

## **BUTARO YAMADA, PLAINTIFF AND APPELLEE, VS. THE MANILA RAILROAD CO., DEFENDANT, AND BACHRACH GARAGE TAXICAB CO., DEFENDANT AND APPELLANT.**

*G.R. No. 10073. December 24, 1915*

Ponente: MORELAND, J.

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### **MORELAND, J.:**

The three cases dealt with in this decision differ in their facts only with respect to the injury suffered by the respective plaintiffs. The law applicable to them is the same and, at the request of counsel, they will be decided at the same time. Plaintiffs claim damages against both the railroad and the garage company because of injuries suffered by them in a collision between a train owned by and operated over tracks belonging to the railroad company and an automobile the property of the Bachrach Garage & Taxicab Co.

On January 2, 1913, the plaintiffs, together with three companions, hired an automobile from the defendant taxicab company for a trip to Cavite Viejo. The automobile was secured at a certain price per hour and was driven and controlled by a chauffeur supplied by the taxicab company. The journey to Cavite Viejo was made without incident but, on the return trip, while crossing the tracks of defendant railroad company in the barrio of San Juan, municipality of Cavite Viejo, the automobile was struck by a train and the plaintiffs injured.

The trial court dismissed the complaint on the merits as to the Manila Railroad Company and held the defendant taxicab company liable for damages to the plaintiffs in various amounts. The taxicab company appealed.

It appears from the record, and was found by the trial court, that the driver of the automobile drove his machine upon the railroad tracks without observing the precautions which ordinary care and prudence would require, without reducing speed and without taking any precaution looking to determining whether there was danger from a train or locomotive. The trial court accordingly found that the driver was guilty of gross negligence and that said negligence was the proximate cause of the accident. It also found that the driver had been, in effect, instructed by the taxicab company to approach and pass over railroad tracks in the manner and form followed and observed on the occasion in question, and that, for that reason, the taxicab company was liable for the damages caused.

Several errors are assigned by the appellant. The first one relates to the finding of the trial court: "That the driver of the automobile did not slacken speed, which was fast, upon approaching the railroad crossing, which was clearly visible and had to be approached on an upward grade, or take any other precaution to avert accident. \* \* \* and I can but conclude that the driver of the automobile was grossly negligent and careless in not taking such precaution as would have notified him of the coming of the train. On the contrary, he proceeded with reckless speed and regardless of possible or threatened danger. If he had been driving the automobile at a proper rate of speed for going over railroad crossings he could easily have stopped before going over the railroad crossing after seeing the train."

The argument of the appellant which is devoted to this finding seems to admit impliedly at least that the driver of the automobile maintained his rate of speed as he approached and went upon the railroad crossing; and that he

took no precaution to ascertain the approach of a train.

The appellant contended on the trial and offered evidence to prove that, on approaching the railroad crossing from the direction in which the automobile was traveling at the time, the view of the railroad tracks in both directions was obstructed by bushes and trees growing alongside thereof, and that it was impossible for a person approaching the crossing, even though on guard, to detect by sight the approach of a train. If that were the case, it was clearly the duty of the driver to reduce the speed of his car and the noise thereof to such an extent that he would be able to determine from the unrestricted and uninterrupted use of all his faculties whether or not a train was near. It is the law that a person must use ordinary care and prudence in passing over a railroad crossing. While we are not prepared to lay down any absolute rule as to what precise acts of precaution are necessary to be done or left undone by a person who may have need to pass over a railroad crossing, we may say that it is always incumbent on him to use ordinary care and diligence. What acts are necessary to constitute such care and diligence must depend on the circumstances of each particular case. The degree of care differs in different cases. Greater care is necessary in crossing a road where the cars are running at a high rate of speed and close together than where they are running at less speed and remote from one another. But in every case: due care should be exercised. It is very possible that where, on approaching a crossing, the view of the tracks in both directions is unobstructed for such a distance as to render it perfectly safe to pass over without the use of any other faculty than sight, such use alone is sufficient and it is not necessary to stop or even to slacken speed or listen. On the other hand, where the view of the tracks is obstructed, then it is a driver's duty to slacken speed, to reduce the noise, if any, of the vehicle, to look and to listen, if necessary, or do any other act necessary to determine that a train is not in dangerous proximity to the crossing.

In the case at bar the appellant's own showing is to the effect that the view of the track in the direction from which the train was coming was obstructed in such manner that neither the track nor a train could be seen as a traveler approached the crossing; and yet, in spite of that fact, the chauffeur drove upon the tracks without investigation or precaution of any kind. The very fact that a train was approaching and was so near as to collide with the automobile is strong evidence of the fact that no precaution<sup>1</sup> were taken to determine that fact. It is undoubted that if the driver had taken the simplest means of permitting his own faculties to exercise themselves fairly, there would have been no accident, as the presence of the train would have been discovered in an instant; but he chose, rather, to give his senses no opportunity to protect him or his passengers and drove on the track at full speed with all the noise which an automobile produces at such speed on an upgrade and the sense of hearing impaired by the rush of the wind. Railroad trains rarely pass over tracks without noise and their presence, generally speaking, is easily detected by persons who take ordinary precautions.

Under this assignment the appellant's main effort is bent to the demonstration of the fact that there was a custom established among automobile drivers of Manila by which they habitually drove their cars over railroad crossings in the manner in which the automobile was driven by defendant's servant on the occasion in controversy. To prove that custom counsel presents the evidence of the president of the defendant company, Mr. Bachrach, who testified on the trial that all of his drivers, including the one in charge of the car on the night of the accident, operated cars in that manner and that it was the custom among automobile drivers generally. Counsel also cites the testimony of the witness Palido, living near the scene of the accident, who testified that, as a general rule, automobiles passed over the railroad crossing without changing speed. This testimony was corroborated by the defendant company's driver who had the automobile in charge at the time of the occurrence. Basing himself on this alleged custom counsel contends that "When a person does what is usual and customary, i. e., proceeds as he and others engaged in a like occupation have been accustomed to proceed, the action cannot be characterized as reckless, nor, strictly speaking, as negligent." To this the obvious reply may be made, for the moment admitting the existence of the custom, that a practice which is dangerous to human life cannot ripen into a custom which will protect anyone

who follows it. To to upon a railroad crossing without making any effort to ascertain the approach of a train is so hazardous an act and one. so dangerous to life, that no one may be permitted to excuse himself who does it, provided injury results. One who performs an act so inherently dangerous cannot, when an accident occurs, take refuge behind the plea that others have performed the same act safely.

Under the second error assigned, the appellant contends with much vigor that the plaintiffs cannot recover for the reason that the negligence of the driver of the automobile, if any, was imputable to them, they having permitted the driver to approach and pass over the railroad crossing without the use of ordinary care and diligence to determine the proximity of a train or locomotive, and having made no effort to caution or instruct him or compel him to take reasonable care in making the crossing. With this contention we cannot agree. We think the better rule, and one more consonant with the weight of authority, is that a person who hires a public automobile and gives the driver directions as to the place to which he wishes to be conveyed, but exercises no other control over the conduct of the driver, is not responsible for acts of negligence of the latter or prevented from recovering for injuries suffered from a collision between the automobile and a train, caused by the negligence either of the locomotive engineer or the automobile driver. (*Little vs. Hackett*, 116 U. S., 366.) The theory on which the negligence of the driver has in some instances been imputed to the occupant of the vehicle is that, having trusted the driver by selecting the particular conveyance, the plaintiff so far identified himself with the owner and his servants that, in case of injury resulting from their negligence, he was considered a party thereto. This was the theory upon which the case of *Thorogood vs. Bryan* (8 C. B., 115) was decided, which is the leading case in favor of the principle contended for by appellant. The Supreme Court of the United States, however, in *Little #,-\**. *Hackett* (116 U. S., 366), had this to say concerning the ground on which the *Thorogood* case was decided: "The truth is, the decision in *Thorogood vs. Bryan* rests upon indefensible ground. The identification of the passenger with the negligent driver or the owner, without his personal cooperation or encouragement, is a gratuitous assumption. There is no such identity. The parties are not in the same position. The owner of a public conveyance is a carrier, and the driver or the person managing it is his servant. Neither of them is the servant of the passenger, and his asserted identity with them is contradicted by the daily experience of the world."

Further discussing the same question the court said: "There is no distinction in principle whether the passengers be on a public conveyance like a railroad train or an omnibus, or be on a hack hired from a public stand in the street for a drive. Those on a hack do not become responsible for the negligence of the driver if they exercise no control over him further than to indicate the route they wish to travel or the places to which they wish to go. If he is their agent so that his negligence can be imputed to them to prevent their recovery against a third party, he must be their agent in all other respects, so far as the management of the carriage is concerned, and responsibility to third parties would attach to them for injuries caused by his negligence in the course of his employment. But, as we have already stated, responsibility cannot, within any recognized rules of law, be fastened upon one who has in no way interfered with and controlled in the matter causing the injury. From the simple fact of hiring the carriage or riding in it no such liability can arise. The party hiring or riding must in some way have cooperated in producing the injury complained of before he incurs any liability for it. 'If the law were otherwise as said by Mr. Justice Depue in his elaborate opinion in the latest case in New Jersey, 'not only the hirer of the coach but also all the passengers in it would be under a constraint to mount the box and superintend the conduct of the driver in the management and control of his team, or be put for remedy exclusively to an action against the irresponsible driver or equally irresponsible owner of a coach taken, it may be, from a coach stand, for the consequences of an injury which was the product of the cooperating wrongful acts of the driver and of a third person, and that, too, though the passengers were ignorant of the character of the driver, and of the responsibility of the owner of the team, and strangers to the route over which they were to be carried.' (*New York, Lake Erie & Western Railroad vs. Steinbrenner*, 47 N. J. L. [18 Vroom], 161, 171.)"

We are of the opinion, therefore, that the rule is as we have stated it. Ordinarily where one rides in a public vehicle with the driver thereof and is injured by the negligence of a third person, to which negligence that of the driver contributes, his contributory negligence is not imputable to the passenger unless said passenger has or is in the position to have and exercise some control over the driver with reference to the matter wherein he was negligent. Whether the person injured exercises any control over the conduct of the driver further than to indicate the place to which he wishes to drive is a question of fact to be determined by the trial court on all of the evidence in the case. (Duval vs. Railroad Co., 134 N. C, 331; Hampel vs. Detroit etc. R. R. Co., 110 Am. St. Rep., 275; Cotton vs. Willmar etc. R. R. Co., 99 Minn., 366; Shultz vs. Old Colony Street Ry. Co., 193 Mass., 309; Wilson vs. Puget Sound Elec. Ry., 52 Wash., 522; Johnson vs. Coey, 237 Ill., 88; Hinds vs. Steere, 209 Mass., 442.)

The appellant assigns as the third error the finding of the trial court "that the defendant Manila Railroad Company was not guilty of negligence which contributed to the causing of the accident complained of."

In this connection it appears that, prior to the beginning of the action now before us, two actions were instituted, both growing out of the accident which forms the basis of the actions before us: (1) A criminal action against the engineer of the train, in which the engineer was acquitted; and (2) a civil action for damages by the garage and taxicab company, the appellant herein, against the defendant railroad company, for damages to the automobile which was destroyed as a result of the accident, in which judgment was for defendant. There is evidence in the record showing that the locomotive engineer gave due and timely signals an approaching the crossing in question. The trial court found that the employees of the railroad company fully performed their duty as the train approached the crossing on the night in question and that, therefore, the railroad company in nowise contributed to the accident. We do not believe that the record will justify us in a reversal of this finding. There is abundant evidence to support it and we have nothing before us by which that evidence may be impeached. That the bell was rung and the whistle was blown on nearing the crossing, giving due and timely warning to all persons approaching, was testified to not only by servants of the corporation but by passengers on the train. We find nothing in the record which materially impairs the credibility of these witnesses or to show that their evidence is improbable or unreasonable; and we would be going far under such circumstances in discarding it and reversing a judgment based thereon.

The appellant under this assignment of error presents other facts which he claims show necessarily that the company was negligent. He asserts: "(1) That this accident occurred in the heart of the barrio of San Juan (Cavite Viejo), within approximately one hundred meters of the railroad station, that is, in a populous community; (2) that the railroad company did not maintain either a flagman or protecting gates at the grade crossing where the accident occurred, while the sign "Railroad Crossing" was broken on the side toward the road; (3) that trees and undergrowth had been permitted to grow on and adjoining the right of way, and houses were constructed thereon, in such manner as to obstruct the view of persons approaching the railroad track until within a few meters thereof; and (4) that the approach to the crossing is twisting, and on either side thereof are ditches about two meters deep."

With respect to the existence of trees and undergrowth on the railroad company's right of way, the evidence is conflicting, plaintiff maintaining and attempting to prove that such trees and undergrowth existed, while defendant company contended and offered evidence to show that no such growth existed at the time of the accident. On this conflict of evidence the trial court found: "Evidence on the part of the defendant Bachrach Garage & Taxicab Co. is to the effect that the view from the crossing along the track towards Manila was obstructed by bushes growing on the railroad right of way along the track, while the preponderance of the evidence discloses that for a distance of twelve or fifteen meters from the crossing a view of the track for a considerable distance is wholly unobstructed, and I can but conclude that the driver of the automobile was grossly negligent and careless in not taking such precaution as would have notified him of the coming of the train. On the

contrary, he proceeded with reckless speed and regardless of possible or threatened danger."

Here again we are met with a contradiction in the evidence of witnesses who, so far as appears, are equally entitled to credit, which conflict has been resolved by the trial court in favor of the witnesses for the defendant railroad company. Counsel for appellant has failed to give any reason why we should accept the testimony of appellant's witnesses rather than those of the railroad company and he has also neglected to point out any error committed by the trial court in making its finding in this regard. A careful examination of the record discloses no reason why the judgment of the trial court on this point should be disturbed, there appearing nothing on which we could base a judgment declaring that the trial court erred in making its decision.

As to the other facts set forth on which appellant predicates negligence on the part of the railroad company, we find them, even if admitted, to be insufficient to establish negligence. It is not negligence on the part of the railroad company to maintain grade crossings, even in populous districts? nor is it negligence not to maintain a flagman at such crossings. It is true that a railroad company is held to greater caution in the more thronged streets of the densely populated portions of the city than in the less frequented streets in suburban parts or in towns; but this does not mean that it is negligence to maintain grade crossing? in such densely populated portions or that it is negligent not to maintain a flagman at crossings located in such districts. It simply means that the company in operating its trains over such crossings must exercise care commensurate with the use of crossings in any given locality.

The main contention of the appellant is based on the claim that, even admitting as proved all of the facts alleged by the plaintiffs, the appellant is not liable. It is maintained that up to the time the accident occurred the defendant taxicab company had fully performed its duty to the public, it being undisputed in the record that the driver was competent and had a long and satisfactory record, having driven cars for the defendant for 5 or 6 years without accident or misadventure, and that his negligence, if any, in attempting to pass over the crossing on the occasion before us, cannot legally be imputed to the taxicab company so as to make it liable for the damages resulting therefrom. In support of this argument the case of *Johnson vs. David* (5 Phil. Rep., 663), is cited as determinative of the question under consideration. The appellant, however, having denied the fact of negligence, we might, before entering on a discussion of the applicability of the principles enunciated in *Johnson vs. David* to the facts before us, repeat what we have already said, that it appears from the record, and was found by the trial court, that the driver of the automobile drove his machine upon the railroad tracks without observing the precautions which, ordinary care and prudence would have required. He made substantially no effort toward ascertaining whether there was danger from a train or locomotive. The trial court found, as was quite necessary under the facts, that the driver was guilty of gross negligence and that such negligence was the proximate cause of the accident. It also found that the taxicab company had permitted its drivers to approach and pass over railroad tracks in the manner and form followed and observed on the occasion in question until it had become a custom among its drivers, known and sanctioned by the company; and that, for that reason, the taxicab company was liable for the damages caused. We are of the opinion that the trial court is fully supported in the finding that the conduct of the officials of the taxicab company, and notably the president thereof, amounted, in law, to a sanction of the custom established among its automobile drivers in passing over railroad crossings. Counsel is met, therefore, at the opening of his discussion on this branch of the case, with the question: Did the defendant taxicab company fully discharge its duty when it furnished a suitable and proper car and selected a driver who had been with the company for 5 or 6 years, and who had not had an accident or misadventure before? We think not. It was the duty of the company not only to furnish a suitable and proper car and select a competent operator, but also to supervise and, where necessary, instruct him properly.

Returning now to the applicability of the case of *Johnson vs. David* to the facts before us:

The Civil Code, in dealing with the liability of a master for the negligent acts of his servant, makes a distinction between private individuals and public enterprises. (Art. 1903, Civil Code.) That article, together with the preceding article, is as follows:

"ART. 1902. A person who by an act or omission causes damage to another when there is fault or negligence shall be obliged to repair the damage so done.

"ART. 1903. The obligation imposed by the preceding article is demandable, not only for personal acts and omissions, but also for those of the persons for whom they should be responsible.

"The father, and on his death or incapacity the mother, is liable for the damages caused by the minors who live with them.

"Guardians are liable for the damages caused by minors or incapacitated persons who are under their authority and live with them.

"Owners or directors of an establishment or enterprise are equally liable for the damages caused by their employees in the service of the branches in which the latter may be employed or on account of their duties.

"The State is liable in this sense when it acts through a special agent, but not when the damage should have been caused by the official to whom properly it pertained to do the act performed, in which case the provisions of the preceding article shall be applicable.

"Finally, masters or directors of arts and trades are liable for the damages caused by their pupils or apprentices while they are under their custody.

"The liability referred to in this article shall cease when the persons mentioned therein prove that they employed all the diligence of a good father of a family to avoid the damage."

These two articles are found under chapter 2, title 16, of the Civil Code, dealing with "obligations which arise from fault or negligence;" and set out the cases, generally speaking, in which the master is liable for the acts of his servant. That chapter also contains articles providing for liability for negligent acts of servants in special cases, among them 1905, which provides that "the possessor of an animal, or the one who uses it, is liable for the damages it may cause, even when said animal escapes from him or strays," but that this liability shall cease "in case the damage should arise from force majeure or from the fault of the person who may have suffered it;" 1906, which declares that "the owner of a game preserve shall be liable for damages caused by the game to neighboring estates, should he not have done what may have been necessary to avoid increase of the same or should he have hindered the efforts of the owners of said estates to hunt;" 1907, which provides for the liability of the owner of a building "for damages which may result from the collapse of the whole or a part thereof, if it should occur through the absence of necessary repairs;" 1908, which states that "owners shall be liable for damages caused by the explosion of machines which may not have been cared for with due diligence, and for kindling of explosive substances, which may not have been placed in a safe and proper place;" "by excessive smoke, which may be noxious to persons or property;" "by the fall of trees, located in places of transit, when not caused by force majeure;" "by the emanations of sewers or deposits of infectious matters, when constructed without precautions proper for the place where they are located;" and "the head of a family who dwells in a house, or in a part of the same, is liable for the damages by the things which may be thrown or which may fall therefrom."

These are the only cases under the Civil Code in which damages may be recovered from the master for the negligent acts of his servant. As is seen from a reading of article 1903, a person being driven about by his servant is not liable for injuries done to others by the servant's negligent acts except under certain circumstances. (Chapman vs. Underwood, 27 Phil. Rep., 374; Johnson vs. David, *supra*.) On the other hand, the master is liable

for the negligent acts of his servant where he is the owner or director of a business or enterprise and the negligent acts are committed while the servant is engaged in his master's employment as such owner.

The distinction made in the Code has been observed, as would naturally be expected, by the decisions of this court. In the case of *Johnson vs. David*, supra, we held that the defendant was not liable for the acts of his servant in negligently driving a horse and carriage against plaintiff, who was at the time riding a bicycle in the streets of Manila, throwing him to the ground and injuring him and his bicycle. It appeared in that case that the vehicle was owned by the defendant, that it was being driven by the defendant's coachman on the private affairs of the owner, that it was not a public conveyance driven for hire or as a part of a business or enterprise. In that case we said: "It would seem, from an examination of these various provisions, that the obligation to respond for the negligent acts of another was limited to the particular cases mentioned; in other words, we are of the opinion and so hold that it was the intention of the legislature in enacting said chapter 2 to enumerate all the persons for whose negligent acts third persons are responsible. Article 1902 provides when a person himself is liable for negligence. Articles 1903, 1904, 1905, 1906, 1907, 1908, and 1910 provide when a person shall be liable for injuries caused, not by his own negligence but by the negligence of other persons or things.

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These sections do not include a liability on the part of the plaintiff for injuries resulting from acts of negligence such as are complained of in the present cause \* \* \* " The case of *Chapman vs. Underwood* (27 Phil. Rep., 374) was similar in its facts and the principles governing it, to that of *Johnson vs. David*. In that case the plaintiff, while about to board a street car, was struck by an automobile which, at the time, was being driven on the wrong side of the street. The automobile was in charge of the servant of the owner, who was present in the automobile at the time the accident occurred. The automobile was not a part of defendant's business nor was it being used at the time as a part or adjunct of any business or enterprise owned or conducted by him. Although the act of the driver was negligent, and was so declared by this court, it was, nevertheless, held that the master was not liable for the results of the act. We said:

"The defendant, however, is not responsible for the negligence of his driver, under the facts and circumstances of this case. As we have said in the case of *Johnson vs. David* (5 Phil. Rep., 663), the driver does not fall within the list of persons in article 1903 of the Civil Code for whose acts the defendant would be responsible.

"Although in the *David* case the owner of the vehicle was not present at the time the alleged negligent acts were committed by the driver, the same rule applies where the owner is present, unless the negligent acts of the driver are continued for such a length of time as to give the owner a reasonable opportunity to observe them and to direct his driver to desist therefrom. An owner who sits in his automobile, or other vehicle, and permits his driver to continue in a violation of the law by the performance of negligent acts, after he has had a reasonable opportunity to observe them and to direct that the driver desist, becomes himself responsible for such acts. The owner of an automobile who permits his chauffeur to drive up the Escolta, for example, at a speed of 60 miles an hour, without any effort to stop him, although he has had a reasonable opportunity to do so, becomes himself responsible, both criminally and civilly, for the results produced by the acts of his chauffeur. On the other hand, if the driver, by a sudden act of negligence, and without the owner having a reasonable opportunity to prevent the act or its continuance, injures a person or violates the criminal law, the owner of the automobile, although present therein at the time the act was committed, is not responsible, either civilly or criminally, therefor. The act complained of must be continued in the presence of the owner for such a length of time that the owner, by his acquiescence, makes his driver's act his own.

"In the case before us it does not appear from the record that, from the time the automobile took the wrong side of the road to the commission of the injury, sufficient time intervened to afford the defendant an opportunity to correct the act of his driver. Instead, it appears with fair clearness that the interval between the turning out to meet and pass the street car and the happening of the accident was so short as not to be sufficient to charge

defendant with the negligence of the driver."

The case of *Bahia vs. Litonjua and Leynes* (30 Phil. Rep., 624), was a case of a different character. There an automobile was being operated by the defendant as a public vehicle carrying passengers from Balayan to Tuy (Province of Batangas) and return for hire. On one of the trips, the machine, by reason of a defect in the steering gear, refused to respond to the guidance of the driver and, as a result, a child was run over and killed. That case, as is seen at a glance, is quite different from the case of *Johnson vs. David* and that of *Chapman vs. Underwood*, in that the automobile was operated as a business or enterprise on which the defendant had entered for gain; and this is the particular distinction which is made in article 1903 of the Civil Code which holds the master responsible for the negligent acts of the servant when the master is the owner "of an establishment or enterprise," and the acts complained of are committed within the scope of the servant's employment in such business. In the case under discussion we held that, in addition to the requirement to furnish and use proper and safe machines, it was the duty of a person or corporation operating automobiles for hire to exercise ordinary care and diligence in the selection of the drivers of his or its automobiles and in supervision over them while in his or its employ, including the promulgation of proper rules and regulations and the formulation and due publication of proper instructions for their guidance in cases where such rules, regulations and instructions are necessary. Discussing article 1903 of the Civil Code, which, as we have seen, not only establishes liability in cases of negligence but also provides when that liability ceases, the court in that case said:

"From this article two things are apparent: (1) That when an injury is caused by the negligence of a servant or employee there instantly arises a presumption of law that there was negligence on the part of the master or employer either in the selection of the servant or employee or in supervision over him after the selection, or both; and (2) that that presumption is *juris tantum* and not *juris et de jure*, and consequently may be rebutted. It follows necessarily that if the employer shows to the satisfaction of the court that in selection and supervision he has exercised the care and diligence of a good father of a family, the presumption is overcome and he is relieved from liability.

"This theory bases the responsibility of the master ultimately on his own negligence and not on that of his servant. This is the notable peculiarity of the Spanish law of negligence. It is, of course, in striking contrast to the American doctrine that, in relations with strangers, the negligence of the servant is conclusively the negligence of the master.

"In the case before us the death of the child caused by a defect in the steering gear of the automobile immediately raised the presumption that Leynes was negligent in selecting a defective automobile or in his failure to maintain it in good condition after selection and the burden of proof was on him to show that he had exercised the care of a good father of a family."

In that case we further said: "From the commencement of the use of the machine until the accident occurred sufficient time had not elapsed to require an examination of the machine by the defendant as a part of his duty of inspection and supervision. While it does not appear that the defendant formulated rules and regulations for the guidance of the drivers and gave them proper instructions, designed for the protection of the public and the passengers, the evidence shows, as we have seen, that the death of the child was not caused by a failure to promulgate rules and regulations. It was caused by a defect in the machine as to which the defendant has shown himself free from responsibility."

We, therefore, see that the taxicab company did not perform its full duty when it furnished a safe and proper car and a driver with a long and satisfactory record. It failed to comply with one of the essential requirements of the law of negligence in this jurisdiction, that of supervision and instruction, including the promulgation of proper rules and regulations and the formulation and publication of proper instructions for their guidance in cases where such rules and regulations and instructions are necessary. To repeat,<sup>1</sup> it was found by the trial court, and that

finding is fully sustained by the record, that it was the custom of the driver who operated the machine on the night of the accident, to approach and pass over railroad crossings without adequate precautions, and that such custom was known to and had been sanctioned by the officials of the taxicab company, the president of the company testifying that none of its drivers, especially the one who operated the car on the night of the accident, were accustomed to stop or even reduce speed or take any other precaution in approaching and passing over railroad crossings, no matter of what nature, unless they heard "the signal of a car." He testified that he himself had ridden behind several of his drivers, among them the one who handled the automobile on the night of the accident, and that it was their settled practice, to which he made no objection and as to which he gave no instructions, to approach and pass over railroad crossings without any effort to ascertain the proximity of a train. These facts and circumstances bring the case within the doctrine enunciated in the *Litonjua* case to which reference has already been made, and, at the same time, remove it from that class of cases governed by *Johnson vs. David*. Not only has the defendant taxicab company failed to rebut the presumption of negligence arising from the carelessness of its servant, but it has, in effect, made those negligent acts its own by having observed and known the custom of its drivers without disapproving it and without issuing instructions designed to supersede it.

We are of the opinion that the trial court erred in fixing the amount of damages which the plaintiffs suffered. Under the law, each of the plaintiffs is entitled to recover the damages which he actually suffered, consisting in loss of time, doctors' bills and hospital bills and medicines, and any other item of expense which it was found necessary to undergo by reason of the damages sustained.

The plaintiff Butaro Yamada is entitled to be reimbursed for his hospital bill of P49, for the P50 which he paid to Dr. Strahan, and for the loss of time which he suffered at the rate of P100 a month. The trial court allowed him for certain alleged fees of doctors and expenses in hospitals and at hot springs in Japan. He was also allowed P150 alleged by him to have been paid to a Japanese doctor in Manila. We do not believe that the record warrants these allowances. As to the expenses in Japan, we may say that the injury occurred to plaintiff on the 2d of January and he remained in Manila for nearly 6 months before going to Japan. According to the testimony of Dr. Strahan the plaintiff was in good physical condition long before he left this country for Japan. His testimony is to the effect that the plaintiff suffered no permanent injuries, the damage being limited to temporary shocks and bruises, and that he would be ready for his usual occupation in about 3 months. According to plaintiff's own testimony he went back to work 2 months after the injury, but, claiming he still felt pains, went to Japan. We do not believe that we ought to accept the plaintiff's bare statement as to his physical condition after leaving the Philippine Islands in defiance of the testimony of Dr. Strahan as to his physical condition 3 months after the injury was received and particularly in view of the fact that he returned to work at the end of 2 months. As to the P150 alleged to have been paid to a Japanese doctor in Manila, we have grave doubts whether he has sufficiently proved that item of expenditure. He does not give the name of the physician to whom he paid the money and he presents no receipt or voucher from the person whom he paid. He made no memorandum of the payment at the time or of the name of the person to whom he paid it or of the date on which it was paid. All of his testimony relating to the items which constitute his damage was based on a memorandum made from memory on the morning of the trial. It seems to us that where the sources of knowledge are to so large an extent within the knowledge and control of the person who presents the evidence, he should be held rather strictly to presenting the best evidence that the circumstances permit. If he had offered the Japanese doctor as a witness or if he had even produced receipts from him, the matter would have borne quite a different aspect.

We are accordingly of the opinion that the judgment in favor of this plaintiff should consist simply of the loss of time, amounting to 2 months at P100 a month, his hospital bill of P49 and his doctor's bill of P50, in all P299, with costs.

With respect to the plaintiff Takutaru Uyehara, the judgment in his favor must also be modified. Concerning his condition we have substantially the same testimony by the same doctor that we had in the case of Yamada. There were no permanent injuries. The plaintiff suffered merely from shock and bruises. He was quite recovered in 3 months. It appears that he was earning P200 a month at the time of his injury and that his hospital expense, including attendance of a physician, was P350. We are satisfied from the record that he is entitled to P600 for 3 months' loss of wages and to P350 for hospital expenses and medical attendance. As to the claim for P150 paid to a Japanese doctor, we have in substance the same circumstances found in connection with the claim of the plaintiff Yamada,—no name, no date, no memorandum, no receipt; nothing but the testimony of the plaintiff himself based upon data prepared from memory. It is worthy of note also that both this plaintiff and plaintiff Yamada claim to have paid exactly the same amount to Japanese doctors in Manila.

Judgment is hereby rendered in favor of the plaintiff Takutaru Uyehara for the sum of P950, and costs.

With respect to the judgment in favor of the plaintiff Kenjiro Karabayashi, we are clear that it must be reduced in amount. This plaintiff was able, immediately after the accident occurred, to move about readily and to assist his injured companions. He did not go to a hospital, or, so far as appears, consult a physician until some time after the accident. He alleges that he paid to Japanese doctors P310 and to massage doctors P130, and that he paid P365 for medicines. The injury was received on the 2d of January, 1913, and this action was commenced in October of the same year. It seems to us incredible that the plaintiff, who suffered and suffers from no physical injury testified to by any physician, should have paid out during that time more than P800 for medicines and doctors. That sum exceeds the sums claimed to have been paid out by the other plaintiffs, who were so badly injured that they were carried in a semiconscious condition to the hospital and were unable to move without assistance for some days.

This plaintiff complains of loss of memory as the only result of his injuries and claims that he is unable to obtain a salary equivalent to that which he was receiving before the accident. He presents no evidence of such loss of memory except his own statement, his physical condition at the time of the trial being apparently perfect and there being at that time no evidence, as he himself admitted, of loss of memory. He presented no doctor to testify as to services rendered, indeed, he does not even furnish the name of the person to whom the money was paid, and he shows no receipts and produces no evidence except his own statement with respect to the amount paid out for medicines. We believe that, under this testimony, no damages should be allowed to this plaintiff except possibly salary for the short period during which, by reason of shock, he may have been unable to render active service. He testified that he lost two and one-half months' time, during which he did not work at all, and that his services were worth P160 a month.

The judgment of the Court of First Instance with respect to this plaintiff, Kenjiro Karabayashi, is modified and judgment in his favor and against the Bachrach Garage & Taxicab Co. for P400 is hereby decreed, with costs.

It may be urged that the reductions in the amounts allowed the several plaintiffs by the trial court are arbitrary, the evidence as to the damages sustained being uncontradicted and the trial court having accepted it as true and having based its judgment thereon. It is clear, however, that we are in no way interfering with the rule so many times laid down by this court that we will not interfere with the judgment of the trial court as to the credibility of witnesses except where it appears that the court overlooked or misapplied facts or circumstances of weight and influence appearing in the case. Here the trial court seems to have overlooked those facts and circumstances to which we have adverted and which we have made the basis of the modification. It nowhere appears in the decision of the trial court or elsewhere in the record that it took any of those facts and circumstances into consideration. So ordered.

Arellano, C.J., Torres, Carson, and Araullo, JJ., concur.

Johnson, J., concurs in the result.

Trent, J., did not sit in the case.

Judgments modified.

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