

IGNACIO DEL PRADO, PLAINTIFF AND APPELLEE, VSU MANILA ELECTRIC CO., DEFENDANT AND APPELLANT.*G.R. No. 29462. March 07, 1929*

Ponente: STREET, J.

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This action was instituted in the Court of First Instance of Manila by Ignacio del Prado to recover damages in the amount of P50,000 for personal injuries alleged to have been caused by the negligence of the defendant, the Manila Electric Company, in the operation of one of its street cars in the City of Manila. Upon hearing the cause the trial court awarded to the plaintiff the sum of P10,000, as damages, with costs of suit, and the defendant appealed.

The appellant, the Manila Electric Company, is engaged in operating street cars in the City of Manila for the conveyance of passengers; and on the morning of November 18, 1925, one Teodorico Florenciano, as appellant's motorman, was in charge of car No. 74 running from east to west on R. Hidalgo Street, the scene of the accident being at a point near the intersection of said street and Mendoza Street. After the car had stopped at its appointed place for taking on and letting off passengers, just east of the intersection, it resumed its course at a moderate speed under the guidance of the motorman. The car had proceeded only a short distance, however, when the plaintiff, Ignacio del Prado, ran across the street to catch the car, his approach being made from the left. The car was of the kind having entrance and exit at either end, and the movement of the plaintiff was so timed that he arrived at the front entrance of the car at the moment when the car was passing.

The testimony of the plaintiff and of Ciriaco Guevara, one of his witnesses, tends to show that the plaintiff, upon approaching the car, raised his hand as an indication to the motorman of his desire to board the car, in response to which the motorman eased up a little, without stopping. Upon this the plaintiff seized, with his left hand, the front perpendicular handpost, at the same time placing his left foot upon the platform. However, before the plaintiff's position had become secure, and even before his raised right foot had reached the platform, the motorman applied the power, with the result that the car gave a slight lurch forward. This sudden impulse to the car caused the plaintiff's foot to slip, and his hand was jerked loose from the handpost. He therefore fell to the ground, and his right foot was caught and crushed by the moving car. The next day the member had to be amputated in the hospital. The witness, Ciriaco Guevara, also stated that, as the plaintiff started to board the car, he grasped the handpost on either side with both right and left hand. The latter statement may possibly be incorrect as regards the use of his right hand by the plaintiff, but we are of the opinion that the finding of the trial court to the effect that the motorman slowed up slightly as the plaintiff was boarding the car and that the plaintiff's fall was due in part at least to a sudden forward movement at the moment, when the plaintiff put his foot on the platform is supported by the evidence and ought not to be disturbed by us.

The motorman stated at the trial that he did not see the plaintiff attempting to board the car; that he did not accelerate the speed of the car as claimed by the plaintiff's witnesses; and that he in fact knew nothing of the incident until after the plaintiff had been hurt and some one called to him to stop. We are not convinced of the

complete candor of this statement, for we are unable to see how a motorman operating this car could have failed to see a person boarding the car under the circumstances revealed in this case. It must be remembered that the front handpost which, as all witnesses agree, was grasped by the plaintiff in attempting to board the car, was immediately on the left side of the motorman.

With respect to the legal aspects of the case we may observe at the outset that there is no obligation on the part of a street railway company to stop its cars to let on intending passengers at other points than those appointed for stoppage. In fact it would be impossible to operate a system of street cars if a company engaged in this business were required to stop any and everywhere to take on people who are too indolent, or who imagine themselves to be in too great a hurry, to go to the proper place for boarding the cars. Nevertheless, although the motorman of this car was not bound to stop to let the plaintiff on, it was his duty to do no act that would have the effect of increasing the plaintiff's peril while he was attempting to board the car. The premature acceleration of the car was, in our opinion, a breach of this duty.

The relation between a carrier of passengers for hire and its patrons is of a contractual nature; and a failure on the part of the carrier to use due care in carrying its passengers safely is a breach of duty (*culpa contractual*) under articles 1101, 1103, and 1104 of the Civil Code. Furthermore, the duty that the carrier of passengers owes to its patrons extends to persons boarding the cars as well as to those alighting therefrom. The case of *Cangco vs. Manila Railroad Co.* (38 Phil., 768), supplies an instance of the violation of this duty with respect to a passenger who was getting, off of a train. In that case the plaintiff stepped off of a moving train, while it was slowing down in a station, and at a time when it was too dark for him to see clearly where he was putting his feet. The employees of the company had carelessly left watermelons on the platform at the place where the plaintiff alighted, with the result that his feet slipped and he fell under the car, where his right arm was badly injured. This court held that the railroad company was liable for breach of positive duty (*culpa contractual*), and the plaintiff was awarded damages in the amount of P2,500 for the loss of his arm. In the opinion in that case the distinction is clearly drawn between a liability for negligence arising from breach of contractual duty and that arising under articles 1902 and 1903 of the Civil Code (*culpa aquiliana*).

The distinction between these two sorts of negligence is important in this jurisdiction, for the reason that where liability arises from a mere tort (*culpa aquiliana*), not involving a breach of positive obligation, an employer, or master, may exculpate himself, under the last paragraph of article 1903 of the Civil Code, by proving that he had exercised due diligence to prevent the damage; whereas this defense is not available if the liability of the master arises from a breach of contractual duty (*culpa contractual*). In the case before us the company pleaded as a special defense that it had used all the diligence of a good father of a family to prevent the damage suffered by the plaintiff; and to establish this contention the company introduced testimony showing that due care had been used in training and instructing the motorman in charge of this car in his art. But this proof is irrelevant in view of the fact that the liability involved was derived from a breach of obligation under article 1101 of the Civil Code and related provisions. (*Manila Railroad Co. vs. Compania Trasatlantica and Atlantic, Gulf & Pacific Co.*, 38 Phil., 875, 887; *De Guia vs. Manila Electric Railroad & Light Co.*, 40 Phil., 706, 710.)

Another practical difference between liability for negligence arising under article 1902 of the Civil Code and liability arising from negligence in the performance of a positive duty, under article 1101 and related provisions of the Civil Code, is that, in dealing with the latter form of negligence, the court is given a discretion to mitigate liability according to the circumstances of the case (art 1103). No such general discretion is given by the Code in dealing with liability arising under article 1902; though possibly the same end is reached by courts in dealing with the latter form of liability because of the latitude of the considerations pertinent to cases arising under this article.

As to the contributory negligence of the plaintiff, we are of the opinion that it should be treated, as in *Rakes vs.*

Atlantic, Gulf and Pacific Co. (7 Phil., 359), as a mitigating circumstance under article 1103 of the Civil Code. It is obvious that the plaintiff's negligence in attempting to board the moving car was not the proximate cause of the injury. The direct and proximate cause of the injury was the act of appellant's motorman in putting on the power prematurely. A person boarding a moving car must be taken to assume the risk of injury from boarding the car under the conditions open to his view, but he cannot fairly be held to assume the risk that the motorman, having the situation in view, will increase his peril by accelerating the speed of the car before he is planted safely on the platform. Again, the situation before us is one where the negligent act of the company's servant succeeded the negligent act of the plaintiff, and the negligence of the company must be considered the proximate cause of the injury. The rule here applicable seems to be analogous to, if not identical with that which is sometimes referred to as the doctrine of "the last clear chance" In accordance with this doctrine, the contributory negligence of the party injured will not defeat the action if it be shown that the defendant might, by the exercise of reasonable care and prudence, have avoided the consequences of the negligence of the injured party (20 R. C. L., p. 139; Carr vs. Interurban Ry. Co., 185 Iowa, 872; 171 N. W., 167). The negligence of the plaintiff was, however, contributory to the accident and must be considered as a mitigating circumstance.

With respect to the effect of this injury upon the plaintiff's earning power, we note that, although he lost his foot, he is able to use an artificial member without great inconvenience and his earning capacity has probably not been reduced by more than 30 per centum. In view of the precedents found in our decisions with respect to the damages that ought to be awarded for the loss of a limb, and more particularly Rakes vs. Atlantic, Gulf and Pacific Co. (7 Phil., 359); Cangco vs. Manila Railroad Co. (38 Phil., 768); and Borromeo vs. Manila Electric Railroad and Light Co. (44 Phil., 165), and in view of all the circumstances connected with the case, we are of the opinion that the plaintiff will be adequately compensated by an award of P2,500.

It being understood, therefore, that the appealed judgment is modified by reducing the recovery to the sum of P2,500, the judgment, as thus modified, is affirmed. So ordered, with costs against the appellant.

Malcolm, Villamor, Ostrand, Romualdez, and Villa-Real, JJ., concur.

DISSENTING

JOHNSON, J., with whom concurs JOHNS, J.:

This appeal presents a hard case, whichever way it is decided.

I read the entire record in this case before it was submitted to the second division for decision. I was then the ponente. I was then convinced, as I am now, after a re-examination of the record, that the judgment of the lower court should be revoked for the following reasons:

- (a) That the motorman managed the car carefully and with ordinary prudence at the moment the alleged accident occurred;
- (b) That the appellee acted with imprudence and lack of due care in attempting to board a street car while the same was in motion; and
- (c) That he contributed to his own injury, without any negligence or malice or imprudence on the part of the defendant.

There is nothing in the record which even remotely justifies a contribution of damages between the appellee and the appellant. The appellee should be required to suffer the damages which he himself, through his own negligence, occasioned, without any negligence, imprudence or malice on the part of the appellant.

Therefore, the judgment of the court a quo should be revoked, and the appellant absolved from all liability under the complaint.

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