IN THE COURT OF APPEAL OF THE DEMOCRATIC SOCIALIST REPUBLIC OF SRI LANKA

P.P. Panditharathna of
Devagiri Group,
Kottawagama, Galle.

PLAINTIFF-APPELLANT

C.A 1311/1996 (F)
D.C. Galle 5744/M

Vs.

1. K. Dharmasena of
"Nandana Sevana", Kahagala,
Kamburupitiya.

2. W. K. Lionel of
New Town,
Kamburupitiya.

DEFENDANT-RESPONDENTS

BEFORE: Anil Gooneratne J.

COUNSEL: Appellant is absent and unrepresented

U. de. Z. Gunawardena for 1st & 2nd Defendant-Respondents

ARGUED ON: 06.05.2011

DECIDED ON: 22.06.2011

GOONERATNE J.

This is an appeal by the Plaintiff-Appellant from a judgment of the District Judge of Galle dismissing an action instituted by him against the 1st & 2nd Defendant-Respondents for the recovery of a sum of Rs. 850,000/- as damages resulting from an accident in which he suffered injuries by being knocked down by a private bus bearing No. 30 Sri 6220 driven by the 2nd Defendant-Respondent. The 1st Defendant-Respondent was the registered owner of the said bus. At the trial 4 admissions were recorded. Date of accident and that the bus was driven by the 2nd Defendant, ownership of bus, injuries as described in paragraph 4 of plaint are all admitted facts. Parties proceeded to trial on 13 issues.

On perusing the case docket I find that both parties have obtained the brief from the Registry. However this appeal had been listed in this court on several days but on all occasions the Appellant was absent and unrepresented. When this case was listed for hearing on 6.5.2011 once again the Appellant was absent and unrepresented and as such Court heard the learned Counsel for the 1st & 2nd Respondents, and reserved the judgment for 22.6.2011. The absence of the Appellant on dates of hearing, appears to this court that the Appellant has failed to exercise due diligence to prosecute this

appeal. On this ground alone this appeal is liable to be rejected. However this court considered the merits of this appeal.

The accident had taken place on the Galle-Matara road near the petrol shed at Kotugoda, on the right side of the road. The sketch plan of the place of accident had been produced marked P1. perusal of same gives details of the situation of accident and as to how the bus and the motor cycle were placed after the accident. Plaintiff's evidence was that he went to the petrol shed in his motor cycle. He states that from the petrol shed he had driven the motor cycle on to the main Galle road towards Colombo. When turning his motor cycle on to the main road and when one looks towards Colombo the motor cycle was on the left side (sea side). Very briefly the following was uttered by Plaintiff.

මගේ වාහනය ගැටීම වුනේ මගේ වාහනය මුහුදු පැත්තට මුහුණ දැම්මට පසුවය. මුහුදු පැත්තට මුහුණ ලා තියෙන අවස්ථාවේදි පාර අවසාන වන තිරුවේන් මගේ මොටර් සයිකලය තිබුනා, සාමාන්‍යයෙන් අඩි 2 ක් පමණ දුරිනි.

The Police Constable who did the investigation of the accident had given evidence in the District Court. At the point of accident according to his version is that the road was narrow at that point, the tarred surface is 9 meters, 9.8 yards or 28 feet. It is the point where the Galle Akuressa road meets the Galle-Matara Road. There is traffic congestion. No brake marks

found at the point of impact etc. The point 'x' in P1 is where the bus was parked after the impact which show that the bus had been parked on the sea side obstructing the road and the rear side of the bus on the middle of the road and the rest towards the right side of the road.

The learned trial Judge had examined the sketch plan and the defence version. The Defendant's evidence was that the motor cycle had been put on to the road suddenly from the side of the petrol shed to the main road and as a result the 2nd Defendant had to steer the bus to the right side to avoid a collusion with Plaintiff's cycle. The motor cycle has struck the left front side of the bus. Learned Judge's conclusion on this aspect is that on perusing P1 and the point 'X', Defendant's version is more probable. It is the trial Judge who heard, saw and formed an opinion of the demeanour of the witnesses in this case, both Plaintiff and 2nd Defendant and others.

In a case of this nature the evidence given in court and any contradiction on former statements would be made note of by the trial Judge. Appellate Court should not rush to overturn primary facts, on which trial Court Judge makes observations.

The learned District Judge has also given his mind to the Plaintiff's evidence in court and the statement he made to the police and expressed the contrary position of Plaintiff. In the statement to the police

Plaintiff states that the accident took place as he steered the motor cycle to the main road from petrol shed .. යතුරු පැදියේ නැග ගාල්ල දෙසට ඒමට ඉන්ධන අසලින් ගාල්ල පාරට ඇතුලත කරකවනවාත් සමගම ගාල්ල පැත්තේ සිට පැමිණි පුද්ගලික බස් රථය මා යටකර ගෙන මඳක් ඉදිරියට ඇද්දුවා. The Judge observes that the above statement differ from his evidence in court. In comparison the trial Judge goes to the point that the 2nd Defendant's version in court on the point of impact and manner of impact and the Plaintiff's statement on same to police are almost similar.

The above material carefully examined by the learned Trial Judge, indicates negligence of the Plaintiff. His (plaintiff) taking the motor cycle suddenly on to the main road resulted in a sudden accident for which the 2nd Defendant cannot be held responsible. The accident is an inevitable accident. The Respondent driver with all reasonable diligence could not have avoided the accident.

At this point of my judgment, having perused the written submissions of the very learned counsel for the 1st & 2nd Respondents, I wish to incorporate the following extract from the written submissions which should be taken note of in cases of this nature on negligence and resulting in

claim for damages, where Defendant could demonstrate an inevitable accident as a defence, to exonerate himself. In the result victim is without a remedy.

On the evidence in this case the accident in question is one which can aptly be designated an inevitable accident because no amount of ingenuity or skill on the part of the driver of the bus (2nd defendant) could have averted the accident, because the moment of the plaintiff (motor cyclist) entering the main road to cross it an the moment of the occurrence of the collision had synchronized and there was not even the lapse of an infinitesimal fraction of a second between the two events.

The plaintiff had sued the defendants – respondents in the tort of negligence which is essentially fault based. According to the present state of the law, which is most unsatisfactory, it is regrettable no relief can be granted to the plaintiff.

I cannot resist reproducing in this context an eloquent quotation from Lord Denning which is as follows: "from the very earliest times there has been no sense of justice in the law of damages ..... Our law as to personal injuries is entirely out of date ..... It was formed in relation to horse transport and rail transport, It is quite inapplicable to transport by motor vehicles. These bring death disablement on all sides. It is imperative, as a matter of justice, that there should be introduced a system of compensation to victims even though they cannot prove negligence: not fault liability as it is called:

The above observations apply with equal force to our law of damages. It is only if matters of this sort are highlighted in judgments that they will make a significant impact on public consciousness and will be propelled into public discussion.

Lord Pearson recognized that in point of principle, no fault liability should in time supersede altogether liability for negligence.

The above extract from the written submissions simply and clearly explain the facts of the case in hand and comments on the attitude of law, relevant to both past and present. However the facts reveal an inevitable accident.

It is a rule that a motorist who approach a main road should always stop his vehicle and take a look on both sides of the main road before proceeding along the main road and decide for himself that the path is clear. If not such motorist should allow the vehicles on the main road to proceed and wait for his turn or if possible indicate by way of signal that he is getting on to the main road. Failure to follow this simple method of driving would cause obstruction to those motorist on the main road for which they cannot be held responsible. Driving a vehicle without a proper look out would amount to negligent driving. The case in hand is a tipical example. I have no reason to dispute the learned District Judge's views.

In all the above circumstance I affirm the judgment of the District Court and dismiss this appeal.

Appeal dismissed without costs.

JUDGE OF THE COURT OF APPEAL