[HIGH COURT OF AUSTRALIA.]

BEHRENDORFF AND ANOTHER . . . APPLICANTS;

AND

SOBLUSKY . . . . . RESPONDENT.

H. C. OF A. 1957.

SYDNEY, *Dec.* 2, 3.

Dixon C.J., McTiernan and Taylor JJ.

Negligence—Vicarious liability—Agency—Motor car driven by friend of "owner"—"Owner" present—Accident—Car driven at "owner's" request—Mutual purpose—Negligence of car driver—Responsibility of owner—The Motor Vehicles Insurance Acts 1936 *to* 1945 (*Q.*), *s.* 3 (2).

The plaintiff had possession of a panel van under an hire-purchase agreement: the first defendant had possession of a car under another hire-purchase agreement. They exchanged vehicles. The plaintiff was injured while travelling in the car which he had handed over to the second defendant to drive.

Section 3 of the *Motor Vehicles Insurance Act* 1936 (Q.) as amended provides that for the purposes of every claim for accidental bodily injury, fatal or non-fatal, to any person caused by, through or in connexion with a motor vehicle insured thereunder every person other than the owner who at any time is in charge of such motor vehicle, whether or not with the owner's authority, shall be deemed to be acting in relation thereto within the scope of his authority as such agent.

The plaintiff brought an action under the statute against the first defendant as the owner of the car and against the second defendant as his authorised agent. He was awarded damages and the defendants' appeal to the Full Supreme Court was dismissed. They applied for special leave to appeal.

Held: that though by imputation of law the second defendant may have been the plaintiff's agent, this could not affect the liability of the defendants to the plaintiff under the statute.

At the hearing of the application counsel for the defendants contended that the second defendant was not in charge of the motor vehicle within the meaning of the section.

Held: that, since the second defendant was in full control of the car, the view that he was so in charge of the car was fairly open, and that special leave

H. C. OF A. 1957.

BEHRENDORFF v. SOBLUSKY.

should not be granted in order that such a question should be canvassed, particularly as the point was not raised before the Full Court.

Samson v. *Aitchison* (1912) A.C. 844, and *Ormrod* v. *Crosville Motor Services Ltd.* (1953) 1 W.L.R. 409; 1120, referred to.

APPLICATION for special leave to appeal.

By an action commenced in the Supreme Court of Queensland, Maryborough District Registry, by way of writ of summons and based on s. 3 (2) of *The Motor Vehicles Insurance Act* of 1936, as amended, the plaintiff, Ogust Mathias Soblusky, claimed from the defendants, Keith Leslie Behrendorff and Bernard William Lewis respectively, damages for personal injury, loss and damage caused by, through or in connexion with a motor vehicle allegedly being driven negligently by the defendant Bernard William Lewis.

The insurance commissioner, as defined under *The Insurance Act of* 1916 (Q.), as being the licensed insurer of Behrendorff pursuant to the provisions of *The Motor Vehicles Insurance Acts of* 1936 *to* 1945 and the regulations made thereunder in respect of Soblusky's claim for accidental bodily injury, elected to be joined in the action.

At the trial of the action the judge gave judgment for the plaintiff against all the defendants in the sum of £800 and, in addition, against the defendant Lewis in the sum of £20 1s. 0d., with costs.

An appeal to the Full Court of the Supreme Court of Queensland (*Philp*, *Stanley* and *Mack* JJ.) was dismissed.

From that decision upon notice of motion Behrendorff and the insurance commissioner applied to the High Court of Australia for special leave to appeal on the grounds: (i) that the proper construction of *The Motor Vehicles Insurance Acts of* 1936 *to* 1945 and the regulations made thereunder and in particular the definition of *owner* therein contained and of ss. 3, 4 and 6 of those Acts; (ii) that the proper construction of *The Law Reform* (*Tortfeasors Contribution, Contributory Negligence, and Division of Chattels*) *Act of* 1952, and particularly the definition of *fault* therein contained and s. 10 thereof; (iii) that the application of each of those Acts upon their proper construction to the facts as found and as appeared in the evidence in the said action; (iv) that the extent to which those Acts upon their proper construction altered, added to and derogated from the common law; and (v) that whether upon the true construction of those Acts the plaintiff should recover from the applicants having regard to the fact that the said negligent driving of Lewis was done whilst acting as agent of the plaintiff in fact and whilst also deemed by statute to be acting as agent for Behrendorff were all questions involved in the case.

The relevant facts and statutory provisions are sufficiently stated in the judgment hereunder.

G. A. G. Lucas, for the applicants.

P. D. Connolly, for the respondent.

During argument the following cases, *inter alia*, were referred to :—*McFee* v. *Joss* (1) ; *Jones* v. *Richards* (2) ; *Davison* v. *Vickery's Motors Ltd.* (*In Liq.*) (3) ; *Bolton Partners* v. *Lambert* (4) ; *Trust Co. Ltd.* v. *de Silva* (5) ; *Genders* v. *Ajax Insurance Co. Ltd.* (6) ; *Samson* v. *Aitchison* (7) ; *Pratt* v. *Patrick* (8) and *Ormrod* v. *Crosville Motor Services Ltd.* ; *Murphie, Third Party* (9).

Dec. 3.

DIXON C.J. delivered the judgment of the Court as follows :—

This is an application for special leave to appeal from the judgment of the Full Court of Queensland affirming the judgment given for the plaintiff at the trial. The question upon which the decision of the Full Court depended and which is raised upon this application for special leave is of a very peculiar description. To make it clear, it is desirable to say a little about the facts of the case.

It appears that Soblusky, who was the plaintiff in the action, had possession of a Pontiac panel van under a hire purchase agreement. No doubt colloquially he would be said to be the owner. It further appears that Behrendorff, who is the defendant in the action, held under a hire purchase agreement a Ford V8 sedan. The two men resolved to exchange the vehicles and Soblusky took possession of the Ford V8 sedan and proceeded to drive it. He was a somewhat elderly man and had suffered some injuries which made him unwilling to drive the car any long distance. He did not become the registered owner of the car, he did nothing to change the title of the car, he simply took it over and had possession of it.

On 1st September 1956 he and a party determined to drive from Maryborough to Gayndah to attend a meeting of a Buffalo Lodge. The party consisted of a Mr. Lewis, a Mr. Egan and a Mr. Anderson as well as the plaintiff Soblusky.

Soblusky appears to have asked Lewis to undertake the driving and to have placed him in charge of the car in the sense that he put him in the driver's seat and resigned the whole business to him. Soblusky dropped off to sleep.

(1) (1925) 56 Ont.L.R. 578, at p. 584.
(2) (1955) 1 W.L.R. 444.
(3) (1925) 37 C.L.R. 1.
(4) (1889) 41 Ch. D. 295.
(5) (1956) 1 W.L.R. 376.
(6) (1950) 81 C.L.R. 470.
(7) (1912) A.C. 844.
(8) (1924) 1 K.B. 488.
(9) (1953) 1 W.L.R. 409 ; 1120.

H. C. OF A. 1957. BEHRENDORFF v. SOBLUSKY. Dixon C.J. McTiernan J. Taylor J.

Whether Mr. Lewis went to sleep or not does not appear, but the car ran off the road doing considerable injury to at least three of the passengers. Soblusky was one of these and he brought an action against Lewis and Behrendorff in which the insurance commissioner as the insurer of Behrendorff was joined. In that action he recovered damages but not a sufficient amount to enable him to appeal to this Court without special leave.

The insurance commissioner in Behrendorff's name and in his own behalf seeks special leave to appeal from the judgment which has been affirmed.

The action which Soblusky brought was based on sub-s. (2) of s. 3 of *The Motor Vehicles Insurance Act of* 1936 (Q.) as amended. That section says, so far as is material, that for the purposes of every claim for accidental bodily injury, fatal or non-fatal, to any person caused by, through or in connexion with a motor vehicle insured thereunder every person other than the owner who at any time is in charge of such motor vehicle, whether or not with the owner's authority, shall be deemed to be the authorised agent of the owner and to be acting in relation thereto within the scope of his authority as such agent.

Soblusky's case is that as Lewis was driving the car and as Behrendorff was the owner of the car, Lewis was Behrendorff's agent and was to be deemed to be his authorised agent and to be acting in relation thereto within the scope of his authority as such agent.

That Behrendorff was the owner of the car appears clearly enough from the definition of owner. The definition is a very long one, but so far as it is material to Behrendorff's case, it says that the word means a person registered in the records of the Commissioner of Main Roads under *The Main Roads Act* as the owner of the motor vehicle unless such person shall have given to the commissioner a notice in writing in accordance with the *Main Roads Regulations* advising the transfer of the motor vehicle or authorising the cancellation of the certificate of registration or renewal of registration appearing in his name in respect thereof. Behrendorff fills that character and therefore falls within the definition of " owner ". None of the notices referred to was given and he stands registered as the owner and insured as the owner.

Availing himself therefore of the imputed or statutory agency, Soblusky sued Behrendorff saying " Lewis is the statutory agent of the defendant and therefore I can recover."

On the terms of the statute every condition is fulfilled to enable him to satisfy that description. It is to be observed that sub-s. (2)

does not speak in terms of liability, it speaks in terms of agency. Lewis was however negligent and as the statutory agent acting in the scope of his statutory authority from Behrendorff, he must have made Behrendorff vicariously liable and consequently the insurance office would stand in his place and be required to meet its insurance.

The answer which was attempted before the Full Court of the Supreme Court is that while that all may be true, nevertheless Lewis was the agent also of the injured man, the plaintiff Soblusky, and in driving the car was driving as his agent. To establish that the line of authority which is commonly thought to begin with *Samson* v. *Aitchison* (1) and which goes on to the interesting case of *Ormrod* v. *Crosville Motor Services Ltd.* (2) is relied upon.

Having established that on authority that is at least a possible view of the relationship between Lewis and Soblusky, it is then said on behalf of the applicant that you have two agencies. You have the statutory agency imputed to Behrendorff so that Lewis represents him by statute. You have another legal agency imputed under judicial authority so that Lewis represents Soblusky the injured man as his agent to drive the car.

Then a step is taken which the Full Court thought had no warrant. It is said that with these two lines of agency the consequent liability which one would think would flow from the application of sub-s. (2) of s. 3 should be intercepted and Soblusky's action should fail because the injury was caused by an act of negligence of a man who was also his agent. It is to be noted as a very obvious thing that Lewis may have been responsible to Soblusky for damages but Soblusky was under no relevant liability as a result of Lewis's negligence. Soblusky was the injured man and we are concerned now only with liability for his injuries. We are not dealing with any vicarious liability of Soblusky. He is simply the person who was injured and who is making the claim under the statute. The simple answer appears to me to be that given by the Full Court that there is no basis for indemnity or contribution in this supposed double relationship, namely, the statutory agency of Lewis imputed to Behrendorff as principal and the agency of Lewis in driving the car for Soblusky under his authority actual or imputed.

The statute simply says that the owner, namely Behrendorff, shall be in the position of operating the car by his authorised agent Lewis acting in relation thereto within the scope of his authority as such agent. It seems therefore to follow that there is no means of interrupting or intercepting the operation of a tortious liability

(1) (1912) A.C. 844.

(2) (1953) 1 W.L.R. 409; 1120.

H. C. OF A. 1957.

BEHRENDORFF v. SOBLUSKY.

Dixon C.J. McTiernan J. Taylor J.

to the plaintiff Soblusky which follows from Lewis's negligence as Behrendorff's statutory agent.

A further argument however was presented to us which appears not to have been presented to the Full Court of Queensland. It was that really Lewis was not the person in charge of the motor vehicle within the meaning of sub-s. (2) of s. 3, that Soblusky himself remained in charge.

Notwithstanding what Mr. *Lucas* has said in his able argument, I remain of the view that that is, to a great extent, a question of fact.

I am not disposed as at present advised to deny that the words " in charge " may be compatible with some other person actually occupying the driver's seat. If the person who is generally in charge of a car put an unlicensed driver there in order to teach him or put a child there it may be so. One feels that the words " in charge " are probably used to include cases where no one is occupying the driver's seat, as for example, if the person in charge happens momentarily not to be actually in the car. But however that may be, in the present case Lewis was put in the driver's seat to drive because Soblusky said he was not fit to undertake the full responsibility of the journey. Soblusky went off to sleep and Lewis seems to have been left in full command. At all events that view of the case is fairly open and we could not grant special leave in order that such a question should be canvassed, particularly as it was a point not taken before the Full Court itself.

For those reasons I am of opinion that special leave should be refused. The application will accordingly be refused. It will be refused with costs.

Application refused with costs.

Solicitors for the applicants, *J. B. Greaves*, Sydney, by *G.A.L. Uhl & Sheldon*, Brisbane, by *Corser, Sheldon & Gordon*, Maryborough.

Solicitors for the respondent, *Gregory S. Madden & Co.*, Sydney, by *Macrossan & Co.*, Brisbane, by *J. G. Comans*, Maryborough.

J. B.