IN THE FIJI COURT OF APPEAL

CIVIL JURISDICTION

CIVIL APPEAL NO.ABU0051U.96S
(High Court Civil Appeal No. 134 of 1990)

BETWEEN:

SUNIL CHANDRA f/n JAGAR NATH — APPELLANT

-AND-

RAM NARAIN f/n RAM GARIB
JINENDRA KUMAR NARAIN f/n RAM NARAIN
VIMLESH KUMAR f/n BRIJ LAL

RESPONDENTS

Mr. R. Prakash for the Appellant
Mr. C.B. Young for the Respondents

Date and Place of Hearing	:	5 November 1997, Suva
Date of Delivery of Judgment	:	14 November, 1997

JUDGMENT OF THE COURT

The Respondent, Mr Ram Narain, is the administrator of the estate of his son, Jinendra Kumar Narain, ("the deceased") who died on 13 October 1987 at the age of 18. The deceased suffered fatal injuries. He was a passenger in a motor vehicle, driven by the second respondent, Vimlesh Kumar, ('Vimlesh') and owned by the first Respondent, Sunil Chandra ('Sunil') which went out of control and crashed on a gravel road.

On 15 May 1990, the Respondent issued proceedings in the High Court at Lautoka seeking damages under both the Law Reform (Miscellaneous Provisions) (Death and Interest Act) (Cap 27) and the Compensation to Relatives Act (Cap. 29). He was entitled to invoke the first statute to claim damages for the benefit of his son's estate and to invoke the

second because he was a relative of the deceased entitled to sue for his own pecuniary loss, resulting from his son's death. The statement of claim erroneously stated that the proceedings had been brought on behalf of the deceased's brother and sisters as well as the father and the deceased's mother. The statement of claim did not specify any sums claimed under either head or indeed any basis for calculating damages.

The action came on for hearing before Sadal J. in the High Court at Lautoka on 1st and 2nd November 1993. At the conclusion of the evidence, the learned Judge called for written submissions. We were told by counsel that these were supplied promptly. The last minute on the file before actual delivery of judgment is dated 28 January 1994. We accordingly assume that all material necessary for a decision had been placed before the learned Judge by that date. Notwithstanding the relative simplicity of the facts and the application to those facts of legal principles outlined in the written submissions, it was not until 2nd August 1996 that Sadal J. delivered his reserved judgment. He found that Vimlesh, the driver of the vehicle, had been negligent, and that Vilmesh was the agent of the vehicle owner, Sunil. The Judge awarded damages of $39,900 plus costs against both Vimlesh and Sunil. There was no reason stated in his judgment for the delay of over 2 ½ years in delivering judgment in a relatively simple case. At the hearing in this Court, neither counsel was unable to suggest any. The Judge made no mention of interest although it had been claimed in the statement of claim.

The Judge held that the accident in which the deceased lost his life was caused wholly by the negligent of driving of Vimlesh with no contributory negligence on the part of deceased. Understandably, Mr Prakash abandoned his appeal against that finding which was

the only one open on the evidence. Vimlesh did not appeal against any part of the judgment and did not appear at the appeal hearing.

The principal question for this Court is to determine whether judgment should have been entered against the owner of the vehicle in the circumstances as found by the Judge. There were submissions by counsel for the Appellant that the Judge was wrong in certain of his factual findings. We find no merit whatever in these submissions. Despite the inexplicable and unfortunate delay of over two- and- a-half years between hearing and delivery of judgment, the facts as found by the Judge were open to him on the evidence. We do not think that counsel for the appellant has come close to discharging the difficult task of upsetting any factual finding, made after seeing and hearing the witnesses. We now record the facts as found by the Judge..

Sunil was a market gardener who sold at the Ba market; he traded principally in bananas. On the day of the accident, Sunil's brother-in-law, Rohit, drove Sunil's Daihatsu van on an expedition to collect mangoes for Sunil. The passengers on the vehicle, as it left Sunil's house, were Yad Ram Sharma, Ajesh Kumar, Vimlesh and the deceased. Despite Sunil's denial that he did not authorise the mango-gathering expedition, and knew nothing about it, the Judge preferred the evidence of Yad Ram Sharma and Ajesh Kumar to the contrary. Yad Ram Sharma said he was to be paid $6 per day by Sunil. Vimlesh said that he went on the expedition at the request of his friend Rohit. There was no evidence that he or Rohit was to be paid anything.

Sunil's wife was a passenger when the van left Sunil's house. She was dropped off at the Ba market. The party proceeded to the Bula Bula area where they picked some mangoes and loaded them into crates. The fatal accident occurred on the homeward journey when Vimlesh drove too fast downhill on a gravel road.

Ajesh Kumar confirmed that he and Vimlesh had been asked by Sunil to get mangoes. He had previously worked for Sunil. He said that Vimlesh was present when Sunil told them to pick mangoes. Vimlesh said he took over the driving at the invitation of Rohit who gave him the key. The reason for the change of drivers was not clear. Rohit was not called to give evidence. Sunil denied that he had instructed Rohit and the others to pick mangoes or that he had asked Yad Ram or Ajesh Kumar to work for him. Rohit was Sunil's brother-in-law, living with him at the time. Sunil admitted that the van was parked at his home when not in use and that Rohit had his general permission to drive the van. He denied authorising Vimlesh to drive that day.

The Judge disbelieved Sunil's evidence that he did not authorise Rohit to pick mangoes for him. The Judge also held that Sunil knew the identity of those in the party when the van drove away from his house. This finding accords with the evidence of Ajesh Kumar who said Sunil asked him to sit in the van.

The reasoning of the learned Judge in finding that Vimlesh was driving the van as the servant and agent of Sunil at the time of the accident appears to be that Vimlesh was told

by Sunil to pick mangoes for him, even although it was Rohit who drove the van away from Sunil's premises. Although the Judge had the benefit of extensive submissions from counsel on the difficult issue of the vicarious liability of a car owner, he mentioned no authority in his tardily-delivered reserved judgment.

With respect to the learned Judge, there is just no evidence of a master/servant relationship between Vimlesh and Sunil. The plaintiff's witnesses said nothing about Sunil paying Vimlesh. Neither did Vimlesh and Sunil in their evidence. Vimlesh was going along with the mango-picking party with Sunil's knowledge at the invitation of Rohit.

The law on fixing vicarious liability for a driver's negligence on the owner of a motor vehicle has been frequently considered by the Courts. The decision of the New Zealand Court of Appeal in Manawatu County, v. Rowe, [1956] NZLR 78, approved by the Privy Council Rambarran v. Gurrucharran, [1970] 1 WLR 556, 560, establishes the following propositions

1. The onus of proving agency rests on the party alleging it.

2. The fact of ownership of a vehicle gives rise to an inference that the driver was the agent of the owner; in other words, that fact alone in the absence of anything else, provides some evidence to go to a jury;

3. This inference can be drawn in the absence of other evidence bearing on the issue or where such other evidence as there is, fails to counter-balance it.

4. For the plaintiff to make the owner liable, the plaintiff must establish that the driver was driving the car as a servant or agent of the owner and not for the driver's own benefit and for his own concerns.

In Rowe's case, Mrs Rowe, while driving her husband's motor car with his consent, collided with the appellant's vehicle. The Court of Appeal held that she was not driving the car as a servant or agent of her husband. In Rambarran's case, the Privy Council held that the the father of a son driving the father's car with the father's general permission was not vicariously liable for the son's negligent driving. In allowing the appeal from Guyana Court of Appeal, the Privy Council noted that the occasion when the accident happened was not one of those specified by the appellant as one when the son would drive on his behalf; the appellant was unaware that the son had taken the car on that day nor did he hear of the accident until a fortnight after it had happened. These facts, destroyed any presumption of agency and raised the strong inference that the son was not driving as the appellant's servant or agent.

In the most recent leading authority, Launchbury v. Morgans [1973] AC 127, Lord Salmon at 151 referred with approval to the two cases just cited. In that case, a wife owner was held not to be vicariously liable for the negligent driving of a friend of her husband who was driving the husband home after a drinking session.The vehicle was owned by the

wife but used by the husband and the wife for various purposes, it was regarded as "their" car. The husband had telephoned the wife warning her that he was going out drinking with his friends and might arrange to be chauffeured home. The House of Lords held that to fix vicarious liability on the owner of the car, even when there was express or implied permission from the owner for the driver to drive it, it had to be shown, that the driver was using the vehicle for the owner's purposes under delegation of a task or duty. The owner's interest or concern for the safety of the car or its occupants was not sufficient. On the facts, it was impossible to hold that the driver had been the wife's agent when driving the husband home after the husband had become unfit to drive. Mere permission to drive is not enough to extend the principle of vicarious liability even in the special case of the motor vehicles. Any further extension of the principle of vicarious liability in relation to car owners requires legislation. This had not occurred in England at the time of the Launchbury case and it has not occurred in Fiji.

Another formulation of the test was made by du Parcq, L J in Hewitt v. Bonvin [1940] 1 K.B. 188, 194-5, approved by Lord Salmon in Launchbury at 149. "The driver of a car may not be the owner's servant and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority express or implied to drive on the owner's behalf. Such liability depends not on ownership, but on the delegation of a task or duty."

All these authorities were adopted by this Court in Ganesh and Anor v. Ali (Civil Appeal No.47 of 1978 - judgment 30 November 1978). This Court held that mere permission from the owner for the driver to use the vehicle coupled with his knowledge of and approval of

the reason for the use of the vehicle (i.e. attending a wedding) was not suffiicient to impute agency to the vehicle owner.

Counsel referred to the English Court of Appeal decisions in Ilkiw v. Samuels, [1963] 2 All.E.R. 879 and Rose v. Plenty, [1975] 1 All.E.R.97. These were master and servant cases where a driver had disobeyed instructions and, in the first case, had allowed another person to drive the employer's truck and, in the other, had allowed an unauthorised youth onto a milk delivery vehicle. Both cases appear to be concerned with the scope of employment which was not limited but which was being carried out improperly. They have little relevance in the present situation, since neither Rohit nor Vimlesh could be said to have been Sunil's employees. There was no evidence of any contract of employment in their case.

On the extremely meagre direct evidence given, the Court has to consider whether on a balance of probabilities the inference arising from Sunil's ownership was counter- balanced by the evidence. Put another way, was the vehicle being driven for Sunil's purposes and did the driver have his express or implied permission to drive?

It appears to us on the direct evidence of Yad Ram and Ajesh that they were employed by Sunil Chandra for $6 per day to pick mangoes. The deceased was also present on the mango picking venture. The finding of the judge that he disbelieved Sunil when he said that he did not authorise Rohit to pick mangoes for him, amounts to a finding that Rohit was authorised to collect mangoes for him. In these circumstances, it can readily be inferred that Sunil had arranged a party of men to pick, collect and transport mangoes for him on the day in

question. Vimlesh said he was helping Rohit as a friend; although the Judge made no express finding about him, it can be inferred that Vimlesh also was working for Sunil as one of the party, even though he may not have known that the activity for which he was helping Rohit was really for Sunil's benefit. It would seem then that Yad Ram and Ajesh were in a master and servant relationship to Sunil; the deceased may have been; Rohit and Vimlesh may have been agents but not servants.

To carry out the task, Sunil provided a vehicle for the collection and cartage of the mangoes and the transport of the working party. On the actual day it was driven by Rohit, who was known to drive the vehicle from time to time. Rohit was there when Yad Ram and Ajesh reported for work at Sunil's property. There was no evidence that Rohit was in charge of the vehicle or had sole control of it; nor was there evidence of any prohibition by Sunil of any members of the party driving the vehicle, although it could be inferred that there would not have been any implied authority that an unlicensed person could drive; no implied authority to do something unlawful should be inferred. That would require clear and direct evidence. However, the record of a criminal prosecution of Vimlesh, produced at the trial, showed that he was a licensed driver.

Had Sunil provided a hand- cart for the collection and cartage of the mangoes and any one of the party had pulled it, then it would reasonably be held that that member of the party or as an authorised agent. Sunil would be vicariously liable for any act of negligence on his part. For example, if Vimlesh had been pulling the cart, heavily loaded with mangoes, and negligently pulled it on to the deceased so that he broke his leg, it could not be doubted that Sunil would be vicariously liable.

In our view, today's provision of a motor vehicle to carry out an allotted task is not qualitatively different from yesterday's provision of a hand-cart. It is the appropriate method in modern terms. It follows that Sunil would be vicariously liable for the negligence of any one of the party who used the vehicle and injured another, so long as he was a licensed driver. The position might well have been different if Sunil had put Rohit in sole charge of the vehicle or had expressly prohibited the others from driving it. Accordingly, we dismiss the appeal against liability on the part of Sunil.

The other ground of appeal related to the calculation of damages. The learned Judge was presented with very little evidence, certainly not as much he was entitled to expect, on the question of quantum. He did the best on the limited evidence and decided that the pecunary loss for the Respondent from the death of his son should be fixed as $50 a week. The Judge then used a multiplier of 16 to come to the figure awarded, which included funeral expenses plus the standard $1250 for loss of life expectancy. However, the learned Judge seemed to have not appreciated, when calculating damages, that the two causes of action pleaded gave rise to two bases for awarding damages; one to the father as a dependant and one to the estate under the Law Reform legislation. The finding that $50 per week was the exent of the father's loss was open to the Judge. We cannot see that he was in error, despite the submissions against his factual finding.

We are surprised that Sadal J. did not advert to these two bases for damages because thejudgment of this court delivered on 30/6/1994 in the case of Dreunimisimisi and Another v. Ratnam (Civil Appeal No. 60 of 1992) was an appeal from the same Judge. That

judgment referred to Daya Ram v. Pene Caca (Civil Appeal No.50 of 1992) a judgment of this Court delivered in March 1983. In both judgments, this Court set out the bases for calculating damages under both causes of action.

The first calculation, i.e. of the claim for compensation due to the father and mother occasioned by the death of the deceased, would have as its first step an assessment similar to that taken by the learned Judge i.e. to assess the pecuniary loss to the relative. Next the Judge would have to project for how long that loss would enure; then he would calculate the 'present value' of a lump sum which invested now would produce an annuity for the required amount over the required term. Finally some deduction for contingencies would have to be made. Such calculations are made by accountants and actuaries. We do not understand why the Judge was not assisted by such evidence in the present case. In the absence of further evidence, we see no reason to interfere with the Judge's assessment although we have grave doubts about his method of calculation.

The other claim under the Law Reform legislation would have been for the "lost years' for the benefit of the estate of the deceased. It could be considerable, given that the deceased was a young man of promise, aged 17 and in good health. The two heads of damage were not specifically addressed in counsel's submissions. Despite our warning that persistence with this ground of appeal was possibly unwise, Mr Prakash elected to continue with it. There was no cross appeal by the respondent, as well there might have been. Mr Young indicated that he was content with the amount awarded. We have no evidence on which we can make any

calculation under the Law Reform legislation. It was up to the Plaintiff's advisers to lead appropriate evidence. They chose not to do so.

The appeal by Sunil is dismissed with costs. The judgment against Vimlesh must stand.

We have noted earlier the very long delay between the date of hearing the date of delivery of judgment. Such a delay would not be acceptable, even in a complex and lengthy case; this was neither. We deplore the fact that the learned Judge took so long to give this decision; such a delay is not fair to the parties and reflects badly on the administration of justice.

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Sir Ian Barker
Judge of Appeal

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Mr Justice I. Thompson
Judge of Appeal

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Mr Justice R. Savage
Judge of Appeal

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