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CASE NO 448/90

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

CONCORD INSURANCE COMPANY LIMITED — APPELLANT

and

CARMEL MARIE OELOFSEN NO — RESPONDENT

CORAM: BOTHA, HEFER, GOLDSTONE JJA, HOWIE et HARMS AJJA

DATE HEARD: 27 MAY 1992

DATE DELIVERED: 21 AUGUST 1992

J U D G M E N T

HEFER, JA:

During 1985 Cigna Insurance Company S A Limited which has since changed its name to Concord Insurance Company Limited ("Concord") issued a policy to

Pieter Daniel Oelofsen ("the insured"). In terms which will presently be cited the policy provided for the payment of certain benefits inter alia in the event of the insured's death as a result of bodily injury caused by accidental means.

On 28 February 1986 the insured died of a heart attack within hours after he had been involved in a motor accident. After his death the executrix in his estate, claiming that the heart attack had been caused by the accident, sued Concord for payment under the policy. Concord resisted the claim. The dispute eventually led to a trial in the Transvaal Provincial Division before DU PLESSIS J who upheld the claim (in a judgment reported in 1991(1) SA 74(T)) but granted Concord leave to appeal to this Court.

The appeal centres on two expressions

used in the policy - "bodily injury" and "independently of any other cause". The context in which the expressions occur will emerge later but, in order to understand their relevance, it is first necessary to refer briefly to the facts.

It appears from the evidence that, since about two years before the accident, the insured had been suffering from a coronary disease known as triple artery athero-sclerosis which in layman's language means the narrowing of the arteries in question. His condition was serious in the sense that he might have suffered a heart attack at any time but he nevertheless led a painless life free from discomfort and without finding it necessary to take the prescribed medication. The accident in which he was involved on 28 February 1986 was not particularly serious. He sustained no

apparent physical injury and for about an hour afterwards showed no sign of having been affected in any way. Only when he was about to leave the scene of the accident did the first symptoms of a heart attack appear. He was rushed to hospital where he received treatment but ventricular fibrillation developed from which he could not be resuscitated and he died later the same evening.

The medical experts who testified at the trial were agreed that the immediate cause of the fibrillation was myocardial ischaemia due to a constriction in the area where the arteries had already been narrowed by sclerosis, but differed on the probable cause of the constriction. Concord's witness, Dr Baskind, was of the view that it occurred naturally in the progression of the disease and was unrelated to the accident. But the

executrix called Prof Simson who maintained that the constriction was probably caused by a biological process whereby, due to the shock of the accident, the sympathetic nervous system released chemical substances into the blood. DU PLESSIS J preferred Prof Simson's view. On his evidence the learned judge found

> "that the ischaemia of the heart was caused by the stress of the collision coupled with the pre-existing disease which together resulted in a vasoconstriction with the resultant chain of events described above." (p 81 I-J of the report).

In this court Mr Trengove who argued the appeal on Concord's behalf accepted the trial court's finding but submitted that it does not bring the insured's death within the ambit of the risk undertaken in the policy. For this argument he relied on what I will refer to as "the cover clause". It reads as follows:

"If during any period of insurance an Insured

> Person sustains Bodily Injury which, independently of any other cause, results in the Death, or Permanent Disablement of the Insured Person, the Company will pay to the Insured Person or his estate the compensation stated below."

In the present case, Mr Trengove submitted, the insured did not suffer "bodily injury" and, even if he did, it did not result in his death "independently of any other cause" since the pre-existing disease was a contributory cause.

The difficulty that I have with the first limb of the argument is that it proceeds from what Mr Trengove called the ordinary meaning of "bodily injury" instead of the definition of that expression in the policy itself. According to what I will henceforth refer to as "the definition"

> "'Bodily Injury' shall mean injury which is caused by accidental means and which within twenty-four months from the date of the accident results in the Insured Person's death, dismemberment or permanent disablement."

The definition plainly entails that any injury of whatever kind qualifies as "bodily injury" provided only that it is caused accidentally and results in death (or dismemberment or permanent disablement). And I know of no legal grounds for departing in a case like the present one from the parties' own definition. An insurance policy falls to be interpreted like any other contract by ascertaining the parties' intention from the language used (Lourens NO v Colonial Mutual Life Assurance Society Ltd 1986(3) SA 373(A) at 383 E-G). As WESSELS CJ said in Scottish Union & National Insurance Co Ltd v Native Recruiting Corporation Ltd 1934 AD 458 at 465 "if the language is clear we must give effect to what the parties themselves have said"; and

> "...if the contract itself...affords a definite indication of the meaning of the contracting

parties...a court should always give effect to that meaning." (Per INNES J in Joubert v Enslin 1910 AD 6 at 38).

What we are really concerned with is the word injury which occurs in the definition and the question whether it can be said that the insured sustained an injury according to the ordinary meaning of that word. For the answer it is necessary to revert to Prof Simson's evidence. The biological process brought about by the shock of the accident and leading to the constriction of the arteries has already been mentioned. Prof Simson stressed that such a constriction occurs at the existing sclerotic site and entails in 90% of deaths in similar cases a fissure in the plaque and the release of a thrombus or thrombi which may cause a total occlusion of the arteries and lead successively to myocardial ischaemia, ventricular fibrillation and

death. This, in his opinion, was what had happened to the insured.

Mr Trengove accepted Prof Simson's evidence save for his theory of a fissure developing in and a thrombus being released from the plaque. This theory, he submitted, is based entirely on statistics and does not constitute proof on a preponderance of probability. I do not agree. It is clear that Prof Simson applied his own expert knowledge as a pathologist and referred to the statistics merely to bolster his opinion. There is no reason to doubt the validity of his theory (which, I may add, was precisely Dr Baskind's theory too except that according to Dr Baskind the fissure and thrombus developed naturally and not as a result of the shock of the accident.)

Accepting then, as I think we must, that a fissure

did develop it is quite plain that the insured did sustain an injury. And even if it did not, the conclusion remains the same. For, although the word "injury" is often used to connote the traumatic destruction of the tissues of the body or a fracture of a bone or the rupture of an organ, it is not uncommon to speak of an injury to an organ to describe the impairment of its functional effectiveness. The policy itself speaks eg of "injury caused by starvation, thirst and/or exposure to the elements" and elsewhere it is said that "Bodily Injury shall be deemed to include death or permanent disablement of an Insured Person as a result of accidental drowning or gassing". There is accordingly every reason to believe that the parties did not intend to limit the term, and thus to confine the cover, to injuries of the kind first described. In my

judgment the impairment of the insured's bodily functions by a progressive pathological process constituted an injury.

What now remains is the question of causation in connection, firstly, with the definition and, secondly, with the cover clause.

The definition presents no problem. The trial court found that the pre-existing athero-sclerotic condition contributed to the fatal heart attack but that the accident was its proximate cause. Mr Trenqove did not contest this finding and conceded that the definition requires the injury to be caused no more than proximately by an accident and, in similar fashion, to result in the insured's death, dismemberment or disablement. (Cf Incorporated General Insurances Ltd v Shooter t/a Shooter's Fisheries 1987(1) SA 842(A) at 862

B-E). It follows that the trial court correctly found that the insured suffered bodily injury caused by accidental means.

In the context of the cover clause it may similarly be said that the bodily injury constituted the proximate cause of death but in view of the words "independently of any other cause" this is plainly not enough. If the insured's pre-existing condition was a contributory "cause" within the intended meaning of this word Concord must be absolved.

The emphasis on the intended meaning of the word "cause" serves to indicate what I conceive to be the correct approach to the problem at hand. Legal causation is not a logical concept and the law does not ascribe causative effect to every logical sine qua non (cf International Shipping Co (Pty) Ltd v Bentley

1990(1) SA 680(A) at 700 E-I). Basically this is so because complex legal questions - often involving considerations of policy - cannot be solved satisfactorily by a general positive application of the simple logical proposition that a particular fact or state of affairs cannot be regarded as the cause of another unless the former is a sine qua non for the latter. Such questions usually arise where several factors concurrently or successively contribute to a single result and it is necessary to decide whether any particular one of them is to be regarded legally as a cause. In criminal law and the law of delict legal policy may provide an answer but in a contractual context where policy considerations usually do not enter the enquiry, effect must be given to the parties' own perception of causality lest a result be imposed upon

them which they did not intend. What must accordingly be decided in the present case is whether the parties, by referring in the cover clause to "any other cause" of an insured's death or disablement, intended to include his infirmity.

That they could not possibly have attached a meaning to the word "cause" which would embrace every conceivable sine qua non is clear. Mr Trengove conceded that such a construction would make a mockery of the agreement. The enquiry must accordingly proceed on the basis that the word was used in a restricted sense. But there is no express indication of the extent of the contemplated limitation nor can its ambit be gauged by way of implication from the other terms. Why then should we favour an interpretation which would specifically include the insured's infirmity? To this

question Mr Trengove supplied no answer. Not a word is said in the policy about the insured's state of health either at the time of his application for insurance nor at any time thereafter and one is left with the firm impression that it is something which simply did not concern the parties. Because it obviously affects the risk an insured's state of health is commonly known to be of decisive importance to any life insurer. Indeed one can almost describe it as standard practice for insurers to insert a provision in a life policy whereby the application for insurance, containing the applicant's answers to searching questions regarding his medical history and the state of his health, is incorporated in the policy. Moreover, it is not unusual for accident policies to contain specific provisions excluding liability for the insured's death or

disablement arising from or traceable to any physical defect or infirmity existing prior to the accident. (Such a provision appeared eg in the policy before the court in Jason v Batten (1930) Ltd 1969 1 L1 Rep 281 (QBD) - a case on which Mr Trengove relied but which is clearly distinguishable - and in a number of other cases). Bearing this in mind, the significance of the absence from the present policy of any reference whatsoever to the insured's state of health is patent. It is difficult to accept, to say the least, that the parties meant to express in the simple words "independently of any other cause" an intention similar in effect to the one evinced by the elaborate provisions in the policies in cases like Jason v Batten.

In any event we must apply the rule that verba fortius accipiuntur contra proferentem. In French

Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd 1931 AD 60 at 65 it was said that

> "it is an accepted principle in interpreting insurance contracts that it is the duty of the insurer to make it clear what particular risks he wishes to exclude."

Accordingly, as KOTZE JA said in Norwich Union Fire Insurance Society Ltd v South African Toilet Requisite Co, Ltd 1924 AD 212 at 222,

> "(i)t is laid down that, as insurance is a contract of indemnity, it is to be construed reasonably and fairly to that end. Hence conditions and provisos will be strictly construed against the insurers because they have for their object the limitation of the scope and purpose of the contract."

(See also Pereira v Marine and Trade Insurance Co Ltd 1975(4) SA 745(A) at 752 F - 753 A and cases cited there; Price and Another v Incorporated General Insurances Ltd 1983(1) SA 311(A) at 315 G-fin).

Although the independent cause provision does not appear in the present policy under the conditions or exceptions its object is plainly to limit the liability and the same principle applies. On a strict and reasonable interpretation of the policy I have no doubt that an insured's ill health at the time of the accident was not intended to constitute another "cause" of his death or disablement. I say this for the reasons stated earlier and bearing in mind the frailty of the human body and the great variety of physical conditions that may develop at any time and may aggravate the effect of an injury or in one way or another contribute to death or disablement. Reasonably speaking I find it inconceivable that the parties intended to exclude liability in every case in which such a condition occurs. The trial court's conclusion that the insured's

death was caused by bodily injury independently of any other cause is accordingly correct.

The appeal is dismissed with costs including the costs of two counsel.

J J F HEFER, JA

BOTHA, JA)
GOLDSTONE, JA) CONCUR
HOWIE, AJA)
HARMS, AJA)