1981 May 6

[A. LOIZOU, DEMETRIADES, SAVVIDES, JJ.]

ANDREAS CHR. THEODOULOU,

Appellant-Plaintiff,

v.

MARIKKA PELOPIDHA,

Respondent-Defendant.

(*Civil Appeal No.* 5932).

Negligence—Inevitable accident—Meaning—Burden of proof—Vehicle going off its course because of breaking of king pin of wheel—And colliding with car coming from opposite direction—Accident could not be prevented by exercise of ordinary care, caution and skill—Defence of inevitable accident duly established.

Whilst the respondent—defendant ("the respondent") was driving her car along Makarios III Avenue at Limassol she realised that her car was pulling to the off-side. She reacted by trying to keep the car in its proper course but her attempts to control it proved fruitless with the result that a collision occurred with a car driven by the appellant-plaintiff from the opposite direction and which the respondent first noticed at a distance of about 25 meters from her. Her speed at the time was about 12-15 m.p.h. In an action for damages by the plaintiff the defence of the respondent was that of inevitable accident and in order to establish it—once the burden was upon her being the person who set it up—she called an expert on mechanical defects who testified that the cause of the accident was the breaking of the king pin of the off-side front wheel of the car. This witness explained that it was practically impossible for the respondent to have known of the existence of this defect even if the car had been regularly serviced; and that when this pin breaks the wheels fail to respond to the steering wheel with the result that the vehicle goes out of control. The trial Court having accepted this evidence, which remained unchallenged, found that the respondent discharged the burden cast

upon her to satisfy the Court that the cause of her car going off its course was the breaking of the pin and dismissed the action.

Upon appeal by the plaintiff it was contended:

(a) That the expert witness should not have been believed inasmuch as the king pin broke at the time and as a result of the impact and not before that, as testified by the witness, and

(b) that the respondent failed to take reasonable avoiding action when she lost control of her vehicle.

Held, (1) that having perused the evidence relevant to the findings of the trial Judge and bearing in mind that the evidence of this expert witness was uncontradicted and had no inherent weaknesses in it, this Court sees no reason why, as a Court hearing the case on appeal, should interfere with a finding of fact based on the credibility of a witness which is in addition to and supports at that the version of the respondent herself as to when she lost control of her vehicle when her car went off course obviously on account of the king pin having been broken.

(2) That in an action based on negligence, if the facts proved by the plaintiff raise a prima facie case of negligence against the defendant the burden of proof is then cast upon him to establish facts negativing his liability, and one way in which he can do this is by proving inevitable accident, which is where a person in doing an act which he lawfully may do, causes damage without either negligence or intention on his part (pp. 234–5 post); that considering that the learned trial Judge has rightly concluded on the evidence before him that the damage suffered by the appellant could not possibly be prevented by the respondent, by the exercise of ordinary care, caution and skill, this Court is in agreement with the trial Judge that the defence of inevitable accident was duly established by the respondent; consequently the appeal must be dismissed.

Appeal dismissed.

Cases referred to:

Browne v. *De Luxe Car Services* [1941] 1 K.B. 549 at p. 552;

The Merchant Prince [1892] P. 179 at p. 189.

Appeal.

Appeal by plaintiff against the judgment of the District

Court of Limassol (Artemis, D.J.) dated the 10th February, 1979 (Action No. 1619/77) whereby his claim for the damage sustained by his car in a road accident was dismissed.

Appellant appeared in person.

P. Pavlou, for the respondent.

A. Loizou J. gave the following judgment of the Court. This is an appeal from the judgment of the District Court of Limassol by which the claim of the plaintiff—appellant in this Court—for damages, for the damage sustained by his car in a road accident, was dismissed with no order as to costs.

The facts of the case are very simple. On the night of the 2nd June 1975, the respondent was driving her car under registration No. H.A. 758, along Makarios III avenue at Limassol, when at a particular point she realised that her car was pulling to the off-side. She reacted by trying to keep the car in its proper course but her attempts to control it proved fruitless with the result that a collision occurred with motor-car under registration No. H.Q. 555 driven by the appellant from the opposite direction and which the respondent first noticed at a distance of about 25 meters from her. Her speed at the time was about 12-15 m.p.h. As a result of this collision, both vehicles sustained damage and the respondent suffered also personal injuries, but as her counterclaim for damages for the damage to the car and the injuries she received was dismissed by the trial Judge and she has not appealed against that dismissal we shall not be concerned with that aspect of the case.

The defence of the respondent was that of inevitable accident and in order to establish that defence—once the burden was upon her being the person who set it up—called in addition to other witnesses Chief Inspector of Police Zavros, an expert on mechanical defects of motorcars who examined her said car a few days after the accident and found that the king pin of its off-side front wheel was broken. He noticed that the said pin was cracked prior to its severance. He explained that this metal may break because of bad casting or metal fatigue, and that it was practically impossible for the respondent to have known of the existence of this defect even if the car had been regularly serviced. In fact there was evidence to the effect that the car had been serviced fifteen days prior to the accident.

This witness further testified that when this pin breaks the wheels fail to respond to the steering-wheel with the result that the vehicle goes out of control. The effect of the evidence of this witness was, as found by the learned trial Judge, that if other causes, consistent with negligence were excluded from having caused the respondent to drive to the offside, then it was plain beyond doubt that the car veered off its course because of the breakage of the king pin prior to the collision.

The learned trial Judge after dealing with the evidence and the Law on the defence of inevitable accident had this to say:

"Having considered the evidence with the utmost care, I accept the evidence of the Defendant, which is unchallenged by other evidence on this point, that at the time her car veered off its course, she was not inattentive in any way. I find that on the balance of probabilities she has discharged the burden cast upon her to satisfy me that the cause of her car going off its course was the breaking of the king pin. Bearing in mind the evidence that it was practically impossible to have known of the existence of this defect even if the car had been regularly serviced (and the evidence is that the car had been serviced 15 days prior to the accident), I find that it could not have been foreseeable by the Defendant that this event might have occurred. As a result of the breaking of the king pin I find that the wheels did not respond to the driver's attempt to steer the car and, as a result the car went off its course. In the circumstances and bearing in mind the agony of the emergency, I find that the reasonable reaction of a driver would be that of the Defendant, i.e. to try and keep the car under control by means of the steering wheel. In the circumstances I am not satisfied that her failure to use her brakes is consistent with any negligence on her part bearing also in mind the small distance separating her from the oncoming vehicle. On the other hand, I find that the Plaintiff at the time was driving at a slow speed and that when he realised that the other car was coming towards him, he even reduced his speed further. The plaintiff also cannot be blamed for not taking any other steps to avoid a possible collision. He himself was already very near the other car and I find that he did not have the time to decide that the other car would continue to come

towards him and therefore take any other avoiding action or brake once he had reduced his speed".

The appellant by this appeal has raised two points. (a) that the expert witness Zavros should not have been believed inasmuch as the king pin broke at the time and as a result of the impact and not before that, as testified by the witness, and (b) that the respondent failed to take reasonable avoiding action when she lost control of her vehicle.

With regard to the first point, having ourselves perused the evidence relevant to the findings of the trial Judge and bearing in mind that the evidence of this expert witness was uncontradicted and had no inherent weaknesses in it, we see no reason why, as a Court hearing the case on appeal, should interfere with a finding of fact based on the credibility of a witness which is in addition to and supports at that the version of the respondent herself as to when she lost control of her vehicle when her car went off course obviously on account of the king pin having been broken.

Going now to the second point raised by the appellant, the answer is to be found in the conclusion reached by the learned trial Judge on the evidence before him, that in the circumstances and bearing in mind the agony of the emergency the respondent acted reasonably and she could not be blamed for not taking any other steps to avoid a possible collision.

No doubt in an action based on negligence, if the facts proved by the plaintiff raise a prima facie case of negligence against the defendant the burden of proof is then cast upon him to establish facts negativing his liability, and one way in which he can do this is by proving inevitable accident, which is where a person in doing an act which he lawfully may do, causes damage without either negligence or intention on his part.

The legal position is summed up in *Charlesworth on Negligence* 6th edition para. 1256 as follows:

"In maritime cases it has been described as follows: 'In inevitable accident in point of law is this: viz., that which the party charged with the offence could not possibly prevent by the exercise of ordinary care, caution, and maritime skill'. (*The Marpesia* [1872] L.R. 4 P.C. 212,

220). As to other cases, Lopes L.J. after quoting: 'Inevitable accident is that which the party charged with the damage could not possibly prevent by the exercise of ordinary care, caution, and maritime skill', has said: 'I know no distinction as regards inevitable accident between cases which occur on land and those which occur at sea.' *The Schwan* [1892] P. 419, 434".

And as Lord Greene in *Browne* v. *De Luxe Car Services* [1941] K.B. 459, 552 said:

"I do not feel myself assisted by considering the meaning of the phrase 'inevitable accident'. I prefer to put the problem in a more simple way, namely, has it been established that the driver of the car was guilty of negligence?"

Useful reference may be made also to what was said in the *Merchant Prince* [1892] P. 179 by Fry L.J. at p. 189:

"The burden rests on the Defendants to show inevitable accident. To sustain that, the Defendants must do one or other of two things. They must either show what was the cause of the accident and, show that the result of that cause was inevitable; or they must show all the possible causes, one or other of which produced the effect and must however show with regard to everyone of these possible causes that the result could not have been avoided. Unless they do one or other of these two things, it does not appear to me that they have shown inevitable accident".

Guided by the aforesaid principles of Law and considering that the learned trial Judge has rightly concluded on the evidence before him that the damage suffered by the appellant could not possibly be prevented by the respondent, by the exercise of ordinary care, caution and skill, we agree that the defence of inevitable accident was duly established by the respondent and consequently the appeal is hereby dismissed with costs.

Appeal dismissed with costs.