Privy Council Appeal No. 2 of 1939

Holford Stewart - - - - - - - - - *Appellant*

v.

George Alfred Francis Hancock - - - - - - *Respondent*

FROM

THE COURT OF APPEAL OF NEW ZEALAND

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 5TH APRIL, 1940

Present at the Hearing:

THE LORD CHANCELLOR
(VISCOUNT CALDECOTE).
VISCOUNT SANKEY.
LORD THANKERTON.
LORD RUSSELL OF KILLOWEN.
LORD ROCHE.

[*Delivered by* LORD ROCHE]

This is an appeal *in formâ pauperis* by the appellant, the plaintiff in the action, from a judgment of the Court of Appeal of New Zealand whereby it was ordered that the action be remitted to the Supreme Court at Auckland for judgment to be entered for the respondent, the defendant in the action with costs.

The circumstances giving rise to this appeal were as follows: The appellant, just after midnight on 8th December, 1935, was proceeding on his motor-cycle along a main road leading from Hamilton to Auckland and was riding on his proper side in the direction of Auckland. At this time the defendant's motor-car had come to a standstill on the same side of the road facing in the same direction, that is to say, towards Auckland, showing no rear or other light. His lights had been switched off by the respondent whilst he was stopped. At the same time there was another motor-car stationary in the roadway and showing lights. This car, whilst proceeding from Auckland towards Hamilton, had been hailed to stop by the defendant when his own car was stopped and the driver of this other car, a Mr. Singer, complied with the request so made and brought his car to rest on his side of the road some 30 yards or thereabouts past the defendant's car and on the opposite side of the road. In this situation the appellant on his motor-cycle approached and passed by Mr. Singer's car reducing his speed from about 35 miles per hour to about 25 miles

per hour and when he had passed out of the beams of its lights, saw the loom of the respondent's car, braked and swerved but came into collision with the near side rear mud-guard of the car and sustained injuries.

The action was brought to recover damages for such injuries and was tried before Mr. Justice Fair and a jury on 30th and 31st July, 1936. Evidence was called on the part of the appellant, the plaintiff in the action, and when his case was closed, counsel for the respondent asked for a nonsuit on the ground that upon the evidence thus called and the undisputed facts of the case the appellant was guilty of contributory negligence in (i) failing to keep a proper look-out, (ii) proceeding as he did when dazzled by the lights of another (Mr. Singer's) car, and (iii) proceeding at such a pace as would not enable him to stop in time to avoid anything which might have been on the road. There was no argument upon this submission at the trial but the point was reserved until after verdict for further consideration and argument.

The respondent's counsel then addressed the jury and called evidence. The defendant's explanation of his lights being off was that he switched them off in order to spare his battery whilst he was trying to re-start his car by means of the starting handle and that he forgot to switch them on again. The negligence of the defendant was not admitted on the pleadings and was in issue at the trial.

The learned Judge directed the jury that if it found that the plaintiff had the last opportunity of avoiding the accident and negligently failed to avail himself of it or if he was negligent in any of the respects alleged and such negligence was a proximate cause of the accident, there should be a verdict for the defendant. He also told the jury that if it found that negligence of the defendant was the sole proximate cause of the accident there should be a verdict for the plaintiff. It was not suggested that these directions were not correct in law or were open to any objection on the part of the respondent. The jury returned a verdict for the appellant for damages amounting to £1,259 8s. 2d. Judgment was entered in accordance with the verdict, leave being reserved to move to set aside the judgment.

Pursuant to such leave the Court was moved to set aside the judgment and asked either to enter judgment for the defendant or for a nonsuit on the grounds submitted at the close of the plaintiff's case at the trial or to order a new trial on the ground that the damages were excessive and on the ground that certain evidence given for the appellant had been wrongly admitted.

On 13th October, 1936, the learned Judge gave a considered judgment dismissing the motion. As to the question of nonsuit he held that on the facts it was impossible to say that as a matter of law the appellant was guilty of contributory negligence and that there was evidence fit for consideration by the jury as the judge of fact upon which it could reasonably find that negligence in the appellant was

not established. On the question of the suggested wrongful admission of evidence, a matter that will be discussed in more detail later in this judgment, the learned Judge held that there was no wrongful admission of evidence and in any case there was no miscarriage of justice. The question of amount was dealt with and the verdict and judgment upheld and this matter was not raised upon appeal in New Zealand or before their Lordships.

The respondent appealed to the Court of Appeal of New Zealand and the appeal was heard by Ostler, Smith and Johnston JJ. The appeal was allowed: the Court by a majority (Smith J. dissenting) holding that judgment should have been entered for the respondent on the ground that it was conclusively proved that the proximate cause of the accident was the appellant's own negligence and that the verdict of the jury was so unreasonable as to be perverse. Smith J. took the contrary view on this point and agreed with the learned trial Judge but held that evidence had been wrongly admitted and that a new trial should be had. It was not necessary that the Judges in the majority should express an opinion on this latter point and they did not in fact do so. With this conflict of judicial opinion the appeal came before their Lordships and was carefully and elaborately argued.

On the main point their Lordships are of opinion that the correct view and conclusion was that expressed by the trial Judge and in the dissenting judgment of Smith J. in the Court of Appeal and they approve of the reasoning of those learned Judges.

A number of cases were cited in the Court of Appeal and before their Lordships including cases of collisions by motor vehicles with stationary unlighted objects. Their Lordships are of opinion that no useful purpose would be served by a further discussion of those cases and still less by a consideration of the question of whether any particular one of them was rightly decided on the facts. They agree with the summary of their legal effect presented by Ostler J. The learned Judge, in dealing with the case of *Tidy* v. *Battman*, [1934] 1 K.B. 319 (a judgment of Macnaghten J. approved by the Court of Appeal), read the following passage from the judgment of Macnaghten J.:—

> "At night time the visibility of an unlighted obstruction to a person driving a lighted vehicle along the road must necessarily depend on a variety of facts such as the colour of the obstruction, the background against which it stands and the light coming from other sources. . . . It cannot, I think, be said that where there is an unlighted obstruction in the roadway a careful driver of a motor vehicle is bound to see it in time to avoid it and must therefore be guilty of negligence if he runs into it."

Ostler J. then proceeded:—

> "With that passage I respectfully agree. It might be paraphrased and shortened into a statement that negligence is a question of fact not of law: that each case must depend upon its own facts: and that there is no rule of law which in every case disqualified a motorist from recovering damages where he had run into a stationary unlighted object."

Agreeing as they do with this admirable summary of the law applicable to this case, their Lordships pass to an examination of the facts of this case in more detail and to their reasons for differing from the conclusion of Ostler J. and of Johnston J. that there were no facts in the present case fit for consideration by a jury or of any value so as to justify a verdict for the appellant.

The facts, and in particular those as to weather conditions, are compendiously and correctly summarised in the judgment of Smith J. as follows:—

> "Were, then, the circumstances such that reasonable men might not find that the respondent was not guilty of negligence? The jury had before them the following facts that the appellant's unlit and stationary car occupied 4 feet 6 inches of a bitumen road 20 feet wide. The car was dark in colour. It was not disputed that the bitumen road was of the same colour, and indeed that is common knowledge. There was thus no contrast between the car and the road. There is no exact evidence as to the atmospheric conditions at the place and time of the accident, but there is evidence from which the jury might infer that the conditions of visibility were then and there such that it was not easy for a motorist proceeding normally with good lights to pick up this unlighted obstruction. There is divergent evidence about the state of the moon, whether it was obscured by clouds or not, whether the night was clear or dark. There is evidence from which the jury could conclude that about midnight when the accident took place the moon was five-sixths of its way across the sky. There is also evidence of fog at some distance from the scene of the accident which might indicate to the jury an excess of moisture in the atmosphere. In my opinion, the jury might think that, at the scene of the accident, vision was difficult. For example, after William Arthur Singer's car had passed the appellant's car and had drawn up at a distance of say, 90 feet from the appellant's car, Singer said that when he looked back, he could not see the appellant's car from where he was. Furthermore, the jury might think that conditions existed at or about the scene of the accident in which the lights of a motor-car or motor-cycle were partially absorbed by the bitumen surface. This inference is supported, I think, by the evidence of the occupants of Singer's car which approached the appellant's stationary car from the direction of Auckland. . . . In my opinion, then, the jury were entitled to think that the conditions of visibility were difficult and peculiar when Singer's car approached the appellant's car from the north. They were, I think, entitled to conclude that a similar difficulty existed when the respondent's motor-cycle approached from the south, and to think that the difficulty was greater because the respondent had then to contend with the headlights of Singer's car which had its front wheels turned slightly at an angle, ready to go back on the road, and as a consequence had its headlamps showing at a slight angle across the road."

Some suggestion was made in argument that the appellant must have had a light less powerful than was required by the regulations in force, but it became manifest that no such case could be made and that the real point was whether the appellant was or was not keeping a proper look out. As was pointed out by Smith J. no allegation complaining of the appellant's light was made in the pleadings and the point was abandoned below. The appellant gave evidence as to his look-out and observation of the road. The salient features of the evidence were: that the appellant on

approaching the two cars in question justifiably concluded that the only car on the road was Singer's car and that but for it the road was clear. As to other objects such as possible foot passengers it is to be observed that the road was a country road and the time after midnight. Under such circumstances the appellant said he reduced his speed and approached Singer's car and when he appreciated it was stationary directed his attention to that car: that though he was not dazzled by the lights of Singer's car, which were dipped, there was a slight blinding effect from them. He spoke to the facts already mentioned in this judgment as to the coloration of the road and of the respondent's car and as to the distance at which he picked it up and the action he took to avert a collision. Their Lordships agree with the opinion of Smith J. thus expressed:—

> " In my opinion, the jury might infer from this evidence not only that the respondent glanced towards Singer's car because he thought he had had engine trouble but also that the respondent would look towards Singer's car after slowing down because he thought people might step out from behind Singer's car and that he did so look after passing Singer's car, because when he ' looked back,' the unlighted car was looming ahead about 20-30 feet away. The lights of Singer's car had a slight blinding effect at the moment of passing but the jury might infer, I think, that during the operation of the blinding effect, the respondent would have covered some part of the distance between Singer's car and the appellant's. Under these circumstances and those affecting the illumination of the road, the jury might conclude, reasonably, I think, that the respondent was exposed to a special hazard in the first place in meeting at night on a main highway in the country a stationary car (*a*) with lights showing across the road and causing a slight blindness as he passed it, (*b*) under such circumstances that it properly required some attention after the cyclist had recovered his sight and (*c*) under such circumstances that he was induced to move further over to his left; and, in the second place, in being thus brought more into direct line with an unlit stationary car only 90 feet away from Singer's car which was not shown up by the light of his cycle before his attention was engaged by Singer's car and which, as the jury might think, was only 20-30 feet away from respondent when he again looked ahead after looking to the rear of Singer's car to see if people might step out there."

The question, it need hardly be said, is not whether their Lordships would have arrived at the same conclusion as the jury arrived at after seeing and hearing the witnesses, but whether the jury arrived at an unreasonable conclusion or one unsupported by evidence fit for their consideration. As to this their Lordships hold a clear opinion that there was proper and ample evidence before the jury that the appellant, whilst dealing with a situation of some difficulty, created by the respondent himself, and whilst keeping a good look-out, properly attended for a sufficient time to an element of possible danger, namely, Mr. Singer's car, to account for the fact that he did not see the respondent's unlit car quite in time to avert the consequences of its naturally unexpected presence. With regard to the appellant's speed: it was contended that this was excessive and that he should have stopped if he could not see. This was a consideration which no doubt was urged by counsel

in addressing the jury and was no doubt considered by the jury, but having regard in particular to the fact that so far as all appearances and observation could show there was no car but Singer's car to be considered, it seems to their Lordships to be impossible to hold that the jury was bound to find negligence in this regard.

For these reasons their Lordships hold that the Court of Appeal was wrong in directing that judgment should be entered for the respondent.

There remains to be considered the other question of the alleged wrongful admission of evidence as affording ground for an order for a new trial. The facts and the ruling of the learned trial Judge are thus stated in his judgment upon further consideration:—

> " The next ground upon which a new trial was sought was that Counsel for the Plaintiff led evidence early in the hearing as to an admission made by Miss Vincent a passenger in the Defendant's car after the collision as to the Defendant's responsibility as follows:—' Q.: Was anything said by you to the people there?—I said to a young lady present: " Where are your lights? " Q.: Was anything said in reply to that?—She said: " This is our fault entirely and we will take care of everything." (Mr. Towle objects.) '
>
> Counsel for the Plaintiff when this evidence was led assumed that he could prove that the Defendant was within hearing when the admission was made and stated that he had two witnesses who could depose of this fact. I ruled that its admissibility was dependent on it being shown to have been made in his hearing. It subsequently appeared however that this could not be shown. There was no evidence that Miss Vincent had authority to make such an admission. She herself denied having made it.
>
> In order that this may be a ground for a new trial it should appear that some substantial wrong or miscarriage of justice was occasioned to the Defendant by this evidence: r. 277 of the Code of Civil Procedure. I do not think that this can be said. The negligence of the Defendant is not now seriously contested. The only questions requiring detailed consideration by the jury were those as to the contributory negligence of the Plaintiff. In some circumstances the evidence complained of might have had a material effect upon the view taken by the jury of the facts. But in the present case the jury was well aware from the evidence the conduct of the case the addresses of Counsel and the summing-up that the real question was as to the Plaintiff's contributory negligence. The members of the jury would also be aware that the opinion of Miss Vincent (if it had been given as deposed to by the Plaintiff) was entitled to little or no weight on that question and that it must be determined on the facts presented in evidence before it.
>
> Moreover although this evidence was heard by the jury it was ruled to be inadmissible upon the facts as they emerged. Counsel might have dealt with this matter in his address or asked that it be dealt with in the summing-up. Possibly it was thought that a reference to its inadmissibility might lead to its being brought prominently before the jury and neither course was followed. Under these circumstances I do not think it can now be said that the evidence was improperly admitted or that any substantial wrong or miscarriage was caused."

On these facts their Lordships in this respect find themselves in agreement with the trial Judge and in disagreement with the contrary opinion expressed by Smith J. in the Court of

Appeal, and are of opinion that there was no admission of the evidence complained of, that when it was conditionally taken subject to proof of other matters there was a sufficient direction that unless those conditions were fulfilled it was not evidence in the case and that having regard to the course of the trial the learned trial Judge was not wrong and was probably wise in not again reminding the jury of matters which counsel in their concluding speeches had thought it right to ignore. In any event their Lordships are of opinion that no substantial wrong or miscarriage of justice can in these circumstances be said to have occurred.

Their Lordships will accordingly humbly advise His Majesty that the appeal should be allowed with such costs as are proper in a case of an appeal to His Majesty in Council *in formâ pauperis* and that the judgment for the appellant for the sum of £1,259 8s. 2d. and costs should be restored and that the appellant should have the costs of the appeal to the Court of Appeal.

(23313) Wt. 8017—49 90 4/40 P. St. G. 338

In the Privy Council

HOLFORD STEWART

v.

GEORGE ALFRED FRANCIS HANCOCK

DELIVERED BY LORD ROCHE

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