IN THE HIGH COURT OF SWAZILAND

NANA MTHUPHA	PLAINTIFF
V	
MOTOR VEHICLE ACCIDENT FUND	DEFENDANT
Case no 2754/95	
CORAM	S.W. SAPIRE, A C J
For Plaintiff	Mr. Kades
For Defendant	Mr. Currie

JUDGMENT

(23/5/97

On 24th December 1994 the plaintiff, while driving her own vehicle SD584 XH on the Mbabane by pass was towing her sister's vehicle to a workshop in Mbabane.. The towed vehicle, SD 009 AG, was Insured by the Defendant in terms of the Motor Vehicle Accident Act, in respect of which insurance the Defendant had issued the Declaration of insurance as provided for by the Act. The defendant's sister Sizakele Gama, was sitting in the driver's seat of her vehicle acting as "steersperson".(I use this word as was done in the cases later referred to) One Machel was a passenger in the towed vehicle. He was an employee of the workshop to which the towed vehicle was being taken.

The two vehicles had been joined by a rigid tow bar fixed to the vehicles by Machel who had come to assist the plaintiff and her sister in setting up and conducting the tow. Where he was seated in the towed vehicle is a point matter of difference between him and Ms. Gama. Ms. Gama insisted that he was seated alongside her on the front seat. Machel maintains with equal vigour that he was sitting on the edge of the back seat leaning forward and gripping the back rest of the front bench. The significance of the difference, if any is still not clear to me.

It is also a matter of difference as to how it occurred, but while the vehicles were travelling in tow, on the by pass, after the Gilfillan Road corner the plaintiff lost control of the

vehicle driven by her, the tow came apart, and the plaintiff's car went over the side of the road and overturned. As a result of injuries sustained by her the plaintiff is now seriously handicapped, being confined to a wheel chair with no hope of recovery.

Arising from this, the plaintiff claims compensation or damages from the defendant in an amount of Ea. 500 000. (The figures in the statement of claim is "El,5 000.000.00" but the amount stated in words makes it clear that this is an error). There is a natural inclination to wish to see her compensated, but her claim can only be accepted if her injuries arise out of the negligent or other wrongful driving of the insured vehicle, and if someone other than herself was the driver thereof. It is on this aspect of the matter that the case was heard, as the parties have agreed to defer the determination of the amount of damages to which the plaintiff may be entitled, until the question of

liability has first been determined.

Three witnesses testified to the events leading to, and culminating in, the accident. The plaintiff called her sister Sizakele Gama, thereafter plaintiff herself gave evidence of the little she could recall. For the defendant, Machel, was called to give his account. As is not unusual, the accounts differed according to the interests of the party on whose behalf the witness testified. Gama showed a gallant readiness to accept full blame and responsibility for the accident. No doubt she wished to see her sister compensated to the full, and it wold be unnatural for her evidence not to be coloured by this consideration.

Gama, called by the Plaintiff, admitted that she had never before participated in the towing of a motor vehicle, said that she assisted on this occasion in the towing of her vehicle the few Kilometres from her sister's home to the workshop where her own car was to have been repaired and restored to working order. It was because of some engine fault that it could not be driven under its own power.

After Machel, who had come or been sent by the owner of the workshop to assist the women, had joined the vehicles with the rigid tow bar he had brought with him for the purpose, they set off to travel the five or so kilometres from Sidwashini to the workshop. The plaintiff drove her own car, which towed Gama's car from the front. Gama herself sat at the wheel of her car with Machel alongside of her on the front seat.

They travelled without mishap at something under 60 kph. After they had passed the corner of Gilfillan Street where it enters the by pass in which they were travelling they, seemed to be picking up speed and the speedometer needle indicated that they were going to do more than 60kph, which is the speed limit on that section of the road. At about this time Machel told her to indicate to the Plaintiff, her sister, to slow down. This she did and she saw the taillights of the front vehicle come on. She says that she then panicked, fearing that her sister was about to bring the leading vehicle to a sudden halt, and that the towed vehicle would run into it. She therefor irrationally swung the car violently to the right. By so doing, she explained, she caused the plaintiff to lose control of the front car which resulted in a collapse of the tow and the disaster to the front car and the Plaintiff who had been driving it.

The plaintiff testified from her wheel chair. Her evidence was up to a point to the same effect as that of her sister. Her account however of what happened immediately before she lost control of the vehicle she was driving is different in some important respects from that of Mrs Gama She said that she did not see the signal given to her by Mrs Gama but applied her brakes when in her rear view mirror she saw the towed car swerving to the right. Although her recall is vague, because of a degree of retrograde amnesia as her counsel suggests, the sequence of

events as she does remember them is significantly different from that recounted by her sister. On her evidence the swerve to the right was the reason for her sharp application of the brakes. Mrs Gama maintains that the swerve to the right was a panic reaction to the sudden slowing down of the towing vehicle.

Machel who testified for the Defendant, describes the same events in a different way. He claims to have been decidedly uneasy at the speed at which the vehicles were travelling in tow. He claimed to have had some experience of towing. In the light of his experiences he had a greater appreciation of the dangers involved in a towing operation than that of the two ladies.. He gave this as his reason for choosing to sit at the back of the car.

One thing is common cause, and that is that he did tell Mrs Gama to give her sister a signal to slow down. He says he did it because he noticed that because they were travelling at an excessive speed the towed vehicle was swaying, dangerously in his opinion, from side to side.. This was not put to plaintiff and her witness in so many words, and plaintiff's counsel urged me to regard this description of the movement of the vehicles as a recent fabrication. This would not be a correct approach in my view. The defendant has from its plea maintained that the plaintiff herself was negligent by travelling at too high a speed. The movement of the vehicles is no more than a description of the effects of the excessive speed. That the plaintiff had been driving at an excessive speed was put both to Gama and the plaintiff.

Whatever conflicts of fact there may be, it is clear that at least one, but probably both, of those in the towed car considered it necessary to indicate to the plaintiff to slow down. Gama herself claims to have given such a signal, although she does not say that it was because the plaintiff was travelling at an unsafe speed . She claims that she did not want her sister exceed the speed limit and so cautioned her to slow down. The probabilities are Theor that the plaintiff was driving at an excessive speed, more especially as she was towing another car. It may be that the decline from the Gilfillan corner caused the plaintiff to travel faster than she realised. Even if Mrs Gama did react to a perceived deceleration in a dangerous and illogical manner, it was the plaintiff herself who brought about the dangerous situation

The of towing the motor vehicle should be seen as a joint effort on the part of the two women, neither of whom was experienced in that operation. The Plaintiff herself, assumed control of both vehicles, which while they were attached to each other, were to be regarded as one vehicle for the purposes of the Act.

In any apportionment of the blame for the accident and its tragic results the Plaintiff would have to be adjudged liable to bear at least half thereof.

Before the question of apportionment can arise, it is for the plaintiff to show that the accident and her bodily injuries consequent thereon were caused by the negligence or other wrongful "driving of the " insured vehicle. This raises the question as to whether it was Mrs Gama who was the driver of the insured vehicle or whether it was not the plaintiff herself.

I put this difficulty to both counsel in the course of argument but the problem was not answered. I was informed that there was a dearth of authority directly in point. Mr. Kades did however refer to SCHLEBUSCH V PRESIDENT VERSEKERTNGSMAATSKAPPY MTHUPHA MVA

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in which Claasen J held in the Transvaal Provincial Division that although an insured trailer was drawn by another vehicle at the time of the collision, the driver of the towed vehicle who was sitting behind the steering wheel was nonetheless less responsible for the absence of lights on the trailer. As the judgment is not fully reported the reasoning which led to this conclusion is not readily ascertainable. It is also difficult to understand why the person who assisted in the tow by controlling the towed vehicle could be said to be the driver in the sense of the Act

In S V EKSTRAAL 1981(4) SA 406, to which Mr Kades also referred, it was held (quoting the head note)

"The appellant had been convicted in a magistrate's court of driving under the influence of intoxicating liquor in contravention of s 140 (1) (a) of Ord 21 of 1966 © and sentenced. In an appeal against the

conviction and sentence, it appeared that the appellant had been at the wheel of his car which was then being towed by another car when he was stopped by a provincial traffic inspector and that he was then under the influence of liquor. The only point argued in the appeal against the conviction was whether appellant's actions in steering a towed vehicle constituted the activity of driving.

Held, that the appellant's actions did fall within the concept of driving and that he was accordingly correctly convicted".

In coming to this conclusion, Williamson J after finding no help in the definition section of the legislation with which he was dealing, said:

"Both the sections to which I have referred are obviously of no assistance in helping one to find a solution to the problem of what is really meant by the word "drive" in the context of this legislation.

Counsel did not refer us to any South African cases nor am I aware of any which are in point. We were however referred to certain English decisions which considered a similar problem.

Thus, in Wallace v Major 1946 KBD reported in (1946) 2 All ER at 87, the Court, when dealing with the position of the "steersman" of a vehicle being towed, held that this did not constitute "driving" as the "steersman" of the towed vehicle had no control over the forward motion of the vehicle. To the same effect is R v Arnold 1964 Criminal Law Review 664 where it is held that the person steering a vehicle which was being pushed from behind by another vehicle was not the driver thereof within the meaning of the Road Traffic Act. The basis of this decision was that the "steersman" was not making the vehicle go The commentary on this case, which summarises the English cases, reads as follows:

"D is driving where he steers a vehicle down a hill, under the force of gravity:

Saycell v Bool; and where he steers a vehicle being pushed by other persons: Spindley and Pearman (also Shimmel v Fisher, though there the charge was taking and driving away (s 217), where different considerations might obtain, as that provision is aimed at a different mischief). D is not driving where he is being towed by another vehicle: Wallace v Major or, as now appears, pushed by another vehicle.

It is suggested in the comment on Spindley that the test is whether D has control over the forward motion of the vehicle. Clearly he does so when the vehicle is being pushed by hand or travelling under the force of gravity for then he can stop it any moment by applying the brake. But when he is being towed, he might be dragged along by the towing vehicle even though he applied the brake; and the same considerations might apply where he is being pushed by another vehicle."

I find the English cases singularly unhelpful and I do not think we should follow them. They portray an over-technical approach and their results are in my view artificial.

Now the word "drive", in common with many other words, has several ordinary meanings, and one has to look at the context in which that word is used in order to ascertain that meaning which is appropriate. The Concise Oxford Dictionary give as one of its meanings "to operate and direct the course of a vehicle or locomotive"; Webster's Dictionary is to much the same effect, namely "to control the movement or direct the course of an automobile, etc"; Hamlyn encyclopaedia World Dictionary includes as one meaning "to cause and guide the movement of a vehicle".

Both the Oxford and the Hamlyn dictionaries suggest that two elements must concur before the

activity constitutes diving, namely the movement of the vehicle must be caused or operated by a person and then that some person must also direct or guide the course or movement of the vehicle.

Webster's Dictionary however suggests that either the mere controlling of the movement of a vehicle may by itself constitute driving or that the mere directing of the course of a vehicle may also by itself constitute driving.

The Ordinance, as one of its objects, is clearly concerned with controlling the movement of vehicles on public roads in the interests of public safety. To that end it is made an offence for a person to drive a vehicle on a public road when he is under the influence of intoxicating liquor.

In these circumstances it is in my view only common sense to include in the

definition of driver at least those persons who direct or guide the course of a vehicle. In down to earth terms this means that a person who merely steers a vehicle is the driver thereof. It is his steering which is potentially a source of danger to other road users. It would be highly artificial not to regard such a person as the driver. Were one to exclude this sort of activity from the concept of driving one would permit a mischief which the Ordinance, in my opinion, is designed to discourage.

On this view, then, it follows that the appellant's actions fall within the concept of driving, and he was accordingly correctly convicted. There is, however, another approach which also commends itself to me. The appellant originally drove this vehicle under its own power. When that source of power failed he arranged for a substitute, namely the towing vehicle. He deliberately caused his own vehicle to be attached by a chain to the towing vehicle and he then deliberately caused the towing vehicle to pull him along. Admittedly he now had no direct and immediate control over that new source of power, but when he arranged it he knew that his vehicle, which he was steering, was to be drawn along by a source of power not responsive to his immediate command or control. By deliberately making these arrangements I think appellant was so allying himself to the new source of power that he can properly be regarded as being in joint control of it.

On this approach appellant would still be so intimately linked with the propulsion of his vehicle that from a practical common sense view point he was at least jointly responsible, as the dictionary puts it, for causing and guiding the movement of his vehicle.

For the reasons given above I am of the view that the appellant was correctly convicted" Williamson J., it must be remembered was considering the meaning of the word "drive" in relation to the particular ordinance then to be interpreted. Whether he would have come to the same conclusion in relation to a third party claim is open to conjecture. In coming to his conclusion he considered the particular mischief the ordinance intended to punish. The same considerations do not apply in the interpretation of the Motor Vehicle Insurance Act I cannot agree with his rejection of the English authorities cited in the judgment, the reasoning in which I cannot dismiss as Williamson J was able to do..

FLYNN v UNIIE NASIONAAL SUID-BRITSE VERSEKERINGSMAATSKAPPY BPK 1974 (4) SA 283 (NC)and NKHALA v MUTUAL EN FEDERALE VERSEEKERINGS MAATSKAPPY BPK 1985 (1) SA 824 O to which Plaintiffs counsel referred, do not seem to be in point.

My preference for the reasoning in the English cases is on the other hand supported by the dictionary meaning of the word "drive" and decisions of the South African Courts which appear to be more relevant than those cited by Mr Kades.

CHURCHILL v STANDARD GENERAL INSURANCE CO LTD 1977 (1) SA 506 (A) is such a case.

The head note reads

A part from the provisions of section 1 (3) of the Motor Vehicle Insurance Act, 29 of 1942, as amended, in regard to "driving", nowhere in the Act is there an indication that the Legislature intended to alter the common law approach to the doctrine of causation, and it is clear that the Act can be construed in such a way as to fit in with the common law. Therefore, if negligent driving is accepted, the insurer of a mechanical horse is liable under the Act if the mechanical horse causes damage. It is also liable if the trailer drawn by the mechanical horse causes damage. The insurer of the trailer which caused damage is, however, also liable because, by reason of its nature, the trailer is normally driven by the driver of the mechanical horse. Both insurers are jointly and severally liable. Applying the principles of the common law it would also appear that, if the damage is caused by the mechanical horse alone, the insurer of the trailer is not liable. It must be so, because the driving of the trailer in such a case did not cause the damage. The insurer of the mechanical horse would also not be liable if, after uncoupling the vehicle, damage is caused by negligent handling of the trailer by someone in control thereof. The insurer of the trailer would be solely liable if the trailer is in fact separately driven, even if it is coupled to the mechanical horse with driver, if only the driver of the trailer drives negligently and thereby causes the trailer to do damage. The insurer of the trailer would in such case also be solely liable if damage is caused by the mechanical horse through negligence on the part of the driver of the trailer and the driver of the mechanical horse is not negligent If both drivers are negligent there would probably be joint liability of both insurers, depending upon the circumstances.

That, in practice, problems can arise, because of the great variety of mechanical horses and trailers, in connection with damage which is "caused by or flows from the driving" of the insured vehicle, permits of no doubt.

The vehicle or vehicles with which that case was concerned was a mechanical horse and trailer. An important distinction is that the trailer was not controlled by a steersman, as the tow was so articulated that the path of the trailer did not require to be controlled by anyone other than the driver of the mechanical horse. The case does however seem to be authority for the proposition that when one vehicle is being towed by another in it the driver of the towing vehicle who is the "driver" of both.
SANTAM VERSEKERINGSMAATSKAPPY BPK v KEMP 1971 (3) SA 305 (A)is an earlier case which was considered by Rumff J in his judgment. The head note on aspects relevant to this case is:

"Section 1 (2) of Act 29 of 1942, as amended, is applicable to a motor vehicle, such as a trailer, which is hauled by another motor vehicle with its own source of power, such as a tractor, and the trailer is deemed to the driven by the driver of the tractor. The driver of the tractor is therefore deemed by the Act to act in two capacities, namely as driver of the tractor and as driver of the trailer."

Plaintiffs claim is made in terms of The Motor Vehicle Accidents Act, 1991 (Act No. 13 of 1991). The liability of the MVA Fund is provided for in Section 10 .(1) which reads

as follows:-

" 10. (1) The MVA Fund shall, subject to the provisions of this Act and to such conditions as may be prescribed, be utilised for the purposes of compensating any injured person or, in the event of death, any dependant of the deceased (sn this Act called 'the third party") for any loss or damage which the third parry has suffered as a result of

a) any bodily injury to himself;
b) the death of or any bodily injury to any person;

which in either case is caused by or arises out of the driving of any motor vehicle by any other person at any place in Swaziland and the injury or death is due to the negligence or other unlawful act of the person driving the motor vehicle (in this Act called " the driver") or of the owner of the motor vehicle or his servant in the execution of his duty."

Section 2(2) of the Act provides

" For the purposes of this Act a motor vehicle which is being propelled by any mechanical, animal, or human power or by gravity or momentum shall be deemed to be driven by the person in control of the vehicles"

The Plaintiff herself was in control of the vehicles. She was able to regulate the overall speed of both, and she could determine the direction in which they were to travel. It was for the Plaintiff to have kept a proper look out and for her to have ensured the safety of the tow. Accordingly she is deemed to have been the driver of the insured vehicle. Gama's negligence or other wrongful act is relevant only in so far as she was the owner of the vehicle.

There is no allegation in the amended particulars of claim as to her ownership of the vehicle. In evidence the vehicle was in loose terms described as being "hers"and this was not challenged. This is a case where it appears to be common cause that she was the owner. Thus the defendant is liable to compensate the Plaintiff for the loss she has suffered occasioned by her negligence qua owner.

On this basis I find that the accident was caused by the negligence of both the plaintiff and Ms Gama as owner of the insured vehicle. They were both negligent in undertaking the tow when both of them were inexperienced in the operation and not fully competent so to do. The Plaintiff, as driver of both vehicles was negligent, in driving at an excessive speed. It was this apart, from the initial undertaking of the tow when neither she nor her steersperson of the towed vehicle were competent so to do, which is the basic cause of the accident. It was the plaintiff who was in control of both vehicles and she should have ensured that proper precautions for the safe conduct of the operation. It was her responsibility to have had the towed vehicle steered by one experienced in so doing. Ms Gama herself as owners knowing of her inexperience should not have undertaken the duties of steersperson. It is a combination of all these factors which culminated in Ms Gama not being able to cope with the situation in which she found herself.

In the circumstances it is fair to apportion the blame equally between the driver, and the owner. The damages which the Plaintiff succeeds in proving will be reduced

therefor by one half.

S W SAPIRE

Acting Chief Justice