MURUGASAN KUPPUSAMY & ANOR v. CHIEW ENG CHAI
HIGH COURT MALAYA, PULAU PINANG
ABDUL HAMID MOHAMAD J
CIVIL APPEAL NO: 12-169-95
28 SEPTEMBER 1999
[2000] 1 CLJ 42

*CIVIL LAW ACT: Negligence - Contribution - Husband and wife filed separate suits against defendant - Husband found contributorily negligent - Wife's award reduced proportionately - Whether reduction correct - Civil Law Act 1956, ss. 7(5),10(1)(c),12(4)*

This was an appeal by the appellants ('the plaintiffs') against the decision of the senior assistant registrar in respect of the quantum of damages awarded to the plaintiffs. In this case there was a road accident, and two files were filed separately by the first plaintiff as the rider of the motorcycle and the second plaintiff as the pillion rider against the defendant. The defendant counter-claimed and pleaded a set-off against the first plaintiff by pleading contributory negligence on the part of the first plaintiff and for a contribution by the same for any judgment sum that the defendant may be ordered to pay to the second plaintiff. The issue before the court was whether the defendant's counter-claim amounted to an indirect claim so as to reduce/set-off the second plaintiff's award.

Held:

[1]The Civil Law Act 1956 ('the Act')should be interpreted in context. Section 10(1)(c) of the Act,in particular the words "who is, or would if sued have been, liable", should be interpreted with reference to the act or omission that gives rise to the liability in tort, in this case the negligence of the parties to the accident. It is that kind of liability that the section is concerned with, not liability, or the absence of it, as a result of some other rules, in this case the common law rules. The fact that a husband cannot be sued by his wife, under common law, is not a relevant consideration.

[2] Since only one action can be brought for a death under s. 7(5) of the Act,the reduction of the damages recoverable to the proportionate extent as required by s. 12(4)must take place within that action. The statute does not envisage a situation where the dependants may recover unreduced the total amount of their damages from one or more defendants and leave them to claim contribution in some other action. This principle was applicable in the instant case by way of analogy, and the court should take all these factors into account if the administration of justice was to be fair and effective.

[4] Regarding the quantum of damages awarded in respect of the first plaintiff's kidney operation and the second plaintiff's comminuted fractured mid-shaft left tibia, the awards granted were not manifestly low nor was the sessions judge wrong in principle.

*[Appeal dismissed with costs.]*

Case(s) referred to:

*Barber v. Pigden [1937] 1 All ER 115 (refd)*

*Juminah Tongkon & Anor v. Yim Kam Cheng & Anor 6 Mallals Digest, 4th edn, 1997 Reissue, para 918 (refd)*

*Lim Siew Hock v. Low Foong Kew (High Court Pulau Pinang, Civil Appeals No: 12-177-1996 and 12-177A-1996) (refd)*

*Maimunah Hassan, Administratrix of the Estate of Rozita, deceased v. Marimuthu 6 Mallal's Digest, 4th edn, 1997 Reissue, para 1141 (refd)*

*Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264;[1992] 2 MLJ 793 (refd)*

*Official Administrator Malaysia & Ors v. Yeoh Ah Lee 6 Mallal's Digest, 4th edn, 1997 Reissue, para 715 (refd)*

*Rasul Rabdar v. Loh Ah Muay [1989] Mallal's Digest, para 682 (refd)*

*Rubaidah Dirin V. Ahmad Ariffin [1997] 1 CLJ 447*

*Seow Gek Soo & Anor v. Chia Mun Fook 6 Mallal's Digest, 4th edn, 1997 Reissue, para 1263 (refd)*

*Sweh Kok Wai v. Siew Meng Wai 6 Mallal's Digest, 4th edn, 1997 Reissue, para 1310 (refd)*

**Legislation referred to:**

**Civil Law Act 1956, ss. 7(5), 10(1)(a), (c), 12(4)**

**Married Women Act 1957, s. 4A**

**Counsel:**

***For the appellants - Brijnandan Singh Bhar; M/s Brijnandan Singh Bhar & Co***

***For the respondent - En Khairuddin; M/s Bala Mahesan & KhairuddinReported by Farah Naim***

**JUDGMENT**

**Abdul Hamid Mohamad J:**

There was a road accident on 5 April 1992 involving a motorcycle and a motorcar. Arising out of that accident, two suits were filed in the Sessions Court. The first is Sessions Court Summons No. 53-288-93. The plaintiff in that suit is the rider of the motorcycle and the defendant is the driver of the motorcar. In that suit ("the first suit") the plaintiff ("the first plaintiff") alleged negligence on the part of the defendant. The defendant counterclaimed and pleaded a set-off against the first plaintiff by pleading contributory negligence on the part of the first plaintiff and also for a contribution by the first plaintiff for any judgment sum that the defendant may be ordered to pay to the second plaintiff in the second suit, proportionate to the first plaintiff's liability which amount is to be reduced from the judgment sum that the defendant may be ordered to pay to the second plaintiff.

In the other suit, Sessions Court Summons No: 53-291-93 ("the second suit") the plaintiff ("the second plaintiff"), the wife of the first plaintiff and pillion rider of the motorcycle, also alleged negligence on the part of the defendant. The defendant also counterclaimed and pleaded a set-off similar to that in the first suit.

In the first suit the learned Sessions Court judge found that the defendant was 80% liable and the first plaintiff 20% liable.

In the second suit he found the defendant 100% liable. However, in making the award he reduced the amount of damages to be paid by the defendant to the second plaintiff by 20% which is equivalent to the first plaintiff's liability for contributory negligence. In other words the learned Sessions Court judge ordered the defendant to pay the second plaintiff an amount equal to his liability of 80%.

Learned counsel for the plaintiffs (now appellants, but to avoid confusion I shall refer to the parties as "plaintiff(s)" and "defendant") argued that the learned Sessions Court judge was wrong in "deducting" 20% off the damages awarded to the second plaintiff. He argued that, prior to 8 July 1994, *ie*, prior to the amendment of the Married Women Act 1957that inserted the new s. 4A,a husband and a wife could not sue each other in tort. The accident happened on 5 April 1992 which was before the amendment. The amendment was not retrospective. As the second plaintiff could not have sued the first plaintiff when the cause of action arose, *ie*, on the date of the accident, the first plaintiff should not be made to bear the 20% liability attributed to him.

At the hearing of the appeal, learned counsel for the plaintiffs argued that the counterclaim by the defendant against the first plaintiff did not amount to an indirect claim by the second plaintiff against the first plaintiff since the defendant was, anyway, liable to pay the second plaintiff in full. However in his subsequent written submission, he conceded that for the counterclaim to succeed it must satisfy the condition laid down in s. 10(1)(c) of the Civil Law Act 1956which provides that any tort-feasor may recover contribution from any other tortfeasor "who is, or would if sued have been, liable". Section 10(1)(a)and(c) provide:

> 10(1). Where damage is suffered by any person as a result of a tort (whether a crime or not):
> (a) judgment recovered against any tortfeasor liable in respect of that damage shall not be a bar to an action against any other person who would, if sued, have been liable as a joint tortfeasor in respect of the same damage;
> (b)...
> (c) any tortfeasor liable in respect of that damage may recover contribution from any

> other tortfeasor who is, or would if sued have been, liable in respect of the same damage, whether as a joint tortfeasor or otherwise...

Therefore, he said that the pertinent question to be asked was whether the first plaintiff would be liable to the second plaintiff if the second plaintiff had sued the first plaintiff as at the date the counterclaim was filed. In other words, learned counsel for the plaintiff took the date of filing of the counterclaim as the material date, not the date of the accident. He argued that as at the date of the filing of the counterclaim (by the defendant) the second plaintiff could have sued the first plaintiff as the amendment to the Married Women Act 1957had already come into force even though the accident happened prior to the amendment. The amendment, he argued did not create a cause of action in favour of the second plaintiff, unlike, for example, the provision of s. 7 of the Civil Law Act 1956. What the amendment did was to remove a procedural bar that had existed against the wife which prevented her from suing her husband in tort. Therefore the question whether the amendment to the Married Women Act 1957was retrospective or not was in material. In the alternative learned counsel for the plaintiff argued that the amendment being purely procedural it was in fact retrospective.

The relevant amendment to the Married Women Act 1957reads as follows:

> 4A. A husband or a wife shall be entitled to sue each other in tort for damages in respect of injuries to his or her person, as the case may be, in the manner as any other two separate individuals.

This amendment, inserted by Act A 893 come into force on 8 July 1994, which is after the date of the accident. Both learned counsel accepted the position that prior to 8 July 1994 a husband and a wife could not sue each other in tort. No doubt that is the correct view, in law. In *Mohamed Habibullah Mahmood v. Faridah Dato' Talib [1993] 1 CLJ 264;*[1992] 2 MLJ 793 SC Harun Hashim SCJ said at p. 804:

> The rule that a married couple cannot sue each other in tort is derived from the common law of England where it was held that marital status made the husband and wife one person in the eyes of the law and therefore a suit by one against the other is like suing oneself. This common law rule has since been removed by the (U.K.) Law Reform (Husband and Wife) Act 1962 and each parties to a marriage has the same right of action in tort against the other as if they were not married.
> But our law still stands.

Scott LJ in *Barber v. Pigden* [1939] 1 All ER 115 describes the position as follows, at p. 125:

> ... a woman on marrying become merged in the personality of her husband and ceased to be a fully qualified and separate human person.

It is interesting to compare this common law position with the position under the Islamic Law. Under the Islamic Law a woman does not lose her identity upon marriage. She remains the same individual person that she was before the marriage. Her personality does not "merge" with that of her husband. She does not become "Mrs. Somebody." She retains her maiden name and her natural father's surname. Upon marriage she becomes her husband's wife just as he becomes her husband, so long as the marriage, a contract, subsists. Each of them, as an individual, retains his or her personality, qualification, identity rights and

obligations in law as an individual.

Even though it is now academic, one wonders whether that principle of common law, based on such premise should have been introduced at all in this country.

This case has raised a rather intricate point of law which, according to both learned counsel, have not been decided by the courts in this country. I am myself unable to find any authority that can assist me except, perhaps the case of *Rubaidah bte Dirin v. Ahmad bin Ariffin* [1997] 1 AMR 900, which I shall revert to later.

The problem arises not from the provisions of the Civil Law Act 1956,but from the application of the common law rule to the Act. I am of the view that the interpretation of the Civil Law Act 1956,should be made in its context. For example, in interpreting s. 10(1)(c) of the Civil Law Act 1956in particular the words "who is, or would if sued, have been liable", it should be interpreted with reference to the act or omission that gives rise to the liability in tort, in this case the negligence of the parties to the accident. It is that kind of liability that the section is talking about, not liability, or the absence of it, as a result of some other rules, in this case the common law rule. I am therefore of the view that the fact that the husband cannot be sued by the wife, under common law, is not a relevant consideration.

The other way of looking at it is that, since common law treats the wife and one person as the husband, then his negligence should also be attributed to her. So, if the husband is liable to the defendant for contributory negligence of 20%, that should be attributed to her as they are in law one person. True as a pillion rider she cannot be liable for contributory negligence. But that is not because she is the wife of the rider, but because she is a pillion rider and a pillion rider cannot be held responsible for the manner in which the motorcycle was driven leading to the accident. As a pillion rider (if she were not the wife of the rider) she can sue the rider under the Civil Law Act 1956for his portion of the negligence. What prevents her from doing so is because she is the rider's wife, by virtue of a common law rule. Why should that incapacity be applied to the defendant who is neither the rider's wife nor husband?

Yet another way of looking at it is this. If the common law treats her as one person as her husband and therefore she cannot sue him, then as against the defendant too she should be treated as one person, in law, as the husband. If the husband cannot claim for the 20% damages from the defendant, she too should not be able to claim from the defendant. On the reverse, if the defendant is entitled to a deduction of 20% in the husband's suit because of his contributory negligence he should also be entitled to the same deduction in the suit by the wife. They are in law one and the same person, after all.

I shall now come to the case of *Rubaidah bte Dirin v. Ahmad bin Ariffin* [1997] 1 AMR 900. I have in *Lim Siew Hock v. Low Foong Kew* (Penang High Court Civil Appeal No: 12-177-1996 and 12-177A-1996) said that that judgment of the Court of Appeal was most welcomed. In *Rubaidah bte Dirin v. Ahmad bin Ariffin* the appellant whose husband was killed in a motor accident, filed a dependency claim under s. 7 of the Civil Law Act 1956against the respondent. The Sessions Court judge found the respondent 100% liable. On appeal the High Court held the deceased to be 70% liable for the accident. The appellant appealed to the Court of Appeal. The issue was whether, in a dependency claim, the dependent plaintiffs were entitled to effect total recovery of their damages from a defendant tortfeasor regardless of the extent which the deceased was found contributorily negligent for his death. It was held by the Court of Appeal that as the deceased was contributorily negligent, the dependent

plaintiff could only recover from any or all tortfeasors liable, such proportion of their damages as can be attributed to the defendant's share of blame. Since only one action can be brought for a death by s. 7(5) of the Civil Law Act 1956,the reduction of the damages recoverable to the proportionate extent as required by s. 12(4)must take place within that action. The statute does not envisage a situation where the dependents may recover unreduced the total amount of their damages from one or more defendants and leave them to claim contribution in some other action.

True, that is a dependency claim. But, I think the principle is applicable, by way of analogy. In that case, as in this case, the accident happened before the amendment to the relevant provision of the Married Women Act 1957. In both cases the plaintiffs are the respective wives of the joint tortfeasor. Both of them could not sue the joint tortfeasors who are their respective husbands. Yet in *Rubaidah bte Dirin* the Court of Appeal deduced 30% from the plaintiff's claim which equals to her husband's liability for contributory negligence. If, as argued in this case, the defendant is not entitled to the reduction because the second plaintiff (the wife) cannot sue the first plaintiff (her husband), in that case too, for the same reason the plaintiff cannot sue her husband for his portion of the liability. So, I see no reason why the principle cannot be applied to the present situation.

If, as conceded by learned counsel for the plaintiff in his written submission that, because of the wording of s. 10(1)(c)and the common law rule, the second plaintiff cannot sue the first plaintiff (her husband) and therefore the defendant too cannot sue (counterclaim against) the husband, then the defendant has no remedy against the first plaintiff. It means that the defendant will not be able to recover the 20% damages which he is made to pay to the second plaintiff, the first plaintiff's wife.

So, the argument that he should pay the full damages first and recover the 30% later from the first plaintiff is not a valid argument.

As a matter of policy too, I see no reason why the defendant should be made to pay more to the wife of the other tortfeasor, why she should recover more from him than what she is entitled to (imagine if the defendant is only, say, 10% liable and yet will have to pay 100% damages), why the defendant should be made to file a fresh action (assuming that he can) against her husband to recover the difference incurring more costs and time while clogging the court docket, why the defendant should be made to face the uncertainty whether that difference may ever be recovered at all?

The court should take all these factors into account if administration of justice is to be fair and effective.

Indeed, in this case I do not see the necessity of requiring the defendant to file a fresh suit against the first plaintiff. The defendant had already counterclaimed against the first plaintiff in the first plaintiff's suit against him. In the second plaintiff's suit he had prayed for a set-off from whatever judgment he might get in the first suit. Both cases were heard together. The Sessions Court judge had found the first plaintiff contributorily negligent. Another suit would be *res judicata*. The counterclaim is already a suit and has been decided upon, after a full trial.

For these reasons, I am of the view that the order of the learned Sessions Court judge in reducing the damages awarded to the second plaintiff is correct, just and expedient, and I

confirm his decision.

I do not think it is necessary for me to discuss the arguments of the subissues raised by with learned counsel.

It was also argued that the defendant should have been held to be 100% liable.

The learned Sessions Court judge had found that the accident occurred at the round about near Perai. The first plaintiff was travelling from Butterworth towards Perai. The plaintiff entered the round about and went around it. When the motorcycle was opposite Jalan Perusahaan, the defendant's car came out from that road and entered the round about and knocked the motorcycle on its left side.

The learned Sessions Court judge found that the defendant was negligent in not paying attention to the presence of the first plaintiff's motorcycle on his right before entering the round about. Had he been a bit patient and waited for a while he would have seen the motorcycle, he said. However the Sessions Court judge also found the first plaintiff to be contributorily negligent. That is because the plaintiff in his own evidence said that he did not see the defendant's car prior to the accident and he did not know the position and which part of the car had come into contact with his motorcycle. The learned Sessions Court judge was of the view that if the first plaintiff had paid attention he could have seen the defendant's car entering the round about. He apportioned the first plaintiff's contributory negligent as 20%.

I see no reason why I should disturb the learned Sessions Court judges finding.

Regarding quantum, in respect of the first plaintiff's claim, only one issue was raised and that is regarding kidney operation. The learned Sessions Court judge awarded RM8,000. Learned counsel for the first plaintiff argued that that was inadequate. He asked for RM15,000. Learned Sessions Court judge, in his grounds of judgment, said that it was agreed by both parties that the first plaintiff, prior to the accident, was suffering from kidney stones and as a result of the accident two kidney stones had to removed. It was only the kidney stones that were removed and the first plaintiff kidney functioned normally after the operation. In the circumstances, he awarded RM8,000.

Before me learned counsel for the first plaintiff referred to the Singapore case of *Rasul bin Rabdar v. Loh Ah Muay*, a summary of which is reported in (1989) *Mallal's Digest* para. 682. In that case S$20,000 was awarded for nephrectomy *ie*, removal of the kidney.

He also referred to the case of *Sweh Kok Wai, Siew Meng Wai*, another Singapore case summarised in 1992 *Mallal's Digest* para. 912. In that case for surgical removal of bladder stone and treatment of bladder malfunction a sum of S$10,000 was awarded.

Learned counsel for the defendant on the other hand referred to the case of *Maimunah bte Hassan* summarised in 1992 *Mallal's Digest* para. 894 in which for spleenectomy (removal of the spleen) RM8,000 was awarded by the High Court, Seremban.

I do not think I am justified to interfere with the award. It is neither manifestly low nor wrong in principle that merits interference.

Regarding the second plaintiff, the learned Sessions Court judge awarded RM24,000 for

comminuted fracture mid-shaft left tibia. Learned counsel for the second plaintiff argued that it was too low and asked for RM30,000.

Learned counsel for the second plaintiff referred to the case of *Juminah bte Tongkon & Anor v. Yim Kam Cheng & Anor* summarised in 1991, *Mallals' Digest* para. 900. In that case the plaintiff suffered a fracture of left femur, a fracture of left tibia and a 3cm shortening of left leg. Abu Mansor J (as he then was) awarded RM40,000 for pain and suffering.

He also referred to the case of *Official Administrator Malaysia & Ors. v. Yeoh Ah Lee alias Yeoh Bok Lee* summarised in 1989 *Mallal's Digest*, para. 674 in which for fracture of right femur RM22,000 was awarded.

In *Seow Gek Soo & Anor v. Chia Mun Fook*, summarised in 1989 *Mallal's Digest*, para. 708, for shortening of left leg with stiffness of leg resulting in limp as well as inability to squat RM22,000 was awarded.

In this case, according to the medical report, "lower leg suffers angulation at midshaft of Tibia due to moderate malunion. Fracture union is not complete."

For fracture of neck of right femur of the second plaintiff, the learned Sessions Court judge awarded RM17,000. Learned counsel asked for RM25,000.

All the authorities referred to above were referred to the learned Sessions Court judge. Again I do not think that the awards are manifestly low or that the learned Sessions Court judge is wrong in principle in the making of awards that what he did merits interference by this court.

I dismissed the appeal with costs.