

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA HOLDEN
AT KUALA LUMPUR

B E T W E E N:

HITAM bin ABDULLAH CHUA SOON KOW Appellants

- and -

10 KOM FOONG YEE (f)
CHIAN NGAN NGU @
CHEONG NEGAN NGOH Respondents

CASE FOR THE RESPONDENTS

1. This is an Appeal from the Judgment and Order of the Federal Court of Malaysia (Appellate Jurisdiction) dated 21st March 1972 pursuant to Final Leave of Appeal granted by the said Court dated 7th August 1972 whereby the said Court dismissed with costs the Appellants appeal from the Judgment and Order of the High Court of Malaya dated 14th October 1971. p.63

20 2. Under the Judgment and Order of the High Court of Malaya dated 14th October 1971, the Respondents who were the Plaintiffs in the action were awarded the sum of \$56,100 with costs against both the Defendants who are the Appellants. p.52

THE PLEADINGS

3. The Respondents are admittedly the Administratrixes of one CHEONG CHOK HENG who was killed in a road accident on the 13th March

p.20
1.5-7

1966 and the action was brought on behalf of his dependants. The sum of \$56,100 is an agreed figure for damages and accordingly only those passages in the Pleadings which are relevant to the issues of liability are referred to in this Case.

p.4

4. In paragraph 2 of the Statement of Claim it was alleged that on the 13th November 1966 the deceased was lawfully driving motor car C5968 along the Kuantan/Kemaman Road, Pahang when at or near the 22½ milestone, Sungei Ular in the District of Kuantan he was run into and killed by motor lorry C6867 which was being driven by the first named Defendant who was the servant or agent of the second named Defendant along the same road in the direction of Kuantan.

10

5. In paragraph 3 of the Statement of Claim, the Respondent alleged the following Particulars of Negligence

PARTICULARS OF NEGLIGENCE OF
THE FIRST NAMED DEFENDANT

p.4-5

- (a) Failing to keep any or any proper lookout;
- (b) Driving at an excessive speed in the circumstances;
- (c) Driving into the motor car driven by the deceased.
- (d) Taking a right angled bend on the highway at speed;
- (e) Failing to give any or any sufficient warning of his approach;
- (f) Failing to exercise any or any proper or sufficient control of the Motor Lorry;
- (g) Failing to observe the presence of the motor car driven by the deceased on the highway;
- (h) Encroaching into the path of motor car No. C5968;
- (i) Driving in a careless, reckless and negligent manner;

20

30

- (j) Failing to stop, swerve, slow down or otherwise avoid the said collision.

6. The Defendants delivered separate defences both dated 10th October 1968 in identical terms. Both Defendants denied negligence in paragraph 3 of their respective Defence both alleged that the collision was caused solely by or, alternatively was contributed to by the negligence of the deceased and then gave the following particulars

p.7-9

10

PARTICULARS OF NEGLIGENCE OF THE DECEASED

- (a) Failing to keep any or any proper lookout;
- (b) Driving at an excessive speed in the circumstances;
- (c) Driving into the lorry driven by the First Defendant;
- (d) Taking a left hand bend on the highway at speed;
- (e) Failing to give any or any sufficient warning of his approach;
- (f) Failing to exercise any or any proper or sufficient control of the Motor Car;
- (g) Failing to observe the presence of the motor lorry driven by the First Defendant on the highway;
- (h) Encroaching on to the path of Motor Lorry C6867.

20

MAIN QUESTIONS ARISING IN THIS APPEAL

7. The only question in this appeal is whether the 1st Defendant was guilty of negligence and, if so, whether the deceased was guilty of contributory negligence. If the Appellants failed on the first of these two issues but was successful on the second the question of apportionment would consequently arise.

30

PRIMARY CONTENTION OF THE RESPONDENTS

8. In the first place the Respondents contend that there are concurred findings of fact against the Appellants on both these issues and accordingly that this Appeal should be dismissed without even investigating the evidence referred to hereunder.

9. The action came on for hearing before Syed Othman J. on the 9th October 1970.

10. The deceased was unaccompanied and the Plaintiffs were unable to rely on the evidence of eye-witnesses. In the main the Plaintiffs had to rely on the story which could be reconstructed from studying the sketch plan with the key, produced by 2 P/W.

p.69

10

11. The following background facts appear from the evidence:-

The deceased worked as a compradore in the Kuantan Branch of the Chartered Bank. The accident took place on Sunday. In the morning, the deceased had gone out to buy vegetables. He had returned for lunch at which he did not drink. Sometime after 1 p.m. on Sunday he set out in his car at Kuantan to drive to Kemaman. At the time of the collision which was at 2 p.m. the weather was good and the road was dry. A Post Mortem on the deceased makes no reference to alcohol.

p.10
l.24
- p.11
l.20

20

p. 67

12. The sketch plan with the key is at the back of the Record. The Respondents contend that the Trial Judge properly drew the following conclusions from the Sketch Plan.

"The sketch plan shows that the width of the road where the accident occurred is 17 feet, the width of the grass verge on the lorry side i.e. Kemaman - Kuantan is 9 feet and on the car side i.e. Kuantan - Kemaman 10 feet. There are two tyre marks running almost parallel to the car which is stationary at the edge of the grass verge on its side of the road with the left rear wheel in a shallow drain. These tyre marks are marked C1 and C2. They appear to be continuous if not for a

p.47
l.33
to
p.49
l.6

30

40

break. It runs in a curve starting at a point 9 feet 8 inches from the edge of the road on the lorry side and 7 feet 4 inches from the edge of the road on the car side. At the end of the curve where it is shown nearest to the lorry and among glass splinters the distance from the edge of the road on the lorry side is given as 11 feet while the distance from the edge of the road on the car side is given as 6 feet. The length of these tyre marks C2 is given at 14 feet and C1 at 11 feet. On the lorry side of the road there is a long tyre mark starting at A1 on that part of the road over a culvert and almost at the end of the bend; it runs for a short distance on the road entering at point A2 the grass verge on which it runs in a wide curve for a distance of 136 feet; it enters the road at point A3; then there is a break for some distance. At A4 the tyre mark is shown to be at 2 feet from the edge of the road on the lorry side. As it progresses on the road the path is more to the centre of the road till point A5 somewhere at the left rear wheel of the lorry. Running partly parallel to this tyre mark is another mark B1 - B2. B2 stops just before about the middle part of the lorry; the lorry is shown to be stationary across the road with the cabin part over the edge of the road and on the grass verge on the car side of the road. The car is to the left of the lorry facing the left side of the lorry at an angle. There are glass splinters on this grass verge, the nearest point is about 21 feet from the right side of the lorry.

Considering the evidence, particularly the sketch plan, I find that the accident occurred well on the car side of the road. The glass splinters on the road showing the spot of collision are all on the car side of the road. Both vehicles were damaged on the offside. The tyre marks C1 and C2, (25 feet) which could only have been caused by offside wheels of the car, show that the car must have been on the correct side of the road immediately before the accident. The tyre marks somewhere near the centre of the road but still on the car side and then curve towards the edge of the road on its side. The indications are that the deceased must have applied his brakes

and at the same time swerved more to the left before the collision. Having regard to the position of the two vehicles on the sketch plan the force must have come from the lorry pushing the car off the road and into the drain at the end of the grass verge on its side of the road. In the sketch plan it stands almost parallel to the beginning of the tyre mark C2 and about 11 feet from the lorry. My conclusion is that the impact must also have been such as to cause the windscreen of the car to have been dislodged, fly off past over the front of the lorry and smashed on the grass verge on the car side at a distance of more than 30 feet from the car."

10

13. The Defendant called four witnesses. The 1 D/W was the first Defendant who was admittedly driving as the servant of the second Defendant. The 2 D/W was the mate or attendant of the first Defendant. The other two witnesses were friends of the first Defendant who did not witness the accident but who claim to have witnessed the Plaintiff driving his car in an improper manner prior to the collision.

20

14. The first Defendant stated that he was driving his lorry from Kemaman to Kuantan and after passing a bend just prior to the scene of the accident, he saw the deceased's car coming in the opposite direction. The following passages are extracts from his evidence:

"The accident happened soon after the bend. When I came to the bend I saw a car coming from the opposite direction. I switched on my head lamps. The car was coming towards my direction. The car was on my left. It was on my left. It was on my side of the road."

30

p.16
1.21-27

"When I saw car encroaching on my side of road I sounded my horn. I applied my brakes. My lorry stopped. The car came and hit my lorry. My lorry had come to a dead stop when the car hit it. I stopped on my side of the road. Only after the collision the front of the lorry swung to the other side of the road. The front of the lorry turned to the other side of the road. The front wheels of the lorry

40

p.17
1.22-32

faced the grass verge of the other side of the road. The car was crushed from the front lamp to the front door."

"The accident happened after the bend. At the side of the bend there was a coffee shop."

p.18
1.12-13

10

"That day I intended to stop at the coffee shop. I had the intention far away from the bend. I washed at 26th milestone. At this spot I was thinking of going to the coffee shop. There was a crowd at the coffee shop. As soon as I saw the crowd I changed my mind. I agree that I had unobstructed view of coffee shop for one or two miles.

p.19
1.15-46

20

I slowed down to 20 m.p.h. before reaching the coffee shop bend. I am certain of this. I agree that at the bend I would have been doing 10 to 15 miles per hour. I agree that as I did not want to stop I accelerated. I did so right in front of the coffee shop. My lorry was a diesel. I agree that it took up sometime to pick up speed. I had travelled for a distance of about 1½ chain when the accident occurred. I can't say how long it was. At the bend I slowed down. Then I changed to third gear and accelerated. If I did not change my engine would have stalled. When accident occurred I was travelling at about 25 miles per hour.

30

When I first saw the car it was on its wrong side of the road. It was on my side of the road. It was completely on my side of the road. I felt that it was strange. That's why I flicked the headlights. After that I became alarmed. After I passed the culvert I flicked headlights. I agree that I was alarmed when I saw car on my side of road. I stopped my car. I applied brakes. The lorry stopped. The car ran into my lorry."

40

"I am looking at sketch plan P2. I am looking G/s 1 glass splinters. I also see the position of the lorry with front wheels over the grass.verge. I am looking at photos (e). I cannot see here that front screen of car smashed. I don't understand

p.20
1.14-25

how the glass splinters came to be on the grass verge. Accident happened on my side of road. I am looking at tyre marks B1 and B2. I am looking at A1 A2 and A3 and then A4 - A5. A1 A2 A3 are not my tyre marks A4 to A5 are my tyre marks. B1 B2 also my tyre marks. I applied brakes after passing the coffee shop."

15. The 2 D/W was the first Defendant's attendant, Ismail Bin Mohamed Teh who was 75 years old. The following passage is an extract from his evidence:

10

p.20
l.35 to
p.21
l.24

"The accident occurred near the bend where there was a coffee shop on left side of the road. We did stop at the coffee shop that day. We did not have coffee. We did not get down. We thought of having coffee. The lorry slowed down near the coffee shop. There was a crowd at coffee shop. I was at the back of the lorry. After the coffee shop I saw a car coming from the opposite direction. The car was travelling on our left side of the road. I did not do anything. The driver D.W.1 sounded the horn. He slowed down the lorry. The car looked like as if it wanted to go to the other side of the road. A collision occurred. The lorry had stopped when the collision occurred. After the collision the lorry was swung to a position at right angles to the road. I was not hurt. D.W.1 too was not hurt. Both of us got down from the lorry I went to give assistance to the injured person - I mean the driver of the car. I carried him so that he could be taken to hospital. I did not do anything to him. There was blood on him. I removed the blood. I used his handkerchief to wipe the blood. He had 2 handkerchieves. I got one handkerchief from his right trousers pockets and the other from his shirt pocket. I could get the smell of alcohol. I can't remember what day it was. D.W.1 went off in a lorry to police station. I stayed at the spot."

20

30

40

16. The 3rd D/W was Zakaria Abdul Halim Bin Raji. The following two passages are extracts from his evidence:

"I know D.W.1. We were working for the same contractor in 1966. I remember in 1966 I saw a collision between his lorry and a car. I was driving my own lorry on that road. I was travelling from Kuantan to Kemaman. Before the accident I saw the car at 19th milestone. At first it was behind me. It wanted to overtake me. I allowed it. It sounded its horn. I slowed down and allowed it to pass. I saw the car was travelling from side to side. It went along and disappeared. On the 20th milestone I saw the car in an accident."

p.22
1.11-22

10

"The car sounded its horn. So I allowed it to overtake. I agree that before the car overtook my lorry the attendant had signalled that a vehicle wanted to overtake. He knocked the cabin. I looked through rear view mirror, slowed down and allowed car to overtake.

I agree that car had to go on other side to overtake and then swerve back to his side of the road. After that the car went to the other side of road. I thought that the driver was playing the fool. It is not true that I exaggerated as to what had happened because I had worked with D.W.1. and under the same contractor."

p.23
1.2-14

20

17. The 4 D/W was Ismail Bin Othman. The following passage is an extract from his evidence:

"I know the first Defendant Che Hitam. I remember he had an accident in 1966. At that time I was working as lorry driver for a different contractor. In my working I drove along Kemaman Kuantan road. Earlier that afternoon before accident I had travelled along that road. I was travelling towards Kuantan. I saw a motor car coming from the opposite side of the road. I drove my lorry close to my side of the road. I did not do anything else. The car went straight on. I moved off the road and drove on the grass verge. I stopped. The car travelled on my side of the road. I saw the number of the car was 5968. There was one person in the car. He was the driver. I came to know about the accident in the evening. I heard about it from my friends. I did not meet first Defendant. When I heard about it and came to know the number of the car I pulled out of my pocket the number of the car

p.23
1.40 to
p.24
1.23

30

40

which I had recorded earlier. It was confirmed that same car had been involved in the accident. I recorded number of car because if I met the car again I wanted to ask why the car had wanted to run into me. I do not know where the car driver lived."

18. The Defendants and the Plaintiffs both made submissions in writing to the Trial Judge. The submissions of the Defendants included the following passage:

10

"In encroaching into the path of the car

It would appear that there was a degree of encroachment
Perhaps DW1 had it in mind to avoid the car by going to the other side
He does not say so but the sketch plan suggests that this may have been the position
Possibly he did this in the agony of the moment
If there is negligence there it is submitted that it is a small degree and what the evidence shows the major responsibility rests with the deceased."

20

p.35
1.27 to
p.36 1.8

19. In his judgment the Trial Judge said, inter alia,

"The first Defendant says that when coming to the bend he was thinking of stopping to have coffee at the shop there. D.W.2, the attendant, says that the lorry had in fact stopped."

p.49
1.7-11

"I cannot accept the testimony of the first Defendant and D.W.2 as to what happened at the bend particularly when they say that the lorry had stopped and slowed down at the bend for the reasons stated above. Leaving aside A1-A3 from consideration, if the lorry had been travelling about 25 mph or had been moving forward from a stop before the accident, it would not have left tyre marks as long as and in such a pattern as A4-A5 or B1-B2. These tyre marks by themselves indicate that the first Defendant must have driven the lorry at a very fast speed losing control of the lorry and causing it to go into the path of the car, which had been trying to avoid it by swerving more to the left.

30

p.49
1.43 to
p.50 1.9

40

Considering the evidence up to this point only I am convinced that the first Defendant was at fault."

"I now deal with the other defence evidence. D.W.3. says in effect that after the deceased had overtaken his lorry at the 19th milestone he saw the car being driven from side to side. D.W.4 says that at a spot along the same road, which he cannot remember, the car came to his side causing him to stop his lorry. Now both D.W.3. and D.W.4 are friends. Before the accident they had been travelling in the opposite direction. Traffic on the road along the east coast even at the present day is not heavy compared with that in the west coast. It is an occasion to meet friends on the road here. Both claim to have met the car. Yet one did not meet the other on the road. The testimony of D.W.4 amounts to an allegation that the deceased had driven his car in an inconsiderate manner. He took the trouble of recording the number of the car. But he did not report the matter to the police. His purpose in doing so, according to him, was to meet the driver of the car whose address he did not even know. The testimony of D.W.2, the attendant, that the deceased smelt of liquor when he came to assist the deceased after the accident is not supported by the report from the doctor who examined the deceased's body. I am inclined to believe that the evidence of these witnesses as to the conduct of the deceased had been made up for the purpose of mitigating the fault of the first Defendant. In any case, whatever these witnesses may say about the deceased, I can find nothing from the evidence which shows that the deceased could have been at fault immediately before the accident or that the deceased could have done any more than what he had done to avoid the accident."

p.51
l.49

On the whole defence story, I am more convinced than ever that the first Defendant must have driven the lorry at great speed when coming to the bend and lost control of it when negotiating the bend resulting in the lorry making the tyre marks A1, A2 and A3 and then

A4-A5 and B1 and B2, and then running into the car which had been trying to avoid it, by swerving more to the edge of the road on its side, having regard to the car tyre mark C1-C2.

The evidence that the first Defendant was wholly responsible for the accident is overwhelming."

20. The Defendants appealed and the Appeal came on for hearing before ONG C.J. High Court Malaya GILL J. and ALI J.J. Federal Court of Malaysia on the 21st March 1972 and by Order of the same date was dismissed. On 18th May 1972 ONG C.J. delivered a judgment with which GILL ALI F.J.J. concurred.

10

21. The following passages are excerpts from the judgment of the Court:-

It was for this very reason that counsel for the defendants was forced to admit (at page 49 of his written submission) as follows:-

"Encroaching into the path of the car

p.60
l.40 to
p.61
l.10

It would appear that there was a degree of encroachment.

20

Perhaps D.W.1 (the lorry driver) had it in mind to avoid the car by going to the other side.

He does not say so, but the plan suggests that this may have been the position."

(The underlining is mine).

I do not think the judge could properly have accepted the above explanation for the lorry driver going across the road unless this driver alleged that such was his intention.

30

In the next place, the judge had to choose between believing the police inspector who drew the sketch plan or preferring the evidence of the lorry-driver and his witnesses. He accepted the police inspector's evidence and in my opinion he rightly held that the evidence of two defence witnesses as to the manner the car was being driven by the deceased before the accident was "made up for

p.61
l.18 to
p.62
l.12

the purpose of mitigating the fault of the first defendant". As to the lorry-driver and his attendant, both of them categorically stated, in examination-in-chief, that the lorry "had come to a dead stop when the car hit it". In cross-examination, however, the driver said, "When the accident occurred I was travelling at about 25 miles per hour". After such selfcontradiction, revealing a blatant untruth, is it any wonder that the learned trial judge considered him unworthy of credit? The tyre-marks A4-A5 and B1-B2 were admitted by him to be those made by the lorry - they were obviously marks of the rear wheels, which by no means retraced the course of the front wheels, except where a vehicle was going perfectly straight ahead. It was, in my view sufficient to take note only of the tyre-mark A4-A5. At its commencement it was 2 feet from the grass verge, 20 80 feet further on it was 4 feet 7 inches and at A5 it was 8 feet 1 inch from the grass. At all stages along A4-A5, therefore, it was beyond dispute that this lorry 7 feet 5 inches wide was progressively encroaching over the middle line on to its wrong side of the road. It was impossible for a stationary lorry to have made those marks. They could only have been made by a vehicle exceeding 25 m.p.h. The glass splinters (GS1 and GS2) should indicate approximately the point of impact as somewhere in between. That the two vehicles did not collide fully head on, but on their offside, showed that the car must have been well inside its own half when the lorry was over the crown of the road. Hence the judge came to a conclusion which, in my opinion, was irresistible.

40 In my opinion the defendant lorry-driver must have ran into the car in the manner and for the reason the judge believed it did. I had no hesitation, therefore, in dismissing this appeal with costs.

p.62
1.22-26

22. The Respondents contend that the conclusions to be drawn from the sketch plan points irresistibly to those conclusions drawn by both Courts and that

the evidence given by the Defence witnesses should be rejected for the reasons given by both Courts.

23. Accordingly, the Respondents humbly submit that this Appeal should be dismissed for the following, amongst others:-

REASONS

- (a) that there are concurrent findings of fact by both Courts that the Appellants were negligent.
- (b) that there are concurrent findings of fact that the deceased was not negligent.
- (c) that on a proper interpretation of the credible evidence, the sole cause of the accident was the negligent driving of the lorry by the first Appellant who was the servant of the second Appellant.

10

Ian Baillieu

No. 5 of 1973

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE FEDERAL COURT OF MALAYSIA
HOLDEN AT KUALA LUMPUR

B E T W E E N :

HITAM bin ABDULLAH CHUA SOON KOW
Appellants

- and -

KOM FOONG YEE (f)
CHIAN NGAN NGU @
CHEONG NEGAN NGOH Respondents

CASE FOR THE RESPONDENTS

LE BRASSEUR & OAKLEY,
71 Great Russell Street,
London WC1B 3BZ

Solicitors for the Respondents