Malayan Law Journal Reports/2003/Volume 4/BATUMALEE A/L MASILAMANI & ANOR V THONG CHAN LENG & ANOR - [2003] 4 MLJ 391 - 25 July 2003

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[2003] 4 MLJ 391

BATUMALEE A/L MASILAMANI & ANOR V THONG CHAN LENG & ANOR

HIGH COURT (SHAH ALAM)
SURIYADI J
CIVIL APPEAL NO (MT1)12-56 OF 2000
25 July 2003

Damages (Personal Injury or Death) -- Personal injuries -- Arm -- Fracture of radius -- Injury to radius serious with permanent residual disabilities and deformity -- Whether award by sessions court judge adequate

Damages (Personal Injury or Death) -- Personal injuries -- Loss of future earnings -- Loss of income of part-time job resulting from injuries sustained by plaintiff -- Amount to be awarded to plaintiff for loss of future earnings

Damages (Personal Injury or Death) -- Personal injuries -- Medical expenses -- Plaintiff sought treatment at private hospital -- Whether sessions court judge correct in reducing claim for private hospital bill

Damages (Personal Injury Or Death) -- Personal injuries -- Ribs -- Fracture -- Quantum -- Upward movement in amounts awarded -- Whether RM1,500 per rib awarded by sessions court judge was reasonable

A collision had occurred between the first plaintiff and the first defendant, resulting in injuries and losses on the part of the former. After a full trial, the sessions court judge found the defendants wholly liable and awarded: (a) general damages of RM32,500 comprised of RM1,500 per rib for the fractures of the second, third, fourth and seventh ribs; RM6,000 for the fracture of the right radius, with bone deformity and other residuals; RM14,000 for the compound fracture of the right patella with disabilities; RM2,000 for osteoarthritis and RM3,000 for loss of amenities; and (b) RM4,200 for loss of earning prior to the date of the accident based on a multiplier of 12 months. The sessions court judge awarded a sum of RM4,200 for loss of earnings based on RM300 per month for his part-time job as a gardener at a multiplier of 12 months, plus a two-month bonus of RM600. The reason given by the sessions court judge was that as a part-time gardener, the first plaintiff could easily recover from his injuries after one year and accordingly, damages for future loss of earnings was not awarded as the first plaintiff should be able to do some other part time job in his present condition and earn RM300 or more. For the private hospital bill under the heading of special damages, the sessions court judge reduced the amount claimed from RM742.25 to RM250 on the ground that the first plaintiff, a government servant, could have continued with his treatment at the government hospital instead of a private hospital. The first plaintiff worked with the Majlis Perbandaran Petaling Jaya as a collector of larvae and earned about RM500 to RM600 per month. This was the plaintiffs' appeal against the quantum awarded by the sessions court judge in respect of the compensation awarded for the fractures of the ribs and radius, the medical expenses and the loss of earnings.

Held, allowing the appeal:

(1) Based on case law, an upward movement in the awards could be detected, either because of time factor or due to the seriousness of the injuries, but the sum awarded was certainly a far cry from RM1,500 per rib. Having considered the authorities supplied by the parties, an award of RM2,500 per rib was not unreasonable (see p 401D-E).

(2) In respect of the compensation for the fracture of the radius, the learned sessions court judge had again supplied a rather skimpy and non-talking ground of judgment without explaining the reason for the award. Based on the medical report, it was quite clear that the injury to the radius was serious enough to have permanent residual disabilities with deformity. Accordingly, the award of RM6,000 was varied to RM8,000 (see pp 402B-C, 403A-B).

(3) The reason supplied by the learned sessions court judge in reducing the medical expenses bill by one-third from the original sum of RM742.25 to RM250 was that the first plaintiff could have continued with his treatment at the government hospital instead of a private hospital. The view of the learned session court judge, unless qualified, would mean that a government servant was not worthy of treatment at a private hospital and that it was incumbent for a government servant to be admitted into a government hospital. Whether a successful litigant had obtained medical attention from a private hospital or not, the bottom line was that his attempts to recover those expenses was not an exercise to enrich himself, but was merely an attempt to recover the exact sum of out-of-pocket expenses as per the bill tendered in court. He would not get one sen more than what he has spent. The necessity of having to be admitted in a private hospital, be it by choice or circumstances, was purely a question of self-preservation at that crucial moment. On that construction, the emphasis that the first plaintiff must not seek medical assistance from a private hospital, but seek recourse from a government hospital primarily to suppress expenses should be abhorred. Putting things in perspective, not only did the defendant take away the life, health and happiness of the first plaintiff, but now the learned sessions court judge had taken away his right of choice of selection of hospital (see p 404E-H).

(4) In the instant case, the first plaintiff said that his initial treatment was at the General Hospital of Klang ('Klang GH'), which was an act of mitigation by itself. There, a metal plate was inserted onto his leg. The first plaintiff was informed that he had to wait three

to four years to remove the metal plate at the Klang GH. The first plaintiff was advised by a doctor at the Klang GH to have the metal plate removed at a private hospital and it was pursuant to that advice that the first plaintiff went to the private hospital. It was quite obvious that the first plaintiff had done everything to mitigate the expenses, and only proceeded to the private hospital after acceding to the advice of the government doctor. His actions therefore were justifiable and reasonable. As such, there was no reason why the learned sessions court judge should have rejected the actual claim of RM742.75. Even the formula of the one-third deduction was without any foundation. On that score, the order of the lower court was accordingly varied and the claim for special damages for the full sum of RM742.75 was allowed (see pp 405E-F, 406C-E).

(5) The accident occurred on 8 November 1996 and the decision was given on 10 March 2000. In spite of the prevalence of evidence confirming that the wounds were healed by 20 March 1998, the learned sessions court judge never alluded to the same. Instead, he stated that a multiplier of 12 months was used because the first plaintiff could easily recover from his injuries after one year. Therefore, an error had been committed here, as the lower court had been on some speculative exercise instead of alluding to the medical report (see p 407A-C).

(6) As reflected by the job held by the first plaintiff, he was not a highly educated man and his physical strength was his only asset to pep up his monthly income. The first plaintiff's own evidence, which were not contradicted, established that he could not walk normally or carry heavy work. With the first plaintiff now physically weakened through no fault of his, he should not be deprived of the income of his part-time job and suffer an uncertain future, just because the defendant had canvassed that the first plaintiff could seek out some other part-time job. After pondering the matter to its extremity, this court was unable to pinpoint any job which the first plaintiff could take up that did not require physical strength. With the weight of evidence against the view of the conclusions of the learned sessions court judge, the order pertaining to the pre-judgment loss of income was accordingly varied. The pre-judgment period was three years and four months. On the premise of the accepted RM4,200 per year multiplied by three years (ie RM12,600), and adding to it a sum of RM1,200 (ie RM300 4 month), the pre-judgment

loss of earning of RM13,800 was awarded. As for the future earnings and adverting to the formula in s 28A of the Civil Law Act 1956, the multiplier arrived at was 5.5 years (that is, 55 minus his age of 44, and thereafter dividing the difference by 2). Accordingly, a sum of RM23,000 (or 5.5 years multiplied by RM4,200) for loss of future earnings (see p 407D-F).

[2003] 4 MLJ 391 at 393

Bahasa Malaysia summary

Satu perlanggaran telah berlaku antara plaintif pertama dan defendan pertama, telah menyebabkan kecederaan dan kerugian di pihak plaintif pertama. Setelah perbicaraan penuh, hakim mahkamah sesyen mendapati defendan-defendan bertanggungjawab keseluruhannya dan mengawardkan: (a) ganti rugi am RM32,500 termasuk RM1,500 untuk satu tulang rusuk untuk keretakan tulang rusuk kedua, ketiga, keempat dan ketujuh; RM6,000 untuk keretakan radius kanan, kecacatan tulang dan lain-lain kecederaan; RM14,000 untuk keretakan teruk patella kanan yang menyebabkan kecacatan; RM2,000 untuk osteoarthritis dan RM3,000 untuk kehilangan kemudahan; dan (b) RM4,200 untuk kehilangan mata pencarian sebelum tarikh kemalangan berdasarkan satu pengganda 12 bulan. Hakim mahkamah sesyen telah mengawardkan satu jumlah RM4,200 untuk kehilangan mata pencarian berdasarkan RM300 sebulan untuk kerja sambilan beliau sebagai pekebun pada pengganda 12 bulan, dan juga bonus dua bulan RM600. Alasan yang diberikan oleh hakim mahkamah sesyen adalah oleh kerana sebagai pekebun sambilan, plaintif pertama boleh dengan mudah pulih dari kecederaannya selepas setahun dan sewajarnya, ganti rugi untuk kehilangan mata pencarian masa hadapan tidak boleh diawardkan kerana plaintif pertama boleh membuat kerja sambilan lain dalam keadaan sekarang dan mendapat RM300 atau lebih. Untuk bil-bil hospital persendirian di bawah tajuk ganti rugi khas, hakim mahkamah sesyen telah mengurangkan jumlah yang dituntut dari RM742.25 kepada RM250 atas alasan bahawa plaintif pertama, seorang kakitangan kerajaan, boleh meneruskan rawatan beliau di hospital kerajaan dan bukan hospital swasta. Plaintif pertama bekerja dengan Majlis Perbandaran Petaling Jaya sebagai pemungut larva dan mendapat RM500 hingga RM600 sebulan. Ini adalah rayuan plaintif-plaintif terhadap kuantum yang diawardkan oleh hakim mahkamh sesyen berhubung pampasan yang diawardkan unutk keretakan-keretakan tulang-tulang rusuk dan radius, perbelanjaan perubatan dan kehilangan mata pencarian.

Diputuskan, membenarkan rayuan tersebut:

(1) Berdasarkan undang-undang kes, peningkatan dalam pemberian award boleh dikesan, sama ada disebabkan faktor masa atau disebabkan keseriusan kecederaan, tetapi jumlah yang diawardkan lebih daripada RM1,500 untuk satu tulang rusuk. Setelah mengambilkira autoriti-autoriti yang dikemukakan oleh pihak-pihak, satu award RM2,500 untuk satu tulang rusuk adalah tidak munasabah (lihat ms 401D-E).

(2) Berhubung pampasan untuk keretakan radius, hakim mahkamah sesyen yang bijaksana sekali lagi telah mengemukakan alasan penghakiman yang tidak mencukupi tanpa menjelaskan alasan award tersebut. Berdasarkan laporan perubatan, ia adalah tidak jelas bahawa kecederaan kepada radius adalah tidak begitu serius

[2003] 4 MLJ 391 at 394

untuk mengakibatkan ketidakupayaan berkekalan yang lain dengan kecacatan. Sewajarnya, award RM6,000 telah diubah kepada RM8,000 (lihat ms 402B-C, 403A-B)

(3) Alasan yang diberikan oleh hakim mahkamah sesyen dalam mengurangkan perbelanjaan perubatan dengan satu pertiga dari jumlah asal RM742.25 kepada RM250 adalah bahawa plaintif pertama boleh meneruskan rawatan di hospital kerajaan dan bukan hospital swasta. Pendapat hakim mahkamah seyen yang bijaksana, kecuali bersyarat, akan bermaksud bahawa seorang pegawai kerajaan tidak layak menerima rawatan di sebuah hospital swasta dan ia adalah wajip seorang pegawai kerajaan untuk dimasukkan ke hospital kerajaan. Sama ada seorang litigan yang berjaya telah menerima rawatan perubatan dari sebuah hospital swasta atau tidak, pertimbangan utama adalah percubaan beliau untuk mendapat balik perbelanjaan tersebut bukan suatu perbuatan untuk mendapat kekayaan, tetapi hanya

percubaan untuk mendapat jumlah tepat perbelanjaan yang telah dibuat sebagaimana ditenderkan dalam bil di mahkamah. Beliau tidak akan mendapat sesen lebih daripada apa yang beliau telah belanja. Keperluan untuk dimasukkan ke hospital swasta, sama ada ia melalui pilihan atau keadaan, adalah semata-mata satu persoalan ketahanan diri pada masa tersebut. Berdasarkan tersebut, penekanan bahawa plaintif pertama tidak sepatutnya menerima bantuan perubatan dari hospital swasta, tetapi patut menerima rawatan di hospital kerajaan terutamanya untuk memperoleh perbelanjaan tidak patut berlaku. Melihat dari perspektif yang betul. Bukan shaja defendan telah menjejaskan kehidupan, kesihatan dan kebahagiaan plaintif pertama, tetapi sekarang hakim mahkamah sesyen yang bijaksana telah merampas hak beliau untuk memilih pilihan hospital yang ada (lihat ms 404D-H).

(4) Dalam kes semasa, plaintif pertama mengatakan bahawa rawaan pertama beliau adalah di Hospital Kerajaan Klang ('HK Klang'), yang merupkan satu tindakan pengurangan dengan sendirinya. Di sana, satu plet besi telah dimasukkan ke dalam kaki beliau. Plaintif pertama telah dimaklumkan bahawa beliau perlu menunggu tiga hingga empat tahun sebelum plet besi tersebut boleh dikeluarkan di HK Klang. Plaintif pertama telah dinasihatkan oleh seorang doktor di HK Klang untuk mengeluarkan plet besi tersebut di hospital swasta dan berikutan nasihat itulah plaintif pertama telah pergi ke hospital swasta. Ia aadalah jelas bahawa plaintif pertama telah melakukan segalanya untuk mengurangkan perbelanjaan, dan hanya telah pergi ke hospital swasta selepas mendapat nasihat daripada doktor kerajaan. Tindakan-tindakan beliau oleh demikian dijustifikasikan dan munasabah. Olehitu, tiada sebab kenapa hakim mahkamah sesyen yang bijaksana patut menolak tuntutan sebenar berjumlah RM742.75. Bahkan formula potongan satu pertiga tersebut tidak berasas. Berdasarkan sedemikian, perintah

mahkamah bawahan telah diubah sewajarnya dan tuntuan untuk ganti rugi khas untuk jumlah penuh sebanyak RM742.75 dibenarkan (lihat ms 406C-E).

(5) Kemalangan tersebut berlaku pada 8 November 1996 dan keputusan telah diberikan pada 10 Mac 2000. Walaupun terdapat keterangan mengesahkan kecederaan tersebut telah pulih menjelang 20 Mac 1998, hakim mahkamah sesyen yang bijaksana tidak pernah menyebut tentangnya. Sebaliknya, beliau menyatakan bahawa penggan 12 bulan telah digunakan kerana plaintif pertama boleh pulih dengan mudah daripada kecederaan beliau selepas setahun. Oleh itu, satu kesilapan telah berlaku di sini, kerana mahkamah bawahan telah membuat spekulasi dan tidak merujuk kepada laporan perubatan (lihat ms 407A-C).

(6) Sebagaimana yang digambarkan oleh pekerjaan yang dipegang oleh plaintif pertama, beliau bukan seorang yang berpelajaran tinggi dan kekuatan fisikal beliau merupakan satu-satunya aset beliau mendapat pendapatan bulanan. Keterangan plaintif pertama sendiri, yang tidak ditentang, membuktikan bahawa beliau tidak dapat berjalan seperti biasa atau menjalankan kerja-kerja berat. Dengan keadaan plaintif pertama yang sekarang tidak kuat secara fisikal yang bukan disebabkan oleh kelalaian beliau sendiri, beliau tidak sepatutnya tidak diberikan gaji daripada kerja sambilan beliau dan mengalami masa hadapan yang malap, hanya disebabkan oleh defendan yang telah mengatakan bahawa plaintif pertama boleh memohon kerja sambilan yang lain. Setelah meneliti perkara ini, mahkamah ini tidak dapat menunjukkan apa-apa kerja yang plaintif pertama boleh lakukan yang tidak memerlukan kekuatan fisikal. Berdasarkan beban keterangan terhadap pendapat tentang keputusan hakim mahkamah sesyen yang bijaksana, perintah berhubung pra penghakiman kehilangan pendapatan telah diubah sewajarnya. Berdasarkan premis RM4,200 setahun yang diterima untuk digandakan dengan tiga tahun (iaitu RM12,600), dan menambahkannya kepada jumlah RM1,200 (iaitu RM300 x 4 bulan), pra penghakiman kehilangan pendapatan berjumlah RM13,800 telah diawardkan. Untuk pendatan masa hadapan dan merujuk kepada formula dalam s 28A Akta Undang-Undang Sivil 1956, penggandanya adalah 5.5 tahun (iaitu 55 tolak umur beliau 44 tahun, dan kemudiannya membahagikan perbezaan tersebut dengan 2). Sewajarnya, jumlah RM23,000 (atau 5.5 tahun diganda dengan RM4,2000) untuk kehilangan pendapatan amsa hadapan (lihat ms 407D-F).]

Notes

For cases on loss of future earnings, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 674-703.

For cases on medical expenses, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) para 710.

For cases on personal injuries to the arm, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 454-455.

For cases on rib fractures, see 6 *Mallal's Digest* (4th Ed, 2002 Reissue) paras 757-758.

Cases referred to

Chong Kam Siong v Herman bin Baharuddin [1995] 2 CLJ 413

Chong Kim Kee v Tan Kok Hua [1968] 2 MLJ xxii

Davis v Powell Duffryn Associated Collieries Ltd [1942] AC 601

Dhoo Yin Kong v Yeoh Siong Chan [1999] MMD 1234

Fatimah bte Derakman v Wan Jusoh bin Wan Kolok & Anor [1994] 3 MLJ cl

Fauziyah bte Mansor v Abu Bakar bin Hussin [1993] Mallal's Curent Law para 353

Ismail bin Haji Manap & Anor Onn Swee Imm [1997] 6 Mallal's Curent Law

Mokhtaruddin Abdullah & Anor v Norizan bin Rosdi & Ors [1999] 1 AMR 419

Ng Beng Yoing v Mohd Faisal bin Selamat [1999] MMD 1228

Ong Ah Long v Dr S Underwood [1983] 2 MLJ 324

Rubiah Anuar v Lim Seng [1998] 3 CLJ 314

Saraswathy a/l Govindasamy v Balan Param Godan [1999] Mallal's Curent Law para 70

Siti Rahman binti Ibrahim v Marappan a/l Nallan Kounder & Anor [1989] 1 CLJ 252

Tan Cheong Poh & Anor v Teoh Ah Keow [1995] 3 MLJ 89

Tan Kok Soon v Tan Peng Swee & Anor [1988] MLJ xxxvi

Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22

Yai Yen Hon v Teng Ah Kek [1994] MMD 1223

Legislation referred to

Civil Law Act 1956 s 28A

Gomez (*Jerald Gomez & Assoc*) for the appellant/plaintiff.

Elango (*PH Looi & Co*) for the respondent/defendant.

Suriyadi J:

The first plaintiff, together with the second plaintiff who was his son, at the relevant time was riding motorcycle number BEL 2176. At that material time, the first defendant was driving his taxi whilst the second defendant was the owner of that vehicle. A collision had occurred between the first plaintiff and the first defendant, resulting in injuries and losses on the part of the former. After a full trial, on 10 March 2000 the session court judge had found the defendants 100% liable.

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The court after announcing its findings had accordingly ordered RM32,500 as general damages, carrying 8% interest a year from the date of filing of the case up to the decision date, RM4,200 for loss of income with 8% interest per year from the date of filing until the decision date, and RM5,060 as special damages carrying 4% interest per year from the date of accident to the decision date. The court had further ordered RM6,000 for the injuries of the second plaintiff, together with 4% interest from the date of the accident, till the date of the decision. Thereafter, from the date of decision until full payment, the interest rate ordered per year was 8%.

The plaintiffs, being dissatisfied with the quantum order subsequently filed an appeal. Having gauged the notes of proceedings, I found the sessions court's pronouncement as follows:

(i) For the fractures of the second, third, fourth and seventh ribs the court had awarded RM1,500 per rib (totaling RM6,000) after having followed the case of *Yai Yen Hon v Teng Ah Kok* [1994] Mallal's Digest at para 1223;

(ii) For the fracture of the right radius, with bone deformity and other residuals, the court had ordered RM6,000 following strictly to *Fatimah bte Derahman, Wan Jusoh bin Wan Kolok & Anor* [1994] 3 MLJ cl;

(iii) For the compound fracture of the right patella with disabilities, the court had awarded RM 14,000 (in the process following *Rubiah Anuar v Urn Seng* [1998] 3 CLJ 314, which had granted RM11,000 only);

(iv) For osteoarthritis the court had awarded RM2,000;

(v) For loss of amenities RM3,000 was awarded (hence the above grand total of RM32,500);

(vi) A mere RM4,200, based on a multiplier of 1 moths was ordered for the loss of earnings prior to the accident date. The reasons supplied for this RM4,200 were as follows:

> As for the first plaintiff''s claim for loss of earning, as a part time gardener, I awarded RM300 x 12 months = RM3,600 plus RM600 as two months bonus. The amount awarded is RM4,200. I used a multiplier of 12 months because the first plaintiff could easily recover from his injuries after one year. I did not award any future loss of earning because the first plaintiff had recovered from his injuries, which had healed. He should be able to do some other part time job in his present condition and earn RM300 or more. In fact the first plaintiff testified that he could do some part time job'; and

(vii) For *item k* under the heading of special damages, the bill which showed the amount of RM742.25 was reduced to RM250.

The sessions court justified the assessment of *item vii* in the following manner:

> For item (k) the bill came up to RM742.25 which I reduced to 1/3 = RM250. This is because the first plaintiff could have continued with his treatment at the government hospital instead of a private hospital.

[2003] 4 MLJ 391 at 398

To reiterate and for clarification purposes, bearing in mind that the appeal was confined to the issue of quantum, the

appellant had restricted the appeal only to the issues of compensation for the fractures of the ribs and radius, the matter of the medical expenses, and an additional loss of earnings. For the medical expenses, the appellant had wanted the full RM742.25 with the respondent wanting the original order of RM250 be maintained; for the loss of earning the sessions court merely gave RM4,200 but only for one year prior to the date of judgment. The appellant had canvassed for a longer period prior to the judgment; seven years and six months, with RM4,200 being maintained per year, after judgment. And of course the respondent made no offers to help things out.

From the plethora of cases slowly mounting up in our country, it is quite trite that appeal courts are not unaware that they should be quite slow in disturbing the decisions of courts of first instance, with the drastic action of undoing or varying the pronouncements of those courts only if the situation warrants it. Whether that drastic action is to be undertaken, will very much depend on the circumstances of the case, in particular whether the court has resorted to any wrong principles of law. In a case where the matter under appeal relates to quantum, the appeal court has to consider whether an erroneous estimate of the amount has been made, in the form of omissions by the presiding court to consider relevant matters, or having admitted irrelevant factors in the course of the assessment (see *Tan Cheong Poh v Teoh Ah Keow* [1995] 3 MLJ 89). In *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22, the Supreme Court had opined at p 23:

> The principle that could guide this court in determining whether it should interfere with the quantum of damages is crystal clear. What is also clear is that much depends on the circumstances of each case, in particular the amount of the award. In a particular case therefore it is for in that, either there was omission on the part of the judge to consider some relevant materials or he had admitted for purposes the appeal court to consider whether in the light of the circumstances of that case there is an erroneous estimate of the amount of the damage of assessment some irrelevant considerations. If the court is satisfied or convinced that the judge has acted upon wrong princile of law then it is justified in reversing; indeed it is its duty to reverse the finding of the trial judge.

Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd* [1942] AC 601 had occasion to remark:

> It is not enough that there is a balance of opinion or preference. The scale must go down heavily against the figure attacked if the appellate court is to interfere, whether on the ground of excess or insufficiency.

Abdul Wahab Patail J in *Mokhtaruddin Abdullah & Anor v Norizan bin Rosdi & Ors* [1999] 1 AMR 419 had also occasion to say:

> The burden on an appellant is therefore a heavy one. Firstly, the court in an appeal starts with the working presumption that any decision appealed against is right in every respect. To succeed the appellant must convince the appellate court that the decision appealed from is wrong. Not merely wrong
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> *[2003] 4 MLJ 391 at 399*
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> in law or manifestly excessive or inadequate as to be obviously so as to be plainly unreasonable.

Applying the above guiding principles to the facts of this case, I will now trudge along and see whether the subordinate court had applied the wrong principle of law or otherwise. As the appeal relates to quantum as reflected above, I have to decide whether an erroneous estimate of the amount had been made by virtue of omissions to consider relevant matters, or in the course of the assessment irrelevant factors had been taken into account by the judge. If there are too many fundamental erroneous factors that could be identified, which had influenced the subordinate court, I sitting as the appellate court, on balance will certainly be justified in rejecting or varying that adjudged sum.

I start of with the fracture of the ribs where the sessions court had ordered RM6,000 (RM1,500 per rib), with the appellant wanting an increased sum of RM12,000 (RM3,000 per rib). In the course of the hearing, the appellant had canvassed a few cases for my benefit, with a few from Singapore, and they were as follows:

(i) *Chong Kim Kee v Tan Kok Hua* [1968] 2 MLJ xxii, per rib being S$1500;

(ii) *Tan Kok Soon v Tan Peng Swee & Anor* [1988] MLJ xxxvi, per rib being S$1500; and

(iii) *Fauziyah bte Mansor v Abu Bakar bin Hussin* [1993] Mallal"s Digest p 353, per rib being S$3000.

From the above, it is crystal clear that the cases are primarily from Singapore, and spanned from 1968 till 1993, with the amount doubling after being stagnant for many years. In direct response, the defendant referred to these cases:

(i) Yai Yen Hon v Teng Ah Kek [1994] MMD 1223 where the court awarded RM1,500 per rib;

(ii) Choo Yin Kong v Yeoh Siong Chan [1999] MMD 1234 where the court awarded RM2,000 per rib; and

(iii) Ng Beng Yoing v Mohd Faisal bin Selamat [1999] MMD 1228 where the court awarded RM1,500 per rib (consent judgment).

The sums suggested by the defendant from the above precedents, clearly illustrate that courts have been quite consistent in meting out awards, which were quite low, regardless of the havoc created by inflationary factors in recent times. In the current case, the subordinate court had taken the safe route out by ordering that the defendant pay $1,500 for every fractured rib following the case of *Yai Yen Hong v Teng Ah Kok* [1994] Mallal's Digest at para 1223. That was the only reason for the award. It is thus quite impossible for me to conclude whether the court had erroneously been influenced by certain irrelevant factors or had failed to take into account matters that should have been considered. Nothing was mentioned whether the fractures were debilitating, whether they were simple fractures, whether

the compensatory sum was fair in the circumstances of the case, whether the injuries in the case of *Yai Yen Hong v Teng Ah Kok* were similar with the impugned injuries or not, and whether the court had considered matters of inflation etc. In a gist, the judgment was non-talking and thus had failed to justify the award.

Admittedly, it was a Herculean task to track down cases pertaining to injuries of ribs, but difficulty aside, in the sojourn I did find these enlightening cases:

(i) *Ismail bin Haji Manap & Anor Onn Swee Imm* 6 *Mallal's Digest* 1997 Reissue at para 1309 two right ribs suffering fractures with pneumothorax awarded RM3,325 (averaging RM1,662);

(ii) *Choo Yin Kong v Yeoh Siong Chan & Anor* (Summons 73-137-1997) awarded RM2,000 per rib; and

(iii) *Krishnan a/l Kotan Raman v Tan Tse Chow Lian* (Summons 53-171-1993) awarded RM3,000 per rib with left sided-haemarthorax.

From the above three cases a pattern could be detected, in that there was an upward movement in the awards, either because of time factor or due to the seriousness of the injuries, but certainly a far cry from RM1,500 per rib. Having considered all the authorities supplied by the appellant, the respondents, and other authorities read along the way, I could not help but conclude that an award of RM2,500 per rib was not unreasonable. Had the injuries been more serious, or had left more serious residual effects I would not have hesitated to award RM3,000 per rib.

It must stressed that awards are not meant to be punitive or a reward for a litigant"s sufferings but merely fair

compensation for the natural and direct consequences of the mistakes of a guilty party. In the process, that defendant should not be ruined or unfairly treated by the monetary compensation (*Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324). Further, the permanent social and financial changes, especially these last few years, with particular reference to the purchasing power of any award must also be taken into account. Adjustments must be undertaken, especially the indicated factor of inflation, which had resulted in the decline of the real value of money. In *Siti Rahmah binti Ibrahim v Marappan a/l Nallan Kounder & Anor*, Abdul Malek Ahmad J (as his Lordship then was) had occasion to say:

> The local authorities cases cited had given awards ranging from S$150 to S$350 *and in the light of inflation*, I would think an award of $350 per month to be fair and adequate for the cost of caring for the plaintiff at home. (Emphasis added.)

Apart from the above stance, judges as far back in 1973 had the courage to explore the effect of the diminution of value of money vis-a-vis an award, thus negativing the archaic fear of 'opening the floodgates' (see *Phuah Jee Suan v Nila Vasu Pillai* [1973] 1 MLJ 186; *Wong Tin Vui v Patrick Midok & Anor* [1975] 2 MLJ 260; *RJ Mcuiness v Ahmad Zaini* [1980] MLJ 304; *Siti*

Rahmah binti Ibrahim v Marappan a/l Nallan Kounder & Anor [1989] 1 CLJ 252). The fact that an award of a few ringgit fifty to sixty years ago have spiraled by leaps and bounds of late, merely confirms the fact that courts have not been unmindful of the reality of life and the effect of globalization. If the government has taken the pragmatic step to increase the price of water to be sold to Singapore, it does not take a wise person to ventilate that courts must move along with time too.

I now touch on the compensation for the fracture of the radius, of which the sessions court had ordered RM8,000, with the appellant demanding a sum of RM14,000. Again, the learned sessions court judge had supplied a rather skimpy and non-talking ground of judgment, and referring to a particular case but without explaining the reason for the meted out award. The appellant had referred to some cases and they were:

> (i) *Fauziyah bte Mansor v Abu Bakar bin Hussin* [1993] Mallal's Digest 353 where for the fracture of the radius and ulna S$10,000 was awarded for each fracture; and
>
> (ii) *Chong Kam Siong v Herman bin Baharuddin* [1995] 2 CLJ 413 where RM15,00 was awarded for the fractures of the radius and ulna.

The defendant merely referred to one case, ie *Saraswathy a/l Govindasamy v Balan Param Godan* [1999] MCL 70 where an award of RM15,000 was awarded for the injuries to the radius and ulna. A perusal of Road *Accidents Citator* by Hamid Ibrahim at p 388 indicated that for a closed fracture of the right radius and ulna in the case of *Chua Lee Hun v Rosli bin Mokmin* (*Summons* 53-16-1997) RM20,000 was awarded; for a simple fracture of radius and ulna with disabilities, in the case of *Mashitah bte Perang v Razali bin Jalil* (*Summons* 53-371-1995) RM20,000 was also awarded. It must be emphasized that, even though the latter cases emanate from the subordinate courts, their importance cannot be discounted, as their relevancy lie in mirroring the highly experienced minds of the lower courts.

Perusing the medical report, it was quite clear that the injury to the radius was serious, as illustrated by these excerpts:

> (i) at p 65:
>
> Uneven R wrist joint and inability to fully flex the right index finger. Limitation of flexion of 20% over right index finger;

(ii) at p 66:

Swollen R index finger and disorganization of the right wrist.

(iii) at p 67:

Dislocation of interior radio ulna joint noted with antero lateral angulation of ulna giving rise to the swollen wrist dorsum. Loss of joint space at the inferior radio ulna joint level.

(iv) at p 71:

His fracture distal end of right radius had healed with bony deformity of his right wrist and weakness of his right hand and has an inability to lift heavy objects with his right hand.

From the description of the report, I am satisfied that the injury to the radius is not simple but serious enough to have permanent residual disabilities with deformity. I therefore vary the order from RM6,000 to RM8,000.

I now zero in onto the issue of the rejected medical expenses wherein the court had reduced the bill by one-third, thus awarding only RM250 from the original sum of RM742.25. The reasons supplied by the learned sessions court judge were as follows:

For item (k) the bill came up to RM742.25 which I reduced to 1/3 = RM250. This is because the first plaintiff could have continued with his treatment at the government hospital instead of a private hospital.

Only that singular reason was given. From the above quotation, a rather controversial poser besets me, which require some iscussion, ie whether there is a first instance requirement that a plaintiff employed by the government must, by the nature of that connection, be admitted to a government hospital. Generally from past cases, any unsuccessful defendant would propagate that view, on the principle that a litigant must mitigate his losses, among others, in the like of not refusing to undergo surgery if required so, not to discharge himself against medical advice, and not spend on matters which have no correlation to the injury or connected to its recovery (see *Goh Beng Seng v Dot bin Dollah* [1970] 2 MLJ 95; *Yoong Leok Kee Corporation Sdn Bhd v Chin Thong Thai* [1981] 2 MLJ 1). The view of the learned sessions court judge, unless qualified would mean that:

(i) any government servant is not worthy of a private hospital treatment. It is a historical fact that government hospitals are meant to serve the public, especially the poorer sector, but certainly not to maintain and preserve the financial status of any defendant. The issue of quality or lack of it in government hospitals, is not too much debated nowadays, and thus it would take a brave person to say that changes have not taken place. But what cannot be denied, due to its popular patronage, speed of service is still a matter of concern for the man on the street;

(ii) if a government servant is unfortunate enough to be injured by an absolutely negligent defendant, and in

a state of pain or disorientation, is still required to be admitted into a government hospital. This stance is certainly unacceptable;

(iii) regardless of the government servant not knowing whether he will be able to recover his expenses or not from the defendant, it is still encumbent upon him to get admitted into a government hospital. It must be borne in mind that at the time of the admission the plaintiff would be in the dark as to the eventual outcome, not only of his expenses but also his life. In fact he would be putting himself at risk of having a huge bill to pay up his whole "working"life, in the event of his

[2003] 4 MLJ 391 at 403

failure to recover the expended sum from the defendant. Indisputably, it must also be reminded that, after any collision, uppermost in the mind of fair minded people is the saving of the injured person"s life, or at the very least to minimize the injuries and pain, and not the issue of cost saving;

(iv) the duty of any injured government servant to ensure that the financial position of the defendant remains firm whilst in what ever condition, regardless of the defendant"s outright culpability. This is nonsensical, as when the defendant was driving at breakneck speed, the interest of the plaintiff was a million miles away from his mind, but when his interest is being jeopardized, he screams out loudly for the protection of his rights and property; and

(v) that if the government servant is unfortunate enough to enjoy the benefits of a private hospital, apart from already suffering the physical pain and a bleak future, the risk of a huge bill confronting him in future is progressively stacking up against him rather than the guilty.

What about non-government servants or wealthy plaintiffs who suffer the misfortune of having being knocked down? Must they likewise act like that hypothetical government servant, and locate the nearest government hospital, so as to cut expenses for the benefit of the guilty party, or are they exempted? Even if so, to be consistent with the factor of cost saving, surely they ought to stay in third class wards. If different yardsticks are applied for government servants and non-government servant/wealthy plaintiffs, then surely something is not right somewhere.

At the end of the day, whether a successful litigant has obtained medical attention from a private hospital or not, the bottom line is that, his attempts to recover those expenses is not an exercise to enrich himself, but merely attempting to recover the exact sum of out-of-pocket expenses as per the bill tendered in court. He will not get one cent more than what he has spent (see *Guan Soon Tin Mining Co v Wong Fook Kim* [1969] 1 MLJ 99; *Mohamed Ibrahim & Anor v Christopher Piff & Anor* [1981] 1 MLJ 221).

The necessity of having to be admitted in a private hospital, be it by choice or circumstances, is pure and simple a question of self- preservation at that crucial moment. On that construction, the emphasis that the plaintiff here must not seek medical assistance from a private hospital, but seek recourse from a government hospital primarily to suppress expenses should be abhorred. Putting things in perspective, not only has the defendant taken away the life/health/happiness of the plaintiff, but now the learned sessions court judge has taken away his right of choice of selection of hospital. To wind up the matter, it would be appropriate to refer to the case of *Chong Kam Sion v Herman bin Baharuddin* [1995] 2 CLJ 413 where James Foong J had opined:

> Various authorities on this point were forwarded for my consideration but I find them to be contradictory with no firm guiding principles ...
>
> *[2003] 4 MLJ 391 at 404*
>
> In an unreported case of *Amamuthu a/l Suppiah v Mohamad Abu bin Hussin* (JB High Court Civil Suit No 1109-85) Mr Justice LC Vohrah awarded a sum of S$27, 811 as medical expenses incurred by the plaintiff for treatment in Singapore. An appeal against this decision was made by the defendant to the Supreme Court and the Supreme Court rejected the appeal .... The issue before this Court is therefore (a) whether the plaintiff is entitled

> to medical treatment in a private hospital ...
>
> Relating to the first question and after careful consideration .... In my opinion, an ordinary citizen of this country has a right to choose medical treatment for his injuries and illness from whatever and from wherever. The only limitation to this freedom are economic and availability factors.
>
> Applying the aforesaid principle of the freedom of choice, an injured victim in a road accident should also be granted the same right to choose where and by whom he wishes to be treated. When such patient seeks medical treatment at the material time, his immediate objective is to cure himself speedily. Next in his mind, would be whether he can afford such treatment and theavailability of medical specialist, equipment and treatment from the establishment he seeks to be admitted there is no certainty he would succeed in his claim for recovery of his expenses ...

For the reasons aforesaid, I find that the plaintiff in this case is entitled to seek medical treatment other than in a government hospital.

Returning to the main stream of the case, as against the above unusual statement made by the learned sessions court judge, the plaintiff clearly had said that his initial treatment was at the General Hospital of Klang, which is an act of mitigation by itself (appeal record at p 103). There a metal plate was inserted onto his leg. He also said:

> Hospital Kerajaan kata mesti tunggu tiga ke empat tahun untuk keluarkan plet. Doktor kata kalau mahu cuba pergi hospital swasta. Saya ikut nasihat pergi hospital luar (translation: *The* government hospital said that waiting time was three to four years to extricate the metal plate. Doctor said if I wish to try go to a private hospital. I followed that advice and went to the private hospital.] Prior to that in the examination in chief he had also testified the following:

> 'Ini bil dan resit yang saya telah buat bayaran. Ada pembedahan di lakukan untuk keluarkan besi dari tangan saya. Sebab masa terlalu lama untuk dibedah di Hospital Besar Klang. Saya pergi ke Andala Medical Centre kerana saya hendak pembedahan yang cepat sebab saya mengalami kesusahan untuk berjalan dari rumah saya ke pangsapuri *sebelum kemalangan*.
>
> (Translation: These are the bills and receipts of my payments. An operation was carried out to extricate the metal from my hand. It takes too long to perform the surgery at the Klang General Hospital. I went to the Andalas Medical Center as I wanted to have the surgery performed quickly as I found great difficulty walking from my home *after the accident*
>
> *[2003] 4 MLJ 391 at 405*
>
> (I believe there was a typographical error here. It cannot be *before* the accident).'

What could not be denied was that the evidence of the plaintiff was never effectively cross-examined. In resounding terms he asserted that:

(i) he went to a government hospital first before admitting himself into a private hospital;
(ii) a metal plate had been inserted onto his limbs which required eventual extraction;
(iii) he was in pain and had found difficulty in walking;
(iv) it would take a long time to wait for his turn due to the busy schedule of the government hospital;
(v) a doctor at that government hospital had advised him to try the private sector; and
(vi) he went to the private hospital pursuant to that advice.

From the above, it was quite obvious that he had done everything to mitigate the expenses, and had only proceeded to the private hospital after acceding to the advice of the government doctor. His actions therefore were justifiable and reasonable. With the above testimony left untouched by any cross-examination, I see no reason why the learned sessions court should have rejected the actual claim of RM742.75. Even the formula of the 1/3 deduction was without any foundation. On that score, I vary the order of the lower court, and allow the special damages prayer for the full sum

of RM742.75.

I now touch on the last issue of whether the plaintiff is entitled to all the loss of earnings up to the date of judgment (and thus not limited to the sum of RM4,200), and whether he is entitled to a future loss of earning for seven and a half years. To resolve these contentious matters, by necessity they must be resolved simultaneously, by virtue of their nexus and logic. In the circumstances of the case, if he is entitled to a loss of earning after judgment, then surely he is entitled to all the loss earnings before judgment, ie from the date of accident.

Scrutinizing the learned sessions court judge's order, he had only awarded RM4,200 for the loss of earning up to the date of judgment, and nothing thereafter for future loss of earning. The court had viewed the matter in the following way:

> As for the first plaintiff"s claim for loss of earning, as a part time gardner, I awarded RM300.00 x 12 months = RM3,600 plus RM600 as two months bonus. The amount awarded is RM4,200. *I used a multiplier of 12 months because the first plaintiff could easily recover from his injuries after one year. I did not award any future loss of earning because the first plaintiff had recovered from his injuries which had healed. He should be able to do some other part time job in his present condition and earn RM300 or more. In fact, the first plaintiff testified that he could do some part-time job.* (Emphasis added.)

The facts elicited from the notes of proceedings show that the impugned accident occurred on 8 November 1996 and the decision was meted out on 10 March 2000. As at 14 August 1997 as per the medical report in RR23 the injuries were yet to be healed. On 27 November 1997 he was admitted to the Andalas Medical Centre, and discharged on the same day for the above extraction of the metal plate, the source of the bill of RM742.75. The report of Dr Teo Wee Sin supplied by the defendant (RR 69) dated 20 March 1998 was the only conclusive report establishing when his injuries were healed. In spite of the prevalence of evidence confirming that the wounds were healed by 20 March 1998 the learned sessions court judge never alluded to them. Instead he uttered, 'I used a multiplier of 12 months because the first plaintiff could easily recover from his injuries after one year'. Surely an error had been committed here, as the court had been on some speculative exercise instead of alluding to the very report of the defendant. That report affirmatively confirmed that the injuries were eventually healed, but leaving behind physical pain, scars, residual deformities and a severe reduction of usage of the injured limbs.

This appellant works with the Majlis Perbandaran Petaling Jaya, as a collector of larvae earning about RM500-RM600 per month. He lives in one of the MPPJ quarters and moves around with that ill-fated motorcycle. During the trial, he opted to give evidence in Tamil. From the above facts, it was crystal clear that he was most comfortable in his mother tongue, and as reflected by the job he held, he was not a highly educated man; from the other evidence his physical strength was his only asset to pep up his monthly income. And now he is debilitated by physical afflictions. Had he not been in the employment of the MPPJ at the date of collision, with those permanent disabilities hindering his movements, he and his family would certainly have a bleak future. With the appellant now physically weakened, and devoid of any fault, is he to be deprived of the income of his part time job and suffer an uncertain future, just because the defendant canvassed that the appellant could seek out some other part time job? If the learned sessions court's decision is maintained, it means he has loss his future earnings, but strapped with all the pain and residual disabilities permanently and all for no fault of his.

With his antecedents and background, and after pondering the matter to its extremity, I am unable to pinpoint any job the appellant could take up, that does not require physical strength. His inability to squat fully or stand on his right leg without help too long, a limitation of flexion of the right knee joint, a patella distorted with loss of congruity, a generalized wasting of his right lower limb, and walking with a mild limp, which were clearly documented in the specialist reports, how could he? The plaintiff"s own evidence, which were not contradicted established that he could not walk normally or carry heavy work. Expecting him to become an Amway salesman overnight, with such a poor educational background and lack of language and selling skill, is a desperate act on the part of the defendant to impose the impossible on the appellant. Possibilities based on speculation are there, but we are living in a real world where

probability is the yardstick.

[2003] 4 MLJ 391 at 407

With the weight of evidence against the view of the conclusions of the learned sessions court judge, I herewith vary the order pertaining the prejudgment loss of income. After carrying out some arithmetical exercise, I calculate that the prejudgment period is three years and four months. On the premise of the accepted RM4,200 per year multiplied by three years (RM12,600), and adding to it RM1,200 (RM300 x four month), I hereby order the prejudgment loss of earning to be RM13,800.

As for the future earnings and adverting to the formula in the Civil Law Act 1956 (s 28A), I deduct from the number of 55 his age, ie 44, and thereafter divide by two (see *Marappan & Anor v Siti Rahmah bte Ibrahim* [1990] 1 MLJ 99). With the result of five and a half years multiplied by RM4,200 the eventual result is RM23,000.

To wind up the matter, I therefore allow this appeal with costs and make these consequential orders:

(i) I award RM2,500 for each rib fractured (increased from RM1,500 per rib);

(ii) I award RM8,000 for the fractured radius with their deformities thus increasing the award by another RM2,000;

(iii) I allow the full claim of RM742.75 for the special damages as per the bill; and

(iv) I award RM13,800 for the prejudgment loss of earning (inclusive of the learned sessions court award); and

(v) RM23,100 for future loss of earning.

(vi) All sums carry the usual interest from the date of accident except for post-trial.

Appeal allowed.
[2003] 4 MLJ 391 at 408

Reported by Lim Lee Na