97/92

Case No 330/91

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

GUARDIAN NATIONAL INSURANCE COMPANY LIMITED ..... Appellant

and

VAN GOOL N O ..... Respondent

Coram: JOUBERT, HEFER, VIVIER, F H GROSSKOPF et GOLDSTONE J J A.

Heard: 4 May 1992

Delivered: 29 May 1992

J U D G M E N T

JOUBERT, J A :

This is an appeal against a judgment of DE KLERK J in the Witwatersrand Local Division, dismissing a special plea raised by the appellant as defendant in an action instituted by the respondent ("Van Gool") as plaintiff. Leave to appeal to this Court was granted by the Court a quo. The judgment of the Court a quo has been reported : see Van Gool N O v Guardian National Insurance Co Ltd., 1992(1) SA 191 (W).

The material facts in this appeal are common cause. On 7 February 1986 Catherine, a minor daughter (an infans approximately 2 years and 3 months of age) of Van Gool sustained serious bodily injuries when a motor vehicle driven by him collided with and ran over her. The motor vehicle was insured by the appellant in terms of the Compulsory Motor Vehicle Insurance Act No 56 of 1972

(the "Act"). Van Gool in his representative capacity as father and natural guardian of Catherine during September 1989 instituted an action against the appellant claiming payment of R937 000-00 compensation in terms of sec 21 of the Act. According to his particulars of claim the sum of R937 000-00 comprised the following amounts:

(i) R298 000-00 for estimated future medical and hospital expenses;

(ii) R564 000-00 for estimated future loss of earnings and loss of earning capacity; and

(iii) R75 000-00 being damages for pain and suffering, loss of amenities of life, disability and disfigurement.

It is to be noted that there was no claim in respect of medical and hospital expenses incurred until the institution of the action.

It was also common cause that Van Gool as father and natural guardian of Catherine was financially able

to support her and to pay all the estimated future medical and hospital expenses necessitated by the accident.

The appellant as defendant raised a special plea for the dismissal of the aforementioned claim for future medical and hospital expenses. The basis of the special plea is that Van Gool as father and natural guardian of Catherine owes her a duty of support until her majority or until she becomes self-supporting, which would include the duty to pay in his personal capacity all medical and hospital expenses reasonably incurred in respect of her, whereas Van Gool in his capacity as her father and natural guardian has not suffered any damage in respect of such expenses.

The damages relating to bodily injuries are in practice classified as either special damages or general damages. See Corbett & Buchanan, The Quantum of Damages, 2nd ed., 1964 at p 3: "Secondly, as regards bodily injury, all patrimonial loss actually incurred by the plaintiff,

such as, for example, medical and hospital expenses and past loss of earnings is treated as special damage; while all non-patrimonial loss, such as pain and suffering, loss of amenities, disfigurement and loss of expectation of life, and patrimonial loss, which up to the time of the hearing has not yet crystallized in actual loss or disbursement but is still prospective, such as future medical expenses and future loss of earnings are classified as general damages. "(My underlining). So too Boberg, The Law of Delict, vol 1, 1984, p 530 and McKerron, The Law of Delict, 7th ed., p 117-118.

The issue in this appeal as raised by the special plea is whether or not Catherine as a minor is in law entitled to claim compensation for future medical and hospital expenses as prospective patrimonial loss in respect of her bodily injuries.

Roman Law.

The Lex Aquilia, enacted by a plebiscite circa 286 B C, awarded the actio legis Aquiliae as a delictual and penal remedy for wrongful and negligent damage to property. Originally this legal remedy was not available to a freeman (liber homo) who was wrongfully and negligently wounded because he was not considered to have owned his own body (D 9.2.13 pr quoniam dominus membrorum suorum nemo videtur). A freeman was not a slave (servus or mancipium). Inst. 1.3 pr, D 1.5.3. He was either freeborn (ingenuus), Inst 1.4 pr, D 1.5.5.2, or liberated from slavery (libertinus), Inst 1.5 pr, D 1.5.7. The Praetor, however, extended the scope of the Lex Aquilia by making the actio legis Aquiliae utilis available to freemen who had been bodily injured but not killed. D 9.2.13 pr, 33.1, Modderman, Handboek voor het Romeinsche Recht, 5th ed., 1913, vol 3 p 150-151, Buckland, A Text-Book of Roman Law, 3rd ed., p 588-589,

Van Oven, Leerboek van Romeinsch Privaatrecht, 3rd ed., p 353.

In principle the extension brought about by the actio legis Aquiliae utilis in this regard enabled a freeman to recover compensation for patrimonial loss in respect of bodily injury actually incurred, e.g. medical expenses and treatment, loss of earnings, as well as compensation for prospective patrimonial loss, such as future loss of earnings. He would, however, not be entitled to recover compensation for non-patrimonial loss, e.g. pain and suffering, disfigurement etc. This result is in conformity with the nature of the similar compensation which a freeman could recover with the quasi delictual actio de rebus effusis vel deiectis where he was bodily injured by things thrown or poured from a building onto him in a road as appears from D 9.3.7 (Gaius) which provides as follows :-

Cum liberi hominis corpus ex eo, quod

deiectum effusumve quid erit, laesum fuerit, iudex computat mercedes medicis praestitas ceteraque impendia, quae in curatione facta sunt, praeterea operarum, quibus caruit aut cariturus est ob id, quod inutilis factus est. Cicatricium autem aut deformitatis nulla fit aestimatio, quia liberum corpus nullam recipit aestimationem.

(Translation by Watson et alii:

"When a freeman sustains bodily injury by something which is thrown down or poured out, the judge takes account of the cost of medical attendance and other expenses incurred in his recovery as well as the value of any employment which he lost or will have to lose because of his disability. However, no account is taken of scars or disfigurement because the body of a freeman is not susceptible of valuation.").

This result is endorsed by the great German jurist Von Glück (1755-1831) in his Ausführliche Erläuterung der Pandecten, 1808, vol 10 p 342-343 as follows:

Ist ein freyer Mensch verwundet worden, so kann zwar kein Ersatz für die ihm an seinem

> Körper zugefügte Beschädigung, also kein Schmerzengeld, auch keine Vergütung wegen entstandener Verunstaltung, nach dem Römischen Rechte gefordert werden; sondern dem Beschädigten wird nur eine actio Legis Aquiliae utilis gestattet, vermöge welcher er den Ersatz der Cur und Heilungskosten, und dessen, was er während der Cur in seinen Geschäften versäumt hat, oder noch in der Folge hätte verdienen können, wenn er nicht durch die erlittene körperliche Verletzung zur Arbeit untauglich geworden wäre, fordern kann.
>
> The same principles were applied where freemen such as patresfamilias and filiifamilias were wounded by four-footed animals D 9.1.3.

Who was to claim with the actio legis Aquiliae utilis for patrimonial loss in respect of bodily injury sustained by a filiusfamilias as a freeman ? The clear answer is furnished by the Dutch jurist Noodt (1647 - 1725) in his Opera Omnia vol 1, (1724), ad Legem Aquiliam

liber Singularis caput 20 , viz. that the paterfamilias should institute the action because he suffered the patrimonial loss occasioned by the loss of the services of the filiusfamilias and by paying for his treatment. The action was not available to a filiusfamilias because whatever he acquired was acquired by his paterfamilias. Noodt states:

> Idem jus est, si filiusfamilias vulneratus sit : placet enim, actionem dari patri; eaque consequi eum, quod minus ex operis filii sui habiturus sit & impendia quae pro ejus curatione fecerit, D 9.2.5.6, 6 & 7. Atque id in patre certum est : sed de filiofamilias videamus, an & ei actio danda sit. & non placit, ei dandam esse : quia enim filiusfamilias, quodcumque adquirit, non sibi, sed patri cujus in potestate est, adquirit ; consequens est, ut, si quae de his actio competat, ea patris, non filii, actio intelligatur : nec ea filius, sed pater, expiriri possit.

As regards the contractual capacity of a filiusfamilias and the existence of his peculium castrense and peculium quasi-castrense consult Van Oven, op.cit., paras 310 and 319. Roman-Dutch Law.

The reception in Roman-Dutch law of the actio legis Aquiliae utilis with its aforementioned extension in regard to patrimonial loss occasioned by bodily injury is well known. See De Groot (1583-1645) 3.34.2, Matthaeus II (1601-1654) De Criminibus ad D 47 tit 3 cap 1 nr 2, Van Leeuwen (1626-1682) C.F. 1.5.21.17, Voet (1647-1713) 9.2.11. The Dutch jurists took a major step forward by allowing an injured person to claim non-patrimonial loss for pain (dolor, smert), scars (cicatrices) and disfigurement (deformitas). See De Groot loc cit, Van Leeuwen C.F.1.5.21.18, Voet 9.1.8, 9.2.11, 9.3.4, Matthaeus II, op.cit, ad D 47 tit 3 cap. 3 nr 4, Groenewegen (1613-1652) ad D 9.3.7 nrs 3-4, Van der Keessel (1738-1816) ad Gr

3.34.2,Van der Linden (1756-1835) 1.16.3. In Hoffa N O v S A Mutual Fire & General Insurance Co Ltd, 1965(2) SA 944 (C) Van Winsen J at p 951 E-F expressed the view that the claim for pain and suffering apparently arose out of Germanic and local Netherlandic custom and could be maintained independently of either the actio legis Aquiliae or the actio injuriarum. His attention as to the origin of the said claim had obviously not been directed to the researches of Prof. Feenstra of the University of Leiden as published in 1958 Acta Juridica p 27-42 in regard to the origin of the contents of Gr. 3.33.2 and 3.34.2. His conclusion is that the origin of the contents of these two texts "niet uitsluitend en rechtstreeks in het Hollandse inheemse recht moet worden gezocht, voor een belangrijk deel zijn zij door Spaanse natuurrechtelijke auteurs uit de 16e eeuw geinspireerd, daarnaast wellicht ook voor een deel door costumen van andere Noord- en Zuid-Nederlandse gebieden en

geleerde commentaren daarop". This Court in Government of the Republic of South Africa v Ngubane, 1972(2) SA 601(A) at p 606 E-H confirmed the correctness of Hoffa's case that it would be "inappropriate to try to bring such a claim under the umbrella of either the actio legis Aquiliae or the actio injuriarum." Finally, in Administrator, Natal v Edouard, 1990(3) SA 581 (A) at p 595 G-H this Court affirmed that a claim for non-patrimonial loss in respect of bodily injury to a person was an actio sui generis "differing from the Aquilian action only insofar as it is not from its inception actively transmissible."

The Roman concept of a patriarchal familia organised under the aegis of a paterfamilias with his lifelong patria potestas over his filiifamilias and filiaefamilias was never adopted by the Dutch. De Groot 1.6.3, Van Leeuwen R H R 1.13.1, Van Der Keessel ad Gr. 1.6.3; Wessels, History of the Roman-Dutch Law, 1908, p

417; Calitz v Calitz 1939 A D 56 at p 61; Spiro, Law of Parent and Child, 4th ed., p 3. According to Roman-Dutch law parents have parental authority over their legitimate children during their minority. De Groot 1.6.1,3, Van der Linden 1.4.1; Lee and Honoré, Family, Things and Succession, 2nd ed., para 145. Moreover, by operation of natural law (ex jure naturae) there is a mutual duty of support between parents and their children in accordance with their respective means. Van Leeuwen R H R 1.13.7, Voet 25.3.4, 6, 8; Spiro, op.cit., pp 385, 403; Lee and Honoré, op.cit., para. 159. Support includes medicine employed with a view to the care of health (Voet 25.3.4; Surdus at the end of the 16th century in his Tractatus de Alimentis, 1645, tit 1 quaestio 1 nr 1, tit 4 quaestio 5 nrs 1,3,18).

Natural persons acquire at birth legal capacity (regsbevoegdheid) to have or posess legal rights and duties. See Boberg, The Law of Persons and the Family,

1977, pp 37-41, 529. A minor may at birth or at any time during minority inherit property and become the owner thereof. He may have an estate of his own with an income, as appears from numerous references in the authorities e.g. Van der Keessel ad Gr 1.6.1,3, Lee & Honoré, op.cit., para 148 (i) - (iv), (vi).

In the present matter Catherine has no assets or income of her own. Since she is not self-supporting to maintain herself, there is accordingly available to her a right to claim support from her parents to pay, according to their means, her prospective medical and hospital expenses. But as the victim of a delict perpetrated against her she also has an additional legal right to claim compensation from the wrongdoer for general damages relating to non-patrimonial loss (such as pain and suffering, loss of amenities, disfigurement and loss of expectation of life) as well as prospective patrimonial loss such as future medical and

hospital expenses and future loss of earnings. The delictual liability of the wrongdoer (Van Gool in his personal capacity) arising from the collision falls ex lege on the appellant as an authorized insurer of the motor vehicle in terms of the provisions of the Act.

A minor has no locus standi in judicio to appear on his own in civil proceedings. Voet 5.1.10, 11, Herbstein & Van Winsen, The Civil Practice of the Superior Courts in South Africa, 1966, p 142. He requires the assistance of a guardian or a curator ad litem in Court. Wolman and Others v Wolman, 1963(2) S A 452 (A) at p 459 A - B. In the case of an infans below the age of 7 years the practice is that the guardian or curator ad litem should sue or be sued in his representative capacity. Lee and Honoré, op.cit., para 149. That procedure was in fact adopted in the present matter since Van Gool instituted the action in his capacity as father and natural guardian of

Catherine. He did not personally claim any relief. The special plea is directed at the fact that he sued in his representative and not in his personal capacity. It is Catherine and not Van Gool who is party to the action as plaintiff. Mokhesi N O v Demas, 1951(2) S A 502 (T) at p 503 E, Greyling v Administrator, Natal, 1966(2) S A 684 (D) at p 689 A-B.

Mr Du Toit on behalf of the appellant made several submissions in support of the special plea.

Firstly he contended, with reliance on a passage in Voet 9.2.11, that Van Gool was personally liable for future medical and hospital expenses during the minority of Catherine and that she had no right to claim compensation in respect thereof. The particular passage in Voet in discussing the actio legis Aquiliae utilis in Roman law reads as follows:

Si filiusfamilias vulneratus sit, non filio

> sed patri utilem actionem dari placuit, ad impendia in medicos facta, & operarum aestimationem, D 19.2.13.4, D 9.2.5.3, 6 & 7, D 47.2.56.16, quod et in filiis annis viginti quinque minoribus hodie receptum est, Gr 3.34.3.
> (My underlining).
> Gane's translation :
> "If a son of a household has been wounded it has been held that a beneficial action is granted not to the son but to his father for expenses incurred on medical men and for the value of his services. This has also been adopted today in regard to sons less than twenty-five years old."
> (My underlining).

In this passage Voet is dealing with a wounded filiusfamilias. The actio legis Aquiliae utilis for damages actually incurred (facta) in respect of medical expenses and for the value of the services of the filiusfamilias, i.e. for patrimonial loss actually incurred, was available to the paterfamilias and not to the

filiusfamilias. This passage should be read in conjuction with what Noodt stated supra, viz that the paterfamilias should institute the action because he suffered the patrimonial loss and that whatever a filiusfamilias acquired was acquired by his paterfamilias. In the last sentence of this passage Voet claims that the position is the same in Roman-Dutch law in respect of minors, that is to say, in regard to patrimonial loss actually incurred by a father in respect of bodily injuries sustained by his minor son. The last sentence accordingly deals with past medical expenses and past loss of services. This passage accordingly does not support the contention of Mr Du Toit that Van Gool was personally liable for future medical and hospital expenses necessitated by the bodily injuries of Catherine during her minority and that Catherine had no right to claim compensation in respect of prospective patrimonial loss for future medical and hospital expenses. In my judgment

there is no merit in this contention of Mr Du Toit.

Secondly, Mr Du Toit contended that because Van Gool owed Catherine a duty of support during her minority he was personally liable for her future medical and hospital expenses. According to this contention Catherine did not suffer any loss in respect of future medical and hospital expenses. The fundamental fallacy underlying this contention is that it ignores what I have indicated supra viz that Catherine has two legal rights i.e. a right to claim support from her parents according to their means as well a delictual right against her wrongdoer to claim compensation for prospective patrimonial loss such as future medical and hospital expenses. These two legal rights are coexistent. The existence of the one does not exclude the other in respect of a right to payment of future medical and hospital expenses. Her right to parental support does not deprive her of her delictual right against her wrongdoer. In the

present matter Van Gool sues in his representative capacity as father and natural guardian of Catherine who is the plaintiff, as indicated supra. It follows that this contention cannot be accepted.

Finally, Mr Du Toit sought to rely on the judgment of Trollip J in Schnellen v Rondalia Assurance Corporation of S A Ltd., 1969(1) S A 517 (W) as authority for his contention that Van Gool was in his personal capacity, and not in his representative capacity as father and natural guardian, liable for the future medical and hospital expenses of Catherine. This calls for a careful analysis of Trollip J's judgment. Schnellen, his wife and their four minor children were injured in a motor collision. He instituted an action against the registered insurer claiming in his personal capacity both special and general damages. The special damages were for patrimonial loss actually incurred by him viz past medical and hospital

expenses and past loss of earnings. The general damages were for non-patrimonial loss in respect of pain and suffering, loss of amenities, disfigurement and disablement, as well as general damages for prospective patrimonial loss in respect of future medical and hospital expenses. In his capacity as father and natural guardian he claimed general and special damages on behalf of his children. The special damages in respect of his children for patrimonial loss actually incurred comprised only medical and hospital expenses (p 518 A-B). The nature of the general damages in respect of his children is not revealed in the judgment. The defendant, however, disputed that Schnellen could in his representative capacity claim any special damages on behalf of his children, maintaining that they were claimable by him only in his personal capacity (p 518 B-C). At the trial Schnellen sought an amendment of his pleadings, excising the claims

for special damages from the children's action and transferring them to the claims made in his personal capacity (p 518 C-D). The defendant opposed the amendment on certain grounds, including the prescription of the claim in Schnellen's personal capacity for the children's special damages. Trollip J granted the amendment sought. On the issue whether Schnellen in his personal capacity was entitled to claim special damages for the medical and hospital expenses actually incurred in respect of his minor children, Trollip J, in our judgment, correctly held in favour of Schnellen that he was so entitled (p 518 F-G). It was never in issue in Schnellen's case whether he was entitled in his capacity as father and natural guardian to claim on behalf of his minor children general damages comprising prospective patrimonial loss in respect of their future medical and hospital expenses. Nor was the question considered in Schnellen's case whether a minor has a

delictual action against the wrongdoer for damages in respect of future medical and hospital expenses. It follows that Mr Du Toit's reliance on Schnellen's case as authority for his contention was misplaced.

In the light of the aforegoing the Court a quo correctly dismissed the special plea.

In the result the appeal is dismissed with costs.

C P JOUBERT J A.

HEFER JA

VIVIER JA Concur.

F H GROSSKOPF JA

GOLDSTONE JA