MOHD IDHAM YAHYA & ANOR
v.
STP ENGINEERING SDN BHD

Sessions Court, Ipoh
Khairul Anuar Abd Halim SJ
[Summons Nos: 53-664-07/11 and 53-417-04/12]
3 August 2012

QUANTUM TABLE

1. Head - Brain

Date of accident: 1 July 2010

Brief description of plaintiff's injuries

(Summons Nos 53-664-07/2011)

1. Severe post traumatic brain injury with diffuse axonal injury

Disabilities

(Summons Nos 53-664-07/2011)

1. Inability to comprehend, to obey simple rules and unresponsive to call

2. Inability to fix his gaze and follow objects

3. Inability to recognise family members

4. Inability to sit up for more than 15 minutes and poor head and trunk control, thus remains bedridden

5. Inability to turn in bed

6. Incontinence of urine and faeces

7. On nasogastric feeds

8. Significant increase in muscle tone of all four limbs with spasticity and contractures at both the wrists and both the ankles

9. Remains mute

10. Suffers from generalised tonic-clonic seizures

11. Totally dependent on others for all activities of daily life

Plaintiff's age

(a) As at date of accident: 24 years

(b) As at date of hearing: 26 years

Plaintiff's occupation

(a) As at date of accident: Despatch cum driver

(b) As at date of hearing: NA

Plaintiff's earnings

(a) As at date of accident: RM1,500.00 per month

(b) As at date of hearing: NA

Liability

0% against defendant

Award (Based on 100% liability)

1. General damages

(a)	Loss of income (RM1,000.00 x 16 years)	-	RM192,000.00
(b)	Nursing care (RM5,240.00 x 24 years)	-	RM1,509,120.00
(c)	Severe post traumatic brain injury with diffuse axonal injury (Note: The plaintiff as a result remains mute and is unable to comprehend, to obey simple command, unresponsive to call, unable to recognise family members, unable to fix his gaze and follow objects, unable to turn in bed, to sit up for more than 15 minutes and has poor head and trunk control, thus remains bedridden. The plaintiff is on nasogastric feeds and suffers from generalised tonic-clonic seizures, incontinence of urine and faeces and	-	RM350,000.00

totally dependent on others for all basic functions of life)

Interest

(b) 8% per annum on general damages from date of service of summons until date of judgment.

(a) 4% per annum on special damages from date of accident until date of judgment.

(c) 8% per annum on total judgment sum from date of judgment until date of full settlement.

Case(s) referred to:
M Kumaresan Muniandy lwn. Gan Yew Peng [2008] PILRU 51; [2011] 2 PIR 35 (refd)
Peraganathan Karpaya v. Choong Yuk Sang & Anor [1995] 3 MLRH 700; [1996] 1 CLJ 622 (refd)
PP v. Datuk Hj Harun Hj Idris (No 2) [1976] 1 MLRH 562; [1977] 1 MLJ 15 (refd)

Legislation referred to:
Civil Law Act 1956, s 7

Counsel:
For the plaintiffs: M Sooriabalan (together with Mohd Saufi Samsudin); M/s G Dorai & Co
For the defendant: B Shanta Mohan; M/s V P Nathan & Partners

[Order accordingly.]

JUDGMENT

Khairul Anuar Abd Halim SJ:

Introduction

[1] This is a running down claim (NO 53-664-11 (the first action)) and dependency claim (NO 53-417-12 (the second action)). The first plaintiff in the first action is bringing the action through his wife, the second plaintiff.

[2] It is the plaintiffs' claim that on 1 July 2010, the first plaintiff was a passenger of a motorjeep registration No BJT 4606 (the motorjeep). It is his claim that the driver of the said motorjeep was one Chew Ee (the deceased) and that the defendant is the registered owner of the said motorjeep.

[3] On 1 July 2010, the first plaintiff and the deceased were driving from

Penang to Kuala Lumpur. At KM 302.5 of the North-South Highway (the highway), the deceased lost control of the said motorjeep and later skidded and plunged down a ravine. As a result of this accident, the first plaintiff has sustained severe injuries.

[4] It is the first plaintiff claim that the accident was solely/partly caused by the defendant and/or its agent ie the deceased.

[5] In the second action, it was filed by the deceased wife and for the benefit of the deceased's children and parents, pursuant to s 7 of the Civil Law Act 1956. In this action the plaintiffs alleged that the first plaintiff in the first action was the driver of the said motorjeep and that the passenger was the said deceased. It is their claim that at KM 302.2 of the highway, the first plaintiff had loss control of the said motorjeep and collided with a railing at the highway and plunged into a ravine which caused the death of the deceased.

[6] It is the plaintiffs' claim that the accident was solely/partly caused by the defendant and/or its agent ie the first plaintiff. In its amended statement of defence, the defendant stated that the first plaintiff (in the first action) was the driver of the said motorjeep and that the accident was solely/partly caused by the negligent act of the first plaintiff.

Preliminary Observations

[7] Before I proceed to discuss the merits of this case, I have to comment about the conduct of the plaintiff's counsel and the IO which in my view did not assist this court at all, but more towards delaying this matter.

[8] The first hearing date was fixed on 30 March 2012. It started at about 12.10 hrs. Being an IO and especially in a fatal accident case, one would expect that the IO to bring the investigation diary (ID) to the court. But no! This IO, Insp 118003 Mohd Arifridzuan Ezahar (SP1) decided not to bring the ID to the court. And sure enough, he fumbled on the first question during the cross-examination. For that, I had reluctantly adjourned this matter to 21 May 2012.

[9] SP1 then gave lengthy evidence on 21 May 2012 and the matter was then adjourned to another date to give parties a chance to explore for settlement. On 10 June 2012, the learned plaintiff's counsel Mr Sooria did not turn up and merely instructed one Ahmad Syauqi to mention on his behalf and inform that settlement failed. I then fixed two hearing dates on 4 July and 6, 2012 as a continued hearing.

[10] One would expect that, as a plaintiff's counsel and when settlement failed, he would like to proceed with the trial as soonest, for the best interest of his client. But then again, my common sense failed here.

[11] On 4 July 2012 (and started late) at about 11.00 hrs two counsels from Messrs G Dorai, namely Gary Reginald Gomez and Mohd Saufi Shamsudin (the two counsels), informed me that their firm had just filed an application, a day before the trial (ie on 3 July 2012 - encl 55) to discharge Messrs VP

Nathan in those two actions.

[12] I had summarily dismissed the said application as I viewed that application would delay this matter and defeated the whole reason why I gave two days priority date for the trial to be completed. To make thing worst, the plaintiff's counsel in charge, Mr Sooria don't even bother to turn up and taking for granted that this hearing would be adjourned, to give way to encl 55.

[13] After dismissing this application, I directed the two counsels to proceed with the hearing at 11.30. Despite my clear and firm direction, one of them, Mohd Saufi was adamant that this matter ought to be postponed or alternatively the court should wait for Mr Sooria. Such an arrogant request was totally uncalled for! Mr Sooria totally aware about the hearing date and why he chooses not to come is his own choice. And to make thing worst, none of the plaintiff's witnesses was even at the court on that day!

[14] Subsequently, I gave a direction for the two counsels to close the plaintiff's case and directed the defendant to proceed with their case.

Liability

[15] Taking into consideration of all the available evidence, the facts and circumstances of this case, and the written submission from the respective counsels, I hold that the plaintiffs in the first action had failed to proof their case against the defendant, and here are my reasons:

> i. The IO (SP1) for this case testified that he had gone down into the ravine, together with one Sjn Zakaria Husin, to investigate this accident. SP1 testified when he arrived down there, he noted that the firemen were in the process of rescuing the victims from the said motorjeep. Subsequently, he saw they extricate one of the victims from the said motorjeep driver seat and brought him up on the road. SP1 also went up and examined the identity of said victim and found out that it was the deceased. He also found out that a passenger was still in the said motorjeep.

[16] SP1 evidence has been subjected to vigorous challenge from the defendant's counsel. The following points are pertinent:

> a. SP1 admitted that when he arrived at the accident scene at about 22:00 hrs. He noticed that the Fire Department and PLUS personnel were already there. He never investigated when both of the parties arrived. However he did not agree with the suggestion that any of PLUS personnel member went down the ravine as well. SP1 agreed that he could not ascertain the time of accident.
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> b. SP1 was then referred to a report made by one Mahyiddin Abdul Ghafar, a policeman (see exh D6 at p 47 of ID-A). He agreed with the learned defendant's counsel's suggestion that based on D6, the accident may have happened at about 20:45 hrs. SP1 was also referred

to a PLUS report of the incident (see exh D7). This report also stated that the accident happened at about 20:45 hrs. Hence, it is clear that SP1 only arrived at the accident nearly 1 hour and 15 minute after the accident happened.

c. SP1 then agreed that that, since the Fire Department was involved in the rescue mission, they would be the one who knew better, who were the driver and the passenger of the said motorjeep. However, when a suggestion was put up by the learned defendant's counsel that the driver of the said motorjeep was injured and that the passenger was dead, SP1 adamant with his investigation that it was the driver who had passed away.

Evaluating Evidence Pertaining To The Identity Of The Driver

[17] It is to be noted here that, there is no record in his ID stating that SP1 did in fact went into the ravine. However, for the purpose of this trial let us examine the veracity of SP1 evidence:

i. SP1 had arrived about 1 hour and 15 minutes after the accident. He also admitted that when he arrived, the PLUS and Fire Department personnel were already at the accident scene.

ii. Despite there was nothing stated in his ID, SP1 adamant that he did go down into the ravine. However he did not take any photographs. Darkness was his reason! SP1 noted that the light inside the said motorjeep was turned on when the Fire Department carried the rescue mission.

iii. Bear in mind, SP1 is a police investigator. He should have interviewed or took down statements from some of the Fire Department personnel. He himself admitted that the Fire Department would be the best unit to determine the identity of the driver and the passenger of the said motorjeep. All these sum up a probability that, SP1 investigation may not fully complete. Though I have no doubt that SP1 probably went down into the ravine, but his presence there may probably as an observer who failed to get the right information due to lack of communication with other department personnel.

[18] In *PP v. Datuk Hj Harun Hj Idris (No 2)* [1976] 1 MLRH 562; [1977] 1 MLJ 15, per Raja Azlan Shah FJ at p 19:

"In this case different witnesses have testified to different parts of what had happened..., some discrepancies as would be expected of witnesses giving their recollections of a series of events that took place in 1971 to 1973. In my opinion discrepancies there will always be, because in the circumstances in which the events happened, every witnesses does not remember the same thing and does not remember accurately every single thing that happened. It may be open to criticism, or it might be better if they took down a notebook and wrote

> down every single thing that happened and every single thing that was said. But they did not know that they are going to be witnesses at this trial. I shall be almost inclined to think that if there are no discrepancies, it might be suggested that they have concocted their accounts of what had happened or what had been said because their versions are too consistent. The question is whether the existence of certain discrepancies is sufficient to destroy their credibility. There is no rule of law that the testimony of a witness must either be believed in its entirety or not at all. A court is fully competent, for good and cogent reasons, to accept one part of the testimony of a witness and to reject the other. It is, therefore. Necessary to scrutinise each evidence very carefully as this involves the question of weight to be given to certain evidence in particular circumstances."

[19] Since SP1 is unable to convince me the identity of the driver, I need to resort to other available evidence, ie the respective PLUS and Fire Department personnel who were present at that material time. Before I venture further, I have to register my total disagreement against the learned plaintiff's counsel submission that for accident cases, only the investigation officer's evidence is relevant and none others. Such proposition is never stated in any case law at all. Chin Fook Yen JC (judge later on) in the case of *Peraganathan Karpaya v. Choong Yuk Sang & Anor* [1995] 3 MLRH 700; [1996] 1 CLJ 622, was of the view that (at p 624):

> "The sketch plan and the keys thereto could not offer any clue which would provide some objective evidence one way or the other. The point of impact in relation to the road indicated by the second defendant to the police and the place where the plaintiff's motorcycle was found, both of them appeared sides of the road. There were no other marks such as brake marks, fragments of broken glass, blood stains, anything at all to throw a clue or two of where, in relation to the road, was the point of impact."

[20] The learned judge in that case could not rely to the IO's investigation as it did not offer any clue. And of course, he had to resort to all the available evidence. And that is what I intend to do now.

The (Second Action) Version

[21] The following fire department personnel have testified:

> (on behalf of defendant in the second action) but for the purpose of consolidation, all of them have been recorded as "saksi defendan" ("SD"):

SD1 - Shaiful Bahari Jamaluddin

SD6 - Mohamad Ibrahim

SD7 - Azemi Shewib

SD8 - Mohd Asri Tak

[22] SD1 was not involve in the rescue mission on that day. He was a Statistic Officer for State of Perak Fire Department. He had prepared a report pertaining to the accident in this case (see exh P10). At para 7 of the report it was stated that:

> "Semasa pasukan bomba sampai di tempat kejadian, didapati sebuah kenderaan jenis Mitsubishi Triton, No Pendaftaran BJT 4606, pemandunya tersepit dan penumpangnya disahkan meninggal oleh pihak perubatan yang datang di tempat kejadian."

[23] This report was made pursuant to "Laporan JPBM2". SD6, is one of the four Gopeng Fire Department's personnel who attended to this rescue mission. In his witness statement (exh D26), SD6 confirmed that they had gone to down into the ravine and that one PLUS personnel by the name of Azemi bin Saharu was also there. SD6 confirmed that the driver of the said motorjeep was still alive and he confirmed that the driver was a Malay man. The passenger who was a Chinese man passed away. The plaintiff's counsel had tried to attack the credibility of SD6 by asking the witness a random date and to specify what kind of assignment he attended to that date ie on 28 June 2010 and 25 June 2010. No witness in any trial would remember such a random date without some guidance. Hence I failed to see any relevancy of the learned plaintiff's counsel's question and in any event, it does not affect SD6's credibility at all.

[24] The other witnesses, SD7 and SD8 also confirmed SD6's evidence that the driver was a Malay man and the passenger, a Chinese man.

Finding

[25] Could any of these witnesses (SD1, SD6, SD7 and SD8) lie about the identity of the driver and the passenger of the said motorjeep? Bear in mind, even SP1 agreed that the Fire Department personnel who were there at that time attending to the rescue mission and that they were the one who can exactly identify the driver and passenger of the motorjeep.

[26] Do all these evidence need to be in writing? The answer would be No None of these witnesses are legally obliged to write a report pertaining to this accident. So could the court simply ignore their compelling evidence simply because of that? The answer would be no! What these witnesses had perceived on that day was a simple fact, that the driver was a Malay descendant and the passenger was a Chinese descendant.

[27] My sympathy is towards the first plaintiff in the first action. However, as a presiding Sessions judge, my decision would have to be based on the available evidence and not speculation or shaky evidence. Having considered those evidence (confined only to SD1, SD6, SD7 and SD8 testimonies) I hold that, on the balance of probabilities, the first plaintiff in the first action was the driver of the said motorjeep and that the deceased in the second action was the passenger. With that finding, I hold that first plaintiff is unable to proof his case against the defendant. And in the premise, I dismiss the plaintiffs' claim in the first action with cost. And cost to be tax unless agreed upon.

[28] With that finding about the identity of the driver, the first plaintiff being the agent of the defendant had probably caused the said accident with his negligent act of driving. With that the dependency claim in the second action is allowed with cost.

Quantum

For The First Action

(a) Severe Post Traumatic Brain Injury With Diffuse Axonal Injury

[29] I have directed the learned plaintiff's counsel to file a written submission in respect of quantum for the first plaintiff. The learned counsel submission on this point is very brief. He merely requested for an amount of RM350,000.00 as general damages. Perusing the first plaintiff "butir-butir kecederaan plaintif pertama" in the first action, the following injury were listed:

- Post severe traumatic brain injury with diffuse axonal injury.

[30] Based on the specialist report from Dr Benedict Marius Selladurai, the first plaintiff's present disabilities are as follows:

> (a) He remains mute, unable to comprehend, unable to obey simple commands and unresponsive to call. He can only make incomprehensible sounds. He cannot recognise members of his family. He is not able to fix his gaze on an object. He has normal sleep-wake cycles;
>
> (b) He has significantly increased muscle tone in all 4 limbs with spasticity, with contractures at both wrists and both ankles. He is not able to turn. He is able to be sit up for about 15 minutes on the bed or on the wheel chair but has poor head and trunk control. He remains bedridden;
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> (c) He is on nasogastric feeds. He is able to cough. He is incontinent of urine and faeces and wears sanitary napkins. He is totally dependent on his wife and his mother for all basic functions of life; and
>
> (d) He suffers generalised tonic-clonic seizures and is on antiepileptic

medication.

Cases

i. *Baharuddin Sulong & Anor v. Hiew Chong Choo* [2007] PILRU 6; [2008] 1 PIR 40, where RM100,000.00 was awarded for diffuse axonal injury. As a result, the plaintiff suffers from impaired attention span (immediate recall), impaired recent recall and some impairment of constructional ability (constructional apraxia) and left lower limb weakness and numbness;

ii. *Kalaiarsan T Sukumaran lwn. Khor Lye Choo* [2010] MLRSU 1; [2011] 2 PIR 6, where RM350,000.00 was awarded for severe head injury (very severe cerebral concussion (diffuse brain injury), intracerebral haemorrhage, cerebral oedema and brain damage resulting in permanent dysarthria and some impairment of mental functions, permanent weakness of the right side due to the right hemiparesis and unable to stand and walk independently); and

iii. *Julisa Wahid v. Abdullah Idros* [2009] 1 PIR 50, where RM150,000.00 was awarded for severe head injury with skull fracture and diffuse axonal injury.

[31] Based on all above, I am awarding the first plaintiff RM350,000.00 for this injury.

(b) Loss Of Income

[32] The first plaintiff was employed as a despatch cum driver with Century West. His basic salary was RM1,500.00 per month (see exh D20). At the time of accident, the first plaintiff was about 24 years of age at the time of accident. Hence the multiplicand would be 16 year (192 months) x RM1,000.00 (as submitted by the plaintiff's counsel) = RM192,000.00 is awarded for loss of income.

(c) Nursing Care

[32] I have no doubt about the need to provide a nursing care for the first plaintiff. He needs professional nursing care. The plaintiff's counsel submitted for an amount of RM3,081,120.00 (RM5,240.00 per month x 49 years).

[33] I am disagreeable with this calculation. Instead I shall follow the case of *M Kumaresan Muniandy lwn. Gan Yew Peng* [2008] PILRU 51; [2011] 2 PIR 35. The multiplier shall be as follows:

(60-24)-36-12 = 24 years (288 months) = RM1,509,120.00

Special Damages

[34] Despite a clear direction been given, the learned plaintiff's counsel did not submit anything on special damages. I noted that there are 39 items pleaded in the first action. However, none of them are supported by any receipts.

[35] Nevertheless I taken liberty of perusing the plaintiff's bundle of documents and found out the following payments have been made:

(a) Nemedcare invoice No IN000097 for amount of RM850.00 (payment for what is unknown);

(b) Receipts Nos 3891 and 4234 for total amount of RM600.00 for renting an ambulance to transfer the plaintiff to and from Selayang - Kuala Lumpur GH;

(c) Receipts Nos 1307, 1297, 1277, 1345 and 1344 for a total amount of RM1,015.00 for child care in respect of Puteri Nur Syahirah;

(d) Receipt NO 0004 for amount of RM300.00 for renting a motorvan;

(e) Receipt from Super Best Medicine Trading for amount of RM59.90 - items not specified; and

(f) Receipts from Puteri Malaysia, for a total amount of RM900.00.

[36] However, without submission from the learned plaintiff's counsel, I am unable to determine the purpose of all those payments. With regret, I could not allow any of the special damages pleaded in the first action.

For The Second Action

Dependency Claim

[37] The learned counsel for both parties in the second action have recorded a settlement for an amount of RM270,000.00 subject to the determination of liability, which I've already decided in the plaintiffs' favour. The apportionment shall be as follows:

i. first plaintiff - RM220,000.00;

ii. second and third plaintiffs are minor - RM20,000.00 each and to be held in trust, and to be deposited with ARB with liberty to apply; and

iii. and the fourth and fifth RM5,000.00 each.