# THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

## JUDGMENT

Case no**:** 74/10

In the matter between:

**J M GROVE** **Appellant**

and

**ROAD ACCIDENT FUND** **1st Respondent**

**L KOOPMAN** **2nd Respondent**

**Neutral citation:** *JM Grove v The Road Accident Fund* (74/10) [2011] ZASC 55 (31 March 2011)

**Coram:** NUGENT and TSHIQI JJA AND PLASKET AJA

**Heard:** **4 March 2011**

**Delivered:** **31 March 2011**

**Summary**: Causation – Section 17(1) of the Road Accident Fund Act 56 of 1996 - No causal nexus established.

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**ORDER**

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**On appeal from:** North Gauteng High Court, Pretoria (Ledwaba J sitting as court of first instance):
The appeal is dismissed with costs.

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**JUDGMENT**

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TSHIQI JA (NUGENT JA and PLASKET AJA concurring)

[1] On 4 November 2005 an accident occurred at the corner of Duncan Street and Duxbury Road, in the vicinity of Brooklyn and Hatfield, Pretoria. The accident occurred after the second respondent (Koopman) lost control of his motor vehicle, a red Audi. It left the road and collided with a wall on the eastern side of the road. The appellant, who was a front seat passenger in the Audi, suffered serious bodily injuries as a result of the accident.

[2] Koopman and the appellant were travelling from a night club in Brooklyn. They left the club together with Koopman's friend and flatmate, Christiaan Potgieter (Potgieter) who was driving his own vehicle, a 1990 Volkswagen Jetta.

[3] Both Koopman and Potgieter drove at a high speed. Two tow-truck drivers who were seated in their trucks in the vicinity took the view that the motor vehicles were racing with each other because of their speed, the roar of the engines and the fact that the motor vehicles were driving very close to each other. According to their observation Koopman lost control after the motor vehicles had crossed Duxbury Road, after which the vehicle left the road and collided with the wall. After this, so they stated, Potgieter stopped, reversed and

parked next to a bus stop close to the scene of the accident. Potgieter alighted and approached the Audi. The appellant was found inside the Audi having sustained serious injuries.

[4] The appellant lodged a claim with the Road Accident Fund (RAF) and subsequently instituted action in the North Gauteng High Court against the RAF for damages arising out of the injuries sustained in the accident. She alleged that the accident had been caused by the negligence of Potgieter, who was alleged to have enticed Koopman to engage in racing their vehicles. In the alternative, it was alleged that the accident had been caused by their joint negligence, alternatively by the negligence of Koopman alone. The RAF admitted that the negligence of Koopman had caused the accident but denied the remaining allegations. It thus pleaded that its liability was limited under s 18(1)(b) of the Road Accident Fund Act 56 of 1996 (the RAF Act) to R25 000 plus hospital and medical expenses. This was not accepted by the appellant and the action proceeded on the question of the alleged causal negligence of Potgieter. It was alleged that the collision was caused by or arose from the negligent and wrongful driving of Potgieter, ie dicing, particularly as contemplated in s 17(1) the RAF Act.[1]

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[1]Section 17(1) of the RAF Act provides:
'17 Liability of Fund and agents
(1) The Fund or an agent shall-
(a)subject to this Act, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of the owner or the driver thereof has been established;
(b) subject to any regulation made under section 26, in the case of a claim for compensation under this section arising from the driving of a motor vehicle where the identity of neither the owner nor the driver thereof has been established,
be obliged to compensate any person (the third party) for any loss or damage which the third party has suffered as a result of any bodily injury to himself or herself or the death of or any bodily injury to any other person, caused by or arising from the driving of a motor vehicle by any person at any place within the Republic, if the injury or death is due to the negligence or other wrongful act of the driver or of the owner of the motor vehicle or of his or her employee in the performance of the employee's duties as employee: Provided that the obligation of the Fund to compensate a third party for non-pecuniary loss shall be limited to compensation for a serious injury as contemplated in subsection (1A) and shall be paid by way of a lump sum'.

[5] An agreement between the parties, in terms of rule 33(4) of the Uniform Rules, to separate merits from quantum was made an order of the court. The court below (per Ledwaba J) dismissed the action on the merits with costs. This appeal is brought with his leave.

[6] It was conceded, when the appeal was argued before us, and it seems also in the court below, that the two motor vehicles were driving at a high speed at the time of the accident. Because driving at a high speed in that area was in itself unlawful conduct and amounted to negligence, it seems to me that the pertinent issue of causation can easily be determined without engaging in an exercise to determine whether Potgieter and Koopman were indeed involved in dicing, but I will assume for present purposes that they were.

[7] The RAF is obliged to compensate for damages arising from bodily injury 'caused by or arising from' the driving of a motor vehicle. The causal link that is required is essentially the same as the causal link that is required for Aquilian liability. There can be no question of liability if it is not proved that the wrongdoer caused the damage of the person suffering the harm. Whether an act can be identified as a cause, depends on a conclusion drawn from available facts and relevant probabilities. The important question is how one should determine a causal nexus, namely whether one fact follows from another.

[8] In most cases there is no problem in determining in one way or another whether or not the conduct of the wrongdoer has caused harm to the plaintiff. This the courts usually achieve by simply adopting what is usually termed the 'but-for' test or the sine qua non approach which entails an enquiry whether the

harm would have occurred but for the wrongdoer's conduct. If it would not have occurred, then the wrongdoer's conduct is not a sine qua non of the harm.

[9] The problem with the 'but-for' test is that it does not always provide the right answers to causal problems. One of its major flaws is that if it is used, almost anything is a cause. It fails to take into account that some consequences of a person's conduct will inevitably be too remote to create liability.[2]

[10] It would be unjust to hold a wrongdoer liable without some limitation for the endless chain of harmful consequences which his act may have caused. It follows that some means must be found to limit the wrongdoer's liability.

[11] Whether the wrongdoer should be liable for the consequences of his wrongful conduct entails an enquiry into whether the link between the act or omission and the harm is sufficiently close or direct for legal liability to ensue, or whether the harm is, as it is said 'too remote'. This enquiry is concerned with a juridical problem in which considerations of legal policy may play a part.[3]

[12] Courts have in the past grappled with choosing a criterion to be applied to determine legal causation. In *S v Mokgethi & others,*[4] Van Heerden JA held that there is no single and general criterion for legal causation which is applicable in all instances. He suggested a flexible approach where the court has the freedom in each case to apply a theory which serves reasonableness and justice, in light of the circumstances, taking into account considerations of policy.[5] The basic

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[2] *Re Polemis & Furness, Withy & Co Ltd* [1921] 3 KB 560; *Minister van Polisie en Binnelandse Sake v Van Aswegen* 1974 (2) SA 101 (A); Jonathan Burchell *Principles of Delict* (1993) p32.
[3] *International Shipping Co (Pty) Ltd v Bentley* 1990 (1) SA 680 (A) at 700H-I.
[4] *S v Mokgethi & others* 1990 (1) SA 32 (A) 40 – 41.
[5] J Neethling, J M Potgieter and P J Visser *Law of Delict* 5 ed (2005) page 174.

question is whether there is a close enough relationship between the wrongdoer's conduct and its consequence for such consequence to be imputed to the wrongdoer in view of policy considerations based on reasonableness, fairness and justice.

[13] A useful guide is found in *Wells & another v Shield Insurance Co Ltd & others*[6] where Corbett CJ stated:

'In searching for some limit lying between direct causation and the vast and unrestricted field of the *causa sine qua non*, the Court must, I think, be guided by a consideration of the object and scope of the Act and by notions of common sense. . . .

The death or bodily injury for which compensation is claimed must be causally related to this negligent or otherwise unlawful act and also to the driving of the vehicle. Where the direct cause from the point of culpability is the same act or omission on the part of the driver in the actual driving of the vehicle then it would generally be found that the death or injury was "caused by" the driving. Where the direct cause is some antecedent or ancillary act, then it could not normally be said that the death or injury was '"caused by" the driving; but it might be found to arise out of the driving. Whether this would be found would depend upon the particular facts of the case and whether, applying ordinary, common-sense standards, it could be said that the causal connection between the death or injury and the driving was sufficiently real and close to enable the Court to say that the death or injury did arise out of the driving. I do not think that it is either possible or advisable to state the position more precisely than this, save to emphasise that, generally speaking, the mere fact that the motor vehicle in question was being driven at the time death was caused or the injury inflicted or that it had been driven shortly prior to this would not, of itself, provide sufficient causal connection. Thus the injury suffered by a passenger aboard a bus as a result of being assaulted by a bus conductor could not be said to arise from the driving of the bus, even though the bus was being driven at the precise moment when the assault was committed. Similarly, in the illustration already

[6] *Wells & another v Shield Insurance Co Ltd & others* 1965 (2) SA 865 (C) at 870A-H.

given of X who stepped off the bus into a hole in the pavement, it could not be said that the injury arose out of the driving merely because driving (in the ordinary sense) had taken place immediately prior to this.'

[14] It is also helpful to refer to the case of *Grobler v Santam Versekering Bpk.*[7] In that case the driver of a motor vehicle had been involved in an accident with a horse. He failed to ensure that the dead horse was removed from the road. Another vehicle, in which the plaintiff was a passenger, collided with the dead horse half an hour later. The court found that there was a causal nexus between the negligence of a driver who had failed to remove the dead horse from the road and the accident which occurred half an hour later. The court reasoned that without the driving of the vehicle in the earlier accident, the horse would not have been lying on the road. It concluded that the driving of the insured vehicle was accordingly a sine qua non for the presence of the horse on the road.

[15] The essence of the distinction between *Grobler v Santam*[8] and the present matter is that in *Grobler v Santam* it was the negligence of the driver of the vehicle involved in the earlier accident, in failing to remove the dead horse that caused the accident. There was therefore, in that matter, a causal nexus between the negligent driving and the accident. In this matter on the other hand, it was uncontroverted that other than the negligent manner in which the two vehicles were being driven, there was no other basis on which Potgieter was said to be connected with the accident. Although the Jetta was being driven at a high speed, it did not cause anything that could be held to have caused Koopman to loose control and collide with the wall.

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[7] Grobler v Santam Versekering Bpk 1996 (2) SA 643 (T) at 650H-I.
[8] Para 14 above.

[16] The pertinent question whether the negligent driving by Potgieter, can in itself without any other factor be held to have caused the accident, must therefore be answered in the negative. The cause of the accident was the fact that Koopman himself, with no further conduct from Potgieter, lost control of the Audi before it left the road and hit the wall. There was therefore no causal nexus between the driving by Potgieter and the accident.

[17] The appeal must accordingly fail.

[18] I make the following order:

The appeal is dismissed with costs.

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Z L L Tshiqi

Judge of Appeal

APPEARANCES

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