1956 *Present:* H. N. G. Fernando, J., and T. S. Fernando, J.

L. M. ELLIS, Appellant, *and* L. D. K. PARANAVITANE, Respondent

S. C. 357—D. C. Gampaha, 3,792/M

Delict—Master and servant—"Course of employment".

A master is not responsible for the negligence of his servant where the latter is about his own business with the permission but not at the request of or on the direction or order of the master. Therefore, if A permits B, who is a car driver in A's employment, to drive A's car for B's own purposes, A is not liable in damages for B's negligence in doing so.

APPEAL from a judgment of the District Court, Gampaha.

B. A. R. Candappa, with *Vernon Martyn*, for the defendant-appellant.

No appearance for the plaintiff-respondent.

Cur. adv. vult.

December 5, 1956. T. S. FERNANDO, J.—

As a result of a motor car belonging to the defendant coming into collision with a motor car of the plaintiff in which she was being driven the plaintiff received injuries and her car was badly damaged. The collision

was admitted by the defendant to have been due to the negligent driving of her car by one Perera, a car driver in her employment. In this action instituted by the plaintiff against the defendant for recovery of damages suffered by reason of the negligence of the defendant's servant acting " within the scope of his usual employment ", the learned District Judge has estimated the damages suffered by the plaintiff on account of the injuries caused to her person at Rs. 500 and the damages to her car at Rs. 3,500 and awarded her the sum of Rs. 4,000. The defendant had however denied liability on the ground that at the time of the collision Perera was not driving the car within the scope of his employment. It is this defence that arises for consideration on this appeal.

According to the evidence, the car was maintained by the defendant for the purpose of sending her children to school and bringing them back home. On the day of the collision, after the children had been brought back home from school, Perera made a request to the defendant that he be allowed to drive away in the car to enable him to pay a visit to his wife who was ill at the time. The request was granted by the defendant. This evidence was not challenged in cross-examination and has not been doubted by the learned District Judge. Indeed, an acceptance of the truth of this evidence is implicit in his judgment. Nevertheless, the learned District Judge has held the defendant liable in damages on account of the negligence of her servant Perera on the ground that (1) Perera's function was to drive her car, and (2) he was in fact driving her car at the time of the collision. The learned judge has also found that the driving of the car at the relevant time was with the full knowledge and authority of the defendant and has held that the mere fact that the purpose of the particular trip in which Perera was engaged in at the time of the collision between the two cars was one in which the defendant was not interested did not absolve her from liability.

The fact that the defendant knew that the car was to be used for a particular purpose by Perera and authorised its use for that purpose in the sense that she permitted its use is not, in my opinion, sufficient to attach liability to the defendant for the tort of her servant Perera. To attach liability the circumstances in which Perera drove the car must be such as to constitute a driving within the scope of his *employment* as a driver. The evidence does not warrant the inference that there was anything in the nature of a request, a direction or an order emanating from the defendant to her servant to drive the car on this occasion so as to constitute the occasion one on which he was *employed* by her to drive the car. I would refer in this connection to the following passage appearing in the standard work on *Torts* by Salmond, (11th. ed), at page 115 :—

" A master is not responsible for the negligence of his servant while engaged in doing something which he is *permitted* to do for his own purposes, but not *employed* to do for his master. I am liable only for what I employ my servant to do for me, not for what I allow him to do for himself. If I permit my servant for his own ends to drive my car, I am not liable for his negligence in doing so. In this respect he is not my servant, but a mere bailee to whom I have lent my property ; and there is no more reason why I should answer for his conduct in such a

matter than reason why I should answer for that of my friends or my children to whom, without personal negligence on my part, I lend or intrust property that may be made the instrument of mischief."

I should perhaps add that the plaintiff was not represented at the hearing of the appeal before us, and such researches into case law as we have ourselves been able to undertake have not led us to a previous decision where a court has attached liability to a master in damages for the negligence of his servant where the latter was about his own business or the business of a person other than his master with the permission but not at the request of or on the direction or order of the master.

In reaching a decision in favour of the plaintiff, the learned District Judge has purported to follow the South African case of *Limason v. Leyland Motors* [1] referred to in Negligence in Delict by Macintosh and Scoble, 2nd. ed., at page 100. Quite apart from the fact that McKerron in his treatise on the law of Delict (see 4th. ed., at page 131) submits reasons why the decision in that case was wrong, that case is distinguishable from the present case as there the use of the car by the servant could have been said to have been in furtherance of his employer's business. The facts of the present case approximate more closely to those in the English case of *Higbid v. Hammett Limited* [2] contrasted with *Limason v. Leyland Motors* by the learned authors on the very same page 100. In *Higbid's* case it was held that when an employee, for his own purposes, used his employer's bicycle, by the employer's permission, the employer was not liable for the employee's negligence. The reason for the decision was that the employee was not doing something in the course of the employer's business at the time of the negligent act.

That there is no difference between the Roman-Dutch law and the English law on the point that arises in this case is apparent not only on a consideration of cases decided in South Africa and in England, but is also clear from the judgment of Innes J. A., in the leading case of *Mkize v. Martens*, [3] in the course of which he stated :

"The principle generally adopted by those (South African) courts is that expressed by Pothier as follows : 'Whoever appoints a person to any function is answerable for the wrongs and neglects which his agent may commit in the exercise of the functions to which he is appointed'. In effect it is identical with the English rule that a master is answerable for the torts of a servant committed in the course of his employment. The reason underlying this important exception to the maxim *poena suos tenet auctores* has been differently expressed by different writers. But perhaps the most satisfactory statement of it is that given by Pollock on *Torts* founded upon a pronouncement of Chief Justice Shaw of Massachusetts : 'I am answerable for the wrongs of my servant or agent, not because he is authorised by me or personally represents me, but because he is about my affairs, and I am bound to see that my affairs are conducted with due regard to the safety of others.' However that may be, we may, for practical pur-

[1] *(1929) C. P. D. 318.* [2] *(1932) 49 T. L. R. 101.*
[3] *S. A. L. R. (1914) App. Div. 382 at 390.*

poses, adopt the principle that a master is answerable for the torts of his servant committed in the course of his employment, bearing in mind that an act done by a servant solely for his own interests and purposes, and outside his authority, is not done in the course of his employment, even though it may have been done during his employment.'

The same principle is echoed in the words of Wessels J. A., in *Estate Van Der Byl v. Swanepol* [1],

> " What, however, the employer can say is : ' when my servant did the act complained of he was not about my affairs and he did not do the act whilst looking after my affairs or in the course of my employment, but he did it whilst on his own business and for his own purposes'."

Apart from *Higbid's* case referred to already by me, there are other decisions of the English courts giving effect to the same principle. In *Britt v. Galmoye and Nevill* [2], the facts were that the first defendant, who had the second defendant in his employment as a van-driver, lent him his private motor car after the day's work was finished, to take friends to a theatre. The second defendant by his negligent driving injured the plaintiff. One of the reasons given by Shearman J. in awarding judgment in favour of the first defendant was that the journey not being on the master's business the latter was not liable for his servant's act. The principle was more vividly exemplified in the judgment of the Court of Appeal in the case of *Hewitt v. Bonvin et al.*[3] where the facts were that a son obtained from his mother, who had authority to grant it, permission to drive his father's motor car. The son wanted the car for his own purposes in order to drive two girl friends to their homes. Neither the father nor the mother knew the girls and it was no concern of either of them that the girls should be taken to their homes. On the way, through the negligent driving of the son, the car was upset and a friend who had accompanied the party was killed. In an action by the administrator of the deceased man against the father, the owner of the car, it was held that the son was not driving the car as his father's servant or agent or for his father's purposes, and that therefore the father was not liable for the son's tortious act. MacKinnon L.J., reversing the judgment of Lewis J., stated as follows :—

> " The essential passage in the judgment of Lewis J. is the following sentence : ' It seems to me clear that the boy was driving this car with the consent of the owner. Therefore he was on that journey the servant or agent—the agent—of the owner '. I am quite sure that this is an erroneous statement of the law. "

Again, in the recent case of *Ormrod v. Crossville Motor Services Ltd.* [4], the principle was set out by Denning L.J. in the following words :—

> " The law puts an especial responsibility on the owner of a vehicle who allows it to go on the road in charge of someone else, no matter

[1] *S. A. L. R. (1927) App : Div. 141 at 150.*
[2] *(1928) 44 T. L. R. 291.*
[3] *(1940) L. R. 1 K. B. D. 188.*
[4] *(1953) 2 A. E. R. at 755.*

whether it is his servant, his friend, or anyone else. If it is being used wholly or partly on the owner's business or for the owner's purposes, the owner is liable for any negligence on the part of the driver. *The owner only escapes liability when he lends it or hires it to a third person to be used for purposes in which the owner has no interest or concern.*".

In the present case, the learned District Judge's finding that the function of Perera was to drive the defendant's car does not appear to me to be complete, if it stands unqualified. To put it accurately, the finding should have been that it was Perera's function to drive the defendant's car for the defendant's purposes, and the question of the defendant's liability is dependent on the answer to the further question whether at the time of the collision Perera was driving the car for the defendant's purposes or about her business. The learned District Judge has found that at the time of the collision Perera was driving the defendant's car the use of which he had obtained from the defendant—after his normal work was over—for the purpose of enabling him to visit his sick wife. Having regard to this finding which must form the basis for the application of the relevant law, I am clearly of opinion that Perera, having been allowed to take the car for his own purposes, was not at the time of the collision driving the car for the defendant's purposes or about her business and was not acting within the scope of his employment. In the circumstances no liability attached to the defendant in law, and the plaintiff's action should have been dismissed. I would therefore allow the appeal and direct that the plaintiff's action be dismissed with costs in both courts.

H. N. G. Fernando, J.—I agree.

Appeal allowed.