

56/1959

56/59

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

(Appellate

Provincial Division.)  
Provinsiale Afdeling).

Appeal in Civil Case.  
Appel in Siviele Saak.

ELIJAH ROSENTHAL

Appellant,

versus

WELCOME SERVICE STATION

Respondent.

Appellant's Attorney

Prokureur vir Appellant

Appellant's Advocate

Advokaat vir Appellant

Respondent's Attorney

Prokureur vir Respondent

Respondent's Advocate

Advokaat vir Respondent

Goodrich P.  
A. B. Harcourt C.

J. A. Howard

Kriek P.  
R. N. Leon Q.C.

R. N. Leon Q.C.

Set down for hearing on  
Op die rol geplaas vir verhoor op

Friday, 20<sup>th</sup> November, 1959.

(DCL)

(A)

1. 11. 1959  
9.45 a.m.

C. A. V.

D. A. V.  
Rep.

Postea: Thursday 3<sup>rd</sup> December, 1959.

Appeal dismissed with costs.

Coram: Steyn C.J.  
Gubbins J.A.  
Cibulski Thompson J.A.  
Booth A.J.A.  
van Wyk A.J.A.

D. A. V.  
Rep.

IN THE SUPREME COURT OF SOUTH AFRICA.

( APPELLATE DIVISION. )

In the matter between:

ELIJAH ROSENTHAL..... Appellant.

versus

WELCOME SERVICE STATION..... Respondent.

CORAM: STEYN, C.J. MALAN, OGILVIE THOMPSON, J.J.A.  
BOTH A et VAN WYK, A.J.J.A.

HEARD: 20th November, 1959.

DELIVERED: 3-12-59

---

J U D G M E N T.

BOTH A, A.J.A.: This is an appeal against the judgment of James, J. sitting in the Durban and Coast Local Division in an action in which appellant unsuccessfully claimed from the respondent payment of the sum of £770 by way of damages, and costs.

Respondent is a registered firm carrying on business as a motor service station in Durban and of which the members are Trevor Cuthbert and Charles Ivor Wright. It is alleged that on 23rd December, 1956, appellant, pursuant to a verbal agreement entered into between appellant and respondent - the latter being represented by Cuthbert - delivered to respondent a

2.certain/.....

certain Plymouth motor car for service and return to appellant. The respondent failed to return to appellant the said car in the same condition in which it was received by respondent but <sup>returned instead.</sup> ~~was~~ a wreck valued at £770 less than the value of the car when delivered to respondent.

Respondent admits that it undertook to service and to return the car to the appellant, but alleges that while the car was being driven back by Cuthbert, on behalf of the respondent, for delivery to the appellant, in accordance with his instructions, it skidded violently to the left as a result of which it struck the wall separating the two portions of the double highway on which it was being driven at the time, and rebounded off the left hand side of the road. This occurrence, which <sup>resulted in</sup> ~~was the cause of~~ the damage to the car, was caused, so it is alleged, by circumstances entirely beyond the control of Cuthbert and without any negligence on his part. In particulars of the occurrence, furnished in the plea, it is alleged inter alia that the skidding was caused by the car coming into contact with a <sup>slippery</sup> ~~slippy~~ and oily patch on the road, and that it took place notwithstanding the exercise of due and proper care on the part

of Cuthbert.

The learned trial judge found, on a review of all the evidence, that the respondent on whom the onus rested to establish the defence raised by the plea, had made out that defence and accordingly gave judgment for the respondent with costs. It is against this finding that the appeal is <sup>brought.</sup> ~~made~~ to this Court.

The nature of the road at the scene where the accident took place, is described by the trial judge as follows:

" At the scene of the accident the national road is a double carriage way. Proceeding on the uptrack from Durban immediately before the scene of the accident the road takes a long gentle bend to the left which gradually grows sharper as it continues. The down track is on a higher level than the uptrack and the bank supporting the down track is faced with a stone wall which in effect separates the tracks. There is ample room for two cars to travel abreast on the uptrack. The track is gently

4. banked/.....

banked upwards from the inside to the  
outside of the curve."

Cuthbert said in evidence that in accordance with his arrangements with the appellant, he fetched the latter's car at his house on Sunday morning, 23rd December, 1956, for service at the respondent's service station. After the work was completed, he returned with the car <sup>on his way</sup> to the appellant's house along the national road. It was a hot, overcast and humid day with intermittent showers, and as he approached the scene of the accident it was drizzling and the road was wet. He has been a licensed driver for approximately 20 years, he knew the road well, and was driving carefully at a speed of 40 - 45 m.p.h. Visibility was good, and he was keeping a normal and proper lookout. Just before he came into the left hand curve of the road, he passed a car the driver of which he subsequently discovered was the witness Lewis who was driving exceptionally slowly. After passing Lewis he continued driving on the right hand section of the road and did not, at any time before the accident took place, commence to turn to the left. Just after he had passed Lewis, the rear wheels of his car suddenly skidded to the left pushing the front of his car towards the wall separating the two highways. He

emphatically denied a suggestion that immediately prior to the skid he had jerked the steering wheel towards the right. To correct the skid he pulled the steering wheel to the left as a result of which the right rear of the car thumped against the wall and bounded off. His efforts to pull the car out of the skid proved unsuccessful and after the car once again bounced against the wall it careered across the road where it came to rest against some boulders on the left. Cuthbert himself was thrown out of the car before it came to rest, but he immediately thrust himself back into the car, switched off the ignition and applied the handbrake to avoid its going down the hill.

Cuthbert was unable to say what caused the skid, but he maintained that it was not due to any act on his part. He saw no oil or other foreign matter on the road which could have induced a skid, but he considered that there must have been something in the road which caused the car to slide, and after he was told that an oily patch was found on the road where approximately the skid took place, he formed the opinion that that was the cause of the accident.

Lewis said that when Cuthbert passed him, he,

Lewis, was travelling at 35 m.p.h. as he was running-in a new car and that was the speed he was restricted to.

He said that Cuthbert passed him very slowly and that he estimated his speed at no more than 40 m.p.h. He said that because Cuthbert actually travelled alongside of him for some distance before actually passing him. He noticed nothing improper about the way Cuthbert drove his car, and thought that his speed was in all the circumstances a safe speed. After Cuthbert passed him, he continued driving on the right hand section of the road and did not at any stage pull to the left. When Cuthbert was approximately 30 yards ahead of him, he noticed that the rear of his car suddenly skidded very violently to the left leaving the front portion of the car pointing towards the dividing wall. He could see Cuthbert making every effort to correct the skid by pulling the steering wheel to the left, but that the right rear of the car struck the wall, bounced off, struck the wall again and then careered across the road to the left hand side where it came to rest as described by Cuthbert.

Cuthbert's partner Wright said that about an hour after the accident took place, he examined the road surface backwards from the spot where the car came<sup>to</sup> rest. In the centre of the right hand portion of the road, he

found an irregularly shaped oily patch from two to three feet wide and six feet long. He found other slippery patches, not due to the presence of oil, on the road at the scene of the accident. He alleged, indeed, that while walking along that part of the road, he slipped and nearly fell over. Wright said that the oily patch which he found was, because it had been thoroughly mixed with rainwater by the traffic, not readily visible. He himself only saw it when he came upon it.

Based upon the presence on the road of the oily patch found by Wright, the defence developed a theory that the skid was in fact induced thereby, and called, in support thereof, the witness Simpson, a qualified motor mechanic of considerable experience, who in addition claimed special experience of skids induced by oil or an emulsion of bitumen and water on road surfaces. The difficulty that faced the defence in the present case was the alleged unusual feature that despite the curve of the road to the left, the rear of the car, when it skidded, skidded to the left and not to the right as one would normally have expected in view of the fact that centrifugal force tends to impel to the right a car negotiating a curve of the road to the left. Simpson, while conceding



that a skid on a bend to the left would normally be to the right, nevertheless advanced the theory that a skid of the rear of a car to the left with the downward slope of the road could be induced by the car's right hand wheels spinning and losing traction as a result of running into a slippery patch, while the left hand back wheel continued to retain its traction. He conceded though that a skid to the left could also have been caused by the driver applying his brakes or accellarating suddenly, or jerking the steering wheel to the right.

The appellant, in rebuttal, <sup>c</sup>alled two witnesses, viz. Kelly, who although not technically qualified, has had considerable experience in the investigation of accidents caused by skids, and Eaton, a man who has had some experience of motor racing. Kelly rejected entirely Simpson's theory that on the curve of the road in the present case the presence of oil could induce a skid to the left. In his view a skid to the left by the back of the car in the curve of the road as at the scene of the accident could only have been caused by the driver having turned his steering wheel to the left and, finding that he had gone too far, had overcorrected sharply to the right. As I understand his evidence, he conceded

that the state of the road at the time, the curve and the slope were all relevant factors and that, because of those factors, no great movement of the steering wheel would have been necessary to produce such a skid. He refused to concede, however, that such a skid could have been caused without negligence on the part of Cuthbert.

Eaton also rejected Simpson's theory. He found it difficult to conceive how the accident could have happened in the way it was described to him. He advanced substantially the same theory as Kelly, viz. that the driver must have <sup>4</sup>swang his wheel first to the <sup>left</sup>~~right~~ and then over-corrected by swinging to the right, but he thought that the driver acted fairly vigorously on both occasions, <sup>though</sup> ~~but~~ "Just beyond the bounds of being careful," as he put it, yet conceded that the accident might have been caused as a result of something on the road which caused the wheels to slip at a time when the driver was doing something perfectly proper like making a minor correction to his steering, though he did not think that the six-feet patch of oil could have caused that.

The trial judge accepted the evidence of Cuthbert supported as it is by Lewis on all essential points, which evidence he regarded as honest evidence and which

disproves negligence on Cuthbert's part. He found it difficult, however, to accept Simpson's theory that the skid to the left could have been caused by the wheels on the right side of the car running into oil and spinning. In regard to the evidence of Kelly and Eaton that the accident could only have happened if Cuthbert was negligent, the trial judge concluded that, even on the acceptance of their theory that a rear skid could under the circumstances only have been caused by a movement of the steering wheel to the right, and he doubted whether that was the only acceptable theory, he could not, on all the evidence, be certain that a skid to the left by the rear of the car would necessarily because of the condition of the road surface, have been caused by a negligent movement of the steering wheel to the right.

It is clear that as a depositary is obliged to return to the owner the thing deposited in the same condition in which it was received, the respondent, in order to escape liability for the damage to appellant's car, has to prove, by a preponderance of probability, that the damage was caused notwithstanding the exercise of due diligence on the part of Cuthbert. (Frenkel vs. Ohlsson's Cape Breweries, Ltd., 1909 T.S. 957 at pp. 962 - 5; Eensaam Syndicate vs. Moore, 1920 A.D. 457 at p. 458; Rosenthal vs. Marks, 1944 T.P.D. 172 at p. 176 and Essa vs. Divaris, 1947(1) S.A. 753 (A.D.)). The point is made in respondent's

main heads of argument that there is no evidence that the servicing of appellant's car by respondent was for reward; that in the absence of such evidence it must be assumed that the service was gratuitous and that the respondent is, therefore, in the light of passages in Voet, 16.3.7 and Grotius 3.7.9, liable only if the damage to appellant's car was caused by culpa lata on Cuthbert's part. In the view I take of the matter, it is not necessary to investigate this contention. I shall assume, against the respondent, that the service was for reward and that the respondent, being a depositary for reward, would therefore be liable if the damage was caused by the failure on the part of Cuthbert to exercise that degree of care which a reasonably prudent and careful man might have been expected to take in the circumstances of this case. ( Lituli vs. Omar, 1909 T.S. 192 at pp. 194-195 and Rosenthal vs. Marks, supra. ).

Counsel for the appellant contended in this Court that in order to have discharged the onus which rested upon the respondent, it was not sufficient for it to show that the accident occurred notwithstanding the exercise of due diligence by Cuthbert, but that it should in addition have given some explanation of the causes of

the skid which culminated in the damage to appellant's car. Counsel conceded that the mere fact that a car skids is not necessarily ~~a general rule~~ indicative of negligence on the part of the driver, ( Baumann's Selected Products vs. Porter, 1934 C.P.D. 383 at p. 384 and R. vs. Aucamp, 1959(2) S.A. 755 at pp. 756 and 757) but contended that an inference of negligence can be drawn depending upon the circumstances giving rise to the skid, including the nature of the skid, and where the only person able to speak in detail as to the circumstances giving rise to a skid, which is not an act of God, is the driver of the car and he does not do so, an inference of negligence may be drawn against him. It may be that the known circumstances giving rise to a skid or the nature of the skid itself, may be such as to be consistent only with negligence on the part of the driver and inconsistent with the exercise by him of due diligence, in which case there cannot be proof by a preponderance of probability that the accident occurred notwithstanding the exercise of due diligence on the part of the driver. That however, is an inference that may be drawn from the facts of each particular case, and cannot support the broad general proposition that in order to discharge the onus which rests upon a depositary in a case such as this,

some explanation of the cause of the loss or damage is essential. That would in my view be an unjustifiable extension of the onus which could lead to obviously unjust results.

I think it is clear also that an inference adverse to a depositary ~~[not necessarily of negligence]~~ may be drawn where by reason of the circumstances of the loss <sup>of</sup> or damage <sup>to</sup> ~~of~~ property <sup>deposited</sup> ~~deposited~~ with him, he may reasonably be presumed to have knowledge of the cause of the loss or damage in consequence of which he may reasonably be expected to give an explanation of the cause of such loss or damage and fails to do so. (Cf. Weiner vs. Calderbank, 1929 T.P.D. 654 at pp. 665, 666.) But this is not such a case, for it is clear from the evidence of the experts that a skid may be caused without any act, negligent or otherwise, on the part of the driver of the car, and it follows, I think, by causes of which the driver may not reasonably be expected to have any knowledge. The trial judge accepted Cuthbert's evidence that he was unable to explain the cause of the skid and that the accident occurred notwithstanding the exercise by him of due diligence. On the assumption that the acceptance of Cuthbert's evidence is correct, we do not know how the skid was

caused but we do know that it occurred despite the exercise of due diligence by Cuthbert. (Colman vs. Dunbar, 1933 A.D. 141 at p. 158). In these circumstances the onus resting upon the defendant would in my view be discharged by proof that the damage to plaintiff's car was caused notwithstanding the exercise of due diligence on the part of Cuthbert, without an explanation by the latter of the cause/ of the skid, and that no inference *adverse* to the respondent can be drawn from the fact that it was unable to give any such explanation.

It follows that for this appeal to succeed, the appellant has to convince us that the trial judge was wrong in accepting the evidence of Cuthbert, as corroborated by Lewis, that the accident occurred despite the exercise of due diligence by him. ( Mine Workers' Union vs. Brodrick, 1948(4) S.A. 959 at p. 970 (A.D.)).

Counsel did not challenge the finding of the learned judge that Cuthbert and Lewis were both honest witnesses. He could hardly have done so. But he contended that though they gave honest evidence, it was not reliable because, as regards Cuthbert, there is evidence that as a result of injuries sustained by him in the accident, he was badly dazed and there must therefore

have been considerable doubt as to whether he was able to give an accurate account of what had occurred, and, as regards Lewis, that travelling as he was, in the left hand lane of the road some 30 yards behind Cuthbert, he was not in a position to observe a sudden braking, acceleration or movement of the steering wheel by Cuthbert, anyone of which could have caused the skid observed by Lewis.

The corroboration on all essential points of Cuthbert's evidence by Lewis, to which I have already referred, does not suggest inability on the part of Cuthbert to give an accurate account of what had occurred on the day in question. It was not suggested to Cuthbert in cross-examination ~~that he was unable to remember the details of the accident~~ ~~that as a result of the injuries sustained by him, he was unable to remember the details of the accident.~~ that as a result of the injuries sustained by him, he was unable to rem<sup>m</sup>ember the details of the accident. The manner in which he gave his evidence and the subsequent pointing out by him of the relevant spots at the scene of the accident, independently of Lewis, but which spots coincided with the spots pointed out by Lewis, all go to show that he had no difficulty in remembering the details of the accident.

The attack on the reliability of the evidence



of Lewis was limited to his denial that, before the skid started, there was any sign of a sudden braking, acceleration or jerking of the steering wheel by Cuthbert. In my view there is no justification for this criticism. Lewis did not deny the possibility of a sudden braking, acceleration or jerking of the steering wheel by Cuthbert; he merely said that he saw no sign of it. Kelly and Eaton do not for their theories as to how the accident probably happened, rely upon a sudden braking or acceleration as a cause or an essential contributing cause ~~for~~<sup>of</sup> the skid. Cuthbert denied it and there was indeed no reason whatsoever why he should either suddenly have braked or accelerated at the time and place of the accident. It is not surprising therefore, that Lewis saw no sign of a sudden braking or acceleration. What Lewis saw was a violent skid to the left. If that had been induced by a turn of the steering wheel to the right, it would have had to be a sharp turn which Lewis would in all probability have observed in view of the fact that he did not fail to notice the turn of the steering to the left by Cuthbert in his effort to correct the skid. In my view the attack on the reliability of the evidence of Cuthbert and Lewis must fail.

It was finally contended that, because of the improbability of a car negotiating a lefthand curve skidding to the left, unless the front wheels of the car were turned to the right, and the evidence of Kelly and Eaton that a skid to the left in such circumstances could only have been induced by a sudden and negligent movement of the steering wheel to the right, the evidence of Cuthbert was inconsistent with the probable cause of the skid and that the respondent had therefore, on the case as a whole, failed to prove, by a preponderance of probability, that the accident occurred notwithstanding the exercise of due diligence by Cuthbert.

It is common cause that the road at the curve where the accident occurred slopes gently to the left to counteract the effect on the centrifugal force of a car negotiating the bend to the left. Kelly suggests that though that was the purpose of the slope, the object was not achieved. He admits that he knows nothing about the necessary technical data and, beyond saying that one cannot go round many of the bends on that particular road without reducing speed considerably, he provides no basis for his assertion that the object of the slope at the bend where the accident occurred was not achieved, and

he does not say to what extent it was not achieved, though he admits that, the road does to a great extent counteract the centrifugal force. The curve in the road at the scene of the accident is described by the learned judge as "a long gentle bend to the left" and it seems improbable therefore that centrifugal force could have much effect on the movement of a car. If that is so, the theory advanced by Kelly and Eaton that a rear skid to the left could only have been caused by a movement of the steering wheel to the right, does not seem to be a probable one.

But there is a further improbable feature of the theory advanced by Kelly and Eaton. If the violent skid to the left testified to by Cuthbert and Lewis was induced by a movement to the right of the steering wheel, a sharp turn would have been necessary to produce it. Eaton thought that on a wet and slippery road a turn of about 45 degrees would have been necessary. But a sudden turn by Cuthbert without any apparent reason, to the right into the wall dividing the two highways seems so improbable that it hardly merits serious consideration. Equally improbable is Kelly's suggestion that the turn to the right was an over correction of a preceding turn to the left which had taken Cuthbert too far. Cuthbert was

travelling on the right hand side of the road and even if he had <sup>moved</sup> ~~curved~~ to the left, he had a long way to go before he <sup>would</sup> ~~could~~ have realised that he had gone so far to the left that a correction to the right was not only necessary but urgent. The suggestion is moreover against the evidence of Lewis who said that Cuthbert did not prior to the skid move over to the left.

Even assuming, however, that the skid was induced by a movement of the steering wheel to the right, then I agree with the learned judge that the evidence as a whole does not show that the skid to the left by the rear of the car was necessarily caused by a negligent movement of the steering wheel to the right. Kelly conceded that having regard to the state of the road at the time, the curve and the slope down to the left and the speed of the car, no great movement of the steering wheel to the right would have been necessary to produce a skid to the left. Eaton admitted that the accident could have been caused as a result of something on the road which caused the wheels to slip at a time when the driver was doing something perfectly proper like making a minor correction to his steering, though he did not think that the alleged six-foot patch of oil could have caused that. Wright however found other

slippery patches on the road about an hour after the accident when conditions were still very much the same as at the time of the accident. It was conceded that a driver negotiating a bend in the road will almost subconsciously from time to time make minor movements with his steering wheel to the left or to the right to make adjustments to his line of travel. It follows, therefore, that even if the skid to the left was induced by a movement of the steering wheel to the right, the movement may, having regard to the slippery conditions of the road at the time of the accident, have been made by Cuthbert without negligence and merely to adjust his line of travel. The evidence of Kelly and Eaton ~~in my view~~ is therefore in my view not inconsistent with the evidence of Cuthbert that the accident occurred notwithstanding the exercise by him of due diligence.

The appellant has therefore failed to show that the learned judge was wrong in accepting and relying on the evidence of Cuthbert as supported by Lewis, and the appeal must therefore be dismissed with costs.

STEYN, C.J.  
MALAN, J.A.  
OGILVIE THOMPSON, J.A.  
VAN WYK, A.J.A. } CONCLUDED.

*D. H. Butler*  
.....