

338/82/AV

IVAN JOSEPH DE BEYER

AND

SIDNEY JOHN HART-DAVIS

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

IVAN JOSEPH DE BEYER

Appellant

AND

SIDNEY JOHN HART-DAVIS

Respondent

CORAM: Jansen, Cillié, JJA, Wessels, AJA

HEARD: 22 November 1984

DELIVERED:

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J U D G M E N T

WESSELS, AJA

This is an appeal against the judgment of KANNEMEYER,

J., delivered in the East London Circuit Local Division,

in .....

in which appellant (defendant in the action) was ordered,

inter alia, to pay to respondent (plaintiff in the action)

damages in the sum of R3 527,60 to compensate him for damage

caused to a Ford Escort motorcar as a result of a collision

with a Volkswagen motorcar on 25 August 1979. Plaintiff

was the driver of the Ford Escort, and defendant that of the

Volkswagen.

The collision occurred between 19h30 and 20h00

on the evening in question. The plaintiff was travelling

on the Old Transkei Main Road from East London towards Beacon

Bay where he then lived. In the relevant area the road

runs roughly from west to east. A road leading from

MacLeantown joins the Old Transkei Main Road from the north.

Before .....

Before joining the Old Transkei Main Road it runs roughly from north-east to south-west. That is, the roads do not form a right-angled intersection. It would also appear that at the intersection, the MacLeantown Road is a good deal wider than it is north-east thereof. It would also appear that a yield-sign controls traffic entering the Old Transkei Main Road from the MacLeantown Road. It is situated on the pavement on the eastern side of MacLeantown Road. White lines divide both the Old Transkei Main Road and the MacLeantown Road into two separate traffic lanes.

The first witness called by the plaintiff was the 23-year old Andrew Kenneth Allam who was a member of the South African Police from 1976 to 1980. On 25 August

1979 .....

1979, while he was stationed at Beacon Bay, he was called out to investigate the collision. He arrived at the scene at 8.11 p.m. His evidence is summarised as follows in the judgment of the Court a quo:

"He found the vehicles at the site and saw the plaintiff and defendant there. He says neither of them was under the influence of alcohol. He marked the positions of the two vehicles and the plaintiff pointed out what he claimed to be the point of impact which Allam marked with yellow chalk. He saw glass on the surface of the road which, he says, was mainly at the point of impact and also in front of the Ford and at the side of the Volkswagen. When the plaintiff pointed out the area in which the collision had occurred Allam says that he 'asked him to be specific' and that the plaintiff then put his foot down near or at a spot where the tar of the road surface had been repaired. The defendant was,

by .....

by reason of the injuries he had received, unconscious and thus could give no information. Allam then, having marked the relevant spots, went to get assistance and returned to the scene with a colleague at about 9.30 or 9.40 p.m., when he took measurements from which he drew the police plan, EXHIBIT G2 and prepared the key, EXHIBIT G1, the following morning.

On the following morning Allam also returned to the scene to ascertain the number of the pole marked 'C' on his plan. He found it to be unnumbered. He looked for brake marks without success. He then removed glass which was still lying on the surface of the road.

When Allam was cross-examined the main thrust was directed towards his evidence concerning the glass on the road, based on the fact that he had not shown the presence of any glass on EXHIBIT G2. He said that, when undergoing his training he had been taught to indicate marks on the road

and .....

and the apparent point of impact when drawing plans but that his training did not require him to indicate where glass lay on the road. He said he relied on his memory for his evidence concerning the glass on the road surface. He said that the glass was concentrated near the point of impact indicated by the plaintiff - point X on EXHIBIT G2 - and also in front of the Ford and at the side of the Volkswagen. The concentrated area of glass was about three-quarters of a metre in diameter while most of the scattered glass was towards the southern side of the road. When he returned to the scene to take the measurements most of the glass in the concentrated area was still there where he had seen it earlier and the following morning there was still sufficient glass in that area to have enabled him to have found the point of impact as pointed out by the plaintiff. It was put to him that two witnesses to be called by the

defendant .....

defendant would testify that there was no glass on the northern half of the road and he repeated that, apart from the area where glass was concentrated there was also glass in the vicinity of point A2 on EXHIBIT G2 (the front left side of the Ford) and on the tar on the side of the Volkswagen and also on the southern gravel verge. He saw no glass on the tarred surface of the road to the west of the electricity pole marked C on EXHIBIT G2. He says he found the two motor cars in the positions shown on EXHIBIT G2, the Ford having its right rear portion over, and on the northern side of the centre line. It was put to him that, if his measurements were plotted on a scale plan, the Ford was entirely on the southern side of the centre line - see EXHIBIT J - and he replied: 'I seem clearly to remember it being over the line.'

Plaintiff, a specialist paediatrician aged about

fifty-one .....

fifty-one years, gave evidence regarding the circumstances

which led up to the collision. He had played golf that

afternoon and left the club for home at about 7.30 p.m.

His evidence is summarised as follows in the

judgment of the Court a quo:

"He was driving the Ford which he had had for about two months. There is no street lighting in the area in which the accident occurred. As he neared the area he was driving at about 70 km/h. He fixes his speed by reference to the fact that the Ford was fitted with a speed control which he had set at 70 km/h and, as he drove uphill towards the accident scene, he looked at his speedometer to check the speed control's efficacy.

It was dark and he had the Ford's headlights on dim. He was on his correct side of the Old Transkei Main Road as he travelled towards the east.

As .....

As he approached the junction with the MacLeantown road he saw the lights of a motor vehicle coming along it towards the Old Transkei Main Road. He continued at about 70 km/h until he realised that this vehicle - the Volkswagen - was not slowing down. He says he disengaged his speed control and hooted. The Volkswagen continued towards him so he moved over to the right hand half of his side - the northern side - of the road. The Volkswagen approached him and he swerved to the right and 'Slammed on my brakes'. He could not judge the speed of the Volkswagen but 'it was such that it could not stop'. He moved to the right half of his side of the road as at first he expected the Volkswagen to stop in the mouth of the intersection. After he had swerved right and braked the collision occurred. His impression is that the middle of the front of his Ford came into contact with the Volkswagen's right front bumper. At the time of the accident the Volkswagen was coming out of the

MacLeantown .....

MacLeantown Road and turning west  
towards East London."

The plaintiff was still at the scene of the collision when Allam arrived, and he pointed out the point of impact to him. He was assisted in pointing out a specific spot because of a concentration of broken glass. Allam indicated this spot as "X" on Exhibit G, a plan prepared by him and handed in as an exhibit. This point was slightly to the north of the white centre line on the Old Transkei Main Road. Plaintiff was not sure whether he crossed over the centre line of the road but, at the time, he thought that he may have done so. The plaintiff was asked what he would say if the defendant were to say in evidence that he had already turned out of the MacLeantown

Road .....

Road, entered the Old Transkei Main Road and had reached a point opposite the gate in the pre-fab wall when he first saw the plaintiff's motor car. He answered: "I don't believe it". Asked what his reaction would be to a suggestion that the impact occurred to the west of this gate he answered: "No, quite impossible . He had not yet completed his turn; I hit him as he came from my left". As to the situation of the afore-mentioned gate, it appears from a plan, handed in as an exhibit at the trial, that on the south side of the Old Transkei Main Road and some short distance to the west of the intersection of that road and the MacLeantown Road there is a building referred to as "Peter's Store". The pre-fab wall runs in an easternly

direction .....

direction from the north-westerly corner of Peter's Store.

The gate is some 10 meters to the east of Peter's Store.

The plaintiff said that when he saw the lights of the Volkswagen approaching along the MacLeantown Road he moved to his right and that that was his invariable practice. His impression was that the defendant, who did not stop at the yield sign at the mouth of the MacLeantown Road, cut the corner into the Old Transkei Main Road but he could not be adamant about this. Further cross-examined, the plaintiff became adamant that the Volkswagen came out from the MacLeantown Road without stopping at the broken white line on the northern side of the Old Transkei Main Road. He disputed that it had so stopped while he

was .....

was still out of sight to the west. He stated if he were out of sight at that time he would not have seen a stationary vehicle at the broken white line on the northern side of the Old Transkei Main Road. This cross-examination related to evidence given by plaintiff at a criminal trial instituted against defendant in connection with the collision. He denied that the Ford was swaying from side to side and that the defendant was forced to swing to his left in an unsuccessful attempt to avoid the collision. He also said that the collision took place well to the east of Peter's Store.

The defendant gave evidence at the trial and called several witnesses to testify on his behalf. At the time of the trial defendant was twenty-four years old and he was

employed .....

employed by a textile mill as a maintenance fitter and

turner. On the night in question he was at his home

in the MacLeantown Road with his fiancée and a younger sister.

They decided to drive to East London to buy refreshments.

They left in his Volkswagen, which he was driving, at about

7.40 p.m. His evidence concerning the incidents which

led up to the collision is summarised as follows in the

judgment of the Court a quo:

"He says that on reaching the junction of the MacLeantown and Old Transkei Roads which is governed by a yield sign, he stopped at the broken white line which can be seen in photograph B4. He remembers that while he was stationary there his wife lowered her window and threw out a cigarette butt. He saw no traffic on the Old Transkei Road, into which he then drove. When

he .....

he was in the Old Transkei Road he saw the lights of a vehicle approaching at speed from the East London side. The lights appeared to be swaying from side to side and then the oncoming vehicle moved over onto his side of the road. In an unsuccessful attempt to avoid the accident he swerved to his left. The last thing he remembers is 'a thud'. He regained consciousness in hospital. He says that the collision occurred between the pole Z and Peter's Store, but nearer to the shop."

His attention was drawn to evidence given by him at the criminal trial. As to that his evidence is summarised as follows in the judgment of the Court a quo:

"He said, in the criminal trial, that when he first saw the Ford it was 40 to 50 metres from him and he confirmed this distance under cross-examination. He was asked why he did not see the

Ford .....

Ford earlier in view of the fact that one can see about 200 metres to the west from the junction of the roads and he answered that he was not 'good at distances'. However he said that he was certain the Ford was not 200 metres from him when he first saw it - the most it could have been was between 80 and 90 metres. When he first saw the Ford he was travelling at about 15 km/h. He claims to have looked at his speedometer as he was crossing over from the MacLeantown road. He says he did not actually read his speedometer but looked to see if his instruments were working and noticed that his speed was between 10 and 15 km/h. He drove a further 50 metres and then saw the Ford. He was still only travelling at 15 km/h at that stage. He agreed that this was an extraordinarily slow speed in the circumstances and said he was accelerating slowly and on reaching the decline to the west he would have increased his speed to 60 km/h.

When .....

When he first saw the Ford it was on its correct side of the road and apparently travelling normally. He cannot dispute the plaintiff's evidence that he (the plaintiff) was travelling at 70 km/h. From the time he first saw the Ford up to the collision he estimates that he travelled a further 5 metres westward. The Ford swerved onto his side when it was about 30 metres from him. Until then it had been behaving normally. He then said that the Ford was 'swaying from side to side. The first thing that I noticed was that it swayed', but he cannot say if it crossed the centre line. He said he swerved to his left when the Ford started to zig-zag at which stage he must have been travelling at about 15 km/h, but, he says, he did not look at his speedometer then. His answer in the criminal trial (EXHIBIT A page 289 line 3) to the question 'When was the last time that you looked at your speedometer?'

---'The .....

--- 'The last time I looked at my speedo was when I saw the other car zig-zagging'.

He agreed that the above evidence recorded in EXHIBIT A must be correct as his memory of the events would then have been fresher but he cannot say why he looked at his speedometer at that stage. He finally said he was near telephone pole Y at the time of the collision. As he crossed over the middle of the Old Transkei Road he says he looked to his right but saw no lights or glow of lights to his right. He agreed that, at the criminal trial, he said that the Ford started to sway when 'it was closer than 50 metres, much closer'."

The other eye witnesses who were called by the defendant were his sister, Gèralyn de Beyer, and his wife.

At the time of the collision Gèralyn was some 14 years old

and in standard 6 at school. She gave a version as to

how .....

how the collision occurred. It is stated in the judgment of the Court a quo that Geralyn "was a very unimpressive witness" and that her evidence about when she saw the Ford is so contradictory as to make her other evidence suspect. The learned Judge a quo concluded that "no reliance can be placed on her evidence". It appears from the judgment of the Court a quo that little reliance could be placed on the evidence of defendant's wife. Certain three other witnesses, Mrs E Botha, Mrs M Y Boshoff and Mr J J Jordaan testified on defendant's behalf. Although they were not eyewitnesses, they arrived on the scene shortly after the collision had occurred. In so far as Mrs Botha is concerned, the learned Judge a quo concluded, in my opinion

justifiably .....

justifiably so, that she gave the impression of being partisan. He stated that she did not impress him favourably.

In so far as Mrs Boshoff is concerned, the Court a quo

formed a far better impression of her than in the case of

Mrs Botha. However, she was only asked about the posi-

tion of glass on the road some thirty two months after the

accident. The learned Judge a quo was satisfied on the

probabilities that there was a concentration of broken glass

at the spot marked by Allam on Exhibit G2 as the point of

impact pointed out by the plaintiff. In dealing with

the probabilities, the judgment of the Court a quo reads

as follows:

"Other probabilities also support the plaintiff. There was no reason for

any .....

any erratic 'swaying' or 'zig-zagging' by him on his incorrect side of the road. The probabilities certainly support his evidence that the Volkswagen appeared to cut its corner and come into his line of travel forcing him to swing to his right. If one accepts point X on EXHIBIT G2 - and as plotted on EXHIBIT F - as being the approximate point of impact; as I do, the probabilities in favour of the plaintiff's version become overwhelming."

The Court a quo concludes:

"On the plaintiff's version there can be no doubt that the defendant was negligent and that his negligence contributed towards the accident. On this version it is shown that the defendant moved from the MacLeantown road into the Old Transkei Main Road at a time when it was inopportune and dangerous to do so, without regard to the approaching Ford which was travelling on the major through road."

As .....

As to the above-mentioned findings of the Court a quo, I am of the opinion that there appears to be no adequate grounds for disagreeing therewith.

It remains to be determined whether the Court a quo correctly concluded that the defendant was the sole cause of the collision or whether there was any negligence on the part of the plaintiff which contributed thereto.

It is necessary at the outset to refer to certain findings which the Court a quo made in connection with the credibility and demeanour of the plaintiff, the defendant and some of the witnesses.

In regard to the plaintiff the learned Judge a quo remarked that he appeared to be a phlegmatic type of person, whose evidence had the ring of truth. He was not dog-

matic .....

matic in respect of points which could have told in his favour. He told a simple straightforward story of the Volkswagen coming from a T-junction into his line of travel and his swerve to the right in an attempt to avoid the collision.

As to the defendant, the learned Judge a quo states that he is "a man of simple background who was somewhat slow in the witness box". However, he stated that no adverse finding can be made in respect of his demeanour. The learned Judge did, however, refer to certain unsatisfactory aspects in his evidence. They are referred to as follows in the judgment of the Court a quo:

"It .....

"It is improbable that he would have crossed the road and started to drive towards East London at only 15 km/h. His evidence concerning looking at his speedometer is unlikely. Had he stopped and looked to the right he must have seen the plaintiff's Ford approaching earlier than he says he did. Whether it was 40 or 90 metres away when he saw it, he should have seen it earlier. His estimate that the Ford swerved to the right some 30 metres before the collision, before which it had travelled normally on its correct side, supports the plaintiff's version. His suggestion - and that of his sister - that the plaintiff zig-zagged was not put to the plaintiff in cross-examination. It was merely put to him that his vehicle 'was swerving' which he denied."

I have already referred to the view of the Court

a quo that both defendant's wife and sister were unimpres-

sive .....

sive witnesses.

On the issue of contributory negligence the onus of proof that plaintiff was also negligent and that his negligence contributed to the collision rests on the defendant. The version of the plaintiff as to his approach to the junction in question is summarised as follows in the judgment of the Court a quo:

"The plaintiff says he saw the lights of the Volkswagen approaching the Old Transkei Main Road along the MacLeantown road, before it reached the junction. There is no reason to reject his evidence. He was, thus, keeping a proper lookout. He was entitled to expect the Volkswagen to give him the right of way although, of course this did not relieve him of the duty to keep it under general observation and to take appropriate steps should it fail

to .....

to behave as he was entitled to expect. He says that he noticed that the Volkswagen was not slowing so he disengaged his speed control and hooted and when the Volkswagen continued to come he moved somewhat to his right, thus allowing it a wider berth in which to stop. When he realised that the Volkswagen would or could not stop he applied his brakes violently and swung to the right."

The learned Judge a quo stated the following in his judgment:

"The pertinent questions in this case are whether it has been shown that the plaintiff ought to have appreciated earlier than he did that the defendant was not going to yield the right of way to him and, if so, whether he could have avoided the accident had he appreciated that the defendant was not going to stop at that earlier time.

In .....

In my view it has not been shown that the plaintiff should have appreciated the situation, and accordingly taken avoiding action earlier than he did. Nor, in my view, has it been shown that the action he took in swerving to the right was unreasonable in the circumstances particularly in view of the emergency which existed and which was not of his own making."

I remain unpersuaded that the Court a quo erred in any manner in dealing with and disposing of the issue of contributory negligence.

The appeal is dismissed with costs.

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P J WESSELS, AJA

JANSEN, JA }  
CILLIÉ, JA } Concur