

DIFFICULTIES SUFFERED BY ACCIDENT VICTIMS

ETICAN RAMASAMY*

This article highlights the sufferings of victims of motor vehicle accidents due to the amendments to Civil Law Act 1956 by Amendment Act A602 in the year 1984.

INTRODUCTION

1. It has been often said that about 50 to 60 per cent of the litigation work handled by lawyers somehow arises due to road accident claims commonly called running down cases. The main claims would be either loss of dependancy or injury claims or both. Prior to the introduction of major amendments by the Amendment Act No: A 602 amending Section 7 and also introducing the new Section 28A of the Civil Law Act 1956 (the CLA) the law for loss of dependancy and injury claims was largely governed by common law based on English law and case precedents. The amendments to CLA made by the Amendment Act No: 602 came into force on 1st October 1984. Sixteen years have passed and numerous judicial decisions have been made on the interpretation of these sections by Judges of High Court, Supreme Court and now Court of Appeal and Federal Court.

2. The question one often asks or is often confronted with is that, are these laws and their interpretations and applications fair to all concerned, in particular to the dependants whose bread winner has been killed or the accident victim who has been seriously injured or maimed?

3. In claims of this nature two elements need to be looked into. The first is the question of negligence and the other is damages which encompass bereavement, loss of dependancy, damages for pain and suffering loss of past and future earnings and other special damages. I shall not deal with the question of negligence in this article as it is still completely covered by common law principles and in my humble opinion the state of the law in our country as in many other common law jurisdictions seems to be satisfactory. Negligence in each case

* Advocate & Solicitor, High Court of Malaya

depends on its own facts and circumstances though judicial precedents do play an important role in maintaining consistency. Depending upon the question of negligence commonly called “liability” the claimant may get hundred percent of the claim or it may be reduced by 10, 20, 50 or even 80 per cent as contributory negligence or may even be dismissed depending on the facts of each case.

4. The element of DAMAGES is now the greatest concern of all lawyers who are conversant in this area of the law. I shall deal with loss of dependancy, bereavement and injury claims separately.

LOSS OF DEPENDANCY

5. Loss of Dependancy claims brought by spouse, children and parents of the deceased often arise due to the death of victims in motor vehicle accidents. In cases where the victim suffers personal injuries then the victim himself brings the claim for damages for pain and suffering and loss of earnings and other special damages suffered by him.

6. Prior to the amendments to CLA, when a person is killed in a motor vehicle accident, subject to liability, the parents, wife (or husband) and children of the deceased could claim damages for loss of dependancy or loss of support as a result of the death of the bread winner. The aggrieved family members could also claim a sum of RM6,000-00 or so as general damages for loss of expectation of life (as value of the life lost) and funeral expenses ranging from RM500-00 to RM5,000-00. In order to arrive at a fair and reasonable amount as damages the dependants had to prove and convince the Court two factors called “MULTIPLICAND” and “MULTIPLIER”.

MULTIPLICAND

7. The MULTIPLICAND was arrived at, after establishing the earnings or the earning potentials or earning capacity of the deceased and out of that figure, the sum alleged to have been given to the dependants would become the multiplicand. To cite an example, if the deceased was earning RM1,000-00 a month his widow and children as dependants may be awarded a sum of

RM700-00 a month as the multiplicand. This figure largely depends on the evidence adduced on earnings or potential earning capacity of the deceased. Please see the following cases on this:-

- a) AHMAD NORDIN & ANOR V ENG NGAH HUA & ORS (1985) 2 MLJ 431
- b) CHONG SOW YING & ANOR V OFFICIAL ADMINISTRATOR (1984) 1 MLJ 185

MULTIPLIER

8. The MULTIPLIER was generally arrived at by taking the age of the deceased at the time of his death and minus it from the life expectancy of the deceased. Prior to the 1984 amendments life expectancy was taken to be around 55 to 65 years depending upon the age and health of the person at the time of his death or trial. Out of that resultant figure it was reduced by one third for contingencies and other vicissitudes of life. For example, if the deceased, a plantation or factory worker or clerk was 36 years of age at the time of his death the multiplier would be 60 minus 36 less one-third which would give 16 years as the multiplier. For better understanding see the following cases on the multiplier:-

- a) KR TAXI SERVICE LTD. & ANOR V ZAHARAH & OTHERS (1969) 1 MLJ 49
- b) LEE THIAM V FATIMAH BTE SALLEH (1981) 1 MLJ 285
- c) CHONG SOW YING V OFFICIAL ADMINISTRATOR (1984) 1 MLJ 185
- d) RAFIAH BTE DAUD & ANOR V SHUKOR B. DASURI & ANOR (1985) 2 MLJ CXLVII
- e) CHE ZAH BTE DIN V NORDIN BIN NAYAN (1987) 1 CLJ 57
- f) CHAN HON FAH V KHOO HOON ANN (1988) 1 CLJ 791 @ 794

9. Taking the multiplicand and the multiplier the total damages for loss of dependancy is arrived at by looking at the annuity table. In the example cited above, taking RM700-00 as multiplicand and 16 years as the multiplier the figure for loss of dependancy as per annuity table would be RM91,056-00. The figure RM700-00 (multiplicand) was not given a direct multiplication by the multiplier 16 years but was read against the calculation as in the annuity table as the payment was accelerated in one lump sum. Please see the 6 cases cited in paragraph 8 above to get a greater understanding of this calculation.

PRE TRIAL AND POST TRIAL AWARDS

10. Due to a lapse of several years between the date of accident and the date of Court judgment in most cases the awards have been split into pre and post trial awards. Pre trial award also carried interest at 4 per cent per annum from the date of accident till date of judgment under the category of special damages. For purposes of this presentation I shall not go into the details of the workings of such cases except to say that the pre-trial award was arrived at by multiplying the amount of monthly loss (the multiplicand) by the number of months calculated from the date of accident to the date of Judgment. The post-trial award is for the future loss. For further understanding please see the following cases:-

a) NANI D/O NAGOO v WAYNE GARY WILLIAMS (1984) 2 CLJ 51

b) CHOH NYEE NGAH & ANOR v SYARIKAT BERUNTONG SDN. BHD. (1989) 3 MLJ 112

c) PANERSELVI v TOH BEE LIAN (1995) 4 CLJ 567

CLAIM FOR LOST YEARS

11. In passing I would like to add that prior to the 1984 amendments there was another type of claim called “claim for lost years for the benefit of the estate of the deceased”. This was established by the House of Lords case of Gammel v Wilson (1981) 1 AER 578 in England and it was followed by our Courts in the case of Thangavelu v Chia Kok Bin (1981) 2 MLJ 277. This type of claim has been abolished by the 1984 amendments and therefore it will not serve any purpose to say anymore on this.

THE LAW OF DEPENDANCY AFTER AMENDMENTS TO CLA

12. When a person dies, the wife, husband, parent and children of the deceased as dependants of the deceased are entitled to bring a claim for loss of dependancy under Section 7(1), (2) & (3) of CLA. Subject to the question of negligence (liability) as stated hereinbefore, the quantum of damages depends on two factors called multiplicand and multiplier.

PRESENT LAW ON MULTIPLICAND

13. The MULTIPLICAND as stated earlier is the amount of money that the

deceased is alleged to have earned and given to the dependants at the time of death. In order to arrive at this figure the dependants have to establish that the deceased was employed and was earning at the time of his death. If the deceased who has worked for 10 years resigns and while holidaying or taking a short break of 3 months before going into the next employment gets killed, his dependants may fail in the claim as the deceased was not working at the time of his death. The words “earnings at the time of injury (or death)” was discussed in detail in the Supreme Court case of *Dirkjee Halma v Mohd. Noor* (1990) 2 CLJ 167. It also appears that if a chambering pupil suffers death in an accident his dependants cannot claim anything beyond his meagre monthly allowances, if any, that he was receiving and giving to his dependants at the time of the fatal accident.

14. Of the total earnings earned at the time of deceased death so established, the following will be deducted:-

Income tax, if any, that was payable out of the income of deceased and deceased living or personal expenses. Normally about 20 per cent of his income is deducted for this purpose. See the case of *Takong Tabari v Government of Sarawak & Others* (1996) 5 MLJ 435 @ 462 and 463 where this has been well discussed by the learned Judge Mr. Justice Richard Malanjum in his judgment. Also see the case of *Tay Chan & Anor v SEA Insurance Bhd* (1993) 3 MLJ 706 where Richard Talalla J has also discussed this point in his judgment.

15. The establishing or proving of the multiplicand is largely a question of fact to be adduced and to be determined by the Court on the balance of probabilities. This area is often the hotly fought out segment when the matter proceeds for trial.

16. The important feature to note is that prior to the 1984 amendment the dependants could in proper cases argue and submit that the deceased, if not for his death, had good prospects of earning a high income in the future, or would continue with another job in the case of a deceased who had resigned shortly before the accident and that the earnings would have greatly benefitted the dependants. This point was discussed and accepted by the Courts in the

case of *Nani d/o Nagoo v Wayne Gary Williams* (1984) 2 CLJ 51 @ 52; *Mariam Binte Ahad v Ernesto A. Gacad* (1986) 1 MLJ 266; *Nordin Bin Haji Abdul Wahab v Mohamed Salleh Bin Hassan* (1986) 2 MLJ 294 and *Parvathy & Ors. v Liew Yoke Khoon* (1984) 1 MLJ 183. By the 1984 amendments [Section 7(3)(iv)(b)] the dependants cannot advance this argument anymore. Section 7(3)(iv)(b) reads:-

7(3)(iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:-

a) take into account that where the person deceased has attained the age of fifty five years at the time of his death, his loss of earnings for any period after his death shall not be taken into consideration; and in the case of any other person deceased, his loss of earnings for any period after his death shall be taken into consideration if it is proved or admitted that the person deceased was in good health but for the injury that caused his death and was receiving earnings by his own labour or other gainful activity prior to his death;

b) take into account only the amount relating to the earnings as aforesaid and the Court shall not take into account any prospect of the earnings as aforesaid being increased at any period after the person's death.

17. An example will not be out of place. A young lawyer or doctor aged 26 years and just employed for a couple of years earning a salary of RM2,000-00 a month, gets killed in an accident. His dependants now cannot argue and say that at the age of 35, if not for his death, he would be earning RM5,000-00 a month and would have contributed a larger amount (say RM3,500-00) to the dependants. If the young lawyer or doctor who was earning RM2,000-00 a month had resigned from Government service or had resigned from his former employment to set up a practice of his own and was taking a break for 2 months and gets killed in an accident at anytime during those 2 months his dependants may not succeed in their dependancy claim at all as he was not earning at the time or prior to his death. See the case of *Dirkjee Pieternella*

Halma v Mohd. Noor Bin Baharom (1990) 2 CLJ 167.

PRESENT LAW ON MULTIPLIER

18. The other factor called MULTIPLIER was, prior to the amendment left to the discretion of the trial judge as we see in all cases decided prior to the 1984 amendments as set out in paragraph 8 above. By the amendment the multiplier is now fixed by statute as follows:-

Section 7(3)(iv)(d) of CLA:

take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2.

19. Assuming that the deceased was earning RM1,000-00 a month (as in the example given in para 7 above) and that he was 36 years of age at the time of his death the dependancy claim under the amended law would be RM79,800-00 calculated as follows:-

- | | |
|--|-----------------------------|
| a) taking multiplicand to be | ... RM700-00 a month; |
| b) multiplier as fixed by law
(55 years minus 36 divide by 2) | ... 9 1/2 years (114months) |
| c) RM700-00 x 114 months | ... RM79,800-00 |

20. It has been strenuously argued by lawyers appearing for Defendants (Insurance Companies) that the multiplicand RM700-00 and the multiplier 9 1/2 years should be read against the annuity table, whereas lawyers appearing for Plaintiffs (dependants) argued that the statute (amendments) had taken into consideration the contingencies and other vicissitudes of life and the accelerated payments by limiting the age at 55 years and further by reducing the working life by half. The High Court and Supreme Court in numerous decisions has affirmed that a straight multiplier should be used and not the

annuity table and no further reductions should made. See the following cases:-

- a) SITI RAHMAH V MARAPPAN A/L NALLAN GOUNDER AND ANOR (1989) 1 CLJ 252
- b) DIRKJEE PIETERNELLA HALMA V MOHD NOOR BIN BAHAROM (1990) 2 CLJ 167
- c) WAKIL DIRI BAGI HARTA PUSAKA ATAS ROSLI MD. NOR (SI MATI) & ORS V TP SAFFEER & ANOR (1998) 4 CLJ 159
- d) LIM CHIN TEE V NORAZITA & OTHERS (1996) 1 CLJ 159
- e) KAMALA A/P GOPAL V RAJENDRAN A/L RAMASAMY & ANOR (1989) JULY BLD PARA 990

21. Unfortunately this trend seems to have been upset by the recent case of Takong Tabari v Government of Sarawak and others (1996) 5 MLJ 435 @ 463. The Learned High Court Judge Richard Malanjum J who dealt with the question of liability in an excellent manner had, with great respect, just by one sentence without arguments and reasonings in his judgment, reduced the damages by one-third for contingencies, other vicissitudes of life and accelerated payment (Ibid page 463 E). In that case there was ample evidence to show that the deceased was earning RM3,180-00 a month and after tax deductions and his personal expenses of RM600-00 he would have given RM2,500-00 a month to his dependants and therefore the amount of the multiplicand as claimed by the deceased wife, children and parents (as dependants) was rightly fixed at RM2,500-00 a month by the court. The multiplier as provided by the amended Civil Law Act Section 7(3)(iv)(d) was fixed at 9 years (55 minus his age 37 divided by two). On a straight multiplier the award was RM270,000-00 (RM2,500-00 x 12 x 9). By one-third reduction the dependants were awarded only RM180,000-00 as loss of dependancy.

22. The dependants lodged an appeal and the Court of Appeal upheld the decision of Mr. Justice Richard Malanjum. See Takong Tabari v Government of Sarawak & Others (1998) 4 MLJ 512. The dependants made an application to the Federal Court for leave to appeal to test this important point of law in view of other previous decisions on this area of the law. Unfortunately, I understand, leave has been refused as it is a question of quantum and not a point of law.

THE TAKONG TABARI CASE

23. In Takong Tabari, the deceased husband Jeffrey Satuk Gabar died on 16-

2-1990 due to the negligence of Defendants cited herein. The High Court Judgment was delivered on 17-10-1995. The Appeal to Court of Appeal was determined on 5-8-1998. The dependants of Jeffrey waited for about 100 months (8 years) for the determination of their claim. The trial Judge rightly held, the dependants needed RM2,500-00 a month for their survival. The total award is RM180,000-00 calculated at the rate of RM2,500-00 a month for a period of 72 months. The award of RM180,000-00 subject to the fees and disbursements payable to the Solicitors, would be hardly enough to cover the dependants daily sustenance needs during the period from 16-12-1990 to 5-8-1998 (100 months). The big question is, where do the dependants get their future income as their sole bread-winner had been killed without any fault on his part.

24. In this respect I am of the view that the only way to do justice to the dependants of such claims is to make an award of “pre-trial loss” for the period calculated from the date of death of the deceased till the time of trial and post-trial award for the remaining period as done in those pre-amendment cases cited in paragraph 10 above.

25. I respectfully submit that in a case like Takong Tabari where the trial was delayed by 66 months the award should have been made as follows:-

- a) Pre-trial loss at the rate of RM2,500-00 a month for a period of 66 months (from date of accident to High Court Judgment date) amounting to RM165,000-00 with 4% interest per annum from the date of death of the deceased to the date of Judgment;
- b) For post-trial loss the multiplier should be 55 less 42.5 (age of deceased Jeffrey calculated at the time of trial) divide by 2 as provided by Section 7(3)(iv)(d) of CLA. This will give 6.2 years or 74 months as the multiplicand. Thus, the post-trial award should have been RM2,500-00 x 74 months which gives RM185,000-00.

26. The award by way of pre-trial and post-trial loss would produce a more just and equitable result, particularly when the trial has been delayed for years for one reason or another. This can be achieved by suitable amendment to section 7(3)(iv)(d).

27. Now the lawyers are left with a big problem in hand in advising clients and I humbly believe the lower Courts which now deal with all running down cases are also faced with greater difficulties in deciding the multiplier, as the Court decisions are conflicting. The following cases have used a straight multiplier without one-third reduction as done in the case of Takong Tabari:-

- a) LIM CHIN TEE V NORAZITA & OTHERS (1996) 1 CLJ 159
- b) KAMALA A/P GOPAL V RAJENDRAN A/L RAMASAMY (1989) JULY BLD PADA 990
- c) SITI RAHMAH BTE IBRAHIM V MARAPPAN (1989) 1 CLJ 252
- d) DIRKJEE HALMA V MOHD NOOR (1990) 2 CLJ 167
- e) WAKIL DIRI BAGI HARTA PUSAKA ATAS ROSLI MD. NOR V TP SAFFEER & ANOR (1998) 4 CLJ 241

28. Leaving aside for a moment the agonies of lawyers and the agonies, if any, of the lower Court Judges and Magistrates, what is the effect of Takong Tabari on the dependants, the Public, for whose benefit the law and justice is to serve?

29. Let me take the example cited above, where the deceased aged 36 years and was earning RM1,000-00 a month at the time of his death.

- a) Prior to the 1984 amendments the dependancy claim on the annuity table would be taking RM700-00 as the multiplicand and 16 years as the multiplier will be. ... RM91,056-00
- b) After the 1984 amendment taking RM700-00 as the multiplicand and 9.5 years (114 months) as the multiplier on a straight multiplication the claim would be (RM700-00 x 114 months). ... RM79,800-00
- c) Following the decision of Takong Tabari the claim as in (b) above being further reduced by one-third would be. ... RM53,200-00

30. I humbly submit that by looking at the illustration quoted above the dependants will be very much worse off when compared to pre-amendment awards unless the Court of Appeal or the Federal Court takes a second look on the one-third reduction. For the time being until the present law is amended

I am of the humble view that there should not be one third reduction as done in the case of Takong Tabari.

31. In a short while I will even show that there are several other unsatisfactory features in the area of the law dealing with dependancy, bereavement and injury claims and that several changes by way of Parliamentary Legislation are needed, to make it just for the innocent victims of road accidents and other negligence claims resulting in death or personal injuries.

32. The law of dependancy now restricts the age limit to 55 years. (Section 7(3)(iv)(a & d)). This simply means that when a person attains the age of 55 years and gets killed in a motor vehicle accident or by other form of negligent act by a tort feisor his wife children and parents as dependants of the deceased will not be entitled to any dependancy claim. In the present day conditions this is another unsatisfactory feature. It may be alright where the deceased spouse is a government employee as the surviving spouse and minor children would enjoy pension benefits for the rest of their lives or till they attain age of majority. What about those millions who are in the private sector or professionals who go on working till 60 or even 65 years. According to the Ministry of Health the average life span of men is now 68 years and women is 72 years. (See New Straits Times, September 15, 1999). I humbly suggest that where the deceased person was working at the time of his death and there is evidence to show that he could go on working till 60 or 65 years depending on his health and the nature of his work or employment the multiplier should be calculated using a figure of 55 or 60 or 65 as the case may be depending on the evidence made available before the Court. The figure for multiplier should be left to the Courts' discretion depending on the evidence adduced or the cut-off age be increased to 60 or 65 instead of 55. The award should also be by way of pre-trial and post-trial awards.

CHAN CHIN MING'S CASE

33. The case of Chan Chin Ming & Anor v. Lim Yok Eng (1994) 3 MLJ 233 also created some confusion on the multiplier in respect of dependancy claims, where the deceased is an unmarried person leaving only parents as dependants. Prior to the amendment the multiplier was left to the discretion of the Court

depending on various factors. After the 1984 amendments the Courts calculated the multiplier as provided in Section 7(3)(iv)(d) of CLA. But in the case of Chan Chin Ming by a majority decision, the Federal Court has brought back the common law principles to ascertain the multiplier. The majority decision of Mr. Justice Peh Swee Chin SCJ concurred by Mr. Justice Dzaidin SCJ has an equally if not a strongly reasoned dissenting judgment of Mr. Justice Edgar Joseph Jr. SCJ who held the multiplier should be in accordance with Section 7(3)(iv)(d) of the Act without any reduction. As the statute stands now, I respectfully submit that the dissenting Judgment of Edgar Joseph Jr. SCJ correctly states the law simply based on principles governing the interpretation of statutes. If one takes the decision of Mr. Justice Peh Swee Chin SCJ and apply it to many other unsatisfactory features created by the 1984 amendments, I wonder whether our Courts will accept those arguments and decide according to pre-amendment laws and precedents.

THE HARDSHIP

34. Just to give an example, a person who had just graduated, after receiving his scroll with a first class degree in medicine or law or engineering, while on his way home after a convocation ceremony gets killed in a road accident without any fault on his part. As the law stands now, he being above 18, unmarried and not in gainful employment yet, his parents could claim nothing except a sum between RM2,000-00 to RM3,000-00 as funeral expenses. Is this fair to the parents who had spent a large sum of money on him and had high hopes of receiving benefits from him at their old age and till death takes them? We must not forget that the Public and the government expects, if not demands that the parents are the responsibility of their children, in a caring society. At their old age the children are expected to look after and care for them. It is also wrong to assume that parents dependancy will be cut off when the son/daughter gets married. We Malaysians do care for our parents even after the son or daughter gets married. The amount given to his/her parents may drop. Therefore the multiplicand can be adjusted. I venture to suggest that, with the current life expectancy in Malaysia, parents life can go on till 70 years or so. Therefore, the multiplier should be worked out depending on the age of parents of the deceased. The formula for multiplier could be 70 minus

the age of parents at the time of the accident and divided by two. If the age of parents differs then the multiplier should be worked out separately for each parent. Until such legislative amendments are made, the multiplier should strictly follow the formula as in Section 7(3), (iv) (d) of CLA without any further reduction as stated by Mr. Justice Edgar Joseph SCJ in his dissenting judgment in Chan Chin Ming's case.

BEREAVEMENT

35. According to Section 7(3A) and (3B) of CLA the spouse of the person deceased and the parents of unmarried minor are entitled to RM10,000-00 as bereavement. The Section reads:-

7(3A):An action under this section may consist of or include a claim for damages for bereavement and, subject to subsection (3D), the sum to be awarded as damages under this subsection shall be ten thousand ringgit (RM10,000-00).

7(3B):A claim for damages for bereavement shall only be for the benefit:-
a) of the spouse of the person deceased; and
b) where the person deceased was a minor and never married, of his parents.

7(3C):Where there is a claim for damages under paragraph (b) of subsection (3B) for the benefit of the parents of the person deceased, the sum awarded shall be divided equally between them subject to any deduction likely to be made in respect of all costs and expenses including costs not recovered from the defendant.

7(3D):The Yang Di-Pertuan Agong may from time to time by order published in the Gazette vary the sum specified in subsection (3A).

36. Prior to the amendment this part of the claim was called "loss of expectation of life" and the award had moved steadily from RM3,000-00 in the sixties to RM6,000-00 or so in 1984. The amendment had pushed up the figure to RM10,000-00 as bereavement. This figure can be pushed upward without much difficulty as provided in Section 7(3D) as set out above. Since this figure was fixed, 16 years have passed, and money has lost its value. I humbly suggest

that it is time that this figure of RM10,000-00 for bereavement should be increased to RM25,000-00 by an order made by Yang Di-Pertuan Agong as provided by Section 7(3D).

37. The other unsatisfactory feature of this section is that only the spouse of the deceased and the parents of unmarried deceased minor can claim for bereavement. What about unmarried persons who are above 18 years of age. What about parents who are killed in an accident. Do they not have any close kins to grieve or bereave. I suggest that Section 7(3B) be amended to read as follows:-

3(B) A claim for damages for bereavement shall be for the benefit:-

- a) of the spouse and children of the person deceased;
- b) of the parents where the deceased is unmarried;
- c) of the children where the deceased person leaves no spouse and no parents;
- d) of the brother and sister of the deceased where the person leaves no spouse, children or parents.

LOSS OF EARNINGS FOR INJURY CLAIMS

38. Prior to the 1984 amendments in calculating loss of earnings the Court did take into consideration the actual earnings, the prospective earnings and future earning capabilities depending on the facts of the case. See the case of:-

- a) *YANG SALBIAH & ANOR v JAMIL BIN HARUN* (1981) 1 MLJ 292. The Privy Council has confirmed this decision. See (1984) 1 MLJ 217.
- b) *THAM YEW HENG & ANOR v CHONG TOH CHENG* (1985) 1 MLJ 408
- c) *PANERSELVI v TOH BEE LIAN* (1995) 4 CLJ 567

39. All these cases have been nullified, so to say, by the introduction of Section 28A of CLA which reads:-

28A. DAMAGES IN RESPECT OF PERSONAL INJURY

- (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account:-
 - a) any sum paid or payable in respect of the personal injury under any

contract of assurance or insurance, whether made before or after the coming into force of this Act;

b) any pension or gratuity, which has been or will or may be paid as a result of the personal injury; or

c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.

2. In assessing damages under this section:-

a) no damages shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

b) if the plaintiff's expectation of life has been reduced by the injury, the Court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

c) in awarding damages for loss of future earnings the Court shall take into account;

i) that in the case of a Plaintiff who has attained the age of fifty five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

d) in assessing damages for loss of future earnings the Court shall take into account that:-

i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

ii) in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

40. In the case of a Plaintiff (injured) who had attained the age of 55 years or above at the time when he was injured no award for loss of earnings will be made. This certainly is not a satisfactory law as almost all professionals and businessmen go on working till about 60 or 65 years. There are also many other ordinary workers who go on working well after the age of 55 years.

41. By a close reading of Section 28A(2), (c), (i) and (ii) no loss of earnings will be awarded unless it is proven that the injured at the time when he suffered injury he was gainfully employed or was receiving earnings. In the absence of such evidence the injured will get nothing by way of loss of earnings even if the medical report clearly shows that he can never work in the future or even if he worked his earning capacity would have been drastically reduced.

42. The extreme and most unsatisfactory cases are where a bright student just after his graduation gets seriously injured and suffers disabilities whereby he is unable to work and earn an income. As the law now stands he will not receive any award for loss of earnings, partial loss of earnings or loss of earning capacity.

PROPOSED AMENDMENTS

43. The age 55 years appearing in Sections 7(iv) (a), 7(iv) (d) and 28A (2) (c) (i) and (d) (ii) of the Civil Law Act should be amended to read as 65 years.

44.1 In the case of dependency by parents the multiplier should be decided by taking the age of the parents at the time of their son or daughter's death and minus it from 70 years (life expectancy in Malaysia) and divided by 2.

44.2 The resultant figure using the multiplicand and the multiplier so derived in all dependency cases should not be further reduced by one-third as was done in the case of Takong Tabari.

45. Sections 7 and 28A of CLA be amended to allow prospective earnings or loss of earning capacity to be taken into consideration when a person dies or is seriously injured.

46. The claim for bereavement as in Section 7(3A) be increased from RM10,000-00 to RM25,000-00 by Gazette notification by Order of Yang Di-Pertuan Agong.

47. Section 7(3B) be amended to read as follows:-

- 3(B) A claim for damages for bereavement shall be for the benefit:-
- a) of the spouse and children of the person deceased;
 - b) of the parents where the deceased is unmarried;
 - c) of the children where the deceased person leaves no spouse and no parents;
 - d) of the brother and sister of the deceased where the person leaves no spouse, children or parents.

CONCLUSION:

48. Fellow Members of the Bar who handle death or injury claims and even members of the public have expressed great concern over the hardships caused by the Amendment Act A602 to the writer. This paper will be submitted to the Law Reform and New Legislation Committee of the Malaysian Bar Council to prepare a memorandum to be submitted to the relevant authorities for appropriate changes in the law. The writer welcomes suggestions from Members of the Bar and the public to reach him or the Bar Council by 31st October 2000.