

Talwalkar

**IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION
FIRST APPEAL NO. 1180 OF 2012**

- 1. SANGITA PRAKASH PAWAR,**
 - 2. SHUBHANGI AJEET SHINDE,**
Aged about 25 years.
 - 3. ABHIJEET PRAKASH PAWAR,**
Aged about 7 years.
 - 4. HIRABAI ANANDRAO PAWAR,**
Age about 59 years,
All are residing at Gaikwad Chawl,
Room No. 15, Opp. Mohan Nagar,
Sion-Chunabhatti, Hill Road,
Mumbai – 400 022
- ... **APPELLANTS**

versus

- 1. MAHADEORAO R MAHADIK,**
At & Post Pulachi Shirab, Tal.:
Hatkanangale, District: Kolhapur
- 2. THE NEW INDIA ASSURANCE
CO LTD.,**
87, M.G. Road, Fort, Mumbai 400
001
- 3. NAVLAKHS SATYENDRA
BIRDICHAND,**

T/G/30, Truck Terminal, Steel
Market Complex, Opp. Libra Weigh
Bridge, Kalamboli, Taluka Panvel,
District Raigad.

4. **THE NEW INDIA ASSURANCE
CO LTD.,**
New India Bhava, M.G. Road, Fort,
Mumbai 400 001

... **RESPONDENTS**

APPEARANCES

FOR THE APPELLANT	TJ Mandon.
FOR THE RESPONDENT	DS Joshi.

CORAM : **G.S.Patel, J.**

DATED : **9th June 2017**

ORAL JUDGMENT:

1. The First Appeal is directed against an order 28th February 2011 rendered by the Hon'ble Chairman of the Motor Accidents Claims Tribunal, Mumbai in a claim application brought by the heirs of a person who died in a vehicular accident.

2. The previous orders dated 20th January 2016 and 27th September 2016 clearly indicated that the appeal would be taken up for final hearing at the stage of admission. Notice was issued to all

the Respondents including the 1st Respondent. The Office noting shows that the notice is served. The 1st Respondent has remained absent.

3. The deceased, Prakash Pawar, was at the material time a driver with BEST. As there is no dispute in this appeal about quantum, I do not think it is necessary to address questions of salary, multiplier used and so on. The issue at hand is indeed narrow and turns on the correct legal position in regard to what is known as “composite negligence” when there is more than one vehicle involved.

4. To the facts of this particular tragedy. On 5th June 1997, almost exactly 20 years ago to the day, at about 3:55 am in the early hours of the morning, Pawar was travelling in a milk tanker No. MH-09-Q-5546 on the Mumbai Pune road. The milk tanker was in the vicinity of village Vaksai in Lonavla Taluka when the accident occurred. It seems there was a collision between milk tanker and another vehicle, a gas tanker No. MCT-1693. The gas tanker was in front of the milk tanker. Both were proceeding in the same direction. There is no dispute that both were in same side of the road. There is also no dispute that the rear right side of the gas tanker was damaged in this collision. A lady named Surekha Ghorpade died on the spot. Pawar was one of those injured. He later succumbed to his injuries. None of Pawar’s heirs, the Applicants, were eye witnesses. In their claim, they contended that the accident was a result of “composite negligence” of the two tankers, i.e., the milk tanker and the gas tanker. As a result, they claimed that owners and the insurers of both vehicles were jointly and severally liable.

5. The original Opponent No. 3, the New India Assurance Co Ltd, was the insurer of both vehicles.

6. The claim having been filed, notices were issued to all parties. Opponent No. 1 (Respondent No. 1 to the appeal) was the owner of the milk tanker. Opponent No. 2, one Navlakha Satyendra Birdichand, owned the gas tanker. Neither entered appearance or contested the proceedings. They are Respondent Nos. 1 and 3 respectively in the present appeal. The claim proceeded *ex parte* against both.

7. The New India Assurance Company Ltd, Opponent no. 3 (joined as Respondent Nos. 2 and 4 to this appeal) filed a written statement and contested the proceedings. It raised several distinct defences including that including of non-joinder of necessary parties. Since there were two vehicles concerned, the defences taken by the insured party against the claim were distinct for each vehicle. As regards the milk tanker, the insurer said there was a breach of the terms and conditions of the insurance policy: a goods vehicle was illicitly being used for carriage of passengers. This was, the insurer contended, a breach of the terms and conditions of the insurance policy sufficient to justify absolving the insurer from all liability on account of, or in respect of, the coverage of the milk tanker.

8. As regards the gas tanker, the insurer first said there was no negligence at all. In the alternative, the insurer pleaded that there was composite negligence on the part of both vehicles, which could be apportioned, but since this was negligence on the part of the

drivers of the vehicles, at best the owners of the vehicles could be held liable but not the insurer.

9. The MACT framed and answered three issues thus:

Sr No	ISSUES	FINDINGS
1)	Whether the Applicants prove that the vehicular accident occurred on 05/06/1997 at about 3.55 a.m., on Mumbai-Pune road, in which the deceased Prakash A. Pawar lost his life, had taken place because of rash and /or negligent driving of tanker bearing No. MH-09-Q-5546 belongs to the Opp. Party No. 1?	Yes
2)	Whether the monthly income of the deceased was Rs.5708/-?	Yes
3)	Whether the insurer of the motor tanker bearing No. MH-09-Q-5546 proves that the vehicular accident had taken place because of composite negligence of the driver of two vehicles involved in vehicular accident?	No
4)	Whether the Applicants are entitled to the compensation, if yes, what amount and from whom?	Yes, Rs. 11,75,870/- from the Opp. Party. The claim against insurer of M/Tanker, Opp. Party No. 2 and insurer of Gas Tanker stands dismissed.

10. Thus, the insurer was wholly exonerated and absolved of all liability, and liability was fastened only on the owner of the milk tanker. The only parties in the contest before the MACT were Applicants and the insurer. Only the 1st Applicant, Pawar's widow, examined herself. There was no other evidence.

11. In paragraph 12 of the judgement under appeal, the Trial Court specifically found that the Applicants first pleaded rash and negligent driving by the driver of the milk tanker but later propounded a case of composite negligence of both drivers. The Applicant No.1 examined herself. She was admittedly not an eye witness. In my view, the Tribunal correctly held that her claiming that there was composite negligence can hardly be termed as evidence. It is at best hearsay. She had no personal knowledge of the events or the accident itself.

12. Paragraph 14 of the impugned order is actually pivotal to this appeal. This is how it is reads:

"14. The Applicants have not adduced the ocular evidence, therefore, the question as to whose rash and negligent driving of the vehicle, resulted into the vehicular accident, has to be decided on the basis of principles of *res ipsa loquitur*."

13. It is not controverted that the Applicants did not lead any evidence, oral or ocular, on the question of negligence or which of the two vehicle drivers was at fault. The contention was that this was a case of *res ipsa loquitur*; since there were two vehicles involved, there must axiomatically be composite negligence.

14. The FIR in question which is at Exh.20 of the record, shows that, at the material time, Pawar and three others were travelling in the milk tanker. The enquiry with the others indicated that the milk tanker attempted to pass the gas tanker on its right, and, in doing so, it hit or clipped in the right rear end of the gas tanker. The Tribunal held that this clearly suggested rashness and negligence on the part of the driver of the milk tanker; had it not been so, there would not have been damage to that portion of the gas tanker.

15. Then come the following observations in paragraph 15 of the impugned order:

"15. There is no evidence or any material to suggest even from the copy of FIR which is at Ex.20 that while the driver of the milk tanker made an attempt to overtake the Gas tanker, the driver of the Gas tanker swerved the vehicle/Gas tanker to the right side, as a result, the Gas tanker dashed against the milk tanker. What is emerging from the certified copy of FIR is that while the driver of the milk tanker made an attempt to overtake the Gas tanker, the milk tanker dashed against the driver's rear portion of the Gas tanker and then the milk tanker overturned to its right side.

16. it is difficult to fault the Tribunal's reasoning in this regard. It is for this reason that the Tribunal came to the conclusions that are set out in paragraphs 16 and 17 of its judgment:

16. In view of the above discussion, I find that the vehicular accident in question had taken place because of rash and negligent driving of the milk tanker in which the deceased and others were travelling.

17. There is absolutely no evidence or material to suggest even remotely that the driver of the Gas tanker in any manner was responsible for the vehicular accident in question, as such, I find that case of the Applicants and alternate defence of the insurer of the milk tanker that the vehicular accident had occurred because of composite negligence of the drivers of Milk tanker and Gas tanker, has not been probabalised or it must fail. In view of the above discussion, I answer issue No. 1 in affirmative and issue No. 3 in negative.

17. I find from the record that these conclusions are fully supported by other material that was before the Tribunal, in particular the spot panchanama. This document, at Exhibit 24, clearly indicates that:

- (a) both vehicles were on the same side of the road and to their side of the divider line;
- (b) The milk tanker was to the right of the gas tanker.
- (c) The right portion of the milk tanker was close to or touching the highway divider line; and, finally,
- (d) That it was the right rear portion of the gas tanker that was severely damaged (including damage to its bumper and rear tin sheets.)

This damage and collision could only have happened if the milk tanker had moved to its right, attempted to pass the gas tanker then in front of it, and because of negligence or rashness (or both), caused the accident. It is impossible from this statement of facts and from

any examination of the material on record to conclude that the driver of the gas tanker was in any way responsible.

18. In consequence, leaving aside the other issues about income and so on – about which there is no dispute – the Tribunal had made an award of Rs.11,75,870 but fastened liability only on the owner of the milk tanker, Opposite Party No. 1 (Respondent No.1 to this appeal), and held the insurer not to be liable at all.

19. It is against this limited aspect that Mr Mendon for the Appellants takes exception. It has been Mr Mendon's most strenuous endeavour to persuade me to accept the following propositions:

- (a) negligence in a motor accident claim under Section 166 of the Motor Vehicles Act, 1988 need never be proved;
- (b) That the law on composite negligence is settled to be such that the claimant does not require to adduce proof of negligence. The fact that the liability of two persons said to be compositely negligent is joint and several is sufficient proof of the negligence of each.

20. In support of these propositions, Mr Mendon cites the following judgments:

- (a) *Maharashtra State Road Transport Corporation v Pundlik Natthuji Adagale & Ors.*¹
- (b) *Chhaganlal Nathubhai Patel v Bhagirath Kheraji & Ors.*²

1 2014 ACJ 589.

2 1993 ACJ 1152.

- (c) *TO Anthony v Karvarnan & Ors.*³
- (d) *Kamlesh & Ors v Attar Singh & Ors.*⁴
- (e) *Khenyei v New India Assurance Co. Ltd. & Ors.*⁵

21. I am unable to accept either of Mr Mendon's propositions. Indeed, it seems to me that they must only be stated to be rejected. None of the authorities contains the propositions that Mr Mendon canvasses. They could not. Negligence is a tort. Negligence is always a question of fact. There is a species of negligence where the nature of the act is such that the fact proves itself. This is not true of every kind of negligence and in motor vehicle accidents, leaving aside the statutory fiction introduced in Section 163-A, negligence must usually be proved. The evidence may be of various types, and no doubt the court will look at the preponderance of probabilities and take into account all surrounding factors. There may be evidence as to the speed of vehicle, or whether it was travelling on wrong side of the road, in an uneven manner or was attempting while mobile something especially hazardous. These are all questions of fact. Negligence cannot be assumed nor can the necessary factual proof be done away with.

22. Sections 163-A and 166 of the Motor Vehicles Act, 1988 read thus:

**163A. SPECIAL PROVISIONS AS TO PAYMENT OF
COMPENSATION ON STRUCTURED FORMULA BASIS**

3 2008 ACJ 1165.

4 2016 ACJ 1.

5 2015 ACJ 1441.

(1) Notwithstanding anything contained in this Act or in any other law for the time being in force or instrument having the force of law, the owner of the motor vehicle of the authorised insurer shall be liable to pay in the case of death or permanent disablement due to accident arising out of the use of motor vehicle, compensation, as indicated in the Second Schedule, to the legal heirs or the victim, as the case may be.

Explanation.—For the purposes of this sub-section, “permanent disability” shall have the same meaning and extent as in the Workmen’s Compensation Act, 1923 (8 of 1923).

(2) In any claim for compensation under sub-section (1), the claimant shall not be required to plead or establish that the death or permanent disablement in respect of which the claim has been made was due to any wrongful act or neglect or default of the owner of the vehicle or vehicles concerned or of any other person.

(3) The Central Government may, keeping in view the cost of living by notification in the Official Gazette, from time to time amend the Second Schedule.

SECTION 166 — APPLICATION FOR COMPENSATION

(1) An application for compensation arising out of an accident of the nature specified in sub-section (1) of section 165 may be made-

(a) by the person who has sustained the injury;
or

(b) by the owner of the property; or

(c) where death has resulted from the accident, by all or any of the legal representatives of the deceased; or

(d) by any agent duly authorised by the person injured or all or any of the legal representatives of the deceased, as the case may be:

Provided that where all the legal representatives of the deceased have not joined in any such application for compensation, the application shall be made on behalf of or for the benefit of all the legal representatives of the deceased and the legal representatives who have not so joined, shall be impleaded as respondents to the application.

(2) Every application under sub-section (1) shall be made, at the option of the claimant, either to the Claims Tribunal having jurisdiction over the area in which the accident occurred or to the Claims Tribunal within the local limits of whose jurisdiction the claimant resides or carries on business or within the local limits of whose jurisdiction the defendant resides, and shall be in such form and contain such particulars as may be prescribed:

Provided that where no claim for compensation under section 140 is made in such application, the application shall contain a separate statement to that effect immediately before the signature of the applicant.

* * *

(4) The Claims Tribunal shall treat any report of accidents forwarded to it under sub-section (6) of section 158 as an application for compensation under this Act.

23. Mr Joshi for the insurer is, I believe, completely correct in saying that it is not remotely possible to import the provisions of Section 163-A into the requirements of proof necessary to sustain a claim under Section 166. Section 163-A creates, by a legal fiction and a specific statutory provision, a formula for payment of compensation on a 'structured formula'. The provisions of Section 163-A(2), which obviate the need for proof of negligence, cannot be imported or engrafted into Section 166.

24. In *Deepal Girishbhai Soni & Ors v United India Insurance Co Ltd*,⁶ the Supreme Court traced the legislative history of Section 163-A and analysed the Motor Vehicles Act, holding it to be a social welfare legislation. In the context of Section 163-A and Section 166, the Supreme Court said:

51. The scheme envisaged under Section 163-A, in our opinion, leaves no manner of doubt that by reason thereof the rights and obligations of the parties are to be determined finally. The amount of compensation payable under the aforementioned provisions is not to be altered or varied in any other proceedings. It does not contain any provision providing for set-off against a higher compensation unlike Section 140. **In terms of the said provision, a distinct and specified class of citizens, namely, persons whose income per annum is Rs 40,000 or less is covered thereunder whereas Sections 140 and 166 cater to all sections of society.**

59. The question may be considered from different angles. As for example, if in the proceedings under Section 166 of the Act, **after obtaining compensation under**

6 (2004) 5 SCC 385.

Section 163-A, the awardee fails to prove that the accident took place owing to negligence on the part of the driver or if it is found as of fact that the deceased or the victim himself was responsible therefor as a consequence whereto the Tribunal refuses to grant any compensation; would it be within its jurisdiction to direct refund either in whole or in part of the amount of compensation already paid on the basis of structured formula? Furthermore, if in a case the Tribunal upon considering the relevant materials comes to the conclusion that no case has been made out for awarding the compensation under Section 166 of the Act, would it be at liberty to award compensation in terms of Section 163-A thereof?

60. The answer to both the aforementioned questions must be rendered in the negative. In other words, the question of adjustment or refund will invariably arise in the event if it is held that the amount of compensation paid in the proceedings under Section 163-A of the Act is interim in nature.

61. It is, therefore, evident that whenever Parliament intended to provide for adjustment or refund of the compensation payable on the basis of no-fault liability, as for example, Sections 140 and 161 in case of hit-and-run motor accident, from the amount of compensation payable under the award on the basis of fault liability under Section 166 of the Act, the same has expressly been provided for and having regard to the fact that no such procedure for refund or adjustment of compensation has been provided for in relation to the proceedings under Section 163-A of the Act, **it must be held that the scheme of the provisions under Sections 163-A and 166 are distinct and separate in nature.**

(Emphasis added)

25. This brings us back to the first limb of Mr Mendon's argument, viz., that since the liability of those proved to be compositely negligent is 'joint and several', therefore there is no question of 'proving negligence'. As I noted, this proposition is inaccurate and incorrect. The 'joint and several' aspect speaks to the *extent* of liability. It does not by itself *prove* liability. All that the decisions cited by Mr Mendon say is that where the negligence of more than one tortfeasor is established as a composite negligence, the liability of each is joint and several. Each is liable for the full extent of the claim, and both are jointly liable for the full extent of the claim. This cannot be held to mean a dispensation with proof of negligence. Once negligence is proved, and it is also found that there is more than one person negligent, i.e., when a question of composite negligence arises, it is not necessary to ascertain with mathematical precision the extent of the share of negligence of each. The reason is obvious. The liability of every tortfeasor in a composite negligence case is always joint and several and extends to the full amount of the claim.

26. If this be so, it was for the claimant to first show not only that the driver of the milk tanker which was attempting the overtaking manoeuvre was negligent, but that so too was the gas tanker. The claimants could have done so in different ways, and I do not suggest that they necessarily needed an eye witness. They might have been able to summon another witness from nearby or perhaps refer to the existing material on record such as the spot panchanama or FIR if

they could, to demonstrate that the record as it stood before the Tribunal showed some negligence on the part of the gas tanker.

27. Had the claimants done that, the question of composite negligence might have arisen. But this would not have fulfilled Mr Mendon's purpose, which is to ensnare Mr Joshi's client, the insurer, and to make it liable. That would still does not address the question of why the insurer could be said to be liable when the terms of its policy were breached and the milk tanker, the driver of whom was alone found to be negligent, was carrying passengers in violation of its purpose, which was carriage of goods. A contract of insurance is a contract of indemnity. Having a motor vehicle insurance cover is not a license to ply one's vehicle in a haphazard and negligent manner.

28. In fact Mr Mendon's argument inverts the traditional sequence in such matters. The sequence is this. The driver is shown to be at fault. The owner of the vehicle (if he is not the driver) is vicariously liable for the negligent acts of his employee. The insurance company bears the monetary compensation awarded against that vicarious liability. This is a well-established hierarchical structure in such matters. A finding of fault on the part of the driver lies at the root of it; without that fault established the insurer's liability does not come into play at all. In other words, if the driver of the gas tanker was found not to be at fault, his employer's insurer could hardly be expected to pay compensation for an accident that occurred for no fault of its owner.

29. Of the two vehicles, the milk tanker was being operated in breach of the terms of its policy by carrying passengers when it was insured only for carriage of goods. Its insurer was thus not liable. The gas tanker driver was not at fault, and hence no negligence was shown, and thus its insurer incurred no liability.

30. Having regard to the foregoing discussion, I am unable to accept Mr Mendon's submission that the judgment under appeal should be modified or reversed with a finding of composite negligence; or that the insurer of the gas tanker should also be held liable; or that liability should be fastened on the insurer of the milk tanker.

31. The Appeal fails and is dismissed. No costs.

(G. S. PATEL, J.)