16 Torts

INTRODUCTION

The contribution made by Sultan Azlan Shah in the field of the law of tort cannot be under-estimated. Many of the cases dealt with by His Royal Highness show great clarity of thought and an unerring desire to do justice within the boundaries of the law. Indeed several of His Royal Highness' decisions on the law of tort show a brave attempt to change out-moded law through ingenious interpretation and application. These cases are therefore to be regarded as landmark decisions.

Some of the judgments of His Royal Highness are quite definitive and helpfully lay out guidelines for future cases. In the case of *Chan Kwon Fong & Anor* v *Chan Wah*,[1] Raja Azlan Shah FJ (as he then was) defined the conditions for tortious liability in Malaysia for an act committed abroad. In that case the respondents were employees of the appellants

[1] [1977] 1 MLJ 232.

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and had been injured in the course of employment. It was alleged that the injures arose from an unsafe system of work. The accident occurred in Samarinda, Kalimantan Indonesia. It was held that an action for tort will lie in Malaysia for a wrong alleged to be committed in another country if two conditions are fulfilled. Firstly, the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been justifiable by the law of the country where it was committed. In His Lordship's mind there was no doubt that the first requirement had been met. However, regarding the second requirement, His Lordship expressed the view that he was doubtful that an actionable wrong had been committed under Indonesian law. As such, the appeal had to be allowed.

Sultan Azlan Shah's decisions on the tort of negligence are equally useful for their matter-of-fact and practical approach. In *Wong See Kui* v *Hong Hin Tin Mining Co*[2] the plaintiff was the holder of a temporary occupation licence in respect of a pond for use as a fishpond. The defendant company obtained a licence for mining operations on certain nearby land. One of the conditions of the licence was that tailings from the land should be deposited on the land on which the plaintiff's pond was situated. The defendant company started to dump tailings into the plaintiff's pond. The plaintiff thereupon brought an action for trespass; nuisance and negligence, but omitted to adduce evidence to establish the damage caused by the dumping.

Raja Azlan Shah J (as he then was) held that the plaintiff had not proven that he had suffered any damage from the dumping of tailings into the pond over which he held the temporary occupation licence. As the plaintiff had failed to prove damage, the action for negligence and nuisance failed. On the claim based for trespass, His Lordship dispensed with it by saying simply that, since the licence given to the defendant company by the Mines Department included the right to dump the tailings into the pond, there was no trespass since this act was "consistent with the acts of any occupying owner who might be expected to deal with it".[3]

The case of *Elizabeth Choo* v *Government of Malaysia & Anor*[4] was an action for personal injuries against the Government of Malaysia and an anaesthetist. The plaintiff alleged that, owing to the negligence of the anaesthetist in carrying out a pre-operation sigmoidoscopic examination, the plaintiff suffered a perforation of the colon. As a result the plaintiff was unable to undergo a piles operation because of the nervous shock she had suffered from the perforation.

Raja Azlan Shah J (as he then was) re-established the law in regard to the standard of care required of a skilled person, such as the second

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[2][1969] 2 MLJ 234.

[3]At page 237.

[4][1970] 2 MLJ 171.

defendant. His Lordship stated that a practitioner will not be held negligent if he, in the circumstances of the case simply followed the general and approved practice. His Lordship cited various cases, including *Bolam* v *Friern Hospital Management Committee,*[5] and the Malaysian case of *Chin Keow* v *Government of Malaysia & Anor,*[6] and came to the conclusion that the second defendant was indeed competent to carry out the examination and had exhibited competent care and skill as was required of him.

It is interesting to note some of the remarks made by His Lordship in his judgment. Counsel for the plaintiff had stated that the courts were always reluctant to find negligence against a medical man. His Lordship came out strongly against this statement and said:

> To say the least I am no advocate of the right of medical men occupying a position of privilege. They stand in the same position as any other men. Their acts cannot be free from restraint; where they are wrongfully exercised by commission or default, it becomes the duty of the courts to intervene ...[7]

The Government of Malaysia & Ors v *Jumat b Mahmud*[8] deals basically with the duty of care of a school teacher towards his pupil. The case has added weight and interest in that this was the first time that the Federal Court applied the principle of law propounded by the Privy Council in *The Wagon Mound.*[9]

Raja Azlan Shah FJ (as he then was) delivered the judgment of the Federal Court and decided the question from the point of view of causation. His Lordship accepted the contention that a school teacher owes a duty of care to his pupils and that this duty was to take reasonable steps to protect the pupil against foreseeable risks.[10] His Lordship then went on to say that, assuming that the teacher had breached her duty in not keeping an eye on the pupils all the time, there was in fact no connection between the teacher's breach of duty and the subsequent injury. In arriving at this conclusion His Lordship resorted to the celebrated "foreseeability test" for causation as propounded by the Privy Council in *The Wagon Mound.*[11] His Lordship stated:

> In *The Wagon Mound, supra,* it was held that if the damage which materialised was damaged by fire, then for the defendant to be liable he must have been able to anticipate damage by fire ... Since that case the principle that the damage sustained must not only be caused by the wrongful act, but must be damage of a class or character reasonably

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[5][1951] 2 All ER 118.

[6][1967] 2 MLJ 45.

[7][1970] 2 MLJ 171 at page 172.

[8][1979] 2 MLJ 103.

[9][1961] AC 388.

[10]This had been the decision in the earlier Malaysian case of *Chen Soon Lee* v *Chong Voon Pin* [1966] 2 MLJ 264, where Lee Hun Hoe J (as he then was) stated the duty to be such as would be owed by a careful father towards his children.

[11][1961] AC 388.

foreseeable as a possible result of that act *is now firmly established* ...[12]

In making this statement, His Lordship swept aside with a single stroke of his pen a whole line of binding precedent established by the Court of Appeal's decision in *Re Polemis.*[13] This was a bold step to take especially since *The Wagon Mound* is only of persuasive authority, being a Privy Council decision from Australia. This move taken by His Royal Highness is certainly welcomed. His Highness did not feel compelled to follow laws that were out of line with modern needs and trends. But intentionally or inadvertently, the doctrine of *stare decisis* was disregarded.

In the case of *Chong Fook Kam & Anor* v *Shaaban b Hussein & Ors* [14] Raja Azlan Shah J (as he then was) restated the law regarding the extent of the powers of a police officer to arrest without warrant. This power, said His Lordship, was set out under section 23 (1)(a) of the Criminal Procedure Code, and the procedure to be taken after arrest was contained in section 28. To justify an arrest by a police officer under this section, there must be a reasonable complaint or reasonable suspicion or credible information received of the person having been involved in a seizable offence. Reasonable suspicion, said His Lordship, must be founded on some tangible legal evidence within the cognisance of the police officer such as that which would justify a reasonable person in concluding that the suspect is guilty of a seizable crime. His Lordship also stated, and it is submitted, correctly, that the evidence need not be of such a nature as to constitute proof, or to convince a court of law beyond reasonable doubt. The suspicion may turn out to be insubstantial upon subsequent investigation but this does not make the initial arrest unlawful. All that suffices is that, at the time of arrest, the officer had some firm basis for believing it to be substantial.

His Lordship therefore held that the defendants were not liable for wrongful arrest. It was further held that section 28 of the Criminal Procedure Code had not been breached. Whereupon the plaintiffs appealed to the Federal Court.

The Federal Court,[15] however, disagreed with the resonable suspicion test applied by Raja Azlan Shah J. They said that before a policeman can arrest a man without a warrant, there must be enough proof to make out a *prima facie* case that the arrested man had committed an offence. Where no such *prima facie* case had been made out, any arrest that follows would constitute false arrest. Based on this the Federal Court held that the respondents were not justified in arresting the appellants without a warrant, and allowed the appeal.

Upon further appeal, the Privy Council,[16] reinstated the reasonable suspicion test applied by Raja Azlan Shah J at first instance. The *prima*

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[12][1977] 2 MLJ 103 at p 104.

[13][1921] 3 KB 560.

[14][1967] 2 MLJ 54.

[15][1968] 2 MLJ 50.

[16][1969] 2 MLJ 219.

facie case test used by the Federal Court was wrong, since all that was required was a reasonable suspicion. Reasonable suspicion, said the Privy Council differed from *prima facie* proof because the former is merely a subjective feeling and need not be supported by hard evidence. Reasonable suspicion is what starts an investigation at the end of which, through the collection of evidence, a *prima facie* case is made out.

However, on the facts, the Privy Council held that at the initial arrest, the appellants had no reasonable suspicion that the respondents were involved in a seizable offence.

In *Lembaga Letrik Negara, Malaysia* v *Ramakrishnan* [17] Raja Azlan Shah CJ (Malaya) as he then was, again inclined towards developing the law along more dynamic lines by ignoring binding but archaic precedent. The respondent, a ten-year-old boy, had been electrocuted and severely injured as a result of climbing an unguarded H-pole erected and maintained by the appellants. The appellant contended that the respondent was a trespasser and that therefore no duty was owed to him.

In delivering the judgment of the Federal Court, Raja Azlan Shah CJ (as he then was) chose to follow the case of *Southern Portland Cement Ltd* v *Cooper,*[18] a Privy Council appeal from Australia, which had adopted the "common humanity" principle enunciated in *British Railway Board* v *Harrington.*[19] This principle is contrary to the old principle of non-liability of occupiers for injuries caused to trespassers that was laid down in the Court of Appeal case of *Addie* v *Dumbreck*[20] which, heretofore, had been binding upon Malaysian courts, being a post-1956 decision.[21]

The Federal Court in the instant case found that, based on the common humanity duty test, the appellants did owe a duty to the respondent.

DECISIONS AND COMMENTS

BREACH OF STATUTORY DUTY

(i) Chan Kwon Fong & Anor v Chan Wah

[1977] 1 MLJ 232 Federal Court, Kuala Lumpur

Coram: Ali Ag CJ (Malaya), Raja Azlan Shah and Wan Suleiman FJJ

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[17][1982] 2 MLJ 128.

[18][1974] AC 623.

[19][1972] AC 277.

[20][1929] AC 358.

[21]Section 3, Civil Law Act 1956.

Cases referred to:-
(1) *Phillips* v *Eyre* (1870) LR 6 QB 1, 28-29.
(2) *Boys* v *Chaplin* [1971] AC 356.
(3) *Liverpool, Brazil and Ravis Plate Steam Navigation Co Ltd* v *Banham (The Halley)* (1868) LR 2 PC 193.
(4) *Machado* v *Fontes* [1897] 2 QB 231, 235.
(5) *Koop* v *Bebb* (1951) 84 CLR 629.
(6) *Anderson* v *Eric Anderson Radio and TV Pty Ltd* (1965) 114 CLR 20, 42.

RAJA AZLAN SHAH FJ: The appellants in this case are the defendants in an action before the High Court in which they are sued by the respondent for damages for injuries sustained in the course of employment arising from an alleged unsafe system of work. By his statement of claim the respondent alleges that the appellants were guilty of negligence in not providing a safe system of work.

Since the accident occurred in Samarinda, Kalimantan, Indonesia, a place outside the jurisdiction of our courts, the question of jurisdiction was in issue. The respondent's cause of action, as the learned trial judge held, arose from the submission of the appellants to the jurisdiction of the court. The appellants had entered unconditional appearance. They took objection but the matter was not pursued at great length and no serious discussion was taken in the court below. They further argued that it was for the respondent to establish that his claim was justifiable and/or actionable in the place where the wrong was committed and it was not for the appellants or the court to establish that the wrong complained of was or was not actionable or justifiable in the place where the wrong was committed. *Phillips* v *Eyre*[1] and *Boys* v *Chaplin*[2] were relied upon in support of the proposition. Indeed that was one of the grounds of appeal argued before us. In view of what I am going to say in a moment, I think other considerations relating to the appeal need not at this juncture be gone into.

The respondent is a citizen of Malaysia. The appellants are carrying on business under the name and style of Hon San Timber Co, at No 149, Jalan Imbi, Kuala Lumpur. The facts are sufficiently stated in the judgment of the learned trial judge. The respondent was employed as a logging lorry driver. Logs were loaded on to his lorry and he was required to drive the lorry from the site of loading to a point of discharge. The loading was done by the use of a bulldozer or tractor which pushed the logs on to the lorry. In order to facilitate this, another log was positioned behind a lorry. The traction was provided by a winch which was part of the lorry. In the course of the loading one of the logs slipped, struck the respondent and inflicted on him injuries which incapacitated him from work for about 15 months, fractured his spine and destroyed one of his kidneys.

The learned trial judge found for the respondent and awarded him $8,000 special damages and $19,000 general damages.

It is necessary, in my view, to ascertain the rule of private international law which defines the conditions of civil liability in this country for an act done abroad. As the law stands it must be accepted that an

action of tort will lie in Malaysia for a wrong alleged to be committed in a country outside Malaysia if two conditions are fulfilled. Firstly, the wrong must be of such a character that it would have been actionable if it had been committed in Malaysia. Secondly, it must not have been justifiable by the law of the country where it was committed.

It was Willes J who expressed the proposition some 100 years ago in *Phillips* v *Eyre, supra,* a case concerning the jurisdiction of English courts in cases of foreign torts. The first branch of the statement was derived from the decision in *Liverpool, Brazil, and River Plate Steam Navigation Co Ltd* v *Banham (The Halley)*[3] although in that case the Privy Council held that the defendant was not liable in England for an act done abroad by another defendant, not because of the character of the act according to English law, but because the person who did it was not one for whose defaults the defendant was liable according to English law. This branch of Willes J's statement of the law is free from ambiguity. It is the second branch of his statement, expressed by the phrase 'not justifiable', that has provoked criticism. The respondent claimed that he needed only to establish the first branch of the rule, not the second. In other words, it is said in order to found jurisdiction in respect of a foreign tort, a plaintiff need only prove that the wrong is of such a character that it is actionable according to the *lex fori,* and if that is established, then it is for the defence to show that the wrong is justified by the *lex loci delicti,* relying on the words of Rigby LJ in *Machado* v *Fontes*[4]:

> I think there is no doubt at all that an action for a libel published abroad is maintainable here, *unless it can be shewn to be justified or excused in the country where it was published;*

a negative averment, thus falling on the defence to establish it.

Machado v *Fontes* has been the subject of much criticism ever since its birth. It has been followed in Canada, doubted in the Privy Council, severely criticised in Australia, and not followed in Scotland, where it has long been settled law that 'not justifiable' means 'actionable'. It has also been severely criticised by academic writers: see Dicey & Morris. *The Conflict of Laws,* 9th edition, page 943. In *Machado* v *Fontes* it was held that if the act was contrary in any respect to the law of that country, then, although it gave rise to no civil liability there, it was not justifiable there, and the second branch of the rule was therefore not established. The High Court in Australia in *Koop* v *Bebb*[5] rejected *Machado* v *Fontes* saying that that decision went too far. The House of Lords in *Boys* v *Chaplin, supra,* at page 377 overruled *Machado* v *Fontes.* Lord Hodson dealt with the matter in the following words:

> If the decision in *Machado* v *Fontes* could be supported on the ground that actionability is not essential the respondent must succeed but, in my opinion, that decision is wrong and should be overruled.

In my opinion, with regard to the choice of law the generally accepted rule is that an act committed abroad is a tort and actionable as such, only if it is both actionable as a tort in this country as well as in the

country where it was done. It is here we must be careful to consider two separate issues — jurisdiction and the choice of law, for they are logically distinct and separate. Windeyer J in *Anderson* v *Eric Anderson Radio & TV Pty Ltd*[6] puts the matter succinctly in this passage:

> When in *Koop* v *Bebb* this court spoke of 'the rule of private international law which defines the conditions of civil liability' in one State for an act done in another, the reference was not, as I read the judgment, merely to the entertaining of an action but also to the substantive law for determining liability in an action.

Once the cause of action is established, then it is a matter of determining the nature of the plaintiff's remedy which is partly procedural and partly substantive — the actual quantification of damages under the relevant heads being procedural; questions whether loss of earning capacity or pain and suffering are admissible heads of damage being questions of substantive law. I may as well add that the nature of the plaintiff's remedy is to be determined by the *lex fori:* see the speech of Lord Hodson in *Boys* v *Chaplin, supra,* at pages 378, 379.

Accordingly our courts, following English practice, have jurisdiction in respect of foreign torts whenever we have jurisdiction *in personam* over the defendant. That is clearly stated in *Halsbury's Laws of England,* 4th edition, paragraph 406, page 308:

> In general, the English court has jurisdiction in actions in personam against any person who is present in England when the writ of summons or other originating process is served upon him. As a general rule the domicile, residence and nationality of the parties are all immaterial. In certain cases the court may make an order for substituted service, or for service outside the jurisdiction.
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> The parties may by their conduct give the English court a jurisdiction which it would not otherwise possess. By coming to the English court as a plaintiff, a person gives it jurisdiction over any counterclaim brought by the defendant. A writ is deemed to have been duly served on the defendant if he enters an unconditional appearance, or if his solicitor indorses on the writ a statement that he accepts service of the writ on his behalf. A contract may provide that the English court shall have jurisdiction over any action in respect of the contract, and may contain special provisions as to the mode and place of service.

See also Rule 20, Rule 21, Dicey & Morris, *Conflict of Laws,* 9th edition.

Section 23(1)(b) of the Courts of Judicature Act, 1964 is declaratory of this rule. It enacts *inter alia,* that:

> ...the High Courts shall have jurisdiction to try all civil proceedings where the defendant or one of several defendants resides or has his place of business... within the local jurisdiction of the court....

In my opinion, no difficulty arises in this case as to the High Court's jurisdiction over the appellants. The trouble starts when we consider the choice of law. It is here, in my view, the respondent has to establish both the conditions laid down in *Phillips* v *Eyre.* Dicey & Morris in their

Conflict of Laws, 9th edition, rule 178, supports this view; so also *Halsbury's Laws of England,* 4th edition, paras 615-620.

I now turn to the present case. There is no doubt that the wrong done to the respondent is actionable here, but there is doubt that an actionable wrong by Indonesian law was committed in Samarinda, Kalimantan, Indonesia. No evidence was led on this point, and, indeed, there is not a scintilla of evidence directed to this issue. As it is, since the person who wishes to establish a claim in respect of a foreign tort must also show that it is actionable in the foreign country, he must fail in his claim if he leads no evidence on the point. The speech of Lord Hodson in *Boys* v *Chaplin* (page 379) is in point:

> If it were clear that there existed in Malta in this case civil liability for the wrong done there would be no obstacle in the respondent's way, for in principle a person should in such circumstances be permitted to claim in this country for the wrong committed in Malta. This is to state the general rule as generally accepted which takes no account of circumstances peculiar to the parties on the occurrence. The existence of the relevant civil liability is, however, not clear in this case.

I would allow the appeal with costs here and below. It may be argued that this is a fit case for a re-trial. In my opinion, as the respondent has failed to prove his case, he cannot be allowed to have a second bite at the cherry.

Ali Ag CJ (Malaya) and **Wan Suleiman FJ** concurred.

Appeal allowed.

JG Bernatt for the Appellants.
Shee Koon Ruay for the Respondent.

Note

This case lays down guidelines as to when an action for tort will lie in Malaysia for a wrong committed outside Malaysia. The conditions are:

(a) The wrong must be of such a character that it would have been actionable if it had been committed in Malaysia; and
(b) It must not have been justifiable by the laws of the country where it was committed.

(ii) Wong Soon San
v
Malayan United Industrial Co Ltd

[1967] 1 MLJ 1 High Court, Kuala Lumpur

Cases referred to:-

(1) *Mitchell* v *North British Rubber Co Ltd* [1945] SC (J) 69 at p 3.
(2) *Lim Thong Eng* v *Sungei Choh Rubber Co* [1962] MLJ 15 at p 17.
(3) *Grant* v *National Coal Board* [1956] 1 All ER 682.

(4) *Groves* v *Wimborne* [1898] 2 QB 402.
(5) *Caswell* v *Powell Duffryn Collieries Ltd* [1940] AC 152, 172.
(6) *Wakelin* v *London and South Western Rly* (1886), 12 App Cas 41, 47.
(7) *Flower* v *Ebb Vale Steel, Iron and Coal Co Ltd* [1934] 2 KB 132, 143.
(8) *Lewis* v *Denye* [1940] AC 921, 931.
(9) *Gahan* v *C E Heinke & Co Ltd* [1958] 1 QB 432.
(10) *Smith* v *Baker & Sons Ltd* [1891] AC 325 at p 362.
(11) *Nicholls* v *Austin (Leyton) Ltd* [1946] 2 All ER 97.
(12) *Paris* v *Stepney Borough Council* [1951] 1 All ER 42 at p 50.
(13) *Re Polemis and Furners Withy & Co Ltd* [1921] 3 KB 560 at p 574..
(14) *Morton* v *William Dixon Ltd* [1909] SC 807 at p 809.

RAJA AZLAN SHAH J: This is a claim for damages in respect of personal injury sustained by the plaintiff in the course of his employment with the defendants. The plaintiff is a machine-man employed by the defendants who are manufacturers of kitchen utensils. On 20th February 1963 the plaintiff in the course of his employment was engaged in trimming and fettling zinc plates on the fettling and beading machine when a zinc trimming flew into his right eye in consequence of which the sight of the eye was destroyed.

The working of the machine is quite simple. The zinc plates for trimming are fitted one at a time on to a circular plate on the machine. When each zinc plate is in position, a lever is thrown to activate a shaft to hold the plate in place. Another lever is then thrown to start the machine. I have visited the factory and a demonstration was given on the very machine concerned in this case, and the whole process to trim each plate took from two to three seconds. On the far side of the circular plate on the machine is a zinc guard to protect the machine operator against trimmings which shoot off the lips of the zinc plates towards the wall as shown in photograph B. The height and angle of this guard can be adjusted manually. In normal circumstances the trimmings shoot forward towards the wall at a terrific velocity and eventually drop to the floor. The responsibility for adjusting the zinc guard rests on the supervisor and another person and that was not denied by the defendants. The guard is to prevent trimmings from flying backwards. I accept as a fact that if the guard is badly placed or adjusted the trimmings would shoot backwards at a terrific velocity and that, in my view, would be a source of danger to the machine operators who were not provided with goggles or face shields. It is not denied that goggles were not provided to the machine operators.

The plaintiff therefore contends that the injury to his eye was due to a breach of statutory duty under regulation 16(3) of the Machinery (Safety, Health and Welfare) Regulations 1956 — L N 208/56 — in that the defendants did not provide the plaintiff with any suitable goggles or a face shield or effective screen to protect his eyes. In the alternative, he contends that the said injury was due to a breach of the common law duty which the defendants owed him.

I will now consider the first claim. In September 1962 a representative from the machinery department inspected the machine in question and certified that it was properly installed. There was no condition

specified in respect of the machine. The representative testified that the operator behind the machine is adequately protected from flying trimmings by the guard — 'deflector' as he termed it. Accordingly, he said no special devices other than the deflector were required to ensure the safety of the machine operators. I am not bound by the opinion of the representative of the machinery department because the test in such cases is 'objective and impersonal'. That was clearly laid down in *Mitchell* v *North British Rubber Co Ltd*[1] which was applied by Ong J in *Lim Thong Eng* v *Sungei Choh Rubber Co Ltd.*[2] I am of the view that the defendants were in breach of their statutory duty in not providing goggles or face shields to the machine operators. Mr Cheah for the defence submitted that in order to succeed the plaintiff must bring his case within the ambit of the regulation. He submitted that the plaintiff must prove two limbs. Firstly, he must be exposed to danger, and secondly, the danger is one that caused injury to his eye. I agree with the proposition but I will put it somewhat differently. Regulation 16(3) reads:

> Where any person is engaged or assists in any process which may expose him to glare or to the danger of a foreign body injuring the eye suitable goggles or a face shield shall be provided and maintained in good condition for the use of such person.

In my view the regulation is designed for the safety, health and welfare of workmen, and it seems to cover workmen whose work would expose them *inter alia* to 'the danger of a foreign body injuring the eye'. I must also remember that the Machinery (Safety, Health and Welfare) Regulations are intended not only for the protection of careful, intelligent and obedient workmen but also of those who are stupid, careless, unreasonable or disobedient. In order to attract the provisions of regulation 16(3) it must be established that the plantiff is one of a class of persons whom the regulation is designed to protect and the damage suffered by the plaintiff is the kind contemplated to be guarded against. Viscount Simonds put the matter succintly in *Grant* v *National Coal Board:*[3]

> ... where damages are claimed for breach of a statutory duty without any allegation of negligence, the pursuer must establish two things, first, that the breach is intended not only to be visited by a penalty but also to be the ground of civil liability to a class of persons of whom the pursuer is one, and secondly, that the injury was one against which the legislation was designed to protect him.

In my judgment, both the tests are satisfied in this case.

It will also be noticed that the regulation is one of absolute liability; it is not qualified, as a statutory obligation sometimes is, by such words as 'as soon as possible' or 'reasonably practicable'. The point is significant because it involves the question whether the plaintiff has to establish negligence on the part of the defendants for it is undoubted law that when a statutory provision contains an absolute obligation a breach of that provision is sufficient to found liability, independent of any proof of negligence. Thus in *Groves* v *Wimborne*[4] it was held that liability for

a breach of the statutory duty to fence dangerous machinery was absolute, and independent of any proof of negligence on the part of the defendant or his servants. In the circumstances, the plaintiff is entitled to succeed under the first claim.

However, that is not the end of the matter. The defendants have pleaded contributory negligence. Even in cases of breach of statutory duty the ordinary plea of contributory negligence is available to the defendants. Lord Wright in *Caswell* v *Powell Duffryn Collieries Ltd*[5] said that 'in this connection the same rule applies as that stated by Lord Watson in *Wakelin* v *London and South Western Railway Co*[6] applicable to an ordinary plea of contributory negligence'. *Caswell's* case was concerned with a claim for breach of duty under section 55 of the Coal Mines Act, 1911. In *Wakelin's* case, Lord Watson stated the law as follows:

> I am of opinion that the onus of proving affirmatively that there was contributory negligence on the part of the person injured rests, in the first instance, upon the defendants, and that in the absence of evidence tending to that conclusion the plaintiff is not bound to prove the negative in order to entitle her to a verdict in her favour.

In *Caswell's* case Lord Wright (at p 172) remarked that 'the onus is on the defendant to prove that the plaintiff's contributory negligence was a substantial or material co-operating cause'. But in cases of this kind where the breach of provision is designed for the safety of workmen, too high a standard of care must not be demanded from a workman. Lawrence J in *Flower* v *Ebb Vale Steel, Iron & Coal Co Ltd*[7] said:

> I think of course that in considering whether an ordinary prudent workman would have taken more care than the injured man, the tribunal of fact has to take into account all the circumstances of work in a factory, and that it is not for every risky thing which a workman in a factory may do in his familiarity with the machinery that a plaintiff ought to be held guilty of contributory negligence.

Lord Atkin and Lord Wright in *Caswell's* case, *supra,*and Viscount Simonds in *Lewis* v *Denye*[8] expressed approval of the statement of the law made by Lawrence J. Viscount Simonds in *Lewis'*case (p 931) stated that "too high a standard of care must not be demanded from a workman".

I will now consider that aspect of the case in the light of the established principles. To my mind, if the guard was badly adjusted the zinc trimmings would shoot backwards. If the guard had not been improperly adjusted the trimmings would shoot forward. In this case, the plaintiff sustained an injury to his eye by a short trimming flying into it. As a matter of deduction, the cause was therefore that the guard had been improperly adjusted. The question is who had done that? Was it the supervisor or the plaintiff himself or some unknown person? The burden is on the defendants to prove contributory negligence. All things being equal, it is highly improbable for the supervisor or some other workman to adjust the guard so as to afford unnecessary risks to the plaintiff. On the other hand it is probable that the plaintiff had adjusted

it without the knowledge of the supervisor, resulting in the injury to his eye, and to that extent he was negligent in the way he did. The problem therefore becomes one of apportionment of the damages in respect of the injury which he suffered. I would therefore apportion his liability at 30 per cent. I have considered the age of the plaintiff and other contingencies and I would assess general damages at $12,000 less 30 per cent, i.e. $8, 400, and costs. He had suffered no special damages and his claim under that head fails.

Although the causes of action as pleaded are distinct and separate, there is really only one head of damage for which redress is sought, so that satisfaction of one cause of action ends the whole claim: *Gahan* v *CE Heinke & Co Ltd.*[9] Be that as it may, for the sake of completeness I will consider the common law duty of an employer towards his employee. It is well established that the duty is no more than a duty to take reasonable care not to expose the workman to unnecessary risk. The principle has been put forward by different judges in different words. Thus, Lord Herschell stated the law in *Smith* v *Baker & Sons*[10] as follows:

> It is quite clear that the contract between employer and employed involves on the part of the former the duty of taking reasonable care to provide proper appliances, and to maintain them in a proper condition, and so to carry on his operations as not to subject those employed by him to unnecessary risk.

Lord Wright in *Nicholls* v *Austin (Leyton) Ltd*[11] put the duty at common law in this way:

> That the common law duty exists in proper cases is unquestionable. But it is limited to reasonable exercise of care and skill to guard against danger which as reasonable people, the employers ought to have anticipated.

In his speech in *Paris* v *Stepney Borough Council*[12] Lord Oaksey said that the duty of an employer towards his servant is to take reasonable care for the servant's safety in all the circumstances of the case.

Having stated the law, I will now consider the facts. I find from the evidence that if properly placed, the zinc guard would afford adequate protection from flying trimmings to a machine operator in the position of the plaintiff, but if improperly placed or adjusted the zinc guard would cause unnecessary risk to him. Evidence has been led that machine operators did on occasion and of their own accord adjust the zinc guards but were checked by the supervisor when detected. From that it would follow that in all probability such adjustments were at times made undetected. That, to my mind, would expose the operators to unnecessary risks. If there is such danger from flying objects off the machine, a real danger which the supervisor had conceded, there is as much reason to protect workmen from such danger as there is. In such circumstances there is reason to anticipate such danger which could result in an accident. If there is the risk of trimmings flying off the machine caused by the improper adjustment of the guard, there must always be a risk of some injury to the eye, and that is something that ought to be anticipated . I think assistance can be gained from the words

of Warrington LJ in *Re Polemis & Furness, Withy & Co Ltd:*[13]

> The result may be summarised as follows: The presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be thus determined to be negligent, then the question whether particular damages are recoverable depends only on the answer to the question whether they are the direct consequences of the act.

Even if one could say that no one thought about the possibility or probability of an injury to the eye, it cannot be right if there are these frequent occasions when zinc trimmings fly off the machine due to improper adjustment of the guard that the defendants should do nothing constructive about it except re-adjusting the guard by the supervisor when he detects it. In my view there is a clear case of failure to take a precaution which if taken would result in the workman having less risk to undergo. I take the test which I think ought to be applied from the well known passage in the *judgment* of Lord Dunedin in *Morton* v *William Dixon Ltd:*[14]

> Where the negligence of the employer consists of what I may call a fault of omission, I think it is absolutely necessary that the proof of that fault of omission should be one of two kinds, either — to show that the thing which he did not do was a thing which was commonly done by other persons in like circumstances, or — to show that it was a thing which was obviously wanted that it would be folly in anyone to neglect to provide it.

In my judgment the defendants are responsible for damages for breach of the duty which they owe to the plaintiff under the common law. With regard to contributory negligence and quantum of damages, I will adhere to my earlier finding under the first claim.

Order accordingly.

Kirpal Singh Brar for the Plaintiff.
H Cheah for the Defendants.

FALSE ARREST

Chong Fook Kam & Anor
v
Shaaban bin Hussien & Ors

[1967] 2 MLJ 54 High Court, Raub

Cases referred to:-
(1) *Christie* v *Leachinsky* [1947] AC 573.
(2) *Re Charn Chandra Majumdar,* AIR (1917) Cal 25.
(3) Sabodh Chandra v *Emperor,* AIR (1925) Cal 278.
(4) *Tan Kay Teck & Anor* v *Attorney-General* [1957] MLJ 237.
(5) *John Lewis & Co Ltd* v *Tims* [1952] 1 All ER 1203.
(6) *Dallison* v *Caffery* [1964] 2 All ER 610.
(7) *Herniman* v *Smith* [1938] 1 All ER 1; [1938] AC 305.

(8) *State of Hyderabad* v *Kankadu,* AIR (1954) Hyd 89.

RAJA AZLAN SHAH J: This case is nothing more than a reassertion and reapplication of the statutory powers of the police with regard to arrest without warrant.

The plaintiffs in this case claim damages against the defendants for wrongful arrest and detention. The first and second plaintiffs are respectively the attendant and driver of motor-lorry C.8200 belonging to Temerloh Timber Trading Co Ltd, 5th milestone, Karak Road, Mentakab. I will for the sake of convenience refer to them as the attendant and driver respectively. The first and second defendants are respectively the Area Inspector, Mentakab, and the OCPD, Police District, Temerloh. I will refer to them as the inspector and OCPD respectively. It is common ground that the third defendant is their employer.

The facts that are not in dispute can be stated as follows: At about 9.25 pm on 10th July 1965 a fatal road accident occurred at the 2nd milestone, Karak Road. One Kanniah was driving his motor-car BC.6912 with four passengers. At about 9.25 pm he crossed a motor-lorry pulling a trailer loaded with sawn timber at the 2nd milestone, Karak Road. While doing so, a length of timber fell off the trailer and smashed the screen of the car, injuring three of the occupants and killing the fourth. As it was dark, Kanniah could not identify the registration number of the said lorry but he was positive that the lorry failed to stop and have proceeded in the direction of Mentakab. The inspector was subsequently informed of the fatal accident at 10.15 pm when Kanniah lodged a report at the police station. *Prima facie* an offence under section 304A of the Penal Code was disclosed. The inspector interrogated Kanniah who informed him of the description of the motor trailer and added that it had a red bonnet. The inspector then informed the OCPD who instructed him to put up road blocks at various places in order to stop for the purpose of interrogation any lorry with trailer answering to the description furnished by Kanniah. The inspector accordingly carried out the instruction. Together with Kanniah he also proceeded to the scene of the accident which was at a double bend and found broken glass on the grass verge as well as broken sawn timber. From there they went to see the deceased person at the mortuary. That same night the inspector made enquiries and obtained information that between 9.00 pm and 10.00 pm on 10th July 1965 a timber lorry with red bonnet and loaded with sawn timber was seen travelling from the direction of Bentong towards Mentakab. At about 12.00 midnight the inspector saw a timber lorry C.8200 with red bonnet parked in front of the Caltex petrol station on the Mentakab-Temerloh road. He sent for Kanniah who identified the lorry as being similar to the one involved in the accident. The inspector tried to locate the driver of the said lorry but was unsuccessful. He obtained particulars of the owner of the lorry from the nameplate which was fixed to the back of the driver's cabin and telephoned the sawmill in question but received no reply. He then

detailed two police constables to guard the said lorry and to bring the vehicle to the police station if its driver turned up. He then went round Mentakab and Temerloh and discovered that no vehicle of the description as furnished by Kanniah had passed through any of the road blocks. He further checked the only three sawmills in Mentakab and discovered that there was no vehicle which answered to that description. In the light of those enquiries the inspector had grounds to suspect that lorry C.8200 was the vehicle involved in the accident. Before returning to his quarters that night the inspector gave instructions to relieve the two police constables guarding the lorry.

At about 5.00 am on 11th July 1965 the inspector went to the Caltex petrol station and found that the said lorry had disappeared. He informed the OCPD who instructed him to contact the police station at Lanchang and Bukit Tinggi and, if possible, at Gombak to stop the said lorry for purposes of investigation. The first defendant rang up the police stations and instructed them to stop lorry C.8200 as it had been involved in a fatal road accident and to inform him accordingly. At 7.20 am the OCS Bukit Tinggi received the instruction from the inspector. He then instructed PC.22927 and another to proceed to the 20th milestone which was about a quarter-mile from the police station and to put up a road block in order to stop the said lorry. The police constables arrived at the 20th milestone at 7.55 am. He saw motor-lorry C.8200 loaded with sawn timber stationary in front of a coffee-shop. The said police constable, after having been told by the second plaintiff that he was the driver, informed him that he had received instructions from his OCS that he (the driver) was suspected of being involved in a motor accident. At 8.05 am the OCS arrived at the scene. He was then asked by the driver what wrong he had done and the OCS told him that he had received instructions from Mentakab to detain him on suspicion of being involved in a fatal road accident. The attendant was then within hearing distance of them.

There may be discrepancies about the time the inspector received the news from the OCS Bukit Tinggi that the lorry had been detained. But after considering all the circumstances in this case I accept as a fact that the inspector received the news at 9.10 am for otherwise the OCPD, whose evidence I have no reason to reject, would not have received the information at 10.30 am from the inspector.

Both the defendants and the owner of the lorry, Mr Yap, arrived at Bukit Tinggi at 1.00 pm. The OCS then handed the case to his superiors.

Having stated the undisputed facts, I now consider the subsequent events as told by both sides which would seem to be completely at variance.

Both the plaintiffs testified that they stopped their lorry at Bukit Tinggi at about 7.00 am. Two police constables stopped them and told them that they had instructions to do so from their superiors and to wait for their arrival from Mentakab. But the plaintiffs vehemently denied that the police constables told them the reason for their detention. The attendant said that the police constables did not ask for their NRICs or driving licences, but the driver said he remembered a sergeant took

his driving licence and NRIC which were never returned. As soon as the defendants together with Mr Yap arrived at 2.00 pm they interrogated the plaintiffs separately. They denied that their lorry was involved in the accident. The attendant said that although he was told that the accident occurred in Mentakab he was not told by the defendant of the nature of the accident. On the other hand, the driver said that he was neither told the place of the accident nor the nature of it. The plaintiffs were then asked to drive their lorry to Bukit Tinggi police station. They arrived there at about 3.00 pm and from there the plaintiffs, defendants, and Mr Yap left for Mentakab police station in the latter's car, arriving in Mentakab at about 5.00 pm.

At the station the plaintiffs were further interrogated. The attendant told the defendants of his movements on 10th July and the morning of the 11th, but he said the defendants did not verify them. The driver also told the defendants of his movements. The inspector together with Mr Yap then took the driver to town where the inspector questioned a stall keeper and a barber. Both the plaintiffs were later detained in the police lock-up for the night.

At about 8.00 am on 12th July 1965 both the plaintiffs were handcuffed and brought to Temerloh by two police constables and a Chinese corporal. At Temerloh they were taken to an 'upstairs' office where their handcuffs were removed. They were then asked by a Chinese who was not an interpreter to affix their signatures to a form written in English and which they were told was for the purposes of detention and food. The plaintiffs said that they were not told the reason for their detention and the nature and contents of the said form. Both the defendants were not there at that time. Having affixed their signatures on the form they were again handcuffed and taken to the magistrate's court 25 yards away where they had to wait for 15 to 30 minutes. The driver was given permission to telephone for his employer who came and asked by the plaintiffs to bail them out, but they were told by the corporal that since they had signed the form that could not be done. They denied that they were taken by the inspector before a magistrate who, through the court interpreter, explained to them that they were to be detained for one week. From the court the plaintiffs were taken back to Mentakab at 12.00 noon and detained in separate cells. In the afternoon both were interrogated by the inspector and at 5.00 pm on the following day, 13th July 1965, they were released by the OCPD.

The defendants' version is as follows. The plaintiffs were detained at 7.55 am on 11th July 1965 by PC.22927. That was a Sunday. That police constable and subsequently the OCS told the plaintiffs the reason for their detention. Their evidence was never challenged. If that was so, then the principle as reflected in *Christie* v *Leachinsky*[1] that in ordinary circumstances an arrested man must be informed of the substantial ground of arrest had been fulfilled. The defendants arrived at the scene at 1.00 pm. That was corrobarated by the OCS whose evidence on that point was not challenged. The defendants then interrogated the plaintiffs separately and jointly. It was argued somewhat mildly by counsel for the plaintiffs that the defendants had not stated correctly which person

each had interrogated. In my view, if there was any discrepancy between their evidence and that of the plaintiffs they were of such a trivial nature that I do not consider it has any bearing on their veracity as witnesses.

With regard to the interrogation at Bukit Tinggi, the inspector said that he did inform the attendant of his strong suspicion that his lorry was involved in an accident and that as he was not satisfied with his explanation he was detaining him for further investigation. The driver did tell him that he was the driver of the lorry on 10th-11th July, but as it was the normal practice for timber lorries to carry two drivers he was not then in a position to establish the identity of the driver. The inspector did check the driver's movements on 10th July 1965 but the two persons he had interrogated were reluctant to tell him anything. He further interrogated the attendant but was given the same story. He then informed the OCPD of the position and was instructed by him to detain the plaintiffs for further questioning. On Monday, 12th July 1965 at 8.00 am the inspector prepared the investigation diary and at 8.30 am he took both the plaintiffs to the court. There is no resident magistrate in Temerloh. But there are five *ex-officio* magistrates at the district office a few yards away from the court house. The inspector saw the Chinese interpreter and registered the plaintiffs' names in the register. He then brought them before the *ex-officio* magistrate (DW3) who, after having taken cognisance of the case, explained to them through the interpreter that they were to be detained till 18th July 1965. The inspector then took the plaintiffs back to the court house to wait for the warrant of remand which was being prepared by the court interpreter. From there he took both plaintiffs back to Mentakab and after that he recorded statements from witnesses including those of the plaintiffs. On 13th July 1965 he had recorded all the relevant statements and at 3.00 pm the OCPD telephoned him to ask if he had completed investigations and to release the plaintiffs if there was in sufficent evidence against them. After satisfying himself that there was insufficient evidence the inspector took the investigation diary back to the magistrate who signed the plaintiffs' release.

The OCPD did not come into the picture on 12th July 1965. On returning to the police station from Bukit Tinggi at 5.00 pm on 11th July 1965 he instructed the inspector to continue his investigation and, if necessary, to obtain a court order under section 117 of the Criminal Procedure Code. On 13th July 1965 when he was told by the inspector that there was insufficient evidence to establish a case against the plaintiffs he instructed the inspector to release them.

The *ex-officio* magistrate (DW3) testified that between 8.30 am and 9.00 am on 12th July 1965 the inspector brought the two plaintiffs before him for the purpose of detention under section 117 of the Criminal Procedure Code. After due consideration he approved the detention for a week. But he did not sign the warrant of remand as he remembered that he went out after that. On 13th July 1965 he signed for their release. An attempt was made to discredit the witness. Questions were put to him to suggest that the inspector never brought

the two plaintiffs before him and that the detention order which he had approved was signed subsequently. That, to my mind, is an attack on the character of what to me seems to be a straightforward and simple witness who had no apparent motive to mislead or deceive the court. The magistrate's evidence is corroborated by the evidence of the court interpreter (DW7) and the other *ex-officio* magistrate (DW4). The interpreter said that on the morning of 12th July 1965 the inspector brought the plaintiffs to the court house. From there all four went to see DW3 at about 9.00 am for the purpose of obtaining a detention order. He said that he had explained to the plaintiffs that they were to be detained for one week. In cross-examination he said that he did not ask any of the plaintiffs to sign any form. The other *ex-officio* magistrate (DW4) testified that he had signed the warrant of remand on 12th July 1965 after ascertaining that the detention order had been approved. If it was contended that the failure of the inspector to produce the warrant and the suspects before the second magistrate is vital to the validity of the warrant I think it is only necessary to state the contention to show that it is utterly unsound.

Of the two, I would prefer the defendants' version. To me, the plaintiffs appeared vague and unconvincing. Each had said that they were stopped by the police constables at 7.00 am while the police constable in question said, and his evidence was unshaken, that he detained the plaintiffs at 7.55 am — a difference of almost an hour. Again, each of the plaintiffs said that the reason for his detention was not given to him. That evidence, if it is tangible, has been negatived by the police constable and OCS whose evidence was also not challenged. The plaintiffs said that the defendants arrived at Bukit Tinggi at 1.00 pm while the defendants themselves said that they arrived at 2.00 pm. That evidence was substantiated by the OCS whose evidence I accept. The plaintiffs said that they were asked by a Chinese who was not an interpreter to sign a form. The court interpreter denied that he had ever asked them to sign any form. The *ex-officio* magistrate was not even asked in cross-examination whether he had asked the plaintiffs to sign any form. In the absence of any evidence to the contrary, it is fair to infer that he did not ask the plaintiffs to sign any form. The plaintiffs contended that the inspector did not take them before the magistrate (DW3). That was set right by the unshaken evidence of the court interpreter.

Summing up, I have no hesitation to conclude that the plaintiffs' evidence is unsatisfactory and present improbable features. On the other hand, the defendants' story sounded reasonably credible.

The extent of the power of a police officer to arrest without a warrant a person whom he suspects of having committed a seizable offence is enumerated in section 23(i)(a) of the Criminal Procedure Code, and the procedure to be taken after arrest is contained in section 28. To justify a police officer to arrest under section 23(i)(a) there must be a reasonable complaint or suspicion or credible information of the person to be arrested having been concerned in a seizable offence. It is not possible to lay down any abstract rule as to whether it may or it may not be a

reasonable suspicion or complaint to insist upon without reference to the particular facts and circumstances which are established in the individual case. In any event it must be founded on some tangible legal evidence within the cognisance of the police officer to justify a reasonable person in concluding that the suspect is guilty of a seizable crime. The evidence need not be of such a nature as to constitute proof or to convince a court of law beyond a reasonable doubt; it may, upon examination after arrest, turn out to be insubstantial so long as the arresting officer had some solid basis for believing it to be substantial at the time he acted. Thus it was held in *Re Charu Chandra Majumdar*[2] that the reasonable suspicion and credible information must be based upon definite facts which the police officer effecting the arrest must consider for himself before he acts under section 54 of the Indian Criminal Procedure Code which corresponds with section 23 of our Code. In *Sabodh Chandra* v *Emperor,*[3] the court had to determine what constituted a reasonable complaint or suspicion or credible information under section 54 of the Indian Criminal Procedure Code where the only information the Calcutta police acted upon in effecting arrest was two telegrams the first of which, in addition to personal description, said, 'Wanted for embezzelment'; and the second, in addition to a suggestion about possible movements, said, 'Embezzlement of money to the value of a couple of lakhs of rupees'. Mukerji J in a judgment of the court said that 'the circumstances of each particular case must determine the question as to what is a reasonable complaint or suspicion; but at least this much is clear, that no mere vague surmise or information must be the basis thereof but some definite fact tending to throw suspicion on the arrested person'.

In my opinion, a reasonable complaint or suspicion may be equated with reasonable or probable cause as found in the English authorities. I find support in this assertion in a passage of Whyatt CJ in *Tan Kay Teck & Anor* v *Attorney-General*[4] where, after noting that in *John Lewis & Co Ltd* v *Tims*[5] an objective test is required of what constitutes a reasonable complaint, said that the reasonable or probable cause required at common law to justify an arrest without warrant of a person suspected of a felony is in *pari materia* with arrest under statutory powers upon a reasonable complaint and that in his view the same principles apply.

What is a reasonable complaint or suspicion or, to use the English alternative phrase, reasonable or probable cause to justify an arrest without warrant is in my view a state of facts which would lead a man of ordinary care and prudence to believe or entertain an honest and strong suspicion that the suspect is guilty of an offence. A recent authority which is directly germane to our present case is afforded by *Dallison* v *Caffery.*[6] In that case, Diplock LJ said at p 619:

> The rule that a person who arrests, detains or prosecutes a suspected felon commits no actionable wrong if he acts honestly and reasonably, applies alike to private persons and to police officers, but what is reasonable conduct in the circumstances may differ according to whether the arrestor is a private person or a police officer. One difference, too well settled now by authority to be altered, is that a private person can only arrest if a

> felony has in fact been committed, whereas a police officer can do so if he reasonably believes that a felony has been committed; but this, together with the distinction between felony and misdemeanour, is I believe the only respect in which the common law has become fossilized. In all others the rule of reasonableness applies. Where a felony has been committed, a person, whether or not he is a police officer, acts reasonably in making an arrest without a warrant if the facts which he himself knows or of which he has been credibly informed at the time of the arrest make it probable that the person arrested committed the felony. That is what constitutes in law reasonable and probable cause for the arrest.... What is reasonable conduct on the part of a police officer in this respect may not be the same as what would be reasonable conduct on the part of a private arrestor.

In another passage he said:

> One word about the requirement that the arrestor or prosecutor should act honestly as well as reasonably. In this context it means no more than that he himself at the time believed that there was reasonable and probable cause, in the sense that I have defined it above, for the arrest or for the prosecution as the case may be. The test whether there was reasonable and probable cause for the arrest or prosecution is an objective one, namely, whether a reasonable man, assumed to know the law and possessed of the information which in fact was possessed by the defendant, would believe that there was reasonable and probable cause. Where that test is satisfied, the onus lies on the person who has been arrested or prosecuted to establish that his arrestor or prosecutor did not in fact believe what *ex hypothesi* he would have believed had he been reasonable: see *Herniman* v *Smith,*[7] per Lord Atkin.

The present case therefore boils down to this: when the police at Bukit Tinggi were told to stop and did stop the plaintiffs and their lorry, were the facts within the cognisance of the defendants founded upon some tangible legal evidence which in the circumstances constituted reasonable complaint or suspicion? There is overwhelming evidence that at 9.25 pm on 10th July 1965 a fatal road accident had occurred at the second milestone Karak Road and a motor lorry with a trailer loaded with sawn timber was involved. The said lorry did not stop but proceeded in the direction of Mentakab. It was clearly a hit-and-run case. *Prima facie* an offence under section 304A of the Penal Code, a seizable offence, was disclosed. Where that is so, it is in the public interest that the culprit should be caught and punished. Acting on the complaint, the inspector started investigations. He interrogated the complainant who informed him that the lorry in question had a red bonnet. The inspector subsequently informed the OCPD who gave instructions to put up road blocks. He later visited the scene together with the complainant and found broken pieces of glass and sawn timber. He also visited the mortuary and saw the dead body. That same night he received information that between 9.00 pm and 10.00 pm a red bonnet timber lorry was seen heading for Mentakab. At about midnight the inspector found a red bonnet timber lorry, C 8200, parked in front of the Caltex petrol station on the Mentakab-Temerloh road which answered the description given by the complainant earlier. He brought the complainant to

the said lorry and the latter was convinced that it was similar to the one involved in the accident. He made every effort to trace the driver but was not successful. Two police constables were detailed to guard the said lorry with instructions to bring it to the police station when the driver turned up. The inspector discovered that the owner of the said lorry lived at the 5th milestone Karak Road. He therefore tried to get in touch with him but was also not successful. He checked the road blocks at Mentakab and Temerloh and learned that no timber lorry answering to the description given by the complainant had passed through them. He also checked the three sawmills in Mentakab and found that there was no timber lorry answering to that description. Suspicion focussed reasonably enough on the said lorry and it goes without saying on the driver. His suspicion was later confirmed by the disappearance of the said lorry in the early hours of the morning of 11th July 1965 which was a Sunday. He notified his OCPD who instructed that road blocks be put up at Lanchang and Bukit Tinggi. The inspector notified the respective OCSs, and at 9.10 am news was received from the OCS Bukit Tinggi that the said lorry had been detained. The facts within the cognisance of the defendants then were therefore circumstantial. There was no direct eye-witness to establish the identity of the driver. The defendants proceeded to Bukit Tinggi and interrogated the plaintiffs. They were told by the driver himself that he was driving the said lorry on 10th July 1965. It was suggested by counsel for the plaintiffs that at that stage there was not enough evidence to connect the attendant with the offence in view of the admission of the driver. That may be so, but that was not tangible evidence. That piece of evidence is inadmissible in a court of law. There is the possibility that the driver was lying. The defendants had still to find independent evidence to establish the identity of the driver. The defendants were also confronted by the fact that it is the normal practice for timber lorries to carry two drivers. The attendant of a timber lorry is also a licenced driver. In any event the question to be posed is not whether there is evidence to constitute proof or to convince a court of law beyond a reasonable doubt but whether the defendants had acted honestly and reasonably. The defendants decided to bring both the plaintiffs back to Mentakab for further interrogation. At Mentakab both the plaintiffs told the defendants of their movements at the relevant time. The driver told the inspector that he had taken food at a shop and afterwards had his hair cut. He willingly cooperated in leading the inspector to the shops but the interviews produced no result. The inspector gained no assistance from the persons whom he interviewed. The case presented formidable problems to the inspector and he therefore briefed his OCPD of the latest situation and was instructed to carry on with the investigation and if necessary to obtain a remand order under section 117 of the Criminal Procedure Code on the following day (Monday) which the inspector in fact obtained. The investigation ended that night and the plaintiffs were placed in the police lock-up. Why were they not granted police bail that night? The defendants considered that their investigation was not completed and in my view the measures taken were perfectly reasonable in the circumstances in order to do justice not only to the plaintiffs

but also to the State. It is apt that I cite a passage from the judgment of Lord Denning MR in *Dallison* v *Caffrey, supra.* At p 617 the Master of The Rolls said:

> When a constable has taken into custody a person reasonably suspected of felony, he can do what is reasonable to investigate the matter, and to see whether the suspicions are supported or not by further evidence. He can, for instance, take the person suspected to his own house to see whether any of the stolen property is there; else it may be removed and valuable evidence lost. He can take the person suspected to the place where he says that he was working, for there he may find persons to confirm or refute his *alibi.* The constable can put the suspect up on an identification parade to see if he is picked out by the witnesses. So long as such measures are taken reasonably, they are an important adjunct to the administration of justice; by which I mean, of course, justice not only to the man himself but also to the community at large. The measures must, however, be reasonable.

It is my opinion that the defendants had acted honestly and reasonably founded on such facts which I consider established a reasonable complaint or suspicion.

That is not the end of the matter. It was said on behalf of the plaintiffs that they were illegally detained for more than 24 hours. When a police officer has taken a person into custody he shall without unnecessary delay take him before a magistrate. The person arrested cannot be detained by the police for more than 24 hours unless the police had earlier obtained a remand order under section 117 of the Criminal Procedure Code. The period of 24 hours must exclude the necessary time taken for the journey from the place of arrest to the magistrate's court. This procedure is to my mind founded on the theory that where policemen are judges, individual liberty and dignity cannot long survive. Therefore the section provides for an independent and impartial observer to judge the validity of the arrest. In the *State of Hyderabad* v *Kankadu*[7] the question for decision was whether the accused was in lawful custody after the expiry of 24 hours from 11.30 pm on 24th June 1952. In that case the accused was arrested at 11.30 pm on 24th June 1952 and was kept in the lock-up. At 8.00 pm on 25th June 1952 the police took him to the magistrate at Narayanpet for a remand order. But the magistrate was on leave and the police were directed to take the accused for purposes of remand to the district magistrate at Mahbubnagar which is about 50 to 60 miles distant. There was no train or bus available for this purpose. Accused was therefore kept again in the police lock-up to await journey by the next available conveyance which was at 8.00 am on 26th June 1952. Some time between 3.00 am and 6.00 am on 26th June 1952 the accused escaped from the lock-up and was not re-arrested until 9th July 1952. The court held that the accused was in lawful custody, saying that the 24 hours of detention under the section were to be counted up to the time when the accused left the station.

The question for decision here is whether the accused was in lawful custody after the expiry of 24 hours from 7.55 am on 11th July 1965. It

is evident from the facts in the present case that up to the time the plaintiffs left the police station at 8.30 am on 12th July 1965 they were already in police custody for 24 hours 35 minutes. Section 28 of the Criminal Procedure Code expressly states that the necessary time taken for the journey from Bukit Tinggi to the magistrate's court at Temerloh must be excluded. The distance between these two places I take it to be more than 50 miles of hilly country which in normal circumstances would take more than an hour. It is therefore fair to say that in the circumstances the plaintiffs were in lawful custody well within 24 hours.

If I am wrong in the calculation of time, I hold that 11th July 1965 being a Sunday, it was not possible for the plaintiffs to be produced before the *ex-officio* magistrate for purposes of remand. Had they left at 7.55 am on Monday 12th July 1965 (which was within the 24-hour period) they would not, in my opinion, have been produced until 8.30 am or thereabout, bearing in mind that there is no resident magistrate in Temerloh and that it would in any event be some time to take the plaintiffs from the court house to the district officer.

I will therefore dismiss both the plaintiffs' claim with costs.

Claim dismissed.

DR Seenivasangam & DP Xavier for the Plantiffs.
Au Ah Wah (Senior Federal Counsel) for the Defendants.

Note

This case restates the extent of statutory powers of the police with regards to an arrest without a warrant. The test of reasonable suspicion was explained and applied. Although the decision was reversed by the Federal Court, it was reinstated by the Privy Council in so far as the reasonable suspicion test was concerned.

NEGLIGENCE

(i) Elizabeth Choo
v
Government of Malaysia & Anor

[1970] 2 MLJ 171 High Court, Kuala Lumpur

Cases referred to:-
(1) *Vancouver General Hospital* v *MacDaniel & Anor* (1934) 152 LJ 56.
(2) *Hunter* v *Hanley* (1955) SLT 213 at p 217.
(3) *Bolam* v *Friern Hospital Committee* [1951] 2 All ER 118 at p 122.
(4) *R* v *Bateman* (1925) 94 LJ KB 791: [1925] All ER Rep 45.
(5) *Rich* v *Pierpoint* (1862), 176 ER 16 at pp 18 and 19.
(6) *Chin Keow* v *Government of Malaysia & Anor* [1967] 2 MLJ 45.

RAJA AZLAN SHAH J: This is an action for damages for personal injuries

against the Government of Malaysia and the anaesthetist. The plaintiff was admitted to the General Hospital, Kuala Lumpur for the purpose of piles operation but she left the hospital after 35 days without the operation being performed. Instead another operation had to be performed for the repair of her colon which was perforated due to the alleged negligence of the anaesthetist during the sigmoidoscopic examination. In consequence the plaintiff still suffers from haemorrhoids and is still unable to undergo the piles operation by reason of the nervous shocks she suffered from the perforation of her colon. She says she suffers and will continue to suffer pain and discomfort from her haemorrhoids.

The facts leading up to the present case can be briefly stated. The plaintiff is an employee of Messrs. Lindeteves-Jacoberg (Malaya) Sendirian Berhad, Kuala Lumpur. She consulted the company doctor, Dr H A L Wagner, with regard to her haemorrhoids and was recommended to see Mr Alhady, the senior consultant surgeon, General Hospital, Kuala Lumpur. He admitted her and recommended an operation since he found that her haemorrhoids were at a very advanced stage. Before the operation a pre-operative sigmoidoscopic examination was to be performed by Mr Alhady. He was then occupied and he delegated the examination to the anaesthetist. The anaesthetist performed the said examination under general anaesthesia. The sigmoidoscope which is about 16 cm long is introduced into the rectum slowly using a certain amount of pressure. Great concentration is needed to see that the passage is not obstructed and that is done with the aid of the light in the instrument and by inflating the rectum with air. When the instrument reached the 13 cm level the anaesthetist saw some blood and he was doubtful of some abnormal pathology. He consulted Mr Alhady who carried out an immediate laparotomy when a small laceration was found and sutured and a temporary iliac sigmoid-colostomy carried out. It was also found that the plaintiff has a bicernuate uterus situated in front of the rectum. The colostomy was closed and the sigmoid colon replaced on October 4, 1967. She now bears two permanent scars on the upper and lower parts of her abdomen. The plaintiff made an uneventful convalescence except for some post-operative wound sepsis. She was later discharged.

Four particulars of negligence have been advanced against the anaesthetist:

(a) he failed to exercise due care and attention in the performance of the said sigmoidoscopy;
(b) he carried out the sigmoidoscopy after the administering of premedication to the plaintiff when he knew or ought to have known that the premedication would reduce her perception of pain and disable her from appreciating the traumatic perforation of her gut;
(c) he performed a sigmoidoscopy at a time when it was unnecessary;
(d) he failed to exercise reasonable care and gentleness in the manipulation of the plaintiff's sigmoid colon with the sigmoidoscope.

In my view (a) and (d) can be dealt with together.

I will deal first with (b) and this can be disposed of on comparatively simple considerations. Mr Alhady who is a witness for the plaintiff is an

eminent surgeon in this country and generally held in high esteem in the profession. He had successfully performed hundreds of sigmoidoscopic examinations under general anaesthesia. This technique is in vogue in his unit since 1956 and that technique had not earned the condemnation of medical opinion generally or of any medical man in particular except Dr Wagner, who had expressed the view that it is better to perform sigmoidoscopy without anaesthesia because the patient could forewarn the anaesthetist of any pain. He recalled his own experience in undergoing sigmoidoscopic examination in Australia without anaesthesia. The anaesthetist in our present case had done his surgical training under Mr Alhady and it was during his housemanship that he had acquired this technique of using general anaesthesia during sigmoidoscopy. He had successfully performed hundreds of sigmoidoscopic examination under general anaesthesia. No one had complained about this technique. The principle of law is well established that a practitioner cannot be held negligent if he treads the well-worn path; he cannot be held negligent if he follows what is the general and approved practice in the situation with which he is faced. There is the judgment of the Privy Council in *Vancouver General Hospital* v *MacDaniel & Anor*[1] for such a proposition. I might also refer to a statement which is contained in a Scottish case, *Hunter* v *Hanley*[2] where the Lord President (Lord Clyde) said this:

> In the realm of diagnosis and treatment there is ample scope for genuine difference of opinion, and one man clearly is not negligent merely because his conclusion differs from that of other professional men. ....The true test for establishing negligence in diagnosis or treatment on the part of a doctor is whether he has been proved to be guilty of such failure as no doctor of ordinary skill would be guilty of it acting with ordinary care.

McNair J in *Bolam* v *Friern Hospital Committee*[3] put the matter in this way:

> A doctor is not guilty of negligence if he has acted in accordance with a practice accepted as proper by a responsible body of medical men skilled in that particular art.... Putting it the other way round, a doctor is not negligent, if he is acting in accordance with such a practice, merely because there is a body of opinion that takes a contrary view.

I think that disposes of this matter.

I am of the view that nothing turns on (c) as there exists abundant evidence from medical witnesses on both sides which are consistent with each other than sigmoidoscopy is necessary before haemorrhoidectomy is undertaken, to ensure that no rectal disease is present and particularly to exclude a neoplasm. This is in accord with the view expressed by Charles Rob and Rodney Smith in the 3rd Volume of *Operative Surgery* on page 17, a Butterworths Medical Publication.

I now deal with (a) and (d). It was stated by Mr Peddie for the plaintiff that the courts are always reluctant to find negligence against a medical man. With respect that proposition cannot be true. To say the least I am no advocate of the right of medical men occupying a position

of privilege. They stand in the same position as any other man. Their acts cannot be free from restraint; where they are wrongfully exercised by commission or default, it becomes the duty of the courts to intervene. The present case is not a new one. The point was argued on a number of occasions. The authorities on the point which were cited by counsel laid down propositions which are familiar to this court and that is that the standard of care expected of a medical practitioner is that he is not required to exercise the highest or a very high standard but only a fair and reasonable standard of care and skill in his treatment of his patients. That was exemplified in the judgment of Lord Hewart CJ in *R V Bateman.*[4] Mr Peddie claimed to be able to invoke the doctrine of *res ipsa loquitur* on the basis that the anaesthetist had failed to avoid perforating the intestine which he ought to have done. He seemed to take the view that the occurrence spoke of negligence on the part of the anaesthetist. In my judgment the doctrine could not be invoked by the plaintiff. There could be no presumption of negligence arising from the mere circumstance that the anaesthetist failed to avoid perforation because that might have been caused by causes beyond his control. Liability must depend on the plaintiff establishing that there had been a want of competent care and skill. The true test was, I think, expressed by Erle LCJ, in *Rich* v *Pierpont*[5] when, in summing up the case to the jury, he is reported to have said:

> It was an action charging him with a breach of his legal duty, by reason of inattention and negligence and want of proper care and skill; and if they were of opinion that there had been a culpable want of attention and care, he would be liable. A medical man was certainly not answerable merely because some other practitioner might possibly have shown greater skill and knowledge; but he was bound to have that degree of skill which could not be defined, but which, in the opinion of the jury, was a competent degree of skill and knowledge. What that was the jury were to judge. It was not enough to make the defendant liable that some medical men, of far greater experience or ability, might have used a greater degree of skill, nor that even he might possibly have used some greater degree of care. The question was whether there had been a want of competent care and skill to such an extent as to lead to the bad result.

The point, therefore, to be determined is whether the anaesthetist was competent to do the sigmoidoscopic examination, and if so, whether upon the occasion in question he did or did not exercise a reasonable and proper care, skill and judgment: see also *Chin Keow* v *Government of Malaysia & Anor.*[6] This is a question of fact.

The anaesthetist obtained his degree of Bachelor of Medicine and Bachelor of Surgery in 1955. After his housemanship he was medical officer at the General Hospital Penang for one year in surgery and anaesthesia. After that he was medical officer-in-charge of out-patients and officials and prisons in Penang. When in Penang he did anaesthesia under Dr L P Scott and surgery under Mr Alhady. He went to the United Kingdom and took his primary surgical FRCS in May 1961. He became a Fellow of the Faculty of Anaesthetics in the Royal College of Surgeons (FFARCS) in 1962. When he came back he was again posted to the

Penang General Hospital as a consultant anaesthetist until February 1965. In March 1965 he was transferred to the General Hospital, Kuala Lumpur and worked in Mr Alhady's surgical unit, and it was quite common for Mr Alhady to allow him to do endoscopic examinations.

It was put to him in cross-examination that endoscopic examination is not the work of an anaesthetist. In answer he said that the whole concept of modern anaesthetist is not only seeing the patient before and after the operation but he might be called upon to work in intensive care units and various diagnostic procedures such as passing catheters, performing endoscopic duties etc. He said that during his training in the United Kingdom he was taught to perform various endoscopic duties including sigmoidoscopy. In my view sigmoidoscopy does not involve utilisation of a new advance in technique which carries with it wholly unforeseen dangers and difficulties. It is being carried out every day as a pre-operative examination for piles surgery. Every houseman is trained to do sigmoidoscopy and any doctor with the minimum basic training is taught to use endoscopic instruments. Sigmoidoscopy has been accepted as a relatively minor operation.

The anaesthetist had done hundreds of endoscopic examinations including sigmoidoscopy in Penang and in Kuala Lumpur and had encountered no trouble except this particular mishap which Mr Alhady described as unfortunate because it turned out that the plaintiff has a bicernuate uterus which according to him might have been the cause of the slight perforation during the examination. According to him the possibility exists. There is evidence that the greatest care is required to ensure free passage when the instrument is introduced into the rectum and the procedure required a high degree of concentration. The anaesthetist said he exercised all the care and caution he possessed at the time and although he was showing the houseman the sigmoidoscopy, at no time he said did he lift his sight from the mirror.

Having regard to all the circumstances of this case I am satisfied that the anaesthetist was competent to do the sigmoidoscopic examination and he had exhibited competent care and skill on that particular occasion. This was an unfortunate incident which does occur, though rarely, in such cases even with the most skilled treatment as was examplified by Mr Alhady in a similar case which did occur in the United Kingdom. The proposition that the bicernuate uterus is a contributory factor is not without force as the possibility suggested cannot altogether be ruled out. I have every reason to sympathise with the plaintiff but sympathy alone is not sufficient to found a claim on negligence.

I find as a fact that negligence has not been established. There will be no order as to costs.

Case dismissed.

SDK Peddie for the Plaintiff.
Ajaib Singh (Senior Federal Counsel) for the Defendant.

Note

This case is an application of the standard of care and skill that is required of a skilled defendant, in this case, an anaesthetist.

(ii) Lim Ah Toh
v
Ang Yau Chee & Anor

[1969] 2 MLJ 194 High Court, Kuala Lumpur

Cases referred to:-
(1) *Menon* v *Pigeonneau* [1957] MLJ 85.
(2) *Tan Giok Hue* v *Lim Swee Peng* [1960] MLJ 190, 191.
(3) *Laurie* v *Raylan Building Co Ltd* [1942] 1 KB 152, 154.
(4) *Richley* v *Foull* [1965] 3 All ER 109, 119.
(5) *Browne* v *De Luxe Car Services* [1941] 1 KB 549, 553.
(6) *Noor Mohamed* v *Palanivelu* [1956] MLJ 115.
(7) *EA Long* v *Wong Chin Wah* [1957] MLJ 163.
(8) *Ormrod* v *Crosville Motor Services Ltd* [1953] 2 All ER 753.
(9) *Wong It Yong* v *Lim Gaw Teong* [1969] 1 MLJ 79, 80.
(10) *Hewitt* v *Bonvin* [1940] 1 KB 188, 191, 196.
(11) *Lee Chong* v *Tan Kwee Low* [1961] MLJ 98.

RAJA AZLAN SHAH J: The first defendant while driving a motor-van belonging to the second defendant collided with an oncoming omnibus on the wrong side of the road and as a result the deceased who was a passenger in the said motor-van was killed. The plaintiff (mother of the deceased) brings this action as administratrix of his estate and on her own behalf under sections 7 and 8 of the Civil Law Ordinance, 1956. She alleges that her son's death was caused solely by the negligence of the first defendant, the servant or agent of the second defendant, thus making the latter vicariously liable for his negligence.

The defence as pleaded is two fold: (1) a denial of negligence on the part of the first defendant and (2) the deceased caused and or induced the said negligence by compelling the first defendant to drive fast and in the circumstances the deceased knew or ought to have known that there would be a risk of injury to him and by so compelling the first defendant he impliedly consented to the said risk. The latter defence is refuted by the first defendant himself. In his evidence he testified that the deceased did not compel him to drive fast. Therefore that defence no longer fall for consideration.

Ordinarily, both the first defendant and the deceased were employees of the second defendant who runs a plumbing business. The day in question was not a working day. They were assisting their employer with his brother's wedding arrangements. The ceremony was to be held at his house in Klang. The first defendant who was authorised to use the

motor-van for purposes of the wedding drove it to Port Swettenham in order to borrow a tarpaulin. The deceased who was also authorised to travel in it went with the first defendant. According to the first defendant the deceased wanted to see a friend in Port Swettenham. When they left it was raining heavily.

The first defendant's story is this: He says that he was following a lorry on that straight stretch of road between Klang and Port Swettenham at an even distance of 30 feet when it stopped at the 3rd mile to drop a passenger. It was drizzling and the road surface was wet. He says he was then travelling at a speed of 25 mph. Visibility according to him was poor. He could only see a distance of 33 yards. He intended to overtake the lorry, so he swerved his vehicle out and when he did that he saw in front of him an oncoming omnibus travelling at a high speed. The distance between his vehicle and the oncoming bus he says was about 20-30 feet. He applied his brakes a little bit and his van skidded. He lost control of his vehicle which collided with the bus on his wrong side of the road.

Four days later he made a statement to the police. He did not mention that he was following a lorry but a motor-car. He was subsequently charged with an offence under section 304A of the Penal Code but at the end of the prosecution case the charge was amended to one of driving without due care and attention under section 36(1) of the Road Traffic Ordinance, 1958. He pleaded guilty and was fined $150.

The version of the driver of the omnibus is different. There was no oncoming lorry. It was drizzling and the visibility was good. When the said motor-van was about 20 feet from his bus it encroached into his path. He sounded his horn and as he had no alternative to avoid the accident he drove his bus into a ditch on his left side. The van skidded and hit his bus. It was then travelling between 20-25 mph although at the hearing before the magistrate he did say he was travelling at about 30 mph. I do not think that would affect his credibility because it is common knowledge that in traffic accidents drivers of motor vehicles try to exaggerate their speeds.

Between the two versions I would prefer the evidence of the omnibus driver. I take it as a fact that there was no lorry at the material time and place. The statement to the police which was made some 4 days afterwards was made when there was a *lis mota* and therefore it fell far short of the truth.

When a motor vehicle collides with an oncoming vehicle on the wrong side of a straight stretch of road, that is *prima facie* evidence of negligence: see *Menon* v *Pigeonneau*[1] and *Tan Giok Hue* v *Lim Swee Peng.*[2] The onus is therefore upon the defendants to show that the motor-van found itself where it did without any negligence on their part.

The first defendant attributes the accident to a skid when he applied his brakes while trying to overtake the lorry in the face of the oncoming omnibus. It is now contended that the circumstances establishing that the accident was due to a skid is sufficient to displace the *prima facie* case. I do not accept that proposition. It is well-established that a skid is

a neutral element. It *per se* means nothing. See *Laurie* v *Raylan Building Co Ltd.*[3] To displace the *prima facie* case on the ground of a skid it must be established by affirmative evidence that it happened without fault on the part of the first defendant. Putting it in another way, he would fail if he does not prove that the skid which took him to the wrong place happened without his fault; see also *Richley* v *Faull.*[4] Assuming there was such a lorry at the material time and place, a prudent driver would not have tried to overtake the lorry unless it was reasonably safe to do so. He must keep a proper look-out of the road ahead. The evidence shows that it was not safe to overtake the lorry because an omnibus was coming from the opposite direction. He did not see the bus coming. He tried to overtake it when the omnibus was only 20-30 feet away. There was no room to overtake the lorry safely and at the same time to avoid collision with the bus. He then applied his brakes which caused the violent skid thus resulting in a collision with the bus. All the factors favouring a skid were also present i.e., the weather conditions and the wet road surface, and any motorist of reasonable prudence should have been well aware of the necessity for exercising more than the ordinary degree of care: see *Tan Giok Hue* v *Lim Swee Peng, supra.* As was also said in *Browne* v *De Luxe Car Services:*[5]

> A driver who is proceeding along a road which he knows to be slippery has imposed upon him the burden of driving with an extra degree of care.

Therefore on the 1st defendant's own version it is difficult to see in what way he has displaced the *prima facie* case.

Rejecting as I do the defence version that there was a lorry at the material time and place, there is no material which would justify my finding that it has displaced the *prima facie* case of negligence. It is a clear case of travelling at an excessive speed and without keeping a proper lookout under unfavourable weather and road conditions. The skid happened as a result of his own default. The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the plaintiff's case and which weighs against the defendants: see *Noor Mohamed* v *Palanivelu*[6] *LA Long* v *Wong Chin Wah.*[7]

Is the second defendant vicariously liable for the first defendant's negligence? To impute him with liability, it must be proved that the first defendant when driving the motor-van at the material time was his agent for the general purposes of the journey. The journey must be undertaken for the second defendant's purposes. It is not necessary to cite authority on the subject but the principle enunciated in *Ormrod* v *Crosville Motor Services Ltd*[8] which was adopted by the Federal Court in *Wong It Yong* v *Lim Gaw Teong*[9] might be referred to. Denning LJ (as he then was) held the owner's liability firmly on the ground of agency:

> The owner is also liable if the driver is his agent, that is to say, if the driver is, with the owner's consent, driving the car on the owner's business or for the owner's purposes.

Mr Vijandran on behalf of the defendants stressed the need to keep the

principle in *Ormrod's* case, *supra,* within its own limit. He submitted that the 'owner's purposes' must be personal to him and therefore a brother's wedding does not come within that category. It seems to me that that case does not decide such a far-reaching proposition as that. I think that in the present case it has been pushed too far. In the passage cited above Denning LJ in his usual way stated the point emphatically and concisely. If the owner has an interest or concern in the purpose for which the vehicle is being driven, that is good evidence of agency. A social or moral obligation will suffice to impute agency: see *Hewitt* v *Bonvin*[10] *per* du Parcq LJ at page 196.

The question which is involved in this case raises no new principles of law; it elucidates no new aspects of familiar principles; it is a mere question of the application of the principle in *Ormrod's case* to this particular case. Applying it here there can be no doubt that the first defendant was authorised by the second defendant's father, who had authority to grant it, to drive the motor-van for the purposes in which the second defendant had an interest i.e., to borrow the tarpaulin for the wedding arrangements. He had a moral obligation to see that his brother's wedding is carried through without a hitch. It therefore cannot be said that he had no interest or concern in the journey performed by the first defendant.

I cannot for one moment subscribe to the view as Mr Vijandran wants me to that the present case is on all fours with the case of *Lee Chong* v *Tan Kwee Low.*[11] In that case the owner had lent his car to a third party (the second defendant) to be used for purposes in which he had not the slightest interest or concern. It was a case of an outright bailment. The present case is different. The motor-van was there at the owner's house to be used for the purposes of the brother's wedding and the first defendant who is the regular driver of the said van was authorised to drive it. The owner retained possession and the right of control of the motor-van at the material time by the presence in the van of his agent.

I am satisfied that the second defendant is vicariously liable for the negligence of the first defendant.

I will hear arguments as to damages.

Order accordingly.

G Tara Singh Sindhu for the Plaintiff.
DP Vijandran for the Defendants.

(iii) Periasamy v Suppiah

[1967] 1 MLJ 19 High Court, Kuala Lumpur

Cases referred to:-
(1) *Powell* v *Strantham Manor Nursing Home* [1935] AC 243 at p 256.
(2) *Barnes* v *Lucille Ltd* (1907), 96 LT 680.
(3) *Donoghue* v *Stevenson* [1932] AC 562 at p 580.

(4) *Samson* v *Aitchison* [1912] AC 844.
(5) *Hewitt* v *Bonvin* [1940] 1 KB 188, 195-196.
(6) *Norton* v *Canadian Pacific Steamships Ltd* [1961] 1 WLR 1057.
(7) *Ormood* v *Crosville Motor Services Ltd* [1953] WLR 1120.

RAJA AZLAN SHAH J (delivering oral judgment): This is an appeal by the defendant against the judgment of the learned president, sessions court, sitting at Raub. The plaintiff testified that on the date and time in question he was driving a cart which was being pulled by two bulls along the Raub-Benta main road. The defendant's cattle, including a bull, were then grazing at the roadside. Suddenly the defendant's bull attacked one of the plaintiff's bulls, resulting in injuries to the latter animal. That is the case as alleged by the plaintiff in the court below. The defendant denied that he was the owner of the cattle including the bull in question. The learned president came to the conclusion that the bull which attacked the plaintiff's bull belonged to the defendant. He based his decision on the evidence of the plaintiff and witnesses Nos 2, 3, 4 and 5. PW2 in evidence stated that he knew that the defendant owned the bull that attacked the plaintiff's bull. He had seen the defendant attending to the bull and giving it grass to eat at Sempalit. He also said that the defendant had owned the bull for the past one year. He had also seen the defendant escorting the cattle home. PW3 testified that he had bought four head of cattle from the defendant. PW4 had stated that he had bought fresh cow's milk from the defendant. PW5 said that he knew the defendant had a bull dark-brown in colour and that he had seen the defendant attending to his cattle in the cattle shed. On the other hand, the defendant testified that he had no bull on the date in question. It is a question of which side to believe on the balance of probabilities. The learned president chose to believe the plaintiff's version and awarded him damages.

The judgment of the court below has been attacked by counsel for the appellant. It was said that there was no proper identification of the bull in question, and the particular bull was not produced within the precincts of this court. His argument was based on the premise that the plaintiff had adduced insufficient evidence of ownership of the bull. In this connection I would like to cite a passage from the case of *Powell* v *Streatham Manor Nursing Home*[1] and I quote:

> The case was tried by a judge sitting alone, and on appeal from the decision of a judge the Court of Appeal and this House have a duty to exercise their jurisdiction as tribunals of appeal on fact as well as on law, a jurisdiction which your Lordships have never hesitated to exercise when satisfied that the courts below have erred on a question of fact. Where, however, as in the present instance, the question is one of credibility, where either story told in the witness-box may be true, where the probabilities and possibilities are evenly balanced and where the personal motives and interests of the parties cannot but affect their testimony, this House has always been reluctant to differ from the judge who has seen and heard the witnesses, unless it can be clearly shown that he has fallen into error.

That well-known principle has been repeatedly followed by our courts, and I see no reason to depart from that principle in the present case. It has not been shown to me that the learned president was wrong in his assessment of the facts and I am of the view that on the evidence before him he was entitled to come to the conclusion he did, and I am not disposed to interfere on his finding of fact.

It was then said in argument by counsel that there was no evidence adduced by the plaintiff that the mother-in-law of the defendant was his servant so as to impute him with liability. That aspect of the case is linked with the next proposition put forward by counsel and I will deal with it in a moment. I wish to make it plain here that we are not concerned with cattle-trespass or damage done by dangerous animals, and therefore cases connected therewith are not applicable in the instant case.

Counsel further argued that in the instant case the learned president had failed to direct himself on the law in that the plaintiff had to prove knowledge of the mischievous propensity of the bull in question. I accept as a question of law that the bull belonged to the class *mansuetae naturae.* When damage is done by an animal *mansuetae naturae* the plaintiff must prove, firstly, that the animal had previously committed or attempted to commit at least one act that showed the particular kind of viciousness now complained of, secondly, that the defendant knew of the act or attempt in question. I quote a passage from the 14th edition of *Salmond on Torts* at pp 474-475 where the author cited a passage from *Williams on Liability for Animals:*

> Unless there is evidence to the contrary, I must assume that it is not natural for a bull to attack another bull; therefore it is necessary for the plaintiff to prove that the defendant actually knew that the bull was dangerous and had departed from the peaceful habit of its species.

In this case liability can only be based on the defendant's actual knowledge of the particular animal's past conduct. That principle is well established. However, in *Barnes* v *Lucille Ltd*[2] it was there held that it is not necessary to prove that the animal has on any previous occasion actually done the kind of harm complained of. It is enough that it has sufficiently manifested a tendency to do such harm and that the defendant was aware of the fact. In the present case the plaintiff has from cross-examination of the defendant elicited from him the following facts:

> Two years ago I had appeared in court as defendant to defend a similar case. It was dismissed.

In the court below both parties were unrepresented. I have called for the civil suit file in question which bears CS No 86 of 1963. In that case the plaintiff was one Kartar Singh son of Mol Singh and the defendant is the present appellant, Periasamy. The third paragraph of the statement of claim stated as follows:

> That on 3.11.1963 at about 12.00 noon the plaintiff tied up his bullocks to the different trees by the roadside at 1st mile Lipis Road, Raub, and he

> went home for lunch. At about 12.45 pm on the same day he came out from his house to see the bullocks, but he was surprised to see that one of the bullocks fell to the ground and injured, i.e., the right horn was broken and bleeding and I saw a bullock belonging to the defendant was nearby. When the plaintiff's bullock was attacked by the defendant's bullock Messrs Jang Singh and Suppiah were at spot and they separated them ....

Jang Singh and Suppiah gave evidence supporting the plaintiff's case. However, the defence was not called and the case was dimissed. After reading the notes of evidence as recorded by the court in that case it is clear that the case was based on cattle-trespass. It is now said that case is not conclusive for present purposes because we are not in a position to know whether that same bull emerged again in the present case. In this connection I refer to the evidence of PW5 in the present case in which he stated that he knew that the defendant had a bull, dark-brown in colour. PW2 stated in evidence:

> The defendant has been having the bull for the past one year before that day, i.e. 18.6.1965.

All things being equal, it is highly probable that the defendant had owned that bull in 1963. That being the case, the position is clear. The plaintiff has established on the balance of probabilities that the defendant knew that this particular bull has had a mischievous propensity to attack another bull and causing similar damage. Once that has been established, the plaintiff succeeds under the scienter rule.

It was also argued that the mother-in-law who was then looking after the cattle and the bull was not the servant of the defendant so as to found liability against the defendant. That argument is only significant and relevant if the knowledge of the mother-in-law is to be imputed to the defendant on a basis of master and servant relationship. However, the present case is different as the defendant himself has knowledge of the mischievous propensity of the bull. It therefore follows that argument is not tenable. However, the plaintiff's claim is based on neglignce and it is on that aspect of the case that this present appeal has to be decided. Paragraph 6 of the plaintiff's statement of claim states:

> The defendant was negligent to the extent that he did not exercise proper care and control of such a bull when grazing near the main thoroughfare.

It is a perfectly clear principle of law that a man may be involved in liability for damage done by his animals under the general principle of negligence. In such case the plaintiff must prove a duty owed to him by the defendant. It is also perfectly clear that he is liable if his animal damaged his neighbour's property. Who is one's neighbour has been judicially defined. Lord Atkin in the celebrated case of *Donoghue* v *Stevenson*[3] stated the law as follows:

> The rule that you are to love your neighbour becomes in law, you must not injure your neighbour; and the lawyer's question, Who is my neighbour? receives a restricted reply. You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure

> your neighbour. Who, then, in law is my neighbour? The answer seems to be persons who are so closely and directly affected by my act that I ought reasonably to have been in contemplation as being so affected when I am directing my mind to the acts or omission which are called in question.

That classic statement bears reference to 'persons' but I have no doubt that includes his property as well. Applying that test, it is beyond doubt that the defendant owes a duty to the plaintiff to take reasonable care not to damage the plaintiff's property which is in the near neighbourhood. On the facts as found by the learned president the defendant has failed to take reasonable care as a result of which the plaintiff's bull was injured.

It was submitted that the cattle including the bull were looked after by the defendant's mother-in-law and therefore the defendant cannot be imputed with liability because the mother-in-law was not his servant. It was said that the mother-in-law should be so sued or joined as defendant. It is common ground that a man may vicariously be liable through the act of his servant and the dominant consideration in that case is the well known principle that the servant must be subject to the control and direction of his employer in respect of the manner in which his work is to be done. The relationship of master and servant is commonly a continuing engagement in consideration of wages paid but, in my opinion, that is not essential. One person may be the servant of another on a single occasion and for an individual transaction provided the element of control and supervision is present. Moreover, the service may be merely gratuitous, as where a child acts *de facto* as the servant of his father or the owner of a vehicle asks a friend to drive it. The test of service is not physical control but the right to control. The right of control may be deduced from the circumstances of each case, such as the fact that the owner of a motor-car remains in it while allowing another to drive, *Samson* v *Aitchison.*[4] Even if there is no right of control, the owner of a vehicle may be liable if he has delegated to the other the duty of looking after it: *Hewitt* v *Bonvin;*[5] *Norton* v *Canadian Pacific Steamships Ltd*[6] or if it is being used partly or wholly on the owner's business or for the owner's purposes, *Ormood* v *Crosville Motor Services Ltd.*[7] On the analogy of the above principle it is beyond doubt that the mother-in-law was looking after the cattle and bull for the defendant's purposes. It is equally clear that the defendant had an interest in them. Therefore, on the facts as found by the learned president there is ample evidence to justify his conclusion that the defendant was negligent in allowing his bull to cause damage to the plaintiff's bull.

The appeal is therefore dismissed with costs.

Appeal dismissed.

S Kulasegaram for the Appellant.
In Person for the Respondent.

(iv) Government of Malaysia & Ors v Jumat bin Mahmud & Anor

[1977] 2 MLJ 103 Federal Court, Kuala Lumpur

Coram: Suffian LP, Raja Azlan Shah and Wan Suleiman FJJ

Cases referred to:-
(1) *Chen Soon Lee* v *Chong Voon Pin & Ors* [1966] 2 MLJ 264.
(2) *Ricketts* v *Erith Borough Council* [1943] 2 All ER 629, 631.
(3) *Richards* v *State of Victoria* [1969] VR 139, 141.
(4) *Bourhill* v *Young* [1943] AC 92.
(5) *King* v *Phillips* [1953] 1 QB 429.
(6) *The Wagon Mound* [1961] AC 388.
(7) *Bradford* v *Robinson Rentals* [1967] 1 All ER 267.

RAJA AZLAN SHAH FJ (delivering the judgment of the Court): On March 1, 1977 we allowed this appeal and said that we would give our reasons at a later date. We now proceed to do so.

This appeal raises an important point, and it is the second occasion on which such a question relating to schools has come before our courts.

On the first occasion a party of students and teachers of Chung San School, Riam Road, Miri, Sarawak, went on a picnic to Tanjong Lobang, and the deceased (a school girl aged 11 years) while playing a ball game with her friends in waist deep water, suddenly moved into a depression and was drowned. Lee Hun Hoe J (as he then was) in dismissing the case held as a second limb of his judgment that a schoolmaster's duty towards his pupil is the same as that of a careful father, *i.e.*, to take such care of his pupils as a careful father would take of his children: see *Chen Soon Lee* v *Chong Voon Pin & Ors*[1].

The second occasion concerns this appeal. The facts are short and simple. The plaintiff aged 11 years old was a Standard V student of Sekolah Dato Klana Maamor, Jalan Range, Seremban. He was injured in his right eye when another pupil, Azmi bin Manan (Azmi), celebrated his teacher's momentary inattention in class by pricking the plaintiff's thigh with a pin which produced a shock causing the latter to turn round and his right eye came in contact with the sharp end of the pencil which Azmi was holding. The eye had to be removed subsequently. Azmi said it was an accident. The trial judge agreed that he did not deliberately stab the plaintiff's eye with a pencil. I think the evidence favours such an inference, otherwise the serious injury sustained by the plaintiff would have been immediately noticed. It is in evidence that Azmi was a playful boy and had on previous occasions poked the plaintiff and other boys with a pin or pencil but never in their eyes, and that was done without the knowledge of the form teacher or Mrs Kenny in whose class the accident occurred. It also never occurred to any pupil to complain of Azmi's abnormal propensity.

It is common ground that at the time of the accident Mrs Kenny had given written work to the class consisting of 40 pupils and it was during the period when she was doing her work at the table that Azmi

wandered about pricking a boy sitting next to the plaintiff and also the plaintiff. It was argued before the trial judge that there was lack of supervision in Mrs Kenny's class thus resulting in the accident which caused the injury to the plaintiff. That, it was contended, constituted breach of duty which the appellants owed the plaintiff. If Mrs Kenny had paid particular attention to Azmi's behaviour, or misbehaviour, the accident would not have happened and therefore the plaintiff would not have sustained the serious injury.

The learned trial judge gave judgment for the plaintiff. After addressing his mind to paragraphs 297, 299 and 301 in *Charlesworth on Negligence,* 5th ed, he held as follows:

> I am satisfied that there has not been sufficient or reasonable supervision of the class by Mrs Kenny at the material time and that the injury inflicted by Azmi bin Manan on the infant plaintiff was caused by her negligence. It is established that Azmi bin Manan was a playful and mischievous boy who used to go round and disturb other boys especially those sitting at the back and had either Mrs Kenny or the form teacher bothered to find out she would at least have discovered that Azmi bin Manan had been carrying a pencil with him when he wandered about in the class-room and therefore ought to have warned him and the class as a whole not to play with sharp pencils. As it was, such a warning was given only after the incident. Mrs Kenny was not attending to any particular pupil and if she had paid proper attention to what was going on at the back of the class she certainly would have noticed that Azmi bin Manan was missing from his desk and found out what he was up to. Mrs Kenny knew that Azmi bin Manan was playful and as she ought to have known also of his propensity to play with sharp pencils it was her duty to take precautions to prevent him from causing any possible injury to other pupils in the class which she had not taken.

Before us it was agreed that this was not a case of breach of the obligation of the school teacher to maintain that degree of discipline which would enable her effectively to perform her function as a teacher, but one of lack of supervision on her part in that she had failed to check or prevent a recalcitrant pupil from wandering about in the classroom. Therefore the issue here is whether there was evidence on which the court could conclude that the injury to the plaintiff was causally related to any negligence on the part of the appellants. Counsel on behalf of the appellants submitted that there was none. The trial judge held there was. The question arises how much supervision is required of a school teacher in a classroom in order to protect the pupils from molestation and other risks of injury whatever their source.

It is accepted that by reason of the special relationship of teacher and pupil, a school teacher owes a duty to the pupil to take reasonable care, for the safety of the pupil. The duty of care on the part of the teacher to the plaintiff must commensurate with his/her opportunity and ability to protect the pupil from dangers that are known or that should be apprehended and the duty of care required is that which a careful father with a very large family would take of his own children: see *Ricketts* v *Erith Borough Council.*[2] It is not a duty of insurance against harm but

only a duty to take reasonable care for the safety of the pupil. The duty is aptly described by the learned Chief Justice of Victoria in the judgment of the Full Court in *Richards* v *State of Victoria*[3] when he said:

> The duty of care owed by (the teacher) required only that he should take such measures as in all the circumstances were reasonable to prevent physical injury to (the pupil). This duty not being one to insure against injury, but to take reasonable care to prevent it, required no more than the taking of reasonable steps to protect the plaintiff against risks of injury which ex hypothesi (the teacher) should reasonably have foreseen.

In that case the plaintiff suffered brain damage as a result of a fist fight which occurred at a High School in a classroom and in the presence of a teacher. Evidence suggested that the particular teacher had had some difficulties in maintaining discipline in the past and that, on the day in question, the blow which caused serious injuries to the plaintiff had been preceded by an argument, a scuffle, and then a fight.

The law does not attach strict liability on a school teacher for the torts of his/her pupil, but only on proof that he/she had failed to exercise reasonable care in controlling the pupil such as would have avoided the injury to the plaintiff. Since that is a matter of evidence and inference, great care needs to be taken to see that the breach of the duty of care must be causally related to the injury received. Thus Lord Porter in *Bourhill* v *Young,*[4] Denning LJ (as he then was) in *King* v *Phillips,*[5] and the Privy Council in *The Wagon Mound*[6] have expressed the view that the test of liability for shock is foreseeability of injury by shock. In *The Wagon Mound, supra,* it was held that if the damage which materialised was damaged by fire, then for the defendant to be liable he must have been able to anticipate damage by fire; that he could anticipate damage by fouling the wharf's slipways was held not to be enough. Since that case the principle that the damage sustained must not only be caused by the wrongful act, but must be damage of a class or character reasonably foreseeable as a possible result of that act is now firmly established. There must be testimony from which it is a logical and reasonable inference, and not mere speculation or conjecture, that the school teacher's act contributed to the injury. And, of course, in deciding this matter, it is relevant to take into account common experience in a big school classroom consisting of 40 pupils. Therefore for a plaintiff to succeed in a case such as the present he must adduce direct or circumstantial evidence which tends to show not only how the accident happened but also that the injury was the result of some conduct on the part of the defendant. Whether the evidence permits a logical and reasonable inference that the defendant's conduct had some effect in producing the injury is a question of law which this court can decide. *Bradford* v *Robinson Rentals, Ltd*[7] illustrates the working of these principles. In that case the defendant employers carelessly exposed the plaintiff van driver to extreme cold in the course of his duties. In consequence he suffered frost-bite. The court held that the defendants exposed him to severe cold and fatigue likely to cause a common cold, pneumonia or chilblains, and that frost-bite was of the same type and kind as the

harms foreseeable, so that the defendants were held liable.

In the present case, in considering whether or not the appellants were in breach of their duty of care to the plaintiff it was necessary for the trial judge to consider first whether the risks of injury to the plaintiff were reasonably foreseeable and secondly, assuming it was, whether the appellants took reasonable steps to protect the plaintiff against those risks. It is unfortunate that the trial judge did not clearly indicate in his judgment that these two questions were separate and should be dealt with by him separately.

In my judgment, only the first question needs to be considered. There is evidence that the class never lacked supervision. The form teacher and Mrs Kenny knew of Azmi's propensity to leave the desk and wander about and when they noticed it they immediately asked him to return to his desk which he did. But there was no evidence that they knew that Azmi was a bully because no pupil had ever complained to either of them. The trial judge held that Mrs Kenny was negligent in failing to give proper attention to the class all the time, and that if she had paid proper attention to what was going on at the back of the class she certainly would have noticed that Azmi was missing from his desk and found out what he was doing and thus would have prevented the injury to the plaintiff. The question here is whether there was evidence from which a logical and reasonable inference could be drawn that as a result of the teacher's momentary inattention the injury to the plaintiff was reasonably foreseeable. In other words, according to the trial judge, there was evidence on which he could conclude that the injury to the plaintiff was causally connected with her wrongful act of momentary inattention. With due respect to the trial judge the evidence falls short of the requirement that the injury sustained by the plaintiff was of a kind or type of class reasonably foreseeable as a result of Mrs Kenny's wrongful act, assuming she was wrongful.

The sole question in the present case is a question of causation. In my judgment it cannot be said that the particular teacher carelessly exposed the plaintiff to injury of the class or type that could reasonably have been foreseen. If the injury which resulted was injury by the sharp end of a pencil, then for the appellants to be liable they must have foreseen injury by the sharp end of a pencil. A pencil is not a dangerous article. All pupils use pencil in classrooms. Indeed the trial judge accepted appellants' contention that to say that there was a duty by them to instruct each and every pupil on the proper use of a pencil was to stretch things to a ridiculous extent. Again, assuming the injury to the plaintiff's eye was in fact caused by a wrongful act of the teacher — for not being attentive in class all the time — it cannot be said that it was reasonably foreseeable that the injury of this class or character was a reasonably foreseeable result of such a wrongful act. In my opinion, I cannot conclude as a matter of evidence and inference that more probably than not constant vigilance in the classroom would have prevented the injury which the plaintiff in fact received. There is no factual basis of the causal connexion between the step the trial judge was entitled to think the teacher ought, in the performance of her duty

to care, to have taken, and the injury of which the plaintiff sustained. Because notwithstanding the proper exercise of supervision a recalcitrant pupil may act to the injury of a fellow pupil, it is prudent to see that the necessary causal relationship is made out. The effect of constant vigilance in class as a method of preventing a recalcitrant pupil from wandering about is often such a debatable matter that the causal relation between the lack of supervision and the injury caused to a fellow pupil may not be a matter of evidential probability but be no more than a matter of mere speculation.

Appeal allowed.

Lim Beng Choon (Senior Federal Counsel) for the 1st & 2nd Appellants.
C Abraham for the 3rd Appellant.
AKJ D'Cruz for the Respondents.

Note

This case concerns the duty of care owed by the teacher to his pupil and the content of that duty. In determining liability the court also stressed the importance of establishing a causal connection between the breach of duty and the resultant injury. This case has added importance in that the "reasonable foreseeability" test for legal causation, as enunciated by the Privy Council in the case of *The Wagon Wound,* was applied.

OCCUPIER'S LIABILITY

(i) Lembaga Letrik Negara, Malaysia
v
Ramakrishnan

[1982] 2 MLJ 128 Federal Court, Penang

Coram: Raja Azlan Shah CJ (Malaya), Abdul Hamid FJ and Abdoolcader J

Cases referred to:-
(1) *Donoghue* v *Stevenson* [1932] AC 562
(2) *Munnings & Anor* v *The Hydro-Electric Commission* [1971] 125 CLR 1.
(3) *Buckland* v *Guildford Gas Light and Coke Co* [1949] 1 KB 410.
(4) *Thompson* v *Bankstown Corporation* (1952-1953) 87 CLR 619.
(5) *Commissioner for Railways* v *Quinlan* [1964] AC 1054, 1081.
(6) *British Railways Board* v *Herrington* [1972] AC 877.
(7) *Southern Portland Cement Limited* v *Cooper* [1974] AC 623; [1974] 1 MLJ 194.
(8) *McCarthy* v *Wellington City* [1966] NZLR 481.
(9) *Lengyel* v *Manitoba Power Commission* [1958] 12 DLR (2d) 126.
(10) *Nixon* v *Manitoba Power Commission* [1960] 21 DLR (2d) 68.
(11) *Jones* v *City of Calgary* (1969) 3DLR (3d) 455.
(12) *Davis* v *St Mary's Demolition Co Ltd* [1954] 1 WLR 592.
(13) *Creed* v *McGeoch & Sons Ltd* [1955] 1 WLR 1005.
(14) *Gough* v *Thorne* [1966] 3 All ER 398, 400.
(15) *Yachuk* v *Oliver Blais Co Ltd* [1949] 2 All ER 150.
(16) *Bonnington Castings Ltd* v *Wardlaw* [1956] AC 613, 620.
(17) *Lynch* v *Nurdin* (1841) 1 QB 29; 113 ER 1041.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court). This is an appeal from the decision of the High Court, Penang in an action for damages for personal injuries in which the present respondent is the plaintiff and present appellants are defendants. The learned judge found for the plaintiff and awarded $34,000.00 as agreed damages. The trial proceeded on the issue of liability.

The claim was based on the negligence of the appellants in having erected and maintained a terminal steel pole more commonly known as H-pole which carried high-voltage electric wires immediately adjoining an unfenced public foot-path in a padi field in Bayan Lepas, Penang (opposite the international airport) which H-pole and wires constituted a dangerous hazard and allurement to the respondent and for breach of statutory duty under the Electricity Regulations 1951 (LN 406/51). The defence was a bare denial of negligence and breach of statutory duty but in the course of the arguments before the learned judge and repeated before us, the main contention was that the respondent was a trespasser and therefore the relationship of occupier/trespasser fell into consideration. The learned trial judge decided the case on the basis that it was a straightforward case of negligence based on the *Donoghue* v *Stevenson*[1] principle. He relied on the Australian case of *Munnings & Anor* v *The Hydro-Electric Commission*[2] where it was held that the liability should be determined by reference to the standard of care owed by an undertaker maintaining a highly dangerous electrical transmission system over the land of another to which the plaintiff, a boy aged 11 years and other children resorted, and the English case at first instance in *Buckland* v *Guildfore Gas Light and Coke Co,*[3] where a girl aged 13 years was electrocuted while climbing a readily climbable tree immediately below high-voltage electric wires, the property of the defendants, in a farmer's field. The learned judge however, failed to consider the issue of contributory negligence which was pleaded in the statement of defence.

There is little or no dispute about the facts. In pursuance of its function to provide electricity in the island of Penang the predecessors of the appellants, the Lembaga Pengurusan Kerajaan Tempatan, Pulau Pinang, erected and maintained the H-pole which was situated immediately adjoining to a foot-path connecting a kampong consisting of 150 to 200 houses, to the Bayan Lepas main road where there are 3 schools. The foot-path was used by the kampong folk and children as a public foot-path leading to the main road. The appellants were very much aware of the existence of the foot-path before the accident and admitted that they did not take any step, and that it was prudent, to put up anti-climbing devices e.g. warning signs, barbed wires or spikes on the H-pole in view of its potential danger and its proximity of the foot-path.

On April 25, 1975 the respondent then aged 10 years was walking along the foot-path with a group of boys when he was moved to climb the H-pole in an apparent attempt to release a bird trapped on the wire on top of the pole but upon reaching the bracket or cross-arm supporting the cable box which is about 7 feet from the ground level

there was a flashover which resulted in the respondent being electrocuted and thrown to the ground. As a result he suffered severe injuries and first and second degree burns which resulted in scars and permanent disfiguring.

The learned judge held that:

> There is no need for the pole to be an allurement as the danger potential of the pole is so great that some form of precaution should have been considered necessary to ensure no one came to or attempted to climb the pole. The proximity of a path which led to the main road from a kampong inhabited should have made it reasonably foreseeable that people will be near the pole. ...In the present case the defendant ought to have known poles in unoccupied land especially H-poles will invariably tempt children to climb them, even if it was not for the purpose of releasing birds trapped on top of them. And there was nothing whatsoever to suggest that there was imminent peril in climbing them. And the defendant had therefore not discharged their duty of care to others when installing and maintaining that H-pole.

The difficulty in deciding this appeal arises from the possibility and perhaps the necessity of choosing between two competing categories of the law of torts and applying one of them to the facts to the exclusion of the other. One category concerns the duties of an occupier of a structure with respect to the safety of those who come upon it or within the area of the control exercised or exercisable by the occupier. The other category forms part of the general law of negligence based on the *Donoghue* v *Stevenson, supra,* principle and relates to the duty of exercising a high standard of care falling upon those controlling an extremely dangerous entity, such as electricity of a lethal voltage.

We first consider two Australian cases, *Thompson* v *Bankstown Corporation*[4], and *Munnings* v *The Hydro-Electric Commission, supra.* In *Thompson's* case a boy aged thirteen years, in endeavouring to reach a bird's nest some eight to ten feet from the ground, in a ledge in a decayed portion of a pole which had been erected by the defendants on a public road for the purposes of carrying high tension wires, was electrocuted as a result of the neglected maintenance and control by the defendants of their overhead electric wires and the High Court dealt with the matter as an occupier/trespasser case but held that the duty of care sprang from the creation of a highly dangerous situation. If not occupier/trespasser, there was a relationship of occupier/person who had no right to be there. The basis of liability seems to be that the defendants had created or allowed a highly dangerous situation to arise in relation to high tension wires.

Thompson's case reflects a tendency towards the recognition of a general duty of care independent of the liability that might arise from the relation of occupier/trespasser. The concept of general duty of care, co-existing with the limited duties arising from occupation of land available to the plaintiff was most strikingly emphasized in the judgment of Kitto J at pages 642/643:

> The respondent's contention appears to assume that the rule of law which defines the limits of the duty owed by an occupier to a trespasser goes so

> far as to provide the occupier with an effective answer to any assertion by the trespasser that during the period of the trespasser the occupier owed him a duty of care. The assumption is unwarranted, for the rule is concerned only with the incidents which the law attaches to the specific relation of occupier and trespasser. It demands, as Lord Uthwatt said in *Read* v *J Lyons & Co Ltd* [1947] AC 156, at p 185, a standard of conduct which a reasonably-minded occupier with due regard to his own interests might well agree to be fair and a trespasser might in a civilized community reasonably expect. It would be a misconception of the rule to regard it as precluding the application of the general principle of *M'Alister (or Donoghue)* v *Stevenson (Pauper)* [1932] AC 562, to a case where an occupier, in addition to being an occupier, stands in some other relation to a trespasser so that the latter is not only a trespasser but is also the occupier's neighbour, in Lord Atkin's sense of the word: see *Transport Commissioners of New South Wales* v *Barton* (1933) 49 CLR at pp 122, 127 *et seq.*

Thompson's case was applied in *Munning's* case, which was also concerned with high tension electric wires placed in proximity to places where children might be and the duty was that owed by an undertaker maintaining a highly dangerous electrical transmission system over the land of another to which the boy and other children resorted.

This concept of a concurrent liability was criticised by Viscount Radcliffe in *Commissioner for Railways* v *Quinlan*[5] thus: 'Their Lordships cannot find any line of reasoning by which the limited duty that an occupier owes to a trespasser can co-exist with the wider general duty of care appropriate to the *Donoghue* v *Stevenson, supra* formula.' The House of Lords in *British Railways Board* v *Herrington*[6] approved and adopted the principle in *Quinlan's* case that an occupier does not owe a trespasser the common duty of care and foresight as expressed in *Donoghue* v *Stevenson.* It did not support a concurrent liability rule. Lord Reid pointed out (at page 899) that the occupier does not voluntarily assume a relationship with trespassers. By trespassing they force a 'neighbour' relationship on him. The Privy Council in *Southern Portland Cement Limited* v *Cooper*[7] made similar emphasis on this, Lord Reid reiterating (at pages 643, 644): 'That, it must be remembered that the neighbourhood relationship has been forced on the occupier by the trespasser and it would therefore be unjust to subject him to the full obligations resulting from it in the ordinary way.'

We are aware that both *Herrington* and *Cooper* have been the subject of proffered criticism by text-book writers and the Law Commission that this branch of the law has become 'over-refined', that they created more problems than solved them and that legislative action was necessary. The Law Commission had proposed that, in essence, the common duty of care should be owed to trespassers, and that the criteria favoured in *Herrington* and *Cooper* be rejected. (See Working Paper No 52/1973 at page 26). We are also aware that judicial recognition of the plaintiff's problem has been universal in most common law countries but their response is less inhibited than their counterpart in England. In Australia, New Zealand and Canada, the occupier's liability to trespas-

sers is based on the broad principles of negligence. See *Munnings* v *The Hydro Electric Commission, supra: McCarthy* v *Wellington City*[8]; *Lengyel* v *Manitoba Power Commission*[9]; *Nixon* v *Manitoba Power Commission*[10]; *Jones* v *City of Calgary*[11]. See also the *American Law Institute's Restatement of The Law of Torts* (section 339) relating to the liability of occupiers for artificial conditions highly dangerous to trespassing children. Because of the unbreakable stranglehold of *stare decisis* we are bound by the Privy Council decision in *Cooper,* if it is applicable.

We conclude that on the evidence the present case is a case of occupier/trespasser on the simple ground that the respondent trespassed on the property of the appellants and therefore the *Herrington* and *Cooper* principles are applicable. It was said in argument that that is not so because the appellants are not the occupiers of the land on which the H-pole stood and therefore owed a higher degree of care of the type illustrated in *Donoghue* v *Stevenson, supra.* When discussing this aspect of the case, one readily brings to mind such cases as *Buckland* v *Guildford Gas Light and Coke Co, supra, Munnings & Anor* v *The Hydro-Electric Commission, supra,* both cases relied upon by the learned judge, and *Davis* v *St Mary's Demolition Co Ltd*[12] and *Creed* v *McGeoh & Sons Ltd.*[13]

It must be said in passing that all these four cases were referred to and commented upon by Lords Wilberforce (page 914), Pearson (pages 924, 929) and Diplock (page 943) in *Herrington's* case. Without going into the matter at lenght, the balance of the *dicta* in *Herrington's* case point toward the removal of any sharp distinction between occupiers and non-occupiers in this respect, so that the plaintiff being a trespasser would be relevant in a claim against either. (See also 11th ed *Winfield & Jolowicz on Tort* at page 214). Lord Diplock in particular left the matter open as 'the instant case is not an appropriate one in which to deal with the liability to trespassers of persons who are not the occupiers of the land on which the trespass is committed.' (page 943). We would reiterate what Lord Reid said in *Cooper's* case at pages 643, 644 referred to earlier in this judgment.

In *Herrington's* case the defendants owned an electrified railway line which was fenced off from a meadow where children lawfully played. The defendants knew that the fence was dilapidated and that children played on the line, but they did not repair the fence. The six-year-old plaintiff walked over the broken fence, trespassed on to the railway track and was severely burned by the live line. The House of Lords unanimously held the defendants liable; Lord Reid found that no individual had acted inhumanly but that the defendants stood condemned as a result of 'general slackness in the organisation'. (page 900).

The facts in *Cooper's* case were that the defendant quarriers created a large mound of waste material on their premises so as to get a gradient for railway shunting purposes. After some months of dumping — which had continued despite the defendants' superintendent's orders to stop — the mound had engulfed some high tension electricity poles, and

eventually the gap between the top of the mound and the cables themselves was small. Children were accustomed to play in two places near, but outside, the defendants' land, and these were only a few hundred yards from the mound which was plainly visible from those areas. It was from one such area that the plaintiff, a boy aged thirteen, and his friend went to play on the mound. While so doing, the plaintiff's arm came into contact with the electric cable and was injured. The Privy Council, as did the High Court of Australia, found the defendants liable.

In *Herrington's* case there were five separate speeches and amidst such a bewildering array of tests with their imprecisely defined terms, it is difficult to express precisely the *ratio decidendi* of the case. In positive terms, the case, which was followed in essence by the Privy Council in *Cooper's case* decided, first, that there is a duty owed by the owner/occupier to a trespasser whose presence is either known or reasonably to be anticipated: 'when he knows facts which show a substantial chance that they may come there': see *Cooper's* case at page 644; and secondly, that the measure of that duty is the dictates of common humanity. This test of humanity is nothing new. Lord Reid in *Cooper's* case (pages 642, 643) pointed out that:

> Their Lordships are breaking no new ground in holding that the nature and extent of an occupier's duty to a trespasser must be based on considerations of humanity. As long ago as 1820 in *Hott* v *Wilkes* (1820) 3 B & Ald 304, a case dealing with injury to a trespasser by a spring gun, Best J said, at p 319: 'the law of England will not sanction what is inconsistent with humanity.' In *Grand Trunk Railway Co of Canada* v *Barnett* [1911] AC 361, the judgment of the Board refers, at p 370, to 'wilful or reckless disregard of ordinary humanity rather than mere absence of reasonable care.'

The nature and extent of that duty is lower than that which would be expected of the reasonable man in the ordinary law of negligence. The nature of the duty depends on what the defendant knew, as distinct from what he ought reasonably to have known. Thus the owner/occupier comes under a duty only if it is shown first, that he actually knew of the trespasser's presence or at least of facts which rendered his presence substantially likely; and secondly, that he actually knew facts relating to the condition of the land or the activities on it which would be likely to cause personal injury to such a trespasser who was unaware of the danger (per Lord Diplock at page 941). It is not enough, as it would be in a negligence case, that he ought to have known of these matters. Further, the extent of the duty falls short of the reasonable man standard, since what is expected of the owner/occupier in discharging his duty varies with his personal circumstances and capacity to deal with the danger, such as his knowledge, skill and resources of money and labour: *per* Lord Reid at page 899; *per* Lord Wilberforce at page 920; *per* Lord Diplock at page 796. Lord Reid in *Cooper's* case (at page 644) divided dangers in respect of which the duty is owed into dangers which the occupier had not created and those which he had. With respect to dangers which have arisen on his land without his knowledge the occupier can have no obligation to make enquiries or inspection. With

regard to those which he has knowledge but which he did not create he cannot be expected to incur what for him would be a large expense. But if he created the danger when he knows that there was a chance that trespassers will come that way and would not see or realize the danger he may have to do more. The more serious the danger the greater is the obligation to avoid it and if the dangerous thing or something near it is an allurement to children that may greatly increase the chance that children will come there.

In summary, then, the duty owed to trespassers arises when the occupier knows facts which show a substantial chance that they may come to a place where there is a danger which he has created or knows about, and the duty is discharged by the occupier taking such steps in accordance with the dictates of common humanity and in the light of his own circumstances and financial limitations.

It now becomes necessary to consider whether the appellants had any, and if so what duty to the respondent, and if they did owe a duty to him whether they were in breach of it, with the result that he suffered injury.

We are satisfied that the appellants owed a duty to the respondent. They had erected, maintained and controlled a highly dangerous H-pole of hidden lethal potentialities immediately adjacent to a foot-path connecting the kampong to the Bayan Lepas main road which was used by the kampong folk including children. The pole was within easy reach of children and it was ideally suited for children wishing to climb it. They must be assumed to have known that children could be mischievous and could no things without realising the consequences and therefore there was a 'substantial chance' that they might come there. There was a duty 'because of the existence, near to the public, of a dangerous situation:' *per* Lord Wilberforce in *Herrington* at page 920.

Given that a danger is present and a duty exists what must the appellants do? The answer is that they must give an 'all embracing' consideration to what they should do, taking into account the seriousness of the danger, the degree of likelihood of trespassers coming, and the degree of hidden or unexpected danger to which they may be exposed if they come, giving more weight to these factors if the trespassers are likely to be children. Such considerations are to be made in the light of their financial and other limitations, and of every kind of disadvantage that may accrue to them if they take or refrain from action for the benefit of trespassers. The test here is that they must act in a humane manner. In the present case there was evidence that they knew of facts, relevant to the time and place of the accident, which would fairly lead a humane and sensible man, reflecting on those facts known to him which such a man would take into account, to draw the inference that there was a likelihood that in the absence of precautions, an accident could happen of the nature of the accident which in fact happened. Common sense and common humanity dictated that such steps e.g. putting up warning signs and adequate anti-climbing devices, should be taken. They did not do that. We therefore conclude that they were in breach of the duty owed by them to the respondent, resulting in

the injury to him. We would therefore uphold the decision of the learned judge but for the reasons which we have indicated above.

Was the respondent guilty of contributory negligence? The allegation here is really that the respondent failed to take reasonable care for his own safety. It is said that he should not have climbed the pole in view of the dangerous situation overhead. We must consider his age and the circumstances of the case. The test is an objective one; it is whether an ordinary child of the respondent's age and experience — not a 'paragon of prudence' nor a 'scatter-brain' — would have taken any more care than did the respondent: *per* Salmon LJ in *Gough* v *Thorn*[14].

In *Yachuk* v *Oliver Blais Co, Ltd*[15], the Privy Council held that a boy aged nine years, had not been guilty of contributory negligence for he neither knew nor could he be expected to know the peculiarly dangerous quality of gasoline; he was never warned about the properties of gasoline. In that case an employee of the respondents, proprietors of a filling station, supplied petrol to the boy. Though the boy told the employee that he wanted the petrol for his mother's car which was 'stuck down the road', he really wanted it for a game of Red Indians. In the course of this game he ignited the petrol and injured himself. In *Gough* v *Thorne, supra,* a girl aged $13^1/_2$ years was held to be not contributory negligent in crossing the road on a signal from a lorry driver without checking that the way was clear beyond the lorry; it was wrong to hold that a girl of $13^1/_2$ was negligent because she failed to ponder whether it was safe to cross the road and relied unquestioningly on the lorry driver's signal. That indeed might be reasonably expected of a grown-up person with a fully developed road sense, but not a child of $13^1/_2$.

Here the respondent and a group of boys were walking along the foot-path when he saw a bird trapped on the wires on top of the pole which was a danger imperceptible by a child of the respondent's age simply because he was not old enough to see the dangerous situation; whether or not it was obvious to his eye, it was concealed from his understanding. A careful examination of the evidence has satisfied us that the respondent did not know nor could he be expected to know of the dangerous situation. He has never been told or warned of such danger. He himself said, what is likely enough, that he did not know what electricity was; that it was dangerous. He thought the electric wires were cables for some purposes. He had not seen such cables in his house. On the evidence then, it is in our view, impossible to regard him as any more capable of taking care of himself in the circumstances in which he was placed than a normal boy of his age might be expected to be.

The negligence of the appellants consisted in erecting, maintaining and controlling a highly dangerous pole with hidden lethal potentialities near a public foot-path where there is a substantial chance that children may come and the absence of any warning or anti-climbing device that there was imminent peril to climb it. The fact that the respondent climbed the pole, a fact on which the appellants' counsel much relied to show that the effective cause of the accident was the deliberate act of folly by the respondent, and therefore, the breach of

duty by them had not 'caused or materially contributed to his damage': *per* Lord Reid in *Bonnington Castings Ltd* v *Wardlaw*[16], cannot avail the appellants in view of the evidence. To place the dangerous pole there is to subject him to temptation and the risk of injury. The respondent's action in climbing the pole can afford no excuse to the appellants when it is found that the pole is within easy reach of children and ideally suited for them wishing to climb it and that it was prudent to put up a warning sign or anti-climbing device. In the circumstances, therefore, we would adopt the words of Denman, CJ, in *Lynch* v *Nurdin*[17]:

> The most blameable carelessness of his servant having tempted the child, he (the defendant) ought not to reproach the child with yielding to that temptation. He has been the real and only cause of the mischief. He has been deficient in ordinary care; the child, acting without prudence or thought, has, however, shown these qualities in as great a degree as he could be expected to possess them. His misconduct bears no proportion to that of the defendant which produced it.

It is a fair inference from the evidence that it was the dangerous situation created by the appellants which the respondent neither knew, nor could he be expected to know, which brought about his misadventure. We are accordingly of the opinion that on the facts of this case, the respondent could not be held guilty of contributory negligence.

We would accordingly dismiss the appeal with costs.

Appeal dismissed.

Cecil Abraham for the Appellants.
Sri Ram for the Respondent.

Note

This is one of the landmark cases in the Malaysian law relating to occupier's liability. It brings Malaysian law in line with the latest development in English law by the application of the House of Lords decision in *Herrington* v *British Railway Board,* which put forward the concept of a duty owed to "common humanity".

(ii) Wong See Kui
v
Hong Hin Tin Mining Co

[1969] 2 MLJ 234 High Court, Kuala Lumpur

Cases referred to:-
(1) *Sedleigh-Denfield* v *O'Callaghan* [1940] AC 880.
(2) *Munday Ltd* v *London County Council* [1916] 2 KB 331.
(3) *East Suffolk Rivers Catchment Board* v *Kent* [1940] 4 All ER 527 at p 532.
(4) *Nicholls* v *Ely Beet Sugar Factory Ltd* [1936] Ch 343.
(5) *Mohamed Said* v *Fatimah* [1962] MLJ 328.

(6) *Julaika Bivi* v *Mydin* [1961] MLJ 310.
(7) *Lord Fitzhardinge* v *Purcell* [1908] 2 Ch 145.
(8) *Fowley Marine (Emsworth) Ltd* v *Gafford* [1968] 1 All ER 979, 986.
(9) *The Raub Australian Gold Mines Ltd* v *F Rostados & AN Dumaresq* (1920) FMSLR 216.

RAJA AZLAN SHAH J: The plaintiff, Wong See Kui, held a temporary occupation licence (hereinafter referred to as a TOL) in respect of a pond situate on lot 3442, Mukim of Rawang, Selangor for use as a fish pond. The TOL No 518047 was first granted in 1961 and had been renewed annually. It was valid on the date of the present action and was to expire on 31st December 1967. There was an outlet from the pond into Sungei Rawang.

On 18th March 1967, the senior inspector of mines, Selangor, issued a licence to the defendant company, Hong Hing Tin Mining Company, for mining operations in nearby land, namely lots 3517 and 4791, Mukim of Rawang, Selangor (Licence No 59/67). This licence was effective from 6th February 1967 to 12th December 1967. The licence stated: "That all tailings be deposited on the land described in Schedule 'B', vide attached plan" which was lot 3442. Accordingly, the defendant company constructed a pipe connecting their mine to plaintiff's pond for the discharge of tailings, slime, dregs and water.

From 12th February 1967, the defendant company started to dump into plaintiff's pond. On the next day, 13th February 1967, plaintiff wrote a complaint to the defendant company and warned them to stop the dumping. A copy of this letter was sent to the Collector of Land Revenue, Ulu Selangor, Kuala Kubu Bharu. On 17th February 1967 plaintiff's solicitors wrote to the manager of the defendant company requesting that they immediately cease the unlawful dumping. On 24th February 1967, defendant company's solicitors replied that the defendant company would not comply with plaintiff's request since the use of the pond as tailings area had been approved by the mines department. On 7th April 1967 the mines department wrote to the plaintiff's solicitors confirming that a licence had been granted to the defendant company to carry out mining and to make use of the pond for dumping.

Plaintiff then brought this action for trespass and nuisance. In the course of the hearing, plaintiff also submitted a claim on negligence. Plaintiff claimed damages and an injunction.

It is plaintiff's case that the dumping by the defendant company caused him damage. He claimed that the tailings, slime, dregs and water which defendant company discharged into his pond (i) killed the fish which he was rearing therein (ii) caused an overflow of water in the pond which resulted in further loss of fish and (iii) damaged the support surrounding his pond.

Plaintiff claims that during the period January 1966 to May 1966, he introduced 12,000 fish into the pond at a cost of $4,100. Plaintiff produced three bills Nos 2377, 3396 and 5199 from the Keow Kee Fish Merchants, Jinjang South, Kuala Lumpur, dated 29th January 1966, 3rd March 1966 and 13th May 1966 respectively for the supply of fish to the value of $1,300, $2,000 and $800 respectively. These fish were to

be harvested in a year's time. Plaintiff says that he had not at any time harvested the fish as they were not large enough.

An expert on fisheries, Mr AA Jothy, from the Fisheries Research Institute, Penang described the effect of tailings on fish as follows:

> As soon as the tailings are dumped in the pool they tend to make the water turbid. This can bring about discomfort to the fish, eventually resulting in mortality mainly because of two reasons: (i) slit from the dredge tends to clog the respiratory mechanism of the fish and they die from suffocation; (ii) there will be depletion in the dissolved oxygen content of the water, also giving rise to suffocation.
>
> As tailings come in at one end of the pool, the natural reaction on the part of the fish would be to move to the opposite end of the pool or towards any outlets through which they would escape. If there are no outlets, the fish will eventually be trapped by the silt, suffer mortality, and within a matter of about three days sink to the bottom. During the period of the three days they can be observed to struggle on the water surface, gasping for air, and after they sink to the bottom decomposition begins to take place, the abdominal cavity bloats up and the fish surfaces.

This, then, is what could happen to the fish on the introduction of tailings. In the present case, no one saw any struggling or dead fish in the pond. From February 1967 to March 1967, the manager of the defendant company visited the pond four or five times a week and he did not see any dead fish in the pond. The plaintiff himself did not see any. None was found. It is unusual that no one saw any dead fish though it is claimed that some 12,000 had been introduced. True, there might be a tendency for the fish to escape through the outlet to Sungei Rawang. But this is merely hypothetical. No proof was given that fish did escape from the pond by way of the outlet or that dead fish were washed away through the outlet — though this possibly could happen. There are serious doubts as to whether any fish was in fact introduced into the pond.

Even assuming that fish were in fact introduced into the pond, the plaintiff had failed to prove that the dumping of tailings by the defendant company did in fact kill the fish. Mr Jothy's evidence is theoretical — it must be supported by evidence that what Mr Jothy described did occur in the present case. No test of any kind was taken of the water in the pond in spite of the fact that to the date of the present action the defendant company was still dumping into the pond. And no dead fish was sent for examination to ascertain the actual cause of death — in fact none was found.

The plaintiff next claims that the dumping caused an overflow which resulted in further loss of fish. To fortify his point he produced some photographs showing the surplus water escaping from the fish pond to Sungei Rawang through the outlet. But this is inadequate evidence. The issue is whether any fish did in fact escape from the fish pond because of the overflow. The fact of an overflow does not prove that fish did in fact escape — though this could possibly happen.

Finally, the plaintiff claims that the support surrounding the pond was damaged. He says that he had put a wire mesh across the poles at the

outlet of the pond to Sungei Rawang to prevent fish escaping into the river. He produced some photographs showing some poles across the outlet at a distance of a few feet apart. But there is no evidence that there was any wire mesh across them. He alleges that the defendant company had removed the wire mesh, but he did not see that happen nor did he adduce any evidence to prove that.

Therefore, the plaintiff has not discharged his burden of proof on the question of damage caused to him by the defendant company. The test is one of balance of probabilities, not the existence of possibilities.

Since damage is one of the essentials of nuisance: see *Sedleigh-Denfield* v *O'Callaghan*[1] and negligence: see *Munday Ltd* v *London* County Council[2] the plaintiff's case founded on these two causes of action must fail. In *Sedleigh-Denfield's* case Lord Atkin said at page 896:

> It is probably strictly correct to say that so long as the offending condition is confined to the defendant's own land without causing damage it is not a nuisance, though it may threaten to become a nuisance. But where damage has accrued the nuisance has been caused.

In *Munday's* case Lord Reading, CJ said at p 334:

> Negligence alone does not give a cause of action, damages alone does not give a cause of action; the two must co-exist.

See also *East Suffolk Rivers Catchment Board* v *Kent.*[3]

The case of *Nicholls* v *Ely Beet Sugar Factory Ltd*[4] is of no assistance to the plaintiff. In *Nicholl's* case, the plaintiff was the owner of two several and exclusive fisheries in a river. Defendants were manufacturers of beet-sugar with a factory some miles above the plaintiff's fisheries. The plaintiff alleged that the defendants discharged into the river large quantities of refuse and effluent whereby he suffered damage. Though the plaintiff failed to prove that the injury to his fisheries had been caused by the acts of defendants, the Court of Appeal held that he was entitled to succeed on the broad principle that the invasion of a legal right carried along the right to damage without proof of pecuniary loss. But *Nicholl's* case can be distinguished on the ground that the plaintiff in that case was the owner of the several fishery in gross not appendant or appurtenant to land, the nature of his right being a profit a prendre. We are not concerned with the infringement of a profit a prendre in the present case. It may be so that in the case of a nuisance to a profit a pendre, no damage need be proved. *Nicholl's* case in authority only for that proposition and not that damage need not be proved in all actions for nuisance.

I now come to the question of trespass. On principle and authority, the plaintiff is entitled to exclusive possession, that is as exclusive as the nature of the *locus in quo* would permit to maintain a case of trespass: see *Mohamed Said* v *Fatimah:*[5] *Julaika Bivi* v *Mydin.*[6] Trespass consists in the intentional intrusion of another's land. It is committed not only by intrusion in person but also by propelling objects on to another's land. The defendant company by intentionally discharging into the plaintiff's

pond has committed trespass and every continuance of a trespass is a fresh trespass. *Prima facie* the plaintiff is entitled to succeed though there were no proof of actual damage suffered since trespass is actionable *per se.*

For the defendant company it is said that they had a licence from the mines department to dump their tailings into the same pond. Putting in a compendious form they regard their acts of dumping the tailings into the same pond as 'equivalent acts of concurrent possession.' They contended that this area whether it is described as TOL land or mining land, belongs to one and the same owner i.e., the Ruler of the State in whom all land in the State vests, and they are claiming under the title of the Ruler.

The point is novel. The law on such matters can be restated without any difficulty. It is well established that as against a person in possession a stranger cannot defend himself by showing that there was title in some third person unless he himself claims under it. In the words of Parker J in *Lord Fitzhardinge* v *Purcell*[7]:

> An action of trespass is found on possession, and in order to succeed the plaintiff must show possession of the lands on which the acts complained of were committed at the date of such acts. If possession be shown, the defendant is not at liberty to set up the title of a third party unless he justifies what he has done under a licence from such third party.

For a recent exposition of the same matter, see the observation of Willmer LJ in *Fowley Marine (Emsworth) Ltd* v *Gafford.*[8]

It only becomes necessary to examine the facts relied on by the defendant company in order to see whether they can fairly be described as 'equivalent acts of concurrent possession.'

The Temporary Occupation Licence was first issued to the plaintiff in 1961 when the FMS Land Code (Cap 138) was operative. Section 17 of that Code provided:

> The Ruler in Council may permit (a) temporary occupation of State land under licence.

That Code had since been replaced by the National Land Code, 1965 which is now the operative law. Section 65(1) of the National Land Code provides:

> The State Authority may in accordance with the provisions of this Chapter and of any rules under section 14, permit the temporary occupation under licence of — (a) State land.

The licence of the defendant company was issued in 1967 under section 91(i) of the Mining Enactment (Cap 147). It provides:

> The warden may grant to any person a licence, for a period not exceeding twelve months and subject to such conditions, as shall be therein stated, to work mining land by any of such means as are in section 90 mentioned.

Section 82(i) of the Enactment provides:

> An inspector may direct any occupier of mining land to deposit his

tailings or overburden on any State or mining land.

The dumping area in this case was stated in defendant company's licence to be lot 3442.

Under departmental arrangement, the mines department would normally inform the land office when they wished to retain land for dumping and the land office would contact the mines department before issuing a Temporary Occupation Licence. In 1968 the mines department had informed the Land Office in Kuala Kubu Bharu that they wished to use Lot 3442 for dumping purposes and there was no record of any objection by the land office. But the land office did not contact the mines department when they issued a Temporary Occupation Licence to the plaintiff in 1961 in respect of lot 3442.

The departmental arrangement is for convenience and does not affect the rights and liabilities of the parties to the dispute.

The inference which I should be inclined to draw is that any person in the position of the defendant company who were licensed to dump tailings into the same pond did so with an *animus possidendi.* Their acts were consistent with the acts of any occupying owner who might be expected to deal with it. The test propounded in a passage from *Pollock and Wright on Possession in the Common Law* p 30 is germane:

> What kind of acts and how many, can be accepted as proof of exclusive use, must depend to a great extent on the manner in which the particular kind of property is commonly used. When the object is as a whole incapable of manual control, and the question is mainly who has *de facto* possession, all that a claimant can do is to show that he or someone through whom he claims has been dealing with that object as an occupying owner might be expected to deal with it, and that no one else has done so.

In my opinion I regard the defendant company's acts as 'equivalent' to those of the plaintiff; I think that they were acts of possession. It would be wrong in the circumstances to allow the plaintiff to found a claim in trespass in view of the mining licence granted to the defendant company. The defendant company's contention must therefore prevail.

The only cause open to the plaintiff in the circumstances is an action for damages under the Mining Enactment, that is, a claim for breach of a statutory provision i.e., section 134, which provides:

> No title, licence or other authority issued under this Enactment shall exempt any person from liability in respect of any damage occasioned by such person to the property of the Government or of any person.

In this connection the case of *The Raub Australian Gold Mines Ltd* v *E Rostados and AN Dumaresq*[9] might be of assistance to the plaintiff. But I fail to see how he can succeed in view of my finding that damage has not been proved. In any event such claim is not justified by the pleadings.

For the above reasons I would dismiss the plaintiff's case. I do not think this is a proper case where I should award costs against the unsuccessful plaintiff.

Action dismissed.

V Oorjitham for the Plaintiff.
Ronald Khoo for the Defendants.

NUISANCE OR NEGLIGENCE ON HIGHWAYS

Len Omnibus Co Bhd
v
North South Transport Sdn Bhd & Anor and Another Appeal

[1978] 2 MLJ 246 Federal Court, Kuala Lumpur

Coram: Raja Azlan Shah Ag CJ (Malaya), Wan Suleiman and Chang Min Tat FJJ

Cases reffered to:-
(1) *KR Taxi Service Ltd* v *Zaharah* [1969] 1 MLJ 49.
(2) *Govinda Raju* v *Laws* [1966] 1 MLJ 188.
(3) *Lim Kar Bee* v *Abdul Latif bin Ismail* [1978] 1 MLJ 109, 119.
(4) *US Shipping Board* v *Laird Line Ltd* [1924] AC 286, 291.
(5) *Ramoo* v *Gan Soo Swee & Anor* [1971] 1 MLJ 235, 239.
(6) *Caminer* v *Northern and London Investment Trust Ltd* [1951] AC 88.
(7) *Thean Chew* v *The Seaport (Selangor) Rubber Estate Ltd* [1960] MLJ 166.

RAJA AZLAN SHAH Ag CJ (MALAYA): This is a consolidated appeal against the decision of the learned judge sitting at Kuala Lumpur to the effect that the appellants were partly to blame for the nasty head-on collision between their motor bus and the respondents' motor lorry at the 25th milestone Kuala Lumpur/Ipoh main highway and that the third party was exonerated from blame because one of its rubber trees standing on its estate adjoining the highway fell on the said highway.

The appellants brought this action against the respondents and recovered judgment for $45,000 for damages and other consequential loss suffered by them. The learned trial judge held that the respondents were 75% to blame and that the appellants were 25% to blame. They now say that the respondents were wholly to blame for the accident and that they should recover judgment for the full amount of $60,000 the quantum agreed on a 100% liability.

The accident occurred at about 10.40 pm. The road had no street light. At the time of the collision a rubber tree adjoining the highway and belonging to the third party had fallen and was lying across the motor lorry's side of the road. The other half of the road, that is, on the motor bus' side, was clear.

The road at that particular stretch was straight. As one faces Ipoh the left grass side table measured 11 ft 9 ins with tall grass and trees immediately after it; the right side table measured 14 ft until it reached the high bank of a rubber estate belonging to the third party.

The motor bus was carrying passengers. The motor lorry was carrying goods. Both the drivers of the two vehicles were killed on the spot. Several passengers in the motor bus were killed and/or injured. Neither the bus conductor nor the lorry attendant could assist the court as to how the accident occurred.

On the version of the silent evidence which the learned judge accepted, it appears that the collision took place as a result of the lorry travelling on its incorrect side of the road in an attempt to proceed past the fallen tree in complete disregard of the presence of the bus which

was consistently on its correct side of the road. But he held that the motor bus ought to have stopped on seeing that the lorry had begun to encroach into his path, and that if it had done so, the head-on collision would have been avoided. In those circumstances he concluded that the lorry driver's negligence was the substantial but not the sole cause of the accident, and that the bus driver had also been negligent, although to a lesser extent. He was of the view that the bus driver had failed to exercise a very 'high' degree of care when driving a very large vehicle as the bus in question in not keeping a proper look out. He seems to have in mind the proposition that those first in time have priority on the road no matter whether they are to blame or not.

According to the evidence the bus had stopped some 200 yards before the spot of the collision to alight passengers. It then proceeded on its way and it is here that the evidence of Encik Mahinder Singh, an advocate and solicitor, assumes much importance and this has not been missed by the learned judge.

He said he was following the bus and wanted to overtake it at the 25th milestone but could not do so as he was unable to see in front of him on his offside. He noticed the bus was moving towards the left grass verge and its nearside tyres were near the grass verge. He then noticed rays of light coming from the front and through something that was on the road. He stopped his car on the right side of the road, i.e., his incorrect side. The bus was still moving slowly. The next thing there was an explosion and the lorry landed and overturned about 35-40 yards in front of him on his left. At the time of the explosion he was about 100-200 ft. away from the bus. He said the tree covered about two-thirds of the road, and the branches extended beyond the centre white line. In cross-examination he said he was travelling at 35-40 mph. The bus was travelling around 35 mph. At that time he had the impression that the lorry was coming very fast. In answer to a question by the court he said he stopped his car because of the obstruction and he could not see in front of him. He said the bus driver would be in a better position to see the obstruction. He further said the bus reduced speed considerably but it still proceeded on.

The learned judge accepted the version of Encik Mahinder Singh and concluded that the bus driver was travelling fast in the circumstances of the case, and that he should have stopped as Encik Mahinder Singh did.

It was submitted on behalf of the appellants that the learned judge was wrong in two aspects. First there was no evidence of speed. Even relying on the evidence of Encik Mahinder Singh, the bus could not be said to be travelling fast. Secondly, the bus driver who was driving his vehicle on its correct side of the road was under no obligation to stop it because it had a reasonably clear passage in front of him. Encik Mahinder Singh supports this aspect of the case for he said that the bus driver would be in a better position to see the obstruction. Encik Mahinder Singh stopped as he did because he could not overtake the bus in view of the obstruction in front of him. Encik Mahinder Singh was faced with a difficult situation. But not the bus driver. If the evidence of Encik Mahinder Singh were to be accepted, and the learned judge accepted his version, it was at this time that the collision took place — at

or near the position of the fallen tree.

In my opinion the submission of counsel for the appellants is correct. There is evidence that the bus driver had reduced speed considerably before the impact. He had seen the fallen tree. But he did not expect the on-coming lorry to encroach into his path in order to pass it. The bus driver driving his vehicle along a straight stretch of road and on his correct side was justified in assuming that the on-coming lorry would keep to its side and would not encroach into the former's path. By so doing the lorry had put the bus into a situation of extreme peril and it is idle to say that if the bus driver had acted rashly in the agony of the moment he was guilty of contributory negligence. In those circumstances the bus driver was not expected to behave like a superman: see *KR Taxi Service Ltd* v *Zaharah*[1]. We are only too familiar with cases of collision being brought about by rashness owing to want of due consideration as to the act to be done: see *Govinda Raju* v *Laws*[2]. I would reiterate the remark I made in *Lim Kar Bee* v *Abdul Latif bin Ismail*[3]: "The law is content to take the cavalier view that a driver of a motor car travelling along a main highway is under no duty to be on the look-out for anybody suddenly darting out into the road in a negligent and irresponsible manner".

There is no reasonable guarantee that if the bus had stopped a collision would have been avoided. The lorry may still have maintained its course on the incorrect side of the road. There is also doubt as to whether there was sufficient room to negotiate safely on the left grass side table. Some of the photographs and the sketch plan suggest there was but there is evidence that there were tall grass and trees immediately after it. Consequently I am unable to say with any degree of assurance that the appellants were guilty of contributory negligence. To hold, as the learned judge did, that it was negligent of the bus driver not to have stopped his vehicle some distance back when he saw the lorry coming towards him on its incorrect side of the road was not a finding which should have been made nor should he be regarded as blameworthy in not going to the left grass side table in an endeavour to let the lorry pass. With all respect to the learned judge, I am unable to agree with his conclusion that, in the emergency which faced him, the bus driver acted negligently. Reference might be aptly made to a passage from the speech of Lord Dunedin in *US Shipping Board* v *Laird Line, Ltd*[4] that "it is not in the mouth of those who have created the danger of the situation to be minutely critical of what is done by those whom they have by their fault involved in the danger".

I am constrained to say that the learned judge was wrong. In that exceptional situation this court is justified in interfering with an apportionment of liability: per Lord Cross in *Ramoo* v *Gan Soo Swee & Anor.*[5]

The respondents by their pleadings claimed that they were entitled to contribution and/or to be indemnified by the third party against the claim of the appellants. They alleged that the fall of the rubber tree on the said highway was occasioned by reason of the negligence of the third party. Alternatively they alleged that the third party had created a

public nuisance by leaving in the dark an unlighted tree obstructing the highway without any proper warning sign.

Amongst the several particulars of negligence pleaded, only one in my opinion is worthy of consideration and determination, viz., permitting the said rubber tree to become or to remain in a defective or dangerous condition, so that it was liable to and did in fact fall on the said road.

The learned judge dealt with the issue stating as his reason for dismissing the claim in negligence the unusually bad weather condition, in particular the heavy rain that had fallen in the last three days of August and the first seven days of September causing the ground to become saturated coupled with the condition of the tree top which had become heavier caused by the retention of rain water on the canopy or foliage with the result that slight wind would had been sufficient to topple the tree over. He came to the conclusion that the third party had kept a reasonable look out and had taken reasonable steps to look for signs or symptoms of root disease. He found as a fact that the particular tree was not suffering from any root disease.

In this court the respondents did not press on the issue of negligence beyond complaining in the usual way that the learned judge's finding that the third party had discharged its duty as owner of the fallen tree was not supported by the evidence.

In my opinion the learned judge had correctly applied the law to the facts of the present case. It is well established that the duty of the appellants as an estate owner was to take such steps as a reasonable and prudent landowner would take, and the question was one of fact whether their conduct infringed this requirement. This was the test adopted by Lords Normand and Reid in *Caminer* v *Northern & London Investment Trust, Limited*[6] and which was applied in the local case of *Thean Chew* v *The Seaport (Selangor) Rubber Estate Ltd.*[7] This test postulates not expert knowledge on their part but some degree of knowledge as a reasonable and prudent landowner would possess. Accordingly, an estate owner who has rubber trees growing on his estate adjoining the highway is not expected to possess scientific knowledge of diseases that may affect the trees but he is expected as a reasonable and prudent landowner to inspect the trees from time to time to assess their safety and if there is a danger of one of those trees falling on the highway, and possibly injuring someone who is using the highway, it is his duty to have that tree removed which is found to be dangerous.

It is now necessary to look at the evidence. The estate comprised of 2,900 acres with approximately half a million rubber trees which were 20 years old and in healthy condition. Up to 16 years after planting routine inspection for root and other diseases were carried out. During that period the lateral roots had exploited the whole of the top soil area and there was very little chance of the trees contracting any disease. No one knew precisely at what time the tree fell. But one thing is certain. It fell between 8.30 pm and 10.40 pm. It came from the first row of the second terrace. There was no tree immediately before that tree. The

distance from the stump of the tree to the edge of the road was 45 feet. After it fell its root was inspected but no sign or symptom of root disease was found. That night was the only occasion a rubber tree from this estate had fallen on the highway although there had been cases of branches falling and infringing the highway.

Great play was made as to the size of the head of the tree in question. The manager of the estate was asked the following question: "Q. Knowing that the rain was heavy and there was possibility of trees falling what steps did you take to prevent any tree from falling?" "A. Except for normal inspection to see if there was any tree in danger of toppling we did not take any other step. No special steps were taken. There is no way to tell whether a tree will topple until it topples over."

The issue seems to me to be a broader and more general one, viz., in the case of an apparently healthy rubber tree, ought its owner to have it lopped or topped because either wind or weather condition might cause it to be uprooted? Unless one is to take the view that every rubber tree growing beside a main highway should be lopped and topped and that its owner is guilty of negligence unless he so treats it, I see no reason for imputing a want of care on the part of its owner. But as I understand the judgment of the learned judge, however, he took the view that the tree fell because of weather and wind conditions causing it to be unbalanced and fall, and not because of want of due care on their part to see that the tree was dangerous. It had rained for the past ten days with a recorded rainfall of 6.16 inches for the first seven days of September. But there was nothing exceptional about the rain or the wind that night. There was also nothing exceptional about the canopy or foliage of this particular tree. Apart from the testimony of the manager no evidence of the size of the head was given on behalf of the respondents. I do not regard the evidence as establishing that the rubber tree in question was so plainly a danger as to require it being lopped or topped lest it should fall though it was healthy and regular examination did not raise a doubt as to its general condition. If such a duty existed, there would be a vast number of negligent estate owners who are only saved from liability owing to the chance that their rubber trees have in fact resisted the weather tending to make them fall.

I must approach the question of nuisance on the basis of the learned judge's finding that there was no negligence on the part of the third party in respect of the fallen tree. It was argued that, apart from the issue of negligence, by the mere fact that the tree was left unattended and without any proper warning sign so that it could not be seen, it was a dangerous obstruction in the highway and so a nuisance. Consequently an absolute duty was imposed on the third party to light it or otherwise effectively guard it to prevent accidents.

That is a proposition which I refuse to accept. If a tree adjoining a highway falls on the road without any negligence on the part of its owner, and the said tree causes an obstruction to the said highway, it is wrong to suppose that *ipso facto* and immediately a nuisance is created. The keynote of his responsibility is knowledge or means of knowledge. Thus, a nuisance will obviously be created if, knowing or

having the means of knowing of its existence, he allows it to continue for an unreasonable time or in unreasonable circumstances, but the mere fact that an obstruction has come into existence cannot overnight turn it into a nuisance. Each case must be examined whether or not a nuisance is created. If that were not so, it would seem that every landowner who owns trees adjoining a highway would be turned into an insurer. That in my opinion would run contrary to the recognised law on the question of nuisance to highways. In the present case, the third party having been found not guilty of negligence, there remained nothing but the allegation of nuisance. In my opinion, on the evidence the learned judge was right in not deciding that question. The allegation of nuisance was not satisfied.

The appeal by the appellants against the respondents is allowed with costs here and full costs in the court below.

The appeal by the respondents against the third party is dismissed with costs.

Wan Suleiman and **Chang Min Tat FJJ** concurred.

Order accordingly.

Khoo Eng Chin for Appellant & 1st Respondent for first and second appeal respectively.

Kok Wee Kiat for 1st Respondent & Appellant for first and second appeal respectively.

C Abraham for 2nd Respondent.