

DAMAGES FOR PERSONAL INJURIES AND CAUSING DEATH RESULTING FROM ROAD TRAFFIC ACCIDENT: A SURVEY FROM MALAYSIA

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ABSTRACT

In Malaysia, damages for personal injuries and causing death, other than homicide, is primarily governed by the Civil Law Act 1956 (Amendment 1984). Quantum for damages for personal injuries are said to be higher than the fatal case which is confined to bereavement, funeral expenses, estate claim and dependency claim. If the injured are alive and suffer resulting from the incident, there are four types of damages that can be claimed, namely: (i) pain and suffering and loss of amenities, (ii) loss of future earnings, (iii) loss of earning capacity and (iv) future care expenses. For most road accident cases, the root cause is said to be negligence. The principles of negligence under the law of tort is used to determine liability. Using road traffic accident cases as the focus of the study, this paper examines in details the current situation, address issues, the role of insurance company as well as show where changes to the law are necessary.

Keywords: damages, personal injuries, road accident, civil law.

1. INTRODUCTION

For a person suffering personal injuries as a result of any tortious act committed upon him, the usual redress is an award for damages. The principle used in *restitutio in integrum*. It means to restore the plaintiff to the position he or she would have been in if the relevant tort had not been committed. It is not to enrich the injured but the approach is to put the injured party in a position he would have been in had he not been injured. The goal of this *restitutio* concept is that the plaintiff is to be fully compensated for his loss as far as is possible by monetary compensation.

In Malaysia, damages for personal injuries and causing death, other than homicide, is primarily governed by the Civil Law Act 1956. CLA 1956 was introduced as a continuation from Civil Law Ordinance 1937. The Act was amended in 1972 and in 1984 a new amendment was made to include section 28A on damages in respect of personal injury. The then amendment is said to be making changes to the law by putting in the method of calculation and assessment of damages if the injured persons are alive and suffer resulting from the incident. Thus, four types of damages can be claimed, namely: (i) pain and suffering and loss of amenities, (ii) loss of future earnings, (iii) loss of earning capacity and (iv) future care expenses. Quantum for damages for fatal cases remain the same and are confined to bereavement, funeral expenses, estate claim and dependency claim. The road traffic accident is dealt with road traffic law, personal injury law and also insurance law. The accident is investigated by the

traffic police and the police report is required to be made by both parties involved. Once the liability is determined, the case can be settled either through the insurance company or be referred to the court. Cases that are considered as straightforward and without any dispute, can be referred to the insurance company. The notice must be given by the insured to the insurer as stipulated under the Insurance Act. If the case cannot be settled immediately, particularly those involving serious or fatal injuries and dispute occurs as to determining liability and quantum, then it will go to court. The principle of negligence under the law of tort will be used to determine liability of parties involved and the consequences of liability in terms of compensation is dealt with by Civil law Act 1956. The fault party is not necessarily be found liable 100%, in certain cases, the liability may be apportioned between both parties depending on the facts of each case. The article looks at selected cases to see the interface between the law with the quantum of awards for death and personal injuries and see whether it reflects the real problem of injuries suffered by the victims.

2. METHOD

This paper analyses provisions under the Civil Law Act 1956, the main references for claim when death or personal injuries occur are section 7, 8 and 28A of the Act. Then we go on examining the decisions on quantum of damages handed down by various courts for various types of injuries and losses suffered by the victims. For this we used reported cases, selected according to headings of injuries, to evaluate how the quantum of damages were awarded.

3. RESULTS AND DISCUSSION

The Civil Law Act 1956 is the main reference and it contains seven parts with provisions regarding fatal accidents and survival of causes of action, tortfeasors and award of interest; contributory negligence and common employment, frustrated contracts, apportionment, disposal, devolution of property and miscellaneous. The Act was amended in 1984 where section 28A was included spelling out the compensation benefited injured persons or the defendants of deceased persons. Quantum for damages for personal injuries are said to be higher than the fatal case which is confined to bereavement, funeral expenses, estate claim and dependency claim. If the injured are alive and suffer resulting from the incident, there are four types of damages that can be claimed, namely: (1) pain and suffering and loss of amenities, (2) loss of future earnings, (3) loss of earning capacity and (4) future care expenses. Damages payable are divided into two types: general and special damages.

Special damages are referred to as the plaintiff's actual pecuniary loss between the date of the accident and the date of trial. It consists of out-of-pocket expenses like hospital bills, operation cost, repair cost and actual loss of earnings during the period of total incapacity. Generally it can be calculated exactly. All special damages must be specifically pleaded and proved, otherwise no award will be made as decided in *R.J McGuinness v. Ahmad Zaini* ([1980] 2 MLJ 404). It is also the duty of the plaintiff to mitigate his loss. General damages represents the loss to the plaintiff that cannot be precisely quantified like pain and suffering and so on.

3.1 Death resulting from road traffic accident

Part 3 of the Act is entitled Fatal Accidents and Survival of Causes of Action. For compensation to the family of a person for loss occasioned by his death, section 7(1) provides that whenever the death of a person is caused by wrongful act, neglect or default, the family as the heir, have the rights to initiate an action and recover damages. The action can be taken by family members who are limited to the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased. Below are the damages that can be claimed and awarded by the court to be paid by the defendant and/or insurance company:

- a. Funeral expenses of the person deceased if such expenses have been incurred by the party bringing the action;
- b. Bereavement which is RM10,000.00 for the benefit of the spouse or his parent if the deceased was a minor and never married. This total is to be divided equally between them.
- c. Loss of earnings (section 7(3)(iv)). For loss of earnings, the calculation is made as follow:

(a) take into account that where the person deceased has attained the age of 55 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 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 or other gainful activity prior to his death;

(b) 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 If he or she was of the age of 30 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 31 years and 54 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.

In the case of *Muhammad Hanif Ishak v. Mohammad Syazwan Mohamad Fuad & Anor* ([2017] 1 LNS 372, the plaintiff claims the sum of RM 1,500.00 per month at the multiplier of 16 years adding up to RM 288,000.00. The defendant however submitted that the award should be on the basis of RM 200.00 per month for 16 years totalling RM 38,400.00. The learned Sessions Court Judge meanwhile awarded the plaintiff RM 500 per month with the total award on the basis of 16 years multiplier being RM 96,000.00.

3.2 Injuries Resulting from Road Traffic Accident

Damages for personal injuries claim can be divided into non-pecuniary and pecuniary losses as will be discussed below:

i. Non-pecuniary loss

a) Pain and suffering.

Pain is referred as physical hurt or discomfort attributable to the injury itself or consequent upon it. Suffering means the mental or emotional distress which the plaintiff may feel as a consequence of the injury (Ahangar, 2012, 40) For this, section 28A(2)(b) provides that 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. In the case of *Mohd Arif Abdullah v Mohamed Mat Nor & Afifah Wira Construction Sdn Bhd* ([2015] 5 LNS 9, the court awarded a total of RM110,000.00 to the plaintiff who had severe traumatic head injury with intracranial Haemorrhage (RM100,000.00), soft tissue injuries (RM5,000.00) and scars (RM5,000.00)

ii. *Pecuniary loss*

b) Loss of Future Earning:

For loss of future earnings, section 28A(2)(c) states that:

(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;

Section 28A(2)(d) provides that 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.

In brief, the loss of future earnings is calculated by multiplying the multiplier (the annual loss of future earning) with multiplicand (the number of years from the trial date until the year that he or she is predicted to separate (retire) from workforce). Multiplier means pre-accident earning minus post-accident earning, while multiplicand would be retirement age minus the age at trial date.

In *Mohd Nur Akmal Yahya & Anor vs. Rickson Akup & Anor* ([2017] 5 LNS 1), who lost his future earning capacity altogether due to the accident. A week prior to the accident that left him with serious permanent cognitive disabilities and impairment, the plaintiff received a job offer letter from Malaysia Airports Berhad with a monthly salary of RM1,100.00. He accepted the offer and soon after that MAB booked him a flight ticket to Kuala Lumpur to start working. Unfortunately, the accident robbed everything of him. The court decided that based on the evidence that the plaintiff was in good health, had no disabilities, therefore, he had lost the future earning capacity which is as follows: $(RM1,100.00 \times 12 \times 16 = RM211,200.00)$. However, due to the seriousness of his condition, the court held that it is not suitable to award him the loss of earning, because he has permanent cognitive impairment and requires lifetime care, and the insurers must not be allowed to scuttle the claims under the "duty to mitigate" because what is required is optimal care. Therefore, he was awarded cost for future nursing care of

RM2,117,908.00. For pain and suffering out of the injuries sustained, he was given RM287,000.00 and the breakdown are for these injuries:

- a. Right temporal skull fracture with pneumocranium and small EDH (extraduralhaematoma) RM150,000.00
- b. Left ear noted dried blood clot – RM5,000.00
- c. Left ear moderately conductive hearing loss - RM15,000.00
- d. Loss of smell from both nostrils (anosmia)- RM20,000.00
- e. Nasal bone fracture -RM8,000
- f. Zygoma body right fracture were injuries clearly- RM8,000.00
- g. Left central incisor tooth missing - no award due to no proof
- h. Fracture of tooth- RM2,000.00
- i. Peri-ocular swelling of eyes (right 5mm and left 3mm) during first admission in Sarawak General Hospital (SGH) and had facial asymmetry with slight periorbital ecchymosis and swelling on face during 2nd admission in SGH – RM3,000
- j. Right eye shows a squint and diplopia (both right and left) - RM10,000.00
- k. Loss of vision 50% on both eyes- RM60,000.00
- l. Scar of about 1 cm over the right face- RM1,000.00
- m. Loss of Consciousness RM5,000.00.00

For loss of future earning capacity, the principle from the case of *Mohd Nur Akmal* is a good example whereby the earning capacity must be clear as to what capacity means. Unlike the case of *Yang Yap Fong & Anor v. Leong Pek Hoon & Anor* [1987] CLJ (Rep) 419, the appellant was just 19 years at the date of hearing and was not in any employment. But there was a prospect of getting one in the future soon after he qualified himself as a TV mechanic for which as stated earlier his father intended to send him as soon as he had sufficient funds. The principle applicable to future loss of earning capacity and its distinction with future loss of earnings are explicitly discussed in *Ngooi Ku Siong & Anor. v. Aldi Abdullah* [1984] 1 CLJ (Rep) 294 by the Federal Court. The proper test to be applied is whether sometime in the future, due to the effect of the injuries sustained by him, the plaintiff will face a substantial risk of either losing his job or getting a less paid employment. It does not matter whether the plaintiff was in employment or not at the time of the trial so long as Court is satisfied from evidence that there is a real or substantial risk that his earning capacity will be affected in the future. *Moeliker v. A. Reyrolle & Co. Ltd.* [1977] 1 All ER 9 and *Cook v. Consolidated Fisheries Ltd.* [1977] 1 CR 635, 639 are some of the cases in which a claim for loss of earning capacity was allowed to plaintiffs who were in employment and whose earnings were not affected at the material time.

For a 50 year old like *Badaran Ponniah v Salma Ali* [2014] 5 LNS 84, the accident caused him his right leg which had to be amputated up to the knee. Apart from prosthetic cost of RM30,000, he received loss of earning, which was calculated based on multiplier (30 months) and multiplicand was RM1100.00 (RM50.00 per day for 22 days in a month). So, RM1100.00 x 30 months = RM33,000.00.

In *Teoh Ching Hwa v. Mohd Nor Arif Ahmad & Anor and Another Case* [2017] 2 CLJ 107 plaintiff's claim in the Sessions Court is for special damages, general damages, interests and costs for loss arising from a road accident which occurred on 23 April 2011 at about 3 to 3.05am between the plaintiff, as a pedestrian, and the motorcycle which was ridden by the first defendant on the road. As a consequence of the accident, the plaintiff suffered serious injuries and losses. Based on the finding, the trial judge found the plaintiff negligent by 20%, and the defendant negligent by 80%. The decision was affirmed by

the High Court. The trial judge, in awarding loss of future earning, considered the following:

The net pay was RM3,045.10, but deducted about RM1,200.00 as per cost of living. Therefore, the total monthly earning was RM1,845.10 x 15 years and 4 months. So, the loss of future earning amounting to RM339,498.40.

Judge Yeoh Wee Siam viewed that the award of RM339,498.40 for loss of future earnings is reasonable and ought to be maintained. In fact, this amount can never make up for the fact that the plaintiff, who has a bachelor degree from the University of Technology, Sydney, and was an Account Manager prior to the accident, is now classified as "*Orang Kurang Upaya*".

The trial judge awarded general damages of RM247,000.00 as follows:

(i) Trauma head injury (GCS 13/15, bilateral periorbital haematoma, left frontal and temporal skull vault fractures extending to sphenoid wing, fractures of orbits, maxillary, ethmoid and frontal sinuses, epidural haematoma, left frontal and left temporal contusions and subarachnoid haemorrhages, right upper limb weaknesses and dysphasia, craniotomy and tracheostomy done, right sided hemiparesis, impaired immediate and short term memory, impaired concentration, independent of all activities of daily living, impaired of speech, able to walk independently and able to reason and make sensible judgements) - RM160,000.00.

(ii) Total blindness of left eye - RM80,000.00.

(iii) Scars (Laceration wound at left eyebrow 3 x 2cm and 20cm scar at left region of scalp behind the hairline, tracheostomy scar and bruises over the face abdomen and right knee with abrasions over his left flank and face) - RM7,000.00.

In *Ong Ah Long v. Dr S Underwood* [1983] 2 CLJ 198; [1983] CLJ (Rep) 300; [1983] 2 MLJ 324 at p. 325 the Federal Court laid down the principle for awarding loss of earnings and profits as follows:

"The general principle is that an injured plaintiff is entitled to damages for the loss of earnings and profits which he has suffered by reason of his injuries up to the date of trial and for the loss of the prospective earnings and profits of which he is likely to be deprived in the future."

However, as submitted by learned counsel for the plaintiff, at the time of the trial, it was about three years and nine months after the accident. Yet, at that time the plaintiff had, the following problems:

- (a) Difficulty in expressing himself, word finding difficulties, undergoing speech therapy
- (b) Slow at counting, difficult to read and understand
- (c) Finding it difficult to converse in Bahasa Malaysia
- (d) Occasional headaches
- (e) Forgetful
- (f) Angry and depressed at times
- (g) Cannot drive
- (h) Cannot play badminton and difficult to aim at the shuttlecock
- (i) Right upper limb weakness; right-hand dexterity is reduced

Thus, it can be safely concluded that it is obvious that in his poor health condition, he could not be gainfully employed. It is highly probable that at that point in time, the plaintiff would not be able to

perform work as an account manager, in the same manner that he was doing before the accident.

c. Future Care Expenses: Nursing care.

For those required lifetime care, the court will consider the nursing care. The calculation is based on the standard cost estimated by a nursing house and the duration of care considered by the court. The rate used in practice is taken from nursing house like Gleneagles Hospital and Cheras Rehabilitative Centre, both in Kuala Lumpur.

COMPENDIUM 2014: ITS SIGNIFICANCE AS GUIDELINES FOR JUDGES

In order to help judges adjudicate claims for personal injuries, case laws and *Compendium of Personal Injuries 2014* are used as reference, apart from the law. *Compendium of Personal Injuries* was first constructed in 2010 by the Attorney General's Chamber of Malaysia and was revised in 2014 by a Taskforce Working Committee under the Malaysian Bar Council. As guidelines, The *Compendium* is aimed to facilitate the court in determining the appropriate amount of compensation to be awarded. The *Compendium* offers range, not the exact amount, and this would allow the judge to use his judicial discretion after considering facts of the cases before him or her. The insurer, i.e the insurance company will burden the liability imposed by the court and will proceed with the payment if the dispute had been settled.

2. SPECIAL DAMAGES

As mentioned earlier, special damages must be specifically pleaded and the burden of proof lies on the plaintiff. Even though in all civil cases, the balance of probabilities apply, Justice M. Shankar emphasised in 1987 case of *Thrimalai and Anor vs. Mohd Masry bin Tukimin* ([1987] 1 MLJ 153) that "special damages must be strictly proved. To my mind the evidentiality burden here goes beyond establishing the claim on a balance of probabilities. The figures put forward for special damages must come as close to mathematical certainty as the circumstances of the case would allow."

For that matter, documentary evidence to support the claim is properly necessary and should be marked as exhibits before the court can decide on its amount. The typical claims are:

- a. essential item like prosthesis for an amputee
- b. receipt of the repairer for cost of repairs like damage or destruction to motor vehicle
- c. funeral expenses is also allowed based on judicial notice given earlier
- d. loss due to theft after accident. Loss of jewellery was recoverable in *Parvathy & Ors. vs. Liew Yoke Khoon* ([1984] 1 MLJ 183;
- e. cost of medical expenses
- f. traditional treatment

Example of case for special damages are for cost borne by the plaintiff and in *Mohd Arif Abdullah v Mohamed Mat Nor & Afiah Wira Construction Sdn Bhd* [2015] 5 LNS 9 are as follow:

- a. medical report cost (RM100.00)
- b. damage to shirt and shoes (RM100.00)
- c. police report, sketch plan and key (RM12.00)
- d. JPJ search (RM10.00)
- e. expert medical report (RM1,963.00)

f. Hospital bill (RM943.50)

In *Nur Akmal's* case, about RM422.00 were awarded and the list are:

1. SGH Bill No. 1066799 dated 27/2/2013 for RM196.00 with Payments Receipts No. A905604 for RM46.00, No.A902266 for RM100.00 and No. A904963 for RM50.00 totalling **RM196.00**;
2. Cover letter from SGH dated 1/3/2013 and Receipt A90313 for Medical Report for **RM40.00**;
3. SGH Bil No. 1067412 for RM147.00 with Payment Receipt No. A904962 for **RM147.00**
4. Receipts for payment of various police reports lodged, rough sketch plan and investigation result in respect of the said Accident for **RM24.00**;
5. JPJ search Receipt No. AN726061 for **RM10.00**

In *Teoh Ching Hwa v. Mohd Nor Arif Ahmad & Anor and Another Case* [2017] 2 CLJ 107 1, special damages pleaded and allowed, not all, are about RM61,880.80 comprising of:

- (i) Medical costs of RM61,115.80.00;
- (ii) Expenses for speech therapy - RM33,978.
- (iii) Bill for treatment at Hospital Kuala Lumpur ("HKL") - RM135.
- (iv) Expenses for return trips made by family members when visiting the plaintiff - RM500.
- (v) Costs of police report, search with JPJ on sketch plan - RM40.
- (vi) Costs of medical report from HKL - RM40 .
- (vii) Damage to clothes - RM50.00

ANALYSIS: ISSUES AND SUGGESTIONS

Several issues arise out of these four heads particularly concerning 55 years as the ultimate year of getting earnings out of employment. No damages for loss of future earnings shall be awarded to a plaintiff who has already attained 55 years of age except for those who can prove that he is actually in employment above 55 years. Apart from that is the interpretation of "good health". The requirement of good health as opposed to "poor health" is unclear. There are few suggestions that can be made:

1. In accordance with Section 3D CLA 1956 which says that The Yang Di-Pertuan Agong may from time to time by order published in the Gazette vary the sum specified in subsection (3A), it is timely that the amount of bereavement which is RM10,000 be increased to RM20,000 or more.
2. In assessing the loss of earning occasioned by the death or by the injuries so suffered by the victims depriving him or her from any employment, the age of retirement nowadays has increased to sixty and in specific sectors like education or judiciary, the age can be more than sixty. Therefore, it is also a good consideration to amend the age limit for claim from 55 to 60 or 65. This has also been suggested by the judge sitting as Session Court in Kuala Lumpur, Mr Justice Nuaman Mahmud Zuhdi and supported by academic, Norila Abu Hassan. According to P. Balan, law professor, the 1984 Amendment Act has removed the discretion of judges to award damages for those who could work, or are working, after 55 years
3. The interpretation of earning. Courts are not consistent with the meaning of earning and how to calculate damages for loss of earning. All earnings existed during the accident must be proved.

In certain cases the exact number of earning was reduced due to the fact that total spent for work (like petrol, travel cost, food and all items related to the employment) was no longer applied because of the accident.

4. Loopholes in compendium. According to medical expert, the range created under the compendium which is to be referred by judges in making an estimation is too low, incomplete and need further details. For example, inadequacy of injuries types, the under-rated value of facial injuries and so on.
5. Interpretation of a good health. It is still questionable whether a person with any type of diseases but healthy and actively in employment is interpreted as not in good health?

CONCLUSION

Damages in road traffic accident are allowed not only for past and present losses, but also for future losses. Losses can be in terms of monetary which is called pecuniary and also non-pecuniary like all sorts of pain and sufferings which cannot be valued in exact but can be calculated based on Compendium for Personal Injuries Awards 2014 introduced to assist court in estimating damages to be awarded. However, this Compendium can be improved by consulting the medical experts who can advice on the range of values of bodily parts. In all road traffic accident cases, all are to be paid after finding fault and liability by the liable party i.e the defendant, through the insurance company as the insurer of the defendant driver. Therefore, it is important to notify the insurer when the accident took place, failure to do so will result in non-payment or rejection of claim.

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