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Case No 732/92

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

HARTE AND FISHER

Appellant

and

JAN CHRISTOFFEL AUCAMP

Respondent

CORAM : BOTHA, E M GROSSKOPF et HOWIE JJA

DATE HEARD : 30 AUGUST 1994

DATE DELIVERED : 12 SEPTEMBER 1994

J U D G M E N T

HOWIE JA/....

HOWIE JA :

Respondent is a stock farmer in the Molteno district of the Eastern Cape. During the early months of 1988 he noticed that some of his sheep were behaving abnormally. There was a weakness and swaying motion of the hindquarters and on occasions they would fall down and kick their legs in the air. Several died. As a result, in March or April, he consulted Dr A D Fisher who conducted a veterinary practice in Queenstown in partnership with Dr C P Harte. This is the appellant firm. Fisher suspected a magnesium deficiency and advised that one teaspoon of magnesium sulphate crystals be given to each animal. This was tried but brought about no improvement. Further fatalities ensued.

On the evening of 18 July respondent telephoned Harte and explained the problem. Harte said he thought that the afflicted sheep could be suffering from a copper deficiency. In the course of their conversation Harte

mentioned the use of copper sulphate as a cure. The primary point in dispute at all stages of this case has concerned the circumstances and the terms in which Harte expressed himself regarding the use of copper sulphate. More of that presently.

On 19 July respondent bought three tins of copper sulphate crystals and instructed his stockman to administer half a teaspoon of crystals per sheep. During that afternoon 446 animals were dosed. By the next morning over 200 of them were found dead. The eventual death-toll was 277. The cause of death was acute copper sulphate poisoning.

Arising out of these events respondent sued appellant in the Eastern Cape Division for damages, alleging that the loss of his sheep was due to negligent advice given to him by Harte. Respondent averred that in answer to his request for advice, Harte had recommended a dose of half a teaspoon of copper sulphate per sheep and that he had failed to give

respondent the correct advice, namely, that the copper sulphate had to be dissolved in water and administered as a 10% solution.

In the plea appellant alleged that Harte told respondent that he could not make a diagnosis over the telephone but that the symptoms described were consistent with a condition called "swayback" which was due to a copper deficiency. He informed respondent further that the usual treatment was a half teaspoon of copper sulphate solution for each animal. Respondent then enquired whether copper sulphate was "die gewone blouvitrioel oplossing", thus indicating his familiarity with the usual solution in farming use, namely a 10% solution. Appellant went on to deny that Harte had recommended or prescribed the use of copper sulphate either in solution or otherwise. Consequently it was denied that Harte had in any way been negligent and respondent was put to the proof of his alleged damages.

The matter proceeded to trial before **JENNETT J.**

During the hearing the quantum of damages was agreed and the salient issues which remained for decision were:

(a) whether Harte had been negligent as alleged, and if

so,

(b) whether such negligence was causally linked to the death of the sheep.

On both questions the learned Judge held in respondent's favour and awarded him the agreed damages.

The trial Court's decision was upheld on appeal to the Full Bench by a majority save only that, because of an erroneous calculation of the damages by the parties at the trial, the sum awarded was increased by agreement.

Before this Court the issues were, once again, negligence and causation.

The negligence issue really comprises two questions -

(i) Did Harte advise the use of copper sulphate without specifying that it had to be administered as a 10%

solution?

(ii) If so, did that constitute negligence as alleged?

Counsel for appellant conceded, rightly in my view, that if this Court were to answer the first question in the affirmative then the second had also to be answered affirmatively.

The evidence concerning the first question is limited to that of respondent and Harte. Respondent's version was this. On the morning of 18 July, a Monday, his stockman, Abie Xhawe, drew his attention to the fact that all was particularly well on the farm concerned but for the persisting symptoms of what we now know was swayback among the affected flock. Respondent therefore decided to raise this problem with Harte when, as he was due to do, he telephoned to enquire when Harte proposed to complete certain pregnancy tests on respondent's cattle.

The telephone call was made between 6 p.m. and 8 p.m. that evening. Harte received it at his consulting rooms

where he was working late. Respondent described the symptoms and, recounting that Dr Fisher had suspected a magnesium deficiency and had advised the use of magnesium sulphate, reported that this treatment had not succeeded in curing the ailment. It was then that Harte said he thought the problem was due to a copper deficiency. Respondent asked what was to be done about it. In response, Harte recommended dosing each animal with half a teaspoon of copper sulphate. Respondent then enquired:

"Is dit die goed wat 'n mens blouvitrioel van maak?"

Harte's answer was that that was indeed so. Harte went on to add that copper sulphate could also be sprinkled in the sheep's drinking water but he did not indicate in what quantity. It emerged from respondent's evidence that he had always been aware, even before this telephone call, that a 10% copper sulphate solution was in common farming use. He said it was known among farmers as "blouvitrioel" and was used, for example, for footrot among cattle, for

washing out the eyes of sheep suffering from blindness and for eradicating frogs that blocked water pipes. However, copper sulphate as such he knew in one form only and that was the crystalline form. When it was put to him in cross-examination that Harte would testify to having referred to copper sulphate solution he denied this. Then it was put to him that, having been referred by Harte to a copper sulphate solution, he asked Harte -

"Is dit die gewone blouvitriool oplossing?"

which Harte then affirmed. That allegation respondent also denied.

The next morning, as a result of the telephone call, respondent bought the copper sulphate and the dosing proceeded that afternoon. Apart from showing Abie how much copper sulphate to put in a teaspoon, respondent also told him to put two handfuls of the crystals in the animals' water trough.

The news of the disastrous aftermath reached

respondent during the following morning, the Wednesday. He telephoned Harte to report the loss. The latter said he did not think copper sulphate could have been the cause of the deaths and suggested that respondent bring him some of the carcasses to examine. Respondent was on the point of leaving for Queenstown with two of his dead animals when his wife drew his attention to a passage in a veterinary handbook which they kept at home. The authors referred to a normal dose of copper sulphate as being a half teaspoonful of a 10% solution in water and went on to state that two tablespoonfuls could be toxic. Respondent immediately telephoned Harte again and after summarising this passage asked what, in the light of the author's warning, the impact would be of "'n halwe lepel konsentraat". According to respondent Harte's only answer was that he could not see that copper sulphate had killed the sheep. It is common cause that the two men had no dealing with each other after that.

Harte testified that the telephone call on Monday 18 July came towards the end of what had been a particularly long, busy day. After respondent had outlined the problem and the history, Harte said it was impossible to diagnose over the telephone but proffered the suggestion as to a copper deficiency. Respondent enquired what the normal treatment was. Harte replied that what was used on occasions was half a teaspoon of copper sulphate solution. Respondent then asked whether this was the usual "blouvitrioel oplossing" and Harte said it was. In these circumstances, and also because most experienced farmers would use that solution, Harte accepted that respondent clearly understood what had to be done if he was going to dose the sheep with copper sulphate. He emphasised, however, that what he said to respondent on the subject of his sheep constituted neither a diagnosis nor a prescribed course of treatment.

Concerning the third telephone conversation, Harte

said that respondent reported having read in the handbook that copper sulphate should be given in a liquid form. Harte said he agreed. Asked in cross-examination whether respondent had not gone on to ask what the consequence would be of administration of "die konsentraat", Harte said that respondent probably had. This prompted respondent's counsel to ask what Harte had understood by the word "konsentraat". He said "I should imagine a very concentrated solution". Pressed as to whether respondent's questions had not elicited questions from his side as to what respondent meant by concentrate or as to what solution had in fact been administered, Harte replied that he did not think he had asked anything to this effect. He offered the explanation that he was under stress of other work at the time.

Harte testified further that during the following week he became aware of a report in a local newspaper that respondent had lost a considerable number of sheep pursuant

to taking certain veterinary advice. That prompted Harte to apply his mind to what had passed between himself and respondent and this review of the relevant events, he said, reinforced his recollection, particularly of their first telephone conversation.

It remains to say, as far as the evidence relative to the negligence aspect is concerned, that it was accepted on all sides, and at all stages of this litigation, that Harte, as an experienced veterinarian, would never wittingly have advised or even suggested that the sheep be dosed with copper sulphate crystals.

Faced with the credibility dispute to which these conflicting versions give rise, the trial Judge considered that the rival witnesses had both made favourable impressions as honest people and that the present issue could only be resolved by reference to the inherent probabilities. In that regard he found that two features rendered respondent's version the more probable one. The

first was the fact that respondent employed crystals, not a solution. That conduct was consistent with his version and inconsistent with Harte's. The learned Judge found it inconceivable that respondent, who was not a stranger to the use of copper sulphate and "blouvitriciel" solution, would have had crystals administered if he had been told that what one used was a solution. The other feature was Harte's reaction to respondent's reference to the relevant contents of the handbook. Had he indeed mentioned a solution to respondent in the Monday evening conversation, it was to be expected that on the Wednesday he would have asked why respondent was quoting a source to him that said the same thing. Harte's evidence was found to be an honest but erroneous reconstruction and, because of the improbabilities referred to, it was rejected.

On appeal to this Court the essence of the argument by appellant's counsel on this issue was that the trial Judge had failed to consider two distinct possibilities.

One was that it was respondent who had reconstructed wrongly. The other was that respondent had been mistaken - he had either misheard Harte or misunderstood him.

I do not think that there is really any room for the conclusion that respondent reconstructed Harte's description of the remedy. His response to what Harte told him was as immediate as time permitted - he went to buy copper sulphate the very next morning and then arranged for its administration in crystal form.

In so far as possible reconstruction of what respondent said in answer to Harte is concerned, counsel contended that if respondent had truly asked "is dit die goed wat 'n mens blouvitrioel van maak?" it would have been plain to Harte that he had been misunderstood as having said that the relevant remedy was copper sulphate in crystalline form. Because Harte would never have described the remedy as anything other than a 10% copper sulphate solution, he would not have answered respondent's question

in the affirmative but would have corrected the latter's misapprehension forthwith. That being so, said counsel, respondent's version could not be correct. In my opinion, however, Harte would not inevitably, or even probably, have construed respondent's enquiry in this way. It is certainly a possible construction but it is no less possible that Harte understood respondent as merely checking that they had the same chemical in mind, namely, the one used to make the fluid which respondent called blue vitriol. Naturally, Harte could then have gone on to say that it was precisely blue vitriol that he was talking about, but it was equally relevant and appropriate simply to affirm as he was alleged to have done.

As far as a possible mistake on respondent's part is concerned the first difficulty in appellant's way is that the case was fought on the basis that one of the witnesses was right and the other wrong. The possibility of a mistake on respondent's part was never investigated or even

mooted. However unlikely it might seem that a party who has staked his success on a version, the strengths and weaknesses of which have been proved and tested in numerous consultations, and who has eventually reached the stage of cross-examination, will concede the chance of his having been mistaken, it nevertheless behoved appellant's legal representatives at the trial to launch the requisite investigation and challenge if it was proposed to argue in the end that mistake was a cognisable possibility. Had this been done respondent might very well have advanced convincing reasons why there was no realistic possibility of his having misheard or misunderstood what Harte said.

The second factor destructive of the present submission is that, as pointed out by the trial Judge, respondent was familiar with the use of a copper sulphate solution in the farming context. Had it been unknown to him he could, if Harte had indeed referred to a solution, possibly have missed the import of the word "solution" and

have focused solely on the words "copper sulphate". However, given the knowledge and experience he had, it is improbable that respondent did mishear the word "solution" or overlook its significance.

In the third place, although respondent had allowed months to pass since Fisher's opinion was obtained before seeking further advice, the fact remains that there was a persistent and distressing affliction among his sheep and it did cause him concern. He was the person with the problem and it is probable, not only that he sought advice from Harte, as opposed to a mere passing comment as Harte suggested, but, more importantly, that he had an interest and a reason to listen attentively. Harte, by contrast - and one is not without sympathy for him in the position in which he found himself - was working late and had not yet completed all the tasks with which a long, busy day had landed him. In these circumstances, if anyone was liable to concentrate inadequately on what passed between them it

was more likely to have been Harte than respondent.

As to the two probabilities which the trial Court found were supportive of respondent's version, appellant's counsel argued in regard to the first that respondent's resort to the administration of crystals instead of a solution showed no more than that it was his genuine belief that Harte had mentioned the use of crystals; it did not show that that is what Harte in fact said. It suffices to say that I agree fully with the reasoning of the learned Judge on this point. Apropos the second probability, counsel contended that Harte's omission to be more inquisitive when referred to the handbook, was simply attributable to his having been under pressure of work. However I agree with the trial Court's reasons for holding adversely to appellant on this score. Indeed, there is a double significance in Harte's reticence. The apparent discovery by respondent in the handbook that the appropriate remedy was a 10% solution would surely have

alerted Harte, had he recalled on the Wednesday what he said on the Monday, to the implication that respondent had not dosed the sheep with a solution after all. This implication was strengthened by respondent's mention of "konsentraat" (whether that meant crystals or a concentrated solution does not matter). Consequently, either Harte came to the stunning realisation during this conversation that he had failed on the Monday evening to be as specific as he ought to have been, or he simply had no recollection then of what he had said on the Monday. The second inference makes it likely that his purported positive recall when giving evidence was mere wishful reconstruction.

Finally on this issue, it seems to me that there are two further factors which detract from Harte's version. Firstly, it was common cause that the farming community in the relevant area used the term "blouvitrioel" to refer not to copper sulphate as such but to a 10% copper sulphate

solution. That being the case, Harte's assertion is clearly improbable that respondent would, on the Monday evening, tautologously have referred to "blouvitrioel oplossing". And of course, as already mentioned, respondent was most unlikely to have referred to a solution when he so clearly understood Harte to refer to crystals.

Secondly, Harte's protestation rings hollow that he did not intend to advise or prescribe and could not have been understood to do so. As I have said, it is probable that respondent wanted advice; his was not a mere casual enquiry. From Harte's point of view there was no doubt as to what chemical substance had to be used and provided it was applied in the right form there would have been no danger to respondent's stock even if their ailment was not in fact a copper deficiency.

For all these reasons appellant cannot succeed on the negligence issue.

On the matter of causation, appellant's counsel relied

on the evidence of a toxicologist, Dr A. Immelman, who was called to give expert evidence on behalf of appellant. The thrust of the argument was that Dr Immelman's evidence compelled the conclusion that even if one assumed that Harte had been negligent as found, Abie had administered grossly excessive quantities of copper sulphate to those sheep that had succumbed, and that their deaths were due to this cause and not to Harte's negligence.

Abie testified that he administered copper sulphate as instructed by respondent. It was agreed during the hearing the the quantity of copper sulphate alleged to have been given to each sheep by Abie was 3,5 grams. When the dosing was complete, so he said, he had used up one complete tin of copper sulphate and a small quantity of another. (Each tin contained one kilogram.) Abie's evidence was not attacked in cross-examination as being false or even as being of doubtful reliability. The trial Judge found that he had given satisfactory and credible

evidence.

Another witness for respondent was Dr C.D. Christie. As State Veterinarian at Queenstown at the relevant time, he conducted post-mortem examinations on four of the dead sheep. He took samples of content and tissue from their stomachs, livers and kidneys and sent the samples for analysis. The result of the analysis, the correctness of which was agreed by the parties, showed a substantial quantity of copper in the rumen content of one of the sheep. The rumen is the first of a sheep's four stomachs. Dr Immelman (whose experience and eminence as a veterinary toxicologist were beyond question) built a deduction on this particular rumen analysis with the aid of certain assumptions. His conclusion was that the animal in question had been given the equivalent of 12 level teaspoons of 6 heaped teaspoons of copper sulphate.

This is a bizarre result. It is abundantly clear from the evidence that copper sulphate crystals would have

caused considerable irritation in the sheep's mouths and that administering even one teaspoon would have required careful manipulation. It would not have been achieved without a material degree of difficulty. That any sheep was given as much as Dr Immelman deduced is inherently unlikely not only because of the physical difficulty just referred to but also because it is improbable that Abie would have given so much. He had his instructions and there is no reason why he would have ignored them. Moreover he said that he managed to give each animal the amount indicated to him by respondent despite some spillage. The veracity of his evidence was, as I have said, not assailed. It was only after Immelman's evidence, and at the close of the trial, that Abie was recalled at the suggestion of respondent's counsel so that appellant's trial counsel (he did not appear on appeal in this Court) could formally put it to him that he had given the sheep a dose greater than he had alleged. This he denied.

Considering the obvious implications adverse to Abie which arise from Dr Immelman's theory, this was simply no way in which to impugn Abie's credibility and so lay a foundation for the possible acceptance of Dr Immelman's deduction.

Apart from this consideration it was not disputed that the dosing exercise consumed less than one and a half tins of copper sulphate. However, even if Abie used as much as 1 500 grams this means that on average each of the 446 sheep would have received no more than 3,4 grams.

Finally, of all the assumptions made by Dr Immelman one of the most important concerned the weight of the rumen content. There was no evidence at all which could assist on this point. The assumption in question was based on pure speculation. This consideration is enough to eviscerate his deduction.

It follows that appellant cannot succeed on the causation issue either.

In the result, the appeal is dismissed, with costs.

HOWIE C T

JUDGE OF APPEAL

BOTHA JA]

] CONCUR

E M GROSSKOPF JA]