A

RAM CHARAN AND OTHERS

v.

THE PUBLIC TRUSTEE OF FIJI

B

[COURT OF APPEAL (Marsack J. A., Henry J. A.), 20th, 28th November 1973]

Civil Jurisdiction

Tort—vicarious liability—whether owner of car vicariously liable for negligence of driver—whether driver acting on owner's behalf as his agent.

Damages—death caused by negligent driving—principles of assessment—Compensation to Relatives Ordinance (*Cap.* 22). C

Negligence—damages for—death caused by negligent driving—principles of assessment—Compensation to Relatives Ordinance (*Cap.* 22).

Appeal—damages—appeal against award—circumstances in which appellate court will interfere with such award.

Damages—appeal against award—circumstances in which appellate court will interfere with such award. D

In order to fix liability on the owner of a car for the negligence of its driver, it is necessary to show either that the driver was the owner's servant or that at the material time, the driver was acting on the owner's behalf as his agent. In the present case the owner had assumed paramount authority over the car and could have taken control himself or given any order he wished. In these circumstances the owner was vicariously liable for the negligence of his driver. E

The Court then applied the test laid down by Lord Wright in *Davies v. Powell Duffyn Associated Colleries Ltd.* [1942] A.C. 617, where he said that a court, before it interferes with an award of damages, should be satisfied that the judge had acted upon a wrong principle of law, or had misapprehended the facts or had for these or other reasons made a wholly erroneous estimate of the damage suffered. F

In the present case applying this test the Court held that the trial judge in calculating the multiplicand and multiplier did not sufficiently take into account the actual earnings of the deceased, the contingencies concerning advancement, the effect that present value had on the deceased's probable earnings, and the prospect of the widow re-marrying. The amount of damages was therefore reduced by a third.

G

Cases referred to:

Cassell & Co. Ltd. v. Broome [1972] 1 All E.R. 801; [1972] 2 W.L.R. 645.

Morgans v. Launchbury and Others [1972] 2 All E.R. 606; [1973] A.C. 127.

Samson v. Aitchison [1912] A.C. 844; 107 L.T. 106.

Mallett v. McMonagle [1969] 2 All E.R. 178; [1969] 2 W.L.R. 767.

Davies v. Powell Duffyn Associated Colleries Ltd.; [1942] A.C. 617: [1942] 1 All E.R. 657 H

Flint v. Lovell [1935] 1 K.B. 354; 51 T.L.R. 127

Appeal against the judgment of the Supreme Court holding the third appellant vicariously liable for the negligence of his driver and against the award of damages.

R. W. Mitchell for the first and second appellants.

F. M. K. Sherani for the third appellant.

R. I. Kapadia for the respondent.

Judgment of the Court (read by HENRY J. A.): [28th November 1973]—

On Sunday night, August 4, 1968, a motor car registered No. L806 owned by Hari Ram and driven by Jaimuni Prasad in which Satya Nadan Mudaliar and the said Hari Ram were passengers came into collision with a truck registered No. 3325 which was owned by Ram Charan and was driven by Maula Buksh. Jaimuni Prasad and Satya Nadan Mudaliar were killed as a direct result of the collision. It is convenient to refer throughout this judgment to each of the said persons by name. The Public Trustee, acting as administrator of the estate of Satya Nadan Mudaliar sued the respective owners and drivers of the said vehicles. It was alleged that one Sushila had intermeddled in the estate of Jaimuni Prasad. She was sued as executrix de son tort. The action was heard by the learned Chief Justice who held both drivers negligent and awarded damages in the total sum of $29,377.12 against all four defendants. From this judgment Hari Ram, Ram Charan and Maula Buksh have brought appeals. Two points were taken on appeal, namely:—

(1) that the learned Chief Justice erred in holding that Jaimuni Prasad the driver of the said motor car No. L806 was the agent of the owner Hari Ram and therefore judgment ought to have been entered for Hari Ram with consequent relief for costs, and

(2) that the damages awarded were excessive.

The first ground affects only Hari Ram whilst the second ground affects all defendants even though Sushila, representing the estate of Jaimuni Prasad, had her appeal dismissed for failure to comply with an order for security for costs. There can be only one award as to amount in an action against joint tortfeasors: *Cassell & Co. Ltd. v. Broome* [1972] 1 All E.R. 801. Both appeals were heard together.

We turn first to deal with the question whether the learned Chief Justice erred in holding that Jaimuni Prasad was acting as the agent of Hari Ram at the time of the collision. Hari Ram, Satya Nadan Mudaliar together with two other left Suva on the afternoon of Friday August 2, 1968 for the purpose of witnessing soccer matches to be played at Ba over the August holiday weekend. They were in Hari Ram's motor car No. L806 and he drove. Hari Ram said that, if all had gone well, the party would have returned to Suva in his car on Monday August 5 On Friday night the party stayed at the guest house of Jaimuni Prasad at Nadi. On Saturday August 3 Hari Ram drove Satya Nadan Mudaliar and two others to Ba to see the football. He drove them back later to the guest house of Jaimuni Prasad where he stayed for night.

On Sunday August 4, Hari Ram intended to go again to the football at Ba. On this occasion Jaimuni Prasad drove motor car No. L806 from the guest house. When asked who gave Jaimuni Prasad the keys to the car Hari Ram said " He asked for the keys and I gave it to him ". On the way petrol was obtained and Jaimuni Prasad paid for it. The party set out to return to Nadi about 4 p.m. and again Jaimuni Prasad drove. At Lautoka they stopped at the house of one Ram Shanker. Jaimuni Prasad did not go into the house but the rest of the party did. Hari Ram agreed that Jaimuni Prasad could take the car on a trip which is stated to be " private business " of Jaimuni Prasad. The rest of the party meanwhile consumed liquor in Ram Shanker's place and also at the Lautoka Club.

Jaimuni Prasad returned about 7.30 p.m. The party got into the car with the intention of returning to Jaimuni Prasad's guest house. Hari Ram gave evidence in chief as follows:— A

" Q. He came back to pick you people up? A. Yes, he was coming. Q. Who was driving? A. Jai Muni Prasad. Q. Had you been drinking in Ba before coming down to Ram Shanker's house? A. No. Q. Did Jai Muni come inside the house after he came back from his business? A. Yes, Sir. Q. You said you were drinking. Were you feeling sober or drunk? A. I was drunk. Q. You got into the car? A. Yes, Sir. Q. You remember getting into the car? A. Yes, Sir. Q. Where did you sit? A. In the back seat, right hand side. Q. Now,the car took off from Ram Shanker's house, remember that? A. Yes, Sir. Q. Do you remember the accident. A. No, Sir. Q. Now, you left Ram Shanker's house in Vitogo Parade, that is in Lautoka Town? A. Yes, Sir. Q. You know the area well? A. Quite, Sir. Q. Do you remember the area proceeding along Vitogo Parade towards Nadi? A. Yes, Sir. Q. What was the last thing you remember, sitting in the back seat of the car? A. I was near Natabua." B C

In cross-examination the following passage appears:—

" Q. Is it after you returned from Lautoka Club you had drinks at Ram Shanker's, and you said you would not have driven the car in that condition? A. Yes. Q. And when Jai Muni Prasad came and asked you to drive to Namaka, you asked him to drive? A. No, Sir.

[*Court:* Q. You did not object to his driving? A. No, Sir.] Q. In fact, he drove for you? A. No, Sir. Q. Well, it it was your car? A. Yes, but he was driving; I gave him the car. Q. And you asked him to drive it for you? A. No, Sir, Q. Now, we go back to the time when you first gave him the car, that is when he drove you to Ba. That was the first time. You gave him the key and what did you say? A. He asked me for the key and I gave it to him. Q. Did he say why he wanted it? A. He said he wanted to drive. Q. And you accepted him to drive? A. Yes, Sir. Q. You wanted him to drive? A. Not exactly. Q. You had driven the previous day, had you not? A. Yes, Sir. Q. And you felt a bit tired to drive the next day? A. No, it was not that. He asked me for the car and I gave it to him. Q. And had you made arrangements to stay at Ram Shanker's that evening? A. No, Sir. Q. In fact, you expected to return to Namaka? A. Well, we were not waiting. I could have slept there." D E

The learned Chief Justice made the following finding of fact:

" He (Jaimuni Prasad) returned at about 7.30 p.m. and after picking up his passengers set off for his guest house where they were to spend the night. In the meantime the second named defendant, according to his evidence, had imbibed sufficient alcohol to become ' drunk but not very drunk '. I am satisfied that at the time he re-entered the car he knew what he was doing and that he was not only agreeable to the deceased driver driving the car for the purpose of getting them to the guest house but, having regard to the condition he was in, he desired him to do so." F G

This finding, in our opinion, was fully supported by the evidence, and, in so far as inferences are drawn, they appear to us to be proper inferences.

Counsel argued that the interposing of the journey for " private business " completely brought to an end any question that Jaimuni Prasad continued to act as agent for Hari Ram thereafter and further that agency must be established a fresh after the moment of his return to Ram Shanker's house. The argument in effect was that Jaimuni Prasad was now in sole charge of the car for his own purposes and that he was merely obliging Hari Ram by taking him and the other members of the party back to his guest house at Lautoka. We reject this submission. H

The learned Chief Justice was entitled to look at the whole of the conduct as given in evidence in coming to his final conclusion. He certainly was not bound to look narrowly and freshly at the position when Jaimuni Prasad returned from what was called " his private business ". Moreover, the learned Chief Justice saw and heard Hari Ram in the witness box and the learned Chief Justice was not prepared to give Hari Ram much credibility about his condition as to sobriety.

The law as to vicarious responsibility, when a person other than the owner is driving a motor vehicle, was authoritatively laid down by the House of Lords in *Morgans v. Launchbury & Ors.* [1972] 2 All E.R. 606. The headnote reads:

> " In order to fix liability on the owner of a car for the negligence of its driver, it was necessary to show either that the driver was the owner's servant or that, at the material time, the driver was acting on the owner's behalf as his agent. To establish the existence of the agency relationship it was necessary to show that the driver was using the car at the owner's request, express or implied, or on his instructions, and was doing so in performance of the task or duty thereby delegated to him by the owner. The fact that the driver was using the car with the owner's permission and that the purpose for which the car was being used was one in which the owner had an interest or concern, was not sufficient to establish vicarious liability."

Lord Wilberforce at p. 609 said:

> " I accept entirely that ' agency ' in contexts such as these is merely a concept, the meaning and purpose of which is to say ' is vicariously liable, and that either expression reflects a judgment of value—respondeat superior is the law saying that the owner ought to pay. It is this imperative which the common law has endeavoured to work out through the cases. The owner ought to pay, it says, because he has authorised the act, or requested it, or because the actor is carrying out a task or duty delegated, or because he is in control of the actor's conduct. He ought not to pay (on accepted rules) if he has no control over the actor, has not authorised or requested the act, or if the actor, is acting wholly for his own purposes."

Lord Pearson said at p. 614 that the fact that the journey was undertaken partly for the purposes of the agent as well as for the purposes of the owner does not negative the creation of the agency relationship. Even if there were some merit in the contention that the last journey alone should be considered it is plain that Jaimuni Prasad was driving Hari Ram to the place where he (Hari Ram) intended to stay the night and from whence Hari Ram intended himself to drive his car back to Suva the next day. The finding of the learned Chief Justice is to the effect that Hari Ram had assumed paramount authority over his motor car and that Hari Ram could have given any order he wished or could have taken control himself. We consider that the finding that Hari Ram desired Jaimuni Prasad to drive him (Hari Ram) home was a finding that was impeccable: vide *Samson v. Aitchison* [1912] A.C. 844 and particularly at p. 850. No case has been cited by counsel where the owner of the vehicle was himself in the vehicle and was being conveyed on a journey he intended to take and to a point where, after a night's stay, he intended to drive his car next morning to a distant destination. That is this case.
The appeal based on the first ground therefore fails.

The learned Chief Justice, in assessing damages, adopted the method of fixing a basic yearly figure for deceased's probable earnings (a multiplicand) and a number of years purchase (a multiplier). This is a method commonly employed. The multiplicand was $2,700 less $900 for deceased's own personal share making an effective figure of $1,800. The multiplier adopted was seventeen years purchase. This gave a figure of $30,600. These figures are challenged on appeal.

These damages are sought under the provisions of the Compensation to Relatives Ordinance Cap. 22. It is an action for the benefit of the wife and three children of deceased and relates to the damages they have suffered as the result of his death being negligently caused by the defendants. There are three children, all sons, the youngest having been born after deceased was killed. The children are:

Nageshwaran born October 31, 1962.

Sudeshwaran born December 24, 1965.

Dharmeshwaran born December 15, 1968.

Deceased was nearly 31 years old and his wife 24 years old at the date of death. The life expectancy of each is relevant.

The family was totally dependent on deceased. The dependency of the children will cease at such age as they might be expected to leave school and become self-supporting, usually about sixteen years of age. As each becomes independent there is more money for the remainder to enjoy including a possible increase in spending by deceased on himself. Deceased was described as a healthy active man of his age and of temperate habits. He had steady employment with an established airline. There was no suggestion that his wife did not also have a normal life expectancy. The children are apparently normal.

The learned Chief Justice fixed deceased's annual earnings at $1,560 at the date of death. His basic wage was $1,360 and he worked overtime. Some attempt was made by counsel for the Public Trustee to claim that the sum of $200 (to make the total of $1,560) should be higher but the learned Chief Justice fixed overtime at $200. On the evidence this was proper since, although some figures were mentioned, no attempt was made to prove the actual pre-death earnings. The starting point at death is therefore $1,560. There was evidence that, at the date of hearing (February, 1973) four and one-half years after death, a clerk in the same position as deceased could expect to earn $2,400. There is no evidence as to overtime at this stage. Some increases in the basic rate were made after 1968 but the information is meagre. As to the figure of $2,400 the witness said that in the opinion of the management deceased would have got this salary. It was claimed that this was hearsay and should be disregarded. No objection was taken at the hearing. If it had it might have been that the witness was qualified to give this evidence. We do not know so it must stand. Thus at the end of approximately five years deceased could be assessed at $2,400 per annum so, by then, he was still short of $2,700 which was taken as the basic figure for a total of seventeen years.

In *Mallet v. McMonagle* [1969] 2 All E.R. 178, 189 Lord Diplock made these general observations about damages for a family's loss of their breadwinner, namely

> " My Lords, the purpose of an award of damages under the Fatal Accidents Acts is to provide the widow and other dependants of the deceased with a capital sum which with prudent management will be sufficient to supply them with material benefits of the same standard and duration as would have been provided for them out of the earnings of the deceased had he not been killed by the tortious act of the respondents, credit being given for the value of any material benefits which will accrue to them (otherwise than as the fruits of insurance) as a result of his death."

His Lordship then went on to deal with the method of adopting a multiplicand to a multiplier and pointed out the many variables which might affect such calculations.

A convenient, and generally accepted statement of the law, on an appeal against an award of damages is that contained in the speech of Lord Wright in *Davies v. Powell Duffryn Associated Collieries Ltd.* [1942] A.C. 617; [1942] 1 All E.R. 657, 661. His Lordship said an appellate court is always reluctant to interfere with the finding of the trial Judge on any question of fact but that it is particularly reluctant to interfere with a finding on damages and remarked that such a finding is much more a matter of speculation and estimate than a finding of fact. His Lordship then went on to say after dealing with jury awards at pages 664 and 665:—

> " Where, however, the award is that of the judge alone, the appeal is by way of rehearing on damages as on all other issues, but as there is generally so much room for individual choice so that the assessment of damages is more like an exercise of discretion than an ordinary act of decision, the appellate court is particularly slow to reverse the trial judge on a question of the amount of damages. It is difficult to lay down any precise rule which will cover all cases, but a good general guide is given by Greer, L.J., in *Flint v. Lovell* [1935] 1 K.B. 354, 360. In effect, the court, before it interferes with an award of damages, should be satisfied that the judge has acted upon a wrong principle of law, or has misapprehended the facts, or has for these or other reasons made a wholly erroneous estimate of the damage suffered. It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency."

The learned Chief Justice said deceased had the prospect of a long and successful working life with, in all probability, from time to time promotion and higher remuneration. He did not refer to the wife but clearly considered that she had a good life expectancy because that must also be weighed. Seventeen years would take deceased to 48 years of age and his wife to 41 years. The chances of re-marriage must be weighed as must all the contingencies and hazards of life, both good and bad, which deceased must undergo if he had survived this accident. His wife must likewise be considered as to her future. In any figure fixed also that portion referable to the future, as from the date of hearing, requires to be discounted, or, as it is stated brought to a present value. Frequently this is done by calculations made from tables. No such evidence was given so the Court must make some form of discount for loss presently paid for but not yet suffered. The learned Chief Justice did not determine these matters specifically but, after fixing the basis of $2,700 less one-third and a period of seventeen years, he said " I assess the number of years by which that figure of annual dependency should be multiplied at seventeen. That assessment is based on a consideration of the number of working years of which he has been deprived, the numerous and various perils of uncertainties in life, including the prospect of remarriage of the young widow who has the responsibility of raising the three children, the fluctuations that may occur in the value of money and the fact that the damages awarded will be paid in a lump sum from which interest may be derived during the period of dependency." Applying the test laid down by Lord Wright (*supra*) can it be said that the learned Chief Justice acted on a wrong principle of law, has misapprehended the facts or has for these or any other reasons made a wholly erroneous estimation of the damage?

Lord Morris of Borth-Y-Gest said in *Mallett v. McMonagle* (*supra*) at p. 188:

> " In cases such as that now being considered it is inevitable that in assessing damages there must be elements of estimate and to some extent of conjecture. All the chances and the changes of the future must be assessed. They must be weighed not only with sympathy but with fairness for the interests of all concerned and at all times with a sense of proportion."

We turn to examine in greater detail the figures taken by the learned Chief Justice for deceased's basic annual earnings ($2,700), deceased's expenditure on himself ($900) leaving $1,800 for his family and the multiplier of seventeen years. The figure of $2,700 would not, as events turned out, have been reached at the present time, approximately five years after death. The commencing figure was only $1,560 and would not, assuming all in deceased's favour, have exceeded ($2,400) at the end of five years. This means that, at the expiration of any period fixed as a multiplier, deceased's wages would require to show a large increase beyond $2,700 to sustain that as an average figure. With respect we are unable to see a sufficiently strong probability on the evidence that this would be so. If this is correct then the assessment of $900 as deceased's average share would reduce the balance available to his family. It may be argued that $900 was fixed on a basis of $2,700 but it is probable that deceased's expenditure might well be as high in any event. It was unfortunate that no assessment was made based on known circumstances at the date of his death but the impression is left that he was prepared to leave his family and indulge in holiday weekends with his male companions. We have the impression that, over the whole period, $900 would not be an unreasonable figure and more realistic than a nominal one third of a figure not reached in his life time.

The multiplier is higher than that usually adopted in English cases and substantially higher than any figure for awards in Fiji. Two cases were cited to us. They were very low figures and were really of no value for comparative use. In *Mallet v. McMonagle* (*supra*) at p. 191 Lord Dlipock said that in cases of a young widow about 25 years of age, with a husband about the same age, the multiplier was not infrequently sixteen but, he added, " in those cases the prospect of re-marriage may be thought to be reduced..... to a point at which little account need be taken for this factor." In our respectful view a widow with three children who are all provided with a considerable lump sum award of damages ought, in Fiji, to be regarded as having a reasonable prospect of re-marriage.

The learned Chief Justice said he took into account interest which may be derived during the period of dependency which means that the figure of $1,800 (ie. $2,700—$900) was the present value of the basic figure fixed for the period. This would mean that the estimated average earnings over the period would be still higher than $2,700. It would appear to us, with respect that the multiplicand and the multiplier clearly did not sufficiently take into account the actual earnings of the deceased, the contingencies concerning advancement, the effect that present value has on the figure of $2,700 and the prospects of the widow re-marrying.

We conclude, therefore, that the award is such that this Court ought, on the principles stated, set aside the judgment. Giving all factors the best consideration we can, and, taking into account family life and conditions in Fiji, we fix a multiplicand of $1,600 and a multiplier of fourteen. This gives a figure of $22,400 which, when adjusted in accordance with other findings not challenged, means that judgment will be for the sum of $21,177.12. The division of this sum amongst those entitled must be adjusted. We divide damages as follows:

His widow	$13,677.12
His son (first one)	1,500.00
His son (second one)	2,500.00
His son (third one)..	3,500.00
Total	$21,177.12

The appeal is allowed and the judgment in the Court below is set aside. In lieu
A judgment shall be entered for the sum of $21,177.12 together with costs in the Court below. Respondent was successful on the appeal by 3rd appellant Hari Ram on the substantial question of liability but she was unsuccessful on the appeal against quantum. Hari Ram will pay two-thirds of the costs of respondent on appeal. All other costs are to be borne by the respective parties themselves.

Appeal allowed to the extent of a reduction in the amount of damages.

B