

SOUTH AFRICA / JUDGMENT

Aegis Insurance Company Ltd. v Consani

NO (6/95) [1996] ZASCA 66; 1996 (4) SA 1 (SCA); [1996] 3 All SA 547 (A); (31 May 1996)

[1996] ZASCA 66

COURT

Supreme Court of Appeal

BEFORE

E M Grosskopf, Nienaber, Schutz

CASE / FILE NUMBER

6/95

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CASE NO. 6/95

SCHUTZJA

I differ from my brother Grosskopf only regarding his conclusion that the respondent has, on the probabilities, excluded suicide, and accordingly established accident. As the facts have been set out, my reasons for differing will be fairly brief.

Two set of facts have been presented, Verhoef in life and the manner of his dying. These two sets are not easily weighed against one another. But as Lord Dumedin indicated in *Dominion Trust Company v New York Life Assurance Co*[1919] AC 254 (PC) at 258, the dichotomy is natural. "The evidence in such a case [accident versus suicide] falls at once into two distinct divisions. There is the evidence which bears on the motives for such an act, and there is the evidence of the facts as to the method of death" In that case both classes of evidence pointed the same way, to suicide. In this case they do not. There is no evidence of a predisposition to suicide, or a weighty reason or motive for self-destruction. Indeed the reverse. Particularly telling in this regard are Verhoef's last recorded words, about the events of the morrow. But that evidence does not exclude the possibility of some darkness in the soul of the deceased of which he had told nobody, or nobody who gave evidence. The psychiatrist called by the respondent, George, said that quite often the ultimate reason for suicide cannot be determined, and the act comes as a complete shock and surprise to the family. As to the so-

called presumption against suicide, it is a truism, which does not deter a small minority of persons ending their own lives. The Question is whether that is what happened here.

Not that Verhoef was unaffected by the events of the evening.

What had happened caused him to react sufficiently for someone to appeal to Mrs van der Merwe, and for her to take him aside and talk to him. What Garieda had done to him was not a matter of ultimate moment. But the young are inclined to take the affronts of life more seriously than those who have suffered them more often, and this is reflected in the suicide figures. With that said, if only the first category of evidence is considered, suicide seems most unlikely.

However, one must go on and consider how Verhoef died. I would have expected the plaintiff, bearing the onus, to have led evidence as to the state of the body, the state of the room, the state of the rifle, and flowing from that such expert medical and ballistic evidence as may have been needed to create a probability in his favour. But what do we find? The doctor who performed the post-mortem was not called. There was no evidence as to the wound, other than the photographs, which do not even include one depicting or locating the entrance wound. No police evidence was led as to what was found that morning, particularly with regard to the path taken by the bullet after its exit. Nor was there evidence as to whether more than one cartridge had been loaded into the rifle. Such expert medical and ballistic evidence as was led (that of "Professor, having read both the reports of dr. Strauss, having viewed these photos, would you be prepared to voice an opinion as to whether this was an intentional or accidental shooting? ... I am not in a position to indicate this solely on the "

Kan

u ongeluk dat hierdie 'n blote ongeluk was, uitsluit? .

. . U Edele, nadat ek by hierdie toneel was, nadat ek die wapen ondersoek het en soos ek gese het ek het op die toneel, wel, omtrent 'n halwe dag gespandeer, maar nadat ek die wapen deeglik ondersoek het, het ek - kan ek vir die Hof werklik nie se of dit selfmoord of 'n ongeluk was nie, want daar is duidelike aanduidings dat daar ook 'n ongeluk kon gewees het."

But even before these answers are reached there is the more general criticism of the respondent's case (as far as the method of death is concerned) that practically nothing was proved.

The explanations given for not calling the post-mortem doctor, dr Strauss, were that the two copies of his report were so poor in quality

and so contradictory that the respondent could not have been expected to call him: and that in any event the respondent's advisers, having been

furnished with a notice that the appellant proposed to call him as an expert witness, expected the Appellant to call him. That done it would be better to cross-examine him than have him on one's own side. I am not impressed. As to the second reason, once the appellant closed its case without calling dr Strauss, the respondent should have had no difficulty in obtaining a re-opening of its case, particularly as it had been entitled to expect that the appellant would call him. But no attempt was made to re-open. The result was that we know nothing of the wound, other than what is shown on the photographs, which, as I have said, do not depict the entrance wound. This leads to the question whether his evidence would have tended to establish suicide, and whether that was

"You see doctor why I put this to you is, I want to submit to you at this stage that really on this report, one cannot be certain about anything. It is such a sloppy report that one has great difficulty, firstly ascertaining the size of the wound, secondly ascertaining to what extent there was tattooing and thirdly to ascertain to what extent there was really burning or soot burnt into it, those are the three factors you mentioned not so? . . . Right, but I'd have to respectfully disagree with you and say that while this report is not great, it contains adequate information and in conjunction with the photographs indicates the trajectory, that in The "great difficulties" alluded to in the question, matters of size of wound, tattooing and burning or soot, all went to the exact distance of the muzzle from the wound, an issue within narrow parameters. What was important was where the entrance wound was, which is very relevant to trajectory, the central point of what remains of Di Maio's evidence. The trial Judge considered that the passage quoted shows how unsatisfactory a witness Di Maio was. On the contrary, I consider that her criticism shows that she did not fully follow the significance of what he was saying.

Originally Di Maio's opinion that suicide was the probable cause of death was based on four things, first the weapon itself, second the location of the entrance wound (under the chin he assumed), third the nature of the entrance wound, and fourth the trajectory of the bullet. The second And third of these were derived from the post-mortem report. As the report was not proved, his reliance on these things must now be discounted, save to the extent that one or both of them can be inferred from other evidence. The second, the location of the entrance wound, can be inferred, at least approximately, from Di Maio's evidence as to the trajectory. I shall return to this subject. Further as to the third, the nature of the entrance wound, as I have indicated already it may be a contact wound for all we know. In any event it is common cause that the distance from the muzzle to the wound could not have been

much,
and I do not think that the absence of proof in this regard particularly affects Di Maio's main conclusion. As to the first point, the weapon itself, by this Di Maio meant that it was a rifle, over a metre long, and of high velocity. These facts are proved. Their relevance to the accident theory will appear later.

Dr. Di Maio was strongly criticised by the trial Judge as sticking to his opinion when the basis for it had been knocked away, and as being

dogmatic to the point that his views amounted to no more than a bald statement of opinion, which was of no assistance to the Court. This is a criticism that I think goes to content rather than demeanour, and when the content is properly understood I do not consider that the strictures on his evidence were warranted. On the contrary, I am impressed by the reasons which he gave for holding to his opinion, even though one or two. The main part of his evidence that in my opinion still stands is that as to the trajectory of the bullet. It should be noticed that he has had much experience both as a ballistics expert and as a pathologist. On the other side neither Professor Smith nor Wolmarans considered that they were able to venture an opinion as to the trajectory. Di Maio's evidence on this score was therefore uncontradicted.

In essence Di Maio's evidence, based on the photographs and his experience, was that the bullet had travelled more or less vertically

upward from the chin, near the front of the head, leading to the upper frontal part of the head being blown away in the manner depicted on the photographs. It is true that in the earlier parts of his evidence he relied

"Doctor are you prepared, after a body has been moved and just by looking at this photo, to say where exactly along the head this bullet moved? . . . Yes, I have said, I have said it, it's straight up through the frontal region and I said that it exited in the frontal region, I can't give you an exact point, but I am saying it went from underneath, it went straight up because the way the face has opened in a book-like fashion and that means that the path was a vertical path close to the external aspects of the face."

"Yes but you see Doctor, even if the bullet had travelled from here and exited at the back here, you would still have the

face opening up. . . . No. What you would have, if it comes here and it goes back, you are going to have a large gaping wound of the back of the head and you are going to have multiple, palpable fractures of the cranial wall. You will have destruction of the floor of the skull, but you will not have the face opened up. The face opens up only when the path is essentially a vertical path adjacent. Once you go back towards the vertex of the head you

get a totally different wound."

Di Maio's evidence establishes, in my view, that the trajectory of the bullet was vertical. In order to reach this conclusion it is not necessary to refer to the evidence, or rather lack of it, as to what was found in the ceiling. But at least the evidence of Wolmarans that there were marks there suggesting that bits of something had been prized out, was not inconsistent with the conclusion.

Because of the length of the rifle Di Maio was of the opinion that Verhoef was erect when the shot went off. If that be so the question arises how this happened so that the bullet passed upwards through his "You would have to say that this man somehow slipped and as he slipped instead of trying to break his fall, as does all human normal people do, he somehow pulled, he did something which was abnormal, and pulled the gun towards him, and then he had to arch his head this way and then the gun had to be under his chin and then he had to somehow depress the safety and fire it, or depress the trigger and fire it. So what you are having is three things that are very atypical and which together add up to be an absurdity. A fall where you don't try to break it, a head arched backward, and a hand coming down and hitting the trigger off safety. So you have got three things."

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the natural reflex action is for one's hands to go out to break the fall and protect the face, and for the chin to be tucked in. The reference to the safety catch being put off is to Wolmarans's recognition of this problem, which he suggested might be overcome by an hypothesis that the rifle had been bumped against a cupboard. In addition, a hand also had to reach the trigger. There seems to me to be weight in Di Maio's argument that such a concurrence of three unnatural things was most unlikely. I would add one other factor, that there had to be a cartridge loaded into the breach of a rifle not intended to be fired. There are people who behave in this foolish way, but it is not usual. The respondent has no real counter to this argument, other than a suggestion that the trigger may have been pulled not by the hand of

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Verhoef but the paw of his dog. This Di Maio conceded was a possibility, but not a likelihood. He added that in all his experience he had never seen anyone accidentally shoot himself under the chin. Near the end of his evidence Di Maio remarked that however much one dislikes a finding of suicide, on the evidence it was the only probable cause of death. Of other possibilities he said, "The others are possible but you have to keep putting all these facts and you have to keep stretching. This one (suicide) you don't have to stretch." A freak accident indeed.

Looking at the method of death I agree with his conclusion. It remains to weigh it against the first class of evidence concerning Verhoef's apparent state of mind. When one does that, it seems to me

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that whereas the first class makes it unlikely that he would end his own life, the second, the circumstances of his death, clearly indicate that he

My conclusion, reached with regret, is that it is clearly more likely that Verhoef committed suicide than that he died by accident. The respondent therefore did not discharge the onus that rested on him.

The appeal is allowed with costs

The order of the Court below is replaced with the following: "Absolution is granted against the plaintiff with costs."

W.P. SCHUTZ JUDGE OF APPEAL NIENABER JA) CONCURS

Case number 6/95 IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between: AEGIS INSURANCE COMPANY LIMITED Appellant
 and
 ERIC ADRIAN CONSANI NO
 Respondent
 CORAM
 : E M GROSSKOPF, NIENABER et
 SCHUTZ JJA DATE OF HEARING : 6 MAY 1996 DATE OF JUDGMENT : 31 MAY 1996

JUDGMENT

E.M. GROSSKOPF J A/

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E.M. GROSSKOPF JA :

On 18 January 1992 a young man, James Verhoef (the deceased), died as a result of a rifle wound to his head. In terms of an insurance policy the appellant company had undertaken to pay compensation to the deceased's estate in an amount of one million rand in the event of his suffering bodily injury caused by accidental, violent, external and visible means and dying therefrom directly and independently of all other causes. The appellant repudiated liability on the ground that the deceased's death was not accidental but was suicide. The respondent, being the executor in the deceased's estate, successfully sued the appellant in the Cape Provincial Division for payment in terms of the policy. With the leave of the court a quo (Traverso J) the matter now comes on appeal before us.

There was some argument before us about the incidence of the burden of proof and for that reason it

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is necessary to take a closer look at the pleadings. The particulars of claim include the following averment:

"On or about 18 January 1992 and at Beaufort West, when a firearm accidentally discharged and a projectile fired from such firearm struck [the deceased] visibly and violently in the head, he suffered a bodily injury which directly and independently of all other causes led to his death on the said date."

The appellant pleaded to this as follows:

"Save to deny that [the deceased's] death was caused accidentally, defendant admits the allegations in this paragraph."

Later in its plea the appellant raised a further defence as follows:

"4.1.1 In terms of the policy defendant is not obliged to pay any compensation in respect of death by suicide. 4.1.2

[The deceased] committed suicide. 4.1.3

In the premises defendant is not liable to pay any compensation as a result of [the deceased's] death."

On the pleadings the appellant accordingly had two strings to its bow. It denied that the deceased's death was caused accidentally, and it relied on a provision in

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the policy whereby death by suicide was excluded. This duality continued during the pre-trial conference in terms of rule of court 37. The first two paragraphs of the minute of the meeting read as follows: "1. THE ISSUES IN DISPUTE

It was agreed between the parties that the only issues to be considered by the Honourable Court were as follows: 1.1

Was the death accidental, or; 1.2 Was the death as a result of suicide.

2. ONUS

It was agreed that the onus to prove accidental death rests with the Plaintiff and the onus to prove that the death was as a result of suicide rests with the Defendant."

When the matter came to trial the parties accepted, on the basis of the judgment of Murray J in *Griessel N O v 5 A Myn en Algemene Assuransie Edms Bpk 7 952 (4) SA 4 73 fTj*, that the two issues could not be kept separate. In that case the following was said (at 477C to 478G):

"It is common cause that the plaintiff has to prove, and I think prove on the ordinary balance of probabilities, that the occurrence falls within the terms of the policy and is, therefore, an accident causing death. The question now arises what is the

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defendant's position in this case. The defendant has alleged that this is suicide

It is not necessary to consider all the authorities that have been quoted to me, but it seems clear, and I quote from Halsbury Laws of England, Vol 18 para 846 (Hailsham Ed):

that there must be an accident causing personal injury to the assured, and the result of the injury must be his death or disablement. The word 'accident' excludes the operation of natural causes, and implies the intervention of some cause which is brought into operation by chance, and which can therefore be described as fortuitous'.

[It] seems to me to follow that where the injury itself is the result of some deliberate act on the part of the deceased person, where he acts consciously and intends to bring about disablement or death, it speaks for itself that this is not accident but is the deliberate result of the deceased person's own activities. The result of that is, I think, that whether or not there is this provision ... which excludes suicide or attempted suicide or self-injury, it is really not a matter of defence for the insurer that such provision arises. It is, in my view, inherent in the idea of an accident that there must not be the deliberate bringing about of the result by the deceased person or the injured person of his own volition. That seems to me to be in accord with authority. I was referred to a passage in MacGillivray's Insurance Law at p 1143, where the learned author deals with 'Clauses excepting injuries intentionally inflicted by the assured or some other person' and he there states that:

^ in so far as this exception relates to injuries intentionally inflicted by the assured upon himself it is not really an exception because it is not accidental and

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therefore would not fall within the general risk.'

.... in the present case ... the risk against which the deceased was insured was an accident causing either death or injury. It is, therefore, incumbent on the plaintiff to prove as an essential initial step that the event in which the insurance is payable, viz. an accident of the above character, did occur. It is not sufficient for him to prove merely the death or the injury, and to leave it to the insurer, by establishing either the probability or the certainty of suicide or self-injury, to disprove the accident as the cause of death or injury. It may well be, for example, in a case where there are no eye witnesses of the fatal event that prima facie proof of the occurrence of an 'accident' may be found in the circumstances of the case, without requiring the insured or his representative to give positive proof eliminating suicide or self-injury; it may also be that the normal improbability of intention to kill or maim oneself favours the course of attributing the death or injury to accident. But as I see the present position ... the plaintiff must at the outset convince the Court on a balance of probability, and having regard to all the evidence led, that the deceased died as a consequence of an accident, and not of his own conscious intention to kill or maim himself."

At the trial both parties accepted that this passage was correct. So did the court a quo. It held that the respondent had discharged the onus of establishing that

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the deceased's death had been caused by an accident. In the circumstances this entailed proving that this was not a case of suicide.

On appeal before us Mr Modes, on behalf of the respondent, contended that the trial court had erred in burdening the respondent with the onus of proof. There were two legs to his argument. He contended first that the parties had agreed in the pre-trial conference that the onus of proving suicide rested on the appellant. The trial court, he said, was bound by this agreement even if it did not agree with it. For this argument he assumed the correctness of Griessel's case. There is no substance in this contention. In the first place, if Griessel's case is correct, the agreement was clearly based on a common mistake as to the applicable legal principles. As I have shown, to prove accident in a case like the present a plaintiff has, on the authority of Griessel's case, to exclude suicide. It is therefore

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nonsensical to place the onus of proving accident on one party and the onus of proving suicide on the other. When it came to the trial the parties realized the inappropriateness of their agreement and fought the case on the correct basis.

But in any event this argument is misconceived. The incidence of the onus of proof in a particular case is a matter of law. See, e g, *During N O v Boesak and Another* 7 990 (3) SA 661 (A) at 672 H-I and *S v Nkwanyana and Others* 7990 (4) SA 735 (A) at 743 H-I. The parties to legal proceedings cannot, by their agreement, compel the court to decide the case on an incorrect legal basis.

The second leg to Mr Hodes's argument was that Griessel's case was wrongly decided. He referred to a number of cases and textbooks for the proposition that in English, American and Commonwealth law there is a presumption against suicide. The reason for this presumption is, according to MacGillivray and Parkington

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on Insurance Law, 8 ed (1988) p 831 para 1848 "that the law will not assume that the insured committed a crime". The learned authors continue: "... it is submitted that the presumption should still apply even though suicide is no longer a crime, since there is inevitably a certain moral or social stigma that attaches to a person who commits suicide".

Other reasons have also been advanced for the presumption. Thus it has been said that "[the] presumption against suicide is based on the nearly universal human characteristics of love of life and fear of death" (*Evans v Provident Life & Accident Insurance Co* 875 P 2d 550 (Supreme Court of Kansas, 1991) at 555). See also *Dominion Trust Company v New York Life Assurance Co* [1919] AC 254 at 259 where Lord Dunedin referred to "... the inference drawn from the experience of mankind that self-destruction, being contrary to human instincts, is unlikely to have occurred."

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The sources quoted to us demonstrate clearly that a presumption against suicide is widely recognized. What is less clear is the status or effect of this presumption. Thus the presumption is sometimes invoked where an insurer relies on an exception clause, e g, where suicide is excepted in a life policy. So, for instance, the respondent's references to Colinvaux's Law of Insurance, 6 ed (1990) p 267 para 16-11 and Hardy Ivamv, General Principles of Insurance Law, 6 ed (1993) 446 were to passages dealing with proof that the loss falls within an exception. In that regard the rule, according to Colinvaux loc cit is: "The burden of proving that a loss falls within an excepted peril always falls upon the insurers." In this context the presumption against suicide would not affect the incidence of the onus of proof, which is in any event on the insurer. The presumption could accordingly play a role only in determining the weight or effect of the evidence adduced. An example of such a

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case is *The London Z, Life Insurance Company v Chase* [1963] SCR 207 where the Supreme Court of Canada held on appeal (at p 211) that the lower court had correctly adopted the standard

"of weighing the probabilities and improbabilities of the plaintiff's case against those of the case for the defendant and that having due regard to the seriousness of the allegation of suicide and the complete absence of motive they concluded that the preponderance of evidence weighed in the plaintiff's favour".

We were also referred to a number of cases where accident insurance was involved. Here various dicta were quoted to us which suggest that the presumption has a bearing on the onus of proof. Unfortunately it is seldom made clear what is meant by onus of proof, and for the most part the courts concerned seem to be saying no more than that some evidence is required to displace the presumption. And in his heads of argument the respondent accepted "that the presumption against suicide is a presumption of fact, bringing with it an evidentiary

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burden to adduce evidence to combat a prima facie case made by one's opponent". Reference was made to Hoffmann & Zeffertt, *The South African Law of Evidence*, 4 ed (1988) at 496 which makes it quite clear that an evidentiary burden of this sort does not affect the onus of proof in its true sense i e, "the duty which is cast on the particular litigant, in order to be successful, of finally satisfying the Court that he is entitled to succeed on his claim, or defence, as the case may be" (*Pillar v Krishna and Another* 1946 AD 946 at 952-3. See also *South Cape Corporation (Pty) Ltd v Engineering Management Services (Pty) Ltd* 1977 (3) SA 534 (A) at 548 A-C).

In his oral argument Mr Hodes went further and contended that the effect of the presumption against suicide was to displace the true onus. In a claim on a policy in respect of accidental death, he contended, the plaintiff need prove only a death by violent, external

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and visible means. If suicide is in issue, the insurer would have to prove it. This seems contrary to principle. Normally a plaintiff has to prove that the risk in respect of which he claims is covered by the policy. In an accident policy he must therefore prove accidental death or injury. If, in a particular case, this requires him to disprove suicide, then so be it. In this regard it seems to me the logic of Griessel's case is unassailable. And no authority has been quoted which in my view casts any doubt on its correctness.

I consider therefore that the attitude adopted in the respondent's heads of argument is basically correct. Suicide is, for the reasons discussed above, an inherently unlikely act and this should be borne in mind when assessing the evidence. Griessel's case accepts this - Murray J mentions (at 478F) "the normal improbability of intention to kill or maim oneself". Whether one calls this a presumption or an inference does

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not matter. The weight to be accorded to this presumption or inference would of course depend on the circumstances. Ultimately, when all the evidence has been considered and due effect given to the unlikelihood of suicide, the plaintiff fails in his action if he has not established that the death was accidental. See in this regard also the judgment of Rand J in the Canadian case of *New York Life Insurance Co v Schlitt* [1945] 2 DLR 209 at 223 to 225.

I turn now to the merits of the dispute between the parties. It was common cause that the deceased died from a gunshot wound to his head which was consistent only with accident or suicide. In its attempt to disprove suicide the respondent led the following classes of evidence: 1.

Evidence concerning the deceased's nature and background; 2. Evidence of the events during the evening in 1.

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question;

3. Expert ballistic and medical evidence on the cause of death.

The effect of this evidence was as follows. The deceased was born on 10 July 1969. He was accordingly 22 years old when he died. His father was a prominent businessman. The deceased was the youngest of three children born of his father's first marriage. In 1983 his parents were divorced.

The deceased passed his standard eight at the Camps Bay High school. He then wanted to make a change and attended another school, Boston College. At that stage he went through a rebellious stage and did not pass matric. After school he did his military service. He was first stationed in Heidelberg. He had some trouble there. According to his father he did not get on with a corporal and was not allowed to sleep. There is also a suggestion that he was court-martialled for refusing to

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obey an order and was confined to barracks. Be that as it may, the deceased's house doctor, Dr Edelstein, testified that the deceased saw him on 13 May 1988. The deceased complained that he was unhappy and depressed, that he had not been allowed to sleep for 48 hours or something to that effect. Dr Edelstein advised him to go back, see his superior officer and if necessary ask to be referred to the army doctor. No medication was prescribed. Dr Edelstein did not see him again for depression. Other evidence establishes that the deceased managed to secure a transfer to Cape Town, where he lived with his mother, and later to Oudtshoorn. He then had no further difficulty with his military training.

The deceased's father was the part owner of the farm Highlands in the Beaufort West district. The deceased was an enthusiastic hunter and had often gone on hunting expeditions with his father. He was keen to develop this farm as a game farm and to organize hunts. Moreover he

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wanted to establish walking trails. After his release from the army he lived on the farm from 1990 to manage it. During 1991 the deceased's father bought out his co-owner. The deceased was delighted at this and persuaded his father to extend the area of the farm. Shortly before his death he had the first hunting party on the farm. This was a great success.

There was a good relationship between the deceased and his family, more particularly his parents and his sister Gina. Gina visited him on the farm the weekend before his death. He was happy and excited, and enjoyed the work on the farm.

His positive state of mind was confirmed by his cousin, Andrew Morton, who lived on the farm with him and helped with the work. At the time of his death the deceased was looking forward to a visit by his father which was due in the near future.

The deceased had a number of girl friends over the

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years. Some months before his death he entered into a relationship with a Beaufort West girl called Garieda (also spelt Gerida) Smit. A number of witnesses testified that this was a fairly casual relationship. Moreover there was evidence that the deceased had decided to end it but did not want to do so immediately. His reason was that they had agreed to attend a wedding with some other people a week later and he did not want to disrupt the plans.

A psychiatrist, Dr George, gave evidence that, on the information before the court, there were no indications of suicidal tendencies on the part of the deceased. He was strenuously cross-examined on this, but stuck to his view. Although the appellant had given notice of an intention to call a psychiatrist itself, it did not in the end do so. Dr George's evidence consequently stands uncontradicted.

I now turn to the events of the day before the death

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of the deceased. Morton and the deceased went into Beaufort West on the morning of 17 February 1992. They were to attend a party to be given that night by Mr van der Merwe, a local attorney, and his wife. The two young men bought supplies for the farm, and then had lunch at a local restaurant. The owner of the restaurant showed them a tree which had fallen over, and they decided to cut it up. The deceased went to fetch labourers and started to cut up the tree. Morton went to help Mrs van der Merwe with the preparations for the party. Later that evening the deceased went to the party. It is common cause that during the evening Garieda Smit broke off her relationship with the deceased. Mrs van der Merwe gave the following evidence in this regard:

"U het hom wel later die aand gesien, toe net hy met u gesels nadat hy en Gerida blykbaar 'n uitval of

iets gehad het. Korrek. Wat was die probleem? Dit was ongeveer elfuur

die aand gewees en as ek reg onthou het iemand vir my gese maar ek moet kyk, Jamie lyk nie so gelukkig nie. Toe het ek na Jamie toe gegaan, ek het horn gaan opsoek. Ek net ook gesien daar is iets wat

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krap aan horn. Ek het horn bultentoe geneem en vir horn gese ons moet nou 'n bietjie daar op die gras sommer hier by die stoep se deur sit en ek het horn gevra wat fout is. Wat was sy ongelukkligheid, wat was sy klagte gewees?

Dit was 'n kwessie tussen horn en Gerida. Die verhouding is be indig deur Gerida so 'nrukkie voor ek met horn in gesprek getree het en hy was nie gelukkig oor die wyse waarop dinge toe verloop het nie. Het hy ooit aan u te kenne gegee dat hy nou jammer is dat hy 'n liefde verloor het, dat dit die rede was hoekom hy ongelukkig was? Nee. Wat het hy gese wat is die rede dan waaroor hy ongelukkig was? Klaarblyklik het, nadat sy dit

nou aan horn gestel het dat sy nou die verhouding beeindig, het sy binnetoe gegaan en aan 'n hele klompie mense dit bekend gemaak dat sy nou vir Jamie, soos sy dit stel, gelos het. Hy het gevoel dit is nie nodig gewees nie, dat dit eintlik 'n private aangeleentheid was en dat sy nie nodig gehad het om daarop uit te brei hier voor ander mense nie. Nadat u met horn gesels het toe, wat was u indruk van horn? Heeltemal kalm."

It had earlier been agreed that the deceased and Horton would spend the night with Garieda. In view of the changed circumstances the Van der Merwes offered to put them up. The deceased preferred to return to the farm since he intended to finish the job of cutting up the tree the next morning and had to bring the labourers

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from the farm. If he slept in Beaufort West he would have to drive out to the farm to fetch the labourers at 7 a.m.

The two young men left the party at about midnight and drove back to the farm. The deceased had not had much to drink. Horton was tired and sleepy. They did not talk much. Horton said that the deceased "looked angry ... he was brooding about something." Later he qualified this: "I wouldn't say angry ...something was niggling him ...he was quiet, he was contemplating". On their arrival at the farm Horton wanted to make coffee and offered some to the deceased. The deceased was in his room. He said that he did not want coffee, but asked Horton to wake him with a cup of coffee the next morning and said something about having to pick up the labourers. Horton continued to the kitchen, which was about 100 metres from the deceased's room. About a minute to a minute and a half after the deceased had spoken to him

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Morton heard a shot. He rushed to the deceased's room and found him dead.

The rifle which fired the fatal shot was kept in the deceased's room. Horton said that it used to hang on the bed post, or was propped against the bed itself or against a chair. The deceased would sometimes take it with him when doing game counts. The evidence also shows that, although the deceased had a lot of experience of firearms, he was careless in his use of them, and was generally unconcerned about his own safety.

What I have said above represents the effect of the evidence led on behalf of the respondent. Although conflicting versions were put to some of the witnesses, these were denied. No contradictory evidence was in the result adduced by the appellant, and the above facts were held by the trial court, correctly in my view, to have been proved.

Before dealing with the technical evidence about the

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shooting itself I should indicate the basis upon which the appellant opposed the respondent's claim. The appellant repudiated liability in a letter of 25 January 1993 in which the following allegations, inter alia, were made (I have numbered them for convenience and add my comment):

1 . "At the time of his death the insured was extremely tense, worked up and depressed." On the evidence this is, at best, a gross exaggeration. 2. "That evening the insured and his girlfriend had an argument at a party at Mr van der Merwe's house and they split up. The cause of the argument was the fact that his girlfriend, Garieta Smit, had attended the party with her ex-boyfriend Mr Hattingh. The insured stormed out of the party at midnight very upset." No evidence was led as to the cause of the

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argument, and the evidence does not support the last sentence. 3. "The morning of his death insured damaged the rear differential of the farm's four wheel drive vehicle. The insured was extremely upset about this. On a previous occasion the insured and his father were in an argument about damage to this vehicle. So much so that the insured decided he would not tell his

father about the incident and pay for the damage himself, due to the strained relationship with his father." The uncontradicted evidence is that the accident occurred some days before the deceased's death, that he was not particularly concerned about it, and that he telephoned his father to tell him about it. According to the deceased's father ha (i e, the father) "just

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laughed about it because he's always breaking things". 4 . "The rifle did not have a very light trigger." This will be dealt with later. 5.

"The first safari was not a success. The organisation and catering facilities did not turn out as expected. The hunting party made it known that they would never return to the farm. This incident upset the insured who knew the information would reach his father." The evidence set out above was to the contrary. 6.

"The tests undertaken by our assessor showed the rifle could not be fired accidentally." No such evidence was adduced. 7.

Reference was also made to "an individual" who heard the deceased's father stating that he could not understand why the deceased had 5.

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committed suicide, and another individual who could confirm that the deceased threatened to take his own life if his girl friend, Garieda Smit, terminated their relationship. No evidence was led to substantiate either of these averments. That then brings me to the pleadings. In the respondent's request for further particulars for trial the appellant was asked for full particulars of the facts relied on in support of the allegation that the deceased committed suicide. The answer was as follows:

"Plaintiff is referred to the summaries of the evidence of Drs Strauss, Klatzow, O'Neill-Kerr and Di Maggio (sic - it should be Di Maio)... Based on the facts and the expert opinions of the aforementioned witnesses defendant contends that James Verhoef committed suicide".

However, after the respondent closed its case, the appellant led only the evidence of Dr Di Maio. None of the other named experts, nor, for that matter, any lay witness, was called.

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The failure of the appellant to call these experts led to a most unusual situation. Dr Strauss, stated to be an expert to be called by the appellant, was the district surgeon of Beaufort West. He performed the autopsy on the deceased. Two post mortem reports by him were available. One was handwritten, and was, according to the evidence, difficult to read. There was no copy of this report in the record. Then Dr Strauss signed a typed report. At the pre-trial conference between the parties the status of the report was considered. The following was recorded:

"The Plaintiff does not admit the correctness of the post mortem examination conducted by Dr Strauss ... The nature of the wound and the distance between the firearm and the wound at the time of discharge remain in dispute."

Dr Di Maio has both medical and ballistic qualifications. His evidence was limited to the conclusions to be drawn from the technical evidence. On the respondent's behalf evidence of a similar type was given by a pathologist, Dr

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Smith, and a ballistics expert, Mr Wolmarans. None of these witnesses had examined the body of the deceased. They based their opinions purely on the evidence given or to be given by others. In particular they relied on the post mortem reports of Dr Strauss. A great deal of criticism was directed at these reports, inter alia that they differed in important respects and did not provide sufficient particulars to found reliable opinions. As stated above, in the end Dr Strauss did not testify, with the result that his report was not before the court at all.

In the absence of evidence by Dr Strauss there is very little evidence about the nature of the wound. Photographs of the body were handed in, but although they demonstrate that the deceased had suffered a severe head wound, they do not show the entrance wound or the exit wound. There is accordingly no reliable indication of where exactly the two wounds were. Nor was there

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evidence of the size and appearance of the entrance wound. Such evidence was necessary to determine how far the firearm was from the deceased when it was discharged. Wolmarans did testify that, when he inspected the deceased's room, he saw a mark on the ceiling which he was told had been caused by pieces of bullet or skull. This evidence was accordingly hearsay, but in any event one can at best infer from it that the bullet went upwards. We do not, however, know from where.

The absence of Dr Strauss's evidence is particularly important in respect of the evidence of Dr Di Maio. Dr Di Maio expressed the view that the deceased's death was suicide. He based this on four factors. One was the weapon itself, two was the location of the wound, three the nature of the wound and the fourth the* protectory (or trajectory) of the bullet. The nature of the weapon was important, he said, because its calibre was 6 mm. The wound was 30 by 10 cm with black, curled edges and some

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tattooing around it. The size of the wound, compared to the calibre of the rifle, indicated a close-range wound. This, Dr Di Maio continued, was confirmed by the nature of the wound. Now the size and nature of the wound were derived from Dr Strauss's report. In the absence of the report these conclusions would have no basis.

The further factor relied upon was the trajectory of the wound. Here Dr Di Maio relied on the position of the wound, as described by Dr Strauss, plus the injuries showed by the photographs. Once again there was, in the absence of Dr Strauss's report, no evidence as to the position of the wound. This factor also therefore lacks a factual foundation.

Even on the basis of his findings Dr Di Maio accepted that accident was possible although unlikely. We do not know what his view would have been if he had disregarded the post mortem report.

The respondent's expert witnesses Dr Smith and Mr

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Wolmarans also assumed the correctness of the post mortem report. Even on that assumption they disagreed with Dr Di Maio. Their conclusion was that the known facts (including the post mortem reports) did not show that suicide was a more likely Inference than accident.

Mr Wolmarans also examined the rifle and came to certain conclusions. There were defects in the rifle which could cause it to fire without the trigger being pulled. Mr Wolmarans considered it unlikely that this happened in the present case, but this view might also be influenced by the content of the post mortem report. Moreover the trigger adjustment screw was loose. It could move as a result of vibration (e g by being conveyed over bumpy farm roads) which could result in a very light trigger resistance. In this regard it should be noted that Morton described it as having a "hair trigger".

In my view, in the absence of Dr Strauss's evidence,

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the technical evidence is of very little assistance. The trial court in any event preferred the evidence of the respondent's witnesses to that of Dr Di Maio. I do not have to consider whether it was correct in doing so.

When all the evidence in the case is weighed I consider that the following conclusions are justified. The deceased did not have a depressed or suicidal personality. He was on close terms with his immediate family and would not want to inflict pain on them. He was very happy in his work and had many plans for the future. The incident with Garieda Smit happened during the evening and he was somewhat upset by it but there was no indication that it had a deep or profound effect upon him. Immediately before his death he was still making arrangements for the next morning.

The rifle was normally kept in his bedroom but was not always in the same place. It would not be unusual for the deceased to handle it and even to be somewhat

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careless in doing so. There were defects in the rifle which could cause it to go off without the trigger being touched. In any event it had a very light trigger. One can only speculate on how exactly the wound was inflicted.

In all these circumstances I consider it unlikely that the deceased committed suicide. I would dismiss the appeal with costs, including the costs of two counsel.

E.M. GROSSKOPF JUDGE OF APPEAL /a1

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