Privy Council Appeal No. 31 *of* 1931.

Raymond Lincoln - - - - - - - - *Appellant*

v.

Mrs. Alice Poupinel de Valencé, the widow of Louis le Breton - *Respondent*

FROM

THE SUPREME COURT OF MAURITIUS.

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 16TH FEBRUARY, 1932.

Present at the Hearing:

LORD BLANESBURGH.
LORD RUSSELL OF KILLOWEN.
LORD MACMILLAN.

[*Delivered by* LORD MACMILLAN.]

Their Lordships on this occasion find themselves in the unusual position of being the first Court of Appeal from the trial tribunal. Any disadvantage, however, which might otherwise have arisen from the absence of any intermediate review is compensated by the fact that the Court of first instance was composed of three Judges of the Supreme Court of Mauritius, at whose hands the case has manifestly received prolonged and careful consideration.

The action is one of damages for personal injuries sustained by the plaintiff in a motor accident, such as is commonly tried in this country by a Judge and jury, and resulted in a unanimous judgment for the defendant. Inasmuch as the appeal is not from the verdict of a jury, their Lordships have conceived it to be their duty to review the whole case on its merits and not merely to consider whether there was evidence before the Court below on which the judgment pronounced could proceed. At the same time, in a case such as this, in which the issues are entirely confined to questions of fact and credibility, their Lordships recognise that the Judges in Mauritius, who not only saw and heard the witnesses, but also twice viewed the locus of the

accident, possessed advantages in weighing the evidence which are denied to their Lordships.

The accident occurred about 5.30 in the afternoon of the 25th December, 1928, in broad daylight, in the Rue Royale, an important thoroughfare in Port Louis, at a spot close to the entrance to the house and grounds of a Mr. d'Unienville. The road is here on a rising gradient from the direction of L'Eau Coulée towards the Curepipe Road Station, and is about 27½ feet broad, with a ditch on each side, and apparently no regular footpath on either side. The entrance to Mr. d'Unienville's house and grounds is by a drive leading off at right angles from the road on the left side as it ascends, and the ditch is at this point covered over in order to give access for foot passengers and vehicles to his premises. The church of Ste. Hélène is on the same side of the road as Mr. d'Unienville's property, about fifty or sixty yards away in the downhill direction.

On the occasion of the accident the plaintiff was proceeding up the road on a motor-bicycle towards Curepipe Road Station on his own, the left-hand side of the road. The defendant's motor-car was being driven by the defendant's chauffeur, who was its sole occupant, in the opposite direction and was on its way to Mr. d'Unienville's house.

The plaintiff alleges that the defendant's chauffeur so negligently managed and drove his motor-car that it collided with the plaintiff's motor-bicycle, with the result that the plaintiff and his motor-bicycle were thrown into the ditch and the plaintiff so seriously injured that his right leg had to be amputated. He avers in his statement of claim that "the negligence of the defendant's chauffeur consisted in driving the said motor-car at a speed and in a manner dangerous to the public, having regard to the nature, condition and use of the highway, and in turning the said motor-car without warning and suddenly across the said highway towards the entrance to the drive of an adjoining house, when the said motor-car collided with the said motor-cycle." The defendant denies that the accident was due to the negligence of her chauffeur and avers that the collision was the direct result of the plaintiff's reckless driving of his motor-cycle at an excessive speed, that her chauffeur did all he could to avoid the accident, and that the plaintiff was alone to blame.

The plaintiff gave evidence which conformed generally with the allegations in his statement of claim. He said that he was proceeding up the Rue Royale at a normal speed on the extreme left of the roadway and was near the church of Ste. Hélène when he observed the defendant's motor-car approaching from the opposite direction. It was then abreast of the entrance to Mr. d'Unienville's house. As he had, he said, a perfectly clear course in front of him he continued on his way till he had got almost past Mr. d'Unienville's entrance, when the defendant's motor-car turned "*brusquement et rapidement*" across the road,

with the result that the plaintiff's motor-cycle collided with it about four feet from the ditch. Up to the moment when the motor-car suddenly turned upon him he had no warning and saw no indication that it was going to cross over to Mr. d'Unienville's entrance. When he saw it, it was parallel with the direction of the road, and if it had started across the road before he came up he would have noticed it. If he had seen it slanting across to enter Mr. d'Unienville's drive he could probably have passed behind it if it had not suddenly turned upon him. The plaintiff is not able to say whether before the collision the motor-car had stopped on the other side of the road before turning across. It may be added that the plaintiff in his evidence made a point of the clearness and accuracy of his recollection of the events immediately preceding the collision. He had also, as the Acting Chief Judge Nairac points out, the unusual advantage, owing to the course which the proceedings took, of being afforded an opportunity of adding to or correcting his evidence after it was first given.

Such being the account of the facts put forward by the plaintiff in the Court below and adhered to by him in his printed case to this Board, it is manifest that were it accepted he would be well on the way to establishing his claim. Unfortunately for him, the Judges in Mauritius unanimously rejected his story, and when the appeal was opened at their Lordships' bar the plaintiff's Counsel candidly admitted that he could not rely on his client's account of the matter. This circumstance of itself would in the ordinary case be enough to justify the dismissal of the appeal, for, the burden of proof being upon the plaintiff, if he is unsuccessful in proving the case which both in averment and in evidence he sets out to make, he must inevitably fail. Mr. Doughty, however, submitted on his client's behalf that, accepting in almost all material respects the very different account of the facts which the Judges below found proved and praying in aid portions of the evidence of the defendant's chauffeur, he was still entitled to succeed, as on this different presentment of the facts he was still able to show that the defendant's chauffeur had been guilty of negligence. Their Lordships heard counsel's argument in full, but they must observe that they cannot lend any countenance to the view that a plaintiff is entitled to throw over the case of negligence which he has alleged and spoken to in evidence and then ask their Lordships to find negligence established on a quite different *species facti*. To permit this might work grave injustice to a defendant who had properly directed his evidence to the case which he had been told he had to meet. This is illustrated in the present instance by the fact that neither in the evidence nor in the judgments below was attention directed to the elucidation of the case as now presented at their Lordships' bar, and matters are left uncertain which would doubtless have been cleared up had the case now sought to be made been advanced

below. It is true that the story told by the defendant's chauffeur also failed to find acceptance at the hands of the Judges, and their Lordships had the remarkable experience of hearing Counsel on each side declining to rely upon the testimony of his leading witness. But the circumstance that the evidence of the two participants in the accident, the plaintiff and the defendant's chauffeur, has not been accepted by the Judges who heard the case, and is not put forward by either side before their Lordships as reliable, certainly does not advance the appellant's case or entitle him to avail himself of coincidences in their inaccuracies.

Fortunately, in the interests of truth, the Court in Mauritius had the advantage of hearing the testimony of two independent eye-witnesses of the accident, whose evidence the Court accepted and whose account of the matter their Lordships are satisfied is accurate.

One of these witnesses is Mr. Houdet, who with his wife and two daughters was on his way up the road from the church. He says that a little before he reached Mr. d'Unienville's entrance he saw a motor-car coming in the opposite direction and heard the chauffeur sound his horn and saw him make a signal by holding out his arm. As he saw that the car was about to enter Mr. d'Unienville's drive he and his family stopped, and the chauffeur observing them brought his car to a stand to allow them to pass. " I am certain," he says, " that when I crossed Mr. d'Unienville's entrance the car had already slanted across and had stopped in an oblique position relatively to Mr. d'Unienville's entrance. The distance between the outer edge of the culvert at Mr. d'Unienville's and the place where the car was standing was about five to seven feet ; the distance could not have been more as we had to pass in Indian file."

The other independent eye-witness was Mr. Le Même, who at the time of the accident was walking up the road on the opposite side ; that is, on the side on which the defendant's car approached. His evidence is not so precise as that of Mr. Houdet, but he speaks to seeing the defendant's motor-car turning slowly to its right to enter Mr. d'Unienville's drive before the accident occurred. He is not sure, but is " under the impression that the car had practically stopped to let some people go by." " The car," he says, " looked stationary at the moment when it was making the curve ; it was going so slowly that I thought it had stopped." The only other witness who actually saw the accident was a cake-seller, Dawood Bheekhoo, who was coming down the road on Mr. d'Unienville's side, and who stopped, on a signal from the defendant's chauffeur, to let the car enter the drive, but as he is characterised by one of the Judges as a " downright liar " and no one believes him, his contribution may be disregarded.

It will have been observed that in Mr. Houdet's testimony there is an item of what may be termed real evidence, namely, that he and his family had to fall into Indian file in order to pass

between the defendant's car and the edge of the culvert covering the ditch at Mr. d'Unienville's entrance. The plaintiff himself seems to admit that the Houdets passed in single file in front of the car, for, when asked if he did not think that they and two other persons occupied a space of four feet from the ditch, his answer was, " Non. Il me semble que ces personnes étaient à la file indienne, l'une derrière l'autre ; je n'ai pas vu que ces personnes occupaient la largeur du chemin." Now the fact that the Houdet family had to go in Indian file in order to pass between the defendant's car and the side of the road is conclusive of two things : first, that the car must have been, as Mr. Houdet said, stationary at the time, and, second, that the front of the car must have been only a short distance from the edge of the road.

Accepting the fact, contrary to the appellant's evidence, that the car had pulled up on the slant at a distance of from five to seven feet from the ditch to allow the Houdets to pass, and admitting that up to this point there was no negligence on the part of the defendant's chauffeur, the appellant's Counsel submitted that it was negligent on the part of the defendant's chauffeur to set his car in motion after the Houdets had passed and to proceed towards Mr. d'Unienville's drive without looking round to see if any other traffic was coming up on his left between him and the ditch ; if he had looked, it was urged, he must have seen the plaintiff approaching and about to pass through the space between the car and the culvert. But it is not proved that the defendant's chauffeur did in fact restart before the collision. On this point the appellant's Counsel sought to avail himself of the evidence of the defendant's chauffeur, but the appellant cannot legitimately invoke for this purpose evidence directed to another and quite different story which has not been believed. This belated attempt to establish a new ground of negligence against the defendant's chauffeur on the reconstituted facts as found by the Court below and accepted by their Lordships demonstrates the danger of allowing a new case to be put forward at this late stage, for what is now sought to be made the crisis of the case is a point to which neither the evidence nor the attention of the Judges below was directed. Their Lordships are in consequence unable to ascertain whether or not the Judges below were of opinion that the defendant's car was restarted after the Houdets passed in front of it, while the evidence on the subject is left quite inconclusive. In such a state of matters it would be out of the question for their Lordships to find that negligence on the part of the defendant's chauffeur had been proved.

As the plaintiff's evidence was that his side of the road was clear ahead and that the defendant's car was on the other side of the road until it suddenly turned in upon him, he has, of course, given no explanation of how he did not see the defendant's car standing at rest aslant across the road, and of why he came on in

these circumstances without slackening his speed—which was certainly not less than 15 miles an hour, and may well have been more, for after the collision his cycle went on for some 42 feet before it collapsed into the ditch, incidentally striking Mr. Houdet and the cake-seller on its way. The plaintiff himself says that if he had seen the car in such a position as that in which it is now found to have been he could have passed behind it. If it is necessary to reach any conclusion as to what really happened, it is most probable either that the plaintiff never observed the car standing athwart the road at all or if he did that he thought he could pass between the standing car and the culvert, and by an unhappy miscalculation just hit the side of the defendant's car.

As their Lordships have indicated, the complete failure of the appellant to establish the case of negligence averred in his pleadings and spoken to in his evidence would have justified the dismissal of the appeal on this ground alone, but their Lordships, recognising the seriousness of the matter to the appellant, have re-examined the whole case on its merits and, having done so, they find themselves in complete agreement with the result reached by the Court below.

Their Lordships will therefore humbly advise His Majesty that the appeal be dismissed. The defendant will have her costs of the appeal.

In the Privy Council.

RAYMOND LINCOLN

v.

MRS. ALICE POUPINEL DE VALENCE, THE WIDOW OF LOUIS LE BRETON.

DELIVERED BY LORD MACMILLAN.

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