BALA KRISHNA *v.* VEERASAMI

[Appellate Jurisdiction (Hyne, C.J.) October 18th, 1954]

Negligence—apportionment of damages.

The appellant was the driver of a vehicle which collided with another owned by the respondent at Saweni near Lautoka.

The respondent then sued the appellant claiming the cost of repairs to his vehicle alleging that the appellant had been negligent. The appellant similarly counter-claimed.

At the hearing of the action by the 1st Class Magistrate, Lautoka, he found both parties equally to blame and apportioned damages on a 50 per cent basis.

On appeal from this decision.

HELD.—That the Magistrate's decision was legally correct.

Cases referred to:—

Baker v. Market Harborough Industrial Co-operative Society Ltd. (1953) 1 W.L.R. 1472.
Bray v. Palmer (1953) 1 W.L.R. 1455.
Wallace v. Richards (1953) 1 W.L.R. 1472.
Ingram v. United Automobile Services Ltd. and Another [1943] 2 A.E.R. 71.

R. Kermode for the appellant.

K. Stuart for the respondent.

HYNE, C. J.—This is an appeal against a judgment of the Magistrate at Lautoka in which the learned Magistrate awarded plaintiff the sum of £77 4s. 0d. as damages, the plaintiff in that action being the present respondent.

The claim arose out of a collision which occurred at Saweni on 21st February, 1953, between the appellant's and the respondent's vehicles.

The respondent (the plaintiff in the action) claimed in all £231 8s. 0d. He abandoned so much of his claim as exceeded £200 to bring the action within magisterial jurisdiction. He alleged negligence on the part of the appellant (the defendant in the action).

The appellant denied negligence on his part, alleged negligence on the part of the respondent, and counter-claimed for £77 0s. 0d. for damage caused to his vehicle.

The grounds of appeal are:—

"1. That the learned Magistrate erred in law in holding that he was prevented from holding that no negligence had been proved.

2. That the learned Magistrate erred in holding on the evidence before him that the appellant had been negligent.

3. That the learned Magistrate erred in not holding that the respondent had failed to prove his claim and that the appellant was entitled to succeed on his counterclaim.

4. That the learned Magistrate erred in holding that both parties were equally to blame and assuming that the appellant was negligent (which he denies) a proper consideration of the evidence would have placed the appellant's blame at less than 25 per centum of the cause of the damage.

5. That assuming both parties were equally negligent the learned Magistrate erred in law in finding damage to the respondent in excess of the damage claimed by the respondent and using such excess which was in excess of the amount which the respondent could have recovered from the appellant as a basis for arriving at the proportion of the damage to be borne by the parties.

6. That the learned Magistrate failed to direct his mind to evidence of the appellant which if found proved would have entitled the appellant to have judgment in his favour on the claim and the counter-claim."

It was agreed between Counsel that the learned Magistrate should have arrived at the amount awarded on the basis of a claim for £200 and not £231 8s. od., the sum of £200 only being claimed by plaintiff. This ground was therefore not argued.

The respondent was the owner of a motor vehicle No. 4243. His story is that he collided with a truck at about midnight on 21st February, 1953, on the Nadi side of a small bridge at a bend in the road near but past the village of Lawaki. He had two passengers, Fakir Samy and Krishna Samy. He was going towards Nadi at about 30 to 35 miles an hour. He had his lights on. He saw a lorry approaching and he slowed down. The lorry had lights which were not dipped. The lorry bumped his car which was pulled to the right. The respondent marked a spot " O " on the plan produced. If this be the spot where his car was at the time then he was well on his correct side.

Police Constable Mohammed Azan, however, said that the point of impact was at a place where there was debris on the road, more to the righthand side of the road. This witness was emphatic in saying that the parties agreed that the debris was the point of impact. The debris was on the right hand side travelling to Lautoka.

The appellant drove lorry 1431 on the night of the collision. His story is that he was proceeding in it towards Lautoka. He had with him one, Mahadeo, and one, Subramani. He says he was two chains from the culvert when he saw the other driver taking the bend on the wrong side and travelling very fast. According to his story the appellant dipped his lights but the respondent did not dip his. The appellant slowed down to 10 miles per hour, he says, but when he got on to the culvert and was passing the car they collided; the respondent's car hitting the rear point of the lorry. The appellant claims he was right against the bank on his left when the collision occurred. The appellant agrees that the position where the debris was was the point of impact, i.e. he agrees that point of impact was as shown by the constable. He said in re-examination, however, that the parties agreed that the point of impact was where the glass lay on the ground but he did not agree with the plan.

The passengers gave evidence for their respective drivers, supporting the stories told by them. The only independent witness was constable Mohammed Azan.

Mr. Kermode for the appellant submitted that the Magistrate's judgment was coloured by the cases of *Baker v. Market Harborough Industrial Co-operative Society Ltd.*, and of *Wallace v. Richards (Leicester) Ltd.*, both reported in (1953) 1 W.L.R. at p. 1472. The former was heard at Leicester Assizes in February, 1953, before *Ormerod, J.*, and the latter at Leicester Assizes in May, 1953, before *Sellers, J.* The plaintiffs were the widows of two lorry drivers killed in a collision when it was still dark on the morning of January 7th, 1952.

In the former case *Ormerod J.* found for the defendants, holding that the plaintiff had failed to prove negligence on the part of Wallace, the driver of the van.

In the latter case, on evidence which was substantially the same as in the former, *Sellers J.* found that both drivers were to blame.

The plaintiff in the first action and the defendant in the second both appealed, and the appeals were heard together.

The decision of the Court of Appeal is set out in the head note which reads:—

> " Where the evidence established that a collision between two motor vehicles proceeding in opposite directions occurred in the centre of a straight road during the hours of darkness, when both drivers were killed, the inference, in the absence of any other evidence enabling the Court to draw a distinction between them, was that each driver was committing almost the same acts of negligence—failing to keep a proper lookout and to drive his vehicle on the correct side of the road—and accordingly both were equally to blame."

Denning, L.J., said:—

> " Even assuming that one of the vehicles was over the centre line, and thus to blame, the absence of any avoiding action by the other vehicle made that vehicle also to blame. Once both were to blame, and there was no means of distinguishing between them, the blame should be cast equally on each."

It is clear that the Magistrate in the present case was from the nature of the evidence faced with a very difficult problem. In effect both plaintiff and respondent, as one would perhaps expect, gave evidence in which each sought to put the whole responsibility on the other. He was bound, however, to come to some decision because of the judgment of the Court of Appeal in *Bray v. Palmer* (1953) 1 W.L.R. at p. 1455. It will be sufficient to quote the head note, which is as follows:—

> " On August 6th, 1951, the plaintiffs, the driver and his pillion passenger, were proceeding upon a motor cycle southward on a main road in daylight. The defendant was driving a motor car northward. Neither party was proceeding at undue speed when they came into head-on collision in the centre of the road. The plaintiffs suffered injuries and in these two actions respectively claimed damages for negligence. The defendant counter-claimed. Each party alleged that the cause of the accident was due to the negligence of the other. *Oliver J.* held that the accident was due solely to the gross negligence of the plaintiff, the driver of the motor cycle, or to that of the defendant, the driver of the motor car.

> On the evidence he did not see his way to holding that both were responsible. He was unable to decide whether the plaintiffs' story or that of the defendant was true and he dismissed the action and counter-claim. The plaintiffs appealed:—Held, that the explanation that both the plaintiff driver of the motor cycle and the defendant driver of the motor car were in some measure to blame for the accident was at least as likely as the explanation that one or other was wholly to blame; that until the Judge had decided that the accident had happened in some particular way, he was not in a position to say that it was not a case in which both were partly to blame; and that there should be a new trial."

It has been suggested by learned Counsel for the appellant that the present case differs from the two cases first cited in that there was an abundance of evidence in the present case on which the Magistrate could come to a decision that the negligence was that of the plaintiff. I do not propose to traverse this evidence—I have already briefly referred to it earlier—but it is quite clear that the Magistrate could not on the evidence of the plaintiff and his witnesses and on the evidence of the defendant and his witnesses alone, decide against one or the other. He, very rightly, in my opinion, believed neither, and based his decision on the evidence of the constable. It has been urged that the evidence of the constable was contradicted. I cannot see that it was contradicted in any material particular, nor was his evidence seriously challenged. It is true that the learned Magistrate did not place much reliance on the plan, but he did accept the oral evidence of the constable as to the point of impact, and having so accepted it, he came to the decision that the defendant " poached on to the wrong side of the road, but not so far that the accident could not have been avoided by proper care on the part of the plaintiff ". In other words, inasmuch as the plaintiff took no avoiding action, this made him also blameworthy.

The learned Magistrate, in my opinion, gave the fullest consideration to the evidence before him and in his judgment fully weighed it in respect of both appellant and respondent and I think he was quite right in concluding that both drivers were negligent. Mr. Kermode has submitted that on the ground of respondent's speed, and the fact that he took no evasive action, the Magistrate should not have held them to be equally culpable. He submitted that if there were negligence on the part of both, it should have been based on a 75/25 basis, that is to say the respondent was 75 per cent to blame.

Mr. Stuart, for the respondent, submitted that the Magistrate found as a fact that both were equally negligent. He submitted that an appellate Court could not disturb a finding of fact by the Court appealed from unless it was clear that the Court had misdirected itself. I cannot hold that in this case the Magistrate misdirected himself in any way as to the evidence.

The Magistrate apportioned damages on a 50/50 basis. As I have said Mr. Kermode contended this was wrong. This question would seem to have been settled by the case of *Ingram v. United Automobile Services Ltd., and Another* [1943] 2. A.E.R. p. 71. In that case the respondent was injured as the result of an accident to an omnibus.

A lorry owned by the first appellants had been left standing near a bend in the road early in the morning while the black-out was still operative and when the road was covered with a sheet of ice. The omnibus in passing the lorry ran into the parapet of a bridge. The Judge found that both appellants were negligent and apportioned the damages as to two-thirds to the owners of the omnibus. The owners of the lorry appealed, alleging that they ought to be absolved from all liability, or, alternatively, that if they had been at all negligent the damages had been wrongly apportioned. The owners of the omnibus cross-appealed, alleging that the other appellants should bear the whole damages.

It was held the Judge was correct in his decision that both appellants had been negligent, and that being so the Court should not interfere with his apportionment of the damages.

I do not, therefore, intend to interfere with the apportionment by the Magistrate.

As I observed earlier, the final figure arrived at by the learned Magistrate is based on a claim by the plaintiff for £231 8s. od. It is conceded by Mr. Stuart that this was an oversight. The amount claimed was £200.

The respondent should have had £100 on his claim and the appellant should have the amount awarded, namely £38 10s. od.

The net result to the plaintiff is therefore £61 10s. od. and the judgment of the learned Magistrate is varied to this extent.

Except as to this the appeal fails, and is dismissed.