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JANITA YUMGAD JAN

v.

SUKHLAL AND ANOTHER

[SUPREME COURT, 1968 (Thompson Ag. P.J.) 27th March, 22nd April] B

Civil Jurisdiction

Practice and procedure—statement of claim—struck out as against owner of motor vehicle where no basis for vicarious liability averred—owner's vicarious liability not increased by Motor Vehicles (Third Party Insurance) Ordinance (Cap. 153—1967) s.6.

Tort—vicarious liability—motor vehicle driven by person other than owner—vicarious liability of owner not enlarged by Motor Vehicles (Third Party Insurance) Ordinance (Cap. 153—1967)—necessity for basis of liability of owner to be averred in statement of claim. C

Insurance—motor vehicles—third party—vicarious liability of owner for acts of driver not enlarged by Motor Vehicles (Third Party Insurance) Ordinance (Cap. 153—1967).

The Motor Vehicles (Third Party Insurance) Ordinance does not increase the vicarious liability of the owner of a motor vehicle for the D acts of another person who is driving the vehicle. The owner is vicariously liable only if the vehicle is driven by his servant or agent or if he has retained control over the driving of it. A statement of claim which simply alleges that the driver committed the act of negligence and fails to state the basis upon which the owner is alleged to be vicariously liable discloses no cause of action against the owner.

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Cases referred to: *Barnard v. Sully* (1931) 47 T.L.R. 557: *Timaru Borough v. Squire* [1919] N.Z.L.R. 151.

Application in the Supreme Court to strike out statement of claim as against owner of motor vehicle.

F. M. K. Sherani for the plaintiff. F

A. I. N. Deoki for the defendant.

H. A. L. Marquardt-Gray for the second defendant.

THOMPSON J.: [22nd April 1968]—

This is an application by the first defendant to strike out the Statement G of Claim in so far as it concerns him on the ground that it discloses no cause of action against him.

In her Statement of Claim the plaintiff alleges that she was run down by a vehicle owned by the first defendant and driven by the second defendant. In the General Endorsement of Claim on the Writ of Summons it is alleged that the second defendant drove the vehicle with the consent H of the first defendant. This assertion is not repeated in the Statement of Claim; nor is it anywhere alleged that the second defendant was the servant or agent of the first defendant.

In running-down cases in which the owner is not himself driving the vehicle, he is vicariously liable for the injuries caused only if the vehicle was driven by his servant or agent or if he has retained control over the driving of it. That position has not been altered by the Motor Vehicles (Third Party Insurance) Ordinance (Cap. 153). It does impose on the owner a direct statutory obligation not to use, or cause or permit any other person to use, the vehicle unless there is in force in relation to its use by him or the other person an insurance policy in respect of third party risks; but this is not a vicarious liability. By the provisions of section 6 (3) the insurance company issuing the policy must indemnify permitted drivers, as well as the owner, against claims by third parties in, *inter alia*, running-down cases. Thus the person injured is protected against finding that, although he can succeed in an action against the driver, the driver is a "man of straw." This being so, there is no reason for the statute to increase the owner's vicarious liability and it has not been increased.

Every pleading must contain a statement of the material facts on which the party pleading relies for his claim or defence, as the case may be (0.19 r.4). One of the facts on which the petitioner in a case such as the present one must rely, if he is to succeed against the owner of the vehicle, is that either the driver was his servant or agent or he himself retained control over the driving of the vehicle or he caused or permitted the driver to use the vehicle when there was no insurance policy in force. This must be pleaded.

Mr. Sherani has cited two cases, *Barnard v. Sully* (1931) 47 T.L.R. 557 and *Timaru Borough v. Squire* [1919] N.Z.L.R. 151 as authorities for the proposition that, once ownership has been proved, the onus of proving that the driver was not his servant or agent lies on the owner. There are a number of authorities, particularly certain Australian cases set out in Mazengarb (4th Edition) at p.265, in which proof of ownership was held to be insufficient to establish agency. But, most important, neither of the cases is concerned with the pleadings. According to the notes in the Times Law Reports the plaintiff in *Barnard v. Sully* claimed damages "for alleged negligence of the defendant's servant or agent in the driving, management or control of the defendant's motor-car." In *Timaru Borough Council v. Squire* Sim J. said "The question to be determined is whether or not it has been made out that Miss Squire, when the collision took place, was acting as her father's agent in driving the car."

I have no doubt that the plaintiff's Statement of Claim does not disclose any cause of action against the first defendant, because it states simply that the second defendant committed the act of alleged negligence and fails to state on what basis the first defendant it alleged to be vicariously liable for the second defendant's act.

The first defendant included in his Defence an assertion that the Statement of Claim disclosed no cause of action. The plaintiff took no steps to put matters right. Now, at the last minute, on the day before the action was due to be heard, the first defendant has filed his notice of motion to strike it out. It is difficult to see what other course was open to him; it was necessary that the plaintiff should either amend his statement of claim so as to show a cause of action or abandon his claim against the first defendant before costs were thrown away hearing a case based on a claim lacking a proper foundation.

As Mr. Sherani has pointed out, the Courts will not generally strike out pleadings at a late stage; further, when an application is made under 0.25 r.4, the Statement of Claim will not usually be struck out if it can be made good by amendment. If Mr. Sherani had sought leave to amend his Statement of Claim so as to allege that the second defendant was servant or agent of the first defendant or that the first defendant retained control over the driving of the vehicle or that he caused or permitted the second defendant to use the vehicle when there was no insurance policy in force, I should without hesitation have allowed him to amend. However, no such application was made. The Court was not even informed that any such allegation would be made. Mr. Sherani filed, on the day before the hearing and long after the pleadings had closed, a Reply to the Defence alleging that the second defendant was driving the vehicle with the consent or knowledge of the first defendant. He made no application by summons for leave to deliver that Reply; and in any case those facts alleged would not make the first defendant liable.

In the absence, therefore, of any application to amend the Statement of Claim so as to put it into order I have no alternative but to strike it out insofar as it relates to the first defendant. In view of the provisions of s.6 (3) of the Motor Vehicles (Third Party Insurance) Ordinance it may be that continuation of the action against the second defendant alone will suffice the plaintiff. If not, she will have to recommence the action against the first defendant — and, if she wishes, the second defendant — on the basis of an adequate Statement of Claim.

I order that the plaintiff's Statement of Claim be struck out insofar as it relates to the first defendant, with costs to be taxed.

Application allowed.