

MUHAMMAD FAUZI BIN HJ SABI

...APPELLANT

AND

MULTAZIMAH BINTI MOHAMMAD SALLEH

...RESPONDENT

**Court of Appeal of Brunei Darussalam
(Civil Appeal No. 4 of 2021)**

Before: Burrell P, Seagroatt and Lunn JJ A.

Date of Hearing: 16th November 2022

Date of handing Down Decision: 1st December 2022

Headnote: Road Traffic accident and personal injuries.

Mr. Lim Chin Wah for Messrs. Ahmad Zakaria & Associates for Appellant
Ms. Melissa Ang Yee Heng for Messrs. Melissa Ang & Co for Respondent

Burrell, P.:

At the hearing of this appeal we gave rulings in open court in relation to the two matters before us. We now give brief reasons for each of those rulings.

Leave to appeal

This action concerns a road traffic collision which occurred on 24th February 2016 between a motorcycle being driven by the appellant/plaintiff and a motorcar being driven by the respondent/defendant. A writ and statement of claim was served on 2nd March 2019; a trial commenced before the Hon. Judicial Commission Hj Abdullah Soefri on 12th October 2020. The trial concluded on 10th November 2020 for judgment to be given on 31st December 2020. That date was postponed. On 25th May 2021 the judge gave an oral decision. The oral decision was only to inform the parties that the plaintiff's claim was dismissed, with written reasons to follow "in due course".

The judge's written decision (which was dated 25th May 2021 the same date as the oral verdict) was first provided to the plaintiff's solicitors on 21st September 2022, nearly 2 years after the conclusion of the trial.

The plaintiff's solicitors had filed but not served a notice of appeal on 16th June 2021, 22 days after the oral decision on 25th May 2021. It was not served on the defendant's solicitors until 1st September 2022 (3 weeks before the written reasons were finally provided).

The respondent took a preliminary point that the service of the notice of appeal was out of time (which it was). They opposed the plaintiff's motion for leave to appeal out of time. In short they submitted that leave should not be granted and the appeal dismissed with costs.

We ruled against the respondent on this preliminary issue. Counsel for the respondent conceded that no prejudice had been occurred by the delay. The reality was that it would have wasted money and time to carry out the necessary preparatory work in serving the notice without access to written reasons for the decision and notes of proceedings. The plaintiffs were right to wait; although of course, they did not know how long they would have to wait. They were simply not able to formulate any grounds of appeal within the statutory framework setting out time limits. The lodging of a notice of appeal, within time, was in reality the only protective step they could take at the time.

The appeal

The trial preparation was poor. The accident seems to have been a straightforward collision between two vehicles travelling (at the time of impact) in the same direction. The plaintiff says he was hit from behind; the defendant says the plaintiff was moving from the inside lane to the outside lane when the vehicles collided, in the outside lane. The plaintiff's motorcycle collided with the front near side of her car.

These were the two versions concerning the moment of the collision. However, the evidence and findings concerning the movements of the two vehicles prior to the collision is unclear. At trial, there were no certified plans to scale of the junction in question, no photographs of the locus showing road markings or road signs. There was no police report other than a sketch of the junction drawn by a police officer showing where the vehicles ended up.

In short, it has proved very difficult from a reading of the notes of evidence and the judgment to discern what happened.

Having set out his understanding of the parties' evidence the judge said:

"In this present case before me, I will adopt the approach as enunciated by Lim Ben Choon, J in Noorianti binti Zainal Abidin (f) and 8 others vs Tang Le Ngei and Tang Lye Chang (1990) CLJ 943 and adopted by Datin Paduka Hajah Hayati, J in Barita anak Imen & others vs Baru Agong and anor (High Court of Brunei Darussalam Civil Suit No 50 of 2004) in considering the evidence in this case and which I have highlighted above."

He did not recite what that "approach" was, but went on to say:

"The question before this court is which of these two conflicting versions of the accident was inherently probable or improbable."

Put more simply what is required is clear findings of fact, based on the evidence followed by the court's conclusion as to what happened which would then form the basis of the final decision.

An example of the difficulty in discerning what happened comes from the following passage in the judgment.

“The non-disputed evidence is as follows:

1. *Plaintiff towing truck has passed him and went to Kuala Belait direction;*
2. *Plaintiff made a U-turn in order to go to another U-turn to chase the tow truck; and*
3. *Accident took place after plaintiff had executed the U-turn.”*

It seems the plaintiff was following a tow truck to an agreed destination. They had been travelling in the same direction. There is no understandable explanation of why he made a U-turn in order to make another U-turn in order to continue his pursuit of the tow truck. It is possible to second guess or theorize but that is not the function of this court.

However, apart from the poor trial preparation and the confusing evidence, the reason we have found it necessary to order a re-trial is found at the conclusion of the judgment.

In the penultimate paragraph it is said that *“the evidence of the plaintiff in questionable...”* We are unclear what is to be understood by the word “questionable.” What is required is unequivocal findings of fact and credibility.

Our greatest cause for concern however comes in the final paragraph where the judgment states:

“My conclusion is that the defendant is not fully liable for the accident...”

We must give these words their natural and ordinary meaning. It can only mean that if she was *“not fully liable”* then she must have been partially liable.

Once again it is not the function of this court to speculate whether or not it was intended to say something different. The words themselves have only one meaning. The fact that they may be illogical in the overall context is neither here nor there.

The words themselves can only be a preamble to a consideration of contributory negligence. There was no such consideration, there should have been. An assessment of damages hearing would then have followed.

In these circumstance we have concluded, with considerable reluctance, that a re-trial is the only course open to us.

The plaintiff’s unfiled and undated notice of appeal at paragraph 3 states:

*“3. The appellant/plaintiff respectfully prays the written judgment of the Honourable Judicial Commission be reversed and set aside and the **appellant/plaintiff’s case be heard before the Court of Appeal.**”* (emphasis added)

We asked Mr. Lim, the appellant’s counsel, if he was asking *this* court to re-hear the case. His response was merely that “we will leave it to the discretion of the court.”

We are aware of the difficulties and inconvenience which follow an order for a re-trial, particularly when the accident occurred nearly 7 years ago. However, it will give both parties an opportunity to prepare their cases more carefully and we direct that a new hearing date is expedited, which should be no more than 2 months from the date hereof.

Circumstances such as these naturally require a different judge to preside over the re-trial and we so direct.

Costs

The costs of the preliminary application shall be to the appellant in any event. The costs of the appeal shall be reserved to the trial judge.

Burrell, P.

Seagroatt, J.A.

Lunn, J.A