A **BURNS PHILP (SOUTH SEA) CO. LTD.**

v.

VISHNU DEO AND ANOTHER

[SUPREME COURT, 1966 (Knox-Mawer P.J.), 20th December 1965,
B 11th January 1966]

Civil Jurisdiction

Damages—negligence—collision with parked vehicle—primary cause failure to light—contributory negligence by excessive speed—apportionment of responsibility.
Negligence—parked vehicle—failure to show proper lights—contributory negli-
C *gence by excessive speed—apportionment of damages.*

In an action for damages arising out of a collision between vehicles, in circumstances in which the negligence of the first defendant consisted of parking his cane truck unlighted so far as vehicles approaching from the rear were concerned, and the plaintiff was guilty of contributory negligence in driving at an excessive speed at a place
D where the necessity of driving with dipped headlights was to be expected, it was held that the negligence of the first defendant was the primary cause of the collision and that the responsibility would be apportioned two thirds to the defendants and one third to the plaintiff.

E Cases referred to :

Henley v. Cameron [1949] L.J.R. 989; 65 T.L.R. 17: *Hill-Venning v.* Beszant [1950] 2 All E.R. 1151; 66 (pt. 2) T.L.R. 921.

Action in the Supreme Court for damages for negligence.

K. A. Stuart for the plaintiff company.

F *D. S. Sharma* for the defendants.

The facts sufficiently appear from the judgment.

KNOX-MAWER P.J. [11th January, 1966]—

This is an action in tort for damages for negligence. It is common
G ground that on 9th October 1963, during the hours of darkness (about 8.00 p.m.), a Mr. Wardrop, an employee of the plaintiff company, who was driving the plaintiff's motor car along the Queen's Road near Lomolomo, collided into the back of a loaded cane truck. The cane truck, which was owned by the second defendant, was, at the relevant time, under the charge and control of the first defendant as servant
H or agent of the second defendant. It is not disputed that if negligence on the part of the first defendant was a cause of the damages arising out of the collision, both defendants are jointly and severally liable.

What interconnection or merger existed between the plaintiff and the Queensland Insurance Company, vis-a-vis Lautoka business, has not been clarified. However, no issue turns upon this, or upon any related question of subrogation or agency. The sole issue is whether the defendants are liable for all or any part of the damages claimed. If they are, then it is not contested that the plaintiff company is entitled to recover damages from them in this suit.

As for the quantum of damages, the plaintiff's claim is now limited to—

(*a*) £640, being the loss of value of the plaintiff's motor car;

(*b*) £21.5.6, being the hospital charges properly incurred by the plaintiff in respect of Mr. Wardrop's medical treatment due to the accident.

The claim for towing charges has not been established in law. The evidence adduced on behalf of the plaintiff that the value of the car before the accident was £950 and that afterwards the vehicle realised only £310 is not challenged, nor is the claim for medical expenses.

That the plaintiff's motor car was damaged to such an extent that the loss thereon totalled £650, and that Mr. Wardrop's injuries necessitated hospital treatment costing £21.5.6 has accordingly been shown to be due to the violence of the collision which occurred. What, therefore, was the cause, or what were the causes of that violent collision?

The Court has no doubt upon the evidence that the primary cause was the negligence of the first defendant in parking the cane truck unlighted to vehicles driving up behind. In arriving at this conclusion, the Court is able to place particular reliance upon the evidence of the eye-witness, Mr. Kermode. The Court has viewed the scene of the accident, and is entirely satisfied that Mr. Kermode is correct when he said, in chief,

"I would certainly have seen the lights had there been any."

That part of the cane truck where the red tail light would normally be positioned was smashed by the impact, but the collision did not disturb the place where the rear lights on the cane load should have been, — and, so far as the latter lights were concerned, the defendant was obliged to admit that he had none.

While the Court thus finds that the first defendant's negligence was the primary cause of what happened, there can be no doubt that the speed at which Mr. Wardrop was driving contributed to the violence of the collision. It is true that Mr. Kermode's evidence has established the difficulty of seeing the parked lorry, in the position described by Police Corporal Sharma, but Mr. Kermode also expressed the opinion that Mr. Wardrop was driving fast. Police Corporal Sharma further described the pronounced skid marks, fifty feet in length.

Having regard, therefore, to Mr. Wardrop's speed, especially in circumstances where the necessity of driving with dipped headlights was to be anticipated, the Court considers that an apportionment of responsibility such as that adopted by the English Court of Appeal in

Henley v. Cameron [1949] L.J.R. 989: 65 T.L.R. 17 is applicable to the facts of this case. In *Henley v. Cameron* the defendant's motor car was parked unlighted by the kerb of the road at the time when the deceased driver collided with him, during the hours of darkness. It
A was held by the Court of Appeal (per Tucker L.J.) that the defendant was negligent in leaving the car unlighted in that position in the hours of darkness and the car constituted a nuisance. The absence of a light was *prima facie* a cause contributing to the accident. The fact that a car driver runs into a stationary unlighted vehicle does not establish that he is solely to blame. It is a question of fact depending
B on the particular circumstances. Singleton L.J. in his assenting judgment commented upon the evidence of the witnesses as to the difficulty of seeing the car in that position. The Court of Appeal apportioned the responsibility — defendant two thirds, deceased one third.

It is to be noted that in a later case, *Hill-Venning v. Beszant* [1950]
C 2 All E.R. 1151, where the plaintiff, driving with dipped headlights ran into the defendant's unlighted motor-cycle, that Denning L.J. expressed the view (obiter) that he would have been inclined to apportion the responsibility two-thirds to the unlighted vehicle, as in *Henley v. Cameron* (supra).

In the outcome, therefore, the plaintiff is awarded judgment against the defendants for two-thirds of the total proven damages
D (£661 . 5 . 6), that is to say, for £440 . 17 . 0 and costs.

Judgment for plaintiff company for two-thirds of damages proved.