1963 *Present :* **Sansoni, J., and L. B. de Silva, J.**

A. B. C. DE SILVA and Another, Appellants, *and* A. L. DE S. GUNAWARDENA, Respondent

S. C. 246–247/60—D. C. Colombo, 45853/M

Delict—Collision between two motor cars—Negligence—Burden of proof—Presumption of liability arising from ownership of car—Liability of parent for wrongful act of his minor child.

In an action for recovery of damages caused by a collision between two motor cars, the plaintiff, even if he has been guilty of some negligence, is entitled to recover damages if the defendant's negligence was the decisive and effective cause of the collision.

The owner of the car which caused the accident is liable in the absence of any evidence as to whether or not the person who drove it was acting as the servant or agent of the owner. This presumption of liability arising from ownership is applicable even if the driver was a minor child of the owner.

APPEAL from a judgment of the District Court, Colombo.

H. W. Jayewardene, Q.C., with *W. D. Gunasekera* and *Sinha Basnayake*, for the 1st and 2nd Defendant-Appellants.

Colvin R. de Silva with *M. L. de Silva*, for the Plaintiff-Respondent.

Cur. adv. vult.

May 6, 1963. SANSONI, J.—

This is an action for damages filed by the Plaintiff against the driver (the 1st Defendant) and the owner (the 2nd Defendant) of a motor car which collided with a car which was being driven by the Plaintiff. The collision occurred at about 8.30 p.m. at the intersection of McCarthy Road and Gregory's Road. The Plaintiff was driving his Vauxhall car EY 4565 along McCarthy Road towards Buller's Road, while the 1st Defendant (a minor at that time) was driving his father's (the 2nd Defendant) Jaguar car CY 3710 along Gregory's Road towards Maitland Crescent. The point of impact appears to have been a little on the Buller's Road side of the intersection and about 18′ 6″ from where McCarthy Road meets Gregory's Road as one travels from Horton Place.

The learned trial Judge has held that the collision was due entirely to the negligence of the 1st Defendant and that there was no contributory negligence on the part of the Plaintiff. He awarded the Plaintiff a sum of Rs. 50,000 as damages. He has also held that the 1st Defendant was at

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the time driving the Jaguar car as an agent of the 2nd Defendant, and that both Defendants were jointly and severally liable to pay the damages awarded.

It is common ground that where Gregory's Road meets McCarthy Road the word " Stop " was painted in large white letters on Gregory's Road, on either side of the intersection. Further, the Plaintiff approached the intersection on the right hand side of the 1st Defendant. As the learned Judge has held, it was the plain duty of the 1st Defendant to have given way to the Plaintiff, if necessary by stopping his car on Gregory's Road. He should have made certain, before he entered the intersection, that there was no car entering it on his right hand side, because the Plaintiff had the right of way. The 1st Defendant, as found by the learned Judge, saw the Plaintiff's car approaching the intersection. Under these circumstances the failure of the 1st Defendant to stop and let the Plaintiff's car proceed as it had the right of way constituted negligence on the part of the 1st Defendant.

Mr. Jayewardene accepted the finding that the 1st Defendant had been negligent. He submitted, however, that the learned Judge should have found the Plaintiff guilty of contributory negligence which disentitled him to recover any damages. He relied most strongly on the Plaintiff's admission that when he arrived at the point where McCarthy Road met Gregory's Road, he drove through the junction without looking to either side. The Plaintiff's explanation seems to be that when he approached the junction he slowed down, tooted his horn but got no reply from any other horn, and then went straight on. He said that he was not aware of any other car approaching the junction nor did he see the 1st Defendant's car until it collided with the rear of his car. The 1st Defendant's version was that before he came to the " Stop " sign, he applied his brakes, tooted his horn and changed down to third gear. When he had almost reached the intersection he saw the Plaintiff's car coming very fast. He braked hard and swerved to the left, but could not avoid the collision.

The learned Judge, who was in the best position to assess the credibility of the respective parties, has made a finding which I quote verbatim. It is that " the 1st Defendant came up Gregory's Road at such an excessive speed that even when he saw the Plaintiff's car before he reached the 'Stop' signal, he was unable to stop his car in spite of applying brakes. The brake marks indicate that in spite of the application of brakes the car proceeded a distance of 24 feet and was impeded only by reason of its banging into the rear of the plaintiff's car, and even thereafter the car appears to have proceeded a further 2 feet before it came to a halt facing the lamp post. Obviously the Plaintiff reached the intersection before the 1st Defendant and he had proceeded a distance of 18' 6" and almost crossed the intersection and got on to the McCarthy Road on the other side before the 1st Defendant banged into him. This accident is due entirely to the 1st Defendant not halting his car at the 'Stop' signal as he should have done and not giving the plaintiff his right of way

as he should have done. As I stated earlier, both these things took place on account of the excessive speed at which the 1st defendant was coming along Gregory's Road in his powerful Jaguar car."

The learned Judge's finding just quoted by me is a finding that it was the 1st Defendant's negligence in driving up to this junction at a speed which was excessive in the circumstances which was the decisive and only effective cause of the collision.

Let it be granted that the Plaintiff should have looked to his left and to his right before he started crossing the intersection. If the 1st Defendant had been driving at a reasonable speed at the time he approached the "Stop" sign, he would have been able, as soon as he saw the Plaintiff's car coming along McCarthy Road, to stop his car or at least to slow down sufficiently to enable the Plaintiff to cross the intersection before he himself had crossed it. Instead of doing that, it is clear that he came at a speed which was too high to permit him to stop his car or to slow down sufficiently to avoid colliding with the Plaintiff's car. He braked and he swerved to his left, but he was going so fast that his right front mudguard and the right edge of his buffer hit the left rear wheel of the Plaintiff's car and dented it inwards.

Many cases were cited to us on the question of negligence. I do not intend to refer to them because the circumstances of each case are peculiar to that case, but the principle to be extracted from the cases is clear enough. Even if the plaintiff has been guilty of some negligence, the 1st Defendant's negligence was the decisive and effective cause of the collision and that is the case here. The Plaintiff is therefore entitled to recover damages.

The next point raised by Mr. Jayewardene was the liability of the 2nd Defendant. He was the owner of the car, and there was no evidence from either Defendant or from the Plaintiff as to whether the 1st Defendant was driving the car as a servant or agent of the 2nd Defendant. The 1st Defendant gave evidence but said nothing on this point. The 2nd Defendant gave no evidence, while the Plaintiff did not claim to know anything about this aspect of the matter. In these circumstances, the law is clear that the mere fact of ownership of the car is some evidence against the person who is the owner of the car that he permitted the car to be driven by his servant in the course of his employment or by his agent within the scope of his authority. It is a circumstance from which the Court may draw an inference if the owner does not furnish the Court with further explanation. The cases of *Barnard v. Sully* [1] and *Hewitt v. Bonvin* [2] refer to this presumption. Other cases on the point are referred to by Macintosh and Scoble in Negligence in Delict (3rd Edn.) p. 90.

Mr. Jayewardene argued that the presumption cannot be applied to a case where the driver is a minor child of the owner and he cited among other authorities *Conradi v. Wiehahn* [3]. But even in such a case the rule

[1] *(1931) 47 T. L. R. 557.* [2] *(1940) 1 K. B. 188.*
[3] *(1911) C. P. D. 704.*

set out in McKerron in the Law of Delict, 5th Edition, page 78, is that "a parent cannot be made liable for a wrongful act committed by his minor child, unless he expressly or impliedly authorised the act, or unless the child was acting as his servant or agent, or unless he was negligent in allowing or affording the child the opportunity of doing mischief". In the absence of any facts from either Defendant, each of whom was in the best position to say whether the 1st Defendant was driving as the servant or agent or not of the 2nd Defendant, I think this is a case to which the presumption arising from ownership should be applied.

Finally, there is the question of damages. As a result of the accident the Plaintiff sustained the following injuries to his right hand, which have been referred to by the learned Judge in his judgment as follows :—

"(1) a fracture of the base of the 5th metacarpal bone ;

(2) a compound fracture of the base of the 4th metacarpal bone in the right hand ; and

(3) a fracture of the proximal phalanx of the middle finger.

As a result of the compound fracture of the base of the 4th metacarpal bone there was a shortening of this bone and a resulting depression of the 4th knuckle. This has resulted in the permanent disability to the middle finger, 4th finger and 5th finger of his right hand. He is unable to bring these three fingers up to the palm and there is a limitation of the flexion of these fingers. Dr. Peiris's evidence is that this is a permanent disability and he cannot do long and delicate operations with his right hand. Moreover he will be unable to play tennis which appears to have been his recreation."

The plaintiff is a doctor in Government Service who has practised his profession from 1943, and was 39 years old when this accident occurred. He has carried out different kinds of operations as a Surgeon, although he has not specialised in any branch. He stated in evidence that it was his intention to retire from Government Service and start a private practice in his home town of Kalutara. As a result of the permanent disability he now suffers from, he will be handicapped and his practice is bound to suffer, because his patients will know about his disability.

The only question is the quantum of damages that should be awarded. The learned Judge has awarded Rs. 50,000. Mr. Jayewardene submitted that this was grossly excessive, while Mr. de Silva said that there was no reason why we should interfere with the learned Judge's estimate.

I do not see why the Plaintiff should not be compensated for the loss of his freedom to choose a new way of exercising his profession. He is handicapped to the extent that he cannot do all the work a Surgeon should be able to do. His power to earn is, to this extent, impaired. He is not bound to continue in Government Service: if he had been, of course, the quantum of damages would be almost trivial. He has lost the right, which he formerly had, of earning his living in the best way possible.

After careful consideration of such other cases as have come to our notice, and the extent to which the Plaintiff's practice of his profession will be affected, I consider that a sum of Rs. 30,000 would be adequate compensation.

I would therefore vary the decree entered in this case by substituting Rs. 30,000 for Rs. 50,000 and with this variation dismiss the appeal with costs in both Courts.

L. B. DE SILVA, J.—I agree.

Decree varied.