1959 *Present:* **Sansoni, J., and T. S. Fernando, J.**

A. THAVATHURAI, Appellant, *and* T. S. ROCHAI, Respondent

S. C. 199—D. C. Mannar, 11,024

Collision—Damages—Insurance policy held by plaintiff—Effect of it on assessment of damages.

Plaintiff sued the defendant for damages resulting from a collision between the defendant's station wagon and the plaintiff's motor car. Plaintiff had already been indemnified by his insurers.

***Held*, that the defendant was not entitled to diminish the damages by showing that the plaintiff had obtained compensation for the injury under a policy of insurance held by the plaintiff.**

APPEAL from a judgment of the District Court, Mannar.

G. D. C. Weerasinghe, with *N. R. M. Daluwatte*, for the Plaintiff-Appellant.

S. Sharvananda, for the Defendant-Respondent.

Cur. adv. vult.

May 8, 1959. SANSONI, J.—

This action was brought by the plaintiff to recover a sum of Rs. 4,266·87 from the defendant as damages resulting from a collision between the defendant's station wagon and the plaintiff's motor car.

The only matters in dispute were (1) whether the plaintiff has proved the damage actually sustained by his motor car from the collision, and (2) whether the plaintiff was entitled to recover any damages at all from the defendant, seeing that he had been indemnified by his insurers.

The learned District Judge held that as the plaintiff had received a sum of Rs. 2,081/33 from his insurers he was entitled to recover a sum of only Rs. 600 from the defendant, to cover further damages which he had suffered but had not received from the insurers.

The repairers' bills for the repairs effected, totalling Rs. 2,081·33, were settled by the plaintiff's insurers and the learned Judge was satisfied that these repairs were necessary. The defendant-appellant's counsel urged that there was insufficient evidence to prove the actual damage suffered by the plaintiff's motor car as a result of this accident, but we do not think that there is any reason to doubt that these repairs were rendered necessary by this accident. As the plaintiff was deprived of the use of his motor car for three months and incurred other expenses owing to the accident, which the learned Judge has assessed at Rs. 600,

this sum must be added to the sum of Rs. 2,081·33, and the plaintiff is therefore entitled to recover the total sum of Rs. 2,681·33, unless the defence succeeds on the question of law.

Now the law has always been that a defendant cannot diminish the damages by showing that the plaintiff has obtained compensation for the injury under a policy of insurance—see 23 Halsbury (2nd edition) page 726. This rule has stood for nearly 200 years and has never been doubted. But it is submitted that a different view should now be taken in view of the decision of the House of Lords in *British Transport Commission v. Gourley* [1].

It was decided there that in assessing damages, in an action for personal injuries, for the loss of actual or prospective earnings, the Court must take account of the plaintiff's net earnings after deduction of tax, and not his gross earnings. The principle applied was that the plaintiff in such a case should be awarded such a sum of money as will put him in the same position as he would have been if he had not sustained the injuries, and it would therefore be wrong to award the plaintiff a sum without regard to the amount of tax for which he would be liable.

The case had nothing to do with the other principle that I referred to, that the defendant cannot claim any benefit from the circumstance that a plaintiff has been insured. There seems to be some uncertainty as to the true basis upon which that principle rests. Pigott B. in *Bradburn v. Great Western Railway* [2] said : " There is no reason or justice in setting off what the plaintiff has entitled himself to under a contract with third persons, by which he has bargained for the payment of a sum of money in the event of an accident happening to him. He does not receive that sum of money because of the accident, but because he has made a contract providing for this contingency ; an accident must occur to entitle him to it, but it is not the accident but his contract which is the cause of his receiving it ".

Another view is that a wrongdoer should not get the benefit of the fortuitous circumstance that the plaintiff was insured, and appropriate to himself the benefit of the premiums paid by the plaintiff to cover accident risks. An editorial note in the Law Quarterly Review, Vol. 72, page 154 says : " The rule concerning insurance is a peculiar one, based on considerations of public policy ", and this is also the view of Mr. Mc Kerron in his book *The Law of Delict* (5th edition) page 107 where he says : " The result of the decisions is that the plaintiff may sometimes receive double compensation. They are therefore anomalous in that they involve a departure from the rule that damages in the Aquilian action are essentially compensatory. The truth would appear to be that it is impossible to justify the anomaly on purely logical grounds, and that it must be regarded as based on considerations of social policy. The interests of society are sometimes better served by allowing the injured party to recover damages beyond the compensatory measure than by allowing the wrongdoer to benefit by the fact that some other person has discharged his liability. Moreover, the effect of refusing to allow recovery in full would be to deprive the third party of any right he might have to claim reimbursement from the injured party by subrogation or cession of action ".

[1] *(1956) A. C. 185.* [2] *(1874) L. R. 10 Ex. 1.*

This comment and the note in the Law Quarterly Review were written after the decision in *British Transport Commission v. Gourley*[1] and they support the view that the decision in that case does not affect the principle I have referred to.

I would therefore set aside the judgment under appeal and give the plaintiff-appellant judgment in a sum of Rs. 2,681·33 and his costs in both Courts.

T. S. FERNANDO, J.—I agree.

Appeal allowed.