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G.M.G. 2

Judgment
25, 1965

No. 46 of 1964

UNIVERSITY OF LONDON
INSTITUTION OF
- 9 FEB 1966
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LONDON, V.C.I.

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL
FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

. 80064

B E T W E E N :

GERALD LOUIS JEREMIAH (Plaintiff)
Appellant

- and -

10 LEE YEW KWAI (Defendants)
MOK SAI YU Respondents

C A S E FOR THE APPELLANT

Record

- 1. This is an appeal from an Order dated the 11th March 1964 of the Federal Court of Malaysia pursuant to leave granted by the said Court on 2nd September 1964. p. 39
- 2. The Order dated the 11th March 1964 dismissed with costs the Appellant's appeal from an Order of the High Court in Malaya at Ipoh dated 18th December 1963 which ordered that judgment be entered for the Appellant against the Respondents for \$ 25,930. pp.28 - 29
- 3. The primary question for decision on this Appeal is whether for the purposes of section 12 of the Civil Law Ordinance No. 5 of 1956 the Appellant had any share in the responsibility for the damage which he suffered in the circumstances hereinafter appearing, and the secondary question is whether if (contrary to his contentions) the Appellant had any share in the responsibility for the damage, that share was as great as a 50% contribution.
- 4. On the 9th November 1960 the Appellant was riding a motor cycle, registration number 39 YP 37, along Tambun Road, Ipoh, when it collided p. 20 lines 6 - 12

Record

- pp. 23 line
39 - 27 line
44.
pp. 1 - 3
- with a motor lorry, registration number A 6136, owned by the second-named Respondent and driven by the first-named Respondent who was the second-named Respondent's servant or agent. As a consequence of the collision the Appellant incurred pain, suffering and loss.
5. By a writ of summons dated 22nd March 1963 the Appellant commenced proceedings against the Respondents claiming damages for injury caused by the negligent driving of the first-named Respondent as servant or agent of the second-named Respondent. 10
- p. 7
lines 19
- 33.
6. By paragraph 5 of their Statement of Defence dated 3rd June 1963 the Respondents averred (inter alia) that the negligence of the Plaintiff contributed to the collision.
7. On October 17th, 1963, the action came on for hearing before Neal J. in the High Court of Malaya at Ipoh. The following facts were proved: 20
- p. 14
line 2
p. 13
line 28
- (a) The Appellant was travelling northward along Tambun Road, Ipoh (which is a main road) at a speed of between 25 and 30 m.p.h. and approaching the junction of Cheah Cheang Lim Lane.
- p. 13 lines
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p. 17 line
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p.15 lines
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- (b) Parked 10 feet to the south of the said junction on the Appellant's near side was a van belonging to the Central Electricity Board (C.E.B.). This van was approximately 6 feet wide and approximately one foot of its width was off the road. 30
- p. 13 line
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- (c) The Appellant slowed down between 16 and 25 m.p.h. before passing the C.E.B. van.
- p. 14 lines
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p. 15 line
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- (d) When the Appellant came abreast of the C.E.B. van he first saw the lorry driven by the first named Respondent. That lorry was then about 12 feet away from him and emerging from Cheah Cheang Lim Lane.
- p. 42
- (An unscaled diagrammatic plan was produced as exhibit P.11). 40
- p. 14 lines
3 - 4
- (e) Upon seeing the said lorry the Appellant in order to avoid a collision accelerated and swerved to his right in order to try and pass in front of the lorry, but did not succeed in so doing and the collision occurred.

8. Neal J. found that "the collision was due to the negligence of the first" named Respondent. Upon the issue as to whether there had been any contributory negligence upon the part of the Appellant the learned judge said:

p. 22 line
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"it is clear on the evidence of the plaintiff himself that he was aware of the lorry concerned when he was a distance of some 12 feet from the cab of the lorry which on his own evidence was moving across his line of passage and that at that time he had been decelerating he thereupon accelerated and endeavoured to pass across the front of the lorry. Leaving out the consideration altogether whether or not he was keeping the lookout that he ought to have been keeping and should have seen the lorry before that point of time, if he was travelling at the speed at which he said he was travelling it was not only negligent of him to attempt this manoeuvre but extremely dangerous. He was cross-examined as to whether or not he had been negligent in not braking and thereby avoiding the collision. There is little evidence upon which I can make a finding but on all of the evidence there is and I am inclined to the view that allowing for the lapse of time of the brain to communicate with the limbs his braking would not have avoided a collision between the lorry and the motor cycle. He was therefore not in breach of the highway code. As to whether that collision whilst it could not have caused the actual damage to the plaintiff would have been as great or less it is in my opinion impossible to determine. It is however in my opinion abundantly clear that had he braked the continuance of the lorry (if it did continue) would have left him adequate room to pass behind the lorry.

p. 22 line
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p. 23 line
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I have considered the authorities on "the agony of the moment" and "sudden emergency" but these have references to an emergency created by the defendant. On the facts as I have found them the plaintiff would not had he been maintaining a proper lookout, have been placed in any emergency but for the existence of the C.E.B. van in breach of the road traffic legislation and the authorities therefore in my opinion have no application.

Record

I have considered all of the authorities based upon the equivalent section in the English legislation as to the test to be applied and I have considered the authorities on the question of apportionment; it is a practical impossibility to apportion the proportions of culpability which are the cause of the accident, and I have come to the conclusion that the proper award would be that the plaintiff contributed 50 per cent towards the damage which he sustained."

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p. 27 line 43 - p. 28 line 1 9. Neal J. awarded the Appellant \$ 25,930 as general and special damages being one half of the amount which he would have awarded on a basis of full liability.

10. The Appellant appealed against the finding of contributory negligence, and the following grounds of appeal were set out in the Memorandum of Appeal:

p. 30 line 37 - p. 31 line 38

2 The learned judge was wrong in fact and in law in deciding that the Plaintiff was negligent in attempting to pass across the front of the lorry by swerving and accelerating when faced with a lorry coming into his road at a distance of only 12 ft. in front of him.

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3. The learned judge was wrong in fact and in law in deciding that, had the Plaintiff braked, the continuance of the lorry would have left him adequate room to pass behind the lorry, having previously decided that if the Plaintiff had braked, he would not have avoided a collision between the lorry and the motor cycle.

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4. The learned judge was wrong in fact and in law in deciding that the authorities on the agony of the moment and sudden emergency had no application to the facts of this particular case by virtue of the fact that the emergency was created by the position of the C.E.B. van. The emergency was created not by the position of the C.E.B. van but by the action of the Defendant driver.

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5. The learned judge was wrong in fact and in law in holding that the action of the driver of the lorry did not create an

emergency because of the position of the C.E.B. van in breach of the road traffic legislation and was wrong in fact and in law in holding that the relevant authorities had no application to this case.

10 6. The learned judge was wrong in fact and in law in holding that it was a practical impossibility to apportion the proportions of culpability and by reason of that impossibility, in assessing the liability at 50%

7. The learned judge should have held in fact and in law that the Plaintiff himself was not in any way negligent.

8. The learned judge was wrong in fact and in law in assessing the degree of culpability in the Plaintiff at 50% and in the Defendant driver at only 50%, the Defendant driver being far more to blame.

20 11. The appeal came on for hearing on the 11th March 1964 before Thomson, Lord President, Malaysia, Wylie, Chief Justice, Borneo and Tan Ah Tah, Judge Federal Court. On the same day the appeal was dismissed with costs. The judgment of the Court was given by Thomson, Lord President, who said:

30 "On the whole the evidence, to put it at the lowest, suggests that the motor cyclist was keeping a less than adequate look-out. I base this largely on the plan. Making all allowances for what has been said about the lack of accuracy of this document, it seems to me that having regard to the fact that when the motor cyclist commenced, if I may so put it, to go round the front of the lorry he had on his right not only over 20 feet of roadway, regarding which there is no evidence whatsoever of oncoming traffic, but also on his immediate right what I may describe as an escape route leading off to the right at an angle of 45°. Judging by its position after 40 the accident the lorry could not have been travelling at any great speed. Postulating on the part of the motor cyclist a normal human sense of self-preservation I find it very very difficult to think that had he been keeping a proper look-out he could not have succeeded in avoiding the collision."

p. 38 lines
16 - 37

Record

12. The Appellant respectfully submits that the learned Lord President was wrong in stating that the evidence suggests that the Appellant was keeping a less than adequate look-out. The trial judge did not find that the Appellant was not keeping a proper look-out, and found that the Appellant was only 12 feet away from the first-named Respondent's lorry when he first saw it.

13. The Appellant further respectfully submits that the learned Lord President was wrong in suggesting that the Appellant could or should have avoided the collision by turning to his right. There was no evidence that this manoeuvre was performable and a less exaggerated turn to the right was described by the learned trial judge as "extremely dangerous" and was apparently the only basis upon which he found the Appellant to have been negligent.

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p. 22
line 49

14. The Appellant further respectfully submits the learned trial judge was wrong in law and in fact in excluding the presence of the C.E.B. van in considering the authorities upon the "agony of the moment". The Appellant respectfully submits that all the static surroundings of an accident are material when considering the question of the "agony of the moment", and that the Federal Court was wrong in not so holding and in not reversing the trial judge upon that ground.

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15. The Appellant further respectfully submits that the learned trial judge was wrong in law and in fact in ascribing the creation of the emergency with which the Appellant was confronted to the presence of the C.E.B. van. The Appellant respectfully submits that the emergency was created by the emergence of the first-named Respondent's lorry from behind that van, and that the Federal Court was wrong in not so holding and in not reversing the trial judge upon that ground.

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16. The Appellant further respectfully submits that there was no evidence of negligence on his part and that the trial judge and the Federal Court should have so held.

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17. The Appellant further respectfully submits that if contrary to his contentions, he had any share in the responsibility for the damage which occurred then the evidence does not support the conclusion that he was 50% to blame for the collision.

18. The Appellant therefore respectfully submits that this Appeal should be allowed with costs for the following among other

R E A S O N S

- (1) BECAUSE there was no evidence of negligence on his part.
- (2) BECAUSE all the static surroundings of an accident are material when considering that which ought to be done in the "agony of the moment".
- (3) BECAUSE the cause of the "sudden emergency" was the first-named Respondent's negligence.

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MICHAEL MANN

No. 46 of 1964

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B E T W E E N
GERALD LOUIS JEREMIAH (Plaintiff)
Appellant

- v -

LEE YEW KWAI (Defendants)
MOK SAI YU Respondents

C A S E
FOR THE APPELLANT

LIPTON & JEFFERIES
39, Jermyn Street,
London, S.W.1.

Solicitors for the Appellant