78/56

G.P.-S.103675—(1954-5—1,000). U.D.J. 219.

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

(Appellate Provincial Division).
(Appèlafdeling Provinsiale Afdeling).

Appeal in Civil Case.
Appèl in Siviele Saak.

JOHN MARTIN (NO.) *Appellant,*

versus

OCEAN ACCIDENT & G. CORP^N LTD. *Respondent.*

Appellant's Attorney / *Prokureur vir Appellant* C. Reid.

Respondent's Attorney / *Prokureur vir Respondent* Purius & B.

Appellant's Advocate / *Advokaat vir Appellant* A.D. Davidson

Respondent's Advocate / *Advokaat vir Respondent* J.D. Jerling

Set down for hearing on / *Op die rol geplaas vir verhoor op* Monday, 5th Nov., 1956.
(WLD) & Tuesday, 6th Nov., 1956.

4, 5, 6/11/56 — 5/11/56 9.45 - 12.50
2.15 - 4.25
6/11/56 9.45 - 12.50
2.15 - 2.50

C.A.V.

Postea

(Appeal dismissed with costs except such costs as maintained Labour Order of 9 June to agree to grant judgment for Plaintiff in sum of £4,716/6/4 such costs to include those incurred by A on personal claim and absolution from instance on claim as father and natural guardian of his minor son; appellant entitled to costs of appeal granted up to 22 May, 1956. Reynolds J.P. dissenting)

J. Hilbert
a/a Registrar
26/11/56

IN THE SUPREME COURT OF SOUTH AFRICA.

(APPELLATE DIVISION)

In the matter between:-

JAMES MARTIN ..... Appellant.

and

THE OCEAN ACCIDENT & GUARANTEE CORPORATION LIMITED ..... Defendant.

CORAM:- Fagan, Steyn, De Beer, Reynolds et De Villiers, JJ.A.

Heard: 5th & 6th November, 1956. Delivered:

JUDGMENT.

DE VILLIERS, J.A.:

This is an appeal against an order made by Boshoff, A.J in the Witwatersrand Local Division, dismissing the Appellant's claim against the Respondent, made on his own behalf and on behalf of his minor son and granting judgment for the Defendant.

The main facts are set out in the judgment of Boshoff A.J. as follows:-

> " On the 23rd day of January, 1954, James Boyd
> " Martin, the minor child of the plaintiff, sus-
> " tained bodily injury when the bicycle he
> " was riding collided with a motorcar driven by
> " one van Aswegen. The motorcar was at the time
> " of the collision insured by the defendant un-
> " der the provisions of the Motor Vehicle In-
> " surance Act No. 29 of 1942, as amended.
> " The plaintiff is now alleging negligence
> " on the part of van Aswegen and claiming from
> " the defendant compensation for damage suffered
> " by the said child as a result of the bodily
> " injury. The defendant denies such negligence
> " and in the alternative raises the usual

defences...../2.

" defences based on contributory negligence.
" The scene of the collision is a bridge
" in the grounds of the Modderfontein Dynamite
" Factory at Modderfontein. The Court held and
" inspection in loco and the plan before the
" Court is one prepared on what was observed at
" the inspection. A macadamised road crosses
" the bridge from west to east. At the western
" entrance of the bridge a road joins this main
" road at right angles, forming what is commonly
" known as a 'T' intersection. This side road
" is on the northern side of the main road and
" is also macadamised. The macadamised portion
" of this road is 7 paces wide and fans out
" where it joins the main road. It is a stop
" street and the stop sign is near the western
" entrance of the bridge. The main road is 27
" feet 10 inches wide on the bridge. The side
" walls of the bridge are fortified with square
" pillars. There are 16 pillars on each side.
" The width of each pillar is 18 inches and the
" pillars are so spaced that the distance from
" the centre of a pillar to the centre of the
" next pillar is 8 feet. At the western entrance
" of the bridge the northern wall of the bridge
" curves towards the side road and there are
" approximately 3 pillars in the curve. Traffic,
" approaching the bridge from the west, travels
" downhill to the bridge and has a clear view
" onto the bridge and of the approach to the
" bridge from the east which is also on a slope
" towards the bridge.
" During the trial witnesses referred to
" points on the bridge which were determined in
" their relation to the pillars on the side of
" the bridge. This was done by counting the
" number of pillars from the eastern entrance of
" the bridge.
" The facts which were established by the
" evidence were the following: On the 23rd day
" of January, 1954, at about 11 a.m., the Martin
" boy, who was nearly ten years of age, was rid-
" ing his bicycle from east to west along the

" main...../3.

" main road onto the bridge. Van Aswegen
" approached the bridge in his motorcar from the
" opposite direction, slowed down at the inter-
" section and proceeded on to the bridge. The
" bicycle and the motorcar collided with each
" other an the western half of the bridge and on
" the northern half of the road, that is to say,
" on the incorrect side of the cyclist. The
" motorcar continued for a few yards after the
" collision before it came to a stop. The
" bicycle collided with the left front of the
" motorcar and both the boy and the bicycle were
" in the northern half of the road in front of
" the motorcar after the motorcar came to a stop.
" The motorcar came to a stop not more than 3
" feet away from the northern side of the bridge.
" There were no brake marks on the road and no
" marks on the motorcar. The sky was overcast
" and it was drizzling at the time of the
" collision."

The learned Judge came to the conclusion that the Plaintiff had proved that Van Aswegen was negligent in not timeously seeing that the boy was cutting the corner in front of him because he did not keep a proper lookout and that this negligence was a cause of the damage. He, however, also found that the Defendant had proved that the boy was negligent in going on to his incorrect side of the road in the line of travel of Van Aswegen's car and that the boy's negligence was a contributory cause of the damage.

On Appeal Mr. Davidson, for the Appellant, contended that the learned Judge erred in holding that the boy's negligence was in law a cause of the damage, and that he should have found that the damage was caused solely by the negligence of Van Aswegen, in that he could, with the excercise of reasonable care, have

avoided...../4.

avoided the consequences of the boy's conduct, however negligent, in going on to the incorrect side of the road, preparatory to cutting the corner into the side road. Mr. Davidson relied on the principle stated in Sutherland versus Banwell 1938 A.D. at page 485 and re-stated in the recent case of Coetzee versus Van Rensburg 1954 (4) S.A.(A.D.) 616.

Mr. Jerling, for the Respondent, contended that the learned Judge should have found that the boy turned to his incorrect side of the road at a stage when Van Aswegen was so close to him that he could not avoid hitting the boy, and that negligence on the part of Van Aswegen had not been proved; alternatively, if Van Aswegen's negligence was established, Mr. Jerling contended that this was a clear case of joint and simultaneous negligence of Van Aswegen and the boy and that the judgment was correct.

During the argument, the point was raised as to the standard of care that the law requires from a boy of ten. Must it be the ordinary standard of the bonus paterfamilias i.e. of the average reasonable adult, or must the lower standard of what one may call the bonus filiusfamilias, i.e. of the average reasonable boy of ten be applied?

In my view, the present case does not call for a decision on the point raised.

In my judgment, the decision of the instant Case

depends...../5.

depends on the answer to the following question:-

When it should have been clear to Van Aswegen that the boy was going to proceed across his line of travel to cut the corner into the side road, was Van Aswegen then a sufficient distance away from the boy that he could, with reasonable care, have avoided the collision?

If it was shown that had Van Aswegen kept a proper look-out he must have become aware of the boy's intention to proceed in front of him into the side street, at a stage when he could have taken steps to avoid the collision, then Van Aswegen was negligent either in not keeping a proper look-out, or in failing to take steps to avoid the collision when he had the opportunity to do so. It may be that Van Aswegen's negligence would then be the decisive cause of the damage and that the Plaintiff should have succeeded.

If the facts show that when Van Aswegen should have been aware that the boy was cutting across his line of approach, he was so close to the boy that he could take no avoiding action, then Van Aswegen was not negligent, and there should have been judgment for the Defendant.

If, from the facts and the probabilities, no definite answer can be given to the question posed, then the Plaintiff's claim should have failed and absolution should have been granted.

On the issue of liability, the Plaintiff's case depended almost entirely on the evidence of the witnesses Sangster and Van ...../6.

Van Wyk, and the Defendant's Case on the evidence of Van Aswegen and his passenger, Van Niekerk.

Sangster was driving in his motor car behind the boy and, just prior to the collision, he estimated that he was 15 to 20 yards behind the boy. He saw Van Aswegen approaching from the opposite direction and he saw the collision taking place.

Van Wyk was running on the side of the main road near the bridge when the boy passed him, on his bicycle, from behind. He also saw Van Aswegen approaching and saw the collision.

Van Aswegen and Van Niekerk saw the boy approaching on the bridge and they both saw the collision.

I proceed to consider the evidence of these witnesses in the light of the probabilities and the judgment of the learned Judge a quo.

Of Sangster, the learned Judge said:

> " This witness impressed me as being honest and
> " candid. It was quite clear that he had great
> " difficulty in giving estimates of speeds and
> "distances and at no stage professed to be accu-
> " rate. He also made it clear that the positions
> " pointed out by him were general impressions
> " and not intended to be accurate observations.
> " He was, however, emphatic that the boy did not
> " suddenly swerve into the line of travel of the
> " oncoming car but moved slowly across the road
> " soon after he had entered the bridge."

Sangster's evidence is to the following effect:- He was driving behind the boy before the boy reached the bridge and he

kept ...../7.

kept at a pace to remain behind the boy. His speed was about 15 miles per hour and the boy was going about the same speed or a little faster.

When the boy was more or less opposite the third pillar from the eastern end of the bridge he dropped his right hand and gave a clear signal that he was going to the right. Sangster presumed that he was going to turn right into the side road just beyond the bridge. The boy continued on his correct side for some distance and then began to veer to his right or incorrect side. When the boy was about halfway on the bridge he was either on the centre of the road or a little on his incorrect side.

When the boy began to veer to his right, Sangster saw Van Aswegen's car beyond the intersection of the side road. This car was travelling about 25 or 30 miles per hour but slackened speed at the intersection and proceeded on the bridge at a speed of 15 to 20 miles per hour.

According to Sangster, there was no sudden swerve by the boy to his right. From the time that it became clear that the boy was going to cut the corner, Sangster's impression was that Van Aswegen had ample time to avoid the collision by stopping or turning to his left into the side road or turning to his right to allow the boy to pass him on his left or the Northern side of the bridge.

At the inspection <u>in loco</u>, Sangster pointed out

where...../8.

where the car was when the boy went over the centre of the road. This spot was 58 paces from the point of impact. According to Sangster, the boy was approximately opposite the 7th pillar when he began to veer across the road. Sangster fixed the point of impact as between the 11th and 12th pillars.

Van Wyk's evidence was to the effect that the boy crossed over the centre of the road on to his incorrect side when he was between the 8th and 9th pillars, and that the point of impact was between the 11th and 12th pillars. The boy, according to Van Wyk, was 9 paces or 24 feet from the point of impact when he went on to his incorrect side and he put the car, at that stage, at 48 paces from the point of impact.

Van Wyk did not see the boy give any hand signal, but he stated that it was obvious that the boy was going to cut the corner into the side street, and that Van Aswegen had ample opportunity of avoiding the collision if he had kept a proper lookout. The boy made no sudden swerve.

Van Aswegen stated that he slowed down when he was about to go onto the bridge and that his speed, from there on, was about 10 miles per hour. He intended stopping on the Eastern side of the bridge where Van Niekerk's car was. He saw the boy approaching from the opposite direction; he could see that it was a small person but could not judge his age. The boy had his hat pulled

over...../9.

over his eyes and his head bent forward. ~~Van Aswegen was under the impression that he was shielding his eyes from the sun~~. The boy was approaching on his correct side, but when he was approximately opposite the 7th pillar, he suddenly swerved to the right directly in front of him (Van Aswegen). He "slammed" on his brakes but could not avoid hitting the boy. Everything happened in the twinkling of an eye. Van Aswegen saw no swerve before the boy was right in front of him on his incorrect side.

Van Niekerk, Van Aswegen's passenger, largely corroborated Van Aswegen. He put van Aswegen's speed, on the bridge, at somewhat below 20 miles per hour.

Neither Van Aswegen nor Van Niekerk saw the boy give any hand signal.

It is extremely difficult to obtain a clear picture of the events preceding the collision.

The plan that was put in was of little assistance, not being drawn to scale and not showing the various positions marked on it.

The learned Judge accepted the evidence of Sangster, as corroborated by Van Wyk. He came to the conclusion that their impression was correct and held that Van Aswegen could not really dispute their evidence as he admits that he did not see the commencement of the boy's swerve, but saw that he had gone on to

his...../10.

his wrong side only when the boy was right in front of him and well on the boy's incorrect side.

Like most collision cases the law is clear, but the application of the law to the facts and probabilities extremely difficult.

In my view, nothing has been advanced before us to justify us in differing from the learned Judge a quo as to the bona fides and credibility of Sangster.

The question remains, however, whether Sangster and Van Wyk did not form a mistaken impression.

Of Sangster, as quoted above, the learned Judge said:-

> " He had great difficulty in giving estimates of
> " speeds and distances and at no stage professed
> " to be accurate. He also made it clear that
> " the positions pointed out by him were general
> " impressions and not intended to be accurate
> " observations."

It must be remembered that both Sangster and Van Wyk were following behind the boy and proceeding in the same direction. Van Aswegen was appraoching the boy and them directly from the front. They did not have a side-view of the scene, but an end-on view. It must, consequently, have been extremely difficult for them to judge the distance, accurately, between the boy and Van Aswegen at the various stages and the rate of their approach to one another. Sangster estimated the speed of Van Aswegen's car from the intersection at 15 to 20 miles per hour and the speed

of...../11

of the boy on his bicycle as 15 miles per hour or a little more. According to Sangster, when it became apparent that the boy was going to change his course he was about 24 feet from the point of impact. In this respect Van Wyk agrees entirely with Sangster. Yet Sangster says that at this stage Van Aswegen was 58 paces from the point of impact. If we take 24 feet to be the 9 paces, as indicated by Van Wyk, then Van Aswegen was more than six times as far from the point of impact as the boy and his average speed over the 58 paces must have been about 90 miles per hour. This is clearly wrong. Van Wyk gave the same distance as 48 paces. That would make van Aswegen's average speed 75 miles per hour.

I do not think we would be justified in discarding Sangster's estimate of the speed of the bicycle as about 15 miles per hour. Sangster was keeping his position behind the boy and estimated his own speed as about 15 miles per hour. Sangster put van Aswegen's speed at between 15 and 20 miles per hour and Van Niekerk put his speed at something below 20 miles per hour. The evidence, therefore, indicates that Van Aswegen was travelling between 15 and 20 miles per hour. He intended stopping just beyond the bridge where Van Niekerk's motor car was standing, and the evidence indicated that Van Aswegen stopped within a few yards after hitting the boy; and there was no acceptable evidence

that...../12

that Van Aswegen had applied the brakes of his car hard.

We therefore have this position:- The boy was travelling at a speed of about 15 miles per hour. When he was opposite the 3rd pillar he gave a handsignal by "dropping" his right hand. Only Sangster who was immediately behind the boy saw the signal.

When the boy was approximately opposite the 7th pillar he began to veer to his right or incorrect side, and when he was between the 8th and 9th pillars he had reached the centre of the road or ~~first~~ just crossed over it. He was then approximately 24 feet from the point of impact, as indicated by the witnesses Sangster and Van Wyk, between the 11th and 12th pillars.

Van Aswegen, also travelled at about 15 miles per hour. He must, therefore, also have been about 24 feet from the point of impact when the boy reached the centre line of the road. The parties were then about 48 feet apart and were approaching one another at a combined speed of about 30 miles per hour or 45 feet per second. On this reckoning, ~~first~~ just about one second would have elapsed from the time that the boy had moved on to, or just over, the centre of the road until the impact.

I do not think negligence can be imputed to Van Aswegen for not seeing the hand signal given by the boy as deposed to by Sangster. According to Sangster the boy removed his right hand from the handle bar and hung it down beside him. That is, ~~[illegible]~~

I...../13

I think, the meaning of the expression used by Sangster, namely that the boy signalled by " dropping his right hand ".

It conveys to me the kind of half-hearted apology for a signal that one so often sees users of the road, especially cyclists, give of their intention to turn to the right. When the boy gave this signal opposite the 3rd pillar, Van Aswegen was some considerable distance away and not yet on the bridge. Any signal of an intention to turn right would, at that stage have been entirely unexpected as far as Van ~~Reegen~~ Aswegen was concerned: nor do I think that Van Aswegen was negligent if he did not realise that the boy was crossing over on to his incorrect side of the road before the course he was travelling had carried him at least to the centre of the road. When the boy, in his veer to the right, had reached the centre of the road and failed to correct his course immediately, I think Van Aswegen should have realised the situation; but half a second could easily have elapsed from the time the boy had reached the centre of the road and ~~the~~ such realization ~~thereof~~ by Van Aswegen. If another half second is allowed for Van Aswegen to react to the situation then one second would have elapsed, and the impact would have occurred before Van Aswegen could do anything.

Van Aswegen's evidence is not very different from that given by Sangster and Van Wyk: he says that the

boy commenced to swerve in front of him when the boy was approximately opposite the 7th pillar. Van Aswegen, however, in my view probably correctly, puts the point of impact further East than between the 11th and 12th pillars. He puts it at about the 9th pillar. I shall revert to this point later.

Even if the speeds and distances were adjusted to give Van Aswegen a little longer than one second within which to act, I am still extremely doubtful whether he could be expected to have taken steps to avoid the accident except on a counsel of perfection.

Of the time at his disposal one second would be taken up in realising that the boy is doing a most unexpected, - nay, a suicidal - thing, and reacting to this realisation. Sangster was approaching behind the boy. What could Van Aswegen have done in this split second, in the confined space on the bridge?

Of all the distances, points and speeds deposed to by the witnesses, one point alone is certain and that is the point where Van Aswegen's car came to rest, between the 8th and 9th pillars, with the bicycle in front of it.

If the point of impact was between the 11th and 12th pillars, then the bicycle was thrown a distance of more than 8 yards. This seems most unlikely. The bicycle was

moving/...../16.

moving in the opposite direction at the time of impact.

None of the witnesses stated that the collision was a particularly violent crash or that the car was travelling at speed when the collision took place. Moreover, one would then not have expected the boy and the bicycle to by lying in front of the motor car. It is more likely that the motor car would, in that case, have gone over the boy or the bicycle, or both.

The learned judge found that the motor car continued for a few yards after the collision before it came to a stop.

Sangster stated that Van Aswegen applied his brakes before the collision but still hit the boy.

Van Aswegen stated that he travelled about six feet after the collision.

In the light of the evidence, it seems to me improbable that the cycle would have been flung a distance of more than 8 yards and that Van Aswegen travelled 8 yards after the impact before his car stopped.

The probability is that the point of impact was nearer to the 8th pillar than between the 11th and 12th pillars.

However that may be, in my view, even if the point of impact was in the vicinity of the 11th pillar so that

the/..../17.

the boy had veered for about 24 feet before the collision, it would still have appeared to Van Aswegen as a sudden swerve, a fortiori if the point of impact was nearer the 8th pillar.

To bring home negligence to Van Aswegen, the boy must have been on his incorrect side on the bridge much earlier than deposed to by any of the witnesses. Only on this supposition can reliance be placed on the impression formed by Sangster and Van Wyk.

These witnesses have been shown to be unreliable in their recollection and impression of material distances and positions. Is there a preponderance of probability that they are correct in their impression that Van Aswegen could have avoided the collision ? In my view not.

I come to the conclusion, therefore, that the Appellant failed to prove that Van Aswegen should have seen the boy altering his course at a distance sufficient for him to have taken successful steps to avoid the collision.

The appeal therefore fails.

After the appeal was noted the Respondent, with a view of avoiding the expense of an appeal, made an offer of settlement in the amount of £47-16-4, the Appellant's personal claim for medical expenses, and costs on the Magistrate's Court Higher Scale A plus costs of appeal to date of the offer which was the 22nd

May, 1956.

At the hearing of the appeal, my brother Fagan, who presided, asked Mr. Jerling whether this was " an out and out tender to stand in any event ".

Mr. Jerling answered in the affirmative. The order therefore is:-

A. The appeal is dismissed with costs except for such costs as are mentioned in "C" below.

B. The Order of the Court a quo is altered to read: " Judgment for the Plaintiff in the sum of £47-16-4 with costs on the Magistrate's Court Higher Scale A on his personal claim, and absolution from the instance on his claim as father and natural guardian of his minor son."

C. The Appellant is entitled to the costs of appeal incurred up to the 22nd May, 1956.

Fagan, J.A.
Steyn, J.A. —— Concurred.
De Beer, J.A.

Reynolds, J.A. —— Dissenting.

IN THE SUPREME COURT OF SOUTH AFRICA
(Appellate Division)

In the matter between:

JAMES MARTIN , N.O. APPELLANT .

and

THE OCEAN ACCIDENT & GUARANTEE CORPORATION LIMITED.
RESPONDENT.

CORAM: Fagan, Steyn, de Beer, Reynolds et de Villiers JJA.

HEARD: 5th November, 1956. DELIVERED. 16 : XI : 1956.

JUDGMENT:

REYNOLDS, J.A.

In this matter the locality in which the collision occurred is described in the preceding judgment and need not be repeated.

It may be added that before the evidence of eyewitnesses to the collision was led , the inspection had been held and certain witnesses had then pointed out spots to which their evidence referred . They were naturally more at home in pointing out these spots at the inspection than they were in decribing them at the trial , but the Court knew from its inspection the spots then pointed out and so was well able to know the precise points to which they were referring , particularly the point of impact.

It is quite clear that the cyclist on whose

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behalf the plaintiff sued, was a boy between nine and ten years of age who was proceeding along the bridge from East to West. The bridge is about forty yards long and his left hand, and correct side, would be the Southern side of the bridge. The car involved in the collision was driven by one Van Aswegen, had Van Niekerk as a passenger, and was proceeding from West to East towards the bridge. The collision occurred on the bridge and on the Northern half of the road across the bridge. It is stated to have occurred at a point eight feet ten inches from the Northern side, and so occurred at a spot on Van Aswegen's correct side of the road.

There is, however, a great dispute as to the course the cyclist took in going over to his incorrect side and reaching the point of collision. That question has to be examined in detail later on, but at the present moment it is sufficient to say in outline that the evidence of Sangster and Van Wyk, called as witnesses for the plaintiff, stated that the boy veered over gradually from his correct side when he entered upon the bridge, and then gradually proceeded across the centre line of the road to the point of impact, and that he made no sudden turn

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into the pathway of the car driven by Van Aswegen. The boy cyclist was not called at all owing to his memory not being sufficiently clear. Van Aswegen and Van Niekerk gave a completely opposite picture. They said that the cyclist proceeded along the bridge just a few feet from the pillars on his correct, or Southern side of the bridge, and that suddenly, and without warning, he turned when nearly opposite Van Aswegen, into the path of the car, leaving Van Aswegen no opportunity to avoid him.

After carefully considering the evidence, and what was pointed out at the inspection, the Court found the following as to the course of the cyclist and I agree there is no reason to doubt the correctness of this finding of fact:-

> "The evidence of Sangster and Van Wyk, which is "accepted, was in substance that the boy, on "entering the bridge, moved from a position "approximately six feet from the Southern side "of the bridge over the centre of the road at a "point approximately sixty feet from the entrance "of the bridge to the point of impact eight feet "ten inches from the Northern side of the bridge "at a point approximately eighty four feet from "the entrance of the bridge. The distances from "the entrance of the bridge are based on the "number of pillars the respective points are

"away from the entrance and the distance between
"the pillars. When the motorcar was some distance
"away beyond the intersection, the boy had already
"crossed over onto his incorrect side. It must
"therefore have been evident to Van Aswegen, had
"he kept a proper look-out, that the boy was in
"his line of travel. Van Aswegen, however,
"continued on his way and collided with the boy
"without taking any steps to avoid the collision".

This finding is borne out fully by the evidence of Sangster and Van Wyk, and Sangster says in addition, that before crossing to his incorrect side the cyclist "dropped his hand and gave a signal of his intention to cross the road at about the third pillar from the Eastern side", and in answer to the question "Now you say he dropped his hand and he gave a clear sign?", Sangster answered "Yes". There is additional evidence, later to be detailed, that even before he proceeded onto the bridge, the cyclist had bent his head down (gebuig), probably to avoid the drizzle which would be blown into his eyes by the wind created by his progress.

From this it is quite clear that, had he been an adult, the cyclist must be found to be guilty of negligence. He was crossing over the middle line onto the Northern side of the road crossing the bridge, and before

.....doing.....5.....

doing so he must take all reasonable precautions to see he could cross in safety, not merely cross over. MILTON VS VACUUM OIL COMPANY OF S.A. LIMITED 1932 A.D. 197. Even if his signal be clear, he must still see that he could cross in safety in regard to oncoming traffic and keep his eyes open on his observing that Van Aswegen's car would interfere with his course, and he should have seen that, if he had been properly observant. As said, had the cyclist been an adult, there would have been no question that he was negligent. Whether a boy of nearly ten must be held similarly negligent may be a question of fact in each case, but it is too difficult to believe that a boy over nine, who apparently was trusted and able to ride a bicycle, could not be sufficiently intelligent to know, and obey, the usual rules and not go blindly across to his wrong side. The boy cyclist was clearly negligent and was really trying "to cut the corner" at the North end of the bridge where the road fans out as Van Wyk says.

But to this must be added a most important aspect of the conduct of the cyclist - an aspect that must have been apparent to a motorist approaching here, as Van Aswegen did. Admittedly there was nothing in the way

.....preventing.....6.....

preventing the driver of the car from seeing the cyclist, or the cyclist from seeing the car. But what those in the car driven by Van Aswegen could see of the approaching cyclist is best told by Van Niekerk who was a passenger in the car and a witness for the defence. He says he saw the cyclist thirty/five yards before the cyclist proceeded onto the bridge, and saw the cyclist was a child ('n kind). He further said the cyclist was bending forward as if he was riding against the wind that way to keep the rain out of his eyes. It was drizzling that day but Van Niekerk makes it clear that there was no breeze and by riding against the wind he means the wind created by the forward passage of the cycle. Van Aswegen also saw the cyclist and that he had his head bent down and saw this when the cyclist had just proceeded onto the bridge and his evidence on this point will be quoted later on. This was the position, according to Van Niekerk and Van Aswegen, when the cyclist entered the bridge. It seems to be clear that if Van Aswegen had actually and in fact looked he would have seen (1) that the cyclist was a child just as Van Niekerk did, (2) that this child was veering towards and over the centre, (3) that this child was cycling with his head bent to keep the rain out of his

eyes. Even if he had not seen the hand signal, he would have had plenty of warning, had he looked in time, during the progress of the cyclist.

But the question is, did he actually look and see all this and is now telling falsehoods to conceal the facts he denies, or did he drive on without seeing this at all until the last split second of time when a collision could not be avoided? The Court a quo discarded his evidence and ~~so said~~ found he was telling falsehoods. But it would be a complete mistake to say that because he told falsehoods, and told of a swerve that never occurred, therefore he did not see the movements of the cyclist as described by Sangster and found by the Court a quo, or did not see, what Van Niekerk admits, that the cyclist was a child. In most cases where there is a conflict of evidence, and when the driver of one car alleged to be negligent gives evidence of movements of the driver of the other car as to the other ~~car~~ driver being negligent, and the Court disbelieves that evidence, the Court has no difficulty in concluding that the falsehoods cover the fact that the driver of the defaulting car saw what actually happened, but gives a false account for his own purposes. That is

especially a matter to consider where both participants in the collision have really been at fault. A driver may, like Van Aswegen, tell falsehoods and deny what he really did see, in the confidence that even if he is disbelieved, it will be thought that he saw nothing, and hence had no chance actually of avoiding the collision which would then be a case of joint negligence, if the other driver was also negligent in not seeing anything in time. Stated that way, this position seems to have considerable advantage over the quite popular defence of temporary amnesia. In it the delinquent driver can try to impress the Court with a false story and then, if that story be rejected, take refuge in the plea of joint negligence if the other party were also negligent. The present case is particularly one that illustrates this. When a party negligently does not see things that he should have seen in a collision, he is in no better a position than if he had seen them. SUTHERLAND VS BANNELL 1938 A.D. 476. But that rule has to be applied to both parties, the cyclist as well as to Van Aswegen, BEZUIDENHOUT VS DIPPENAAR 1943 A.D. 195. Anything that can be said then will apply to both those parties who would not be looking, and it is impossible here to say there was a critical moment when Van Aswegen had the chance to avoid the

collision whereas the cyclist had not, and then apply the rule set out in PIERCE VS HAU MON 1943 A.D. 186. Indeed, in view of the remarks of TINDALL J.A. in FRANCO VS KLUG 1940 A.D. at page 136, it is doubtful if that rule can ever be applied in such cases. Hence it is necessary to see whether Van Aswegen is telling falsehoods as to the movements of the cyclist because he saw the real movements and these real movements would be against him, if he admits he saw them.

There can be no doubt in this case that he did see the movements of the cyclist and is giving this account of an imaginary swerve to conceal the fact that he did see the true movements of the cyclist. Not to see these movements was impossible in going over a bridge twenty seven feet ~~two~~ ten inches wide with only a cyclist and a car on the bridge and Van Aswegen does not pretend he did not see them from the time the cyclist entered onto the bridge. Van Aswegen makes it very clear he did see the car, the cyclist, and another youthful cyclist who was ahead and crossed in a normal manner into the road at the West end of the bridge. He saw all the traffic we know for certain was there, including the injured cyclist. He even knows the relative position of these vehicles for he saw the cyclist nearest

him who crossed safely, coming next he saw the cyclist in question (the boy), and then the car (that of Sangster). He says he saw the cyclist in question (the boy) just as he entered the bridge at the first pillar and he says that this cyclist was then on his correct left side and remained on that correct left side until ~~when~~ close to and opposite to Van Aswegen, where he suddenly swerved into the path of the car in such a fashion that it seemed that he was trying to turn round on the bridge. His evidence was as follows:-

> "En wat het die fietsryer gedoen? - Hy het
> "aangery ook op sy linkerkant van die pad op
> "die brug.
> "Het hy op sy linkerkant gebly? -- Ja tot
> "omtrent die 7de pilaar, en daar het hy skielik
> "regs geswaai"

and later:-

> "En voordat hy geswaai het was hy nog aan die
> "linkerkant van die pad? -- Ja.
> "Hoe ver van die linkerkant van die brug was
> "hy, 'n paar voet of 'n paar tree? -- So
> "tussen drie en vier voet".

Hence the account of Van Aswegen is not an account that he never saw the cyclist, or an account from whence a Court can infer that he never saw it, but simply a false account to try and make the Court believe something happened which

never happened at all, and when from his own admission he had his eyes on the cyclist all the time. When a witness takes up this attitude of telling falsehoods about an incident he must have seen, a Court may take every reasonable inference against him. But it is not necessary to rely on that because here clearly Van Aswegen was observing the cycle throughout ~~it's~~ its passage on his own submissions, clearly saw some things that did occur, and has just falsely altered the course of the cycle to suit his account. There is no difficulty in this case in concluding that he actually did see the actual course and conduct of the boy, as hereinbefore outlined, and is telling falsehoods to conceal that, and it was not a case of his never seeing the boy until a swerve took place and it was too late to avoid a collision.

That being so, it is clear that Van Aswegen did see there was a boy approaching him on a cycle and his statement that he did not know it was a boy until after the collision is not believable. He must also have seen this boy was riding with his head down apparently to keep out the rain. Though he may have deduced nothing when the boy commenced to veer towards the centre, when the boy approached the centre he should have realized what might occur,

especially as he had seen another boy go down the side path. Even without the hand signal and the head being bent down, Van Aswegen, from what he actually saw, must have realized the boy was going to "cut the corner" and was, for a time, blind to any danger. Sangster too says the signal was clear, but all this must be more fully gone into later.

It will next be convenient to consider whether there arose a duty on him (1) to take all reasonable steps to avoid colliding with the cyclist, and (2) if there was that duty, could he have taken those steps and avoided the accident.

It seems difficult to believe that the law is otherwise than that a man should take all reasonable steps to avoid inflicting injury on someone he sees exposing himself to the danger of that injury, and especially when those reasonable steps involve no danger to the man taking them and indeed avoid danger to him. The matter, however, seems fully covered by the decision of R & W. PAULL LTD. VS GREAT EASTERN RAILWAY COMPANY 36 TLR 344, and this decision was quoted with approval by CENTLIVRES (now C.J.) in PIERCE VS HAU MON 1944 A.D. 225 and stated in NOLUTSHUNGU VS ALLIANCE ASSURANCE COMPANY 1952 (4) S.A.L.R. at page 160 to have been approved of.

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by our Courts. The head note of PAULL'S case reads:-

> "If a person while taking no active steps himself "in regard to the collision, is injured, without "knowing he was in imminent danger of being run "over, although he could have known and could "have protected himself but for his own careless- "ness, and if the person who ran over him saw that "he did not know it, but, having time to stop, "negligently drove on and ran over him, the person "who so caused the injury is liable, and the plea of "contributory negligence fails".

In PIERCE VS HAU MON the Court was dealing with fast moving traffic and yet adopted the view quoted, while also considering how it might even favour a reckless driver who might place another driver in the position of having to avoid a collision, and apparently adopted the view expressed by PROFESSOR MC-KERRON that the criminal law provides a sanction against recklessness. In the NOLUTSHUNGU case (supra) VAN DER HEEVER J.A. (sitting alone) also dealt with the PAULL LTD. case and observed the dicta must not be divorced from the circumstances of the case, and of course that is correct of all dicta. As the learned judge pointed out, the rule is more easily or reasonably applied where a person becomes exposed to danger through some disability, lack of foresight, and relative

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immobility e.g. the woolgathering pedestrian. But it must be applied with due caution to the case of fast moving vehicles coming into collision. This seems obviously the case and the reasons for this would be at least two. In fast moving traffic, approaching one another transversely or from opposite directions, the driver of the car alleged to have been negligent, would often (1) have little opportunity or time to see that the driver of the other car was paying no attention, and (2) might reasonably only become aware of the inattention when it was too late to avoid an accident. The questions in the instant case are really two (1) Was the inattention and negligence of the boy on the cycle such as conveyed to Van Aswegen that the boy was negligently inattentive and exposing himself to danger and, if so, (2) did Van Aswegen have the reasonable time and opportunity to take the necessary precautions that would have avoided the collision? The second question is the one of real importance in this case because it cannot be doubted that the negligence of the youthful cyclist in taking the course he did, and in addition in taking it with his head down and clearly without observing the traffic, gave every demonstration of inattention to anyone looking

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at him. It has also been pointed out that anyone entering the bridge with the road twenty/seven feet two inches wide simply must have seen this in actual fact unless that person was gazing elsewhere, and it has been pointed out that Van Aswegen definitely was not so negligent as that, and says he saw the boy the moment the boy came onto the bridge with his head down and saw him from thenceforth to the moment of collision, only Van Aswegen gives a false account of the real course of the boy to hide the fact there was no sudden swerve. Nor is the Court dealing really with fast moving traffic for the boy was on a bicycle and the evidence and finding of the Court is that it was moving slowly while Van Aswegen himself says he had brought his car down to a speed of twenty/five miles to allow one boy to cross his path, and then lowered it to fifteen miles. But still due allowance must be made in favour of Van Aswegen ~~of~~ for those speeds. It remains to see whether the conduct of the boy on the cycle, actually seen by Van Aswegen, was observed by Van Aswegen at a time when he could reasonably avoid colliding with the cycle. In that case he would be negligent for then it would be obvious that he simply ignored the danger signs he saw and went on and took the ~~risk~~ chance that the boy might become attentive

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and respect the right of way of Van Aswegen. No one on the evidence can suggest that Van Aswegen intentionally rode down the cyclist, but if he had timeous warning of the position, and chose to run the risk, as some motorists do, of asserting his right of way under the circumstances, he would be plainly negligent. That is what happens when persons perceive in time that persons in their paths, pedestrians or not, are inattentive and still do not take reasonable precautions to avoid them.

That Van Aswegen saw and had all the warning that he had to deal not only with an inattentive cyclist, but also a boy rider who might do something not wise and to whom was owed some special degree of care owed to children, is clear, but the imp~~n~~or~~t~~tant point is whether he saw this in time to avoid the collision by reasonable precautions.

To decide this it is necessary to settle the point of impact, and how much further the cyclist had to go to get into the safety of the side road on his right towards which he was obviously making by "cutting the corner". The bridge is one hundred and twenty feet long, (see Sangster's evidence), but ~~at~~ at the last three pillars it ~~falls~~ fans into the side road, ~~at North and South~~. These pillars are eight feet apart

so that from the East entrance of the bridge to the point of the corner ~~to~~ which the cyclist was cutting, the length is ninety/six feet. But that is the point of the corner around which the cyclist would proceed and in cutting the corner he would not want to graze that point but would be in the ordinary way about four feet or a little more from it for that really is cutting a corner.

Now the place of impact was pointed out and it is eight feet ten inches from the Northern side, and to reach it the cyclist travelled across in a straight line (so Van Wyk says) and the Court found he commenced this course from near the entrance to the bridge and travelled eighty/four feet to the point of impact. As he travelled in a straight line but diagonally from the first pillar about ~~four~~ eight feet from the entrance, it seems to follow that in justice to Van Aswegen, ~~about six~~ about eight feet must be ignored in deciding how far the cyclist was from the Northern corner when the impact occurred. But ignoring it, that means at impact, the cyclist had only twelve feet to go to reach the corner, and sixteen feet to be in a position to go down the side road quite safely - certainly he would not have to go more than twenty feet. So that if Van Aswegen saw him, travelling inattentively, in time for Van Aswegen to stop

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just more than twenty feet from the point of impact the collision would be avoided.

It must be remembered in addition, that the cyclist was veering to the North side of the bridge and at some time beyond the point of impact would be out of the path of the car, and that very fact might then have given Van Aswegen more room to swerve to his right without crossing the centre line to his wrong side. But that consideration will be left out of the present question as to whether Van Aswegen saw the cyclist, his course and lack of attention, in time to avoid the collision.

Setting out in detail the actual evidence given as to the course of the boy, Van Wyk says the boy passed him at the entrance to the bridge (the first pillar) and he goes on:-

> "How far on your right hand side was James away
> "from you when he passed you? -- Within a
> "couple of feet because he passed me close!

Van Wyk was right on the Southern side of the bridge and he goes on:-

> "What was the course of the child? -- Straight,
> "it was not a wobble at all, as though he was
> "making dead for the place, no movement to the
> "side at all".

Van Wyk was then talking of the veering

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to the point of impact, and was emphatic there was this straight veering and no sudden change of direction or swerve at any point, let alone when the boy crossed the centre line of the road. The Court accepted this evidence in the finding quoted, that James commenced the straight veer at the entrance to the bridge.

Sangster is to the same effect, speaking of how James entered onto the bridge, says:-

"And then he veered towards the centre of the "road at some stage? -- Yes, he continued for "a few yards and then made not a direct turn "but a veer.
"Now can you say he veered gradually towards the "centre of the road? -- Yes".

He goes on to deny in clear terms that the boy made any swerve at any time.

Van Aswegen also saw the boy as the boy came onto the bridge. His evidence is:-

"Wanneer het u opgelet dat hy ry met sy kop "gebuk? -- Nadat hy reeds op die brug was, "hy was al die eerste pilaar verby".

and:-

"Wat was die posisie van die fietsdrywer se "hoed? -- Hy het gery met sy hoed oor sy "gesig. Die hoed was voorop sy kop".

and:-

"En voordat hy geswaai het was hy nog aan die "linkerkant van die pad? -- Ja".

"Hoe ver van die linkerkant van die brug was hy, "'n paar voet of 'n paar treë? -- So tussen "drie en vier voet".

The statement about swerving the Court disbelieved as already stated.

So that Van Aswegen agrees with Van Wyk that the boy was about two to three feet from his extreme left side as he passed the first pillar. He denies the gradual move from there straight to the point of impact and says the boy kept along his extreme left until he suddenly turned and did so with his head still down. But he makes it clear he kept his eyes on the boy all the time for there was nothing else to distract his attention. So he denies what he did see, and must have seen, and that is (1) the straight course of the boy to the point of impact, and (2) denies he saw the cycle was ridden by a child though his passenger, Van Niekerk, saw that thirty-five yards before the cyclist entered upon the bridge, and thought the fact that this rider of the cycle was only a child must have been apparent. He, and Van Niekerk, however, make it clear they always from the first sight of him, saw also that the child continued riding with his head down. It would be sheerest fiction to hold that Van Aswegen did not see the straight

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course pursued by the child, and his denial is plainly due to his recognition that if he admitted seeing the straight course, and that the cyclist was a child, that must tell against him, as it plainly does.

This being the case, did Van Aswegen see the negligent course of the boy, also riding with his head bent, in time to take reasonable precautions to avoid the accident? It is difficult to see that Van Aswegen would think that the boy would be guilty of this conduct when the boy was still two or three feet or even six feet from the extreme edge of his correct side. But it is still more difficult to hold that Van Aswegen's duty towards the careless boy only arose when the boy actually crossed the line which is the middle of the road, and when he saw the boy preparing to cross the middle of the road in a blind fashion and make straight for a point which would bring him into collision with the car of Van Aswegen at the now ascertained point of impact. It is not necessary to consider to what extent Van Aswegen should look across the centre of the road to see what is occurring on the other half of the road, because he did in fact look and see the cycle at all stages of it's progress, and is merely giving a false account of that progress to conceal the truth.

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The boy crossed the centre line twenty/four feet from the point of impact and that would scarcely be enough warning if Van Aswegen only had to take notice of him then. But it seems to me there was a point before the boy crossed over the middle when it must have been apparent to Van Aswegen, watching him as he did, that he was going to cross over the middle of the road and ride blindly on, and it then became the duty of Van Aswegen to take reasonable steps to avoid the collision, if he had the time to do so, especially when he saw this was a boy with his head down in a drizzle. The boy veered from a point where he passed Van Wyk close to the entrance to the bridge and six to eight feet from it, and veered from there to where he crossed the centre line sixty feet from the entrance. Taking eight feet as the point of veering, when the boy was half way, or had gone twenty/six feet in this veer, Van Aswegen had ample warning that his blind negligent conduct was leading him straight into the place where the impact took place twenty/four feet from where the point was where he crossed the centre line. In other words, Van Aswegen must have had warning of the course of the boy when the boy was fifty feet from the point of impact, not when he was only

twenty four feet away from it.

No witness for the plaintiff can fix by satisfactory indication where Van Aswegen was when this fifty feet commenced to be traversed by the boy. Clearly both Sangster and Van Wyk could not fix the point for they were looking at the boy crossing the line, and it is in any event most difficult to fix actual distance at which a person sees a vehicle actually approaching him. Their estimates of Van Aswegen being fifty eight or forty eight paces away when the boy crossed the centre line twenty four feet from the point of impact, show how wrong they are as to the distance - but shows nothing more. Fortunately there is another way of fixing where Van Aswegen was when he saw the boy fifty feet from the point of impact. Though the Court a quo was inclined to consider that the boy was proceeding at a speed of less than fifteen miles, it will be safest on the evidence to accept that he did proceed at fifteen miles per hour. To cover fifty feet, he would take two and one third seconds. Now in PRETORIUS VS AFRICAN GATE AND FENCE WORKS LIMITED 1939 A.D. 578. it was held that one and three quarter seconds was an appreciable time to avoid the negligence of another, but there the ~~lorry~~ driver to

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blame in not avoiding the accident, was going at a slow speed. But still it shows what is a sufficient time if only the ground a person, like Van Aswegen, has to cover to reach the point of impact is sufficient at the speed at which he proceeds for him to stop to avoid the collision. Van Aswegen says he was approaching the bridge at a speed of twenty five miles per hour. That means, when the boy was fifty feet away from the point of impact, and would take two and one third seconds to reach it, Van Aswegen was about eighty five feet away from it, since at twenty five miles per hour he travels 36·7 feet per second. Van Aswegen says he maintained only this speed because people do come out of the side road, and that statement seems reasonable. He maintained this until he got passed the side road and then dropped to a speed of fifteen miles per hour, and then to ten miles per hour, but this ten miles was, on his account, when he was already on the bridge and only collided with the cyclist at the middle of the bridge. This last statement the Court a quo did not accept and fixed the point of impact as already stated. Allowing most generously for this diminution of fifteen miles per hour when he passed the side road; (as he said "verby is"), Van Aswegen must have been at least sixty five feet away,

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proceeding at twenty five miles per hour, when he first saw the boy commencing the last fifty ~~one~~ feet of his passage, and thus have been warned, he must take steps to avoid the danger. He could thus easily have stopped his car in forty five feet, or twenty feet short of the point of impact, and given the boy every opportunity of reaching into the side road, or even avoiding him as he veered to the North, and gave Van Aswegen room to veer to his right without Van Aswegen crossing over the centre to his wrong side, even if Van Aswegen had not stopped in time, and a collision could have been avoided. Indeed Van Aswegen was in a very favourable position to do this. He says he was going carefully, is a very experienced driver, his brakes were in perfect condition, and he had put his foot on the brake so as to give anyone coming out of the side path every chance. It seems to me, therefore, this is a case where he was negligent and elected to take a risk that the boy would look up and respect his right of way, for, I do not think that he deliberately tried to injure the boy any more than did the person involved in the PAULL LTD. case intend to injure the person with whom he had collided. Had this been the case of two persons both taking their eyes off their path, it would have been

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difficult to think otherwise than that this was a simple case of joint negligence, for anything that could be argued that one could do to avoid the collision, could equally be argued against the other. But it is not that type of case at all, but the case of one actually in blind negligence, exposing himself to danger and the other, actually seeing that, and being able to avoid the collision, negligently failing to take the steps open to him to avoid the collision.

But there are other grounds to be considered as to whether the negligence of Van Aswegen was the cause of the accident even though the boy was negligent. There is the question of the failure of Van Aswegen to hoot to warn the boy who was riding with his head down, and from that, and his course, it was clear to Van Aswegen that he was not looking. In the declaration hooting is not mentioned, but there is a general charge of taking no precautions after a specification of various acts of negligence. But on the evidence, it would be a mere technicality to take advantage of any defect in the pleadings;- if, indeed, there be a defect. Van Wyk heard no hooter and there was no suggestion that a hooter was used,

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for Van Aswegen's account was that the cyclist swerved so suddenly that he had no time to use the hooter. His evidence was:-

> "En as hy dertig tree voor u ingeswaai het dan "kon u ook u toeter geblaas het? -- Ja. "Maar tog sê u dat dit so skielik gebeur het "dat u niks kon doen om die ongeluk te vermy "nie? -- Na my mening was daar niks wat ek "kon gedoen het nie".

Clearly he admits that he did not use the hooter, and there is no suggestion that the hooter was used.

If this were a case of two drivers, each proceeding to the last stage without seeing one another until a collision occurred, or was inevitable, the case would be one of joint negligence, and the cyclist could not recover damages. For then, on that assumption, even if Van Aswegen had used his hooter, he would only have put the cyclist in the condition the cyclist should have been in by using his eyes. Even if it could then be argued that Van Aswegen should have ~~done~~ hooted if he had looked, it could equally be argued against the cyclist that he would have seen the car if he had looked, and all this is said on the authority of SUTHERLAND VS BANWELL

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(already quoted) but that is not the case here. The boy did not give evidence, and possibly may have seen the car before he commenced to veer, but the position of his head, and his course, indicate that in actual fact he saw nothing after that. As indicated, Van Aswegen saw all, though he falsely describes the course of the boy, and from the evidence of his eyes, knew the boy was not looking, and careless, and going to collide with him. Even if Van Aswegen, under the circumstances, only sounded his hooter when the boy actually crossed the centre of the road twenty four feet from the point of impact, the collision would in all probability have been avoided. The car was not travelling on the centre line of the road, for the collision, twenty four feet away, took place eight feet ten inches from the North side of the road to which spot the boy had veered. Hence, the boy, warned by the hooter, would not even then have got into the path of the car, and, indeed, proceeding as he did at a fairly acute angle, would have to travel a few feet to get into that path. It would have been easy for the boy, by the mere slight change of direction to his left, to avoid the car of whose approach he is now warned by the hoot. He was on a cycle too, that requires little lateral room to be deflected. Even,

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therefore, if Van Aswegen only had a duty towards the boy when the boy actually crossed the centre line, he failed in that duty to hoot and to cause the collision in all probability to be avoided, and cannot avoid the consequences by speculating on the possibility that the boy, in alarm, may not have done the correct thing. As that is so, if Van Aswegen should have done this and avoided the accident by blowing his hooter when the boy crossed the centre of the road, a fortiori, the accident would have been avoided if he had sounded his hooter before the boy crossed the line, whether it be a few feet before or fifty feet before then. His own evidence, just quoted, shows this.

Indeed, if the evidence of Van Aswegen could even have been accepted that he was going at ten miles per hour on the bridge, some little time before the impact, the position would be the worse for him. Then, when the boy was fifty feet from the point of impact, as already pointed out, Van Aswegen was thirty five feet from it, taking two and one third seconds to reach it. He says at that speed he could stop instantaneously (sommer dadelik), and could have stopped and hooted to warn the boy, not yet in his path, and given the boy ample time to avoid the

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collision. But the Court did not accept the view that the impact was at the middle of the bridge of one hundred and twenty feet, and the point was fixed by the Court on inspection, and it accepts that the cycle was dragged, and there is not sufficient evidence to upset this finding. Hence, it will be best to ignore this evidence of Van Aswegen, merely pointing out how much it would tell against him, if it were true.

The conclusion is then that this was not a case of two drivers approaching each other and not seeing each other's movements until a collision had occurred or was inevitable, and thus the collision occurs through joint negligence, but a case where Van Aswegen saw the boy being very negligent as described, saw this in time to avoid injury to the boy, and failed to take any precauti at all to avoid injury, when he could effectively have taken those precautions. Under these circumstances, i seems to me, that the appeal should be allowed.

As this is a dissenting judgment, it necessary to consider the question of damages.

[redacted]