1944 *Present:* **Howard C.J. and de Kretser J.**

FERNANDO, Appellant, *and* GUNAWARDENA, Respondent.

19—D. C. Kalutara, 22,603.

Negligence—Action for damages caused to a passenger in bus—Collision between bus and lorry—Burden of proof.

Plaintiff sued the defendant to recover damages for injuries received when the plaintiff was travelling in a motor bus driven by a servant of the defendant. Plaintiff was a passenger in the bus when it came into collision with a motor lorry. The lorry had its rear door flap partly open and some bolt on the flap came into contact with the right-hand side of the bus and broke the plaintiff's arm.

The defendant denied the allegation of negligence and pleaded that the plaintiff had his arm protruding out of the bus at the time of the collision and was therefore guilty of contributory negligence. The learned Judge held that the plaintiff was not guilty of contributory negligence and that the proximate cause of the injuries was that the two vehicles were being driven too close to each other at a bend of the road and the defendant's driver not taking any steps to prevent an accident.

***Held*, that the burden of proof was upon the plaintiff and that the plaintiff could not by merely proving the collision, the injury and damages transfer the *onus* of proof to the defendant to establish that he had done all he could have done with care, foresight and skill within all possible human limits.**

APPEAL from a judgment of the District Judge of Kalutara.

N. Nadarajah, K.C. (with him *U. A. Jayasundera* and *S. E. J. Fernando*), for the defendant, appellant.

H. V. Perera, K.C. (with him *J. E. M. Obeyesekere*), for the plaintiff, respondent.

Cur. adv. vult.

October 27, 1944. HOWARD C.J.—

The defendant appeals from a judgment of the District Judge of Kalutara awarding the plaintiff Rs. 5,000 as damages for injuries received when the plaintiff was travelling in a motor bus driven by a servant of the defendant. The plaintiff was, with several others, a passenger on March 8, 1941, in a motor bus going from Panadure to Adam's Peak. About 4 or 4.30 A.M. the bus came into collision with a motor lorry near Nittambuwa on the Colombo-Kandy road. The lorry had its rear door flap partly open and some bolt on the flap had come in contact with the right-hand side of the bus, took off the hair knot of a lady seated next to the plaintiff and broke the plaintiff's arm. In deciding in favour of the plaintiff the learned Judge has held that the latter's arm was fractured by reason of the driver of the bus failing to exercise all possible care, skill and foresight in carrying him. The defendant in his defence denied the allegation of negligence and further pleaded that the plaintiff had

his arm protruding out of the bus at the time of the alleged collision and was therefore guilty of contributory negligence. The learned Judge held that, although the plaintiff had his elbow on the window-sill of the bus and ε little of it was protruding out, he was not guilty of contributory negligence. He also held the proximate cause of the injuries was that the two vehicles were being driven too close to each other at a bend of the road which was right-handed to the defendant's bus and the defendant's driver not taking any steps to prevent an accident.

The burden of proof lay on the plaintiff. The maxim of *res ipsa loquitur* does not apply to a case of this kind. In other words the plaintiff could not merely prove the collision, injury and damages and transfer the *onus* of proof to the defendant to establish he had done all he could have with care, foresight and skill within all possible human limits. The general principle to test liability where negligence is alleged, was stated by Willes J. in *Daniel v. The Metropolitan Railway Company*[1] as follows:—

> "It is necessary for the plaintiff to establish by evidence circumstances from which it may fairly be inferred that there is reasonable probability that the accident resulted from the want of some precaution which the defendants might and ought to have resorted to: and I go further, and say that the plaintiff should also show with reasonable certainty what particular precaution should have been taken".

In the present case the plaintiff alleges that the bus and lorry were driven too close to each other and the negligence of the driver of the bus consisted in his driving it too close to the lorry. The question as to whether the driver of the lorry was also guilty of negligent driving is not material. The only question is whether the driver of the bus was negligent in not having driven it further to the left so as to have avoided any possibility of a collision. Although it is not quite clear, it would appear from the evidence that the flap or open door of the lorry grazed the bus. The case put forward on behalf of the plaintiff has not been prepared with the care that one would expect in a case of this nature. There was no definite evidence as to the position of the flap and its method of attachment to the body of the lorry. The same uncertainty existed with regard to the bolt. The Court was not supplied with plans of the road showing its width at the particular spot where the collision occurred. Nor was there any evidence of the dimensions of the two vehicles that came into collision. Nor was there any evidence as to the speed with which the lorry came round the bend. The evidence as to the exact position of the bus on the road when the collision took place is vague and unsatisfactory. After the accident no doubt it was found that the bus was more to the centre than the lorry. It is contended that the driver of the bus seeing a lorry approaching should have realized that there might be a rear door flap open and hence the swinging of the lorry round the bend would bring the door into contact with the bus. Even then the accident would not have occurred if the bolt had not come in contact with the plaintiff's arm. So we have the further contention that the driver of the bus should have contemplated the possibility of a bolt being attached to the flap. Then

[1] *(1868) L. R. 3 C. P. 222.*

again the learned Judge has found as a fact that a little of the plaintiff's elbow was outside. Presumably this was another possibility that should have been contemplated by the driver. In these circumstances I am of opinion that the negligence of the driver of the bus has not been established. In *Simon v. The London General Omnibus Co. Ltd.*[1] the facts were as follows:—The plaintiff was a passenger on the top of one of the defendants' omnibuses. The driver of the amnibus, in turning out of one street into another, drove the omnibus close to the kerb to avoid an electric tram-car which was passing in the same direction, and while passing an electric light standard, which was on the pavement, the jolt of the omnibus grating round the kerb caused the plaintiff's arm to come in contact with a fire alarm finger-post fixed to and standing out from the electric standard. The plaintiff's arm was at the time projecting from the amnibus, but the fire alarm finger-post did not project over but came flush with the kerb. In an action to recover damages for negligence there was no evidence that the driver either saw or knew of the fire alarm finger-post. It was held that, as it was not shown that there was an obstruction of such a nature that with reasonable care the driver ought to have seen it and ought to have realized that it would or might hit a passenger on the omnibus, there was no evidence of negligence. So in the present case I do not think it can be said that the driver ought to have seen the bolt or realized that a bolt would hit the protruding arm of a passenger in the bus. In *Hase v. The London General Omnibus Co. Ltd.*,[2] the facts were as follows:—The plaintiff was a passenger on the top of one of the defendants' omnibuses. In consequence of the road along which the omnibus usually travelled being closed, the driver of the omnibus had to pass through side streets, and in turning the corner of one of the side streets the omnibus was driven close to the kerb, so that the top of the omnibus, owing to the camber of the road, projected over the foot pavement. A street lamp stood at the corner with a small iron arm projecting from it, but not sufficiently far to extend over the road-way. While the omnibus was being driven round the corner the iron arm struck the plaintiff on the chest and injured him. There was no traffic which prevented the omnibus from being driven further away from the kerb. In an action in the County Court to recover damages for negligence the Judge found that the driver did not see the projecting arm, and that he was not guilty of negligence in not having seen it and in having driven close to the kerb, and he gave judgments for the defendants. It was held that unless the driver saw the small projecting arm or unless by exercising reasonable care he might have seen it, it could not be said he was negligent. So in the present case if the driver did not see the bolt or might not have seen it by the exercise of reasonable care, I do not think he can be said to have been negligent.

For the reasons I have given the appeal is allowed and the plaintiff's action dismissed with costs in both Courts.

DE KRETSER J.—I agree.

Appeal allowed.

[1] *23 T. L. R. 463.*

[2] *23 T. L. R 616.*