Goh Suan Hee v Teo Cher Teck
[2009] SGCA 52

Case Number : CA 10/2009

Decision Date : 06 November 2009

Tribunal/Court : Court of Appeal

Coram : Chao Hick Tin JA; V K Rajah JA

Counsel Name(s) : Chew Mei Lin Lynette and Sue-Anne Lim (Harry Elias Partnership) for the appellant; Tiwary Anuradha (Vision Law LLC) for the respondent

Parties : Goh Suan Hee — Teo Cher Teck

Conflict of Laws

Tort

6 November 2009

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

Introduction

1 This is an appeal by Goh Suan Hee (the defendant in DC Suit No 1070 of 2008/W ("DC Suit 1070")) against the decision of the judge below ("the Judge") in *Teo Cher Teck v Goh Suan Hee* [2009] 1 SLR 749 ("the Judgment"), who reversed the decision of the District Judge ("the DJ") which ordered a stay of the respondent's (the plaintiff in DC Suit 1070) action on the ground of *forum non conveniens*. We heard and dismissed the appeal on 18 May 2009. We now give the reasons for our decision.

The Background

2 The appellant, a Malaysian national, was involved in a motor accident with the respondent, a Singaporean national, on 21 January 2007 in Johor Bahru, Malaysia. The appellant's car had collided into the back of the respondent's car. As a result of this accident, the appellant was fined RM300 by the Malaysian traffic police. Subsequently, the respondent brought a claim against the appellant in the District Court in Singapore for damages for personal injury caused by the appellant's negligence. The appellant's insurer, Pacific & Orient Insurance Co, took over the conduct of the proceedings.

3 The appellant applied for an order that the action be stayed on the ground of *forum non conveniens*, arguing that Malaysia was a more appropriate forum to adjudicate on the matter. This application was dismissed by the Deputy Registrar of the Subordinate Courts, Ms Carol Ling, but was allowed, on appeal, by the DJ. The DJ, in allowing the appeal, had accepted the appellant's argument that Malaysia was the proper forum because it was the place where the tort had occurred. The respondent appealed.

The Judge's Decision

4 The Judge reversed the DJ's decision and held that the appellant had failed to show that Malaysia was the more appropriate forum. The Judge expressed the following reasons for his decision:

(a) Although as a general rule in tortious claims, the *lex loci delicti*, which in this case was

Malaysian law, would determine the rights and liabilities of the parties, this was not an inflexible rule. It was possible for some other law to apply (the Judgment at [5]).

(b) In any event, Malaysian law on the tort of negligence was largely similar to Singapore law (the Judgment at [7]).

(c) On the question of witnesses, the respondent had five witnesses based in Singapore (himself, two doctors, a repair mechanic and a surveyor) whereas the appellant had no witnesses other than himself (the Judgment at [3]).

(d) This was an uncomplicated case because liability was not really in dispute and the case was most likely concerned only with the assessment of damages (the Judgment at [6]).

(e) In road accident cases in which the main issue in dispute was the quantum of damages, where the inconvenience was roughly the same, it would be better not to cause inconvenience to an injured plaintiff than a defendant tortfeasor unless it would appear that the plaintiff's claim was unlikely to succeed (*ibid*).

(f) On the question of damages, if the claim was brought in Malaysia, the respondent would receive less by way of an award in Malaysian currency as compared to an award granted in Singapore. The respondent ought to be compensated for what he had lost, and what he would lose in Singapore (the Judgment at [8]).

5 For these reasons, the Judge found that, on balance, the appellant had failed to show that Malaysia was a clearly and distinctly more appropriate forum than Singapore to adjudicate on the matter. He thus allowed the appeal against the DJ's decision to stay the proceedings.

Our Decision

General principles on the doctrine of forum non conveniens

6 In deciding whether to stay an action on the basis of *forum non conveniens*, the question the court will always have to bear in mind is which forum meets the ends of justice. This was emphasised in *Murakami Takako (executrix of the estate of Takashi Murakami Suroso, deceased) v Wiryadi Louise Maria* [2007] 4 SLR 565 ("*Murakami*") at [49]:

> In our view, the relevant test as to which is the more suitable jurisdiction is really a simple and commonsensical one – namely, which is the forum that meets the ends of justice, having regard to the interests of the parties…

7 It is beyond question that the principles in *Spiliada Maritime Corporation v Cansulex Ltd* [1987] AC 460 ("*Spiliada*") apply as well (see *Rickshaw Investments Ltd v Nicolai Baron von Uexkull* [2007] 1 SLR 377 ("*Rickshaw*") at [12]). The *Spiliada* principles were summarised in *Rickshaw* (at [14]) as follows:

> Under *Spiliada*, the first issue that must be determined is whether, *prima facie*, there is some other available forum which is more appropriate for the case to be tried ("Stage One"). At this stage, the legal burden is on the defendant. If the court concludes that there is a more appropriate forum, the court will ordinarily grant a stay unless there are circumstances by reason of which justice requires that a stay should nonetheless not be granted ("Stage Two").

8 At this first stage of the analysis ("Stage One"), the relevant factors are, *inter alia*, the general connecting factors, the choice of law and the jurisdiction in which the tort had occurred (see *Rickshaw* at [15]). The process at Stage One is not a mechanical one and as V K Rajah J explained in *Peters Roger May v Pinder Lillian Gek Lian* [2006] 2 SLR 381 ("*Pinder Lillian*") at [20]:

> A court has to take into account an entire multitude of factors in balancing the competing interests. The weightage accorded to a particular factor varies in different cases and the ultimate appraisal ought to reflect the exigencies dictated by the factual matrix. Copious citations of precedents and *dicta* are usually of little assistance and may in reality serve to cloud rather than elucidate the applicable principles.

With these principles in mind, we turn to consider the question of whether the Judge had erred in holding that the appellant had failed to show that Malaysia was a clearly and distinctly more appropriate forum to adjudicate on the respondent's claim.

9 We will begin by considering the factors which are germane to the Stage One analysis.

The jurisdiction in which the tort had occurred

10 As a general rule, the place where a tort had occurred is *prima facie* the natural forum for determining the claim (see *Rickshaw* at [37] where this principle expressed in *Cordoba Shipping Co Ltd v National State Bank, Elizabeth, New Jersey (The Albaforth)* [1984] 12 Lloyd's Rep 91 was accepted as one which is compatible with the *Spiliada* principles). This, however, is just one of the factors to be considered in the *Spiliada* test and is not conclusive (see *Rickshaw* at [38] endorsing this view expressed by Clarke J in *The Xin Yang and An Kang Jiang* [1996] 2 Lloyd's Rep 217). In this case, the fact that the tort had occurred in Malaysia is only *one factor* pointing to Malaysia as a clearly and distinctly more appropriate forum to adjudicate on the matter. It will nevertheless be necessary to consider and weigh that against all the other factors.

The availability of witnesses

11 The availability of witnesses, which has an impact on the convenience or expense of a trial in a particular forum, was expressly mentioned by Lord Goff of Chieveley (in *Spiliada* ([7] *supra*) at 478) as falling within the Stage One analysis. In this case, the appellant, apart from himself, has no other witnesses. In contrast, the respondent, apart from himself, has four witnesses based in Singapore: Dr Ting Sing Shing from Changi General Hospital and Dr Ngian Kite Seng from Island Orthopaedic Consultants will give evidence on the nature and extent of the respondent's injuries; and Mr Ng Ching Chye from Auto Spec Appraiser and Mr Sih Heng Huat from Autoexel Engineering Pte Ltd will give evidence on the extent of the damage caused to the car. Therefore, all the witnesses with the exception of the appellant are based in Singapore. In the circumstances, the inconvenience it would take to have the respondent and his witnesses testify in Malaysia is clearly a factor which goes against the finding that Malaysia is a clearly and distinctly more appropriate forum to adjudicate on the matter.

Choice of Law

12 The *lex causae* is the *lex loci delicti* which is Malaysian law. This is a factor which points towards Malaysia as the more appropriate forum. The Judge, however, expressed the view that there are exceptions to the application of the *lex loci delicti* as the *lex causae* in the choice of law analysis. The Judge relied on the case of *Chaplin v Boys* [1971] AC 356 ("*Chaplin*") in which the House of Lords applied English law even though the claimant was injured in Malta in a road accident. We agree with

the appellant that *Chaplin* can and should be distinguished from the present case. Lord Hodson explained in *Chaplin* at 380 that the conclusion was reached because:

> [he] would accordingly, in agreement with the Master of the Rolls, treat the law of England as applicable since even though the occurrence [of the accident] took place in Malta *this was overshadowed by the identity and circumstances of the parties, British subjects temporarily serving in Malta*.[emphasis added]

The unique facts in *Chaplin*, namely that both the parties were British subjects temporarily serving in Malta, were such that in the choice of law analysis it would have been proper to apply English law. This is not the case here. The appellant is Malaysian while the respondent is Singaporean. There are no special facts which would militate against the application of the *lex loci delicti*. As such, the *lex loci delicti* which is Malaysian law would apply as the *lex causae*.

13 On the face of it, this choice of law factor would suggest that Malaysia is the more appropriate forum. However, we note that the law relating to negligence on the roads in Malaysia and Singapore is essentially the same (*Ismail bin Sukardi v Kamal bin Ikhwan* [2008] SGHC 191 ("*Ismail*") at [23]). The parties agree that the primary difference in the law lies only in the quantification of damages (and more shall be said about this later at [14]–[25]). Thus, as far as liability is concerned, in the light of the similarity of the contents of the laws of both jurisdictions, being based on common law principles of reasonable care, this choice of law factor is, in our view, a neutral one.

The quantification of damages

14 Turning to the question of special damages, there is no difference in quantification in Singapore and Malaysia because the quantum of special damages awarded is dependant on *proved loss*. As for general damages for pain and suffering and loss of earning capacity, the parties do not dispute that an award made in the Malaysian courts is likely to be less than that made in the Singapore courts. The appellant argued that the likelihood of the respondent obtaining a larger award in general damages in Singapore was a juridical advantage which the respondent has obtained by choosing to institute proceedings in Singapore. This juridical advantage, the appellant contended, was an irrelevant consideration under Stage One of the *Spiliada* test. In support, he referred to the following passage by Lord Goff in *Spiliada* ([7] *supra*) (at 482):

> The key to the solution of [the problem of juridical advantages whereby one party's advantage gives rise to the opposing party's comparable disadvantage] lies, in my judgment, in the underlying fundamental principle. We have to consider where the case may be tried "suitably for the interests of all the parties and for the ends of justice." Let me consider the application of that principle in relation to advantages which the plaintiff may derive from invoking the English jurisdiction. Typical examples are: damages awarded on a higher scale; a more complete procedure of discovery; a power to award interest; a more generous limitation period. Now, as a general rule, I do not think that the court should be deterred from granting a stay of proceedings, or from exercising its discretion against granting leave under R.S.C. Ord. 11, simply because the plaintiff will be deprived of such an advantage, provided that the court is satisfied that substantial justice will be done in the available appropriate forum.

Thus, as a general rule, the court will not refrain from granting a stay of proceedings simply because the plaintiff will be deprived of a juridical advantage if he has to litigate in the other forum, *provided* that substantial justice will be done in the other forum. Lord Goff (*Spiliada* at 483–484) helpfully provided an example of a case in which the court will refrain from granting a stay and allow the party opposing the stay to claim the juridical advantage as a factor in its favour because substantial justice

will *not* be done in the other forum. In Lord Goff's example, the claimant has *reasonably* brought an action in England and under English law, the action is not time-barred whereas in the other forum, the action would have been time-barred. The court will allow the claimant to rely on the juridical advantage it has gained by bringing the claim in England as a factor militating against the finding that the other forum is more appropriate. In this example, there is reason to refuse the stay because substantial justice will not be done in the other forum since the claimant will be deprived of his claim there.

15 This is not the case here. The appellant quite rightly argued that even if the respondent receives a smaller award in Malaysia if he succeeds in his claim, *substantial* justice will still be done. Therefore, the juridical advantage which the respondent will gain by continuing with the action in Singapore ought to be regarded as neutral at best. We agree.

16 In any event, we do not think it a foregone conclusion that the respondent's claim if heard in Singapore would mean that Singapore law would apply to determine the quantification of damages. Under the traditional common law position, the question of quantification of damages is one of procedure and is thus governed by the *lex fori* (see generally *J D'Almeida Araujo LDA v Sir Frederick Becker & Co Ld* [1953] 2 QB 329 at 336 and *Chaplin* ([12] *supra*) at 378–379, 382–383, 392–393 and 394). This position was confirmed again by the House of Lords more recently in *Harding v Wealands* [2007] 2 AC 1 ("*Harding (HL)*"). In *Harding (HL)*, the claimant, an English national domiciled in England, was involved in a motor accident in a car driven by the defendant in February 2003 in New South Wales, Australia and was rendered tetraplegic. The defendant, who was his partner, was an Australian national who had lived in Australia until June 2001 before moving to England to live with the claimant. The accident occurred while the couple was on a holiday in Australia. At trial, the defendant conceded liability and a preliminary issue arose as to whether certain New South Wales statutory provisions on damages, which imposed restrictions on the amount of damages recoverable, would be applicable to the assessment of damages. Elias J at first instance determined that the New South Wales statutory provisions on damages were procedural in nature. Given the general rule that quantification of damages is one of procedure and is thus governed by the *lex fori*, Elias J held that English law would apply to determine the quantum of damages and the New South Wales statutory provisions had no application (see *Harding v Wealands* [2004] EWHC 1957 at [62]–[64] and [68]).

17 On appeal, the Court of Appeal, by a majority, reversed the decision of Elias J. The court accepted the defendant's contention that the New South Wales statutory provisions were substantive in nature and they were therefore applicable (as part of the law of the tort which was the law of New South Wales in this case) (see *Harding v Wealands* [2005] 1 WLR 1539 ("*Harding (CA)*") at [47], [55], [81], [86], [93] and [105]). The House of Lords, however, disagreed with the characterisation of the nature of the New South Wales statutory provisions by the Court of Appeal and allowed the claimant's appeal and restored Elias J's judgment (*Harding (HL)* at [11], [13], [42], [48], [53] and [77]). The House of Lords also affirmed the general principle that the quantification of damages was a matter of procedure which was governed by the *lex fori* and was of the view that this was the common law position which was preserved by s 14(3)(*b*) of the Private International Law (Miscellaneous Provisions) Act 1995 (c 42) (UK) (*Harding (HL)* at [32]–[35], [37], [51], [67], [83]).

18 If this position is adopted in the present case, the *lex fori*, which is Singapore law, will apply to determine the quantification of damages. However, the position taken in *Harding (HL)* no longer holds good in England. Since 11 January 2009, the Rome II Regulation (Regulation (EC) No 864/2007) ("the Regulation") on the law applicable to non-contractual obligations directly applies in all European Community Member States, with the exception of Denmark. There is some debate as to whether the Regulation enters into force on the date of its application (*ie*, 11 January 2009) or on the date of its adoption (*ie*, 11 July 2007) (see James Fawcett & Janeen M Carruthers, *Cheshire, North & Fawcett*

Private International Law (Oxford University Press, 14th Ed, 2008) at p 775) but this question is not material to the present discussion. Article 15 of the Regulation provides:

> The law applicable to non-contractual obligations under this Regulation shall govern in particular:
>
> ...
>
> (c) the existence, the nature and the assessment of damage or the remedy claimed; ...

Under Art 15, the law applicable to non-contractual obligations will apply not only to determine the question of liability but the quantification of damages as well (see generally *Maher v Groupama Grand Est* [2009] 1 WLR 1752). As observed by the learned editors of *Cheshire, North & Fawcett Private International Law* at p 844:

> In so far as the foreign applicable law has legal rules in relation to assessment of damage, the effect of Article 15(c) is clear enough. The English court must apply these rules.

19 While this development in English law was the result of the Regulation, a modification of the common law principle was already taking shape even earlier in Australia. In *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503 ("*Rogerson*"), the claimant sued his employer in the Australian Capital Territory for injuries he had suffered in a work accident in New South Wales. In the Australian Capital Territory, damages were assessed at A$30,000 plus out of pocket expenses. Had the claim been brought in the New South Wales, damages would have been limited to a considerably lesser sum under the Workers Compensation Act 1987 (NSW). The High Court of Australia reconsidered the rule laid down in *Stevens v Head* (1993) 176 CLR 433 ("*Stevens*") that a statutory rule laying down a limit on damages was procedural in nature. It departed from the position in *Stevens* and decided that the New South Wales provision, which placed a cap on damages, was a substantive rule (at [103], [134] and [199]). A majority of the High Court went even further and indicated that *all* questions relating to the amount of damages that may be recovered ought to be treated as substantive issues with the result that the law applicable to the tort would apply as well to determine these questions (at [100] and [102]). There is nonetheless a qualification to the position taken in *Rogerson*. While it is clear that the approach enunciated in *Rogerson* applies to Australia's domestic tort conflict context, there may be a doubt as to whether it also applies to the international tort conflict context. On this point, the Australian High Court in *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491 has explicitly reserved the question as to whether, in international torts cases, the question of the kinds and quantification of damages should also be governed by the *lex loci delicti* (at [76]). In this regard, we would note that Sir William Aldous at the Court of Appeal in *Harding (CA)* had expressed the pertinent view that the Australian High Court's reasoning in *Rogerson* indicated that the court would have considered the approach they had taken to be applicable in the international tort conflict context as well and it would be illogical to come to a different conclusion (see *Harding (CA)* at [94]).

20 These developments reveal that there are other reasonable ways of looking at the choice of law analysis for quantification of damages. In the light of these developments, it is no longer a foregone conclusion that tortious claims arising from wrongs committed overseas but brought in Singapore, if successful, would automatically lead to the application of Singapore law to determine the quantification of damages. In an appropriate case, the court may very well choose to apply the law applicable to the non-contractual obligation (which may or may not be Singapore law) to determine the quantification of damages. There is in fact a suggestion that the characterisation of an issue as procedural and thus governed by the *lex fori* should be narrowed in *all areas* of the law relating to non-contractual obligations and not just for the quantification of damages (see Anthony Gray, "Loss Distribution Issues in Multinational Tort Claims: Giving Substance to Substance" [2008] 4

J Priv Int L 279).

21 It also seems to us that the traditional approach, as reflected in *Harding (HL)* ([16] *supra*), of treating a head of claim for damages as relating to substantive law while the determination of the quantum for that head as relating to procedure, is unreal. First, one would have thought that procedure will be directed to matters governing or regulating the mode or conduct of court proceedings. Second, the traditional approach is likely to encourage forum shopping, a development which is hardly desirable especially in this day and age of globalisation and easy communications. Third, it stands to reason that he who travels to a foreign land must comply and accept the law of that land, subject only to the caveat that universal norms of minimum standards for treatment of foreigners are observed. It should follow that the law of the place where the wrong was committed should govern the rights and duties of the parties. These rights must necessarily include the heads of claim as well as the quantification for the wrong done as they will collectively determine the amount of damages payable to the injured. To separate a head of claim from the question of quantum appears to be wholly artificial. Similarly, it is also untenable in principle to separate remedy from rights. It also seems to us that the traditional common law approach would lead to a less than desirable outcome. Following from that approach, it would mean that if a national of a developed country were to be injured in a foreign land, and because he would in all likelihood get a higher award in terms of damages if he were to sue in his own country, he would be encouraged to do so. Therefore the whole question of whether he would be entitled to a higher or lower award would become one of chance, depending on whether the factors (often fortuitous) favour a trial in the foreign land or his own country.

22 In the light of the foregoing, the question of whether the *lex loci delicti* should apply to determining the quantum of damages is very much an open question. We will have to await another day for an appropriate case where full arguments on it are presented before making a ruling. We would therefore caution litigants against bringing their claims in Singapore with the expectation that Singapore law will *invariably* apply to determine the quantification of damages so as to give them a larger award (as the case may be). It may be that the quantification of damages will be governed by the *lex loci delicti*. The successful litigant would thus be in no better position than if he had sued in the place in which the tort had occurred. Furthermore, if it can be shown that the claim ought to have been brought in another more appropriate jurisdiction, the proceedings will be stayed and the opportunistic claimant will be penalised by being made to pay costs for initiating proceedings which ought not to have been initiated in Singapore.

23 Returning to the point on quantification of damages, if the Singapore courts were to adopt the approach taken in *Rogerson* ([19] *supra*) (assuming its applicability in the international context) and which has been encapsulated in Art 15(c) of the Regulation so as to apply the *lex loci delicti* to determine both the head of claims and quantification, it is important to bear in mind the following comments by the learned editors of *Cheshire, North & Fawcett Private International Law* ([18] *supra*) at pp 844–846 (while made in the context of Art 15(c) of the Regulation, are of general application to the said approach):

> In so far as the foreign applicable law has legal rules in relation to assessment of damage, the effect of Article 15(c) is clear enough. The English court must apply these rules. However, the assessment of damage can involve questions of fact. The amount of damages awarded in any state is going to be influenced by the social and economic conditions in that country. This is to do with fact rather than a rule of law. Questions of fact should be determined by the forum. ... If the question in relation to assessment is only one of fact, this is a matter purely for the court hearing the action and the applicable law [to the non-contractual obligation] will not govern the issue. ...

> This leaves the difficulty of determining whether there is a rule of law in relation to assessment or whether it is a question of fact. A ceiling on damages in a statute or an international convention clearly involves a rule of law and is subject to the applicable law.
>
> ... The more difficult thing to identify is a question of fact. In so far as the calculation takes into account the social and economic conditions in that country, this must be regarded as a question of fact. But is a particular method of calculation a rule of law or a matter of fact? In the past it has not been necessary to make this distinction. Now, under the Regulation, where the evidence is simply that a foreign court applies a different method of assessment, or would make a lower award of general damages in tort than an English court, further evidence would be needed as to whether this difference is the result of a rule of law or a matter of fact.

We see one uncertainty in the passage of *Cheshire, North & Fawcett Private International Law* quoted above, in particular, the last part. Suppose the foreign country in which the tort had occurred is a country, where due to its economic condition, awards given in respect of a specific injury is lower than awards given for that injury in the country of the injured, are such awards of the foreign country to be treated as a rule of law or a matter of fact? It seems to us that in each case, the court will have to determine, on the basis of evidence of the foreign law, whether the discrepancy in the award of damages is a result of a rule of law in the foreign country or not, and if it is, to apply the rule of law. In making this determination, as a matter of logic, and for consistency, the court should make no distinction between rules governing the question of quantum whether laid down in statutes or in case law (if the tort had occurred in a common law country). Common law is no less law. While we recognise that the position is more certain where the question of quantum is governed by rules laid down in statutes than if it is to be obtained from case law of that foreign country, such case law of that foreign country could easily be established by evidence of the foreign law. It may well be that, even if an assessment were to be carried out in the country where the tort had occurred, the court there would have to hear evidence to determine certain factual issues. If, on the principles of *forum non conveniens*, the trial of the claim would be heard in the court of the country of the injured instead, then such factual issues would likewise have to be determined. The point which we would underscore is that the *lex loci delicti* of a foreign country should embrace the whole body of law of that country, whether statutory or otherwise.

24 Notwithstanding the views hereinbefore expressed, we would reiterate the point made in [22] above that the question of whether the *lex loci delicti* should apply to determining the quantum of damages is still an open question.

25 On this note, we return to the case before us. We have found (at [15] above) that the fact that the claimant, if successful, is likely to receive a higher award in general damages here than in Malaysia is a neutral factor.

Causing inconvenience to an injured plaintiff

26 The appellant has argued that the Judge erred in preferring to inconvenience a defendant tortfeasor rather than an injured plaintiff unless the plaintiff's claim was unlikely to succeed. The Judge commented (at [6]) that:

> Where the inconvenience is roughly the same, I would prefer not to cause inconvenience to an injured plaintiff than the defendant tortfeasor, unless it appears that the plaintiff's claim was unlikely to succeed. I am confining my views on this point to road accident cases only and where the main issues and the principal dispute case would most likely concern only the quantum of damages, as in the present case.

While it may be right that if one had to choose between inconveniencing a tortfeasor and an aggrieved party, it would be better not to further inconvenience the latter, this would mean that the court would be required to characterise one party as the *innocent* victim and the other as the *blameworthy* tortfeasor. This exercise in which the strength of the claim and defence has to be evaluated requires one to examine the merits of the case. This opens up a Pandora's box because, without the benefit of a full trial, parties can argue about the strengths of their respective claims without having to actually prove it. Indeed, the parties in the present case have yet to resolve the issue of liability.

27 In our opinion, the reference to the strength of the parties' respective cases is unnecessary and unhelpful to the application of the *Spiliada* test. Questions pertaining to the merits of the case ought not to be considered at this stage where the court is faced with a question of jurisdiction. The very purpose of the trial is to decide liability, the quantum of damages to be awarded and other substantive issues. It would confuse matters to have the court look into the merits of a case at a stage where the court is faced with the question of determining the appropriate forum. In this connection, this court had said previously in *The Rainbow Joy* [2005] 3 SLR 719 at [27] that:

> [i]n weighing the balance of convenience under the doctrine of *forum non conveniens*, the issue of whether there is a defence to the claim is not a relevant consideration as the court should not be required to go into the merits.

We would therefore refrain from characterising one party as the innocent victim and the other as the blameworthy tortfeasor. The question of inconveniencing the "innocent" victim is thus an irrelevant consideration at Stage One. With respect to the Judge, this factor ought not to have been taken into consideration in deciding whether the action ought to be stayed.

Whether Malaysia is clearly and distinctly a more appropriate forum to try the matter

28 In the final analysis, all that remains are two competing factors for our consideration: first, the fact that the tort had occurred in Malaysia; and second, the fact that all of the witnesses (with the exception of the appellant) are in Singapore. On the first factor, while Malaysia as the place where the tort had occurred is *prima facie* the natural forum for determining the claim (see [10] above), what this means in practical terms is that Malaysian law would apply to the claim. However, as mentioned above (at [13]), the law of negligence in Malaysia and Singapore is essentially the same. As for the quantification of damages, while the law applicable to the item of claim for special damages is the same, there is a difference as far as the item of claim relating to general damages is concerned but the issue is far from settled as to whether a Singapore court will apply Malaysian law or Singapore law on that item of claim (see [14]–[25] above).

29 As for the second factor, we are conscious that the view has been expressed in *Pinder Lillian* ([8] *supra*) at [26] that:

> [t]he easy and ready availability of video link nowadays warrants an altogether different, more measured and pragmatic re-assessment of the need for the physical presence of foreign witnesses in stay proceedings. Geographical proximity and physical convenience are no longer compelling factors nudging a decision on *forum non conveniens* towards the most "witness convenient" jurisdiction from the viewpoint of physical access.

But it remains a factor that all the witnesses which the respondent proposed to call to testify for him are all resident here. It does not make much sense to have a forum outside Singapore hear practically all the evidence via video-link from witnesses in Singapore (see *Ismail* ([13] *supra*) at [26]). Even if

the question of liability could not ultimately be agreed upon by the parties, only the appellant would be testifying in a Malaysian court. Moreover, there was no evidence before us as to whether the Malaysian court would be amenable to hearing witnesses through video-link. On balance, we did not think that the appellant had shown that Malaysia is a clearly more appropriate forum. Considering all the circumstances, we were of the view that allowing the action to proceed in Singapore would meet the ends of justice. Accordingly, we found that the Judge did not err in refusing to stay the respondent's action. Given that the present case fails at the Stage One analysis of the *Spiliada* test, there is thus no need for us to proceed to the Stage Two analysis.

Conclusion

30 In the result, we dismissed the appeal with costs and the usual consequential orders.