1959 *Present :* **Sansoni, J., and Sinnetamby, J.**

K. L. JAYANHAMY, Appellant, *and* THE PANADURA MOTOR TRANSIT CO., LTD., Respondent

S. C. 134—D. C. Badulla, 13240

Delict—Cause of action—Requirement that it should be pleaded—Vicarious liability—Servant's negligence set up as cause of action—Right of plaintiff to rely on defendent's breach of duty to take reasonable care.

Where the only cause of action pleaded is that the defendant's servant had been negligent, and it is sought to make the defendant liable only on the ground of vicarious responsibility for the acts and default of the servant, it is not open to the plaintiff to claim that the defendant is liable upon some other charge of negligence that has not been pleaded.

Accordingly, where the cause of action set out in the plaint is that the defendant's omnibus was driven rashly and/or negligently by the defendant's driver acting within the scope of his employment, it cannot be contended for the first time in appeal that the defendant is liable for breach of duty to take reasonable care that the omnibus was in good order and in a safe condition to carry passengers when it was used for that purpose.

APPEAL from a judgment of the District Court, Badulla.

K. Shinya, with *A. A. de Silva*, for the Plaintiff-Appellant.

Sam P. C. Fernando, for the Defendant-Respondent.

Cur. adv. vult.

May 4, 1959. SANSONI, J.—

The plaintiff was travelling in an omnibus belonging to the defendant and driven by a driver employed by the defendant. Near the 127th mile post on the Wellawaya-Haputale road the omnibus ran off the road into an embankment, toppled over, and came to rest on its side. The plaintiff was seriously injured and he brought this action against the defendant to recover a sum of Rs. 10,000 as damages.

The cause of action set out in the plaint is that the omnibus was driven rashly and/or negligently by the defendant's driver acting within the scope of his employment. The particulars of rashness and negligence given in the plaint were that the omnibus was driven (1) at an excessive speed, (2) with a set of defective spring blades, (3) without a sufficient or proper look-out, (4) without due care or regard for the passengers, (5) without a satisfactory or efficient braking system and/or in an unroadworthy condition, and (6) without taking such action as was necessary to prevent the omnibus running off the road.

After trial the learned District Judge found that the accident occurred because the offside front spring main blade broke. The evidence of the Examiner of motor vehicles showed that when a blade breaks, the steering mechanism goes out of order, and the vehicle cannot be controlled. The Sub-Inspector of Police who visited the scene of the accident found the spring blade broken in two and fallen about 28 feet away from where the omnibus toppled over.

The only question that remained for decision was whether there had been negligence on the part of the driver in driving a vehicle which was not roadworthy because it had a defective spring blade. This position could not be substantiated as the Examiner of motor vehicles stated that although he found an old crack in the spring blade, the existence of that crack could not have been discovered unless the omnibus was dismantled and examined. I agree with the learned Judge that the failure on the part of an omnibus driver to do this would not constitute negligence. As none of the other particulars of rashness or negligence was established on the evidence led at the trial, the learned Judge was perfectly correct when he dismissed the plaintiff's action.

It was, however, submitted to us for the plaintiff, who appealed against the order of dismissal, that the defendant should have been held liable for negligence because it owed a duty to the plaintiff, who was a passenger in the omnibus, to take all reasonable care that the omnibus was in good

order and in a safe condition to carry passengers when it was used for that purpose, and it had failed to perform this duty. Reliance was placed on the decision in *Cabral v. Alberatne*[1]. In that case a motor truck belonging to the defendant ran off the road into the plaintiff's house and damaged it. The accident occurred because the steering rod had become detached from the joint where it met the tie-rod; this mechanical defect had developed suddenly in the course of the journey and taken the driver unawares. The maxim *res ipsa loquitur* was applied by the Court and the plaintiff was awarded damages. Learned Counsel for the appellant submitted to us that both in that case and in this the action was framed on the basis that the vehicle in question was driven negligently, and we should follow that decision and hold the defendant liable for the negligence of the driver.

So far as the present action is concerned, I think it would be wrong to do so for the reason that negligence on the part of the driver has been disproved, and the only ground upon which the plaintiff sought to make the defendant liable was that of vicarious liability for the negligent driving of its servant. The actual ground on which the defendant in *Cabral v. Alberatne*[1] was held liable was that the defendant had been negligent in permitting an unroadworthy vehicle to be driven on the road. The point does not appear to have been taken there that this was a new cause of action which was not pleaded in the plaint, and that decision is therefore of no assistance on this particular aspect of the argument.

We must certainly refuse to permit such a case to be put forward at this stage, because no such case appears in the plaint. The objection to this course is clearly explained by Lord Wright M. R. in *Marshall v. London Passenger Transport Board*[2]. It is that there will be set up "a new cause of action involving quite new considerations, quite new sets of facts, and quite new causes of damage and injury, and the only point of similarity would be that the plaintiff had suffered certain injuries."

Another authority for the view I am taking is the decision of the House of Lords in *Esso Petroleum Co., Ltd. v. Southport Corporation*[3]. Where the only cause of action pleaded is that the defendant's servant had been negligent, and it is sought to make the defendant liable only on the ground of vicarious responsibility for the acts and default of the servant, it is not open to the plaintiff to claim that the defendant is liable upon some other charge of negligence that has not been pleaded. It therefore does not lie in the mouth of the plaintiff at this stage to urge that the defendant has been guilty of negligence in allowing its omnibus to be driven on the road in a defective condition.

I would therefore dismiss this appeal with costs.

SINNETAMBY, J.—I agree.

Appeal dismissed.

[1] *(1955) 57 N. L. R. 368.*

[2] *(1936) 3 A. E. R. 83.*

[3] *(1956) A. C. 218.*