. du Plooy concluded at 22h45 on the night before and there is no evidence that Timothy was complaining of anything when he was placed in the cell with others at 23h15 that night. In view of the evidence of the point of time at which the complete rupture must have occurred (to which I shall revert presently) Timothy's ordeal must have started during the night as he sobered up.

There was evidence that the Leslie police station was not a twenty four hour per day charge office which means, presumably, that complaints were only received during normal office hours, and that prisoners in the cells need not be visited every hour. It appears from the record that there were police officials on duty during the night but no evidence was led as to whether,

if ...../11

if something were to happen in the cell during the night which necessitated the urgent attention of the police staff, there was some device which could be used to raise an alarm or summon the members of the staff who were on duty. Nor was evidence led that Timothy, or one of the other cell inmates on his behalf, would have summoned aid even if such device did exist. Nothing has been advanced to suggest that any of the members of the police staff should or could have known of Timothy's serious condition before the cells were unlocked on the morning of 24 September.

A cell inmate, one Simon Ndaba, testified that early the next morning he heard Timothy groaning and saw him huddled up, squatting on his pile of blankets and holding his stomach. When he did lie down, he moved his body from side to side. He also vomited. This witness was held to be an unsatisfactory witness in a number of respects and the learned Judge a quo did not attach much

importance ...../12

importance to his evidence. His evidence of the groaning and of Timothy sitting huddled up accords, however, with the evidence of Mr. Lotzof, Dr. Mellet and Dr. du Plooy as to the conduct usually manifested by a person who has sustained an injury of the type Timothy sustained.

Maila and Davel could not have failed to notice Timothy's agony and to realize his grave condition when they unlocked the cells the next morning at 7h45. It is common cause that Timothy almost immediately told Maila, who interpreted to Davel, that he was ill and requested to be taken to a doctor. There is some dispute between Davel and Maila as to the extent of the complaint. Maila testified that he interpreted to Davel that Timothy complained of a very serious pain in his abdomen and his ribs. Davel's evidence was that Maila told him that Timothy complained of a pain in his chest only. The learned Judge a quo rejected Davel's evidence, however, and in my view correctly so.

The ...../13

The medical witnesses were generally cautious in voicing an opinion as to what impression laymen like Maila and Davel would form of Timothy's condition under the circumstances, but there is sufficient evidence by Maila himself that the impression he gained was that Timothy was seriously ill. Maila admitted under cross-examination that he was told that Timothy had been involved in a very serious accident and he proceeded to testify as follows:-

> "Now he obviously had to be attended by a doctor, because that is what he asked in fact, and it must have been apparent that he needed attention? - Yes.
> You could see that he was in pain? - At the time the deceased lodged the complaint he was holding his stomach and I could see that he was in pain".

In response to Timothy's request to be taken to a doctor Davel's instructions to Maila, according to Maila's evidence, were to serve breakfast to the prisoners first, to accomplish the chores which had, as a matter of routine, to

be ...../14

be attended to at that time of the morning and thereafter to take him to the doctor. Breakfast was served to the prisoners at approximately 8h30 that morning. Timothy also tried to eat something. There was evidence to the effect that his relatives brought him food. He partook of some sour porridge but Maila saw him vomiting after that. Davel's evidence was that he instructed Maila to take Timothy to the doctor's consulting rooms at 8h30, the time when the doctor's consulting hours commenced on a Sunday morning. Under cross-examination he added that he instructed Maila to take Timothy to the doctor if it appeared to Maila that Timothy's condition deteriorated.

Whatever the instruction was, the evidence was that when Maila was ready to take Timothy to the doctor, Davel, having been called out to investigate a complaint of stock theft, was not there and Maila, who was then alone at the police station, had to wait until Davel returned. Whether he did wait until Davel was back is not clear from Maila's evidence. According to Davel's own evidence he returned approximately fifteen minutes before the ambulance arrived. If he is to be believed Maila must have been to the doctor with Timothy while Davel was absent

and ..../15

and must have returned before Davel's return to the police station. On the other hand, Maila's evidence that on his return from the doctor he reported to Davel that the doctor advised that Timothy should be taken to hospital is consistent only with Davel's presence at the police station when Maila and Timothy returned from the doctor.

This apparent discrepancy is of little moment, however. What is material is that Timothy was only taken to Dr. du Plooy at approximately 9h30. In this respect either Davel or Maila was, or both jointly were, gravely remiss. In terms of the Police Standing Orders, an Afrikaans copy of which was handed in at the trial, the following orders had to be observed by the two police officials:-

> "18. Waar 'n gevangene ernstig beseer is, of ernstig siek voorkom, moet die distriksgeneesheer so spoedig moontlik ontbied en eerstehulp intussen toegepas word.
>
> 19. .... Indien hy per telefoon ontbied is, moet ook die naam van die persoon wat die boodskap ontvang vermeld word .....

20. ...../16

> 20. Indien die distriksgeneesheer nie beskikbaar is nie, kan, in ernstige en dringende gevalle, enige ander mediese praktisyn ontbied word om die gevangene, in afwagting van die distriksgeneesheer se aankoms, te behandel .....
>
> 21. Enige opdrag deur die distriksgeneesheer of mediese praktisyn wat namens hom optree, moet sonder enige versuim nagekom word. ....."

By not communicating with Dr. du Plooy immediately after receipt of Timothy's complaint and his request to see a doctor, the police officials not only acted in breach of their own standing orders but were, in my view, negligent to a high degree. It was argued on the appellant's behalf that the two police officials could not be held to have been negligent because if they were to heed and immediately attend to every little trifling complaint from a prisoner, the majority of which complaints are usually either spurious or exaggerated, it would create an impossible situation and greatly interfere with their other and sometimes more pressing duties. It may be true that policemen in charge of prisoners in cells and prison warders receive

many ...../17

many complaints which are not genuine, that it is only natural that their sense of duty in this regard becomes blunted and that they may be pardoned for not getting alarmed in the odd genuine case. On the other hand, where detainees are concerned no policeman should allow his diligence to lag for a moment. He is the custodian of the detainees under his charge who have been deprived of their freedom of movement and whose capacity to make their own decisions and carry them out, has not only been restricted but completely neutralised. A comparable case is that of a prison warder in charge of prisoners. The emphasis SCHREINER, J.A., placed upon the duty of a prison warder to protect prisoners in his charge, in Mtati v. Minister of Justice, 1958(1) S.A. 221 (A.D.) at p. 224 appears to me to be, mutatis mutandis, a weighty consideration in the present case, and generally in all cases in which the freedom of movement of the person concerned has been restricted by official interference.

What ...../18

What is more, it must have been palpably clear to Davel and Maila that Timothy was seriously ill and not malingering. Maila, at least, who was the more reliable witness of the two, gained the impression, according to his evidence, that Timothy was in agony. Although the vomiting might to a layman have appeared consistent with the after-effects suffered by a person who had been heavily inebriated the night before and was sobering up, the excruciating pain suffered by Timothy could not, even to a layman, have been so regarded. With reference to the second period referred to above (7h45 to 9h30) they were, therefore, clearly negligent in not communicating with the doctor immediately upon receiving the complaint.

It was accepted by the learned trial Judge that Dr. du Plooy, after having examined Timothy, told Maila that Timothy had to be removed to the Far East Rand Hospital immediately, and he also accepted that it was probable that Maila told Davel what the doctor said. These findings

appear ...../19

appear to me, on the evidence, to be justified. On the other hand it cannot be held, in my view, that Maila should have realised that the doctor required Timothy to be transported to hospital by any means other than by ambulance. If Dr. du Plooy had found it necessary to have Timothy removed to hospital by a speedier mode of transport, he should and would have instructed Maila to that effect. Maila was, as a layman, in the circumstances entitled to assume that Dr. du Plooy had in mind (as in fact he did have) the usual mode of transport, viz. by ambulance.

Neither Maila nor Davel can, therefore, be held to have been

negligent ..../20

negligent in deciding upon the ambulance as the mode of transport to be used.

There appears, however, to have been a delay in summoning the ambulance. There is no evidence who summoned the ambulance. Maila could not tell who did. It was put to him under cross-examination that one of Timothy's relatives went for the ambulance driver in the location. Maila could not recollect whether that was so, or not. The evidence indicates that on that Sunday morning, if no time had been wasted, the ambulance could have been at the police station within half an hour after Maila had been instructed to take Timothy to hospital. The journey to the Far East Rand Hospital usually, and on that Sunday actually, took an hour which means that the ambulance could have arrived an hour and a half after the doctor had advised that he should be taken to hospital. It was clearly the duty of Davel and Maila, as appears from Standing Order No. 21, portion of which is quoted above, to execute the instruction

given ..../21

given them by the district surgeon without delay. It is also provided that if an instruction is received to remove a prisoner to any hospital other than a prison hospital, a person to guard him on the journey and during his sojourn in hospital must be provided. As stated above, no guard was available and it was accordingly decided to release Timothy on bail. Although Timothy could have been released on bail at an earlier stage than at 11h30, this delay becomes irrelevant because he was thus released before, albeit shortly before, the arrival of the ambulance.

As stated, Timothy arrived at the hospital at 12h30. There he waited until 13h50 before he was admitted to a ward. Why he had to wait for that period before admission, is not clear. The only evidence led on this aspect was that of Dr. du Plooy who suggested that it is possible that he had to wait before being admitted to the ward because there were other patients before him. This might have been the normal period which ordinarily elapsed between

arrival ...../22

arrival and reception but this was a particularly serious case and an exception could and should have been made by admitting Timothy immediately on arrival, but since there has not been any suggestion that Davel or Maila was at fault in this regard, I do not deem it necessary to pursue this aspect. I need only add that there is no evidence that the time Timothy had to wait was unusual and unlike other Sundays.

Very soon after Timothy's admission to the ward he was seen by the anaesthetist who, it may safely be inferred, realised that Timothy was, as Dr. Mellet put it, in a moribund condition. There is an absolute dearth of evidence as to what actually happened upon his admission. It is probable that members of the nursing staff who attended upon Timothy when he was admitted, rea-

lised ...../23

lised that Timothy was in a very poor condition and alerted the medical staff.

Whatever the true position was, there was no further culpable delay. The delay from 14h00 to 16h15 was not culpable in itself. This delay was occasioned by the other delays in getting Timothy to hospital and admitted in time so as to be operated on when he was still a reasonable surgical risk.

I have endeavoured to deal above with the negligence issue purely and simply from a point of view of a failure to exercise the necessary care which Maila and Davel owed and should have displayed under the circumstances. I have tried to avoid complicating the issue by introducing considerations of foreseeability. Cf. S. v. Van As, 1976 (2) S.A. 921 (A.D.) at p. 929 B-C. I now proceed to deal with this other element of culpa, viz. the foreseeability.

On the foreseeability issue the learned Judge a quo found that a reasonable man who at 7h45 was aware of

all ...../24

all the circumstances would have foreseen that, unless medical aid was furnished expeditiously the deceased might die. This finding was attacked by counsel for the appellant who referred us to the relevant passages in the evidence which, in his submission, do not support the conslusion arrived at by the learned Judge. We were referred to the following evidence:-

(a) That of Mr. Lotzof who testified that merely sitting as the deceased sat would mean nothing to a layman, and probably nothing to a doctor; that, on the other hand, so sitting in conjunction with groaning must mean something even to the most ignorant of individuals; but, the witness conceded, so sitting is also consistent with a "hangover", and groaning is indicative of some form of discomfort, either major or minor;

(b) that of Maila who admitted that Timothy was in agony and had the appearance of a man who was seriously ill; and

(c) ..../25

(c) that of the witness Davel who testified that the deceased complained of a pain in the chest, but that Timothy was not groaning and did not appear to be very seriously ill.

It was submitted, on behalf of the appellant, that the evidence referred to must be viewed bearing the following circumstances in mind:-

(i) That prisoners do make complaints unnecessarily;

(ii) the deceased's drunken state the night before which was common knowledge;

(iii) the deceased's medical examination the night before which was common knowledge; and

(iv) that one should guard against being wise after the event.

It was further submitted that the test to be applied is that of "the average reasonable man" (South African Railways v. Symington, 1935 A.D. 37, 43); "the ordinary man of average knowledge" (Mandelbaum v. Bekker 1927 C.P.D. 375, 377);

"whether ...../26

"whether the reasonable man would, not could, have foreseen the harm .... and would have guarded against it" (Herschel v. Mrupe, 1954(3) S.A. 464 (A.D.) at pp. 475B to 476H and 492H). The court was referred to Macintosh and Scoble, Negligence in Delict, 5th ed., pages 22-24, wherein, at p. 22, reference is made to what Lord MacMillan said in Glasgow Corporation v. Muir, (1943) 2 All. E.R. 44 (H.L.) at p. 48, "The reasonable man is presumed to be free both from over-apprehension and over-confidence"; to Salmond on Torts, wherein (15th ed., p.283) reference is made by the authors to the following dictum of Greer L.J. in Hall v. Brooklands Auto-Racing Club, (1933) 1 K.B. 205 at p. 224:- "The person concerned is sometimes described as .. 'the man on the Clapham omnubus'"; to Winfield on Tort, 9th ed., who says at p. 26 "Nobody expects the man on the Clapham omnubus to have any skill as a surgeon, a lawyer, a docker or a chimney-sweep unless he is one; but if he professes to be one, then the law requires him to show such skill as any

ordinary ...../27

ordinary member of the profession or calling to which he belongs, or claims to belong, would display".

Relying on these authorities and analogies counsel argued that, because Maila and Davel were laymen in the medical field, they could not be expected to notice and correctly assess the clinical signs and symptoms which to the medical practitioners signified danger.

For the purposes of considering this argument Davel's evidence must be ignored. He was found by the learned Judge a quo (and correctly so, in my view) to be an unreliable witness. Judging from Maila's evidence both he and Davel must have realized that Timothy was seriously ill and it must have been apparent to them that his condition was rapidly deteriorating. They were both aware that Timothy had been involved in a serious accident the night before and it seems to me, prima facie, that they, being aware of this fact and other circumstances, ought reasonably to have foreseen (Herschel v. Mrupe, 1954(3) S.A.

464 (A.D.), at p. 475; S. v. Van As, 1976(2) S.A. 921 (A.D.), at p. 927H), Timothy's death as a result if they unduly delayed to get him to hospital. In the matter of the State v. Bernardus, 1965(3) S.A. 287 (A.D.) at p. 307 HOLMES, J.A., said:-

> "Furthermore, the possibility of serious injury being reasonably foreseeable, the appellant ought also to have foreseen the possibility of death hovering in attendance: the two are sombrely familiar as cause and effect in the walks of human experience".

I would, with respect and with apology, adapt this dictum as follows for the purposes of the present case:-

> "Aware of the seriously ill condition of Timothy and noticing the rapid deterioration of that condition, Maila and Davel ought reasonably to have foreseen the possibility of death hovering in attendance".

I have said above that this is my prima facie view. In view of the conclusion to which I have come on the causation issue, I do not deem it necessary to pursue this matter. I have consequently, not fully considered the impact of the decision in S. v. Van As (supra) in

respect ...../29

respect of the element of foreseeability on the law of delict and the extent to which the decision has affected the type of approach reflected in the adapted version (above) of the dictum of HOLMES, J.A., in Bernardus's case (supra).

Having isolated the periods 7h45 to 9h30 and 9h30 to 11h30 as the periods in respect of which the two police officials were negligent, I proceed to inquire to what extent, if any, this negligence is causally linked to Timothy's death. The inquiry, as I have indicated above, is a twofold one, viz.:-

(a) whether the negligent acts or omissions were a cause, at all, of Timothy's death, and if so,

(b) whether that cause was such as, combined with or tempered by other considerations, to render the appellant liable in law.

There are a great number of theories of causation which have been, and still are being, fiercely debated in many legal systems. Van der Merwe and Olivier, who favour

the ...../30

the conditio sine qua non test, discuss "Kousaliteit" at pp. 170-195 of their work Die Onregmatige Daad in die Suid-Afrikaanse Reg (2nd edition) and in the course of this discussion they refer to a number of articles and works dealing with this subject. I agree, with respect, with the learned authors that the determination as to whether a negligent act or omission is a cause of a certain result is a factual inquiry. It may be difficult, for instance, in the case of simultaneous but independently motivated acts which might equally effectively have caused the specific result, to determine whose act was the cause of that result. This difficulty is clearly demonstrated by a hypothetical case postulated by Prof. A.D.J. van Rensburg, in an article 'n Kritiese Beskouing van die Conditio sine qua non - oorsaaklikheidsteorie soos uiteengesit deur ons Suid-Afrikaanse Skrywers in Huldigingsbundel Daniel Pont, p. 384 at pp. 398/9, of two persons each of whom, acting independently of the other, at exactly the same

moment ...../31

moment as the other, fires a shot at a third person, both bullets penetrating his heart. Which of the two shots was the cause of the victim's death?

Other sets of circumstances of multiple acts or omissions in which difficulties in determining, factually, whether an act or omission caused a certain result either solely, contributorily or cumulatively with another or others may conceivably be encountered or imagined but these are difficulties relating to proof. Once it has been established that an act or omission was a cause of a given result, the further inquiry suggested above has to be undertaken. This is a legal problem. Various theories have been, and still are being, expounded in this regard among which, in English law, such theories as the "direct consequences" and "proximate cause" theories may be mentioned and, on the continent of Europe the "adequate veroorsaking" and "wirksamste bedingung" theories are two of the best known. In our law various tests for determining whether a cause is of such calibre as to found legal liability have been suggested or applied. Expressions such as causa causans, effective cause, proximate cause, sub-

stantial cause and negligence materially contributing to the result (cf. Silva's Fishing Corporation (Pty) Ltd. v. Maweza, 1957(2) S.A. 256 (A.D.) at p. 264B) are encountered.

Whatever the considerations to be applied to identify or qualify a cause as an element of liability may be, I am convinced that the conditio sine qua non test is logically the only test to be applied to determine whether a negligent act or an omission is a cause of the relevant result. I can conceive of no other test to be applied for this purpose. The inquiry simply is: Would the result have set in but for the negligent act or omission of the person concerned? In applying this test to a case in which successive acts or omissions have preceded a given result to determine which of those acts or omissions constituted a cause, singly, cumulatively or contributorily, of the result one has, of course, logically to bear in mind that a reconstruction of the events for the purpose of testing the causal effect of a particular person's default by eliminating from the series of events that default, only affects the causation relating to that person's negligent act or omission and not that of any other person who may be in-

volved ..../33

volved in the series. For instance, if it were alleged that a certain person was negligently responsible for a certain delay which has contributed to the result, a reconstruction of the events by eliminating this delay would necessarily entail the advancement in time of subsequent acts or omissions. In my view such advancement would be irrelevant for the purposes of testing the causation relating to any other person's acts or omissions.

Bearing this in mind I now proceed to inquire whether the negligent acts or omissions of Maila and Davel were, at all, a cause of Timothy's death. This, as I have made clear above, is a factual inquiry and has, therefore, to be related to the onus of proof. Consequently the plaintiff must prove, on a balance of probabilities that, but for the negligent acts or omissions of Maila and Davel, Timothy would not have died. As STEYN, C.J., pointed out in S. van As en 'n Ander, 1967(4) S.A. 594 (A.D.) at p. 601, this inquiry falls into two parts; firstly what a reasonable person would have done under the circumstances and, secondly, whether, if the person concerned had so acted, he would have prevented the result. In the present case the inquiry resolves itself into one of establishing, as accurately as possible, at what time the

operation would probably have commenced but for the delays for which Maila and Davel were accountable and to determine what Timothy's chances of survival would probably have been at that stage. I am mindful of the difficulty which presents itself that, in trying to determine the probabilities on this basis I shall, in attempting to construct the probabilities, have to rely to an appreciable extent on conjecture because there are quite a number of contingencies and imponderable factors which have to be considered. I shall, however, endeavour to be as realistic as possible, and not to be over-generous to the culprits Davel and Maila.

The cells were opened at 7h45, and soon thereafter Timothy complained of a pain in his abdomen and chest. To be reasonable I have to allow some time for the discussion between Maila and Timothy and interrogation by Maila of Timothy to determine the exact nature of the latter's condition. What Maila learned he interpreted to Davel. Allowing some time for exchanges between Timothy and Maila

and ...../35

and Maila and Davel and for the return to the office where the telephone was, it would not be unreasonable to assume that either Davel or Maila could have telephoned Dr. du Plooy at approximately 8h00. Dr. du Plooy stated in evidence that although he was prepared to see a patient at the cells, he preferred seeing patients at his consulting rooms. Dr. du Plooy would probably have inquired whether Timothy could walk and upon receiving the answer that he could, as is probable, he would have told the official who telephoned, to walk Timothy to the consulting rooms which were only fifty yards from the police station. Whether the doctor could or would have left his home immediately is open to conjecture but if he did depart from home immediately he would either have walked or driven in his car to his consulting rooms or to the police station - a distance in either case of about 150 yards. He could reasonably have been at either the police station or at his consulting rooms by 8h15. The examination itself did not last long.

He ...../36

He had no difficulty in making the diagnosis and stated in evidence, which in any event is a decided probability, that he would have made the same diagnosis at 8h00. Examining Timothy, making the diagnosis, writing the letter and giving Maila the simple instruction which he did, could not have lasted much more than ten minutes. Add another five minutes for walking Timothy back to the police station and making arrangements for somebody to go and find the ambulance driver, and that would take the time to 8h30. According to the witness Lieut. Bloem the driver could have been ready to commence the journey with the patient within half an hour if the decision to take him to hospital had been acted upon immediately. The journey itself normally lasted an hour. Timothy could, therefore, have been at the hospital at 10h00. If a further period of one hour and twenty minutes, which was the period Timothy in fact had to wait to be admitted, and probably would have had to wait in any event, unless special arrangements

were ...../37

were made by Dr. du Plooy, is added, he would probably have been admitted to a ward at approximately 11h20 that morning. The anaesthetist might have seen him at 11h30.

Whether, if he had been admitted and seen by the anaesthetist at 11h30, it would have been necessary to resuscitate him, does not appear from the evidence. As far as causation is concerned the resuscitation is, in any event, a neutral factor. Had he not been in such a serious condition at 14h00 as to need resuscitation, it is probable that the operation would have commenced at that hour instead of at 16h25. At the latter stage he probably was, due to the resuscitation, a slightly better risk for an operation than at 14h00. This is the effect of an answer to a question put to Mr. Lotzof (a specialist general surgeon who was called on behalf of the respondent) by the appellant's (defendant's) counsel. The question and answer are recorded as follows:-

"Now, .../38

> "Now, Mr. Lotzof, if a patient is brought into a hospital, in a critical condition, and to use your terminology, urgently requires surgical management, presumably that can be done very rapidly? ..... It cannot be started until the patient is thoroughly resuscitated. It can be done rapidly if the patient is fit for operation, but the surgical operation itself should not be hastened at risk to the patient, until the patient has been resuscitated, put in a fit anaesthetic state, more than surgical. The surgery itself is only a technical procedure; the hazard is the anaesthetic".

Not to complicate matters I shall assume that at 11h30 Timothy would not have needed any resuscitation. The question then arises when the operation would, on that supposition, probably have commenced. In this respect Mr. Lotzof, still under cross-examination, gave the following evidence:-

> "Now, if the patient, or if a patient, Mr. Lotzof, is in a fit enough condition to accept the anaesthetic, then the surgery can be commenced almost immediately in an emergency? ... Yes, in the time it takes to set up the theatre, which would be half an hour to three-quarters of an hour".

If, .../39

If, therefore, it was at 11h30 decided to operate immediately, the operation could have commenced at 12h00.

Whether this difference would have reversed the fact that death ensued under the circumstances which were actually present to a probability in favour of Timothy's life being saved is a problem which has occasioned me considerable difficulty. That the effluxion of time was crucial to Timothy's chances of survival, was stressed by all the medical experts who testified. When Dr. du Plooy examined Timothy on the night of 23 September he found no signs of a ruptured viscus. When he examined him the next morning at approximately 9h30 he immediately diagnosed an acute abdomen. According to Dr. Mellet the best way to summarise the effects of an acute abdomen due to a perforated viscus, is to divide the period following the rupture, roughly into 6 hour periods. If an operation is performed on the patient during the first six hours after the perfora-

tion ...../40

tion of the bowel, the prognosis is very good; if performed in the second six to twelve hours the prognosis is fair - he would say the patient would have a 50% chance of survival; if performed in the third six hour period, from twelve to eighteen hours, the prognosis is poor - in his view the patient would roughly have a 25% chance of survival; and from eighteen to twenty four hours after perforation of the bowel the chances that an operation will save the patient's life, are very poor. After twenty four hours, if the patient is still alive, he would be moribund and the chances of survival almost nil. The other medical experts generally agreed with this rough division, but also agreed with Dr. Mellet's evidence that the rate of retrogression would be affected by factors such as the size and site of the rupture. It is, therefore, of the utmost importance to try and establish when the complete rupture was likely to have occurred and what factors were present which influenced the rate of retrogression and to what extent.

According ...../41

According to the evidence of Dr. du Plooy Timothy's life could have been saved if he had reached the hospital within two hours after 9h30, the time when he made his diagnosis. This view was initially expressed as a possibility, not a probability. However, after some exchange of views between Dr. du Plooy and the learned Judge a quo, the former conceded it as a probability in the following words:-

> "Ek dink 'n uur en 'n half vertraging sal hom meer as 'n 50% kans gee, 'n uur en 'n half vroeër operasie sal hom meer as 'n 50% kans gee vir herstel. Ongelukkig is die tydstip waarop die derm ruptuur het nie bekend nie".

Dr. du Plooy apparently lost sight of the period between 14h00 and 16h25 which was taken up by the resuscitation measures which were applied. If he did not his evidence means that if Timothy were operated on at 14h55 he would have had more than a 50% chance of survival. If this was the opinion expressed by Dr. du Plooy, the opinion was clearly unfounded because at 14h00 Timothy was, according to

Dr. Mellet, in a moribund state. I shall assume that Dr. du Plooy simply meant that if Timothy had reached the hospital one and a half hours sooner than he in fact did, his life could have been saved. On that construction the effect of his evidence is that if Timothy had reached the hospital by 11h00 his life could have been saved. It is not clear whether, on this basis, Dr. du Plooy considered the one hour and twenty minutes Timothy had to wait before being admitted to the ward. If he did Timothy would only have been ready for the operation some time after 12h20. Add another half-hour for the set-up of the theatre and it takes the time to almost 13h00. Regard being had to all the evidence of the other experts, the opinion expressed by Dr. du Plooy, thus construed, cannot be relied on as being sound.

In any event, Dr. du Plooy did not express his opinion as a dogmatic assertion. He qualified his own opinion in the last sentence appearing in the above excerpt

from ...../43

from his evidence. As appears from his judgment, the learned trial Judge attached a great deal of weight to this evidence of Dr. du Plooy's. In my opinion, he erred in doing so, in view, particularly, of the qualified form in which Dr. du Plooy couched his evidence. The learned Judge referred in his judgment to Dr. Mellet's time table of dividing the retrogression into six hour periods and proceeded:-

> "It is difficult to apply this time table to the deceased's condition since it is unknown at what stage the deceased's bowel was perforated or at what stage the perforation became complete. Nevertheless, it assists in giving the picture of the importance of the lapse of time on a patient's chances of survival. (See also paragraph 6 of the abovementioned points of agreement).
> In my view Dr. du Plooy's evidence supports the probability that the deceased would have lived had he reached the hospital at some time between 9.30 and 10 o'clock".

As I read the judgment the learned Judge did not on any other basis find that there was a probability which

could ...../44

could be "supported" by Dr. du Plooy's evidence. To decide whether there was such a probability, it was, as I have stated, essential to determine the time when the complete perforation probably occurred. This, although there was ample evidence on which to make such a finding, the learned trial Judge did not do. I proceed to analyse the evidence on this aspect.

In the course of the trial the learned trial Judge requested counsel to consider the possibility of eliminating any dispute on the medical evidence by causing the various medical experts to debate the issues and to try and reach agreement thereon. The medical experts eventually produced the following agreement:-

"1. That the patient sustained injury to bowel which could have resulted from either a motor vehicle accident or other causes.

2. That in the first instance rupture could have been incomplete through all layers of bowel wall.

3. ...../45

3. That complete rupture of bowel occurred subsequent to Dr. W. du Plooy's first examination.

4. That the exact time of rupture through all layers of the bowel cannot be exactly determined but must have occurred at some time after Dr. du Plooy's first examination and before his second examination.

5. That at the time of Dr. du Plooy's second examination a definite diagnosis of acute abdomen was beyond doubt.

6. That a delay before the institution of surgical management materially affects the prognosis i.e. the prognosis after 4 hours progressively worsens with the passage of time.

7. That the cause of death was due to peritonitis toxaemia ending in endo-toxic shock brought about by a complete rupture of bowel.

8. That no negligence on the part of medical attendants was the cause of death.

9. That alcoholic intoxication could mask signs (abdominal) of an acute abdomen.

10. That a patient with an acute abdomen from ruptured bowel would be able to eat.

11. That initially a patient with an acute abdomen due to perforated bowel could walk".

Die ...../46

The agreement was elaborated upon by the evidence of doctors Du Plooy & Mellet and Mr. Lotzof. The latter's evidence is to the effect that the complete rupture occurred at approximately 23h00, or later, on the night of 23 September. He expressed the opinion that the clinical findings of Dr. du Plooy were consistent with the complete rupture having occurred after the examination. It is clear from his evidence, though, that, after the complete bursting, it takes some time before pain is felt and before the defence mechanism goes into action.

He ...../47

He drew a distinction between a localised peritonitis like one caused by a ruptured appendix, for instance, and the rupture of the duodenum which Timothy sustained. In respect of the latter he said:-

> "In a generalised sudden outflow of fluid like this into the peritoneum, the patient will experience an acute generalised pain, which doubles them up ... (Court intervenes). Court: Is this at the moment of bursting? ... When it bursts, within quarter of an hour to an hour, I mean it takes a few - as I say not all that length of time, for the peritoneum to be irritated by this greatly infected toxic material .....
> So the effect now on the inner layer of the abdominal wall which is the peritoneum, the parietal peritoneum ... is that it must find a defence mechanism, it does not want any more mischief to the abdominal content and the muscles tighten up".

Talking of the progression of the peritonitis, Mr. Lotzof made it clear that the retrogression accelerates as time passes. He testified:-

> "In this particular patient, if I have the story correct, you have a history here of an accident, progressing to death within a period of 22 hours, so it shows that from

the ...../48

> the maximal period of the accident, with a complete rupture at the time of accident, to the time that he died after the operation, was approximately 22 hours. Now it just shows the virulence of the progression, the first few hours the patient has pain, and now the chemical process is changed over into a true effective peritonitis, with the absorption of the toxin. Now although he may be pretty good for four hours, from then on, it is not a charted four hours, four hours, and four hours, he may be 50% worse in the first hour and the second, and the change becomes very rapid and unpredictable, and can be whereas you see the patient for example four or six hours after the accident and he may be reasonable, with a reasonable blood pressure, and you say, well, I will give him some fluid, a short period later he may be in a complete state of collapse due to endo-toxic shock. And this is the killer, and difficult to control, and time the essence".

Whether Mr. Lotzof said or meant to say, "... with a complete rupture at the time of the accident", as is recorded, is open to doubt because the doctor had in mind the history of the case, and in his opinion the rupture was not complete at the time of the accident. In all probability he either

said ...../49

said or meant to say, "... with an incomplete rupture at the time of the accident". Either he or the transcriber made an error. In any event, the general effect of the evidence appears to be that there is not a gradual and, relative to the passing of time, an evenly spread deterioration of the patient's condition, but that the longer the operation is delayed, the more rapid the rate of retrogression becomes. After some learned digression on the symptoms of ruptured viscera and his opinion, elicited by counsel, on the form of transport which would be suitable, Mr. Lotzof, at the insistence of counsel, returned to the time aspect and gave the following evidence:-

> "Now, Mr. Lotzof, I just want to get back to a point which I think you have already covered, but perhaps you can cover it more specifically, you heard the evidence of Ndaba that this man to whom he referred asked for medical assistance at a certain stage, and that it could have been perhaps an hour and a half thereafter that he was removed from the cell. Would you have any comment to make in regard to the delay of

an ...../50

an hour and a half in so far as his condition was concerned, and the delay in treating that condition is concerned? .....
As I intimated we have here in this particular case, that his pathogenesis at the maximum could have been 22 hours, if anything, less, because the actual time of rupture is after 11 o'clock that night. So in actual fact we are talking in terms of from 11 o'clock that night until ... (Mr. Kuny intervenes).
Or later? ... Or later, until 5 o'clock that afternoon, so it is approximately 18 hours, so we can reduce the period to 18 hours or less. Now you take one and a half hours in 18 hours or less, it must be proportionate that every half an hour is very very serious. If this man would have died in four days, then an hour and a half would not really have been a significant proportion of the time that it took from pop, from the time of rupturing to the point of death, the percentage would not have been as significant as it is here, one and a half in eighteen as opposed to one and a half in 96. So time is of the essence here, and proven in this case in particular, in general it is a factor.
And you say a particular factor in this case? ... In this case in particular, yes, because he died within 22 hours of the possible partial rupture, and 18 hours and less from the time of complete rupture".

Questioning Mr. Lotzof on the various points of the agreement reached by the medical experts, the learned

trial Judge elicited the following evidence from him:-

"The second one: that in the first instance rupture could have been incomplete through all layers of bowel wall. Now, is this merely a possibility or is this the probability? ... It is a probability, you see the next stage is that possibly - the situation from that is, what we are trying to say is by virtue of Dr. du Plooy's examination being negative as recorded in his alcoholic assessment, although there could have been a complete rupture, one anticipated after the period of time from the time of accident to the time he completed his examination, one would have expected a sign, especially due to the rapidity of the progress of this condition to ultimate death.

Do I understand you correct that if there had been a complete rupture at that particular stage ... (witness intervenes) ..... I would have expected it at the time of Dr. du Plooy's examination, and it was a full examination, and by virtue of the fact that he did not record any sign of a rupture, one tends to go later, but it could have been present before".

"..... 9 is also clear I think? ..... That is explaining away possible cause for No. 1. Are you reading 9 with 1? ... Yes, it can explain to an extent why if there was a complete rupture, that the alcohol could have masked some of the signs".

Arising ...../52

Arising out of the explanation of the agreement by Mr. Lotzof in answers to questions put by the learned Judge, counsel for the defendant (appellant) put a few further questions to this witness to which he received the following answers:-

> "..... but number 9, I think, is the written agreement clause which indicates that alcohol could have masked, is that right? ..... Yes.
> Alcoholic intoxication could mask signs of abdominal - of an acute abdomen? .....
> That is why I put it as a possibility.
> Now obviously, Mr. Lotzof, the greater the degree of intoxication, the greater the possibility of a masking? .....
> This I would agree, yes".

I have above alluded to Dr. Mellet's evidence on the general effect of a delay to perform an operation after a complete rupture of the viscus. In answer to a question as to what in his opinion the clinical features were at 9h00 that morning, Dr. Mellet dealt specifically with the operation performed on Timothy, as follows:-

> "Can you give the Court any indication of what clinical features might have been pre-

sent ...../53

sent at 9 o'clock that morning? ... I do not want to stick my neck out and give an indication what it is, I can surmise if you want to, I can surmise according to what I think the condition was, that the patient when I operated was about perforated round about between 18 and 24 hours, so we work that from 4 o'clock to 8 o'clock in the morning, that is about eight hours, so according to that the rupture must have been about plus minus 10 hours old, and he would fall in that second category that I mentioned there, the six to twelve hour category, which would be perfectly, I think the symptoms would have been perfectly clear, the rigid abdomen, bowel distension, rapid pulse, drop in blood pressure."

The following evidence was elicited from Dr. Mellet by cross-examination:-

"Now, you were also asked about the size of the perforation of the bowel, and whether this would have any effect on the onset of the condition? .... Correct.

Can you comment on the perforation in this particular case? ... I must speak now from memory and from previous discussions that we had, I think that the perforation in this case was a very very extensive perforation, I think something like in the vicinity of 3 cm.

Is that considered large? ... Very large, yes.

And ...../54

> And would that bring about the onset of the condition rapidly or slowly? .. I would say rapidly.
> And would one expect in these circumstances for spasm of the - possible spasm of the bowel to delay the onset of the peritonitis? ..... Yes, it would.
> To what extent if you have a perforation of this size? ... It is difficult to say to what extent it is going to delay it, but I would imagine that a perforation of 3 cm. the outpour of intestinal contents would be so rapid that your patient would start developing the signs of peritonitis, irritation of the peritoneum very very soon, and the spasm, I do not know how long it would last, it is difficult to say, but whether it will wear off in time I am not prepared to say."

According to Dr. Mellet's evidence, therefore, the rupture was approximately ten hours old at 8h00 on the morning of 24 September. The complete rupture must, accordingly, have occurred at approximately 22h00 the previous night. Regard being had to his evidence that in the case of that large perforation Timothy must, very soon after the complete rupture, have started developing clinical symptoms it is probable, Dr. du Plooy not having detected any such symptoms, that the complete rupture occurred somewhat later

than ...../55

than 22h00. It might, however, have occurred during the examination in which case the clinical symptoms might only have appeared thereafter which is consistent with the evidence of both Dr. Mellet and Mr. Lotzof. Timothy may even have experienced pain in the region of his abdomen during the examination if the liquor had not masked the pain. In giving the evidence that the complete perforation occurred at approximately 23h00, or later, Mr. Lotzof's main object was to stress the particular virulence and rapidity of the retrogression and not so much to demonstrate that a period of twelve hours did not expire before Timothy could have been operated on if Davel and Maila had not been negligent.

It seems to me that the plaintiff is in this dilemma - either the twelve hour period as a watershed between a probability in favour of survival and against it did not apply because in Timothy's case the retrogression was so rapid, or, if it did apply, the evidence indicates that the complete rupture probably occurred during Dr. du Plooy's examination. If the operation was performed at

12h00 ...../56

12h00 as probably would have been the case on my estimate set out above if Davel and Maila had not been negligent, Timothy's chances of survival were, on the probabilities, too remote to constitute a factor in the causal chain of events. Admittedly Davel's and Maila's default affected Timothy's chances of survival. Had they not been remiss in the respects detailed above, Timothy's chances of survival would certainly have been better. But to what extent? Dum spiro spero - while there is life, there is hope - and Timothy was undoubtedly robbed of at least some chances of survival. But that does not, in my view, render such deprivation of his chances a cause of his death. Only if the deprivation were such as to convert what would have been a probability in favour of his survival to a probability against it, could it be said to be a proven cause of his death. A slight permutation of the existing facts would make this clear. Assume that 11h00 was the crucial point in time (as, in fact, it more or less was according to my assessment) in the sense that had the operation commenced before this hour Timothy would probably have lived

and ...../57

and if thereafter, he would probably have died. Assume further that but for their default, the operation could have commenced at 8h00. Any culpable delay occasioned by them which by itself or together with other delays caused the operation to be commenced after 11h00 would be a cause, either solely or cumulatively with other delays, of Timothy's death.

For the reasons stated the plaintiff has, in my view, failed to discharge the onus which rested upon her of proving, on a balance of probabilities, that the negligence of Davel and Maila was a cause of Timothy's death.

I would allow the appeal, with costs, and alter the order of the Court a quo to read:-

"The defendant is absolved from the instance, with costs".

Viljoen

VILJOEN, A.J.A.