1953 *Present :* **Gratiaen J. and Gunasekara J.**

J. G. DIAS, Appellant, *and* S. A. G. SILVA, Respondent

S. C. 87—D. C. Colombo, 20,506

Collision—Negligence—Award of damages—Circumstances when court of appeal will interfere.

In a running down case, a court of appeal will interfere with an award of damages if it is satisfied that the trial judge has misapprehended the facts and has for that reason made a wholly erroneous estimate of the damage suffered.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, with *D. R. P. Goonetilleke*, for the plaintiff appellant.

H. V. Perera, Q.C., with *H. Wanigatunga* and *M. Ramalingam*, for the defendant respondent.

Cur. adv. vult.

April 28, 1953. GUNASEKARA J.—

The plaintiff, a clerk in the employ of Messrs. Hoare and Co., 37 years of age, was injured in a collision, brought about by the defendant's negligence, between a motor bicycle ridden by him and one ridden by the defendant. He sued the latter in the District Court of Colombo to recover a sum of Rs. 15,000 as damages for the personal injuries so caused, and was awarded a sum of Rs. 3,500. He appeals on the ground that this sum is inadequate. In his assessment the learned judge allowed a sum of Rs. 1,900 as expenses incurred by the plaintiff in consequence of the injuries. The question raised in the appeal is the adequacy of the award of Rs. 1,600 under other heads of damage.

The accident occurred on the 28th May, 1948, and the plaintiff was treated for the resulting injuries at the General Hospital in Colombo from that day till the 11th June, 1948, as an in-patient, and for some time after that as an out-patient. Three metatarsal bones of the right foot were fractured. One of these injuries was a compound, comminuted

fracture of the first metatarsal bone, and the head of that bone as well as other fragments of bone had to be removed, and the plaintiff had to have his foot and leg in plaster for about six weeks. In the opinion of the senior surgeon of the hospital, Mr. Jayasuriya, who had him under his care and treatment, he " would have been in great pain on account of this injury ". After an examination on the 18th September, 1948, four months after the accident, the surgeon stated in a report :

> " At present there is slight shortening of the right big toe and inability to put his weight on inner side of foot. There is also slight oedema of the foot and ankle. At present he is not fit to perform any duties that require standing or walking any distance."

On the 4th February, 1949, eight months after the accident, he said in a further report :

> " At present there is shortening of the right big toe with slight dorsiflexion of toe. There is a drop of the anterior arch of the foot and neuralgic pain in sole of foot on standing or walking. He has to put his weight on outer part of foot. This disability is permanent and the loss of earning capacity may be assessed at ten per cent."

These statements he supported by evidence given at the trial, on the 30th August, 1950. Explaining the nature of the permanent disablement, he said:

> " It means that the plaintiff has no longer the free and complete use of his right foot. He would not be able to walk freely, easily and well. He cannot rest on any part of that foot, except the outer portion, when he stands. That will be a great strain on his foot. He would probably feel a certain amount of strain when he stands for a long period. I doubt plaintiff's being able to walk long distances normally. He will have a definite limp in his walk. I doubt very much plaintiff's being able to play cricket. It is very doubtful that he will be able to play football freely. If the plaintiff is prepared to suffer a certain amount of discomfort and pain probably he would be able to play tennis but not as he was able to do before the accident. If he plays cricket he will not be able to run about. There are some people who dance even with an artificial limb. Certainly he would not be able to dance gracefully. "

He added that the plaintiff would be able to ride a motor bicycle, but with some discomfort, and that he could " walk a quarter mile with a certain amount of discomfort and pain ". An anterior arch support " would to a certain extent reduce the deficiency of the foot ", but he would still be " a disabled man ".

The effect of this evidence is stated by the learned District Judge in these terms :

> " According to Dr. Jayasuriya plaintiff cannot use his foot very well now. He could walk but he cannot walk so rapidly now as before. Dr. Jayasuriya further says that the plaintiff may be able to take to

games like football and tennis or cricket or dance but he will not be able to do so with the same freedom and without strain as he had done before the accident. There is undoubtedly an impairment of plaintiff's physical powers. Of course Dr. Jayasuriya says that the man may be able to ride a motor cycle but the movement of his foot will certainly not be as free as before the accident."

He goes on to say that the plaintiff " undoubtedly must have undergone great pain of mind and body " and that he " certainly is entitled to some damages ".

With all respect to the learned judge, it seems to me that he has quite misapprehended the effect of the surgeon's evidence. The understatement in " plaintiff cannot use his foot very well now " is not a mere figure of speech, as is shown by the rest of the passage, but is apparently intended to be taken literally as a statement of the gist of Mr. Jayasuriya's evidence. The learned judge has failed to appreciate that the effect of the injury on the plaintiff's ability to walk is that he can never again walk like a normal man, and that he can walk only a short distance at a time and that too with discomfort and pain : it is not merely that he " could walk but he cannot walk so rapidly as before ". The surgeon does not undertake to say that the plaintiff may be able to play football and cricket. On the contrary, he is strongly inclined to the view that he cannot. " I doubt very much, " he says, " plaintiff's being able to play cricket ", and he goes on to say that " if he plays cricket he will not be able to run about " : that is to say, I suppose, that if he does venture to play at all he must not hope to bowl or field, and he must cultivate a one-footed stance for batting. What he says about football is that it is " very doubtful that he will be able to play football freely ". It is clear from this witness's evidence that any football that the plaintiff may play he must play without running or kicking. What he says about the likelihood of the plaintiff's being able to dance is that " certainly he would not be able to dance gracefully ". Seeing that such an assurance should be enough to keep any normal person off the dance floor, the evidence surely means that the plaintiff is prevented for the rest of his life from dancing.

It appears from the plaintiff's evidence that before this accident he was a man of robust constitution who led a very active life. He says that he was in the Army during the war, from 1940 to 1945, as a bombardier in the Ceylon Garrison Artillery. Up to the time of the accident, according to him, he used to play cricket and football and he used to dance. " Now ", he says, " I cannot do any of these things. I cannot even walk for exercise." He was not cross-examined or contradicted on these points. It is evident that as a result of this accident he has been compelled, while yet in the prime of life, to give up for good his main recreations ; and that from being a healthy man who delighted in physical exercise and whose recreations included dancing, he has become a cripple who must for the rest of his life be content to walk with an ungainly limp and with discomfort and pain. He is clearly entitled to very substantial damages, and not merely to " some damages ",

for the injury sustained in his physical capacity of enjoying life, and for the bodily pain and discomfort that he has suffered and must yet suffer for the rest of his days.

The plaintiff's earnings by way of salary and allowance amounted to Rs. 145 a month at the time of the accident and Rs. 180 at the time of the trial in August 1950. He stated, however, that owing to his injury, on the one hand he has been deprived of an opportunity that he used to have of earning an additional sum of Rs. 20 or Rs. 30 a month for going on board ships and supervising the clearing of goods, while on the other it now costs him more to travel to work because he cannot ride a motor bicycle. He also said that he must now abandon an idea that he had of rejoining the Army where he could get better pay. It does not appear that the learned judge has included reduction of earnings among the heads of damage, and I do not think that it can be said that any substantial loss under that head has been proved.

The principles that should govern a court of appeal in deciding whether it should interfere with a finding as to the question of damages by a judge sitting without a jury have been stated by Lord Wright in *Davies v. Powell Duffryn Associated Collieries, Ltd.*[1] in these terms :

> " In effect the court before it interferes with an award of damages, should be satisfied that the judge has acted on a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered."

In the present case I am satisfied that the learned district judge has misapprehended the facts and has for that reason made a wholly erroneous estimate of the damage suffered. The award of Rs. 1,600 appears to be based upon an entirely erroneous view that in the matter of physical activity the plaintiff can continue to do much the same sort of thing as before the accident though not with quite the same ease or speed or skill or grace. I appreciate that in cases such as this, when damages have to be awarded for bodily pain and suffering and loss of amenities, a court can do no more than try " to compensate a person in the plight of the plaintiff by awarding what might fairly be described as notional or theoretical compensation to take the place of that which is not possible, viz., actual compensation ". (per Romer L.J. in *Rushton v. National Coal Board* [2]). I do not doubt, however, that a more correct view of the result of the injury would have led the learned district judge to make a proportionate assessment of the " theoretical compensation " and to estimate it at many times the sum of Rs. 1,600. In my opinion it would be reasonable to award a sum of Rs. 10,000 under this head, so that the total would be Rs. 11,900, inclusive of the sum awarded by the learned judge, as special damage. I would, therefore, order that the damages be increased from Rs. 3,500 to Rs. 11,900. The plaintiff must have his costs in both courts.

GRATIAEN J.—I agree.

Appeal allowed.

[1] [*1942*] *A. C. 601 at 617.*

[2] [*1953*] *1 All E. R. 314 at 317.*