IN THE GENERAL DIVISION OF
THE HIGH COURT OF THE REPUBLIC OF SINGAPORE

[2024] SGHC 36

District Court Appeal No 4 of 2023

Between

Nagarajan Murugesan

… *Appellant*

And

(1) Grand Rich Electrical & Engineering Pte Ltd
(2) Yuan Ji Enterprises Pte Ltd
(3) Eng Lee Engineering Pte Ltd

… *Respondents*

JUDGMENT

[Tort — Negligence — Breach of duty]
[Tort — Negligence — Contributory negligence]

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v
Grand Rich Electrical & Engineering Pte Ltd and others

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8 February 2024 Judgment reserved.

Dedar Singh Gill J:

Introduction

1 This is an appeal by Mr Nagarajan Murugesan, a construction labourer, who was injured at a worksite after an excavator unexpectedly moved forward and collided into him. In this judgment, I consider the liability of his employer, the main contractor and the third party whose construction site operated adjacent to the worksite where the accident took place. For the reasons set out, I allow the appeal to the extent stated in this judgment.

Facts

Parties

2 The appellant is an Indian national. He was employed by the first respondent, Grand Rich Electrical & Engineering Pte Ltd, as a construction

labourer from 15 January 2019 to 16 May 2019.[1] The second respondent, Yuan Ji Enterprises Pte Ltd, was the main contractor and occupier of the worksite located at Yishun Avenue 7, near Lamp Post 50 (the "Worksite").[2] It had been awarded a contract for the supply and installation of power cables, and subsequently engaged the first respondent as an independent contractor for the construction of pipe trench and joint pit/bay with steel decking. Among other things, the first respondent was obliged to supply an excavation team, which included an excavator and operator.[3] The third respondent, Eng Lee Engineering Pte Ltd, was the main contractor and occupier of the construction site located opposite the Worksite (the "third respondent's Worksite"). It was also the employer of Mr Neelamegam Alagu ("Neelamegam"), a banksman who was working on the third respondent's construction site.[4]

3 The appellant claimed against the respondents for damages arising from an accident which took place on 16 May 2019 at the Worksite.[5]

Undisputed facts

4 On 16 May 2019, the appellant was assigned by the first respondent to assist in the excavation work at the Worksite, in the role of a banksman. The appellant was to work with an excavator operator, Mr Jayaraman

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1 Nagarajan Murugesan's Affidavit of Evidence-in-Chief dated 29 December 2021 ("Appellant's AEIC") at para 2.

2 Statement of Claim (Amendment No. 2) dated 9 February 2021 ("SOC") at para 2; Kasinathan Ramesh's Affidavit of Evidence-in-Chief dated 6 December 2021 ("Kasinathan's AEIC") at para 2.

3 Arockiadoss Prem Kumar Sadeesh Mathew's Affidavit of Evidence-in-Chief dated 18 December 2021 ("Arockiadoss' AEIC") at paras 2–3; SOC at para 5.

4 SOC at para 4.

5 SOC at paras 5–11.

Vanmigunathan (the "Operator"), who was also employed by the first respondent.[6]

5 The Worksite was situated on the second lane of a three-lane carriageway. As the construction work progressed, the Worksite would move within the lane further up along the road.[7] On the day of the accident, the Worksite was located adjacent to the third respondent's Worksite, separated only by the third lane of the carriageway.[8] Barriers had been placed around the Worksite to delineate it from the other parts of the public road, which were still accessible to traffic.[9]

6 At around 10.30am, one of the third respondent's trucks (the "third respondent's Truck") arrived and was to enter the third respondent's Worksite. However, there was insufficient berth for the third respondent's Truck to reverse into the third respondent's Worksite.[10]

7 Thereafter, the excavator moved forward and collided into the appellant, causing him to fall down (the "Accident").[11] As a result of the Accident, the appellant suffered the following injuries:[12]

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6 Appellant's AEIC at paras 4–5.

7 Transcript (28 September 2022) at p 27 ln 31 to p 28 ln 5, p 91, ln 13–23.

8 Murugaiyan Velmurugan's Affidavit of Evidence-in-Chief dated 21 September 2021 ("Murugaiyan's AEIC") at paras 3–5.

9 SOC at para 6.

10 Murugaiyan's AEIC at para 6.

11 SOC at paras 8–9.

12 Appellant's AEIC at NM-2, p 11.

(a) right foot open lisfranc fracture dislocation with severe degloving injury;

(b) right ankle medial malleolus fracture; and

(c) left bimalleolar ankle fracture with multiple associated foot fractures.

Procedural history

8 The appellant filed DC/S 1040/2019 against the first respondent on 14 October 2019 ("Suit 1040").[13] The second and third respondents were joined as defendants to Suit 1040 on 8 July 2020 and 26 February 2021 respectively.[14] The trial on liability was held before the State Courts on 25 July 2022, and from 27 to 29 September 2022. On 28 July 2022, after the first tranche of the trial, the second respondent made an offer to settle with the appellant (the "OTS"). However, the OTS was not taken up by the appellant.

Parties' cases in Suit 1040

Appellant's case

9 The appellant's account of the events leading up to the Accident was as follows. The appellant had been at the Worksite when he observed that the third respondent's Truck was attempting to enter the third respondent's Worksite. The third respondent's Truck had insufficient space to manoeuvre and blocked the flow of traffic.[15] Thus, the appellant gave the signal to the Operator to stop

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13 Writ of Summons dated 14 October 2019.

14 Writ of Summons dated 8 July 2020; Writ of Summons dated 26 February 2021.

15 Appellant's AEIC at para 6.

the excavator. After ensuring that the excavator had stopped, the appellant walked to the front right side of the excavator[16] to pull the water barriers inwards. This was to create more space for the third respondent's Truck to move.[17] However, Neelamegam, the third respondent's banksman, instructed the Operator to move the excavator forward. The Operator complied with Neelamegam's directions.[18] As a result, the excavator collided into the appellant, causing the appellant to sustain severe injuries.[19]

10 The appellant's case was that the Accident was caused by the respondents' breach of their common law and/or statutory duties.[20] Among other things, the first respondent failed to implement the necessary safety measures, and the second respondent did not exercise effective supervision of the work being carried out by the appellant and Operator at the Worksite. The third respondent did not ensure that Neelamegam was sufficiently competent to give directions as a banksman.[21] Further or in the alternative, the respondents were vicariously liable for the negligence of their employees/servants/agents. In particular, the Operator had been negligent in moving the excavator in the absence of directions from the appellant, who had been the designated banksman.[22] Neelamegam was also negligent in directing the Operator to move the excavator forward without ascertaining whether it was safe to do so.[23]

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16 SOC at para 8.

17 Appellant's AEIC at para 7 and p 3.

18 Appellant's AEIC at para 8.

19 Appellant's AEIC at paras 8–10.

20 SOC at para 11.

21 SOC at para 11.

22 SOC at para 11.

23 SOC at para 11.

First and second respondents' case

11 Conversely, the first and second respondents' version of the events was that prior to the Accident, all of the first respondent's employees, including the appellant, were instructed to leave the Worksite to offload materials from a dump truck. The dump truck was parked behind the excavator. Only the Operator remained at the Worksite. Thereafter, a commotion occurred when the third respondent's Truck was unable to enter the third respondent's Worksite because it was blocked by the water barriers surrounding the Worksite. The appellant re-entered the Worksite on his own accord to pull the water barriers around the Worksite to create space for the third respondent's Truck. However, the appellant failed to inform and/or alert the Operator that he had re-entered the Worksite. Further, while pulling the water barriers, the appellant stood in the excavator's blind spot, in breach of the safety protocols of the Worksite. Neelamegam shouted at the Operator to move the excavator forward to make space for the third respondent's Truck. The Operator complied, as he was under the impression that all of the first and second respondents' workers had exited the Worksite and did not realise that the appellant was standing in the blind spot of the excavator. When the excavator moved forward, the excavator ran over the appellant's foot.[24]

12 The first respondent conceded that it bore some responsibility to the appellant.[25] However, the first and second respondents submitted that the second respondent was not liable to the appellant at all. First, the second respondent was not liable as an occupier of the Worksite – the physical condition of the

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24 1st and 2nd Defendants' closing submissions dated 24 November 2022 ("D1-2CS") at para 9.

25 D1-2CS at para 112.

Worksite had no bearing on the Accident.[26] Second, the manner in which the work was carried out was not within the control of the second respondent.[27] Third, no vicarious liability ought to be imposed on the second respondent for the negligence of the Operator.[28] The first and second respondents also took the position that the third respondent ought to bear "nominal liability" for the Accident. This is because Neelamegam directed the Operator to move forward and failed to alert the Operator of the appellant's presence, despite the appellant being in Neelamegam's line of sight.[29] Finally, the first and second respondents claimed that the appellant was contributorily negligent for, among other reasons, standing in the blind spot of the excavator without warning the Operator of his presence. In doing so, the appellant flouted the safety protocols implemented at the Worksite. Further, he did so while the excavator's engine was still switched on.[30] Therefore, the first and second respondents submitted that the apportionment of liability should be as follows: (a) appellant (50%); (b) first respondent (40%); (c) second respondent (0%); (d) third respondent (10%).[31]

Third respondent's case

13 The third respondent denied owing any liability to the appellant. It claimed that it did not owe a duty of care to the appellant. In the alternative, even if the third respondent owed a duty of care to the appellant and

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26 D1-2CS at paras 17 and 25.

27 D1-2CS at para 28.

28 D1-2CS at para 45.

29 D1-2CS at paras 55–59.

30 D1-2CS at para 89.

31 D1-2CS at para 112.

Neelamegam did, in fact, instruct the Operator to move the excavator forward, the third respondent submitted that there was no reason for the Operator to listen to Neelamegam's instructions. There was clear protocol that the Operator should only take instructions from the first respondent's banksman, *ie*, the appellant.[32] However, on the basis that the third respondent was liable in negligence, the third respondent submitted that the appellant should be contributorily negligent to the extent of 50% against the respondents collectively because he knowingly placed himself in a dangerous position where he could not be seen by the Operator.[33] The third respondent did not submit on the apportionment of the first and second respondents' liability.

Decision below

14 The learned District Judge (the "DJ") gave his decision on 19 January 2023, and subsequently set out his full grounds of reasoning on 18 April 2023 (the "GD").

15 First, the DJ held that the first respondent was liable to the appellant under the tort of negligence and the doctrine of vicarious liability (GD at [28(a)]). In terms of direct liability, the DJ found that the first respondent was negligent in failing to provide effective supervision of its employees (GD at [51]). The DJ accepted the appellant's argument that when the third respondent's Truck arrived, the failure of Nathan Raja, the first respondent's supervisor, to coordinate the areas of the Worksite where the excavator had stopped amounted to a failure in his duty to effectively supervise the appellant

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32 3rd Defendant's closing submissions dated 24 November 2022 ("D3CS") at paras 11–13.

33 D3CS at para 10.

and the Operator, and that this had contributed to the Accident (GD at [36]–[40]). However, the DJ did not find that the appellant had discharged his burden of showing that the safety measures put in place by the first respondent in relation to the operation of the excavator were inadequate (GD at [41]–[51]). In the alternative, the DJ held that the first respondent was vicariously liable for the negligence of the Operator in the management of the excavator (GD at [52]–[60]).

16 Second, the DJ held that the second respondent was not liable to the appellant under both the tort of negligence and the doctrine of dual vicarious liability. The DJ was of the view that the second respondent owed a duty of care to the appellant (GD at [63]–[64]). However, the DJ disagreed with the appellant that the second respondent had breached its duty of care in failing to: (a) provide proper training and safety briefings for the appellant; (b) exercise proper supervision; and (c) coordinate and make arrangements between the Worksite and the third respondent's Worksite (collectively, the "Worksites") (GD at [65]–[74]). In relation to the doctrine of vicarious liability, the DJ held that the relationship between the second respondent and the Operator was not similar or analogous to that of an employer and employee. The Operator was merely the employee of an independent subcontractor of the second respondent (GD at [78]). Further, the degree of control exercised by the second respondent over how the Operator did his work was extremely limited (GD at [79]). In any event, the relationship between the second respondent and the Operator did not create or significantly enhance the risk of the tort being committed (GD at [82]). Thus, the DJ concluded that the second respondent ought not to assume any liability for the Accident.

17 Third, the DJ found that the third respondent was liable to the appellant under the doctrine of vicarious liability for Neelamegam's negligence. Neelamegam, the third respondent's banksman, owed a duty of care to the appellant, given his physical and causal proximity with the appellant (GD at [95]). Further, the DJ made a finding of fact that Neelamegan instructed the Operator to move the excavator forward, and it was based on these instructions that the Operator did so (GD at [90]). This amounted to a breach of duty of care (GD at [96]). Neelamegam ought to have kept a look out and actively assessed the safety of the situation before giving instructions to the Operator to move the excavator (GD at [98]).

18 In terms of apportionment of liability, the DJ found the appellant contributorily negligent to the extent of 33.33%. The first and third respondents were liable to the extents of 56.67% and 10% respectively. The DJ granted the appellant interlocutory judgment against the first and third respondents for 66.67% of the damages to be assessed. The DJ made no contribution orders as between the first and third respondents, as contribution proceedings were not brought between both parties (GD at [29]).

Parties' cases on appeal

19 The appeal against the DJ's decision is on the following grounds:[34]

(a) First, the DJ erred in finding that the first respondent had implemented adequate safety measures necessary to ensure safety in respect of the excavator at the Worksite.

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[34] Appellant's Case dated 18 May 2023 ("AC") at para 41.

(b) Second, the Trial Judge erred in finding that the second respondent did not breach its duty of care to the appellant. This is because the second respondent: (i) failed to provide proper training and safety briefings for the appellant; and (ii) did not exercise proper supervision and did not coordinate and make the necessary arrangements with the third respondent with respect to the movement of the third respondent's Truck into the third respondent's Worksite.

(c) Third, the DJ had erred in finding that the second respondent was not vicariously liable for the Operator's negligence.

(d) Fourth, the DJ's finding of the appellant's contributory negligence was manifestly excessive. Instead, the first and second respondents should be liable to the extent of 80%.

(e) Fifth, the third respondent's liability should be revised upwards from 10% to 20%.

(f) Sixth, should the appeal against the second respondent be dismissed, the DJ had erred in ordering that the appellant pays the second respondent costs on a standard basis up to the date of the OTS, and on an indemnity basis from 29 July 2022 to the date of the interlocutory judgment. The appellant submits that a Sanderson order would have been appropriate instead.[35]

20 In short, the first and second respondents take the position that the DJ's decision ought not to be disturbed and that the appellant's appeal ought to be

[35] AC at paras 141–148.

dismissed with costs.[36] The third respondent also submits that the appellant's appeal against it should be dismissed.[37]

21 I will consider each ground of appeal in turn.

Relevant legal principles

22 The legal requirements necessary to establish an action in the tort of negligence are as follows: (a) the defendant owed the claimant a duty of care; (b) the defendant's conduct breached the duty of care by falling below the requisite standard of care; (c) the claimant has suffered loss; and (d) the defendant's breach of duty was a cause of the claimant's loss (*Chen Qiangshi v Hong Fei CDY Construction Pte Ltd and another* [2014] SGHC 177 at [125]).

23 To determine whether the first element (*ie,* a duty of care) has been established, the court applies the approach set out in *Spandeck Engineering (S) Pte Ltd v Defence Science & Technology Agency* [2007] 4 SLR(R) 100 ("*Spandeck*"). First, before a two-stage test is applied, there is a threshold requirement of factual foreseeability. This refers to a reasonable foreseeability and will almost always be satisfied. The first stage requires sufficient legal proximity, which is determined by the closeness of the parties' relationship, including physical, circumstantial and causal proximity, having regard to factors such as the defendant's assumption of responsibility and the plaintiff's actual reliance upon the defendant. Where there is factual foreseeability and legal proximity, a *prima facie* duty of care arises. The second stage entails

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[36] 1st and 2nd Respondents' Case dated 19 June 2023 ("1-2RC") at para 119.

[37] 3rd Respondent's Case dated 19 June 2023 at para 21.

weighing policy considerations to determine whether the prima facie duty should be negated or limited (*Spandeck* at [73] – [86]).

24 The question of breach of duty requires an assessment of whether the defendant's conduct has fallen short of the standard of care. Generally, the standard of care is the objective standard of a reasonable person using ordinary care and skill. A number of factors go into the determination: the likelihood and risks of harm, the extent of harm, the costs of avoiding harm, the defendant's conduct or activity, the hazard or danger posed to the plaintiff and the industry standards or common practice (Gary Chan Kok Yew, *The Law of Torts in Singapore* (Academy Publishing, 2016) at paras 06.006, 06.018–06.037). Additionally, the standard of care is determined based on the reasonableness as determined at the time of the tortious event. The court should refrain from assessing the situation with the benefit of hindsight (*PlanAssure PAC (formerly known as Patrick Lee PAC) v Gaelic Inns Pte Ltd* [2007] 4 SLR(R) 513 at [54]).

First respondent's liability

25 It is undisputed that the first respondent, as the appellant's employer, owed the appellant a duty of care to take reasonable care for the appellant's safety at work (*The Law of Torts in Singapore* at para 04.010; also see *Zheng Yu Shan v Lian Beng Construction (1988) Pte Ltd* [2009] SGHC 6 at [38] and *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377 ("*Parno*") at [46] and [48]).

26 The key issue in dispute is whether the first respondent had breached its duty to the appellant by failing to take adequate safety measures in respect of the excavator on the Worksite. In particular, the question is whether a reasonable employer of a banksman and excavator operator using ordinary care and skill would have implemented a horning system and installed additional

cameras (that give the operator a live view of the blind spots of the excavator) onto its excavators. If so, the first respondent would be in breach for not doing so prior to the Accident.

27 During cross-examination, the director of the first respondent, Mr Arockiadoss Prem Kumar Sadeesh Mathew ("Arockiadoss") testified that after the Accident, two additional safety measures have been implemented (the "Additional Measures"). First, a horning system has been instituted, whereby the excavator operator is required to "horn" once before moving off. Second, newer models of excavators that have cameras installed on the sides of each excavator are used. These cameras connect to a monitor within the cabin, which allow an excavator operator to have a better view of the blind spots of the excavator.[38] Arockiadoss conceded that if the horning system had been implemented before the Accident, the Accident could have been avoided.[39] It is equally likely that if the excavator had been equipped with the new cameras prior to the Accident, the Operator would have noticed the appellant thereby averting the Accident. As a result, the appellant submits that the first respondent ought to have implemented the Additional Measures prior to the Accident. Further, the fact that these steps were "quickly and readily implemented after the [A]ccident shows that more could and should have been done to ensure the safety of the [appellant] at the Worksite".[40] The DJ rejected the appellant's argument as he deemed that the existing measures put in place by the first respondent were sufficient. In particular, the existing measures were: (a) the banksman system; (b) the loud beeping sound emitted by the excavator before

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38 Transcript (28 September 2022) at p 46 ln 29 to p 47 ln 19.

39 Transcript (28 September 2022) at p 47 ln 24 to p 48 ln 2.

40 AC at para 45.

it moved; (c) the Safe Work Procedure and Risk Assessments put in place by the second respondent, which the first respondent was required to comply with; and (d) the daily toolbox meetings where the first respondent's employees were briefed to look out for the blind spots of the excavator (GD at [43]–[49]). Further, the DJ stressed the fact that the two Additional Measures were put in place after the accident did not, without more, suggest that the existing safety measures were inadequate (GD at [50]).

28 After considering all the evidence before me, I hold that the DJ erred on this issue. In particular, the first respondent had breached its duty of care by failing to implement the horning system.

29 In my view, the existing safety measures were inadequate. I illustrate this by describing how the existing safety measures operate together. I accept that the banksman system is a safety measure. An excavator operator may not have a complete view of his surroundings, but the banksman provides an extra pair of eyes to ensure that the excavator moves around safely in the Worksite. A banksman can ascertain whether any person is standing in the excavator's blind spots. In essence, the banksman's role is to guide the excavator's movement with safety in mind. Next, the second respondent put in place the Safe Work Procedure for Operation of Excavator (the "Safe Work Procedure"), as well as the "Activity-Based Risk Assessment" (the "Risk Assessment"), which were to be implemented by the first respondent. For context, these documents set out the safety protocol for the operation of an excavator in a worksite.[41] For example, cl 4.2.6 of the Safety Work Procedure explicitly stated that the operator is "not allowed to operate the excavator" "in the absence of [a]

[41] Kasinathan's AEIC at KR-1, pp 49–52.

banksman". S/N (f) of the Risk Assessment stated that the excavator operator was "to move only [when] … given instruction (*sic*) by banksman".[42] Ideally, an excavator operator would apply the safety protocol and only move the excavator on the instructions of the banksman. In addition, during the daily toolbox meetings, workers would be briefed to not stand in the blind spots of the excavator. However, if the excavator operator erred by moving the excavator without the banksman's authorisation, there were no additional checks on safety. The DJ took the view that the loud beeping sounds emitted by the excavator would operate as a final check on safety, as the sounds would alert persons in the vicinity that the excavator was about to move (GD at [45]). However, I disagree that the beeping sounds were a safety measure. Neither the Safe Work Procedure nor the Risk Assessment mentioned the beeping sounds as part of the safe operation of an excavator. Let alone did these documents state that workers were to be alerted of the excavator's movements through the beeping sounds. Mr Murugaiyan Velmurugan, the site supervisor of the third respondent, adduced the video footage of the Accident taken on the external camera of the excavator (the "Video"). Based on the Video, it was clear that the loud beeping sounds were made *less than two seconds* before the excavator moved forward and hit the appellant. This provided insufficient reaction time for the appellant to register the movement of the excavator and move out of its way. I also agree with the appellant's submission that the beeping sounds easily blended into the background noise of the Worksite and the surrounding traffic, making the sounds less detectable.[43] Therefore, the beeping sounds of the excavator were not a safety measure put in place by the first respondent. Instead, the beeping sounds emitted appeared to be inherent in the operation of the

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42 Kasinathan's AEIC at KR-1, p 83.

43 AC at para 52.

excavator. In contrast, the horning system would have required the operator to take the deliberate act of "horning" once before he moves the excavator. This would alert the workers that the excavator was going to move.

30 One relevant consideration in determining the requisite standard of care is the cost and practicability of steps to eliminate or mitigate that risk (*BNJ (suing by her lawful father and litigation representative, B) v SMRT Trains Ltd and another* [2014] 2 SLR 7 ("*BNJ*") at [55]). The relevant risk in the present case is the risk of a worker being hit by an excavator at a worksite. I consider this factor in relation to whether the two additional safety measures ought to have been implemented before the Accident. In my judgment, the horning system is an extremely low-cost solution, and is simple to implement. To borrow the words of the House of Lords in *Overseas Tankship (UK) Ltd v The Miller Steamship Co Pty* [1967] 1 AC 617, the "action to eliminate [the risk] presented no difficulty, involved no disadvantage, and required no expense". In the first and second respondents' case, they argue that the horning system "may impinge upon public safety given that it may sound similar to a car horning", and that "this would confuse members of the public driving around the vicinity, possibly resulting in traffic accidents".[44] However, this argument is disingenuous and moot given that the first respondent did, in fact, implement the horning system after the Accident. Further, a horning system is not unprecedented. At the time of the Accident, cl 4.2.6 of the second respondent's Safety Work Procedure required excavator operators to "horn 3 times then check back before reversing".[45] Under S/N (i) of the Risk Assessment, operators

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44 1-2RC at para 39.

45 Kasinathan's AEIC at KR-1, p 51.

were also required to horn before reversing..[46] Therefore, it would be a simple matter to require excavator operators to horn before moving the excavator forward. In the GD, the Judge stated that "the sufficiency of the safety measures should be assessed based upon the state of affairs at the time of the accident, and should not be judged with the benefit of hindsight", referencing *BNJ* at [92] (GD at [50]). In my view, the horning system was an entirely reasonable measure for the first respondent to have implemented at the time of the Accident; it did not become an obvious solution *only* with the benefit of hindsight.

31 On the other hand, I accept that the appellant has not discharged his burden of proof in relation to the first respondent's failure to install cameras that give the operator a live view of the excavator's blind spots. The appellant claims that "[c]ameras are easy to install and maintain".[47] However, the appellant has provided no evidence of whether cameras and live monitors could have been installed on the first respondent's pre-existing excavators, and whether that would have been cost-efficient. In contrast, Arockiadoss gave evidence that the Additional Measures did not envision the "*installation*" of cameras at the side of each excavator, but rather that newly manufactured excavators came pre-installed with cameras.[48]

32 In terms of the magnitude of harm, excavators, with their size and power, can cause serious damage if they come into contact with workers at construction

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46 Kasinathan's AEIC at KR-1, p 85.

47 AC at para 65.

48 Transcript (28 September 2022) at p 47, ln 13–19.

sites.[49] Even though the appellant did not tender statistics of the frequency of excavator-related accidents to show the likelihood of harm, I accept that this was a real and not miniscule risk. Excavation is an inherently dangerous process. This is illustrated by the long list of potential safety hazards stated in the Risk Assessment. Weighing against these considerations was the relatively simple measure of implementing the horning system. Having regard to all the factors, I find that the first respondent had breached its duty to provide adequate safety measures by its failure to implement the horning system.

Second respondent's liability

33 Before this court, the second respondent does not dispute the DJ's finding that it owed a duty of care to the appellant, as the main contractor and occupier of the Worksite (see GD at [61]–[64]). In any event, I agree that the second respondent owed a duty of care to the appellant. Instead, the primary dispute concerns whether the second respondent had breached its duty of care to the appellant.

Breach of duty

Failure to provide proper training and safety briefings for the appellant

34 First, the appellant submits that the DJ erred in finding that the second respondent had not failed to provide proper training and safety briefings for the appellant. The appellant alleges that the second respondent's site supervisor, Mr Kasinathan Ramesh ("Kasinathan"), failed to brief the appellant on the locations of the excavator's blind spot during the toolbox meeting held in the

[49] AC at para 61.

morning of 16 May 2019.[50] One such blind spot would be where the appellant was standing at the time of the Accident.

35 As a preliminary point, I clarify the appellant's position right before the Accident took place. The appellant was at the front right corner of the excavator, next to the arm of the excavator and close towards the water barriers. He was facing away from the excavator and engaged in moving the water barriers inwards. This is shown in the Video, from which I have reproduced a still:

In the Appellant's Case, the appellant does not dispute that he was standing in a blind spot of the excavator.[51]

36 The burden of proof lies on the plaintiff to establish each of the legal requirements in the tort of negligence (*The Law of Torts in Singapore* at para 03.006; s 103 of the Evidence Act 1893 (2020 Rev Ed) ("Evidence Act")). The appellant must prove on the balance of probabilities to the satisfaction of the

50 AC at para 67.

51 AC at para 115.

court that he was *not* briefed on the location of the blind spot that he was standing at. In my judgment, the appellant had failed to do so.

37 Kasinathan testified that that the appellant had been briefed on the locations of the blind spot during the daily toolbox meetings.[52] In response, the appellant points to the handwritten notes recording the toolbox meeting on that day, which merely state that workers had been briefed not to "stand under excavator arms" and to "check [blind] spot and do not stand (*sic*) excavator rear". According to the appellant, the notes did not specifically identify *all* the other blind spots, including the location where the appellant had been standing. Therefore, the appellant claims that this evidences Kasinathan's omission. On balance, I accept Kasinathan's explanation that he had orally briefed the appellant about the blind spot where the Accident took place, just that it was not possible to record everything stated during the toolbox meetings.[53] Having raised the topic that workers were to check the blind spots of the excavator, it was more likely than not that Kasinathan would have also mentioned the locations of the blind spots.

38 Counsel for the appellant counters that the appellant specifically testified that he was uncertain if the locations of the blind spots were mentioned at the toolbox meeting:

> Q: Now, witness, I am going back to the put question, "You did not follow the toolbox instructions not to stand at the blind spot of the excavator." You said you agreed. I earlier asked you to explain. What I meant, and I should be clearer, Your Honour, is what do you understand by standing at the blind spot of the excavator?

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52 Transcript (28 September 2022) at p 83, ln 15–24.

53 Transcript (28 September 2022) at p 83, ln 13–14.

> A: I attended the meeting. *I am not sure* if they mentioned about the blind spot, but *I think* the blind spot is beside the arm.
>
> [emphasis added]

According to the appellant, this shows that it cannot be "conclusively determined that the [appellant] was briefed on the location of the blind spot at the toolbox meeting".[54]

39 I am not persuaded by this argument. In my judgment, the tentative language used by the appellant is a neutral factor. The appellant did not go as far as to say that the locations of the blind spot were *not* mentioned by Kasinathan. The uncertainty in the appellant's words could be a result of how long ago the toolbox meeting was, *ie*, more than three years before the appellant was cross-examined. The appellant himself acknowledged that "it ha[d] been a long time" since that toolbox meeting (in the context of whether the appellant had been briefed to wear PPE to work and not to stand under the excavation arm).[55] Therefore, the appellant's testimony could simply have been a reflection of his inability to remember definitively whether he had been orally briefed about the blind spots of the excavator. The appellant does not otherwise tender any further evidence that he was *not* briefed on the locations of the blind spots. On the balance of probabilities, I find that Kasinathan did brief the appellant on the locations of the blind spots of the excavator. Therefore, the DJ was right to conclude that the second respondent provided proper training and safety briefings for the appellant.

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54 AC at paras 69–70.

55 Transcript (25 July 2022) at p 23, ln 8–9.

Failure to exercise proper supervision

40 At the time of the Accident, Kasinathan, the second respondent's site supervisor, was not present at the Worksite. Kasinathan testified that, in his role as the second respondent's site supervisor, he oversaw five teams of workers, including the workers on the Worksite. On the day of the Accident, after conducting the toolbox meeting at the Worksite, he left to attend to another team.[56]

41 The appellant claims that Kasinathan's absence at the Worksite amounted to a breach of duty, as the second respondent had failed to exercise proper supervision over the excavator operations at the Worksite.[57] In the Case filed by the first and second respondents, the second respondent does not appear to dispute that a reasonable main contractor/occupier would be expected to supervise the Worksite. Instead, the second respondent submits that it had, in fact, exercised proper supervision over the Worksite.[58]

42 In my judgment, the second respondent had exercised proper supervision over the Worksite and was not in breach of this duty. The DJ rightly held that "by virtue of the Sub-contract entered into between the [first respondent] and [second respondent], the [second respondent] was entitled to rely on its sub-contractor, the [first respondent], to supervise the excavation works, including supervising the Operator and the banksman" (GD at [70]).

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56 Transcript (28 September 2022) at p 78 ln 4–6, p 79 ln 5–9.

57 AC at paras 76–82.

58 1-2RC at paras 52–57.

43 Clause 1.1 of the contract between the first and second respondents (the "Subcontract") stated that the first respondent "shall be employed as an independent contractor and shall provide and furnish all necessary resources for the proper and complete performance and acceptance of the works in relation to: 1) construction of pipe trench … [and] 2) construction of joint pit/bay with steel decking …".[59] To execute these works, cl 1.2(f)–(g) of the Subcontract indicated that the first respondent was to provide supervisors for the project. That was why the first respondent appointed Nathan Raja as the supervisor for the excavation team at the Worksite. Therefore, in terms of the allocation of responsibilities, the second respondent had contracted for the first respondent to supervise the works taking place at the Worksite. For completeness, I am not suggesting that a main contractor can abrogate its duties and claim that it was not in breach simply because it had subcontracted the relevant construction works to a subcontractor. However, in the present case, the first and second respondents had specifically contemplated the responsibility of supervision in the Subcontract. Therefore, the second respondent was entitled to rely on the first respondent to supervise the Worksite. For the same reasons, the first respondent's failure to ensure that Nathan Raja was present at the Worksite to supervise did not render the second respondent in breach of its duties.

44 In any event, the second respondent did not merely subcontract the construction of pipe trench and joint pit/bay with steel decking to the first respondent. It had taken steps to equip Nathan Raja with necessary safety skills and knowledge. By virtue of cl 1.2 of the Subcontract, the first respondent's supervisor was contractually obliged to attend and clear a safety course.[60] The

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59 Arockiadoss' AEIC at M-1, pp 5 and 6.

60 Arockiadoss' AEIC at M-1, p 6.

appellant relies on Kasinathan's testimony that Nathan Raja's knowledge of the second respondent's safety protocol was limited *solely* to what was briefed to workers at the toolbox meeting.[61] However, this was not Nathan Raja's direct evidence, as he was not called as a witness. Further, Kasinathan's statement is contradicted by the contemporaneous documentary evidence. Nathan Raja had also attended the Occupational Health and Safety Induction Course[62] and the Risk Assessment & Safe Work Procedure Briefing[63] on 14 September 2019.[64] Both the course and briefing had been conducted by the second respondent. In my judgment, the course, briefing and toolbox meetings would have equipped Nathan Raja with the skills to supervise the excavation works with safety in mind.

45 It would be unduly onerous to require the second respondent, as the main contractor, to provide an employee to be stationed with and supervise the works of each subcontractor (including the first respondent), notwithstanding the presence of the subcontractor's own supervisor. In the circumstances, the second respondent had discharged its duty of exercising proper supervision over the Worksite.

Failure to coordinate the Worksite and the third respondent's Worksite

46 Conversely, I find that the second respondent had breached its duty of care by failing to coordinate arrangements between the Worksite and the third respondent's Worksite. Counsel for the second respondent stated that the second

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61 AC at paras 80 –81.

62 Kasinathan's AEIC at KR-1, p 5.

63 Kasinathan's AEIC at KR-1, p 6.

64 1-2RC at para 53.

respondent had fulfilled this duty by: (a) entrusting the coordination of both Worksites to Nathan Raja; and (b) deploying two traffic controllers at the Worksite to manage the traffic flow.[65] I disagree.

47 In terms of the second respondent's contractual obligations, cl 1.2 of the Subcontract stated that the second respondent would provide a "Pavement Supervisor, Project Coordinator & Senior Supervisor to *coordinate site work*" to complement the first respondent's works.[66] This obligation would extend to making the necessary arrangements with the third respondent for the movement of vehicles in and out of the third respondent's Worksite. I highlight that the Worksite and the third respondent's Worksite were narrowly separated by a single lane on the carriageway. Furthermore, the evidence before me shows that the second respondent's employees knew they were responsible for coordinating both Worksites. On the stand, Kasinathan admitted that it was his responsibility and that of the project manager, another employee of the second respondent, to coordinate between the Worksite and the third respondent's Worksite. He did not deny that this job should *not* have been delegated to Nathan Raja:[67]

> Q Therefore it is your responsibility to coordinate between the work sites and this cannot and should not have been delegated to Nathan Raja. Do you agree?
>
> A *It is both the responsibility of me and my project manager.*
>
> Q Thank you. Just to clarify, by "project manager", do you mean Mr Song Yi?
>
> A Yes.
>
> Q *He's also an employee of the 2nd defendant*?

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65 1-2RC at para 59.

66 Arockiadoss' AEIC at p 6.

67 Transcript (29 September 2022) at p 3, ln 14–22.

> A *Yes.*
>
> [emphasis added]

48 In fact, during the trial, Kasinathan claimed that on 13 May 2019 (*ie,* three days before the Accident), he had gone to the third respondent's Worksite to verbally inform the third respondent that the second and first respondents were going to start work at the Worksite.[68] Kasinathan knew that as the project work progressed, the works would keep moving further along the road and that the barriers would also be shifted up along the road.[69] He knew that the third respondent's Worksite was stationary and that the Worksite would eventually be adjacent to the third respondent's Worksite. Kasinathan gave notice of the location of the Worksite because he foresaw that there would be an issue for the movement of vehicles in and out of the third respondent's Worksite. His actions show that he *appreciated* that it was the responsibility of the second respondent to coordinate between both Worksites. I reproduce the relevant parts of Kasinathan's cross-examination:[70]

> Q Did you discuss any coordination for how vehicles should enter and exit the [third respondent's] worksite?
>
> A No, we did not discuss any coordination.
>
> Q Did you discuss who should be the designated point of contact between the two worksites?
>
> A No, no such thing.
>
> Q … may I just ask who was present during your conversation … at the [third respondent's] worksite?
>
> A I cannot remember; it has been a long time already.
>
> Q Were you alone?

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68 Transcript (28 September 2022) at p 92, ln 8–11.

69 Transcript (28 September 2022) at p 91, ln 13–23.

70 Transcript (28 September 2022) at p 93 ln 2 to p 94 ln 12.

> A I recall being alone.
>
> Q So, there is no one that would corroborate your statement?
>
> A No such person.
>
> Q … You had approached the [third respondents] to inform them that you would be carrying out work outside of the [third respondent's] worksite because you could foresee that there may be issues for the movement of vehicles in and out of the [third respondent's] worksite, correct?
>
> A I did not think it would become a problem. I just went there to inform them.
>
> Q So, it was just a neighbourly "hello"?
>
> A Yes.
>
> Q I put it to you that you did, in fact, foresee that there would be an issue for the movement of vehicles in and out of the [third respondent's] worksite, therefore you went to inform them that their vehicles may be obstructed. I put it to you - do you agree or disagree?
>
> A I agree.
>
> Q … Now, because you agree that you had foreseen that this may be an issue, it would be fair to say that this would require preparations to be made by you, so that any issues that may arise from the blockage of the [third respondent's] vehicles could be addressed, you would have had to make preparations, do you agree?
>
> A I agree.
>
> …
>
> Q But you did not make any of these preparations, do you agree?
>
> A I agree that I didn't make any preparations but that is why we have two traffic controllers.

49 On the other hand, Arockiadoss, the director of the first respondent, testified that:[71]

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[71] Transcript (28 September 2022) at p 33, ln 28 –32.

> … [the third respondent] are supposed to know earlier once the vehicle be coming in and out, so they supposed to come and inform us, they supposed to clear the way for the vehicle to moving in. For on the time of accident, nobody inform [the first or second respondent] earlier there is the vehicle be coming in.

50 His statement suggests that the third respondent was responsible for coordinating the movement of vehicles into and out of the third respondents' Worksite. However, in light of the clear evidence given by Kasinathan that the second respondent was responsible for the coordination of the Worksites, I place no weight on this aspect of Arockiadoss' testimony.

51 However, Kasinathan's efforts to coordinate the Worksite and the third respondent's Worksite were plainly inadequate. I disagree with the first and second respondents' suggestion that such a duty on the second respondent would require it to provide "standing supervision" and "coordinate the vehicles of the Worksite". The important point is that when Kasinathan went to the third respondent's Worksite, he failed to make *any* arrangements to coordinate the traffic in the left-lane between the Worksites. In my view, to coordinate the Worksites, Kasinathan ought to have at minimum, given a point of contact to the third respondent. This would enable the third respondent to inform the first or second respondent in advance if large vehicles needed to turn into the third respondent's Worksite. Instead, as no communication was established, when the third respondent's Truck arrived and was unable to enter the third respondent's Worksite, the first respondent's employees (including the appellant) were left to make decisions at the spur of the moment.[72] During the trial, Kasinathan conceded that he did not make any further preparations.[73]

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72 Plaintiff's Closing Submissions dated 24 November 2022 ("PCS") at para 90.

73 Transcript (28 September 2022) at p 94, ln 10–12.

52 In addition, while the second respondent submits that it had deployed two traffic controllers to manage the flow of traffic, the evidence does not show that they were stationed at the Worksite at the time of the Accident. The second respondent relies on Kasinathan's evidence. During cross-examination, Kasinathan stated that the traffic controllers were supposed to stand by the road throughout the duration of the day. He explained that when road works were ongoing, it was "compulsory for a traffic controller team to be present". Otherwise, the authorities would "not allow [them] to work".[74] However, when asked whether there was any evidence that the traffic controllers were present the whole day, Kasinathan evasively said that "[t]he evidence is that they have been assigned to the traffic controller team".[75] Further, Kasinathan could not have seen the traffic controllers stationed at the Worksite, because he had left the Worksite in the morning after the toolbox meeting. On the other hand, the appellant testified that at the time of the Accident, "there was nobody at the place" and "[t]he traffic controller was also not there".[76] The second respondent did not identify any of the persons in the Video to be the traffic controllers either. As such, I find that the second respondent did not ensure that traffic controllers were present at the Worksite at the material time to manage the traffic flow.

53 On balance, the second respondent failed to discharge its duty to coordinate between the Worksites. Had the second respondent done so, this would likely have prevented the Accident from occurring. In the circumstances, I find the second respondent liable to the appellant in negligence.

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74 Transcript (28 September 2022) at p 94, ln 17–31, p 95 ln 5–8.

75 Transcript (28 September 2022) at p 94 ln 22–25.

76 Transcript (25 July 2022) at p 19, ln 24–25.

Vicarious liability

Relevant legal principles

54 In my earlier decision of *Munshi Mohammad Faiz v Interpro Construction Pte Ltd and others and another appeal* [2021] 4 SLR 1371 ("*Munshi*"), I held that it was permissible to hold multiple defendants vicariously liable for the negligence of a single tortfeasor, *ie*, dual vicarious liability (*Munshi* at [53]).

55 To determine whether each defendant ought to be held vicariously liable for a tortfeasor's negligence, the general two-stage test set out by the Court of Appeal in *Ng Huat Seng and another v Munib Mohammad Madni and another* [2017] 2 SLR 1074 ("*Ng Huat Seng*") (at [42] and [44]) is applied. Where more than one defendant satisfies the two-stage test, dual vicarious liability will simply be the result (*Munshi* at [68]). The two-stage test is as follows:

> (a) First, the relationship between the primary tortfeasor and defendant must be sufficiently close so as to make it fair, just and reasonable to impose vicarious liability on the defendant for the primary tortfeasor's acts.
>
> (b) Second, there must be sufficient connection between the defendant's relationship with the primary tortfeasor on the one hand and the commission of the tort on the other. In particular, the question is whether the relationship created or significantly enhanced the risk of the tort being committed.

56 In *Ng Huat Seng*, the Court of Appeal referred to the English Supreme Court's holding in *Various Claimants v Catholic Child Welfare Society and*

others [2012] 3 WLR 1319 ("*Christian Brothers*"). Specifically, the English Supreme Court (at [35]) identified a number of policy factors that would usually make it fair, just and reasonable for vicarious liability to be imposed in employment relationships. These were as follows:

(a) that the employer would be more likely than the employee to have the means to compensate the victim and could be expected to have insured itself against that liability;

(b) that the tort would have been committed as a result of activity undertaken by the employee on behalf of the employer;

(c) that the employee's activity would likely be part of the business activity of the employer;

(d) that the employer, by employing the employee to carry out the activity, would have created the risk of the tort being committed by the latter; and

(e) that the employee would, to a greater or lesser degree, have been under the control of the employer at the time the tort was committed.

57 The English Supreme Court added that even if the defendant and tortfeasor were not bound by an employment contract, vicarious liability could still be imposed where the relationship had the same incidents so that it was "akin to [an employment relationship]" (*Christian Brothers* at [47], cited in *Ng Huat Seng* at [54]). The Court of Appeal in *Ng Huat Seng* accepted (at [62] read with [54(a)]–[54(e)]) that these factors "help to guide the court in determining the types of relationships within which it would be fair, just and reasonable to impose [vicarious] liability".

Decision

58 The DJ found that the first respondent was vicariously liable for the Operator's negligence in managing the excavator (GD at [60]). I find no reason to depart from that decision, and parties have not disputed this outcome. Thus, the question is whether the second respondent should *also* be held vicariously liable for the Operator's negligence. In my judgment, this question must be answered in the negative.

59 Under cl 1.1 and 8 of the Subcontract, the first respondent was described to be an independent contractor of the second respondent. The appellant does not challenge that the first respondent was an independent contractor. Therefore, the DJ rightly pointed out that the Operator was "the employee of an *independent subcontractor* of the [second respondent]" (GD at [78]). It is trite law that vicarious liability cannot be imposed on a defendant where the tortfeasor is an independent contractor (*Ng Huat Seng* at [64]). The second respondent was not vicariously liable for the Operator's negligence in managing the excavator.

The appellant's contributory negligence

Relevant legal principles

60 Contributory negligence is a partial defence that reduces the quantum of damages payable to plaintiffs if they fail to safeguard their own interests (*Cheng William v Allister Lim & Thrumurgan and another and another appeal* [2015] 3 SLR 201 at [13]). The relevant provision is s 3(1) of the Contributory Negligence and Personal Injuries Act 1953 (2020 Rev Ed), which states as follows:

> **Apportionment of liability in case of contributory negligence**
>
> 3.—(1) Where any person suffers damage as the result partly of his own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the court thinks just and equitable having regard to the claimant's share in the responsibility for the damage.

61 With regard to the share of responsibility, the courts take into consideration the relative causative potency and the relative moral blameworthiness of the parties' conduct (*The Law of Torts in Singapore* at para 08.101).

62 Further guidance was provided by Belinda Ang JC, as she then was, in *Ng Swee Eng (administrator of the estate of Tan Chee Wee, deceased) v Ang Oh Chuan* [2002] 2 SLR(R) 321 ("*Ng Swee Eng*") at [60] and [61]:

> The existence of contributory negligence does not depend on any duty owed by the plaintiff to the defendant and all that is necessary to establish a plea of contributory negligence is for the defendant to prove that the plaintiff did not in his own interest take reasonable care of himself and contributed by this want of care to his own injury.
>
> …
>
> The standard of care depends on foreseeability … [S]o contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonably prudent person, he might hurt himself. A plaintiff must take into account the possibility of others being careless. As with negligence, the standard of care is objective in that the plaintiff is assumed to be of normal intelligence and skill in the circumstances.

63 Additionally, the defendant bears the onus of establishing contributory negligence on the part of the plaintiff (*Ng Swee Eng* at [59]).

64 Apportionment of liability in negligence involves a very fact-sensitive balance. As the Court of Appeal observed in *Asnah bte Ab Rahman v Li Jianlin* [2016] 2 SLR 944 ("*Asnah*") at [118] (in the majority decision), "it has been said that a finding of apportionment is a finding upon a question, 'not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis and of weighing different considerations'" (citing *British Fame (Owners) v MacGregor (Owners)* [1943] AC 197 at 201). The Court of Appeal in *Asnah* also stated that the apportionment exercise should be applied in a "rough and ready" manner, for the factors that the court is required to consider are "incapable of precise measurement" and are often "incommensurable" (citing *Jackson v Murray* [2015] UKSC 5 at [27]–[28] and [46])An appellate court should not intervene on the issue of apportionment by the trial judge unless it was clearly against the weight of evidence or was plainly wrong (*Ng Li Ning v Ting Jun Heng and another* [2021] 2 SLR 1267 at [34]).

Decision

65 Taking into consideration all the circumstances, I am satisfied that the present case meets the threshold for appellate intervention. I appreciate that this is a high threshold — an appellate court ought to intervene in appeals against apportionment of liability when it can be shown that the trial judge erred in principle, misapprehended the facts, or is otherwise clearly shown to have been wrong (*Goh Sin Huat Electrical Pte Ltd v Ho See Jui (trading as Xuanhua Art Gallery) and another* [2012] 3 SLR 1038 at [51]). To my mind, this threshold has been met for three key reasons. First, I have found that the first respondent committed another breach of its duty by failing to implement the horning system. Second, I held that the second respondent was liable to the appellant in negligence for its failure to discharge its duty to coordinate between the

Worksites. Third, the weight of the evidence shows that the engine of the excavator had, in fact, been switched off before the Accident (see below at [67]). In short, the conduct of the respondents was more blameworthy than what the DJ had found. Therefore, I reverse the decision of the DJ and hold that a lesser degree of blameworthiness should be attributed to the appellant.

66 In the present case, I accept that the appellant did not exercise sufficient care for his own safety by moving the water barriers while at the blind spot of the excavator, in breach of the safety protocols implemented at the Worksite, such that he was out of the Operator's view. Further, the appellant accepted that, as a banksman, he ought to have known better than to do that.[77]

67 Nevertheless, this must be balanced against other factors. First, it was reasonable for the appellant to take the view that the excavator would remain stationary. Assuming that I accept the first and second respondents' account of the events, at the material time, excavation work had stopped to allow the workers to perform other work. This was stated by the Operator in his Affidavit of Evidence-in-Chief.[78] There was no reason for the excavator to move. Further, according to the Safety Work Procedure, the Operator was required to wait for the directions of the designated banksman, *ie*, the appellant, before he could move the excavator.[79] Therefore, in the absence of any instructions from the appellant, the excavator would not have been expected to move. Respectfully, I also disagree with the DJ's finding that the engine of the excavator was still switched on at the material time (GD at [113]). The DJ gave no explanation for

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77 Transcript (25 July 2022) at p 40, ln 20–22.

78 Jayaraman Vanmigunathan's Affidavit of Evidence-in-Chief dated 7 December 2021 ("Operator's AEIC") at para 5.

79 Transcript (27 September 2022) at p 40, ln 8–22.

this finding. I recognise that the parties, including the appellant, accept that the engine was switched on. However, the only basis for this was the appellant's agreement during cross-examination that the engine was "not switched off".[80] On the contrary, the Operator explicitly stated in his Affidavit of Evidence-in-Chief that:[81]

> At or about 10.40am, we stopped the Excavation Work in order for the workers to carry out other work. All the workers including the [appellant] went out from the [Worksite] to perform some other work. I remained seated in the excavator, I lowered the boom and closed the arm of the excavator, *turn off the engine of the excavator and waiting for instructions to continue with the Excavation Work.*
>
> [emphasis added]

Under cross-examination, the Operator further testified that he only switched on the engine of the excavator right before he moved it forward:[82]

> Q: No, sorry, my question is from the time the conversation ended till the time that you switched on the engine to the excavator, how long was that?
>
> A: About 3 or 5 minutes, *I switched on the vehicle and moved.*

68 Between the evidence of the appellant and the Operator, I prefer the evidence of the Operator. The Operator was the person operating the excavator and would have personal knowledge of whether the engine was on when the appellant moved to the blind spot of the excavator. Therefore, the fact that the engine of the excavator had been switched off would reduce the appellant's expectation that the excavator would move forward.

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80 Transcript (25 July 2022) at p 34, ln 4–11 and p 50, ln 17–19.

81 Operator's AEIC at para 5.

82 Transcript (27 September 2022) at p 124 ln 30 to p 125 ln 1.

69 Second, I consider the DJ's finding that the appellant was inattentive. The DJ found that when the excavator moved, its arm lifted, and this was followed by various loud beeping sounds. Based on the loudness of the sound generated, the DJ concluded that it was implausible that the appellant would not have heard all these sounds and attempted some evasive action unless he was inattentive to his surroundings. The DJ noted that the appellant could have shouted to the Operator not to move or crossed over the water barriers to get out of the excavator's path, but he did not do either (GD at [114]). In my judgment, the facts of the Accident must be considered in their rightful context. In the static environment of the court room, it is simple to conjure up counterfactuals of what a party could have and should have done. However, the court must be attuned to the realities of a dynamic worksite. In this case, the Worksite was situated in the middle-lane of a three-lane road. Both the left and right lane were still accessible to public vehicles. According to both the appellant and the Operator, at the material time, there were "many cars coming", the "traffic was building up" and "getting heavy", "the vehicles were honking".[83] It was more likely than not that there was much ambient noise in this chaotic environment. Further, even though the excavator emitted beeping sounds which could be heard from the Video, these sounds were likely to be amplified as they were recorded by a camera fitted on the excavator. The DJ also acknowledged that the appellant only had a short span of a few seconds to react and decide what to do to avoid being hit by the excavator (GD at [118]). I emphasise that right before the Accident, the appellant was not simply standing around in the blind spot of the excavator. Rather, he was focused on pulling in the water barriers to

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[83] Transcript (27 September 2022) at p 11, ln 11–12, p 27, ln 32 to p 28, ln 1, p 31, ln 8–9.

remedy the situation between both Worksites. I also consider the observations of the Court of Appeal in *Parno* to be relevant (at [64]):

> *Courts have generally been reluctant to hold an employee to be at fault if his actions were taken in the heat of the moment following an emergency created by the employer's carelessness.* Courts would also be slow to scrutinise to the minute detail the conduct of a conscientious employee as the primary responsibility for ensuring safety rests with the employer. Additionally, the fact that the plaintiff had to take a risk does not amount to contributory negligence on his part if the risk were created by the negligence of the defendant and was one which a reasonably prudent man in the plaintiff's position would take. Broadly, it would seem that employees have more often than not been judged by less exacting standards than employers.
>
> [emphasis added]

70 In my view, the second respondent's failure to coordinate the Worksite and the third respondent's Worksite contributed to the disturbance created when the third respondent's Truck arrived. The appellant testified that he was facing substantial pressure, given that both the first and second respondents' supervisors were absent from the Worksite. The Operator also testified on the urgency that he experienced in the situation, stating that he was "afraid that the company may get summoned and that there may be problems between the two companies, for example LTA may call up and cut our points"[84] and that the "[third respondent's Truck] needed to go in so as not to cause any disturbance"[85]. The first and second respondents rebut that the appellant failed to procure the assistance of the traffic controllers to assist with the movement of the third respondent's Truck.[86] However, again, this begs the question of why

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84 Transcript (27 September 2022) at p 28, ln 1–4.

85 Transcript (27 September 2022) at p 54, ln 24–25.

86 1-2RC at para 58.

the traffic controllers of the second respondent were not present to regulate the traffic in the first place. It was not the duty of the appellant to find the traffic controllers. In my judgment, the appellant's decision to move the water barriers inwards was merely him going beyond his job scope. Undoubtedly, he wrongly stood in the blind spot of the excavator. However, his mistake must be weighed against the wrongs of the defendants – *ie*, the Operator's decision to move the excavator in the absence of the banksman's instructions, which was flagrantly in breach of the Worksite safety protocol, the first respondent's failure to provide adequate safety measures, the second respondent's failure to coordinate between both Worksites, and Neelamegam's decision to instruct the Operator to move the excavator without ascertaining whether it was safe to do so. In these circumstances, the court cannot have an unduly exacting standard towards the appellant's conduct.

71 Third, I consider the DJ's finding that the appellant heard Neelamegam asking the Operator to move the excavator (GD at [115]). The DJ opined that "[t]his should have heightened the [appellant's] level of vigilance further as to the potential dangers of standing next to the excavator which still had its engine on, since there was a distinct possibility that the Operator might move the excavator under pressure from Neelamegam". I earlier found that the engine of the excavator were switched off. In my judgment, even if the appellant had, in fact, heard Neelamegam's instructions, weight must also be placed on the fact that the Operator only moved the excavator forward three to five minutes later.[87] This was a noticeable period of inaction. I agree with the appellant's submission that it was reasonable for the appellant to construe the Operator's intention as

[87] Transcript (27 September 2022) at p 37 ln 30 to p 38 ln 3.

one where he had no intention to comply with Neelamegam's directions, except to wait for the appellant's further instructions.[88]

72 Therefore, on the totality of the evidence, the DJ was plainly wrong in deciding the extent of the appellant's contributory negligence.

Apportionment of liability

73 Based on the foregoing, I hold that the appellant was contributorily negligent to the extent of 10%.

74 The blameworthiness of the respondents was high. As explained by the DJ (GD at [135]), the Operator, an employee of the first respondent, was in breach of safety procedure by moving without the instructions of the banksman. He also failed to check his blind spots before moving the excavator. The first respondent was also negligent in failing to provide effective supervision of its employees and failing to implement the horning system. In relation to the second respondent, the Accident could have been avoided if it had taken prior measures to coordinate arrangements with the third respondent. Finally, Neelamegam, the third respondent's banksman, was the catalyst that resulted in the Accident. Had he not instructed the Operator to move the excavator, or had he ensured that the excavator's path was clear or alerted the Operator that the appellant was standing next to the excavator before giving his instructions, the Accident would have been averted. I disagree with the DJ's finding that because the Operator only moved the excavator three to five minutes after Neelamegam's instructions, this "weaken[ed] the causative potency between Neelamegam's acts and the [A]ccident" (GD at [137(b)]). The instructions

[88] AC at para 120.

given by Neelamegam were clearly weighing on the Operator's mind, which was why the Operator subsequently moved the excavator forward.

75 In his decision, the DJ relied on analogous cases to find that the appellant was liable for 33.33% of the damages. I agree with the appellant's submission that these authorities can be distinguished from the present case. The first case was *Neo Siong Chew v Chew Guan Seng* [2013] SGHC 93 ("*Neo Siong Chew*") (GD at [126]–[128]). In *Neo Siong Chew*, the plaintiff ("Neo") claimed against the first defendant ("Cheng"), second defendant ("Sim") and third defendant ("Kim Ting Landscape") for injuries he sustained arising out of an accident involving an excavator operated by Cheng. Sim was the main contractor for the construction of a building. It appointed Hock Po Leng Landscape & Construction Pte Ltd ("Hock Po Leng") to cut and uproot trees ("the job"). Hock Po Leng in turn subcontracted the job to Kim Ting Landscape. Kim Ting Landscape hired an excavator from Gim Soon Heng Engineering Contractor ("Gim Soon Heng") to do the job. However, since Gim Soon Heng had no excavators available for hire, it sub-contracted the work to Cheng who was an independent excavator operator (*Neo Siong Chew* at [1]–[3]). On 2 November 2008, Neo was supervising and working with Kim Ting Landscape's workers, when the excavator operated by Cheng reversed into Neo (*Neo Siong Chew* at [4]). At the material time, Neo had been walking along the construction site's cemented path towards a side gate (*Neo Siong Chew* at [4]). He suffered physical injury as a result. The High Court found Neo to be contributorily negligent to the extent of 30% for the injuries sustained by him as a consequence of the accident. This was for the following reasons (*Neo Siong Chew* at [60]):

> The plaintiff's warning to the third defendant's workers to "keep away from the excavator" showed that he appreciated the danger posed by working in close proximity with the excavator. Given the size of the excavator and the noise it generated, the

> plaintiff must have noticed the excavator as he was making his way to the side gate. A reasonably prudent man in the plaintiff's position would have kept a close eye on the excavator and given the excavator a wide berth. The plaintiff was careless in failing to keep a safe distance and a proper lookout for the excavator, thereby contributing to the accident.

76 In the GD, the DJ acknowledged that certain factors in the case pointed to a higher level of contributory negligence than in *Neo Siong Chew*, but other factors pointed in the opposite direction. Therefore, considered in totality, the extent of the plaintiffs' blameworthiness in both cases appeared comparable (GD at [128]). With respect, the appellant in the present case had a lower level of contributory negligence than the plaintiff in *Neo Siong Chew*. I emphasise two factors. First, in *Neo Siong Chew*, there was no evidence that Neo knew that the excavator had stopped its operations. In the present case, the Operator had been given a signal to stop operations. This would have reduced the appellant's expectation that the excavator would subsequently move without his instructions.[89] Second, in *Neo Siong Chew*, Neo failed to maintain a safe distance from the excavator when walking to the side gate to purchase drinks for the other workers. In this case, the appellant had a more pressing reason to be near the excavator at the material time: he was focused on the task of moving the water barriers inwards in what he perceived as an urgent situation. I acknowledge that this was not explicitly part of the appellant's job scope, but neither was he prohibited from assisting with this task. Therefore, this reduces the overall blameworthiness of the appellant relative to the plaintiff in *Neo Siong Chew*.

77 The second case is *Parno*. In *Parno*, the respondent shipowner employed the appellant as a rigger on board a barge. The barge was engaged in

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89 AC at para 137.

pile-driving operations, where a hammer would be used to drive the piles into the seabed. The hammer was started by what was known as a "starter". To start the piling, the starter would hoist the hammer vertically upwards. Thereafter, the starter would remain idle in that raised position throughout the piling operation (*Parno* at [2]–[3], [7]). On the day of the accident, the appellant was assigned to monitor the status and condition of the hammer from the piling tower deck (*Parno* at [8]). At the material time, piling operations stopped temporarily. It was undisputed that a pin on the hammer had become loose (*Parno* at [10]). The appellant sought to rectify the situation by attempting to temporarily replace the loose pin with a small wire normally used for welding. Whilst trying to replace the loose pin, the appellant stepped away from the platform and moved towards the hammer before the starter came down. In the course of his moving away, the starter fell onto the appellant's injuries (*Parno* at [11]). The Court of Appeal apportioned responsibility for the appellant's injuries in the proportion of one-third to the appellant and two-third to the respondent (*Parno* at [71]). This was on the following basis (*Parno* at [65]):

> While it was no doubt true that the appellant had approached the hammer at a time when the starter had not yet come down, it must be remembered that this was not a deliberate act of folly on the appellant's part. At the material time, the appellant had clearly overlooked that the starter had not come down or that it would do so within the course of the next few seconds. It was not the respondent's case that the appellant had consciously stepped into the path of the starter knowing full well that it was on the way down. At most, it was only a momentary lapse on the appellant's part.

78 In my view, notwithstanding certain similarities between the facts of *Parno* and the present case (see GD at [125]), there was one key differentiating

factor that was not considered by the DJ.[90] In *Parno*, if the pin was removed, it was *certain* that the starter would come down. Therefore, it was negligent that the appellant in that case "clearly overlooked that the starter had not come down or that it would do so within the course of the next few seconds" (*Parno* at [65]). However, in the present case, that degree of certainty was not present. It was not certain that the excavator would move forward if the appellant decided to move to the right front side of the excavator to move the barriers inward. As explained, it was reasonable for the appellant to have thought that the excavator would not move forward.

79 Therefore, the appellant is contributorily negligent to the extent of 10% for the injuries sustained by him as a result of the Accident.

The court's power to apportion the respondents' liability

80 To recapitulate, the DJ found the appellant contributorily negligent to the extent of 33.33%. The first and third respondents were liable to the extents of 56.67% and 10% respectively. In the present proceedings, the appellant seeks for the third respondent's liability to be revised upwards to 20%. However, the respondents did not make a formal claim for contribution against each other under ss 15 and 16 of the Civil Law Act (2020, Rev Ed) ("CLA"). Therefore, the question arises whether the court is empowered to apportion liability between the respondents in these circumstances.

81 In my view, the DJ ought not to have apportioned liability vis-à-vis the respondents. In Suit 1040, the appellant's case was simply that the respondents were jointly and severally liable in negligence – whether the respondents were

90 AC at para 134.

jointly liable was the question that the court had to answer. The appellant did not claim for the apportionment of each respondent's liability and, in any event, there was no reason for the appellant to do so. There was simply nothing further to be decided.

82 The same issue was considered in *Hwa Aik Engineering Pte Lt v Munshi Mohammad Faiz and another* [2021] SGHC(A) 1 ("*Hwa Aik*"), which was an application for leave to appeal two issues arising from my decision in *Munshi*. In *Munshi*, the plaintiff ("Munshi"), a construction worker, was injured by an excavator. The court held that the first defendant ("Interpro"), the subcontractor that carried out certain excavation works, and the third defendant ("Hwa Aik"), which supplied the excavator and operator ("Sujan"), were vicariously liable for the negligence of Sujan. Hwa Aik brought the application for leave to appeal. In *Hwa Aik*, the Appellate Division of the High Court ("AD") observed that Hwa Aik had not argued for contribution from the other two defendants in *Munshi*. Hwa Aik also did not argue that the court had power to make such an order for contribution in the absence of a formal claim for contribution. Therefore, the AD held that it was too late for Hwa Aik to seek such an order under an application for leave to appeal (*Hwa Aik* at [30]). In the subsequent case of *The Subsidiary Management Corporation No 01 – Strata Title Plan No 4355 v Janaed and another and another appeal* [2022] 2 SLR 743, the AD emphasised that:

> [d]efendants who wish to claim a contribution against each other should take note that they have to file the requisite notices of contribution under the [Rules of Court (2014 Rev Ed)] so that the issue can be dealt with by the trial judge. While we are aware that at times defendants seek such a contribution before a trial judge without filing the requisite notice of contribution and trial judges have made decisions on such a contribution, we take this opportunity to remind litigants and

> legal practitioners to comply with the Rules (as we have said so previously in [*Hwa Aik*] at [31]–[33]).

83 Before the DJ, the first and second respondents had made submissions on the apportionment of liability between the appellant and the three respondents: (a) appellant (50%); (b) first respondent (40%); (c) second respondent (0%); (d) third respondent (10%).[91] However, they did not present arguments on why the court had power to apportion liability in the absence of their formal claim for contribution. Further, the third respondent did not argue for contribution from the first and second respondents. It merely denied liability and submitted that the appellant should be contributorily negligent to the extent of 50%.[92] The DJ, therefore, did not hear the third respondent's arguments on the apportionment of liability. In all these circumstances, the DJ ought not to have apportioned the respondents' liability as between themselves.

Conclusion

84 For the above reasons, I allow the appeal. I summarise my findings:

(a) The first respondent was in breach of its duty to the appellant by failing to take adequate safety measures in respect of the excavator on the Worksite. In particular, the first respondent failed to implement the horning system prior to the Accident.

(b) The second respondent discharged its duty of exercising proper supervision over the Worksite. The second respondent was also not vicariously liable for the negligent acts of the Operator. However, the

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91 D1-2CS at para 112.

92 D3CS at para 10.

second respondent was in breach through its failure to coordinate between the Worksite and the third respondent's Worksite. Therefore, I reverse the DJ's finding that the second respondent was not liable to the appellant in negligence.

(c) The conduct of the respondents was more blameworthy than what the DJ had held. A lesser degree of blameworthiness should be attributed to the appellant. The appellant was contributorily negligent to the extent of 10%.

85 I therefore order judgment for the appellant against the respondents jointly and severally for 90% of damages to be assessed.

86 I will hear the parties on costs separately.

Dedar Singh Gill
Judge of the High Court

Han Hean Juan and Lu Zhao Bo Yu (Hoh Law Corporation) for the appellant;
Phua Cheng Sye Charles (PKWA Law Practice LLC) for the first and second respondents;
Tang Jin Sheng and Lin Weizhi Joshua (WhiteFern LLC) for the third respondent.