1939 *Present* : **de Kretser J.**

FERNANDO *v.* F.ODE.

228—C. R. Colombo, 38,457.

Action for damages—Motor car collision—Negligence of defendant—Contributory negligence of plaintiff—Burden of proof.

The plaintiff was driving her car slowly along the Galle Face Centre road intending to find a convenient spot at which to park her car on the Galle Face green. Noticing that another car was preparing to leave, she passed that car and halted about two yards away, in order to move into the vacant place.

When the car moved away, she looked behind in order to make sure that she would not reverse into an incoming car and saw the defendant driving his car behind her. The defendant was not looking ahead at her but across the green. She did not sound her horn to attract his attention with the result that there was a collision.

***Held*, that the defendant was guilty of negligence and that the burden of proving contributory negligence on the part of the plaintiff was on the defendant.**

THE plaintiff sued the defendant to recover damages caused to her car by reason of a collision between her car and the car of the defendant, which was alleged to be due to the defendant's negligence. The defendant denied that he was negligent and pleaded that the collision was caused by the negligence of the plaintiff and that, even if there was negligence on his part, the plaintiff was guilty of contributory negligence and that therefore he was absolved from the liability to pay damages.

The Commissioner of Requests gave judgment for the plaintiff.

S. de Zoysa for defendant, appellant.—There has been negligence on the defendant's part, but the plaintiff has also been negligent and such negligence has been a contributory cause of the accident.

On the evidence, the plaintiff who anticipated the collision, could have averted it either by moving her car forward or by drawing the attention of the defendant to the danger by sounding her horn. She did neither. This is contributory negligence.

The plaintiff, seeing defendant's negligence, was not entitled to cast the entire burden on defendant and neglect to do what she could have done to avoid the consequences of defendant's negligence. (*Robinson v. Henderson*[1].)

[1] *(1928) S. A. L. R. App. Div. p. 138.*

Plaintiff cannot in this case plead that she was thrown into a state of imminent danger by the conduct of defendant and excuse her negligence on the footing of the ruling in *Thornton v. Fismer*[1]. The evidence shows she was not perturbed and had ample opportunity of calm and proper action.

E. B. Wikremanayake, for plaintiff, respondent.—There is no appeal from the facts in this case. The question of negligence is a question of fact and the finding is that the plaintiff was not negligent. Even if the plaintiff had been negligent she can still recover unless she had the last opportunity of avoiding the accident. The defendant has not given evidence and there is no evidence that in spite of his original negligence he could have avoided the accident if the plaintiff had been careful. (*Perera v. United Planters Company*[2].) Plaintiff's failure to do the right thing in an emergency does not exculpate the defendant. (*Thornton v. Fismer* (*supra*).)

Cur. adv. vult.

April 4, 1939. DE KRETSER J.—

In this case the plaintiff sues the defendant to recover damages which were caused to her car by reason of a collision between her car and the car of the defendant, which collision she alleges was due to the defendant's negligence.

The defendant denied that he was negligent, denied the extent of the damage, and said that the collision was due to the negligence of the plaintiff and that, if there was negligence on his part, plaintiff was guilty of contributory negligence and that therefore he was absolved from the responsibility to pay damages.

Neither party averred what the negligence of the other consisted in, and the issues framed at the trial did not carry the matter further.

At the conclusion of the plaintiff's case no evidence was called for the defence and the defendant's Counsel stated then, as he did at the appeal, that he would take the facts as deposed to by the plaintiff and her witness.

The facts then are as follows:—The plaintiff was driving her car slowly along the Galle Face Centre road on a Sunday afternoon when the green is lined with the cars of many people. She was intending to find a convenient spot at which to park her car.

She noticed another car preparing to go away, so she passed that car and halted about two yards away in order to move into the vacancy which would be caused. She says she stopped her car for about three minutes. On that car moving away, she looked behind, presumably in order to make sure that she would not reverse into some oncoming car, and she then noticed the defendant driving a big two-seater behind her. It may be here stated that both of them were on the correct side of the road, and that she stated that he was moving slowly.

She noticed at the time that he was not looking ahead at her, but across the green towards the hotel. She estimates the distance between them as being 15 to 20 yards. Her witness estimated it to be 20 to 25 yards. The plaintiff states she realized that if the defendant continued to drive with his head turned away, he might bang against her car, but she states

[1] (*1928*) *S. A. L. R. App. Div. p. 398.*

[2] *4 N. L. R. 140.*

that she did not anticipate that he would bang into her, because she expected him to look ahead. She did, however, remark light-heartedly, "It looks as if he is going to bang against us."

She says her engine was working and that she could have moved forward if she had been in gear. She did not sound her horn to attract his attention, and admits that if she did she may have attracted his attention. She added that she did not think it necessary to move forward and she concluded her cross-examination by saying that she did not stop her car suddenly, which indicates that the defendant's position was that the collision was due to her stopping the car suddenly. If that had been so the defendant was far too close up to the plaintiff's car and would have been guilty of negligence.

Plaintiff's witness stated that she was not alarmed because the defendant had ample time to stop and he could have avoided the collision either by stopping his car or passing on the side of plaintiff's car.

On this statement of facts it is quite clear that the defendant was guilty of negligence—gross negligence I should call it, for no one has a right to drive a highly powered vehicle like a motor car with his attention absorbed in something across the way, and much less has he a right to do so on the Galle Face Centre road on a Sunday afternoon. The plaintiff therefore has proved her case and it is not required of her that she should prove that she was not negligent.

The next question is whether the defendant has succeeded in proving that the plaintiff was guilty of contributory negligence. There the *onus* is on the defendant and the defendant has chosen to rest his case merely on such facts as he was able to elicit in cross-examination.

If the plaintiff has made clear admissions, then, of course, the defendant can act on them. Now, the negligence which the defendant alleges consists in the plaintiff not sounding her horn so as to attract his attention, and in a minor degree he alleges that she might have moved away instead of remaining stationary. The plaintiff's reply to this is that she expected the defendant to act in a reasonable way and not to keep looking away from the road. But that is only saying that he was negligent and "if", as Solomon C.J. remarked in *Robinson Bros. v. Henderson*[1], "every driver of a motor car were a reasonable man, there would be few accidents; it is against the careless and reckless driver that one has to be on one's guard . . . . He (plaintiff) would have realized in ample time that . . . . there was danger of a collision. His duty then was to avoid the consequences of the defendant's negligence." He referred to a Judgment of Innes C. J., in the case of *Solomon and another v. Mussett & Bright, Ltd.*[2], who said, "So soon as it would be evident to a reasonable man that there is danger of an accident, arising from the inability, refusal, or neglect of the wrongdoer to give way, then the rightful user of the road is bound to take all reasonable steps to avoid an accident."

Plaintiff admits she realized the danger, in fact she commented on it, but she was light-hearted enough to hope that the worst would not happen. If she had sounded her horn, she may not have attracted the defendant's attention, but at least she would not have been guilty of

[1] *(1928) S. A. L. R. App. Div. p. 138.*

[2] *(1926) A. D. at p. 433.*

negligence. As to whether she could have moved forward, the evidence is doubtful, for her evidence suggests that her car was not in gear, and one has to realize that whatever happened, happened almost in an instant.

I think the plaintiff ought to have sounded her horn. In the case of *Thornton and another v. Fismer*[1], Solomon C.J. explained his earlier judgment and said he meant that while a person might assume that the other driver would act reasonably, it was still his duty to be vigilant and to try to avoid an accident in case the driver of the other car should be careless or reckless. Turning to the case he was then dealing with, which has some similarity to the present case, he stated that the plaintiffs were entitled to assume that the driver would act reasonably, that he would see and avoid them, but that would not justify them in taking no further notice of the car, and their duty was to try and avoid an accident. He went on to assume that the offending driver was not known to be looking away and therefore the conduct of the plaintiffs would be reasonable in assuming that he would avoid them, but he added significantly that if there was something to indicate to them that he was ignorant of their presence, as for example, if they could observe that he was looking in another direction, then they would not be acting reasonably in so assuming.

Primâ facie therefore the defendant has proved that plaintiff was guilty of some negligence, and we must take the case on that footing, though I rather feel that plaintiff's alleged light-heartedness was not only unreasonable but was really something in the nature of an after-thought, and that the interval of time was so short that she had really no time either to think or to act

Assuming, now, that negligence on the part of the plaintiff has been proved, the next thing the defendant has to prove is that that negligence contributed to the accident.

Beven on Negligence (*vol. I., 1928 ed., at p. 169*) deals with the question as to what amount of negligence disentitles a plaintiff to recover, a question which arose in the case of *Tuff v. Warman*. Cockburn C. J. said, "The true question in these cases is, whether the damage having been occasioned by the negligence of the defendant, the negligence of the plaintiff has directly contributed to it". Wightman J. said, *inter alia*, "Mere negligence or want of ordinary care or caution would not, however, disentitle him to recover, unless it were such, that, but for that negligence or want of ordinary care and caution the misfortune would not have happened; nor, if the defendant might, by the exercise of care on his part, have avoided the consequences of the neglect or carelessness of the plaintiff."

Here we have a good illustration of the risk which a defendant takes when he does not go into the box to prove his allegation of contributory negligence, a risk which is alluded to in the next books on the subject. It is rarely that evidence elicited in cross-examination is free from doubt and is sufficient for the defendant to be able to say that he has discharged the *onus* which lay upon him.

[1] *(1928) S. A. L. R. A.pp. Div. p. 398.*

In the present case we have no evidence telling us what the defendant was looking at, what the degree of fascination was, when he began to look at it, and at what time he turned his attention to the road and found the plaintiff's car in front of him. We have no evidence as to the rate at which the defendant was moving. Plaintiff said he was moving slowly, but that is a relative term. We have no idea of the distance between the two cars when the plaintiff first saw him—a statement by plaintiff's witness can scarcely be taken as an admission by her, and what is the admission in the plaintiff's evidence? Is it 15 yards or 20 yards, or something between?

Counsel for the defendant stressed the statement by the plaintiff's witness that if defendant's attention was drawn to the fact that they were ahead, he could have easily stopped, but here the witness was merely saying that if he did turn his attention to the road, he could have stopped, and she was referring to the place he was first seen to be at; it was later that she passed on to the question of the sounding of the horn.

There is then the further fact that while a person might make a remark simultaneously with seeing a car behind her, to sound her horn would take even a very small amount of time. The question therefore is whether, even if plaintiff had sounded her horn, defendant would have been able to avoid a collision. When there is further the fact to be considered that he might be so absorbed in something as to belong to the class of persons who have ears but hear not, the doubt becomes greater as to whether plaintiff's negligence might be taken to be the ultimate cause of the collision.

The *onus* is on the defendant and in a case of doubt the defence must fail. That means that the appeal too fails and must be dismissed with costs.

Appeal dismissed.