Rashid Osman bin Abdul Razak *v* Abdul Muhaimin bin Khairuddin and another [2013] SGHC 49

Case Number : Suit No 79 of 2011/K

Decision Date : 27 February 2013

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : Subir Singh Panoo (Sim Mong Teck & Partners) for the Plaintiff; Cosmas Gomez (Cosmas & Co) for the Defendant; Ramesh Appoo (Just Law LLC) for the Co-Defendant.

Parties : Rashid Osman bin Abdul Razak — Abdul Muhaimin bin Khairuddin and another

Tort – Negligence

27 February 2013

Woo Bih Li J:

Introduction

1 NTUC Income Insurance Co-Operative Ltd ("the Co-Defendant") had issued to one Nasiruddin Shaifuddin ("the Insured") Motorcycle Insurance Policy Number 5027515523 in respect of motorcycle number FX 1426B ("the motorcycle"). On 30 November 2008, the Insured parked the motorcycle at the car park at Block 108, Woodlands Street 31. The following day, on 1 December 2008, the Insured discovered that the motorcycle was missing from the car park and lodged a police report. One Muhammed Afandi bin Yusoff ("Afandi") was subsequently charged with and convicted of, *inter alia*, the theft of the motorcycle.

2 In the meantime, on 16 December 2008, the Defendant, who was acquainted with Afandi, was riding the motorcycle with the Plaintiff as his pillion passenger when the motorcycle skidded. Both the Plaintiff and the Defendant suffered injuries. It transpired that the Defendant did not possess a valid motorcycle licence at the time of the accident, and he was administered a stern warning for the offences of riding without a valid licence and riding without valid insurance coverage.

3 The Plaintiff commenced this action against the Defendant claiming for injuries, loss and damage suffered by him due to the Defendant's alleged negligent riding of the motorcycle. The Plaintiff averred that he had no knowledge that the motorcycle was stolen or that the Defendant did not possess a valid motorcycle licence at the material time. [note: 1] The Defendant denied the Plaintiff's claim and counterclaimed against the Plaintiff for injuries, loss and damage allegedly incurred by him due to the Plaintiff's negligence. The Defendant pleaded that he lost control of the motorcycle as a result of the negligent action of the Plaintiff while the Plaintiff was riding as a pillion passenger and that the Plaintiff's negligence caused or contributed to the accident. [note: 2] The Defendant also pleaded that the Plaintiff persuaded him to ride the motorcycle and rode pillion on the motorcycle even though he was aware that the Defendant did not possess a valid motorcycle licence. [note: 3]

4 The Co-Defendant applied to be and was joined to the action on 15 July 2011. The Co-Defendant pleaded that because the Plaintiff was aware that the motorcycle was stolen and that the

Defendant did not possess a valid motorcycle licence at the material time, the Plaintiff's claim was void for illegality. The Co-Defendant's position was that any enforcement of a judgment in the Plaintiff's favour would therefore be contrary to public policy. The Co-Defendant also pleaded that because the Plaintiff knew that the Defendant did not possess a valid motorcycle licence, the Plaintiff had voluntarily consented to accept the risk of injury and to waive any claim in respect of any injury suffered by him in the circumstances.

5 The trial to determine liability took place from 17 to 19 April 2012 and the morning of 19 September 2012, during the course of which six witnesses testified. The Plaintiff's witnesses were the investigating officer Norazlan bin Abdul Aziz, the Plaintiff and one Nurhidayah bte Hashim ("Hidayah"), who was a friend of the Plaintiff as well as the girlfriend of the Defendant at the material time. The Defendant gave evidence for the Defence. The Insured and Afandi were witnesses for the Co-Defendant. I found the Defendant to be 100% responsible for the accident and granted interlocutory judgment in favour of the Plaintiff, on that basis with damages to be assessed by the Registrar and the usual consequential orders. The Co-Defendant has filed an appeal to the Court of Appeal.

Background

6 The evidence of the Plaintiff, the Defendant and Hidayah as to how they became acquainted was largely not in dispute. As of the time of the accident in December 2008, the Plaintiff and Hidayah had been close friends for a number of years and the Plaintiff had been staying in Hidayah's flat for several months because of financial difficulties. [note: 4] The Plaintiff and Hidayah used to frequent the 7-Eleven outlet at Admiralty Mass Rapid Transit Station, ("Admiralty MRT"), where the Defendant worked, and thereby got to know the Defendant. The Plaintiff had known the Defendant for some six to eight months before the accident, [note: 5] and he and a group of friends, including Hidayah, would meet up with the Defendant almost daily after work near Admiralty MRT. [note: 6] A few months after they met, Hidayah and the Defendant started dating. [note: 7] The Plaintiff was aware that Hidayah and the Defendant were in a relationship, which relationship was confirmed by Hidayah in cross-examination. [note: 8]

7 The Plaintiff's evidence was that prior to 16 December 2008, he and his group of friends, including Hidayah, were unaware that the Defendant did not possess a valid motorcycle licence due to the fact that the Defendant would regularly mention riding his father's motorcycle to school or to run errands. [note: 9] Hidayah corroborated the Plaintiff's evidence, except that she said that she learnt otherwise on 13 December 2008. Her evidence was that on 13 December 2008, she met with the Defendant and his group of friends at Admiralty MRT. During that meeting, she found out that the Defendant did not in fact have a valid motorcycle licence due to a chance remark made by one of the Defendant's friends. I will elaborate on the remark later. However, she claimed that she did not convey this information to the Plaintiff or any of her other friends at the Defendant's request. [note: 10]

8 The Plaintiff testified that on the night of 15 December 2008, he met the Defendant, Hidayah and his other friends at Admiralty MRT. [note: 11] The Plaintiff returned to Hidayah's flat for a shower, after which he rejoined his friends at the void deck just below Hidayah's flat at Block 622, Woodlands Ring Road ("Block 622"). When he arrived at the void deck, he saw that Afandi was already there. The Plaintiff testified that he had first seen Afandi from a distance one or two months before. They had been communicating via text messages. [note: 12] According to the Plaintiff, he was meeting Afandi for the first time on 15 December 2008. [note: 13] The Defendant and his other friends were

also meeting Afandi for the first time. The Plaintiff's evidence was that Afandi had earlier sent him a text message saying that he was bored, and the Plaintiff had replied by telling him to come to Block 622. [note: 14] Upon arriving at the void deck of Block 622, the Plaintiff walked over to introduce himself and the rest of the group to Afandi (whom they referred to as "Andy"). The rest of the group was interested in getting to know Afandi because he had arrived with a motorcycle, [note: 15] (*ie*, the motorcycle mentioned at [1] above) which he told them he had just bought the week before from his friend.

9 The Plaintiff's evidence was that sometime later in the early hours of 16 December 2008, he felt hungry and suggested to the group that they find something to eat. A few in the group suggested that since the Plaintiff was hungry, he should volunteer to go to buy food from some shops at Admiralty MRT. The Plaintiff agreed and the Defendant offered to give him a lift there on the motorcycle, [note: 16] to which Afandi nodded and grunted his consent. The Plaintiff and the Defendant then put on helmets and set off on the motorcycle. According to the Plaintiff, they rode out of the car park onto Woodlands Drive 52 and turned left into Woodlands Ring Road. The Plaintiff's evidence was that as they approached a bend, the Defendant leaned to the right too early, as a result of which the motorcycle went out of control and collided into the kerb.

10 The Defendant's evidence differed from the Plaintiff's. His evidence was that earlier in the night, Afandi had offered him a ride on the motorcycle. The Defendant and Hidayah had gone up to Hidayah's flat to fetch a second helmet, after which the couple took the motorcycle on a joyride to Admiralty MRT. [note: 17] Sometime later, after the couple returned to the void deck of Block 622, the Plaintiff persuaded the Defendant to give him a ride to Admiralty MRT to buy food. [note: 18] After the Defendant rode one round at Woodlands Ring Road with the Plaintiff as his pillion passenger, he wanted to stop, but the Plaintiff suggested that they carry on for a second round. At a bend, the Plaintiff failed to follow the flow of the motorcycle, shifting his body in a manner that caused the Defendant to lose control and the motorcycle to skid. [note: 19]

11 The Plaintiff and the Defendant sustained serious injuries in the resulting crash. It subsequently came to light that the man whom they knew as "Andy" was actually Afandi who was subsequently charged with and convicted of the theft of the motorcycle.

The issues

12 The following questions arose before this court in the determination of the Defendant's liability:

(a) whether the Plaintiff knew that the motorcycle was stolen;

(b) whether the Plaintiff knew that the Defendant did not possess a valid motorcycle licence at the material time;

(c) if question (a) and/or (b) was answered in the affirmative, whether, upon consideration of the relevant knowledge of the Plaintiff, the defence of *ex turpi causa non oritur actio* ("*ex turpi causa*") and/or *volenti non fit injuria* applied to deny the Plaintiff the relief sought; and

(d) whether the injuries of the Plaintiff were caused by the Defendant's negligent riding of the motorcycle and if so, whether the Plantiff was contributorily negligent.

13 These issues will be dealt with in turn.

Whether the Plaintiff knew that the motorcycle was stolen

14 Mr Appoo, counsel for the Co-Defendant, submitted that the Plaintiff knew that the motorcycle was stolen. He relied on two points.

15 First, the motorcycle did not have a rear number plate. He submitted that the Plaintiff must have noticed this and must have realised that the motorcycle had been stolen.

16 Secondly, Mr Appoo relied on the testimony of Afandi. It will be re-called that Afandi was the one who had stolen the motorcycle. He gave evidence at the second tranche of the trial, *ie*, on 19 September 2012, after Mr Appoo managed to locate his whereabouts. According to Afandi, he parked the motorcycle on 16 December 2008 near the void deck below Block 622. There were tables and stone benches at the void deck, and he sat on one of the benches and waited for the Plaintiff. When the Plaintiff arrived, he introduced three girls, including Hidayah, and the Defendant to Afandi. They saw the motorcycle and went to have a closer look at it. Hidayah asked Afandi when he had obtained his motorcycle licence, and he replied in the presence of everyone that he did not have a licence. She then asked him how he had managed to get a motorcycle without a licence. He kept quiet. In his mind, all of them would have realised that he had stolen the motorcycle although in cross-examination, he said that he did not know whether they knew he had stolen the motorcycle. [note: 20]

17 I will deal with the second point first. Afandi's version was not put to the Plaintiff or to Hidayah who had already completed giving their evidence by the time Afandi testified in court. Moreover, when the Defendant was giving his evidence, he did not mention the points that Afandi made.

18 I did not accept that Afandi had disclosed that he did not have a valid motorcycle licence. Having stolen the motorcycle, he would not have wanted others to be suspicious of him. Furthermore, as mentioned above, the Defendant himself did not say that Afandi had disclosed that he did not have a valid motorcycle licence, and that he (the Defendant) and the others realised that Afandi had stolen the motorcycle. Indeed, in the Defendant's affidavit of 13 June 2011, which he had adopted as his affidavit of evidence-in-chief ("AEIC"), the Defendant asserted at para 5(i) that he "never knew" that the motorcycle had been stolen at the material time. There was no reason why the Plaintiff, but not the Defendant, would have realised that the motorcycle was stolen if Afandi had told everyone there that he did not have a valid motorcycle licence.

19 I also did not accept that the Plaintiff must have noticed the absence of the rear number plate and concluded that the motorcycle was stolen. The point about the absence of the rear number plate was put to the Plaintiff when he was cross-examined, but he denied noticing the missing number plate. Even if he did notice this, it did not necessarily mean that he therefore knew that the motorcycle was stolen. Even the Defendant did not say that he realised that the motorcycle was stolen because he noticed that the rear number plate was missing. Indeed, he did not claim to have noticed the missing number plate. As already mentioned above, it was also his position that he never knew that the motorcycle had been stolen.

20 In the circumstances, I was of the view that Mr Appoo failed to establish that the Plaintiff knew at the material time that the motorcycle had been stolen.

Whether the Plaintiff knew that the Defendant did not possess a valid motorcycle licence

21 The Plaintiff's case was that prior to the accident on 16 December 2008, he was unaware that

the Defendant did not possess a valid motorcycle licence. The Plaintiff gave evidence, [note: 21] which Hidayah confirmed, [note: 22] that he and his group of friends were under the impression that the Defendant had a valid motorcycle licence because the Defendant had said on various occasions that he had ridden his father's motorcycle. According to the Plaintiff, the Defendant also mentioned that he was working to save money to buy his own motorcycle. The Plaintiff said that he had never seen the Defendant with a motorcycle before the accident, though he had seen him carrying a helmet and what the Plaintiff assumed to be a motorcycle key. [note: 23] The Defendant's evidence was that he did not explicitly tell the Plaintiff or his friends that he had a valid motorcycle licence, though he conceded that the Plaintiff and his group of friends might have assumed that he had a valid motorcycle licence because he used to brag about how he rode his father's and his friend's motorcycles. [note: 24]

22 The Plaintiff and Hidayah testified that on a few occasions prior to the accident, the Defendant was asked by someone in their group to show his motorcycle licence [note: 25]. The Defendant always brushed off the request with excuses, for example, that his licence was at home or that he had forgotten to bring it.

23 Mr Appoo submitted that if the Plaintiff and his friends were convinced by the Defendant's excuses and believed that he actually had a valid motorcycle licence, they would not have asked the Defendant to show his licence on more than one occasion. The Plaintiff's evidence was that their requests for the Defendant to produce his motorcycle licence were casual, and that he had never doubted the Defendant. [note: 26] Hidayah's testimony was rather unclear on this point. She conceded that she was not entirely sure what she believed. In response to a question from the court, Hidayah agreed that she thought that the Defendant was "just talking big", and that at a certain point, the group felt "*du lan*" (slang for "annoyed") at the Defendant for always giving excuses, and therefore, she gave up asking him about the licence. [note: 27] On the other hand, at another point in her cross-examination, Hidayah testified that the group did not disbelieve the Defendant and were simply curious to see the licence, especially since Hidayah herself was taking motorcycle lessons and wanted to see what a motorcycle licence looked like. [note: 28]

24 Hidayah stated in her AEIC that she only found out that the Defendant did not possess a valid motorcycle licence three days before the accident. [note: 29] Hidayah testified that on 13 December 2008, she met up with the Defendant and his group of friends. [note: 30] She claimed that neither the Plaintiff nor any of her own friends were present on this occasion. At the meeting, Hidayah overheard one of the Defendant's friends asking the Defendant, "how was your practical?" She asked the Defendant what the question meant, and when pressed, the Defendant admitted that he had no motorcycle licence but was in the process of taking lessons. Hidayah said that she was shocked and disappointed, but the Defendant pleaded with her not to tell her friends that he did not have a valid motorcycle licence as it would embarrass him. In contrast, the Defendant asserted that the Plaintiff and his friends were also present at the meeting on 13 December 2008. [note: 31] The Defendant agreed that his friend had indeed asked him about his practical, and that Hidayah had been shocked and angry when she learnt that he did not have a valid motorcycle licence. The Defendant's evidence was that he believed the Plaintiff, whom he claimed was present, would have heard the exchange. [note: 32] The Defendant denied that he had pleaded with Hidayah to keep the information to herself. [note: 33] He further testified that later that night, in the early hours of 14 December 2008, the Plaintiff advised him to complete his motorcycle lessons. [note: 34] The Plaintiff denied ever advising the Defendant to complete his lessons, maintaining that he thought the Defendant already had a valid

motorcycle licence. The Plaintiff testified, [note: 35] and Hidayah confirmed, [note: 36] that Hidayah did not inform him of the fact that she had discovered on 13 December 2008 that the Defendant did not have a valid motorcycle licence.

25 On the night of 15 December 2008, the Plaintiff, the Defendant, Hidayah, Afandi and a few other friends gathered at the void deck of Block 622. The evidence of Afandi is that during that night, the Defendant asked many basic questions about motorcycle riding, which should have made it apparent to the Plaintiff that the Defendant did not have a valid motorcycle licence. [note: 37] However, Afandi also testified that during the conversation he had with the Defendant about motorcycles, the Plaintiff was preoccupied with his own conversation with somebody else. [note: 38] Therefore, there was insufficient evidence to establish that the Plaintiff heard what Afandi and the Defendant were discussing.

26 Mr Appoo made much of the fact that Hidayah failed to stop the Plaintiff from taking a ride from the Defendant and that she failed to warn him that the Defendant did not have a valid motorcycle licence, despite the fact that she was a close friend of the Plaintiff. Hidayah's evidence on this point was as follows: [note: 39]

> Q: So what is it—what—what is your reason for not telling Rashid [the Plaintiff] not to accept that offer to ride? Is it because you didn't hear Muhaimin [the Defendant] making the offer or you heard it and you dismissed it. What—what is your exact reason for not alerting Rashid that Muhaimin did not have a licence?
>
> A: (Through Interpreter) I never expected this to happen. Muhaimin told me not to tell anyone.
>
> (In English) That's why I keep it to myself. That's why I don't tell anybody.
>
> Q: So you felt this obligation to keep a secret, to keep this fact a secret, right, was more important than your best friend risking injury? And risking his life in fact. You felt that this duty to maintain this secret was more important than the possibility that your friend, your best friend would get injured. Is that—is that what you are saying?
>
> A: (Through Interpreter) I did not expect that Rashid would accept the offer, accept Muhaimin's offer.
>
> Q: You never thought that Rashid would accept Muhaimin's offer and why is that? What makes you think Rashid will dismiss this offer? He won't accept it. What makes you think that?
>
> A: (Through Interpreter) It is Rashid's choice. I cannot prevent him from doing what he wanted.
>
> Q: Nobody is asking why you didn't prevent him. Why did you not warn him, inform him of the fact that Muhaimin had no licence and warned him not to take the risk of riding pillion on him, with him?
>
> A: (Through Interpreter) This thing happened so fast.

Hidayah also claimed that she did not even notice that Afandi came with the motorcycle and that she did not see any motorcycle in the vicinity of where she and the group were seated. [note: 40] Hidayah claimed that she was unaware at any point before the Defendant invited the Plaintiff to ride pillion that Afandi brought the motorcycle to Block 622.

27 While Hidayah's evidence as to her not noticing the motorcycle was implausible, I find on a balance of probabilities that the Plaintiff did not know that the Defendant did not possess a valid motorcycle licence. Hidayah testified that she had not warned the Plaintiff that the Defendant did not have a valid motorcycle licence because the Defendant had asked her to keep the fact a secret. Although the Defendant denied asking Hidayah to keep this fact a secret, I found that he did do so. He never openly admitted that he did not have a valid motorcycle licence and it is likely that he asked Hidayah to keep this information a secret. In such circumstances, it is understandable that Hidayah would have felt torn between her loyalty to her then boyfriend (*ie*, the Defendant) and her friendship with the Plaintiff. I find that Hidayah, having promised the Defendant to keep silent, had already decided to remain silent before 16 December 2008. Therefore, in the events which transpired that night, it did not cross her mind to warn the Plaintiff that the Defendant did not possess a valid motorcycle licence. I should mention that Hidayah was no longer the girlfriend of the Defendant by the time the trial started. However, she was still a close friend of the Plaintiff. Nevertheless, there was no suggestion that she had reason to favour the Plaintiff over the Defendant. Also, she did not have to volunteer the information that she had learnt the truth that the Defendant did not have a valid motorcycle licence three days before the accident, but she did anyway. The Defendant did not even say in his AEIC that Hidayah had learnt the truth about his not having a valid motorcycle licence. Neither did he allege in his AEIC that Hidayah had disclosed the truth to the Plaintiff. He also did not allege in his AEIC that the Plaintiff was present when his (the Defendant's) friend asked him on 13 December 2008 how he was progressing with his practical. I believed Hidayah that the Plaintiff was not present on that occasion and that she did not disclose the truth to him.

28 The burden of proof was on the Co-Defendant to establish its allegation about the Plaintiff's knowledge and I found that the Co-Defendant failed to do so.

The defences of *ex turpi causa* and *volenti non fit injuria*

29 As the Co-Defendant failed to establish that the Plaintiff knew that the motorcycle was stolen or that the Plaintiff knew that the Defendant did not have a valid motorcycle licence, the defences of *ex turpi causa* and *volenti non fit injuria* failed to have any application. However, I will refer to the arguments thereon as they raise issues of law or mixed law and fact.

30 Mr Panoo, counsel for the Plaintiff, submitted that the effect of s 5 of the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) ("the Act") is that any defence of *volenti non fit injuria* which might previously have been pleaded by a negligent rider sued by his passenger may no longer be sustained. The relevant section is reproduced as follows:

> **5(1**) Where a person uses a motor vehicle in circumstances such that under section 3 there is required to be in force in relation to his use of it such a policy of insurance or security as is mentioned in section 3(1), then, if any other person is carried in or upon the motor vehicle while the user is so using it, any antecedent agreement or understanding between them (whether intended to be legally binding or not) shall be of no effect so far as it purports or might be held —
>
> (*a*) to negative or restrict any such liability of the user in respect of persons carried in or upon the motor vehicle as is required by section 4 to be covered by a policy of insurance; or
>
> (*b*) to impose any conditions with respect to the enforcement of any such liability of the user.
>
> (2) The fact that a person so carried as referred to in subsection (1) has *willingly accepted as his the risk of negligence on the part of the user shall not be treated as negativing any such*

liability of the user.

[emphasis added]

In *Pitts v Hunt* [1991] 1 QB 24 ("*Pitts v Hunt*"), the English Court of Appeal considered the effect of the corresponding English statutory provisions. Beldam LJ opined that the relevant sections "clearly mean that it is no longer open to the driver of a motor vehicle to say that the fact of his passenger travelling in circumstances in which for one reason or another it could be said that he had willingly accepted a risk of negligence on the driver's part, relieves him of liability for such negligence". [note: 41]

31 However, Mr Appoo argued that s 5 of the Act was inapplicable in the present case because there was no effective policy of insurance at the time of the accident. He submitted that the policy issued by the Co-Defendant to the Insured was ineffective at the time of the accident as the motorcycle had not only been stolen at the time of the accident, but had also been ridden by the Defendant, who was neither the policy-holder nor a licensed rider. Instead, the liability of the Co-Defendant, if any, arose through the workings of the Memorandum of Agreement ("MOA") entered into by the Motor Insurers' Bureau ("MIB") with the Minister of Finance on 22 February 1975 and a Domestic Agreement subsequently entered into by MIB and Singapore-registered insurers. The combined effect of the MOA and the Domestic Agreement is that in cases where there is not in force a policy of insurance as required under the Act or where such a policy is ineffective, the last insurer of the vehicle in question—in this case, the Co-Defendant—is liable to third parties to fulfil any judgment entered in respect of liability for any accident involving the vehicle. Mr Appoo argued that s 5 of the Act only abolished the use of the defence of *volenti non fit injuria* where liability arose by operation of the Act. According to him, since any *prima facie* liability of the Co-Defendant in the present case arose out of the MOA and the Domestic Agreement, the defence of *volenti non fit injuria* could in fact be raised.

32 I would not have been inclined to accept Mr Appoo's argument that s 5 of the Act is inapplicable. The Act does not state that there must be an effective policy of insurance at the time of the accident in order for s 5 to apply. The section explicitly states that it is triggered when a motor vehicle is used in circumstances such that there is required under the Act to be in force a policy of insurance. Hence, s 5 should be applicable in the circumstances of the present case, where the Defendant useda motor vehicle (*ie*, the motorcycle) which would require a policy of insurance under the Act. The effect of s 5 is that the defence of *volenti non fit injuria* would not have been available to the Co-Defendant.

33 As for the alternative defence of *ex turpi causa*, it is trite that for that defence to arise, the damage suffered by the plaintiff must be sufficiently connected to the plaintiff's wrongdoing [note: 42] . The fact that the plaintiff was involved in some wrongdoing does not of itself preclude him from bringing a claim.

34 In *Saunders v Edwards* [1987] 1 WLR 1116, Bingham LJ drew a crucial distinction between cases where the plaintiff's action arose directly *ex turpi causa* and cases where the plaintiff suffered a genuine wrong in respect of which his allegedly unlawful conduct was merely incidental. In the present case, even if the Plaintiff knew that Afandi had stolen the motorcycle, it seemed to me that his allegedly wrongful conduct in riding pillion on the motorcycle would have been incidental to his claim in negligence against the Defendant. Likewise, had the Plaintiff known that the Defendant did not have a valid motorcycle licence, his allegedly wrongful conduct in riding pillion with the Defendant would have been incidental to his claim. The present case would be distinguishable from *Pitts v Hunt*,

where it was found that the plaintiff pillion passenger had gotten intoxicated together with the defendant (whom the plaintiff knew did not possess a valid motorcycle licence), and had thereafter aided and abetted the defendant in riding the motorcycle in a reckless manner calculated to frighten others on the road. In my view, even if the Plaintiff in the present case had known that the defendant did not possess a valid motorcycle licence, the situation would have been more akin to that in *Jackson v Harrison* (1978) 138 CLR 438. In the latter case, the respondent was injured when he was travelling as a passenger in a motor car driven by a driver whom he knew to be disqualified, and the two of them were thereby jointly participating in an offence under the South Australian Motor Vehicles Act 1959. The majority in the High Court of Australia held that the respondent was not precluded from recovering damages on the ground that the illegality had no bearing on the standard of care reasonably to be expected of the driver. As enunciated by Mason J at 453, "[t]here is nothing inherent in the character of an unlicensed driver which is inconsistent with his owing a duty of care to other road users and to his passengers who happen to be engaged in unlawful activity".

The apportionment of liability

35 The final issue for determination is whether the injuries of the Plaintiff were caused by the Defendant's negligent riding of the motorcycle and whether the Plantiff was contributorily negligent. The Plaintiff's case was that the accident was caused by the poor skills of the Defendant in handling the motorcycle. In the Plaintiff's Statement of Claim, particulars of the Defendant's negligence included riding at a speed which was excessive in the circumstances and losing control of the motorcycle. [note: 43] On the other hand, the Defence was that the Defendant lost control of the motorcycle and skidded as a result of the actions of the Plaintiff while the latter was riding as a pillion passenger. Particulars of the Plaintiff's negligence as pleaded by the Defendant included negligently riding pillion on the motorcycle when the Plaintiff was fully aware that the Defendant did not possess a valid motorcycle licence and negligently moving his body in a manner which would cause the motorcycle to lose control. [note: 44]

36 I have already found that the Plaintiff did not know that the Defendant did not have a valid motorcycle licence at the time of the accident.

37 I come now to the question of whether the Defendant and/or the Plaintiff caused the accident.

38 The Plaintiff denied that the accident was caused by his failing to shift his weight as the motorcycle went around a bend. [note: 45] According to the Plaintiff, he had ridden pillion on a motorcycle on three occasions before the accident and had learnt how to follow the body posture of the rider. [note: 46] The Plaintiff's evidence was that the accident was caused by the Defendant leaning to the right too early when approaching a bend, which caused the motorcycle to skid. [note: 47]

39 When asked whether he had lost control of the motorcycle because he was an inexperienced rider, the Defendant replied in the affirmative. [note: 48] In his statement to the police dated 16 December 2008, which he confirmed in cross- examination, [note: 49] the Defendant stated that "I accidentally ran over a debris and later self skided" [*sic*]. Notably, he did not attribute any blame to the Plaintiff in his police statement. Further, during the trial, the Defendant testified as follows regarding the real reason for the accident: [note: 50]

> I will say, ah, combining morning dew, debris, construction, speed, ah, I think I will say everything went wrong at the point of time, as in everything accumulated to cause the ac---

> accident. From the speed to the debris of the construction to the morning dew at 4.00am, our body position to my focus of concentration of riding the bike also.

The Defendant did not clearly specify the Plaintiff's supposed failure to follow his body movements until the court specifically asked him about this, to which he replied that it was a "partial" reason for the accident. [note: 51] It is pertinent to note also that neither the Defendant nor the Co-Defendant's counsel cross-examined the Plaintiff about his body movements.

40 I found that the Defendant's complaint about the Plaintiff's body movements was an afterthought and was largely motivated by a desire to evade liability.

41 Yong Pung How CJ's words in *Muthan Sinnathamby v Puran Singh* [1992] 2 SLR(R) 88 at [5] are worth repeating:

> In this case, there were no witnesses for the plaintiff, but the mere fact that the accident occurred spoke for itself and, in applying the maxim *res ipsa loquitur*, the court could draw an inference of negligence against the defendant so as to establish a *prima facie* case against him. The motorcycle was at all times under the defendant's control and management, and the accident which involved the motorcycle going off the road and colliding into a tree could not have happened in the ordinary course of things without negligence on his part. A burden is therefore cast upon the defendant, and he must show how the accident actually occurred, and how this was consistent with due care on his part. In other words, he must rebut the inference of negligence raised against him: *Ooi Han Sun v Bee Hua Meng* [1991] 1 SLR(R) 922.

42 In the present case, the motorcycle was in the sole control and management of the Defendant, who was riding without a valid motorcycle licence. These two facts taken together gave rise to a very strong inference that the accident was attributable to his lack of skill or care in operating the motorcycle. In fact, the Defendant even gave evidence that the accident occurred due to his "speed", "body position" and "concentration". [note: 52] I found that the Defendant failed to rebut the above inference and I did not find the Plaintiff contributorily negligent. There was no evidence of any contributory negligence on the part of the Plaintiff other than the Defendant's bare assertion of the fact.

Conclusion

43 I therefore granted judgment to the Plaintiff on the basis of 100% liability against the Defendant. I ordered damages to be assessed by the Registrar and directed that the costs of the action and the assessment and interest be reserved to the Registrar. The counterclaim of the Defendant was dismissed with no order as to costs.

[note: 1] Reply and Defence to Counterclaim at para 3(a)

[note: 2] Defence and Counterclaim at paras 2 and 3

[note: 3] Ibid at para 3(a) and (b)

[note: 4] Notes of evidence ("NE"), 17/4/12 at p 12

[note: 5] NE, 17/4/12 at p 13 and 18/4/12 at p 7

[note: 6] Plaintiff's affidavit of examination-in-chief ("AEIC") dated 1/12/11 at para 3 and the Defendant's affidavit dated 13/6/11 at para 2

[note: 7] NE, 18/4/12 at p 7 and p 95

[note: 8] NE, 17/4/12 at p 15 and 18/4/12 at pp 7-8

[note: 9] Plaintiff's AEIC at para 4

[note: 10] NE, 18/4/12 at p 40

[note: 11] NE, 17/4/12 at p 22

[note: 12] NE, 17/4/12 at p 23

[note: 13] NE, 17/4/12 at p 24

[note: 14] NE, 17/4/12 at p 30

[note: 15] Ibid at para 8

[note: 16] Ibid at para 9

[note: 17] NE, 19/4/12 at p 13

[note: 18] The Defendant's Affidavit dated 16/12/11 at para 3 and NE, 19/4/12 at p 16

[note: 19] The Defendant's Affidavit at para 4

[note: 20] NE 19/9/12 at p 15, ln 8-12

[note: 21] Plaintiff's AEIC at para 4 and NE, 17/4/12 at p 18

[note: 22] Hidayah's AEIC dated 1/12/11 at para 5 and NE, 18/4/12 at p 32

[note: 23] NE, 17/4/12 at pp 16 and 19-21

[note: 24] NE, 18/4/12 at p 96

[note: 25] The Plaintiff's AEIC at para 5; Hidayah's AEIC at para 6; and NE, 17/4/12 at p 19 and 18/4/12 at p 36

[note: 26] NE, 17/4/12 at p 20

[note: 27] NE, 18/4/12 at p 37

[note: 28] NE, 18/4/12 at p 38

[note: 29] Hidayah's AEIC at para 7

[note: 30] NE, 18/4/12 at p.39

[note: 31] NE, 18/4/12 at p.98

[note: 32] NE, 18/4/12 at p 100 and 19/4/12 at p 54

[note: 33] NE, 19/4/12 at p 43-44

[note: 34] NE, 18/4/12 at p 100 and 19/4/12 at pp 56-57

[note: 35] NE, 17/4/12 at pp 17-18

[note: 36] NE, 18/4/12 at p 40

[note: 37] NE, 19/9/12 at p 18-20

[note: 38] NE, 19/4/12 at p 27

[note: 39] NE, 18/4/12 at p 59

[note: 40] NE, 18/4/12 at p 47

[note: 41] [1991] 1 QB 24 at p 48

[note: 42] Gary Chan, *The Law of Torts in Singapore* (Academy Publishing, 2011) at p 276

[note: 43] Statement of Claim at para 2

[note: 44] Defence at para 3

[note: 45] NE, 17/4/12 at p 36

[note: 46] Plaintiff's AEIC at para 10 and NE, 17/4/12 at pp 19-20

[note: 47] NE, 17/4/12 at p 37

[note: 48] NE, 19/4/12 at p 82

[note: 49] NE, 19/4/12 at p 22

[note: 50] NE, 19/4/12 at pp 92-93

[note: 51] NE, 19/4/12 at p 93

[note: 52] NE, 19/4/12 at pp 92-93