1971 KHC 113
Kerala High Court
V. R. Krishna Iyer, J.
GEORGE THARAKAN v. KOCHAPPI NARAYANAN AND OTHERS
S. A. No. 634 of 1968
15 June, 1971

Torts - Torts -- Damages -- Motor Accident -- Do not harm thy neighbour is a legal obligation -- So the child that moves on to the road will be a neighbour, to whom the driver owes a duty to take care -- The principle of res ipsa loquitur applies in cases where the automobile is found after the accident in an illegitimate position (Para 4, 6, 9)

AIR 1962 SC 1; Referred to

A. Hariharasubramonian; L. G. Potti; A. Balasubramanian; For Appellant
K. A. Muhammed; V. K. M. Hassan; P. P. Thampi; For Respondents

JUDGMENT

1 Automobile accidents on account of negligent driving are escalating in the Kerala State so steeply, with attendant loss of life and limb, that the law, being charged with realism and humanism, has to operate effectively and disenchant those who tempt courts with ersatz contentions out of touch with the facts of life. The present suit was one for damages, the cause of action set out being that the plaintiff's child, 5 years old, was hit by a car (KLE. 246) driven by the 2nd defendant and belonging to the 1st defendant, on the Edacochi - Aroor road at a spot where there are shops, residential houses and heavy vehicular traffic. Admittedly, on 20th January, 1962, at about 1p.m. the plaintiff's child was knocked down by this car and sustained multiple injuries, after having been thrown forward by several feet. Later he succumbed to the injuries., notwithstanding the medical aid given from a neighbouring hospital. The trial judge moralised, with a motorist's slant, that the negligence, if any, was that of the child's irresponsible parents and not of the car driver. His judgment dismissing the suit was assailed in appeal and the learned District Judge held that, on the facts differently found by him and in the light of the correct law as laid down in 1965 KLT 1174, the 2nd defendant was guilty of negligence and that the master, the 1st defendant, also was vicariously liable in a sum of Rs. 2000. We are not concerned with the quantum of the compensation but only with the culpability of the defendants since no appeal has been filed against the moderate award. The 2nd defendant has remained *ex parte* but the 1st defendant, the more vulnerable financially, has however challenged his liability by canvassing the correctness of the finding of negligent driving.

2 More facts must be mentioned before proceeding to apply the law. It is common case that the Cochin - Edacochin road where the accident took place is busy with pedestrian and wheeled traffic, particularly during day time. The liberal sprinkling of schools by the road side and the crowded residential population pressing on the highway make women and children walking along the road or even cutting across a ubiquitous feature. The road is rather narrow at the place of occurrence, relative to the volume of traffic, the evidence being that this stretch, though straight, is only about 21 ft. wide at the tragic spot, a ribbon of 16 ft. being black topped and a small strip on either side remaining untarred. Judging by the tyre marks the car stopped at a

distance of about 26 or 30 ft. beyond the point at which the brake was pressed, throwing light on the speed. Padmanabhan the child, was thrown off about 4 yards from where he was hit and the vehicle itself was damaged, its left front fog light glass and bulb having been broken by the dash and the bracket which held the light itself bent by the impact. It is further seen from the mahazar, Ext. P 9, and other evidence in the case that the car had left the tarred track and got on to the untarred portion when it dashed against the victim. If the ordinary inference from this concatenation of circumstances is that the driving was careless and even otherwise one should have expected the 2nd defendant, to be examined to explain the factors which led to the accident: but he has discreetly desisted from deposing to his version. The reason given for the omission is that the owner had dispensed with the services of the driver and his present whereabouts were not known to him. No steps are seen to have been taken to get at him nor is any reason assigned why the driver was discharged, the case of the owner being that there was no negligence on his part. The excuse given was just a thinly disguised pretext to keep away from that inconvenient cubicle for untruthful individuals and at the same time to avoid the adverse inference arising from such absence. The 1st defendant would not say that he dismissed the driver for fear that it would imply some kind of misconduct on the part of the 2nd defendant. Nor could he Say that he was still in his employ lest he be asked to produce him for examination. The 1st defendant was in an unenviable fix. The non examination of the 2nd defendant, in these circumstances, damages the case of the defendants.

3 On the facts stated above, there was considerable argument about the negligence of the 2nd defendant, the 1st defendant being only vicariously liable. Counsel for the appellant submitted that the road was straight and it was noonday, and so, the speed of 30 miles per hour at which the appellate court thought the vehicle was moving at the time of the accident could not be said to be excessive. He further argued that the house of the child was on the west, that the accident took place on the eastern side of the road, probably because Padmanabhan had come from the east running towards his house, and the car hit him unexpectedly, there being no duty to be extraordinarily circumspect.

4 I agree that accidents without negligence are not uncommon and every automobile casualty does not call for a rash driver as the scapegoat of the law. The plaintiff must prove the defendant negligent. It happens sometimes that children not properly taken care of by their parents, frisk about thoughtlessly and get run over by the most careful of drivers. They are cases of damnum sine injuria. Let us examine the situation more closely. A pedestrian or a cyclist may sometimes be negligent and may cause damage, but a motorist causing damage by negligent driving causes casualties when life is lost. Naturally, the very severity of the consequence must lead to greater diligence. I would, therefore, expect an automobile driver, as a prudent man, to take far more care than a pedestrian or cart driver. Similarly, driving on a city road or along a residential street which is crowded, and there being shops by the road, calls for greater care on the part of a speedy motorist. Again, a road which, is narrow, puts the driver under a more serious obligation of circumspection. In this case, there is evidence to show that somewhere near the point of accident there was a stationary bus thus narrowing the width available for driving. The various factors that produce ' accidents in an overcrowded city with narrow streets like Cochin must register in the motorist's mind. Negligence is not a legal abstraction. First, there must be a duty to take care; and next the act which caused the damage must have been done without that degree of care that the law enjoins. 'Love thy neighbour' is a moral injunction; do not harm thy neighbour is a legal obligation. Who is a 'neighbour' in the eye of the law has been explained by Lord Atkin in Donoghue v. Stevenson (1932 A.C. 562). The learned Law Lord observed thus: "The rule that you are to love your neighbour becomes in law, yon must not injure your neighbour; and the lawyer's question, who is my neighbour? receives a restricted reply. You

must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer must be persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question. Driving a vehicle closely and directly affects other users of the road. The child that moves on to the road will be a neighbour to whom the driver owes a duty to take care if the latter ought reasonably to have the former in contemplation as being likely to be injured by the driving. We have to make a pragmatic approach to the complex fact law situation. For, a prudent man adopts that standard of care and takes only that calculated risk as will reasonably protect others to whom he owes a legal duty of care. What then is the conspectus of facts relevant to reasonable care and the area of neighbourhood.

5 The scene is in a notoriously crowded city Cochin. The streets are narrow, the road corrugated and punctuated by pits and pot holes with invalid vehicles lying in long slumber unattended. Shops and dwelling houses close to the road margin throw out people on to the road there being no sidewalks. Straying animals, in their sluggish course, clog the way unconcerned by possible danger. Schools dot the city and children flow into the streets like monsoon rushes in undefined channels and care free abandon. Most of these factors make driving without hurting others difficult unless a higher degree of care is brought into play by the man at the wheel and he reckons with children and adults showing up by surprise. And children are children, not circumspect elders and no prudent man expects a child to be an adult. The law speaks of a prudent man not a mythical man. The sensible driver is sensitive to these usual circumstances of Kerala roads particularly those uneven surfaces notion ally set apart for a confused miscellany of moving objects to use. While the responsibility of Government and local bodies in maintaining the city roads leaves much Ho be desired, the driver has to take the conditions as they are and use his car cautiously. Indeed, what is ordinarily unexpected elsewhere is to be expected in the actual situation in Cochin city. I may even say that the warning to the motorists on the road sides "expect the unexpected" is a crude but common sense rendering of the extent of duty the law expects of the prudent driver. In the natural course he should, and shall I say would, expect children to come on to the streets without much of forethought about possible accidents. In this city there are so many children about they cannot be bottled up trekking along to the school and from the school at all times of the day. Our streets are lined with residential houses, particularly of the poor, and children are sent usually to make small purchases. You cannot dismiss accidents involving them by calling the parents irresponsible. Any prudent driver knows that these children are not sophisticated enough or trained in children's traffic parks to avoid fast moving vehicles. A judicial verdict, particularly in the field of negligence, depends not on theoretical concepts and ideal conditions but on things of actual life. In this view, I must hold that the foresight and skill expected of a motorist in the difficult conditions often found in a city like Cochin, is of a high order and children turning up indifferent to risks ought to be within his range of attention and expectation.

6 These guidelines of the law will serve resolve the present dispute. The car was moving at a speed of around 30 miles per hour on a busy thoroughfare at noon day. I would call it a risky speed on a track effectively 16 ft. wide, narrowed by a stationary bus on the west of the road. We have also the evidence of the plaintiff's witnesses to show that the car had gone off the tarred track and hit the child with its left end, the inference being that the child was standing at a spot outside the tarred portion of the road. The contact was rather hard as I have already explained. Under these circumstances, I am inclined to think that the principle laid down in AIR 1962 SC 1 may be invoked and a presumption raised against the defendant, rebuttable of course, provided he is able to explain that reasonable foresight could not have prevented what

took place. The principle of res ipsa loquitur applies in these cases where the automobile is found, after the accident, in an illegitimate position, that is, where it would not be in the ordinary course, where the speed was not what it should be in the place where the accident occurred and the consequence was not so innocuous as might have been the case had the diligence the situation demanded been displayed. Salmond (Law of Torts, 15th Edn.) observes: "The maxim res ipsa loquitur applies whenever it is so improbable that such an accident would have happened without the negligence of the defendant that a reasonable jury could find without further evidence that it was so caused. 'There must be reasonable evidence of negligence,' said Sir William Erle C.J , delivering the judgment of the Court of Exchequer Chamber in the leading case of Scott v. London and St. Kaherine Docks Co., 'but where the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care.' " Two conditions have to be made out to attract the principle in Scott v. London and 'St Katherine Docks Co.,
(i) that 'the thing is shown to be under the management of the defendant or his servants."
(ii) that "the accident is such as in the ordinary course of things does not happen if those who have the management use proper care.";'

8 This wholesome rule thus applies to the present case; for, the episode, as disclosed in the evidence, tells its own story. The presumption so raised has not been repelled by any useful explanation and the driver himself has shied at the witness stand.

9 The rules regarding the prudent man and his perspective about neighbours, and the initial presumption against the motorist now spelt out by me may be viewed as too demanding but those who propel vehicles in high risk circumstances must bring to bear an equally high degree of care as a safety obligation. The rule of law will defeat itself in its purpose of social defense and individual protection if it does not rise to the challenge of real life and run close to it. I, therefore, agree with the finding of the lower appellate court and dismiss the appeal.

10 It transpires that the amount decreed is only Rs. 2000/. In the normal course the insurer would have been liable to pay this sum. But after enquiring of counsel why the insurer was not made a party or notice issued to the State Insurance Department I gathered that no insurance policy had been produced or exhibited in this case. S.94 of the Motor Vehicles Act (the corresponding provision in the Kerala Act also) makes insurance against third party risks compulsory. No person shall use a motor vehicle in a public place unless there is in force in relation to the use of the vehicle a policy of insurance covering third party risks. In the Kerala State, under the relevant statute applicable, there is a statutory obligation to insure with the State Insurance Department to cover third party risks. From the materials available on record the 1st defendant's car does not appear to have been insured. He has prima facie violated the obligation cast by the Motor Vehicles Act. There is an interlocking system, as it were, prevalent in the State with the result that even the motor vehicle tax is not received without evidence of payment of the premium of insurance. It would, therefore, appear, unless there is something not disclosed by the records in this case, that the owner of the motor car K. L. E. 248 had neither paid the tax nor taken out the insurance policy at the time the accident took place. It is unfortunate that the official enforcement agencies indifferently execute their duty so as to allow vehicles on the roads unchecked even though tax or premium has not been paid. The State should tighten up enforcement of these provisions, particularly when motor accidents multiply and insurance becomes some kind of a relief for poorer victims. In this case a copy of the judgment will be sent to the Collector, Ernakulam District so that he may take suitable action

against the owner if it is found that he has not paid the tax or paid the insurance premium for the car during the time when the accident occurred.
I dismiss the appeal with costs.
