1942 *Present :* **Hearne and Jayetileke JJ.**

MOHIDEEN *v.* SENANAYAKE

10—D. C. Colombo, 12,431.

Motor car—Plaintiff knocked down while alighting from tram car—Negligence of defendant's driver—No contributory negligence on plaintiff's part—Liability of defendant.

Where the driver of defendant's car drove it too close to a stationary tram car, which had stopped at a regular stopping place, too fast and without sounding his horn, and ran into the plaintiff who, at the time the car emerged from behind the tram car, was in the act of alighting from the tram car with his back momentarily turned in the direction from which the car came,—

Held, that the driver had been negligent.

Held, further, that as the plaintiff was in the actual process of alighting from the tram car and as there was ample room for the car to pass him in safety, he cannot be said to have been negligent merely because, before he put his foot on the ground, he did not look beyond the end of the tram car. The plaintiff was entitled to assume that if a vehicle does pass the tram car it will, at least, give him a wide enough berth for standing room on the ground.

APPEAL from a judgment of the District Judge of Colombo.

H. V. Perera, K.C. (with him *Cyril E. S. Perera*), for defendant, appellant.

E. G. Wickremanayake (with him *E. B. Wickremanayake*), for plaintiff, respondent.

Cur. adv. vult.

July 22, 1942. HEARNE J.—

In this case it was found by the trial Judge that the driver of the car of the defendant appellant drove it too close to a stationary tram car, which had stopped at a regular stopping place, too fast and without sounding his horn. It was also found that in so doing he ran into the plaintiff who, "at the time the car emerged from behind the tram car, was in the act of alighting from the tram car with his back momentarily turned in the direction from which the car came". On these facts the driver was certainly negligent.

On appeal, it was argued that, assuming the driver was negligent, the plaintiff was also negligent and that if, in consequence of their joint

negligence, a collision became imminent and the driver could not by the exercise of ordinary care and diligence have avoided it, the plaintiff cannot succeed.

It is impossible to deduce from the evidence of the driver that, when the danger of an accident threatened, he did all that he could reasonably have done to avoid it : for he merely said that he did not see the plaintiff alight, does not know how the plaintiff was injured and did not see him till after he was injured. There can, I think, be no doubt that he was an untruthful witness. It appears from the evidence of the tram car driver, which was accepted by the Judge, that the defendant's driver did see the plaintiff before the accident. According to this witness the driver of the car tried to avoid a collision by swerving to his right but was too late. If he had become aware of the presence of the plaintiff when he had almost reached the tram car, it is possible he, thereafter, did all he could to avoid an accident. If he had become aware of the presence of the plaintiff further back than the end of the tram car, it may be that he did not exercise ordinary care and diligence in his failure to pass the plaintiff in safety. The question can be answered only if it is known when he saw the plaintiff before the accident. The tram car driver could not help the Court. The defendant's driver could, but he refused to say anything on the subject. To the end of his evidence he maintained that he had not seen the plaintiff before the accident and even that he had not swerved to avoid him.

I turn to the question of whether the plaintiff was negligent. What are the facts ?

The exit door used by the plaintiff was in the middle of the tram car on the right hand side. In the demonstration given to the Court "he faced the road on to which he was going to descend, and then having looked towards the Fort, he grasped the railing with his left hand and in doing so looked towards his rear over his right shoulder. He then for a moment in trying to alight turned his back completely towards the Maradana direction and put his right foot on the ground, after satisfying himself that the road was clear, and that no vehicle that was visible was approaching him". It was "just then", according to the judge's finding, that the defendant's car, overtaking the tram car, knocked the plaintiff down.

In his evidence the plaintiff said that in looking over his right shoulder, that is to say in the direction from which the car came, he did not look beyond the end of the tram. That, at any rate, is what he is recorded as having said. The Judge's "impression is that that was not the full effect of the evidence of the plaintiff considered as a whole". "The impression", he said, "that the plaintiff's evidence leaves on my mind is that he saw the whole length of Norris Road to his rear up to the Bo-tree junction but that he was particularly looking at the rear of the tram car to see whether any vehicle which was masked from his view was coming from the back of the tram car . . . . ".

Counsel for the appellant has invited us to accept what the plaintiff actually said, "I looked up to the end of the tram car", and to hold that in looking only so far and no further he acted negligently.

The evidence in the case indicates that the plaintiff was knocked down in the immediate vicinity of the tram car. The defendant's driver said that he had a clearance of three feet but, in the finding of the Judge, the defendant's car was very much less than two feet from the tram car when it passed. The tram car driver said that the motor car "almost grazed along the tram car" and that "the plaintiff had put his right foot on the ground and was struck before he could get his left foot to the ground". The defendant's driver admitted that there was no other traffic on his side of the road.

Can it be said that the plaintiff was negligent because, before stepping a foot or two on to a side of the road which was "clear of other traffic". he did not look beyond the end of the tram car to his rear? I do not think so.

When a tram car has stopped at a regular stopping place, for the purpose of taking on or discharging passengers, a passenger alighting is entitled to assume that a motorist will anticipate that passengers will be getting on and off the tram car. He may also assume that if a vehicle does pass the tram car it will at least "give him a wide enough berth for standing room on the ground". Where, as in the circumstances of this case, the plaintiff was not crossing the road but was in the actual process of alighting and no more, and there was ample room for the car of the defendant or any car to pass him in safety, he cannot be said to have been negligent because, before he put his foot to the ground, he did not look beyond the end of the tram car.

The damages awarded are more than I would personally have awarded. This, however, is not a good ground for reducing them. The Judge has properly instructed himself in regard to the basis of assessment and I am disinclined to interfere.

The appeal is dismissed with costs.

JAYETILEKE J.—I agree.

Appeal dismissed.