1947 *Present :* **Soertsz S.P.J. and Canekeratne J.**

PERERA, Appellant, *and* CHARLES *et al.*, Respondents.

S. C. 211—D. C. Kegalla, 2, 958.

Negligence—Passenger in bus—Arm protruding from bus—Defendant negligent—Contributory negligence of plaintiff—Test applicable.

Plaintiff, a passenger in ominibus referred to as X. bus, was seated with his arm resting on a brass rod that ran along the side of the bus and part of his arm protruded from the bus. As it approached a culvert this bus met the W. bus driven by the driver of the first defendant. The W. bus collided with the X. bus and the plaintiff's arm was injured. There was negligence on the part of the drivers of both buses. The trail Judge dismissed tbe action on the ground that the plaintiff bad, by sitting with his arm protruding from the bus, being guilty of contributory negligence.

Held, that the negligence of the plaintiff, if any, was not a fault contributory to the collision. The sole cause of the accident was the negligence of the driver of the W. bus or his negligence aided by that of the X. Bus.

APPEAL from a judgment of the District Judge, Kegalla.

F A. Hayley, K.C. (with him *C. E. S. Perera, E.B. Wikramanayake* and *S. R. Wijayatilake*), for the plaintiff, appellant.

C. R. Guneratne, for the 1st defendant, respondent.

H. V. Perera, K.C. (with him *U. A. Jayasundere*), for the 2nd defendant, respondent.

Cur. adv. vult.

November 7, 1947. CANEKERATNE J.—

This is an appeal by the plaintiff from a judgment dismissing his action for the recovery of damages for personal injuries against the two defendants. The plaintiff who was a passenger in omnibus bearing No. X 7897—I shall refer to it as the X. bus—instituted the action on November 4, 1943, against one K. G. Charles, the first defendant, and the Panadure Bus Company of Panadure, which was named the second defendant. It was alleged that the first defendant was the owner of a bus bearing No. W. 1372, driven by one Peter, and the second defendant the owner of bus bearing No. X. 7897 and driven by one Ekanayake, and that " the two buses were driven recklessly and negligently by the aforesaid drivers in the course of their employment by the two defendants and as a result of such reckless and negligent driving the buses met with a collision ". On January 11, 1944, the proctor for the plaintiff changed the name of the second defendant to the Panadure Motor Transit Co. On February 9, 1944, a proxy was filed on behalf of the second defendant, and begins thus : The Panadure Bus Company by . . . . The seal of the Panadure Motor Transit Co., Ltd., is affixed at the bottom.

The date for filing answer was fixed for March 1. On that day the first defendant filed answer, the second defendant took time. On March 29 a new proxy was filed in favour of another proctor by the second defendant—it begins thus : The Panadure Motor Transit Company, Limited, Panadure—a rubber stamp is affixed at the bottom and underneath is the signature of the Secretary and a Director, and answer was filed also on this date. In the answer the second defendant, as the Judge states, admitted that it was the owner of omnibus X. 7897, and that its driver E. A. John Ekanayake did drive the bus along the Undugoda-Bulathkohupitiya Road on April 5, 1943, and that the plaintiff was a passenger in the said bus. Omnibus bearing No. W. 1372 had at this time been 13 years in use—I shall refer to it as the W. bus.

In April the trial was fixed for August 25, 1944 ; as the proctor for the second defendant was ill the trial was postponed for December 8. On December 8, the proctor for second defendant moved to file an amended answer ; as objection was taken to this, order was made to " call it on December 13 ". Case was called on 13 : Order was " parties will now get ready for trial. Call case December 18, 1944, to fix date of trial. Question as regards the amount of costs will be considered on that date ". The journal entry of that day begins thus : " Mr. . . . . instructed by . . . . for second defendant ". The proctor is the same person who appeared for the second defendant then on the record. There is an observation by this Counsel—" Mr. . . . . wishes it recorded that order for costs can be made against who appeared to be second defendant on the record ". Some confusion seems to have been caused on this date. The proctor for the plaintiff appears to re-echo some observation made by another in Court " as he is not a legal person, Mr. Fernando moves to amend the caption by deleting Panadure Motor Transit Co. and adding W. Leo Fernando, carrying on business under the name and style of Panadure Motor Transit Co. Trial postponed for April 27, 1945 ". On March 16, 1945, a proxy was filed signed by W. Leo Fernando. There is a document in the record purporting to be the amended answer of the second defendant " The Panadure Motor Transit Co. of Panadure " dated December 6, 1944—there is no order accepting this answer nor is there any answer filed by W. Leo Fernando.

The plaintiff who appeared to have what seemed a good cause of action against the Panadure Motor Transit Co., Ltd., which had admitted that E. A. John Ekanayake was the driver employed by it—so far practically abandoned the proceedings against this Company and induced by some-one or other made the present second respondent the second defendant to the action.

On February 23, 1945, the plaintiff's proctor obtained an order for interrogatories to be answered by the first and second defendants. The second defendant, in answer to interrogatory 3, said that he was the proprietor of the Panadure Motor Transit Company, but the Company had become defunct. He did not condescend to answer interrogatory 5 but referred the plaintiff to para. 6 (*d*) of the amended answer. The answer to interrogatory 1 is an improper answer in so far as it attempts to give gratuitous advice to the plaintiff. At the trial which took place on

April 24, 1945, Counsel appeared for this defendant ; he did not call any witness ; the Counsel for the first defendant appears to have obliged the second defendant by calling the driver of the X. bus as a witness, and this witness was allowed to produce two documents which should have been produced by someone called by the second defendant. This driver said that he was not employed by the second defendant, but he could give no satisfactory explanation as to how the proctor for the second defendant gave the address of the driver of the X. bus, of the conductor of the same bus and of the ticket examiner as care of Panadure Motor Transit Co., Ltd., Panadure. The evidence of Peter, the driver, is that Ekanayake was, at the time of the accident, employed by the Panadure Bus Company.

The judgment of the trial Judge is not of much assistance. Very early in his judgment he began by stating that the facts of this case are similar to those in the case of *Fernando v. Gunawardene*[1]—there is a superficial resemblance as there too an arm of a person was jutting out ; that was a case not of contributory negligence but of there being no evidence of negligence. This is a serious misdirection : next one has to read the judgment more than once to glean what views the Judge holds on the evidence. After summarising what some of the witnesses called by the plaintiff stated he leaves their evidence with the brief remark, the witness did not make a statement to the Police. Instead of this he should have tried to come to a decision as regards the credibility of these witnesses. Ekanayake has not spoken the truth on a number of points, Peter has not given the true version on some matters, the statement made by Peter to the Police is almost a replica of what Ekanayake said. Not much reliance can be placed on the evidence of the two constables, Abeyratne and Edmund, the former was at a great disadvantage from the moment he confessed that the note book in which he took down the statement of the plaintiff—the plaintiff denied he made a statement—is missing and that he cannot explain how it was lost, the latter's evidence is contradictory of the former's. Abeyratne's version is that he did not see the plaintiff till some time after the driver's statement had been recorded. It is likely that he was induced to take the view that, as there was not much harm done, a detailed inquiry was not necessary—his conduct can be explained only on this supposition. Apparently there was overcrowding in the X. bus, whether it was uncomfortable overcrowding or not cannot be determined with certainty.

One question for decision is : Was Ekanayake in the employment of the second defendant at the time of the accident ? The plaintiff did not give any evidence bearing on this question. There is, however, the statement of the driver Peter, but it is not sufficiently definite ; the strongest circumstance against the second defendant is furnished by his conduct in these proceedings, but still it is hardly possible on that alone to come to a conclusion adverse to the second defendant. The document 2 D 1 is not of importance on the real question at issue : it may have been *prima facie* evidence in an action instituted against another party.

The collision between these two buses occurred at about 9 A.M. near the 8th milepost in Moradane village. The W. bus was proceeding

[1] *(1944) 45 N. L. R. 521.*

from Kegalla to Bulathkohupitiya, the driver says he saw the other bus about 8 fathoms away when his bus had got on to the culvert or the bulk of his bus was on the culvert, the culvert was 47 feet in length and near it on the Bulathkohupitiya side of it is a bend in the road. The road within the culvert is narrow and there was no room for that bus to pass the W. bus, according to driver Peter—the evidence of Abeyratne is substantially to the same effect ; Peter said he halted his bus, but the trial Judge does not seem to accept this view (p. 81) : he seems also to hold that Dharmawardene was, contrary to the driver's testimony, a passenger in the bus ; it seems clear that there was blood on the outside of this bus and also on the top of the body of the other bus ; blood was seen immediately after the impact; there was a dent on the top of the body of the X. bus and a mark on the W. bus. It is also a fact that Ekanayake accelerated the engine at the time and changed gear, for to go forward the engine has, according to him, to be accelerated : the driver of the W. bus says he was travelling at 20 to 25 miles an hour.

At that time the X. bus was some distance from the entrance to the culvert and was doing, according to the driver, about 10 to 15 miles an hour, according to the driver Peter about 15 to 20 miles. When it had proceeded some distance Ekanayake saw the other bus on the culvert, though he started by saying that he did not apply his brakes he later admitted that he came applying his brakes—this is confirmed by what the witnesses who were passengers in his bus state.

The other bus had its right wheel on the middle of the road thus not leaving much room for one to pass if both were moving, as clearly they were. While the X. bus was approaching the W. bus to pass it as described above and when the front of the former was nearly level with the front part of the W. bus, the latter apparently made a move and swerved and one knocked against the other. The course steered by the X. bus and the W. bus was faulty in that the former was aiming to pass the W. bus, the latter to pass the X. bus too close. There was not a sufficient space between itself and the other bus so as to eliminate the risk if the W. bus or the X. bus happened to move somewhat nearer, and also to give that bus more time to avoid a collision if a danger of this sort presented itself.

Plaintiff had his hand on the rest or plank of the bus body, near, or on the brass knob : there were brass rods from one post to the other. His evidence was that no part of his arm was protruding outside the bus. If this hand was resting in this manner at the time the bus entered the culvert—and there was no uncomfortable overcrowding—he had been negligent at an earlier stage in leaving his arm protruding ; the W. bus struck against the other bus and as a result the brass rod was moved off its post and rod and knob were turned towards the inside of the bus, it then struck against the arm of the plaintiff. Both these buses had mudguards : the probabilities are that the mudguard of one of these buses would be at least 2 inches in width, there would be a space of 4 inches between the 2 buses comparatively free from any danger. If the hand was projecting out of the bus 4 inches or 5 inches no harm could have been caused to the plaintiff as the W. bus was passing if

it was driven carefully. By not keeping a proper lookout Ekanayake failed to stop his bus before the entrance to the culvert, he thus disabled himself from avoiding a collision. The driver of the W. bus was driving at an excessive speed considering the circumstances—he was proceeding on a culvert of this nature at a time when another bus was approaching from the other direction. The negligence of the driver of the W. bus continued right up to the moment when the collision became inevitable. As by driving more carefully or by stopping his bus before he came in front of the other he could have avoided hitting the other bus, his negligence was the cause or/and the negligence of the other driver was the cause of the damage.

The burden of proving contributory negligence on the part of the plaintiff lies on the defendant. The defendant must prove that there was a failure by the plaintiff to protect himself from harm when he ought to have done so, that he culpably exposed himself to the risk of harm consciously or inadvertently. Legal responsibility in cases of contributory negligence may be determined by finding out which party is the real or the effective cause of the harm—or the " decisive " cause of it ; sometimes one is said to be the " proximate cause " of the damage—it may also be referred to as the " dominant or determining cause " of the disaster. " The interpretation to be applied does not involve any metaphysical or scientific view of causation. Most results are brought about by a combination of causes, and a search for ' the cause ' involves a selection of the governing explanation in each case "[1]. It has to be selected by the common sense standard applied by the man in the street. The question of contributory negligence should be approached broadly avoiding those fine distinctions which are apt to be drawn when some slight act of negligence on the part of the one person might be said to defeat his claim [2]. " The cause of the death of a human being may, I suppose, be scientifically stated to be the failure of the supply of sufficient oxygen to the brain, but when a medical man certifies ' the cause of death ' he looks for the thing which has predominantly operated to bring death about. In such a case—it is this sort of practical test which has to be applied. "

Passengers are often seen holding the brass rod fixed between the posts, this would happen more frequently near bends and culverts. The plaintiff was negligent, according to the first defendant, because he had his arm protruding from the rest on the bus, this negligence of his was in existence at the time the X. bus entered the culvert. The driver of the first defendant knew of the risk which has been created or was in a position in which he ought to know of the risk. In a collision case the acts of the parties may be successive in point of time : here usually one party has by negligent conduct created a state of affairs which presents risk of danger in certain conditions, and the other disturbs the existing state of affairs by adding the fact or necessary for the production of it, he thereby converts a potentially harmful state of affairs into one causing harm. *Davis v. Mann*[3] *; Radley v. London and North Western*

[1] *Yorkshire Dale Steamship Co. v. Minister, 1942, A. C. 691 at p. 698.*

[2] *Volute (1922) 1 A. C. 129, p. 144.* [3] *(1842) 10 M. & W. 546.*

Railway Co.[1]. The later actor could have avoided causing damage by the exercise of reasonable care and he is responsible for the other party's damage ; but if he is the person suing for damages he cannot generally recover (*Butterfield v. Forrester* [2]). Whether the plaintiff got in the way of the W. bus with or without negligence on his part, the first respondent's driver could and ought to have avoided the consequences of that negligence, he failed to do so not by any combination of negligence on the part of the plaintiff and his own, but solely by his negligence in driving the bus carelessly and in not stopping the bus when he saw the other bus approaching. The negligence of the plaintiff, if any, was not a fault contributing to the collision. The sole cause of the accident was the negligence of the driver of the W. bus or his negligence aided by that of the X. bus. An ordinary passenger by an ominbus is not affected by the negligence of the driver unless he actually assumes control over his actions. The "*Bernina*" [3]. It may be that the respondent may be able to contend that there was a combination of negligence on the part of the driver Ekanayake and his driver but that is immaterial in the present case.

It may often be helpful to take into consideration the culpability of the conduct of the parties. A choice would have to be made between two faults which are very closely connected. It may often appear that one cause was more important or played a greater part in bringing about the result and that one person was therefore more to blame. Often it may seem as if a Judge has placed the blame and consequent liability upon the party whose conduct deserved the greater censure. As Voet states "he is liable whose fault is regarded the greater" (9. 2. 17 ; cf. 9. 2. 22 too).

The plaintiff has suffered, as the Judge states, both mentally and bodily. The plaintiff was, according to the evidence led in the case, earning at least Rs. 120 a month : his earning capacity has been decreased at least 50 per cent. according to the medical evidence : he is not able to use his right hand for writing and he cannot carry anything by that hand. He was 55 years old at the time of the accident. He should be given a sum sufficient to compensate him for the loss that he has suffered for two years and would suffer for a number of years by reason of the incapacity to earn the former income. He is also entitled to some compensation for the pain and discomfort suffered by him by reason of the injury : the wrong doer must also compensate him the expenses he would have incurred in getting treatment. The plaintiff should get a sum of Rs. 5,000 as damages. The second defendant will not be entitled to any costs considering the attitude adopted by him in this case. The first defendant will pay the appellant the sum of Rs. 5,000 together with interest from this date, the costs of trial and of appeal.

SOERTSZ S. P. J.—I agree.

Damages awarded against first defendant.
Action against second defendant dismissed without costs.

[1] *(1876) 1 A. C. 754.*
[2] *(1809) 11 East 60.*
[3] *(1888) 13 A. C. I.*