1958 *Present :* **Weerasooriya, J., and Sansoni, J.**

H. W. MENDIS SILVA, Appellant, *and* THE CEYLON INSURANCE CO., LTD., Respondent

S. C. 114—D. C. Colombo, 34320/M

Insurance—Motor vehicle—Proposal form—Statements therein—Interpretation—Evidence of un-roadworthiness—" Judicial notice ".

A lorry, which had been insured by the plaintiff with the defendant Company, ran off the road by accident when the steering rod gave way when it was being driven by the plaintiff's driver. In a claim made by the plaintiff for the cost of repairing the lorry plus the towing charges—

Held, (i) that the accident was caused by " accidental, external means ".

(ii) that the weight stated by the plaintiff in the proposal form as the " maximum carrying capacity of the vehicle " ought not to be regarded as incorrect merely because it exceeded the authorised payload specified in the licence as the maximum load which could be carried on the lorry, under section 36 of the Motor Traffic Act No. 14 of 1957.

(iii) that it could not be contended that the plaintiff committed a breach of the condition to " maintain in efficient condition " the insured lorry merely by proving that of the six tyres on the lorry (for it had six wheels) the three on the off side were worn smooth. A Court should not take judicial notice of the fact that if there are any smooth tyres on a motor vehicle, the vehicle is un-roadworthy.

APPEAL from a judgment of the District Court, Colombo.

E. F. N. Gratiaen, Q.C., with *S. C. E. Rodrigo* and *John de Saram*, for the Plaintiff-Appellant.

E. B. Wikramanayake, Q.C., with *H. Wanigatunga*, for the Defendant-Respondent.

Cur. adv. vult

February 18, 1958. SANSONI, J.—

The plaintiff insured his Chevrolet lorry bearing No. CY 4144 with the defendant company upon a Policy of Insurance dated 26th May, 1954. When the lorry was being driven to Trincomalee on 8th August, 1954

by the plaintiff's driver it ran off the road and was seriously damaged. The lorry was thereafter towed to Colombo, and the cost of repairing it was estimated by Rowlands Ltd. at Rs. 5,093·73.

The plaintiff brought this action to recover Rs. 9,000, further damages at Rs. 10 a day from 8th September, 1954, and a sum of Rs. 150 as towing charges. The defendant company, after negotiations with the plaintiff, denied its liability in any sum whatsoever. After trial the learned District Judge dismissed the plaintiff's action, upholding the defence on three grounds: they were (1) because the damage to the lorry was not caused by "accidental, external means", (2) because the plaintiff had given a false answer in the proposal by stating that the "maximum carrying capacity of the vehicle" was 3½ tons and not 2 tons, (3) because the plaintiff failed to "take all reasonable precautions to safeguard from loss or damage and to maintain in efficient condition" the insured lorry, in breach of condition 5 of the Policy.

At the hearing of the appeal, Mr. Gratiaen who appeared for the plaintiff-appellant limited his claim to Rs. 5,243.73 being the estimated cost of repairing the lorry plus the towing charges. Mr. Wikramanayake who appeared for the defendant-respondent did not attempt to support the learned Judge's finding on the first ground which I have set out. It is clear from the evidence that the lorry ran off the road by accident when the steering rod gave way, and was damaged when it collided with a log; the case therefore fell within the phrase "accidental, external means". If the attention of the learned Judge had been drawn to such cases as *Winspear v. Accidental Insurance Company*[1], and *Lawrence v. Accidental Insurance Company*[2], his decision on this point would have been different.

With regard to the second ground, Mr. Gratiaen conceded that since the proposal was the basis of the contract, the statements in the proposal had to be true if the contract was not to be avoided. It was submitted, however, that upon a fair and reasonable construction the answer "3½ tons" was the true answer to the question "maximum carrying capacity of vehicle"; or that, at the lowest, the question was ambiguous and should therefore be construed against the insurers. The learned Judge's view was that the maximum carrying capacity of a vehicle is neither more nor less than the payload of 2 tons which the licensing authority had specified in the licence as the maximum load which may be carried on the lorry, under Section 36 of the Motor Traffic Act No. 14 of 1957. If the question in the proposal can and does in fact mean only what the learned Judge thought it meant, there is no doubt as to the falsity of the answer given by the plaintiff. But the evidence of the witnesses Nelson and Wettasinghe, called by the plaintiff and the defendant company respectively, shows that the authorised pay-load mentioned in the licence is sometimes, at the discretion of the Commissioner of Motor Transport, fixed at a lower figure than the total weight of the goods which the vehicle is capable of carrying; and that a lorry such as this, with a "wheel base of 161" can carry 3½ tons of goods. Their evidence is not very clear on some matters, but it was for the defendant company to

[1] *(1880) 6 Q. B. D. 42.* [2] *(1881) 7 Q. B. D. 216.*

show that the particular answer was false. If the information which the insurers were seeking to obtain by the particular question in the proposal was in regard to the pay-load, I find it difficult to understand why the question was not asked in those plain terms. Even if the question as framed does not refer only to the maximum load that the vehicle was built to carry, it can well bear that meaning also. I do not therefore consider that the answer given to the question was shown to be false.

I come now to the third ground on which the learned Judge held against the plaintiff. Condition 5 of the Policy which I have set out requires the plaintiff to maintain the vehicle in efficient condition : this means that the plaintiff had to take reasonable precautions " to make the vehicle or keep the vehicle road-worthy—that is, in an efficient condition for the purpose for which it was going to be used, namely, to run upon the roads "—see *Brown v. Zurich General Accident and Liability Insurance Ltd*[1].

In order to show that there had been a breach of this condition, the defendant company relied on the evidence of its representative Zahir who had inspected the lorry at the scene of the accident on 12th August, 1954. This witness stated that he then found that of the six tyres on the lorry (for it had six wheels) the three on the off side were worn smooth and two of them were in a worse condition than the third. As the learned trial Judge has accepted the evidence of this witness as to the condition of these three tyres I shall consider the case on that footing. I do not, however, see that the necessary or proper conclusion to be drawn from this finding of fact is that this lorry was not in an efficient condition. It is significant that although the plaintiff called the witness Nelson who had been an engineer of Rowlands Ltd. for about 30 years, and the defendant company called the witness Wettasinghe who had been an Examiner of motor vehicles for 25 years, neither of these witnesses was asked for his opinion as to whether the three tyres of this lorry rendered it un-road-worthy. Even the witness Zahir does not express such an opinion.

Can it be said that the Court should take judicial notice of the fact that if there are any smooth tyres on a motor vehicle the vehicle is un-road-worthy ? I do not think so. Perhaps in an extreme case, where all the tyres of a vehicle are smooth, the answer may be easier to give. But what if, of the six tyres, only one or two or three tyres are smooth ? Is the vehicle to be considered un-road-worthy in all these instances ? And if not in all, then in how many ? The particular clause of the policy does not, of course, require the vehicle to be maintained in perfect condition but only in an efficient condition.

In considering the question whether the Court can take judicial notice of this matter, I would refer to the following observations in Wigmore on Evidence (3rd edition) Vol. 9 at section 2580 :—

> " Judicial notice is a judicial short cut, a doing away, in the case of evidence, with the formal necessity for evidence, because there is no real necessity for it. So far as matters of common knowledge are

[1] *(1954) 2 Ll. L. Rep. 243.*

concerned, it is saying there is no need of formally offering evidence of those things, because practically everyone knows them in advance, and there can be no question about them. The rule in this respect is well stated on 15 R.C.L. 1057 as follows: "It may be stated generally with regard to the question of what matters are properly of judicial cognizance that, while the power of judicial notice is to be exercised with caution, Courts should take notice of whatever is or ought to be generally known within the limits of their jurisdiction, for justice does not require that Courts profess to be more ignorant than the rest of mankind. This rule enumerates three material requisites: (1) The matter of which the Court will take judicial notice must be a matter of common and general knowledge. The fact that the belief is not universal, however, is not controlling, for there is scarcely any belief that is accepted by everyone. Courts take judicial notice of those things which are common knowledge to the majority of mankind, or to those persons familiar with the particular matter in question. But matters of which Courts have judicial knowledge are uniform and fixed, and do not depend upon an uncertain testimony; as soon as circumstances become disputable, it ceases to fall under the head of common knowledge, and so will not be judicially recognised, (2) A matter properly a subject of judicial notice must be "known"; that is, well established and authoritatively settled, not doubtful or uncertain. In every instance the test is whether sufficient notoriety attaches to the fact involved as to make it safe and proper to assume its existence without proof. In harmony with that view it has been said that Courts must "judicially recognise whatever has the requisite certainty and notoriety in every field of knowledge, in every walk of practical life" . . . . (I need not quote the third requisite because it is not material in this case).

"The test, therefore, in any particular case where it is sought to avoid or excuse the production of evidence because the fact to be proven is one of general knowledge and notoriety, is: (1) Is the fact one of common, everyday knowledge in that jurisdiction, which everyone of average intelligence and knowledge of things about him can be presumed to know? and (2) is it certain and indisputable? If it is, it is a proper case for dispensing with evidence, for its production cannot add or aid. On the other hand, we may well repeat, if there is any reasonable question whatever as to either point, proof should be required. Only so can the danger involved in dispensing with proof be avoided. Even if the matter be one of judicial cognizance, there is still no error or impropriety in requiring evidence."

Mr. Wikramanayake submitted that the conclusion of the learned Judge, drawn from the condition of the three worn tyres, that the lorry was un-road-worthy, is a question of fact which should not be interfered with in appeal. I have already said that I accept the learned Judge's finding of fact that three tyres on this lorry were smooth, but the question that now arises is the proper inference to be drawn from that fact. The difference, as pointed out in *Benmax v. Austin Motor Co. Ltd.*,[1] is between

[1] *(1955) A. C. 370.*

the perception of facts and the evaluation of facts, and I think this Court is in a position to judge whether the inference of the lorry being in an un-road-worthy condition was the proper inference to be drawn from the specific fact found by the learned Judge. I do not think the learned Judge could take judicial notice of the fact that a lorry with three such tyres was not in an efficient condition. It seems to me to be a matter to be established by the evidence of an expert speaking to the facts of the particular case, for the subject-matter of inquiry is such that inexperienced persons are unlikely to prove capable of forming a correct judgment upon it without such assistance.

The learned Judge has also found that the defects in the steering mechanism of the lorry showed that the lorry was not maintained in efficient condition. Here again there is a total absence of any evidence, expert or otherwise, as to the condition of the steering mechanism at or before the time of the accident. I think it is dangerous to infer that the mechanism had not been in efficient condition merely because it failed to function just before the accident occurred. It is true that no major repairs had been done to the lorry since the plaintiff purchased it second-hand in 1946, but what was the need for them if the lorry was working satisfactorily? Minor repairs were effected when required, and the lorry was serviced from time to time, and I do not see that the plaintiff failed to observe condition 5 by failing to look for defects which were not apparent.

For these reasons I would set aside the judgment appealed from and give judgment for the plaintiff in a sum of Rs. 5,243·73 and costs in both Courts.

WEERASOORIYA, J.—I agree.

Judgment set aside.