IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 22

Civil Appeal No 26 of 2017

Between

Minichit Bunhom

… *Appellant*

And

(1) Jazali bin Kastari
(2) Ergo Insurance Pte Ltd

… *Respondents*

GROUNDS OF DECISION

[Damages] — [Special damages]
[Tort] — [Negligence] — [Medical expenses]
[Employment law] — [Employer's duties] — [Medical expenses of foreign employee]

Version No 1: 27 Oct 2020 (22:40 hrs)

TABLE OF CONTENTS

Version No 1: 27 Oct 2020 (22:40 hrs)

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Minichit Bunhom
v
Jazali bin Kastari and another

[2018] SGCA 22

Court of Appeal — Civil Appeal No 26 of 2017
Sundaresh Menon CJ, Andrew Phang Boon Leong JA and Steven Chong JA
17 January 2018

27 April 2018

Steven Chong JA (delivering the grounds of decision of the court):

Introduction

1 Consider an accident involving two workers who were injured following a road accident for which the driver of the vehicle was wholly responsible. Both incurred similar medical expenses and brought separate legal proceedings to recover damages, including the medical expenses, against the negligent driver. One worker was a local while the other was a foreign worker. The foreign worker's employment, unlike the local worker, was governed by the Employment of Foreign Manpower Act (Cap 91A, 2009 Rev Ed) ("EFMA"). Even though the employer had initially paid for the medical expenses in both cases, it was beyond question that the local worker would be able to claim for his medical expenses against the negligent driver. The position in respect of the foreign work was however disputed. Should the employment status of the

injured worker affect his right of recovery in respect of the medical expenses against the negligent driver? This was, in essence, the issue before us.

2 In examining this issue, it is imperative to bear in mind that such a scenario involves an interaction between two distinct legal relationships – the first is between the employer and employee, and the second is between the tortfeasor and the victim. Each of these two distinct relationships is driven by different policy considerations and governed by different legal principles, giving rise to separate duties and legal consequences.

3 In the present case, the insurer of the negligent driver argued that the victim, being a foreign employee, cannot recover the medical expenses from the tortfeasor because such expenses had in fact been paid by and, more significantly, were required to be borne by the victim's employer under the EFMA. The insurer claimed that to allow recovery would result in double recovery for the victim or his employer, and/or would undermine the non-delegable statutory duties imposed on the employer under the EFMA.

4 The District Judge ("the DJ") agreed with the insurer and disallowed the victim's recovery of the medical expenses. The appeal was dismissed by the High Court Judge ("the Judge"). Although the medical expenses only involved a relatively small sum of $15,682.97, the Judge duly acknowledged that the dispute raised an important question of law and accordingly granted leave to appeal. The insurer, quite fairly, did not resist the leave application.

5 We heard and allowed the appeal on 17 January 2018, noting that the issue is indeed an important point of law and that we would explain our decision in due course. This we do now.

Version No 1: 27 Oct 2020 (22:40 hrs)

Background facts

6 Minichit Bunhom ("the appellant") was a foreign employee of Thai nationality holding a work permit under the EFMA.

7 On 8 November 2013, the appellant, together with around 30 other foreign work permit holders, was travelling in a lorry driven by one Jazali Bin Kastari ("the first respondent") when the lorry hit the kerb of a road divider, causing the appellant and other passengers to suffer injuries. It was not disputed that the accident occurred as a result of the first respondent's negligence. Nor was it disputed that the accident arose in the course of the appellant's employment.

8 The appellant was taken to the National University Hospital ("NUH") for medical treatment. Amongst other injuries, he suffered facial fractures.[1]

9 The appellant's employer at the material time was KPW Singapore Pte Ltd ("KPW"). In consideration for the provision of medical care, NUH required a written undertaking from KPW that the latter would make payment of all hospital expenses incurred by the appellant which KPW duly provided. Subsequent hospital bills were addressed to and paid by KPW.[2] In total, the appellant incurred medical expenses amounting to $15,682.97.

10 The appellant claimed that he could not afford to pay for the medical expenses,[3] and that KPW had paid these expenses on his behalf on the "understanding and agreement" that he would thereafter claim them from the first respondent and repay KPW.[4] In the hearing before us, counsel for the

1 2ACB16–19.

2 2ACB21–48.

3 2ACB14.

Version No 1: 27 Oct 2020 (22:40 hrs)

appellant confirmed that this agreement was on a non-recourse basis, *ie*, KPW would have had no claim against the appellant even if the appellant failed to recover the medical expenses from the first respondent.

11 On 12 June 2015, the appellant filed a claim against the first respondent for damages for pain and suffering, medical expenses, other consequential loss and expenses arising from the accident.[5]

12 On 8 July 2015, interlocutory judgment was granted in favour of the appellant in default of appearance by the first respondent, leaving damages to be assessed.[6]

13 On 30 July 2015, Ergo Insurance Pte Ltd ("the second respondent"), which was the first respondent's motor insurance company, obtained leave to intervene in the proceedings under O 15 r 6(2) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed) ("ROC").[7]

14 At all times in these proceedings, the first respondent was unrepresented and did not enter an appearance.

The Decisions Below

Assessment of damages hearing

15 On 11 April 2016, the hearing for assessment of damages was heard before a Deputy Registrar ("the DR") of the State Courts.[8] The DR declined to

4 Appellant's Case at para 6.

5 ROP Vol II, pp 13–25.

6 2ACB63; ROP Vol II, p 26.

7 DC/SUM 2637/2015 (ROP Vol II, p 27); ROP Vol II, pp 3–4 item 12.

8 DC/AD 672/2015 (ROP Vol II, p 43).

Version No 1: 27 Oct 2020 (22:40 hrs)

award the appellant any damages on the basis that the appellant had already made a workman's compensation claim under the Work Injury Compensation Act (Cap 354, 2009 Rev Ed) ("WICA").

Registrar's Appeal to the District Court

16 The appellant filed a Registrar's Appeal[9] which was heard by the DJ in chambers.[10]

17 On 2 August 2016, the DJ rendered her decision allowing the appeal in part.[11] She was satisfied that the appellant had *not* made a claim under the WICA scheme. On that basis, she awarded the appellant general and special damages, as well as other disbursements.

18 However, the DJ disallowed the appellant's claim for special damages in the sum of $15,682.97, being the medical expenses that KPW had paid to NUH on the appellant's behalf. In her view, the appellant was not entitled to recover these expenses from the first respondent for the following reasons:[12]

> (a) The EFMA imposed a non-delegable duty on KPW as the employer to bear the appellant's cost of medical treatment arising from the accident. It was not open for KPW to delegate this duty by entering into a loan agreement with the appellant.

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9 ROP Vol III Part B, pp 124–128.

10 DC/RA 31/2016.

11 ROP Vol III Part B, pp 129–132.

12 ROP Vol III Part B, pp 130–132.

Version No 1: 27 Oct 2020 (22:40 hrs)

(b) Since KPW was statutorily obliged to bear the appellant's medical expenses, allowing the appellant to recover the same against the first respondent would result in double recovery for the appellant.

(c) KPW was obliged to take out medical insurance for the appellant's in-patient care and day surgery under Condition 4 of Part IV of the Fourth Schedule of the Employment of Foreign Manpower (Work Passes) Regulations 2012 (Cap 91A, Rg 2, 2009 Rev Ed) ("EFMR") ("Condition 4"). In this context, KPW may obtain double recovery if it claimed the appellant's medical expenses from its own insurers (hereinafter, the "EFMA insurer") and also obtained repayment from the appellant. KPW's EFMA insurer should instead exercise its right of subrogation and bring a claim against the first respondent.

(d) Choo Han Teck J's decision in *Sun Delong v Teo Poh Soon and another* [2016] SGHC 129 ("*Sun Delong*"), on which the appellant relied, could be distinguished from the present case because it appeared that Choo J had not been referred to Condition 4 or the decision of the High Court in *Lee Chiang Theng v Public Prosecutor and other matters* [2012] 1 SLR 751 ("*Lee Chiang Theng*").

Appeal to a High Court Judge in chambers

19 The appellant appealed against the DJ's decision on his entitlement to medical expenses.[13] As the amount in dispute was less than $50,000, the appellant sought and obtained leave to appeal under s 21(1)(*b*) of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed) read with O 55C r 2(1) of the ROC.[14]

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13 ROP Vol III, pp 182–183.

14 ROP Vol III, pp 134–136, 181.

Version No 1: 27 Oct 2020 (22:40 hrs)

20 The appeal was heard by the Judge in chambers. Oral judgment was delivered on 28 October 2016, supplemented by his written grounds issued on 7 December 2016 in *Minichit Bunhom v Jazali bin Kastari and another* [2017] 3 SLR 608 ("the GD"). The Judge agreed with the DJ and dismissed the appeal for the following reasons:

(a) The EFMA and the EFMR placed a non-delegable statutory duty on the employer to bear the foreign employee's medical expenses, the risk of which could not be allocated to the employee.

(b) The DJ was justified in concluding that Choo J's decision in *Sun Delong* did not bind her as Choo J had not been referred to Condition 4 or *Lee Chiang Theng*. In any event, Choo J's interpretation of the scope of the employer's obligation under the EFMA "could be said to be limited to medical treatment in respect of injuries suffered *outside of* the course of employment" (see GD at [17]) [emphasis in original].

(c) On the facts, KPW must bear the appellant's medical expenses and cannot delegate its responsibility to the appellant or to the tortfeasor by the extension of a loan to the appellant with an expectation of repayment.

(d) The DJ's ruling was "necessary to avoid 'double recovery' in two senses":

(i) there would be double recovery for the appellant if the first respondent was ordered to pay the appellant the medical expenses that had already been paid for by KPW; and

(ii) there would be double recovery for KPW if the court allowed the appellant's claim against the first respondent with a

Version No 1: 27 Oct 2020 (22:40 hrs)

direction for the appellant to repay KPW, and KPW also made a claim on its EFMA insurance for the same.

21 On 13 January 2017, the Judge granted leave to the appellant to appeal against his decision to the Court of Appeal.[15] The second respondent did not resist the leave application.[16] On 9 February 2017, the appellant filed a notice of appeal against the whole of the Judge's decision.

The parties' cases on appeal

Appellant's submissions

22 The appellant's position was that the EFMA had no application to the present case. Parliament's intention in enacting the statute was to protect the rights of a foreign worker in situations where medical expenses were incurred in the *absence of a tortfeasor*.[17] In other words, on a proper construction of the EFMA and the EFMR, an employer's obligation to pay the medical expenses incurred by its foreign employee *does not* extend to medical expenses occasioned by a third party tort.[18]

23 Furthermore, to support its claim for the medical expenses against the first respondent, the appellant placed reliance on *Sun Delong* in that a tortfeasor should be responsible for any loss arising from his tortious conduct, and on other policy arguments. The appellant further submitted that *Lee Chiang Theng* was distinguishable from the present case.

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15 ROP Vol III Part B, p 233.

16 ROP Vol III Part B, p 232.

17 Appellant's Skeletal Submissions at para 13.

18 Appellant's Skeletal Submissions at para 11.

Version No 1: 27 Oct 2020 (22:40 hrs)

Second respondent's submissions

24 The second respondent's position was that under the EFMA, an employer bore a duty to provide for its foreign employee's medical expenses. This duty extended to the "*full medical expenses* of the foreign worker" [emphasis in original][19] and therefore also included medical expenses necessitated by third party torts. An employer could not delegate or oust this duty by contract or other devices.[20] Thus, on the facts, the loan which KPW purportedly extended to the appellant was "void, illegal and unenforceable".[21] Rather, KPW's remedy was to claim against its own EFMA insurer,[22] and it only had itself to blame if it had not secured sufficient insurance coverage.[23]

25 In addition to the EFMA and the EFMR, the second respondent relied on the decision in *Lee Chiang Theng*, the rule against double recovery, and the policy argument that the courts should not sanction secret loans or advances that operated against the spirit of the EFMA. Finally, it was argued that *Sun Delong* should not be followed as the relevant authorities had not been placed before the court there.

The issue

26 The sole issue before this Court was whether the appellant was entitled to claim his medical expenses as a head of special damages against the first respondent whose tortious act occasioned such expenses, in light of the fact that the appellant was a foreign employee holding a work permit under the EFMA

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19 Second respondent's Skeletal Submissions at para 29(c).

20 Second respondent's Case at para 20.

21 Second respondent's Skeletal Submissions at para 18.

22 Second respondent's Case at para 13.

23 Second respondent's Case at para 25.

Version No 1: 27 Oct 2020 (22:40 hrs)

and thus a beneficiary of certain obligations relating to medical expenses and insurance imposed on his employer under the EFMR.

27 For ease of reference, we will use the term "foreign employee" to refer to a person, such as the appellant, who has been issued a work permit and is not a domestic worker under the EFMR.

The analysis

Standard of review

28 In an appeal against the decision of a High Court judge on an assessment of damages, this Court may vary the quantum of damages awarded by the judge only if it is shown that the latter: (a) acted on the wrong principles; (b) misapprehended the facts; or (c) had for these or other reasons made a wholly erroneous estimate of the damages (see *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439 at [11]; *Tan Boon Heng v Lau Pang Cheng David* [2013] 4 SLR 718 at [7]).

29 In the present appeal, as it was common ground that the sole issue in dispute concerned the propriety of the legal principles which the DJ and the Judge had applied in rejecting the appellant's claim for medical expenses, there was no dispute that the assessment was subject to appellate intervention.

The EFMA and the EFMR

30 The starting point of the analysis was the undisputed proposition that the first respondent would have been liable to compensate the appellant for the medical expenses incurred as a result of his negligence, if the appellant had *not* been a work permit holder under the EFMA. Indeed, this appeared to us to be an incontrovertible application of the compensation principle, which this Court

Version No 1: 27 Oct 2020 (22:40 hrs)

stated in the following terms in *ACES System Development Pte Ltd v Yenty Lily (trading as Access International Services)* [2013] 4 SLR 1317 (at [14]):

> 14 The compensation principle is a general principle which prescribes that when a tortious wrong is committed by the defendant, the plaintiff ought – as a matter of logic, commonsense as well as justice and fairness – to be put in the same position (as far as it is possible) as if the tort had not been committed. In the oft-cited words of Lord Blackburn in the House of Lords decision of *Livingstone v The Rawyards Coal Company* (1880) 5 App Cas 25 (at 39):
>
> > [W]here any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

31 In the present case, the first respondent's negligence in causing the accident was not disputed. Nor was the fact that the medical expenses concerned had been incurred as a result of the first respondent's negligence. The quantum of the medical expenses was also not challenged. In these circumstances, it was clear that the medical expenses claimed would ordinarily have been recoverable by the appellant from the first respondent. The question therefore was whether the EFMA and the EFMR altered the position such that a claim which would otherwise have been recoverable under common law became irrecoverable.

32 Before examining the legal issues arising from this appeal, we believe it will be useful to first understand the scheme of the EFMA and specifically how it is to work in the context of foreign employees who have incurred medical expenses occasioned with or without the involvement of a third party tortfeasor.

Version No 1: 27 Oct 2020 (22:40 hrs)

33 We should first point out that the EFMA does not *itself* specifically provide for an employer's duty to pay for the medical expenses or the related insurance of a foreign employee. Neither does it deal with the situation where the medical expenses were incurred as a result of a third party tort. However, the EFMA does empower the Controller of Work Passes ("the Controller") to impose conditions on the issuance of a work pass that relate to the employment of a foreign employee. The relevant part of s 7(4A) of the EFMA provides as follows:

> **Applications for work pass**
>
> […]
>
> (4A) For the purposes of this section, the Controller may, in relation to a foreign employee –
>
> > (*a*) impose conditions that the employer of the foreign employee shall comply with –
> >
> > > (i) relating to the employment of the foreign employee; or
> > >
> > > (ii) relating to the foreign employee, after the in-principle approval or the work pass relating to that foreign employee is cancelled or revoked or expires; and
> >
> > […]

34 The conditions that may be imposed are in turn prescribed in the EFMR. In the present case, the operative version of the EFMR was promulgated in 2012 by the Minister for Manpower in the exercise of his powers under s 29 of the EFMA. Section 29(1) of the EFMA empowers the Minister to make regulations for any purpose for which regulations may be made under the EFMA. Specifically, s 29(2)(*c*)(iv) of the EFMA states that the regulations made under s 29(1) may prescribe "any conditions (including any regulatory condition) subject to which an in-principle approval may be issued, or a work pass may be issued, renewed, or reinstated".

Version No 1: 27 Oct 2020 (22:40 hrs)

35 The work permit held by the appellant is one category of work passes that may be issued by the Controller (see r 2(1)(*a*) of the EFMR). Under r 4(3) of the EFMR, every work permit issued to a foreign employee (whose occupation is other than a "domestic worker") must be subject to conditions imposed on the employer as set out in Parts III and VI of the Fourth Schedule of the EFMR.

36 The Fourth Schedule of the EFMR is titled "Conditions and regulatory conditions of work permit". Two paragraphs in the Fourth Schedule of the EFMR were relevant for present purposes.

37 First, paragraph 1 of Part III of the Fourth Schedule ("Condition 1") provides that the employer must bear the cost of, *inter alia*, the foreign employee's medical treatment, subject to certain express exceptions. Part III is titled "Conditions to be complied with by employer of foreign employee who is not domestic worker, who is issued with work permit". The version of Condition 1 that was operative at the time of the accident (*ie*, November 2013) stated as follows:

> **Upkeep, maintenance and well-being**
>
> 1. The employer shall be responsible for and bear the costs of the foreign employee's upkeep (excluding the provision of food) and maintenance in Singapore. This includes the provision of *medical treatment*, *except that and subject to paragraphs 1A and 1B, the foreign employee may be made to bear part of any medical costs in excess of the minimum mandatory coverage* if —
>
> (*a*) the part of the medical costs to be paid by the foreign employee forms not more than 10% of the employee's fixed monthly salary per month;
>
> (*b*) the period for which the foreign employee has to pay part of any medical costs must not exceed an aggregate of 6 months of his period of employment with the same employer; and

Version No 1: 27 Oct 2020 (22:40 hrs)

> (*c*) the foreign employee's agreement to pay part of any medical costs is stated explicitly in the foreign employee's employment contract or collective agreement.
>
> [emphasis added]

38 There have been two amendments to Condition 1 since its promulgation in November 2012, but neither amendment was material to the present appeal.

39 The second relevant paragraph is Condition 4, which records the employer's obligation to provide medical insurance for the foreign employee's in-patient care and day surgery. Condition 4 falls under Part IV of the Fourth Schedule of the EFMR. Part IV is titled "Regulatory conditions to be complied with by employer of foreign employee who is not domestic worker, who is issued with work permit". Condition 4 states as follows:

> 4. The employer shall purchase and maintain medical insurance with coverage of at least $15,000 per 12-month period of the foreign employee's employment (or for such shorter period where the foreign employee's period of employment is less than 12 months) for the foreign employee's in-patient care and day surgery *except as the Controller may otherwise provide by notification in writing*. … [emphasis added]

40 Insofar as the exceptions to the employer's obligations in Conditions 1 and 4 are restrictive and exhaustively stipulated, we agreed with the Judge that the EFMR indicated a general rule that the employer of a foreign employee is to be responsible for the provision of the latter's medical treatment (see GD at [15]). In particular, we observed the following:

> (a) Condition 1 provides for an exception where the employee may be made to share the costs of his medical expenses. This exception had no application in the present case. That said, as the Judge also noted (see GD at [15]), the manner in which the condition is framed suggests that the general rule is for the employer to be responsible for the provision

Version No 1: 27 Oct 2020 (22:40 hrs)

of the foreign employee's medical treatment. More importantly, the exception limits only the *quantum* of the employer's obligation, but does not otherwise suggest that there is any qualifier on the scope or nature of the employer's obligations.

(b) Condition 4 similarly provides for an exception where the Controller may permit a derogation by notification in writing. This also did not apply to the present case. Notably, the fact that the medical insurance coverage must be at least $15,000 per year for each foreign employee does not mean that $15,000 is therefore the maximum extent of an employer's liability. It appears that in the event that the foreign employee's medical expenses exceed the amount insured, the employer remains responsible to cover the difference. Indeed, depending on the employer's own assessment of his needs, the EFMR does not prevent him from maintaining insurance coverage beyond the minimum amount to better protect himself against the medical expenses of his employees. Again, this suggested a broad and uncompromising scope of the employer's obligation to provide coverage for medical expenses *vis-à-vis* the foreign employee.

41 However, with respect, we did not think that the broad scope of an employer's obligations relating to a foreign employee's medical expenses would in itself have any bearing on the separate question of whether a victim-foreign employee could recover the medical expenses occasioned by a third party tort from the tortfeasor. The statutory provisions in the EFMA and the EFMR were designed to ensure that, *as between an employer and his foreign employee*, the employer bore the obligation to provide for the employee's upkeep and maintenance. There are sound policy reasons behind this position, not least for the protection of the foreign employee as well as to ensure that the

Version No 1: 27 Oct 2020 (22:40 hrs)

ultimate burden for the upkeep of foreign workers should not fall on the State (see [47] below).

42 However, nothing in the EFMA or the EFMR suggested that they were intended to abridge the recovery of medical expenses *as between a tortfeasor and the victim*. As we alluded to above, the employment and the tortious relationships are wholly distinct and they implicate different policies and principles.

43 Indeed, it could not have been Parliament's intention for the EFMA or the EFMR to affect not only the employer's obligations relating to a foreign employee's medical expenses, but also the entitlement of a victim to seek the recovery of such medical expenses from the tortfeasor at common law.

44 First, there was no indication that Parliament had contemplated a departure from the compensatory principle highlighted above at [30], specifically and only in relation to victims who were also foreign employees governed by the EFMA. The approach proposed by the second respondent would create a situation where a third party tortfeasor would be liable to the victim for general and all other heads of special damages, except medical expenses, simply because the victim held a work permit. In our view, it would be highly anomalous if the EFMA or the EFMR was so designed to put a tortfeasor who committed a tort against a foreign employee in a better position than a tortfeasor who committed a tort against any other person (such as a Singapore citizen, a Permanent Resident, or a tourist). If Parliament intended to abridge the victim-foreign employee's common law right to claim medical expenses from a third party tortfeasor, stronger and clearer statutory language would in our view be required.

Version No 1: 27 Oct 2020 (22:40 hrs)

45 Secondly, the effect of the second respondent's argument was that the EFMA and/or the EFMR operated to exonerate the first respondent of his common law obligation to pay for the appellant's medical expenses notwithstanding his negligence. This would suggest that the statutory framework was intended to operate to the benefit of a third party tortfeasor at the expense of the employers. This did not seem to us logical or consistent with the policy of the EFMA.

46 Thirdly, and relatedly, we also did not think that Parliament had intended the EFMA or the EFMR to place onto the employer an obligation to bear the medical expenses of the foreign employee with no prospect of recovery in circumstances where the medical expenses were occasioned by a tortfeasor. In such situations, the imposition of an obligation on the employer to bear the medical expenses with no right of recovery would serve no protective purpose *vis-à-vis* the victim-foreign employee.

47 Fourthly, the legislative history did not assist the second respondent. The EFMA can be traced back to the Regulation of Employment Act (Cap 272, 1985 Rev Ed) which was originally enacted in 1965 to regulate the employment of foreign workers and to aid in the management of Singapore's "economic and social burdens" (*Singapore Parliamentary Debates, Official Report* (22 December 1965) vol 24 cols 479-480 (Jek Yeun Thong, Minister for Labour)). In 1990, the Regulation of Employment Act was repealed and re-enacted as the Employment of Foreign Workers Act (Act 21 of 1990). The new legislation maintained the same broad objective as its predecessor – the regulation of the employment of foreign workers (see *Singapore Parliamentary Debates, Official Report* (4 October 1990) vol 56 col 449 (Lee Yock Suan, Minister for Labour)). In 2009, the EFMA was enacted to replace the Employment of Foreign Workers Act (Cap 91A, 1997 Rev Ed). The then-minister for Manpower, Dr Ng Eng Hen,

Version No 1: 27 Oct 2020 (22:40 hrs)

in moving the bill, stated that one objective of the EFMA was to "protect the well-being of foreign workers… [by] impos[ing] conditions on employers for their housing, remuneration and medical coverage" (*Singapore Parliamentary Debates, Official Report* (22 May 2007) vol 83 cols 928–931). Nothing in our survey of the legislative history suggested that it had been Parliament's intention for the EFMA not just to govern the incidents of the relationship between an employer and a foreign employee, but also that between a tortfeasor and the victim where that victim was a work permit holder.

48 In our judgment, where a third party tortfeasor was liable for the medical expenses incurred by a victim-foreign employee as a result of the former's tortious conduct, neither the EFMA nor the EFMR applied to exonerate the tortfeasor or to shift that duty onto the employer by precluding the victim's right of recovery against the tortfeasor. Indeed, nothing in the text, history, or purpose of the EFMA and the EFMR suggested that the legislation had any bearing on the recoverability of the medical expenses as between the victim and the tortfeasor. This submission stemmed from an unfortunate misunderstanding of the purpose and object of the EFMA and the EFMR. The duty of the employer to provide medical coverage for his foreign employee is an incident of the employment relationship and hence governed by the EFMA and the EFMR. This however was a distinct issue from the entitlement of the victim to seek recovery from the tortfeasor, which is an incident of the tortious relationship and hence governed by the common law.

49 Did the extension of the non-recourse loan by KPW to the appellant for the medical expenses in any way affect the above analysis? According to the second respondent, such a loan was contrary to the policy of the EFMA or the EFMR. The Judge observed that the law should not "sanction secret or covert 'loan' or 'advance' arrangements by employers with their employees which are

Version No 1: 27 Oct 2020 (22:40 hrs)

aimed at seeking further recovery notwithstanding the clear scope of the employers' statutory duties under the EFMA" (see GD at [25]). With respect, while we did not disagree with the Judge's view as regards the sanctity of the EFMA obligations, in our view, that concern was not engaged in the present case. The fact that the loan was made on a *non-recourse* basis was material. Insofar as the victim-foreign employee's liability to make repayment under the non-recourse loan was contingent on *actual* recovery by him of the medical expenses from the tortfeasor, there was no material risk that the burden of any unrecovered medical expenses might eventually fall on him. In any event and to the extent that the victim-foreign employee could not recover any part of the medical expenses from the tortfeasor, for instance if the tortfeasor was bankrupt or if the victim was found to have been contributorily negligent, the employer has no right to enforce the loan against the victim-foreign employee given its non-recourse nature. As such, the protective policy of the EFMA and the EFMR would not be infringed by the provision of such non-recourse loans.

The case law

50 The parties principally relied on two cases which dealt with the scope of the employer's obligations under EFMA and the EFMR, albeit in support of diametrically opposing interpretations – see *Lee Chiang Theng* and *Sun Delong*. Significantly, both the DJ and the Judge relied on *Lee Chiang Theng* and distinguished *Sun Delong*. A closer examination of these two decisions is therefore essential to evaluate their relevance, if any, in the context of the present case.

Lee Chiang Theng

51 The second respondent placed heavy reliance on the decision of VK Rajah JA in *Lee Chiang Theng*. There, the offender faced a total of

Version No 1: 27 Oct 2020 (22:40 hrs)

100 criminal charges under the EFMA for*, inter alia*, failing to pay the salaries of his foreign employees on time and employing foreign workers without valid work permits. The matter came before Rajah JA as a Magistrate's Appeal against the sentence imposed by the district court.

52 Rajah JA prefaced his analysis of the case with "some observations on the legislative framework governing the employment of foreign workers in Singapore" (at [7]). He briefly traced the legislative history of the EFMA and summarised it as follows (at [11]–[12]):

> 11 Under the EFMA, *employers owe heavy responsibilities to their foreign workers*. The bulk of these responsibilities are set out in the First Schedule to the Employment of Foreign Manpower (Work Passes) Regulations (Cap 91A, Rg 2, 2009 Rev Ed). Pursuant to s 22(1)(a) of the EFMA, the contravention of any condition of a foreign worker's work pass attracts sanctions as specified in the EFMA. Part II of the said Schedule ("Part II") is of greatest relevance to the present case as the foreign workers concerned here are not domestic workers. In brief, under Part II, employers are responsible for, *inter alia*:
>
> > (a) the foreign employee's upkeep and maintenance in Singapore, including the provision of medical treatment (subject to certain conditions) (para 3 of Part II);
> >
> > (b) providing safe working conditions and taking measures that are necessary to ensure the safety and health of the foreign employee at work, as well as providing acceptable accommodation as prescribed by laws, regulations, directives, guidelines, circulars and other government instruments (para 4 of Part II);
> >
> > (c) purchasing and maintaining medical insurance (para 5 of Part II); and
> >
> > (d) paying the salary (including allowances) due to the foreign employee not later than seven days after the last day of the salary period (which must not exceed one month) (para 6 of Part II), regardless of whether there is actual work for the foreign employee (para 7 of Part II).
>
> 12 With this *unambiguous and non-delegable* legislative framework of employer responsibilities in mind, I turn next to examine the pertinent background facts of the present case.

Version No 1: 27 Oct 2020 (22:40 hrs)

[emphasis added]

53 The second respondent asserted that *Lee Chiang Theng* stood for the proposition that an employer's obligations under the EFMA, including the payment of medical expenses for its foreign employees, were "non-delegable".[24] On the strength of that proposition, the second respondent submitted that to permit recovery would undermine the non-delegable statutory duties imposed on the employer under the EFMA.

54 When read in its proper context, it was clear to us that *Lee Chiang Theng* had no immediate relevance to the present appeal.

55 First, *Lee Chiang Theng* concerned a criminal case involving the neglect and abuse by an employer of its foreign employees. The court's concern was with the proper sentencing approach in dealing with such errant employers, and not with the right of recovery of medical expenses. For that reason, the issue of medical expenses or insurance did not arise for consideration in *Lee Chiang Theng*. Nor were Conditions 1 and 4 brought to the attention of the court.

56 Secondly, and relatedly, in setting out the "unambiguous and non-delegable legislative framework of employer responsibilities", *Lee Chiang Theng*'s focus was singularly on the relationship between an employer and the foreign employee. There was no third party tortfeasor in that case, and neither the incidents of the relationship between a tortfeasor and the victim, nor the interaction between the tortious and the employment relationships, arose for consideration.

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[24] Second respondent's Case at para 17.

Version No 1: 27 Oct 2020 (22:40 hrs)

57 Thirdly, it appeared that the parties had placed an unintended meaning on the term "non-delegable" that was used in *Lee Chiang Theng*. In the true sense of the term "non-delegable" in the area of tort law, it refers to a situation where one would be held liable in tort "even if he had non-negligently delegated the performance of certain tasks to an independent contractor", so long as that independent contractor had been negligent in performing those tasks (see, *eg*, *Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd and another* [2016] 4 SLR 521 at [24]; *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 at [80]). In *Lee Chiang Theng*, the issue of delegability was raised in a completely different context. It was not used as a term of art in the legal sense in tort law but rather as a response to the factual assertion by the employer-offender in mitigation that his failure to pay the foreign employees' wages was due to the failure of the shipyard which was contractually responsible for providing jobs to the employees (see *Lee Chiang Theng* at [22]). It was in this context that Rajah JA had used the term "non-delegable" to describe the responsibilities owed by the employer to his foreign employees. However, the present case did not involve holding KPW liable notwithstanding the *delegation* of obligations to an independent contractor. Rather, the issue was simply whether KPW's obligations as an employer to provide for the appellant's medical expenses precluded the appellant from recovering such medical expenses against the third party tortfeasor, *ie*, the first respondent. On the facts, the question of delegability did not even arise.

58 In the circumstances, we were of the view that the second respondent's reliance on the term "non-delegable" in *Lee Chiang Theng* was misplaced. For the same reasons, we respectfully disagreed with the Judge's reasoning that "the [DJ] was properly guided by Rajah JA's clear and unequivocal statement that

Version No 1: 27 Oct 2020 (22:40 hrs)

the EFMA contains an 'unambiguous and *non-delegable* legislative framework of employer responsibilities'" [emphasis in original] (see GD at [19]). That holding in *Lee Chiang Theng* was not incorrect only insofar as it concerned the obligations of the employer *vis-à-vis* the foreign employee under the EFMA and the EFMR but no more.

Sun Delong

59 On the appellant's part, he relied on the High Court decision in *Sun Delong*. The appellant argued that *Sun Delong* stood for the proposition that the EFMA did not preclude a victim-foreign employee from exercising his rights against the tortfeasor for the recovery of medical expenses as special damages under common law.[25]

60 In *Sun Delong*, the plaintiff was a Chinese national employed on a work permit in Singapore. He was knocked down by a lorry while cycling outside the course of his employment. He suffered injuries and claimed against the lorry driver (who was the defendant) for general and special damages. One head of special damages claimed was the medical and nursing care expenses he incurred in the amount of $84,954.64. Out of this amount, his employer paid the majority sum of $84,204.16, while the plaintiff paid the remainder.

61 Two points in *Sun Delong* were said to be relevant in the present case.

62 First, the defendant argued that the plaintiff should not be allowed to claim the medical expenses from him since it was the plaintiff's employer's statutory obligation to pay for such expenses under Condition 1 of the EFMR. Choo J did not accept this argument and instead held that Condition 1 imposed

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[25] Appellant's Case at paras 32–34.

Version No 1: 27 Oct 2020 (22:40 hrs)

an obligation on the employer to provide for the foreign employee's medical expenses *only* in relation to his regular upkeep and maintenance, and not for serious injuries arising from the tortious conduct of third parties (*Sun Delong* at [25]):

> … According to counsel for the Defendants, pursuant to Condition 1, the employer of a foreign employee is obliged to pay for whatever medical treatment the employee undergoes while he is in its employment, even in cases where the medical treatment was necessitated by injury not suffered in the course of his employment but by the tortious conduct of a third party. I am not persuaded. It is clear from the wording of Condition 1 that it imposes an obligation for employers to provide for the "medical treatment" of their foreign employees but only to the extent that it is necessary for their "upkeep and maintenance". *Employers must provide "medical treatment" to maintain the health and well-being of their foreign employees, but when their employees, like Sun, suffer serious injuries* ***due*** *to the tortious conduct of third parties, it cannot be the case that liability to pay for treatment for those injuries lies with the employers while the tortfeasor(s) are absolved from their responsibility to pay damages for the wrong that they have done.* In such situations, the medical treatment required by the employee goes beyond that for his regular "upkeep and maintenance" and, accordingly, falls outside the scope of Condition 1. [emphasis added in italics and bold italics]

63 Second, the plaintiff in *Sun Delong* relied on *Donnelly v Joyce* [1974] 1 QB 454 ("*Donnelly*"). That case principally concerned the question whether an infant-plaintiff who was injured by the defendant could bring a claim for his mother's loss of wages when the mother was not a party to the action. The infant-plaintiff's post-accident nursing care was provided by his mother. She had to give up her part-time job to care for the infant-plaintiff. The claim for the mother's lost wages was allowed because the court found that the infant-plaintiff's need for the nursing services was caused by the defendant's wrongdoing. In that sense, the loss was the infant-plaintiff's loss. It could be said that *Donnelly* contravened the double recovery rule because the effect of the decision was that the infant-plaintiff had the benefit of both the mother's

Version No 1: 27 Oct 2020 (22:40 hrs)

nursing care as well as the award of special damages for the lost wages arising from the provision of the same nursing care by the mother. Nonetheless, that was not considered to be a legal impediment to the recovery of the lost wages.

64 By the same token, in *Sun Delong*, it was argued by the plaintiff that the fact that the employer had paid the medical expenses should not change the characterisation of these expenses as the employee's loss because the medical treatment was occasioned by the tortfeasor's wrongdoing. Although Choo J noted that the characterisation of the infant-plaintiff's loss in *Donnelly* had been heavily criticised as "artificial", he recognised that part of its ratio had been followed by this Court in *Ang Eng Lee and another v Lim Lye Soon* [1985-1986] SLR(R) 931 ("*Ang Eng Lee*") in awarding an infant-plaintiff the medical expenses that were paid by his father as they "arose out of [the infant-plaintiff's] need for the services" (see *Ang Eng Lee* at [11]). After considering *Donnelly* and *Ang Eng Lee*, Choo J explained when, in his view, the double recovery rule would be engaged (at [28]):

> … Beyond the specific context where the provider is a family member or close relative of the plaintiff, I am of the view that the plaintiff should not be allowed to claim from the tortfeasor(s) for needs that have already been provided for by a third party, *if he is under no obligation to repay the provider*. In such cases, I see no reason to depart from the rule against double recovery. [emphasis added]

65 It is pertinent to note that Choo J did not draw any distinction between a *legal* and a *moral* obligation to repay. On the facts, Choo J found that the rule against double recovery was not engaged. This was because even though the plaintiff's employer had paid for the plaintiff's medical bills, the plaintiff remained under an obligation to repay the sums to the employer once he had recovered the same from the defendant. Consequently, Choo J allowed the plaintiff's claim against the defendant for the entire sum of the medical

Version No 1: 27 Oct 2020 (22:40 hrs)

expenses, but stipulated (a) a condition that the plaintiff was to reimburse his employer; and (b) a direction to the plaintiff's counsel to inform the employer of the award and the basis on which it was made (see *Sun Delong* at [29]). We will elaborate on the relevance of the double recovery rule at [82] to [88] below.

66 We have explained our approach in construing the scope and content of the EFMA and the EFMR at [48] above. Subject to one caveat (see [68]–[69] below), we agreed with Choo J that Condition 1 did not preclude an employee from recovering the medical expenses occasioned by a third party tort from the tortfeasor. Although Choo J did not expressly refer to Condition 4 or *Lee Chiang Theng* (this omission being the basis on which the DJ and the Judge distinguished *Sun Delong*), this did not materially affect the probative force of his conclusion since, as we have observed, these authorities were themselves of no immediate relevance to a situation where there were two distinct relationships (*ie*, the employment and the tortious) to be considered.

67 The Judge also sought to distinguish *Sun Delong* on the basis that it concerned injuries suffered *outside* the course of employment, whereas the present case concerned injuries suffered *within* the course of employment (see GD at [17]). With respect, we did not agree that *Sun Delong* could be confined to injuries suffered outside the course of employment. The EFMA and the EFMR, which the court in *Sun Delong* considered, provide for the employer's general obligations *vis-a-vis* the foreign employee and do not distinguish between obligations applicable (or injuries suffered such as s 14(2) of the WICA) within and outside of the course of employment.

Version No 1: 27 Oct 2020 (22:40 hrs)

68 Having said that, we respectfully disagreed with the distinction drawn by Choo J in *Sun Delong* at [25] between serious injuries caused with and without the involvement of a third party tortfeasor:

> … It is clear from the wording of Condition 1 that it imposes an obligation for employers to provide for the "medical treatment" of their foreign employees but only to the extent that it is necessary for their "upkeep and maintenance". Employers must provide "medical treatment" to maintain the health and well-being of their foreign employees, but *when their employees… suffer serious injuries due to the tortious conduct of third parties*, it cannot be the case that liability to pay for treatment for those injuries lies with the employers while the tortfeasor(s) are absolved from their responsibility to pay damages for the wrong that they have done. *In such situations, the medical treatment required by the employee goes beyond that for his regular "upkeep and maintenance" and, accordingly, falls outside the scope of Condition 1*. [emphasis added]

69 The above holding suggested that the medical expenses incurred by a foreign employee would fall outside the scope of Condition 1 if they were *occasioned by a third party tortfeasor*. This was the basis of the appellant's argument in this appeal (see [22] above). While we allowed the appeal, we did not agree with this submission or with this holding of *Sun Delong*. At [42]–[48] above, we have explained the scheme of the EFMA together with the EFMR. The applicability of Condition 1 (and other obligations in the EFMA and the EFMR) was *not* dependent on the presence or absence of any third party tortious conduct. Rather, these obligations independently applied in either case as between the employer and the victim-foreign employee; the point was simply that they had no bearing on the latter's entitlement to recover the medical expenses occasioned by a third party tort from the tortfeasor.

Lim Kiat Boon

70 In addition to *Lee Chiang Theng*, the second respondent also relied on the Malaysian case of *Lim Kiat Boon & ors v Lim Seu Kong & anor* [1980]

Version No 1: 27 Oct 2020 (22:40 hrs)

2 MLJ 39 ("*Lim Kiat Boon*"). In that case, the victim-employee suffered injuries as a result of the defendant's negligence. During the ensuing six months of incapacity, the plaintiff's employer settled the plaintiff's hospital bills and paid his salary and commissions even though he was unfit for work. The defendant argued that the medical expenses, salary, and commissions paid for by the plaintiff's employer should be deducted from the plaintiff's claim against the defendant.

71 Azmi J rejected the defendant's argument. In doing so, he first surveyed the relevant authorities and then stated:

> It seems to me that the proposition that there should be no reduction where the money is given gratuitously or advanced by a sympathetic employer is based on the principle that the generosity of others is *res inter alios acta* and not something from which the wrongdoer should reap the benefit. But where the injured plaintiff receives the money as of right from the employer either under statutory or contractual obligations, the money received is deductible. …

72 Having laid down the general proposition that statutorily or contractually obligated payments by an employer to a victim-employee ought not to be recoverable by the latter against the tortfeasor, Azmi J then reinforced his proposition with two authorities:

(a) *Browning v The War Office & anor* [1963] 1 QB 750 CA ("*Browning*") where Lord Denning MR held that a plaintiff who had been paid his wages as of right by his employer during his incapacity could not claim again the self-same wages from the tortfeasor but must instead give credit for the wages that he had received.

(b) *Receiver for the Metropolitan Police District v Croydon Corp* [1957] 2 QB 154 where the court held that if an employer was statutorily

Version No 1: 27 Oct 2020 (22:40 hrs)

> obliged to pay a victim-employee his wages whether he was fit for duty or not, the victim-employee would have suffered no loss in relation to the wages and could recover no damages in this regard from the tortfeasor.

73 On the facts, Azmi J found that all three payments by the employer to the plaintiff – the medical expenses, the salary, and the commissions – had been gratuitously paid by the "sympathetic employer", with an expectation that the payments should be refunded if the plaintiff succeeded in his claim against the defendant. Accordingly, applying the proposition summarised above (see [71]–[72]), Azmi J held that the principle in *Browning* did not apply and that the plaintiff could recover these payments from the defendant, albeit on the condition that he should thereafter pay them over to his employer.

74 In the hearing before us, counsel for the second respondent relied on *Lim Kiat Boon* in support of the argument that since the EFMA and the EFMR *statutorily obliged* KPW to pay for the appellant's medical expenses, these expenses could not be recovered by the appellant against the first respondent.

75 At the outset, we noted that *Lim Kiat Boon* had been cited in at least two local decisions where this distinction between gratuitous and obligated payments was applied.

76 The first case was *Ong Jin Choon v Lim Hin Hock and another* [1988] 1 SLR(R) 559 ("*Ong Jin Choon*"). Here, the plaintiff suffered injuries as a result of a collision between a motorcycle ridden by the first defendant and a taxi driven by the second defendant. He sued the two defendants in the tort of negligence. One issue that arose was whether the plaintiff suffered any loss of earnings due to the long period of incapacity during which he could not work

Version No 1: 27 Oct 2020 (22:40 hrs)

for his two employers (of which he was the director) but continued to draw salaries from them. The plaintiff claimed that he drew the salaries as he required them for his livelihood and expenditure, and that he would refund to the companies any amount awarded to him in respect of such loss.

77 In the High Court, L P Thean J (as he then was) cited, amongst others, *Lim Kiat Boon* and held that no credit ought to be given for the salaries drawn by him in assessing his loss of earnings, on the basis that (i) he was not entitled to receive the salaries as of right; (ii) it could not be said that the companies had paid him the salaries on an *ex gratia* basis; and (iii) the salaries "could be regarded as advances made to him by the companies in the form of a loan or moneys wrongfully taken by a director without any authority" (at [12]). Notably, the court accepted that if the plaintiff had received the salaries *as of right* under his contracts of service with the companies (assuming there were such contracts), he would *not* be entitled to recover any loss of earnings from the defendants "as no loss [would have] been suffered" (at [8]). On the other hand, if the payments had been made on an *ex gratia* basis, such payments would not be taken into account in assessing his loss of earnings (at [9]). The High Court's decision was affirmed on appeal (see *Lim Hin Hock v Ong Jin Choon and another and another appeal* [1991] 1 SLR(R) 381). However, the issue on appeal centred on whether, *on the evidence*, the plaintiff had received his salaries as of right. Nothing was said or argued about the underlying legal proposition that a distinction should be drawn between gratuitous and obligated payments.

78 The second case was *Au Yeong Wing Loong v Chew Hai Ban and another* [1993] 2 SLR(R) 290 ("*Au Yeong Wing Loong*"). In this case, the plaintiff was severely disabled due to a motor accident caused by the first defendant who was an agent of the second defendant. The plaintiff claimed

Version No 1: 27 Oct 2020 (22:40 hrs)

pre-trial loss of earnings which included salaries and bonuses already paid to the plaintiff by his employer, which was a family concern, during the period of his incapacity. K S Rajah JC cited *Lim Kiat Boon* and *Ong Jin Choon* and held (at [32]–[33]) that the plaintiff was not entitled to recover the wages from the tortfeasor because he had been paid as of right under his employment contract and was under no legal obligation to refund his employer the sums:

> 32 In this case, the business records were produced. The records and IR 8A form show that the plaintiff was paid because of his contractual right. The plaintiff is under no legal obligation to refund to his employer the amounts he received as wages. I am unable to find that his employer, a family concern, expects the wages to be repaid, notwithstanding the oral evidence that was given before me. Apart from being against the tradition of family concerns, the father [of the plaintiff], who is the managing director, did not leave me with the impression that he would hold out his hands and ask his son to "pay up" for or receive the money, even if it be on behalf of the company, the wages paid to his ailing son who was his employee under a contract of service. The claw back of sums paid will, I find not take place and the fundamental principle that damages are compensatory must be applied.
>
> 33 The salary was not paid on an *ex gratia* basis for it to be regarded as a loan or moneys advanced to the plaintiff. I find the money was paid as wages and must remain paid as wages. The plaintiff is not entitled to recover the full wages and CPF contributions that he was paid…

79 We should note two points about this case. First, the appeal against this decision apparently led to a variation of the order of court but no written grounds of decision were rendered by the Court of Appeal. Secondly, there was no argument regarding, nor did the court consider the possibility of, a direction by the court that, upon recovery, repayment be made by the plaintiff-employee to his employer of any salaries or bonuses that had been paid.

80 Taking the cases together, we were of the view that *Lim Kiat Boon* could not assist the second respondent. In *Lim Kiat Boon*, the court drew a distinction

Version No 1: 27 Oct 2020 (22:40 hrs)

between "gratuitous" payments and "obligated" payments and held that only the former was recoverable from the tortfeasor based on the principle of *res inter alios acta*. It appeared from the cases cited above that the distinction had since been adopted by local courts. With respect, however, we had serious reservations about the correctness of such a distinction. We need not come to a concluded view on this issue at present given our decision (at [81] below) that the distinction should not, in any event, apply to the recovery of *medical expenses* occasioned by a third party tort. Nonetheless, for completeness, we briefly explain our reservations:

(a) First, as a matter of principle, we did not think that the question of whether a payment was gratuitous or obligated should affect the recoverability of the victim's otherwise legitimate claim from the tortfeasor. It seemed to us that the principal concern in these cases was to ensure that there was no double recovery by the victim. That concern can be adequately addressed by appropriate directions of the court granting the relief. Further, if, as Azmi J noted in *Lim Kiat Boon*, recovery of a gratuitous payment was permissible because the tortfeasor should not "reap the benefit" of that payment, there was no reason why the tortfeasor should be entitled to the benefit of an obligated payment when he was never intended to be the beneficiary of that obligation in the first place. In this regard, to bar recovery on the basis of the distinction drawn in *Lim Kiat Boon* may unwittingly and unduly benefit a tortfeasor.

(b) Secondly, the two principal authorities relied on by Azmi J in *Lim Kiat Boon* were *Browning* and the 12th and 13th editions of *McGregor on Damages*. However, as the 19th edition of the work noted, the position *vis-à-vis* obligated payments of medical expenses made by

Version No 1: 27 Oct 2020 (22:40 hrs)

third parties including employers may no longer be the same (see Harvey McGregor, *McGregor on Damages* (Sweet & Maxwell, 19th Ed, 2014) ("*McGregor on Damages*") at para 38-219):

> Where the claimant's medical expenses are paid by employer, husband or parent upon whom rests an obligation to pay them, whether by contract or under the general law, it once seemed that the claimant could not include these expenses within his or her claim for damages. … Now, however, the courts have inclined to the view that recovery for such medical expenses should go to the wife, child and servant themselves, a solution stemming primarily from the decision in *Donnelly v Joyce*…

There may well be further intricacies to this issue. In this regard, it is notable that *Browning* was decided in 1963 (see [72(a)] above) and chronologically preceded *Donnelly*, which was decided in 1974 (see [63] above). However, *Donnelly* did not cite or discuss *Browning*. Further, it appeared that *Donnelly* itself was overruled by the House of Lords in *Hunt v Severs* [1994] 2 AC 350, a decision which was subject of much criticism and later recommended for statutory reversal by The Law Commission in *Damages for Personal Injury: Medical, Nursing and other Expenses; Collateral Benefits* (November 1999). Nevertheless, the point remained that the basis of the decision in *Lim Kiat Boon* may warrant a revisit in the light of the changes to English law since then.

(c) Thirdly, insofar as the two local decisions were concerned, no substantive arguments had been made in *Ong Jin Choon* or in *Au Yeong Wing Loong* about the distinction drawn in *Lim Kiat Boon*. The courts therefore did not have the opportunity to consider the correctness of the distinction or the appropriateness of its adoption in Singapore.

Version No 1: 27 Oct 2020 (22:40 hrs)

81 In any event, we were of the view that the distinction raised in *Lim Kiat Boon* between gratuitous and obligated payments did not apply in the present case. In this regard, it was notable that the authorities cited by Azmi J in *Lim Kiat Boon* uniformly concerned the issue of whether a deduction should be made from the victim-employee's claim against the tortfeasor for the wages or its equivalent (such as bonuses) that had been paid to him by his employer. Significantly, none of the cases or academic texts cited dealt with the deductibility of medical expenses paid by the employer. Therefore, *even if* the distinction between gratuitous and obligated payments was tenable in the context of wages or its equivalent, there was no apparent basis for Azmi J to extend it to medical expenses. In the same vein, it was notable that the two local decisions in *Ong Jin Choon* and *Au Yeong Wing Loong* also concerned the deductibility of wages and bonuses paid by the employer to the victim-employee, rather than that of medical expenses (see [76] and [78] above). In our judgment, this was a crucial distinction. While the victim-employee would have received his wages and its equivalent even if the tort had not occurred, the same cannot be said about the payments of medical expenses on his behalf, such as those made by KPW to NUH on the appellant's behalf. Unlike the payment of wages, it was undeniable that the payment of the medical expenses would *not* have been made or even needed if the tort had not occurred. In this sense, there was a closer and more direct nexus between the tort and the payment of medical expenses than between the tort and wages and its equivalent. This, in our view, justified allowing the recovery of medical expenses by a victim-employee against a third party tortfeasor even if they had been paid by the employer, regardless of whether such payments were made under an obligation or otherwise, *provided* adequate safeguards have been put in place to prevent double recovery.

Version No 1: 27 Oct 2020 (22:40 hrs)

The rule against double recovery

82 This discussion of *Sun Delong* and *Lee Kiat Boon* above leads to the final argument raised by the second respondent – the rule against double recovery. This was also one of the principal concerns of the Judge in deciding to uphold the DJ's decision. In particular, the Judge was of the view, in which the second respondent joined on appeal, that if the appellant's claim for medical expenses against the first respondent was allowed, it may result in double recovery in two senses:

(a) double recovery for the appellant if the first respondent was ordered to pay the appellant the medical expenses that had already been paid for by KPW; and

(b) double recovery for KPW if the appellant's claim against the first respondent is allowed with a direction for the appellant to repay KPW, and KPW also made a claim on its EFMA insurance for the same.

83 At the outset, we make the point that while the rule against double recovery is important and well-established, it is not necessarily paramount in all situations. Under the doctrine of collateral benefits, even if the plaintiff's losses had, in full or in part, been recouped by reason of collateral benefits conferred upon him by parties unrelated to the tortfeasor, the plaintiff may nonetheless in some instances be allowed to retain those collateral benefits *and* make a claim for the full extent of his loss from the tortfeasor without an equivalent deduction to account for the collateral benefit. One example of such a collateral benefit would be monies paid out under an insurance policy: generally, these are not deductible from the plaintiff's claim because "even if in the result the [plaintiff] may be compensated beyond his loss, he has paid for the accident insurance with his own moneys, and the fruits of this thrift and foresight should in fairness

Version No 1: 27 Oct 2020 (22:40 hrs)

enure to his and not to the defendant's advantage" (*McGregor on Damages* at para 38-148). However, the precise nature, scope and content of this doctrine are admittedly vexed. As Belinda Ang J opined in *Lo Lee Len v Grand Interior Renovation Works Pte Ltd and others* [2004] 2 SLR(R) 1 ("*Lo Lee Len*") (at [33]):

> … [T]here was no universal principle as to deductibility of collateral benefits at common law. Whilst various benefits accruing to an injured victim have been taken into account, others have not, and it would seem that the common law has treated this matter as one depending on justice, reasonableness and public policy. …

84 Similarly, even though the term "collateral benefit" was not expressly referred to in *The MARA* [2000] 3 SLR(R) 31, in that case, this Court elaborated on the exceptions to the rule against double recovery in the following terms:

> 28 There are two established exceptions to the basic rule against double recovery. The first is where a plaintiff recovers any moneys under an insurance policy for which he has paid the premiums, and the insurance moneys are not deductible from damages payable by the tortfeasor… The second is where the plaintiff receives money from the benevolence of third parties prompted by sympathy for his misfortune, as in the case of a beneficiary from a disaster fund, and the amount received is again to be disregarded…
>
> 29 We have an observation on these two exceptions. The number of such exceptions is by no means closed, and there are circumstances where payments made to the injured plaintiffs do not fall precisely and squarely within either of the exceptions but are nonetheless not deductible in the assessment of recoverable loss. It should be borne in mind that the distinction between what is deductible and what is not is at times certainly not clear cut, and in between them are borderline cases which essentially turn on the special facts. …

85 In reviewing *Sun Delong* and *Lim Kiat Boon*, we have alluded to the relevance of the rule at [63], [64], [80], and [81] above. It bears mention that in both *Sun Delong* and *Lim Kiat Boon* where the courts had allowed the recovery by a victim-employee from the tortfeasor of payments that had been made by

Version No 1: 27 Oct 2020 (22:40 hrs)

his employer, there was in fact *no* risk of double recovery. In both cases, the court imposed a condition for the repayment of the recovered expenses to the respective employers. In our view, the approach we have set out at [48]–[49] above in relation to the employer's liability similarly did not offend the rule against double recovery:

(a) From the *victim-foreign employee's perspective*, there was no material chance that he would obtain double recovery of the medical expenses. This was because the employer's payment of his medical expenses would typically be on the basis of an agreement that he would subsequently repay the employer the payments made, should he succeed in his claim for medical expenses against the tortfeasor. In any event, the court in granting the victim-foreign employee's claim for medical expenses against the tortfeasor would, and should as a matter of course, require an undertaking or make a direction that the victim-foreign employee was to return the recovered medical expenses to the employer. On a practical level, given the weak financial position of foreign employees in similar situations, any recovery action would likely be brought by the employer in the name of the victim-foreign employee, thereby effectively eliminating the risk of double recovery to the victim-foreign employee.

(b) Similarly, the spectre of double recovery *to the employer* was more illusory than real. The second respondent sought to stress the fact that the employer could, apart from obtaining repayment from the victim-foreign employee, make a claim on his EMFA insurance policy. There were several reasons why this argument had no merit. First, the employer was strictly speaking not a party to this action and therefore the possibility that a claim might have been made by the employer

Version No 1: 27 Oct 2020 (22:40 hrs)

> against the insurer was at best speculative. Second, whether the employer was able to claim reimbursement from his EFMA insurer in such a situation was a matter between the employer and its insurer. If there was fraud or falsification, other consequences including criminal liability may follow. Premiums may also be adjusted if the employer made a claim on his EFMA insurance even though he could have or did in fact recover the medical expenses upon the victim-foreign employee's successful suit against the tortfeasor. On the facts, there was nothing to suggest that KPW would achieve double recovery if the appellant was allowed to recover his medical expenses against the first respondent.

86 For these reasons, we were not persuaded that allowing the appellant's claim for medical expenses against the first respondent would result in any material risk of double recovery for either the appellant or his employer, KPW. Rather, it appeared apparent to us that *disallowing* the appellant's claim would in fact lead to an anomalous situation where (a) an employee suffered the consequences of the clear and undisputed fault of the tortfeasor; and (b) the tortfeasor would be placed in a better position if he committed a tort against a foreign employee than if he did against any other persons.

87 For completeness, we should add that our decision would also not expose the tortfeasor (or his insurer) to *double liability* for the medical expenses. This was because the victim-foreign employee's suit against the tortfeasor would recover all of the damages which a victim would ordinarily be able to receive from the tortfeasor. Insofar as the medical expenses were concerned, repayment by the victim-foreign employee to his employer would thereafter be a matter between the employer and the victim-foreign employee. If the victim-foreign employee failed or refused to do so, the employer's remedy lies

Version No 1: 27 Oct 2020 (22:40 hrs)

against the victim-foreign employee and not the tortfeasor. Given our observation at [85(a)] above, this difficulty would rarely, if ever, arise.

88 Therefore, we saw no grounds to believe that our approach would result in double-exposure of the tortfeasor, whether he was insured or otherwise, to the same liability.

Summary of considerations

89 Based on our decision above, in a similar situation where injuries are caused to a foreign employee by a third party tortfeasor and medical expenses are occasioned, stakeholders may wish to bear in mind the following considerations:

(a) The employer bears a broad and uncompromising duty to provide for the upkeep and maintenance of his foreign employees. This includes the payment of the employee's medical expenses and the provision of medical insurance, to the extent required by the EFMA and the EFMR, *even if* such expenses were occasioned by a third party tort. In this regard, there is also no distinction between serious and non-serious injuries or between injuries sustained within or outside the course of employment.

(b) The employer's obligations under the EFMA and the EFMR relating to the foreign employee's medical expenses and insurance, however, have no bearing on the separate question of whether the foreign employee can recover the medical expenses occasioned by a third party tort from the tortfeasor.

Version No 1: 27 Oct 2020 (22:40 hrs)

(c) The employer may pay for the medical expenses of the foreign employee on the basis of a non-recourse loan agreement providing that the employee will repay the medical expenses to the employer, should the expenses be subsequently recovered from the tortfeasor. The non-recourse basis of the loan means that if the employee's recovery of the full extent of the medical expenses occasioned from the tortfeasor is practically or legally limited, he needs only to pay over to the employer whatever is actually recovered. The shortfall will be borne by the employer to the extent that it complies with the limits prescribed in Condition 1. Such an agreement will not be contrary to the provisions or the policy of the EFMA and the EFMR, and will in fact mitigate the risk of double recovery for the foreign employee.

(d) On account of the rule against double recovery, any actual recovery of medical expenses should be repaid by the foreign employee to the employer. In this regard, apart from any non-recourse loan agreement that the parties may have entered into, the court granting the recovery should, as a matter of course, extract an undertaking or make a direction that the foreign employee is to pay the medical expenses recovered over to his employer and for the counsel representing the foreign employee to inform the employer of the outcome and the basis on which the award is made.

90 Given the myriad of factual situations that may arise, there may well be cases for which the above considerations may not be entirely appropriate or adequate. Nevertheless, it is hoped that this decision will provide some useful guidance as to the courts' approach in situations involving the interaction between the two distinct legal relationships (*ie*, the employment and the tortious

Version No 1: 27 Oct 2020 (22:40 hrs)

relationships) each of which involve different policy considerations and are governed by different legal principles.

Concluding Remarks

91 For this appeal, there was no evidence whether the suit was funded by the employer or the appellant as this point was not raised at all. We should observe that in a situation where the victim-foreign employee is not in a financial position to bring a suit against the tortfeasor, it appears to us that maintenance and champerty would *not* be obstacles to the provision of litigation financing by the employer, insofar as the employer, having made the payments for the medical expenses, would have a genuine, commercial, and substantial interest in the victim-foreign employee's enforcement of his claim against the tortfeasor.

92 For reasons which we have explained, at the conclusion of the oral hearing on 17 January 2018, we allowed the present appeal with costs fixed at $23,000 inclusive of disbursements. We also directed that upon recovery of the medical expenses in question from the second respondent, the appellant was to pay the sum over to his employer, KPW.

93 Subsequently, in the course of preparing these grounds, the appellant's counsel ("AC") and the second respondent's counsel wrote in to the Court on 16 and 18 April 2018 respectively. Their letters raised two issues:

(a) First, the AC stated that the appellant was no longer in Singapore and that his bank account in Singapore had been closed. As such, it sought consequential orders that the judgment sum awarded in favour of the appellant be paid to the solicitors for the appellant. The parties were

Version No 1: 27 Oct 2020 (22:40 hrs)

at variance as to whether the consent of the Public Trustee ("PT") was required.

(b) Second, the AC sought the Court's clarification that the standard interest rate of 5.33% per annum should apply to the medical expenses from the date of the accident on 8 November 2013 to the date of this Court's order on 17 January 2018. The second respondent objected on grounds that (i) the appellant had not sought leave to appeal in relation to the issue of interest which was therefore not before this Court, and (ii) in any event, interest was "usually" awarded at 5.33% per annum from the date of service of the writ (and *not* the date of the accident) to the date of the final judgment.

94 We deal first with the AC's second request relating to the issue of interest. We are not persuaded that the appellant should be precluded from recovering interest on the medical expenses merely because the application for leave to appeal against the DJ's decision (or that against the HC's decision) did not include a specific reference to interest. First, the appellant had clearly stated his claim for "[i]nterest on the amount of damages so assessed… or such other interest on the whole or any part of the damages so assessed…" at para 6(b) of his Statement of Claims dated 12 June 2015. Secondly, we note that the lower courts did not consider the issue of interest because recovery of such expenses was not allowed in the first place.

95 As for the proper rate and period of interest, the general principles on the award of pre-judgment interest have been summarised by this Court in *Grains and Industrial Products Trading Pte Ltd v Bank of India and another* [2016] 3 SLR 1308 at [137]–[139]. As was noted there, the basis for an award of pre-judgment interest lies in the fact that the defendant had kept the plaintiff

Version No 1: 27 Oct 2020 (22:40 hrs)

out of sums to which the latter has been shown to be entitled (at [137]). In that regard, as a matter of principle, plaintiffs who have been kept out of pocket should be able to recover interest on the sums that are found to have been owed to them from the date of their entitlement, *ie*, the date of accrual of loss, until the date they are paid (at [138]). The court, however, has the discretion to depart from this general rule if, for instance, the plaintiff had been guilty of inordinate delay in bringing the action (at [139]).

96 On the facts, we are of the view that an award of interest from the date the writ of summons was filed (*ie*, 12 June 2015) to the date of this Court's judgment (*ie*, 17 January 2018) at the standard interest rate of 5.33% per annum would be a fair estimation of the opportunity cost suffered by the appellant in having been kept out of the sums to which he was entitled. In this regard, we note that the invoices recording the appellant's medical expenses were issued to and paid by KPW on his behalf over a period of around a year *after* the accident.[26] In this context, if the appellant's submission for the period of interest to commence on the date of the accident was accepted, that would lead to over-compensation. Both parties are in agreement that the end date of the interest-bearing period should be the date of this Court's judgment, delivered orally on 17 January 2018.

97 Turning now to the issue of payment, given the developments stated in the AC's letter, we see no reason to reject the AC's request for a variation of our earlier direction such that the judgment sum will be paid by the second respondent to the AC who would in turn disburse the relevant part thereof to KPW. This is in substance aligned with our earlier direction for the appellant to pay over the medical expenses to KPW upon recovery of the same from the

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[26] 2ACB20–46.

Version No 1: 27 Oct 2020 (22:40 hrs)

second respondent. Nothing in the Motor Vehicles (Third-Party Risks and Compensation) Act (Cap 189, 2000 Rev Ed) ("MVA") suggests that the PT has any role in relation to the medical expenses payable as between the second respondent and the appellant. In the circumstances, we allow the AC's first request and direct that the second respondent is to pay the medical expenses of $15,682.97, interests thereon at the rate and for the period stated above (see [96]), and costs of the appeal fixed at $23,000 inclusive of disbursements (see [92]), directly to the AC who is in turn to pay over the relevant part thereof to KPW.

98 A final observation is due. In the present case, the appellant was only one of around 30 foreign employees involved in the same accident caused by the first respondent. According to the appellant, around 20 of these cases had concluded with medical expenses awarded to the victim-employees, but the rest have been held in abeyance pending this appeal. Given our decision, we trust that the remaining pending cases will be satisfactorily resolved.

Sundaresh Menon Chief Justice	Andrew Phang Judge of Appeal	Steven Chong Judge of Appeal

Version No 1: 27 Oct 2020 (22:40 hrs)

Simon Yuen and Felicia Chain (Legal Clinic LLC) for the appellant;
the first respondent unrepresented and not present;
Mahendra Prasad Rai (Cooma & Rai) for the second respondent.

Version No 1: 27 Oct 2020 (22:40 hrs)