Faridah Binti Hj Abd Hamid	**…**	**1st Appellant**
Rozini Bin Hamdan	**…**	**2nd Appellant**

AND

Azman Bin Amran	**…**	**1st Respondent**
Nadirahtul Elmi Binti Amran	**…**	**2nd Respondent**
(through her father and next friend)		
Amran Bin Hj Aji	**…**	**3rd Respondent**
Sidup Bin Burut	**…**	**4th Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 22 of 2009)

Power, P; Mortimer and Davies, JJ.A.
7th May, 2009.

Judge's interlocutory decision in plaintiffs' favour on liability only. Leave to appeal necessary but leave not applied for at the appropriate time. Leave to appeal and leave to apply out or time granted on the appellants' undertaking to pay the costs of any further appeal in the action. Appeal against liability and contributory negligence dismissed with costs.

Dr Colin Ong and Mr Lim Chih Wah of Messrs. Dr Colin Ong legal Services for the Appellants.
Mr Yusof Halim of Messrs. Cheok Sankaran Halim for the Respondents.

Cases cited in the Judgment:

Mohamad Affi bin Hassan v Alvin Chong and Chong Yee Civil Appeal No.14 of 2008.

Sec 20 (2) (f) of the Supreme Court Act.

Mortimer, J.A.:

1. This is a defendant's appeal from a decision of Hairolarni J given on 7 October 2008 in favour of the plaintiffs on liability only.

Leave to appeal against this interlocutory judgment

2. Any issues on quantum of damages remain to be determined at a separate hearing. As there may be only one final judgment in an action Hairolarni J's decision is interlocutory only. As such leave to appeal to this court is required and no such leave had been obtained. See *Sec 20 (2) (f) of the Supreme Court Act)* Also, see the significant remarks of this court concerning interlocutory decisions and the undesirability of having separate hearings on liability and

quantum in *Mohamad Affi bin Hassan v Alvin Chong and Chong Yee*. Civil Appeal No.14 of 2008.

3. It was necessary therefore for Dr Ong, who appears for the appellant/defendants, to make an application for leave to appeal out of time. On his undertaking that the appellants will pay all the costs of any further appeal in the action we granted his application and heard the appeal.

Background

4. The action concerns a road accident which took place on 30 July 2003. At about 06:45 am on that day the fourth plaintiff was driving his car along Jalan Labu in the direction from Bangar to Labu. He was being followed by the first plaintiff driving his car in the same direction. According to the judge's findings, as the fourth plaintiff approached the junction on his near side leading to the Bumiputra Shops, the first defendant drove out of the junction without stopping and turned to her right across the front of the fourth plaintiff. In order to avoid colliding with her the fourth plaintiff had to break sharply. The first plaintiff who was following was unable to stop in time so that his car collided with the rear of the fourth plaintiff's car.

5. Both cars were damaged and the first plaintiff, together with the second plaintiff his passenger, were injured.

Finding on Liability

6. On these facts the judge held the first defendant liable for driving out of the junction into the main road without stopping when it was unsafe to do so because of the approach of the fourth plaintiff. He had to brake sharply in order to avoid a collision with the consequence that the first plaintiff, who was following, collided with the back of his car.

7. The first defendant denied at trial that she was the driver concerned and through her counsel she alleged a conspiracy, on the part of the plaintiffs and their witnesses, to bring a fraudulent claim. Although fraud was not pleaded, the judge permitted the allegation to be advanced. He considered the evidence on this but in the end firmly rejected it.

Appeal on Liability

8. Mindful of his difficulties in this respect, Dr Ong challenges the judge's factual finding that it was the first defendant who drove out of the junction and caused the accident. He submits that the judge was plainly wrong and that he ought to have held not only that the plaintiffs were lying but that the evidence of the bus driver who observed the accident 70 yards away from near the Bumiputra shops and that of the driver following some distance behind was all concocted.

9. In support first he makes the point that when the fourth plaintiff made a police report on the same morning as the accident he failed to mention the involvement of the first defendant's car at all. To the same effect, he only depicted the two cars which collided on a contemporaneous sketch plan. Ten minutes later, however, he made a further statement in which he alleges the first defendant to be responsible. He also invites our attention to the fact that this second statement contained signed amendments concerning the correct registration number of the car.

10. He listed for our consideration a number of discrepancies, contradictions and inconsistencies in the oral evidence and between the oral evidence and contemporaneous documents to which he submits the judge gave insufficient or no weight.

11. He argues that the judge ought not to have given such weight to the first defendant's admission to the police of failing to stop at the junction. He suggests, in effect, that the judge ought to have found that the police officer was unreliable and had overborne the first defendant who did not understand the significance of her acceptance of guilt.

12. Relying on these grounds he says we ought to rule that the judge's finding of fact was plainly wrong, that on the evidence he ought not to have found that the first defendant was the driver of the car which caused the accident and, therefore, we should reverse the judge on liability.

Conclusion on Liability

13. It is the duty of an appellate court to interfere with a judge's finding of facts if, and only if, it is demonstrated that the judge below has gone wrong in principle, has misapprehended the facts, has not profited by the advantage of seeing and hearing all the witnesses, or is otherwise plainly wrong. The central issue at trial was whether the evidence showed that the first defendant, and no other, emerged from the junction and caused the accident. Evidence identifying her or her car was given by the two plaintiffs, and the two other witnesses to whom we have referred. The plaintiffs also relied upon her admission to the police that she had emerged from the junction without stopping.

14. The defendants' counsel made submissions to the judge upon the evidence and the weight to be given to it taking the points that were made to this court. On the submissions we have heard there is no reason to think that the judge failed to profit from his advantage of hearing the witnesses, or that he failed to take into account the criticisms of the evidence advanced before him and now repeated before this court. The inconsistencies in the evidence were mostly peripheral or inconsequential. None of counsel's submissions has demonstrated any of those matters which would justify this court in interfering with the judge's finding of the facts establishing liability.

15. Frankly, the appeal on liability is without merit and had leave to appeal been applied for at the appropriate time it is likely that it would have been refused. On this aspect of the case the judge's decision appears to us to have been plainly correct.

The allegation of contributory negligence

16. Although the accident happened in 2003 the defendants made no allegation of contributory negligence until after the trial had begun in January, 2008 when the judge allowed the pleadings to be amended.

17. Having heard the evidence the judge dismissed the allegations.

Pleadings and the notice of appeal on contributory negligence

18. As has been pointed out by counsel for the respondents, the amended pleadings on contributory negligence do not allege driving too fast or that the first plaintiff was driving too close to the fourth defendant as one would expect in these circumstances. However, the general terms would permit a finding on this basis.

19. The issue on contributory negligence is raised in ground 5 of the Petition which reads:

> *"5. The honourable judge also erred in stating that the defendants had not produced evidence of contributory negligence when there is abundant evidence to show that the first plaintiff/ first respondent was driving at 60/70 kmh which was too fast when he was following the fourth plaintiffs car cruising at 20/30 kmh. as a result of which the first plaintiff/ first respondent could not stop in time to avoid the accident."*

20. Ground 3(1) also touches on the point. This reads:

> *"3 (1). The honourable judge from the court below did not address the issue that the first plaintiff/ first respondent was charged under section 29(1) of the road traffic Act Cap. 68 for careless driving and he pleaded guilty and paid a fine of Brunei $250. 00 on 27 December 2003. On the other hand, the "conviction" of the first defendant/ first appellant under section 39(1) of the Road Traffic Act, Cap 68 where the first defendant/ first appellant paid a compound fine of Brunei $50. 00 was dealt with in great detail although the charge against the first defendant was a lesser one."*

These grounds are not pursued further in the petition as is there no prayer or other ground asking for the judge to be reversed on the point and for this court to make a finding of contributory negligence.

21. Dr. Ong neither abandoned nor argued the point in his submissions, nevertheless we turn to consider the issues raised.

22. The judge made his findings on contributory negligence in these terms:

> *"The weather at the time of the accident was fine and the fourth plaintiff and the first plaintiff was driving at a speed of around 40 to 50 kph and 60 to 70 kph respectively. The first plaintiff stated that he was about three car lengths before the collision occurred. I believe these testimonies to be correct and this was no disputed by the defendants. The fourth plaintiff claimed he was doing 20 to 30 kph when the accident happened and managed to brake his car to a complete halt.*
>
> *I believe that that speed in itself is not a prima facie evidence of careless or negligent driving. In this case I believe that the first defendant speed of 60 to 70 kph is not excessive given that the absence of the speed limit in the area. However, Mr. Walter Boyd was only able to find a speed limit sign of 65 kph approximately some 3 km away from the vicinity of the accident. But I believe this has no relevance to this case.*
>
> *No expert evidence was called to determine the functionality of a car traveling at 60 to 70 kph to brake to a complete halt in order to avoid an accident. But given this lack of expert evidence, I believe that the main question to be asked is whether at the time when the fourth plaintiff applied his brake the first plaintiff as a prudent and competent driver in this circumstance of the case would be able to avoid rear ending the fourth plaintiff's car. I believe that travelling at the speed of 60 to 70 kph was a normal speed in the area and no evidence from the defendant's to suggest otherwise. And it follows that as a prudent and competent driver in the circumstances of the case, could the first plaintiff seeing the car coming to a complete halt make emergency avoidance that would need reaction time at that stage? I accept that he was three car lengths away from the fourth plaintiff's car. I believe it is too much an expectation for a normal, attentive driver and circumstance of the case to expect a car in front of him/her the to do as the fourth plaintiff did i.e. to negotiate his car to a complete halt all of a sudden and expect the first plaintiff who was following from the rear to react and at the same time response in order to avoid the accident. I believe the first defendant had made all the necessary emergency avoidance in the circumstances to avoid a collision."*

23. Several points arise. The first is the judge's finding that the fourth plaintiff was driving at about 40 to 50 kph. Followed by the first plaintiff at a three car distance travelling at 60 to 70 kph. In such circumstances a finding that the first plaintiff was driving too near the car in front and too fast would be almost inevitable.

24. Mr. Halim, for the respondents, refers to the relevant evidence and submits that the finding that the first plaintiff was travelling between 60 to 70 kph at the time of the accident is almost certainly a mistake. The evidence was that

at some earlier stage of the journey the first plaintiff had been traveling at this speed but in cross examination he said that immediately before the accident that he had slowed down to 20 to 30 kph and was in second or third gear. He disagreed that he was travelling faster than the fourth plaintiff.

25. There was no direct evidence that the first plaintiff's speed was a 60 to 70 kph although it was open to the judge to infer this. It is clear from the fourth plaintiff's evidence and his statement to the police that there was a difference between the speed he was driving along the road before the accident and the speed at the time of the accident. The same distinction is made by the first plaintiff in his evidence and this may have led to the error. In other respects the judge accepted the first plaintiff's evidence and, as submitted by counsel, we are satisfied that this finding was a mistake. The first plaintiff was following the fourth plaintiff at approximately the same speed and at a distance of the length of three cars.

26. The second matter for our consideration is counsel's submission that whereas the judge relied upon the first defendant's admission of an offence of failing to stop at the junction in support of his finding that she caused the accident the first plaintiff's conviction of the more serious offence of careless driving did not merit a mention at all in the judgment. Dr Ong says this indicates that the whole cause of the accident was the first plaintiff's driving.

27. The evidence of the convictions of the first defendant and the first plaintiff was admitted at trial without objection and was available for the judge's consideration. He correctly considered this prima facie evidence in the first defendant's case. However, the evidence of the first plaintiff's conviction on a plea of guilty for careless driving is also prima facie evidence which, if unexplained, would support a finding of contributory negligence. Undoubtedly the judge ought have assessed this evidence and made a finding upon it.

28. The first plaintiff's explanation, which we must now consider, was given in cross examination. He agreed that he had pleaded guilty but pointed out that he was unrepresented. His explanation for his admission was, *"according to law if someone knocks the rear of another car it would be an offence"*. Asked then why he did not say it was the fault of the first defendant he answered, *"Coz the collision happened between me and Sidup.*" (the fourth plaintiff).

29. This explanation that he thought running into the back of another car was sufficient evidence of careless driving understandable. In normal circumstances colliding with a car in front is sufficient evidence. However, as the judge found, the circumstances here were far from normal. The fourth plaintiff's car was not being driven normally. It had to brake suddenly and make an abnormal, emergency stop. The government bus driver who saw the accident from near the Bumiputra shops described it in significant terms:

> *"I saw a Tata Sumo theft was being driven along Jalan Labu I was very near to the said junction when the Vitara turned right.* ***I shouted as I fear that an accident would occur between these two cars. The***

> ***Tata Sumo braked hard and was hit from the rear by another car."****[Emphasis added]*

30. Aside from his mistake about the first plaintiff's speed and apart from the conviction the judge considered the other evidence of contributory negligence, and rejected it.

31. This leaves the weight if any which ought be given to the first plaintiff's plea to careless driving. Having dealt in detail with the first defendant's admission of failing to stop at the junction it is likely that the judge had the first plaintiff's conviction well in mind but it was necessary for him to consider it in his judgment. Having examined the evidence summarised above we are satisfied that there is no reason to reject the explanation given in cross examination. Further, there is no inconsistency between the plea and the first plaintiff's evidence at trial. Had the judge considered this evidence we are satisfied it was open to him to reach the same conclusion and he would have done so.

32. In the circumstances we have set out we are satisfied that the judge's finding of no contributory negligence must stand.

Conclusion

33. For these reasons this appeal is dismissed.

Orders

34. On the appellants' undertaking, made by their counsel Dr Ong, to pay all the costs of any further appeal in this action, we grant leave to appeal out of time.

35. We order that the appeal is dismissed with an order nisi for costs against the appellant to be taxed if not agreed. This order will become final on the 6 June 2009 unless on or before 30 May, 2009 either party makes application to the registrar to be heard.

Power, P.

Mortimer, J.A. **Davies, J.A.**