Hin Hup Bus Service (a firm) v Tay Chwee Hiang and Another
[2006] SGHC 169

Case Number : DA 17/2005

Decision Date : 25 September 2006

Tribunal/Court : High Court

Coram : Lai Siu Chiu J

Counsel Name(s) : Madan Assomull and Vivian Chew (Assomull & Partners) for the appellants; R Kurubalan (Kuru & Co) for the first respondent

Parties : Hin Hup Bus Service (a firm) — Tay Chwee Hiang; Poh Tian Pow

Civil Procedure – Amendments – Judgments – Magistrate issuing second judgment after first judgment – Second judgment covering events occurring after first judgment – Whether second judgment not valid as court operating functus officio

Civil Procedure – Pleadings – Amendment – Further and better particulars – Whether defence of fraud and particular fraudulent acts clearly pleaded – Whether material fact pleaded – Meaning of "material"

Evidence – Admissibility of evidence – Similar fact evidence – Whether principles relating to similar fact evidence in criminal cases equally applicable to civil cases – Applicable principles

Tort – Vicarious liability – Scope of employer's vicarious liability for employee's fraudulent acts – Whether necessary for fraudulent acts to have been done for employer's benefit

25 September 2006

Lai Siu Chiu J:

The facts

1 The first respondent, Tay Chwee Hiang ("Tay"), was the owner of a concrete mixer, No WB5241E ("the concrete mixer"). His duty was to transport concrete between construction sites. On 1 July 2003 at 6.37pm, the concrete mixer driven by Tay collided with a bus, No PH2136Y ("the bus"), being driven by the second respondent, Poh Tian Pow ("Poh"). (Henceforth, Poh and Tay will be referred to collectively as "the respondents" and the collision will be referred to as "the accident"). Poh was the first defendant and was employed by Hin Hup Bus Service ("Hin Hup"), the owner of the bus. Hin Hup was the second defendant in Magistrate's Court Suit No 2365 of 2004 ("the action").

2 On the day in question, Tay was travelling straight along Benoi Road when the bus driven by Poh emerged from the filter lane at the junction between Benoi Road and Jalan Ahmad Ibrahim and hit the concrete mixer. As a result of the accident, the left side and front of the concrete mixer was extensively damaged.

3 In the action, Tay claimed the following special damages against Poh and Hin Hup arising out of the accident:

(a)	Cost of repairs	$29,900.00
(b)	Loss of use	$ 4,800.00

$34,700.00

4 Hin Hup's defence in the action was that Tay's claim was false and/or fraudulent and should be invalidated or dismissed for the following reasons:

(a) The accident was staged and/or concocted by Tay, Poh and Tay's repairer, Sun Automobile Services ("Sun Automobile") owned by one Voon Thye Sang ("Voon").

(b) The claim was fraudulently made and/or highly inflated and/or greatly in excess of the true amount of the damage Tay allegedly sustained as to be incompatible with good faith.

5 On 25 February 2005, the magistrate who tried the action on 27 January 2005 made the following orders:

(a) The defendant and the plaintiff were to bear 70% and 30% liability respectively for the accident.

(b) The defendant was to pay the plaintiff 70% of the damages, *viz*, $17,533.25.

(c) The defendant was to pay the plaintiff costs fixed at $5,000 plus reasonable disbursements.

The total claim of $34,700 was reduced by $9,652.50 to $25,047.50 before apportionment of liability by the magistrate. The claim for cost of repairs ($29,900) was reduced to $24,247.50 while that for loss of use was reduced from $4,800 to $800. The magistrate had apparently taken into consideration the evidence of Hin Hup's surveyor (Ng Cheng Yeow) that 14 items of Tay's claim for cost of repairs were not replaced and she disallowed certain items therefrom.

6 The magistrate delivered her written judgment on 25 February 2005 in open court ("the first judgment"). The order of court for the first judgment was extracted on 23 March 2005. Subsequently the magistrate released a second written judgment (see *Tay Chwee Hiang v Poh Tian Pow* [2005] SGMC 24) on 26 August 2005 together with the record of proceedings, after the notice of appeal was filed (see [7] below).

7 On 2 June 2005 in Originating Summons No 290 of 2005 ("the OS"), the High Court granted Hin Hup leave to appeal to the High Court against the decision below. (The magistrate had refused to grant Hin Hup leave to appeal.) Hin Hup filed the notice of appeal herein in District Court Appeal No 17 of 2005 ("the Appeal") on 16 June 2005. This was followed by Hin Hup's application for leave to adduce further evidence in the Appeal, which was granted. The order of court dated 9 September 2005 states:

…

2. the Appellants be at liberty upon the hearing of the Appeal herein … to adduce the following additional evidence:–

(a) Discharge voucher dated 17 February 2004 allegedly signed by one, Guay Chin Hock on behalf of Optimix Concrete Pte Ltd and witnessed by the 1st Respondent's Repairer, Voon Thye Sang.

(b) Notice of Resolution of Optimix Concrete Pte Ltd lodged on 24 December 2003.

(c) Registry of Companies Search of Optimix Concrete Pte Ltd.

8 Pursuant to O 55C of the Rules of Court (Cap 322, R 5, 1997 Rev Ed) ("the 1997 Rules") which was then applicable, Hin Hup filed its appellant's case for the appeal on 21 October 2005 but neither Tay nor Poh filed their respondents' case. At the hearing of the Appeal, only Tay was represented although Poh was present. I allowed the Appeal, set aside the judgment of the magistrate and dismissed with costs here and below, Tay's claim against Hin Hup.

The issues

9 The issues that arose in connection with the appeal were the following:

(a) Could the magistrate issue a second judgment after she had delivered her first judgment?

(b) Were Hin Hup's pleadings on fraud inadequate?

(c) Did the respondents stage the accident and make a fraudulent claim on Hin Hup as the latter alleged?

(d) Was Hin Hup, as Poh's employer, vicariously liable for his negligence?

Tay's failure to file a respondent's case

10 Before dealing with the above issues, I need to dispose of a preliminary point. Order 55C of the 1997 Rules is now replaced by O55D of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("the Rules") which came into force on 1 January 2006. Order 55D sets out the rules for appeals from the Subordinate Courts to the High Court. Order 55D rr 7(2) and 7(15) read as follows:

(2) The respondent must file his Case (referred to in this Order as the Respondent's Case) —

(*a*) within one month after service on him of the record of appeal and the Appellant's Case; or

(*b*) in the event a joint record of appeal is filed, within one month after service on him of the Appellant's Case.

…

(15) A respondent who fails to file his Case within the time specified in paragraph (2) may be heard only with the leave of the High Court and on such terms and conditions as the High Court may impose.

11 Counsel for the first respondent, Mr Kurubalan, did not file Tay's case but only filed his skeletal submissions which were served on counsel for Hin Hup on 13 February 2006. In submitting that the court should not allow his opponent to submit Tay's case orally, Mr Madan Assomull, counsel for Hin Hup, relied on *Glahe International Expo AG v ACS Computer Pte Ltd* [1999] 2 SLR 620 at [18] where the Court of Appeal said:

No respondent's case was filed on behalf of ACS in this appeal, notwithstanding that they were legally represented. Their counsel was before us, and *at the commencement of the hearing no*

application was made by him pursuant to O 57 r 9A (17) of Rules of Court for leave to be heard. In view of his unexplained silence, we enquired of him why no respondent's case was filed on behalf of ACS and whether he would be applying for leave to be heard. To our utter astonishment, he replied nonchalantly that there was no need to file a respondent's case for ACS, as he expected the appeal to be disposed of without him being called to reply and that after hearing the arguments advanced on behalf of Glahe, *if necessary, he would apply for leave to be heard … It was wholly presumptuous of him to expect that the court would grant him leave to be heard. There was no question of granting him such leave in this appeal.* Regrettably, we heard this appeal unassisted by counsel for ACS. [emphasis added]

12 In addition, Mr Assomull referred the court to a passage in another Court of Appeal decision in *Tan Boon Hai v Lee Ah Fong* [2002] 1 SLR 10 at [8]:

The 17 defendants, the respondents in this appeal, did *not file the respondents' case*, as they were required to do under the rules. However, through their counsel they put in a *written 'skeletal submission'* and intended to obtain leave of the court, by an oral application, to argue against the appeal before us. Counsel for the appellant objected to this course of conduct on the part of the respondents. In response, counsel for the respondents explained that the reason for not filing the respondents' case was that the respondents wished to save further costs and expenses in the litigation, and applied orally for leave to make submission before us in this appeal. *We did not find such explanation acceptable, and accordingly we refused leave to counsel for the respondents to make any submission on behalf of the respondents in resisting the appeal. We also refused to consider the written skeletal submission filed in court.* [emphasis added]

13 Questioned by the court why he failed to file the first respondent's case, Mr Kurubalan's cavalier explanation was, there was no need as he was not contesting the magistrate's judgment! As the explanation was unacceptable, I refused to exercise my discretion under O 55D r 7(15) of the Rules to allow Mr Kurubalan leave to make any submission on behalf of the first respondent.

Could the magistrate deliver a second judgment after the first judgment?

14 I turn now to the first issue. Mr Assomull stated that in the second judgment, the magistrate referred to the application in the OS for leave to appeal. He submitted that the magistrate's role as a judge was *functus officio* after 25 February 2005 when the order of court for the first judgment was extracted. The offending parts of the second judgment ([6] *supra*) were [4], [39], [62], [79], [80] and [87] where the magistrate made copious reference to the OS and to the affidavit filed on behalf of Hin Hup in support of the application. Further, the magistrate varied her order for costs from $5,000 in the first judgment to $6,000 in the second judgment. Which judgment and which order for costs should prevail?

15 The court in *Tan Yeow Hiang Kenneth v Tan Chor Chuan* [2006] 1 SLR 557 at [8] clarified the principle of finality of judgments as follows:

As the order of court had been extracted, the court was *functus officio* and could not allow what would in effect be a variation of the order as distinct from a clarification. The distinction between the two is brought out in *Wee Soon Kim Anthony v UBS AG* [2005] SGCA 3, where the Court of Appeal held at [69] as follows:

It is absurd to suggest that when clarification is given, the court is *functus officio*, which was the stand taken by Mr Wee. In giving the clarification, the court is not making a new or additional order but merely clarifying what was already ordered. It is in the inherent

jurisdiction of the court to do so and this jurisdiction has been exercised from time to time. This jurisdiction is consistent with logic and justice.

Neither is it possible, in my view, to invoke the inherent jurisdiction of the court under the Rules of Court (Cap 322, R 5, 2004 Rev Ed) O 92 r 5. That rule states:

> Without prejudice to Rule 4, the Court may make or give such further orders or directions incidental or consequential to any judgment or order as may be necessary in any case.

An order to vary the Order of Court of 10 August 2005 would not be consequential or incidental thereto or to the judgment as it does not follow as a matter of course from such order or judgment. As distinct from, for example, a subsequent order supplying an obvious omission, or clarifying what was already ordered, the variation of an earlier order goes against the intent of the earlier order.

16 In incorporating into the second judgment events which occurred *after* the first judgment and which were presented to the court in the OS, the magistrate ran foul of the *functus officio* principle. She was not clarifying or expanding on the first judgment; she gave different reasons for her earlier decision. I therefore accepted Mr Assomull's arguments and disregarded the second judgment. Hence, the applicable judgment for the purposes of the Appeal was the first judgment.

Were the pleadings of Hin Hup adequate?

17 The amended defence of the second defendant dated 12 November 2004 read as follows:

> 9 The 2nd Defendants will further say that the Plaintiff and/or his servants and/or agents including Messrs. Sun Automobile Service and the 1st Defendant have made herein a false and/or fraudulent claim against the 2nd Defendants and/or their insurers knowing the same to be false and untrue.
>
> PARTICULARS
>
> (a) Staging and/or concocting an accident on or about 1 July 2003 and/or the extent of it with the 1st Defendant in order to make a false claim against the 2nd Defendants and/or their insurers.
>
> (b) Falsely representing the extent of the damage to the Plaintiff's vehicle as a result of the alleged accident.
>
> (c) Falsely representing the costs of repairs of the damage to the Plaintiff's vehicle as a result of the alleged accident.
>
> (d) Falsely representing the loss of use of the Plaintiff's vehicle as a result of the alleged accident.

18 The magistrate in the first judgment held:[note: 1]

From paragraph 9 of the amended defence, the only substantive particular of fraud was the bare allegation that the 1st defendant has 'stage[d] or concocted an accident on or about 1 July and/or the extent of it with the 1st Defendant in order to make a false claim against the 2nd Defendants and/or their insurers'. There was nothing in the 2nd defendant's defence stating

> the basis on which they say that, the 1st defendant has staged or concocted the accident, and how the 1st defendant has staged or concocted the accident. Further, it must be emphasized that the pleadings alleged not only fraud on the part of the 1st defendant, but also fraud on the part of the plaintiff and Sun Automobile. … The subsequent particulars from (b) – (d) did not contain any substantive particulars either, but were obvious consequences 'following on' from (a), and could not aid the inadequacies of the 2nd defendant's defence.

19 On this issue, Mr Assomull informed the court that at the trial, counsel for Tay had objected to the lack of particularity. However, when evidence was adduced in court, no objection was raised by the counsel. Mr Assomull submitted that, in any case, the particulars in his client's amended defence were not deficient, pointing out that counsel for the plaintiff could have but did not apply for further and better particulars under O 18 r 12 of the 1997 Rules.

20 The magistrate however took a different view – she had held that, "There was nothing in the 2nd defendant's defence stating the basis on which they say that, the 1st defendant has staged or concocted the accident, and how the 1st defendant has staged or concocted the accident."

21 The magistrate went on to add in the first judgment:

> Case law makes it very clear that when an allegation as serious and as prejudicial as fraud is being raised, the burden is on the party asserting the fraud to not only prove this, but also to provide sufficient particulars of the fraud.

22 The Court of Appeal in *Development Bank of Singapore Ltd v Bok Chee Seng Construction Pte Ltd* [2002] 3 SLR 547 held at [24]:

> It is settled law that only material facts need to be pleaded, not propositions or inferences of law. This is illustrated and enunciated eloquently in three cases by Lord Denning. In *Karsales (Harrow) v Wallis* [1956] 2 All ER 866 Lord Denning stated (at p 869):
>
> > The only real difficulty that I have felt in the case is whether this point is put with sufficient clarity in the pleadings … Nevertheless, I have always understood in modern times that it is sufficient for a pleader to plead the material facts*. He need not plead the legal consequences which flow from them. Even though he has stated the legal consequences inaccurately or incompletely, that does not shut him out from arguing points of law which arise on the facts pleaded*. … [emphasis added by the Court of Appeal]

23 The word "material" means necessary for the purpose of formulating a complete cause of action (*per* Scott LJ in *Bruce v Odhams Press, Limited* [1936] 1 KB 697 at 712).The function of pleadings is to give fair notice of the case which has to be met so that the opposing party may direct his evidence to the issue disclosed by them (*per* Lord Normand in *Esso Petroleum Co Ltd v Southport Corporation* [1956] AC 218 at 238).

24 Order 18 r 7 of the Rules (and the 1997 Rules) states:

> Subject to this Rule and Rules 10, 11 and 12, every pleading must contain, and contain only, a statement in *a summary form of the material facts* on which the party pleading relies for his claim or defence, as the case may be, but not the evidence by which those facts are to be proved, and *the statement must be as brief as the nature of the case admits*. [emphasis added]

25 Reverting to the pleadings in our present case (see [17] above), Hin Hup's defence clearly pleaded the defence of fraud and particularised the fraudulent acts on the part of the respondents. Nothing more was required to let Tay as the plaintiff know the case he had to meet. I therefore did not agree with the magistrate's view that Hin Hup's defence was lacking in particulars. Even if it was, it was not fatal.

Were the respondents fraudulent?

26 Prior to 1 July 2003, Poh was involved in a string of similar road accidents in the interval between 21 August 2002 and 16 June 2003:

(a) On 21 August 2002 at 8.10pm, Poh reversed into a concrete mixer while driving a tipper lorry.

(b) On 26 August 2002 at 8.55pm, Poh came out of a slip road while driving a tipper lorry and hit a concrete mixer.

(c) On 5 September 2002 at 8.45pm, Poh came out of a slip road and his tipper lorry hit a concrete mixer.

(d) On 26 September 2002, Poh's tipper lorry reversed into a concrete mixer.

(e) On 28 March 2003 at 7.35pm, Poh cut into the lane of a motor car while driving the bus.

(f) On 3 May 2003 at 5.40pm, the bus skidded while being driven by Poh and hit a motor car.

(g) On 16 June 203 at 6.45pm, the bus skidded while being driven by Poh.

27 Mr Assomull submitted that such frequent accidents with startling similarities showed that the accident on 1 July 2003 was not genuine. He pointed out there were eight accidents *in toto* which took place in the evenings save for one. Four accidents involved concrete mixers and the proximity of the occurrence of each accident was from five days to one week. He added that prior to the string of accidents, Poh was accident-free for 20 years.

28 Mr Assomull drew the court's attention to Poh's revelation that he would ask about insurance coverage when he applied for a job. This emerged in the course of Poh's cross-examination:[note: 2]

Q: Would you tell us why you feel that you were not responsible for the action?

A: Because Hin Hup is covered by insurance.

Q: Can you tell us why you believe you are not responsible for this accident in a nutshell?

A: When I was applying for a job, I asked the boss who should be responsible if an accident happened. And if the boss did not buy insurance, then I would not work for them.

Q: So you only worked for companies with insurance coverage otherwise you would not work for them?

A: Yes.

This was reinforced when the magistrate questioned Poh after the above cross-examination:[note: 3]

Ct: Have you been working as a driver for the last 20 years?

A: Yes.

Ct: Explain why you would only work for a company which is covered by insurance?

A: Because if they do not buy insurance and we are out on our own, when we drive, we will not have the means to…

Ct: What are you afraid of if the vehicle is not covered by insurance?

A: I am afraid that should an accident occur and if the company is not insured then the driver will be held responsible for the cause [*sic*] of repairs.

…

2nd D/C: … Whether he was involved in other accidents before 21 August 2003?

Ct: The answer is "no".

29 Yet, the magistrate stated in the first judgment:

> With respect, just because a driver had been involved in a large number of accidents in the course of a relatively short period of time, this did not *ipso facto* mean, on more than "on a balance of probabilities", that he must have staged all of those previous accidents, and the latest accident. Unless there is evidence suggesting planning and premeditation in the accident, e.g. suspicious conduct of the driver prior to and on that day, the testimony of a passenger or an eye-witness to that effect, or any PI evidence, it is not improbable that the large number of accidents could be attributed to more innocuous reasons, such as pure recklessness, poor road and traffic conditions, as well as the contributory negligence on the part of other drivers. … In addition, the contents of each one of those police or motor accident reports which the 2nd defendants have filed in these proceedings (as evidence of fraud) are *hearsay evidence* untested in this or any other proceedings. *A finding of fraud cannot rest on such potentially unreliable evidence*. [emphasis added]

Again, I disagree with her conclusion. With respect, eight similar road accidents in less than a year cannot be anything other than "a systematic course of conduct", a submission of Hin Hup which the court below rejected.

30 Poh was also cross-examined by Mr Assomull on the eight accidents as can be seen from the following extracts from the trial notes of evidence:[note: 4]

Q: Rf 2DBD 88. Agree that you were involved in all of these 8 accidents?

A: Yes.

Q: Agree with all the dates stated therein?

A: Yes.

Q: For accident 1, 2 and 4, all concrete mixers?

A: Yes.

Q: And this accident also a concrete mixer?

A: Yes.

Q: I'm putting it to you that these accidents are all staged by you to make insurance claims?

A: I disagree.

Q: The reason why they are deliberately caused for No. 1, 2, 3, 4 and 8 are accidents where 'WB' vehicles were involved was because the cost of repairs are significantly higher than a normal car?

A: I disagree.

Q: And this is why you targeted on 'WB' vehicles, the whole scam is centred on 'WB'?

A: I disagree.

Q: Between No. 1 and 2 accident, only a difference of 5 days?

A: I agree.

Q: And then some 10 days later, yet another accident, again 'WB'?

A: Yes.

Q: And then some 20 days later, another accident again – 'WB'?

A: Yes.

Q: Then the next accident was 6 months later – a normal car?

A: Yes.

Q: Another accident on 3 May 2003. About 1 month later?

A: Yes.

Q: And on 16 June, another one?

A: Yes.

Q: And some 2 weeks later, you went for another case of 'WB'?

A: Yes.

Q: In your accidents on 21 August 2002 and 26 September 2002, the description and how

the accidents occurred were extraordinarily similar?

A: I agree.

Q: And for accidents on 26 August 2002 and 5 September 2003, the cause of the accidents by both of the Plaintiffs were extraordinarily similar?

A: Yes.

Q: I will say … the current accident was another accident similar to what happened on 26 August 2002, and 5 September 2002?

A: Yes.

Q: Your evidence is that these accidents were not deliberate?

A: Yes, not.

Q: And you are in fact asking this court to believe that the following are purely coincidental:

(a) For 4 to 5 accidents, the causes were all similar.

A: It is a coincidence.

Q: (b) And for 5 of the 8 accidents you were involved in, you just happened to collide into concrete mixers?

A: Yes.

Based on the above notes of evidence, there was no denial by Poh of the previous accidents. The magistrate therefore erred when she held that there was only hearsay or unreliable evidence of those accidents based on the accident reports(see [29] above). Under s 18(2) of the Evidence Act (Cap 97, 1997 Rev Ed) ("the Act"), admissions made by parties to suits are not admissions unless they were made while a party making them held that character. The above admissions were made by Poh while he was the first defendant. Accordingly, his admissions constituted admissible evidence and under s 17 of the Act, it is a relevant fact with regard to the inference of fraud.

31 Mr Assomull drew the court's attention to an accident on 26 August 2002 between a concrete mixer driven by one Guay Chin Hock ("Guay") on behalf of Optimix Concrete Pte Ltd and a tipper lorry driven by Poh, then employed by Eng Hua Thong Construction Pte Ltd. He relied on the additional evidence that the High Court had allowed the appellant to adduce on 9 September 2005 (see [7] above). Mr Assomull pointed out that Guay signed NTUC Insurance's discharge voucher dated 17 February 2004 for the payment for the third-party claim even though he was only the subcontractor of Optimix Concrete Pte Ltd. Furthermore, Optimix Concrete Pte Ltd was already in voluntary liquidation by 23 December 2003. More significant was the fact that Voon witnessed Guay's signing of the discharge voucher.

32 Mr Assomull asked the court to make a finding as pleaded by Hin Hup, that the respondents and Voon had made a fraudulent claim against Hip Hup and its insurers and, that Poh was not acting within the scope of his employment at the material time.

The law on similar fact evidence

33 The magistrate had summarised Hin Hup's position in the first judgment as follows:

> The 2nd defendant placed strong reliance on what they describe as a "systematic course of conduct" on the part of the 1st defendant, having been involved on [*sic*] eight accidents, over a period of about one year. They said that it was significant that in four of these accidents, concrete mixers were involved, and pointed to similarities on how the accidents occurred. They also said that it was pertinent that both the plaintiff and the 1st defendant admitted to not being in a position to pay for the costs of repairs themselves, and that the repairer had admitted in court that he had conduct of the litigation.

34 Section 14 of the Act and Explanation 1 thereof states:

> Facts showing the existence of any state of mind, such as intention, knowledge, good faith, negligence, rashness, ill-will or good-will towards any particular person, or showing the existence of any state of body or bodily feeling, are relevant when the existence of any such state of mind or body or bodily feeling is in issue or relevant.
>
> *Explanation* 1.—A fact relevant as showing the existence of a relevant state of mind must show that the state of mind exists not generally but in reference to the particular matter in question.

35 Section 15 and illus (*a*) of the Act reads:

> When there is a question whether an act was accidental or intentional or done with a particular knowledge or intention, the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.
>
> *Illustrations*
>
> (*a*) *A* is accused of burning down his house in order to obtain money for which it is insured.
>
> The facts that *A* lived in several houses successively, each of which he insured, in each of which a fire occurred, and after each of which fires *A* received payment from a different insurance office, are relevant as tending to show that the fire was not accidental.

36 The "striking resemblances" or "unusual features" may consist of a significant similarity as to the *modus operandi* (see: *R v Sims* [1946] KB 531 and *R v William Albert Davis and Patrick Colin Murphy* (1972) 56 Cr App R 249).

37 In relation to s 15 of the Act, "It may be submitted, as a matter of principle, that a "series" connotes a recurring pattern which would ordinarily require proof of more than one other similar act. It is seldom that a systematic course of conduct would be held established on the basis of the accused's behaviour on the occasion referred to in the charge and one other act." (see: Gamini Lakshman Peiris, *The Law of Evidence in Sri Lanka* (Lake House Investments, 1974) at p 94).

38 The Court of Appeal in *Tan Meng Jee v PP*[1996] 2 SLR 422 followed the balancing test propounded in *Director of Public Prosecutions v Boardman* [1975] AC 421 ("*Boardman*"). Under the *Boardman* test, the probative value of the similar fact evidence had to outweigh its prejudicial effect before that evidence can be relevant. In *Tan Meng Jee v PP,* the appellate court held (at 432, [41]):

> The underlying rationale for the rule excluding similar fact evidence is that to allow it in every instance is to risk the conviction of an accused not on the evidence relating to the facts but because of past behaviour or disposition towards crime. Such evidence without doubt has a prejudicial effect against the accused. *However, at times, similar facts can be so probative of guilt that to ignore it via the imposition of a blanket prohibition would unduly impair the interests of justice.* [emphasis added by Hin Hup in its submissions below].

Whether the probative force of the evidence outweighed the prejudicial effect depended, *inter alia,* on the cogency of the evidence, the strength of inference that could be drawn from it and its relevance.

39 Similar fact evidence is undoubtedly prejudicial. The more "similar" the evidence, the more probative it is. In *Boardman,* the House of Lords referred extensively to the test of "striking similarity". Hence, the similar facts must be both similar in terms of the number of times the similar incidents had occurred and in its qualities.

40 The principles relating to similar fact evidence in criminal cases are equally applicable to civil cases. In *Mood Music Publishing Co Ltd v De Wolfe Ltd* [1976] Ch 119, Lord Denning observed (at 127):

> In civil cases the courts will admit evidence of similar facts if it is logically probative, that is, if it is logically relevant in determining the matter which is in issue: provided that it is not oppressive or unfair to the other side: and also that the other side has fair notice of it and is able to deal with it.

Ratanlal & Dhirajlal, *The Law of Evidence* (Wadhwa and Company, 22nd Ed, 2006) at p 305 states:

> In **England** evidence of facts or transactions similar to the fact or transaction directly in issue is admissible if it is logically probative …

41 In the first judgment, the magistrate stated:

> Again, I had no hesitation in stating that there was insufficient evidence, linking these parties together prior to and after the accident (other than in the ordinary course of nature in repairing the plaintiff's vehicle), much less to prove that they were engaged in a conspiracy to defraud the 2nd defendant and its insurers in this particular accident. The admission by the plaintiff and the 1st defendant that they could not afford to pay for the costs of repairs did not mean anything at all. And the conduct of the plaintiff's repairer in funding the litigation, whilst undesirable, also could not indicate that he had connived with the plaintiff and the 1st defendant to "stage or concoct the accident".

42 In cross-examination, Tay said that he had been sending his concrete mixer to Sun Automobile for routine repairs and maintenance regularly over the last two years. The relevant portions of Voon's cross-examination are set out below:[note: 5]

> Q: Do you know Tay Chwee Hiang, the Plaintiff?
>
> A: Yes, he is the owner of the vehicle. He asked me to repair his vehicle. I know him for about 2 years.
>
> Q: Does he regularly come to your workshop?

A: No, only when his vehicle breaks down.

Q: All in all in 2 years, how many times did he come to your workshop?

A: I am not sure.

Q: 10 times?

A: About. He comes everytime when there is a small malfunction in his vehicle.

…

Q: You really do not know if you will receive $29,900 from Plaintiff if he does or does not succeed?

A: That's right.

Q: That is a risk which you took?

A: Yes.

…

Q: But you really do not know if the Plaintiff will pay you since you do not have a written agreement?

A: Yes.

Q: So you effected repairs close to $30,000, made investment on parts, in the hope that the Plaintiff will succeed and the Plaintiff will receive this money and in all good faith make payment back to you?

A: Yes.

Q: And if nothing comes about it, Plaintiff does not succeed, then you sue him?

A: Yes.

Q: And whether Plaintiff is in a position to pay you, you do not know?

A: Yes.

43 During his cross-examination, Voon said that the owner paid for the survey fees of Delta-V Consultant. However, Loo Yee Khang, Tay's surveyor and/or licensed appraiser from Delta-V Consultant who had assessed the damage to the concrete mixer, deposed that his bill was paid by Voon or Sun Automobile.

44 Why would Voon be funding the litigation? Mr Assomull pointed to the fact that Voon had not been paid for two years and there was no assurance that he would be paid at all. Consequently, he submitted, the accident was part of a scam and was not genuine; I agreed. It was inconceivable that any car repairer would assume the risk that Voon did.

Burden of proof for fraud

45 In *Brightside Mechanical and Electrical Services Group Ltd v Standard Chartered Bank* [1989] SLR 519, Chan Sek Keong J (as he then was) commented at 528, [27]:

> The standard of proof for fraud was discussed by Ackner LJ [at 561] in [*United Trading Corporation SA and Murray Clayton Ltd v*] *Allied Arab Bank* [1985] 2 Lloyd's Rep 554 in the following words:
>
> > …
> >
> > … The evidence of fraud must be clear, both as to the fact of fraud and as to the bank's knowledge. The mere assertion or allegation of fraud would not be sufficient (see [*Bolivinter Oil SA v Chase Manhattan Bank, Commercial Bank of Syria and General Company of Homs Refinery*] [1984] 1 Lloyd's Rep 251 per Sir John Donaldson MR at p 257). We would expect the Court to require strong corroborative evidence of the allegation, usually in the form of contemporary documents, particularly those emanating from the buyer. In general, for the evidence of fraud to be clear, we would also expect the buyer to have been given an opportunity to answer the allegation and to have failed to provide any, or any adequate answer in circumstances where one could properly be expected. *If the Court considers that on the material before it the only realistic inference to draw is that of fraud, then the seller would have made out a sufficient case of fraud*.
>
> [emphasis added]

46 Andrew Phang J (as he then was) clarified the burden of proof of fraud in a recent case, *Chua Kwee Chen, Lim Kah Nee and Lim Chah In v Koh Choon Chin* [2006] 3 SLR 469 at [39]:

> In summary, the standard of proof in civil proceedings where fraud and/or dishonesty is alleged is the civil standard of proof on a balance of probabilities. However, where such an allegation is made (as in the present proceedings), *more* evidence is required than would be the situation in an ordinary civil case. Such an inquiry lies, therefore and in the final analysis, in the sphere of practical application (rather than theoretical speculation). In this regard, a distinction ought not, in my view, to be drawn between civil fraud and criminal fraud. [emphasis in original]

47 Lai Kew Chai J made a similar observation in *Sumitomo Bank Ltd v Kartika Ratna Thahir* [1993] 1 SLR 735 at 776 which was affirmed by the Court of Appeal (see [1994] 3 SLR 257):

> … that a part of Pertamina's allegations involve allegations of a fraudulent or criminal nature and that as a matter of the law of evidence it is necessary for Pertamina to prove their case to a high standard, which is *higher than the standard in a non-fraud case …* The *circumstantial evidence must be so compelling and convincing that bearing in mind the high standard of proof one is nevertheless satisfied that an inference of fraud is justified*. It will therefore be necessary to consider the evidence, if any. [emphasis added]

48 Mr Assomull submitted that as the court below did not make a finding on the credibility of the witnesses, the court was free to make such a finding and would not be hampered by the usual restrictions placed on an appellate court.

49 It is trite law that "the appellate court will be slow to disturb the trial judge's findings of fact, particularly since the latter would have had the opportunity of observing the witnesses first-hand and

is therefore presumed to have a much clearer view of the credibility and demeanour of the witnesses concerned" (*Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604 at [9]) unless the findings of fact are plainly wrong (*Arts Niche Cyber Distribution Pte Ltd v PP* [1999] 4 SLR 111 at [30]). This was a case however where the findings of the court below went against the weight of the evidence adduced and required intervention by an appellate court.

The decision

50 To my mind, the seven previous accidents involving Poh constituted evidence of a regular "system" which justified the admissibility of such evidence as similar fact evidence. Eight accidents occurring within 11 months showed a pattern of consistent conduct. I was satisfied that the probative force of such evidence was so great that it outweighed any prejudice that may be occasioned to Poh.

51 The magistrate, however, treated the accident as a genuine one despite the "coincidences". She further held that "it is not improbable that the large number of accidents could be attributed to more innocuous reasons, such as pure recklessness, poor road and traffic conditions, as well as the contributory negligence on the part of other drivers". I respectfully disagreed. The magistrate had failed to give proper weight to the factors that pointed to a strong inference of fraud on the part of the respondents. One such factor was the preposterous explanation from Poh (when questioned why he had become prone to accidents after being accident-free for 20 years), that "vehicles are bound to break down and become faulty if they are kept for too long",[note: 6] not to mention suggesting that there was something wrong with the tyres and brakes of the bus. There was not one iota of evidence before the court to support Poh's assertion or the court's finding as quoted earlier in this paragraph.

52 During cross-examination (see [30] above), Poh had further conceded that for the accidents on 21 August 2002 and 26 September 2002, the descriptions on how the accidents occurred were extraordinarily similar. He also accepted that the cause of the accidents on 26 August 2002 and 5 September 2002 was similar. Even the reports of the accident made by Tay and Poh on 2 and 3 July 2003 respectively were remarkably similar.

53 Tay's accident report reads:

> I was driving straight along benoi road when suddenly a vehicle (PH 2136Y) make a *dashed out* from the filter lane which was on my left and thus hitting my vehicle on front and left side portion of my vehicle. *I have the right of way and he should be stopping to give way*. [emphasis added]

while Poh's accident report states:

> I stopped my vehicle along the slip rd of Jalan Ahmad Ibrahim waiting for vehicle on the main road to be cleared. When my vehicle moved slightly forward out, the vehicle (WB 5241E) on the main rd suddenly dash out. I tried to stop but my vehicle skidded and accidentally hit together with vehicle (WB 5241E). My vehicle near front right wheel portion was damaged.

54 It was inconceivable that a driver like Poh who had a previous unblemished driving record of 20 years could suddenly cause eight accidents between 21 August 2002 and 1 July 2003. I was therefore of the view that all eight accidents were deliberately caused. Hin Hup had quite rightly submitted that, "With the assurance of insurance coverage, the first defendant knew he could conveniently plan an accident to mount false claims for financial gain."

55 The unusual conduct of an employee enquiring from every potential employer about insurance coverage, the respondents admitting that they would be in no position to pay for the cost of repairs themselves, the car repairer, Voon, making payment of the surveyor's fees and undertaking the repairs to the damaged vehicle with the knowledge that he might never be paid back were factors which, taken together, gave rise to a strong suspicion that the respondents had planned to defraud Poh's employer (Hin Hup) and its insurers.

56 Having regard to the facts as a whole, I found that Hin Hup had satisfied the requisite high standard of proof for fraud in civil proceedings. The circumstantial evidence warranted such a finding.

Was Hin Hup vicariously liable for Poh's actions?

57 The principle of vicarious liability is stated in the following extract from RFV Heuston & RA Buckley, *Salmond & Heuston on theLaw of Torts* (Sweet & Maxwell, 21st Ed, 1996) at p 443:

> A master is not responsible for a wrongful act done by his servant unless it is done in the *course of his employment*. It is deemed to be so done if it is either: (1) a wrongful act authorised by the master, or (2) a wrongful and unauthorised mode of doing some act authorised by the master. … [I]t is clear that the master is responsible for acts actually authorised by him: for liability would exist in this case, even if the relation between the parties was merely one of agency, and not one of service at all. But a master, as opposed to the employer of an independent contractor, is liable even for acts which he has not authorised, provided they are so connected with acts which he has authorised that they may rightly be regarded as modes – although improper modes – of doing them. In other words, a master is responsible not merely for what he authorises his servant to do, but also for the way in which he does it. … On the other hand, if the unauthorised and wrongful act of the servant is not so connected with the authorised act as to be a mode of doing it, but is an independent act, the master is not responsible: for in such a case the servant is not acting in the course of his employment, but has gone outside of it. [emphasis added]

58 I accepted the magistrate's view that the principle of vicarious liability for an agent's *fraudulent* conduct (adopted by Karthigesu J in *Blue Nile Co Ltd v Emery Customs Brokers (S) Pte Ltd* [1992] 1 SLR 296) is that stated in *Lloyd v Grace, Smith & Co* [1912] AC 716, *viz*, for an employer to be vicariously liable for the fraud of the employee, it was not necessary that the act be done for the benefit of the employer. An employer would still be liable for the fraud of his employee if the employee had the authority to act as he did, and if the fraudulent act could be regarded as a manner (however wrongful and dishonest) of performing the tasks for which he was engaged.

59 However, Poh's deliberate act of causing an accident by colliding into the concrete mixer while driving the bus was not an act that Hin Hup could be said to have expressly or impliedly authorised; Poh was not doing an authorised act in an unlawful manner for which his employer should or would be held responsible. Since Poh's conduct was undoubtedly fraudulent, it must follow that Hin Hup was not vicariously liable for his acts.

Conclusion

60 The facts before the court and the evidence in the action below strongly suggested fraudulent conduct on the part of the respondents to which Sun Automobile was a party. Consequently, the decision below in awarding damages to Tay could not be allowed to stand.

61 For the foregoing reasons, I allowed the appeal, set aside the judgment below and made the usual consequential orders relating to security for costs. The order for costs below of $5,000 was

reversed in favour of the appellant, Hin Hup.

[note: 1] At notes of evidence ("NE") at pp 72–73.

[note: 2] NE at p 41.

[note: 3] NE at p 48.

[note: 4] NE at pp 39–42.

[note: 5] NE at pp 21–24.

[note: 6] NE at p 36.