1981 September 14

[TRIANTAFYLLIDES, P., DEMETRIADES, SAVVIDES, JJ.]

ELIOFOTOS PROCOPIOU,

Appellant-Defendant,

v.

SOCRATES PANAYI,

Respondent-Plaintiff.

(*Civil Appeal No.* 6043).

Negligence—Road accident—Brakes—No evidence that they were defective so as to shift evidential burden of proof.

Negligence—Road accident—Collision between vehicles moving in opposite directions—Appellant trying to overtake on a blind bend a lorry ahead of him—And blocking way of respondent who was coming from the opposite direction—Finding of trial Judge that appellant solely to blame for the accident sustained.

These proceedings arose out of a collision between two cars moving in opposite directions. The version of the respondent-plaintiff was that on a blind bend, on the Nicosia-Clirou road, he was confronted with an oncoming lorry and a small car, driven by the appellant-defendant, which was about to overtake the lorry; and that in an effort to avoid hitting the small car, which was blocking his way, he applied brakes and swerved to his right coming thus into collision with the on-coming lorry. The trial Judge accepted the version of the respondent as more probable than that of the appellant and found that the respondent was not at all to blame for the collision because, when faced with an emergency created by the driving of the appellant, he tried to avoid the accident as best as he could under the circumstances.

Upon appeal by the defendant it was contended:

(a) That the above conclusions of the trial Judge were wrong and that they should not be upheld.

Counsel submitted in this connection, by referring to *Henderson* v. *Henry E. Jenkins & Sons* [1969] 3

All E.R. 756 at p. 766, that since the police investigating officer has found at the point of the collision only marks of the application of the brakes on the right-hand side wheels of the vehicle of the respondent, it must be inferred, at least prima facie, that the brakes of the vehicle of the respondent were defective, in the sense that the brakes on the left-hand side wheels of the said vehicle could not be applied effectively and it was up to the respondent to adduce evidence in order to show that they were not defective.

(b) That the respondent was guilty of contributory negligence because he was driving at an excessive speed in approaching a bend and because he did not give sufficient warning of his approach by sounding his horn.

Held, that there is not the slightest evidence in this case that the brakes of the vehicle of the respondent were found, after the collision, to be defective, nor is there any expert evidence before this Court which could lead it to the conclusion that it should have been inferred, even prima facie, that they were defective, so as to shift the evidential burden of proof on to the respondent; accordingly contention (a) should fail (facts of this case distinguishable from those of the *Henderson* case, *supra*); in the circumstances of this case there can be no doubt that the sole cause of the accident was the manner in which the appellant was driving his car in trying to overtake on a blind bend a lorry ahead of him, with the result that he was found blocking the way of the respondent who was driving his vehicle from the opposite direction and, therefore, it cannot be accepted that any blame for the accident attaches to the respondent; accordingly contention (b) should, also, fail.

Appeal dismissed.

Cases referred to:

Henderson v. *Henry E. Jenkins & Sons* [1969] 3 All E.R. 756 at p. 766.

Appeal.

Appeal by defendant against the judgment of the District Court of Nicosia (Stavrinakis, P.D.C.) dated the 20th November,

1979 (Action No. 5835/74) whereby he was ordered to pay to the plaintiff the sum of C£2,602.- by way of damages for injuries suffered by the respondent in a traffic accident.

X. Syllouris, for the appellant.

G. Mechanikos, for the respondent.

Cur. adv. vult.

TRIANTAFYLLIDES P. read the following judgment of the Court. The appellant, who was the defendant before the trial Court, has appealed against the judgment of such Court by means of which he was ordered to pay to be respondent, as the plaintiff, the sum of C£2,602 by way of damages for injuries suffered by the respondent in a traffic accident.

The facts of this case, as well as the two versions of the parties, appear from the following extract from the judgment of the trial Judge:

"The plaintiff in this action claims against the defendant damages for personal injuries received in a road traffic accident which occurred on 15.10.1974 along the Nicosia-Clerou Road. The general and special damages have been agreed on a full liability basis at £2,602.- and what remains to be determined is the issue of liability on which three witnesses testified in support of the plaintiff's case and one in support of the defendant's case.

At the material time, the plaintiff was driving motorlorry under Registration No. CT576 along the Nicosia-Clerou road, proceeding towards Clerou direction. The defendant was driving a small saloon car along the same road but in the opposite direction.

It is the allegation of the plaintiff that on a blind bend he was confronted with an on-coming lorry and a small car which was about to overtake the said lorry. The plaintiff, in an effort to avoid hitting the small car which, as he said, was blocking his way, applied brakes and swerved to his right, coming thus into collision with the on-coming lorry. It is, further, the allegation of the plaintiff that he could not swerve to the left because there was high ground on that side.

The version of the defendant in short is, that he is not to blame at all for the accident and the actions of the plaintiff, because he was quite some distance behind the lorry he was about to overtake, and he created no emergency justifying the taking of such a dangerous avoiding action by the plaintiff. In any event, it was argued on the defendant's behalf that even if the defendant had some responsibility for the accident the plaintiff's contribution to it should be by far greater".

The trial Judge went on to say that he accepted the version of the respondent—(the plaintiff)—as more probable than the version of the appellant—(the defendant)—who, in any event, did not impress him as a reliable witness, and that he found that the respondent was not at all to blame for the collision because, when faced with an emergency created by the driving of the appellant, he tried to avoid the accident as best as he could under the circumstances.

Counsel for the appellant has submitted that the above conclusions of the trial Judge are wrong and that they should not be upheld; one of his main arguments in this respect being that, since the police investigating officer has found at the point of the collision only marks of the application of the brakes on the right-hand side wheels of the vehicle of the respondent, it must be inferred, at least prima facie, that the brakes of the vehicle of the respondent were defective, in the sense that the brakes on the left-hand side wheels of the said vehicle could not be applied effectively and it was up to the respondent to adduce evidence in order to show that they were not defective. We have been referred, in particular, in this connection, to the case of *Henderson* v. *Henry E. Jenkins & Sons*, [1969] 3 All E.R. 756, where (at p. 766) Lord Pearson stated the following in delivering his judgment in the House of Lords:-

"My Lords, in my opinion, the decision in this appeal turns on what is sometimes called 'the evidential burden of proof', which is to be distinguished from the formal (or legal or technical) burden of proof. Passages which bear on this distinction will be found in *Esso Petroleum Co., Ltd.* v. *Southport Corpn.*, per DEVLIN, J., and per LORD RADCLIFFE, and in *Barkway* v. *South Wales Transport Co., Ltd.* per LORD PORTER and per LORD

NORMAND. For the purposes of the present case the distinction can be simply stated in this way. In an action for negligence the plaintiff must allege, and has the burden of proving, that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But in the course of the trial there is proved a set of fact which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants. I have some doubts whether it is strictly correct to use the expression 'burden of proof' with this meaning, as there is a risk of it being confused with the formal burden of proof, but it is a familiar and convenient usage".

It must be pointed out that the facts of the *Henderson* case, *supra*, are distinguishable from those of the case now before us because in the *Henderson* case it was ascertained as a matter of fact that the brakes of one of the vehicles involved in a collision were defective and, therefore, it was hald that evidence had to be adduced by those responsible for the vehicle concerned that in all the circumstances which they knew, or ought to have known, they took all proper steps to avoid danger.

There is not the slightest evidence in this case that the brakes of the vehicle of the respondent were found, after the collision, to be defective, nor is there any expert evidence before us which could lead us to the conclusion that it should have been inferred, even prima facie, that they were defective, so as to shift the evidential burden of proof on to the respondent.

The version of the appellant was, in our opinion, rightly disbelieved by the trial Judge because the appellant, in his own evidence, stated that he saw just before the curve, at a distance of about one hundred to one hundred and fifty metres, the

lorry of the respondent, whilst he himself was driving towards that lorry behind, allegedly, another lorry which was ahead of him, and with which the respondent eventually collided. It is obvious, in our view, that the appellant could only have seen the lorry of the respondent if he had gone away from his proper side of the road and swerved to his right in an effort to overtake the lorry ahead of him. This tallies with the evidence of the respondent who says that he did see, before the collision, the car of the appellant driven in an effort to overtake the lorry which was proceeding ahead of it in the same direction, with the result that the respondent had to take avoiding action and, eventually, he collided with the said lorry.

Counsel for the appellant has submitted that the respondent was guilty of contributory negligence because he was driving at an excessive speed in approaching a bend and because he did not give sufficient warning of his approach by sounding his horn. In the circumstances of this case there can be no doubt that the sole cause of the accident was the manner in which the appellant was driving his car in trying to overtake on a blind bend a lorry ahead of him, with the result that he was found blocking the way of the respondent who was driving his vehicle from the opposite direction and, therefore, we cannot accept that any blame for the accident attaches to the respondent.

In the result, this appeal has to be dismissed with costs.

Appeal dismissed with costs.