HEMACHANDRA

v.

AYOOB AND ANOTHER

COURT OF APPEAL.
MOONEMALLE, J. AND GOONEWARDENA, J.
C.A. APPEAL No. 87/77(F).
D.C. COLOMBO No. 78011/M.
FEBRUARY 2, 1986.

Negligence–Contributory negligence–Breach of rules of the road.

Breach of the rules of the road can constitute negligence. The question of negligence must be considered on the basis of all the evidence. It must not be made to hinge upon one answer such as that there was no fault on either side given in the context of the questioning on the fact that there was no police prosecution.

Cases referred to:

(1) *Martindale v. Wolfaardt–1940 AD 235.*

(2) *Dunn v. Macpherson–N.P.D. 1931 (P.H.O. 14).*

APPEAL from judgment of District Court of Colombo.

Dr. H. W. Jayewardene, Q.C. with *Ronald Perera* and *Miss T. Keenawinna* for plaintiff-appellant.

Mark Fernando, P.C. with *P. Abdul Rahman* for defendants-respondents.

Cur. adv. vult.

March 26, 1986.

GOONEWARDENA, J.

The plaintiff-appellant filed this action in the District Court to recover from the defendant-respondents a sum of Rs. 42,000 claimed by way of damages.

The claim arose consequent upon an accident that occurred on 24.3.1971 between a motor cycle ridden by the plaintiff-appellant and a motor car bearing No. CL 8023 belonging to the 1st defendant-respondent and driven on this occasion by the 2nd defendant-respondent.

The case of the plaintiff briefly had been that when he was riding this motor cycle along Galle Road from the direction of Fort towards Bambalapitiya this car driven by the 2nd defendant emerged from Edward Lane into Galle road and in attempting to cross the line of traffic to proceed towards Fort collided with his motor cycle as a result of which he sustained the injuries which constitute the foundation of his claim. The plaintiff had contended that the proximate cause of this accident was the negligence of the 2nd defendant which gave rise to the liability of the latter to make good the damages claimed. The defendants however had taken up the position that it was the contributory negligence, if not negligence of the plaintiff that brought about the accident.

After trial the learned District Judge dismissed the plaintiff's action in the view that he had taken that it was the negligence of the plaintiff that resulted in the accident. While not accepting the 2nd defendant's evidence that at the time of the accident the plaintiff was talking to his pillion rider the District Judge has concluded that there was negligence on the part of the plaintiff giving as far as I could see as his reason for such conclusion that taking into account the plaintiff's evidence that there were three lines of traffic on the Colpetty-Bambalapitiya Road, if the 2nd defendant's car went across this road from the side road, it was possible that this car would have collided with other vehicles travelling on this road, as well. In the event, the 2nd defendant's car did so go across this road and in my view the finding of the learned District Judge on this material leaves much to be desired and it behoves me then to deal with this matter in some depth in order to arrive at a proper finding.

That Galle Road is a main road with respect to Edward Lane there can be no doubt. What then would be the duty of a motorist who endeavours to cross Galle Road from Edward Lane with a view to proceeding towards Fort? What specifically would be the duty of such motorist with respect to traffic moving along Galle road in the direction of Bambalapitiya? In my view it would be the duty of such a motorist to give way to traffic along Galle Road proceeding toward Bambalapitiya, as to hold otherwise would be virtually tantamount to saving that such motorist cutting across Galle Road from Edward Lane would be at

liberty to do so even if it results in the obstruction of such traffic. The Rules of the road contained in the Motor Traffic Act intended to regulate traffic in an orderly manner and so ensure the safety of all users of the road I think imposes this duty on such a motorist and a breach of such duty to my mind constitutes negligence which if it brings about damage or injury becomes actionable in law. To put it precisely and with respect to the case before us I think it was the duty of the 2nd defendant to have halted his car at the top of Edward Lane before entering Galle Road (without having proceeded up to the centre line as he says he did) and then to have crossed the landside half of Galle Road to enter the seaside half only when it was possible to do so without obstructing the traffic going toward Bambalapitiya, that is when the landside half of Galle road was reasonably clear of traffic at this point to permit the 2nd defendant to cross this half without imperilling the safety of such traffic. Anyone negotiating a vehicle along Galle Road (as the plaintiff did) keeping a lookout for other traffic also proceeding in the same direction (as the plaintiff would have had to do) could reasonably be expected to contemplate that he could do so without being exposed to the hazard of suddenly encountering without adequate warning a vehicle across his path; vide *Martindale v. Wolfaardt* (1)—Negligence in Delict by Macintosh & Scoble, 4th Ed. pp. 288 & 289—and in such a situation if evasive action of some kind is taken by him (such as what the plaintiff says he attempted to do here) in my view one cannot find much fault with that or term it contributory negligence even if such action might not have been of the optimum kind that might have been taken had there been the time and opportunity to do so.

The plaintiff's evidence was that he, a police officer, was riding his motor cycle on official business at about 12 noon towards Bambalapitiya traffic lights, that Galle Road was divided into two, that there were three lines of traffic, that he was riding on the middle of the road, that as he got close to the traffic lights they indicated the colour green whereupon traffic started to proceed towards Bambalapitiya, that a motor vehicle suddenly was put across the road from a side road on the landside resulting in this collision, that there was no opportunity to avoid the collision as the motor vehicle was very close, but that while he braked he steered his motor cycle to the right side.

The version of the 2nd defendant was that when he came up to Galle Road along Edward Lane and gave a signal, in the three rows of traffic were two cars and a bus which halted and signalled to him to proceed whereupon he drove up to the centre line and stopped to look out for traffic when the motor cycle came along with the rider talking to the pillion rider behind and collided with the front left head lamp of his vehicle. As I said earlier the District Judge has not accepted the 2nd defendant's evidence that the plaintiff was talking to his pillion rider and I am inclined to agree with that view. Learned Queen's Counsel for appellant has contended that on the evidence a prime facie case of negligence has been established and I agree with that contention. As I stated earlier the 2nd defendant owed a duty of care not only with respect to the vehicles he claimed were stopped on his signal namely the two cars and a bus but also with respect to the motor cycle which was being ridden along the main road. To repeat in the context of the evidence what I said earlier it was incumbent upon the 2nd defendant-respondent not to have proceeded up to the spot he did proceed up to, but to have allowed the motor cycle to pass before doing so, unless the motor cycle was at such a distance from him that it was possible for him to have got across the road before the motor cycle got up to his vehicle, which latter position however is not the case of the 2nd defendant. (Vide *Dunn v. Macpherson* (2))–Negligence in Delict (ibid) page 289). I take the view that the probabilities are that the 2nd defendant drove his car up to the centre line completely blocking the path of the motor cycle which was close to it thus rendering it necessary for the plaintiff to move to the right in an attempt to avoid the car. Learned President's Counsel for the respondents contended that the fact that the damage was to the left front side of the car points to the negligence of the plaintiff but in my view such damage is compatible with the plaintiff having tried to avoid the impact without success and being hit by the area of the left front head lamp of the car. The representations shown on the sketch produced at the trial I think support that view. Learned President's Counsel for the respondents also contended that the plaintiff had admitted in evidence that there was no fault on both sides and that the benefit of that evidence must be given to his client. I cannot agree that this answer of the plaintiff given in response to a question put as to the absence of a police prosecution against the 2nd defendant can be said

to be conclusive of the question of negligence just as much as the absence of such prosecution cannot be regarded as conclusive of such question either. Such negligence or absence of negligence on the part of either party in my view has to be determined upon an examination of all the circumstances surrounding the accident and cannot be made to hinge upon a single answer such as this. Suffice it to add that for the purpose of determining where the blame lay account must also be taken of the diminished credibility of the 2nd defendant consequent inter alia to the different positions taken by him with respect to the passengers in his car and the number of statements made to the police.

In the result I am of the view that the plaintiff has successfully discharged the burden that lay upon him to establish the requisite negligence on the part of the 2nd defendant and that the position so made out by the plaintiff has not been displaced by the 2nd defendant. The only question that then remains is as to the quantum of damages.

Learned President's Counsel for the defendants-respondents did not address us on this question and what was urged in this connection by learned Queen's Counsel remains unchallenged. Taking into account all the circumstances including the medical evidence and the bodily injury suffered by the plaintiff-appellant as well as the residual physical impairment he must carry through life I am of the view that the amount of Rs. 42,000 claimed is a fair and reasonable estimate of the damages the plaintiff-appellant should receive.

I set aside the judgment of the learned District Judge and give judgment for the plaintiff-appellant as prayed for in his plaint. He will also be entitled to his costs in this court and in the court below.

MOONEMALLE, J.—I agree.

Appeal allowed.