1978 *Present :* **Wimalaratne, J., Rajaratnam, J. and Walpita, J.**

SINNIAH NADARAJAH, Plaintiff-Appellant

and

THE CEYLON TRANSPORT BOARD and ANOTHER
Defendants-Respondents

S.C. 319/75 (F) —D.C. Colombo E/614/M

Delict—Claim against two defendants for damages for personal injury—Whether driver of vehicle negligent—Plea of guilt tendered by him when charged in Magistrate's Court—Admission—Whether relevant on such issue in civil suit.

Damages—Severe injuries and disablement caused by being knocked down by bus—Heads of damage—Assessment.

Where the driver of a vehicle (2nd defendant) is sued along with his employer (1st defendant) for the recovery of damages resulting from an accident in which the plaintiff suffered injuries by being knocked down, a plea of guilt tendered by the driver, when charged in the Magistrate's Court in respect of the same accident, is relevant as an admission made by him and ought to be taken into consideration by the trial Judge in the civil suit.

In a claim for damages for physical injury whether caused by negligence or otherwise, the damages are, apart from special damages, at large, and will be given for the physical injury itself, and in case of disablement for its effect upon the physical capacity of the injured person to enjoy life as well as for his bodily pain and suffering.

Per Wimalaratne, J. :

"This accident took place on the approach road running in front of the Fort Railway Station, within the railway premises. This is a road where many people gather around, and a place where passengers go to and fro. There was, therefore, a high degree of care cast upon drivers of vehicles and a duty to drive extremely carefully in order to avoid possible accidents. The accident took place about 24 feet in front of the bus halt, which was situated on the pavement. One would expect the bus to have been driven alongside the pavement and halted at the bus halt, but the bus knocked down the plaintiff 24 feet in front of the bus halt, and thereafter proceeded a further 46 feet from the bus halt before it stopped. These facts show that the bus was driven at a speed excessive in the circumstances, and that the driver also failed to keep to the left or near side of the highway. The learned Judge has failed to consider these facts in relation to the issue of negligence particularised in the plaint."

Case referred to :

Hollington v. Hewthorn & Co. Ltd., (1943) 2 *All E. R. 35 ; (1943) 1 K. B. 587 ; 169 L. T. 21 ; 59 T. L. R. 32.*

APPEAL from a judgment of the District Court, Colombo.

A. H. C. de Silva, Q. C., with *M. Underwood* and *C. V. Vivekanantha*, for the plaintiff-appellant.

W. N. D. Perera, Senior State Counsel, for the defendants-respondents.

Cur. adv. vult.

February 8, 1978. WIMALARATNE, J.

This is an appeal by the plaintiff-appellant from a judgment of the District Judge of Colombo dismissing an action instituted by him against the defendants-respondents for the recovery of a sum of Rs. 200,000 as damages resulting from an accident in which he suffered severe injuries by being knocked down by a C. T. B. double decker bus.

The plaintiff alleged that he received injuries by reason of being knocked down by a motor bus bearing No. 23, Sri 3294 belonging to the 1st defendant and driven by the 2nd defendant on 7th June, 1973, opposite the Fort Railway Station while he was crossing the railway station approach road in front of the station. At the trial the ownership of the motor bus by the 1st defendant and the fact that the 2nd defendant drove the bus at the time of the accident in the course of his employment under the 1st defendant were admitted. The plaintiff raised the issue as to whether the said accident was caused by the negligence of the 2nd defendant as set out in paragraph 6 of the plaint.

The evidence of the plaintiff was that having got down from the train arriving from Jaffna at about 7 a.m. he walked across to the bus halt in front of the station, and having seen a friend of his named Arumugam on the island situated on the approach road he left his bag at the bus halt and went across to the said island to speak to his friend. He was facing Olcott Mawatha and his friend was facing the station when his friend told him that the No. 134 bus was approaching. He turned back and saw the bus coming at a distance of 50 yards. At this time he says the bus was coming slowly. He walked in the direction of the bus halt when the bus accelerated. Seeing this he stopped half way. Then the bus came and collided with him. He fell down and did not know anything thereafter till he recovered consciousness in hospital.

The 2nd defendant said in evidence that he was driving the bus in question with passengers from Pettah and reached the approach road to the Fort Railway Station driving at about 10 m.p.h. when in front of the railway station which he had passed, a man jumped in front of the bus, very close to the bus. The 2nd defendant's version of what happened was as follows:— "He jumped as from the right side to the left side. He jumped very close to the bus. At that time I applied the brakes of the bus. Thereafter he went back and again came to the front. At that time I applied brakes. But the bus dragged forward. He was very close to the bus. Thereafter that gentleman struck against the right mudguard of the bus."

The learned District Judge has dismissed the plaintiff's action on the ground that there was no negligence on the part of the defendant, but that there has been entire negligence on the part of the plaintiff. The learned Judge has disbelieved the Plaintiff's version given at the trial in view of the fact that his statement to the police which was recorded in hospital on 8.9.73 (D1) differs from this version in the following particulars :—

(*a*) in his statement to the police the plaintiff stated that he first saw the bus when it was about 10 or 15 feet away. Thinking that the bus would reduce speed or stop, he said in that statement, that he jumped across the road.

(*b*) in D1 the plaintiff stated that the right mudguard of the bus struck his left leg causing him to fall down and that his right leg was injured by the fall. But in cross-examination, however, the plaintiff attempted to take up the position that the bus struck him on the right side of his body.

It has been submitted on behalf of the appellant that the learned Judge has misdirected himself by his failure to consider these contradictions in the background of the evidence as a whole as well as by his failure to give proper consideration to the plight of the plaintiff who was a patient with severe injuries suffered only the previous day. Dr. Parameswaram, a surgeon of the General Hospital who examined the plaintiff said that on admission his blood pressure was found to be very low and that he was pale. He was resuscitated and when his pressure was 120/80 he was taken up for surgery. The chief injuries were (*a*) a fracture of right humerus near the upper end, (*b*) a fracture of the neck of the femur near its base also on the right side, and (c) a compound double comminuted fracture of the left tibia. He left hospital on 18th September, 1973, but the plaster of the left leg was removed only on the 20th of December, 1973. The plaintiff himself said that he made a statement to the police on the day following the operation, and that as a result of severe pain he was not in a suitable condition to make a statement. His left leg was completely plastered ; the right hand could not be moved. His hand was bound to the body so that it may not be moved. The learned District Judge does not appear to have appreciated the plaintiff's uncomfortable condition at the time D1 was recorded, and has made no allowance for any mistaken impressions of distances which a person in the position of the plaintiff may have formed.

On the question as to which side of the bus struck which part of the plaintiff's body, there does not appear to be much discrepancy between the plaintiff's evidence and the statement

D1. The plaintiff's evidence was that he had no opportunity of crossing the road because in the attempt to do so he was knocked down. To a question in cross-examination " Q : Did you cross the road or not ? " the plaintiff's reply was " A : No, the bus struck me on the side of the right hand ". This was not considered a contradiction of the statement to the police because that portion of D1 was not even put to the plaintiff by defence counsel. But the learned District Judge has made much of this when he says :

> " Now he says he struck against the bus on his right hand side. Generally a person who went from the right side of a bus to the left side of the bus should strike against the left side of the bus. He said so when he made the statement to the police but now he changes that also and says that he struck against the right side. He had stated to the police that his left foot struck against the right mudguard in front. He was thrown to the right side and after his fall his right foot was injured. "

A minute examination of the evidence of persons placed in a position such as the plaintiff, in order to discover possible contradictions with a view to establishing negligence on their part is in my view not quite necessary. What is required firstly is a consideration of the evidence in order to see whether there has been negligence on the part of the driver of the vehicle. That the learned Judge has failed to do. He has either not considered at all or not given due weight to such factors as the violence of the impact and the distance of 46 feet the bus traversed after the impact as indicative of its speed ; the place where the accident occurred ; and the plea of guilt tendered by the 2nd defendant in the Magistrate's Court.

This accident took place on the approach road running in front of the Fort Railway Station, within the railway premises. This is a road where many people gather around, and a place where passengers go to and fro. There was, therefore, a high degree of care cast upon drivers of vehicles and a duty to drive extremely carefully in order to avoid possible accidents. The accident took place about 24 feet in front of the bus halt, which was situated on the pavement. One would expect the bus to have been driven alongside the pavement and halted at the bus halt, but the bus knocked down the plaintiff 24 feet in front of the bus halt, and thereafter proceeded a further 46 feet from the bus halt before it stopped. These facts show that the bus was driven at a speed excessive in the circumstances, and that the driver also failed to keep to the left or near side of the highway. The learned Judge has failed to consider these facts in relation to the issue of negligence particularised in the plaint.

The District Judge has attached no weight at all to the plea of guilt tendered by the 2nd defendant to the second charge preferred against him in M.C. Narahenpitiya case No. 97484/A. Two charges were preferred against him in respect of this same accident. The first was a charge of negligent driving in breach of section 151(3) and the second was a charge of having failed to take such action as may be necessary to avoid an accident, in breach of section 149(1) of the Motor Traffic Act (Cap. 203). The action which the defendant failed to take was itemised as follows in the Magistrate's Court plaint P10 :—

(*a*) failing to stop or reduce the speed ;

(*b*) failing to keep a proper look out of the road ; and

(c) failing to keep to the left or near side of the highway.

The accused (2nd defendant) tendered an unqualified plea of guilt to the second charge, whereupon the prosecution withdrew the first charge. The accused was warned and discharged, but ordered to pay Rs. 85 as Crown costs.

The learned Judge has accepted the 2nd defendant's explanation that he pleaded guilty to the second charge in the hope that he would be warned and discharged. But surely the 2nd defendant's plea amounted to an admission that he drove this double decker bus on this occasion and failed to reduce its speed, failed to keep a proper look out and failed to keep to the left side of the highway, and thereby failed to avoid this accident. In the light of this evidence it is difficult to see how the learned Judge could have answered issue 4(*b*) relating to inevitable accident in favour of the defendants.

In *Hollington v. Hewthorn & Co. Ltd.*, (1943) 2 A.E.R. 35, a *conviction* of one of the defendants for careless driving was held to be inadmissible as evidence of his negligence in proceedings for damages on that ground against him and his employer. But "had the defendant before the Magistrates *pleaded guilt,* or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved but not the result of the trial." per Goddard, L. J. at page 42. The 2nd defendant's plea of guilt in the Magistrate's Court was, therefore, most relevant and ought to have been taken into consideration by the learned Judge in assessing of the plaintiff's case.

For these reasons I would set aside the dismissal of the plaintiff's action, and enter judgment for the plaintiff on the ground of the 2nd defendant's negligence.

In the event of this court holding with the plaintiff on the issue of negligence the District Judge has assessed the damages,

the plaintiff should be entitled to at Rs. 59,923.75 made up as follows :—

Special Damages :—

	Rs.	c.
In lieu of half-pay leave for one year ..	4,963	75
Special items of nutritional food	2,000	00
Taxi hire	1,000	00
Special attendants	1,680	00
Ambulance charges	280	00
Total ..	9,923	75

General Damages .. .. Rs. 50,000.00

There is no controversy about the several items of special damages. Learned Counsel for the appellant contends however, that the award of Rs. 50,000.00 as general damages is inadequate under the circumstances.

In a claim for damages for personal injury, whether caused by negligence or otherwise, the damages are, apart from special damages, at large, and will be given for the physical injury itself, and in case of disablement, for its effect upon the physical capacity of the injured person to enjoy life as well as for his bodily pain and suffering. "Such damages cannot be a perfect compensation but must be arrived at by a reasonable consideration of all the heads of damage in respect of which the plaintiff is entitled to compensation and of his circumstance, making allowances for the ordinary accidents and chances of life." *Halsbury—Laws of England* (3rd Edition), Vol. 11, paragraph 427.

The question we have to decide in appeal is whether the learned District Judge's assessment of damages is not only on the low side but also is so much on the low side that this Court should interfere with it and should increase it.

Dr. Parameswaram had examined the plaintiff subsequently on 30th June, 1975, the day before he gave evidence at the trial. On that date the fracture of the right humerus was well united and all movements were full. The fracture of the neck of the femur was healed, with a residual deformity leading to a shortening of about ¾ inch. The external rotation and movements of his right hip are limited. The doctor is of the opinion that all acts of the right leg are limited and accordingly the plaintiff will find difficulty in sitting cross legged, in squatting or in bending to remove his shoes. The plaintiff had tremors of the hand even prior to the accident. The accident had aggravated that condition. and consequently his handwriting is not normal.

After this accident there has been no loss in his salary increments. He still continues to be employed in the Tamil section of the Broadcasting Corporation, and has been given work which does not involve his going from place to place. His salary has not been reduced for that reason. He is now a little over 51 years of age, and there is nothing to prevent him continuing in employment until the age of retirement.

The most significant feature of the man's post-accident condition as at present established is that his right hip movement is limited, with the consequential disability referred to by the doctor. The tremors of the hand were there even before the accident. Account, has, however, to be taken also of the aggravation of that condition as a result of the accident. A consideration of all the evidence leads me to the conclusion that the learned Judge's estimate of general damages at Rs. 50,000 is reasonable, and should not be interfered with.

I would accordingly enter judgment for the plaintiff-appellant against the defendants-respondents in a sum of Rs. 59,923.75 with costs both here and in the court below.

RAJARATNAM, J.

I agree. In this case the order made by the learned District Judge dismissing the plaintiff's action must be set aside and judgment be entered for the plaintiff as set out above.

The learned trial Judge has minutely examined the evidence of the plaintiff and not subjected the defendant's testimony to the same minute examination before arriving at a finding on the question whether the defendant had acted negligently. Moreover there were many items of evidence of a circumstantial nature which had not received serious consideration, e.g. :

1. the admission made by the defendant that he had failed to take the necessary steps to avoid an accident,

2. the absence of brake marks as against the oral testimony of the defendant that he applied the brakes,

3. the fact that the bus careered a further distance of 46 feet from the point of impact in spite of the speed being 10 m.p.h. and the vehicle was driven on third gear, and

4. the bus was being driven within the railway premises and the point of impact was about 24 feet in front of a bus halt.

In motor 'accident' cases, there are almost invariably many items of circumstantial evidence to support a plaintiff's or a defendant's case and in such cases it will not be in the interests of justice to ignore them and depend solely on the credibility of

witnesses who may not while they reconstruct the happenings present too accurate a picture of the incident. In this particular case, the proved circumstances contribute to establish the plaintiff's case.

WALPITA, J.

I agree that this appeal be allowed and that judgment be entered for the plaintiff-respondent in a sum of Rs. 59,923.75 with costs in both Courts.

The plea of guilt to the second charge by 2nd defendant cannot be lightly ignored in considering whose negligence caused the accident in this case. The plea means the 2nd defendant could very well have avoided the accident.

Appeal allowed.