

UNION OF INDIA
v.
UNITED INDIA INSURANCE CO. LTD. AND ORS.

OCTOBER 22, 1997

[S.B. MAJMUDAR AND M. JAGANNADHA RAO, JJ.]

Motor Vehicles Act, 1939 : Ss. 110(1) & 110 B (1988 Act ss. 165 & 168 (1) r/w Rule 100 (f) of Rules made under 1939 Act, and ss. 13(c) & 13(d), Railways Act, 1890 ; Train-bus accident at unmanned level crossing—Majority of bus passengers and driver killed, others injured—Bus driver not familiar with territory—Train visible to him and passengers from a distance—No caution board or indication to show that road was cutting across railway line—No handrails, stiles, gates erected to alert passerby ; Claim against bus owner, insurance company and railways : Held : Bus driver was negligent at common law in not stopping the vehicle to see, hear and find out if any train was coming—That his negligence does not vicariously attach to passengers of that motor vehicle—That under the law of torts obligation of railways run concurrently under statute and under common law—That statutory duties under s. 13, Railways Act did not arise—That railways was negligent at common law on the neighbourhood principle in not taking cognizance of increased rail road traffic at that level crossing and not converting it into a manned one with gates—That railways was under a duty of care—That its omission to provide appropriate safeguards at the level crossing was irrational on the doctrine of general expectation of the community—That there is a clear indication in ss. 13(c) and 13(d) of Railways Act that affected parties are intended to be compensated—Thus creating a private law cause of action against railways for damages—And that Claims Tribunal was competent to award damages against railways.

Motor Vehicles Act, 1939 : Ss. 110(1) & 110B (1988 Act ss. 165 & 168(1)) r/w ss. 110F & 110E : Train-bus accident at unmanned level crossing—Claim for damages : Held : Motor Accidents Claims Tribunal is an alternative forum in substitution of civil court—That it has jurisdiction to entertain claims against another joint tort feisor connected with same accident—And that it can pass award against railways for negligence in relation to same accident. Further, where bus driver is not negligent or vehicle had no defect the case goes out of s. 110(1) and becomes one of

A *exclusive negligence of railways, and not maintainable before Tribunal.*

*Railways Act, 1890 : Ss. 13(c) & 13(d) : Statutory interpretation of :
Held : There is clear indication in them that affected parties are intended to be compensated.*

B Section 13 of the Railways Act, 1890 empowers the Central Government to require the railway administration, for the purpose of preventing danger to passengers on the road, to erect, within a specified time (a) boundary marks or fences, (b) screens, (c) suitable gates, chains, bars, stiles or handrails at places where a railway line crosses a public road on the level, and (d) that persons be employed to open and shut such gates, chains or bars. Section

C 110 (1) of the Motor Vehicles Act, 1939 provides for constituting the Claims Tribunals for adjudicating upon claims for compensation in respect of accidents, involving the death or bodily injury of persons, arising out of the use of motor-vehicles or damage of any property of a third party so arising or both. Section 110B of that Act empowers the Tribunal to determine the amount

D of compensation and specifying the person or persons to whom compensation shall be paid, and also to specify the amount which shall be paid by the insurer or owner or driver of the vehicle involved in the accident or by all or any of them, as the case may be. Clause (f) of Rule 100 of the Rules made by the Central Government under the Motor Vehicles Act, 1939 required the conductor of a stage carriage while crossing an unmanned railway level crossing with his vehicles to make the driver stop the vehicle on the road at the place notified for such stoppage by appropriate sign board, to get down from the vehicle and after making sure that no train is approaching the level crossing from either side, walk ahead of the vehicle until it has safely crossed the level crossing.

F A train-bus accident at an unmanned level crossing resulted in majority of the bus passengers, including driver, being killed and others sustaining injuries. The hired bus was on a tour of Kerala and the train was a superfast one running at high speed. The train was visible to the driver and the passengers at a distance of about 1 km. The road had no curve. The caution

G board at the entrance of the level crossing was moth eaten and the writing on it difficult to decipher. There was no indication that the road was cutting across railway line. The level crossing had no gates, stiles or handrails to alert the passerby. The bus driver proceeded to cross the railway line, when the vehicle somehow stopped and did not move, and the collision occurred.

H In a batch of cases filed by dependents of deceased and injured persons,

the Motor Accidents Claims Tribunal held that the driver of the bus was negligent, and passed awards against the owner of the bus and the insurance company but dismissed the claim against the railways on the ground that there was no negligence on the part of the driver of the railway engine concerned or on the part of the railway administration. The High Court partly allowed the appeals and cross objections, making the railways also liable. In two other cases, decided earlier, the said Tribunal had held the railway administration also liable on account of its negligence in regard to the same accident. In both the judgments the Tribunal had further held that under sections 110(1) and 110(b) of the Motor Vehicles Act, 1939, an award could be passed against the railways also, which view was upheld by the High Court.

It was contended for the Union of India that as a matter of common law duty, at the level crossing, the driver of a motor vehicle was obliged to stop, see, listen and get down and proceed. Rule 100 of the Rules made under the Motor Vehicles Act, 1939 was referred to. It was also contended that there was no pleading in regard to the negligence of the railways, and that because of the specific reference in section 110-B of the Motor Vehicles Act, 1939 to the insurer, owner and driver, an award cannot be passed by the Claims Tribunal against anybody else.

For the respondents it was contended that under the common law the railways, as an occupier of the level crossing for the purpose of running railway trains which is inherently dangerous to those who use the public road at that point, has special responsibilities as a responsible body to see that accidents are kept to the minimum.

Dismissing the appeals, the Court

HELD : 1. Clause (f) of Rule 100 of the Motor Vehicles Rules postulates the existence of a sign board requiring the vehicle to stop and the conductor to get down. Since in the instant case, admittedly, the writing on the signboard at the level crossing was moth eaten, and no writing was visible, it cannot be said that the special obligations created by the said rule, which were in addition to the common law requirements, were applicable. There was no notice board as contemplated by the rule. There was, therefore, only an ordinary common law duty as applicable to prudent persons. This was a duty to stop, see and hear and find out if any train was coming. If that was not done, there would clearly be negligence on the part of the driver. Inasmuch as in the instant case, the driver did not stop the vehicle at the level crossing, even though there was no curve or obstruction at the point, the Tribunal and the High Court

A were justified in finding negligence on the part of the driver. The High Court was also right in its view that the driver, who must be deemed to be conscious that his own life was at stake could not be accused of criminal negligence in wanting to kill the passengers, and that the case might be one where the drive took a risk which ought not to have been taken, and the engine of the bus for some unknown reasons, might have failed while it was on the track. This finding of negligence of the bus driver does not call for interference.

[656-B-E; 657-A-B; G]

Baltimore & O.R. Co. v. Goodman, (1927) 275 US 66 (72 L. ed. 167, 48 S. Ct. 24) and *Pokora v. Wabash Rly. Co.*, (1934) 292 US 98 (78 L. ed. 1149, 54 S. Ct. 580) referred to.

S.N. Hussain v. State of A.P., AIR (1972) SC 685, referred to.

2. It cannot, however, be said that the driver's negligence in any manner vicariously attaches to the passengers of the motor vehicle of which he was the driver. The principle in the law of torts called the 'doctrine of identification' or 'imputation', is to the effect that the defendant can plead contributory negligence of the plaintiff or of an employee of the plaintiff where the employee is acting in the course of employment. This principle of contributory negligence is confined to the actual negligence of the plaintiff or of his agents. There is no rule that the driver of an omnibus or a coach or a cab or the engine driver of a train, or the captain of a ship on the one hand and the passengers on the other hand are to be identified so as to fasten the latter with any liability for the former's contributory negligence. There cannot be a fiction of the passenger sharing a right of control of the operation of the vehicle nor is there a fiction that the driver is an agent of the passenger. A passenger is not treated as a back-seat driver. Therefore, even if the driver of the passenger vehicle was negligent, the railways, if its negligence was otherwise proved, could not plead contributory negligence on the part of the passengers of the vehicle. Thus, qua the passengers of the bus who were innocent, the driver and owner of the bus and, if proved, the railways can all be joint tort-feasors. [657-H; 658-A-B; E-G]

Mills v. Armstrong, (1988) 13 A.C. 1 HL; *Halsbury's Laws of England* 4th Ed., (1984) Vol. 34, p. 74 referred to.

Ratanlal & Dhirajlal, Law of Torts, 23rd Ed. (1997) p. 511; *Ramaswamy Iyer, Law of Torts*, 7th Ed. p. 447 and *Prosser & Keeton on Torts*, 5th Ed. 1984 pp. 521-522, referred to.

3.1. It cannot be said that there was no pleading in regard to the negligence of the railways. It is well settled that when the issue framed by the trial court is wide and parties understood the scope thereof and adduced such evidence as they wanted to, then there can be no prejudice and a contention regarding absence of a detailed pleading cannot be countenanced. In the instant case the trial court had framed an issue on the negligence of all or any of the respondents, and the parties had led evidence on that issue.

[658-H; 659-B-C]

3.2. Under section 13 of the Railways Act, 1890 no duties are imposed directly on the railway administration by the statute in regard to erection of gates and employment of watchmen etc. at the level crossings if the railways was cutting across a public road. The section only confers a power on the Central Government to issue a requisition to the railway administration to take steps as per section 13. Obviously, if the Central Government does not think fit to exercise that power and does not issue any such requisition the occasion for the railway administration to take steps under section 13, as per the statutory mandate, will not arise. The statutory duties of the railway administration under section 13, therefore, do not arise unless a requisition is made by the Central Government. [659-E-G; 660-D]

B.N. Rly Co. v. Tara Prasad, AIR (1928) Cal. 504) and *Henry Condon v. Balhaprasad Bhagwan*, (1895) Un P. J. Bombay High Court 91, referred to.

3.3. The law is, however, well settled that the claimants can at their choice sue the railways to enforce either or both types of duties, i.e., under common law as well as under statute. The claimants can, therefore, sue the railways concurrently for breach of the common law or statutory duties or for breach of either of the duties. [660-G; 661-A]

Commissiner for Railways v. McDermott, (1966) 2 All ER 162 PC, referred to.

3.4. The railways' duty of care at common law is based on the principle of neighbourhood due to the inherently dangerous or perilous nature of the operations of the railways. They are, thus, at common law, to take reasonable and necessary care even if the provisions in section 13(c) and (d) of the Railways Act, 1890 are not attracted for want of requisition by the Central Government. In that view of the matter, the railways are bound to take steps from time to time by considering the increase in the rail and road traffic at the level crossings to prevent accidents, like putting up gates. Increased traffic require a reappraisal of the measures previously taken. Greater the

A thoroughfare over any part of the line, the greater care and vigilance that ought to be exercised by the railways. If there is increase in the number of local inhabitants using the level crossing, then reasonable additional precautions should be taken. Even if the road users know that there is a crossing, they should be alerted at the proper moment by the boards since it is not a case of remote knowledge but one of immediate alertness.

B [661-B-C; 662-B-E; 663-D]

Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat, [1994] 4 SCC 1 and *Union of India v. La Iman S/o, Badri Prasad*, AIR (1934) V.F. 17, referred to.

C *Commisioner for Railways v. McDermott*, (1966) 2 All ER 162 PC; *Donoghue v. Stevenson*, (1932) AC 562; *London Passenger Transport Board v. Upson*, (1949) AC 155 HL; *Smith v. London Midland & Scottish Railway Co.* (1948) SC 125; *Lloyds Bank Ltd. v. Railway Executive*, (1952) 1 All ER 1248 CA) and *Cliff v. Midland Railway Co.*, (1870) LR 5 QB 258, referred to.

D *Halsbury's Laws of England*, Vol. 39 4th Edn. para 868, referred to.

3.5. The High Court noticed that 300 vehicles pass through the said level crossing and six express trains cut across that public road every day, and that there must be other non-express or passenger trains and goods trains, and that the population is dense in that part of Kerala. It further found that the bus driver was from Tamil Nadu, he was not familiar with that place in Kerala where the accident occurred, there was no caution board or indication to show that the road was cutting across a railway line, and there were no gates or handrails to alert the passerby. It took the view that if the railways had taken adequate precautionary measures, such as erecting handrails or gates, a severe accident like that would not have taken place. In the absence of gates and caution board, the said level crossing was of the nature of a trap. In that view of the matter, the High Court rightly held that applying the common law principles, the railway must also be deemed to be negligent in not converting the unmanned level crossing into a manned one with-gates having regard to the volume of rail and road traffic at the said level crossing.

G [664-D-G]

4.1. Private law rights under common law can arise in two distinct type of cases : One where there is omission on the part of the public authority to perform an alleged statutory, mandatory or discretionary duty, and another where there is omission to exercise such statutory powers or rather not deciding whether to exercise such statutory power or not. Section 13 of the

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Railways Act 1890 enables the Central Government to send a requisition to the railway administration to take certain steps in regard to level crossings. In the case of the said level crossing it was never done. The case thus belongs to the second category. [666-B-C]

4.2. In the case of positive acts, the liability of a public authority in tort is in principle the same as that of a private person but may be restricted by the statutory powers and duties. The same is true of omission to perform a statutory duty. If the policy of the Act was not to create a statutory liability to pay compensation, the same policy should certainly exclude the existence of a common law duty of care. But it is not as if a statutory 'may' can never give rise to a common law duty of care. There are exceptions in which a statutory 'may' could create a common law 'ought'. These exceptions require two conditions to be proved to postulate a duty to perform a common law obligation within the statutory framework of a discretionary power: firstly, that it should have been irrational not to have exercised the power, and secondly that the policy of the statute requires compensation to be paid to persons who would suffer damage because the power conferred was not exercised at all or not exercised when it was generally expected to be exercised.

[666-G-H; 668-B-F]

4.3. If the particular reliance of the plaintiff in respect of an expectation of exercise of statutory power by the authority was belied, then a conclusion can be drawn that the non-exercise was irrational. Alternatively, if the plaintiff had no idea of particularly relying upon the exercise of power by the authority in his favour but if as a matter of general reliance a society could by previous experience expect the exercise of such a power and if such an expectation stood belied, then also a conclusion could be drawn that the non-exercise of power by the authority was irrational. This doctrine of general expectation is based upon the general expectation of the community. It is clearly applicable in the instant case. In view of this general expectation of the community that appropriate safeguards will be taken by the railways at level crossing, the first precondition is clearly satisfied. [669-D-F; 670-E]

4.4. A policy to pay compensation could be inferred from the statute if the power was intended to protect members of the public from risks against which they could not guard themselves i.e. having regard to the expense involved or the highly technical nature of safeguards needed to be taken or because the safeguards have to be taken in the premises of the public authority. This principle extends to operations which are inherently dangerous or

- A complex against which members of the public cannot protect themselves. The running of trains by the railways has been recognised as inherently perilous and certainly creates in the minds of the public a general expectation that safety measures, which the public cannot otherwise afford, have been taken by the railway administration. The steps mentioned by the legislature in the various clauses of section 13 of the Railways Act, 1890 are steps which, even according to the legislature, individual members of society cannot afford to take and are not capable of taking, having regard to the expense or expertise involved or for the reason that these steps have to be taken in or in respect of the property of the railways. Applying the principle, there is a clear indication in section 13(c) and (d) of the Railways Act itself that the affected parties are intended to be compensated because of the non-exercise of the aforesaid statutory powers by the railways. Thus, the second condition as to a statutory intent of providing compensation is also satisfied. [670-F-G; 671-E; 672-C-F]

- 4.5. The case thus falls within the exception where a statutory 'may' gives rise to a common law 'ought'. That being so, it can be said that the non-exercise of public law or statutory powers under section 13(c) and (d) did create a private law cause of action for damages for breach of a statutory duty. [672-H]

- Rajkot Municipal Corporation v. Manjulaben Jayantilal Nakum*, [1997] 9 SCC 552 and *M.C. Mehta & Anr. v. Union of India & Ors.*, [1987] 1 SCC 393, referred to.

- Donoghue v. Stevenson*, (1932) AC 562; *Anns v. Merton London Borough*, (1978) AC 728; *Murphy v. Brentwood District Council*, (1991) 1 AC 398; *Stovin v. Wise*, (1996) 3 WLR 388; *East Suffolk Rivers Catchment Board v. Kent*, (1941) AC 74; *Sutneland Snire Council Co. v. Heyman*, (1985) 157 CLR 424 and 483; *Invercargill v. Hamelin*, (1994) 3 NZLR 513 (526); *Invercargill v. Hamelin*, (1996) 2 WLR 367 PC; *Swanson Estate v. Canada*, (1991) 80 D.L.R. (4th) 741; *Commissioner for Railways v. McDermott*, (1966) 2 All ER 162 PC; *Craig*, (1978) 94 LQR 428 and *Bowman & Bailey*, [1984] P.L. 27, referred to.

- Jackson & Powell on Professional Negligence*, (1997) 4th Ed., p. 26-41; *Modern Law Review*, (1997) Vol. 60. p. 559 and *Law Quarterly Review*, (1997) Vol. 113, p. 398; *Halsbury's Laws of England*, Vol. 34, Negligence, 4th Edn. para 73 and *Aronson & Whitmore-Public Torts & Contracts, Australia*, (1982), referred to.

5.1. Under s. 110(1) of the Motor Vehicles Act, 1939 Claims Tribunals have been constituted for adjudicating upon claims for compensation in respect of accidents involving the death or bodily injury of persons, arising out of the use of motor vehicles or damages to any property of a third party so arising or both. Section 110(1) thus deals with jurisdiction of the Tribunal. Section 110-B, on the other hand, is procedural and is in two parts. The first part states that after following certain procedures, the Claims Tribunal Shall make an award determining the amount of compensation which appears to it to be just and specifying the person or persons to whom compensation shall be paid, obviously, the word 'compensation' here in the first part of Section 110-B is referable to the Compensation to be decided by the Tribunal under Section 110(1). The second part of s.110-B is purely procedural when it refers to specification of the amounts payable by the insurer or owner or driver and has no bearing on the scope of the jurisdiction conferred by s.110(1) upon the Tribunal. That question has to be decided by interpreting the plain words "arising out of the use of the vehicle" occurring in s.110(1) and is not any manner controlled by s.110-B. The scope of the jurisdiction is clear.

[673-B-C; D-F; 674-A-B]

5.2. The Claims Tribunal is an alternative forum in substitution for the Civil Court for adjudicating upon claims for compensation arising out of the use of motor vehicles. Section 110-F of the Act, which states that no Civil Court shall entertain any question relating to any claims for compensation which may be adjudicated upon by Claims Tribunal, makes it further Clear.

[674-D-E]

New India Insurance Co. Ltd. v. Shanti Mishra, [1975] 2 SCC 840 and *Gujarat State RTC v. Ramanbhai Prabhatbhai*, [1987] 3 SCC 234, referred to.

5.3. When s.110-B does not and cannot control s.110(1), a Claim is entertainable by the Tribunal, if it arises out of the use of a motor vehicle and it is claimed against persons or agencies other than the driver, owner or insurer of the vehicle provided in tort, such other persons or agencies are also claimed to be liable as joint tort-feasors. Prior to the constitution of the Tribunal, such compensation could be decreed by the Civil Court not only against the owner-driver and insurer of the motor vehicle but also against others who are found to be joint tort feasors. [674-E-G]

Shivaji Dayanu Patil v. Vatschala Uttam More, [1991] 3 SCC 530,

A referred to.

Government Insurance Office of NSW v. R.J. Green & Lloyds Pvt. Ltd., (1965) 114 CLR 437, referred to.

B 5.4. Further s.110-E of the Act provides for recovery of the compensation "from any person" as arrears of land revenue and recovery under that sections is not restricted to the owner/driver or insurer specified in the second part of s. 110-B. Obviously, the words " from any person" are referable to persons other than the driver/owner or insurer of the motor vehicle. [675-B-C]

C 5.5. A claim for compensation, thus, lies before the Tribunal against other persons or agencies which are held to be guilty of composite negligence or are joint tort feasers, and if arising out of the use of the motor vehicle. The Tribunal and the High Court were therefore, right in holding that an award could be passed against the Railways if its negligence in relation to the same accident was also proved. [675-D]

D *Union of India v. Bhagwati Prasad*, AIR (1982) All 310; *Rajpal Singh v. Union of India*, (1986) ACJ 344 P&H; *Gujarat SRTC v. Union of India*, AIR (1988) Guj. 13; *United India Insurance Co. v. Premakumaran*, (1988) ACJ 597 (Ker) and *Union of India v. Dr. Sewak Ram*, (1993) ACJ 366 Raj., E approved.

Oriental Fire & General Insurance Co. v. Union of India, (1975) ACJ 33 AP, AIR (1975) AP 222 and *Union of India v. Bhimeswara Reddy*, (1988) ACJ 660 AP, distinguished.

F *Swarnalata Dutta v. National Transport India (Pvt.) Ltd.*, AIR (1974) Gau. 31; *Orissa RTC Ltd. v. Umakanta Singh*, AIR (1987) Orissa 110 and *Union of India v. Kailasan*, (1974) ACJ 488 Mad, overruled.

G 5.6. Claims where it is alleged that the driver/owner of the motor vehicle is solely responsible for the accident, claims on the basis of the composite negligence of the driver of the motor vehicle as well as driver or owner of any other vehicle or of any other outside agency would be maintainable before the Tribunal. But in the latter type of cases, if it is ultimately found that there is no defect in the vehicle but the accident is only due to the sole negligence of the other parties/agencies, then on that finding the claim would go out of s.110(1) of the Act because the case would then H

become one of exclusive negligence of railways. Again, if the accident had arisen only on account of the negligence of persons other than the driver/owner of the motor vehicle, the claim would not be maintainable before the Tribunal. [676-E-G] A

CIVIL APPELLATE JURISDICTION : Civil Appeal No. 3033 of 1990.

From the Judgment and Order dated 14.10.87 of the Kerala High Court In M.F.A. No 726 of 1986. B

WITH

C.A. Nos. 3034, 3035, 3036, 3037, 3038, 3039, 3040, 3041, 3042, 3043, 3044, 3045, 3046, 3047, 3048, 3050, 3051, 3052, 3053, 3054, 3055, 3056, 3057, 3058, 3059, 3060, 3061, 3062, 3063, 3064, 3065, 3066/1990 and C.A. Nos. 7418-19/97. C

N.N. Goswami K.N. Shukla, H.L. Agrawal, M.L. Jain, Praveen Swarup, Satpal Singh, S. Wasim A. Qadri, P. Parmeswaran, Rajiv Sharma, K.K. Dhawan, K.S. Rana, Hemant Sharma, Y.P. Mahajan, A.D. N. Rao, A.K. Sharma, Rajiv Nanda, Fizani Husain Ravidra Kumar, Rajiv Mehta, Yatendra Shrama, Ms. Manupriya Mittal, Ms. Indira Swawhney, Ms. Indu Goswami Ms. Kamkshi, S. Mehlwal, Ms. Smitha Inna, Ms. Sushma Suri, K.N. Bhargava, Ms. Beena Prakash, G. Prakash, K.M.K. Nair, S. Srinivasan, Dr. K.S. Chauhan and M.K. Diwakaran Namordiri for the appearing parties. D

The Judgement of the Court was delivered by

M. JAGANNADHA RAO, J. Leave granted in the SLPs. E

Several important issues-whether omission to perform public law statutory duties can or cannot give rise to action at private law (Point 4) and liability of public bodies in tort while performing inherently dangerous operations (Point 3) etc. arise for consideration in this batch of cases. F

This is a batch of appeals preferred by the Union of India represented by the General Manager, Southern Railways. The accident occurred on 9.5.1979 at an unmanned level crossing at Akaparemoa (near Kalady) in Kerala when a hired passengers bus was hit of the Jayanthi Janatha Express at about 3 P.M., and 40 passengers in the bus and the driver there of were killed while some other passengers sustained injuries. Two judgments of the Motor Accidents Claims Tribunal, Ernakulam in regard to the same accident are under appeal before us. In onc batch of cases filed by dependents of deceased and injured persons, the Motor Accidents Claims Tribunal, Ernakulam by judgment dated 28.2.1986 held that the driver of the bus was negligent and passed awards against the owner of the bus and the Insurance Company but H

A dismissed the claim against the Railway on the ground that there was no negligence on the part of the driver of the railway-engine concerned or on part of the Railway Administration. The liability of the Insurance Company was restricted to a maximum of Rs. 5000 Per passengers as per the statutory provisions then in force. On appeals by the Insurance company, cross objections were preferred by claimants (in some cases). The appeals and

B cross objections filed were partly allowed by the High Court, making the Railways also liable. In two other cases which were decided in an earlier judgment dated 27.9.1984, the same Tribunal at Ernakulam had held the Railways Administration also liable on account of its negligence in regard to the same accidents. However, in both judgments, it was held that under

C Section 110(1) and 110-B of the Motor Vehicles Act, 1939 an award could be passed against the railway also which view was accepted by the High Court. Against all these Judgement, the Union of India has preferred these Civil Appeals, Stay of operation of the judgments was refused by this Court pending these appeals.

D The facts of the case are as follows :

The motor vehicle in question belonged to one K. Arumughan of Arni, Tamilnadu and was hired by employees of the Survey and Land Records Dept. of the Tamilnadu State for a trip to Trivandrum, Cochin, Kalady, Guruvayoor, etc. in Kerala. One Rajan was the Manager of the tour. On

E 7.5.1979, the bus started at Trivandrum or Cochin. There was some delay on the way and the passengers were finding fault with the driver in regard to the said delay. It appears that the driver was angry with some of the passengers who found fault with him for delay and he told them that he would abandon the bus and leave the passengers in a forest. By noon, the bus reached

F Cochin and proceeded to Kalady via Angamali. The Bus was to cross an unmanned level crossing at Akaparmba at about 3 P.M. The said railway crossing had no gates or stiles. It is now found on evidence that the caution board at the entrance of the level crossing was moth eaten and the writings thereon could not be deciphered by any one even if one was inclined to read. the train was visible to the driver and passengers at a distance of 1 k.m. The

G driver drove the vehicle and was crossing the railway line when the vehicle stooped on the track and did not move. The passengers cried and shouted in panic but the bus remained there and was pushed up to a distance of 500 meters by the locomotive. In that process forty passengers and the driver died while some other passengers were injured.

H We have heard the counsel on both sides. From the submissions the

following points arise for considerations:

(1) What are the common law duties of a motor vehicles driver at a railway level crossing? Whether, on facts, the bus driver was negligent? A

(2) Whether under the 'doctrine of imputation' the negligence of the driver in which the passengers travelled could be imputed to the passengers by the railways as part of the defence for the purpose of raising a plea of contributory negligence of the passengers? B

(3) Whether under the law of torts the claimants in rail-motor collisions can that the obligations of the Railways under statute as well as under common law will run concurrently? What are the *common law duties* of the railways at level crossings and whether the Railways is bound to the cognizance of the increase in the volume of traffic and ought to have installed gates and kept a watchman at the level crossing? C

(4) Whether a public authority upon whom powers are conferred by statute to exercise discretion for benefit of the public can be said to be under a duty of care so that omission to exercise that power could be treated as negligence at common law giving a right to compensation? If not, whether there are any exceptions to the rule that a statutory may can never give rise to a common law ought? What is the effect of the omission of the Railways to exercise power under Section 13(c) and (d)? D

(5) Whether the Motor Accidents Claims Tribunal has jurisdiction under Section 110(1) of the Motor Vehicles Act, 1939 read with Section 110(B) thereof (corresponding to Section 165 and 168(1) respectively of the Motor Vehicles Act, 1988) to adjudicate a claim against the Railways Administration when a motor vehicle is hit by a railway train and whether the Tribunal can pass an award under Section 110(B) against the Railways also, in addition to an award against the owner of the vehicle, driver and the insurer? E

Point 1: The facts of the case before us reveal that the driver as well as the passengers in the bus saw the train at a distance of one kilometer from the level crossing. But the driver of the bus proceeded forward. The train which was a Super fast one, was running at a speed of 75 k.m. per hour. That would mean that it would have taken about 40-50 seconds to reach the level crossing. It is not clear to us as to how far the bus was at that time from the level crossing but the evidence reveals that the bus proceeded to cross the railway line and thereafter did not move from the track and was then hit by the train and dragged upto 500 meters. There is no evidence that the engine driver was negligent. In fact if he had applied the brakes when he saw the F

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- A bus about 100 feet away while the train was running at a speed of 75 k.m. per hour, there would have been a derailment of several compartments of the train itself.

- It was argued for the Union of India that as a matter of common law duty, at the level crossing, the driver of motor vehicle was obliged to stop, see, listen and *get down* and proceed. Rule 100 of the Rules made by the Central Government under the Motor Vehicles Act, 1939 which refers to the duties of Conductors was referred to. Clause (f) of Rule 100 (introduced w.e.f. 1.7.1965) states that the Conductor of a stage carriage while on duty, shall.

- “....while crossing an unmanned railway level crossing with his vehicle, require the driver to stop the vehicle on the road *at the place notified for such stoppage by appropriate sign board* as set out in the third Schedule to these Rules and on stopping, shall *get down* and after making sure that no train is approaching the level - crossing from either side, walk ahead of the vehicle until it has safely crossed the level crossing”.

- The Rule therefore postulates the existence of a sign board as mentioned therein, requiring the conductor to get down, Now admittedly the writing on the sign board at the level crossing was moth eaten and no writing was visible. Hence in our view no special obligations created by the rule, which were in addition to the common law requirements, can be said to apply. There was no notice as contemplated by the rule which laid down as extra obligation on the conductor to *get down* from the vehicle as stated in clause (f) of Rule 100.

- In our opinion, in the absence of a board statutorily requiring the vehicle to “stop” and the conductor to “get down”, there was only an ordinary common law duty as applicable to prudent persons. This was a duty to “stop” “see and hear” and find out if any train was coming. It has been held by the U.S. Courts that there is no absolute duty at common law to get down from the vehicle invariably. In fact a rigid rule of ‘getting down from the vehicle in addition to stopping looking and hearing was laid down at one time by Justice Holmes in *Baltimore & O.R. Co. v. Goodmen*, (1927) 275 US (72 L.Ed. 167, 48 S.Ct.24) but such a principle of special caution which was under adverse criticism was rejected by Cardoza, J. in *Pokora v. Wabash Rly., Co.* (1934) 292 US 98 78 L.Ed. 1149, 54 S.Ct. 580 stating that the requirement of *getting down* from the motor vehicle was good if there was a curve or an obstruction or such like situation but not when the line was straight and

the train was visible. The 'get out of the car requirement was, in the absence of special circumstances, an uncommon precaution, likely to be futile and sometimes even dangerous', said Cardoza, J. In our opinion, there was no duty - in the absence of a board directing the driver or conductor- to get out of the vehicle, but there was certainly a duty to stop, see and hear, at the unmanned level crossing. If that was not done, there would clearly be negligence on the part of the driver. In fact, it has been so held by this Court, in case under Section 304 A, IPC that the driver must be deemed to be rash and negligent if he did not stop the vehicle and then see and hear. (*S.N. Hussain v. State of A.P.*, AIR (1972) S.C. 685. It was there observed :

"Where a level crossing is unmanned, it may be right to insist that the driver of the vehicle should *stop* the vehicle, look both ways to see if a train is approaching and thereafter only drive his vehicle after satisfying himself that there was no danger in crossing the railway track."

It was also pointed out :

"But where a level crossing is protected by a gateman and the gateman opens out the gate inviting the vehicle to pass, it will be too much to expect of any reachable and prudent driver to stop his vehicle and look out for any approaching train".

Inasmuch as in this case, the driver did not stop the vehicle at the unmanned crossing, it must in our view be held that he was guilty of negligence even though there was no curve or obstruction at the point. The Tribunal and the High Court were, in our opinion, justified in finding negligence on the part of the driver. Of course, the High Court felt that the driver who must be deemed to be conscious that his own life was at stake could not be accused of criminal negligence in wanting to kill the passengers even if he was angry with their complaint of delay. The High Court thought that the case might be one where the driver took a risk which ought not to have been taken and the engine of the bus, for some unknown reasons, might have failed, while it was on the track. In any event, the finding of negligence of the bus driver does not call for interference.

Point 2. The claimants are either the injured passengers or the dependents of the deceased passengers travelling in the ill-fated motor-vehicle. We have accepted that the driver of the said motor vehicle was Negligent. The question is whether the driver's negligence in any manner

- A vicariously attaches to the passenger of the motor-vehicle of which he was the driver?

B There is a well-known principle in the law of torts, called the 'doctrine of identification or 'imputation'. It is to the effect that the dependent can plead the contributor/negligence of the plaintiff or of an employee of the plaintiff where the employee is acting in the course of employment. But it has been also held in *Mills v. Armstrong*, (1988) 13 A.C. 1 HL (also called *The Berrina* case) that the principle is not applicable to a passenger in a vehicle in the sense that the negligence of the driver of the vehicles in which the passenger in travelling, cannot be imputed to the passenger. (Halsbury's laws of England 4th Ed., 1984 Vol. 34, page 74) Ratanlal and Dhirajlal, Law of Torts 23rd Ed. (1997), p. 511 (Ramaswamy Iyer, Law of Torts, 7th Ed. p. 447). *The Bernina* case in which this principle was laid in 1888 related to passengers in a steamship. In that case a member of the crew and a passenger in the ship *Bushire* were of owned on account of its collision with another ship *Bernina*. It was held that even if the navigators of the ship *Bushire* were negligence, the navigators' negligence could not be imputed to the deceased who were travelling in that ship. This principle has been applied, in latter cases, to passengers travelling in a motor-vehicle whose driver is found guilty of contributory negligence. In other words principle of contributory negligence is confined to the actual negligence of the plaintiff or of his agents. There is no rule that the driver of an omnibus or a coach or a cab or the engine driver of a train, or the captain of a ship on the one hand the passengers on the other hand are to be 'identified' so as to fasten the latter with any liability for the farmer's contributory negligence. There cannot be a fiction of the passenger sharing a 'right of control' of the operation of the vehicle nor is there a fiction that the driver is an agent of the passenger'. A passenger is not treated as a backseat driver. Pressor and Keeton on Torts, 5th Ed., (1984) p. 521-522. It is therefore clear that even if the driver of the passenger vehicle was negligence, the Railways, if its negligence was otherwise proved-could not plead contributory negligence on the part of the passengers of the vehicle. What is clear is that *qua* the passengers of the bus who were innocent,- the driver and owner of the of the bus and, if proved, the railways - can all be joint tort-feasors.

H *Point 3.* This point deals with the *common law* duty of railways at level crossings. A contention was raised for the Union of India that there was no pleading in regard to the negligence of the Railways. This contention was rightly rejected by the High Court. In our view, the issue framed by the

Tribunal was broad based. It read as follows :

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“Whether the accident was caused due to the negligence of all or any of the respondents or of the bus driver?”

The claimants and the bus owner led evidence and were elaborately cross examined by the Railways. The Railways Examined the engine driver and filed the report of the Commissioner of Railways who inquired into the cause of the accident. No other evidence was adduced by the railways . It is well settled that when the issue framed the trial court is wide and parties understood the scope thereof and adduced such evidence as they wanted to, then there can be no prejudice and a contention regarding absence of a detailed pleading cannot be countenanced.

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We shall now deal with the main point. At the out set it is necessary to notice the difference between the statutes in England and in India. In England as shown below, duties are statutory imposed under two statutes of 1845 and 1863 directly on the Railways to erect gates and employ watchmen, etc. at the level crossing if the Railways was cutting across a public road. But the position in our country is somewhat different. As pointed out by the Bombay High Court in *Henry Condor v. Ballaprased Bhagwan*, in (1895) Un P.J. of Bombay High Court 91 by Sir Charles Sargent CJ. (quoted in *B.N. Rly Co. v. Tara Prasad*), AIR (1928) Cal 504, the direct obligation cast on the Railway by Section 21 of the Act 18 of 1954 was repealed later by Act 25 of 1871. To this extent the Indian imposed statute therefore differs from the English statute. Under Section 13 of the Railways Act, 1890 no such duties are directly on the Railway Administration by the Statute. The section on the other hand only confers a power on the Central Government to issue a requisition on the Railway administration, i.e. the General Managers or the Railway Companies (if any) to take steps as per section 13. Obviously, if the Central Government does not think fit to exercise that power and does not issue any such requisition, the occasion for the Railway Administration to take steps under section 13, as per the statutory mandate, will not arise. (As to what can be the effect of an omission to exercise this statutory power to issue a requisition, will be dealt with separately under Point 4). Section 13 of the Indian Act may be noticed :

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“Section 13; Fences, screens, gates and bars : the Central Government may require that, within a time to be specified in the requisition or within such further time as it may appoint in this behalf-

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- A (a) boundary-marks or fences be provided or renewed by a railway administration for a railways or any part thereof and for roads constructed in connection therewith;
- (b) any works in the nature of a screen near to or adjoining the side of any public road constructed before the making of a railways be provided or renewed by a railway administration for the purpose of preventing danger to passengers on the road by reason of horses or other animals being frightened by the sight or noise of the rolling-stock moving on the railway :
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- C (c) *suitable gates, chains, bars, stiles, or hand-rails be erected or renewed* by a railway administration at placed where a railway crosses a *public road* on the level ;
- (d) persons be employed by a railway administration to open and shut such gates, chains or bars.”
- D In view of the above provision, which does not cast a direct obligation on the railway administration, several High Courts have taken the view, and in our opinion, rightly that the statutory duties of the Railway Administration under Section 13, do not arise unless a requisition is made by the Central Government. The above anomaly has naturally compelled the Courts to fall back upon the *common law* duties resting on the Railways. It has been
- E contended for the claimants that under the common law the Railways, as an occupier of the level crossing for the purpose of running railway trains which are *inherently dangerous* to those who use the public road at that point, has special responsibilities as a responsible body to see that accidents are kept at the *minimum*. Question then arises whether the common law duties are
- F *concurrently* enforceable alongwith or independently of the statutory duties under section 13.

The law in this behalf is again well settled that the claimants can at their choice sue the railways to enforce either or both types of these duties. i.e. under common law as well as under statute. These aspects have been

G summarised by the Privy Council in *Commissioner for Railways v. Mc. Dermott*, (1966) 2 All E.R. 162 PC. That was a case which arose from the judgment of the High Court of Australia. In that case. Lord Bardiner L.C. stated :

H “Theoretically, in such a situation, there are *two duties* of care existing *concurrently, neither displacing each other*. A plaintiff could

successfully sue for breaches of either or both of the duties,.....” A

It must, therefore, be accepted that the claimants can sue the Railways concurrently for breach of the common law or statutory duties or for breach of either of the duties.

The next question is as to what are the common law duties of the Railways at level crossing from time to time? In the same decision of the Privy Council in *Commissioner for Railways v. McDermott*, (1966) 2 All E.R. 162 PC, it has been stated that the Railway’s duty of care at common law is based on the principle of neighbourhood laid down by Lord Atkin in *Donoghue v. Stevenson*, (1932) AC 562 inasmuch as the Railway. B

“was carrying an *inherently dangerous activity* of running express trains through a level crossing which was *lawfully* and *necessarily* used by local inhabitants and their guests and persons visiting them on business. Such an activity was likely to cause accidents, unless it was carried with *all* reasonable care..... In principle, the liabilities is not based, however on matters of title but on the *perilous nature of the operation* and the defect relationship which after *Donoghue v. Stevenson*. (1932) A.C. 562 would be called proximity’ or ‘neighbourly relation between the railway operator and a substantial number of persons lawfully using the level crossing”. C D

The duty to care at common law is therefore based upon the dangerous or perilous nature of the operations of the railways. E

In *Donoghue v. Stevenson*, (1932) AC 562 a manufacturer was held liable to the ultimate consumer at *common law* on the principle of duty to care. Lord. Atkin said “you must take reasonable care to avoid acts or omissions which you can *reasonably foresee* would be likely to injure your *neighbour*. He asked : “Who, then, in law is my *neighbour*? The answer seems to be, persons who are as so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question”. The test of breach of common law duty is again the test of a reasonable or prudent person in the particular fact situation, of course the amount of care, skill, diligence or the like, varying according to the circumstances of the particular case. The standard of foresight is again that of a reasonable person. Such a person is also expected to take into account common negligence in human behaviour. Of course, he need not anticipate H

- A folly in all its forms (*London Passenger Transport Board v. Upson*. (1949) A.C. 155 HL. That if there is omission to exercise such a common law duty of care, an action at common law can be filed for non-feasance is also clear from a judgment of this Court in *Jay Laxmi Salt Works (P) Ltd. v. State of Gujarat*, [1994] 4 SCC 1. In our view, therefore, because the Railways are involved in what is recognised as *dangerous* or *perilous* operation, they are at common law, to take reasonable and necessary care, on the neighbourhood principle - even if the provisions in Section 13 (c) and (d) of the Railways Act, 1890 are not attracted for want of requisition by the Central Government.

- C The next important question is whether there can be any breach of a *common law duty* on the part of the Railway if it does not take notice of the *increase in the volume of rail and motor traffic* at the unmanned level crossing and if it does not take adequate steps such as putting up gates with a Watchman so as to prevent accidents at such a point? What is the extant of care required at common law has also been decided.

- D In several cases the need to have a constant appraisal of increase in volume of rail and road traffic at level crossings has been treated as a requirement of the common law. In *Smith v. London Midland & Scottish Railway Co.* [1948] S.C. 125. Lord Cooper emphasised that the railway should take *all precautions* which will '*reduce the danger to the minimum* and should take into account 'the nature and *volume of such traffic* reasonably to be anticipated'. In *Lloyds Bank Ltd. v. Railway Executive* (1952) 1 All E.R. 1248 CA. Denning and Romer, L.JJ. had occasion to say that the railway authorities were bound to take steps from time to time by considering the increase in the rail and road traffic at the level crossing. On facts in *Lloyds Bank* case it was found that 75 to 100 vehicles crossed the level crossing per day and it was held that the railway company could not say,

“--this increased traffic on the road is no concern of ours. It was their concern”.

- G The duties of the railways treating the railway line as an accommodation line at a private road and alternatively as one cutting across a public road were separately considered. It was held that treating it as a private road, the railway authorities ought to have taken steps to have warnings or whistles given. Alternatively, treating it as a public road the railways ought to have put up *gates* as per the Railways Clauses Consolidation Act, 1845 and a 'lodge' as per the Railway Clauses Act, 1863. Under both alternatives, the increased

traffic required a re-appraisal of the measures previously taken by the railway to prevent accidents. A

In an earlier case *Lush, J.* also had occasion to emphasise the need to take into account the *increase* in the *volume of traffic*. In *Cliff v. Midland Railway Co.* (1870) L.R. 5 Q.B. 258, he stated that the 'greater the thoroughfare over any part of the line, the greater care and vigilance that ought to be exercised by those who have the charge of the trains. Whatever the *degree of traffic* may be, be it more or less, a corresponding degree of care was required on the part of the company.' B

In *Halsbury's Laws of England Railways Vol. 39 4th End. (1984)* para 868, it is stated that if there is *increase* in the number local inhabitants using the level crossing, then reasonable additional precautions must be taken. C

In regard to the absence of a proper notice board, we may also refer to what *Krishnan, Judicial Commissioner*, said in *Union of India v. Lalman S/o Badri Prasad*, AIR (1934) V.F. 17. He said: "even if the car driver knew that there was a crossing, the road users should be *alerted at the proper moment*" by the boards and it is not a case for remote Knowledge but "one for *immediate alertness*". D

Further in our view, the following passage in the judgment of the aforesaid learned Judicial Commissioner correctly represents the position at *common law* : E

"A level crossing is on the one hand a danger spot in view of the possible movement of trains, and on the other is an invitation to the passer-by. This is a public crossing and not merely one by private accommodation. Therefore it is the legal duty of the railway to assure reasonable safety. The most obvious way of doing it is to provide gates or chain barriers and to post a watchman who should close them shortly before the trains pass. F

But failure to do so is not by itself an act of negligence provided that the railway had taken other steps sufficient in those circumstances to caution affectively a passer-by of average alertness and prudence. At a reasonable distance on either side, prominently written boards can be affixed, asking the road-users to beware of trains. If the track on either side is visible from near the caution board or within a short distance from the crossing, this would be sufficient because a diligent H

A road-user could look round and see the train. On the other hand, if there is a bend on the track or there are trees or bush in between, or the road on either side of the crossing is very far below the level of the railway track, or for any other similar reasons the track is not visible beyond a short distance, then even the caution boards are useless. In that case gates are indicated. Similarly boards may be affixed along the railway, say half to three-fourth of a mile in either direction calling upon the engine driver to whistle. A whistle by the driver can supplement, but cannot replace gates or caution boards as a device to protect the users of a crossing."

C In the case before us the Railways have led no independent evidence of any application of mind to these issues. Obviously. The railways presumed that the negligence of the driver of the bus could be imputed to the passengers but this, as stated by us under Point 2 is legally untenable. The High Court has notified that 300 vehicles pass through this point and six express trains cut across this public road every day (obviously there must be other non-express or passenger trains and goods trains every day). The population is dense in Kerala and more so near Kalady, the pilgrimage centre connected with Sri Jagadguru Adi Sankaracharya. In *Lloyd's case*, (1932) All E.R. 1248 CA, the Court of Appeal thought that even when the road traffic reached a level of 75 to 100 vehicles, the railways ought to have, if it was a public road, put gates and a watchman, as required by statute. The High Court, in our view, rightly observed that the bus driver was from Tamil Nadu, he was not familiar with this place in Kerala State where the accident occurred, there was no caution board or other indication to show that the road was cutting across a railways line, and there were no gates or hand-rails to alert the passer-by. It was held that if the Railway had taken adequate precautionary measures such as, erecting hand rails or gates, a severe accident like this would not have taken place. In the absence of gates and caution Bord, the level crossing was held to be in the nature of a trap.

G For the aforesaid reasons, no case is made out by the appellant for disturbing the finding of the High Court that applying common law principles, the Railways must also be deemed to be negligent in not converting the unmanned level crossing into a manned one with gates,- having regard to the volume of rail and road traffic at this point.

H *Point 4.* Point is whether omission to perform public law statutory duties can or cannot give rise to actions at private law and it they cannot,

ordinarily, - whether there are an exceptions?

We are here concerned with the question as to whether omission on the part of the Central Government to take a decision whether or not to exercise powers under Section 13 of the Railways Act, 1890 - in particular under clause (c) and (d) of Section 13 - amounted to a breach of a statutory duty giving rise to a cause of action for damages based on negligence .

Recently this court had occasion in *Rajkot Municipal Corporation v. Manjulaben Jayantilal Nakum*, [1997] 9 SCC 552 to consider an analogous problem. There the issue was regarding the omission on the part of the local authority to remove a tree from a public road. The tree later fell on the plaintiff's husband who was passing by the road resulting in his death. The High Court had decreed compensation but this court allowed the appeal and dismissed the claim holding that no breach of statutory duty was involved. In that context, this court had occasion to refer to the principles laid down by Lord Atkin in *Denoghue v. Stevenson*. (1932) AC 562 as regards 'proximity' and 'neighbourhood, and to the extension of these principles by Lord Wilberforce in *Anns v. Merton London Borough*, (1978) AC 728 to cases of omission on the part of local authorities to properly scrutinise building plans where such omissions resulted in the cracking of walls of the buildings constructed, thereby causing 'economic losses'. This court also referred to *Murphy v. Brent-wood District Council*, (1991) 1 AC 398 which overruled *Anns*.

Whether *Anns* was rightly overruled in *Murphy* in regard to economic losses, it is not necessary for us to decide. We shall assume *Murphy* is *Right*. We are referring to this aspect because the extent to which private law rights under common law can arise on account of non-performance of statutory, mandatory or discretionary duties or omission to exercise such statutory powers can differ from country to country. In several common law countries, it is seen that *Anns* might still be pressed into service. (See the Canadian view of 1992 of McLachlin, L Heureux - Dube & Cory, JJ; the Australian view of 1995 (in fact Brennan, J., whose opinion as to incremental development of common law was the basis for *Murphy*, soon found' himself in a minority in later cases in Australia); and the 1994 deviation from *Murphy* in New Zealand (which was approved with special appreciation by the Privy Council in 1996 in a case noted below) (See Jackson and Powell on Professional Negligence, (1997) 4th Ed. P. 36-40. In fact Bhagwati, CJ stated in *M.C. Mehta & Another v. Union of India & Others*, [1987] 1 SCC 395 that the common law in our

A country is to keep pace with social-economic norms of our country.

We may state that there are two distinct types of cases. One relates to the omission on the part of the public authority to perform an alleged statutory duty - as in the *Rajkot* case. Another relates to omission to exercise a power or rather not deciding whether to exercise statutory power or not. The case before us belongs to the latter category. Section 13 of the Railways Act, 1890 enables the Central Government to send a requisition to the railway administration to take certain steps in regard to level crossings. The House of Lords in a recent case in *Stovin v. Wise*, (1996) 3 WLR 388¹ was directly concerned with this second type of case - omission to take a decision with regard to exercise of statutory power under Section 79 of the Highway Act. That case, we consider is more directly in point. In that case, an earthen mound in the land of the defendant was causing obstruction to the vision of the drivers of vehicles passing on the road at a junction and on that account the plaintiff met with an accident and was injured. The local authority had no power to enter on the land of the owner and remove the mound, but had power under Section 79 to issue a requisition to the land owner to remove the mound. In fact, a requisition was sent a few days before the accident and the land-owner was yet to respond. The claim was based on the delay in the exercise of power by the local authority, that is to say, at an earlier point of time which according to the plaintiff, was the cause for the accident.

Lord Hoffman, speaking for the Majority (it is not necessary here for us to decide whether the minority view of Lord Nicholls is not correct. We shall assume that the majority view of Lord Hoffman is correct stated that in the case of positive acts, the liability of a public authority in tort is in principle the same as that of a private person but may be *restricted* by its statutory powers and duties. The argument therein *Stovin v. Wise*, was that the duty of the highway authority was *enlarged* because of the statutory powers and they created a proximity' between the authority and the road-user (p. 409). But in *East Suffolk Rivers Catchment Board v. Kent*, (1941) AC 74, Lord Romer had stated : .

"Where a statutory authority is entrusted with a mere power it cannot be made liable for any damage sustained by a member of the public

¹See among others. (1997) Vol. 60. *Modern Law Review* p. 559 'Public or Private': Duty of care in a statutory frame work : *Stovin v. Wise* in the House of Lords by Jane Convery. See also : (1997) Vol. 113 *Law Quarterly Review* P. 398. Powers and Duties - A small breach in East Suffolk Wall by M.C. Harris Where *Stovin v. Wise*, was commented upon.

by reason of its *failure* to exercise that power”.

In *Anns*, this principle was somewhat deviated from. As stated earlier the plaintiff in *Anns* had sued for losses to flats in a new block which had been damaged by subsidence caused by inadequate foundations. The contention that the Council was negligent in the exercise of statutory powers to inspect foundations of new buildings giving rise to a claim for economic damage suffered was upheld. This principle was however not accepted in *Murphy* to the extent economic losses were concerned. According to Lord Hoffman, *Anns* was not overruled in *Murphy* so far as physical injury resulting from omission to exercise statutory powers was concerned (P 410). A duty of care at common law can be derived from the authority's duty in public law to “give proper consideration to the question” whether to exercise power or not (p. 411). This public law duty cannot by itself give rise to a duty of care. A public body almost always has a duty in public law to consider whether it should exercise its powers but that did not mean that it necessarily owed a duty of care which might require that the power should be actually exercised. A mandamus could require future consideration of the exercise of a power. But an action for negligence looked back at what the authority ought to have done. Question is as to when a public law duty to consider exercise of power vested by statute would create a private law duty to Act, giving rise to a claim for compensation against public funds (p. 412). One simply cannot derive a common law “ought” from a statutory “may”. The distinction made by Lord Wilberforce in *Anns* between ‘policy’ and ‘operations’ is an inadequate tool with which to discover whether it was appropriate to impose a duty of care or not. But leaving that distinction, it does not always follow that the law should superimpose a common law duty of care upon a discretionary statutory power (p. 413). Apart from exceptions relating to individual or societal reliance on exercise of statutory power, - it is not reasonable to expect a service to be provided at public expense and also a duty to pay compensation for loss occasioned by failure to provide the service. An absolute rule to provide compensation would increase the burden on public funds.

Lord Hoffman further observed that whether a statutory duty gave rise to a private cause of action or not was a question of construction of the statute. It required an examination of the policy of the statute to decide whether it was intended to confer a right to compensation for breach. The question whether it could be relied upon to support the existence of a common law duty of care was not exactly a matter of construction because

- A the cause of action did not arise out of the statute itself. Whether there was a common law duty and if so what was its ambit must be profoundly *influenced* by the *statutory framework* within which the acts complained of were done. The same was true (was true) of omission to perform a statutory duty. If the policy of the Act was not to create a statutory liability to pay compensation, the same policy should certainly exclude the existence of a common law duty to care.
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But it is not as if that a statutory 'may' can never give rise to a common law duty of care (p. 414). There are exceptions in which a statutory 'may' could create a common law 'ought'.

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- The exception according to Lord Hoffman require *two conditions* to be proved to postulate a duty to perform a common law obligation within the statutory framework of a discretionary power. The *two* minimum pre-conditions for basing a duty of care on the exercise of a statutory power were *firstly* that it would have been *irrational* not to have exercised the power so that there was a public duty to act and *secondly* that there were exceptional grounds for holding that the policy of the statute must have been to require compensation to be paid to persons who would suffer damage because the power conferred was not exercised at all or not exercised when it was generally expected to be exercised.
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- Lord Hoffman's observations indicate that he agreed that *Anns* was overruled in *Murphy* only in relation to the extension of the 'neighbourhood' rule as laid down in *Donoghue v. Stevenson* to economic losses and that the said judgment in *Anns* was not overruled so far as compensation for *physical injury* (p. 410). But on facts in *Stovin v. Wise*, though it was a case of personal injury, the claim against the local authority for non-exercise of the power to direct the land owner to remove the earthen mound was rejected by the House of Lords on the ground that the above two preconditions were not fulfilled. Again, Lord Hoffman stated that the distinction made by Lord Wilberforce in *Anns* between non-feasance due to 'policy' and 'operations' was not a sound one.²
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²A view to the contrary was expressed in De Smith, Woolf and Jowell in *Judicial Review of Administrative Law* in 1995 that *Anns* still holds the field in regard to 'operations' but that was before *Stovin v. Wise*. came to be decided by the House of Lords in 1996.

Having referred to the two preconditions, we shall now refer to the more important part of decision of the majority. This concerns the manner in which one can show that the *two* pre-conditions are to be satisfied in a given case of non-exercise of statutory power. A

So far as the *first* condition relating to irrationality' is concerned reference was made by the House of Lords in the above case to the principle of "*particular reliance*" laid down by Brennan J. of the Australian High Court in *Sutneland Snire Council Co. v. Heyman*, (1985) 157 CLR 424 (at 483) and also to the other alternative principle of "*general reliance*" laid down by Mason J. in the same case (p. 415). Lord Hoffman said that if the particular reliance' of the plaintiff in respect of an expectation of exercise of statutory power by the authority was belied, then a conclusion can be drawn that the non-exercise was irrational. This form of liability based upon *representation* and *reliance*. would not depend upon the public nature of the authority's power and would cause no problem. Alternatively, if the plaintiff had no idea of particularly relying upon the exercise of power by the authority in his favour but if as a matter of *general reliance* society could by previous experience except the exercise of such a power and if such an expectation stood belied, then also a conclusion could be drawn that the non-exercise of power by the authority was *irrational*. This doctrine of 'general reliance according to the House of Lords had little in common with the ordinary doctrine of reliance, Here so far as a general reliance was concerned, the particular plaintiff need not have expected that the power would be used or need not have even known that such a power existed. This principle is based upon the general expectation of the community - which the individual plaintiff may or may not have shared. A widespread assumption that an important statutory power would be exercised would certainly affect the general pattern of economic and social behaviour of the community. It was further stated by the majority that this doctrine required an inquiry into the role of a given statutory power and its effect on the behaviour of the general public. On this principle of general reliance, their Lordships stated that an outstanding example of its meaning was contained in the judgment of Richardson. J of Newzealand Appeal Court in *Invercargill v. Hamelir*, (1994) 3 NZLR 513 526 which was affirmed by the Privy Council in *Invercargill v. Hamelin*, (1996) 2 WLR 367 PC. As per this principle of general reliance propounded by Mason. J, it appeared that the benefit of service provided under statutory powers should B
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- A be of a uniform and routine nature, so that one could describe exactly what the public authority was supposed to do. For example, a power of *inspection* for defects would clearly fall into this category. Again if a particular service was being provided as a matter of routine, it would be irrational for a public authority to provide it in one case and withhold it in another. Obviously this
- B was the main ground upon which in *Anns* it was considered that the power of the local authority to inspect foundations gave rise to a duty of care.

We are of the view that the principle laid down by Mason, J, is clearly applicable here. This general expectation of the community so far as the

C railways are concerned can be summarised from the following passage in *Halsbury's Laws of England* (Vol. 34. Negligence, 4th Ed. 1984, para 73). It is stated that "a plaintiff is entitled to rely on reasonable care and proper precautions being taken and, in places to which the public has access, he is *entitled to assume* the existence of such protection as the *public has, through*

D *custom*, become justified in expecting" Halsbury then refers to a large number of cases of railway accidents. In view of this general expectation of the community that appropriate safeguards will be taken by the railways at level crossings, the first precondition is, in our view, clearly satisfied.

- E As to the *second* condition, namely, whether the statute can be taken to have intended to provide compensation for the injury arising out of non-exercise of statutory powers, Lord Hoffman again referred to Mason. J's Judgment where he said that such a policy to pay compensation could be inferred if the power was intended to *protect members of the public, from*
- F *risks* against which *they could not guard themselves* i.e. having regard to the expense involved or the highly technical nature of safeguards needed to be taken or because the safeguards have to be taken in the premises of the public authority. In the *Invercargill* case the Newzealand Court of Appeal found it in the general pattern of socio-economic behaviour. A careful analysis of community behaviour was therefore warranted. It is therefore necessary to
- G know exactly what in the judgment of the Australian High Court, Mason J stated. He observed as follows (at p. 460 of 157 CLR).

- H "But an authority may by its conduct place itself in such a position that it attracts a duty of care which calls for exercise of the power. A common illustration is provided by the cases in which an authority in

the exercise of its functions has *created a danger*, thereby subjecting itself to a duty of care for the safety of others which must be discharged by an exercise of its statutory powers or by giving a warning. That it is the conduct of the authority in creating the danger that attracts the duty of care is demonstrated by *Sheopard v. Glossop Corporation*, 1921(2) K.B. 132 .

There are situations in which the authority 's occupation of premises or its ownership or control of a structure in a highway or public place attracts to it a duty of care.....

And then there are situations in which a public authority not otherwise under a relevant duty may place itself in such a position that others rely on it to take *care for their safety* so that the authority comes under a duty of care calling for positive action.....*Mercer v. South Eastern & Chethem Railway*, (1922) 2 KB, 549."

Thereafter Justice Moson touched the crucial aspect in this branch of law which was quoted by the House of Lords) in *Stovin v. Wise*. That passage refers to the special duties of public authorities recognised by the legislature to cover situations in which it is necessary to presume the inability of the public to protect themselves against certain serious and complex risks. That passage reads as follows:- (p. 464)

"Reliance or dependence in this case is in general the product of the grant (and exercise) of powers designed to prevent or minimise a risk of personal injury or disability *recognized by the legislature as being of such magnitude or complexity that individuals cannot* or may not, *take adequate steps for their own protection*. This situation generates on one side (the individual) a general expectation that the power will be exercised and on the other side (the authority) a realisation that there is a general reliance or dependence on its exercise of power to act.....The control of *air traffic*, the safety inspection of *air craft* and the fighting of a *fire* in a building by a fire authority may well be examples of this type of function."

- A The reference here to *air traffic* and fire fighting department, in our view, is illustrative but important and in our opinion the principle laid down by Mason, J. Clearly extends to other operations which are inherently dangerous or complex against which members of the public cannot protect themselves. In Canada, it has been held in *Swanson Estate v. Canada*, (1991)
- B 80 D.L.R. (4th) 741 by Linden J.A. that the special protection in favour of the Government "must be limited only to those functions of Government that are considered to be 'governing' and that the decision of the regional director of a licencing body to allow an *airline* to continue unsafe flying practices was not part of a governmental function and the transport regulator was liable for negligence. In *Jast v. British Columbia*, (1990) 64 D.L.R. (4th) 680 it was held
- C that reduction in budgetary allotment for road inspection to prevent accidents could be a protected policy decision only if it constituted a reasonable exercise of bona fide discretion based upon the non-availability of funds. The running of trains by the railways, as pointed out by the Privy Council in *Commissioner for Railways v. Mc Dermott*, (1966) 2 All ER. 162 PC has been
- D recognised as inherently perilous and, in our view, certainly creates, in the minds of the public a general expectation that safety measures-which the public cannot otherwise afford. have been taken by the railway administration. In our opinion, the steps mentioned by the legislature in the various clauses
- E of Section 13 of the Railways Act, 1890 are in the words of Mason, J. steps which, even according to the legislature, individual members of society can not effort to take and are not capable of taking, having regard to the expense or expertise involved or for the reason that these steps have to be taken in or in respect of the property of the railways. Applying the principle laid down
- F by Lord Hoffman, in *Stovin v. wise*, there is in our opinion a clear indication in section 13(c) and (d) of the Railways Act itself that the affected parties are intended to be compensated because of the non-exercise of the aforeside statutory powers by the railways. Thus the second condition as to a statutory intent of providing compensation is also satisfied.
- G Once the two preconditions laid in *Stovin v. Wise* are satisfied both as to non-exercise of statutory powers which was irrational and as to the statutory intent of payment of compensation for injury or death due to running inherently dangerous services in respect of which individuals cannot afford to protect themselves the conclusion is irresistible that the non-exercise of public law
- H or statutory powers under Section 13(c) and (d) did create a private law cause

of action for damages for breach of a statutory duty. The case falls within the exception where a statutory 'may' give rise to a 'common law' ought. A

We make it however clear that *Stovin v. Wise* is not to be readily invoked in every case of non-exercise of statutory powers unless the two pre-conditions laid down in the judgment of the majority in *Stovin v. Wise* are satisfied.³ We should not also be understood as saying that all unmanned level crossings should have gates with watchman. It all depends on the volume of traffic at the point and the applicability of the principles stated above in Point 3 & 4. B

Point 5. Under Section 110(1) of the Motor Vehicles Act, 1939 (corresponding to Section 165 of the 1988 Act) Claims Tribunals have been constituted for adjudicating upon claims for *Compensation* in respect of accidents involving the death or bodily injury of persons, "arising out of the use of motor vehicles" or *damage* to any property of a third party "so arising" or both. Section 110(1) in our view deals with the jurisdiction of the Tribunal. On the other hand, Section 110-B (corresponding to section 168(1) of the new Act of 1988) is procedural and is in two parts. The first part states that after following certain procedure, the Claims Tribunal shall "make an award determining the amount of *Compensation* which appears to it to be just and specifying the person or persons to whom compensation shall be paid" Obviously, the word 'Compensation' here in the first part of Section 110 (B) is referable to the compensation to be decided by the Tribunal under Section 110(1). But it is the second part of Section 110 B on which the appellant (Union of India) has relied and that part reads as follows:- C D E

"in making the award the Claims Tribunal shall specify the amount which shall be paid by the *insurer* or *owner* or *driver* of the vehicle involved in the accident or by all or any of them, as the case may be." F

It is stressed for the appellant that because of the specific reference here to the insurer, owner and driver, an award cannot be passed by the Tribunal against anybody else. In our view, the second part of Section 110-B extracted above is purely procedural when it refers to the specification of G

³For discussion on *Stovin v. Wise* and recent views in New Zealand, Canada & Australia- See Jackson & Powell on Professional Negligence (4th Edn., 1997 pp. 26 to 41), Aronson and Whitmore, Public Torts and Contracts Australia, 1982; Craing (1978) 94 L.Q.R 428; Bowman & Bailey; 1984 P.L. 27. H

- A the amounts payable by the insurer or owner or driver and has no bearing on the scope of the jurisdiction conferred by Section 110(1) upon the Tribunals. That question has to be decided by interpreting the plain words, "arising out of the use of the vehicle" occurring in Section 110(1) and is not in any manner controlled by Section 110(B). The scope of the jurisdiction is clear. In *new*
- B *India Insurance Co. Ltd. v. Shanti Mishra*, [1975] 2 SCC 840, this Court stated that the provisions in Chapter VIII of the 1939 Act contained a law "relating to change of forum." It was specifically held that the "jurisdiction of the Civil Court is ousted as soon as the Claims Tribunal is constituted and the filing of the application before the Tribunal is the *only remedy* available for the Claimant." It was again held in *Gujarat State RTC v. Ramanbhai Prabhatbhai*,
- C [1987] 3 SCC 234 that Chapter VIII provided for an "alternative forum" to the one provided under the Fatal Accidents Act for realisation of compensation payable, on account of motor vehicle accidents.

- In our view, the Tribunal is clearly an alternative forum in substitution
- D for the Civil Court for adjudicating upon Claims for compensation arising out of the "use of motor vehicles." This is further made clear from Section 110-F of the Act which states that no Civil Court shall entertain any question "relating to any claims for compensation which may be adjudicated upon by the Claims Tribunal." In our view, when we are concerned only with Section
- E 110(1) and when Section 110B does not and cannot control Section 110(1), a claim is entertainable by the Tribunal, if it arises out of the use of a motor vehicle and if it is claimed against persons or agencies other than the driver, owner insurer of the vehicle provided in tort, such other persons or agencies are also claimed to be liable as joint tort-feasors. It is obvious that prior to the constitution of the Tribunal, such compensation could be decreed by the
- F Civil Court not only against the owner/driver and insurer of the motor vehicle but also against others who are found to be joint tort feasors. The words "use of the motor vehicle" are also be construed in a wide manner. The above words were interpreted by this Court in *Shivaji Dayanu Patil v. Vatschala Uttam More*, [1991] 3 SCC 530, in the context of Section 92 A. This Court in
- G that connection referred to the Australian case in *Government Insurance Office of N.S.W. v. R.J. Green & Lloyds Pvt. Ltd.* (1965) 114 CLR 437 and to the observations of Bawick CJ. that those words have to be widely construed. We may also refer to the observations of Windeyer. J in same case to the following effect:-

- H ".....no sound reason was given for restricting the phrase," the

use of a motor vehicle" in this way. The only limitation upon its.....
 that I can see is that the injury must be one *in any way a consequence*
of a use of the vehicles as a motor vehicle."

Further, Section 110-E of the Act provides for recovery of the compensation "from any person" as arrears of land revenue and recovery under that Section is not restricted to the owner/driver or insurer specified in the second part of Section 110-B. Obviously the words from any person' are referable to persons other than the driver/owner or insurer of the motor vehicle.

For all the above reasons, we hold that the claim for compensation is maintainable before the Tribunal against other persons or agencies with are held to be guilty of composite negligence or are joint tort feassors, and if arising out of use of the motor vehicle. We hold that the Tribunal and the High Court were right in holding that an award could be passed against the Railways if its negligence in relation to the same accident was *also* proved. We find that there has been a conflict of judicial opinion among the High Courts on the above aspect. The Andhra Pradesh High Court in *Oriental Fire & General Insurance Co. Ltd. v. Union of India*, (1975) ACJ, 33 AP, AIR (1975) AP 222, took the view that the claims before the Tribunal are restricted to those against the driver, owner and insurer of the motor vehicles and not against the railways. But on facts the decision is correct inasmuch as though it was an accident between a lorry and a train at a railway crossing, it was a case where the driver, cleaner etc., travelling in the lorry were injured and there was no claim against the lorry owner. The suit was filed in 1967 in the Civil Court and was decreed against the railway. A plea raised in the High Court that the Civil Court had no jurisdiction and only the Tribunal had jurisdiction was negatived. In our view, on facts the decision is correct because the plea was one of the exclusive negligence of the railway. In *Union of India v. Bhimeswars Reddy*, (1988) ACJ 660 AP 1, though the driver and owner were parties, the ultimate finding was that the driver of the motor vehicle was not negligent and the sole negligence was that of the railway. The case then at that stage comes out of Section 110 (1). Here also the conclusion on facts, in our view, is correct. But certain general broad observations made in these two cases that in no circumstances a claim can be tried by the Tribunal against the persons/agencies not referred to in the second part of Section 110-B, are not correct. Similarly the Gauhati High Court in *Swarnalata*

- A *Dutta v. National Transport India (Pvt.) Ltds.*, AIR (1974) Gav. 310, by the Orissa High Court in *Orissa RTC Ltd. v. Umakanta Singh*, AIR (1987) Orissa 110 and the Madras High Court in *Union of India v. Kailasan*, (1974) ACJ 488 (Mad.) have held that no award can be passed against others except the owner/driver or insurer of the motor vehicle. On the other hand the Allahabad High Court in *Union of India v. Bhagwati Prasad*, AIR (1982) All 310, the majority in the full Bench of the Punjab & Haryana High Court in *Rajpal Singh v. Union of India*, (1986) ACJ 344 P&H, the Gujarat High Court in *Gujarat SRTC v. Union of India*, AIR (1988) Guj. 13, the Kerala High Court in the Judgment under appeal and in *United India Insurance Co v. Premakumaran*, (1988) ACJ 597 (Ker) and the Rajasthan High Court in *Union of India v. Dr. Sewak Ram*, (1993) ACJ 366 (Raj.) have taken the view that a claim lies before the Tribunal even against another joint tort-feasor connected with the same accident or against whom composite negligence is alleged.

D We are of the opinion that the view taken by the Andhra Pradesh, by way of obiter and the views of the Gauhati, Orissa and Madras High Courts is not correct and that the view taken by the Allahabad, Punjab and Haryana, Gujarat, Kerala and Rajasthan High Courts is the correct view. Further as pointed by the Gujarat High Court, claims where it is alleged that the driver/owner of the motor vehicle is solely responsible for the accident, claims on the basis of the composite negligence of the driver of the motor vehicle as well as driver or owner of any other vehicle or of any other outside agency would be maintainable before the Tribunal but in the latter type of case, if it is ultimately found that there is no negligence on the part of the driver of the vehicle or there is no defect in the vehicle but the accident is only due to the sole negligence of the other parties/agencies, then on that finding, the claim would go out of Section 110(1) of the Act because the case would then become one of exclusive negligence of railways. Again if the accident had arisen only on account of the negligence of persons *other* than the driver/owner of the motor vehicle, the claim would not be maintainable before the Tribunal.

G We may however add that if, as of today, any claims against persons other than the driver/owner insurer are pending in Civil Courts, but which *as per the law herein above stated*, ought to have been lodged before the Tribunal, then the Civil Courts concerned shall return the complaints and the Claimants could present the same as a petition before the Tribunals. In that event, they shall be dealt with as if they are claim petitions presented before H the Tribunals on the date on which the complaints were filed in the Civil Courts

and shall be disposed of under the provisions of the Motor Vehicles Act and in accordance with law. A

For all the aforeside reasons, these appeals are dismissed but without costs.

P.S.S.

Appeals dismissed.

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