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Case no 591/87
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IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

A.A. MUTUAL INSURANCE ASSOCIATION LIMITED — Appellant

- and-

MICHAEL RIVINGTON — Respondent

Coram: VAN HEERDEN, VIVIER *et* MILNE JJA.

Heard: 16 May 1989

Delivered: 30 May 1989

JUDGMENT

VIVIER JA.

VIVIER JA:

At about 9.30 on the evening of 25 March 1981 a collision occurred on what is known as the old Transkei Road near East London between a Fiat 128 motor vehicle driven by the respondent ("the plaintiff") and a Chevrolet truck driven by one Vosloo. The truck was towing a Toyota ambulance van. At the time the Fiat was proceeding uphill in an easterly direction towards Gonubie while the truck was travelling in the opposite direction, i e going west towards Beacon Bay. The truck was insured by the appellant ("the defendant") in terms of the Compulsory Motor Vehicle Insurance Act 56 of 1972. The plaintiff sustained serious head and back injuries in the collision and in due course he instituted an action for damages for personal injuries in the Eastern Cape Division against the defendant, alleging that the collision was due to the negligence of the driver of the insured vehicle. In its plea the defendant denied such negligence and countered that the collision had been caused by the negligence of the plaintiff himself. The defendant further disputed the quantum of the plaintiff's damages. By agreement between the parties the trial Court (SMALBERGER J) was asked to decide only the question of the causation of the collision, leaving the issue of the quantum of damages to stand over for later determination, if necessary. After hearing evidence on the merits of the plaintiff's action SMALBERGER J found that the collision had been caused by the negligence of both the plaintiff and Vosloo and apportioned fault equally between them. Following an agreement reached between the parties that the total damages suffered by the plaintiff was the sum of R75 000, an order was made by MULLINS and KROON JJ (SMALBERGER J no longer being available) awarding compensation to the plaintiff in an amount of R37 500 with interest thereon and costs of suit. With the leave of the Court a quo the defendant appeals to this Court against the finding by SMALBERGER J that the collision had been caused partly by the negligence of Vosloo and against the order granted by MULLINS and KROON JJ.

No direct evidence was led at the trial as to how the collision occurred or where on the surface of the road the collision took place. The plaintiff and his passenger both testified that due to the injuries sustained by them in the collision they had no recollection of the collision itself nor of the events which immediately preceded it. The driver of the insured vehicle, although available, was not called as a witness nor was his wife who was a passenger in his vehicle.

From the presence of broken glass on the road, the positions in which the vehicles landed up after the collision and the damage to the vehicles, the trial Judge found, as a reasonable and possible inference, that the collision had occurred somewhere between the centre of the road and the plaintiff's correct side thereof. As a result of Vosloo's failure to give evidence this prima facie inference became the most likely inference. The learned Judge accordingly found that the plaintiff had established that the collision took place somewhere between the centre of the road and approximately one metre onto his correct side of the road. As he could not find that it was more likely that the collision occurred on the plaintiff's correct side of the road than in the centre thereof, the learned Judge concluded that the plaintiff had established no more than that the collision had taken place in the centre of the road. It was common cause on appeal that this finding was correct if the inference was justified that the collision had occurred somewhere between the centre of the road and the plaintiff's correct side thereof.

On appeal the essential issue was whether the objective facts of this case are such as to justify the inference drawn by the trial Judge. The fundamental problem in cases of this nature is succinctly stated in the well-known passage from the speech of Lord Wright in Caswell v Powell Duffryn Associated Collieries Ltd (1939) 3 All ER 722 at 733 E :

> "Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective

facts from which to infer the other facts which it is sought to establish .... But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture."

The inference sought to be drawn from the objective facts need not be the only reasonable inference which can be drawn from those facts. An inference may be selected as being

"the more natural, or plausible, conclusion from amongst several conceivable ones".

See Wigmore, Evidence, 3rd ed para 32 and Ocean Accident and Guarantee Corporation Ltd v Koch 1963(4) SA 147 (A) where HOLMES JA, referred with approval to this passage from Wigmore and added the following with regard to the meaning of "plausible", at p 159 C-D:

"I need hardly add that 'plausible' is not

> here used in its bad sense of 'specious', but in the connotation which is covered by words such as acceptable, credible, suitable."

See also A A Onderlinge Assuransie Assosiasie Bpk v De Beer 1982(2) SA 603 (A) where VILJOEN JA said at p 614 H that a plaintiff will succeed if the inference contended for by him is -

> "die mees voor-die-hand-liggende en aanvaarbare afleiding van 'n aantal moontlike afleidings".

This passage was referred to with apparent approval in Motor Vehicle Assurance Fund v Dubuzane 1984(1) SA 700 (A) at 707 A-B.

In the present case the plaintiff, as I have mentioned, was proceeding in an easterly direction from Beacon Bay to Gonubie while Vosloo was travelling in the opposite direction. It is apparent from the photographs which were handed in at the trial that the Fiat, driven by the plaintiff, is a very much smaller vehicle than Vosloo's truck, and it can safely be accepted that the combined weight of the truck and the vehicle it was towing far exceeded that of the Fiat. The collision occurred about 6 km from Beacon Bay in an area where the road rises fairly steeply in the direction in which the plaintiff was travelling. The road is unlit. It was raining at the time and the road was wet. The tarred surface of the road in the vicinity where the collision occurred is approximately 7 metres wide, divided into two sections for traffic proceeding in opposite directions by a centre double barrier white line. The tarred surface has a gravel verge. Vosloo's truck was 2 metres wide which means that, if he kept to the tarred surface, he could hardly have travelled more than a metre from the centre of the road.

Evidence was given at the trial by Mr Barry William Louw that on the evening in question he heard the sound of the impact from his house, which is only a short distance away. He was the first person to arrive on the scene. He found all three vehicles on the northern, i e the plaintiff's correct side of the road. The Fiat was standing right off the tarred surface on the northern side of the road, facing roughly in the opposite direction to that in which it had been travelling at the time of the collision. The truck and the Toyota were standing diagonally across the northern half of the road, about 6 metres west of the Fiat. Louw initially said that the truck was facing north-west, i e towards the gravel verge on the northern side of the road, but he conceded in cross-examination that it may have faced south-west, i e towards the centre of the road. His evidence that all three vehicles landed up on the plaintiff's correct side of the road was not challenged. Louw took Vosloo's wife and child to his home, notified the police and ambulance, and returned to the scene. Louw said that he saw broken glass generally scattered all over the road, but that there was a concentration of broken glass covering an area of approximately one square metre which commenced at the centre line and extended on to the northern half of the road. At this point the road curves slightly to the south. The trial Judge was clearly impressed with the quality of Louw's evidence. He described Louw as a careful and reliable witness and accepted his evidence concerning the concentration of broken glass which he saw in the middle of the road.

On appeal Mr Leach, who appeared on behalf of the appellant, critisised Louw's evidence in two respects: firstly that he changed his evidence with regard to whether the truck was facing north-west instead of south-west and secondly that he said that the truck ended up about 6 metres away from the Fiat, whereas Sergeant Horman,whose evidence will be referred to later, measured the distance to be 38,5 metres. Horman took his measurements and prepared his rough sketch some time after Louw had made his observations. However, I do not regard these aspects as detracting from the reliability of Louw's evidence relating to the concentration of glass, on which he was never challenged in the trial Court.

Evidence for the plaintiff was also given by Sergeant Horman who arrived on the scene in response to Louw's call. Horman could not say exactly what time he arrived there. He almost immediately left again to notify the plaintiff's family in Beacon Bay. He later returned to the scene and then took measurements and prepared a rough sketch showing the positions of the vehicles after the collision. Horman's sketch supports Louw's evidence regarding the positions of the vehicles after the collision, save that it shows the truck facing south-west, i e towards the middle of the road, 38,5 metres away from the Fiat. Horman's plan indicates a point of impact right in the middle of the road, which he testified was pointed out to him by the insured driver, apparently only after Horman's return to the scene. On the authority of the decisions of this Court in <u>Union and South West Africa Insurance</u>

Co Ltd v Quntana NO 1977(4) SA 410 (A) and Titus v Shield Insurance Company Limited 1980(3) SA 119 (A) the trial Judge ruled that this evidence was inadmissible against the defendant for the purpose of establishing the point of impact. Horman could not recall noticing any broken glass on the road nor any other sign of the point of impact.

From the photographs it appears that the right side of the Fiat, from the front to behind the right front door, was smashed in and there are clear signs of direct contact with the truck on the right front as well as the right front door of the Fiat. The right front headlight, the windscreen and the window of the right front door were broken. As against that only the right front of the truck would appear to have come into contact with the Fiat. The right front headlight of the truck was broken which seems to be the only part of the truck from which the glass found on the road could have come.

I regard it as unlikely that the force of the impact would have pushed the truck from its correct side of the road to the position where it ended up after the collision. The truck was a far bigger and heavier vehicle than the Fiat and the impact occurred on the truck's right front which would have tended to move the truck to its left rather than to its incorrect side of the road. This is exactly what happened to the Fiat. There was, furthermore, no suggestion that the steering mechanism of the truck was damaged thereby forcing the truck over to its incorrect side of the road. As has been mentioned, the road in the vicinity where Louw observed the concentration of broken glass, curves slightly to Vosloo's left as he was travelling immediately prior to the collision. Had he been driving normally he would have been steering to his left i e the southern side of the road at the point of impact.

Under the circumstances the positions in which the vehicles ended up after the collision, particularly the position in which the truck ended up, justify the reasonable inference that the collision occurred either in the centre of the road or on the plaintiff's correct side thereof. The concentration of broken glass seen by Louw in the middle of the road which extended to the plaintiff's correct side of the road, is consistent with the positions in which the vehicles ended up after the collision and strengthens the inference that the collision occurred either in the middle of the road or on the plaintiff's correct side thereof. The facts of this case are thus clearly distinguishable from the facts in McCabe v Santam Insurance Company Limited 1971(1) PH J2, which was relied upon by Mr Leach. In that case the defendant unsuccessfully sought to contradict direct evidence given by two eye-witnesses for the plaintiff that the collision had occurred on the insured driver's incorrect side of the road, by relying solely on an inference, based on the presence of dried mud and broken glass found on the road, that the collision had occurred on the other side of the road. This Court held that under the circumstances no reliable inference could be drawn from the evidence relating to the mud and glass.

Vosloo was available to give evidence and it is quite clear from evidence given by Louw, Horman and the plaintiff's brother that he was able to give an explanation of what had happened. In the particular circumstances of this case I consider that an adverse inference is justified from the appellant's failure to call Vosloo as a witness (cf Titus v Shield Insurance Co Ltd, supra, at 133 C-H). When that is done the probable inference is the one drawn by the trial Judge i e that the collision occurred either in the centre of the road or on the plaintiff's correct side thereof. It follows that the trial Judge correctly found that the plaintiff had established that the collision had occurred in the centre of the road.

The appeal is accordingly dismissed with costs.

W. VIVIER JA.

VAN HEERDEN JA)
Concur.
MILNE JA)