G.P.-S.59968—1970-71—2 500 30-6-76 J 219 21/10

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

(APPELLATE ~~Provincial~~ Division)
(~~Provinsiale~~ Afdeling)

and Cross Appeal

Appeal in Civil Case
Appèl in Siviele Saak

COMMERCIAL UNION ASSURANCE COMPANY OF SOUTH AFRICA LTD Appellant,

versus

ALFRED BERNARD CALDWELL Respondent

Appellant's Attorney / *Prokureur vir Appellant* Webber & Newdigate
Respondent's Attorney / *Prokureur vir Respondent* Israel & Sackstein

Appellant's Advocate / *Advokaat vir Appellant* H.J.O. van Heerden SC
Respondent's Advocate / *Advokaat vir Respondent* A Solomon SC

Set down for hearing on / *Op die rol geplaas vir verhoor op* 13-11-1976

4591013

Coram: Jansen, Trollip, de Villiers, Kotzé AJA & Galgut AJA

Van Heerden - 9.45 - 11.00; 12.07 - 12.27.
Solomon - 11.15 - 12.07.

(E.C.D.) C.A.V.

The Court dismisses the
[illegible] cross appeal with costs,
the respondent in the cross appeal
is to pay the costs of appeal
in terms of the tender [illegible]

[illegible] APPEAL UPHELD [illegible]
judgment [illegible] Security [illegible] lodged
[illegible] on [illegible]
8/12/76

Bills taxed—Kosterekenings getakseer

Writ issued
Lasbrief uitgereik

Date and initials
Datum en paraaf

Date Datum	Amount Bedrag	Initials Paraaf

IN THE SUPREME COURT OF SOUTH AFRICA

(APPELLATE DIVISION)

In the matter between:

ALFRED BERNARD CALDWELL ..... Cross-Appellant.

and

COMMERCIAL UNION ASSURANCE
COMPANY OF SOUTH AFRICA LIMITED..... Respondent.

Coram: JANSEN, TROLLIP, DE VILLIERS, KOTZé JJA et GALGUT AJA.

Heard: 15 November 1976.

Delivered: 8 December 1976.

J U D G M E N T

JANSEN JA :-

On 5 May 1972, at about 9.20 p.m., the cross-appellant (hereinafter named the appellant)

was / .....

was driving a Ranger motor-car from south to north along Drake Road, East London. As he approached the intersection with Beach Road, a main thoroughfare running east to west, he slowed down, and, as his entry to the intersection was governed by a stop-sign, he stopped at the stop-line. He thereafter drove forward into the intersection, intending to turn to the right into Beach Road and to continue to the east. Whilst in the intersection - to what extent the appellant had completed his turn to the right is in dispute - the right side of the Ranger was struck by a Toyota light delivery van coming from the east along Beach Road. The appellant was severely injured and in due course sued the respondent (viz. in the cross-appeal), the statutory insurer of the Toyota, for damages. The appellant alleged negligence on the part of the driver of the Toyota, one Roux. The case was tried in the East London Circuit Local

Division (per DE WET J). The court found that Roux had been negligent in that he had driven at an excessive speed in the circumstances and that he had failed to keep a proper look-out; the damage suffered by the appellant was determined at R23 398-25, but he was only awarded a reduced amount of R17 544-93, as it was held that the appellant was himself 25% at fault in respect of the damage.

The respondent lodged an appeal against the award of damages and the appellant lodged a cross-appeal against the finding that he had been guilty of contributory negligence, as also against the apportionment. By notice dated 5 March 1976 the respondent withdrew its appeal and tendered costs to that date, but the appellant persists in the cross-appeal. The only questions before us, consequently, relate to whether the appellant was negligent, and, if so, the degree of fault to be attributed to him.

The material facts fall within a very small compass. According to the evidence of a witness, Sanders, who was driving a car following the Toyota and who saw the Ranger crossing the kerb-line into the intersection and the stop-lights of the Toyota flash immediately before the collision, the speed of the Toyota must at that moment have been 60 m.p.h. or over, but less than 65 m.p.h. (Imperial measures will be adhered to, as in the Court a quo). This was accepted by the Court a quo and, correctly, not disputed before us. Two parallel skid-marks caused by the Toyota, obviously as a result of wheels locking, extended for a distance of some 148 feet (45.3m) on the southern half of Beach Road. They were more or less parallel to the kerb-line, however, swinging to the right (viz. to the north) in the intersection and ending just short of the imaginary centre-line of Beach Road and just beyond

the imaginary centre-line of Drake Road. The obvious inference is that the collision occured somewhere to the north of where the skid-marks ended. On the evidence of the appellant and his wife, who was in the car, it is contended that when the actual collision took place, the Ranger was already completely on the northern half of Beach Road and had by then completed the turn to the right (east). As the area of contact on the Ranger, as would appear from a photograph, extends between a point above the hub of the left back wheel and the right front windscreen pillar, this contention not only involves an extraordinary conjunction of angles, in relation to the imaginary centre-line of Beach Road, between the Ranger and the Toyota, but also that the skid-marks were caused by the locking of the back wheels of the Toyota. (Which is not inconsistent with braking tests conducted with similar Toyotas).

However, /.....

However, for reasons that will become apparent in due course, it is unnecessary to decide to what extent the appellant had negotiated his turn to the right and whether the Ranger was in fact completely on the northern half of the road, parallel to the imaginary centre-line, at the time of collision. According to the appellant, after having stopped at the stop-line, he slowly moved forward, and as his car was passing over the stop-line and he, himself, was more or less above the line, he saw the lights of a car(which must have been the Toyota) approaching from the east. He initially estimated in his evidence that it was then some 300 to 400 yards away; but at the inspection in loco he pointed out the locality, which was found to be 160 paces east of the imaginary centre-line of Drake Road. The appellant thought it safe to enter the intersection, and he proceeded to do so at a speed of 5 - 10 m.p.h. It was only later -

he says as he was taking the turn - that he realized that the car was approaching at high speed. It is conceded, correctly, that for present purposes it must be accepted that the appellant, as he was crossing the stop-line, saw the Toyota approaching, some 160 paces away.

On these facts the question is whether the appellant was negligent in continuing into the intersection in the face of the oncoming Toyota. It is conceded that in view of the stop-sign a reasonable driver would have determined particularly whether it was safe to proceed; but it is contended that in the circumstances the reasonable driver would in any event have come to the conclusion that there was indeed ample time to turn to the right and cross the southern half of Beach Road. From the stop-line to the southern kerb-line of Beach Road is about 10 feet, and from there to the imaginary centre-

line of the road, about 18½ feet. This means that a distance of some 28½ feet had to be traversed (without even considering the length of the car itself, which was almost 15 feet), to enable the Ranger to reach the safety of the northern half of the road. As has been said, it must be accepted that the Toyota was then 160 paces (i.e. at most 480 feet) away, travelling at no less than 60 m.p.h., i.e. 88 feet per second.

The argument on behalf of the appellant rests principally on the contention that the reasonable driver would not have realized or have foreseen that the Toyota was travelling at that speed, a speed which the Court a quo described as "grossly in excess of the speed which a reasonable driver would travel" in a built-up area with a speed limit of 35 m.p.h. It is also said to be notoriously difficult to assess the speed of an oncoming vehicle

by night. However, the Toyota's excess of speed over the speed limit was not so great that it could be said in the circumstances to have amounted to unreasonable conduct on the part of the driver so beyond common experience that it could not reasonably have been foreseen. This was a well-lighted main thoroughfare, with side streets governed by stop-signs. The appellant even conceded, albeit reluctantly, that he knew that the speed limit was sometimes there exceeded. A reasonable driver in the appellant's position would have foreseen that the approaching vehicle might well be exceeding the speed limit, and as it was at the relatively close distance of 160 paces, he would have paid particular attention to it and would not have proceeded substantially beyond the kerb-line of Beach Road unless he had made some dependable assessment of its speed. As the Toyota was approaching

at / .....

at some 88 feet per second, he would in all probability then have realized that its speed was such as to leave little time for the intended turn into Beach Road, or, alternatively, if he could not have guaged its speed, he would at least have foreseen the possibility that its speed could be such as to make it dangerous to attempt to cross the southern half of Beach Road at that time. In either case the reasonable driver would then have waited for the Toyota to pass. It follows that the appellant was negligent in entering the intersection in the face of the oncoming Toyota. Had he not done so, the collision, and the resultant damage, would not have occurred. It does not seem to matter on which half of Beach Road the collision took place. The contention that if the Toyota had continued on a straight course the collision would not have happened, does not avail the appellant. It was in the circumstances reasonably

to be foreseen that if the Ranger were suddenly to appear in the path of the Toyota, the driver thereof might not react immediately, that he might apply his brakes fully and either lose control or attempt to swerve at the last moment.

While fully recognizing that each case must be decided on its own peculiar facts, counsel for the appellant urged us to consider the unreported case of Jones v. Santam Insurance Co. Ltd. (East London Circuit Court Local Division, 12/10/76). In this case the plaintiff entered an intersection after stopping at the stop-line. She considered it safe to do so although she saw the insured vehicle, which shortly after collided with her, approaching from her right. Despite it being day-time, she underestimated the speed of the vehicle. The Court (KANNEMEYER J) found her to have been not negligent: it was not persuaded that it had been proved that the plaintiff "could and should

have appreciated that Qcaki (the driver of the insured vehicle) was driving at an excessive speed". It is not clear from the judgment precisely how far away the insured vehicle was when first seen by the plaintiff, although it would appear to have been at some considerable distance. Nor is it clear at what speed it was travelling. Although a witness estimated it to have been between 50 and 60 mph., the Court only held it to have been "excessively fast". It may well have been over 60 mph. - depending upon how far away the car was when first seen. Moreover, when she first saw the insured car as she entered the intersection, a red motorcar ahead of the insured car apparently partly obscured it, which, it seems, in the view of the learned Judge led to her misjudging the actual speed of the insured car.

With these uncertainties present, and the role played by the red car, this case is hardly comparable to the present instance where the speed of the

insured vehicle and the distance at which it was first seen have been determined. The decision cannot, therefore, assist in the present case; nor is it necessary to express any views on its correctness or otherwise.

In the circumstances it cannot be held that the Court a quo erred in finding the appellant negligent and that his negligence was causally connected with the damage. Neither can it be held, in my view, that the Court a quo was so far off the mark in determining the appellant's fault at 25%, that it is incumbent upon us to interfere.

The cross-appeal is dismissed with costs; the respondent in the cross-appeal is to pay the costs of appeal in terms of its tender of 5 March 1976.

E.L. JANSEN,
Judge of Appeal.

TROLLIP JA)
DE VILLIERS JA)
KOTZÉ JA) Concur.
GALGUT AJA)