Judgment 21

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL No. 12 of 1972

ON APPEAL

FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN :

WONG THIN YIT	Appellant (Defendant)
- and -	
MOHD ALI bin P.S. ISMAIL (suing as an infant through his father and next friend Abdul Rahman s/o Syed Ibramshah)	Respondent (Plaintiff)

CASE FOR THE APPELLANT

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1. This is an appeal from the Judgment of the Federal Court of Malaysia (Ong, C.J., Gill, F.J. and Ali, F.J.) dated the 9th day of July, 1971, which dismissed an appeal (Ong, C.J. dissenting) from a Judgment of the High Court in Malaya at Ipoh dated the 23rd day of February, 1971, (Grounds of Judgment given on the 14th April, 1971) when Judgment was given for the infant Plaintiff (Respondent herein) in the sum of $33,000, being as to $32,000 general damages for personal injuries and as to $1,000 agreed special damages suffered by the Respondent as a result of the Defendant's (Appellant) negligence, with interest at the rate of 6% per annum from the 23rd day of February, 1971, until the date of realisation, and costs. pp.25,34, 39. p.19

2. In his Statement of Claim, dated the 8th May 1970, the infant Plaintiff averred as follows, so far as material: p.3

> "1. The Plaintiff is an infant suing by his father and next friend whose place for service is No. 11 Jalan Tokong, Kampar, Perak.
>
> 2. The Defendant is the owner and driver of motor cycle No. AJ 8007. His address for service is No. 24 Jalan Gopeng, Kampar, Perak.

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3. On the 21st February 1969 the Plaintiff was knocked down by the motor cycle driven by the Defendant from the rear and as a result of the accident the Plaintiff's right leg was amputated above the knee.

4. The said accident was caused due to the negligence of the Defendant.

5. PARTICULARS OF NEGLIGENCE

(a) Failing to keep any or any proper look out;

(b) Driving at an excessive speed in the circumstances;

(c) Failing to observe the position of the Plaintiff walking on the highway;

(d) Driving into the Plaintiff from the rear;

(e) Failing to give any or any sufficient warning of his approach;

(f) Failing to stop, slow down or otherwise avoid the severe collision."

3. The Plaintiff then dealt with special damage and continued:

p.4 L.23

"7. PARTICULARS OF INJURIES

Medical Report by Dr. S. Appu, Orthopaedic Unit General Hospital, Ipoh, dated the 7th March, 1970.

On Exam: General Condition - Poor
In coma

Injuries: (1) 3" laceration over the forehead

(2) Crush injury right leg - involving the bones, and all other structures of the right leg.

The patient had to undergo a through right knee amputation of right leg in view of

injury (2). The patient was discharged on 6.4.1969 from the ward and followed up as an out-patient. Record

Subsequently, the patient had to have right patelectomy done on 21/5/69 and discharge from the ward on 10/6/69. On 8/7/69 he was referred to the Superintendent of Artificial Limb Centre, General Hospital, Kuala Lumpur for a right through knee artificial leg and pair of shoes.

8. And the Plaintiff claims damages."

4. In his Defence, dated the 17th June, 1970, the Defendant denied knowledge of the facts averred in paragraph 1 of the Statement of Claim, admitted paragraph 2 thereof and continued: p.6

"3. Save that it is admitted that a collision took place on the date and place specified between the Defendant's motor cycle and the Plaintiff, paragraph 3 of the Statement of Claim is denied. The Defendant avers that the said collision was caused solely and/or contributed to entirely by the negligence of the Plaintiff. p.6 L.16

4. The Defendant denies that he was negligent as alleged in paragraph 4 of the Plaintiff's Statement of Claim or at all and save as aforesaid the Defendant denies each and every allegation in the Particulars of Negligence as set out in paragraph 5 of the Statement of Claim.

PARTICULARS OF NEGLIGENCE OF PLAINTIFF

(a) Failed to keep any or any proper look out or at all;

(b) Failed to observe the approach of the Defendant's motor cycle;

(c) Failed to observe the simplest elements of kerb drill;

(d) Attempted to cross the road when it was unsafe for him to do so;

(e) Suddenly and/or without any or any sufficient warning or indication ran across the path of

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the said motor cycle without taking any measure whatsoever to ensure that it was safe for him to do so;

(f) Failed to remain at the edge of the road and allow the Defendant the free excess (sic) of his right of way;

(g) Failed to stop, slow down or in any manner so as to avoid running into the Defendant's motor cycle and/or so as not to give the Defendant any opportunity of avoiding the said collision."

5. The action was heard in the High Court at Ipoh before The Honourable Mr. Justice Pawan Ahmad on the 21st and 23rd February, 1971.

p.17 L.32 6. Counsel for both parties told the learned Judge that special damages were agreed at $1,000 and an Agreed Bundle of Documents was put in and marked Exhibit "A". The Bundle included:

p.48 (1) Police Report dated 21st February 1969 (No.1)

p.49 (2) Sketch plan (No.3)

p.51 (3) Key to sketch plan (No.4)

p.52 (4) Medical Report of Dr. S. Appu dated 7th March 1970 (No. 9)

p.53 (5) Notes of Evidence in Summons Case No. 513/69 in the Magistrates Court at Kampar, heard on the 8th September 1969, when the Defendant was acquitted on a submission of No Case to Asnwer (No.10)

p.8 7. Evidence was given by the Plaintiff, P.W.1. He said he was at all times on the grass verge and p.9 did not try to cross the road. Evidence was also p.11 given by P.W.2. Kunasegeram s/o Marimuthu and P.W.3. Kumaran s/o Sinniah, who told substantially the same story. None of these witnesses was sworn, but all were warned to speak the truth, being aged, respectively, 12, 13 and 12.

8. The Defendant did not appear, and no witnesses were called on his behalf. Nevertheless, the evidence given before the Magistrates' Court was available to the learned trial Judge, as was the

Defendant's version of the accident in the Police Report. Record

9. At the proceedings in the Magistrate's Court the Plaintiff had said that he was walking on the edge of the road about two feet from the grass verge. Evidence was also given by P.W.6. Sgt. 13325 Ahmad bin Mohd Zain who found broken pieces of glass in the road and scratch marks on the road. A rattan cake basket, which the Plaintiff had been carrying, was also found in the road. The positions of the scratch mark and the cake basket are marked on the sketch plan in the agreed bundle. The scratch mark was 40 feet long and between 1 foot 8 inches and 1 foot 10 inches from the edge of the grass verge. The Defendant's version of the accident as contained in the Police Report was that all three pedestrians (witnesses P.W.1., P.W.2., and P.W.3.) had crossed the road from the Defendant's left, when he was about 30 yards from them. He braked, then they suddenly crossed back.

p.55 L.8
p.58 L.22
p.58 L.25
p.58 L.17
p.48

10. Notwithstanding the evidence contained in the agreed bundle, the learned trial Judge found the Defendant solely to blame for the accident, and awarded $32,000 general damages with 6% interest and costs.

11. In his Grounds of Judgment, dated the 14th April, 1971, the learned Judge dismissed the Defendant's version, it is submitted wrongly, as:

> "...highly improbable because it was unlikely that the three children would have crossed back the road immediately after they had crossed it. Further, if the Defendant had been travelling at the speed of 25 m.p.h. and had applied brakes before the children crossed back I failed to see how he could have knocked into the Plaintiff unless he was negligent. The injuries suffered by the Plaintiff as a result of the accident were a fracture to his right leg and a laceration on his forehead and that would appear to be consistent with the version given by the Plaintiff that he was knocked from behind and falling forward rather than with the Defendant's report that the Plaintiff was knocked while back to the left side of the road meaning that he was knocked on the left side."

p.16 L.45

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12. The learned Judge found that the scratch mark was made by the motor cycle and continued, it is submitted wrongly:

p.17 L.21

> "The position of the scratch mark as well as the positions of the basket and cakes shown in the sketch plan and in the photographs tended to indicate that the accident took place at that point somewhere very near the left edge of the road - either on the grass verge or on the road. The road was also clear of traffic at the time of the accident and if the Defendant had not been negligent the accident would not have occurred. I therefore found that the accident was wholly due to the negligence of the Defendant."

13. The Defendant was dissatisfied with the Judgment of the learned trial Judge and appealed to the Federal Court of Malaysia. The grounds were that the learned Judge:

p.21

(1) Erred in holding the accident to have occurred on the grass verge;

(2) Erred in failing to consider the Plaintiff's contributory negligence and in finding the Defendant wholly to blame;

(3) Erred in finding the Defendant's version highly improbable;

(4) Erred in finding the Plaintiff's injuries inconsistent with the Defendant's version;

(5) Erred in awarding $32,000 general damages, which figure was too high.

14. The Appeal was heard on the 7th June, 1971 and Judgment was delivered on the 9th July, 1971, when the appeal was dismissed with costs, Ong C.J. dissenting. Gill and Ali F.J.J. basically thought, it is submitted wrongly, that Pawan Ahmad J. had made findings of fact which were correct and which in any event could not be upset by the Federal Court. The Police Report was not in their judgment substantive evidence (per Gill F.J.) but hearsay and inadmissible (per Ali F.J.). Gill and Ali F.J.J., it is submitted wrongly, further dismissed the appeal as to quantum.

p.36 L.23

p.42 L.39

15. Ong C.J., dissenting, held, it is submitted correctly, that the learned trial Judge could not have fully accepted the evidence of the Plaintiff and his two witnesses, as he did not categorically hold that the accident took place on the grass verge. He further held, it is submitted correctly, that the Federal Court was in as good a position as the trial Judge to draw inferences from findings of fact, and that the Defendant's version was probable and that the accident on the balance of probabilities happened as related by the Defendant. Accordingly he would have apportioned liability for the accident equally. Record p.25

16. Being dissatisfied with the said Judgment, the Defendant applied for leave to appeal to His Majesty The Yang di-Pertuan Agong, and an order granting leave was made on the 10th January 1972.

17. It is respectfully submitted that the learned trial Judge was wrong in finding for the Plaintiff/ Respondent. At no stage in his judgment did he say in terms that he accepted the evidence of the Plaintiff and his witnesses although he sets out his version that "he was walking on the correct side of the road along the grass verge about 2 feet away from the edge of the road", and records that his two friends "in short more or less gave the same version of how the accident occurred". It is indeed submitted that the learned trial Judge must be taken to have rejected the evidence that the Plaintiff was on the grass verge about 2 feet away from the edge of the road as being inconsistent with the scratch mark made by the motor cycle. His finding on this point reads as follows :

> "From the scratch mark shown in the sketch plan it was apparent that it was made by the motor cycle. The position of the scratch mark as well as the positions of the basket and cakes shown in the sketch plan and in the photographs tended to indicate that the accident took place at that point somewhere very near the left edge of the road - either on the grass verge or on the road."

18. It is respectively submitted that the positions of the scratch mark, the basket and the cakes are consistent, and consistent only, with a collision in the road and not on the grass verge, and the

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learned trial Judge ought to have so held; but the quotation from his judgment is sufficient, it is submitted, to show:

(1) that (apart from the fact that the injuries suffered by the Plaintiff were a fracture to his right leg and a laceration on his forehead) the only primary findings of fact the learned trial Judge felt able to make were that the scratch mark made by the motor cycle and the positions of the basket and cakes were as shown on the sketch plan and photographs included in the agreed bundle of documents, and

(2) that the learned Judge cannot be taken to have considered that the evidence provided by the scratch mark, basket and cakes was in any way corroborative of the evidence of the Plaintiff and his witnesses that he was on the grass verge about 2 feet away from the edge of the road.

19. The evidence of the Plaintiff and his witnesses was open to serious criticisms in that they all gave accounts of P.W.2. Kunasegerum s/o Marimuthu calling out a warning to the Plaintiff and the Plaintiff reacting to the shout during the very short space of time it would have taken the motor cycle to cover a distance of about 12 feet. The Plaintiff said: "I was ahead of my two friends. They were behind me about 12 feet away" "My friends who were at the back called me by my name and they shouted out that a motor cycle was coming. I turned round to see it but before I could see the motor cycle it knocked me from behind. It was when I was about to turn round that the motor cycle knocked into me." P.W.2. Kunasegeram s/o Marimuthu P.W.2. said "P.W.1. /the Plaintiff/ was about 12 feet in front of me ... While we were walking I heard the sound of a motor cycle coming from behind. It grazed me, and I fell down. At that time I shouted out to P.W.1. and as he was about to turn round he was hit by the motor cycle from behind ... I did turn round to look at the motor cycle. When I first saw this motor cycle it was about 5 feet to 6 feet away. The motor cycle was then on the road. But the motor cycle came suddenly on to the grass verge and came straight towards me. So I moved further away but the motor cycle grazed my leg. Kumaran was

p.9 L.1
p.9 L.9
p.10 L.7
p.10 L.10
p.10 L.20

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then to my left. I jumped to my left and I knocked into Kumaran and he too fell on the grass verge. The rear wheel of the motor cycle grazed my leg. I still had time to shout out to P.W.1. I only shouted out P.W.1.'s name but before he could turn round the motor cycle hit him. I agree that all these things happened in a short space of time." P.W.3. Kumaran s/o Sinniah said: "P.W.2. was walking abreast with me and he was on my right. P.W.1. was walking ahead of us about 10 to 12 feet away ... After P.W.2 was grazed by the motor cycle he shouted out to P.W.1. by calling out his name and shouting out that a motor cycle was coming. The front wheel of the motor cycle knocked into P.W.2. After that the motor cycle went along the grass verge and it knocked into P.W.1." p.11 L.9 p.11 L.30

20. It is submitted that the learned trial Judge was right, when the only oral evidence before him was that of three unsworn children whose accounts were uncorroborated by and indeed largely inconsistent with the evidence provided by the sketch plan and photographs, and in some respects incredible, to make no finding that he accepted the truth of their accounts.

21. It is submitted that the learned trial Judge was right to attach weight to the evidence provided by the sketch plan and photographs and to consider, as an alternative theory of how the accident could have happened, the Defendant's report to the Police made within 2 hours of the collision, all of which were in the agreed bundle of documents put before the learned Judge, but that he was wrong in rejecting the Defendant's account as highly improbable.

22. It is submitted that since children of the age of the Plaintiff and his friends have been known to play games of daring in traffic the Defendant's account is no more improbable than that he should suddenly for no ascertainable reason have left the road and driven on the grass verge.

23. It is submitted that if the Plaintiff and his friends behaved in the manner described in the Defendant's report it is not surprising that an accident occurred even though the Defendant had applied his brakes before the children crossed back, and if the learned trial Judge intended to hold that he would have found the Defendant negligent on his own account of how the accident occurred, there

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was no evidence on which he could properly do so.

24. It is submitted that the only proper inference to be drawn from the positions of the scratch mark, the basket and the cakes is that the collision occurred in the road; but that even if the learned trial Judge was justified in holding that their
p.17 L.23 positions "tended to indicate that the accident took place at that point somewhere very near the left edge of the road, either on the grass verge or on the road", such a finding, involving as it did a rejection of the account of the Plaintiff and his witnesses as to the Plaintiff's position on the grass verge 2 feet from the edge of the
p.17 L.29 road, could not properly support the further inference that "if the Defendant had not been negligent the accident obviously would not have occurred."

25. In the Federal Court of Malaysia Ong C.J. came to the conclusion, it is submitted correctly, that the learned trial Judge had not accepted the
p.27 L.5 Plaintiff and his witnesses as witnesses of truth. He said "In the instant case there was no ambiguity in the Plaintiff's evidence as to where he was when he was knocked down. He was "in fact walking on the grass verge about 2 feet away from the edge of the road". But was his evidence accepted as <u>proof</u> of the allegation? I think not."

p.27 L.24 "If the Judge did accept the evidence of the Plaintiff and his witnesses, he should have said so in the plainest of terms, instead of leaving us to guess what he did find as a fact. The Plaintiff was either 2 feet inside the grass verge as he claimed, or he must have been on the
p.27 L.30 road. And yet the Judge was unable to "say categorically that the accident happened on the grass verge". In my view, therefore, it is clear enough that he was not satisfied as to the truthfulness of the Plaintiff and his witnesses."

p.31 L.29 26. The learned Chief Justice was of the opinion that an appellate court was in as good a position as the trial Judge to draw its conclusions from the primary undisputed facts, and it is submitted that he was right to do so for the following reasons:

(1) the refusal of the learned trial Judge to say

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that he accepted the evidence of the Plaintiff and his witnesses coupled with a finding as to where the accident occurred which was wholly irreconcilable with a vital part of their account indicated, as the learned Chief Justice held, that the learned trial Judge was not satisfied with their truthfulness;

(2) the inability of the Defendant's insurers to produce him to give evidence at the trial was a circumstance which called for careful scrutiny of the evidence for the Plaintiff to see whether it was true or untrue;

(3) when carefully scrutinised the evidence for the Plaintiff was profoundly unsatisfactory. Quite apart from the conflict with the mute testimony of the scratch mark on the road, the learned Chief Justice, it is submitted correctly, considered the evidence about Kumasegeram having time to call out a warning to the Plaintiff and his description of the course of the motor cycle incredible and stigmatised his evidence as a cock-and-bull story.

27. It is submitted that the learned Chief Justice was fully justified in rejecting the evidence of the Plaintiff and his witnesses and in preferring the account contained in the Defendant's report. He would have allowed the appeal and held the Plaintiff equally to blame for the accident.

28. Gill F.J. and Ali F.J. were for dismissing the appeal. Gill F.J., it is submitted wrongly, said that "it would seem clear that the judgment appealed from was based almost entirely of findings of fact and that it is not open to this Court to set aside such findings of fact", but as appears from his judgment he also agreed with the inferences that the learned trial Judge drew as to the Defendant's negligence. p.39 L.1

29. Ali F.J. was of the opinion that the learned trial Judge must have accepted the evidence of the Plaintiff and his witnesses to the effect that the Plaintiff was knocked down from the rear. He said: "The dispute turned on the fact whether the Respondent/Plaintiff was knocked down by the Appellant's motor cycle from the rear as alleged in paragraph 3 of the Statement of Claim or that he was knocked down while attempting to cross the road as alleged in the Statement of Defence. The Plaintiff p.41 L.1

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and his witnesses all gave evidence to the effect that he was knocked down from the rear. They all said that they were walking on the grass verge some 2 feet from the edge of the road when the collision took place. They all denied any suggestion that the Plaintiff was attempting to cross the road when he was knocked down. There were minor discrepancies, here and there, but they did not seem material enough to prevent the trial court from arriving at a finding that the Respondent was knocked down from the rear. The learned trial Judge found this consistent with the markings found on the sketch plan. He was not however altogether satisfied that the collision occurred on the grass verge as stated by the Plaintiff and his witnesses. He said it could be on the grass verge or on the road. But he seems reasonably satisfied that it occurred enough to the left edge of the road. On such a finding it was a fair inference that the motor cyclist was not keeping a proper lookout or if he was he was riding too fast with complete disregard for the safety of those walking by the side of the road".

p.42 L.13 "Speaking for myself, I can find no reason for interfering with the trial court's finding of fact so far as it was based on the oral evidence of the Plaintiff and his witnesses."

30. It is submitted that the learned Federal Judge was mistaken in thinking that the trial Judge had made express findings that the Plaintiff had been knocked down from the rear and that this was consistent with the markings on the sketch plan.

31. It is submitted that it is significant that the learned trial Judge did not make the express findings attributed to him, and it is also submitted that if such findings are to be inferred from his judgment they are not primary findings of fact based on the oral evidence of the Plaintiff and his witnesses but are founded on:

(1) his rejection of the Defendant's account as highly improbable; and

(2) his reliance on the nature of the Plaintiff's injuries as more consistent with the Plaintiff's account than with the Defendant's.

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32. It is submitted that Gill and Ali F.J.J. failed to appreciate the extreme paucity of the primary findings of fact by the learned trial Judge and were mistaken in thinking that the Federal Court ought not to upset the trial Judge's findings in the circumstances.

33. The Appellant respectfully submits that this appeal should be allowed with costs and that Judgment should be entered for the Plaintiff/Respondent for such sum as reflects the conclusion that he was largely if not entirely the author of his own misfortune for the following among other

R E A S O N S

1. BECAUSE the learned trial Judge wrongly found that the Defendant was wholly liable for the accident.

2. BECAUSE the learned trial Judge wrongly failed to consider alternatively found no contributory negligence.

3. BECAUSE the learned trial Judge, having correctly found that the scratch mark was made by the Defendant's motor cycle, wrongly held that the collision occurred on the grass verge, if he did so hold; alternatively accepted the tenor of the Plaintiff's evidence and of the evidence of the Plaintiff's witnesses, when he found or ought to have found that the accident occurred on the road, contrary to their assertions.

4. BECAUSE the learned trial Judge wrongly paid insufficient or no attention to the Defendant's statement in the agreed Police Report.

5. BECAUSE the learned trial Judge wrongly paid insufficient or no attention to the Plaintiff's evidence at the Magistrate's Court hearing, as contained in the agreed bundle, to the effect that he was walking on the edge of the road, about 2 feet away from the grass verge.

6. BECAUSE the learned trial Judge wrongly paid insufficient or no attention to the position of the scratch mark and of the rattan cake basket.

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7. BECAUSE the learned trial Judge ought not to have accepted alternatively relied on the Plaintiff and his witnesses, none of whom were on oath, and therefore whose evidence was not corroborated, if he did so.

8. BECAUSE the learned trial Judge wrongly dismissed the Defendant's account of the accident as highly improbable.

9. BECAUSE the learned trial Judge wrongly considered the Plaintiff's injuries consistent with the Plaintiff's version and inconsistent with the Defendant's version.

10. BECAUSE the learned trial Judge wrongly awarded the sum of $32,000 as general damages, the said sum being excessive and against the trend of awards for similar injuries.

11. BECAUSE Gill and Ali F.J.J. wrongly dismissed the appeal, holding that the learned trial Judge was correct alternatively that the Federal Court could not upset his findings.

12. BECAUSE Ong C.J., dissenting in the Federal Court, was right in holding that the Federal Court could and should reconsider the case and find the Plaintiff equally to blame for the accident.

13. BECAUSE the Plaintiff was equally to blame for the accident.

14. BECAUSE the Federal Court wrongly held that the Police Report, which had been agreed, was hearsay and inadmissible, if it did so hold, and that it was not substantive evidence.

15. BECAUSE the Judgments of the learned trial Judge and of the majority of the Federal Court were wrong, and the Judgment of Ong C.J. was right.

JOHN ARCHER

No. 12 of 1972

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ON APPEAL FROM THE FEDERAL COURT OF MALAYSIA

BETWEEN:

WONG THIN YIT — Appellant (Defendant)

- and -

MOHD ALI bin P.S. ISMAIL (suing as an infant through his father and next friend Abdul Rahman s/o Syed Ibramshah) — Respomdemt (Plaintiff)

CASE FOR THE APPELLANT

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