**JOHN BANYAN**

*v.*

**SAUKAT ALI**

[COURT OF APPEAL, 1971 (Gould V.P., Marsack J.A., Richmond J.A.), 26th April]

Civil Jurisdiction

*Negligence—collision between motor vehicles—injuries to passenger—right to elect to sue drivers of both or either vehicle—one driver consenting to judgment in action aainst him by other—assessment of as evidence in action by passenger against consenting driver—election by defendant to call no evidence in negligence action—qustion of negligence to be decided by judge as one of fact.*

*Evidence and proof—collision between motor vehicles—evidence of judgment by consent in action by one driver agaist the other—assessment of weight of consent as evidence of negligence in separate action by passenger against driver consenting.*

The appellant, a passenger in a motor vehicle driven by one Jaglal brought an action against the respondent for damages arising out of a collision between that vehicle and a motor vehicle driven by the respondent. At the hearing in the Supreme Court the respondent elected to call no evidence. It was proved as part of the appellant's case that in other proceedings brought by Jaglal against the respondent, the latter had consented to judgment. The appellant's action was dismissed.

*Held:* 1. The appellant, as a passenger, had every right to elect whether to sue Jaglal or the respondent or both.

2. The evidence given in the Supreme Court as to the facts did not discharge the onus of proof of negligence which rested upon the appellant.

3. When the respondent elected to call no evidence the trial judge had to decide the question of negligence as a matter of fact. It could not be said that the judge was wrong when he decided that the entry of the consent judgment did not carry sufficient weight, in conjunction with the other evidence, to establish the appellant's case.

Case referred to :

*Fardon v. Harcourt-Rivington* (1932) 146 L.T. 391; [1932] All E.R. Rep. 81.

Appeal from a judgment of the Supreme Court in an action for damages for negligence.

*R. I. Kapadia* for the appellant.

*R. G. Kermode* for the respondent.

The facts are sufficiently stated in the judgment of Richmond J.A.

26th April 1971

The following judgments were delivered orally:

RICHMOND J.A. :

This is an appeal from a judgment of the Supreme Court in a civil action claiming damages arising out of a motor car accident.

The accident happened about 10.30 a.m. on the 26th February, 1967. The weather was fine and visibility clear. The appellant was a passenger in a car driven by one Jaglal. This car was travelling along Vuci Road towards the Rewa River. The road in the vicinity of the scene of the accident was straight for a distance of about half a mile. There was no other traffic (apart from the respondent's car) and there was no speed restriction on this particular portion of the road. At the same time and place a car driven by the respondent was proceeding in the opposite direction, that is, towards Suva. Jaglal turned to his right across the path of the respondent's oncoming vehicle with the intention of entering a driveway leading to his house.

The learned trial Judge found as a fact that Jaglal's vehicle stalled while he was in the process of making this turn and that when his car was so stalled and stationary it was hit by the respondent's car. The evidence showed quite clearly that Jaglal's car was hit on the left front mudgaurd and door. It necessarily followed, in my opinion, that the car stalled before the front wheels reached the bridge leading across the drain into Jaglal's driveway. A police plan was produced by a detective constable. This plan showed tyre marks made by the respondent's car. These marks were in a straight line and were parallel to the side of the road. The detective constable described these marks in evidence as — "At least 39 feet, defendant had applied his brake hard. Defendant was clearly on his correct side. At least 3 feet from the edge of the road". This means, in my view, that the front of Jaglal's car must have been a foot or so short of the bridge over the drain at the moment of impact.

In evidence the appellant estimated the respondent's car to be some 5 to 6 chains away when Jaglal commenced his turn. In saying this I have not overlooked the submissions which have been made to us by counsel for the appellant, namely that the evidence should be interpreted as relating this estimate of distance to the time when Jaglal's vehicle stalled. For myself, after giving careful consideration to the notes of the evidence given both by the appellant and by Jaglal, I am quite sure that the estimate given by the appellant related, as I have said, to the time when Jaglal commenced his turn. Jaglal himself gave a similar estimate that the respondent was about 5 chains away when he slowed down and turned. Jaglal estimated the respondent's speed at between 45 and 50 miles per hour. The appellant gave no actual estimate of speed but thought that the respondent's car was going "too fast" at a stage where it had almost hit Jaglal's car. The learned Judge found as a fact that excessive speed in all the circumstances was not established by the evidence and I for my part see no reason to disagree with that finding. It was also agreed by counsel that the police plan shows that the width of the roadway at the scene of the accident was approximately 20 feet.

Against that background I turn more particularly to consider whether or not the decision of the learned trial Judge is one with which this Court should interfere. I wish to say at the outset that I entirely accept the legal proposition that the appellant, as a passenger in Jaglal's car, had every right to elect whether he would sue Jaglal or the respondent or both. He, for reasons which no doubt appeared proper ones, elected to sue the respondent only. Having adopted that course he placed

himself in the ordinary position of a plaintiff in a civil action whereby he was under a duty to establish affirmatively, at least on a balance of probability, that the respondent had committed some act of negligence which was a real and effective cause of this accident although, of course, not necessarily the sole effective cause. A

What then does the evidenec establish as against the respondent?

First, it establishes that when he was at a distance of about 100 yards from Jaglal's car, he saw or ought to have seen Jaglal commence a right hand turn. At this point I observe that for myself I can see no reason why the respondent, at that stage, should have foreseen any such risk of accident as would require him to take any particular or special precaution. It appears that Jaglal himself had no feelings of apprehension when he commenced his right hand turn and in my view the evidence does not disclose that the respondent should have been in any greater state of apprehension than was Jaglal. I would accept, in this connection, the test which is referred to in *Bingham's Motor Claims Cases* (5th Edition) at p.2. It is a dictum of Lord Dunedin in *Fardon v. Harcourt-Rivington* (1932) 146 L.T. 391 and is as follows :— B C

> "If the possibility of danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possiblity which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions." D

The next significant point established by the evidence is that the whole time involved from the moment when Jaglal commenced his turn until the impact occurred was approximately 4 to 5 seconds. This can be easily calculated as the distance apart at the time when the turn began with some 300 feet and a speed of 45 to 50 miles an hour is roughly 60 to 70 feet per second. E

The third point is this. When Jaglal reached a point somewhere short of the bridge his engine stalled. I think that such an event was not one which the ordinary reasonable motorist would have foreseen and guarded against. It was quite an unusual and unexpected event. It is important, also, to bear in mind that it was an event of a kind which could take a reasonable motorist an appreciable time to react to. I visualize the effect of the engine stopping as to bring Jaglal's vehicle to a gradual stop. This would not be something nearly as striking from the respondent's point of view as the sudden application of brakes would be. This is important because it means that without any negligence on his part the respondent could well have moved forward a substantial distance, (some 50 feet or so) before, as a reasonable motorist, he was able to take some definite action in the matter. The action which he did take was the vigorous applicaton of his brakes. It is suggested that he should have swerved to his right and passed behind Jaglal's car. As to this suggestion I would point out first of all that a motorist who is suddenly confronted with an unexpected emergency cannot be blamed merely because in the "agony of the moment", as is sometimes called, he followed a course which failed to avoid the accident whereas, looking at the matter with the wisdom of "hindsight" he could have adopted another course which might have avoided the accident. In reacting as he did in a situation of emergency I do not consider that the respondent was guilty of negligence. Further, I am far from satisfied that he could, in any event, have avoided the F G H

accident. I say that because, as I have pointed out, the evidence shows that Jaglal was somewhere short of the bridge at the time when his engine stalled and there could be liittle available roadway between the rear of his vehicle and the respondent's right hand edge of the road.

In my view therefore, the evidence, insofar as I have dealt with it up till now, did not discharge the ordinary onus of proof in a civil action which rested on the appellant in the present case.

There is, however, one other matter in the evidence which was relied on by counsel and that is the evidence as to a consent judgment being entered in other proceedings between Jaglal and the present respondent. I have carefully considered this evidence. In the first place, I am not prepared to assume that the learned Judge did not give consideration to this evidence, particularly as I see that he has made a note of Mr. Kapadia's submission on this point at page 40 of the record. Next, it is to be remembered that in a trial such as this was, before a Judge alone, the Judge is the tribunal of both fact and law. When the present respondent elected to call no evidence the Judge was not then confronted with a situation in which he had to decide, as a matter of law, whether there was any evidence on which he could find negligence. He had to decide the matter as one of fact. In all the circumstances, I do not feel that this Court could properly say that the learned Judge was wrong when he evidently decided that the entry of the consent judgment did not carry sufficient weight, when taken along with all the other evidence, to establish the appellant's case.

Finally, there is one other matter to which I should refer. I have given careful consideration to the various authorities which were cited to the Court by Mr. Kapadia, but I have come to the conclusion that the facts in those cases were substantially different from those with which we are concerned and I have been unable to derive any real assistance from them.

For my own part, and for the reasons which I have endeavoured to express, I would dismiss the appeal.

MARSACK J.A.:

I agree with the opinion expressed by my brother Richmond and with the reasons he has given in support of that opinion. I would, however, like to make one further comment on the subject of the admission of negligence on the part of the respondent which might be implied from his consenting to judgment in the other proceedings against him. In my view, any such implied admission would undoubtedly strengthen the case against the person making it; but it is not in itself conclusive in the absence of other evidence establishing a prima facie case of negligence. As it has not been shown that the Trial Judge was in error in finding no evidence of negligence against the respondent, then the fact that the respondent consented to judgment in other proceedings is not a sufficient basis for a finding of negligence against him in the proceedings now before this Court.

GOULD V.P. :

I am in entire agreement with the two judgments just delivered by my brethren. All members of the court being of the same opinion the appeal is dismissed with costs, which we fix at $60 and disbursements (if any) to be settled by the Registrar.

*Appeal dismissed.*