DAMAGES FOR PERSONAL INJURIES AND THE CIVIL LAW (AMENDMENT) ACT, 1984

On 1.10.1984 the Civil Law (Amendment) Act, 1984 (Act A602) (hereinafter referred to as the "1984 Act") came into force. The 1984 Act made significant and far-reaching changes to the law governing the assessment of damages for personal injuries and for causing death. The general effect of the 1984 Act was to reduce damages for a claimant in this area of the law. This it achieved both by amending existing provisions in the parent Act, the Civil Law Act, 1956 (Revised 1972) (Act 67) and by enacting new statutory provisions which altered the applicable common law in Malaysia on the subject. The 1984 Act was severely criticised by lawyers, laymen and consumer bodies because it removed or altered some common law principles which benefited injured persons or the dependants of deceased persons.[1]

The 1984 Act was prompted, according to the explanatory statement to the Civil Law Amendment Bill, because "of the vast variance of court awards for damages for personal injuries including those resulting in death." Another reason for the amendments appears to be to pacify the insurance industry. It was common knowledge that the considerable increase in the size of judicial awards for personal injuries and for causing death in the late 1970s and early 1980s caused some concern in the insurance industry. A few of the amending provisions in the 1984 Act were based on the Administration of Justice Act, 1982 of England while the rest were novel provisions which had no equivalent elsewhere.

The 1984 Act may be criticised not only because of its severe provisions but also because of the doubts and ambiguities it created. There were doubts as to the extent to which it

[1]See for example Param Cumaraswamy, "The Uncivil Act," INSAF Vol XVII, No. 3, October 1984; Seth M Reiss, "Quantum For Future Loss In Personal Injury and Fatal Accident Cases After the Civil Law (Amendment) Act, 1984" [1985] 2 MLJ lxii; Peter F Rhodes, "Accident Compensation Reforms: England, Hong Kong and Malaysia" HKLJ (1986) (Vol 16, No 1), 8.

had amended the existing law. There was also uncertainty as to the meaning of some of its vague provisions. These doubts and ambiguities could only be resolved by either further legislation or by judicial interpretation. Decisions on the 1984 Act were therefore eagerly awaited between 1984 and 1989.

The first reported Supreme Court decision on the Act, *Marappan a/l Nallan Koundar & Anor* v *Siti Rahmah bt Ibrahim*[2] is a personal injury case. The case sheds some light on a few obscurities of the 1984 Act concerning personal injuries and is worthy of this short note.

Before an attempt is made to discuss *Marappan's* case it will be useful to consider in brief the principal changes and uncertainties brought about in the law concerning personal injuries by the 1984 Act.[3]

The first change was the abolition of the head of damages for loss of expectation of life.[4] Before 1.10.1984 it was open for Malaysian courts to award a conventional sum under this head. Thus in *Lee Ann* v *Mohamed Sahari*[5] an award of $2000.00 was made. The 1984 Act abolished this head[6] but the effect of this amendment was somewhat reduced by a provision[7] which provided that if a plaintiff's expectation of life was reduced, the court could, in assessing damages for pain and suffering take into account his suffering from his awareness that his expectation of life had been so reduced.

In the area of personal injuries the principal and significant changes made by the 1984 Act concern the assessment of damages for loss of future earnings. The 1984 Act provided that no damages for loss of future earnings shall be awarded to a plaintiff who had already attained fifty-five years of age at the time of the injury.[8] Previously it was customary (but

[2][1990] 1 CLJ 32; [1990] 1 MLJ 99.
[3]In this note no attempt is made to discuss the changes made to the law relating to damages for causing death. A good account on this subject may be found in Mr. Reiss's article cited in n. 1.
[4]This amendment was based on section 1(1)(a) of the (English) Administration of Justice Act, 1982.
[5][1987] 1 MLJ 252. The injury occurred on 3.10.1982.
[6]By section 5 of the 1984 Act. All the amendments mentioned in this note were achieved by adding a new subsection (2) to section 28A of the parent Act, Civil Law Act, 1956. Damages for this head were removed by a new subsection (2)(a).
[7]See section 28A(2)(b), added to the Civil Law Act, 1956 by section 5 of the 1984 Act.
[8]See section 28A(2)(c)(i) added to the Civil Law Act, 1956 by section 5 of the 1984 Act.

not a strict rule) for the courts to take fifty-five as the retiring age and to assume that the plaintiff's earnings would cease at that age.[9] However where there was evidence that the injured person would have worked beyond the normal retiring age of fifty-five years, it was open for the court to take this factor into consideration when computing the multiplier for assessment of loss of future earnings.[10] Again it is fair and reasonable to award damages under this head to a plaintiff aged fifty-five years or above if he was actually in employment at the date of his injury. Two fatal accident cases decided in 1983[11] and 1984[12] illustrate this point. In both cases the deceased persons were healthy sixty year old men in active employment. Multipliers of seven and six years respectively were given for dependency claims. In some professions men and women work beyond the age of fifty-five years and take on or incur financial commitments on their ability to work after that age. Unfortunately the 1984 Act removed the discretion of the judges to award damages for those who could work, or are working, after fifty-five years.

The 1984 Act also provided that damages for loss of future earnings "shall not be awarded unless it is proved or admitted that the plaintiff was in good health."[13] This provision may be criticised for two main reasons. Previously the plaintiff's poor health may be a contingency which may reduce his multiplier and consequently reduce his award for loss of earnings.[14] His poor health or some pre-existing weakness or vulnerability to injury was not a bar to recovery of future earnings. Again, the 1984 Act did not define "good health" and the courts now face a heavy burden to arrive at a just definition.

Perhaps the most severe amendment was a new provision that loss of future earnings shall not be awarded unless the

[9]See *Murtadza* v *Chong Swee Pian* [1980] 1 MLJ 216, 218; *Mat Jusoh* v *Syarikat Jaya Seberang Tuktr Sdn Bhd* [1982] 2 MLJ 71, 77; *Lim Eng Kay* v *Jaafar bin Mohamed Said* [1982] 2 MLJ 156, 161.

[10]See *Teh Hwa Seong* v *Chop Lim Chin Moh & Anor* [1981] 2 MLJ 341, 342. This case may be criticised on the ground that the court appears to have based its assessment on the victim's "expectancy of life" and not on the possible duration of his working life.

[11]*Yaakob* v *Sintat Rent A Car Service (M) Sdn Bhd & Anor* [1983] 2 MLJ 283.

[12]*Chong Sow Ying* v *Official Administrator* [1984] 1 MLJ 185.

[13]*Supra*, n 8.

[14]See *Moores* v *Co-operative Wholesale Society Ltd* (Court of Appeal) Times, 9 May 1955. In this connection see Munkman, *Damages For Personal Injuries And Death* (8th Ed) 39-40, 49-54.

plaintiff "was receiving earnings by his own labour or other gainful activity before he was injured."[15] This amendment affects many categories of employable persons who are not receiving earnings at the time of the injury. Amongst those affected are persons who are temporarily out of employment,[16] young men and women just about to enter employment and children who would have found employment in the future. At common law the fact that the victim was not earning at the time of the injury was never a total bar to a claim for loss of future earnings.[17] Indeed awards under this head had been made in the case of very young children although such assessment involved great difficulty and, invariably, some guesswork.[18]

Another change affected the previous rule that the court could in assessing future loss of earnings, take into account the prospect that, had the plaintiff not been injured, his earnings would have increased in the future.[19] Previously it was well established that the court could take into account the prospects of increase of the plaintiff's income e.g by promotion in his job. Thus in a Privy Council appeal from Malaysia[20] consideration was given to the fact that the plaintiff, a graduate teacher, had lost an opportunity to rise in his profession, even though he had previously failed his probationer's examination and had only one more attempt. In another case[21] the prospect of a plaintiff who was a Lance-Corporal at the time of injury, rising to a rank of Sergeant was taken into account by the Supreme Court. The 1984 Act has removed such discretion by providing that "the court

[15] *Supra*, n 8.

[16] A strict application of this provision will affect situations like in *Lim Eng Kay* v *Jaafar bin Mohamed* [1982] 2 MLJ 156. In this case the plaintiff, a university student, was on "no pay leave" from his employers when the accident occurred.

[17] In *Lai Chi Kay* v *Lee Kuo Shin* [1981] 2 MLJ 167 the plaintiff was a government scholar from Hong Kong pursuing his fourth year medical studies in Singapore when he was injured. His injuries forced him to abandon his medical studies. The court had no doubt that had he not been injured the plaintiff would have qualified and joined the Hong Kong Medical Service. Per Chua J: "In my view the reasonable and fair basis to ascertain his loss of future earnings would be a sum representing the mean between the maximum and minimum salaries in the Hong Kong Medical Service."

[18] See the cases cited in Munkman, *Damages For Personal Injuries and Death* (8th Ed) 71-72. In the leading Malaysian case of *Jamil bin Harun* v *Yang Kamsiah & Anor* [1984] 1 MLJ 217 the Privy Council upheld a award of $200 per month for twenty-five years to a child who was seven years old at the time of the accident and eleven years old at the time of the trial.

[19] See section 28A(2)(c)(ii) added to the Civil Law Act, 1956 by section 5 of the 1984 Act.

[20] *Ratnasingam* v *Kow Ah Dek* [1983] 2 MLJ 297.

[21] *Nordin bin Haji Abdul Wahab* v *Mohamed Salleh bin Hassan* [1986] 2 MLJ 294. The injury occurred on 21.11.1980.

shall not take into account any prospect of the earnings. ... being increased in the future." The 1984 Act is silent on the prospects of decrease, a factor which is relevant at common law.[22]

The 1984 Act also provided that the court in awarding damages for loss of future earnings shall take into account "any diminution of any such amount ... by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured."[23] This amendment may be criticised as another infringement of the avowed principle of damages for personal injuries namely that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened. It is true that when damages for the "lost years" was awarded for a living plaintiff in *Pickett* v *British Rail Engineering Ltd*[24] it was decided that such damages will be subject to deduction of the sums which he would spend on himself during that period. This deduction of living expenses applies only to lost earnings in the "lost years." Unfortunately under the 1984 Act this deduction applies to all damages for loss of future earnings.

The final change made by the 1984 Act related to the computation of the multiplier or "the years of purchase" for loss of earnings. Malaysian cases were not always consistent in the mode which they adopted for determining the multiplier. However, the common practice was to determine the multiplier by first taking the age of fifty-five years as the age when earnings would cease, deducting the age of the victim at the date of trial from this figure of fifty-five and reducing the balance obtained by one-third of the said balance for contigencies. The 1984 Act altered the position by providing a fixed multiplier of 16 years for a victim of the age of thirty years or below "at the time when he was injured." For a plaintiff who was of the age range between 31 years and 55 years "at the time when he was injured," the multiplier was to be determined by "using the figure 55, minus the age

[22]See Munkman, *Damages For Personal Injuries And Death* (8th Ed) 66-67.
[23]See section 28A(2)(c)(iii) added to the Civil Law Act, 1956 by section 5 of the 1984 Act.
[24][1980] AC 136.

of the person at the time when he was injured and dividing the remainder by the figure 2."[25]

The 1984 Act was responsible for creating some uncertainty in this area of the law. One such uncertainty, the requirement of "good health" has already been dealt with above. Another was in respect of the multiplier applicable for future medical and nursing care. It was unclear whether the multiplier for this head would be computed according to the previous practice or whether the new fixed multipliers for loss of earnings could also be utilised for this purpose. There was also some doubt whether the 1984 Act had made it unnecessary to distinguish between pre-trial and post-trial loss of earnings. The then existing practice was to treat all pre-trial loss of income as special damages and compute loss of earnings as post-trial loss from the date of trial. The doubt regarding pre-trial and post-trial loss was prompted by the fact that the 1984 Act prescribed multipliers for loss of earnings by taking into account the age of the victim "at the time when he was injured." Another outcome was the uncertainty about the continued use of the so-called "annuity" or "actuarial" tables. Previous to the 1984 Act, direct multiplication of the multiplicand and multiplier was not the normal practice by which the courts arrived at the final figure or capital sum for loss of earnings. Instead the capital sum would be determined, once the multiplier and multiplicand were determined, by using a set of tables commonly called the "annuity tables."[26] These tables provided the capital sum required when money is invested at 5% per annum for the purpose of providing a fixed monthly payment over a given period of years.[27] In an appeal from Singapore[28] the Privy Council demonstrated that the use of the tables with a multiplier already reduced for contingencies will result in a capital sum which is considerably lower than a sum obtained by the English practice of direct multiplication. However the use of the tables continued in the period before the 1984 Act

[25]See section 28A(2)(d) added to the Civil Law Act, 1956 by section 5(b) of the 1984 Act. For a comparison of the old and new multipliers, see Mr Seth Reiss's article cited in n. 1.
[26]See for instance *Mat Jusoh* v *Syarikat Jaya Seberang Takir Sdn Bhd* [1982] 2 MLJ 71, 77.
[27]The tables are reproduced in K.S. Dass, *Quantum in Accident Claims* (1975) p 1007.
[28]*Loh Wee Lian* v *Singapore Bus Service* (1978) Ltd [1984] 1 MLJ 325, 329.

came into force.[29] It was noted above that the 1984 Act discarded the old mode of computing multipliers and instead provided for new and fixed multipliers. The introduction of the new fixed multipliers prompted a doubt as to whether the English practice of direct multiplication could be used, instead of the tables, to arrive at the capital sum for loss of future earnings.[30]

With this brief background our attention can now turn to the first Supreme Court decision on the 1984 Act, *Marappan a/l Nallan Koundar & Anor* v *Siti Rahmah bt Ibrahim*.[31] On 12.10.1986 the plaintiff, who was then 23 years old, was knocked down by a motor car driven by the first defendant. She suffered severe injuries resulting in complete paralysis in her four limbs. At the time of the accident the plaintiff was a trainee teacher receiving a training allowance of $345.00 a month.

Liability for the accident was agreed to by the parties at 35% against the defendants and 65% against the plaintiff. Submissions in the High Court were therefore confined to the question of the quantum of damages. The learned Judge assessed general damages for pain and suffering and loss of amenities at the sum of $180,000.00; cost of future care at the sum of $67,200.00 *(based on a multiplicand of $350 and a multiplier of 16 years);* future loss of earnings at the sum of $66,240.00 *(based on a multiplicand of $345 and a multiplier of 16 years)* and special damages at the sum of $8,695.00. The trial judge reduced the award under each head by 65% in accordance with the parties agreement relating to liability.

The defendants appealed to the Supreme Court.

The first ground of appeal was that the award of $350.00 for future care was too high. Gunn Chit Tuan SCJ, who delivered the judgment of the Supreme Court, said,[32]

[29]See *Ahmad Nordin* v *Eng Ngak Hua & Ors* [1985] 2 MLJ 431, 435.
[30]The trial judge in *Maruppan's* case ([1989] 1 CLJ 252, 257) had used direct multiplication. In another reported case, *Kamala a/p Gopal* v *Rajendran a/l Ramasamy* [1989] 1 CLJ 1075 the tables were preferred.
[31][1990] 1 CLJ 32; [1990] 1 MLJ 99.
[32][1990] 1 CLJ 32, 33; [1990] 1 MLJ 99, 100.

> "Before us, counsel submitted that $250.00 per month should be sufficient but we agreed with the learned Judge that in the circumstances of this case the award for this item should be $350.00 per month as the plaintiff was paralysed and needed care and nursing all the time."

It will be noted that the trial judge had utilised the multiplier provided by the 1984 Act for future loss of earnings for computing damages for future care in this case. Secondly the learned judge had arrived at the capital sum for this head by direct multiplication. No objection seems to have been raised on the use of the Act's multipliers and one uncertainty of the 1984 Act now seems settled.

The second ground of appeal was that the learned judge had misdirected himself as to the effect of section 28(2)(c)(i) which provides that damages for loss of future earnings "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*[33] by his own labour or other gainful activity before he was injured." Counsel for the appellants argued that the training allowance of $345.00 received by the plaitiff was not "earnings" by her own labour or other gainful activity. Counsel argued that the allowance was incidental earnings and likened it to a waiter's tips. Gunn Chit Tuan SCJ rejected this argument. His Lordship said,[34]

> "The learned Judge was, however, of the view that an allowance, even if it was incidental to earnings, would be part of it and could be considered such. He disagreed with the submission of counsel and held that a teacher undergoing training could be considered to be engaged in gainful activity just like a musician or a karate instructor. He preferred the analogy stated by counsel for the plaintiff who compared the plaintiff's position with that of a law pupil in Chambers, and therefore concluded that the $345.00 per month allowance given to the plaintiff at the time of the accident fell within the purview of the said section. Here we might mention that the U.K. Court of Appeal has in *Penn* v *Spiers & Pond, Limited* [1908] 1 KB 766 in construing a provision in Schedule 1 of the English Workmen's Compensation Act, 1906, held that a waiter's tips were part of his earnings. That case was followed by the House

[33]The emphasis is mine.
[34][1990] 1 CLJ 32, 34; [1990] 1 MLJ 99, 101.

> of Lords in *Great Western Railway Company* v *Helps* [1918] AC 143 in which it was held that tips received by a railway porter were part of his earnings for the purpose of assessing compensation payable under the English Workmen's Compensation Act, 1906. We agreed with both the learned Judge and counsel that in construing the above-quoted s. 28A(2)(c)(i) the expression "earnings" must in this case be read together with the words "or other gainful activity." We think that the expression "earnings" in that sub-section of s 28A of the Act was used not in the sense in which economical writers use it, but in a popular sense. We therefore considered that the training undertaken by the plaintiff to enable her to become a teacher was an activity which resulted in a gain of $345 per month for her and this sum of money was therefore earnings contemplated by that section."

This liberal interpretation of the expression "earnings" in section 28A(2)(c)(i) is just and most welcome. The amendment Act had caused a major change by providing that the injured victim must be earning at the time of the accident. To impose a strict interpretation on the word "earnings" and to ignore incidental earnings like training allowances would be too severe. In this case had the plaintiff's unfortunate accident occurred before 1.10.1984 she would have received a substantial sum as lost earnings. The fact that she would have qualified had she not been injured and that she would have received a trained teacher's pay would have been taken into account.

The third ground of appeal was that the learned Judge had misdirected himself in that he had awarded a multiplier of 16 despite the fact that both the counsel for the plaintiff and the defendants had agreed and applied to him to record a multiplier of 15. Gunn Chit Tuan SCJ held that the trial Judge was right in awarding a multiplier of 16 years. His Lordship said,[35]

> "The legislature has made its intention very clear by using mandatory language in s. 28A(2)(d) of the Act that "in assessing damages for loss of future earnings the Court shall take into account that 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."

[35] *Ibid.*

The judgment of the trial judge as well as that of the Supreme Court do not indicate why the multiplier of 15 instead of 16, was raised by counsel. It is likely that this reduced multiplier (reduced by one) was put forward because the trial judge had awarded pre-trial loss of earnings of eleven month's training allowance ($11 \times \$345 = \$3795$) as special damages. Neither the judgment of the trial judge nor that of the Supreme Court raised the issue whether pre-trial loss of earnings could be awarded now that the 1984 Act prescribes a multiplier based on the plaintiff's age at the time when he was injured.

The fourth and fifth ground of appeal related to the learned trial judge's use of direct multiplication to decide on the capital sum for loss of future earnings. It was argued that the actuarial or "annuity" tables should have been used. Gunn Chit Tuan SCJ rejected this argument. His Lordship said,[36]

> "Counsel's contention was that s. 28A of the Civil Law Act, 1956, relating to damages in respect of personal injury, has not referred to the annuity tables which have been used in this country as a matter of practice for a long time. He submitted that the annuity tables have not been "repealed" and should therefore still be used in calculating the award of damages in accordance with the trend of previous awards. We rejected that submission of counsel, because there is no need of any legislation to repeal what was a matter of practice, and considered that the learned Judge had not misdirected himself in applying the direct multiplier rather than using the annuity tables in calculating the award of damages for the cost of future care and loss of future earnings in this case."

The doubt as to whether a direct multiplication or the annuity tables is to be applied now appears settled. It is to be noted that the trial judge gave his reasons for adopting direct multiplication. He had said,[37]

> "Since the amendments to the Act had been modelled on the English Administration of Justice Act 1982 under which the direct multiplier is used and since the usage of the annuity tables in this country is more a matter of practice than of law, in view of the set multiplier for victims below thirty, the Court is of the opinion that the direct multiplier should apply as contingencies and the lump sum payment

[36] *Ibid.*
[37] [1989] 1 CLJ 252, 257.

had been taken care of by the amendment as to the set multiplier."

The Supreme Court seems to have endorsed the learned trial judge's reasons by holding that he had not misdirected himself.

The final ground of appeal was that the learned trial judge had misdirected himself when he failed to take into account or deduct the living expenses of the plaintiff as required by section s. 28A(2)(c)(iii). On this point Gunn Chit Tuan SCJ said,[38]

> "On this ground we also agreed with the learned Judge that the Court should not make any deduction for living expenses under that sub-section of s. 28A of the Act as there was no proof or admission in this case as to what the actual living expenses of the plaintiff were at the time when she was injured."

The High Court judge was in fact asked by counsel for the plaintiff to make a ruling on the "constitutionality" of s. 28A(c)(iii).[39] The learned trial judge felt it was unnecessary to do so because the living expenses were neither proved nor admitted before him.[40] Needless to say the Supreme Court's decision is of no significance on this subject except for the point that a trial judge need not consider it unless it is proved or admitted. Unless some ingenious interpretation is found and accepted in the future for getting around section 28A(2)(c)(iii) living expenses will be deductible if proved (by the defendant) or admitted (by the plaintiff).

Marappan a/l Nallan Koundar & Anor v *Siti Ramlah bte Ibrahim*, the first reported Supreme Court decision on the Civil Law (Amendment) Act, 1984 will, no doubt, serve as a useful guide to practitioners and students on the application of the 1984 Act. There are other questions on this controversial Act which remain unanswered and must await future decisions. The ideal would be a thorough examination of the 1984 Act with a view of not only removing its obscurities but of removing or altering its unpopular provisions.

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[38] [1990] 1 CLJ 32, 34; [1990] 1 MLJ 99, 101.
[39] [1989] 1 CLJ 252, 257.
[40] *Ibid.*