14 Personal Injuries and Fatal Accidents

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INTRODUCTION

One might have thought that the law of personal injuries and fatal accidents is by now so well-settled that little can be done by way of further expounding it. However, a cursory glance at the decisions of His Royal Highness, Sultan Azlan Shah in this field quickly proves one wrong. Even in this 'mundane' field His Royal Highness made his judicial contribution felt; The Sultan was quick to seize the opportunity for righting the wrong and displayed a unique boldness in so doing. The case of *Yee Boon Heng* is a case in point. This was an otherwise ordinary running down action, but the defendant in the case failed to raise the defence of contributory negligence on the pleadings. Raja Azlan Shah J

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(as he then was), whilst allowing an amendment, no-doubt *ex abundanti cautela,* ruled that the court was nevertheless bound to give effect to the defence as may be just and equitable.

In the same case Raja Azlan Shah J had the opportunity of coming up against the then controversial question of awarding interest upon damages in running down actions. His Lordship did not mince words when he said:

> If it is now said that these two authorities above set at rest the principles to be applied in all similar cases, I am not prepared to bind myself to that argument. Paraphrasing it, if it is contended that a successful plaintiff in a non-fatal motor accident case is entitled to interest on damages as of right, I venture to say that the argument is ill-founded.[1]

Neither was His Lordship impressed by the defence counsel's submission:

> On the other hand Mr Tallala relied on the practice in vogue in Singapore and the United Kingdom that the courts have so far refused to make such an award. If it is also said that this court is bound to follow the practice in the two dominions, again I must disassociate myself from that proposition. I would reiterate my view that a discretion is a discretion and it is desirable that it should remain so.[2]

In the event Raja Azlan Shah J concluded:

> In the absence of any persuasive argument to the contrary I take the view that in running down actions it is not normal for the court to award interest on damages.[3]

In this case His Lordship ruled that no interest should be awarded for pain and suffering and loss of amenities and prospective loss of earnings.

Raja Azlan Shah J (as he then was) did not award interest in the earlier cases of *Govinda Raju, Chonk Kek Ling,* and *Raja Zam Zam* nor in the later case of *Raja Mokhtar.* In fact the question of interest does not seem to have been convassed in these cases. However, since the English Court of Appeal case of *Jefford* v *Gee*[4], His Lordship appears to have changed his views about granting interest. In *Murtadza* Raja Azlan Shah CJ (as he then was) explained the need to itemise damages and stated that an award for pain and suffering and loss of amenities carries interest from the date of service of the writ to the date of trial' (following *Jefford).* In the law of personal injuries and fatal accidents the clearest contribution of His Royal Highness may be said to be his successful disposition of the practice of the "global" award of damages in

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[1]At page 160.

[2]*Ibid*

[3]*Ibid*

[4][1970] 1 A11 ER 1202 (which was applied in the Federal Court case of *Foong Nan* v *Sagadevan* [1971] 2 MLJ 24).

Malaysia. Once again, there was little doubt as to the message which His Royal Highness wanted to put across:

> A global award has the distinct advantage of covering a multitude of sins. It does not show where or how the judge had erred on the side of overgenerosity or on the side of parsimony.[5]

It was in *Yang Salbiah* again that Raja Azlan Shah CJ (as he then was) boldly proclaimed the House of Lords decision in *Lim Poh Choon* "as the leading case on the subject", almost as though it was binding authority. Needless to say, the issue of applying English case law in running-down actions in Malaysia did not go unchallenged. Unfortunately the challenge was to no avail. The Privy Council vindicated the views of His Royal Highness. Lord Scarman, delivering the judgment of the Board said, inter alia:

> The Federal Court is well-placed to decide whether and to what extent the guidance of modern English authority should be accepted.

The liberal approach of the Sultan towards the attainment of justice is exemplified by the *Yang Salbiah* case and the case of *Raja Mokhtar* where His Royal Highness categorically stated that though English cases were not strictly binding on Malaysian Courts they and other cases from Commonwealth jurisdictions may be applied. On a broader perspective it may be fairly asserted that in so far as Malaysian legal jurisprudence is concerned the singular contribution of the Sultan perhaps lies in his endeavour to streamline Malaysian cases in line with Commonwealth decisions so that the common law and its development may be homogeneous in the various sections of the Commonwealth.[6]

DECISIONS AND COMMENTS

DAMAGES

(a) General Damages: pleading: heads of damages

Raja Zam Zam
v
Vaithiyanathan

[1965] 2 MLJ 252 High Court, Kuala Lumpur

Cases referred to:-
(1) *British Transport Commission* v *Gourley* [1956] AC 185 at p 206
(2) *Roach* v *Yates* [1937] 3 All ER 442 at p 444
(3) *Shearman* v *Folland* [1950] 1 All ER 976
(4) *Brockbank* v *Whitehaven Junction Railway Company* 158 ER 706

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[5] *Yang Salbiah's* case, *supra.*

[6] see *Raja Mohktar's* case, *supra*

RAJA AZLAN SHAH J: On 19th October, 1962 while the plaintiff was walking on her correct side of the road she was knocked down by the defendant who was then driving his motor-car. Liability is admitted, and therefore the sole issue before the court is the quantum of damages. She claims general damages for injuries sustained in the sum of $30,000. Special damages were not claimed.

This is a peculiar way of claiming general damages. It is not the present practice to specify the amount of general damages in the pleadings. As was said by Lord Goddard in *British Transport Commission* v *Gourley:*[1]

> In an action for personal injuries, the damages are always divided into two main parts. First, there is what is referred to as special damage which has to be specially pleaded and proved.... Secondly, there is general damage which the law implies and which is not specially pleaded.

At the time of the accident the plaintiff was and still is a married woman, aged 31 years. The husband works in the Pejabat Telecom at a salary of $620 per month. She has seven children. She used to do household work which consisted of cooking, taking care of the house and family, washing and sewing. In fact she was doing what a normal, happy and healthy housewife would have done. She used to attend parties, visit the cinemas, entertain guests, and visit her mother at Klang. After the accident she no longer does household work because she says she cannot now sit for a long time and whenever she does household work she feels sick. She still complains of pain in the buttock and attacks of headache. She now employs a servant to do the cooking and washing at $50 per month and another servant to do the ironing at $8 per month.

In assessing general damages there are three elements to be considered: (a) pain and suffering; (b) loss of enjoyments of life; (c) prospective pecuniary loss. Under the first head I think a substantial sum should be awarded. The accident occurred on 19th October 1962. She sustained a fracture of the coccyx. This symptom of coccydynia has proved to be permanent and will incapacitate her in activities like prolonged sitting, riding in a car, and such like activities. Up to the present day she has been treated as an out-patient which consists of heat therapy and the taking of pain killers (analgesics). This symptom may happen any day or every day, depending on the activities of the plaintiff. The pain is brought about by the pressure on the spine. Such pain is confined to the buttock and the area between the thighs. It is therefore clear that the plaintiff must have suffered considerable pain at the time of the accident right up to the present moment and there is a possibility that such pain will remain permanent. I think a sum of $6,000 would not be an excessive award under this head.

Under the second element, the plaintiff was a vigorous, happy and healthy woman of 31 years who has suffered a permanent symptom of coccydynia which will prevent her from indulging in those normal forms of recreation to which she was accustomed. When before she could visit the cinema, attend parties, entertain guests, go for rides in the motor-car, she now can no longer perform with that amount of

enthusiasm and zest. When formerly she enjoyed doing household work and looking after her family, she now can no longer perform. I do not think a sum of $3,000 would be excessive under this head.

With regard to prospective pecuniary loss, it was argued by defence counsel that as no special damages were claimed in respect of providing the plaintiff with servants, the plaintiff cannot now successfully use this as an element for awarding damages. For myself, the argument is without substance. As was said by Greer LJ in *Roach* v *Yates:*[2]

> I think that Mr Beyfus was right in saying that we must take into account, at any rate, for the period during which he must now be expected to live, the sum of £3 per week as the minimum expense which this unfortunate man would have to incur in retaining the services of his wife and his sister-in-law.

In that case the plaintiff's wife and sister-in-law gave up their work (at which they earned £3 a week between them) to look after the plaintiff. The lost wages, at £3 a week, were taken as the minimum expense which attendance on the plaintiff would involve. Again, in *Shearman* v *Folland,*[3] an old lady had lost a leg and had to have a companion. She claimed 10 guineas as attendance expenses not already incurred as prospective loss under the head of general damages. The Court of Appeal held that she was entitled to claim under that head but reduced the figure as being excessive. Asquith LJ at p 981 said:

> All damages which up to the time of hearing have not yet crystallised in actual disbursement, but are still prospective, are general damages.

In the light of these authorities it is clear that the plaintiff can claim the expense of engaging the servants as a prospective expense which will be capitalised in the same way as loss of earnings.

In cases like the present where a housewife is partially disabled, the claim is usually made by the husband who has a right of action at common law for the loss of his wife's services; see *Brockbank* v *Whitehaven Junction Railway Company.*[4] If, however, the wife herself, as in this case, accepts responsibility for paying her substitutes, in my opinion there is no reason in principle why she could not include the cost in her own claim without the intervention of her husband.

The cost of employing two servants at $58 a month amounts to $696 a year. But for the accident, the average expectation of life of a Malaysian woman of 30 years, taking the nearest figure, would be 36.76 years. This figure is obtained from the Malaysia Official Year Book, 1963, at page 46. Due to the permanent injury and mental distress which she suffered, here expectation of life would, in my opinion, be reduced by 20 years. On these figures, as a matter of arithmetical calculation, it would come to $10,440. However, I must allow for the various relevant contingencies to which a Malaysian housewife would be subjected. I have to consider the cost of living in this country which has gone up and may go up and which may affect the cost of employing servants in the future. I have also to consider the probability that having regard to the station in life of the plaintiff's husband he may have to provide her with

servants at some stage of their family life. Taking these and other contingencies into consideration, I will allow a reduction of 10 per cent. That would amount to $9,400. In all I will allow $18,500 as general damages. There will be the usual order for costs in this case.

Order accordingly.

Hee Keng Loon for the Plaintiff.
Tara Singh Sidhu for the Defendant.

Notes

(i) In this case the general damages claimed were specified at $30,000. The court disapproved of the practice of specifying the quantum of general damages in the pleadings.
(ii) This case reiterates and is further authority for the familiar proposition that unlike special damages, the quantum of general damages shall not be specified in the claim.

(b) Interest on Damages: pleading contributory negligence

Yee Boon Heng
v
Tan Chwee

[1967] 2 MLJ 157 High Court, Kuala Lumpur

Cases referred to:
(1) *The Mimosa* (1944), 77 LILR 217; [1944] WN 74
(2) *Grayson* v *Ellerman Lines Ltd* [1920] AC 466 at p 477
(3) *Nance* v *British Columbia Electric Co* [1951] AC 601 at p 611
(4) *Ghulam Hussain* v *Shaharom & Anor* [1966] 2 MLJ 207
(5) *Sivarajan* v *Swee Lam Estates (M) Ltd* [1966] 1 MLJ xvii.
(6) *Ban Pet Hock* v *Ong Ah Ho* [1966] 2 MLJ 256.

RAJA AZLAN SHAH J: This is yet another running-down case. On 24th October 1964 the plaintiff was driving a lorry, and about 15 miles from Triang on the way to Temerloh there was a collision between his lorry and an on-coming lorry driven by the defendant. He sustained a dislocation of the hip bone together with a fracture of the pelvic bone which forms part of the hip joint. By a writ dated 9th November 1965 he brought an action claiming that his injury resulted from the negligence of the defendant. In his pleadings the defendant denied negligence. There was no allegation in the defence of negligence against the plaintiff. In my view, it is immaterial that the defendant did not allege negligence against the plaintiff as long as the court, after having reviewed all the facts, finds that such negligence exists. Section 12 of the Civil Law Ordinance, 1956, provides for apportionment of liability in

cases of contributory negligence: See *The Mimosa*[1]. Be that as it may, the court gave leave for the inclusion of this plea in the course of the proceedings.

The accident occurred at a bend in the road between Temerloh and Triang. Vehicles approaching from opposite directions are obscured from one another by a line of bushy trees until they are in close proximity to the bend. The road is 11' 6" wide, and several guide posts on either side of it at the point of impact limit the use of the side-tables to the very minimum. The width of each of the lorries in question was 7' 6", so that a reasonable and prudent driver would approach this blind bend at such a speed as would enable him to stop, if necessary, before reaching the bend. To fail to do this would be tantamount to a failure to take reasonable precautions to avoid a collision. That would constitute negligence.

An examination of the scene of the accident revealed two important facts. The first was that the off-side tyres of the defendant's lorry had left a brake mark measuring 57' 8" on the plaintiff's half of the road. The other fact was that the off-side front mudguards of both vehicles were damaged.

The plaintiff's story is that at the time of the accident he was conveying four timber logs from Triang to Kuala Lumpur at a speed of 10 to 20 miles per hour. He said that when he was within a hundred feet of the bend he saw an on-coming lorry between 220 and 230 feet from the bend. The said lorry was fully loaded with 48 bags of rice. He reduced his speed and observed that the other lorry did likewise, and he heard the screech of brakes being applied. However, that vehicle failed to stop and a collision occurred at the bend. At the time of impact the plaintiff's vehicle was about to stop. His attendant gave evidence to the effect that immediately before the accident the other lorry was travelling in the middle of the road, and that is sufficiently substantiated by the evidence of the brake marks on the road. If the plaintiff's version is to be believed, I have no hesitation to conclude that the defendant was comparatively further away from the bend and that as an ordinary prudent driver he should have allowed the plaintiff's vehicle to negotiate the bend first.

The defendant contended that both his vehicle and that of the plaintiff were at equal distances from the bend — about 220 feet. He said both vehicles were travelling at a speed of about 30 miles per hour. On sighting the plaintiff's lorry he sounded his horn and applied his brakes in order to stop his lorry. He said the plaintiff's lorry did not slow down. Then the collision occurred. In cross-examination he told a different story, and I reproduce that part of his evidence:

> I sounded my horn in order to let the other driver know that I was crossing the culvert. I was then about 25 ft. from culvert. I did not sound my horn earlier as I could not see the on coming vehicle yet. I wanted to cross the culvert first. That was why I sounded my horn.
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> When I applied my brakes I had already seen the on-coming lorry. When I came to about 25 ft. from culvert, and as I had intended to cross it first, I sounded my horn to draw the other driver's attention. I was hoping

that the other lorry would do something to let me through.

If that is the probable version of what happened, the facts do not justify the conclusion. The silent evidence of the brake marks on the road leading up to the point of impact tells a very different story. The brake marks measuring 57' 8" indicate that they were applied when the defendant's lorry was at about that distance from the bend, without taking into account the distance travelled by him while making up his mind to apply his brakes. That is sufficient to discredit the defendant's story. Another improbability in his evidence is that he could not have seen the timber lorry at a distance of 440 ft in view of the bushy trees that lined the left hand side of his road and the blind bend.

In the present case it is not unnatural to expect one party to blame the other for the accident, and in such circumstance their evidence requires very careful scrutiny.

The probabilities favour the inference that the defendant failed to see the on-coming timber lorry when he was approaching the bend. He then applied his brakes but the lorry failed to stop as his brakes were not fully effective. That caused him to sound his horn to attract the other driver's attention in the hope that the latter might do something to let him negotiate the bend first. The plaintiff, thinking he had the right of way by reason of being nearer the bend, proceeded to negotiate it. Then the collision occurred. He did not apply his brakes abruptly through fear that the logs behind him would maintain their forward momentum and crush him.

In my judgment the defendant was negligent in two respects: (i) failing to keep a proper look-out in attempting to negotiate the bend; (ii) being suddenly deprived of proper control of his vehicle by some defect suddenly manifesting itself in the vehicle, resulting in the collision.

It was then said by Mr Talalla on behalf of the defendant that the plaintiff contributed to his own injury. This part of the law is no longer in doubt. When it is said that the plaintiff is guilty of contributory negligence, all that is meant is that he has failed to take reasonable precaution for his own safety; whether at the same time he has also been careless regarding the safety of others is an immaterial consideration, though such a duty will normally be owed in most cases of highway collision: see *Grayson* v *Ellerman Lines Ltd;*[2] *Nance* v *British Columbia Electric Co*[3].

In my judgment the plaintiff in the circumstances of this case should have driven his lorry at a speed which would have enabled him to stop it before the bend and thus avoid the accident. In a way he has contributed to his own injury, and I assess his liability at 25 per cent.

The plaintiff sustained a dislocation of the hip joint and this dislocation was complicated by a fracture of the pelvic bone which forms part of the hip joint. An open reduction was undertaken, that is, the wound was opened by cutting through the muscles and setting the bone. The fractured fragments had to be screwed to the pelvic bone in order to hold the dislocated bone in position. The plaintiff was hospitalised for 2 months and 12 days. The Orthopaedic Surgeon examined him again on

the morning of the trial and stated that his post-operative recovery was normal and satisfactory and that he had been fortunate to recover the use of his hip. He estimated the extent of disablement to be about 20 per cent. As to the period of time during which a person with such injuries would be unable to work, he stated that this depended on response to treatment of the individual concerned, but 4 to 5 months could be taken as the average period. This would be followed by about 2 months of light work. He further stated that osteo-arthritis could be expected to develop at the site of the injuries in about 4 or 5 years' time and could affect his working capacity.

In view of the dislocation which was complicated by the fracture and which in turn necessitated an open reduction and the probability that osteo-arthritis would set in later years, I assess a sum of $6,000 under this head. It was contended that had the plaintiff received immediate medical attention after the accident he would not have suffered the present injuries which necessitated an open reduction. In my view, if the plaintiff had received immediate medical attention the hip could have been reduced by close reduction, but not the fracture. Open surgery was necessary to fix the fracture by screwing the bone fragments. I do not think the contention affects the quantum of damages. If it does, it is minimal.

With regard to the claim for loss of prospective earnings, the award must be nominal. At the time of the accident the plaintiff earned an average monthly income of $300. At the present moment he is earning between $260 and $270 per month. Therefore the differences of loss of possible earnings is in the region of $30 per month which, to my mind, is nominal, and considering the hazardous nature of work of the defendant at the time of the accident it cannot reasonably be said that he could have earned a fixed sum of $300 per month. In the circumstances I would allow a sum of $500 for loss of prospective earnings.

In respect of special damages it is reasonable to award a sum of $100 for transport expenses. As to loss of earnings, I would allow a sum of $1,500 at the rate of $300 a month for 5 months. Therefore, special damages would total $1,600.

I now come to the controversial question whether interest should be awarded on damages in respect of personal injury caused in a motor accident. Section 11 of the Civil Law Ordinance, 1956, which is the same as section 8 of the Singapore Civil Law Ordinance (Cap 24), is in *pari materia* with section 3 of the (UK) Law Reform (Miscellaneous Provisions) Act, 1934. It is common ground that the section gives the court a discretion in the matter.

Mr Richard Ho on behalf of the plaintiff argued that this court should award the plaintiff interest on damages from the date of the accident to the date of judgment, basing his claim on two local authorities of *Ghulam Hussain* v *Shaharom & Anor*[3] and *Sivarajan* v *Swee Lam Estates* (M) Ltd.[4] In the former case the trial judge awarded interest at 6 per cent on the full damages. It would appear the question of interest was not argued. In the latter, the case took some 23 months to be heard, and Azmi J (as he then was) awarded interest on damages from

the date of issue of writ to the date of payment under O.40 r. 11 on the 'iniquity of keeping the plaintiff out of the use of moneys legitimately due to him for an unconscionably long time'. If it is now said that these two authorities above set at rest the principles to be applied in all similar cases, I am not prepared to bind myself to that argument. Paraphrasing it, if it is contended that a successful plaintiff in a non-fatal motor accident case is entitled to interest on damages as of right, I venture to say that the argument is ill-founded. The discretion which the court has under that section seems to me to be as unfettered as any discretion can be, and I think it would be a misfortune if an exercise of discretion on particular facts should be used to impose fetters on all subsequent use of the discretion in other cases.

On the other hand, Mr Talalla relied on the practice in vogue in Singapore and in the United Kingdom that the courts have so far refused to make such award. If it is also said that this court is bound to follow the practice in the two dominions, again I must disassociate myself from that proposition. I would reiterate my view that a discretion is a discretion and it is desirable that it should remain so.

The popular reason advanced for the proposition that interest should be paid is that the plaintiff is in a worse position by withholding money which is legitimately due to him. It is contended that in practically every case when a writ is filed against a defendant he should have admitted the claim and have paid the appropriate sum for damages, and failure to do that would entitle the plaintiff to interest. In my view, that is a simplification of the matter. The criterion in all contested running-down cases is the question of liability and the assessment of damages. It is unlike the case for recovery of a debt where the amount owing is ascertainable. I am in full accord with the view taken by the trial judge in *Ban Pet Hock* v *Ong Ah Ho.*[5] In that case a passage from page 275 of the 12th edition of *Mayne & McGregor on Damages* was relied by the trial judge for the proposition that 'torts affecting the person are in the nature of things not likely to require the award of interest in the damages'. The reason behind the doctrine is that in tort the plaintiff has been deprived of a capital asset upon which he could earn interest. That passage was also relied by the author of an article appearing in [1966] 1 MLJ xxxi. In the absence of any persuasive argument to the contrary, I take the view that in running-down actions it is not normal for the court to award interest on damages. This is subject to the following observations:

(i) In cases where damages awarded are for non-pecuniary loss, e.g. for pain and suffering and loss of amenities in personal injury cases, interest on damages are to be disallowed because they do not constitute capital asset.

(ii) Insofar as pecuniary loss is concerned, where the loss is in respect of prospective earnings no interest should be awarded since at the time of the action such loss has not accrued. In such a case the invariable practice is to award a sum calculated by reference to estimated loss in the future as from date of judgment.

(iii) In cases of pecuniary loss which has accrued on the date of

judgment, e.g. wages and salaries, medical expenses, transport expenses and loss or damage to chattels, interest should be awarded in respect of the period during which he has been deprived of these sums or chattels. In normal cases the amount of interest on such damages are likely to be too small to warrant the award. It is here that the court will have to exercise its discretion accordingly.

(iv) The principle will not necessarily apply in cases where money has been paid into court.

There will therefore be general damages in the sum of $6,500 and special damages in the sum of $1,600. In view of the contributory negligence of the plaintiff assessed at 25 per cent, the amount of damages due to him is to be apportioned accordingly.

Insofar as interest is concerned, the amount which I would have awarded on the special damages with effect from the date of issue of the writ to the date of judgment, a period of some 20 months, which in the circumstances is reasonable in this particular case, is so negligible as not to justify an award.

The plaintiff will get his full costs.

Order accordingly.

Richard Ho for the Plaintiff.
Richard Talalla for the Respondent.

Notes

(i) In this case there was no allegation of contributory negligence in the defence and the question was whether the Court was bound to take cognizance of the defence based on the facts of the case. The Court allowed an amendment to the defence but nevertheless made it clear that it had the power to give effect to the defence of contributory negligence despite it not being raised in the defence.

(ii) The Court relied for its power on section 12 of the Civil Law Act, 1956 and it appears that that power is not dependent on whether or not contributory negligence is pleaded.

(iii) It may be noted that it was held in the case of *Boothman* v *British Northrop Ltd* [1972] 13 KIR 112 CA that it was wrong to suggest that the court can disregard contributory negligence in awarding damages, if it thinks it just and equitable: see 12 *Halsbury's Laws of England* 4th Ed p 499 *et seq.*

(iv) The Court ruled in this case that no award of interest should be made on damages for pain and suffering and loss of amenities and on prospective loss of earnings. However, since the English Court of Appeal case of *Jefford* v *Gee* [1970] 1 All ER 1202 and the subsequent Federal Court cases of *Foong Nan* v *Sagadevan* [1971] 2 MLJ 24, *Murtadza bin Mohamed Hassan* v *Chong Swee Pian* [1980] 1 MLJ 216 and *Yang Salbiah & Anor* v *Jamil bin Harun* (and the appeal to the Privy Council) and the House of Lords case of *Lim Poh Choo* v *Camden* and *Islington Area Health Authority* [1979] 2 All ER 910 there is no doubt that interest may be awarded on damages for pain and suffering and loss of amenities.

(c) Pension in quantum of damages: application of Commonwealth cases

Raja Mokhtar bin Raja Yaakob
v
Public Trustee, Malaysia

[1970] 2 MLJ 151 High Court, Kuala Lumpur

Cases referred to:-
(1) Oliver v *Ashman* [1961] 3 All ER 323
(2) *Pay Eng Kee* v *Ramasamy* [1963] MLJ 177
(3) *Parry* v *Cleaver* [1969] 1 All ER 555
(4) *Browning* v *War Office* [1962] 3 All ER 1089
(5) *James* v *Gleeson* (1965) 39 ALJR 258, 259
(6) *Smith* v *Leech Brain & Co Ltd* [1962] 2 QB 415.

RAJA AZLAN SHAH J: The plaintiff sustained severe injuries resulting in the complete paralysis of the lower half of his body. He suffered from a fracture dislocation of the spine and as a result is unable to use both the lower limbs and the muscles of the belly. There is complete paralysis of ordinary bowel, bladder and sexual functions. The defendant admitted liability but contested the amount of general damages. Special damages were agreed at $10,000.

The question of quantum presents a perennial difficulty because no two cases are alike and any decided case can only be helpful by way of comparison. The paramount consideration for this court is to do what is right and fair between the parties so that the injured person may have the right sum of damages, in so far as damages can compensate for an accident of a serious character.

The plaintiff met with a motor accident on June 30, 1967. He was admitted to the General Hospital, Ipoh on July 1, 1967. On the same day an open reduction with internal fixation and toilet and suture of lacerated wounds were carried out. He was also found to be suffering from diabetes mellitis but that was controlled.

On October 28, 1967 he was admitted into Perth Hospital, West Australia. He took a considerably long period of time to learn how to empty his bladder by expression, and the bowel by manual removal of faecal material. Over a long period of time the severe spinal pain was combated. He had a major operation involving the removal of a vertebra and exploration of the vertebral column. But some spinal pain still persisted, particularly at the fracture site, where on X-ray there was found a new bone formation and which might be related to an infection which had rested therein. There was a subsequent flare up of this infection and after his return here he was admitted into the University Hospital and on May 27, 1969 he was operated when a clearance of the infection and bone grafting was done. Diabetes could have been a factor contributing to the plaintiff's condition between the operation in Australia and the relapse although infection could have occurred

without it. That is a point which must not be lost sight of in considering loss of expectation of life. It was conceded that a diabetic is more prone to infection than a healthy man.

On the facts of the case there are two heads of damages: (i) loss of amenities and pain and suffering; (ii) loss of future earnings.

Any compensation for loss of amenities and pain and suffering must be artificial. No sum can be adequate. But the court must give an award which would represent artificially the gravity of the loss and the severity of the pain and suffering. It is hard to give cogent reasons for this figure or for that. One can only assert: see *Oliver* v *Ashman*[1].

I have been referred to comparable awards in 5 local cases also involving paralysis of the lower limbs, and which it is said are far more serious than the present case. These cases do not readily fit into the present case. It seems to me that in a given case the quantum of damage is even more than usually at large. Looking at the plaintiff's background, a person of his calibre and standing would lose much more than would a student teacher or petrol gauger or cement mixer or gardener or garage fitter.

In a case like the present the plaintiff's real loss is not so much his physical injury as the loss of those opportunities to lead a full and normal life which are now denied to him by his physical condition and for what he will suffer from being unable to do so. There are two elements involved, what he has lost and what he must feel about it and of the two the latter is generally the more important to the injured man. For everyday of his life he is acutely conscious of what he has suffered and what he has lost. He must therefore be compensated, as far as money can do it, for that and for the mental strain and anxiety which results.

The plaintiff will remain seriously and permanently disabled for the rest of his life. He is saddled to a wheel-chair existence and will always need quite a lot of domestic assistance. He has nothing to look forward to but a life of frustration and handicap.

Over and above that he had suffered great pain and has had three major operations. It is sufficient to quote a passage from Dr G M Bedbrook's report:

> He had great difficulty with his lower limbs and a severe spinal pain which was giving a great deal of concern and disability. The patient's general condition was not good, and he was very depressed about the whole matter of his paraplegia.

The pain was combated over a long period of time.

After taking into consideration all the circumstances and possible contingencies, I award a sum of $80,000 as a reasonable compensation for loss of amenities and pain and suffering.

I now turn to consider loss of future earnings. The plaintiff was appointed State Secretary, Perak, with effect from February 10, 1965. That was a superscale D appointment. He was then 41 years old, married with 9 children. He met with the accident on June 30, 1967. The post of State Secretary, Perak, was upgraded to superscale C in January 1969. In the normal course of events I am confident and so

hold, that he would have been promoted to that post but for the accident. He would then be 45 years old. He had very bright prospects. It appears from the evidence given that there is no likelihood of loss of expectation of life. Taking all the circumstances into consideration and making due allowance for various contingencies, I would give him 7 years expectation of life as from the date of the accident *i.e.* when he was 43 years old. In that span of life he would have reached the age of 50 years, the optional age of retirement, and he would have held the post of State Secretary, Perak for about 9 years. I have anxiously considered his prospects for promotion to a superscale B post during the remaining 5 years of his expectation of life and after considering the general trend of promotion in the government service, I have every reason to believe that he would be acting in a superscale B appointment, but for purposes of pension at the optional age of 50, only his substantive salary at superscale C will be considered.

As a result of the accident he was compulsorily retired on August 1, 1968 and given a lump sum gratuity of $28,606 and in addition he received a pension of $6,867.87 per annum. If he had retired at the optional age of 50 years in a superscale D post, he would have received a gratuity of $35,000 plus a yearly pension of $8,491.95. Had he opted to retire at the age of 50 years in a superscale C post he would have received $37,290 gratuity and a yearly pension of $8,949.60. Between July 1, 1967 and March 21, 1968 he was drawing his full salary and after giving due allowance for income tax element he had received $16,091.61. From March 22, 1968 to July 21, 1968 he drew half salary and that totalled $3,709.94 after deducting income tax.

Now, this case brings in review the question of service pension. It is urged upon me that such pension is to be considered in assessing damages at common law. The only local case in point is a Singapore case, *Pay Eng Kee* v *Ramasamy*.[2] But that was an extempore decision because it proceeded on the basis that both counsel agreed that service pension was not to be taken into account. The recent House of Lords case in *Parry* v *Cleaver*[3] demonstrates the need to adopt a pragmatic approach to the question before us. Their Lordships had exhaustively examined previous decisions on the point, in particular *Browning* v *War Office*[4] and had given a careful analysis of the cases. *Browning's* case was disapproved. I think it is sufficient to quote a short passage from the speech of Lord Reid at page 563:

> In my judgment, a decision that pensions should not be brought into account in assessing damages at common law is consistent with general principles, with the preponderating weight of authority, and with public policy as enacted by Parliament and I would therefore so decide.

It is axiomatic that though our courts are not strictly speaking bound by decisions of the House of Lords, we have always recognised and continue to recognise their peculiarly high persuasive value. Moreover the reasoning of any judgment delivered in the House of Lords, whether dissenting or concurring, commands and must always command the utmost respect. The question of pension rights has also been considered

by the High Court of Australia on several occasions and in the recent case of *Jones* v *Gleeson,*[5] the *Browning* case was not followed. I need only quote a passage from that judgment at page 259:

> In recent years, however, the relevance or otherwise to the issue of damages of the fact that an injured person is entitled to a pension has been considered by this court on several occasions... and a very different view has been taken from that which is expressed in the majority judgments in *Browning's* case... We treat as irrelevant the fact that the appellant in the present case will, on his retirement from the police force, receive a pension.

Although decisions of Commonwealth Courts are not binding, they are entitled to the highest respect. In my view it is important that I should apply the principles formulated in *Parry* v *Cleaver* and *Jones* v *Gleeson* so that the common law and its development should be homogeneous in the various sections of the Commonwealth: *per* Lord Parker CJ in *Smith* v *Leech Brain & Co Ltd.*[6] A proposition was put forward on behalf of the defendant in the present case that the only occasion where pensions shall not be taken into account is in an action for death benefits under section 7(3) of the Civil Law Ordinance, 1956, and no other. I think it is only necessary to state the proposition to show that it is utterly unsound. If public policy as enacted in the Civil Law Ordinance requires all pensions to be disregarded in a claim for death benefits, how can it be argued as proper to take pensions into account in assessing damages at common law. If section 7(3) of the Civil Law Ordinance confers an advantage to claimants in respect of pensions rights in actions for death benefits, I do not see any difference that such pensions should not confer an equal benefit to claimants in actions for personal injuries at common law. In my judgment pension rights are *ex gratia* payments made to a government servant in respect of his past conduct and service out of the discretion of the Government and independent of the existence of any right of redress given to him against others.

I am satisfied that the weight of authorities and public policy support my view that pensions are not to be brought into account in assessing damages at common law.

Giving the best estimate I can, I award the plaintiff a sum of $109,419 for loss of future earnings. I arrive at that figure as follows: emoluments at superscale D for 2 years less tax; emoluments at superscale C for 4 years less tax: emoluments for acting in superscale B for 1 year less tax. That works out to $119,852. I add to that $8,690 the difference between pension at superscale C at 50 years and compulsory pension received. This gives $128,542. He has received a sum of $19,123 by way of emoluments and deducting that I arrive at $109,419.

Therefore I award him a sum of $110,000 (making it a round figure) for loss of future earnings plus $80,000 for loss of amenities and pain and suffering and $10,000 agreed special damages. I think that represents a reasonable award which in the circumstances of the case warrant. I order that this award be handed to the Public Trustee to administer it on behalf of the plaintiff. Costs to the plaintiff in any event.

Judgment for the plaintiff.

NH Chan for the Plaintiff.
PP Dharmananda for the Defendant.

Notes

This case establishes the following propositions:

(i) though decisions of the House of Lords are not strictly binding on Malaysian Courts they deserve the highest consideration, whether they are concurring or dissenting judgments;

(ii) the same rule applies to decisions of other Commonwealth jurisdictions so that the development of the Common Law may be homogeneous in the various sections of the Commonwealth; and

(iii) Pensions are not to be reckoned in computing the quantum of damages.

(d) Itemisation of damages under separate heads: interest on future loss of earning

(i) Murtadza bin Mohamed Hassan
v
Chong Swee Pian

[1980] 1 MLJ 216 Federal Court, Penang

Coram: Raja Azlan Shah CJ (Malaya), Chang Min Tat FJ and Abdoolcader J

Cases referred to:-
(1) *Ilkiw* v *Samuels & Ors* [1963] 2 All ER 879
(2) *Yee Hup Transport & Co & Anor* v *Wong Kong* [1967] 2 MLJ 93
(3) *Jefford* v *Gee* [1970] 1 All ER 1202
(4) *Cookson* v *Knowles* [1977] 2 All ER 820
(5) *Pickett* v *British Rail Engineering Ltd* [1978] 3 WLR 955
(6) *Foong Nan* v *Sagadevan* [1971] 2 MLJ 24.

RAJA AZLAN SHAH CJ (MALAYA) I have had the advantage of reading the judgment of my brother Chang Min Tat and agree with his conclusion that the appeal should be allowed to the extent there set out. I only wish to say something on the question of interest in claims for personal injuries.

It is now well recognised, on principle and authority, that the courts must itemise the award of damages in personal injury cases under three separate heads, namely, special damages, compensation for pain, suffering and loss of amenities and lastly, loss of future earnings. In *Jefford* v *Gee*(3) Lord Denning MR said at page 1212 that 'the court will, in future, have to itemise the damages in most personal injury cases.' This is because different rules of interest apply under the separate

heads. An award of interest must be made having regard to the temporal conditions applicable to them. Thus under the head of special damages the discretion to award interest is calculated from the date of the accident; an award under pain, suffering and loss of amenities carries interest from the date of service of the writ to the date of trial; an award for future earnings carries no interest at all. The reason for awarding interest is to compensate the plaintiff from being kept out of money which theoretically is due to him at the date of the accident. Therefore, to allow interest on the award of damages for future earnings is wrong on the ground that the plaintiff *ex hypothesis* has not been kept out of his money.

In *Pickett* v *British Rail Engineering Ltd*[5] Lord Scarman at page 537 said that the decision of the Court of Appeal in *Cookson* v *Knowles,*[4] in so far as it purported to deny interest to general damages, was *obiter.*

In the circumstances, the learned judge erred when he failed to itemise the award of damages into separate heads, so that it made it very difficult for him properly to exercise his discretion in relation to the award of interest.

Appeal allowed.

S Thillaimuthu for the Appellant.
R Manecksha for the Respondent.

Notes

(i) This case establishes that there is a need to itemise the award of damages in personal injury cases under separate heads as the question of interest has to be differently decided.
(ii) The decision as to itemisation was followed later in the case of *Yang Salbiah & Anor* v *Jamil bin Harun* [1981] 1 MLJ 292 which was upheld on appeal to the Privy Council: see *Jamil bin Harun* v *Yang Kamsiah & Anor* [1984] 1 MLJ 217.
(iii) The leading judgment of the Court was delivered by Chang Min Tat FJ.

(d) Itemisation of damages under separate heads: interest on future loss of earning

(ii) Yang Salbiah & Anor
v
Jamil bin Harun

[1981] 1 MLJ 292 Federal Court, Kuala Lumpur
Coram: Raja Azlan Shah CJ (Malaya), Syed Othman and Salleh Abas FJJ

Cases referred to:-
(1) *Murtadza bin Mohamed Hassan* v *Chong Swee Pian* [1980] 1 MLJ 216.

(2) *Jefford* v *Gee* [1970] 2 QB 130; [1970] 1 All ER 1202
(3) *Cookson* v *Knowles* [1979] AC 556; [1978] 2 All ER 604.
(4) *Pickett* v *British Rail Engineering Ltd.* [1978] 3 WLR 955; [1980] AC 136; [1979] 1 All ER 774.
(5) *Lim Poh Choo* v *Camden and Islington Area Health Authority* [1978] 3 WLR 895; [1979] 3 WLR 44; [1979] 2 All ER 910.
(6) *Wise* v *Kaye* [1962] 1 QB 638; [1962] 1 All ER 257.
(7) *H West & Son Ltd* v *Shephard* [1964] AC 326; [1963] 2 All ER 625.
(8) *Benham* v *Gambling* [1941] AC 157; [1941] 1 All ER 7.
(9) *Livingstone* v *Rawyards Coal Co* (1880) 5 App Cas 25, 39.
(10) *Thompson* v *Faraonio* [1979] 1 WLR 1157.
(11) *Ooi Soon Eng* v *Ng Kee Lin* [1980] 1 MLJ 26.
(12) *Chow Yee Wah & Anor* v *Choo Ah Pat* [1978] 2 MLJ 41.
(13) *Syarikat Jengka Sdn Bhd* v *Abdul Rashid bin Harun* [1981] 1 MLJ 201.

RAJA AZLAN SHAH CJ (MALAYA) (delivering the judgment of the Court): The appellant, Yang Salbiah bt Meor Rasdi (Salbiah), the only appellant, despite the heading, is a very unfortunate young girl. She was run down by a bus and though the visible injuries sustained were a few abrasions and contusions, the end result was disastrous. She became, in that awful but very descriptive term, vegetative. She had in fact sustained severe traumatic cerebral damage and from being a happy normal healthy and intelligent school girl she has become a severely mentally retarded child, with very little awareness of her surroundings and no ability to respond socially or to control herself physically. She is unable to manage wilfully her bladder and her bowel functions. Born on May 10, 1968, she was at the time of the accident, a bit more than 7 years old. Four years later, just before the trial of the action at a neurological test conducted by a consultant, she was assessed at a mental age of 3 years. She is now a little better than a vegetable. Her condition is irreversible with hardly any prospects of improvement, but the poignancy of her situation is that her span of life is in no way shortened. Throughout the rest of her life — and one may reasonably expect that she will live out her normal span of life in this country — she will be unable to appreciate the world she lives in, to grow up to a gainfully employed life, or marry and bear children, otherwise to lead a normal healthy life and she will need constant care and attention and nursing.

Liability for the accident having been fully admitted by the defence, she must recover a substantial award for general damages to cover past, present and future injury and loss. Such an award is final and as remarked, 'it is not susceptible to review as the future unfolds, substituting fact for estimate.' The award has to be a lump sum assessed at the conclusion of the legal process.

It is perhaps for this reason that her claim in the statement of claim delivered on her behalf was merely expressed to be for general damages with the usual prayer for interest and cost. But at the conclusion of the case, her counsel descended into some particulars and submitted that the award should be for (i) pain and suffering and loss of amenities, (ii) future loss and (iii) nursing services. Her counsel however signally

failed to lead any evidence of what this future loss would be or any evidence of the cost of the nursing services he had in mind or he was advised were available for the child. The trial judge, after hearing defendant's counsel's submission which let it be said, without disrespect, was equally of no assistance to the judge, awarded $75,000 as general damages with the 'usual' order as to interest and costs. So far from being usual, it is in fact, unusual. From his grounds of decision supplied subsequently, this sum was awarded on a global basis, because, in his view, the general trend in cases of this sort showed an inclination towards an award of a global sum which would, however, take into account all these three cases'. By the three cases, he obviously meant the three heads of claim referred to in counsel's submission.

A global award has the distinct advantage of covering a multitude of sins. It does not show where or how the judge had erred on the side of overgenerosity or on the side of parsimony. But there is at least one good reason why a global sum should be discouraged.

It must be remembered that the purpose of damages is to try, so far as humanly possible, to put the victim back to the position he would have been in but for the accident. The damages must be fair, adequate and not excessive. A reasoned judgment must therefore be given by the judge, following legal principles and precedents. Other awards in other cases should normally be prayed in aid, but consideration must be given where the circumstances differ.

In *Murtadza bin Mohamed Hassan* v *Chong Swee Pian,*[1] this court has explained that because no interest can be given on future loss, it is entirely inappropriate to make a global award which must necessarily incorporate this future loss into the past loss. Unfortunately the trial judge's attention was not drawn to this case. The explanation was evident. He gave judgment before the delivery of the Federal Court judgment. But this explanation does not quite absolve anyone from the duty to draw his attention to the case of *Jefford* v *Gee;*[2] *Cookson* v *Knowles;*[3] and *Pickett* v *British Rail Engineering Ltd*[4] which are the authorities relied on for this court's judgment. If his attention had been drawn to these authorities, he would have realised that the trend of the modern authorities is not towards awards of global sums but towards awards under particular heads of claim.

In the matter of what are the proper heads of claims in a case of total or near total incapacity, his attention should have been drawn to the House of Lords case of *Lim Poh Choo* v *Camden and Islington Area Health Authority*[5] which must now be regarded as the leading case on the subject. It is realised that the final words of that case were not said until June 21, 1979 and the judgment did not reach us before the case was heard. But the judgments of Bristow J at first instance and of the Court of Appeal were published on December 1, 1978 in the *Weekly Law Reports,* [1978] 3 WLR 895, months before the case was heard in the High Court. Again, if his attention had been drawn to that case, he would have been able to advise himself that in a case of total or near-total incapacity, the heads of claim for damages are: (i) pain and suffering and loss of amenities, (ii) out of pocket expenses up to date of

trial, (iii) cost of care to date of judgment with interest, (iv) loss of earnings to date of judgment with interest, (v) cost of future care and (vi) loss of future earnings. And he would have then dealt with the action before him on this basis, except possibly in this particular case, loss of actual earnings.

In the House of Lords: see [1979] 3 WLR 44; [1979] 2 All ER 910, except for some matters which need not concern us here, the judgments of Bristow J and the majority of the Court of Appeal were in the main upheld. Not only did Lord Scarman, with the concurrence of all his brethren, continue to consider the claim under these heads of claim, he also set out deliberately to restate the principles in a particularly attractive and useful way, with special reference to the more serious, often catastrophic cases of severe injuries, often affecting the mental perception of the victim. We can do no better than to turn to the speech of Lord Scarman in our task which clearly lies before us, in this appeal, to assess the proper damages to be awarded to Salbiah under the various heads and then on the aggregate to see whether it differs so much from the trial judge's own global sum that we in the exercise of our appellate jurisdiction and on well-established principles, ought to interfere.

(i) The award for pain and suffering and loss of amenities:

The House of Lords reaffirmed the authority of *Wise* v *Kaye*[6] and of *H West & Son Ltd* v *Shephard*[7] and the two rules formulated are: (a) The fact of unconsciousness does not eliminate the actuality of the deprivation of the ordinary experience and amenities of life. *Lim Poh Choo's* case in effect extends the Pickett principle to the plaintiff who is prevented from feeling his loss, not by death, but by total disablement, and is thus the logical corollary of that case. (b) If damages are awarded on a correct basis, it is of no concern to the court to consider any question as to the use that will thereafter be made of the money awarded. The House of Lords made it quite clear that damages are first and foremost for replacing what the plaintiff has lost.

Lord Scarman considered that the effect of these two cases is twofold. 'First, they draw a clear distinction between damages for pain and suffering and damages for loss of amenities. The former depend on the plaintiff's personal awareness of pain, her capacity for suffering. But the latter are awarded for the fact of deprivation, a substantial loss whether the plaintiff is aware of it or not. Secondly, they establish that the award in *Benham* v *Gambling*[8] (assessment in fatal cases of damages for loss of expectation of life) is not to be compared with and has no application to, damages to be awarded to a living plaintiff for loss of amenities.'

On the evidence, Bristow J found that Dr Lim's loss of amenities of her good and useful life is total. On this finding which Lord Scarman refused to overrule, although he was referred to the medical evidence led which would suggest that Dr Lim's awareness of her condition was greater and more sustained than the trial judge found, the Law Lord held that the award of £20,000 was not excessive under this head. He would appear to suggest that if the medical finding was otherwise, the award could be higher.

Dr Lim was a mature woman, with professional qualifications, on the way to the top of her career as a psychiatric consultant. It may of course be argued that Salbiah had not 'lived' in the way that Dr Lim had and therefore would not have lost as much in the way of amenities and ought not therefore to be compensated with a comparable sum. On the other hand, it can also be argued that Salbiah has a longer way to go, and on the way she could and would have 'lived' in the way that Dr Lim had if she had not suffered her catastrophic injuries and therefore her loss of amenities must be regarded as greater because of the longer life ahead of her. For ourselves, we do not consider that Salbiah's immaturity is of any great significance. She certainly has a greater awareness of her physical condition.

In all the circumstances of this case, we would award $70,000 for pain and suffering and loss of amenities, which, on the authority of *Pickett* v *British Rail Engineering Ltd, supra,* should bear interest at 6% from the date of the service of the writ to the date of trial.

(ii) Out of pocket expenses and (iii) Cost of care to date of judgment:

The out of pocket expenses have been charged at $50, travelling expenses for Salbiah and settled at the higher figure of $500.

As for the cost of care to date of judgment, no evidence was led that this care undertaken by Salbiah's mother was other than the normal care devoted by a mother to an infant or a girl of tender years. Consequently we make no award.

(iv) Cost of future care:

Again, no evidence was led in the High Court of the cost of future care. A submission was however made based on certain figures submitted by counsel.

It should perhaps be realised that a submission must be made on the evidence adduced in court or on admissions agreed to by the parties and that a court can only act on such evidence and admissions. Nevertheless it must be a matter of some certainty that there must come a time when Salbiah's parents will not be able to look after her physical needs and will have to call on outside assistance which will have to be paid for. Even if it is otherwise and Salbiah's parents can look after her, they will have to be compensated for the time and money spent on such care and such compensation, in our view, must be a charge for future care.

If we are not to shirk our duty to apply the principle of law that the compensation should as nearly as possible put the party who has suffered in the same position as he would have been in if he had not sustained the wrong, a principle distilled by Lord Scarman from *Livingstone* v *Rawyards Coal Co,*[9] we must do the best we can as we are enjoined by authority to do, in the circumstances of this case and the evidence or rather in the absence of it. But we must also bear in mind the facts of the accelerated payment and the availability of capital as well as income to meet the cost of care and the contingency that Salbiah may not live out her full expectation of life. She is now aged 12. In all the circumstances of the case we therefore take a multiplier of 25 years' purchase on a multiplicand of $150 and reach a figure of $25,362 for cost of future care.

(v) Loss of future earnings:

Despite the tender age of Salbiah, we have not the slightest doubt that if she had not been injured and rendered totally incapable of gainful employment, she would have, at the appropriate age, earned an income for herself. This she has now lost by reason of the tort committed on her by the respondent and for this in our view she must receive compensation.

The basis for such an award is that she should recover for her future loss 'a capital sum which, after all proper duductions, will represent her loss of earnings, net after allowing for working expenses, and her cost of care, net after deducting the domestic element. A capital sum so assessed will compensate for a genuine loss and for a genuine item of additional expenditure, both of which arise from the injury she has sustained. It will not contain any element of duplication or go beyond compensation into surplus.'

Unfortunately we do not have any evidence of Salbiah's social and economic background or her prospects. We have again to do the best we can and doing just that, we take what we believe to be a reasonably moderate figure of $200 for her net monthly income and having regard to a span of a working life of, say, 25 years, having regard to her age and to the discounts earlier referred to as necessarily to be taken, we arrive at a figure of $33,816.

On the authority of *Cookson* v *Knowles, supra,* and of the latter case of *Thompson* v *Faraonio,*[10] on appeal from the Full Court of the Supreme Court of South Australia, in which the Privy Council held that on principle there should be no interest on an award for future loss of earning capacity, this sum shall not bear interest, nor will the sum awarded for cost of future care.

The total of general damages:

In the result, the total now comes to $129,178. Lord Scarman has made it clear that the amount of the total is quite immaterial and that if the tortfeasors are to succeed, they must show that one or more of the component items of the award are wrong. But for the purpose of this appeal, having regard to the global award made and the absence of any indication of the amount of each proper head of claim, the total serves as an indication whether the award made was so excessive or so inadequate that an appellate court ought to intervene. Clearly the global sum awarded is so inadequate that we must have no hesitation to substitute our assessment for that of the trial judge.

It is obvious and we state this as a fact that the High Court had been labouring under a misdirection and the Federal Court met with considerable difficulties because no sufficient consideration had been given to the proper claims for damages in a case such as this and the proper assistance which a trial court must have a right to expect, was not given. But this we must also say. When the only issue is the question of general damages, there can be absolutely no justification for the inclusion in the Record of Appeal of those pages-pages 35-36, and 42 relating to special expenses and pages 39-41 relating to negligence: see *Ooi Soon Eng* v *Ng Kee Lin;*[11] *Chow Yee Wah & Anor* v *Choo Ah Pat*[12]

and the judgment in *Syarikat Jengka Sdn Bhd* v *Abdul Rashid bin Harun.*[13]

The appeal is allowed, the award of $129,178 will be substituted for the $75,000 award of the High Court. The appellant shall have the costs of the appeal except for the costs of the unnecessary pages in the record referred to in the preceding paragraph. The award is to be paid to the Public Trustee to be held in trust for Salbiah.

Appeal allowed.

RK Nathan for the Appellant.
G Sri Ram for the Respondent.

Notes

(i) This case may be regarded as a landmark decision in the field of running-down actions. It rejected the trial judge's view that a global award may be made and established firmly that henceforth damages in running-down actions must be itemised.

(ii) The heads of damages for purposes of itemisation were stated as follows:
  (a) pain, suffering and loss of amenities;
  (b) loss of future earnings and
  (c) cost of future care;

(iii) Interest was awarded for item (a) but not for items (b) and (c) above:

(iv) The Court in this case followed the House of Lords decision in *Lim Poh Choo* v *Camden and Islington Area Health Authority* [1980] AC 174 for the proposition that damages must be itemised. Though the use of English principles was objected to, the Privy Council upheld the Federal Court decision on appeal: see *Jamil bin Harun* v *Yang Kamsiah & Anor* [1984] 1 MLJ 217.

(d) Itemisation of damages under separate heads: interest on future loss of earning.

(iii) Lim Kar Bee
v
Abdul Latif bin Ismail

[1978] 1 MLJ 109 Federal Court, Kuala Lumpur

Coram: Gill CJ (Malaya), Ong Hock Sim and Raja Azlan Shah FJJ

Cases referred to:-
(1) *Searle* v *Wallbank* [1947] AC 341
(2) *Lavine* v *Morris* [1970] 1 All ER 144
(2a) *Gray* v *Pullen* (1864) 5 B & S 970
(2b) *Govinda Raju & Anor* v *Laws* [1966] 1 MLJ 188, 190
(3) *Lewys* v *Burnett* [1945] 2 All ER 555, 560
(4) *JW Dewhurst Ltd* v *Ratcliffe* (1951) 101 LJ 361
(5) *Tart* v *Chitty* [1933] 2 KB 453.

(6) *Butterfield* v *Forrester* 11 East 60.
(7) *Levine* v *Morris* [1970] 1 All ER 144, 148
(8) *London Passenger Transport Board* v *Upson* [1949] AC 155, 176.
(9) *Hay or Bourhill* v *Young* [1973] AC 92, 104
(10) *Hughes* v *Sheppard* 163 LT 177, 179
(11) *Trevett* v *Lee* [1955] 1 WLR 113, 116-117
(12) *Farrell* v *John Mowlem & Co Ltd* [1954] 1 Lloyd's Rep 437, 439
(13) *Dymond* v *Pearce* [1972] 1 QB 496; [1972] 1 All ER 1142
(14) *Wills* v *TF Martin Roof (Contractors) Ltd* The Times, January 21, 1972; [1972] 1 Lloyd's Rep 541
(15) *Doyle* v *Olby* [1969] 2 QB 158, 166
(16) *Hollington* v *Hewthorn & Co Ltd* [1943] 2 All ER 35
(17) *Crane* v *South Suburban Gas Co* [1916] 1 KB 33
(18) *Latham* v *R Johnson & Nephew* [1913] 1 KB 398, 413.
(19) *Heaven* v *Pender* (1883) 2 QBD 503
(20) *Donoghue* v *Stevenson* [1932] AC 562, 580
(21) *Anns* v *London Borough of Morton* [1977] 2 All ER 492, 498
(22) *The Wagon Mound (No 2)* [1967] 1 AC 617, 639
(23) *Scott* v *Shepherd* 96 ER 525
(24) *Shiffman* v *The Venerable Order of the Hospital of St John of Jerusalem* [1936] 1 All ER 557, 561
(25) *Thompson* v *Bankstown Corporation* (1953) 87 CLR 630
(26) *Candler* v *Crane Christmas & Co* [1951] 2 KB 164, 192
(27) *Brophy* v *Shaw* The Times, June 25, 1965
(28) *KR Taxi Service Ltd* v *Zaharah* [1969] 1 MLJ 49, 52
(29) *Morton* v *Wheeler* The Times, February 1, (1956)
(30) *Harrold* v *Watney* [1898] 2 QB 320
(31) *Jewson* v *Gatti* (1886) 2 TLR 441
(32) *Harrison* v *Rutland (Duke of)* [1893] 1 QB 142
(33) *Barnes* v *Ward* (1850) 19 LJ (CP) 195
(34) *Ann Hardcastle* v *The South Yorkshire Railway and River Dun Company* (1859) 4 H & N 67
(35) *Jefford* v *Gee* [1970] 1 All ER 1202
(36) *London, Chatham and Dover Railway Co* v *South Eastern Railway Co* [1893] AC 429, 437

RAJA AZLAN SHAH FJ: This is an appeal from a judgment of the High Court at Kuala Lumpur given on April 4, 1977. It was a claim for personal injuries as a result of an accident on the KL/Sungai Besi road which serves as the main highway to Serdang from Kuala Lumpur. It is 22 feet wide near the place of the accident and the area is a built-up area in the sense that there are houses on both sides of it, and not in the sense as we understand it as a speed-limit area. Briefly the plaintiff's case was that in trying to avoid a child crossing the said road, about 10 feet ahead of him, he swerved his motor cycle to the left and in doing so crashed into a 32" steel pipes which had been left lying about 3 feet to 4 feet from the nearside edge of the said road for the past one or two years. The pipe had a sharp steel-rim edge exposed and that constituted, as the learned trial judge held, a potential danger to road users. As a result his left leg was amputated. Quantum was agreed at $35,000. The case was founded on alleged negligence and alternatively on alleged nuisance. The learned trial judge held that on both issues the defendant was wholly to blame. Hence this appeal.

The facts in essence are simple, and were related by the learned judge as follows:

At all material times, the plaintiff was the rider of motor cycle BG8432 and the defendant was a contractor under contract with the Selangor State Government for laying 32 inch pipes along Jalan Sungai Besi/Kuala Lumpur and was at all material times in charge of storing and laying the said pipes. There were 32 inch pipes stored along the side of Jalan Sungai Besi on the material date. On June 1, 1972 at about 1.30 pm, the plaintiff was riding his motor cycle along Jalan Sungai Besi from Kuala Lumpur to Sungai Besi. After passing the junction of Jalan Kuchai Lama for a distance of about three lamp posts, (appróximately 200 feet), a boy crossed the road from left to right about 10 feet away. He applied the brake and swerved to the left to avoid the boy. In so doing, he knocked into the pipes lying on the road side. He indicated that he came from the direction of the stationary motor car shown in photo 3 in the Non-Agreed Bundle. The pipes are also shown in that photograph and in photos 1 and 2. The left side of the motor cycle and plaintiff's left leg hit the pipes. The plaintiff agreed that he used the road daily and he knew the pipes were lying by the side of the road for one or two years.

The learned judge found the following facts:

(i) The pipes had been lying there for at least two years. (ii) The outer edges of the pipes seemed to have worn out exposing sharp steel rims. (iii) These pipes are shown from the photograph to be lying very close to the edge of the road. (iv) There was no warning sign at or around the place of accident.

There is no dispute with regard to (i) and (iii).

With regard to (ii), it was contended before us that there is no evidence that the ends of the pipes had sharp edges. It is in evidence that the pipes were left by the roadside for an unduly long time. Did they expose sharp edge rims at both ends? It is common knowledge that these pipes are such that they are to be connected with other pipes so that it is necessary to have sharp edge rims at both ends for this purpose. The photographic evidence highlights this point. A consideration of all these relevant facts led the learned judge to form the view that their edges were so worn out exposing steel rims that they were potentially dangerous to road users . That is a question of fact with which this court is loath to interfere. In an appeal against a finding of fact, however much the appellate court may be in an equal position with the trial judge as to the drawing of inferences, the appellate court ought not to reverse the finding of fact unless it is convinced that it is wrong. If that finding is a view that is reasonably open on the evidence, it is not enough to warrant its reversal that the appellate court could not have been prepared on that evidence to make the same finding. In any case, an appellate court is not bound to reverse the trial judge's finding of fact merely because it holds a different opinion to that of the trial judge. Where the members of the appellate court are themselves not unanimous on a particular point, there would seem to be good reason to doubt the propriety of reversing the trial judge if his finding is really open on the material before him.

With regard to (iv), it was said on behalf of the defendant that there was a warning sign that pipe laying work was in progress along the said

road, but it was conceded that there was no warning sign at or near the particular spot of the accident because it was said that at that time work was not in progress. I think this aspect of the case bears some relevance when I consider the duty-relationship between the defendant and the plaintiff.

Reference was made to the provisions of the Minor Offences Ordinance, 1955, in particular section 12(a), but in my view nothing turns on this. On the analogy of *Hollington* v *Hewthorn & Co Ltd*,[16] breach of the provisions of section 12(a) is irrelevant. The court is not concerned with its operation to determine the civil liability of the defendant. In fact, the learned judge recognised this aspect of the case when he took an alternative view of the section. He said this: 'I hasten to add that the civil liability of the defendant may not be wholly dependent upon the breach of this provision, in the event there is a breach'.

Counsel, on behalf of the defendant, admitted liability but argued there was contributory negligence on the part of the plaintiff. He said both were equally at fault, and that at the most liability on the part of the plaintiff ought to have been assessed at 75% and on the part of the defendant at 25%.

As a starting point it is trite law that an alternative claim in negligence and nuisance is permissible: see, for example, *Crane* v *South Suburban Gas Co*[17] and *Dymond* v *Pearce*.[13] But the differences between cases of nuisance and cases of negligence must never be lost sight of: *per* Lord Summer in *Latham* v *R Johnson & Nephew, Ltd* .[18] The differences are these: first, that negligence is not an element in nuisance, and, secondly, that where the nuisance, in respect of which a private person sues, is a public nuisance, he must prove special damage. It is also well to remember how far from its former scope and meaning nuisance has strayed, largely, by reason of the impact of the law of public nuisance upon the original concept of that tort.

The claim in negligence postulates a breach by the defendant of some duty owed by him to the plaintiff. Accordingly the first question to be asked and answered is whether a duty was owed to the plaintiff by him of which he committed a breach. In order to determine the existence of this duty, I think a citation of two passages from well-known judgments are relevant. The first is from the judgment of Brett MR in *Heaven* v *Pender*:[19] 'Whenever one person is by circumstances placed in such a position with regard to another that everyone of ordinary sense who did think would at once recognise that if he did not use ordinary care and skill in his own conduct with regard to those circumstances he would cause danger or injury to the person or property of the other, a duty arises to use ordinary care and skill to avoid such danger'. The second is from the famous dictum of Lord Atkin in *Donoghue* v *Stevenson*:[20] 'You must take reasonable care to avoid acts or omissions which you can reasonably foresee would be likely to injure your neighbour. Who, then, in law is my neighbour? The answer seems to be — persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'. See also the

latest exposition of the law based on the neighbour-principle in the speech of Lord Wilberforce in *Anns* v *London Borough of Morton.*[21] It may be noted that there is no negligence in the abstract but a duty related to the particular circumstances of the plaintiff. The liability only arises 'where there is a duty to take care and when failure in that duty has caused damage': *per* Lord Macmillan in *Donoghue* v *Stevenson: supra,* page 618. Such a duty only arises to those persons so placed that they may reasonably be expected to be injured by the acts or omissions of the defendant: see *Hay or Bourhill* v *Young.*[9] Foreseeability is an essential ingredient: see *The Wagon Mound (No 2).*[22] Thus, where the act of a third party is reasonably foreseeable, the defendant owes a duty to take care that it does not occur. In *Scott* v *Shepherd*[23] the defendant threw a lighted squib into a crowded market place. A third party picked it up and threw it again acting in self-prevention and for the protection of property. It hit the plaintiff in the face and exploded causing him to lose an eye. It was held to be no defence to the defendant that the plaintiff would have suffered no damage had not the third party picked it up and threw it a second time. In *Shiffman* v *The Venerable Order of the Hospital of St John of Jerusalem,*[24] a flag-pole was insecurely erected in Hyde Park. Some children while playing there observed this and in trying to bring it down, it fell on and injured the plaintiff. The owner of flag-pole was held liable for not anticipating that the children would interfere with it.

It seems clear that the 'acts of omissions' are the alleged acts of negligence, and that Lord Atkin's test of whether the plaintiff was the defendant's neighbour, can only be applied *ex post facto:* see *Winfield and Jolowicz on Tort,* 10th Ed (1971) page 54. In *Thompson* v *Blankstown Corporation*[25] it was said: 'In the application of these formulas it is important to avoid the error of confusing the precise chain of circumstances by which the plaintiff incurs the injuries or damage of which he complains with the question whether he, acting as he did, falls within the general description of persons likely to be affected. The exact course which events take can seldom be foreseen in detail.'

Was the defendant under a duty to the plaintiff? Can it be said that he had only a duty to lay the pipes under contract with the State Government, and so long as this duty was complied with and that he had put up warning signs to that effect, he had no duty at all to consider unnecessary hazards to any such person in the situation of the plaintiff, not even if there existed various means to eliminate them? In my opinion, any such proposition in relation to the defendant's action is untenable. At the present time, when road works, and works involving laying of electricity and telephone cables and water pipes adjoining the highway, are part of the realities of life, a duty to take reasonable care is owed to road users who may *inadvertently* (emphasis is mine) leave the road and collide with them. The law on this point has not changed because nowadays one comes across large numbers of such cases where contractors leave unnecessary hazards on land adjoining the highway and no one seems to object. If the proposition of the no 'duty-relationship' is

accepted, the effect of *Donoghue* v *Stevenson, supra,* would be so radically curtailed as to be virtually eliminated. As was said by Lord Macmillan in that case, the categories of negligence are never closed which means at least, as Asquith LJ said in *Candler* v *Crane Christmas & Co*[26] 'that in accordance with changing social needs and standards new classes of persons legally bound or entitled to the exercise of care may from time to time emerge.' In *Levine* v *Morris*[7] a case relied on heavily by the plaintiff and which was considered by the learned judge, where an analogous point arose, it was held that the Ministry of Transport, when siting road signs by the side of a 'fast traffic highway' — 4 feet from the near edge of the highway — owed a duty to a motorist who may inadvertently leave the road and collide with them. All three judges of the Court of Appeal were unanimous on the analogous point raised that any such proposition taken on behalf of the Ministry was too narrow a view of the duty of the Ministry. Sachs LJ had this to say (page 148):

> It is well known that on high speed roads there is a risk of motorists going off the carriageway inadvertently through no fault of their own, especially in bad weather. There are many potential causes of such inadvertent happenings, such as, for example, tyres that burst or, unknown to the driver, are out of balance; indeed, one could frame a long list of causes which carry no blame on the driver. In addition, there are cases in which the accidents are due to that category of negligence which, to adopt the words of Lord du Parcq in *London Passenger Transport Board* v *Upson:* 'experience and common sense teach' is likely to occur. The chances of such accidents happening ought always to be borne in mind by the Ministry, and the extent of those chances should be assessed. The Ministry owe to motorists at least a duty when siting massive signs to take reasonable care when there are two sites equally good as regards visibility not to select the one that involves materially greater hazards to the motorist.

Widgery LJ was of the same opinion (page 150):

> The first submission of counsel for the Ministry, as I understand it, is that when siting the sign the Ministry of Transport had no duty of care towards a motorist who was himself guilty of negligence and whose negligence had caused his car to leave the carriageway and thus to be at risk of colliding with the sign. In my opinion, this is far too narrow a view of the duty of the highway authority. All motorists are guilty of errors of one kind or another on one occasion or another, and I think it would be quite unreal if roads were designed on the assumption that no driver would ever err. Indeed, as Lord du Parcq put it in *London Passenger Transport Board* v *Upson* (supra, page 176) '...a prudent man will guard against the possible negligence of others, when experience shows such negligence to be common.' It seems to me that that phrase is entirely apt to dispose of the submisson that no duty of care was owed to a motorist in the position of the driver in this case. Of course, the duty of the highway authority is limited by the fact that it is only required to do what is reasonable in order to avoid reasonably foreseeable accidents.

Russell LJ put it in similar vein (page 152):

> The contention that in siting these signs the Ministry had no duty of care

> to vehicles leaving the road because of negligent driving cannot be supported. Counsel for the Ministry in submitting this had to go to the length of suggesting that equally there was no duty owed towards a vehicle leaving the road without negligence, and this seems to me to be plainly wrong. The presence of these traffic signs on four substantial concrete posts just off a fast traffic highway is a plain danger to vehicles which leave the highway whether through negligent driving or without negligence. It is well known that vehicles do leave such a highway at speed from time to time. The duty to take reasonable care to avoid a danger obviously does not require the Ministry not to erect such signs at all at places appropriate to their function, but the duty does, in my view, require that reasonable steps to minimise the dangers should be taken. If a choice of sites is available, both consistent with the proper functioning of the sign, then, in my judgment, the duty of reasonable care requires that consideration be given to the question of relative probability of a vehicle leaving the road and passing over one site rather than the other.

There is no doubt that there was a duty — relationship between the defendant and the plaintiff who may inadvertently leave the road and collide with the pipes. A person who maintains any thing on, under, above or adjacent to a highway owes a duty to persons lawfully using the highway to prevent damage to their person or property. This duty is no higher than a duty to exercise reasonable care to see that persons using it are not unduly inconvenienced or injured by any carelessness on the part of the defendant. The duty is a duty to take reasonable care and not a duty to put up warning signs. Lord Macmillan's dictum in *Bourhill* v *Young, supra,* page 104. 'The duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed' bears the same meaning as Lord Atkin's description in *Donoghue* v *Stevenson, supra,* page 580, *viz:* 'Persons who are so closely and directly affected by my act that I ought reasonably to have them in contemplation as being so affected when I am directing my mind to the acts or omissions which are called in question'. It seems to me that the plaintiff, acting as he did, fall within the general description of persons likely to be affected by the defendant's action.

The question of liability is whether the defendant had observed the standard of care required by the circumstances of the case in relation to the plaintiff. The test and scope of this duty is whether the defendant ought to have contemplated as a reasonable man that if he did not take steps to eliminate the unnecessary hazards adjoining the highway he would cause danger of injury to the plaintiff, arising inadvertently by coming into contact with the exposed sharp steel rims. It is not as a matter of law necessary that the defendant should have anticipated the exact accident that ensued but the likelihood of an accident with the said pipes. Why should not this probability or possibility be regarded as within reasonable foresight? It is a matter of fact that the pipes had been lying so close to the highway for an unduly long time that their outer edges had worn out exposing sharp steel-rims. In the circumstances it seems proper to impute to the defendant knowledge that a person in the situation of the plaintiff, lawfully using the highway, would be apt for one reason or another to come into contact with the exposed danger. I

reiterate what was said in *Thompson* v *Bankstown Corporation, supra,* 'The exact course which events take can seldom be foreseen in detail.' The fact that the plaintiff had failed to keep a proper look out, or that he had been negligent, does not take him out of the scope of persons whom the defendant could reasonably contemplate might be affected by his neglect. Even the most skilled driver, taking reasonable care for his own safety, may inadvertently come in contact with the exposed sharp steel-rims. In my judgment, once the possibility of a causal act of inadvertence is taken into consideration — an act which may result in injury — it is impossible to say that a consequential duty to adopt precautions before it culminates in injury are not needed.

I conclude on the evidence that it was the duty of the defendant, strictly speaking, the duty of his kepala and engineer to whom he had left the matter entirely, when placing the pipes to consider the risk of collision as one of the factors affecting the said work. If that had been done by any competent contractor, it seems to me that he would have both recognised a serious hazard presented by the pipes in that condition, and the comparative ease with which that hazard could have been avoided by, for example, not placing the pipes at that particular spot for an unduly long time before work commenced. It seems to me clear that the failure to consider those factors and to reach that conclusion, and having reached the conclusion to put it into effect, constituted a breach of duty on which the plaintiff relied in this case.

It cannot be said that if the plaintiff had kept a proper look-out, or if he had reduced speed or if he had applied his brakes in time, he would not in all probability have been faced with the sudden emergency and gone to the left and collided into the said pipe. It also cannot be said that he ought under the circumstances to have gone to the right, and if he had done so, he would not have collided into the said pipe. This, if I may say so, is looking at the situation with the benefit of hindsight. This proposition is no doubt founded on the allegation that he was partly to blame for the injury to himself. Was the plaintiff negligent? It is relevant in testing the existence of this liability to quote a passage from the judgment of Wilmer LJ in *Brophy* v *Shaw*[27] (unreported) which was cited and applied in *KR Taxi Service Ltd* v *Zaharah*[28] 'The defendant's (driver of a motor car) duty, like that of any other road user, was to exercise reasonable care. He was not under a duty to be a perfectionist. It would be going too far to say that in the circumstances surrounding this accident the defendant should have observed the negligent and irresponsible action of these two men (one of them was the plaintiff) earlier than he did.' I think that case is on all fours with the present case. In that case the plaintiff (in the present case the boy) darted into the defendant's path and the learned judge held that the plaintiff's action was about as negligent and irresponsible as anything could be and he lost his case. *Edwards* v *Nobbs* (unreported) which was also cited in *Zaharah's* case, *supra,* carried the same point. There is no evidence in the present case that the plaintiff was travelling at an excessive speed under the circumstances. There is also no evidence of the interval of time and space affording him opportunity to avoid the consequence of the boy's

recklessness after he should reasonably have anticipated danger. It therefore seems to me that in the absence of such evidence the inference of lack of care cannot be legitimately drawn. Even if the plaintiff had seen the boy earlier on, he could not have expected the boy to dart into the road in front of an oncoming vehicle, and even if he had seen him at the moment he darted out it was questionable whether it would have been wise for the plaintiff to swerve to his right. In this connection it is sufficient if I again use the reasoning I applied in *Govinda Raju* v *Laws*[2] *viz:* When a plaintiff is perplexed or agitated when exposed to danger by the wrongful act of another, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence.' In that light it cannot be now said that the plaintiff was partly to blame for the injury he sustained. The law is content to take the cavalier view that a driver of a motor car travelling along a main highway is under no duty to be on the look-out for anybody suddenly darting out into the road in a negligent and irresponsible manner.

In a clear and careful judgment, the learned judge also found that the pipes, in the condition in which they were, constituted a danger to those using the KL/Sungai Besi highway — that is, they constituted a nuisance. Can this conclusion be supported? I think it is necessary to determine the legal definition of highway nuisance. The relevant law is conveniently stated in a passage in *Salmond on Torts,* 16th Ed. at page 82: 'Public nuisance to a highway consists in obstructing the highway or rendering it dangerous.' Denning LJ recognised the existence of these two categories in *Morton* v *Wheeler*[29] when he said:

> As all lawyers know, the tort of public nuisance is a curious mixture. It covers a multitude of sins. We are concerned today with only one of them, namely, a danger in or adjoining a highway. This is different, I think, from an obstruction in the highway. If a man wrongfully obstructs a highway, or makes it less commodious for others (without making it dangerous) he is guilty of a public nuisance because he interferes with the right of the public to pass along it freely. (Then a little later he said): Danger stands, however, on a different footing from obstruction.

The present case is concerned with danger arising from the condition of the pipes bordering the highway. Salmond gives a number of examples and a reference to these examples seems to me to show that *prima facie,* at any rate, when one speaks of danger to a highway one means something done in the highway itself or by something done on the land which adjoins it. Thus allowing a fence immediately adjoining the highway to become ruinous and dangerous is a nuisance: see *Harrold* v *Watney.*[30] In that case the infant plaintiff was lawfully using the highway and on the other side of the fence was a ground on which boys were accustomed to play. That attracted him and he wanted to go to the playground by climbing over the fence. He had put one foot on it and was about to put the other on, when it came down and injured him. That decision supports the case of *Jewson* v *Gatti.*[31] In that case there was a

cellar beside the highway in which scene-painting was going on. There was a bar round the opening; a passing child naturally leaned on the bar to see what was going on down there; the bar gave way and he fell into the cellar and was injured. Lord Esher MR in giving judgment said: 'This was a case of premises on the highway in a street where hundreds of persons and many children were passing up and down, and the area was left unprotected without any regard to the safety of the public, and that by itself might be sufficient to sustain a case for the plaintiff.'

I agree with the learned judge that on the facts the only conclusion to be arrived at is that the pipe, in the condition in which it was constituted an actionable nuisance at the time when the plaintiff crashed into it. The leaving of a dangerous pipe for a considerable period close to the highway, *prima facie,* resulted in a nuisance being created, for it was caused by something done on the land bordering the highway.

But the mere fact that the pipe was a nuisance does not render the maker liable to the plaintiff in damages unless its being in that position was a cause of the accident. It entails the question whether the nuisance was causative of the accident? When it was suggested that the answer was in the negative, that amounted to a suggestion that the accident was not caused by the nuisance, but by the conduct of the plaintiff in trying to avoid the boy darting into his path. In my view, looking at the facts of this case, it is not true to say that the accident was caused by the conduct of the plaintiff. It seems to me the defendant caused the nuisance which clearly gave rise to a danger to road users. What constituted danger was answered by Denning LJ in *Morton* v *Wheeler, supra,* in these word:

> But how are we to determine whether a state of affairs in or near a highway is a danger? (and answered) This depends, I think, on whether injury may reasoanbly be foreseen. If you take all the cases in the books, you will find that if the state of affairs is such that injury may reasonably be anticipated by persons using the highway, it is a public nuisance ... but if the possibility of injury is so remote that he (the reasonable man) would dismiss it out of hand, saying 'Of course, it is possible, but not in the least probable', then it is not a danger.

This question of danger is inextricably linked up with that of causation. 'In an action for private damage arising out of a public nuisance, the court does not look at the conduct of the defendant and ask whether he was negligent. It looks at the actual state of affairs as it exists in or adjoining the highway, without regard to the merits or demerits of the defendant. If the state of affairs is such as to be a danger to persons using the highway ... it is a public nuisance. Once it is held to be a danger, the person who created it is liable unless he can show sufficient justification or excuse': see *Morton* v *Wheeler, supra.* Therefore 'if deliberately created and clearly giving rise to danger to road users, fault is implicit and liability incontestable': *per* Edmund Davies LJ in *Dymond* v *Pearce, supra,* at [1927] All ER page 1150.

The answer to the question is that the highway is normally used for passage and repassage: see *Harrison* v *Rutland (Duke of),*[32] and if the defendant left a nuisance so close to a highway and it was extremely

likely to cause injury to persons using it, it was the nuisance which was the cause of the injury to the plaintiff, and the defendant cannot resile from the conclusion by relying on the act of the plaintiff in trying to avoid the boy because that act could have been prevented if he had kept a proper look-out, or if he had applied his brakes in time or if he had travelled less slowly than he did: see *Govinda Raju* v *Laws, supra.* I think cases like *Barnes* v *Ward,*[33] and *Ann Hardcastle* v *The South Yorkshire Railway and River Dun Company*[34] carry the present case. The principle of both the cases is that where a source of danger is made substantially adjoining a public highway, an action lies against the maker by a person who has strayed off the highway and fallen into it, or who has made a false step or became giddy and left it and sustained injury.

It was further argued that since quantum was agreed upon at the date of trial interest on damages should be awarded from date of judgment and not, as the learned judge held, from date of service of writ. Counsel did not elaborate on it, and the matter was left there without it being fully argued before us.

The power of the court to award interest on damages is contained in section 11 of the Civil Law Act, 67 of 1956: see also O 40, r 11 of the *Supreme Court Rules.* This section gives the court power, if it thinks fit, to order that there shall be included in the sum in which judgment is given interest at such rate as it thinks fit on the whole or any part of the damages for the *whole or any part of the period* (emphasis mine) between the date when the cause of action arose and the date of judgment. Therefore, in proceedings for the recovery of damages, the court generally exercises its power so as to include in that sum interest on those damages or on such part of them as it considers appropriate, unless it is satisfied that there are special reasons why no interest should be given. The basis of an award of interest is that the defendant has kept the plaintiff out of his money and has had the use of it himself, so he ought to compensate the plaintiff accordingly. Section 11 of the Civil Law Act is, I think, modelled on the provisions of section 3(1) of the (UK) Law Reform (Miscellaneous Provisions) Act, 1934, and those provisions have been judicially considered in a number of cases, where the courts have laid down certain guide lines: see, for example, *Jefford* v *Gee.*[35]

In proceedings for the recovery of damages for personal injuries, the court awards one lump sum, and it is under no duty to divide up the award between component elements, the sum assessed being one overall payment adjudged to be a fair compensation. Interest should therefore be awarded on this lump sum as from the date when the defendant ought to have paid it, but did not, for it is from that date that a plaintiff can be said to have been kept out of his money. This date is normally 'from the time of action brought at all events': *per* Lord Herschell LC in *London, Chatham and Dover Railway Co* v *South Eastern Railway Co*[36] which was applied in *Jefford* v *Gee, supra.* If the plaintiff had paid the amount into court, and the plaintiff had taken it out of court in satisfaction of the claim, then that is the end of the matter. He gets no interest because there is no judgment. If a defendant wishes to

avoid the payment of interest he should in future make his payment into court of an amount which he says is sufficient to satisfy the cause of action apart from interest.

In the result I am not persuaded to take a contrary view that interest ought to be awarded from the date of judgment.

For these reasons I am of the opinion that the appeal should be dismissed with costs, and judgment that the defendant is wholly to blame upheld.

Appeal dismissed.

V Krishnan for the Appellant.
RK Nathan for the Respondent.

Notes

(i) In this case Raja Azlan Shah FJ (as he then was) delivered the majority judgment dismissing the appeal after discussing various principles underlying the torts of negligence and nuisance.

(ii) This is one of the earlier cases of Raja Azlan Shah FJ (as he then was) where he ruled:

> In proceedings for the recovery of damages for personal injuries, the court awards one lump sum, and it is under no duty to divide up the award between component elements, the sum assessed being one overall payment adjudged to be a fair compensation. Interest should therefore be awarded on this lump sum....

(iii) In view of the judgment of the Federal Court in the subsequent cases of *Murtadza bin Mohamad Hassan* v *Chong Swee Pian* [1980] 1 MLJ 216 and *Yang Salbiah & Anor* v *Jamil bin Harun* [1981] 1 MLJ 292 (presided by Raja Azlan Shah CJ (as he then was), this case must be considered to have been overruled in so far as the proposition that lump sum awards should be made in personal injuries cases.

CONTRIBUTORY NEGLIGENCE: APPORTIONMENT OF DAMAGES, PLEA OF GUILTY

(i) Chock Kek Ling
v
Patt Hup Transport Co Ltd & Ors

[1966] 1 MLJ 120 High Court, Malacca

Cases referred to:-
(1) *Noor Mohamed* v *Palanivelu* [1956] MLJ 114.
(2) *Government of Malaysia and another* v *Kona Ee Kim* [1965] 1 MLJ 81 at p 85.
(3) *London Passenger Transport Board* v *Upsom* [1949] 1 All ER 60 at p 70

RAJA AZLAN SHAH J: On 13th May 1961, at about 2.40 pm the plaintiff was travelling as a passenger in the first defendant's motor-bus M 6398 driven by the second defendant from Masjid Tanah to Lubok China. He was seated immediately behind the driver's cabin and next to the off-side wall of the bus. At the $27^1/_4$ milestone, about 100 yards before entering Lubok China, the said bus met with an accident with an on-coming lorry NA 3219 owned by the third defendant and driven by the fourth defendant.

As a result of the accident the plaintiff sustained personal injuries. He now claims damages against all four defendants. He averred that due to the negligence of the second and fourth defendants or of either of them, the two vehicles came into violent collision. At the time of the accident the plaintiff was 11 years of age and was attending Masjid Tanah Chinese Primary School. He now sues through his next friend, his father.

The first and second defendants admitted that the accident did happen at the time and place in question but denied liability and averred that the accident was caused solely by the negligence of the fourth defendant as the servant or agent of the third defendant. The third and fourth defendants also admitted the accident but denied liability and cast the blame on the second defendant who they averred caused or contributed to the accident.

The first and second defendants' story is as follows. The second defendant has held a valid driving licence for some 36 years. At the time of accident it was drizzling. The road which was metalled was wet and the surface was slightly slippery. He was on his correct side of the road. When he negotiated a slight right-hand bend he saw the on-coming lorry. When both vehicles tried to cross each other the lorry grazed the off-side of the bus. He said that the lorry came to his side of the road; that was the cause of the accident. If each vehicle was on its correct side of the road he said the accident would not have happened. He said he first saw the lorry some 60 feet away. The speed of the bus was more than 20 mph. He said the lorry was approaching in a perfectly normal way. He further said that before the accident he noticed on the lorry's near side of the road a heap of gravel and sand measuring one foot in height and spreading on to the roadway for about one foot while the rest was on the grass verge. Evidence was brought to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident. Although this was not conclusive evidence of the fourth defendant's negligence, it is an admissible admission which supports the plaintiff's case and which weighs against the fourth defendant: see *Noor Mohamed* v *Palanivelu.*[1] Mr Joseph has criticised this aspect of the evidence, saying that not only were the facts not put to his client but they were not admitted by him. This, he says, is a serious defect which affects its weight. That is an ingenious way of reasoning, but I think it is too late in the day to attack the record. I take the record as I find it.

The third and fourth defendants' story is as follows. The fourth defendant has been a lorry driver for more than ten years. On the day and time in question he was driving the said lorry from Kuala Lumpur to

Masjid Tanah; the lorry was loaded with tiles. When he came to the $27^{1}/_{4}$ milestone Lubok China he was then doing not more than 30 mph. On the left hand side of the road, about 400 feet in front of him, he saw a heap of gravel, the same one which the second defendant had mentioned earlier in his evidence. He intended to by-pass the heap of gravel by going towards the crown of the road. At about this time he saw the on-coming bus some 60 feet in front of him doing about 30 mph and which was on its correct side of the road. He then applied his brakes and at the same time swerved his lorry slightly to the left. When he applied his brakes, the heap of gravel was about 5 to 6 feet away and the on-coming bus was about 30 feet away. As a result, the rear of this lorry skidded and grazed against the bus. After impact the lorry travelled for some 10 feet and finally stopped as shown in the photographs.

I find there was a slight bend in the road. From the photographs, there was extensive damage to the off-side of the bus from the front off-side to the middle of the bus. The off-side front bumper of the lorry was damaged; the off-side body was ripped off. The width of the road in this area was between 16'8" and 16'11", and at its widest taking the figure of 16'11", the said lorry, if it proceeded on its own side of the road, would have a small clearance of merely 1'3" while the bus in similar circumstances would have a small clearance of 1'7".

Considering the case as a whole, I find that the accident occurred when the two vehicles, travelling in opposite directions, were crossing each other in broad daylight on a nearly straight stretch of road which was slightly slippery. There was no obstruction to visibility and there was no traffic on the road. I cannot on the evidence bring myself to believe that the lorry skidded. The damage to both the vehicles, the position of the lorry when it finally stopped, the absence of skid marks, lend colour to the probability that no skid ever took place.

I find as a fact that there was this heap of gravel on the road as was told to us by the second defendant as well as the fourth defendant. Mr Keith Sellar has attacked the report lodged in which the fourth defendant had failed to mention that fact. To this I would say that the report does not and will not contain everything under the sun. It is merely the first step to bring the police machinery into effect. Be that as it may, his client (the second defendant) has admitted in evidence that there was this heap of gravel. So there was. Learned counsel cannot have it both ways.

Knowing that there was this heap of stones which spread on to the road for some one foot, thus, when considering the width of the lorry which was 7'4", giving his vehicle no more room for clearance, he still pursued the idea of by-passing them by driving his lorry towards the crown of the road and thereby encroaching in the path of the on-coming bus resulting in the collision. In the circumstances, has be taken reasonable care so as not to injure persons and vehicles in his near neighbourhood?

As was said by Thomson LP in the case of *Government of Malaysia & Anor* v *Kong Ee Kim:*[(2)]

> ... every user of a highway owes a duty of care to all other users, and he

> violates that duty if he does an act without reasonable care which injures another user.

The answer is obvious. I hold that he was clearly negligent in the way he did. However, that is not the end of the matter. Mr Joseph urged the court to consider the question of contributory negligence.

The second defendant testified that he hugged to his side of the road all the way. He said this:

> Before impact I did not swerve to the left. I proceeded on my own side of the road. If each vehicle was on its own side of the road the accident would not have happened. I believe the lorry came onto my side of the road. That is why it grazed against my bus.

The second defendant knew that part of the road very well. He had first noticed the heap of gravel before the accident. He had noticed the on-coming lorry. Did he foresee or ought to have foreseen what the lorry driver would do next; if so, did he take avoiding action. In this respect the words of Lord Uthwatt in *London Passenger Transport Board* v *Upsom*[3] are not without relevance:

> A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form those follies commonly take.

It was in the same vein that Lord du Parcq said at page 72:

> A prudent man will guard against the possible negligence of others when experience shows such negligence to be common.

The second defendant said that even if one keeps to the left of the road, the clearance is about less than a foot. On the other hand, the fourth defendant said that the bus could have avoided the accident if applied its brakes. The inference therefore is that the second defendant appears to have thought that he owes no duty of care to other users so long as he kept his vehicle to his own side of the road. In my view the second defendant clearly failed to take any avoiding action and is also to blame.

I have no hesitation to say that both drivers of the vehicles are to blame. I hold that the fourth defendant is 75 per cent to blame and the second defendant 25 per cent.

Special damages were agreed at $175, not taking into account the item under extra nourishment which Mr Joseph has attacked as being unreasonable on the ground that hospital nourishment was adequate and that the doctor did not recommend it. I am inclined to agree with learned counsel and I would disallow that part of the claim.

With regard to general damages, the plaintiff at the time of accident was 11 years old. He was hospitalised for one month and thereafter was treated as an out-patient for six months. He sustained a 4" laceration wound over the media aspect of his left ankle, severing the tendons; and a fracture of the ankle bone. There was therefore pain and suffering. He now bears a scar over this injury.

The lady doctor who treated him during the six months he was treated as an outpatient said that there would still be some disability. He

would not be able to participate in school games. The doctor said that his wound has now completely healed. To this, the plaintiff said that he still encounters some pain in his ankle. If he walks for long distances the pain will come back. If he presses the injured part he says that there is pain. If he wears shoes he will get the pain. That may be so, but, in my view the pain will eventually disappear.

I have considered similar or quite similar authorities on the point which were cited by counsel and I would assess a sum of $2,500 for pain and suffering. In all, there will be $175 special damages and $2,500 general damages. This amount together with the plaintiff's costs will be apportioned between the defendants according to their respective liabilities.

Order accordingly.

HB Ball for the Plaintiff.
FK Sellar for the 1st & 2nd Defendants.
Edgar Joseph for the 3rd & 4th Defendants.

Notes

In this case it was held:
(a) that both defendants contributed to the accident and therefore the damages awarded were to be apportioned accordingly; and
(b) that the plea of guilty to driving without due care and attention was an admissible admission and that the Court must take the record as it finds it.

(ii) Govinda Raju & Anor
v
Laws

[1966] 1 MLJ 188 High Court, Kuala Lumpur

RAJA AZLAN SHAH J: This is a claim for damages in respect of personal injuries sustained by both the plaintiffs in a road accident. At the material time, the first plaintiff was the rider of a motor-cycle which was involved in the accident with a car driven by the defendant. The second plaintiff was a pillion rider on the motor-cycle.

With regard to the second plaintiff, general damages were agreed at $27,000 and special damages at $3,295. This plaintiff is 23 years old and earned $180 as a salesman in a drug store. He suffered a fracture of the shaft of the right femur and 3 inches shortening. He was admitted to hospital for about three months and continued as an out-patient for about one year. He now walks with a limp. The main limitation is in the external rotation. He cannot squat fully because of the injury to his femur 8 inches above the knee joint.

With regard to the first plaintiff, special damages were agreed at $70.

The substantial question for determination is whether negligence had been established, and if so, whether there was contributory negligence on the part of the plaintiffs.

The plaintiffs' case is that on 7th December, 1963, between 8.00 and 8.30 pm they were riding a motor-cycle along Ampang Road in the direction of Kuala Lumpur. They were travelling at about 27 to 28 miles per hour on their correct side of the road and between 3 to 4 feet from their left grass verge. The road is 21 feet wide and has a speed limit of 30 miles per hour. The only traffic ahead of them was a motor-cycle which was about 60 yards away. There was a row of on-coming cars. As soon as the first car had passed them, the first plaintiff said that he saw the defendant's car, which was then about 15 yards from him, swerving into his path. The plaintiff also swerved to his right to avoid the accident. He said that he could not swerve more to the right because there was more on-coming traffic. The motor-cycle crashed into the left near-side of the car. In cross-examination, the first plaintiff said that when he saw the defendant's car swerving about 15 yards away from him he tried to apply his brakes but he could not remember if he tried to apply them hard enough. He also said that at the time of impact he was nervous and did not know what to do. He further continued that as the row of cars approached him he did not slow down his speed.

The defendant's version is as follows. At the material time he was driving a Simca station-wagon, the overall length of which is 15 feet 1 inch and overall width is 5 feet 3 inches. He was returning from the golf club and was travelling along Ampang Road in order to visit a friend whose house lay on his right-hand side of the road. He said that before he came to a side lane leading to the house he stopped about 29 feet away, leaving sufficient room for vehicles to pass on his left. On his right there was a fairly heavy stream of on-coming traffic. He said he had his trafficator on, indicating he was turning to the right. While he was stationary, a vehicle passed him on his left. He then concentrated on the on-coming traffic. When the road appeared to be clear, he put his car in gear and proceeded to turn into the lane leading to the house. When the greater part of his vehicle had cleared the bitumen part of the road, leaving about 4 to 5 feet which was at an angle on the road, his rear near-side was knocked. He came out of his car and saw a motor-cycle lying on its side and the plaintiffs lying on the road. He rang for the ambulance and later directed traffic. It was a fairly straight stretch of road and was well lighted. In cross-examination he said that he did not see the motor-cycle at all and gave no explanation as to why he did not see the motor-cycle in question. He also said that he was stationary for not less than 30 seconds and not more than a minute.

Section 59 subsection (4) of the Road Traffic Ordinance, 1958, enacts:

> Failure on the part of any person to observe any provisions of the Highway Code ... may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings as tending to establish or to negative any liability which is in question in those proceedings.

Section 18 of the Highway Code states:

> When turning left or right drivers must always give way to through traffic, including pedestrians.

Applying these tests, it is clearly established that the defendant failed to keep a proper look-out before he swerved to the right, resulting in the accident. Indeed, he admitted this in evidence. From that it can be reasonably inferred that he was negligent in the way he did.

It was urged upon me that the plaintiffs contributed to the negligence of the defendant by driving at an excessive speed in the circumstances thereby failing to avoid the accident by going round the motor-vehicle when a part of it was some 4 to 5 feet on the bitumen. I cannot accept this proposition in the light of all the surrounding circumstances. It is not the case of a car being stationary and leaving some 4 to 5 feet of it on the bitumen. It is the case of a moving vehicle trying to turn right in the path of an on-coming motor-cycle and intending to enter a lane to a house. The plaintiff saw the motor-vehicle swerving into his path. Perplexed by being exposed to the danger created by the defendant he also swerved to his right in an attempt to avoid the accident but failed. To my mind, when a plaintiff is perplexed or agitated when exposed to danger by the wrongful act of a defendant, it is sufficient if he shows as much judgment and control in attempting to avoid the accident as may reasonably be expected of him in the circumstances. To that extent I am satisfied that the plaintiff had so acted in the circumstances. What is done or omitted to be done in the agony of the moment cannot be fairly treated as negligence. I therefore hold that there is no contributory negligence on the part of the plaintiffs.

The only point to consider now is general damages as claimed by the first plaintiff. He was admitted to hospital for eleven days, suffering from laceration of the scalp 2 inches long and bleeding from the right ear. Having considered the authorities, I would assess general damages at $1,000. There will be the usual costs to the plaintiffs.

Judgment for the plaintiffs.

Denis Murphy for the Plaintiffs.
RHV Rintoul for the Defendant.

Note

This case reiterates the familiar principle that when the plaintiff acts in the "agony of the moment" under a dangerous situation created by the defendant the plaintiff is not guilty of contributory negligence.

RES IPSA LOQUITUR: CORROBORATION: VICARIOUS LIABILITY

Karthiyayani & Anor
v
Lee Leong Sin & Anor

[1975] 1 MLJ 119 Federal Court, Ipoh

Coram: Suffian LP, Lee Hun Hoe CJ (Borneo) and Raja Azlan Shah FJ

Cases referred to:-
(1) *Colvilles Ltd* v *Devine* [1969] 2 All ER 53, 57
(2) *Powell* v *Strathan Manner Nursing Home* [1935] AC 243,245,247
(3) *Watt or Thomas* v *Thomas* [1947] AC 484,487,488
(4) *Ormrod* v *Crosville Motor Services Ltd* [1953] 2 All ER 753,754
(5) *Hewitt* v *Bonvin* [1940] 1 KB 188,191,194
(6) *Rambaram* v *Gurrucharran* [1970] 1 All ER 749
(7) *Norton* v *Canadian Pacific Steamships Ltd* [1961] 2 All ER 785
(8) *Vandyke* v *Fender* [1970] 2 All ER 339,342
(9) *Morgans* v *Launchbury* [1972] 2 All ER 606,613,614
(10) *Hilton* v *Thomas Burton (Rhodes) Ltd* [1961] 1 All ER 74,76
(11) *Klein* v *Caluori* [1971] 2 All ER 701,702

RAJA AZLAN SHAH FJ: This appeal arises out of a motor car accident in which respondent No 1 was injured and the only passenger was killed. Respondent No 1 was driving the motor car. He had borrowed it from his brother, respondent No 2, in order to see a cinema show together with his friend, the deceased, at Seremban. The appellants who are the administrators of the estate of the deceased passenger brought an action for damages in respect of his death against the respondents.

The following facts are not in dispute. After the show they were returning to Tanjong Sepat, Selangor. It was about 11 pm on 20 November 1966. They took the Sepang/Tanjong Sepat straight stretch of open road; which was 14'6" wide. There were no street lights; it was drizzling. Some distance before they reached Tanjong Sepat the car ended up diagonally against the cement culvert on the opposite side of the road with the substantial part of the vehicle on the road. The car was a total wreck. The deceased died on the spot. Respondent No 1 was severely injured. He was unconscious and regained consciousness at Klang Hospital. He lodged a police report 4 days later.

The appellants pleaded *res ipsa loquitur.* The respondents denied negligence. They averred that the accident was caused or contributed to by the negligence of the driver of an oncoming lorry which encroached into their path with the headlights blinding the driver (respondent 1) and therefore the accident could not have been avoided by the exercise of reasonable care on their part.

In the light of the pleadings it fell upon the respondents to give a reasonable explanation of the accident and show this explanation was consistent with no lack of care on their part: see *Colvilles Ltd* v *Devine.*[1] They only called the driver, respondent 1, and the owner of the car, respondent 2. The investigating officer who went to the scene the same

night and drew the sketch plan was not called as a witness.

The case for the respondents was to the effect that as the two vehicles were about to pass each other, respondent 1's eyes were blinded by the headlights of the oncoming lorry which was encroaching on his wrong side of the road with the result that respondent 1 had to swerve his car onto the left grass verge in order to avoid a head-on collision. Oral evidence was also adduced that respondent 1 drove the car for some distance on the grass verge and when he saw his car was heading towards the left cement culvert 10 feet away he swerved it to the right where it finally landed against the cement culvert on the opposite side of the road. Respondent 1 could not avoid the accident by applying his brakes because, as stated by him, if the car was brought to a standstill on the road there would have been a head-on collision with the oncoming lorry.

The evidence thus led found favour with the learned trial judge who felt inclined to believe that the evidence was consistent with the statement respondent 1 made at the inquest that he 'swerved to the right in order to avoid a culvert on the grass on my left'. The learned judge went on to say that even if it were true that he had not swerved to the left, he was of the opinion that he would still be excused for crashing into the culvert on the right as it was an accident caused by the encroachment of the lorry and its dazzling lights.

He relied on the police report as corroboration of the encroachment.

He also held that respondent 1 was driving the car between 30 to 40 miles per hour. Here are his words:

> It was submitted that since the car was a 'total wreck' after the accident, this shows exceedingly high speed of the car. Although there is evidence to the effect that the car was extensively damaged and could not be used after the accident, there is no evidence of how old the car was. An old car may be extensively damaged when involved in collision even if driven at a moderate speed. I accept the first defendant's evidence that he was driving between 30 to 40 miles per hour.

He therefore dismissed the case against respondent 1. As regards the case against respondent 2, he also dismissed it on the ground that the appellants had not pleaded the cause of action against him.

The appellants now appeal against that decision.

Case against Respondent No 1

The crux of the matter is whether the respondents have given a reasonable explanation consistent with no negligence on their part. They raised three issues *viz.,* (i) there was an oncoming lorry with dazzling lights encroaching respondent 1's path; (ii) respondent 1 had to swerve his car to the left in order to avoid a head-on collision and then to the right, and (iii) he was driving at a reasonable speed of 30-40 miles per hour.

The learned judge accepted the story of the respondents. He fortified his finding by resorting to the previous statement made by respondent 1 at the inquest on 26th December 1968, which he said is consistent with the testimony respondent 1 gave in court. The learned judge did not say

it in express words what provisions of the Evidence Act he had in mind. Reading in its context I have no doubt he was referring to section 157 of the Evidence Act which enables a court to have regard to any former statement made by a witness relating to the same fact at or about the time when the fact took place, or before any authority legally competent to investigate the fact, in order to corroborate the testimony of such a witness.

In my judgment the finding of the learned judge shows that certain salient features of this aspect of the evidence were missed or were not properly appreciated. It is settled law that a person cannot corroborate himself but it would appear that section 157 of the Evidence Act enables a person to corroborate his testimony by his previous statement. The section adopts a contrary rule of English jurisprudence by enacting that a former statement of a witness is admissible to corroborate him, if the former statement is consistent with the evidence given by him in court. The rule is based on the assumption that consistency of utterance is a ground for belief in the witness's truthfulness, just as inconsistency is a ground for disbelieving him. As for myself, although the previous statement made under section 157 is admissible as corroboration, it constitutes a very weak type of corroborative evidence as it tends to defeat the object of the rule that a person cannot corroborate himself. In my opinion the nature and extent of corroboration necessary in such a case must depend on and vary according to the particular circumstances of each case. What is required is some additional evidence rendering it probable that the story of the witness is true and that it is reasonably safe to act upon it. If a witness is independent, *i.e.*, if he has no interest in the success or failure of a case and his evidence inspires confidence of the court, such evidence can be acted upon. A witness is normally to be considered independent unless he springs from sources which are likely to be tainted. If there are circumstances tending to affect his impartiality, such circumstances will have to be taken into account and the court will have to come to a decision having regard to such circumstances. The court must examine the evidence given by such witness very carefully and scrutinise all the infirmities in that evidence before deciding to act upon it.

The nature and extent of corroborative evidence is a factor which should have been weighed by the learned judge. But as far as I can see, he did not mention it.

It was submitted to us on behalf of the appellants that if it was true that there was an oncoming lorry with dazzling lights encroaching the respondent's path thus making him swerve his car to the left grass verge and travel on it for some distance, then as it was drizzling that night, such manoeuvre would have left tyre marks on the grass verge. But the sketch plan does not show that. On this aspect of the case the learned judge observed thus:

> I do not think it can be positively said that there were no tyre marks on the left grass verge merely because they do not appear on the sketch plan. If the investigation officer who drew the sketch plan visited the scene in the middle of the night and did not use proper light on every part of the area

> of the accident the chances were that he might have not seen tyre marks that might be present there. It is possible that the investigation officer might not have directed his attention to the left grass verge in view of the fact that the car was found on the right hand side of the road. Evidence shows that the first defendant was injured and unconscious after the accident, and therefore he would not be present to assist the investigation officer in investigation which might be carried out at the scene that night.

In my opinion this conclusion demonstrates that the learned judge fell into error in relation to such matters. If that is so then it would not be just for an appellate court to regard itself as compelled to regard as conclusive his finding on the issue of fact. The investigating officer was never called as a witness by the respondents. In the absence of clear and convincing evidence the beliefs and assumptions of the trial judge cannot be validly imported into his finding of fact. He cannot be both judge and witness. In cases where the oral evidence of a witness may be tested by some objective fact of a highly persuasive nature, it is within the competence of a modern appellate court to override the trial court on questions of pure fact, even though this has been decided on the basis of credibility. In my opinion this is a case where a material document, *i.e.,* the sketch plan, so flatly contradicts a passage of oral testimony that doubt may be entertained about the weight attributed at the trial court for that piece of evidence.

The learned judge held further that the encroachment by the oncoming lorry is corroborated by the police report. Here again the learned judge was wrong in his approach on the matter. In the familiar case where a police report is admitted under the law, it is necessary that it should have been made before police investigation has commenced. The reason for this is that this class of statement is admitted upon the principle that it is the natural effusion of a party, who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth. The main test as to whether there has been a delay in making the report is whether it was made as early as can reasonably be expected in the circumstances of the case and before there is opportunity for tutoring or concoction. This, in my opinion, is also a circumstance tending to affect a witness's impartiality, hence his veracity which must be taken into account in arriving at a decision.

The learned judge should have borne in mind that the police report was not made at or about the time of the accident; it was made some four days later, *i.e.,* after police investigation has commenced. It is therefore not a first information report and consequently its effect as corroborative evidence must be tested by reference to the probabilities of the case. I feel there was a misdirection by the learned judge.

The learned judge also held that respondent 1 was driving at a reasonable speed of 30-40 miles per hour. There is not a scintilla of evidence to show the age of the car but he made a finding on the assumption that an old car may be extensively damaged in collision even if driven at a moderate speed. The possibility that the car is old is entirely speculative and unproven to the point of improbability.

It was submitted to us in the course of the argument that the findings of the learned judge are findings of fact and therefore this court should not reverse them: see *Powell* v *Stratham Manor Nursing Home.*[2] In my opinion, the proper course to be adopted in the present case is to have regard to the well-known observations enunciated by Lord Thankerton in *Watt* or *Thomas* v *Thomas:*[3]

> I. Where a question of fact has been tried by a judge without a jury, and there is no question of misdirection of himself by the judge, an appellate court which is disposed to come to a different conclusion on the printed evidence, should not do so unless it is satisfied that any advantage enjoyed by the trial judge by reason of having seen and heard the witnesses, could not be sufficient to explain or justify the trial judge's conclusion; II. The appellate court may take the view that, without having seen or heard the witnesses, it is not in a position to come to any satisfactory conclusion on the printed evidence; III. The appellate court, either because the reasons given by the trial judge are not satisfactory, or because it unmistakably so appears from the evidence, may be satisfied that he has not taken proper advantage of his having seen and heard the witnesses, and the matter will then become at large for the appellate court....

And then Lord Thankerton added words of particular pertinence in the present case:

> ...It is obvious that the value and importance of having seen and heard the witnesses will vary according to the class of case, and, it may be, the individual case in question....

In my judgment, on the question of corroboration, there has unfortunately indeed been a misdirection in the present case. On the question of speed, there is simply no evidence to support the finding that respondent No 1 drove the car at a reasonable speed of 30-40 miles per hour. This mistaken view as to corroboration and speed and the importance the learned trial judge demonstrably attributed to them must, in my opinion, have coloured his final approach to the issue of fact so gravely that the present judgment ought not to be allowed to stand.

In the result the respondents have not adduced reasonable explanation of the accident which is consistent with negligence on their part.

Case against respondent No 2;

The only question to ask is whether the relationship between the respondents is such as to lead to vicarious liability. Although the statement of claim did not plead that at the material time respondent 1 drove the car as respondent 2's servant or agent, the amended statement of defence did allege that respondent 1 was not driving respondent 2's car as his servant or agent. Therefore that issue was brought before the court on which evidence was led by both parties. In my opinion the learned judge was wrong in dismissing the appellant's case on the basis that no cause of action was shown to exist against respondent No 2.

The case for the respondent was this: (i) At the material time respondent 1 was not driving the car as his servant and (ii) that he had no interest in the object of the particular journey undertaken by respondent 1 and the deceased.

The appellants put their case on the fact of ownership. They averred that the law puts an especial responsibility on the owner of the vehicle who allowed it to go on the road in the charge of someone else.

Although there is some force in saying that the fact of ownership is a valuable consideration in determining whether or not the driver is driving independently or for and on behalf of the owner, it would be surprising that that fact alone could saddle the owner with liability. It has never been the law that the owner of a car is responsible in law for damage done by the negligence of a person to whom the car is lent or whom he has permitted to use it. Singleton LJ said this in *Ormrod* v *Crosville Motor Services Ltd*[4] (at page 754):

> It has been said more than once that a driver of a motor car must be doing something for the owner of the car in order to become an agent of the owner. The mere fact of consent by the owner to the use of the chattel is not proof of agency....

Any other view would be tantamount to say that *Hewitt* v *Bonvin*[5] was wrongly decided. And that case was approved by the Privy Council in *Rambarran* v *Gurrucharran.*[6] In my view the legal principle was correctly stated by MacKinnon LJ in *Hewitt* v *Bonvin* (page 191):

> If A suffers damages by the wrongful act of B, and seeks to say that C is liable for that damage he must establish that in doing the act B acted as the agent or servant of C. If he says that he was C's agent he must further show that C authorised the act. If he can establish B was the servant of C the question of authority need not arise.

Du Parcq LJ in that case put the matter in the following way (page 194):

> The driver of a car may not be the owner's servant, and the owner will be nevertheless liable for his negligent driving if it be proved that at the material time he had authority, express or implied, to drive on the owner's behalf. Such liability depends not on ownership but on the delegation of a task or duty....

The reasoning in *Ormrod's* case is based on the same principle. Pearson LJ in *Norton* v *Canadian Pacific Steamships Ltd*[7] said (page 790):

> The owner of a car when he takes or sends it on a journey for his own purposes, owes a duty of care to other road users, and if any of them suffers damage from negligent driving of the car, whether by the owner himself or by an agent to whom he has delegated the driving, the owner is liable.

Sachs LJ in *Vandyke* v *Fender*[8] said of Ormrod's case:

> Ever since the decision of this court in *Ormrod* v *Crosville Motor Services Ltd, supra,* it has been considered clear that where the owner of the car has authorised a driver to drive a car, and has an interest in one of the objects of the particular journey, the driver is his agent when driving.

From the above authorities it can be said without fear of contradiction that the legal principle of vicarious liability for the negligent driving of a car by another person is the principle *qui facit per alium, facit per se,* I

cannot put the matter better or more tersely than as I found it put by Lord Pearson in his speech in *Morgans* v *Launchbury:*[9]

> If the car is being driven by a servant of the owner in the course of the employment or by an agent of the owner in the coure of the agency, the owner is responsible for negligence in the driving. The making of the journey is a delegated duty or task undertaken by the servant or agent in pursuance of an order or instruction or request from the owner and for the purposes of the owner. For the creation of the agency relationship it is not necessary that there should be a legally binding contract of agency, but it is necessary that there should be an instruction or request from the owner and an undertaking of the duty or task by the agent. Also the fact that the journey is undertaken partly for the purposes of the agent as well as for the purposes of the owner does not negative the creation of the agency relationship. *Hewitt* v *Bonvin, Ormrod* v *Crosville Motor Services Ltd, Hilton* v *Thomas Burton (Rhodes) Ltd,*[10] *Norton* v *Canadian Pacific Steamships Ltd* and *Klein* v *Caluori.*[11] I think there has to be an acceptance by the agent of a mandate from the principal though neither the acceptance nor the mandate has to be formally expressed or legally binding.

It can therefore be seen that the test of vicarious liability in such cases as the present is not the 'interest and concern' argument. The principle that the owner of a car is vicariously liable for the user of it by someone whom he has permitted to use it if he has an interest or concern in the purposes for which it is being used, is not only unsatisfactory but unwarranted. Every person who permits another to use his car may be said to have an interest or concern in the car being carefully used and in most cases to have an interest or concern in the safety of the driver but it has never been the law that mere permission is sufficient to establish vicarious liability. A person who permits another to use his car does not become the former's agent if on his own volition he uses it for the owner's benefit, e.g., a person using his brother's car with permission does not become the latter's agent because, remembering that the latter has a luggage at the shop he uses the car to collect it. If the journey is at the owner's own request as in *Ormrod's* case or where the owner asks his brother to bring the car to the railway station to meet him, then the driver can be said to do an act for the owner and acting as his agent. The owner is liable because he has authorised or requested the act or because the driver is carrying out a task or duty delegated to him, or because he is in control of the driver's conduct. He is not liable just because he has given permission to use the car, and has an interest or concern in the purpose for which the car is being used. The phrase *qui facit per alium, facit per se* correctly expresses the principle governing vicarious liability.

In the present case there is not an *iota* of evidence to suggest that at the material time respondent 1 was respondent 2's servant or he was acting on respondent 2's behalf as his agent. I agree with the decision of the learned trial judge but on a different ground.

Damages:

The deceased left behind him his widow, 23 years old and a son $2^1/_2$

years old. The learned judge accepted the following facts:

> ...The deceased was employed and received a salary of $425/- pm. The loss to the family was $200/- per month. Deceased was 30 years old at the time of his death.

There are insurance monies and EPF monies belonging to the estate but these monies are not to be taken into account in awarding damages under the Civil Law Act. But the bank saving of $1,000/- is to be considered since it is savings. The widow is comparatively young and the possibility of remarriage cannot be excluded. Both she and her son are now living with her father. She is not working.

Having regard to the age of the deceased, the age of the widow and of the son and taking into account the usual factors that must be considered in this type of case including the normal expectation of a normal working life of a man of 30 years, the hazards and vicissitudes of life itself and of exmployment and the payment of a lumpsum compensation, I make an award based on $200/- per month spread over 18 years, *i.e.,* $43,200. Of this amount the bank saving of $1,000 must be deducted thus leaving a sum of $42,200.

Therefore the appeal against respondent 1 is allowed with costs here and below. The appeal against respondent 2 is dismissed with costs. Deposit to respondent 2 against taxed costs.

Suffian LP and **Lee Hun Hoe CJ (Borneo)** concurred.

Appeal against 1st respondent allowed.
Appeal against 2nd respondent dismissed.

NT Rajah for the Appellants.
BK Tan for the Respondents.

Notes

(i) This case discusses the application of the important principles of *res ipsa loquitur* and vicarious liability in running down cases.
(ii) It is also important from the point of view of corroboration of a witness by himself under section 157 Evidence Act 1950.
(iii) It also held that so long as the issue was raised it did not matter that vicarious liability was not specifically pleaded in the statement of claim.