
(1973) 12 MP CK 0008

In the Madhya Pradesh High Court

Case No : Miscellaneous Appeal No"s. 44 and 65 of 1968

Smt. Sushila Devi and Others

APPELLANT

Vs

Ibrahim and Another

RESPONDENT

Date of Decision : 04-12-1973

Acts Referred:

Motor Vehicles Act, 1939 — Section 110A, 110B

Citation : (1974) ACJ 150 : AIR 1974 MP 181 : (1974) JLJ 279 : (1974) 19 MPLJ 168 : (1974) MPLJ 168

Hon'ble Judges : G.G. Sohani, J;A.P. Sen, J

Bench : Division Bench

Advocate : G.M. Chafekar and Dandwate, for No. 2 Appellant, for the Appellant;
P.N. Muley, for the Respondent

Judgement

Sen, J.

These appeals u/s 110-D of the Motor Vehicles Act, 1939, preferred by two sets of claimants, are directed against the decision of the Motor Accident Claims Tribunal. Indore, rejecting their claim for compensation for the death of two of the passengers, Jinendra Kumar and Basantilal, arising from ,a motor accident.

The material facts, shortly stated, are as follows:--

On the 13th February, 1965, there was a ghastly accident on the Mortakka Bridge over the Narbada resulting in the tragic death of eight persons. It is as very large bridge, having a length of 2600 ft. with twenty-four spans each of 108 ft. Motor bus No. MPB 1492, owned by respondent No. 1 Ibrahim and driven by deceased Lal Khan, was carrying eight passengers en route Ujjain-Onkare-shwar via Indore. The bus entered the bridge near about 11-30 A.M., and after it had crossed as many as twenty-one spans of the bridge, the driver suddenly applied the brakes; but the bus went forward with a jerk, suddenly veered across the bridge to the off side, dashed against two or three railings, crashed through the railings, and fell down off the bridge from a height of about 50 ft. into the rocky

bed of the river, resulting in the death of the driver and seven passengers including Jinendra Kumar and Basantilal. The sole survivor was one of the passengers, A.W. 3 Sajjan Singh, who had a miraculous escape.

The first set of claimants, Smt. Sushila Devi and others, the heirs of Jinendra Kumar, alleged that the accident was caused by negligence on the part of the driver. In support of that plea, they gave the following particulars of negligence:

"After the bus actually entered the bridge and was crossing the Narbada river and was nearing the southern end of the bridge, it suddenly ran into the railings on the right-hand side of the bridge and crashing through the same fell into the rocky bed of the river about 45 feet below."

The second set of claimants, Smt. Kamalabai and others, however, alleged that the accident occurred due to the negligence of the owner of the bus, i.e., respondent No. 1. The particulars of negligence pleaded by them were these:

"At the time when the sad and horrible accident took place, the condition of the said bus was also not in perfect order. The bus was moving then without a conductor, at the time of the accident. The axle of the bus was also not in order. It is learned by the applicants that the axle was broken on the Narmada River bridge and due to this, bus could not be controlled and ultimately it fell down."

In answer to their claim the respondent Ibrahim in his written statement denied that the accident was caused due to any negligence on his part or on the part of the driver. In his defence he asserted that the accident was caused by a "sudden mechanical failure. That plea was in these terms:--

"The accident occurred as the axle was broken and due to breakage of the right pin and tie-rod of the driver side and as such the connection between the steering wheel and the front wheel disconnected and the vehicle became out of control. This being Vis Major, the owner is not liable for compensation."

The Claims Tribunal held that this was purely an accident caused due to a sudden dislocation of the tie-rod during the course of the journey, resulting in a disconnection of the steering wheel and the front wheel. While dealing with the question whether the claimants could rely on the doctrine *res ipsa loquitur*, the Tribunal observed following the dictum of Lord Simon in *Woods v. Duncan* (1946) 1 All ER 420, that *res ipsa loquitur* only shifts the onus of proof which is adequately met by showing that the defendant was not, in fact, negligent. It accepted the explanation of the respondent No. 1 that the bus was kept in a proper state of repairs and that the accident was due to the breaking of the tie-rod. In reaching that conclusion, it relied on the testimony of NA.W. 1 Ibrahim the owner of the bus, NA.W. 2 Ravinandan Sahay, Motor Vehicles Inspector, and NA.W. 3 Narsingh Rao, Surveyor deputed by the Insurer to assess the extent of the loss. The Claims Tribunal then observed:--

"When the tie-rod breaks, the vehicle becomes out of control. It does not stop and proceeds in the direction taken by front wheels".

The short question involved in these appeals is, whether the decision of the case should rest on the rule laid down in *Ram Dulare Shukla v. M.P. State Road Transport Corporation*, Gwalior 1969 MPLJ 922, or on the doctrine of *res ipsa loquitur*.

The appellants rest their case on the doctrine *res ipsa loquitur*. In *Ram Dulare Shukla's* case, 1969 MPLJ 922 (*supra*) I had occasion to state:--

"The *res ipsa loquitur* is not a rule of law. As observed in *Charlesworth on Negligence*, 3rd Edn., p. 42-

"It is no more than a rule of evidence affecting onus, it is based on common sense and its purpose is to enable justice to be done when, the facts bearing on a causation and on the care exercised by the defendant are at outset unknown to the plaintiff and are or ought to be within the knowledge of the defendant".

If the facts are sufficiently known, the question ceases to be whether the facts speak for themselves, and the only question is whether on the facts as established, negligence is to be inferred or not. The doctrine of *res ipsa loquitur* does not, therefore, apply when the cause of the accident is known."

The decision in *Ram Dulare's* case (*supra*) is, however, clearly distinguishable on facts. There, the cause of accident was known; and therefore, the doctrine *res ipsa loquitur* did not apply. The Corporation was able to rebut the inference of negligence arising from the doctrine by showing that the accident there was due to a latent defect in the vehicle brought about by the slipping of the shackle-pin of the right front wheel and was not due to any negligence on the part of the driver in driving the bus at an uncontrollable speed, as alleged in that case.

The law on the subject is stated in *Winfield on Tort*, 7th Edn., P. 199 thus-

"1. If the defendant shows how the accident actually occurred and the true explanation is consistent with due diligence on his part, then he is not liable.

Even if he cannot explain the accident, if the defendant shows that there was no lack of reasonable care on his part or on the part of persons for whose negligence he is responsible, then again he has exonerated himself from liability."

The true ambit of the doctrine *res ipsa loquitur* has been recently elucidated in *Colvilles Ltd. v Devine* (1969) 2 All ER 53 and *Ludgate v. Lovett* (1969) 2 All ER 1275. The test in ascertaining whether the doctrine applies is laid down in the well-known passage in the judgment of Erle, C. J. in *Scott v. London and St. Katherine Docks Co.* (1861) 73 All ER Rep 246, to the following effect:

"There must be reasonable evidence of negligence. 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 defendants, that the accident arose from want of care."

We have examined very carefully the evidence on record and have come to the conclusion that the doctrine does apply to the circumstances of this case. Although the respondent No. 1 could, by satisfying the Court that he was not negligent, succeed even if he could not show as to how the accident happened, the evidence, in the circumstances, was insufficient to rebut the inference of negligence raised by the maxim *res ipsa loquitur*. Now, here the respondent No. 1, conscious that the things looked black against him, averred that the sudden breakage of the tie-rod and the axle caused a disconnection of the steering and the right front wheel. There is, however, no sufficient evidence to support the plea that the latent defect was the real cause of the accident. It was for the respondent No. 1 to show that he had taken all reasonable care and that despite this, the defect remained hidden. The evidence shows that the bus was purchased by him second-hand for a paltry sum of Rs. 12,000. That circumstance speaks for itself. The evidence of NA.W. 1. Ibrahim NA.W. 2 Ravinandan Sahay and NA.W. 3 Narsingh Rao is of little assistance in this case. NA.W. 1 Ibrahim and NA.W. 2 Ravinandan Sahay no doubt state that they found tyre-marks over a distance of 30 ft. on the bridge which showed that the driver all of a sudden applied brakes in an effort to stop the vehicle. But it swerved to the right and then crashed through the railing. The existence of tyre-marks is, however, not conclusively proved. There is nothing to show that the bridge was cordoned off by the police after the accident. Nor has the respondent No. 1 placed on record the report of the Motor Vehicles Inspector showing the existence of the tyre-marks. We are, therefore, left with the word of NA.W. 1 Ibrahim, the owner. NA.W. 2 Ravinandan Sahay, on his own admission stated that he had visited the place of the accident on the 15th, i.e. two days after the accident. The road between Indore and Khandwa has a heavy vehicular traffic and all vehicles have necessarily to pass over the bridge.

NA.W. 2 Ravinandan Sahay inspected the damaged bus after the accident. He states that he found the brake connections of three of its wheels intact; but that of the fourth wheel was not there, obviously, because the wheel itself had come off. No doubt, this witness gave his opinion that the accident was caused by the breaking of the tie-rod. But during his cross-examination he was frank enough to confess that the (accident could also have resulted due to negligent driving of the bus by the driver and the tie-rod may have broken due to the fall from a height of 50 ft. So also, the evidence of NA.W. 3 Narsingh Rao carries us nowhere. He was merely a surveyor deputed by the respondent No. 2, Jupiter General Insurance Co. Ltd., the insurer, to assess the extent of loss to the vehicle; and therefore, his opinion as to the cause of the accident is not conclusive. In that state of evidence, the Tribunal was not right in its view that the accident, in fact, was due to a latent defect, i.e., a sudden snapping of the tie-rod and the breaking of the axle, resulting in a disconnection of the steering and the right front wheel.

The cause of the accident, therefore, remains unexplained. The fact, however, remains that the bus violently swerved to the right. This is a case where the

doctrine *res ipsa loquitur* must necessarily apply since the cause of the accident is not known. The maxim raises an inference of negligence which the respondent has not succeeded in rebutting.

The weight of authority clearly is in support of the view that we have taken. In *Barkway v. South Wales Transport Co. Ltd.* (1948) 2 All ER 460, precisely in somewhat similar circumstances where a motor omnibus suddenly left the road, mounted the pavement, crashed into some railings, and fell down an embankment, when the offside front tyre burst, the Court of Appeal (per Scott and Asquith, L. JJ., Bucknill L. J. Dissenting), held that the fact that the omnibus left the road and fell down the embankment raised a presumption of negligence against the defendants requiring them to prove affirmatively that they had exercised all reasonable care to displace the presumption it was not sufficient for the defendants to show that the immediate cause of the accident was a tyre burst," since a tyre-burst per se was equally consistent with negligence or due diligence on their part; but it was necessary for the defendants to prove either that the burst itself was due to a specific cause which did not connote negligence, or, if they could point to no such specific cause, that they had used all reasonable care in the management of their tyres.

After referring to the well-known dictum of Erle C. J., in (1861) 73 All ER 246 (*supra*), their Lordships adverted to the decision of the House of Lords in *Woods v. Duncan* (*supra*), and in particular, to the observation of Lord Simonds to the effect-

"The accident may remain inapplicable (*sic* inexplicable?) or at least no satisfactory explanation other than his negligence may be offered; yet, if the court is satisfied by his evidence that he was not negligent, the plaintiffs case must fail."

and found that on the facts and circumstances of that case, and on the evidence, the defendants had failed to prove that they had taken all reasonable steps to ascertain that the tyre on the fateful day, was fit for use, which they, in order to avoid liability, bound to prove. In that view, the learned Lord Justices held that the plaintiff had established negligence against the defendants and therefore, was entitled to recover damages.

On facts, however, Scott and Asquith L. JJ. differed. While explaining the rule of evidence embodied in the maxim *res ipsa loquitur*, Asquith L. J. said-

"The position as to onus of proof in this case seems to me to be fairly summarised in the following short propositions : (i) if the defendants omnibus leaves the road and falls down an embankment, and this without more is proved, then *res ipsa loquitur*, there is a presumption that the event is caused by negligence on the part of the defendants, and the plaintiff succeeds unless the defendants can rebut this presumption. (ii) It is no rebuttal for the defendants to show, again without more, that the immediate cause of the omnibus leaving the road is a tyre-burst, since a tyre-burst per se is a neutral event consistent, and

equally consistent, with negligence or due diligence on the part of the defendants. When a balance has been tilted one way, you cannot redress it by adding an equal weight to each scale, The depressed scale will remain down. This is the effect of the decision in *Laurie v. Raglan Building Co.Ltd..* (1941) 3 All ER 332, where not a tyre burst but a skid was involved, (iii) To displace the presumption, the defendants must go further and prove for it must emerge from the evidence as a whole) either (a) that the burst itself was due to a specific" cause which does not connote negligence on their part but points to its absence as more probable, or (b) if they can point to no such specific cause, that they used all reasonable care in and about the management of their tyres: *Woods v. Duncan*".

If this was, in truth, the burden on the defendants, Asquith L. J. was of the opinion, for the detailed reasons given by Scott L. J., that they had discharged it. That was because the learned Lord Justices were of the view that the defendants had proved as a matter of fact, that they had observed a reasonable system of inspection in regard to their tyres. They accordingly reversed the decision of Sellers, J., allowing the claim.

In dealing with the present question, Scott L. J. had stated-

"I agree that the mounting of the omnibus on the footpath was a fact which raised the presumption expressed in the phrase *res ipsa loquitur*. That phrase, however, represents nothing more than a *prima facie* presumption of fault."

Then he went on to explain that the presumption was a rebuttable one, in these words-

"It is rebuttable by the same defence as is open to any defendant accused of negligence, against whom the plaintiff's evidence has made out a *prima facie* case. When the plaintiff has done that, the onus is said to shift to the defendant. In a case where *res ipsa loquitur* the onus starts on the defendant and requires him to prove affirmatively that he has exercised all reasonable care, but that proof is very greatly facilitated if he can show that the event which caused the plaintiff damage happened through some cause for which no blame can attach to him, even though it cannot be specifically identified, and, if it can be so identified, his task is not only facilitated but achieved. If he thus succeeds in demonstrating, positively the probable operation of such cause, whether specifically identifiable or not, the onus is then discharged, and the presumption of fault on his part ceases and the plaintiff is left in the position of having failed to prove his case."

"The doctrine of *res ipsa loquitur* then goes out of the picture and the court, has to decide on the balance of proof on each side."

On further appeal, the House of Lords in *Barkway v. South Wales Transport Co. Ltd.* (1950) 1 All ER 392, set aside the decision of the Court of Appeal, and found that the defendants were, in fact, negligent in that though the practice of

inspection and overhaul of tyres was adequate in other respects and was in accordance with the practice of operators carrying on similar occupation, they failed to instruct their drivers about impact fractures and to require them to report, and the tyre examiners ought to have been, but were not informed.

The weighty observations of Asquith L. J. in *Barkway v. South Wales Transport Co.* (supra) in the Court of Appeal, have been received with approval by their Lordships in *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, . It must, therefore, be taken as the law that when a motor vehicle suddenly leaves the road, mounts the pavement or crashes against an offside tree, or falls down an embankment and meets with an accident resulting in death, the fact that it went off the road is, without more per se proof of negligence. By parity of reasoning, the very" fact that -here the ill-fated bus suddenly swerved to the right with a jerk, crashed through the railings and fell down from the Mortakka bridge into the rocky bed of the Narmada river from a height of 50 ft., itself gives rise to an inference of negligence.

We may like to point out that recently the House of Lords in *Henderson v. Henry E. Jenkins & Sons* (1969) 3 All ER 756 has gone a step farther. A majority of the Law Lords has, in their speeches, indicated that the defendants could not escape liability by merely raising a plea of latent defect in answer to a claim for damages for negligence but had to prove affirmatively that in all circumstances which they knew or ought to have known, they took all proper steps to avoid danger. Lord Pearson, in his speech stated-

"The decision in this appeal turns on what is sometimes called the evidential burden of proof, which is to be distinguished from the formal (or legal or technical) burden of proof. Passages which bear upon this distinction will be found in *Esso Petroleum Co. Ltd. v. Southport Corporation* (1952) 2 All EE 1204 per Devlin J. and per Lord Redcliffe, and in (1950) 1 All EB 392 per Lord Porter and at p. 400 per Lord Normand. For the purposes of the present case the distinction can be simply stated in this way. In an action for negligence the plaintiff must allege, and has the burden of proving that the accident was caused by negligence on the part of the defendants. That is the issue throughout the trial, and in giving judgment at the end of the trial the Judge has to decide whether he is satisfied on a balance of probabilities that the accident was caused by negligence on the part of the defendants, and if he is not so satisfied the plaintiff's action fails. The formal burden of proof does not shift. But if in the course of the trial there is proved a set of facts which raises a prima facie inference that the accident was caused by negligence on the part of the defendants, the issue will be decided in the plaintiff's favour unless the defendants by their evidence provide some answer which is adequate to displace the prima facie inference. In this situation there is said to be an evidential burden of proof resting on the defendants.

The plaintiff in her statement of claim, after alleging in paragraphs 5 and 6 that the accident was caused by negligence on the part of the second defendant, who

was the driver of the lorry, went on to allege in paragraph 7 that the accident was caused by negligence of the first defendants, who were the owners of the lorry, and gave particulars of the negligence..... The defendants in paragraph 2 of their defence denied that they were guilty of negligence as alleged or at all, and further denied that the collision was caused by the alleged or any negligence on their part. Then there was an additional plea in paragraph 3 as follows:

"3. The said collision was caused by a sudden brake failure on the said motor lorry resulting from a latent defect, that is to say corrosion of the brake fluid pipe, which occurred without any fault on the part of the defendants and the existence of which was not discoverable by the exercise of reasonable care by them".

What was the effect of this additional plea?

I do not think it raised any new or separate issue.....

The defendants were by this plea alleging and, therefore, admitting that the accident was caused by a sudden brake failure resulting from corrosion of the brake fluid pipe, and were assuming an evidential burden of proving that the corrosion occurred without any fault on their part and that its existence was not discoverable by the exercise of reasonable care by them. That was the effect of the defendants' pleading, but in any case the physical facts of the case raise a strong prima facie inference that the defendants were at fault and that their fault was a cause of the accident.....

From these facts it seems to me clear, as a prima facie inference, that the accident must have been due to a default of the defendants in respect of inspection or maintenance or both. Unless they had a satisfactory answer, sufficient to displace the inference, they should have been held liable."

Lord Reid and Lord Donovan were substantially of the same view.

The test laid down by their Lordships is clearly not fulfilled in the instant case.

That takes us to the question of assessment of damages which flow from the accident. In *Smt. Gulab Devi Sohaney Vs. Govt. of Madhya Pradesh* and Another, one of us (Sen J.) had occasion to observe-

"Under Section 110-B of the Motor Vehicles Act. 1939, the Claims Tribunal is required to determine an amount of compensation which appears to it to be just. That amount of compensation would be just has necessarily to depend upon the facts and circumstances of each case, The expression "just" has a wider ambit than the words used in Sections 1A and 2 of the Fatal Accidents Act and, therefore, though a Claims Tribunal while dealing with a claim under the Motor Vehicles Act has only to consider what appears to it to be "just compensation", on the facts and circumstances of the case before it, need not strictly follow and apply the basis of the assessment of compensation indicated in the various decisions under the Fatal Accidents Act; such decisions, Indian or English, are of

general guidance in cases of claim for compensation. The Claims Tribunal must, therefore, in claims arising from death in road accidents from the use of motor vehicles, while deciding the "just" compensation in a case, bear in mind and apply any general principle or principles laid down in the Indian or English decisions under the Fatal Accidents Act as far as they may be applicable, and in so far as they may promote the interests of justice, on the facts and circumstances of each particular case...

There are three decisions in which the Supreme Court had occasion to deal with a claim under the Fatal Accidents Act and to interpret Sections 1A and 2. The principles governing the assessment of damages under Sections 1A and 2 are, therefore, well settled. See, *Gobald Motor Service Ltd. and Another Vs. R.M.K. Veluswami and Others*, ; *Municipal Corporation of Delhi Vs. Subhagwanti and Others*, and *C.K. Subramania Iyer and Others Vs. T. Kunhikuttan Nair and Others*, . The damages are to be based on the reasonable expectation of pecuniary benefit or benefits reducible to money value. In assessing the damages all circumstances which may be legitimately pleaded in diminution of the damages must be considered. The actual pecuniary loss of each individual entitled to sue can only be ascertained by balancing on the one hand, the loss to him of the future pecuniary benefit, and, on the other, any pecuniary advantage which from whatever source comes to him, by reason of the death."

Their Lordships of the Supreme Court in *Sheikhupura Transport Co. Ltd. Vs. Northern India Transport Insurance Co.*, , have stated the same principles, thus-

"Under Section 110-B of the Motor Vehicles Act, 1939 the Tribunal is required to fix such compensation which appears to it to be just. The power given to the Tribunal in the matter of fixing compensation under that provision is wide. Even if we assume (we do not propose to decide that question in this case) that compensation under that provision has to be fixed on the same basis as is required to be done under Fatal Accidents Act, 1855. (Act 13 of 1855), the pecuniary loss to the aggrieved party would depend upon data which cannot be ascertained accurately but must necessarily be an estimate or even partly a conjecture. The general principle is that the pecuniary loss can be ascertained only by balancing on the one hand the loss to the claimants of the future pecuniary benefit and on the other any pecuniary advantage which from whatever sources come to them by reason of the death, that is, the balance of loss and gain to a dependant by the death must be ascertained."

The principles governing award of damages for death are well settled and may be briefly stated here;

(i) When the Court awards damages to the dependants for death due to negligence, it awards one lump sum, calculated by taking the yearly pecuniary loss and multiplying it by the number of years' purchase.

(ii) It does not divide it into two parts, such as special damage upto the date of trial and future loss after the date of trial. The Court treats it as damage inflicted

once and for all at the time of accident.

(iii) It has to follow the rule of basic figure a certain number of years" purchase and allowance for lump sum down.

(iv) If the period is a long one, the "multiplier" will be much smaller than the number of years, even where the contingencies which are allowed for are of small account. The reason is that while in so far as the lump sum of damages is still unspent, it will be earning interest and the damages and interest together will be adequate to last out for the period. The reason is that a prudent person receiving a lump sum, to make good his loss over a period, is expected to invest it and to use it up gradually.

(v) The sum to be awarded as damages should be equal to the cost of purchasing an annuity of the relevant amount for the relevant period.

The question then is whether the dependants should, bring into account the "collateral benefits" which they may have received by reason of the death e.g., the social assurance or insurance, pension-- contributory or non-contributory, gratuity etc. At common law, pecuniary benefits from insurance policies, whatever the source, and pension schemes whether contributory or non-contributory, were deducted; (*Grand Trunk Railway of Canada v. Jennings* (1388) 13 AC 800). This situation was reversed by statute, i.e. the Fatal Accidents (Damages) Act, 1908, which provided that insurance benefits should not be deducted. This left the law in an unsatisfactory state of affairs.

The guiding principle in assessing damages in England under the Fatal Accidents Acts 1846 to 1908, have always been that the loss suffered by the dependants must be balanced against any pecuniary advantages coming to them as a result of the death of, the breadwinner. This principle was qualified by exceptions, mainly concerning insurance payments and such gratuities which could not reasonably be expected, Under the then existing legislation, prior to the Fatal Accidents Act, 1959, as interpreted by the Courts, especially under the Fatal Accidents (Damages) Act, 1908, and under the Law Reform (Personal Injuries) Act, 1948, private insurance money and social insurance of any kind payable on the deceased's death was disregarded, i.e., not deducted from the damages payable by a tortfeasor; but other benefits, e.g. compulsory pension -- contributory or non-contributory, insurance or gratuity which has been or will or may be paid, by reason of the death, being in the form of "deferred annuities" were held to be deductible.

In Halsbury's Laws of England, Third Edn., Vol. 28, pp. 103-4 the law is stated thus:--

"Deductions from damages: In assessing damages under the Fatal Accidents Acts, any pecuniary advantage which the dependant has received from any source as a result of the death must be set off against his probable loss. (*Davies v. Powell Duffryn Associated Collieries Ltd.* (1942) 1 All ER 657). Thus a

deduction is to be made where under a settlement the claimant benefits in consequence of the death. (*Pym v. Great Northern Railway Co.* (1861) All ER 180). Even if the money or other advantage received by reason of the death would in any event have come to the claimant in due course, a deduction from the damages is to be allowed for the benefit of accelerated receipt."

So also, in Vol. II at p. 257 :

"..... the Court in assessing damages under the Fatal Accidents Acts, must make the best estimate it can of the benefit which the dependants on whose behalf the claim is made would be likely to obtain from, the claim for loss of expectation of life, and deduct that sum from the amount which would otherwise be awarded under the Fatal Accidents Acts."

Fleming in his classic work on the Law of Torts has summed up the law on the subject in these words (pp. 688-91):

"The pecuniary loss of such dependant can only be ascertained by balancing, on the one hand, the loss to him of future pecuniary benefit, and, on the other, any pecuniary advantage which, from whatever source, comes to him by reason of the death. Thus, the benefit which a wife and children take under a will or settlement upon the death of the husband has to be taken into account in reduction of the compensation; though the full value of personal effects of which the widow had previously enjoyed the use, such as a house and furniture, is not deductible, but only such an amount as is attributed to the net advantage, if any, accruing to her in relation to those assets by the death of her husband. Not only legal rights to a pecuniary benefit, but also voluntary benefits, are to be taken into consideration: "Just as in assessing the loss by the death the probability of voluntary contribution destroyed by the death of the contributor may be included to swell the claim, so the probability of voluntary contribution bestowed in consequence of the death may be used to reduce it.....

Insurance policies and pensions merit special attention. There is a vital distinction between the receipt of moneys under accident insurance and life assurance policies. In the case of accident policies, the full value is deductible on the ground that there was no certainty, or even a reasonable probability, that the insured would ever suffer an accident. But since man is certain to die, it would not be justifiable to set off the whole proceeds from a life assurance policy, since it is legitimate to assume that the widow would have received some benefit, if her husband had pre-deceased her, during the currency of the policy or if the policy had matured during their joint lives. The exact extent of permissible reduction, however, is still a matter of uncertainty..... As regards pensions, a distinction must be observed between contributory superannuation schemes under which the employee's benefits vary in relation to the scale of his contributions, and Government schemes, like the Commonwealth Social Services Consolidation Act, 1947-53, where there is a flat rate of contribution and of benefits, and its basis is public philanthropy rather than contract. The amount of

the pension received by the widow from the latter source is deductible, but the benefits accruing under a superannuation scheme arising from contract between employer and employee have generally been treated in the same manner as life assurances, because such private pensions are in reality none other than annuities payable by instalments." (See also, Winfield on Tort, Seventh Edition, pp. 136-8; Clerk & Lindsell on Torts, Thirteenth Edn., pp. 429-30; (1959) 22 Modern Law Review, pp. 96/99; (1960) 23 Modern Law Review, pp. 60-63; (1961) Modern Law Review, pp. 559-75; (1963) 26 Modern Law Review pp. 315-18).

In England, the law now has been drastically altered by the Fatal Accidents Act, 1959. It rationalized the principles which govern the disregard of "compensating advantages" in the assessment of damages for the benefit of dependants. Section 2 of the Act put an end to the unfortunate state of affairs, and provided that in future, there shall not be taken into account "any insurance money, benefit, pension of gratuity which has been or will or may be paid as a result of the death", and "benefits" includes benefit under the National Insurance Acts of Great Britain and of Northern Ireland as well as friendly society or trade union benefit payments, and "pension" a return of contributions and any lump sum payments in respect of a person's employment. The words "may be paid" suggest that a reasonable expectation without legal claim is covered, i.e., is to be disregarded.

It is needless for us to stress the immediate need for Law Reform in our country. Legislation on the lines of the Fatal Accidents Act, 1959, should be introduced forthwith. Unless this is done, the principles set forth in *Grand Trunk Railway Co. v. Jennings* (1838) 13 AC 800; *Pym v. Great Northern Rail Co.* (1861) All ER 180; *Baker v. Dalgleish S. S. Co.* (1922) 1 KB 361; *Davies v. Powell Duffryn Associated Collieries Ltd.* (1942) 1 All ER 657, would still hold the field. Under the present law, in assessing damages under the Motor Vehicles Act, 1939, as it stands, the Court has to as it must, set off against the probable loss which the dependant has suffered, any pecuniary advantage which he has received from any source, as a result of the death such as pension, whether contributory or non-contributory, insurance or gratuity.

The view taken by the Gujarat High Court in *Life Insurance Corporation of India and Another Vs. Kasturben Naranbhai Vadhia and Others*, , to the contrary, does not appear to us to lay down good law for two reasons. In the first place, in the absence of any Act like the Fatal Accidents Act, 1959, of England, the benefits cannot be disregarded. Secondly, the learned Judges, with respect, fell into an error in relying upon the principles laid down in *Barry v. Cleaver* (1969) 1 All ER 555 (HL) and *Bradburn v. Great Western Rly. Co.* (1874) All ER 195. Both were cases of non-fatal accidents and therefore, somewhat different considerations came into play. (See Hals-bury's Laws of England, 3rd Edn., Vol. 11, pp. 240-1).

In *Bradburn v. Great Western Rly.* (1874) All ER 195 (supra), the plaintiff, who had been injured by the defendant's negligence, received a sum of money under

a personal accident insurance policy which he had taken out. It was argued that this sum should be set against his damages; but the Court of Exchequer regarded it obvious that he was entitled to retain the benefit of his policy. Similarly, in *Payne v. Railway Executive* (1951) 2 All ER 910, the Court of Appeal declined to take into account a pension which had been awarded to the plaintiff because, as a result of his injury, he had to be invalidated out of the Royal Navy. However, in *Borwning v. War" Office* (1962) 3 All ER 1089, the Court of Appeal struck a discordant note, and held, following *British Transport Commission v. Gourley* (1955) 3 All ER 796, that damages for negligence being compensatory and not punitive, a plaintiff must give credit for all sums he receives in diminution of his loss "save in so far as it would not be fair or just to require him to do so". Clerk & Lindsell on Torts, 13th Edn. p. 366, tries to reconcile this, by observing that in the former case payment of the pension was discretionary while in the latter the plaintiff received his pension as of right. According to the learned authors, the House of Lords, by majority, has now in *Parry v. Cleaver* (1969) 1 All ER 555 (supra) held the distinction to be unsound.

To sum up, in a claim for damages for death u/s 110-B of the Motor Vehicles Act, 1939, as it now stands, sums payable on death under any contract of social assurance or insurance are to be disregarded, but the reasonable prospect(s) of receiving benefits such as compulsory employers' insurance, whether contributory or non-contributory, gratuity and pension have to be taken into account.

In the light of these principles, we shall proceed to ascertain the damages payable to the two sets of claimants.

Taking the case of the first set, i.e. Smt. Sushila Devi and others, we may state that Jinendra Kumar was an accountant in the office of the Commissioner of Sales Tax in the Grade of 130--5--160--6--190 EB 10--240. At the time of his death he was (39) years of age and has still 14 years to attain the then age of superannuation. He was earning Rs. 186 per month and had a settled life, with reasonable prospects. The claimants are entitled to such sum as will make good to them the financial loss as they had suffered and will suffer as a result of his death. The future loss is necessarily conjecture. If all had gone well, Jinendra Kumar would have earned promotions and higher grade, so that he could have maintained the members of his family, at least, at their standard of living at the time of his death and also made other provisions for their future. But all might not have gone well; any of them might have died prematurely, he might not have been able to earn these sums, or other misfortunes might have occurred. So, allowance must be made for all this (Per Lord Reid in *Taylor v. O'Connor* (1970) 1 All ER 365).

Jinendra Kumar had not completed 25 years qualifying superior service. His dependants were, therefore, not entitled to any family pension. That was because they did not qualify to such pension under Rule 5 of the New Pension Rules, 1951. However, we are informed that the Accountant General paid to

them Death-cum-Retirement Gratuity amount to Rs. 1992. This was apart from Insurance money of Rs. 2851 payable under the Madhya Bharat Government Life Assurance Rules, 1949. Thus, the dependants received in all Rs. 4843.

Taking the normal expectancy of life to be 60 years, Jinendra Kumar could have lived for another 21 years; after his superannuation he would have been entitled to pension as well. At the time of his death he left a widow aged 31 years, three sons aged respectively, 12, 7 and 11/2 years, a daughter aged 10 years and his parents aged respectively 69 and 65 years. Since the period is a long one, the "multiplier" will be much smaller, as stated by Lord Reid in *Taylor v. O'Connor* (1970) 1 All ER 365 (supra).

Taking the basic figure as Rs. 125 per month which Jinendra Kumar must have been giving to his family for their maintenance, the extent of the pecuniary loss to the dependants has to be ascertained by multiplying the basic figure by a number of years. The multiplier of "15" can be wholly justified on the settled principles. The application of "15-year multiplier" to the dependency of Rs. 1500 per year gives the resultant figure of financial loss to the dependants at Rs. 22,500. That is the conventional approach in this type of case. Even adopting the other method, the resultant figure is more or less the same. The cost of purchasing an annuity yielding an income of Rs. 1,500 per year at the normal bank rate of 7 per cent, would be about RE, 21,400. From out of this, allowance has to be made for the pecuniary benefit that the claimants derived by reason of the death, as also, for the fact that they received a lump sum payment. As already stated above, they have received Rupees 43,430. The extent of loss to the dependants of Jinendra Kumar is, therefore, ascertained at Rs. 18,000 in round figures. We accordingly award to them Rs. 18,000 as damages.

The second set of claimants, i.e. Smt. Kamalabai and others, however, stand on a different footing. Basantlal was 54 years of age. He had no settled employment, not any definite source of income. The data furnished by the claimants as to the extent of his earning is wholly inadequate. Though the evidence led by them suggests that he was earning Rs 250 per month, the evidence is not worthy of any credence. Basantlal was an astrologer "and an ayurvedic physician. The evidence of his own son A.W. 9, Ganpat, as well as the entries from the register Ex. P/3, shows that he could not have been earning much. Even taking the basic figure as high as Rs. 75 per month, with the expectancy of life to be 60 years, the "multiplier" should be "6"; and therefore, the claimants are not entitled to anything more than Rs. 5,000. The cost of buying an annuity yielding an income of Rs. 900 per year would also be the same. We accordingly award to the claimants Smt. Kamalabai and others, Rs. 5,000 as damages.

In the present case, we are dealing with accident to a vehicle in which more than six passengers were allowed to be carried. Hence the maximum liability imposed u/s 95 (2) (b) of the Motor Vehicles Act, 1939, on the insurers, i.e. the Jupiter General Insurance Company Ltd., is Rs. 2,000 per passenger. The claimants have

neither pleaded nor proved that the contract of insurance entered into between the owner of the vehicle and the insurance company provided for payment of any sum higher than that fixed u/s 95 (2) (b) of the Act. Hence the liability of the Insurer in the present case only extends upto Rs. 2,000 (Two thousand) each, in the case of Jinendra Kumar and Basantlal.

In the result, the appeals succeed and are partly allowed. The order of the Motor Accidents Claims Tribunal is set aside. The claim of Smt. Sushila Devi and others, i.e. the heirs of Jinendra Kumar, is decreed to the extent of Rs. 18,000 (eighteen thousand) while that of Smt. Kamalabai and others, i.e. the heirs of Basantlal, is decreed to the extent of Rs. 5,000 (five thousand). In the special circumstances of this case we make no order as to costs.