No.5 of 1973

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

BETWEEN:

HITAM BIN ABDULLAH
CHUA SOON KOW — Appellants

10

- and -

KOK FOONG YEE (f)
CHIANG NGAN NGU &
CHEONG NEGAN NGOH — Respondents

CASE FOR THE APPELLANTS

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1. This is an Appeal by the Appellants from an Order of the Federal Court of Malaysia (Ong.C.J., Gill and Ali F.J.J.) dated the 21st March 1972 P.63 dismissing an appeal by the Appellants from an
20 order of the Honourable Mr.Justice Syed Othman Bin Ali made on the 14th October 1971 whereby P.52 judgment was entered for the Plaintiffs against the Defendants in the sum of $56,100 with costs.

2. The Plaintiffs, as administratrix and co-administratrix of the estate of Cheong Chok Heng deceased (hereinafter referred to as "the deceased"), claimed damages on behalf of the estate of the deceased and on behalf of his dependents. The claim arose out of a road accident on the 13th November 1966 on the road
30 between Kuantan/Kemaman, Pahang, between a lorry driven by the first named Appellant as servant or agent of the second named Appellant and a motor car driven by the deceased. In the accident the deceased sustained fatal injuries, and the Respondents alleged that the accident was caused by the negligence of the first

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Appellant. The Appellants denied negligence and alleged contributory negligence on the part of the deceased. Damages were agreed subject to liability, and the only issue at trial was whether the first Appellant had been negligent and, if so, whether the deceased had been contributorily negligent.

3. The accident occurred early in the afternoon. The first Appellant was driving the lorry in the direction of Kuantan. The deceased was driving the motor car in the opposite direction towards Kemaman. The first Appellant had rounded a right-hand bend and entered a straight stretch of road when a collision occurred between the lorry and the car driven by the deceased. The only direct oral evidence as to the happening of the accident was given by the first Appellant and his passenger. Their evidence was to the effect that when he rounded the bend the first Appellant was driving on his near side of the road and saw a car coming
P.17 from the opposite direction on his side of the road; he sounded his horn, flashed his headlights, and slowed down from what was already a fairly slow speed in an attempt to avoid the collision.
P.22 The Appellants called evidence from other lorry
P.23 drivers who had seen the car driven by the deceased on the road shortly prior to the accident when it was being driven erratically and at times on its offside of the road. The Respondents relied upon the evidence of a police inspector who examined the scene of the accident shortly afterwards and took measurements which he recorded on a sketch plan to which reference is now made. The width of the road was recorded as 17 feet. A.1 to A.3 was a continuous mark of 136 feet in length, and was a freehand drawing. A.4 to A.5 was a single tyre mark 80 feet long. The distance between A.3 and A.4 was 32 feet 7 inches. B.1 to B.2 was 50 feet 6 inches, There were also tyre marks recorded as C, C.1. and C.2. The inspector also gave evidence that there was a faint line between A.3 and A.4, although such line was not recorded and such evidence had not been given by him when describing the tyre marks in detail in previous proceedings arising out of the accident. He accepted that he had said in the previous proceedings that tyre marks A.4 to A.5 were thicker than A.1 to A.3. The inspector further stated that he found other marks on the grass verge on
P.15 the left-hand side of the road facing Kuantan,

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namely, in the area where marks A.1 to A.3 were found. The inspector gave evidence that the damage to the vehicles, as appears from photographs, was to the right-hand side and front of each vehicle. The lorry was 7 feet 5 inches wide; the car was 5 feet 9 inches wide. P.13

4. On this evidence the learned Judge found that tyre marks A.4 to A.5 and B.1 to B.2 were made by the lorry, and he inferred therefrom that the lorry must necessarily have been travelling at a very fast speed and that the first Appellant was losing control of the lorry. He held that, if the lorry had been travelling at a speed in the order of 25 m.p.h.,it would not have left the tyre marks as long as or in such a pattern as A.4 to A.5 or B.1 to B.2. He further found that the tyre marks C.1 and C.2 could only have been caried by the offside wheels of the car. He therefore held that the accident occurred when the lorry was out of control, on its offside of the road, and notwithstanding the fact that the deceased swerved in order to attempt to avoid the lorry. He further found, although he would have reached his decision without such finding, that tyre marks A.1 to A.3 were made by the lorry. He rejected all the Respondents' evidence and attributed full responsibility for the accident to the first Appellant. On appeal the Federal Court held that the learned Judge was entitled to reject the Appellants' evidence; that it was beyond dispute that the lorry was encroaching over the middle line on its wrong side of the road and that the tyre marks A.4 to A.5 could only have been made by a vehicle exceeding 25 m.p.h. The Court upheld the decision of the learned Judge.

5. The principal submissions of the Appellants are :-

(i) There was no evidence to support the inference drawn by the learned Judge that the tyre marks C.1 and C2 could only have been made by the offside wheels of the car. The tyre marks were fully consistent with their having been made by the nearside wheels of the car, and this was more in accordance with the Appellants' evidence. If the tyre marks had been made by the nearside wheels of the car, then the proper inference was that the car was wholly over on its offside of the road before attempting to take evasive action. Even if

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the marks were made by the offside wheels of the car, the proper inference therefrom is that the car was substantially on its wrong side of the road before it commenced evasive action.

(ii) There was no direct evidence that the lorry was travelling too fast or that the first Appellant lost control thereof. The tyre marks A.4 to A.5 and B.1 to B.2 are wholly insufficient to justify any such inference. In so far as the learned Judge found marks A.1 to A.3 were made by the lorry and relied thereon, it is submitted that it was unsafe so to find by reasons of the presence of other tyre marks on that verge, the absence of evidence of the police inspector as to connecting marks between A.1 to A.3 and A.4 to A.5 in the previous proceedings; and the difference in width between marks A.1 to A.3 and marks A.4 to A.5 on the reasons for which the Judge speculated without evidence. The learned Judge should not have held on the evidence that marks A.1 to A.3 were made by the first Appellant.

(iii) The learned Judge thus rejected the evidence for the Appellants on the basis of inferences which could not properly be drawn from the tyre marks C.1 and C.2 and A.4 to A.5. respectively. Without such wrong inferences, there were insufficient grounds for the rejection of the Appellants' evidence and the wrongful reliance upon such inferences renders the rejection of the evidence improper and unsafe. Without such wrong inferences, there was no evidence to support the positive findings made by the Judge in favour of the Respondents.

(iv) The learned Judge should have drawn the inference that, although the lorry may have encroached onto its offside of the road, this did not constitute fault in circumstances where the width of the lorry was 7 feet 5 inches and half the width of the road was only 8 feet 6 inches. He should have held that the car was travelling on its off-side of the road without good reason and placed the lorry in circumstances of peril; that the car, being 5 feet 9 inches wide could have found it much easier than the lorry to

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travel on its own near side of the road; that the car had opportunity to take evasive action by reaching its nearside of the road or alternatively, moving onto the verge; that, had the car been travelling on its proper side of the road and reacted with reasonable speed to the presence of the lorry on the road, no collision would have occurred. The learned Judge ought to have held that the deceased was responsible for the accident or, alternatively, that he was in a substantial degree contributorily negligent.

6. Wherefore the Appellants submit that this appeal should be allowed for the following among other

REASONS

1. BECAUSE the learned Judge wrongly rejected the evidence of the Appellants' witnesses.

2. BECAUSE the learned Judge wrongly drew the inference that the lorry driven by the first Appellant was being driven too fast and that the first Appellant was losing control thereof.

3. BECAUSE the learned Judge wrongly drew the inference that the tyre marks C.1 and C.2 were made by the off-side wheels of the car driven by the deceased.

4. BECAUSE on the evidence the only proper inference was that the car driven by the deceased was wholly or alternatively substantially on its wrong side to the road prior to the collision and could be the exercise of reasonable car have avoided the collision.

5. BECAUSE the learned Judge ought to have held that the deceased was responsible for the accident or, alternatively, contributorily negligent.

6. BECAUSE the decision of the learned Judge of the Federal Court was wrong and ought to be reversed or varied accordingly.

ROBERT ALEXANDER

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Respondents

CASE FOR THE APPELLANTS

STEPHENSON HARWOOD & TATHAM,
Saddlers' Hall,
Gutter Lane,
Cheapside,
London, E.C.2.
Appellants' Solicitors.