1948 *Present*: **Dias and Windham JJ.**

WIJE BUS CO., LTD., Respondent, *and* SOYSA, Appellant

S. C. 400-401—D. C. Negombo, 14,042

Negligence—Application of maxim res ipsa loquitur*—Nature of burden on defence—Explanation founded on evidence—Burden on plaintiff to prove negligence.*

Plaintiff was injured as a result of the bus in which he was travelling being driven off the road and overturning upon impact with a culvert. The driver of the bus gave evidence which was accepted that the accident was due to the steering lock giving way when he was about twenty

[1] *(1914) 18 N. L. R. 174.*

feet from the culvert. The Judge, however, gave judgment for the plaintiff on the ground that the defence called no evidence to prove that the defect in the steering was not due to any default or negligence on their part.

***Held*, that the Judge was wrong. Where the maxim *res ipsa loquitur* applies, the burden on the defence is merely of giving a reasonable explanation of the accident provided it is not conjectured but founded on evidence. Where that is done the plaintiff has to show actual negligence on the part of the defendant in order to succeed.**

***Safena Umma v. Siddick* (*1934*) *37 N. L. R. 25* considered.**

APPEAL from a judgment of the District Judge, Negombo.

H. W. Jayewardene, for defendant appellant in 401 and respondent in 400.

N. E. Weerasooria, K.C., with *G. T. Samarawickreme* and *W. D. Gunasekera*, for plaintiff respondent in 401 and appellant in 400.

Cur. adv. vult.

December 10, 1948. WINDHAM J.—

This is an appeal arising upon an action in tort for damages, brought by the plaintiff-respondent, who was a passenger in a motor omnibus owned by the defendant-appellant company and driven by its employee, in respect of injuries sustained by him as a result of the bus being driven off the road and overturning upon impact with a culvert on the road side. The plaintiff alleged that the accident was due to the negligence of the defendants' driver, and the learned District Judge, finding in his favour on this issue, awarded him damages in the amount of Rs. 2,500. Against this finding the defendant company has appealed, while the plaintiff-respondent has cross-appealed on the ground that the damages were inadequate.

The question in issue on the main appeal is briefly this. The learned District Judge rightly found that the sudden running of the bus off the road was a fact from which negligence on the driver's part might be presumed in the absence of any explanation by the latter as to how the accident occurred. He went further than this, however, and held that the running of the bus off the road cast the burden upon the defence of proving that the accident was not due to any negligence on their part. The driver gave evidence that the accident was due to the steering lock giving way when he was about 20 feet from the culvert which caused the bus to overturn. The learned District Judge accepted this evidence, and found that the accident was caused in the manner stated by the driver, namely, through the steering gear having got out of control. He also made a finding, which in my view was warranted by the evidence, that the bus was being driven at a speed of between 20 and 25 miles per hour, a speed which he quite properly considered to be a normal one. Nevertheless he found that the defence

had failed to " disprove negligence ". While accepting that the accident was due to the steering lock giving way, he went on to hold as follows :— " In this case the defence has not proved why the steering ball joint came off the socket. The defence has called no evidence to prove that this defect in the steering was not due to any default or negligence on their part. There is no proof that this defect in the steering could not have been reasonably foreseen and remedied. In view of the decision in 37 N. L. R. 25 and as the defence has not proved that the defect in the steering could not have been reasonably foreseen and remedied by them and that it had developed suddenly and unexpectedly, I hold that it was negligent on the part of the defendant's company to use this bus on the road with a defective steering mechanism ".

I will refer presently to the case reported in 37 N. L. R. 25, on which the learned District Judge relied ; but before examining the law on the subject I will briefly review the evidence on which the learned District Judge arrived at his findings on the issue of negligence. The plaintiff himself, a passenger in the bus, was unable to say what caused it to leave the road. His evidence that the bus was travelling at 35 miles per hour was rejected. Neither he nor the other passenger whom he called to testify stated that the steering gear showed any sign of being out of order before the running off the road which immediately preceded the accident. The driver's evidence on the cause of the accident I have already referred to, and the court accepted it. It was the only evidence on the point. The relevant passages in it were as follows :— " On the day of this accident I was the driver of this bus. The bus left Kattukachchiya at 5 p.m. The scene of the accident was about 1½ miles from Kattukachchiya. I was driving the bus at about 15 miles per hour on this day. A little this side of the scene of the accident, I noticed the wheels of the bus going towards the right hand side. I was driving on the left side of the road. I turned the steering to the left but it did not answer. Just then the bus struck against the culvert. As soon as I applied the brakes, the bus collided with the culvert and it turned over . . . ". (Cross-examined) " I noticed that the steering did not answer when the bus was about 20 feet from the culvert . . . As the steering lock had come out, I could not stop the bus though I was driving about 15 miles per hour . . . . The road is full of pot-holes ".

Save that he found the speed of the bus to have been from 20 to 25 miles per hour and not the 15 miles per hour alleged by the driver, the learned District Judge accepted the driver's evidence which indeed was not contradicted (save as to the speed) by that of any other witness. The court further found, upon the driver's evidence and that of the District Revenue Officer, that the road was a bad one, full of pot-holes and ruts, and was some 14 feet wide. He also accepted the evidence of the Examiner of Motor Cars, who inspected the bus after the accident. The latter's evidence regarding the steering apparatus was as follows :—" I found the bus badly damaged. The steering hand had come out of the ball joint, in the ball and crank joint. If the steering had come out of the ball joint while the bus was being driven, the bus would get out of control. I cannot say if the steering gave way before the accident or if it

happened after the accident. A violent impact can cause the ball joint to give way . . . . I am unable to state if the accident was due to rash or negligent driving or due to an unavoidable accident. Bus drivers have to keep vehicles in good condition and roadworthy. This bus is about 8 to 10 years old. There are older buses on the road. This bus plies daily on that road."

So much for the positive evidence. With regard to matters upon which there was an absence of evidence, it is to be noted that there was no evidence that the driver had had any previous trouble with the steering gear, whether on any previous trip or upon the trip on which he was engaged, before the moment when the bus ran off the road. With regard to whether the driver or any official of the defendant company had inspected the steering apparatus recently or immediately before setting out on the trip in question, there was no evidence one way or the other. The driver himself did not volunteer any evidence on the point, nor was the question put to him in cross-examination.

In the light of this evidence and of the findings upon it, I consider that the learned District Judge erred in holding that the defence had failed to discharge the burden which the law placed upon them, and in my view he rated that burden too high. A case such as the present, where the evidence adduced by an injured plaintiff shows that he has sustained his injuries by reason of a motor vehicle, driven by an employee of the defendants (acting in the scope of his duty), having run off the road in its wrong side and overturned, is, I think, undoubtedly one where, in the absence of explanation, the maxim "res ipsa loquitur" applies, and a *prima facie* case of negligence will be held to be made out against the defence. The question is, however, what is the burden which its application casts upon the defence. This question has been considered at some length in two South African cases, *De Wet v. Adams* [1] and *Naude N. O. v. Transvaal Boot and Shoe Manufacturing Co.* [2] In both cases it was held that the burden cast upon the defence is not that of proving the absence of negligence, as was assumed by the learned District Judge in the present case, but is merely that of giving a reasonable explanation of the accident,—an explanation which would negative the presumption of negligence which the unexplained accident had raised. The explanation must, of course, be not only acceptable to the reason, but must also be founded on evidence. A mere suggestion or conjecture that the accident may perhaps have been caused in such and such a manner will not be enough; there must be evidence that it was caused, or was probably caused, in a particular manner. If this burden is discharged by the defence, the plaintiff will have to show actual negligence on the defendant's part in order to succeed. In the words of Lord Dunedin in *Ballard v. North British Railway Co.* [3] cited with approval in *De Wet v. Adams* (*supra*)— "if the defenders can show a way in which the accident may have occurred without negligence, the cogency of the fact of the accident by itself disappears, and the pursuer is left as he began, namely, that he has to show negligence. I need scarcely add that the suggestion of how the accident may have occurred must be a reasonable suggestion".

[1] *(1935) T. P. D. 247.* [2] *(1938) A. D. 379.*

[3] *(1923) 60 S. L. R. 449.*

Tinddall J.A., in *Naude N. O. v. Transvaal Boot and Shoe Manufacturing Co.* (*supra*) put the proposition thus :—" This simple reference to elementary principles leads to the clear conclusion that whether the case is one to which the expression of *res ipsa loquitur* applies or not, the burden of proving negligence is on the plaintiff who alleges it. When, therefore, the evidence on both sides is heard, if there is not a balance of probability in favour of the inference of negligence, the plaintiff must fail ".

Applying these principles to the facts and findings in the present case, I hold that the defendants discharged the burden which the running of their bus off the road and into the culvert placed upon them, by explaining, through their driver (whose evidence was accepted), that the running off was caused by a sudden failure of the steering apparatus. The evidence of the Examiner of Motor Cars, and indeed common sense, support the conclusion that such a mishap would cause the bus to get out of control and thereby bring about the accident. The driver's evidence being accepted, there remained no balance of probability in favour of the inference of negligence on the part of the defendant company or their driver, and the onus thereupon shifted back to the plaintiff to show either (*a*) that the giving way of the steering lock was itself brought about by, or would not have occurred without, negligence on the part of the defendant company or their driver ; or (*b*) that after the giving way of the steering lock and before the impact with the culvert (which caused the bus to overturn) the driver was guilty of some negligent act or omission but for which the accident might have been averted. This latter point does not appear to have been argued below, nor was it considered by the learned District Judge ; but where he went wrong was in holding, on the former point, that it was for the defence to prove that the failure of the steering was not due to their negligence, rather than that it was for the plaintiff to prove that it was due to their negligence.

This burden the plaintiff failed to discharge, either on oral or circumstantial evidence. As I have said, there was no evidence one way or the other on the question whether the steering apparatus was already worn or defective, or on the question whether the defendants had recently inspected it. The burden lay on the plaintiff to establish the defendants' negligence in this respect if they sought to rely on it, either by endeavouring to extract an admission from the driver or by calling evidence, expert or otherwise, to show a pre-existing worn or defective condition of the steering gear or the absence or unlikelihood of a recent inspection of it. This they failed to do. Nor did the circumstances support the probability that there had been no recent inspection, or that the steering apparatus was worn or defective before the moment the bus ran off the road. Indeed, the fact that the bus had been driven without mishap for a mile and a half before it ran off the road would seem to indicate that it was not out of order until that moment. And with regard to the question what it was that might reasonably be supposed to have caused the steering suddenly to fail (though it was not for the defence to prove positively what did so cause it) there was the accepted evidence that the road was a bad one, full of pot-holes

and ruts. In brief, the plaintiff failed to show on a balance of evidence that the giving way of the steering apparatus was due to negligence on the part of the defendants.

On this aspect of the case, it is but fair to say that the learned District Judge, in placing upon the defence the burden of proving that the failure of the steering apparatus was not due to their default or negligence, relied on a two-judge decision of the Supreme Court, in *Safenaumma v. Siddick* [1], a case where the facts were somewhat similar. In that case, as in the present one, the defendant's motor bus caused injuries to the complainant through running off the road, and the defence was that the steering gear broke. The court held that the bare statement of one of the two defendants to that effect was not sufficient to discharge the onus upon them. But with respect, although I have no doubt that the ultimate decision in that case was the right one, since there was overwhelming evidence that the bus was being driven at an excessive speed, nevertheless I think the court applied the wrong principle when it laid down that the onus lay on the defendants to show positively that there was no want of care on their part. Dalton J. in his judgment in that case also went on to say that "even assuming that the steering gear was worn and defective but that the defendants had no knowledge of the defect, to place a bus on the road in that condition was a thing necessarily dangerous to users of the road and others, and it amounts to negligence". To this proposition, always assuming that the defendants ought to have had knowledge of the defect, no exception can be taken, but it is a little disconcerting to find, on perusing the record of the evidence before the District Court whose judgment was there appealed from, that there was in fact no evidence in that case, any more than in the present one, that the steering gear was already worn and defective. However, be that as it may, there was certainly in the present case no such evidence, and for the reasons I have given, it was for the plaintiff to adduce it, which he failed to do.

There remains the question whether the evidence discloses any negligence on the part of the driver of the bus after he discovered that the steering apparatus was out of order and before the impact with the culvert (which was the immediate cause of the overturning of the bus) so that it could be said that but for such negligence the accident might have been averted. As I have stated earlier, this question does not appear to have been argued below, nor was it considered by the learned trial judge. Nevertheless it has been raised here, and the evidence on the point must be considered. It is contended for the plaintiff that the driver was guilty of negligence in not applying his brakes immediately upon finding that the bus was running towards the right hand side of the road, instead of first endeavouring to steer it back to the left of the road. The only evidence on the point was the driver's own which I have earlier set out. His uncontradicted evidence was that the spot at which he first noticed that the steering gear was out of order, that is to say, where he found the wheels of the bus going towards the right of the road and endeavoured to turn them back to the left, was only twenty feet from the culvert. Travelling at 20 miles per hour he would thus have had about two-thirds of a second in which to decide what to

[1] *(1934) 37 N. L. R. 25.*

do for the best, and it sems to me that he cannot be held to have been guilty of negligent conduct in first trying to turn the bus from the culvert to which it was heading, and in applying the brakes a mere fraction of a second later. Nor can it be certain or even probable that an immediate application of the brakes, while the bus was still travelling towards the right, would have averted the accident, bearing in mind that the width of the road was only 14 feet and that he was already on the right hand side of it. The observations of Goddard J. in the English case of *Hunter v. Wright* [1] seem to me apposite in this connection. That was a case where the defendant's car having skidded on a road through no fault of her own, the question arose whether she could still have averted the accident which resulted from its mounting the pavement, had she, immediately after the skid, not accelerated, or had she turned the steering wheel in the direction opposite to that in which she did turn it. Goddard J. said : " Once it has been decided . . . . that the car in which the lady was driving got into a skid through no fault of her own, it seems to me that it is absolutely impossible to say that she had either the time or the space in which to correct the consequences of that skid. At the worst for her, it is a second ; at the best for her, it is about two-fifths of a second. When one says that, if she had turned the car one way, she might have done something or if she had turned the car another way, some other consequence might have happened I think that one is reduced to an element of speculation. It is like the question which is so constantly asked in running-down cases, and which is of every little use in deciding them : ' How quickly can you pull up your car if necessary? '. If the true answer is given it is that no one knows how quickly one can pull up a car when going at any given speed. One may know how quickly one can do it in going through a test. If one is going past a particular point and knows that at that point one is going to pull on the brakes and see how quickly they will act, no doubt one can do it and get the record. In this case, however, the human mind has to grasp the fact that something has gone wrong and has to decide how to act. When one has got less than a second, and not more than 15 feet, or possibly 20 feet, before the accident happens, it seems to me impossible to say that, once the lady has shown that she skidded without any fault, any fault remains in her, or that any possibility of fault remains in her ".

While in cases of this kind one must look for general principles rather than for facts on all fours, the application of the above observations to the present case cannot be gainsaid, the circumstances of the time and distance during which the driver had to decide what to do for the best after the car got out of control being so similar in the two cases. Applying the same line of reasoning I am unable to hold that any blame can attach to the driver in the present case for the action he took endeavouring to avoid the accident, or that he was therein guilty of any fault or negligence, so as to render the defendant company liable to the plaintiff in damages for the injuries sustained by him in the overturning of the bus.

For all these reasons, while fully sympathising with the plaintiff for the injuries and resulting expenses which he incurred, I must allow the appeal and hold that, the plaintiff having failed to prove that the accident was due to any negligence on the part of the defendant company's driver,

[1] *(1938) 2 A. E. R. P. 625.*

the company cannot be held liable to him in damages. The question of the adequacy of the damages awarded, raised in the cross-appeal, accordingly does not arise, and the cross- appeal is dismissed. In all the circumstances, however, while not attaching any blame to the defendant company, I think the more equitable course would be to make no order for costs, either here or below, but to let each party bear his own . I so order accordingly.

DIAS J.—I agree.

Appeal allowed.