

**MAIMUNAH BTE ABD GANI**

**Appellant**

AND

**HJH SUAYAH BTE HJ KAMIS**

**Respondent**

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**(Court of Appeal of Brunei Darussalam)  
(Civil Appeal No. 1 of 2008)**

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Power, P.; Mortimer and Chong, JJ.A.  
**20<sup>th</sup> May, 2008.**

Appeal from Registrar's assessment of damages to a Judge. Appeal from Judge's decision to Court of Appeal. Appeal to Judge is a rehearing in which it is incumbent upon Judge to come to his own decision on the matter. Judge erred in finding "no sufficient reasons to justify" interfering with Registrar's decision. Matter remitted to Judge to complete hearing.

**Case(s) cited in the Judgment:**

*Cooper v Cooper* [1936] 2 All E.R. 542 [1936] W.N.205, CA  
*Church v London Borough of Southward*, Court of Appeal (Civil Decision)  
*Cremin v Barjack Properties Ltd* [1985] 273 E.G.299 CA  
*Flint v Lovell* [1936] 1 KB 354  
*Joyce v Yeomans* [1981] 1 WLR 549  
*Lim Xueru & Anor v Lim Kai Meng* [1993] 1 SLR 279  
*Owen v Sykes* [1936] 1 K.B. 192  
*Rae v Yorkshire Bank plc* [1989] The Times  
*Teo Chee Yeo Alloysius & Anor v Tan Harry & Anor* [2004] 3 SLR 588

**Power, P.:**

On 19<sup>th</sup> September 2000 in the vicinity of Jalan Lamunin, Tutong a Toyota Corona driven by Hajah Suayah Binti Haji Kamis (hereafter referred to as the Plaintiff) and a Hyundai Accent driven by Maimunah Binti Abdul Gani (hereafter referred to as the Defendant) came into collision. The Plaintiff sustained a displaced communicated fracture of her 2<sup>nd</sup> cervical vertebra (C.2) which broke into several pieces.

On 19<sup>th</sup> December 2001 she commenced action against the Defendant. He admitted liability and on 2<sup>nd</sup> November 2004 judgment was entered against him with damages to be assessed by the Registrar.

There was a protracted hearing over 19 days between 14<sup>th</sup> November 2005 and 25<sup>th</sup> November 2006 before Registrar Norismayanti during which the Plaintiff called 15 witnesses and Defendant called five.

At the conclusion of that hearing the Registrar held:

“At the time of the accident the Plaintiff was working as a government school teacher. As a result of the accident, she suffered from a C2 fracture to her neck and an abrasion to her hand. Several issues were raised as a result of the Plaintiff’s injuries, particularly on whether the Plaintiff already suffered from a pre-existing condition prior to the accident. I have considered these issues and I have taken into consideration the submission of both the Plaintiff and Defence Counsel including all the evidence adduced in report of the said issues and have I have concluded as follows:

Did the Plaintiff have a pre-existing cervical spondylosis of degeneration of the spine prior to the accident?

This is the main issue that was addresses at the assessment hearing whereby parties called expert witness with opposing findings. I am satisfied with the evidence adduced, both documentary and oral evidence that the Plaintiff did not suffer from a pre-existing cervical spondylosis or degeneration of the spine prior to the accident. I am also satisfied with the expert evidence adduced by the Plaintiff that the development of cervical spondylosis had only occurred after the accident.

Are the cause of the Plaintiff’s disabilities and impairments due to cervical spondylosis or the C2 fracture from the accident?

I will not go through the evidence here but I make it clear I have assessed the expert evidence adduced by both parties in respect of this issue. I am persuaded by the Plaintiff’s submission that the Plaintiff’s disabilities and impairments and constant neck pain are not due to cervical spondylosis but due to the C2 fracture.”

The defendant appealed under O.56 r.1 to a Judge in Chambers.

Commissioner Lugar Mawson delivered judgment on the appeal on 5<sup>th</sup> December, 2007. This judgment is the subject of an appeal to this court.

The Commissioner carefully set out the Registrar’s findings noting that the Registrar had accepted the evidence of the Plaintiff’s medical experts and rejected that of the Defendant’s medical reports. He then reviewed the evidence of the Plaintiff and went on carefully to summarize the medical evidence from both sides.

He then stated that the Defendant faced 2 hurdles.

The first hurdle he propounded as follows:

“32. Firstly although 0.56 proceedings are rehearing (as are appeals to Court of Appeal), that does not mean that I am bound to look at the issues all over again, and redetermine the amount for each of the Plaintiff’s heads of claim. That would be an impossible task, as I do not have the advantage the Registrar had of seeing and hearing the witnesses and evaluating the strengths and weaknesses of their evidence.

33. This was made clear in the Singapore Court of Appeal case of *Teo Chee Yeow Aloysius & Anor v Tan Harry & Anor* [2004] 3 SLR 588; where it was said, at page 593:

‘All it (a rehearing) means is that the judge is entitled, where an issue is raised before him on appeal, to determine the matter unfettered by the discretion exercised by the registrar. This is not to say that the judge should totally disregard the decision of the registrar but that he is not fettered by any principle limiting his discretion and he is free to come to a conclusion that is different from that of the registrar.’

34. Further, in another Singapore case involving an appeal to a judge in chambers from a Registrar’s assessment of damages, *Lim Xueru & Anor v Lim Kai Meng* [1993] 1 SLR 279, Karthigesu J held that the principles on which an appellate court will interfere with a lower court’s assessment of damages are well settled, and went on to refer to *Flint v Lovell* [1935] 1 KB 354, where Greer LJ said:

‘In order to justify reversing the trial judge on the question of the amount of damages it will generally be necessary that this Court (the Court of Appeal) should be convinced either that the judge acted upon some wrong principle of law or that the amount awarded was so extremely high or so very small so to make it, in the judgment of this Court, an entirely erroneous estimate of the damage to which the Plaintiff is entitled.’ “.

The Commissioner went on to state:

“The second hurdle follows on from the first; it is well established that an appellate court will be slow to interfere with a trial judge’s findings of fact on medical evidence, since it is for the trial judge to assess the weight to be given to the evidence of medical experts, having heard them give their evidence and observed their demeanor in the witness box.”

He then referred to the judgment of Brandon L.J. in *Joyce v Yeomans* [1981] 1W. LR 549 and Dillon L.J. in *Church v London Borough of Southwark*, Court of Appeal (Civil Decision) 19<sup>th</sup> January 1993.

Dillon L.J. in the latter case having reviewed the evidence from two eminent neurosurgeons, one from each side, said “Neither was inherently incredible. The judge preferred the evidence of Mr. Polkley and there is no sufficient material to justify this court in interfering.”

Pursuant to this approach and echoing the words of Dillon L.J. the Commissioner ruled as follows on the medical evidence: “Neither theory was inherently incredible. The Registrar decided that they preferred the evidence of the plaintiff’s experts. I have not been persuaded that there is sufficient reason to justify my interfering with her decision.”

This finding was called into question in this appeal in ground 3.1 which stated:

“Order 56, Rules of the Supreme Court

3.1 The learned judge erred in law, when he interpreted Order 56 meaning, although order 56 proceedings are rehearings, he is not bound to look at the issues ‘all over again’ (paragraph 32 of the judgment) when a judge hearing an appeal from a decision of a Registrar should deal with the Appeal ‘as though the matter came before him for the first time’.”

The Singapore Civil Procedure 2007 in its note to O.56 r.1 sets out the nature of the appeal from a Registrar to a Judge as follows:

“The English position is that an appeal from the registrar to the judge in chambers is dealt with by way of a rehearing of the application which led to the order under appeal, and the judge treats the matter as though it came before him for the first time, save that the party appealing, even though the original application was not by him but against him, has the right as well as the obligation to open the appeal. The judge “will of course give the weight it deserves to the previous decision of the Master [registrar]; but he is in no way bound by it” (per Lord Atkin in *Evans v. Bartlam* [1937] A.G. 473 at 478; [1937] 2 ALL E.R. 646, HL). The judge in chambers is in no way fettered by the previous exercise of the registrar’s discretion, and on appeal from the judge in chambers, the Court of Appeal will treat the substantial discretion as that of the judge, and not of the registrar (*Evans v Bartlam (above)*; *Cooper v Cooper* [1936] 2 All E.R. 542 [1936] W.N.205, CA; and *Cremin v Barjack Properties Ltd* [1985] 273 E.G. 299, CA).”

The note goes on, to state:

“However, a judge hearing an appeal from a registrar is entitled, if he thinks fit, to adopt the Registrar’s reasoning in his own judgment without setting out the reasoning himself; by so doing the judge does not fail to exercise the discretion conferred on him (*Rae v Yorkshire Bank plc* [1989] The Times, October 16, CA)”.

The Commissioner was clearly proceeding on the basis that the same principles govern an 0.56 appeal from a Registrar to a Judge as those which govern an appeal from the

decision of a Judge to the Court of Appeal. He was, it seems clear, persuaded that this was so by the Judgment of Karthigesu J. in Lim's case, which is set out above, where that judge applied the principles enunciated in *Flint v Lovell* to an appeal from the Registrar.

*Flint v Lovell* was, however, dealing with an appeal from a Judge to the Court of Appeal. The approach in that case, which restated a long established principle in such appeals, was authoritatively affirmed in the House of Lords in *Davies v Powell Duffryn* [1942] A.C. 601, in particular see the judgment of Lord Wright at p.616.

Indeed it is unfortunate that the Commissioner when he cited the passage from *Teo Chee Yeo Aloysius v Tan Harry* did not go on to cite the final words of that passage which words, at p.593, we emphasise below:

‘All it (a rehearing) means is that the judge is entitled, where an issue is raised before him on appeal, to determine the matter unfettered by the discretion exercised by the registrar. This is not to say that the judge should totally disregard the decision of the registrar, but that he is not fettered by any principle limiting his discretion and he is free to come to a conclusion that is different from that of the registrar. This situation should be contrasted with that of an appeal from a decision of the High Court to the Court of Appeal. In the latter case, this court may only upset a decision of the High Court judge if it is shown that the latter has erred on a matter of principle, or has taken irrelevant considerations into account, or that the decision is plainly wrong: see *The Vishva Apurva* [1992] 2 SLR 175.’

The difficulty which the Commissioner faced arises, in part at least, from the fact that appeals to a single judge and appeals to the Court of Appeal are both referred to as appeals by way of “rehearing”. They are, however, appeals of a very different kind.

The cases of *Joyce v Yeomans*, *Church v London Borough of Southwark* and *Flint v Lovell*, each of which the Commissioner relied upon, all deal with the approach in an appeal from a judge to the Court of Appeal. They clearly hold that in such matters the Court of Appeal will not interfere unless satisfied that the judge acted on some wrong principle of law or made an entirely erroneous estimate.

A quite different approach where the appeal is from a matter to a single Judge is set out in *Evans v Bartlam* [1937] A.C. 473 where Lord Atkin, at p.478, states:

“As to the limits of the discretion, if any, it may be necessary to say a word or two later. I only stay to mention a contention of the respondent that the Master having exercised his discretion the judge in Chambers should not reverse him unless it was made evident that the Master has exercised his discretion on wrong principles. I wish to state my conviction that where there is a discretionary jurisdiction given to the Court or a judge the judge in Chambers is in no way fettered by the previous exercise of the Master's discretion. His own discretion is intended by the rules to determine the parties' rights: and he is entitled to exercise

it as though the matter came before him for the first time. He will, of course, give the weight it deserves to the previous decision of the Master: but he is in no way bound by it.” This in my experience has always been the practice in Chambers, and I am glad to find it confirmed by the recent decision of the Court of Appeal in *Cooper v Cooper* [1936 W.N. 205 with which I entirely agree” (Emphasis supplied).

Mrs. Lim for the Appellant, relying thereon, submits that the judge in an appeal from a Registrar must exercise his own discretion and come to his own decision. She also places reliance also upon the citation the *Teo Chee Yeow Aloysius* case, referred to above, at p. 593.

She submits that, although the reference to the exercise of the power of the Judge is phrased permissively in that passage, it must be read as imposing a mandatory duty on the Judge to exercise an unfettered discretion. She submits that the authorities place beyond doubt the duty of the Judge to treat the matter as though it came before him for the first time and to exercise his own discretion.

Miss Naz for the Respondent refers us to the practice in England before the advent of the CPR. At that time O.58 r.2 of the Supreme Court Practice provided that an Appeal from the Master, who, she submits, is, for these purposes, equivalent to our Registrar, on an assessment of damages, is direct to the Court of Appeal. She submits that that provision is the most sensible approach. In our view it certainly is. It obviates the necessity for a dual appeal, saves the litigants costs and provides an efficient, timely disposal of the matter. Consideration should be given in this jurisdiction to the adoption of a rule similar to the English O.58 r.2. What we must decide, however, is whether such an approach is in accordance with our rules. Miss Naz goes on to question the authority of *Evans v Bartlam* in so far as it is applied to appeals from the Registrar to a Judge. She points out that it was dealing with an interlocutory appeal and contends, although unable to refer us to any authority on this point, that in 1937 where it was decided there were no assessments of damages by a master. Further she contends, again without authority, that when such assessments came to be referred to a Master, in the 1950 A, O.58 r.2 was placed in the English Rules to ensure that such appeals did not go to a single Judge.

Even if the above be so it in no way assists her as it indicates that without O.58 r.2 the applicable rule would have been O.58 r.1 which we are satisfied would have been governed by *Evans v Bartlam*. This is certainly the view taken by the Courts in Singapore as it indicated in the note in their Civil Procedure which we set out above. With this view we respectfully agree. We are satisfied also that is the view taken to date in Brunei and that it has been the practice in this jurisdiction.

A judge hearing an appeal from a Registrar can, it is true, adopt the Registrar’s reasoning as his own but it is incumbent upon him, when so doing to make his own decision on the evidence before him.

When the Commissioner did no more than say “I have not been persuaded that there is sufficient reason to justify my interfering with her decision” he was, we were satisfied, in error.

He was required to exercise his own discretion upon the matter. He could, have adopted the reasoning of the Registrar but this he did not do.

His decision must be quashed and the matter remitted to him to complete the hearing exercising his own discretion.

We direct the Registrar to send such case papers, as we indicate, forthwith by D.H.L. to the Commissioner. We so order because this case concerns an injury sustained by the Plaintiff as long ago as September 2000. We understand that the judge will not return to Brunei until towards the end of the year, further lengthy delays are not acceptable, they tend to bring the system into dispute.

We make an order nisi that the Respondent pay the appellant’s costs of this appeal to be taxed. This order will become absolute if application is not made before 9.00 am, on Saturday 24<sup>th</sup> May.