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for thirty years. That being so I find no ground upon which any part of the plaintiff's claim could be awarded. I hold that it entirely fails and must now be dismissed with costs.

Attorneys for the plaintiff: *Messrs. Mansukhlal, Jamsetji and Hiralal.*

Attorneys for the defendants: *Messrs. Mirza, Mirza and Mangaldas; Mulji, Khambata and Thakoredas; Nadirshaw and Darasha.*

Suit dismissed.

H. S. C.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913.
August 26.

SORABJI HORMUSJI BATLIVALA (DEFENDANT), APPELLANT, *v.* JAMSHEDJI MERWANJI WADIA (PLAINTIFF), RESPONDENT.*

Negligence—Driving motor-car at excessive speed—Injury to bare licensee being driven in car—Liability of car owner—Quantum of damages.

The defendant was driving a party of relatives and friends (including the plaintiff) in his motor-car from Deolali to Igatpuri. The road at one point turned somewhat abruptly to the left and crossed the lines of the Great Indian Peninsula Railway by means of a level crossing; after the level crossing the road turned abruptly to the right. The defendant who was driving his car at an excessive speed drove over the crossing at the time that a train was there due. Though it got over the crossing safely the car failed to take the abrupt turning to the right and jumping an embankment rushed into a paddy field below. The occupants of the car, with the exception of the defendant, were thrown out with much violence and the plaintiff received such grave injuries as would render him a cripple for the rest of his life. The plaintiff sued to recover damages caused to him by the defendant's negligence.

Held, that putting the skill and caution exigible from the defendant at the very lowest, he was grossly and culpably negligent, that he was liable in damages to the plaintiff and that in assessing damages the same principles

* O. C. J. Appeal No. 6 of 1913; Suit No. 684 of 1911.

should be applied whether the person who had incurred the liability was a private individual or a wealthy company.

IN September 1910 the plaintiff was staying with a friend of his, one Kapadia, at Deolali. The defendant lived with his relatives in the adjoining bungalow. On the morning of the 18th September 1910 these two neighbouring families organised an excursion to Igatpuri and back. The party was accommodated in two cars, one of them belonging to Kapadia and the other a steam car to the defendant. The plaintiff was given a seat in the defendant's car.

At one place the road from Deolali to Igatpuri turns sharply to the left and crosses the lines of the Great Indian Peninsula Railway by means of a level crossing; after the crossing the road turns abruptly to the right. The turning to the right would not be seen by the driver of a car until he was on the level crossing and his view would be impeded by a railway gateman's lodge which at the time in question stood at the far side of the crossing.

It appeared that the defendant was driving his car at an excessive speed when he reached the crossing, at which time a railway train was due to pass and the signal at the crossing had already been lowered in favour of the train, and that the defendant, whether owing to the previous excessive speed of his car or to his attempt to get clear of the crossing before the passing train, failed to negotiate the sharp turn to the right in the road beyond. The car left the road, jumped down an embankment nearly ten feet high and rushed for a considerable distance into a paddy field below. Owing to the impact all the occupants of the car with the exception of the defendant were thrown out and one of them was killed on the spot.

The plaintiff received serious injuries, consisting of fractures of the shin bone of the left leg, of the hip

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socket and of the pelvis and dislocation of the left thigh bone. He was brought to Bombay and was kept at Dr. Masina's hospital for three months for treatment. He was next removed to his sister's house where he was attended to by several doctors for three months. He was then advised to go to England, which he did. He was advised that a cure would never be effected and that he would be a cripple for life.

On the 19th August 1911 the plaintiff sued to recover Rs. 69,000 as damages from the defendant.

The defendant denied negligence and also his liability to pay any damages to the plaintiff.

The cause was tried by Mr. Justice Macleod who on the 2nd of December 1912 gave judgment in favour of the plaintiff. On the question of negligence the learned Judge held that the defendant was unquestionably negligent and that the accident was due to the defendant approaching the crossing at an excessive speed.

By a separate judgment delivered on the 3rd of December 1912 the learned Judge, after reviewing the evidence relating to the various expenses incurred by the plaintiff, awarded the plaintiff Rs. 38,000 by way of damages.

The defendant appealed.

Setalvad, with *Davar* and *Mody*, for the appellant.

Strangman, Advocate General, with *Wadia* and *Bahadurji*, for the respondent.

Setalvad:—The plaintiff was a mere licensee. See *Moffatt* v. *Bateman*[1]; *Giblin* v. *McMullen*[2]; *Lagunas Nitrate Company* v. *Lagunas Syndicate*[3]; *Harris* v. *Perry & Co.*[4].

(1) (1869) L. R. 3 P. C. 115.
(2) (1868) L. R. 2 P. C. 317.
(3) [1899] 2 Ch. 392.
(4) [1903] 2 K. B. 219.

Strangman was heard only on an item of £103 for hotel and other expenses.

C. A. V.

BATCHELOR, J. :—The suit which gives rise to this appeal was filed to obtain damages for personal injuries sustained while the plaintiff, as a bare licensee, was being driven gratuitously by his friend, the defendant, in the defendant's motor-car.

The learned trial Judge, Macleod J., has found that the defendant is liable on the ground of negligence, and has awarded to the plaintiff the sum of Rs. 38,000 as damages. The defendant now appeals from that decree.

It will be convenient to use the word "accident" in reference to the occurrence, but the word must be understood in its popular sense, and not as indicating any suggestion as to whether the occurrence was, or was not, avoidable. The accident, then, occurred while the defendant was driving a party of relatives and friends in his white steam car from Deolali to Igatpuri. On the way there is a level crossing over the G. I. P. Railway and this crossing admittedly is such as needs some degree of care to pass in safety. Coming from Deolali it is approached on a fairly straight road, but the crossing itself turns to the left somewhat abruptly from the road, and, when once the crossing is passed, the road swings round sharply to the right: see the plan, Exhibit B. Moreover, as this plan and the photographs on the record show, this sharp turn of the road to the right is invisible to an approaching driver until he is practically over the level crossing; and his view to his front is further impeded by a railway gateman's lodge situated on the far side of the crossing to the approaching driver's right hand. Admittedly the defendant's car, for one reason or another, failed to take the sharp

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right-handed turn after the crossing: instead of doing so, it preserved its direction in practically a straight line, with the result that just beyond the crossing it left the road and ran, or jumped, down the bank to the left into the paddy field beyond. Except the defendant himself, who was at the wheel and thus had some support, all the occupants of the car were thrown out with much violence, and were more or less seriously injured; one little girl was unfortunately killed outright, and the plaintiff received such grave injuries to his leg that he will, as the medical evidence proves, remain a cripple for the rest of his life.

The first question which arises is whether the learned Judge below was right in holding that the defendant is in law liable in respect of the injuries caused to the plaintiff. The plaintiff, as we have said, was a bare licensee, and the defendant in driving him was giving his services gratuitously as a friend. In these circumstances it is contended for the defendant that no liability can attach to him unless he is shown to have been guilty of gross negligence, of something amounting to culpable default, and that in law he is not liable for mere want of foresight or mistake of judgment. In support of this contention Mr. Setalvad has cited *Moffatt* v. *Bateman*[1] and *Giblin* v. *McMullen*[2]. If the law laid down in these decisions caused any embarrassment to the present plaintiff in the facts underlying this appeal, it might be relevant to observe that *Giblin* v. *McMullen*[2] was not a case of an accident at all, and that in *Moffatt's case* the judgment was largely based upon the consideration that the evidence did not disclose any tenable theory to explain how the accident arose. In our opinion, however, it is unnecessary to pursue this subject, because this case must be decided on its own facts, and those facts are decisive against the

[1] (1869) L. R. 3 P. C. 115. [2] (1868) L. R. 2 P. C. 317.

defendant even on the assumption that the rulings in the two cited cases are applicable without reservation or qualification. In other words, it is unnecessary here to attempt either to fix the precise difference between negligence and gross negligence, or to define the exact degree of the defendant's liability. For, in our view, on the facts of this case, the defendant's negligence and carelessness were such that, putting the law as to his responsibility most favourably to him, it is impossible to acquit him of liability; assuming that gross negligence amounting to culpable default is required, then we think we have it here.

It appears to us, however, that the determination of this point of law will be facilitated if we consider not so much the degree of negligence which would expose the defendant to liability as the nature of the positive duty, which, in the circumstances of this case, was cast upon him. Upon this aspect of the matter we have the guidance of the Earl of Halsbury's "Laws of England" (title 'Negligence', Article 641). Mr. Setalvad admits that the driving of a motor-car is a business or occupation requiring skill, and undoubtedly the defendant had that skill: that being so, and he being a volunteer, the article cited lays down that he was bound to act to the best of his skill, which must be such as a person skilled in such matters may reasonably be expected to possess. Reference may be made to *Wilson* v. *Brett*[1] where the point is illustrated. That was a case where the defendant, who was skilled in the management and riding of horses, rode the plaintiff's horse gratuitously at the plaintiff's request in order to show the horse for sale. In riding over slippery ground the defendant let down the horse and injured him by breaking his knee. The Jury found for the plaintiff, and, on a motion for a new trial on the ground of misdirection, Parke B. stated the

[1] (1843) 11 M. & W. 113

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law thus in his judgment :—"The defendant was shewn to be a person conversant with horses, and was therefore bound to use such care and skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence. The whole effect of what was said by the learned Judge as to the distinction between this case and that of a borrower, was this; that this particular defendant, being in fact a person of competent skill, was in effect in the same situation as that of a borrower, who in point of law represents to the lender that he is a person of competent skill. In the case of a gratuitous bailee, where his profession or situation is such as to imply the possession of competent skill, he is equally liable for the neglect to use it." And Alderson B. gave judgment to the same effect. In our present case the defendant was admittedly a person of competent skill in driving a motor-car, though the evidence suggests that he was a nervous driver; moreover he placed himself in a situation which implied the possession of competent skill.

If this is a correct statement of the law, the only question which remains is whether the defendant at the critical point of the drive exercised such skill as a person skilled in driving motor-cars may reasonably be expected to possess. We entirely agree with Macleod, J., that this question must be answered in the negative. In our opinion the evidence establishes that the sole cause of the disaster was the excessive and reckless speed at which the defendant was driving.

It appears to us that this explanation is the only reasonable explanation of the proved or admitted facts, and is also the explanation which defendant himself offered immediately after the accident. It is not easy to feel quite confident as to the details of the defence which is now attempted; but the gist of it appears to

lie in the assertion that, as the defendant approached the level crossing, only the left hand gates were thrown open for his passage, and that the roadway was thus so blocked that even at the eight or nine miles an hour at which he was travelling, he was unable to turn the car after it had passed the further gate. Upon the evidence it is, we think, not possible to hold that the incident occurred in this way. It is, however, material to note that, on his own showing, the defendant, at least by the time he had reached the crossing, became aware of the proximity of the oncoming express, and accelerated his speed on this account. It might at first sight seem that this was a very plausible admission, and, being to some extent against the defendant's own interest, should be accepted as the whole truth ; but it is to be observed that, in view of the defendant's first statements made on the Igatpuri platform in the presence of such independent witnesses as Cherry and Arnot, it was not open to the defendant to avoid the admission that he quickened his speed at or about the crossing.

The foundation of the defendant's case as made in this appeal lies in the contention that on his approaching the crossing the right hand gates were closed to him, that he had to pass through the left hand gates, which alone were opened to him, and that in consequence his course was fatally hampered. It is very possible that the defendant in the moment of confusion and danger did not really observe the condition of the gates, but in any event we are satisfied that his present account of their position is incorrect. His own best witness, indeed the only witness on the defendant's side who inspires us with any confidence as to the circumstances of the accident, is Mr. P. S. Taleyarkhan, who was driving the Renault car containing the other members of the excursion. Mr. Taleyarkhan, who crossed the railway a minute or two before the

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defendant came up in the steam car, deposes that the right hand gates were opened for him and that he had no difficulty in keeping to the road; it is indeed admitted by Mr. Setalvad, and is manifest from the plans, that the crossing and turning present no more difficulty if the right hand gates are open than if all the gates are open, and defendant's case confessedly depends upon the theory that the left side gates, and they alone, were open. Now the evidence is practically uniform that, just after Taleyarkhan had crossed, the gateman was proceeding to shut the opened right gates, when he heard the defendant's horn and, suspending the operation of closing the gates, he at once threw them open. It is, in our judgment, not believable that at such a juncture the gateman should have taken the useless trouble to finish closing the half closed right gates in order that he might open the less convenient left gates which were fast shut. Further, if we were forced to suppose that the gates on one side only were opened, it is reasonably certain that they would be the right hand gates; they gave the driver a very much more convenient access, as the gateman must have realised, and realised the more readily as the road is frequented by motor-cars. Even on this footing, therefore, the defendant's case fails. But upon the evidence we see no escape from the conclusion that all four gates were thrown open to the defendant's passage. We do not for a moment suggest that Mr. Taleyarkhan is not telling the truth to the best of his recollection, but if, as he admits, he found the right hand gates open, he would not be concerned to observe whether the left gates were open or shut, for their position would have been a matter of no moment to him. However, that may be, we find that in fact all four gates were opened for the defendant. This finding seems to us to be established by the independent witnesses, Shivram Cupe,

Gangaram Dagdu and Ganpat Bhau. These men, who are Hindus and have no interest in the success of either party, are not shaken in cross-examination ; their statements carry conviction to our minds, and they were believed by the learned Judge who heard and saw them. We do not seek to fortify them by the similar testimony of the chauffeur Shekh Lal Mahomed, because there are passages in his deposition which lead us to doubt whether he is telling the whole truth. But we rely upon Shivram, Gangaram and Ganpat; and these witnesses prove not only that all four gates were opened for the defendant, but that the defendant came up to the crossing and passed over it at excessive speed. There is all the more reason to accept this evidence as to excessive speed because it really derives confirmation from defendant's own version. Admittedly he accelerated because he knew the train was approaching : the only question is, when did he do so? He says he did so on reaching the first rail at the crossing, while the plaintiff's witnesses declare that he came up to the crossing at high speed. Now Mr. Arnould's testimony and the other evidence prove that the lowered signal, which, apprising the defendant of the approach of the train, led him to increase his speed, would have been seen long before he reached the crossing ; and, in any event, if he was safely on the crossing going at seven or eight miles an hour with no train in sight, his passage was assured, and there was no need to quicken the speed. There are also three other facts disclosed upon the evidence which, as we think, corroborate the plaintiff's case of excessive speed, and are scarcely reconcilable with the defendant's version : these facts are, first, that, with the exception of the defendant who had hold of the steering wheel, all the occupants of the car were shot violently out ; secondly, that the car did not run down, but jumped,

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the fairly easy slope of the bank down from the road into the field; and, thirdly, that the car ran on for a distance of as much as thirty feet into the soft, muddy paddy field.

Turning now to the account which the defendant himself gave of the event shortly after its occurrence and before he had had time to "think a lot over the causes of the accident," as in his own words he has since done, we find this account established by the two independent witnesses, Arnot and Cherry. No attempt has been made by defendant's counsel to discredit these gentlemen in any way, and indeed the most that the defendant himself can allege against them is that they do not report his statements *verbatim*. That may be so, but we think that no one who reads the depositions of these witnesses fairly, without any effort to evade their plain meaning, can fail to understand their significance. "He said", says Mr. Cherry, referring to the defendant, "he either saw or knew the train was coming. He saw the gates open, and hurried on to get through before the train. He was unaware of the turn to the right, and went straight on." Mr. Arnot confirms this account, and there can be no doubt of its truth. We have it, therefore, that within a few hours of the occurrence the defendant in explaining it attributes it to his own haste in trying to rush through the open gates and to his ignorance of the abrupt turn; that, in our judgment, is enough to dispose of the theory that any gates were closed against him, or that his speed was within the limits set by ordinary prudence. It may be added that this almost contemporaneous explanation makes no mention of muddy roads, of the car being bumped badly over the rails, of the gear being loose, or of any other matter on which the defendant's case is now sought to be based. The occurrence is attributed to two causes only, high speed and the driver's carelessness as to the character or

direction of the invisible road in front of him. We have no doubt that these causes, and these alone, led to the disaster which the defendant himself has such good reason to deplore.

As to the evidence called for the defence, it is unnecessary to add much to what has already been said. Upon the defendant's own testimony it is, as we have indicated, not possible to rely; that may well be because his observation at the time of the sudden disaster was imperfect or because on looking back at these events and pondering over them from his own point of view, his memory has betrayed him. But the result is that his version of the disaster cannot be accepted. And in the circumstances of the case we cannot concede that that version derives any increased plausibility by reason of the fact that it is more or less supported by the defendant's own wife and her father. Nor is the balance of the evidence materially affected by the testimony of the boy Kaikobad Mody, who admits his sense of obligation to the defendant, or of Temuras Mody, who is apprenticed to the defendant and is working under his manager. As to Mr. Taleyarkhan, his evidence, in so far as it tells in the defendant's favour, has already been considered.

On a consideration of the whole evidence, therefore, we are bound to agree with the conclusion of the learned trying Judge, that the sole cause of the disaster was that the defendant, in order to get ahead of the coming train, drove to the crossing and over it at excessive speed, and in total disregard of the need for caution imposed by the fact that the road in front of him was hidden from his view on account of the abrupt turning. In these circumstances we cannot doubt that, putting the skill and caution exigible from the defendant at their very lowest, he was grossly and culpably negligent. It follows that he is liable in damages.

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As to the amount of damages which should be awarded, the learned Judge has allowed Rs. 8,000 on the score of expenses, Rs. 10,000 on the score of pain and suffering, and Rs. 20,000 on the score of loss of income, past and prospective. All these items have been canvassed by Mr. Setalvad for the defendant, but we have heard no argument which would justify us in interfering with the damages allowed under the two last-mentioned heads. The plaintiff is a young man who had a career of good promise before him. That career has been ruined; he has already suffered intense pain and is likely to suffer in the future; he is crippled for life; and his means of earning a fair income in the future, if they have not been destroyed, have been lamentably reduced. Therefore on neither of these heads can the damages awarded be regarded as excessive.

We think, however, that a reduction of Rs. 2,000 should be made from the Rs. 8,000 which Macleod, J., allowed for expenses. The details supplied by the plaintiff in Exhibit 10 show that these expenses have been calculated on a somewhat extravagant scale, yet the plaintiff's own estimate is exceeded by the learned Judge by about Rs. 400. We cannot allow Mr. Setalvad's contention that the plaintiff was not justified in going to England at all for treatment, seeing that he was advised to do so by his own surgeon, Dr. Masina, a gentleman of acknowledged professional skill. But the expenses incurred while in England on account of hotel and other charges and various sums debited on account of board and lodging, clothing, and expenses at Deolali seem to us to be exaggerated, and upon consideration of the evidence and the arguments on these points we think it right to reduce the Rs. 8,000 on this head to Rs. 6,000.

The result, therefore, is that the only alteration to be made in the decree is that the damages allowed to the

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plaintiff are to be Rs. 36,000 instead of Rs. 38,000; in other respects, the decree under appeal is affirmed.

As to costs, each party will bear his own costs of the last day's hearing of the appeal, and all other costs in the appeal must be borne by the defendant-appellant.

Attorneys for the plaintiff: *Messrs. Payne & Co.*

Attorneys for the defendant: *Messrs. Captain and Vaidya.*

Appeal dismissed.

H. S. C.

ORIGINAL CIVIL.

Before Sir Basil Scott, Kt., Chief Justice, and Mr. Justice Batchelor.

1913.
September 5.

THE GREAT INDIAN PENINSULA RAILWAY COMPANY (DEFENDANTS), APPELLANTS, *v.* THE MUNICIPAL CORPORATION OF THE CITY OF BOMBAY AND ANOTHER (PLAINTIFFS), RESPONDENTS.*

Indian Railways Act (IX of 1890), section 7—City of Bombay Municipal Act (Bombay Act III of 1888), sections 289, 293—Public streets—Vesting of public streets in Municipality—Laying railway lines under statutory authority over such streets—Land Acquisition Act (I of 1894), section 7—Proceedings under Land Acquisition Act unnecessary in case of such streets.

The Great Indian Peninsula Railway in constructing a line of railway known as the Harbour Branch Railway in the Island of Bombay laid down the lines of rails in a level-crossing across a public street known as Sewri Koliwada Road, vested in the Municipal Corporation of Bombay under section 289 of the City of Bombay Municipal Act, without permission granted by the Municipal Corporation. The Municipal Corporation sued to obtain a declaration that the Railway Company could not lawfully maintain their lines of railway across the street in question without either obtaining permission granted by the Corporation and confirmed by the Government under section 293 of the City of Bombay Municipal Act or acquiring the land required for the level-crossing under the Land Acquisition Act, 1894.

* O. C. J. Appeal No. 17 of 1913; Suit No. 693 of 1912