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Judgment
11, 1956

26 1955

Supreme Court of Ceylon
No. 229 (Final) of 1951

District Court, Colombo
No. 23098.

IN HER MAJESTY'S PRIVY COUNCIL
ON AN APPEAL FROM
THE SUPREME COURT OF CEYLON

BETWEEN

UNIVERSITY OF LONDON
W.C.1.
19 FEB 1957
INSTITUTE OF ADVANCED
LEGAL STUDIES

Dr. T. H. I. de SILVA
of Mirihana..... *Plaintiff-Respondent.*

AND

THE TRUST COMPANY LIMITED
of Colombo..... *Defendant-Appellant.*

RECORD
OF PROCEEDINGS

INDEX—PART I.

Serial No.	Description of Document	Date	Page
1	Journal Entries	15th June, 1950 to 19th November, 1953	1
2	Plaint of the Plaintiff	12th June, 1950	6
3	Answer of the Defendant	25th August, 1950	7
4	Issues Framed	—	8
5	Plaintiff's Evidence	—	9
6	Defendant's Evidence	—	17
7	Addresses to Court	—	30
8	Judgment of the District Court	8th March, 1951	36
9	Decree of the District Court	8th March, 1951	44
10	Petition of Appeal to the Supreme Court	14th March, 1951	44
11	Judgment of the Supreme Court	29th October, 1953	46
12	Decree of the Supreme Court	29th October, 1953	52
13	Application for Conditional Leave to Appeal to the Privy Council	13th November, 1953	58
14	Decree granting Conditional Leave to Appeal to the Privy Council	16th March, 1954	55
15	Application for Final Leave to Appeal to the Privy Council	8th April, 1954	56
16	Decree granting Final Leave to Appeal to the Privy Council	26th May, 1954	58

INST. PART I. PRINTED
 LEG. L. OFFICE
 25, ROSSINI SQUARE,
 LONDON,
 W.C.1.

INDEX—PART II.
Plaintiff's Documents

Exhibit Mark	Description of Document	Date	Page
P 1	Bed Head Ticket	9th May, 1950	68
P 1A	Fever Chart	—	71
P 2	Letter from E. Holsinger to Defendant Co. ...	19th April, 1950	63
P 3	Extract from the Registrar of Motor Cars ...	—	61
P 4	Letter from Proctor for Plaintiff to Defendant Co. ...	25th May, 1950	72
P 5	Letter from Defendant Co. to Proctor for Plaintiff ...	29th May, 1950	72
P 6	Letter from Proctors for Defendant Co. to Proctor for Plaintiff	20th June, 1950	73
P 7	Letter from Proctor for Plaintiff to Proctors for Defendant Co.	23rd June, 1950	73

Defendant's Documents

Exhibit Mark	Description of Document	Date	Page
D 1	Extracts from the Police Information Book ...	27th & 28th April, 1950	63
D 2	Agreement between the Defendant Co., and J. A. Perera	30th July, 1948	59
D 3	Register of Documents of the Defendant Co. (Page 5)	September, 1948	61
D 4	General Ledger of the Defendant Co. (Page 42) ...	1949	62
D 5	Page 17 of the General Ledger of the Defendant Co.	1949	62
D 6	Statement of Account of J. A. Perera appearing in the Commission Ledger of the Defendant Co. ...	1950	Not filed

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No. 229 (Final) of 1951

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AND

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of Colombo.....

Defendant-Appellant.

RECORD OF PROCEEDINGS

PART I.

No. 1
Journal Entries.

No. 1
Journal
Entries
15-6-50 to
19-11-58

JOURNAL.

The 15th day of June, 1950.

M/s. E. R. de Silva and I. Ratnayaka file appointment (1A) and
plaint (1).

Plaint is accepted and summons ordered for 21st July, 1950.

(Sgd.) H. A. DE SILVA.

(2) 5-7-50. Summons issued on defendant.

10 (3) 21-7-50. Summons served.
Defendant's Proxy filed. Answer 25-8-50.

Intd. H. A. de S.,
D. J.

(4) 25-8-50. Mr. E. R. de Silva for plaintiff.
Messrs. de Silva and Mendis for defendant Co.
Answer filed.
Trial on 17-11-50 before D. J.

Intd. K. D. de S.,
A. D. J.

20 (5) 15-9-50. As the Plaintiff is a party Defendant to a land acquisition
Case in D. C. Galle, which has been specially fixed for
trial for November 13th, 14th, 15th, 16th, 17th and 18th,
1950, Proctor for Plaintiff moves that this case which has
been fixed for trial for 17-11-50, be fixed for hearing for
another date. He also moves to call this case on 22-9-50 to
fix a date.
Proctors for Defendant received notice and copy.
Call this case on 22-9-50.

Intd. H. A. de S.,
D. J.

30

(6) 22-9-50. Mr. E. R. de Silva for Plaintiff.
Messrs. De Silva and Mendis for Defendant Co.
Case called—*vide* J. E. (5).
Messrs. De Silva and Mendis have no objection.
Trial is refixed for 18-12-50.

(18 Dec.).
Intd. H. A. de S.,
D. J.

No. 1
Journal
Entries
15-6-50 to
19-11-53
—continued.

- (7) 28-11-50. Proctor for Plaintiff files the Plaintiff's list of witnesses and documents and moves for summons.
Proctor for Defendant received notice with copy.
Allowed.
Re Witnesses Nos. 5 and 6 obtain certified copies.
Intd. N. S.,
D. J.
- (8) 30-11-50. Summons issued on four witnesses by plaintiff.
- (9) 5-12-50. Proctor for Plaintiff files Plaintiff's additional list of witnesses and moves for summons. 10
Proctors for Defendant received notice with copy.
Allowed :
Intd. N. S.,
D. J.
- (10) 7-12-50. Summons issued on one witness by Plaintiff.
- (11) 7-12-50. Summons tendered witness P. C. 1087 Samath.
Leave not obtained.
- (12) 8-12-50. Proctors for defendant with notice to Proctor for plaintiff file list of witnesses and move for summons.
They also move that the Court be pleased to issue an order 20 on the Asst. Supdt. of Police Anuradhapura (6th witness) directing him to furnish with certified copies of the statements of all witnesses recorded in the information book of the Anuradhapura Police Station in connection with the accident which occurred near Anuradhapura on or about 27th April, 1950.
Allowed.
A. S. P. Anuradhapura is directed to issue copies on payment of his charge.
Intd. N. S., 30
D. J.
- (13) 12-12-50. Proctor for Plaintiff files Plaintiff's further additional list of witnesses and moves for summons.
Proctors for Defendant received notice with copy.
Allowed :
Intd. N. S.,
D. J.
- (14) 18-12-50. Trial *vide* (6).
Mr. E. R. de Silva for Plaintiff.
M/s. de Silva and Mendis for Defendant. 40
Vide proceedings filed (14).
Trial postponed for 31-1-51.
Intd. N. S.,
D. J.

- (15) 31-1-51. Trial (contd.) *vide* (14).
Vide proceedings filed (15).
 C. A. V. for 14-2-51.

Intd. N. S.,
 D. J.

No. 1
 Journal
 Entries
 15-6-50 to
 19-11-53
 —continued.

- (16) 3-2-51. Proctor for plaintiff tenders documents marked P1 to P7.

Check and file :
 Intd.....
 D. J.

- 10(17) 3-2-51. Proctor for Defendant tenders documents marked D1 to D6
 (D3, D4 and D6—three books).

Check and file :
 Intd. N. S.,
 D. J.

- 20 (18) 14-2-51. M/s. de Silva and Mendis for Defendant move that Mr. E. B. Wikremanayake, K.C., Counsel for Defendant desires to submit an authority in support of the Defendant's claim, *i.e.* the report of the case Colonial Mutual Life Assurance Society Ltd. *vs.* Macdonald South African Law Reports Appellate Division (1931) at page 412. They also move to add that Junior Counsel tendered this report to Mr. E. G. Wikremanayake K.C., Counsel for Plaintiff for his perusal and this application is being made with his knowledge and approval.

Call on Proctor. *Vide* proceedings further argument on 22/2.

Intd. N. S.,
 D. J.

- 30 (19) 22-2-51. Addresses *vide* (18).
Vide proceedings filed (19).
 Judgment on 8-3-51.

Intd. N. S.,
 D. J.

- (20) 8-3-51. Judgment delivered in open Court.
 Plaintiff's action dismissed with costs.

Intd. N. S.,
 D. J.

- (21) Decree entered.

No. 1
Journal
Entries
15-6-50 to
19-11-53
—continued.

- (22) 14-3-51. Proctor for Plaintiff tenders petition of appeal of Plaintiff (22a) against the judgment of Court dated 8-3-51 with notice of Security application for typewritten brief and stamps for Rs. 48/- for S. C. Decree (22b) and Rs. 24/- for Certificate in appeal (22c).

Stamps affixed to blank forms and cancelled.

Accept :

Intd. N. S.,
D. J.

- (23) 14-3-51. Proctor for Plaintiff moves that on the petition of appeal being accepted by Court, he would on 21-3-51 or soon thereafter tender Rs. 250/- as security for costs of appeal and will deposit on the said date a sufficient sum of money to cover the expenses of serving notice of appeal. Proctor for Defendant received notice for 21-3-51.

1. Issue voucher for Rs. 250/-.
2. Call 21-3-51.

Intd. N. S.,
D. J.

- (24) 14-3-51. Proctor for Plaintiff-Appellant files application for type-20 written brief and moves for a voucher for Rs. 25/-.

Issue :

Intd. N. S.,
D. J.

- (25) 14-3-51. Vouchers for Rs. 250/- and Rs. 25/- issued.

- (26) 21-3-51. Case called *vide* (23).

Mr. E. R. de Silva for Plaintiff-Appellant.

M/s. de Silva and Mendis for Defendant-Respondent.

Abs.

Security offered is accepted.

Issue notice of appeal on bond being perfected for 4/5. 80

Intd. N. S.,
D. J.

- (27) 27-3-51. Proctor for Plaintiff-Appellant tenders security bond together with K. R. R. and notice of appeal.

Vide J. E. (26). Issue notice of appeal.

Intd. M. V. M.,
A. D. J.

- (27A) K. R. G/9 No. 2433/59566 of 20-3-51 for Rs. 250/- being security filed. 40

- (27B) K. R. G/9 No. 2263/59196 d/d 19-3-51 for Rs. 25/- being copying fees filed,

(28) 28-3-51. Notice of appeal issued

(29) 7-4-51. *Vide* Memo from Appeal Branch to call for fees from Proctor for Appellant Rs. 37/50; Proctor for Respondent Rs. 125/-
Call for

No. 1
Journal
Entries
15-6-50 to
19-11-53
—continued.

(30) 9-4-51. *Vide* (29) above two vouchers issued with covering letters.

(31) 24-4-51. K. R. G/9 No. 1336/64087 of 12-4-51 for Rs. 37/50 filed.

(32) 30-4-51. K. R. G/9 No. 1872/64623 of 19-4-51 for Rs. 125/- filed.

(33) 31-5-51. Record forwarded to Registrar S. C. with briefs.

(Sgd.)

10

Secretary.

(34) 4-11-53. Registrar S. C. returns record together with S. C. Judgment (34).

It is considered and adjudged that the judgment under appeal be and the same is hereby set aside and decree is entered in favour of the plaintiff for Rs. 50,000 with costs in both Courts.

Proctors to note.

(Sgd.)

D. J.

20 (35) 7-11-53. Proctor for plaintiff files application for execution of decree and moves to issue writ against the defendant.

Allowed :
(Sgd.)

D. J.

(36) 17-11-53. Warrant issued against defendant. Writ returnable 10-11-54.

(37) 17-11-53. Proctor for Defendant-Petitioner files petition and copy of application for conditional leave to appeal to P. C. and copy of application to the S. C. to effect substituted service of notice of its intention to appeal and moves that the prayer of the petition be allowed.

30

Mr. Adv. Navaratnarajah in support. *Vide* proceedings and order.

Inquiry 19-11.

(Sgd.)

D. J.

No. 1
Journal
Entries
15-6-50 to
19-11-58
—continued.

(38) 17-11-53. Proctors for Defendant-Petitioner tenders notice served on Proctor for plaintiff-respondent *re* Inquiry fixed for 19-11-53.

File.

(Sgd.)

D. J.

(39) 19-11-53. Inquiry *vide* (37).

Mr. E. R. de Silva for plaintiff.

M/s. de Silva and Mendis for defendant-petitioner.

Vide proceedings (39) filed.

Proceedings filed 26-11.

10

(Sgd.)

D. J.

No. 2
Plaint of the
Plaintiff
12-6-50

No. 2.

Plaint of the Plaintiff.

IN THE DISTRICT COURT OF COLOMBO

DR. T. H. I. DE SILVA of Mirihana, Nugegoda.....*Plaintiff*.

vs.

TRUST Co. LTD., Gaffoor Building, Fort, Colombo.....*Defendant*.

On this 12th day of June, 1950.

20

The Plaintiff of the plaintiff abovenamed appearing by his Proctor Edward R. de Silva and his assistant Iris Ratnayake, Proctor, states as follows :—

1. The parties to this action reside at the respective places above-mentioned within the jurisdiction of this Court.

2. The defendant is a company duly incorporated under the Companies Ordinance and having its registered office and principal place of business at Colombo within the jurisdiction of this Court.

3. At all times material to this action the defendant company engaged the services of the plaintiff to proceed to Jaffna to examine certain prospective insurers and on or about 27-4-1950 while the plaintiff was being conveyed in motor car No. CY 8850, belonging to the defendant company, and driven by an employee of the company acting within the scope of his employment and for the benefit of the company, the said car ran off the road about three miles this side of Anuradhapura causing the plaintiff several serious injuries.

4. The plaintiff was so injured by reason of the rashness and/or negligence of the said driver of the defendant. The said rashness and/or negligence consisted in the driver of the said car falling asleep while driving.

40

5. By reason of the aforesaid rash and/or negligent act of the driver of the defendant the plaintiff has suffered loss and damage and pain of body and mind. The plaintiff assesses the total damages so sustained by him in the sum of Rs. 50,000/-.

No. 2
Plaint of the
Plaintiff
12-6-50
—continued.

6. A cause of action has thus accrued to the plaintiff to sue and recover from the defendant the said sum of Rs. 50,000/- which sum or any part thereof the defendant has failed and neglected to pay though thereto often demanded.

Wherefore the plaintiff prays :—

- 10 (a) for judgment against the defendant for the said sum of Rs. 50,000/- together with legal interest thereon from date of action to date of decree and thereafter on the aggregate amount of the decree till payment in full ;
- (b) for costs of suit ; and
- (c) for such other and further relief as to this Court shall seem meet.

(Sgd.) E. R. DE SILVA,
Proctor for Plaintiff.

No. 3.

20

Answer of the Defendant.

No. 3
Answer
of the
Defendant
25-8-50

IN THE DISTRICT COURT OF COLOMBO

DR. T. H. I. DE SILVA of Mirihana, Nugegoda.....*Plaintiff.*

vs.

TRUST COMPANY LIMITED, Gaffoor Building, Fort, Colombo...*Defendant.*

On this 25th day of August, 1950.

The answer of the Defendant abovenamed appearing by Felix Charles Aloysius Domingo De Silva and Noel Servulus Oswald Mendis practising in partnership in Colombo under the name style and firm of " DE SILVA AND MENDIS " and their Assistants Felix Joseph Peter Perera, John Samuel Paranavitana, Joseph Domingo Bertram Fernando, Christopher Gilbert Jayasuriya, Francis Derrick Lancelot Koch, Ananda Clarence Dimbulane, and Rajeswary Nagalingam, its Proctors, states as follows :—

1. The Defendant admits the averments in paragraphs 1 and 2 of the plaint.

2. Answering to paragraph 3 of the plaint the Defendant admits that the Plaintiff went to Jaffna on the day in question for the purpose of examining certain prospective insurers in the Northern Province for the Defendant Company but the Defendant denies that car No. CY 8850 belonged to the Defendant and/or that the said car was at any time

No. 3
Answer
of the
Defendant
25-8-50
—continued.

driven by an employee of the Defendant. The Defendant is unaware that the said car ran off the road about three miles this side of Anuradhapura causing the plaintiff several serious injuries.

3. The Defendant denies the averments in paragraphs 4, 5 and 6 of the plaint and states that in any event the damages claimed are excessive.

4. Further answering the Defendant states (a) that the said car was bought by one James Andrew Pereira and registered in the name of the Defendant by way of security for the repayment of a sum of money advanced to the said J. A. Pereira for the purchase of the said car. The said car was at all material times in the control and possession of the 10 said James Andrew Pereira ; and the driver referred to in paragraph 3 of the plaint was under the employ of the said James Andrew Pereira.

(b) The plaintiff had to proceed to the residences of the prospective insurers at his own cost and expense and at Plaintiff's request the said car together with a driver was loaned to the Plaintiff by the said James Andrew Pereira in order that Plaintiff's travelling expenses might be reduced as much as possible.

Wherefore the Defendant prays :—

- (a) that Plaintiff's action be dismissed ;
- (b) for costs ; and
- (c) for such other and further relief in the premises as to this Court shall seem meet.

(Sgd.) DE SILVA & MENDIS,
Proctors for Defendant.

No. 4
Issues
Framed

No. 4.

Issues Framed.

18-12-50.

ADV. E. G. WICKREMANAYAKE, K.C., with ADV. G. R. P. GUNATILLEKE instructed by MR. E. R. DE ZILVA for the plaintiff.

ADV. E. B. WICKREMANAYAKE, K.C., with ADV. NAVARATNARAJAH instructed by MESSRS. DE SILVA & MENDIS for the defendant.

Mr. E. G. Wickremanayake opens his case and suggests the following issues :—

1. Were the injuries sustained by the Plaintiff on or about 27 April, 1950, due to the negligence of the person driving Car No. CY 8850 ?
2. Was the said car at the time being driven by an employee of the defendant Company acting within the scope of his employment and for the benefit of the defendant Company ?
3. If Issues 1 and 2 are answered in the affirmative to what damages 40 is the plaintiff entitled ?

Mr. E. B. Wickremanayake suggests that Issue 2 be split up as follows :—

2 (a). Was the said car at the time being driven by an employee of the defendant Company ?

(b) Was the said employee acting within the scope of his employment and for the benefit of the defendant Company ?

Issue 3 should therefore read as follows :—

3. If Issues 1, 2 (a) and 2 (b) are answered in the affirmative to what damages is the plaintiff entitled ?

10 Mr. E. G. Wickremanayake has no objection to the issues in their amended form.

Mr. E. B. Wickremanayake suggests the following further issues :—

4. Was the defendant Company the owner of the said car on the date in question ?

5. If not, can plaintiff maintain this action ?

Mr. E. B. Wickremanayake states that his case is that even if the driver of the car was driving within the scope of his employment and negligent the defendant Company will not be liable if the car did not belong to the defendant Company.

20

No. 5.

Plaintiff's Evidence.

No. 5
Plaintiff's
Evidence.
M. Paul
Examination

MR. E. G. WICKREMANAYAKE calls :
PROF. MILROY PAUL—Sworn.

I am an F.R.C.S. (England) and an M.S. of London. I am also an M.R.C.P. and Professor of Surgery in the University of Ceylon. I am one of the surgeons of the General Hospital, Colombo.

Plaintiff was brought to the General Hospital, Colombo, on 17 April, 1950, at 3-50 p.m. I saw him for the first time later on the same day. The time I saw him has not been noted. I cannot recall the time I saw 30 him. I saw him on the same day.

He had a dislocation of the right hip bone, a depressed fracture of the frontal bone of the vault of the skull, and he also had a blood stream leaking from both nostrils which indicated that there was a crack at the base of the skull. The fracture in front was a fracture of the vault of the skull and there was also a crack at the back of the skull which was indicated by the cerebral spinal fluid which was escaping. The plaintiff was in a dangerous condition. The leak of the cerebral spinal fluid exposed him to meningitis, which he did not get, but he ran that risk. Till the crack at the base of the skull healed he would have been in danger. There was no leak on 40 the 29th of the same month, April, 1950. At that time we could take it that it was healed sufficiently : the immediate risk had passed off. He

No. 5
Plaintiff's
Evidence.
M. Paul
Examination
—continued.

was kept in hospital till the 8th of May. He would have suffered considerable pain from the dislocation of the hip till it was reduced. I spoke to him outside the court. He still has a stiffness at the joint which is to be expected. He would not be his normal self, as far as the hip is concerned, for some time. That would depend on a number of factors. That would depend on his age. A young person would recover quickly. He is 29. In time he should recover. The hip bone is slightly stiff at the moment but the probabilities are that he will recover in about a year.

I examined him this morning on the verandah and the stiffness is still there. He is unable to use his limbs with the same freedom. 10

The depression of the skull is a disfigurement which is permanent. There is the possibility of mental trouble. After an injury like this he might suffer from headaches. He might suffer from inability to sleep. It is difficult to assess the damage to his mental faculties. It might not be unreasonable to say that he would be below par as a result of the injuries, but it is not possible to say so definitely. It will depend on how much damage was done to the brain. Putting it at its very worst a person with an injury like that might go mad but many people might carry on well. One of the results of a head injury may be that you can become insane. There is no risk of insanity supervening in this case. 20 Plaintiff complains of headaches and difficulty to sleep. Plaintiff told me that there was an obstruction in the nose. Considering that the depression is close to the nose that would not be unreasonable. All his life he would have to suffer from those difficulties.

(To Court :

Q. Is there a possibility in the future of something developing which is not at present apparent ?

A. I do not think so.

Whatever he has will continue, or might disappear. But it is not likely that he will develop something in the future which he hasn't got 30 already.)

The Pelvis is the hip joint.

(Mr. Wickremanayake marks in evidence the Bed Head Ticket P1 and the Fever Chart P1a.)

According to P1a he had a temperature of 100 up to the 3rd May. It is possible that during that period he would not have been able to recollect what took place.

For the dislocation of the hip joint the hip must be acutely bent. Plaintiff told me he was in the back seat of the car and leaning forward. Most probably he was projected violently against the front seat and the 40 hip was driven out. That is consistent with his leaning forward at the time.

The X'ray photograph was taken after the dislocation was reduced. I was satisfied from the X'ray and from my clinical examination that he suffered from what I have stated he suffered. The bone was driven out

of the socket for a fair distance. That had to be put back and it had to heal. It is still a little stiff. He has to gradually stretch out till it gets to normal length. I think the period of healing I have given of one year is quite reasonable.

No. 5
Plaintiff's
Evidence.
M. Paul
Examination
—continued.

Cross-examined :

On the 1st May his temperature was 99 degrees. On 2nd May in the morning his temperature was normal. In the evening it appears to have gone up to 100 degrees. Usually the afternoon temperature is taken between 2 and 3 p.m. That is done by the House Officer. The morning temperature is taken before 8 a.m. On the 3rd May the temperature had again come down to normal and it went up in the afternoon.

M. Paul
Cross-
Examination

He can, and he is actually attending to his work as a doctor now. Temperature would not have any effect on the man's ability to understand and know what he is saying but the injuries on his head might have effected his mental faculties. There is nothing in the Bed Head Ticket regarding his mental faculties. If such a thing had been observed, if he was definitely mentally confused that would have been noted in the Bed Head Ticket ; that is, in speaking to him if he did not answer rationally the questions put to him it would have been noted.

20 Re-examination : Nil.

(Sgd.) N. SINNATHAMBY,
D. J.

T. H. I. DE SILVA—Affirmed, 29, Medical Practitioner, Mirihana.

T. H. I. de
Silva
Examination

I have my own dispensary. I am a private practitioner. I am an M.B., B.S., Ceylon. I got my M.B., B.S. in March, 1949. I was a Government practitioner earlier.

I was examining cases for this particular Insurance Company from somewhere in November or December, 1949. I was paid at the rates of Rs. 15 and Rs. 13, depending on the amount of the policy. Most of the persons I examined were round about Colombo. I have examined cases from outside Colombo also. James Perera and Earle Holsingher brought the patients to me. Perera is an organiser and Holsingher is an Agent of the defendant Company. This is a locally floated Company having its business in Chatham Street. I have my own car which is an Austin A 40. I drive myself. This is the car I use for my own work and business. The defendant Company got me to examine people outside Colombo. On those occasions these two people, Perera and Holsingher, came for me. They brought a car and took me out for the examination. They always brought me that car. I have not travelled in that car except on Insurance work. I did not know Perera and Holsingher except in regard to this work. I had no occasion to borrow a car from Perera. The car in which Perera and Holsingher took me to examine insurance cases was a Ford Anglia. It was a much smaller and less comfortable car than mine.

No. 5
Plaintiff's
Evidence.
T. H. I. de
Silva
Examination
—continued.

I first heard of the trip to Jaffna from Holsingher. He wrote to me a letter dated 19th April, 1940, from the Resthouse at Kankesanturai, which I produce marked P2. As far as my private practice is concerned, when I go away for a number of days it is necessary that I should make arrangements. They gave me four days' time. On this occasion I could not make arrangements because the time they gave me was not sufficient. They came on the 27th. They wrote to me asking me to be free on the 29th but they came on the 27th. Holsingher and Perera came for me in the same car, CY 8850. I got into the car with them to go to Jaffna to examine the case.

10

When I was paid Rs. 15 a case I did not have to make my own arrangements to go to Jaffna. It is not correct that because I had to make my own arrangements I had to borrow a car. I had my own car and there was no need to borrow a car.

(Sgd.) N. SINNATHAMBY,
D. J.

INTERVAL.

18-12-50.

AFTER LUNCH.

DR. T. H. I. DE SILVA—Affirmed.

20

Examination in chief continued.

On the previous occasions I went in this car sometimes H. Holsingher, James Perera or the driver drove it. On this occasion they came in the car at 1-30 a.m. and put me up at Mirihana and we went in the car. All three of them took turns in driving. The accident took place in the early morning. At that time Holsingher was driving. I do not know whether he has a certificate of competence. I was in the rear seat. Shortly before the accident I saw the car going off the road. I saw the man driving the car was nodding and I lent forward to wake him. I was not able to wake him, before I could do so the car had gone off the road and crashed into a huge tree by the road side. I lost consciousness and knew nothing thereafter. I was brought to the General Hospital, Colombo. I suffered a dislocation of the hip joint and from a depressed fracture of the frontal bone of the skull and fracture of the base of the skull. I was in hospital for some time. I have not yet recovered fully the use of my leg. It is stiff and I walk with a limp. I cannot sit down completely. I get headaches off and on and I cannot sleep at night. I take a long time to fall asleep. My nose gets blocked whenever I get a cold and I find it difficult to breathe. I can do my work but I cannot concentrate. I get tired soon. The headaches come on frequently. I am 29 years old. I am not married. The fracture on the skull has left a permanent depression on my forehead. There is a hollow on the forehead. I ask for Rs. 50,000 as damages.

Cross-examined :

I passed as a doctor in March, 1949. My experience as a practising doctor has been short. I passed in Ceylon. I was M. O. H. at Anuradhapura and other places after I passed and I came to Mirihana in August, 1949. On my present practice at Mirihana I make about Rs. 1,000 a month. On some days I get about 30 patients. There is no other doctor in Mirihana. I know Holsingher from about November, 1949. He came with James Perera in November, 1949, in connection with some insurance work. He came and asked me whether I would like to be a medical
 10 examiner for the Company. I said alright. I am a medical examiner for the Standard Insurance Company. That is a Ceylon Company and also for the Lanka Life and United Ceylon Co. I am not the only doctor who examines medically for these companies. No medical examiner is under contract with any company. I have no contract with this company or any other company. The only thing is they have a regular doctor to attend to their work and who watch their interests more than a casual doctor. Their regular doctor would be more careful. Apart from that there is nothing else. This company and the other companies have accepted my proposals. It is the company's agent who comes and calls
 20 me to make an examination. The canvasser comes and takes me for the examination. The patient cannot select any doctor he likes because such a doctor may pass even an unfit person. I am paid Rs. 15 or Rs. 13 for each examination. This company has paid me by two cheques Rs. 200, that is for the period from November up to March. I have examined about 14 people for this company altogether. Holsingher is a canvasser. I know that there are a lot of people canvassing for insurance companies whose regular occupation is something else. I do not know whether they do it on a commission basis. When I examined people in Colombo I do not go in my own car. Only on one occasion when I was returning from
 30 Galle that I went in my own car and examined a patient. The insurance company has to provide the car if I am going out otherwise it is not worth while. Normally they provide the car. The arrangement was for the company to provide the transport. That arrangement was made with Holsingher. He said he will provide me with transport—by that he meant the company. He said he will get the company's car. That is the company had to provide the transport. That is what he told me. I had no correspondence with the company. They did not offer to provide me with a car. Even in regard to the other companies I had no correspondence with the companies. If the company wanted a person examined in Jaffna
 40 they would not employ the D. M. O. at Jaffna to do the examination because they do not know him. My experience as a doctor has been for nearly one year. I have no special skill. An M.B., B.S. doctor is not skilled in any branch except what he has acquired by experience. I passed in the ordinary class because I was referred. I cannot give any reason why they wanted me to go to Jaffna to hold the examination. I cannot say why they wanted me to go and examine. I thought there would be about 30 patients to be examined in Jaffna and it was worth my while going. When I was asked to go to Jaffna I did not ask him

No. 5
 Plaintiff's
 Evidence.
 T. H. I. de
 Silva
 Cross-
 Examination
 —continued.

No. 5
Plaintiff's
Evidence.
T. H. I. de
Silva
Cross-
Examination
—continued.

how many I had to examine. He said there are about 30 to 40 cases but he did not say how many I had to examine. He did not tell me why a local doctor was not engaged. He was not a friend of mine and I did not know him before. At one stage he was staying with James Perera. Before we went to Jaffna he said he was coming for me and whether I was prepared to go and I said alright, at that time there was no question about the transport. If he did not provide me with a car I would not have gone. I asked for transport and said I could not go unless he gave the transport because it was not worth while to go in my car. From Jaffna I do not know whether I had to go to Madawachchi. I was to¹⁰ stay there about four days according to what he said. I cannot remember whether I was to be paid Rs. 15 or Rs. 16 for each examination. Some companies paid Rs. 16. I do not know whether Holsingher got a commission. I had no dealings with Mr. Perera. Both of them came and saw me. Mr. Perera and Holsingher came and saw me. The trip was in the morning and the previous evening both of them came to my place and told me they were starting at 12 midnight. I never share my fee with the canvasser.

Q. I put it to you that it was your suggestion and you agreed to pay the hotel bill of Holsingher and the petrol? 20

A. Certainly not. I did not buy any petrol. I was concerned with the advantage the trip brought to me. I am not in a position to say whether the company was not concerned whether I examined or other doctor examined the people.

Q. The ordinary person to do the examination in Jaffna was the D. M. O.?

A. Any doctor can examine. If there are private practitioners in Jaffna they can examine. I do not know whether there are private practitioners in Jaffna. There is a D. M. O. in Jaffna and also a D. M. A. There are House Officers. There are surgeons. All of them are com-³⁰petent to serve. I cannot say whether there was any particular necessity for the company to take me there. I went because I would have got Rs. 400 or Rs. 500. If I got to make about Rs. 600 in three days I would be keen in going. I did not tell Holsingher that I had no car, I had my car which I had bought in 1948. I never told him that my car was not fit to do the trip to Jaffna. My tyres were alright. I had purchased two tyres three months before the accident. I had done about 10,000 miles after the accident. I did not tell Holsingher that my tyres were bad and wasted. The car that I went in was brought by James Perera. That car belonged to the Trust Company. The driver, one Gunapala, told me⁴⁰ that. He has not been summoned in this case. The company did not ask me to go to Jaffna. The car was driven by all three of them, that is Holsingher, the driver and Mr. Perera. At the time of the accident Holsingher was driving. The car was travelling at a speed of 25 to 30 miles an hour. It suddenly went off the road. The road was clear. I made a statement to the police on the 2nd May. I was conscious at that time but I could not remember exactly what happened when I made

that statement. (Statement read). This is a complete statement. I could not recollect at that time what had actually happened and I did not state about the driver falling asleep. I remember saying " I cannot say how the car went off the road ". Certain questions were put to me and I answered them. I was asked how the car went off the road and I said I could not say. My case now is that the car went off the road because the driver had fallen asleep. It is after I left the hospital that I recollected that. I do not know whether Holsingher was not charged. They themselves admitted that he fell asleep. Holsingher himself admitted that. He told me that. He told me that a few days after I left hospital. After I left hospital I recollected that and it was corroborated by his statement to me. He told me that when I went to James Perera's house about three weeks later. There was a bag of his lying with me and I had to return it and I then found Holsingher there. James Perera himself was there. I sent the letter of demand on 25-5-50. I told my lawyer that the driver had fallen asleep. I do not know why that is not mentioned in the letter. I left hospital about the 8th of May and I saw James Perera about three weeks after I left hospital. I deny that the idea of the driver sleeping at the wheel came into my head long after the sending of the letter of demand. When I was alright I left the hospital and a few days after that it struck me that the driver had fallen asleep at the wheel. I told that to others also and it is known to most of the people. I was in hospital for 12 days. During those 12 days I did not recollect that. I was in the non-paying section. I told about the driver falling asleep to my relations. I told it to my brother-in-law, Mr. Thenagoda, and also I told the driver Gunapala about it. He was in the car himself. He also made a statement. I do not know whether he knew that the driver had fallen asleep. I cannot remember the names of all the people to whom I said that the driver had fallen asleep. My relations started to question me as to how this accident happened and then I remembered that it was owing to the driver falling asleep. My relations and friends came to the hospital. They did not ask me there how the accident happened, it was after I went home that they asked me how it happened. (Mr. E. B. Wickremanayake marks statement made by the witness D1). I drive my car myself. I do not know whether if the steering got locked the car would go off the road. I pay income tax. Last year I paid income tax on the basis of Rs. 4,000 nett income. I paid on that basis because last year I had to spend about Rs. 2,000 in equipping my dispensary and that had to be deducted from the income.

40 Re-examined :

I started private practice in August, 1949, and the income tax year ended on 31st March. Prior to that Government paid me Rs. 450 a month and travelling. James Perera was there when the arrangement was made about the company providing the transport. James Perera invariably came with Holsingher. James Perera was an organiser. He went along with the agents canvassing and had something to do in supervising the agents and even for the medical examination he comes with

No. 5
Plaintiff's
Evidence.
T. H. I. de
Silva, Re-
examination
—continued.

the agent. Even in cases where examinations are made in Colombo it is done by going in the company's car. That car is provided by the company. It was always this particular car that was provided. So far as I was aware it was the company's car. I produce P3 certificate of registration of the car showing that there has been only one owner registered for this car and that is the Trust Company and it was bought new on 27-4-48 (P3). By the 19th July it still remained the company's car. The car suddenly went off the road. There was no traffic on the road or any animal on the road. There was no reason for the car to go off the road. When I was in hospital I was in severe pain and orders were given¹⁰ that I should not be disturbed. Then when I left hospital I could not walk and had to be carried. After I left hospital people began to ask me about the accident. I had received an injury on the front of my head and I gave thought as to how that injury occurred and that made me recollect. I recollected then that I lent forward to wake the driver. I had subsequent conversations with James Perera and Holsingher and the driver. Holsingher admitted that he had fallen asleep. That was admitted in the presence of James Perera. That conversation with James Perera whether it was before I saw my proctor or after I cannot say. I had sent word to my proctor that I had met with this accident and wanted²⁰ to claim damages. I produce the letter dated 25-5-50 P4. I received reply dated 29-5. P5 and letter of 20-6-50 P6. I then instructed my proctor to send P7. I cannot tell the court what reason there was for the insurance company asking me to examine, so far as I was concerned I was going to earn my fee.

Q. Who wanted this work done ?

A. The agents.

Q. For whose benefit ?

A. For the benefit of the Insurance Company. A possible reason why they wanted me to examine may be that there were doctors who³⁰ passed even unfit cases and they did not want to entrust the work to doctors unknown to them. All Government doctors are not allowed private practice and this is part of private practice. Even old entrants were not allowed private practice except specialists. Those holding qualifications such as F.R.C.S., M.D. and M.R.C.P. are allowed private practice and others are not allowed legally to have private practice.

(Sgd.) N. SINNATHAMBY,
D. J.

18-12-50.

Mr. E. G. Wickremanayake closes his case reading P1 to P7.

40

Defendant's Evidence.

No. 6
Defendant's
Evidence.
A. Amerese-
kere,
Examination

MR. E. B. WICKREMANAYAKE calls :

A. AMERESEKERA—Affirmed, 37.

I was a proctor before. I am not in practice. I have been the Secretary of this company for six years. We do insurance business in life, fire, motor and marine, etc. We get custom through agents. The agents are not in our employment they are merely canvassers and they are paid a commission. The commission is paid according to the business
10 they bring. They do not get a salary. A number of them have other occupations as well. Every applicant for insurance has got to be medically examined. We do not have doctors in our employment. Normally the D. M. O. or the D. M. A. of any particular area does the examination. If they are not allowed private practice then a private doctor does it. The agents select the doctor. That part of the business is delegated to the agents. When an agent brings an applicant he must also bring a certificate from a doctor. Normally the proposal paper and medical report are brought together. The proposal is accepted on the medical
20 report. Irrespective of whether the proposal is acceptable or not the medical examination is made. There is no restriction placed in the choice of the doctor, except that he has to be three years in practice. Our agents know that. They are verbal instructions given to them. I was not aware that the plaintiff in this case did not have three years' experience. James Perera is a field officer. He is a direct employee of the company and paid a salary. He is called field organiser. He is expected to assist the agents and to get business through the agents or bring personal business through his sub-agents. He has to supervise and control the agents. There are three field supervisors. An agent can bring business
30 direct to us or if the field officer tells the agent to bring business he brings the man to us and we pay the field officer what is called over riding commission. That is if the business comes through the field officer it costs the company a little more. We get very many direct cases also. Holsingher was a person employed by James Perera to help him to procure business. He was not paid a salary by the company. He was a canvasser and he got a commission on the premium paid. For the first year he is paid 40 per cent. and thereafter 5 per cent. on the premium. Holsingher had been a canvasser for about 10 months. They are not expected to do canvassing for other companies. Holsingher had no other job except for this. His main occupation was to canvass for us. The rates
40 of commission vary in the cases of different companies. Doctors who examine applicants have to provide their own transport normally. The company has not undertaken to provide transport for doctors because we pay the doctor a fee of Rs. 13 and Rs. 15. Rs. 13 up to Rs. 2,000 and over that Rs. 15. The doctor goes to the proponent who wants to insure. If we want to insure someone in Jaffna the D. M. O. or the D. M. A. or a doctor in Jaffna would examine him. Our main purpose is to make

No. 6
Defendant's
Evidence.
A. Amerese-
kere,
Examination
—continued.

matters easy for the proponent. Prior to March, 1949, I cannot say whether we had any applicants from Jaffna. That is a field we did not work on and did not concentrate much in that area. There are a few policies from that area. We had no particular man who did our insurance work there. So long as the doctor had three years' experience it did not matter who examined the applicant. Sometimes if the insurance is for a big amount we get another examination done to confirm the first. Holsingher did not mention to us that he was getting a proposal from Jaffna. They make arrangements on their own and get examination done and send us the form. I was not aware that the plaintiff was going 10 to Jaffna. There was no need to take the plaintiff from Colombo to Jaffna to get the man examined so far the company was concerned. This car actually belonged to James Perera. James Perera wanted a loan and as security we registered the car in the name of the company and gave him the loan. He wanted the loan to purchase a car. I produce the register of documents D3 which shows this car entered against the date 6-9-48. I produce our general ledger for 1948 D4 showing the price of the car. We opened a ledger account for the car. We took it as an asset of the company and that was pointed out to us by our auditor as being incorrect and in the subsequent page that has been altered. The 20 ledger for 1949 D5 shows James Perera has been debited with the amount and credited with it. The insurance and repairs would be credited to his account and the commission has been credited. The value of the car should have been taken over from the previous ledger but that has not been done in P5. Rs. 1,095 is over-riding commission entered in P5 and that has been taken over from the commission ledger. That was taken as an instalment. As he was an employee of the company we were not too strict in making deductions. .

(Mr. E. B. Wickremanayake marks as D6 ledger account of Andrew Perera which shows the amount of commission he had earned during that 30 period and the amounts paid to him and the amount transferred to the motor car account.)

To Court :

Q. Have you no where debited him with the value of the car ?

A. I cannot say, the accountant will be able to say that. I do not know if his account has been debited with the value of the car. His account has been debited with the value of the car.)

(Counsel says the ledger account has not been debited with this amount.)

The driver of the car was paid by James Perera. He was employed 40 by James Perera. We did not have the right to dismiss him. Holsingher did not inform me at any time that he was taking the plaintiff to Jaffna.

Cross-examined :

A. Amerese-
kere, Cross-
examination

The business of our company is insurance. I passed as proctor about 10 years ago and I practised for a few years. We have no managing director. The Secretary does the Managing Director's work. We do not

have a manager for life insurance or for the insurance branch. The Secretary functions as agent of the entire Board. There are field officers. There are three of them. They are paid a salary. They are paid about Rs. 100 a month and they are answerable to the Secretary. Their functions are to bring in insurance work. It is left to them whom they will employ. They employ their own canvassers. Canvassers are not paid any salary. The commission due to the canvassers are paid by the company. We have a commission ledger and in that ledger we enter the names of the canvassers. There are canvassers appointed directly by us
 10 also. That is done on application made to us. Sometimes those applications come direct. In respect of their work we do not pay any over riding commission it is those who come through the field officers that the over-riding commission is paid to the field officers. The moment the name of a canvasser is entered in the ledger he is recognised as a canvasser of the company. We have registered agents and field officers have their own sub-agents. If an outsider comes to us direct and says he has a proposal we cannot accept that unless he is registered in our books. In regard to canvassers appointed directly by us we enter into an agreement with regard to the commission and lay down that they should bring in a certain amount
 20 of work and if they do not bring in that amount of work they do not get any commission. In the case of our agents they have to put in Rs. 5,000 worth of business a year. I cannot say whether the canvasser is an employee of the company. He works for us and he gets paid for the work he does. What he does in getting policies is for the benefit of the company. So far as the doctors are concerned we are not concerned with it, it is left to the field officer or agent. If the field officer brings a proposal it is up to him to see that the proposal is accompanied with a doctor's report. Sometimes we also write to the doctor and give him instructions to examine a case.

30 Q. Have you any experience of persons who have been passed who should not have been passed ?

A. No. I am alive to that risk. Such a risk is present but it will not be eliminated by the skill of the doctor but by the fact that the doctor should be careful—that he should take care to look into the interests of the company. It is essential that the doctor who examines an applicant should have the interests of the company at heart otherwise he may make a casual examination and pass a man unfit for insurance. Instructions are given to canvassers that they must be careful and they are experienced men and know all that. Field officers are told that they
 40 should select doctors who would examine carefully in the interests of the company. When field officers sent up medical reports they are accepted and paid for. We pay the doctor for the work he does. That is even doctors whom we had not selected but whom the field officer had selected on the authority given to him. We pay rates ranging from Rs. 13 to Rs. 16. A field officer cannot function efficiently without a car. They are not in a position often to buy their own cars. The fact that he has got a new car will make his work all the better and more efficient. For

No. 6
Defendant's
Evidence.
A. Amerese-
kere, Cross-
examination
—continued.

that purpose the company has advanced moneys to field officers and agents to buy cars. We do not buy the car. This car was purchased on 26-4-48. That appears in general ledger D4 at page 42. There appears an entry "New motor car account". Our audited accounts shows this as an asset of the company. We paid the cheque for the car direct to the Ford Company and entered it in our books in the new motor car account. The car was registered in our name. There was no registration of the real owner and the nominal owner. If we were the nominal owners I do not know whether we could have registered our name as the nominal owner and the other party as the real owner. That registration was on 10 27-4-48.

Q. Can you show any debit against James Perera in April, 1948?

A. It is not there.

Q. From April, 1948 to July, 1948, what was the position of the car?

A. There was no alteration in the position. From April to July the car was the company's car according to the books. There was no agreement but there was an understanding. In the meantime he used the car and we were going to debit certain sums of money against him against that item. The agreement only provides that he should pay certain sums of money at the end of which we had to transfer the car to 20 him.

(To Court: Right through it is shown as an asset of the company.)

The agreement says for the purchase of a motor car for the party of the first part as owner, that is the company. It says till such amount has been repaid by the party of the 2nd part and when he fulfils his obligation to transfer the ownership to the party of the second part. We gave a cheque to James Perera and he took possession of the car. He was our agent at the time to go and purchase the car. He used it from that date till July without any agreement. Between April and July he paid no money back. 30

Q. In July you thought of selling him that car?

A. No. The whole idea was he said he wanted a car and he wanted a loan and we gave him the loan. There was no loan account opened when we gave the loan. In our audited accounts he is shown as a debtor. That is not shown in the balance sheet. There is one item in the balance sheet as sundry debtors and it is included in that. There is no list of sundry debtors in the balance sheet. That will appear in the auditors' report. Besides this car he had taken other moneys also and a lump sum is shown against him. He had taken other money before he purchased the car. There was a loan account when the car was bought. When the 40 car was bought no entry was made in the loan account. Entry was made on the loan account only from the date of the agreement—that is irregular accounting. It was disclosed to the auditor that the car really belonged to the canvasser. There is not only this car but a number of other vehicles, Carter and de Costa are our auditors. The purchase of this

car was not put up to the Directors' Meeting. Application was made and papers submitted to the Directors and they approved of it. It is submitted verbally. The field officer himself sometimes goes and discusses the matter with the Directors and the Directors sanction it. Even one director can sanction it. I cannot remember who was the Director who sanctioned this. There is no minute about it. The Board of Directors had to approve the loan. That has to be done at a meeting of the Board or circulation of the minute paper. This company does it orally.

No. 6
Defendant's
Evidence.
A. Amerese-
kerc, Cross-
examination
—continued.

10 18-12-50.

(Sgd.) N. SINNATHAMBY,
D. J.

For want of time further hearing postponed for 31-1-51.

31-1-51.

Trial resumed. Same appearances.

A. AMERESEKERA—Affirmed, recalled. Cross-examination contd.

There is a Board of Directors, there is no Managing Director, there is no General Manager. The Secretary does all the supervision in the office. For the field work there are three organisers paid a commencing salary of Rs. 100 with commission on business brought in. It is their function to bring in the business. They are given complete discretion as to the manner in which they set about bringing in business. They are given discretion to employ canvassers who will be paid for by way of commission.

(Evidence of this witness at p. 12 read to him). The moment the name of the canvasser is entered in the ledger he is recognised as a canvasser of the company.

(Shown D6). (Witness is asked to look for the ledger account of Mr. Holsingher, canvasser). His name as a canvasser appears at page 430. He has brought in quite a large volume of business to the company. It is carried on from p. 430 to pp. 431 and 433 and from there to p. 475. All the pages show work brought in by this canvasser. His accounts appears thereafter at pp. 490 to 500. On the face of this commission ledger it is apparent that he has brought in more business than any other canvasser of the company.

We have field officers and ordinary agents on a commission basis. In fact we have no organisers in our company. We call them field officers who are given discretion as to how they set about bringing their work. In the matter of where a case is to be examined we do not instruct the field officers. He does it on his discretion. Whether the case is to be examined in his house or in the house of the doctor is decided by the field officer.

Q. Whether a man is to be taken to the house of the doctor or not is left to the field officer?

No. 6
 Defendant's
 Evidence.
 A. Amerese-
 kere, Cross-
 examination
 —continued.

A. Yes. We were only concerned with the payment which was to be a commission on the value of the policy.

The car was purchased in April, 1948. On that day a cheque in favour of the Ford Co. was drawn by the Trust Co. and paid direct to the Ford Co. On that day a new motor car account was opened in the books of the Trust Co. It is still there as the new car account showing it as an asset of the company.

(Witness' evidence at p. 14 of the record put to him.) Right through it is shown as an asset of the company. This car met with the accident somewhere at Anuradhapura. It was left there in the charge of the police. After some time it was taken delivery of. The person who went to take delivery was our accountant Mr. Andrado who took delivery of the car. I do not know how he took charge of the car. He went as an accountant of the company to take charge of this property. From the day the car was purchased it was used by this field officer of ours. As he used it he had to maintain it and insurance was paid by him. In the course of maintenance there were bills to pay. Sometimes we paid them and debited his account. All that is shown in the ledger account of James Perera, our payments in respect of repairs of the car being entered against the purchase price. Having purchased it in April, 1948, in July, 1948, we entered into an agreement with Perera.

(Mr. Wickremanayake calls for the agreement. It is handed over to him by Mr. Navaratnarajah.) The party of the first part is still referred to as the owner of the car. This loan has not been and is not shown up to now as a loan in the books. Clause 7 provides that when the party of the 2nd part, namely the field officer James Perera, has done certain things and paid the balance due with interest the party of the first part undertakes to transfer the ownership of the car to the party of the 2nd part. As a matter of fact the entire amount has not been paid. The company is still the owner of the car. He was holding the car for the purpose of our business and using it for such purpose. He could have used it for his private purposes also. It was mainly for the company's business.

(To Court: The car is insured. If it met with an accident and became a total wreck the company will get the money.)

With regard to the examination of proponents by doctors there is a standard medical report form. It is not something which we started ourselves. It has been taken over from Insurance Companies in existence for a long time. Because we were satisfied that answers to the questions in that form will indicate whether the man is a satisfactory life or not we adopted it. All the doctor is expected to do is to examine to get answers to the particular questions. We ask the doctor whether he considers him a first class life or not. We get his family history and questions with regard to his heart and blood pressure, etc. On those answers he has to say whether he considers it a first class life or not.

(To Court: Our field officer, when he took the doctor in our car, I do not say he was acting in the interest of the company. That is not the

only doctor who can examine for us. There are several other doctors. He chose to take this doctor. In doing so it may be that he was acting both in the interest of the company and in his own interest. He got a fee himself. Whichever doctor he took he got a fee.

No. 6
Defendant's
Evidence.
A. Amerese-
kere, Cross-
examination
—continued.

Q. Will you say that he was acting in the interests of the company or not?

A. I cannot say.)

Cross-examined further with permission :

Q. Does the taking of doctors by James Perera to examine insurers benefit the company?

A. I cannot say. In some cases it benefits our company. In all cases it is intended to benefit the company.

Re-examination :

The car at the time of the accident was driven by Holsingher who was in the first instance employed as a canvasser by James Perera a field officer. Holsingher was not answerable to us. He had no specified hours of work. We cannot ask him to go and get a particular proposal. If we do so he can refuse. If he does work or not is a matter entirely for him. If he does not work he gets no commission. Apart from these canvassers who are employed by field agents we also appointed canvassers directly under us. To canvassers employed by us direct we do not pay a salary. We pay a commission. Even with regard to canvassers employed by us there are no specified hours of work. Even a canvasser employed by us we cannot ask to go and get work from so and so. If the canvasser employed by us does not bring in a certain amount of work the renewal commission will be forfeited. At the worst we might terminate their service. We expected work up to a minimum of Rs. 5,000 a year to prevent their renewal commission being forfeited. Rs. 5,000 was the value of the policies. This rule did not apply to Holsingher because he was not appointed by us. He was appointed by the field officer. In the pages of D6 dealing with Holsingher's commission there is also the name of James Perera. Holsingher's name is within brackets. James Perera has employed other canvassers also including Kandampe whose name appears at p. 429 of D6. The book shows that the other field officers also have appointed their own agents.

A. Amerese-
kere, Re-
examination

(At this stage Issue 2b is altered to read :

Was the said employee acting in the course of and within the scope of his employment and for the benefit of the said company?

Mr. Navaratnarajah has no objection to the Issue being adopted.)

(Sgd.) N. SINNATHAMBY,
D. J.

No. 6
Defendant's
Evidence.
E Holsinger
Examination

E. HOLSINGER—Sworn, 41, Insurance Agent, Kotte.

I am a canvasser of the defendant Company, James Perera appointed me as a canvasser. I was not paid a monthly salary. I was only entitled to commission. There were no fixed hours of work for me.

Q. Could the defendant Company give you any instructions as to who you should see in respect of getting a policy of insurance?

A. No. If I do not get any business I will have to starve. The defendant Company cannot tell me to go to Jaffna or Batticaloa to canvass work. The defendant Company does only life business. I work for other Companies also. I do motor and accident policies. I have been a canvasser of the defendant Company for a little over a year. I have brought in a very large volume of work. On the work brought in by me I am paid a commission. James Perera is also paid an over-riding commission.

I came to know the plaintiff somewhere early last year. His sister first mentioned his name to me. His sister lives in Galle. Plaintiff's sister took out a policy with the defendant Company. After the plaintiff's sister had mentioned his name to me I saw the plaintiff at his dispensary. That was in January, 1950. That day we discussed terms with him. I told him how much he would be paid for examining a particular person. He was to be paid Rs. 15 and Rs. 13 depending on the amount of the 20 policy.

(Shown P2.) I wrote this letter to the plaintiff from Kankasanturai. At the time of writing this letter I had arranged with a number of persons to take out policies with the Company. I had arranged about 50 persons. I met the plaintiff in Colombo after writing P2. I told him that it will be about 50 cases he will have to examine in Jaffna. The doctor would have got roughly about Rs. 700. We were to go in his car. At the last moment he said his tyres were bad and we did not go in his car. He asked me to bring a car. The doctor was to pay the petrol. As I was giving him 50 cases he was going to spend on the trip. He was going to finance 30 the trip in regard to travelling and resthouse bills. We started off at about 1-30 a.m. About 6 gallons of petrol were put into the car. The doctor paid for the petrol. The doctor gave Rs. 20. The balance was with James Perera. At 1-30 I drove the car from Colombo. I drove up to Negombo. At Negombo James Perera took charge of the car. He drove the car up to Marawila. Thereafter the driver took charge of the car till Puttalam. We arrived at Puttalam at about 5 o'clock. Thereafter I took charge of the car. I drove the car at the time the accident took place. We had morning tea at Puttalam. The tea was paid for out of the balance we had. At the time the accident took place I was driving 40 at about 25 m.p.h. Whilst I was driving the car suddenly swerved to a side. Something, I think, went wrong with the steering and it went off the road. It was a fairly good road. It is not a very good road. It is not correct to say that I fell asleep and the car went off the road. I did not even doze off. I have been driving for 20 years. I have a clean licence, I also sustained injuries. It is not correct that I was nodding

at the wheel. We had an early dinner at 7 o'clock and slept till about 12-30 when we started off. We drove in our night clothes.

No. 6
Defendant's
Evidence.
E Holsinger
Examination
—continued.

(To Court : I was wearing pijamas—a pair of khaki shorts. I had no coat. I had a banian. I had a shirt and banian. I had no belt, no buckles. That is my normal sleeping short. Sometimes I carry a pijama. Normally I sleep in pijamas. That night I slept in khaki short and shirt. I was in my home clothes. I did not sleep in my normal sleeping suit. That night I slept in my normal home clothes because I wanted to save time. I take about 2 minutes to put on my khaki short and shirt. The
10 doctor was in a hurry to go. I asked my wife to wake me at 12-30.)

I also sustained injuries and was in hospital for about 10 days. I did not discuss with the plaintiff how this accident occurred. The doctor was not unconscious after the accident. He could have spoken. We were so excited we had no time to discuss the accident. We were worried about rushing these people to hospital. The accident occurred a few miles this side of Anuradhapura on the Puttalam side.

(To Court : We were so anxious to bring them to hospital that we had no time to discuss the accident. Just a few minutes after the accident a lorry arrived in which we took them to hospital. We were excited, we
20 could not discuss the accident. We spoke to each other. We wondered how to get to the nearest hospital. We did not discuss anything about the accident.)

I fractured the bone of my right leg, the ankle, and I had other cuts.

Cross-examined :

The more work I do it is the better for me. The more insurance I get for the company it is the better for me. The company benefits because it gets policies. I benefit from the commission. When I get policies for the company James Perera also benefits because he gets an over-riding commission. It is to James Perera's interest to see that I get as much
30 work as possible. It is in both our interests. In the first instance I went to Jaffna with James Perera. We went in this car. From Colombo we went to Jaffna and went about Jaffna in this car and saw prospective clients and got them to agree to insure. We discussed the amounts also. All that was left was to get a doctor's report. The proposal forms were ready to be filled up when the doctor's reports were ready. James Perera and I had gone in this car and prepared the ground. Having done all that I wrote the letter P2 to the doctor. I first came to know the plaintiff through his sister. His sister took a policy. She mentioned her brother in Mirihana. I mentioned to her that I was living at Etul Kotte close to
40 Mirihana. From that day I got the plaintiff to examine cases for this company. It is a matter of importance that the doctor should pay attention to his examination. James Perera was keen to see that the doctor did his work well and examined his cases. We were present when the doctor examined other cases also. We did not take the doctor in this car to examine other cases also. Up to this day we did not take the doctor in this car. In every instance we went in the doctor's car. I

E Holsinger
Cross-
examination

No. 6
 Defendant's
 Evidence.
 E Holsingher
 Cross-
 examination
 —continued.

instructed the defendant's proctor that in every instance we had gone in the doctor's car. The doctor's car was an A 40. This is the only livelihood I have. That the Secretary of this company was up to date unaware of the fact that I did work for somebody else I do not know. I did not tell him. I work for Clark Young & Co. who are agents of various Insurance companies: I work for the New India Insurance Co. of which H. L. de Mel & Co. are agents. They do life as well. I have found persons who insure their cars and their life at the same time. In such a case I give the policies to these people. It was in James Perera's car that I went about for other work also. James Perera does not work for other 10 companies. I went about in this car and did insurance work for other companies as well. James Perera works only for the defendant company. I was paid my commission cheques by the company direct. My name was in the books of the company. I got monthly cheques from the company for any fresh policies and for any renewals also. The arrangement with James Perera was that I did this canvassing and the company paid me. He was employing me for the company. In the course of this canvassing whatever James Perera asked me to do for the company I did. James Perera does not take me along with him. I take him along. I fix my own time. I asked James Perera whether he was free and he 20 brought the car along in which all the canvassing was done. Sometimes I drove this car with the approval of James Perera and sometimes the driver drove the car. I hold a certificate of competence to drive a car. On this day also I drove with James Perera's approval. We started off at 1 a.m.

(To Court: At that time I lived with James Perera. I did not keep house. My wife was away. My wife was also living with me at that time; I was just about to take a house. Previously my wife was away. I went to stay with James Perera for a few days and my wife came along. Earlier I did not understand the question. It was my wife who woke me.) 30

That evening I saw the doctor. I had been to Jaffna collecting these cases and I wrote to him from Jaffna on 19th April. From the 19th I still continued to be at Jaffna area canvassing for some time. Then I came down to Colombo. I went and saw the doctor on the 27th evening. That was the first time I saw the doctor after I wrote this letter to him. I cannot remember what I suggested to the doctor. I wrote to the doctor about going on the 29th. Actually we went on the 27th. After consultation with the doctor we agreed to go on the 27th. It was the doctor's suggestion that we should start at 1 a.m. to save time as he could not leave his dispensary. The doctor stayed back in his house and I went 40 with James Perera to his house. I dined with James Perera. I drink. James Perera also takes a drink. We hadn't anything on that particular day because we were resting. Drinks have a disturbing effect. So we did not drink. We drink arrack. James Perera ordinarily has arrack. Sometimes I have a bottle in his house. Before dinner normally James Perera and I had one or two drinks. It was decided that we should not drink. As we were starting early morning we decided not to have a drink.

I saw the doctor at about 7-30 and thereafter went home straight. We dined at about 7-30. James Perera is a married man. His wife and children are there. I slept in a bedroom in the same shirt and shorts in which I had gone to see the doctor. James Perera went in his sarong to see the doctor. When James Perera is not working he goes about in a sarong. He goes about in his sarong to see his friends. I have not spoken to the doctor in connexion with anything other than insurance work. James Perera is not a friend of the doctor. In the course of our business we became friends. James Perera was sleeping in his sarong because he went to see the doctor in his sarong. That night I woke Perera. For about a month prior to that I had been staying in Perera's house. We went and woke the doctor and he got into our car. The doctor had his own car which he drove. I had a driver Gunapala who was with us that day. We only changed over at Negombo. We did not stop there. We stopped next at Marawila only to change over. James Perera found it tiresome to drive beyond Marawila from Colombo. That is a distance of about 22 miles. James Perera drives slowly. He was feeling drowsy and the driver took over. I drove the first 20 miles and gave over because I was feeling drowsy. James Perera drove 20 miles and he felt drowsy. The driver drove to Puttalam, where I took over. At that stage the car had been driven practically throughout the night. James Perera was in the rear seat. I did not notice whether James Perera was sleeping. There was very little conversation in the back of the car. Most of the people were too tired to talk. I was driving with the driver by me. Suddenly the car swerved off the road. Earlier when I drove the car there was no inclination for the car to pull to the right. There was no such inclination from Puttalam to Anuradhapura. Suddenly it went off the road into a tree. The car was examined by a motor examiner. When I was in hospital I heard that the motor examiner had gone to the spot and examined the car. I do not know what his report is. I know that the car had been taken delivery of by an employee of the Trust Company and a receipt given to the motor examiner. Plaintiff was not unconscious. If he said so that is false. I know he fractured his skull. Plaintiff was bleeding. He was quite conscious. I spoke to him. I told him that we must get him to hospital as quickly as possible. I made a statement to the police. At the time I made the statement Gunapala was present. I cannot remember whether he made a statement immediately after I. I made a statement to the police at the Anuradhapura Hospital. I did not know where the driver was when I made my statement. I am not aware that the driver's statement and mine were recorded in the presence of each other. I cannot recognise the sergeant who recorded my statement. I was so excited at the time. I had a pain in my leg. I was treated at the General Hospital. I was put in plaster. (Shown Police Sergeant No. 1087). I think this is the sergeant who recorded my statement. Gunapala was not by when I made my statement. He was also brought to hospital but not with me. We were removed to the same ward. My statement was recorded in the ward. Gunapala was in the same ward. He was in the ward when my statement was recorded. I cannot

No. 6
 Defendant's
 Evidence.
 E Holsinger
 Cross-
 examination
 —continued.

remember whether we were on adjoining beds. I am not sure whether Gunapala was in the adjoining bed. All of us were there for only half an hour in the ward before we were removed by ambulance. I cannot say whether it was during that time that the statements of myself and Gunapala were recorded. I cannot say whether the doctor's statement was not taken on that day. I did not hear Gunapala's statement. Before the accident Gunapala did not want me to give over the wheel to him. Shortly before the accident Gunapala did not tell me not to drive so fast. The car was very badly smashed. I have driven for 20 years. The stopping of a car driven at 20 m.p.h. would depend on how the brake is applied.¹⁰ These brakes were efficient. It is possible to stop this car when travelling at 20 m.p.h. within 20 yards or even less. I am not sure that the car travelled over 30 feet before hitting the tree. We were all excited and wondering how to get to hospital. I did not measure the distance the car went off the road. The lorry came about 5 or 10 minutes later. Those roads are deserted. Within those 10 minutes I did not try to see how far the car went off the road. In spite of my applying the brake the car crashed into the tree with force and was heavily damaged in spite of my applying the brake. I was not travelling fast. I can only say that the car left the road. I cannot say how or why it left the road.²⁰ This might well have happened if I fell asleep. I never heard of people falling asleep at the wheel when driving at night. The car was being used at the time to examine cases for the obtaining of policies of insurance for the Insurance Company. James Perera, a direct employee of the company who in turn employed me, was in the car. James Perera knew that the car was being driven to see cases. He approved of my driving the car. I get no instructions direct from the Company regarding my work. I get instruction from nobody. I find my work. I find the persons to be insured with the Company. James Perera does not suggest going to Jaffna in search of work. It was my idea to go to Jaffna. I do not³⁰ know anybody in Jaffna. I suggested going to Jaffna and James Perera agreed. The doctor paid Rs. 20 for petrol. I told defendant's lawyers that the doctor paid Rs. 20. I said that the doctor had agreed to pay the expenses of the whole thing and Rs. 20 was an advance. In this job I earn about Rs. 1,000 a month. I have to start paying income tax. I have paid income tax in 1934 and 1935. The years after 1934/35 were bad years until last year. I have not been noticed yet to pay income tax. Thereafter I did not receive assessment forms. From this company I get Rs. 1,000 a month. The books will show that. I have been working in this company for just a little over one year. From the time I started⁴⁰ I have been earning over Rs. 1,000 a month. A bag belonging to James Perera had been removed by the doctor's brother-in-law when he was in hospital. As soon as the doctor came out of hospital he went to James Perera's house and the accident was discussed. The discussion was about the doctor getting damages. The doctor asked me whether I had fallen asleep at the wheel. I said, No. In the presence of James Perera the doctor asked me whether I did not fall asleep. The doctor told me that he too tried to check the career of the car. The doctor did not tell me

on that day that he leaned forward to wake me up. The doctor tugged at the hand-brake from behind. He reached over and tugged at the hand-brake. Gunapala was in the front seat. I applied the foot-brake and did not apply the hand-brake. Gunapala did not apply the hand-brake. I deny that I told the doctor that I fell asleep on that day. Shortly before the accident I felt somebody leaning on me. I was in the driving seat and the plaintiff was behind me to the left. The brake was between the two seats. Plaintiff had practically to stand over me and lean over the seat and get the brake. He did all that. The car got off
 10 the road so suddenly. The car was not driven so fast. Everything happened in the twinkling of an eye. Before the car crashed he leaned over. The doctor did not tell me that he had tried to wake me. I did not admit that I fell asleep. I know that if I told the police that I had fallen asleep I would have been prosecuted. I was not prosecuted.

The doctor paid for the petrol. Petrol was bought at Cinnamon Gardens. The doctor gave the money to James Perera. It was James Perera who paid for the petrol. Any evidence on that would be forthcoming from James Perera. James Perera is usually the man who keeps money on our travelling. He was the treasurer. The doctor had been
 20 travelling with us before to Horana and these places in his car. On the previous trips Perera was not the treasurer because we went in the doctor's car and the doctor put the petrol. On every trip on which I went with Perera he was the treasurer. It was only when I went alone with Perera that he was the treasurer. This trip to Jaffna was to be financed by the doctor and he gave us an advance of Rs. 20 to put in petrol. The money was handed over to Perera. In the letter I wrote to the doctor there is no mention of his financing the trip. We had come to a common understanding on the first time we met. The doctor had not financed any trips before this. Before this the doctor had gone on several trips but
 30 he did not finance them. In my letter there is no mention of the fact that the doctor was to finance the trip. I assumed that the doctor as agreed would finance this trip although he had not financed any of the other trips. Without any reference to the agreement I expected him to finance the trip. The agreement was made when we met the doctor for the first time. On the day we went on this trip I reminded the doctor of the arrangement and asked him to finance the trip. We saw him earlier in the morning and asked him to make arrangements. 7 o'clock was the last time we met the doctor and fixed the time for the trip. I did not say earlier that after I left for Jaffna on the 19th I did not see
 40 him before 7 o'clock that night. I met the doctor in the morning. We went there in the morning to find out what arrangements he could make to leave. Then he told me that he will try to make some arrangements during the course of the day. He said he will find someone to look after his dispensary. He was not sure in the morning what time he would start. Then he came to James Perera's house in the afternoon and said that he had made all arrangements. Till 7 o'clock he was not sure at what time he could start. He asked us to come and see him in the evening. We discussed the question of his financing the trip when we

No. 6
Defendant's
Evidence.
E Holsingher
Cross-
Examination
—continued.

met in the morning. By we I meant James Perera and I. I told the doctor that he had to go along with us and asked him whether he could make any arrangements regarding his dispensary and told him that he will have to pay all the expenses of the travelling. I told him this, that is, the expenses of James Perera, myself and the driver. On that occasion I did not refer to the earlier agreement. It was not necessary to do so. That was the only talk about the expenses of the trip. At 2 o'clock he came and gave the Rs. 20 towards the expenses of the trip. Then we met him at 7 o'clock. Petrol was put in earlier—in the afternoon—before we saw him at 7 o'clock. The petrol was put in before we met the doctor¹⁰ at 7 o'clock in the evening of 27th April.

Re-examination : Nil.

(Sgd.) N. SINNATHAMBY,
D. J.

Mr. Navaratnarajah closes his case reading in evidence D1 to D6.
He addresses Court :

No. 7.

No. 7
Addresses to
Court

Addresses to Court.

The first issue relates to whether the car was driven negligently by Holsingher. The fact that the car went off the road is evidence of negli-²⁰ gence. It is for Holsingher to give a reasonable explanation why the car went off the road. If he has not given any the negligence is established. The Company is not here to establish that Holsingher was a good driver or that he was not negligent on that day. The only question for determination is whether the car was at the time driven by an employee of the defendant Company. Was Holsingher, the man who drove the car at the time of the accident, an employee of the defendant Company? If I give my driver my car for a specific purpose but he decides in the course of it to teach a friend to drive the car it has been held that such a driving is in the course of my employment. Plaintiff must establish his case.³⁰ Plaintiff can only charge the defendant with the negligence of James Perera.

He cites 52 Times Law Reports at p. 212. He submits that the question, Is Holsingher an employee of the defendant Company? should be answered in the negative.

He cites 1918 2 Chancery p. 378; Bevan on Negligence (1947 Ed.) pp. 44, 55 and 59; Clark and Liveson on Torts p. 115, 1915 1 K.B. p. 644.

Before a third party is made liable the plaintiff must establish that it was either a servant or an agent of the defendant. He submits that Holsingher was not the servant,

He cites 1924 1 K.B. p. 762 ; 1915 1 K.B. 157 and 1917 1 K.B. 550.

No. 7
Addresses to
Court
—continued.

The Company is liable for the negligence of James Perera. If Perera during the course of the journey allowed Holsingher to drive the car the defendant is liable for the negligence of Perera and not for the negligence of Holsingher. The liability is the negligence of the servant in having allowed something to be done. If the plaintiff's case was that the defendant was liable because the defendant's servant had acted negligently in having allowed Holsingher to drive the car, or that he was negligent in that he did not control the driving by Holsingher, then the plaintiff's
10 pleadings must be different. Defendant is not called upon to meet that case. Pleadings must be strict. Defendant must be told why he is liable.

Mr. Navaratnarajah examines the Issues : Issue 1 deals with the person who was driving the car. The 2nd Issue does not refer to Perera. Defendant's case is that Holsingher was not an employee of the defendant Company. He refers to the evidence of the plaintiff at p. 5 of the record. They are going on the basis that Holsingher was the servant of the Company and Holsingher was driving the car in the course of his employment and therefore the Company is liable. If it is sought to change the plaintiff's case the issue must be raised whether James Perera was an employee of
20 the Company and whether he acted negligently in allowing Holsingher to drive the car. If that question was raised defendant would have been able to satisfy the Court that Perera was not an employee of the defendant Company.

On the question of ownership of the car : Whether the defendant is owner of the car or not is relevant only for the purpose of raising the presumption that the person who drove the car was a person employed by the defendant. That presumption can always be rebutted by evidence.

He cites 47 Times Law Reports p. 557 ; Bevan on Evidence at p. 65.

The question of ownership is not material at all to determine the
30 question as to whether the owner of the vehicle is liable for the negligence of the driver or not. He cites Bevan at p. 64.

The document D2 shows only that the control of the car was to be with James Perera and not with the Company. Perera no doubt had under that agreement to pay the cost and certain insurance. Ownership was to remain with the Company until payment of the price of the car. This is similar to the case of a person who loans his car to a friend of his to go on a holiday in which case the owner cannot be held liable for anything. Even if the driver drives the car the question is : Under whose control was the car at the time of the accident. The mere fact that the
40 driver was driving the car does not make the owner liable unless he was acting in the course of his employment. Who is the person who has control of the man driving the vehicle ?

He cites 1947 Appeal cases at p. 1.

It is a question of fact as to who had control of the servant at the time of the accident. He cites Bevan on Negligence pp. 47 to 49.

No. 7
Addresses to
Court
—continued.

In this case the only question the defendant is called upon to meet is, Was Holsingher the defendant's servant and was he acting within the course of his employment and was he negligent. Defendant has not to meet any other case. The whole case stands or falls on the question whether he was the servant of the defendant Company.

James Perera when going on this trip was in no better and in no worse position than Holsingher with regard to the Company. Perera was going on work merely to get policies and to get a commission on the policies obtained by him.

Plaintiff must be confined strictly to his pleadings.

10

INTERVAL.

(Sgd.) N. SINNATHAMBY,
D. J.

31-1-51.

AFTER LUNCH.

Mr. Wickremanayake continues his address :

Emphasises the fact that basis of liability is negligence on the part of a servant or agent. Without that there is no liability at all. It may be presumed that the negligence was in the course of employment but there should be proof that the negligence was on the part of the servant²⁰ or agent. Holsingher was not in the employment of the defendant and not its servant and his negligence is his own negligence for which he is personally liable and plaintiff has sued the wrong person. Cites Clarke & Gimson on Tort 196. A man may be an agent for a particular purpose but no evidence that Holsingher was in such a position. He worked for a commission and he did that work for others as well. Holsingher not an agent in the legal sense, therefore plaintiff must fail. No evidence that James Perera was an agent or that he was negligent. He entrusted the driving to somebody else, and it has not been shown that that person was unskilled. If he entrusted the driving to a skilled driver then there is³⁰ no negligence, and it was an accident.

Damages.—The sum claimed is excessive. The injury may be a serious one, but it has not impaired the plaintiff in his work as a doctor. Plaintiff was a Government doctor and in private practice only for a few months at the time. The evidence of Dr. Paul is that plaintiff can attend to his duties. The evidence is that the injury will not result in lunacy. Refers to Mc Caren on Delict 99. There is also the question of benefit, plaintiff was going for his own benefit, but even otherwise that is not relevant unless he had authority to go as agent for a particular purpose.

Mr. E. G. Wickremanayake addresses :

40

No question of *res ipse loquitur*. There is the evidence of plaintiff and Holsingher. Which evidence will the Court accept. Holsingher prepared to tell lies. Suggestion was made that plaintiff was sharing the commission. Not stated by Holsingher in his evidence. There is evidence

that plaintiff never went in his own car on these trips. He always went in this car which was brought to him by James Perera and Holsingher. James Perera, an employee of the defendant Company. He was present in Court, but not called. With regard to how the accident took place, that is borne out by the injuries. Holsingher said he felt somebody lean over him. With regard to the expenses, Court will reject the evidence of Holsingher. Regarding the liability of the company. Counsel concedes the negligence should be by a servant or agent of the company. The servant need not be a permanent employee. If a person is employed for
 10 a particular purpose and the accident happens in the course of such employment the owner will be liable. Employment may be *ad hoc*. Court has to look into the surrounding circumstances and see why he was employed and how he came to do such work. Counsel differentiates the case of the canvasser. The fact of the car in that case not being the company's car is relevant. This car was undoubtedly a car belonging to the company—bought by the defendant company for their employee. The car was used on this occasion to do the work of the company. Used by two persons who are in the pay of the company. These facts show why this man was driving, he was driving to get custom for defendant
 20 Company. He was also at the moment under the immediate control of the person whom defendant had authorised to employ persons for such work. Evidence of the Secretary that organisers were given authority to employ persons. Car given to James Perera because he had need of a car for the company's work. Evidence is he could use it for other purposes as well. Defendant had to rebut the presumption that it was not used for office purposes. If defendant has proved it was not being used at the time on defendant Company's work then they rebut the presumption. James Perera was given authority and general discretion to employ persons for the company's work and any person he employed for the purpose is
 30 then an employee of the company. If James Perera employed a driver at that time the company would be answerable for the acts of that driver. Here he drove part of the way and then got Holsingher to drive and then the driver. The admissions of the Secretary of the company and document D2 and books of the company show that James Perera was an organiser of the company. Counsel says he could have called James Perera but that would not have affected the evidence of the Secretary. The Secretary says who James Perera was. Even if James Perera asked a friend to drive under these circumstances when he was doing work for the company the company would be liable. All text books indicate that position. If
 40 he was not doing his master's business but his own business he would not be liable. With regard to his being an employee of the company it does not matter if he is not paid a fixed salary it is enough if he was paid by the job. Whether he was an employee or not the evidence of the Secretary shows he had been given general directions to employ whom he liked. Reads evidence on page 18. With regard to his doing any other work that does not affect the question.

Damages.—Damages not over-estimated. Plaintiff a doctor who has just passed out and was in private practice. He had his whole future

No. 7
Addresses to
Court
—continued.

before him. There is the evidence of Dr. Paul that his powers of concentration will be affected. Plaintiff says he cannot concentrate. His brain has been affected and he gets headaches. Where a man starts with these handicaps in life his whole future is affected. Rs. 5,000 was given as damages for an X-ray burn. Disfigurement is one thing on which he should be given substantial damages. A woman was given Rs. 7,500 in this Court because she could not raise her hand to comb her hair. The disfigurement will cause him embarrassment. Plaintiff says he cannot sleep. Dr. Paul says that is very likely. A professional man depends on his mental capacity. In the words of Justice Soertsz "One should not look at these things cynically and feel that everybody who comes to Court comes with an exaggerated claim". Reads para 4 (b) of the answer. There is also the admission that the car was at all material times under the control of James Perera. Para. 4 Burden on defendant to prove that James Perera was not using this car on behalf of the company. If James Perera got anyone to drive the car the company is responsible for the acts of that person. In sudden emergencies James Perera could act on his own and in other circumstances he had to get instructions from the company. James Perera given the discretion to employ anyone to drive the car and he acted within that discretion. 20

D. J.

C. A. V. for 14-2-51.

It is agreed that certified copies of the ledger only need be submitted.

D. J.

31-1-51.

14-2-51.

MR. ADV. E. G. WICKREMANAYAKE for the plaintiff.

MR. ADV. NAVARATNARAJAH for defendant.

Judgment in this case was due today. Defendant's Counsel has submitted an authority after Counsel had addressed me on the last date. Learned Counsel for plaintiff desires to address me further upon this authority. I fix the matter for further addresses on 22-2-51.

(Sgd.) N. SINNATHAMBY,
D. J.

22-2-51.

Addresses continued :

Mr. Navaratnarajah addresses Court :

He cites 1931 Appellate Div. South African Law Reports p. 412 at pp. 432 and 435. He submits that there is no evidence that the defendant Company had the legal right to direct Holsingher and James Perera how to drive the car and whom to employ. The onus of proving that the defendant is liable is on the plaintiff. There is no evidence that James

Perera had authority to employ anybody he liked. He only had authority to employ canvassers. No evidence has been led to show what the contract of employment was between the parties.

No. 7
Addresses to
Court
—continued.

He cites Barlow's South African Law of Vicarious Liability p. 98.

Mr. Wickremanayake replies. He says that he will distinguish the facts of the case cited from the facts of this case. That case goes on the score that the canvasser was not a servant but was an independent contractor. Holsingher in so far as he was acting for the company was an independent contractor. He refers to p. 103 of Barlow.

10 James Perera is admittedly an employee of the company, a paid employee of the company, and the scope of his employment has been set out by the Secretary of the company ; he said James Perera was employed to supervise field work, was paid a salary and an over-riding commission. He was given authority to employ canvassers and to direct them how to bring in work. James Perera goes about in a car belonging to the company. In the case referred to the car was bought on a hire-purchase agreement by the canvasser from an outsider and at a later stage the Insurance Company took over the ownership of the car under a separate purchase agreement. At the time of this accident the Insurance Company had
20 normal ownership of the vehicle and Perera was the hirer. The car was bought by the Insurance Company and it was entrusted to James Perera for the purposes of getting policies. In the case cited also the canvasser was given the car for the purpose of his business except that the canvasser was not a direct employee of the company. Here James Perera is a field officer of the company. Holsingher was a canvassing agent. There is the evidence of the Secretary as to what Perera's functions were. He had the right and the discretion to employ canvassers who were recognised by the company and registered. He was paid a regular salary for work done. Unlike Holsingher he was a direct employee. James Perera was in the
30 car at the time and he was in a position to control the driving of the vehicle for and on behalf of the company. If in the case cited there had been in the car some officer of the company, directly employed by the company, by reason of that fact the driver would have become an assistant in the company's business and the position would have been vastly different. In this case Perera got a paid driver to drive when he was tired ; when the driver was tired Holsingher drove the car. James Perera himself went to sleep and did not exercise the control he should have exercised. The company would have been liable if James Perera himself drove the car. The company is equally liable by reason of James Perera's
40 being in the car and not exercising control over the person whom he authorised to drive the car at the time.

He cites S. A. Law Reports Cape Div. 1934 p. 265. James Perera was in the position to direct where and when to stop the car. He was a supervising officer of the Insurance Company. At the time of the accident he was in the car. If the Court is satisfied that James Perera was acting as an employee of the company, within the scope of his employment, and he drove the car, then the company is liable. James Perera was present

No. 7
Addresses to
Court
—continued.

in Court but he was not called. The master is liable for the negligence of his servant in that he did not control somebody else. The other party becomes a servant of the company for that purpose. In the case cited by him the person who drove the car was not a servant but the lady was liable for that person's act. He becomes a servant for the time being. The moment Holsingher took over the wheel of the car and drove he became a servant of the company at the time.

JUDGMENT on 8-3-51.

(Sgd.) N. SINNATHAMBY,
D. J. 10

No. 8
Judgment of
the District
Court
8-3-51

No. 8.

Judgment of the District Court.

JUDGMENT.

The plaintiff seeks in this action to recover from the defendant Company a sum of Rs. 50,000 being damages for injuries caused to him in an accident which occurred when car No. 8850, in which the plaintiff was travelling, went off the road and crashed into a tree. The basis on which the plaintiff seeks to make the defendant Company liable is that the car in question was at the time being driven by an employee of the defendant Company and that the accident occurred as a result of rashness 20 or negligence on the part of the driver. At the time the car went off the road, the contention is that it was being driven by the employee in the course of and within the scope of his employment and for the benefit of the defendant Company. The defendant denied liability and stated that the car was bought by one James Andrew Perera but registered in the name of the defendant Company as security for the repayment of money advanced to him. They denied that the car was at the time driven by an employee of the defendant.

It would thus be seen upon the pleadings that the basis on which the plaintiff seeks to fix liability upon the defendant Company is that the 30 injuries were caused by the negligent act of a servant of the defendant Company in the course of and within the scope of his employment. It is on this basis that issues were framed.

It would appear that in point of fact the car was at the time being driven by one Holsingher who was a canvasser in the defendant Company. There was in the car at the time one James Perera an organiser, sometimes termed a field officer, of the Company. At a later stage learned Counsel for the plaintiff seemed to concede that Holsingher was not directly a servant of the defendant Company but that he being under the control of James Perera, the company was liable in as much as James Perera was 40 at that time an agent of the Company. This was strictly not covered by the pleadings or the issues, but as the matter has been fully argued I

propose to deal with it. Before doing so, however, I shall consider the question as to whether Holsingher, who was the driver at the time of the accident, can be regarded as a servant of the Company and whether he was at that time acting in the course of and within the scope of his employment.

No. 8
Judgment of
the District
Court
8-3-51
—continued.

According to the plaintiff who is a doctor it was Holsingher who arranged with him on the day in question to proceed to Jaffna to examine 30 to 40 proponents whose lives the canvasser Holsingher intended to insure with the defendant Company. Holsingher wrote letter P2 to the 10 defendant suggesting that the doctor should accompany him on the 29th of February to Jaffna to examine these proponents, but actually he arrived earlier and the trip was made on the 27th. The party consisted of the doctor, James Perera, Holsingher and the driver and they left Colombo at about 1-30 a.m. They had proceeded some distance, (the doctor was in the rear seat and Holsingher was driving) when suddenly the car went off the road and struck against a huge tree. The doctor lost consciousness and did not recover till he was brought to the General Hospital. His evidence in Court was that the driver was nodding and he bent over to wake him up when the car went off the road. Holsingher can give no 20 explanation but seems to think that there was something wrong with the steering, but there is no evidence of that. It is in evidence, however, that on the 2nd of May when the doctor was examined by the Police officer who recorded his statement, he was unable to say how the car went off the road. His explanation is that at that time he was not fully conscious of what had happened and had no recollection. Later when his friends and relations spoke to him about the accident, he was able to recall that the driver was falling asleep. This is the explanation that he offers. It would appear that some time after the accident the doctor called upon James Perera and Holsingher, who were living together, to 30 return a bag. They then discussed the accident and how it occurred. The doctor says that on this day Holsingher admitted that he had fallen asleep. Holsingher, however, while he admits the discussion denies that he ever admitted this. It is possible that the doctor's recollection revived after this conversation. There is, however, the fact that he was unable to give the cause for the car going off the road when he was able to make a statement. The point, however, does not appear to be very material, because, even if the plaintiff's evidence on this point has to be rejected there is the fact that a car for no apparent reason, suddenly went off the road, and the principle *res ipse loquitur* will apply. In any event, learned 40 Counsel for the defendant Company did not in the course of his address suggest that there was no negligence on the part of the driver. In point of fact he conceded that there was evidence of negligence. This being so the question arises as to whether upon the negligence of Holsingher the defendant Company can be held liable. There is no doubt that the trip was made with the object of helping the defendant Company in the furtherance of its business. At the same time it was for the benefit also of all the parties concerned, namely, the doctor, Holsingher and James Perera. Holsingher, as a canvasser, would have got commission ; Perera

No. 8
Judgment of
the District
Court
8-3-51
—continued.

as a field organiser would have got over-riding commission and the doctor would have got his fees. The evidence shows that Holsingher was paid on a commission basis. He received no salary ; he was not obliged to bring in business for the Company ; he had no fixed hours of work ; he could not be compelled by the defendant Company to do any particular work or to bring in proposals in respect of any particular person. The manner in which he did his work was entirely at his discretion. The defendant Company could not control that. If he did not bring work he would get no commission, but if the amount of business he did was less than Rs. 5,000 he would have to forego renewal commission. He suffered 10 no other disability. This is the evidence of the Secretary of the Company. It can hardly be said therefore in these circumstances that he was a servant of the defendant Company. Even if he was a servant, driving a car was not one of his duties as such servant. That was something he did on his own and over which the defendant Company had absolutely no control. The authorities which I shall refer to presently show that, in these circumstances, Holsingher could not have been regarded as a servant of the defendant Company.

I shall now deal with the contention advanced by learned Counsel for the plaintiff. The law involved was argued at a second hearing on 20 the 22nd February, 1951. He then conceded that the canvasser, Holsingher, in so far so he was acting for the Company, was but for the presence of James Perera an independent contractor, but that James Perera who was in the car was a servant and employee of the Company who had control over Holsingher's driving. The suggestion appeared to be that James Perera was an attorney or agent of the Company with authority to engage and employ persons for the purpose of securing business, and that he being in the car, the position would be the same as if the Company was in the car and that he having control over the manner in which the car was driven, employed the services of Holsingher to drive 30 the car and Holsingher was in consequence a servant of the Company. A servant may be one in regular employment or one engaged *ad hoc*. By the mere fact of the taking over of the wheel and driving of the car in the presence of James Perera, Holsingher it was contended became a servant of the Company. If James Perera had driven the car when the accident occurred would the Company have been liable ? If the Company was not liable then clearly the fact that he was in the car when Holsingher drove will not make the Company liable. In order to appreciate and decide whether this argument can be accepted or not, one has to consider the relationship between James Perera and the Company. If James Perera 40 was expressly employed by the Company for the purpose of taking canvassers around in order to secure proponents and the Company could have controlled the manner in which James Perera did this work one would be prepared to concede that James Perera in those circumstances was an agent for whose wrongful acts the Company would be liable, but in this case one cannot say that this is so. It is undoubtedly true that the car was registered in the name of the defendant Company. The normal presumption would then be that the driver of the car was a

servant of the Company. But it is a presumption that can be rebutted. In this case the evidence clearly shows that the car was bought by the Insurance Company for James Perera who had not the money to pay for it. They gave it to him for the purpose of enabling him to do his business better. They had no control over him as to how he should use the car. The car was expected to be used for the defendant Company's business, but James Perera could, according to the Secretary, have used it for his own purposes also. The agreement D2 shows the rights of the parties in regard to the car. This agreement was duly registered in the book D3
 10 of the Company which is a register of documents to which the Company's Seal has been affixed. It is not denied that this document is a genuine one. The document shows that in order to help James Perera to discharge his obligations the Company has lent him a sum of Rs. 5,870 for the purpose of purchasing a motor car in the name of the Company as its owner until such time as the Rs. 5,870 with interest has been repaid. Then follows certain provisions with regard to keeping the car in good condition, repairs, method of repayment out of commission, etc. It also provides that when the repayment has been made the Company will transfer the ownership of the car to James Perera. It is thus clear from
 20 this document, coupled with the evidence of the Secretary, that although the Company was nominally the owner, the control and possession of the car remained with James Perera and to all intents and purposes James Perera was the owner but the car was registered in the Company's name until James Perera repaid the amount. The books of the Company however seem to indicate otherwise and the car has been put down as an asset of the Company, but D5 a ledger of the Company shows that the over-riding commission payable to James Perera has been credited against the value of repairs, etc., incurred by the Company in respect of the car. This account is headed "James Perera's Ford Car Account" and it is
 30 obvious that by opening this account the Company was giving effect to the provisions of the agreement D2. The evidence is that the Company did not have any control whatever over the car. According to the Secretary, James Perera had the right to employ canvassers who were recognised by the Company and Holsingher is one such canvasser. He (James Perera) was expected to assist the agents and to get business through the agents. He had also to control and supervise their work. With regard to the persons James Perera can employ that was entirely within his discretion. If a proposal is brought it is for him to see that it is accompanied by a doctor's report. His salary was Rs. 100 only and
 40 nothing compared to the commission that he earned. Ameresekere, the Secretary, specifically says that the organisers or field officers like James Perera were given complete discretion as to the manner in which they set about bringing in business; the Company was only concerned with the result of their efforts and not with the manner in which they sought to obtain business. No instructions were given to field officers as to where the proponent is to be examined and who the doctor to be employed is; that was entirely within their discretion. In these circumstances it can hardly be said that even James Perera was a servant of the Company

No. 8
Judgment of
the District
Court
8-3-51
—continued.

in the sense in which that term is used in order to fix liability upon the master. It is not sought to fix liability on the Company in this case by asserting that the injuries caused was the result of negligence on the part of James Perera in permitting Holsingher to drive. That is not the plaintiff's case as set out in the pleadings. The contention is that James Perera was in the position of the Company itself and had direct control over the driving of Holsingher. If this is correct, then the Company would have been liable if James Perera himself was the driver at the time of the accident. The terms of James Perera's employment make it clear that he cannot be regarded as a servant still less as a person in the position of the defendant Company in so far as Holsingher was concerned. In this connection it will be relevant to cite the observations made by Justice Willes referred to in Clerk and Lindsell on Torts, 10th Ed. at page 106 :

“ I apprehend it to be a clear rule in ascertaining who is liable for the act of a wrongdoer that you must look to the wrongdoer himself or to the first person in the ascending line who is the employer and has control over the work. You cannot go further back and make the employer of that person liable.”

In the cases in which the owner of an omnibus was held liable where the omnibus was driven by a conductor with the driver seated by his side, the basis upon which liability was fixed was the negligence on the part of the driver in allowing the omnibus to be driven by the conductor. It is only where the servant was authorised to do the act and was present at the doing of it that the question arises whether the accident was due to his negligence in permitting some one else over whom he had control to do the act. The basis on which it is sought to make the defendant Company liable in this case is not the same. It is not on the footing that its employee or servant, James Perera, was negligent in permitting Holsingher to drive.

30

It is always a difficult matter in a case of this type to decide whether a person was a servant or not. It is a mixed question of law and fact and the authorities go to show that in deciding the question one has to consider all the relevant terms of the employment. The leading South African case upon the point is *The Colonial Mutual Life Insurance Co., vs. Mc Donald*. The facts of that case are very much similar to the facts of the present case. In that case one Brittain who was described as an agent for the defendant Company, had under his contract to obtain proposals for assurance, to collect premia and to arrange for proponents to be medically examined. He was paid no salary and in that respect his terms were different to the terms of employment of James Perera. He was entitled to a commission and he could do other work which is unconnected with insurance. The society had no right of supervision or control over the methods he employed. He was entitled to obtain proposals or not as he pleased. He used a car which the Society sold to him on the hire-purchase system. While driving the car himself he caused injury to the Medical Practitioner whom he was carrying with a view to

examining proponents for life insurance policies. The injury was the result of his negligence. The Appeal Court held that in those circumstances Brittain could not be regarded as a servant of the Insurance Company. The Roman Dutch Law was fully discussed and it was there stated by Chief Justice de Villiers that there is no difference between the English Law and the South African Law on this question. A passage from Fraser on Master and Servant was quoted with approval and is to the following effect :

No. 8
Judgment of
the District
Court
8-3-51
—continued.

10 “ The true test by which to determine whether one person who renders service to another does so as a contractor or not, is to ascertain whether he renders the service in the course of an independent occupation, representing the will of his employer only as to the result of the work, and not as to the means by which it is accomplished.”

Applying this test to the facts of this case it is quite clear that all that the Company was concerned with was the result of James Perera's efforts. They had no control over the manner in which he set about his employment or the means by which he accomplished the results obtained. Chief Justice de Villiers also quotes with approval a passage by Welford in his book on Accident Insurance :

20 “ The mere fact that one person employs another to do work on his behalf does not establish the relation of master and servant between them. Even the right to give directions as to the work to be done and to superintend its execution, is not in itself sufficient to do so. The essential feature of the relation is that the master has the right to control the servant even in details and to direct not only the work which is to be done, but the manner in which the servant is to do it.”

Justice Wessels in the same case agreed that Brittain could not be regarded as the servant of the Insurance Company. He applied the following
30 test to find out whether a person is acting as servant of another or not. One had to see whether the agent was acting solely in the interests of the principal or whether he was acting in the interests of both the principal and himself. If the latter, he could not be regarded as the servant but as an independent contractor. This is how he puts it :

40 “ We must be careful to see that at the moment the injury is done to a third party, the agent is acting wholly in the business or work of the principal. If he is acting in his own business and while so acting is also acting in the business of his principal and does the injury to a third party the connection between agent and principal is quite remote to hold the principal liable.”

And again :

“ Before a principal can be held liable it must be proved that at the moment when the wrong was done the agent was acting within the terms of his mandate and on behalf of his principal and that at that moment he was actually doing the work or business of his principal rather than his own.”

No. 8
 Judgment of
 the District
 Court
 8-3-51
 —continued.

Applying this test to the facts of the present case, it is quite clear that both Holsingher and James Perera, when they took the plaintiff out in the car to examine proponents were acting in their own interests and also by so doing in the interests of the defendant Company. They were going to profit by this work. They would each be getting commission from the defendant Company. It was their business to introduce proponents, have them medically examined and submit proposals to the defendant Company. They had an absolute discretion as to how they should set about this work and they profited by it as much as did the defendant Company. In these circumstances they could not be held to be servants of the 10 defendant Company. Justice Wessels in that particular case went on further to hold that it made no difference whether the car in which Brittain went was his own car or whether it was a car of the Company. In this case too on the same principles the fact that the Company was the nominal owner will make no difference, it only creates a presumption which has been rebutted. The Roman Dutch Law on the subject has been fully discussed by Barlow in his book on the South African Law of Vacarious Liability. He there refers to the Mac Donald case and suggests that the correct test to apply is to find out whether there exists between the parties a legal relationship which enables one party to give commands 20 to the other and demand obedience to his orders and states that the man whom the law regards as master must have the right of control over the other party. Reference was made by Counsel to a case reported in the South African Law Reports (1934) C. D. p. 265. This case too is discussed by Barlow in his book. It deals with the question of control. In that case where a friend was driving a car belonging to the plaintiff, at her request, and he did it gratuitously for her, it was held that the plaintiff was liable for injuries caused to the defendant as a result of negligent driving by the friend. Although the driver was not paid anything and was performing the duties gratuitously, the plaintiff could choose when to 30 start, where to stop, what route to take, what speed to travel, what passengers and luggage to carry, and so on. This they held was sufficient right of control which in the eyes of the law rendered her friend her servant. Barlow refers to the case of a taxi driver. There too within limits there are certain rights of control, but the taxi driver is not legally bound to follow instructions as to how he should drive between any two particular spots. The passenger can order him to stop at a particular place or to take him to a particular place, but he has no legal right to control his driving or the way in which he should drive. In such a case there is no juristic control which places the passenger in the position of 40 the master and the taxi driver in the position of the servant.

Taking into consideration all the terms of employment of James Perera, one cannot say that he was a servant of the Company at the moment he was driving the car. If the accident had arisen at the time he drove it and before he handed it over to Holsingher the Company in my view would not have been liable. They had no control over his driving. They could not under the terms of his employment have exercised any control with regard to the manner in which he drove the

car or used it. If the Company could not have been held liable, I do not see how the mere fact of his presence in the car when it was driven by Holsingher would make the Company liable.

No. 8
Judgment of
the District
Court
8-3-51
—continued.

The doctor has undoubtedly suffered grievous injury and one sympathises with him, but it seems to me that he has sued the wrong party. However much one extends sympathy to him one cannot merely because of that fact overlook the relationship between the defendant Company and either Holsingher or James Perera. It was not a relationship that creates the liabilities which are imposed upon the master for the acts of
10 his servant. The Company, therefore, cannot be called upon to pay him as claimed. In view of the fact, however, that it is possible for the Appeal Court to take a different view upon the law, I think it necessary that I should assess the damages, although in view of my finding that will not be necessary. The plaintiff is a young doctor who has only been a few years in the profession. He has established a fairly lucrative practice in Mirihana. He says that he was earning about Rs. 1,000 a month. Dr. Paul has given evidence of the injuries he observed and their effect upon the mental capacity of the plaintiff. According to Dr. Paul the disfigurement of the skull is a permanent one. For an unmarried young man this
20 certainly is a matter of great concern. There is a depression right in the middle of the forehead which considerably impairs his appearance. According to Dr. Paul there is a possibility of mental trouble; that after an injury like this plaintiff may suffer from headaches and inability to sleep and in regard to his mental faculties he would be below par. Plaintiff himself says that he does suffer from sleeplessness and from headaches. He also says that he cannot concentrate and when he gets a cold he cannot breathe and his nose gets blocked. He also says he gets tired soon. He is 29 years old. He had been in hospital and one of his legs was dislocated. He still suffers from a limp but this may in course of time disappear. In
30 all the circumstances I cannot say that the amount that he has claimed as damages is excessive. I answer the issues framed as follows :—

1. Yes. Negligence of Holsingher.
2. (a) No.
(b) No.
3. As claimed.
4. Yes. The nominal owner. The actual owner being James Perera.
5. I think plaintiff can maintain the action if issues 1 and 2 had been answered in favour of the plaintiff.

I accordingly dismiss plaintiff's action with costs.

40

(Sgd.) N. SINNATHAMBY,
District Judge.

Judgment pronounced in open Court in the presence of Mr. E. R. de Silva for the plaintiff and Mr. Jayasooriya of De Silva & Mendis for the Defendant.

(Sgd.) N. SINNATHAMBY,
District Judge.

No. 9.

Decree of the District Court.

DECREE.

Class VI.

No. 23098/M.

IN THE DISTRICT COURT OF COLOMBO.

DR. T. H. I. DE SILVA of Mirihana, Nugegoda.....*Plaintiff.**against*TRUST CO. LTD., Gaffoor Buildings, Fort, Colombo.....*Defendant.*

This action coming on for final disposal before N. Sinnathamby, Esq., District Judge, Colombo, on the 8th day of March, 1951, in the presence 10 of Proctor on the part of the Plaintiff and of Proctor on the part of the Defendant, it is ordered and decreed that Plaintiff's action be and the same is hereby dismissed with costs.

(Sgd.) N. SINNATHAMBY,
District Judge.

The 8th day of March, 1951.

 No. 10.

Petition of Appeal to the Supreme Court.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

D. C. Colombo Case No. 23098/M. 20

DR. T. H. I. DE SILVA of Mirihana.....*Plaintiff-Appellant.**vs.*TRUST CO. LTD., Fort, Colombo.....*Defendant-Respondent.**To*

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUSTICES OF
THE SUPREME COURT OF THE ISLAND OF CEYLON.

On this 14th day of March, 1951.

The Petition of Appeal of the plaintiff-appellant abovenamed appearing by Edward R. de Silva, his proctor states as follows :—

1. The plaintiff-appellant brought this action to recover from the 30 defendant-respondent Company a sum of Rs. 50,000/- being damages sustained for injuries suffered by him in a motor accident which occurred on 27th April, 1950.

2. The plaintiff-appellant sought to make the defendant-respondent Company liable to pay the said sum on the ground that the injury suffered by the plaintiff-appellant was due to the negligence of the driver of the vehicle in which the plaintiff-appellant was travelling and that the said driver was an employee of the defendant-respondent Company acting in the course of and within the scope of his employment.

No. 10
Petition of
Appeal to
the Supreme
Court
14-8-51
—continued.

3. The defendant-respondent Company denied that the driver of the vehicle in question was an employee or that at the time of the accident he was acting within the scope of his employment.

10 4. At the trial the following issues were framed :—

(1) were the injuries sustained by the plaintiff on or about 27th April, 1950, due to the negligence of the person driving car No. CY 8850 ?

(2) (a) was the said car at the time being driven by an employee of the defendant Company ?

(b) was the said employee acting within the scope of his employment for the benefit of the defendant Company ?

(3) if issues 1, 2a and 2b are answered in the affirmative to what damages is the plaintiff entitled ?

20 (4) was the defendant Company the owner of the said car on the date in question ?

(5) if not can plaintiff maintain this action ?

5. After trial the learned District Judge by his judgment dated 8th March, 1951, dismissed the plaintiff-appellant's action with costs holding that the plaintiff-appellant had sued the wrong party but assessing the damages suffered by the plaintiff-appellant at Rs. 50,000/- as claimed.

6. Being aggrieved with the said judgment the plaintiff-appellant begs to appeal therefrom to Your Lordship's Court on the following among other grounds that may be urged at the hearing of this appeal :—

30 (a) The said judgment is contrary to law and against the weight of the evidence led in the case ;

(b) It is submitted that the evidence in the case clearly establishes that the driver Holsinger was an employee of the defendant-respondent Company at the time of the accident and was acting within the scope of his employment ;

(c) It is submitted that there is ample evidence to show that the vehicle in question was the property of the defendant-respondent Company and was being used at the time in question primarily for the benefit of the defendant-respondent Company ;

40 (d) It is submitted that the evidence discloses that James Perera was at the relevant time acting as an agent of the defendant-respondent Company and that Holsinger was acting under his directions and for the benefit of the defendant-respondent Company. In the circumstances, it is submitted that the defendant-respondent Company is liable to pay the damages as assessed ;

No. 10
Petition of
Appeal to
the Supreme
Court
14-8-51
—continued.

(e) It is submitted that the authority referred to by the learned District Judge, namely, Colonial Mutual Life Insurance Co. *vs.* Mac Donald, has no application to the facts of this case and in the circumstances the learned District Judge has erred in following the same ;

(f) It is submitted that James Perera was an employee of the defendant-respondent Company at the time of the accident who was using a vehicle belonging to the defendant-respondent Company for its benefit and in the circumstances the defendant-respondent Company must be held liable in as much as the accident was due to the negligence of the driver who was acting under the direction and 10 control of James Perera and as such must be deemed in law to be a servant of the defendant-respondent Company.

Wherefore the plaintiff-appellant prays :—

(a) that Your Lordship's Court may be pleased to set aside the judgment of the learned District Judge and to enter judgment in favour of the plaintiff-appellant as prayed for with costs in both Courts, and

(b) for such other and further relief in the premises as to this Court shall seem meet.

(Sgd.) E. R. DE SILVA,
Proctor for Plaintiff-Appellant. 20

No. 11.

Judgment of the Supreme Court.

S. C. No. 229 of 1951.

D. C. Colombo No. 23098/M.

DR. T. H. I. DE SILVA of Mirihana.....*Plaintiff-Appellant.*
against

TRUST Co., LTD., of Colombo.....*Defendant-Respondent.*

Present : GRATIAEN, J. and H. A. DE SILVA, J.

Argued on : 16th and 23rd October, 1953.

Decided on : 29th October, 1953.

Counsel : N. E. WEERASOORIYA, Q.C., with H. W. JAYAWARDENE and 80 D. R. P. GOONETILLEKE, for the Appellant.

H. V. PERERA, Q.C., with P. NAVARATNARAJAH and W. D. GUNASEKERA, for the Respondent.

GRATIAEN, J.

The plaintiff is a medical practitioner. On 27th April, 1950, he was travelling from Colombo to Jaffna in a Ford motor car belonging to the defendant Company which does business in life insurance. The other occupants of the car were J. A. Pereira (an employee of the Company performing the duties of a " field officer "), E. Holsinger (a free-lance

No. 11
Judgment of
the Supreme
Court
29-10-53

insurance “canvasser”) and a chauffeur directly employed by Pereira. Pereira, Holsingher and the chauffeur took turns at driving and, shortly before the car reached Anuradhapura, when Holsingher was driving, it suddenly went off the road and the plaintiff was seriously injured. Holsingher had apparently fallen asleep at the wheel.

No. 11
Judgment of
the Supreme
Court
29-10-53
—continued.

It is no longer disputed that Holsingher’s negligence was the effective cause of the accident. The learned District Judge assessed the damages payable to the plaintiff (in the event of the Company being held liable) at Rs. 50,000/-, and no complaint has been made against this assessment. The only issue which therefore calls for our decision is whether or not, in the circumstances of this case, the Company is vicariously responsible for the consequences of Holsingher’s negligence.

The plaintiff had since about November, 1949, been engaged from time to time to examine persons proposing to take out policies of life insurance with the Company. He was paid a fee of Rs. 15/- by the Company for each case, and as a general rule the examinations were carried out in his own place of business.

The plaintiff alleged in his plaint that the Company had “engaged (his) services to proceed to Jaffna to examine certain prospective (clients)” and that the accident occurred while he was being conveyed in the Company’s motor car for that purpose. The Company in its answer admitted “that the plaintiff went to Jaffna on the day in question for the purpose of examining certain prospective (clients) in the Northern Province for the defendant Company”, but denied liability. In particular, it pleaded that the car belonged in truth to J. A. Pereira who was “in control and possession of it” at the relevant time and that the driver (*i.e.*, Holsingher) was “under the employ of Pereira”. With regard to the terms on which the plaintiff was engaged to examine the Company’s proposed clients, the Company alleged that “the plaintiff had to proceed to their residences at his own cost and expense”, and that on this particular occasion “Pereira had lent the car to him, together with a driver, in order that the plaintiff’s travelling expenses might be reduced as much as possible”.

The vital issues on which the parties went to trial on the question as to the disputed liability of the Company were as follows :—

- “ 4. Was the defendant Company the owner of the car on the day in question ?
- 2 (a) Was the said car at the time being driven by an employee of the defendant Company ?
- 2 (b) (As eventually amended). Was the said employee acting in the course of and within the scope of his employment and for the benefit of the said Company ? ”

The learned District Judge answered these issues against the plaintiff upon the evidence placed before him, and took the view that the case was on all fours with that which came before the Court of Appeal of South Africa in *Colonial Mutual Life Insurance Co. vs. Macdonald* (1931) S. A. A. D. 412. The plaintiff’s action was accordingly dismissed with costs.

No. 11
 Judgment of
 the Supreme
 Court
 29-10-53
 —continued.

The version of each party as to the circumstances in which the plaintiff happened to be a passenger in the motor car, and as to the relationship between the Company, Pereira and Holsinger in regard to the driving of the motor car, was placed before the trial Judge, and it is implicit in his judgment that Holsinger's evidence has been rejected wherever it came into conflict with that of the plaintiff. Pereira himself, although available as a witness, was not called to support the plea that he had lent the car to the plaintiff for the purposes of the journey.

Certain questions immediately call for an answer. For instance, what was the precise relationship between the Company on the one hand 10 and Pereira and Holsinger respectively on the other? What were the circumstances in which the Company's car was placed at the disposal of Pereira? And what were the circumstances in which the plaintiff was a passenger in the car at the time of the mishap? It is conceded that Pereira had authorised Holsinger to drive the car. Did he do so in circumstances which rendered the Company liable to compensate the plaintiff for the injuries which he sustained in the accident?

The Secretary of the Company has explained how its business affairs were conducted during the relevant period. There was a Board of Directors, but no Managing Director. The Secretary supervised the work 20 in the office, and the "field work" was entrusted to three persons designated "field officers", one of whom was Pereira. These "field officers" were salaried employees, and each of them received as additional remuneration an "over-riding commission" on the amount of business introduced by him. They were "answerable to the Secretary" in a general way, but were given "complete discretion as to the manner in which they set about bringing in business, and.....complete discretion to employ canvassers on a commission basis". Holsinger was one of the canvassers whom Pereira had engaged in the exercise of this authority. Among the duties of a "field officer" was that of "supervising and controlling" the 30 work of canvassers engaged by him.

A medical certificate was required in the case of every person proposing to insure his life with the Company, and, explained the Secretary, "field officers were told that they should select doctors who would examine carefully in the interests of the Company". The plaintiff was one of the doctors selected by Pereira and Holsinger to examine cases introduced by them, and, whenever he was professionally engaged by them for any particular case, he was brought into contractual relationship with the Company for that occasion.

It is clear enough, I think, that Holsinger could not, *in relation to* 40 *his functions as a canvasser*, be regarded as a servant of the Company. Although he was liable, in a certain sense, to be "supervised and controlled" by Pereira, he was nevertheless his own master. He was in truth an independent contractor, so that the Company could not, under normal circumstances, be held responsible for any torts committed by him *qua canvasser*. His position was similar to that of the commercial traveller in *Eggington vs. Reader* (1936) 52 T. L. R. 212.

The learned District Judge took the view that "even Pereira was not a servant of the Company in the sense in which that term is used in order to fix liability upon the master". The reason given for this conclusion was that "no instructions were given to field officers as to where the proponent is to be examined and who the doctor to be employed is; that was entirely within their discretion". The judgment proceeds as follows on this issue :

No. 11
Judgment of
the Supreme
Court
29-10-53
—continued.

10 ".....it is quite clear that all that the Company was concerned with was the results of Pereira's efforts. They had no control over the manner in which he set about his employment or the means by which he accomplished the results obtained."

With respect, I do not accept this line of reasoning. An employer cannot escape liability for his servant's torts by pleading that he had vested in the servant a discretion as to how he should carry out his duties—*Mersey Docks and Harbour Board vs. Coggins & Griffith (Liverpool) Ltd.* (1947) A. C. 1. "It is true" said Lord Porter, "that in most cases no orders as to how a job should be done are given or required: the man is left to do his own work in his own way. But the ultimate question is not what specific orders, or whether any specific orders, were given but *who is* 20 *entitled to give the orders as to how the work should be done*". Applying this test, I would hold that the functions of Pereira, *qua* "field agent" of the Company, were those of a servant under a "contract of service" as distinguished from those of an independent contractor under a "contract of services". He was answerable to the Secretary of the Company, and the unlimited discretion or authority which he was given as to how he should perform his "field duties" for the benefit of his employer could have been withdrawn or curtailed at any moment. It has not even been suggested that the Company had contracted itself out of its right to give him particular directions (if it so desired) as to how he should discharge 30 his duties in the future. In my opinion, the learned Judge misdirected himself as to the true relationship between Pereira and the Company.

I shall now examine the circumstances in which the Company's motor car was made available to Pereira. The Secretary admitted, and it is obvious, that "a field officer cannot function efficiently without a car". Accordingly, the Company purchased this particular vehicle and "loaned" it to Pereira "with a view to helping him to discharge his obligations (as a field officer)"—*vide* the formal agreement D2 dated 30th July, 1948, in terms of which Pereira was handed possession of the car.

40 The question at once arises whether the Company could under any circumstances have been held responsible for the negligence of a person driving the vehicle at a time when it was in Pereira's possession under the "contract of loan" D2. The learned Judge seems to have thought that no such liability could ever attach because "the control.....remained with Pereira and to all intents and purposes Pereira was the owner". In my opinion, this proposition goes too far. The authorities indicate that, in certain instances, the Company might well be liable for the negligence of the driver of the car because of the special relationship

No. 11
Judgment of
the Supreme
Court
29-10-53
—continued.

subsisting between Pereira and the Company. The judgment of the Privy Council in *Canadian Pacific Railway Co. vs. Lockhart* (1942) A. C. 591 establishes that, if the motor car had been negligently driven on any occasion in the course of a journey “for the purposes of, and as a means of execution of the work of” Pereira as an employee of the Company, the Company would have been liable to compensate a third party injured by reason of that negligence. Pereira’s general duties as a field officer necessitated and involved his presence as the Company’s representative in many places, and if he was travelling in the car in order to perform any of these duties, “the means of transport used by him was clearly incidental to the execution of that which he was employed to do”. In *Lockhart’s case*, the car belonged to the servant and not to the employer. In addition, the servant had been expressly forbidden to use a vehicle which was not insured against third-party risks. Nevertheless, the employer was held responsible for the servant’s negligence while driving an uninsured vehicle in the course of and for the purposes of his employment, because “the prohibition did not limit the sphere of his employment”. How much stronger would be a situation in which Pereira was engaged in travelling on the Company’s business in a motor car which had primarily been placed at his disposal for that very purpose? 20

A recent decision of Devlin, J. in *Ormrod vs. Crossville Motor Services Ltd., et al* (1953) 1 W. L. R. 409, which was upheld by the Court of Appeal —(1953) 2 A. E. R. 753—illustrates that the owner of a vehicle may be responsible for the negligence of a person who was driving it if the owner had (or even shared with that other person) *an interest in the journey being undertaken*—or, as Lenning, L.J. put it, if the vehicle was “being used wholly or partly on the owner’s business or for the owner’s purposes”.

I concede that Pereira was not precluded by the terms of the “contract of loan” from using the vehicle for his private purposes if he so desired. If, therefore, the car were negligently driven while Pereira was travelling to his golf club, the Company could not have been held responsible. But if, on the other hand, an accident occurred while he was engaged on the Company’s business in the performance of his legitimate duties as the Company’s employee, the position would have been entirely different.

Let me now examine the circumstances in which the plaintiff happened to be travelling in the motor car at the time of the accident. On that issue, the trial Judge had before him only the conflicting versions of the plaintiff and Holsinger. Pereira’s exclusion from the witness-box is significant, and it is not unreasonable to presume that, if the Company had chosen to call him as a witness, he could not have truthfully carried the defence any further. The difficult questions which the learned Judge was called upon to resolve would not have arisen at all if he believed that the plaintiff had merely borrowed the car for his own exclusive benefit in order to fulfil an undertaking to travel to Jaffna “at his own cost and expense”. Indeed, Mr. H. V. Perera conceded that the acceptance of

the plaintiff's evidence on this aspect of the case is implicit in the judgment under appeal. I shall therefore summarise this evidence, which is to the following effect :—

No. 11
Judgment of
the Supreme
Court
29-10-53
—continued.

On earlier occasions, Pereira and Holsingher had (except in one instance) taken the plaintiff in this identical car to the proposed client's residence if it was not convenient to bring the client to the plaintiff's place of business. The arrangement arrived at with Holsingher, *in the presence and with the approval of Pereira*, was "for the Company to provide the transport". With regard to the particular journey with which this
10 case is concerned, Holsingher, who had previously gone to Jaffna with Pereira on a canvassing tour, wrote a letter P2 dated 19th April, 1950, on business notepaper belonging to the Company, saying "we are at present working at Jaffna, and as promised we are going to give you all the business up here, which would be a very large number of exams. You will have to spend four days with us as the volume of work is going to be large". In due course, Holsingher and Pereira arrived at the plaintiff's house and took him away in the car. It was in the course of this journey that the accident occurred by reason of Holsingher's negligence.

The plaintiff expressly denied that he had "borrowed" the car from
20 Pereira for the purposes of the trip, and explained that, if he had undertaken to provide his own transport, (which he did not) he could very well have used his private motor car. On the contrary, he said, he had made it clear that he would not go unless he was provided with transport "because it was not worth while to go in my car"—the distance involved being 248 miles each way.

It seems to me that, upon the facts as I have set them out, the Company's liability has been clearly established. The resemblance between the present case and that which was considered in *Colonial Mutual Life Insurance Co. vs. Macdonald (supra)* is only superficial, and disappears
30 when one appreciates (a) the true relationship between Pereira and the Company, and (b) the responsible part which Pereira had himself played in the transaction. He had a discretion as to the selection of the doctor who was to examine the cases in Jaffna; he exercised that discretion in favour of the plaintiff. He was a party to the negotiated arrangement that, as a term of the plaintiff's engagement to examine the cases in Jaffna, he should be provided with transport; and he did in fact provide the transport. He had a right to select the person who should drive the car during any stage of the journey; he selected Holsingher. He had the right to decide whether or not in the Company's interests no less than in
40 his own, he should accompany Holsingher and the plaintiff on the trip; and he accompanied them.

At no relevant stage had Pereira divested himself of his character as a servant authorised by the Company to act on its behalf. Throughout the journey, therefore, the car was, through Pereira's instrumentality, being used *on the Company's business*. If through Holsingher's negligence, a pedestrian had been injured during the course of the trip, the Company would have been liable. For, in addition to the contractual arrangement

No. 11
Judgment of
the Supreme
Court
29-10-53
—continued.

to convey the plaintiff to Jaffna, the car was without doubt being used as “ a means of transport which was clearly incidental to the execution of that which (Pereira) was employed to do ”. He was engaged *on the Company's business* while he was travelling to Jaffna.

The duty which was owed to the plaintiff as a passenger in the car cannot logically be placed on a lower plane. He had stipulated that he should be conveyed to Jaffna by the Company, which, through its accredited representative, had engaged him to undertake professional work on its behalf at the other end. Even if that accredited representative, *i.e.*, Pereira, had (unknown to the plaintiff) been prohibited expressly from agreeing to provide such transport, it would have made no difference whatsoever, because a master is responsible for the “ unauthorised act of a servant done in the course of an authorised employment ”—*Citizens Life Association Co. vs. Brown* (1904) A. C. 423 at 428.

In my opinion the judgment under appeal should be set aside. It has not been argued that the learned Judge's estimate on the issue of damages is excessive. I would therefore enter a decree in favour of the plaintiff for Rs. 50,000/- with costs in both Courts.

(Sgd.) E. F. N. GRATIAEN,
Puisne Justice. 20

H. A. DE SILVA, J.
I agree.

(Sgd.) H. A. DE SILVA,
Puisne Justice.

No. 12
Decree of
the Supreme
Court
29-10-53

No. 12.

Decree of the Supreme Court.

ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER
REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

DR. T. H. I. DE SILVA of Mirihana.....*Plaintiff-Appellant.* 30
against

TRUST CO., LTD., Fort, Colombo.....*Defendant-Respondent.*

Action No. 23098/M.

District Court of Colombo.

This cause coming on for hearing and determination on the 16th, 23rd and 29th day of October, 1953, and on this day, upon an appeal preferred by the Plaintiff-Appellant before the Hon. Mr. E. F. N. Gratiaen, Q.C., Puisne Justice, and the Hon. Mr. H. A. de Silva, Puisne Justice of this Court, in the presence of Counsel for the Appellant and Respondent.

It is considered and adjudged that the judgment under Appeal be and the same is hereby set aside and decree is entered in favour of the plaintiff for Rs. 50,000/- with costs in both Courts.

No. 12
Decree of
the Supreme
Court
29-10-53
—continued.

Witness the Hon. Sir Alan Edward Percival Rose, Kt., Q.C., Chief Justice, at Colombo, the 3rd day of November, in the year of our Lord One thousand Nine hundred and Fifty-three, and of Our Reign the Second.

(Sgd.) W. G. WOUTERSZ,
Deputy Registrar, S. C.

No. 13.

10 Application for Conditional Leave to Appeal to the Privy Council.

No. 13
Application
for Condi-
tional Leave
to Appeal to
the Privy
Council
13-11-53

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

In the matter of an application for Conditional Leave to Appeal under the Appeals (Privy Council) Ordinance, Chapter 85.

THE TRUST COMPANY LIMITED, Fort, Colombo.....*Defendant-Appellant.*

S. C. No. 229 (F/1951) *vs.*
D. C. Colombo 23098/M.

DR. T. H. I. DE SILVA of 223, High Level Road, Nugegoda.....*Plaintiff-Respondent.*

20 *To*

THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF
THE SUPREME COURT OF CEYLON.

On this 13th day of November, 1953.

The petition of the Defendant-Appellant abovenamed appearing by Felix Charles Aloysius Domingo De Silva and Noel Servulus Oswald Mendis, practising in partnership in Colombo under the name style and firm of "DE SILVA & MENDIS" and their Assistants John Samuel Parana-vitana, Joseph Domingo Bertram Fernando, Ananda Clarence Dimbulana, Rajeswary Nagalingam, Arthur Francis Bertram de Waas Tillekeratne,
30 Maduwage Diananda de Silva and Shelton Ernest Abeysuriya, its Proctors states as follows :—

1. That feeling aggrieved by the Judgment and Decree of this Hon'ble Court pronounced on the 29th day of October, 1953, the defendant-

No. 18
Application
for Condi-
tional Leave
to Appeal to
the Privy
Council
18-11-53
—continued.

appellant is desirous of appealing therefrom to Her Majesty the Queen in Council.

2. That the said judgment is a final judgment and the matter in dispute on the appeal amounts to or is of the value of Rs. 50,000/- and/or the appeal involves directly or indirectly some claim or question to or respecting some civil right amounting to or of the value of Rs. 5,000/- or upwards.

3. On the direction of this Court the Defendant-Appellant has duly noticed the Plaintiff-Respondent in terms of Rule 2 of the Schedule to the appeals (Privy Council) Ordinance Chapter 85 by affixing on November 10, 1953, a copy of the notice of intention to appeal to Plaintiff-Respondent's last known place of abode namely 223, High Level Road, Nugegoda, and by the publication of the said notice on November 10, 1953, in the "Ceylon Daily News" and "Times of Ceylon". Copies of such publication are annexed hereto marked "A" and "B". The Deputy Fiscal, Colombo, has submitted to this Court his process server's report of service. On November 7, 1953, the Defendant-Appellant also posted to the Plaintiff-Respondent under Registered Express Post two copies of the notice—one to his residential address and the other to his official address. The receipts are annexed hereto marked "C" and "D". The copy of the notice addressed to his official address has been returned in the post to the Defendant-Appellant with the remarks "Refused at Medical Registrar's Office 7-11-53" and "Doctor is on leave therefore I cannot take this letter". The envelope which gave cover to the returned copy of notice is annexed hereto marked "E".

Wherefore the Defendant-Appellant prays for Conditional Leave to appeal against the said judgment of this Court dated the 29th day of October, 1953, to Her Majesty the Queen in Council.

(Sgd.) DE SILVA & MENDIS,
Proctors for Defendant-Appellant. 30

Documents filed with the Petition.

1. Copy of publication of notice in the "Ceylon Daily News" marked "A".
2. Copy of publication of notice in the "Times of Ceylon" marked "B".
3. Postal Article Registered Receipt marked "C".
4. Postal Article Registered Receipt marked "D", and
5. Returned envelope marked "E".

(Sgd.) DE SILVA & MENDIS,
Proctors for Defendant-Appellant.

**Decree granting Conditional Leave to Appeal to the
Privy Council.**

No. 14
Decree
granting
Conditional
Leave to
Appeal to
the Privy
Council
16-3-54

**ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER
REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH.**

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

THE TRUST COMPANY LIMITED, Fort, Colombo.....*Appellant.*
(Defendant-Respondent).
against

10 DR. T. H. I. DE SILVA of 223, High Level Road, Nugegoda.....*Respondent*
(Plaintiff-Appellant).

Action No. 23098/M (S. C. 229 Final). District Court of Colombo.

In the matter of an Application dated 14th November, 1953, for Conditional Leave to Appeal to Her Majesty the Queen in Council by Defendant-Respondent abovenamed against the decree dated 29th October, 1953.

This matter coming on for hearing and determination on the 16th day of March, 1954, before the Hon. Mr. E. F. N. Gratiaen, Q.C., Puisne Justice, and the Hon. Mr. V. L. St. C. Swan, Puisne Justice of this Court, 20 in the presence of Counsel for the Petitioner and Respondent.

It is considered and adjudged that this Application be and the same is hereby allowed upon the condition that the applicant do within one month from this date :—

1. Deposit with the Registrar of the Supreme Court a sum of Rs. 3,000/- and hypothecate the same by bond or such other security as the Court in terms of Section 7 (1) of the Appellate Procedure (Privy Council) Order shall on application made after due notice to the other side approve.

2. Deposit in terms of provisions of Section 8 (a) of the Appellate 30 Procedure (Privy Council) Order with the Registrar a sum of Rs. 300/- in respect of fees mentioned in Section 4 (b) and (c) of Ordinance No. 31 of 1909 (Chapter 85).

Provided that the applicant may apply in writing to the said Registrar stating whether he intends to print the record or any part thereof in Ceylon, for an estimate of such amounts and fees and thereafter deposit the estimated sum with the said Registrar.

With regard to the plaintiff-respondent's application for writ, pending the decision of the Privy Council, this Court directs that writ of execution shall not issue under any circumstances until the 7th April, 1954. If on 40 or before the 6th April, 1954, the defendant-petitioner deposits and

No. 14
Decree
granting
Conditional
Leave to
Appeal to
the Privy
Council
16-3-54
—continued.

hypothecates with the Registrar of this Court a sum of Rs. 50,000/- in cash as security for the due performance of the order of Her Majesty in Council, then execution shall not issue until the final decision of this appeal. In the event of cash not being deposited and hypothecated in terms of this order on or before the 6th April, 1954, the Court directs that the plaintiff-respondent's application for execution be allowed, on the plaintiff-respondent depositing and hypothecating with the Registrar of this Court a sum of Rs. 50,000/- similarly.

Witness the Hon. Mr. C. Nagalingam, Q.C., Acting Chief Justice at Colombo, the 26th day of March, in the year of our Lord One thousand 10 Nine hundred and Fifty-four and of Our Reign the Third.

(Sgd.) W. G. WOUTERSZ,
Deputy Registrar, S. C.

No. 15.

No. 15
Application
for Final
Leave to
Appeal to
the Privy
Council
8-4-54

Application for Final Leave to Appeal to the Privy Council.

IN THE SUPREME COURT OF THE ISLAND OF CEYLON

In the matter of an application for Final Leave to Appeal to Her Majesty in Council in terms of Rule 21 of the Schedule to the Appeals (Privy Council) Ordinance, Chapter 85. 20

DR. T. H. I. DE SILVA of 223, High Level Road, Nugegoda.....*Plaintiff.*

S. C. Application 543. S. C. No. 229 (F/1951)
D. C. Colombo No. 23098.

vs.

TRUST COMPANY LIMITED, Gaffoor Buildings, Fort, Colombo...*Defendant.*

TRUST COMPANY LIMITED, Gaffoor Buildings, Fort, Colombo...*Defendant-Appellant.*

vs.

DR. T. H. I. DE SILVA of 223, High Level Road, Nugegoda.....*Plaintiff-Respondent.* 30

To

**THE HONOURABLE THE CHIEF JUSTICE AND THE OTHER JUDGES OF
THE SUPREME COURT OF THE ISLAND OF CEYLON.**

On this 8th day of April, 1954.

The Petition of the Defendant-Appellant abovenamed appearing by Felix Charles Aloysius Domingo de Silva and Noel Servulus Oswald

Mendis practising in partnership in Colombo under the name style and firm of "DE SILVA & MENDIS" and their Assistants John Samuel Parana-
 vitane, Joseph Domingo Bertram Fernando, Ananda Clarence Dimbulana,
 Rajeswary Nagalingam, Arthur Francis Bertram de Waas Tillekeratne,
 Maduwage Diananda de Silva and Shelton Ernest Abeysuriya, its Proctors
 states as follows :—

No. 15
 Application
 for Final
 Leave to
 Appeal to
 the Privy
 Council
 8-4-54
 —continued.

1. The Defendant-Appellant on the 16th day of March, 1954, obtained Conditional Leave from Your Lordships' Court to appeal to Her Majesty the Queen in Council against the Judgment of this Court pronounced on the 29th day of October, 1953, in case No. S. C. 229 (F/1951)/D. C. Colombo No. 23098.

2. The Defendant-Appellant has in compliance of the conditions in which such leave was granted and in accordance with the order of Your Lordships' Court dated 16th March, 1954 :

- (a) deposited with the Registrar of the Supreme Court on 2nd April, 1954, a sum of Rupees Fifty thousand (Rs. 50,000/-) in cash and hypothecated the same by bond on 5th April, 1954 ;
- (b) deposited with the said Registrar on 6th April, 1954, a sum of Rupees Three thousand (Rs. 3,000/-) in cash and hypothecated the same by bond on 7th April, 1954, as security for the due prosecution of the appeal and the payment of all such costs as may become payable to the Plaintiff-Respondent in the event of the Defendant-Appellant not obtaining an order granting the Defendant-Appellant Final Leave to appeal in accordance with Rule 3 of the Schedule to the Appeals (Privy Council) Ordinance ; and
- (c) deposited with the said Registrar a sum of Rupees three hundred (Rs. 300/-) in cash on 6th April, 1954, in accordance with Section 8 of the Appellate Procedure (Privy Council) Order, 1921.

3. Notice of this application for Final Leave has been given to the Plaintiff-Respondent and his Proctor.

Wherefore the Defendant-Appellant prays :—

- (a) that Your Lordships' Court be pleased to grant the Defendant-Appellant Final Leave to appeal against the said judgment of this Court dated 29th October, 1953, to Her Majesty the Queen in Council.

(Sgd.) DE SILVA & MENDIS,
 Proctors for Defendant-Appellant.

No. 16
Decree
granting
Final Leave
to Appeal to
the Privy
Council
26-5-54

No. 16.

Decree granting Final Leave to Appeal to the Privy Council.

**ELIZABETH THE SECOND, QUEEN OF CEYLON AND OF HER OTHER
REALMS AND TERRITORIES, HEAD OF THE COMMONWEALTH**

IN THE SUPREME COURT OF THE ISLAND OF CEYLON.

**THE TRUST COMPANY LIMITED, Fort, Colombo.....Appellant.
(Defendant-Respondent).**

against

**DR. T. H. I. DE SILVA of 223, High Level Road, Nugegoda....Respondent.
(Plaintiff-Appellant). 10**

Action No. 23098/M. (S. C. 229 Final). District Court of Colombo.

In the matter of an Application by the Defendant abovenamed dated 20th April, 1954, for Final Leave to Appeal to Her Majesty the Queen in Council against the decree of this Court dated 29th October, 1953.

This matter coming on for hearing and determination on the 26th day of May, 1954, before the Hon. Mr. E. F. N. Gratiaen, Q.C., Puisne Justice, and the Hon. Mr. H. N. G. Fernando, Acting Puisne Justice of this Court, in the presence of Counsel for the Applicant and Respondent.

The applicant have complied with the conditions imposed on him by the order of this Court dated 16th March, 1954, granting Conditional Leave 20 to appeal.

It is considered and adjudged that the applicant's application for Final Leave to Appeal to Her Majesty the Queen in Council be and the same is hereby allowed.

Witness the Hon. Sir Alan Edward Percival Rose, Kt., Q.C., Chief Justice at Colombo, the 8th day of June, in the year of our Lord One thousand Nine hundred and Fifty-four, and of Our Reign the Third.

(Sgd.) W. G. WOUTERSZ,
Deputy Registrar, S. C.

PART II.
EXHIBITS.

D 2.

Exhibits
—
D 2
Agreement
between the
Defendant
Co. and
J. A. Pereira
80-7-48

Agreement between the Defendant Co. and J. A. Pereira.

Memorandum of Agreement entered into between The Trust Company, Limited, a company incorporated in Ceylon under Ordinance No. 51 of 1938, and having its registered office at No. 15, First Floor, Gaffoor Buildings, Fort, Colombo, (hereinafter referred to as "the party of the first part") and James Andrew Pereira presently of 36, Welikada, Raja-
10 giriya (hereinafter referred to as "the party of the second part").

Whereas the party of the first part has employed the party of the second part as one of its field officers.

And whereas under the conditions of appointment the party of the second part is obliged to discharge certain obligations.

And whereas with a view to helping the party of the second part to discharge these obligations the party of the first part has loaned to the party of the second part on the security of a promissory note a sum of Rupees Five thousand Eight hundred and Seventy-five only (Rs. 5,875/-) for the express and definite purpose of purchasing a motor car in the
20 name of the party of the first part as its owner till such time the full amount of Rs. 5,875/- referred to, together with interest at six per centum per annum is repaid to the party of the first part.

And whereas the party of the second part has bought Ford Eight Motor Car No. CY 8850 in the name of the party of the first part.

Now this Agreement witnesseth :

- 80
- (1) The party of the second part doth hereby undertake to keep the said motor car in good repair and condition at his own expense, and to have it insured against all risks under a comprehensive cover, the cost of which must be borne by him, and to produce it for inspection whenever he is called upon to do so by the party of the first.
 - (2) The party of the second part doth hereby undertake to pay to the party of the first part at least a sum of Two hundred Rupees (Rs. 200/-) every month until the full amount of Rs. 5,875/- referred to, together with interest, is extinguished.
 - (3) In the event of the party of the second part having commission at least to the value of Rs. 200/- to his credit in the books of the party of the first part at the end of every month, the party of the second part doth hereby authorise the party of the first

Exhibits
D 2
Agreement
between the
Defendant
Co. and
J. A. Pereira
80-7-48
—continued.

part to debit him for the sum of Rs. 200/- referred to against his commission and credit the same to the loan account, but irrespective of this procedure the party of the first part shall have the right to demand the sum of Rs. 200/- referred to from the party of the second part.

- (4) In the event of the party of the second part violating any of the stipulations which by this Agreement he has undertaken to perform the party of the first part shall have the unqualified and undisputed right to seize the said motor car and forbid the use of it forthwith by the party of the second part. 10
- (5) In the event of the said motor car being seized by the party of the first part under clause (4) of this Agreement the party of the second part doth hereby renounce all rights to the said motor car and also to any claims to the monies paid by him to the party of the first part under clauses (2) and (3).
- (6) In the event of the said motor car being seized by the party of the first part under clause (4) of this Agreement the party of the second part doth hereby undertake to pay on demand in full the balance unpaid at date of seizure from the full amount of Rs. 5,875/- together with interest due, as referred to in 20 clause (2).
- (7) When the party of the second part has faithfully discharged his obligations under this Agreement or in terms of the provisions of clause (6) had paid the said balance due and interest, the party of the first part doth hereby undertake to transfer the ownership of the said motor car to the party of the second part.

In witness whereof, the party of the first part has affixed its Common Seal and the party of the second part has put his signature to this Instrument this 30th day of July, 1948. 30

THE TRUST Co., LTD.,

(Sgd) Illegibly.....
Director.

(Sgd) Illegibly.....
Secretary.

Party of the First Part.

(Sgd.) Illegibly
Party of the Second Part.

WITNESSES :

(1) (Sgd.) Illegibly.

40

(2) (Sgd.) Illegibly.

Extract from the Register of Motor Cars.

Distinctive No. : CY 8850.
Date of first Registration : 27-4-48.
Make and Class of Vehicle : Ford Car.

Name and Address of Registered Owner.	Date of Ownership.
The Trust Co., Ltd.,	27-4-48.
15, 1st Floor, Gaffoor Buildings.	
Colombo 1.	

10 I, W. R. O. Fernando, Chief Clerk, Motor Transport Dept., do hereby certify that the foregoing is a true extract from the Register of Motor Cars as appearing on this date in respect of Motor Vehicle No. CY 8850 and the same is issued on the application of Mr. E. R. de Silva, Proctor and Notary Public, No. 250/2, Hultsdorp, Colombo.

(Sgd.) Illegibly.
Chief Clerk.

Office of the Commissioner of Motor Transport,
Colombo, 19th July, 1950.

Prepared by :
20 Checked by :

D 3.

Register of Documents of the Defendant Co. (Page 5).

Date	Document Sealed	No. of Copies	By whom attested
2-9-48	Policies : 3292, 5540, 5541, 5542, 5543, 5544, 5545, 5546, 5547 and 5548	10	Sgd. Illegible Director. Sgd. Illegible Secretary.
3-9-48	Proxy : Selves vs. K. P. Shelton Silva Action on Pro-note. Amount Rs. 500/- Interest		Sgd. Illegible Director. Sgd. Illegible Secretary.
6-9-48	Agreement dated 30-7-48 Parties : Selves vs. Jas. A. Pereira Nature : Terms under which the Company has given the use of Motor Car No. CY 8850 to Jas. A. Pereira	1	Sgd. Illegible Director. Sgd. Illegible Secretary.
9-9-48	Policies : 5549, 5550, 5551, 5552, 5553, 5554, 5555, 5556, 5557, 5558 and 5559	11	Sgd. Illegible Director. Sgd. Illegible Secretary.

Exhibits	Date	Document Sealed	No. of Copies	By whom attested	
D 3 Register of Documents of the Defendant Co. (Page 5). Sept. 1948 —continued.	9-9-48	Agreement dated 27-7-48 <i>Parties</i> : Selves vs. A..... <i>Nature</i> : Terms under which the Company has given the use of Motor Cycle No. 8825	1	Sgd. Illegible <i>Director.</i> Sgd. Illegible <i>Secretary.</i>	
	10-9-48	Proxy : Selves vs. The Consumers Ltd. Action for the recovery of Motor Insurance premium on Motor Vehicles CY 1063, CY 1669, CY 2353, CY 2882, CY 1063, CY 1669. All amounting to Rs. 1,045/63	1	Sgd. Illegible <i>Director.</i> Sgd. Illegible <i>Secretary.</i>	10
	17-9-48	Workmen's Compensation Policy No. 29	1	Sgd. Illegible <i>Director.</i> Sgd. Illegible <i>Secretary.</i>	

D 4
General Ledger of the Defendant Co. (Page 42).
1949

D 4.

General Ledger of the Defendant Co. (Page 42).

New Motor Car A/C

1948	April 26	To R. P. Cash A/C Value of Ford Car No. C.Y. 37 8856	587500	By balance	587500	20
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D 5
Page 17 of the General Ledger of the Defendant Co.
1949

D 5.

Page 17 of the General Ledger of the Defendant Co.

James A. Pereira Ford Car A/c CY 8850.

1949					Rs.	c.
April	20	To Cash A/c	Value of 4 Tyres	CB 33	212	52
		"	Value of 1 Petrol Pump	CB 33	40	00
May	16	"	Repair to car Darley Motor	CB 39	60	00
	30	"	A. A. C. Membership	CB 41	33	00
July	11	"	Repairs to Car	CB 51	681	30
	26	"	Value of Battery	CB 54	100	63 30
Oct.	26	Cash No. 1 A/c	Repair to CY 8850	CB 74	361	75
Dec.	15	Cash No. 1 A/c	Western Union Traders Reps.	CB 85	84	00
May	31	to Sundries A/c.	Insurance to Car	J 8	153	25
					<u>1,676 45</u>	
April	30	By Sundries A/c	Over-riding Commission	J 8	1,095	47

Certified correct :

THE TRUST CO. LTD.,
(Sgd.) Illegibly.....
Accountant.

P 2.

Letter from E. Holsinger to Defendant Co.

THE TRUST Co., LTD.,
Phone : 3600
Grams.: " Cotrust "

P. O. Box 208,
15, First Floor,
Gaffoor Buildings, Colombo.

E. Holsinger,
Resthouse, Kankesanturai.

19-4-50.

Exhibits
P 2
Letter from
E Holsinger
to Defendant
Co.
19-4-50

Dear Doctor,

We are at present working at Jaffna, and as promised we are going
10 to give you all the business up here, which would be a very large number
of exams.

You will have to spend four days with us as the volume of work is
going to be large. We will be requiring your service somewhere about
the 29th or so. Please make the necessary arrangements at your end
and drop me a P. C. c/o Postmaster, Jaffna, informing us of what arrange-
ments you have made.

Wishing you the best,
Yours Sincerely,
(Sgd) EARLE HOLSINGER.

20

D 1.

Extracts from the Police Information Book.**Extract from the M. O. I. B. of Anuradhapura Police Station.**

Page : 214. Para.: 338. Date : 27-4-50. Time : 7-40 a.m.

Information re Accident.

On receipt of information *re* an accident on Puttalam road, P. C. 4941
Seneviratne and 1866 Perera are sent in the Ambulance that arrived just
now to the spot as there are said to be two other injured persons and to
have them removed to Hospital, and leave P. C. 1866 to be at the spot
until arrival of P. S. 1087. Signed P. S. 874, Dissanayake.

30 Extract from the A. C. I. B. of Anuradhapura Police Station.

Page : 83. Para.: 108. Date : 27-4-50. Time : 8 a.m.
P. S. 1087 Out.

Vide para. 338 of M. O. I. B. I am leaving in car CY 2204 for an
inquiry. Signed P. S. 1087 Samat.

D 1
Extracts
from the
Police
Information
Book
27 & 28-4-50

Exhibits

D 1
 Extracts
 from the
 Police
 Information
 Book
 27 & 28-4-50
 —continued.

Page : 83. Para.: 109. Date : 27-4-50. Time : 11 a.m.

P. S. 1087 In.

Vide above I returned after inquiry. G. H. TT. is sent to Hospital for report. Notes in M. P. I. B. Signed P. S. 1087 Samat.

Page : 83. Para.: 110. Date : 27-4-50. Time : 11-30 a.m.

G. H. T. T. Received with D. M. O's Report.

Vide para. above G. H. TT. Nos. 5, 6, 7, and 8 received from Hospital with D. M. O.'s reports which read as follows :—G. H. T. No. 5. Issued to Holsinger reads thus : Lacerated would Blunt Non-grievous. Signed D. M. O., A'pura. G. H. T. No. 6 issued to W. A. Gunapala reads thus : 10 Lacerated would Blunt Non-grievous. Signed D. M. O., A'pura. G.H.T. No. 7 issued to Dr. T. H. De Silva reads thus : Fracture, blunt, grievous. Signed D. M. O., A'pura. G. H. T. No. 8 issued to M. James Perera reads thus : Lacerated would blunt Non-grievous. Signed D. M. O., A'pura. G. H. TT. perfected in book. Signed P. C. 2007.

Extract from the R. I. B. of the Anuradhapura Police Station.

Page : 60. Para.: 2054. Date : 27-4-50. Time : 8-55 a.m.

P. C. 4941 In.

Vide M. O. I. B. Para. 338 I returned from Hospital after taking the injured to the Hospital and produce a Parker Vacumatic Pen which 20 was found on the road in the accident scene and entered in P. R. No. 16 and kept in S. B. Signed P. C. 4941 Seneviratne.

Page : 66. Para.: 2084. Date : 27-4-50. Time : 3 p.m.

Guard duty P. C. 1866 In.

Vide para. 338 of the M. O. I. B. P. C. 1866 Perera returned after guard duty from Karabawa and he reads his notes as follows :—27-4-50 at 9-55 a.m. at Karambawa. The injured person Dr. Silva came to the spot in the ambulance and removed the following articles to Colombo :— Three suitcases, some files, one weighing balance, one telescope, one pair of shoes, and some other articles contained in a tin box. Signed Dr. Silva. 30 Read over and signed in English. Admitted correct. Signed P. C. 1866 read over signed P. C. 1866,

Extract from the M. P. I. B. of Anuradhapura Police Station.

Exhibits

Out for an Accident Inquiry.

Page : 116. Para.: 30. Date : 27-4-50. Time : 8 a.m.

D 1
 Extracts
 from the
 Police
 Information
 Book
 27 & 28-4-50
 —continued.

I am leaving for an accident inquiry in car CY 2204 with P. C. 380.
 Signed P. S. 1087 Samath.

Page : 116. Para.: 31. Date : 27-4-50. Time : 8-15 a.m.

At Puttalam road, arrived near 43 $\frac{1}{4}$ mile at Gorakawa. The car appears to have come from the direction of Puttalam towards A'pura then ran off the road and knocked against a tree on the right side of the road. Which is 8' away from the edge of the road. I find car CY 5840 with its engine bonnet and front wind-screen have been pressed inward owing to the force of the impact with the tree. The switch board is broken into pieces. The wheel of the steering lower portion bent inward. The two front mudguards also pressed in inward and dented. The car is a Ford Anglia 8 H.P. belonging to Trust Company Ltd., Gaffoor Buildings Colombo. All the occupants have been already despatched. I find blood stains all over the car. The road at the spot is quite straight and weather is clear. Licence for 1950 correct. Now I record the statement of a witness who had come to the spot at the time of this incident.

20 WIDANAGEDARA GUNADASA : aged 30 years, Sinhalese, cultivator, residing at Gorakewa present and states :—Today at about 7-30 a.m. when I was in my boutique, I saw this car passing my boutique. A few minutes later I heard a noise. I came out of the boutique to see the noise. I saw this had knocked against the tree and all the four occupants in the car were injured. I questioned from them as to who drove the car and the man who was taken last in the ambulance admitted having driven the car. He also had injuries on his R. leg and some fingers on his right hand. At the time a lorry came from the direction of Puttalam and the lorry was stopped and transported three persons who had sustained serious 30 injuries. I cannot say the speed the car was travelling. It was driven at a moderate speed. This is all. Signed in Sinhalese.

At 9-40 a.m. at the Hospital arrived. I find all the injuries are being attended. Now I record the statement of driver. He has an injury on his left knee and finger on left hand. A injury on right knee.

E. HOLSINGER : 40 years, driver, Burgher, residing at No. 270, Etul Kotte in Welikade present and states :—At about 7 a.m. I was driving car No. CY 5840 from Puttalam towards A'pura along Puttalam road. As we were nearing A'pura the car suddenly pulled on to a side,

Exhibits
 D 1
 Extracts
 from the
 Police
 Information
 Book
 27 & 28-4-50
 —continued.

I tried to take it on to the road in the meantime it knocked against a tree which is by the road side. I was driving the car between 25 and 30 M.P.H. We started our journey from Colombo at about 2-30 a.m. and the car was driven by me from Colombo to Negombo. Then driver Gunapala drove from Negombo to Puttalam. The road was quite clear when the car went off the road. I cannot say why it got suddenly pulled to a side. This is all. Signed in English. Read over and admitted correct. Signed P. S. 1087 Samath.

W. A. GUNAPALA : aged 27 years, Sinhalese, driver holding C/C 99763, residing at No. 270, Etul Kotte present and states : I am the driver of 10 this car. I drove this car from Negombo to Puttalam. At Puttalam Mr. Holsingher started driving up to the place where we met with the accident. I was seated on the front seat. The speed was about 35 miles P.H. I told him not to drive fast as he was speeding and requested him to give the car to me to be driven by me. Suddenly the car went off the road and collided against the tree on the right side of the road. The road was quite clear. I am the driver employed by my master here. Mr. Holsingher also drove the car. This is all. Signed in Sinhalese read over and explained. Admitted correct. Signed P. S. 1087.

JAMES A. PERERA : 47 years, Field Officer, Trust Co., residing at 270, 20 Etul Kotte present and states : I was also coming in this car from Colombo. I was asleep and did not know till the car collided against the tree. Mr. Holsingher was driving the car from Puttalam. The usual driver is Gunapala. He was seated on the front seat, with Mr. Holsingher. This is all. Signed in English. Read over. Dr. T. H. De Silva of dispensary and surgery. Mirihana, Nugegoda. His condition is bad and the D. M. O. informed that the injureds are being despatched to General Hospital. His statement not recorded P. C. 1866 Perera is guarding the car. All their belongings were removed in the ambulance itself. H. TT. 5, 6, 7, 8 sent to Hospital for reports. Signed P. S. 1087 Samath. 30

Statement of Dr. T. H. I. SILVA pasted in the book received from Hospital Post reads as follows :—2-5-50 at 10-35 a.m. General Hospital ward. No. 5 patient. Dr. T. H. I. Silva age 28 years of Mirihana states : On 27-4-50 at about 2 a.m. I left Colombo to Jaffna with Mr. James Perera and E. Holsingher. About 3 miles this side of Anuradhapura, at about 7-30 a.m. the car went off the road and knocked against a tree which was by the side of the road. The car was driven by Mr. Holsingher and was about 25 to 30 miles per hour at the time of the accident. I with James Perera was seated in the rear seat. There was no any other traffic on the road at the time. I cannot say how the car went off the road. I do not 40 know where my head struck. I am having two injuries on my forehead, and dislocation of right hip. The driver Gunapala was in the front seat by the side of Mr. Holsingher. All the four sustained injuries. We were taken to A'pura Hospital and later brought to this Hospital by ambulance. Signed in English. Read over admitted to be correct. Signed P. C. 1825.

Extract from the R. I. B. of Anuradhapura Police Station.

Page : 90. Para.: 2168. Date : 28-4-50. Time : 12-10 p.m.

Guard Duty Out.

P. C. 4941 Seneviratne was instructed and sent out at 12 noon to relieve P. C. 1866 who is guarding the car. Note book signed. Signed P. S. 874.

Exhibits
D 1
Extracts
from the
Police
Information
Book
27 & 28-4-50
—continued.

Extract from the A. C. I. B. of Anuradhapura Police Station.

Page : 64. Para.: 111. Date : 28-4-50. Time : 4-30 p.m.

P. C. 4941 In and produced Report of E.M.C.

- 10 *Vide* R. I. B. para 2168 I am entering my notes from my note book as follows :—On 28-4-50 at 3-20 p.m. The Examiner of Motor Cars arrived and examined the car No. CY 8850 and obtained the report from the Examiner of Motor Cars. Signed P. C. 4941. At 3-40 p.m. I am handing over the car CY 8850 to the Accountant J. A. D. Andrado, Accountant, Trust Company Limited, Gaffoor Buildings, Colombo, present and states : I am taking charge the car No. CY 8850 which is involved in an accident along Puttalam road, Korakawa from P. C. 4941 Seneviratne of A'pura Police with the articles correctly. Signed in English. Dated 28-4-50. Read over and admitted correct. I am now leaving back to station.
- 20 Signed P. C. 4941. This is all. I have recorded in my note book and I am pasting the report at below.

Copy of Report of the E. M. C.

Driver not present. Date and time accident : 27-4-50, 6-30 a.m. Date and time of call : 27-4-50, 5-10 p.m. Date and time of examination : 28-4-50, 3-10 p.m. Engine No. 356849. Make and class of vehicle : Ford car. Distinctive No. CY 8850. To Inspector of Anuradhapura. This is to certify that I examined the abovementioned vehicle in the presence of P. C. 4941 at 43rd milepost Korakawa, Puttalam road, A'pura and submit the following report :—

- 30 Efficiency of hand brakes : damaged. Efficiency of foot brakes : damaged. Mechanical condition of steering gear : damaged. Inefficiency of foot brakes due to : damaged as a result of accident. Inefficiency of hand brakes due to :..... Defective steering gear due to :..... Observations : tyres good. Lights : left side head lamp in order. Screen wiper : defective. Dist. Nos. of other vehicles involved in this accident : nil. Serial Nos. of reports issued on above vehicle : nil. Above vehicle : nil. Report received by P. C. 4941 Seneviratne. Date and time : 28-4-50

Exhibits at 3-35 p.m. Signed in English : E. M. C. Kurunegalle. Date and time :
 D 1 28-4-50, 3-35 p.m. Report pasted and shown to the Reserve P. C. 2099.
 Extracts from the N. B. signed by the Reserve. Signed P. C. 4941 Seneviratne.
 Police Information Book I certify that the foregoing is a true copy.
 27 & 28-4-50 (Sgd.) Illegibly.
 —continued. Police Office, Anuradhapura, Head Clerk.
 December 15, 1950.

P 1
 Bed Head
 Ticket
 9-5-50

P 1.

Bed Head Ticket.

Casualty Ward 5. True Copy. 10
 GENERAL HOSPITAL, COLOMBO.
 DR. T. H. I. DE SILVA.
 Case No.: 15321 P/225 Age 29 Sex M Civil Condition : S Physician/Surgeon : Prof. Paul
 By whom sent : D. M. O. Anuradhapura House Physician/Surgeon : Dr. K. M. C. de Silva
 Name and Address of Parent or Guardian : C. de Silva Thenabadu (Bro.-in-law) Patient's Inventory : Cash nil. Cash nil No. R. B. 1 Suitcase Inform Police. Police informed. Police notified Intd.....
 No. 5, William Place, Mount Lavinia 20
 Address of Patient : Same Birthplace : Same Nationality : Sin. Occupation : Private Doctor Income : Rs. 100/- P. M.
 Religion : Bud. Tikiri Hannidige Inter de
 Name : Dr. T. H. I. de Silva Date : 27-4-50 Time : 3-50 p.m. Ward : 5

NOTES OF ADMITTING MEDICAL OFFICER. 30

Complaint : ? Motor Car Accident. ? Fracture of Femur and Pelvis.
 Duration of Illness :
 Mode of onset and present condition : H. S. to see Case immediately.
 Sgd.....
 Signature.

ABSTRACT OF CASE BY VISITING OFFICER.

Motor car accident dislocation of rt. hip reduced. Depressed fracture of frontal bone causing no symptoms.
 Fracture of base of skull and dislocation of rt. hip. Reduced—H. frontal bone.
 Date of Discharge : 9-5-1950. 40
 12 N
 Diagnosis : Dislocation of rt. hip, fracture of frontal bone and base of skull.
 Stamp Re. 1
 Cancelled.
 Certified true copy :
 Sgd. S. E. WIJETILAKE,
 Surgical Registrar,
 General Hospital, Colombo.
 11-12-50
 Sgd. M. PAUL,
 Signature, Visiting Officer.

Date	Case Notes and Treatment	Exhibits
27-4-50	<p>15321 Dr. de Silva. Motor Car Accident this morning. C/O pain in rt. hip. O/E (1) Depressed fracture of frontal bone over frontal sinuses. (2) ? Dislocation rt. hip joint. Heart : N. A. d. Lungs : Clear. Abd. : Soft. Liver } Spleen } N. P. For X'Ray of Pelvis. (2) At Femur. (3) Skull.</p>	<p>P 1 Bed Head Ticket 9-5-50 —continued.</p>
10		

Rx. Morphia gr. ¼ sos^v given at 8-45 p.m. Atropene sulphate gr. 1/100. Sod. Pentotal GR 5 gr. Bld. stained C. S. F. from left nostril.
 27-4-50.

Date	Diet	Extras	Date	Diet	Extras	Date	Diet	Extras
27/4	2		9/5	N.D.				
28	2							
20 29	4 f							
30	4 f							
1/5	4 f							
2	4 f							
3	4 f							
4	4 f							
5	4/f							
6	4/f							
7	4/f							
8	4/f							

30 15321 DR. T. H. I. DE SILVA Ward 5

Date	Previous history.	Present symptoms.	Diagnosis and Treatment
27/4	Operation No. 34 by Prof. Paul Under pentothal sodium Dislocation Rt. Hip reduced.		Drop of sero. blood in nose Jones method.
	Rx penicillin 300,000 tds. Rx A. T. S. 3000 units x		900,000 units penicillin. 27/4
28/4	M. Temp. 100 4° F Better		Intd..... 27-4-50.
40	Cont. penicillin Rx Luminal gr. i } noeti Asprin gr. v }		900,000 units penicillin Intd..... 28-4-50
		Intd..... 28/4	

Exhibits	Date	Previous history.	Present symptoms.	Diagnosis and Treatment	
P 1 Bed Head Ticket 9-5-50 —continued.	29/4	Cont. penicillin Temp. 99.8°		900,000 units penicillin Intd.....	29/4
		Belateral black eyes No headache No leak from nose.			
	30/4	Ct. penicillin		600,000 units Rms. Intd.....	10
	1/5	Cont. penicillin		600,000 units penicillin Intd.....	30/4 1/5
	2/5/50	For X'Ray of skull and pelvis Cont. penicillin		CL. 600,000 units penicillin Intd..... Intd.....	2/5 2/5/50
	3/5	Cont. penicillin		600,000 units penicillin Intd..... Intd.....	3/5 3/5/50 20
		X'Ray 10271 10272 (1) Reduction complete at rt. hip joint (2) Fracture of frontal bone			
	4/5	Cont. penicillin		600,000 units penicillin Intd..... Intd.....	4/5
	5/5	Cont. penicillin Slight temperature still		600,000 units Issued Intd..... Intd.....	5/5 5/5 30
		Pain in R. knee Nil abnormal On inspection			
	6/5	Cont. penicillin		600,000 units penicillin	
	7/5	Ct. penicillin		600,000 units issued 600,000 units 7/5 6/5 7/5	
	8/5	Omit penicillin			40
		To leave—Discharged Intd..... 9/5 To rest for a further 2 weeks.			

P 4.

Exhibits

P 4
Letter from
Proctor for
Plaintiff to
Defendant
Co.
25-5-50

Letter from Proctor for Plaintiff to Defendant Co.

No. 250/2, Hulftsdorp,
Colombo, 25th May, 1950.

TRUST Co., LTD.,
Gaffoor Buildings, Colombo 1.

Dear Sir,

I am instructed by my client, Dr. T. H. I. de Silva, of Mirihana, Nugegoda, to demand of you the sum of Rs. 50,000/- being damages sustained by him by reason of the rash and/or negligent driving of your 10 motor car CY 8850 by your agent near Anuradhapura on or about the 27th April, 1950.

Should you fail to comply with this request by the 28th instant I have instructions to sue you.

When remitting please include Rs. 21/- being my fee for this letter.

Yours faithfully,
(Sgd.) E. R. DE SILVA.

P 5.

P 5
Letter from
Defendant
Co. to
Proctor for
Plaintiff
29-5-50

Letter from Defendant Co. to Proctor for Plaintiff.

TRUST Co., LTD.,

Ref.: AA/MF/9.

Edward R. de Silva, Esq.,
Proctor & Notary Public,
250/2, Hulftsdorp, Colombo.

Dear Sir,

Re DR. T. H. I. DE SILVA.

Reference your letter of the 25th instant, we write to state that 30 same has been sent to our lawyers for their disposal.

Yours faithfully,
THE TRUST Co., LTD.,
(Sgd.) Illegibly,
Secretary.

(SEAL)

P 6.

Letter from Proctors for Defendant Co. to Proctor for Plaintiff.

DE SILVA & MENDIS,
Proctors & Notaries Public.

P. O. Box 884,
Imperial Bank Buildings,
Colombo, 20th June, 1950.

Exhibits

P 6

Letter from
Proctors for
Defendant
Co. to
Proctor for
Plaintiff
20-6-50

In reply please quote Ref. No. T/84.

E. R. de Silva, Esq.,
Proctor & Notary, 250/2, Hulftsdorp,
Colombo 12.

10 Dear Sir,

DR. T. H. I. DE SILVA—THE TRUST COMPANY LIMITED.

Your letter of the 25th ultimo addressed to our clients, The Trust Co., Ltd., has been referred to us for attention.

Our clients, without prejudice to any legal defences which they might think fit to take against your client in a legal action, have instructed us to request you to be good enough to let us know the extent of the damages sustained by your client in the accident which occurred on the 27th of April, 1950.

We shall be pleased to have your early reply.

20

Yours faithfully,
(Sgd.) DE SILVA & MENDIS.

P 7.

Letter from Proctor for Plaintiff to Proctors for Defendant Co.

EDWARD R. DE SILVA,
Proctor & Notary.

No. 250/2, Hulftsdorp.
Colombo, 23rd June, 1950.

P 7
Letter from
Proctor for
Plaintiff to
Proctors for
Defendant
Co.
23-6-50

Messrs. De Silva & Mendis,
Proctors, Colombo.

D. C. COLOMBO 23098/M. DR. T. H. I. DE SILVA *vs.* TRUST CO.

Dear Sirs,

30 With reference to your letter of the 20th instant action has already been filed against your client for the recovery of a sum of Rs. 50,000/- as damages. The number of the case is as above.

Unless your client is willing to admit liability my client is not prepared to discuss the question of damages.

Yours faithfully,
(Sgd.) E. R. DE SILVA.

Supreme Court of Ceylon
No. 229 (Final) of 1951

District Court, Colombo
No. 28098

*In Her Majesty's Privy Council
on an Appeal from the Supreme Court of Ceylon*

BETWEEN

Dr. T. H. I. de SILVA
of Mirihana.....*Plaintiff-Respondent.*

AND

THE TRUST COMPANY LIMITED
of Colombo.....*Defendant-Appellant.*

RECORD
OF PROCEEDINGS
