

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between

THE NEW ZEALAND INSURANCE

COMPANY LIMITEDAppellant

and

M [REDACTED] S [REDACTED] K [REDACTED] (duly

assisted by his mother and

natural guardian Z [REDACTED]

K [REDACTED])Respondent.

Coram: Steyn C.J., van Blerk, Rumpff, Holmes JJ.A. et
Hoexter A.J.A.

HEARD: 12th September, 1963. DELIVERED: 23rd September, '63

JUDGMENT

STEYN C.J.:

This is an appeal against ~~the~~² judgment in the Court below awarding the respondent damages in an amount of R637.74, sustained as a result of a collision with a motor vehicle insured with the appellant company. The action, of course, was based on negligence. The relevant allegations were that Levitan, the driver

of.....2/

of the vehicle, had driven ~~at~~ at an excessive speed, had failed to keep a proper look-out, had failed to avoid the collision by stopping, swerving or so managing his vehicle as to do so, and had failed to give any warning or any timeous and sufficient warning of his approach.

It appears that at about midday on Saturday, 1st July, 1961, the respondent, then seven years old, was crossing Queen Street in Durban when he collided with the vehicle in question. He was in the course of ~~a~~passing from the southern side of the street, where his father had a shop, to the northern side, where his home was, carrying two oranges which he had bought at a cafe in the close vicinity of the shop. On both sides of the street, there were a number of cars parked parallel with it. On the southern side, to the right of the respondent as he entered the street, two cars had been double-parked, with their front bumpers more or less in a line, the one furthest away from him being a fairly large van. Between these two cars and

another.....3/

another car to his left, there was an entrance to business premises on the same side, some eight or ten feet wide. When he entered the street, he passed through this vacant space. At that time the vehicle driven by Levitan was approaching from his right, i.e. from the east. As it was passing the double-parked van at a distance of about three feet from it, the collision took place. The trial Court found that the respondent and Levitan had both been negligent and awarded the respondent two-thirds of the damages found to have been proved.

At the trial counsel for the respondent informed the Court that he was not taking the point that the respondent was, because of his age, incapable of contributory negligence and the trial proceeded on that basis. Also before this Court counsel for the respondent did not rely on any such contention.

Queen Street, according to the evidence, is a very busy thoroughfare on a Saturday morning. The trial Court found -- and this finding is

not contested -- that Levitan ought to have foreseen the possibility of people crossing the street by passing in front of the van where, as he approached, he could not see, and that in passing the van he was negligent,

"because in the circumstances he drove at an excessive speed, he failed to avoid the collision by stopping, swerving or so managing his vehicle as to do so, when with the exercise of reasonable care, he could have done so and he failed to give timely and sufficient warning of his approach from alongside a double-parked vehicle that hid his view",

The contention on appeal is that the trial Court erred in finding negligence on any of the grounds mentioned.

As to the speed at which Levitan was driving, he himself said it was ten to twelve miles per hour. Two witnesses who observed the incident

from the northern side of the street, gave estimates. Naidoo, a witness for the respondent, put it at twenty to twenty-five miles per hour, but ~~admitted~~ conceded under cross-examination that it ^{might} ~~may~~ have been ten to fifteen miles per hour. According to Michael, a witness for the appellant, it was under fifteen miles per hour. These estimates, for what they may be worth, do not show that Levitan is wrong as to his speed. More important than the estimates, is the fact that when Levitan's vehicle had come to a stop, its back door was more or less in line with the bumper of the van. His evidence is that he first saw the respondent when he was about level with the van. This evidence is probably true. ~~It is probable~~ ~~that the respondent~~. The learned trial judge accepted that Levitan could obviously not have seen the respondent until his vehicle and the double-parked van were more or less level. That means that his vehicle, a Hillman station-wagon, was brought to a standstill in less than two-thirds of its own length, which provides substantial support for a speed which would seem to be moderate

even in a busy street. On this evidence counsel for the respondent could not urge that the speed was excessive having regard to the circumstances.

As to timeous and sufficient warning of approach, I would hesitate to subscribe to a general rule that every driver in a busy street passing a parked vehicle from in front of which an unseen pedestrian may emerge, should sound his hooter. The clamour which may attend such a rule may well defeat its purpose. It would be sufficient, I consider, if a driver in such circumstances keeps a proper lookout and drives at a speed which enables him to avoid collision with a pedestrian proceeding into his line of travel in a manner which may reasonably be expected.

The contention here is that at the time of the collision the respondent was running blindly across the street. According to Levitan, the respondent was running very fast with his head down. The witness Michael confirms that he was running and

had his head down. The boy's father said that he was walking as he entered the street, but from where he sat in front of his shop, his view was obstructed by the parked vehicles and he could not see the boy as he came nearer to the point of collision. Naidoo also said that the boy was walking, but admitted that he was not observing him at the crucial time. The respondent's own evidence is obviously unreliable and his statement that he was walking does not take the matter any further. It appears, moreover, that the boy came into contact with the front portion of the vehicle at a point on its left side. The only indication of any damage to the vehicle is a dent, one and a half inches in diameter, on top of the mud-guard thirteen inches behind the head-lamp. There is evidence that some part of the boy's body was seen some twelve inches above the mud-guard and the suggestion is that the dent must have been made as he came down. There is nothing to show that he was struck by the front of the vehicle and it is not seriously contested

that.....8/

that he must have collided with it when it was at a standstill or almost so. He was at the time passing the van at a distance of several feet in front of it. It is difficult to conjecture how he could in such circumstances have been thrown ~~up~~ in such a way, even by a frontal collision; but whatever happened, it seems highly questionable whether he could have received his injuries by walking into the side of the almost stationary vehicle. According to the evidence, the vehicle did not run into him. He moved into the vehicle. ^{It} is evident, I think, that he must have done so with a considerably greater momentum than could be achieved by walking. Although the learned trial judge made no ~~clear~~ finding as to the pace at which the respondent was proceeding, it follows that Levitan's evidence that he was running fast, cannot be rejected. Indeed, counsel for the respondent had difficulty in arguing that the respondent was not running and conceded that he probably was doing so.

It is not contended that Levitan

saw.....9/

line of heavy traffic, and that he should therefore have regulated his manner of driving accordingly. There is no likelihood that the respondent would have been injured, had he been walking instead of running.

Counsel for the respondent argued that Levitan, on his own evidence, hesitated before he reacted, that he did so because he thought the child might stop, and that as a result thereof, he did not swerve to the right, as he could have done, in order to avoid the collision. The evidence relied on here is that, when he came next to the van, he saw something moving out of the corner of his eye. He looked to his left and saw a young boy "running out". He first saw him, about one and a half paces away, when his bumper was just past the van's front bumper, immediately jammed on his brakes and hooted. That seemed to attract the boy's attention and he tried to stop running, but he was running too fast and ran into the side of the car. He saw the boy glancing up, and for a second he thought the boy would be able to stop but when he saw how fast

he.....11/

he was running, he knew he would not be able to do so. There was nothing to prevent him from swerving to the right, but it did not occur to him to do so.

It is, I presume, a consideration of this evidence which led the learned trial judge to the conclusion that Levitan saw the child sooner than he would have the Court believe. On the other hand, as already indicated, he accepted that Levitan could obviously not have seen him until his vehicle was more or less level with the van. That, according to Levitan's evidence, is in fact when he did first see the boy. If he did notice something moving before that, it does not appear that he knew it was a running child. Whatever his recollection after the event may be of his mental processes during the few seconds between his first observation of the child and the collision, it is more than doubtful whether he could have avoided the collision by swerving to the right. As to the possibility of such avoidance, he gave the following evidence:

"Mr. Levitan, if at the very first moment you had set eyes on the boy, the first moment you saw him, you had braked immediately, full brake, and swerved your car to the right, do you think you could have avoided this accident? If you pulled your wheel hard over to the right and braked at the same time, do you think you could have avoided this accident?---No, I could not have.

Even at 5 m.p.h. or some very slow speed you were travelling?---The boy would have run into me whatever happened."

The respondent, on whom the onus rests, has not shown that the ^{reply to the} last question is wrong.

I am disposed to think it is correct. In my opinion the evidence does not establish that Levitan was negligent in any respect alleged.

The appeal is allowed with costs and the judgment of the Court below is altered to judgment for the defendant with costs.

Van Blerk J.A., Rumpff J.A., Holmes J.A., Hoexter A.J.A.
concur.

45/63

In the Supreme Court of South Africa.
In die Hooggeregshof van Suid-Afrika.

{ PROVINCIAL Provincial Division.)
Provinsiale Afdeling.)

**Appeal in Civil Case.
Appel in Siviele Saak.**

NEW ZEALAND T.S. CO. LTD.

Appellant,

versus

M.S. KIRKIN

Respondent

Appellant's Attorney

Prokureur vir Appellant

FEARNSIDE

Respondent's Attorney

Prokureur vir Respondent

CH. K. J. J. J.

Appellant's Advocate

Advokaat vir Appellant

J. J. BROOME

Respondent's Advocate

Advokaat vir Respondent

B. B. HARDMAN.

Set down for hearing on

Op die rol geplaas vir verhoor op

Donderdag 12 Sept 1963

1.2.4.69

*Ac. C. D.
Circuit and District
Court divisions.*

9:45 — 12:30

C. A. V.

The appeal is allowed with costs and the
judgment of the court below is set aside to
judgment for the dependant with
costs.

