1955 *Present :* Gratiaen, J. and K. D. de Silva, J.

K. SUBRAMANIAM, Appellant, *and* S. V. P. SUDALAIMANY NADAR, Respondent

S. C. 589—D. C. Colombo, 30,472/M

Delict—Master and servant—Loan of car—Negligence of driver—Injury to borrower—Liability of owner—" Course of employment "—Burden of proof.

Where A borrows B's car and is injured in consequence of the negligent driving of B's driver, A is entitled to recover damages from B, unless B can show that he had placed the driver under the complete control of A.

Where a plaintiff establishes that damage has been caused to him by the negligent driving of the defendant's motor car, the fact of ownership is *prima facie* evidence that the car was driven, at the material time, by the owner or by his servant or agent.

APPEAL from a judgment of the District Court, Colombo.

Ivor Misso, with *R. Manicavasagar*, for plaintiff-appellant.

V. A. Kandiah, for defendant-respondent.

Cur. adv. vult.

September 21, 1955. de SILVA, J.—

This is an appeal from the judgment of the District Judge, Colombo, dismissing the plaintiff's action to recover damages resulting from a motor-car accident.

[1] *22 Tax Cases 51.*

The defendant is the owner of motor-car bearing No. C. N. 4738. He resides in India, but he carries on a business in Colombo. His Attorney in Ceylon is one V. Chelliah. On October 17th 1952, the plaintiff borrowed this car from Chelliah to go to Negombo. It was driven by the defendant's driver M. W. Perera who was instructed by Chelliah to take the plaintiff to Negombo and bring it back before 2.30 p.m. that day. Accordingly the driver took the plaintiff and two others to Negombo. They left Negombo at about 1:15 or 1.30 p.m. on the return journey. When they had proceeded about 16 miles from Negombo they met a lorry proceeding in the same direction. At the time, this car was being driven, according to the driver, at a speed of 30 or 45 miles per hour. The defendant's driver wanted to overtake this lorry and sounded his horn. Then he saw a hand from the lorry moving forward and he concluded that it was the signal for him to overtake. Thereupon he increased his speed and swerved the car to the right and attempted to overtake the lorry when he found a car coming in front of him from the opposite direction. He then swerved the car to the left and applied the brakes in order to prevent a collision with the lorry. The car however overturned and fell on its side in the middle of the road. As a result of the accident the plaintiff sustained a compound fracture of the left radius and also an injury to the medial nerve of the left forearm. In consequence of these injuries the plaintiff had to remain nearly two weeks in hospital and also had to undergo two operations. Dr. Francis Silva who attended on him stated in his evidence that the plaintiff's left forearm was incapacitated to the extent of 20 to 25 per cent.

The plaintiff instituted this action to recover a sum of Rs. 5,000 as damages on the ground that the accident was caused by the rash and negligent manner in which the defendant's vehicle was being driven at the time. The defendant filed answer stating, *inter alia*, that the overturning of the car was due to the state of the road at the time and therefore it was beyond the control of the driver. In other words, he set up the defence that it was an inevitable accident. There was also a general denial that the driver was acting in the course of his employment at the time.

The case proceeded to trial on the following issues :—

1. Was motor-car No. C.N. 4738, belonging to the defendant driven by his driver, acting in the scope of his employment on 17.10.'52 ?

2. Did the said car overturn as the result of all, or any of the acts of negligence on the part of the driver of the car, set out in para 4 of the plaint ?

3. What damages, if any, is plaintiff entitled to recover from the defendant ?

The learned District Judge held that the plaintiff had failed to prove negligence on the part of the defendant's driver. He also took the view that the driver was not acting within the scope of his employment. He further held that the plaintiff had failed to prove that Chelliah was the defendant's Attorney at the time in question. Accordingly, he dismissed the plaintiff's action with costs.

I am unable to agree with the trial judge that the plaintiff had failed to establish negligence on the part of the driver of the car. The driver who gave evidence for the defendant admitted that at the time he saw the lorry ahead he was driving at a speed of 30 or 45 miles an hour. When he attempted to overtake the lorry he increased that speed further. At the time the road was wet. The driver also admitted that he did not see clearly the signal alleged to have been given by the lorry driver. What he in fact saw were four fingers projecting from the lorry. He admitted that, as he was in a hurry, he concluded that this was a signal for him to overtake. On this evidence it is not possible to hold that the driver of the lorry in fact gave the signal to overtake. Even if such a signal was given the responsibility was still with the driver of the car to satisfy himself that the road ahead was clear. Section 150 (3) of the Motor Traffic Act of 1952 enacts that a motor-car shall not be driven so as to overtake other traffic unless the driver has a clear and unobstructed view of the road ahead. This is a rule of the road the breach of which is an offence. That the defendant's driver had no unobstructed view of the road is clear from the fact that immediately he took his vehicle to the right to overtake the lorry he found himself suddenly confronted with a car coming from the opposite direction. He admits that there would have been a head-on collision with that car if he proceeded any further in that direction. Not only did he fail to have a clear and an unobstructed view of the road ahead when he attempted to overtake the lorry but he also attempted to overtake it at a speed which must be considered to be dangerous considering the fact that the road was wet at the time. It is therefore clear that the overturning of this car was due to the negligent driving of the driver.

The learned District Judge has also erred in holding that the defendant's driver was not acting within the scope of his employment. Admittedly, M. W. Perera drove the defendant's car on the day in question at the request of Chelliah. If Chelliah was the Attorney of the defendant the latter would be prima facie liable in damages if the accident was due to negligence of his driver. I have already held that negligence on the part of M. W. Perera has been established. The learned District Judge took the view that the driver was not acting within the scope of his employment probably because the plaintiff had borrowed the car on this occasion. That however does not relieve the defendant of his responsibility for the negligence of the driver. It was so held by this Court in *Jafferjee v. Munasinghe* [1]. The burden is on the defendant—and this is a heavy burden—that he had placed the driver under the complete control of the plaintiff, if the defendant seeks to escape liability—*Mersey Docks and Harbour Board v. Coggins and Griffiths (Liverpool) Ltd. and Mcfarlane* [2]. There is no evidence whatsoever that when the car was lent to the plaintiff the driver was placed under his control. On the contrary, the driver was carrying out the instructions of Chelliah in the course of this journey. Chelliah had ordered the driver to bring back the car before 2.30 p.m. Indeed, the driver admitted that he was anxious to overtake the lorry because he was in a hurry. He further stated that the only instructions he got regarding the use of the car that day were

[1] *(1951) 52 N. L. R. 313.* [2] *(1946) 2 A. E. R. 345.*

from Chelliah. Where a plaintiff has established that damage has been caused to him by the negligent driving of the defendant's motor-car the fact of ownership is prima facie evidence that the motor car, at the material time, was driven by the owner or by his servant or agent—*Barnard v. Sully* [1]. In this case it has been established that the defendant's car was driven by M. W. Perera. That amounts to prima facie evidence that M. W. Perera was a servant or the agent of the defendant. Indeed, it is not denied that M. W. Perera was in fact the servant of the defendant at the material time.

The learned trial Judge also took the view that the plaintiff had failed to prove that Chelliah was the Attorney of the defendant. Chelliah was called as a witness by the plaintiff. He produced his power of Attorney for the year 1954 and stated that during the years 1952 and 1953 also he was the Attorney of the defendant. His evidence stands uncontradicted. It was not even suggested to him in cross-examination that he did not have the power of Attorney from the defendant during the year 1952. On this evidence the learned District Judge should have held that Chelliah was the Attorney of the defendant at the time of the accident. The answers to issues 1 and 2 should be in the affirmative. The plaintiff therefore is entitled to recover damages from the defendant. The learned District Judge stated in his judgment that if the plaintiff succeeded in the action he would not have been entitled to recover more than Rs. 1,500. In my view Rs. 1,500 is a fair assessment of the plaintiff's damages. I would therefore allow the appeal and enter judgment for the plaintiff in the sum of Rs. 1,500 with costs in both Courts.

GRATIAEN, J.—I agree.

Appeal allowed.