Union Of India vs United India Insurance Co. Ltd. & Ors on 22 October, 1997

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Author: M. Jagannadha Rao

Bench: S. B. Majmudar, M. Jagannadha Rao

PETITIONER:
UNION OF INDIA

Vs.

RESPONDENT:
UNITED INDIA INSURANCE CO. LTD. & ORS.

DATE OF JUDGMENT: 22/10/1997

BENCH:
S. B. MAJMUDAR, M. JAGANNADHA RAO

ACT:

HEADNOTE:

JUDGMENT:

Present:

Hon'ble Mr. Justice S.B.Majmudar Hon'ble Mr. Justice Jagannadha Rao N.N.

Goswami, K.L. Shukla, H.L. Agrawal, M.L. Jain, Sr. Advs., 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, Ravindra Kumar, Rajiv Mehta Yatendra Sharma, Ms. Manupriya Mittal, Ms. Indira Swawhney, Ms. Indu Goswami MS. Kamakshi, 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, M.K. Diwakaran Nambordiri, Advs. with them for the appearing parties.

J U D G M E N T The following Judgment of the Court was delivered:

WITH (CA 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 & C.A. Nos. 7418-19/97 (Arising out of S.L.P. (C) Nos. 17291/97 & 2918/89) J U D G M E N T M. JAGANNADHA RAO, J.

Leave granted in the SLPS.

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.

This is a batch of appeals preferred by the Union of India represented by the General Manager, Southern Railway. The accident occurred on 9.5.1979 at an unmanned level crossing at Akaparampa (near Kalady) in Kerala when a hired passenger-bus was hit, by the Jayanthi Janatha Express at about 3 P.M., and 40 passengers in the bus and the driver thereof were killed while same 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 one 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 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. 500/- per passenger 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 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 accident. However, in both judgments, it was held that under Section 110 (1) and 110B 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 judgments, the Union of India has preferred these Civil Appeals. Stay of operation of the judgments was refused by the Court, pending these appeals.

The fact of the case are as follows:

The motor vehicle in question belonged to one K. Arumugham of Arni, Tamilnadu and 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 7.5.1979, the Bus started at Trivandrum for 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 reached Cochin and proceeded to Kaady via Angamali. The bus was to cross an unmarried level crossing at Akaparamba 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 driver drove the vehicle and was crossing the railway line when the vehicle stopped on the track and did not move. The passengers cried and shouted in panic but the bus remained there and was pushed upto a distance of 500 meters by the locomotive. In that process forty passengers and the driver died while some other passengers were injured.

We have heard the counsel on both sides. From the submissions the following points arise for consideration:

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

(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? (3) Whether under the law of torts the claimants in rail-

motor collisions can claim that the obligations of the Railway 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 Railway is bound to take cognizance of the increase in the volume of traffic and ought to have installed gates and kept a watchman at the level crossing?

(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)? (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 Railway 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?

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 for 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 metres. There is no evidence that the engine driver was negligent. In fact if he had applied the brakes when the saw the 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 Unions of India that as a matter of common lam duty, at the level crossing, the driver of a motor vehicle was obliged to stop, sea, 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 places 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 an extra obligations on the conductor to get down from the vehicle as stared in clause

(f) of Rule 100.

In our opinion, in the absence of a board statutory 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 stooping down from the vehicle in addition to stooping locking and hearing was laid down at one time by Justice Holmes in Baltimore & O.R. Co. Vs. Goodman 91927) 275 US 66 (72 L.Ed. 167, 48 S.Ct. 24) but such a principle of special caution which was under adverse criticism was rejected by Cardozc, J. in Pokora Vs. Mabash Rly.Co. (1934) 292 US (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 requirement, an uncommon precaution, likely to be futile and sometimes even dangerous', said Cardozo 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 more, there would clearly be negligence on the part of the driver. In fact, it has been so held by this Court, in a 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 vs. 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 that the gate inviting the vehicle to pass, it will be too much to expect of any reasonable 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 vicariously attaches to the passengers of the motor-vehicle of which he was the driver?

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 defendant can plead the contributory 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 vs. Armstrong [1988] 13 A.C. 1 (HL) (also called The Bernina case) that principle is not applicable to a passenger in a vehicle in the sense that the negligence of the driver of the vehicle in which the passenger is travelling, cannot be imputed to 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 Barnina case in which the 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 drowned on account of its collision with another ship Bernina. It was held that even if the navigators of the ship Bushire were negligent, the navigators' negligence could not be imputed to the deceased who were travelling in that ship. This principle has been applied, in latter cases, no passengers travelling in a motor-vehicle whose driver is found guilty of contributory negligence. In other words, the 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 of 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 backseat driver. (Prosser and Keeton on Torts, 5th Ed., (984 p.521 522). It is therefore clear that 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. What is clear is that 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. 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:

"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 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.

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 statutorily imposed under two statutes of 1845 and 1863 directly on the Railways to erect gates and employ watchmen, etc. at the level crossings if the Railway 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 Vs. Ballaprasad Bhagwan in (1895) in P.J. of Bombay High Court 91 by Sir Charles Sargent CJ quoted in B.N. Ply Co. Vs. 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 statute therefore differs from the English statute. Under Section 13 of the Railways Act, 1890 no such duties are imposed 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 to 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 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:

> "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 support in this behalf-
>
> (a) boundary-marks or fence be provided or renewed by a railway administration for a railway 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 railway 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;
>
> (c) suitable gates, chains, bars, stiles or hand-rails to erected or renewed by a railway administration at places 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."

> 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 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 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 summarised by the Privy Council in Commissioner for Railways Vs. Mr Dermott [1966 (2) ALl E.R. 162 (PCO)]. That was a case which arose from the judgment of the High Court of Australia. In that case, Lord Gardinar L.C. stated:

"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....."

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 crossings from time to time? In the same decision of the Privy Council in Commissioner for Railways Vs. 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 Donaghue Vs. Stevenson [1932 AC 5621] inasmuch as the Railway "was carrying an inherently dangerous activity of running express trains through a level crossing which was lawfully and necessarily used by local inhabitant 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 defects relationship which after Donaghue Vs. 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".

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

In Donoghue vs. 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 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 resonable person. Such a person is also expected to take into account common negligence in human behaviour. Of course, he need not anticipate folly in all its forms (London Passenger Transport Board Vs. Udson [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. vs. State of Gujarat 1994 (4) SCC 1. In our view, therefore, because the Railways are involved in what is recognised as dangerous or perilous operations, 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.

The next important question is whether there can be any breach or 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 extent of care required at common law has also been decided.

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 Vs. London Midland & Scottian Railway Co. (1949 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. Vs. 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 he rail and rod 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".

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 pates as per the Railway 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.

In an earlier case Lush, J. also had occasion to emphasis the need to take into account the increase in the volume of traffic. In Cliff Vs. 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.

In Halstury's laws of England Railways Vol. 39. 4th Edn. 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.

In regard to the absence of a proper notice board, we may also refer to what Krishnan, Judicial Commissioner, said in Union of India vs. Lalman S/o Badri Prasad [AIR 1954 V.P. 173. He said: "even if the car driver knew that there was a crossing, the road users should be altered at the proper moment" by the boards and it is not a case for remote knowledge but "one for immediate alertness".

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

> "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 passerby. 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.
>
> 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 effectively a passerby 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 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 ceiling 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."

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 noticed 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 in dense in Kerala and more so near Kalady, the pilgrimage centre connected with Sri Jagadguru Adi Sankaracharya. In Lloyd's case 1932 (1) All E.R. 1248 (CA), the Court of Appeal though 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 railway 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 board, the level crossing was held to be in the nature of a trap.

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 Railway must also be deemed to be negligent is not converting the unmanned level crossing into a manner one with gates, - having regard to the volume of rail and road traffic at this point. Point 4: Point is whether omission to perform public law statutory duties can or cannot give rise to actions at private law and if they cannot, ordinarily, - whether there are any 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 Railway 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 damaged based on negligence.

Recently this court had occasion in Rajkat Municipal Corporation vs. Manjulaben Jayantilal Nakum 1997(9) SCC 562 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 Donoghue vs. Stevenson [1932 AC 562] as regards `proximity' and `neighbourhood', and to the extension of these principles by Lord Wilberforce in Anns vs. 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 vs. Brent - wood District Council 1991 (1) AC 398 which overrules 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 tight. 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'Haureax - Dube & Cory, JJ the Australian

view of 1995 (in fact Brennanm 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 Poweli on Professional Negligence, 1997 4th Ed., p. 36-

40). In fact Bhagwati, CJ stated in M.C.Mehta & Another vs. Union of India & Others [1987 (1) SCC 395] that the common law in our country is to keep pace with socio-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, 1850 enables the Central Government to send a regulation to the railway administration to take certain steps in regard to level crossings. The House of Lords in a recent case in Stoyin Vs. Wise: 1996 (3) W.L.R 388 was directly concerned with this second type of cases - 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 obstructor to the vision of the drives 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 power 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 powre by the loc 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

---------- (1) See among others, (1997) Vol. 60. Modern Law Review p. 559 `Public or Private': Duty of care in a statutory frame work: Stovin Vs. Wise vs. Wise in the House of Lorde by Jane Convery. See also: (1997) Vol. 113 Law Quartersly Review p.

398. Powers and Duties - A small breach in East Suffolk Wall by M.C. Harris where Stovin Vs. Wise was commented upon.

---------- of Lord Nicholas 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 Vs. 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 Buffolk Rivers Catchment Board Vs. 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 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 inedequate foundations. The contention that the Council was negligent in the exercise of statutory powers to inspect foundations of new buildings givingrise 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 too 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 Anna 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 exerciwe of statutory power, - it is not reasonable to expect a service to be provided at public exepnse and also a duty to pay compensation for loss occasion 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 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 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 lae duty to care.

But it is not as ig that a statutory `may' can never give rise to a common law duty of care (p. 414). There was exceptions in which a statutory `may' could create a common law `ought'.

The exceptions according to Lord Hoffman require two conditions to be proved to postulate a duty to perform a common law obligation within the statutory framewor 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 woudl suffer damage because the power conferred was not exercised at all or not exercised when it was generally expected to be exercised.

Lord Hoffman's observations indicate that the agreed that Anns was overrules in Murphy only in relation to the extension of the neighbourhood rule as laid down in donoghue vs. 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 vs. 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) Having referred to the two preconditions. We shall

---------- (2) A 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 Vs. Wise came to be decided by the House of Lords in 1996.

---------- now refer to the more important part of the decision of the majority. This concerns the manner in which one can show that the two preconditions are to be satisfied in a given case of non-exercise of statutory powers.

So far as the first conditions 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 Prennan J. of the Australian High Court in Sutherland Shire Council vs. 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 (p415). Lord Hoffman said that if the particular reliance' of the plaintiff n 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 probllem. Alternatively, if the plaintiff had no idea of particularly relying upon the exercise of power by the authority in his favour but if a matter of general reliance society could by previous experience expect the exercise of such a power and if such an expectstion 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 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 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 injury 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 vs. Hamelin 1994 (3) NZLR 513 (526) which was affirmed by the Privy Council in INvercargill vs. 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 be of a uniform and routins 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 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 cars.

We are of the view that the principle and down by Mason, J. is clearly applicable here. This general expectation of the community so far as the railways are concerned can be summarised from the following passage in Helsbury's Laws of England (Vol. 34, Negligence, 0th 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 pxblic has access, he is entitled to assume the existence of such protection as the public has, through 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.
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> As to the second condition, namely, whether the statute can be takne 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 pau compensation could be inferred 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. In the Invercargill case the Newzealand Court of Appeal found it in the general pattern of socio-economic behaviour. A careful analysis of community behavious was therefore warranted. It is therefore necessary to know exactly what in the judgment of the Australian High Court, Mason J stated. He observed as follows: (at p460 of 157 CLR) "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 subjection 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 Sheppard Vs. 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 ..... Marcer vs. South Eastern & Chetham Railway (1922 (2) KB,

549)".

Thereafter Justice Mason touched the crucial aspect in this branch of law which was quoted by the House of Lords) in Stovin Vs. 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:- (6464) "Reliance or dependance 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 of 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 dependance 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."

The reference here to air traffic and fire fighting department, in our view,mis 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 Vs. Canada (1991) 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 last Vs. British Columbia (1990) 64 D.L.R (4th) 689 it was held 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 funds. The running of trains by the railways, as pointed out by the Privy Council in Commissioner for Railways Vs. Mc Dermott 1966(2) All E.R. 162 (PC) has been recognised as inherently preilous and, in our view, certainly creates, in the minds of the public a general expectation that safety measures _ whcih the public canot otherwise afford, have been taken by the railway administration. In our opinion, the steps mentioned by the legislature in the various clauses 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 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 laid down by Lord Hoffman, in Stovin vs. 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 aforesaid statutory powers by the railways. Thus the second condition as to a statutory intent of providing compensation is also satisfied.

Once the two preconditions laid in Stovin vs. Wisa 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 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' gives rise to a `common law' ought.

We make it however clear that Stovin Vs. Wise is not to be eadily 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 vs. 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 Points 3 & 4.

Point 5: Under Section 110(1) of the Motor Vehicles Act, 1939 (corresponding to Section 165 of the 1988 Act) Claims Tribunals have been constitured for adjudicating

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(3) For discussion on Stovin Vs. Wise and recent views in Newzealand, Canada & Australia - See Jackon & Powell on Professional Negligence (4th Edn., 1997 pp. 26 to 41), Aronson and Whitemore, Public Torts and Contracts Australia, 1982); Craig (1978) 94 L.W.R 428; Bowman & Bailey: 1984 P.L. 27.

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upon claims for compensation in respect of accidents involving the death or bodily injury of persons, "arising byt of the sue of motorvehicles or damage to any property of a third party "so arising" or both. Section 110 (1) in out 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 100 B on which the appellant (Union of India) has relied and that part reads as follows:-

> "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".

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-P extracted above is purely procedural when it refers to the specification of the amounts payable by the insurer or owner driver and has no bearing on the scope of the jurisdiction red 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 India Insurance Co. Ltd. vs. 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 vs. Ramanbhai Prabhatbhai 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 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 110 (1) and when Section 110 B does not and cannot control Section 110 (1), a claim is entertainable by the Tribunal, if it arises out of the use of the use of a motor vehicle and if 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 point tort-feasors. It is obvious that 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. 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 Davanu Patil vs. Vatschala Uttam More: 1991 (3) SCC 530, in the context of Section 92A. This Court in that connection referred to the Australian case in Government Insurance Office of N.S.W vs. R.J. Green & Lloyds Pvt. Ltd. (1965) 114 C.L.R 437 and to the observations of Barwick 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:-

> "..... 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 sany way a consequence of a use of the vehicle as a motor vehicle".

Further, Section 110-E of the Act provides of 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 which are held to be guilty of composites, negligence or are joint tort feasors, and if arising out of use of the motor vehicle. We hold 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 vs. Union of India 1975 ACC 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 through 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 vs. Bhimeswara Reddy [1988 ACT 660 (AP)], though the driver and owner were parties, the ultimate finding was that the driver of the motor vehicle was not negligent and the sale negligence was that of the railway. The case then at that stage comes out of Section 110 (1). Here also the concluded 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 Dutta vs. National Transport India (Pvt.) Ltd.s [AIR 1974 Gav.31], by the Orissa High Court in Orissa RTC Ltd. vs. Umakanta Singh (AIR 1987 Orissa 110) and the Madras High Court in Union of India vs. Kailasan 1974 AC] 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 vs. Bhagwati Prasad AIR 1982 (All) 310, the majority in the Full Bench of the Punjab & Haryana High Court in Rajpal Singh vs. Union of India 1986 ACT 344 (P&H), the Gujarat High Court in Gujarat SRTC vs. Union of India (AIR 1988 Guj.13), the Kerala High Court in the Judgment under appeal and in United India Insurance Co. vs. Premakumarar [1988 ACT 597 (Ker)] and the Rajasthan High Court in Union of India vs. Dr. Sewak Ram 1993 ACT 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.

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 Court 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 them 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.

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 hereinabove stated ought to have been lodger before the Tribunal, then the Civil Courts concerned shall return the plaints 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 the Tribunals on the date on which the plaints were filed in the Civil Courts and shall be disposed of under the provisions of the Motor Vehicles Act and in accordance with law.

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