AMIN HALIM BIN CASAN **Appellant/Plaintiff**

AND

MASA'IN BINTI AWANG HAJI TUAH **1st Respondent/Defendant**
NORMILA SDN BHD **2nd Respondent/Defendant**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 7 of 2024)

Steven Chong, C.J., Lunn and Sir Peter Gross JJAs
Date of Hearing: 4 June 2025.
Date of Judgment: 14 July 2025.

Headnote: Civil Law A.'s appeal dismissed. Appeal against J.'s finding of contributory negligence and assessment of 30% liability; failure to award damages for Future Loss of Earnings, Loss of ability to carry out DIY, Loss of salary-2018 to 2023; quantum of damages for Loss of Earning Capacity too low

Held: Appellate Court does not interfere with judge's findings of facts, unless judge is wrong in principle, having heard all the witnesses, has misapprehended the facts or is otherwise plainly wrong.

Contributory negligence: 2nd R. conducted safety briefings- warning to stay 3-5 from operating excavator; in standing 1 m. from operating excavator A. in dangerous position- careless. J.'s assessment of 30% liability not plainly wrong.

Loss of Future Earnings; in choosing to resign from R.'s employment, leaving Brunei to return to Indonesia, two years after returning to work on full salary performing 'light duties', A. chose 'risk of unemployment', which occurred: A. did not mitigate his loss. J entitled to dismiss his claim.

Loss of ability to carry out DIY- J. entitled to find no evidence to support claim.

Loss of salary, overtime and benefits- September 2018-2023: J entitled to reject claim on basis of A's choice to resign from R's employment, leave Brunei and return to Indonesia with associated 'risk of unemployment'.

Loss of Earning Capacity-quantum: J.'s award of B$40,000 was amount sought by A. at trial. J. not plainly wrong.

Costs: parties directed to file written submissions.

Ms Subrina Tan Yii Chun and Mr Awang Ahmad Tarmizi Bin Hj Awang Jokeple (M/S Fortis Law) for Appellant/Plaintiff.
Ms Veronica K. Rajakanu and Mr Pao Jia Wan (M/S V.K. Rajakanu & Associates) for Respondents/Defendants.

Cases cited:
Neo Siong v Cheng Ghuan Seng & Others [2013] SGHC 93.
Ponnusamy Rajapandian v Hj Awg Mohammed Hussain bin PP Awg Ahmed [ICCS No. 43 of 2012]
Siti Supatin binti Hj Asar v The Estate of Norliah binti Yousoff (deceased) & Anor, [2002] BLR 229
Muliiadi Bin Awg Moksin v Wang Meng Peck & Anor (2003) 2 BLR 257
Tiong Ing Chlong v Giovanni Vinetti [1984] 2 MLJ 169
*Ogedegbe Imoukhuede Rawlings v Lingeswaran a/l Muniandy [*2016] MLJ 222
Muhud Irrawadey bin Metali v Ibrahim bin Maidin [2011] BLR 247
Faridah Abdul Hamid & Anor v Azman Bin Amran & 3 Ors.[2009] Civil Appeal No. 22 of 2009
Ng Li Ning v Ting Jun Heng & Anor. [2021] 2 SLR 1267

Lunn, J.A.:

1. The Appellant appeals against the determination by Muhammed Faisal bin PDJLD Kol (B) DSP Hj Kefli JC in his Judgment, dated 30 May 2024, that he was culpable of contributory negligence in the accident which occurred on 2 March 2016, in which the Appellant sustained injuries, in consequence of which he suffered losses and damages. Also, the Appellant appeals against the quantum of damages awarded against the 1st and 2nd Respondents, whom the Judge found liable for their breach of their duty of care towards the Appellant, their employee, for failing to award damages in respect of:

- loss of future earnings;
- loss of ability to carry out Do-It Yourself chores or tasks; and
- special damages for partial loss of salary, overtime and benefits.

Further, it was submitted that the Judge erred in awarding only B$40,000 for loss of earning capacity.

The accident

2. In the afternoon of 2 March 2016, whilst working as a labourer in the employment of both the 1st and 2nd Respondents on a construction site of the Telisai-Lumut Highway, the Appellant sustained serious injuries to his lower left leg when an excavator operated by a fellow employee was manoeuvred so that it collided with him.

The parties

3. The Appellant, an Indonesian national, had been employed by the 1st Respondent, the registered sole proprietor of a registered business, since 2011 as a labourer. The 2nd Respondent, a private limited company registered in Brunei, had entered into a sub-contract, dated 15 June 2010, with CCCC Third Harbour Engineering Co Ltd ("CCCC") for the construction of the Telisai-Lumut Highway. On 1 October 2010, the 1st Respondent entered into a sub-contract with the 2nd Respondent for Reinforcement Concrete Works to be constructed in that project.

The Appellant's case

4. The Appellant filed two affidavits of Evidence -in-Chief, dated 1 April 2023 and 10 April 2023, and gave oral evidence in support of his case. Also, Professor Dr. Pande produced an affidavit of Evidence-in-Chief, dated 31 March 2023 and gave expert oral evidence as to the medical condition of the Appellant.

5. Having been born in Indonesia in 1980 and having left school in 1996, the Appellant worked as a farmer before coming to Brunei in early 2011 under the sponsorship of the 1st Respondent. From the outset he was housed in living quarters operated by the 2nd Respondent, whose employees directed his work. Five or six months after his arrival, he was moved to living quarters at Telisai, from which place he began to work on the construction of the highway to Lumut. He worked in a team of six men under the direction of '*Ah Min*', Jee Yok Min, a foreman, and Hartono, a supervisor, both of whom worked for the 2nd Respondent. The work of that team was to clear land and construct drainage ditches, for which purpose an excavator was used. The driver of the excavator was Abdul Ghofur. By the time of the accident on 2 March 2016, the Appellant had been performing those tasks at work for almost 5 years.

The accident: 2 March 2016

6. On 2 March 2016, the Appellant had begun work on site at about 8:00 am. During the morning the team had been constructing a drain. Having had lunch, concrete was poured into the mould to be used to form the drain. Whilst it dried, the team took a break and sat on the ground near where they had been working. Then, Ah Min instructed him to assist Ghofur, who was manoeuvring the excavator at a place near to a small drain, next to a hill at the base of a bridge, in preparation for digging the surface of the hillside. He was instructed to ensure that the arm of the excavator did not hit the bridge and to do so by warning the driver as required. He was given no other instructions. This was the first time that he had been asked to perform these duties. Nevertheless, he did as instructed.

7. The cabin of the excavator was positioned at right angles to its tracks and was facing the hillside, in which direction the arm was deployed. There was very limited space in which to position himself. He took up a position about one metre away from the left side of the excavator. A Chinese worker of CCCC was guiding Ghofur from a position at the top of the hill, in which direction Ghofur faced. Ghofur did not look at the Appellant as he worked. Suddenly, the excavator moved to its left and its track collided with his left leg causing him injuries.

Safety briefings

8. The Appellant said that throughout the period he had been at the worksite there had been no safety briefings nor were they given any safety training. There was no such briefing that morning.

Injuries and treatment

9. Having been treated for his injuries at RIPAS for six days, during which time he underwent surgery on 3 March 2016 for open reduction and internal fixation of his left ankle, he was discharged. Further surgery was performed on 12 May 2016 to remove a syndesmotic screw. His employment contract having ended, the Appellant returned to Indonesia in June 2016.

Resumption of work: August 2016-September 2018

10. However, in August 2016 he returned to Brunei and resumed work on the project. Because of his inability to perform heavy work, due to his injury, he was assigned light work duties. Subsequently, he worked at other sites for the 2nd Respondent performing light duty work only. The appellant said that he had been able to resume work and earn a living, *"…because my foreman, supervisor and co-workers were understanding of my disabilities and pain and helped me as much as they could. If it were not for their sympathetic attitude, I would not be able to work as a labourer at all given my condition*." Nevertheless, even those duties caused him pain and he needed to take rest regularly. In the result, having decided that he could not continue to perform that work, he returned to Indonesia in September 2018.

The Respondent's case

11. Hartono, the head labourer of the team in which the Appellant worked at the site, produced an affidavit of Evidence-in-Chief and gave oral evidence. He is an Indonesian national who joined the 2nd Respondent in 2010 and worked with them thereafter. In 2016, he was working at the site at which the accident occurred. He said that the 2nd Respondent gave daily '*Toolbox*' safety briefings at which the employees were instructed to wear safety equipment and keep a safe distance from machinery and vehicles. At least once a week a safety briefing was given to workers at the worksite by CCCC.

12. On the afternoon of 2 March 2016, he saw the Appellant with Wartoni, a fellow employee of the team, during their break standing at the place where workers gathered at their break. They were at a distance from him of 50 to 100 metres. A supervisor of CCCC instructed Ghofur to use the excavator to dig a trench in order to lay a pipe in front of the place at which the Appellant was standing. Then, the supervisor walked past where the Appellant was standing. Ghofur drove the excavator towards where the Appellant and Wartoni were still standing, but neither of them moved. The excavator moved across his line of sight and he was no longer able to see the Appellant. Next, he heard Wartoni shouting that the Appellant had been hit by the excavator.

13. In cross-examination, he denied that he had seen the foreman, whom he called '*Ah Ming'*, talking to the Appellant before the accident. He said Ah Ming was not on site.

14. Hartono confirmed that a few months after the accident, the Appellant had returned to work, but agreed that he was doing light work.

15. Chow Kwai Choong, a director of the 2nd Respondent, produced an affidavit of Evidence-in-Chief, dated 4 April 2023, and gave oral evidence. On 15 June 2010, the 2nd Respondent entered into a Contract with CCCC for construction of the Telisai to Lumut Highway. On 1 October 2010, the 1st Respondent entered into a sub-contract with the 2nd Respondent to provide Reinforcement Concrete Works at that project. By agreement, at the request of the 1st Respondent, the 2nd Respondent provided living quarters for employees of the 1st Respondent engaged in the project and paid them their salaries on behalf for the 1st Respondent.

16. Chow Kwai Choong said that the 2nd Respondent conducted Toolbox briefings for its employees on a daily basis. In those briefings workers were advised of the blind spots and safe areas on excavating machines and instructed not to come within a 5 metres radius of an operating excavator. Further, the workers were informed that there would be consequences for breach of

those instructions. Also, he said that CCCC conducted their own safety briefings for workers on the site twice a week.

17. Dr. Tan Tiam Siong produced an affidavit, dated 11 April 2023, in which he gave his opinions of the consequences of the injuries to the Appellant, having had regard to the reports of other doctors and following his own examination on 23 March 2023.

Judgment

18. Having reviewed the evidence adduced at trial comprehensively, and having noted the conflict in the evidence of the Appellant that he received no safety or Toolbox briefings and that of Chow and Hartono, the Judge observed that, notwithstanding their evidence of the practice of giving such briefings, neither of those witnesses had testified that there was a Toolbox briefing on 2 March 2016. In consequence, he found that *"…there were no safety briefing or Toolbox briefing conducted on the day of the accident*."[1]

19. Having found that the Appellant was the employee of the 1st Respondent at the time of the accident and having stipulated the various duties owed to him by the 1st Respondent, the Judge found that the 1st Respondent had failed in discharging those duties, which failure resulted in the injuries sustained by the Appellant.[2]

20. The Judge found that the Appellant worked under the direct management supervision and control of the 2nd Respondent's foreman and supervisor at the worksite, such that the 2nd Respondent was the "*factual employer*" of the Appellant. As such, the 2nd Respondent owed a duty of care to the Appellant, which they failed to discharge. Further, he found that the 2nd Respondent was in joint occupation of the worksite with CCCC.[3]

21. In conclusion the Judge determined that the 1st and 2nd Respondents, "*share liability for the injuries sustained by the Plaintiff*."[4]

Contributory negligence

22. The Judge said that, although he had found that no Toolbox or other safety briefings had been given to the Appellant and his fellow workers on 2 March 2016, nevertheless he accepted that, *"…toolbox briefings were conducted regularly prior to the start of work*". Those briefings included information about the 'blind spots' of excavators and instructions not to come within 3-5 metres of an operating excavator. He was satisfied that the Appellant, having worked with both Respondents since 2011, should have known *"…about the inherent risk of being physically close to a working excavator and be aware of the excavator's potential blind spots*."[5]

23. The Judge found that the fact that the Appellant, "*…was standing only a metre away from a working excavator, places himself in a dangerous position and was careless in failing to keep a safe distance from the excavator*." Further, given the Appellant's evidence that the excavator driver was not looking at him, but rather was focused on digging into the hill and upon the CCCC signalman, the Judge found that the Appellant, "…*would have known that he ought to have placed*

[1] ROA page 13, Judgment.
[2] ROA page 14, Judgment.
[3] ROA page 15, Judgment.
[4] ROA page 16, Judgment.
[5] ROA page 16, Judgment.

himself in a safe distance of at least 3-5 metres away from the excavator and not a mere metre away." [6]

24. Having referred to the judgment in *Neo Siong v Cheng Ghuan Seng & Other*s [2013] SGHC 93, the Judge found that, "*a reasonably prudent man in the Plaintiff's position would have kept a close eye on the excavator*." In the result, he determined that the Appellant, *"…bears personal responsibility for the injuries sustained in the accident, with 30% of the liability attributed to his own actions.*"

Medical evidence

25. Having reviewed the respective evidence of Dr. Pande and Dr. Tan in considerable detail, the Judge identified what he determined to be the differences in their testimony under four headings:1. Severity of injuries; 2. Functional limitations; 3. The need for surgery; and 4. Prognosis.[7] In the result, the Judge said, "*I would lean towards the testimony and views of Dr. Tan Tiam Siong.*"[8]

Quantum of damages

26. The Judge stipulated the following awards of damages for:[9]

A. General damages

1. Pain and Suffering and Loss of Amenities of B$120,196.00;

2. Loss of Earnings Capacity of B$40,000.00; and

3. Loss of Future Earnings of B$15,654.08.

B. Special Damages-B$2,049.80.

Loss of Future Earnings

27. The Judge declined to make any award of damages under the head of Loss of Future Earnings. In considering the matter, the Judge found that the Appellant was, *"…unable to perform physically demanding tasks due to lower limb strength and joint movement issues.*"[10] Nevertheless, he noted that the Appellant had remained employed by the 2nd Respondent at full salary, albeit performing "*simpler tasks*". In that context, he noted that the Appellant, *"…chose to leave the job and returned to Indonesia voluntarily, thus knowingly increasing his losses and assuming the associated risks*."[11]

28. Having referred to the judgment of Judge Masni in the Intermediate Court in *Ponnusamy Rajapandian v Hj Awg Mohammed Hussain bin PP Awg Ahmed* [12], the Judge found that having chosen *"…to leave his employment, without being terminated,"* the Appellant was*, "… not entitled to the loss of future earnings*", which award he declined to make.[13]

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[6] Ibid.
[7] ROA page 19, Judgment.
[8] ROA page 20, Judgment.
[9] ROA pages 20-28.
[10] ROA page 23, Judgment.
[11] ROA page 23, Judgment.
[12] *Ponnusamy Rajapandian v Hj Awg Mohammed Hussain bin PP Awg Ahmed* [ICCS No. 43 of 2012]- 8 July 2019.
[13] ROA page 23, Judgment.

Loss of Earnings Capacity

29. Having noted that the agreed medical opinion was that the Appellant was deemed to be *"...permanently unable to perform physically strenuous work which requires prolonged standing and walking permanently*", the Judge noted that Dr. Tan accepted that there were *"...features of post-traumatic osteoarthritis including osteophytes and subchondral sclerosis which will be permanent*", the Judge said that, in consequence, there was a "*substantial risk*" that the Appellant, *"...will lose his employment in the near future and will likely struggle to regain employment*."[14]

30. Having noted that the Appellant's physical limitations, *"...restrict him to only light tasks, rendering him incapable of performing heavy manual work*", the Judge found, "*This limitation puts him at a disadvantage in the job market, as employers typically seek individuals capable of handling heavy duties*." Having referred to the judgment of Saied CJ in *Siti Supatin binti Hj Asar v The Estate of Norliah binti Yousoff (deceased) & Anor.),*[15] the Judge noted that, "*The Plaintiff's claim mirrored the circumstances of Siti Supatin*." He added that the Appellant claimed, *"...the same compensatio*n", but said that the 2nd Respondent resisted the claim. There is no dispute that is what the Appellant's written submissions sought specifically.[16] In the result, in awarding the Appellant B$40,000 under this head of damages, the judge stated in terms. that he did so, *"...following the Supatin case*".[17]

Loss of ability to carry out Do-It-Yourself chores or tasks

31. The Judge declined to make any award under the head of Loss of ability to carry out Do-It-Yourself chores or tasks. He noted that Dr. Tan had acknowledged that, whilst the Appellant could still perform activities like driving, cycling and simple housework, there were some limitations in his abilities in that respect. However, he said that, on the evidence presented, he denied the claim.[18]

Special damages

*Partial loss of salary, over time and benefit*s

32. The Judge denied the Appellant's claim for payment of $40,600, being partial loss of salary, overtime and benefits at $700 per month for the period from September 2018, when the Appellant left Brunei, to July 2023. In doing so, the Judge said that he had regard to the fact that the Appellant had, *"...on his own accord and choice*" left his employment with the 2nd Respondent. He noted that a similar claim in *Poonusammy* had been dismissed. He said that, in consequence, the Appellant had, *"...failed in his duty to mitigate his losses*".[19]

Grounds of appeal

Contributory negligence

33. In the Petition of Appeal, it was submitted that the Judge had failed to appreciate that the burden of proving contributory negligence of the Appellant lay with the Respondents and that they had failed to satisfy the burden. There ought to be no finding of contributory negligence, or the Judge's

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[14] ROA page 23, Judgment.
[15] *Siti Supatin binti Hj Asar v The Estate of Norliah binti Yousoff (deceased) & Anor,* [2002] BLR 229.
[16] ROA page 1163, at paragraph 35.7.
[17] ROA page 24, Judgment.
[18] ROA page 24, Judgment.
[19] ROA page 27, Judgment.

apportionment of 30% liability should be reduced, having regard to the Judge's findings and the evidence to which he failed to give due weight or consider.

Quantum

34. Further, it was submitted that in his award of damages the Judge had erred in failing to award the Appellant damages for:

- loss of future earnings;
- loss of ability to carry out Do-it-Yourself chores or tasks; and
- special damages for partial loss of salary, over time and benefits.

In addition, the Judge erred in awarding the Appellant only B$40,000 for loss of earning capacity. In all the circumstances, that award was too low.

The Appellant's submissions

Contributory negligence

35. It was acknowledged on behalf of the Appellant that an appellate court is slow to interfere with the apportionment of contributory negligence of a trial Judge, unless there was an error in principle or law, or in exceptional cases where the apportionment is clearly wrong because the Judge had failed to take into account a material fact or consideration.

Two different versions

36. At the outset of the Appellant's written and oral submissions, Ms. Subrina Tan invited the Court to note that at trial two entirely different versions of the events, relevant to a consideration of contributory negligence, had been advanced. The Appellant said that at the time of the accident he was standing about one metre away from the excavator, having been instructed by Ah Min to assist the driver of the excavator in performing his duties, in particular to assist him to avoid the shovel arm of the excavator hitting the nearby bridge. By contrast the Respondent's case was that the Appellant was not instructed to work at that place nor was he doing so. Rather, he simply remained where he and a colleague were standing and talking when the excavator manoeuvred next to them to begin excavation.

37. Ms. Subrina Tan submitted that the Judge had accepted the Appellant's version of the accident on 2 March 2016, when he noted of the role of the 2nd Respondent's workers at the worksite that they, "*controlled, managed and supervised the work*", and added, "*Ah Min and supervisor Hartono were at the worksite, supervising and instructing Amin Halim and other workers on the works to be done*." The Judge had concluded that the 1st and 2nd Respondents *"...share liability for the injury sustained by the Plaintiff"*.[20]

38. The Appellant contended that the Judge failed to give sufficient weight to the following evidence, namely that:

- the Appellant had been instructed by Ah Min, a supervisor and employee of the 2nd Respondent, to perform duties to assist the driver of the excavator in performing his work, particularly to ensure that the arm of the excavator did not strike the bridge next to which it was working;

[20] ROA page 16, Judgment.

- it was not possible, given the very limited space, to perform that duty and keep at a distance of 3-5 metres away from the excavator;
- no specific instructions of where to stand had been given to the Appellant, who had been left to decide himself where to stand;
- the 2nd Respondent had failed to assess the inherent risks and provide precautionary measures to prevent the accident;
- there was no evidence that there was any other place for him to stand to perform his duties.

39. In those circumstances the Judge ought to have found the Appellant was not properly supervised, so that in carrying out the instructions he had been given he was not careless.

40. Further, the Judge failed to consider that the Appellant had been employed to construct drains, not trained to monitor at close quarters the movements of an excavator in operation.

Quantum

Loss of Future Earnings

41. Ms. Subrina Tan submitted that the Judge had erred in determining not to make an award of damages in respect of loss of future earnings solely on the basis that the Appellant, *"...chose to leave his employment, without being terminated*." The Judge erred in failing to have regard to the Appellant's evidence that he resigned because he was still suffering the consequences of his injuries: he limped and felt pain after standing for a long time; at the end of a working day his left ankle was swollen and painful; walking on uneven ground caused piercing pain in his left foot; and, he needed regular rest.[21]

42. That evidence was supported by the evidence of Dr. Tan that the Appellant was unable to perform heavy duties like lifting heavy objects and perform work that required squatting. He was limited to only light duty work. He would suffer swelling and inflammation, if he did too much work. The Judge failed to take that evidence into account in considering the Appellant's resignation from his employment.

43.The Court was invited to note that awards of damages for loss of future earnings have been made and approved by courts, even in circumstances where the Plaintiff voluntarily resigned from his employment.[22]

44. Finally, it was submitted that the Judge had erred in relying on the judgment of Intermediate Court Judge Masni in *Poonnusamy.* In that case, the Plaintiff had worked as a driver for the defendant in Brunei, both before and after his accident. After the accident, he was capable of continuing to drive and he did so for more than two years. Then, he had decided voluntarily to resign from his employment and had returned to his native India, where he worked as a taxi driver. It was in those circumstances, that the Judge had denied the Plaintiff's claim for loss of future earnings.

45. By contrast, in the instant case, the Appellant was unable to continue to perform the strenuous physical work he had performed before the accident. He was only able to do light work. The Judge

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[21] ROA, page 712. Appellant's affidavit, paragraph 52-53.

[22] *Tiong Ing Chiong v Giovanni Vinetti* [1984] 2 MLJ 169.
Ogedegbe Imoukhuede Rawlings v Lingeswaran a/l Muniandy [2016] MLJ 222.
Muhud Irrawadey bin Metali v Ibrahim bin Maidin [2011] BLR 247.

ought to have found that, but for his permanent disabilities, the Appellant would not have resigned and would have continued his employment with higher salaries and promotions.

Loss of Earnings Capacity

46. In support of the submission made to this court that the award of $40,000 for loss of earnings capacity was too low, Ms. Subrina Tan invited the Court to note that an award of B$65,000 had been made by Saeid CJ in the High Court in *Muliiadi Bin Awg Moksin v Wang Meng Peck & Anor* (2003) 2 BLR 257, at pages 292 G-294 E.

Loss of ability to carry out Do-It-Yourself chores or tasks

47. In support of the submission that the Judge erred in not awarding any damages under the head of Loss of ability to carry out Do-It-Yourself chores or task it was submitted that, although the Judge preferred the evidence of Dr. Tan to that of Dr. Pande, he had failed to give weight to that evidence in respect of the Appellant's loss of those abilities. Dr. Tan said of the Appellant: he was able to operate a motorcycle, but there were some limitations, given that he would have to use his left ankle to operate the gears located on the left side of a motorcycle; he could do simple housework, but he would not be able to squat down completely; and he would have to take painkilling medication for the rest of his life

The 2nd Respondent's submissions

Contributory negligence

48. Ms. Veronica Rajakanu contended on behalf of the 2nd Respondent that an appellate court only interferes with a trial Judge's determination in respect of contributory negligence if the Judge had gone wrong in principle, misapprehended the facts, not profited by the advantages of seeing and hearing all the witnesses, or is otherwise plainly wrong.[23] It was submitted that the Appellant had failed that test.

49. She said that the Judge did not accept the evidence that the Appellant had given in cross-examination that the reason that he stood so close to the excavator was that he had never been taught or warned of the dangers of doing so. Moreover, the Judge did not accept the Appellant's evidence that the excavator was working in a tight space; the Appellant was instructed to stand in a dangerous narrow space to assist the excavator driver; and that to do so the Appellant was required to stand only one metre from the working excavator.

50. Further, Ms. Veronica Rajakanu said there was no evidence that Ah Min had instructed the Appellant specifically to stand, as he did, at a position next to the excavator. Relevant to that matter was the evidence that there was a Chinese worker on the hill above the excavator, monitoring its activities, and the Appellant's evidence that the excavator driver could not see nor hear the Appellant where he stood next to the excavator. In those circumstances the Appellant could have made a reasonable and prudent decision to join the Chinese worker safely on the hill or returned and informed Ah Min of those difficulties. There was no necessity for Ah Min to have given the Appellant's specific instructions as to where to stand in order to carry out his instructions. It was for the Appellant to exercise his discretion. There was no evidence that the Appellant was at risk of losing his employment or that he was afraid of the consequences, if he did not carry out those instructions.

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[23] *Faridah Abdul Hamid & Anor v Azman Bin Amran & 3 Ors.*[2009] Civil Appeal No. 22 of 2009.

51. The Appellant had been provided with a proper, safe system of work. As the Judge found, the Appellant was instructed to stand a least 3 to 5 metres away from an excavator that was being operated.

52. In the result, Ms. Veronica Rajakanu contended that the 2nd Respondent was successful in discharging the burden to prove contributory negligence and that the Judge was correct in relying on *Neo Siong Chew*, to find the Appellant was responsible for 30% of the liability.

Loss of Future Earnings

53. Of the Judge's refusal to make an award for Loss of Future Earnings, Ms. Veronica Rajakanu said that the Appellant had resumed working for the 2nd Respondent after the accident and was able to perform the light duties required of him at the same rate of salary and overtime as he had earned before the accident. There was no evidence that the Appellant would have been promoted or, if he had been promoted, what his salary would have been.

54. Of the circumstances in which the Appellant had resigned his employment, Ms. Veronica Rajakanu reminded the Court that, in addition to complaining of ongoing pain at work, the Appellant had chosen to add, "*My salary also had not increased ever since I came back to Brunei after the said accident.*"[24]

55. Of the issue of the Appellant's pain, Ms. Veronica Rajakanu said that on his examination of the Appellant on 23 March 2023, having noted that the Appellant walked without a limp Dr. Tan said, "*Amin Halim was able to walk into my room and to the X-Ray Department which is situated a floor below my room without much pain or difficulty. Amin Halim was not in unbearable pain at the time of the examination*."[25]

56. Having chosen to resign his employment, leave Brunei and return to Indonesia, where he helped his parents as a subsistence farmer, there was no evidence of the Appellant having applied for any other jobs. In consequence, the Appellant had failed in his duty to mitigate his loss. The Judge was correct to rely on the approach taken by the Judge in *Poonusammy*.

Loss of Earning Capacity

57. Of the Appellant's reliance now before this Court on the determination of the Judge in *Muliiadi Bin Awg Moksin* to make an award of B$65,000 for Loss of Earning Capacity, Ms. Veronica Rajakanu submitted that, having invited the Judge specifically to follow the judgment of Saied CJ in *Siti Supatani* and make an award of B$40,000, the invitation to this Court was an abuse of process. In any event, she invited the Court to note the significant differences in the factual circumstances of that case with the instant case: namely, that the Plaintiff: suffered serious injuries to both his right wrist and right ankle; and was determined to have a 15% disability of the '*Whole Man'* and like impairment of his earning capacity. By contrast, Dr. Tan's opinion was that the Appellant had a Whole Person Impairment of 6%.[26]

58. It was submitted that the Judge's award of B$40,000 for loss of earning capacity was extremely reasonable, if not generous.

Loss of ability to carry out Do-It-Yourself chores or tasks

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[24] ROA, page 712 at paragraph 53.
[25] ROA, page 971 at paragraph 8
[26] ROA, page 533 at paragraph 24.

59. Of the claim that the Judge had erred in refusing to make an award of damages in respect of the Appellant's Loss of ability to carry out Do-It-Yourself chores or tasks, Ms. Veronica Rajakanu said that there was no evidence that the Appellant had engaged in such activities before the accident or that he was unable to do so afterwards. In any event, it was Dr Tan's evidence that the Appellant, *"…can perform all his basic personal activities of daily living. He also able (sic) to drive with his current condition. He can perform Do it Yourself (DIY) tasks as long as those tasks do not require him to squat for long or carry heavy objects*."[27] Ms. Veronica Rajakanu said that the Judge was correct to find that there was no evidence to support the claim.[28]

Special damages: Loss of salary, overtime and benefits.

60. Ms. Veronica Rajakanu submitted that the Judge was correct to have found that the Appellant had continued to earn a full salary and overtime after the accident until September 2018 when, on his own accord, he had chosen to leave the employment of the 2nd Respondent, leave Brunei and return to Indonesia. Similarly, he was correct to find that the Appellant had failed in his duty to mitigate his losses and, in consequence, to deny the Appellant's claim for partial loss of salary, overtime benefits.

A consideration of the submissions

Contributory negligence

61. The broad context in which the Judge was called upon to determine whether or not the Appellant was contributorily negligent in the accident is that at the time the Appellant had been employed for about five years as a labourer by the 1st and 2nd Respondents, working on the construction of the Telisai to Lumut Highway with a team clearing the land, digging ditches with an excavator and forming and constructing drains.

62. Although the Judge found that there had been no Toolbox briefing or safety briefing on 2 March 2016, he found that such briefings were conducted on a regular basis throughout that project. In particular, he noted that the briefings sought to educate or warn employees of the '*blind spots*' of excavators and provided instructions, including that they were forbidden to be within a 3-5 metres radius of an excavator that was being operated.

Why was the Appellant next to the excavator?

63. As noted earlier, there was a dispute in the evidence between the Appellant and Hartono about the circumstances in which the Appellant was present about one metre from the excavator, as it was being operated to dig on the hillside at the time of the accident. The Appellant said that he was there because, during a team work-break, he had received instructions from Ah Min, to assist the driver of the excavator, as he performed digging on the hillside at the base of the bridge. He was instructed to alert him to any danger of the shovel arm colliding with the bridge. As a result, he had gone to the immediate vicinity of the excavator. Whilst he was performing those instructions he was hit by the excavator's track as it moved.

64. On the other hand, it was the evidence of Hartono that the Appellant and Wartoni were simply standing chatting to each other when, on the instructions of a supervisor from CCCC to dig a trench

[27] ROA, page 554 at paragraph 1.
[28] ROA, page 24 at paragraph D.

to lay a pipe, the driver of the excavator manoeuvred the excavator towards and passed by the Appellant and Wartoni, who simply remained where they were chatting. Ah Min was not on site.

65. We do not accept Ms. Subrina Tan's submission that the Judge resolved the conflict in the evidence in favour of the Appellant's version of events. The Judge's finding that, *"...foremen, Ah Min and supervisor, Hartono, were at the said worksite supervising and instructing Alim Halim and other workers in the works to be done*" was not a finding related specifically to the events of 2 March 2016. Rather, it was only a general finding in respect of the relationship of the Appellant to the 1st and 2nd Respondents, which led to his determination that they, *"...share liability for the injuries sustained by the Plaintiff*."

66. In fact, the Judge did not specifically resolve the dispute in the evidence as to why the Appellant was standing next to the excavator. Rather, he addressed the issue in the context of what the Judge described as a "*dispute*" between the parties as to the presence of a signalman at the time that the excavator was operating. He said that whilst the 2nd Respondent asserted that the signalman was present, the Appellant asserted that it was the lack of a signalman during the operation of the excavator that was the main cause of the accident.[29] However, there was no such conflict in the evidence. The Appellant said that there was a Chinese worker of CCCC on top of the hill, above the excavator monitoring the excavator driver.[30] He confirmed that to be the case in his oral evidence.[31] Chow Kwai Chong said that there was a signalman present.[32]

67. In his analysis of the evidence, the Judge had particular regard to the fact of the Appellant's presence next to the excavator, rather than why the Appellant came to be there. In the context of what he said was the dispute about the presence of a signalman, the Judge said, "*I believe that the fact that all of the workers were advised not to be within 3-5 m of working excavators to be more relevant*."[33] [Italics added.]

68. Of the fact that the Appellant was standing one metre away from a working excavator, the Judge said that, *"...places himself in a dangerous position*". In failing to keep a safe distance from the excavator, the Judge found that the Appellant was, "careless."

69. We are satisfied that the Judge was clearly entitled to make those findings and to determine that the Appellant bore, *"...partial responsibility for the injuries sustained in the accident*". To be in a position one metre from a working excavator was not only contrary to the specific directions given in the safety briefing but also contrary to all common sense.

70. In determining that the Appellant bore 30% of the responsibility for the accident, having heard all the evidence, the Judge was exercising an apportionment of a discretionary nature with which an appellate court should not interfere unless it was clearly against the weight of the evidence or plainly wrong.[34] It was neither.

Loss of Future Earnings

70. In addressing the claim for loss of future earnings, at the outset the Judge noted that in consequence of the accident, whilst the Appellant was unable to perform physically demanding

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[29] ROA, page 16-Judgment.. ROA, page 1103. -Plaintiffs submissions in Reply at paragraph 11.6.
[30] ROA, page 707, Appellant's Affidavit of Evidence-in-Chief at paragraph 30.
[31] ROA, page 44.
[32] ROA page 82.
[33] ROA page 16, Judgment.
[34] *Ng Li Ning v Ting Jun Heng & Anor*. [2021] 2 SLR 1267. Singapore Court of Appeal, at paragraph 34.

tasks, nevertheless he had been employed at full salary by the Respondent for two years *"...performing simpler tasks". In choosing to resign his employment and returning to Indonesia, the Judge found that the Appellant did so, "assuming the associated risks*." [35]

71. Those risks were eloquently described by the Appellant himself in his affidavit, *"...it is also difficult for people like me who has a low level of education, to find work in Indonesia. Besides being able to do manual work prior to the said accident, I have no other skills or qualifications. I am not qualified for sedentary works*." Of those difficulties, he added, "*There are so many able-bodied workers in Indonesia and the employers would not employ someone who has physical disabilities such as mine*."[36]

72. The Appellant's poignant, but realistic, assessment of his difficulties of obtaining employment in Indonesia are fully vindicated by events. On his return to Indonesia, he worked as a subsistence farmer, earning the maximum per month of only the equivalent of B$200. But, that was his choice. He resigned from a job in which he was required to perform only light duties, but was earning the same salary as he earned before the accident. He had been able to do so for two years after the accident.

73. In those circumstances, the Judge was entitled to find that the Appellant was not entitled to an award of damages for loss of future earnings.

Loss of Earnings Capacity

74. In the course of her oral submissions, Ms. Subrina Tan acknowledged that the award of B$40,000 for loss of earnings capacity made by the Judge was the award that she had asked the Judge to make in her written Closing Submissions.[37] She sought to justify her submission before this Court that the award was wrong on the basis that her submission to the trial Judge was predicated on the claim made to the Judge for an award for loss of future earnings. The Judge not having made any award for loss of future earnings, she now advanced a claim.

75. There is no merit at all in that submission. Obviously, the two heads of damages are quite different, The Judge's determination not to make an award of damages for future loss of earnings is not relevant to the validity of the quantum of damages awarded for loss of earning capacity. In acceding to the Appellant's specific request at trial, in the face of opposition by the 2nd Respondent, for an award of B$40,000, the Judge said that he had regard to the fact that the Appellant was now limited to only light tasks at work, with the consequent disadvantage that put him at in the job market. As in the case of *Siti Supatin,* the particular issue that the Judge addressed was the risk of loss of employment in the future arising from the weakened position the Appellant had in the labour market, having regard to his disability.

76. In *Siti Supatin,* the Plaintiff sustained injuries in a car accident, in particular to her left knee, which was restricted in flexion, assessed at 10% permanent disability. At the time of the accident, she was 27 years of age and completing the final semester of a course in Electrical and Electronic Engineering for a Higher National Diploma at the Institut Teknologi Brunei. She resigned from the course, because she would be unable physically to do the job required of her training: her knee began to hurt after standing for longer than 45 minutes and after walking for more than 30 minutes. However, having entered the labour market, she experienced difficulties in retaining employment

[35] ROA, page 23 at B.
[36] ROA, page 715 at paragraphs 65-66.
[37] ROA, page 1163 at paragraph 35.7.

because of her restricted mobility: at the end of the probationary period she was asked to leave a job as a general clerk in a frame maker, which required her to stand for long periods; she resigned a position monitoring and repairing sewing machines, again because she was unable to physically handle the job. At the time of trial, she was employed as a technician in the Telecoms Department. The job required a lot of walking, but her superior showed latitude in matters that required physical effort. Her concern was that, if that superior was replaced, a new superior officer might not be so understanding of her physical impairment. The judge found those circumstances to represent a "*substantial risk*" of future unemployment and awarded her damages of B$40,000 under the head of loss of earning capacity.

77. Of the Appellant's reliance before this Court on the judgment of Saied CJ in *Muliiadi Bin Awg Moksin,* it is relevant*,* as Ms. Veronica Rajakanu pointed, out that in the Appellant's case his disability was assessed at 6% of the Whole Person, not the disability of 15% of the Whole Person suffered by the Appellant in *Muliiadi Bin Awg Moksin.*

78. There is nothing to suggest that the Judge's acceptance of the considered submission made to him by Ms. Subrina Tan to make an award of B40,000 was wrong.

Loss of ability to carry out Do-It-Yourself chores or tasks

79. As the Judge found, there was no evidence of the Appellant's loss of ability to carry out Do-it-Yourself chores or tasks. Dr. Tan found that he was able to perform all tasks of daily living, other than squatting for any length of time. There is no merit whatsoever in this ground of appeal.

Special damages: Loss of salary, overtime and benefits

80. We are satisfied that the judge was entitled to reject the Appellant's claim for B$700 per month, for loss of salary, overtime and benefits from the time of his resignation from his employment in September 2018, on the basis that the claimed loss followed his voluntary decision to resign his employment in Brunei, in circumstances where he was unable to obtain employment in Indonesia.

Conclusion

81. In the result, for the reasons that we have given, we dismiss the Appellant's appeal.

Costs

82. Having received short oral submissions from the parties at the conclusion of the hearing on the issue of the costs, we order that the parties file with the Court written submissions in respect of the order of costs to be made by the Court and serve a copy on the other party in accordance with the following timetable:

(i) the Appellant files written submissions with the Court and serves a copy on the Respondent within seven days hereof; and

(ii) the 2nd Respondent files written submissions with the Court and serves a copy on the Appellant within seven days thereafter.

STEVEN CHONG, C.J.

LUNN, J.A.

SIR PETER GROSS, J.A.