

BUALI BUNYANG AND ORS

Appellant

AND

TAN JI MUI AND ANOR

Respondent

**(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 9 of 2007)**

Power, P., Mortimer and Davies, JJA.
22nd May, 2008.

Negligence – joint tortfeasors causing collision which caused plaintiffs’ injuries – plaintiffs entitled to recover from either tortfeasor – duty of following driver.

Miss Subrina Tan (M/S Sandhu & Co.) for the Appellant.
Mr. John Lee (M/S YC Lee & Lee) for the Respondent.

Cases cited in the Judgment:

Clark v Newsham [1847] 1 Ex 131 at 140
National Coal Board v England [1954] AC 403 at 420
Stapley v Gypsum Mines Ltd [1953] AC 663

Davies, J.A.:

The appeal

This is an appeal against a judgment dismissing a claim by the first and second plaintiffs and what appears to have been intended to be a judgment for damages to be assessed against the defendants in respect of the third plaintiff’s claim together with consequent orders for costs. The action for damages arose out of a motor vehicle collision between a car and a light truck. The first and second plaintiffs were passengers or prospective passengers in the light truck; and the third plaintiff was the owner of the truck. There were two defendants, the driver and the owner of the car. The collision occurred at about 6.30 p.m. on 9 October 2003.

If, as appears to have been the intention of the learned trial judge, what was said in respect of the third plaintiff’s claim purported to be a judgment for damages to be assessed in respect of that plaintiff’s claim, the learned trial judge should have given that judgment; that is, a judgment for the third plaintiff against the defendants for one fifth of its damages to be assessed: Order 37 rule 1 of the Rules of the Supreme Court. Instead,

the learned trial judge simply made findings of liability between the plaintiff and defendants in the proportions of one fifth and four fifths respectively.

However we think that a better course, in a case such as this, where the assessment of damages could have been conveniently heard and final judgment given without the incurring of substantial additional costs, would have been for the judge to proceed to assess damages and give final judgment accordingly. Such a course would have required advance notice to the parties of the likelihood of that occurring so that they could have prepared adequately for that eventuality. But it would have eliminated the need for a further hearing with the consequent additional costs and delay which that would have entailed and now will.

The plaintiff's case

On the above afternoon, the driver of the truck, Mr Luqman, had been instructed by his superior Mr Jermis to pick up six workers who had been working on Simpang 112 just off a major road, Jalan Sungai Pandan. The instructions apparently were to pick up the workers, who included the first and second plaintiffs, on Jalan Sungai Pandan where they were waiting.

Accordingly, when he reached them where they were waiting by the road, he pulled over to the left side and stopped. According to both plaintiffs, the brake lights of the truck came on as it came to a halt. This evidence was uncontradicted and there is no reason to disbelieve it. They also said that they saw the hazard lights of the truck come on. That those lights came on before the collision was disputed by the defendants. We will return to this conflict later.

By the time that the collision occurred, four of the six workers had completely boarded the truck. One, Sopha, had entered the front cabin of the truck. Three others, Jardee, Muslih and the first plaintiff Buali had boarded the back of the truck in that order. The first plaintiff, the last of these to board, was standing on the back of the truck looking for a seat when the collision occurred.

At the time that the collision occurred, the last two workers, the second plaintiff Hariyanto and Budi Santoso, were in the process of boarding at the rear of the truck. The second plaintiff had his left leg already inside the truck and was about to lift his right leg on to the truck when he heard a loud bang and felt a sharp pain in that leg.

Only the two plaintiffs gave direct evidence, on the plaintiff's side of the record, of events immediately surrounding the collision.

The second plaintiff gave evidence that Luqman and Muslih had left the country some time after 9 October 2003. On the basis of that evidence, the plaintiffs sought to adduce statements taken by the investigating police officer from Luqman and Muslih. The learned trial judge refused to admit these on the ground that the evidence did not

convince her that either Luqman or Muslih was outside Brunei and that it was not reasonably practicable to secure his attendance. The learned judge then concluded:

“Therefore, the conditions in section 3A of the Emergency (Evidence Act) Amendment Order 1997 have not been satisfied and I will not admit this evidence.”

Section 3A became section 73A of the Evidence Act under the heading “Documentary evidence”. Subsection (1) of that section provided for the admission of documentary evidence which included a requirement that the maker of the statement contained in a document be called as a witness. It then contains the following proviso:

“Provided that the condition that the maker of the statement shall be called as a witness need not be satisfied.....if he is outside Brunei Darussalam and it is not reasonably practicable to secure his attendance.”

It is to this proviso that the judge was referring in refusing to admit the statements.

Two years after this section was inserted in the Evidence Act, that Act was further amended to insert a new Chapter XII headed “HEARSAY EVIDENCE” containing sections 168 to 175.

It was submitted for the plaintiff appellants in this Court by Ms Tan, in a well constructed argument, that these provisions implicitly repealed section 73A. We accept that argument. Chapter XII appears intended to deal comprehensively with hearsay evidence, whether documentary or oral. A clear indication of this appears from section 172 which, in subsection (2), makes the question whether it would have been reasonable and practicable to have produced the maker of the original statement as a witness a question going only to the weight of the evidence rather than, as in section 73A, its admissibility. We think therefore that the learned judge erred in excluding the statements of these two witnesses.

It should be added that the authenticity of neither of these statements was definitively proved. However, pursuant to section 170, the plaintiffs gave notice of their intention to adduce these statements in evidence, stating that there was no doubt as to their authenticity and the defendants did not, at any stage, dispute that. We do not think that any lack of definitive proof of this was an impediment to the admission of either of these statements.

The evidence contained in these statements tended to confirm the evidence of the first and second plaintiffs, referred to below, that the truck was stationary when they boarded it and that the hazard lights were then on.

There was, apparently, no evidence of the whereabouts of Sopha, Jaidee or Budi Santosa or about whether any of them would have been able to give any relevant evidence.

Presumably, at worst for the plaintiffs, the court could have inferred that the evidence of these witnesses would not have materially assisted the plaintiffs' case.

On the evidence which we have recounted so far, which was uncontradicted except as to the question of the hazard lights, the truck must have been stationary for at least several seconds before the collision occurred. It must have taken at least that long for the boardings and partial boardings which we have described to take place. The evidence of the first and second plaintiffs was that the truck was stationary before these boardings commenced. So much was conceded before us by Mr Lee, counsel for the respondent. Indeed he conceded that the truck must have been stationary for 3 to 5 seconds before the collision occurred.

The defendant's case

The first defendant, who was the only other witness to give direct evidence about the collision, said that, for some time, she had been travelling behind the truck at a speed of about 20 to 30 mph. She said that she was travelling quite closely behind it, about a car length away. Plainly she must have been mistaken about that for if, as was conceded by the respondent before this Court, the truck had stopped for 3 to 5 seconds before the collision, she must have been travelling at a considerably further distance behind the truck before it braked and stopped and must have still been a considerable distance behind it after it came to a complete halt.

She said that the truck stopped suddenly without any prior warning. If by that she meant that it did not activate its left trafficator, that may well have been correct. But she ought to have seen its brake lights and, given the length of time that it must have been stopped before she collided with it, she ought to have noticed that it had stopped well before she did. The only avoiding actions which she attempted were to steer to her right into the oncoming lane and to brake, both only in the instant before the collision, but she did not have time to do either of these to any effect before she collided with the rear of the truck.

First, there was a continuous white line along the side of the road in the direction in which the parties were travelling. This indicated a prohibition on parking, but not stopping, along that section of the road: Road Traffic Regulations, reg. 134(4). But Mr Luqman was not intending to park, and did not park where he stopped; he intended to and did stop only long enough for the workers to board the truck. Consequently the white line is of no more than marginal relevance.

It may possibly be relevant to the negligence of the truck driver because it may have reflected the volume of traffic which the road usually carried and the narrowness of the carriageway. These together may have made it more difficult for a following driver to move to his or her right to overtake a truck such as this one as it came to a halt. There was some evidence in this case which indicated that a following driver in the first defendant's position, in order to overtake the stationary truck, would have had to veer on to the oncoming carriageway. In other words, stopping in this way might constitute a

hazard to following motorists and so it might, in some circumstances, be negligent to stop, or at least stop suddenly.

However, in the present case, the defendant said that the road was not busy and was attempting an overtaking manoeuvre when she collided with the truck. She was unable to avoid the collision only because, by the time she attempted it, she was too close to the truck to avoid the collision. Yet when she first should have seen that truck had stopped, she must have been considerable distance away. At that distance, the first defendant would have had adequate time to stop before reaching the truck. For that reason, even if Luqman should not have stopped where he did, that would not have been an operative cause of the collision.

Secondly, there was evidence from the second defendant, the husband of the first defendant, that the hazard lights on the truck were activated only after he arrived at the scene of the collision some time later. For present purposes, notwithstanding the evidence to the contrary of both plaintiffs, we would be prepared to accept his evidence in this respect. But again it may be doubted whether the failure to activate the hazard lights amounted to operative negligence. It is unlikely that they would have been activated, even by a cautious driver, before the truck had come to a stop and the fact that it was coming to a halt would have been signalled in advance by the operation of the brake lights. More importantly, by the time the truck had come to a complete halt, the first defendant, as her counsel conceded, still had 3 to 5 seconds in which to stop or veer to her right to avoid the collision.

Thirdly there was a dispute between the parties as to the weather conditions at the time of the collision and the consequent state of visibility. Again, notwithstanding the evidence to the contrary by the investigating police officer and the two plaintiffs, we are prepared, for present purposes, to accept the first defendant's version of this; that it was getting dark, drizzling rain and that she had her headlights on though the plaintiffs truck did not have its headlights on. However this is, at best, of only marginal relevance to the question of any operative negligence. The first defendant had, for some time, been aware of the truck in front of her and if, as she said, visibility was not good, she ought to have paid much closer attention to it than she plainly did for more than 3 to 5 seconds before the collision.

The findings and judgment of the learned trial judge

The learned trial judge apportioned negligence, as between the first defendant and Mr Luqman, at 1/5 to the first defendant and 4/5 to Luqman. Consequently she apportioned responsibility between the third plaintiff and defendants in those proportions.

As to any breach of a duty of care to the first and second plaintiffs the learned trial judge said:

“However, if she were liable, she was only liable to the truck owner, the third plaintiff, and not both Buali and Hariyanto. Ample authorities have been adduced

which cast on the driver of the following car a liability to the driver and passengers of the leading car. However both Buali and Hariyanto were not passengers of a stationary truck. They were not really passengers of the truck because they were not already in the truck before the truck stopped. They were trying to board the truck and be a passenger of the truck when their adventure ended in a mishap.

Their presence on the road and their attempt in boarding the truck was not foreseeable by Tan. Luqman was not supposed to pick up passengers from the main road. It is illegal to stop and park on the main road and by the same token, one cannot pick up passengers by the side of any such road. Anyone who practices such acts only has themselves to blame if anything untoward were to happen. In practicing such a pattern of picking up passengers from the main road, Luqman and subsequently Jermis's employer, through Jermis, who gave him that instruction, had exposed them to danger and risk. They alone should be fully liable to the first and second plaintiffs".

Our conclusion

This is what we find difficult to understand. The first and second plaintiffs' injuries were caused by the collision between the car and truck. If, as the learned trial judge found, negligence by each of the first defendant and Luqman contributed to that collision, they were joint tortfeasors whose negligence caused those plaintiffs' injuries. In those circumstances, those plaintiffs were entitled to judgment for their loss and damage against both or either of them. See *Clark v Newsham* [1847] 1 Ex 131 at 140.

With great respect, we think that the learned trial judge failed to see that, having accepted that the first defendant was guilty of negligence contributing to the collision, it followed that the first and second plaintiffs, who were injured because of that collision, were entitled to recover damages from that defendant.

We turn now to the question of apportionment of responsibility between the defendants and the third plaintiff in respect of the third plaintiff's damages which, it must be accepted, must be reduced if, and to the extent that, Luqman's negligence was responsible for the collision.

Generally, if an appellate court accepts the lower court's findings of fact, and there is no error of law, it will be reluctant to interfere with the lower court's apportionment of responsibility. That is because, as a rule, "an appellate body does not interfere with the discretion exercised by the judge who tried the case": *National Coal Board v England* [1954] AC 403 at 420 in which the House of Lords nevertheless altered the apportionment of responsibility, as it did also in *Stapley v Gypsum Mines Ltd* [1953] AC 663.

Here, we regret to say, there has been, in our opinion, incorrect inferences of fact and an error of law. The principal error of fact which, in our opinion, the learned trial judge

made, was in failing to appreciate the length of time during which the first defendant should have seen the truck coming to a halt and remaining stationary for long enough for four people to board it. And the learned trial judge erred also, in our opinion, in failing to see that, because the first defendant ought to have had, and said she had the truck within her field of vision for some time before it stopped and because she attempted avoiding action only moments before the collision, the fact that Luqman brought the truck to a halt where he did, even if he should not have done so, was not an operative cause of the collision.

As the learned trial judge pointed out, in effect, in the passage which we have quoted from her reasons, the driver of a following car has a heavy duty to drive at a speed and at a distance behind the vehicle in front, and to keep such a look out, as to be able to avoid a collision in the event that the vehicle in front slows or stops suddenly. However, as we have shown, this was not a case of a sudden stopping immediately before a collision, and the first defendant's negligence is, for that reason, all the more serious.

Even if it is true that Mr Luqman, or his employer, should have selected a safer pick up point than at the side of a quite narrow road on which, no doubt for that reason, parking was prohibited, that was not operative negligence for the reasons we have given. The first defendant's negligence was, in our opinion, the sole cause of the collision.

Orders

1. Allow the appeal;
2. Set aside the orders made by the Intermediate Court Judge;
3. In lieu:
 - a) give judgment for each of the first, second and third plaintiffs against the defendants for their damages to be assessed;
 - b) order nisi that the defendants pay the plaintiffs their costs of this appeal and of the trial unless application is made to this court by 9.00 a.m. on Saturday 24th May 2008.