13 of 1975

(13)

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 24 of 1973

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

CHOP SENG HENG (sued as a firm) (Fourth Defendants) Appellants

- and -

(1) THEVANNASAN s/o SINNAPAN (First Defendant)

(2) SING CHEONG HIN LORRY TRANSPORT CO. (sued as a firm) (Second Defendants)

Respondents

(3) PANG CHEONG YOW (Plaintiff)

RECORD OF PROCEEDINGS

GASTERS
44 Bedford Row,
London, WC1R 4LL

Solicitors for the Appellants

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

Solicitors for the 1st & 2nd Respondents

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

Solicitors for the 3rd Respondent

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 24 of 1973

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

CHOP SENG HENG (sued as a firm) (Fourth Defendants) Appellants

- and -

(1) THEVANNASAN S/O SINNAPAN (First Defendant)

(2) SING CHEONG HIN LORRY TRANSPORT Co. (sued as a firm) (Second Defendants) Respondents

(3) PANG CHEONG YOW (Plaintiff)

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

No.	Description of Document	Date	Page
	IN THE HIGH COURT OF MALAYA AT RAUB		
1.	Generally Endorsed Writ	2nd February 1970	1
2.	Statement of Claim	2nd February 1970	4
3.	Statement of Defence of First and Second Defendants	6th March 1970	7
4.	Statement of Defence of Third and Fourth Defendants	26th March 1970	8
5.	Statement of agreed facts	2nd November 1970	10
	Plaintiff's evidence		
6.	Pang Cheong Yow	17th April 1972	11
	First Defendant's evidence		
7.	Thevannasan s/o Sinnapan	17th April 1972	18

No.	Description of Document	Date	Page
8.	Judgment of Suffian F.J.	17th June 1972	27
9.	Order of Court	17th June 1972	33
	IN THE FEDERAL COURT OF MALAYSIA (APPELLATE JURISDICTION)		
10.	Notice of Appeal	14th July 1972	35
11.	Memorandum of Appeal	22nd August 1972	37
12.	Notice of Cross-Appeal	13th September 1972	42
13.	Judgment of Ali F.J.	14th March 1973	43
14.	Judgment of Gill F.J.	14th March 1973	48
15.	Judgment of Ong C.J. (dissenting)	14th March 1973	49
16.	Order of Court	14th March 1973	55
17.	Formal order granting final leave appeal to His Majesty the Yang Dipertuan Agung	3rd September 1973	56

EXHIBITS

Exhibit Mark	Description of Document	Date	Page
A	Translation of police report (complaint by 3rd Defendant)	4th February 1969	58
B	Translation of Police report (complaint of 1st Defendant)	4th February 1969	59
C	Police sketch plan	undated	60
D	Translation of key to sketch plan	undated	61
E	Certificate of examination of second Defendant's vehicle	10th February 1969	63

Exhibit Mark	Description of Document	Date	Page
F	Certificate of examination of fourth Defendant's vehicle	10th February 1969	64
G	Translation of notes of proceedings in the Magistrates' Court at Bentong	1st December 1969 and 12th January 1970	65

LIST OF DOCUMENTS TRANSMITTED BUT NOT PRODUCED

Description of Document	Date
Originals of documents of which translations have been transmitted	Various
Medical report on Plaintiff	22nd July 1969
Such portions of the notes of Suffian F.J. as relate to arguments and submissions by Counsel	17th-18th April 1972
Notes of arguments recorded by Ong C.J., Gill and Ali F.J.J.	2nd October 1972
Affidavit of Low Chee Lang in support of motion for leave to appeal to His Majesty the Yang Dipertuan Agung	30th March 1973
Motion for leave to appeal to His Majesty the Yang Dipertuan Agung	2nd April 1973
Order granting Conditional Leave to Appeal to His Majesty the Yang Dipertuan Agung	17th April 1973

No. 24 of 1973

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

CHOP SENG HENG (sued as a firm)
(Fourth Defendants) Appellants

- and -

(1) THEVANNASAN S/O SINNAPAN
(First Defendant)

10

(2) SING CHEONG HIN LORRY TRANSPORT
CO. (sued as a firm)
(Second Defendants) Respondents

(3) PANG CHEONG YOW (Plaintiff)

RECORD OF PROCEEDINGS

In the High Court

No. 1

Generally Endorsed Writ

2nd February 1970

No. 1

GENERALLY ENDORSED WRIT

IN THE HIGH COURT IN MALAYA AT RAUB
CIVIL SUIT NO: 13 of 1970

BETWEEN

20

PANG CHEONG YOW — Plaintiff

and

1. THEVENNASAN S/O SINNAPAN
2. SIN CHEONG HIN LORRY TRANSPORT
CO. (sued as a firm)
3. KOW CHAI @ CHEW CHIN
4. CHONG SENG HENG (sued as a firm) — Defendants

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

Yang di-Pertuan Agong.

To:

1. Thevennasan s/o Sinnapan,
   No: 83, Batu 14, Kajang.
2. Sin Cheong Hin Lorry Transport Co.,
   (sued as a firm)
   No.: 83, Jalan Cheras,
   Kajang.
3. Kow Chai @ Chew Chin,
   No: T-42, Sempalit New Village,
   Raub.
4. Chop Seng Heng (sued as a firm),
   No: 446, 3rd mile Ipoh Road,
   Kuala Lumpur.

10

WE COMMAND you, that within twelve 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 Pang Cheong Yow of No: T-61, Sempalit New Village, Raub, Pahang.

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

20

WITNESS, ABDUL MALIK BIN MOHD SALLEH, Asst Registrar of the High Court in Malaya, this 26th day of February 1970.

Sd. MURPHY & DUNBAR	Sgd:
Plaintiff's solicitors	Assistant Registrar, High Court, Malaya, Raub.

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.

30

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 Raub.

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 Raub.

In the High Court

No. 1

Generally Endorsed Writ

2nd February 1970

(continued)

THE PLAINTIFF'S CLAIM IS FOR damages for personal injuries and consequential loss suffered by him and caused by the negligence of the 1st named Defendant and servant or agent of the 2nd named Defendants and by the negligence of the 3rd named Defendant the servant or agent of the 4th named Defendants or alternatively by the negligence of one or other of them in the driving, use and management of their respective vehicles.

10

Dated this 2nd day of February, 1970.

Sgd: MURPHY & DUNBAR

Plaintiff's Solicitors.

This Writ was issued by MESSRS. MURPHY & DUNBAR whose address for service is at Chartered Bank Building, 6th Floor, Jalan Ampang, Kuala Lumpur, Solicitors for the Plaintiff who resides at c/o Messrs. Murphy & Dunbar Advocates & Solicitors, Chartered Bank Building, 6th Floor, Jalan Ampang, Kuala Lumpur.

20

This Writ was served by me at M/s Shearn Delamore & Co. on the 2nd and 3rd defendants on the 3rd day of March 1970 at the hour of

Indorsed this 3rd day of March 1970

(Signed)

30

(Address)

In the High Court

No. 2

Statement of Claim

2nd February 1970

No. 2

STATEMENT OF CLAIM

1. On or about the 4th day of February 1969 at or about 3.00 a.m. the Plaintiff was lawfully travelling as an attendant in Motor Lorry No: BL 5223 which was being driven by the 3rd named Defendant along the Bentong/Kuala Lumpur Road in the State of Pahang travelling in the direction of Bentong from Kuala Lumpur when at or near 4¼ milestone of the said road he ran into and collided with the rear of Motor Lorry No: BL 2715 which was being driven and/or controlled and/or managed by the 1st named Defendant. 10

2. The said collision was caused by the negligence of the 1st named Defendant the servant or agent of the 2nd named Defendants and by the negligence of the 3rd named Defendants the servant or agent of the 4th named Defendants or alternatively by the negligence of one or other of them in the driving, use and management of their respective motor vehicles. 20

PARTICULARS OF NEGLIGENCE OF THE 1ST NAMED DEFENDANT

(a) Failing to keep any or any proper lookout;

(b) Driving without any or any sufficient lights;

(c) Failing to notice the presence of Motor Lorry BL 5223 which was following behind him;

(d) Failing to give any or any sufficient warning of his intention to stop; 30

(e) Stopping suddenly when it was unsafe so to do;

(f) Parking his Motor Lorry without any or any sufficient lights;

(g) Placing his Motor Lorry in such a position as to disallow other traffic to pass him safely.

PARTICULARS OF NEGLIGENCE
OF THE 3RD NAMED DEFENDANT

(a) Failing to keep any or any proper lookout;

(b) Driving at an excessive speed in the circumstances;

(c) Driving with insufficient lights;

(d) Failing to observe the presence of Motor Lorry BL 2715 on the highway;

(e) Failing to allow himself sufficient time or distance in which to stop his lorry from colliding with Motor Lorry BL 2715;

10

(f) Following Motor Lorry BL 2715 too closely in the circumstances;

(g) Driving into Motor Lorry BL 2715;

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

3. By reason of the aforesaid negligence the Plaintiff has suffered injuries, had endured pain and has been put to loss and expense.

20

PARTICULARS OF PERSONAL INJURIES

The Plaintiff was admitted to the Bentong District Hospital on the 4th day of February 1969 and the following injuries were found.

1. Traumatic amputation of the left leg above the knee was done.

2. Traumatic amputation right leg big toe at proximal interphalangeal joint was also done.

He was treated and discharged on 6.3.69 and continued as an out-patient.

30

His disability is estimated at 60%.

PARTICULARS OF SPECIAL DAMAGES

Transport expenses for wife to visit the Plaintiff

In the High Court

No. 2

Statement of Claim

2nd February 1970

(continued)

at the General Hospital, Kuala Lumpur for 7 trips at $6.10 per trip — $42.70

Transport expenses for Plaintiff to attend out-patient treatment at the General Hospital, Kuala Lumpur for 3 trips at $4.20 per trip. — $12.60

Loss of earnings at $250/- per month as a lorry attendant from 3.2.69 to the date of filing the Writ of Summons

Cost of Artificial leg — $400.00 10

Shoes — $20.00

And the Plaintiff claims damages together with interest thereon at 6% per annum under Section 11 of the Civil Law Ordinance No: 5 of 1956 from the 4th day of February 1969 to the date of Judgment.

Dated this 2nd day of February, 1970.

Sgd: MURPHY & DUNBAR
Plaintiff's Solicitors

To: The above named Defendants

1. Thevennasan s/o Sinnapan,
No: 83, Batu 14,
Kajang. 20

2. Sin Cheong Hin Lorry Transport Co.,
(sued as a firm)
No: 83, Jalan Cheras,
Kajang.

3. Kow Chai @ Chew Chin,
No: T-42, Sempalit New Village,
Raub.

4. Chop Seng Heng, 30
(sued as a firm)
No: 446, 3rd mile Ipoh Road,
Kuala Lumpur.

No. 3

STATEMENT OF DEFENCE

(1st and 2nd DEFENDANTS)

1. Save that it is admitted that an accident took place on the date and place described, paragraph 1 of the Statement of Claim is denied.

2. The 1st named Defendant denies that he was negligent as alleged in paragraph 2 of the Statement of Claim or at all and puts the Plaintiff
10 to strict proof of the particulars of negligence contained therein. The 1st and 2nd Defendants aver that the accident was entirely caused and/or contributed to by the negligence of the 3rd Defendant.

PARTICULARS OF NEGLIGENCE OF 3RD DEFENDANT

(a) Failed to keep any or any proper lookout at all;

(b) Drove at an excessive speed in the circumstances;

20 (c) Drove with insufficient lights;

(d) Failed to observe the presence of motor lorry BL 2715 which was stationary at the time of the accident;

(e) Collided into the rear of motor lorry BL 2715;

(f) Failed to allow himself sufficient time or distance in which to stop his lorry from colliding with motor lorry BL 2715;

(g) Followed motor lorry BL 2715 too closely in the circumstances;

30 (h) Drove into motor lorry BL 2715;

(i) Failed to stop, swerve, slow down or otherwise avoid the said collision.

3. The 1st and 2nd Defendants deny paragraph 3 of the Statement of Claim and put the Plaintiff to

In the High Court

No. 3

Statement of Defence (1st and 2nd Defendants)

6th March 1970

(continued)

strict proof of the particulars of personal injuries and particulars of special damage enumerated thereunder.

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

And the 1st and 2nd Defendants pray that this suit be dismissed with costs.

Dated this 6th day of March, 1970. 10

Sgd: SHEARN DELAMORE & CO.

Solicitors for the 1st and 2nd Defendants.

This Statement of Defence is filed by Messrs. Shearn Delamore & Company, Solicitors for the 1st and 2nd Defendants, whose address for service is No: 2, Benteng, Kuala Lumpur.

No. 4

Statement of Defence (3rd and 4th Defendants)

26th March 1970

No. 4

STATEMENT OF DEFENCE

(3rd and 4th DEFENDANTS) 20

1. Paragraph 1 of the Statement of Claim is admitted.

2. Save and except that the collision was caused by the negligence of the 1st named Defendant as the servant or agent of the 2nd named Defendant the whole of paragraph 2 of the Statement of Claim is denied.

3. The 3rd and 4th named Defendants contend and will contend that the collision was caused solely by the negligence of the 1st Defendant 30 as servant or agent of the 2nd named Defendant or in the alternative was substantially contributed to by the 1st Defendant's negligence.

PARTICULARS OF NEGLIGENCE OF 1st NAMED DEFENDANT

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

(b) Driving without any or any sufficient lights;

(c) Failing to notice the presence of Lorry No: BL 5223 which was following behind him;

(d) Failing to give any or any sufficient warning of his intention to stop;

10 (e) Stopping suddenly when it was unsafe and dangerous to do so;

(f) Parking his motor lorry without any or any sufficient lights;

(g) Placing his lorry in such a position as to disallow other traffic to pass him safely.

4. No admission is made as to the alleged or any injuries, pain, loss, expense or damages.

5. Save as hereinbefore expressly admitted the 3rd and 4th named Defendants deny each and every allegation in the Statement of Claim as if set out
20 and traversed seriatim.

The 3rd and 4th named Defendants pray that the suit against them be dismissed with costs.

Dated this 26th day of March, 1970.

Sgd: MORRIS EDGAR & CO.

Solicitors for the 3rd and 4th named Defendants.

This Statement of Defence was filed by Messrs. Morris Edgar & Co., Safety Insurance Building, Jalan Melayu, Kuala Lumpur, Solicitors for the 3rd and 4th
30 named Defendants.

In the High Court

No. 5

Statement of Agreed Facts

2nd November 1970

No. 5

STATEMENT OF AGREED FACTS

1. A collision between Motor Lorry BL 5223 and Motor Lorry BL 2715 occurred on the 4th day of February 1969 at about 3.00 a.m.

2. The collision took place at or near the 4¼ mile stone Bentong/Kuala Lumpur Road in the State of Pahang.

3. The Plaintiff was at the time of the accident employed by the 4th named Defendants as a Lorry Attendant. 10

4. At the time of the accident the Plaintiff was travelling as an attendant on Motor Lorry BL 5223 which was being driven by the 3rd named Defendant along the Bentong/Kuala Lumpur Road travelling in the direction of Bentong from the direction of Kuala Lumpur.

5. The 3rd named Defendant is the servant or agent of the 4th named Defendants.

6. Motor Lorry BL 2715 was being driven and/or controlled and/or managed by the 1st named Defendant the servant or agent of the 2nd named Defendants. 20

7. As a result of the collision the Plaintiff was admitted to the Bentong District Hospital on the 4th of February 1969 and :-

1. Traumatice amputation of the left leg below the knee was done.

2. Traumatic amputation right big toe at proximal interphalangeal joint was also done. 30

He was treated and discharged on 6.3.69 and continued as an out-patient.

Dated this 2nd day of November 1970.

Sgd: Murphy & Dunbar
Plaintiff's Solicitors

To: Messrs. Shearn, Delamore & Co.,
Eastern Bank Building,
2 Benteng,
Kuala Lumpur.
Solicitors for the 1st & 2nd Defendants.

Messrs. Morris Edgar & Co.,
Bangunan Safety,
Jalan Melayu,
Kuala Lumpur.
10 Solicitors for the 3rd & 4th Defendants.

In the High Court

No. 5

Statement of Agreed Facts

2nd November 1970

(continued)

No. 6

PANG CHEONG YOW

Plaintiff's Evidence

No. 6

Pang Cheong Yow.

Examination

Tay: addresses - and calls.

PW1 affirmed states in Hakka:

Pang Cheong Yow, aged 29, unemployed, 3105 Sempalit Village, Raub.

In early hours at 4.2.69 I was working as attendant on lorry BL 5223. It was being driven by Kow Chai, 3rd defendant. 4th Defendant was our
20 towkay. It was going from K.L. towards Bentong.

At about 3 a.m. at m.s. 4¼ the lorry met with an accident. It rounded a left-hand corner and banged into the rear of a stationary lorry facing Bentong. Stationary lorry - the whole of it was parked on the metalled portion of the road. It was not visible from the commencement of the corner. It was parked about 30 feet away on the other side of the corner. Its near-side was about 1½ foot from road edge. We could not see the lorry because it
30 had no light. Also there was mist about. As we entered the left-hand corner there was a hill on top of which there were rubber trees - and because of the hill we could not see round the corner. The corner was quite sharp.

Our lorry, its approximate speed was 35 m.p.h.

Our headlights were on. I was sitting in cabin next driver. When I first saw lorry in front, it was only a shadow and the same instant there was a

In the High Court

Plaintiff's Evidence

No. 6

Pang Cheong Yow

Examination

(continued)

collision.

After impact I was unconscious.

I was admitted to hospital the same day and discharged on 6.5.69. After that I attended for outpatient treatment. I went three times. I don't go to hospital for treatment any more.

My left leg was amputated above knee. I got an artificial limb costing $400/-. I also had to buy shoes costing $20/- for same. (Mr. Sodhy does not dispute cost of this leg and shoes). 10

Since accident I have not worked. I tried to get work but unsuccessfully. I went to school for 2 years - so can't read or write well - I can sign my name. I am a manual worker.

At time of accident I earned about $250/- a month as attendant - I was paid on commission basis. The lorry carried logs. My earnings were not fixed, sometimes more, sometimes less. The minimum I could expect to earn per month was $240 - $250. The maximum was $280/-. 20

At time of accident I was married. I have 2 children aged 6 and 9. At time of accident my wife was not working - I was sole breadwinner of the family.

After accident I have received no wages whatsoever. I kept going by relying on my wife. She works as a rubber tapper.

My older child, a boy, goes to school.

Cross-Examination for 2nd Defendant

XD Sodhy for 1st and 2nd Defendants: 30

I was paid so much a trip. The more trips, the more money I make. That morning the lorry started from K.L. - it was going to Bentong empty. It was doing about 35 m.p.h. - it had a trailer. The lorry had come to K.L. at midnight of the 3rd February - it was loaded with timber taken on in Raub. 3rd defendant and I had brought in the lorry from Raub. Timber unloaded and we left to go back to Bentong. We rested for about 2 hours. We left K.L. at about 2 am. on 4.2.69. We arrived 40

at scene of accident at about 3 or 3.30 a.m.

3rd defendant drove to K.L. and from K.L. to Bentong 3rd defendant and I had left Raub on 3.2.69 at between 7 and 8 p.m. On 3.2.69 at about noon we unloaded logs in K.L., then about 2 p.m. we left for Raub, loaded logs there and about 7 or 8 p.m. we left Raub for K.L. with the logs.

Logs unloaded at noon on 3.2.69 in K.L. came from Raub.

10 On 4.2.69 we were on our way to Raub via Bentong when we had the accident.

We had been travelling up and down for at least 18 hours since 8 a.m. on 3.2.69.

(To Court)

(To Court - we started work on 3.2.69 at about 11 a.m. at Raub. We loaded timber in deep jungle about 40 miles from Raub and at about 7 p.m. went to K.L.)

We left late because we had to get certain documents from Forest Department - we could get
20 them even at night.

We could make one trip K.L. - Raub per day. We unload in K.L., go back to Raub and load and return to K.L. and so on.

Q. When you said you started work at 11 a.m. on 3.2.69, what did you mean?

A. We had to wait some time to get enough logs.

Q. Where had you come from when you started work on 3.2.69 at 11 a.m.?

A. We were in the jungle waiting for logs.

30 Q. In the jungle where had you come from?

A. We were in K.L. on 2.2.69 at about 11 p.m. or midnight - we arrived in jungle at about 3 or 4 a.m. on 3.2.69

In the High Court

Plaintiff's Evidence

No. 6

Pang Cheong Yow

Cross-Examination for 2nd Defendant

(continued)

Q. So you had been travelling continuously?

A. We slept in the jungle before we started work at 11.00 a.m. on 3.2.69 - yes, we worked continuously from then.

Before accident we left K.L. at about 2 a.m. - no traffic on the road - I was sitting next to driver - I was not sleeping - I was concentrating.

Q. Place of accident - do you agree that after the corner there was a straight stretch of road? 10

A. Yes.

Q. I put it to you that our lorry was parked about 100 yards after the bend.

A. No - it was about 30 feet after the bend

Q. Did you see our lorry moving in front of you at any time.

A. No - it was stationary.

(To Court: I did not see it at any time until the accident). 20

I first saw the lorry when it was stationary - it was about from here to the books (about 12 to 15 feet).

Q. In that short while you could tell us how and where it was parked and whether or not it had lights?

A. Yes.

Yes, we were doing about 35 m.p.h.

I have told Court what I saw myself.

I could see that lorry parked about ½ foot from road edge. 30

Yes, there was plenty of mist on the road.

In the High Court

Plaintiff's Evidence

No. 6

Pang Cheong Yow

Cross-Examination for 2nd Defendant

(continued)

(To Court: Scene of accident is about 4 to 5 miles from Ketari junction.)

Our lorry went smack into rear of your lorry.

Front near-side of our lorry hit off-side rear of other lorry. Yes, I saw this.

Q. Your driver 3rd defendant took avoiding action?

A. He shouted, swerved to the right.

Q. I put it to you lorry in front had lights on.

10 A. Not so.

I don't agree that our lorry was speeding at much more than 35 m.p.h.

Other lorry was loaded with cement.

Q. Your lorry pushed our lorry about 16 feet?

A. After accident I was unconscious - so I don't know.

Q. Other lorry - was it not covered with tarpaulin?

A. I am not sure.

20 Q. How did you know our lorry had cement when you were unconscious?

A. I was told by my driver when I was in General Hospital in K.L.

Q. What else did he tell you about the accident?

A. He also told me other lorry had no light.

(To Court: But I also noticed it myself).

Q. Did he also tell you about the distance and that it was parked round the corner?

A. No.

30 Q. During monsoon period did you work on the lorry and collect timber?

In the High Court

Plaintiff's Evidence

No. 6

Pang Cheong Yow

Cross-Examination for 2nd Defendant

(continued)

A. No during monsoon period I work only 19 days in a month, i.e. when weather is fine.

We get a day off per week.

Q. Our lorry had not only its light on but also its left indicator flashing.

A. Not so.

Cross-Examination for 3rd and 4th Defendants

QD by 4th defendant

Q. You sometimes earn less than $100 a month?

A. Not so.

Q. I pay the driver and he divides payment between you and him? 10

A. Yes.

My share is more than $200 a month.

Q. The lorry can only make 8 full trips Raub to K.L. per month?

A. More than 8.

Q. According to my receipt here I paid driver on 1st January, 1969, $327.08, being 25% of $1,308.32 and you and the driver had to share this amount ($327.08)? 20

Tay objects to question - on grounds -

(a) no disclosure of receipt and

(b) signer of receipt not to be called.

(Court disallows the question)

Q. Did you know that I instructed the driver, 3rd defendant to sleep the night of the accident at my sawmill in K.L. and not to

return that night to Bentong?

A. Not so.

Q. Your home is at Raub?

A. Yes.

Q. On night in question you wanted to go back home in Raub?

A. Yes.

Q. Accident happened because you and driver disobeyed instructions?

10 A. The towkay at the sawmill in K.L. did not allow us to sleep there.

Re-examined by Tay

Every 24 hours at time of accident I slept 3 to 4 hours at a stretch. In between trips - I also slept. So every 24 hours I slept on average 6 to 7 hours. During other hours I worked. My working day is about 16 to 17 hours every 24 hours. - during those 16 to 17 hours we would make one trip Raub to K.L. and back to Raub.

20 From Raub down to K.L. our lorry if fully loaded would take about 4 hours - the return journey when empty takes about 3 hours.

Q. That gives 7 hours. What do you do during other hours?

A. Eating - waiting for lorry to be loaded and unloaded.

On an average trip Raub to K.L. I would get $9 to $10.

Every month I worked daily except for 4 off
30 days.

In the High Court

1st Defendant's Evidence

No. 7

Thevannasan

Examination

No. 7

THEVANNASAN SON OF SINNAPAN

Thevennasan son of Sinnapan (1st defendant), aged 32, lorry driver, 315A, JKR lines, Kg. Chokra, Port Dickson

On 3.2.69 at about 12 midnight or 12.30 a.m. I left K.L. driving lorry BL 2715 loaded with 100 bags of cement. Lorry covered with tarpaulin. We made for Kuantan.

Before leaving K.L. I checked my lorry. I checked its headlights, wipers, tail lights, indicator lights and reflectors. They were OK. I had an attendant under the tarpaulin at back - he was Ramayah - I cannot trace him. I tried earlier and since 15.4.72 - I hear he is in Bentong. 10

(To Court: Since the accident I no longer worked for my towkay - I stopped in June 1970. Ramayah was only a substitute attendant for the towkay). 20

On way towards Bentong I was doing 25 to 30 m.p.h. because of the load. Up a slope speed reduced to 20 to 25 m.p.h. Lorry was a 5 tonner and carried a full load. No traffic overtook me - one or two vehicles came from opposite direction.

When we were about 3 to 4 miles from Bentong, my attendant told me he wanted to urinate. I told him not possible to stop the lorry at that spot as it was a winding road and it was misty. I told him I would stop at a straight stretch. After negotiating a bend I saw a straight stretch. Four or five chains from the bend I saw road ahead was straight. I put on the left-hand flashing light - and dipped my headlights. I stopped my lorry. The rear number plate lights were also on. I sat in driver's seat pressing the brakes. Hamayah came down and was standing on the steps of the cabin to get down. Through the rear view mirror I saw two rays of light coming from a vehicle travelling very fast. It hit my lorry in the rear with a loud sound. As a result my chest hit the steering wheel - my lorry was pushed forward and its 30 40

near-side front tyre went into a ditch. Near-side rear tyre was about to fall into a ditch, but did not do so.

(To Court: The road there gently sloped down towards the front).

The impact of other lorry on mine was hard.

Before we stopped at scene, I saw no vehicle coming from behind.

I stopped my lorry 4 or 5 chains from bend.

10 My indicator was working.

I stopped in such a way that the near-side front wheel was on the grass. I was frightened to go further to left because of soft soil. There was enough space for another vehicle to pass easily. The road there was broad. My lorry was parked at a slight angle - because of the darkness I could not park it straight. It was partly on road and partly on grass.

After impact, my chest hit the steering wheel 20 and all my lights went out. Lights of other lorry also went out. Later a tyre of the other lorry burst. It was time when rubber tappers were going to work. I was frightened of them and hid myself in bushes.

Ramayah went to Police and reported. Later I also reported.

My lorry lights went out because the battery was under the seat and as a result of impact the battery and my seat were pushed forward and battery 30 disconnected.

Before the accident there was no sounding of horn by other lorry.

Not true that I was parked at the corner and on metalled part of road.

There was slight mist - if there had been a red light in front I would have been able to see it.

In the High Court

1st Defendant's Evidence

No. 7

Thevannasan

Examination

(continued)

My lorry also had two lights on the cabin - a red one on the right and a green one on the left. All these lights had been checked by me before leaving K.L. - by switching them on and getting down to see the lights. My attendant checked the indicator and rear lights - I was told they were in order. I asked him to do so and I also checked them myself.

(Agreed that 3rd defendant pleaded guilty to dangerous driving in Magistrate's Court in Bentong, case No: BMS. 354/69.) 10

Sodhy applies to tender as exhibits notes of the proceedings in which 3rd defendant pleaded guilty to charge of dangerous driving.

Yap objects - 3rd defendant is not here and I won't have chance to cross examine him.

Sodhy addresses

(1967) 2 M.L.J. 31

Tay addresses - repeats reasons as above - adds that according to the proceedings 3rd defendant first claimed trial but later changed plea to one of guilty. 20

Court admits original of above proceedings - marked Exhibit D 1. Also certified translation of the same - marked D 1T.

Cross-examination for Plaintiff

QD by Tay (for plaintiff)

Q. Yours was a very powerful Diesel lorry?

A. No.

Yes, it can carry up to 5 tons.

It was a Bedford lorry. 30

Q. If empty, it could travel more than 40 m.p.h.?

A. I am not allowed to drive more than 35 m.p.h.

Question repeated.

A. I have never done more than 35 m.p.h. If I did and anything happened, my employer would cut my pay.

I had been employed as lorry driver by this company for about 1½ years before the accident.

Q. You habitually drove this particular lorry?

A. I started driving it one week before the accident as substitute driver. Earlier I was driving a timber lorry CA 7173 with trailer.

10 Maximum permitted speed for timber lorry was 35 m.p.h. Driving it I never once exceeded that speed.

Coming back to this particular lorry at time of accident, I agree it was loaded to maximum permitted - 100 bags of cemt. Each bag weighs about 80 katis.

Each bag is about (shows) 2½ feet long - 1½ feet wide - about 4 to 6 inches deep.

20 The lorry's sideboards at the back come up to my shoulder as I sit on the driver's seat.

(Shown a toy lorry).

The lorry is something like this.

The top bags come up to below my shoulder.

The bags were stacked on the floor 3 deep.

If I stand on the floor of rear portion of lorry, the top of the sideboards come up to my waist.

30 Top bags on the pile did not come up to my waist - they came to (shows) about 1½ feet below the top of the sideboards.

The tarpaulin covered up all the bags. But in the middle it was held up by two poles (one in front, the other at back), each higher than the top of the sideboards.

The attendant in the rear of the lorry was

In the High Court

1st Defendant's Evidence

No. 7

Thevannasan

Cross-examination for Plaintiff

(continued)

inside the tarpaulin

Q. So it was difficult for attendant to talk to you?

A. There is opening behind me in the back of the cabin through which he and I can communicate. The opening is in the centre of the cabin back. The centre post supporting tarpaulin starts from top of the opening and does not go below it.

Q. Accident happened between 3 and 4 a.m.? 10

A. Yes.

Q. How long had you been driving in mist before the accident?

A. For one hour.

Q. Attendant told you he wanted to urinate - how long before the accident?

A. Can't remember.

Q. One minute, two?

A. About ½ hour. I did not stop until I had cleared bends. 20

He told me he wanted to urinate, 2 or 3 times.

Did you tell him you would stop at a straight stretch and when there was no mist?

A. I told him I would stop at a straight stretch. I did not tell him when there was no mist.

Q. So you meant you would stop at a straight stretch even if it was misty?

A. Yes. 30

Q. Half hour before accident at what milestone were you?

A. Can't remember.

In the High Court

1st Defendant's Evidence

No. 7

Thevannasan

Cross-examination for Plaintiff

(continued)

I could have been 10 miles away from scene of collision.

(referred to Police report which is interpreted to witness - AB p.4)

I agree that was my report, but it omits a few sentences.

I agree that, apart from those omissions, the report is correct.

(Referred to 3rd and 4th sentences in report)

10 Q. Do you agree they are correct?

A. Not correct.

After passing bends I put on flashing light, I went on for 4 or 5 chains, only did I stop.

I told all this to Police Officer, but he did not put same in report.

Q. Is it true that very soon after stopping there was a collision?

A. After stopping, 2 or 3 minutes later came the impact before attendant could get down from
20 lorry - he was still on the steps.

It normally takes him 1 or 2 minutes to get down from lorry.

Q. If he was full of water, he would have been very keen to get down?

A. That is true.

Q. Surely it won't take an attendant one or two minutes to get down from lorry?

A. I say it would take him one or two minutes.

Q. Did you hear the sound of our lorry before the
30 impact?

A. No.

Q. It was a quiet night.

In the High Court

1st Defendant's Evidence

No. 7

Thevannasan

Cross-examination for Plaintiff

(continued)

A. I did not hear sound of other lorry.

Q. When you saw the lights of our lorry, did you not hear its sound?

A. I did not - I saw the lights approaching very fast - my engine was also running.

Q. Was it possible for your attendant to urinate from back of lorry when lorry in motion?

A. No - because of tarpaulin.

Q. How did tarpaulin stop him doing so? 10

A. It was tied up at the end. It was quite uncomfortable to urinate from lorry in motion - it would give pain.

Yes, I have experienced it.

It is not possible to urinate from moving lorry because of jolting.

Yes, I have urinated from moving lorry when I worked as attendant.

Nearside behind cabin - there is an opening in the tarpaulin through which attendant could get out of lorry. 20

While in lorry attendant was completely covered by the tarpaulin - except at the opening.

Because of arrests by Police for not having attendants at back of lorry - we always have an attendant at back - though he is no use to me.

Q. I put it to you - it was you yourself who wanted to urinate. 30

A. No - it was my attendant.

After impact my chest was thrown against steering wheel.

And my lorry went forward.

Q. If something hit lorry from behdind, you would have been thrown backward, not forward.

A. I was resting my hands on the steering wheel - and impact threw me forward on steering wheel. I do not agree with your suggestion.

I am telling the Court what I experienced.

Cross-examination by 4th Defendant

XD by 4th defendant

Q. Under the law, if a lorry stops on the highway, you must put a warning sign on the road behind it.

10

A. I did not put warning sign behind my lorry - but I had my flashing lights on.

Q. Is it not true that immediately after accident you were not in the cabin of the lorry?

A. After the other lorry's tyre burst, I ran into the bushes - because there were some Chinese rubber tappers about and I was scared of them.

(4th defendant again asks for adjournment - to enable him to engage counsel. Court turns down application).

20

Q. Was it a misty night?

A. There was a slight mist.

Re-examination

Re-examined by Sodhy

Tarpaulin when up in an inverted V. Pole in centre behind cabin and another pole at back of lorry - a third pole is put on the two poles - and tarpaulin is laid on top. In the centre you can walk about without your head touching the tarpaulin.

At the back the tarpaulin is closed by two overlapping flaps - tied from outside, not inside.

30

In the High Court

1st Defendant's Defence

No. 7

Thevannasan

Re-examination

(continued)

The tarpaulin in front - on driver's side it is tied to a hook in the driver's cabin - on other side it is left open or free.

For attendant to come down from lorry it is easy to do so through the opening - he has to crawl through it.

I had been driving in mist for an hour before the accident. It was slight mist. Where I stopped, mist was neither too thick nor too thin.

The side flaps of sideboards have an opening about 2 or 3 inches wide between 2 planks. 10

When other lorry came from behind, I wasn't bothered - I thought it would pass me.

I did not place a safety triangle - my engine was running.

After impact Chinese driver shouted "Tolong, tolong" and then tyre burst. I thought some one had fired shot at me - so I run into the bushes.

By Court

QD by Court at Tay's request

Before accident my tail light and flashing light were on. 20

Q. During half hour between attendant asking you to stop and you stopping, why didn't you pull in at a lay-bye?

A. I can't remember if there was any laybye.

In the High Court

No. 8

Judgment of Suffian, F.J.

17th June 1972

No. 8

JUDGMENT OF SUFFIAN, F.J.

On 4th February, 1969, Pang Cheong Yow the Plaintiff was riding in lorry BL 5223 as an attendant. The Lorry had left Kuala Lumpur and was on its way towards Bentong. The time was about 3.00 in the morning and there was mist about and the road was a winding one. The lorry rammed into the rear of a stationary lorry. As a result of the collision the Plaintiff was injured and he sues Thevannasan s/o Sinnapan, the driver of the stationary lorry (first defendant), and his employers, the Sin Cheong Hin Lorry Transport Co. (second defendant) and he also sues Kow Chai alias Chew Chin, the driver of the lorry in which he was travelling (third defendant) as well as his employer, Chop Seng Heng (fourth defendant).

The first issue to be determined is: who was to blame for this collision?

The Plaintiff alleges that both lorry drivers were to blame, or alternatively one or the other of them was to blame.

The driver and owner of the stationary lorry (first and second defendants) deny liability and instead blame the driver of the lorry that rammed into the rear of the stationary lorry. They say that the accident was caused either wholly or in part by the negligence of the driver of the other lorry.

The driver of the other lorry and his employer (third and fourth defendants) deny liability and allege that the driver of the stationary lorry was wholly or partly to blame.

At the trial the driver of the lorry in which the plaintiff was riding as an attendant was not available to give evidence, nor was the attendant of the stationary lorry, and in the event only two eye-witnesses were called - the plaintiff attendant and the driver of the stationary lorry (first defendant).

Their evidence, needless to say, is conflicting.

In the High Court

No. 8

Judgment of Suffian, F.J.

17th June 1972

(continued)

The accident happened because, according to the plaintiff's evidence, the lorry in front had stopped on the road about 30 feet away on the other side of a blind corner, it had no lights on and visibility at the time was poor as there was plenty of mist around. In detail he said the nearside of the stationary lorry was about half a foot from the left edge of the road. The lorry in which he was travelling was doing approximately 35 miles per hour. It had its headlights on and from where he was sitting in the cabin next to the driver he first saw the stationary lorry in front only as a shadow and the same instant there was a collision. It was not visible from the commencement of the bend because it had no lights on and there was mist about. 10

The driver of the stationary lorry (first defendant) in his evidence said that before leaving Kuala Lumpur he had checked all the lights of his lorry and he found them all in order. When he was about 3 or 4 miles from Bentong his attendant told him that he wanted to urinate. He told the attendant that it was not possible to stop the lorry at that spot, as it was a winding road and it was misty and that he would stop at a straight stretch. After negotiating the bend he saw a straight stretch and 4 or 5 chains from the bend he put on the left-hand flashing light, dipped his headlights and stopped his lorry. He also left his rear number plate lights on. While his attendant was getting off the lorry to urinate, he (the first defendant) saw in his rear view mirror two rays of light coming from a vehicle travelling very fast. That vehicle hit the rear of his lorry with a loud bang. The first defendant said that thereupon the lights in his lorry went out because the impact had wrenched and disconnected his battery. 20 30

The facts as I find them are as follows. The road was wide enough to have allowed in the ordinary way the lorry behind to pass the stationary lorry in front in safety. The lorry in front was parked on its correct side of the road. There was no reason why it should not have its lights on while so parked, and I find that it had its lights on, including the offside rear flasher. I find that there was some mist around, which somewhat reduced visibility. I find that the lorry behind was travelling at a moderate speed with its lights on when it ran into the rear of the stationary lorry. 40

On the question whether the collision occurred 30 feet after the exit of the left-hand bend, as contended by the plaintiff, or four or five chains after, as contended by the driver of the stationary lorry (the first defendant) and by the second defendant, the evidence is as follows. The plaintiff is adamant that the collision occurred because the stationary lorry had parked too close to the bend. The first defendant denies this.
10 The police sketch is unfortunately silent as to this very important point. In the lower court when the driver of the lorry behind was charged with dangerous driving he pleaded guilty to the charge and admitted the facts as given by the prosecution officer. This officer had said that the driver of the stationary lorry had stopped that lorry on a stretch of straight road. I consider this evidence as nuetral, because it is not disputed by the plaintiff that the collision occurred at a straight
20 stretch of the road; all he says it that it was so near after the exit of the bend. Each of the reports made by the two drivers to the police on the day of the accident (neither mentions a bend at or near the scene) is also in my view neutral, because it is not to be expected that a person reporting to the police should go into details. Having given all this evidence the best consideration I can give it, I find it more probable than not that the accident occurred because the first
30 defendant had parked the stationary lorry 30 feet from the exit of a blind left-hand bend.

During cross-examination the plaintiff admits that he and his driver (the third defendant) had previous to the accident worked the following hours. On 2nd March they were in Kuala Lumpur at about 11 p.m. or midnight. A few hours later at about 3 or 4 a.m. on 3rd March they arrived in the jungle near Raub to load more timber to be taken to Kuala Lumpur. They slept there until 11 a.m. when they
40 resumed work. After loading up they went to Kuala Lumpur where they unloaded at about noon: these times must be approximate because it takes an ordinary car about three hours to drive from Raub to Kuala Lumpur. At 2 p.m., ie., about two hours later they returned to Raub to get more timber and at about 7 or 8 p.m. they left Raub for Kuala Lumpur. They arrived in Kuala Lumpur at about midnight and the timber was unloaded. Two hours later at 2 a.m. they left Kuala Lumpur for Bentong and on the way the
50 accident happened at about 3 or 3.30 a.m.

In the High Court

No. 8

Judgment of Suffian F.J.

17th June 1972

(continued)

In view of the above admissions Mr. Sodhy for the driver of the stationary lorry the first defendant and for the second defendant submits that probably the driver of the lorry behind was fatigued because of the long hours of continuous work and but for this he would have been able to concentrate on his driving and the accident would not have happened.

My finding on this is that the driver of the lorry behind had worked long hours, but it was possible for him to rest in between periods of work and the primary cause of the accident was the fact (as found by me) that the driver of the stationary lorry had parked his car too near the exit of a blind corner.

10

Now as regards apportionment of blame, I am of the opinion that the driver of the stationary lorry was not wholly to blame. There was mist around, and yet the driver of the other lorry (the absent third defendant) drove round a blind corner at 35 m.p.h. I am of the opinion that that was a bit fast in the circumstances; probably he drove at that speed as his lorry was empty and he thought that it would have been safe to do so in view of the little traffic on the road at that time of the night. In the circumstances, I find that the first defendant was 75% and the third defendant 25% to blame for the accident and therefore the first and second defendants should pay 75% and the third and fourth defendants 25% of the damages and costs awarded to the plaintiff.

20

30

On quantum, my findings are as follows. At the time of the accident the plaintiff was a lorry attendant aged about 26 employed by the fourth defendant, who paid him and the driver (the third defendant) a percentage of what the fourth defendant is paid for haulage of timber, and the plaintiff and the third defendant divide this percentage between themselves according to a formula agreed by themselves. What this formula was is not in evidence. In evidence the plaintiff said that the minimum he could expect to receive every month was $240/- to $250/- and the maximum $280/-. His employer submits that the plaintiff received only about $140/- a month. Mr. Tay for the plaintiff submits that it is probably true that the plaintiff earned $250/- a month. I find that

40

it is more probable than not that the plaintiff earned $175/- rather than $250/- a month.

As regards the injuries suffered by the plaintiff, I find that he was on the day of the accident (4th February, 1969) admitted to the Hospital at Bentong from where he was later transferred to the General Hospital at Kuala Lumpur and was not discharged until 6th March after which he continued to receive outpatient treatment. It is not disputed that his left leg had to be amputated above the knee. I also find that his right big toe had to be amputated at the proximal interphalangeal joint.

The doctor reported on 22nd July, 1969, that the estimated disability suffered by the plaintiff was 60% and I am of the opinion that this is quite serious for the plaintiff because he is a manual worker.

Having considered this matter in the light of the authorities cited by Mr. Tay, I am of the opinion that the fairest thing to do here is to award the plaintiff damages as follows:

A. Special damages totalling $7,125.30 made up as follows:

(1) transport expenses for wife to visit plaintiff in hospital (as claimed)	$55.30
(2) cost of artificial leg (agreed)	$400.00
(3) cost of shoe for artificial leg (agreed)	20.00
(e) earnings actually lost from date of accident until date of trial - $175/- p.m. for 38 months	$6,650.00

B. General damages of $40,000/- for loss of amenities and pain and suffering and for prospective loss of future earnings arising out of the amputation above the knee of left leg and amputation

In the High Court

No. 8

Judgment of Suffian, F.J.

17th June 1972

(continued)

of right big toe and the consequent disability arising therefrom	$40,000.00

I order the defendants to pay interest on the special damages at 3% per annum from the date of the accident until the date of judgment and on the general damages at 6% from the date of issue of writ until judgment.

I also order that the plaintiff should get the taxed costs of this suit. 10

Delivered in Kuala Lumpur, on 17th June, 1972.

(M. Suffian)
FEDERAL JUDGE, MALAYSIA.

Notes:

1. Heard in Kuala Lumpur on 17th and 18th April, 1972.

2. Counsel:

   Mr. David Tay of Messrs. Murphy & Dunbar, Kuala Lumpur, for plaintiff.

   Mr. R.S. Sodhy of Messrs. Shearn, Delamore & Co., Kuala Lumpur, for first and second defendants. 30

   Mr. Albert Lian of Messrs. Morris Edgar & Co., Kuala Lumpur, for third and fourth defendants.

3. Authorities cited

(1) (1967) 2 M.L.J. 31
(2) (1956) M.L.J. 115
(3) (1969) 2 M.L.J. 194
(4) (1957) M.L.J. 163
(5) Chan (1971) 1 M.L.J. 253 40
(6) K.L. Civil Suit 173/68 unreported.
(7) Harun (1969) 1 M.L.J. 169
(8) Othman bin Ahmad (1966) 1 M.L.J. 64
(9) Chin Boon Keng (1965) 2 M.L.J. 239
(10) Teo (1964) 2 M.L.J. c.x.
(11) Yeo (1965) 1 M.L.J. xviii.
(12) (1967) 2 M.L.J. xxviii.
(13) (1970) 1 M.L.J. xv.

No. 9

ORDER

IN THE HIGH COURT IN MALAYA AT RAUB

CIVIL SUIT NO: 13 of 1970

Between

Pang Cheong Yow — Plaintiff

and

1. Thevannasan s/o Sinnapan
2. Sin Cheong Hin Lorry Transport Co. (sued as a firm)
3. Kow Chai @ Chew Chin
4. Chop Seng Heng (sued as a firm) — Defendants

BEFORE THE HONOURABLE MR. JUSTICE TAN SRI MOHD SUFFIAN BIN HASHIM

IN OPEN COURT

This 17th day of June 1972.

ORDER

THIS ACTION coming on for hearing on the 17th day of April 1972 in the presence of Mr. David Tay Seow Hai of Counsel for the Plaintiff and Mr. Ranjit Singh Sodhy of Counsel for the 1st and 2nd Defendants and in the absence of the 3rd Defendant and with the 4th Defendant appearing in person AND UPON HEARING the evidence adduced and arguments of Counsel aforesaid and of the 4th Defendant in person IT WAS ORDERED that judgment do stand reserved AND THIS ACTION coming on for delivery of Judgment this 17th day of June 1972 in the presence of Mr. David Tay Seow Hai of Counsel for the Plaintiff and Mr. Ranjit Singh Sodhy of Counsel for the 1st and 2nd Defendants and in the absence of the 3rd and 4th Defendants and the Court having found the 1st and 2nd Defendants 75% to blame and the 3rd and 4th Defendants 25% to blame IT IS HEREBY ORDERED that the Plaintiff do recover against the Defendants the sum of $40,000/- as General Damages and the sum of $7,125.30 as Special Damages AND IT IS FURTHER ORDERED

In the High Court

No. 9

Order

17th June 1972

(continued)

that the General Damages do bear interest at the rate of 6% per annum from the 2nd day of February 1970 to the 17th day of June 1972 amounting to the sum of $5,693.33 and that the Special Damages do bear interest at the rate of 3% per annum from the 4th day of February 1969 to the 17th day of June 1972 amounting to a sum of $720.33 AND IT IS LASTLY ORDERED that the Party & Party costs of this action be taxed by a proper officer of the Court and be paid by the Defendants. 10

GIVEN under my hand and the Seal of the Court this 17th day of June 1972.

Sgd: Illegible.

Assistant Registrar.
High Court,
RAUB.

No. 10

NOTICE OF APPEAL

IN THE FEDERAL COURT OF MALAYSIA

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: of 1972

Between

1. Thevannasan s/o Sinnapan
2. Sin Cheong Hin Lorry Transport Co. (sued as a firm) Appellants

10 and

1. Pang Cheong Yow
2. Kow Chai @ Chew Chin
3. Chop Seng Heng (sued as a firm) Respondent

(In the Matter of Civil Suit No. 13 of 1970 in the High Court in Malaya at Raub

Between

Pang Cheong Yow Plaintiff

and

20 1. Thevannasan s/o Sinnapan
2. Sin Cheong Hin Lorry Transport Co. (sued as a firm)
3. Kow Chai @ Chew Chin
4. Chop Seng Heng (sued as a firm) Defendants)

NOTICE OF APPEAL

TAKE NOTICE that Thevannasan s/o Sinnapan and Sin Cheong Hin Lorry Transport Co. (sued as a firm) the Appellants abovenamed being dissatisfied with the decision of the Honourable Mr. Justice Suffian
30 given at the High Court, Raub on the 17th day of June 1972 appeal to the Federal Court against the whole of the said decision in respect of liability.

Dated this 14th day of July 1972.

Sgd: Shearn Delamore & Co.

SOLICITORS FOR THE ABOVE-NAMED APPELLANTS

In the Federal Court

No. 10

Notice of Appeal

14th July 1972

(continued)

To:

The Registrar,
The Federal Court,
Kuala Lumpur.

And to:

The Assistant Registrar,
The High Court in Malaya at Raub

And to:

Messrs. Murphy & Dunbar,
Chartered Bank Buildg., (5th Floor),
Jalan Ampang, 10
Kuala Lumpur.
Solicitors for the 1st named Respondent abovenamed.

And to:

Kow Chai @ Chew Chin,
No: T.42, Sempalit N/Village,
Raub.

And to:

Chop Seng Heng,
446 3rd mile, Jalan Ipoh,
Kuala Lumpur. 20

This Notice of Appeal is filed by Messrs. Shearn Delamore & Co. and Drew & Napier, solicitors for the Appellants herein whose address for service is No: 2 Benteng, Kuala Lumpur

No. 11

MEMORANDUM OF APPEAL

The Appellants, Thevannasan s/o Sinnapan and Sin Cheong Hin Lorry Transport Co. (sued as a firm) abovenamed appeal to the Federal Court against the whole of the decision in respect of the apportionment of liability, of the Honourable Justice Suffian given at Kuala Lumpur on the 17th day of June, 1972 on the following grounds:-

10 1. The learned trial Judge having found as a fact that the Appellants' stationary lorry was parked on its correct side of the road and that the road was wide enough to have allowed in the ordinary way the lorry behind (the trailer) to pass the stationary lorry in front in safety and having found that the Appellants' lorry had its lights on including the rear flasher erred in holding that the Appellants were 75% to blame for the said accident.

20 2. The learned trial Judge erred in law and in fact in having found that it was more probable that the accident ocurred because the 1st Defendant (the Appellant) had parked the stationary lorry 30 feet from the exit of a blind left-hand bend when there was no evidence to support this finding:-

(a) The learned trial Judge failed to give the necessary inferences due consideration or having given due consideration failed to draw the necessary inference from the 30 facts admitted by the 2nd respondent (driver of the trailer) when he was charged with dangerous driving in the Lower court. When pleading guilty to the charge the 2nd respondent had admitted that the accident occurred on a straight stretch of road.

(b) The learned trial Judge failed to take into consideration or having taken into consideration failed to attach sufficient weight to the sketch plan of the scene 40 of the accident which does not indicate the bend at either end of the road. If the accident had occurred as found by the learned trial Judge then the sketch plan would of necessity disclose the bend in view

of the fact that the length of the trailer would have put the tail end of the trailer on the bend itself.

(c) The learned trial Judge erred in failing to give due weight to the fact that there was no mention of the bend in the 2nd respondent's police report. If, as is suggested, the material reason for the failure to observe the presence of the stationary lorry was the presence of the blind bend then this would have been specifically stated in the 2nd respondent's police report. 10

(d) The learned trial Judge having considered the admitted facts at the criminal proceedings in the Lower Court omitted to give due weight to the failure of the 2nd respondent in not mentioning the blind bend even in mitigation before the sentence. 20

(e) The learned trial Judge failed to take cognizance of the fact that the allegation by the 1st respondent that the accident occurred immediately after the blind bend or even near to a bend was first taken up only at the trial. No where in the pleadings or the police reports or the criminal proceedings is there any suggestion that the accident occurred at or near a bend.

3. The learned trial Judge having found as a fact the existence of a blind left-hand bend erred in law and in fact in failing to give adequate consideration to the fact of the negligence of the 2nd respondent:- 30

(a) The learned trial Judge having found as a fact that visibility was somewhat limited owing to the presence of mist failed to take into account the excessive speed of the trailer in the circumstances.

(b) The learned trial Judge having accepted as a fact that the trailer was travelling round a blind corner at 35 m.p.h. erred in holding that in his view this speed was only "a bit" fast in the circumstances. 40

(c) The learned trial Judge failed to take cognizance of the evidence in the sketch plan that the stationary lorry which was fully loaded with 100 bags of cement was pushed forward a distance of 18 feet on impact. This implies a speed greater than the admitted speed of 35 m.p.h. which would again lead to the irresistable conclusion that the vehicle was travelling along a straight stretch of road before the impact and not as alleged around a blind bend.

(d) The learned trial Judge failed to consider the R.I.M.V. reports which indicate extensive damage to both vehicles.

(e) The learned trial Judge did not give sufficient consideration to the fact that the trailer was empty at the time of the accident.

4. The learned trial Judge having disbelieved the 1st respondent's evidence on a material particular to wit that the stationary lorry was unlit at the time of the accident and having found as a fact that it was in fact lit and even had its rear flasher on, failed to conclude that the 1st respondent's evidence could not be believed in the circumstances. The learned trial Judge ought to have in the circumstances wholely disregarded the 1st respondent's evidence at the trial and in particular that part of the evidence with regard to the existence of the bend at or near the scene of the accident.

5. The learned trial Judge erred in law in going beyond the pleadings to determine this suit.

6. The learned trial Judge ought to have taken into account the fact that the 1st respondent on his own admission first saw the lorry at a distance of 12 to 15 feet and immediately on impact became unconscious. The 1st respondent could not in the circumstances have been in any position to judge the distance between the stationary vehicle and the alleged bend.

7. The learned trial Judge erred in law in failing to take cognizance of the provision of Section 114(g) of the Evidence Ordinance in view of the absence of the 2nd respondent at the trial.

In the Federal Court

No. 11

Memorandum of Appeal

22nd August 1972

(continued)

8. The learned trial Judge having found as a fact that the 1st and 2nd respondents worked a continuous period of not less than 18 hours failed to give sufficient weight to the same in arriving at his decision.

(a) The learned trial Judge found as a fact that the 1st and 2nd respondents had worked long hours but then proceeded to infer on the basis of speculation that the 1st and 2nd respondent may have rested between periods of work. 10

(b) It was admitted by the 1st respondent in evidence that it took approximately 4 hours to drive from Raub to Kuala Lumpur a fully loaded lorry and approximately 3 hours for the return journey with the lorry empty. It was also admitted in evidence that the 1st and 2nd respondents began work for the day at about 11.00 a.m. the previous morning. The irresistable conclusion is therefore that there was no time for the 1st and 2nd respondents to rest between their heavy schedule of duty. 20

(c) The 1st respondent's evidence that the 1st and 2nd respondents were paid by the trip was not taken into account by the learned trial Judge.

(d) The learned trial Judge failed to consider the 1st respondent's evidence that he slept for stretches of 3 to 4 hours only on any one day. The learned trial Judge also failed to take into consideration the fact that the accident occurred on the return journey after which the 1st and 2nd respondents would be off duty. 30

(e) The learned trial Judge ought to have concluded in the circumstances that it was probable that the 2nd respondent was tired and sleepy and that the accident could have happened as a result of his poor lookout. 40

9. The learned trial Judge erred in law and in fact in failing to hold the 2nd respondent wholely or substantially to blame for the accident.

In the Federal Court

No. 11

Memorandum of Appeal

22nd August 1972

(continued)

In the circumstances, the learned trial Judge erred in finding liability in the proportion of 25% on the part of the 2nd and 3rd respondents and 75% on the part of the appellants.

Dated this 22nd day of August, 1972.

Sgd: SHEARN DELAMORE & CO.,

Solicitors for the Appellants.

To:

1. Chief Registrar,
   Federal Court of Malaysia,
   Kuala Lumpur.

2. Registrar,
   High Court,
   Raub.

3. Messrs. Murphy & Dunbar,
   Chartered Bank Building, (6th Floor),
   Jalan Ampang,
   Kuala Lumpur.

   (Solicitors for the 1st named respondent abovenamed).

4. Kow Chai @ Chew Chin,
   No: T.42, Sempalit n/village,
   Raub.

5. Chop Seng Heng,
   446, 3rd mile,
   Kuala Lumpur.

The address for service of the Appellants is No. 2, Benteng, Kuala Lumpur.

In the Federal Court

No. 12

Notice of Cross-Appeal

13th September 1972

No. 12

NOTICE OF CROSS-APPEAL

TAKE NOTICE that, on the hearing of the above appeal Chop Seng Heng, the 3rd Respondent abovenamed, will contend that the decision of the Honourable Justice Suffian given at Kuala Lumpur on the 17th day of June 1972 ought to be varied to the extent and on the ground hereinafter set out.

(1) The Learned Trial Judge having found as a fact that the accident occurred because the 1st Appellant had parked the stationary lorry 30 feet from the exit of a blind left-hand bend, erred in holding that the 2nd Respondent was 25% to blame for the accident and that accordingly the 2nd Respondent and the 3rd Respondent are liable to pay 25% of the damages and costs.

(2) In finding as a fact that the accident occurred because the 1st Appellant had parked the stationary lorry 30 feet from the exit of a blind left-hand bend, the Learned Trial Judge should have accordingly held that it was impossible for the 2nd Respondent to avoid colliding into the stationary lorry after negotiating the blind left-hand bend driving at the speed of 35 m.p.h.

(3) The Learned Trial Judge should have further considered the fact that even if the 2nd Respondent was driving at a speed of 25 m.p.h. it would not have been possible for the 2nd Respondent to avoid colliding into the stationary lorry as it was parked 30 feet from the exit of the blind left-hand bend.

Dated this 13th day of September, 1972.

Sgd. Illegible

Solicitors for the 3rd Respondent

To:

1. The Appellants abovenamed or their Solicitors M/s. Shearn, Delamore & Co. Kuala Lumpur.

2. Senior Assistant Registrar,
   High Court,
   Raub.

3 3. Chief Registrar,
   Federal Court,
   Kuala Lumpur.

4. M/s. Murkpy & Dunbar,
   Solicitors for the 1st Respondent above-named
   Chartered Bank Building, (6th Floor)
   Jalan Ampang,
   Kuala Lumpur

10

This Notice of Cross-Appeal was taken out by Messrs. Chooi & Company, Solicitors for the 3rd Respondent herein, whose address for service is at Kwong Yik Bank Building, 10th Floor, Jalan Bandar,

---

No. 13

JUDGMENT OF ALI, F.J.

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

This is an appeal from the judgment of Suffian, F.J. sitting in the High Court at Raub.

30

The first respondent, Pang Cheong Yow, was injured when the lorry in which he was travelling as an attendant rammed into the rear of the appellants' lorry which was stationary.

On the evidence at the trial the learned Judge made the following finding of facts:

"The facts as I find them are as follows. The road was wide enough to have allowed in the ordinary way the lorry behind to pass the stationary lorry in front in safety. The lorry in front was parked on its correct side of the road. There was no reason why it should not have its lights on while so parked, and I find that it had its lights on, including the offside rear flasher.

40

I find that there was some mist around, which somewhat reduced visibility. I find that the lorry behind was travelling at a moderate speed with its lights on when it ran into the rear of the stationary lorry."

On these findings he concluded -

..."Having given all this evidence the best consideration I can give it, I find it more probable than not that the accident occurred because the first defendant had parked the stationary lorry 30 feet from the exit of a blind left-hand bend." 10

Later in his judgment he added -

"Now as regards apportionment of blame. I am of the opinion that the driver of the stationary lorry was not wholly to blame. There was mist around, and yet the driver of the other lorry (the absent third defendant) drove round a blind corner at 35 m.p.h. I am of the opinion that that was a bit fast in the circumstances; probably he drove at that speed as his lorry was empty and he thought that it would have been safe to do so in view of the little traffic on the road at that time of the night. In the circumstances, I find that the first defendant was 75% and the third defendant 25% to blame for the accident and therefore the first and second defendants should pay 75% and the third and fourth defendants 25% of the damages and costs awarded to the plaintiff." 20 30

Both appellants and the third respondent have respectively appealed and cross-appealed against the trial court's findings on liability and its apportionment. The case for the appellants, simply stated, is that on the facts found by the trial court, judgment for the whole amount of damage should have been entered against the respondents. The case for the third respondent, on the other hand, is that if, as stated by the trial judge in his judgment, the presence of the stationary lorry near the corner had solely caused 40

the accident then there was nothing which the second respondent could do to avoid the collision; in that context the appellants should be held solely liable.

It is necessary to refer again to the passage in the judgment of the trial judge which forms the basis of the third respondent's cross-appeal. It reads -

> ...."I find it more probable than not that the accident occurred because the first defendant had parked the stationary lorry 30 feet from the exit of a blind left-hand bend."

10

If these words mean no more than that the presence of the stationary lorry near the blind corner had partly caused the accident or collision, then I can find no substance in the cross-appeal. It would seem clear to me reading the judgment as a whole that the trial judge was of the view that the appellants and the respondents are to share the blame in the proportion stated. As regards his finding of liability against the respondent, I think it is impossible for the third respondent to challenge it in view of the evidence. I entirely agree with the trial judge that the second respondent was negligent in driving round the blind corner at 35 miles per hour. I would for this reason dismiss the cross-appeal with costs.

20

It remains for consideration whether the finding of liability against the appellants can be supported. If so, the appellants' appeal must be dismissed. If otherwise the respondents must be held solely liable for the full amount of damage awarded to the first respondent. One thing which is clear is that when the collision occurred the appellants' lorry was not in motion but was stationary. This means the act of negligence by the first appellant, if at all, was the act of parking his lorry too close to the blind corner. The question which arises is, what was his common law duty in the circumstances? Stopping or parking a vehicle on the road can by no means be an unlawful act unless, of course, it is so provided by statute. We are here concerned with the law of negligence which involves the consideration of a driver's duty to take care. On the finding of facts in this case

30

40

In the Federal Court

No. 13

Judgment of Ali, F.J.

14th March 1973

(continued)

I fail to see how the first appellant can be said to have failed in his common law duty to take care. He parked his lorry with its rear lights on and in such a manner as to leave enough space for vehicles coming from the rear to pass through safely. Does the law require him to do anything more? As pointed out by Lord Normand in Bolton and Others v. Stone (1) -

> "It is not the law that precautions must be taken against every peril that can be foreseen by the timorous."

10

Was he required by law to park his lorry more than 30 feet from the corner? If so, how far away? The learned trial judge did not say how far away from the corner could be a safe distance to park the lorry. The reason is clear because it is impossible to lay down any hard and fast rule. Parking anywhere on the road undoubtedly involves some risks. But as stated by Lord Porter in the Bolton's case (supra) at page 1081 :

20

> ".... The existence of some risk is an ordinary incident of life, even when all due care has been, as it must be, taken."

With great respect to the learned trial judge in this case I do not agree with him that the first appellant was guilty of negligence merely because he parked his lorry too close to the corner. I take the view that he did what a reasonable driver would have done in similar circumstances.

30

The facts of this case are somewhat similar to the facts of Chan Loo Khee v. Lai Siew San & Ors. case (2) in which a third party whose car was parked by the roadside was held by a majority judgment of the Federal Court not liable for the collision between two cars travelling in opposite directions. In that case the claim against the third party was on the basis that the presence of his car on the road had a causative effect or influence on the accident. Following the view of

40

(1) (1951) 1 All E.R. 1078, 1082

(2) (1971) 1 M.L.J. 253

the common law taken by Ashworth J. in Kelly v. W.R.N. Contracting Ltd. Anor (Burke, Third Party)(3) I held that the third party not liable even though the presence of his car on the road had a causative effect or influence on the accident. In Kelly's case Ashworth J. said so in clear words on page 923 as follows:

> "....There is nothing at common law which rendered Dr. Burke's conduct blameworthy in any respect. He had about two or three feet of his little Ford Anglia on the highway. The road at that place is 31 feet wide, and there was abundant room for any vehicle carefully driven to pass that car with safety. I have no doubt at all if the claim against Dr. Burke depended on common law negligence it would fail, but the position in regard to statute is somewhat different because Mr. Hytner contends there was here a breach of regulations."

He said this despite the finding of fact that Dr. Burke's car did have a causative effect or influence on the accident. But the claim before him was not based on common law negligence. It was based on a breach of regulations. So based his decision holding Dr. Burke liable or partly liable in damages is, therefore, not germane to the present case or Chan Loo Khee's case (supra). Therefore, even if Ashworth, J's decision in holding Dr. Burke liable for breach of regulations was wrong, as was held by the Court of Appeal in Coote and Another v. Stone, (4) his view on the common law remains unchallenged. Coote's case is also a decision on a claim for breach of regulations and not for negligence although it was for negligence at the start. Nowhere in the judgment of that case can I find any criticism of Ashworth J's view of the common law. Accordingly, so far as the case under review involves a claim based on negligence it must fail because on the law as I find it the first appellant cannot be held guilty of negligence for having parked his lorry near the blind corner. I would for that reason allow the appellants' appeal with costs.

---

(3) (1968) 1 W.L.R. 921

(4) (1971) 1 W.L.R. 279

In the Federal Court

No. 13

Judgment of Ali, F.J.

14th March 1973

(continued)

Accordingly, the appellants' appeal is allowed and the third respondents' cross-appeal dismissed with costs. This means that the first respondent succeeds in his claim against the second and third respondents but fails as against the appellants. Costs as between the parties in the action shall be in terms of the Bullock order.

? TAN SRI DATO JUSTICE ALI BIN HASSAN

(Ali bin Hassan)

Judge, 10

Federal Court, Malaysia

Kuala Lumpur,
March 14, 1973

Counsel :

Mr. Ranjit Singh Sodhy of M/s Shearn, Delamore & Co. for appellants.

Mr. David Tay of M/s Murphy & Dunbar for first respondent.

Mr. Chooi Mun Sou of M/s Chooi & Co. for third respondent 20

No. 14

Judgment of Gill, F.J.

14th March 1973

No. 14

JUDGMENT OF GILL, F.J.

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

I agree with my brother Ali, for the reasons which he has stated so clearly, that this appeal be allowed and that the third respondent's cross-appeal be dismissed. I also agree with his proposed order as regards costs.

As I said in the case of Chan Loo Khee v. Lai Siew San & Ors, which has been referred to by my 30 brother Ali in his judgment, I have not been able to find a single decided case where the owner or driver of a vehicle leaving it on the highway with its lights on has been held liable in negligence.

In the Federal Court

No. 14

Judgment of Gill, F.J.

14th March 1973

(continued)

Each case, of course, must depend upon its own facts. But in view of the findings of fact made by the learned trial judge in this case, I do not see how the appellants can be held to blame in any way for the accident. It is to be observed that the second respondent pleaded guilty to a charge of dangerous driving and he failed to appear at the trial of the action to give evidence as to why the accident happened.

10

S.S. GILL

(S.S. GILL)
JUDGE
FEDERAL COURT

Kuala Lumpur.

14th March, 1973.

Counsel:

Mr. Ranjit Singh Sodhy of M/s. Shearn, Delamore & Co. for appellants.

Mr. David Tay of M/s. Murphy & Dunbar for 1st respondent.

20

Mr. Chooi Mun Sou of M/s. Chooi & Co. for 3rd respondent.

No. 15

Judgment of Ong, C.J. (dissenting)

14th March 1973

No. 15

JUDGMENT OF ONG, C.J. (dissenting)

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

At about 3 a.m. on a misty night the second appellant's lorry was parked on its own side of the road 4¼ miles before Bentong when another lorry, carrying the first respondent as an attendant, crashed into the stationary vehicle from behind. The first respondent suffered serious injury, requiring amputation of his left leg above the knee. He subsequently claimed damages against the drivers

30

and owners of both vehicles, alleging negligence on the part of the drivers of one or the other or both of them.

The action came on for trial in the High Court at Raub almost 3½ years after the event. The learned trial judge found as a fact that the primary cause of the accident was because the stationary lorry had been parked 30 feet from the exit of a blind left hand bend. On that account he held the first appellant 75% to blame and apportioned 25% of blame to the other driver for driving round a blind corner at 35 miles per hour - which the judge thought a bit fast because of the mist around at the time. Against such decision the appellants and third respondent have both appealed - each on the ground that the other side was wholly to blame.

During the long interval between the accident and trial the attendant of the stationary lorry and the driver of the other had sought employment elsewhere and could not be traced. In the event the only eye-witnesses called were the plaintiff (first respondent) and Thevannasan, the Tamil driver of the stationary lorry. The evidence they gave was naturally in direct conflict. The judge reserved his decision and it clear beyond doubt, from a close perusal of his judgment, that he had given all available evidence and arguments his most careful consideration to ascertain the effective cause of the accident.

This primary issue was a pure question of fact. The plaintiff, to quote the judge, "was adamant that the collision occurred because the stationary lorry had parked too close to the bend. The first defendant denies this". One of them must, in this case, have been telling the truth and the other a pack of lies. The judge believed the plaintiff. He had had the advantage, denied to us, of seeing and hearing the witness on each side. Having to decide on their credibility, he made his election and consequent finding of fact. Such a finding should not, in my opinion, be lightly disturbed by us in the absence of cogent evidence shewing that he was demonstrably in error.

An appeal to this Court is by way of rehearing: (see section 69 of the Courts of Judicature Act).

In the Federal Court

No. 15

Judgment of Ong, C.J. (dissenting)

14th March 1973

(continued)

Adopting this approach, I too have independently reached the same conclusion as the learned trial judge. In my view the conclusion is irresistible that the accident occurred purely because the first defendant had parked the stationary lorry some 30 feet from the exit of a blind left hand bend. I would reject as wholly implausible the evidence of Thevannasan that his lorry was parked as much as 4 or 5 chains after the bend. If that allegation were true, the plaintiff's driver, notwithstanding that he must have had the stationary lorry in full view for a considerable distance, still rammed into it. Such a proposition necessarily postulates that the plaintiff's driver must have been driving with unseeing eyes, which is absurd. He had been travelling along a winding road for miles requiring constant alertness - not miles of a long straight stretch which might have induced drowsiness. Hence, speaking for myself, I cannot believe that he could have failed to see the huge vehicle ahead, unless it was concealed by the blind bend. The plaintiff had no grounds for bias since he was in any event bound to recover damages whether one or both drivers should be found negligent. I should here observe that the learned judge had duly taken note of the suggestion that the plaintiff's driver might probably have been overcome by drowsiness. But he had considered and rejected it. He had also carefully considered the plea of guilty made by the plaintiff's driver to a charge of dangerous driving, as well as counsel's comments on the sketch plan which, so far as it went, showed no bend, but, as the judge said, in all the circumstances, such evidence should properly be regarded as neutral, and I respectfully agree. The driver had in fact claimed trial when first charged in the Magistrate's Court. What caused him to change his plea later might be explained on grounds which need not be gone into here. As regards the police sketch plan, the learned trial judge gave his reasons for discounting its value. The plan only contained what the police sergeant thought relevant. It was not necessarily in conflict with the plaintiff's testimony, as the judge took pains to explain. In this connection I think it is also a point to be remembered that this trial judge had over the years been quite familiar with the Bentong road and that, before as well as after the trial up to delivery of judgment, he had had to pass that very spot - although no specific reference to this fact was

made in his judgment. At all events, what is, for present purposes, conclusive is the fact that the learned judge rejected the first appellant's story as improbable and untrue, while giving first respondent's evidence full credence.

I turn now to the third respondent's cross-appeal. The relevant passage of the judgment apportioning 25% liability to the second and third respondents reads as follows:-

> "I am of the opinion that the driver of the stationary lorry was not wholly to blame. There was mist around, and yet this driver of the other lorry drove round a blind corner at 35 m.p.h. I am of the opinion that that was a bit fast in the circumstances; probably he drove at that speed as his lorry was empty and he thought that it would have been safe to do so in view of the little traffic at that time of night".

It may be observed that the respondents' share of liability was, in plain terms, stated to be entirely a matter of the learned trial judge's opinion - as distinguished from a finding of fact. According to Thevannasan, giving hostile evidence, he had left Kuala Lumpur at about midnight and up to the scene of the accident no traffic had overtaken him although he had met one or two vehicles coming from the opposite direction. Therefore, there was on this same stretch of road travelled also by the respondents' lorry, so little traffic as to be negligible. According to Thevannasan, again, there was "slight mist" where he stopped, "neither too thick nor thin". Visibility up to what distance was never disclosed: but certainly no evidence to show that 35 m.p.h. was excessive. As regards speed, 35 m.p.h. going round a bend on the open road cannot per se be evidence of negligence for any vehicle keeping to its own side of the road, unless the bend taken was such that a vehicle at that speed had to encroach on the path of oncoming traffic. The learned judge, quite rightly, expressed the opinion that probably the respondents' driver thought it safe to do so in view of the little traffic at that time. Since this driver negotiated the bend without any difficulty, it was, of course, a reasonable speed, expecting no obstruction in his own path round the bend.

With the greatest respect, therefore, I think the learned trial judge had demanded of the respondents' driver a higher standard of care than was reasonable in the circumstances. As Willmer L.J. said in Brophy v. Shaw:- (1)

> "The short answer to this appeal is to remember that the defendant's duty, like that of any other road user, was to exercise reasonable care. He was not under a duty to be a perfectionist".

10

In an earlier case Edwards v. Nobbs (2) his Lordship had similarly said:-

> "It is possible that the most expert driver might have done a little better. The standard, however, is not that of the perfect driver, but the driver using ordinary care and skill".

This driver could not reasonably be required to anticipate an obstruction lying directly in his path, of which there were no warning signs whatsoever. It has to be remembered at all times that an oncoming vehicle betrays its presence long before its arrival by the beam of its headlights. Therefore, when the road beyond the blind bend appeared to reveal no beam of any oncoming vehicle there was no need for any unusual caution. The rear lights of the appellants' stationary lorry cast no beam behind. Rear lights do not function like headlamps. The respondents' driver accordingly must have been taken completely by surprise to see what the learned trial judge found as a fact: that a stationary lorry was blocking its path no more than 30 feet beyond the blind left-hand bend. Could this driver then have taken any evasive action - even were he travelling at 25 m.p.h.? I think not. At 35 m.p.h. the rate of travel is approximately 52½ feet per second; at 25 m.p.h., it would be 37½ feet per second. The distance of 30 feet in this case would be covered in less than one second - not counting reaction time to translate a visual message into action. In the place of the respondents' driver, I do not think it was humanly possible, on the facts found, for any person, however skilled in driving, to avoid crashing into the

20

30

40

---

(1) The Times, June 25, 1965; (1965) C.L.Y. 2677 C.A.; (1969) 1 M.L.J. 49, 52.
(2) (1969) 1 M.L.J. 49, 52 quoting from Bingham.

In the Federal Court

No. 15

Judgment of Ong, C.J. (dissenting)

14th March 1973

(continued)

stationary lorry. The principle enunciated by Lord Denning M.R. in Kerry v. Carter (3) which this Court has followed in Sepang Omnibus Sdn. Bhd. v. Christina Loh Soo Pang (4) and other cases is as follows:-

> "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".

I would accordingly dismiss the appeal and allow the third respondents' cross-appeal with costs. In the result the appellants will be liable to satisfy the whole of the first respondent's claim, with costs here and in the Court below.

(Sgd.) H.T. ONG

CHIEF JUSTICE
HIGH COURT IN MALAYA

Kuala Lumpr,
March 14, 1973

Mr. Ranjit Singh Sodhy of M/s Shearn, Delamore & Co. for appellants

Mr. David Tay of M/s Murphy & Dunbar for 1st respondent

Mr. Chooi Mun Sou of M/s Chooi & Co. for 3rd respondent

---

(3) (1969) 1 W.L.R. 1372, 1376

(4) (1970) 2 M.L.J. 234, 236

No. 16

ORDER

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

IN OPEN COURT

THIS 14TH DAY OF MARCH 1973

THIS APPEAL coming on for hearing on the 2nd day of October 1972 in the presence of Mr. Ranjit Singh Sodhy of Counsel for the Appellants and Mr. David Tay of Counsel for the 1st Respondent and Mr. Chooi Mun Sou of Counsel for the 3rd Respondent AND UPON READING the Record of Appeal filed herein AND UPON HEARING the submissions of Counsel aforesaid IT WAS ORDERED that this Appeal do stand adjourned for Judgment AND the same coming on for Judgment this day in the presence of Encik Anwar Ismail of Counsel for the Appellants and Mr. David Tay of Counsel for the 1st Respondent and Mr. Wong Soon Foh of Counsel for the 3rd Respondents IT IS ORDERED that the Appeal herein be and is hereby allowed AND IT IS ORDERED that the Cross Appeal of the 3rd Respondent herein be and is hereby dismissed with costs AND IT IS ORDERED that the costs between the parties in the action shall be in terms of the Bullock Order AND IT IS LASTLY ORDERED that the sum of Dollars Five hundred only ($500.00) paid into Court by the Appellants as security for costs of this Appeal be refunded to the Appellants.

GIVEN under my hand and the Seal of the Court this 14th day of March 1973.

Sgd. Illegible

CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

In the Federal Court

No. 17

Order granting Final Leave to Appeal

3rd September 1973

No. 17

ORDER GRANTING FINAL LEAVE TO APPEAL

IN THE FEDERAL COURT OF MALAYSIA HOLDEN AT KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO: 80 of 1972

BETWEEN

1. Thevannasan s/o Sinnapan
2. Sin Cheong Hin Lorry Transport Co. (sued as a firm) — Appellants

and

1. Pang Cheong Yow
2. Kow Chai @ Chew Chin
3. Chop Seng Heng (sued as a firm) — Respondents

AND

(In the matter of Civil Suit No. 13 of 1970 in the High Court in Malaya at Raub,

BETWEEN

Pang Cheong Yow — Plaintiff

and

1. Thevannasan s/o Sinnapan
2. Sin Cheong Hin Lorry Transport Co. (sued as a firm)
3. Kow Chai @ Chew Chin
4. Chop Seng Heng (sued as a firm) — Defendants)

CORAM: SUFFIAN, JUDGE, FEDERAL COURT, MALAYSIA;
GILL, JUDGE, FEDERAL COURT, MALAYSIA;
ONG HOCK SIM, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

THIS 3RD DAY OF SEPTEMBER 1973

UPON MOTION made unto Court this day by Mr. Wong Soon Foh of Counsel for the Third Respondents

In the Federal Court

No. 17

Order granting Final Leave to Appeal

3rd September 1973

(continued)

abovenamed and also mentioning on behalf of Messrs. Murphy & Dunbar of Counsel for the First Respondent abovenamed and Mr. M.L. Wong of Counsel for the Appellants abovenamed AND UPON READING the Notice of Motion dated the 13th day of August, 1973 and the Affidavit of Wong Soon Foh affirmed on the 27th day of July, 1973 and filed in support of the said motion AND UPON HEARING Counsel for the Third Respondents as aforesaid IT IS ORDERED that the
10 said Third Respondents be and is hereby granted final leave to appeal to His Majesty the Yang Dipertuan Agung AND IT IS ORDERED that the costs of this application be costs in the Appeal.

GIVEN under my hand and the Seal of the Court this 3rd day of September, 1973.

Sgd. Illegible

CHIEF REGISTRAR,
FEDERAL COURT,
MALAYSIA.

Exhibits

Exhibit A

Translation of Police Report

Complaint by 3rd Defendant

4th February 1969

EXHIBIT A

TRANSLATION OF POLICE REPORT

(complaint by 3rd Defendant)

ROYAL MALAYSIAN POLICE

Copy of Report

Report No. 205/69   Police Station Bentong

At 4.10 a.m. on 4.2.1969.

Complainant: Kow Chai alias Chew Chin Swes
IC PA 000406/1318825
male/female

Nationality: Chinese, 31 years of age,
Occupation: Motor Lorry Driver

Living at No T 42, Sempalit New Village, Raub, Pahang.

Complainant states:

At about 3.40 a.m. on 4.2.69 I was the driver of Motor Lorry No BL 5223 from Kuala Lumpir intending to return to Raub. My friend Ah Chuan was seated at the back of the Lorry. On arriving at the 6th Milestone in Bentong - Kuala Lumpur Road there was a mist and it was very dark. Suddenly I saw a motor lorry that had stopped on the left side of the road as one comes from Kula Lumpur. The lights of the lorry were not put on nor was there any warning. Just then I could not brake in time as my lorry was about 15 feet from the stationary lorry. My lorry collided into the rear of the stationary lorry and my lorry came to a halt. I got down from my lorry and found that my friend's left leg had been fractured. I sent him to the Bentong Hospital in another lorry. I sustained minor injuries. The front part of my lorry was completely damaged and I could not estimate the costs of the damage. I have come here to lodge my complaint.

Sd. Kow Chai. Complainant
Sd. Ahmad. Police Constable 24068

CERTIFIED TRUE COPY
Sd.
Mehy Som bin Baba,
O.C.P.D. Bentong.
14.2.69

EXHIBIT B

TRANSLATION OF POLICE REPORT

(complaint by 3rd Defendant)

ROYAL MALAYSIAN POLICE.

Copy of Report.

No. of Report 206/69   Police Station: Bentong

At 8.5 a.m. on 4.2.1969.

Complainant: Thevannasan S/O Sinnapan
IC (NS) 006501/7990194
male/female

Nationality: Indian, 29 years of age.
Occupation: Motor Lorry Driver

Living at No 83, 14 Mile, Kajang, Selangor.

Complainant states:

At about 3.00 a.m. on 4.2.69 I was the driver of Motor Lorry No BL 2715 coming from Kuala Lumpur. I intended to go to Kuantan. At the back of the lorry was my attendant Ramaya. When I reached the 5th Milestone in Bentong - Kuala Lumpur Road, my attendant told me that he wanted to urinate and he requested me to stop the lorry for a while. I braked and stopped the lorry on the left side of the road. Before my attendant could alight from the lorry another lorry also coming from the direction of Kuala Lumpur collided into the rear of my lorry. I then got down from my lorry to look at the rear of my lorry. The offside tyre on the rear of my lorry was punctured, the wooden plank on the rear of my lorry was torn, the place where the spare tyre was kept was bent and so was the number plate. The body of my lorry was broken and the top part of the lorry was dislodged and pushed to the front. The front windscreen was torn. It became bent but was not broken. I do not know the cost of the damage. My attendant was not injured. I have come to the Station here to make my complaint.

Sd. PS Thevennasan. Complainant
Sd. Ahmad. Police Constable 23068

CERTIFIED TRUE COPY
Sd.
Mohd Som bin Baba,
OCPD, Bentong 14.2.69.

Exhibits

Exhibit B

Translation of Police Report

Complaint by 3rd Defendant

4th February 1969

Exhibits

Exhibit D

Key to Police Sketch Plan

undated

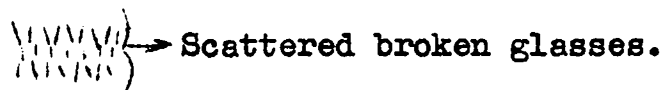
EXHIBIT D

KEY TO POLICE SKETCH PLAN

Key to Rough Sketch Plan
Bentong Report No 205/69.

Explanation:

A	=	The edge of the metalled road on the left side to Bentong
B	=	The edge of the metalled road on the right hand side to Bentong.
C	=	The grass on the right hand side of the road to Bentong.
D	=	The grass on the left side of the road to Bentong.
E	=	Drain.
F	=	The front near-side tyre of Lorry BL 2715
G	=	The front off-side tyre of Lorry BL 2715
H	=	The rear near-side tyre of Lorry BL 2715
I	=	The rear off-side tyre of Lorry BL 2715
J	=	Red stones. (Reflecting stones?)
K	=	Free wheel cover.
L	=	The small front light.
M	=	Blood.
MO	=	Brake marks.
P	=	The front near-side tyre of Lorry trailer BL 5223.
Q	=	The front off-side tyre of Lorry trailer BL 5223.
R	=	The left side of the trailer BL 5223.
S	=	The right side of the trailer BL 5223.
T	=	The rear left side of the trailer BL 5223.
U	=	The rear right side of the trailer BL 5223.
V	=	Unnumbered telephone post on the right hand side of the road to Bentong.



Measurements:

A to B = 26' 08"	B to U = 16' 09"
B to C = 15' 01"	H to N = 16' 09"
A to D = 7' 00"	H to P = 16' 01"
D to E = 4' 08"	H to M = 18' 06"

<u>Exhibits</u>

Exhibit D

Key to Police Sketch Plan

undated

(continued)

D to F = 3' 03"	P to M = 1' o5"
D to H = 6' 04"	O to N = 2' 06"
B to G = 25' 08"	K to Q = 6' 09"
B to I = 22' 06"	I to Q = 16' 06"
A to P = 3' 04"	K to I = 9' 08"
A to R = 4' 00"	J to I = 9' 10"
A to T = 3' 09"	L to I = 11' 02"
A to M = 2' 08"	J to Q = 6' 07"
A to N = 0' 10"	G to V = 63' 07"
A to O = 1' 00"	I to V = 50' 07"
B to Q = 16' 04"	Q to V = 35' 06"
B to R = 16' 06"	U to V = 30' 00"

Lorry Trailer
BL 5223 T/B 1377
Length = 31' 03"
Width = 7' 05"

Lorry BL 2715:
Length = 23' 03"
Width = 7' 05"

EXHIBIT E

CERTIFICATE OF EXAMINATION OF 2nd DEFENDANTS VEHICLE

Exhibits
Exhibit E
Certificate of Examination of 2nd Defendants vehicle
10th February 1969

Police Report No: [illegible]/69 Ref. No. RT (VE) [illegible]/69

O.C.P.D.,
Bentong/Pahang.

ROAD TRANSPORT DEPARTMENT MALAYSIA.

Certificate of Examination of a Motor Vehicle
Section 143 (6) of the Road Traffic Ordinance, 1958.

I hereby certify that I [illegible] a Road Transport Officer attached to the RIMV's Office, Raub, Pahang, have examined Motor Vehicle No.

No: [illegible] 2715 Make Bedford-Diesel Class Lorry [illegible]

on 4th February, 69 at 2.15 [illegible] At RIMV's Office [illegible] and that the result of my examination is as under :-

(1) That owing to accident damage the vehicle could not be tested by driving it on a road. * A static test of the condition of the brake and steering was carried out with the road wheels raised off the ground.

(2) The condition of the foot brake was Satisfactory

(3) The condition of the hand brake was Satisfactory

(4) The condition of the steering was Satisfactory

(5) The condition of the tyres was :

Near-side front 60% [illegible] Off-side front 60% [illegible]

N/side intermediate outer/solo 60% [illegible] O/side intermediate outer/solo 60% [illegible]

N/side intermediate inner 60% [illegible] O/side intermediate inner 60% [illegible]

N/side rear outer/sole - O/side rear outer/solo -

N/side rear inner - O/side rear inner -

(6) The condition of other components was :- Satisfactory

(7) Damage which appeared to have been caused in an accident was :-

1. Rear portion of the chassis sidemembers (Frames) twisted inwards.
2. Rear chassis crossmember bent downwards.
3. Rear wooden body crossmember broken at O/S
4. Driver's cab damaged at O/S front lower portion.
5. Note:

Spare tyre damaged at outer wall. (cut through for about 5" Dia.)

CERTIFIED TRUE COPY! [signature]
([illegible])
PENDAFTAR DAN PEMEREKSA
KERETA MOTOR

(8) General condition of the vehicle (discounting the effects of accident damage was:- Satisfactory 3/7/69

Signature: ([illegible])
Appointment: Examiner,
Road Transport Department,
Pahang.

Tarikh: 10th. February 1969

PENDAFTAR DAN PEMEREKSA
KERETA MOTOR
PAHANG

EXHIBIT F

CERTIFICATE OF EXAMINATION OF 4th DEFENDANTS VEHICLE

Exhibits

Exhibit F
Certificate of Examination of 4th Defendants vehicle
10th February 1969

Police Report No: Bentong-295-296/69 Ref. No. RT (VE) SGY 15/69

O.C.P.D.,
Bentong/Pahang.

ROAD TRANSPORT DEPARTMENT MALAYSIA.

Certificate of Examination of a Motor Vehicle
Section 143 (6) of the Road Traffic Ordinance, 1958.

I hereby certify that I Shahari Shah b. Yahaya a Road Transport Officer attached to the RIMV's Office, Raub, Pahang, have examined Motor Vehicle No. BL 5223 & T/B 1377 Make Bedford-Diesel Class Timber Jinkers-10 Wheelers on 5th Februari, 69, at 1.00am AT RIMV's Office, Raub, Pahang and that the result of my examination is as under :-

(1) That owing to accident damage the vehicle could not be tested by driving it on a road. * A static test of the condition of the brake and steering was carried out with the road wheels raised off the ground.

(2) The condition of the foot brake was Could not be tested-Footbrake pedal badly bent and jammed into O/S Front floorboard.

(3) The condition of the hand brake was Serviceable

(4) The condition of the steering was Could not be tested-Steering wheel badly pressed downwards and the shaft coupling broken.

(5) The condition of the tyres was :

Near-side front 65%-S Off-side front 65%-S

N/side intermediate outer/solo 65%-S O/side intermediate outer/solo 65%-S

N/side intermediate inner 65%-S O/side intermediate inner 65%-S

N/side rear outer/solo 70%-S O/side rear outer/solo 70%-S

N/side rear inner 70%-S O/side rear inner 70%-S

(6) The condition of other components was :- Serviceable

(7) Damage which appeared to have been caused in an accident was :-

1. Chassis Front N/S Sidemember badly bent inwards.
2. Front axle including N/S Wheel assembly badly knocked in.
3. Bonnet crumpled at N/S front.
4. Front N/S mudguard including head & sidelamps crushed.
5. Front windscreen completely shattered.
6. Radiator & Grille knocked at N/S front and pressed to fan assembly.
7. Driver's cab distorted at N/S front.
8. Engine and gearbox displaced from mountings.
9. Front O/S mudguard and headlamp damaged.
10. Dashboard (Meterboard) badly damaged.

CERTIFIED TRUE COPY
(signed)
M.S. [illegible]
PENDAFTAR DAN PEMEREKSA
KERETA2 MOTOR 3/7/69

(8) General condition of the vehicle (discounting the effects of accident damage was:- Could not be established owing to extreme damage of accident damage.

Signature: (Shahari Shah b. Yahaya)
Appointment: Examiner,
Road Transport Department,
Pahang.

5th February 1969

PENDAFTAR DAN PEMEREKSA
KERETA2 MOTOR
PAHANG

EXHIBIT G

TRANSLATION OF NOTES OF PROCEEDINGS IN BENONG MAGISTRATES COURT

MALAYA

STATE OF PAHANG

IN THE MAGISTRATE'S COURT AT BENTONG

SUMMONS CASE NO. BMS 354/1969

Name of accused: Kow Chai @ Chew Chin Swee
I/C 1318825.

Address of accused: T-24 Kampong Sempalit, Raub.

Charge: Bentong Report No. 608/1969

That you on the 4th day of February 1969 at about 3.00 a.m., at 4¾ milestone, Bentong/Kuala Lumpur road, in the District of Bentong, in the State of Pahang, being the driver of motor lorry trailer No. BL 5223, did drive the said vehicle on a public road, in a manner which having to all the circumstances (including the nature, condition and size of the road and the amount of traffic which was or might be expected to be on the road) was dangerous to the public and that you have thereby committed an offence punishable under Section 35(1) of the Road Traffic Ordinance No. 49 of 1958.

Name of complainant: Sgt. 5406 Mahmood.

Date of complaint: 9th May 1969.

Address of complainant: Balai Polis, Bentong.

Nationality of accused: Chinese

Plea: Charge read, explained and understood - claims trial.

Prosecuting Advocate or officer: Inspector Ismail.

Defending Advocate: in person.

Exhibits

Exhibit G

Translation of Notes of Proceedings in Penang Magistrates Court

12th January 1970

(continued)

Findings: Salah dan hukum.

Sentence and/or other order and/or bond: Denda $ 200.00 atau satu bulan penjara. Lesen Memandu di-tanda.

Date of termination of proceedings: 12th January 1970.

Signed: Enche Halim bin Haji Mohamed (Magistrate).

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 24 of 1973

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

CHOP SENG HENG (sued as a firm) (Fourth Defendants) Appellants

- and -

(1) THEVANNASAN s/o SINNAPAN (First Defendant)

(2) SING CHEONG HIN LORRY TRANSPORT CO. (sued as a firm) (Second Defendants)

Respondents

(3) PANG CHEONG YON (Plaintiff)

RECORD OF PROCEEDINGS

GASTERS ~~[illegible]~~
44 Bedford Row,
London, WCIR 4LL

Solicitors for the Appellants

WILSON FREEMAN,
6/8 Westminster Palace Gardens,
Artillery Row,
London, SWIP IRL

Solicitors for the 1st & 2nd Respondents

LE BRASSEUR & OAKLEY,
71, Great Russell Street,
LONDON, WC1B 3BZ,
Solicitors for the 3rd Respondent