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G.P.-S.33967—4968-69—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.

MACCIE LEVY N.O. *Appellant,*

versus

RONDALIA ASSURANCE CORPORATION OF SOUTH AFRICA LIMITED *Respondent*

Appellant's Attorney / *Prokureur vir Appellant* Lovius B,M & C

Respondent's Attorney / *Prokureur vir Respondent* Symington & de Kok

Appellant's Advocate / *Advokaat vir Appellant* H W Levy

Respondent's Advocate / *Advokaat vir Respondent* H C Nel

Set down for hearing on / *Op die rol geplaas vir verhoor op* 16-3-1971

3.4.6.7.9

CORAM: HOLMES, TROSKIE, A.AA, DIEMONT, MILLER ET KOTZÉ, WND AJ

APPELLANT: 9.45 AM - 10.00 AM

(C.P.D.) ~~C.P.D.~~ RESPONDENT: 10.00 VM - 11.00 VM
11.15 VM - 12.00 NM

APPELLANT: 12.00 NM - 12.10 NM (In reply)

C A V

Holmes J.A. (a) The appeal is allowed with costs.

(b) The Order of the Court a quo is set aside.

(c) There is substituted an order awarding R1400 to the plaintiff with costs, including the qualifying expenses of the surveyor.

REGISTRAR.
23.3.1971

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 -

MAKKIE LEVY, N.O. ..... Appellant

AND

RONDALIA ASSURANCE CORPORATION OF SOUTH AFRICA, LIMITED ..... Respondent

Coram: Holmes, Jansen, JJ.A., et Diemont, Miller, Kotzé, A.JJ.A.

Heard: 16 March 1971. Delivered: 23 March 1971.

J U D G M E N T

HOLMES, J.A.:

As a general proposition it is well settled, and it accords with humanity and common sense, that a motorist approaching young children near the edge of the road ought to drive with a degree of special care and vigilance because of their tendency sometimes to dash heedlessly across the road. To hold otherwise would be to put an old head on young shoulders, and to assume that they will look before they leap.

2/... But

But the rule must not be applied as a fixed principle without reference to the facts. The foreseeability of reasonably possible collision, and the degree of special care required, will vary according to the particular circumstances of each case, for example, the visibility of the children; their apparent age; their proximity to the edge of the road and to the path of the vehicle; their immobility or liveliness; the indications, if any, of an intention to cross the road; the extent of their supervision by a responsible person; the apparent awareness of the latter, and of the children, of the approach of the motorist; the available width of road; and the stopping power of the vehicle in relation to speed, brakes and road surface. Such factors (and the list is not exhaustive) are inter-related and not individually decisive. Their cumulative effect must be considered. Similarly, the particular circumstances will dictate the reasonable steps in relation to matters such as hooting, berth, swerving, slowing down or pulling up, with a view to guarding against the

3/... occurrence

occurrence of collision, the reasonable possibility of which was foreseeable. The decided cases are legion. It is not necessary to cite them: most of them are illustrative rather than definitive of the principle involved. The most recent decision in this Court is S. v. Phyffers, 1970 (4) S.A. 104.

With that prelude I turn to the facts of this case. In the Cape Provincial Division the appellant, in his capacity as father and guardian of his minor daughter of tender years, sued for damages in respect of injuries which, it was averred, were caused to the child when she was knocked down by a vehicle insured by the respondent under Act 29 of 1942. The quantum of damages was agreed at R1400. The issue was the causal negligence of the driver. The trial Court held that this was not proved, and granted absolution from the instance with costs. The appellant appeals.

At the trial, the appellant called as witnesses -

(a) a land-surveyor, who handed in a plan drawn by him and who described the scene of the collision;

4/... (b) the

(b) the uncle of the child, who was with her and was about to cross the road when the collision occurred;

(c) the mother of the child who arrived after the collision, and who testified as to the child's age and what she found at the scene.

The child did not give evidence. She was in Court and the trial Judge spoke to her; but she said, in answer to a question from counsel, that she did not remember anything about the accident.

The only witness called by the respondent was the policeman who arrived on the scene after the injured child had been taken to hospital. He drew a plan which he handed in. The respondent did not call the driver of the insured motor car, although he was at Court and available as a witness.

It is, of course, well settled, as counsel for the respondent stressed, that one does not draw inferences of negligence on a piecemeal approach of presumption and rebuttal.

5/... In

In particular, one should not isolate the mere fact that a motorist ran down a pedestrian in daylight, and draw therefrom a prima facie inference of negligence. The correct approach, in deciding whether there is proof of negligence, is to consider the totality of the facts after both sides have closed their cases; see R. v. Sacco, 1958 (2) S.A. 349 at 351/2, Norwich Union v. Tutt, 1962 (3) 993 (A.D.), S. v. Snyman, 1968 (2) S.A. 582 (A.D.) at 589 H. I proceed to do this.

The facts which, on the pleadings and evidence, are either common cause or not disputed, are as follows:

(i) About 11.30 a.m. on 9 April 1967 the insured motor car, driven by one Nortje, collided with the child, aged very nearly four years, on the Klipfontein Road in the municipality of Cape Town.

(ii) The road is a very busy one, is approximately 40' wide, and has a tarmac surface. There is a broken white line down the centre.

6/... (iii) The

(iii) The collision took place opposite a cafe, which is on the northern side of the road. Beyond the cafe, and on the same side of the road, are more buildings for a distance of some fifty yards. The last of them is a tailor's shop. Just before one reaches the cafe, and still on the same (i.e. northern) side, there is a large repair shop for the Golden Arrow Bus Services. Between these two is a bus stop. On the opposite (i.e. southern) side of the road is a bus parking area. Along the northern edge of the road, between the tarmac and the building line, there is what is described as a shallow sloot, three feet wide. Apparently it serves as a drain and a side-walk.

(iv) The child had come from the cafe, together with her uncle and another young child who was only three years old. At one stage the three of them were standing in the shallow sloot, near the edge of the tarmac, with the intention of crossing the road. The uncle was between the children, holding a hand of

7/... each

each. The child with whom we are concerned was on his left. They were no more than toddlers.

(v) As already mentioned, it is a fact that the motor car, approaching from the right of this little group, collided with one of the children, i.e. the one concerned in this litigation. The fact that the car collided with the child is admitted in the pleadings. The extent to which the child had entered upon the tarmac is a matter to which I shall refer later.

(vi) After the collision the motor car pulled up several yards further on, roughly in the centre of the 40' road, but slewed towards the right, i.e. toward the southern side, as though it had swerved.

(vii) There were no signs of brake-marks up to the vicinity of impact or thereafter.

(viii) A motorist approaching the cafe, as was the driver of the insured motor car, would have a clear view of the road for at least fifty yards. At the time of the collision the surface of the road was dry and visibility was good.

8/... I turn

I turn now to facts in dispute. They relate in the main to the extent to which the child had entered upon the tarmac when the collision occurred. The child's uncle gave evidence. He is a Cape Malay. In evidence-in-chief he said that he had taken the children to the cafe to buy sweets. He emerged holding the hand of each child - one on each side of him. They reached the sloot, almost crossed it, and stood waiting for cars to go past before attempting to cross the road. He personally had one foot in the sloot and the other PARTLY on the tarmac. He looked to the right, then to the left, and again to the right. The girl, still with her hand in his, might have pulled forward a pace or two (i.e. her toddler paces), and the next thing he knew was that the car had collided with her. He fainted, and came to in the cafe. He was closely and ably cross-examined. It was put to him in cross-examination that the point of impact was eleven feet from the edge of the tarmac. He denied this, saying that the child was only an arm's length (i.e. his arm)

9/... in

in the road. At this stage there was put to him his signed statement to the police on 18 April 1967. It reads -

> "Op 9/4/67 om ongeveer 12/30 nm. het ek en 'n 4 jarige kleurling dogtertjie vanuit 'n restaurant in Klipfontein weg, Swart Rivier, gestap. Die dogtertjie het aan my linkerkant gestap. Terwyl ek nog op die sypaadjie gestaan het, het die dogtertjie die straat begin oorsteek. Die volgende oomblik het ek gesien dat 'n motor met die kind bots. As gevolg van die botsing het die kleurling dogtertjie haar regter been gebreek en skrape aan haar kop opgedoen. Ten tye van die ongeluk was die verkeer druk, die uitsig goed en die pad droog".

As to the foregoing, it seems fairly clear that it was the policeman's resumé, in the policeman's phraseology. The witness was a humble Cape Malay and is not likely to have used words like "restaurant", "kleurling dogtertjie",

10/... "sypaadjie"

"sypaadjie" (he consistently referred to it in evidence as a "sloot") and "oorsteek". This brief and condensed statement does not seem to me to be at variance with his evidence-in-chief. Questioned closely about the word "oorsteek", he explained, "Sy mag miskien vorentoe gegaan het wat ek haar hand gehou het. Daai wat ek gesê het". And it will be noted that the words, albeit the policeman's, were "<u>begin</u> oorsteek". Questioned further, he explained that he said "mag vorentoe gegaan het" because he did not see her do this; but what he did know was that she still had her hand in his. This seems to me an honest concession of the possibility that she strained forward. At this stage there was put to him part of his evidence at the criminal proceedings against the driver, which is there recorded as follows -

> "Ongeluk het op pad gebeur? -- Ja.
>
> Toe die ongeluk gebeur het -- Toe is die kind nie meer in my hand nie.
>
> Hoe so? -- Ek kan self nie sê nie.
>
> Het jy op die slootjie gestaan? -- Ek was 2 vt van die slootjie in die straat se kant.
>
> Hoe ver het die ongeluk gebeur van

waar jy gestaan het? -- Ek sal self nie kan sê nie.

Toe die ongeluk gebeur het, het jy op die stoep gestaan. Die kind het vinnig in die straat ingehardloop -- Ek het aan die slootjie gestaan.

Die kind het regoor die pad gehardloop? -- Nee die kind was met my. Ek weet nie of die kind gehardloop het nie".

In the present proceedings the witness was pressed in cross-examination on the foregoing evidence, particularly with regard to the fact that he there said "Ek was 2 vt. van die slootjie in die straat se kant". This does not seem to me to differ significantly from his evidence-in-chief, bearing in mind that it was given three years after the event, in which he said that his right foot was in the sloot and his left foot partly on the tarmac. There followed further cross-examination as to what he had seen. In the passage just quoted from his evidence in the criminal proceedings, in answer to the question "Toe die ongeluk gebeur het", he replied, "Toe is die kind nie meer in my hand nie".

12/... This,

This, I consider, was a reference by him to the situation after the car had, as he endeavoured to put it, knocked the child out of his hand, his recollection being that, when this happened, she was possibly a pace or two ahead of him. At this stage the contest between able counsel and humble witness became an unequal one; and the witness was reduced to conceding that the child might, just before the collision, have removed her hand from his. Pressing home this advantage, the cross-examiner scored in the following exchange-

> "Jy weet ook nie of sy gestap het vorentoe en of sy gehardloop het vorentoe nie? - Vorentoe nie.
>
> Dit weet jy nie -- Nee.
>
> Jy weet nie hoe naby die kar was aan julle toe die dogtertjie vorentoe stap of hardloop nie? -- Nee.
>
> Dit weet jy nie. Jy weet nie of daar tyd was vir die bestuurder van die motorkar om pad te gee vir die kind nie? -- Dit kan ek nie sê nie.
>
> Jy weet nie of daar tyd vir hom was om te stop nie? -- Dit kan ek nie sê nie."

13/... Eventually

Eventually the witness said that he did not actually know what happened, save that the child might have proceeded a pace or two forward when she was knocked down. When the witness concluded by saying "Verder onthou ek niks nie", he was, it seems, referring to the fact that he fainted when the collision occurred.

Well now, after the dust of doughty cross-examination had settled, what was the substance and effect of the uncle's evidence? The learned trial Judge said this -

> "In my opinion, Hoosain was, as a witness, totally unreliable as to what occurred after he stood at the roadside holding the two children by their hands .... In fairness to the witness I must record that I cannot find, although I am uncertain in this respect, that he attempted to mislead the Court. I do find, however, that his recollection of the events is so totally unreliable that I can attach no weight to his evidence."

Bearing in mind the absence of any unfavourable findings as to demeanour or dishonesty, this Court is free

14/... to

to express its own opinion, which is that a careful and perceptive analysis of the evidence of the witness does not warrant the foregoing rejection. The probable picture to which one must attune one's mind is not that of a trio standing to attention at the roadside in a straight line with eyes dressed to the right. These were two lively little toddlers happy with their sweets, and although their uncle had each by the hand, there is nothing improbable in his impression that the little girl might have been pulling forward a couple of steps into the roadway. These were eager little children, not robots. It seems to me that what the uncle was conscientiously conveying was that the child was struck when she was about the length of his arm into the tarmac roadway; that he thought that he then still had her by the hand as she pulled forward; that he believed that the car knocked her out of his grasp but that it is just possible that at the last moment before the impact she might have broken free. All this accords with the probabilities.

15/... Why

Why should this solicitous uncle, wo shepherded his charges to the cafe to buy sweets, and emerged holding each by the hand, and carefully stood by the roadside waiting for traffic to pass before crossing, suddenly release her hand at the very moment when she most needed his protection? Furthermore, the point of impact as conveyed by him, namely, about an arm's length into the roadway, is not inconsistent with the evidence of the mother, who said that she picked up her child lying in the road close to the sloot "a little bit into the road". The car must have been moving quite slowly for it was brought to a halt about 18' ahead without leaving brake marks. Hence the relative unlikelihood of the child having been violently thrown sideways to any significant extent. The policeman's sketch reflecting the position of the child lying 52' beyond the alleged point of impact is obviously incorrect. As a matter of interest he originally indicated, in the sketch, a position which agrees with the evidence of the mother.

16/... I turn

I turn now to the fact that the policeman's sketch indicates a point of impact eleven feet from the edge of the tarmac. There were no marks on the road to support this, but he said in evidence that the driver had pointed out the place to him. This was hearsay, and not probative of the point of impact. But counsel for the respondent argued that it had some relevance as it was elicited at the trial by counsel for the plaintiff. As to that, at the outset of the trial the record contains the following note:-

> "Constable E.J. Joubert of the South African Police hands the Court Police Case Docket No. C.408/67, and Magistrate's Court Record No. C.408/67, in the matter of the State v. Joseph Nortje".

No use of this was made by counsel for the plaintiff. But when the uncle of the child was giving evidence, the cross-examiner put this to him -

> "Jy sien, die getuienis sal wees dat die briekmerke aantoon dat die botsing

> plaasgevind het 11 vt van die kant van die slootjie af - 11 vt in die pad - en nie, soos jy sê, naby die slootjie nie".

The witness resisted this suggestion. After the plaintiff's case was closed, counsel for the defendant called the policeman concerned, and said to him, "Het u n afskrif van die plan daar by u?" Answer: "Dit is in die Polisie-dossier wat ek ingehandig het". (Dossier word aan getuie gegee). "U het die punt van botsing op die plan aangedui as synde X". Answer: "Dit is korrek". Now a reference to the sketch and its key reveals, as a matter of simple arithmetic, that "X" was eleven feet from the tarmac; and counsel for the plaintiff brought this out in cross-examination. In the circumstances, it does not seem to me that reliance can be placed on this hearsay evidence "on the grounds that counsel for the plaintiff placed it before the Court". The boot is on the other foot.

To sum up so far, at the conclusion of the plaintiff's case there was direct evidence that the car had collided

18/... with

with the child close to the edge of the tarmac, about an arm's length in the road. The driver was not called to gainsay it. This ipso facto tends to strengthen the evidence for, not having been contradicted, there is less reason for doubting it; the more so if it could have been gainsaid if incorrect: the driver was at Court and available; see S. v. Snyman, 1968 (2) S.A. 582 (A.D.) at 588 F - H.

The learned trial Judge, in granting absolution from the instance, expressed his difficulties ABOUT THE UNCLE'S EVIDENCE thus -

> "I cannot, on his evidence, find as a matter of probability - (a) that he still had the child's hand in his hand when the car struck her; (b) at what stage the child moved forward, i.e. at what point of time prior to the collision the child moved forward; (c) how far the child moved into the roadway; (d) at what pace, approximately, the child moved forward; (e) where the car was when she moved forward; (f) at what point of time a motorist would have been able to observe the child moving forward, with reference to other traffic,

19/... either

> either stationary traffic or traffic moving in Klipfontein Road; (g) at what approximate speed the vehicle which struck the child was moving; and (h) what part of the insured vehicle came into collision with the child."

As to (a), in my view the tenor of the uncle's evidence is that he did have the child by the hand when the car struck her. But in any event, if she did break free an instant before impact, how far could she have got before being struck? It seems to me that this is insufficient basis for rejecting his assertion that she was then no more than the length of his arm into the roadway.

As to (b), the effect of his evidence is that this pulling or tugging forward by the child was just before the collision. He says he saw the approaching car only when it was upon them.

As to (c), this has been dealt with.

As to (d), this does not appear to be material, seeing that he had her by the hand up to the last moment.

20/... As

As to (e), the car was almost upon them.

As to (f), the evidence is to the effect that a motorist in the driver's position would have had a clear view of the scene for 50 yards. Furthermore, the uncle says that the driver could have seen them if he had looked. This evidence was not contradicted. If the respondent had wished to contend that, for example, a bus obscured the driver's view (as was hinted in the cross-examination of the child's mother) the driver could have been called to testify.

As to (g), it does not appear that this is material. Undue speed was apparently not a cause of the collision. As already indicated, the car pulled up within 18' or so, without leaving brake marks.

As to (h), does this matter, seeing that the pleadings concede that the car collided with the child?

Turning to the issue of the causal negligence of the driver, in my view he ought timeously to have noticed that two little children, no more than toddlers, in the

21/... company

company of an adult, were standing at or near the edge of the tarmac, apparently intending to cross the road. True, the adult had each by the hand but, as to that, (a) where there are two small children, ~~he~~ the motorist should realise that it is somewhat more difficult to maintain control over them, and (b) there is no probability that the driver was conscious of any awareness by the adult of the approach of the motor car, for the driver did not give evidence, and he may well have not been keeping a proper look-out. Had the driver observed any such awareness, he would have been entitled to be more assured that the adult would effectively restrain the children. This latter point is well made by Henning J. in Cakata v. Provincial Ins. Co. Ltd., 1963 (2) S.A. 607 (N) at 611 G. In the circumstances of the present case it can be said that the driver was obliged to exercise a special degree of care in relation to the little children. He could and should have given them a much wider berth. His half of the road was approximately 20' wide and, as to the other half, there is no evidence that, at that time, any traffic was approaching from the opposite direction. Indeed, the car, after the collision, was

22/... left

left slewed across the centre of the road. In breach of this special duty of care, the motorist approached the children on a course calculated to allow them a berth of only a few feet. The reasonably foreseeable possibility happened - one of the children moved forward and was knocked down. It does not matter whether one says that the motorist was not keeping a proper look-out or whether it is held that he allowed an insufficient berth. In either event he was negligent, and this caused the collision.

In the result -

(a) The appeal is allowed with costs.

(b) The order of the Court a quo is set aside.

(c) There is substituted an order awarding R1400 to the plaintiff with costs, including the qualifying expenses of the surveyor.

G.N. HOLMES

JUDGE OF APPEAL

JANSEN, J.A.
DIEMONT, A.J.A.
MILLER, A.J.A.
KOTZÉ, A.J.A.
} Concur