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LAW: TORT – CONTRIBUTORY NEGLIGENCE – DUTY OF CARE WHICH PEDESTRIANS OUGHT TO EXERCISE WHEN USING SIGNALISED PEDESTRIAN CROSSINGS

***Asnah bte Ab Rahman v Li Jianlin* [2016] SGCA 16**

In Summary

This Singapore Court of Appeal decision of 17 March 2016 explored the appropriate duty of care which pedestrians ought to exercise when using signalised pedestrian crossings, particularly whether the pedestrian had a duty to remain attentive even when the lights of the signalised pedestrian crossing was in his favour.

Facts

This case involves an accident between a motor taxi and a pedestrian. The Appellant was the driver of the motor taxi while the Respondent, a full-time National Serviceman, was the pedestrian who was crossing a signalised pedestrian crossing when the pedestrian signal was in his favour.

The road where the accident occurred was a dual-carriageway road with dual lanes on each side and a road divider with metal fencing. The Respondent was hit by the motor taxi after he passed the centre divider. The accident took place at about 10:00pm and at the time of the accident, the weather was fine, the road surface was dry, the traffic flow was light, the visibility was clear and the Appellant admitted that she was driving the motor taxi at about 55km/h.

Issues

The main issue in this appeal is whether the Respondent was contributorily negligent, in particular:

(a) Did the Respondent have a duty to guard himself against the Appellant's wrongful driving?

(b) If so, did the Respondent discharge that duty of his with due care and diligence?

(c) If the Appellant is found to have been contributorily negligent, how should liability be apportioned?

It should be noted that since the trial below was bifurcated, the decision of the trial Judge, which is the subject of this appeal, is only with regard to the issue of liability.

Holding of the Court of Appeal

The decision of the 3 Judges of the Court of Appeal was surprisingly not unanimous and was split 2:1.

Decision of the Majority

The majority's judgement, which was delivered by Chao Hick Tin JA, held that the Respondent was contributorily negligent and the quantum of damages payable to the Respondent would be reduced by 15%.

In coming to their decision, the majority answered the following 3 questions in the affirmative:

(a) Whether the pedestrian has a duty to keep a proper lookout before entering a signalised pedestrian crossing when the traffic lights are in his favour;

(b) Whether the pedestrian has to check for approaching traffic once again at the centre-divider of an unbroken pedestrian crossing within a dual-carriageway; and

(c) Whether the Respondent did in fact check for approaching traffic at the centre-divider.

Basic Principles of Contributory Negligence

The defence of contributory negligence modulated a victim's right to recover damages from a tortfeasor by the extent to which he could himself have prevented the accident from happening. In the prevailing circumstances of each case, a person would be guilty of contributory negligence if he ought to have objectively foreseen that his failure to act prudently could result in hurting himself and accordingly take reasonable measures to guard against that foreseeable harm. The standard of care expected of the claimant was measured against a person of ordinary prudence.

Question 1: Whether the Pedestrian has a Duty to Keep a Proper Lookout Entering a Signalised Pedestrian Crossing when Traffic Lights are in his Favour

The position in Singapore is that a pedestrian is not expected to take precautions against all risks – he needs only to guard himself against forms of injury that might reasonably have been foreseen and avoided, meaning that the pedestrian is only bound to guard against such eventualities that a reasonable man ought to foresee as being within the ordinary range of human experiences.

In the premises, the Court first considered whether the risk of vehicles running red lights (whatever may be the cause) is a remote possibility that would not have occurred to the mind of a reasonable pedestrian, or whether the possibility of such danger emerging is a reasonably apparent one such that the pedestrian ought to safeguard himself.

For this, the Court observed that while the majority of motorists exercised good road safety habits, it is not sufficient cause for pedestrians to be lulled into a sense of complacency when they utilise pedestrian crossings. The Court stated that one must also be cognisant of the fact that humans are not infallible and do suffer from occasional lapses, and accidents inevitably occur. As such, while pedestrians had a stuatutory right of way when using pedestrian crossings, a violation of the pedestrians' rights should not precule the tortfeasor from raising contributory negligence. Also, requiring pedestrians to exercise care for their safety was not inconsistent with the institution of pedestrian crossings.

The Court also considered *Rule 22* of the *Highway Code* which required pedestrians to look out for

errant motorists at signalised pedestrian crossings before entering the crossing. The duty was not contingent on how long the green man had turned on. As such, if the pedestrian entered a crossing without having satisfied himself that the vehicles had come to a stop or were coming to a stop, he should remain attentive during his crossing.

Based on all the points above, the answer to Question 1 posed by the Court was that a pedestrian is not entitled to be guided exclusively by the green pedestrian signal and ought to keep a proper lookout for approaching traffic before commencing to cross the road. If he fails to do so, the damages he is otherwise entitled to may be reduced by reason of contributory negligence on his part.

Question 2: Whether the Pedestrian Should Check for Approaching Traffic Once Again at the Centre-Divider

While there is generally no obligation on the pedestrian to constantly check for traffic when he is already in the midst of completing the pedestrian crossing, given the centre-divider, the Court considered whether crossing this road comprises of two separate crossings such that a duty to check arises again when the pedestrian reaches the centre-divider.

The Court decided that while the centre-divider was nothing akin to a safety islands (which had the effect of separating a single crossing into two), it is possible for a dual-carriageway to be treated as two separate crossings in certain circumstances.

It is a question of fact in each case if the centre-divider constitutes a "central refuge". However, since no evidence was tendered in relation to the dimensions of the centre-divider, the Court looked at other reasons to support a finding that the Respondent was contributorily negligent in the circumstances.

Relying again on *Rule 22* of the *Highway Code,* the Court found that the features of the road (in particular the fencing and the bend) impeded the Respondent's assessment of vehicular traffic on the second half of the road if the said assessment was made before he commenced crossing. Accordingly, the Respondent should have checked again for approaching traffic before he stepped onto the second half of the road.

Question 3: Whether the Pedestrian Should Check for Approaching Traffic Once Again at the Centre-Divider

As there were no direct evidence for the Appellant to prove that the Respondent checked for approaching traffic at the centre-divider, the Court looked towards objective facts from which reasonable inferences can be drawn.

On a balance of probabilities, the Court held that the Respondent failed to do so based on the position where the Respondent was hit (which was his second or third step past the centre-divider) and the speed of the motor taxi (which was about 55km/h) – inferring that if the Respondent had checked, it would be apparent to him that the motor taxi was not going to stop in good time, and he would not have continued his journey across the second half of the crossing.

Apportionment of Damages

While Courts tend to hold motorists as the more culpable party having regard to the "destructive disparity" between a driver and a pedestrian, it is not a hard and fast rule as apportionment is a highly fact-sensitive exercise.

Nevertheless in this case, it was clear that the Appellant was mostly to blame for the accident and the Court decided to reduce the Respondent's damages by a modest 15% to reflect the greater causative potency and blameworthiness of the Appellants atrocious driving.

Opinion of the Minority

The dissenting Judge, Sundaresh Menon CJ, was of the opinion that the issue which the Court had to assess was whether it was reasonable for the Respondent to be expected to guard against a driver who was not so much squeezing past a traffic light, but being wholly indifferent to it.

In this case, given the circumstances, the Appellant's actions of beating the traffic light (which was visible to the Appellant 8 to 10 seconds prior to the collision) was so egregious that it was dangerous to other road users. Thus, the road user who was acting entirely within the law should not be subjected to a duty to guard against the dangerous conduct of others.

Concluding Views

While it is fascinating to note the difference in views as to the types of danger a pedestrian had to lookout for, this case reinforces the position that both the road users and the pedestrians have a shared responsibility to ensure road safety. In particular for the pedestrians, a simple act of keeping a proper lookout and not getting distracted while crossing the road can potentially translate to an accident averted and a life saved.

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WHETHER BUILDER AND ARCHITECT OWED MANGEMENT CORPORATION NON-DELEGABLE DUTY IN COMMON LAW AND STATUTE (BUILDING CONTROL ACT – CAP 29, 1999 Rev Ed)

Management Corporation Strata Title Plan No 3322 v Tiong Aik Construction Pte Ltd and another [2016] SGCA 40

In Summary

This Singapore Court on 6 May 2016 decided on whether the Main Contractor and the Architect owed the MCST non-delegable duties to ensure that the condominium's common property were designed and built with reasonable care.

Facts

In the case of *Management Corporation Strata Title Plan No 3322 v Mer Vue Developments Pte Ltd and others (King Wan Construction Pte Ltd and others, third parties) [2016] SGHC 38*, the MCST brought proceedings against four defendants in respect of defects in the common areas of the condominium, namely, the developer, the Main Contractor, the Architect and one of the Architect's sub-contractors.

The MCST cited only the Main Contractor and the Architect as the respondents to this appeal, leaving out the developer and the Architect's sub-contractor.

The Appellant was the management corporation ("the MCST") of The Seaview condominium ("the Condominium"). The first respondent was the builder, or main contractor, of the Condominium ("the Main Contractor"). The second respondent was the architectural firm appointed by the developer for the construction of the Condominium ("the Architect").

The MCST brought proceedings against the Main Contractor and the Architect for building defects in the Condominium's common property. These defects were caused by their subcontractors' negligence. The subject of the appeal was the MCST's claim that the Architect and the Main Contractor owed it non-delegable duties to ensure that the Condominium's common property were designed and built with reasonable care ("the Proposed Non-Delegable Duty").

This issue was heard by the High Court as a preliminary issue. After a ten-day trial, in which this issue, as well as several others, were considered, the judge ("the Judge") held that the respondents did not owe the MCST the Proposed Non-Delegable Duty. The MCST appealed against the Judge's decision.

Issues

The main issues were as follows:

(a) Common Law Non-Delegable Duties – A new common law category of non-delegable duties for construction professionals are only under a duty not to unreasonably delegate any of its professional responsibilities

(b) Statutory Non-Delegable Duties – The Statutory Non-Delegable duties under *Section* 9 and *11* of the *BCA* were limited to only building safety, construction in accordance with the relevant approved plans, and compliance with the various rules, regulations and conditions set by the Commissioner of Building Control (nothing to do with poor workmanship)

Facts of the Appeal

Initially, the MCST's appeal was centred on whether the Main Contractor and Architect owed the MCST non-delegable duties in tort under statute and/or common law to build and design The Seaview with reasonable care.

During the Appeal Hearing, lawyers for the MCST stated that it will only be pursuing the issue of whether the Main Contractor and the Architect owed the MCST non-delegable duties under common law to build and design *The Seaview* with reasonable care.

Decision of the Court of Appeal

The Court of Appeal dismissed the appeal and found that the non-delegable duty advanced by the MCST did not exist under statute or common law.

Common Law Non-Delegable Duties

Tortious liability is generally circumscribed by the fundamental fault-based principle that liability lies with the party that has engaged in the tortious acts in question.

Non-delegable duties are personal duties, the delegation of which will not enable the duty-bearer to escape tortious liability because the legal responsibility for the proper performance of the duty resides with the duty-bearer.

Well-settled instances of non-delegable duties include:

(a) Employee safety

(b) Hospitals and health authorities have been observed to owe non-delegable duties to their patients

(c) Schools and school authorities have been found to owe non-delegable duties to students

(d) Non-delegable duties have been held to arise in cases involving extra-hazardous

Reference to *Woodland v Swimming Teachers Association* [2014] AC 537

The UK Supreme Court identified 5 defining features of non-delegable duties:

(a) Claimant is patient or child, or someone especially vulnerable;

(b) There is an antecedent relationship between the claimant and defendant, such as actual custody, charge or care of claimant;

(c) The claimant has no control over how the defendant chooses to perform those obligations;

(d) The defendant has delegated to a third party some function which is an integral part of the positive duty which he has assumed towards the claimant; and

(e) The third party has been negligent in the performance of the very function assumed by the defendant and delegated by the defendant to him.

The Court decided that the principles of the *Woodland* case were not present in this case as:

(a) There was no "custody, care and charge" between the MCST and the Respondents;

(b) MCST was not "especially vulnerable or dependent on the protection of the Respondents against the risk of injury";

(c) The developer was not in "custody, care and charge" of the respondents";

(d) The Main Contractor expressly contemplated that it would engage subcontractors of various trades and the developer would accept the warranty certificates issued by the subcontractors;

(e) Looking at the transaction in its entirety, it was wholly commercial.

Concluding Views

MCST would have to pursue such claims directly against the specific sub- consultants or sub-contractors responsible for the poor workmanship and/or any alleged defects.

This includes taking up additional applications to ascertain the correct defendant, and might even end up suing a defendant who could not meet the full judgment sum – which the Court of Appeal stated "was part and parcel of any litigation and was an ordinary risk endemic in any investment, including the purchase of a property".

***iTronic Holdings Pte Ltd v Tan Swee Leong and another suit* [2016] SGHC 77**

This High Court Case of 21 April 2016 considered the redefined test for whether certain sums payable on breach of contract were penal and therefore unenforceable, as set out in the English Supreme Court case of *Cavendish Square Holding BV v Talal El Makdessi* and *ParkingEye Ltd v Beavis (Consumers' Association intervening)* [2015] UKSC 67 (see CC – Newsletter Issue 1 of 2016 – January), however the case was silent on whether this redefined case applies in Singapore, and we have yet to see its application by the Singapore courts.

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