1970 *Present :* H. N. G. Fernando, C.J., and Samerawickrame, J.

G. C. I. DE SILVA and another, Appellants, *and* D. E. R. HAPUARATCHI and another, Respondents

S. C. 601/66 (F)—D. C. Colombo, 60291/M

Delict—Running down case—Negligent driving of motor car by minor son who lives with his father and is dependent on him—Car owned by the father—Liability of the father for the son's negligence—Quantum of damages.

Where, in a running down case, the evidence establishes that the car which was driven negligently was driven with the express authority of the owner of the car, the owner will not be held liable for the negligent driving unless the evidence also justifies the conclusion that the car was driven on the owner's behalf. The mere giving of authority to drive does not by itself establish the essential fact that there was authority to drive *on the owner's behalf.*

The owner, however, will be held liable if he fails to repel the presumption that the ownership of a vehicle furnishes *prima facie* evidence that the negligent driver was either the owner himself, or some servant or agent of his.

The defendant's minor son, aged 19, asked his father one morning whether he could "have the (father's) car for a few minutes", and the request was granted. A little while later, the plaintiff (aged about 15) was injured in consequence of the negligent driving of the car by the defendant's son. Although the defendant stated in evidence "I did not send my son on any errand of mine. He took the car for his own purposes", the evidence established that the son, who was a student in a fashionable area in Colombo, was maintained by and living with the defendant and that he used to drive the car off and on. The son, when he gave evidence, did not state that the actual purpose for which he used the car at the time of the accident fell outside the scope of the father's duty to maintain his son.

Held, that the defendant was liable for the negligent driving of his car by his minor son.

Held further, that the trial Judge's award of Rs. 30,000 as damages was excessive in the circumstances of the present case and should be reduced to a sum of Rs. 15,000. *Dias v. Silva* (55 N. L. R. 7) distinguished.

APPEAL from a judgment of the District Court, Colombo.

C. Ranganathan, Q.C., with *M. M. K. Subramaniam* and *B. A. R. Candappa*, for the defendants-appellants.

H. W. Jayewardene, Q.C., with *L. V. R. Fernando*, for the plaintiffs-respondents.

Cur. adv. vult.

January 29, 1971. H. N. G. FERNANDO, C.J.—

About 8 a.m. on the morning of March 9th 1962, the defendant's minor son (then aged 19) asked his father whether he could "have the (father's) car for a few minutes", and this request was granted. About 8.30 a.m. that morning, the car while being driven by the defendant's son knocked down and injured the plaintiff. In this action filed against the defendant, the District Judge held that the plaintiff was injured in consequence of the negligent driving of the car, and that finding has not been challenged in appeal. But the decree awarding damages in Rs. 30,000 against the defendant has been challenged on two other grounds, firstly that the defendant was wrongly held liable for the negligent driving of the car by his minor son, and secondly that in any event the award of damages was excessive.

The references to various decisions as to the liability of the owner of a vehicle driven by a person other than his servant, which counsel on both sides made, have assisted me to appreciate that the solution to the problem in consideration is to be found in 2 or 3 decisions of the Courts in England.

In *Barnard v. Sully* [1] it was decided, following an unreported case of 1926, that proof of the ownership of a vehicle furnished prima facie evidence that the vehicle was at the material time being driven by the owner, his agent or servant. In that particular case the only evidence available was that the defendant owned the vehicle which had been negligently driven and there was no indication as to the identity of the person who drove it or as to the purpose for which it was driven. The defendant was held liable upon the prima facie evidence.

The case of *Hewitt v. Bonvin* [2] is of special interest and importance. The evidence established that the minor son of the owner had been ordered not to drive the owner's car without the permission of the latter or of his wife, that on the particular occasion the wife in the owner's absence gave the son permission to drive the car, that the son's purpose which was known to the wife was to convey some of the son's friends to some destination, and that the journey was of no concern to the owner or his wife. The Court of Appeal referred to the decision in *Barnard v. Sully* in the following terms :—

> "It is true that if a plaintiff proves that a vehicle was negligently driven and that the defendant was its owner, and the Court is left without further information, it is legitimate to draw the inference that the negligent driver was either the owner himself, or some servant or agent of his : (*Barnard v. Sully*) ; but in the present case all the facts were ascertained and the judge was not left to draw an inference from incomplete data."

[1] *1931 Times L. R. 557.*

[2] *(1940) 1 K. B. 188.*

du Parcq L. J. made the following further observations :—

"The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty."

"In *Parker v. Miller* this Court differed from a Divisional Court as to the effect of the evidence, but not, apparently, as to the law. The report is meagre, but it would seem that the defendant, who had been taking a friend and the friend's daughter for a drive, got out of the car and permitted or requested the friend to drive himself and his daughter home. The County Court Judge whose decision on questions of fact was of course not open to review, must, I think, have drawn the inference that the defendant had delegated the tasks of conveying the female passenger to her destination and of looking after the car to his friend, who was therefore in charge of the car as his agent, and not merely as a bailee."

"If, for instance, a father consents to his young son inviting a guest to the family home, and then permits him to use the father's car for the entertainment or convenience of the guest, it may well be a justifiable conclusion that the son is driving for and on behalf of the father. Ultimately the question is always one of fact."

"Neither the appellant nor Madame Bonvin was responsible for the welfare of the girls, and I am not satisfied that Madame Bonvin even approved of the journey, much less that she regarded its performance as a duty to be delegated to her son. The plaintiff has failed to show more than a bailment of the car by the appellant to the person responsible for driving it negligently."

The learned District Judge who tried the instant case appears to have rested his decision against the defendant on the mere fact that in this case the owner, the defendant, had given his minor son express authority to drive the car on this particular occasion ; and if the Judge did so, he was clearly wrong, for the mere giving of authority to drive does not by itself establish the essential fact that there was authority to drive on *the owner's behalf*. The decision can therefore be upheld only if the evidence justifies the conclusion that the car was driven on this occasion on the owner's behalf.

The judgment in *Hewitt v. Bonvin* was applied by the Privy Council in the case of *Rambarran v. Gurrucharran*[1]. In that case, it was established by the evidence that the owner of the car neither drove it himself, nor

[1] *(1970) 1 A. E. R. 749.*

employed a paid driver for the car. Three of the defendant's sons had driving licences, and one or other of them used to drive the owner when the latter required the use of the car for his own purposes. The owner gave evidence of the specific purposes for which he would thus use the car, and stated that on the occasion when the accident occurred the car was not being driven for any of these purposes. He stated also that any of the three sons who were licensed drivers had authority to use the car for their own personal purposes. On the relevant occasion, which occurred on a Sunday, the car was driven by one of these sons, and after the accident a woman and four other persons were seen to get out of the car.

The Privy Council held that on this evidence the owner repelled the inference arising from his ownership that the car had been driven by his servant or agent. In reaching this conclusion their Lordships stated as follows :—

> "The appellant, it is true, could not, except at his peril, leave court without any other knowledge than that the car belonged to him. But he could repel any inference, based on this fact, that the driver was his servant or agent in either of two ways. One, by giving or calling evidence as to Leslie's object in making the journey in question, and establishing that it served no purpose of the appellant. Two, by simply asserting that the car was not being driven for any purpose of the appellant, and proving that assertion by means of such supporting evidence as was available to him. If this supporting evidence was sufficiently cogent and credible to be accepted, it is not to be overthrown simply because the appellant chose this way of defeating the respondent's case instead of the other. Once he had thus proved that Leslie was not driving as his servant or agent, then the actual purpose of Leslie on that day was irrelevant."

In looking for assistance from the cases cited above, I bear in mind the observation in *Hewitt v. Bonvin* that the question for decision in the instant case, which is whether the defendant's son drove the car on this occasion on behalf of his father, is ultimately one of fact. The defendant stated in evidence "I did not send my son on any errand of mine. He took the car for his own purposes. ....He was a student. I was maintaining him and he was living with me. He was dependent on me. He did not tell me where he wanted to go in the car. ....He used to drive this car off and on. He does not drive the car on my errands. He may have driven my wife along. The petrol is paid for by me. ....I did not ask the purpose for which he wanted the car". The defendant's son stated in evidence "on the morning of 9th March I had the use of my father's car. ....I had two of my friends in the car."

It will be seen that the defendant could not have known and did not in fact know the purpose for which the car was used, and that his statement "he took the car for his own purposes" was thus merely an inference

and not a statement of fact. The son's statement "I had the use of the car" does not in my opinion negative the possibility that the purpose for which he used the car may have been to go to the Pembroke Academy (at which he was a student), or for some other purpose falling within the scope of a father's duty to maintain his dependent children. One can think of other such purposes, e.g., a visit to a doctor, the purchase of necessaries, etc. In fact, although the son was the best person and perhaps the only person who could specify the purpose for which he used the car, he did not choose to state that purpose to the Court. In the South African case *Goosen v. Stevenson*[1] the Court referred with approval to the English case of *Barnard v. Sully* and applied the principle stated in *Union Government v. Sykes*[2] "the important point is that less evidence will suffice to establish the prima facie case where the matter is peculiarly within the knowledge of the opposite party". Considering that the defendant's son did not state to the Court the actual purpose for which he used the car, despite his obvious knowledge of that purpose, the District Judge was in the language of the judgment in *Barnard v. Sully* left to draw an inference from incomplete data.

In *Hewitt v. Bonvin* it was established beyond doubt that the car was used by the minor son for a purely private purpose which could not in the circumstances be regarded in any way as a purpose for which the owner maintained the car. In the case recently decided by the Privy Council the owner was able to establish that, although he was unaware of the actual purpose for which the car was used by his son, it could not have been used for any of the known purposes for which it was ordinarily used by the owner or on his behalf. The owner was thus able to negative the possibility that the son was his agent. In any event, there was nothing to show that the son in that case was a minor dependent on the owner.

In considering a question of fact such as this, it is legitimate to take into account the practice among residents in Colombo particularly in the city's more fashionable areas. It is well known that one important purpose for which cars are maintained is for their use to convey minor children to educational institutions, for visits to dentists, for the purchase of books and necessaries, for music lessons, etc. Ordinarily if a paid driver is employed it would be his duty to drive the car on such occasions. Indeed the traffic jams which occur daily outside large schools in the city fairly indicate that if a father owns a motor car his children would rarely utilize public transport.

In these conditions, which differ so much from those in a country like England, it is only reasonable to hold, in the absence of evidence to the contrary, that if a car is used for the conveyance of the children of the owner for any purpose such as one of those envisaged above, then it is used for a purpose for which its owner maintains it, that is to say in the course of his duty as a parent to his dependent children.

[1] *(1932) T. P. D. 223.* [2] *(1913) A. D. 173.*

Counsel for the defendant argued with utmost confidence that a motor car which conveys its owner's child to school is used for a purpose of the child, and cannot therefore be regarded as being used *on behalf of the owner*. The fallacy here lies in the reasoning that the fact of the child's purpose being served automatically negatives an user on his father's behalf. If that reasoning be correct, there is a distinction between one case in which a father's car conveys a studious and willing child to school and another case in which it conveys a child who in Shakespear's word "creeps like snail unwillingly to school"; is it to be said that in the former case the car is driven purely for the child's purpose, whereas in the latter it is driven on the father's behalf? Is there a similar distinction between a case in which a child asks to be taken to the dentist, and one in which he is compelled to go and have his teeth drilled?

In *Hewitt v. Bonvin*, du Parcq L. J. contemplated that an owner may be liable for his son's negligence, if he permits the son to drive home the son's friend who had been a guest at a party at the owner's house; the learned Judge was of opinion that such a liability would arise if the permission is granted in fulfilment of some social or moral obligation regarded as being owed by the father to his son's friend. In the case thus contemplated, the fact that the guest's purpose is served by his being conveyed home would not in the opinion of du Parcq L. J. by itself negative the fact that the car is also used on the owner's behalf. That opinion would apply with greater force when the owner permits his car to be used by his own minor child, for the existence of an obligation owed to the child, whether it be legal, social or moral, is the more probable in such a case.

It seems to me that we have encountered difficulty in considering the question whether the defendant's car was used on the defendant's behalf mainly because the same question does not ordinarily arise in running down cases. In the vast majority of such cases, the owner is held liable on the simple ground that his car was driven either by himself or by his servant in the course of his employment, and there is no occasion to consider whether the car was used by a bailee, or else on the owner's behalf. But where a car is in fact used by its owner's minor child, it would ordinarily be contrary to common-sense to regard the case as one of bailment. It seems to me quite unreasonable to think that when my paid driver conveys my dependent child to school in my car, the use of the car is either lent or gifted to the child. If that use be regarded as a bailment of the car, then, when the child is sent to school in a taxi, my payment of the taxi-fare must similarly be regarded as a loan or gift to the child. In the simple common-sense view, there is not any loan or gift of the car or of the taxi-fare, but instead the provision of a means of transport, in performance of a parent's duty to maintain and educate his child. The fact that the child may drive himself to school in the father's car does not by itself negative the probability that the use of the car is yet being provided in performance of that same duty.

The evidence in this case, that the defendant's son did not perform his father's "errands", has not negatived the possibility that the car was nevertheless used for some purpose of the son which would yet fall within the purposes for which the defendant maintained the car. Such a possibility could have been negatived in this case if the defendant's son had testified to some actual private purpose for which he used the car, or if, as in the case decided in the Privy Council, the evidence sufficed to negative the possibility adverse to the defendant.

The defendant attempted to repel the inference arising from his ownership in the second way contemplated in the Privy Council judgment, that is to say, by simply asserting that the car had not been driven for any purpose of his, and by attempting to prove that assertion. But he failed to adduce supporting evidence which should have been available to him if the assertion was correct. In my opinion that failure, when considered together with the known circumstances as to the use of cars in Colombo to which I have already referred, is a proper ground upon which to distinguish the present case from *Hewitt v. Bonvin* and from *Rambarran v. Gurrucharran*, and to hold that the inference arising from ownership has not been rebutted.

The conclusion of the learned District Judge that the defendant was liable for the negligent driving of his car by his minor son has accordingly to be affirmed.

At the time of this accident the plaintiff was a minor aged about 15 years. According to the medical evidence he had been unconscious on admission to the hospital, but recovered consciousness within a few hours. He had sustained a compound fracture of the right tibia, a small lacerated wound on his eye lid, and a wound about 6" long on the right buttock. As a result of the fracture the leg had to be in plaster for three months. The medical evidence was that the bad effects of the fracture were not in any way permanent. All that remained in consequence of this injury was a slight alteration in the shape of the leg. For about three days the plaintiff suffered from the effects of concussion, and the Doctor accepted as being probably correct the plaintiff's own statement that even four years after the accident he suffered from frequent headaches. The plaintiff has in addition a small scar on his eye-lid.

The learned trial judge himself accepted the following statements made by the plaintiff :—

(*a*) That headaches had interfered with his study, and that in consequence of this accident the plaintiff had abandoned the idea of studying engineering, and had instead chosen to become a teacher.

(*b*) That the plaintiff suffers from pain if he runs even for a short distance and that he is unable therefore to play cricket or rugger.

There was only the plaintiff's word that his student career had been affected as a result of the accident, although this was a matter which could have best been spoken to by the school authorities. Similarly the plaintiff's complaint that he suffered from frequent headaches could have been supported by the evidence of the Doctor who according to the plaintiff had treated him for these headaches. It seems to me that too much reliance was placed by the Judge on the plaintiff's bare assertions as to these matters.

In the case of *Dias v. Silva* [1] there was medical testimony that the plaintiff had suffered fractures on the bones of the right foot ; that his leg had to be in plaster for about six weeks ; that he suffered permanent injury which caused him inability " to perform any duties that require standing or walking any distance "; that he would have a definite permanent limp in his walk, and it was very doubtful whether he could play cricket or football ; that he could " walk a quarter mile with a certain amount of discomfort and pain ", and " he would be a disabled man ". The plaintiff in that case was awarded a sum of Rs. 3,500 as damages by the District Judge. In appeal this amount was enhanced to Rs. 11,900 which included a sum of Rs. 1,900 as expenses incurred in consequence of the injury. Thus the plaintiff in that case received Rs. 10,000 as damages for pain of mind and body and for the permanent impairment of his foot and its consequences.

In comparison, the plaintiff in the present case was less seriously injured, and he cannot be said to have suffered the same pain of mind and body or similar disablement. Had there been impartial evidence as to the effect of this accident on the plaintiff's school career, and as to his suffering from frequent headaches, the District Judge may have been justified in making the present award of Rs. 30,000. But on the available evidence, it is quite disproportionate to the award made in *Dias v. Silva* by this Court. I would accordingly reduce the award to a sum of Rs. 15,000.

The decree under appeal is affirmed subject to the alteration that the amount of damages is reduced to Rs. 15,000. The defendant must pay one-half of the costs of this appeal.

SAMERAWICKRAME, J.—I agree.

Appeal partly allowed.

[1] *(1953) 55 N. L. R. 7.*