

UGANDA / JUDGMENT

Souza v Pragji (Civ. App. No. 5/1938) [1938] EACA 34 (1 January 1938)

[1938] EACA 34**COURT**

East African Court of Appeal

BEFORE

Gamble, J. (Uganda), Thacker J, Whitley CJ

CASE / FILE NUMBER

Civ. App. No. 5/1938

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COURT OF APPEAL FOR EASTERN AFRICA**Before WHITLEY, C. J. (Uganda); GAMBLE, J. (Uganda); and THACKER, J. (Kenya).****DEJANIRA FELIZA DE SA E. SOUZA, Appellant (Original Plaintiff) v.****VASANJI PRAGJI, Respondent (Original Defendant) Civ. App. No. 5/1938****(Appeal from decision of Johnston, Ag. J. (Uganda)).**

Carrier-Passenger-Implied warranty of fitness-Negligence of manufacturer—Defective vehicle—Responsibility of carrier.

Respondent was the proprietor of an omnibus in which the appellant was a passenger when, owing to faulty construction or assembly by the manufacturer whereby a split pin of the wrong size had been fitted to the omnibus, the off-side front wheel came adrift and caused the omnibus to leave the road. A door beside which the appellant was sitting was either opened by her or swung open through the bolt slipping and her leg was crushed between the omnibus and the stump of a tree. Appellant claimed damages.

Held (13-5-38).—That as the fitting of a wrong size of split pin was a defect which could have been discovered by reasonable care or skill on the part of some person concerned with the construction, alteration, repair or maintenance of the vehicle the appellant could recover damages from the respondent for breach of an implied warranty that the vehicle was safe and fit for the carriage of passengers.

Priestly for the appellant: —

If there was a defect in the omnibus which could have been discovered by reasonable care and skill on the part of the respondent or the manufacturer the defendant is responsible for damages suffered by the appellant if they were occasioned by the defect. He referred to *Sharp v. Grey* (131 E. R. 684), *Redhead v. The Midland Railway Co.* (2 Q. B. 412), *Redhead v. The Midland Railway Co.* (appeal) (4 Q. B. 379), *Grote v. The Chester and Holyhead Railway Co.* (154 E. R. 486), *Francis v. Cockrell* (5 Q. B. 501), *Hall v. Brooklands Auto-Racing Club* (48 T. L. R. 546), *Hyman and Wife v. Nye and Sons* (6 Q. B. D. 685) and on the point of contributory negligence to *Jones v. Boyce* \$(171)\$ E. R. 540).

Baerlein for the respondent referred to *Newberry v. Bristol Tramway and Carriage Co., Ltd.* (29 T. L. R. 177), *Redhead v. The Midland Railway Co.* (supra) and *Hailsham Laws of England*, Volume 4, pages 60 and 61.

Whitley, \$C. J.\$ —The appellant was a passenger in the respondent's motor bus when the off front wheel came off causing the bus to run off the road. She was sitting by the left side door on the front seat. The door was either opened by her or swung open through the bolt slipping and her leg was crushed between the bus and the stump of a tree causing such injuries that it had to be amputated. She claimed damages for negligence.

Expert evidence showed that the cause of the accident was the breaking or shearing of a split-pin, due most probably to a split-pin of the wrong size having been put in at the time of construction or assembling. The learned trial Judge found as a fact that that was the cause of the accident and he further found that there was no negligence on the part of the respondent or his servants and that the accident was one which could not have been prevented by the ordinary daily care and caution of the defendant or his servants. There was in my opinion ample evidence to support these findings. The Judge held that under those circumstances the respondent was not liable. The question for me to decide is whether in law he was right in so holding. The leading case on the point is *Sharp v. Grey* (131 E. R. 684). In that case the defendant was a coach proprietor. The axle tree of his coach broke and in the accident which followed the plaintiff was injured. In the course of his judgment Alderson, J., observed that a coach proprietor is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards and be discovered on investigation; that the injury appeared to have been caused by an original defect of construction and that if the defendants were not responsible a coach proprietor might buy ill-constructed or unsafe vehicles and his passengers be without remedy. This case was distinguished but not disapproved in *Redhead v. The Midland Railway Co.* (2 Q. B. 412) where the facts were somewhat different in that the defect which caused the accident was a flaw in metal which could not possibly have been detected at any time. There it was held that the carrier's duty to take due care, however widely construed or however rigorously enforced, would not subject the defendants to the plain injustice of being compelled by law to make reparation for a disaster arising from a latent defect in the machinery which they were obliged to use, which no human skill or care could either have prevented or detected. In an Irish case *Burns v. Cork and Bandon Railway Co.* (8 E & E Dig. 76, paragraph \$525\$ (1)) it was held that a railway company which has purchased its rolling stock from competent manufacturers in the due course of business, is

responsible for the negligence of the manufacturers in the construction of that stock, to the same extent as they would be in case they themselves were the manufacturers. The most recent case is that of *MacLenan v. Segar* (1917, 2 K. B. 325), where the following passage occurs in the judgment of McCardie, J.: -

"The contract between the parties contains an implied warranty that the premises are as safe for that purpose as reasonable care and skill on the part of anyone can make them. The rule is subject to the limitation that the defendant is not to be held responsible for defects which could not have been discovered by reasonable care or skill on the part of any person concerned with the construction, alteration, repair or maintenance of the premises. The principle is basic and applies alike to premises and to vehicles. It matters not whether the subject be a theatre, an inn, a taxicab, an omnibus or a railway carriage." \$\overline{1}\$\$

The law then is well established and the question to be decided in the present case is whether the fitting of a split-pin of wrong size during the construction of the omnibus is a defect which could not have been discovered by reasonable care on the part of the constructors or their workmen. In my opinion it is a defect which could

have been discovered and accordingly the respondent must be liable. The learned trial Judge did not have the advantage of being referred to the judgment of McCardie, J., which states the law so clearly; if he had seen it he might have come to the same conclusion as I have. I would add that the rule seems to be founded on sound common sense as well as on law. The bus owner presumably has his remedy against the builder whereas unless the injured passenger has a right to recover against the bus owner he or she is left with no remedy at all.

There remains the question of contributory negligence. The trial Judge found that when the bus left the road the plaintiff tried to alight and that if she had not put her leg out she would not have been injured. I think that a proper finding on the evidence. If through the default of a coach proprietor in neglecting to provide proper means of conveyance a passenger be placed in so perilous a situation as to render it prudent for him to leap from the coach, whereby his leg is broken, the proprietor will be responsible in damages, although the coach was not actually overturned; *Jones v. Boyce* (171) E. R. 540). In my opinion it was not proved affirmatively by the respondent that it was imprudent or rash for appellant to do what she did in view of the two facts that the bus was proceeding slowly at the time and that it must have been tilted over in an alarming manner by the loss of the wheel. I do not think that it can be said that her act resulted from a rash or imprudent apprehension of a danger which did not exist. As McCardie, J., observed at the close of his judgment in *MacLenan v. Segar* (supra), the conduct of the plaintiff (appellant) cannot be effectively tested by the light of facts subsequently and precisely ascertained; it is necessary to regard the circumstances as they appeared to her at the time.

That being so, it follows that the allegation of contributory negligence is not proved and it must be remembered that the onus of proof was on the respondent. I would allow the appeal and remit the case to the High Court for the assessment of damages.

Gamble, \$J.-I\$ concur with the judgment of the learned Chief Justice of Uganda and have nothing to add.

Thacker, J.—I concur.

Appeal allowed with costs in this Court and the Court below.—*Ed.*

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