

35/84

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF THE STATE OF BRUNEI

B E T W E E N :

TIONG ING CHIONG Appellant
(Defendant)
- and -

GIOVANNI VINETTI Respondent
(Plaintiff)

A N D B E T W E E N

GIOVANNI VINETTI Appellant
(Plaintiff)
- and -

TIONG ING CHIONG Respondent
(Defendant)

(CROSS-APPEAL)

CASE FOR THE RESPONDENT, GIOVANNI VINETTI,
IN BOTH APPEAL AND CROSS-APPEAL

Record

- 20 1. This is an Appeal from the Judgment and Order of the Court of Appeal of the State of Brunei (Briggs, P., Huggins, J.A. and Bewley, J.) dated 18th October, 1982, whereby the Appeal of the Appellant was allowed in part against the Order and Judgment of the High Court of the State of Brunei (Penlington, J) dated 9th December, 1981, whereby the Respondent was awarded damages totalling B.\$1,300,792.00 with interest and costs and whereby the Cross-Appeal of the Respondent was dismissed with costs. By the said Order of the Court of Appeal the damages awarded to the Respondent were reduced by B.\$93,311.42 to B.\$1,207,480.58 with consequential amendments as to interest. pp.45-59
pp.59-60
- 30 2. The Respondent commenced the action leading to the instant Appeal by Writ of Summons issued on 28th August 1980. The claim was for damages pp.1-4

Record

arising out of a motor vehicle collision at Jalan Bunga Raya, Kuala Belait in the State of Brunei.

p.4
11.27 -
end

3. The Respondent alleged by Paragraph 3 of his Statement of Claim as follows:-

"At about 2210 hours on the 6th day of October 1977 the Plaintiff was riding his motor-cycle with a pillion rider along Jalan Bunga Raya, Kuala Belait in the direction of Kuala Belait Town when the Defendant so negligently drove, controlled or managed KA 1963 in the opposite direction that he caused the same to collide with the Plaintiff."

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p.5 1.38
-p.6 1.11
p.6 1.12
-p.7 1.20

4. By reason of the collision, the Respondent sustained serious injuries (as set out in the Particulars of Injuries) and suffered loss and damage (as set out in the Particulars of Special Damage and which included loss of future earnings).

pp.8-10

5. The Appellant filed a Statement of Defence and Counterclaim on 25th September 1980. In his Defence the Appellant admitted the collision but denied any negligence on his part and put the Respondent to proof of any injuries, loss or damage.

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p.8 11.18
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6. The action came for hearing on 7th December 1981 before the Honourable Mr Justice Penlington in the High Court of Negara Brunei Darussalam. The Respondent called six witnesses and the Appellant called three witnesses, testimony in respect of the Respondent's medical condition being given in his deposition by Dr Richard John Hamshere on behalf of the Respondent and Dr Cheng Wei Nien on behalf of the Appellant. Medical reports on the Respondent were produced as exhibits marked Exhibit P5 and Exhibit D1.

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p.11
11.19-29
p.11-25
p.11 11.30
-31
pp.62-71
pp.12-13
pp.74-75
pp.75-81

p.14 11.10
-end

7. The Respondent gave evidence of his actual and anticipated earnings in the period 1977-1981 entirely in Brunei dollars, he at no stage being asked to convert any sum into Italian lira.

pp.20-24
pp.20-22

8. Vittoria Majoni, operations Manager of the Respondent's former employers, was called on the Respondent's behalf. He gave evidence in chief of the Respondent's actual and anticipated earnings in Brunei dollars and said that the Respondent's basic salary was paid in Italy. In cross-examination, the witness is recorded as saying:-

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p.23 11.13
-16

"Exchange rate in 1977 was L.780.00 to B\$1.00. Now it is about L.520.00 to B\$1.00. Contract was more in Italy. Paid around L.1,100,000 at that time".

The Record at p.23 1.13 incorrectly records the witness as saying "L.780": there is no dispute that it should read "L.280".

Record

9. On 9th December, 1981, Penlington, J. delivered judgment.

pp.27-35

10. As to liability, the learned Judge found the Appellant to be solely to blame for the collision. He found that the Appellant had made a right turn across the Respondent's path, causing the collision on the Respondent's side of the road. He found the Respondent to be an impressive and honest witness, accepting his evidence that he was travelling at 25/30 m.p.h.

pp.28-29
p.29 11.
37-38
p.29 11.
3-13
p.29 11.
32-35

11. As to damages, the learned Judge made the following award (plus interest):

p.33 11.43
-end

(1)	Agreed special damages including hospital expenses etc.	B\$ 10,292
(2)	Loss of earnings up to the date of trial	B\$ 327,000
(3)	General Damages for pain, suffering and loss of amenities	B\$ 27,500
(4)	Loss of future earnings	B\$ 936,000
	Total	<u>B\$1,300,792</u>

12. As to loss of earnings up to the date of trial, the learned Judge set out his findings of fact and detailed calculations (all of which were in Brunei dollars, although the Respondent was paid part of his earnings and unemployment allowance in Italy in Italian lira).

p.29 1.44
- p.31 1.4
p.30 11.1-46

13. As to loss of future earnings, the learned Judge arrived at a multiplicand of B\$72,000 per annum by accepting Vittoria Majoni's evidence that the Respondent would in all probability become a first-class diver and then a superintendent at a monthly income of B\$12,000 - B\$14,000 and by deducting from the lower monthly figure of B\$12,000 the sum of B\$6,000 per month estimated to be his average monthly income in the future. The learned Judge then took a multiplier of 13, on the basis that the Respondent was 27 and would normally have retired at age 60. He took into account the fact that the Respondent was engaged in a hazardous operation and referred to a case where a multiplier of 12 had been applied in the case of a driller of 34 who would retire at age 55. In dealing with the Appellant's argument

pp.32-33

p.33 11.33
-40

Record

p.34 11.1-4 that the award was too high having regard to current interest rates, the learned Judge said:

p.34 11.32-35 "Taking account of inflation I am of the view that the Courts should still base awards on the traditional rates of interest of 5-6%."

pp.38-39
pp.39-41
pp.42-45
p.42 1.23-
p.43 1.12
14. On 19th December 1981, the Appellant served a Notice of Appeal and on 4th March 1982 filed his Memorandum of Appeal. The Respondent served his Notice of Cross-Appeal on 4th May 1982. The Appellant appealed both in respect of liability and damages. So far as now material, the Respondent cross-appealed on the basis that the multiplier of 13 in respect of loss of future earnings was manifestly too low and failed to take into account certain factors set out in paragraph 1 of his Notice of Cross-Appeal.

pp.45-59
15. The Appeal and Cross-Appeal were heard on 9th and 10th May, 1982 by the Court of Appeal of the State of Brunei (Briggs, P., Huggins J.A. and Bewley, J.) and the Judgment of the Court was delivered by Sir Alan Huggins, J.A. on 18th October, 1982.

p.46 11.10-41
p.47 11.20-27
p.47 1.41-
p.50 1.22
p.50 1.23
-p.53 1.20
p.50 1.31
- p.52 1.15
p.52 11.16
-29 p.52 1.20
-p.53 1.2
p.53 11.2-9
p.53 11.14-20
16. As to the Appellant's Appeal, the Court of Appeal dealt with liability first and held that the trial Judge was entitled to reach the conclusion that he did. As to damages, the Court of Appeal referred to the fact that part of the Respondent's salary was paid in Lira in Italy and to the unsatisfactory nature of the evidence. As to loss of pre-trial earnings, the Court of Appeal analysed the evidence and set out its detailed calculations, reducing the trial Judge's award by B\$93,311.42 from B\$327,000 to B\$233,688.58. In respect of all its calculations in respect of actual and anticipated earnings for the period from the date of the accident to the date of trial, the Court of Appeal applied the 1977 rate of exchange of L.280 to B\$1.00 whether the actual or anticipated earnings were for the year 1977 when such rate of exchange was applicable or for the period shortly before the trial in December 1981 when the rate of exchange was L.520 to B\$1.00. To arrive at a judgment in Brunei dollars, all sums in Italian lira (having been converted to lira by the Court of Appeal by the application of the rate of exchange L.280 to B\$1.00) were converted to Brunei dollars by applying the rate of exchange L.520 to B\$1.00. The Court of Appeal then considered loss of future earnings, upholding the trial Judge's award of B\$936,000. The Court of Appeal referred to the trial Judge's view concerning "traditional rates of interest of 5-6%" and concluded that in the case of

the Respondent's working life of 28 years, it was "too early to abandon the more modest rates which have been applied until now". The Court of Appeal said it would not disagree with the figure of 6% adopted by the trial Judge, although that would result in the Respondent's capital of B\$936,000 being exhausted at the end of the 25th year, in the case of a working life of 28 years. The Court of Appeal, therefore, allowed the Appellant's appeal to the extent of B\$93,311.42 in respect of loss of pre-trial earnings and dismissed the cross-appeal.

Record

p.58 11.20
-22

p.58 11.30
-33

p.58 11.45
-49

17. On the 5th January, 1983, both the Appellant and the Respondent were given leave by the Supreme Court of the State of Brunei to appeal to the Privy Council. pp.60-61

18. As to the Appellant's Appeal, it is respectfully submitted that both the trial Judge and the Court of Appeal correctly held that the Appellant was solely to blame for the collision. As to damages, it is respectfully submitted that (with the exception of two points which form the subject-matter of the Cross-Appeal, namely, (i) the application by the trial Judge and the Court of Appeal of a multiplier of 13 in respect of loss of future earnings, and (ii) the application by the Court of Appeal of the 1977 exchange rate to all actual or anticipated earnings in the period 1977-1981) the Court of Appeal correctly upheld the trial Judge.

19. As to the Cross-Appeal, it is respectfully submitted that it was wrong in principle, or a wholly erroneous estimate, to take a multiplier of 13 in this case in respect of loss of future earnings. The Courts in the State of Brunei apply English principles and practice in assessing damages for personal injuries. It is submitted that it was not correct for the trial Judge or the Court of Appeal to refer to the traditional rates of interest as being "5%-6%". The conventional multipliers applied by the Courts in England have assumed a rate of interest of 4%-5%, while recognizing that actual rates of interest have been much higher (see Mallett v. McMonagle (1970) A.C. 166, at 176 C-E and Lim Poh Choo v. Camden Health Authority (1980) A.C. 174 at 193C). Neither the trial Judge nor the Court of Appeal was seeking to adopt a different approach for the State of Brunei. It is respectfully submitted that both Courts below purported to follow the English principles and practice but were in error in adopting, as they did, 6% as the traditional rate of interest. In this case, taking a multiplier of 13 and a

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multiplicand of B\$72,000 to produce a fund of B\$936,000 and applying a rate of interest of 6% would result in the fund being exhausted at the end of 25 years (for the method of calculation see Taylor -v- O'Connor (1971) A.C. 115 at 144 A-C). Applying what is submitted to be the correct rate of interest of 5% and taking the multipliers of 13, 14, 15 and 16 respectively and a multiplicand of B\$72,000, the fund in each case would be exhausted as follows:-

<u>Multiplier</u>	<u>Fund</u>	<u>Rate of Interest</u>	<u>Fund Exhausted After</u>
13	B\$ 936,000	5%	21 years
14	B\$1,008,000	"	24 "
15	B\$1,080,000	"	27 "
16	B\$1,152,000	"	32 "

20. It is respectfully submitted that the correct multiplier in this case should be 15 because

- (a) at age 27 and retiring at 60, the Respondent had a working life of 33 years ahead of him;
- (b) making full allowance for the contingencies of life, including the hazardous nature of the Respondent's occupation, the loss of future earnings should be based on a working life of 28 years;
- (c) a multiplier of 15 would result in the fund of B\$1,080,000 being exhausted at the end of the 27th year applying the traditional rate of interest of 5%;
- (d) a multiplier of 15 would thus result in a moderate award within a reasonable range of conventional awards in such cases.

21. It is therefore respectfully submitted that the award of B\$936,000 for loss of future earnings should be increased by B\$144,000 (=2 x B\$72,000) to B\$1,080,000.

22. It is respectfully submitted that the Court of Appeal should have applied the rate of exchange as at the date of the trial (i.e. B\$1.00 to L.520.00) to all actual or anticipated earnings in the period 1.8.80 to 6.12.81 and not the 1977 rate of exchange of B\$1.00 to L.280.00. In other words, in the absence of any evidence of the rate of exchange after 1977 (save as at the date of trial in December, 1981), the Court of Appeal should have upheld the trial Judge's approach at least for the period 1.8.80 to 6.12.81 by expressing in

Brunei dollars both the actual profits of the Respondent's business and his anticipated earnings as a diver (which he would have earned but for his injuries) for that period.

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23. As to the Respondent's actual earnings, the date, 1st August, 1980, was the time when the Respondent started his own business, the Court of Appeal agreeing with the trial Judge's assessment of a monthly profit therefrom of B\$4,000 from 1.8.80 to 6.12.81. Evidence was given at the trial in December 1981 by the Respondent that the turnover of his business was B\$4,000 per month, no evidence being given at any stage of corresponding values in Italian lira. The Court of Appeal held that the trial Judge on the state of the evidence was entitled to treat the whole of the B\$4,000 as profit: the Respondent does not pursue any cross-appeal on that point. But the Court of Appeal went on to hold that:

p.14 ll.
39-41
p.52 ll.
6-10
p.14 l.47
p.16 ll.
25-27

p.52 ll.
6-10

"It (i.e. the B\$4,000 monthly profit) should, however be expressed in lire without the benefit of the increasingly favourable exchange rate i.e. L. 1,120,000. Accordingly, in the period August 1980 to 6th December, 1981 the total would come to L.18,136,774.09."

p.52
ll.10-15

Thus, the Court of Appeal applied the 1977 rate of exchange of B\$1.00 to L.280.00 to the profits of the Respondent's business in the period 1.8.80 to 6.12.81 to arrive at L. 1,120,000.00 as the amount of the monthly profit throughout that period (some 16.19 months). It is respectfully submitted that there was no justification in the absence of any evidence as to the appropriate rate of exchange for expressing the monthly profit of B\$4,000 other than in Brunei dollars. Alternatively, if any rate of exchange was to be applied, it is respectfully submitted that it was not appropriate or just to apply the 1977 rate of exchange. As the only other rate of exchange of which evidence was given was that as at the date of trial (and which was the more appropriate and just rate to apply), the monthly profit of B\$4,000 should not have been converted into Italian lira at all, as the award was to be expressed in Brunei dollars.

24. The submissions in paragraph 23 hereof apply equally to the Respondent's anticipated earnings (which he would have earned but for his injuries) in the period 1.8.80 to 6.12.81.

25. If the submissions in paragraphs 23 and 24 hereof are correct, then the Court of Appeal should have increased the sum it awarded of B\$233,688.58

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in respect of loss of earnings to the date of trial by B\$26,763.00 (to make a total of B\$260,451.58), calculated as follows:-

Actual Earnings 1.8.80 to 6.12.81:

L.18,136,744 (See Record p. 52 1.28)

convert to B\$ (÷ 280)

= B\$67,774

(x520)

= L. 33,682,579

Less L. 18,136,774

15,545,805

(÷ 520)

= B\$29,895

(= the amount by which actual earnings were understated)

Anticipated Earnings 1.8.80 to 6.12.81:

(i) 1.8.80 to 31.12.80 (5 months)
L.21,840,000 (see Record p.53 1.7)
for 5 months = L. 9,100,000

(ii) 1.1.81 to 6.12.81 = L.25,273,548 (see Record p.53 1.7)
Add (i) & (ii) = L.34,373,548

convert to B\$ (÷ 280)

= B\$ 122,762

(x 520)

= L.63,836,240

Less L.34,373,548

L.29,462,269

(÷ 520)

= B\$56,658

(= the amount by which Anticipated earnings were understated)

Thus:

Understatement of Anticipated Earnings
(B\$56,658)

less

Understatement of Actual Earnings (B\$29,895)

= B\$26,763

26. It is therefore respectfully submitted that the award of B\$233,688.58 in respect of loss of earnings to the date of trial should be increased by B\$26,763.

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27. The Respondent respectfully submits that the Appellant's appeal ought to be dismissed with costs and the Respondent's Cross-Appeal ought to be allowed with costs by increasing the award of damages to the Respondent by the sum of B\$170,763 (i.e. B\$144,000 in respect of future loss of earnings and B\$26,763 in respect of loss of earnings to date of trial) with consequential amendments as to interest for the following (among other)

R E A S O N S

- (1) BECAUSE the trial Judge and the Court of Appeal correctly held the Appellant to be solely to blame for the collision;
- (2) BECAUSE the Court of Appeal was right in upholding the trial Judge's award of damages, save as to the matters hereinafter referred to;
- (3) BECAUSE both the trial Judge and the Court of Appeal wrongly applied a multiplier of 13 and should have applied a multiplier of 15 in respect of the loss of future earnings;
- (4) BECAUSE both the trial Judge and the Court of Appeal were wrong in applying 6% as the traditional rate of interest in arriving at a conventional multiplier;
- (5) BECAUSE the award in respect of future loss of earnings should be increased by the sum of B\$144,000;
- (6) BECAUSE the Court of Appeal was wrong to apply the 1977 exchange rate to the Respondent's actual and anticipated earnings for the period 1.8.80 to 6.12.81;
- (7) BECAUSE the Respondent's actual and anticipated earnings for the period 1.8.80 to 6.12.81 should not have been converted into Italian lira but should have remained expressed in Brunei dollars;
- (8) BECAUSE the Court of Appeal's award in respect of loss of earnings to the date of trial should be increased by the sum of \$26,763.

STUART N. MCKINNON

T. C. CHAN

IN THE JUDICIAL COMMITTEE OF THE
PRIVY COUNCIL

O N A P P E A L
FROM THE COURT OF APPEAL OF THE
STATE OF BRUNEI

B E T W E E N :

TIONG ING CHIONG	<u>Appellant</u> (Defendant)
- and -	
GIOVANNI VINETTI	<u>Respondent</u> (Plaintiff)

AND BETWEEN :

GIOVANNI VINETTI	<u>Appellant</u> (Plaintiff)
- and -	
TIONG ING CHIONG	<u>Respondent</u> (Defendant)

CASE FOR THE RESPONDENT,
GIOVANNI VINETTI, IN BOTH APPEAL
AND CROSS-APPEAL

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