THE DEFENCE OF CONTRIBUTORY INTENT (VOLUNTARY ASSUMPTION OF RISK)

Neethling v Oosthuizen 2009 5 SA 376 (WCC)

Facts

The plaintiffs, Neethling and Breytenbach, were travelling with the defendant, Oosthuizen (and his wife), in a Land Rover. They had gone on an extended holiday tour of Mozambique and were returning to George in South Africa. Their final stop was supposed to be the Gariep Dam in the Free State but unfortunately their holiday was cut short due to an accident which occurred on 3 April 2003. At the time of the accident, the defendant was driving a Land Rover which was towing a heavily laden trailer on a gravel road between Wepener and Smithfield, when the left rear tyre burst. The defendant lost control of the vehicle which overturned and landed on its wheels on the other side of the road. Breytenbach (second plaintiff), was asleep at the time of the accident and therefore could not recall how the accident occurred. As a result of him not wearing a seatbelt he was thrown out of the vehicle and landed unconscious on the road (379E–F). He suffered a contusion of the brain and cuts to his face and head. Neethling (first plaintiff) suffered injuries to her right foot (378–379).

It appeared (380–381) that the same tyre was punctured on two occasions in Mozambique and was replaced with a spare wheel. The damaged tyre was thereafter repaired in Nelspruit. Also while in Mozambique the spring of the trailer broke and they were unable to find the correct size spring but in any case replaced both springs of the trailer with different sized springs. While the foursome were travelling from Nelspruit near Standerton the power steering of the Land Rover also gave in. However, it is alleged that the defendant assured the others that it was safe to continue their journey without power steering and so they continued their journey the next day, when the accident occurred. It was common cause that "the trip was dogged by mishap" (380I–J) and that the Land Rover was not in a "roadworthy condition" (381C–D).

Plaintiffs' argument

The plaintiffs had initially instituted claims against the Road Accident Fund, but in terms of section 18 of the Road Accident Fund Act of 1996, their claims were limited to R25 000 each. The first plaintiff claimed the balance of R239 051,85 and the second plaintiff the balance of R105 000 from the defendant in terms of common law on the grounds of causal negligence (379B–D). It is interesting to note that had this accident occurred on or after 1 August 2008, the plaintiffs' claims against the Road Accident Fund would not have been limited to R25 000; and furthermore in terms of the RAF Amendment Act 19 of 2005 the plaintiffs would not have been able to claim any damages from the defendant.

Defendant's argument

The defendant pleaded that he was not at fault as a sudden emergency had arisen due to the burst tyre which occurred suddenly, unexpectedly, without warning and that he had taken all necessary steps to avoid the accident but to no avail. In the alternative the defendant pleaded that if he were found negligent, the

plaintiffs had been contributorily negligent in that they had failed to wear their seat belts. As a further alternative the defendant pleaded that the plaintiffs were aware of the inherent dangers of the journey, that they were aware of the risks involved in being passengers of an un-roadworthy vehicle and that despite such knowledge, they agreed to continue their journey. Therefore, under the circumstances the defendant could not be held liable for any loss or damage suffered by them (379D–F).

Findings

The issue of merits and *quantum* of the case were separated (379G–H) and Moosa J decided to deal only with the issue of whether the defendant was negligent and whether such negligence contributed to the accident and the harm and loss suffered by the plaintiffs (379H–I). The judge did not consider the defence of contributory negligence or the defence of the plaintiffs' voluntary assumption of risk.

Moosa J accepted that the test for negligence is the failure to exercise a degree of skill that a reasonable person would have exercised in the circumstances (379–380). After hearing expert evidence, oral evidence from the parties and the arguments of both parties (381–383), the judge focussed on two questions. The first question was whether according to the evidence the defendant had braked, but Moosa J found it unnecessary to make a formal finding on the matter as the plaintiffs did not rely on that specific ground of negligence. The plaintiffs essentially relied on the disablement of the power steering and the failure of the defendant to effect the necessary repairs before proceeding with the journey, as the ground of negligence (384F–H). Secondly the judge enquired whether the defendant's failure to repair the power steering contributed towards the accident. Besides it being "common cause" that the power steering was disabled and could have been repaired in Bethlehem, the foursome continued on the journey (384H–J). Moreover, the defendant had opted to take a gravel road which required "greater steering input" than travelling on a tarred road (384–385). Moosa J stated that a legal duty rested on the defendant to maintain his vehicle in a roadworthy condition, that he had breached the duty and that the breach was "actionable" (385A–B). The court further investigated the requirement of causation and stated that in terms of the *conditio sine qua non* test ("but for" test) for factual causation, if the power steering had not been disabled it was probable that the defendant could have controlled the vehicle after it went into a skid following the burst tyre and that the vehicle would not have capsized. In regard to the second leg of the inquiry, namely legal causation based on a value judgment, reasonableness, fairness and justice, Moosa J was of the view that the wrongful conduct of the defendant contributed directly or sufficiently closely to the harm or loss suffered by the plaintiffs and that the wrongful conduct was therefore not sufficiently remote to enable the defendant to escape liability. He concluded that the defendant's negligence was the sole cause of the accident (389F–G) and found in favour of the plaintiffs (389G–H).

Comment

It is apparent that the defendant was negligent in that he failed to maintain his vehicle in a roadworthy condition and it is probable that had the vehicle been in a roadworthy condition the accident may not have occurred. However, it is submitted that the plaintiffs had acted with some degree of contributory fault as

argued by the defendant, in that, by remaining as passengers in the unroadworthy vehicle at the time of the accident, they had voluntarily assumed the risk of harm by intentionally exposing themselves to such risk knowing full well the consequences of doing so, and that despite such knowledge and appreciation of the risks involved agreed to continue their journey in the vehicle. Thus it could be argued that *dolus eventualis* was present (379D–F). The plaintiffs were aware that the trailer was carrying a heavy load, that the same left rear wheel tyre had punctured on two occasions, that the springs of the trailer had broken and were replaced with incorrect sized springs, that the power steering had been disabled the day before the accident and that the defendant chose to travel on a gravel road instead of a tarred road which required "greater steering input" and yet they still intentionally exposed themselves to the risk of harm knowing full well the consequences of doing so and intended to continue their journey to Gariep Dam. This defence was overlooked and not considered by the judge (379E–G).

Therefore under the circumstances the defendant's liability could either be limited on the ground that the plaintiffs' loss was caused partly by their own fault and to this extent should reduce the defendant's liability or possibly totally exclude the defendant's liability on the ground that the plaintiff's intention completely cancels the defendant's negligence (Neethling and Potgieter *Neethling-Potgieter-Visser Law of delict* (2010) 171).

Contributory intent as a defence excluding delictual liability

In practice "contributory intent" frequently manifests itself in the form of voluntary assumption of risk which may, depending on the circumstances, be embodied in the well-known Roman and Roman-Dutch law maxim *volenti non fit iniuria*, and essentially means, "a willing person is not wronged" or "he who consents cannot be injured" (Neethling and Potgieter *Delict* 103 fn 498; Van der Walt and Midgley *Principles of delict* (2005) 140; Boberg *The law of delict* (1984) 724; Burchell *Principles of delict* (1993) 68; McKerron *The law of delict* (1971) 67; *Waring and Gillow Ltd v Sherborne* 1904 TS 344). It is a defence that negates wrongfulness (Boberg *Delict* 724).

Volenti non fit iniuria may mean either consent to injury or consent to the risk of injury (commonly referred to as voluntary assumption of risk) (see Burchell *Delict* 68; Boberg *Delict* 724; Neethling and Potgieter *Delict* 103; Van der Walt and Midgley *Delict* 140; McKerron *Delict* 67). While "consent to the injury" does not present any problems in practice, the application of the second form of consent, "consent to the risk of injury" or voluntary assumption of risk, is problematic and therefore far more important in practice (Boberg *Delict* 724; McKerron *Delict* 67; *Lampert v Hefer* 1955 2 SA 507 (A) 508).

Consent to the risk of injury is a unilateral act which must be given freely or voluntarily by a person capable of volition (Neethling and Potgieter *Delict* 106). The person consenting must have knowledge of the extent of the possible risk and must fully appreciate the nature and extent of such risk. Furthermore, the person consenting must in fact subjectively consent to the prejudicial act and such consent must not be *contra bonos mores* (Neethling and Potgieter *Delict* 106–108). The three essential elements of this defence are knowledge, appreciation and consent *(Waring and Gillow Ltd v Sherborne* 1904 TS 344; *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 779B–C; Burchell *Delict* 69; Van der Walt and Midgley *Delict* 140; McKerron *Delict* 67). It must be

clearly shown that in addition to knowledge and appreciation of the danger, the risk was known, that is, the risk of injury was foreseen and that it was voluntarily undertaken (*Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 764E–F; *Waring and Gillow Ltd v Sherborne* 1904 TS 340; *Maartens v Pope* 1992 4 SA 883 (N) 883E–F). The elements of knowledge and appreciation have been considered mainly in cases involving informed consent in regard to medical cases and sporting injuries (Burchell *Delict* 69) and little or no difficulty is encountered regarding these elements. It is the element of consent that presents difficulties, as knowledge and appreciation do not constitute such consent and it is often said that the maxim is *volenti non fit iniuria* and not *scienti non fit iniuria* (*Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 779B–D).

This defence of voluntary assumption of risk has been applied with great caution and circumspection (*Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 764; *Netherlands Insurance Co of SA* v *Van der Vyver* 1968 1 SA 412 (A); *Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A) 774–775; Van der Walt and Midgley *Delict* 140). This is also evident from the fact that since 1928 the defence of *volenti non fit iniuria* has only been successfully invoked in the four cases, namely, *Lampert v Hefer* 1955 2 SA 507 (A); *Card v Sparg* 1984 4 SA 667 (E); *Boshoff v Boshoff* 1987 2 SA 694 (O) 700 and *Maartens v Pope* 1992 4 SA 883 (N) (Van der Walt and Midgley *Delict* 145 fn 4). Returning to the facts in *Neethling*, it is clear that even though the plaintiffs may have realised (foreseen) and appreciated the risk of being injured, it cannot be said that they consented to such risk and even if they had consented to the risk, the consent, being consent to the risk of serious bodily injury, would have been *contra bonos mores* and therefore invalid.

What should have been questioned in *Neethling*, is whether the plaintiffs actually subjectively foresaw the possibility that (after the sequence of events that had occurred prior to the accident) an accident may occur as a result of the vehicle being in an un-roadworthy condition and that should they have remained in the un-roadworthy vehicle there was a possibility that they could have been injured and reconciled themselves with that possibility (*dolus eventualis*, see Neethling and Potgieter *Delict* 127). The court should have considered the defence of voluntary assumption of risk *albeit* in the form of contributory intent which cancels the defendant's fault (see Knobel's discussion of *Pope* 1993 *THRHR* 303–304).

It may be argued that in several of the well-known cases dealing with the defence of voluntary assumption of risk (*Santam Insurance Co Ltd v Vorster* 1973 4 SA 764 (A); *Lampert v Hefer* 1955 2 SA 507 (A) and *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A)), all the plaintiffs, to some degree, intentionally and voluntarily assumed the risk of harm. However, the courts have been reluctant to recognise it as a separate defence (*Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422).

According to leading academics it is unclear whether "contributory intent" may in principle be used as a separate ground of justification that negates wrongfulness, or whether it can serve as a ground excluding fault. Van der Walt is of the view that a plaintiff's "contributory intent" cannot render the defendant's conduct unlawful and that it is better to look for a solution in the element of causation, as the harm was caused by the defendant, and not the plaintiff, despite any fault on the plaintiff's part. The defendant's conduct should be considered the sole cause of the plaintiff's harm (see Van der Walt and Midgley *Delict* 147).

Midgley is of the opinion that "contributory intent" could serve as a ground of justification, but should be treated separately from "contributory intent" for the purposes of apportionment. If "contributory intent" is recognised as a defence, the issue of apportionment does not arise. Midgley refers to *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 421–422, where the court showed a reluctance to accept contributory intent as a distinct and separate defence, but on the flip side quotes *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418 where it was held that a plaintiff who intentionally contributed to his or her own loss could not claim damages for such loss or part of it from a negligent defendant, and submits that although this judgment was given in the light of apportionment, the court acknowledged "contributory intent" as a defence to a claim. According to Midgley, it is an application of the general criterion of reasonableness (see Van der Walt and Midgley *Delict* 147).

Neethling and Potgieter (*Delict* 171), whose standpoint is to be preferred, are of the view that "contributory intent" can also be referred to as "voluntary assumption of risk" which is a ground that cancels fault and not a defence against wrongfulness. They suggest (104 fn 502) that instead of being blinded by clichés such as *volenti non fit iniuria,* voluntary assumption of risk and consent, one should ascertain from the situation whether wrongfulness was excluded as a result of consent by the injured person, or whether the plaintiff's "contributory intent" cancelled the defendant's negligence, or whether the plaintiff neither consented to injury or the risk thereof, nor had "contributory intent", but was in fact contributory negligent in respect of his damage because he acted in a manner different from that of the reasonable person.

There is uncertainty as to the extent of the application of contributory intent in terms of the Apportionment of Damages Act 34 of 1956 ("Apportionment of Damages Act" or the "Act"). Neethling and Potgieter (*Delict* 171) nevertheless convincingly argue that the conscious taking of unreasonable risk by the plaintiff cancels fault on the part of the defendant, and is a common-law principle that functions independently of the Apportionment of Damages Act.

In the *Neethling* case it can be argued, as pointed out above, that contributory intent in the form of *dolus eventualis* was present on the part of the plaintiffs and, if so, such contributory intent should have cancelled the negligence on the defendant's part. As such, contributory intent functioned as a defence excluding delictual liability on the part of the defendant.

Contributory intent as a defence limiting delictual liability

The word "fault" in section 1 of the Apportionment of Damages Act is used with reference to both the plaintiff and the defendant and in general fault encompasses both intent and negligence. However, the courts have initially expressed the view that the Act does not apply to cases involving contributory intent. In *South British Insurance Co Ltd v Smit* 1962 3 SA 826 (A) 835, the court held that fault refers to negligence and further that the degrees of fault relate to degrees of negligence.

Two important questions have been raised in regard to section 1 of the Act. The first question, relevant to this case in regard to the possibility of apportioning the liability between the defendant and the plaintiffs, is whether it applies in instances where the plaintiff intentionally contributed to his or her own loss and the defendant acted negligently. Here the plaintiff will have to forfeit his or

her claim (Neethling and Potgieter *Delict* 162; *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418). The second question is whether the defence of contributory intent can be applied in instances where the defendant and plaintiff acted with "intent" in regard to the plaintiff's loss. Here the law is unsettled and it remains debatable whether or not such a defendant can raise a plea of the plaintiff's contributory intent as it seems that in light of the historical background of the Act as well as the wording of section 1 of the Act, the legislature intended to make provision for the defence of contributory negligence and not contributory intent (*Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 569; *Wapnick v Durban City Garage* 1984 2 SA 414 (D) 418; *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422); Kelly "The apportionment of damages between a negligent collecting bank and a thief of cheques: Does the Apportionment of Damages Act apply?" 2001 *SA Merc LJ* 514–517 refers to *Mabaso v Felix* 1981 3 SA 865 (A) 877, where the court expressed doubt whether section 1(1)(a) applied to fault (of the defendant) in the form of intentional wrongdoing; *Netherlands Insurance Co of SA Ltd v Van der Vyver* 1968 1 SA 412 (A) 422, where the court was reluctant to decide upon the issue; *Thoroughbred Breeders Association of South Africa v Price Waterhouse* 2001 4 SA 551 (SCA), where the court was of the view that fault referred to negligence and not intention; *Minister van Wet en Orde v Ntsane* 1993 1 SA 560 (A) 569, where the court left open the question on the meaning of fault in terms of section 1 of the Act, but acknowledged that fault includes intent and negligence). However, in *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W) 606–607 the court held in regard to section 1(1)(a) of the Act, that since there "is *dolus* on both sides there appears to be no reason not to give effect to the ordinary meaning of the word 'fault'". Despite the "references to negligence in the long title of the Act [and] the headings of chap 1 and s 1", the court's interpretation as to the intention of the legislature "leads to no absurdity, inconsistency, hardship or anomaly"; on the contrary, applying section (1)(a) "produces a result which was fair and which the language of the statute indicates the Legislature must have intended".

Section 2 of the Act applies to joint wrongdoers, currently defined as persons who are jointly or severally liable in delict for the same damage to the plaintiff (Neethling and Potgieter *Delict* 265). What is relevant in regard to this section and the defence of "contributory intent" is the practical manner (as illustrated in the cases mentioned in the paragraph below) in which the courts apportion damages between intentional wrongdoers or intentional and negligent wrongdoers, as this may be of assistance in apportioning damages in instances where the plaintiff acted intentionally and the defendant negligently (first question raised above), or where the defendant and plaintiff both acted intentionally (second question raised above).

In *Randbond Investments (Pty) Ltd v FPS (Northern region) (Pty) Ltd* 1992 2 SA 608 (W) 616 the court held that the Act also applies to intentional, as opposed to negligent, joint wrongdoers and further stated that the difficulty in apportioning liability between two joint wrongdoers who acted intentionally could be overcome by taking into account their respective degrees of culpability. In another important case, *Lloyd-Gray Lithographers (Pty) Ltd t/a Nedbank* 1998 2 SA 667 (W) 672–673, the court recognised that apportionment could even apply between negligent and intentional joint wrongdoers by assessing the relative degrees of blameworthiness. Boruchowitz J stated that intention and negligence are not mutually exclusive concepts and that it is logically possible for both to be present simultaneously (Neethling and Potgieter *Delict* 266 fn 6).

There are a number of judgments that support the view that if intent is present, negligence is included in the intent (see the cases cited by Neethling and Potgieter *Delict* 133 fn 67). However, there are a number of judgments that support the opposite view that negligence may only exist in regard to a consequence if the wrongdoer has not "intentionally" caused the consequence. Thus in terms of this view intention and negligence are mutually exclusive concepts in that the one cannot be present when the other exists (see the cases cited by Neethling and Potgieter *Delict* 133 fn 66). In *S v Ngubane* 1985 3 SA 677 (A), the Appellate Division held that for purposes of criminal law, intent and negligence may be present simultaneously. In this regard it may be argued that the intentional causing of harm to another person is contrary to the standard of care that the reasonable person would have exercised and that negligence is thus simultaneously present (Neethling and Potgieter *Delict* 133).

If this argument is accepted, and furthermore that an intentional act (which may differ depending on the form of intent involved) deviates 100 per cent from the norm of the reasonable person, apportionment can be applied between joint wrongdoers using this yardstick (Neethling and Potgieter *Delict* 266 fn 6). Similarly the same yardstick may also apply to all such cases involving "contributory intent" within the ambit of the Apportionment of Damages Act (Neethling and Potgieter *Delict* 163 fn 233).

Kelly 2001 *SA Merc LJ* 529 concurs with the approach that "fault" should include both negligent and intentional conduct and that a defence of contributory intent should be allowed. She submits that in cases like *Randbond* where joint wrongdoers acted intentionally the problem with apportioning liability could be overcome by taking into account their respective degrees of culpability and with the suggestion made by Neethling that if a person acts intentionally, he simultaneously acts negligently and that an intentional act deviates 100 per cent from the norm of a reasonable person (Neethling and Potgieter *Delict* 133–134). Kelly further submits that the Act should apply in the following two situations, firstly where both the plaintiff and the defendant acted intentionally thereby contributing to the plaintiff's damage and secondly where both wrongdoers acted intentionally causing the same damage to the plaintiff, thereby apportioning the liability between the wrongdoers taking into account their respective degrees of culpability.

The recognition of the defence of "contributory intent" stemming from *Greater Johannesburg Transitional Metropolitan Council v ABSA Bank Ltd t/a Volkskas Bank* 1997 2 SA 591 (W), and that apportionment could be applied between joint wrongdoers whose fault was in the form of *dolus*, stemming from *Randbond Investments (Pty) Ltd v FPS (Northern Region) (Pty) Ltd* 1992 2 SA 608 (W) have thus generally been welcomed. (See, however, Potgieter in his discussion of *Lloyd-Gray* (*infra*) 1998 *THRHR* 731ff who is of the view that "fault" has the same meaning in section 1 and 2 of the Act and that the legislature's intention was to apply the Act to contributory negligence and not to wrongful acts perpetrated intentionally. According to him there are anomalies in the Act that need to be addressed, but it should be borne in mind that before cases like *Lloyd-Gray Lithographers (Pty) Ltd t/a Nedbank* 1998 2 SA 667 (W), cases of apportionment between negligent and intentional wrongdoers were rare.)

A Bill, namely the Apportionment of Loss Bill 2003 has been prepared to replace the current Act, but it is yet to be promulgated. The South African Law

Reform Commission (see *Report on the Apportionment of Damages Act 34 of 1956* 27) recommended that the word "fault" should be given its ordinary meaning to include contributory intent as a basis for the apportionment of damages.

Applying the above principles to *Neethling*, it can be argued that since the defendant acted negligently while the plaintiffs intentionally contributed to their own damage, apportionment of damages could have taken place and in this way limited the defendant's liability.

Conclusion

Even though, as mentioned earlier, there is no doubt that the defendant was negligent in that he failed to maintain his vehicle in a roadworthy condition, he should not be held fully liable for the damages just because he assured the plaintiffs that it was safe to continue the journey in the un-roadworthy vehicle. There are sufficient indications that the plaintiffs were well aware of the fact that they were exposing themselves to the risk of harm knowing full well the consequences of doing so. Thus the plaintiffs' conscious taking of unreasonable risk could possibly cancel or limit the defendant's liability.

Alternatively in this case it may be argued that the defendant's delictual liability could have been apportioned on the ground that the plaintiffs' failure to wear their seatbelts amounted to contributory negligence and that such negligence further led to the plaintiffs' increased loss or damage. Had the second plaintiff worn a seatbelt, it is possible that he would not have been thrown out of the vehicle thereafter suffering a contusion of the brain and cuts to his face and head. The established principle is that the failure to wear a seatbelt constitutes contributory negligence (in effect, action in a manner which differs from that of the reasonable person) on the part of the plaintiff and, although it did not contribute to the accident, is relevant in so far as it has led to an increase in the damage (*Union National South British Insurance Co Ltd v Vitoria* 1982 1 SA 444 (A); Neethling and Potgieter *Delict* 167–168; Klopper *The law of third party compensation* (2008) 267–268). Seen thus, the defendant should not have been found fully liable for the damages awarded to the plaintiffs. At the very least the defence of contributory negligence should have been successful and the plaintiffs' compensation should have been reduced in terms of the application of section 1(1)(a) of the Apportionment of Damages Act (see the cases cited by Neethling and Potgieter *Delict* 168 fn 264).

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