BATUMALEE MASILAMANI & ANOR

v.

THONG CHAN LENG & ANOR

HIGH COURT MALAYA, SHAH ALAM
SURIYADI HALIM OMAR J
[CIVIL APPEAL NO: (MT1) 12-56-2000]
25 JULY 2003

DAMAGES: *Personal injuries - Quantum - Appeal against quantum - Rib fractures - Whether RM1500 per rib reasonable in current times - Medical expenses - Whether treatment sought at private hospital did not warrant full claim - Pre-judgment loss of earnings and future loss of earnings - Whether rightfully assessed by trial judge*

This was the plaintiffs' appeal against the quantum of damages awarded by the sessions court for personal injuries as a result of a road accident. The first plaintiff together with the second plaintiff, who was his son, was riding a motorcycle at the material time when the accident occurred with the first defendant who was driving a taxi. The second defendant was the owner of that vehicle. The sessions court judge ('sessions judge') found the defendants 100% liable. The appeal herein was restricted only to the issues of compensation for the fractures of the ribs and radius, medical expenses incurred and additional loss of earnings. For the medical expenses, the first plaintiff had claimed the full amount of RM742.25 for treatment sought at a private hospital but the sessions judge only granted RM250 on the basis that he should not have sought treatment there after his initial treatment at a government hospital. For the pre-judgment loss of earnings where the first plaintiff canvassed for a longer period, the sessions court only granted one year prior to judgment, *ie*, a sum of RM4,200 (RM300 wage per month x 12 months plus 2 months bonus).

Held:

[1] The sessions court judge failed to justify the award of RM1,500 for every fractured rib. The authorities show that there has been an increase in the awards for injuries of ribs. An award of RM2,500 per rib was not unreasonable. Had the injuries been more serious or had left more serious residual effects, the court would not hesitate to award RM3,000 per rib. (pp 101 h & 102 a-d)

[2] The sessions judge had not justified the award of RM6,000 for the fracture of the radius. The medical report showed that the fracture to the radius was serious enough to have permanent residual disabilities with deformity. Further, the authorities suggest a higher award for the fractures of the radius and ulna. Therefore the order of the sessions judge for the fracture to the radius should be varied from RM6,000 to RM8,000. (pp 103 c-h & 104 a-d)

[3] The first plaintiff must be allowed to seek medical treatment in a private hospital and not only from the government hospital. His initial treatment at the General Hospital of Klang was an act of mitigation itself. He only proceeded to the private hospital upon the advice of the government doctor. His actions therefore were justifiable and reasonable. There was no reason why the sessions judge should reject his claim of RM742.25 for medical expenses incurred. (pp 106 d-e, 107 c & 108 d)

[4] The first plaintiff was not a highly educated man which was reflected by the job he held. His physical strength was his only asset to pep up his monthly income. Had he not been in the employment of the MPPJ at the date of collision, he and his family would certainly have a bleak future due to his permanent disabilities hindering his movements. He should not be deprived of the income of his part-time job and suffer an uncertain future. (p 109 e-f)

[5] The pre-judgment period for loss of earnings was three years four months. On the premise of the accepted RM4,200 per year multiplied by three years (RM12,600) plus RM300 x 4 months (RM1,200), the pre-judgment loss of earning should be RM13,800. (p 110 b)

[6] The formula in s. 28A of the Civil Law Act 1956 applied for loss of future earnings. The plaintiff's age of 44 years deducted from 55 and divided by 2 and then multiplied by RM4,200 resulted in RM23,100. (p 110 d)

[Appeal allowed with costs and consequential orders.]

Case(s) referred to:

Choo Yin Kong v. Yeoh Siong Chan [1999] MMD 1234 ***(refd)***
Chong Kam Siong v. Herman Baharuddin [1995] 2 CLJ 413 HC ***(refd)***
Chong Kim Kee v. Tan Kok Hua [1968] 2 MLJ 22 ***(refd)***
Chua Lee hun v. Rosli Mokmin (summons 53-16-1997) ***(refd)***
Davis v. Powell Duffryn Associated Collieries Ltd [1942] AC 601 ***(refd)***
Fatimah Derahman, Wan Jusoh Wan Kolok [1994] 4 CLJ 537 HC ***(refd)***
Fauziyah Mansor v. Abu Bakar Hussin [1993] Mallal's Digest 353 ***(refd)***
Goh Beng Seng v. Dol Dollah [1970] 2 MLJ 95 ***(refd)***
Guan Soon Tin Mining Co v. Wong Fook Kim [1969] 1 MLJ 99 ***(refd)***
Ismail Hj Manap & Anor Onn Swee Imm Mallal's Digest Vol 6 1997 Reissue 1309 ***(refd)***
Krishnan Kotan Raman v. Tan Tse Chow Lian (summons 53-171-1993) (unreported) ***(refd)***
Marappan v. Siti Rahman Ibrahim [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174 SC ***(refd)***
Mashitah Perang v. Razali Jalil (summons 53-371-1995) ***(refd)***
Mohamed Ibrahim & Anor v. Christopher Piff & Anor [1981] 1 MLJ 221 ***(refd)***
Mokhtaruddin Abdullah & Anor v. Norizan Rosdi & Ors [1999] 1 AMR 419 HC ***(refd)***
Ng Beng Yoing v. Mohd Faisal Selamat [1999] MMD 1228 ***(refd)***
Ong Ah Long v. Dr S Underwood [1983] 2 CLJ 198; [1983] CLJ (Rep) 300 FC ***(refd)***
Rubiah Anuar v. Lim Sang [1998] 3 CLJ Supp 314 HC ***(refd)***
Saraswathy Govindasamy v. Balan Param Godan [1999] MCL 70 ***(refd)***
Siti Rahmah Ibrahim v. Marappan Nallan Kounder & Anor [1989] 1 CLJ 252; [1989] 2 CLJ (Rep) 481 HC ***(refd)***
Tan Cheong Poh v. Teoh Ah Keow [1996] 3 CLJ 665 CA ***(refd)***
Tan Kok Soon v. Tan Peng Swee & Anor [1988] MLJ 36 ***(refd)***
Tan Kuan Yau v. Suhindrimani [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 SC ***(refd)***
Yai Yen Hong v. Teng Ah Kok [1994] Mallal's Digest 1223 ***(refd)***
Yoong Leok Kee Corporation Sdn Bhd v. Chin Thong Thai [1981] 2 MLJ 21 FC ***(refd)***

For the appellant/plaintiff - Gomez; M/s Jerald Gomez & Assoc
For the respondent/defendant - Elango; M/s PH Looi & Co

Reported by Usha Thiagarajah

JUDGMENT

Suriyadi Halim Omar 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 Sessions Court judge had found the defendants 100% liable.

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 2nd, 3rd, 4th, and 7th ribs the court had awarded RM 1,500 per rib (totaling RM6,000) after having followed the case of *Yai Yen Hon v. Teng Ah Kok* [1994] Mallal's Digest at 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* [1994] 4 CLJ 537;

iii. For the compound fracture of the right patella with disabilities, the court had awarded RM14,000 (in the process following *Rubiah Anuar v. Lim 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 12 months was ordered for the loss of earning 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.

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 to 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 (*Tan Cheong Poh v. Teoh Ah Keow* [1996] 3 CLJ 665). In *Tan Kuan Yau v. Suhindrimani* [1985] 1 CLJ 429; [1985] CLJ (Rep) 323 the Supreme Court had opined:

> 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 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 in that, either there was omission on the part of the judge to consider some relevant materials or he had admitted for purposes of assessment some irrelevant considerations. If the court is satisfied or convinced that the judge has acted upon wrong principle 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 & 2 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 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$1,500;

ii. *Tan Kok Soon v. Tan Peng Swee & Anor* [1988] MLJ xxxvi, per rib being S$1,500; and

iii. *Fauziyah bte Mansor v. Abu Bakar bin Hussin (1993) Mallal's Digest* p. 353, per rib being S$3,000.

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 to pay RM1,500 for every fractured rib following the case of *Yai Yen Hong v. Teng Ah Kok* [1994] Mallal's Digest at 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 (supra)* 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 Mallal's Digest Vol 6 1997 Reissue 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 CLJ 198; [1983] CLJ (Rep) 300). 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 Rahman binti Ibrahim v. Marappan a/l Nallan Kounder & Anor (infra)*, Abdul Malek bin Haji 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" (*Phuah Jee Suan v. Nila Vasu Pillai* [1973] 1 MLJ 186; *Wong Tin Vui v. Patrick Midok & Anor* [1975] 2 MLJ 260; *RJ Guiness v. Ahmad Zaini* [1980] MLJ 304; *Siti Rahmah binti Ibrahim v. Marappan a/l Nallan Kounder & Anor* [1989] 1 CLJ 252; [1989] 2 CLJ (Rep) 481). 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 RM6,000, 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 RM15,000 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 emphasised 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 discussion 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 (*Goh Beng Seng v. Dol bin Dollah* [1970] 2 MLJ 95; *Yoong Leok Kee Corporation Sdn. Bhd. v. Chin Thong Thai* [1981] 2 MLJ 21). 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 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. it is 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 (*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 ...
>
> 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 the availability 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 3 ke 4 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 3 to 4 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 Andalas 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 (mine-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 RM742.25. 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 RM742.25.

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 7 1/2 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 2 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.

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 RM742.25. 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 lost 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.

With the weight of evidence against the view of the conclusions of the learned Sessions 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 4 months), 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 2 (*Marappan v. Siti Rahman bt Ibrahim* [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174). With the result of 5.5 years multiplied by RM4,200 the eventual result is RM23,100.

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 RM742.25 for the special damages as per the bill; and

iv. I award RM13,800 for the prejudgment loss of earning (inclusive of the learned Session 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.