Imam Muhajir … **Appellant**
[In his personal capacity and as Administrator
for the Estate of Waqingatul Ngadawiyah (Deceased)]

AND

Shahul Hameed Jahir Hussain … **1st Respondent**
Koperasi Serbaguna Mukim Lumapas Bhd … **2nd Respondent**

(Court of Appeal of Brunei Darussalam)
(Civil Appeal No. 9 of 2010)

Mortimer, P.; Davies and Leonard, JJ.A.
27th November, 2010.

Approach of Court of Appeal to findings of fact based on acceptance by trial judge of oral evidence – advantage of trial judge who has seen and heard witness.

Mr. Leney Andrew Albert of Messrs. Sankaran Halim for the Appellant.
Mr. Eric Siow of Messrs. Lt. Col (Rtd) Harif Eric for the Respondents.

Davies, J.A.:

The appeal

This is an appeal from a judgment of the Intermediate Court on 20 March 2010 dismissing an action for damages for wrongful death of Waqingatul Ngadawiyah on 15 September 2002. The plaintiff, appellant, sued in his personal capacity and on behalf of the estate of the deceased pursuant to the Fatal Accidents and Personal Injuries Act, 1991.

At the conclusion of argument we dismissed this appeal with costs. The following are our reasons for doing so.

The deceased was a bus conductor employed by the second respondent. She had been so employed since about March or April 2001. The first respondent was a bus driver also employed by the second respondent.

On 15 September 2002 at about 7 p.m. the first respondent and the deceased had finished their day's work and the first respondent was driving the deceased home in bus number 47. It was part of their ordinary work at the end of their driving shift to return to the bus depot where the conductor would hand over tickets and money and they would there together clean the bus. Ordinarily the driver would clean the outside of the bus while the conductor would clean the interior. However, according to the first respondent, on the night in question the deceased said that she was tired and asked the first respondent to drive her home without pausing to clean the bus.

It was during the course of this drive that the deceased suffered injury from which she died. She apparently fell out of the passenger door of the bus onto the roadway pavement causing the injuries from which she later died. The only people present at the time this occurred were the first respondent and the deceased.

This last fact posed a substantial difficulty at trial for the plaintiff unless the evidence of the first respondent supported a finding of negligence against him, and consequently vicariously against the second respondent, causing the deceased's fall; or supported a finding of a negligent system of work causing the deceased's fall; or the evidence left it open to the court to infer negligence causing the fall.

Unfortunately for the appellant, the first respondent gave evidence which did not support either of those findings and his evidence was accepted by the learned judge who found him to be a trustworthy witness. This poses an additional difficulty in this appeal, courts of appeal being generally reluctant to overturn findings of fact by a trial judge. This reluctance is even stronger where those findings depend primarily on an assessment of credit of witnesses by the trial judge who has had the advantage of seeing and hearing them give evidence. That was the case here.

We now turn to the relevant evidence.

The evidence and the judge's findings

The passenger door on the bus was on the left-hand side level with or possibly a little behind the driver. If operating correctly, it could be operated either automatically by the driver or manually by the conductor depending on the position of the switch beside that door. Ordinarily, when the bus is in operation, the switch is in automatic mode so that it is operated only by the driver.

The first respondent gave evidence that, on the day in question the automatic passenger door was operating correctly. Counsel for the appellant then put to him that, in a statement to police on 11 March, 2004, he had said that the automatic door was "spoilt". In the English translation from its original Malay which we have and which was agreed by the parties, the relevant question and the first respondent's answer are recorded as follows:

> *"Is there any automatic system for the door of bus 47 registration number BS5850 or not?"*
> *"Yes, there is an automatic system but it was already faulty and it can be opened by the bus conductor."*

Without more, it is unclear what this statement means. In any event, the first respondent denied having made such a statement notwithstanding having signed the document on which this statement was recorded. The first respondent is a Tamil speaker and gave his evidence at trial in Tamil through an interpreter. He said that he did not read Malay, the language in which his above statement had been recorded and that, notwithstanding that, he signed the document. The learned trial judge accepted his evidence that he did not say what is recorded in his written statement.

His evidence at trial about what he said, relevantly, in his interview on 11 March, 2004 was that there was no defect; that the door was operating manually. This must a reference to his evidence, referred to below, that he heard the door open.

The first respondent's evidence that, on the day in question, the automatic mechanism of the door of the bus was operating correctly was supported by the evidence of Aini bin Haji Ahmed, the manager of the second respondent who gave evidence that, after the accident, a mechanic Shah Alam Shaikh, employed by the second respondent had examined the door mechanism and found it to be operating normally.

This was plainly hearsay evidence and, in this Court for the first time, the appellant sought to have it excluded on that basis. We refused that application. Chapter XII of the Evidence Act provides, in section 168, that the provisions of that Chapter apply to all civil proceedings, notwithstanding any provisions of that Act; in section 169(1) that, in civil proceedings, evidence shall not be excluded on the ground that it is hearsay; and in section 170(3) that if no prior notice is given of an intention to adduce hearsay evidence, that failure may be taken into account in affecting the weight of that evidence. The above evidence was therefore admissible although the failure to give prior notice of an intention to adduce it may affect its weight.

The learned judge accepted that on the day in question, the door was operating correctly.

When they set out on the journey from the bus depot to the deceased's home the deceased, according to the first respondent, was seated next to and immediately behind the stairs leading down to the passenger door notwithstanding that there were designated seats for a conductor in front of those stairs.

The journey required the driver to turn left at a road junction. It was, he said, at a point about 100 feet after that road junction, when he was travelling at about 40 km an hour, that the accident occurred. Sometime during the course of this journey, it is unclear whether this was before or after the first respondent had negotiated the junction, the first respondent noticed in his rearview mirror that the deceased had risen from her seat and was walking around the bus picking up rubbish and pieces of paper on the floor of the bus. She had a bucket in her hand. The bucket was found by the first respondent on the roadway near the deceased’s body.

The first respondent said that he then heard the bus door being opened. He asked the deceased why she had opened the door and when he received no response, he said, he looked in his rearview mirror and saw that she was no longer there but that one of her slippers was on the floor. He stopped the bus immediately. She had, he inferred, fallen out of the door. He got out of the bus and went to where he found the deceased lying on the roadway. From there she was taken to hospital where she died some time later.

What we have set out so far was, we think, what the first respondent either saw or heard or reasonably inferred from that. However he also said:

> *"While I was driving her back home, she wanted to throw the bucket that was full of rubbish and a bit of water. It was like a rubbish bin in the bus. She opened the door with the manual switch……"*

This appears to be a mixture of inference and speculation from what he saw and heard.

The appellant had alleged that the respondent was travelling at an excessive speed. The learned trial judge accepted the first respondent's evidence that he was at the time of the incident travelling at 40 km an hour and described this speed is by no means fast.

It was also alleged by the appellant that the bus door mechanism was defective and that it had fallen open, permitting the deceased to fall out. The judge rejected this allegation, having accepted the evidence to the contrary to which we have referred. She also said that any such conclusion was inconsistent with the statement of the first respondent, which she accepted, that he asked the conductor why she had opened the door.

The learned judge, having accepted the first respondent as a truthful witness, inferred that the deceased probably opened the door manually, perhaps to throw rubbish out, and had fallen out of the door. In those circumstances she concluded that her accident and death were caused solely by the deceased's own negligence in standing and moving about inside the moving bus and in opening the door manually while the bus was being driven at about 40 km per hour.

The appellant's contentions and our conclusion

Before this Court the appellant had three principal contentions. First he contended that, accepting the first respondent's estimate of his speed at 40 km an hour, this was an excessive speed, particularly in the circumstances in which the first respondent was rounding a corner while, as he knew, the deceased was walking around the bus and picking up items of rubbish and paper from the floor; and that this excessive speed was a cause of the accident.

Secondly he contended that the learned trial judge should not have accepted the hearsay evidence as to what the mechanic had said about the safe working of the door mechanism. And thirdly he contended that the learned trial judge was wrong to accept the contentious evidence of the first respondent when it was plain that he had an interest in the outcome of the case and there were inconsistencies in his evidence.

Once the evidence of the mechanic and that part of the first respondent's evidence which was contentious was excluded, the appellant says that, applying the doctrine of res ipsa loquitur, the Court should have inferred negligence of the respondents which caused the accident. That is, that the Court should have inferred that the door opened spontaneously while the deceased was walking round the cabin and picking up rubbish and paper and that this caused her to fall out; or that the first respondent's excessive speed contributed to the propulsion of the deceased out of the door.

There was opinion evidence from the investigating police officer that the first respondent's speed was excessive. However, when that police officer came to give evidence nearly 10 years after the accident it was plain that he had very little recollection of what had occurred and in a number of respects his evidence appeared to be inconsistent with his sketch plan and statements taken from the first respondent shortly after the accident.

Consequently, there was no evidence from which it could be inferred that 40 km an hour was an excessive speed having regard to the nature of the roadway at the time at which the first respondent was driving at that speed. Nor was there any evidence as to how long had elapsed between the time when the first respondent saw the deceased walking around picking up rubbish and paper and the time when he braked prior to stopping the bus; or how long between his hearing the door open and his braking. In those circumstances we find it impossible to conclude that he ought to have driven more slowly or slowed down or stopped before he did.

As to the second contention, even if the learned judge should have given the hearsay evidence less weight than if it had been direct evidence, she was plainly entitled to accept it as she did.

The appellant's third contention is, even at first sight, difficult to sustain. The judge accepted the first respondent as a witness of truth having seen and heard him give evidence and having, no doubt, taken into account the fact that he had an interest in the outcome of the trial. In such cases courts of appeal are reluctant to overturn findings of fact based on the acceptance of such oral evidence because of the evident advantage which the trial judge had in assessing the reliability of that evidence.

We are unable to say that the judge erred in accepting the evidence of the first respondent. It follows that the third contention must also fail. And we think that the failure of that contention means that this appeal must also fail. We do not think that the evidentiary rule of res ipsa loquitur can have any application once the evidence of the first respondent is accepted.

Mortimer, P.

Davies, J.A. **Leonard, J.A.**