Nicholson v Lennard 8 ALR (Mal) 364

Judgment

Court:	Supreme Court Of Appeal
Bench:	The Honourable Chief Justice Skinner, JA., Honourable Justice Jere, JA., Honourable Justice Villiera, Ag. JA.
Cause Number:	8 ALR (Mal) 364
Date of Judgment:	November 08, 1977
Bar:	Hanjahanja, Counsel for the Appellant Mhango, Counsel for the Respondent

On August 1st, 1971 the plaintiff, who is the respondent in this court, was driving his taxi on the Lilongwe to Blantyre road at a place some 15 miles south of Dedza between Dedza and Blantyre. The defendant, who is the appellant in this court, was following the plaintiff driving a private motor vehicle, the property of her husband. The defendant attempted to overtake the plaintiff's taxi and in doing so there was a collision between the two vehicles. The plaintiff brought an action against the defendant alleging that the collision was caused by the negligent driving of the defendant, that by reason thereof she caused serious damage to his taxi, and that he was in consequence put to loss, for which he claimed damages. The defendant denied that she was negligent and averred that the collision was occasioned solely by the plaintiff's negligent driving.

The action was heard by Mead, J. in the High Court at Blantyre. The learned trial judge found that both the plaintiff and the defendant were negligent and found the plaintiff's responsibility to be 80%. He said that had it not been for the contributory negligence of the plaintiff he would have entered judgment for him in the sum of K677.13. In the result, he entered judgment for the plaintiff in the sum of K135.43 being 20% of K677.13 and awarded costs of the suit to him to the extent of 20% thereof.

The defendant appeals to this court against the decision that she was 20% blameworthy and the plaintiff appeals against the order as to costs.

Mr. Hanjahanja for the defendant has filed a number of grounds of appeal but, on analysis, it would appear that only one point is taken, namely that the judgment was against the weight of the evidence — the remaining grounds being simply argument in support of this.

The facts found by the learned judge were as follows. The plaintiff was driving his taxi along the Dedza to Blantyre main road approaching an access road leading to a Portuguese shop. He was travelling on the lefthand side of the road at a speed of 30-35 m.p.h. The defendant was driving her car along the same road following the plaintiff and travelling at a speed of 40 — 45 m.p.h. on the lefthand side of the road. There was no traffic in view approaching from the opposite direction and there was no traffic in view following the defendant. The main road

where it approaches the access road is straight for a distance sufficient to enable a driver to see ahead clearly for about three-quarters of a mile. There is no signpost on the Dedza side of the approach to the access road to warn traffic of the existence of the access road, and such road is first visible from the main road when approaching from the direction of Dedza when a driver of a motor vehicle is about 20 yds. from the entrance to it. The defendant, drawing up behind the plaintiff's taxi, reduced her speed to that of the plaintiff's vehicle. She remained behind it at a distance of about 30 yds. for some time to satisfy herself that the plaintiff was intending to continue on his straight course. Having satisfied herself on this point, the defendant decided to overtake the plaintiff. She drew out towards the righthand side of the road switching on her off-side indicator, sounded her horn and accelerated. As she began to overtake the taxi the plaintiff drew to his right. The defendant sounded her hooter and braked, continuing on her forward course, which by then was well on her righthand side of the road, with the off-side wheels of her vehicle about a yard from the edge of the main road. The plaintiff continued to draw to his right completely blocking the defendant's way, and he then for the first time switched on his off-side indicator. The defendant again sounded her hooter and continued braking. The taxi was about 2 ft. in front of her car, and in an endeavour to avoid hitting it the defendant tried to steer to her left, but the off-side mudguard of her car struck the middle of the rear of the taxi causing the mudguard on her car to fold down on to the wheel. That damage, coupled with the effect of the braking and the engine of the defendant's car stopping, brought it to an immediate halt. The taxi turned to the righthand side of the road, crossed the dirt verge at the side of the main road beyond the entrance to the access road, and stopped in the ditch bordering the dirt verge. When the defendant was travelling behind the plaintiff immediately before the accident the plaintiff did not give any signal either manual or mechanical from which the defendant could be warned that he

intended to move across to the righthand side of the road.

The learned judge further found that even if, as was alleged by the plaintiff, he first observed that the defendant's car was travelling behind his taxi when he was about 150 — 200 yds. from the entrance to the access road, he did not check on the position of the car either before steering his taxi to the right, away from the straight course it was on, or before steering further to the right in the direction of the access road.

The defendant and her husband, who was a passenger in the car, described an incident which had taken place earlier in the vicinity of Dedza township. It is of great importance because it forms the basis for the learned judge's finding that there was some negligence on the part of the defendant. The defendant said that when she was driving in the neighbourhood of Dedza township there were three vehicles in front of her. The second of these vehicles attempted to pass the first whereupon the first vehicle moved erratically from left to right of the road preventing the second vehicle overtaking it. The second vehicle pulled to the side of the road and stopped, and the first vehicle increased speed rapidly and drove ahead. The plaintiff's taxi was the vehicle that had been driven erratically and it was recognised by the defendant when she came up behind it shortly before the accident. She said that because of the earlier erratic driving she decided to make certain of the plaintiff's intention before attempting to overtake him. In his judgment the learned trial judge, having found that the defendant gave the correct warning of her intention to overtake the plaintiff, and gave that warning in adequate time, referred to this piece of evidence in the following passage:

"The evidence of the defendant and of Mr. Nicholson as to the plaintiff's manner of driving in the area of Dedza township was not substantiated by the evidence of Mr. Wanda. The defendant and Mr. Nicholson may have been mistaken in their recollection of the manner of the plaintiff's driving. Be that as it may, the defendant and Mr. Nicholson considered it necessary for the defendant to exercise particular caution before attempting to overtake the plaintiff's taxi."

He then referred to the defendant's decision that it was safe to overtake because, as she stated in evidence, after she had given warnings of her intention so to do the plaintiff continued on his straight course on his left hand side of the road; and this was interpreted by the defendant as indicating his awareness of her warnings and intention to overtake. In the opinion of the learned judge the plaintiff's action was negative. He was of the view that such did not clearly indicate whether the plaintiff had or had not known of and appreciated the defendant's intention. The plaintiff had not shown any positive reaction by pulling further to his lefthand side, by signalling the defendant to overtake, or by turning his head in such a way as to show that he was aware of the warnings and intention of the defendant.

The learned judge then directed himself on the law. He referred to the dictum of Slade, J. in Berrill v Road Haulage Exec. (1) ([1952] 2 Lloyd's Rep. at 492) as approved by Bolt, J. in Burgess v Aisha Osman (3); the judgment of Roskill, J. in Clark v Wakelin (4); and the decisions in Tocci v Hankard (6); Brandon v Osborne,

Garrett & Co. (2); and Matapila v Rep. (5). Applying these opinions and decisions to the case before him he referred to his finding that the defendant was doubtful of the plaintiff's exercising reasonable care. She had said that she had dispelled that doubt by driving behind the taxi for a distance sufficiently far to satisfy herself that the plaintiff was driving carefully. The learned trial judge referred also to his finding, that the plaintiff had not, whilst the defendant was driving behind him immediately before the accident, given the slightest sign that he would do something other than what the defendant as an ordinary careful driver might expect. The plaintiff, however, had not given any sign that he was aware of the presence of the defendant's car behind him or that he was aware of the defendant's warnings of her intention to overtake. He further said it was not a rule of the road or a rule of law that before a driver overtakes a vehicle the overtaking driver must satisfy himself that the driver of the vehicle to be overtaken has been aware of the proposed overtaking. The overtaking driver's duty was to satisfy himself that it is safe to overtake. In the opinion of the learned judge, it would be prudent in some circumstances for the overtaking driver to make certain that the driver in front is aware of the proposed overtaking, for example, on a very narrow road where even a slight deviation to the right of the leading vehicle could result in a collision.

In the case before him, the road at the place of the accident was 22 ft., 4 in. wide. The combined width of the two vehicles was between 10 or 11 ft. There would have been a space of about 6 ft. between the two vehicles when the defendant's car was overtaking the taxi, assuming the plaintiff had maintained a straight course. In normal circumstances this space would have been sufficient for the defendant to assume that she could overtake without danger but the circumstances in the case before him were rendered different from the normal by

the defendant's belief that the plaintiff might not be an ordinary careful driver. He found that in such circumstances, when without positive sign or action by the plaintiff that he had appreciated the defendant's warnings, she was not entitled to assume that he would not do something that would not be expected of an ordinary careful driver. The circumstances require the defendant to exercise care above the average. He found that as the defendant did not satisfy herself by some positive sign or action given or done by the plaintiff to show that he was aware of and had appreciated the defendant's intention to overtake, there was a degree of negligence on the defendant's part. In the opinion of the learned judge, the defendant should have continued hooting her horn until she had dispelled the last lingering doubt as to whether the plaintiff was aware of her intention to overtake. In the circumstances such was the final precaution the defendant should have taken but when weighing her failure in this respect against those precautions which she had already taken the degree of negligence on her part was slight. He assessed it at 20%.

It is perhaps unnecessary to state it, as it is trite law, but the duty on the defendant as on all drivers on the highway was to use reasonable care to avoid causing damage to other persons or vehicles: such care as would be used by an ordinary skilful driver in the circumstances in which the defendant found herself. The driver of a vehicle who wishes to overtake should see that it is safe to do so. The observations of Roskill, J. in Clark v Wakelin (4) as quoted in Bingham's Motor Claims Cases, 6th ed., at 73-74 (1968), was referred to by the learned judge, the report not being available to him, namely, that a driver is entitled to assume he could overtake without danger if what he is overtaking gave not the slightest sign that it was going to do something other than what another ordinary careful motorist might expect. The facts state that P, a cyclist, was injured in a collision

with D's motor cycle. According to P, he had put out his right hand, turned across the road, and was run into on the crown of the road by D coming up behind. According to D, P suddenly turned as D was about to overtake. It was held that D's version was to be accepted and he was entitled to assume that he could overtake without danger if what he was overtaking gave not the slightest sign that it was going to do something other than what an ordinary motorist might expect.

It is clear that the decision in that case related to what was observed immediately before the accident and in the instant case the faulty driving took place some time before. However, we do not seek to criticise it, it appears to us that the principle is correct, we would say that what a driver is entitled to assume will depend on many factors including how immediate or remote was the sign that the other driver was going to do something different from the norm.

We agree with the trial judge that the position in the instant case was complicated by the earlier erratic driving by the plaintiff but it seems to us, and here we disagree with him, that the defendant was not negligent in overtaking in the circumstances in which she did. It must be remembered that the plaintiff's faulty driving of the taxi took place some considerable time before and that he had driven for a number of miles since then. The defendant followed him for some time and had his vehicle under observation. He was then travelling at a speed of 35 m.p.h. and was well into his own side of the road. The defendant's evidence was that she was particularly careful because of the earlier incident and that when she decided to overtake she shortened the distance between the cars to 30 yds., put out her indicator and sounded her horn. It was a straight road with

no traffic on it other than the two vehicles and the plaintiff was driving carefully and had been doing so for some time. We think that in these circumstances the steps taken by the defendant to perform her duty of taking reasonable care were such as an ordinary skilful driver would exercise. She had satisfied herself that the plaintiff was no longer driving in a careless fashion, indeed, while she had him under observation he was driving with great care. Despite the failure by the plaintiff to use his indicator or to give any other positive sign that he knew the defendant wished to overtake, we think that she was entitled to assume that he did know her intention due to the use of her indicator and hooter, coupled with the speed his vehicle was travelling at and the fact that he continued to travel on the extreme left hand side of the road.

We have re - heard the case on the evidence before the judge and given weight to his opinion. We do not differ from him on his findings of fact but on the inference to be drawn from those findings and, as we have indicated earlier, we find that there was no negligence on the part of the defendant. We are satisfied that the accident was solely caused by the plaintiff's negligent driving. We allow the defendant's appeal. The judgment in the court below is set aside and the defendant is to have her costs of the trial and the appeal.

As we have allowed the defendant's appeal it is not necessary for us to deal with the plaintiff's appeal on the order for costs in the court below.