Loh Luan Choo Betsy (alias Loh Baby) (administratrix of the estate of Lim Him Long) and Others v Foo Wah Jek
[2004] SGHC 230

Case Number : Suit 127/2003

Decision Date : 15 October 2004

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Leonard Loo (Leonard Loo and Co) for plaintiffs; Ramasamy K Chettiar (Acies Law Corporation) for defendant

Parties : Loh Luan Choo Betsy (alias Loh Baby) (administratrix of the estate of Lim Him Long); Loh Luan Choo Betsy alias Loh Baby; Lim Yuan Wei (a minor) suing by his lawful mother and guardian and litem, Loh Luan Choo Betsy alias Loh Baby — Foo Wah Jek

Tort – Breach of statutory duty – Accident occurring while defendant driving vehicle in South Africa without international driving licence required under South African statute – Whether breach of South African statute conferring private right of action for damages on plaintiffs – Whether defendant breaching Singapore statutes by driving in South Africa without international driving licence

Tort – Negligence – Defences – Defendant driving in South Africa when tyre burst resulting in accident – Plaintiffs suing defendant for damages for driving vehicle negligently – Whether defendant negligent in his driving – Whether defence of inevitable accident established

15 October 2004 *Judgment reserved.*

Judith Prakash J:

Introduction

1 This action arises out of a road accident that took place in South Africa in which one passenger of the vehicle driven by the defendant was killed and another was seriously injured. The plaintiffs are first, Mdm Loh Luan Choo Betsy, the wife of the deceased, who is suing on behalf of his estate and also on her own account as a dependent of the deceased and a person who was injured in the accident, and second, her son, who also sustained physical injuries in the accident.

2 In December 2001, the deceased, Mr Lim Him Long, and his family (comprising his wife and three sons) and the defendant, Mr Foo Wah Jek, and his family (comprising his wife, daughter and two sons), were on holiday together in South Africa. The two men were both aircraft maintenance engineers and had worked together for some time. Their families were also on friendly terms.

3 In Cape Town, Mr Lim hired a Volkswagen Caravelle and a driver from a tour agency and they started their private tour in this vehicle on 8 December. The vehicle was classified as a car according to the South African road regulations but from the photographs in evidence, it appears to have been more of a passenger van than a saloon car. On 12 December, the group decided to return to Cape Town. They were then in Kynsna. They left Kynsna at about 10.00am and arrived at noon at a town named Outshoorn. After spending a few hours there, they proceeded to Calitzdorp. At that stage, the driver, Mr Zaid Ebrahim, told the group that he needed to rest as he was fasting and was very tired. Mr Foo then took over the wheel. He had been driving the vehicle for about two hours when the right rear tyre burst. As a result the vehicle veered and subsequently went off the road and rolled over. Both Mr Lim and Mr Foo were thrown out of the vehicle. Mr Lim died instantly. Mr Foo had only minor

injuries. Mdm Loh and her son, Lim Yuan Wei, were also injured.

The evidence

4 In her affidavit Mdm Loh stated that on 12 December 2001 at about 3.00pm, Mr Ebrahim had complained of fatigue and had informed the party that he wanted a short rest. Mr Foo, however, wanted to press on with the journey and he unilaterally decided to take over the driving of the vehicle from Mr Ebrahim. She added that at that juncture, Mr Foo did not seek the consent of the other passengers as to whether he should or should not drive the vehicle. After Mr Foo had driven the vehicle for about 15 minutes, his daughter wanted to go to the toilet. Unfortunately, there was no town in the vicinity and Mr Foo then "proceeded to speed up his driving" so as to reach the next town quickly. At about 1745 hours, Mr Foo lost control of the vehicle. It was then travelling towards Barrydale along the R62 road that ran between the towns of Ladysmith and Barrydale. The vehicle then veered off the road.

5 Under cross-examination, Mdm Loh denied that the four adults had had a discussion about who should take over the driving from Mr Ebrahim. She maintained that it was Mr Foo who had persuaded Mr Ebrahim to let him drive but she agreed that the other three adults had not objected to Mr Foo's proposal. It was put to her that the members of the party had used the toilet facilities at Calitzdorp. After that the vehicle had passed Ladysmith on its way to Barrydale but there had been no request by Mr Foo's daughter to use the toilet. Mdm Loh disagreed. She maintained that she was awake from the time of the changeover in drivers up to the time of the accident but she could not remember how long Mr Foo had been driving for before the accident took place. She did not agree, however, that the journey took about one and a half to two hours. When asked about the speed of the vehicle, she said she did not know what the speed was. However, she conceded that she had not been concerned that he was speeding and had not felt unsafe. She also agreed that from the time Mr Foo took over the driving up till the time of the incident he had been able to manage the vehicle well.

6 Mdm Loh also stated that before the vehicle went off the road, she heard a loud sound. However, she did not remember what the sound was. She agreed that she was aware before the vehicle went off the road that one of its tyres had burst but she would not agree that she knew it was only after the tyre burst that the vehicle started to go out of control. When asked what had caused the vehicle to go off the road, her answer was "I don't know". When asked what Mr Foo had done wrongly that caused the accident, her reply was "negligence". When she was asked what the act of negligence was, her reply was "I don't know". She was then asked whether it was her complaint that Mr Foo was speeding. She replied that it was. She also complained that he was not careful. Finally, she said her complaint against him was that he was speeding and he should not have taken over the driving.

7 Mdm Loh was shown a copy of the statement that she had allegedly given to the Barrydale police after the accident. In that statement, she had said that Mr Foo was not driving the vehicle fast but she could not see how slowly he was going. When shown that statement in court, Mdm Loh asserted that the signature appearing at the bottom of the statement was not her normal signature and said that she could not remember signing it. Subsequently she asserted that she had not given any statement to anyone. Mdm Loh was reminded that Inspector Andrew Mark Lagerwald of the South African Police Services attached to the Barrydale precinct had testified that according to witness statements he had taken, the vehicle was not travelling fast at the time of the accident. It was within the speed limit of 100km/h. In response, she said that Inspector Lagerwald had not taken a statement from her.

8 The evidence of Zaid Ebrahim was that the party had left Outshoorn between 3.00pm and 4.00pm and had subsequently reached the town of Calitzdorp where they stopped at a service station in order that the group could use the toilet facilities. He was very tired by then as it was the fasting month of Ramadan. He therefore informed the group that he would not be able to drive until he had had time to rest. The group felt that stopping would be a waste of time and they then discussed it among themselves. A short time thereafter, Mr Foo told him that he would take over the wheel. He then got into the front passenger seat next to Mr Foo. Mr Ebrahim guided Mr Foo out of the town and once they got onto the highway about five to ten minutes later, Mr Ebrahim went to sleep. He was satisfied at that stage that Mr Foo was a competent driver. He did not know what caused the vehicle to go off the road as he was still asleep at that time.

9 Under cross-examination, Mr Ebrahim said that when Mr Foo volunteered to take over the driving, he had mentioned that he had a driver's licence. All four adults in the group had spoken to him about continuing the journey with one of them driving. Mr Ebrahim's evidence was that it would take about 45 minutes to one hour to travel between Calitzdorp and Ladysmith because of the winding nature of the road which is between mountain cliffs on one side and a steep ravine on the other. It would take another 45 minutes to travel between Ladysmith and the place where the vehicle went off the road. Mr Ebrahim told me that he had driven the vehicle for two days prior to the incident and had not experienced any problems either with the brakes or the tyres during that period. He had checked these parts before the party had left on the tour and also while the tour continued. The condition of the tyres was satisfactory as far as he was concerned.

10 The defendant in his affidavit of evidence-in-chief said that he took over the driving of the vehicle because Mr Ebrahim was tired. He discussed the matter with Mr Lim and their respective spouses as all of them were qualified drivers. At that point no one knew that an international driver's licence was required for foreigners to drive in South Africa.

11 When he took over the vehicle, Mr Foo maintained a speed of about 100km/h. This was the speed limit and, being in a foreign country he did not want to exceed it and be stopped by the traffic police. Besides, all of them were chatting and taking in the sights. There was no urgency for him to drive the vehicle beyond the speed limit or at excessive speed. The accident took place at about 5.30pm. By then he had been driving for about two hours. At that time, they were proceeding along a straight stretch of the road R62 between Ladysmith and Barrydale. There was no other vehicular traffic. The road surface was dry and visibility was very good.

12 All of a sudden, Mr Foo heard a flapping sound and he immediately shouted "[expletive] … tyre burst". He stepped on the brakes, but the vehicle veered to the right. He released the brakes and turned the steering wheel to the left. The vehicle did turn towards the left and he then stepped on the brakes again with a view to bringing the vehicle to a halt. Instead it veered to the right and this time, Mr Foo could not do anything to prevent the vehicle from going off the road and going down the slope. Mr Foo momentarily lost consciousness. When he regained consciousness he found himself lying in front of the vehicle and on the ground. He realised he had gone through the windscreen. He then saw the deceased's body lying on the ground. Mr Foo went to help Mr Lim and called his name several times but he did not respond. He then went to help the other passengers who were in the vehicle.

13 Mr Foo maintained that the cause of the accident was the bursting of the right rear tyre. When he took over the driving of the vehicle he did not know that that tyre was defective. It looked fine. On the day of the accident, they had been travelling in the vehicle from 10.00am up to 3.00pm without experiencing any problems. Mr Foo did not know what caused the right tyre to burst. He believed that the accident was inevitable and unavoidable despite the fact that he had used his best

endeavours to bring the vehicle under control and prevent it from going off the road. The entire accident happened in a matter of seconds.

14 Under cross-examination, Mr Foo said that he now agreed that, at the time of the accident, he had not been qualified to drive the vehicle in South Africa as he did not have an international driving licence, but then he had thought that there was no such requirement. He also stated that that was not the first occasion on which he had driven in a foreign country. He had previously driven in Australia, France, New Zealand and the United States and had not needed an international driving licence to do so. As regards taking over the wheel when Mr Ebrahim was tired, Mr Foo's position was that the final decision was made by himself and Mr Lim. He had volunteered to drive because he did not expect the ladies to drive in a foreign country and Mr Lim had poor eyesight.

15 Mr Foo said that from the time he took over the driving up to the time of the accident, he had used the brakes of the vehicle several times. When he applied the brakes normally, there had been no unusual reaction and the vehicle had not swung from one side to another. In his view, the brakes were effective. Under cross-examination, Mr Foo clarified the statement in his affidavit that "when I took over the vehicle, I was going at a speed of about 100kmph". He explained that that sentence referred to the time when he hit the straight road which was some time after the vehicle had left Calitzdorp. When he started driving in Calitzdorp, his speed was slow as that was an urban area. He disagreed he had travelled at a speed of 100km/h from the beginning. As regards the sentence in his affidavit "besides we were all chatting and taking in the sights", Mr Foo at first said that he was not chatting away nor enjoying the sights while he was driving. Subsequently, Mr Foo agreed that the sentence in his affidavit referred to his behaviour as well, but he qualified his agreement by stating that most of the time he was concentrating on his driving although the chatting probably involved him too. He also said that there had been very few cars travelling along the road R62 and the phrase "no other vehicular traffic" in his affidavit meant very low traffic but not that there were no other vehicles at all. He clarified that at the time that he heard the tyre-flapping sound, the vehicle he was driving was the only one on that stretch of the road as far as he could see.

16 Mr Foo described the flapping sound as being very loud and sounding like "plup, plup, plup". It was a continuous sound. When he first heard it he was driving straight along a straight stretch of road. He was not chatting or taking in the sights at that moment though he was looking at the scenery in front of him. The flapping sound came from the rear right hand side of the vehicle. He was not shocked when he heard the loud sound though he had not encountered any situation of a tyre bursting prior to that occasion. Mr Foo was asked whether he had lost his composure after hearing the sound. He replied that he had not as he had taken corrective action after hearing it. He had taught himself the method of dealing with a burst tyre through his years of driving experience, from reading and from other drivers. As he knew it, the method of dealing with a burst tyre was for the motorist to hold on stiffly to the steering wheel and maintain a straight course. The motorist should not apply "hard brakes". Mr Foo volunteered that he had once had a situation where a tyre had deflated while he was driving along a Malaysian highway. He had dealt with that situation successfully by applying his brakes and bringing the car to a halt. Mr Foo stated that the method of dealing with a deflated tyre while driving was very similar to the method of dealing with a burst tyre.

17 Mr Foo was asked how long he had taken to step on the brakes after hearing the loud sound. His first reply was "a few seconds later". He was not able to estimate exactly how many seconds had passed but he said that he had definitely not stepped on the brakes immediately. He then explained that the loud sound he heard was the sound of a tyre flapping and that that sound had continued. There was no specific bursting sound followed by a flapping sound. He said it was possible there was a "pop" sound just before the flapping sound but he really could not remember. A few seconds later,

he made the first brake application. This was a tap on the brakes made with the intention of slowing down the vehicle. The vehicle then moved to the right and when it did so he released the brakes. He was surprised when the vehicle moved to the right. He remembered turning the steering wheel to the left to bring the vehicle back to a straight travelling line but could not remember whether he had steered gently or violently. The vehicle returned to a straight travelling line and he then stepped on the brakes again with the intention of bringing the vehicle to a halt. This was a hard application of the brakes and the vehicle then veered sharply to the right.

18 Mr Foo was asked whether he had followed the prescribed method of dealing with a burst tyre as described by himself when he encountered that situation on the highway. His response was "I can't remember. It happened in a split second." He agreed that on the second occasion that he applied the brakes, he had applied them hard enough to leave tyre marks on the road. When asked to estimate how long it took for the vehicle to leave the road from the time it had first veered to the right, Mr Foo replied that it all happened very fast and might have taken one or two seconds. Later he said that everything happened so fast and he had probably panicked after the first time he had applied the brakes because he was so surprised by the way the vehicle veered to the right. At that stage, he could not tell whether it was necessary to apply the brakes. All that he was thinking of was to save the lives of everyone in the vehicle and bring it to a safe stop. It was pointed out to Mr Foo that in the statement he had made to the South African police, he had not mentioned applying the brakes. He explained that this statement was made immediately after the accident and in conditions that he described as "very traumatised". The account of the accident in his affidavit was written after he had taken time to recollect everything that had happened and it was the more true reflection of what had happened that evening. It was put to Mr Foo that he did not apply the brakes repeatedly during the incident. He disagreed. With the benefit of hindsight, Mr Foo considered that he should not have applied the brakes at all and should only have tried to keep the vehicle moving straight forward.

19 The Defence called an expert witness, one Mr Johannes Jacobus Heese, who is a senior lecturer in the Department of Mechanical Engineering, University of Stellenbosch, South Africa. Mr Heese did a reconstruction of the accident. He visited the accident site and took measurements there. He examined photographs of the damaged vehicle and was given access to the police photographs of the accident scene and the evidence of the South African officers. He was also given information on the course of events by Mr Foo. Mr Heese came to the following conclusions:

(a) The speed of the vehicle was not in excess of the speed limit of 100km/h at the time when the tyre burst;

(b) The most probable reconstruction was that the vehicle left the road, travelled through the air for a distance of about 10m and landed again on the left front side and immediately thereafter the left rear tyre made contact with the surface beside the road. The vehicle was in a rotational motion and this caused the blow-out of the left rear tyre;

(c) The tyre burst due to one or more of the following factors:

(i) defects in the tyre;

(ii) road damage to the tyre;

(iii) internal separation of the plies and breakdown of the air seal; and

(iv) driving with an under-inflated tyre.

(d) The sharp swing to the right experienced by Mr Foo on the application of the brakes was not consistent with an intact braking system.

20 Mr Heese elaborated the last point as follows. He noted that the vehicle swung to the right when Mr Foo first applied the brakes. He got the vehicle under control and repeated the attempt at braking. This time the instability swung the vehicle violently to the right. Mr Heese stated that that reaction was not expected since the vehicle had a rear wheel drive and balanced tyres. Initially, when the right rear tyre deflated, the radius of this wheel became less than that of the other driving wheel. Traction would be lost due to this deflated tyre and a gentle swing to the right might be expected. If the accelerator pedal were to be released, braking would be more effective on the undamaged tyre and the swing would usually be arrested. During braking the damaged wheel would not have the same amount of grip and a swing to the left might be expected. This would be dangerous since, to arrest this swing, the right rear side must be relied upon. In this instance, the driver experienced a pull to the right twice after he braked. This could have been the result of two front brakes which were not braking equally. A right front brake out-braking the left front brake would certainly swing the car violently to the right.

21 In court, Mr Heese was told that Mr Foo had testified that he had no complaint about the vehicle's brakes. Mr Heese was asked to reconcile this statement with the suggestion in his report that the two front brakes might not have braked equally and that was why the vehicle veered to the right. Mr Heese said that normally with a braking system balanced between left and right, application of the brakes should have stabilised the initial swing towards the right. It did not happen in this case. The only explanation he could give was that either the front left brake was not working properly or the right front brake was locking. This fault was not picked up by either Mr Foo or Mr Ebrahim. Normally, when a person applied the brake under controlled circumstances, the person would not be bothered by a slight pull to the right or the left. However, in a situation of panic when the brakes were applied without control then the defect would show up. When I asked the witness whether he was speculating, he agreed that he was.

22 Other evidence adduced showed that the stretch of road where the accident took place was straight and well maintained with good road markings. The road was bordered by a gravelled shoulder and the area beyond the shoulder was about 1.3m lower than the road surface. The road surface was dry at the time of the accident and as it was still daylight and the weather conditions were clear, visibility was good. After the accident, unfortunately, no forensic examination of the right rear tyre was undertaken and thus the cause of the blow-out could not be established. The vehicle has since been scrapped. The owner of the vehicle, Mr Rithwaan Omer, testified that he had bought it, second-hand, shortly before hiring it to the deceased, and at that time the vehicle had passed a roadworthiness test. He also stated that the brakes of the vehicle had been well maintained by him and he had no complaints about the brakes before he hired it out to the deceased. Under cross-examination, Mr Omer confirmed that no repair or maintenance work had been done on the vehicle between the time he bought it and the time he rented it out as it had just gone through and passed its roadworthiness test.

The issues

23 In his closing submissions, counsel for the plaintiffs defined the issues as being:

(a) whether the defendant was allowed to drive in South Africa without an international driving licence;

(b) whether the defendant was negligent in the way he drove the vehicle on 12 December

2001.

Breach of statutory duty

24 The first issue can be dealt with fairly briefly. Counsel for both parties had agreed that, at the time of the accident, a Singaporean driver had to hold an international driving licence if he wanted to drive in South Africa. It was against South African law then for a Singaporean who did not hold such a licence to drive in the country. The defendant did not dispute that he did not have an international driving licence at the time of the accident. He should not therefore have taken the wheel of the vehicle and he could, if the South African authorities wish to do so, be prosecuted for having driven it. That breach of South African law, however, does not automatically render the defendant liable to the plaintiffs. The accident was not caused by the defendant's failure to obtain a valid international driving licence. The evidence before me was that in December 2001, the defendant had had about 25 years of driving experience and held a valid Singapore driving licence. Whilst not technically qualified to drive under South African law, he was a competent and experienced driver.

25 Counsel for the defendant submitted that the law is clear: a defendant who is in breach of a statutory provision such as driving licensing regulations cannot be found liable for damages in a civil action in the absence of negligence. This submission was based on *Charlesworth & Percy on Negligence* (Sweet & Maxwell, 10th Ed, 2001) which states at para 11-12 that the basic rule is that in the ordinary case, breach of a statutory duty does not in itself give rise to a private law cause of action for damages. It is only when construction of the statute in question establishes "that the statutory duty was imposed for the protection of a limited class of the public and that Parliament intended to confer on members of that class a private right of action for breach of the duty" (see *X (Minors) v Bedfordshire County Council* [1995] 2 AC 633 at 731) that such a cause of action will arise. The court therefore has to look at the provisions of the statute that has been breached to determine what private rights, if any, accrue from such breach.

26 In this case, there are two possible statutes that were breached: one in South Africa and the other in Singapore. The plaintiffs did not adduce evidence of the South African statute that required a foreigner to hold an international driving licence. Nor did they call any expert witness to testify that that statute was intended to confer a private right of action on persons who were injured by foreigners who drove without a proper licence. Without such evidence, I cannot hold that the defendant's failure to obtain an international driving licence by itself conferred, under South African law, a right of action on the plaintiffs. As for the position in Singapore, as far as I can see, there was no breach of any statutory duty in here. The Road Traffic (International Circulation) Rules (Cap 276, R 7, 2001 Rev Ed) ("the Rules") made pursuant to the Road Traffic Act (Cap 276, 1997 Rev Ed) give the Automobile Association of Singapore and the Deputy Commissioner of Police the power to issue international driving permits to qualified persons who apply for them (see r 4). The Rules do not provide that a person who is going abroad must apply for an international driving permit. Since it is not mandatory for someone to apply for such a permit, the defendant did not breach any Singapore statutory provision. On this issue, therefore, I must find against the plaintiffs.

Negligence or inevitable accident

27 The plaintiffs submitted that the accident was caused by the defendant's negligence. They submitted that the evidence showed that he did not concentrate on his driving prior to the accident because while he was driving, all the people present in the vehicle, including the defendant, were chatting and taking in the sights. Secondly, he had been driving at an excessive speed and that was the reason why he had to apply the brakes repeatedly thus causing the vehicle to go out of control. Thirdly, the defendant had failed to establish that the vehicle was travelling below the speed limit of

100km/h when the accident occurred. Fourthly, he was negligent in that he failed to steer the vehicle properly and overreacted to the bursting of the tyre causing the vehicle to skid and to overturn.

28 The defence is that of inevitable accident. In the Canadian case of *Bown v Rafuse* (1969) 8 DLR (3d) 649, there was an extensive discussion of what a defendant needed to establish in order to successfully maintain a defence of inevitable accident. Dubinsky J considered the *dictum* of Cartwright J in *Rintoul v X-Ray & Radium Industries Ltd* [1956] SCR 674 to the effect that a person relying on inevitable accident had to show that "something happened over which he had no control, and the effect of which could not have been avoided by the greatest care and skill" and noted that in a succeeding paragraph, Cartwright J had referred to "reasonable care". He also noted that in a 1957 Ontario Court of Appeal case, the view of the Privy Council in *The Marpesia* (1872) LR 4 PC 212 on inevitable accident had been preferred to that of Cartwright J. In *The Marpesia*, it was said at 220, following Dr Lushington's definition in *The Virgil* (1843) 2 W Rob 205; 166 ER 730:

> [I]nevitable accident … is … that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill.

Dubinsky J followed the Ontario Court of Appeal in adopting this definition. The Privy Council decision has stood the test of time, as far as I am aware, and the plaintiffs have not submitted any authority that impugns that decision. Like Cartwright J therefore, I propose to adopt the definition laid down in *The Marpesia*. In this case, therefore, to establish inevitable accident, the defendant would have to show that he could not, by exercising ordinary care, caution and skill, have prevented the accident.

29 Before I go on to discuss the facts here, it should be noted that in *Bown v Rafuse*, what had happened was that while the defendant was driving he heard a gush of air from his left rear tyre and his car immediately began to swerve towards an on-coming truck driven by the plaintiff in the opposite direction. It hit both the plaintiff's vehicle and the car following it. The defendant did not apply his foot brake or emergency brake before the accident. It was held that while proof of periodic checking of the tyres had indicated them to be in satisfactory condition and thus established that the blow-out of the tyre was unavoidable, such evidence did not establish that the collision was an inevitable result of the blow-out. The defendant had explained that he did not apply his brakes because he had once heard that one should never apply brakes if one has a blow-out or flat tyre. The judge (at 660) found that the road was completely dry and there was no evidence to suggest that either brake on the car was not functioning properly or that the defendant had been driving at an excessive rate of speed. Even if he had been unable to stop the car instantly, had he applied his brakes he would have slowed down considerably the careening vehicle as it moved towards not one, but two other vehicles, and the result might very well have been different. In those circumstances, Dubinsky J held that the defendant had not established that the accident could not have been prevented by the exercise of reasonable care on his part. The judge considered that whilst the defendant had been placed in difficult circumstances, he had not shown that what he had done in those circumstances was what a reasonable man might well have done when faced with a similar situation.

30 In considering whether the defendant has made out his defence of inevitable accident, I have also to consider the particulars of negligence relied on by the plaintiffs as these two matters are opposite sides of the same coin. If the defendant was negligent, then the accident could not have been inevitable. If I find the accident was inevitable, then the defendant cannot be considered to have been negligent.

31 The first of the plaintiffs' allegations was that the defendant had been driving without due attention to the road because he had been chatting and observing the sights while driving. The

defendant admitted that he had been chatting and had looked at the sights through the front windshield. That admission in itself does not mean that he was not paying proper attention to his driving. Mdm Loh, who was awake throughout the time that the defendant was at the wheel, agreed that from the time he took over the driving up to the time of the incident, the defendant had been able to manage the vehicle well. She did not make any adverse remark about his driving nor did she adduce evidence from any of her children as to the manner in which the defendant had driven. In fact, she felt safe during the journey. Whilst Mdm Loh did not remember the route taken, the evidence was that there was a winding stretch of road between Calitzdorp and Ladysmith along the Huysriver pass and one had to drive relatively slowly there. At Ladysmith, there was a junction and a left turn had to be taken to get the vehicle onto the R62 road. Mdm Loh had no memory of any incident during this longish journey of one and a half to two hours over unfamiliar terrain and that must be some indication that the defendant's driving was of a reasonable standard. In my view, there was insufficient evidence to justify a holding that the defendant had not paid proper attention to his driving.

32 The next allegation concerned the speed at which the vehicle was travelling. There were two allegations in this respect. The first was that the defendant was driving above the speed limit of 100km/h and the other was that his speed was excessive in the circumstances. As regards the first allegation, the defendant maintained that he had not been able to drive very fast at the beginning of the trip because of the nature of the road between Calitzdorp and Ladysmith. After Ladysmith and once he was on the R62 road, he had travelled within the speed limit but he did not know what his speed just before the accident was. According to Mr Heese's reconstruction, based on the skid marks that the vehicle left on the road, at the time the defendant applied the brakes for the second time, the speed of the vehicle was between 84 and 91km/h. He estimated that the speed of the vehicle before the brakes were applied for the first time was probably about 10km/h faster, *ie*, between 94 and 101km/h.

33 There was no other evidence of what the defendant's speed was. Mdm Loh testified that she did not know what the speed of the vehicle was. She did maintain that the defendant speeded up 15 minutes after he took the wheel, because his daughter wanted to go to the toilet and he was trying to get to the next town as quickly as possible for her sake. That evidence was not, however, very credible as at the time the defendant took the wheel, the group was in Calitzdorp and 15 minutes later, they were on their way towards Ladysmith. If a toilet stop had been desired soon after the defendant started driving, it would have been made at Ladysmith before the vehicle got on to the R62 road. Yet, Mdm Loh agreed that no stops were made after the defendant started driving. The defendant's daughter, Michelle Foo, testified that she had not made such a request of her father while he was driving. Significantly, her evidence on this point was not challenged by counsel for the plaintiffs. Additionally, in the statement she made shortly after the accident, Mdm Loh stated that the defendant had not been driving fast. Whilst she sought to disavow that statement before me, I found her disclaimer to be unbelievable. It is notable that shortly after the accident Mdm Loh did not assert that the defendant had been speeding.

34 Whilst counsel for the plaintiffs did challenge Mr Heese's reconstruction, I found Mr Heese to be a competent and convincing witness. His calculations were based on measurements that were different from those of the traffic police. However, the measurements were made at the site and I have no reason to doubt the accuracy of his observations. He convinced me that any mistake in the measurements of the accident site was made by the police and not by him. The plaintiffs did not call any rebuttal evidence on this point from the South African police although they had been able to arrange for one of the police officers to give evidence through video link at the beginning of the trial. I therefore find that the defendant's speed at the time of the accident did not exceed the speed limit for the R62 road.

35 That is not the end of the matter. Even if the defendant was travelling within the speed limit, admittedly his speed was very close to that limit of 100km/h. The question is whether he was travelling at a speed that was excessive in the circumstances. The speed limit for a particular road specifies the maximum speed at which one can legally travel along that road, but that does not mean that a driver who drives his vehicle at that speed can never be considered to be driving at an excessive speed. Whether a particular speed is excessive or not will depend not only on the speed limit but also on the road and weather conditions at any particular time. In this particular case, the road was straight, there was very little other vehicular traffic on the road (in fact when the accident happened there were no other vehicles nearby), weather conditions were good and visibility was clear. Mdm Loh did not feel unsafe by reason of the manner in which the defendant was driving. She also confirmed that none of the other passengers had objected to or commented on the way he was driving. Mr Ebrahim managed to sleep throughout the journey until the accident took place. In my view, the evidence establishes that the defendant was not driving at an excessive speed just before the accident even though his speed was probably at or close to the speed limit.

36 I now come to the nub of the case: the bursting of the tyre and the events that happened thereafter. The plaintiffs have not alleged that the defendant was responsible in any way for the fact that the tyre burst. In this they were wise as the defendant was not the owner of the vehicle or in any other way responsible for the maintenance and condition of the tyres. Further, the vehicle had carried the party for a few days and nothing had occurred to put the defendant on notice as to the condition of the tyres. Mr Ebrahim's evidence was that he had checked all the tyres and they were in good condition. In relation to the tyre, the plaintiffs' allegation in their final submission is that the defendant did not properly handle the urgent situation that arose when the tyre burst.

37 The plaintiffs pointed out that the defendant had applied the brakes twice after the tyre burst. The first application was a light tap while the second application was a hard braking action intended to stop the vehicle completely. These actions had been taken despite the defendant's knowledge, as appeared from his testimony, that the correct method of dealing with a burst tyre was to "[h]old on stiff to the steering wheel. Maintain straight. Do not apply hard brakes." The defendant had failed to do what he asserted was the right and prudent thing to do in reaction to a burst tyre situation. The plaintiffs further submitted that it was unreasonable for the defendant to apply the brakes a second time and/or to brake hard on the second occasion. The veering of the vehicle after the first application of brakes (when the defendant had merely tapped the brake pedal), ought to have been a warning to him against a second application of the brakes. Yet he exacerbated the situation by applying them again and more strongly.

38 The plaintiffs also submitted that the defendant had to brake repeatedly because the vehicle was travelling at an excessive speed and it was due to the speed of the vehicle that it veered right on the second occasion after it was brought back to a straight travelling line. Since the defendant had managed to regain control of the vehicle after it veered to the right when he applied the brakes for the first time and since, at that time, the vehicle was travelling along a straight road with no other vehicles in sight, there was no real urgency to compel the defendant to brake hard in order to halt the vehicle completely. The plaintiffs submitted that in all probability, the vehicle would have travelled in a straight path if the brakes had not been applied the second time. The prudent course for the defendant to follow in the circumstances would have been to release the accelerator completely and allow the vehicle to slow down until it came to a complete stop, or for him to allow the vehicle to slow down somewhat and then reapply the brakes gently in order to bring it to a complete stop. Their conclusion was that the defendant's hard application of the brakes and his failure to maintain a firm grip on the steering wheel had caused the accident.

39 The defendant's reply was that it was not the speed of the vehicle nor the application of the

brakes in itself that had caused the vehicle to go off the road. He submitted that the reaction of the vehicle to the application of the brakes after the bursting of the right rear tyre was not normal. Mr Heese had stated that in such a situation, a gentle swing to the right might be expected before the brakes were applied. During braking, however, a swing to the left might be expected because the brakes would have a greater effect on the left front and rear wheels. In this case, the defendant instead twice experienced a pull to the right after braking. Mr Heese explained this unexpected reaction by theorising that the two front brakes had not been equally effective. If the right front brake was more effective than the left front brake, then the vehicle would definitely swing to the right. He might have been speculating but that is not by itself a reason to discard the explanation proferred by Mr Heese. This explanation was coherent and credible.

40 The defendant submitted that it was not his actions that had caused the vehicle to pull violently to its right when he braked after the bursting of the tyre. During the period before the incident, the brakes had worked well and thus the unexpected disparity in the braking efficiency between the left and right wheels could have been brought about by the bursting of the tyre. It was not his action but the unforeseeable reaction of the brakes that led to the accident.

41 The evidence before me was that if a tyre deflates or bursts while the vehicle is being driven, an unstable situation is created. The issue is how best to deal with that situation. Various cases cited to me by counsel for the defendant showed that different views had been taken by different judges depending on the circumstances. In some cases like that of *Bown v Rafuse* ([28] *supra*), the driver of the vehicle with the burst tyre was found negligent for not applying his brakes. In *Madyosi v SA Eagle Insurance Co Ltd* 1990 (3) SA 442 ("the *Madyosi* case"), on the other hand, the driver of a bus did not apply his brakes when a tyre burst and the bus subsequently left the road and overturned, yet the driver was held not to have been negligent. In this case, during the trial, counsel for the plaintiffs himself displayed some uncertainty as to what the proper method of approaching such a situation would be. His questions showed that the plaintiffs were trying to establish that the defendant had not applied the brakes at all and that was why the accident happened. It was only in the submissions that the plaintiffs accepted that the defendant had applied the brakes and then used that admission on the part of the defendant as evidence of negligence.

42 The defendant testified that his only previous experience of a similar situation had been when a tyre deflated as he was driving in Malaysia. In that case, he had applied his brakes and brought the vehicle to a stop. He had not then experienced any pull to either side. In this case, the reaction of the vehicle to the first application of the brakes had been completely unexpected and it was this that had unnerved him. The only expert evidence in the case was that of Mr Heese and he stated that the pull to the right was an unusual reaction. He also calculated that it took about 1.25 seconds for the vehicle to leave the road after the second application of the brakes. The usual time in which a driver would be able to react to a situation on the road was 1.5 seconds, according to Mr Heese. Therefore, he said, the defendant had no time in which to react to the second and violent swing of the vehicle to the right and there was nothing he could do from that point onwards to avoid the accident. The accident was inevitable. No one has been able to estimate the time lapse between the first and second applications of the brakes. The defendant himself said that everything happened in almost a split second and that he had no time to decide what to do but had to simply react and he did this by applying the brakes again in order to bring the vehicle to a complete halt. Unfortunately, this action had the wrong result. There is of course no way of knowing whether the accident would still have happened if he had not applied the brakes at all. In the *Madyosi* case after all, the driver was unable to prevent the vehicle from leaving the road and overturning despite his efforts to keep it on a straight course on the road.

43 As counsel for the defendant submitted, one has to scrutinise the defendant's conduct within

the context of the situation with which he was faced to determine whether a driver of ordinary skill and competence would have reacted in the same way. It is relevant that once an ordinary driver is faced with an unstable driving situation, his main aim would be to bring the vehicle in which he is travelling to a stop as soon as possible. It is also relevant that the ordinary driver is not trained in dealing with emergencies such as that created by the bursting of a tyre. In this case, the defendant had the theoretical knowledge that one should not apply the brakes hard in such a situation but should attempt to keep the vehicle on a straight course until it comes to a stop. However, he also had had a previous experience where the application of the brakes had resulted in a safe outcome. He was driving his family and his friends and was concerned for their safety above all bearing in mind the unfamiliar road and driving conditions. He therefore tried to slow down the vehicle in order to bring it to a stop and when his first application of the brakes caused the vehicle to veer, he overreacted by applying the brakes more strongly the second time. In hindsight he thought that he had done the wrong thing but at the time he was doing his best to control the situation for the safety of everyone in the vehicle.

44 In my view, the defendant was not negligent. He was faced with an agonising situation. He took the course of action that had worked in the past. There was some indication that this course of action was not suitable for this vehicle but he had to make a split second decision and was not afforded the luxury of the time needed to logically process the consequences of the first braking action. It would have been counter-intuitive in the circumstances for him to let the vehicle proceed at its own pace till it stopped. He was frightened for the safety of his family and friends and did what he thought was the right thing, on the basis of his previous experience, to keep them safe. It is easy in hindsight to criticise him and say that he should not have braked the second time but it must always be remembered that the dangerous situation the defendant was in was not created by any action on his part and all he could do was to react to it in the best way that he knew. There is no basis for holding that his reactions were any different from those of the ordinary and careful driver placed in the same situation. That he reacted in what turned out to be the wrong way has meant tragic consequences for the plaintiffs and the deceased and for the defendant himself. Having seen him in the witness box, I know that the defendant will be haunted for a long time to come, if not for the rest of his life, by the decisions he took on 12 December 2001. Nevertheless, no matter how much the defendant may privately castigate himself for his actions on that day, such regrets do not make him responsible in tort for the sad outcome of something that was done with the best of intentions for all concerned and with the exercise of ordinary care and skill.

Conclusion

45 In the circumstances, I find that the defendant was not negligent in his handling of the vehicle when the tyre burst and that the bursting of the tyre made the accident inevitable. This case must therefore be dismissed. I will hear the parties on costs.

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