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BIJAI SINGH

v.

SUSHIL CHANDRA AND ANOTHER

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[SUPREME COURT, 1972 (Tuivaga J.), 10th August, 5th October]

Civil Jurisdiction

Negligence—action for damages for personal injury—negligent driving of motor vehicle —owner not in vehicle—driver using vehicle with consent and permission of owner—
C *purpose of use—whether owner vicariously liable.*

The plaintiff was injured by the impact of a motor vehicle driven (negligently as the court held) by the first defendant but owned by the second defendant, who was not in the vehicle at the material time. The first defendant was using the vehicle with the consent and permission of his brother, the second defendant, in order to visit a motion picture
D theatre. The second defendant did not give evidence.

Held: The only inference which could be drawn on the whole of the evidence was that the first defedant was driving the vehicle for his own private purposes, in which the second defendant had no interest or ocncern. The second defendant was not therefore liable for the first defendant's negligence.

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Cases referred to:

Ormrod v. Crossville Motor Services Ltd. [1953] 2 All E.R. 753; 97 Sol. Jo. 570.

Launchbury v. Morgans [1971] 1 All E.R. 642; [1971] 2 W.L.R. 602

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Hewitt v. Bonvin [1940] 1 K.B. 188; 161 L.T. 360.

Britt v. Galmoye & Neville (1928) 44 T.L.R. 294.

Action for damages for personal injury; reported only on the question of vicarious liability.

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R. I. Kapadia for the plaintiff.

R. G. Kermode for the defendants.

The facts sufficiently appear from the judgment.

H 5th October 1972

TUIVAGA J.:

In this case the plaintiff seeks damages from the defendants in respect of injuries received and loss and damages sustained by him when a motor

car driven by the first defendant collided with him on Rodwell Road, Suva, on the afternoon of 23rd January, 1968 at between 5.30 p.m. and 6.00 p.m. The car was owned by the second defendant. He alleges that the collision was caused by the negligence of the defendants. A

The defendants deny the allegation and allege that it was caused or contributed to by the negligence of the plaintiff.

On the day in question after he finished work the plaintiff came to Morris Hedstrom Limited Service Station in Rodwell Road to deliver a cheque. Having done so he proceeded on his way to the Bus Stand to catch a bus to take him home. In order to do so he had to walk across Rodwell Road to the otherside. At the time Rodwell Road was a dual carriage-way road with flower beds demarcating the two sections of the road. The city-side of the road carries city bound traffic and it was on this part of the road where the accident occurred. According to the plaintiff before he crossed the road at the pedestrian crossing he looked first to his right where he saw one car travelling towards the city from the directiton of Walu Bay. The car was a fair distance away. He then proceeded to cross the road. It was still daylight. There was a light drizzle otherwise it was fine. After he had gone a halfway on that particular section of the road he did not bother further to look to his right to ascertain the state of traffic. When he was about one pace from the flower bed, he was suddenly knocked down by the car he had seen earlier. He was immediately rendered unconscious and only recovered his senses when he was in hospital some hours later. B C D

Another witness called for the plaintiff was Kiran Kumar s/o Daya Ram (PW3) who gave evidence to the effect that he saw the plaintiff knocked down about one pace from the flower garden. He was standing on the opposite side of the road when he saw this happen. E

Inspector Aminiasi Batinirerega (PW2) gave evidence that as a result of an accident report he went to the scene of the accident where he saw the defendant's car Reg. No. H53. It was lying almost perpendicular to the road close to the flower bed. He said he made a sketch plan of the area which tendered in evidence as Ex. 6 with a key Ex. 6A. According to the Inspector the width of the road where the accident occurred was 42 feet. He also said that he saw two sets of brake marks of the length of 82 feet and 57 feet respectively. He said that there were pedestrian crossing notices on either side of Rodwell Road at the scene of the accident and stated that the car came to rest between the two notices. F G

Only one witness was called for the defendants. He is Mohammed Mehboob Hassan s/o Mohammed Neki (DW1). He said that he was with the first defendant on that day at his brother's place. That afternoon he came down with the first defendant in the car to go to the Phoenix Theatre apparently to watch a film. He was sitting on the left side in front. They came and stopped at the Phoenix Theatre but as the theatre was full they drove on along Rodwell Road with the intention of going to the Lilac Theatre. As they came near the Bus Stand they saw a person cross the road and the first defendant, according to the witness, blew his horn. The next thing he realised was when the car braked severely H

and knocked down a man on the road. He said that their view was
A obstructed by a carrier which was parked on the side of the road. He said that he first saw the plaintiff about 40 feet to 50 feet ahead. In cross-examination he said that the car struck the plaintiff almost in the middle of the road and at the time the car was not pulling to its right.

I have carefully considered the evidence adduced at the trial. I am satisfied that the plaintiff was knocked down close to the flower bed.
B I am also satisfied that the plaintiff had looked to his right before crossing and at the time it was safe to cross the road since the on-coming car was still a fair distance away. I am satisfied that the plaintiff crossed the road at the pedestrian crossing which he was entitled to do. I find as a fact that the first defendant did not keep a proper look-out immediately prior to the accident. The road was a wide one and his view was clear and that there was no reason for him not to have noticed the plain-
C tiff crossing the road. From the brake marks it is clear that he must have been travelling at a high speed at any rate at a speed of over 40 miles an hour which in the prevailing circumstances was excessive. I am satisfied on the whole of the circumstances and on the balance of probabilities that the first defendant was alone negligent and such negligence was the sole cause for the occurrence of the accident.

D It has been submitted that the first defendant was on that day driving for his own purposes and not as agent of the second defendant who is the registered owner of the car which was involved in the accident. For that reason, it is said, liability cannot vicariously be attributed to the second defendant.

E The second defendant has not chosen to give evidence in this case. Therefore in the absence of any evidence to the contrary I have to draw what inferences I can form on the available evidence. I am satisfied that the first defendant was driving motor car Reg. No. H53 with the consent and permission of the second defendant immediately prior to the accident. Indeed the evidence disclosed that the first defendant and DW1 had just come from the second defendant's place when they were involved in
F this accident. The question arises whether the first defendant was an agent of the second defendant when the accident occurred. If so, the second defendant would also be liable. To establish such agency it must be shown that at the material time the defendant was driving the car on the second defendant's business or in his interest: *Ormrod v. Crossville Motor Services Limited* [1953]2 All. E.R. 753: *Launchbury v. Morgans* [1971] 2 W.L.R. 602. In other words the second defendant will escape
G liabilitiy if it is shown that when he lent his car out to his brother, the first defendant, it was to be used for purposes in which the second defendant had no interest or concern: *Hewitt v. Bonvin* [1940] 1 K.B.188; *Britt v. Galmoye & Neville* (1928) 44 T.L.R. 294. I find that there is no evidence to show that the first defendant was driving the car on that afternoon on the second defendant's business or purposes. Indeed the only inference which can reasonably be drawn on the whole of the evidence is that the
H first defendant was on that afternoon driving for his own private purpose in which the second defendant had no interest or concern. In the result the claim against the second defendant fails and is dismissed with costs. It follows therefore from the above that only the first defendant is liable in negligence to the plaintiff.

As a result of the accident the plaintiff suffered injuries which have been described in three letters from the doctors who examined him (Exs.1, 2 and 3). I accept the medical evidence as to injuries and hold them to be as follows :— A

(a) Abrasions right elbow, dorsum of left hand, right knee.

(b) Small bruise on the lateral side of the right hip.

(c) Fracture of the right hip joint and the inferior remus of pubic bone (pelvis). B

The plaintiff was admitted in hospital on the 23rd January, 1968 and was discharged on 11th March, 1968. After his discharge he was seen as an out-patient on subsequent visits and was found to be walking well except with periodic attacks of pain on the right hip. The plaintiff was re-examined on the 2nd July, 1969 by Dr. Ramrakha when it was found C that the plaintiff was still suffering from pain and that arthritic changes have taken place. Dr. Ramrakha again examined the plaintiff on 26th July, 1972 when he noted that there was a minimal shortening of the right lower limb. There was no muscle wasting and apart from some limitation of internal and external rotation there was almost full movement of the hip. The fracture has fully healed. The plaintiff himself gave evidence and said that he still suffers pain on the right hip. As a D result of his injuries he was absent from work for four months at a time when his rate of pay was £5. 12. 6 per week. I accept sixteen weeks as a reasonable period during which the plaintiff with such injuries as he has had might be expected to be absent from his particular type of work.

It seems clear that no loss of earning capacity has been sustained by the plaintiff as a result of the accident. He is a driver by occupation and E this he will be able to continue to do for many years to come. Because of the pain he will require to purchase tablets from time to time. I have taken this into account in assessing damages. As far as loss of amenities of life is concerned it is clear that because of his arthritic condition the plaintiff will continue to suffer pain and discomfort depending upon the state of weather. I have also noted under this heading that the plaintiff did not have any particular hobbies or sports which might be said to F have been adversely affected by the accident. Having taken these matters into consideration and having regard to the nature of his injuries I think the amount of damages to award which is fair both to him and the first defendant is $800. In addition to this, I award the plaintiff a sum of $40.00 by way of agreed special damages and $180 for loss of wages. Judgment is accordingly entered for the plaintiff against the first defendant for these amounts with costs. G

Judgment for plaintiff against first defendant only.