G.P.-S.33967—1968-69—1,000.

J. 219.

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

(APPELLATE Provincial Division.)
(Provinsiale Afdeling.)

Appeal in Civil Case.
Appèl in Siviele Saak.

JEANETTA ELLEN McCABE *Appellant,*

versus

SANTAM INSURANCE COMPANY LIMITED *Respondent*

Appellant's Attorney Symington & de Kok *Respondent's Attorney* Naude & Namde
Prokureur vir Appellant *Prokureur vir Respondent*

Appellant's Advocate H P V Ljoen *Respondent's Advocate* J P Machardie
Advokaat vir Appellant *Advokaat vir Respondent*

Set down for hearing on 17 - 9 - 70
Op die rol geplaas vir verhoor op

13 - 10 - 70

Coram: van Blerk A C J, Rumpff, Wessels, Potgieter JJA et Corbett A J A

(E.C.D.)

9.45 am — 11.00 am
11.15 am — 12.45 pm
2.15 pm — 3.00 pm

C A V.

Judgment on 30-9-70 per Corbett A J A:- Appeal with costs. Order as per written judgment.

Writ issued Lasbrief uitgereik	Bills Taxed.—Kosterekenings Getakseer.		
	Date. Datum.	Amount. Bedrag.	Initials. Paraaf.
Date and initials Datum en paraaf			

IN THE SUPREME COURT OF SOUTH AFRICA
(APPELLATE DIVISION)

In the matter between:

JEANETTA ELLEN McCABE ..... Appellant
in her personal capacity and also in her capacity as Mother and natural guardian of her minor daughter VIRGINIA JEANETTA McCABE

and

SANTAM INSURANCE COMPANY LIMITED ..... Respondent

CORAM: Van Blerk, A.C.J.; Rumpff, Wessels, Potgieter J.J.A. et Corbett, A.J.A.

HEARD ON: 17th September, 1970. DELIVERED:

J U D G M E N T.

CORBETT, A.J.A.

On the 24th September, 1968, and in Beetlestone Road, Port Elizabeth a collision occurred between an Opel Kapitan motor car driven by one Henry McCabe (hereinafter referred to as "the deceased") and a Morris 1100 motor car driven by one Robert Redcliffe. Henry McCabe died as a result of this collision. Thereafter his widow, the present appellant,

sued...../2

sued the respondent, as insurers under the Motor Vehicle Insurance Act of Redcliffe's vehicle, for damages for loss of support. This action was brought by appellant both in her personal capacity in respect of the loss of support suffered by her and in her capacity as the mother and natural guardian of her minor daughter, Virginia Jeanetta McCabe, for the loss of support suffered by the latter. In her declaration appellant alleged that the collision was due entirely to the negligence of Redcliffe in one or more of the following respects:

"A. He drove at a speed excessive in the circumstances.

B. He failed to keep a proper look-out.

C. He failed to apply brakes timeously when by doing so he might have avoided said collision.

D. He failed to switch the head-lights of his vehicle from high beam to low beam at a time when it was necessary and/or desirable for him to do so.

E. He allowed his vehicle to depart from its correct side

of the...../3

Respondent's counsel thereupon applied for absolution from the instance on the ground that plaintiff had not established a *prima facie* case. This application was refused by the learned trial judge and immediately thereafter respondent's counsel closed his client's case without calling any evidence. Having heard argument, *Cloete*, J. ordered absolution from the instance with costs.

Appellant now appeals against this decision, leave having been granted to her by this Court to prosecute the appeal *in forma pauperis*.

As the case unfolded in the Court *a quo*, it became clear that the sole issue was whether appellant had succeeded in establishing that the collision, which cost her late husband his life, was to any material degree caused by the negligence of the driver of the insured motor vehicle, Redcliffe. In order to substantiate plaintiff's case four witnesses were called: Moses Joseph Anthony, a sergeant in the South African Police; Johannes Moses, a constable in

the...../5

the South African Police; William Pietersen, a passenger in the deceased's motor car at the time of the collision; and John Webber, the driver of another motor vehicle which was travelling along the same stretch of roadway at the time of the collision.

From the evidence of these witnesses and from the attitude of the respondent, as indicated by its counsel in the course of the trial, it appears to be undisputed that the collision occurred at approximately 10 p.m. and at a point in Beetlestone Road close to where a side street, Raphael Crescent, makes a T-junction with Beetlestone Road. This stretch of Beetlestone Road runs approximately East/West. To the East lies the central part of the city of Port Elizabeth and to the West a residential area known as Gelvandale. To anyone approaching from the East, Beetlestone Road runs straight for some distance before the point of collision is reached. Proceeding further in a Westerly direction one passes the entrance to Raphael Crescent and thereafter

Beetlestone Road...../6

Beetlestone Road starts to curve gently to the left. Immediately prior to, and at the time of, the collision the deceased was driving his Opel motor car from West to East, i.e. in the direction of the city area of Port Elizabeth, while Redcliffe was driving his Morris motor car in the opposite direction, i.e. from East to West. It would seem that the collision between the two vehicles was in the nature of a head-on one but there was no evidence before the Court to indicate which portions of the vehicles came into contact with one another. After the collision Redcliffe's vehicle came to a standstill on the southern edge of Beetlestone Road, standing at right-angles to, and straddling the kerb with its nose pointing towards the middle of the street and with approximately half the length of the car in the street and half on the pavement. The deceased's vehicle was found about 93 feet to the East of Redcliffe's, standing at a slight angle to the edge of the street and pointing generally in a Westerly direction, i.e. in the direction from which it

had...../7

had come.

It is evident from this recital of the undisputed facts that it is of prime importance, in fixing responsibility for this collision, to know exactly where in relation to the centre line of the road the collision took place. This was in fact the central issue in the case and appellant's evidence was mainly directed towards showing that at the time of the collision the deceased's vehicle was travelling upon its correct side. The cardinal question which confronted the trial Court and which confronts this Court on appeal is whether this evidence established appellant's case upon a balance of probabilities.

The first witness called by the appellant, Sgt. Anthony, did not materially advance her case. He merely deposed to having approached Redcliffe a day or two after the accident and in the course of investigating the matter and to having asked Redcliffe whether he was prepared to make a statement. According to Anthony Redcliffe replied that he would see his

attorney...../8

attorney and make a statement to him.

The next witness, Const. Moses, actually investigated the accident on the night in question. He gave evidence as to his observations at the scene of the accident and handed in the usual police plan and key thereto. From this it appears, inter alia, that at this point the roadway is twenty-four feet wide. He stated that on his arrival he found the two vehicles in the positions which I have described. The deceased was lying in the road in front of his vehicle in an unconscious state and was consequently unable to throw any light on the matter. There was a passenger sitting in the back of the motor car. The driver of the insured vehicle, Redcliffe, though conscious, appeared to have sustained a blow on the head. Moses asked him to point out the place where the collision occurred but he was unable to do so. There were two passengers in this vehicle.

Moses also deposed to certain real evidence observed by him in the form of dry mud and broken glass which had been

deposited...../9

deposited in the roadway and from which he made certain deductions as to the point of the collision. According to him this mud and broken glass was concentrated mainly around a point F which was situated immediately in front of Redcliffe's vehicle. The measured distance from point F to the southern kerb of the street was six feet. Redcliffe's vehicle was protruding about five feet into the roadway. I shall discuss Moses' evidence concerning the mud and glass in more detail later. At this stage it is sufficient to say that, under cross-examination, Moses stated that the inference which he drew from his observations was that point F represented the point of the collision.

The passenger in the deceased's vehicle, William Pietersen, aged 37, was a fellow employee of the deceased's in the service of the local bus company. They also lived in the same area. On the evening in question he and the deceased finished work at approximately the same time. The deceased offered to drive another employee, one David

Abrahams, to his home in Gelvandale - which offer the latter accepted with gratitude - and the witness accompanied them. It was after dropping Abrahams at his home in Gelvandale and while they were driving down Beetlestone Road on their way to Schauder Township where they both lived that the accident occurred. Pietersen stated that after dropping Abrahams he continued to sit in the back seat, on the left-hand side. Being a driver himself, he is normally attentive when being driven and on this occasion he watched what was happening in the road ahead. In Beetlestone Road the deceased drove at a speed of about 30 to 35 miles per hour with his lights on dim and on his correct side of the road. There is actually no centre line marked on this stretch of road but the witness estimated that the left-hand side of the deceased's vehicle was about 2 to 2½ feet from the left-hand pavement. Vehicles coming in the opposite direction all showed their head lights. There were no vehicles immediately in front of them, i.e. proceeding in the same direction. His description

of the...../11

of the accident itself is somewhat cryptic, as this extract from his evidence-in-chief indicates:

"MNR. CUBITT: Wat het nou gebeur? Julle ry daar af, ja, en toe?-- Wel, soos ons Beetlestoneweg deurry, het ek net gevoel die kar stamp teen iets, maar ek was nie bewus daarvan dat die kar teen n ander motor n botsing gehad het nie.

Jy sê jy het net gevoel die kar stamp teen iets?-- Teen iets, ja.

Hierdie stamp is dit iets wat jy kan self onthou?-- Ek kon net sover onthou, die stamp wat die ongeluk betref.

Op dàardie moment toe jy voel die kar stamp aan iets, waar was julle kar gewees in vergelyking met die pad?-- Hy was op die linkerrybaan gewees.

Hy was nie op sy verkeerde kant van die straat nie?-- Nee."

He was knocked unconscious by the collision

and...../12

and upon coming to he observed the damage to the vehicle and found the deceased lying unconscious in the street. Under cross-examination his knowledge of the events leading up to the accident was further probed:

"MNR. DE WET: Die volgende ding wat jy weet, toe is daar 'n slag?-- Toe is daar 'n slag.

Jy het nie gesien hoe dit gebeur het dat die ongeluk plaasgevind het nie?-- Nee.

Jy weet nie?-- Ek het net gevoel hier stamp die kar teen iets en toe is ek vir enkele minute bewusteloos.

Met ander woorde, is die korrekte manier om jou getuienis te gee, julle het gery, julle was op julle korrekte kant van die pad en wat jy tóé weet, is daar 'n botsing wat jou bewusteloos maak?-- Ja.

Wat presies vóór die botsing gebeur het, weet jy nie?-- Ek het net die stamp gevoel, dis al."

At a later stage of the proceedings Pietersen was recalled and respondent's counsel questioned him in regard

to an...../13

to an affidavit which he had made in connection with the inquest proceedings relating to the deceased. From this further evidence it would seem that one of the oncoming cars had failed to dim its lights. They blinded the witness and could have blinded the deceased. This was the last oncoming car which he saw prior to the accident.

The witness Webber, a painter aged 44 years, told the Court that on the evening in question he had attended a choir practice in Schauderville and at the time when the collision occurred he was driving home in his Datsun van with two lady passengers. While proceeding along Beetlestone Road in a Westerly direction, i.e. towards Gelvandale, he noticed an Opel motor car approaching from the opposite direction. There were no approaching vehicles immediately in front of this motor car. He was aware, from what he could see in his rear-view mirror, that there was another motor car travelling immediately behind him. He himself was driving at about 25 miles per hour on his correct side

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of the road, with the left-hand side of his vehicle about 3 to 4 feet from the left-hand kerb, and the approaching Opel motor car was similarly adhering to its correct side of the road. Immediately after the Opel motor car had passed him ("Die motor het net n raps verby my gegaan" - as he put it) he heard a loud report. This occurred so soon after the passing of the Opel that he thought that the latter vehicle had collided with the rear portion of his own vehicle. He immediately pulled to the side of the road and stopped. Thereafter he returned to the scene of the accident and assisted in extricating one of the lady passengers from, presumably, Redcliffe's vehicle. He identified the Opel motor as having been McCabe's vehicle.

In his judgment the learned trial judge summarized Pietersen's evidence and then commented as follows:

> "Pietersen's evidence is obviously not of great value except in so far as it suggests that at the time of the collision, or shortly before that, the vehicle

of the...../15

of the deceased was on its correct side of the road." Assuming that the learned judge intended to convey that the evidence of Pietersen to the effect that the deceased was on his correct side of the road was of great value, this comment was, generally speaking, well-founded.

With reference to Webber the trial Court stated, inter alia:-

> "He was closely questioned in cross-examination as to the direction from which this sound came, and he says he thought it was from the side of the body-work of his Datsun vehicle and definitely on his side of the road. This must necessarily follow because he is adamant and very firm in his evidence that he was well on his correct side of the road. If therefore, he formed the impression that something had collided with the rear portion of his vehicle from the sound of an impact coming from that vicinity, then of necessity - to be logical - he must say that

this...../16

this sound came from somewhere near the rear of his vehicle on his correct side of the road.

This evidence taken by itself is, of course, evidence of slight probative value".

This passage from the judgment might create the impression that Webber stated that from the sound of the report he thought the collision which caused it took place on his side of the road. I do not read his evidence in this way. The relevant cross-examination commenced as follows:

"MNR. DE WET: Jy het vir ons in hoofgetuienis gesê jy het gedog dit is teen die bak van jou kar omdat dit so'n harde slag was, nie waar nie?-- Reg.

HOF: Is dit reg so?-- Reg.

Omdat dit n harde slag was, het jy gedink dit was teen die bak?-- Reg.

MNR. DE WET: Soos jy vir ons gesê het, jy was op jou korrekte kant van die pad, nie waar nie?-- Ja, Regter.

Met ander woorde..... /17

Met ander woorde jy het gedog dat hierdie voertuig was op sy verkeerde kant gewees om jou te kan slaan, is dit reg?-- Ek het nie so gedink nie want soos ek sê die kar is net-net-net, hy is nèt verby my toe gaan daar 'n skoot af.

Moenie jou storie nou draai nie, John, ek wil hê jy moet nou mooi luister na wat ek vra. Jy het vir ons gesê jy het gedog die slag is teen jou kar?-- Ja.

Jy was op die korrekte kant van die pad, is dit reg?-- Reg, Regter."

The questioning proceeded very much in this vein until ultimately, in reply to the Court, the witness stated:

"Verstaan ek dit nou heeltemaal duidelik dat jy was heeltemaal op jou korrekte kant van die pad gewees?-- Reg.

Die slag wat jy gehoor het, het jy gedink het jou kar getref?-- Reg.

Dit het vir jou, volgens die geluid wat jy gehoor

het..... /18

het, geklink asof die botsing aan jou kant van die pad was?-- Reg."

It seems to me that all that this amounts to is that the witness was persuaded eventually to concede that because he was travelling on his correct side of the road and because he thought the report was caused by the Opel colliding with the rear of his vehicle, he must have thought that such collision occurred in his half of the road. The hypothesis is unfounded because McCabe's vehicle did not collide with his own. Moreover, I do not understand it to be suggested that, independently of possible deductions from the fear that his own vehicle may have been hit, Webber formed any accurate impression as to the direction from which the sound came. In fact, if he had, I would discount it as being, in the circumstances, wholly unreliable. In the passage from the judgment quoted above this evidence is described as having, by itself, "slight probative value". I would prefer to disregard it altogether. I cannot, therefore,

with respect, agree with the further observation of the learned judge (in the next paragraph of his judgment) to the effect that Webber's evidence as to the sound of the collision was "incompatible" with Pietersen's averment that the deceased's vehicle was travelling on its correct side of the road shortly before the accident.

Thereafter the learned trial judge dealt with the evidence of Moses and placed particular emphasis upon his evidence as to the mud and broken glass and the inference which Moses drew therefrom. In this connection the learned trial judge observed:

> "But the evidence of Moses does not end there. He says that it was his clear impression, and he drew the inference from what he saw, that the point of impact was on the deceased's incorrect side of the road. In other words, that it was on the correct side of the road in so far as the insured vehicle's line of travel was concerned.

There may be...../20

> There may be some difficulty in reconciling the evidence of Moses that this deposit of mud was found close to the middle line, and the fact that he fixed the point of impact on the deceased's incorrect side of the road. Nevertheless, he was definite in his evidence that the collision took place on the deceased's incorrect lane."

This passage rather suggests that the trial Court relied directly upon the inference which was drawn by Moses. If this is so then, in my view, this was an error. Any such inference would be a matter of opinion and would not be material upon which a Court should rely. If, on the other hand, the trial Court drew its own inference from the evidence of Moses, then this criticism falls away and the only question which arises is whether this inference, or finding based on inference, was well-founded.

In order to assess this finding it is necessary to refer in more detail to the evidence of Moses. The point F

at which..... /21

at which the mud and broken glass was said to be concentrated does not appear on the police plan. It was suggested in argument that Moses obtained this point and the information relevant thereto from his policeman's notebook but this is pure speculation. The fact that his evidence regarding point F is not confirmed by the plan is an unsatisfactory feature of his testimony. Although his evidence upon this point is not altogether consistent, it would appear that, according to him, the mud and broken glass was scattered over a fairly wide area. He described it as extending as far as the imaginary middle-line of the road and, in another passage, for a distance of approximately two paces in front of the Morris motor car. In view of the facts that the roadway was 24 feet wide and that the Morris protruded 5 feet into the roadway this latter description would bring some of the mud deposits close to the middle-line of the road.

I have two fundamental difficulties in regard to

this...../22

this evidence. The first relates to its factual accuracy and the second to the soundness of the inferences which were drawn. As regards accuracy, it must be borne in mind that Moses was giving evidence over a year later as to observations made in the dark. And, as I have said, it is not clear to what extent, if at all, he was able to refresh his memory from a contemporary record. Where accurate measurement might have been of critical importance he was only able to give an estimate. Thus, for example, if the distance he estimated as two paces was in fact three paces, this would have brought the mud deposits well onto the insured driver's incorrect side of the road. In this regard it must also be remembered that there was no middle white line to assist him in determining precisely how far the mud extended.

In my opinion, the inferences sought to be drawn from this evidence are equally fallible. Generally speaking it is very dangerous to draw inferences when

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one has an imperfect knowledge of the relevant facts. In the present instance the presence of mud and broken glass on the roadway cannot serve as a reliable indication of the position of the vehicles at the time of the collision unless one knows, at least, (i) how the vehicles collided and which portions of the vehicles came into contact with one another; (ii) approximately the movements of the vehicles after impact; (iii) from which portions of the vehicles, or any one of them, the mud and broken glass is likely to have come; and (iv) what distance a vehicle is likely to have moved after the initial impact before mud or glass is likely to have fallen from it to the ground. None of this information is available in the present case.

Moses' conclusion that point F represents the point of collision is manifestly unsound. Even ignoring the problems mentioned in the previous paragraph, this conclusion is against all the probabilities. It would place

the point...../24

the point of collision about 6 feet from the kerb on the deceased's incorrect side of the road. Accepting the evidence of Webber, this postulates a sudden swerve to the right of considerable violence on the deceased's part immediately after he had passed Webber's vehicle. This seems very improbable. It also postulates that although the deceased's vehicle continued for a distance of some 93 feet after impact, Redcliffe's vehicle hardly moved after impact. It also fails to explain the presence of mud and glass as far as the middle-line inasmuch as upon this hypothesis, it is unlikely that either vehicle have moved in that direction after impact.

Having regard to all these factors, I do not think that any reliable inference can be drawn from the evidence as to the mud and broken glass. Moreover, even if Moses' evidence in this regard be accepted as completely accurate, I do not regard it as being incompatible with the evidence of Pietersen and Webber to the effect that immediately

prior...../25

prior to the collision the deceased was well onto his correct side of the road.

The plaintiff's evidence stands uncontradicted, defendant having decided not to lead any evidence. It does not necessarily follow that it must be accepted but on the other hand there does not appear to be any reason to reject it. The learned trial judge did not comment adversely on the credibility of Pietersen and Webber. As I understand his reasons, he found himself unable, upon a balance of probabilities, to accept the accuracy of their evidence because of the inconsistency which he found to exist between their evidence and (a) Webber's concessions as to the direction from which the sound of the crash came and (b) the evidence of Moses as to the mud and broken glass. For the reasons stated above I am of the opinion that there was no real inconsistency in this regard. There is accordingly no obstacle on this score to the acceptance of their evidence. Nor can I find any ground

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in the evidence itself for not regarding their testimony as honest and truthful. This evidence, if accepted, gives rise to a probable inference that at least a substantial portion of the insured vehicle was on its incorrect side of the road at the time of the collision. This gives rise to a prima facie inference of negligence and, in the absence of any explanation from the driver of the insured vehicle, the plaintiff must be held to have discharged the onus resting upon her and to have established grounds E and/or F and/or G of the negligence pleaded by her.

The appeal is accordingly allowed with costs and the order of the trial Court is altered to read:

"(1) An order is granted declaring defendant to be liable to plaintiff for such damages for loss of support as she and her minor daughter, Virginia Jeanetta McCabe, may have suffered through the death of the late Henry McCabe;

(2)...../27

(2) The costs are to stand over for determination by the Court which hears the remainder of the action."

M.M. Corbett

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CORBETT, A.J.A.

Van Blerk, A.C.J.
Rumpff, J.A.
Wessels, J.A. Concurred.
Potgieter, J.A.

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