

IN THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[1992] SGHC 178

Suit No 3101 of 1987

Between

Balasubramanian s/o Rajoo, a
minor suing by his father
Rajoo s/o Muthusamy as his
next friend

... Plaintiff

And

Singapore Airlines Limited
Exclusive Environmental
Services Pte Ltd

... Defendant

And

Exclusive Environmental
Services Pte Ltd

... Third Party

GROUND S OF DECISION

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Balasubramanian s/o Rajoo, a minor suing by his father Rajoo s/o Muthusamy as his next friend v Singapore Airlines Limited and Another (Exclusive Environmental Services Pte Ltd, Third Party)

[1992] SGHC 178

Suit No 3101 of 1987
G P Selvam J
27 June 1992

1 **Judgment:**

2 CORAM: G P SELVAM, JC

3 JUDGMENT

4 The plaintiff was engaged by the second defendants (Exclusive) as a cleaner of aircraft owned by the first defendants (SIA). Exclusive had an agreement with SIA to supply labour to perform the cleaning job.

5 Exclusive appointed two supervisors to take charge of the cleaners who were taken to Changi Airport. As a routine the two supervisors and the cleaners including the plaintiff reported to a supervisor in the employ of SIA at SIA's hangar. They were then assigned work and divided into groups by SIA's supervisor. They were thereafter deployed to several locations within the airport to clean aeroplanes.

6 Under the contract between SIA and Exclusive the latter provided the "cleaning agents, detergents, scouring pads, polishing materials and cleaning equipment". Exclusive therefore furnished basic items such as brushes, plastic buckets, rags and plastic spray guns to do the cleaning. It was a term of the contract that the workers work under the close supervision and direction of SIA personnel.

7 Mobile platforms owned by SIA were available to the employees of Exclusive to stand on to clean higher areas of aircraft. On 26 December 1986 the plaintiff was on one of the mobile platforms. While cleaning a "Big Top Boeing 747" he was holding on to a side railing of the platform for support. The railing gave way and the plaintiff fell and struck the ground and suffered injury. The collapse of the railing was due to weakening of the joint caused by rusting which had not been detected before the accident.

8 The plaintiff brought this action by his next friend, his father, against both defendants seeking damages. The causes of action he relied on were negligence, breach of duty of employer or occupier and under the Factories Act (Cap 104). The damages claimed were general damages for pain and suffering, loss of future earnings, future medical care and special damages.

9 Employer's duty to employees

10 First the liability of Exclusive. The duty of an employer under a contract of employment is stated succinctly in Chitty on Contract, 26th Ed Para 3935:

11 It is the common law duty of the employer to each of his employees to take reasonable care to see that the plant, tools, equipment, premises and system

of work used in his business are safe and select and engage other employees who are competent.

12 Lord Wright in *Wilsons & Clyde Coal Co v English* < 1938 > AC 57 stated the duty of an employer to his employee in respect of his personal safety as follows :

13 The obligation is threefold, the provision of a competent staff of men, adequate material and a proper system and effective supervision.

14 To discharge the duty, the employer must take positive measures to ensure that the equipment used in the performance of work by employees is of adequate strength and free from patent defect and that they are properly maintained. This naturally calls for regular careful inspection of the equipment by the employer.

15 It is further clear that the duty of an employer to take reasonable measures to avoid injury to his employees is primary in the sense that he cannot escape liability on the ground that he relied on others to discharge the duty or on the ground that another party was also subject to a similar duty. Denning LJ in *Cassidy v Ministry of Health* < 1951 > 2 QB 343 stated the principle in these words :

16 Where a person is himself under a duty to use care, he cannot get rid of his responsibility by delegating the performance of it to someone else, no matter whether to a servant or to an independent contractor.

17 This principle was reiterated by Thean J in *Ng Kim Cheng v Naigai Nitto Singapore Pte Ltd & Anor* < 1991 > 2 MLJ 296 at 299:

18 An employer cannot escape liability by delegating the performance of such duty to an independent contractor; if he does delegate the performance of such duty, which in some cases he would have to do, and such duty is performed negligently he remains vicariously liable.

19 Exclusive argued that the plaintiff was not an employee of Exclusive but of SIA. I cannot accept the argument for the following reasons: The plaintiff signed an agreement with Exclusive. Exclusive not SIA hired him and they had the right to fire him. They had to employ him because it was necessary for them to employ the plaintiff to discharge their obligation under their agreement with SIA. It was Exclusive who paid the plaintiff his salary and the Central Provident Fund contributions on his income and the insurance premium for any personal injury he might suffer. The role of SIA was merely to accept the plaintiff as presented by Exclusive and assign the piece of work done and express dissatisfaction, if any, over his work. Supervisors were employed by Exclusive to oversee their work. As such they were the superior employees of Exclusive and the cleaners were subordinate employees. They were all employees of Exclusive and not SIA. They were under the command of Exclusive to enable Exclusive to discharge their contractual obligation to SIA namely clean SIA's aircraft. SIA did not have direct and effective control over the mode and manner in which the work was performed save to express dissatisfaction over incompetence. Thus by no stretch of imagination could SIA be made the employer of the plaintiff.

20 The primary duty of Exclusive to the plaintiff was to take reasonable steps to make the platform from which the plaintiff fell safe. Exclusive failed to discharge that duty. There was no one to inspect the platforms and ensure that there was no patent weaknesses in them due to rust and other factors. Exclusive in fact supported the plaintiff's contention that the platform was unsafe. I therefore hold that Exclusive were in breach of their duty as employers to take reasonable care to provide a safe platform for the plaintiff.

21 Duty of owner of equipment

22 I shall now consider the common law liability of SIA. The defendant in *Woodman v Richardson and Concrete Ltd* < 1937 > 3 ALL E R 866 had contracted to erect a building. To do so he had to erect a scaffolding for the use of his own workmen and of his sub-contractor's workmen. The plaintiff, a workman employed by the sub- contractor, was working on the scaffolding when he saw a ladder, by which he had ascended, being removed by two men employed by the defendant. The plaintiff found another ladder and when he was descending by it he slipped and sustained injuries because two rungs were missing. The evidence showed that the defective ladder had been put on a dump with discarded plant, a place from which no employee of the defendant had any right to remove it and again put it in use. There was no evidence that the defendant's employees had placed the defective ladder against the scaffolding. In an action for negligence against the defendant it was held that the plaintiff could not succeed in his action as he had failed to prove negligence on the part of the defendant. In other words the defective ladder had been positioned by an unknown third party and not by the defendant or his servants. It had not been left about for use by the plaintiff. From a close reading of the judgments of Greer

and Slessor LJJ the principle can be extracted that when an employee of a contractor performing work for the owner or person in control of the work place is injured while using defective equipment belonging to the owner or person in control, the latter would be liable if it can be shown that his servants or agents made available the defective equipment which he knew or might have known to be defective.

23 Apart from that case, the modern law of negligence based on the principle of foreseeability imposes a duty of care on the owner of equipment to ensure that it is safe when he permits a third party to make use of it or knows that such third party will lawfully use it.

24 SIA clearly owed such duty to the plaintiff and was in breach of this duty. The duty arose from its knowledge that Exclusive's employees depended on SIA's platforms to perform their duties and it was foreseeable injury was likely if any platform was not safe.

25 In their pleadings SIA did not set up a positive defence against the plaintiff's allegation of negligence and particulars of such negligence. It made the bare statement that "it was the plaintiff's failure to take care that caused or contributed to the accident". No particulars of the plaintiff's failure to take care was given. It was said that full particulars of the plaintiff's negligence would be given after completion of discovery. Notwithstanding this no particulars were given up to the time the trial opened.

26 SIA's counsel while cross-examining a plaintiff's witness put to him that the plaintiff used the platform in question without the authority of SIA in that it had been kept out of the plaintiff's reach with an appropriate notice to that effect.

The plaintiff and the witness, it was put by counsel, removed the platform from a secluded part where it had been secured by chain and lock with notice of its defect. Counsel's attention was drawn to the rule stated in *Regina Fur Company Ltd v Bossom* < 1958 > 2 LLR that a defendant would not be allowed to cross-examine a witness on a positive case unless it was in the defence. Counsel's response to this was that SIA could not have pleaded a positive case as it did not have the evidence of plaintiff's witness and that this evidence could not, with the use of reasonable diligence, have been obtained prior to the trial. I dismissed the response as facile.

27 A case to the effect that the platform in question had been found to be defective and kept secured in a separate location (if SIA was in possession of facts to support it) could have been pleaded without the evidence of the plaintiff's witness. Such facts, if they existed, would have been within the knowledge of the employees of SIA the day the accident happened or very soon thereafter. In any event SIA had all the time it needed to investigate such a case and plead it. The real issue was whether the platform was kept away with due notice of the defect. The actuality was that there was no evidence of an investigation into how the defective platform happened to be available for use by the plaintiff. There was evidence that an unidentified number of platforms had been kept secured in a secluded spot. But there was no record or evidence to establish that the platform in question was one of those platforms. I accepted the evidence of the plaintiff's witness that the platform in question had been left about in the vicinity and the plaintiff with the help of the witness who was the plaintiff's co- worker lawfully pushed it to the place of his work. The witness said the plaintiff did not remove a platform which had been taken off and secured and I accepted his evidence. SIA was negligent in leaving the platform

about when it knew that it would be used by its own employees as well as the employees of Exclusive. Although it might have been difficult to push the platform for long distances there was credible evidence that it was so pushed from where it was to the spot where the accident happened. SIA adduced evidence to the effect that there was a system of perambulatory inspection of the platforms for defects by one of its employees. The evidence revealed that such inspection was confined essentially to the rollers and steps of the platform. There was no evidence that anyone went up the steps to look at the joints of the handrail and that the platform in question had been found to be defective and quarantined. The proven facts were insufficient to warrant an inference in favour of SIA.

28 For the reasons stated above I hold that SIA is also liable for negligence. SIA cannot absolve itself from blame on the ground that the platform was there for use by Exclusive's employees at their own peril. It was under a duty to take reasonable care to ensure that the platforms were safe because it had knowledge that Exclusive's employees were using them. Such knowledge provided the proximity and the basis of reasonableness for the duty of care.

29 Counsel for the plaintiff did not open his case based on Factories Act as he made no opening in the usual desirable form. The case on the Factories Act remained closed until written submissions. In his closing written submissions plaintiff's counsel developed at length the position under the Factories Act. Unhappily, I did not have the benefit of the response of the defendants to such case. In the circumstances I base my judgment on the common law without considering the applicability of the Factories Act.

30 Damages: Pain and suffering and loss of amenities

31 I shall now consider the question of damages. Under this heading the plaintiff claimed \$100,000. He suffered a fall from a height of some one and a half storeys. On admission to the hospital he was drowsy and restless with bleeding from the ear. He had suffered a fracture of the right temporal bone and slight cerebral contusion of the right temporal lobe. He was warded for about two weeks during which he was treated conservatively. Later he was found to have suffered intellectual and memory impairment and to be functioning at the mentally retarded range of 46. The plaintiff eventually recovered from his physical injuries but his mental impairment remained. Before the accident he was gregarious and very active in sports. As a result of the injury he was deprived of personal and social pleasures. He perceptibly became dependent on others but his essential physical functions were not impeded.

32 Having taken all these factors into consideration and the awards in *Tominam Binte Tukimin v Toh Kai Chup* < 1985 > 1 MLJ 408, *Lai Chi Kay & Ors v Lee Kuo Shin* < 1981 > 2 MLJ 167, *Teo Tio Khian v Ooi Eng Teong* <1987> 1 MLJ 198, *Peh Diana & Anor v Tan Miang Lee* < 1991 > 3 MLJ 375 and the other authorities cited I am of the view that \$60,000 would be the proper amount of damages under this head. This is the quantification put forward by Exclusive. This amount goes well with the award of \$70,000 in *Peh Diana and another v Tan Miang Lee* < 1991 > 3 MLJ 375. In this case the plaintiff after suffering a bad head injury was in coma for 20 days. She was left with a paresis (partial paralysis) of the left third and seventh nerve upper motor neurone lesion and a clumsy left hand. She had difficulty in expressing herself in order to communicate with others. Her talk was childish and her physical appearance had suffered with double vision and slanted mouth and face. Chao Hick Tin J reviewed the authorities and awarded \$70,000. The plaintiff in this case suffered

less severe injuries and disabilities and his physical features and functions were not seriously affected. Loss of marriage prospects is excluded as it is not a factor to be taken into consideration in the case of a male.

33 Loss of future earnings

34 The plaintiff was at the time of trial about 24 years old. He claimed a multiplier of 20-22 years.

35 The plaintiff was a robust young man. He regularly participated in sports. He aspired to be a marine engineer which does not require an academic degree. He in my view had the ingredients of a healthy long life. And in such a job the age of 60 would be the proper age for retirement. But I have to take him as I find him now. On this basis 16 would be a realistic multiplier consistent with the decided cases.

36 The plaintiff claimed a multiplicand of \$1000 - \$1200 per month. He took seven years to finish his primary education. He then went to a vocational institute where he finished one year of basic skills in training in marine fitting. He sat the secondary one normal examination in 1985 and passed three out of five subjects. He failed in mathematics and science. Later he attended a private school where he passed five subjects inclusive of mathematics at a level which purported to be equivalent to that of the General Certificate of Education. Undeniably this is not the same as passing a public examination. But he had a strong motivation to achieve his goal of becoming a marine engineer. I would add that to become a marine engineer one does not require the intellectual capacity required for a degree course in engineering.

37 The plaintiff called as witness an officer from the National Maritime Board. He gave evidence to the effect that the plaintiff with his background could theoretically become a chief engineer. He said that the plaintiff was qualified for the job of a rating on a Singapore ship which would give him a monthly tax-free salary commencing at \$1000 with good prospects of earning around \$2000 after a couple of years. There would in addition be Central Provident Fund contributions. All are tax free. He also said that for the job of a rating the over-all position of a candidate was more important than his academic qualifications. In Singapore there has been a perennial shortage of applications from Singapore citizens to fill the vacancies on Singapore ships. I therefore accept the evidence of the officer and hold that the plaintiff would have had no difficulty in securing a mariner's job although it would have taken some time to achieve. In these circumstances a multiplicand of \$1000 per month would be reasonable and conservative. The plaintiff shall, therefore, recover $16 \times 12 \times \$1,000 = \$192,000$ under this head.

38 Medical evidence

39 The claim for loss of future earnings is on the basis of total disability. This is founded on the combined effect of the expert evidence of Dr Gopal Baratham (neuro surgeon), Dr Tay Woo Kheng (psychologist) and Dr Paul W Ngui (psychiatrist). The nucleus of their evidence was that the plaintiff as a result of the accident, had suffered such damage to his cognitive and psychosocial abilities that he was incapable of holding any job. Their evidence and the evidence of the plaintiff's sister established that he suffered from infantile behaviour.

40 Dr Baratham was the expert called by the plaintiff. His experience in neuro-surgery exceeds a quarter century. He has done surgery on thousands of heads - some 50% of them were head injury cases. In terms of experience he is probably the nonpareil in the field in Singapore. His finding after a brain scan of the plaintiff was that there was permanent and severe brain damage. He has seen many similar cases. From these facts he concluded that the plaintiff's mood capability was not consistent making it impossible for him to hold any responsible job. At one moment he would be depressed, at times disinterested and violent at other moments. He was not even fit to be a car- park or lift attendant. Unpredictable behaviour was the main problem facing the plaintiff when getting and keeping any job.

41 Dr Tay the psychologist who had observed the plaintiff also came to the conclusion the brain damage had resulted in cognitive impairment and permanent propensity to inconsistent behaviour.

42 Dr Paul W Ngui, a consultant psychiatrist of repute after studying the plaintiff in 1987 concluded as follows :

43 This patient had suffered from a serious head injury as a result of his fall from a height. His present mental state revealed cognitive dysfunction with poor comprehension, intellectual impairment, and gross disturbance of memory. There has also occurred an adverse change of his personality.

44 The clinical picture is consistent with an organic brain damage.

45 As with most brain damage, the prognosis is not quite clear until a lapse of at least three to five years after the head injury.

46 In late 1991 he found that there was no radical improvement in his condition. Said Dr Paul Ngui:

47 I am of the opinion that he suffers from post-traumatic dementia with severe impairment of cognitive functioning. He has also post-traumatic personality change associated with brain damage.

48 He is not able to hold a job and is unlikely to recover and be fit to work. He will require to continue psychiatric treatment with drug therapy for tension and irritability. Supportive psychotherapy will be required from time to time.

49 They all were of the view that the plaintiff could not be restored to his former self by medical treatment.

50 SIA did not call an expert medical witness. Exclusive called Dr Wong Yip Chong as their expert. He had examined the plaintiff and came to the conclusion, inter alia, that he had suffered mental impairment which was difficult to assess. The plaintiff according to him suffered from "apparently malingering syndrome". He differed with the plaintiff's expert medical witness as to the severity of his problem and the prognosis of treatment.

51 Exclusive which called Dr Wong made no effort in its submissions to defend the stand taken by him. It did not submit that the plaintiff did not suffer from effective total disability as regards securing and retaining employment.

52 SIA relied on Dr Wong's evidence but made no serious attempt to submit why his evidence should be preferred to that of the plaintiff's team of expert medical witnesses. Their evidence was overwhelmingly convincing.

53 I found the evidence of Dr Wong superficial and indefinite. He took an extreme position against the plaintiff without sufficient investigation or reasoning to support his position.

54 The plaintiff was offered for questioning by counsel for the defendants. They did so for a short while but he was unable to respond intelligibly. His poor condition appeared to be real. No suggestion that he was feigning was made by counsel for the defendants. Accordingly I concluded that on the balance of probabilities his disability was permanent.

55 Pre-judgment earnings

56 As regards loss of pre-trial earnings the plaintiff's claim was computed from 27 December 1986 at \$580 per month plus CPF contribution at an average of 15%. It was in evidence that after the accident the plaintiff was paid his salary for some unspecified time. No record was available from Exclusive. Exclusive suggest a deduction for three months. The plaintiff agreed. The loss therefore is from April 1987 till May 1992. It gives 62 months.

57 In support of salary at \$580 per month no salary slip or CPF document was produced in evidence. In a notice of accident Exclusive sent to the Ministry of Labour his salary was stated as "\$450 + \$30 = laundry + \$50 = incentive vouchers".

58 Laundry and incentive allowance were given only for full attendance. However, there was no suggestion that the plaintiff was prone to absenteeism. Accordingly it should be included in the salary. A witness called by the plaintiff was employed in the same position and received \$500 per month. I therefore

conclude that the plaintiff's loss was \$500 per month plus CPF which I fix at 13.5%. The plaintiff was liable to do national service for 2 years at \$160 per month. The actual loss by the plaintiff accordingly is as follows :

59 Time of loss - 62 months Less NS 24 months 38 months At \$500 pm \$19,000 Add CPF at 13.5% \$ 2,295 \$21,295 Add 2 yrs NS at \$160 per month \$ 3,840 \$25,135 Add interest at 3% for 5 1/2 yrs 4,147 Total \$29,282

60 Special damages

61 Documents produced by the plaintiff and accepted by the defendants showed that hospital bills amounted to \$5654.20. A claim for \$200 in respect of transport was not disputed. These items therefore are allowed.

62 The plaintiff claimed medical expenses at \$100 per month for 22 years. There was no satisfactory evidence to substantiate this. He would require some medical care for a short period and I award a lump sum of \$10,000 on account of this. He claimed the cost of employing someone to attend to him. Dr Paul Ngui said that the plaintiff did not need a helper to closely supervise him for the rest of his life. It is an utterly unrealistic claim and it is disallowed.

63 There will be judgment to the plaintiff against both defendants. The plaintiff shall have the costs of the action.

64 SIA has made a claim against Exclusive for contribution and indemnity. This will be adjudicated separately.

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G P Selvam J

V Ramakrishnan for the plaintiff
P Selvadurai for the First defendant
Lee Tau Chai for the Second defendants
