Hum Weng Fong v Koh Siang Hong
[2008] SGCA 28

Case Number : CA 92/2007

Decision Date : 07 July 2008

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA

Counsel Name(s) : Chua Tong Nung Edwin and Wong Sow Yee (Lawrence Chua & Partners) for the appellant; Abraham Teo Siew Kuey (Abraham Teo & Co) for the respondent

Parties : Hum Weng Fong — Koh Siang Hong

Damages – Apportionment – Motorcyclist travelling on major road colliding with cyclist emerging from slip road – Trial judge finding motorcyclist liable for two-thirds of damages – Whether appellate court should interfere with trial judge's apportionment

Evidence – Witnesses – Trial judge asking many questions of witness – Whether trial judge intervened excessively – Section 167 Evidence Act (Cap 97, 1997 Rev Ed)

7 July 2008

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 This was an appeal by the defendant against the decision of the High Court which held that liability for an accident, which occurred at 4.45am on 26 January 2004 at the junction of Ang Mo Kio Avenue 3 ("AMK Ave 3") and Ang Mo Kio Industrial Park 2 ("the AMK TI junction") and caused the death of one Teow Moi Chye ("the deceased"), be apportioned between the defendant and the deceased in the ratio of two-thirds and one-third respectively.

2 We heard the appeal on 13 May 2008 and allowed it by varying the proportion of liability for the accident to that of one-third for the defendant and two-thirds for the deceased. We now give our reasons for the decision.

Facts of the case

3 The plaintiff respondent is the widow of the deceased and the administratrix of the deceased's estate. At the time of the accident, the deceased, aged 55, was a school bus driver. The plaintiff assisted her husband in his work by being the bus attendant. On every school day, at about 4.30am, the deceased would cycle from his home at Ang Mo Kio Avenue 4 to Serangoon Garden South School at AMK Ave 3 where his bus was parked the night before. The deceased would then drive the bus home to pick up the plaintiff before they went about their daily work.

4 The defendant appellant retired as a welder at the age of 55. He was 58 years old on the date of the accident. On the night before the accident, the appellant was having dinner at a coffee shop at Kallang Bahru. There he met up with some friends and they had drinks. The appellant consumed three large bottles of Carlsberg beer. It was then raining heavily. At about 4.15am when the rain subsided, he put on his raincoat and rode his motorcycle intending to return home. His route took him through the Central Expressway and AMK Ave 3 towards the direction of Hougang. It was at

a spot just a few metres past the AMK T-junction when the appellant's motorcycle collided into the deceased who was cycling from Ang Mo Kio Industrial Park 2 and taking the left slip road to join up with AMK Ave 3. The deceased suffered head injuries from which he died.

5 There was no eye witness to the accident other than the appellant. AMK Ave 3 is a dual carriageway with each direction having three traffic lanes. According to the appellant, on that morning, he was riding his motorcycle along the middle lane of AMK Ave 3 at a speed of 50 km/h with his headlights on. The traffic at that hour was very light. As he approached the traffic-controlled AMK T-junction, the traffic lights were in his favour and he proceeded along. Just past the junction, as the slip road merged with AMK Ave 3, the deceased rode his bicycle very quickly onto the main road. The appellant said that when he saw the deceased, the latter was only about one car length away from him. He also said that he tried to avoid a collision by swerving to the right and applying the brakes. But it was of no avail.

6 The police sketch plan of the scene of the accident showed that the bicycle was lying on the left edge of the left lane of AMK Ave 3, where the slip road and the main road joined up. The deceased was lying on the left edge of the middle lane. The motorcycle was lying on the right edge of the left lane.

Decision of the court below

7 The judge below ("the Judge") had difficulties accepting the appellant's evidence that the deceased had suddenly emerged from the slip road and encroached onto his path. He referred to the appellant's evidence during cross-examination when he said that he had filtered from the middle lane to the left lane as he was reaching the Caltex petrol station. This petrol station is located at the AMK T-junction, on the same side from which the deceased emerged from the slip road onto AMK Ave 3. In his police report, the appellant never mentioned anything about filtering to the left lane from the middle lane. There he only stated that, at the AMK T-junction, "a cyclist suddenly came out from the slip road".[note: 1] The Judge also pointed out that the appellant's report to his insurer, where he enclosed a sketch of the scene of the accident, showed that he was travelling in the middle lane throughout and the collision took place at the left edge of the middle lane.

8 Next, the Judge took issue with the appellant's claim that he had swerved right upon seeing the deceased encroaching onto his path. The Judge opined (at [7] of his grounds of decision in *Koh Siang Hong v Hum Weng Fong* [2007] SGHC 218) that "[w]ere that the case, [the appellant's] motorcycle would have ended on the right side of AMK Ave 3, not the leftmost lane".

9 Third, the Judge questioned why the appellant had not noticed the deceased earlier and only saw the latter when the latter was one car length away; if the appellant had kept a proper lookout he would have seen the deceased earlier as the latter was pedalling along the slip road. The Judge thought that this might be due to the fact that the appellant was tired and not alert, having spent the last seven hours or so drinking. Moreover, he also opined that, while the appellant was riding within the speed limit prescribed by law, having regard to the lighting conditions, the wet road surface and the state of his alertness, riding at 50km/h was excessive and not safe.

10 The Judge placed one-third blame on the deceased because he entered AMK Ave 3 without ensuring that it was safe for him to do so. However, the Judge thought that greater fault lay with the appellant for not keeping a proper lookout and for having changed from the middle to the left lane, thus putting him on a collision course with the deceased. The Judge held him two-thirds to blame.

The appeal

11 Before us, the appellant submitted that the Judge was wrong to have held that he was two-thirds to blame for the accident. Indeed, the appellant argued that he should be absolved from fault altogether because:

(a) any motorist or cyclist who emerges from a minor or slip road onto the main road should give way to traffic on the main road;

(b) the appellant could not be considered to be riding fast at a speed of 50 km/h; and

(c) a reasonable motorist in the position of the appellant would not have seen the cyclist's sudden emergence onto the main road as it was dark and the bicycle had no lights.

The respondent submitted that the Judge, having carefully analysed the evidence, was correct in his apportionment. Emphasis was placed on the fact that the appellant had switched lanes and failed to keep a proper lookout for other users of the road such as the deceased.

Issues in the appeal

Changing lanes

12 Before we proceed to address the main issues in this appeal, we would like to deal briefly with the question of changing lanes, a matter which the Judge seemed to have placed some emphasis. In cross-examination the appellant admitted that as he approached the AMK TI junction he filtered from the middle to the left lane. The Judge pointed out that the appellant did not mention anything about changing lanes either in his police report or in his report to his insurers. Accordingly, the Judge had some doubts as to the quality of his evidence.

13 It could not be disputed that the evidence about lane-changing was new. It was not alluded to by the appellant in his earlier statements. We agreed that in the light of such a change of evidence, the appellant's evidence should be scrutinised with care.

Speed

14 We will first deal with the question of the speed of the appellant's motorcycle as it approached the said junction. The Judge accepted the appellant's evidence that he was travelling at 50km/h and that this was within the speed limit prescribed by law. Of course, the fact that a motorist drives within the prescribed speed limit does not mean that the motorist could not be negligent. The speed limit merely sets the maximum speed at which a motorist can drive on that road without infringing the law. The question of whether a motorist is negligent or not will depend on all the circumstances of the case of which speed is only one factor. The general overall condition of the road will determine whether the particular speed at which a motorist is driving is excessive. The same speed in one set of circumstances may well be perfectly in order whereas in a different set of conditions it may be considered to be excessive and the motorist thus negligent.

15 The Judge gave three reasons at [9] of his grounds of decision for holding that the speed of 50km/h at which the appellant was riding was excessive. First was the lighting. Second was the wet condition of the road. Third was the state of alertness of the appellant. There was evidence that at the relevant time that stretch of the road was lit by street lights. The appellant said that he could see things ahead of him. One must not draw the conclusion that lighting was inadequate simply because a thing or an occurrence was not seen or witnessed by a motorist. This could be due to a variety of other reasons which have nothing to do with the matter of lighting, such as the motorist's

focus not being in that direction or a momentary lapse in the motorist's concentration.

16 We agree that, as a general rule, the fact that the road is wet is relevant in determining whether the speed at which a motorist is travelling is excessive as that condition can affect braking distance. However, it would appear that the Judge was concerned with visibility in view of the slight rain. He was troubled by the fact that the appellant did not see the deceased until the deceased was one car length away. However, the evidence of the appellant was that while there was a slight drizzle then, he was able to see clearly through the visor of his helmet. This aspect of his evidence was not challenged.

17 As for the Judge's comment at [9] of his grounds of decision regarding the long night and the appellant's lack of alertness, having spent "the last seven hours or so drinking", we would add that it was not entirely correct to say that the appellant was drinking during the last seven hours before he embarked on his journey home. In his evidence, the appellant said that he had had his last drink that morning at 2.00am. Thus, the appellant had already stopped drinking for more than two hours before he started on his ride home. At the trial, counsel for the respondent also informed the court that during the Coroner's Inquiry into the death of the deceased, evidence was adduced to show that upon his being conveyed to the hospital (the appellant was also injured during the collision) his blood alcohol level was 78mg/100ml, which was below the legal limit of 80mg/100ml. The appellant also told the court that he drank beer in those quantities every week. It was not something unusual. He was a seasoned drinker and his faculties were not affected. However, while we accepted that the appellant could very well be tired, we did not think that this necessarily means that the speed at which he was travelling was excessive. We will now turn to the question of lack of alertness due to tiredness.

Alertness

18 The Judge held (also at [9] of his grounds of decision) that in view of the long night, with quite a number of hours spent in drinking, the appellant was tired and was not alert to the dangers of the road on which he was riding. If the appellant had exercised care, he would have seen the deceased cycling along the slip road to get onto AMK Ave 3 much earlier than the appellant did. It will be recalled that the appellant said that when he first saw the deceased the latter was just one car length away from him.

19 Counsel for the appellant, relying on cases such as *Mohamed Repin v Lim Yu Kee* [1965-1968] SLR 353 ("*Mohamed Repin*"), argued that no blame should be placed on the appellant as the deceased, who was travelling on a minor or slip road, should have ensured that the main road was clear before he entered it. However, there is a significant difference between *Mohamed Repin* and the present case because in *Mohamed Repin* the motorist was coming out from a minor road onto a major road, where there was a halt sign against the minor road. That motorist was held wholly to blame for the accident as the vehicle travelling on the major road was entitled to assume that the vehicles from the minor road would halt and give way to traffic on the main road. The court even went further to say that had the driver of the vehicle on the major road seen the vehicle on the minor road earlier, he would be entitled to assume that the vehicle on the minor road would stop at the halt line and give way to traffic on the main road. In coming to his decision, F A Chua J relied on the unreported English decision of *Brooks v Graham and Berrington* (Court of Appeal, 1964) where Willmer LJ said:

> Assuming, therefore, that Mr Berrington had seen the Dormobile van at the time when he reached the cross-roads, he would have been right to go on as he was going so as to get across; he would have been right to assume that the Dormobile would stop at the halt line and allow him to do so. It appears to me that this is a feature of the case which the learned judge has overlooked. He has treated the case as though it were one of a collision at an uncontrolled

> cross-road, or a cross-road subject only to a Slow sign. It seems to me that, when one is dealing with a cross-road subject to a halt sign, wholly different considerations apply. If a vehicle on the major road is to approach such a cross-road in such a way that it can stop dead if a vehicle on the minor road fails to observe the halt sign, it would mean that it would have to slow down to little more than walking pace. That would have the effect for all practical purposes of bringing traffic on the major road to a standstill. That, as I said earlier, would represent a wholly unrealistic view of the requirements of present day traffic conditions.

20 Reliance was also wrongly placed by the appellant on *Ong Sim Moy v Ong Sim Hoe* [1965-1968] SLR 846 which was again a case involving a minor road with a halt sign and a major road. There a cyclist, emerging from such a minor road, was also held wholly to blame for the accident which occurred with a vehicle travelling on the major road.

21 In our case here, there was no halt sign at the point where the slip road merged with AMK Ave 3. What was marked on the slip road at the point of merging were parallel broken white lines indicating that traffic on the slip road should give way to traffic on the main road. There was no obligation for traffic on the slip road to stop before entering AMK Ave 3 as would be the case if there was a halt or stop sign. In our opinion, the situation in our case here is similar to that where the sign against the minor road is "Slow Major Road Ahead". This was the case in *Lang v London Transport Executive* [1959] 1 WLR 1168 ("*Lang*") where a motorcyclist emerged from such a minor side road onto a major road and collided with an omnibus which was travelling along the major road. The motorcyclist was killed. The court held that although the motorcyclist was highly negligent, the bus driver was nevertheless one-third to blame because the possibility of danger was reasonably apparent and the bus driver should have taken the precaution of looking at the traffic coming from the side road to see whether the motorcyclist would slow down to let traffic on the main road clear.

22 What situations would give rise to a duty of care would depend on the factual circumstances. It is not a matter which is amenable to precise definition. Ultimately the test is one of reasonable foreseeability. If a danger is reasonably foreseeable, then a duty of care arises. In *Fardon v Harcourt-Rivington* (1932) 146 LT 391 at 392, Lord Dunedin stated:

> [W]hat is negligence depends on the facts with which you have to deal. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions. … [P]eople must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities.

23 Reverting to our present case, on the morning when the accident occurred, there was hardly any traffic on the road. But that did not mean that the appellant could simply assume that there would be no other road users or that he need not keep a proper lookout for traffic on the road. A person who drives any vehicle, including a motorcycle, must keep a proper lookout at all times as his vehicle can turn into a lethal weapon. He should never permit himself to be lulled into thinking that he can somehow relax.

24 In this case, what troubled us, as also the Judge, was the failure of the appellant to see the deceased until the latter was just one car length away from him. If he had exercised reasonable care, he would have noticed the deceased pedalling his bicycle on the slip road approaching AMK Ave 3. Another pertinent aspect was that the appellant claimed that upon seeing the deceased he tried to swerve right. If he did manage to swerve right, as the Judge observed, his motorcycle would probably have landed at the outer lane of the carriageway. However, the police sketch plan showed that the

motorcycle was lying on the right edge of the left lane. This could only mean that he was so close to the deceased's bicycle that he had no time to swerve. This is evidence that the appellant did not keep a proper lookout. The cause for that state of affairs would not be difficult to ascertain. Though he was not drunk, and was fully capable of managing his motorcycle, the appellant was obviously tired, having had a long night out. As a result, he was less than alert, only noticing the deceased when it was too late for him to take any evasive measures.

Apportionment of blame

25 We now turn to consider the question of apportionment of fault for the accident. The Judge was of the view (at [10] of his grounds of decision) that the predominant blame should fall on the appellant, placing much emphasis on the fact that the appellant switched lanes and did not keep a proper lookout. As for the deceased, the Judge said (*ibid*) that he was also at fault as "he was entering AMK Ave 3 from the slip road and was obliged to ensure that it was safe for him to do so".

26 Apportionment of liability is an exercise involving the comparison of culpability, and of the relative importance, of the acts of the parties in causing the damage or injuries. For this purpose it will be necessary to look at the entire conduct of each of the parties. It is very much a balancing act, a matter of judgment on which opinions among judges might well differ. It is not a science. Accordingly, an appellate court should only interfere in the apportionment made by the trial judge in exceptional circumstances. In *British Fame v Macgregor* [1943] AC 197 ("*Macgregor*") the House of Lords held that when an appellate tribunal accepted the findings of fact of the court below, it should, in the absence of an error of law, only revise the distribution of blame determined by the court below in very exceptional cases. Viscount Simon LC elaborated (at 199):

> I apprehend that, if a number of different reasons were given why one ship is to blame, but the Court of Appeal, on examination, found some of those reasons not to be valid, that might have the effect of altering the distribution of the burden. If the trial judge, when distributing blame, could be shown to have misapprehended a vital fact bearing on the matter, that, I think, would be a reason for considering whether a change in the distribution should be made on appeal.

The principles enunciated in *Macgregor* have been applied in many local cases, such as by the Court of Appeal in *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR 543 at [159], and in *Ramoo v Gan Soo Swee* [1969-1971] SLR 34 (a Privy Council appeal from Singapore) at 41, [15].

27 However, in the present case, the Judge did not appear to have paid sufficient regard to the fact that the deceased, who was emerging from a slip road (across which there were parallel broken white lines) onto the main road, was required to give way to traffic on AMK Ave 3. It was this act of the deceased of proceeding from the slip road onto AMK Ave 3 without giving way to the appellant, who was travelling on the main road, which created the dangerous situation. Moreover, we did not share the Judge's view that the appellant was speeding when he was riding at 50kmph. The fault of the appellant was in failing to keep a proper lookout. If he had kept a proper lookout, he would have seen the deceased earlier and would have been better able to take evasive actions. It was therefore our judgment that it was the deceased's negligence which was the substantial cause of the accident. The Judge's apportionment of placing greater blame on the appellant was clearly excessive and unwarranted and out of line with similar cases, *eg, Lang* ([21] *supra*) and *Ng Swee Eng v Ang Oh Chuan* [2002] 4 SLR 425. In both these cases, the motorists travelling on the main road were held to have failed to keep a proper lookout and were made partially liable with substantial liability being placed on the motorists emerging from the minor road.

28 Of course, we recognise that each case would turn on its own facts and no two cases can

be the same. Here, had the appellant been alert he would have seen the lone cyclist pedalling along the slip road earlier and similarly had the deceased kept a proper lookout for traffic on the main road and had given way to the appellant as the deceased should, the collision might probably not have occurred. There were no other unusual features. The changing of lanes on the part of the appellant was neither here nor there. The scratch marks on AMK Ave 3 caused by the motorcycle would appear to indicate that while the appellant was, just before the collision, riding along the left lane, it was nearer to the outer edge of that lane. While this was a case where there were failings on the part of both parties, the important difference between them was that it was the deceased who should have given way to vehicles on the main road. Thus it was only fair that the deceased should bear a greater part of the responsibility. In our opinion, the correct apportionment of liability would be one- third to the appellant and two-thirds to the deceased.

Observations on interventions by trial judge

29 Before we conclude, we would like to allude briefly to a matter raised in the appellant's case that the Judge had intervened excessively during the trial. It was suggested that the Judge had entered into the arena. Under s 167 of the Evidence Act (Cap 97, 1997 Rev Ed), a judge is entitled to ask any question of any witness in any form and at any time. While the power given to the judge under this section is very wide, he should nevertheless not enter the fray and assume the role of counsel. It should always be borne in mind that ours is an adversarial system. The object of a judge in asking questions of witnesses should only be to clarify and not to conduct an investigation or advance any particular viewpoint. In *Yap Chwee Khim v American Home Assurance Co* [2001] 2 SLR 421 ("*Yap Chwee Khim*"), this court said at [25]:

> [S]uch wide power must be exercised with caution and within well- recognised limits with judicial calm and detachment and without usurping or assuming the functions of counsel. Case law has shown that, while a trial judge has the power to ask questions of witnesses at any stage of the hearing, an excessive exercise of such power may, and indeed would, operate unfairly against the witnesses and litigants.

30 In this connection, it may be appropriate for us to quote a passage of Denning LJ in *Jones v National Coal Board* [1957] 2 QB 55 at 63–64, which passage was approved in *Yap Chwee Khim* at [25]:

> In the system of trial which we have evolved in this country, the judge sits to hear and determine the issues raised by the parties, not to conduct an investigation or examination on behalf of society at large, as happens, we believe, in some foreign countries. Even in England, however, a judge is not a mere umpire to answer the question "How's that?" His object, above all, is to find out the truth, and to do justice according to law; and in the daily pursuit of it the advocate plays an honourable and necessary role. … If a judge, said Lord Greene, should himself conduct the examination of witnesses, "he, so to speak, descends into the arena and is liable to have his vision clouded by the dust of conflict"…
>
> Yes, he must keep his vision unclouded. It is all very well to paint justice blind, but she does better without a bandage round her eyes. She should be blind indeed to favour or prejudice, but clear to see which way lies the truth: and the less dust there is about the better. Let the advocates one after the other put the weights into the scales – the "nicely calculated less or more" – but the judge at the end decides which way the balance tilts, be it ever so slightly. … [I]t is for the advocates, each in his turn, to examine the witnesses, and not for the judge to take it on himself lest by so doing he appear to favour one side or the other … And it is for the advocate to state his case as fairly and strongly as he can, without undue interruption, lest the

> sequence of his argument be lost … The judge's part in all this is to hearken to the evidence, only himself asking questions of witnesses when it is necessary to clear up any point that has been overlooked or left obscure; to see that the advocates behave themselves seemly and keep to the rules laid down by law; to exclude irrelevancies and discourage repetition; to make sure by wise intervention that he follows the points that the advocates are making and can assess their worth; and at the end to make up his mind where the truth lies. If he goes beyond this, he drops the mantle of a judge and assumes the robe of an advocate; and the change does not become him well.

31 Admittedly, it is often difficult to define at which point a judge has crossed the line. This is all the more so in modern litigation involving voluminous documents. The judge may need to intervene more frequently in order to understand the issues and the evidence. Such a situation should be borne in mind when a question arises as to whether the judge has entered into the arena (see *Re Shankar Alan s/o Anant Kulkarni* [2007] 1 SLR 85 at [114]). Ultimately it is a judgment call for the appellate tribunal, after having examined the entire trial record.

32 In the present case, it is true that the Judge had asked many questions of the appellant when the latter was on the stand. But looking at them in their totality, we were inclined to think that the Judge was essentially seeking to clarify the evidence and establish the truth. It must be borne in mind that we are here dealing with a fatal accident. The other party to the accident could no longer come forward to testify and the only evidence was that of the defendant appellant. It was thus critical that the evidence of the defendant should be clearly established. However, in order to avoid any such allegations arising, it may be prudent for a trial judge to remind himself or herself that his or her role is only to ask questions to clarify and not to advance a cause that might result in his objectivity being assailed. Some cases have sought to lay down general guidelines for the assistance of judges, *eg*, *Galea v Galea* (1990) 19 NSWLR 263 at 281–282, which are no doubt useful.

33 At the end of the day, we are confident that if a judge is conscious enough to remind himself that he should not enter the arena, such allegations of excessive intervention will most unlikely arise.

Conclusion

34 In the result, we allowed the appeal with costs and varied the apportionment of liability for the accident between the appellant and the deceased to that of one-third and two-thirds respectively.

[note: 1]Core Bundle vol. II at 10.