

UNIVERSITY OF LONDON
INSTITUTE OF ADVANCED
LEGAL STUDIES
28 MAY 1974
25 RUSSELL SQUARE
LONDON W.C.1

1.

No.12 of 1972

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL
ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

B E T W E E N :

WONG THIN YIT (Defendant) Appellant

- and -

MOHD ALI bin P.S. ISMAIL
(Suing as an infant through
his father and next friend
Abdul Rahman s/o Syed
Ibrahimshah (Plaintiff) Respondent

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CASE FOR THE RESPONDENT

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1. This is an appeal from a Judgment of the Federal Court of Malaysia (Ong, C.J. dissenting, Gill, F.J. and Ali, F.J.) dated the 9th day of July 1971 which dismissed an appeal by the Appellant herein from a Judgment of the High Court in Malaya at Ipoh (Pawan Ahmad, J.) dated the 23rd day of February 1971 whereby the Respondent was awarded \$32,000 general damages and \$1,000 agreed special damages for injuries sustained by him as a result of a road accident caused by the negligent driving of the Appellant.

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2. In his Statement of Claim dated 8th May 1970, the Plaintiff (an infant aged 11, suing by his father) averred that on the 21st February, 1969, he was knocked down from the rear by a motor cycle driven by the Defendant, as a result of which his right leg was amputated. He pleaded that the accident was caused by the negligence of the Defendant in

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- "(a) Failing to keep any or any proper look out;
- (b) Driving at an excessive speed in the circumstances;
- (c) Failing to observe the position of the Plaintiff walking on the highway;
- (d) Driving into the Plaintiff from the rear;

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- (e) Failing to give any or any sufficient warning of his approach;
- (f) Failing to stop, slow down or otherwise avoid the severe collision;"

He claimed general and special damages.

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3. In his Defence dated 17th June 1970, the Defendant denied that he was negligent as alleged or at all and averred that the collision was caused solely and/or contributed to entirely by the negligence of the Plaintiff in that he:

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- "(a) Failed to keep any or any proper look out or at all;
- (b) Failed to observe the approach of the Defendant's motor-cycle;
- (c) Failed to observe the simplest elements of kerb drill;
- (d) Attempted to cross the road when it was unsafe for him to do so;
- (e) Suddenly and/or without any or any sufficient warning or indication ran across the path of the said motor-cycle without taking any measure whatsoever to ensure that it was safe for him to do so;
- (f) Failed to remain at the edge of the road and allow the Defendant the free excess(sic) of his right of way;
- (g) Failed to stop, slow down or in any manner so as to avoid running into the Defendant's motor-cycle and/or so as not to give the Defendant any opportunity of avoiding the said collision."

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4. The hearing commenced before Pawan Ahmad J. on the 21st January 1971. Special damages were agreed at \$1,000 and an agreed bundle of documents was put in.

5. Evidence was given by the Plaintiff (P.W.1) Kunasegeram (P.W.2) and Kumaran (P.W.3) who were aged 12, 13 and 12 respectively, at the date of the trial. They did not take the oath nor affirmed,

but were given the usual warning about speaking the truth.

10 The Plaintiff's evidence was that just before the accident he was walking in the direction of Teluk Anson on his correct side of the road along the grass verge about 2 feet away from the left side of the road, carrying on his right shoulder a basket of cakes for sale, when he suddenly heard the sound of a motor-cycle from behind. Two of his friends, Kunasegeram (P.W.2) and Kumaran (P.W.3) who were walking behind him at a distance of some 20ft, shouted out to him that a motor-cycle was coming. As he was about to turn round to look, the motor-cycle knocked him down as a result of which he became unconscious.

p.8,1.21-
p.9,1.35

20 P.W.2 and P.W.3 substantially corroborated the evidence of the Plaintiff, each of them testifying that they were walking abreast on the grass verge about 12 feet behind the Plaintiff when they heard the sound of a motor-cycle coming from behind. P.W.2 said that the motor cycle grazed him causing him to fall down and that in jumping to his left he knocked into P.W.3 who also fell on the grass verge. P.W.3 confirmed that P.W.2 on being grazed by the motor-cycle fell on him causing him to fall into the earthen drain nearby.

p.9,1.36-
p.11

30 6. At the close of the Plaintiff's case, Defence Counsel asked for an adjournment because the Defendant was absent. The case was adjourned to 23rd February 1971, on which date Defence counsel informed the court that he could not trace the Defendant and was unable to produce any witnesses for the Defence. In his submissions however, he relied on certain documents put in in the agreed bundle, namely:

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- 40 (a) A police report made by the Defendant shortly after the accident;
- (b) A sketch plan showing a long scratch mark near to the left edge of the road;
- (c) A photograph showing a basket and some cakes lying scattered about on the same side of the road.

In his report to the police, the Defendant stated that he was riding his motor-cycle at a speed of 25 mph when he noticed three children in front of him about 30 yards away crossing the road from left to right.

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He then applied his brakes but the children suddenly walked back to the left side of the road. He therefore swerved to the left and in doing so knocked into one of the children. As a result of the accident he fell forward on the road and the boy fell on the grass verge.

p.13,11.29-33

7. On the 23rd February, 1971 the learned trial judge found the Defendant wholly to blame for the accident and awarded \$32,000 general damages, \$1,000 special damages and costs.

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8. On the 14th April 1971, the learned judge gave the grounds of his judgment. He related the evidence given by the Plaintiff and his witnesses and what the Defendant said in his police report, then held, it is submitted correctly, as follows:

p.16,1.44-
p.17,1.31

"The defendant's account of the accident as related in his report was highly improbable because it was unlikely that the three children would have crossed back the road immediately after they had crossed it. Further, if the defendant had been travelling at the speed of 25 mph and had applied brakes before the children crossed back I failed to see how he could have knocked into the Plaintiff unless he was negligent. The injuries suffered by the Plaintiff as a result of the accident were a fracture to his right leg and a laceration on his forehead and that would appear to be consistent with the version given by the Plaintiff that he was knocked from behind and falling forward rather than with the Defendant's report that the Plaintiff was knocked while back to the left side of the road meaning that he was knocked on the left side.

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Moreover, in addition to the evidence of the Plaintiff and his two witnesses, the court had also the opportunity of scrutinising the sketch plan and photographs included in the agreed bundle of documents. From the scratch mark shown in the sketch plan it was apparent that it was made by the motor-cycle. The position of the scratch mark as well as the positions of the basket and cakes shown in the sketch plan and in the photographs tended to indicate that the accident took place at that point somewhere very near the left edge of the road - either on the grass verge or on the road. The road was also clear of traffic at the time

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of the accident and if the defendant had not been negligent the accident obviously would not have occurred. I therefore found that the accident was wholly due to the negligence of the Defendant."

10 The learned judge then referred to the injuries suffered by the Plaintiff, to the amputation of his right leg and the subsequent treatment he received in hospital. He said that it was evident that the Plaintiff must have been in severe pain and suffering, and moreover, for life had to suffer the loss of normal amenities of life due to the amputation of his leg. Having regard to the amount of awards by the Courts of Malaysia for similar types of injuries he awarded the Plaintiff \$32,000 towards general damages.

p.17,1.35-
p.18

9. The Defendant appealed to the Federal Court on grounds which substantially challenged the trial judge's findings of fact. It was also contended that the amount of \$32,000 was excessive.

pp.19-21

20 10. The Federal Court (Ong, C.J. dissenting) dismissed the appeal on the 9th July 1971.

30 In his dissenting judgment, Ong, C.J. took the view that in this case an appellate court is in as good a position as the trial judge to draw its own conclusions from the primary undisputed facts. He said that he had no hesitation in saying that the learned trial judge was wrong, in particular on the basis that it was not open for him to find that the accident took place near the left edge of the road, because the Plaintiff's case was that the accident did happen on the grass verge. He concluded his judgment by saying "Having considered all the circumstances all I need say is that I should have allowed the appeal with costs and apportioned the blame so that it is shared equally."

p.31,1.29-
p.33

11. The Respondent respectfully submits that the judgment of Ong, C.J. is wrong because:

- 40 (a) the learned Chief Justice should not have interfered with the findings of fact made by the trial judge;
- (b) the learned Chief Justice erred in saying that it was not open to the trial judge to find that the collision took place on the road.

What the learned judge did in fact say is that the

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sketch plan, scratch mark and photographs "tended to indicate that the accident took place at the point somewhere very near the left edge of the road - either on the grass verge or on the road." It is submitted that what the learned judge was saying, it is submitted correctly, is that whether the collision took place on the grass verge or on the road very near to the grass verge - the Defendant was negligent and fully to blame.

p. 37, 11. 33-39 12. In his judgment, Gill, F.J. reviewed the evidence and findings of the trial judge and concluded "whatever flaws one may be able to find in the judge's reasoning, and speaking for myself I cannot say that I can find any, there can be no doubt whatsoever that the Plaintiff had established a prima facie case of negligence on the part of the Defendant, which was not rebutted by any evidence before him". 10

The learned judge then dealt with the grounds of appeal and concluded his judgment as follows: 20

p. 38, 1. 46-39, 1. 12 "To sum up on the question of liability, it would seem clear that the judgment appealed from was based almost entirely on findings of fact and that it is not open to this court to set aside such findings of fact. I would therefore dismiss the appeal as regards liability.

As regards quantum, the Plaintiff suffered injuries on his forehead and the right leg which had to be amputated at the knee. The sum awarded to him as general damages is by no means against the general trend of awards in similar cases or inordinately high. The appeal against quantum therefore must also fail." 30

p. 42, 11. 13-16 13. Ali, F.J. also reviewed the evidence and findings of the learned trial judge. He concluded "speaking for myself I can find no reason for interfering with the trial court's finding of fact, so far as it was based on the oral evidence of the Plaintiff and his witnesses". He then referred to the Defendant's police report and sketch plan and said "putting it at its lowest, even if this case has to be decided on the balance of probability, the learned trial judge, on the materials before him, was entitled to conclude that the appellant was wholly to blame for the accident". With regard to the police report, Ali F.J. held that though it was admissible by reason of section 35 40

p. 42, 11. 25-30

p. 42, 1. 32-p. 44

of the Evidence Ordinance, it was not substantive evidence of the fact that the Plaintiff was knocked down while crossing the road. The report was clearly hearsay evidence. The learned judge referred to the rule against hearsay and certain cases thereon and concluded his judgment as follows:-

"Upon any view, therefore the appellant's appeal on the question of liability must fail.

10 As regards quantum, counsel for the appellant has submitted that the award of \$32,000.00 as general damages was excessive and against the trend of awards for similar cases. From the authorities cited, the awards in similar cases do not seem to be so substantially different from the award in this case as to enable me to say that it is inordinately high. On this question too, the appeal fails".

14. The Respondent respectfully submits that this appeal should be dismissed with costs for the following among other
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R E A S O N S

1. BECAUSE there were concurrent findings of fact in the Respondent's favour in the courts below.
2. BECAUSE the said concurrent findings of fact are right on the evidence.
3. BECAUSE the trial judge and majority judges in the Federal Court were right in holding that the accident was wholly due to the negligence of the Appellant.
- 30 4. BECAUSE the trial judge was right in awarding \$32,000 general damages and Gill F.J. and Ali F.J. were right in confirming that award.
5. BECAUSE Ali F.J. was right in holding that the police report was not substantive evidence and constituted hearsay.
6. BECAUSE the judgment of Ong, C.J. is wrong.

EUGENE COTRAN

No.12 of 1972

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

ON APPEAL FROM THE FEDERAL
COURT OF MALAYSIA

B E T W E E N :

WONG THIN YIT
(Defendant) Appellant

- and -

MOHD ALI bin
P.S. ISMAIL
(Suing as an infant
through his father
and next friend
Abdul Rahman s/o
Syed Ibramshah)
(Plaintiff) Respondent

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