1943 *Present:* **Moseley and Keuneman JJ.**

PARMSOTY, Appellant, *and* VEENAYAGAMOORTHY *et al.*

262—D. C. Jaffna, 15,713.

Tort—Action for damages to car—Ownership of car—Defence of justification at Law—Negligence of defendant.

Where a person brings an action for damages caused to a car by the negligence of the defendant and for personal injuries caused to himself it would be sufficient in order to sustain his cause of action if he has only a limited interest in the car.

Where the defendant has discharged the onus laid upon him of proving that his act was justified by law, it is open to the plaintiff to prove that the defendant is not entitled to the protection of the law because the powers conferred upon him by statute were exercised negligently.

APPEAL from a judgment of the District Judge of Jaffna.

The facts appear from the headnote and the argument.

L. A. Rajapakse (with him *C. T. Olegasegaram*), for the plaintiff, appellant.—The plaintiff's claim has been dismissed chiefly on the ground that the plaintiff was not the owner of the car in question. It is submitted that the evidence in the case sufficiently proves the ownership of the plaintiff. The fact that the car was registered in the name of the plaintiff's brother is not conclusive evidence of that brother's ownership—*Sarasinghe v. Wijedasa* [1].

Even if the plaintiff was not the owner of the car he had a sufficient interest in it to enable him to bring this action *Nathan's Law of Torts (1921 ed.), pp. 62-63.*

N. Nadarajah, K.C. (with him *H. W. Thambiah*), for the defendants, respondents.—The defendants are public servants and were *bona fide* discharging a statutory duty when they stopped cars suspected of carrying contraband. They are peace officers within the meaning of section 2 of the Criminal Procedure Code, and were acting lawfully. See sections 23 and 32 (1) (b) of the Criminal Procedure Code ; sections 31 (1) (2), 71, 75, 27, 28, 31, 76 of Dangerous Drugs Ordinance (Cap. 172) ; sections 27, 28, 31, 71, 76 of Customs Ordinance (Cap. 185). No action will lie for doing that which the Legislature has authorised if it be done without negligence—*David Geddis v. Proprietors of the Bann Reservoir* [2], *Union Government v. Sykes* [3], *Jayawardene v. William* [4], *Nathan's Law of Torts, p. 8, McKerron's Law of Delict (2nd ed.) 87, Costa v. Sinho* [5].

It cannot be said that the plaintiff was the owner of the car. He had merely a limited interest in it. See *McKerron's Law of Delict (2nd ed.), 126.*

L. A. Rajapakse in reply.—The defence of statutory authority must be expressly pleaded and strictly proved. The provisions of the law under which the defendants acted were not pleaded.

[1] *(1920) 8 C. W. R. 3.*
[2] *L. R. (1878) 3 A. C. 430 at 454-6.*
[3] *S. A. L. R. (1913) A. D. 156 at P. 169.*
[4] *(1920) 21 N. L. R. 379 at P. 381.*
[5] *(1903) 7 N. L. R. 287.*

The exercise of statutory power is limited by an important consideration, namely, that it must be carried out without negligence—*McKerron's Law of Delict, pp. 88-89.* In the present case there was definite proof and finding of negligence. The practice of stopping motor vehicles in the manner adopted in this case has been condemned—*Ossen v. Excise Inspector Ponniah* [1], *Excise Inspector, Elephant Pass v. Regunathapillai* [2].

The wrong of trespass consists in the unlawful disturbance of another person's possession, and is essentially a wrong to possession and not to ownership—*McKerron, pp. 214, 126.*

Cur. adv. vult.

July 6, 1943. MOSELEY J.—

The respondents to this appeal are respectively the Udaiyar of Pandaiterrippu and the Kirama Vidhane of Mathakal. It is not disputed that on September 22, 1939, they were in receipt of information of the arrival of a ship with "contraband". In order to intercept cars by means of which they suspected the contraband would be transported and, if necessary, to arrest persons concerned in the transportation, they stationed themselves on the road which runs from Kayts to Kankesanthurai. Having failed in their efforts to stop by signal the first car to pass, they proceeded to barricade the road by placing across it the trunk of a palmyra palm and reinforcing the obstruction by tying a rope at a height above the trunk of the palm. The appellant who was returning from Kayts by car with two friends at about 1 A.M. on the 23rd saw these obstacles when he was 15 or 20 yards distant from them. He applied his brakes but, the road being wet after recent rain, the car skidded and collided with the palmyra trunk. The appellant and the car both sustained injuries in respect of which the appellant sued the respondents for damages. The parties went to trial on a number of issues. It is sufficient at the moment to say that, with one exception, these were answered generally in the appellant's favour. At the close of the examination-in-chief of the appellant, however, the following issue was framed:—

> "XI. Was plaintiff the owner of the car in question on the dates material to this action ?"

The issue was answered in the negative and the learned Judge held that it followed that the appellant was not entitled to recover damages. Holding further that the respondents' act was wrongful, he, while dismissing the action, ordered the parties to bear their own costs. It is not, I would say, easy to understand why, upon this finding the appellant should have been deprived, for example, of the damages which he claimed and for which the learned Judge found to some extent in his favour in respect of medical expenses and pain of mind and body. These are claims on which the appellant should have succeeded irrespective of ownership of the car. But the matter, I think, goes further. Issue XI. was answered in the negative upon the evidence that the appellant's brother was registered under the Motor Car Ordinance as the owner of the car. Moreover the appellant in his report to the Police, made a few hours after the incident, described his brother as the owner of the car,

[1] *(1932) 34 N. L. R. 50.*

[2] *(1933) 14 C. L. Rec. 123.*

and in the light of that evidence it seems to me impossible to say that the learned Judge was in this respect wrong. But does the fact of non-ownership deprive the appellant of the right to sue for the damage caused to the car ? Counsel for the respondents relied upon a passage which appears in *McKerron's Law of Delict (2nd edition, page 126)* which implies that a non-owner has no cause of action unless he proves that he is in possession of the property and has a limited interest therein. Now, in this case, the appellant explained why the car was registered in his brother's name, namely, that the latter had advanced Rs. 450 towards the purchase price of the car, but his evidence that the car was in his possession, that he used it for the purposes of his business, and that he himself paid the account for the repairs necessitated by the incident, all goes to prove that he had at least a limited interest in the car. Moreover as is observed by *McKerron*, at page 214 of the work above quoted, "Trespass is essentially a wrong to possession and not to ownership. An action for trespass can therefore be maintained by any person in lawful occupation or possession of the property at the date of the trespass. Thus a bailee can sue for a trespass causing damage to the goods the subject of the bailment . . . . "

In my view therefore the learned Judge erred in dismissing the action on this ground. He appears, further, to have thought, that if the appellant was acting within the scope of the employment of a third party (and he found as a fact that he was so acting) that the action must necessarily fail. In arriving at this conclusion he was seriously misdirected himself as to the effect of the authorities upon which he relied. These authorities deal with the liability of a master for the tort of a servant committed while acting within the scope of his employment, and do not affect the right of a servant to sue.

Counsel for the respondents, while supporting the judgment, did so mainly upon another ground. The respondents who, as has already been stated, were public servants, pleaded in their answer that they acted in good faith in the lawful discharge of their duties and that therefore no action was maintainable against them. Bearing on this point issues 1 and 10 were framed and answered as follows :—

"1. Was the act complained of in paragraph 3 of the plaint done by defendant wrongfully and without any warning to the Public ? (Answer : Yes).

10. Were defendants acting *bona fide* in the discharge of their duties as public servants ? (Answer : Yes, but it does not mean that *bona fides* exonerates the defendants).

Counsel contended that the answers to these issues are mutually contradictory, and that the learned Judge in finding that the respondents were, even in a qualified fashion, acting *bona fide* in the discharge of their duties, was inconsistent in finding that they were acting wrongfully and without any warning to the public. I do not myself find any difficulty in reconciling the answers to these two issues, even if one accepts unreservedly Counsel's contention that the respondents were performing a statutory duty imposed upon them by the Criminal Procedure Code,

the Poisons, Opium and Dangerous Drugs Ordinance and the Customs Ordinance. Each of these Legislative acts, no doubt, confers a duty or right to arrest and to resort to various services towards effecting arrest, and Counsel quoted from *Nathan's Law of Torts* (*page 8*), to the effect that " if a man does that which the law justifies him in doing, he commits no delict ". Assuming that a defendant has discharged the onus laid upon him of proving that his act was justified by law, it is, however, open to the plaintiff " to show that the defendant is not entitled to the protection of the statute because the powers conferred were exercised negligently. Negligence in this connection means the failure to take reasonably practicable measures to prevent the damage complained of." *McKerron's Law of Delict* (*2nd edition, page 89*). It seems to me that the learned Judge, if he had in mind this principle of law which seems to me to be well-established, could well answer issues 1 and 10 as he did. The second respondent gave evidence to the effect that he and the first respondent stood in front of the obstruction and signalled to approaching cars to stop by calling out " stop stop " and raising their hands. He wore his badge, characterised by the learned Judge as " puny ", and had his diary, perhaps equally puny, in his hand. With them, he said, were 10 or 12 other people to assist if necessary. The appellant testifies that there was no one on the road, that no one signalled, and that no one approached until a few minutes after the car came to a halt. Even if one accepts the second respondent's version, can it be said that the respondents took reasonably practicable measures to prevent such damageaswascaused? The appellant says that he applied his brakes as soon as he saw the obstruction and that in spite of that the car struck the palmyra trunk. It could hardly be suggested that he did not do everything in his power to avoid a collision which must inevitably cause damage. In the circumstances I think it may fairly be said that the obstructing of a main road in this manner without taking effective steps to avoid such damage is, to put it at its very lowest, a negligent act. It seems to me, that in the event, the respondents cannot escape liability, notwithstanding the *bona fides* of their actions.

Counsel for the appellant has criticised the action of the learned Judge in reducing the amounts claimed in respect of medical expenses and damages for non-user for the period for which the car was out of action. Although the appellant's evidence in support of these items was not contradicted, I do not propose to interfere with the opinion of the learned Judge expressed after hearing the evidence. The amounts which the appellant is entitled to recover under the various heads are as follows :— Repairs to car ; Rs. 351, non-user : Rs. 50, medical attendance : Rs. 25, pain of mind and body : Rs. 150, total : Rs. 576.

I would, therefore, allow the appeal with costs. The judgment of the lower court is set aside and judgment entered for plaintiff for Rs. 576 and costs.

KEUNEMAN J.—I agree.

Appeal allowed.