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NORTH WEST TRANSPORT CO. LTD.

v.

IFEREMI KUBUKAWA AND ANOTHER

B [COURT OF APPEAL, 1968 (Gould V.P., Hutchison J.A., Marsack J.A.), 4th, 18th October]

Civil Jurisdiction

C *Damages—death caused by negligent driving—apportionment of degrees of blame attachable to driver of each motor vehicle—variation of apportionment by appellate court.*

Appeal—civil appeal—death caused by negligent driving of two motor vehicles—apportionment of degrees of blame—variation of apportionment by appellate court.

Negligence—damages for—apportionment of blame between two negligent drivers—variation of apportionment by appellate court.

D The apportionment of the blame between the drivers of two motor vehicles which have collided, made by the trial judge in an action for damages arising out of the collision, will only in exceptional cases be varied by an appellate court which has accepted the findings of the trial judge. Where, however, the evidence at the trial did not support the finding of the trial judge that one vehicle was on its wrong side of the road, the Court of Appeal varied the apportionment of the degrees of responsibility in the light of that fact.

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Cases referred to: *Bracegirdle v. Oxley* [1947] K.B. 349; [1947] 1 All E.R. 126: *British Fame (Owners) v. MacGregor (Owners)* [1943] A.C. 197; [1943] 1 All E.R. 33: *The Umtali* (1938) 160 L.T. 114: *The Karamea* [1921] P.76; 124 L.T. 653.

F Appeal from a judgment of the Supreme Court in an action for damages for fatal injuries caused by negligent driving.

R. G. Q. Kermode for the appellant.

R. I. Kapadia and Mrs. Nandan for the first respondent.

G. M. G. Johnson for the second respondent.

G The facts are sufficiently set out in the judgment of *Marsack J.A.*

The following judgments were read :

MARSACK J.A.: [18th October, 1968]—

This is an appeal from the Judgment of the Supreme Court in an action for damages for personal injury brought by the first respondent, Iferemi

H Kubukawa, against the appellant company and the second respondent, Asha Devi. The first respondent received his injuries while being driven as a passenger on a bus, owned and operated by the appellant company, which came into violent collision with a commercial truck owned and

being driven by one Daya Ram. The driver of the bus, employed by the appellant company, and Daya Ram, were both killed in the accident and the second respondent was sued as the administratrix to the estate of the latter. The quantum of damages (if it should be found that the first respondent was entitled to damages) was agreed upon, and the only questions at the trial of this action were whether one or both of the drivers had been negligent, and if both, the apportionment of their responsibility. In the result the learned Chief Justice found that both drivers were negligent, and made an apportionment of 70% in respect of the bus driver and 30% in respect of the lorry driver. The second respondent has not appealed against the judgment, and opposes the appeal only in so far as it might result in any increased award against her.

As to the collision, it is common ground that the vehicles approached each other from opposite directions and that there was no other relevant traffic. The general circumstances are described in the judgment of the learned Chief Justice as follows —

> "On the evidence before me, which in these respects did not appear to be in dispute, I hold as fact that the collision occurred after dark, at about 7.45 p.m. on a dry and clear but dark night on the main Kings Road near Tagi Tagi. The road was 23 feet wide at the scene of the collision and has a gravelled surface with a rough grass verge on each side. The road was dry and there was no other traffic in the vicinity at the time. Each vehicle had an overall width of 7' 5", and there was sufficient room for them to pass each other in safety provided each vehicle kept well to its correct side of the road. In fact if the near side wheels of each vehicle had been kept within 3 feet of the verge on its own side of the road the vehicles would have passed each other two feet apart."

There is a further finding, to which there has been no challenge on the appeal, in the following terms —

> "As the vehicles approached each other they were travelling on a fairly straight and level section of the road. Both drivers should, had they been keeping a proper lookout, have seen the lights of the oncoming vehicle ahead in ample time to reduce speed and to steer a safe course. I say this in spite of the rise in the road up which the lorry went shortly before the collision and the slight bend in the road which had been negotiated by the bus shortly before it came on to the straight section of the road on which the collision took place."

The conclusions of the learned Chief Justice were —

(a) that both vehicles were being driven too fast at the time of the collision;

(b) that neither vehicle reduced its speed materially or changed its course materially before the collision; and

(c) that the driver of the bus was not steering a course close enough to the left-hand side of the road to avoid the lorry.

In the light of another portion of the judgment to which later reference will be made, and of the apportionment of damages, conclusion (c) must

be construed as involving a finding that some part of the bus was across
A the centre line of the road.

The grounds of appeal set out in the notice of appeal, and argued before us, may I think be fairly summarised thus: that the learned trial Judge was in error in finding as a fact —

(i) that the bus was at the time of the collision being driven at an excessive speed;

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(ii) that the bus driver had not reduced speed or taken other steps to avoid the collision;

(iii) that at the time of the collision part of the bus was across the centre line of the road.

C Appellant appeals also against the allocation of damages in the proportion of 70% against the appellant and 30% against the driver of the lorry.

Counsel's argument as to the speed of the bus at the time of impact was based on evidence given by two witnesses that the bus was in second gear after the accident. One of the witnesses said he judged it to be in second gear by the engine sound; the other, the secretary and director of the appellant company, said that he saw that it was in second gear.
D An expert witness said that if the back wheels had a load on them, they would not have turned if the engine were in top gear; he would have expected the engine to stall. In first or second gear it could have continued to run; in second gear the bus would do no more than 20 m.p.h.

The Chief Justice said in his judgment that he had given careful consideration to this evidence but found it inconclusive. He accepted the
E evidence of two independent witnesses, passengers in the bus and both experienced drivers of heavy vehicles, one of whom estimated that the bus was travelling at 35 m.p.h. and the other at 40-45 m.p.h. I do not think that it is for an appellate court to set aside this finding. It is not clear whether the Chief Justice accepted that the bus was in second gear after the accident. Only one witness was really definite about that,
F while passenger witnesses affirmed that it was travelling in top gear; and indeed there seems to have been no reason why it should have been in any other. If the driver had made a last-minute change from top to second gear it would surely have been a manoeuvre which would have been observed by one or more of the four passenger witnesses. Whatever may have been the trial Judge's view on this point, it is clear that he based his finding as to the speed of the bus on the evidence of two
G witnesses whom he held to be reliable.

In any event the finding of the learned Chief Justice that the bus was being driven too fast at the time of the collision must be taken to mean that in all the surrounding circumstances — the fact that it was nighttime, the approach of another vehicle from the opposite direction, the width of the bus compared with the width of one-half of the road, the
H possibility that the approaching vehicle was equally wide, the position of the bus on the road as it was travelling, and the duty owed by the driver of a bus in respect of the safety of his passengers — the speed of the bus at perhaps 40 m.p.h. or thereabouts was excessive. There was,

in my opinion, ample evidence to justify this finding and I am of opinion that this Court should not interfere with it. In the words of Denning J. in *Bracegirdle v. Oxley* [1947] 1 All E.R. 126 at p.130 — A

"the question whether a speed is dangerous is a question of degree and a conclusion on a question of degree is a conclusion of fact. The court will only interfere if the conclusion cannot reasonably be drawn from the primary facts."

The second finding of fact challenged by the appellant, namely that the driver of the bus had failed to reduce speed or to take other steps to avoid the collision, is really bound up with the findings that the speed at the time of the collision was excessive and that the bus was on the wrong side of the centre line of the road at the point of impact. If the bus was travelling too fast at the moment of collision then it is clear that proper steps to reduce speed to a safe level had not been taken by the driver when he became aware of the approach of the oncoming vehicle. If the bus was at the time of collision not as far to the left as was reasonably practicable, then it is clear that the driver had not taken effective steps to avoid the collision. It is therefore unnecessary, in my view, to make further reference to this particular finding. B C

The third finding, namely that the off-side of the bus was over the centre line of the road, is based mainly on two independent pieces of evidence — D

(a) the direct testimony of Manasa Nole, whose evidence was accepted by the learned trial Judge, and was quoted in the judgment as being to the effect that the near side of the bus was several feet away from the left-hand side of the road;

(b) the brake skid marks, made by the tyres of the bus, seen by Police Inspector Nadolo who deposed that they were about 2 yards from the left-hand side of the road. E

There is a third piece of evidence, again from Inspector Nadolo, to the effect that he had found a pool of fresh oil some 6 feet from the left-hand edge of the road on the bus's correct side, and smears of oil generally on that same side of the road. He also found broken glass on both sides of the road. It is difficult to draw any firm conclusion from this as to the point in the road at which the actual collision took place. F

The presumption can, I think, properly be drawn from the evidence as to the brake marks that these were caused by the near wheels of the bus, and in that event some portion of the bus must necessarily have been across the centre line of the road. This evidence must, however, be considered in conjunction with that of Manasa Nole. What that witness actually said is this — G

"The bus's left-hand side was almost in the middle of the road. There were about four feet between the bus and its left-hand side of the road."

Later, in the course of cross-examination, he stated he was certain that just before the impact the bus was four feet from the left edge of the formed road. H

It is to be noted that the distances given by Inspector Nadolo and Manasa Nole are estimates only, and not the result of accurate measurement. On the basis of four feet, the off-side of the bus would have been almost in the middle of the road. If the "2 yards" figure is accepted, part of the bus would definitely have been on its wrong side.

In my opinion all that can properly be inferred from these two pieces of evidence is that the bus was not travelling on a safe course as far as practicable to the left of the road. I do not think the finding that part of the bus was on its wrong side is justified. It may have been; but the evidence does not definitely establish that it was. At the same time a finding that the driver of the bus was not keeping to the safe course he could have kept, is a finding that he was negligent in that respect.

Accordingly, I would hold that the learned trial Judge was right in reaching the conclusion that the appellant's driver had been negligent, and that his negligence had materially contributed to the collision which took place between the vehicles concerned.

There remains to be considered the last ground of appeal, namely that the learned Judge had erred in holding the negligence of the bus driver to be the major cause of the accident. On this ground the appellant challenges the allocation of the agreed damages in the proportion of 70% against the bus driver and 30% against the driver of the lorry. There is ample authority for the proposition that an appellate tribunal will only in very exceptional cases be justified in varying the allocation of blame made by the trial Judge. In *British Fame v. MacGregor* [1943] 1 All E.R. 33, Viscount Simon L.C. at p.34 cites with approval the language used by Lord Wright in *The Umtali* (1938) 160 L.T. 114 —

> "I ought to add that it would require a very strong and exceptional case to induce an appellate court to vary the apportionment of the different degrees of blame which the judge has made, when the appellate court accepts the fiindings of the judge."

In *The Karamea* [1921] P.76, Warrington L.J. says at pp.83, 84 —

> "It may well be and probably is the case that if the court arrives at the same conclusion both of the facts and in law it would not interfere merely because the learned Judge in his discretion has given proportions which this court thinks it would not have given."

This present case, in my view, falls within the exception referred to in the passages quoted, in that, while the trial Judge's finding that both parties were negligent is accepted, the assessment of the respective degrees of negligence must necessarily be varied by the finding in this judgment that there was no definite proof that the bus was on its wrong side at the point of impact. Taking this into account, I would hold that the drivers were equally negligent, and that the award of £700 damages against the appellant and £300 against the second respondent be varied to £500 in each case.

This course of severing the judgments, instead of giving the plaintiff in the Supreme Court a joint judgment against both defendants, was apparently adopted by consent of counsel as a convenient method of giving effect to the apportionment of liability. No question as to the

propriety of this method of dealing with the matter was raised at the hearing of the appeal, and this Court was not asked to adopt a different course.

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With regard to costs: the appellant has to some extent succeeded against the second respondent and I would allow the appellant the sum of 30 guineas plus disbursements against the second respondent accordingly. The first ground of appeal, directed against the first respondent, has failed and the first respondent is entitled to costs against the appellant. As first respondent was called upon to appear but took no part in the main argument I would fix these costs at 15 guineas and disbursements.

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GOULD V.P.:

I have had the advantage of reading the judgment of Marsack J.A. and I agree with his reasoning and conclusions. This appeal will be allowed to the extent indicated in his judgment and there will be orders as to costs as proposed by him.

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HUTCHINSON J.A.

I agree with the judgment delivered by my brother Marsack, and do not wish to add anything to it.

Appeal allowed — judgment of Supreme Court varied.