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

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B E T W E E N :

LUDHIANA TRANSPORT SYNDICATE and  
SOMANAIDU s/o BANKARIAH

Appellants  
(Defendants)

- and -

CHEW SOO IAN (widow) and  
CHONG CHAP SENG the Administratrix  
and Co-Administrator of the Estate  
of CHOONG TUNG CHEONG also known as  
CHONG THONG CHONG, deceased

Respondents  
(Plaintiffs)

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CASE FOR THE RESPONDENTS

RECORD

1. This is an Appeal from a Judgment of the Federal Court of Malaysia dated 19th July, 1976, allowing with costs the Respondents' Appeal from a Judgment of Ajaib Singh J. in the High Court of Malaya at Seremban dated 12th February, 1976, whereby it was ordered that the Respondents' claim against the Appellants for damages arising out of the death of one, Choong Tung Cheong (hereinafter called "the deceased") be dismissed.

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2. The point raised by this Appeal is whether the Federal Court of Malaysia were right in holding that the Appellants were liable for damages for the death of the deceased.

3. The action arises out of a collision which occurred on the 31st day of December, 1970 at about 12.50 p.m. on the Jalan Kuala Pilah/Seremban Road between a Mercedes motor car being driven by one Chia Chah Hoo in the direction of Seremban and in which the deceased was travelling as a passenger, and a motor lorry owned by the First Appellants and being driven in the opposite direction by their servant or agent the Second Appellant. As a result of the collision

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the deceased received fatal injuries and died on the 31st day of December, 1970.

p.1

4. The action was commenced by Writ dated the 15th day of November, 1972, and claimed damages for the benefit of the Estate of the deceased and for the benefit of the First Respondent as widow of the deceased and the deceased's other dependants, namely:

(i) Choong Yew Siong, aged 18 years.

(ii) Choong Yin Siong, aged 17 years.

(iii) Choong Kai Seong, aged 15 years.

(iv) Choong Choon Kien, aged 13 years.

(v) Choong Chiong Siong, aged 11 years.

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5. The Statement of Claim dated the 15th day of November, 1972, contained detailed allegations of negligence against the Second Defendant and gave particulars of the dependancy alleged and of special damages claimed in the sum of \$4,965.

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6. By their Statement of Defence dated the 15th day of February, 1973, the Appellants denied the allegations of negligence and alleged in the alternative that the collision was caused or contributed to by the negligence of the said driver of the motor car in which the deceased had been travelling as a passenger. Particulars of the alleged negligence were set out in Paragraph 3 of the Statement of Defence.

7. At the trial of the action the Respondents called the following witnesses:

pp.8-10

(a) Chia Chah Hoo

pp.10-12

(b) The widow of the deceased, the First Respondent to this Appeal.

8. The Appellants called two witnesses, namely:

pp.12-15

(a) Somanaidu s/o Bankariah, the Second Appellant to this Appeal

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(b) Soundaraju.

9. In addition the following documents were placed before the Court:

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(i)(a) Royal Malaysian Police Report No. 139/70 (in English)

- (b) Royal Malaysian Police Report No. 139/70 (in Malaysian)
- (ii)(a) Royal Malaysian Police Report No. 140/70 (in English) p.51
- (b) Royal Malaysian Police Report No. 140/70 (in Malaysian)
- (iii)(a) Royal Malaysian Police Report No. 141/70 (in English) p.52
- (b) Royal Malaysian Police Report No. 141/70 (in Malaysian)
- (iv)(a) Sketch plan and key (in English) pp.53-55
- (b) Key (in Malaysian)
- (v) Two photographs
- (vi) Grant of Letters of Administration of the Estate of Choong Tung Cheong also known as Chong Thong Chong, deceased (in Johore Bahru High Court Petition for L/A No. 67/1971) p.56
- (vii) Photostat copies of birth certificates of the dependants of the deceased pp.58-67
- Special Damages were agreed at \$1,515. p. 7

10. Having heard the evidence and considered the documents the Learned Trial Judge dismissed the action finding that the collision was caused solely by the negligence of the driver of the car in which the deceased had been travelling as a passenger, for the reasons set out in the Grounds of Judgment. The Learned Judge assessed General Damages at \$42,625.

pp.18-25  
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11. By Notice of Appeal dated the 9th day of December, 1975 the Appellants Appealed to the Federal Court of Malaysia and on the 7th day of April, 1976 the Federal Court of Malaysia allowed the Appeal, setting aside the Judgment of the High Court at Seremban and substituting an Order that liability for the accident be apportioned equally between the drivers of the two vehicles and ordered that Judgment be entered for the Plaintiffs for \$22,071.50 with interest at 6% on \$21,314 from date of service of the Writ and 3% per annum on \$757.50 from

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the date of the accident. It was further ordered that the Respondents pay the costs of the Appeal and the costs in the Court below.

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pp.40-41  
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12. The Reasons of the Federal Court are set out in the Judgment delivered on the 19th day of July, 1976. On the 7th day of June, 1976 the Federal Court at Kuala Lumpur granted the Appellants conditional leave to Appeal to His Majesty the Yang Di Pertuan Agong and final leave to Appeal to His Majesty the Yang Di Pertuan Agong was granted on the 13th day of September, 1976.

13. It is apparent that on the hearing of the action each driver sought to blame the other for the collision. The passenger in the lorry did not give any evidence which was of material assistance and there were no independent witnesses. It is clear that both vehicles were moving at the time of the collision and that the collision occurred somewhere near the centre of the road. The Respondents respectfully submit that in these circumstances there is prima facie evidence of negligence by both drivers.

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14. The Respondents respectfully submit that in order to arrive at his conclusion the Learned Trial Judge was constrained to speculate and/or draw inferences which were not justified by the evidence. In particular:

- (a) The fact that the lorry would have negotiated a number of bends prior to approaching the bridge did not mean that the lorry could not have been travelling fast although this was the sole basis for the Judge so finding.
- (b) The fact that the road up to the place of the accident from Kuala Pilah (the direction in which the car was travelling) was fairly straight unlike the section of road along which the lorry driver approached did not justify a finding that it was the car which went on to the wrong side of the road.
- (c) The fact that the car swung round after impact did not justify a finding that the car was travelling faster than the lorry, bearing in mind the respective weights of the two vehicles.

15. In the absence of any reliable guide as to

which of the two versions was correct the Learned Trial Judge was constrained to hold that a scratch mark shown on the sketch plan in all probability indicated that the accident had occurred on the correct side of the road from the point of view of the lorry driver. No evidence had been adduced at trial as to how this scratch had been made and in the absence of any evidence as to its probable source the Respondents respectfully submit that the Learned Trial Judge was not entitled to draw inferences adverse to the Respondents' case. Equally the fact that after both vehicles had finally come to a halt, some glass from the windscreen of the car was found near the front offside wing of the lorry did not justify the Judge's finding that this supported the evidence of the lorry driver that he had swerved to the very left edge of the road in an attempt to avoid the car.

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p.24

16. The lorry driver's principal contention at trial was that the car driver had driven on to the wrong side of the road. He had not made this complaint in his statement to the police and the Respondents respectfully submit that in the absence of some credible explanation for this omission the Learned Trial Judge ought not to have accepted the lorry driver's evidence at trial that the lorry was on its correct side of the road at the time of the accident and the car alone was on its wrong side.

17. The Respondents respectfully submit that in the light of the fact that shortly before the accident the lorry had to negotiate a narrow bridge, the probabilities are that the lorry had not regained its correct side before the collision. Moreover the lorry driver's admission in cross-examination that he could only see for a distance of some 50 feet, which, coupled with the evidence that the lorry was still moving at impact ought to have led to a finding that the lorry was going too fast for the prevailing circumstances.

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18. The Respondents further respectfully submit that the Federal Court at Kuala Lumpur were right in saying that the fact that the damage to both vehicles was to the front offside and that neither vehicle had left the road before impact clearly indicated that the accident took place at or very near the middle of the road.

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19. In all these circumstances it is respectfully submitted that the proper finding

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was that both drivers were to blame for this collision and in the absence of cogent and reliable evidence enabling the Court to distinguish between the liabilities of the two drivers the correct apportionment was that arrived at by the Federal Court.

20. It was conceded on the hearing before the Federal Court and is conceded for the purposes of this Appeal that the deceased was vicariously liable for any negligence by the car driver.

The Respondents submit that this Appeal should be dismissed with costs for the following (among other)

REASONS

- (1) That the evidence adduced at trial, other than the oral testimony of the two drivers, showed that on the balance of probabilities both drivers were to blame for the accident.
- (2) That there was nothing in the oral testimony of the two drivers to justify a finding that the car driver was solely to blame for the collision.
- (3) That in the absence of cogent and reliable evidence on which to distinguish between the degree of blame to be attributed to each driver liability should have been apportioned equally.
- (4) That the Judgment of the Learned Trial Judge was wrong.
- (5) That the Judgment of the Federal Court was right.

JOHN CROWLEY

No. 32 of 1976

IN THE JUDICIAL COMMITTEE  
OF THE PRIVY COUNCIL

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CHONG THONG CHONG,  
deceased

Respondents  
(Plaintiffs)

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CASE FOR THE RESPONDENTS

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