IN THE COURT OF APPEAL OF BRUNEI DARUSSALAM

CIVIL APPEAL NO. 8 OF 1997

BETWEEN

CHOO OI HIAW — 1st Appellant
ALPHONSUS THNG CHENG NAM — 2nd Appellant

AND

HJ ROSMAN BIN HJ JALUDIN — Respondent

Before : FUAD, P.; HUGGINS, J.A. AND CONS, J.A.

Dates of Hearing : 23RD AND 24TH APRIL, 1998.

Date of Judgment : 9TH MAY, 1998.

J U D G M E N T

HUGGINS, J.A.:

This is an appeal in a claim by the Respondent for damages for negligence. He was riding a motor-cycle on the Bandar Seri Begawan/Tutong road at about 2030 hrs when he came into collision with a motor-car owned by the Second Appellant and driven by the First Appellant. As a result of the accident he received very serious injuries. The trial judge found the First Appellant to be wholly to blame for the collision and awarded damages in the sum of $835,937.00 and interest thereon. The Appellants appeal against both the finding of liability and the quantum of damages.

It is not disputed that the Respondent was driving at 60-70 k.p.h. on the correct side of the road. The First Appellant had been driving in the opposite direction but wished to turn right and stopped to allow a car which was coming towards him to go past. He then started across the road at a time when the Respondent was some ten metres away. The judge found that the Respondent could not avoid a collision.

Although there was some argument about this before us, it is quite clear that there was

no speed limit at the point of collision. Nevertheless, Mr Lee for the Appellants contends that the motor-cycle was travelling too fast in all the circumstances and that this caused or contributed to the accident. We see no reason to disagree with the view of the judge that a speed of 60-70 k.p.h. was reasonable. There was no obligation upon the Respondent to slow down at every junction or for a vehicle which was indicating an intention to turn across his path if that vehicle had already stopped. We must, however, mention one factor which was relied on not only in this connexion but as a complete answer to the action.

The Respondent held a licence which authorised him to drive motor-cars but not motor-cycles. Therefore at the time of the accident he was committing the offences of driving without a valid licence and without third party insurance and this, it is contended, bars him from bringing an action, for ex turpi causa non oritur actio.

Although the Respondent would not have been on the road if he had been obeying the law, it was not the absence of a valid driving licence and third party insurance which caused the accident but, if the judge was right, the negligence of the First Appellant. The action did not arise from the offences committed by the Respondent. We accept that causation is not the only consideration in deciding whether, as a matter of public policy, a wrong-doer should be barred from suing, but the wrong-doing must have some connexion with the plaintiff's injury. Thus in *Jackson v Harrison (1978) 19 A.L.R. 129* the High Court of Australia held that where two men, both of whom to the knowledge of the other were disqualified from driving, had gone for a drive, the passenger was not barred from claiming damages against the driver when injury was caused to him wholly by the negligence of the driver. Where the nexus between the wrong-doing and the injury is established, what a court has to do is to weigh the degree of criminal culpability of the plaintiff against the culpability of the defendant, and then, taking a pragmatic view, to decide whether it is so much more reprehensible that the public conscience would be affronted if a remedy were to be granted. In this connexion it may be an important factor if both parties are participants in the same act of wrong-doing.

In the present case we think that there was neither a sufficient nexus between the wrong-doing and the injury nor, there being no participation in a joint wrong-doing, a sufficient balance of culpability in favour of the First Appellant to destroy the Respondent's right of action.

The second limb of the argument is that the fact that the Respondent had been driving without a valid licence since he was 15 years of age indicates that he had not been tested as to his competence to ride a motor-cycle and must be presumed not to be competent. This, it was said, was relevant to the manner in which he drove at the material time. Though counsel argued at length that it does, a failure to take a test does not necessarily indicate incompetence to drive. The argument advanced would have the result that a driver on the way to the testing station is presumed to be incompetent whereas, as soon as he has satisfied the examiner, that presumption no longer arises. In any event, what the judge had to decide in this case was not whether the Respondent was in general a competent driver but whether he drove negligently on this occasion and whether any negligence on his part caused or contributed to the damage. We certainly cannot accept the submission that failure to take and pass a test is ipso facto evidence of negligent driving.

It is then argued that the Respondent was, on the whole of the evidence, negligent in not avoiding a collision: a reasonably competent driver would have swerved to the left and passed in front of the turning car. Although a swerve might have avoided the collision we think the judge was justified in exonerating the Respondent. It was impossible for him to brake to a stop before he reached the car and he could not be certain what speed the First Appellant would reach. It is not surprising that he “panicked”, not knowing whether to attempt to pass in front of the car or behind it. He says that a collision was in any event unavoidable. In our view the judge came to the right conclusion, and the appeal on liability is dismissed.

We turn to the appeal on quantum and to the belated Respondents’ Notice relating to the same issue.

From a sketch plan drawn by the Police it appears that the Respondent was thrown over eight metres along the road. He was unconscious when he was removed to hospital. There he was found to have a fracture of the spinal cord causing paraplegia and complete loss of sensation below the nipple line. As a result of this loss of sensation, after his discharge he suffered severe scalding on both legs when he had a shower which, unknown to him, was much too hot. He lost all control over his bladder and bowels, but it was agreed that he should have a bladder stimulator fitted which, if successful, would provide a measure of control. The operation to do this would have to be performed in Singapore, and the stimulator might have to be

replaced in the future. He will be confined to a wheel-chair for the rest of his life.

The Appellants challenge the award of damages on three grounds. First it is said that the sum of $200,000.00 was too much for pain and suffering and loss of amenities. It was a sum fixed by the judge after comparing the injuries suffered by the Respondent with those suffered by the plaintiff in *Gregory Anak Anyau v Wong Sie Sing Contractor Sdn Bhd (1997) 1 J.C.B.D.90*, who was given a like amount. It is submitted that the Respondent should receive less than Gregory because he was not conscious throughout, he can have an operation which will ameliorate his condition (although this would have only a 60% chance of success) and provision has been made for him to have more in the way of medical equipment than had Gregory. The judge recognised that no two cases were identical and that any comparison must be "rough and ready". Indeed, he referred to *Yong Kuang Su v Yong Siong Hai Transport Co. (1996) 2 J.C.B.D.205* and said that he would have awarded $200,000.00 in that case, where the injuries were even more severe, but for the age of the plaintiff, who was 35 years older than the other two. We think that the judge was justified in the view which he took, and this ground of appeal fails.

Objection is then taken to the provision made for a full-time maid-servant to attend the Respondent, although the cost of such provision is not disputed. One of the reasons for allowing full-time help was that the Respondent was initially unable to clean himself when he was incontinent. It is argued that if the proposed bladder implant were successful that reason would no longer stand and any attendance which the Respondent required could be provided by members of his family. As we understand the medical evidence the implant of a bladder stimulator might control the flow of urine but would not prevent leakage from the bowel. Even in relation to urine the operation had only a 60% chance of success. We see no ground for allowing only one third of the cost of providing attendance, as the Appellants ask.

Finally the Appellants contend that the judge was wrong to make no deduction in assessing the loss of "future earnings" for the possibility that the Respondent might be able to do some remunerative work with his hands: the judge said:

> "Until I am given evidence that a disabled person can obtain employment, limited though this may be in Brunei, I shall not make any deduction from the damages for this reason."

Counsel contends that what is to be compensated for is loss of earning capacity and that the Respondent has a residual capacity to work and, therefore, to earn. It was suggested that he might do some basket weaving or, after training, furniture making. Even accepting this to be true we think that the prospects of his earning more than a pittance could properly be ignored.

The Appellant's appeal as to quantum is therefore dismissed. That, however, leaves the cross-appeal.

First it is contended that the judge wrongly failed to include in the loss of pre-trial earnings any allowance for the accommodation and board which the Respondent was entitled to as an officer in the Royal Brunei Police: although this was not an allowance payable in cash, it was a benefit which went with his job and which he lost as a result of his injuries. The judge gave no reason for excluding this benefit, but counsel for the Appellants submits that he may have done so because he had elsewhere allowed for the cost of altering the Respondent's own house to provide wheel-chair access. In the court below such alteration was sometimes referred to inaccurately as "renovation", but the judge expressly disallowed the cost of making good at least some existing damage. We are not satisfied that that was the reason for disallowing the accommodation benefit: the alterations formed another, entirely different item of claim, in respect of which no issue has been raised on the appeal. The accommodation was valued by the judge at half the $800.00 estimated as the value of free quarters provided (with free electricity and water but, presumably, without food) for married officers. The accident occurred on 10th October 1995 and judgment in the action was delivered on 20th January 1998, mistyped on the judgment itself as "20th January 1997". The Respondent was, however, employed by the Police Force until 22nd September 1996, when he was discharged. At p.82 of the Record the judge said:

> "Rosman's pre-trial loss, assuming 16 months between his discharge from the RBPF and judgment, would be $1125 x 16 or $18,000."

He seems to have overlooked that on the same page he had said that the loss "before marriage" was $1,525 a month. Counsel submits that the calculation should be $1,525 x 14 or $21,350: the "14", he says, is the correct number of months from discharge to judgment. We think the judge was right in his calculation of the period of loss, but we agree that allowance should have been made for the additional $400 a month. The $18,000 should therefore be

increased to $24,400 (1,525 x 16).

It is then said that the assessment of the post-trial loss of earnings, likewise, did not take account of the value of bachelor quarters and that, again, the judge miscalculated a relevant period. The Respondent had been contemplating marriage at the time of the accident but the lady in question broke off the relationship because of the Respondent's injuries. The judge assumed that a marriage would have taken place on 1st October 1998, and neither side has objected to this. Up to 1st October 1998, therefore, the judge assessed the post-trial loss on the basis that the Respondent would have remained a bachelor. There was also evidence that he might well be promoted to the rank of Corporal 10 years after he joined the Force, that is on 12th April 2002. The judge assumed that he would have been, and this also remains unchallenged. The judge assessed the loss over three periods, (a) from judgment to assumed marriage, (b) from assumed marriage to assumed promotion to Corporal and (c) from assumed promotion to date of compulsory retirement aged 45 years, and we must deal with each period in turn.

In view of what we have already said, his basic figure of $1,125 a month for an unmarried constable under (a) must be increased to $1,525 to include the quarters. The judge then takes the period as being nine months "from 1/12/97 to 1/10/98". Counsel says this should be 10 months, and he would be right were it not for the fact that the date "1/12/97" is incorrect: judgment was delivered on 20th January 1998, which in fact was less than nine months before 1st October 1998. We are disposed to allow $1,525 x 9 for this period, i.e. $13,725.

For period (b) the judge awarded $1,525 x 42. It is submitted that the loss was $1,925 a month (as, again, the judge had said earlier on the same page). Since the quarters provided after marriage would be worth $800 a month instead of the $400 for a bachelor, we think that is right. The figure for this period is thus $1,925 x 42, i.e. $80,850.

No criticism is made of the award of $2,156 x 198 for period (c), and the total loss during the three periods was therefore $13,725 + $80,850 + $426,888 or $521,463 and not $501,063 as in the judgment, and the average monthly loss over the total period of 249 months was therefore $521,463 ÷ 249, which is $2,094 a month or $25,128 a year. Applying the judge's unchallenged multiplier of 14 to the last figure one gets $351,792 as the loss of earnings from

judgment to retirement in place of his figure of $336,000.

The judge then observed that this calculation disregarded the pension the Respondent would have received from retirement to the estimated date of death. That, it is not disputed, would have amounted to $117,600 if he had lived out his expected span. What the judge then did was to add the total loss of post-trial earnings (now calculated at $521,643) and the pension ($117,600) and to divide the resulting figure by 42 (the number of years from judgment to age 65). He went on to discount that final figure for early payment by applying a multiplier of 18, which was appropriate for a loss extending over 42 years.

It is contended that it was wrong to combine the lost earnings and the pension in this way and to apply a single multiplier to both: the earnings and the pension should be treated separately "since such losses relate to different future periods and would therefore have different present day values". Counsel argued that the judge had been right when, initially, he applied a multiplier of 14 to the lost earnings on the basis that they would have been earned over a period of 22 years, but that he should then have discounted the pension alone more heavily because it was so far in the future. It was proposed that, based on the period of 20 years during which the pension might be payable, it should be discounted by using a multiplier of only 4: the effect of applying an over-all multiplier derived from combining the period of earning with the period on pension was, in effect, unreasonably to reduce the compensation payable in respect of the lost earnings. Indeed, there might be a case where a plaintiff with a pension would recover less damages than a plaintiff who had the same salary but no pension. In the present case the result of lumping the salary and pension together would be to produce an (adjusted) loss of $273,961.27 ($521,643 + $117,600 ÷ 42 x 18), whereas if they were treated separately the loss would be $355,474.63 ($521,643 ÷ 22 x 14) + ($117,600 ÷ 20 x 4).

A retirement pension is not wages. In *Perry v Cleaver (1970) A.C. 1*, which was concerned with the question whether a disability pension should be deducted in the assessment of loss of earning capacity, Lord Reid said at p.16G:

> "A pension is intrinsically of a different kind from wages. If one confines one's attention to the period immediately after the disablement it is easy to say that but for the accident he would have got £X, now he gets £Y, so his loss is £X-Y. But the true situation is that a pension is the fruit, through insurance, of all the money which was set aside in the past in respect of his past work. They are

different in kind."

The pension in the present case would have been a non-contributory pension which was not the fruit of a policy of insurance. However, there is no basis for distinguishing between such a pension and a non-contributory pension which was the fruit of insurance: it is a benefit which the servant was to get in addition to his wages, and it is the opportunity to continue to serve and thus to obtain this benefit which has been lost. A retirement pension usually provides an income which is lower, and often substantially lower, than the wages. As a general rule, therefore, it seems to us that it should be valued separately. There may be cases where (i) the difference between the pension and the wages and (ii) the length of time during which it is expected that the pension will be payable are such that it would not be unfair to deal with the wages and the pension together, but this is not such a case. We think counsel for the Respondent is right and are content to adopt his calculation.

The judge accepted that the Respondent ought to have a special mattress and that this would require maintenance. There was evidence that this mattress cost $2,800 and that maintenance would be 10% of the purchase price every year for 10 years. It is complained that the judge allowed only $73 p.a. for maintenance, although he gave no reason for so doing. He expressly referred to a 10% cost of maintenance and seems to have intended to allow it in the same way that he allowed the cost of maintaining the wheel-chairs. Counsel for the Appellants concedes that this part of the award should be increased. We think $280 p.a. should be awarded for 18 years, making the total for maintenance $15,624 instead of $11,860.

The judge accepted that the Respondent would require various pharmaceutical items, the cost of which he assessed. In making his assessment he applied a multiplier of 18 as discount for early payment, but at the bottom of p.56 of his judgment he appears to have discounted the total cost again: we can see no other explanation for his having divided the total of the sums he had assessed by 40 and then multiplying by 18. On his own calculation the post-trial award under this heading should be $72,404. Counsel for the Appellants agreed this also.

In his Statement of Claim the Respondent claimed "transportation costs for regular therapy and other purposes". Evidence was led of his requirement for three purposes: (i) attending for physiotherapy at the hospital, (ii) regular monthly check-ups by a doctor and (iii)

outings designed to avoid the onset of the depression which often attacks paraplegics, who are normally confined in claustrophobic surroundings. As to the first of these the judge accepted that the Respondent had made visits to the hospital which had cost $120 a month for 18 months. He allowed for the continuance of these visits for another six months but thought that further such visits would not then be necessary. No complaint is made of this finding or of the sum awarded.

In his Judgment the judge did not mention visits to the doctor and made no award for transport to them. The report of Dr Sivananthan, whose evidence the judge appeared generally to accept, stated that to avoid complications the Respondent should make visits to the doctor at least once every month and that, if complications developed, he should make more frequent visits. Mr Ong for the Respondent agrees that he did not expressly refer to such visits in argument, but the evidence was there. We think that some provision must be made for this expense.

As to the third requirement for transport the judge described such outings as "recreational" and said that they were desirable but not an unavoidable expense arising from the accident for which the Appellants should pay. Another judge might have taken a more generous view, but we do not think we should interfere with the decision of the trial judge on this point.

The visits to the doctor will continue for the rest of the Respondent's life, and we allow $10 a month or $120 a year with a multiplier of 18, which is $2,160. Adding that figure to the post-trial award of $720 for transport we increase the award to $2,880.

Finally it is complained that the judge failed to allow the cost of two wheel-chairs which the Respondent purchased before trial. The Statement of Claim was amended at the trial to include a claim in respect of these chairs. It is said that the judge allowed provision for three chairs post-trial but overlooked that the Respondent had already paid $1,500 for two he was using. (A third one had been a gift). What in fact the judge allowed for was replacement of six wheel-chairs in the future, although at first sight each might seem to have been allowed at $5,872. The explanation appears to be this. There was evidence that the Respondent needed three types of chair, a heavy one for general use, a folding one and one for the shower, but there

is no express finding as to this. The occupational therapist described three chairs priced respectively at $1,777, $2,140 and $1,955. One of each would cost a total of $5,872 and it is, therefore, reasonable to assume that the judge accepted that three chairs were necessary. In the absence of a finding that the Respondent had not bought the two chairs in respect of which he claimed we think the claim should be allowed.

Adapting the Summary at the end of the Judgment we think that the damages should be:

Special damages		
Pre-trial loss of earnings	$24,400	
Family help	$ 3,150	
Repairs to motor-cycle	$ 2,500	
Massage	$ 650	
Diapers	$ 972	
Transport to hospital	$ 2,160	
Wheel-chairs	$ 1,500	$35,332
General damages		
Pain and suffering and loss of amenities	$200,000	
Alterations to house	$ 50,000	
The bladder stimulator	$101,315	
Cost of domestic helper	$115,316	
Loss of earnings (not including pension)	$331,954	
Loss of pension	$ 23,520	
Commuted pension	$ 15,624	
Medical equipment	$ 14,200	
Medical items (maintenance)	$ 15,624	

	(replacement)	$ 29,160	
	(disposable)	$ 72,404	
Transport		$ 2,880	$971,997
	TOTAL		$1,007,329

The cross-appeal is allowed to the extent that the special damages are increased from $27,432 to $35,332 and the general damages from $835,937 to $1,007,329.

SIR ALAN HUGGINS
Judge, Court of Appeal

KUTLU TEKIN FUAD
President, Court of Appeal

SIR DEREK CONS
Judge, Court of Appeal

Y C Lee for Appellants.

Andrew Ong for Respondent.