Privy Council Appeal No. 32 of 1976

Ludhiana Transport Syndicate and another – – – *Appellants*

v.

Chew Soo Lan and another – – – – – – *Respondents*

FROM

THE FEDERAL COURT OF MALAYSIA

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 4TH APRIL 1979

Present at the Hearing:

VISCOUNT DILHORNE
LORD RUSSELL OF KILLOWEN
LORD KEITH OF KINKEL

[*Delivered by* LORD KEITH OF KINKEL]

This appeal is concerned with a road accident which occurred on 31st December 1970 near the 12½ milestone on the Seremban/Kuala Pilah Road in the Police District of Kuala Pilah. The husband of the first respondent was a passenger in a Mercedes motor car which was being driven towards Seremban by one Chia Chah Hoo, who was his servant or agent. A 6-ton motor lorry owned by the first appellants and driven by the second appellant in the course of his employment with them was travelling in the opposite direction. The two vehicles collided and the first respondent's husband sustained fatal injuries.

The respondents, as administratrix and co-administrator of the deceased's estate, brought the present action against the appellants in the High Court at Seremban, claiming damages on the ground that the accident was caused by the negligence of the second appellant, for whose actions in the course of his employment with them the first appellants were responsible. On 12th February 1976 Ajaib Singh J., after trial, gave judgment for the appellants, holding that the accident was wholly caused by the fault of Chia Chah Hoo, the driver of the motor car. The respondents appealed to the Federal Court of Malaysia, and on 19th July 1976 that Court (Gill C.J., Wan Suleiman and Ali F. JJ.) delivered a judgment setting aside the order of Ajaib Singh J., holding that the second appellant and the driver of the motor car were both equally to blame for the accident, and awarding the respondents damages of $22,071·50. The present appeal from that judgment comes before this Board with leave of the Federal Court dated 13th September 1976.

Part of the evidence led at the trial consisted of a sketch plan, prepared by a police officer and agreed as accurate, showing the state of affairs at the scene of the accident shortly after its occurrence. From this it appeared that the road was 19 feet wide, with a 5-foot grass verge on

either side. There was a bridge with parapets close up against the carriageway about 60 feet from the *locus* in the direction of Seremban, *i.e.*, the direction from which the lorry had been travelling, and the road curved to the left in that direction. There were a considerable number of bends in the road further in that direction, but the approach to the bridge from the direction of Kuala Pilah was fairly straight. The Mercedes car was lying at an angle facing towards Kuala Pilah, *i.e.* in the opposite direction to that in which it had been travelling, partly on its nearside half of the carriageway and partly on the adjacent verge. The motor lorry was also facing towards Kuala Pilah, lying at roughly the same angle across its own nearside verge, its offside rear corner being on the carriageway and its nearside front corner being beyond the verge. Fragments from the broken windscreen of the car were lying in the centre of the verge near the offside front wheel of the lorry. There was a depression or scratch mark on the same side of the carriageway as the lorry, 3 feet 6 inches from the centre line and a few feet behind the offside rear wheel of the lorry. There was no evidence as to how or when that mark had got there. The damage to both vehicles was on the front offside. A photograph produced in evidence showed that the car's front bumper had been almost completely torn off. The presence of the scratch mark on the plan suggests that its appearance was such as to indicate, to the mind of the police officer who prepared the plan, a possible connection with the accident.

According to the evidence of the car driver, he was driving at about 35 m.p.h. on his own side of the road when he saw the motor lorry coming very fast about 40 feet away. He had been unable to see it earlier because of the bend in the road, and it encroached into his path and crashed into his vehicle. He sounded his horn but could not take any evasive action since he was as close as he could be to his own side of the road. The evidence of the lorry driver was in sharp conflict. He said that as he passed the bridge driving at 15 to 20 m.p.h. he saw the Mercedes coming from the opposite direction and coming onto his way. He swerved the lorry to his very left, but the car knocked into the front portion of the lorry and swung round. He claimed to have been on his correct side of the road within his own half, and denied having encroached onto the path of the other vehicle. Apart from that of the two drivers, there was no direct evidence as to how the accident occurred. The car driver, in a statement made to the police shortly after the accident, specifically said that the lorry had encroached onto his path. The lorry driver, in a similar statement, did not say that the car had encroached onto his path, but merely that the car "knocked into my lorry". In answer to a question by the trial judge he explained that this meant that the car encroached onto his path.

The learned trial judge said in his judgment that he accepted the evidence of the lorry driver and rejected that of the car driver. He expressed the view that since the lorry had travelled along many bends immediately before reaching the bridge it could not have been travelling fast as alleged by the car driver. The motor car, on the other hand, had been travelling along a fairly straight stretch of road. He considered that the position of the scratch mark on the road in all probability indicated that the collision occurred on the lorry's side of the road, and that the presence of glass fragments from the car's windscreen on the verge next to the lorry tended to support the lorry driver's evidence that he swerved to the very left edge of the road in an attempt to avoid the oncoming car. He also took the view that in all probability it was the car rather than the lorry which was travelling very fast, since after the collision it swung round and ended up facing the direction from which it had come. He therefore held that the car driver had failed to exercise

due care and attention by driving fast and encroaching into the other half of the road, and that the plaintiffs had failed to prove any negligence on the part of the defendants.

The Federal Court, in the judgment under appeal, stated that the finding of the trial judge whereby he accepted the evidence of the lorry driver and rejected that of the car driver was clearly not based entirely on the demeanour of the witnesses as they gave evidence, and that the Court therefore thought in all the circumstances of the case they were in as good a position as the trial judge to form a view as to what happened. The Court considered that the trial judge was speculating when he inferred that the lorry driver could not have been going fast because he had travelled along many bends immediately before reaching the bridge. They regarded it as common knowledge that drivers tend to cut the corner when negotiating right hand bends, as the lorry driver was doing in this case. They considered the circumstance that the car swung round after the collision to be indicative of high speed on the part of the lorry, not the car, and that the trial judge had failed to take account of the relative widths and weights of the lorry and of the car, or to make any allowance for the fact that the lorry had immediately before the accident crossed a narrow bridge. The Court further expressed the opinion that, there being no evidence as to how the scratch mark came to be on the road or that it was made by the car, the trial judge was not entitled to infer from its presence that the accident occurred on the lorry's side of the road. Likewise, the presence of broken glass on the verge beside the lorry did not in the opinion of the Court support the lorry driver's statement that he swerved to the left edge of the road in attempting to avoid the car. In this connection it is to be noted that the Court overlooked that it was an agreed fact that the broken glass came from the windscreen of the car, and mistakenly thought that this depended on the evidence of the lorry driver. The Court also considered that some significance ought to be attached to the circumstance that the car driver had specifically stated in his report to the police after the accident that the lorry had encroached onto his path, whereas the lorry driver's report contained no statement that the car had encroached onto his path, and that the trial judge should not have accepted the lorry driver's explanation of this.

In the result, the Federal Court came to the conclusion that since the road at the place of the accident was rather narrow and the damage to both vehicles was to the front offside, the evidence clearly indicated that the accident took place at or very near the middle of the road. Since the trial judge had not decided the case wholly on the oral testimony of the two drivers and nothing very much turned on the evidence about the scratch mark on the road or the broken glass on the verge, the balance of probability was in favour of the view that the drivers of both vehicles were to blame, and that it was impossible to say in what proportion the blame should be allocated between them. In the circumstances the Court thought it reasonable to apportion the liability equally between the two drivers, and they accordingly gave judgment in favour of the plaintiffs for one half of the agreed special damages and of the general damages as assessed by the trial judge.

Their Lordships are of opinion that this is a case where the circumstantial or real evidence available to the learned trial judge offered minimal and most uncertain guidance towards a conclusion as to why and upon what part of the road the collision took place. The circumstance that the Mercedes car swung right round after the collision appears completely neutral in judging of the relative speeds of the car and the lorry immediately before the impact. The presence and position of the scratch mark and the broken glass do not in themselves support any

reliable inference regarding the probable point of impact, but their Lordships are not prepared to hold that it would be an error to treat them as favouring to some extent the view that the collision occurred towards the side of the road on which they were found. In circumstances such as these the oral evidence of the two drivers assumed very great importance. The learned trial judge accepted that of the lorry driver and rejected that of the car driver. He does not expressly say in his judgment that he did so in the light of their demeanour in the witness box, but he must be taken, in a short and uncomplex case such as this one, to have at least taken the view that their demeanour was such as to justify the course which he took. While the learned judge relies upon certain aspects of the circumstantial evidence as supporting his decision to accept the evidence of one driver in preference to that of the other, it does not appear to their Lordships that these aspects are expressed to be the ground for that decision. As it is, their Lordships consider, as already mentioned, that the evidence about the scratch mark and the broken glass favours to some extent the view of the trial judge, but that the evidence about the car having swung round is entirely neutral. The circumstance that the damage to both vehicles was on the front offside must also, contrary to the view of the Federal Court, be regarded as entirely neutral.

There is a strong temptation, in an accident case where the circumstantial evidence is as scanty and inconclusive as it is here, to embark upon a course of speculation. It is, however, most important to refrain from founding upon any theory about the cause of the accident which has not been thoroughly tested in examination and cross-examination of witnesses. If the theory is so tested, the resultant reaction and demeanour of the witness may well be crucial in determining the issue of credibility and reliability. An appeal court should be most wary of upsetting the finding of the trial judge, who has seen and heard the witnesses, upon the basis of theories of their own as to the general probabilities, which have not been fully tested at the trial. Their Lordships consider, with the greatest respect, that the Federal Court have fallen into that sort of error in the present case. It is to be kept in view that it was for the plaintiffs to prove that the accident was caused, to some extent at least, by the fault of the lorry driver. The only evidence in support of their case was that of the car driver, but the trial judge rejected it. It is a strong step for an appeal court, which neither saw nor heard the witnesses, to hold that the trial judge was wrong to do so. Here the Federal Court have not only done that, partly on their view as to the general probabilities and partly by attaching significance to pieces of evidence in themselves completely neutral, but they have reached a contrary finding as to the cause of the accident which was not supported by any witness at the trial, and which necessarily involves, furthermore, that the car driver cannot have been telling the truth when he said he was driving as close as could be to his own side of the road.

For these reasons their Lordships are of opinion that the Federal Court were wrong in setting aside the order of Ajaib Singh J., and that the appeal should therefore be allowed and the order of Ajaib Singh J. restored. The appellants must have their costs of the proceedings here and before the Federal Court.

Their Lordships will advise His Majesty the Yang di-Pertuan Agong accordingly.

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In the Privy Council

LUDHIANA TRANSPORT SYNDICATE AND ANOTHER

v.

CHEW SOO LAN AND ANOTHER

DELIVERED BY
LORD KEITH OF KINKEL

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