**Carmelina J. Vasquez** … **Appellant**
**(as administrator of Dennis Veluz Landicha)**

AND

**Mohd Alit Abd Rahman Bin Hj Mohd Jaafar & Anor** … **Respondent**

---

**(Court of Appeal of Brunei Darussalam)**
**(Civil Appeal No. 15 of 2007)**

---

Power, P; Mortimer and Davies, JJ.A.
**22nd November, 2008.**

Civil appeal. Fatal accidents claim. The deceased cyclist riding erratically in same direction as the car driven by the defendant. Driver sounded horn to warn cyclist of his approach. Cyclist pulled in towards his nearside. When the driver was passing him he suddenly and without signal or warning rode to his right into the path of the car. The judge's decision that the accident was entirely the fault of the cyclist upheld on appeal. The decision of the judge purely a question of fact.

Mrs Naz Parveen Rashid of Messrs. Sandhu & Co for the Appellant.
Mr Pg Izad Ryan Bin PLKD Pg Hj Bahrin of Messrs Pg Izad & Lee for the Respondent.

**Cases cited in the Judgment:**

*Smith and Others v Air Tours Holidays Limited* [2004] EWCA Civ. 453.

**Mortimer, J.A.:**

On 30th August 2007 Hairolarni J.C. (as he then was) dismissed this plaintiff widow's fatal accident claim for the death of her husband (the cyclist) in a road accident on 13 December 2002.

At about 09:15 am on that day the cyclist was riding along Kampong Kapok Jalan Muara in the Muara direction. The first defendant (the driver) was driving the second defendant's car in the same direction when it collided with the cyclist who suffered severe head injuries from which he died. He was 28 years of age.

The road was reasonably straight with a single carriageway in each direction. The driver, the second defendant and another passenger were the only eyewitnesses. According to the driver's evidence, supported by the others, he first saw the cyclist

well ahead of him riding erratically in the middle of the same carriage way. He slowed down and sounded his horn on several occasions to warn the cyclist of his approach. The cyclist moved in towards his near side. The driver then made to pass the cyclist and in doing so encroached slightly over the centre of the road. As he was about to overtake the cyclist suddenly moved into the path of the car without looking and without signalling. The cyclist was struck by the near side front of the car so that he was thrown onto the car and then onto the road. He landed near the centre.

The judge accepted the defendants' evidence as described above and dismissed the claim holding that the cyclist was solely to blame for moving in front of the car suddenly and without any signal or warning so that the driver was unable to avoid colliding with him.

**The appeal**

Mrs. Parveen appears for the plaintiff on this appeal. She concedes at the outset the difficulty of her task. She seeks to overturn the judge's decision which depends entirely upon his findings of fact on the evidence he saw and heard.

Nevertheless, she contends that the judge ought to have rejected the defendant's evidence on grounds to which we will refer. He ought to have found on a balance of probability that the cyclist continued to ride erratically in the centre of the carriage way and to move towards the centre of the road. The defendant driver seeing that the cyclist was continuing to move in that direction tried to overtake or move alongside the cyclist to scold him for his riding and so collided with him. On this version of the facts Mrs. Parveen says that the judge ought to have found the driver at least 50% to blame for failing to slow down sufficiently, for driving too fast and for not sufficiently heeding the presence of the cyclist on the road.

In suggesting that the judge was wrong to accept the evidence of the driver and his witnesses Mrs. Parveen submits that the judge overlooked a number of flaws in the evidence. The first is the inherent improbabilities of the driver's version. She submits that it is highly improbable that the cyclist moved to his left having heard the warnings and then suddenly and suicidally moved to his right in front of the car. The probability was that the cyclist was riding in the carriageway in front of the car, and continued to move to the right towards the centre of the road until the car collided with him from behind.

Secondly she contends that there are inconsistencies between the second defendant's and the other passenger's statements to the police and their evidence at trial including their affidavits. In particular she says that the second defendant and the passenger failed in their police statements (taken shortly after the accident) to describe the cyclist pulling into the left hand side of the road after the warnings.

Additionally, she says that the judge failed to take into account that the driver and the other two eyewitnesses each made affidavits describing the events leading up to the accident and the accident itself in precisely the same words. The judge should have treated their evidence with the greatest suspicion on the grounds that the similarities

demonstrated collusion between the witnesses or that the evidence was suggested by a third party. As an example she cites *Smith and Others v Air Tours Holidays Limited* [2004] EWCA Civ. 453 where the judge rejected similar identical statements on the basis that important features of the statements must have been suggested to their makers

Lastly, on this aspect of the appeal, she submits that the judge failed to give any or any sufficient weight to the evidence of the second defendant (a passenger) that the driver intended not to pass the cyclist but to draw near and scold him for his erratic riding.

Finally Mrs. Parveen turned to the expert evidence. She criticizes the judge for preferring the evidence of Mr. Marks, the defendants' expert, to that of Mr. Ruller the plaintiff's expert and failing to give adequate reasons for doing so.

In his report Mr Marks makes two statements which she challenges. The first is:

> *"It appears that the deceased was riding his bicycle towards Muara and when they [the defendants] were in the vicinity of a mini mart grocery shop."*

The second:

> *"It appears from the witness statements summary that the entire sequence of events took place within 44.1m distance from the Mini Mart grocery shop driveway to the entrance of Simpang 209*."

She points out that these opinions were founded upon the time involved for the car to travel from the Mini Mart (shown on the plans) to the accident amounting to between 1.8 and 2.6 seconds, whereas the driver's evidence was that he was about 50m before the Mini Mart when he first saw the cyclist. This doubles the distance used by this expert. So Mrs. Parveen argues that having rejected this evidence the judge ought to have found that the defendant had sufficient time to slow down, remain behind the cyclist and so avoid the collision.

Relying upon all these matters that plaintiff urges this court to say that the judge was wrong and that in all the circumstances even the admitted speed of 50 to 60 KPH was too fast and that the accident was caused by the defendants negligence in driving too fast, failing to stay behind the cyclist and failing to drive its so as to avoid him.

Mr Pengiran Azad, for the defendant, submits that there are no grounds for the court to disturb the judge's decision. He correctly reminds the court that this appeal turns purely on questions of fact. The judge saw and heard all the evidence given. There is no reason to doubt that he took advantage of seeing and hearing the witnesses. Further, all the accepted and agreed physical evidence at the scene is consistent with his decision.

He readily admits responsibility for the affidavits of the driver and the passengers and to having interviewed all three together with the consequence that each was identical

in its material parts. None of the witnesses spoke English. However, he draws our attention to the material evidence each gave in cross examination and re-examination which covered the material facts founds.

He also referred to the police statements of the second defendant and the passenger. The word for word literal translation of the English version made the discrepancies between their statements and evidence appear greater than they were in fact. The judge speaks Malay so he would not be misled by the translation.

**The submissions considered**

The judge set out the substance of the evidence of each witness and clearly had all the evidence in mind. Although he made no reference to it this must include the second defendant's evidence that the driver intended to scold or speak to the cyclist.

Mrs Parveen was able to make all the points to the judge which she now makes to this court. He considered them. These include the identical affidavits, the discrepancies in the police statements, the intended scolding, and the overall probabilities.

Each witness was examined and cross examined. The judge had this evidence to consider as well as the affidavits.

Even though he accepted Mr. Mark's criticized evidence of time and distance to which we have referred this is not a sufficient basis to disturb his principal findings on which this case turns. The experts had a limited contribution in this case. Neither was able to examine the road nor the damage to the vehicles immediately after the collision. They each described the damage to the vehicles from the police photographs and draw inferences from the police sketch plan and pre-hearing statements of the witnesses. Each was permitted to make suggestions as to how the accident may have happened and what the driver ought to have done to avoid it which was neither expert evidence nor admissible

The driver and his passengers were the only eyewitnesses. The evidence they gave was unequivocal and uncontradicted. It is significant that all the independent physical evidence of the damage to the vehicles, of the point of impact, and of the position of the car on the offside carriageway where it came to rest, was consistent with their evidence as accepted by the judge. Mr Pengiran Azad pointed out that the damage to the bicycle was consistent with being hit on the offside. Although this was not relied upon by the judge it is consistent with his finding.

**Conclusion**

Mrs Paveen makes every possible point on behalf of her client but for the reasons we have given we are satisfied that the judge's findings of fact where firmly based on the evidence on which it was open to him to accept and find as he did. The agreed physical evidence was consistent with his decision and there's no reason to think that

he did not have all the evidence and the submissions made by counsel in mind when he made those findings.

This appeal is dismissed.

**The orders**

1. This appeal is dismissed.
2. An order nisi that the appellant plaintiff shall pay the costs of the appeal to be taxed if not agreed. The order to become absolute at 9.00 am on 26 November 2008 if application is not made before.

**Power, P**

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