

Judgment

21

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

No. 12 of 1972

O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA

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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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RECORD OF PROCEEDINGS

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

WILSON FREEMAN,  
6/8 Westminster Palace Gardens,  
London, SW1P 1RL.

Solicitors for the Appellant

COOPER, BAKE, FETTES, ROCHE  
& WADE,  
6 & 7 Portman Street,  
London, W1H 0BA.

Solicitors for the Respondent

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)

10

Respondent

RECORD OF PROCEEDINGS

No. 1

In the High  
Court

Generally Indorsed Writ

No. 1

IN THE HIGH COURT IN MALAYA AT IPOH

CIVIL SUIT NO. 205 OF 1970

Generally  
Indorsed Writ  
20th May 1970

BETWEEN

Mohd. Ali bin P.S. Ismail,  
(suing as an Infant through  
his father and next friend  
Abdul Rahman s/o Syed Ibramshah)  
No. 11 Jalan Tokong,  
Kampar.

... Plaintiff

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AND

Wong Thin Yit,  
No. 24 Jalan Gopeng,  
Kampar.

... Defendant

GENERALLY INDORSED WRIT

THE HONOURABLE TAN SRI ONG HOCK THYE, P.S.M.,  
D.P.M.S., Chief Justice of the High Court of  
Malaya, in the name and on behalf of His Majesty

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In the High Court

No. 1

Generally Indorsed Writ  
20th May 1970

(continued)

the Yang di-Pertuan Agong.

To: Mr. Wong Thin Yit,  
No. 24 Jalan Gopeng,  
Kampar.

WE COMMAND You, that within eight days after service of this Writ on you, inclusive of the day of such service you do cause an appearance to be entered for you in an action at the suit of Mohd. Ali bin P.S. Ismail (suing as an infant through his father and next friend Abdul Rahman s/o Syed Ibramshah) of No. 11 Jalan Tokong, Kampar.

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AND TAKE NOTICE that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

WITNESS, Nik Mohamed bin Nik Yahya Senior Assistant Registrar of the High Court in Malaya, this 20th day of May, 1970

Sgd. Bala & Co.  
Plaintiff's Solicitors

Sgd: Nik Mohamed bin Nik Yahya  
Senior Assistant Registrar,  
High Court, Malaya, Ipoh. 20

N.B. This Writ is to be served within twelve months from the date thereof, or if renewed, within six months from the date of last renewal, including the day of such date, and not afterwards.

The Defendant (or Defendants) may appear hereto by entering an appearance (or appearances) either personally or by Solicitor at the Registry of the High Court in Malaya at Ipoh.

A Defendant appearing personally may, if he desires enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for \$3.00 with an addressed envelope to the Registrar of the High Court in Malaya at Ipoh.

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The Plaintiff's claim is for injuries and losses suffered by the Plaintiff as a result of an accident caused by the negligence of the Defendant who knocked the Plaintiff from the rear with his motor cycle No. AJ 8007 on the 21st February, 1969

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3.

and as a result of which the Plaintiff's right leg was amputated above the knee.

In the High Court

Dated this 8th day of May, 1970.

No. 1

(Sgd.) Bala & Co.  
Plaintiff's Solicitors

Generally  
Indorsed Writ  
20th May 1970

(continued)

This Writ is issued by M/s Bala & Co., whose address for service is at Room 305, 2nd Floor, East Asia Building, No. 17 Kylene Street, Kuala Lumpur. Solicitors for the Plaintiff(s) who resides at No. 11 Jalan Toking, Kampar.

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THIS WRIT was served by me at on the Defendant on the day of 1970 at the hour of

INDORSED this day of 1970

(Signed)

(Addressed)

No. 2

No. 2

STATEMENT OF CLAIM

Statement of  
Claim  
8th May 1970

1. The Plaintiff is an infant suing by his father and his next friend whose place for service is No. 11 Jalan Tokong, Kampar, Perak.

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2. The Defendant is the owner and driver of motorcycle No. AJ 8007. His address for service is No. 24 Jalan Gopeng, Kampar, Perak.

3. On the 21st February 1969 the Plaintiff was knocked down by the motorcycle driven by the Defendant from the rear and as a result of the accident, the Plaintiff's right leg was amputated above the knee.

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4. The said accident was caused due to the negligence of the Defendant.

5. PARTICULARS OF NEGLIGENCE

(a) Failing to keep any or any proper look out;

In the High  
Court

No. 2

Statement of  
Claim

8th May 1970

(continued)

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

6. PARTICULARS OF SPECIAL DAMAGE 10

(a) Transport expenses to and from Ipoh Hospital and Home at \$4/- per day for 23 days	\$92.00	
(b) Cost of torn clothings and nourishing food	\$380.00	
(c) Expenses incurred in attending Hospital after discharge	\$ 40.00	
(d) Expenses incurred in travelling to Kuala Lumpur General Hospital to fix artificial limb	\$ 55.00	
(e) Cost of artificial limb	<u>\$1500.00</u>	20
Total :-	<u>\$2067.00</u>	

7. PARTICULARS OF INJURIES

Medical Report by Dr. S. Appu,  
Orthopaedic Unit, General Hospital,  
Ipoh dated the 7th March, 1970.

On Exam: General Condition - Poor  
In coma

- Injuries: (1) 3" laceration over the forehead
- (2) Crush injury right leg - involving the bones, and all other structures of the right leg. 30

The patient had to undergo a through right knee

5.

amputation of right leg in view of injury (2).

The patient was discharged on 6.4.1969 from the ward and followed up as an out-patient.

Subsequently, the patient had to have right patelelectomy done on 21/5/69 and discharged from the ward on 10/6/69.

10 On 8/7/69 he was referred to the Superintendent of Artificial Limb Centre, General Hospital, Kuala Lumpur for a right through knee artificial leg and pair of shoes.

8. And the Plaintiff claims damages.

Wherefore the Plaintiff prays for judgment for the following:-

- 20 (a) General Damages;  
(b) Special Damages;  
(c) Interest from the date of accident until realisation;  
(d) Cost of this suit;  
(e) Such other right or relief the Court deems fit.

Dated this 8th day of May, 1970.

(Sgd.) Bala & Co.

Plaintiff's Solicitors

This Statement of Claim is filed by Messrs. Bala & Co., Advocates & Solicitors on behalf of the abovenamed Plaintiff whose address for service is at Room 305 2nd Floor, East Asia Building, No. 17 Klyne Street, Kuala Lumpur.

30 No. 3

STATEMENT OF DEFENCE

IN THE HIGH COURT IN MALAYA AT IPOH

CIVIL SUIT NO. 205 of 1970

BETWEEN

In the High Court

                      
No. 2

Statement of Claim  
8th May 1970  
(continued)

No. 3

Statement of Defence  
17th June 1970

In the High  
Court

No. 3

Statement of  
Defence  
17th June 1970  
(continued)

Mohd. Ali bin P.S. Ismail,  
(suing as an Infant through  
his father and next friend  
Abdul Rahman s/o Syed Ibramshah)  
No. 11 Jalan Tokong,  
Kampar. ...

Plaintiff

and

Wong Thin Yit,  
No. 24 Jalan Gopeng,  
Kampar. ...

Defendant 10

STATEMENT OF DEFENCE

1. The Defendant has no knowledge of the facts averred to in paragraph 1 of the Statement of Claim.
2. The Defendant admits paragraph 2 of the Statement of Claim.
3. Save that it is admitted that a collision took place on the date and place specified between the Defendant's motor-cycle and the Plaintiff, paragraph 3 of the Statement of Claim is denied. The Defendant avers that the said collision was caused solely and/or contributed to entirely by the negligence of the Plaintiff. 20
4. The Defendant denies that he was negligent as alleged in paragraph 4 of the Plaintiff's Statement of Claim or at all and save as aforesaid the Defendant denied each and every allegation in the Particulars of Negligence as set out in paragraph 5 of the Statement of Claim.

PARTICULARS OF NEGLIGENCE OF PLAINTIFF

- (a) Failed to keep any or any proper look out or at all; 30
- (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 the said motor-cycle without taking any measure whatsoever to ensure that it was safe for him to do so;

In the High Court

                      
No. 3

Statement of  
Defence  
17th June 1970

(continued)

(f) Failed to remain at the edge of the road and allow the Defendant the free ~~excess~~ (sic) of his right of way;

10 (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.

5. Paragraph 6 of the Statement of Claim is denied and the particulars of special damage referred to therein are denied and the Plaintiff is put to strict proof thereof.

20 6. Paragraph 7 of the Statement of Claim is denied and the particulars of Injuries referred to therein are denied and the Plaintiff is put to strict proof thereof.

7. Paragraph 8 of the Statement of Claim is denied and the Plaintiff is put to strict proof of damages stated therein.

Save and except as is hereinbefore expressly admitted each and every averment in the Statement of Claim is denied as if set out and traversed seriatim.

And the Defendant prays that this suit be dismissed with costs.

30 Dated this 17th day of June, 1970.

Sgd.: Shearn Delamore & Co.  
Solicitors for the Defendant

This Statement of Defence is filed by M/s Shearn Delamore & Company and Drew & Napier, Solicitors for the Defendant whose address for service is at No. 2 Benteng, Kuala Lumpur.



8.

No. 4

In the High Court

PROCEEDINGS

No. 4

Thursday, 21st January, 1971

Proceedings  
21st January  
1971

Ipoh Civil Suit No. 205 of 1970

Mohd. Ali bin. P.S. Ismail,  
(suing as an Infant through  
his father and next friend,  
Abdul Rahman s/o Syed Ibramshah) ... Plaintiff

and

Wong Thin Yit ... Defendant 10

Mr. K. Balakrishnan with Mr. Ram for plaintiff.

Mr. Ronald Khoo for defendant.

Mr. Balakrishnan and Mr. Ronald Khoo report that both parties agreed that the special damages amount to \$1,000.

By consent "Agreed Bundle of Documents" put in and marked exhibit "A".

No. 5

No. 5

Plaintiff's Evidence

Plaintiff's Evidence  
Mohd. Ali - Examination

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Mohd. Ali  
Examination

P.W. 1 - Mohd. Ali s/o P.S. Ismail warned to speak the truth states in Tamil:

I am 12 years old and I live at No. 128 S.E.K. labour quarters along the Degong/Teluk Anson Road.

On 21/2/1969 at about 9.00 a.m. I was selling cakes and I was walking along Degong/Teluk Anson Road. I was walking on the correct side of the road. I was walking on my correct side of the road and proceeding towards the direction of Teluk Anson. I was in fact walking on the grass verge about 2 feet away from the edge of the road.

30

There were two friends with me at that time. They were Kenasegeram s/o Marimuthu (identified) and Kumaran s/o Sinniah (identified). We were going

towards Membang Di-Awan about  $\frac{1}{4}$  mile away. I was ahead of my two friends. They were behind me about 12 feet away. I was not talking to my friends. There were no on-coming vehicles.

In the High Court

No. 5

Plaintiff's Evidence

Mohd. Ali

Examination  
21st January  
1971

(continued)

10 While I was walking on the grass verge I heard the sound of a motor-cycle coming from behind. That motor-cycle knocked me down. As a result I became unconscious. I did not know what happened after that. My friends who were at the back called me by my name and they shouted out to me that a motor-cycle was coming. I turned round to see it but before I could see the motor-cycle it knocked me from behind. It was when I was about to turn round that the motor-cycle knocked into me.

I did not run across the road. I also did not make any attempt to cross the road at any time. My friends also did not try to cross the road. I did not hear the motor-cycle tooting its horn.

20 XXD: When I was knocked down by the motor-cycle I was on the grass verge. I still maintain that I was walking on the grass verge all the time. It was a very wide grass verge. It was also a wide road. Before I heard the sound of the motor-cycle there was no other vehicle on the road either from the front or from the rear. The incident happened in between a double bend.

Cross-examination

30 When the motor-cycle hit me I was on the grass verge about 2 feet from the edge of the road. I am not in a position to say what part of the motor-cycle hit me, I agree that the motor-cycle must also have been on the grass verge when it hit me. My two friends behind me were also on the grass verge.

I deny that I tried to run across the road. The collision did not take place on the road.

Re-Xd: Nil.

No. 6

P.W.2 - Kunasegeram s/o Marimuthu, 13 years old, does not understand the nature and meaning of an oath, warned to speak the truth states in Tamil:

No. 6  
Kunasegeram  
Examination

40 On 21.2.1969 at about 9.00 a.m. I was in the company of P.W. 1 (identified) and proceeding to a camp which is away from Kampar along Teluk Anson Road. Kumaran s/o Sinniah (identified) was also

In the High  
Court

No. 6

Plaintiff's  
Evidence

Kunasegeram

Examination  
21st January

1971

(continued)

with us. We were going along the lefthand side of the road as one faces from Kampar to Teluk Anson.

I was walking on the grass verge. P.W. 1 was walking ahead of me. Kumaran was abreast with me and he was on my left. I was walking on the grass verge about 2 feet to 2½ feet from the edge of the road. P.W. 1 was about 12 feet in front of me. P.W. 1 was carrying the cakes in a basket on his right shoulder.

While we were walking I heard the sound of a motor-cycle coming from behind. It grazed me, and I fell down. At that time I shouted out to P.W. 1 and as he was about to turn round he was hit by the motor-cycle from behind. P.W. 1 also fell to the ground. I fell to my left on the grass verge. At the time of the accident I was not trying to cross the road.

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Cross-  
examination

XXD: Before this incident there was no traffic on the road either from in front or from behind. I could recognise the sound of the motor-cycle. I did turn round to look at the motor-cycle. When I first saw this motor-cycle it was about 5 feet to 6 feet away. The motor-cycle was then on the road. But the motor-cycle came suddenly on to the grass verge and came straight towards me. So I moved further away but the motor-cycle grazed my leg. Kumaran was then to my left. I jumped to my left and I knocked into Kumaran and he too fell on the grass verge. The rear wheel of the motor-cycle grazed my leg. I still had time to shout out to P.W. 1. I only shouted out P.W. 1's name but before he could turn round the motor-cycle hit him. I agree that all these things happened in a short space of time. P.W. 1 was on the grass verge when the motor-cycle hit him. Even though I fell down I still saw the motor-cycle hit P.W. 1. P.W. 1 fell on the grass verge. The basket which he was carrying also fell on the grass verge. I deny that this accident happened when my friends and I were running across the road. I did not discuss about this case with P.W. 1. The motor-cycle fell on the road after the accident. The cycle came from the road to the grass verge. Then it grazed me and after that it hit into P.W. 1 also on the grass verge and after that the motor-cycle fell on the road.

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RE-XN: Nil.

P.W. 3 - Kumaran s/o Sinniah, 12 years old, does not understand the meaning of an oath, warned to speak the truth, states in Tamil:

In the High Court

No. 7

Plaintiff's Evidence

Kumaran

Examination  
21st January  
1971

I live in S.E.K. Mines in Kampar.

10 On 21.2.69 at about 9.00 a.m. I was in the company of P.W. 1 (identified) and P.W. 2 (identified). We were then going from the direction of Kampar to Membang Di-Awan. We were walking on the grass verge along this road. P.W. 2 was walking abreast with me and he was on my right. P.W. 1 was walking ahead of us about 10 feet to 12 feet away. P.W. 1 was carrying some cakes in a basket on his right shoulder. There was no vehicle coming from the front. Only one motor-cycle came from the rear.

20 First this motor-cycle knocked into P.W. 2 and after that it knocked into P.W. 1. After that the motor-cycle fell on the road. When P.W. 2 was grazed by the motor-cycle he fell on me and I fell into the earthen drain nearby. When P.W. 2 and I got up the motor-cyclist picked up a stone to throw at us and so we ran away.

XXD: The drain I fell into was at the edge of the side table. The side table was wide. I was well inside the side table. The side table was about 4 feet wide.

Cross-examination

30 I only heard the sound of the motor-cycle before it grazed P.W. 2 I did not see it. When I heard the sound of the motor-cycle I did try to turn round to look at it but before I could do so the motor-cycle grazed P.W. 2. After P.W. 2 was grazed by the motor-cycle he shouted out to P.W. 1 by calling out his name and shouting out that a motor-cycle was coming. The front wheel of the motor-cycle knocked into P.W. 2. After that the motor-cycle went along the grass verge and it knocked into P.W. 1. I did not notice what part of P.W. 1 was hit by the motor-cycle.

40 P.W. 1 fell to his left. His basket fell somewhere at the edge of the road, partly on the road and partly on the grass verge. The motor-cycle fell on the grass verge. I deny that this accident happened on the road.

RE-XN: Nil.

In the High  
Court

No. 7  
Plaintiff's  
Evidence

Case for the Plaintiff

Mr. Ronald Khoo asks for an adjournment because the defendant is absent. Mr. Balakrishnan has no objection.

Adjourned to 23rd February 1971 at 9.30 a.m.

Sgd.: Pawan Ahmad.  
Judge.

No. 8

Counsel's  
Submissions

No. 8

Counsel's Submissions

Tuesday, 23rd February, 1971

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Ipoh Civil Suit No. 205 of 1970

Parties as before.

Mr. Khoo states that he has not been able to trace the defendant in spite of several attempts to find him. States therefore he is unable to produce any witness for the defence.

Mr. Khoo submits:-

Refers to police report at pages 1 and 2 of exhibit "A".

States that report gives the Defendant's version 20 of the accident and it is entirely different from the version given by the plaintiff.

Refers to sketch plan at page 5 of exhibit "A". States that sketch plan is consistent with defendant's version.

States that there are some discrepancies in the evidence of the plaintiff and his witnesses.

Quantum: Mallal's Digest (3rd Edition)  
Vol.11 p. 502.

(1) Ang Lian Seng v. Teo Kim Geok  
(1964) M.L.J. lix. General damages \$30,000;  
schoolboy 12 years old; amputation above knee.

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(2) Ismail bin Hashim (1964) M.L.J. lix

(3) Jag Singh v. Toong Fong Omnibus Co. Ltd.  
(1964) M.L.J. 463 P.C.

In the High  
Court

Interest on damages:

Paragraphs 3592 and 3593 Mallal's Digest  
(3rd Edition) Vol. 11 page 478.

No. 8

Counsel's  
Submissions  
23rd February  
1971  
(continued)

Mr. Balakrishnan replies:

Evidence of plaintiff and his two witnesses  
are consistent except for minor discrepancies.

10 Photographs and sketch plan corroborate the  
version of the plaintiff. There is no brake mark  
on the road to support the defendant's version.

On the question of "highway" refers to The  
County Council of Derby v. The Urban District of  
Marlock Bath and Scarthin Nick (1896) A.C. p. 315.

Refers to definition of "highway" Halsbury  
Laws of England, 3rd Edition, Vol. 19 section 2  
p.12.

On contributory negligence:

Gough v. Thorne (1966) 3 A.E.R. p. 398 at  
p.399.

20 On submission of no case to answer refers to  
Mallal's Rules of Supreme Court Practice p. 436.

Refers to presumption arising from party not  
going into the witness box - Sarkar on Evidence  
11th Edition, p. 999.

On quantum:

(1) Lim Jit Lee v. Ng Kuan (1964) M.L.J. lxx

(2) Chin Boon Deng v. Sri Java Transport Co.  
Ltd. & Anor. (1965) 2 M.L.J. 239.

30 I find the defendant wholly to blame for the  
accident.

I therefore award general damages in the sum  
of \$32,000 and agreed special damages of \$1,000  
and costs.

Sgd.: Pawan Ahmad  
Judge.

14.

No. 9

Order

In the High Court

No. 9

Order  
23rd February  
1971

IN THE HIGH COURT IN MALAYA AT IPOH

CIVIL SUIT NO. 205 OF 1970

BETWEEN

Mohd. Ali bin P.S. Ismail,  
(suing as an Infant through  
his father and next friend,  
Abdul Rahman s/o Syed Ibramshah)  
No. 11 Jalan Tokong,  
Kampar.

... Plaintiff

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And

Wong Thin Yit,  
No. 24 Jalan Gopeng,  
Kampar.

... Defendant

BEFORE THE HONOURABLE MR. JUSTICE PAWAN AHMAD

THIS 23RD DAY OF FEBRUARY, 1971

IN OPEN COURT

O R D E R

UPON HEARING Mr. K. Balakrishnan and Mr. G.S. Ram of Counsel for the Plaintiff and Mr. R.T.S. Khoo of Counsel for the Defendant AND UPON HEARING the Plaintiff and his witnesses and upon this suit being adjourned to the 23rd day of February, 1971 and the same coming up for hearing on that day before Mr. K. Balakrishnan and Mr. G.S. Ram of Counsel for the Plaintiff and Mr. R.T.S. Khoo for the Defendant AND UPON HEARING the submissions of Counsel IT IS HEREBY ORDERED that the Defendant do pay to the Plaintiff the sum of \$32,000 (Dollars Thirty-two thousand only) being general damages together with the sum of \$1,000 (Dollars One thousand only) being agreed special damages, together with interest at the rate of 6% per annum from the date of judgment that is the 23rd day of February, 1971 until the date of realisation AND IT IS LASTLY ORDERED that the Defendant do pay to the Plaintiff the costs of this suit.

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Given under my hand and the seal of this Court

15.

this 23rd day of February, 1971.

Sgd.: Illegible  
Senior Assistant Registrar,  
High Court,  
Ipoh.

In the High  
Court

No. 9

Order  
23rd February  
1971  
(continued)

This Order is filed by Messrs. Bala & Co., Advocates and Solicitors, whose address for service is at Room 305, 2nd Floor, East Asia Building, No. 17 Jalan Klyne, Kuala Lumpur.

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No. 10

No.10

Grounds of Judgment

Grounds of  
Judgment  
14th April 1971

IN THE HIGH COURT IN MALAYA AT IPOH

CIVIL SUIT NO. 205 OF 1970

BETWEEN

20

Mohd. Ali bin P.S. Ismail,  
(suing as an Infant through  
his father and next friend,  
Abdul Rahman s/o Syed Ibramshah)  
No. 11 Jalan Tokong,  
Kampar.

... Plaintiff

AND

Wong Thin Yit,  
No. 24 Jalan Gopeng,  
Kampar.

... Defendant

GROUNDS OF JUDGMENT

30

This was a running down case which took place on 21st February 1969 at about 9.00 a.m. on the Degong/Teluk Anson Road. The Plaintiff alleged that the accident was wholly due to the negligence of the defendant and as a result of the accident the plaintiff suffered several injuries.

The plaintiff was a young boy of about 10 years old at the time to the accident. According to his version, on the day and time in question, he was walking on the correct side of the road along



In the High  
Court

-----  
No.10

Grounds of  
Judgment  
14th April 1971  
(continued)

the grass verge about 2 feet away from the edge of the road. He was proceeding towards the direction of Teluk Anson, and he was carrying on his right shoulder a basket of cakes for sale. Two of his friends, namely P.W. 2 and P.W. 3 were following behind him about 12 feet away. While he was thus walking he suddenly heard the sound of a motor-cycle coming from behind. His two friends also warned him of the motor-cycle approaching from behind. He turned round but before he could do anything the motor-cycle knocked into him from behind and he lost consciousness.

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The Plaintiff's two friends, P.W. 2 and P.W. 3 in short more or less also gave the same version of how the accident occurred. They stated that both of them were also walking on the same grass verge and they were walking abreast about 12 feet behind P.W. 1. The road was clear at first but later they heard the sound of a motor-cycle coming from behind and it grazed P.W. 3 who was on the right and he fell down. At that time he shouted out to P.W. 1 warning him about the said motor-cycle but as P.W. 1 was turning round he was hit by the motor-cycle and he fell to the ground.

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As for the defence case, the defendant failed to turn up to give evidence and nor were witnesses called on his behalf to give evidence. I was therefore only left with his report in the agreed bundle of documents for what it was worth for the purpose of considering the defence case.

30

According to the defendant's report, on the date and time in question he was riding a motor-cycle on his way from Kampar to Landkap. When he came to the scene of the accident he was riding at a speed of 25 mp.h. and he noticed three children in front of him about 30 yards away crossing the road from left to right. He then applied his brakes but the three 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.

40

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 m.p.h. 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.

In the High  
Court

\_\_\_\_\_  
No.10

Grounds of  
Judgment  
14th April 1971  
(continued)

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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 motorcycle. 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 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.

In this case the parties agreed that the special damages be fixed at \$1,000. I had therefore only to consider the amount of general damages.

As a result of the accident the plaintiff was admitted to the orthopaedic unit of the General Hospital, Ipoh, on 21.2.1969 in a coma and suffering the following injuries:-

- (1) 3" laceration over the forehead;
- (2) Crush injury right leg - involving the bones, and all other structures of the right leg.

He had to undergo a through right knee amputation of the right leg and he was discharged from

In the High  
Court

No.10

Grounds of  
Judgment  
14th April 1971  
(continued)

the hospital on 6.4.1969 but had to follow up his treatment as an out-patient. Subsequently, on 21.5.1969 the plaintiff had to have right patelectomy done and he was only discharged from the ward on 10.6.1969. On 8.7.1969 he was referred to the Superintendent, Artificial Limb Centre, General Hospital, Kuala Lumpur, for a right through knee artificial leg and a pair of shoes.

It was evident from the nature of the injuries sustained by the plaintiff and the treatment that followed he must have been in severe pain and suffering and moreover for life had to suffer the loss of the normal amenities of life due to the amputation of his right leg. 10

Having regard to the amount of awards for general damages awarded by the courts of this country for similar types of injuries I awarded the sum of \$32,000 towards general damages.

In the circumstances I gave judgment to the plaintiff and I awarded him \$32,000 towards general damages with \$1,000 towards agreed special damages and also costs. 20

Sgd.: Pawan Ahmad

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Judge,  
High Court.

14th April, 1971

For plaintiff - Enche X Balakrishnan,  
Enche G.S. Ram with him.  
(Bala & Co.)

For defendant - Enche R.T.S. Khoo  
(Shearn Delamore & Co.) 30

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19.

No. 11

Notice of Appeal

In the Federal  
Court

No.11

IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

Notice of  
Appeal  
16th March 1971

CIVIL APPEAL NO. 28 OF 1971

BETWEEN

Wong Thin Yit ... Appellant

And

10 Mohd. Ali bin P.S. Ismail,  
(suing as an infant through  
his father and next friend  
Abdul Rahman s/o Syed Ibrahimshah) ... Respondent

BETWEEN

Mohd. Ali bin P.S. Ismail,  
(suing as an infant through  
his father and next friend  
Abdul Rahman s/o Syed Ibrahimshah) ... Plaintiff

And

Wong Thin Yit ... Defendant

20 NOTICE OF APPEAL

TAKE NOTICE that Wong Thin Yit, the Appellant abovenamed being dissatisfied with the decision of the Honourable Mr. Justice Pawan Ahmad given at Ipoh on the 23rd day of February, 1971 appeals to the Federal Court against the whole of the said decision.

Dated this 16th day of March, 1971

Sgd.: Shearn Delamore & Co.  
Solicitors for the Appellant

30 To: Chief Registrar,  
Federal Court,  
Kuala Lumpur.

In the Federal Court

No.11

Notice of Appeal  
16th March 1971  
(continued)

Senior Assistant Registrar,  
High Court,  
Ipoh.

And to:

The Plaintiff or his Solicitors,  
Bala & Co.,  
East Asia Building,  
17 Klyne Street,  
Kuala Lumpur.

The address for service of the Appellant is  
Messrs. Shearn Delamore & Company, No. 2 Benteng,  
Kuala Lumpur.

10

No.12

Memorandum of Appeal  
26th April 1971

No. 12

Memorandum of Appeal

IN THE FEDERAL COURT OF MALAYSIA  
(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 28 OF 1971

BETWEEN

Wong Thin Yit

...

Appellant

And

20

Mohd. Ali bin P.S. Ismail,  
(suing as an infant through  
his father and next friend,  
Abdul Rahman s/o Syed Ibramshah) ...

Respondent

(In the Matter of Ipoh High Court  
Civil Suit No. 205 of 1970)

BETWEEN

Mohd. Ali bin P.S. Ismail,  
(suing as an infant through  
his father and next friend,  
Abdul Rahman s/o Syed Ibramshah) ...

Plaintiff

30

And

Wong Thin Yit

...

Defendant)

MEMORANDUM OF APPEALIn the Federal  
Court

No.12

Memorandum  
of Appeal  
26th April 1971  
(continued)

The Appellant, Wong Thin Yit abovenamed appeals to the Federal Court against the whole of the decision of the Honourable Justice Pawan Ahmad given at Ipoh on the 23rd February 1971 on the following grounds:-

- 10 1. The learned trial judge, having found as a fact that the Plaintiff was walking on the grass verge and that the scratch mark as shown in the sketch plan belonged to the plaintiff's motor-cycle, erred in holding that the accident could have happened on the grass verge.
2. The learned trial Judge having found as a fact that the scratch mark on the sketch plan was made by the Defendant's motor-cycle and having regard to the Police photographs of the scene of the accident erred in holding the defendant solely liable for the accident.
- 20 3. The learned trial Judge erred in dismissing the defendant's account of the accident as highly improbable in the light of the evidence which was before him.
4. The learned trial Judge erred in concluding that injuries sustained by the plaintiff were consistent with the plaintiff's version of the facts that he was knocked from behind.
- 30 5. Having found as a fact that the road on which the defendant was travelling was clear of traffic, the learned trial Judge erred in concluding that the defendant was wholly responsible for the accident.
6. The learned trial Judge failed to consider the probability and possibility of contributory negligence on the part of the plaintiff.
7. The learned trial Judge awarded a sum of \$32,000/- as general damages, this award was in the circumstances excessive and against the trend of awards for the injuries the plaintiff sustained.

Dated this 26th day of April 1971

Shearn Delamore & Co.  
Solicitors for the Appellant

In the Federal Court

No.12

Memorandum of Appeal  
26th April 1971  
(continued)

To:

1. Chief Registrar,  
Federal Court of Malaysia,  
Kuala Lumpur.
2. Senior Assistant Registrar,  
High Court,  
Ipoh.
3. The Respondent, or his Solicitors,  
Bala & Co.,  
East Asia Building,  
17 Klyne Street,  
Kuala Lumpur.

10

The address for service of the Appellant is Shearn Delamore & Company, No. 2 Benteng, Kuala Lumpur.

No.13

Notes of Argument of Ong, C.J.  
7th June 1971

No. 13

Notes of Argument of Ong, C.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR  
(Appellate Jurisdiction)

Federal Court Civil Appeal No. 28 of 1971

20

BETWEEN

Wong Thin Yit ... .. Appellant

and

Mohd. Ali bin P.S. Ismail  
(suing as an infant through his father and next friend Abdul Rahman s/o Syed Ibramshah) ... Respondent

(In the matter of Ipoh High Court Civil Suit No. 205 of 1970

BETWEEN

Mohd. Ali bin. P.S. Ismail  
(suing as an infant through his father and next friend Abdul Rahman s/o Syed Ibramshah) Plaintiff

30

Wong Thin Yit and Defendant)

In the Federal  
Court

No.13

Cor: Ong, C.J.  
Gill, F.J.  
Ali, F.J.

Notes of  
Argument  
of Ong, C.J.  
7th June, 1971  
(continued)

NOTES OF ARGUMENT RECORDED BY ONG, C.J.

Monday, 7th June, 1971.

Ronald Khoo for applt.

K. Balakrishnan with G.S. Ram for respt.

10 Khoo: deft. didn't appear; but trial judge didn't bear in mind.

p.23F - starting p.22G.

Pltf. & witnesses - state they were on grass verge all the time.

Contradiction by sketch plan, p.36.

43 - photographs.

Submit - if pltf's evidence true - accident could not have happened - case of contributory negligence.

20 Quantum: \$32,000 for knee amputation - submit \$25,000 to \$40,000.

Mallal's Digest Vol. 2 - Govindasamy's case \$20,000 + \$25,000 loss of earnings.

Bala: Grd. I - accident on grass verge.

cf. p.23E

p.24A - med. report.

Grd. II - scratch.

(1966) 2 M.L.J. 149  
(1966) 3 A.E.R. 398.

30

C.A.V.

Sgd. H.T. Ong



In the Federal Court

Friday, 9th July, 1971

No.13

Notes of Argument of Ong, C.J. 9th July, 1971 (continued)

Ronald Khoo for appellant.

G.S. Ram for respondent.

Ali reads 1st judgment dismissing appeal.

Gill reads 2nd judgment dismissing appeal.

The appeal dismissed with costs. The deposit to respt. to a/c taxed costs.

Sgd. H. T. Ong

7th September 1971

Tuesday, 7th Sept. 1971

R. Khoo for applt.

10

Balakrishnan for respt.

Conditional leave on usual terms - \$5,000/- etc. Costs in the cause.

By consent - amount of the award of damages to be paid to the P.T. - with liberty to g-a-l to apply for withdrawals from time to time for the benefit of the infant.

Sgd. H. T. Ong

25.

No. 14

Judgment of Ong C.J.

In the Federal  
Court

                      
No.14

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA  
LUMPUR  
(Appellate Jurisdiction)

Judgment of  
Ong C.J.  
9th July 1971

Federal Court Civil Appeal No. 28 of 1971

BETWEEN

Wong Thin Yit ... Appellant

and

10 Mohd. Ali bin P.S. Ismail  
(suing as an infant through  
his father and next friend  
Abdul Rahman s/o Syed Irbamshah) ... Respondent

(In the matter of Ipoh High Court Civil Suit  
No. 205 of 1970

BETWEEN

20 Mohd. Ali bin P.S. Ismail  
(suing as an infant through  
his father and next friend,  
Abdul Rahman s/o Syed Ibramshah) ... Plaintiff

and

Wong Thin Yit ... Defendant).

Cor: Ong, C.J.  
Gill, F.J.  
Ali, F.J.

JUDGMENT OF ONG, C.J.

30 At about 9 a.m. on February 21, 1969 three  
small Tamil boys were on a lonely stretch of the  
Kampar-Teluk Anson Road when one of them was  
knocked down by a motor-cycle driven by the  
defendant. His right leg was fractured and had to  
be amputated at the knee. Suing by his father, he  
was awarded damages by the High Court at Ipoh on  
the ground that the accident was entirely due to  
the negligence of the defendant. The object of

In the Federal  
Court

this appeal is to seek apportionment of blame  
between the parties.

No.14

Judgment of  
Ong, C.J.  
9th July 1971  
(continued)

The defendant as well as the Tamil boys were proceeding in the same direction. The road was 18 feet wide and clear of other traffic. The plaintiff's case was that he was walking 2 feet away from the left edge of the road, along the grass verge - as were his two friends following about 12 feet behind him - when the defendant came on to the grass and knocked him down. He and his friends were positive that they were 2 feet inside the grass verge when the accident occurred.

10

The defendant's insurers, who defended the case on behalf of their assured, were unable to produce him at the trial to give evidence on his own behalf. His disinterest in the matter hardly needs explanation. The case is, in my view, indistinguishable from that where the defendant is unable to defend himself because he is dead. The court in such event applies a wise and salutary rule. As Isaac J. put it in *Plunkett v. Bull*:<sup>(1)</sup>

20

"..... in cases of this sort the Court scrutinizes very carefully a claim against the estate of a deceased person. It is not that the Court looks on the plaintiff's case with suspicion and as prima facie fraudulent, but it scrutinizes the evidence very carefully to see whether it is true or untrue."

See also Hill v. Wilson:<sup>(2)</sup> In re Garnett:<sup>(3)</sup>  
Lachmi Parshad v. Maharajah Narendro Kishore Singh Bahadur <sup>(4)</sup>

30

In a negligence action the onus of proof rests wholly on the plaintiff, whether or not the defendant gives evidence. The plaintiff cannot succeed without proof of the defendant's negligence. "Evidence is the foundation of proof, with which it must not be confounded. Proof is that which leads to a conclusion as to the truth or falsity of alleged facts

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- (1) 19 C.L.R. 544, 548  
(2) 8 Ch. App. 888.  
(3) 31 Ch. D. 1.  
(4) L.R. 19 I.A. 9

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which are the subject of inquiry. Evidence, if accepted and believed, may result in proof, but it is not necessarily proof of itself." : see 15 Halsbury (3rd Ed.) p.260.

In the Federal  
Court

            
No.14

Judgment of  
Ong C.J.  
9th July 1971  
(continued)

10 In the instant case there was no ambiguity in the plaintiff's evidence as to where he was when he was knocked down. He was "in fact walking on the grass verge about 2 feet away from the edge of the road". But was his evidence accepted as proof of the allegation? I think not. As Ali F.J. just stated in his judgment, the learned trial judge "was not, however, altogether satisfied that the collision occurred on the grass verge as stated by the plaintiff's witnesses." And Gill F.J. says:

20 "The first ground of appeal is that the learned trial judge erred in holding that the accident could have happened on the grass verge. The short answer to that is that the learned trial judge did not say categorically that the accident happened on the grass verge. The finding of fact which he made was that the accident took place at a point somewhere near the left edge of the road."

30 If the judge did accept the evidence of the plaintiff and his witnesses, he should have said so in the plainest of terms, instead of leaving us to guess what he did find as a fact. The plaintiff was either 2 feet inside the grass verge, as he claimed, or he must have been on the road. And yet the judge was unable to "say categorically that the accident happened on the grass verge". In my view, therefore, it is clear enough that he was not satisfied as to the truthfulness of the plaintiff or his witnesses.

It is equally clear to me, from his grounds of judgment, that under the circumstances he relied mainly on the sketch plan and photographs in the agreed bundle of documents as supporting the plaintiff's case. He said as follows:

40 "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

In the Federal  
Court

          
No.14

Judgment of  
Ong, C.J.  
9th July 1971  
(continued)

that the accident took place at a point  
somewhere very near the left edge of the  
road - either on the grass verge or on the  
road."

When pronouncing judgment on February 23, 1971  
it seems to me that the judge must have done so on  
the assumption that the motor-cycle went into the  
grass verge, as the plaintiff averred. If that were  
true, the defendant was of course entirely to blame.  
But when the judgment later came to be written on 10  
April 14, after necessary scrutiny of the plan and  
photographs, it is clear that the judge was no  
longer as satisfied that the accident happened  
inside the grass verge. Only a modified version  
of the plaintiff's story would avoid a conflict with  
the mute testimony of the plan and photographs.  
Accordingly the judge was forced to the conclusion  
that the accident might well have happened on the 20  
road, though close to its edge, however stoutly the  
plaintiff and his witnesses maintained the contrary.  
With the greatest respect, I do not think that the  
learned trial judge was entitled, in disregard of  
the evidence, to state the plaintiff's case in a way  
which the plaintiff himself never did or attempted  
to do.

The judge had found as a fact that the scratch  
marks on the road were made by the motor-cycle. At  
"K" on the sketch plan, where the mark started, the  
distance from the edge of the road was 1 foot 8  
inches and at "S" 1 foot 10 inches away. Between 30  
"K" and "S", a distance of 40 feet, was the basket  
carried by the plaintiff, lying 2 feet 10 inches  
from the grass. There was evidence of the police  
sergeant that broken glass from the motor-cycle  
headlamp was found scattered on the road surface in  
addition to the cakes contained in the basket, which  
are also visible in the photographs. There were no  
signs of the motor-cycle hitting the plaintiff on  
the grass verge. (The police officer's evidence 40  
put in by consent is, in my opinion, admissible  
under section 33 of the Evidence Ordinance).

The scratch mark could only have been made by  
the footrest after the motor-cycle fell on its side,  
The photograph "E" shows the right footrest neither  
damaged nor bent. Its height above ground could not  
have been more than 10 inches. Hence, assuming that  
the mark was made by the left footrest, the motor-  
cycle, as it fell, must have been more than 1 foot

8 inches from the grass. In any event, whether it was the left or right footrest which made the mark, the motor-cycle clearly fell on the road and continuing to proceed, while on its side, in a straight line.

In the Federal  
Court

\_\_\_\_\_  
No.14

Judgment of  
Ong, C.J.  
9th July 1971  
(continued)

10 Here I should observe that I am not forgetting the fact that the motor-cycle fell after colliding with the plaintiff and the point of impact must naturally have been somewhere before one comes to "K". Could this point of impact have been on the grass or on the road? The line of the scratch, if projected backwards from "S" beyond "K", would still be on the road and gives some clue to the point of impact. Of more significance still is the fact that the scratch mark was parallel to the edge of the road. An inanimate object propelled forward moves along a definite path in accordance with physical laws. Had the path of the scratch been a curve, it should continue as a curve unless the object on its course was deflected by a heavier or immovable object. Now, what was the path alleged to have been followed by the motor-cycle before and after the collision? Kunasegeram, the oldest boy who was 12 at the time of the accident and the plaintiff's own witness, said as follows:-

20

30 "Before this incident there was no traffic on the road either from in front or from behind. I could recognise the sound of the motor-cycle. I did turn round to look at the motor-cycle. When I first saw this motor-cycle it was about 5 feet to 6 feet away. The motor-cycle was then on the road. But the motor-cycle came suddenly on to the grass verge and came straight towards me. So I moved further away but the motor-cycle grazed my leg. Kumaran was then to my left. I jumped to my left and I knocked into Kumaran and he too fell on the grass verge. The rear wheel of the motor-cycle grazed my leg. I still had time to shout out to P.W. 1. I only shouted out P.W. 1's name but before he could turn round the motor-cycle hit him. I agree that all these things happened in a short space of time. P.W. 1 was on the grass verge when the motor-cycle hit him. Even though I fell down I still saw the motor-cycle hit P.W. 1. P.W. 1 fell on the grass verge. The basket

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In the Federal  
Court

No.14

Judgment of  
Ong, C.J.  
9th July 1971  
(continued)

which he was carrying also fell on the grass verge. I deny that this accident happened when my friends and I were running across the road. I did not discuss about this case with P.W. 1. The motor-cycle fell on the road after the accident. The cycle came from the road to the grass verge. Then it grazed me and after that it hit into P.W. 1 also on the grass verge and after that the motor-cycle fell on the road."

10

Remembering that this witness was about 12 feet behind the plaintiff, the motor-cycle according to him, must have mounted the grass verge at a tangent from the road, then travelled far enough on the grass to hit the plaintiff and finally regained the road. This curve or arc was a fairly tight one, in which case one should have expected the motor-cycle, now out of control, to follow the path of the curve across the road. Could it have made a straight line from "K" to "S"? I think not.

20

In my opinion, Kunasegeram told a cock-and-bull story in the evidence I have just quoted. The events he described did not take place in slow motion. Hence, in the fraction of a second that the motor-cycle travelled some 20 feet he could not have had time to shout a warning, as the plaintiff also said he did. In this connection I think the warning shouts of the boys to one another suggest a more plausible explanation. Ordinarily neither children, nor adults for that matter, call one another's attention to every passing vehicle. Hence I ask myself: why did they have to do so in this case unless the situation was unusual in that they were in danger themselves? If it was true that all three boys were well off the road when the motor-cycle was approaching, the occasion certainly called for no remarks. Why then should this particular vehicle have evoked from them shouts of warning? Unless, it seems to me, they were where they ought not to be - crossing the road in the path of an oncoming vehicle.

30

40

That was the defendant's explanation. Its rejection in favour of the plaintiff's story in toto means in effect that the defendant, an ordinary man, for no rhyme or reason, who had no cause for losing control of his motor-cycle, must then have

deliberately driven his machine at the boys, knowing that he was liable to cause serious injury not only to them but also to himself and damage to his motor-cycle. I cannot accept any such theory. If such was not the case, what were the probabilities?

In the Federal  
Court

\_\_\_\_\_  
No.14

Judgment of  
Ong, C.J.  
9th July 1971  
(continued)

10 I now turn to the defendant's own story. Was there any improbability at all in children straying onto the road - especially in play? He said he saw the children going across and suddenly turning back: he braked, took evasive action but unfortunately failed to avoid collision with one boy. And, if it was true that the boys were walking along the road-  
20 side, as they had every right to do, why was it necessary for them to conceal that fact and assert that they were inside the grass verge? Even so, why should the defendant have run into them any more than the other pedestrians whom he encountered on the way from Kampar? As to the injury to the plaintiff's right leg, it is true that if he had  
30 turned his left side towards the motor-cycle when attempting to go back to the roadside, his left leg should have been exposed to the impact. But the fact that his right leg was fractured is far from conclusive, since the injury would depend upon the position of his body vis-a-vis the motor-cycle, as to which there are several possibilities. So I do not think the nature of the plaintiff's injuries affects the issue.

30 In this case I am of opinion that an appellate court is in as good a position as the trial judge to draw its own conclusions from the primary undisputed facts: see Benmax v. Austin Motor Co. Ltd.<sup>(5)</sup> I do not think it is correct to assume, as a matter of course, that because the trial judge had seen and heard the witnesses, he must necessarily be right. In my opinion, even where he has been impressed by the demeanour of certain witnesses, the appellate court has still an obligation to scrutinize their  
40 evidence for the reasons stated by Greene, M.R. in Yuill v. Yuill<sup>(6)</sup> as follows:-

"Puisne judges would be the last persons to lay claim to infallibility, even in assessing the demeanour of a witness. The most experienced judge may, albeit rarely, be

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(5) 1955 A.C. 370

(6) 1945 1 A.E.R. 183, 188



In the Federal  
Court

No.14

Judgment of  
Ong, C.J.  
9th July, 1971  
(continued)

deceived by a clever liar or led to form an unfavourable opinion of an honest witness and may express his view that his demeanour was excellent or bad, as the case may be. Most experienced counsel can, I have no doubt, recall at least one case where this has happened to their knowledge. I may further point out that an impression as to the demeanour of a witness ought not to be adopted by a trial judge without testing it against the whole of the evidence of the witness in question. If it can be demonstrated to conviction that a witness whose demeanour has been praised by the trial judge has on some collateral matter deliberately given an untrue answer, the favourable view formed by the judge as to his demeanour must necessarily lose its value."

10

On the function of an appellate <sup>(7)</sup> I would quote Lord Denning M.R. in Kerry v. Carter as follows: 20

"We have been referred to cases on this subject, particularly the recent case of Brown v. Thompson /1968/ 1 W.L.R. 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case, at p.1012, by Edmund Davies L.J. when he quoted from the judgment of Sellers L.J. in Quintas v. National Smelting Board /1961/ 1 W.L.R. 401, 409. This court adopts in regard to apportionment the same attitude as it does to damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong. If we think that the judge below was wrong, then we ought to say so, and alter the apportionment accordingly."

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40

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(7) 1969 1 W.L.R. 1372, 1376.

In the instant case I have no hesitation in saying that the learned trial judge was wrong. The plaintiff's case was simply that, while he was on the grass verge, the defendant knocked him down. That was the nature of the defendant's negligence specifically alleged against him. It was therefore not open to the plaintiff to rely on any alternative situation accounting for his presence on the road or any portion of the road - indeed his evidence was otherwise. If he was on the road the onus was on him to explain how he stepped off the grass. There was no such explanation. If he was not on the grass, he might have been anywhere on the road and thereby caused or contributed to his own injury. Since Gill F.J. holds that the defendant's police report was not substantive evidence, the position is no different from where a submission of no case has been made by the defendant. Having heard the case for the plaintiff, the judge was not prepared to say categorically that he was satisfied that the collision occurred on the grass verge. Could he, any more than the plaintiff, set up a case of negligence against the defendant which was never even suggested by the plaintiff?

I deeply sympathise with the unfortunate child, but hard cases make bad law. It is not within the discretion of this court to let sympathy lend weight to the evidence on either side. Having considered all the circumstances - which need not be gone into in detail by reason of the majority decision - all I need say is that I should have allowed the appeal with costs and apportioned the blame so that it is shared equally.

Kuala Lumpur,  
9th July, 1971

Sgd. ? Ong  
CHIEF JUSTICE,  
HIGH COURT OF MALAYA.

Ronald T.S. Khoo Esq. (of Messrs. Shearn Delamore & Co.  
for appellant.

40 K. Balakrishnan Esq. (G.S. Ram Esq. with him) of Messrs.  
Bala & Co. for respondent.

In the Federal  
Court

\_\_\_\_\_   
No.14

Judgment of  
Ong, C.J.  
9th July, 1971  
(continued)

In the Federal  
Court

No. 15

Judgment of Gill, F.J.

No.15

Judgment of  
Gill, F.J.  
9th July 1971

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA  
LUMPUR  
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 28 OF 1971

BETWEEN

Wong Thin Yit

Appellant

and

Mohd. Ali bin P.S. Ismail  
(suing as an infant through  
his father and next friend,  
Abdul Rahman s/o Syed  
Ibrahimshah)

10

Respondent

(In the matter of Ipoh High Court  
Civil Suit No.205 of 1970)

BETWEEN

Mohd. Ali bin P.S. Ismail  
(suing as an infant through  
his father and next friend,  
Abdul Rahman s/o Syed  
Ibrahimshah)

20

Plaintiff

and

Wong Thin Yit

Defendant)

Cor: Ong, C.J.  
Gill, F.J.  
Ali, F.J.

JUDGMENT OF GILL F.J.

This is an appeal from a judgment of Pawan  
Ahmad J whereby the defendant/appellant was held  
entirely to blame for a road accident resulting in  
injuries to the plaintiff/respondent for which he  
was awarded a sum of \$32,000 by way of general  
damages.

30

The accident took place on February 21 1969 at about 9.0 a.m. Shortly afterwards, at about 10.40 a.m., the defendant made a report at Kampar police station in which he stated as follows. He was travelling on his motor-cycle at about 25 m.p.h. along Kampar/Teluk Anson road when on arriving at a bridge he noticed three children about 30 yards in front of him crossing the road from left to right. As he applied his brakes the three children suddenly

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walked back to the left side and he swerved to the left, with the result that he knocked into one of them. He fell forward from his motor-cycle on the road and the child fell on the grass verge.

The respondent's report to the police formed part of the agreed bundle of documents which was put in by consent at the commencement of the trial of the action. Amongst the other documents in the agreed bundle were a sketch plan and photographs of the scene of the accident and the notes of evidence taken in a summons case against the defendant in the Magistrate's Court at Kampar which ended in his acquittal without his being called upon to enter his defence.

20

The trial of the action took place on January 21, 1971. The plaintiff's evidence in court 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 20 feet, 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.

30

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

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In the Federal  
Court

—  
No.15

Judgment of  
Gill, F.J.  
9th July 1971  
(continued)

In the Federal  
Court

—  
No.15

Judgment of  
Gill, F.J.  
9th July 1971  
(continued)

causing him to fall into the earthen drain nearby.

At the close of the case for the plaintiff counsel for the defence asked for an adjournment because the defendant was absent. The case was adjourned to February 23, 1971, on which date counsel for the defence informed the court that in spite of several attempts he had been unable to trace the defendant and that therefore he was unable to produce any evidence. The learned trial judge was thus left to decide the case on the evidence of the plaintiff and his witnesses and such documentary evidence as was put in by consent of counsel for both parties. 10

It is to be observed that the plaintiff and his witnesses were approximately 12, 13 and 12 years old respectively on the date of the trial, so that they were 10, 11 and 10 years old respectively on the date of the accident. They were not affirmed or put on oath when they began giving their evidence in court, but they were given the usual warning to speak the truth and they were cross-examined. The statement of the defendant contained in his report to the police, on the other hand, was not substantive evidence, although it could have been used to corroborate the evidence which might have been given by the defendant in court, or to confirm his credit, under sections 157 and 158 respectively of the Evidence Ordinance, 1950. Similarly, the notes of evidence in the summons case in which the defendant was acquitted without being called on to enter his defence were not substantive evidence in the action, although they could have been used to impeach the credit of any of the witnesses. The plaintiff and his witnesses gave evidence in that summons case, but such evidence was not used to impeach their credit when they gave evidence at the trial of this action. In any event, the statement of the defendant in the police report that the children in front of him were crossing the road from the left to the right and then suddenly walked back to the left side was denied by the plaintiff and his witnesses, and there is nothing to suggest that their evidence to that effect was shaken under cross-examination. 20 30 40

Coming to the other documentary exhibits in the case, the sketch plan showed a long scratch mark not far from the left edge of the road, and one of the

10 photographs showed a basket and some cakes lying scattered about, also on the same side of the road. The learned trial judge found that the scratch mark in the plan was apparently made by the motor-cycle. This was clearly a reasonable inference from the evidence in the case. Taking into account the evidence of the plaintiff and his witnesses and upon a close scrutiny of the sketch plan and the photographs, he found as a fact that the accident took place very near the left edge of the road, either on the grass verge or on the road. He further found that, as the road was clear of other traffic at the time, the accident would not have happened if the defendant had not been negligent, and hence held him entirely to blame.

20 It is true that nowhere in his judgment has the learned judge said that he believed the evidence of the plaintiff and his witnesses, but that he preferred such evidence to the defendant's version of the accident as contained in his police report would appear to be abundantly clear, because he says that "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." He further says that if the defendant was in fact going at 25 mp.h. and had applied the brakes he failed to see how he could have knocked the plaintiff unless he was negligent.

30 And he also found that the fracture of the plaintiff's right leg was more consistent with the plaintiff's story than that of the defendant. 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. Perhaps the learned judge should have

40 considered the question as to why the defendant after going over the wooden bridge shown on the sketch plan went off at a tangent on to the grass verge, but even if he had done so it would not have been open to him to speculate on the answer to that question.

The first ground of appeal is that the learned trial judge erred in holding that the accident could have happened on the grass verge. The short

In the Federal Court

\_\_\_\_\_  
No.15

Judgment of  
Gill, F.J.  
9th July 1971  
(continued)

In the Federal  
Court

—  
No.15

Judgment of  
Gill, F.J.  
9th July 1971  
(continued)

answer to that is that the learned trial judge did not say categorically that the accident happened on the grass verge. The finding of fact which he made was that the accident took place at a point somewhere near the left edge of the road.

The second ground of appeal is that the learned trial judge having found as a fact that the scratch mark on the sketch plan was made by the defendant's motor-cycle and having regard to the police photographs of the scene of the accident erred in holding the defendant liable for the accident. There might have been some substance in that ground of appeal if the learned trial judge had made his finding of fact solely on the sketch plan and the photographs, but coupled with that documentary evidence was the evidence of the plaintiff and his three witnesses, which had not been shaken by cross-examination. It has to be borne in mind that each of the witnesses had emphatically denied that he crossed or attempted to cross the road. I would therefore reject that ground of appeal.

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It is next said that the learned trial judge erred in dismissing the defendant's account of the accident as highly improbable in the light of the evidence which was before him. In my judgment, the learned trial judge was entitled to reject the defendant's account of the accident because of the evidence of the plaintiff and his witnesses which he had before him. I do not think it would have been right for the learned trial judge to reject the evidence of the plaintiff and his witnesses merely on the strength of the defendant's statement in the police report, which after all was not substantive evidence in the true sense of the word. Assuming that it was substantive evidence, it was not tested by the usual method of cross-examination.

30

It is finally said that the learned trial judge failed to consider the probability and possibility of contributory negligence on the part of the plaintiff. I do not think there is any substance in that argument. A mere possibility of contributory negligence is of no avail, and there was no evidence to suggest that on the balance of probabilities the defendant was guilty of contributory negligence.

40

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.

In the Federal Court

No. 15  
Judgment of  
Gill, F.J.  
9th July, 1971  
(continued)

10

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.

Kuala Lumpur (Sgd.) S.S.GILL  
9th July, 1971 (S.S. Gill)  
Judge  
Federal Court

Mr. R.T.S. Khoo of Messrs. Shearn Delamore & Co. for appellant.

20

Mr. K. Balakrishnan (Mr. G.S. Ram with him) of Messrs. Bala & Co., for respondent.

No. 16

Judgment of Ali, F.J.

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR  
(Appellate Jurisdiction)

FEDERAL COURT CIVIL APPEAL NO. 28 OF 1971

BETWEEN

Wong Thin Yit ... Appellant

And

30

Mohd. Ali bin P.S. Ismail  
(suing as an infant through his father and next friend, Abdul Rahman s/o Syed Ibrahimshah) ... Respondent

No.16

Judgment of  
Ali, F.J.  
9th July, 1971



In the Federal  
Court

(In the matter of Ipoh High Court Civil  
Suit No. 205 of 1970)

No.16

BETWEEN

Judgment of  
Ali, F.J.  
9th July, 1971  
(continued)

Mohd. Ali bin P.S. Ismail  
(suing as an infant through  
his father and next friend,  
Abdul Rahman s/o Syed Ibrahimshah) ... Plaintiff

And

Wong Thin Yit ... Defendant)

Coram: Ong, C.J.  
Gill, F.J.  
Ali, F.J.

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JUDGMENT OF ALI, F.J.

This is an appeal from the judgment of Pawan Ahmad J. in the High Court at Ipoh.

The respondent, the plaintiff in the action, was involved in an accident with a motorcycle while walking on the road along Degong/Teluk Anson on the morning of February 21, 1969. He suffered injuries on the forehead and also on the right leg. The right leg from the knee was amputated. By his next friend he sued the motorcyclist for damages on the ground of negligence. The plaintiff's case of negligence was founded on a number of particulars set out in paragraph 5 of the statement of claim. I shall in due course refer to some of these particulars on which findings of fact were arrived at by the trial court. The defence was a denial of negligence. It was stated in the statement of defence in these words:

"..... collision was caused solely and/or contributed to entirely by the negligence of the Plaintiff."

30

The word "entirely" would tend to negative any suggestion of contributory negligence in the sense that blame for the accident was to be shared proportionately as the appellant is now contending in this appeal. However, for the purpose of this judgment, I shall assume that contributory negligence in the sense stated has been pleaded by the defence.

40

The dispute turned on the fact whether the respondent/plaintiff was knocked down by the appellant's motorcycle from the rear as alleged in paragraph 3 of the statement of claim or that he was knocked down while attempting to cross the road as alleged in the statement of defence. The plaintiff and his witnesses all gave evidence to the effect that he was knocked down from the rear. They all said that they were walking on the grass verge some 2 feet from the edge of the road when the collision took place. They all denied any suggestion that the plaintiff was attempting to cross the road when he was knocked down. There were minor discrepancies, here and there, but they did not seem material enough to prevent the trial court from arriving at the finding that the respondent was knocked down from the rear. The learned trial Judge found this consistent with the markings shown in the sketch plan. He was not, however, altogether satisfied that the collision occurred on the grass verge as stated by the plaintiff and his witnesses. He said it could be on the grass verge or on the road. But he seems reasonably satisfied that it occurred close enough to the left edge of the road. On such a finding it was fair inference that the motorcyclist was either not keeping a proper look-out or if he was, he was riding too fast with complete disregard for the safety of those walking by the side of the road. Whichever it was, the plaintiff's evidence must have satisfied the trial court that a prima facie case of negligence has been made out against the defendant/appellant. Unless the defence could negative negligence by proper evidence the trial court would have no alternative but to enter judgment for the respondent. As it happened in this case no proper evidence could be adduced on behalf of the appellant. He did not appear at the trial. The learned trial Judge granted him indulgence by adjourning the hearing of the case to another date to enable him to appear. This failed to service its purpose. The defence counsel did what could possibly be done in the circumstances. In the absence of proper evidence to negative negligence he did his utmost to persuade the trial court not to attach much weight to the evidence of the plaintiff and his witnesses. He referred to certain discrepancies in their evidence. The plaintiff and his witnesses, undoubtedly, were still minors when

In the Federal  
Court

—————  
No.16

Judgment of  
Ali, F.J.  
9th July, 1971  
(continued)

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In the Federal  
Court

\_\_\_\_\_  
No.16

Judgment of  
Ali, F.J.  
9th July, 1971  
(continued)

they gave evidence. They were not sworn or affirmed. But they were all warned to speak the truth as required by section 6 of the Oath and Affirmation Ordinance 1949. Children injured in motor accidents or young witnesses have, in the past, given evidence in court and subjected to cross-examinations by opposing counsels. Whether their evidence has value is, of course, a matter for the trial court to consider and decide. The court can, of course, come to a different view on any such evidence if the view of the trial court is clearly unwarranted by the evidence on record. 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. Defence counsel has also referred to the police report made by the appellant after the accident. The learned trial Judge has considered the report but found it highly improbable that the accident could have happened in the manner described by the appellant. He said this in his judgment after considering the sketch plan which, if I may say so, is capable of supporting either of the conflicting versions of the accident. 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. I have used the words "even if" advisedly, for in my view the police report in this case, though admissible by reason of section 35 of the Evidence Ordinance, was not substantive evidence of the fact, as asserted by the defence, that the plaintiff was knocked down while crossing the road. The report or the police officer who recorded it could only say this: "This is a statement by the appellant". To that extent the report was clearly hearsay evidence. Its inclusion in the agreed bundle was obviously on the assumption that the appellant would appear at the trial to testify. If he had done so, the report would undoubtedly have some value as corroborative evidence within the meaning of section 157 of the Evidence Ordinance. But standing by itself for the purpose of the present dispute it was clearly hearsay. The rule against hearsay evidence is expressed in Phipson on Evidence, 10th Edition (1963), p.280 as follows:-

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"The rule against hearsay excludes, in general, all statements oral or written, the probative force of which depends either wholly or in part on the credit of an unexamined person notwithstanding that such statements may possess an independent evidentiary value derived from the circumstances under which they were made and notwithstanding that no better evidence of the facts stated is to be obtained."

In the Federal  
Court

\_\_\_\_\_  
No.16

Judgment of  
Ali, F.J.  
9th July, 1971  
(continued)

10

That is a rule at common law to which there are exceptions. Section 32 of our Evidence Ordinance contains these exceptions. It does not seem to me that the appellant's report in this case can possibly come within any of the exceptions. Strict adherence to the common law rule against hearsay was insisted upon by the House of Lords in Myers v. Director of Public Prosecutions<sup>(1)</sup>. At page 1024 Lord Reid said:

20

".... It is true that a judge has a discretion to exclude legally admissible evidence if justice so requires, but it is a very different thing to say that he has a discretion to admit legally inadmissible evidence. The whole development of the exceptions to the hearsay rule is based on the determination of certain classes of evidence as admissible or inadmissible and not on the apparent credibility of particular evidence tendered. No matter how cogent particular evidence may seem to be, unless it comes within a class which is admissible, it is excluded. Half a dozen witnesses may offer to prove that they heard two men of high character who cannot now be found to discuss in detail the fact now in issue and agree on a credible account of it, but that evidence would not be admitted although it might be by far the best evidence available."

30

40

In G. (A) v. G. (T.), reported in the Law Reports 1970, Pt.12 - December 1970, Lord Denning M.R. considered this rule against hearsay evidence and said on page 652:

"..... If that statement ("I'm enclosing

(1) (1965) A.C. 1001

In the Federal  
Court

—————  
No.16

Judgment of  
Ali, F.J.  
9th July, 1971  
(continued)

£5 for you from T") had been made by the  
lad's mother on oath, it would have been  
evidence of a payment by T. for the  
maintenance of the child. Not being  
made on oath, but in a letter - and the  
mother not being called - it is hearsay:  
and according to the common law, it is  
not admissible."

Referring to Myers v. Director of Public Prosecutions:  
(supra), the Master of the Roll added: 10

"..... Such being the common law about  
hearsay, we are not at liberty to depart  
from it."

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

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 20  
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.

JUSTICE ALI BIN HASSAN  
(Ali bin Hassan)  
Judge  
Federal Court, Malaysia

Kuala Lumpur,  
9th July, 1971.

Mr. R.T.S. Khoo of M/s Shearn Delamore & Co. for  
appellant.

Mr. K. Balakrishnan (Mr. G.S. Ram with him) of  
M/s Bala & Co. for respondent.

45.

No. 17

Order

In the Federal  
Court

No.17

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA  
LUMPUR  
(Appellate Jurisdiction)

Order  
9th July, 1971

FEDERAL COURT CIVIL APPEAL NO. 28 OF 1971

BETWEEN

Wong Thin Yit ... Appellant

And

10 Mohd. Ali bin P.S. Ismail  
(suing as an infant through  
his father and next friend,  
Abdul Rahman s/o Syed Ibramshah) ... Respondent

(In the matter of Civil Suit No. 205 of  
1970 in the High Court of Malaya at Ipoh

BETWEEN

20 Mohd. Ali bin P.S. Ismail  
(suing as an infant through  
his father and next friend,  
Abdul Rahman s/o Syed Ibramshah) ... Plaintiff

And

Wong Thin Yit ... Defendant)

CORAM: ONG HOCK THYE, CHIEF JUSTICE, HIGH COURT  
IN MALAYA:  
GILL, JUDGE, FEDERAL COURT, MALAYSIA:  
ALI HASSAN, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT  
THIS 9TH DAY OF JULY, 1971.

O R D E R

30 THIS APPEAL coming on for hearing on the 7th  
day of June, 1971 in the presence of Mr. R.T.S.  
Khoo of Counsel for the Appellant and Mr. K.  
Balakrishnan (Mr. G.S. Ram with him) of Counsel for  
the Respondent AND UPON READING the Record of

In the Federal Court

                      
No.17

Order  
9th July, 1971  
(continued)

Appeal filed herein AND UPON HEARING the submissions of Counsel aforesaid IT WAS ORDERED that this Appeal do stand adjourned AND the same coming on for judgment this day in the presence of Mr. R.T.S. Khoo of Counsel for the Appellant and Mr. G.S. Ram of Counsel for the Respondent IT IS ORDERED that the Appeal herein be and is hereby dismissed AND IT IS ORDERED that the Appellant do pay to the Respondent the costs of this Appeal as taxed by the proper officer AND IT IS LASTLY ORDERED that the sum of \$500/- (Dollars Five Hundred only) paid into Court by the Appellant as security for Costs of this Appeal be paid out to the Respondent towards his taxed costs.

10

GIVEN under my hand and the seal of the Court this 9th day of July, 1971.

Sgd. Illegible  
DEPUTY REGISTRAR  
FEDERAL COURT, MALAYSIA

20

This Order is filed by M/s Bala & Co., Advocates & Solicitors, Room 305, 2nd Floor, East Asia Building, No.17 Jalan Klyne, Kuala Lumpur.

No.18

Order  
granting  
Final Leave  
to Appeal  
to His  
Majesty the  
Yang di-  
Pertuan  
Agong  
10th January,  
1972

No. 18

Order granting Final Leave to Appeal  
to His Majesty the Yang di-Pertuan  
Agong

IN THE FEDERAL COURT IN MALAYSIA HOLDEN AT KUALA LUMPUR  
(Appellate Jurisdiction)

30

FEDERAL COURT CIVIL APPEAL NO. 28 OF 1971

BETWEEN

Wong Thin Yit ... Appellant

And

Mohd. Ali bin P.S. Ismail  
(suing as an infant through  
his father and next friend  
(Abdul Rahman s/o Syed Ibramshah) ... Respondent

(In the Matter of Civil Suit No. 205 of  
1970 in the High Court of Malaya at Ipoh

In the Federal  
Court

BETWEEN

No.18

Mohd. Ali bin P.S. Ismail  
(suing as an infant through  
his father and next friend  
Abdul Rahman s/o Syed Ibrahimshah) ... Plaintiff

And

Wong Thin Yit ... Defendant)

Order  
granting  
Final Leave to  
Appeal to His  
Majesty the  
Yang Di-  
Pertuan Agong  
10th January,  
1972  
(continued)

10 CORAM: ONG, AG. LORD PRESIDENT, FEDERAL COURT,  
MALAYSIA  
GILL, JUDGE, FEDERAL COURT, MALAYSIA  
ALI, JUDGE, FEDERAL COURT, MALAYSIA

IN OPEN COURT  
THIS 10TH DAY OF JANUARY, 1972

O R D E R

20 UPON MOTION made unto this Court this day by  
Mrs. Santha Menon of Counsel for the Appellant  
abovenamed in the presence of Mr. G. Sri Ram of  
Counsel for the Respondent abovenamed AND UPON  
READING the Notice of Motion dated the 8th day of  
December 1971 and the Affidavit of Ronald Khoo Teng  
Swee affirmed on the 8th day of December 1971 all  
filed herein AND UPON HEARING the submissions of  
Counsel aforesaid IT IS ORDERED that final leave  
to appeal to His Majesty the Yang di-Pertuan Agong  
be and is hereby granted to the Appellant AND IT  
IS ORDERED that the costs of this application be  
costs in the cause.

30 GIVEN under my hand and the Seal of the  
Court this 10th day of January 1972.

(L.S.) Sd. Dato Sheikh Abdul Rahman bin  
Sheikh Abu Bakar

CHIEF REGISTRAR  
FEDERAL COURT  
MALAYSIA.



Exhibits

Exhibit A  
Agreed Bundle  
of Documents  
No. 1  
Police Report  
21st February  
1969

Exhibit A - Agreed Bundle of Documents

No. 1 - Police Report  
(Police 51A)

A ..... PAGE .....

ROYAL FEDERATION POLICE

COPY OF REPORT

Report No: 546/69

Police Station: Kampar

Received at 10.40 a.m. on 21/2/1969 Subject:

Complainant: Wong Tek Yek I/C 7784509 Sex:

Race: Hainanese (Hylam) Age: 21 years.

Occupation: Mining Engine "Jaga" 10

Address: No. 57 Jalan Gopeng, Kampar.

Interpreter: Lim Boon Kiam DPC 28642

From Chinese into Malay.

Witness:

Complainant states:

At about 10.20 a.m. on 21/2/1969 I left Kampar riding motor-cycle No. AJ 8007 to go to Langkap to see my brother. I was riding at a speed of 25 m.p.h. About 2 miles away from Kampar along Teluk Anson Road there is a bridge and there I noticed three children in front of me crossing the road from left to the right. They were about 30 yards away from me. I then brake my motor-cycle suddenly these 3 children walked back to the left side. I swerved to the left and one of the children, an Indian boy was knocked. I flung forward and fell on the road and then he fell on the left grass verge table. I lifted my motor-cycle and put it on the road side. I then stopped a passing car and took him to Kampar Hospital. My motor-cycle was damage and I do not know at which place. My right and left hand were wounded and also both my legs. The boy was seriously injured on the head and his right leg fractured. This is my report.

20

30

Sgd.: Complainant

49.

Sgd.: Interpreter: Lim Boh  
Kim DPC 28642

Sgd.: Ketua Hashim Cpl. 2756

Exhibits

—  
Exhibit A  
Agreed Bundle  
of Documents  
No. 1  
Police Report  
21st February  
1969  
(continued)

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This is the certified  
Translation of the original  
document produced for Transla-  
tion in Ipoh High Court  
Translation Serial No.L 143 of  
1970.

10 Sgd.: Illegible. Interpreter  
High Court  
Ipoh.

Date: 15/7/1970

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No. 3 - Sketch Plan

No. 3  
Sketch Plan

(See page 50)

Exhibits

Exhibit A  
Agreed Bundle  
of Documents  
No. 3  
Sketch Plan

50.

EXHIBIT A - Agreed bundle of documents

No. 3 - Sketch Plan

EXHIBIT A - Agreed bundle of DocumentsNo. 4. Key to Sketch PlanKey to Rough Sketch Plan of place of accident  
At Batu 26 $\frac{1}{2}$  Degong Road, Kampar, Report No.  
546/69ExhibitsExhibit A  
Agreed Bundle  
of Documents  
No. 5  
Key to Sketch  
PlanMarking

- A = m/cycle AJ 8007 Suzuki 100 cc  
 B = Cake basket of child who had been knocked  
 10 C = White line on the road  
 D = Edge of the tarred road on the left side to  
 M/Diawan  
 E = Edge of the tarred road on the right side to  
 M/Diawan  
 F = Edge of the grass verge on the right side to  
 M/Diawan  
 G = Edge of the grass verge on the left side to  
 M/Diawan  
 20 T = Telegraph post No. 38 on the left side of  
 the road to M/Diawan  
 K = The beginning of the scratch mark on the road  
 to S.
- 

Measurement

- D - E = 18' 0"  
 D - G = 9' 0"  
 C - E = 9' 0"  
 D - B = 2'10"  
 D - G = 9' 0"  
 E - F = 8' 0"  
 30 K - S = 40' 0"  
 S - T = 61' 0"  
 K - to edge of the tarred road on the left side 1'8"  
 S - to edge of the tarred road on the right side 1'10"  
 A - M/cycle AJ 8007 which had been removed by A1  
 parked on the left side of the road

Exhibits

Exhibit A  
 Agreed Bundle  
 of Documents  
 No. 4  
 Key to Sketch  
 Plan  
 (continued)

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This is the certified  
 Translation of the original  
 document produced for Transal-  
 tion in Ipoh High Court  
 Translation Serial No. 143 of  
 1970.

Sd. Illegible Interpreter  
 High Court  
 Ipoh.

Date: 15.7.1970

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10

No. 9  
 Medical Report

No. 9 Medical Report

P490/69

Your Ref. KB/P/405/69

General Hospital,  
 IPOH: 7th March, 1970.

Messrs. Bala & Co.,  
 Advocates & Solicitors,  
 Bungunan East Asia,  
 17 Jalan Klyne,  
 KUALA LUMPUR.

Re: Mohd. Ali bin P.S. Ismail

Patient was admitted to the Orthopaedic Unit  
 of this hospital on 21.2.1969 with history of  
 alleged motor vehicle accident.

20

On Exam: General condition - Poor  
 In coma

Injuries: (1) 3" laceration over the forehead  
 (2) Crush injury Right leg - involving  
 the bones, and all other structures  
 of the Right leg.

The patient had to under go a through Right  
 knee amputation of Right leg in view of injury (2). 30

The patient was discharged on 6.4.69 from  
 the ward and followed up as an out-patient.

Subsequently, the patient had to have Right  
 patelectomy done on 21/5/69 and discharged from the  
 ward on 10/6/69.

On 8/7/69 he was referred to the Superintendent

of Artificial Limb Centre, General Hospital,  
Kuala Lumpur for a right through knee artificial  
leg and pair of shoes.

Sgd:  
(Dr. S. Appu)  
Medical Officer,  
Orthopaedic Unit,  
General Hospital,  
IPOH.

Exhibits

Exhibit A  
Agreed Bundle  
of Documents  
No. 9  
Medical Report  
(continued)

10 SA/LSG

No. 10. Notes of Evidence, Summons  
Case No. 513/69

FEDERATION OF MALAYSIA

STATE OF PERAK

IN THE MAGISTRATE'S COURT AT KAMPAR

SUMMONS CASE NO: 513/69

NOTES OF EVIDENCE

No.10  
Notes of  
Evidence,  
Summons  
Case No.  
513/69  
14th July 1969

14.7.69 - Inspector Zubir for Prosecution.

Defendant present.

Charge read and explained to the  
defendant.

Defendant - Claims trial.

Mr. Krishnan appears in Court as Counsel  
for the defence.

To 8.9.69 - Hearing.

Sd: Dulip Singh.

8.9.69 - Inspector Peter Lai for Prosecution.

Defendant present - charge read and  
explained.

Defendant - claims trial.

Mr. Krishnan appears as Counsel for the  
defence.

Mr. K. Balakrishnan appears as Counsel

8th September  
1969

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30

## Exhibits

Exhibit A  
 Agreed Bundle  
 of Documents  
 No.10  
 Notes of  
 Evidence,  
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 Case No.  
 513/69  
 8th September,  
 1969  
 (continued)

on watching brief on behalf of a  
 Prosecution, witness named Mohd Ali  
 bin P.S. Ismail.

P.W. (1) - Mohd Daud bin Abdul Manan affirmed  
 states in English

I am a motor vehicle examiner with Registrar  
 and Inspector Motor Vehicle, Perak. On 24.2.69 at  
 about 11.20 a.m. at Registrar and Inspector Motor  
 Vehicle, Perak, Ipoh, I examined motor cycle No.  
 AJ 8007. The motor cycle was not tested on the  
 road due to the damage.

10

A static test was carried out and I found:-

- (1) Hand brakes and foot brakes appeared to be in order.
- (2) Tyres serviceable.

The damage to the motor cycle were:-

- (1) Speedometer broken.
- (2) Head Lamp broken.
- (3) Steering handle - both ends bent inward.
- (4) Timing casing missing.
- (5) Front Registration No. plate missing.
- (6) Front mudguard scratched at front.

20

General condition could not be established due  
 to accident.

Sd: Dulip Singh.

Cross-Examination:

Nil.

Sd: Dulip Singh.

Witness is released

P.W. (2) - Mohd. Ali s/o Abdul Rahman, aged 11  
 years. Speaking Tamil is warned to speak the  
 truth. On 21.2.69 at about 9.00 a.m. I was with  
 Kunasegar and Kumaran.

30

These are the two boys who were with me.

Kunasegar s/o Marimuthu and S. Kumaran called  
 into Court and identified.

The three of us were going along Jalan Degong towards Mambang di-Awan carrying cakes. We were walking on the left side of the road on the grass as one faces Mambang Di-Awan. I was walking in front. My two friends were behind me. At 26½ milestone Jalan Degong, a motor cycle came from behind and knocked into me. I fell down and became unconscious. I was walking on the edge of the road. I was about 2 feet away from the grass verge. I recovered in Hospital.

10

Sd: Dulip Singh.

Cross-Examination by Defence Counsel:-

I am sure the motor cycle knocked me from behind. My two friends were behind me. The motor cyclist grazed along my two friends and then knocked into me. I do not know which of my two friends were walking close to the road. I do not know if my two friends were injured. I was walking. I was not talking with my two friends. I was about 12 feet away from my friends. (Witness points to a wall which is about 12 feet away).

20

There were no cars from the front. The impact occurred when I was about 2 feet away from the grass verge. It is not true that I was crossing the road when the accident occurred. I did not cross the road. My friends did not attempt to cross the road. It is not true that I was crossing the road and that the motor cycle hooted.

Sd: Dulip Singh.

30 Re-Examination:-

Nil.

Sd: Dulip Singh.

P.W. (3) - Kunasegara s/o Marimuthu, aged about 12 years. Speaking Tamil is warned to speak the truth. Court warned the witness. On 21.2.69 at about 9.00 a.m. P.W. (2), myself and Kumaran were walking along Jalan Degong. I do not know the time. I was walking on the left side of the road as one faces Mambang Di-Awan. P.W. (2) was walking in front of us. I and my other friend were walking about 8 feet behind P.W. (2). (Witness points to a chair about 8 feet away). P.W. (2)

40

Exhibits

Exhibit A  
Agreed Bundle  
of Documents  
No.10  
Notes of  
Evidence,  
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Exhibits

Exhibit A  
 Agreed Bundle  
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 (continued)

was walking on the grass. He was walking on the grass. P.W. (2) did not walk on the road. I heard the sound of a motor cycle behind me. I turned round and saw. The motor cyclist grazed my right leg and then knocked into P.W. (2).

When the motor cycle knocked into P.W. (2) at that time P.W. (2) was walking on the grass. P.W. (2) fell down. I saw the face of the motor cyclist. I can identify him. Witness points to defendant in Court.

10

The Defendant was the motor cyclist. I do not know the No. of the motor cycle. When I went near the motor cyclist (the defendant) he raised his hand and wanted to throw stone at me, so I ran away.

One rattan basket - produced and marked exhibit IDI.

The basket belongs to P.W. (2). I was walking on the grass when the motor cycle came from the rear.

20

Sd. Dulip Singh.

Cross-Examination by Defence Counsel:-

The motor cycle grazed into me. The tyre of the motor cycle touched me. I was not injured. The handle bar of the motor cycle did not touch me as I leaned to one side. There is a bend at the place of impact. It is a gradual bend. It is not true that the accident occurred when P.W. (2) tried to cross the road as P.W. (2) did not cross the road. The accident occurred on the grass. There were no on-coming vehicles on the road. After the impact P.W. (2) fell on the grass. The defendant fell on the road about two feet away from the grass verge. The accident occurred on the grass and not on the road.

30

Sd. Dulip Singh.

Re-Examination

Nil

Sd. Dulip Singh.

P.W. (4) - Kumaran s/o Chinniah aged about 10 years. Speaking Tamil is warned to speak the truth. Court explains the warning to the witness and he understands the warning. On 21.2.69 at about 10.20 a.m. I was with P.W. (2) and P.W. (3) at about 26 $\frac{3}{4}$  milestone Jalan Degong facing Mambang Di-Awan.

Exhibits

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(continued)

10 P.W. (2) was walking ahead of us (witness points to a chair which is about 12 feet away from him).  
P.W. (2) was walking about 12 feet ahead of us.  
P.W. (3) and I were walking behind on the grass.  
P.W. (2) was walking on the grass. P.W. (3) was on my right. The motor cycle grazed P.W. (3) and then knocked into P.W. (2). The motor cycle came from Kampar town and was going towards Mambang Di-Awan.

When we went near to see, the motor cyclist took stone and wanted to throw at us, so we ran away. (Witness looks round at members of the public in Court and points to defendant).

20 The defendant was the motor cyclist P.W. (2) fell down when he was knocked.

Sd. Dulip Singh.

Cross-Examination by Defence Counsel

30 The motor cyclist fell on the grass verge. We were walking about two feet away from the grass verge on the grass. The motor cyclist came on the grass from behind and knocked into P.W. (2). There were no on-coming vehicles. Only the motor cyclist came from rear. It is not that we were trying to cross the road when the motor cycle knocked into P.W. (2).

Re-Examination

Sd. Dulip Singh.

Nil

Sd. Dulip Singh.

P.W. (5) Hashim bin Ahmad affirmed states in Malay:-

I am Opl. 2756 stationed at Kampar. On 21.2.69 at about 10.40 a.m. I was at the Police Station when I received information of a traffic accident at 26 $\frac{3}{4}$  milestone Jalan Degong.

40 I then informed Sgt. 13325 about the accident.

Sd. Dulip Singh.

Exhibits

Exhibit A  
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 (continued)

Cross-Examination by Defence Counsel

Nil.

Sd. Dulip Singh.

P.W. (6) - Ahmad bin Mohd Zain affirmed states in  
 Malay:-

I am Sgt. 13325 stationed at Kampar. On 21.2.69 at about 10.46 a.m. I met the defendant at Kampar Police Station. He claimed to be the rider of motor cycle No. AJ 8007. I then went with him to 26 $\frac{3}{4}$  milestone Jalan Degong. The condition of the road was good. The road was dry. There is a slight bend there. At the scene I saw a ratan basket in the middle of the road. I saw motor cycle AJ 8007 stationary on the left edge of the road as one faces Mambang Di-Awan. The motor cycle was on the grass.

10

Exhibit IDI basket shown to witness. That is the basket exhibit IDI identified and now marked exhibit P1.

Near the basket I also saw broken pieces of glass on the road.

20

I collected the broken pieces of glass - broken pieces of glass produced in Court and marked exhibit P2. I saw some cakes lying near the basket. There were no blood stains on the road but I saw scratch marks on the road.

I then took measurements of the scene and drew a sketch plan. This is the sketch plan with the key - produced and marked exhibit P3 and P3K respectively.

30

I instructed PC 12082 to take five photographs in all. Three were taken at the scene and two later on. These are the five photographs - produced in Court and marked exhibit P4 A-E.

B in the sketch plan represents the basket. K - S is the scratch mark made by the motor cycle. The scratch mark led to the motor cycle.

A is motor cycle No. AJ 8007.

G - D is the grass edge of the road.

C is the centre line of the road.

B - D is 2 feet 10 inches.

B - C is 6 feet 2 inches.

On the same day at about 2.15 p.m. I served a copy of Notice of Intended Prosecution on the defendant and he acknowledged receipt of it. This is the copy of Notice of Intended Prosecution with the acknowledgment - produced and marked exhibit P5.

10 On 24.2.69 at about 11.20 a.m. I escorted motor cycle No. AJ 8007 to Registrar and Inspector Motor Vehicle Perak, Ipoh for examination. On 26.3.69 I served a copy of Medical Report of P.W.(2) on the defendant and obtained his acknowledgment. This is the copy of Medical report with the acknowledgment - produced and marked exhibit P6.

Sd. Dulip Singh.

Cross-Examination:-

20 When I went to the scene the position of the motor cycle was as shown in photographs exhibit P4 A,B,C. I did not find any marks on the grass verge. There were no brake marks. The broken pieces of glass were beside the basket at point marked B in the sketch plan.

Sd. Dulip Singh.

Re-Examination:-

The broken pieces of glass were scattered about on the road.

Sd. Dulip Singh.

30 P.W. (7) - Mohd Rashid bin Hashim affirmed states in Malay:-

I am PC 12082 stationed at Kampar as Police Photographer. On 21.2.69 at about 10.50 a.m. I went to 26 $\frac{1}{2}$  milestone Jalan Degong with P.W. (6). On his instructions I took three photographs of the scene. Later at 11.20 a.m. I took two more photographs at Kampar Police Station.

Exhibit P4 A - E shown to witness. These are

Exhibits

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No.10

Notes on  
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Exhibit A  
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the five photographs identified.

I now produce the five negatives - produced  
and marked exhibit P4 AN - EN.

Sd. Dulip Singh.

Cross-Examination:-

Nil.

Sd. Dulip Singh.

Prosecuting Officer closes the case for the  
Prosecution. Mr. Krishnan submits:-

- (1) No case for defendant to answer.
- (2) Evidence of P.W.(2), P.W.(3) and P.W.(4)  
very consistent, but evidence of P.W.(6) Sgt.13325  
shows no marks.

10

Evidence of P.W.(2), P.W.(3) and P.W.(4) not  
corroborated.

Prosecuting Officer submits:-

r

- (1) Sgt. 13325 P.W.(6) went to scene later.

Finding:-

I find from the evidence before me that the  
Prosecution has not made a prima facie case against  
the defendant. I find that there is a doubt in my  
mind and I give the benefit of the doubt to the  
defendant. I acquit and discharge the defendant  
without calling for his defence.

20

Sd. Dulip Singh.

8.9.69.

Certified True Copy,

(L.S.) Sgd. Illegible.....

CIRCUIT MAGISTRATE,

KAMPAR.

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IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

No. 12 of 1972

O N A P P E A L  
FROM THE FEDERAL COURT OF MALAYSIA

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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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RECORD OF PROCEEDINGS

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WILSON FREEMAN,  
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Solicitors for the Appellant

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