IN THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

REPORTABLE
Case number : 656/98

In the matter between :

THE ROAD ACCIDENT FUND
Appellant

and

TERESA DORIS RUSSELL
Respondent

CORAM : Howie, Schutz JJA and Chetty AJA

HEARD : 13 November 2000

DELIVERED : 24 November 2000

Legal causation - whether death by suicide of a person of impaired mind and judgment, a *novus actus interveniens*

JUDGMENT

CHETTY AJA/

CHETTY AJA :

[1] On 16 August 1989 Michael Henry Russell (the deceased), a roofing contractor of Durban, sustained severe multiple injuries as a result of a motor collision, *inter alia* concussion with brain damage, scalp lacerations, multiple rib fractures, a contusion of the left lung, a fracture of the right humerus, a fracture of the right femur, a fracture of the right lower tibia, and a fracture dislocation of the left metatarpals.

[2] The deceased was hospitalised initially at the King Edward Hospital where he lay in a comatose state for approximately one month, whereafter he was transferred to the Addington Hospital where he remained until his discharge on 22 January 1990. Save for two short periods of further hospitalisation in July and October 1990, the deceased lived with his wife, the respondent, and their children in the family home until November 1990. In that month she had him admitted to Morningside Nursing Home where, in January 1991, he committed suicide.

[3] It is clear from the evidence of the respondent that the collision completely transformed the deceased, not only disabling him physically but moreover seriously affecting his interpersonal relationships. She described him prior to the collision as being a wonderful husband and father to his children, a fit and healthy individual, a man who loved life. The collision, however, had rendered him intolerant, impatient, irritable, subject to angry outbursts and lacking libido. In short, the man whom she had described as a fighter and full of spirit, was completely transformed.

[4] Approximately two months prior to the deceased's death the respondent took the decision to admit the deceased to the nursing home. The decision was not taken lightly. It was thrust upon her by events. Shortly before the deceased's admission to the nursing home, the respondent discovered the deceased on the roof of their house. It seemed to her that he must have crawled up the staircase, as he could not walk. The respondent concluded that the deceased intended committing suicide. The other incident related to an apparent overdose of pills, which required hospitalisation. The respondent had become fully engaged in the running of the family business, with the result that,

notwithstanding trained personnel being employed to watch over the deceased at home, she had concluded that he had nonetheless attempted suicide. Concerned for his future well-being, the respondent considered that the deceased needed proper care and this could only be provided at the nursing home. She intended this as a temporary measure pending a more agreeable permanent arrangement.

[5] After his admission to the nursing home she discerned no meaningful change in his personality. Sister Cohen, who was in charge of the nursing home and who at times conversed with the deceased, albeit superficially, opined that the deceased was inwardly unhappy and from her observations over a period of time concluded from his inappropriate behaviour that his mental functioning was clearly not normal. It was also obvious to her that the deceased suffered from depression.

[6] The respondent visited the deceased regularly and on occasion took him on excursions. On the morning of his suicide she took him for a medical assessment to determine his prospects of recovery and future working capabilities. The deceased was informed that his prospects were nil.

[7] It is common cause that during the course of that morning the deceased jumped to his death from a second storey parapet of the nursing home.

[8] The respondent instituted two damages actions against the appellant in terms of the relevant third party compensation legislation. The first, in her capacity as executrix of the estate of the respondent, was settled. The second, on behalf of the minor children for loss of support, proceeded to trial in the Durban and Coast Local Division before Jappie J, solely on the merits.

[9] The central issue which the trial court was required to decide was whether the death of the deceased arose as a result of the injuries sustained in the collision and in circumstances not involving any *novus actus interveniens*. The trial court found in favour of the respondent but granted the appellant leave to appeal to this court.

[10] The expert testimony adduced at the trial must be considered against the background that neither Professor Von Dellen, on behalf of the respondent, nor Professor Schlebusch, for the appellant had had any contact with the deceased

prior to his death. Professor Schlebusch, a prominent neuropsychologist, conducted a psychological autopsy on the deceased, which he described as "taking a backward glance to recover relevant information about a person who is already dead ... in an attempt to reconstruct the role which the deceased played in eventuating his own demise." He concluded, on the basis of information made available to him, primarily through interviews with Sister Cohen and the respondent, that although the deceased had undergone some behavioural and personality changes after the collision he was fairly appreciative of his condition and could understand what was going on. He expressed the view that the deceased "wasn't a mental or a cognitive invalid" and that he was "fairly able intellectually or cognitively to understand and appreciate his actions."

[11] Although Prof Schlebusch conceded that the deceased suffered from severe depression, albeit not major depression, he was constrained to admit that depression is a brain dysfunction. He furthermore reluctantly conceded but only as a possibility that the most significant contributing factor to the depression was the deceased's brain injury. Such injury was consistent with his irritability, inappropriate behaviour, inability to control outbursts, lack of short term memory, reduced concentration and loss of fine motor control functions. In her testimony the respondent had described all these manifestations of the deceased's altered personality and conduct. Finally, Prof Schlebusch conceded that there was a clear relationship between the deceased's depression and the suicide.

[12] However, it was submitted on behalf of the appellant that there was no acceptable evidence that the decision by the deceased to take his own life was a consequence of brain damage. The evidence of Prof von Dellen does not support this submission. It is true that there was some conflict between it and medical literature produced to advance his opinion. That, however, does not

diminish the force of his evidence. He is an eminently qualified and experienced neurosurgeon. His practical experience is considerable. In his experience the type of brain lesion suffered by the deceased very often adversely affects a person's behaviour. He furthermore adverted to a frequent link between the sort of injuries sustained by the deceased and severe depression and concluded that the deceased suffered from a tendency to mix reality and fiction, or at the very least from a lack of full cognitive function. It cannot be denied, and this was in fact conceded by Prof Schlebusch, that prior to the collision the deceased did not suffer from depression. Its onset became evident after his brain was injured.

[13] Upon careful evaluation therefore, the evidence establishes that the brain injury probably caused, or was the major factor, inducing the depression.

[14] A proper appraisal of the evidence of the respondent, and to a lesser degree that of Sister Cohen, indubitably establishes that, although the deceased was not *non compos mentis,* he clearly could not be regarded as a person with all his mental faculties intact.

[15] It was conceded on behalf of the appellant that the injuries sustained by the deceased in the collision were a *sine qua non* of his eventual suicide, in the sense that had he not sustained such injuries he probably would not have committed suicide. It was submitted, however, that the deceased's decision to terminate his life was an informed and voluntary act on his part and as such constituted a *novus actus interveniens,* which served to break the chain of causation between the collision and the deceased's death.

[16] The trial court found that the suicide was not a *novus actus interveniens* but was causally connected to the negligence of the insured driver. It appears from a proper appraisal of the evidence that no factors extraneous to the injuries caused by the accident led to the suicide. Such inducing factors as there might have been, additional to the depression and loss of cognitive function, factors such as an inability to earn a living and being removed from his home environment, were all direct consequences of his injuries.

[17] In *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) Corbett CJ reaffirmed that the determination of causation in the law of delict involves two distinct enquiries, which he formulated as follows at 700E-I:

> "As has previously been pointed out by this Court, in the law of delict causation involves two distinct enquiries. The first is a factual one and relates to the question as to whether the defendant's wrongful act was a cause of the plaintiff's loss. This

> has been referred to as 'factual causation'. The enquiry as to factual causation is generally conducted by applying the so-called 'but-for' test, which is designed to determine whether a postulated cause can be identified as a *causa sine qua non* of the loss in question. In order to apply this test one must make a hypothetical enquiry as to what probably would have happened but for the wrongful conduct of the defendant. This enquiry may involve the mental elimination of the wrongful conduct and the substitution of a hypothetical course of lawful conduct and the posing of the question as to whether upon such an hypothesis plaintiff's loss would have ensued or not. If it would in any event have ensued, then the wrongful conduct was not a cause of the plaintiff's loss; *aliter*, if it would not so have ensued. If the wrongful act is shown in this way not to be a *causa sine qua non* of the loss suffered, then no legal liability can arise. On the other hand, demonstration that the wrongful act was a *causa sine qua non* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it is said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called 'legal causation'."

[18] In our law, the test to be applied in determining legal causation was described by Corbett CJ as "a flexible one in which factors such as reasonable foreseeability, directness, the absence or presence of a *novus actus interveniens*, legal policy, reasonability, fairness and justice all play their part." (*Standard Chartered Bank of Canada v Nedperm Bank Ltd* 1994 (4) SA 747 (A) at 764I-765B.)

[19] In *Smit v Abrahams* 1994 (4) SA 1 (A), Botha JA, in advancing the flexible approach to legal causality espoused by Van Heerden JA in *S v Mokgethi en Andere* 1990 (1) SA 32 (A) at 39J-41B (albeit in a criminal law context) deemed it necessary to make the following general remarks (at 18E-

HOF):

> "Die belangrikheid en die krag van die oorheersende maatstaf om vrae van juridiese kousaliteit op te los, wat in *Mokgethi (supra)* en *International Shipping Co (supra)* aanvaar is, lê juis in die soepelheid daarvan. Dit is my oortuiging dat enige poging om aan die buigsaamheid daarvan afbreuk te doen, weerstaan moet word. Vergelykings tussen die feite van die geval wat opgelos moet word en die feite van ander gevalle waarin daar alreeds 'n oplossing gevind is, of wat hipoteties kan ontstaan, kan vanselfsprekend nuttig en waardevol, en soms miskien selfs deurslaggewend, wees, maar 'n mens moet oppas om nie uit die vergelykingsproses vaste of algemeengeldende reëls of beginsels te probeer distilleer nie. Die argument dat die eiser se eis 'in beginsel' verwerp moet word, is misplaas. Daar is net een 'beginsel': om te bepaal of die eiser se skade te ver verwyderd is van die verweerder se handeling om laasgenoemde dit toe te reken, moet oorwegings van beleid, redelikheid, billikheid en regverdigheid toegepas word op die besondere feite van hierdie saak."

[20] In support of his submission that the deceased's deliberate act of suicide negatived the causal connection between the collision and his subsequent death, appellant's counsel referred to the decision of the House of Lords in *Reeves v Commissioner of Police of the Metropolis* [1999] 3 All ER 897. This case is factually distinguishable in one vitally important respect. The deceased in that matter was found to be of sound mind and with unimpaired judgment when he committed suicide while in police custody. The argument raised on behalf of the Commissioner there was that a person's deliberate act of suicide, when of sound mind, was a *novus actus interveniens* which negatived the causal connection

between the breach of duty owed by the police to the deceased and his death.

[21] It is clear from the majority and minority speeches that in deciding the question raised a clear distinction was drawn between a person who commits suicide whilst of sound mind and unimpaired judgment and one who is not. As to the former situation, the majority held (at 902e-g):

> "... People of full age and sound understanding must look after themselves and take responsibility for their actions. This philosophy expresses itself in the fact that duties to safeguard from harm deliberately caused by others are unusual and a duty to protect a person of full understanding from causing harm to himself is very rare indeed. But, once it is admitted that this is the rare case in which such a duty is owed, it seems to me self-contradictory to say that the breach could not have been a cause of the harm because the victim caused it himself."

[22] It is implicit from the speeches in that case that an act of suicide by a person not of sound mind and unimpaired judgment, would not constitute a *novus actus interveniens*.

[23] A case not too dissimilar from the present is the earlier decision of the English Court of Appeal in *Kirkham v Chief Constable of the Greater Manchester Police* [1990] 2 QB 283 (CA) in which it was held that a prisoner's wife was entitled to recover damages in tort because of the defendant's negligence in not preventing the suicide of her husband whilst in custody. The proven facts were that the deceased was suffering from clinical depression. Lloyd LJ said (at 290B-E):

> "So I would be inclined to hold that where a man of sound mind commits suicide, his estate would be unable to maintain an action against the hospital or prison authorities, as the case might be. Volenti non fit injuria would provide them with a complete defence. There should be no distinction between a successful attempt and an unsuccessful attempt at suicide. Nor should there be any

> distinction between an action for the benefit of the estate under the Act of 1934 and an action for the benefit of dependants under the Fatal Accidents Act 1976. In so far as Pilcher J drew a distinction between the two types of action in *Pigney v Pointer's Transport Services Ltd* [1957] 2 All ER 807, [1957] 1 WLR 1121, I would respectfully disagree.
>
> *But in the present case Mr Kirkham was not of sound mind. True, he was sane in the legal sense. His suicide was a deliberate and conscious act. But Dr Sayed, whose evidence the judge accepted, said that Mr Kirkham was suffering from clinical depression. His judgment was impaired.* If it had been a case of murder, he would have had a defence of diminished responsibility due to disease of the mind. I have had some doubt on this aspect of the case in the light of Dr Sayed's further evidence that, though his judgment was impaired, Mr Kirkham knew what he was doing. But in the end I have been persuaded by Mr Foster that, even so, he was not truly volens. Having regard to his mental state, he cannot, by his act, be said to have waived or abandoned any claim arising out of his suicide. So I would reject the defence of volenti non fit injuria." (My emphasis.)

[24] This examination of the English authorities establishes the principle that a person who is not of sound mind cannot be said to have acted with unimpaired volition in forming the decision to commit suicide and that such suicide does not constitute a *novus actus interveniens*.

[25] The question raised by the present appeal has as yet not been considered by this Court. However, even though the deceased's act of suicide may be said to have been deliberate, the weight of the evidence proves on the probabilities that the deceased's mind was impaired to a material degree by the brain injury and resultant depression. Consequently his ability to make a balanced decision was deleteriously affected. Hence his act of suicide, though deliberate, did not amount to a *novus actus interveniens*. It is unnecessary for the purpose of this case to determine whether the question of *novus actus interveniens* is properly a consideration material to legal causation or, rather, factual causation and that question is accordingly left open.

[26] As far as foreseeability is concerned it is not necessary for the wrongdoer to have foreseen the details of any, possibly subtle, connection between the

injuries caused to the deceased and his subsequent suicide. Finally, in applying the flexible approach which this Court enjoins one to employ in determining the question of legal causation, it would be eminently reasonable, fair and just to hold that the evidence established the requirements for the existence of such causation. Consequently the appellant is liable to compensate the respondent for such damage as she may prove.

[27] The appeal is dismissed with costs.

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D CHETTY
ACTING JUDGE OF APPEAL

Concur :

HOWIE JA
SCHUTZ JA