1952 *Present*: **Gratiaen J. and Gunasekara J.**

W. H. BUS CO., LTD., Appellant, *and* J. SAMARANAYAKE, Respondent

S. C. 427—D. C. Kandy, 2,545

Collision—Contributory negligence—Test of reasonableness—Damages for loss of income—Proof necessary.

A collision took place between plaintiff's hiring car and defendant's omnibus at a junction where two highways met. Plaintiff's car was admittedly being driven along the " major road ". Moreover, it had reached the junction before the other vehicle.

Held, that the issue whether the plaintiff was guilty of contributory negligence should be decided by " the test of reasonableness " and depended on whether the plaintiff, assuming he knew of defendant's driver's negligence, could reasonably have been expected to avert the accident.

Held further, that when the owner of a car which has been damaged claims damages for loss of income owing to the fact that he has been deprived of the means of earning his living, he should adduce precise proof of the pecuniary loss suffered.

APPEAL from a judgment of the District Court, Kandy.

S. J. Kadirgamar, for the defendant appellant.

H. W. Jayewardene, for the plaintiff respondent.

Cur. adv. vult.

May 15, 1952. GRATIAEN J.—

This is an appeal against a judgment awarding the plaintiff a sum of Rs. 3,000 as damages in respect of a collision which took place between his motor car No. X 6571 and the Company's omnibus No. C. E. 4836 during the early hours of the morning of 18th March, 1946.

The plaintiff's motor car, though of some antiquity, was in a serviceable condition before the accident, and he used it to convey passengers for hire in the Kandy District. On the morning in question he was driving it from the direction of Katugastota along Trincomalee Street when the defendant's omnibus, which was being driven along Colombo Street, collided with it at the junction where the two highways intersect. As a result of the impact the car was pushed some distance across the street and sustained fairly substantial damage.

The learned District Judge found as a fact that the collision was caused by the negligence of the defendant's bus driver, and he awarded the plaintiff (*a*) a sum of Rs. 2,000 as compensation for the estimated damage to the vehicle and (*b*) a further sum of Rs. 1,000 " as damages for being thrown out of employment for ten months before the action was brought ".

In my opinion the decision in favour of the plaintiff on the issue of negligence was perfectly correct. Trincomalee Street was admittedly a " major road ", and there was a notice which gave ample warning of this fact to the drivers of vehicles approaching the junction along Colombo Street. Moreover, the plaintiff's car had reached the junction before the other vehicle, and it was clearly a negligent act on the part of the defendant's driver not to have taken all reasonable steps within his power to avoid a collision. Indeed, I would have been disposed to hold that, even if traffic proceeding along Colombo Street had been entitled to claim the right of way, it was the negligence of the defendant's driver which in the circumstances of this particular case " substantially caused the injury " [1].

Mr. Kadirgamar has argued that in any event the plaintiff was himself guilty of contributory negligence in not taking steps to avoid the impending collision. I am quite unable to accept this submission. " Fast moving traffic would become impossible if compliance with the ordinary rules of the road on the part of those concerned could not, in the first instance, be taken for granted. The test to be applied in order to ascertain when the person duly and properly using the road should waive his rights is the test of reasonableness. As soon as it would be evident to a reasonable man that there is danger of an accident arising from the inability, refusal or neglect of the wrongdoer to give way, the rightful user of the road is bound to take all reasonable steps to avoid an accident " [2]. As Innes C.J. points out, however, the conduct of a motorist placed in such a situation " is not to be judged in the light of subsequent events, but by the standard of what a reasonable man would have done at the time ".

It is idle to suggest that, if his conduct be judged in the light of this principle, the plaintiff could reasonably have been expected to avert the accident which did occur. The time available for deciding how he should act " in the grip of the impending disaster " could not, at best, have exceeded the fraction of a second, and I certainly do not construe his attitude at this critical point of time as that of a man who obstinately insisted, regardless of the consequences, that it was solely the other man's business to prevent a collision. The facts set out in the judgment of *Robinson v. Henderson* [3] were entirely different. Adopting the language of Lord Birkenhead's classic expression of the principles of contributory negligence in *The Volute* [4], I would hold that " in the ordinary plain common sense of the business ", the negligence of the defendant's driver was " the sole cause of the collision ". The plaintiff must therefore be compensated for the pecuniary loss which he suffered in consequence.

I am satisfied that the learned trial Judge correctly estimated the compensation payable for the damage sustained by the plaintiff's vehicle. The estimated cost of repairing the car was rather less than Rs. 2,000, and in normal circumstances, no doubt, this would have represented the proper sum to be awarded under this head of damages. But the evidence

[1] *Swadling v. Cooper (1931) A. C. 1.*
[2] *Solomon et al. v. Mussett & Bright, Ltd. (1916) S. A. A. D. 427.*
[3] *(1928) S. A. A. D. 138.*
[4] *(1922) 1 A. C. 38.*

shows that such repairs would not have fully restored the car to its earlier state of efficiency. In these circumstances, the learned Judge assessed the damage by reference to the extent to which the value of the car had depreciated by reason of the accident, and in my opinion this was the proper method of approach to the question.

With regard to the further award of a sum of Rs. 1,000 for loss of income, I think that the evidence on record was insufficient to justify the plaintiff's claim. His own evidence is extremely vague as to the period of time which elapsed before he succeeded in obtaining other employment after the accident occurred, and there is no material of any kind upon which a Court could assess, except by a process of pure speculation, the loss of income sustained by reason of the damage to the vehicle. " If the owner of a car which has been damaged claims damages for loss of income owing to the fact that he has been deprived of the means of earning his living, he should adduce evidence as to his average daily income and, when the car has been repaired, as to the time it took to be repaired. If it has not been repaired, evidence should be led to show how long it would ordinarily take to repair the car "[1]. Notwithstanding the absence of such evidence, the learned Judge, purporting to " take all the circumstances into consideration ", awarded a round sum of Rs. 1,000 for loss of income. With respect, this is not a legitimate approach to the determining of an issue where the pecuniary loss claimed by a party is, by its very nature, capable of precise proof.

In my opinion the award of Rs. 1,000 for loss of income should be deleted, and I would accordingly vary the decree entered in the plaintiff's favour by restricting the damages to Rs. 2,000. The plaintiff is entitled to his costs in the Court below, but these must be taxed on the footing that the action was instituted for the recovery of Rs. 2,000 only. Each party has partially succeeded upon this appeal, and I would therefore award no costs of appeal to either side.

GUNASEKARA J.—I agree.

Decree varied.