IN THE COURT OF APPEAL OF THE DEMOCRAIC SOCIALIST REPUBLIC OF SRI LANKA.

Court of Appeal
Case No. CA 977/98 (F)

District Court Negombo
Case No. 7720/M

Aparekkage Wasantha Pushpakumara Perea,
No.1, Miriswatta, Demanhandiya
Plaintiff

Vs.

1. Wickramage Devid,
   Kuliyapitiya, Hunumulla.
2. North Colombo Regional Transport Board,
   No. 200/30, Kirula Road, Colombo 3
3. Peoplised Transport Service Ltd.,
   Negombo.
4. Hon. Attorney General,
   Attorney General's Department,
   Colombo 12

Defendants

And Now

2 North Colombo Regional Transport Board,
No. 300/30, Kirula Road, Colombo 3
Defendant-Appellant

Vs.

Aparekkage Wasantha Pushpakumara Perea,
No.1, Miriswatta, Demanhandiya
Plaintiff Respondent

Before : Malinie Gunarathne J.

: L.T.B. Dehideniya J.

Counsel : Farzana Jameel DSG for the 2nd Defendant Appellant.

: Dr. Sunil Cooray with B. Hemage for the Plaintiff Respondent.

Argued on : 14.12.2015

Written Submissions of the 2nd Defendant Appellant Filed on : 16.02.2016

Written Submission of the Plaintiff Respondent Filed on : 16.02.2016

Decided on : 27.05.2016

L.T.B. Dehideniya J.

This is an appeal against a judgment of the learned District Judge of Negombo. The Plaintiff Respondent (Respondent) instituted this action claiming compensation for a road traffic accident. The Respondent's case is that while he was riding a motor bicycle on Negombo – Merigama road towards Negombo, a cow suddenly crossed the road making him to apply brake to avoid colliding with it. The bus, negligently driven by the 1st Defendant, came behind on the same direction and hit him causing injuries. As a consequence to this accident, the Respondent was hospitalized for 11 days. His spleen ruptured due to the accident and had to undergo an operation and it was removed. He was claiming Rs. 250,000/- as compensation. The 2nd Defendant Appellant (Appellant) filed answer denying the allegation of negligence and took up the defence of contributory negligence of the Respondent and inevitable accident. The learned District Judge after trial

awarded the full amount claimed as compensation. Being aggrieved by the said judgment, appealed against it.

The bus driver, the 1st Defendant, was charged in the Magistrate Court for negligent driving and failure to avoid an accident under Motor Traffic Act. He pleaded guilty to the second count, i.e. failure to avoid an accident and the first count, i.e. negligent driving, was withdrawn by the police. The details of the charge that he pleaded guilty are thus;

a) The 1st defendant is the driver of the CTB bus No. 30 Sri 7587

b) He failed to avoid an accident and hit against the motor bicycle No. 93 Sri 215

c) He failed to;

1) Drive the vehicle in a controllable speed suitable to the place and the situation,

2) Drive the vehicle carefully and

3) Drive the vehicle with a proper lookout on the other users of the road.

The 1st Defendant pleaded guilty to this charge and on his own plea, he was convicted and fined Rs. 500/-

The amendment brought to the Evidence Ordinance in 1998 by Act 33 of 1998, made a conviction in a criminal Court a relevant fact in a civil Court. Section 41 A (2) reads thus;

41A. (2) Without prejudice to the provisions of subsection (1), where in any civil proceedings, the question whether any person, whether such person is a party to such civil proceedings or not, has been convicted of any offence by any court or court martial in Sri Lanka, or has committed the acts constituting an offence, is a fact in issue, a

judgment or order of such court or court martial recording a conviction of such person for such offence, being a judgment or order against which no appeal has been preferred within the appealable period, or which has been finally affirmed in appeal, shall be relevant for the purposes of proving that such person committed such offence or committed the acts constituting such offence.

This section provided that a conviction is admissible evidence in a civil suit where the fact that he (the person whom so convicted) has committed the acts constituting the offence is a fact in issue. Before this amendment the law was that a conviction is admissible only if it is on an admission of guilt. It has been so held in the case of [2006] 2 Sri L R 272 Mahipala and Others vs. Martin Singho. Edissuriya J. after considering several authorities; expressed the law relating to admissibility of a conviction in criminal Court, in a civil action.

The 1st defendant was charged in respect of the said accident under the Motor Traffic Act (Cap 203) as amended by Act, No. 21 of 1981 and Act, No. 40 of 1984, for failure to report an accident, for negligent driving in breach of section 151 (3) and for failure to avoid an accident in breach of section 149(1) of the Motor Traffic Act. The main charge was driving the vehicle bearing No. 6306 negligently, recklessly and dangerously, without care or regard to the other road users and knocking down the cyclist, Martin Singho, causing grievous injuries to him. The accused (1 st defendant) tendered an unqualified plea of guilt to all charges, whereupon the accused was ordered to pay Rs. 600 as State costs. [Journal Entry dated 23.08.1995 of the case record of M. C. Anuradhapura case No. 6648 (page 187 of the Judge's brief)]

The 1st defendant's plea amounted to an admission that he drove the Army truck bearing No. 6306 on that occasion negligently, recklessly and dangerously, without care or regard to the other road users, at an excessive speed and lost control of the said vehicle and knocked down the cyclist, Martin Singho, causing grievous injuries to him. The 1st defendant's unqualified plea of guilt is most relevant and admissible as evidence of negligence on the part of the 1st defendant.

The learned State Counsel contended that a plea of guilt in a criminal case has no effect on the consideration in a civil matter. The learned State Counsel heavily relied on the unreported Court of Appeal judgment in CA No. 146/91(F)CA minutes of 29.10.1996. In this case Justice Edussuriya, held that a plea of guilt in a criminal case does not establish negligence in a civil action. The Court of Appeal of the United Kingdom in Hollington Vs. Hewthon Ltd.(1) held that evidence of a conviction was inadmissible in subsequent proceedings. However the full Bench decision in Western Australia in MicKelberg Vs. Director of the Perth Mint(2), refused to follow that decision, and held, evidence of a prior conviction is admissible.

The Supreme Court of Sri Lanka has also held that a plea of guilt in a criminal court is admissible in civil proceedings. In the Supreme Court case of Sinnaih Nadarajah Vs. Ceylon Transport Board(3) it was held that where the driver of a vehicle is sued along with his employer for the recovery of damages resulting from an accident in which the plaintiff suffered injuries by being knocked down, a plea of guilt tendered by the driver, when charged in the Magistrate's Court in respect of the same accident, is relevant as an admission made by him and ought to be taken into consideration by the trial judge in the civil suit. Wimalaratne, J. who delivered the judgment in this case referred

to the aforesaid case of Hollington Vs. Hewthon and Co. Limited (supra) and said (at 52),

"In Hollington Vs. Hewthorn & Co. Ltd., (supra) a conviction of one of the defendants for careless driving was held to be inadmissible as evidence of his negligence in proceedings for damages on that ground against him and his employer. But had the defendant before the Magistrate pleaded guilt or made some admission in giving evidence that would have supported the plaintiff's case, this could have been proved but not the result of the trial. per Goddard, L. J.....The 2nd defendant's plea of guilt in the Magistrate's Court was, therefore, most relevant and to have been taken into consideration by the learned Judge in assessing the plaintiffs case"

The law in regard to this is explained by Ratnalal & Dhirajalal in "The Law of Evidence", 19th edition at page 185, with reference to Indian cases, as follows:

*"It is a well-recognized principle of law that a conviction in a criminal case is no evidence of the facts on which that conviction was based in a civil case in which those facts are in issue or form the subject-matter of the suit. But the authorities are clear that, when a conviction is based on a plea of guilty, that plea is relevant and to prove in the judgment in the criminal case is admissible in evidence in the subsequent civil suit in which the facts giving rise to the charge are in issue or form the subject matter of the suit." Meenakshisundaram Cheety Vs. Kuttimali(4)_*

In assessing the plaintiffs case the learned Judge has considered the plea of guilt of the 1 st defendant in the case filed against him under the Motor Traffic Act for negligent driving in breach of section 151 (3) of the Act, by committing one or more of the grounds of the negligent

acts described in the charge. The 1 st defendant's plea of guilt is most relevant and the learned Judge has correctly taken that into consideration. In criminal proceedings the prosecution must prove its case beyond reasonable doubt. However in civil proceedings a balance of probability is sufficient to decide the case in favour of the plaintiff. The plaintiff is not required to demonstrate his case. When the 1 st defendant pleaded guilty to the aforesaid charges of reckless and negligent driving under the Motor Traffic Act, in the Magistrate's Court, it has legal proof in the legal sense.

This position was changed by the Legislature by making the conviction, irrespective of whether it is on an admission of guilt or otherwise, admissible in a civil suit. In the instant case the driver of the bus, the first Defendant, pleaded guilty in the Magistrate Court.

A conviction on charge of failure to avoid an accident under Motor Traffic Act to become relevant in a civil action for compensation for negligent driving; the conviction must be on the same items as complained of, by the Plaintiff, which constitute the negligent driving. If the driver has not admitted or was not found guilty for the acts of negligence complained of, the conviction cannot be made use to prove his negligence.

De Mel and another V. Rev. Somaloka [2002] 2 Sri L R 23 at 27

It has to be emphasized that admissions must specifically relate to the items of negligent driving as set out in the plaint.

In the present case the Plaintiff in paragraph 11 of the plaint describes the negligent acts of the driver of the bus, the 1st Defendant. Out of item (i) to (ix) in the said paragraph, item (i) and (vii) are the same as items specified in the charge sheet. The first item in the paragraph 11 of the plaint is that the 1st Defendant was driving the vehicle in an excessive speed. The first act that he

failed to do according to the charge sheet is that he failed to drive the vehicle in a controllable speed. When it is put to the positive form, it means that he was driving the vehicle in an excessive speed. The eighth item in paragraph 11 of the plaint is that he drove the vehicle without paying attention to the vehicles and pedestrians going along the road. The third item that he failed to do to avoid the accident as per the charge sheet is also the same. Under these circumstances, the driver of the bus was convicted on his own admission at least for two negligent acts complained in the plaint. Therefore the conviction in the criminal case becomes relevant and admissible in the civil action. It was held by Edissuriya J. in Mahipala and others v. Martin Singno (supra) at page 276, *"The 1st defendant's unqualified plea of guilt is most relevant and admissible as evidence of negligence on the part of the 1st defendant."* And at page 277 *"it has legal proof in the legal sense"*.

Except the conviction in Magistrate Court, other evidence is also available to establish the negligence of the 1st Defendant. The Plaintiff Respondent was riding his motor bicycle in front of the bus driven by the 1st Defendant. The driver of the vehicle running behind has a duty of care to see that he is keeping a safe distance from the vehicle going in the front and maintain a speed that he will not collide with it. In the instant case the tyre mark of the bus was 13 meters. It means that after applying brakes, the wheels of the bus has come to a halt but the bus kept moving for 13 meters. No evidence to show that the road was wet or sandy. The only explanation possible is that the bus was running in a high speed and it skidded for 13 meters before coming to a halt. This itself constitute negligence.

The Appellant raised the defence of contributory negligence of the Respondent. The Appellant was mostly relying on the fact that the Respondent did not possess a driving license issued by the Commissioner of Motor Traffic. If a person possess a driving license, it establishes the fact that

he is competent in driving that kind of vehicle, but not having a driving license does not necessarily mean that he cannot drive that type of vehicle. It may be an offence under the law to drive a vehicle on the road without a driving license, but whether it was the cause for the accident is matter that has to be proved separately. Not having a driving license alone does not prove the negligence. In the present case the Respondent stated to Court in evidence that he was riding motor bicycles from the age of 12. No evidence to the contrary was led.

The learned DSG for the Appellant submitted that if the Respondent was a competent rider, he would have balanced and controlled the bike without toppling when he applied break to prevent hitting the cow. No evidence to show that the Respondent was not competent enough to ride a motor bike. It is the Appellant who had the last opportunity to avoid the accident. He was coming behind the motor bicycle. He can see what is happening in front of him. The cow coming across the road, the Respondent breaking his motor bike and toppling happened in front of the Appellant. He had the last opportunity to avoid the accident, but he could not, because he was driving the bus too fast. It was the Appellant who had the last opportunity but not the Respondent. The Respondent cannot be blamed for contributory negligence.

Daniel V. Cooray. 42 NLR 422

In cases where the defendant pleads contributory negligence the inquiry resolves itself in an elucidation of the question as to which party, by the exercise of ordinary care, had the last opportunity of preventing the occurrence.

The learned DSG's submission that the learned District Judge has failed to consider the defence of contributory negligence in his judgment, is not correct. The learned District Judge considered the said defence and has

come to the finding that there is no contributory negligence. I do not see any reason to interfere with this finding.

The Appellant submits that the learned District Judge has failed to assess the damages properly. It is the contention of the Appellant that the loss of income and the physical injuries not proved by the Respondent. Before going in to the details of this submission, the Respondent's claim must be considered. In paragraph 14 of the plaint he says that he worked as a lorry cleaner and earned Rs.3000/- per month but in paragraph 16 and 17 of the plaint he does not claim any pecuniary loss on the basis of "loss of income". In paragraph 16 he claims Rs. 200,000/- for the physical pain and inconveniences and in paragraph 17, Rs. 50,000/- as expenses incurred for the special medical treatment, cost incurred on medical attendants, cost of special meals, and travelling expenses. In these circumstances, it is not necessary to consider whether the Respondent was employed prior to the accident and his income and whether there is any disability to engage in an employment in future. It is not a fact in issue in this case.

He is claiming Rs. 200,000/- for his pain and suffering. The Respondent was injured due to this accident was hospitalized for 11 days and had to undergo an operation to remove his spleen. Prof. Ravindra Fernando and Dr. Paramalingam Sivaraja testified to the fact that the Respondent was in the hospital for 11 days and he was operated and his spleen was removed. The MLR, the bed head ticket and the diagnoses card of the Respondent was produced in evidence. The operation was performed under general anesthesia. It is common sense that a patient has to suffer pain until the wounds are healed. Apart from the injuries that he sustained due to the accident, he had to suffer the pain of the surgical wound too.

In assessing damages on personal injuries, Mckerron on Law of Delict page 117 says that;

In an action for personal injuries that Plaintiff is entitled to claim compensation for

(1) actual expenditure and pecuniary loss

(2) disfigurement, pain and suffering, and loss of general health and amenities of life,

(3) future expenses and loss of earning capacity.

In the case of Mahipala and others v. Martin Singho (supra) at page 277 it had been held that;

The only question which remains to be decided is the measure of damages. R. G. Mc Kerron in 'The Law of Delict", 6th edition at page 209 states thus:

"By the measure of damage is meant the standard or method of calculation by which the amount of damage is to be assessed.....where the injuria is clear, substantial damages will as a rule be given, although no actual damage is proved."

Wimwlchandra J. went on further and held at page 279 that;

The Plaintiff can claim compensation not only for the physical injury that had been occasion by the accident and its aftermath, but also for the inconvenience and lost of amenities. This includes the deprivation of the ability to participate in normal activities in day to day life. This may also include the deprivation of sexual pleasure, mental suffering and frustration resulting from the victim's inability to lead a normal life.

Burchell in "Principles of Delict", Cape Town, Juta & Co. (1993) at page 136 has this to say on loss of amenities of life-

"The legal concept of amenities of life comprises all the factors which go to make up an enjoyable human life..... As Claasen, J., in Reyneke Vs. Mutual and Federal Insurance Co. Ltd.(5) said :

"The amenities of life flow from the blessings of an unclouded mind, healthy body, sound limbs and the ability to conduct unaided the basic functions of life such as running, eating, reading, dressing and controlling one's bladder and bowels."

In the present case the Respondent was injured due to the accident and had to undergo an operation. He was in the hospital for 11 days. His pain and suffering did not come to an end within that period. He testified that he is suffering an abdominal pain when he is engaged in a heavy labour work such as lifting heavy items or running for a while. The learned DSG submitted that Prof. Ravindra Fernando in his report has repeated what the Respondent said to him and cannot rely on the report. Prof. Ravindra Fernando said in his evidence that it is possible that an abdominal pain to continue after an operation of this nature. It is the person who is suffering the pain can only speak about the actual pain. Prof. Ravindra Fernando's evidence corroborates the evidence of the accident victim in relation to the pain. This is a deprivation of his amenities of life and he must be compensated.

Makerron in his Law of Delict platinum edition page 118 says that *"there are no scales by which pain and suffering can be measured, and there is no relationship between pain and money which makes it possible to express the one in terms of the other with any approach to certainty. The usual method adopted is to take all the circumstances in to consideration and award substantially an arbitrary sum."* In the instant case learned District Judge in his judgment considered the overall evidence on the injuries and has decided the amount of compensation for injuries. There is no reason to interfere with this finding.

The next question is whether the Respondent was able to prove the expenditure incurred. He claims Rs. 50,000/- as pecuniary damages. The Respondent was unable to submit any document to prove the expenses. The Respondent had to undergo an operation and it may have been necessary to keep medical attendant for few days. He may have spent money for travelling too. He was treated in a government hospital and there is no necessity to spend money on treatment. Considering these circumstances, I hold that the learned District Judge's finding that the Respondent may have spend the amount claimed, that is Rs. 50,000/-, is excessive. I reduce the pecuniary loss to Rs. 25,000/-.

I award a total sum of Rs. 225,000/- as compensation to the Respondent.

Subject to the above variation, I affirm the judgment of the learned District Judge.

The Respondent is entitle to cost of this Court as well as the Court below.

Judge of the Court of Appeal

Malinie Gunarathne J.

I agree.

Judge of the Court of Appeal