SHELL FIJI LTD v SUSHIL CHAND (CAV0003 of 2011)

SUPREME COURT — APPELLATE JURISDICTION

MARSOOF, CHANDRA and HETTIGE JJA

4 May 2012

Negligence — vicarious liability — negligent driving — employer — vehicle in accident — passenger injured in accident — leave to appeal award of damages — prohibition on passengers — notice displayed in vehicle — whether petitioner vicariously liable for negligent driving — whether damages were excessive — condition of respondent — Supreme Court Act s 7(3).

The respondent was awarded damages on account of his being a victim of an accident while travelling in a vehicle belonging to the petitioner. The driver had been assigned the task of delivering a load of fuel by the petitioner. According to the plaintiff, the driver asked him to accompany him in the vehicle and assist him in his work. The petitioner challenged the action on the basis that there was a prohibition on the driver not to give lifts to passengers, and that a notice to that effect was displayed on the dashboard of the vehicle. The Court of Appeal agreed with the High Court and held the petitioner vicariously liable for the negligent driving of the driver.

Held –

(1) The finding that the respondent was in the vehicle to assist the driver plays a crucial part in the liability of the petitioner on the basis of vicarious liability. The respondent had been invited by the driver to assist him in carrying out the employer's work, which makes the employer liable for the negligent act of the driver.

Rose v Plenty [1976] 1 WLR 141, applied.

(2) The fact of placing a notice within the vehicle regarding the prohibition would not make any difference if the vehicle is being driven by the driver for the employer's purpose.

(3) The law relating to vicarious liability imposes a very heavy burden on employers when engaging employees, as they have to act prudently in selecting employees to carry out tasks for the employer. If the tasks to be carried out by the employees, with or without prohibitions, amounts to situations where the employer's purpose is being carried out then the employer would be held liable for the wrongs of his employees.

Estate Van Der Byl v Swanepoel 1927 AD 141, considered.

Appeal dismissed subject to variation in damages.

Cases referred to

Devi v Chand [2008] FJHL 144; *Pranish Prakash Chand v Ganpati Bulla and Anor* 112 of 2004; *Sarath Kumara Perera v Winifred Keerthiwansa and others* [1993] LKSC 48; *The Permanent Secretary for Health and Another v Arvind Kumar and another* (unreported Civil Appeal No 84 of 2006 delivered on 20th June 2008); *Twine v Bean's Express* [1946] 62 TLR 458, considered.

Aldred v Nananco [1987] IRL 292; *Canadian Pacific Railway Co v Lockhart* [1942] AC 591; *Conway v Wimpey* [1951] 2 KB 266, followed.

A Ram with H Nagin for the Petitioner

A Sen with J UditandD Singh for the Respondent

[1] Chandra J. This is an application for special leave to Appeal to the Supreme Court from the Judgment of the Court of Appeal dated 8th February 2011 which was an appeal against the judgment of the High Court at Labasa dated 27th May 2008.

[2] The High Court in an action where the present Respondent claimed damages on account of his being a victim of an accident while travelling in a vehicle belonging to the Petitioner.

[3] The High Court gave judgment in favour of the Respondent and awarded damages which includes general and special damages and interest totaling $ 32,987.93 and costs summarily assessed at $ 650 on the basis that the Respondent received injuries as a result of the negligent driving of the Petitioners' driver Mukesh Chand for which the Petitioner was vicariously liable.

[4] On appeal by the Petitioner to the Court of Appeal, the Court of Appeal dismissed the appeal of the Petitioner by agreeing with the High Court Judge on the issue of liability but varied the award of damages and costs and granted damages in a sum of $ 126,043.04 and $ 7500 as costs for the trial and $ 5000 as costs for the appeal.

[5] The Petitioner in his application seeking special leave to appeal has relied on the grounds set out in s 7(3) of the Supreme Court Act of 1998 on the basis that the present case involves far reaching questions of law relating to employment and of great general or public importance and a matter that is otherwise of substantial general interest to the administration of civil justice because it involves a question of whether employees should carry unauthorized persons on vehicles and whether persons should go for joy rides in vehicles which are carrying a cargo which is inherently dangerous.

[6] The Petitioner based his submission on three matters, namely

(a) The finding of negligent driving;
(b) The finding of vicarious liability; and
(c) The quantum of damages.

[7] An examination of the facts relating to this action would be necessary to consider the questions relied upon by the Petitioner. The action of the Respondent was on the basis that the driver of the oil tanker belonging to the Petitioner had invited the Respondent to accompany him when the driver had been asked to deliver a load of fuel to Savusavu, that the vehicle went off the road and that he suffered injuries. The Respondent had brought the action against the driver's wife as the driver died on the spot due to the accident and the Petitioner as being the employer of the driver.

[8] A default judgment had been entered against the 1st Respondent (the deceased driver's widow). The Petitioner challenged the action on the basis that there was a prohibition on their driver not to give lifts to passengers and that a notice to that effect was displayed on the dashboard of the vehicle and that specific instructions had been given to the driver in his hand book and orally regarding such prohibition.

[9] As a result of the vehicle going off the road and going down an embankment the driver had died on the spot and the Respondent had jumped off the vehicle as it was going down the embankment. He had been found to be unconscious and had been taken to Auckland for treatment where he regained consciousness in a hospital in Auckland. He had suffered multiple injuries which resulted in him undergoing surgery and being subjected to other treatment over a period of time.

[10] As regards the issue of negligence, it was the contention of the Petitioner that the Respondent had not proved negligence and that therefore the action should have failed. Before the High Court the Plaintiff gave evidence and narrated the events leading up to the accident. The Plaintiff also led the evidence

of the Police Officer who had visited the scene and prepared a sketch who had observed a brake mark of 120 meters before the vehicle veered off the road. The Petitioner did not adduce any evidence regarding any mechanical failure in the vehicle although they had examined the vehicle even after the accident.

[11] The High Court considered the evidence placed before it and the submissions made by both parties and arrived at the conclusion that the accident had been due to the negligence of the driver.

[12] On appeal to the Court of Appeal the Court of Appeal, did not find any fault in the conclusion of the High Court on the issue of negligence and concurred with that decision.

[13] This Court has considered the submissions made on behalf of the Petitioner and the Respondent and is of the view that the issue of negligence had been clearly established in this case and therefore special leave cannot be granted on that issue.

[14] However, on the question of vicarious liability, regarding which the Court of Appeal agreed with the finding of the High Court, this Court would consider the issue on the basis that it gives rise to a situation of general or public importance and would grant leave to appeal.

[15] A consideration of the facts reveal that the driver who met with his death in the accident had been assigned the task by the Petitioner Company to deliver a load of fuel on the vehicle he was driving to Savusavu. The driver had according to the plaintiff's evidence asked him to accompany him to Suva and to assist him in his work and had given him $10 for the trip. The plaintiff had stated in his evidence that he was picked up by the driver at a point away from the Company Depot and that while proceeding he had on one occasion stopped the vehicle and got him to check on the tyres of the vehicle. Although the Petitioner sought to establish that there was a notice displayed on the dashboard prohibiting the taking of passengers in the vehicle, the plaintiff in his evidence said that he did not see such a notice in the vehicle.

[16] The submission of the plaintiff before this Court was that the effect of the Prohibition given to its driver was to the effect that it limited the scope of his employment and did not relate to the conduct within the course of employment and therefore the driver's act of taking the plaintiff in the vehicle was an act which was outside his scope of employment and hence the Petitioner was not vicariously liable for such an act and its consequences. Although it was the Respondent's contention that he was asked to assist the driver and to accompany him by the driver himself, the Petitioner's position was that at the best the Respondent's version was unreliable and that he was there in the vehicle merely to keep company. However, this contention of the Petitioner is one based on the facts placed before the High Court on which the finding of the learned High Court Judge was that the Respondent was in the vehicle on the invitation of the driver to assist the driver, even though taking a passenger in the vehicle was prohibited by the driver's employer. The Court of Appeal considered this position and upheld the finding of the High Court and relied on the decision in *Rose v Plenty* [1976] 1 WLR 141 as being applicably in Fiji as well.

[17] The Petitioner's Counsel relied on the judgments of *Twine v Bean's Express* [1946] 62 TLR 458 and *Conway v George Wimpey & Co Ltd* [1951] 2 KB 266 which have often been considered in many jurisdictions on this issue of acts done by employees when there are prohibitions imposed on them. He sought to distinguish the decision in Rose v Plenty on the basis that the facts in the

present case do not come within the situation that arose in that case and hence the judgment of the Court of Appeal cannot stand. Counsel also relied on the judgment in *Canadian Pacific Railway Co v Lockhart* [1942] AC 591 for the proposition that 'there are prohibitions which limit the sphere of employment and prohibitions which only deal with conduct within the sphere of employment' and that the instant case fell within the first category set out in that proposition. This is the same line of thinking which arise from the decisions in Twine v Beans Express; Conway v Wimpey. Counsel also sought to base his argument on the decision *Aldred v Nananco* [1987] IRL 292 the facts of which case fall completely outside the scope of the present situation as it dealt with a situation where an employee had committed an act intentionally in trying to frighten a fellow employee resulted in injury which act had nothing to do with his employment and there the Employer was clearly held not vicariously liable.

[18] But as has been stated in paragraph 16 above, the finding of fact in this case is that the Respondent had been on the vehicle on the invitation of the driver and to assist him. The contention of the Petitioner that the present case falls within the group of cases starting from Twine v Bean's Express where the employer was held not liable in cases where there were prohibitions which limited the scope of employment as against conduct within the course of employment.

[19] The Respondent's Counsel while relying on the decision in Rose v Plenty also sought to rely on the Sri Lanka case of *Sarath Kumara Perera v Winifred Keerthiwansa and others* (1993) LKSC 48 where the Supreme Court of Sri Lanka held the employer liable in a situation where the driver of a vehicle had taken passengers in his vehicle in spite of a prohibition from taking passengers. The Supreme Court of Sri Lanka held the Employer liable on the basis that the Employer was at fault in engaging employees who carry out their duties carelessly.

[20] In the light of these decisions it is necessary for this Court to view the position of vicarious liability in a case as is the present one. As far as the facts are concerned, this is a situation in which the driver of the Petitioner's vehicle acting contrary to a prohibition placed on him had taken the respondent in his vehicle which according to the plaintiff's evidence was to assist him, which was accepted by the High Court and the Court of Appeal.

[21] It is this finding that the Respondent being in the vehicle to assist the driver that plays a crucial part in the liability of the Petitioner on the basis of vicarious liability. It is this factor that distinguishes this case from the line of authority starting from Twine v Bean's Express where the Employer was held not liable. Whereas in the decision of Rose v Plenty the assistance given by the boy on the van to help the driver was the matter that made the employer vicariously liable. Lord Denning in Rose v Plenty stated thus:

> *"In considering whether a prohibited act was within the course of employment, it depends very much on the purpose for which it is done. If it is done for his employer's business, it is usually done in the course of his employment, even though it is a prohibited act."*
>
> In the present case too the Respondent had been invited by the driver to assist him in carrying out the employer's work which makes the Employer liable for the negligent act of the driver.

[22] In the same case of Rose v Plenty, Lord Justice Scarman went further by stating thus:

'But basically, as I understand it, the employer is made vicariously liable for the tort of his employee not because the plaintiff is an invitee, nor because of the authority possessed by the servant, but because it is a case in which the employer, having put matters into motion, should be liable if the motion that he has originated leads to damage to another.'

[23] This dictum of Lord Justice Scarman brings in a wider concept based on public policy by which an employer is made liable if he initiates some action which may for some unfortuitous events bring about some damage to a person., which borders more on personal liability than on vicarious liability when an employer engages a driver to drive a vehicle for the employer's purposes. Irrespective of any prohibitions or instructions given to the driver, the employer is liable for the negligent driving of the vehicle..

[24] The Respondent cited the judgment in *Sarath Kumara Perera v Winifred Keerthiwansa and others* (1993) LKSC 48 where it was held that the Employer was vicariously liable for the negligence of its driver in causing the death of a passenger taken in a car by driving it negligently and meeting with an accident contrary to instructions given to him not to give lifts to passengers. In that case Chief Justice GPS de Silva stated that the act of taking Keerthiwansa (the passenger) in the car was within the ostensible authority of Sally (the driver) and was not an unauthorized act, and that Sally was acting within the scope of his employment in taking the passenger in the car and that the employer was vicariously liable.

[25] In the course of his judgment Chief Justice GPS de Silva cited with approval the following dictum of Wessels J in *Estate Van Der Byl v Swanepoel* [1927] AD 141 at 151

'It is within the master's power to select trustworthy servants who will exercise due care towards the public and carry out his instructions. The third party has no choice in the matter and if the injury done to the third party by the servant is a natural or likely result from the employment of the servant then it is the master who must suffer rather than the third party. The master ought not to be allowed to set up as a defense secret instructions given to the servant where the latter is left as the public is concerned, with all the insignia of a general authority to carry on the kind of business for which he is employed.'

and stated that according to the facts in that case that the employer had failed to exercise the degree of care expected of a prudent employer in selecting the person whom he employed. This is in line with the pronouncement of Lord Justice Scarman in Rose v Plenty quoted above. The liability of the employer is more on the basis of not being careful in selecting his employees.

[26] As was stated in the present case, does the fact that the prohibition given to the driver is displayed in the vehicle, which was fixed to the dashboard in this case make a difference in the responsibility of the employer. What if the person who was given the lift was an illiterate person who could not read such a notice? As has been held in the above cases, the fact of placing a notice within the vehicle regarding the prohibition would not make any difference if the vehicle is being driven by the driver for the employer's purpose.

[27] The law relating to vicarious liability has developed over the years and has advanced to the stage of imposing a very heavy burden on employers when engaging employees as they have to act prudently in selecting employees to carry out tasks for the employer. It the tasks to be carried out by the employees with

or without prohibitions amounts to situations where the employer's purpose is being carried out then the employer would be held liable for the wrongs of his employees.

[28] In the above circumstances this Court of the opinion that the Petitioner is vicariously liable for the negligent driving of its driver and would affirm the finding of the Court of Appeal.

[29] On the question of damages that have been awarded, the Petitioner's contention was that the damages awarded were excessive taking into consideration the condition of the Respondent after he had received treatment. The High Court had granted $32,987.93 as general, special damages and interest while the Court of Appeal varied same and awarded $60,000 as general damages, $12,400 as Special damages, totaling a sum of $72,400. The Court also ordered the Petitioner to pay interest at 6% per annum from 20th August 2001 (the date of the Writ) until 8th February 2011 (the date of the judgment).

[30] There is no doubt that the Respondent received multiple injuries due to the accident and he certainly is fortunate to have survived, when the driver of the vehicle had died instantaneously. Although the Petitioner sought to make out that the Respondent had recovered very much, that too had been due to proper medical treatment which however took a considerable period of time, However, he has still been left with certain physical impairments to his body and still has metal insertions in his body which probably would cause him considerable discomfort. These injuries would certainly hinder him from living a life which he would have very much like to have lived under normal circumstances. It is very clear from the medical evidence that he had suffered very serious injuries which leave an indelible stamp on his life. The pain and suffering he would have undergone during the period he was under constant treatment is beyond doubt a matter to be given serious consideration. The Respondent was 25 years of age at the time of the accident, in the year 1999, married with three children and was a self-employed sugar cane farmer. His livelihood as a farmer would certainly be affected as his physical capabilities would be reduced to a great extent. The prime of his life has been affected, the loss of amenities he had suffered cannot be effectually remedied. The bizarre event of being subjected to the accident in the manner in which it had been described would haunt him for the rest of his life. We agree with the observations of the Court of Appeal that the damages awarded should be more than nominal especially in these circumstances.

[31] This Court also endorses the views expressed in The Permanent Secretary for Health and Another v Arvind Kumar and another (unreported Civil Appeal No.84 of 2006 delivered on 20th June 2008) cited by the Court of Appeal to the effect that in the assessment of the quantum of damages, the socio-economic conditions of Fiji though relevant should not be an over-riding factor and that the task of the Court should be to arrive at a proper figure which will properly compensate a person who has suffered pain and suffering and loss of enjoyment of life.

CONCLUSION

[32] Having considered all the circumstances of the case specially the fact that the Appellant company flew the Respondent to New Zealand soon after the accident and got him treated, we vary the quantum of general damages ordered by the Court of Appeal, although the view has been expressed that it is the trial Court that can properly assess damages and that a Court of Appeal should not in general increase the damages awarded by a trial Court as we consider that the

award made by the trial Court in this instance is inadequate considering the nature of the injuries suffered by the Respondent and his subsequent condition. However, we consider that the award made by the Court of Appeal in granting $60,000 as general damages is somewhat excessive taking into account earlier decisions such as Pranish Prakash Chand v Ganpati Bulla and Anor 112 of 2004, where $50,000 had been awarded and Devi v Chand 2008 FJHL 144 where general damages awarded were $45,000 in situations where the injuries caused were much more serious, we vary the said quantum by reducing same to $45,000. We therefore vary the award of the Court of Appeal by awarding $45,000 as general damages (for pain and suffering and loss of amenities), thus totaling a sum of $57,400 being $45,000 as general damages and $12,400 as special damages (being loss of earnings) with interest as set out in the judgment of the Court of Appeal. We dismiss the appeal subject to the above variation in respect of damages. We also affirm the costs awarded by the Court of Appeal and in addition grant costs of this appeal as $5,000 to be paid to the Respondent by the Petitioner.

Appeal dismissed.