1942 *Present :* **Howard C.J. and Soertsz J.**

PARAMESWARI *v.* KANAKARATNAM.

165—D. C. Colombo, 1,747.

Negligence—Action for damages—Child injured by defendant's driver—Real issue in case—Negligence of defendant.

In an action to recover damages for injuries caused to a school girl, five years old, by the driver of defendant's car, the plaintiff's case was that the girl was knocked down as she ran out of the school into the road, four feet from the school gate, and that at the time the driver was going much beyond his side of the road. The defendant denied liability on the ground that his driver was not negligent and alleged contributory negligence on the part of the plaintiff.

Held, that the real issue in the case was whether the defendant's driver was negligent in the circumstances and that the negligence of the child was not a primary issue but arose only on the defendant's driver being found to have been negligent.

Quaere : What is the position of a child of five years if the question of contributory negligence arises ?

APPEAL from a judgment of the District Judge of Colombo. The facts appear from the head-note.

H. V. Perera, K.C. (with him *P. Malalgoda*), for the plaintiff, appellant.—The evidence led on behalf of the plaintiff has not been fully considered. It is clear that the defendant's driver was on the wrong side of the road. If it is true that the driver overtook a cart it was his duty to have done so at a safe spot and not near the entrance to the school. He should have contemplated the possibility of children running out of the school gate into the road. The car was driven in such a manner that if a child emerged from the gate an accident would have been inevitable. The case of *Soper v. Watney*[1] is exactly in point. See also *Estate Fallon v. Claret*[2] and *Culkin v. McFie & Sons, Ltd.*[3]

N. Nadarajah, K.C. (with him *H. W. Tambiah*), for the defendant, respondent.—The finding of the District Judge is supported by the evidence on record. The evidence is that the car was driven at a moderate speed. The present case can, therefore, be distinguished from *Soper v. Watney (supra)*. The plaintiff must fail if her injury was due to her own negligence in failing to take reasonable care—*Swadling v. Cooper.*[4] Any damages claimed by a plaintiff must follow from the defendant's negligence—*Clerk & Lindsell on Torts* (8th ed.), p. 452.

The best evidence of any negligence would have been that of the Police, who had investigated into the circumstances of the accident, but it was not led by the plaintiff.

H. V. Perera, K.C., in reply.—In the circumstances of this case, even a speed of 15 miles per hour at the spot at which the accident took place is evidence of negligence. The same degree of care cannot reasonably be required of a child as of an adult—*McKerron on Delicts* (1933) p. 36.

Cur. adv. vult.

[1] *(1934) Cape P.D. 203.*
[2] *(1932) A.D. 177.*
[3] *(1939) A.E.R., Vol. 3, p. 613.*
[4] *(1931) A.C. 1 at 8.*

June 23, 1942. SOERTSZ J.—

This is a running down case and, like most such cases, is fraught with difficulty, involving as they do questions of negligence and rashness which have to be determined with reference to a certain hypothetical standard, namely the standard of that legendary individual whom we encounter, at every turn, in the field—of Jurisprudence—" The Reasonable Man ". It has been observed by high authority that his " Apparitions " mark the road to Equity and Right, for he is always thinking of others ; " prudence is his guide ; and ' safety First ' his rule of life ". In this case we have, in addition, the somewhat shadowy figure of " The Reasonable Infant " lurking in the background, and due to loom large if " The Reasonable Man " fails to keep tryst with the defendant.

The substantial question, then, that arose first of all, was whether, on the occasion on which the plaintiff was run down by the defendant's driver, that driver adequately played the part of " The Reasonable Man ".

The learned trial Judge has answered that question in the affirmative and, ordinarily, that answer should have put an end to this case, for the Judge was performing the functions of a jury as well. But, unfortunately, as Judge, he appears to have gravely misdirected himself. As I have already observed, the real issue was this :—" was the defendant's driver negligent "? but it is quite clear from the judgment that the Judge directed himself as if the issue was " who was negligent, the plaintiff or the defendant "? He adopted issue No. 3 suggested by the defendant's Counsel, " Where the injuries caused to the plaintiff occasioned solely by the negligence of the plaintiff in running out of the school to cross the road without keeping a proper lookout " ?

This issue was a false issue, calculated to divert attention from the real issue, and that it achieved this purpose is quite clear from the fact that the Judge concluded his judgment as follows :—

> " she (*i.e.*, the plaintiff) was injured through her own negligence and not through any negligence of the defendant's driver."

In the circumstances of this case, it is a point for consideration whether there could have been any question of plaintiff's negligence. Negligence results from a breach of a statutory duty or from the breach of the general duty to take care. This little girl of five years of age was under no statutory duty not to run out of the school gate at the luncheon interval, and it is difficult to suppose that, when she so ran out, she fell below the standard of care that can reasonably be expected from a child of that age. At any rate, that question would have arisen only in the event of the defendant's driver being found negligent and, although the Judge rightly says that, on his answer to issue (1), the question of the plaintiff's negligence did not arise, he dealt with the case as if the negligence of the plaintiff was a primary and independent issue and not as a matter arising only in a certain contingency.

The whole judgment of the learned Judge has been coloured by this method of approach. He has failed to consider and deal with the case

the plaintiff presented against the defendant, that is to say, that the defendant's driver drove his car at a medium speed, going so much beyond his side of the road as to strike down the plaintiff when she was only about four feet away from the school gate. This is the definite position resulting from the evidence of the rickshaw puller, Kapiapa Thevar.

The learned Judge has not addressed himself to these matters at all, although they are matters of great importance, particularly the fact that the defendant's driver was so far beyond his side of the road when the plaintiff was injured. Was there or was there not a cart on the road? Was the driver so far on the right hand side of the road because he was overtaking a bullock cart? Should he, in the circumstances as known to him, have overtaken the cart at that point? If there was no cart can he justify his going so far beyond his side of the road? If he cannot, is he entitled to turn round and say to the plaintiff—you ran into my car? These questions do not appear to have even occurred to the trial Judge, and they are ultimately the important questions in the case.

The Judge acquitted the defendant's driver of negligence because, to quote from the judgment, the driver says,—

> " (*a*) He was travelling at about 12 or 15 miles per hour which is not an excessive speed ".

But it is not a question of speed in the abstract, but speed in all the circumstances of the case, that arose for consideration.

> " (*b*) He saw a firewood cart halted on the road and he overtook it, and the plaintiff came out of the school gate and ran into the side-door ".

As I have already pointed out, the Judge does not say whether he finds that there was a firewood cart on the road, and does not consider the question whether, if there was such a cart, the defendant's driver acted reasonably, in the circumstances as known to him, in overtaking it as he did.

> " (*c*) He sounded his horn ".

The rickshaw puller's evidence negatives that statement of the defendant's driver. The Judge does not return a finding in regard to it, and does not consider the relevancy of the question, whether a horn was sounded or not.

> " (*d*) He proceeded with due care and caution ".

But that was precisely the question for the Judge and not for the defendant's driver to decide.

Again, the fact that the Police did not prosecute the defendant's driver appears to have put some weight into the scales on the defendant's side for, although the Judge rightly observes that that fact is irrelevant and that " even if the Police thought the driver was not negligent, this Court can form its independent conclusions ", he does not seem to have borne in mind another aspect of the matter, namely, that the Police would

look for evidence of " wicked negligence ", of " such disregard for the life and safety of others as to deserve punishment ", when they were considering the question of prosecution or no prosecution, and not merely for evidence of such negligence as would support a claim of this kind.

For these reasons, I am of opinion that this case should be remitted for trial by another Judge on the lines indicated in this judgment. Costs including the costs of this appeal, will abide the result.

HOWARD C.J.—I agree.

Case remitted.