

DHAPEL

A

v.

ARJUN

[SUPREME COURT, 1962 (Hammett Ag. C.J.),
23rd March, 13th April.]

B

Appellate Jurisdiction

*Tort—negligence—child permitted to ride behind driver of tractor—unlawful act—
heavy duty of care on driver—apportionment of negligence—Compensation to
Relatives Ordinance (Cap. 20)—Law Reform (Miscellaneous Provisions) (Death
and Interest) Ordinance (Cap. 17).*

C

*Damages—contributory negligence—child carried behind driver of tractor—
apportionment of negligence to child to be determined having regard to age and
knowledge he might be expected to have of risk.*

The appellant's action for damages in respect of the death of his son, Jagdish Prasad, was dismissed in the Magistrate's Court. The deceased was a boy aged 13½ years who was permitted by the respondent to travel behind him on a tractor which he was driving, this being an action known to the respondent to be unlawful. It was after dark and he drove at a speed up to twenty miles per hour along a newly made unmetalled road. The tractor swerved to one side, possibly as the result of a puncture, and overturned into a ditch, killing the deceased. The magistrate accepted the explanation of the respondent that when the tractor swerved the deceased clutched him, he looked behind him, and therefore failed to correct in time the course of the tractor.

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E

Held: 1. The magistrate had overlooked that it was a wrongful act on the respondent's part to allow a child to travel with him on the tractor; that as the tractor was not constructed for passengers it should have been obvious to the respondent that the deceased would instantly clutch him at a swerve or jolt. Once he allowed the deceased so to travel he undertook a particularly heavy duty to take care.

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2. In those circumstances, to drive in the dark at a fast speed on a newly made road was itself dangerous and negligent, as also was his action in turning when clutched by the deceased.

G

3. The negligence must be apportioned between the respondent and the deceased, having regard to the age of the deceased, and of the knowledge that the deceased might reasonably be expected to have of the perils to which the respondent's negligence exposed him.

Appeal from a judgment of the Magistrate's Court dismissing an action for damages for death caused by negligence.

H

V. R. Sharma for the appellant.

R. D. Patel for the respondent.

- A The facts sufficiently appear from the judgment of the Acting Chief Justice.

HAMMETT Ag. C.J. : [13th April, 1962]—

- B This is an appeal from the decision of the Magistrate's Court sitting at Ba whereby the Plaintiff-Appellant's claims under the Compensation to Relatives Ordinance (Cap. 20) and the Law Reform (Miscellaneous Provisions) (Death and Interest) Ordinance (Cap. 17) for damages in respect of the injuries and death caused to Jagdish Prasad, the Plaintiff's son, by the negligent driving of a tractor by the Defendant, were dismissed with costs.

- C There are a number of grounds of appeal which it is not necessary to set out in full, the purport of which is that the learned trial Magistrate erred in absolving the Defendant from responsibility.

The facts held by the learned trial Magistrate, in respect of which there was no complaint, were as follows:

- D The Plaintiff is the father of the deceased Jagdish Prasad who died on 13th December, 1957, as a result of injuries received when a tractor driven by the Defendant ran off the road and overturned.

- E The Defendant was driving a Fordson tractor at night after dark, along a newly made unmetalled road, back towards his home at about 7:30-8:00 p.m. at the conclusion of his day's work ploughing. He allowed the deceased, a young boy aged 13½ years, to travel on the tractor behind him. The tractor is not designed for the carriage of passengers and the Defendant admitted that he knew that he was not permitted to carry anyone on the tractor besides the driver. He said he had been specifically warned when paying the tractor licence fee not to carry anybody on the tractor and that he knew the Police prosecuted people for doing so. He also agreed that to carry passengers on the back of a tractor was an unusual practice.

- F The Defendant drove his tractor at a fast pace, reaching a speed of about 20 m.p.h. within a matter of 2 or 3 chains of where he started. He then felt the tractor pull to one side as a result, he believes, of a puncture. The deceased clutched hold of him and he became excited and looked behind him and before he could correct the course being taken by the tractor it had run off the edge of the road into the deep ditch alongside and overturned.

G The Defendant-Respondent maintained that the accident was caused by the act of the deceased in grabbing hold of him from behind and thereby preventing him from correcting the course of the tractor away from the edge of the road.

- H The learned trial Magistrate accepted the explanation given by the Respondent in evidence and held that the act of the deceased in clutching at the Respondent was the immediate cause of the

accident. He held that this explanation successfully discharged the onus cast upon the Respondent in negating the presumption of negligence which arose from the doctrine of "*res ipsa loquitur*" on the tractor running off the road into the ditch.

I appreciate the reasoning of the learned trial Magistrate but I feel it has been overlooked that it was a wrongful act on the part of the Respondent to allow this child of 13 years to travel with him on the tractor in the first place. Since the tractor was not constructed for the carriage of passengers it should have been obvious to the Defendant that in the event of the tractor swerving or jolting the child behind him would instinctively clutch hold of the driver to save himself from falling off. In these circumstances, to drive a tractor, in the dark, along a newly made road at what for a tractor, even the Respondent admitted, was a fast speed, with a child precariously perched on the tractor behind him, was itself a dangerous and negligent thing to do. When the tractor swerved the Respondent should have expected the child behind him would clutch hold of him to maintain his balance in the absence of any other instructions given to the child which, it is clear from the evidence, the Respondent did not give. When he felt the child clutch him the Respondent admitted he got excited, to such an extent, indeed, that instead of concentrating his mind and energies on correcting the course taken by the tractor, the Defendant looked round behind him.

In these circumstances it is clear that whilst the deceased's own acts may well have been one of the causes of the accident, the Respondent by his own acts had (a) wrongfully allowed the deceased to be where he was and in a position where he was likely to do what he did, (b) wrongfully in such circumstances driven at such a high speed, on such a newly made unmetalled road in the dark, and (c) turned round so that he couldn't see where the tractor was going at the very moment that it was heading for the ditch on the side of the road.

In my opinion all these factors are very important parts of the second particular of negligence alleged against the Respondent—namely that "he failed to keep a proper control over the tractor".

Negligence is, after all, the failure to carry out a duty to take care. The Respondent should not of course have allowed this child to travel on his tractor at all. Once he did allow the deceased child to travel, in circumstances of considerable danger, on his tractor, he undertook a particularly heavy duty to take care. He drove so fast at night that when the vehicle swerved and the child clutched at him, he looked back in his excitement and failed to keep a proper control over the tractor. In these circumstances I consider the Plaintiff-Appellant was entitled to succeed in his claim and that the Defendant was guilty of at least contributory negligence.

After giving the whole of the case and the submissions of Counsel the most careful consideration, I am of the opinion that the blame for this accident must be apportioned between the negligence of the Respondent and that of the deceased on the basis of their joint contributory negligence. In considering whether a child has taken

A reasonable care for its own safety regard must be had to the age of the child, the circumstances of the case, and the knowledge that the child might reasonably expect to have of the perils to which the Respondent's negligence exposed him. Having regard to these factors I consider that the total amount recoverable by the Plaintiff-Appellant from the Defendant-Respondent must be reduced by 25 per cent.

B For these reasons I allow this appeal and hold that the Plaintiff-Appellant is entitled to recover from the Defendant-Respondent 75% of the total sum he would have been entitled to recover had the Defendant's negligence been the sole cause of the deceased's injuries and death.

C I remit the case to the Court below to assess the damages in this case on this basis, after hearing Counsel further if it thinks fit, and to enter judgment for the Plaintiff accordingly with costs both in the Court below and of the appeal.

Appeal allowed — remitted to Magistrate's Court for assessment of damages.