Erin Brooke Mullin and another *v* Rosli Bin Salim and another [2012] SGHC 27

Case Number : Suit No 540 of 2010

Decision Date : 03 February 2012

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Mr Sarjeet Singh s/o Gummer Singh (Acies Law Corporation) for the plaintiffs; Mr Niru Pillai and Ms Ooi Yee Mun (Global Law Alliance LLC) for the first defendant; Mr Desmond Tan Yen Hau and Ms Lam Su-Yin Natalie (Lee & Lee) for the second defendant.

Parties : Erin Brooke Mullin and another — Rosli Bin Salim and another

Tort – Negligence – Motor Accident – Liability

3 February 2012 Judgment reserved.

Lai Siu Chiu J:

1 This was a claim by Erin Brooke Mullin ("the first plaintiff") against Rosli Bin Salim ("the first defendant") and Toh Yoke Chin ("the second defendant") for the horrendous injuries that the first plaintiff sustained arising out of a motor accident on 18 September 2007 involving vehicles driven by the two defendants.

2 The first plaintiff is an American citizen who left Singapore after the accident and returned to Illinios, in the United States, together with her husband Jason Elliot Mullin ("the second plaintiff").

The facts

3 At about 7.30am on 18 September 2007, the first plaintiff was at MacDonald's Tea Garden ("MacDonald's") located at Queensway to buy breakfast. MacDonald's has an open car park ("the car park") for its patrons. Just then, a Honda Odyssey multipurpose vehicle with automatic transmission numbered SDU 2401E ("the vehicle") driven by the first defendant turned into the car park. As the vehicle was turning into the car park, a bus numbered CB 4939U ("the school bus") driven by the second defendant collided into its rear. (Hereinafter this collision will be referred to as "the first accident"). Instead of braking and stopping, the first defendant accelerated the vehicle. As a result, the vehicle collided into the front bumper of a stationary vehicle numbered SCQ 1166Z ("the second vehicle) before colliding into the right front bumper of another stationery vehicle numbered SGW 8811 ("the third vehicle") as well as the first plaintiff. The left front bumper of the vehicle crushed the first plaintiff's right leg. (Hereinafter this second collision will be referred to as "the second accident"). The serious injuries sustained by the first plaintiff necessitated her right leg being amputated below the knee in consequence.

4 Subsequently (on 6 January 2009), the first defendant was charged and convicted under ss 279 and 338 respectively of the Penal Code (Cap 224, 2008 Rev Ed) ("the Penal Code") for rash and negligent driving and causing grievous hurt. The first defendant pleaded guilty to the charges, was convicted and sentenced to imprisonment of four months and one month each for the two offences (the sentences to run consecutively) and was also disqualified from driving all classes of vehicles for

four years.

5 The first plaintiff sued for damages arising out of the second accident while the second plaintiff sued for the post-traumatic stress disorder he claimed he suffered as a result of his wife's injuries. The plaintiffs relied on the first defendant's conviction in [4] as evidence of the latter's negligence pursuant to s 45A of the Evidence Act (Cap 97, 1997 Rev Ed) ("The Evidence Act").

6 Initially, the first defendant denied the plaintiffs' claims. The first defendant pleaded that he lost control and panicked after the first accident, causing him to step on the accelerator instead of on the brake and to collide into the second and third vehicles consequentially. He admitted he pleaded guilty to and was convicted of the criminal charges in [4] above.

7 In his defence, the second defendant alleged that the vehicle had encroached into the path of the school bus, causing the second defendant to collide into the vehicle. The second defendant denied he was liable for the second accident contending that those subsequent collisions were independent acts of the first defendant and separate from the first accident.

8 In their respective defences, the defendants did not allege any contributory negligence on the part of the first plaintiff for the second accident. However, the second defendant alleged that it was the first defendant's negligence that caused or contributed to the second accident.

9 In March 2011, the first defendant consented to interlocutory judgment being entered against him for the plaintiffs' claim.

10 The first defendant had initially issued a Third Party Notice against the second defendant after the commencement of these proceedings. The Third Party Notice was subsequently discontinued with leave of court.

11 In May 2011, the first defendant issued a Notice of Indemnity and Contribution against the second defendant pursuant to O 16 r 8(1) of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for the issue of the proportion of liability between the two defendants to be determined.

12 In September 2011, the two defendants agreed to the quantum of the second plaintiff's claim being fixed at $10,000 subject to the issue of liability being determined between them.

13 The trial before this court was only to determine the extent of liability between the two defendants for the second accident. Parties agreed to dispense with the first plaintiff's presence at the trial. Both defendants testified for their respective defences. Although the first defendant's wife was the front seat passenger of the vehicle at the material time, she did not testify even though the first defendant made repeated reference to her reactions prior to the second accident.

The evidence

The first defendant's case

14 In his affidavit of evidence-in-chief ("AEIC"), the first defendant deposed that on that fateful morning, he and his wife left home at about 6.45am for work. The first defendant was then a driver for Mitsui Chemicals Asia Pacific Ltd ("Mitsui") which had leased the vehicle. The first defendant was allowed to drive the vehicle home if he worked late into the night and/or had to be at work early in the morning. The couple intended to have breakfast at MacDonald's before the first defendant dropped his wife off at her office at Robertson Quay.

15 To get to MacDonald's from his home at Woodlands, the first defendant used (i) the Seletar Expressway, (ii) the Bukit Timah Expressway and (iii) the Pan Island Expressway in that order. He deposed he exited from the Pan Island Expressway at Eng Neo Avenue and travelled down Farrer Road and Queensway. Traffic that morning along the first defendant's route was moderate and the weather was fine with good visibility.

16 As the first defendant approached MacDonald's, his vehicle which was then in the left lane, was travelling at approximately 50 kph. The first defendant noticed the school bus in front of him moving "a bit slow" (N/E 31) and decided to overtake it when approaching MacDonald's. He shifted the vehicle to the centre lane and when he was approximately 3 to 4 car lengths in front of the school bus and about 2 lamp posts away from the car park entrance, he signalled left, increased his speed slightly, overtook the school bus and eased the vehicle back into the left lane, at the same time slowing down to enter the car park.

17 As the vehicle was turning into the car park entrance, the first defendant saw that another vehicle was coming out. He therefore braked and slowed down further to allow the exiting vehicle to pass the vehicle. As he resumed turning into the car park and was moving his foot from the brake onto the accelerator, he felt a sudden and violent impact at the rear of the vehicle when the school bus collided into the vehicle.

18 The first defendant claimed that upon that sudden impact, the windscreen in front of him turned completely white and he could not see anything. He lost control of the vehicle and surged forward into the car park. It was only when his wife screamed (in Malay) "why so fast" that his vision cleared and the first defendant realised that the vehicle was headed towards MacDonald's. To prevent a collision, the first defendant turned the vehicle sharply in the direction of the car park.

19 In his state of shock, the first defendant deposed he was unable to control the speed of the vehicle. His foot was still on the accelerator and even though his mind told him to brake, he was unable to do so as he could not lift his foot off the accelerator. Consequently, the vehicle continued to surge forward and it hit the second and third cars in succession.

20 The first defendant's wife screamed again (in Malay) "there is a person". The first plaintiff had suddenly appeared in front of the third vehicle with a dog. The first defendant claimed he swerved to avoid hitting her but it was too late. She was crushed by the left front bumper of the vehicle and by the right front bumper of the third vehicle.

21 After colliding into the first plaintiff, the first defendant turned the vehicle sharply to his right. The vehicle climbed a slight slope, crossed a large drain and only then came to a stop on a grass verge.

22 The first defendant blamed the second defendant for the second accident contending that it all started with the first accident.

23 Having set out the first defendant's version of events, I turn now to consider the testimony that was adduced from him by counsel for the second defendant during cross-examination.

24 Questioned by counsel for the second defendant, the first defendant estimated that he was about 100m from MacDonald's when he first saw the school bus. Notwithstanding the short distance, he said he overtook the school bus because he thought it was safe to do so. He accelerated after shifting the vehicle into the second lane, overtook the school bus and then changed back to the left lane. By this time, the vehicle was 20m away from the entrance to MacDonald's. When overtaking the

school bus, the vehicle's speed was more than 50kph and he was going faster than the school bus. However, after he moved back to the left lane, the first defendant testified he slowed down. Indeed he was dead slow (N/E 18) at the time of the impact.

25 When his attention was drawn to photographs showing tyre marks made on Queensway by the school bus indicating it had braked and braked hard just before the latter collided into the rear of the vehicle, the first defendant claimed he did not hear any screeching of tyres or horning before the collision. Questioned where he had placed his foot while turning into the car park, the first defendant claimed it was on the brake and not on the accelerator until after the car exiting the car park had passed him. He conceded stepping on the accelerator was the wrong move but maintained he was unable to take his foot off therefrom.

26 The first defendant's attention was drawn to his police report which he lodged a few hours after the accident. Questioned why he had not mentioned he had a blackout and/or saw white and he could not remove his foot from the accelerator, the first defendant claimed he had mentioned those matters to the police officer who recorded his statement. Although he was literate in English, it did not occur to the first defendant to inform the police officer in question that those significant facts had been omitted from his statement. He denied counsel's suggestion it was due to the fact they never happened. Counsel also noted that the statement of facts read in court (to which he admitted without qualification) for the criminal charges preferred against the first defendant in [4] also did not mention any of the three facts. The first defendant claimed he did not read that document.

27 The first defendant denied he was driving at an excessive speed when he overtook the school bus and that he suddenly encroached onto the path of the latter after overtaking in order to make a left turn into the car park. However, the first defendant conceded that if he had not overtaken the school bus, there would not have been any accident at all.

28 When the court as well as counsel for the second defendant inquired why his wife was not called as his witness, the first defendant's absurd explanation was that the investigating officer had informed him she was not eligible to be a witness.

29 Questioned by the court, his counsel explained that he felt the testimony of the first defendant's wife would not have had much value/weight under s 124 of the Evidence Act. Instead, counsel produced a report from New Zealand vehicle accident analysts Marks and Associates Limited dated 3 October 2008 ("the expert's report") which opined that the accident happened due to "unintended acceleration" on the part of the first defendant who actually intended to brake. Notwithstanding that the expert from Marks and Associates Limited who authored the report (Christopher Marks) did not testify, the first defendant's submissions referred to the report *in extenso* arguing that the inclusion of the report in the agreed bundles before the court meant that it formed part of the evidence before this court. I shall return to these submissions later in my findings.

The second defendant's case

30 The second defendant had been driving the school bus since 2000. In his AEIC, the second defendant deposed that on the morning of 18 September 2007, he was going round picking up French students from their homes and sending them to their school at Ang Mo Kio Avenue 3 where classes commenced at 8.15am. He had been doing this routine for over a year before the accident. When he was at Queensway at about 7.30am, he was on his way to pick up a student from Holland Road.

31 Traffic was heavy and the second defendant was travelling in the left lane. Suddenly and without warning, the vehicle that was then in the middle lane made a sudden left turn, cutting across

his path to try to enter the car park on the left. Although he braked immediately and was able to slow down the school bus substantially, the second defendant was unable to stop in time and the school bus hit the rear of the vehicle. The second defendant then pulled up at the road side to look for the vehicle. He walked to the car park and was informed by bystanders that the vehicle had been involved in the second accident.

32 The second defendant alleged that the first accident was due to the first defendant's act of cutting across his path without warning, and the impact of that collision would not have propelled the vehicle across the substantial distance where it caused the second accident.

33 During cross-examination by counsel for the first defendant, the second defendant testified that there were no cars in front of the school bus as he approached MacDonald's. The road leading to MacDonald's (after the exit from the Farrer Road tunnel) initially sloped up and then sloped down once past an Esso petrol station ("the Esso station") situated there. His own speed was about 40kph going up the slope and about 50kph coming down. The second defendant testified that when he first saw the vehicle alongside the school bus in the middle lane, it was travelling at a faster speed than the school bus. He indicated on one of the photographs (at 1AB19) that the vehicle was very close to the entrance of the car park when the first defendant cut across his path. The second defendant could not recall sounding his horn then but denied he was travelling closer to the maximum speed of 60kph at the time because he was rushing to pick up the remaining 10 (of 30 students) to get them to school by 8.15am. In answer to the court's subsequent inquiry, the second defendant testified he had to make three more pickups that morning before heading to Ang Mo Kio Avenue 3.

34 As in the case of the first defendant, the second defendant's police report lodged on the day of the accident omitted certain facts. In his case, there was no mention that the vehicle had cut across his path or that he had applied his brakes hard. His police report merely stated that the vehicle then in front of him made a sudden stop, not that it cut into his path. The second defendant claimed he had given the police officer recording his statement the two missing statements but they were not included in his police report. (The second defendant does not read or write English although he can speak simple English).

35 Questioned by the court, the second defendant explained that the capacity of the school bus was/is 37 passengers. Because of its size, he said the bus could not go fast and he would only drive it at 60kph if and when he was using the expressways.

36 The second defendant's testimony showed he had a poor appreciation of distances and time based on the photographs produced in court, particularly as to when he first sighted the vehicle and where the vehicle cut into his path. As the time and distances involved could be factors relevant to the court's determination of liability between the two defendants, I directed counsel for the parties (and for the plaintiffs) to visit the accident scene to take measurements of certain distances. This was done before trial resumed on the second day.

37 Following the site inspection, parties advised the court of the following distances:

(a) between the exit from the Farrer Road tunnel and the car park entrance it was 570m;

(b) between the Farrer Road tunnel exit and the Esso station (top of the slope) it was 280m;

(c) between the Esso station and the car park entrance it was 290m; and

(d) where the first defendant cut across the second defendant's path it was 36.2m before the

car park's entrance alongside the car park's lot no. 13.

Travelling at 50kph, the court calculated that the second defendant would have taken just 2.6 seconds to travel the distance from the time he first saw the first defendant cutting across his path (which the second defendant estimated was two car lengths away) until the collision at the entrance of the car park where the vehicle had stopped after barely turning in. The second defendant did not recall seeing another vehicle at the entrance of the car park when the vehicle was turning in.

38 The damage to the school bus from the collision was to its front left portion. The second defendant explained it was because the vehicle was straightening out after it cut across his path and he hit the centre and right rear sides of the vehicle at an angle. He disagreed with counsel for the first defendant that the substantial damage to the vehicle (which included breakage of the rear windscreen) was reflective of the high speed at which he was travelling at the time of the impact. He pointed out that the heavy impact was due to the size of the school bus.

39 I should point out that the first defendant was recalled to the witness stand after the second defendant had testified and after parties had visited the accident scene and taken measurements. When he was recalled, the first defendant's testimony changed materially from his earlier evidence. He said:

(a) He had actually noticed the school bus when the vehicle was approaching (less than 20m from) the Esso station. Just a day earlier, (in [24] and in his AEIC) he had testified that he first noticed the school bus about 100m from the entrance to the car park.

(b) He had started overtaking the school bus somewhere just before the Esso station instead of less than 100m away from the car park entrance.

(c) He had completed overtaking the school bus and filtered into the left lane just after the overhead bridge and bus-stop shown in the photograph at 4AB10.

The issues

40 In order to determine which of the two defendants (or both) were liable for the second accident and the plaintiffs' claim, the court has to decide:

(a) Was the first accident caused by the first or the second defendant?

(b) Even if the first accident was caused or partly caused by the second defendant, was there a break in the chain of causation between the first and the second accidents under the *novus actus interveniens* principle such that the first and not the second defendant is liable for the plaintiffs' claim?

The submissions

41 Before I set out my findings, it would be appropriate at this juncture to consider the closing submissions tendered by the parties. Earlier at [29], I had alluded to two of the first defendant's submissions. I shall now return to those two submissions and will also address the first defendant's other submissions where necessary.

The first defendant's submissions

42 The first defendant accused the second defendant of embellishing his testimony by alleging that

the first defendant cut into his path. The first defendant made much of the fact that there was no mention of this allegation in the second defendant's police report which was a contemporaneous document and likely to be more accurate. As it was a critical fact and the trigger point for the second accident, the second defendant would not have failed to mention it in his police report if it had been true. To make matters worse, the second defendant had then disavowed his police report by contending he did not understand the contents. Neither was this allegation pleaded in the second defendant's defence which only alleged that the first defendant suddenly encroached into his lane. The first defendant argued that the allegation was clearly an afterthought and contended that the second defendant was an unreliable witness.

43 The submissions (in para 58) went on to assert that the lane change and overtaking by the first defendant were totally uneventful as they happen all the time in multi-lane traffic. It was further contended that the first defendant was already safely in the left lane as he was turning into the car park entrance when the school bus of the second defendant collided into the rear of the vehicle.

44 The first defendant further relied on the extensive damage to the vehicle and to the school bus as corroborative evidence of the first defendant's version of how the first accident took place, but not the second defendant's version.

45 It was further contended by the first defendant that the second defendant was in a hurry that morning to pick up 10 more students from three condominiums in the Holland Road area. He only had 45 minutes in peak hour traffic to get to Ang Mo Kio Avenue 3 by 8.15am via Farrer Road, Lornie Road, Braddell Road and the Central Expressway The first defendant submitted that the second defendant must have been speeding when going down the slope after the Esso station, since there were skid marks appearing in photographs of Queensway near the scene of the first accident which could only have been made by the school bus (as the court pointed out).

46 The first defendant's submissions went further to put the blame for the first and second accidents squarely on the second defendant, contending it was his negligence that set off the chain of events leading to the second accident, relying on *Teng Ching Sin and Anor v Leong Kwong Sun* [1994] 1 SLR(R) 382. It was submitted that the second defendant was inattentive and hence, failed to apply his brakes in time. Further, he should have known that vehicles would enter and leave the car park, having plied the same route for over a year.

47 Citing *SBS Transit Ltd v Stafford Rosemary Anne Jane* [2007] 2 SLR(R) 211 and *Mohammad Kassim Bin Sapil v Quah Lai Tee & Others* [2003] SGHC 118 as well as the expert's report in [29], the first defendant submitted that but for the first accident, the first defendant would not have caused the second accident. Consequently, the second defendant's case based on *novus actus interveniens* was untenable.

48 The first defendant argued that the second defendant had relied on the first defendant's criminal convictions in [4]. As the expert's report was part of the documents tendered in those proceedings in relation to the first defendant's mitigation plea and sentence, the expert's report must be treated as having been admitted as evidence of its truth. There was also no rebuttal evidence from the second defendant. Therefore, it was no longer possible for the second defendant to question the truth of the expert's report.

49 For the reasons set out in my findings at [66], I do not accept the above submission. The expert's report was not admitted as part of the evidence before this court. Consequently, the first defendant's submissions based on the document are rejected. The first defendant's reliance on s 45A(5) of the Evidence Act in this regard is also misconceived. The first defendant's contention that

he can still call the expert to testify in relation to the expert's report (because the trial is not yet over) is incorrect; the principles in *Ladd v Marshall* [1954] 1 WLR 1489 would certainly preclude the calling of such expert testimony after this trial. The first defendant should not be given a second bite of the cherry to the irreparable prejudice of the second defendant.

The second defendant's submissions

50 I turn now to the submissions of the second defendant. He submitted that the first defendant's evidence was wildly inconsistent and in some parts logically impossible. In this regard, I had earlier (at [39]) noted the different versions given by the first defendant of how the first accident happened, before and after he had visited the accident scene.

51 Counsel for the second defendant argued that his client's version of how the first accident happened was wholly consistent with a sudden cutting into his lane by the first defendant/vehicle. As for the omission of this fact in the police report of the second defendant, it was submitted that the second defendant had given an adequate explanation for the failure of the police officer who recorded his statement to do so – unlike the first defendant, the second defendant does not read but speaks only basic English. The said police officer had spoken to the second defendant in a mixture of English and Mandarin. Therefore, it was quite believable that the communication between them was less than perfect.

52 The second defendant submitted that the first defendant's plea of guilt and conviction in [4], and unqualified admission to the statement of facts presented by the prosecution were clear evidence of his encroachment into the lane of the second defendant.

53 It was also submitted that the court should draw an adverse inference against the first defendant for his failure to call his wife to testify. Even if less weight would be accorded to her testimony as she was not an independent witness, she was a material witness and would have been able to corroborate the first defendant's version of events. (The first defendant had countered this submission by contending that a similar adverse inference should be drawn against the second defendant for failing to call his bus conductress to testify).

54 It was pointed out that the first defendant had never patronised that MacDonald's outlet (N/E113) previously. Consequently, his unfamiliarity with the outlet lent credence to the possibility that he did not know where the car park entrance was when he overtook the school bus. He realized after overtaking that the car park entrance was almost upon him. He tried to make a sudden left turn into the car park, and in doing so, he cut into the path of the second defendant causing the latter to brake the school bus hard albeit too late to avoid the collision.

55 Consequently, the second defendant contended he should not be held liable for the first accident. Even if the second defendant was to some extent contributorily negligent for the first accident, there was no casual link between the first and the second accidents (both in fact and in law) as to hold the second defendant liable for the second accident. He blamed the first defendant for causing both accidents.

The findings

Was the first accident caused by the first or the second defendant?

56 Having considered the oral and documentary evidence presented in court, I am of the view that the first defendant was wholly to blame for the first accident.

57 Notwithstanding the robust submissions put forth by his counsel that his client's testimony should be preferred to that of the second defendant, I find that the first defendant's version of how the first accident took place to be less credible than the second defendant's version and inconsistent with the site measurements taken at the scene of the first accident.

58 The first defendant had contended initially that he first saw the school bus when he was about 100m from the car park entrance. He had also admitted he was driving at an excessive speed (N/E30) when he overtook the school bus. I therefore do not believe the first defendant when he said he was travelling at 50kph for about a minute when he was behind the school bus. At that speed, he would have covered 13.9m every second or 834m per minute. In 30 seconds, the vehicle would have travelled 417m. The first defendant would have long passed the car park entrance before he overtook the school bus if his evidence was true. He was going well beyond 50kph. In this connection, the first defendant's submission that the second defendant was speeding undermined his own case. If the school bus was travelling at or beyond 50kph, it must mean that the first defendant was travelling at an even greater speed in order to overtake the school bus.

59 When he filtered into the left lane from the middle lane, the first defendant's original testimony was that there was only 20m to the car park entrance. The first defendant was also not familiar with that MacDonald's outlet. He had obviously cut sharply into the left lane in front of the school bus when he realised he was about to overshoot the car park entrance. He must also have braked hard to turn left into the car park entrance. As the second defendant was driving a heavy bus with 20 students, he did not have sufficient reaction time or distance to stop even after braking hard. There was no vehicle leaving the car park when the vehicle turned sharply left into the car park. That was a fabrication on the part of the first defendant for his stopping at the entrance. He stopped because he had braked hard in making the turn; it was not to allow any vehicle to leave the car park. He was not going dead slow when he approached the car park entrance as he claimed.

60 It was telling that after he had visited the accident scene, the first defendant changed his testimony to say he noticed the school bus as the vehicle was approaching the Esso station. He went further to claim that he started to overtake the school bus just before the Esso station, as shown in the position marked X in the photograph at 4AB5. This belated change in his testimony was clearly an afterthought. Even if his altered testimony was to be believed, he would still have gone past the car park entrance if he travelled at or faster than 50kph. The distance between the Farrer Road tunnel exit and the car park entrance is only 570m (see [37] above). It would have taken the first defendant 41 seconds to cover that distance had he stayed behind the school bus for any amount of time.

61 It was more likely than not that the first defendant, driving the vehicle at more than 50kph, overtook the school bus some distance after the Esso station. Given the short distance of 20m to the car park entrance after his overtaking, it would have taken the vehicle no more than 1.44 seconds to cover that distance. The first defendant applied the brakes of the vehicle hard and almost stopped because he had nearly overshot the car park entrance.

62 Upon being recalled, the first defendant testified there was another vehicle (which make and model he could not recall) in the middle lane in front of the vehicle that prevented him from filtering back to the left lane immediately after he had overtaken the school bus before the Esso station. This evidence was not in his AEIC or oral testimony on the first day of trial. He suddenly remembered this crucial piece of evidence (N/E106) on the second day. I disbelieve this new evidence.

63 I turn now to address the issue of whether an adverse inference should be drawn against the first defendant for failing to call his wife to testify. The first defendant's closing submissions had cited s 124 of the Evidence Act to explain her non-attendance in court. That provision has no relevance at

all. It states:

> **124**. No person who is or has been married shall be compelled to disclose any communication made to him during marriage by any person to whom he is or has been married; nor shall he be permitted to disclose any such communication unless the person who made it or his representative in interest consents, except in suits between married persons or proceedings in which one married person is prosecuted for any crime committed against the other.

64 In fact the relevant section of the Evidence Act is s 116(g) which states:

> **116**. The court may presume the existence of any fact which it thinks likely to have happened, regard being had to the common course of natural events, human conduct, and public and private business, in their relation to the facts of the particular case.
>
> *Illustrations*
>
> The court may presume –
>
> ...
>
> (g) that evidence which could be and is not produced would if produced be unfavourable to the person who withholds it;

65 I am of the view that an adverse inference should be drawn against the first defendant for not calling his wife as his witness. Unlike the second defendant who made no mention of the bus conductress save when he was cross-examined, the first defendant specifically referred to his wife's reactions when he was accelerating the vehicle in the car park instead of braking and stopping. It was for the court and not the first defendant or his counsel to decide that the wife's testimony would have little or no probative value, after she had taken the stand. Based on s 116(g) of the Evidence Act, I am of the view that had she testified, the wife's testimony would have been unfavourable to the first defendant.

66 Earlier (at [49]), I had indicated that the expert's report would not be admitted as evidence before this court as the maker Christopher Marks did not testify. Contrary to the submissions of the first defendant, documents incorporated in the various agreed bundles before the court were only meant to dispense with formal proof. This was the basis upon which this court marked the agreed bundles at the commencement of trial. The contents of the documents were not admitted unless counsel indicated to the court otherwise. The fact that counsel for the second defendant did not object to the inclusion of the expert's report in the agreed bundle did not mean he accepted the contents of the expert's report as true without more.

67 The first defendant's submissions had conflated the issue of his conviction under ss 279 and 338 of the Penal Code as admissions by the first defendant under s 45A of the Evidence Act with that of the admission of the expert's report by the second defendant. Just because the expert's report formed part of the documents presented in the criminal proceedings against the first defendant did not mean the second defendant had accepted the document's contents. This is clear from s 45A(1) of the Evidence Act which states:

> **45A.** —(1) Without prejudice to sections 42, 43, 44 and 45, the fact that a person has been convicted or acquitted of an offence by or before any court in Singapore shall be admissible in evidence for the purpose of proving, where relevant to any issue in the proceedings, that he

committed (or, as the case may be, did not commit) that offence, whether or not he is a party to the proceedings; and where he was convicted, whether he was so convicted upon a plea of guilty or otherwise.

The second defendant was merely relying on the unqualified admission made by the first defendant to the prosecution's statement of facts as evidence of his negligence that caused the first and second accidents. Contrary to the first defendant's submissions, the expert's report does not fall under the ambit of s 45A(5) of the Evidence Act which states:

> Where relevant, any document containing details of the information, complaint, charge, agreed statement of facts or record of proceedings on which the person in question is convicted shall be admissible in evidence.

68 I accept that the criminal conviction of the first defendant is most relevant. More significantly, the first defendant admitted to the convictions in his defence. It therefore does not lie in his mouth to deny his admission that he encroached into the path of the school bus and to submit that this court should consider evidence to the contrary. It is also a relevant factor that the second defendant was never charged for any offence over the collision of the school bus with the vehicle.

69 The first defendant's submissions (at para 213) had referred to the second defendant's admissions of 10% liability for the claims made by the second and third cars involved in the second accident. The second defendant should, but was never cross-examined on why he had admitted to 10% liability for those claims. Consequently, this submission of the first defendant is to be disregarded.

70 Notwithstanding the second defendant's poor estimates of distances and the minor inconsistencies in his evidence, I find that he was a truthful witness who did not attempt to embellish his testimony as the first defendant sought to do after visiting the accident scene. After that visit, the court was able to establish that the vehicle cut into the second defendant's path at the location of car park 13 which was 36.2m away from the entrance to the car park. Travelling at 40 – 50kph, the school bus would have taken 3.2 or 2.6 seconds to cover the distance before the collision. I note that prior to the site inspection, the second defendant had indicated that the encroachment by the first defendant was some 200m away from the car park entrance. I do not see this change in distances as an inconsistency in the second defendant's testimony that cast doubts on his credibility. He had readily admitted his figure was an estimate.

71 It bears noting that the first defendant's original testimony was consistent with the second defendant's version that the former had suddenly cut into the latter's path after the vehicle overtook the school bus and the vehicle then tried to make a left turn into the car park.

Was there a break in the chain of causation between the first and the second accidents?

72 Even if I am wrong in my first finding and the second defendant was partly liable for the first accident, there was a break in the chain of causation such that he is not liable for the second accident and the plaintiffs' claim.

73 As observed earlier (at [29]), the first defendant's submissions relied heavily on the expert's report and that the second accident was caused by the unintended acceleration of the vehicle by the first defendant. I have already rejected the expert's report and need say no more on the issue. What is most telling of the first defendant's explanation of how the second accident happened, both in his AEIC and in his oral testimony, is that he did not once state that he had stepped on the accelerator

accidentally. His evidence throughout was that he could not take his foot off the accelerator and he could not offer an explanation for his action.

74 The first defendant did not allege that the first accident caused him to step on the accelerator. Instead, he pleaded in his defence that he panicked (but offered no reasons), deposed in his AEIC that he saw something white, claimed in court he had a blackout, and in his police report he stated he had lost control of the vehicle after being hit by the school bus. Notwithstanding his panicked state and/or blackout and/or white vision, the first defendant had the presence of mind to swerve the vehicle towards the car park to avoid crashing into MacDonald's when his wife screamed. Then, he failed to brake and continued to step on the accelerator and collided into the second and third vehicles as well as the first plaintiff as a result. At this moment, he then had the presence of mind to swerve the vehicle sharply to his right thereafter. I note too that during his cross-examination (N/E26), the first defendant agreed that he should not have stepped on the accelerator and it was clearly the wrong thing to do.

75 I further note that the first defendant gave an unconvincing explanation in [28] as to why his police report made no mention of his blackout, the white vision he allegedly saw and his inability to take his foot off the accelerator. Unlike the second defendant, the first defendant is literate in English. Such important facts which could well have explained his conduct then could not have been omitted from his police report if indeed they were true. I am of the view that these excuses were conjured up by the first defendant after the event and are unlikely to have taken place.

76 As stated earlier at [49], the expert's report was not admitted into the evidence before this court. It served little purpose therefore to consider Christopher Mark's opinions on why the first defendant stepped on and continued to step on the accelerator. No medical evidence, which would have been more relevant, was presented to explain why the first defendant stepped on the accelerator and was unable to remove his foot therefrom (if it was true which I doubt).

77 I should add that the cases cited in the first defendant's submissions are not helpful. The finding in every case of negligence turns on its own facts. How a court decides in a case will depend very much on the facts peculiar to the case itself.

78 I therefore accept the submission of the second defendant that the first defendant's act of stepping on the accelerator, instead of braking the vehicle, constituted an intervening act that effectively broke the chain of causation if there was indeed a causal link between the first and second accidents.

Conclusion

79 Consequently, I find that the first defendant's conduct caused the second accident and he is wholly liable for the plaintiffs' claim. The second defendant shall have his costs from the first defendant for these proceedings which are to be taxed on a standard basis unless otherwise agreed.