MEGALIFT SDN BHD **...Appellant**

AND

FABIOLA NG YIOK CHIN **....Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 5 of 2016)

Before: Mortimer P, Burrell and Seagroatt JJ A.
23rd May 2016

Head note – Road Traffic Accident – negligence – vicarious liability – Road Traffic Act (Cap 68) Section 86 – Plaintiff's claim for damages against driver's employer – Appeal by employer – Respondent's (Plaintiff's) counter-notice – damages for quantified likelihood of future medical treatment and costs of maid's services. Substantial delay between end of trial and delivery of judgment. Appellant's claim to disallow interest for that interim period. Appeal dismissed – Cross Appeal allowed.

Mr. P. Roy Rajkumar a/I C.V Prabhakaran and Mr. P. Rajiv CV Prabhakaran (Messrs. Yusof Halim & Partners) for Appellant (Defendant)
Ms. Linda Lee Lian Khing (Messrs. CCW and Partnership) for Respondent (Plaintiff)

Cases/Statutes referred to in Judgment
The Road Traffic Act, CAP 68 s.86

Seagroatt, JA.:

This is an appeal against the judgment of Judge Pg Hanani Pg Metusain, of the Intermediate Court whereby judgment was entered for the Respondent (Plaintiff) for damages for negligence assessed at BND$156,928.43 with interest.

The claim arose out of a traffic accident on Sunday, the 18th October 2009. The plaintiff was driving a motor-car along Jalan Subok towards Bandar Seri Begawan. Travelling in the opposite direction was a vehicle driven by an employee of the defendant named Selvaraj: the road is single carriageway with one lane in either direction. When the vehicles were near the Singapore High Commission building the defendant's vehicle veered across into the plaintiff's lane and a frontal collision occurred.

The simplest issue was whether the defendant's vehicle had been driven negligently by its driver, Selvaraj.

The issue of negligence

The police sketch plan, and photographs recorded debris from the collision situated on the lane along which the plaintiff was travelling. There was no debris on the lane along

which Selvaraj had been driving. This evidence together with that of the skid or tyre marks, showed the plaintiff's vehicle pushed over further on her lane, whilst the defendant's vehicle veered back to the Subok lane direction.

The level of alcohol found in the blood of the defendant's driver was almost three times the prescribed limit. The inference to be drawn, is that the driver concerned was incapacitated from complete control of this vehicle.

No evidence was called to challenge the plaintiff's version of events or the inferences to be drawn from the extrinsic evidence.

There was clear negligence on the part of the defendant's driver. The judge's conclusion was correct.

Contributory Negligence

No evidence was called to lay the ground for such contention nor was it pleaded in the defence. In any case all the existing evidence indicated that the defendant's vehicle suddenly swerved into the plaintiff's and that she had no prospect of avoiding the collision. There was no basis for a finding that she had contributed to the collision. The judge's finding was correct.

Vicarious liability

This was the only serious issue in respect of liability.

The plaintiff sued the defendant as owner of the vehicle and employer of the driver who was its servant or agent.

The Defendant countered with an assertion that the driver, although employed by it, was on a frolic of his own when he took the vehicle without his employer's authority on Sunday when he was off duty.

There was no explanation advanced as to how the driver came to be in possession of the key to the vehicle. Evidence was given on behalf of the Defendant company that keys to the vehicles in the pool were in the custody of another employee, Edwin Obias, and a security guard. Neither was called to give evidence. Accordingly the defendant was unable to show that the driver was acting outside the scope of his employment. The presumption that the driver was acting as the servant or agent of the owner was not displaced. The employee, Selvaraj took no part in the trial.

The Judge was entitled to find on the facts applying common law that the driver was at the material time acting within the scope of his employment, but decided that she did not need to delve into that aspect since she applied section 86 of the Road Traffic Act, Cap. 68:

> *"In addition to any liability imposed by the common law upon the owner of the vehicle…such…owner shall be liable for any injury or damage…which occurs through the negligent driving…by any person employed by him as a driver of such a vehicle when not acting within the scope of his employment…."*

Reliance upon such statutory provision does not need to be pleaded specifically, for which there is long-standing authority which does not need to be reviewed by us.

The Judge very properly found in the plaintiff's favour on this issue.

The Defendant's Petition of Appeal contains three grounds with which we can deal shortly.

The first concerns the Judge's application of section 86 of the Road Traffic Act (Cap 68) which we have set out earlier in this judgment. There are two complaints, the first, being that the Judge did not properly consider the *"first proviso which clearly sets out the pre-conditions to the applicability of the said section."* This has no basis whatsoever.

The act or omission (i.e the negligent driving) unarguably would have give rise to proceedings in tort against the *"person employed by such owner."*

The second complaint suggests that the absence of any proceedings in tort against the person employed by the Appellant disentitles the plaintiff to succeed against the employer. This is nonsense. The plaintiff is entitled to sue either the employer or the employee or both. As is apparent from paragraph 4 of the Petition there were earlier proceedings involving this plaintiff (Respondent) and the employee (Salvaraj) in which the employee sued the Plaintiff for negligence (a somewhat surprising state of affairs) and the plaintiff defended and counter-claimed on the basis of the employee's negligence. That action seemed to go to sleep as Selvaraj did not pursue it. We will return to this aspect or feature later.

Ground 2 is difficult to comprehend. It alleges an abuse of process by proceeding against the employer and thereby gaining a *"juridical advantage."* It gives no reason for suggesting the plaintiff was not entitled to sue the employer, not does it identify what is meant by *"juridical advantage."* This point too is baseless.

Ground 3 alleges delay between the conclusion of the trial and the delivery of the judgment against the Defendant, a period of 15 months. Certainly this delay is not acceptable but it is difficult to see how the Defendant has been prejudiced. It certainly delayed the plaintiff in receiving the money to which she was entitled and the interest calculated over that period has been some compensation for that, but the Defendant's insurers continued to have the use of that money throughout the intervening period. There is nothing in this point.

Finally we return to the content of paragraph 4 which appears to be linked to Ground 2 although it is not formulated as a ground of appeal. It is introduced as a fact which the Defendant wishes to bring to our attention i.e. the separate action brought by the employee (Selvaraj) against the plaintiff claiming damages for negligence (for his injuries) arising out of the same collision

The plaintiff entered a defence and counterclaimed damages for her injuries. Her claim in this action replicated in principle that counterclaim. For some reason, beyond our comprehension, the petition complains that the plaintiff proceeded with her claim in this action without informing the trial Judge of the action by Selvaraj, and that because Selvaraj took no part in this action there was unfairness and/or it was wrong in law.

The Defendant (Appellant) did not inform the court of these proceedings either. This point has no merit at all and lacks logic.

Accordingly we dismiss the appeal.

That however is not the end of this matter.

The plaintiff has issued a Respondent's Notice contending that the Judge erred in dismissing certain of her heads of claim for damages. We will deal with these in the order in which they appear in the Counter Notice.

1. The cost of future medical treatment in the sum of BND$39,000. This claim was based upon the medical consultant's evidence to the effect that her elbow injury, which was a severe one, would likely require, at some future date removal of the metal implant. Such was the extent of the injury to her elbow and the extensive soft tissue injury that she had required reconstruction of the elbow joint by means of plates and screws.

   At the time of trial *"her elbow range of motion and function have stabilised. Further physio will not improve her elbow function of range to any significant extent."*

   In a series of questions in cross-examination the defendant's counsel managed to put the medical evidence in stark relief. The consultant had said that there was *"more than a 50 percent chance for the requirement of implant removal and elbow replacement procedure."* He was then asked, *"do you agree that there is a high likelihood that there would be no need for it?"* The answer was: "*less than 50 per cent chance that she would not require It*".

   It is difficult to see quite where this line of cross-examination was leading. There was no challenge to the consultant's positive chance of future procedure – more than 50% - i.e. more likely than not – and so the negative side of the assessment, was an irrelevant exercise.

   When it was suggested that the plaintiff's pain was manageable by drugs the expert's reply was predictably terse and practical – "long term ingestion of pain medication and anti-inflammatory have side effects and complications."

   He was asked to consider the time frame for the replacement procedure. He considered that *"in her relatively young age and with a degree of osteoarthritis in her right elbow….these are reasons that she has a more than 50% of having osteoarthritis and elbow replacement in her late 60's or early 70's."* The plaintiff was 59 years old at trial and 58 at the time of the most recent x-ray. Pain had increased over the past 5 years and the osteoarthritis is likely to be progressive.

   The judge reproduced this medical evidence and prognosis in all salient features in her judgment. Unfortunately the judge accepted the defence argument that the chances of future surgical intervention following the progressive course of the osteoarthritis and the pain and limitations associated with it were too remote and uncertain to justify making an award to reflect it. The likely cost in today's terms is a total of BND$39,000.

We regret to say that the judge's approach was at fault. Even if the consultant had not been able to quantify the likelihood of future surgical treatment, but had merely said that there was a real risk of such, the plaintiff would have been entitled to an award, discounted to some extent to reflect the level of that risk. But the medical evidence went well beyond a reference to a *"risk".* A more than 50% chance or likelihood – a *"more likely than not"* scenario – unarguably in our view calls for substantial recognition. It is neither remote nor uncertain. She was already experiencing pain and limitation of movement and function five years after the accident. We disagree with the judge.

It is possible that in 5-10 years the cost will have increased beyond the current estimate. We do not think it is appropriate to discount the figure on the basis of accelerated receipt since the probabilities are that the amount received can not earn any significant amount of interest, but we should nonetheless discount it on the risk factor as assessed by the consultant, and do so by one-third. The sum allowed will therefore be $26,000.

2. The cost of employing a maid ($18,612.9) from 1 January 2012 to date of trial (7 October 2014)

   The initial claim for the cost of the services of the maid was based on the period from the date of the accident (18 October 2009) to the date of trial and continuing.

   A material factor was that but for the accident she would not have extended her maid's contract beyond December 2009, her daughter having left to study abroad in July 2009.

   Although the main need for a maid had been to look after her daughter, the former also did the cooking and housework. Her case was that this need continued as a result of the limitations imposed on her by her injuries.

   The judge allowed the claim for what she referred to as a *"reasonable recuperation time"*, deciding that this was a 2-year contract lasting until December 2011. Was the judge wrong in terminating that need for maid service, attributable to the accident, at that date?

   Her reasoning is essentially that the plaintiff retained some functions in her right arm, her dominant one. In taking into account the reduction in one's physical strength and ability as part of the ageing process she misdirected herself. This plaintiff was experiencing accelerated limitation on her strength and ability as a consequence of the injuries suffered, and so was already having to endure those handicaps well in advance of the normal effluxion of time and any ageing process.

   In our view the judge was wrongly dismissive of the plaintiff's evidence of her physical limitations which however she correctly reflected in the principal paragraph on page 10 of her judgment, beginning:

   "The plaintiff gave evidence that five years on…."

and concluding : *"…. for the above reasons she says she will need a maid to assist her for the rest of her life."*

It is important to note that the judge accepted the reality and veracity of the plaintiff's evidence but put a different construction on it which we consider does less than justice to reality.

We credit the plaintiff's need for continuing maid service but not on a full-time basis. She is still at work herself, so the need is not for a full day's service except at weekends.

By the time of trial she was back at full time work so the need for a maid's services were part-time, not full time. It is always difficult to quantify the amount of time for which a maid's services are required. Furthermore the cost of part-time service tends to be proportionately more expensive if hired on an hourly basis. The actual amount of time for which such service is required may be less than half the normal working day but in practice costs more than half the full-time rate.

Having been satisfied that the need on a part-time basis is reasonable and essential to give relief to the plaintiff in respect of the tasks for which she is now handicapped, we consider that half the cost should be allowed for the balance of the period up to trial.

Further costs of maid's servicess

Thereafter it should be at the same rate with a realistic multiplier. She is now 61 years old. Although we are satisfied that currently her need is for part-time services, when she retires and as she gets older, her need will progressively advance to a full-time need. Her problems will not cease but increase, despite the benefit of or relief from surgery in 5 to 10 years time. We think it unrealistic to conclude that she will have anything like a normal elbow after that treatment.

The suggested multiplier of 13 is too high and 10 is more appropriate. The projected future cost is to be halved and multiplied by 10.

The consequence of this review is that the following additional awards of damages will be made.

Future medical expenses:	BND$26,000.
Cost of maid from December 2011 to date of trial (judgment) (at half-rate) January 2012 to 2 April 2016:	BND$10,000
Cost of a maid from 2 April 2016 on future basis (at half rate calculated at an annual rate of $7,800 for a full time maid):	BND$39,000
	BND$75,000

There will therefore be the following order.

1. The appeal of the defendant is dismissed with costs.
2. The cross-appeal of the plaintiff is allowed with costs.

3. The sum of $75,000 damages as itemised in this judgment is additionally awarded and the judgment below will be varied so that the amount of damages awarded will now be BND$231,928.43 with interest to be calculated thereon at the prevailing rates appropriate to the heads of damages.

Delay and the interest point

The trial concluded on 18th October 2014. Judgment was not given until 2nd April 2016. It is regretted that this period of delay of 1 year and 5 months occurred and unfortunate that the four inquiries by letter from the appellant's solicitors to the trial judge as to when the judgment would be available went unanswered.

The applicant's counsel sought to argue that by reason of this delay there should be no award of interest on that sum for the period of delay. Whilst we have every sympathy with the parties for their having to wait so long, the appellant's insurers have retained the benefit of being able to use that money (even if they did not place it in an interest earning bond or such like) whilst the plaintiff has had to wait to know how much by way of damages she was to receive. To order that she should not have interest during the period of delay would penalise her unfairly. And what would be the appropriate period of time for which she should have to forego her interest? This is quite impossible to determine and a court should not have to indulge in such a speculative exercise. It would be quite unfair to deprive the plaintiff of any of her interest on the basis of some period determined by guesswork merely because the insurance company concerned has not been able to earn a level of interest on the money comparable to that to which the plaintiff is in any event entitled. The provision for interest is to remain as ordered.

Mortimer, P.

Burrell, J.A. **Seagroatt, J.A**