IN THE HIGH COURT OF AUSTRALIA

SACHSE AND ANOTHER

V.

BROWN

ORIGINAL

REASONS FOR JUDGMENT

Judgment delivered at MELBOURNE

on THURSDAY, 15TH OCTOBER 1964.

A. C. Brooks, Government Printer, Melbourne
C.7639/60

Kirk

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ORDER

Appeal dismissed with costs.

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JUDGMENT BARWICK C.J.

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The appellants appeal to this Court against the judgment of the Supreme Court of Western Australia finding the appellants and the deceased husband of the respondent each guilty of negligence contributing to the death of the deceased and apportioning responsibility therefor equally between them.

The appellants submit, in the first place, that they were not guilty of any negligence causally related to the death of the deceased and, in the second place, that if they were, their responsibility was much less than that of the deceased himself so that they ought not to bear so high a proportion of the damages as fifty per cent.

The facts of the matter are extremely simple and almost without dispute. The appellant Sachse was the manager of a motor garage and petrol service station at Onslow owned by the appellant Clark. Part of the equipment of the garage was a welding plant which was capable of operating independently as an alternator generating electricity at a voltage of 240 volts. The garage was wired for electricity both for lighting and for use of electric power in its equipment, including its petrol pumps. There was a power supply to the town which at the relevant time was under repair by the Public Works Department of the State. It was necessary that the town power supply should be interrupted from time to time to enable this work to be done. To avoid the inconvenience of being without power in the garage and service station during these interruptions the appellant Sachse arranged with the deceased Brown to effect a temporary installation

which would enable the welder-alternator to feed electricity through the wiring system of the garage and service station. The deceased was a qualified electrician and was employed by the Public Works Department on the work then being done on the town power supply. He did effect the required temporary installation though it is said not in the safest manner. He installed a switch in such a position in relation to the service line from the garage to the town supply mains that if properly used would adequately prevent the alternator feeding electricity into the town supply mains. It appears that there may have been a safer switch which could have been used though it is proper to observe that no evidence was given as to the availability of such a switch in Onslow at the time.

When the deceased made the installation he instructed the appellant Sachse to open the switch before using the alternator to generate electricity and the appellant agreed to do so. The deceased for his part said he would withdraw the service fuses connecting the service line to the garage to the town supply mains. I do not think it is quite clear whether he meant or was understood to mean that he would do this in any case when the town supply was interrupted to enable work to be done on the mains or that he would do so when the alternator was to be used to generate electricity for the garage or service station. But in either case, the withdrawal of the fuses would be an added precaution to safe-guard persons working on the town supply mains from the effect of electricity generated by the alternator and transmitted into the service line connecting the garage with the town supply mains should the switch not be opened as directed and as agreed to be done by the appellant Sachse.

The appellant Sachse who was a mechanic

knew that if this switch was not opened when the alternator was started up electricity at a voltage of 240 volts would be fed into the service line and thence into the town supply mains if by any chance the service fuses had not been withdrawn. He knew the lethal possibility of such an event if anyone happened to be working on the town supply lines. He knew that the deceased on the day in question was likely to be so working.

The alternator was started up with the switch in a closed position. The deceased was not forewarned of the impending use of the alternator. The result was that the deceased was electrocuted and died.

In my opinion these facts clearly establish negligence on the part of the appellants and that that negligence was causally related to the death of the deceased. It has been found that the deceased's failure to withdraw the service fuses when he began to work on the relevant section of the town supply mains was negligent and that it contributed to the result. No appeal has been brought against that finding. Consequently, a case for the application of the Law Reform (Contributory Negligence and Tortfeasors Contribution) Act, 1947 (W.A.) has been made out, and for responsibility for the damages to be apportioned between the parties.

As some point was made of it by the appellants I should add that the failure to provide a different or safer installation of the welder-alternator, even if the responsibility therefore be laid at the deceased's door is, in my opinion, not a circumstance which would relieve the appellants of the responsibility for their negligence.

It is said that because the deceased was a qualified electrician whereas, though a mechanic, the appellant was not, that because the deceased had

effected the installation with the suggested defects and because the deceased could have protected himself completely by withdrawing the service fuses his responsibility for the resulting death was greater than that of the appellants and that an equal division of the damages was erroneous. I do not agree. The critical point of time was the time at which the generator was put into service and the most obvious protection then was the opening of the switch which had been specially provided for such an event and which the appellant had agreed to open before beginning to generate electricity. In my opinion the responsibility of the appellant for the result was, at least, equal to that to be attributed to the deceased.

In my opinion the finding of negligence against the appellants was right and on the appellants' appeal I would not disturb the apportionment of responsibility. The appeal should be dismissed with costs.

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JUDGMENT KITTO J.

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The respondent in this case, the widow of one Frank Richard Brown, suing for the benefit of her five children and herself, claimed damages against the appellants for negligence causing the death of her husband. The action was tried by Wolff C.J., who gave judgment for the plaintiff for £3,980. The amount awarded was one-half of the assessed amount of the damages which the family sustained, his Honour having decided that the death of the deceased was in part caused by a failure on his part to take due care for his own safety and that it was just, in accordance with the degree of negligence attributable to the deceased, to reduce the damages to the extent of fifty per centum: see the Law Reform (Contributory Negligence and Tortfeasors Contribution) Act, 1947 (W.A.) s. 4.

The appellants contend that on the evidence the death of the deceased resulted solely from his own carelessness, or alternatively that the degree of negligence attributable to him called for a greater reduction than fifty per centum in the amount of the damages awarded.

The material facts are simple enough. The deceased, an electrician in the Public Works Department, was working on electricity mains which were carried on poles in the vicinity of a garage in the town of Onslow. The appellant Clark was carrying on in the garage the business of a motor repair shop and petrol filling station, and the appellant Sachse was his employee in that business. The work being done by the deceased required that the town supply of electricity be cut off, and the appellants were given notice of this. Clark had a welder alternator on his premises, and Sachse on his behalf arranged with the deceased, with the approval of departmental officers, that

the deceased should connect the alternator to the wiring of the premises so that when the town power supply was unavailable the alternator might be used as an auxiliary unit to generate power for the working of the petrol pumps. The deceased made a temporary connection to the wiring, but without installing a change-over switch. Such a switch, it seems, would have automatically disconnected the wiring of the premises from the mains whenever the alternator was brought into use, and so prevented current from the alternator flowing back into the mains. According to an electrical inspector who gave evidence an electrician should refuse to instal such an auxiliary supply when there is no change-over switch. In its absence the working of the alternator would make the mains alive, so that the life of the deceased would be in jeopardy unless one of two preventive steps should have been taken. One was to throw the mains switch inside the building, and the other was to pull the service fuse between the mains and the building. The death of the deceased resulted from a starting of the alternator, by an employee of Clark acting under Sachse's instructions, without either of the preventive steps having been taken, while the deceased was at work on the mains.

The danger of such an occurrence was well known to the deceased, and he made it known to Sachse. Indeed he specifically told Sachse to turn the mains switch off when about to start the alternator. Sachse agreed that he would, but said to the deceased: "What if I forget to turn off the mains switch?" The reply was, "Don't worry about it. I'll pull the fuse." In the event, they both forgot.

It was because each forgot the safety precaution he should have taken that the learned Chief Justice considered the two men to have been guilty of negligence in equal degree. In support of the appeal

it has been contended that as the deceased was a qualified electrician and Sachse was not, the negligence of the deceased was the greater. There would be force in this, I think, if it had not been that the deceased clearly apprised Sachse of the danger to be guarded against. Quite plainly the deceased, when he said not to worry as he would pull the fuse, did not mean, and just as plainly Sachse did not understand him to mean, that Sachse was absolved from the duty of turning the mains switch off before the starting of the alternator. Obviously what the deceased conveyed to Sachse was that he himself would not be depending upon Sachse's remembering to turn off the mains switch: he would pull the fuse so as to protect himself against a failure by Sachse to take that precaution, but he still wanted Sachse to throw the switch lest he himself should forget to pull the fuse. They were equally aware of the danger, and each had at hand a ready means of saving the deceased from the results of the other's forgetfulness. Reasonable care on the part of either would have prevented the tragedy, and the extent of the departure from the standard of reasonableness seems to me to have been the same in each case. True, Sachse did not know on the fateful occasion that the deceased was working on the mains; but he knew that he might well be working on them, and that if he were, and if the alternator should be started without the mains switch being thrown, electrocution of the deceased would be the result unless the latter had remembered to pull the fuse. One had his own life to protect, the other the life of a neighbour. Like the Chief Justice, I find it impossible to distinguish between them as regards the degrees of their negligence.

I should mention a submission that was made to us to the effect that the deceased was guilty not only of the negligence involved in his failure to pull the fuse

but also of negligence in effecting the temporary installation of the alternator without a change-over switch. It is true that by so doing he created the situation of potential danger for himself which required the throwing of the mains switch or the pulling of the service fuse whenever the alternator was used as an auxiliary power supply unit. But that was a static situation, and each man accepted the danger inherent in it as something he could and should guard against. Each failed. It was the combination of the failure of the one with the failure of the other that caused the fatality. The original installation of the alternator cannot be considered, in the relevant sense, a cause of it at all.

I would dismiss the appeal.

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JUDGMENT

MENZIES J.

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In an action for damages for negligence brought by the respondent under the Fatal Accidents Act Wolff C.J. found that the death of the respondent's husband was caused by the negligence of himself and of the appellants who were defendants in the action. Accordingly, the learned Chief Justice applied the Law Reform (Contributory Negligence and Tortfeasors' Contribution) Act of 1947 and, finding that the deceased and the defendants were equally negligent, reduced the damages that would have been recoverable had the deceased's death been due to the negligence of the defendants alone, viz. £7,960, by fifty per cent. Judgment was therefore entered in the amount of £3,980.

By this appeal the appellants seek judgment in their favour on the basis that the deceased's negligence was the sole cause of his death or, alternatively, a reduction in the damages awarded against them on the basis that the degree of negligence attributable to the deceased was greater than fifty per cent.

The deceased was an electrician employed by the Public Works Department of Western Australia. At the time of his death he was engaged in replacing the aerial lines to the Onslow township electricity supply. While this work was in progress electricity from the mains would not be available to consumers. Therefore, to enable the appellant Sachse as the servant of the appellant Clark to generate current for use in garage premises when current was not available from the mains and at the request of Sachse, the deceased connected an

alternator upon the premises with a power point in the garage. It was known to all concerned that the use of the alternator without taking precautions to prevent it would cause current to feed through the consumer's lines to the service leads and thence to the supply mains, thereby rendering it unsafe for the deceased to work upon the supply mains. The precautions that the deceased and the defendant Sachse agreed should be taken to prevent this feed-back were twofold - (1) that the deceased would remove the service fuses and (2) that Sachse would not use the alternator to generate electricity before turning off the main switch to prevent current passing from the garage to the mains. If either precaution had been taken while the deceased was working on the mains, he would not have been electrocuted by current generated by the alternator. As it was, neither precaution was taken, and when the alternator was started, upon the defendant Sachse's direction and in forgetfulness of what he had undertaken to do, the deceased, who was working on the supply mains, was electrocuted and died.

The case, therefore, is simply one where a dangerous installation was made by the deceased at the defendant Sachse's request and neither the deceased nor Sachse took the precaution that each had said he would take to prevent current generated by the alternator from feeding to the supply mains. Both were therefore negligent.

In these circumstances the decision of the learned Chief Justice that the deceased and the defendants were equally to blame cannot be impugned by the defendants who were responsible for starting the generator without taking the precaution which Sachse had undertaken.

In my opinion the appeal should be dismissed.