

**Law Tsuey Jen
Voon Jiunn Shiong**

**1st Appellant
2nd Appellant**

AND

**Noorfahrizen Bte Haji Sulaiman
Abdul Hamid Bin Haji Lampong**

**1st Respondent
2nd Respondent**

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 1 of 2006)**

Cons, P; Power and Mortimer, JJ.A.

Handing down of Judgment: 6th December, 2006.

Personal injuries claim. Appeal on fact only on liability and contributory negligence.
No sufficient grounds made out. Appeal on quantum. Awards upheld.

Mr Adrian Chan of Messrs. K. Lim & Company for the Appellants.
Miss Sabrina Tan of Messrs. Sandhu & Company for the Respondents.

Cases cited in the Judgment:

Julia binti Haji Hidup & Anor v Abd Aziz Bin Idris [2002] BLR 73

Muliadi Bin Awg Moxsin v Wong Meng Peck and another [2003] BLR 257

Siti Supatin Binti Hj Asar v the estate of Norliah Binti Yussof [2002] BLR 22

Mortimer, J.A.:

This is a Defendants' appeal on both liability and quantum of damages. It arises out of the Plaintiffs' successful action for personal injuries and loss caused in a collision between a car driven by the First Plaintiff and one driven by the First Defendant. The Second Plaintiff and the Second Defendant are the respective owners of the cars.

On 15 December 2005, Barnett J. found the First Defendant liable and awarded the Plaintiff \$46,360 general damages and \$1,378.33 special damages. The Second Plaintiff was awarded \$4,360 for the cost of repairs to his car.

The collision between the two cars took place at the junction between Jalan Mulaut Limau Manis (the main road) and Jalan Kilanas Mulaut (a side road).

At about noon on 19 May 2003 the First Plaintiff was driving along the main road towards Limau Manis. The First Defendant was driving on the side road which joined the main road on the First Plaintiff's left as she was driving.

As the First Plaintiff approached the junction, a car driving in front of her indicated to turn left into the side road. She pulled out to pass that car. As she approached the junction, the First Defendant drove out of the side road intending to turn right towards Sengkurong. The two cars collided in the junction and the First Plaintiff was seriously injured.

The First Plaintiff's evidence was simply that she was driving along the main road towards the junction and as she approached, she saw the First Defendant drive out in front of her without stopping. She swerved to avoid the First Defendant's car but was unable to do so. She had no memory of the car turning left into the side road.

The First Defendant's evidence was quite different. She described approaching the junction and stopping there, as she was obliged to do by a "stop" sign. She observed a car approaching from her right indicating its intention to turn to the left. At the same time, she saw the First Plaintiff's car following behind about 150 yards away. She judged it safe to pull out and turn to the right but then saw that the First Plaintiff's car had moved over to the right travelling fast to overtake the turning car. By the time, the collision occurred she said she had already crossed into the far lane and had turned right.

The First Plaintiff called her cousin-in-law, Morni Bin Hj Rashid (Morni) who was driving behind the First Defendant as she approached the junction. His evidence was that as the First Defendant approached the junction he could see 2 vehicles approaching on the main road. The leading car was turning left, the following car, which he recognised as the First Plaintiff's moved slightly to the right to overtake. He then saw the First Defendant's car drive out into the main road as if to turn right without stopping at the junction. As she drove out, the 2 cars collided.

Finally, to complete the evidence on liability, the road traffic policeman who attended the accident, produced a sketch plan. This shows that the 2 vehicles came to rest 2.8 metres apart on the side of the main road opposite the junction approximately at right angles to the road. The front of each car was at the edge of the road opposite the side road. Debris and broken glass was on the road between and towards the rear of the 2 cars opposite the junction and in the middle of the lane leading towards Sengkurong. Each car was damaged at the front.

The Judge considered this evidence with some care. He recognised that Morni was not an independent witness, describing him as "semi-independent". He took into account that this witness had made no statement to the police or anyone else until shortly before trial. Nevertheless, the Judge accepted Morni's evidence and rejected that of the First Defendant.

He found as follows:

"I find as facts therefore: that the First Defendant did fail to stop at the junction; that the First Plaintiff was not driving at an excessive speed and had not increased her speed significantly as she came to the junction; that the First Plaintiff had moved to her right in order to clear the car which was turning left: and that the First Defendant failed to appreciate that it was unsafe to drive out in front of oncoming traffic.

In the circumstances I find that the First Defendant was negligent and therefore liable to the Plaintiffs for the injuries and damages caused.”

The judge did not mention the First Defendant’s allegations of contributory negligence and made no finding upon them.

The Appeal

Liability

Counsel for the First Defendant submits that the Judge ought not to have found the First Defendant liable. He says that on the evidence the Judge ought to have found that the First Defendant stopped at the junction; that it was in the circumstances safe for her to proceed onto the main road and turn right; and that the First Plaintiff was driving at an excessive speed. Further, that he ought to have found that the accident happened in the middle of the Senkurong carriageway opposite the junction at the place where the debris was found. This it is submitted is more consistent with the First Defendant’s account than that of the Plaintiff.

He says that the Judge ought to have made this finding because of the position at which the vehicles came to rest coupled with position of the glass and debris in the middle of the Sengkurong carriageway and the damage to the front of each car. All this he says is consistent with the impact having taken place in the centre of the Sengkurong carriageway.

Further, the Judge ought to have found that the probable cause of the accident was that the First Plaintiff was driving too fast, pulling over into the Sengkurong carriageway as she overtook the turning car and failing to keep a proper look out for the other car.

Counsel also submits that the Judge did not give sufficient weight to the fact that Morni was not an independent witness, that he had not given any statement to either the police or anyone else at the time of or shortly after the accident and that he had given his first account of it shortly before trial. The Judge therefore should not have preferred his evidence to that of the First Defendant.

Conclusion on liability

It is convenient to consider first whether there is any basis upon which the Judge’s acceptance of Morni’s evidence and the finding that the First Defendant failed to stop at the junction can be successfully challenged. The Judge heard and saw Morni give evidence. He was cross-examined upon all the points made by Counsel, both at trial and on appeal, which are relied upon. The Judge weighed all these matters. He was fully aware of Morni’s possible weaknesses as an accurate and truthful witness and yet he accepted his evidence.

The Judge saw and heard the First Defendant give evidence to the contrary. Having done so, he rejected her evidence.

We turn to consider the position of the debris, the damage to the front of the cars and their final resting places.

There is no doubt that the Judge had all these matters in mind. He describes the sketch plan prepared by the police in some detail but draws no specific conclusion from it.

Our task is to assess this uncontroversial evidence and decide whether the Judge's findings can stand. Our conclusion is that this evidence does not in any way diminish the soundness of the Judge's other findings. When faced with unexpected and immediate danger, drivers naturally swerve in the agony of the moment. This was the First Plaintiff's evidence and the judge accepted it. The damage to the cars, the position of the debris and the final resting place of the vehicles are not inconsistent with any of the findings.

Nothing has been put before us by counsel which shows that the Judge's findings were wrong. We are unable to accept his submissions to this effect.

For these reasons, the First Defendant's appeal on liability is dismissed.

Contributory negligence

Next Mr Chan submits that in any event the Judge ought to have found the First Plaintiff guilty of about one third contributory negligence. He takes two points. The first is that the First Plaintiff was driving too fast and the second, that she was not keeping a proper lookout.

As to the first point, the only indication that the First Plaintiff was driving too fast is an inference from the evidence of the First Defendant that she saw the First Plaintiff 150 yards away but by the time she had reached the middle of the junction it was only half its length away. As the First Defendant's evidence was rejected there is no need to consider this point further. The damage to the vehicles and the information on the Police plan, if anything, tend to support the First Plaintiff's contention that she was travelling at only 50km per hour.

Mr Chan is on firmer ground on his second point. The First Plaintiff did not remember the car in front of her in her Affidavit and in cross-examination she denied its presence altogether. As the Judge found that the car was turning left in front of her and that she pulled over towards the centre of the road to pass it, her denial could indicate that she was not paying attention to other traffic. More important however, is the time when she first saw the First Defendant. Her evidence is clear:

"As I reached the vicinity of the junction ... I saw a red vehicle ... driven by the First Defendant ... without stopping at the junction, suddenly emerged on to the main road and encroached into my path."

Later she said that her instinctive reaction was to swerve to her right to avoid hitting it. After the impact she was in shock.

It is trite that drivers must keep a good lookout and take reasonable care. If driving on a main road, they cannot drive regardless of cars emerging from minor roads. If they see, or are in a position to see, danger arising, they must drive as to avoid it if possible.

In *Muliadi Bin Awg Moxsin v Wong Meng Peck and another* [2003] BLR 257 the Chief Justice encapsulated the point:

“... The burden cast upon the driver on a major road does not absolve him from taking precautions against traffic emerging from minor roads and he is expected to take due care to avoid colliding with it or endangering it, it being a question of fact whether he has been negligent in regard to it. While entitled to assume that drivers on the minor road will behave properly he must take precautions if it becomes apparent they will not; in other words, the driver on a major road must still watch the minor road.”

The burden of proving contributory negligence rests upon the First Defendant. In order to succeed therefore, the First Defendant must not only show that the First Plaintiff has been negligent and but also that the negligence was a cause of the accident.

Mr Chan’s argument is assisted by the Judge’s failure of to make any findings on contributory negligence. We must consider whether at best, there is an evidential basis for such a finding.

Had there been evidence that when the First Plaintiff first saw the First Defendant, it was obvious that she was not going to stop at the junction and was intending to drive into the First Plaintiff’s path when some avoiding action was possible, such would require serious consideration. However, there is no such evidence. The Defendant drove into the main road without stopping and in such a manner that the collision was inevitable even though the Plaintiff was travelling at a moderate speed.

We hold therefore that there was no evidence upon which the Judge could have found either that the First Plaintiff failed to keep a proper lookout or that any such failure was a cause of the accident.

Notwithstanding this the Judge ought to have dealt with the issue. He probably failed to do so inadvertently because of the absence of such evidence.

In these circumstances, the Appeal on contributory negligence is dismissed.

The appeal on quantum of damages

The Judge’s assessments of both general and special damages are challenged by Mr Chan as excessive. Miss Tan for the Plaintiffs supports them.

Mr Chan says that the Judge failed to properly take into account relevant awards and his figures were substantially too high for the injuries and the disability.

The injuries generally

The First Plaintiff sustained a fractured femur, a dislocated big toe, a penetration wound with scarring on her chin and three surgical scars on her right leg. One was 9 cms long on the outer aspect of the upper right thigh, the second was a 1cm scar just below and there was a further 1cm scar above the right knee.

The fractured femur had to be reduced with a metal nail. The First Plaintiff spent 2 weeks in hospital and was in plaster from 19 May 2003 until 14 July 2003. She was on crutches for 2 months. During this time she was unable to look after the house and her 3 young children. After discharge, she had physiotherapy on 12 occasions to try to restore the strength of the gluteal muscles and to reduce the restricted movement of her hip.

There has been little improvement. Consistent with the injuries, she is left with pain in the right thigh and knee, has difficulty in kneeling and squatting, and she cannot stand for more than half an hour.

She has been unable to resume her former activities of cycling and playing badminton and the Judge rejected the suggestion that she is in any way exaggerating her condition.

Having weighed the medical evidence, the Judge concluded that the Plaintiff has permanent residual disability. This is minimal weakness of gluteal muscles, limited flexion of the right hip of between 30° and 40° and an inability to squat. She needs physiotherapy to try to improve these but she is unlikely to fully recover. The doctors were disagreed as to whether the nail should be removed in the absence of infection. In the circumstances, the Judge held that Plaintiff's wish to have the nail removed was reasonable.

We turn to the awards for each injury

Dislocation of left big toe

For this injury the Judge awarded \$5,000. Mr Chan suggests that this figure is too high and inconsistent with the usual level of awards in Brunei and neighbouring jurisdictions.

He cites three examples decided in 2004, a Malaysian case in which \$3,000 was awarded for the "open dislocation of the left big toe" and 2 Singaporean cases; the first was \$2,500 for "a toe injury"; the second the same sum for a "toe tuft fracture".

There is no indication in these reports either of the pain involved or of any permanent disability. In consequence, they are of little value as guides in this case. It is axiomatic that the precise assessment of general damages for pain, suffering and loss of convenience is made on the particular facts.

Here, the Judge made his award "*having regard to the pain of the injury and the continuing restriction of movement ...*" Although the Plaintiff makes no complaint of continuing disability in the toe, she described the pain suffered when the dislocation was manipulated – apparently without painkillers or anaesthetic. But she has

considerable permanent loss of movement as there is no plantar flexion and only 50% of dorsi-flexion.

The cases cited are of little assistance. In our judgment, the award is proper for the pain and permanent disability involved.

Penetrating injury to chin, internal injury in the oral cavity and scarring

For the penetrating laceration to the chin, the internal laceration and the permanent scar, the Judge awarded \$7,000. This, Mr Chan says, should be reduced to about \$4,000.

In this instance also, the Judge considered other awards. The variation was between RM2000 and B\$14,000. It is difficult to compare awards for scars. Descriptions are often inadequate and only the Judge at trial sees them. We have seen a colour photograph but the Judge saw the scar. He thought the closest comparable was *Siti Supatin Binti Hj Asar v the estate of Norliah Binti Yussof [2002] BLR 229* in which \$4,000 was awarded for a 3.5cm laceration near the chin.

Having described the scar as ‘coming at the lower end of cosmetic disfigurement’ he also compensated for the other consequences of the injury. First, the severity of the injury itself. Not only was there a 4 cm laceration of the chin but the wound penetrated into the oral cavity and lacerated the inside of the mouth. It was a nasty and painful injury even though the residual scar is not of the worst kind. It was much more serious than a simple laceration with a minor scar. On these facts, we consider the award appropriate.

Fracture of the right femur, scarring and permanent disability

It is said that the Judge overcompensated for these injuries. It is useful, therefore, to examine the trend of recent awards. Although there are exceptions, we recognise that for the fracture of a femur an award in the region of \$20,000 is appropriate. The facts of each must be taken fully into account so less may be proper for those with little or no disability but more if there is permanent disability.

The Judge noted two cases, *Julia binti Haji Hidup & Anor v Abd Aziz Bin Idris [2002] BLR 73* and *Siti’s case (supra)*. In the former, the award was \$25,000 but there was 1 cm shortening of the limb and in *Siti’s case* the award was \$20,000.

In the instant case, the Judge’s award was for considerably more than an uncomplicated fracture. This was a serious fracture which had to be reduced by pinning. The pin remains in the leg. Presently it causes no problem but there is a risk of future infection and in due course she wants it removed. The Judge found this reasonable and she is entitled to compensation for her future operation.

Also, there are serious surgical scars, compensation for which is included in the award. Importantly, the Judge accepted the First Plaintiff’s evidence about past and present disability and pain. This included a detailed subjective description consistent with the medical evidence of the difficulties she has faced in the past and will face in

the future. These prevent her from pursuing her former hobbies of cycling and playing badminton. These are serious deprivations for such a young person.

As can be seen from his Judgment, the Judge weighed all the relevant matters. In the light of his findings, the award for these injuries and disability is certainly not excessive.

Domestic Help

The First Plaintiff cares for her husband and three young children. Her description of the difficulties she faces in carrying out these duties in a stilted house were such that the Judge concluded that she was entitled to be compensated by payment for some domestic assistance. He assessed this in the round at one day per week.

Mr Chan argues that because the First Plaintiff has been physically able to carry out her duties, even if more slowly, she is not entitled to compensation. As compensation is to put the Plaintiff as nearly as possible into the position she would have been in the absence of her injury this submission is not acceptable. Ideal compensation is impossible in personal injury cases but here the provision of some domestic assistance is justified as a step towards it.

The consequence is the Judge's award for this aspect of the continuing disability is unassailable.

Special damages

The First Plaintiff

The only sum in dispute was the cost of travelling to the 12 physiotherapy sessions. She claimed \$20 per visit totalling \$360 but as she was driven there on each occasion by the Second Plaintiff, the Judge awarded a sum for petrol, oil and maintenance at \$100. With other agreed sums, the award was \$1,378.33.

The Second Plaintiff

Apart from the cost of towing the car at \$180, the cost of repair and re-spray was the subject of some challenge. In consequence the Judge deducted the cost of replacement of 1 headlamp unit. He rejected the First Defendant's suggestion that it was unnecessary to re-spray the whole car when only the front was damaged. The final sum awarded to the Second Plaintiff was £3,480.

Special damages

Mr Chan relies upon his written submission. He takes 2 main points. First that the evidence given about the cost of travel was not sufficiently cogent. Secondly he repeats that the judge was wrong to award the cost of a total re-spray.

We consider neither point is seriously arguable. There was evidence of visits for treatment for which the First Plaintiff was entitled to the cost of travel. Common

experience is that a partial re-spray of a car rarely matches the existing paint. There are no grounds upon which we ought to interfere with these awards.

Conclusion

For the above reasons, this Appeal on both liability, contributory negligence and quantum of damages is dismissed.

Costs

We order Nisi that the costs of this Appeal follow the event. The order will be made absolute at 10.30 am if no application is made by either party before then.