SARATH KUMARA PERERA
v.
KEERTHIWANSA AND OTHERS

COURT OF APPEAL
PALAKIDNAR, J. (P/CA)
A. DE Z. GUNAWARDANA, J.
C.A. NO. 37/82(F)
D.C. GAMPAHA NO. 21936/M
8 MAY, 29 JUNE AND
24 AUGUST 1992

Delict – Vicarious liability of the master for injuries caused by negligent act of a servant – Can secret instructions given absolve the vicarious liability of the master – Meaning of 'scope of employment' and, in the 'course of employment' – Prescription – Requirement that the cause of action must be pleaded in the plaint – Whether inflation should be taken into account in assessing damages.

The plaintiff filed action for damages against the defendant, who is the master of the driver of a hiring car, for having caused the death of the deceased, who was the husband of the 1st plaintiff and the father of the 2nd to 5th plaintiffs, as a result of the negligence of the defendant's driver. The car had gone on a hire to drop some tourists at a hotel in Trincomalee. On its return trip to Colombo, contrary to verbal instructions by the master, the driver had picked up three passengers, one of whom was the deceased. At Kalagedihena on the Colombo-Kandy road, the car had met with an accident and the deceased suffered serious injuries in consequence of which he died about two years later.

Held:

(i) that all the facts and circumstances of this case show that the driver was acting within the sphere of employment and thereby the act of giving a lift to the deceased, would come within the scope of his employment. Therefore, the defendant, as the master is vicariously liable for having caused the death of the deceased as a result of the negligence of his driver.

(ii) that in an action by dependants of the deceased for recovery of damages for deprivation of maintenance and assistance and recovery of expenditure incurred, prescription will begin to run only from the date of the death of the deceased.

(iii) that where facts and circumstances constituting the cause of action and the different claims that have accrued to the plaintiffs are set out in the plaint and in addition the reliefs sought are averred in the prayer to the plaint, there is sufficient compliance with section 40 of the Civil Procedure Code.

(iv) that it is very much the practice in judicial decisions, to take into consideration inflation, in assessing damages.

Per Gunawardana, J. "We are in agreement that it ought to be so. Otherwise, the decree of Court will move away from reality."

Cases referred to:

1. *Estate Van Der Byl v. Swanpoel* (1927) S.A.L.R. (A.D.) 141, 145, 151.
2. *Lumpus v. General Omnibus Co.* 32 L.J. Ex. 40.
3. *Rossouw v. Central News Agency, Ltd.* (1948) 2 S.A.L.R. 267.
4. *South African Railways and Harbours v. Marais* 1950 S.A.L.R. 610.

5. *Twine v. Bean's Express Limited* (1946) 1 ALL ER 202.
6. *Mckize v. Masters* 1914 AD 382.
7. *Feldman (Pty) Ltd., v. Mall* 1945 S.A.L.R. (AD) 733, 736.
8. *Joel v. Morrison* (1834) 6 CP 502, 503.
9. *Municipal Council of Jaffna v. Dodwell & Co.*, 74 NLR 25, 28.
10. *Mitchell v. Mulholland* (No. 2) (1972) 1QB65, 83.
11. *Cookson v. Knowles* (1977) QB 913, 921.

APPEAL from District Court of Gampaha.

R. C. Gooneratne for defendant-appellant.

G. F. Sethukavalar, P.C. with *Shammil J. Perera* for plaintiff-respondent.

Cur adv vult.

15th October, 1992.

A. DE Z. GUNAWARDANA, J.

This is an appeal from a judgment of the District Court of Gampaha, dated 3, February 1982, awarding a sum of One Hundred and Fifty Thousand Rupees (Rs. 150,000/-) as damages to the Plaintiffs-Respondents and an additional sum of Thirty Three Thousand one Hundred and Twenty Three Rupees (Rs. 33,123/-), as expenditure incurred by the 1st Plaintiff-Respondent. The Plaintiffs-Respondents alleged that the death of the deceased, who was the husband of the 1st Plaintiff-Respondent and the father of the 2nd to 5th Plaintiffs-Respondents, was caused by the negligent driving of a motor car by the Defendant-Appellant's driver, in the course of his employment. After trial, the learned trial judge held with the Plaintiffs-Respondents and awarded the aforesaid damages.

The Defendant-Appellant had hired his car and the driver, to Baur & Co. Ltd., through a company called Cosmos Travels and Tours, to transport some tourists from Katunayake Airport to the Club Oceanic

Hotel, Trincomalee. Having dropped the tourists at Trincomalee the driver came back alone in the car upto Kurunegala, where he offered a lift to one Hettiaratchi, who was on the road. Both of them travelled upto the Kurunegala bus stand, where the deceased and a woman passenger were also picked up. The car proceeded on its journey to Colombo and at Kalagedihena on the Colombo-Kandy road, the car met with an accident at about 5.30 a.m. on 21, July 1975. According to witness Hettiaratchi the car was driven at a fast speed, around 60 M.P.H. At the time of the accident the car had moved in a zig zag manner and struck against a post by the side of the road and thereafter it had overturned. The deceased who was travelling in the rear seat had to be lifted out of the car as he could not move his limbs. The deceased had sustained serious injuries on his neck causing a dislocation of the cervical spine, which had resulted in paralysing him below his neck. He was admitted to the hospital on the same day. He underwent medical treatment in hospital till he died, on 14, October 1977.

The learned Counsel for Defendant-Appellant submitted that the Defendant-Appellant is not vicariously liable to pay damages for causing the death of the deceased, because the act of the driver in giving a lift to the deceased was a completely unauthorised act, which was outside scope of his employment and in no way furthered the Defendant-Appellant's interest. In this context it would be appropriate to examine the facts of the case, to ascertain whether in fact the act of the driver in giving the lift to the deceased was "completely unauthorised". The relevant evidence in this regard comes from the witness Wadood who was the Manager of Baur & Co. Ltd., the Defendant-Appellant himself, and the driver. According to Wadood his company has informed the suppliers of vehicles, not to transport anyone when the vehicles come back empty. He was unable to say whether written instructions were given to that effect. His company had dealings with Cosmos & Co. and had no contact with the driver. The position taken up by the Defendant-Appellant in his evidence was that he had given specific instructions, verbally, to the driver not to take in passengers on his return trips and to take only persons who have hired the car. However, in cross-examination he has admitted that no such written instructions were given. The

driver in his evidence has admitted that the owner, the Defendant-Appellant, has told him not to take in passengers on his return trips, when the car is coming "empty". Thus it appears that verbal instructions had been given to the driver not to take in passengers on his return trips.

In this context it must be noted that merely giving instructions would not enable the master to disclaim liability. It is up to the master to select trustworthy servants who will exercise due care towards the public and carry out his instructions. If the injury that has been caused to a third party is a likely or natural result that could be expected from the type of employment the servant was engaged to perform, then it is only just and equitable that master should suffer, than the third party. As was pointed out by Wessels, J. in *Estate Van Der Byl v. Swanpoel* [1].

"The Master ought not to be allowed to set up as a defence secret instructions given to the servant where the latter is left, as far 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".

"The law is not so futile as to allow the master by giving secret instructions to a servant to set aside his liability" [2]. Per Blackburn in *Lumpus v. General Omnibus Co.*[2].

In the instant case there were no written instructions. There was no way how a third party would have known that the driver had been given instructions not to carry passengers on his return trip. On the other hand, the driver had conducted himself in such a way as if he ostensibly had such authority.

In any event, even if such instructions had been given, does that absolve the vicarious liability of the master, the Defendant-Appellant? The real issue then is, was the driver acting within the scope of his employment in giving a lift to the deceased? It is undoubtedly a difficult question to answer, as the law in this area is far from being settled, and the best approach is to examine the facts of each case and apply the relevant legal principles accordingly.

The learned Counsel for the Defendant-Appellant cited the South African case of *Rossouw v. Central News Agency, Ltd.*[3], where the employee (one Ashburner) of the respondent company, while on the business of his employers, had given a lift to the applicant in the car, the said employee was driving. The car had met with an accident due to the negligence of the employee, and the applicant was seriously injured. It was held that as the giving of the lift to the applicant was something completely foreign to the scope of the employer's duties, the respondent company was not liable. The learned Counsel drew our attention to the following observation made by Blackwell, J. in the said case viz., ". . . the only question is, whether it can be fairly said that in picking up and conveying the applicant he was acting in the course of his employment." Blackwell, J. went on to state further that, " In the present case the giving of a lift to a stranger was something completely foreign to the scope of Ashburner's duties, it was neither necessary nor incidental to them."

The learned Counsel for Defendant-Appellant also cited the case of *South African Railways and Harbours v. Marais* [4], where Greenberg, J. has quoted Lord Greene M. R. in the case of *Twine v. Bean's Express Limited* [5], that the driver was "doing two things at once." Greenberg, J. went on to explain that, "He was driving his engine from one place to another in the course of his employment and simultaneously was doing something totally outside the scope of his employment, viz. conveying someone on his engine who had no right to be there; to this person, viz. the deceased Marais (or to his dependants), the appellant owed no duty to take care."

Since a master is liable for the acts done by a servant "in the course of his employment" or "within the scope of his employment", it would be appropriate to examine what these phrases actually mean. As was stated in the case of *Mckize v. Masters* [6], the basis of liability appears to be the same in English law. Watermayer, C.J. has pointed out in the case of *Feldman (Pty) Ltd., v. Mall* [7], that,

> ". . . the expression "scope of employment" is apt to be misleading, unless one is alive to the fact that the words "scope of employment" are not equivalent to "scope of authority". One

is apt, when using the expression "scope of employment" in relation to the work of a servant, to picture to oneself a particular task or understanding or piece of work assigned to a servant, which is limited in scope by the express instructions of the master, and to think that all acts done by the servant outside of or contrary to his master's instructions are outside the scope of his employment: but such a conception of the meaning of "scope of employment" is too narrow. Instructions vary in character, some may define the work to be done by the servant, others may prescribe the manner in which it is to be accomplished: some may indicate the end to be attained and others the means by which it is to be attained. Provided the servant is doing his master's work or pursuing his master's ends he is acting within the scope of his employment even if he disobeys his master's instructions as to the manner of doing the work or as to the means by which the end is to be attained . . . Consequently, a servant can act in disobedience of his master's instructions and yet render his master liable for his acts".

The majority of the Judges (4 out of 5) applied the said criteria in the said case to ascertain what the words "scope of employment" means and held that the master was liable for the negligent acts of his servant. The facts of the said case briefly are as follows. One Baloyi was employed by the appellant company as a van driver, in which van the company made deliveries of its goods to various retailers in the suburbs. On the day of the accident, after making the last delivery, he handed over the monies collected to one of the company's officers, at his house. Thereafter his duty was to take the van to the company's garage. However, instead of going direct to the company's garage, he deviated and went to Sophiatown, where he had rented a house. He attended to his affairs there, and was later inveigled by a friend to have some beer, and drank enough to make him unfit to drive the van safely to the company's garage. Later in the evening, when he was on his way to park the van in the company's garage, negligently collided with and killed the husband of the plaintiff and the father of her two minor children.

Watermayer, C.J. having analyzed the above facts, in the said case, came to the following conclusion.

> "Baloyi had not abandoned his master's work entirely. He was still retaining custody and control of the van on behalf of his master, both at the time when he became intoxicated and at the time when the accident occurred, for the ultimate purpose of delivering it at the Sauer Street garage in accordance with his master's instructions. He probably hoped that his escapade would remain undetected. In these circumstances, in my opinion, he was driving the van, not solely for his own purpose but also for his master in his capacity as a servant, and the harm which was caused must be attributed, in part, to a negligent performance of his work as a servant, and his master is therefore legally responsible for it."

It is reasonable to discern from the above conclusion that the liability had been attached to the master, on the basis that the departure from the path of duty by the servant did not take him completely away from the functions entrusted to him as servant, to exonerate his master from the legal responsibility, for the servant's negligence.

If on the other hand, the servant had abandoned the work of the master completely in order to attend to his own affairs, then his master may not, according to the circumstances, be liable for the harm the servant may cause to third parties. This position was aptly explained by Baron Parke, J. in the case of *Joel v. Morrison* [8], where he used the famous phrase "frolic of his own". In summing up to the jury in that case he explained,

> "If you think that the young man who was driving took the car surreptitiously, and was not at the time employed on his master's business, the defendant will not be liable . . . . If he was going out of his way against his master's implied commands when driving on his master's business he will make his master liable, but if he was going on a frolic of his own, without being at all on his master's business, the master will not be liable."

In each case whether the servant has departed so far from his master's instructions or disobeyed the instructions of the master, so

as to make the acts of the servant outside the scope of his employment, is always a question of fact. The dividing line which separates the acts within the scope of servant's employment from those outside is uncertain and has to be decided having regard to all the facts and circumstances of each case.

In the case of *Estate Van Der Byl v. Swanpoel* [1], the appellant was the owner of several taxis, and he employed several drivers. The taxis plied for hire principally between G and S railway stations. The drivers were expressly forbidden by the appellant to take passengers anywhere within the S municipality, as they were not licensed to run for hire within the S municipality. On one occasion one of the drivers disobeyed this instruction, and conveyed a passenger from the S railway station to a place within the S municipality and on his way back to the station negligently drove his taxi into a cart driven by the respondent, who was injured.

In dismissing the appeal against the award of damages against the appellant, Wessels, J. with whom the other four judges agreed, observed at page 145 that,

> "When, however we come to consider whether a master is liable to third parties for the negligence of his servant when the latter does an act in the course of his employment but not reasonably necessary to carry out his orders, then two divergent views may be considered. We may either adopt the view that the master's liability to third parties must be so narrowed down that he will then and then only be liable for the tortious act of his servant when the latter is carrying out the exact instructions of his master or was engaged in an act which was reasonably necessary to carry out those instructions, or else we may adopt a wider interpretation, of a master's liability and hold that the master is liable to a third party whenever the servant does an act which strictly speaking falls outside of the special instructions of the master and also outside of what was absolutely necessary to carry out those instructions but which was done whilst the servant was engaged in the affairs of his master, or in the course of the employment to which the servant was appointed . . .

> Now it is quite clear that this Court has adopted the larger liability of the master and it is therefore this larger liability which is the law of the Union."

When we consider the facts of the instant case in the light of the principles discussed above, it is clear that the Defendant-Appellant's driver was acting in the course of his employment, at the time of the accident. He was driving the car towards Colombo, in the performance of his assigned duty of bringing the car back to Colombo. He had not deviated from the normal route to Colombo. The fact that Defendant-Appellant had given verbal instructions not to carry passengers on the return trip shows that it was a foreseeable act, which the Defendant-Appellant had envisaged could happen in the performance of driver's duty, of bringing the car back to Colombo. It may be called a natural or likely act which the driver would have engaged in whilst performing his duty. It is also to be noted that this car was used for carrying passengers for hire and had a red number plate, according to the evidence of the Defendant-Appellant. The driver was employed for the purpose of carrying passengers for hire. Third parties would know that it is a car plying for hire since it carried red number plates. Of course, the Defendant-Appellant states that the car was used only to carry tourists. All these facts and circumstances go to show that the driver was acting within the sphere of employment and thereby the act of giving a lift to Plaintiff's-Respondent's husband, the deceased, would come within the scope of his employment. Therefore, in our view, the Defendant-Appellant, as the master is vicariously liable for having caused the death of the deceased, as a result of the negligence of his driver.

The learned Counsel for the Defendant-Appellant submitted that action is prescribed, in that the accident occurred on 21, July 1975 and the action was instituted on 8, October 1979. In this regard the learned Counsel for the Plaintiffs-Respondents pointed out that this action is for deprivation of maintenance and assistance owing to the death of the deceased, and for expenditure incurred by the 1st Plaintiff-Respondent from the date of the accident until the death of the deceased. This is not an action for recovery of damages as a result of the accident. Therefore, the learned Counsel for the

Plaintiffs-Respondents rightly submitted that, prescription would run only from the date of the death of the deceased, viz. 14, October 1977. We are in agreement with the said submission and we hold that the action is not prescribed.

The learned Counsel for the Defendant-Appellant submitted that the Plaintiffs-Respondents have not pleaded a cause of action in the plaint. He cited the case of *Municipal Council of Jaffna v. Dodwell & Co.* [9]. He further submitted that there is no relief claimed in the plaint. Therefore, the overruling by the trial Judge of the preliminary objection raised in this case on that basis, was erroneous. Upon a careful examination of the plaint, it is clear that the plaintiffs have set out the facts and circumstances constituting the cause of action and more specifically in para 7, set out the different claims that have accrued to them. They have also prayed for specific reliefs under three heads in the prayer to the plaint. This in our view is sufficient compliance with section 40 subsection (d) and (e) of the Civil Procedure Code, which states that a plaint shall contain the following particulars namely,

> "(d) a plain and concise statement of the circumstances constituting each cause of action, and where and when it arose. Such statement shall be set forth in duly numbered paragraphs . . . . (e) a demand of the relief which the plaintiff claims;"

In *Municipal Council of Jaffna v. Dodwell & Co.* the case relied on by the Counsel for the Defendant-Appellant, the original cause of action pleaded in the plaint was for the recovery of the price of goods delivered upon a contract of sale of goods. At the stage of the trial, the plaintiff tried to raise issues upon an unpleaded cause of action based on unjust enrichment, to the extent of the value of the goods delivered. H. N. G. Fernando, C.J. having set out, "the circumstances constituting the cause of action" necessary to be stated in a plaint in an action for unjust enrichment, went on to observe that,

> "The 'circumstances' which I have mentioned at (1) and (2) above are also circumstances which need to be stated in a

> plaint in an action to enforce a buyer's liability under a contract of sale. They were perforce stated in the plaint in the instant case. But none of the other circumstances which I have listed are stated in this plaint; and these are the very circumstances, a statement of which distinguishes a plaint which pleads the cause of action based on unjust enrichment."

Thus it is clear that the facts and circumstances of the said case are so different that the decision in that case has no application to the instant case. In any event, in our view there is sufficient compliance with the provisions of section 40 of the Civil Procedure Code. Therefore we hold that the learned District Judge was right in over-ruling the said preliminary objection and accepting the plaint.

The final submission made by the learned Counsel for the Defendant-Appellant was that the learned District Judge had erred in law in taking into account inflation, in assessing the damages. It is to be noted here that although the Plaintiffs-Respondents claimed Rs. 250,000/- as damages, the learned District Judge has reduced that amount by Rs. 100,000/- and awarded only Rs. 150,000/- as damages, which he thought was an equitable and reasonable amount having taken into account all the circumstances of the case. It is only reasonable to assume that the monetary compensation awarded to an injured party or a person who has suffered a loss must necessarily help to alleviate his injury or loss to a practical or reasonable level. In arriving at such a realistic assessment inflation necessarily is a factor to be taken into consideration. This reality had been acknowleged and adopted in several judicial decisions in the recent past. For instance, in the case of *Mitchell v. Mulholland* [10], it was held that,

> "No one doubts that an award of damages must reflect the value of the pound sterling at the date of the award, and conventional sums attributed to, say, the loss of an eye, have been adjusted upwards in recent years on that account. Inflation which has reduced the value of money at the date of the award must, thus, be taken into account."

In McGregor on Damages (Fifteenth Edition – 1988) at page 629, it is stated that, "This result seems now to be generally accepted".

Lord Denning M.R. has, in *Cookson v. Knowles* [11], observed that,

> ". . .the Courts invariably assess the lump sum (viz. for the non-pecuniary loss to an injured plaintiff) on the 'scale' for figures current at the date of the trial."

Thus it is seen, that it is very much the practice in judicial decisions, to take into consideration inflation, in assessing damages. We are in agreement that it ought to be so. Otherwise, the decree of Court will move away from reality. Therefore, we are of the view that the learned District Judge had not erred when he took into account inflation, in assessing the amount to be awarded as damages.

Accordingly we affirm the said judgment of the learned District Judge dated 3, February 1982 and dismiss this appeal with costs fixed at Rs. 1050/-.

K. PALAKIDNAR, J. – I agree.

Appeal dismissed.