HINZ v BERRY

[1967 H. No. 95]

[COURT OF APPEAL]

[1970] 2 QB 40

HEARING-DATES: 16 January 1970

16 January 1970

CATCHWORDS:
Damages - **Personal injuries** - Nervous shock - Wife seeing husband fatally injured - Resulting depression - Factor affecting damages - Assessment. Negligence - Duty of care to whom? - Shock - Death of husband - Negligence of driver of car - Wife seeing accident - Resulting nervous shock.

[…]

PANEL: Lord Denning M.R., Lord Pearson and Sir Gordon Willmer

JUDGMENTBY-1: LORD **DENNING** M.R

JUDGMENT-1:

LORD DENNING M.R: It happened on April 19, 1964. It was bluebell time in Kent. Mr. and Mrs. Hinz had been married some 10 years, and they had four children, all aged nine and under. The youngest was one. Mrs. Hinz was a remarkable woman. In addition to her own four, she was foster-mother to four other children. To add to it, she was two months pregnant with her fifth child.

On this day they drove out in a Bedford Dormobile van from Tonbridge to Canvey Island. They took all eight children with them. As they were coming back they turned into a lay-by at Thurnham to have a picnic tea. The husband, Mr. Hinz, was at the back of the Dormobile making the tea. Mrs. Hinz had taken Stephanie, her third child, aged three, across the road to pick bluebells on the opposite side. There came along a Jaguar car driven by Mr. Berry, out of control. A tyre had burst. The Jaguar rushed into this lay-by and crashed into Mr. Hinz and the children. Mr. Hinz was frightfully injured and died a little later. Nearly all the children were hurt. Blood was streaming from their heads. Mrs. Hinz, hearing the crash, turned round and saw this disaster. She ran across the road and did all she could. Her husband was beyond recall. But the children recovered.

An action has been brought on her behalf and on behalf of the children for damages against Mr. Berry, the defendant. The injuries to the children have been settled by various sums being paid. The pecuniary loss to Mrs. Hinz by reason of the loss of her husband has been found by the judge to be some oe15,000; but there remains the question of the damages payable to her for her nervous shock - the shock which she suffered by seeing her husband lying in the road dying, and the children strewn about.

The law at one time said that there could not be damages for nervous shock: but for these last 25 years, it has been settled that damages can be given for nervous shock caused by the sight of an accident, at any rate to a close relative. Very few of these cases have come before

the courts to assess the amount of damages. O'Connor J. fixed the damages at the sum of oe4,000 for nervous shock. The defendant appeals, saying that the sum is too high.

I would like to pay at once a tribute to the insurance company for the considerate and fair way in which they have dealt with the case. In English law no damages are awarded for grief or sorrow caused by a person's death. No damages are to be given for the worry about the children, or for the financial strain or stress, or the difficulties of adjusting to a new life. Damages are, however, recoverable for nervous shock, or, to put it in medical terms, for any recognisable psychiatric illness caused by the breach of duty by the defendant.

There are only two cases in which the quantum of damages for nervous shock has been considered. One is Schneider v. Eisovitch [1960] 2 Q.B. 430. The other, Tregoning v. Hill, The Times, March 2, 1965. But they do not help us here. Somehow or other the court has to draw a line between sorrow and grief for which damages are not recoverable, and nervous shock and psychiatric illness for which damages are recoverable. The way to do this is to estimate how much Mrs. Hinz would have suffered if, for instance, her husband had been killed in an accident when she was 50 miles away: and compare it with what she is now, having suffered all the shock due to being present at the accident. The evidence shows that she suffered much more by being present. I will consider first the grief and sorrow if she had not been present at the accident. The consultant psychiatrist from the hospital in Maidstone said:

"It is common knowledge that there is a 'mourning period' for all of us, and that normally time dispels this. In the average person it might be a year, but in a predisposed person it can be greatly prolonged. ..."

Mrs. Hinz was not predisposed at all. She was a woman of great capacity, level-headed, hard working, happily married. She would have got over the loss of her husband in, say, a year.

Consider next her condition, as it is, due to being present at the accident. Two years after the accident, the consultant psychiatrist said:

"There is no medical doubt at all that she is suffering from a morbid depression; she is now officially ill." He went on to give some of the symptoms. She said to him: "It does not seem worth going on. I feel I cannot cope at all. I get so dreadfully irritable with the children too. It is wrong but I feel like killing him," that is, the posthumous child. The consultant went on: "She feels exhausted, has frequent suicidal ruminations and at the same time is covered with guilt at being like this." The posthumous baby "now saddens her even more because it cries 'Dad, Dad,'" and one of the elder children persists in saying "You have not got a Dad"; and then the other fatherless children join in the chorus." The consultant concluded: "In other circumstances I would probably have brought her into hospital, at least for a rest, but possibly for electrical treatment and it may come to that yet."

At the trial, five years after the accident, she frequently broke down when giving her evidence. She brought the children to court. They were very well turned out. The judge summed up the matter in this way:

"I am satisfied that she was of so robust a character that she would have stood up to that situation, that she would have been hurt, sorrowful, in mourning, Yes; but in a state of morbid depression, No."

He awarded her oe4,000 on this head. There is no suggestion that he misdirected himself. We can only interfere if it is a wholly erroneous estimate. I do not think it is erroneous. I would dismiss the appeal.

Burgess v Rawnsley

COURT OF APPEAL, CIVIL DIVISION

[1975] Ch 429, [1975] 3 All ER 142, 3 WLR 99, 30 P & CR 221

HEARING-DATES:

10, 11, 14, 15 APRIL 1975

15 APRIL 1975

CATCHWORDS:

Trust and trustee - Resulting **trust** - Failure of express **trust** - Failure of purpose - More than one settlor - Common purpose of settlors - Need for common purpose to give rise to resulting **trust** where purpose fails - Joint acquisition of property - Property acquired by man and woman to be held for themselves jointly and beneficially - Both parties contributing to purchase - Man intending property to be matrimonial home - Woman having no knowledge of intention - Woman not contemplating marriage and not willing to marry - Whether property held on resulting **trust** for both parties in equal shares.

Joint tenancy - Severance - Mans of effecting severance - Agreement or conduct - Agreement - Unenforceable agreement - Agreement indicating parties no longer intended tenancy to operate as joint tenancy - Agreement subsequently repudiated by one party - Whether agreement effecting severance of joint tenancy.

Joint tenancy - Severance - Means of effecting severance - Agreement or conduct - Conduct falling short of agreement - Conduct indicating common intention that joint tenancy should be regarded as severed - Whether conduct effecting severance.

Joint tenancy - Severance - Personalty - Notice of severance - Written notice of desire to sever joint tenancy communicated by one joint tenant to the other - Whether written notice capable of effecting severance of joint tenancy of personalty.

[…]

PANEL: LORD DENNING MR. BROWNE LJ AND SIR JOHN PENNYCUICK

JUDGMENTBY-1: LORD **DENNING** MR.

JUDGMENT-1:

LORD DENNING MR. In 1966 there was a scripture rally in Trafalgar Square. A widower, Mr Honick, went to it. He was about 63. A widow, Mrs Rawnsley, also went. She was about 60. He went up to her and introduced himself. He was not much to look at. 'He looked like a tramp', she said. 'He had been picking up fag ends.' They got on well enough, however, to exchange addresses. His was 36 Queen's Road, Waltham Cross, Hertfordshire. Hers was 74 Downton Avenue, Streatham Hill, London, SW2. Next day he went to her house with a gift for her. It was a rose wrapped in a newspaper. Afterwards their friendship grew apace. She was sorry for him, she said. She smartened him up with better clothes. She had him to meals. She went to his house; he went to hers. They wrote to one another in terms of endearment. We were not shown the letters, but counsel described them as love letters.

A few months later Mr Honick had the opportunity of buying the house where he lived at 36 Queen's Road, Waltham Cross. He had been the tenant of it for some years, but his wife had died and his married daughter had left; so that he was alone there. He talked it over with Mrs Rawnsley. He told her that the owner was willing to sell the house to him for L800. Mrs Rawnsley said she would go half shares; she would have the upper flat and he the lower flat.

On 2nd December 1966 a contract was signed by which the owner agreed to sell the house to Mr Honick. It must be noticed that it was to Mr Honick alone. The price was Ł 850; Mrs Rawnsley paid the deposit. A little later Mr Honick went to his solicitor and instructed him to have the property conveyed into the joint names of himself and Mrs Rawnsley. The reason for the joint names was, as the judge found, because Mr Honick firmly believed that he was going to marry Mrs Rawnsley and that it was to be the matrimonial home. 'I have no doubt whatever', said the judge, 'that was his reason for purchasing the house injoint names.'

But although he was minded to marry Mrs Rawnsley, it is clear that she was not minded to marry him. She said -- and the judge accepted her evidence -- that he had never mentioned marriage to her and that she never contemplated marriage. She was minded to join in the purchase and pay half so as to have a place of her own, namely the upstairs flat, whilst he occupied the lower flat.

On 23rd January 1967 the conveyance was executed. It was made to both Mr Honick and Mrs Rawnsley (the purchasers) 'TO HOLD the same unto the Purchasers in fee simple', together with this express declaration of trust:

'... the Purchasers shall hold the said property upon trust to sell the same with power to postpone the sale thereof and shall hold the net proceeds of sale and other money applicable as capital and the net and profits thereof until sale upon trust for themselves as joint tenants...' So the legal estate was held jointly. So were the beneficial interests.

Mr Honick paid for the property by cheque on his own banking account. But Mrs Rawnsley gave evidence (which the judge accepted) that she paid him Ł 425 in four instalments for a half share.

Their expectations were, however, not fulfilled. Mr Honick's hope of marriage failed; Mrs Rawnsley would not marry him. Her hopes for the flat upstair failed; he would not let her have it. He stayed on in the house alone; but they still went to see one another and remained good friends.

In July 1968, being disappointed in his hopes of marriage, Mr Honick wanted Mrs Rawnsley to seel him her share in the house. He came to an agreement with her, as he thought, to buy it for Ł 750. He went to his solicitor and said to him: 'Mrs Rawnsley is not going to marry me, but she has agreed to take Ł 750 for her interest.' He handed the conveyance to the solicitor for him to draw up the necessary document. The solicitor thereupon wrote to Mrs Rawnsley on 1st July 1968 this letter:

'Dear Mrs Rawnsley. re 36 Queen's Road, Waltham Cross.

'Mr. Honick called to see us today stating tht you are agreeable to convey to him your interest in this property for the sum ofŁ 750.0.0. Will you please confirm that this is so and we will then finalise the matter and ask you to call upon us to collect those moneys and to sign the final Deed.'

Next day, however, Mrs Rawnsley went to the solicitors and said she was not willing to sell. She was not satisfied with Ł 750 but wanted Ł 1,000. Mr Honick told his daughter that Mrs Rawnsley was going to ask a thousand which he was not going to pay'.

A few days later Mr Honick went to the solicitor and told him to leave things as they were. He asked for the conveyance back and got it. From that time onwards things went on as before, with Mr Honick in his house alone, and she in hers; but both visited one another, being quite friendly. He paid all the rates and outgoings of his house. This went on for three more years until he died on 26th October 1971.

Now Mr Honick's daughter, Mrs Burgess, has taken out letters of administration to his estate. She claims that as administratrix she is entitled to a half share in the house. But Mrs Rawnsley claims that it belongs to her for her own benefit. It has been sold for some Ł 5,000. So that there is a considerable sum of money in dispute.

Now there is no doubt that the legal estate in the house is vested in Mrs Rawnsley alone. Since 1925 a legal joint tenancy cannot be severed. So on Mr Honick's death, the legal estate survived to Mrs Rawnsley alone. The question is who is entitled to the beneficial interest in the house? The judge held that the legal estate is held by Mrs Rawnsley on trust for herself and Mr Honick's estate in equal shares. But Mrs Rawnsley claims that she entitled to the whole beneficial interest.

There are two points in the case. Was there a resulting trust? If both parties had contemplated marriage -- and the house was taken in joint names with that object -- then when that object failed, there would be a resulting trust for them according to their respective contributions to the purchase price. That is half and half: see Essery v Cowlard n1 and Ulrich v Ulrich and Felton n2. Such would be the position if both parties had contemplated marriage. But what is the position when one contemplates marriage and the other does not? That is the position here. Mr Honick contemplated marriage and that the house should be the matrimonial home. His contemplation failed. Mrs Rawnsley did not contemplate marriage. She contemplated that they would live in it as separate flats, she upstairs and he downstairs. Her contemplation also failed. She said in evidence: 'I mentioned the upper flat but he was a man of his own laws. He made it clear that I wasn't going into that house, and that possession was mine-tenths of the law.' It is plain that the object of each failed. Each has a different object in view, but each failed. What then is the position? I think it is the same as if the common object of both had failed. In my opinion there is a resulting trust in favour of the two of them, according to their respective contributions. That is half and half. But I would not like to put my decision on this ground alone. So I proceed to consider the other ground.

n1 [1974] 3 All ER 38, [1974] 3 WLR 583

n2 [1891] 3 Ch 59

Secondly, was there a severance of the beneficial joint tenancy? The judge said: 'I hold that there has been a severance of the joint tenancy brought about by the conduct of the defendant in asking Ł 750 for her share which was agreed to.' In making that statement the judge made a little slip. She did not ask Ł 750. But it was a slip of no importance. The important finding is that there was an agreement that she would sell her share to him for Ł 750. Almost immediately afterwards she went back on it. Is that conduct sufficient to effect a severance?

Counsel for Mrs Rawnsley submitted that it was not. He relied on the recent decision of Walton J in Nielson-Jones v Fedden n1 given subsequently to the judgment of the judge here. Walton J held that no conduct is sufficient to sever a joint tenancy unless it is irrevocable. Counsel for Mrs Rawnsley said that in the present case the agreement was not in writing. it could not be enforced by specific performance. It was revocable and was in fact revoked by Mrs Rawnsley when she went back on it. So there was, he submitted, no severance.

n1 [1974] 3 All ER 38, [1974] 3 WLR 593

Walton J founded himself on the decision of Stirling J in Re Wilks n2. He criticised Hawksley v May n3 and Re Draper's Conveyance n4, and said they were clearly contrary to the existing well-established law. He went back to Coke on Littleton and to Blackstone's Commentaries. Those old writers were dealing with legal joint renancies. Blackstone said n5:

n2 [1891] 3 Ch 59

n3 [1955] 3 All ER 353, [1956] 1 QB 304

n4 [1967] 3 All ER 853, [1969] 1 Ch 486

n5 Commentaries (4th Edn, 1876), vol II, pp 154, 158

'The properties of a joint-estate are derived from its unity, which is fourfold; the unity of interest, the unity of title, the unity of time, and the unity of possession... an estate in joint-tenancy may be severed and destroyed... by destroying any of its constituent unities.'
And he gives instances of how this may be done. Now that is all very well when you are considering how a legal joint tenancy can be severed. But it is of no application today when there can be no severance of a legal joint tenancy; and you are only considering how a beneficial joint tenancy can be severed. The thing to remember today is that equity leans against joint tenants and favours tenancies in common.

Nowadays everyone starts with the judgment of Page Wood V-C in Williams v Hensman n6 where he said:

n6 (1861) 1 John & H 546 at 557, 558

'A joint-tenancy may be severed in three ways: in the first place, an act of any one of the persons interested operating upon his own share may create a severance as to that share... Secondly, a joint-tenancy may be severed by mutual agreement. And, in the third place, there may be a severance by any course of dealing sufficient to intimate that the interests of all were mutually treated as constituting a tenancy in common. When the severance depends on an inference of this kind without any express act of severance, it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested. You must find in this class of cases a course of dealing by which the shares of all the parties to the contest have been effected, as happened in the cases of Wilson v Bell n1 and Jackson v. Jackson n2.'

n1 (1843) 5 I Eq R 501

n2 (1804) 9 Ves 591
In that passage Page Wool V-C distinguished between severance 'by mutual agreement' and severance by a 'course of dealing'. That shows that a 'course of dealing' need not amount to an agreement, expressed or implied, for severance. It is sufficient if there is a course of dealing in which one party makes clear to the other that he desires that their shares should no longer be held jointly but be held in common. I emphasise that it must be made clear to the other party. That is implicit in the sentence in wich Page Wood V-C says n3 --

n3 (1861) 1 John & H at 558

'it will not suffice to rely on an intention, with respect to the particular share, declared only behind the backs of the other persons interested.'

Similarly it is sufficient if both parties enter on a course of dealing which evinces an intention by both of them that their shares shall henceforth be held in common and not jointly, as appears from the two cases to which Page Wood V-C referred, Wilson v Bell n1 and Jackson v Jackson n2.

n1 (1843) 5 I Eq R 501

n2 (1804) 9 Ves 591

I come now to the question of notice. Suppose that one party gives a notice in writing to the other saying that he desires to sever the joint tenancy. Is that sufficient to effect a severance? I think it is. It was certainly the view of Sir Benjamin Cherry when he drafted s 36(2) of the Law of Property Act 1925. It says in relation to real estates:

'... where a legal estate (not being settled land) is vested in joint tenants beneficially, and any tenant desires to sever the joint tenancy in equity, he shall give to the other joint tenants a notice in writing of such desire or do such other acts or things as would, in the case of personal estate, have been effectual to sever the tenancy in equity, and thereupon under the trust for sale affecting the land the net proceeds of sale, and the net rents and profits until sale, shall be held upon the trusts which would have been requisite for giving effect to the beneficial interests if there had been an actual severance.'

I have underlined the important words. The word 'other' is most illuminating. It shows quite plainly that, in the case of personal estate, one of the things which is effective in equity to sever a joint tenancy is 'a notice in writing' of a desire to sever. So also in regard to real estate.

Taking this view, I find myself in agreement with the decision of Havers J in Hawkesley v May n4, and of Plowman J in Re Draper's Conveyance n5. I cannot agree with Walton J that those cases were wrongly decided. It would be absurd that there should be a difference between real estates and personal estate in this respect. Suppose real estate is held on a joint tenancy on a trust for sale and is sold and converted into personal property. Before sale, it is severable by notice in writing. It would be ridiculous if it could not be severed afterwards in like manner. I look on s 36(2) of the 1925 Act as declaratory of the law as to severance by notice and not as a new provision confined to real estate. A joint tenancy in personal estate can be severed by notice just as a joint tenancy in real estate.

n4 [1955] 3 All ER 353, [1956] 1 QB 304

n5 [1967] 3 All ER 853, [1969] 1 Ch 486

It remains to consider the decision in Nielson-Jones v Fedden n6. In my view it was not correctly decided. The husband and wife entered on a course of dealing sufficient to sever the joint tenancy. They entered into negotiations that the property should be sold. Each received Ł 200 out of the deposit paid by the purchaser. That was sufficient. Furthermore there was disclosed in correspondence a declaration by the husband that he wished to sever the joint tenancy; and this was made clear by the wife. That too was sufficient.

n6 [1974] 3 All ER 38, [1974] 3 WLR 583

I doubt whether Re Wilks n1 can be supported. A young man who had just become 21 applied to the court to have one-third of a joint fund paid out to him. He died just before the application was heard. Stirling J held that, if he died just after there would have been a severance; but, as he died just before, there was not. Ironically enough too, the delay was not on his side. It was the delay of the court. Nowadays I think it should have been decided differently. The application was a clear declaration of his intention to sever. It was made clear to all concerned. There was enough to effect a severance.

n1 [1891] 3 Ch 59

It remains to apply these principles to the present case. I think there was evidence that Mr Honick and Mrs Rawnsley did come to an agreement that he would buy her share for Ł 750. That agreement was not in writing and it was not specifically enforceable. Yet it was sufficient to effect a severance. Even if there was not any firm agreement but only a course of dealing, it clearly evinced an intention by both parties that the property should henceforth be held in common and not jointly.

On these grounds I would dismiss the appeal.