

SOUTH AFRICA / JUDGMENT

Jeffery v Road Accident Fund (1693/2008) [2010] ZAWCHC 539 (10 November 2010)

[2010] ZAWCHC 539**COURT**

Western Cape High Court, Cape Town

BEFORE

Le Grange

CASE / FILE NUMBER

1693/2008

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IN THE HIGH COURT OF SOUTH AFRICA (WESTERN CAPE HIGH COURT, CAPE TOWN) Case No:
1693/2008 -REPORTABLE- In the matter between: TANYA SERINA JEFFEREY

.....Plaintiff And THE ROAD ACCIDENT FUND

.....Defendant Matter was heard on 29 April 2010.

Order was delivered on 10 November 2010. Counsel for Plaintiff : Adv D Melunski Attorneys for
Plaintiff: Lowe & Petersen Counsel for Defendant: Adv R Tainton Attorneys for Defendant: Marais
Muller Yekiso

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And

THE ROAD ACCIDENT FUNDDefendant

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Counsel for Plaintiff : Adv D Melunski

Attorneys for Plaintiff: Lowe & Petersen

Counsel for Defendant: Adv R Tainton

Attorneys for Defendant: Marais Muller Yekiso

IN THE HIGH COURT OF SOUTH AFRICA

[WESTERN CAPE HIGH COURT, CAPE TOWN]

In the matter between:

Case number: 1693/08

- Reportable -

TANYA SERINA JEFFEREYPlaintiff

THE ROAD ACCIDENT FUNDDefendant

JUDGMENT DELIVERED ON 10 NOVEMBER 2010

Le Grange, J:-

Introduction:

- [1] The central question for determination in this matter is whether the Defendant's insured driver, Ms Naidoo ("Naidoo"), through her negligence causally contributed to the fatal accident by not keeping a proper lookout and failing to apply brakes timeously. In addition, the following issues need consideration: whether 1.5 seconds are the norm for the brake perception reaction time allowed for drivers in all sudden emergencies, and whether the opinion evidence of an eyewitness, on a matter which is directly in issue, is admissible or not.
- [2] Advocate D. Melunsky appeared for the Plaintiff and Advocate R. Tainton for the Defendant. I wish to thank both counsels for their comprehensive heads of argument as it was of great assistance in preparing my judgment.

Background:

- [3] The Plaintiff's claim for loss of support on behalf of her two minor children against the Defendant arises from the death of her husband, Liam Jefferey ("the deceased"), who was the father of their two minor children, pursuant to the motor vehicle collision.
- [4] It is common cause that the collision which resulted in the deceased's death occurred on 8 March 2005 at the intersection of the N7 highway and Potsdam Road.
- [5] The deceased, at the time of the collision, was driving a white Ford Fiesta motor vehicle and the other vehicle involved in the collision was a Citi Golf, driven by Naidoo.
- [6] It is not in dispute that the deceased was principally to blame for the cause of the collision between the two vehicles wherein he sustained serious injuries which ultimately resulted in his death.

The Evidence:

- [7] In the Plaintiff's case the following witnesses testified, namely police constables Zondo and November, who attended the scene of the accident; Ms Elmarie Laker ("Laker"), who at the time the accident occurred was traveling in the right lane of the northbound carriageway of the N 7; John Craig ("Craig"), an automotive consultant who has specialized in legal accident work since 2000 and Naidoo, the Defendant's insured driver.
- [8] The Defendant elected not to call any witnesses.
- [9] The evidence of Zondo and November, who attended to the scene of the accident, are largely not in dispute. Zondo completed an accident Report. November completed a sketch plan and identified certain fixed points as seen on exhibit "B 7- 8". According to November, he determined the point of collision to be in the fast lane but close to the centre line and marked it as 'X' on his sketch. This determination by November was based on the concentration of debris, being broken plastic, glass parts and a number plate that was lying in the road.
- [10] Laker's evidence, briefly stated, is as follows. She was driving at a speed of 100km per hour in the right-hand lane of the northbound carriageway of the N 7. In approaching the Potsdam intersection she saw the deceased's Ford stationary at the stop street. Naidoo's Golf was in front of her, traveling in the same direction and at a speed of at least 20 km per hour slower than her. There were no other vehicles between Laker's and Naidoo's and the intersection. Laker maintained her speed of 100km per hour as she neared the intersection, and at which speed she intended to continue through the intersection. She believed this was a safe speed because as she approached, she kept an eye on the deceased's car and it remained standing stationary right up to when she was very close to the intersection, and there was no reason why the approaching vehicles could not be visible to the deceased. It was at this point that the deceased's vehicle unexpectedly pulled away from the stop street and entered the intersection at speed. Laker then saw Naidoo's vehicle, which was to her right swerve to the left and its break lights switch on. She did not hear the sound of the brakes as she had her radio on in the vehicle.
- [11] Laker estimated her vehicle was approximately 30 meters from the intersection and Naidoo's vehicle was about 15 meters in front of her when the deceased vehicle passed in front of her. She testified that to avoid the collision she swerved to the left. According to her if she was approximately 10- 15 meters closer to the intersection at the time the deceased pulled away she would have collided with his vehicle.
- [12] Laker on the same day of the collision wrote down what she could remember of the accident. She also made a second and more detailed statement a few days later. It is not in issue that her first statement does not reflect that Naidoo braked before colliding with the deceased's vehicle. She further testified that she would have been unable to avoid the collision if she was in the Naidoo's position.

- [13] Naidoo's version, in summary, is the following. She travels the section of road where the accident occurred regularly by car. On the day in question the visibility was good. There were no vehicles which obscured her view of the intersection. She deliberately reduced her speed to approximately 70 - 80 km per hour as the intersection was notorious for its high accident rate. As she approached the intersection, the vehicle of the deceased was visible from a distance of about 100 meters away.
- [14] Close to entering the intersection, the deceased's vehicle suddenly pulled away from the stop street into the intersection and directly into her path. She immediately applied brakes and swerved to the left in an attempt to avoid a collision, but was unable to do so. According to her the point of impact occurred on the left-hand side of the right lane. She also testified that she had about 3-5 seconds between seeing the deceased's vehicle pulling away and colliding with it.
- [15] Craig testified that he is a qualified engineer. He was the principal engineer of the Department of Transport, Directorate National Roads, from 1987 -
1995. From 1995 - 2004 he was a Director of a firm Consulting Engineers in their road division. Since 1993 he has been extensively involved in vehicle accident simulation, testing and relevant calculation and reporting. In September 2000, he established his own consulting firm specializing in legal action work. According to him he also has motor racing and driver training experience.
- [16] Craig compiled a report dated 14 April 2010 (Exhibit "D"), to determine the cause of the accident. In his report he relied on the following information:
- An Accident Report (AR) Form completed by constable Zondo dated 08 March 2005.
- A Report compiled by MVO Consultants, including a sworn statement by Laker dated 11 March 2005.
- A Sworn Statement by Naidoo dated 29 March 2005.
- Ten black and white photocopied photographs of the accident scene and damaged vehicles.
- An accident report by a person named Stan Bezuidenhout dated 08 March 2005.
- A statement by Lucien Thomas dated 04 August 2005.
- h) A SAPS Plan and Key of the Accident site, compiled by constable November on 12 March 2005. i) An aerial black and white photocopied photograph of the intersection. j) An Expert Reconstruction Report prepared by Professor Dreyer dated 16 November 2006."

- [17] The crux of Craig's evidence is that the deceased's vehicle accelerated from a standstill position at the stop line to the point of impact, which was approximately 17 m away. This, according to him, would have taken the deceased approximately between 4.1 and 3.4 seconds depending on the acceleration calculations as done by Professor Dreyer in his report (paragraph 6.6 of Exhibit "F").
- [18] According to Craig, the standard brake perception reaction time for an unexpected event is 1.5 seconds. If the perception reaction time is applied then Naidoo had between 1.9 and 2.6 seconds to brake, which would have slowed her vehicle by between 48 and 65 km per hour. After further calculations he concluded that under these circumstances Naidoo had sufficient time to carry out a braking action which would have slowed her sufficiently to avoid the collision. He further testified that the impact zone of the deceased's vehicle was approximately 2m, hence if the impact occurred approximately 0.3 seconds later, the deceased would have cleared the impact zone and the collision would not have occurred.
- [19] Criag was of the view that Naidoo had not swerved appreciably to the left as she claimed. He testified that the resting places of the vehicles are consistent with the collision having taken place in the middle of the fast lane with Naidoo traveling straight. Craig testified that if Naidoo veered appreciably to the left then it would have continued with its momentum and would have ended up to the left of the point of collision, not to the right as it did. Another factor, according him, which counted against violent veering left by Naidoo, was the fact that there were no skid marks.
- [20] Craig in cross-examination was adamant that the standard brake perception reaction time is 1.5 seconds and is universally accepted. He conceded however that personally he has not done any studies or tests in this regard. Craig was confronted with a study done by Monash University in Australia, "Exhibit L", in regard to the reaction time of drivers to emergency road situations. According to this study drivers' response times in sudden emergencies vary widely depending on a variety of factors. After considering it, he responded that the study relates to design requirements for traffic engineering and certain portions of the study supports his view.
- [21] The principal contention by Mr. Melunsky is that, on the probabilities, Naidoo had sufficient time to react to the sudden emergency created by the deceased. According to him, Naidoo's failure to keep a proper look out and not to apply her brakes timeously in the circumstances contributed to the cause of the collision. Evaluation: [22] It is trite law that negligence is the failure to exercise the degree of care and skill the reasonable person would have exercised in the circumstances. The standard by which a driver's conduct is to be judged is therefore an objective one. In applying this standard, a Court must, to the best of its ability, place itself in the position of the driver at the time of the occurrence and judge whether he or she exercised the care which the reasonable person in his or her position would have exercise in the circumstances. In adopting this approach a court should be mindful not to judge the conduct of a driver with hindsight and examining it with after-acquired knowledge. In this regard see Revised edition of Motor Law: Volume Two by Cooper at 78 and the cases referred

to therein.

- [23] Craig's evidence that Naidoo was partly to blame for the collision is in stark contrast to that of Laker and Naidoo. Laker, an independent eyewitness to the accident, corroborates Naidoo's version that it was impossible to take any effective steps to avoid the collision.
- [24] In matters of this nature it is not uncommon for litigants to tender experts' evidence to reconstruct the occurrence of events. The Plaintiff essentially tendered Craig's evidence to cast doubt on certain aspects of the evidence of Laker and Naidoo, who were her own witnesses. Craig has no personal knowledge of the matter and mainly relied on the information as stated in paragraph
- [16] to reconstruct the collision which happened almost five years ago. [25] It is well accepted in our law that direct and or credible evidence of what happened in the event of an occurrence must generally carry greater weight than the opinion of an expert who seeks to reconstruct the events, as strange things often happen in collisions. In this regard see *Van Eck v Santam Insurance Co Ltd* 1996(4) SA 1226 at 1229 I - 1230 A. [26] This approach was again reaffirmed by Lewis JA in *Representative of Lloyds v Classic Sailing Adventures (Pty) Ltd* 2010
- (5) SA 90 (SCA) at 107 F - G, where the following was held: "...I must emphasise that where there is eyewitness or direct evidence of an occurrence, this may render the reconstructions of experts less relevant or even irrelevant."
- [27] The evidence of Craig that the standard brake perception reaction time allowed for drivers in emergency situations is 1.5 seconds needs closure scrutiny. On Craig's own version he has done no independent study or tests in this regard. In support of his view, he solely relied on his own experience and knowledge, without any reference to any authoritative publications. [28] I had great difficulty finding authority in our law that in all emergency situations the standard brake perception reaction time allowed for drivers is 1.5 seconds. I will accept that in determining whether a driver kept a proper lookout and drove at a reasonable speed, allowance must be made for the lapse of time between perception of the danger and the time required to react. See also *Motor law*, supra at 477. [29] However, in determining whether the lapse of time between the perception of the danger and the point of reaction was reasonable or not, the proper approach must be to determine what a reasonable driver would have done in all the particular circumstances. This in my view can only be determined having regard to the particular facts of each case and taking into account inter alia, the degree of urgency, the effect by the element of surprise, the likelihood of momentarily indecision, the agony of the moment, the speed of the vehicles involved in the collision and the inevitable time lag between observation and reaction. Expert evidence may also be of assistance. [30] The ipse dixit of Craig is in my view insufficient to accept as a norm that the standard brake perception time allowed for drivers in all emergency situations is 1.5 seconds.

[31] On Naidoo's uncontested evidence she approached the intersection with caution as it was notorious for car accidents. She reduced her speed to approximately 70 - 80 km per hour on a road in which the speed limit was 100 km per hour. According to her, she kept a proper lookout in approaching the intersection. On her version she had approximately 3-5 seconds to respond when the deceased vehicle suddenly entered the intersection. She immediately swerved to the left and applied brakes but was unable to avoid the collision. Laker also observed how the vehicle of Naidoo swerved to the left and how the brake lights of the vehicle came on. According to Laker's observation it was impossible for Naidoo to take any effective steps to avoid the collision. This evidence of Laker and Naidoo was criticised by Mr. Melunsky. [32] Mr. Melunsky argued that it is irrelevant and inadmissible opinion evidence as it is a matter which is directly in issue. In support of this proposition he relied on the dictum in *Hollinatton v F Hewthorn & Co Ltd*

[1943] 2 All ER 35 (CA) at 40, where the following was held:- "It frequently happens that a bystander has a complete and full view of an accident, it is beyond question that, while he may inform the court of everything that he saw, he may not express any opinion on whether either or both of the parties were negligent. The reason commonly assigned is that this is the precise question the court has to decide; but in truth it is because his opinion is not relevant. Any fact that he can prove is relevant, but his opinion is not." [33] Reference was also made to *Cooper's Motor Law*, supra at 468, where the following is stated: "In general a witness may only testify on what he observed. He may not express his opinion on a point in issue, e.g. whether a driver was negligent, because (it is said) this would be to usurp the function of the court. To this general rule there are exceptions i.e. a) speed and

b) intoxication."

[34] The notion that a witness may not give his or her opinion on the very issue that a court has to decide because to do so, so it appears, would usurp the function of the court, is in my view a fallacy and unsound. [35] The author Zeffert, in "Opinion Evidence" 1976 SAP 275 at 276, stated the following regarding opinion evidence:- "The principle governing the reception or rejection of opinion evidence is clear. Opinion evidence is accepted if relevant; rejected if irrelevant. An opinion will be relevant if it can assist the court; it is irrelevant if it cannot assist the court. A witness's opinion may assist the court if the witness is better qualified to form an opinion than the court: if the court is in a good a position to form an opinion as the witness, the witness's opinion is unhelpful, irrelevant and, consequently inadmissible. It follows that it is inept to think that there is a rule excluding opinion unless it is let in by an exception' such as the exception' relating to 'expert evidence'." [36] This in my view is the correct approach. The opinion evidence of a witness may always be relevant and admissible if the issue is of such a nature that the witness is in a better position than the trier of fact to form an opinion. The opinion evidence will be admissible on the basis of its relevance and probative value. This explains why the opinions of lay persons and experts are at times received. If however the court is in a better position to form an opinion than the

witness, the witness's opinion is unhelpful, irrelevant and, consequently inadmissible. In this regard see also Wigmore on Evidence Vol 7 3rd Ed (1940) at § 1920; South African Law of Evidence by DT Zeffertt & AP Paizes 2nd Edition at 313 and the case law referred to therein.

- [37] Laker testified about events she observed and experienced first hand. She impressed me as an honest and reliable witness. The fact that she omitted to mention in her first statement that the brake lights of Naidoo's vehicle came on does not detract from her credibility. Her second statement, which contains this evidence, was made a few days later. The second statement clearly contained more detail than the first. There is no credible evidence to the contrary to suggest her observations regarding the brake lights which she witnessed was a fabrication or a mistake. [38] Laker's observation regarding her distance from the intersection was also criticized by Craig. His calculations and mathematical

approach, is largely based on the fact that the deceased vehicle was stationed at the stop street and pulled away at a speed of 3m/s^2 . Craig's calculation that the deceased vehicle accelerated at a constant speed of 3m/s^2 is a mere assumption given that Laker and Naidoo only mentioned that the vehicle pulled away at speed. Similarly, Craig's conclusion that Naidoo could have avoided the collision was also based on an incorrect approach that the norm for the brake perception reaction

time of drivers in emergency situations is 1.5 seconds. The proper approach, as stated in paragraph [29], is not one of mathematical

calculation alone but dependant on a variety of factors. The absence of skid marks can also not be the only determining factor that Naidoo did not apply her brakes. The reliance placed on the resting positions of the vehicles and the poor quality of black and white photographs (see Exhibit B pg 27-31) by Craig to assume that Naidoo could not have swerved to her left is also highly questionable in view of Laker's direct evidence to the contrary.

- [39] Craig's expert view of what might have occurred must give way to the direct and credible evidence of Laker and Naidoo, who observed and experienced the accident first hand. They were in a far better position to form an opinion. Laker and Naidoo's evidence has more probative value and carries more weight in the Plaintiff's case and is accepted.
- [40] On the evidence presented by the Plaintiff, the inference cannot be drawn that Naidoo deviated from what a reasonable person would have done and acted negligently in taking an excessively long time to exercise a judgment. In the circumstances of this case it is also difficult to see how Naidoo's perception reaction time could be categorized as amounting to negligence. In any event, this is a matter in which it would be unwise to rely too much upon mathematical calculations.
- [41] For these reasons the evidence presented by the Plaintiff fails to prove that the Defendant's insured driver (Naidoo) also negligently contributed to the cause of the collision. It follows that the Plaintiff's claim cannot succeed. [42] In the result the following order is made. The Plaintiff's claim is dismissed with costs. LE GRANGE, J

- h) A SAPS Plan and Key of the Accident site, compiled by constable November on 12 March 2005.
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Evaluation:

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[41] For these reasons the evidence presented by the Plaintiff fails to prove that the Defendant's insured driver (Naidoo) also negligently contributed to the cause of the collision. It follows that the Plaintiff's claim cannot succeed.

[42] In the result the following order is made.

The Plaintiff's claim is dismissed with costs.

LE GRANGE, J

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