*Present:* Fisher C.J. and Jayewardene A.J. 1928

COARD *v.* BECKER.

*34—D. C. Colombo, 20,189.*

*Action for damages—Motor collision—Contributory negligence—Evidence available, not produced—Evidence Ordinance, s. 114.*

The plaintiff's car in coming up from a cross road to the main road had completed the turn, when it came into collision with the defendant's car, which was proceeding along the main road on the wrong side.

*Held*, that the defendant was liable in damages irrespective of the question whether there was any contributory negligence on the part of the plaintiff.

Where a party does not call evidence, which he might produce, it is a fair inference that such evidence, if produced, would be unfavourable to him.

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the judgment of the Chief Justice.

*Garvin*, for plaintiff, appellant.

*F. H. B. Koch*, for defendant, respondent.

July 2, 1928. FISHER C.J.—

The main question which we have to decide in this case is whether on the evidence the learned Judge should have found for the plaintiff-appellant. The evidence of the plaintiff and his wife is not called in question as regards its honesty, and it is not a case of the learned trial Judge having been in a better position, than is this Court, to judge of the weight of the evidence by reason of the fact that he saw these witnesses and observed their demeanour. Their evidence is free from any attempt to exaggerate and it bears the impress of truth and, in my opinion, the salient facts which it is necessary for us to consider and act upon have been established by it. On the other hand the absence of evidence on behalf of the defendant which might have been put before the Court is a factor which, in my opinion, has an important bearing on the case. Illustration (*g*), section 114, of the Evidence Ordinance provides that "The Court may presume . . . . (*g*) That evidence which could be and is not produced, would if produced be unfavourable to the person who withholds it." The evidence in question is that of the lady who was in the car with the defendant at the time the accident happened, to whom he was subsequently married. She was apparently quite uninjured by the accident and it is obvious that the defendant could have had her evidence put before the Court,

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and his not having done so leaves me to draw the inference that it would have been unfavourable to him. There was moreover some indication in the evidence of the defendant himself that such an inference is correct. In reply to a question put by Mr. Garvin, the plaintiff's counsel, he said that he was aware according to his wife's account that he " had bright head-lights and they were very good ones and threw a beam of fifty yards," but he said that was not correct.

The decisive questions are whether the defendant was driving on the right hand side of the road when he should have been on the left, and if he was, whether there was any excuse for his so doing. The defendant clearly was not proceeding on the left side of the road. He said in cross-examination " If I was keeping on to the left side of the road nothing would have happened probably ", and the learned Judge finds that driving as he was on the crown of the road, which at that particular spot is not the centre of the road " more to the right of the road than to the middle of it " he was encroaching to some extent on the right side of the road. The learned Judge says " It is clear that the defendant did not expect to see another car in front of him, and this could only have happened by plaintiff's car turning into the road at a spot where the defendant did not expect any car. Plaintiff himself is not likely to have turned into the high road if he realized that another car was approaching from the side of the Fort, and I conclude that he took the turn because he did not know that another car was coming. Considering all the circumstances I come to the conclusion that the collision cannot be attributed to the negligence either of the plaintiff or of the defendant. Both parties might have been considered negligent if such an accident took place in the day time, but at 12.30 A.M. they were both entitled to expect the road to be free from traffic." I do not think that the learned Judge can have intended to lay down as an absolute proposition that at 12.30 A.M. a person driving a motor car on a main road into which many side roads emerge is entitled to assume that no vehicle will come from a side road, and that a person coming on to the main road is entitled to assume that the main road is free from traffic. The learned Judge proceeds " I therefore hold on the 1st issue against the plaintiff. With regard to the 2nd issue the fact that he turned into the road without taking sufficient precaution is I think sufficient material for me to conclude that he had been guilty of contributory negligence, but the question does not really arise in view of my finding on the 1st issue." In the absence of any finding that there had been negligence on the part of the defendant the finding of negligence on the part of the plaintiff on the 2nd issue would constitute not contributory but substantive negligence. The nett result of the findings is that the only negligence in the whole occurrence was that of the plaintiff in

that " he turned into the road without taking sufficient precaution ". However, the learned Judge was of opinion that the plaintiff was not likely to have turned into the main road had he realized that another car was approaching and that he was entitled to expect the road to be free from traffic at that hour, he found that the collision could not be attributed to the plaintiff and he did not give judgment for the defendant on his claim in reconvention. But in my opinion the finding that the plaintiff did not take sufficient precaution is not warranted by the evidence. I think the evidence shows that the plaintiff came on to the main road knowing that a motor car was coming from the direction of the Fort, for I think that the evidence of the plaintiff and of his wife as to seeing lights cannot be rejected, and that having given due warning of his being about to come on to the main road he calculated, and rightly calculated, that the on-coming car was at a sufficient distance from the junction to enable him to take his proper place on the main road, and that the defendant, being on the right side of the road to a considerable extent at all events, persisted in remaining there after he became subject to the duty imposed on him with regard to traffic coming from the opposite direction. Taking the evidence of the plaintiff that his car was at a standstill when he was run into to be true, and adding to it that a considerably heavier car than his ran into him at the rate of something like 20 miles an hour, the position of the cars opposite to the exit from the side road cannot be said to be inconsistent with the plaintiff's evidence. That being so, and having regard to the presumption arising under section 114 of the Evidence Ordinance, I think there is no room for any other deduction from the evidence than that the collision was due to the negligence of the defendant in persisting in keeping on the right side of the road after he was aware or ought to have become aware that the plaintiff's car was approaching. I would therefore allow the appeal and set aside the judgment of the learned Judge. As regards the amount of damages, this has not been adjudicated upon, but in order to obviate the necessity for sending the case back it has been agreed between the parties that the amount of damages payable to the plaintiff should be Rs. 800.

Judgment therefore will be entered for the plaintiff for Rs. 800. together with the costs of hearing in the District Court and of this appeal.

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I am inclined to accept the evidence of the plaintiff and his wife that their car had completed the turn and gone some yards towards Colombo when the collision took place. The position of the plaintiff's car after the accident on the Fort side of Ridgeway place and the defendant's admission that he must have dragged the

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plaintiff's car two or three yards support this view. The plaintiff's statement to the Police that night corroborates his later evidence. Soon after the collision when it was evident that the defendant was on the wrong side of the road, he apologised to plaintiff's wife and said it was a very bad skid, meaning, as I take it, that he got on to that side as the result of a skid.

The defendant's wife was in his car at the time of the collision, but has not been called, and the Court may assume that her evidence would not be favourable to him. (*Section 114 of Evidence Act and Ameer Ali 716.*)

In *Sooriah Row v. Cotaghery Boochiah* [1] where a witness who from his situation must have been well acquainted with the subject-matter was not called, the Privy Council held that everything is to be presumed against a party keeping his adversary out of possession of such evidence. Again, in *Rajah N. Singh Deo v. Ramanoograh Roy & others*,[2] it was held that the inference not unfairly to be drawn from the conduct of the plaintiff in not calling witnesses whom he had cited was that those witnesses would have deposed to a state of facts exactly as set up in the defendant's answer.

Section 57 of the Evidence Act provides that the Court shall take judicial notice of the rule of the road on land or sea. The custom or rule of the road on land in England, which is followed here, is that horses and carriages (including motor cars) should respectively keep on the near or left side of the road, except in passing from behind, when they keep to the right. (*Taylor on Evidence, s. 5,* and *Ameer Ali's Evidence Act, 5th ed., p. 448.*) Our Motor By-laws are to the same effect.

Every person driving a car is required when meeting any carriage, horse, or cattle to keep his car on the left or near side of the road. (*Motor By-laws No. 26 under s. 22 of Ordinance No. 4 of 1916.*)

The defendant has not stated why he was violating the rule of the road. He has had to admit that nothing would probably have happened if he kept to the left.

Though the rule of the road is not to be adhered to, if by departing from it, an injury can be avoided, yet where parties meet on the sudden and an injury results the party on the wrong side should be held answerable, unless it appears clearly that the party on the right had ample means and opportunity to prevent it. (*Chaplin v. Hawes.*[3])

The second issue was whether the plaintiff was guilty of contributory negligence. In one place the learned Judge holds that the plaintiff was negligent and had contravened the Municipal by-law requiring the driver of a car coming out of a side road to come slowly and if necessary to pull up his car, and not to turn in till

[1] *2 Moo 1 A. 114, 126 (1838).* [2] *7 W. R. 29, 30 (1867) (Indian).*
[3] *(1828) 3 C. & P. 554 N. P.*

he had made room for traffic on the main road. But in my view, even if the plaintiff had been negligent in turning on to the main road, the courses of the two cars would not have crossed and there would have been no collision if the defendant had not subsequently continued on the wrong side of the road.

In *Admiralty Commissioners v. S. S. Volute*,[1] Lord Birkenhead in a judgment, which Viscount Finlay regarded as a great and permanent contribution to the law of contributory negligence and to the science of jurisprudence, applied the following principle:—

> "In all cases of damage by collision on land or sea, there are three ways in which the question of contributory negligence may arise. A is suing for damage thereby received. He was negligent, but his negligence had brought about a state of things in which there would have been no damages if B had not been subsequently and severably negligent. A recovers in full."

That seems to me completely to fit the situation of the plaintiff, even if we assume that he had contravened the Municipal by-law, as I do not think he had.

In *Spaight v. Tedcastle*,[2] Lord Selborne said:—

> "When the direct and immediate cause of damage is clearly proved to be the fault of the defendant, contributory negligence by the plaintiffs cannot be established merely by showing that, if those in charge of the ship had in some earlier stage of navigation taken a course, or exercised a control over the course taken by the tug, which they did not actually take or exercise, a different situation would have resulted, in which the same danger might not have occurred. Such an omission ought not to be regarded as contributory negligence if it might in the circumstances which actually happened have been unattended with danger but for the defendant's fault, and if it had no proper connection as a cause with the damage which followed as its effect."

The same principle was adopted and followed in *Anglo-Newfoundland Co. v. Pacific Steam Navigation Co.*[3] According to Lord O'Brien C.J. the test is whether the defendant's negligence was the real, direct and effective cause of the misfortune. (*Batterby v. Drogheda Corporation.*[4])

It appears to me that the defendant was wholly at fault. I agree to the order of my Lord, the Chief Justice.

*Appeal allowed.*

[1] *(1922) 1 A. C. 129, 136.*
[2] *(1881) 6 App. Cas. 217, 219.*
[3] *(1924) A. C. 406, 420.*
[4] *(1907) 2 I. R. 134—(21 Hals. 447).*