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(APPELAFDELING)	
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REGISTRAR, SUPREME COURT OF SOUTH AFRICA	

NATIONAL EMPLOYERS' GENERAL
INSURANCE COMPANY LIMITED

Appellant

and

TIMOTHY JAMES SULLIVAN

Respondent

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

NATIONAL EMPLOYERS' GENERAL
INSURANCE COMPANY LIMITED

Appellant

and

TIMOTHY JAMES SULLIVAN

Respondent

Coram: VILJOEN, HEFER, JACOBS, SMALBERGER, JJ A et

BOSHOFF, A J A

Heard: 25 August 1987

Delivered: 15 September 1987

J U D G M E N T

BOSHOFF, A J A :

On 19 June 1981, after dark between

18h00 and 18h30, H P Grater (Grater), driving a BMW motorcar from East to West along Twelth Avenue in Rivonia, Johannesburg, collided with a Ford Capri motorcar, which was being driven by a 17 year old learner driver Granger Manson Stretton (Granger) from South to North along Stiglingh Road. The collision occurred in the intersection of the two roads, causing bodily injury to Timothy James Sullivan, the front seat passenger in the Capri motorcar. Sullivan, as plaintiff, instituted action in the Witwatersrand Local Division for damages for the bodily injury sustained by him against Derrick Thomas Stretton in his capacity as father and natural guardian of Granger as first defendant, against the

National Employers' General Insurance Company Limited,
the insurer of the BMW under the provisions of the Compulsory Motor Vehicle Insurance Act, 56 of 1972, as the second defendant, the appellant in this matter and against the Commercial Union Assurance Company South Africa Limited, the insurer of the Ford Capri motorcar under the provisions of the aforesaid Act, as the third defendant. The plaintiff alleged that his bodily injury was caused by the negligence of Grater and/or Granger and his claim included an amount of R25 000 as general damages for pain and suffering, loss of amenities of life and disability.

In their pleas the first, second and third

defendants...../4

defendants denied that the plaintiff suffered any damage.

The first defendant denied that Granger was in any way

negligent and, in the alternative, in the event of the

Court finding that he was negligent, that he was the

cause of the collision. He averred that the negli-

gence of Grater was the sole cause of the collision.

He accordingly prayed that the claim against him be

dismissed with costs, or alternatively, that the Court

apportion the damages to be paid to the plaintiff by

the first, second and third defendants in such proportions

as the Court deemed just and equitable. The second

and third defendants denied that either Grater or

Granger was negligent.

At the trial a sketch plan of the scene of the collision drawn to scale as well as six photographs of the scene taken by the first defendant a week before the trial were handed in by consent.

The plaintiff relied on his own evidence to establish that the negligence of Granger and/or Grater caused his damage. Granger although present at Court was not called as a witness. He is the plaintiff's second cousin. The second defendant called Grater as a witness.

The plaintiff relied on the evidence of Prof du Toit, an orthopaedic surgeon and research professor with considerable experience in spinal surgery, to

establish...../6

establish the extent of his spinal injury and the prognosis.

The defendants relied upon the evidence of three lay witnesses and three orthopaedic surgeons, one of which was Dr Mynhard who holds a London Fellowship in orthopaedic surgery, to controvert the opinion of Prof du Toit of the extent of the spinal injury and his prognosis.

The trial court had the problem of resolving the conflict of views of Prof du Toit and Dr Mynhard and gave preference to that of Prof du Toit that the injury of the plaintiff was severe and lasting.

The trial court found that both Grater and

Granger were negligent and must share responsibility for the injuries to the plaintiff. The trial court thus granted judgment with costs against the first, second and third defendants jointly and severally for damages which included R25 000 as general damages for pain and suffering and loss of amenities of life. The liability of the third defendant was subject to the limitations of section 22 of Act 56 of 1972.

The trial court refused to apportion the responsibility as between the first and the second defendants.

All three defendants were granted leave to appeal to the full bench but the second and third defendants

were...../8

were refused leave to appeal against the award of general damages. This court however granted them the necessary leave. Only the second defendant persisted in proceeding with the appeal and argued before the Transvaal Provincial Division (Preiss, Kirk-Cohen and Schabert, JJ) firstly that the trial court erred in holding that Grater was negligent and that his negligence was the cause of the plaintiff's injury, and secondly, that the R25 000 awarded as general damages was excessive.

The court a quo rejected the contention that Grater was not negligent or that his negligence was not a contributory cause of the plaintiff's injuries.

The...../9.

The court held that, although his negligence was probably very much less than that of Granger, the slightest degree of causative negligence on his part served to fix the second defendant with liability. As far as the general damages were concerned the court could find no reason to discount the probability that the injuries sustained in the collision, serious as they were, amounted to an aggravation of a pre-existing condition. That being so, the condition of the back of the plaintiff could not be described merely as having been caused entirely by the collision. The court, having regard to all the circumstances, was of the view that a proper amount for general damages would be R14 000 and not R25 000.

The appeal therefore succeeded with costs to the

extent that the general damages were reduced to R14 000.

The second defendant thereupon applied for leave to appeal to this court against the finding that Grater was negligent and the plaintiff in turn applied for leave to appeal against the reduction of the award of general damages from R25 000 to R14 000. Both applications were refused. This court however subsequently granted the second defendant leave to appeal against the finding of negligence on the part of Grater and also granted the plaintiff leave to cross-appeal against the order reducing the award of general damages from R25 000 to R14 000.

The second defendant will hereinafter be referred to as the appellant and the plaintiff

as the respondent.

On the question of the appellant's liability by reason of Grater's alleged negligence, the following facts are relevant.

12th Avenue runs from East to West and has a fairly steep incline from where it begins at its eastern end up to a rock on the lefthand side of the road approximately 30 to 40 meters from the intersection. From that point up to the intersection the incline is less steep. 12th Avenue has a tarmac surface,

5,2 meters...../12

5,2 meters wide, and there are no white lines on its surface. It is a through road from where it begins in the east until its junction with Rivonia Avenue in the west and all the roads that cross it are controlled by stop signs. Stiglingh Road runs from south to north and is on a slight down gradient from south to north. It was a dirt road and a few days prior to the collision roadworks were commenced on it south of its intersection with 12th Avenue. The purpose of the roadworks was to tarmac the surface of Stiglingh Road and to instal storm-water drains at the verges of the corner of the two roads. The newly tarred surface of Stiglingh Road is 7,3 meters wide. While the roadworks were in progress the stop sign

in Stiglingh Road at the southern entrance to the intersection was removed and to that extent the entrance from that side was not controlled by a stop sign. The stop sign was removed shortly before the day of the collision. The stop sign at the northern entrance of the intersection was still intact and visible to traffic approaching the intersection from the south. . There was a "Roadworks Ahead" sign on the lefthand pavement of 12th Avenue in front of the rock 30-40 meters from the intersection although no roadworks were carried out on 12th Avenue itself. There are no street lights at or near the intersection. There is a 7 feet high split pole fence with a thick hedge behind it 3,75 meters to the south of 12th

Avenue and running parallel to it. There is a similar fence and hedge 3,15 meters to the east of Stiglingh Road and running parallel to it. These two fences with the hedges behind them approach each other at right angles practically up to the intersection. The fence along Stiglingh Road ends 10 meters from the southern edge of the tarred portion of 12th Avenue and the fence along 12th Avenue ends 9 meters from the eastern edge of the tarred portion of Stiglingh Road. These two ends are joined by a similar split pole fence which cuts across the corner formed by the two roads. Thus instead of the fences meeting at the corner at right angles the corner formed by them is blunted in such a way that

visibility...../15

visibility from Stiglingh Road to the east into 12th Avenue and from 12th Avenue to the south into Stiglingh Road is thereby slightly increased. Apart from this limited recession of the fence on the south-eastern corner of the intersection the corner is to all intents and purposes a dangerous blind corner. The fence completely blocked the view of drivers approaching the intersection from the east in 12th Avenue, south into Stiglingh Road and the view of drivers approaching the intersection from the south in Stiglingh Road, east into 12th Avenue until they are relatively close to the intersection.

The question to be considered now is whether

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the evidence established that Grater was negligent and, if he was negligent, whether such negligence was the cause of the respondent's injuries. Since Granger did not testify the only material evidence on this aspect of the case was that of his passenger, the respondent, and Grater himself.

According to the respondent, Granger, his second cousin, who lives in that area was driving him and another cousin to a party at a house in Stiglingh Road. Granger was a learner driver and the respondent, being a licensed driver, sat with Granger in the front

and...../17

and was watching the road all the time. They were travelling in Stiglingh Road from south to north. He could not say at what speed they were travelling but in his opinion it was well within the limits laid down for a road in a suburban area, a built up area and a dirt road at that. Where they entered the intersection of 12th Avenue he recalled the motorcar slowing down, not necessarily because of braking but because of the removal of the driver's foot from the accelerator. When they got into the intersection he recalled Granger exclaiming "this car is going to hit us". The respondent then for the first time noticed the motorcar approaching them. At that stage they had not yet crossed the

half-way mark of the intersection. He could not estimate the speed at which the approaching motorcar was travelling and also could not give the exact distance it was from them but he would say it was about 20 paces. After having made the exclamation, Granger accelerated to get across the intersection and the plaintiff could actually feel "the car kick into life". The other motorcar then struck the Ford Capri on the driver's side, roughly in the middle of the motorcar, and pushed it across the intersection on to the other side of Stiglingh Road and 12th Avenue and turned it almost on to its side against an embankment where it came to rest. After having said that it was his opinion that the impact occurred half-way to the

far...../19

far side of 12th Avenue, then a bit north of the centre line of 12th Avenue, he said that he could not recall exactly where they were when the impact occurred and that he just remembered that the Ford Capri ended up on the far side of the road. He had no idea where the actual impact occurred. He finally said that he recalled Granger's exclamation, looking to the right and seeing the motorcar approach. He was taken totally by surprise. It happened so fast, the impact happened almost immediately. In the light of this evidence his estimate that the other car was 20 paces from them when he saw it for the first time and that the impact took place in the northern half of the intersection cannot be seriously entertained.

According...../20

According to him the headlights of the Ford Capri were on but he did not say whether they were on bright or dim. Derrick Thomas Stretton, the first defendant and the father of Granger was called as a witness by the third defendant. He was the owner of the Ford Capri and had personally replaced the headlights of the Ford Capri with 100 quartz hallogen lights approximately 4 to 5 years beforehand. They gave better illumination than the ordinary headlights of the Ford Capri since they threw a whiter light. They however lit up the same distance ahead of the motorcar as the ordinary lights. This also applied to the dim lights. He did not know what distance ahead was illuminated by

these...../21

these lights and supposed that it would be 20 to 25 meters.

He conceded as a result of a suggestion to him by his

counsel that it may even be up to 35 to 40 meters. He

obviously had no idea of the correct distance. The

witness handed in photographs he had taken of the scene

of the collision in the bright lights of a BMW with

100 quartz hallogen lights. They showed what Granger's

visibility more or less was on the evening in question,

firstly approximately 50 meters and then approximately

25 meters from the intersection in question. They also

show the stop sign in Stiglingh Road on the northern

entrance of the intersection which controls entry into

12th Avenue from the northern side.

Grater testified that he had been working as a draftsman for two years virtually round the corner from the scene of the collision and knew 12th Avenue very well as a through road with all the side roads intersecting 12th Avenue controlled by stop signs on both sides of each intersection. On the evening in question he was on his way home and had entered 12th Avenue from Bevan road, the first road east of the intersection of Stiglingh Road with 12th Avenue and running parallel to Stiglingh Road. Driving his BMW uphill from east to west with his headlights on he approached the intersection of Stiglingh Road at approximately 40 km per hour. Because of the incline in the road and the loss of power

of his BMW at the time he could not have exceeded 40 km per hour. He was travelling on the lefthand side of the road with the full realization that he was in a through road and that traffic entering 12th Avenue from a side street could reasonably be expected to heed the stop signs and stop or slow down before entering or crossing the through road. His experience in the past had been that traffic stopped at the stop signs when he passed through the intersections in 12th Avenue. The roadworks were in Stiglingh Road and caused no obstruction in 12th Avenue. As far as traffic in 12th Avenue was concerned there was no need for extra caution. The roadworks had been carried out in Stiglingh Road and the warning "Roadworks

Ahead" was clearly intended to warn users of the road that during the day there were workers on or near the road working in connection with the roadworks. It was dark and he did not see any lights around. He also did not see the lights of the Ford Capri on the road before it entered the intersection. His own headlights were on and shining onto the road in front of him. There was no evidence that he should have seen the beam of the lights of the Ford Capri in front of him on the road when his own lights were shining onto the road. Indeed, the respondent also did not claim that he saw the beam of Grater's headlights on the road or intersection. His visibility to the left was obstructed by

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the fence on the southern side of 12th Avenue and there was no indication that any vehicle was approaching the intersection along Stiglingh Road from the left. Just before he reached the end of the fence which was parallel to 12th Avenue, he saw the Ford Capri emerge from behind the fence which was parallel to Stiglingh Road. He could not have seen the Ford Capri at an earlier stage. He ventured an estimate of the distance he was then from the intersection as 20 m but under cross-examination conceded that it was no more than a guess. He had no idea of the speed of the Ford Capri and as a mere guess put it at 40 km per hour, probably the same speed at which he was travelling. It was approximately the same distance

from the intersection as he was. When he saw the Ford Capri for the first time he thought the Ford Capri was going to stop, seeing that Stiglingh road had always been a stop street, and it also seemed to be slowing down slightly. He could not make out whether it was going to stop. The respondent in fact confirmed this evidence that the Ford Capri slowed down slightly but further stated that it then suddenly accelerated. However, when Grater realized that it was not going to stop it was too late for him to do anything to avoid the collision considering that he was travelling at approximately 40 km per hour which meant about 11 meters per second.

According...../ 27

According to Grater the collision probably occurred in the middle of the intersection. The Ford Capri collided with the left front side of the BMW and swung it right round so that it faced in the direction from which Grater had come. The BMW had hardly any damage in front from the impact. He produced a photograph of the damaged BMW to show that the front was moved sideways from left to right. The front lights were still intact and also the front bumper was merely bent sideways. The chassis was also bent. It was pushed from the front sideways. The Ford Capri ended up in Stiglingh Road on the other side of the intersection, Grater could not say with what part of the Ford Capri

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the BMW made contact. He merely maintained that the Ford Capri struck the left front side of the BMW.

The question now arises whether on this evidence the respondent had discharged the onus resting upon him of establishing that Grater was negligent and that his negligence was causally related to his bodily injury. The negligence required to establish liability in civil actions is determined by a simple test namely the standard of care and skill which would be observed by the reasonable man. The trial court was thus required to determine on all the evidence whether Grater had in the circumstances observed that standard of care and skill. Relevant circumstances included the following

important...../29

important facts. Grater was travelling in a through road of which the side roads were all controlled by stop signs. Stiglingh Road was such a side road on which, to the knowledge of Grater, roadworks were being carried out but unbeknown to him the stop sign on the southern entrance of the intersection had a few days before been temporarily removed on account of the roadworks thereon. The stop sign on the northern entrance was still intact and visible at night in the headlights of a motorcar approaching the intersection in Stiglingh road from the south. Grater had known and travelled in 12th Avenue for a period of at least 2 years and knew that it was a through road of the kind mentioned. In the past he

travelled...../30

travelled through the intersection of Stiglingh Road and found that traffic observed the stop sign at the southern entrance. On the night in question he proceeded along 12th Avenue fully appreciating that it was a through road and expecting traffic emerging from the side roads to observe the stop signs and not to carelessly enter the intersection when it was not safe to do so.

In the case of Franco v Klug 1940 AD 126, Tindall A J is reported to have stated the following at p 135 in respect of a through street:-

"It is true that a driver in a through street wishing to cross an intersection is entitled to expect that a driver approach-

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ing from a stop street will stop at the stop sign. Whether he is entitled to expect the driver in the stop street to wait until he has crossed over depends on the distance of the driver in the through street from the intersection when the driver in the stop street reaches the stop sign. But the requirement ... that the driver in a stop street must bring the vehicle driven by him to a standstill at the stop sign and satisfy himself, before proceeding further, that he can do so with safety to himself and others, does not have the effect of giving a driver who approaches the intersection on a through street an absolute right of precedence or of relieving him from the duty of keeping a general lookout."

See also Diale v Commercial Union Assurance

Co of S A Ltd 1975(4) SA 572 (A) at p 577.

While...../ 32

While the stop sign together with the necessary stop line was absent from the southern entrance to the intersection a driver approaching the intersection from that side would not commit an offence if he did not stop before entering the intersection. That however did not relieve him of the duty to exercise special care before entering or crossing the through road particularly in view of the fact that he had to emerge from a blind corner. A reasonable man proceeding in the through road would have been aware of this.

In the special circumstances of this case Grater could not have been faulted for acting on the

basis...../33

basis that traffic from Stiglingh Road would respect the rights of traffic in the through road.

As stated in the above judgment, Grater by proceeding in the through road did not have an absolute right of precedence and was not relieved from the duty of keeping a general look-out. It follows from this that if the possibility of danger emerging was reasonably apparent, then the failure to take reasonable precautions would constitute negligence. If however the possibility of danger emerging was only a mere possibility which would never have occurred to the mind of a reasonable man, then there was no negligence in not having taken extraordinary precautions.

Grater on the evidence kept a proper look-out and saw the Ford Capri as soon as it emerged from behind the fence. Up to that stage the possibility of danger emerging was not reasonably apparent and there was no need for him to have taken any precautions. From that stage onwards the possibility of danger became apparent and depended on whether the driver of the Ford Capri was going to reduce speed or stop to allow the BMW to pass through the intersection in safety. Grater was travelling at approximately 40 km per hour and covering about 11 meters per second. The Ford Capri at first reduced speed slightly and then accelerated. In the meantime Grater had to assess the situation

to...../35

to see whether the driver of the Ford Capri was either going to stop or reduce his speed to enable him to pass in safety, but as it happened the driver changed his mind and accelerated. This change of mind was probably due to the fact that he was travelling at such a speed and was so close to the intersection and the BMW that he had no alternative but to accelerate to avoid a full-on collision. This probability supported Grater's account of what happened. According to him, when he realized that the driver of the Ford Capri was not going to stop there was nothing he could do to avoid the collision. Everything happened very fast.

It was on this part of the case that the respondent

found himself in difficulty on the evidence. The speeds and the respective positions of the Ford Capri and the BMW at the relevant stages could only be roughly determined by the manifestly uncertain estimates and observations made in difficult circumstances by the respondent himself, who was only a passenger and not the driver of the Ford Capri, and Grater. In fact apart from the estimate of the speed of the BMW by Grater, the estimate of the speeds and distances ventured by these two witnesses were no more than guesses as they themselves admitted. At best for the respondent, his evidence amounted to no more than saying that Granger drove the Ford Capri at a speed which was within the speed limit,

when...../37

when they were near the intersection, he slightly reduced his speed, then exclaimed "this car is going to hit us", the respondent then looked to his left and saw the BMW in 12th Avenue approaching the intersection. Granger accelerated and the collision occurred in the intersection. It is impossible to gather from his evidence how far Grater was from the intersection when he could or should have seen the Ford Capri in Stiglingh Road had he kept a proper look-out and how far the Ford Capri then was from the intersection. This weakness in his case was in all probability in a large measure due to the fact that Granger was not called as a witness.

Grater saw the Ford Capri as soon as it became

visible to him in Stiglingh road. There was no clear and reliable evidence as to how far the two motorcars were from the intersection at that stage. The speed of the BMW was approximately 40 km per hour but there was no reasonably accurate way of knowing what the speed of the Ford Capri was at the relevant stages. There was also no evidence as to how far the two motorcars were from the intersection when Grater realized that the Ford Capri was not going to allow him to pass in safety. According to Grater he was at that stage too close to the Ford Capri to avoid a collision. There was similarly no evidence as to where the two motorcars were when Grater could or should have realized that

the...../39

the Ford Capri was not going to stop and more importantly that Grater could or should by the exercise of care have been able to avoid a collision at that stage.

In the absence of all this very material and important evidence it is impossible to conclude that Grater failed to display the standard of care or skill which would be observed by a reasonable man.

In the result the trial court and the court a quo wrongly concluded that the respondent had discharged the onus of establishing that Grater was negligent and that such negligence contributed to the bodily injury suffered by him. The trial court should have granted

absolution...../40

absolution from the instance with costs in respect of plaintiff's claim against the second respondent and the court a quo should accordingly have allowed the second respondent's appeal with costs on the question of the liability of the second respondent. In arriving at this conclusion it follows that the plaintiff had no claim for damages against the second respondent and there is consequently no need to consider the merits of the cross-appeal on the question of damages.

The result is that the appeal succeeds with costs and the cross-appeal is dismissed with costs.

The judgment of the court a quo is set aside and therefor is substituted the order: "Appeal allowed with costs." The

order of the trial court is amended by the deletion
in the order of the reference to the second defendant
and the addition of the following order:-

"The second defendant is absolved from the
instance with costs."

ACTING JUDGE OF APPEAL

VILJOEN, J A)

concur

SMALBERGER, J A)

NATIONAL EMPLOYERS' GENERAL
INSURANCE COMPANY LIMITED

Appellant

and

TIMOTHY JAMES SULLIVAN

Respondent

HEFER JA

I agree that the appeal should succeed, and with the order proposed by my brother BOSHOFF. I would, however, briefly like to state my reasons for coming to the conclusion that Grater was not negligent.

The Court a quo found that Grater was negligent in that (1) he "had no reason to believe that the Capri was about to stop" and that "in those circumstances he should have proceeded with greater caution", and (2) "he ignored the warning created by the approaching Capri and precluded himself from taking immediate and appropriate action". This reasoning cannot be supported. The driver in a through street, while being required to keep a general lookout, is entitled to assume, in the absence of indications to the

contrary.....2

contrary, that a driver approaching from a stop street will heed the stop sign operating against him and bring his vehicle to a stop. It is only when it would become apparent to a reasonable man in the position of the driver in the through street that the driver in the stop street does not intend to stop, or will be unable to stop in time, that the duty rests on the through street driver to take appropriate avoiding action. Until that stage is reached it is not incumbent upon him, under normal conditions, to regulate his driving on the assumption that the driver in the stop street may not stop. Since Grater was unaware of the removal of the stop sign in Stiglingh Road and since, as far as he was aware, traffic in that road would still be

regulated.....3

regulated by the sign which had always been there, these are the standards according to which his conduct falls to be judged. Therefore, on approaching the intersection he was reasonably entitled to expect that any vehicle approaching along Stiglingh Road from the south, but not yet visible to him because of the fence which obscured his vision, would stop. And when he saw the Ford Capri, which he did at the earliest opportunity, he was still entitled to assume that it would stop, firstly, because he reasonably believed that the stop sign was in position, and, secondly, because he was under the impression that it was slowing down. (That it indeed did slow down was born out by the respondent's own evidence). It is only when it

became4

became apparent to him that the Capri was not going to stop - and there is nothing to suggest that his appreciation of this fact was unreasonably delayed - that the duty arose on his part to take avoiding action. It has not been shown that by then, allowing for reaction time, the distances the vehicles were apart and their respective speeds, there was anything he could do either to avoid the collision or materially reduce the effect thereof. In the result no negligence on his part was established.

HEFER JA.

VILJOEN JA.)

JACOBS JA.) CONCUR.

SMALBERGER JA.)