Analyzing the Effect of Causation in Covid-19 Business Interruption Insurance Claims:

A Black-Letter Law Analysis of Causation within Business Interruption Insurance Cases

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TABLE OF CONTENTS

Compulsory Declaration **3**

CHAPTER ONE **4**

Structure of the Paper **4**

Research Objectives 4

Research Question and Outline 5

Methodology 6

CHAPTER TWO **7**

Introduction **7**

Unprecedented Times 7

Business Interruption Insurance – A Forgotten Lifeline 10

Covid-19 – The Notifiable Disease 12

The Financial Sector Conduct Authority of South Africa 14

CHAPTER THREE **18**

The Law **18**

The Basic Principles of Causation 18

Factual and Legal Causation 19

The Novus Actus Interveniens 21

Causation in Insurance Law 25

The Proximate Cause 28

Act of God or Act of Government 30

CHAPTER FOUR **32**

The Court Challenges **32**

Café Chameleon v Guardrisk WCC 33

Guardrisk v Café Chameleon SCA 36

The UK Test Case – High Court 44

The UK Supreme Court 45

Comparative Analysis: SA vs UK 61

CHAPTER FIVE **63**

Discussion **63**

The Alternative Causation Argument 65

An Alternative Interpretation of the Disease Clause 72

Why an Alternative Interpretation to Causation? - The Apportionment of Compensation 77

An Administrative Law Argument 79

CHAPTER SIX **81**

The Way Forward **81**

BIBLIOGRAPHY **83**

Compulsory Declaration

Research dissertation presented for the approval of Senate in fulfilment of part of the requirements for the Master of Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a programme of courses.

I hereby declare that I have read and understood the regulations governing the submission of Master of Laws dissertations, including those relating to length and plagiarism, as contained in the rules of this University, and that this dissertation conforms to those regulations.

Signature: Signed by candidate *Date*: 13 December 2021

CHAPTER ONE

Structure of the Paper

Research Objectives

In this research paper I will conduct a black letter law analysis of the role causation plays in Business Interruption Insurance ("*BI Insurance*") cases in South Africa and the United Kingdom, directly as it relates to claims that have arisen due to the Covid-19 lockdowns. The paper will focus specifically on the Café Chameleon case in South Africa and the Financial Conduct Authority Test Case that occurred in the United Kingdom. I will analyze the way the courts reasoned through issues of causation in these cases and then posit an alternative interpretation and theory of causation to allow the reader to explore what the outcomes could easily have been had the court ruled in the opposite direction. My analysis will largely be objective and based on the case law, highlighting what has transpired thus far, but where appropriate, I will offer some critique. This paper ultimately seeks to consider an alternative interpretation to what seems to be a global consensus on this issue.

The benefit of this paper is that while insurance law is itself a vast area of law, the area of causation in insurance law is not as extensive as one would think.[1] The Covid-19 event and the government's response to it also opens a largely new area of jurisprudence in the area of causation. Due to the contemporary nature of the pandemic, the courts have found themselves on the backfoot in many respects, cautious of setting the wrong precedent.

[1] Clarke *Law of Insurance Contracts* par 25.2; see further: Reinecke MFB et al. *The Law of South Africa* Volume 12(1), 2nd ed, Causation, p. 317, 2012.

Research Question and Outline

Following the background to the Covid-19 pandemic and an explanation of the rise of BI Insurance claims in Chapter Two, Chapter Three goes straight into considering the question of what exactly causation entails, including what differentiates factual and legal causation from one another, and what role an intervening act plays in the causative chain. I will address these questions through a black letter law analysis, using both case law, opinions, and academic textbook sources. The point of this analysis is not to provide a comprehensive exposition of all the legalities surrounding causation, but rather to provide the reader with sufficient knowledge to understand the more crucial analysis of the case law. I will then briefly consider the question of the unique consideration of causation within insurance law, as opposed to criminal law or delict. Chapter Four considers the question of how South African courts, and also the UK Courts, have dealt with BI Insurance claims due to Covid-19 lockdowns. I will start with the South African case law and then move to the UK test case.

While the focus of this paper is specifically centered around causation, I will briefly discuss the interpretive issues the court faced in determining the correct interpretation of the policies in dispute. The reason for this, is that the correct or incorrect interpretation of the policy clauses in dispute had an effect on the question of causation.[2] This will be expounded on further during the section that deals with case analysis.

While it is unfortunate the local courts did not focus too much on the issue of causation, other than a brief discussion in the Western Cape High Court Café Chameleon case, the UK Supreme Court, on appeal, placed much more emphasis on the topic and provided much needed

[2] See *Concord Insurance Company Limited* and *Guardrisk* at note 51 below.

jurisprudence. Chapter Five will thus analyze the case law through a discussion. While all the court cases discussed herein came to the same conclusion concerning insurer liability, the paper will consider the reasoning of the SA and UK courts to determine where the courts' followed similar considerations.

I will also consider the commentary of two learned professors and discus some further insight for the readers consideration. In Chapter Six I will conclude with some thoughts on the way forward and attempt to answer the question of where the future of BI Insurance policies and claims may move in the future.

Methodology

The methodology used in this paper will be predominantly desktop research. I have used case law, from both South Africa and internationally; library materials from the Cape Bar Davis library; journal articles on the topic written by legal scholars; legal textbooks on causation and web-based services like LexisNexis and Jutastat. I will also briefly consider the policy documents which forms the basis of the BI Insurance claims and the non-binding commentary on these BI Insurance claims by the South African Financial Sector Authorities.

Overarchingly, as stated above, my methodology is a black letter law analysis of the law of causation and its principles, specifically through the lens of the case law. I will consider the UK test case and engage in a brief comparative analysis between South African Courts and the UK Supreme Court. Given the novelty of the response to this pandemic, much emphasis will be placed exploring the court's judgment, considering the reasoning behind its decision, along with any potential shortcomings.

CHAPTER TWO

Introduction

Unprecedented Times

On 11 March 2020 the World Health Organization declared Covid-19 a global pandemic.[3] This action triggered chain of reactions around the globe, throwing the world as we know it into unprecedented terrain. Given the novelty of the Covid-19 virus strain and its ease of transmissibility, world leaders scrambled to enforce mechanisms that would decrease the devastation of the virus on their nation.

For the first time in modern history, Italy imposed a full-scale hard lockdown with travel restrictions on 10 March 2020.[4] The last time any Western nation experienced such severe state controls was during World War II.[5] The application of Italy's lockdown applied to roughly 60 million people, imposing *inter alia* a 6pm curfew and the closure of all non-essential businesses; public facilities and a broad ban on social gatherings.[6] Being the first country to impose a lockdown to this degree, Italy's drastic response to the virus set a precedent for the unprecedented.

Within two weeks of Italy's lockdown, on March 23rd, South Africa's President, Cyril Ramaphosa, advised the nation that South Africa could be entering into a 21 day lockdown

[3] World Health Organization 'WHO Director-General's opening remarks at the media briefing on COVID-19 - 11 March 2020' available at *https://www.who.int/director-general/speeches/detail/who-director-general-s-opening-remarks-at-the-media-briefing-on-covid-19---11-march-2020,* accessed on 5 March 2021.
[4] Silvia Amaro 'No weddings or funerals: Here are the new coronavirus restrictions in Italy' available at *https://www.cnbc.com/2020/03/10/italy-in-national-lockdown-heres-what-it-means.html,* accessed on 5 March 2021.
[5] Reuters Staff 'TIMELINE-How the global coronavirus pandemic unfolded' available at *https://www.reuters.com/article/health-coronavirus-timeline-idUSL1N2GN04J,* accessed on 5 March 2021.
[6] *Id.*

starting on 26 March 2020.[7] This was later extended for a further 14 days.[8] The 'hard-lockdown' was later labelled 'lockdown level 5', distinguishable from the less severe lockdown regulations to come.

Under level 5, all citizens were to remain in their homes other than for the purposes of purchasing food, medical supplies, fulfilling an essential service or travelling to a hospital or doctor for emergency services.[9] As the levels decreased, so did their degree of restrictions.[10] The level 5 lockdown was later replaced with the level 4 lockdown on 29 April 2020 and South Africa, for the first time, moved to level 1 on 18 September 2020.

Despite the fact that lockdown levels decreased over time, certain industries bore the brunt of specific restrictions placed on their industry. This was specifically the case with alcohol and tobacco.[11] As businesses started reopening under level 4, 3, 2 and 1, specific bans were maintained on the sale of alcohol and tobacco.[12] The idea was that banning alcohol would lead to a decrease in trauma related cases needing to be tended to by hospitals, and the banning of tobacco would presumably decrease lung inflammation, leading to better protection of smokers from the virus.

[7]South African Government News Agency 'President Ramaphosa announces a nationwide lockdown' available at *https://www.sanews.gov.za/south-africa/president-ramaphosa-announces-nationwide-lockdown,* accessed 5 March 2021.
[8]Cyril Ramaphosa 'Extension of Coronavirus COVID-19 lockdown to the end of April' available at *https://www.gov.za/speeches/president-cyril-ramaphosa-extension-coronavirus-covid-19-lockdown-end-april-9-apr-2020-0000,* accessed on 5 March 2021.
[9] Government Gazette, Vol. 657, No. 43148, promulgated 25 March 2020.
[10] See 'Alert Level 4': GG No. 43258, GG date 29 Aril 202 (as amended); 'Alert Level 3': GG No. 43364, GG date 28 May 2020 (as amended); 'Alert Level 2': GG No. 43620, GG date 17 August 2020 (as amended); 'Alert Level 1': GG No. 43725, GG date 18 September 2020 (as amended).
[11] See Alert Level 4 above, see also: eNCA 'SA lockdown: Sale of cigarettes, alcohol still prohibited' available at *https://www.enca.com/news/sa-lockdown-sale-cigarettes-alcohol-still-prohibited,* accessed 5 March 2021.
[12] See note 8, Alert Level 3. See also: News24Wire 'Alcohol ban reinstated as SA moves to level 3 lockdown' available at *https://www.polity.org.za/article/alcohol-ban-reinstated-as-sa-moves-to-level-3-lockdown-2020-12-28*, accessed on 5 March 2021.

The specific bans were initially not only on alcohol and tobacco, but also on some arbitrary items such as cooked foods, a restriction that was abruptly withdrawn after much criticism.[13] Nevertheless, the continued bans on specific items had crippling economic effects that rippled through entire industries. As an example, with the ban on alcohol sales, it wasn't merely a loss of profits for blue-chip companies such as South African Breweries[14], but a rippling loss through the entire value chain. Farmers who provided raw materials to make alcoholic beverages were unable to sell their produce.[15] Without their sale and purchase, there was a decreased need for transport of these products, in which case transport companies suffered.[16] Glass manufacturers like Consol Glass suffered a decreased demand for their product, while simultaneously having to expend major resources to keep their services on stand-by.[17] The list of examples goes on.

While there are various opinions on the necessity of the imposition of the lockdown to 'slow the spread', there is no argument as to the economic devastation caused by the lockdowns. As one can imagine, shutting down businesses for five weeks straight caused a huge disturbance in sales and cash flow, leading to an increase in the accrual of debt and the inability to cover running costs. The devastation is still being felt today. To make matters worse, the continued

[13]Cebelihle Bhengu 'Cooked hot food ban- five burning questions government must answer' available at *https://www.timeslive.co.za/news/south-africa/2020-04-21-cooked-hot-food-ban-five-burning-questions-government-must-answer/,* accessed on 6 March 2021.
[14]Penelope Mashego 'South African Breweries lost almost 25% of its revenue to second alcohol ban' available at *https://www.news24.com/fin24/companies/south-african-breweries-lost-almost-25-of-its-revenue-to-second-alcohol-ban-20201029,* accessed on 6 March 2021.
[15] Given Majola '87% small growers in SA haven't recovered from hard lockdown' available at *https://www.iol.co.za/business-report/companies/87-small-growers-in-sa-havent-recovered-from-hard-lockdown-8e5ff2ba-ddb0-4f25-ab86-9c4f63909b13,* accessed on 6 March 2021.
[16] Njabulo Ngcobo 'The transport and logistics sector has taken a beating during the lockdown' available at *https://www.businesslive.co.za/bd/opinion/2020-11-05-the-transport-and-logistics-sector-has-taken-a-beating-during-the-lockdown/,* accessed on 6 March 2021.
[17] Reuters 'SA's glass packagers face R1.5bn hit from alcohol ban — Consol' available at *https://www.timeslive.co.za/news/south-africa/2021-01-19-sas-glass-packagers-face-r15bn-hit-from-alcohol-ban-consol/,* accessed on 6 March 2021.

ban on certain industries led to further damage, some industries experiencing a shocking survival rate.

Struggling to survive, some fortunate businesses had one last lifeline left: business interruption insurance.

Business Interruption Insurance – A Forgotten Lifeline

BI Insurance is an insurance product designed to protect businesses from losses suffered as a result of external forces which cause a disturbance to the business, leading to a loss of productivity and ultimately, income. These interruptions or interferences include, but are not limited to, a murder or suicide at the business premises; armed robbery; food or drink poisoning; shark attack and specific to this paper, a *notifiable disease* occurring within a certain radius of the business premises.[18]

BI Insurance is not one of the more obvious insurance products taken out, like household or vehicle insurance. It's more akin to the extra five Rand added to a credit card contract that covers the debtor in circumstances where he loses his job and is unable to make repayments. It would seem, anecdotally, that due to the uncommon nature of BI insurance claims, specifically for a notifiable disease, many insurance companies opted for a basic and often recycled definition of what constitutes a 'notifiable disease' and under what circumstances a claim would be honoured. This is evident through the case law where the Notifiable Disease clauses in dispute, though coming from different insurers and various policy documents, all consist of more or less the same wording.

[18] See Disease Clause at Note 20 below.

Under the 'Infectious Disease' clause, a very specific limitation is placed on the disease event, which is further qualified and explained by a special provision. While I will only quote the disease clause at issue in the *Grassy Knoll v Guardrisk Insurance*[19] case, the other BI Insurance cases dealt with an almost carbon copy infectious disease clause, arguably stemming from a common legal insurance precedent. This disease clause states[20] *inter alia*:

> ***"'Infectious Diseases/Pollution/Shark Attack/Additional Interruption Extension***
>
> *Loss as insured by this Section resulting in interruption or interference with the Business due to:*
>
> *.....*
>
> *(e) notifiable Disease occurring within a radius of 50 kilometres of the Premises*
>
> *……*
>
> ***Special Provisions***
>
> *(a) Notifiable Disease shall mean illness sustained by any person resulting from any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them, but excluding Human Immune Virus (H.I.V), Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.'"*

[19] *Grassy Knoll Trading 78 CC t/a Fat Cactus and Another v Guardrisk Insurance Company Limited* (10035/2020) [2020] ZAWCHC 168; [2021] 1 All SA 503 (WCC) (20 November 2020).
[20] Ibid para [28].

Unlike many of the other interruption qualifiers in this section, which provide for a pay-out in the event of an armed robbery; suicide; food poisoning or pollution, one of the qualifiers that is present in this specific disease clause is that it requires government notification. The clause makes reference to a 'notifiable' disease, one which a competent local authority has officially noted and requires said authorities notification in terms of law[21]. Thus a claim could not be lodged for ill staff who have contracted the common cold of flu. The qualifier that the government must take notice of the disease presumably adds emphasis to the degree of seriousness required and hints that the disease thought of in this clause would be a potential epidemic or pandemic.

Covid-19 – The Notifiable Disease

Much to the dismay of business interruption insurers across South Africa and the world, Covid-19 entered the world and, unlike many diseases before it, such as 'bird flu' (H5N1) or 'swine flu'[22], due its ease of transmissibility and infection, it caught the attention of all governments.

While the Covid-19 pandemic is undoubtedly an unprecedented event, and a novel Coronavirus, Coronaviruses have themselves been prevalent in society and studied in labs for many years. It may be argued in science that this specific strain was much more transmissible and devastating than other strains that have infected societies, however that is not an argument I shall explore. What one can say for certain is that the *way* the virus outbreak was handled was unprecedented. As discussed earlier, the idea of locking down entire countries and

[21] Health Act No. 63 of 1977.
[22] Reuters Staff 'Partly false: Series of viral outbreaks between 1957 and 2019 all originated in China' available at *https://www.reuters.com/article/uk-factcheck-viral-outbreaks-china-idUSKBN22V2ZB,* accessed 9 March 2021.

implementing marshal law is no simple decision. Only time will tell whether the correct decisions were made.

Covid-19, or at least the response to it, turned the insurance world on its head. An insurance clause that was once considered irrelevant was now the focus of major claims across the world. An interesting question that arises from the disease clause is whether the 'notifiable' qualifier actually worked against insurers in the end. I would submit it did. Had there not been a 'notifiable' qualification by the government, insurance companies would have merely been liable for the loss of productivity of ill staff or other smaller interruptions. If the government had noted the disease and ordered the lockdown, insurers could validly argue that they cannot be held liable for the actions of the government. However, once insurers involved the government in their policies, they inadvertently bound themselves to the consequences of any reasonable actions the government took (as the courts will indicate). In doing so, the South African courts have in effect held insurers liable for the lockdown losses caused by government action, as will be discussed in the case law later in this paper.

During the lockdown, certain businesses that had suffered losses due to the lockdown submitted claims to their insurance provider for payment. However, most, if not all of these claims, were met with a rejection as the various insurers' argued *inter alia* that the lockdown and ensuing losses were not caused by a notifiable disease as specifically detailed in the insurance policy. The insurer's sought to await legal certainty from the courts before making any payments. From this dispute arose various High Court applications, all centred around the interpretation of the 'disease clause', in which more or less the same policy wording was used across the industry.

In all cases, as is well known at this stage, the Courts' found in favour of the insured, ruling that the disease clause covered the losses suffered by restrictions of the government in response to the Covid-19 pandemic. The *Café Chameleon* case that will be discussed below was one of the earlier cases to appear in the Western Cape High Court and its judgments in the WCC and SCA provide the reader great insight into the issues at hand. In some way, this was South Africa's test case.

One specific legal point in issue, common to all these cases, which is the focal point of this dissertation, is the question of how the chain of causation plays a role in the presence of the Covid-19 virus and the government's actions. Specifically in Café Chameleon case, the insured and the insurer argued the point of whether there was a close enough link between the virus entering the country and the losses suffered by the insured. While there were various legal points taken in litigation, the more obvious question, even to the lay person, is whether the insurers' could be held liable for the actions of the government. This is the crux of the causation question.

The Financial Sector Conduct Authority of South Africa

"*The Financial Sector Conduct Authority of South Africa (FSCA) is the market conduct regulator of financial institutions, that provide financial products and financial services, financial institutions that are licensed in terms of a financial sector law, including banks, insurers, retirement funds and administrators, and market infrastructures. The FSCA is responsible for market conduct regulation and supervision. The FSCA aims to enhance and support the efficiency and integrity of financial markets and to protect financial customers by promoting their fair treatment by financial institutions, as well as providing financial*

customers with financial education. The FSCA will further assist in maintaining financial stability."[23]

The FSCA has, since the start of the initiating of BI insurance claims, stepped in to provide guidance to insurers and the insured as to how to go about lodging and processing claims. Through a system of regular press releases, the FSCA has been able to assist parties on how to proceed with lodging of claims; disputes; evidential requirements etc. It must be noted though that while this guidance may be useful, it is merely a recommendation, and not binding on the insurers or the insured. One will however be able to see from the discussion below that the FSCA's views aligned well with the court judgments on the issue.

Following earlier communications which made a distinction between BI insurance claims with and without the extensions for infectious disease outbreaks, the FSCA noted that there had been an influx of queries by stakeholders in relation to[24]:

1. The various policy wording clauses that exist in the industry;
2. The application of the different policy wordings by the insurers underwriting this type of cover;
3. The requirements placed on policyholders to prove a valid claim; and
4. The repudiation of these claims.

Following this, the FSCA requested policy documents from various insurers to understand how different insurers worded and interpreted BI insurance clauses; to compare policy wording to

[23] Financial Sector Conduct Authority 'About Us' available *at https://www.fsca.co.za/Pages/Vision-and-Mission.aspx*, accessed 18 September 2021.
[24] Financial Sector Conduct Authority Communication 34 of 2020 (18 June 2020).

proposed endorsements to the policy wording and to understand why certain endorsements were put forward. It is interesting to note that the FSCA also received a bevy of complaints relating to delays in processing BI Insurance claims as well as objections to repudiated claims. It is presumably for this specific reason that the eye of FSCA was caught.[25]

From considering the policy documents, the FSCA found that there were six distinct caveats to the BI Insurance clauses among the various insurers; some insurers having more than one clause that applies to different types of policies and depending on the insurer and the wording of the policy, the various policies place different standard of proof requirements on claimants. Of the six categories, the findings of the FSCA around 'notifiable disease' is interesting to note. In the South African context, as found by the FSCA, most insurers had a similar disease clause. A notifiable disease under the disease clause is defined as:

> *(a) Notifiable Disease shall mean illness sustained by any person resulting from any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated shall be notified to them, but excluding Human Immune Virus (H.I.V), Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.'*

The FSCA concludes with a variety of recommendations, one being that while it acknowledges that BI Insurance claims can be complex, insurers with claims under *inter alia* the notifiable disease category, should not delay in paying claims when the relevant documentation has been received.

[25] Ibid.

In a later press release[26] the FSCA and the Prudential Authority (Authorities) agreed on a method to move forward to minimize losses for those claims that have been submitted, but remain unpaid while insurers seek clarity on various issues regarding this claims from the courts. The agreed recommendation was for interim payments to be made to those businesses specifically hit hardest by the lockdown, with an option for reimbursement should the courts favour the interpretation of the insurers. The FSCA was trying everything it could at that point to decrease the harm suffered by insured companies while respecting the objections of insurers.

On 11 February 2021 the FSCA notified readers[27] on the legal certainty now present in the courts with various decisions having been delivered. The FSCA was pleased that insurers had attained the legal certainty they were looking for and were continuing to process BI Insurance claims. It is clear that while there may be some appeals in the pipeline, the law is largely settled. It is unlikely, at least in South Africa, that the Constitutional Court would overturn the SCA decision of *Café Chameleon* in favour of Guardrisk.

I move next to consider the law.

[26] FSCA's latest stance on Business Interruption insurance cover 24 July 2020.
[27] The FSCA's current position on Contingent Business Interruption Insurance (11 February 2021).

CHAPTER THREE

The Law

The Basic Principles of Causation

Causation is a legal principle with its genesis dating back hundreds of years ago, with most of its development occurring under Roman and Roman-Dutch law.[28] The general concept, more regularly considered in the law of delict and criminal law, is that for there to exist liability, there must be a causal nexus between the actions or omissions of the defendant and the harm suffered by the plaintiff.[29] This elementary version of causation was in no way comprehensive or complete, and lacked many of the further requirements present in the current law of delict.[30] Essentially, the actions of the defendant must amount to a *causa sine qua non*, which is a question of law, not fact[31], and which is a subjective enquiry, not an objective one.

Simplistically, the question of causation is the question of *cause and effect*. Did A cause B factually? Can A be held liable legally for B? These two seemingly simple questions are at the core of causation, however as will be seen below, the investigation becomes a lot more complex.

When considering causation, it is helpful to imagine a chain with many links. The first link is the cause, the last is the effect. Depending on the amount of variables and complexity of the issues playing a role in the consideration, the chain could have only two links, or twenty. What is important for the consideration of causation is that those links remain *intact*.

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[28] Voet *Commentarius* 9 2 16, 9 2 19; see further: Reinecke MFB et al. *The Law of South Africa*, "*Causation - General*", Vol 15, 3rd ed, 174, 2016.
[29] Ibid.
[30] Ibid.
[31] *Fairchild v Glenhaven Funeral Services Ltd* 2002 3 WLR 89; 2002 3 All ER 305 (HL) pars 21, 52, 54 &|150.

Factual and Legal Causation

The element of causation contains two predominant yet equally important considerations: (i) whether the defendant's actions or omission caused, or materially contributed to, the harm giving rise to the claim. This is known as *factual causation*. If the enquiry on the facts leads to the conclusion that the defendant's acts or omission did not cause, or materially contribute to the harm, then no legal liability can arise. If however factual causation is established, the second leg of the test triggers, that being (ii) determining whether the act or omission is directly, or sufficiently close to the harm, for legal liability to ensue. This is referred to as *legal causation*.[32]

The reason for the second leg of the test, legal causation, is that it is difficult to distinctly identify the proximate cause of the factual cause in situations where there are no parameters. Further, a bevy of immaterial variables could be at play. Factual acts or omissions that lead the parties to the present dispute can, in theory, be argued to have begun even years into the past.[33] Thus factual causation is not sufficient to argue the case for the establishment of a legal relationship of cause and effect. To establish factual causation within a reasonable framework thus requires a second aspect that considers the quality of the factual link and which reasonably limits liability, being a cause in law. Whether an act or omission can be determined to be the cause depends on the conclusion "*drawn from available facts or evidence and relevant probabilities*."[34]

Consider the following example for a better understanding of causation: X punches Y and Y falls to the ground, knocking his head on a pavement, rendering him unconscious. Y needs

[32] *Minister of Police v Skosana* 1977 (1) SA 31 (A) at 34 E-G.
[33] J Neethling, JM Potgieter "*Law of Delict*" 7th Ed, 2014, at 183.
[34] *Lee v Minister For Correctional Services* 2013 (2) SA 144 (CC) at 39.

medical treatment and a nearby witness calls an ambulance. Y later dies in hospital. It is later revealed through an autopsy that Y knocked his head on the ground with sufficient force to cause irreparable brain haemorrhaging, leading to his death. The question to be considered is whether X can be held liable for Y's death.

Considerations ought to be done in the order of factual causation first, and then legal causation. Thus looking first to factual causation, one may apply what is known as the "*but for*" test which asks: but for the conduct of the defendant/accused, would the ensuing result have occurred? In this scenario, but for X punching Y, would Y have knocked his head causing the brain haemorrhaging? The answer is of course, no.

It should be noted that in considering the answer to this question, a linear cause and effect consideration is undertaken, as stated above, in order to consider the facts within specific parameters. One must look only at the actions of X and his effects on Y. These are the parameters in which one must draw a conclusion from the available facts or evidence and relevant probabilities. It would be a fruitless exercise to argue that Y could still have ended up with a brain haemorrhage had he tripped and fell and knocked his head against a pavement, or got knocked over by a car, or any other random event not attributable to X. That would not lead anywhere as the parameters limit the scope of the investigation to the interactions between X and Y. There are of course an infinite number of possibilities if no parameters are present.

Once liability under factual causation has accrued to X, the next inquiry is whether X can be held *legally responsible* for Y's death. Here one must determine whether X's punching of Y is directly or sufficiently close to the death suffered by Y. Of course at this time evidence would be led and arguments made, however it should suffice at this juncture to say that X's punch

was directly, or at least sufficiently close, to Y's suffering of a brain haemorrhage. Thus X would be held criminally liable for the death of Y.

It should be noted that the *condictio sine qua non* theory seems to be accepted[35] by most writers[36] on the topic as well as the Supreme Court of Appeal.[37] However, the SCA has also determined that the *condictio sine qua non* is not the only theory of factual causation.[38] The *condictio sine qua non* is however considered to be the simple and intelligible way of determining factual causation.[39] What will be shown however through the case law and discussion to follow, is that that is not always the case. Quite often the results of following a strict application of the *condictio sine qua non* can lead to a 'clumsy, indirect process of thought that results in circular logic'.[40]

The Novus Actus Interveniens

The question of causation can become slightly more murky when considering intervening acts that break the chain of causation. An intervening act in this context is known as a *novus actus interveniens,* Latin for 'new intervening act'.

An intervening cause is an independent, unconnected and unrelated factor or event, that is unforeseeable, and which actively contributes to the harm suffered by the plaintiff after the

[35] *Law of Delict* op cit note 33 at 185.
[36] Boberg *Delict* 380 ff; Van der Merwe and Olivier 197 ff; Van der Walt and Midgley *Delict* 198 ff; Van Oosten 1982 *De Jure* 4 239, 1983 *De Jure* 36.
[37] *Minister of Police v Skosana* 1977 1 SA 31 (A); *S v Daniels* 1983 3 SA 275 (A); *S v Van As* 1967 4 SA 594 (A).
[38] *Skosana* supra note 37.
[39] *Law of Delict* op cit note 33 at 185.
[40] Van Rensburg Juridiese Kousaliteit 28-30; see further Van der Walt and Midgley *Delict* 199 fn 8; Loubser and Midgley (eds) *Delict* 77. See also: *Law of Delict* op cit note 33 at 187.

defendant's harmful conduct has already occurred.[41] However, if a reasonable person could have foreseen the intervening cause, then such event will not be considered as *novus actus interveniens*.[42] Similarly, if the intervening act was in some way caused by the defendant, or is naturally incidental to his initial conduct, then such an act cannot be considered a *novus actus interveniens.*[43]

As one can see, the depth to which this enquiry goes is quite extensive. First one must consider the legal causation test; then if necessary, consider an intervening act and its applicability; and if again relevant, apply the reasonable persons test to the element of foreseeability.

Looking to a revised example of X and Y above: the paramedics place Y in the back of their ambulance as they leave for the hospital. On their way to the hospital, before the nature of Y's injuries are established, the ambulance is in a vehicle collision with an oncoming vehicle. Y is killed in the accident. The question is now whether X can be held liable for Y's death.

While X is still factually responsible for Y's death, he is presumably not legally liable due to the *novus actus interveniens.* The ambulance collision was not in any way caused by X, however an argument can be made that it was incidental to X's assault on Y. It wasn't completely unrelated to the assault but was reasonably unforeseeable. Who could have known a crash would occur? Under these circumstances, argument could be made either way whether X is legally liable for Y's death or not. While argument could be made as to the incidental

[41] *Tuck v Commissioner for Inland Revenue* 1988 2 All SA 453 (A); 1988 3 SA 819 (A) 833; *Joffe & Co Ltd v Hoskins*; *Joffe & Co Ltd v Bonamour* 1941 AD 431 455–456; *OK Bazaars* (*1929*) *Ltd v Standard Bank of SA Ltd* 2002 JOL 9460 (A); 2002 3 SA 688 (SCA) par 33; *Fischbach v Pretoria City Council* 1969 1 All SA 221 (T); 1969 2 SA 693 (T) 699–700; *Ebrahim v Minister of Law & Order* 1993 4 All SA 161 (T); 1993 2 SA 559 (T) 566; *Vigario v Afrox Ltd* 1996 3 SA 450 (W) 464–465. See further: Reinecke MFB et al. *The Law of South Africa*, "*Causation – Legal Causation*", Vol 15, 3rd ed, 184, 2016.
[42] *The Law of South Africa* Ibid.
[43] *The Law of South Africa* Ibid.

nature of X's action, that had X not struck Y, he would not be in an ambulance to begin with, it would have value for factual causation arguments, but without evidence to support that Y was indeed going to die from a single punch, legal liability for death would be tricky to place on X. X would ordinarily be found guilty of assault if not found guilty of murder.

Issues around causation have come up many times before, especially in criminal law, where an accused seeks to escape liability on the basis that the defendant was already on their way to suffering a certain fate they were accused of bringing about. In *S v Hartmann*[44] the court dealt with the common crime of 'mercy killing'. Hartmann, a medical practitioner, requested that a nurse tending to his father who had a deadly cancer, administer a large and fatal dose of morphine to his father who had been suffering with severe pain. Within seconds, Hartmann's father died. The question of causation was considered on sentencing as the cancer patient would presumably have died anyway, with or without the morphine. However Mr Hartmann was nevertheless found guilty and sentenced to a year in prison coupled with a suspended sentence. On the topic of causation, Van Winsen J had this to say:

> "It is true that the deceased was in a dying condition when this dose of pentothal was administered and that there is evidence that he may very well have died as little as a few hours later. But the law is clear that it nonetheless constitutes the crime of murder even if all that an accused has done is to hasten the death of a human being who was due to die in any event. See *R. v. Makali*, 1950 (1) S.A. 340 (N). Here the State has proved that but for the accused's action the deceased would not have died when he did. That such action, if wilfully undertaken, constitutes murder is also the law of England, as appears from a number of decisions in the English Court, cited by Hart and Honoré in their work Causation in the Law at pp. 307-8."[45]

[44] *S v Hartmann* [1975] 3 ALL SA 87 (C).
[45] Ibid.

Under English law, there exists an interesting maxim to consider circumstances where a defendant causes harm to a plaintiff now, however the plaintiff only suffers a specific harm in the future. The determination of a *novus actus interveniens* would of course be fully explored at this juncture. For example, if A stabbed B, but B received medical treatment and remained in a stable condition, but died a year later through a disease that entered through the open wound, would A be guilty of B's death? What if B was instructed to clean the wound regularly by his doctors, but failed to do so?

In English law, the 'irrebuttable presumption of death within a year and a day' maxim has been in existence since it was introduced by Lord Justice Coke.[46] In the case of *The King v Dyson*[47], Lord Alverstone, CJ states[48]:

> "That was clearly not a proper direction, for, whatever one may think of the merits of such a rule of law, it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause."

This may put to bed the issue of a *novus actus interveniens* with the qualifier of a late suffering in some cases in English courts, however in most cases, especially in South Africa, the investigation of an intervening cause can be quite complex.

[46] *The King v Dyson* (1908) 2 K. B. 454
[47] Ibid.
[48] Ibid at p. 456.

Not much further examination of these principles will be undertaken as what has been explained above will suffice in assisting the reader to understand the case analysis later in this paper.

Causation in Insurance Law

While causation operates in a similar way in delict and criminal law, when it comes to insurance law, there is a distinct difference. Especially when dealing within the confines of a contract, as one is here, the economic harm suffered corresponds to the Continental *lucrum cessans* (loss of profit).[49]

The following commentary from LAWSA[50] provides some useful insight:

> "The test for determining the existence of this causal link depends on the intention of the parties to the insurance contract and is therefore a matter of interpretation of the contract. Thus, it has been observed that "in criminal law and the law of delict legal policy may provide an answer but in a contractual context, where policy considerations usually do not enter the enquiry, effect must be given to the parties' own perception of causality lest a result be imposed upon them which they did not intend". In the insurance context, otherwise than in a non-contractual context, the insurance contract itself identifies the potentially relevant causes or perils, either

[49] Hart H.L.A. and Honore T "*Causation in the Law*", 2nd Ed., Oxford Press, Hong Kong, 1994, at 311.
[50] See Reinecke MFB et al. *The Law of South Africa* note 1 at 317. See further: *Law Union & Rock Insurance Co Ltd v De Wet* 1918 AD 663; *Agiakatsikas v Rotterdam Insurance Co Ltd* 1959 1 All SA 159 (C); 1959 4 SA 726 (C); *Wells v Shield Insurance Co Ltd* 1965 3 All SA 132 (C); 1965 2 SA 865 (C); *Kemp v Santam Insurance Co Ltd* 1975 2 All SA 528 (C); 1975 2 SA 329 (C); *Rabinowitz v Ned-Equity Insurance Co Ltd* 1980 3 All SA 360 (W); 1980 1 SA 403 (W); *Concord Insurance Co Ltd v Oelofsen* 1992 2 All SA 448 (A); 1992 4 SA 669 (A) 673–674; *Cargo Africa CC v Gilbeys Distillers & Vintners* 1996 2 SA 324 (C) 330E; Clarke *Law of Insurance Contracts* par 25.2; Schlemmer 1997 *TSAR* 531.

> by insuring against them or excluding them from cover. Courts seldom concern themselves with causes other than those so highlighted and made relevant by the parties in their contract.
>
> Only if no other intention appears from the contract, may it be assumed that the reference to causation, whether explicit or implicit, was intended *prima facie* to bear the meaning that is attached to the notion of causation in other areas of the law. In this regard it has been observed that "[d]espite the differences between various branches of the law, the basic problem of causation is the same throughout", and that "the general approach to questions of causation . . . based as it is on principle and logic, is equally applicable to insurance law"."

One can see from the commentary above that one clear distinction between delict and criminal law as opposed to insurance law, is that the question of causation does not stand alone. In delict and criminal law the investigation of causation is much more objectively applied. Considerations of factual and legal causation are applied to the facts without much investigation of what the defendant had in mind. However in insurance law, considerations must be considered within the bounds of the contractual relationship, taking into account the intention of the parties.

The contract of insurance is what governs the relationship between the insurer and the insured. Thus, when considering what the word "*cause*", or any other related term means in the context of an insurance contract, the intention of the parties to the contract ought to be considered. The question is thus not purely whether a cause is necessarily a *sine qua non* of a given effect, but rather whether the parties to the contract of insurance intended for such an interpretation to be given to the word "*cause*".[51]

[51] *Concord Insurance Company Limited v Oelofsen NO* 1992 (4) SA 669 (AD) at 451. See further: *Guardrisk Insurance Co Ltd v Café Chameleon CC* 2021 (2) SA 323 (SCA) at [24].

With that, it has further been decided in South African case law that it is the duty of the insurer to make clear what risks it wishes to exclude. When looking at an objective contract of insurance, it can be difficult to deduce the parties intentions. It is thus the responsibility of the insurer make that clear from the outset in the contract of insurance.[52]

An insurance contract, as a contract of indemnity, must be interpreted fair and reasonably. It will be seen later in this paper in the consideration of the case law that this is presumably the rationale the courts' had in considering the BI Insurance claims. But it also for the reason that insurers are the possessors and drafters of the contract, that the insurance contract will be construed against them.[53] This is again seen with the cases discussed below. Insurers have carte blanche to develop an insurance contract that fits their form of policy. It is thus up to them to minimize ambiguity or error and clearly defined where both parties stand.

As it relates to the intention of the parties to the insurance contract, it must be further considered, within reason, what degree of possibilities they envisioned when entering into the agreement. As stated in the introduction, the Covid-19 pandemic was an unprecedented event. Could the 'unprecedented' reasonably be in the minds of contractual parties when entering into an insurance agreement? Further, and more importantly, when it comes to the *force majeure* events, what were the reasonable limitations on the scope of such an event? Does the response to the *force majeure* event fall under the event itself? Was that the intention of the parties? These are all questions to consider when considering the topic of causation in insurance law.

[52] *French Hairdressing Saloons Ltd v National Employers Mutual General Insurance Association Ltd* 1931 AD 60 at 65.
[53] *Norwich Union Fire Insurance Society Ltd v South African Toilet Requisite Co., Ltd* 1924 AD 212 at 222.

Under insurance law, causation specifically falls under the umbrella of 'risk' in that the insurer's duty to perform is dependent on an uncertain future event. Like other areas of law, insurance law considers factual and legal causation, however, the causative investigation tends to go much deeper, not just to finding *a* cause, but *the proximate cause*.

The Proximate Cause

'Proximate cause' is defined by the Merriam Webster dictionary to be: "*a cause that directly or with no intervening agency produces an effect*".[54] Following the development of English law, the test for proximate cause, giving rise to insurer liability, has been expressed in the rule *in iure non remota causa sed proxima spectator,* which means, 'in law, the near cause is looked to, not the remote one'.[55]

A cause will be considered 'proximate' if it is "*dominant*", "*direct*", "*real*", "*actual*", "*effective*", "*determining*", "*operative*", "*predominant*" or "*efficient*".[56] The proximate cause need not be immediate in time to satisfy as the proximate cause, but must be immediate in cause[57], whether one single cause or a co-operation of several successive causes.[58]

The law will however not entertain a subtle analysis on the proximate cause, nor will it investigate too far into the past, only so far as is necessary.[59] The immediate and proximate

[54] See: *Financial Conduct Authority v Arch Insurance (UK) Ltd and* others [2021] UKSC 1 at para 164:

> "The term originates from Sir Francis Bacon's Maxims of the Law (1596). His first maxim (Regula I) was "*In jure non remota causa sed proxima spectatur*", which may be translated as "In law, it is not the remote cause but the near cause that is looked to"."

[55] *Fairchild* supra note 31 p. 318.
[56] *Fairchild* supra note 31 p. 318..
[57] See: *Financial Conduct Authority v Arch Insurance (UK) Ltd and others* [2020] EWHC 2448 (Comm) at para 524.
[58] Ibid.
[59] Ivamy E.R. "*General Principles of Insurance Law*", 6th Ed, Butterworths, London, 1993 at 406-407.

cause is what is important, and once the proximate cause is established, all causes prior to that would generally be rejected as too remote to be of relevance.[60]

Where there are multiple causes occurring in succession which collectively are attributed responsibility for a loss, or may be, the doctrine of proximate cause must be applied to the facts to determine which of the successive causes is the cause to which the loss is attributable within a policy.[61] What is interesting to note is that the in *Café Chameleon* case, in both the High Court and SCA, this endeavour was not undertaken, rather the successive effects were considered a composite peril, in effect both causes being the proximate cause. What is interesting to consider is whether the composite, in an alternative interpretation, could be broken up into two concurrent causes that would, in delict, have rendered both the virus and the government joint wrongdoers.[62]

In insurance claims, the question of liability is determined more by a focus on the proximate cause of the event, instead of the fact that the event itself occurred. This is of course considered for the sake of determining insurer liability. As such, a distinct investigation is embarked on, whereby instead of seeking to merely determine whether A caused B's suffering, one must determine whether A caused B's suffering, and the suffering fits the description of the insured peril/s.

Take for example a fire damage insurance policy, which states that a house and its contents are covered to the value of R5 million for fire damage, unless that damage was caused by an act of God (*force majeure*). One night a lightning storm occurs and a bolt of lightning strikes a nearby

[60] Ibid.
[61] Ibid at p. 408-409.
[62] Potgieter JM, Steynberg L and Floyd TB "*Visser and Potgieter Law of Damages*" 3rd Ed, 2012 at 97-98; fn 203.

electric powerline, which subsequently splits, swinging one end into the insured house, further setting it ablaze. The question becomes: what is the proximate cause of the fire? The lightning, or the powerline? I would argue that the lightning is the proximate cause, and thus the insured would not have a claim, however things get a lot trickier when one narrows down on the circumstances.

Act of God or Act of Government

Much like the example above, the Coronavirus was considered to be a *force majeure* event by local courts[63]. However, what makes this entire experience so interesting, at least in light of the litigation between insurers and the insured, is considering arguments from both sides as to whether the government's actions fall within the definition of the insured peril.[64]

On one side of the argument, 'God' is responsible for allowing a microscopic organism to spread through the earth, infecting and killing thousands of people. However, as an act of God, it is covered by the insurance policy. On the other side of the argument, while God may have allowed the virus to spread, the Government chose to enforce lockdowns as a means of curbing the spread, where many well-reasoned arguments were made to support less extreme measures.[65] So to whom do we attribute blame for the insured's losses? Was the Government acting under duress? It is submitted that these questions are worth pursuing.

The conclusion to this question is the central issue facing courts today that are considering BI Insurance claims. While, as will be discussed later, the courts have decided to focus on a

[63] See case law at note 66.
[64] Ibid.
[65] Jay Bhattacharya, Sunetra Gupta and Martin Kulldorff 'The Great Barrington Declaration' available at *https://gbdeclaration.org,* accessed 2 April 2021.

composite cause, being the Coronavirus coupled with government responses, it begs the question where the line should be drawn on government actions. At what point does the government's decrees become a *novus actus interveniens*? If the South African government had decided to extend the Level 5 lockdown for 6 months, would insurers still be left with the bill? What about the reasonableness of the lockdown regulations – should the insurer accept the government's unreasonableness, if evident, and still pay for it? These are all serious questions that need to be considered, and mentioned herein for the sake of inspiring thought, however it is not for this paper to discuss exhaustively.

The problem with these questions, as will be discussed further later in Chapter Five, is that they were not considered by the courts in SA, nor was it appropriate to do so. Given the doctrine of the separation of powers, the courts were called on to largely determine whether the government's lockdown regulations were *legal*, not *reasonable*.

CHAPTER FOUR

The Court Challenges

Various challenges[66] were launched against insurance companies in the middle of 2020, challenging repudiated claims by insurers who refused to cover losses sustained due to the lockdown. These challenges were interestingly all launched in the Western Cape High Court, situated in Cape Town.

The first urgent matter launched was that of *Café Chameleon v Guardrisk*.[67] This matter was then appealed to the Supreme Court of Appeal ("*SCA*") in November 2020.[68] Before the appeal was decided, both *Ma-Afrika Hotels*[69] and *Interfax*[70] were decided by the Western Cape High Court ("*WCC*"). In coming to its decision on 17 December 2020, the SCA court in the *Café Chameleon* appeal considered[71] *Ma-Afrika*, *Interfax* and the English BI Insurance test case.[72] At this time the *Grassy Knoll* matter had also already been concluded. Given the analogous facts and verbatim disease clauses at issue in all the BI Insurance challenges, it would seem that both insurers and the insured awaited the decision on this issue by the SCA to set the precedent once and for all. For this reason, I will focus my attention on the *Café Chameleon* High Court challenge and the SCA appeal as well as the English Test Case.

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[66] See: *Cafe Chameleon CC v Guardrisk Insurance Company Ltd* 2020 JDR 1376 (WCC); *Guardrisk Insurance Co Ltd v Café Chameleon CC* 2021 (2) SA 323 (SCA); *Ma-Afrika Hotels (Pty) Ltd v Santam Limited* 2020 JDR 2375 (WCC); *Interfax (Pty) Ltd v Old Mutual Insure Limited* 2020 JDR 2478 (WCC) and *Grassy Knoll Trading 78 CC t/a Fat Cactus and Another v Guardrisk Insurance Company Limited* (10035/2020) [2020] ZAWCHC 168; [2021] 1 All SA 503 (WCC) (20 November 2020).
[67] *Cafe Chameleon CC v Guardrisk Insurance Company Ltd* 2020 JDR 1376 (WCC).
[68] *Guardrisk Insurance Co Ltd v Café Chameleon CC* 2021 (2) SA 323 (SCA).
[69] *Ma-Afrika Hotels (Pty) Ltd v Santam Limited* 2020 JDR 2375 (WCC).
[70] *Interfax (Pty) Ltd v Old Mutual Insure Limited* 2020 JDR 2478 (WCC).
[71] Note 35 supra, at [67].
[72] *Financial Conduct Authority v Arch Insurance (UK) Ltd and* Others [2020] EWHC 2448 (Comm).

Café Chameleon v Guardrisk WCC

In a string of court challenges that kicked off in the Western Cape High Court, Café Chameleon, a restaurant, sought an urgent declaratory order declaring that Guardrisk, its BI Insurance provider, was obliged to indemnify it as a policyholder for losses suffered as a result of the government's lockdown[73]. The insurance clause applicable is the exact same as the one discussed above in the *Grassy Knoll* case, as the document stems from the same insurer: Guardrisk.[74]

The policy document signed by Café Chameleon provided cover for defined events, which typically requires damage to property. However, there were two exceptions to the damage to property requirement, one concerning non-property loss by a perilous event that occurs within a specific radius of the insured premises.[75]

Café Chameleon's position was that once the Covid-19 virus had occurred within 50km of its premises in Cape Town, the government's response to it was covered by the disease clause. According to Café Chameleon, the requirements for cover were met once the disease had entered its radius.

Guardrisk, in opposing the relief sought, raised four main grounds, namely: (i) the matter lacks urgency as Café Chameleon is currently not entitled to any relief under the policy; (ii) the relief claimed by the Café Chameleon is inappropriate; (iii) Café Chameleon's loss, if any, is not

[73] *Café Chameleon* supra note 67.
[74] *Grassy Knoll* supra note 19*,* at [1].
[75] Reinecke, MFB and Lubbe, GF, "*Contracts of Insurance and the Objective Approach to Interpretation of Contacts*", 2021 TSAR 346 at 346-347.

insured under the Infectious Diseases Extension clause in the Policy; and lastly, (iv) there is no causal link between the lockdown Regulations and the Infectious Diseases Extension.[76]

The court first went through a process of contractual interpretation and then landed at the discussion around causation, which is what is of more interest in this paper. Counsel for Café Chameleon argued that the lockdown regulations and impositions of the government were a natural response to the pandemic, in line with what the policy document considered, presumably when it required government to officially be notified of it. Counsel for Guardrisk argued that the peril was one that was not caused directly by the Coronavirus, but by the actions of the government. Guardrisk further argued that there was no sufficient causal chain linking the presence of the virus within 50kms of Café Chameleon and the resulting financial losses.[77]

In its *ratio*, the court relied on test laid out in *Napier v Collett and Another* 1995 (3) SA 140 and stated the following[78]:

> "The issue of causation in insurance law was fully discussed in the matter of *Napier* and was stated as follows: 'The general approach to questions of causation as laid down in the context of criminal law and the law of delict, based as it is on principle and logic, is equally applicable to insurance law, although its application will be subject to the provisions of the policy in question. A particular policy will, however, seldom affect the basic approach which requires, in the first place, and (sic) inquiry into the presence of 'factual causation'. If this initial enquiry leads to the conclusion that the prior event was a *causa sine qua non* of the subsequent one, the further question of whether the relationship between the two events is sufficiently close for the form of deposit to the legal cause of the latter rises. In answering this question in the context of

[76] *Café Chameleon* supra tote 67 at para [2].
[77] Ibid paras [70]-[71].
[78] Ibid paras [72].

> insurance law, prime regard must be had to the provisions of the policy question, which may extend or limit the consequences covered. In addition, the specific provisions, matters such as the type of policy the nature of the risk insured against and the conditions of the policy may assist the court in deciding whether the factual cause should be regarded as the cause in law'."

The court went on to apply the 'but for' test to firstly establish factual causation.[79] In determining factual causation, the relevant considerations taken into account by the court were (i) the broad or limiting extent of the policy coverage; (ii) the type of policy; (iii) the nature of the insured risk, and (iv) the conditions of the policy.[80] The court, after analysing the facts, confirmed that factual causation was present. The court then moved to the second leg of the test to establish liability, considering whether legal causation was present.

The court sought guidance from the decision of *International Shipping Co (Pty) v Bentley (Pty) Ltd* 1990 (1) SA 680 (A) where it states[81]:

> '[D]emonstration that the wrongful act was a *causa sine qua none* of the loss does not necessarily result in legal liability. The second enquiry then arises, viz whether the wrongful act is linked sufficiently closely or directly to the loss for legal liability to ensue or whether, as it said, the loss is too remote. This is basically a juridical problem in the solution of which considerations of policy may play a part. This is sometimes called "legal causation".'

[79] Ibid para [74].
[80] Professor F Moosa "*COVID-19 business interruption claims: Café Chameleon CC v Guardrisk Insurance Co Ltd analysed*" LexisNexis – Insurance and Tax, Vol 35, No. 3 August 2020.
[81] *Café Chameleon* supra note 67 para [75].

The court, sparing the reader the details of its thought process, opined that having regard to all the aspects alluded to by the parties, the harm was not too remote from the conduct and it is fair, reasonable and just that Guardrisk be burdened with liability.[82] The application succeeded.

Guardrisk v Café Chameleon SCA

Being the first application of its kind in modern history, Guardrisk appealed[83] the Western Cape High Court decision to the Supreme Court of Appeal to challenge its correctness. The SCA considered again the arguments around causation, both factual and legal, and concluded against Guardrisk. Here, the SCA reasoned that as a matter of construction, 'that the defined event or insured peril is the occurrence of Covid-19 *and* the government's response'.[84]

At paragraph 18 the SCA starts to consider the crux of the interpretive question, being whether the insured peril does indeed include a government response to Covid-19 or not. The court starts off by noting that the trigger for coverage under the disease clause is that the disease is notifiable to the government. The court concludes that the reason a disease is deemed notifiable is that it may be one with the potential to spread locally, provincially and nationally.[85]

Surprisingly, without expounding further, the court directly concludes in the next paragraph that following the presumed intention behind the "notifiable disease" clause, this must mean that both the insured and the insurer understood that what comes from notifying a government about a disease outbreak would be government intervention. The parties must have thus understood that 'business interruption', as defined in the disease clause, was part and parcel of

[82] Ibid para [76]-[81].
[83] *Guardrisk Insurance Co Ltd v Café Chameleon CC* 2021 (2) SA 323 (SCA).
[84] Ibid para [45].
[85] Ibid para [18].

the public health response that was bound to follow the notification.[86] It is likely that the SCA considered the arguments and papers filed in the High Court in coming to its conclusion, although it would have been helpful for legal scholars if the reasoning behind the conclusion had been provided.

As stated above, because at the heart of the overarching matter of most insurance cases is a contractual dispute, the court considered the *ratio* of *Centriq Insurance v Oosthuizen*[87], which states inter alia:

> '[I]nsurance contracts are contracts like any other and must be construed by having regard to their language, context and purpose in what is a unitary exercise. A commercially sensible meaning is to be adopted instead of one that is insensible or at odds with the purpose of the contract. The analysis is objective and is aimed at establishing what the parties must be taken to have intended, having regard to the words they used in the light of the document as a whole and of the factual matrix within which they concluded the contract.'

The court went on further to quote Schreiner JA's obiter[88] from the English law precedent where the learned judge states:

> 'No rule, in the interpretation of a policy, is more firmly established, or more imperative and controlling, than that, in all cases, it must be liberally construed in favour of the insured, so as not to defeat without a plain necessity his claim to the indemnity, which in making the insurance, it was his object to secure. When the words are, without violence, susceptible of two

[86] Ibid para [19].
[87] *Centriq Insurance Company Limited v Oosthuizen and Another* 2019 (3) SA 387 (SCA) at [17].
[88] *Guardrisk* supra note 83 para [13].

interpretations, that which will sustain the claim and cover the loss, must in preference be adopted.'

One can see, like the previously discussed obiter in insurance cases, that the terms of an insurance agreement are largely construed against the insurer, or rather, in favour of the insured. The reasoning behind this seems to be that the courts are more inclined to adopt an interpretation of the contract in line with the intention of the insured, as the insurer is the drafter of the insurance contract, the insured would presumably only sign on to those terms reasonable to him. Put another way, where a clause in an insurance agreement is so patently unreasonable against the insured on a certain interpretation, it can be reasonably assumed that the insured would not have intended for that interpretation when entering into the agreement and would rather find another insurer. The courts would then seem to adopt a different interpretation, one that is more favourable to the insured, if of course still within the realm of reasonableness.

The court makes the distinction following a submission made by counsel for Café Chameleon, that a notifiable disease almost always carries the risk of a government response, and thus the government response is covered by the disease clause 'because it is part of the insured peril, not because it is caused by what was insured against; it is covered because it is what is insured against'.[89] While that is mostly accepted, at least to the degree the response is legal, it remains to be seen to what degree of government action that reasoning will be accepted. This will be discussed in more depth in Chapter Five.

It is submitted that the court here is setting a serious precedent for future cases by creating a composite peril, being both the virus and the government's response collectively being the

[89] Ibid para [21].

proximate cause. The question, in my submission, will always be to what degree can we rely on this composite or to what degree it is fair. It is submitted that the court is taking a leap of faith in counting the occurrence of the virus and the government response as a composite peril, and it is submitted further that this was done for the purpose of coming to a practical and fair conclusion. While the prima facie view may be that the government response acted as an intervening act, there can be no intervention when the purported intervening act is in itself the cause. Whether this sort of reasoning holds in the future remains to be seen.

At paragraph 35 the court considers the question of causation. The court first focuses on the key words, that the disease clause covers a loss resulting in business interruption "*due to"* a notifiable disease.[90] These words are synonymous with "*caused*" or "*caused by*", and indicates an element of causation. It is at this point the court reiterates the argument of Guardrisk, that there must be a causal link between the loss suffered and Covid-19, not the loss and government actions. Guardrisk thus argued that Café Chameleon had not made the case for factual or legal causation.[91]

The court went on to consider the basic principles of causation, after confirming that the general approach to causation applies in the same way to questions of causation in insurance law. The court also explored the 'but for' test.[92] In applying the 'but for' test, the court warned against the rigid deductive logic of applying the test where the result would be an unfair and/or unpalatable result. In furtherance of this, the court cited *Minister of Safety and Security v Van Duivenboden*[93], where Nugent JA said:

[90] Ibid para [35].
[91] Ibid.
[92] Ibid para [37].
[93] *Minister of Safety and Security v Van Duivenboden* [2002] 3 All SA 741 (SCA) at [25].

> ‘ . . . A plaintiff is not required to establish the causal link with certainty, but only to establish that the wrongful conduct was a probable cause of the loss, which calls for a sensible retrospective analysis of what would probably have occurred, based upon the evidence and what can be expected to occur in the course of ordinary human affairs rather than an exercise in metaphysics.’

The court clearly advances a sensible and practical application of factual causation, not on theorizing into perpetuity. While this is a common sense and practical approach that will undoubtedly lead to the final adjudication of disputes, there is one caution to the court’s earlier statement, that the application of the ‘but for’ test ought to lead to a ‘palatable’ or ‘fair’ result.

While it is accepted that courts ought to interpret insurance contracts with a certain degree of fairness, freedom and sanctity of contract[94] ought to be respected, even if the *outcome* will be unfair. To uphold fairness in insurance contracts, each party should be given a fair hearing; fair interpretation of their stance and the insured’s intention ought to be viewed with a slight degree of favour. Equality before the law is what’s required, not equity. What is meant by this is that both the insured and the insurer should have equal (as far as possible) opportunity to state their case before a court, however it should not, with respect, be the role of the court to push for a judgment which it deems fair for both parties. Sometimes the outcome is unfair, even unpalatable[95], but legal, and without such results, there can be no certainty in law.

[94] See D Hutchison et al. ‘*The Law of Contract in South Africa*’ 2nd Ed, 2012 at 23.
[95] See: *Bredenkamp and Others v Standard Bank of South Africa* Ltd 2010 (4) SA 468 (SCA); *Brisley v Drotsky* 2002 (4) SA 1 (SCA); *Afrox Healthcare Bpk v Strydom* [2002] 4 All SA 125 (SCA); *SA Forestry Company Ltd v York Timbers Ltd* [2004] 4 All SA 168 (SCA). Cf. *Barkhuizen v Napier* [2008] JOL 19614 (CC).

The court in some sense seems to further the concern with the sentiment that the common law test referred to in *Van Duivenboden* is applied flexibly, accepting that 'common sense may have to prevail over strict logic'.[96] It could be argued to the contrary that 'strict logic' is what keeps a society from veering into the absurd, and what is 'common sense' today may not be so common tomorrow. Nevertheless, to the degree the court is inferring that 'strict logic' means that which is logical but without restraint or qualification, one ought to be inclined to agree with this dictum.

The court continues in stating that rules around causation ought to be applied with good sense, giving effect to the intention of the parties, not defeating their intention.[97] This is however easier said than done, as one can imagine the ultimate intention of the parties at the time of dispute is at complete opposite. For the insurer, it is to reject a claim, and for the insured, the intention is to have the claim paid. The question in insurance contracts is said to always be: 'Has the event, on which I put my premium, actually occurred?'.[98] That truly is the overarching crux of the question.

The court then discusses the concept of the proximate cause. The court reasons that the proximate cause must be determined as a starting point. The court then states that even if a loss is not felt as a direct result of a specific peril, but rather through a succession of further perils resulting from the first, the first peril will remain the proximate cause, unless there had been a break in the chain of causation. The proximate cause is considered as a matter of 'reality, predominance and efficiency', or stated another way, the proximate (real or dominant) cause, is determined by applying 'good business sense'.[99]

[96] *Guardrisk* supra note 83 para [39].
[97] Ibid.
[98] Ibid.
[99] Ibid para [40].

The court then moved on to consider legal causation. The court considered the law of delict and how legal causation is considered therein. Through this consideration, the court stated that policy considerations should caution against attaching liability 'in an indeterminate amount for an indeterminate time to an indeterminate class'.[100] This of course lends credence to the common sense idea that restrictions ought to be placed on the parameters in which to consider causation.

As did the WCC, the court quotes from *Napier v Collett*[101], which relates specifically to insurance contracts, where Grosskopf JA observed:

> '[O]ne would have prime regard to the provisions of the insurance policy. Thus, for example the policy may extend or limit the consequences covered by the policy, for example by laying down exceptions. But in addition to any specific provisions, matters such as the type of policy, the nature of the risk insured against and the conditions of the policy may assist a court in deciding whether the factual cause should be regarded as the cause in law.'

The court, considering this dictum, concludes that effect must be given to parties own perception of causality to avoid the court imposing on them a concept they did not intend.

In defining and considering the approach to both factual and legal causation, the court then considers the question of whether Café Chameleon sufficiently proved causation. The court first posits the counterfactual posed by Guardrisk: that but for the elimination of the virus (within a 50km radius), there would still have been business interruption due to the lockdown. Therefore, the defined event was not the cause of the loss.[102] The court however countered this

[100] Ibid para [42].
[101] *Napier v Collett and Another* 1995 (3) SA 140 (AD) at 459.
[102] *Guardrisk* supra note 83 para [44].

counterfactual, stating that it had already ruled that the insured peril was both the virus *and* the government response to it. The 'but for' test must therefore be applied with both causes as the insured peril.[103]

The court then succinctly concludes that the lockdowns ordered by the government were also the proximate cause with the virus, or sufficiently linked to the loss, and thus was the legal cause of the business interruption.[104]

It's worth noting that once the court, earlier in its judgment, ruled that the composite peril was both the virus and the government's response, there was no real hope of success for Guardrisk. Guardrisk's entire argument on the point of causation centred around the argument that the lockdowns, not the virus, was what caused the business interruption. But once the court ruled that the lockdown and the virus collectively make up the proximate cause, that entire argument is nullified. The government's response was now to be presumed to be covered by the policy.

The SCA moved on to consider the UK High Court test case. The UK followed similar lockdown procedures as South Africa, and the disease clauses brought before the court to interpret were remarkably similar to that of Guardrisk. The court noted that the UKHC took the same stance the SCA took in relation to the 'localized disease' argument, and that it was sufficiently covered under the policy whether the disease was a localized one within a specific radius and acted upon by a local authority, or a national response. Either way, the response was covered.[105]

[103] Ibid para [45].
[104] Ibid para [51].
[105] Ibid para [55].

The UK High Court ("*UKHC*" or "*High Court*") also ruled in the same way the SCA had in that it determined that by virtue of a disease outbreak qualifying as a 'notifiable' one, it reasonably follows that the authority being notified will respond. As a result, the nature of the notifiable disease clause includes a government response.[106] The court went on to define the similarity between its own *ratio* and the UKHC, in that despite the insurer's attempts to centre the dispute around causation, it really centered around the interpretation of the insurance agreement. It was thus about construction, not causation.[107] The court dismissed the appeal.

The UK Test Case – High Court

The UK test case was taken into consideration by the SCA in *Café Chameleon*[108] and seems to have been of great guidance and influence to the court. The UK High Court and Supreme Court dived much deeper into the question of causation. The Supreme Court however overruled the UKHC on the interpretive process, which ultimately flowed into the determination of causation, and for that reason a brief mention of the UKHC case will be discussed below, but most emphasis will be placed on the Supreme Court decision.

The UK Test Case was brought by the Financial Conduct Authority (FCA) as claimant, a regulator of insurance companies in the United Kingdom, as a test case[109] to the UKHC to determine issues of principle as they relate to incoming BI Insurance claims against eight insurers. These claims arose as a result of the UK government imposing similar lockdown measures in response to Covid-19 as those imposed by the South African government. Unlike the trial and error method in South Africa, the FCA sought to clear up the interpretations of the

[106] Ibid para [56].
[107] Ibid para [57].
[108] Ibid para [67].
[109] *Financial Conduct Authority* supra at note 45.

disease clauses common to the various insurers, so as to clear up the way forward for both claimants and insurers and avoid litigation.

The court in determining this case placed more of a focus on contractual interpretation. While there were relevant issues of causation and prevalence of the disease, which were dealt with towards the end of the judgment, most of the judgment centred around contractual interpretation. The court ultimately found for the FCA and against the insurers, however did not comment much on the arguments around causation as for the court, the question of causation followed its construction of the wordings it considered and it did not therefore need to decide many of the other arguments raised by the parties.[110] However, on appeal[111], the Supreme Court ("*UKSC*") dealt with the issue of causation in greater detail, and deemed these arguments to be 'of crucial importance'.[112]

The UK Supreme Court

As stated above, the UKSC place much more emphasis on the arguments around causation as pleaded by counsel for both sides. At section VII[113] of the judgment, the court explains its 29 page thought process around the considerations of causation. The court here must be given credit for considering the arguments about causation, not just as judges, but even as academics, considering various academic writers and hypotheticals. Just prior to that, in anticipation of the causation argument, the court goes into a determination of the correct interpretation of the disease clauses. The interpretation of the disease clause ultimately ties in with the causation

[110] Paul Lewis et al. 'Supreme Court hands down judgment in FCA's Covid-19 Business Interruption Test Case' available at https://hsfnotes.com/insurance/2021/01/15/supreme-court-hands-down-judgment-in-fcas-covid-19-business-interruption-test-case/, accessed 19 October 2021.
[111] *Financial Conduct Authority v Arch Insurance (UK) Ltd and* others [2021] UKSC 1.
[112] Ibid para 161.
[113] Ibid p. 46.

determination, so it will be discussed first herein. As stated above, the interpretative process embarked on by the UKHC was overruled by the UKSC, and for that reason, the UKSC interpretation will only be discussed herein.

The Interpretation Question

The UKSC faced two primary questions of interpretation on appeal. The central issues were: what is meant by the words in (a)(iii) of the disease clause, "*any…occurrence of a Notifiable Disease within a radius of 25 miles of the Premises*" and secondly, which must be considered in light of the answer to the first question, what causal link is required between the insured peril and the loss in order for the insured to be indemnified.[114]

To assist the reader in understanding the court's *ratio*, the disease clause, which came from the RSA 3 policy document, states as follows[115]:

> "***We shall indemnify You in respect of interruption or interference with the Business during the Indemnity Period following:***
>
> a. ***any***
>
> i. ***occurrence of a Notifiable Disease (as defined below) at the Premises*** or attributable to food or drink supplied from the Premises;
>
> ii. discovery of an organism at the Premises likely to result in the occurrence of a Notifiable Disease;
>
> iii. ***occurrence of a Notifiable Disease within a radius of 25 miles of the Premises***;

[114] Ibid para 54.
[115] Ibid para 13-14.

b. the discovery of vermin or pests at the Premises which causes restrictions on the use of the Premises on the order or advice of the competent local authority;

c. any accident causing defects in the drains or other sanitary arrangements at the Premises which causes restrictions on the use of the Premises on the order or advice of the competent local authority; or

d. any occurrence of murder or suicide at the Premises."

The term "Notifiable Disease" is defined as follows (again with our emphasis):

"1. ***Notifiable Disease shall mean illness sustained by any person resulting from:***

i. food or drink poisoning; or

ii. ***any human infectious or human contagious disease*** excluding Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition ***an outbreak of which the competent local authority has stipulated shall be notified to them***."

In addition, the policy provides that for the purposes of this clause:

"Indemnity Period shall mean the period during which the results of the Business shall be affected in consequence of the occurrence discovery or accident beginning:

i. in the case of a) and d) above with the date of the occurrence or discovery; or

ii. in the case of b) and c) above the date from which the restrictions on the Premises applied;

and ending not later than the Maximum Indemnity Period thereafter shown below.

...

> We shall only be liable for the loss arising at those Premises which are directly affected by the occurrence discovery or accident.
>
> Maximum Indemnity Period shall mean three months." [emphasis added by UKSC]

The UKHC as the court a quo found an interpretation favourable to the FCA, in that firstly, the cover is not limited to interruption of the business by occurrences of a notifiable disease only within a radius of 25 miles, as opposed to outside that radius, and secondly, due the widespread nature of "*outbreaks*", the parties to the BI Insurance agreement must have understood that the response from authorities would not necessarily be just a localized response to each occurrence, but to the disease as a whole. It would thus be irrelevant whether there was an occurrence within or outside of the 25 mile radius as the reaction would most likely not have such a border.[116]

The court a quo thought that it would not make sense to interpret the disease clause extension to be limited to only the effects of a local occurrence (25 mile radius). If it did, it would be difficult to make out, during a large outbreak, whether there was a local occurrence in and of itself, or whether any local occurrence was merely a spill over from the larger outbreak. Further, it would be difficult, if possible at all, to prove what effects the local occurrence elicited from authorities. In the High Court's view, this interpretation was too narrow and it concluded that no reasonable party would have intended to enter into an agreement with that interpretation of the clause. [117] On this interpretation, the UKHC remarked at paragraph 110 of the judgment, that following this interpretation "*the issues as to causation largely answer themselves*". The

[116] Ibid para 56 & 57.
[117] Ibid para 58.

UKHC found that despite what the causal implications were of the word "*following*", the causal requirement was met when the national response was implemented.[118]

The High Court's preferred interpretation was that the cause of business interruption "*is the Notifiable Disease of which the individual outbreaks form indivisible parts*", and each individual occurrence of the disease was a separate but sufficient cause of business interruption.[119]

The UKSC critiqued the High Court's interpretation stating that "*the court below did not spell out in its judgment precisely how, as a matter of the English language, it considered that the words "any ... occurrence of a Notifiable Disease within a radius of 25 miles of the Premises" can be read as meaning "a Notifiable Disease of which there is any occurrence within a radius of 25 miles of the Premises" (our emphasis)."*[120] The UKSC, it is respectfully submitted, correctly determined that the clause above is straightforward and unambiguous, and there is no reasonable person who would read that clause and come to the conclusion that any occurrence of a Notifiable Disease *within* a radius of 25 miles of the Premises means any occurrence of a Notifiable Disease *outside* a radius of 25 miles of the Premises. To favour the latter interpretation would be to "*stand the clause on its head*".[121]

The UKSC went on[122] to cite the warning by Lord Mustill in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313, 388 where he stated:

[118] Ibid para 59.
[119] Ibid.
[120] Ibid para 61.
[121] Ibid.
[122] Ibid para 62.

> "There comes a point at which the court should remind itself that ... to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court."

Counsel for the FCA tried to defend the interpretation by the High Court in arguing that the correct interpretation of the word "*occurrence*" may include "*outbreak*". An outbreak may very well extend far beyond a 25 mile radius of the insured premises. On this interpretation, provided the outbreak has split over into the 25 mile radius, the entire outbreak ("*occurrence*") is covered by the policy.[123]

The UKSC however found this argument, whether valid or not, not to be the actual position of the High Court. The High Court clearly viewed the insured peril as the disease itself, not a specific outbreak.[124] The High Court thus treated the insured peril as Covid-19 itself, not an occurrence or outbreak, no matter how far or narrowly spread. This interpretation thus covered the insured from any effects of Covid-19, as long as there was an occurrence within 25 miles of the insured premises and the cover ran from the date of the local occurrence.[125]

The UKSC, in response to further attempts by counsel for the FCA, makes it clear again that the clause in question does not say that there is cover for an occurrence some part of which is within the 25 mile radius limit, but rather that *any occurrence* within that radius is covered. What this essentially means is that it is an occurrence of the disease within the 25 mile radius that is covered, not anything that occurs outside the radius.[126] The case of clear boundaries and what occurs within or without is evidently pushed by the UKSC.

[123] Ibid para 63.
[124] Ibid para 64.
[125] Ibid.
[126] Ibid para 65.

The UKSC makes a further good point about the specific wording used by the policy, which was not "*outbreak*", but "*occurrence*". If the word 'outbreak' was used, the UKSC continued, that would create huge interpretative issues. What constitutes an outbreak, what the parameters are and what occurrences are part of what outbreak would all be challenging questions to consider.[127] For example, if an outbreak in occurs in Oxford, Manchester and London, but a few individual occurrences are found between these areas, what occurrence stems from which outbreak? This is of course extremely difficult to determine.

The UKSC, in juxtaposing "*outbreak*" with "*occurrence*", continued to show that the word "*occurrence*" is synonymous to the word "*event*", which is widely recognized and understood in the context of insurance law to mean "*something that happens at a particular time, at a particular place, in a particular way*".[128] Occurrence is thus something that happens at a particular date, a single point in time, not something that occurs for a period of time.[129]

The court went one to differentiate between an 'occurrence' and a series of individual events, which cannot be an occurrence. Based on its earlier cited definition, an occurrence is something that happens at a singular point in time. An outbreak on the other hand, is multiple occurrences, in different places and at different times. While one may validly argue that multiple people in a single house being infected at more or less the same time counts as a single occurrence, the same cannot be said about multiple separate cases across the country. Thus, the best fitting interpretation, would be that each case of Covid-19 sustained by an individual counts as a single occurrence. With this interpretation, determining whether there was an occurrence within a 25 mile radius of an insured premises becomes a lot more practical.[130]

[127] Ibid para 66.
[128] Ibid para 67.
[129] Ibid para 68.
[130] Ibid para 69.

The court further bolsters its interpretation by referring back to the definition of "*Notifiable Disease*", which does not refer to a disease in the general sense, but rather an "*illness sustained by any person*". The court held further that the reference in the definition to 'outbreak', was merely to further qualify the disease in question as being one that had to fall under ss (ii) of the definition. Thus, it is not the disease itself as the High Court determined, nor the 'outbreak' as counsel for the FCA argued, but 'the illness sustained by any person suffering from that disease' that triggers the indemnity.[131]

The UKSC returned to the foundation of the interpretive question, holding that the disease clause in the RSA 3 policy does not limit cover to losses which result only from cases of a notifiable disease with a 25 mile radius. This consideration was important as it related to causation. However, it is quite clear from the words used in the policy that occurrences of the virus outside of the 25 mile radius of the insured premises does not constitute part of the insured peril.[132]

In concluding the *ratio* on interpretation, the UKSC held that only occurrences within a 25 mile radius would suffice for the disease clause. This is in accordance with the plain wording of the text.[133]

The Causation Question

The UKSC later moves to the question of causation. The UKSC starts off by accepting the UKHC reasoning that questions of causation largely answer themselves, as it is accepted by

[131] Ibid para 70.
[132] Ibid para 72.
[133] Ibid para 71 & 74.

the courts that if an insured is covered for Covid-19, from the time a case of Covid-19 occurs, the policy covers *all* effects of Covid-19 on the insured's business. It is also accepted that there is no argument that the government's actions were in response to the Covid-19 outbreak, and the losses suffered as a consequence thereto are all linked to the outbreak of Covid-19, whatever the precise nature of the required causal link.[134]

The court then states that on a proper interpretation of the disease clause, it has concluded that the disease clause only covers the effects of cases of Covid-19 occurring within the specified radius of the insured's premises. Thus, the real critical question of causation is limited to the determination of what effect a case or cases of Covid-19 infection had on the business interruption losses.[135]

The court, in considering arguments around causation, first considered the principle of proximate causation.[136] The court largely dismissed any semantic arguments, concluding that although the test for determining causation leans on an interpretation of the policy, it is not a matter of linguistic meaning, determining how the ordinary person would understand the clause, rather, what is at issue is the legal effect of the insurance contract as applied to the factual situation at hand.[137]

Unlike the South African courts which were seized with largely the same infectious disease clause through the various cases, the UKSC was seized with multiple disease clauses. Although these various clauses were fundamentally the same, they had their nuances. This allowed counsel for the various insurers to try different arguments depending on what their client's

[134] Ibid para 160.
[135] Ibid para 161.
[136] Ibid para 162-170.
[137] Ibid para 162.

policy wording was. The court however rejected these semantic arguments early on into its considerations where it stated[138] *inter alia*:

> Many different formulations may be found in insurance policy wordings of the required connection between the occurrence of an insured peril and the loss against which the insurer agrees to indemnify the policyholder. This may be illustrated by the variety of phrases used in the sample wordings in the present case. We noted earlier that RSA 3 uses the word "following" to describe the required connection between occurrence of a notifiable disease and interruption of the business. So do MSA 1 and MSA 2. In the Argenta wording the phrase used is "as a result of". In QBE 1, it is "arising from"; and in QBE 2 and QBE 3, it is "in consequence of". We do not think it profitable to search for shades of semantic difference between these phrases.

The court proceeded to highlight the test for liability relating to 'proximate cause', as so developed by the common law in response to various marine insurance cases, a test that is accepted and further utilized outside of the marine insurance sector. This test was codified in the Marine Insurance Act of 1906 as[139]:

> "... unless the policy otherwise provides, the insurer is liable for any loss proximately caused by a peril insured against, but, subject as aforesaid, he is not liable for any loss which is not proximately caused by a peril insured against."

The court indicated that the word "*proximate*" was misleading as it was no longer used in the original sense.[140] The court then looked to the 19th century at Aristotle's notion of an "*efficient*" cause, meaning something that is the agency of change. Despite 'proximate cause' being retained in law, the influence of Aristotle's 'efficient' cause gained much traction, and altered the idea that the law was primarily concerned with the immediate cause of a loss.[141] In

[138] Ibid.
[139] Ibid para 163.
[140] Ibid para 164.
[141] Ibid para 165.

furthering the description of 'efficient cause', the court went on to cite[142] a speech of Lord Shaw of Dunfermline, where he stated:

> "What does 'proximate' here mean? To treat proximate cause as if it was the cause which is proximate in time is ... out of the question. The cause which is truly proximate is that which is proximate in efficiency. That efficiency may have been preserved although other causes may meantime have sprung up which have yet not destroyed it, or truly impaired it, and it may culminate in a result of which it still remains the real efficient cause to which the event can be ascribed."

The court further defined the test above by indicating that the determination of proximate cause is not based on some unguided gut feeling, but rather a two-step analysis: first, identify, through policy interpretation and consideration of the evidence, whether a peril covered by the policy had any causal involvement in the loss, and if so, secondly, whether any excluded or excepted peril under the policy had any involvement. To determine whether the occurrence of a peril is the proximate or efficient cause of the loss involves making a judgment as to whether the occurrence of the peril made the loss inevitable.[143]

The court then turned to consider *concurrent causes*. The court made reference to what is the leading modern authority on concurrent causes in the insurance field, the case of *JJ Lloyd Instruments Ltd v Northern Star Insurance Co Ltd (The Miss Jay Jay)* [1987] 1 Lloyd's Rep 32. This case concerned an insurance claim for damage to a yacht, insured against "*external accidental means*". The yacht sunk due to a combination of concurrent causes, which were equal, or nearly equal, in their efficiency, being rough seas and defects in the build of the yacht. The rough seas cause fell within the policy coverage, the defects in the yacht build did not. The

[142] Ibid para 166.
[143] Ibid para 168.

Court of Appeal however held that the loss was caused by the peril insured against and thus was covered by the policy.[144] The Court of Appeal thus saw the two perils occurring at the same time, and could not conclusively attribute to which cause the loss was sustained. The court thus found in favour of the insured. This is supported by the *ratio* in *ENE Kos 1 Ltd v Petroleo Brasileiro SA (No 2)* [2012] UKSC 17; [2012] 2 AC 164, paras 12 and 74, where Lord Clarke stated in para 74: "*where there are two effective causes, neither of which is excluded but only one of which is insured, the insurers are liable*".[145]

The court concludes its analysis of proximate cause and concurrent causes by stating that there was no reason in principle why the label of 'proximate cause' cannot be ascribed to multiple causes that compositely bring about a loss. Thus the UKSC agrees with the reasoning of the court *a quo* that the proximate cause was the combination of *all* Covid-19 cases around the country, considered collectively by the UK Government in its decision to impose the lockdowns.[146]

The court then moved forward to consider a primary argument by the insurers, that of the applicability of the 'but for' test. It was argued by counsel for the insurers that the 'but for' test is critical for establishing causation, and specifically in insurance cases, proximate cause.[147] The insurers' argument was essentially this: to establish their clients' liability, it must be asked 'but for a case of Covid-19 occurring within a 25 mile radius of the insured's premises (the insured peril), would the UK government have still enforced the lockdown which led to the losses? The answer is in the affirmative, as the virus had been rapidly spreading throughout the rest of the UK. Thus, any case of Covid-19 found within the 25 mile insured radius cannot be

[144] Ibid para 173.
[145] Ibid.
[146] Ibid para 176.
[147] Ibid para 178.

said to be the proximate cause that lead to the lockdown, as the UK Government had intended to lockdown anyway, and thus there is no causal link between the peril covered by the policy and the losses suffered by the insured. The judgment itself explains this argument best as follows[148]:

> As the FCA has pointed out, the area described by the disease clauses which refer to a radius of 25 miles of the business premises is an area of a little under 2,000 square miles. To put this in perspective, this is bigger than any city in the UK, more than three times the size of Surrey, roughly the combined size of Oxfordshire, Berkshire and Buckinghamshire, and around a quarter of the area of Wales. The FCA produced a map to show that the whole of England can be covered, more or less, by just 20 circles each with a 25 mile radius. Nevertheless, if - as the insurers submit - the relevant test in considering the Government measures taken in March 2020 is to ask whether the Government would have acted in the same way on the counterfactual assumption that there were no cases of COVID-19 within 25 miles of the policyholder's premises but all the other cases elsewhere in the country had occurred as they in fact did, the answer must, in relation to any particular policy, be that it probably would have acted in the same way. As already mentioned, the court below found as a fact (at para 112 of the judgment) that the Government response was a reaction to information about all the cases of COVID-19 in the country and that the response was decided to be national because the outbreak was so widespread. In these circumstances it is unlikely that the existence of an enclave with a radius of 25 miles in any one particular area of the country which was so far free of COVID-19 would have led to that area being excepted from the national measures or otherwise have altered the Government's response to the epidemic. That in turn means that in the vast majority of cases it would be difficult if not impossible for a policyholder to prove that, but for cases of COVID-19 within a radius of 25 miles of the insured premises, the interruption to its business would have been less.

The court indicates that it is inclined to agree with counsel for the insurers that where event Y would have occurred anyway, despite the occurrence of X prior to it, then X cannot be said to have caused Y. However, the court went on to challenge the weaknesses of the 'but for' test,

[148] Ibid para 179.

which is primarily that it fails to limit the great many cases in which X would be the proximate cause of Y.[149] For example, there would in theory be a perpetual list of prior acts that could technically be traced forward to a specific peril (as I indicated above). For example, if A gets hit by a car while walking down the road, is a factual cause that he decided to take a walk and not his car that day? Maybe a factual cause could be that but for A applying for a job, he would not have been travelling to an interview, and then would not have been on the street, and thus would not be knocked by the car.

The court goes on to recognize that in law, the 'but for' test has been largely deemed inadequate[150], a sentiment agreed with and will be argued for further below, albeit for somewhat different reasons. A further logical inconsistency and weakness of the 'but for' test is highlighted by the court in referring to the Canadian Supreme Court case of *Cook v Lewis* [1951] SCR 830 where two hunters simultaneously shot a hiker hiding behind a bush. The medical evidence showed that either bullet would have killed the hiker, even if the other had not been fired. The court indicates that by applying the 'but for' test to this scenario, one is left with the incoherent conclusion that in law, neither hunter's shot caused the hiker's death.[151]

The court moves away from this application of the 'but for' test and proceeds to consider a more applicable situation, were a series of events combine to produce a particular result (peril), but none of the events by themselves constitute a necessary or sufficient cause, enough to bring about the particular result by itself. The court explores this further by citing various examples

[149] Ibid para 181.
[150] Ibid para 182.
[151] Ibid.

by academic Professor Jane Stapleton in her scholarly work on causation. [152] An example cited by the court is described as follows:

> "A hypothetical case adapted from an example given by Professor Stapleton, which was discussed in oral argument on these appeals, postulates 20 individuals who all combine to push a bus over a cliff. Assume it is shown that only, say, 13 or 14 people would have been needed to bring about that result. It could not then be said that the participation of any given individual was either necessary or sufficient to cause the destruction of the bus. Yet it seems appropriate to describe each person's involvement as a cause of the loss. Treating the "but for" test as a minimum threshold which must always be crossed if X is to be regarded as a cause of Y would again lead to the absurd conclusion that no one's actions caused the bus to be destroyed."

The court later proceeded to explore the causal link in the disease clauses.[153] It agrees with counsel for MS Amlin (an insurer respondent) that the question to be considered is: 'did the insured peril (infectious disease within a 25 mile radius of the insured's premises) cause the business interruption losses sustained by the policyholder within the meaning of the causal requirements specified in the policy'?[154] Looking to a specific policy, MSA 1, the question in context was: whether the interruption occurred "*following*" an infection of Covid-19 within a 25 mile radius of the insured's premises. The court noted that it was important to ask whether the causal requirement imposed by 'following' (in the wording of the text) would be satisfied by evidencing that one or more cases of Covid-19 infection occurred within the 25 mile insured radius *before* the national lockdowns were instituted.[155]

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[152] Ibid para 183; J Stapleton, "*Unnecessary causes*" (2013) 129 LQR 39; and "*An 'extended but for' test for the causal relation in the law of obligations*" (2015) 35 OJLS 697.
[153] Ibid para 192.
[154] Ibid
[155] Ibid.

The FCA argued that each individual case of infection was an effective cause, sufficient to warrant the government's lockdown orders. The insurers however argued that the 'but for' test should be applied, and alternatively, a single infection or small group of infected people was not enough to satisfy the casual connection required by the policy.[156] The court ultimately rejected the argument by the insurers, the contention that the occurrence of one or more cases of Covid-19 within the specified radius cannot be a cause of business interruption loss if the loss would not have been suffered but for those cases, as the same interruption of the business would have occurred anyway as a result of other cases of Covid-19 elsewhere in the country.[157] After considering further arguments about 'the weighing approach'[158] and 'the individual cause analysis'[159], neither being considered herein, the court later concluded on these points as follows:

> "We conclude that, on the proper interpretation of the disease clauses, in order to show that loss from interruption of the insured business was proximately caused by one or more occurrences of illness resulting from COVID-19, it is sufficient to prove that the interruption was a result of Government action taken in response to cases of disease which included at least one case of COVID-19 within the geographical area covered by the clause. The basis for this conclusion is the analysis of the court below, which in our opinion is correct, that each of the individual cases of illness resulting from COVID-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the response of the public to it). Our conclusion does not depend on the particular terminology used in the clause to describe the required causal connection between the loss and the insured peril and applies equally whether the term used is "following" or some other formula such as "arising from" or "as a

[156] Ibid para 193.
[157] Ibid para 197.
[158] Ibid para 198-205.
[159] Ibid para 206-212.

result of". It is a conclusion about the legal effect of the insurance contracts as they apply to the facts of this case."

The court concluded the arguments around causation by considering individual arguments made by specific insurer respondents. The UKSC ultimately, bar a few amendments to the judgment from the UKHC, dismissed the appeals of the insurers.

Comparative Analysis: SA vs UK

While there are a variety of differences and similarities between the South African BI Insurance cases and the FCA case, differences such the pure volume of cases between the two jurisdictions, SA having many court applications launched within a short timeframe; the fact the UK case was a test case brought by the FCA and others. What is interesting however is that both jurisdictions had no problem concluding that the government's response to the pandemic was a composite proximate cause with the virus.

While no argument for or against the government's response is made here, it is interesting to note the ease with which the courts in SA, and more predominantly the UK, came to the conclusion that the government's response was an effect of the virus.

The SA High Court *Café Chameleon* case was the case that considered this debate in the most thoughtful way. The court of course found a close enough nexus between the virus and the government's actions, however it is interesting to note that what was thought of as the crux of the matter (causation), by both lawyers and laymen, turned out to be a minor consideration.

What was evidently different is the thought process behind these two cases, at least as explained in the judgments. In the WCC and SCA, the SA courts, with respect, adopted a fairly straightforward approach, relying heavily on the way things have always been done, by applying the 'but for' test and concluding without much reason that the virus and then government lockdowns constituted a composite peril. However, when one looks to the UK, especially the UKSC, the court challenges not only the usefulness of the 'but for' test, but also dives deep in its *ratio* explaining exactly why the government's response to the pandemic, as a concurrent cause, ought to be jointly considered as the proximate cause with the virus.

It should not however be surprising to the reader that there are similarities between the SA and UK jurisprudence on this issue. As can be seen from the *Café Chameleon* case and others, the local South African court's considered the UK test case for guidance. While the South African courts seemed to have come to its conclusions largely on its own, it surely provided some comfort to know that the bench was *ad idem* across jurisdictions.

One point of difference to be noted, as it relates to the future of the concept of causation, is how the SA court and UK court treated the 'but for' test. While a discussion will ensue below about the inadequacies of the 'but for' test, the High Court in *Café Chameleon* seemed to follow the usual factual causation test in determining liability, while the UKSC immediately recognized the inadequacy of the test.

The 'but for' test has been part of the factual causation enquiry for some time. It's simplistic to apply, but unfortunately, as the UKSC boldly noted, it is inadequate in many respects. What the future holds for the determination of factual causation remains to be seen, and whether the 'but for' test will remain in any way a relevant inquiry.

CHAPTER FIVE

Discussion

Going back to the local case law, it is again submitted that had Guardrisk not placed in their policy the caveat of local authority recognition of a relevant virus, there would have been a much stronger argument that it could not be held liable for the actions of the government. It would seem that the courts, in all cases, were sympathetic to the various insured applicants. It is however fully understandable. What one ought to be been wary of, however, is the setting of a precedent whereby unbridled government action sees no corresponding liability, and an insurer gets stuck with the bill.

While the courts' decisions in the various BI Insurance cases are accepted, one has to consider at what point of government action would the decision have been different. As indicated above, had the government ordered a Level 5 hard-lockdown for 6 months, would the courts in that instance still hold the insurers' liable? Or would we find ourselves in a situation where there could in some way be an apportionment of damages?

This consideration is well thought out by Reinecke and Lubbe[160] in their article analysing the *Café Chameleon* cases. The learned professors posit this hypothetical:

> "The second hurdle to overcome before it can be safely accepted that the description of the risk included a general lockdown, is how to accommodate the position where the general lockdown was not in the public interest but unnecessary or unlawful on account of being in conflict with the constitution or other laws. Thus where the general lockdown endured for a time longer than

[160] Reinecke, MFB and Lubbe, GF *Contracts of Insurance and the Objective Approach to Interpretation of Contacts* op cit note 75 at 353.

> necessary in spite of the fact that the epidemic had been brought under control, continuation of the general lockdown would be unnecessary. The same goes for the scenario where the general lockdown was from the start not really necessary because the outbreak was such that it could have been contained by quarantine measures or local lockdowns or, where available, vaccination. The point is that an insurer cannot be expected to pay for losses that were caused by the unlawful, unfair, unnecessary or irresponsible conduct of the government rather than the occurrence of the notifiable disease. After all, we know that nowadays the king can do wrong. Admittedly, these exceptional circumstances are not likely to occur. This aspect was not considered in the *Financial Conduct Authority* case."

Genuine consideration must be given to this argument. It cannot merely be accepted without critique that for the sake of an overarching sense of justice, the insured be granted their application, while not considering the other side of the coin, that to grant these applicants justice is to potentially create a loophole for the government to avoid liability.

There are three active parties in these BI Insurance cases, all with active roles: the insured, the insurer, and the government. The potential problem can be seen merely from the citation of parties, which in all cases is the insured as applicant and the insurer as respondent. Nowhere is the government cited as a respondent nor joined as a third-party by a respondent. Ironically, the direct damage causing event most closely linked to the harm suffered by the applicants was solely initiated by the government.

It cannot however, at this stage, be said that any of the outcomes would have been different in any of the BI Insurance cases if the government was in fact cited and its decisions were

challenged, as virtually all challenges to the lockdown regulations failed.[161] It is however worthy of considering a more unique causation argument, looked at from a different perspective. While this alternate argument would most likely have not led the courts to a different conclusion, if the argument was coupled with a valid argument concerning government acting unlawfully, unnecessarily or irrationally, there could be a different conclusion, at least concerning the apportionment of liability. This argument, as will be set out below, which also highlights some of the failures of the generally understood 'but for' test.

The Alternative Causation Argument

It is respectfully submitted, on an assessment of the case law, that the courts and litigants involved in the BI Insurance cases may have proceeded on a faulty premise, presumably so for the sake of convenience or just outcome. The premise lies in the application of the 'but for' test. Specifically, the fault lies in that the 'but for' test is considered as one of *necessary causation* as opposed to *sufficient causation*. Further, and of more importance, the assumption is made that the virus' presence caused the lockdown, as a matter of logic. It is submitted that this is not necessarily correct, on a deeper analysis of causation.

With this chapter in focus, it must be made known to the reader that it is accepted that the courts' are concerned not with theoretical hypotheses of various aspects of law, but the practical application of the law for the sake of adjudication. Thus it is was never expected that the courts' consider alternative hypotheses like the one below, which ought to be left more of academic discussion.

[161] See as example: *Esau and Others v Minister of Co-operative Governance and Traditional Affairs and Others* (5807/2020) [2020] ZAWCHC 56; 2020 (11) BCLR 1371 (WCC) (26 June 2020).

Sufficient and Necessary Causes

Before going further, it's necessary to understand the distinction between sufficient and necessary causes.

A *sufficient* cause is one that, by itself, can cause a specific outcome. For example, if A is sufficient to cause B, then A by itself occurring can lead to the occurrence of B. However, A is not the only event that can cause B. C, D and E could also cause B if they occurred. Therefore, A, unaided, is sufficient to cause B, but not the only event that can cause B. Practically, not showing up to class all year is a sufficient cause to fail the year if the attendance requirements are not met. However, it's not necessary to fail the year. One could also fail by missing a certain grade threshold.

A *necessary* cause is one that, as the name suggests, is necessary for the occurrence of the next event. Thus, A must exist for B to exist, or, if B exists, then A must have existed before it.

'But For' – A Necessary Cause

The 'but for' test seems to be a necessary cause[162] test.

> *"The traditional test to determine whether a particular act or omission qualifies as a necessary condition is the "but for" criterion: an act or omission is a necessary condition if, but for the particular act or omission, the consequence would not have occurred.*"[163]

Consider further Fleming 'The Law of Torts' (9 ed) 220 which states:

[162] See: *IF P&C Insurance Ltd v Silversea Cruises Ltd* [2003] EWHC 473 (Comm); [2004] Lloyd's Rep IR 217 and [2004] EWCA Civ 769; [2004] Lloyd's Rep IR 696 at [33].
[163] Reinecke MFB et al. *The Law of South Africa*, "*Delict – Causation – Factual Causation*", Vol 15, 3rd ed, 177, 2016.

> "The primary function of the test is negative in screening out and eliminating from further consideration factors which made no difference to the outcome. In contrast, when yielding a positive answer, it merely qualifies a factor as a possible, though by no means necessarily, sufficient cause for legal purposes; for that - let it be reiterated - it must pass an additional test as a 'proximate' or 'legal' cause. In other words, 'but for' is a necessary but not sufficient condition of legal responsibility."[164]

When asking the 'but for' question within the parameters of a certain context (to avoid an infinite number of hypotheticals), and the answer is 'yes', there is no factual nexus established as any number of events could have triggered Y. If the answer is 'no', a factual nexus is established, and the next determination is one of legal causation.

However, if the answer is 'no', that without X, Y would not occur, then X must be necessary for Y, and not merely sufficient.

Another insufficiency of the 'But For' test

The reader should bear in mind that this alternative is considered without taking into account the composite peril already determined by the SCA and UKSC. This alternative is offered as a hypothetical that could have been considered before the dispute went to court.

Another insufficiency of the 'but for' test, under these circumstances, is that it asks the

[164] Fleming, J.G. "*The Law of Torts*" (1998) 9th Edition, LBC Information Services, Sydney, at 220.

question of two objective concretes, and is usually applied that way. For example, if A were to call B's phone, and as it rang, A answered it, A would be the factual cause of B having answered his phone.

However, consider if A called B's phone, and as it rang, due to a dry throat, B went to get a glass of water and then answered the phone. Was A the factual cause of B having gotten a glass of water? Given a dry throat, would B have gotten it anyway? When does the factual causation end in a seemingly perpetual series of events?

Going to the topic in issue, the BI Insurance claims, the thought process applied by the courts seems to be as follows:

I. Covid-19 entered South Africa as a notifiable disease/pandemic and occurred within 50km of the claimant's business premises;
II. The government responded by enacting the provisions of the Disaster Management Act and enforced a hard-lockdown for 5 weeks, followed by varying degrees of lockdown;
III. Due to the lockdown, the claimant's business was interrupted and losses were suffered;
IV. There is a close enough link to the virus entering the country and the actions taken by the government, extending the chain of causation from the virus to the government, and from the government to the claimant, so as to allow the claimants claim to succeed.

However, focusing on the first link in the causation chain, it is submitted that the faulty assumption is that the government *had to* enforce a lockdown. That's not to say that the lockdown wasn't the causal response to the virus, but that it *did not have to be*. So yes, but for

the virus, the government would presumably have not gone into lockdown. But it is the *choice of consequence* that one could take issue with, and that cannot merely be ignored.

Looking to the telephone call example above, the problem with the 'but for' test in that scenario is that we have an objective cause that causes a subjective cause, and that subjective cause causes a further objective cause. Simply put, the virus entering the country (*an objective event*), led to a subjective decision not only to enforce a lockdown, but to also regulate the lockdown in a very specific way (*subjective event*), which then led to closure of businesses and profit losses (*objective event*).

The 'but for' test being applied as it has been in the current case law seems to violate one of the fundamental laws of logic, that of the law of the excluded middle. This law of logic states that for any proposition, either that proposition is true or its negation is true. So for example, in the scenario above, if A were to call B's phone, B's phone either rings or it does not ring. B then either answers it or doesn't answer it. There is no middle option for these two absolutes. Can we however then say the same thing for the government's response to the virus entering the country? That when the virus entered the country, the government had two absolute binary options, either enforce a hard-lockdown or not? This can hardly be the case. There were a variety of options to choose from and varying degrees of lockdown. There are a few countries who, despite the Covid-19 presence in their nation, refused to resort to a hard-lockdown, and successfully so. Secondly, there are serious academics and scientists who disagree with the hard-lockdown method, such as those who drafted the *Great Barrington Declaration*.[165]

[165] Jay Bhattacharya, Sunetra Gupta and Martin Kulldorff 'The Great Barrington Declaration' available at *https://gbdeclaration.org,* accessed 2 April 2021.

Therefore, the imposition of a hard-lockdown was a *policy choice* of the government, not an objective consequence.

Coming back to the point made by Reinecke and Lubbe, the question must be asked, 'to what degree are insurance companies at the mercy of the government?' Surely the business interruption insurance policy, as it relates to notifiable diseases, has some limitations? Can we really say that insurance companies are bound to whatever decisions the government takes regarding a claimants business? For how long? Look at the alcohol and cigarette industries as an example. If the SA Breweries and British American Tobacco cases are found in favour of SAB and BATSA, deeming the restrictions on alcohol and tobacco arbitrary and irrational, can SAB and BATSA still claim full losses from their insurer? What defence would the insurance companies have?

Looking to the LAWSA determination of causation above (which has been taken from case law): "*The traditional test to determine whether a particular act or omission qualifies as a necessary condition is the "but for" criterion: an act or omission is a necessary condition if, but for the particular act or omission, the consequence would not have occurred."*[166] The consequence that is argued to be causally linked back to the act or omission must be *the* consequence *(necessary)*, not *a* consequence (sufficient). Thus the hard-lockdown as an implemented policy must be *the* consequence of Covid-19 entering the country as a matter of necessity and logic. This, as explained above, is not necessarily the case.

The alternative hypothesis proposed here is that the government's actions were not merely an extension in the link of causation, but more of an intervening act. Reading the wording of the

[166] Reinecke MFB et al. *LAWSA* op cit note 162.

insurance policy, an argument can reasonably be made that the policy makes provision for a sick worker, infected supplier etc., which as a result leads to a mere interruption in business activity. Had the government not intervened, Covid-19 would have undoubtedly have caused an interruption in business traffic and function. However, the losses would presumably have been much lower. Therefore a claim against the insurer would still have ensued, but the *quantum* would have been much lower. Of course any claim against the government for losses suffered, if the applications against the lockdown regulations are anything to go on, would not be met with any real success.

In conclusion of this thought, the assumption that the virus being present in the country necessarily led to the lockdown, like calling a phone and it rings, is with respect a false assumption. This hypothesis doesn't seek to find a loophole for insurance companies to evade claims, but potentially to limit their liability, or even to share the liability with the government.

While it is understood that as a matter of practicality and public policy, the courts are inclined to find in favour of the claimants, which is agreed with, but at the very least, and as a matter of fairness, the government should have some liability.

While an arguments for 'reasonableness' by the government in accounting for its actions could very well be made, that opens up a completely different topic of what is 'reasonable' in the current circumstances, a question I don't think can be answered at this stage, most likely only in hindsight once the Covid-19 pandemic has dissipated.

While investigating the hypothesis might not produce much usefulness in terms of current judicial consideration, it is submitted that it's worth looking into.

An Alternative Interpretation of the Disease Clause

One thing that stands out when considering the interpretation and construction of the disease clause is that there is quite a bit of ambiguity and uncertainty. It could make sense then that given the ambiguity, that the courts have interpreted the clauses to the benefit of the insured. As an exercise in exploration of various interpretations, consider again the special provision taken from the policy document in the *Grassy Knoll* case and the breakdown that follows:

> ***Special Provisions***
>
> *(a)* ***Notifiable*** *Disease shall mean illness* ***sustained by*** *any person resulting from any human infectious or human contagious disease, an outbreak of which the competent* ***local authority*** ***has stipulated shall be notified to them****, but excluding Human Immune Virus (H.I.V), Acquired Immune Deficiency Syndrome (AIDS) or an AIDS related condition.'* [emphasis added]

Firstly, as an alternative interpretation, what could very well have been intended by the parties to this BI Insurance contract in "*sustained by*" is that where there is an interruption in the productivity of an insured business, it is due to one or more of their staff members having fallen ill, or a supplier, then such interruption will be covered by the disease clause. The disease must be sustained by someone, and because they have sustained the virus, an interruption ensues. This would align with the UKSC's interpretation of what the proximate cause was.

Secondly, the requirement that the disease must be 'notifiable' lends little credence to the causation argument that because the government was notified, it necessarily follows that it will do something about it, nor is it necessarily logical that a notification would evens likely lead to

action. A mere notification of an outbreak of a virus is does not necessarily equate to the conclusion that the government will step in and take any action at all. Notification often leads to a mere taking note of and monitoring a situation to ensure that a single case does not turn into an outbreak. It could be the caveat that the disease must be notifiable is a provision that restricts the application of this clause to serious and uncommon diseases, not every day illnesses like a cold or flu virus. The purpose of the disease outbreak needing to be notifiable is not so that the insurer can also cover government actions as well as lost productivity, but rather that the only diseases covered would be those that are serious enough to warrant the government's attention.

There are currently hundreds of pathogens roaming the earth, being picked up on a regular basis.[167] With organizations like the World Health Organization, or locally the National Institute for Communicable Disease (NICD) or South African Centre for Disease Control (SACDC), notifications to these institutions presumably happen on a daily basis, as dealing with possible disease outbreaks is what these organizations exist to do.

Considering the NICD Notifiable Medical Conditions Disease List[168], there are four categories of diseases which, when occurring, must be notified to the NICD. The degree of experience of these diseases and the notification requirements between categories are different. The categories and their requirements are as follows[169]:

[167] Francois Balloux 'Q&A: What are pathogens, and what have they done to and for us?' available at *https://bmcbiol.biomedcentral.com/articles/10.1186/s12915-017-0433-z,* accessed 27 November 2021.
[168] National Institute for Communicable Diseases 'Notifiable Medical Conditions (NMC) Disease List' available at *https://www.nicd.ac.za/wp-content/uploads/2017/06/NMC-list_2018.pdf,* accessed 27 November 2021.
[169] Ibid.

Category 1 notifiable medical conditions that require immediate reporting by the most rapid means available upon diagnosis followed by a written or electronic notification to the §Department of Health within 24 hours of diagnosis by health care providers, private health laboratories or public health laboratories. (E.g. Malaria; measles; plague; rabies etc.)

Category 2 notifiable medical conditions to be notified through a written or electronic notification to the Department of Health within seven (7) days of clinical or laboratory diagnosis by health care providers, private health laboratories or public health laboratories. (E.g. Leprosy; lead poisoning; hepatitis A-E; Tetanus etc.)

Category 3 notifiable medical conditions to be notified through a written or electronic notification to the Department of Health within 7 days of diagnosis by private and public health laboratories. (E.g. Ceftriaxone-resistant Neisseria gonorrhoea; rubella virus; Shiga toxin-producing Escherichia coli etc.)

Category 4 notifiable medical conditions to be notified through a written or electronic notification to the Department of Health within 1 month of diagnosis by private and public health laboratories. (E.g. Staphylococcus aureus: hGISA and GISA; Vancomycin-resistant enterococci; Colistin-resistant Pseudomonas aeruginosa etc.)

One can see that there are varying degrees of notification requirements and disease seriousness between the categories. A disease that falls into category one demands immediate notification while a disease in category four allows for notification to be made within a month. With this, it leaves open the topic for debate whether the court was correct or not in attributing that as a necessary conclusion, government notification would normally lead to action, given the various

categories of notifiable diseases. The critiqued interpretation of the special provision is found in *Café Chameleon*[170] where the court states:

> "That a notifiable disease **usually requires a government response** would have been appreciated by the contracting parties. They must therefore be taken to have understood and agreed that 'business interruption' referred to in the infectious diseases clause might result from a public health response to the occurrence of an infectious disease." [emphasis added].

It is respectfully submitted that this reasoning does not necessarily hold true in that the parties to the BI Insurance contract would expect a response from government on the mere notification of notifiable disease. If the special provision were re-phrased in the following way, it is submitted that the meaning would have much more clarity: …*an outbreak of which the competent local authority has stipulated shall be notified to them and which the authority then acts on…*

In a situation where A throws a cigarette into a forest and a large forest fire is later found, it could be argued that it wasn't the cigarette that caused the fire outbreak, but rather the wind that blew the cigarette to the dry parts of the forest and caused the fire to spread. However, blowing wind is a common recurrent of the environment and thus it is not considered an 'intervening' force, but rather part of circumstances in which the cause operates.[171] Can the same however be said about the government's response to the notification of any relevant disease? Is an unprecedented lockdown a common recurrent of public health? Surely not.

[170] *Café Chameleon* supra note 67 para [19].
[171] Hart H.L.A. and Honore T *Causation in the Law* op cit note 49 at p. 72.

Thirdly, as a matter of ordinary contractual interpretation, it may be argued that the inclusion of the specific term "*local*" lends credence to the idea the parties were concerned with small-scale outbreaks, not national pandemics. This is not the same argument made by Guardrisk and others that the response only includes responses from local authorities and thus any action by the national government is not covered, rather the intention of the parties was to insure and cover the loss of production and income for localized illnesses suffered by staff or suppliers.

It should therefore not be possible to argue, hypothetically by Café Chameleon, that because another unrelated business had an outbreak of measles, a disease which is notifiable to the authorities and within 50km of their premises, and because of a precautionary measure, Café Chameleon decided to close its store for two weeks under no instruction to do so by local authorities, that it is now entitled to claim under the BI Insurance policy. That would subject the entire system to rampant abuse. What ought to be reasonably inferred, is that although the special provision refers to "*any person*", what is truly meant and intended by the parties is any "*relevant"* person, meaning a relevant person who, if contracted the measles, would cause business interruption.

The critique offered above is not one aimed at the courts directly, but rather at the drafters BI Insurance contracts. What is offered to those considering the courts' judgments on these matters are merely alternative views of interpretation. Despite the alternative, it is unlikely the courts would have come to a different conclusion, however it is worth discussing.

Why an Alternative Interpretation to Causation? - The Apportionment of Compensation

Legislation increasingly provides for the apportionment of compensation where the harm suffered is as a result of the actions of two or more legally responsible persons. While courts or legislation would have to cross the hurdle of allowing for the government to accrue legal responsibility, it is not an impossible or unreasonable task. Apportionment allows for multiple parties to share the burden of responsibility. In Canadian and American legislation, the consideration of apportionment is linked to the degree of fault and/or negligence.[172]

In *Smith v. Bray*[173] it was held that under the English tortfeasor legislation, damages ought to be considered on the basis of causation, not fault. In determining the degree of apportionment, one would have to consider the 'causative potency' of each party to the dispute in order to attribute to each party the relevant degree of causative influence.[174]

In a different but accepted view, in *Davies v. Swan Motor Co.*[175] Denning LJ expressed the view that "*the amount of reduction does not depend solely on the degree of causation…[it] involves a consideration, not only of the causative potency of a particular factor but also of the its blameworthiness*".[176]

The discussion above regarding an alternative causation view is not to make the case that insurer's should be held to no account at all, but rather that there is a reasonable argument for

[172] Hart H.L.A. and Honore T *Causation in the Law* op cit note 49 p. 232.
[173] *Smith v. Bray* (1939) 56 TLR 200.
[174] Hart H.L.A. and Honore T *Causation in the Law* op cit note 49 p. 232.
[175] *Davies v. Swan Motor Co*. [1949] 2 KB 291, 326.
[176] Hart H.L.A. and Honore T *Causation in the Law* op cit note 49 p. 233.

apportioning the claim between the insurer and the government. If a court were to accept this, the courts could consider whether the implementation of the lockdowns were reasonable or not, specifically for the apportionment of quantum.

What is not being asked to be considered is whether the lockdown was lawful or not, but considering the extensive blanket response, whether it was reasonable. In the court challenges to the lockdown regulations, it was patently clear that the court was dealing with a clear issue of legality of the lockdowns, not whether it was fair or reasonable. Respecting the doctrine of the separation of powers, the courts allowed Parliament or the Minister of Cooperative Governance, who had the requisite power, to make the discretionary decisions it/she felt was best. It was not for the court to decide whether it was the right decision, merely whether Parliament/the Minister has the requisite power to do so.

What is being proposed here as a determination by the court would have no bearing on subsequent challenges to the lockdown regulations, which will always remain a question of legality. It is submitted that the court could consider the reasonableness of the actions of the government within the confines of insurance law and make a decision on whether the response to the pandemic was too excessive or not. Should the court determine the actions of the government were in fact too excessive, the court could then apportion the amount claimed by the insured companies between the government and the insurance companies.

The reason, again, that this option is even being posited is that it cannot be reasonable or fair that insurance companies are at the mercy of a government they cannot control. At the time of writing this paper, South Africa had been in lockdown for 21 months. There's no saying when this will even end. Can we then say that insurance companies must just keep paying claims

whenever the government resort to a hard lockdown, whether reasonable or not? While that question in the early occurrences of Covid-19 and the initial lockdown may not have been a concern, as the world progresses years forward and remains in lockdown, the patent unreasonableness of holding insurance companies liable for the excessive acts of government must inevitably be cause for concern in the near future. While it is accepted that the power of the government is restrained by the vote, that power is only exercised every few years, and thus the courts are there to restrain the power of government on the peoples' behalf.

How exactly the apportionment would be done is a discussion for another paper, as it requires a thorough analysis of the legal principles and case law. What we do however know at this stage is that this recommendation is not uncommon. In the law of delict the topic of apportionment of damages is covered to extensive lengths, and legal scholars could provide further insight and advice.[177]

An Administrative Law Argument

In South Africa, everyone has the right to administrative action that is lawful, reasonable and procedurally fair.[178] Reasonable administrative action by the government is a requirement of rationality.[179] The question this alternative analysis is considering is the question of the reasonableness of the extended lockdowns. While it is accepted that the first five-week hard lockdown occurred following similar actions of many other countries, the question posited here is whether the further extensions of the lockdown were reasonable under the alternative view.

[177] Perhaps not all too ironically, the lead counsel for Café Chameleon in the SCA case, Adv JJ Gauntlett QC SC, has published work in the field of quantum of damages.
[178] The Constitution of the Republic of South Africa, section 33.
[179] *Bel Port School Governing Body v Premier, Western Cape* 2002 (3) SA 265 (CC) [123] – [128]. See also: I Currie and J De Waal 'The Bill of Rights Handbook' 6th Ed, 2015 at p. 669.

The Constitutional Court has held that administrative action is unreasonable if i) it will not reasonably result in the achievement of the goal identified for the exercise of the power; ii) is not reasonably supported on the facts; and iii) is not reasonable in light of the reasons given for it.[180] In the year 2020, South Africa saw one of its biggest peaks in Covid-19 between June and August 2020.[181] During this same time, South Africa was under level 3 of lockdown.[182] As discussed above, the lockdowns, especially the higher levels, had disastrous effects on many businesses.[183] Despite the lockdowns not having their desired effects, as evident from the June/August data of 2020, the South African government ordered the country to move to level 3, or adjusted level 3, three more times,[184] and even to level 4 another two times.[185]

With that, it is submitted that while it may have been legal, and perfectly within the purview of the Executive government to make such a decision, accepting the alternative view posited here, and for the sake of BI Insurance claims, it could be prudent for a court to consider arguments as to the reasonableness of the extended lockdowns in line with the decision of *Bato Star fishing*. If the courts found that the government imposed lockdown was unreasonable, it is submitted that this would provide reasonable grounds for the court to apportion the pay-out due to the insured between the insurer and the government.

[180] *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2004 7 BCLR 687 (CC), 2004 4 SA 490 (CC) at paras 45 – 46 and 48; I M Rautenbach "*Rautenbach-Malherbe Constitutional Law*" 6th ed, 2012 at 446.
[181] Andrew Harding 'Coronavirus: South Africa eases lockdown as 'outbreak reaches peak'' available at *https://www.bbc.com/news/world-africa-53795339,* accessed on 6 December 2021.
[182] Government Gazette Level 3 Lockdown op cit note 10.
[183] Majola G *87% small growers in SA haven't recovered from hard lockdown* op cit note 15
[184] SA Government 'About Alert Systems' available at *https://www.gov.za/covid-19/about/about-alert-system,* accessed 6 December 2021.
[185] Ibid.

CHAPTER SIX

The Way Forward

As can be seen from the discussion above, the application of causation in the law is no small task. It is however maintained that there is a fine line between overlooking critical elements of causation and getting so technical that one drifts off into philosophy. The UKHC test case was an example of a situation where judicial officers sought to overlook the philosophical complexities of argument on causation and sought a more practical method of adjudication. We see later however, that the UKSC places much more emphasis on the topic, expending much energy and thought in thoroughly considering the logic of various arguments and its practical implications.

As it stands, it would seem that the matter has largely been settled. The *Café Chameleon* SCA decision stands, and as far as I am aware, is not on appeal to the Constitutional Court. The *Café Chameleon* SCA judgment thus stands as somewhat of the *locus classicus* for modern disease clause insurance claims.

For insurers, a hard lesson has been learnt. It is submitted that the future of insurance policies is about to change, especially when it comes to the use of standard precedents. If one considers the various local case law on this issue, one will find that the infectious disease clauses are more or less all adopted off of the same blueprint. As such, when one insurer loses on the interpretation of the clause, all insurers lose.

For the insured, a great victory was won, but not without its costs. As for local regulators, it is submitted that much of this back and forth court action would not have been necessary if the

local Financial Sector Conduct Authority had taken the case forward as a test case on behalf of all parties, as was done in the UK test case. In doing so, any variations of disease clauses could be considered and the courts could decide on all policies in one go, thus clearing the way for the insured businesses to lodge their claims without issue. Of course there may be some nuance and technicalities arising from quantum or procedural issues, but largely, the question of whether insurers' are liable for the effects of the lockdown due to Covid-19 would largely be answered. It would however seem as *Café Chameleon* was South Africa's test case.

In conclusion, it would seem that at the date of finalizing this paper, the South African government, as well as governments abroad, have learnt a tough lesson about the efficacy of lockdowns and its devastating effect on the economy. As the new Omicron Covid-19 variant spreads, which was first discovered in SA, the response from government is starkly different. Instead of rushing to lockdowns, the President rather urger citizens to take precautions as we now understand that we are going to be living with this virus for the long term, and thus need to handle the virus while taking into account the needs of the economy.

This was well received by the nation, and hopefully more governments follow.

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