

THE EFFECTS OF THE CLA 1956 ON JUDICIAL  
DISCRETION, QUANTUM OF DAMAGES AND INTEREST ON  
DAMAGES IN PERSONAL INJURY AND FATAL ACCIDENT  
CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS :  
A CRITICAL APPRAISAL

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## ORIGINAL LITERARY WORK DECLARATION

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Title of Thesis : The Effects of the CLA 1956 on Judicial Discretion, Quantum of Damages and Interest on Damages in Personal Injury and Fatal Accident Claims Arising Out of Motor Vehicle Accidents : A Critical Appraisal

Field of Study : Insurance and Personal Injury Law

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## ABSTRACT

Sections 7, 8 and 28A of the Civil Law Act 1956<sup>1</sup> are enacted to regulate the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents. The provisions aim to control the quantum of damages being meted out by the courts. Despite the good intention of the legislature, the provisions have been viewed with disfavour by many as a legislative attempt to reduce the quantum of damages and/or fetter or worst still, to divest the judiciary of their discretion in the assessment of damages. The actual impacts on judicial discretion and the quantum of damages are however yet to be fully worked out. Therefore, this research is to be welcomed as it seeks to critically appraise the actual effects of sections 7, 8 and 28A of the CLA 1956 on the exercise of judicial discretion and the quantum of damages being awarded by the courts. The same critical appraisal is also extended to section 11 of the CLA 1956, the court rules relating to the assessment of interest on damages as well as the provisions relating to the assessment of damages in Singapore and Brunei. This research applied both the descriptive and analytical approach. Malaysian data have been collected from primary and secondary sources together with interviews with legal practitioners and representatives from several Malaysian insurance companies. This research began with the proposition that despite the provisions in the CLA 1956 and court rules, judges in Malaysia still retain their discretion (*albeit* with statutory interventions) in assessing damages and interest on damages for personal injury and fatal accident claims arising out of motor vehicle accidents. It concluded that sections 7, 8, 11, 28A of the CLA 1956 and Order 42 Rule 12 of the Rules of Court have resulted in mixed effects on the judges' discretionary power; total abolition of discretionary power, maintaining the discretionary power as it was before the 1984 amendments, maintaining the discretionary power but with restrictions and mere codification of existing practices. The research also provides several suggestions for statutory amendment in order to rectify the problems with sections 7, 8, 11, 28A of the CLA 1956 and Order 42 Rule 12 of the Rules of Court 2012. The suggested amendments are also necessary to ensure damages and interest awarded for personal injury and fatal accident claims arising out of motor vehicle accidents is consistent, fair and reasonable to the claimants while affordable to the insurance industry.

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<sup>1</sup> Act 67 (of Malaysia). Hereinafter referred to as "the CLA 1956".

## ABSTRAK

Seksyen 7,8 dan 28A Akta Undang-Undang Sivil 1956<sup>2</sup> digubal untuk mengawalselia penaksiran ganti rugi bagi tuntutan kecederaan diri dan kemalangan maut yang diakibatkan oleh kemalangan jalanraya. Peruntukan-peruntukan ini bertujuan untuk mengawal kuantum ganti rugi yang boleh dianugerahkan oleh mahkamah. Di sebalik niat baik pengubal undang-undang, peruntukan-peruntukan ini telah dilihat oleh banyak pihak sebagai usaha pengubal undang-undang untuk mengurangkan jumlah ganti rugi dan mengongkong atau lebih buruk lagi melupuskan kuasa budibicara kehakiman dalam penaksiran ganti rugi. Kesan sebenar pindaan ini ke atas budi bicara kehakiman dan jumlah ganti rugi bagaimanapun masih belum dapat dikenalpasti sepenuhnya. Oleh itu, kajian ini sangat dialu-alukan kerana ia bertujuan membuat penilaian kritis kesan sebenar seksyen 7,8 dan 28A CLA 1956 terhadap pemakaian budi bicara kehakiman dan jumlah ganti rugi yang dianugerahkan oleh mahkamah. Penilaian kritis yang sama dilanjutkan kepada seksyen 11 CLA 195, peraturan-peraturan mahkamah berkaitan penaksiran kadar bunga bagi gantirugi dan peruntukan-peruntukan berkaitan penaksiran gantirugi di Singapura dan Brunei. Penyelidikan ini menggunakan pendekatan deskriptif dan analisis. Data dari Malaysia diperoleh daripada sumber-sumber primer dan sekunder serta temu bual bersama pengamal undang-undang dan wakil daripada beberapa syarikat insurans di Malaysia. Kajian ini bermula dengan cadangan bahawa walaupun terdapat peruntukan di dalam CLA 1956, hakim-hakim di Malaysia masih dapat mengekalkan kuasa budi bicara mereka (walaupun dikawal oleh peruntukan undang-undang) dalam penaksiran ganti rugi dan kadar bunga bagi ganti rugi untuk tuntutan kecederaan diri dan kemalangan maut yang diakibatkan oleh kemalangan jalanraya. Kajian ini menyimpulkan bahawa seksyen 7, 8, 11, 28A dan Aturan 42 Kaedah 12 Kaedah-kaedah Mahkamah 2012 menyebabkan beberapa kesan terhadap kuasa budi bicara kehakiman; penghapusan kuasa budi bicara secara total, pengekalan kuasa budi bicara seperti keadaan sebelum pindaan tahun 1984, pengekalan budi bicara tetapi dengan sekatan-sekatan tertentu serta sekadar pengkanunan amalan-amalan yang sedia ada. Kajian ini turut menyediakan beberapa cadangan untuk pindaan undang-undang bagi menyelesaikan masalah yang terdapat dalam seksyen 7, 8, 11, 28A CLA 1956 dan Aturan 42 Kaedah 12, Kaedah-kaedah Mahkamah 2012. Pindaan-pindaan yang dicadangkan adalah juga perlu untuk memastikan gantirugi dan kadar bunga untuk tuntutan kecederaan diri dan kemalangan maut yang diakibatkan oleh kemalangan jalanraya kemalangan kenderaan bermotor adalah konsisten, adil dan munasabah untuk pihak-pihak menuntut manakala berpatutan untuk industri insurans.

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<sup>2</sup>Akta 67. Selepas ini dirujuk sebagai CLA 1956.

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It was often said that PhD is a lonely journey. It is true. It is a journey that can be completed by no one else other than one self. I however am blessed throughout my journey. I have been accompanied by so many people who have made significant contributions towards the completion of this thesis. It is difficult to mention all of them individually, but there are some whose immense contributions deserve special acknowledgment and appreciation.

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## **DEDICATION**

To my parents

**HJ MAHDZIR BIN SHARIFF and HJH OMAI KALSOM BINTI HAMID**

I dedicate this work

## **TABLE OF CHAPTERS**

CHAPTER 1	INTRODUCTION
CHAPTER 2	JUDICIAL DISCRETION IN THE ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS
CHAPTER 3	THE EFFECTS OF THE CLA 1956 ON JUDICIAL DISCRETION AND THE QUANTUM OF DAMAGES IN PERSONAL INJURY CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS
CHAPTER 4	THE EFFECTS OF THE CLA 1956 ON JUDICIAL DISCRETION AND THE QUANTUM OF DAMAGES IN FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS
CHAPTER 5	JUDICIAL DISCRETION IN THE ASSESSMENT OF INTEREST FOR DAMAGES FOR PERSONAL INJURY AND FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS

CHAPTER 6            THE EFFECTS OF THE STATUTORY PROVISIONS IN  
SINGAPORE    AND    BRUNEI    ON    JUDICIAL  
DISCRETION AND THE QUANTUM OF DAMAGES IN  
PERSONAL INJURY AND FATAL ACCIDENT CLAIMS  
ARISING OUT OF MOTOR VEHICLE ACCIDENTS

CHAPTER 7            CONCLUSIONS    AND    RECOMMENDATION

## TABLE OF CONTENTS

ORIGINAL LITERARY WORK DECLARATION.....	i
ABSTRACT.....	iii
ACKNOWLEDGEMENT.....	v
DEDICATION.....	vi
TABLE OF CHAPTERS.....	vii
TABLE OF CONTENTS .....	ix
TABLE OF ABBREVIATIONS.....	xvii
TABLE OF STATUTES.....	xix
TABLE OF CASES.....	xxii
CHAPTER I .....	1
INTRODUCTION.....	1
1.1 BACKGROUND OF STUDY .....	1
1.2 STATEMENT OF PROBLEM .....	4
1.3 OBJECTIVES OF STUDY .....	9
1.4 RESEARCH QUESTIONS .....	11
1.5 HYPOTHESIS.....	12
1.6 SIGNIFICANCE OF THE STUDY .....	13
1.7 LEGAL FRAMEWORKS STUDIED.....	16
1.7.1 Malaysia.....	17
1.7.2 Singapore.....	18
1.7.3 Brunei.....	18

1.8 LITERATURE REVIEW .....	19
1.9 RESEARCH METHODOLOGY .....	26
1.9.1 Data Collection27	
1.9.2 Data Analysis30	
1.10 SCOPE OF RESEARCH.....	30
1.11 ORGANIZATION OF CHAPTERS .....	31
1.11.1 Chapter1.....	31
1.11.2 Chapter 2.....	32
1.11.3 Chapter 3.....	32
1.11.4 Chapter 4.....	33
1.11.5 Chapter 5.....	34
1.11.6 Chapter 6.....	34
1.11.7 Chapter 7.....	35
1.12 CONCLUSION .....	36
 <b>CHAPTER 2 .....</b>	<b>37</b>
<b>JUDICIAL DISCRETION IN THE ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS .....</b>	<b>37</b>
2.1 INTRODUCTION .....	37
2.2 COMPULSORY MOTOR VEHICLE INSURANCE .....	38
2.3 THE LAW ON PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN MALAYSIA .....	42
2.3.1 The Common Law .....	43
2.3.2 The Civil Law Act 1956.....	45
2.4 JUDICIAL DISCRETION .....	51
2.4.1 Overview of the term ‘judicial discretion’ .....	51

2.4.2 Judicial Discretion in the CLA 1956 (rev 1972).....	53
2.5 CONCLUSIONS .....	58
 <b>CHAPTER 3 .....</b>	<b>60</b>
<b>THE EFFECTS OF THE CLA 1956 ON JUDICIAL DISCRETION AND THE QUANTUM OF DAMAGES IN PERSONAL INJURY CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS.....</b>	<b>60</b>
3.1 INTRODUCTION .....	60
3.2 ABOLISHING THE AWARD FOR LOSS OF EXPECTATION OF LIFE .....	63
3.2.1 Para (b) to the Section Allows for Loss of Expectation of Life.....	66
3.2.2 Minimal Effect of Para (a).....	68
3.3 ABOLISHING THE AWARD FOR LOSS OF PRE-TRIAL EARNINGS .....	70
3.3.1 Dividing the Multiplier for Loss of Future Earnings.....	74
3.3.2 Different Methods of Assessment.....	75
3.4 INTRODUCING PRE-CONDITIONS FOR THE AWARD FOR LOSS OF FUTURE EARNINGS. ....	77
3.4.1 Condition (i): Below Fifty Five (55) Years Old.....	79
3.4.2 Condition (ii): Good Health.....	85
3.4.3 Condition (iii): Earning Income at the Time of Injury.....	94
3.5 REGULATING THE ASSESSMENT OF MULTIPLICAND FOR LOSS OF FUTURE EARNINGS .....	97
3.5.1 Compensations Benefits to be Ignored.....	98
3.5.2 Deduction for Living Expenses.....	101
3.5.3 Prospect of Future Increase in Plaintiff's Earnings is to be Ignored.....	105
3.6 REGULATING THE AWARD FOR LOSS OF FUTURE EARNING CAPACITY .....	108

3.7 FIXING THE MULTIPLIER FOR THE AWARD OF LOSS OF FUTURE EARNINGS .....	117
3.7.1 Loss of Future Earnings.....	118
3.7.2 Loss of Future Earning Capacity.....	121
3.7.3 Fix multiplier v Annuity Table.....	123
3.8 CONCLUSIONS .....	126
3.9 COMPARATIVE TABLE OF CLA 1956 (REV 1972) AND CLA 1956 WITH REGARDS TO PERSONAL INJURY CLAIMS .....	128
 <b>CHAPTER 4.....</b>	<b>130</b>
<b>THE EFFECTS OF THE CLA 1956 ON JUDICIAL DISCRETION AND THE QUANTUM OF DAMAGES IN FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS .....</b>	<b>130</b>
4.1 INTRODUCTION.....	130
4.2 ABOLISHING THE AWARD FOR LOSS OF SERVICES AND CONSORTIUM.....	133
4.2.1 The Abolition of the Award for Loss of Service of Child or Wife.....	133
4.2.2 The Abolition of the Award for Loss of Consortium.....	141
4.3 ABOLISHING AWARD FOR LOSS OF EXPECTATION OF LIFE.....	144
4.4 INTRODUCING THE AWARD FOR BEREAVEMENT.....	147
4.5 INTRODUCING THE AWARD FOR LOSS OF SUPPORT .....	150
4.5.1 Substituting the Measure of Damages.....	150
4.5.2 Confining the Awards to Statutory Dependents.....	153
4.5.3 Loss of Support vs. Loss of Actual Support.....	158
4.6 INTRODUCING PRE-CONDITIONS FOR THE AWARD FOR LOSS OF SUPPORT.....	162
4.6.1 Condition (i): Below Fifty Five (55) Years Old.....	163

4.6.2. Condition (ii): Good Health.....	167
4.6.3 Condition (iii): Earning Income at the Time of Injury.....	168
4.7 REGULATING THE ASSESSMENT OF MULTIPLICAND FOR THE AWARD FOR LOSS OF SUPPORT.....	170
4.7.1 Compensations Benefits to be Ignored.....	172
4.7.2 Deduction for Living Expenses.....	173
4.7.3 Prospect of Future Increase in Deceased's Earnings is to be Ignored.....	176
4.8 FIXING THE MULTIPLIER IN THE AWARD FOR LOSS OF SUPPORT.....	178
4.8.1 Does Proviso (iv) to Section 7(3) of the CLA 1956 Provides for Loss of Earnings or Loss of Support?.....	185
4.8.2 Is <i>Chan Chin Ming v Lim Yoke Eng</i> No Longer Applicable?.....	188
4.9 ABOLISHING THE AWARD FOR LOST OF EARNING IN LOST YEARS...	193
4.10 CONCLUSIONS .....	194
4.11 COMPARATIVE TABLE OF THE CLA 1956 (REV 1972) AND THE CLA 1956 WITH REGARDS TO FATAL ACCIDENT CLAIMS .....	198
 <b>CHAPTER 5.....</b>	<b>199</b>
<b>JUDICIAL DISCRETION IN THE ASSESSMENT OF INTEREST FOR DAMAGES FOR PERSONAL INJURY AND FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS.....</b>	<b>199</b>
5.1 INTRODUCTION.....	199
5.2 DEFINITION, TYPES AND PURPOSES OF INTEREST.....	201
5.2.1 Definition of Interest.....	201
5.2.2 Types of Interest.....	202
5.2.3 Purposes of Interest.....	203
5.3 HISTORICAL BACKGROUND OF THE AWARD FOR INTEREST.....	204

5.3.1 The Common Law .....	204
5.3.2 The Early English Provisions on Interest.....	205
5.3.3 The rule in <i>Jefford &amp; Anor. v Gee</i> .....	209
5.4 MALAYSIAN PROVISIONS REGARDING INTEREST.....	210
5.4.1 Which Provision Governs the Pre-judgment Interest?.....	213
5.4.2 Whether the pre-judgment interest is totally at the discretion of the judges?..	215
5.5 THE MANDATORY OBLIGATION TO AWARD INTEREST.....	217
5.5.1 Statutes.....	218
5.5.2 Rationale.....	230
5.6 ASSESSING THE INTEREST RATE.....	235
5.6.1 Pre-Judgment Interest Rate.....	236
5.6.2 Post-Judgment Interest Rate.....	238
5.7 COMPOUNDED INTEREST.....	242
5.7.1 Restrictive interpretation of proviso (a) to section 11 of the CLA 1956	244
5.7.2 The broader interpretation of term ‘judgment debt’	246
5.7.3 Limited application of section 11 of the CLA 1956.	249
5.8 CONCLUSION .....	251
 <b>CHAPTER 6 .....</b>	 <b>254</b>
<b>THE EFFECTS OF THE STATUTORY PROVISIONS IN SINGAPORE AND BRUNEI ON JUDICIAL DISCRETION AND THE QUANTUM OF DAMAGES IN PERSONAL INJURY AND FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS.....</b>	<b>254</b>
6.1 INTRODUCTION .....	254
6.2 THE DEVELOPMENT OF THE LAW ON PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN SINGAPORE .....	256

6.2.1 The English Common Law .....	257
6.2.2 The Civil Law Act .....	259
6.3 THE DEVELOPMENT OF THE LAW ON PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN BRUNEI .....	262
6.3.1 The English Common Law .....	262
6.3.2. Fatal Accidents and Personal Injuries Act .....	264
6.4. PERSONAL INJURY CLAIMS .....	265
6.4.1 Abolishing the Award for Loss of Expectation of Life .....	266
6.4.2 The Absence of Any Provision on the Assessment of Damages for Loss of earnings .....	272
6.5 FATAL ACCIDENT CLAIMS .....	284
6.5.1 Estate Claim .....	285
6.5.2 The Award for Loss of Support .....	291
6.5.3 Bereavement .....	311
6.5.4 Loss Service of Wife and Child .....	316
6.5.5 Loss of Consortium .....	317
6.6 PROVISIONAL DAMAGES FOR PAIN AND SUFFERING .....	317
6.7 CONCLUSION .....	320
6.8 COMPARATIVE TABLE OF THE LAW ON PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN MALAYSIA, SINGAPORE AND BRUNEI .....	322
<b>CHAPTER 7 .....</b>	<b>319</b>
<b>CONCLUSIONS AND RECOMMENDATIONS .....</b>	<b>319</b>
7.1 RECAPITULATION .....	319
7.1.1 Effects of sections 7, 8, 11 and 28A of the CLA 1956 on Judicial Discretion .....	322

7.1.2 Effects of sections 7, 8 and 28A of the CLA 1956 on the Quantum of damages.....	326
7.1.3 Analysis of the Provisions on Assessment of Damages in Singapore and Brunei.....	327
7.2 RECOMMENDATIONS.....	329
7.2.1 Revising the Pre-Condition that Plaintiff or Deceased Must Be Below the Age of Fifty Five (55) Years Old.....	330
7.2.2 Revising the Maximum Age in the Assessment of Multiplier.....	334
7.2.3 Revising the Fixed Multiplier.....	334
7.2.4 Amending the Pre-Condition of Good Health.....	341
7.2.5 Amending the Pre-Condition of Earning Income at the Time of Accident or Demise.....	344
7.2.6 Amending the Provisions Relating to the Award for Bereavement.....	346
7.2.7 Amending the Provision on ‘Statutory Dependant’.....	349
7.2.8 To Specifically Exclude the Effect of Spouse’s Remarriage in the Assessment of Damages for Loss of Support.....	351
7.2.9 Amending the Provision in Section 28A Relating to Deduction for Living Expenses.....	353
7.2.10 To Include any Increase in Plaintiffs’ Earning at the Time of Trial in the Assessment of Multiplicand.....	355
7.3 CONCLUDING REMARKS .....	358
<b>BIBLIOGRAPHY .....</b>	<b>359</b>

## TABLE OF ABBREVIATIONS

### Common Abbreviations

*e. g* – (*exempligratia*) for example

*et. al* – (*et alia*): and others

*etc.* – and so fourth

*i.e* – that is

*id.* – (*idem*) the same below

*ibid* – (*ibidem*) in the same place

*Vol.* – volume

### Notes on Abbreviations

AC – Appeal Case

PC - Privy Council

LJ – Lord Justice

### Law Reports

AIR – All Indian Report

ALL ER–All England Report

BJ – Brunei Journal

Ch. D – Chanceri Division

ER – English Reports

Haag. Adm. – Haggard’s Admiralty Reports

K.B – King’s Bench

Lloyd’s Rep – Lloyd’s Law Report

LNS – Legal Network Series

LR – Law Report

p. Coop - Cooper's Chancery Practice Cases

Q.B - Queen's Bench

Q.B.D – Queen's Bench Division

SGHC – Singapore High Court

SGCA – Singapore Court of Appeal

WLR – Weekly Law Report

### **Journals**

AMR – All Malaysian Report

BLR – Brunei Law Report

CLJ – Current Law Journal

IIUM Law Journal – International Islamic University Law Journal

INSAF – Journal of the Malaysian Bar

JMCL – Journal of Malaysian and Comparative Law

MLJ – Malayan law Journal

MLJA – Malayan Law Journal Article

MLJU – Malayan Law Journal Unreported

PIR – Personal Injury Report

SLR – Singapore Law Report

SJLS – Singapore Journal of Legal Studies

## TABLE OF STATUTES

### **Malaysia**

Civil Law Act 1956 (Act 67)

Civil Law Act 1956 (Act 67)(rev 1972)

Civil Law (Amendment) Act 1975 (Act A308)

Civil Law (Amendment) Act 1984 (Act A602)

Road Transport Act 1987 (Act 333)

FMS Enactment No 17 of 1937

Straits Settlement Ordinance No 5 of 1938,

Road Traffic Third Party Enactment 1938 (Johore)

Road Traffic Enactment no 16 OF 1356 AH (1938 AD)(Kedah)

Motor Vehicle Enactment No 16 of 1356 (1938 AD)(Terengganu)

Road Traffic (Third Party Insurance) Ordinance 1949 (Sabah Cap 129).

Motor Vehicles (Third Party Risk) Ordinance 1949 (Sarawak Cap130).

Constitution of Malaysia

Constitution (Amendment) Act 1983 (Act A566)

Courts of Judicature (Amendment) Act 1984 (Act A600)

Court of Judicature Act 1964 (Act 91).

Interpretation Act 1967 (Act 388)

Law Reform (Marriage and Divorce) Act 1976

Subordinate Courts Act 1948 (Act 92)

Subordinate Courts Rule Act 1955 (Act 55)

Minimum Retirement Age Act 2012 (Act 753)

Pension Act 1980 (Act 227).

Rules of Court 2012 [PU(A) 205/2012]

Subordinate Courts Rules 1980 [PU(A) 328/1980]

Rules of the High Court 1980 [PU(A) 50/1980]

### **Singapore**

Civil Law Act (cap 43)

Civil Law Act (cap 30)

Civil Law (Amendment) Act 1987(Act 11 of 1987)

Motor Vehicles (Third Party Risk and Compensation) Act 1985 (cap 189)

Republic of Singapore (Independent) Act 1965 (cap 9)

Constitution of the Republic of Singapore (1980)

Judicial Committee Act(cap 148)

Application of English Law Act (cap 7A)

Supreme Court of Judicature Act (cap 322).

Subordinate Courts Act (cap 321)

### **Brunei**

Fatal Accidents and Personal Injuries Act, (cap 160)

Application of Law Enactment (cap 2)

Supreme Court (Appeal to Privy Council) Act (cap 158)

Emergency (Fatal Accident and Personal Injuries) Order 1991

Law Reform (Personal Injuries) Act (cap10)

Law Reform (Contributory Negligence) Act (cap 53)

Brunei Rules of the Supreme Court (cap 5)

**England**

Administration of Justice Act 1982 (cap 53)

Administration of Justice Act 1969 (cap 58)

Fatal Accident Act 1846 (9 & 10 Vict. cap.93)

Fatal Accident (Damages) Act 1908,

Law Reform (Miscellaneous Provisions) Act 1934 (cap 41)

Law Reform (Married Women and Tortfeasors) Act 1935

Brunei (Appeals) Act 1989 (cap 36).

Civil Procedure Acts 1833

Judgment Act 183

## TABLE OF CASES

### A

- A Lim Kiat Boon & Ors. v Lim Seu Kong & Anor.* [1980] 2 MLJ 39  
*ACD (by her next of friend B) v See Mun Li* [2009] SGHC 217  
*Abdul Gaffar bin Md. Amin v Ibrahim bin Yusuff & Anor.* [2008] 3 MLJ 771(FC)  
*Abdul Hamid v Ooi Teik Ean* [1979] 1 MLJ 244  
*Abdul Wahab Jam Jam v Abdul Wahab bin Abdullah* [2008] 7 CLJ 741  
*Admiralty Commissioners v S S Valeria* (1922) AC 242  
*Adsett v West* (1983) 3 WLR 437  
*Ahmad Nordin bin Haji Maslan & Anor. v Eng Ngak Hua & Ors.* [1985] 2 MLJ 431  
*Ahmad Nordin & Anor. v Eng Ngak Hua & Ors.* [1985] 2 MLJ 431  
*Amar Singh v Chin Kiew* (1960) 26 MLJ 77  
*Anantha Kiruisan PSR @ Anantha Krishnan & Anor. v Teoh Chu Thong* [2008] 4 MLJ 672  
*Ang Eng Lee & Anor. v Lim Lye Soon* [1986] SLR 116  
*Ang Soon Seng v Noraini bte Doralik & Anor.* [2003] 5 MLJ 456  
*Appalasamy a/l Bodoyah v Lee Mon Seng* [1996] 3 CLJ 71  
*Asainar bin Sainudin & Anor. v Mohamad Salam bin Sidik* [2002] 5 MLJ 104  
*Asiah bte Kamsah v Dr Rajinder Singh & Ors.* [2002] 1 MLJ 484  
*Athmalingam Muniandy & Anor. V. Khu Li Huang* [2011] 2 CLJ 619  
*Attorney-General v Rada Baskaran* [1972] 2 MLJ 169  
*Au Kee Tuang v Lightweight Concrete Pte Ltd* [1984] 2 MLJ xxix  
*Au Yong Wing Loong v Chew Hai Ban & Anor.* [1993] 3 SLR 355  
*Awangku Muhammad Murshyid b Pengiran Hj Ali & Anor. v Makrami b. Hj. Md Noor & Another Appeal* [2010] 4 MLJ 662  
*Azizah Zainuddin (menuntut sebagai baju dan orang tanggungan yang sah Kamaruddin bin Alias, si mati) v Krishnasamy a/l Muniasamy dan satu lagi* [2006] 2 MLJ 91

### B

- Baker v Bolton* (1808) 1 Camp. 493  
*Baiduri Bank Bhd v Pengiran Datin Hajah Za'baedah bte PRW Pg Hj Metussin and Anor.* [2001] BLR 241  
*Balasubramaniam v Venkitasan* [1986] 2 MLJ 55  
*Ban Pet Hock v Ong Ah Ho* [1966] 2 MLJ 256  
*Bas Mini Muhibbah Sdn. Bhd. v Abdullah bin Salim* [1983] 1 MLJ 405  
*Benham v Gambling* (1941) AC 157  
*Best v Samuel Fox & Co Ltd* (1951) 2 All ER 116, 125 CA  
*Bijun Kalur v Pahayta Sdn. Bhd.* [2010] 5 MLJ 684  
*Billingham v Hughes* (1949) 1 KB 643  
*Bird v Cockings & Son Ltd* (1951) 2 TLR 1260

*Black-Clawson International Ltd. v Papierwerke Waldhof Aschaffenburg AG* (1975) 1 All ER 319  
*British Transport Commission v Gourley* (1956) AC 185  
*Brown v Roberts* (1963) 2 All ER 263  
*Burns v Edman* (1970) 2 QB 541  
*Bushwall Properties v Vortex Properties* (1975) 1 WLR 1649  
*Butler v Forestry Commission*, unreported (1979) CA no 338 (unreported)

## C

*Chai Kang Wei Samuel v Shaw Linda Gillian* [2010] 3 SLR 587  
*Chai Siew Yin v Leong Wee Shing* Civil Appeal No 02-10 of 2003 (W)  
*Chan Ah Fong & Ors. v Goh Kim* Kuala Lumpur Civil Suit No 278 of 1971 (unreported)  
*Chan Chi Fook v Spennex Stainless Steel Industries* (1995) BJ 208  
*Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233  
*Chan Heng Wah v Peh Thiam Choh* [1988] 1 MLJ 74 (CA)  
*Chan Lye Huat v Tan Ong Kong* [1985] 2 MLJ 112  
*Chan Sau Chan v Choi Kong Chaw & Yap Yun Chan* [1991] 1 CLJ 297  
*Chan Yoke May v Lian Seng Co. Ltd.* (1962) MLJ 243  
*Chang Chong Foo v Shivanathan* [1992] 2 MLJ 473  
*Chang Ming Feng & Anor. v Jackson Lim @ Jackson Ak Bajut* [1999] 1 MLJ 1  
*Chen Fung Ying & Ors v Chee Hatt Sang* [1982] 1 MLJ 370  
*Cheng Bee Teik & Ors v Peter a/l Selvaraj & Anor.* [2005] 4 MLJ 301  
*Cheng Chay Choo v Wong Meng Tuck & Anor.* [unreported, 22 May 1992; suit 1573 of 1989]  
*Chew Sheong Yoke v Lawrence Su Chu Seng & Anor.* [1996] MLJU 40  
*Chiang Boon Fatt v Lembaga Kemajuan Negeri Pahang & Anor.* [1983] 1 MLJ 89  
*Chinnakaruppan v Abdul Wahab bin Ahmad* (Unreported)  
*Choa Choon Neo v Spottiswoode* (1869) 12 Ky 216  
*Chan Chong Foo & Anor. v Shivanathan* [1992] 2 MLJ 473  
*Chang Ah Lek & Ors. v Lim Ah Koon* [1999] 1 SLR 82  
*Chong Sin Sen v Janaki a/p Chellamuthu (suing as the widow of Muniappa Pillai a/l Maritha Muthoo, deceased, on behalf of herself and the dependants of the deceased)* [1997] 3 AMR 2217  
*Chong Sow Ying v Official Administrator* [1984] 1 MLJ 185  
*Chong Pik Sing & Anor. v Ng Mun Bee & Ors* [1985] 1 MLJ 433  
*Chor Phaik Har v Farlim Properties Sdn. Bhd.* [1994] 3 AMR 41  
*Chu Kim Sing & Anor. v Abdul Razak bin Amin* [1999] 6 MLJ 433  
*Chua Kim Suan (Adminsitratrix of the Estate of Teoh Tek Lee) & Anor. v Government of Malaysia & Anor.* [1994] 1 MLJ 394  
*Chua Seng Lee v Ang Teow Koon & Anor.* [unreported – suit no 2103 of 1996]  
*Citibank NA v Lee Chew Kok & Anor.* [Civil Suit No D3-23-2277-87] Kuala Lumpur High Court (27 April 1989)  
*Clarke v Rotax Aircraft Equipment Ltd.* (1975) 3 All ER 794  
*Cookson v Knowles* [1979] AC 556  
*Cooper v Motor Insurer's Bureau* (1985) 2 WLR 248  
*Creswell v B.O.C. Ltd.* (1980) 3 All ER 443

*Curwen v James*(1963) 1 WLR 748

## **D**

*Dalip Bhagwan Singh v Public Prosecutor* [1998] 1 MLJ14

*Davies v Powell Duffryn Associated Collieries Ltd* (1942) 1 All ER 657

*De Havilland v Bowerbank* (1807) 1 Camp 50

*Dirkje Pietenella Halma v Mohd Nor bin Baharom & Ors.* [1990] 3 MLJ 103

*Dunthorne v Bentley & Ors* (1999) Llyods Rep IR 560

## **E**

*Eddie Toon Chee Meng v Yeap Chin Hon* [1993] 2 SLR 536

*Eddow v Hopkins* (1780) 1 Douglas 376

*Elliot v Grey* (1959) 3 All ER 733

*Esah bte Ishak &Anor.vKerajaan Malaysia &Anor.* [2006] 6 MLJ 1

*Ex parte Fewing* (1883) 25 Ch. D 338

## **F**

*Flint v Hovell*(1935) 1 KB 354

*Foo Sey Koh & ors.vChua Seng Seng & ors.* [1986] 1 MLJ 501

*Foon Moon Yeow v Tan Sek Kee & Ors* [1973] 2 MLJ 119

*Foong Nan v Sagadevan* [1971] 2 MLJ 24

*Franklin v The South Eastern Ry Co* (1858) 157 ER Ex 448

## **G**

*G. Sivarajan v Swee Lam Estates (M) Ltd* [1966] 1 MLJ xvii

*Gammell v Wilson* (1981) 2 WLR 248

*Gardiner v Sevenoaks RDC* (1950) 2 All ER 84

*Ghulam Hussain v Shaharom &Anor.* [1966] 2 MLJ 207

*Goh Eng Hong v The Management Corporation of the Textile Center*[2001] 1 SLR 209

*Goodburn v Thomas Cotton Ltd.*(1968) 1 QB 845

## **H**

*H Rubber Estates Bhd. v Director-General of Inland Revenue* (1979) 1 MLJ 112

*Hamri Bin Noorsae & Anor.vMas Robil Bin Buang & Ors.* [1995] MLJU 117

*Hanson Ingrid Christina v Tan Puey Tze* [2008] 1 SLR 409

*Harbutts 'Plasticine' Ltd. v Wayne Tank and Pump Co. Ltd.,* (1970) 2 WLR 198

*Harcharan Singh v Hassan bin Ariffin* [1990] 2 CLJ 393

*Hassan bin Muhamad v Teoh Kim Seng*[1987] 1 MLJ 328

*Hay v Hughes* [1975] 1 QB 790

*Hazimah Muda &Anor.vAb Rahim Ab Rahman &Anor.* [2001] 5 CLJ 511

*Heatley Steel Co. of Wales Ltd.* (1953) 1 All ER 489  
*Higgins v Sargents* (1832) 2 B. & C. 348  
*Hj. Hassan b. Munap v Petrodril (B) Sdn. Bhd.* [1988] 1 MLJ 388  
*Hooi Seng v Ooi Pay Yeong (the Legal Representative of the Estate of Ooi Kok Teong, Deceased)* [1995] 4 CLJ 229  
*Ho Yiu v Lim Peng Seng* [2004] 4 SLR (R) 675  
*Ho Yeow Kim v Lai Hai Kuen* [1999] 2 SLR 246  
*Hum Peng Sin v Lim Lai Hoon & Anor.* [2001] 4 MLJ 232  
*Hungerfords v Walker* (1989) 84 ALR 119  
*Hyde v Price* (1837) p. Coop 193

## I

*Ibrahim bin Ismail & Anor. v Hasnah bin Puteh Imat.* [2004] 1 CLJ 797  
*Ismail bin Haji Manap & Yg Ln v Onn Swee Imm* [1992] 2 CLJ 1157  
*Izzard v Universal Insurance Co* (1937) AC 773

## J

*Jayas v PP* [1966] 2 MLJ 22  
*Jaafar Bin Shaari & Anor. (Suing As Administrators of The Estate of Shofiah Bte Ahmad, Deceased) v Tan Lip Eng & Anor.* [1997] 3 MLJ 693  
*Jag Singh v Toong Fong Omnibus Co. Ltd.* [1964] 30 MLJ  
*Jamil bin Harun v Yang Salbiah & Anor.* [1984] 1 MLJ 217  
*Jayakumar a/p Arul Pragasam v Suriya Narayanan a/p V Ramanathan* [1996] 4 MLJ 421  
*Jefford & Anor. v Gee* (1970) 2 QB 130  
*Johannes Koplan v Aw Chen* [1970] 1 MLJ 220  
*Joremi bin Kimin & Anor. v Tan Sai Hong* [2001] 1 AMR 675 (CA)

## K

*K Ratnasingam v Kow Ah Dek* [1983] 2 MLJ 297  
*Karuppiah Nirmala v Singapore Bus Services Ltd* [2002] 3 SLR 415  
*KDE Recreation Bhd. v Low Han Ong & Ors* (Rayuan Sivil No W-04-4-02)  
*King Lee Tee v Norwich Union Fire Insurance Society Ltd* (1933) MLJ 187  
*Koh Soon Pheng v Tan Kah Eng* [2003] 2 SLR (R) 536  
*Koh Chai Kwang v Teo Ai Ling (by her next friend, Chua Wee Bee)* [2011] SGCA 23  
*Krishnan & Anor. v Chow Wing Khuan* (1987) 2 MLJ 691

## L

*Lai Wee Lian v Singapore Buss Service (1978) Ltd.* [1984] 1 MLJ 325  
*Lai Chi Kay & Ors v Lee Kuo Shin* [1981] 2 MLJ 167  
*Lassiter v To* [2005] 2 SLR 8; [2005] SGHC 4

*Lau Kung Kai v Abu Serah Bol (M)* [2008] 1LNS 303  
*Lau Ee Ee v Tan King Kwong* [1986] 1 MLJ 308  
*Lee Ann v Mohammad Sahari bin Zakaria* [1987] 1 MLJ 252  
*Lee Boon Kiat v Ng Sing*[1982] 1 MLJ 229  
*Lee Cheng Yee (suing as Administrator of the Estate of Chia Miew Hein) v Tiu Soon Siang (t/a Tiyor Soon Tiok & Son Co) & Anor.* [1998] 2 MLJ 253  
*Lee Guan Par v Hotel Universal Sdn. Bhd.* [2005] 4 MLJ 589  
*Lee Sai Cheong v Wan Lim Cheong*(1962) MLJ 259  
*Lee Seng Ho v Amir b Bakar & Anor.* [2008] MLJU 166  
*Lee Wei Kong (by his litigation representative Lee Swee Chit) v Ng Siok Tong* [2012] 2 SLR 85  
*See Leong Wee Shing v Chai Siew Yin* [2000] 5 MLJ 162  
*Lien Hock Seng &Anor.vSakkarai a/l Mookiah & Anor.*[1998] 5 MLJ 251  
*Liew Moi & Anor.vDil Bahadur Bura & Ors.*(1963) 27 MLJ 22  
*Liu Haixiang v China Construction (South Pacific) Development Co. Pte. Ltd.* [2009] SGHC 21  
*LimPoh Choo v Camden and Islington Area Health Authority* [1980] AC 174  
*Lim Eng Kay v Jaafar b Mohamed Said* [1982] 2 MLJ 156  
*Lim v Camden and Islington Area Heath Authority* (1980) AC 174  
*Lim Cheng Wah v Ng Yaw Kim* [1985] 2 MLJ 82  
*Lim Yik Hua v Eastern & Oriental Hotel* [1988] 3 MLJ 151  
*Ling Kee Ling v Leow Leng Siong* (1994) 3 SLR (R) 394  
*Liong Thoo v. Sawiyah On& Ors.* [1982] 1 MLJ 286  
*Lo Kit Pin v Fu Khet Nyuk (Deceased) Liew Nyuk Jin &Anor.* [1999] 1 LNS 32  
*Loh Chia May v Koh Kok Han* [2009] SGHC 181  
*Loh Hee Thuan v Mohd Zaini bin Abdullah* [2003] 1 AMR 332  
*Lok Yin v Pat Thoo* (1948) 1 MLJ 26  
*London, Chatham & Dover Railway Co. v South Eastern Railway Co.* (1893) AC 429  
*London Street Tramways v London County Council*(1898) AC 375  
*Looi Gnan Peng v Bay Tong Hai* [2005] 1 CLJ 685  
*Low Ah Tow v Yusuf bin Kayap* (1954) MLJ 112  
*Low Kim Yan v Tay Guat Hian &Ors* (1960) MLJ 261  
*Low Kok Tong v Teo Chan Pan*[1982] 1 MLJ 62  
*Low Kow v Arthur Mortson* (unreported)  
*Low You Choy v Chan Mun Kit* [1992] 3 CLJ 1550

## M

*Majlis Peguam Malaysia & 3 Ors.vJoseph Au Kong Weng* [1993] 1 AMR 26  
*Maimunah bte Hassan (Sebagai Wakil Harta Pusaka Rozita Bte Khamis) & Anor.v. Marimuthu s/o Samanathan & Anor.* [1993] 1 CLJ 119  
*Mallett v McMonagle*,(1970) AC 166  
*Malyon v Plummer* (1963) 2 All ER 344  
*Man Mohan Singh s/o Jothirambal Singh v Dilveer Singh Gill s/o Shokdarchan Singh* [2007] SGHC 73, [2007] 4 SLR 843

*Man Mohan Singh s/o Jothirambal Singh and Another v Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd) and Another and Another Appeal* [2008] 3 SLR 735, [2008] SGCA 24  
*Manogaran a/l Meeramuthu & Anor. v Fauziah bte Mat Isa* [2005] 5 MLJ 34  
*Mariam binti Ahmad v Ernesto A Gacad & Anor.* [1986] 1 MLJ 266  
*Mariah bte Mohhammad v Abdullah b Daud* [1990] 1 MLJ 240  
*Marimuthu Velappan v Abdullah Ismail* High Court Malaya, Ipoh [Civil Appeal No: 12-9-05]  
*Martin v Mott* 12 Wheat 19; 6 L. Ed. (US) 537  
*Mary Colete John v Sourt East Asia Insurance Bhd.* [2004] 7 CLJ 314  
*Mat Desa bin Salleh v Ang Hock Lee & Anor.* [1979] 1 MLJ 62  
*Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn. Bhd.*, [1982] 2 MLJ 71  
*Mead v Clarke Chapman & Co. Ltd.* [1956] 1 All ER 44  
*Minachi v Mohd Yusof bin Zakaria* [1978] 2 MLJ 256  
*Mohamed Fami Hassan v Swissco Pte Ltd* [1986] 1 MLJ 461  
*Mohamed Ikhwan v Johar & Anor.* [1966] 1 MLJ 5  
*Mohd Yusof Abdul Ghani v Tee Song Kee & Anor.* [1995] 3 CLJ 738  
*Mokhtar v Arumugam* (1959) MLJ 232  
*Moeliker v A Reyrolle & Co Ltd.* (1977) 1 All ER 9  
*Muhammad bin Hashim v Teow Teik Chai* [1996] 1 CLJ 615  
*Mohammed Noor bin Othman & Ors. v Haji Mohammed Ismail bin Haji Ibrahim & Ors.* [1988] 2 MLJ 82  
*Murtadza bin Mohammed Hassan v Chong Swee Pian* [1980] 1 MLJ 216

## N

*N. Vijaya Kumar v Voon Chen Lim* [1989] 3 MLJ 255  
*Nasib Kaur v Cheah Kit* [1968] 1 MLJ 58  
*Nagarajan a/l Veerapan v Ananthan a/l Parama Sivam* [1989] 2 CLJ 1243.  
*Nani d/o Nagoo v Wayne Gary Williams* [1984] 2 CLJ 51  
*Neo Kim Soon (Administrator of the Estate of Phanna Mannechuang, deceased) v Subramanian a/l Ramanaidu & Anor.* [1995] 3 MLJ 435  
*New Zealand Co Ltd v Ong Choon Lin t/a Syarikat Federal Motor Trading* [1992] 1 MLJ 185  
*Ng Neoh Ha & Ors. v Maniam s/o Suppiah & Ors.* [1994] MLJ 165  
*Ng Siew Choo v Tan Kian Choon* [1990] 2 MLJ 333  
*Ngui Kee Siong v Guan Soo Wee* [1970] 2 MLJ 48  
*Noor Famiza bte Zabri & Anor. v. Awang bin Muda & Anor.* [1994] 2 CLJ 418  
*Noorianti Zainol Abidin & Ors v Tang Lei Nge* [1990] 2 MLJ 242  
*Noraini bte Omar (wife of deceased, Ku Mansur bin Ku Baharom and mother of the deceased, Ku Amirul bin Ku Mansur) & Anor. v Rohani Said and another appeal* [2006] 3 MLJ 150  
*Northman v Barnett Council* [1978] 1 WLR 221

## O

*Ong Ah Long v Dr. Underwood* [1983] 2 MLJ 324  
*Ooi Han Sun & Anor. v Bee Hua Meng* [1991] 3 MLJ 219  
*Osman Effendi b Mahmud & Anor. v Mohd Noh b Khamis* [1998] 4 AMR 3687  
*Owners of MV 'Kohekohe' & Ors v Supardi bin Sipan, (The 'Kohekohe')* [1985] 2 MLJ 422

## P

*Page v Newman* (1829) 9 B.& C. 378  
*Pahang Lin Siong Motor Co. Ltd. v Cheong Swee Khai* [1962] MLJ 29  
*Pang Ah Chee v Chong Kwee Sang* [1985] 1 MLJ 153  
*Panicker v Chee May Kwong* (1958) MLJ 136  
*Parson v Mather & Platt Ltd.* (1977) 2 All ER 715  
*Parvaty & Ors v Liew Yoke Khoon* [1984] 1 MLJ 183  
*Peh Diana v Tan Miang Lee* [1991] 3 MLJ 375  
*Pelita Leisures Sdn Bhd v Tsai Chee Jung* [2007] 8 MLJ 205  
*Pengarah Institut Penyelidikan Perubatan v Intra Devi* [1988] 1 MLJ 18  
*Permodalan Plantations Sdn Bhd v Rachuta Sdn Bhd* [1985] 1 MLJ 157  
*Perumal a/l Manickam v Malaysian Co-Operative Insurance Society Ltd.* [1995] 2 MLJ 144  
*Phillips v South Western Railway Co.* (1879) 4 QBD 406  
*Picket v British Rail Engineering Ltd.* (1979) 1 All ER 774  
*Pillai v Vincent Tan* [2000] 3 AMR 2991  
*PP v Sihabudin bin Haji Salleh & Anor.* [1980] 2 MLJ 273  
*Public Bank Bhd v Hara Industries Sdn. Bhd. & Anor.* [1988] 2 MLJ 618

## Q

*QBE Insurance Ltd. v Thuraisinggam* [1982] 2 MLJ 62

## R

*R v Willans* (1856) 3 Ky 16  
*R J McGuinness v Ahmad Zaini* [1980] 2 MLJ 304  
*Raja Mokhtar v Public Trustee* [1970] 2 MLJ 151  
*Raja Zam Zam v Vaithiyanathan* [1965] 2 MLJ 252  
*Rasidin bin Partojo v Frederick Kiai* [1976] 2 MLJ 214  
*Ratnam & Anor. v The Public Insurance Co Ltd.* (1956) MLJ 152  
*Re Woo Yoke San @ Woo Yoke Sam; Ex P Ocbc Bank (M) Bhd v Crescent Court Management Corp* [2006] 5 MLJ 638  
*Rebecca Mathew v Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd.* [1990] 1 MLJ 443  
*Re Dundee* (1827) 2 Haag. Adm. 137  
*Riches v Westminster Bank Ltd.* (1947) AC 390  
*Robertson v Lestrage* [1985] 1 All ER 950

*Rodocanachi v Mibburn Brothers* (1887) 18 QBD 67  
*Rohani bt Muda v Mohamed Rahim &Anor.* [1979] 1 MLJ 25  
*Rohani Tengah v Zainal bin Lani & Anor.* [2004] 5 MLJ 289  
*Rose v Ford* (1937) AC 826  
*Roslan bin Haji Bongso v Belait United Traction Co Ltd & Anor.* Civil Suit No 83 of 1989  
 High Court  
*Rowley v London and Northern Western Railway Co.*(1861 – 1873) All ER Reprint 823

## S

*Sambu Pernas Construction v Pitchakarran* [1982] 1 MLJ 269  
*Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295  
*Santhanaletchumy Subramaniam v. Zainal Saad & Anor.*[1994] 4 CLJ 192  
*Sarwari a/p Ainuddin v Abdul Aziz a/l Ainuddin* [2000] 5 MLJ 391  
*Saw Poh Wah v Oi Kean Hang &Anor.* [1985] 2 MLJ 387  
*Seaford Court Estates Ltd. v Asher* (1949) 2 KB 481 at 499  
*Secretary of State Education and Science v Tameside Metropolitan Borough Council*  
 (1976) 3 WLR 641  
*Seenivasan &Anor.vLim Yew Seng* (1961) MLJ 22  
*See Soon v Goh Yong Kwang* [1992] 2 SLR 242  
*Shaik Sahied bin Abdullah Bajerai v S S T Sockalingam Chettiar*(1933) AC 342  
*Shamsuddin Shafie v Lim A Kau* [2002] 7 MLJ 326  
*Sharman v Evans* (1977) 138 CLA 563 at 585  
*Sia Cheng Soon &Anor.vTengku Ismail bin Tengku Ibrahim*[2008] 3 MLJ 753  
*Singapore Buss Service (1978) Ltd. v Lim Soon Yong* [1983] 2 MLJ 306  
*Sinnatamby Seahomes Sdn Bhd v Perwira Habib Bank Malaysia Bhd.* [2001] 2 MLJ 450  
*Slater v Hughes* (1971) 1WLR 1438  
*Smith v Manchester Corp.* (1974) 12 KIR 1  
*Sodah bt Haji Saad (sebagai Isteri dan Waris kepada Haji Abdullah bin ahmad, Simati) v*  
*Saleh bin Bakar &Anor..*Rayuan Sivil No K-04-270-2004  
*Soton Bili &Anor..vKhajijah Led & Ors.* [2008] 9 CLJ 304  
*S.S. Maniam v State of Perak* (1957) 23 MLJ 77  
*Stock v Frank Jones (Tipton) Ltd.* (1978) 1 WLR 23  
*Sumarni v Yow Bing Kwong & Anor.* [2008] 3 CLJ 489  
*Sykes v North Eastern Railway Co.* (1875) 44 LJCP

## T

*Takong Tabari v Government of Sarawak & Ors.* [1998] 4 MLJ 512  
*Taff Vale Ry Co v Jenkins*(1913) AC 1  
*Tan bin Hairuddin v Bayeh a/l Belalat*[1992] 2 CLJ 773  
*Tan Cheong Poh & Anor.vTeoh Ah Keow* [1995] 3 MLJ 89  
*Tan Harry v Teo Chee Yeow Aloysius* (2004) 1 SLR (R) 513  
*Tan Kim Chuan v Chandu Nair* [1991] 2 MLJ 42  
*Tan Ngo Hwa v Siew Mun Phui* [1998] SGHC 376  
*Tan Phaik See v Multi Purpose Insurance Berhad* [2004] 6 MLJ 474

*Tan Swee Tiong v Khor Chin Hau* [2002] 1 CLJ 486  
*Tan Teck Boon v Lee Gim Siong* [2011] SGHC 169  
*Tan Teik Leong v Regina*, (1956) MLJ 14  
*Tan Teck Chye v Chua Mee Sieng* [1988] 2 MLJ xxvi  
*Tang Tiew Yong v Wong Joon Hoon* [2002] 7 MLJ 420  
*Tara Singh v T.M. Banerji Sewa Singh* 7 F.M.S.L.R 58  
*Tay Chan & Anor. v South East Asia Insurance Bhd.* [1993] 3 MLJ 760  
*Tay Cheng Yan v Tock Hua Bin and another* [1992] 1 SLR(R) 779  
*Teh Hwa Seong v Chop Lim Chin Moh & Anor.* [1981] 2 MLJ 341  
*Tengku Rosli b. T. Abdul Hamid v Tahir bin Dahuri* [1983] 2 MLJ 287  
*Teoh Teik Chai v Muhammad b Hasyim* (Civil Appeal No P-45-95) (unreported)  
*Teoh Suan Seng v Lew Meng Shin & Anor.* [1982] 2 MLJ 289  
*Terengganu State Economic Development Corporation v Nadeffinco Ltd.* [1982] 1 MLJ 365  
*Tham Yew Heng v Chong Toh Cheong* [1985] 1 MLJ 408  
*Thangavelu v Chia Kok Bin* [1981] 2 MLJ 277  
*The Amalia* (1864) 5 New Rep. 164  
*The Aizkarai Mendi* (1938) P. 263  
*The Northumbria* (1869) L.R. 3 A. & E. 6  
*The Oriental Insurance Co. Ltd. v Reliance National Asia Re Pte. Ltd.* [2009] 2 SLR 385  
*The People's Insurance Co (M) Sdn Bhd v Syarikat Kenderaan Melayu Kelantan Bhd (No 2)* [2001] 1 CLJ 510  
*The Theems* (1938) P 197  
*Ti Huck & Anor. v Mohamed Yusof* [1973] 2 MLJ 62  
*Timong binti Musing (Administatrix of the Estate of Madam bin Musing dcd) v Chui Han Hwa & Anor.* Suit Civil Suit No 336 of 1987 (High Court of Brunei)  
*Tiong Ing Chiong v Giovanni Vinetti* [1984] 2 MLJ 169  
*Tominam bte Tukiman v Toh Kai Chup* [1985] 2 MLJ 345  
*Trans Elite Equipment Rental Sdn. Bhd. v Psc-Naval Dockyard Sdn. Bhd.* [2003] 4 MLJ 30  
*Trubyfield v G.W. Ry. Co.* (1937) 4 All ER 614  
*TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543

## U

*Union Insurance Malaysia Sdn. Bhd. v Chan You Young* [1999] 3 CLJ 517  
*United Hokkien Cemeteries Penang v The Board, Majlis Perbandaran Pulau Pinang* [1979] 2 MLJ 121  
*United Malayan Banking Corp v Sykt Perumahan Luas Sdn Bhd* [1991] 3 MLJ 181

## V

*Visvalingam a/l Arumugam v Toh Gim Choon* [1998] 3 SLR 974

## W

*Wan Bte Mahmood dan Che Gayah bte Hashim v Abdul Zamri bin Abdul Rahman*  
(Federal Court Notis Usus No 08-108-2006)  
*Watkins v O'Shaughnessy* (1939) 1 All ER 384  
*Wee Sia Tian v Long Thik Boon* [1996] 3 SLR(R) 513  
*West & Sons Ltd v Shephard* (1963) 2 All ER 625  
*Weng Kong v Yee Hup Transport Co. & Ors.* [1966] 2 MLJ 234  
*Wong Fook Cheong v Hj. Abd.Khani b. Hj. Abd. Kadir* [1996] 1 LNS 570  
*Wong Kim Lan v Christie Kondalasamy* [2004] SGDC 234  
*Wong Kuee v Pahang Lin Siong Motor Co. Ltd.* (1962) 28 MLJ lxxxiii

## X

*Xu Jin Long v Nian Chuan Construction Pte. Ltd.* [2001] 4 SLR 624

## Y

*Yaacob v Sintat Rent a Car Services (M) Sdn. Bhd & Anor.* [1983] 2 MLJ 283  
*Yaakob Fong v Lai Mun Keong & Ors.* [1986] 2 MLJ 317  
*Yang Salbiah v Jamil bin Harun* [1981] 1 MLJ 292  
*Yap Ami & Anor. v Tan Hui Pang* [1982] 2 MLJ 316  
*Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381  
*Yeap Cheong Hock v Kajima-Taisei Joint Venture* [1973] 1 MLJ 230  
*Yee Boon Heng v Tan Chwee* [1967] 2 MLJ 157  
*Yeng Hing Enterprise Sdn. Bhd. v Datuk Dr Ong Poh Kah* [1988] 2 MLJ 60  
*Yeoh Cheng Han v Official Administrator* [1972] 2 MLJ 7

## Z

*Zaiton Bee Bee Bte Abdul Majeed v Chan Poh Teong* [2010] SLR 6

# CHAPTER I

## INTRODUCTION

### 1.1 BACKGROUND OF STUDY

The advent of industrialized society brought with it massive increase in motor vehicle usage as well as motor vehicle accidents. In exchange for increasing mobility, modern society is paying a hefty price in terms of compensation for personal injury and fatal accident claims arising from motor vehicle accidents. The steep ascending trend was and still is largely due to the rise in the number of motor vehicle accidents and the increasing or rising claim cost per accident.<sup>3</sup> At the home front while the government and various other non-governmental agencies are working hard to reduce the number of motor vehicle accidents, the Malaysian legislature has come up with its own method of controlling the amount of damages by enacting several provisions in the Civil Law Act 1956<sup>4</sup> to regulate the assessment of damages for personal injury and fatal accident claims.

The law on personal injury and fatal accident claims in Malaysia originated from the English Common Law. Being a branch of law that stems from and develops by the courts over centuries, the body of law is essentially uncodified. The application of the law is generally in the hands of the judges guided by the principles handed down by the courts in

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<sup>3</sup> The upward trend in claim cost is contributed by many factors including (but not restricted to) the raise in cost of medical treatment, wages, cost of living, administrative cost, inflation *etc.* which changes with the change in times and circumstances.

<sup>4</sup> (Act 67). Hereinafter referred to as the CLA 1956.

previously decided cases. It 'is largely a matter of imagination but with restriction'.<sup>5</sup> The 'imagination' of the judges, an overstatement certainly, is the 'judicial discretion' where judges are allowed to apply their own reasoning before arriving at a suitable compensation which is just and reasonable to the claimant. The 'restriction' is where the judges are reminded or cautioned not to depart from 'the general run of damages'.<sup>6</sup> In the case of Malaysian judges, the 'general run of damages' has been established through various decisions handed down by the courts either in England or Malaya/Malaysia and the application of the provisions in the CLA 1956.

The first statutory provisions relating to the assessment of damages for personal injury and fatal accident claims in Malaya/Malaysia were introduced by section 3 and 4 of the Civil Law Enactment 1937.<sup>7</sup> The Enactment was repealed and substituted with the Civil Law Ordinance 1956<sup>8</sup> and later the Civil Law Act 1956 (rev 1972).<sup>9</sup> The CLA 1956 (rev 1972) was amended in 1975 and 1984 by the Civil Law (Amendment) Act 1975<sup>10</sup> the Civil Law (Amendment) Act 1984.<sup>11</sup> From 1984 onwards, sections 7, 8 and 28A of the CLA 1956 constitute the only legal provisions in Malaysia which deal with assessment of damages in personal injury and fatal accident claims. These sections not only provide for the cause of action for both personal injury and fatal accident claims,<sup>12</sup> they also provide for the methods of assessment of the damages under various heads.

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<sup>5</sup> Dass, K.S., *Quantum in Accident Cases*, vol. 1 (Kuala Lumpur: Malaysian Law Publishers, 1975), at 9.

<sup>6</sup> *Ibid.*

<sup>7</sup> (F.M.S no 3 of 1937).

<sup>8</sup> (F. of M. No 5 of 1956).

<sup>9</sup> (Act 67). Hereinafter referred to as the CLA 1956 (rev 1972).

<sup>10</sup> (Act A308). Hereinafter referred to as the CLAA 1975. The amendments were consolidated into the CLA 1956 (rev 1972).

<sup>11</sup> (Act A602). Hereinafter referred to as the CLAA 1984. The amendments were consolidated into the CLA 1956 (rev 1972) forming the current CLA 1956.

<sup>12</sup> The cause of action for fatal accident claims was first introduced by the Fatal Accident Act 1846 (UK). The provisions in the Act were adopted into section 3 and 4 of the Civil Law Enactment 1937. The cause of action for personal injury claims is a creature of the Common Law.

However, twenty nine (29) years after the 1984 amendments to the law on personal injury and fatal accident claims, the provisions relating to the assessment of damages for personal injury and fatal accident claims still generate a lot of debates among legal scholars, practitioners, judges and those involved in the insurance industry: most of which are cast somewhat negatively. The fairness and relevancy of the provisions are often questioned and criticized. Similarly, the conflict between the exercise of judicial discretion *vis-a-vis* the strict statutory provisions is also another point of contention.

This dissertation will, as far as practicable, investigates, assesses and evaluates the effects of the current provisions in the CLA 1956 on the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents with special reference to the exercise of judicial discretion and the amount of damages being awarded by the local courts. It will highlight how the current provisions in the CLA 1956 operate in regulating the assessment of damages. Most importantly, it will explore the question of whether the provisions have indeed abolished or fettered the exercise of judicial discretion in the assessment of damages as claimed by many legal scholars and whether the provisions have any effect in reducing the amount of damages being awarded.

This introductory chapter deals with the background of the study, the statement of problem, research objectives, research questions, hypothesis and the significance of the study. It presents a review of the main literatures used as references throughout this research project. It also incorporates the research methodology adopted for data collection and analysis as well as the scope and limitations of the research. Finally, it provides a summary of the discussions in the subsequent chapters.

## 1.2 STATEMENT OF PROBLEM

In 1984, a legislative reform was made to the law on personal injury and fatal accident claims with the passing of the Civil Law (Amendment) Act 1984 (CLAA 1984). The primary aims of the reform are two-folds. First, they are to create uniformity in the assessment of damages for personal injury and fatal accident claims. This was reflected in the Explanatory Statement to the Civil Law (Amendment) Bill which stated that “This Bill seeks to make certain amendments to the Civil Law Act 1956 in view of vast variance of court awards in respect of action for damages for personal injuries including those resulting in death.” Secondly, to control the amount of damages for personal injury and fatal accident claims being meted out by the courts.

The statutory amendments are necessary with the view to ensuring that the damages awarded are fair to both the claimants and insurance industry. The then Deputy Home Minister during the second and third reading of the Civil Law (Amendment) Bill 1984 stated that the amendment to the CLA1956 (rev 1972) was to prevent the past practice of allowing large awards which was injurious to the insurance companies or industry.<sup>13</sup> He later expressed his view in *The Star* on August 14<sup>th</sup>, 1984 that ‘the sole reason for the amendment Act is to restore the old principle of law relating to award of damages – judge not to give full compensation but only fair compensation. VT Singham J in *Marimuthu Velappan v Abdullah Ismail*<sup>14</sup> acknowledged the intention of the Parliament and his Lordship stated:

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<sup>13</sup> Dr Mahathir Mohammed, the Prime Minister (as he was then), in supporting the amendment said in the *Straits Times of Saturday* on September 8<sup>th</sup>, 1984 that that the changes were necessary to prevent Malaysia from becoming a ‘litigious society’ which in the long run affects the society and not the insurance companies alone.

<sup>14</sup> High Court Malaya, Ipoh [Civil Appeal No: 12-9-05]

“However, it is to be observed that amongst the objects for the substantive amendments to the Civil Law Act 1956 which came into effect on 1 October 1984 were first, to make certain the awards in view of the variance of court awards in running down cases for personal injuries and dependency actions and secondly, with the view to protect the financial position of the Insurance Industry in this jurisdiction.”

To do so, the CLAA 1984 had amended sections 7, 8 and 28A of the CLA 1956 (rev 1972). The amendments abrogated the Common Law heads of damages known as damages for loss of earning in lost years, loss of expectation of life under estate claims as well as loss of service and society of the deceased. It also introduced a new head of damages known as bereavement and several provisions which regulate the assessment of damages for loss of support and loss of future earnings.<sup>15</sup> These regulatory provisions include specific conditions which must be fulfilled before the damages can be awarded, limiting factors upon the assessment of annual loss (multiplicand) and specific methods to be used in determining the duration of prospective loss (multiplier).

Comparing with the previous revisions and amendments to the 1956 Act, the CLAA 1984 has made significant changes to the law on personal injury and fatal accident claims in Malaysia. It is, however, unfavourably received by the legal fraternity.<sup>16</sup> Their main objections were based on their assumption that the amendments had significantly reduced the amount of damages to be received by the claimant under personal injury and fatal

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<sup>15</sup> VT Singham J in *Marimuthu Velappan v Abdullah Ismail*, *op. cit.*, commented “The Explanatory Statement to the Civil Law Amendment Bill 1984 states that the amendment is intended to provide specific rules to guide judges in assessing personal injury claims.”

<sup>16</sup> Balan, P., “Deduction of Living Expenses From Damages for Loss of Future Earnings”, (1992) 4 *Journal of Malaysian Comparative Law*, 229 – 235, at 229.

accident claims. Since the amendments had “swept away a substantial amount of Common Law principles which benefited the injured persons and as well as the dependants of the deceased victims,”<sup>17</sup> they have “severely truncated the court’s power to grant compensation adequate to the actual loss suffered”.<sup>18</sup> Because of these changes, the claimants are getting less compensation under the CLA 1956 comparing with what they would have been receiving under the CLA 1956 (rev 1972) and at Common Law.

Another main reason for these criticisms against the 1984 amendments is their effects of the power of the judges in exercising their discretion in the assessment of damages. Presumably the judicial discretion is an inherent and integral aspect of the law on personal injury and fatal accident claims, the introduction of several provisions by the CLAA 1984 regulating the assessment of damages for loss of support and loss of future earnings is viewed by some as the legislative attempt to “fetter judicial discretion in the assessment of damages”<sup>19</sup> and challenge “the full and adequate compensation concept”.<sup>20</sup> The ‘Uncivil Act’ as coined by the Bar Council Malaysia<sup>21</sup> was said to have swiped away a precious and important facet of the legal system by limiting the use of judicial discretion<sup>22</sup> in the attempt to control the upward rise in the awards for these claims. Some were very vocal in expressing their dissatisfaction with the amendments by contending that the CLAA 1984 did “not take into consideration the situation and the local and economic life of the people

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<sup>17</sup> *Ibid.* See also Balan, P. “Damages for Personal Injury and the Civil Law (Amendment) Act, 1984”, (1989) *Journal of Malaysian Comparative Law*, 181 – 191 and Balan, P., “Damages for Personal Injuries and Causing Death: A Critical Survey”, (2004) 31 *Journal of Malaysian and Comparative Law*, 45 – 67.

<sup>18</sup> Dass, K.S., *Quantum of Damages in Personal Injury, Parliament v Common Law, A critical Examination of the 1984 Amendment to the Civil Law Act 1956*, (Kuala Lumpur: Legal Circle Book Sdn. Bhd, 1997), at 5.

<sup>19</sup> Dass, S. Santhana, “Is There a Need for Review after a Decade of the Civil Law (Amendment) Act 1984 on Damages?,” 11<sup>th</sup> *Malaysian Law Conference*, (Kuala Lumpur, 8-10 November 2001).

<sup>20</sup> Reiss, Seth M., “Quantum for Future Loss in Personal Injury and Fatal Accident Cases After the Civil Law (Amendment) Act 1984”, (1985), 2 *Malayan Law Journal* lxii – lxxi, at lxii.

<sup>21</sup> Bar Council Malaysia, “Editorial : The Uncivil Act”, (1984), 17 No 3 Oct *Journal of the Malaysian Bar (INSAF)*, at 3.

<sup>22</sup> Kumaraswamy, Param, “Memorandum on the Civil Law (Amendment) Act 1984”, (1984), 17 No 3 Oct *Journal of the Malaysian Bar (INSAF)*, 4- 9, at 4.

of Malaysia”.<sup>23</sup> There are also many calls for the provisions to be “reconsidered as to whether they meet the aspirations of a caring society”<sup>24</sup> even from the inception of the amended Act.<sup>25</sup>

Despite the above criticisms, a study of the cases over the years shows that the amount of damages being awarded for personal injury and fatal accident claims arising out of motor vehicle accidents are on the upward trend. In 1986, the plaintiff in *Dr S. Underwood v Ong Ah Long*<sup>26</sup> was awarded over RM 1million for pain and suffering, loss of pre-trial earnings and loss of future earnings. On October 5, 1995, a judge in Klang Session Court awarded 2.6 million to the plaintiff also for pain and suffering, loss of pre-trial earnings and loss of future earnings.<sup>27</sup> The Kuantan Session Court’s judge in December 2006 awarded RM 9.8 million to a ten-year old girl who has been paralyzed from the waist down as a result of her injuries. In the same year, an award of RM 8.75 million was given to a magician couple from the United States of America for injuries resulting from a motor accident in 1998.<sup>28</sup> The arguments that the local courts are more conservative comparing with the courts in United States of America and England and that millions-ringgit awards are rare in our local jurisdiction<sup>29</sup> are now the things of the past.

The above cases show that the amount of damages awarded for personal injury and fatal accident claims arising out of motor vehicle accidents is still on an upward trend despite the so-called ‘statutory control’ imposed by the CLAA 1984 over the judges’ discretion in

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<sup>23</sup> Bar Council Malaysia, “Civil Law (Amendment) Act 1984”, (1984) 2 *Current Law Journal*, 209-216, at 209.

<sup>24</sup> Balan, P., *op. cit.*, (2004), at 46.

<sup>25</sup> See article in the *Straits Time of Saturday*, 8<sup>th</sup> September 1984.

<sup>26</sup> (1986) 2 MLJ 246.

<sup>27</sup> S. Radhakrishnan, “Is the Deep Pocket Syndrome is Spreading Out to Asia?” *Trends in Liability Insurance*, (1997) XXVI No 3, *Journal of Malaysian Bar (INSAF)* 62-72, at 68.

<sup>28</sup> “Ten-year-old Girl Awarded Highest Accident Claim In The Country”, *The Star Online*, 4<sup>th</sup> May 2009 <<http://thestar.com.my/news/story>> .

<sup>29</sup> Chelliah, Kandiah, “Should the Award for Damages be Controlled in Order to Prevent the Increase in Insurance Premium?”, (1998) 2 *Journal of the Malaysian Bar (INSAF)*, 30-43, at 36.

the assessment of damages. As such, it is the primary task of this research that, despite opinions and criticisms of the writers referred to above, other than abolishing the judges' discretion in the assessment of damages for loss of earning for lost years, loss of expectation of life under estate claims as well as loss of service and society of the deceased, the provisions in the CLA 1956, after the 1984 amendments, merely regulate the exercise of judicial discretion in the assessment of damages for heads of damages provided in the Act.<sup>30</sup> Even within the parameters of the provisions in the CLA 1956, there are still many areas in the assessment of damages for personal injury and fatal accident claims where the judicial discretion still exists.

Therefore, it is obvious that there is an urgent need for a serious study to be carried out to thoroughly re-analyse and re-evaluate the actual effects of the provisions of the CLA 1956 on judges' discretionary power in assessing the damages for personal injury and fatal accident claims arising out of motor vehicle accidents. It is sincerely hoped that the final outcome of this research work would answer the questions of whether the CLA 1956 has abolished, fettered or merely regulate the discretionary power of the judges. Should there be such effects, this research aspires to re-evaluate them in order to see whether they have any significant effect on the amount of damages being awarded by the Malaysian courts.

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<sup>30</sup> The assessment of damages for other heads of damages (the heads of damages not provided by the CLA 1956) still governed by the Common Law principles and decided cases. Judges generally have a wide discretion in assessing these damages by applying the Common Law principles and decided cases to the fact of the case.

### **1.3 OBJECTIVES OF STUDY**

The primary aim of this research is to critically re-analyse and re-evaluate the existing provisions in the CLA 1956 relating to the assessment of damages for personal injury claims, fatal accident claims including interest for the damages awards with particular reference to the 1984 amendments. The re-analysis seeks to re-evaluate the actual effects of the statutory provisions on the discretionary power of the judges in assessing the damages. It focuses on unravelling the imbroglio, so to speak, as to whether the provisions in the CLA 1956 have indeed abolished or fettered the exercise of judicial discretion in the assessment of a substantial portion of the damages as claimed by many writers. In doing so, this research will first identify the amendments introduced by the CLAA 1984. The next step is to critically re-analyse how the amendments are supposed to operate in regulating the assessment of damages. The re-analysis will then focus on the question of whether the amendments have abolished or restrict the exercise of judicial discretion in the assessment of damages.

Should the re-analysis of those provisions shows that the judges' discretion are in any way abolished, fettered or regulated by the provision, the research will re-examine whether the restrictions imposed on the exercise of judicial discretion have any effect in reducing the amount of damages for personal injury and fatal accident claims arising out of motor vehicle accidents being meted out by the judges. The researcher sincerely hopes to unravel whether the provisions have indeed caused the claimants to get lesser compensation as claimed by many writers.

Towards the end of the thesis, in Chapter 6, the writer will also embark on re-analysing the statutory provisions in Singapore and Brunei with regard to the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents. The re-analysis will attempt to examine how judicial discretion operates within the confines of those provisions in the two neighbouring countries. The legal frameworks pertaining to the law on personal injury and fatal accident claims as well as the current practices in the two countries are chosen due to the proximity of the laws and judicial interpretations<sup>31</sup> on the same between them and Malaysia. Despite having sprung from the same source, the statutory developments in these countries have created some crucial distinctions in the laws on personal injury and fatal claims. These distinctions will serve as useful references in re-analysing the strengths and weaknesses of the statutory provisions in these countries as well as in making comparison between these provisions and the provisions in the CLA 1956. The lessons learnt from the re-analysis and re-evaluation will hopefully be beneficial in devising suitable recommendations for improving the CLA 1956.

On a practical note, the re-analysis of these provisions are also be important considering the frequent traffic from Malaysia going in and out of these two countries. The respective law in Singapore and Brunei on the same will affect local insurance companies in terms of claim pay-outs. Similarly, Malaysians travelling to Singapore and Brunei will also be affected by the respective provisions in the two countries. Due to word limit constraint, it must be pointed out and emphasised that it will be beyond the scope of this work to extend the study on the same into the law of any other common law jurisdiction.

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<sup>31</sup> Chew, Leslie, *et. al.*, “A Comparative Analysis of Various Aspects in the Law of Personal Injuries in Brunei, Malaysia and Singapore”, (2008) 3 *Malayan Law Journal*, i-xliii, at iv.

To reiterate, the ultimate objective of this research is to propose changes to the current CLA 1956 in the hope of strengthening the assessment of damages for personal injury and fatal accident claims in Malaysia. The recommendations will of course take into consideration the vital aspect of the exercise of judicial discretion in interpreting and applying those statutory provisions.

## **1.4 RESEARCH QUESTIONS**

In meeting the objectives of this research project, the following research questions will be specifically looked into and re-analysed in the context of the web of uncertainties surrounding the actual effects of the 1984 amendments to the CLA 1956 on the judicial discretion in the award of damages for personal injury and fatal accident claims arising out of motor vehicle accidents. They are:

1. How do the amended provisions in the CLA 1956 regulate the assessment of damages?
2. In the effort to regulate the assessment of damages, do the amended provisions of the CLA 1956 abolish, fetter or merely regulate the exercise of judicial discretion?
3. If the amended provisions of the CLA 1956 did abolish, fetter or regulate the exercise of judicial discretion, how do they affect amount of damages being awarded?

4. How do the corresponding provisions of the laws in Singapore and Brunei on the same affect the exercise of judicial discretion in the assessment of damages? And, what lessons can Malaysia learn therefrom?

## **1.5 HYPOTHESIS**

This thesis begins with the proposition that the law on personal injury and fatal accident claims at Common Law is intrinsically<sup>32</sup> discretionary. It should remain discretionary despite being regulated by statutory enactments. Therefore, although the exercise of judicial discretion on several aspects of the law on personal injury and fatal accident claims arising out of motor vehicle accidents are affected by the provisions in the CLA 1956, a large portion of the law still allows for judicial discretion. Since the statutory scheme on personal injury and fatal accident claims in Malaysia is enacted to ensure that the quantum of damages awarded by the courts are manageable, *viz.*, fair and reasonable to both the claimants and insurance companies, the thrust of the judges' discretion stays despite some statutory interventions.

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<sup>32</sup> Emphasis added to indicate the intrinsic and flexible nature of judicial discretion in the matter of assessment of damages. This being the case, the upward trend in the quantum of damages is something to be expected and, hence, inevitable. The upward trend itself is always determined by a number of variables which cause the quantum to rise in the face of changing times and circumstances. The quantum of damages is both a question of law and fact and, it must be emphasized, it does not and will not remain static. Neither does it nor will it fall.

## 1.6 SIGNIFICANCE OF THE STUDY

The contributions of this research can be seen from a few angles. First, it serves as an addendum to the existing literature on personal injury and fatal accident claim compensations specifically with regard to claims arising out of motor vehicle accidents. Secondly, from the practical point of view, it proposes amendments and/or improvements to the current CLA 1956. Thirdly and no less significantly, it also renders more clarity and certainty to the grey areas of the law hitherto left open as a result of criticisms against the CLAA 1984.

Malaysia is the only common law country which possesses sections 7, 8 and 28A of the CLA 1956.<sup>33</sup> As such, most of the literature on the law on personal injury and fatal accident claims arising out of motor vehicle accidents is limited mostly to local authors with very little input from other Common Law countries which apply similar fault-based scheme in motor accident claims but without the statutory provisions similar to those of our CLA 1956. The existing literature on this subject mainly focused on the motor insurance law in Malaysia,<sup>34</sup> third party rights,<sup>35</sup> assessment of damages in personal injury and fatal accident claims<sup>36</sup> and compilation of cases on quantum of injuries (case

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<sup>33</sup> Although the Singaporean Civil Law Act (cap 43) and the Brunei Fatal Accident and Personal Injuries Act have provisions which are almost similar to the CLA 1956, there are many areas where there are apparent dissimilarities between the three statutes which set the CLA 1956 apart from the other provisions. For clarification see discussion in chapter 6.

<sup>34</sup> See Nik Ramlah Mahmood, *Insurance Law in Malaysia*, (Kuala Lumpur: Butterworths, 1992). Poh, Chu Chai, *Law of Insurance*, 2<sup>nd</sup> ed., Singapore: Longman, 1990).

<sup>35</sup> See Hamid Sultan Abu Backer, *Janab's Series to Law, Practice and Legal Remedies*, (Kuala Lumpur: Janab (M) Sdn. Bhd., 2005), Sidhu, Mahinder Singh, *Penanggung dan Pengambil Insurans Motor dan Hak Pihak Ketiga*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1997), Chan, Wai Meng, *Third Party Rights in Insurance Law in Malaysia*, (Petaling Jaya: Sweet & Maxwell Asia, 2008), Balan, P., *Perlindungan Pihak ke Tiga Dalam Undang-Undang Insurans Motor*, (1988) *Makalah Undang-Undang Menghormati Ahmad Ibrahim*, 86-113, Baduyah Obeng, *Insurans Motor Pihak Ketiga Yang Diwajibkan di Malaysia*, (1998) 1 *Current Law Journal*, supp i-xxii, Baduyah Obeng, "Hak Pihak Ketiga Untuk Membuat Tuntutan Dan Menguatkuasakan Penghakiman Yang Diawardkan KEPADANYA Terhadap Syarikat Insurans Motor (Insurer)", (1998) 1 *Current Law Journal*, supp xxiii – xl, Baduyah Obeng, *Insurans Motor: Perlindungan Kepada Pengambil Insurans dan Pihak Ketiga*, LLM Dissertation, Faculty of Law, UM 1994/1995 and Chan Wai Meng, *Rights of Third Parties in Insurance Law in Malaysia*, PhD thesis, Faculty of Law, UM 2007.

<sup>36</sup> See Dass, K.S., *Quantum in Accident Cases*. (vol. 1- 3) (Kuala Lumpur: Malaysian Law Publishers, 1975 – 1984), Chan, Shick Chin, *Personal Injury Law Practice and Precedents*, (Kuala Lumpur: Malayan Law Journal, 2001), Nathan, R.K., *Quantum of Damages*, (Kuala Lumpur: Malayan Law Journal, 1991), Nathan, R.K., *Practical Approach To Assessment of Liability and Damages in Tort*, (Singapore: Malayan LawJournal Pte. Ltd., 1986), Syed Ahmad Alsagof, *The Law of Tort in Malaysia and the Syari'ah*, (Gombak, Syed Ahmad S A Alsagof, 2004), Lim, Audrey, et. al, *Assessment of Damages: Personal Injuries and Fatal Accidents* (Singapore: Butterworth, 2001), Verupillai, Jeyaratnam, *Damages: Loss of Expectation of Life Survival and Deductibility*, (Singapore: Malayan Law

citatory).<sup>37</sup> Only a handful of the published literature attempted to critically discuss the effects of the application of sections 7,8,11 and 28A of the CLA 1956 on the law on personal injury and fatal accident claims<sup>38</sup> as well as the amount of damages being awarded by the courts. These literatures are, however, mostly in the form of articles. The discussions are confined to a specific area of the law each and do not cover all aspects of the provisions in the CLA 1956 resulted from the 1984 amendments. The only comprehensive work done so far which focuses on the same subject is a book published by Dass, K.S.,<sup>39</sup> and a paper presented by Muhammad Altaf Hussain Ahangar during a conference in 2008.<sup>40</sup>

There is also a shortage of comparative analysis of the law on personal injury in Malaysia, Singapore and Brunei published. The only literature found so far is an article by Leslie Chew *et al.*, and a book written by Michael F. Rutter. Unfortunately, although the article by Leslie Chew *et al.*, briefly examined the law on personal injury and fatal accident claims these three (3) countries, it did not, however, cover all aspects of the law thereon. It mainly focused on the award for loss of future earnings, loss of future earning capacity and

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Journal, 1984), Dass, S. Santhana, *op. cit.*, (2000), Nasser Hamid, *op. cit.*, (2008), Lim, Heng Seng, *op. cit.*, (1995), Dass, K. S., "Interest on Damages", (1980) 1 *Malayan Law Journal* lxxxv – lxxxvii, S. Radhakrishnan, "Quantum of Damages in Personal Injury Claims" (1995) 3 *Malayan Law Journal* xxix – xl, T.S.T., "Interest in Damages in Running-Down Cases" (1966) 1 *Malayan Law Journal* xxxi-xxxiii, Verupillai, Jeyaratnam, "Loss of expectation of Life and the Living Plaintiff", 1 (1982) *Malayan Law Journal*, lxxix – lxx, Reiss, Seth M., *op. cit.*, (1985).

<sup>37</sup> See Sidhu, Mahinder Singh, *Casebook on Motor Insurance Law in Malaysia and Singapore*, (Kuala Lumpur: International Law Book Services 1995), Simon, Andrew Christopher, ed., *Personal Injury Quantum, Cases and Materials*, vol 1 & 2, Petaling Jaya: LexisNexis Malaysia, 2008), Nasser Hamid and Hamid Ibrahim, eds., *Road Accident Citorator*, (Petaling Jaya: Gavel Publications, 2007).

<sup>38</sup> Dass, K.S., *op. cit.*, (1997), Muhammad Altaf Hussain Ahangar, *Damages Under Malaysian Tort Law: Cases and Commentary*, (Petaling Jaya: Sweet & Maxwell Asia, 2009), Dass, S. Santhana, "Chan Chin Min v. Ibrahim Ismail - the Unsettled Dispute as to Whether the Court Has the Authority to Reduce the Statutory Multiplier in Dependency Claim", (2006) 3 *Current Law Journal*, i-xlili, Balan, P. "Loss of Future Earnings, Loss of Earning Capacity and the Civil Law (Amendment) Act 1984", 17 (1990) *Journal of Malaysian Comparative Law*, 169 – 180, Chelliah, Kandiah, "Section 7(3)(iv)(d) of the Civil Law Act 1956 and Fatal Accident Claims : Does the Multiplier Differ From a Claimant Who is a Parent (s) and One Who is a Spouse with Children?", (1995) 1 *Current Law Journal*, Muhammad Altaf Hussain Ahangar, "Dependability of Dependency Claims: the Malaysian Perspective", (2004) 1 *Malayan Law Journal* xxii – xxxi, Khoo, Guan Huat, "Assessment of Damages in Fatal Accident Claims and a Commentary of the Civil Law (Amendment) Act 1984", (1993) 1 *Malayan Law Journal* cxix – cxxxviii, Muhammad Altaf Hussain Ahangar, "Damages for Loss of Earning in Malaysia: the Need for a Just Multiplier", (2003) *Malayan Law Journal*, lxxxi – xcvi, Reiss, Seth M., *op. cit.*, (1985), S. Radhakrishnan, *op. cit.*, (1995), Balan, P., *op. cit.*, (1989), Balan, P., *op. cit.*, (1992), Balan, P., *op. cit.*, (2004), Bar Council Malaysia, *op. cit.*, (1984).

<sup>39</sup> Dass, K.S., *op. cit.*, (1997),

<sup>40</sup> Muhammad Altaf Hussain Ahangar, "Judicial Responses to Damages Law in Malaysia: An Analysis", 5<sup>th</sup> Asian Law Institute Conference, (Singapore, 22-23 May 2008).

pre-judgment interest.<sup>41</sup> The book written by Michael F. Rutter,<sup>42</sup> on the other hand, although fairly detailed, only covers the law in Malaysia and Singapore without discussing the law in Brunei. Moreover, it was completed in 1993. In the circumstances, an up-to-date and a far more comprehensive and critical work put together by a focal hypothesis is urgently called for whether for the insurance industry or the legal fraternity particularly in Malaysia.

The above are the gaps this research sought to fill. The finding of this research will contribute to the body of literature on the assessment of damages in personal injury and fatal accident claims arising out of motor accident not only in Malaysia but also in Singapore and Brunei.

On a more practical note, a study of the laws in Singapore and Brunei is essential in view of the high frequency of Malaysian vehicles entering Singapore and Brunei and *vice-versa*. Since the law of the country where the accident occurs, *lex loci delicti commissi*, is applicable in the assessment of damages for personal injury and fatal claims,<sup>43</sup> a Malaysian citizen who is involved in a motor vehicle accident in either Singapore or Brunei will be liable to the law applicable there. Similarly, a Singaporean or Bruneian will also be subject to our local law if he or she is involved in a road accident while driving in Malaysia. Although the law in Malaysia, Singapore and Brunei are almost identical, there are a few significant features in the law of each country which set them apart from each other. As such, there is an urgent need for a comprehensive study on the law governing the assessment of damages for personal injury and fatal accident claims arising out of motor

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<sup>41</sup> Chew, Leslie, et al., *op. cit.*

<sup>42</sup> Rutter, Michael F., *op. cit.*

<sup>43</sup> Law of the place where the tort was committed

vehicle accidents in all three (3) countries in order to fully understand the respective strengths and weaknesses of the said laws especially in respect of the exercise of judicial discretion in the assessment of damages in personal injury and fatal accident claims.

The study will also benefit the legislature and policy-makers in enacting or planning for future reforms or amendments to the statutory provisions relating to the assessment of damages as well as claim procedures. Since personal injury and fatal accident claims arising out of motor vehicle accidents comprise the bulk of civil cases in our courts, the statutory provisions on the assessment of damages for personal injury and fatal accident compensation must be sufficiently fair and effective in balancing the rights and obligations of claimants as well as those of the insurance companies. As such, it is important for us to analyse and evaluate the full effects and implications of sections 7, 8 11 and 28A of the CLA 1956 on the judges' discretion in the assessment of damages and the amount of damages being matted out by the courts.

## **1.7 LEGAL FRAMEWORKS STUDIED**

The law pertaining to assessment of damages in personal injury and fatal accident claims originated from the Common Law principles laid down by judicial decisions. The development of the law was not systematic and largely depended on the generally accepted principles of Common Law and the judges' common sense. Realizing the rapid growth in socio-economic conditions and the rigidity of the Common Law, the English Parliament was the first to intervene by introducing statutory provisions which altered selected areas

of the law in the assessment of damages.<sup>44</sup> This helped to remove the rigidity in the Common Law which in certain cases prevented deserving claimants from claiming compensation under tort.<sup>45</sup> The Malaysian, Singaporean and Brunei Parliaments also followed suit with the introduction of their very own respective statute on personal injury and fatal accident claims. Below are the legal frameworks used in this research.

### 1.7.1 Malaysia

The statutory provisions in Malaysia which deal directly with the assessment of damages in personal injury and fatal accident claims are sections 7, 8 and 28A of the CLA 1956. Section 7 governs the assessment of damages for loss of support, section 8 deals with claims by deceased's estate while section 28A governs claims for personal injuries. Section 11 of the CLA 1956 and Order 42 Rule 12 of the Rule of Courts 2012 on the other hand govern the assessment of interest for the damages. Along with the provisions in section 7, 8 and 28A of the CLA 1956, the Malaysia judges also use their discretion in assessing damages to be awarded based on the Common Law principles, decided cases and the submission of the parties to suit the facts of the case. The application of Common Law principles is made possible by Section 3 of the CLA 1956 which allows the application of Common Law and the rules of equity administered in England as at 7<sup>th</sup> April 1956 whenever there is a lacuna in the local law.<sup>46</sup>

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<sup>44</sup> See the Fatal Accident Act 1846, the Law Reform (Miscellaneous Provisions) Act 1934 and the Administration of Justice Act 1982.

<sup>45</sup> E.g.: the maxim *actio personalis moritur cum persona* which extinguish any causes of action vested on the deceased once he passed away.

<sup>46</sup> Chan, WM., *op. cit.*, (2008) at 7, Wu, MA, *The Malaysian Legal System* (3<sup>rd</sup> ed.), (Petaling Jaya: Pearson, 2005), at 123-138. The cut-off date is different for Sabah and Sarawak. However, one may question the wisdom of this provision on the cut-off date.

### **1.7.2 Singapore**

The Civil Law Act (cap 43)<sup>47</sup> is the main statute that deals with assessment of damages in personal injury claims in Singapore. Similar to Malaysia, Singapore also applies the Common Law principles and previously decided cases to supplement the provisions in sections 10,11, 20, 21 and 22 of the CLA (cap 43) whenever necessary. The Application of English Law Act (cap 7A) allows the English Common Law and principles of equity applicable in England as at 12<sup>th</sup> November 1993 which has been part of the Singaporean law to continue to be applicable in Singapore subject to qualifications of suitability to the circumstances of Singapore and its inhabitants.

### **1.7.3 Brunei**

Contrary to Malaysia and Singapore, Brunei does not have Civil Law Act. The law governing the assessment of damages for personal injury and fatal accident claims in Brunei is provided in the Fatal Accident and Personal Injuries Act (cap 160).<sup>48</sup> The Act abolishes the application of the English statutes in Brunei. Despite not having a Civil Law Act, the provisions in sections 3, 4, 6, 11, and 12 of the Fatal Accident and Personal Injuries Act (cap 160) are very much similar to the provisions in the Singaporean CLA (cap 43). Along with the Fatal Accident and Personal Injuries Act, the Common Law is also applicable in Brunei by virtue of the Application of Law Enactment (cap 2) and Brunei's special arrangement with the government of United Kingdom which placed the Judicial Committee of the Privy Council as the final appellate court for civil cases in

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<sup>47</sup> Hereinafter referred to as the CLA (cap 43)

<sup>48</sup> Hereinafter referred to as the Fatal Accident and Personal Injuries Act.

Brunei.<sup>49</sup> Since Brunei's departure from relying on the English statutes is fairly recent, the assessment of damages in personal injury and fatal accident claims in Brunei are very much influenced by the assessment of damages in England.

## 1.8 LITERATURE REVIEW

A significant number of publications on the law on personal injury and fatal accident claims have been published by local and foreign authors. However, since a large facet of the law relating to the assessment of damages for these claims in Malaysia is distinctly different from those applicable in other countries, the literature written by foreign authors such as those from England, Hong Kong and Singapore are relevant to this research only in respect of their discussion on the assessment of damages based on the Common Law principles. As such, the works of Peter Cane,<sup>50</sup> Harold Luntz,<sup>51</sup> and A.I Ogus,<sup>52</sup> Mark Lunney, Ken Oliphan,<sup>53</sup> Harvey McGregor<sup>54</sup> and David Kemp<sup>55</sup> for example are only relevant for the general discussion on the assessment of damages for the heads of damages not provided for by sections 7, 8 and 28A of the CLA 1956.

Due to the differences in the statutory provisions between Malaysia and other countries, this research relies mostly on literature written specifically on Malaysian law on personal

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<sup>49</sup> See the Brunei's Supreme Court (Appeal to Privy Council) Act (cap 158).

<sup>50</sup> Cane, Peter, *Atiyah's Accidents, Compensation and the Law* (Butterworth : London, 1993).

<sup>51</sup> Luntz, Harold, *Assessment of Damages for Personal Injury and Death*, 3<sup>rd</sup> ed., (Melbourne: Butterworth, 1990).

<sup>52</sup> Ogus, A. I., *The Law of Damages*, (London, Butterworth, 1973).

<sup>53</sup> Lunney, Mark and Ken Oliphan, *Tort Law Text and Materials*, (Oxford: Oxford University Press, 2000).

<sup>54</sup> McGregor, Harvey, *McGregor on Damages*, (London: Sweet & Maxwell, 2003).

<sup>55</sup> Kemp, David and Peter Mantle, *Damages for Personal Injury and Death*, 7<sup>th</sup> ed., (London: Sweet & Maxwell , 1999) and Kemp: David, *The Quantum of Damages*, (London: Sweet & Maxwell, 2004).

injury and fatal accident claims assisted by some literature on the laws in Singapore and Brunei. The literature from Singapore and Brunei are relevant in view of the considerable similarities between the CLA 1956, CLA (cap 43) and the Fatal Accident and Personal Injuries Act. However, since several pertinent provisions in the CLA 1956 are absent in the CLA (cap 43) and the Fatal Accident and Personal Injuries Act, the use of the literature on the law in Singapore and Brunei is generally confined to the discussion in chapter six (6). Due to the impracticability of including all the literature in an extensive manner, only the most important are reviewed in this section.

A classic literature on the assessment of damages in personal injury and fatal accident claims in Malaysia is found in the works of K.S. Dass.<sup>56</sup> The author provides a complete discussion on the method of assessment of damages in three (3) volumes. The books not only discuss the law and principles applicable in the assessment of damages, they also provide list of comparable cases in which the damages were awarded. Unfortunately, since the final volume of the book was published in 1984, the discussion in the books is based on the CLA 1956 (rev 1972) and the Common Law principles which were applicable in Malaysia at that time. The enactment of the CLAA 1984 had made the books partially obsolete since the CLAA 1984 had altered many aspects of the law discussed in the books. As such, there is a huge gap between the law as applicable now and the law stated in the books.

The books written by R.K. Nathan,<sup>57</sup> S. Santhana Dass,<sup>58</sup> Lim Heng Seng,<sup>59</sup> and Chan Shick Chin<sup>60</sup> are all books which discuss the current law on personal injury and fatal

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<sup>56</sup> Dass, K.S., *op cit.*, (1975 – 1984).

<sup>57</sup> Nathan, R. K., *op. cit.*, (1991) and Nathan, R. K., *op. cit.*, (1986).

accident claims. The discussions however focus on the method of assessment based on the respective head of damages rather than the actual analysis of the provisions in the CLA 1956. The same approach was also adopted by S. Radhakrishnan,<sup>61</sup> in his article published in the Malayan Law Journal. These publications, although invaluable in term of explaining the basis of assessment and the ‘grey areas’ in the law, were published some years ago. As such, they did not contain the more recent decisions such as those of *Ibrahim bin Ismail & Anor. v Hasnah bte Puteh Imat*,<sup>62</sup> *Looi Gnan Peng v Bey Tong Hai*,<sup>63</sup> and *Sumarni v Yow Bin Kwong & Anor.*<sup>64</sup> which have huge impact on the assessment of damages in personal injuries and fatal accident claims in Malaysia.<sup>65</sup>

The Bar Council Malaysia,<sup>66</sup> Seth M. Reiss,<sup>67</sup> Param Kumaraswamy<sup>68</sup> and Khoo Guan Huat,<sup>69</sup> took a different approach to the discussion by focusing on the provisions in the CLA 1956. Unfortunately, the analysis centred more on the issue of whether the provisions are just to the claimant rather than the issue of the application of judicial discretion *vis-a-vis* the provisions in the Act. The discussions are quite brief considering that they are in form of articles published in legal journals. Thus, limited and not comprehensive enough to cover all aspects of the law.

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<sup>58</sup> Dass, S. Santhana, *op. cit.*, (2000).

<sup>59</sup> Lim, Heng Seng, *op. cit.*, (1995).

<sup>60</sup> Chan, Shick Chin, *op. cit.*, (2001).

<sup>61</sup> Radhakrishnan, S., *op. cit.*, (1995).

<sup>62</sup> [2004] 1 CLJ 797.

<sup>63</sup> [2005] 1 CLJ 685.

<sup>64</sup> [2008] 3 CLJ 489.

<sup>65</sup> Muhammad Altaf Hussain Ahangar, *op. cit.*, (2009).

<sup>66</sup> Bar Council Malaysia, *op. cit.*, (1984).

<sup>67</sup> Reiss, Seth M., *op. cit.*, (1985).

<sup>68</sup> Kumaraswamy, Param, *op. cit.*, (1984).

<sup>69</sup> Khoo, Guan Huat, *op. cit.*, (1993).

The more recent published book on the subject of assessment of damages for personal injury and fatal accident claims is written by Nasser Hamid.<sup>70</sup> Realizing the divergence of judicial opinions and interpretation with regard to the assessment of damages, the book focuses on how the provision in the CLA 1956 is to be applied rather than explaining the individual head of damages or discussing the issue of relevancy or fairness of the provisions. The author discusses the interpretation of the wordings in the provisions such as the terms shall, living expenses, wife, gratuity *etc.* The discussion also includes some related issues pertaining to the wording used in the provisions such as the right of a ‘wife’ married under customary marriage to the claim for loss of support, the claim for engaging a housekeeper in exchange for the claim for loss of service of wife and the ‘modern trend’ in assessing living expenses. Most importantly the book also contains subject search which includes relevant cases as illustrations as well as the full text of several important decisions in personal injury and fatal accident claims.

An excellent discussion on the application of the provisions in the CLA 1956 in the assessment of damages in personal injury and fatal accident claims is provided by the esteemed KS Dass.<sup>71</sup> The book critically scrutinizes the effects of the amendments made to CLA 1956 (rev 1972) by the CLAA 1984. KS Dass opined that although the amendments had restricted the power of the judges in the assessment of damages by abolishing several Common Law heads of damages and providing conditions prior to the award for loss of support and loss of future earnings can be awarded, the provisions nevertheless fail to prevent judges from allowing large awards. He concluded that “in many cases, claimants were left without being properly compensated while the undeserving is rewarded in

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<sup>70</sup> Nasser Hamid, *op. cit.*, (2008).

<sup>71</sup> Dass, K. S., *op. cit.*, (1997).

abundance”.<sup>72</sup> He also highlighted several grey areas in the Act whereby different interpretations other than those intended by the Parliament can be adopted. The ambiguities in the terms ‘good health’, ‘receiving earning before the injury or death’ as well the cut-off age for loss of support and loss of future earnings were some of the several “follies” in the Act which have negated the intention of the Parliament in regulating the assessment of damages. The most interesting aspect in the book is his proposed Bill to amend the provisions in section 7, 8 and 28A of the CLA 1956. This proposed Bill took into consideration the problems in the provisions which he had highlighted in the book.

KS Dass’s opinion on the amendments made by the CLAA 1984 is to some extent echoed by other authors whose main interest is on personal injury law. Professor P. Balan, in several of his articles commented that the conditions set by section 7 and 28A of the CLA 1956 imposed severe restrictions on the judges in awarding quantum for loss of dependency and loss of future earnings. His criticism primarily rested on the facts that the requirements of good health and earning income at the time of injury are not practicable in modern days.<sup>73</sup> He also stated that the sections had removed many Common Law principles which benefited the injured persons or dependants of deceased persons. In his other article,<sup>74</sup> Balan concluded that despite the commonly accepted interpretation, the ambiguity in the wording of section 28A of the CLA 1956 may imply that the section was not meant to be applicable for persons over the age of fifty (55), persons not in good health and also persons claiming for loss of future earning capacity. As such, the assessment of award for these persons rest solely at the discretion of the judges. He also opined that

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<sup>72</sup> *Id* at 9.

<sup>73</sup> Balan, P., *op. cit.*, (2004).

<sup>74</sup> Balan.P., *op. cit.*, (1990).

living expenses must strictly be proven or admitted. Otherwise, the compulsory deduction provided by section 28A of the CLA 1956 is not applicable.<sup>75</sup>

The book written by Michael F. Rutter<sup>76</sup> is also very crucial for this research. Although Rutter mainly discusses the methods in the assessment of damages according to the separate head of damages, his discussion also includes some comments on the effect of the 1984 amendments to the law on personal injury and fatal accident claims in Malaysia. Similar to Dass and Balan, Rutter also is of the opinion that the provisions in the CLA 1956 contain some ambiguity in the wordings and sometime lead to many harsh consequences which might not be the intention of the legislature while enacting the amendment.<sup>77</sup> The most important contribution of this book to the research is the discussion on the law in Singapore. Since both Malaysian and Singaporean law on personal injury and fatal accident claims are discussed simultaneously, the book has contributed much in the researcher's effort to critically analyse the law in the two countries.

Professor Muhammad Altaf Hussain Ahangar also had written several interesting articles criticizing the fairness of the provisions in the CLA 1956.<sup>78</sup> His arguments are based on the limited concept of dependants, unrealistic meaning of loss of support, unjust reduction of multiplier and unreasonable deduction in the name of contingencies leading to injustice to the claimants. Altaf is partly in disagreement with Dass's proposed Bill. One of his arguments is that it is unjust to bar a person at the age seven (7) to twenty three (23) that have yet to earn income from claiming loss of future earnings if he did not possess at least

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<sup>75</sup> Balan, P., *op. cit.*, (1992).

<sup>76</sup> Rutter, Michael F., *op. cit.* (1993).

<sup>77</sup> *Id.* at 646 – 665.

<sup>78</sup> Muhammad Altaf Hussain Ahangar, *op. cit.* (2004), Muhammad Altaf Hussain Ahangar, *op. cit.*, (2003).

a university education or vocational training. He also disagreed with Balan's and Rutter's interpretations of section 28A above. He opined that the section is all embracing and comprehensive, thus applicable to all. His most recent publication is a book commenting on the cases which were decided based on the provisions in the CLA 1956.<sup>79</sup> The book, although invaluable especially in respect of the author's critical scrutiny of the grounds of judgments in the cases reported, only deals with the post 1984 law. It does not offer any insight on the law prior to the CLAA 1984 thus making it difficult for the reader to understand the problem of the old law and the purpose of the provisions in the CLA 1956. Similarly the book also does not explain the legal principles relating to the law on personal injury and fatal accident claims.

As evidenced above, although there are many literatures on the subject of personal injury and fatal accident claims available, most of the material which critically evaluate the effects of sections 7, 8, and 28A of the CLA 1956 are in forms of articles. Therefore the scope of discussions is limited to specific area only. This is understandable due to the limited capacity of an article. To the researcher's knowledge, there is no single concise material which had ventured to critically evaluate the actual effects of the provisions in section 7, 8 and 28A of the CLA 1956 on the discretionary power of the judges in the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents. There is also no specific literature which actually examines the effects of the provisions on the amount of damages awarded in these claims.

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<sup>79</sup> Muhammad Altaf Hussain Ahangar, *op. cit.*, (2009).

Similarly, other than the book by Michael F. Rutter<sup>80</sup> and an article by Leslie Chew, *et. al.*,<sup>81</sup> there is an absence of a concise effort in analysing the law in Singapore and Brunei on the subject. Unfortunately, the book by Rutter was published in 1993, thus the discussion and cases referred to were only up to that year. More recent development in the law such as the 2011 and 2012 amendments to the law on interest in Malaysia is not available. The book, although contains some reference to Brunei cases, did not discuss on the law in Brunei. The article by Leslie Chew, *et. al.*, is the most recent publication which ventures to compare the law applicable in Malaysia, Singapore and Brunei. The authors focus on the assessment of damages for loss of future earnings and loss of future earning capacity (with special reference to a Brunei case of *Saurabh Gurung v Julia Maksin*).<sup>82</sup> There is also a comparative analysis of the issue of pleading general damages for pain and suffering in statement of claim, pre-judgment interest and assessment of damages for specific body part in the three (3) countries. The article however does not discuss the assessment of damages in on fatal accident claims.

## 1.9 RESEARCH METHODOLOGY

The research is a doctrinal legal research involving systematic inquiry into the current or novel legal issues. It adopts two approaches: the first approach involves library research whereby information is gathered from primary sources and secondary sources. The information gathered via the library research is crucial in analysing the effects of the

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<sup>80</sup> Rutter, Michael F. *op. cit.*, (1993)

<sup>81</sup> Chew, Leslie, *et. al.*, *op. cit.*, (2008).

<sup>82</sup> [Civil Suit No 18 of 2005].

provisions in the CLA 1956 on the exercise of discretionary power of the judges in the assessment of damages in personal injury and fatal accident claims arising out of motor vehicle accidents. The second approach is via interviews with several practitioners and representatives from the insurance company. Although the interviews only play a minor role in the research, the findings nevertheless are crucial in order gain practical insight into the problems faced by the practitioners and the insurance companies with regard to the application of sections 7, 8, 11 and 28A of the CLA 1956. At the same time, the interviews also enable the researcher to triangulate the findings of the research as well as to ascertain the practicability of the suggestions in the final chapter of the thesis.

### **1.9.1 Data Collection**

Primary data was collected from Acts, Rules of Court and Practice Directions. Aside from the published copy of the above, publication from online sources such as the Attorney General Chambers and the Bar Council of Malaysia were continuously referred to for an updated version of the provisions involved. Apart from the current Federal and State Laws, these databases also provide excess to older laws such as repealed Federal and State Laws, Laws of the Federated Malay and Unfederated Malay States, Laws of the Straits Settlements *etc.* Similarly, databases provided by the Attorneys General Chambers of Singapore and Brunei were also utilized in the same way.

Case laws and grounds of judgment for personal injury and fatal accident claims arising out of motor vehicle accident cases were also gathered as part of the primary data for this thesis. Most of the cases were retrieved from the Malayan Law Journal, Current Law

Journal, All Malaysia Reports, Personal Injury Reports, Singapore Law Reports and Brunei Law Reports. Online databases such as LexisNexis online database and CLJ Law subscribed by the University of Malaya and University Utara Malaysia were often utilized. Since it is beyond the objective of this study to compare every aspect of the law on personal injury and fatal accident claims in Malaysia, Singapore and Brunei, the case laws were confined (as far as possible) to cases relating to motor vehicle accidents only. They were referred to for the purpose of interpretation of statutes and legal principles as well as understanding the basis behind the decisions of the courts. Since the provisions in section 7,8,11 and 28A of the CLA 1956 is applicable in all personal injury and fatal accident claims, the selection of cases referred had to be done meticulously to avoid confusions with other types of personal injury and fatal accident claims. This is due to the fact that there are certain elements in the law which set the motor vehicle accidents cases with other type of accident cases.<sup>83</sup>

Secondary data was gathered from published materials such as books and articles from journals, published and unpublished academic papers and conferences, on-line databases and internet sites. JSTOR, LexisNexis Academic Universe and LexisNexis Total Research System, Westlaw and CLJ Law were among the frequently used online databases. Similarly, the research also relied on online publications in Bank Negara Malaysia, the Bar Council of Malaysia and Persatuan Insurans Am Malaysia's official websites for data on claim pay-outs, financial reports, Practice Directions and any recent publications relating to personal injury and fatal accident claims arising out of motor vehicle accidents. These websites provide information on motor vehicle insurance which are accessible but not

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<sup>83</sup> For example, the position of the Court of Appeal as the final appellate court and the unlimited jurisdiction of the Session Court in all personal injury and fatal accident claim cases arising out of motor vehicle accidents.

generally known by the public. Other references in hard copy volumes such as *Halsbury Law of England*,<sup>84</sup> *Mallal's Digest*<sup>85</sup> and *Halsbury Law of Malaysia*<sup>86</sup> were also frequently referred. The same method is also used in evaluating the laws and practices being applied by judges in Singapore and Brunei.

The researcher also conducted several interviews with legal practitioners representing claimants and insurance companies as well as the officers (both executive and managerial levels) from several insurance companies. The interviews were done in order to collect the practitioner's and the officer's perception on the effects of sections 7, 8, 11 and 28A of the CLA 1956 on the judge's discretion in the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents. At the same time, the interviews also enable the researcher to gather their insight on the effects of the provisions on the amount of damages being awarded by the courts. 1956. The most crucial purpose of the interviews is to find out the practicability of the researcher's suggestions. Interview in legal research is necessary in order to find out about the practical application of certain rules of law, cause and effect, current status, trend or perceptions or for the purpose of learning the views of expert in respect of certain legislation.<sup>87</sup>

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<sup>84</sup> "This is the best encyclopedia of English Law available in a set of volumes." Anwarul Yaqin, *Legal Research and Writing*, (Petaling Jaya: LexisNexis, 2007), at 75.

<sup>85</sup> "The most significant digest on Malaysian and Singapore cases is the Mallal's Digest which summarizes the reported cases of the Malaysian and Singapore superior courts and appeals to the Privy Council." *Ibid*, at 73.

<sup>86</sup> "The Malaysian version of encyclopedia called the Halsbury's Law of Malaysia is unique because it encompasses both the common law and Islamic Law." *Ibid*, at 76.

<sup>87</sup> Chatterjee, C., *Methods of Research in Law* (2<sup>nd</sup> ed.), (London: Old Bailey Press, 2000).

### **1.9.2 Data Analysis**

This research applied a two (2) method of data analysis,<sup>88</sup> namely descriptive and analytical methods. The descriptive method was used to examine and explain the provisions in the CLA 1956 (rev 1972) and the problems relating to the application of the provisions in respect of the exercise of judicial discretion in the assessment of damages. The analytical method was used to breaks the provisions in the current CLA 1956 into separate categories to facilitate the task of analysing the effects of the provisions on the exercise of judicial discretion in assessing damages for personal injury claims, fatal accidents claims as well the assessment of pre and post judgment interest. Analytical approach was also adopted in analysing the provisions in Singapore and Brunei. By employing these methods of data analysis, the researcher was able to analyse how the provisions and practices in the assessment of damages for personal injury and fatal claims arising out of motor accidents claims operate in social context.<sup>89</sup> This enables the researcher to evaluate the statutory provisions, principles and considerations adopted by the judges in assessing the amount of damages to be awarded.

## **1.10 SCOPE OF RESEARCH**

Although the law relating to personal injury and fatal accident claims is applicable for all kinds of accident claims such as personal injury insurance, medical negligence, workmen

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<sup>88</sup> “Where the aim of a study is to prepare a dissertation or thesis, the research in most cases involves the use of more than one approach....Most legal studies follow exploratory, descriptive, explanatory, historical, analytical, critical or comparative approach, or a combination of some or all.”Anwarul Yaqin, *op. cit.*, at 19 and 49.

<sup>89</sup> Anwarul Yaqin, *op. cit.*, at 10.

compensation and many other related disciplines, this research focuses solely on the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents. The cases cited throughout the thesis are as far as possible claims arising out of motor vehicle accident. The selection of cases is crucial since there are several features in the law on assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents which set the motor vehicle accident cases apart from other types of accident cases. However there are several instances where non-motor accident cases are cited due to necessity or the relevancy of the cases to the discussion.

## **1.11 ORGANIZATION OF CHAPTERS**

The thesis is divided into seven (7) chapters. The following is a description of the focal issues addressed in each of the chapters:

### **1.11.1 Chapter 1**

The introductory chapter discusses the outline of this thesis covering the background of the area being studied, the problem statement, the objectives of the research and its significances. It also presents the research questions, the scope and limitation of the research, the research methodology as well as the methods adopted for data collection and analysis. Finally, it provides the outline of the whole thesis and a summary of the discussions in the following chapters.

### **1.11.2 Chapter 2**

This chapter is divided into three (3) main parts. The first part discusses the subject of compulsory motor insurance. It explains the provisions in the Road Transport Act 1987<sup>90</sup> which provide statutory assurance<sup>91</sup> to the victims of motor vehicle accidents that they will be compensated for injuries and losses suffered out of motor vehicle accidents. It also explains the contractual obligation of the insurer to compensate the claimants in a motor vehicle claims. The second part of the chapter focuses on the introduction to the law on personal injury and fatal claims in Malaysia. Since detailed discussions on the provisions in the CLA 1956 on this matter are in the following chapters, this part only discusses the origin and the development of the law on personal injury and fatal accident claims in Malaysia, covering both the Common Law and the CLA 1956. The final part of the chapter explores the application of judicial discretion in the assessment of damages for personal injury and fatal claims in Malaysia. It begins with the defining the concept of judicial discretion followed by a discussion on how judicial discretion operates within the purview of the provisions in the CLA 1956 (rev 1972). The provisions in the CLA 1956 (rev 1972) is examined in the effort to understand the problems with the application of the provisions in the CLA 1956 (rev 1972) in relation to the application of judicial discretion as well as the reasons behind the 1984 statutory amendments.

### **1.11.3 Chapter 3**

This chapter discusses the effects of section 28A of the CLA 1956 on the assessment of damages and the amount of damages in personal injury claims arising out of motor vehicle

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<sup>90</sup> (Act 333).

<sup>91</sup> Although the cause of actions for personal injury and fatal accident claims are derived from tort, the provisions in the Road Transport Act 1980 ensure that there will be enough funds available to pay to the claimants (from the insurance company insuring the vehicle at fault) and the claimant have direct against the insurance company insuring the vehicle at fault.

accidents. The section regulates the assessment of damages for loss of expectation of life, pain and suffering as well as loss of future earnings.<sup>92</sup> Rather than discussing the heads of damages individually, the chapter deals directly with the effects of the amendments made by the CLAA 1975 and the CLAA 1984 to the CLA 1956 (rev 1972) on the exercise of judicial discretion in the assessment of damages and the amount of damages being awarded by the courts. The discussion ranges from the effects of the abolition of the award for loss of expectation of life and loss of pre-trial earnings, the introduction of the pre-conditions for the award for loss of future earnings, the itemization of benefits to be excluded in the assessment of multiplicand, the effects of section 28A on the assessment of damages for loss of earning capacity to the imposition of fixed multiplier in the assessment of damages for loss of future earning capacity.

#### **1.11.4 Chapter 4**

This chapter is a continuation of the previous chapter. It however focuses on the analysis of section 7 and 8 of the CLA 1956. The sections provide for the assessment of damages in fatal accident claims. Using similar approach as the previous chapter, it directly deals with the effect of the provisions on the exercise of judicial discretion on the assessment of damages for fatal accident claims arising out of motor vehicle accidents and the amount of damages being awarded by the courts. The discussion touches on the effects of the abolition of the award for loss of service and consortium, loss of expectation of life and loss of earnings in the lost years. It also discusses the effects of the introduction of the award for bereavement, the substitution of the award for ‘loss arising out of death’ with ‘loss of support’, the itemizations of death benefits to be excluded in the assessment of

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<sup>92</sup> The section is also said to indirectly regulate the assessment of damages for loss of pre-trial earnings and loss of earning capacity.

multiplicand for loss of support, the imposition of the pre-conditions for loss of support and the introduction of the fixed multiplier in assessing damages for loss of support.

### **1.11.5 Chapter 5**

This chapter discusses the law on interest in Malaysia and several related issues on the same subject. It starts with defining interest and its purpose followed by discussing the development of the law on interest which mainly focuses on section 3 (1) of the English Law Reform (Miscellaneous Provisions) Act 1934 and the precedence set by *Jefford & Anor. v Gee*.<sup>93</sup> This chapter then examines the law on interest in Malaysia. The provisions in section 11 of the CLA 1956 and the rules of courts (before and after the introduction of Rules of Courts 2012) are analysed in order to determine the effects of the provisions on the assessment of interest for damages in personal injury and fatal accident claims arising out of motor vehicle accidents. The final part of the chapter elaborates three primary issues which originate from the interpretation of the provisions relating to the award of interest i.e. interest as a matter of right, variation of interest rate and compounded interest.

### **1.11.6 Chapter 6**

This chapter deals with the analysis of the law relating to personal injury and fatal accident claims in Singapore and Brunei. It starts with an exploration of the development of the Common Law, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act. The discussion is then followed by the analysis of the effects of the provisions in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act in respect of personal injury and fatal

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<sup>93</sup> (1970) 2 QB 130.

accident claims. The effects of the abolition of the award for loss of expectation of life<sup>94</sup> and loss of earnings in the lost years, the absence of provisions relating to the assessment of damages for loss of earnings,<sup>95</sup> the minimal provisions relating to the assessment of damages for loss of support, the introduction of the award for bereavement, maintaining the award for loss of service of wife or child and loss of consortium of wife and the introduction of the award for provisional damages.

The law applicable in these countries is initially very much similar to Malaysia. The enactment of the CLAA 1984 later sets the Malaysian law apart from the law applicable in either Singapore or Brunei. Singapore and Brunei still relies heavily on the Common Law principles with regard to the assessment of damages since most of their provisions relating to personal injury and fatal accident claims in their respective Acts are very much similar to the English's Administration of Justice Act 1982. As such, the provisions relating to the assessment of damages especially with regard to the award for loss of future earnings and loss of support in the CLA (cap 43) and the Fatal Accident and Personal Injuries Act are essentially different from the CLA 1956.

### **1.11.7 Chapter 7**

This chapter concludes the thesis by providing the findings of the research. It also presents the possible reforms that may be put in place to overcome the problems identified in the provisions of the CLA 1956.

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<sup>94</sup> For both personal injury and estate claims.

<sup>95</sup> Which includes loss of pre-trial earnings, loss of future earnings and loss of future earning capacity.

## 1.12 CONCLUSION

At the outset, the researcher is of the view that the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents in Malaysia is still at the discretion of the presiding judge or judges *albeit* somewhat restrained due to statutory intervention. This discretion, of course, is not absolute and can never be one. The judges *albeit* operating within the statutory parameters of section 7, 8, 11 and 28A of the CLA 1956 and the Common Law principles thereon, nevertheless still retains his or their discretion in the award of damages. Moreover, they have to take into consideration the peculiar facts of each case and the submissions of the parties involved. Many writers had criticized the provisions in the CLA 1956. They contended that the introduction of the CLAA 1984 had abolished or fettered the discretion of the judges to the detriment of the claimants. Although the 1984 amendments constitute some departure from the long accepted norms and principles, it is still argued that the assessment of damages for personal injury and fatal accident claims is better served by applying the discretion of the judges considering the complexity of the matters involved and the multitude of considerations that need to be factored into the computation before damages can be fairly assessed and awarded. The ‘judicial discretion’ referred to, which constitutes the heart of this thesis, is that which is left after the 1984 amendments to the CLA. The researcher will carefully set out in the coming chapters to prove and justify her hypothesis.

## **CHAPTER 2**

### **JUDICIAL DISCRETION IN THE ASSESSMENT OF DAMAGES FOR PERSONAL INJURY AND FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS**

#### **2.1 INTRODUCTION**

The cause of action for personal injury and fatal accident claims originates from tort. However, in personal injury and fatal accident claims arising from motor vehicle accidents, the Malaysian legislature has supplemented this cause of action with statutory provision by making it compulsory for all vehicles travelling on Malaysian roads to have motor insurance policy. The Road Transport Act 1987<sup>1</sup> requires all motor vehicles users to insure their vehicle against certain third party risk.<sup>2</sup> The compulsory motor insurance policy ensures that there will be sufficient fund to pay the damages to the claimants.

The Civil Law Act 1956<sup>3</sup> is the only legislative provision governing the assessment of damages in all civil litigation involving personal injury and fatal accident claims. The current provisions in the Act is the result of two major amendments to the Civil Law Act 1956 (rev 1972)<sup>4</sup> done via the Civil Law (Amendment) Act 1975<sup>5</sup> and the Civil Law

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<sup>1</sup>(Act 333). Hereinafter referred to as “the RTA 1987”.

<sup>2</sup>The victims of motor vehicle accidents claiming under motor vehicle insurance policy is also known as third party. The parties to an insurance policy are the insurance company and the policy owner. A third party is not a party to the policy. In certain situations the law however gives right to a third party to an insurance policy.

<sup>3</sup>(Act 67). Hereinafter referred to as “the CLA 1967”.

<sup>4</sup>(Act 67). Hereinafter referred to as “the CLA 1956 (Rev 1972)”.

<sup>5</sup>(Act A308). Hereinafter referred to as “the CLAA 1975”. The amendments were consolidated into the CLA 1956 (rev 1972).

(Amendment) Act 1984.<sup>6</sup>The law on assessment of damages however is not limited to the provisions in the CLA 1956 only. For the heads of damages not provided in the CLA 1956, the Malaysian judges are bound by the Common Law principles.

## **2.2 COMPULSORY MOTOR VEHICLE INSURANCE**

The event which gives rise to a cause of action for personal injury and fatal accident claims arising out of motor vehicle accident is the occurrence of road traffic accident involving insured vehicle. This right of action is derived from motor vehicle insurance policy which is compulsory for all vehicles travelling on Malaysian roads. Historically, there was no specific law on motor vehicle insurance. Victim of motor vehicle accidents had to rely solely on tort to claim for damages for injuries or any other losses inflicted on him due to the defendant's negligence. Since a suit under tort is filed against the defendant on his personal capacity, there is no guarantee that the victim will be compensated. In cases where the defendant is a man of straw, the victim will be without compensation regardless of the judgment obtained. Even in the rare cases where the defendant's liability is insured by an insurance policy, the doctrine of privity of contract demands that the defendant pay the judgment sum to the victim before indemnifying them<sup>7</sup> against the insurer. The victim (as a third party to the insurance policy) had no direct recourse against the insurer.<sup>8</sup> As

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<sup>6</sup>(Act A602). Hereinafter referred to as "the CLAA 1984". The amendments were consolidated into the CLA 1956 (rev 1972).

<sup>7</sup>Chan Wai Meng, *Rights of Third Parties in Insurance Law in Malaysia*, PhD thesis, Faculty of Law, UM 2007, at 211.

<sup>8</sup> Since an insurance policy is a contract between the policy owner (insured) and insurance company (insurer), the strict application of contract law would preclude a third party from filing a suit to enforce the insured's insurance policy in order to obtain compensation for injuries suffered despite the policy term.

such, he was barred from suing on the insurance policy even if the policy is affected for his own benefit or if the policy provides that the insurer is to remit the policy money to him.<sup>9</sup>

The statutory legislation governing compulsory motor vehicle insurance was first introduced in England through the Road Traffic Act 1930.<sup>10</sup> The preamble to the provisions itself clearly explain the objective behind the enactment of the provisions. It reads, ‘An Act... to make provisions for the protection of third parties against risk arising out of the use of motor vehicles’.<sup>11</sup> The RTA 1930 (UK) was later repealed and replaced by the Road Traffic Act 1960, the Road Traffic Act 1972 and later on the Road Traffic Act 1988. Part IV of the 1988 Act provides for protection relating to death or bodily injury including passenger, caused by the use of motor vehicles<sup>12</sup> by ensuring that any judgment in respect of quantum and liability will be met by the insurer of the vehicle at fault.

Similar to the situation in England prior to the enactment of RTA 1930, victims of motor vehicle accidents in Malaysia also had to rely on tort in order to claim compensation for personal injury and fatal accidents. However, seven (7) years after the enactment of the RTA 1930 (UK), the Federated States decided to enact their own statute on motor vehicle insurance by adopting similar provisions as in the RTA 1930 (UK) into Road Traffic (Third Party Insurance) Enactment 1937.<sup>13</sup> The Enactment introduced the compulsory motor vehicle insurance policy covering third party risk to the Federated Malay States. The Unfederated Malay States also had their own separate laws which more or less similar to

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<sup>9</sup> Chan, Wai Meng, *Third Party Rights in Insurance Law in Malaysia*, (Petaling Jaya: Sweet & Maxwell Asia, 2008), at 1.

<sup>10</sup> Hereinafter referred to as the RTA 1930 (UK). The purpose of this Act is to ensure that there are sufficient fund to compensate victims of motor accidents.

<sup>11</sup> Baduyah Obeng, “Insurans Motor Pihak Ketiga Yang Diwajibkan Di Malaysia”, (1998) 1 *Current Law Journal*, suppli – xxii, at i.

<sup>12</sup> Sidhu, Mahinder Singh, *Penanggung dan Pengambil Insurans Motor dan Pihak Ketiga*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1997), at 8.

<sup>13</sup> FMS Enactment No 17 of 1937.

the RTA 1930 (UK).<sup>14</sup> After 1957, the various Road Transport Enactments of the Federated and Unfederated states were unified under the Road Transport Ordinance 1958. The Ordinance was later on repealed and substituted with the RTA 1987. Sabah<sup>15</sup> and Sarawak<sup>16</sup> adopted the Road Transport Ordinance 1958 in 1984 and later on the RTA 1987 in 1988 after their incorporation with Peninsular Malaysia.<sup>17</sup>

Part IV (sections 89 – 107) of the RTA 1987 provides for compulsory motor vehicle insurance policy under the heading of ‘Provisions against Third Party Risk Arising out Of Use of Motor Vehicles’. Section 90 (1) of the RTA 1987 made protection against third party risk arising out of road<sup>18</sup> traffic<sup>19</sup> accident<sup>20</sup> as prescribe in section 91(1) of the RTA 1987 a compulsory coverage for all motor vehicles<sup>21</sup> use on Malaysian roads.<sup>22</sup> Section 90(1) RTA 1987 reads:

Subject to this Part, there shall not be lawful for any person to use or to cause or to permit any other person to use, a motor vehicle unless there is on force in relation to the user of the motor vehicle by that person or that other person, as the case may be, such a policy of insurance or such a

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<sup>14</sup> See Strait Settlement Ordinance No 5 of 1938, Road Traffic Third Party Enactment 1938 (Johore), Road Traffic Enactment no 16 of 1356 AH (1938 AD) (Kedah), Motor Vehicle Enactment No 16 of 1356 (1938 AD) (Terengganu).

<sup>15</sup> Was governed by Road Traffic (Third Party Insurance) Ordinance 1949 (Sabah Cap 129).

<sup>16</sup> Was governed by Motor Vehicles (Third Party Risk) Ordinance 1949 (Sarawak Cap130).

<sup>17</sup> Section 1(3) of the RTA 1987.

<sup>18</sup> Section 2 of the RTA 1987 defines ‘Road’ as any public road and any other road to which the public has access. It includes bridges, tunnels, lay-bys, ferry facilities, interchanges, roundabouts, traffic islands, road dividers, traffic lanes, acceleration lanes, deceleration lanes, side-tables, median strips, overpasses, underpasses, approaches, entrance and exit ramps, toll plazas, service areas, other structures and fixtures to fully affect its use. The coverage however does not extend to road under construction since ‘road’ under construction would only be considered as ‘road’ for purpose of section 70 and 85 of the Act.

<sup>19</sup> Section 2 of the RTA 1987 defines ‘traffic’ to include bicycles, tricycles, motor vehicles, tram cars, vehicles of every description, pedestrians, processions, bodies of police or troops and all animals being ridden, driven or led. The application of section 90 of the Act however is only confined to motor vehicle.

<sup>20</sup> Section 2 of the RTA 1987 defines ‘accident’ as an accident or occurrence whereby any injury is caused to any person, property, vehicle, structure or animal.

<sup>21</sup> Section 2 of the RTA 1987 defines ‘Motor vehicles’ as vehicles of any description, propelled by means of mechanism contained within itself and constructed or adapted so as to be capable of being used on roads and includes a trailer.

<sup>22</sup> Failure to observe the above section would make a driver liable for fine not exceeding RM1,000 or imprisonment not exceeding 3 months or both. The person so convicted would also be disqualified from holding or obtaining a driving license for 12 months. Apart from being liable for criminal sanction, failure to insure vehicle under section 90 of RTA 1987 also would make the owner or driver of said vehicle personally liable for civil action by the third party.

security in respect of third party risk as complies with the requirement of this Part.

The scope of coverage of the policy must cover protection against personal injury and fatal accidents. Section 91(1) of the RTA 1987 reads

(1) In order to comply with the requirements of this Part, a policy of insurance must be a policy which-

(a) is issued by a person who is an authorised insurer within the meaning of this Part: and

(b) insures such person, or class of persons as may be specified in the policy in respect of any liability which may be incurred by him or them in respect of the *death of or bodily injury* to any person caused by or arising out of the use of the motor vehicle or land implement drawn thereby on a road (*emphasis added*)

Section 96 of the RTA 1987 provides for third party's right to enforce judgment in personal injury motor accident claims arising out of motor vehicle accident against the insurance company which insured the vehicle at fault. By virtue of this section, the insurance company insuring the vehicle at fault has the statutory duty to satisfy the judgment<sup>23</sup> once

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<sup>23</sup>The definition of the term 'judgment' in this context is not only limited to an order from the court on liability and quantum, it also includes any amicable settlement without admission of liability reached by both third party and the insurance company and recorded as consent judgment. Liability of the insurer to pay the awards to the Plaintiff only arises after the judgment is delivered. In *QBE Insurance Ltd v Hasyim b Abdul & Anor*, [1982] 2 MLJ 62., the application to bring the insurer as third party was rejected on appeal on the ground that liability of insurer to a third party did not arise before judgment had been obtained. An insurance company will also be liable to pay the amount agreed upon by them and the third party and the third party signed a discharge letter agreeing to waive any further claim. In this instance, although no order was obtained from court, both sides are bound by the discharge letter: a contract stipulating that the insurance company will pay the agreed amount and third party waiving any further right to claim against the insurer over the same subject matter.

the claimant obtained the same against the person insured by the policy and a notice had been sent to the insurance company.<sup>24</sup>

The right of the third party to enforce the judgment is further strengthened by the motor vehicle policy wordings. All motor vehicle policy have specific clause which undertakes the payment of any claim made against the insured or his authorized driver in event of road traffic accident. Under the heading of Liability to Third Party, the insurer undertakes to pay the amount the insured is obligated to pay to third party in event of death, bodily injury or property damaged.<sup>25</sup> The same term appears in all motor insurance policies.<sup>26</sup>

## **2.3 THE LAW ON PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN MALAYSIA.**

The law on the assessment of damages for personal injury and fatal accident claims in Malaysia is a mixture of the Common Law and the provisions in the CLA 1956.

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<sup>24</sup>Nik Ramlah Mahmood, *Insurance Law in Malaysia*, (Kuala Lumpur: Butterworths, 1992), at 239. Insurer's liability to pay compensation under section 90 and 91 of the RTA 1987 is conditional upon the absence of any application for stay of execution of the judgment pending appeal. If there is an application to hold or postpone payment of the judgment until decision of appeal delivered, the insurer is yet to be under any obligation to pay. At the same time the insurer must have notice of proceeding from third party. No sum is payable under sec 91 of the RTA 1987 unless insurer had been notified of the proceeding at least 7 days before the commencement of the proceeding.

<sup>25</sup>Note that the coverage of section 90(1) of the RTA 1987 does not include damage to property.

<sup>26</sup>Example of motor vehicle policy wordings are as follows: We will pay the amount which You or Your authorized driver are legally liable to pay (including claimants' costs and expenses) for:- (a) death or bodily injury to any person except those specifically excluded under Exceptions to Section B. (b) damage to property as a result of an accident arising out of the use of Your Vehicle provided Your authorized driver also complies with all the terms and conditions of the policy that You are subject to.

### 2.3.1 The Common Law

The Common Law is generally defined as the rules of law develop by the courts through decided cases distinct from legislation passed by parliament. It comprises of a set of principles and specific rules on a wide variety of issues which originates in the custom or maxims common throughout England and expanded, modified and developed over a long period of to a new set of fact via reasoning by analogy.<sup>27</sup> The reception of English Common Law and rules of equity in Malaysia is made possible by section 3 of the CLA 1956.<sup>28</sup> The section formally recognizes the reception of the English Common Law and rules of equity in three (3) stages. The states in West Malaysia may apply the Common Law and the rules of equity in force in England on the 7<sup>th</sup> April 1956. Sabah and Sarawak on the other hand is at liberty to apply the laws as at 1<sup>st</sup> December 1951 and 12<sup>th</sup> December 1949.<sup>29</sup>

By virtue of this section, the Common Law and rules of equity as applicable in England can be adopted in Malaysia in the absence of local statute so long as the Common Law and rules of equity does not act contrary to the local norms and circumstances. Any development in the Common Law and rules of equity in England after the cut-off dates is treated as persuasive and not binding<sup>30</sup>

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<sup>27</sup>Rutter, Michael F, *Applicable Law in Singapore and Malaysia*, (Singapore: Butterworth, 1989), at 69.

<sup>28</sup>The English law was formally received in Penang and Melaka (former Strait Settlement) in 1807 and 1826 respectively. The Federated Malay States, Sabah and Sarawak formally received the English law in 1937. Prior to this, the English Common Law and rules of equity had been informally applied in these states by virtue of them being under the British administration. See Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992).

<sup>29</sup> Sabah and Sarawak also may adopt statutes of general application applicable in England applicable on the respective dates. Similar adoption is not available for the states in West Malaysia. Only in event of lacuna in local laws in commercial transaction such as banking, insurance, partnership that the states in West Malaysia are allowed to adopt the English statute. The liberty however restricted to those statutes which were in force as at 7<sup>th</sup> April 1956. Any amendment or revision to the statute after the cut-off date will not be applicable in West Malaysia. Penang and Melaka on the other hand enjoyed a slightly different status then the other states in West Malaysia. These two states along with Sabah and Sarawak are allowed to adopt the English statute relating to matters enumerated in section 5(1) CLA1956 up to the date in which the issue is being tried on.

<sup>30</sup>The Malaysian courts have not shut the door for the importation of the Common Law and principle of equity indefinitely. There are many examples of Common Law cases decided in England after these dates being judicially followed in Malaysia. Since the principles in assessment of damages in Malaysia is more or less in line with the English Common Law, the local court still take into consideration the English decisions after 1956 to the extent that it is suitable to the Malaysian context *Jag Singh v Toong Fong Omnibus Co. Ltd.* [1964] 30 MLJ. Lord Scarman in a Privy Court decision in *Jamil bin Harun v Yang Kamsiah & Anor*[1984] 1 MLJ 217 held:“...their Lordships do not doubt that it is for the courts of Malaysia to decide, subject always to the statute law of the Federation, whether to follow English case law. Modern English authorities may be persuasive but are not binding. In determining whether to accept their

The decisions of the English courts provide an authoritative source of law on question relating to the assessment of damages.<sup>31</sup> The decisions of the English Courts (other than the Privy Council) especially from the House of Lords are usually treated as highly persuasive although not binding. The application of these cases are however limited to issues on principles of assessment of damages. The local courts are reluctant to follow English cases with regard to quantum of damages. The differences in economic and social condition between Malaysia and England made adopting similar quantum as decided in England inappropriate for local cases.<sup>32</sup> Even in the following decades, when the social and economic condition in Malaysia are much improved than that in the 1960's, the courts are still reluctant to adopt English quantum not only in term of monetary value and economic utility, but also with regard to social outlook.<sup>33</sup>

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guidance the court would have regard to the circumstances of the states of Malaysia and will be careful to apply them only to the extent that the written law permits and no further than in their view it was just to do so."

<sup>31</sup>Rutter, Michael F., *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia*, 2<sup>nd</sup> ed. (Hong Kong: Butterworth Asia, 1993), at 6.

<sup>32</sup> In *Pahang Lin Siong Motor Co. Ltd. v Cheong Swee Khai*, [1962] MLJ 29, Thomson CJ specified two conditions before English decisions to be applied in Malaysia: "Accepting this views two consideration must be borne in mind in their application in this country. The first of these of that local social, economic and industrial conditions are pole apart from condition in England and Scotland and any tendency to take any particular line in relation to the assessment of damages in case of this type from a consideration of English and Scottish cases is not calculated to produce very useful result."

<sup>33</sup>In a High Court case of *Bas Mini Muhibbah Sdn. Bhd. v Abdullah bin Salim*, [1983] 1 MLJ 405, Abd Razak J reiterate the marked differences between the two countries which compel the local courts to adopt the English quantum with reservation: "Coming now to the problem before us, Counsel for the appellant in seeking to vary the order of the learned President, as I said earlier seem somewhat to be obliged to say that in the light of the Robertson's case that the amount given was under the circumstances excessive. In viewing our own situation I do not pretend to be a social scientist to say that I know what is the real answer to the problem before me. I do not pretend to know also whether the Malaysian society had gone through the social transformation that it can safely be said to have reached such heights of sophistication akin to that in a western society.... Against our way of life for different religious background and different culture the Western way of life does not easily fit into the life pattern. It may be we are slow in accepting it, I don't know. May be our outlook towards life is different... I would say thus that in so far as the rule regarding compensation for loss of consortium is concerned, the decision of Robertson v. Turnbull must with deference to their Lordships in that case therefore be applied here with reservation lest an injustice be done."

### 2.3.2 The Civil Law Act 1956

Historically, the current CLA 1956 was preceded by the Civil Law Ordinance 1878, the Civil Law Ordinance 1909,<sup>34</sup> the Civil Law Enactment of 1937,<sup>35</sup> the Civil Law (Extension) Ordinance 1951<sup>36</sup> and the Civil Law Ordinance 1956.<sup>37</sup> The 1956 Ordinance was later replaced by the CLA 1956 (rev 1972) which came into force on 1<sup>st</sup> April 1972. The CLA 1956 (rev 1972) saw two (2) major amendments in respect of the assessment of damages for personal injury and fatal accident claims via the CLAA 1975 and the CLAA 1984. The current provisions on the assessment damages for personal injury and fatal accident claims arising from motor vehicle accidents are the result of these two (2) amendments.

#### The Civil Law Enactment 1937

The first statutory codification of the provisions relating to the assessment of damages for personal injury and fatal accident claims can be traced back to sections 3 and 4 of the Civil Law Enactment 1937. Section 3 of the Civil Law Enactment 1937 provided the statutory cause of action for fatal accident claims. The provision was adopted from the English Fatal Accidents Act 1846. It is a statutory departure from the Common Law rule which prohibits a third party from claiming damages for the death of another person.<sup>38</sup> This rule prevented widow, children or parents who are the dependants of the deceased from taking any action against the tortfeasor for the loss of their financial support due to deceased's demise.

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<sup>34</sup> The Civil Law Ordinance 1878 and the Civil Law Ordinance 1909 were applicable to the Strait Settlements (Penang, Melaka and Singapore).

<sup>35</sup> (F.M.S no 3 of 1937). Hereinafter referred to as the Civil Law Enactment 1937. The Enactment introduced the English Common Law to the Federated Malay States ([Perak](#), [Selangor](#), [Pahang](#) and [Negeri Sembilan](#).)

<sup>36</sup> (F. of M. No 49 of 1951). The Ordinance extended the application of the English Common Law to the Unfederated Malay States ([Kedah](#), [Perlis](#), [Kelantan](#), [Terengganu](#) and [Johor](#)) which became part of the Federation of Malaya in 1948.

<sup>37</sup> (F. of M. No 5 of 1956). Hereinafter referred to as the Civil Law Ordinance 1956. The Ordinance replaced the Civil Law Enactment of 1937 and the Civil Law (Extension) Ordinance 1951. It was applicable to all eleven (11) states of the Federation.

<sup>38</sup> Under the Common Law, death of a person is not a civil wrong, thus does not give rise to any cause of action. "In a civil court, the death of a human being could not be complained of as an injury". See *Baker v Bolton* (1808) 1 Camp. 493, also see decision by Salleh Abbas FJ in *Sambu Pernas Construction v Pitchakarran* [1982] 1 MLJ 269.

Section 3 of the Civil Law Enactment 1937 allowed claims for damages to compensate any loss arising from the death of the deceased for the benefit of deceased's wife, husband, parents and child. Although the measure of damages was stated as 'loss resulting from such death' the section actually provided for damages for loss of dependency.<sup>39</sup>

Section 4 of the Civil Law Enactment of 1937 was an exact copy of section 1 of the Law Reform (Miscellaneous Provisions) Act 1934.<sup>40</sup> It provided for damages available to deceased's estate upon his demise. This section abolished the Common Law rule *personalis moritur cum persona*.<sup>41</sup> By virtue of this section, an action for damages<sup>42</sup> initiated by the deceased prior to his demise can be continued by a representative acting on behalf of his estate for the benefit of the estate.<sup>43</sup> Damages recovered from the proceeding will go to deceased's estate and distributed to his beneficiaries named in his will or as intestacy.<sup>44</sup> The damages recoverable under section 4 of the Civil Law Enactment 1937 comprised of any heads of damages available to the deceased had he did not pass away such as damages for pain and suffering, loss of amenities, loss of expenses, loss of earnings prior to demise, loss of expectation of life and loss of future earning in lost years. The section also allowed the deceased's estate to claim for any expenses incurred as the result of deceased's demise such as funeral expenses.<sup>45</sup>

Although sections 3 and 4 of the Civil Law Enactment 1937 provided for the statutory causes of actions for damages claimable by deceased's dependants and estate, the actual

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<sup>39</sup>Also known as loss of support.

<sup>40</sup>Hereinafter referred to as the Law Reform 1934. Cussen J in *Lok Yin v Pat Thoo* (1946) 1 MLJ 26 held "Our law is identical with the corresponding English Act – The Law Reform (Miscellaneous Provision) Act 1934, section 4 of the Civil Law Enactment 1937 is the same as section 1 of the English Act".

<sup>41</sup>Personal action died with the person.

<sup>42</sup>Except for defamation, seduction, enticement and adultery.

<sup>43</sup>The claim is also known as 'estate claim'.

<sup>44</sup>Rutter, Michael F., *op. cit.*, (1993), at 493.

<sup>45</sup>See explanation by Suffian J in *Yap Ami & Anor v Tan Hui Pang* [198] 316.

method of assessment were not provided. The sections only contained provisions on the measure of damages, persons entitled to claim for the damages and persons who can bring the actions for the damages. The assessment of damages was still based on the Common Law principles and decided cases. Similarly, the causes of action and the assessment of other heads of damages not provided by the sections were also based on the Common Law principles and decided cases.

### **The Civil Law Ordinance 1956**

The provisions in sections 3 and 4 of the Civil Law Enactment 1937 were later adopted by the Civil Law Ordinance 1956 vide sections 7 and 8. Sections 7 and 8 provided for damages for loss of dependency and estate claims respectively. Similar to the Civil Law Enactment 1937, the Civil Law Ordinance 1956 also did not provide for the assessment of damages for the above claims. It also did not contain any provisions on other heads of damages claimable in personal injury and fatal accident claims. The law relating to the assessment of damages for loss of dependency, estate claims and the heads of damages not provided for in the Ordinance remained uncoded. Judges had to rely on the Common Law principles and decided cases.

### **The CLA 1956 (rev 1972)**

Section 7 and 8 of the Civil Law Ordinance 1956 were adopted by section 7 and 8 of the CLA 1956 (rev 1972). The provisions in section 7 of the CLA 1956 (rev 1972) were essentially the same as section 7 of the Civil Law Ordinance 1956. They provided for the

measure of damages, the persons who can initiate an action, the limitation period, persons entitled to the damages as well as the benefits to be received by plaintiff which were to be excluded from the assessment of damages under the section. The assessment of damages was still based on the Common Law principles and decided cases. Only in respect of proviso (i) to section 7(3) and section 7(11), did section 7 of the CLA 1956 (rev 1972) differed from section 7 of the Civil Law Ordinance 1956. Section 7 of the CLA 1956 (rev 1972) included paras (b) and (c) to proviso (i) of subsection (3). The new paras excluded any sum payable under employees provident fund, pension or gratuity which were, will or may be paid as a result of the deceased's death from being taken into consideration in the assessment of loss of dependency. Subsection (11) on the other hand included the definition of the term 'pension'.

The provision in section 8 of the CLA 1956 (rev 1972) were also similar to section 8 of the Civil Law Ordinance 1956 except for a few minor substitutions in the wordings. The substitutions however did not result in any changes in the application of the section. The provisions in the section among others provided for the cause of action and the list of actions which were unavailable to the estate.

### **The Civil Law (Amendment) Act 1975**

The CLA 1956 (rev 1972) was later amended by the CLAA 1975. The CLAA 1975 included para (d) to proviso (i) to section 7(3).<sup>46</sup> Para (d) excluded any financial benefits

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<sup>46</sup>Section 2 of the CLAA 1975.

which were, will or may be paid to the dependants as a result of the deceased's death from being taken into consideration in the assessment of damages for loss of dependency.

The CLAA 1975 also saw section 28A being added to the CLA 1956 (rev 1972).<sup>47</sup> The new section specifically provided for damages in respect of personal injury claims. Similar to proviso (i) to section 7(3), section 28A also excluded any sum which were, will or may be paid to the plaintiff out of any contract of assurance, insurance, pension, gratuity or any compensation received as the result of his injuries from the assessment of damages for personal injury claims.<sup>48</sup> Other than the introduction of these new provisions (effects of which will be addressed in detail in the next chapters), the assessment of damages for personal injury and fatal accident claims remain the same as those in the CLA 1956 (rev 1972).

### **The Civil Law (Amendment) Act 1984**

In 1984, the Malaysian legislature enacted the CLAA 1984<sup>49</sup> to amend the CLA 1956 (rev 1972). The amendments introduced by the CLAA 1975 and CLAA 1984 formed the current CLA 1956. The CLAA 1984 abrogated several Common Law heads of damages such as damages for loss of earnings in lost years,<sup>50</sup> loss of expectation of life,<sup>51</sup> loss of

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<sup>47</sup>Section 3 of the CLAA 1975.

<sup>48</sup>Which may include the awards for pain and suffering, loss of amenities, loss of expectation of life, loss of pre-trial earnings, loss of future earnings and loss of future earning capacity.

<sup>49</sup>The Act adopted several statutory reforms introduced by the English Administration of Justice Act 1982 (cap 53). Hereinafter referred to as the AJA 1982. The AJA 1982 substituted the Fatal Accident Act 1976 and the Law Reform (Misc Provisions) Act 1934). The new Act is the result of Report No 56 (1973) and Lord Pearson Report (1978, Cmnd 7054) published by the Law Commission and the Royal Commission on Civil Liability and Compensation for Personal Injury.

<sup>50</sup>Section 3 of the CLAA 1984.

<sup>51</sup>Section 3 and 5 (b) of the CLAA 1984.

service of child as well as loss of services and society of wife.<sup>52</sup>The CLAA 1984 also introduced and regulated a new head of damages known as bereavement.<sup>53</sup>Other than the above, the Act also went one step further to include several provisions which regulates the assessment of damages for loss of dependency and loss of future earnings by amending sections 7<sup>54</sup> and 28A<sup>55</sup> of the CLA 1956 (rev 1972).

The CLAA 1984 has altered many facets of the law on the assessment of damages for personal injury and fatal accident claims in Malaysia. Damages for loss of earnings in lost years, loss of expectation of life in estate claims, loss of service of child as well as loss of service and consortium of wife are no longer available. The damages for loss of dependency, estate claims,<sup>56</sup> loss of future earnings and loss of earning capacity, can still be awarded. The assessment for these heads of damages however are regulated by specific statutory provisions in sections 7,8 and 28A of the CLA 1956.The award for loss of expectation of life in personal injury claims and loss of pre-trial earnings are also still available. The damages for these two heads of damages are however lumped into damages for pain and suffering and loss of future earnings respectively. The effects of the provisions in the CLA 1956 will be addressed in detail in the next chapters.

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<sup>52</sup>Section 2 (a) of the CLAA 1984.

<sup>53</sup>Section 2 (a) of the CLAA 1984.

<sup>54</sup>Section 2(a) of the CLAA 1984.

<sup>55</sup>Section 5(b) of the CLAA 1984.

<sup>56</sup>Except for loss of earnings in lost years and loss of expectation of life.

## 2.4 JUDICIAL DISCRETION

The term discretion has always been associated with the notion of choice. Linguistically, discretion stems from the word judgement or good judgement. It later evolves to connote personal autonomy in making judgement, assessment or decision.<sup>57</sup> It is the right of self-determination which the actor (discretionary holder) possesses as a consequence of the responsibility that he has.<sup>58</sup> It refers to a situation in which an official has latitude to make authoritative choice not necessarily specified within the source of authority which governs his decision-making.<sup>59</sup> These choices are not only guided by statutory goals, legal criteria but also inescapably the decision-makers value and experiences.<sup>60</sup> Discretion is not a duty. While duty would oblige the actor it to do certain act eventhough the procedures or methods to perform that act is not specified, discretion gives the option to the actor to decide or act as well as the way the decision or action is to be completed.<sup>61</sup>

### 2.4.1 Overview of the term ‘judicial discretion’

Although many had despaired to give a definite legal definition to the term judicial discretion, most had associated it with the power of the law which is given to the judges to choose among several alternatives, each of them lawful.<sup>62</sup> It is to be excised prudently after weighing, reflecting, testing, studying and gaining the impression of the many alternatives. The term ‘discretion’ when qualified by the word ‘judicial’ carries the notion of judges choosing amongst the available alternatives with reference to the rule of law, reasons,

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<sup>57</sup>Galligan, J.D., *Discretionary Powers: A Study of Official Discretion*, (Oxford : Clarendon Press, 1992), at 7

<sup>58</sup>Hawkins, Keith, ed., *The Use of Discretion*, (Oxford: Clarendon Press, 1992), at 93

<sup>59</sup>Atkins, Burton and Mark Pogrebin, ed., *The Invisible Justice System: Discretion & the Law*, (Denver: Anderson Publishing, 1978), at 1.

<sup>60</sup>Sossin, Lorne, “Discretion and the Culture of Justice”, (2006) *Singapore Journal of Legal Studies*, 356-384, at 357.

<sup>61</sup>Abdul Aziz Bari, “Kuasa-Kuasa Budi Bicara, Teori dan Pemakaiannya dalam Undang-Undang Perlembagaan dan Undang-Undang Pentadbiran”, (2004) 8 *Jurnal Undang-Undang dan Masyarakat*, 39-57, at 40.

<sup>62</sup>Barak, Aharon, *Judicial Discretion*, (London : Yale University Press, 1989), at 7.

justice and not according to personal whims.<sup>63</sup> It is where ‘a judge, who has consulted all relevant legal materials, is left free by the law to decide one way or another’<sup>64</sup> within the framework set by the law. The judge is entitled to choose one that appeal to him from the various numbers of options. As if the law or the legislature is saying ‘I have determined the content of the legal norm up to this point. From there on, it is for you, the judge, to determine the content of the legal norm, for I the legal system, am unable to tell you which solution to choose.’<sup>65</sup>

It is to be noted that discretion only exists when there are more than one right and lawful options available to the judge. It does not exist in situations where judge have to choose between right and wrong or lawful and unlawful. In these situations, there is a specific obligation on the judge to choose the right and lawful option. As such, although the term discretion is often defined as the freedom of choice between several options, this definition is actually an oversimplification of a term that conveys not only the authority to choose between several options but the authority to choose between different options for good reasons<sup>66</sup> based on the facts of the case, the submissions of the parties as well as the law, legal principles, judicial precedence and norms governing the issue at hand. Therefore, although the judge has the discretionary power to decide on something, this power cannot be exercise arbitrarily, least it can be struck out by a higher court.

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<sup>63</sup>Massey, I.P., *Administrative Law*, 3<sup>rd</sup> Ed., (Lucknow : Eastern Book Company, 1990), at 55.

<sup>64</sup>Greenwalt, K., “Discretion and Judicial Discretion : the Illusive Quest for the Fetter that Bind Judges”, (1975) 75 *Columbia Law Review*, 359 – 399 cited in Hawkins, Keith, ed., *op. cit.*, at 50.

<sup>65</sup>Barak, Aharon, *op. cit.*, at 5.

<sup>66</sup>Galligan, J.D., *op. cit.*, at 7.

#### **2.4.2 Judicial Discretion in the CLA 1956 (rev 1972)**

Section 7 and 8 of the CLA 1956 (rev 1972), although provided for damages for loss of dependency and estate claims, contained many shortcomings which caused grave concern to the legislature. The sections were seen as insufficient, unclear and ambiguous.<sup>67</sup> The absence of specific provisions in the CLA 1956 (rev 1972) on the method of assessing damages had caused judges to rely on their discretion in meting out suitable damages to the claimants. Some of the provisions in the sections were also not properly defined.<sup>68</sup> Therefore, questions of how the damages was to be calculated and which principles to be applied were left to the discretion of the presiding judge. Although the discretionary power exercised by the judges was not absolute, (the assessment must be governed by the facts of each case, submissions of the parties, the Common Law principles and decided cases), it had caused significant variances and uncertainties in the courts awards. The awards were also seen as speculative.<sup>69</sup>

#### **Section 7 – Damages Claimable by Deceased’s Dependants**

Section 7 of the CLA 1956 (rev 1972) provided for damages for loss of support. The nature of the award caused a lump sum amount being handed over to the dependants of the deceased as compensation for what deceased would have given to his dependants in term of monetary support had he did not passed away. There were several aspects in the section which called for judges to exercise their discretion;

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<sup>67</sup>Parliamentary Debates, House of Representative, Sixth Parliament, Second Session, 18<sup>th</sup> July 1984, at 3318 (Tuan Radzi Sheikh Ahmad).

<sup>68</sup>*Ibid.*

<sup>69</sup>*Ibid.*

***(a) Measure of damages***

Section 7(3) stated:

in every such action the Court may give **such damages as it thinks proportioned to the loss resulting from such death** to the parties respectively for whom and for whose benefit such action is brought:  
*(emphasis added)*

The section did not define what amount to ‘loss resulting from such death’. It fell on the presiding judge to decide what constituted such loss. The absence of specific interpretation of the phrase ‘loss resulting from such death’ was the reason why the Supreme Court in *Chong Pik Sing & Anor. v Ng Mun Bee & Ors.*<sup>70</sup> had to refer to the decisions in *Franklin v The South Eastern Ry Co.*<sup>71</sup> *Taff Vale Ry Co. v Jenkins*<sup>72</sup> and *Davies v Powell Duffryn Associated Collieries Ltd.*<sup>73</sup> to conclusively define what damages was available to the deceased dependants under the section. Based on the decisions, the Supreme Court concluded that section 7 of the CLA 1956 (rev 1972) only provided for injuries capable of evaluation in monetary terms. Losses which cannot be assessed in monetary terms such as loss of consortium cannot be awarded under the section. This monetary loss was defined as “benefit in money or money’s worth arising out of the relationship would have accrued to the person for whom the action is brought from the deceased if the deceased had survived but has been lost by reason of his death”.<sup>74</sup>

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<sup>70</sup>[1985] 1 MLJ 433.

<sup>71</sup>(1858) 157 ER Ex 448.

<sup>72</sup>[1913] AC 1.

<sup>73</sup>[1942] AC 601.

<sup>74</sup>Per Lord Diplock in *Malyon v Plummer* (1963) 2 All ER 344.

***(b) Amount of damages***

How the monetary loss was to be assessed was also not provided by the section. Section 7(3) of the CLA 1956 (rev 1972) only provided that court may allow such damages as ‘it thinks fit’. The amount of damages and the actual method of assessment which will enable the court to arrive at the amount were left to the judge to decide based on the facts of the case, submission of the parties, Common Law principles and previously decided cases.

The method generally adopted by the judges was by multiplying the deceased probable annual financial contributions (multiplicand) with the length of time in which the dependants would be depending on the deceased’s contribution (multiplier). The task of arriving at the multiplicand was made easy if there was specific evidence showing deceased’s annual contribution. However, in the absence of reliable evidence of actual contribution from the deceased, judges had to assess the possible contributions based on deceased’s income and employment benefits at the time of death together with considerations for positive contingencies,<sup>75</sup> negative contingencies,<sup>76</sup> living expenses and the number of dependants under deceased’s care.<sup>77</sup>

The multiplier was assessed based on deceased’s and the dependants’ age at the time of deceased demise together with their life expectation. Judges also had to deduct certain percentage as deduction for benefits received due to accelerated payment in lump sum and contingencies which affected the dependency period. The contingencies included remarriage,<sup>78</sup> prospect of dependents cease to be depending on the deceased<sup>79</sup> and the

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<sup>75</sup>Probable future increase in earnings, future employment benefits, bonuses, increment *etc.*

<sup>76</sup>Probable demotion, salary decreases, illness *etc.*

<sup>77</sup>See *Chan Yoke May v Lian Seng Co. Ltd.* (1962) MLJ 243.

<sup>78</sup>Prospect or subsequent remarriage of spouse (claim for loss of dependency by spouse).

possibility of reduction or cessation of contribution to the dependants'.<sup>80</sup> The case laws were not in uniformity as far as the assessment of multiplier was concerned. The variance in the assessment did not help to draw a clear, distinct and authoritative conclusion.<sup>81</sup> However, the courts have conventionally used the formula of:

Retirement age minus actual age at the date of death minus a further one-third of the difference for contingencies.<sup>82</sup>

## **Section 8 – Estate Claims**

Section 8 of the CLA 1956 (rev 1972) recognized the cause of action for estate claims without specifying how the various heads of damages claimable under estate claims were to be assessed by the judge. As such, judges had to use their discretion in assessing the same guided by the facts of each case, submissions of the parties, the Common Law principles and decided cases. Among the heads of damages claimable under estate claims, damages for loss of earning in lost years and loss of expectation of life were where judicial discretion was most needed.

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<sup>79</sup>Children attaining the age (claim for loss of support by children) of majority or demise of elderly parent (claim for loss of support by parent)

<sup>80</sup>Marriage of child (claim for loss of support by parent to unmarried deceased)

<sup>81</sup>Dass, K.S., *Quantum in Accident Cases*. vol. 1, (Kuala Lumpur: Malaysian Law Publishers, 1975), at 977.

<sup>82</sup>Dass, S. Santhana, *Personal Injury Claims*, (Petaling Jaya: Alpha Sigma, 2000) at 120. See also *Murtadza bin Mohammed Hassan v Chong Swee Pian* [1980] 1 MLJ 216.

***(a) Damages for loss of earning in lost years***

The award for loss of earning in lost years was one of the Common Law heads of damages claimable under estate claims. The award for loss of earning in lost years was intended to compensate the deceased of possible future earnings in the years of his expected working life<sup>83</sup> which he would have earned had he did not succumb to the injuries. However, since deceased had passed away, this award was awarded to his estate. The method of assessment was not provided in section 8 of the CLA 1956 (rev 1972). Therefore, judges had to use their discretion in arriving at a suitable figure by multiplying deceased's annual loss (multiplicand) with his estimated working life lost (multiplier). The multiplicand was calculated by deducting deceased's cost of living plus the cost for providing facilities appropriate to attain his standard of life from his prospective net earnings.<sup>84</sup> The calculation multiplier is similar to the assessment of multiplier in 'loss resulting from such death' above. However, the court will only take into account the age of deceased without considering the age of claimant, prospect of remarriage and other factors.

***(b) The assessment for loss of expectation of life***

The award for loss of expectation of life was also one of the Common Law heads of damages claimable under section 8 CLA 1956 (rev 1972). It was awarded to compensate the deceased of the loss of the prospect of living the normal expectation of life. However, since the deceased passed away, his estate is entitled to claim the award in his behalf. The most difficult task which befalls on the judges was to determine whether deceased would have lead a happy life but for the injury and what were the considerations to be taken into

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<sup>83</sup>Rutter, Michael F., *op. cit.*, (1993), at 563.

<sup>84</sup>Dass, K.S., *Quantum in Accident Claims*, vol. 3, (Kuala Lumpur: Asian Book Co. Sdn. Bhd., 1984), at 406.

account in the assessment. Various factors such as age,<sup>85</sup> lifestyle, earning capacity, family background, social standing<sup>86</sup> and health<sup>87</sup> were taken into consideration. Since there was no specific rules to calculate the life's expectation, judges normally awarded damages within the range from RM 3500 to RM 6000.<sup>88</sup> The difficulty in assessing loss of expectation of life was commented by Cussen J in *Lok Yin v Pat Thoo*<sup>89</sup> where he said:

“I turn now to deal with the second head of claim – the claim for what been termed as ‘loss of expectation of life’. The amount to be given under this head is a matter of great difficulty – it cannot be arrived at by any method of calculation on real data such as I have employed when assessing damages under the first claim... Our law is identical with the corresponding English Act – the Law Reform (Miscellaneous Provisions) Act 1934. Section 4 of the Civil Law Enactment 1937 is the same section 1 of the English Act. It is therefore proper for me to seek for assistance and guidance in the decisions of the English Courts in this question.”

## 2.5 CONCLUSIONS

Section 7, 8 and 28A of the CLA 1956 are not the first attempt by the Malaysian legislature to regulate the assessment of damages for personal injury and fatal accident claims. The

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<sup>85</sup> See *Trubyfield v G.W. Ry. Co.* (1937) 4 All ER 614 where the court considered the age difference between the deceased in this case and *Rose v Ford*.

<sup>86</sup> See *Burns v Edman* (1970) 2 QB 541 where it was held that the life of a criminal might not be a happy one.

<sup>87</sup> See *Pickett v British Rail Engineering Ltd, op. cit.* where the plaintiff who was suffering from lung cancer was awarded £750 for loss of expectation of life.

<sup>88</sup> Syed Ahmad Alsagof, *The Law of Tort in Malaysia and the Syari'ah*, (Gombak, Syed Ahmad S A Alsagof, 2004), at 249.

<sup>89</sup> (1948) 1 MLJ 26.

provision in sections 3 and 4 of the Civil Law Enactment 1937, sections 3 and 4 of the Civil Law Ordinance 1956 as well as sections 7 and 8 of the CLA 1956 (rev 1972) already contained some form of statutory guidelines for judges in assessing damages for personal injury and fatal accident claims albeit not as extensive as the ones in section 7, 8 and 28A of the CLA 1956. The specific statutory provisions and conditions introduced by the 1984 amendments unfortunately are a huge departure to the long accepted practices in assessing the damages. The amendments abolished several Common Law heads of damages while the assessment of many others is subjected to specific requirements and conditions. A majority of the requirements and conditions introduced by the CLAA 1984 have no Common Law or statutory origin.

As a result, there are some who ventured to oppose and criticize the current CLA 1956. One of their main contentions was that the statutory reform introduced by the CLA 1956 is an attempt by the legislature to fetter the exercise of judicial discretion in personal injury cases. There were also opinions saying that the CLA 1956 had greatly reduced the amount of damages to be awarded by the courts in personal injury and fatal accident claims. The following chapters will discuss in detail whether there is any truth in these allegations.

## **CHAPTER 3**

### **THE EFFECTS OF THE CLA 1956 ON JUDICIAL DISCRETION AND THE QUANTUM OF DAMAGES IN PERSONAL INJURY CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS**

#### **3.1 INTRODUCTION**

Personal injury claims arising out of motor vehicle accidents are claims for compensation (damages) for “hurt or damage done to a man’s person, such as a cut or bruise, a broken limb, or the like”<sup>1</sup> which was caused by the accident. The cause of action for these claims arises when the negligent act or omission of the driver of the vehicle at fault causes injury and loss to the claimant. The injury or loss can be physical or psychological. The damages ranges from damages for pain and suffering due to physical injuries, loss of amenities, loss of expectation of life, loss of earning during the period of recovery, expenses and cost incurred, loss of consortium, loss of future earnings and loss of future earning capacity. In Malaysia, the only statutory provision which provides for the assessment of damages for personal injury claims arising out of motor vehicle accidents is section 28A of the Civil Law Act 1956.<sup>2</sup> In fact, the section is the only statutory provision which provides for the assessment of damages for personal injury claim in all type of cases. In addition to this section, judges are also governed by the Common Law principles and decided cases.

Historically, prior to the introduction of section 28A of the CLA 1956, there was no statutory provision providing for the assessment of damages for personal injury claims

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<sup>1</sup>Garner, Brian A., ed., “Black Law Dictionary”, 9<sup>th</sup> ed., (Minnesota: West Publishing, 2009)

<sup>2</sup>(Act 67). Hereinafter referred to as “the CLA 1956”.

in Malaysia. The assessment of damages was based on the Common Law principles and decided cases. Only in 1975 that our legislature saw it fit to introduce section 28A into the Civil Law Act 1956 (rev 1972)<sup>3</sup> vide the Civil Law (Amendment) Act 1975 (Act A308).<sup>4</sup> Section 3 of the CLAA 1975 lists down the compensation benefits received or to be received by the claimant which cannot be taken into consideration in assessing damages for personal injury claims.

In 1984, more provisions were introduced to regulate the assessment of damages for personal injury claims. Section 5 of the Civil Law (Amendment) Act 1984<sup>5</sup> adds more provisions to section 28A of the CLA 1956 (rev 1972). The section contains specific provisions on the assessment of damages for loss of expectation of life in personal injury claims and loss of future earnings. Despite the absence of specific wording, the section is also said to have indirectly affected the assessment of damages for pain and suffering, loss of pre-trial earnings and loss of future earning capacity.

The primary aim of this chapter is to analyze whether section 28A of the CLA 1956 have abolish or fetter the exercise of judicial discretion in personal injury claims arising out of motor vehicle accidents. It also endeavors to analyze whether the abolition or restriction (if any) imposed by the section have any effect in reducing the amount of damages being awarded by the courts in this type of claims. Therefore, the cases cited are confined to cases involving motor vehicle accidents only.<sup>6</sup> The above analyses are crucial in the attempt to answer the question of whether the CLA 1956 have indeed

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<sup>3</sup> (Act 67). Hereinafter referred to as “the CLA 1956 (rev 1972)”.

<sup>4</sup> (Act A308) Hereinafter referred to as “the CLAA 1975”. The amendments are consolidated into the CLA 1956 (rev 1972).

<sup>5</sup> (Act A 602). Hereinafter referred to as “the CLAA 1984”. The amendments are consolidated into the CLA 1956 (rev 1972). The amended Act is the current CLA 1956.

<sup>6</sup> However, personal injury claims arising out of other cause of action are also cited occasionally due to their relevancy to the discussion at hand.

fettered judges' discretionary power in its effort to reduce the amount of damages being meted out by the courts as alleged by many writers.

Rather than discussing the assessment of damages for all individual heads of damages claimable under personal injury claims arising out of motor vehicle accident, this chapter only discusses the heads of damages which are regulated by the provisions in the CLA 1956. The heads of damages which are not regulated by the CLA 1956 are not discussed since they are still governed by the Common Law principles and decided cases.<sup>7</sup>

Throughout the discussion in this chapter, should always be borne in mind that the term 'discretion' used does not refer to judges assessing damages arbitrarily or according to their whim and fancies. The term 'discretion' refers to the fact that in assessing the amount of damages for personal injury judges have to factor in various elements including the facts of the case, the submissions of the parties as well as the law, legal principles, judicial precedence and norms governing the issue at hand judiciously. Since there is no mechanical, scientific<sup>8</sup> or precise way of arriving at the amount of damages to be awarded, judges have to apply their own reasoning in arriving at an amount which is just and reasonable to the litigants.

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<sup>7</sup>The assessment of damages for pain and suffering and loss of amenities, claim for expenses incurred / will be incurred in the future and claim for property damages are not discussed.

<sup>8</sup>Haslifah Hashim and Massita Mohamad, "Factors in Estimating Compensation in Personal Injury and Wrongful Death using Actuarial Approach", *2011 International Conference on Financial Management and Economics*, 2-3 July 2011, (Singapore: IACSIT Press, 2011), 334 -337, at 334.

### 3.2 ABOLISHING THE AWARD FOR LOSS OF EXPECTATION OF LIFE

Loss of expectation of life is the loss of “prospect of an enjoyable, vigorous and happy old age”.<sup>9</sup> Damages under this heading is awarded to compensate plaintiff’s suffering due to his awareness that his enjoyment of life and the number of years in which he would be able to enjoy his life had been diminished because of the injuries suffered.<sup>10</sup> The measure of damages is not the length of life which is lost, but the prospective happiness<sup>11</sup> which is lost due to the injuries.<sup>12</sup>

Historically, loss of expectation of life was not recognized as an independent head of damages in personal injury claims. The loss was assessed together with the assessment for pain and suffering. The first recognition for loss of expectation of life as an independent head of damages was given in *Flint v Lovell*.<sup>13</sup> The decision was later reinforced by the decision in *Rose v Ford*.<sup>14</sup> Both *Flint v Lovell*<sup>15</sup> and *Rose v Ford*<sup>16</sup> however only recognize plaintiff’s right to claim damages loss of expectation of life in personal injury and fatal accident claims as an independent head of damages separate from damages for pain and suffering. They did not provide the method in which the loss is supposed to be assessed. There was also no statutory provision in respect of this head of damages. The assessment of damages under this head was developed by the case laws over the years. Judges have the discretion in deciding whether plaintiff was entitled to the award and the amount of damages to be awarded.

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<sup>9</sup>*Flint v Lovell* (1935) 1 KB 354 (CA).

<sup>10</sup>Lim, Heng Seng, *Assessment of Damages in Personal Injury and Fatal Accident Claims: Principles and Practices*, (Kuala Lumpur: Marsden Law Book, 1995), at 78.

<sup>11</sup>*Benham v Gambling* (1941) AC 157.

<sup>12</sup>Lord Wright in *Rose v Ford* (1937) AC 826 held; “A man has a legal right to his own life. I think he has a legal interest entitling him to complain if the integrity of his life is impaired by tortuous acts, not only in regard to pain and suffering and disability, but also in regard to the continuance of life for its normal expectancy. A man has a legal right that his life should not be shortened by the tortuous act of another. His normal expectancy of life is a thing of temporal value, so that its impairment is something for which damages should be given.”

<sup>13</sup>*Op. cit.* In this case, a 69 years old plaintiff was awarded £4,400 to compensate the shortening of his life in view of the evidence given by his doctors that he would probably be dead within one year after the accident.

<sup>14</sup>*Op. cit.* The court allowed damages for loss of expectation of life as a separate head of damages under estate claims.

<sup>15</sup>*Op. cit.*

<sup>16</sup>*Op. cit.*

Generally, plaintiff's age, family background, lifestyle, earning capacity, social standing and health were some of the considerations adopted by the judges in arriving at the monetary equivalence to the loss of plaintiff's happy and fulfilled life.<sup>17</sup> Since there was not specific method of assessment, judges sometimes found it difficult to assess the loss. This fact was acknowledged by Viscount Simon LC in *Benham v Gambling*;<sup>18</sup>

“Such problem might seem more suitable for discussion in an essay on Aristotelian ethics than in the court of law”

The statutory provision on the award for loss of expectation of life in England was introduced in 1983<sup>19</sup> by section 1(1)(a) of the Administration of Justice Act 1982.<sup>20</sup> However, rather than providing for the method for assessing the damages, the section abolishes the award altogether. Therefore, damages for loss of expectation of life for living plaintiff in personal injury claims can no longer be awarded in England.<sup>21</sup>

Prior to 1984, there was no statutory provision governing the award for loss of expectation of life in Malaysia. The cause of action and the assessment of damages for this head of damages were adopted from the Common Law principles and decided cases. As such, the Malaysian judges also faced the same problem faced by the English judges in determining what constitute happy life and whether plaintiff would have enjoyed a happy life but for the injuries suffered.

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<sup>17</sup>Verupillai, Jeyaratnam, *Damages: Loss of Expectation of Life Survival and Deductibility*, (Singapore: Malayan Law Journal, 1984), at 10.

<sup>18</sup>*Op. cit.*

<sup>19</sup>Rutter, Michael F., *Handbook on Damages for Personal Injury and Death in Singapore and Malaysia*, 2<sup>nd</sup> ed., (Hong Kong: Butterworth, 1993), at 350.

<sup>20</sup> Hereinafter referred to as the AJA 1982

<sup>21</sup>Rutter, Michael F., *loc. cit.*

The statutory provision relating to damages for loss of expectation of life in Malaysia was introduced by the CLAA 1984. Section 5(b) of the CLAA 1984 inserts subsection (2) to section 28A of the CLA 1956(rev 1972).<sup>22</sup> Since the head note to the section specifically states ‘damages in respect of personal injury’, the section operates only in respect of damages for loss of expectation of life for living plaintiff in personal injury claims. Section 28A (2)(a) and (b) of the CLA 1956 is an exact copy of section 1(1)(a) of the AJA 1982. It reads;

(2) In assessing damages under this section –

- (a) **no damage** shall be recoverable in respect of any loss of expectation of life caused to the plaintiffs by the injury; (*emphasis added*)
- (b) if the plaintiff’s expectation of life has been reduced by the injury, the Court, in **assessing damages in respect of pain and suffering** caused by the injury, **shall** take into account any suffering caused or likely to be caused by **awareness that his expectation of life has been so reduced**; (*emphasis added*)

The effects of para (a) to the section is very clear. It abolishes the award for loss of expectation of life from the list of damages claimable under personal injury claims in Malaysia. By virtue of this section, judges’ discretion in respect of awarding and assessing damages for loss of expectation of life in personal injury claims arising out of motor vehicle accidents is also abolished. Judges presiding over motor vehicle accident claim cases no longer have the discretion to decide whether the plaintiff is entitled to damages under this heading. Similarly, judges’ discretion assessing what constitutes a happy life, whether plaintiff would lead a happy life had he did not suffered the injuries

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<sup>22</sup>The amended section now becomes section 28A (2) of the CLA 1956.

and what amount would reasonably be sufficient to compensate plaintiff's suffering for the loss of a happy life is also abolished.

Further, since the award for loss of expectation of life can no longer be awarded in personal injury claims arising out of motor vehicle accidents, it follows that the quantum of damages to be awarded to the plaintiff in this type of claim will also be reduced. By abolishing the award for loss of expectation of life from the list of awards claimable under personal injury claims, the section have taken away a portion of the total quantum of damages which initially available to the plaintiff under personal injury claims arising out of motor vehicle accidents.

However, despite the effects highlighted above, an analysis of the section further reveals that the effects of section are not as clear cut. The following points shows that section 28A (2) of the CLA 1956 have very minimal effect on the exercise of judicial discretion and the quantum of damages in personal injury claims arising out of motor vehicle accidents.

### **3.2.1 Para (b) to the Section Allows for Loss of Expectation of Life**

The effect of para (a) on the award for loss of expectation of life is negated by para (b) of the section. Para (b) allows judges to compensate the plaintiff for the anguish suffered by him due to his awareness that his life expectancy had been reduced. Judges can award any amount which they consider reasonable to compensate the plaintiff for his suffering provided that the amount is assessed together with damages for pain and suffering caused by the injury and plaintiff is aware that his life expectation has been

diminished or reduced due to the injuries.<sup>23</sup> Since para (b) allows judges to award damages for loss of expectation of life (albeit being lumped together with damages for pain and suffering), the notion that judges' discretionary power in awarding damages for loss of expectation of life in personal injury claims arising out of motor vehicle accidents is abolished by section 28A (2) of the CLA 1956 is incorrect. The section merely abolishes the award for loss of expectation of life as an independent head of damages claimable under personal injury claims.<sup>24</sup> It neither abolishes the award altogether nor does it abolish the discretionary power of the judges to award the same.

In addition to returning the discretionary power to award damages for loss of expectation of life in personal injury claims to the judges, para (b) seems to further intensify the need for such discretion in assessing the damages under this heading. Although the para allows judges to assess damages to compensate plaintiff's suffering due to his awareness that his life expectation has been reduced together with damages for pain and suffering caused by the injury, it does not specify how the quantum is to be assessed. Section 28A (2) of the CLA 1956 does not provide the method for assessing the quantum of damages for either plaintiff's pain and suffering caused by the injury<sup>25</sup> or the suffering due to his awareness that the life expectancy has been reduced, the need for judicial discretion in the assessment of damages to be awarded under the section is even more apparent when the two (2) set of damages are to be assessed together.

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<sup>23</sup> Plaintiff must be *compos mentis* after the injury. Plaintiff who is in coma after the injury is not entitled to damages for loss of expectation of life.

<sup>24</sup> Rutter, Michael F., *op. cit.*, at 349.

<sup>25</sup> In assessing damages for pain and suffering, the amount of damages to be awarded for injury to different part of the body and any resulting disabilities is almost entirely set by the judges without any legislative assistance. All the plaintiff need to do is to produce the proof of injuries verifiable by a medical expert either by way of factual description or opinion, and leave it to the judges to decide on quantum. Judges will take into consideration the gravity of injuries and disabilities, overlapping, age, state of health, income and prospect in life in deciding the quantum for his head of damages.

Section 28A (2)(b) of the CLA 1956 re-established the method of assessing damages for loss of expectation of life in personal injury claims prior to *Flint v Lovell*<sup>26</sup> and *Rose v Ford*.<sup>27</sup> The damages for loss of expectation of life is assessed together with damages for pain and suffering<sup>28</sup> and judges have the discretion in assessing the quantum to be awarded.

### 3.2.2 Minimal Effect of Para (a)

Para (a) to the section also have minimal effect on the quantum of damages awarded in personal injury claims arising out of motor vehicle accidents. This is primarily due to the fact that this head of damages is very rarely awarded. Although the award is claimable, there seems to be “an absence of claim for such loss of expectation of life to a living plaintiff in Malaysia”.<sup>29</sup> The list of cases considered in Mallal’s ‘Digest of Malaysia and Singaporean Case Law’ also gives the impression that this head of damages is not generally awarded in personal injury claims in Malaysia. The same result was reached by J. Verupillai in his book. The researcher’s perusal of the collection of cases cited by Nasser Hamid in his Road Accident Citator,<sup>30</sup> the cases reported in the Malayan Law Journal, the Current Law Journal and the Personal Injury Report archives also reveals that the award for loss of expectation of life was generally awarded in estate claims only. This fact was noted by the court in *Lee Ann v Mohamed Sahari bin Zakaria*,<sup>31</sup> where Peh Swee Chin J commented;

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<sup>26</sup>*Op. cit.*

<sup>27</sup>*Op. cit.*

<sup>28</sup>Rutter, Michael F., *op cit.*, at 347.

<sup>29</sup>Syed Ahmad Alsagoff, *The Law of Tort in Malaysia and Syariah*, (Gombak: Syed Ahmad S A Alsagoff, 2004), at 224. See also Verupillai, Jeyaratnam, “Loss of expectation of Life and the Living Plaintiff”, (1982) 1 *Malayan Law Journal*, lxix – lxx, at lxix and Rutter, Michael F., *op. cit.*, at 350.

<sup>30</sup>Nasser Hamid and Hamid Ibrahim, eds., *Road Accident Citator*, (Petaling Jaya: Gavel Publications, 2007).

<sup>31</sup>[1987] 1 MLJ 285.

“Curiously, the plaintiff, a living person made a rather unusual claim for damages for loss of expectation of life which are almost invariably claimed for the estate of a deceased person.”

J. Verupillai in his article opined that the rarity of damages for loss of expectation of life awarded under personal injury claims was probably due to the past practices of awarding general damages under a global figure.<sup>32</sup> Damages for loss of expectation of life was awarded together with other general damages such as pain and suffering. His opinion was derived from decisions in *Ti Huck & Anor. V Mohamed Yusof*<sup>33</sup> and *Mat Desa bin Salleh v Ang Hock Lee & Anor.*<sup>34</sup> In these two (2) cases, the courts omitted to award damages for loss of expectation of life despite awarding damages for pain and suffering. J. Verupillai concluded that these cases are clear examples of the judges' inclination to award damages for loss of expectation of life as part of the assessment for the damages for pain and suffering.

The researcher however humbly submits that J. Verupillai's opinion above is arguable. There is nothing in either *Ti Huck & Anor. V Mohamed Yusof*<sup>35</sup> and *Mat Desa bin Salleh v Ang Hock Lee & Anor.*<sup>36</sup> which indicate that judges in these cases intended to include the damages for loss of expectation of life in the assessment of damages for pain and suffering. Since there is a general practice of itemizing the heads of damages to be awarded even then, the judges would have itemized the damages for loss of expectation of life as a separate head had they intended to award it to the plaintiff. The absence of which supports the notion that judges, even prior to the introduction of

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<sup>32</sup>Verupillai, Jeyaratnam, *op. cit.*, (1982), at lxix.

<sup>33</sup>[1973] 2 MLJ 244.

<sup>34</sup>[1979] 1 MLJ 62.

<sup>35</sup>*Op. cit.*

<sup>36</sup>*Op. cit.*

section 28A (2) of the CLA 1956, were not in the habit of awarding damages for loss of expectation of life in personal injury claims.

Even in the rare cases where the courts had allowed damages for loss of expectation of life in personal injury claims, the amount of damages awarded was very minimal. It had been judicially accepted that the award for loss of expectation of life should be a modest figure after taking into consideration the personal circumstances and age of the plaintiff.<sup>37</sup> The judge *Lee Ann v Mohamed Sahari bin Zakaria*,<sup>38</sup> for example considered RM 4000 as the ‘conventional figure’ in such a claim.<sup>39</sup>

Considering the facts that damages for loss of expectation of life was rarely awarded under personal injury claims and the nominal value of the damages (in the rare case it was awarded), the introduction of section 28A (2)(a) of the CLA 1956 therefore has minimal effect in reducing the quantum of damages in personal injury claims arising out of motor vehicle accidents.

### **3.3 ABOLISHING THE AWARD FOR LOSS OF PRE-TRIAL EARNINGS**

The cause of action for loss of pre-trial earnings arises when plaintiff who was injured by the tortfeasor’s negligent act is deprived of his income throughout the period of his disability.<sup>40</sup> In motor vehicle accident claims, the damages for loss of pre-trial earnings

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<sup>37</sup>Lim, Heng Seng, *op. cit.*, at 78.

<sup>38</sup>*Op. cit.*

<sup>39</sup>The judge however awarded half of this figure considering that plaintiff was ninety (90) years old.

<sup>40</sup>It falls under special damages since it is quantifiable based on plaintiff’s pre-injury income and the period in which he was unable to work up to the date of trial.

is awarded to the plaintiff to compensate him for the loss of his income caused by his inability to earn that income due to the injuries suffered during the accident. The assessment of damages is calculated by multiplying plaintiff's income at the time of injury with the period of disability.<sup>41</sup> The period of disability starts from the date of injury to the date in which the plaintiff is able to resume his employment and able to earn<sup>42</sup> or the date of trial.<sup>43</sup> Plaintiff's income is assessed deducting the amount payable for income-tax (if any) and expenses spent in earning that income<sup>44</sup> from the his total earning at the time of injury (which includes full or partial salary, business profit, increment, fringe benefits and any other source of income which contributes to his earnings)<sup>45</sup> Although the CLA 1956 does not contain any provision recognizing loss of pre-trial earnings as part of damages claimable under personal injury claims, it is recognized by the Common Law. Therefore, judges have the power to award damages for loss of pre-trial earnings in personal injury claims arising out of motor vehicle accidents.

Section 5(b) of the CLAA 1984 introduced section 28 (2)(d) to the CLA 1956 (rev 1972).<sup>46</sup> Section 28A (2)(d) of the CLA 1956 provides;

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

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

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<sup>41</sup>Length of time in which he is unable to earn that income.

<sup>42</sup>Applicable if plaintiff recovers and able to resume employment.

<sup>43</sup> Applicable if plaintiff is unable to resume incapacitate indefinitely and unable to resume employment.

<sup>44</sup>*Ibid.*

<sup>45</sup>Rutter, Michael F. *op cit.*, at 112.

<sup>46</sup>The amended section now becomes section 28A (2) of the CLA 1956.

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

Although literally, the section provides for the assessment of multiplier for loss of future earnings,<sup>47</sup> the application of the section has the effect of abolishing damages for loss of pre-trial earnings from the list of damages claimable in personal injury claims.

Prior to the CLAA 1984, the demarcation line between the multiplier for loss of pre-trial earnings and the multiplier for loss of future earnings was very clear. The multiplier for loss of pre-trial earnings was calculated from the date of injury while the multiplier for loss of future earnings was assessed from the date of trial. The introduction of section 28A (2)(d) of the CLA 1956 has abolished this demarcation line. Since the section states that the assessment for the multiplier for loss of future earnings is to start from the date of injury, it seems that the awards for loss of pre-trial earnings has merged into the award for loss of future earnings. Thus, abolishing the award for loss of pre-trial earnings in personal injury claims. This interpretation was adopted by K. C. Vohrah J in *Nagarajan a/l Veerapan v Ananthan a/l ParamaSivam*;<sup>48</sup>

“Pre-trial loss of earnings for claims arising under the pre-amendment law were and may be claimed as special damages calculated from date of accident and date of trial. The provision of section 28A, made in 1984,

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<sup>47</sup>Also known as post-trial loss of earnings.

<sup>48</sup>[1989] 2 CLJ 1243. See also decision by Abdul Malik Ishak J in *Mohd Yusof Abdul Ghani v Tee Song Kee & Anor* [1995] 3 CLJ 738 and by **KN Segara** in *Tan Swee Tiong v Khor Chin Hau* [2002] 1 CLJ 486.

make no mention of this head of damages; and all relevant provisions for the purpose of calculating loss of future earnings refer to the age at the date of accident and not the age at the date of trial as the figure. It seems to me therefore that there can be no separate head for pre-trial loss.’

Similar sentiment was echoed in *Dirkje Peiternella Halma v Muhd Noor bin Baharom & Ors.*<sup>49</sup> The Supreme Court set aside the award for loss of pre-trial earnings which had been agreed upon by the parties and allowed the claim for loss of future earning capacity. The multiplier for the damages for loss of future earnings capacity was calculated from the date of the accident. Gun Chit Tuan SCJ held;

“Counsel for the respondents submitted that the first issue to be considered by the court was the meaning of ‘future earnings’ in section 28A (2)(c). He also agreed with the view expressed by us in the Court that the previous distinction between pre-trial (past) and post-trial (future) loss of earnings is no longer applicable since the coming into force of the Civil Law (Amendment) Act 1984 on Oct 1984.”

Muhammad Altaf Hussain Ahangar in his article<sup>50</sup> also agrees with the notion that the award for loss of pre-trial earnings is abolished by section 28A (2) (d) of the CLA 1956. He opined that that maintaining loss of pre-trial earnings and loss of future earnings as two separate heads of damages serves more academic importance rather than practical one. He argued that the only material difference between these two (2)

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<sup>49</sup>[1990] 3 MLJ 103.

<sup>50</sup> Muhammad Altaf Hussain Ahangar, “Damages for loss of Earnings in Malaysia: the Need for a ‘Just’ Multiplier”, [2003] 3 *Malayan Law Journal*, lxxxi – xcvi.

awards is the assessment of interest for the awards.<sup>51</sup> Other than that, separating the two awards serves no practical purpose.

Despite the above, it is humbly submitted that further analysis of section 28A (2)(d) of the CLA 1984 and recent cases shows a different interpretation of the section can be reached; that section 28A (2)(d) of the CLA 1956 does not in any way abolish the award for loss of pre-trial earnings. This interpretation is reached by applying the following reasoning;

### **3.3.1 Dividing the Multiplier for Loss of Future Earnings**

There is nothing in section 28A (2)(d) of the CLA 1956 that specifies for the award for loss of pre-trial earnings to be abolished. In fact, there were several post 1984 cases which still allow loss of pre-trial earnings to be awarded. The courts in *Asiah bte Kamsah v Dr Rajinder Singh & Ors.*,<sup>52</sup> *N Vijaya Kumar v Voon Chen Lim*<sup>53</sup> and *Soton Bili & Anor. V Khajijah Led & Ors.*<sup>54</sup> managed to award damages for loss of pre-trial earnings along with damages for loss of future earnings while still adhering to the assessment of multiplier specified in section 28A(2)(d) of the CLA 1956. Such approach is possible by assessing the multiplier for loss of future earnings according to either para (d)(i) or para (d) (ii) to the section and dividing the it into two parts (the pre-trial period and post-trial period). The two multipliers are then multiplied with suitable multiplicands for both heads of damages. By adopting this method, the award for loss

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<sup>51</sup>Since pre-trial losses are awarded with interest while post-trial losses are not, merging both awards as loss of future earnings would be an injustice to the plaintiff. It will deprive him of the interest for damages for loss of pre-trial earnings. See *Chang Chong Foo v Shivanathan* [1992] 2 MLJ 473.

<sup>52</sup>[2002] 1 MLJ 484.

<sup>53</sup>[1989] 3 MLJ 255.

<sup>54</sup>[2008] 9 CLJ 304.

of pre-trial earnings can still be awarded under section 28A (2)(d) of the CLA 1956 as a separate head of damages in personal injury claims.

It should be noted that there is nothing in the section which prevent judges from adopting the above method. Maintaining the award for pre-trial loss of earnings by dividing the multiplier for loss of future earning into two parts does not in any way derogate the intention of the legislature to regulate the assessment of multiplier for loss of future earnings. Since the division between pre-trial loss and post-trial loss is made after the multiplier had been assessed, multiplier will remain as prescribed by the section only apportioned into pre-trial loss and future loss.

### **3.3.2 Different Methods of Assessment**

The notion that the award for loss of pre-trail earnings is merged with the award for loss of future earnings is also made impossible by the different method of assessing the damages for these two heads of damages. The assessment of multiplicand and multiplier for the awards is completely different. While the former is capable of precise calculation, the latter is a hypothetical figure calculated after taking into consideration plaintiff's earning projected future earnings and fringe benefits, retirement age, type of employment, health, education and social background, financial encumbrances, contingencies *etc.*

Apart from the above, the fact that damages for loss of pre-trial earnings is recoverable without any deductions for negative contingencies, accelerated payment, receiving the

money lump-sum or investment value should the money is invested<sup>55</sup> makes the multiplicand under this head of damages slightly higher than those of loss of future earnings. In fact, the courts had been very cautious in the assessment for pre-trial earnings since it may involve a substantial amount of damages and the risk of plaintiff delaying filing the claim in order to accumulate more pre-trial interest.<sup>56</sup> As such, to merge the assessment of damages for loss of pre-trial earnings with damages for loss of future earnings would be an injustice to the plaintiff since it would not only deprive him of the pre-trial interest on the pre-trial earnings, it would also deprive him of the multiplicand which he would have received as damages for loss pre-trial earnings.

It is therefore concluded that section 28A (2)(d) of the CLA 1956 does not abolish the award for loss of pre-trial earnings. Judges still have the discretion to allow and assess damages for loss of pre-trial earnings provided that the assessment of multiplier both loss of pre-trial earnings and loss of future earnings are within the fixed multiplier provided in section 28A(2)(d) of the CLA 1956. Further, since the award for loss of pre-trial earnings can still be awarded albeit the need to deduct its multiplier out of the multiplier for loss of future earnings, section 28A(2)(d) of the CLA 1956 therefore has no effect on the amount of damages being awarded for loss of pre-trial earnings in personal injury claims. The same conclusions can also be extended in respect of personal injury claims arising out of motor vehicle accidents.

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<sup>55</sup>Rutter, Michael F., *op cit.*, at 229. The multiplicand for loss of future earnings must be assessed by making suitable deductions for living expenses. The reductions for negative contingencies, accelerated payment, receiving the money lump-sum and investment value should the money is invested are also made. These reductions had been configured into the fixed multiplier in section 28A(2)(d) of the CLA 1956.

<sup>56</sup>*Id.*, at 230.

### **3.4 INTRODUCING PRE-CONDITIONS FOR THE AWARD FOR LOSS OF FUTURE EARNINGS.**

The cause of action for loss of future earnings arises when the torfeasor's negligent act caused injuries to the plaintiff to the extent that he is no longer able to work or even if he is able to work, unable to earn the same amount of income he expects to receive in the future had he did not suffer the injuries. The award is to compensate the plaintiff for the loss of his prospective earnings within the remaining of his working years which he will be deprived of. In motor vehicle accidents, the award for loss of future earnings is awarded to the plaintiff when the injuries and disabilities caused by the accident render him incapable of earnings or incapable of earning the same income he was earning prior to the accident indefinitely.

Prior to the CLAA 1984, there is no statutory provision in Malaysia providing for the assessment of damages for loss of future earnings. The assessment for this head of damages was left at the discretion of the judges guided by the Common Law principles and decided cases. Judges have to make an estimation of the amount of damages to be awarded since the plaintiff's future earnings are uncertain and cannot be arithmetically calculated with precision. The imprecision in the assessment was highlighted by Lord Reid in *British Transport Commission v Gourley*<sup>57</sup>;

“If he had not been injured, he would have had the prospect of earning a continuing income, it may be, for many years, but there can be no certainty as to what would have happened. In many cases the amount of income maybe doubtful, even if he had remained in good health, and there is always the possibility that he might have died or suffered from some incapacity at any time.

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<sup>57</sup>(1956) AC 185. See also *Ngui Kee Siong v Guan Soo Swee & Anor.* [1970] 2 MLJ 48.

The loss which he had suffered between the date of trial may be certain, but this prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate of the present value of his prospective loss.”

Section 5 of the CLAA 1984 introduced a new provision to section 28A of the CLA 1956 (rev 1972). The new section 28A (2)(c)(i) of the CLA 1956 reads;

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

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

The new provision made it compulsory for judges to satisfy themselves that the plaintiff is below the age of fifty five (55) years old at the date of injury, in good health but for the injury and was earning income prior to the injury before any damages for loss of future earnings under section 28A (2)(c) of the CLA 1956 can be awarded. The section has no equivalent provision in the AJA 1982.<sup>58</sup> Unlike in Malaysia, Judges in

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<sup>58</sup>Reiss in his article commented “While the English Parliament felt it is best not to disturb the method being practiced by the courts in the assessment of this head of damages, the Malaysian Parliament believe that continued exercise of judicial discretion in this respect is responsible for uncertain and inflated awards.” Reiss, Seth M., “Quantum for Future Loss in Personal Injury and Fatal Accident Cases After the Civil Law (Amendment) Act 1984”, (1985), 2 *Malayan Law Journal* lxii – lxxi, at lxiv.

England have the discretion in respect of the factors to be considered in awarding damages for loss of future earnings.

In order to analyse the effects of section 28(2)(c) of the CLA 1956 on judges' discretionary power and the quantum of damages in personal injury claims arising out of motor vehicle accidents, the section is broken into three (3) parts;

### **3.4.1 Condition (i): Below Fifty Five (55) Years Old**

Prior to the CLAA 1984, judges in Malaysia had a wide discretion to determine the maximum working age in which plaintiff can be compensated for loss of future earnings. There was no absolute maximum period limiting plaintiff's working life. The calculation of plaintiff's maximum working life depended on the nature of his employment, education, age, individual lifestyle, health and financial encumbrances. Although the retirement age is often held at fifty five (55) years old,<sup>59</sup> judges were at liberty to allow the award for loss of future earnings to plaintiff who had passed this age should there be evidence to show that he was indeed working, capable of working or required to work beyond the normal retiring age of fifty five (55).<sup>60</sup>

Section 28A (2)(c)(i) of the CLA 1956 statutorily adopt fifty five (55) years old as the maximum working life in the assessment of loss of future earnings.<sup>61</sup> Fifty five (55)

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<sup>59</sup>See *Murtadza bin Mohamed Hassan v Chong Swee Pian* [1980] 1 MLJ 216, *Lai Wee Lian v Singapore Bus Service* [1984] 1 MLJ 325 and *RJ Mc Guinness v Ahmad Zaini* [1980] 2 MLJ 304.

<sup>60</sup>Balan, P., "Damages for Personal Injuries Causing Death: A Critical Survey", (2004) *Journal of Malaysian and Comparative Law*, 45 – 67, at 46. In *Weng Kong v Yee Hup Transport Co. & Ors.* [1966] 2 MLJ 234, the court adopted sixty five (65) years old as working age and awarded damages for loss of future earnings to a fifty five (55) years old plaintiff. Similarly, in *Chinnakaruppan v Abdul Wahab bin Ahmad* (Unreported) cited in Dass, K.S., *Quantum in Accident Cases, vol. I*, (Kuala Lumpur: Malaysian Law Publishers, 1975), at 30, plaintiff who was more than seventy (70) years old was awarded damages for loss of future earnings when he managed to prove that he was working as a gardener at the time of injury.

<sup>61</sup>Lim, Heng Seng, *op. cit.*, at 151.

years old is considered as the cut-off age for the award for loss of future earnings. By virtue of this provision, judges no longer have the discretion to award damages for loss of future earnings for plaintiff who had attained or passed the age of fifty five (55) years old at the time of injury irrespective of whether the plaintiff was working or capable of working beyond that age. The plaintiff in *Tan bin Hairuddin v Bayeh a/l Belalat*<sup>62</sup> for example was denied claim for loss of future earning on account of him being fifty five (55) years old at the time of injury. The judge in this case held;

“My opinion is that section 28A(2)(c) of the Civil Law Act 1956 is clear that a person age 55 or more at the time of injury was sustained cannot be awarded any damages for the loss of future earnings. The important date in the said provision is the date of injury and on that date the respondent / plaintiff was already more than 55 years old.”

The cut-off age sometimes can lead to injustice to the plaintiff. In situations where plaintiff had attained the age of fifty five (55) years old but was still working at the time of injury, the application of section 28A (c)(i) of the CLA 1956 will prevent him from being awarded damages for loss of future earnings. Because of this injustice, some scholars had come up with a different interpretation of the section. K.S. Dass in his commentary of the CLAA 1984<sup>63</sup> opined that section 28A(2)(c)(i) of the CLA 1956 does not take away the judges’ discretionary power to award damages for loss of future earnings for plaintiff who had passed the age of fifty five (55) years old. He claimed that since section 28A(2)(d) of the CLA 1956 already provides for the assessment of multiplier for loss of future earnings for persons under the age of fifty five (55) years

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<sup>62</sup>[1992] 2 CLJ 773. See also *Lo Kit Pin v Fu Khet Nyuk (Deceased) Liew Nyuk Jin & Anor* [1999] 1 LNS 32.

<sup>63</sup>Dass, K.S., *Quantum of Damages in Personal Injury, Parliament v Common Law, a Critical Examination of the 1984 Amendment to the Civil Law Act 1956*, (Kuala Lumpur: Legal Circle Book Sdn. Bhd, 1997).

old,<sup>64</sup> the term ‘in any other case’ in the second limb of section 28A(2)(c)(i) of the CLA 1956 which requires plaintiff to prove that he was in good health and receiving earnings prior to the injury must have been specifically drafted to deal with persons who had passed the age of fifty five (55) years.<sup>65</sup> To require a young person (below the age of fifty five (55)) to proof good health when he was clearly earning at the time of injury would ‘entail ridiculous result - injustice’.<sup>66</sup> From the above analysis, KS Dass concluded that section 28 (2)(c)(i) of the CLA 1956 only bar the award for loss of future earnings to plaintiff who was fifty five (55) years old. Judges however still retain the discretion to award damages for loss of future earnings to plaintiff who had passed the age of fifty five (55) years old provided that he can prove he was in good health and gainfully employed at the time of injury.

In support of the KS Dass’s opinion, Michael F. Rutter commented that the question of whether plaintiff in personal injury cases in Malaysia can claim for post-retirement income (any earnings receive after the age of fifty five (55)) is still unanswered.<sup>67</sup> He opined that section 28A(2)(c)(i) of the CLA 1956 is so poorly drafted that it allows for ambiguity with regard to the status of plaintiff who was beyond the age of fifty five (55). He argued that the section did no abolish or put any limit to these persons. The section in fact is silent on this regard.<sup>68</sup>

It is however submitted that KS Dass and Rutter’s opinion above is not without flaws. KS Dass’s opinion rests on a faulty interpretation of interpretation of section 28A (2)(c)(i) of the CLA 1956. KS Dass equated section 28A (2)(c)(i) of the CLA 1956

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<sup>64</sup>The multiplier for plaintiff who is thirty (30) years old and below is sixteen (16). The multiplier for those above the age of thirty (30) years old is calculated according to the formula of fifty five (55) minus the age at the time of accident divide by two (2).

<sup>65</sup>Dass, K.S., *op. cit.*, (1997), at 65.

<sup>66</sup>*Ibid.*

<sup>67</sup>Rutter, Michael F. *op. cit.*, (1993), at 654.

<sup>68</sup>*Ibid.*

with proviso (iv)(a) to section 7(3) of the same Act. By reading the sections in similar manner, KSDass failed to differentiate the phrase ‘any other person’ in proviso (iv)(a) to section 7(3) of the CLA 1956 with ‘in any other case’ in section 28A (2)(c)(i) of the Act. It should be noted that while the phrase ‘any other person’ in proviso (iv)(a) to section 7(3) of the CLA 1956 may possibly be interpreted as referring to deceased who had passed the age of fifty five (55) years old, the phrase ‘in any other case’ in section 28A(2)(c)(i) of the Act cannot be read as such. Unlike proviso (iv)(a) to section 7(3) of the CLA 1956, section 28A(2)(c)(i) of the Act states ‘plaintiff who had attained the age of fifty-five years or above... no damages for such loss shall be awarded...’. Because of this provision, judges are clearly barred from awarding the award for loss of future earnings to persons who had attained or passed the age of fifty five (55) years old at the time of injury. It does not merely bar the award for loss of future earnings to plaintiff who was fifty five (55) years at the time of injury while allowing the award to those who had passed that age as claimed by KS Dass.

KS Dass’s suggestion that “a living plaintiff who was fifty five (55) and above at the time of injury could claim for loss of future earnings”<sup>69</sup> is unacceptable in light of the specific statutory prohibition. Edgar Joseph SCJ in *Chan Chin Ming v Lim Yok Eng*<sup>70</sup> quoting Hasyim Yeop Sani SCJ in *Mohammed Noor bin Othman & Ors. V Haji Mohammed Ismail bin Haji Ibrahim & Ors.*<sup>71</sup> stated;

“... it is trite law that where the words of a statute are clear, there is no room for court to go beyond the express language of the statute.”

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<sup>69</sup>Dass, K.S., *op. cit.* (1997), at 65.

<sup>70</sup>[1994] 3 MLJ 233.

<sup>71</sup>[1988] 2 MLJ 82 at 84.

Since the provision in section 28A (2)(c)(i) of the CLA 1956 is very clear and specific, there is also no question of ambiguity and uncertainty in the wording of the provisions as claimed by Rutter.

Further, KS Dass's interpretation of section 28A (2)(c)(i) of the CLA 1956 is also questionable on the ground that it will lead to two (2) illogical results. First, it allows the award for loss of future earnings to plaintiff who had passed the age of fifty five (55) years old while barring it those who was fifty five (55) years old at the time of injury. Second, it allows judges to use their discretion in deciding the multiplier for loss of future earnings for plaintiff who had passed the age of fifty five (55) years old while prescribing specific formula for plaintiff who was below the age of fifty (55) at the time of injury. To do so will open up the possibility that plaintiff who had passed the age of fifty five (55) years old receiving more compensation than those below fifty five (55) years old. While a fifty four (54) years old plaintiff is only entitled to a maximum of six (6) months multiplier,<sup>72</sup> a fifty six (56) years old claimant could be receiving more than that.<sup>73</sup> To assume that these two absurd effects are the effects the legislature had envisaged while drafting the CLAA 1984 is illogical.

It is therefore submitted that section 28A (2)(c)(i) of the CLA 1956 has indeed removed the judge's discretion to award damages for loss of future earnings to plaintiff who had attained the age of fifty five (55) years old. The notion that the section is not applicable to plaintiff who had passed the age of fifty five (55) years old at the time of injury as suggested by KS Dass and Rutter is simply their effort to naturalized the effect of the provision on the plaintiff who was actually earning an income at the date of injury

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<sup>72</sup> Maximum multiplier for loss of future earnings for plaintiff aged fifty four (54) years old.

<sup>73</sup> Since judges have the discretion to determine the multiplier for plaintiff who had passed the age of fifty five (55) years old, they are at liberty to award more than six (6) months multiplier for loss of future earnings.

despite attaining the age of fifty five (55) years old. To allow damages for loss of future earnings to plaintiff who had passed the age of fifty five (55) years old is a contradiction of the intention of the legislature. Since it is commonly accepted that the reason behind the 1984 amendment is to control the escalation of awards in personal injury claims due to among others, the awards for loss of future earnings for plaintiff who had attained the age of fifty five (55) years old,<sup>74</sup> the Legislature was trying to prevent judges from allowing the award for loss of future earnings to plaintiff who had reached the age of retirement at the time of accident. As such, any other interpretation of the section would be flying in the face of the legislative intention. Hence, it is concluded that judges' discretion in awarding damages for loss of future earning in personal injury claims is removed. At the same time, the same discretion in respect of personal injury claims arising out of motor vehicle accidents cases is also abolished.

The introduction of this pre-condition in certain cases can also be said as a mere codification of existing practices of the local judges. Some of the pre-1984 cases indicated that judges sometimes had (but not as strict rule) taken fifty five (55) years old as the retiring age and assumed that a person's earning would cease at that age.<sup>75</sup> In these cases, the introduction of the pre-condition that plaintiff must be below the age of fifty five (55) years old at the time of injury by section 28A (2)(c)(i) of the CLA 1956 have no effect on the exercise of judicial discretion. It merely abolishes the discretion which the judges had on its own generally chosen to disregard.

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<sup>74</sup>Per Gopal Sri Ram JCA in *Ibrahim bin Ismail & Anor. V Hasnah bin Puteh Imat* [2004] 1 CLJ 797.

<sup>75</sup>Balan, P., *op. cit.* (2004), at 46. Also see Parliamentary Debates, Senate, Sixth Parliament, Second Session, 3<sup>rd</sup> August 1984, at 134 (Tuan Radzi Sheikh Ahmad). In *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn. Bhd.* [1982] 2 MLJ 71, Salleh Abbas FJ in deciding the multiplicand for loss of future earning capacity, assumed that the Plaintiff would be working until the age of fifty five (55) only and calculated the multiplier for the award with that assumption in mind. Similarly, the Supreme Court in *Ahmad Nordin bin Haji Maslan & Anor. v Eng Ngak Hua & Ors.* [1985] 2 MLJ 431 also noted that there was a general disposition among the local courts toward taking fifty five (55) years old as the retirement age. Because of this, the trial court's finding that the deceased retirement age would be 65 was declared excessive and reduced to fifty five (55). A Brunei decision in *RJ McGuinness v Ahmad Zaini* [1980] 2 MLJ 304 also indicates that plaintiff would continue to work until the age of fifty five (55). Thus, implying that plaintiff's retirement age would be at fifty five (55) years old. In the light of these pre-1984 cases, it is clear that the judges have always considered fifty five (55) as the retirement age even without having specific statutory provision and rarely award damages for loss of future earning beyond that age.

By limiting the award for loss of future earnings to plaintiff who is below the age of fifty five (55) years old only, section 28A (2)(c)(i) of the CLA 1956 has the effect of reducing the quantum of damages being awarded by the courts under personal injury claims. A portion of damages which may be awarded to the plaintiff under the pre-1984 rule is removed. The same effect can also be seen in the personal injury claims arising out of motor vehicle accidents.

### **3.4.2 Condition (ii): Good Health**

The second condition set by section 28A(2)(c)(i) of the CLA 1956 before an award for loss of future earning can be awarded is the plaintiff must prove that he was in good health at the time of the injury. The term ‘shall’ in the section indicates that the requirement of good health is a condition precedent to the award. It can only be waived if plaintiff’s good health is voluntarily admitted by the defendant. In *Sumarni v Yow Bing Kwong & Anor*,<sup>76</sup> the Court of Appeal reiterated the necessity of proving good health and held that the failure on the Appellant’s part to prove good health and the inability to work in the future precluded her from claiming the award for loss of future earnings. Similarly, Richard Malanjum JCA in *Looi Gnan Peng v Bay Tong Hai*,<sup>77</sup> held;

“One of the other elements is that ‘damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury’.

On perusal of the evidence adduced we are in agreement with learned counsel for the respondent that none of the witnesses called by the

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<sup>76</sup>[2008] 3 CLJ 489.

<sup>77</sup>[2005] 1 CLJ 685.

appellant including the appellant herself testified on her overall health condition. No doubt in the medical reports it was stated that her general condition was satisfactory or good. But that could only refer to her condition after the accident and not on her overall health. A simple question to the medical doctors called as witnesses on her overall health condition could have resolved the doubt. Since that was not done we are of the view that one element required for a successful claim remained unproved.”

The condition of good health in section 28A (2)(c)(i) of the CLA 1956 abolishes judges’ power to determine whether damages for loss of future earnings is to be awarded. It also removed judges’ discretionary power to deduct the multiplier on account of plaintiff’s health. Once plaintiff’s good health has been proven or admitted, judges have to allow damages for loss of future earnings in full.

However, the compulsory nature of proving good health which leads to the conclusion that judges’ discretion is abolished by section 28A (2)(c)(i) of the CLA 1956 can be argued upon based on the following points;

**(a) The uncertainty in interpreting the term ‘good health’**

Section 28A (2)(c)(i) of the CLA 1956 does not provide the interpretation for the term good health. The term is also not defined by the interpretation section of the CLA 1956,<sup>78</sup> the Interpretation Act 1967 (Act 388) or by the Legislature in the Explanatory Statement to the CLAA 1984 Bill. In fact, the Legislature had specifically left the task

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<sup>78</sup>Section 2 of the CLA 1956.

of defining the term to the judges. During the Parliamentary Debate on the CLAA 1984 Bill, the then Deputy Home Minister in answering a question by Senator D.P Vijandran on the definition of the term good health commented;

“I am of the opinion that this matter should be left to the judges to decide.

It is not for me to interpret it here.”<sup>79</sup>

However, despite the intention of the Legislature, none of the judges in the decided cases thus far had given a definite interpretation of the term.<sup>80</sup>

The ordinary dictionary meaning of good health is “the state of being vigorous and free from bodily or mental disease”.<sup>81</sup> This definition is however too strict to be followed since ‘free from bodily and mental disease’ would necessitate the absence of any disease; a state which is very difficult to achieve. Due to this, the judge in *Osman Effendi b Mahmud & Anor. V Mohd Noh b Khamis*,<sup>82</sup> opted the yardstick of questioning whether the state of plaintiff’s health interferes with his life, profession or employment.<sup>83</sup> Should the plaintiff was able to lead a normal life, perform his duties and earn income at the time of injury, he is presumed to be in ‘good health’ to satisfy the requirement in the section. KN Segara J held;

“In every motor accident case, where it has been established that the plaintiff had been gainfully employed immediately before the accident, there is always a presumption that plaintiff was in good health before the injury....”

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<sup>79</sup>Parliamentary Debates, Senate, (*op. cit.*), at 159(Tn Radzi bin Sheikh Ahmad).

<sup>80</sup>Radhakrishnan, S., “Quantum of Damages in Personal Injury Claims”, (1995) 3 *Malayan Law Journal*, xxix – xl, at xxxiii.

<sup>81</sup>Rajasooria, J. Edwin, “Necessity of Proving Good Health”, 9<sup>th</sup> July 2010, The Malaysian Bar 8<sup>th</sup> November 2010, <[http://www.malaysianbar.org.my/index2.php?option=com\\_content&do\\_pdf=1&id=30358](http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=30358)>

<sup>82</sup>[1998] 4 AMR 3687.

<sup>83</sup>Radhakrishnan, S., *op. cit.*, at xxxiii. Also see Khoo, Guan Huat, “Assessment of Damages in Fatal Accident Claims and a Commentary of the Civil Law (Amendment) Act 1984”, (1993)1 *Malayan Law Journal* cxxix- cxxxviii, at cxxxv.

Similar interpretation was adopted in *Loh Hee Thuan v Mohd Zaini bin Abdullah*,<sup>84</sup> where it was held that;

“The fact that he had lead a normal life up to the time of the accident had led evidence that he was ‘receiving earnings by his own labour or other gainful activities before he was injured’ is sufficient in my view to satisfy the requirement of proof as stated in s. 28A(2)(c)(i) of the Act.”

By virtue of this yardstick, although the plaintiff was suffering from some kind of illness, disease or medical problem at the time of the injury, he will still be entitle for the award for loss of future earnings if he manages to prove that he was gainfully employed prior to the injury or that his illness, disease or medical problem did not substantially affect his capacity to engage in remunerative activities. This is why in *Loh Hee Thuan v Mohd Zaini bin Abdullah*,<sup>85</sup> the plaintiff who have a history of diabetes mellitus, infarct in the right ganglia of the brain and hypertension was still considered in good health and was awarded the full multiplier under section 28A(2)(c)(i) of the CLA 1956. The judge did not consider his illness sufficient to constitute ‘poor health’. Once a plaintiff is considered to be in good health at the time of accident, he would be entitled to a full multiplier eventhough he is suffering from some kind of illness or disease which may affect his employment at a later date.

It is therefore submitted that the absence of the definition for the term good health enable judges to use their own discretion to determine what constitute good health. It also allows judges the discretion to decide on the nature and extend of plaintiff’s illness which will justify declaring the plaintiff to be in poor health. Section 28A(2)(c)(i) of

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<sup>84</sup>[2003] 1 AMR 332.

<sup>85</sup>*Op. cit.*

the CLA 1956 merely made it compulsory for the plaintiff to prove good health but it does not take away the discretionary power of the judges to determine whether plaintiff is in 'good health' to satisfy the requirement in the section.

#### **(b) The presumption of good health**

Apart from the above, the decisions in *Loh Hee Thuan v Mohd Zaini bin Abdullah*<sup>86</sup> and *Osman Effendi b Mahmud & Anor. V Mohd Noh b Khamis*<sup>87</sup> further support the notion that judges still have the discretion on the issue of proving good health by disregarding the condition that plaintiff's good health needs to be specifically proven by the plaintiff or admitted by the defendant. Instead of requiring the plaintiff to prove he was in good health at the time of injury, the judges in these two cases presumed that the plaintiff were in good health even without any proof on the same. The judge in *Loh Hee Thuan v Mohd Zaini bin Abdullah*<sup>88</sup> held;

"I do not think that the words "proved or admitted" that the plaintiff was in good health as found in s. 28A (2)(c)(i) of the Act must mean that the plaintiff entire medical records must be tendered before the court could make an award for loss of future earnings.

The fact that he had lead a normal life up to the time of the accident had led evidence that he was "receiving earnings by his own labour or other gainful activities before he was injured" is sufficient in my view to satisfy the requirement of proof as stated in s. 28A(2)(c)(i) of the Act."

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<sup>86</sup>*Op. cit.*

<sup>87</sup>*Op. cit.*

<sup>88</sup>*Op. cit.*

Similarly, in *Osman Effendi b Mahmud & Anor. V Mohd Noh b Khamis*,<sup>89</sup>KN Segara J held;

“The requirement in law that it must be proved or admitted that plaintiff was in good health but for the injury, under section 28A(2)(c)(i) of the Civil Law Act 1956, was satisfied when a there was no challenges by the defendant whether specifically in his pleading or in his cross-examination of the plaintiff, as to the plaintiff health but for the injuries.

In the present case, there had been no suggestion at all that the first plaintiff was suffering from any form of ill health before the accident. Therefore, it must be deemed to be admitted that the plaintiff was in good health but for the injuries.”

The decisions in the above cases had shifted the burden of disproving good health to the defendant. In order to dispel the court’s presumption of good health, the defendant have to first direct the mind of the court to the possibility that the plaintiff was suffering from some medical problem which may constitute ‘poor health’. Failure to do so will constitute an admission by the defendant of plaintiff’s good health. In *Loh Hee Thuan v Mohd Zaini bin Abdullah*, the judge held;<sup>90</sup>

“Since Mr Ramanathan had conceded that he did not raise the issue before the learned session court judge, it is my judgement that by his conduct he had ‘admitted’ that the plaintiff was in good health and that such conduct is sufficient in my view to satisfy the requirement of the word ‘admitted’ as stated in section 28A(2)(c)(i) of the Act.”

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<sup>89</sup>*Op. cit.*

<sup>90</sup>*Op. cit.*

Judges' discretion to presume that the plaintiff was good health is also supported by KS Dass and Altaf. KS Dass in his book argued that good health need not be proven or admitted. To require a plaintiff who was gainfully employed at the time of injury to prove that he was in good health is "a sheer waste of time" and "unnatural".<sup>91</sup> On similar vein, Altaf also opined that the pre-condition of proving good health "impose an unduly high burden of proof to qualify for an award in damages for loss of earnings."<sup>92</sup>

Recently, J. Edwin Rajasooria, a legal practitioner also commented that the approaches taken by the courts in *Loh Hee Thuan v Mohd Zaini bin Abdullah*<sup>93</sup> and *Osman Effendi b Mahmud & Anor. V Mohd Noh b Khamis*,<sup>94</sup> is preferable from practical point of view due to the difficulty in actually proving that the plaintiff was in good health. He explained that although the law does not require the plaintiff's complete medical records to be tendered in court in order to prove good health, the requirement of proving good health is still very difficult to fulfil especially if the plaintiff does not have proper medical record, never seek medical treatment before or have sought medical treatment from many clinics and hospitals that it would be difficult to obtain a complete record to prove his good health. As such, it is "more practical and more realistic"<sup>95</sup> to presume that a plaintiff who had been earning prior to the injury was also of good health.

Based on the above, the effect of section 28A (2)(c)(i) of the CLA 1956 in abolishing judges' discretionary power seems to have been negated. Judges not only have the discretionary power to interpret the term good health, they also have the discretion to

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<sup>91</sup>Dass, K.S., *op. cit.* (1997), at 65.

<sup>92</sup>Muhammad Altaf Hussain Ahangar,, "Judicial Responses to Damages Law in Malaysia: An Analysis", 5<sup>th</sup> *Asian Law Institute Conference*, (Singapore, 22-23 May 2008).

<sup>93</sup>*Op. cit.*

<sup>94</sup>*Op. cit.*

<sup>95</sup>Rajasooria, J. Edwin, "Necessity of Proving Good Health", 9<sup>th</sup> July 2010, The Malaysian Bar 8<sup>th</sup> November 2010, <[http://www.malaysianbar.org.my/index2.php?option=com\\_content&do\\_pdf=1&id=30358](http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=30358)>

presume that the plaintiff was in good health even without any specific evidence to the same.

The presumption of good health however must be treated with caution. Despite the practicality of the approach, it can be seen as a direct contradiction of section 28A (2)(c)(i) of the CLA 1956. Eventhough the courts in *Loh Hee Thuan v Mohd Zaini bin Abdullah*<sup>96</sup> and *Osman Effendi b Mahmud & Anor. v Mohd Noh b Khamis*,<sup>97</sup> held that defendant only need to challenge the ‘good health’ in order to dispel the presumption of good health and trigger the requirement of proving good health, the decisions have clearly disregarded the compulsory nature of proving good health set in section 28A(2)(c)(i) of the CLA 1956. The phrase ‘damages for such loss shall not be awarded unless it is proved or admitted that plaintiff was in good health but for the injury’ in the section clearly requires plaintiff’s good health to be strictly proven or admitted by the defendant. The section is clear and does not leave any avenue for other interpretation. Any attempt to depart from this pre-condition due to any reason, would be flying in the face of strict statutory provision. It is submitted that the courts in *Loh Hee Thuan v Mohd Zaini bin Abdullah*<sup>98</sup> and *Osman Effendi b Mahmud & Anor. V Mohd Noh b Khamis*,<sup>99</sup> had chosen to exercise their discretion in interpreting the requirement of proving good health in the above manner in order to avoid hardship and inconvenience to the plaintiff.

Therefore, as it stands, section 28A (2)(c)(i) of the CLA 1956, only accords judges with the discretion to interpret the term good health. This discretion is intentionally given by the legislature to the presiding judges. Judges however have no discretion to presume

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<sup>96</sup>*Op. cit.*

<sup>97</sup>*Op. cit.*

<sup>98</sup>*Op. cit.*

<sup>99</sup>*Op. cit.*

that plaintiff was in good health without specifically proven by the plaintiff or admitted by the defendant.

Further, since section 28A (2)(d) of the CLA 1956 provide specific multiplier for the assessment for loss of future earnings, the plaintiff will be entitle to the full statutory multiplier once he was declared to be 'in good health' eventhough he is suffering from some kind of medical problem which may affect his employment in the future. Unlike the situation prior to the 1984 amendment, judges nowadays have no discretion to reduce the multiplier to suit the plaintiff health condition. The pre-amendment cases showed that while poor health did not totally bar the plaintiff from receiving the award for loss of future earnings (unless it prevented him from earning altogether), the poor health was taken as one of the reason to reduce the multiplier for the award. In *Yaakob Fong v Lai Mun Keong & Ors.*<sup>100</sup> For example, a fifty one (51) years old man with ischemic heart disease was awarded loss of future earnings. The multiplier however was only for six (6) months.

Therefore, it is concluded that the introduction of the condition of proving good health have partial effect on the judge's discretionary power in awarding the award for loss of future earnings in personal injury claims arising out of motor vehicle accidents. Judges have no discretion in deciding whether plaintiff is entitle to the award. They must allow the award in full if the plaintiff manages to prove that he was in good health or the defendant concedes plaintiff's good health. Judges however still retain the discretion to interpret what constitute good health which will enable them to allow the award for loss of future earnings to the plaintiff. Since the judges have to allow full multiplier for the award if the plaintiff manages to prove good health, the section also does not contribute

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<sup>100</sup>[1986] 2 MLJ 317.

much in reducing the quantum for the award for future loss of earnings in personal injury claims arising out of motor vehicle accidents.

### **3.4.3 Condition (iii): Earning Income at the Time of Injury**

The third condition set out by section 28A (2)(c)(i) of the CLA 1956 is the requirement that the plaintiff must be 'receiving earning by his own labour or other gainful activity before he was injured'. The section has made it compulsory for the plaintiff to prove that he was employed and earning income prior to the injury before the award for loss of future earnings can be awarded. Prior to the introduction of this section, judges have a wide discretion in awarding damages for loss of future earnings even to persons who was not earning at the time of injury.<sup>101</sup>

Similar to 'good health' the term 'earnings' is also not defined by the CLA 1956, the Interpretation Act 1967 (Act 388) or by the Legislature in the Explanatory Statement to the CLAA 1984 Bill. Nevertheless, 'earnings' has been commonly accepted as any payment connected to the employment as a measure of work being put in by the claimant<sup>102</sup> for example salary,<sup>103</sup> allowances,<sup>104</sup> fringe benefits and business profit. Plaintiff claiming for loss of future earnings will have to prove that he was receiving some form of income before the injury.

The problem in respect of this condition lies with the phrase 'before he was injured'.

The phrase has been interpreted as 'at the time he was injured'. The interpretation was

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<sup>101</sup> *Yang Salbiah v Jamil bin Harun* [1981] 1 MLJ 292 and *Lim Eng Kay v Jaafar b Mohamed Said* [1982] 2 MLJ 156.

<sup>102</sup> *Nagarajan Veerappan v Ananthan Parama Sivam & Anor* [1989] 2 CLJ 153 (rep) [1989] 2 CLJ 1243.

<sup>103</sup> See *Chang Ming Feng & Anor. v Jackson Lim @ Jackson Ak Bajut* [1999] 1 MLJ 1.

<sup>104</sup> See *Marappan Nallan Kaundar & Anor. v Siti Rahmah binti Ibrahim*, *op. cit.*

provided by Court of Appeal in *Dirkje Peiternella Halma v Muhd Noor bin Baharom & Ors.*<sup>105</sup> and *Tan Kim Chuan v Chandu Nair*.<sup>106</sup> The Court of Appeal in *Dirkje Peiternella Halma v Muhd Noor bin Baharom & Ors.* held that the Legislature's use of a continuous tense in 'receiving earning' indicates that the income is not a matter of past income but income which come from the claimant's employment at the time he was injured.<sup>107</sup> The term 'before' needs to be construed as a whole and not disjunctively. As such, the term must be read with due consideration of the rest of the wordings in the provision. The fact that the Appellant was on a two years no-pay leave when she was knocked down by the Respondent means that she was not earning at the time of injury despite still being employed.<sup>108</sup> The above interpretation was reinforced by *Tan Kim Chuan v Chandu Nair*<sup>109</sup> where the Supreme Court highlighted that since the legislature uses the phrase 'at the time when he was injured' after the phrase 'only the amount relating to his earnings as aforesaid', it is clear that the legislature intended that only the amount that the appellant was receiving at the time he was injured can be taken into account in the assessment of multiplicand for the award for loss of future earnings.

As such, by virtue of section 28A (2)(c)(i) and (ii) of the CLA 1956 together with the two (2) Supreme Court decisions above, judges' discretion to award loss of future earning to plaintiff who was a student, unemployed, on unpaid leave, just resigned from previous employment and waiting to start a new job or those who would have found employment in the immediate future is abolished. The abolition is due to the fact that

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<sup>105</sup> *Op. cit.*

<sup>106</sup> [1991] 1 MLJ 42.

<sup>107</sup> During the appeal, the counsel for the Appellant submitted that the term should be construed as 'any time prior to the injury'. He argued that if the injured person has at some time in his or her life been working and receiving income, he should be entitled to the award for loss of future earnings.

<sup>108</sup> Gunn Chit Tuan SCJ held that "...it is then seen that the intention of the legislature [was] that in awarding damages for loss of future earnings, only the amount that the appellant was receiving at the time he was injured can be taken into account which means that if the appellant (plaintiff) was not receiving any earning at that point of time. She does not qualify for any award of damages for loss of future earnings. In this case, as the appellant was on no pay leave and was not receiving any earning at the time of accident we must regretfully come to the conclusion that she is not entitled to any award of damages for loss of future earnings."

<sup>109</sup> *Op. cit.*

they are not receiving income at the time of injury.<sup>110</sup> Abdul Hamid LP in delivering the judgement of the Supreme Court in *Tan Kim Chuan v Chandu Nair*,<sup>111</sup> held;

“...it is an essential pre-requisite that in awarding damages for loss of future earning or loss of earning capacity there must be a proof that the claimant was receiving earning by his own labour or other gainful activity before he was injured. It is abundantly clear that the legislature, in its own wisdom, decided that an injured person ought not to get any damages in a claim for either loss of future earnings or loss earning capacity unless before the accident (at the date of accident) he was in fact receiving earnings. To hold otherwise would mean that the court is creating a law to provide for something which clearly the legislature has no intention to do.”

The introduction of section 28A (2)(c)(i) of the CLA 1956 also causes a huge reduction in the amount of damages being awarded. Should the case of *Yang Salbiah v Jamil bin Harun*<sup>112</sup> is to be decided according to section 28A (2)(c)(i) of the CLA 1956, the plaintiff will not receiving any damages for loss of future earning considering that she was seven (7) years old and was not earning any income at the time of injury.<sup>113</sup> Similarly, the plaintiff in *Lim Eng Kay v Jaafar b Mohamed Said*<sup>114</sup> will also be deprived of the damages for loss of future earnings considering that he was studying at the time of injury. Although the plaintiff was a trained teacher prior to him continuing his studies, the fact that he was not receiving income at the time of the injury will bar

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<sup>110</sup> The rigidity of this condition leads to many critiques from the legal spheres. The main objection to the application of this condition is it precludes claim by person whose commencement of employment or some other remunerative activity is imminent,<sup>110</sup> but not necessarily at the time of death or injury. For example a university student seeking employment, person on unpaid leave or person who is about to start a new job.

<sup>111</sup> *Op. cit.*

<sup>112</sup> *Op. cit.*

<sup>113</sup> Plaintiff was awarded RM 33,816 for loss of future earnings. The assessment was based on what the court presumed to be a reasonable and moderate figure for her future monthly income and working life.

<sup>114</sup> *Op. cit.*

judges from awarding damages for loss of future earnings under section 28A (2)(c)(i) of the CLA 1956.

### **3.5 REGULATING THE ASSESSMENT OF MULTIPLICAND FOR LOSS OF FUTURE EARNINGS**

Prior to the CLAA 1975, there was no statutory provision relating to the award for loss of future earnings in Malaysia. Although the award is recognized by the courts, the assessment was left in the hands of the judges guided by the Common Law principles and decided cases. The general method was to add up all of plaintiff earnings<sup>115</sup> at the time of trial, the value of fringe benefits<sup>116</sup> and possible future salary increment,<sup>117</sup> benefits, bonuses or extra allowances. From that sum, deduct a portion for expenses incurred in earning the income,<sup>118</sup> income tax,<sup>119</sup> collateral benefits received due to inability to work and contingencies.<sup>120</sup> The outcome was to be regarded as the multiplicand<sup>121</sup> and to be multiplied with a suitable multiplier.

The problem with the Common Law assessment of damages for loss of future earnings was that it required an extensive use of judicial discretion. Judges had to factor in the possible increase in plaintiff salary, fringe benefits, profits, bonuses and other income in order to come up with the annual multiplicand. The process necessitated an extensive use of discretion rather than actual precise calculation. More often than not it was

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<sup>115</sup> Annual salary or business profits

<sup>116</sup> Bonuses, allowances, over-time pay, lodging, employer's contribution in the Employee Provident Fund, insurances, clubs, company car etc.

<sup>117</sup> *Tan Cheong Poh & Anor. v Teoh Ah Keow* [1995] 3 MLJ 89.

<sup>118</sup> Food, travelling expenses, tools, business expenses etc.

<sup>119</sup> *British Transport Commission v Gourley*, *op. cit.* See also *Dirkje Peiternella Halma v Muhd Noor bin Baharom & Ors.*, *op. cit.* where the Supreme Court deducted 12 % from the Appellant earnings for income tax.

<sup>120</sup> Demotion, unemployment, economic recession, pre-mature death, sickness etc.

<sup>121</sup> See Form D1 in Rutter, Michael F., (*op. cit.*), at 118 – 121.

‘inevitably a hit and run affair.’<sup>122</sup> In *Raja Mokhtar v Public Trustee*<sup>123</sup> for example, the possibility of the plaintiff, a public servant, being promoted to superscale C salary grade was considered in the assessment of his future earnings. The speculative nature of the assessment was even more apparent in situations where the plaintiff was not earning at the time of injury. Judges had to speculate plaintiff’s earning prospect without any evidence to his earnings.

The introduction of the CLAA 1975 and the CLAA 1984 has made significant changes to the assessment of multiplicand for loss of future earnings. Other than the Common Law principles, judges now have to adhere to the statutory provisions in section 28A of the CLA 1956. The effects of these amendments on the exercise of judicial discretion in the assessment of multiplicand for loss of future earnings and the quantum of damages under this head of damages are discussed in detail below;

### **3.5.1 Compensations Benefits to be Ignored**

The first legislative attempt to regulate the assessment of the multiplicand for loss of future earning is with the passing of section 3 of the CLAA 1975 to introduce section 28A to the CLA 1956 (rev 1972). This section was later amended by the CLAA 1984 to become section 28A (1) of the CLA 1956. The content in the provision however remains the same. The section provides the list of compensation benefits a person would usually be receiving due to his injuries. They are compensation benefits from compensation funds such as Employee Provident Fund, pension,<sup>124</sup> gratuity, employment benefits, medical insurance, personal injury insurance *etc.* These

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<sup>122</sup>*Id.*, at 262.

<sup>123</sup>[1970] 2 MLJ 151.

<sup>124</sup>See *Rasidin bin Partojo v Frederick Kiai* [1976] 2 MLJ 214.

compensations benefits cannot be taken into consideration in the assessment of damages for loss of future earnings. Although they are benefits which arise from the same cause of action *i.e* the accident, they are not to be deducted from the assessment of damages for loss of future earnings. Section 28A (1) of the CLA 1975 reads;

(1) In assessing damages recoverable in respect of personal injury which does not result in death there shall not be taken into account:

(a) any sum paid or payable in respect of the personal injury under any **contract of assurance or insurance**, whether made before or after the coming into force of this Act;

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

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

The provision however does not bring any significant effect on the exercise of judicial discretion in the assessment of damages for loss of future earning or the quantum of damages under this head of damages. Judges in Malaysia, even prior to the introduction of this section by the CLAA 1975 never deduct the amount received from these compensation funds from the assessment of damages for loss of future earnings.<sup>125</sup> In *A Lim Kiat Boon & Ors. v Lim Seu Kong & Anor.*,<sup>126</sup> the court held that the defendant should not be allowed to benefit from gratuitous contribution given by the plaintiff's employer to assist plaintiff during his recovery. Any benefits received by the plaintiff

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<sup>125</sup>See Form D1 in Rutter, Michael F., (*op. cit.*), at 118 – 121.

<sup>126</sup>[1980] 2 MLJ 39.

due to his injuries must not be deducted from the assessment of multiplicand for loss of plaintiff's future earnings.<sup>127</sup>In *Raja Mokhtar v Public Trustee*<sup>128</sup>Raja Azlan Shah in refusing to deduct pension from the damages for loss of future earnings held;

"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."

As such, the introduction of section 28A (1) into the CLA 1956 (rev 1975) merely put on paper what had been the normal practice of our local courts. It does not bring anything new to the law on personal injury claims in Malaysia.

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<sup>127</sup> The court referred to Article 1122 of the Thirteenth (13<sup>th</sup>) Edition of McGregor on Damages which states; "The courts appear never to have taken into account, in the assessment of damages for loss of earning capacity, moneys gratuitously conferred from private sources upon the plaintiff as a mark of sympathy and assistance, and this approach is fully supported in *Parry v Cleaver* (1970) AC 1 by majority and minority alike.... Similarly, payments made by a sympathetic employer ought not to be taken into account."

<sup>128</sup> *Op. cit.* See also *Ti Huck & Anor. v Mohammed Yusof* [1973] 2 MLJ 62.

### 3.5.2 Deduction for Living Expenses

The CLA 1956 requires that a portion which had been proven or admitted as being the plaintiff's personal expenses to be deducted from the assessment of multiplicand for loss of future earnings. This deduction was introduced by section 5(b) of the CLAA 1984 which inserted para (iii) to section 28A of the CLA 1956 (rev 1972). Section 28A (2)(c)(iii) of the CLA 1956 states;

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

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

The section removed the discretionary power of the judges in the assessment of multiplicand for loss of future earnings by making it compulsory for judges to deduct the amount normally used by the plaintiff for his daily living expenses from the assessment of multiplicand for loss of future earnings. Living expenses are expenses that a person incurs or spend on himself for his day to day existence. It includes food, lodging, transportation, medical expenses, vices, hobbies *etc.* A big portion of a person's income is spent on living expenses while the rest goes to his dependant (if any) or saving. In *Chan Chong Foo & Anor. v Shivanathan*,<sup>129</sup> the Supreme Courts accepted the Respondent's admission that he spent RM 60 per month on petrol to go to work and RM 5 per day for meals while at work (times 26 days) as 'living expenses' and deducted this figure from the assessment of multiplicand for loss of future

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<sup>129</sup>[1992] 2 MLJ 473. Also see *Chan Sau Chan v Choi Kong Chaw & Yap Yun Chan* [1991] 1 CLJ 297 and *Tan Tiew Yong & Ors v Wong Joon Hong & Anor.* [2002] 7 MLJ 420.

earnings. The Court rejected the Respondent's submission that living expenses are only to be deducted in fatal claims. Harun Hashim J held;

“It will be seen that the same language is used in both s 7(3)(iv)(c) and s 28A(2)(c)(iii). It follows that the legislature intended that the same principle be applied in both cases, that is to say, in respect of a dependency claim for loss of earnings arising out of a fatal accident and in respect of a claim for loss of future earnings for personal injury. We are accordingly of the view that the term 'living expenses' in s 7 and s 28A bear the same meaning.”

The introduction of section 28A (2)(c)(iii) of the CLA 1956 has been regarded as a controversy<sup>130</sup> since it is a total departure from the Common Law principle. Previously, living expenses are not deducted from the assessment of damages for loss of future earnings.<sup>131</sup>

It is humbly submitted that the effect of section 28A (2)(c)(iii) of the CLA 1956 in removing the discretionary power of the judges is not absolute. Despite the compulsory nature of the provision, there are several post-1984 cases which still maintained the pre-1984 practices of not deducting living expenses from the assessment of multiplicand. In *Marappan Nallan Kaundar & Anor. v Siti Rahmah binti Ibrahim*,<sup>132</sup> *Harcharan Singh v Hassan bin Ariffin*<sup>133</sup> and *Ismail bin Haji Manap & Yg Ln v Onn Swee Imm*,<sup>134</sup> for example, the assessment of multiplicand for loss of future earnings was done without deducting living expenses from the plaintiff's monthly earnings. The

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<sup>130</sup> Balan, P., “Deduction of Living Expenses From Damages for Loss of Future Earnings”, (1992) 4 *Journal of Malaysian and Comparative Law*, 229 – 235, at 229.

<sup>131</sup> *Id.*, at 230.

<sup>132</sup> *Op. cit.*

<sup>133</sup> [1990] 2 CLJ 393.

<sup>134</sup> [1992] 2 CLJ 1157.

judges in these cases refused to deduct plaintiff's living expenses from the assessment of multiplicand for loss of future earnings since the living expenses were not proven by the defendant, thus failed to meet the requirement in the section.

The importance placed by the judges on the requirement of proving or admitting living expenses in these cases can be view as an excuse to maintain the Common Law practices of not deducting plaintiff's living expenses from the assessment of multiplicand in order to prevent unjust deduction on the multiplicand. Since the natural meaning of the term 'living expenses' is not confined to expenses in earning income, it will be unjust to the plaintiff if the expenses for his day to day existence is also to be deducted from the multiplicand. Therefore, it is submitted that the judges in the above three (3) cases had to find a way to depart from such unjust effect of the provision. Hence, the emphasis on defendant's failure to satisfy the requirement of proving living expenses. Since living expenses are expenses which are common and incurred by everybody, even without them being specifically proven or admitted, the judges can justifiably make some deduction for the same by way of judicial notice should they choose to do so. The Kuala Lumpur High Court in *Chan Sau Chan v Choi Kong Chaw & Yap Yun Chan*<sup>135</sup> adopted this method and deducted RM 1000 for living expenses even though it was not clear whether such expenses were proven or admitted.

Even in cases where living expenses is deducted from the assessment of multiplicand for loss of future earnings, the compulsory deduction has minimal effect in reducing or controlling the quantum of damages being awarded by the courts. This is due to the fact that the term 'living expenses' is often interpreted as 'expenses in earning income.' The deduction for 'living expenses' in *Chan Chong Foo & Anor. v Shivanathan*,<sup>136</sup> for

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<sup>135</sup> [1991] 1 CLJ 297

<sup>136</sup> *Op. cit.*

example was deduction for the amount spent on petrol and food at work. These expenses are expenses spent for producing income. Since the Respondent is no longer working after the accident, he will not be incurring these expenses in the future; thus they should rightfully be deducted from the assessment of multiplicand for loss of his future earnings. The Muar High Court in *Tay Chan & Anor. v South East Asia Insurance Bhd.*<sup>137</sup> also interpreted 'living expenses' in para (iii) to section 28A(2)(c) of the CLA 1956 as the expenses 'in earning a living', not plaintiff's whole day to day expenditure.<sup>138</sup>

Therefore, even though the judges in *Chan Chong Foo & Anor. v Shivanathan*,<sup>139</sup> and *Tay Chan & Anor. v South East Asia Insurance Bhd.*<sup>140</sup> adhered to the compulsory requirement of deducting living expenses from the assessment of multiplicand, the amount held to be plaintiff's living expenses were generally confined to the amount spent on expenses in producing income. Since deduction for expenses in producing income is a deduction which is already recognized by the Common Law as part of necessary deductions in the assessment of multiplicand for loss of future earnings,<sup>141</sup> the judges in these cases were simply continuing the commonly accepted practices of the local courts. Even prior to the introduction of section 28A (2)(c)(iii) of the CLA 1956, judges, by virtue of the Common Law principle have no discretion to include expenses in producing income as part of the multiplicand. By interpreting 'living expense' as 'expenses in earning income,' the judges have rendered section 28A (2)(c)(iii)

<sup>137</sup>[1993] 3 MLJ 760. In *Azam b. Kasman & Anor. v Ramachandran a/l Muthusamy & Anor.* [1996] MLJU 26, the High Court also deducted an amount admitted by the 1<sup>st</sup> Plaintiff as the expenses spent on food and petrol for going to work.

<sup>138</sup>Richard Talalla J held, "As to loss of earnings, the view I take is that the living expenses to be deducted under s 28A (2)(c) of the Civil Law Act 1956 are not the whole of the first plaintiff's expenses of living but the expenses reasonably incurred by him in earning his living, such as the extra cost of having his meals and refreshment while at work, which cost would not ordinarily have been incurred had he stayed at home. To hold otherwise and deduct the whole of the living expenses will, to my mind, give a meaning to the words 'living expenses' in the said section which can lead to absurd and unjust consequences and which, it would seem, could not have been what the Parliament had in mind when it enacted the legislation.

<sup>139</sup>*Op. cit.* Also see *Chan Sau Chan v Choi Kong Chaw & Yap Yun Chan* [1991] 1 CLJ 297 and *Tan Tiew Yong & Ors v Wong Joon Hong & Anor.* [2002] 7 MLJ 420.

<sup>140</sup>*Op. cit.* In *Azam b. Kasman & Anor. v Ramachandran a/l Muthusamy & Anor.* [1996] MLJU 26, the High Court also deducted an amount admitted by the 1<sup>st</sup> Plaintiff as the expenses spent on food and petrol for going to work.

<sup>141</sup>See *Lim v Camden and Islington AHA* (1980) AC 174.

of the CLA 1956 redundant and merely a statutory node to the existing practices. The section therefore merely abolishes the discretion which the judges have chosen to disregard in the first place. It have no significant effect on the exercise of judicial discretion and the quantum of damages in personal injury claims arising out of motor vehicle accidents in Malaysia.

### 3.5.3 Prospect of Future Increase in Plaintiff's Earnings is to be Ignored

The most apparent effect of the CLA 1956 with regard to the assessment of multiplicand for the award for loss of future earnings is brought by section 5(b) of the CLAA 1984. The section amended section 28A of the CLA 1956 (rev 1972) by introducing section 28A (2)(c)(ii) of the CLA 1956. The new section reads;

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

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

The effects of section 28A (2)(c)(ii) of the CLA 1956 are two-folds. First, it excludes future increases from the assessment of multiplicand for loss of future earnings<sup>142</sup> and second, the section made it compulsory for judges to consider only plaintiff's earnings 'at the time of injury' as the basis of calculating the multiplicand. Judges no longer

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<sup>142</sup> Prior to the introduction of para (ii) to section 28A (2)(c) of the CLA 1956, not only plaintiff's current earnings are taken in to account, future increase such as promotional prospect, annual salary increment, future bonuses, overtime, allowances and fringe benefits were also taken into consideration in the assessment of multiplicand. In *Yeap Cheong Hock v Kajima-Taisei Joint Venture* [1973] 1 MLJ 230. For example, the High Court allowed RM 500 hike on the plaintiff's monthly salary at the time of injury after considering the possibility of his promotional prospect. Similarly in *Teoh Suan Seng v Lew Meng Shin & Anor.* [1982] 2 MLJ 289, the Plaintiff's annual salary increment was considered when assessing the multiplicand for loss of future earnings.

have the discretion to factor in any possible increase in the plaintiff's earning in the future in the assessment of multiplicand.<sup>143</sup> As a result, the High Court in *Chew Sheong Yoke v Lawrence Su Chu Seng & Anor.*<sup>144</sup> rejected the Appellant's appeal on loss of future earnings and maintained that any increase in plaintiff's earning must be excluded<sup>145</sup> from the assessment of multiplicand for loss of future earnings.

Apart from abolishing judge's discretion to add the prospect of increase in plaintiff's future earnings in the assessment of multiplicand, the introduction of section 28A (2)(c)(ii) of the CLA 1956 also greatly affects the quantum of damages being matted out by the judges under personal injury claims. Since future increases in plaintiff's earnings are not to be taken into account in the assessment of multiplicand, the multiplicand is reduced to only the amounts plaintiff was receiving at the time of injury. Had the case of *Yeap Cheong Hock v Kajima-Taisei Joint Venture*<sup>146</sup> is decided after the 1984 amendment took effect, the damages for loss of future earnings will only be assessed based on the plaintiff's earnings at the time of injury. The additional RM 500 increase will not be added to the assessment of multiplicand since this amount is the projected future earnings.

There are however a few attempts to depart from literal interpretation of the term 'only the amount relating to his earnings as aforesaid at the time when he was injured'. Instead of excluding any increase in plaintiff's income after the injury, some judges have opted to interpret it as being any increase in plaintiff's earnings after the trial.

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<sup>143</sup> Prior to the introduction of para (ii) to section 28A (2)(c) of the CLA 1956, the plaintiff's current income was assessed at the time of trial and not at the time of injury. (see *Lim Eng Kay v Jaafar b Mohamed Said* [1982] 2 MLJ 156) Since the pre-trial earnings are calculated based on plaintiff's earnings at the time of injury, post-trial earnings was calculated based on plaintiff's earning at time of trial. Although generally the earnings at these two (2) periods are more or less the same, there are cases which show a marked difference in the amount received especially if the case took a long time to be tried. As such, this difference must be taken into consideration. For example, in *Chang Ming Feng v Jackson Lim @ Jackson ak Bajut* [1999] 1 MLJ 1, the Plaintiff received RM 1657 for basic salary and RM 775.28 for off-shore allowances at the time of injury. His basic salary however was increased to RM 2009 but allowances reduced to 247.78 at the time of trial.

<sup>144</sup>[1996] MLJU 40.

<sup>145</sup>Which includes flying allowances, gratuity and pension.

<sup>146</sup>*Op. cit*

Thus, allowing the judges the discretion to assess any increase in plaintiff earnings from the date of injury to the date of trial in the assessment of multiplicand. This interpretation found favours with the Miri High Courts in *Chang Ming Feng v Jackson Lim @ Jackson ak Bajut*.<sup>147</sup> The assessment of multiplicand for loss of future earnings in this case was based on plaintiff's salary at the time of trial and not his salary at the time of injury.<sup>148</sup> The same interpretation was also adopted by the High Court in *Ang Soon Seng v Noraini bte Doralik & Anor*.<sup>149</sup> where Suriyadi J held;

“The phrase 'any prospect of the earnings as aforesaid being increased at some time in the future', as promulgated in the above provision is central to the matter at hand. The above phrase must refer to a scenario where the likelihood of an increase in salary in the near future is uncertain and open to speculation, unlike the current case where the increase of his basic salary was certain. That being so, I was not prevented from taking into account an actual and calculable increment for purposes of calculating and awarding damages for loss of future earnings.”

Although the grounds for the decisions in *Chang Ming Feng v Jackson Lim @ Jackson ak Bajut*.<sup>150</sup> and *Ang Soon Seng v Noraini bte Doralik & Anor*.<sup>151</sup> are not without merit, the decisions were a clear departure from the generally accepted interpretation of section 28A (2)(c)(ii) of the CLA 1956.<sup>152</sup> Since the wordings in the section are clear and concise, they should be literally applied. Any departure from the literal interpretation of the wordings cannot be accepted as an authority in applying said

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<sup>147</sup>*Op. cit.*

<sup>148</sup> There was a slight increase in Plaintiff's salary at the time of trial compared to the time of injury.

<sup>149</sup> [2003] 5 MLJ 456.

<sup>150</sup>*Op. cit.*

<sup>151</sup>*Op. cit.*

<sup>152</sup> S. Santhana Dass in his book *Personal Injury Claims*, (Petaling Jaya: Alpha Sigma, 2000) opined that the decision in *Chang Ming Feng v Jackson Lim @ Jackson ak Bajut*, *op. cit.*, is against the clear wording of section 28A(2)(c)(ii). A judge is totally prohibited from taking into consideration any increase in plaintiff's earnings after the time of injury irrespective of whether the earnings is actual or speculative.

section. Further, the effect of this ‘alternative interpretation’ is only relevant if there is any increase in plaintiff’s income between the date of injury to the date of trial. If there is no difference in plaintiff’s earnings between the two (2) dates, the above interpretation is not relevant.

It can be concluded that the introduction of section 28A (2)(c)(ii) of the CLA 1956 have totally taken away the judges’ discretion to include the increase in plaintiff’s future income in the assessment of multiplicand. The prohibition had significantly reduced the amount of damages being awarded for loss of future earnings since the assessment is only based on plaintiff earnings at the time of injury.

### **3.6 REGULATING THE AWARD FOR LOSS OF FUTURE EARNING CAPACITY**

The award for loss of earning capacity is one of the Common Law heads of damages recognized by the local courts. This head of damages is however not specifically provided for under the CLA 1956 (rev 1972) or the CLA 1956. Nevertheless, it is undisputed that this head of damages is part of the damages claimable under personal injury claims. The question here is whether the CLA 1956 have any effect on the assessment of the award, especially in respect of the exercise of judicial discretion and quantum of damages.

The effect of section 28A of the CLA 1956 on the assessment of damages for loss of future earning capacity was analysed by the Supreme Court in *Dirkje Pietenella Halma*

*v Mohd Nor bin Baharom & Ors.*<sup>153</sup> The Court allowed the alternative claim for loss of future earning capacity since the Appellant was not receiving earning at the time she was injured to satisfy the requirement of the award for loss of future earnings. Although the Court did not specifically mentioned that section 28A (2) is to be applicable for the assessment of loss of earning capacity, the fact that the court took into account the Appellant's salary before she took unpaid leave and adopted the statutory multiplier indicated that the Court intended to adopt the provisions in the section in assessing damages for loss of future earning capacity. Gunn Chit Tuan SCJ held;

“...appellant is entitled to be compensated for her loss of earning capacity.

In this case there is evidence that she was earning \$1,270 per month and there is also evidence that after the accident she was practically a vegetable and would have to be nursed for the rest of her life. In other words she has suffered a total loss of earning capacity for the rest of her working life.

In this case the appellant has suffered total loss of earning capacity. Such loss in her case would last for the rest of her working life which is roughly another 30 years. Taking into account all past and future contingencies, the fact that the appellant was earning \$1,270 per month, her ages at the time of the accident and the multiplier fixed by the legislature in the case of loss of future earnings,...

The provisions in section 28A (2) of the CLA 1956 was also adopted in *Tan Kim Chuan v Chandu Nair*.<sup>154</sup> The appellant in this case was denied the claim for loss of earning capacity on the ground him being unemployed at the time of injury. The

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<sup>153</sup>*Op. cit.*

<sup>154</sup>*Op. cit.* See also *Shanmugam Gopal v Zainal Abidin Nazim & Anor.*[2003] 3 MLJ 76.

Supreme Court in this case went a step further to point out that the legislature had intended for section 28A (2) of the CLA 1956 to govern the award for loss of future earnings as well as loss of future earning capacity. Abdul Hamid Omar LP said;

“We reiterate that s. 28A (2)(c)(ii) which states that only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of earnings aforesaid being increased at some time in the future makes the intention of the Legislature abundantly clear and indeed the Legislature had the prospect of future earnings (whatever be the label attached to it) in mind when the law was enacted.”

The court in *Chong Chee Khong & Anor v Ng Yeow Hin*<sup>155</sup> also of similar opinion where it was decided that the 1984 amendment had placed the necessity of proving that the claimant was receiving earning as before the injury as a prerequisite for the award for loss of earning capacity.<sup>156</sup>

By virtue of the above decisions Altaf opined that section 28A (2) of the CLA 1956 is intended to govern the assessment of all damages relating to future earnings. The distinction between loss of future earnings and loss of future earning capacity according to him was put to an end by the incorporation of the section.<sup>157</sup>The

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<sup>155</sup>[1997] 5 MLJ 786.

<sup>156</sup>KamalanathanRatnam JC stated “Before the Civil Law Act 1956 was amended in 1984, it mattered not whether the plaintiff was in employment or not at the time of the accident so long as the court was satisfied from evidence adduced that there was a real or substantial risk that his earning capacity would be affected in the future. However, after the amendment, it is an essential prerequisite of s 28A (2)(c)(i) that in awarding damages for loss of future earning capacity, there must be proof that the claimant was receiving earnings by his own labour or other gainful activity prior to the accident. In this respect I rely on the clear enunciation of this principle by the (then) Supreme Court in *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 where in the then Lord President, Abdul Hamid Omar LP said at p 44:... We reiterate that s 28A(2)(c)(ii) which states that ‘only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of earnings aforesaid being increase at sometime in the future’, makes the intention of the legislature abundantly clear and indeed the legislature had the prospect of future earnings (whatever label attached to it) in mind when the law was enacted. The use of the words ‘whatever label attached to it’ in my view provides for an awards of loss of earning capacity notwithstanding the fact that evidence discloses no loss of future earnings.”

<sup>157</sup>Muhammad AltafHussainAhangar, *op. cit.*, (2003), at lxxxvii.

assessment for the award is subject to the same conditions in section 28A (2)(c) of the CLA 1956 and the multiplier is to be calculated as per section 28A (2)(d) of the Act.

On this point, it is humbly submitted that despite the above, the question of whether the award for loss of future earning capacity is also governed by section 28A (2) of the CLA 1956 is still open to arguments. Contrary to the learned Abdul Hamid Omar LP's interpretation of section in *Tan Kim Chuan v Chandu Nair*,<sup>158</sup> there is nothing in the wording of the section which gives the impression that it is meant to govern the assessment for loss of future earning capacity. The CLA 1956 specifically mention that para (i),(ii) and (iii) to section 28A(2)(c) and para (i) and (ii) to section 28A(2)(d) of the Act deal with the assessment of damages for loss of future earnings. Eventhough the terms 'shall not be awarded' in in para (i) and 'shall not take into account' in para (ii) in section 28A(2)(c) of the CLA 1956 indicate that the conditions of below the age of fifty five (55), in good health and receiving earnings before the injury are the pre-requisite before an award under the section can be made, the opening sentence to section 28A(2)(c) of the Act clearly states 'in awarding damages for loss of future earnings'. As such, the three (3) conditions are specifically enacted for the award for loss of earnings. Similarly, section 28A (2)(d) of the CLA 1956 also confine itself to the award for loss of future earnings only. The opening sentence to the section states 'in assessing damages for loss of future earnings'. Unless the plurality in the term 'earnings' is to be read as referring to earning capacity as well, it is difficult to comprehend how the assessment of loss of future earning capacity is to be read into the section as opined above.

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<sup>158</sup> *Op. cit.*

The term ‘future earnings’ cannot be read as to include ‘future earning capacity’. The terms are distinct from one another. ‘Future earnings’ refers to plaintiff earnings in the future, either in forms of monthly salary, fringe benefits, bonuses, allowances, business profits *etc.* ‘future earning capacity’ on the other hand is the ability, capability or aptitude to generate or produce an income in the future. Therefore, since the task of the court is to give effect to the plain and ordinary meaning of the statute when the words are clear and unequivocal, ‘future earning capacity’ cannot be lumped together with ‘future earnings’.

Similarly, the obvious dissimilarities between the assessment of the awards for loss of future earnings and loss of future earning capacity also made it abundantly clear that these awards are two separate heads of damages. While the damages for loss of future earnings is awarded to compensate the real and assessable loss<sup>159</sup> to the plaintiff’s income when the injury suffered prevents him from working indefinitely, damages for loss of future earning capacity is awarded in situations where the claimant face the possibility of losing his job or getting a less paid job in the future (although not immediately after resuming employment),<sup>160</sup> where claimant’s capacity to earn is diminished<sup>161</sup> or where the claimant is unemployed or an infant.<sup>162</sup> As such, these two (2) heads of damages cannot possibly be lumped under the same provision unless specifically stated as such. Abd. Wahab J in *Asainar bin Sainudin & Anor. v Mohamad Salam bin Sidik*<sup>163</sup> held that the provisions in section 28A (2) of the CLA 1956 only regulates claims for loss of expectation of life and loss of future earnings only and does not extend itself to other head of claims.<sup>164</sup>

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<sup>159</sup> *Ngooi Ku Siong v Aidi Abdullah* [1985] 1 MLJ 30.

<sup>160</sup> *Moeliker v A Reyrolle & Co. Ltd.* (1977) 1 All ER 9.

<sup>161</sup> *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324.

<sup>162</sup> *Yang Salbiah v Jamil bin Harun, op. cit.*

<sup>163</sup> [2002] 5 MLJ 104.

<sup>164</sup> Nasser Hamid, *Personal Injury & Fatal Accident Claims: Civil Law Act 1956*, (Petaling Jaya: Gavel Publications, 2008), at 129.

“The limitation under s 28A (2) of the Act apply in respect of loss of expectation of life caused by the injury and the assessment and awards of damages for loss of future earnings. No mention was made of other head of damages that cannot be categorized as loss of future earnings, such as cost of nursing care, pampers and wheelchairs. Thus it is clear that on the face of it, s 28A (2) of the Act effects claims for loss of expectation of life and loss of future earnings only, and does not purport to affect other head of damages.”

Perusal of the relevant local literature relating to the claim for loss of future earning capacity<sup>165</sup> reveals that the discussions on the assessment of the loss are mainly confined to the issue of whether the condition of ‘receiving earnings before the injury’ is also applicable for the claim for loss of earnings capacity. The decisions in *Dirkje Pietenella Halma v Mohd Nor bin Baharom & Ors.*,<sup>166</sup> *Tan Kim Chuan v Chandu Nair*<sup>167</sup> and *Chong Che Khong & Anor. v Ng Yeow Hin*<sup>168</sup> are also limited on the similar issue. Although section 28A (2) of the CLA 1956 was quoted in all three (3) cases, the Courts made no mention of whether the conditions that plaintiff must be below fifty five (55) years old and of good health at the time of injury are also applicable for the assessment of this head of damages. Only the portion that relates to earnings was referred to. It is therefore submitted that the *Dirkje Pietenella Halma v Mohd Nor bin Baharom & Ors.*,<sup>169</sup> *Tan Kim Chuan v Chandu Nair*<sup>170</sup> and *Chong Che Khong & Anor. v Ng Yeow Hin*<sup>171</sup> were not to be read as declaring that the entire section 28A(2) of the CLA 1956 is applicable in the assessment of damages under this heading. The cases

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<sup>165</sup>Balan, P. “Loss of Future Earnings, Loss of Earning Capacity and the Civil Law (Amendment) Act, 1984”, 17 (1990) *Journal of Malaysian Comparative Law*, 169 – 180, Dass, S. Santhana, *op.cit.*, (2000), Balan P., *op. cit.*, (2004), Muhammad Altaf Hussain Ahangar, *op. cit.*, (2008), Muhammad Altaf Hussain Ahangar, *op. cit.*, (2003), Rutter, Michael F., *op. cit.*

<sup>166</sup>*Op. cit.*

<sup>167</sup>*Op. cit.*

<sup>168</sup>*Op. cit.*

<sup>169</sup>*Op. cit.*

<sup>170</sup>*Op. cit.*

<sup>171</sup>*Op. cit.*

only adopted the requirement of earning income at the time of injury into the assessment of damages for loss of future earning capacity.

Since neither the wordings in section 28A(2) of the CLA 1956 or the decision in the above three (3) cases can be an absolute authority on the rule that section 28A(2)(c) of the CLA 1956 also governs the assessment of award for loss of future earning capacity, the assessment of the damages to a certain point is clearly still at the discretion of the judges guided by the Common Law principles and decided cases. Judges have the discretion to determine the monetary compensation which will compensate the plaintiff of the loss of his capacity to earn his living and the length of time in which he would be suffering said loss. The determinations of both are subjective, speculative and necessitate a large application of judges own reasoning. As Brown J in *Moeliker v A Reyrolle & Co Ltd.*<sup>172</sup> rightfully said;

“Clearly no mathematical calculation is possible...

The starting point should be the amount which a plaintiff is earning at the time of trial and an estimate of the length of the rest of his working life. This stage of assessment would not have been reached unless the court have already decided that there is a ‘substantial’ or ‘real’ risk that a plaintiff would loss his present job at some time before the end of his working life, but now will be necessary to go on and consider (a) how great this risk is and (a) when it may materialize, remembering that he may lose a job and be thrown in the labour market more that once (for example if he takes a job and finds that he cannot manage it because of his disabilities). The next stage to consider how far he would be handicapped

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<sup>172</sup>*Op. cit.*

by his disability if he is thrown in the labour market, that is what would be his chance of getting a job, and an equally well paid job.”

Having argued that the award for loss of future earning capacity is not subject to the conditions in section 28A (2)(c)(i) of the CLA 1956, The researcher however unable to concur with P. Balan, Rutter and KS Dass that the assessment of damages for loss of earning capacity is still entirely at the discretion of the judges guided by the Common Law principles. The researcher to some extent agrees with Altaf’s opinion that to conclude that judges still have the absolute discretion in assessing damages for loss of future earning capacity while subjecting that discretion in assessing damages for loss of future earning to the conditions in section 28A(2)(c) of the CLA 1956 is unjust.<sup>173</sup> The researcher however regrettably unable to agree with Altaf’s conclusion that section 28A (2) of the CLA 1956 is “all comprehensive” and that the three conditions in the section are also applicable for the assessment of loss of future earning capacity. If the Legislature’s intention is to include the assessment for loss of future earning capacity into the section, the researcher believes it would have done so explicitly, in clear and concise word.

On this point, the researcher humbly submits that the judges’ discretion in assessing damages for loss of future earning capacity is limited by the decisions in *Dirkje Pietenella Halma v Mohd Nor bin Baharom & Ors.*,<sup>174</sup> *Tan Kim Chuan v Chandu Nair*<sup>175</sup> and *Chee Khong & Anor. v Ng Yeow Hin*.<sup>176</sup> The cases introduce a condition of receiving earning at the time of injury of in the assessment of loss of future earning capacity. Plaintiff who was not earning any income at the time of injury is prevented

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<sup>173</sup> Muhammad Altaf Hussain Ahangar, *op. cit.*, (2003), at lxxxix.

<sup>174</sup> *Op. cit.*

<sup>175</sup> *Op. cit.*

<sup>176</sup> *Op. cit.*

from being awarded damages for loss of future earning capacity. This new condition, although a departure from the Common Law, is understandable since the court need to ascertain that the claimant is actually earning at the time of injury and the injury would hinder his capacity to earn similar income in the future. The court also would need to ensure that the claimant have the capacity to work and would indeed be working but for the injury. To allow a child or persons who have yet to earn income the damages for loss of future earning capacity will subject the award to guesswork and uncertainty, something akin to the award for 'loss years' which was abolished by the CLA 1956. Section 3 of the CLA 1956 allow modification to be made to the Common Law principle in the assessment of damages should the courts deem it necessary. The inclusion of the requirement of earning income at the time of injury as a pre-requisite to the award for loss of future earning capacity does not necessitate the whole section 28A (2) of the CLA 1956 is to be adopted in assessing this head of damages.

To conclude, the restriction imposed on the exercise of judicial discretion in the assessment of damages for loss of future earning capacity is not due to the provision in the CLA 1956. Section 28A (2) of the CLA 1956 is not applicable in respect of this head of damages. The judges are still at liberty apply their discretion in the assessment of the same provided that they are satisfied that plaintiff was receiving earnings at the time of injury. Nevertheless, the imposition of the condition of receiving earning at the time of injury has a big impact on the quantum of damages. Since judges now are not at liberty to allow the award for loss of future earning capacity to plaintiff who was not earning at the time of injury, the amount of damages being awarded for personal injury claims arising out of motor vehicle accidents is clearly reduced. The courts' rejection of plaintiff's claim for damages for loss of future earning capacity in *Tan Kim Chuan v*

*Chandu Nair*<sup>177</sup> and *Chee Khong & Anor. v Ng Yeow Hin.*<sup>178</sup> were clear examples of this reduction.

### **3.7 FIXING THE MULTIPLIER FOR THE AWARD OF LOSS OF FUTURE EARNINGS**

The term multiplier and years purchase are used interchangeably. It refers to the period or the duration of the loss. In personal injury claims, multiplier is used in assessing damages for loss of future earnings, loss of future earning capacity, future nursing care, medicine and other expenses claimable as special damages. “Multiplier reflect not only the number of years for which the loss will last but also the elements of uncertainty contained in that prediction and the fact that the plaintiff will receive immediately a lump sum which he is expected to invest.”<sup>179</sup> The assessment of multiplier depends on the type of damages being awarded. Multiplier for loss of future earnings and earning capacity depend on plaintiff expected working life, retirement, age, education and type of work. The multiplier for nursing care, medication and other expenses on the other hand may depend on plaintiff life expectancy, age and the effects of the injury on plaintiff’s life expectancy. However, since the purpose of this research is to analyze the effects of the CLA 1956 on the application of judicial discretion and the quantum of damages, only the effects of the introduction of section 28A of the CLA 1956 on the assessment of the award for loss of future earnings and loss of future earning capacity will be dealt with.

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<sup>177</sup>*Op. cit.*

<sup>178</sup>*Op. cit.*

<sup>179</sup>Devaney, Margaret, “Comparative Assessment of Personal Injuries Compensation Schemes: Lesson for Tort Reform”, (2009) 13.3 *Electronic Journal of Comparative Law*, 24<sup>th</sup> August 2010, <<http://www.ejcl.org/133/art133-2.pdf>>

### 3.7.1 Loss of Future Earnings

The Malaysian legislature had departed from the long accepted Common Law method of assessing the multiplier for loss of future earnings by fixing a statutory multiplier which is based solely on the age of the plaintiff. This departure was brought by the CLAA 1984. Prior to this amendment, there is no definite rule for the assessment of multiplier for loss of future earnings. Judges have the discretion to assess the multiplier for loss of future earnings<sup>180</sup> by taking into consideration plaintiff's employment, health, skills and education level, retirement age, normal life expectancy and age at the date of trial.<sup>181</sup> Negative contingencies which may reduce the length of multiplier such as the possibility of poor health, possibility of plaintiff recovering from his injury and able to earn his pre-injury earnings, demotion and economic down-turn were also taken into consideration.<sup>182</sup> There were a few common methods employed in assessing the multiplier; by extracting the multiplier from comparable cases, by deducting one third from the amount arrived at using the formula plaintiff's age of retirement minus his age at the date of trial or by applying the annuity table. Neither methods are satisfactory and sometimes lead to over or underestimation of the loss.<sup>183</sup>

Section 5(b) of the CLAA 1984 was enacted to amend section 28A of the CLA 1956 (rev 1972). The amendment introduced section 28A (2)(d)(i) and (ii) to the CLA 1956. Section 28A (2)(d)(i) and (ii) of the CLA 1956 is reproduced below;

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

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<sup>180</sup>Muhammad Altaf Hussain Ahangar, *op. cit.*, (2003), at xci.

<sup>181</sup>See *Lim Poh Choo v Camden and Islington Area Heath Authority*, *op. cit.*

<sup>182</sup>The multiplier was adjusted according to the possible effect of these contingencies onto the future earning claims.

<sup>183</sup>Reiss, Seth M., *op. cit.* lxvii.

- (i) in the case of a person who was at the age of thirty years or below at the time when he was injured, the number of years' purchase **shall be 16**; and
- (ii) in the case of any other person who was of the age range extending between thirty –one years and fifty-four years at the time when he was injured, the number of years' purchase **shall be calculated by using the figure fifty five (55), minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.** (*emphasis added*)

The primary effect of this amendment is the abolition of judge's discretionary power in assessing the multiplier for loss of future earnings. By virtue of the above provision, the factors which were commonly considered in the pre-1984 assessment of multiplier are already configured and "built into the statutory formula".<sup>184</sup> Plaintiff who was thirty (30) years old or lesser at time of accident is entitle to sixteen (16) years of multiplier. For those beyond the age of thirty (30) years old, the multiplier is assessed by deducting plaintiff's age at the time of injury from the figure of fifty five (55). The balance is then to be divided by two (2). The total will range between the maximum period of twelve (12) years and minimum of six (6) months depending on plaintiff's age at the time of injury. The Legislature did not provide the reason for fixing sixteen (16) years as the maximum length of multiplier. However, since sixteen (16) years was the maximum length of multiplier commonly awarded in England at the time, it is possible that the multiplier was adopted from the English cases.<sup>185</sup>

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<sup>184</sup>Per Edgar Joseph Jr. SCJ in *Chan Chin Ming v Lim YokEng*, *op. cit.*

<sup>185</sup>Bar Council Malaysia, "Civil Law (Amendment) Act 1984", (1984) 2 *Current Law Journal*, 209 – 216, at 212.

The compulsory nature of the section leaves no avenue for judges to depart from the fixed multiplier in the assessment of damages for loss of future earnings. The Court of Appeal in *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*<sup>186</sup> was very adamant on this point. The multiplier is fixed and cannot be altered by the judge in any way.

“Further, the language of the statutes is imperative. It says ‘the number of years’ purchase shall be 16. The mandatory tenor of this phrase employed by Parliament to convey its message excludes any pretended exercise of judicial power to substitute some other multiplier for that intended.”

Other than abolishing the judge’s discretion in the assessment of multiplier, the introduction of section 28A (2)(d)(i) and (ii) of the CLA 1956 also has huge impact on the amount of damages being awarded under personal injury claims. Prior to the introduction of the fixed multiplier, the amount of damages awarded for loss of future earnings were higher due the judges’ discretion in assessing the multiplier. There are many instances where long multiplier<sup>187</sup> was awarded to plaintiff whose working life could not have been very long. In *Wong Kong v Yee Hup Transport Co & Ors*<sup>188</sup> for example, a fifty five (55) years old plaintiff was awarded thirteen (13) years and six (6) months of multiplier comprising of 42 month pre-trial loss and 10 years post-trial loss of earnings.<sup>189</sup> The judge in *The Hwa Seong v Chop Lim Chin Moh & Anor.*,<sup>190</sup> awarded eight (8) years multiplier for loss future earnings to a fifty three (53) years old plaintiff.<sup>191</sup> The multiplier was arrived at by deduction  $\frac{1}{4}$  from the plaintiff’s probable

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<sup>186</sup> *Op. cit.*

<sup>187</sup> See *Chong Sow Ying v Official Administrator, op.cit.*, *Yaacob v Sintat Rent a Car Services (M) Sdn. Bhd & Anor.*, and *Low Kow v Arthur Morton* (unreported) cited in *Dass, K.S.*, *op. cit.*, (1975), at 816.

<sup>188</sup> [1966] 2 MLJ 234.

<sup>189</sup> If section 28A (2)(d)(i) and (ii) of the CLA 1956 is applicable to this case, the plaintiff will not be able to claim for loss of future earnings since he was already fifty five (55) years old at the time of the injury.

<sup>190</sup> [1981] 2 MLJ 341.

<sup>191</sup> If section 28A (2)(d)(i) and (ii) of the CLA 1956 is applicable to this case, the plaintiff will only be awarded 1 year multiplier based on the calculation of fifty five (55) minus fifty three (3) divided with two (2).

life expectancy of 65 years.<sup>192</sup> The judge in this case did not make any distinction between working age and life expectancy. Thus, implying that plaintiff would be working as long as he live.

### 3.7.2 Loss of Future Earning Capacity

The statutory multiplier in section 28A (2)(d)(i) and (ii) of the CLA 1956 has also been adopted in the assessment of loss of future earning capacity. The Supreme Court in *Dirkje Pietenella Halma v Mohd Nor bin Baharom & Ors.*<sup>193</sup> awarded the statutory multiplier of sixteen (16) years for loss of future earning capacity to the Appellant who was twenty five (25) years old at the time of the accident. In *Sivakumar A/l Avolasamy v Chan Hoong Kok*,<sup>194</sup> the Johor Bharu High Court applied section 28A (2)(d)(ii) of the CLA 1956 and awarded a multiplier of eleven and a half (11.5) years for loss of future earning capacity to the plaintiff who was thirty two (32) years old at the time of the accident.

Prior to *Dirkje Pietenella Halma v Mohd Nor bin Baharom & Ors.*,<sup>195</sup> the assessment of loss of future earning capacity was done either lump sum or via multiplication method. The lump sum method was usually applied in cases involving young children or person who was unemployed at the time of injury where the multiplicand cannot be assessed due to absence of any evidence of earnings. As such, the award will be based on the judge's assessment of the disadvantages that the plaintiff would be suffering in the labour market as well as contingencies.<sup>196</sup> The multiplication method on the other hand

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<sup>192</sup> The ¼ deduction was for contingencies.

<sup>193</sup> *Op. cit.*

<sup>194</sup> [2012] MLJU 48.

<sup>195</sup> *Op. cit.*

<sup>196</sup> Dass, S. Santhana, *op.cit.*, (2000), at 114.

was usually applied when there was evidence of plaintiff's earnings at the time of injury. The multiplicand was calculated according to the plaintiff's earnings and personal expenses while the multiplier was calculated based on the nature of plaintiff's employment, age and future contingencies. In *Ong Ah Long v Dr. S Underwood*,<sup>197</sup> for example, the court awarded a fifty two (52) years old surgeon six (6) years multiplier after taking sixty (60) years as his estimated active working life.

It is however submitted that the assessment for loss of earning capacity should not be subjected to the statutory multiplier in section 28A (2)(d)(i) and (ii) of the CLA 1956. Unlike the assessment for loss of future earning where the calculation of multiplier and multiplicand can be based on plaintiff's income and the nature of his employment at time of injury, loss of future earning capacity is very subjective. It is not a loss that the claimant is actually suffering at the date of injury or date of trial. David Kemp in his book<sup>198</sup> stated:

“In this [handicap in the labor market] class of case, the multiplier / multiplicand approach cannot be used. For since the plaintiff is not suffering from a current loss, there is no relevant multiplicand to be ascertained. The court has to assess the probability and the gravity of plaintiff's future loss owing to his handicap in the labor market.”

Based on above, a parallel observation can be made as for the calculation of multiplier. Since the loss is not current, it would be a matter of guesswork as to when the claimant will actually be suffering the loss. Thus, making the calculation of multiplier based on the fixed table in section 28A (2)(d) of the CLA 1956 impossible. Take for example a

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<sup>197</sup>[1983] 2 MLJ 324. Also see *Krishnan & Anor. v Chow Wing Khuan* [1987] 2 MLJ 691.

<sup>198</sup> Kemp; David, *The Quantum of Damages*, (London: Sweet & Maxwell, 2004), at 184.

thirty five (35) years old labourer who suffered severe injury to his leg. His doctor also predicts that he will suffer osteoarthritis in the future as the result of the injury. He would undoubtedly be entitled for damages for loss of future earning capacity since the osteoarthritis will hinder his capacity to work in the future. However, to calculate the multiplier according to section 28A (2)(d)(ii) of the CLA 1956 (fifty five (55) minus 35 thirty five (35) and divide by two(2)) would be allowing for more than he would have lost. Since his capacity to earn will only be affected in the future (exact date unknown), assessing the multiplier from the date of injury can be considered as an overcompensation.

### 3.7.3 Fix multiplier v Annuity Table

As mentioned earlier, one of the methods adopted by the judges to determine the award for loss of future earnings prior to 1984 was by adopting the annuity table. An example of annuity table is the Murphy and Dunbar Annuity Table.<sup>199</sup> After determining the multiplicand and the multiplier, the judge will read against the annuity table. An example will better illustrate application of annuity table. Take a case where the judge had determined that the plaintiff was receiving a salary worth RM 510 a month (multiplicand). Using the annuity table, the award for loss of future earnings would be RM 63,523.52 at sixteen (16) years multiplier. Similarly should the judge decide on eighteen (18) years multiplier, the annuity table will show that the dependant is entitled to RM 71, 540.29. The case of *Lee Boon Kiat v Ng Sing*,<sup>200</sup> is an example of a case where annuity table was applied.

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<sup>199</sup> See Appendix for an extract from the Murphy and Dunbar Annuity Table

<sup>200</sup> [1982] 1 MLJ 229.

It is humbly submitted although sections 28A (2)(d)(i) and 28A(2)(d)(ii) of the CLA 1956 were enacted with the intention of controlling the amount of damages for loss of future earnings by introducing the statutory multiplier,<sup>201</sup> the sections only manage to limit the length of multiplier, it does not reduce the quantum being awarded by the courts. Should the direct multiplication method is compared to the annuity table, a simple mathematical calculation will show that the annuity table method produces much lower quantum compared to the direct multiplication method. Take the above scenario as an illustration, if the case was decided after 1984 amendment, the plaintiff will be entitle to RM 97,920 using the direct multiplication method using the fixed multiplier of sixteen (16) years, instead of only RM 63,523.52 using the annuity table.<sup>202</sup> Even if the multiplier is increased to eighteen (18) years, the amount of quantum awarded under the annuity table method scheme would still be lower than the quantum arrived at by using the fixed multiplier. As such, the CLA 1956 does not in any way helps to reduce the quantum of damages being awarded for personal injury claims arising out of motor vehicle accidents.

The monetary effect of annuity table and direct multiplication methods was discuss in detail in *Asainar bin Sainudin & Anor. v Mohamad Salam bin Sidik*<sup>203</sup> where the judge concluded that the application of direct multiplication using the statutory multiplier generates more monetary value that the annuity table. As such, even if the fixed multiplier is limited to a maximum of sixteen (16) years, the amount of damages is definitely higher than the amount arrived at using annuity table. The judge held:

“The straight calculation over an expected lifetime, which in this case is 56 years' purchase, results, as illustrated above, in overpayment. It ignores

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<sup>201</sup> See *Ibrahim bin Ismail & Anor. v Hasnah bin Puteh Imat*, *op. cit.*

<sup>202</sup> See also comment made by the Bar Council in Bar Council of Malaysia, *op. cit.*

<sup>203</sup> *Op. cit.*

the basic prudence that a lump sum would be placed in an interest bearing account. Its strength is that the interest derived could help to cover the costs of unpredictable inflation. Yet the calculations show that the interest earnings over the period to be very substantial. On the other hand, the annuity calculation is very precise, but by its precision, it fails to allow for the probability of inflation, and even the possibility that the recipient could live longer than foreseen when the calculations were made. This last could mean that if the recipient actually lives longer than expected, he may face the prospect of having nothing at all left to rely on.”

The introduction of section 28A (2) of the CLA 1956 in short have taken away the discretionary power of the judges to assess the multiplier for loss of future earnings. The imperative nature of the section leaves no avenue in which judges may apply their own discretion whether to reduce or to increase the length of multiplier. Judges however still have the discretion in assessing the multiplier for loss of future earning capacity, guided by the Common Law principles and decided cases. The abolition of the discretionary power in the assessment of multiplier for loss of future earnings does not bring much effect in controlling the amount of damages being awarded. Compared to the use of annuity table, the use of the statutory multiplier in section 28A (2)(d) of the CLA 1956 1956 yields more quantum.

### **3.8 CONCLUSIONS**

Section 28A of the CLA 1956 affects the exercise of judicial discretion in the assessment of damages for personal injury claims arising out of motor vehicle accidents in three (3) ways. The first is by maintaining the discretionary power, second by maintaining the discretionary power albeit with some statutory regulations and third by codifying the existing practices of the judges.

The assessment of damages for loss of future earning capacity and loss of expectation of life is still very much at the discretion of the presiding judges. Despite the argument that section 28A (2) of the CLA 1956 is also applicable in assessing damages for loss of future earning capacity, there is nothing in the provision which specifically states as such. The condition that plaintiff must be earning income at the time of injury is not imposed by the section. Although it was adopted from section 28A (2)(c) of the CLA 1956, the condition is imposed through judicial precedence, not through application of the CLA 1956. The assessment of damages for loss of expectation of life in personal injury claims is also discretionary on the judges. Judges are only barred from awarding this award as a separate heading. They are not prevented from assessing and including it in the award for pain and suffering. Since section 28A of the CLA 1956 does not regulate the method in which the damages for loss of expectation of life is to be assessed, judges still have discretion to assess the same.

The exercise of judicial discretion in the assessment of damages for loss of pre-trial earnings and loss of future earnings has been somewhat affected by the provision in section 28A of the CLA 1956. There are several elements in the assessment of these heads of damages where judges' discretionary power is abolished by the provisions in section 28A the CLA 1956. The assessment of multiplier is strictly regulated by section

28A of the Act and leave little avenue for judicial discretion. Similarly, the condition of earning income before the injury also abolishes judges' discretionary power in awarding damages for loss of future earnings to plaintiff who was not earning income at the time of the injury. On the other hand, the conditions of good health and below the age of fifty five (55) years old in section 28A (2)(c) of the CLA 1956 are worded in such a way that they leave some areas open to judges' interpretation. These interpretations lean towards allowing judges to use their discretion.

The provision in section 28A(2) of the CLA 1956 which prevents judges from deducting the compensation benefits received from the assessment of damages and made it compulsory to deduct plaintiff's living expenses from the assessment of multiplicand can be considered as a mere codification of the existing practices. Judges, even prior to the introduction of section 28A (1) of the CLA 1956 in 1975 had never taken into consideration the benefits received due to the injuries while assessing the multiplicand for loss of future earnings. Similarly, judges also have always deducted cost for producing income from the multiplicand even prior to the introduction of section 28A (2)(iii) of the CLA 1956. Therefore, the introduction of these elements in the assessment of damages for loss of future earnings is merely the CLA 1956 giving a statutory node to the existing practice. The Act just put on paper what had been the practice of the local judges.

With regard to the effect of section 28A of the CLA 1956 on the quantum of damages in personal injury claims arising out of motor vehicle accidents, only the prohibition against considering future increases in plaintiff's income and the requirement of earning income before the injury result in apparent reduction in the quantum of damages being awarded. The fixed multiplier as discussed above yield more damages if

compared to the application of annuity table. The above discussion shows that the introduction of section 28A falls short of its reformatory goal which is to reduce the amount of damages being awarded by the courts.

In conclusion, section 28A of the CLA 1956 neither totally abolish the discretionary power of the judges in assessing damages nor reduce the quantum of damages for personal injury claims arising out of motor vehicle accidents. If one look close enough at the effects of the application of the section, one will see that the ambiguity in the wordings of the provisions and the absence of specific interpretation for the phrases used in the section allow for judges to exercise their discretion. Whether or not the ambiguity or the absence of interpretation is intentional is another question altogether.

### **3.9 COMPARATIVE TABLE OF CLA 1956 (REV 1972) AND CLA 1956 WITH REGARDS TO PERSONAL INJURY CLAIMS**

CLA 1956 (rev 1972)	CLA 1956
Under Common Law, the award for loss of expectation of life awarded as a separate heading. The assessment is up to the judge's discretion.	The award for loss of expectation of life as a separate heading is abolished by section 28A (2)(a). It is however assessed as part of pain and suffering under section 28A (2)(b) provided that the plaintiff was aware of the loss. The assessment is up to the judge's discretion.
Under Common Law loss of pre-trial earnings awarded as separate heading. The multiplier is from the date of injury to the	Although loss of pre-trial earnings is lump into the assessment of loss of future earnings, it can still be awarded as a

date of judgment.	separate heading. The multiplier is from the date of injury to the date of judgment. The period however is deducted from the statutory multiplier for loss of future earnings in section 28A (2)(c).
<p>Loss of Future Earnings allowed under Common Law.</p> <ul style="list-style-type: none"> <li>- No pre-condition.</li> <li>- Compensation benefits from other compensation funds are not taken into consideration.</li> <li>- Only expense in earning / producing income was deducted from the assessment of multiplicand</li> <li>- The assessment of multiplier is based on plaintiff's earning at the time of trial. Any increase or decrease in plaintiff's earnings at the time of trial is factored in into the assessment based on judges' discretion.</li> <li>- The assessment of multiplier is based on judges' discretion guided by the Common Law principle.</li> </ul>	<p>Loss of Future Earnings provided in section 28A (2)(c).</p> <ul style="list-style-type: none"> <li>- 3 pre-conditions must be fulfilled. Plaintiff must be below fifty five (55) years old, receiving earning and in good health at the time of injury.</li> <li>- Compensation benefits from other compensation funds are not taken into consideration.</li> <li>- Living expenses is to be deducted from the assessment of multiplicand.</li> <li>- Future increase in income is not considered. The assessment of multiplicand is based on plaintiff's earnings at the time injury.</li> <li>- The assessment of multiplier is based on the statutory prescribed method.</li> </ul>
<p>Loss of Future Earning Capacity allowed under Common Law</p> <ul style="list-style-type: none"> <li>- The unemployed and minors are allowed to claim.</li> <li>- Prospect of future increase in income is taken into account.</li> <li>- Assessment of multiplier and multiplicand is up to the judge's discretion.</li> </ul>	<p>Loss of Future Earning Capacity not provided for but still allowed under Common Law.</p> <ul style="list-style-type: none"> <li>- Only those who are receiving earning at the time of injury is allowed to claim.</li> <li>- Assessment of multiplier and multiplicand is up to the judge's discretion.</li> </ul>

## CHAPTER 4

### THE EFFECTS OF THE CLA 1956 ON JUDICIAL DISCRETION AND THE QUANTUM OF DAMAGES IN FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS

#### 4.1 INTRODUCTION

Fatal accident claims arising out of motor vehicle accidents are claims for compensation (damages) for the loss suffered by the accident victim (the deceased), his estate or his dependants due to the victim's wrongful death. The cause of action arises when the negligent act or omission of the driver of the vehicle at fault causes the demise of the deceased. It exists irrespective of whether the deceased died instantaneously or survived for some time before succumbing to his injuries.<sup>1</sup> Damages under fatal accident claims can be divided into four (4) main categories; damages awarded to the deceased's estate,<sup>2</sup> damages for loss of support awarded to the deceased's dependants,<sup>3</sup> damages for loss of services and consortiums awarded to deceased spouse or parents<sup>4</sup> and bereavement.<sup>5</sup> Although the right to these damages arises from the same cause of action, the damages does not overlap since they are only available to specific persons as provided in the Civil Law Act 1956.<sup>6</sup> In Malaysia, the only statutory provision which provides for the assessment of damages for fatal accident claims arising out of motor vehicle accidents are sections 7 and 8 of the CLA

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<sup>1</sup> Lim, Heng Seng, *Assessment of Damages in Personal Injury and Fatal Accident Claims: Principles and Practices*, (Kuala Lumpur: Marsden Law Book, 1995), at 109.

<sup>2</sup> Also known as estate claims. Where the deceased did not die instantaneously, the pain and suffering, loss of amenities, loss of earnings as well as expenses which he bears between the time of injury and death would entitle him to claim for compensation. After the deceased die, this right of action is vested on his estate.

<sup>3</sup> Also known as dependency claims. Where the deceased's death causes financial loss to his dependents due to cessation of financial support. The dependents are entitled to be compensated for the loss suffered. This right of action is independent of the right of action vested on deceased's estate.

<sup>4</sup> Also known as claims for loss of service and consortium.

<sup>5</sup> Claim for the grief, sorrow and emotional anguish suffered by deceased's close relatives.

<sup>6</sup> (Act 67). Hereinafter referred to as "the CLA 1956".

1956. The same sections also provide for the assessment of damages in other type of fatal accident claim actions. In addition to these sections, judges are also governed by the Common Law principles and decided cases.

The Civil Law Enactment 1937<sup>7</sup> was the first statutory provisions in Malaysia which recognizes the causes of actions under fatal accident claims.<sup>8</sup> Section 3 provides the cause of action for damages for loss of support by deceased's dependants while section 4 allows deceased's estate to substitute the right of action which originally belongs to the deceased (subject to some exceptions). Apart from providing for the cause of actions, section 3 and 4 of the Civil Law Enactment 1937 also contained provisions on the measure of damages, the beneficiaries to the claims, person who can bring the actions, the limitation period and the benefits which are not to be taken into consideration in the assessment of damages. The actual method of assessing the damages however was left to the discretion of the judges guided by the Common Law principles and decided cases.

The Civil Law (Amendment) Act 1975<sup>9</sup> and the Civil Law (Amendment) Act 1984<sup>10</sup> brought several changes in respect of the assessment of damages for fatal accident claims. These amendments are consolidated into the Civil Law Act 1956 (rev 1972)<sup>11</sup> to form the current CLA 1956. These changes are mainly adopted from the provisions in the English Administration of Justice Act 1982 (cap 53)<sup>12</sup> with several

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<sup>7</sup> (F.M.S no 3 of 1937). Introduced the English Common Law to the Federated Malay States ([Perak](#), [Selangor](#), [Pahang](#) and [Negeri Sembilan](#)). The provisions in the Enactment were extended to the Unfederated Malay States ([Kedah](#), [Perlis](#), [Kelantan](#), [Terengganu](#) and [Johor](#)) via the Civil Law (Extension) Ordinance 1951(F. of M. No 49 of 1951). The Civil Law Enactment 1937 was repealed and substituted with the Civil Law Ordinance 1956 (F. of M. No 5 of 1956), the Civil Law Act 1956 (Act 67)(rev 1972) and later the CLA 1956.

<sup>8</sup> The provisions in the Civil Law Enactment 1937 were adopted from the Fatal Accident Act 1846 (9 & 10 Vict. cap.93) (hereinafter referred to as "the Fatal Accident Act 1846") and the Law Reform (Miscellaneous Provisions) Act 1934 (cap 41)(hereinafter referred to as "the Law Reform 1934") in England.

<sup>9</sup> (Act A308). Hereinafter referred to as "the CLAA 1975". The amendments were consolidated into the CLA 1956 (rev 1972).

<sup>10</sup> (Act A602). Hereinafter referred to as "the CLAA 1984". The amendments were consolidated into the CLA 1956 (rev 1972). The amended Act is the current CLA 1956.

<sup>11</sup> (Act 67). Hereinafter referred to as "the CLA 1956 (rev 1972)"

<sup>12</sup> (cap 53). Hereinafter referred to as "the AJA 1982".

distinctiveness which are purely of our own making. The amendments especially the CLAA 1984 are not well received by the legal community in Malaysia. They are said to have altered many aspects of the law relating to the assessment of damages for loss of support and estate claims to the detriment of the claimants.

Using similar approach as the previous chapter, this chapter focuses on the effects of sections 7 and 8 of the CLA 1956 on the assessment of damages in fatal accident claims arising out of motor vehicle accidents. It analyses the provisions from the perspective of the exercise of judicial discretion as well as the quantum of damages in the effort to answer the question of whether the CLA 1956 have abolish or fetter judges' discretionary power in its effort to reduce the amount of damages being mated out by the courts as claimed. It also analyse whether the abolition or restriction (if any) imposed by the sections have any effect in reducing the amount of damages being awarded by the courts.

As in the previous chapter, it must be emphasis that the cases cited in this chapter are also confined to cases involving motor vehicle accidents only.<sup>13</sup> The discussion is also restricted to the heads of damages which are affected by the provisions in the CLA 1956. The heads of damages which are not affected by the CLA 1956 are not discussed since they are beyond the scope of this research. Again, it should always be borne in mind that the term 'discretion' used throughout this chapter refers to the fact that in assessing the amount of damages for personal injury judges have to factor in various elements including the facts of the case, the submissions of the parties as well as the law, legal principles, judicial precedence and norms governing the issue at hand judiciously and not according to their whim and fancies.

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<sup>13</sup>However, personal injury claims arising out of other cause of action are also cited occasionally due to their relevancy to the discussion at hand.

## 4.2 ABOLISHING THE AWARD FOR LOSS OF SERVICES AND CONSORTIUM

Under the Common Law, parents or husband whose child or wife passed away due to an accident are entitle to claim compensation for the loss of services and society rendered to them by their child or wife. The damages claimable were known as damages for loss of service and consortium. The introduction of section 2(a) of the CLAA 1984 to amend section 7 (3) of the CLA 1956 (rev 1972) have abolished these heads of damages from being awarded under fatal accident claims in Malaysia. The amended proviso (iii) to section 7(3) of the CLA 1956 reads:

- (iii) No damages shall be awarded to a **parent** of the ground only of his having been deprived of the **services of a child**; and no damages shall be awarded to a **husband** on the ground only of his having been deprived of the **services** or **society** of his wife. (*emphasis added*)

The abolition of the awards for loss of services and consortium can also be found in section 2 of the AJA1982. Other than abolishing the awards for loss of services and consortium, proviso (iii) to section 7(3) of the CLA 1956 also have some effects on the exercise of judicial discretion and the quantum of damages under fatal accident claims.

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### 4.2.1 The Abolition of the Award for Loss of Service of Child or Wife

Loss of services of a children or wife is defined as the loss suffered by the parents of a deceased child or the husband of a deceased wife in term of the performance of various

duties in their capacity as a child or wife.<sup>14</sup> The ‘service’ is viewed as something that the parents or husband is depending on the deceased<sup>15</sup> such as their services at home.<sup>16</sup> The quantum awarded was based on the judge’s estimation of a reasonable value of the service. It can either be calculated lump sum or based on multiplication method. All of which is done by applying the judge’s discretion to the fact of the case guided by the Common Law principles and decided cases. The task of estimating the value of the service is a difficult one especially when there is no monetary indicator for the value of service rendered. Judges usually will have to make an estimation of the value of the service by basing it on the prevalent rate of helper at that time and locality.<sup>17</sup>

This head of damages is abolished by proviso (iii) to section 7(3) of the CLA 1956. Judges now have to “disregard any contribution in terms of money or money's worth from the deceased child or wife”<sup>18</sup> in the assessment of damages for fatal accident claims. Peh Swee Jin in *Jaafar bin Shaari & Anor. (Suing as the Administrators of the Estate of Shofiah bte Ahmad, Deceased) v Tan Lip Eng & Anor*<sup>19</sup> commented:

“It is interesting to note in passing that after the date of the accident in this case, any claim for loss of consortium (society) and of services from a deceased wife was also abolished by the Civil Law (Amendment) Act 1984.”

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<sup>14</sup> It originates from the proprietary right of a master towards his servant. A master may bring an action against the tortfeasor for the beating and maiming of his servant to recover damages for the loss of the servant’s service. This right was extended to persons ‘in the service of his domestics’. See Witt, John Fabian, *From Loss of Service to Loss of Support: the Wrongful Death Statutes, the Origin of Modern Tort Law and the Making of the Nineteenth-Century Family*, 23 March 2012, <[http://www.law.yale.edu/documents/pdf/Faculty/Witt\\_From\\_Loss\\_of\\_Services\\_to\\_Loss\\_of\\_Support.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Witt_From_Loss_of_Services_to_Loss_of_Support.pdf)>

<sup>15</sup> In *Lee Sai Cheong v Wan Lim Cheong* (1962) MLJ 259, the Court of Appeal rejected the claim for loss of service of a child by deceased parents on the ground that the parent had failed to prove the loss the service which the child perform for the parent. Although deceased assisted his father to look after the father’s stock of building materials, the fact that the father did not employ other people to take over deceased’s job after his demise indicate that the father did not suffered any loss of deceased’s service.

<sup>16</sup> See *Hay v Hughes* [1975] 1 QB 790 and *Chong Pik Sing & Anor v Ng Mun Bee & Ors* [1985] 1 MLJ 433.

<sup>17</sup> Dass, S. Santhana, *Personal Injury Claims*, (Petaling Jaya: Alpha Sigma, 2000), at 50.

<sup>18</sup> Radhakrishnan, S., “Quantum of Damages in Personal Injury Claims” (1995) 3 *Malayan Law Journal*, xxix – xl, at xxxvi. See also Khoo, Guan Huat, “Assessment of Damages in Fatal Accident Claims and a Commentary of the Civil Law (Amendment) Act 1984”, (1993) 1 *Malayan Law Journal* cxxix – cxxxviii, at cxxxiv.

<sup>19</sup> [1997] 3 MLJ 693.

Unfortunately, the effect of proviso (iii) to section 7(3) of the CLA 1956 in respect of judicial discretion in the assessment of damages and the quantum of damages for loss of services of child or wife is not as clear. Although judges are not allowed to award damages for loss of services of child or wife, their discretion in this respect is not totally abolished. Reason being;

***(a) Section 7(3) of the CLA 1956***

The effect of proviso (iii) to section 7(3) of the CLA 1956 on the discretionary power of the judges however is somewhat negated by section 7(3) of the CLA 1956. The phrase ‘together with any reasonable expenses incurred as a result of the wrongful act’ in section 7(3) of the CLA 1956 made it possible for judges to assess and award damages to compensate the cost to replace the services which were provided by the child or the wife. This was evidenced by the decision in *Neo Kim Soon (Administrator of the estate of Phanna Mannechuang, deceased) v Subramanian a/l Ramanaidu & Anor.*<sup>20</sup> Mahadev Shankar JCA held:

“It is a different matter altogether where a husband has not only lost his wife, but has also been put to monetary loss which has been the direct result of the negligence. Such loss in our view continues to be recoverable.

We say this because s 7 (3) as it is presently worded not only empowers the court to compensate the claimant for any ‘loss of support’ but also for any reasonable expenses incurred as a result of the wrongful act’.”

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<sup>20</sup> [1995] 3 MLJ 435. See also *Chong Pik Sing & Anor. v Ng Mun Bee & Ors* [1985] 1 MLJ 433 and the decision by the Court of Appeal in *KDE Recreation Bhd. v Low Han Ong & 6 Ors.* (Rayuan Sivil No W-04-4-02)

Similar sentiment was echoed by in a Court of Appeal case of *Hum Peng Sin v Lim Lai Hoon & Anor.*<sup>21</sup> Gopal Sri Ram in his judgement held:

“In my judgment, what proviso (iii) to s 7(3) of the Act prohibits is an award for the loss of consortium or services where that is the sole head of claim. In my judgment the third proviso does not prohibit an award for the loss of the services provided by a wife when such a claim is coupled with another head of claim for either actually engaging a housekeeper.”

In the event the parents or husband of a deceased child or wife manages to prove that they had incurred monetary loss which was caused by the need to replace the child or the wife’s services, judges are at liberty to assess and awards damages for this loss under section 7(3) of the CLA 1956. The most common losses which fall under this category are losses due to the cost of engaging the service of helper, housekeeper and baby sitter. The Court of Appeal in *Sodah bt Haji Saad (sebagai isteri dan waris kepada Haji Abdullah bin Ahmad, simati) v Saleh bin Bakar & Anor.*<sup>22</sup> exercised its discretion in assessing the loss of services of a husband by taking into account the husband’s age at the time of his demise and the fact that the loss being claimed was the husband’s assistance at home such as sweeping and going to the market for groceries. The damages was assessed based on the cost for employing part-time helper in rural areas as well as the longer life expectancy of a people living in those areas. Similarly, in *Hum Peng Sin v Lim Lai Hoon & Anor.*,<sup>23</sup> the cost of hiring a maid to replace the service of a wife was assessed by taking into consideration wife’s age at the time of her demise, her probable retirement age and probable monthly salary of a maid.<sup>24</sup>

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<sup>21</sup> [2001] 4 MLJ 232.

<sup>22</sup> Rayuan Sivil No K-04-270-2004.

<sup>23</sup> [2001] 4 MLJ 232.

<sup>24</sup> The Court held: “For the cost of hiring a maid to replace the services rendered by the deceased, I think that a multiplier of ten is just. I derive this by subtracting 40 (the age of the deceased at the date of her death) from 55 (the age at which she would have

As such, proviso (iii) to section 7(3) of the CLA 1956 only abolishes the discretionary power of the judges to award damages for loss of service and to assess what constitute as reasonable value for service rendered by the child or wife. It does not prevent the judges from awarding damages to compensate the parents or husband for the expenses incurred in replacing the service once rendered by the child or wife.

***(b) The Introduction of the Award for Loss of Service of Husband***

The decision in *Sodah bt Haji Saad (sebagai isteri dan waris kepada Haji Abdullah bin Ahmad, simati) v Saleh bin Bakar & Anor*.<sup>25</sup> brought up an interesting point with regard to this issue. The Supreme Court observed that proviso (iii) to section 7(3) of the CLA 1956 seems to have widened the judge's power under fatal accident claims by allowing a new head of damages to emerge; loss of service of husband. Literal interpretation of proviso (iii) to section 7(3) of the CLA 1956 suggests that since the proviso deals solely with the loss of the services of a child or wife, it only abolishes the right of parents or husband to claim for the loss of service their child or wife. The proviso does not extend to the loss of service of a husband. In allowing damages for loss of service of a husband to a wife when her husband was killed in a motor accident, the learned Gopal Sri Ram JCA held:

“Be it noted that it does not say that no damages shall be awarded to a wife on the ground only of her having been deprived of the services or society of her husband. If Parliament had intended to extend the proviso to

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retired), multiplying the difference by two and dividing the product by three. In other words,  $55 - 40 \times \frac{2}{3} = 10$ . Now, for the multiplicand, I consider a sum of RM200 per month to be adequate. The total sum amounts exactly to RM24,000 that is  $200 \times 10 \times 12 = 24,000$ . I would round this off at RM23,000 taking into account the various vicissitudes.” How the Court considered the ‘adequacy’ of RM 200 as multiplicand was however not explained. Similarly the reason why deceased retirement age was taken into consideration as a factor in determining the multiplier was also left unexplained. Since a child, wife or mother’s service to the household does not end when she retires: it is incomprehensible how fifty-five was taken as the maximum ‘service’ age.

<sup>25</sup> *Op. cit.*

wives, it could have easily done so by employing the word “spouse”. Yet it has chosen not to do this. It follows, in my judgment, that a wife is entitled to recover damages for the services performed by her husband before his death. Statute apart, the common law makes no distinction in this regard between the loss of services rendered by a wife or a husband. All that the common law requires is that the loss should result from the relationship between the dependants and the deceased. And it admits of compensation for the loss of gratuitous services rendered by the deceased. Support for these propositions may be found in Clerk & Lindsell on Torts, 18th edition page 1603.”

By virtue of the above interpretation, judges now have the discretion to assess and award damages for loss of services of husband.

The ‘creation’ of this new cause of action is however arguable considering that it has neither Common Law origin nor statutory recognition. A wife under Common Law has no cause of action for the loss of services of her husband. The inferior status of a wife under the old custom does not entitle her to be compensated for the loss of services rendered to her by her husband.<sup>26</sup> Since the award for loss of service of husband has never been recognized as part of the damages in fatal accident claims by the Common Law, it is only reasonable that section 2 of the AJA 1982 did not mentioned anything about abolishing a wife’s right to claim damages for loss of services of her husband.

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<sup>26</sup> Blackstone reasoned out the above by saying: “The inferior hath no kind of property in the company, care or assistance of the superior as the superior is held over to have in those of the inferior, and therefore the inferior can suffer no loss or injury. The wife cannot recover damages for beating her husband for she hath no separate interest in anything during her coverture. The child hath no property in his father or guardian, as they have on him, for the sake of giving him education and nurture... And so, the servant whose master is disabled... suffers no injury and is therefore entitled to no action for any battery of imprisonment which such master may have to endure.”

Similarly, since our law on personal injury and fatal claims are based on the English Common Law, the cause of action for loss of services of husband has never been accorded to the wives in Malaysia. Therefore, there is no reason for our Legislature to include the abolition of the award for loss of services of husband into proviso (iii) of the CLA 1956. Something which had never existed need not be abolished. As such, it is submitted that despite the Supreme Court decision in *Sodah bt Haji Saad (sebagai isteri dan waris kepada Haji Abdullah bin Ahmad, simati) v Saleh bin Bakar & Anor.*<sup>27</sup>, above, proviso (iii) to section 7(3) of the CLA 1956 cannot be read as creating a new head of damages for loss of service of husband.

Nevertheless, damages for loss of services of husband can be awarded under section 7(3) of the CLA 1956. The term ‘together with any reasonable expenses incurred as a result of the wrongful act’ allow judges to award damages to a wife provided that she can prove that she had suffered monetary loss in order to replace the services once rendered by her deceased husband. As such, despite the faulty reasoning for allowing damages for loss of services of husband in *Sodah bt Haji Saad (sebagai isteri dan waris kepada Haji Abdullah bin Ahmad, simati) v Saleh bin Bakar & Anor.*,<sup>28</sup> the sentiment behind it is correct. In situation where a wife suffered monetary loss due to expenses incurred in replacing the service of her husband, judges have the discretion to award damages to compensate the expenses incurred.

As such, it is concluded that proviso (iii) to section 7(3) of the CLA 1956 only abolishes the discretionary power of the judges to award damages for loss of service of child or wife as a separate head of damages. The abolition does not carry much effect on the discretionary power of the judges or the quantum of damages since the effects of

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<sup>27</sup> *Op. cit.*

<sup>28</sup> *Op. cit.*

the abolition is negated by section 7(3) of the CLA 1956 which allows parents or husband to be compensated for any 'reasonable expenses' incurred in replacing the service rendered by their child or wife. The discretion remains since the section does not specify how the amount which constitute 'reasonable expenses' is to be assessed. Section 7(3) of the CLA 1956 also allows judges to use their discretion in awarding damages to a wife to compensate her for the expenses incurred to replace the services rendered by her husband. Since damages for loss of services of husband has never been recognized before, the introduction of proviso (iii) to section 7(3) and section 7(3) of the CLA 1956 seems to have widened the discretionary power of the judges in fatal accident claims. Section 7(3) of the CLA 1956 therefore retains the discretionary power of the judges in the assessment of damages for fatal accident claims arising out of motor vehicle accidents.

Since judges are allowed to assess and award damages to compensate the loss of services rendered by the child, wife and husband, the effect of proviso (iii) to section 7(3) of the CLA 1956 in reducing the quantum of damages awarded under fatal accident claims is limited to cases where the services rendered by the child, wife and husband were not replaced or to cases where the parents, husband or wife did not incur any loss in replacing the services rendered by their child, wife or husband. In situations where the services were replaced and loss incurred in order to replace the services, the quantum of damages for fatal accident claims arising out of motor vehicle accidents remains the same as before the introduction of the CLA 1956.

#### 4.2.2 The Abolition of the Award for Loss of Consortium

The claim for loss of services of wife is usually brought together with the claim for loss consortium.<sup>29</sup> Consortium is the comfort, society and services of one spouse.<sup>30</sup> “It is the companionship, love affection, comfort, mutual services, sexual intercourse – all belong to the married. Taken together to make up the consortium.”<sup>31</sup> It is a Common Law head of damages available only to the husband for the loss of society and consortium of his wife in the event where the wife was injured and unable to provide the same service or consortium to the husband.<sup>32</sup> A wife however has no similar right to claim under Common Law.<sup>33</sup>

In theory, the abolition of the award for loss of consortium of wife by proviso (iii) to section 7(3) of the CLA 1956 also abolishes judges’ discretion in assessing and awarding the damages. Judges no longer have the discretion to assess what constitute the reasonable value of a wife’s consortium. The reality however is different. The provision has no effect on either the exercise of judicial discretion or the quantum of damages being awarded in fatal accident claims. The application of section 7 of the CLA 1956 is confined to losses resulting from death. It follows that the abolition of the award for loss of consortium in proviso (iii) to section 7(3) of the Act is also confined to loss of consortium suffered by a husband as the result of his wife’s demise. Loss of consortium of wife however has never been recognized under the Common Law or adopted by any statute as part of damages claimable under fatal accident claims.

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<sup>29</sup> *Pengarah Institut Penyelidikan Perubatan v Intra Devi* [1988] 1 MLJ 18.

<sup>30</sup> Dass, S. Santhana, *op.cit.* (2000), at 47.

<sup>31</sup> Per Birket J in *Best v Samuel Fox & Co Ltd* (1951) 2 All ER 116, 125 CA

<sup>32</sup> The cause of action originates from a Latin expression: ‘*per quod servitium et consortium amisit*’, translated as ‘in consequence of which he lost her society and services’. Similar to loss of service, loss of consortium is also based on the husband’s position as a master of the household: hence the element of service. The cause of action however gradually weaned from service to the element of consortium.

<sup>33</sup> *Best v Samuel Fox & Co Ltd.*, *op. cit.*

Loss of consortium under Common Law is only available in personal injury claims. A husband is allowed to bring a separate action against the defendant independent of his wife's personal injury suit in order to claim for the loss of consortium of his wife due to the injuries suffered by his wife. The same right is not accorded to the husband when his wife dies.<sup>34</sup> When the Fatal Accident Act 1846<sup>35</sup> was enacted to allow a claim to be filed for losses resulting from the death of another person, the Act did not recognize the award for loss of consortium as part of damages in fatal accident claim. The provisions in Fatal Accident Act 1846 limit themselves to pecuniary losses suffered by deceased's dependants due to deceased demise. It does not extend to other types of losses.<sup>36</sup> As such, loss of consortium remained a creature of the Common Law, hence limited only to loss of consortium in the event of the wife being injured, not deceased. Since any person claiming for damages accorded by the Common Law or the Fatal Accident Act 1846 must adhere to the principles enumerated in the decided cases or the provisions in the Act,<sup>37</sup> a husband is barred from claiming loss of consortium for his wife's demise as it is not provided for under the Common Law and no legislative provision had ventured to give statutory right to the claim.

Similarly, when the Malaysian Parliament adopts the provisions in the Fatal Accident Act 1846 into section 4 of the Civil Law Enactment 1937, the application of the section is also limited to the assessment of the award for pecuniary loss suffered by the dependants only. It does not extend to other type of fatal claim damages under Common Law. As such, loss of consortium of wife had never been recognized or

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<sup>34</sup> Clerk & Lindsell On Torts, 13<sup>th</sup> edi, page 450 paragraph 843 as cited in Dass, K.S., *Quantum in Accident Cases*. (vol. 1) (Kuala Lumpur: Malaysian Law Publishers, 1975) at 41.

<sup>35</sup> (9 & 10 Vict. cap.93). Hereinafter referred to as "the Fatal Accident act 1846".

<sup>36</sup> Lord Wright in *Davies v Powell Duffryn Associated Collieries Ltd.* (1942) 1 All ER 657 held: "The Act 1846, section 2 provides that the action is to be for the benefit of the wife or other member of the family and the jury (or judge) are to give such damages as may be thought proportioned to the injury resulting to such parties from the death. The damages are to be based on the reasonable expectation of pecuniary benefit or benefit reducible to money value..."

<sup>37</sup> Rutter, Michael F., *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia*, 2<sup>nd</sup> ed. (Hong Kong: Butterworth Asia, 1993) at 597.

awarded in fatal accident claims in Malaysia. In *Chong Pik Sing v Ng Mun Bee*,<sup>38</sup> the Supreme Court reversed the decision of the trial court and disallowed the award for loss of consortium on the ground that such an award would be “contrary to the authorities and the law”.<sup>39</sup> Perusal of local literature and case laws also did not reveal any case which directly deals with the award for loss of consortium in fatal accident claims other than in *Chan Ah Fong & Ors. v Goh Kim*.<sup>40</sup> The court in this case allowed \$3250 to the husband for loss of consortium. Detail of the claim and judgment were however unavailable. As such the grounds for allowing such award cannot be ascertained.

Since a husband’s right for the award for loss of consortium in fatal accident claim is neither recognized under Common Law nor the earlier revision of the CLA 1956, the abolition of this head of damages by proviso (iii) to section 7(3) of the CLA 19456 is immaterial. The provision merely abolished something which has never been recognized by the law. Judges, even with the discretionary power given to them would not be able to assess and award damages for loss of consortium in fatal accident claim. Proviso (iii) to section 7(3) of the CLA 1956 therefore has no effect on the exercise of judicial discretion in the assessment of damages in fatal accident claims arising out of motor vehicle accidents. Similarly, it also has no effect in reducing the quantum of damages awarded under this claim.

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<sup>38</sup> *Op. cit.*

<sup>39</sup> The court however maintained the award for loss of service since it can constitute part of the pecuniary loss which a wife gratuitously rendered to her husband.

<sup>40</sup> Kuala Lumpur Civil Suit No 278 of 1971 (unreported) as cited in Dass, K. S., *op. cit.*, (1975), at 41.

### 4.3 ABOLISHING AWARD FOR LOSS OF EXPECTATION OF LIFE

Similar to the award for damages for loss of expectation of life in personal injury claims, the award for damages for loss of expectation of life in fatal accident claims is also awarded to compensate for the deprivation of one's normal life and the enjoyment thereof.<sup>41</sup> However, since the deceased had succumbed to his injuries, the cause of action is vested on his estate. The award therefore becomes part of the awards in estate claims. The assessment of damages is based on whether the court perceive that the deceased will lead a predominantly happy and fulfilling life had he did not succumbed to the injury. The award is abolished by section 3 of the CLAA 1984 which amended section 8(2)(a) of the CLA 1956 (rev 1972). The new section 8(2)(a) of the CLA 1956 reads:

Where a cause of action survive as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person-

(a) **shall not include** any exemplary damages, any damages for bereavement made under subsection (3A) of section 7, **any damages for loss of expectation of life** and any damages for loss of earning in respect of any period after that person death;  
(*emphasis added*)

Unlike section 28A (2)(a) of the CLA 1956, section 8(2)(a) of the CLA 1956 has no corresponding provision in the AJA 1982.<sup>42</sup> The wording in section 8(2)(a) of the CLA 1956 clearly prohibits the deceased's estate from claiming damages for loss of

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<sup>41</sup> Dass, K.S., *op. cit.* (1975), at 35.

<sup>42</sup> Section 1(1)(a) of the AJA 1982 limits itself to claim for personal injury only.

expectation of life in any form. The abolition of the award is primarily due to the fact that the amount awarded under this heading is small. It would be insignificant if compared to the amount awarded under other head of damages.<sup>43</sup> As such, it would be futile and superfluous to continue allowing for this head of damages under fatal accident claims.<sup>44</sup>

Together with abolishing the award for loss of expectation of life in fatal accident claims, section 8(2)(a) of the CLA 1956 also abolishes judges' discretion to assess what constitute a 'predominantly happy life', to determine whether deceased would have lead a predominantly happy life had he did not succumbed to the injuries and to award damages under this heading.

Despite its effect in abolishing judges' discretionary power in the assessment of damages for loss of expectation of life in fatal accident claims, section 8(2)(a) of the CLA 1956 does not contribute much in reducing the quantum of damages under this heading. Previously, damages for loss of expectation of life was rarely awarded as a separate head of damages. It was usually included as part of the award for loss of support.<sup>45</sup> This was evidenced in *Amar Singh v Chin Kiew*,<sup>46</sup> where Thompson J. held:

“in cases of this sort damages recovered for loss of expectation of life must be taken into account in assessing damages for loss of support”

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<sup>43</sup> Parliamentary Debates, Representative, Sixth Parliament, Second Session, 18<sup>th</sup> July 1984, 3319 (YAB Radzi Sheikh Ahmad).

<sup>44</sup> The inability to mathematically assess the loss of the prospect of a happy life in term of monetary value is also one of the reasons behind the abolition. The Manitoba Law Reform Commission in its Working Paper, Rationalizing Actionable Fatalities Claims and Damages, June 1977 cited in Verupillai, Jeyaratnam, *Damages: Loss of Expectation of Life Survival and Deductibility*, (Singapore: Malayan Law Journal, 1984), at 13 stated “Lord Wright in the case of *Rose v Ford* (1937) AC 826 gives us the theoretical basis for the claim, but he does not go one step further and lay down precise guidelines for the actual assessment of damages for the loss of expectation of life.”

<sup>45</sup> Dass, K.S., *op. cit.*, (1975), at 983.

<sup>46</sup> (1960) 26 MLJ 77. Similarly, in *Liew Moi & Anor. v Dil Bahadur Bura & Ors.* (1963) 27 MLJ 22, the court refused to allow the claim for loss of expectation of life as a separate head of damages. The award was considered merged in the award for loss of dependency in section 7. The merger is even more evidenced in the case of *Wong Kuee v Pahang Lin Siong Motor Co. Ltd.* (1962) 28 MLJ lxxxiii where the amount for the award for loss of support was set aside since the amount to be awarded for loss expectation of life and pain and suffering was smaller than the amount for the award for loss of support. As such it is clear that the amount awarded for loss of expectation of life was generally regarded as part of the award for loss of support that in event both head of damages were awarded, the award for loss of expectation of life will not be awarded at all.

Even in cases where the damages was awarded as a separate head of damages, the amount was very minimal. Perusal of the cases shows that the judges had always awarded a moderate sum for loss of expectation of life. The amount usually in the region of RM 3000 to RM 6500.<sup>47</sup> It started at RM 2500 to RM 3000 in the fifties (1950'). The quantum progressed to the region of RM 3000 to RM 3500<sup>48</sup> in the sixties (1960') and seventies (1970'), RM 4000<sup>49</sup> in the eighties (1980') and RM 5000 to RM 6500<sup>50</sup> in the nineties (1990).

Therefore, it is submitted that although the abolition of the award for loss of expectation of life in fatal accident claims by section 8(2)(a) of the CLA 1956 has indeed bar the exercise of judicial discretion under this head of damages, it however does not contribute much in reducing the quantum of damages awarded by the courts. The judges, despite having a wide discretion in awarding damages under this heading had adhered to what Thomson CJ termed as 'judicial legislation' in *Lee Sai Cheong v Wan Lim Cheong*<sup>51</sup> and awarded a relatively moderate and almost consistent award throughout the years.

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<sup>47</sup> See cases cited in Verupillai, Jeyaratnam, *op.cit.*, at 33 -36. Also see Parliamentary Debate, *op. cit.*, at 3319, where YAB Radzi Sheikh Ahmad said that the award for loss of expectation of life was generally at RM 4500.

<sup>48</sup> See *Lee Sai Cheong v Wan Lim Cheong*, *op. cit.*, reduced the award from RM 5000 to 3000 Thomson CJ held at 262 "I would say that in this country at the present time this court should express the view that the conventional figure in the case of a young adult should be RM3000 and that view should be accepted by the judges." See also *Foon Moon Yeow v Tan Sek Kee & Ors* [1973] 2 MLJ 119 and *Seenivasan & Anor v Lim Yew Seng* (1961) MLJ 22.

<sup>49</sup> See *Chiang Boon Fatt v Lembaga Kemajuan Negeri Pahang & Anor* [1983] 1 MLJ 89 and *Thangavelu v Chia Kok Bin* [1981] 2 MLJ 277.

<sup>50</sup> See *Noorianti Zainol Abidin & Ors v Tang Lei Nge*, [1990] 2 MLJ 242, *Chua Kim Suan (Adminsitrix of the Estate of Teoh Tek Lee) & Anor v Government of Malaysia & Anor* [1994] 1 MLJ 394 and *Lee Cheng Yee (suing as Administrator of the Estate of Chia Miew Hein) v Tiu Soon Siang (t/a Tiyor Soon Tiok & Son Co) & Anor*. [1998] 2 MLJ 253.

<sup>51</sup> *Op. cit.*

#### 4.4 INTRODUCING THE AWARD FOR BEREAVEMENT

The award for bereavement is awarded to compensate deceased's close relatives for the grief, sorrow, sadness and emotional suffering suffered due deceased's demise. It was first introduced in Malaysia by section 2 (a) of the CLAA 1984. The section originated from section 2(a) of the AJA 1982.<sup>52</sup> Section 2 (a) of the CLAA 1984 introduced section 7(3A) of the CLA 1956. Section 7(3A) of the CLA 1956 reads:

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

*(emphasis added)*

Other than introducing the award for bereavement as the new head of damages claimable under fatal accident claims, The CLA 1956 also ensures that the damages for bereavement is awarded only to specific person<sup>53</sup> and at a fixed amount.<sup>54</sup> It also provides specific method for dividing the damages among the beneficiaries.<sup>55</sup> Judges have no discretion to in these regards. The absence is reflected in the specific nature of the provisions in sections 7(3A) to 7(3E) of the CLA 1956. Judges have no discretion to allow persons not listed under subsection 3B to claim, to vary the quantum of damages or to decide how the RM10,000 damages is to be divided between the beneficiaries.

The absence of any discretionary power to vary the quantum of damages to be awarded for bereavement had caused two (2) attempts to change the statutory quantum in section

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<sup>52</sup> Also see Parliamentary Debate, *op. cit.* at 3324, where YAB Radzi Sheikh Ahmad said that the AJA had substituted the award for loss of expectation of life with the award for bereavement.

<sup>53</sup> Section 7(3B) of the CLA 1956 specify that the award for bereavement can only be awarded to deceased's spouse and parents (provided that deceased is a minor and unmarried).

<sup>54</sup> Section 7(3A) of the CLA 1956 specify that the quantum of damages to be awarded for bereavement is RM 10,000. The amount is fixed and variable only by the Yang Dipertuan Agong. See section 7(3D) of the CLA 1956.

<sup>55</sup> Section 7(3C) of the CLA 1956 specify that the damages must be divided equally between deceased's parents.

7(3A) of the CLA 1956 using the ‘back door’. In *Hazimah Muda & Anor v Ab Rahim Ab Rahman & Anor*.<sup>56</sup> deceased’s two wives appealed against the decision of the Session Court claiming that since both of them are deceased’s legal spouses, they each have separate action against the defendant for the amount specified in section 7(3A) of the CLA 1956.<sup>57</sup> Another attempt of this nature was brought up for appeal to the Federal Court in *Wan Bte Mahmood dan Che Gayah bte Hashim v Abdul Zamri bin Abdul Rahman*<sup>58</sup> where the counsel for the appellant contended that the Legislature had used the word ‘spouse’ in singular because non-Muslim cannot have more than one wife. Section 7 (3A) however should be read together with section 4(3) of the Interpretation Act 1967<sup>59</sup> in situations involving Muslim polygamous marriages to allow plurality to be read into a word with singular meaning. Therefore, each wife should be entitled to RM 10,000 each.

Although the above appeals were dismissed by the respective courts<sup>60</sup> the appellants arguments are not without merits. Since the term ‘spouse’ is not defined by the interpretation section of the CLA 1956 or section 7(11) of the Act, referral can be made to the Interpretation Act 1967. Thus, allowing for the possibility that the term ‘spouse’ to be read as providing for more than one wives. Section 4(3) of the Interpretation Act 1967 states:

**Words and expressions in the singular include the plural, and words and expressions in the plural include the singular (*emphasis added*)**

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<sup>56</sup> [2001] 5 CLJ 511.

<sup>57</sup> The trial court allowed their claim for bereavement but directed that the RM10,000 was to be divided equally between the two of them.

<sup>58</sup> (Federal Court Notis Usus No 08-108-2006) as cited in Nasser Hamid, *Personal Injury & Fatal Accident Claims: Civil Law Act 1956*, (Petaling Jaya: Gavel Publications, 2008), at 7.

<sup>59</sup> (Act 388). Hereinafter referred to as “the Interpretation Act 1967”.

<sup>60</sup> Muhammad Kamil Awang J in *Hazimah Muda & Anor v Ab Rahim Ab Rahman & Anor*, *op. cit.* and Datuk S. Augustine Paul in *Wan Bte Mahmood dan Che Gayah bte Hashim v Abdul Zamri bin Abdul Rahman*, *op. cit.* held that the intention of the CLA 1956 is to limit the award for bereavement for spouse at RM10,000 without taking into consideration of the plurality of the spouses under personal or customary law. Datuk S. Augustine Paul in his judgement held: “Whether it is morally wrong is not our business. You raise it in Parliament.”

Applying this section to subsection 7(3B) of the CLA 1956 would enable the singularity of the term 'spouse' to be read as plural, thus, allowing judges to award RM 10,000 to each wives in a polygamous marriages. The 'plurality' of the term 'spouse' if read in this manner will not contradict section 7(3A) since each wife would still be entitle to only RM 10,000 for bereavement.

It is puzzling why the Legislature in its wisdom omitted to specify whether wives in a valid Muslim polygamous marriage must share the RM 10,000 knowing well that Muslims are allowed to have more than one wives and Muslims constitute the majority of the local populations. The issue become even more puzzling considering that section 7 (3C) of the CLA 1956 specifically provides that the RM 10,000 is to be divided equally between deceased's parents. Since there is nothing in the whole CLA 1956 which prevents the Legislature to provide for the same provision in respect of deceased's wives, the absence of the provision puzzling. Why would the Legislature distinguished between parents and wives?

The introduction of section 7(3A) of the CLA 1956 has increase the quantum of damages in fatal accident claims. Although the amount to be awarded for bereavement is limited to RM 10,000, this amount is still an addition to the quantum of damages considering that bereavement has never been awarded prior to the CLA 1956. Therefore, it is concluded that the CLA 1956 does not accord the judges with discretion in respect of the award bereavement in fatal accident claims arising out of motor vehicle accident. In addition, rather than reducing the quantum of damages in this type of claims, the Act had increased it by allowing the additional RM 10,000.

## 4.5 INTRODUCING THE AWARD FOR LOSS OF SUPPORT

The dependants of a motor accident victim are entitled to claim for the loss of financial support suffered as the result of the victim's demise.<sup>61</sup> This head of damages is known as damages for loss of support or loss of dependency. The award is provided by sections 7(1) and 7(3) of the CLA 1956. The sections are the result of section 2 of the CLAA 1984. The amended provisions have some effects on the discretionary power of the judges in the assessment of damages for loss of support and the quantum of damages under this head of damages. These effects are best illustrated by breaking them into the following sub-headings:

### 4.5.1 Substituting the Measure of Damages

Section 2(a) of the CLAA 1984 substituted the measure of damages in section 7(3) of the CLA 1956 (rev 1972) from being the amount that the court 'thinks proportioned to the loss resulting from the death' to being the amount to 'compensate... for any loss of support suffered...'.<sup>62</sup> The new section 7(3) of the CLA 1956 reads:

(3) The damages which the party who shall be liable to under Subsection

(1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section be such as will compensate the party for whom and whose benefit the action is brought for **any loss of support suffered together with any reasonable expenses** incurred as result of the wrongful act, neglect or default for the party liable under section 1;...  
*(emphasis added)*

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<sup>61</sup> Dass, S. Santhana, *op. cit.*, (2000), at 119.

<sup>62</sup> Rutter, Michael F., *op. cit.*, at 766.

The substitution of the measure of damages from ‘loss resulting from the death’ to ‘loss of support’, is an attempt by the Legislature to further clarify the award to cover only the pecuniary losses suffered by the dependants by virtue of them being dependants of the deceased.<sup>63</sup> It includes any “pecuniary provisions which furnishes a livelihood, a source of means of living, subsistence, sustenance, maintenance or living.”<sup>64</sup> Therefore, the judges’ discretion in assessing and awarding damages under this section is limited only to the financial loss suffered by deceased’s dependants in their capacity as dependants. It does not extend to the financial loss which was not for the benefit of the dependants. This effect was seen in *Chan Chin Ming v Lim Yoke Eng*,<sup>65</sup> where the Supreme Court gave the term ‘loss of support’ a restrictive interpretation<sup>66</sup> by limiting it to “financial loss which he sustained as dependants and not in any other way”.<sup>67</sup> The plaintiff who was receiving RM 750 from her deceased son prior to his demise was awarded only RM 375 per month as multiplicand for loss of support under sections 7(1) and (3) of the CLA 1956. The Court was unable to allow her the extra RM 375 since the money was not for her benefit, but was for the upkeep of deceased’s siblings. Since deceased’s siblings were not ‘dependants’ by virtue of the sub-sections (2) and (11) of the same section, they were not entitled to the award for loss of support under sections 7(1) and (3) of the CLA 1956.

However, to conclude that the so called ‘restricted interpretation’ of damages for ‘loss of support’ in section 7(3) of the CLA 1956 differs greatly from the interpretation of damages ‘proportioned to the loss resulting from the death’ in the section 7 (3) of the CLA 1956 (rev 1972) to the extent that it abolishes the judges’ discretion in assessing

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<sup>63</sup> Clause 2 of the Explanatory Statement to the Civil Law (Amendment) Bill explained that the changes made to section 7 of the Act were made in order to provide “for a more definitive statement of the purpose of the dependency claim...”

<sup>64</sup> Per Jeffrey Tan in *Muhammad bin Hashim v Teow Teik Chai* [1996] 1 CLJ 615.

<sup>65</sup> [1994] 3 MLJ 233. See also *Muhammad bin Hashim v Teow Teik Chai*, *op. cit.*

<sup>66</sup> Balan, P., “Damages for Personal Injuries Causing Death: A Critical Survey”, (2004) *Journal of Malaysian and Comparative Law*, 45 – 67, at 58.

<sup>67</sup> *Id.* at 59.

damages under the section is not entirely correct. Although the wording in section 7(3) of the CLA 1956 (rev 1972) seems to allow judges to compensate deceased's dependants of any damages as it thinks fit proportionated to the loss suffered due to the death of the deceased, the section never conferred an absolute discretion to the judges to award everything and anything so long as it is proportionated to the loss. 'Loss resulting from the death' in section 7(3) of the CLA 1956 (rev 1972) had been judicially accepted as the loss of financial support suffered by deceased's dependants. The term was defined as compensation for "benefit in money or money's worth arising out of the relationship which would have accrued to the person for whom the action is brought from the deceased if the deceased had survived but has been lost by reason of his death".<sup>68</sup> Therefore, substituting the measure of damages from 'loss resulting from the death' to 'loss of support' has no apparent effect on judges' discretion in assessing and awarding damages for loss of support. Despite the differences in the wording, the interpretation and application of the two (2) measures of damages is the same.

Peh Swee Chin SCJ in *Chan Chin Ming v Lim Yoke Eng v Lim Yoke Eng*,<sup>69</sup> noted the redundancy of substituting the measure of damages and held that the introduction of the phrase 'loss of support' in section 7(3) of the CLA 1956 "has not added anything new to the state of law, but only incorporated what the court had always decided before such an addition, that such damages were in fact loss of support."<sup>70</sup> The substitution of the measure of damages is "not intended to change the nature of or to limit the scope of damages which are recoverable in a dependency claim."<sup>71</sup> It only give a statutory nod to what had always been in practice prior to section 7(3) of the CLA 1956 and nothing more. It does not in any way abolish or restrict the judges' discretion in the assessment

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<sup>68</sup> Per Lord Diplock in *Malyon v Plummer* (1963) 2 All ER 344.

<sup>69</sup> *Op cit.*

<sup>70</sup> Dass, S. Santhana, "Chan Chin Min v. Ibrahim Ismail - the Unsettled Dispute as to Whether the Court Has the Authority to Reduce the Statutory Multiplier in Dependency Claims", (2006) 3 *Current Law Journal* i-xliii.

<sup>71</sup> Lim, Heng Seng, *op. cit.*, at 183.

of damages in fatal accident claims arising out of motor vehicle accidents since the restriction has already been set in place by the judges themselves.

Similarly, since judges had always interpreted damage ‘proportioned to the loss resulting from the death’ as damages for loss of support, substituting the measure of damages also brought no monetary effect to the amount of damages being awarded by the courts in fatal accident claims arising out of motor vehicle accidents.

#### **4.5.2 Confining the Awards to Statutory Dependents**

The persons who are entitled to be awarded with damages for loss of support under section 7(3) of the CLA 1956 are listed in sections 7(2) and (11) of the Act.<sup>72</sup> Section (2) of the CLA 1956 reads:

(2) Every such action shall be for the benefit of the **wife, husband, parents and child**, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased. (*emphasis added*)

The CLA 1956 is very stringent with regard to the beneficiaries to the award for loss of support. Only deceased’s spouse, parent and child are considered as ‘statutory dependents’ and entitled to claim for damages under this heading. The Act even went further to define the exact meaning of each and every relationship in section 7(11) of the Act:

(11) In this section unless the context otherwise requires –

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<sup>72</sup> These sub-sections are not amended by the CLAA 1984. The provisions in these two sub-sections remain the same as per the CLA 1956 (rev 1972).

“parent” includes father, mother, grand-father, and grand-mother;

“child” includes son, daughter, grandson, grand-daughter, stepson and stepdaughter;

Provided that in deducing any relationship referred to in this sub-section any illegitimate person or any person who has been adopted, or whose adoption has been registered, in accordance with the provision of any written law shall be treated as being or as having been the legitimate offspring of his mother and reputed father or, as the case may be, of his adopters.

The effects of these two sub-sections on the exercise of judicial discretion in the assessment of damages for loss of support are two (2) folds. First, they prohibit judges from awarding the damages to persons not listed under section 7(2) and 7(11) of the CLA 1956. Second, they prohibit judges from allowing persons not listed under the sections to benefit from the award even when the claim was filed by persons entitle to receive the award. Peh Swee Chin SCJ discussed these effects in length in the case of *Chan Chin Ming v Lim Yoke Eng*.<sup>73</sup> He concluded that the damages for loss of support is limited only to the portion of deceased’s contribution which is used by the statutory dependants for their upkeep. Since siblings are not included as ‘statutory dependants’ under section 7 (2) of the CLA 1956, judges have no discretion to include the portion of deceased’s contribution which was used for his siblings in the assessment of damages for loss of support. This is irrespective of the fact that the siblings were actually depending on the deceased for their livelihood. The same view was also adopted by Edgar Joseph Jr. SCJ in his dissenting opinion:

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<sup>73</sup> *Op. cit.*

“... the loss suffered must be persona to the class of defendants specified in section 7(2) so that a loss suffered by any other person not falling within that class must be excluded.”

The absence of judges’ discretion in determining the beneficiaries to the award for loss of support had caused some hardship on the claimants. Because of this hardship, the judges in *Chong Sin Sen v Janaki a/p Chellamuthu (suing as the widow of Muniappa Pillai a/l Maritha Muthoo, deceased, on behalf of herself and the dependants of the deceased)*<sup>74</sup> and *Joremi bin Kimin & Anor v Tan Sai Hong*<sup>75</sup> insisted that judges still have the discretion to allow a ‘wife’ in customary marriage to receive damages for loss of support. The High Court in *Chong Sin Sen v Janaki a/p Chellamuthu (suing as the widow of Muniappa Pillai a/l Maritha Muthoo, deceased, on behalf of herself and the dependants of the deceased)*<sup>76</sup> in deciding whether a widow whose marriage was a customary marriage and not registered according to the Law Reform (Marriage and Divorce) Act 1976<sup>77</sup> was a ‘wife’ according to section 7(2) of the CLA 1956<sup>78</sup> held that since there is no requirement in the CLA 1956 that the term ‘wife’ is to be confined to a woman whose marriage was solemnized and registered under the prevailing law relating marriage and divorce,<sup>79</sup> a ‘wife’ should include those married under customary rites. The Court of Appeal in *Joremi bin Kimin & Anor v Tan Sai Hong*<sup>80</sup> also shared the same opinion. It was held that the validity of a customary marriage under the Law Reform (Marriage and Divorce) Act 1976 have no bearing on the wife’s entitlement to claim for loss of support under section 7(3) of the CLA 1956.

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<sup>74</sup> [1997] 3 AMR 2217.

<sup>75</sup> [2001] 1 AMR 675 (CA).

<sup>76</sup> *Op. cit.*

<sup>77</sup> Applicable only to non-Muslims. See section 3 of the Law Reform (Marriage and Divorce) Act 1976.

<sup>78</sup> Unlike the terms ‘parent’ and ‘child’, the terms ‘wife’ and ‘husband’ are not defined in section 7(11) of the Act.

<sup>79</sup> Dass, S. Santhana, *op. cit.* (2000), at 128.

<sup>80</sup> [2001] 1 AMR 675 (CA).

The absence of specific interpretation of the term ‘wife’ and ‘husband’ in section 7(11) of the Act allow judges the discretion to interpret the terms in their natural meaning, which include wife and husband of customary marriages. The courts in both cases acknowledged that the purpose of section 7(2) of the CLA 1956 is to protect the dependants of the deceased and not to determine the legal status of the spouse. Thus, in deciding whether a wife or husband is a ‘wife’ or ‘husband’ in pursuance of section 7(2) of the CLA 1956, the judges are not in any manner deciding on the validity of the marriage.<sup>81</sup> Therefore, the judges still have the discretion to award damages for loss of support to ‘wife’ and ‘husband’ who are not married to the deceased according to the prevailing law on marriage.

It is however humbly submitted that the decisions in the above cases are not entirely reliable to prove that judges have the discretion to interpret ‘wife’ and ‘husband’ as to include persons who are not married under the prevailing law of marriage. The decisions can be challenged on two grounds. First for their reliance on the definition of ‘wife’ and ‘married woman’ under the Married Woman Act 1957 and the Income Tax Act 1967. Although both Acts includes those women who had undergone customary marriage as wife and married woman, the definitions in these two Acts should be confined to the Act only and should not be used to construe the word in the CLA 1956. Second, for their reference to section 34 Law Reform (Marriage and Divorce) Act 1976. The section states that the Act cannot be used to invalidate a valid marriage merely on the ground of non-registration. The courts in both cases viewed both marriages as valid customary marriages, thus, their non-registration did not affect their validity as well as the plaintiffs’ status as wives. On this point, it should be noted that

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<sup>81</sup> Sidhu, Balwant Singh, “Married or Not Married? – That is The Question”, (2002) 3 *Malayan Law Journal*, cxxix – cxlii at cxxxiii.

although the marriage in *Joremi bin Kimin & Anor. v Tan Sai Hong*,<sup>82</sup> was solemnized in Singapore according to Chinese custom, it was not solemnized on the authority of a valid marriage license as required by section 21(1) Woman Charter 1980. Similarly, in *Chong Sin Sen v Janaki a/p Chellamuthu*,<sup>83</sup> other than the absence of registration, there was also no evidence that the marriage was duly solemnized by a priest at any temple appointed according to the Law Reform (Marriage and Divorce) Act 1976. There was nothing to indicate that the marriages were valid customary marriages. The plaintiffs were not ‘wife’ even under customary law.

Therefore, it is concluded that by virtue of the provisions in section 7(2) of the CLA 1956, judges have no discretion to assess and award damages for loss of support in fatal accident claims arising out of motor vehicle accidents to persons not listed as ‘statutory dependants’. Judges also have no discretion to extend the definition of the term wife, husband, parents and child to any persons who are not defined as wife, husband, parents and child under by section 7(11) of the CLA 1956.

Section 7(2) and 7(11) of the CLA 1956 have some effect on the quantum of damages in fatal accident claims arising out of motor vehicle accidents. Since judges are barred from awarding damages for loss of support to persons who are not ‘statutory dependants’, the damages awarded is confined to deceased’s contribution to the ‘statutory dependants’ only. Therefore, Section 7(2) and 7(11) of the CLA 1956 clearly put a limitation to the quantum of damages to be awarded under this heading.

However, the inclusion of grandfather and grandmother in the definition of parents as well as grandson and granddaughter in the definition of child in section 7(11) of the

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<sup>82</sup> *Op. cit.*

<sup>83</sup> *Op. cit.*

CLA 1956 may have some effect in increasing the quantum of damages being awarded for loss of support. While this specific interpretations removes the need for the judges to use their discretion in defining who constitutes ‘parent’ and ‘child’ under the Act, they allow judges to award damages for loss of support to deceased’s grandparents and grandchildren in the presence of deceased’s parents or children. This was evidenced in *Esah bte Ishak & Anor. v Kerajaan Malaysia & Anor.*<sup>84</sup> Deceased’s grandparent in this case was awarded damages for loss of support along with deceased’s parents since they are part of the statutory dependants under section 7(2) and 7(11) of the CLA 1956. This latitude has clearly widened the scope of dependency<sup>85</sup> and operates in contradiction to the general principle under the law of inheritance which states that grandparent have no claim for inheritance in the presence of parent.<sup>86</sup> As such, the provision in section 7(2) and 7(11) of the CLA 1956 allow judges to award bigger quantum by allowing deceased’s grandparent who normally would be depending on their children (deceased’s parent) for financial support, to claim for loss of support. Similarly deceased’s grandchildren are also allowed to receive damages for loss of support along with their parents (deceased children).

#### **4.5.3 Loss of Support vs. Loss of Actual Support**

Despite the intention of the Legislature to provide a more definitive measure of damages, both the CLAA 1984 and the CLA 1956 do not define what constitutes ‘loss of support’. Judges have been adopting the Supreme Court’s interpretation of the phrase in *Chan Chin Ming v Lim Yoke Eng*<sup>87</sup> which is the financial loss suffered by the dependants in their capacity as dependants. The loss is restricted to “pecuniary

<sup>84</sup> [2006] 6 MLJ 1.

<sup>85</sup> Muhammad Altaf Hussain Ahangar, *Damages Under Malaysian Tort Law: Cases and Commentary*, (Petaling Jaya: Sweet & Maxwell Asia, 2009) at 98.

<sup>86</sup> *Ibid.*

<sup>87</sup> *Op. cit.*

provision which furnishes a livelihood, a source of means of living, subsistence, sustenance, maintenance or living, and the "loss of support" means the pecuniary benefit lost; a consequence of the death of the provider."<sup>88</sup> As such, 'loss of support' section 7(3) of the CLA 1956 is interpreted as the loss of actual day to day support suffered by the dependants due to cessation of financial contribution from the deceased.

On this point, it is submitted that although the learned Supreme Court judges in *Chan Chin Ming v Lim Yoke Eng*<sup>89</sup> limit 'loss of support' to loss of financial contributions which provide for the dependants day to day living (loss of actual support)<sup>90</sup> there is nothing in the Common Law and section 7(3) of the CLA 1956 which requires it to be just so. Under the Common Law, as long as the dependants manage to prove financial contribution from the deceased, there is no need to them to show that they are actually depending on the deceased's monetary contribution for their livelihood. It is also not necessary for the dependants to show that they actually need deceased's whole contribution for their livelihood.<sup>91</sup> Similarly, section 7(3) of the CLA 1956 also did not specify the need to prove actual dependency. The section only requires the dependant to show that they are the statutory dependants, they were receiving financial support from the deceased and the fact that deceased was below fifty five (55), of good health and was earning prior to his demise.<sup>92</sup> As such, dependants who were not actually depending on the deceased for their livelihood or have been receiving financial support from someone else after deceased's demise are still entitle for loss of support under

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<sup>88</sup> Per Jeffrey Tan JC in *Muhammad bin Hashim v Teow Teik Chai*, *op. cit.* quoting Peh Swee Chin SCJ in *Chan Chin Ming v Lim Yoke Eng*, *op.cit.*

<sup>89</sup> *Op. cit.*

<sup>90</sup> Muhammad Altaf Hussain Ahangar, "Dependability of Dependency Claims: the Malaysian Perspective" [2004] 1 MLJ xxii – xxxiii, at xxv.

<sup>91</sup> Balan, P., *op. cit.* (2004), at 59.

<sup>92</sup> Proviso (vi)(a) to section 7(3) of the CLA 1956.

section 7(3) of the CLA 1956. Jeffrey Tan JC in *Muhammad bin Hashim v Teow Teik Chai*<sup>93</sup> chose to disregard the ‘loss of actual support’ rule by stating that:

“The test for support is the direct benefit to the claimant, not vicarious, but the claimant need not prove he was dependant on the financial support. A requirement that a claimant must be dependant on the support from a deceased will not be giving the natural meaning to plain and ordinary words in s. 7(3). The finding by the learned Judge that the loss of support was not proved as the appellant was not dependant on the deceased could not be supported as the appellant's direct benefit from the RM700, as a member of that family was never considered.”<sup>94</sup>

Similarly, in *Low Kim Yan v Tay Guat Hian & Ors.*,<sup>95</sup> the court allowed the award for loss of support to the plaintiff and disregarded the fact that plaintiff had been receiving financial assistance from her brother in-law after the demise of her husband and suffered no actual loss of support .

In line with the above decisions, P. Balan opined that once the dependants managed to prove that deceased had provided a certain sum of money for them, the court should not concern itself with what they did with the money.<sup>96</sup> Favourably citing the trial judge decision in *Chan Chin Ming v Lim Yoke Eng*<sup>97</sup> and the High Court’s decision in *Muhammad bin Hashim v Teow Teik Chai*,<sup>98</sup> Balan commented that the requirement for the dependants to be depending on the deceased’s contributions for their day to day

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<sup>93</sup> *Op. cit.* Also see *Rebecca Mathew v Syarikat Kerjasama Serbaguna Gema Wong Siong Bhd.* [1990] 1 MLJ 443.

<sup>94</sup> The trial court in this case had dismissed plaintiff’s claim for loss of support resulting from his son’s demise on the ground that plaintiff had failed to prove that he was actually depending on his son for his livelihood. This decision was later on reversed by the High Court. The High Court’s decision indicates that the definition of loss of support is not restricted to actual loss of support suffered by the plaintiff

<sup>95</sup> (1960) MLJ 261.

<sup>96</sup> Balan, P., *op. cit.*, (2004) at 59.

<sup>97</sup> *Op. cit.*

<sup>98</sup> *Op. cit.*

existence is not the natural meaning to the plain and ordinary words in section 7(3) of the CLA 1956.<sup>99</sup> Altaf is also of similar thought. He observed that the plaintiff in *Chan Chin Ming v Lim Yoke Eng*<sup>100</sup> should be awarded the full RM 750 multiplicand. To limit the interpretation of loss of support to loss of actual support is similar to making the wording in section 7(3) of the CLA 1956 redundant and meaningless.<sup>101</sup>

As there is no requirement to calculate the multiplicand based on actual dependency (no requirement to prove loss of actual support), judges in assessing damages for loss of support under section 7(3) of the CLA 1956 retain their discretion in assessing the amount of multiplicand to be awarded. The same traditional rule of net income minus deceased's personal use is still applicable. Judges is at liberty to assess the multiplicand as he sees fit and reasonable based on the given facts. A millionaire parents of a twenty five (25) years old deceased is entitle for loss of support for sixteen (16) years similar to a wife and small children of a twenty nine (29) years old deceased who depend solely on the deceased for their livelihood. As such, it is humbly submitted that despite the introduction of the award for 'loss of support,' section 7(3) of the CLA 1956 does not abolish the exercise of judicial discretion in the assessment of damages in fatal accident claim arising out of motor vehicle accident. The section also has minimal effect in reducing the quantum of damages since it does not require the dependants to prove loss of actual support.

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<sup>99</sup> Balan, P., *op. cit.* at 59.

<sup>100</sup> *Op. cit.*

<sup>101</sup> Muhammad Altaf Hussain Ahangar, *op. cit.*, (2004) at xxv.

## 4.6 INTRODUCING PRE-CONDITIONS FOR THE AWARD FOR LOSS OF SUPPORT

Proviso (iv)(a) to section 7(3) of the CLA 1956 introduces three (3) pre-conditions before an award for loss of support can be awarded. This proviso was introduced by proviso (iv)(a) to section 2(a) of the CLAA 1984. Unlike the other amendments introduced by the CLAA 1984, proviso (iv)(a) to section 7(3) of the CLA 1956 does not originate from the AJA 1982. In fact, Malaysia is the only country among the many which patented the law on fatal accident claims based on the AJA 1982 which have this proviso. Proviso (iv)(a) to section 7(3) of the CLA 1956 states:

(iv) in assessing the *loss of earnings in respect of any period after the death* of a person where such earnings provide for or contribute to the damage under this section the Court shall –

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

Before an award for loss of support can be awarded the court must be satisfied that the deceased was below the age of fifty five (55) years old, in good health and was earning income prior to his demise. It should be noted that the conditions are similar to those in section 28A (2)(a)(i) of the CLA 1956. As such, to avoid the risk of repeating the

discussion in respect of the same conditions, cross-reference to item 3.4 in chapter 3 is encouraged.

#### **4.6.1 Condition (i): Below Fifty Five (55) Years Old**

Prior to the introduction of proviso (iv)(a) to section 7(3) of the CLA 1956, there was no cut-off age for the award for loss of support set by any statute. Judges had the discretion to award damages for loss of support regardless of deceased's age. In *Chong Sow Ying v Official Administrator*,<sup>102</sup> the court allowed the claim for loss of support under section 7(3) of the CLA 1956 (rev 1972) by the wife of a sixty one (61) years old deceased who was still in active employment at the time of his death. Similarly, the dependants of deceased farmer aged sixty (60) years old at the time of death were also allowed damages for loss of support *Yaacob v Sintat Rent a Car Services (M) Sdn. Bhd & Anor.*<sup>103</sup> Judges also had the discretion to assess deceased maximum working age in which he would have supported his dependants had he did not succumbed to his injuries.

Proviso (iv)(a) to section 7(3) of the CLA 1956 put a stop to judge's discretion to determine the maximum working life of a deceased. The proviso statutorily adopts the age of fifty five (55) as the general age of retirement.<sup>104</sup> It assumes that a person will stop working at the age of fifty five (55) years old and no longer able to contribute to his dependants. Judges are barred from awarding damages for loss of support if the deceased had reached or passed the age of fifty five (55) years old at the time of his demise. The abolition of judges' discretion is absolute. Damages for loss of support

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<sup>102</sup> [1984] 1 MLJ 185.

<sup>103</sup> [1983] 2 MLJ 283. See also cases cited in Dass, K.S. *op. cit.*, (1975) at 1099.

<sup>104</sup> Lim, Seng Heng, *op. cit.*, at 151.

cannot be awarded even in situations where there is evidence to prove that deceased was actually supporting his dependants. This is irrespective of the age and financial condition of the dependants or the fact that they are totally depending on the deceased thus compelling the deceased to work beyond the age of fifty five (55).<sup>105</sup>

The notion that judges' discretion has been abolished by the proviso is objected by KS Dass. He is of the opinion that provisos (iv)(a) and (d) to section 7(3) of the CLA 1956 provides for two (2) types of dependants. The types are categorized according to the age of the deceased at the time of his demise; dependants of deceased who was below the age of thirty years old and dependants of deceased who age between thirty one (31) to fifty five (55) years old. Since these types of dependants have been provided for by provisos (iv)(a) and (d) to section 7(3) of the CLA 1956, it stand to reason that the phrase, 'any other person' in the second part of proviso (iv)(a) to section 7(3) of the CLA 1956 refers to the deceased who had attained or passed the age of fifty five (55) years old at the time of his demise.<sup>106</sup> Therefore, the cut-off age is not applicable to dependants of a deceased who was fifty five years old or above if they can prove that deceased was earning income and in good health prior to his demise. In this situation, judges have the discretion to award damages for loss of support to the dependants. Judges will also have the discretion to assess the multiplier and multiplicand for the damages.<sup>107</sup>

On this point it is submitted that while KS Dass's interpretation above to some extent helps to prevent the injustice caused to the dependants who were barred from receiving damages for loss of support by virtue of deceased being fifty five (55) years old and

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<sup>105</sup> See *Parvaty & Ors v Liew Yoke Khoo* [1984] 1 MLJ 183

<sup>106</sup> Dass, K.S., *Quantum of Damages in Personal Injury, Parliament v Common Law, A critical Examination of the 1984 Amendment to the Civil Law Act 1956*, (Kuala Lumpur: Legal Circle Book Sdn. Bhd, 1997), at 63.

<sup>107</sup> *Id.*, at 65.

above, the interpretation nevertheless may lead to very odd results. First, it allows judges the discretion to award damages for loss of support to the dependants of a deceased who had already passed the age of fifty five (55) years old but bars judges from awarding the same to the dependants of a deceased who was fifty five (55) years old at the time of his demise. Second, it allows judges the discretion to assess damages for the dependants of a deceased who had passed the age of fifty five (55) while limiting the assessment of damages to the dependants of a deceased who was below the age of fifty five (55) years old to the method prescribed in proviso (iv)(d) to section 7(3) of the CLA 1956. This interpretation opens up the possibility that dependants of a deceased who had passed the age of fifty five (55) years old could be receiving more compensation than those below fifty five (55) years old. While the dependants of a deceased who was fifty four (54) years old are only entitled to a maximum of six (6) months multiplier,<sup>108</sup> the dependants of a deceased who was fifty six (56) years old could be receiving more than that.<sup>109</sup> Such results are clearly unjust to the dependants of a deceased who was fifty five (55) years old or below.

It is therefore concluded that KS Dass's interpretation cannot be the correct interpretation of provisos (iv)(a) and (d) to section 7(3) of the CLA 1956 as intended by the Legislature. It is merely an attempt to depart from the effects of the provisos on the judges' discretion to award damages for loss of support to the dependants of a deceased who had passed the age of fifty five (55) years old. KS Dass interpretation is flawed and cannot be the basis in arguing that judges still have the discretion in determining the maximum working age for a deceased in the claim for loss of support. Judges have

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<sup>108</sup> See proviso (iv)(d) to section 7(3) of the CLA 1956. Six (6) months is the maximum multiplier for loss of support for dependent of a deceased who was fifty four (54) years old at the time of demise.

<sup>109</sup> Since judges have the discretion to determine the multiplier for dependants of a deceased who had passed the age of fifty five (55) years old, they are at liberty to award more than six (6) months multiplier for loss of support.

no discretion to extend the award to the dependants of a deceased who had reached or passed the age of fifty five (55).

The condition of below the age of fifty five (55) can also be seen as the Legislative effort to codify what had been the general practise of the courts. The pre-1984 cases show that judges had generally (but not as strict rule) adopted fifty five (55) as the maximum working age.<sup>110</sup> The Federal Court in *Ahmad Nordin b Hj Maslan & Anor v Eng Ngak Hua & Ors*<sup>111</sup> for example held that deceased's retirement age should have been fixed at fifty five (55) instead of sixty five (65). The CLA 1956 merely gives a statutory nod to the existing practices adopted by the judges.

Other than the above, it is also submitted that the introduction of the condition have minimal effect in reducing the quantum of damages in fatal accident claims arising out of motor vehicle accidents. The reduction only affects the quantum of damages to be awarded to the dependants of a deceased who have reached the age of fifty five (55) years old. It does not have any effect on the quantum of damages for to be awarded to the dependants of a deceased who have yet to reach the age of fifty five (55) years old. The negligible effect of this condition is more apparent since the judges have been adopting fifty five years old as the retirement age even prior to the introduction of proviso (iv)(a) to section 7(3) of the CLA 1956.

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<sup>110</sup> Parliamentary Debate, Representative, *op. cit.* at 3321, where YAB Radzi Sheikh Ahmad said that the courts in Malaysia had been using fifty five (55) as the normal retirement age in calculating the multiplier for future losses.

<sup>111</sup> [1985] 2 MLJ 431. See also *Lai Chi Kay & Ors v Lee Kuo Shin* [1981] 2 MLJ 167, *Murtadza bin Mohammed Hassan v Chong Swee Pian* [1980] 1 MLJ 216 and *K Ratnasingham v Kow Ah Dek & Anor* [1983] 2 MLJ 297.

#### 4.6.2. Condition (ii): Good Health

The second condition set by proviso (iv)(a) to section 7(3) of the CLA 1956 before damages for loss of support can be awarded is the condition of good health. The proviso requires either the dependants to prove that deceased was in good health prior to his demise or the defendant to admit that the deceased was in good health prior to his demise. The effect of proviso (iv)(a) of section 7(3) of the CLA 1956 is two-folds. It imposes the condition that deceased must be in good health prior to the award for loss of support. It also made it compulsory that deceased's good health must be proven by the dependants or voluntarily admitted by the defendant.

Similar to section 28A (2)(c)(i) of the CLA 1956, although the term 'shall' in the proviso act as a condition precedent prior to the award, the absence of specific interpretation to define 'good health' still leave some flexibility for judges to exercise their discretion<sup>112</sup> in the assessment of damages for loss of support. In fact, the Legislature deliberately leaves the task of determining what constitute 'good health' in the hands of the judges.<sup>113</sup> Based on the above, it is clear that the introduction of proviso (iv)(a) of section 7(3) of the CLA 1956 is not a bar to the exercise of judicial discretion in the assessment for loss of support in fatal accident claims.

As in award for loss of future earnings, the requirement of proving or admitting good health is also viewed as unnecessary complication to the process of claiming damages for loss of support. There were cases which held that the requirement of good health need not be strictly proven or admitted.<sup>114</sup> Deceased will be presumed to be in good health unless challenged by the defendant. Although this presumption is clearly in

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<sup>112</sup> See discussion in item 3.4.2, *supra*.

<sup>113</sup> Parliamentary Debates, Senate, Sixth Parliament, Second Session, 3rd August 1984, at 159 (Tn Radzi bin Sheikh Ahmad answer to question from Tn D.P. Vijandran)

<sup>114</sup> See *Loh Hee Thuan v Mohd Zaini bin Abdullah* [2003] 1 AMR 332 and *Osman Effendi b Mahmud & Anor. v Mohd Noh b Khamis* [1998] 4 AMR 3687.

contradiction of the proviso, it is adopted in view of the difficulties in obtaining proof of deceased good health.<sup>115</sup> KS Dass was in complete agreement with this presumption. He commented that it is a 'sheer waste of time'<sup>116</sup> to prove good health. It is sufficient for the dependants to prove that deceased was earning income at the time of accident. He argued a person who was earning income would automatically be of good health. As such, there is no reason to believe that the Legislature intended to impose such unnatural conditions.

On this point it is submitted that proviso (iv)(a) of section 7(3) of the CLA 1956 does not give any discretion to the judges to presume that the deceased was in good health. Despite the "pain of adducing evidence to show that deceased was in good health prior to the accident,"<sup>117</sup> the wording in the proviso is very clear and unequivocal. It leaves no avenue for judges to presume that deceased was in good health without it being proven by the dependants or admitted by the defendant. Judges have to apply the law; it is not their task to rectify the problem in the application of the law.

#### **4.6.3 Condition (iii): Earning Income at the Time of Injury**

The third condition in proviso (iv)(a) to section 7(3) in the CLA 1956 is the requirement that deceased must be 'receiving earning by his own labour or other gainful activity prior to his death'. Dependants claiming damages for loss of dependency will have to prove that the deceased was employed and receiving income from that employment at the time of his demise.

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<sup>115</sup> Rajasooria, J. Edwin, "Necessity of Proving Good Health", 9<sup>th</sup> July 2010, The Malaysian Bar, 8<sup>th</sup> November 2010, <[http://www.malaysianbar.org.my/index2.php?option=com\\_content&do\\_pdf=1&id=30358](http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=30358)>.

<sup>116</sup> Dass, K.S., *op. cit.*, (1997), at 65.

<sup>117</sup> *Ibid.*

It is submitted that similar to the effect of this condition on the award for loss of future earnings, the condition of earning income before the demise in proviso (iv)(a) to section 7(3) of the CLA 1956 in reality did not have much effect on the discretionary power of the judges in assessing the award for loss of support or on the quantum of damages awarded. Judges, even prior to the introduction of the proviso generally require the dependants to prove the source and the amount of deceased income prior to his demise. This exercise served two purposes; first, it satisfies the general requirement for the dependants to prove loss occasioned by death by substantiating the claim with proof of earnings and second, to serve as the upper limit for the figure to be adopted as the multiplicand.<sup>118</sup> As such, similar to proviso (iv)(a) to section 7(3) of the CLA 1956, the dependants claiming loss of support under the old section 7(3) of the CLA 1956 (rev 1972) were also required to prove that the deceased was earning income at the time of his demise.<sup>119</sup> As such, the imposition of proviso (iv)(a) of section 7(3) of the CLA 1956 merely put on paper what had generally been the practice of the judges even prior to the 1984 amendment.

Despite the compulsory nature of the requirement of proving that deceased was earning income at the time of his demise, judges sometimes takes upon themselves to award loss of support to dependants even when there is no evidence to prove deceased was earning. Usually in cases where deceased was the sole bread winner for the dependants, there is a possibility that the judge will consider allowing loss of support even without specific proof of income in view of obvious dependency factor. In *Mahmood bin Kailan v Goh Seng Choon & Anor*.<sup>120</sup> for example, Suffian LP held that it would be reasonable for the court to assume that the deceased had earned some money

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<sup>118</sup> Lim, Heng Seng, *op. cit.*, at 143.

<sup>119</sup> Without which there will be difficulties in determining the dependents' loss since there is no prove to substantiate the dependents' claim that there were depending on the deceased and that deceased demise had caused them pecuniary losses.

<sup>120</sup> [1976] 2 MLJ 239.

because at the time of the accident, he had a wife and children to support and he was the sole bread winner.<sup>121</sup> This presumption further negates the effect of proviso (iv)(a) to section 7(3) of the CLA 1956 on the exercise of judicial discretion in the assessment of damages and the quantum of damages being awarded.

#### **4.7 REGULATING THE ASSESSMENT OF MULTIPLICAND FOR THE AWARD FOR LOSS OF SUPPORT**

Multiplicand in the award for loss of support is the annual sum that represents the dependants' losses at the time of the deceased's demise.<sup>122</sup> It is the dependants' annual loss of pecuniary benefits resulting from the cessation of deceased contribution. Prior to the enactment of the CLAA 1975 and the CLAA 1984, judges had a wide discretion in assessing the amount to be regarded as the multiplicand for loss of support. Judges generally assessed deceased's contribution to the dependants by taking into account deceased's earnings at the time of death, fringe benefits, positive<sup>123</sup> and negative<sup>124</sup> contingencies in earnings, taxes, contribution in the employee provident fund, living expenses, expenses in earning income, saving and any other factors which may affect deceased earnings.<sup>125</sup> At the same time judges also considered the factors which may affect the amount of deceased' contributions to the dependants such as the number of

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<sup>121</sup> Nathan, RK., *Practical Approach to Assessment of Liability and Damages in Tort*, (Singapore, Malayan Law Journal Pte. Ltd., 1986), at 299.

<sup>122</sup> Chin, Anthony and Alfred Choi, eds., *Law, Social Science and Public Policy: Towards a Unified Framework* (Singapore: Singapore University Press, 1998) at 72.

<sup>123</sup> Salary raises, promotions, increments, bonuses, overtime and fringe benefits such as accommodations, clubs company car etc.

<sup>124</sup> Salary decrease, demotion, economic recession, unemployment etc.

<sup>125</sup> Rutter, Michael F., (*op. cit.*), at 601.

dependants, dependants' need, class of dependants<sup>126</sup> etc. Lord Diplock in *Malyon v Plummer*,<sup>127</sup> outlined the steps for assessing multiplicand:

“... (a) to ascertain what annual benefit in money or money's worth in fact accrued to the person for whom the action is brought from the deceased and arising out of the relationship before the death of the deceased, (b) to assess the extent (if any) to which that benefit would be likely have increased or diminished in value in the future if the deceased had lived...”

The CLAA 1975 and CLAA 1984 introduced several changes in section 7 of the CLA 1956 (rev 1972). The new provisions in the CLA 1956, list down the items that judges should and should not take into consideration in the assessment of the same. To some extent, the new provisions have taken away the discretionary power of judges to consider the variables which they would normally considered in the assessment of multiplicand for loss of support in fatal accident claims arising out of motor vehicle accidents. The abolition however is not absolute. The exercise of judges' discretion is still required in certain aspects of the assessment. There are also parts of the new provisions where they are merely a statutory codification to the existing practice. It should be noted that the CLA 1956 imposes the same regulatory provisions to regulate the assessment of multiplicand for loss of support and loss of future earnings. As such, the items discussed below are similar to item 3.5 in chapter 3. To avoid the risk of repeating the discussions, cross-reference to item 3.5 in chapter 3 is encouraged.

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<sup>126</sup> Deceased's contributions to his parent are usually smaller compared to his contribution to his wife and children.

<sup>127</sup> *Op. cit.*

#### 4.7.1 Compensations Benefits to be Ignored

Proviso (i) to section 7(3) of the CLA 1956 lists down the compensation benefits received by the dependants upon deceased's demise which should not be taken into consideration when assessing the award for loss of support. Although these benefits are benefits which results from deceased's demise, the amount received must not be deducted from the amount to be assessed for loss of support. Proviso (i) to section 7(3) of the CLA 1956 states:

Provided that -

(i) in assessing the damages there **shall not be taken into account** -

(a) any sum paid or payable on the death of the person deceased under any **contract of assurance or insurance**, whether made before or after the coming into force of this Act;

(b) any sum payable, as a result of the death, under any written law relating to **employees' provident fund**;

(c) any **pension or gratuity**, which has been or will or may be paid as a result of the death or<sup>128</sup>

(d) any sum which has been or will or may be paid under any written law relating to the payment of **any benefit or compensation** whatsoever, in respect of the death; (*emphasis added*)<sup>129</sup>

By virtue of this proviso, judges are prevented from taking into consideration any benefit received by the dependants by way of insurance compensations, saving in

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<sup>128</sup> Para (b) and (c) was introduced by the CLA 1956 (rev 1972).

<sup>129</sup> Para (d) was introduced by the CLAA 1975.

deceased's employee provident fund, deceased's pension, gratuity or any compensation benefit received or to be received by the dependants as a result of deceased demise in the assessment of damages for loss of support.

Similar to the effects of section 28A(1) of the CLA 1956, the provisions in proviso (i) to section 7(3) of the CLA 1956 also did not bring significant effect on the exercise of judicial discretion in the assessment of damages for loss of support in fatal accident claims arising out of motor vehicle accidents or the amount of damages being awarded by the courts under this head of damages.. Judges even without proviso (i) to section 7(3) of the CLA 1956 had always disregarded these death benefits from the assessment of damages. The proviso merely put on paper what had been the general practice of the judges even before the CLA 1956. It abolishes the discretion which the judges had chosen to disregard. At the same time, it also does not have any effect in reducing the quantum of damages in fatal accident claims. Judges never deduct the benefits from the assessment of damages for loss of support even prior to the CLA 1956.

#### **4.7.2 Deduction for Living Expenses**

Apart from specifying the benefits which are not to be considered in the assessment of multiplicand, the CLA 1956 also laid down the item which must be specifically deducted from deceased's earnings before the earnings can be calculated as multiplicand. Section 2(a) of the CLAA 1984 introduced proviso (iv)(c) to section 7(3) of the CLA 1956. The new section reads:

Provided that -

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

(c) take into account any diminution of any such amount as aforesaid by such sum as is **proved or admitted to be the living expenses** of the person deceased at the time of his death;  
(*emphasis added*)

Proviso (iv)(c) to section 7(3) of the CLA 1956 made it compulsory for judges to deduct a portion which represents deceased's living expenses from the assessment of multiplicand. This portion needs to be proven by the defendant or admitted by the dependants as deceased's living expenses. The proviso takes away judges' discretion in determining whether deceased's living expenses is to be deducted from the assessment of multiplicand by making it a compulsory amount to be specifically deducted.

Proviso (iv)(c) to section 7(3) of the CLA 1956 however still maintain the judges' discretion in interpreting 'living expenses'. Although the proviso specifies that deceased's living expenses must be deducted from the assessment of multiplicand, it does not define what constitutes 'living expenses' and how the amount is to be assessed. This task is left to the discretion of the judges. The most common method is by obtaining detailed expenditure of deceased expenses from the dependants. Judges discretion is more apparent in situations where the deceased's contributions to the dependants also include the expenses for items which the deceased shared with his dependants such as payment for house, car, food, utilities *etc.* In *Minachi v Mohd Yusof*

*bin Zakaria*<sup>130</sup> for example, the judge had to deduct a portion out from the total deceased's contribution to the dependants since that portion was considered as the portion used for deceased's food at home. Therefore, it is concluded that judges still retain their discretion in assessing the multiplicand for loss of support in fatal accident claims arising out of motor vehicle accidents.

Further, proviso (iv)(c) to section 7(3) of the CLA 1956 is also another codification of judges' existing practice. Deduction for deceased's living expenses has always been made even prior to the introduction of proviso (iv)(c) to section 7(3) of the CLA 1956. In *Panicker v Chee May Kwong*<sup>131</sup> and *Koo Wah v Wong Ying Choon*,<sup>132</sup> the courts adopted the principle in *Davies v Powell Duffryn Associated Collieries*<sup>133</sup> and *Lim v Camden and Islington Area Health Authority*<sup>134</sup> that deceased's living expenses such as food and other necessities is to be deducted from the assessment of multiplicand for loss of support. Other than food and clothes, expenses which the deceased spend on hobbies, entertainment, alcohol, tobacco and other luxuries are also considered as 'living expenses' and also deducted from the multiplicand.<sup>135</sup> As such, the proviso merely codifies the existing practice<sup>136</sup> of the judges and does not add anything new to the law on fatal accident claims.

It is however puzzling to see the need for codifying deduction for living expenses when other deductions such as income tax, employee provident fund, expenses in producing the income or any compulsory payment such as those of personal or educational loan are not included as part of the deductibles. Had the intention of the Legislature is to

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<sup>130</sup> [1978] 2 MLJ 256.

<sup>131</sup> (1958) MLJ 136.

<sup>132</sup> [1965] 2 MLJ 21.

<sup>133</sup> (1942) 1 All ER 657.

<sup>134</sup> *Op. cit.*

<sup>135</sup> Rutter, Michael F., (*op. cit.*), at 610. See also *Adsett v West* (1983) 3 WLR 437 where McCulloch J held that "There can be no doubt that the cost of the victims pleasure must also be deducted".

<sup>136</sup> *Id.* at 645 – 646.

itemized the deductibles in the assessment of multiplicand for loss of support, they should have included these expenses in proviso (iv)(c) to section 7(3) of the CLA 1956 as well. Thus, does this mean that the judges have the discretion not to deduct these deductibles in the assessment of multiplicand? The answer is no. Similar to living expenses, these expenses are also deceased's personal expenses and not part of the contribution to the dependants. They must be deducted from the assessment of multiplicand. As such, even without proviso (iv)(c) to section 7(3) of the CLA 1956 judges are still obliged to deduct living expenses and any other expenses spent by the deceased from the assessment of multiplicand for loss of support in fatal accident claims arising out of motor vehicle accident.

#### **4.7.3 Prospect of Future Increase in Deceased's Earnings is to be Ignored**

The most notable effect of the CLA 1956 on the exercise of judicial discretion in the assessment of multiplicand for loss of support in fatal accident claims arising out of motor vehicle accidents and the quantum of damages under this head of damages is the effect of proviso (iv)(b) to section 7(3) of the CL A1956. section 2(a) of the CLAA 1984 introduced this proviso to the CLA 1956. The proviso reads:

Provided that -

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

(b) take into account only the amount relating to the earnings as aforesaid and the **Court shall not take into account any**

**prospect of the earnings as aforesaid being increased** at any period after the person's death; (*emphasis added*)

Proviso (iv)(b) to section 7(3) of the CLA 1956 prohibits the judges from taking into account any possible future increases in deceased's earning in assessing damages for loss of support. With the introduction of this proviso, only the amount received by the deceased as his earning<sup>137</sup> at the time of his demise will be the basis for the assessment of multiplicand. The proviso abolishes the judges' discretion to include any probable future increases in deceased's earning including yearly increments, bonuses, commissions or other benefits in the assessment of multiplicand. As such the prospect of promotion and salary increases which were considered by the judges in *K Ratnasingham v Kow Ah Dek*<sup>138</sup> and *Nani d/o Nagoo v Wayne Gary Williams*<sup>139</sup> are no longer relevant for cause of action arising after 1<sup>st</sup> October 1984.

The prohibition against taking into consideration possible future increase in deceased's earning by proviso (iv)(b) to section 7(3) of the CLA 1956 also greatly affects the quantum of damages being awarded by the courts. Since only deceased's earning at the time of his demise can be taken as the basis for the assessment of multiplicand, the multiplicand for loss of support in fatal accident claims arising out of motor vehicle accidents is reduced to only the amount the deceased was receiving at the time of his demise.

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<sup>137</sup> Inclusive of any fringe benefits received at the time of his demise.

<sup>138</sup> *Op. cit.*

<sup>139</sup> [1984] 2 CLJ 51.

## 4.8 FIXING THE MULTIPLIER IN THE AWARD FOR LOSS OF SUPPORT

Multiplier in the award for loss of support refers to the period in which the dependants is expected to receive the contributions from the deceased had the deceased did not die. Prior to the introduction of proviso (iv)(d) to section 7(3) of the CLA 1956, the assessment of multiplier is “entirely an arbitrary matter of speculation”.<sup>140</sup> Judges was entitled to select the multiplier ‘at his discretion’ and the case laws were not in uniformity.<sup>141</sup> Thus, making it difficult to find a clear and authoritative guide for the assessment of the same. The assessment is usually based on the deceased's expectation of life, maximum working age, nature of employment, dependant’s needs together with allowances for contingencies, accelerated payment and the accrual of interest if the money is invested.

Section 2 of the CLAA 1984 introduced proviso (iv)(d) to section 7(3) of the CLA 1956. The proviso introduces the statutory multiplier to replace the Common Law assessment of multiplier. The statutory multiplier only uses the deceased’s age at the time of his demise as the basis of the assessment. Proviso (iv)(d) to section 7(3) of the CLA 1956 reads:

Provided that-

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

(d) take into account that in the case of a person who was of the age of **thirty years old and below at the time of his death,**

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<sup>140</sup> Per Lord Goddard in *Heatley v Steel Co. of Wales Ltd.* (1953) 1 All ER 489.

<sup>141</sup> Dass, K.S, *op. cit.*, (1975) at 977.

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

*(emphasis added)*

Proviso (iv)(d) to section 7(3) of the CLA 1956 fixed sixteen (16) years as the maximum multiplier and six (6) months as the minimum multiplier. Dependants of a deceased who was below the age of thirty (30) years old are entitled to sixteen (16) years multiplier. The multiplier for dependant of a deceased who was in between the age of thirty one (31) and fifty five (55) years old vary depending on deceased's age at the time of death. The multiplier is calculated using the formula of fifty five (55) minus deceased's age at the time of his demise and divide by two (2).

The term 'shall' proviso (iv)(d) to section 7(3) of the CLA 1956 removes judge's discretion in the assessment of multiplier for loss of support in fatal accident claims arising out of motor vehicle accidents. It made it compulsory for judges to adopt the statutory multiplier in assessing the damages under this heading. Judges no longer have the discretion to assess the multiplier according to the Common Law considerations. The contingencies of life and the consideration of receiving money lump sum had already been configured and built by the Legislature into the statutory formula.<sup>142</sup> Judges also have no discretion to decide on the length of multiplier to be

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<sup>142</sup> Per Edgar Joseph Jr. SCJ in *Chan Chin Ming v Lim Yoke Eng*, *op. cit.*

awarded. Edgar Joseph Jr. in his dissenting judgment in *Chan Chin Ming v Lim Yoke Eng*<sup>143</sup> commented:

“To my mind, it is manifestly clear, that in enacting the detailed provisions of proviso (d) to s 7(3)(iv), Parliament had intended to take away the discretion of the court to select the appropriate multiplier, in assessing loss of earnings of a deceased person in respect of any period after his death, for purposes of a claim for loss of support under s 7(1).”

The absence of judges’ discretion in assessing the multiplier was also emphasis by the Court of Appeal in *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*<sup>144</sup> The Court was very adamant in saying that the statutory multiplier in proviso (iv)(d) to section 7(3) of the CLA 1956 is fixed and cannot be altered by the judge in any way.

“Further, the language of the statutes is imperative. It says the ‘the number of years’ purchase shall be 16. The mandatory tenor of this phrase employed by Parliament to convey its message excludes any pretended exercise of judicial power to substitute some other multiplier for that intended. As such, the dissenting view in *Chan Chin Ming v Lim Yoke Eng* should be adopted.”

Thus, the statutory multiplier provided in proviso (iv)(d) is considered as compulsory in assessing damages for loss of support. Any attempt to vary the multiplier will amounts to ‘flying in the face of the mandatory provisions’.<sup>145</sup>

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<sup>143</sup> *Op. cit.*

<sup>144</sup> [2004] 1 CLJ 797.

<sup>145</sup> Per Edgar Joseph Jr SCJ in *Chan Chin Ming v Lim Yoke Eng*, *op. cit.*

The fixed multiplier sometimes leads to over and under compensation. To allow similar multiplier for claim for loss of support by parent of an unmarried deceased and by wife or young children for example would be an over-compensation to the parents and under-compensation to the wife and children. The length of dependency by parent cannot be the same as those of wife and children. While parents' dependency would normally base on the parents' age, the dependency of a wife and children are about the same as deceased's working life. Because of this, the courts on several occasions had departed from the statutory multiplier method and maintained the pre-amendment practices of using their discretion in assessing the multiplier for the award for loss of support. The Supreme Court in *Chan Chin Ming v Lim Yoke Eng*<sup>146</sup> held that the statutory multiplier in proviso (iv)(d) of section 7(3) of the CLA 1956 is not applicable in claim for loss of support by parents of unmarried deceased. Peh Swee Chin SCJ in delivering the majority decision stated that:

“Having regard to the state of the general system of the law before the coming into force of sub-para (d) on 1 October 1984, sub-para (d) seems to be tailor made for a claim by a spouse and children as dependants in respect of a deceased spouse, because under the general system of law, both before or after the enactment of sub-para (d), the duration of a claim for loss of support is usually as long as the deceased's loss of earnings which would have been earned had the deceased lived.

On the other hand the state of general system of law relating to a parent's claim as a dependants for loss of support in respect of an unmarried child before the enactment of sub-para (d) was that such loss of support would either ceased or be reduced considerably on the almost inevitable contingency of subsequent marriage of such unmarried child.”

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<sup>146</sup> *Op. cit.*

In relation to the above, it is of utmost importance to consider whether judges, after the introduction proviso (iv)(d) to section 7(3) of the CLA 1956, have the power to depart from the statutory multiplier and apply their discretion in determining the multiplier according to the fact of the case. Three interesting decisions should be considered on this issue. In *Chan Chin Ming v Lim Yoke Eng*,<sup>147</sup> the Supreme Court had to decide whether the parents of a twenty five (25) years old unmarried deceased is entitled to the sixteen (16) years old statutory multiplier. The majority were of the view that the statutory multiplier is not applicable in the claim for loss of support by parents of an unmarried child considering the possibility of child subsequent marriage. In these instances the general system of law prevailing prior to the 1984 amendment (the loss of support would either cease or reduce considerably on the almost invariable contingency of the subsequent marriage of the child) is still applicable.<sup>148</sup> Had the Legislature intended to depart from the general system of the law, they would have made it abundantly clear in the statute. Since there is no indication of such intention, the court is still at liberty to reduce the multiplier to suit the case.

In *Takong Tabari v Government of Sarawak & Ors*<sup>149</sup> the Court of Appeal while deciding an appeal for a claim by deceased's widow, adhered to the fixed multiplier provided in proviso (iv)(d) of section 7(3) of the CLA 1956 but deducted 1/3 from the total award for contingencies. The Court adopted the reasoning in *Chan Chin Ming v Lim Yoke Eng*<sup>150</sup> and held that since there was no indication that the Legislature intended to depart from the general system of law of making deduction for contingencies in life and accelerated payment, the 1/3 deduction is still applicable.

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<sup>147</sup> *Op. cit.*

<sup>148</sup> Per Peh Swee Chin SCJ in *Chan Chin Ming v Lim Yoke Eng*, *op. cit.*

<sup>149</sup> [1998] 4 MLJ 512.

<sup>150</sup> *Op. cit.*

In 2004, the Court of Appeal via *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor & Anor.*,<sup>151</sup> reconsidered the decision in *Chan Chin Ming v Lim Yoke Eng.*<sup>152</sup> and held that proviso (iv)(d) of section 7(3) of the CLA 1956 intends to take away the discretionary power of judges in determining the multiplier for loss of support and to prevent the high awards in personal injury. Thus, to allow departure from the statutory multiplier as decided in *Chan Chin Ming v Lim Yoke Eng*<sup>153</sup> would amount to re-writing the statutes. The Court of Appeal went even further to say that *Chan Chin Ming v Lim Yoke Eng*<sup>154</sup> was wrongly decided and it was the solemn duty of the Court as the apex court in the matter of personal injury motor accident claim to correct the wrong. The judgement was later on followed by *Cheng Bee Teik & Ors v Peter a/l Selvaraj & Anor*<sup>155</sup> where it was held that since the provision regarding multiplier in proviso (iv)(d) of section 7(3) of the CLA 1956 is clear, it is not open for the court to interpret it otherwise.

On this point it is submitted that after a through reading of *Chan Chin Ming v Lim Yoke Eng*<sup>156</sup> and *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor & Anor.*,<sup>157</sup> the grounds behind the decisions were sound despite being in total contradiction to one another. The researcher however failed to comprehend the justification of the 1/3 deduction applied in *Takong Tabari v Government of Sarawak & Ors.*<sup>158</sup> Although the court in this case was bound by the decision of the *Chan Chin Ming v Lim Yoke Eng*,<sup>159</sup> it failed to consider and appreciate the reasoning in *Chan Chin Ming v Lim*

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<sup>151</sup> *Op. cit.*

<sup>152</sup> *Op. cit.*

<sup>153</sup> *Op. cit.*

<sup>154</sup> *Op. cit.*

<sup>155</sup> [2005] 4 MLJ 301.

<sup>156</sup> *Op. cit.*

<sup>157</sup> *Op. cit.*

<sup>158</sup> *Op. cit.*

<sup>159</sup> *Op. cit.*

*Yoke Eng*.<sup>160</sup> The departure from proviso (iv)(d) of section 7(3) of the CLA 1956 in *Chan Chin Ming v Lim Yoke Eng*<sup>161</sup> was based on the possibility that a subsequent marriage will reduce or stop deceased's contribution to the parents, the same reasoning cannot be applied to the plaintiff in *Takong Tabari v Government of Sarawak & Ors.*<sup>162</sup> Deceased in *Takong Tabari v Government of Sarawak & Ors.*<sup>163</sup> would have definitely continue to support his wife and children throughout his working life, not to mention the possibility of an increase in the dependency due to the possible increase cost of living, education and sustenance as the children grow. Further, the Appellant in *Takong Tabari v Government of Sarawak & Ors.*<sup>164</sup> had forwarded a sound argument that since contingencies and vicissitudes of life had been configured into the statutory multiplier,<sup>165</sup> further deduction on the same ground after adopting the statutory multiplier would be a double jeopardy and improper.

Since the grounds forwarded in both *Chan Chin Ming v Lim Yoke Eng*<sup>166</sup> and *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*<sup>167</sup> were both sound, the answer to the question of whether judges have the discretion to depart from the fixed multiplier in proviso (iv)(d) to section 7(3) of the CLA 1956 in assessing the damages for loss of support in fatal accident claims arising out of motor vehicle accidents would depend on the answers to the following questions:

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<sup>160</sup> *Op. cit.*

<sup>161</sup> *Op. cit.*

<sup>162</sup> *Op. cit.*

<sup>163</sup> *Op. cit.*

<sup>164</sup> *Op. cit.*

<sup>165</sup> Balan, P., *op. cit.*, (2004), at 62.

<sup>166</sup> *Op. cit.*

<sup>167</sup> *Op. cit.*

#### **4.8.1 Does Proviso (iv) to Section 7(3) of the CLA 1956 Provides for Loss of Earnings or Loss of Support?**

The question of whether proviso (iv) to section 7(3) of the CLA 1956 provides for loss of earnings or loss of support arise due to the differences in the wordings used in section 7(3) and proviso (iv) to section 7(3) of the CLA 1956. While the phrase ‘loss of support’ appears in section 7(3) of the CLA 1956, proviso (iv) to the section uses ‘loss of earning’. The differences in wording brings to mind the possibility that the statutory multiplier in proviso (iv)(d) to section 7(3) is not intended by the Legislature to be used in assessing damages for loss of support.

Although judges have generally disregarded the differences in the wording of the provisions and adopted the statutory multiplier while assessing damages for loss of support, a different interpretation however can be accorded to proviso (iv) to section 7(3) of the CLA 1956. The deliberate use of use of the phrase ‘loss of earning’ instead of ‘loss of support’ indicates that the proviso is specifically worded to cater for the assessment of deceased’s earnings where the earnings are to be used in assessing the damages for loss of support. This interpretation is in line with the explanation provided by Part 2 of the Explanatory Statement to Civil Law Amendment Bill 1984. The Explanatory Statement states:

Clause 2 of the Bill amends section 7 of the Act... It also provides for the method of assessing the loss of earning of the deceased person in respect of the period after his death.

Instead of providing for the assessment of damages for loss of support, it is submitted that proviso (iv) to section 7(3) of the CLA 1956 actually intends to provide for the assessment deceased’s earnings which later to be used in assessing damages for loss of support. Therefore, the statutory multiplier in proviso (iv)(d) to section 7(3) of the CLA

1956 is only compulsory on in respect of assessing deceased's earnings and not to be applied in assessing damages for loss of support.

To use the same method of assessment in assessing deceased's earnings and damages for loss of support is incorrect. Deceased's earnings and loss of support are two different subject matters. Therefore, the method of assessment is also different. The assessment of deceased's earnings only requires deduction for the expenses spent for earning that income. The assessment of damages for loss of support on the other hand requires deduction for expenses spent in earning that income together with deductions for deceased's day to day living expenses, savings or expenses spent on person not named in section 7(2) CLA 1956. Therefore, to use the same method of assessment for loss of deceased's earning and damages for loss of support would be wrong.

S. Santhana Dass commented that there is nothing to indicate that loss of earning and loss of support are the same or that the assessment for damages for loss of support must be based on proviso (iv) to section 7(3) of the CLA 19656. *Chan Chin Ming v Lim Yoke Eng*<sup>168</sup> had been rightly decided according to the plain and natural meaning of the section.<sup>169</sup> While the legislature intends to regulate the assessment of multiplier to be used for assessing deceased's earning, there is no indication that the same regulation is to be extended for the assessment of damages for loss of support. Peh Swee Chin SCJ in *Chan Chin Ming v Lim Yoke Eng*<sup>170</sup> had rightfully held:

“Let us examine sub-para (d) reproduced above, it deals with first, the assessment of loss of earnings, and not be it noted, loss of support. They are related to each other but are yet distinctly apart, for it will be

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<sup>168</sup> *Op. cit.*

<sup>169</sup> Dass, S. Santhana, *op. cit.*, (2006), at xxiv.

<sup>170</sup> *Op. cit.*

remembered that the earnings of the deceased, or the amount of such earnings by the deceased by virtue of his death merely the starting point in assessing the loss of support sustained by the dependants, before taking into account of personal expenses of the deceased and contingencies, see *Davies v Powell Duffryn Associated Collieries (No. 2)* (1942) AC 601 at p. 617.”<sup>171</sup>

Similar approach was also adopted in *Lien Hock Seng & Anor v Sakkarai a/l Mokiah & Anor*.<sup>172</sup> where Abd. Wahab J held that the loss of support cannot be equated to loss of earning since loss of support (in that particular case) refers to the loss suffered by the parents of the deceased. The fact that the two terms are sometimes understood referring to loss of support had led to the whole confusion on the issue of fixed multiplier.

It is therefore submitted that the different phrases used in section 7(3) and proviso (iv) to section 7(3) of the CLA 1956 allows judge to exercise their discretion in determining the multiplier for damages for loss of support in fatal accident claims arising out of motor vehicle accidents. Judges are only bound to follow the statutory multiplier while assessing deceased's earnings. They still have the discretion to assess the multiplier for loss of support. Judges are at liberty to increase or reduce the multiplier for loss of support based on the fact of each case provided that the earnings used as the basis for the assessment of multiplicand is assessed using the statutory multiplier in proviso (iv)(d) to section 7(3) of the CLA 1956.

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<sup>171</sup> Based on the above reasoning, it is not surprising when he continued to say that “sub-para (d) seems to be tailor-made for a claim by a spouse and children” and not parents of unmarried deceased since the loss of support suffered by spouse and children is normally pegged to the working life of the deceased. Thus, the multiplier for loss of support for spouse and children would be similar to the calculation for loss of earnings in proviso (iv). The same cannot be said for loss of support for parents of unmarried deceased due to the contingency of subsequent marriage.

<sup>172</sup> [1998] 3 MLJ 251.

#### 4.8.2 Is *Chan Chin Ming v Lim Yoke Eng* No Longer Applicable?

Apart from the above, the notion that judges have the discretion to depart from the statutory multiplier provided in proviso (iv)(d) to section 7(3) of the CLA 1956 originates from the Supreme Court's decision in *Chan Chin Ming v Lim Yoke Eng*.<sup>173</sup> Although the majority of the judges follows the compulsory multiplier rule as decided by the Court of Appeal in *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*,<sup>174</sup> the decision in *Chan Chin Ming v Lim Yoke Eng*.<sup>175</sup> is still a valid decision. The Supreme Court, prior to June 24<sup>th</sup> 1994 stood at the apex of the Malaysian court structure. It was later renamed as the Federal Court by virtue of the Constitution (Amendment) Act (Act A885).<sup>176</sup> By virtue of it being decided by the highest court, it falls to reason that the decision in *Chan Chin Ming v Lim Yoke Eng*<sup>177</sup> is binding on the lower courts and carries more weight compared to *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*<sup>178</sup>

Unfortunately, the Court of Appeal currently stands as the apex court in all matters relating to motor vehicle accident claims. Section 96(a) of the Court of Judicature Act 1965 (Act 91) provides that any appeal to the Federal Court in pursuance of section 97 of the same act is confined to matters relating to the Constitution and cases brought to the High Court in its original jurisdiction. Since the High Court only have appellate jurisdiction over matters in respect of motor vehicle accident claims, the Federal Court have no jurisdiction to hear these cases. Therefore, *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*<sup>179</sup> was also decided by the highest court.

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<sup>173</sup> *Op. cit.*

<sup>174</sup> *Op. cit.*

<sup>175</sup> *Op. cit.*

<sup>176</sup> Bahagian Teknologi Maklumat Pejabat Ketua Pendaftar Mahkamah Persekutuan Malaysia, *Malaysian Judiciary*, Malaysian Court Official Website, 2004, 3th February 2010

<<http://www.kehakiman.gov.my/courts/maljudiciary.shtml>>

<sup>177</sup> *Op. cit.*

<sup>178</sup> *Op. cit.*

<sup>179</sup> *Op. cit.*

The lower courts are bound by the decisions in both cases. VT Singham J in *Marimuthu Velappan v Abdullah Ismail*<sup>180</sup> noted this quandary and held:

“Based on the doctrine of *stare decisis*, this court cannot disregard the majority decision in *Chan Chin Ming v Lim Yoke Eng*, but have to dutifully observe and follow the *ratio decidendi* and at the same time respect the decision of the Court of Appeal in *Ibrahim Ismail, Cheng Bee Teik and Noraini Omar*. ”

Thus, we see decisions like the ones in *Esah bte Ishak (a mother and legal dependants of Nazri bin Ahmad Ramli, deceased) & Anor v Kerajaan Malaysia & Anor* and<sup>181</sup> *Azizah Zainuddin (menuntut sebagai baju dan orang tanggungan yang sah Kamaruddin bin Alias, si mati) v Krishnasamy a/l Muniasamy dan satu lagi*<sup>182</sup> which followed *Chan Chin Ming v Lim Yoke Eng*<sup>183</sup> while *Manogaran a/l Meeramuthu & Anor v Fauziah bte Mat Isa*<sup>184</sup> and *Noraini bte Omar (wife of deceased, Ku Mansur bin Ku Baharom and mother of the deceased, Ku Amirul bin Ku Mansur) & Anor. v Rohani Said and another appeal*<sup>185</sup> followed *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor*.<sup>186</sup>

It is submitted that even if the Court of Appeal currently stands as the highest court on all matter relating to motor vehicle accident claims, *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor*.<sup>187</sup> cannot be regarded as the final authority in this matter.

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<sup>180</sup> *Op. cit.*

<sup>181</sup> [2006] 7 CLJ 353.

<sup>182</sup> [2006] 2 MLJ 91.

<sup>183</sup> *Op. cit.*

<sup>184</sup> [2005] 5 MLJ 34.

<sup>185</sup> [2006] 3 MLJ 150.

<sup>186</sup> *Op. cit.*

<sup>187</sup> *Op. cit.*

Both *Takong Tabari v Government of Sarawak & Ors.*<sup>188</sup> and *Teoh Teik Chai v Muhammad bin Hasyim*<sup>189</sup> were also decided by the Court of Appeal. Thus, of similar stature to *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*<sup>190</sup> These cases are also binding on the inferior courts. As such, judges in the inferior courts have the option to choose either the decisions in *Takung Tabari v Government of Sarawak & Ors*<sup>191</sup> and *Teoh Teik Chai v Muhammad bin Hasyim*<sup>192</sup> which follow *Chan Chin Ming v Lim Yoke Eng*<sup>193</sup> or the decision in *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*<sup>194</sup>

The researcher also humbly submits that there is no definitive answer to the question of whether *Chan Chin Ming v Lim Yoke Eng*<sup>195</sup> has been overruled by *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*<sup>196</sup> The researcher disagree with the conclusion arrived by Farheen Bhaig and Asgar Ali<sup>197</sup> that by virtue of the decision in *Dalip Bhagwan Singh v Public Prosecutor*,<sup>198</sup> the decision in *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.* should prevails over *Chan Chin Ming v Lim Yoke Eng*,<sup>199</sup> *Takung Tabari v Government of Sarawak & Ors.*<sup>200</sup> and *Teoh Teik Chai v Muhammad bin Hasyim*<sup>201</sup> merely by reason of it being the later decision. One should not forget that to enable a court to depart from the decision of another court of similar

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<sup>188</sup> *Op. cit.*

<sup>189</sup> *Op. cit.*

<sup>190</sup> *Op. cit.*

<sup>191</sup> *Op. cit.*

<sup>192</sup> *Op. cit.*

<sup>193</sup> *Op. cit.*

<sup>194</sup> *Op. cit.*

<sup>195</sup> *Op. cit.*

<sup>196</sup> *Op. cit.*

<sup>197</sup> Fardeen Bhaig Sadar Bhaig and Ashgar Ali Ali Mohammed, "Civil Claim Involving Motor Vehicle Accident: Whether Court of Appeal the Apex Court", (2009) 1 *Malayan Law Journal*, xxii-xxxviii.

<sup>198</sup> [1998] 1 MLJ at 14 where Peh Swee Chin observed "when two decision of the Federal Court conflict, on a point of law, for the same reasons, the later decision prevail over the earlier decision."

<sup>199</sup> *Op. cit.*

<sup>200</sup> *Op. cit.*

<sup>201</sup> *Op. cit.*

stature, the court must show that it is right to do so i.e. that the former decision is “wrong, uncertain, unjust, outmoded or obsolete in the modern conditions”.<sup>202</sup>

S. Santhana Dass had rightly pointed out that it is difficult safely say that *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.*<sup>203</sup> have the right to depart and overrule *Chan Chin Ming v Lim Yoke Eng*,<sup>204</sup> *Takung Tabari v Government of Sarawak & Ors*<sup>205</sup> and *Teoh Teik Chai v Muhammad bin Hasyim*.<sup>206</sup> Reason being, none of the exceptions enumerated in *Young v Bristol Aeroplane Co. Ltd*<sup>207</sup> and *London Tramways v London County Council*<sup>208</sup> can be rightfully attribute to these cases; neither was there conflicting decisions of the Court of Appeal to choose from nor the decision in these three (3) cases were given *per incuriam*.<sup>209</sup> As such, it can be concluded that although *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.* was rightfully decided based on the argument forwarded in the judgment, it cannot abrogate the decision in *Chan Chin Ming v Lim Yoke Eng*.<sup>210</sup> *Chan Chin Ming v Lim Yoke Eng*,<sup>211</sup> together with *Takung Tabari v Government of Sarawak & Ors*<sup>212</sup> and *Teoh Teik Chai v Muhammad bin Hasyim*.<sup>213</sup> still stand as a valid authority allowing judges to exercise their discretion in the assessment of multiplier for loss of support in fatal accident claims arising out of motor vehicle accidents.

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<sup>202</sup> *Dalip Bhagwan Singh v Public Prosecutor*, *op. cit.*

<sup>203</sup> *Op. cit.*

<sup>204</sup> *Op. cit.*

<sup>205</sup> *Op. cit.*

<sup>206</sup> *Op. cit.*

<sup>207</sup> *Op. Cit.*

<sup>208</sup> (1898) AC 375.

<sup>209</sup> Dass, S. Santhana, *op. cit.*, (2006), at xlii. See also reasons given by Dass to dispute the arguments provided in *Ibrahim bin Ismail & Anor v Hasnah bt Puteh Imat*, *op. cit.* against *Chan Chin Ming v Lim Yoke Eng*, *op. cit.*

<sup>210</sup> *Op. cit.*

<sup>211</sup> *Op. cit.*

<sup>212</sup> *Op. cit.*

<sup>213</sup> *Op. cit.*

Although there were several applications for leave to file an appeal in pursuant of rule 137 of the Rule of Federal Court 1995<sup>214</sup> filed over motor vehicle accident claims such as in *Abdul Gaffar bin Md. Amin v Ibrahim bin Yusuff & Anor*,<sup>215</sup> *Sia Cheng Soon & Anor v Tengku Ismail bin Tengku Ibrahim*<sup>216</sup> and *Anantha Kiruisan PSR @ Anantha Krishnan & Anor v Teoh Chu Thong*,<sup>217</sup> the Federal Court still maintain that the Court of Appeal is the apex court in motor vehicle accident claims. Rule 137 cannot in any way be “use to bring a case originating from the subordinate courts to the Federal Court and that originating in the Session Court must end at the Court of Appeal”.<sup>218</sup> Thus, we are not given the option bringing a personal injury motor accident claims into the attention of the Federal Court to resolve the issue of these conflicting decisions once and for all.

It is therefore concluded that judges’ discretion in assessing the multiplier for damages for loss of support in fatal accident claims arising out of motor vehicle accidents is not abolished by proviso (iv)(d) to section 7(3) of the CLA 1956. The confusions caused by the different phrase used in section 7(3) and proviso (iv) to the section as well as the conflicting decisions in *Ibrahim Ismail & 15 Anor. v Hasnah Puteh Imat & Anor.* and *Chan Chin Ming v Lim Yoke Eng*.<sup>219</sup> allows judges to exercise their discretion.

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<sup>214</sup> The Rule allow an application for leave to appeal to the Federal Courts to be made “for the removal of doubts it is declared that nothing in these Rules shall be deemed to limit or affect the inherent powers of the court to hear any application or to make any order as may be necessary to prevent injustice or to prevent an abuse of the process of the court.”

<sup>215</sup> [2008] 3 MLJ 771(FC).

<sup>216</sup> [2008] 3 MLJ 753.

<sup>217</sup> [2008] 4 MLJ 672.

<sup>218</sup> Per Zulkifli Ahmad Makinudin FCJ in *Anantha Kiruisan PSR @ Anantha Krishnan & Anor v Teoh Chu Thong*, *op. cit.*

<sup>219</sup> *Op. cit.*

## 4.9 ABOLISHING THE AWARD FOR LOST OF EARNING IN LOST YEARS

The award for loss of earning in lost years is a Common Law head of damages. It arises from deceased's right to claim for loss of future earnings in the years which he would have normally worked had he did not die. Since deceased had passed away, the cause of action is vested on his estate. The introduction of award for loss of earnings in lost years was fairly recent. It was introduced as part of damages recoverable in estate claims by *Picket v British Rail Engineering Ltd.*<sup>220</sup> and *Gammell v Wilson*.<sup>221</sup> The decisions in these cases were later adopted in Malaysia through cases such as *Thangavelu v Chia Kok Bin*<sup>222</sup> and *Yap Ami & Anor. v Tan Hui Pang*.<sup>223</sup>

The introduction of section 8(2)(a) of the CLA 1956 by section 3 of the CLAA 1984 abolishes the award for loss of earning in lost years. Along with it is the judges' discretion to assess the damages for the same. Section 8(2) of the CLA 1956 read:

(2) Where a cause of action survive as aforesaid for the benefit of the estate of a deceased person, the damages recoverable for the benefit of the estate of that person-

(a) ***shall not include*** any exemplary damages, any damages for bereavement made under subsection (3A) of section 7, any damages for loss of expectation of life and ***any damages for loss of earning in respect of any period after that person death; (emphasis added)***

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<sup>220</sup> (1979) 1 All ER 774.

<sup>221</sup> (1981) 2 WLR 248. Note that although the decision concerned the loss of years for living plaintiff.

<sup>222</sup> *Op. cit.*

<sup>223</sup> [1982] 2 MLJ 316.

By abolishing the award for loss years the Legislature manages to reduce the quantum of damages in fatal accident claims arising out of motor vehicle accidents which was (among others) caused by the award for loss earnings in lost years.<sup>224</sup> Cases such as *Thangavelu v Chia Kok Bin*,<sup>225</sup> *Hassan bin Muhamad v Teoh Kim Seng*<sup>226</sup> and *Mariah bte Mohhammad v Abdullah b Daud*<sup>227</sup> all showed quite large amount of damages being awarded for loss of earnings in lost years. Section 8(2) of the CLA 1956 not only abolishes the judges' discretion to assess and award damages for loss of earnings in lost years, it also reduces the quantum of damages in fatal accident claims arising out of motor vehicle accidents.

#### 4.10 CONCLUSIONS

Similar to sections 28A of the CLA 1956, section 7 and 8 of the CLA 1956 also contain several provisions which directly affect the exercise of judicial discretion in the assessment of damages for fatal accident claims arising out of motor vehicle accidents in Malaysia. Compared to section 28A, the effects of section 7 and 8 of the CLA 1956 are more extensive. The effects can be categorized into three (3) parts. First is total abolition of the power, second maintaining the power albeit with some statutory regulation and third merely codifying the existing practices of the judges with regard the exercise of such power.

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<sup>224</sup> The high award for loss years was due to three reasons: it allowed for loss of future earnings being handed out to deceased or injured person who was an infant or unemployed, probable duplicity in compensation for the dependents of deceased in cases where the dependents were also claiming for loss of future earnings for lost years under estate claim together with loss of support and the possibility that the award exceeded deceased's actual earnings.

<sup>225</sup> *Op. cit.* The damages for loss of earnings for lost years under was awarded at RM13,456.80:

<sup>226</sup> [1987] 1 MLJ 328. The damages for loss of earnings for lost years under was awarded at RM14,954.65.

<sup>227</sup> [1990] 1 MLJ 240. The damages for loss of earnings for lost years was awarded at RM 31,150.

The judges' power to exercise their discretion is totally abolished in respect of the assessment of damages for loss of earning in lost years, loss of expectation of life and loss of consortium of wife. The abolition is the result of section 8(2)(a) and proviso (iii) to section 7(3) of the CLA 1956. Since these heads of damages are totally abolished by the provisions in the Act, judges' discretion in awarding and assessing damages under these heading is similarly removed.

The award for bereavement is another area in which judges' discretion is totally removed. Section 7(3A) and (3B) of the CLA 1956 do not allow judges the discretion to assess the amount of damages to be awarded and to determine the beneficiaries to the award. The absence of specific interpretation of the term 'spouse' however may open up the possibility that for judges to exercise their discretion to increase the quantum of damages to be awarded. Although so far the two (2) attempts towards this effect had been rejected by the courts, the possibility for judges to exercise their discretion is still open due to the absence of specific interpretation of the word used in the provision.

The award for loss of support on the other hand falls within the second category. The CLA 1956 introduce specific provisions in section 7 of the CLA 1956 which specifically regulate some elements in the assessment of damages for example the cut-off age of fifty five (55) years old, the condition of proving deceased's good health, the statutory multiplier in assessing deceased's earnings and the prohibition against including any increase in deceased's earning in the assessment of multiplier. Nevertheless, despite the strict statutory provisions, there are still many avenues in which judges can still exercise their discretion. These avenues were discussed in length above. The abolition of the award for loss of services by proviso (iii) to section 7(3) of the CLA 1956 is also another area in which judges can still exercise their discretion.

Although the award is abolished by the proviso (iii) to section 7(3) of the CLA 1956, judges can still assess and award damages to compensate the loss of services under section 7(3) of the Act.

The third category is reflected in the abolition of the awards for loss of consortium of wife. Although the award for loss of consortium is 'abolished' by the proviso, the 'abolition' is a mere technicality since the award had never been recognized either in the CLA 1956 (rev 1972) or the Common Law. As such, the CLA 1956 is abolishing an award which never exists in the first place. Similarly, the substitution of loss resulting from death in section 7(3) with loss of support, the prohibition against taking into consideration the compensation benefits received by the dependants upon deceased's demise in the assessment of damages for loss of support as well as the compulsory deduction for deceased living expenses are just codification of existing practice of the courts. Therefore, the introduction of the provisions which causes these effects has no apparent effect on judges' discretionary power in assessing damages in fatal accident claims arising out of motor vehicle accidents.

With regard to the effects of section 7 and 8 of the CLA 1956 on reducing the quantum of damages in fatal accident claims arising out of motor vehicle accidents in Malaysia, the only provisions which have significant impact on the quantum are the provisions which abolishes the award for loss of earning in lost years and prohibits the inclusion of any increase in deceased's earning in the assessment of multiplier for loss of support.

The abolition of the award for loss of expectation of life claimed under estate claims also affects the quantum of damages being awarded under fatal claims. The effect however is not significant. This is due to the fact that the amount awarded under this

heading over the years was generally moderate; ranging from RM 2500 to RM 6500 only. As such, barring judges from awarding damages for loss of expectation of life in fatal accident claims leaves minimal impact in reducing the amount of damages awarded. Similarly, the introduction of the award for bereavement as a new head of damages under fatal accident claims and the imposition of strict statutory control over the assessment of the award also do not carry much effect on the quantum of damages being awarded by the courts. Since the amount of damages to be awarded as bereavement is fixed at RM 10,000, the effect of section 7(3A) on the quantum of damages is not significant.

From the above discussion it is evident that all is not well with the current provisions in the CLA 1956 with respect to the fatal accident claims. Instead of being the provision to guide judges in the assessment of awards, the provisions in section 7 and 8 of the CLA 1956 on certain occasions create more confusion in its application. Despite the claims that the Act fetters judges' discretion in the assessment of fatal claims, we can still see many areas in which judicial discretion is still applicable or in some cases necessary. Hence, it is clear that abolishing or fettering judicial discretion is not the result intended by the Legislature while enacting the CLAA 1975 and CLAA 1984.

#### 4.11 COMPARATIVE TABLE OF THE CLA 1956 (REV 1972) AND THE CLA 1956 WITH REGARDS TO FATAL ACCIDENT CLAIMS

CLA 1956 (rev 1972)	CLA 1956
Loss service of child and wife and loss of consortium of wife provided under Common Law and section 7(3).	Loss of service of child and wife and loss of consortium of wife totally abolished by proviso (iii) to section 7(3). Judges however can still allow damages to compensate the monetary loss suffered in order to replace the service of the child or wife under special damages.
Loss of expectation of life provided under Common Law and section 8. The assessment is up to the judge's discretion.	Loss of expectation of life abolished totally by section 8(2)(a).
-	Bereavement is provided by section 7(3A) but limited RM 10,000 and strictly for persons listed in section 7 (3B).
<p>Loss of resulting from death provided under section 7(3)</p> <ul style="list-style-type: none"> <li>- No condition.</li> <li>- Compensation benefits from other compensation funds are not taken into consideration.</li> <li>- Only expense in earning / producing income was deducted from the assessment of multiplicand</li> <li>- The assessment of multiplier is based on judges' discretion after considering deceased's earning at the time of demise as well as any possible future increase or decrease in deceased's earnings</li> <li>- The assessment of multiplier is based on judges' discretion guided by the Common Law principle.</li> </ul>	<p>Loss of support provided in section 7(3):</p> <ul style="list-style-type: none"> <li>- 3 conditions must be fulfilled. deceased must be below fifty five (55) years old, receiving earning and in good health at the time of injury.</li> <li>- Compensation benefits from other compensation funds are not taken into consideration.</li> <li>- Living expenses is to be deducted from the assessment of multiplicand.</li> <li>- Future increase in income is not considered. The assessment of multiplicand is based on deceased earnings at the time injury.</li> <li>- The assessment of multiplier is based on the statutory prescribed method.</li> </ul>
Loss of earning in lost years allowed under Common Law and section 8(1)	Loss of earning in lost years is totally abolished by section 8(2)(a).

## **CHAPTER 5**

### **JUDICIAL DISCRETION IN THE ASSESSMENT OF INTEREST FOR DAMAGES FOR PERSONAL INJURY AND FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS**

#### **5.1 INTRODUCTION**

The award for interest for damages is a common feature in personal injury and fatal accident claims arising out of motor vehicle accidents in Malaysia. Similar to the award for damages, the award for interest is also a relic of the English Common Law and statutes. Section 11 of the Civil Law Act (Act 67)<sup>228</sup> is the primary statutory provision granting the judges the power to award interest for damages. This section, coupled together with several other provisions in the Courts of Judicature Act 1964 (Act 91),<sup>229</sup> the Subordinate Courts Act 1948 (Act 92)<sup>230</sup> and the Subordinate Courts Rules Act 1955 (Act 55)<sup>231</sup> allow judges to exercise their discretion in assessing and awarding interest for damages for personal injury and fatal accident claims arising out of motor vehicle accidents.

The provisions relating to the assessment of interest for damages was amended recently. The Rules of Courts 2012<sup>232</sup> was enacted to replace the Rules of High Court 1980<sup>233</sup> and the Subordinate Courts Rules 1980.<sup>234</sup> Currently, section 11 of the CLA

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<sup>228</sup> Hereinafter referred to as “the CLA 1956”.

<sup>229</sup> Hereinafter referred to as “the CJA 1964”.

<sup>230</sup> Hereinafter referred to as “the SCA 1948”.

<sup>231</sup> Hereinafter referred to as “the SCRA 1955”.

<sup>232</sup> [PU(A)205/2012]. Hereinafter referred to as “the Rules of Court 2012”.

<sup>233</sup> [PU (A) 50/1980]. Herein after referred to as “the RHC 1980 (repealed)”.

<sup>234</sup> [PU (A) 328/1980]. Hereinafter referred to as “the SCR 1980 (repealed)”.

1956, Order 42 Rule 12 of the Rules of Court 2012 and the Practice Direction 1/2012<sup>235</sup> are the main provisions which regulate the assessment of interest for damages. The provisions are generally accepted as providing for compulsory interest, the interest rate as well as prohibiting compounded interest. Unfortunately, despite the intention to create single uniformed rules for the assessment of interest for damages, there are several issues relating to judges' discretionary power in awarding interest, assessing the interest rate and awarding compounded interest which still needs to be addressed. These issues arise due to the uncertainty in interpreting section 11 of the CLA 1956, Order 42 Rule 12 of the Rules of Court 2012 and the Practice Direction.

This chapter discusses the assessment of interest for damages in personal injury and fatal accident claims arising out of motor vehicle accidents and several related issues on the subject. It starts with defining interest, types and purposes of interest followed by the historical background on the award of interest for damages. The discussion mainly focuses on and the case of *Jefford & Anor. v Gee*.<sup>236</sup> and section 3 (1) of the English Law Reform (Miscellaneous Provisions) Act 1934.<sup>237</sup> The second part of this chapter deals with the law of interest in Malaysia. The discussion is separated into two sections; pre-Rules of Court 2012 and post-Rules of Court 2012. This chapter ends with the discussion on judges' discretionary power in awarding interest, assessing the interest rate and awarding compounded interest.

This chapter is confined to the assessment of interest for damages in personal injury and fatal accident claims arising out of motor vehicle accidents only. It does not deal with interest on contract debt, interest in suits where the Government is a party, interest on legacies or other types of civil suits where interest is applicable. The cases cited are

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<sup>235</sup> Hereinafter referred to as "the Practice Direction".

<sup>236</sup> (1970) 2 QB 130.

<sup>237</sup> Hereinafter referred to as "the Law Reform 1934".

as far as possible only relate to personal injury and fatal accident claims arising out of motor vehicle accidents. There are however instances where other type of cases are cited due to necessity and suitability to the discussion but with moderation.

## **5.2 DEFINITION, TYPES AND PURPOSES OF INTEREST**

### **5.2.1 Definition of Interest**

There are two (2) general definitions of interest. First, an amount which is agreed to be paid on a loan called principal and second, the damages to be paid for non-payment of a debt or a sum of money on an appointed day.<sup>238</sup> The second definition is applicable for interest in personal injury and fatal accident claims arising out of motor vehicle accidents. Interest in these claims is regarded as the compensation for any loss or damages suffered as the result of being kept out of the money which ought to have been paid<sup>239</sup> to the plaintiff upon delivery of the judgment by the court. Lord Wright in *Riches v Westminster Bank Ltd.*<sup>240</sup> said:

“The essence of interest is that it is a payment which become due because the creditor has not had his money at the due date. It may be regarded either as representing the profit he might have made if he had had the use of the money, or conversely the loss he suffered because he had not that use. The general idea is that he is entitled to compensation for the deprivation. From that point of view it would seem immaterial whether the

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<sup>238</sup> Dass, K.S., *The Law on Interest*, (Batu Pahat : New Law Publishers, 1980), at 1.

<sup>239</sup> Per Lord Herschell in *London, Chatham & Dover Railway Co. v South Eastern Railway Co.* (1893) AC 429. See also *Lim Yik Hua v Eastern & Oriental Hotel* [1988] 3 MLJ 151 and *Lim Eng Kay v Jaafar b Mohamed Said* [1982] 2 MLJ 156.

<sup>240</sup> (1947) AC 390.

money was due to him under a contract express or implied or a statute or whether the money was due to any other reason in law.”

### **5.2.2 Types of Interest**

There are two (2) types of interest in personal injury and fatal accident claims arising out of motor vehicle accidents; pre-judgment and post-judgment interest. Pre-judgment interest is interest awarded over damages which is awarded for the period which spans between the date the cause of action arose until the date of judgment. The purpose of this award is to compensate the plaintiff for being kept out of the money which he is entitled to. Since the defendant had the use of the money which legally belongs to the plaintiff from the date of the accident until the date of the judgment, he must compensate the plaintiff accordingly.<sup>241</sup>

Post-judgment interest is interest awarded on the judgment sum starting from the date of judgment<sup>242</sup> until the date of realization of the judgment sum by the defendant. It is the interest that accrues prior to actual payment of the judgment sum. Since a successful plaintiff have the right to the judgment sum once the judgment is delivered, he should be compensated for the time between the rendering of the judgment and the payment of the judgment sum.

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<sup>241</sup> *Lee Guan Par v Hotel Universal Sdn. Bhd.* [2005] 4 MLJ 589.

<sup>242</sup> Not the date judgment is entered.

### 5.2.3 Purposes of Interest

The purpose of awarding interest in personal injury and fatal accident claims in motor vehicle accidents are three (3) folds; to compensate the plaintiff for the delay in receiving the compensation,<sup>243</sup> to prevent unjust enrichment to the defendant as the result of withholding payment of the judgment sum<sup>244</sup> and to pressure the defendant to satisfy the judgment as soon as possible so as not to deny the plaintiff his compensation for the loss suffered. The imposition of interest will force the defendant and the insurance company insuring the vehicle at fault not to delay the proceedings on sham pleas<sup>245</sup> and to expedite payment of judgment sum so as to ensure that the plaintiff will be compensated accordingly at the earliest possible time. The rationale behind the awards of interest for damages was explained by Lord Herschell L.C in *London, Chatham & Dover Railway Co. v South Eastern Railway Co.*<sup>246</sup> where he held:

“...that when money is owing from one party to another and that other is driven to have recourse to legal proceedings on order to recover the amount due from him, the party who is wrongfully withholding the money from the other ought not in justice to benefit by having that money in his possession and enjoying the use of it, when the money ought to be in the possession of the other party who is entitled to its use”

Similarly, in *Harbutts 'Plasticine' Ltd. v Wayne Tank and Pump Co. Ltd.*,<sup>247</sup> the English Court of Appeal held:

“...the basis of an award of interest is that the defendant has kept the plaintiff out of his money; and the defendant had that use of it himself. So he ought to compensate the plaintiff accordingly.”

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<sup>243</sup> See *Hyde v Price* (1837) p. Coop 193.

<sup>244</sup> Ogus, A. I., *The Law of Damages*, (London: Butterworth, 1973), at 96.

<sup>245</sup> Jai, Janak Raj, *Motor Accident Claims Law and Procedures*, (Delhi : Universal Law Publishing, 2000), at 118.

<sup>246</sup> *Op. cit.*

<sup>247</sup> (1970) 2 WLR 198 at 212.

## 5.3 HISTORICAL BACKGROUND OF THE AWARD FOR INTEREST

### 5.3.1 The Common Law

Historically, the judicial perceptions relating to the award for interest for damages was interwoven with the stigma attached by religion and the notion of taking usury.<sup>248</sup> The early English cases relating to the award for interest for damages were riddled with inconsistencies between the prohibition of interest and the need for the same. The advance in commercial transactions in the seventeenth (17<sup>th</sup>) and eighteenth (18<sup>th</sup>) centuries<sup>249</sup> and the gradual weaning of the traditional perceptions<sup>250</sup> within the society at the time also failed to encourage judges to award interest for damages in civil suits. Interest was awarded only in contract,<sup>251</sup> in cases “where debt was secured by bill of exchange or where a promise to pay interest was implied from a usage of trade or the like.”<sup>252</sup>

The judges’ reluctance to award interest was also apparent in personal injury and fatal accident cases. Before 1970, judges were not in the practice of awarding interest for damages for the period between the date when the cause of action arose and the date of judgment. Interest was only awarded for damages for the period between the date of judgment and date of realization of the judgment.<sup>253</sup> The courts reluctance to award

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<sup>248</sup> Per Mason CJ and Wilson J in *Hungerfords v Walker*, (1989) 84 ALR 119.

<sup>249</sup> Ogus, A. L., *op. cit.* at 97.

<sup>250</sup> McGregor, Harvey, *McGregor on Damages*, (London: Sweet & Maxwell, 2003), at 530.

<sup>251</sup> Originally, under contract, no interest can be awarded if the obligation was not certain or capable of being made certain. Only in cases ‘where there is contract of payment of money on a certain day, as on the bills of exchange, promissory notes *etc*; where there has been an express promise to pay interest, or where, from the course of dealing between the parties, it may be inferred that this was their intention, or where it can be proved that money has been used and interest has actually been made’ that interest might be awarded. See Lord Ellenborough decision in *De Havilland v Bowerbank* (1807) 1 Camp. 50.

<sup>252</sup> Dass, K.S., *op.cit.*, at 1 and Luntz, Harold, *Assessment of Damages for Personal Injury and Death*, 3<sup>rd</sup> ed., (Melbourne: Butterworth, 1990), at 481. Cases such as *Eddow v Hopkins* (1780) 1 Douglas 376, *Page v Newman* (1829) 9 B.& C. 378 and *Higgins v Sargents* (1832) 2 B. & C. 348 proved that the English courts were reluctant to allow interest on money which the defendant should have paid to the plaintiff unless some contractual or statutory right to interest exist.

<sup>253</sup> By virtue of the Judgment Act 1838. The House of Lords in *London, Chatham & Dover Railway Co. v South Eastern Railway Co. op. cit.*, noted that the practice of not allowing interest was so well engrained in the English system that only legislation could affect any change in it.

interest persisted even after the introduction of section 3 of the Law Reform 1934.<sup>254</sup> Only in the Admiralty Courts that the aversion for awarding interest for damages was slightly relaxed.<sup>255</sup>

### 5.3.2 The Early English Provisions on Interest

The earliest piece of legislation which provides for the award of interest for damages is the Civil Procedure Act 1833 and the Judgment Act 1838. Both of these Acts however have their own shortcomings. Although the Civil Procedure Act 1833 was enacted to supplement the areas in which the Common Law already acknowledged the award for interest,<sup>256</sup> the provisions in the Act were too narrow and failed to bring any significant change to the law governing interest.<sup>257</sup> The Judgment Act 1838 on the other hand only allows for interest on damages for the period from spanning from the date of judgment to the date of realization of the judgment sum.<sup>258</sup> As such, the application of this section cannot be extended to the period prior to the date of judgment.

The judges' reluctance to award interest for damages and the shortcomings found in the Civil Procedure Acts 1833 and the Judgment Act 1838 were noted by the English Parliament. In 1934, the Law Reform Committee published a report<sup>259</sup> to encourage the award for interest for damages especially in personal injury and fatal accident claims.

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<sup>254</sup> T.S.T, "Interest in Damages in running-Down Cases" [1966] 1 *Malayan Law Journal* xxxi- xxxiii at xxxi.

<sup>255</sup> See *The Northumbria* (1869) L.R. 3 A. & E. 6, *Re Dundee*(1827) 2 *Haag. Adm.* 137 and *The Amalia*, (1864) 5 New Rep. 164

<sup>256</sup> Section 28 of the Act for example allowed for interest for action on debt in special circumstances such as in cases where the debt was a fixed sum under written contract payable at the specific time or if otherwise made payable by a demand in writing fixing a certain date and notifying the debtor that in default interest would be claimed. Section 29 allowed interest in actions of trover and trespass *de bonis asportatis*.

<sup>257</sup> Lord Herschell in *London, Chatham & Dover Railway Co. v South Eastern Railway Co. op. cit.* held; "When Lord Tenterden dealt with the allowance of interest in this statute he certainly introduced a language which kept such claims within narrow limits; speaking for myself they seem to be too narrow for the purpose of justice."

<sup>258</sup> Post-judgment interest. Section 17 of the Judgment Act 1838.

<sup>259</sup> Cmnd. 4546.

The suggestion in the Law Reform Committee Report was realized into section 3(1) of the Law Reform 1934.<sup>260</sup> The section reads:

In any proceedings tried in any Court of Record for the recovery of any debt or damages, the Court may, if it thinks fit, order that there shall be included in the sum for which judgment is given interest at such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the period between the date when the cause of action arose and the date of the judgment:

Provided that nothing in this section—

- (a) shall authorize the giving of interest upon interest; or
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (c) shall affect the damages recoverable for the dishonor of a bill of exchange.

The section provided a general provision empowering judges with the discretion to award interest for damages in all cases.<sup>261</sup> This discretionary power was not limited to cases in which the plaintiff has contractual or statutory right to interest only.<sup>262</sup> The section accorded judges with the discretion to decide whether to award interest for damages or not, to assess the rate of interest to be awarded, to determine on which part of the debt or damages the interest is to be awarded and to decide the period in which the interest is to be awarded.

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<sup>260</sup> The section was later repealed and superseded by section 15 (4) and (5) of the Administration of Justice Act 1982 (cap 53).

<sup>261</sup> McGregor, Harvey, *op. cit.*, at 531.

<sup>262</sup> *Butler v Forestry Commission*, unreported (1979) CA no 338.

Despite the discretionary power given to the judges above, there were three pertinent points to be noted; first, the section only allowed for simple interest. Judges were not given the discretion to award compounded interest. The prohibition originated from the traditional perception against the practice of usury. At the same time it also prevented unjust enrichment to the plaintiff. Plaintiff was entitled to simple interest only. Second, the section was not applicable for cases in which award for interest was payable as of right. This was to complement the practice of the Common Law which already acknowledged plaintiff's right to interest in cases where there was already an obligation to pay interest. Third, the section placed a limit to the discretionary power of the judge to decide on the period in which interest was to be awarded. Judges were only allowed to award interest for damages within the period spanning from the date in which the cause of action arose to the date of judgment. The power was not extended to the period after the date of judgment. This was due to the existence of section 17 of the Judgment Act 1838 which already made it compulsory for judges to award interest on judgment sum from date of judgment is pronounced to the date of realization of the judgment.<sup>263</sup>

Unfortunately, despite the power granted by section 3 of the Law Reform 1934, the judges were still reluctant to award interest for damages for tort or in personal injury and fatal accidents claims.<sup>264</sup> Even in admiralty courts where interest has generally been awarded on damages, there was no reported case where the section was applied.<sup>265</sup>

The English court's reluctance to invoke section 3(1) of the Law Reform 1934 to award interest for damages in personal injury and fatal accident claims was rectified by

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<sup>263</sup> See *Parson v Mather & Platt Ltd.* (1977) 2 All ER 715.

<sup>264</sup> T.S.T., *op. cit.*, at xxxi and xxxii.

<sup>265</sup> In *The Aizkarai Mendi* (1938) P. 263. <sup>265</sup> for example, the plaintiff's contention that interest should run from the date of accident namely when the cause of action accrued to the date of judgment as provided in section 3(1) of the Law Reform 1934 was rejected. Instead, Langton J. chose to follow the general practice of the court allowing interest from the date of the report of the registrar adjudicating the claim, i.e., interest on judgment debt. Also see *The Theems* (1938) P 197.

section 22 of the Administration of Justice Act 1969.<sup>266</sup> For convenience, section 22 (1) and (2) of the Administration of Justice Act 1969 is reproduced below:

(1) Where in any such proceedings as are mentioned in subsection (1) of this section [**section 3 of the Act of 1934**], judgment is given for a sum which (apart from interest on damages) **exceed £200** and represents or includes damages in respect of **personal injuries to the plaintiff or any other person, or in respect of a person's death**, then (without prejudice to the exercise of the power conferred by that subsection in relation to any part of that sum which does not represent such damages) the court **shall exercise such power so as to include in that sum interest on those damages** or on such part of them as the court consider appropriate, unless the court is satisfied that there are special reasons why no interest should be given in respect damages.  
*(emphasis added)*

(2) Any order under this section may provide for interest to be calculated at different rates in respect of different parts of the period for which interest is given, whether that period is the whole or part of the period mentioned in subsection (1) of this section.

The section made it compulsory for judges to award interest in all personal injury and fatal accident claims where the award exceeds £200. Judges however still have the discretion to assess the rate of interest to be awarded, to determine on which part of the damages the interest is to be awarded and the period in which the interest is to be

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<sup>266</sup> Hereinafter referred to as “the AJA 1969”. The section was later repealed and superseded by section 15 (4) and (5) of the Administration of Justice Act 1982 (cap 53).

awarded. Judges also have the discretion withhold interest when there are special reasons to do so.

### 5.3.3 The rule in *Jefford & Anor. v Gee*<sup>267</sup>

Despite the power to award interest on damages granted by section 3(1) of the Law Reform 1934 and section 22 of the AJA 1969, none of these provisions provide the method in which the interest should be assessed. The English judges were left with almost unguided discretion. Recognizing the problem, Lord Denning in *Jefford v Gee*,<sup>268</sup> laid down the following principles to regulate the assessment of the rate of interest and period in which the interest is to be awarded:<sup>269</sup>

- (a) On special damages such as loss of salary, medical expenses and the loss of personal effects, interest should be awarded from date of accident to the date of trial<sup>270</sup> at half of the appropriate rate;<sup>271</sup>
- (b) No interest on future earnings or other future loss<sup>272</sup> since *ex hypothesi* the loss has yet occurred. Furthermore plaintiff is receiving compensation in advance of his anticipated loss;<sup>273</sup>
- (c) On interest for pain and suffering and loss of amenities, interest should be awarded at appropriate rate from date of service of writ to the date of trial;<sup>274</sup>

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<sup>267</sup> (1970) 2 QB 130.

<sup>268</sup> *Op. cit.*

<sup>269</sup> Dass, S. Santhana, *Personal Injury Claims*, (Petaling Jaya: Alpha Sigma Sdn. Bhd., 2000), at 66.

<sup>270</sup> Since the purpose of awarding interest is to compensate the plaintiff for the deprivation of the use of his money, the interest for special damages is to run at the moment the money was lost to him. Plaintiff who had been deprived of the use of his money either starting from the date he was unable to work, date of payment of hospital bills or date of accident where plaintiff's personal effects were damaged must be compensated at the time these losses occurs. However, since it would be too complicated and detailed to calculate full interest for exactly every single date of loss, a broad time line was suggested i.e.; date of accident, at half of the normal rate

<sup>271</sup> 'Appropriate interest rate' is the rate payable on money in court placed on short-term investment account. See Chew, Leslie *et al.*, "A Comparative Analysis of Various Aspects in the Law of Personal Injuries in Brunei, Malaysia and Singapore" (2008) 3 *Malayan Law Journal* i-ivii, at xxix.

<sup>272</sup> See *Clarke v Rotax Aircraft Equipment Ltd.* (1975) 3 All ER 794 where it was decided that no interest is to be awarded for loss of future earning capacity.

<sup>273</sup> Ogus, A. I., *op. cit.*, at 102.

- (d) With regard to fatal accident, the interest should be awarded in lump sum that is from the date of service of the writ.<sup>275</sup>
- (e) In exceptional circumstances “as and when one party or the other had been guilty of gross delay” the court may diminish or increase the rate at which interest is awarded.
- (f) The court should itemize the damages and the judgment should state the rate of interest and the period for which it is awarded.

The discussion on section 3(1) of the Law Reform 1934 and the rule in *Jefford v Gee*<sup>276</sup> above is crucial in laying the foundation for the following sub-chapters on Malaysian provisions, practices and issues with regard to the award of interest. Although the Law Reform 1934 is not applicable in Malaysia, the pre-1956 cases are still affected by the Act by virtue of English cases which were decided according to the Act being cited and applied in Malaysia.<sup>277</sup> Similarly the rule in *Jefford v Gee*<sup>278</sup> are now considered as an established rule in Malaysia and applied as a matter of course.

## 5.4 MALAYSIAN PROVISIONS REGARDING INTEREST

The primary provision on interest for damages in Malaysia is section 11 of the CLA 1956. The section is almost an exact copy of section 3(1) of the Law Reform 1934 with

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<sup>274</sup> Since non-pecuniary damages cannot be properly divided into pre and post-trial losses, the losses are to be calculated in lump sum and interest should follow.

<sup>275</sup> Interest for damages for pain and suffering as well as loss of support becomes payable not at the time of loss but ‘from the time defendant ought to have paid...but did not’; that is at the date of the writ is served. The Court in this case rationalized its decision by pointing out that since interest ‘should be awarded to the plaintiff for being kept out of money which ought to have been paid to him,’ defendant ought to have paid once the writ is served. Hence the interest should run from the date of writ is served at normal rate.

<sup>276</sup> *Op. cit.*

<sup>277</sup> Rutter, Michael F., *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia*, 2<sup>nd</sup> ed. (Hong Kong: Butterworth Asia, 1993) at 392.

<sup>278</sup> *Op. cit.*

the exception of the omission of the word ‘of Record’. Section 11 of the CLA 1956 reads:

In any proceedings tried in any Court for the **recovery of any debt or damages**, the Court **may, if it thinks fit**, order that there shall be included in the sum for which judgment is given interest **as such rate as it thinks fit** on the **whole or any part of the debt or damages** for the **whole or any part of the period** between the **date when the cause of action arose and the date of the judgment**: (*emphasis added*)

Provided that nothing in this section—

(a) shall authorize the giving of interest upon interest;

(b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or

(c) shall affect the damages recoverable for the dishonor of a bill of exchange.

Section 11 of the CLA 1956 also carries the same effect as section 3(1) of the Law Reform 1934. It is a general provision which allows judges to have the discretion to decide whether interest is to be awarded in cases involving recovery of debt or damages.<sup>279</sup> At the same time, it also grants similar discretion to the judge in determining the interest rate, the portion of the debt or damages where interest is to be awarded and the period in which interest is to be assessed. This power is however limited to the debt or damages awarded for the period starting from the dates of the cause of action arose to the date of judgment.

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<sup>279</sup> The discretionary nature of the award for interest in personal injury and fatal accident claims is further emphasis by the absence of any equivalent provision to section 22 of the AJA 1969. Our local judges are not under any obligation to award interest in personal injury claims. This is recognized by Salleh Abbas FJ in *Lim Eng Kay v Jaafar bin Mohamed Said*, *op. cit.* when he held that; “The ordering of interest to be included in a sum for damages is a judicial discretion. Section 11 of the Civil Law Act gives fairly wide discretion to the court to order interest on the sum adjudged by the court in cases where claimant succeeds in proceedings for the recovery of debt or damages.”

Section 11 of the CLA 1956 is to be read together with Order 42 Rule 12 of the Rules of Court 2012.<sup>280</sup> The provision reads:

Subject to rule 12A, except when it has been otherwise agreed between the parties, **every judgment debt shall carry interest at such rate as the Chief Justice may from time to time determine or at such other rate not exceeding the rate aforesaid as the Court determines**, such interest to be calculated **from the date of judgment until the judgment is satisfied.** (*emphasis added*)

Pursuant to this provision, the Chief Justice, via the Practice Direction issued the following directive:

*Bagi menjalankan kuasa-kuasa yang diberikan kepada saya di bawah Aturan 30, kaedah 6(2);Aturan 42, kaedah 12; Aturan 44, kaedah 18(1b) & (2); Aturan 44, kaedah 19, Kaedah-Kaedah Mahkamah 2012, saya dengan ini mengarahkan kadar bunga di bawah peruntukan-peruntukan di atas ditentukan pada kadar 5 % setahun.*

*Arahan Amalan ini berkuatkuasa mulai 1 Ogos 2012.*

In the exercise the powers conferred upon me under Order 30, Rule 6 (2); Order 42, Rule 12; Order 44, Rule 18 (1b) & (2); Order 44, Rule 19, Rules of the Court 2012, I hereby direct the interest rate under the provisions of the above specified at a rate of 5% *per annum*.

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<sup>280</sup> The Rules of Court 2012 replaces the RHC 1980 and SCR 1980 effective from 1<sup>st</sup> August 2012. It unifies the Rules and Court Forms applicable for High Court and Session Courts' civil proceedings into one Rules of Court. See press statement issued by Attorney General Chamber, Che Wan Zaidi bin Che Wan Ibrahim "Siaran Akhbar Kaedah-Kaedah Mahkamah 2012", 2 July 2012, Malaysian Bar, 4<sup>th</sup> December 2012, <[http://www.malaysianbar.org.my/notices\\_for\\_members/siaran\\_akhbar\\_kaedah\\_kaedah\\_mahkamah\\_2012.html](http://www.malaysianbar.org.my/notices_for_members/siaran_akhbar_kaedah_kaedah_mahkamah_2012.html) >

The Practice Direction will take effect from 1 August 2012.

Order 42 Rule 12 of the Rules of Court 2012 and the Practice Direction provide for that a maximum interest rate of five (5) percent *per annum*<sup>281</sup> is to be calculated on judgment debt starting from the date of judgment to the date where the judgment sum is realized. The rate however is variable at the discretion of the presiding judge provided that the new rate does not exceed five (5) percent.<sup>282</sup> The Practice Direction also gives the Chief Justice the discretion to determine and vary the maximum interest rate.<sup>283</sup> The Rules of Court 2012 abolishes the SCR 1980<sup>284</sup> and the HRC 1980.<sup>285</sup>

However, despite the forethought and considerations of the Rules Committees in enacting the Rules of Court 2012, there are a few areas in which the application of the rule as well as the Practice Direction is still unclear, especially with regard to the followings:

#### **5.4.1 Which Provision Governs the Pre-judgment Interest?**

Prior to the introduction of the Rules of Court 2012, the assessment of interest at the High Court and Subordinate Courts was governed by the RHC 1980 and SCR 1980 respectively. The RHC 1980 unfortunately only provided for post-judgment interest. It did not provide for pre-judgment interest. Nevertheless, the High Court's judges had been awarding pre-judgment interest at the rate of three (3) to four (4) percent for special damages from the date of cause of action arose to date of judgment and six (6)

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<sup>281</sup> Unless agreed by the parties.

<sup>282</sup> This power is similar to Order 29 Rule 12 of the SCR 1980 (repealed) and Order 42 Rule 12 of the RHC 1980 (repealed) which provided for a maximum rate of four (4) percent per annum. The rate was variable at the discretion of the judge provided that the new rate does not exceed four (4) percent.

<sup>283</sup> Prior to the Rules of Court 2012, the Rules Committees was empowered by section 4(g) of the Subordinate Court Rules Act 1955 (Act 55)(rev. 1971) and section 16 of the CJA 1964 to make rules relating to the rate of interest. This power is discretionary.

<sup>284</sup> For Subordinate Courts, Order 28 Rule 18 of the SCR 1980 (repealed) provided for pre-judgment interest. Order 29 Rule 12 of the SCR 1980 (repealed) provided for post-judgment interest.

<sup>285</sup> For High Court, Order 42 Rule 12 of the RHC 1980 (repealed) provided for post judgment interest. There was no provision for pre-judgment interest in the RHC 1980 (repealed).

to eight (8) percent for general non-pecuniary damages from the date of writ to the date of judgment.<sup>286</sup>

The SCR 1980 on the other hand contained Order 28 Rule 18. The provision provided for pre-judgement interest for Subordinate Courts. It reads:

In any action for the recovery of debt or damages, the Court may, if it thinks just, order that there shall be included in the sum for which judgment is given interest at **such rate not exceeding 4 per centum on the whole or any part of the debt or damages for the whole or any party of the period between the date when the cause of action arose and the date of the judgment:** (*emphasis added*)

Provided that nothing in this rule:

- (a) shall authorize the giving of interest upon interest:
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise: or
- (c) shall affect the damages recoverable for the dishonor of a bill of exchange.

Order 28 Rule 18 of the SCR 1980 gave the discretion to the Subordinate Courts' judges to award pre-judgment interest. This discretionary power however was limited. Although judges have the discretion to decide on the rate of pre-judgment interest, rate

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<sup>286</sup> See *Murtadza bin Mohammed Hassan v Chong Swee Pian, op. cit.*, *Chan Lye Huat v Tan Ong Kong* [1985] 2 MLJ 112, *Lau Ee Ee v Tan King Kwong* [1986] 1 MLJ 308, *Lee Ann v Mohammad Sahari bin Zakaria* [1987] 1 MLJ 252, *Santhanaletchumy Subramaniam v. Zainal Saad & Anor.* [1994] 4 CLJ 192, *Athmalingam Muniandy & Anor v. Khu Li Huang* [2011] 2 CLJ 619 and *Lau Kung Kai v Abu Serah bin Bol & Anor.* [2008] 10 CLJ 245.

cannot exceed four (4) percent *per annum*.<sup>287</sup> Judges also were not allowed to award compounded interest, interest on contractual debt and interest for damages for dishonor bill of exchange. However, after the SCR 1980 was repealed by the Rules of Court 2012. The provision governing the pre-judgment interest for Subordinate Courts was also repealed.

Other than repealing the RHC 1980 and SCR 1980, the Rules of Court 2012 also introduce a new provision to govern the award for interest. Order 42 Rule 12 of the Rules of Court 2012 specifically states that interest on judgment debt is to be calculated from the date of judgment to the date of realization of the judgment sum by the defendant i.e. post-judgment interest. It however does not provide anything for the period between the date when the cause of action arose to the date of the judgment i.e. pre-judgment interest. The Practice Direction also does not contain any provision on pre-judgment interest. As such, there is nothing in the current court's rules which provides for pre-judgment interest.

#### **5.4.2 Whether the pre-judgment interest is totally at the discretion of the judges?**

The absence of any provision to govern the pre-judgment interest is not new. As mentioned above, the High Court was not governed by any provision in respect of the assessment of pre-judgment interest even before the introduction of the Rules of Court 2012. The absence of any specific provision in the Rules of Court rule however does not mean that the award for interest totally unregulated by any statutory provision.

Section 11 of the CLA 1956 provides for the award for interest on damages for the period between the cause of action arose to the date of judgment i.e. pre-judgment

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<sup>287</sup> Initially, the rate was set at eight (8) percent *per annum*. The rate was reduced to four (4) percent in 2011 vide the section 2 of the Subordinate Courts (Amendment) Rules 2011(PU (A) 211/2011). The amendment was gazetted on 29<sup>th</sup> June 2011.

interest. As such, in the absence of any provision in the Rules of Court 2012 and the Practice Direction, section 11 of the CLA 1956 can be applied with regard to pre-judgment interest. The term ‘may’ in the section convey the discretionary nature of the provision. Section 11 of the CLA 1956 grants judges the discretion to award pre-judgment interest as and when they see it fit to do so. Judges also have the discretion to decide on the interest rate, the part of damages and the period in which the interest is to be awarded.

It is therefore concluded that the absence of specific provision in the Rules of Court 2012 governing the assessment of pre-judgment interest, the fact that Order 42 Rule 12 of the Rule of Courts 2012 is only applicable for post-judgment period and the discretionary nature of section 11 of the CLA 1956 all lead to the conclusion that judges currently have a wide discretion in respect of pre-judgment interest This discretion is only restricted by provisos (a) to (c) to section 11 of the CLA 1956. As such, other than prohibiting judges from awarding compounded interest, interest on contractual debt and interest for damages for dishonor bill of exchange, judges currently have a wide discretion with regard to pre-judgment interest for damages in personal injury and fatal accident claims arising out of motor vehicle accidents.

## 5.5 THE MANDATORY OBLIGATION TO AWARD INTEREST

Under Common Law, no interest is recoverable unless ‘some contractual or statutory right to interest’ exists.<sup>288</sup> It should follow that plaintiffs in personal injury and fatal accident claims arising out of motor vehicle accidents have no absolute right to interest on damages unless it is made compulsory by the statutes. Unlike section 17 of the Judgment Act 1838 and section 22 of the AJA 1969<sup>289</sup> in England, there is nothing in our local provisions prior to Order 42 Rule 12 of the Rules of Court 1012 which specifically direct the judges to award interest. As such, judges are not obligated to award interest for damages in personal injury and fatal accident claims arising out of motor vehicle accident. Plaintiff also has no absolute right to interest unless and until interest is ordered by the judge.

The introduction of Order 42 Rule 12 of the Rules of Courts 2012<sup>290</sup> creates some confusion to an otherwise clear stand above. The phrase ‘every judgment debt **shall** carry interest...’ in the provision raises the possibility that interest on damages is mandatory. The term ‘shall’ signifies that interest must be awarded and judges have no discretion to deny the successful plaintiff interest on damages. Therefore, it is crucial that the question of whether the judges’ discretion to award interest for damages has been abolished by Order 42 Rule 12 of the Rules of Courts 2012 or in other word whether interest on damages is an absolute right of the successful plaintiff in personal injury and fatal accident claims arising out of motor vehicle accidents is resolve. The answer to the above questions can be found by looking at the following;

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<sup>288</sup> Dass, K.S., *op. cit.*, (1980), at lxxxv. Also see *London, Chatham and Dover Railway Co v South-Eastern Railway Co.*, *op.cit.*

<sup>289</sup> The sections make it compulsory for the English courts to award interest in all personal injury and fatal accident cases.

<sup>290</sup> Similar mandatory effect can be seen in Order 42 Rule 12 of the RHC 1980 (repealed) and Order 29 Rule 12 of the SCR 1980 (repealed).

### 5.5.1 Statutes

As concluded above, the award for pre-judgment interest is currently governed by section 11 of the CLA 1956. The section allows judges the discretion to award interest for damages from the date the cause of action arose until the date of judgment i.e. pre-judgment interest. This discretionary power is absolute. Judges are not under any obligation to award interest unless and until they see it just to do so. This rule was highlighted in *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)*.<sup>291</sup> The Supreme Court endorsed the trial court's decision in not awarding pre-judgment interest on the ground that the power under section 11 of the CLA 1956 is discretionary and the Court saw no reason to review the trial judge's decision as it was assumed that the judge had exercised his discretion judiciously. There is no obligation on the judges to award pre-judgment interest especially when there are special reasons why no interest should be given. Similarly, section 11 of the CLA 1956 also allows judges the discretion to decide on the rate of interest to be awarded. There is no maximum or minimum rate imposed. This discretion was also found in Order 28 Rule 18 of the SCR 1980. The provision also did not confer any right to the plaintiff with regard to interest unless and until it is ordered by the judge. The term 'may' in the provision retained the discretionary power of the judges and imposed no obligation on them to award pre-judgment interest.

The clarity with regard to judges' discretionary power to award pre-judgment interest however does not extend to post-judgment interest. The wording in Order 42 Rule 12 of the Rules of Court 2012 which states that “**every judgment debt shall carry interest** at the rate as the Chief Justice may from time to time determine...” raises the

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<sup>291</sup> *Op cit.*

possibility that the Rules Committees<sup>292</sup> intends to make it mandatory for judges to award post-judgment interest by placing the imperative terms ‘every judgment’ and ‘shall’ in the provision. The imperative nature of the provision also gives the impression that all successful plaintiffs in personal injury and fatal accident claims arising out of motor vehicle accidents have an absolute right to receive post-judgment interest.

The mandatory nature of post-judgment interest can also be found in the now repealed court’s rule i.e., Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 12 of the SCR 1980. Order 42 Rule 12 of the RHC 1980 governed the post-judgment interest for High Court. The provision reads:

**Every judgment** debt **shall** carry interest **at the rate of 4 per centum** per annum **or at such other rate** not exceeding the rate aforesaid as the Court directs (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied. (*emphasis added*)

Almost in the same words, Order 29 Rule 12 of the SCR 1980 provided for post-judgment interest for Subordinate Courts. The provision reads:

**Every judgment** debt **shall** carry interest **at the rate of 4 per centum** per annum, **or at such other rate** not exceeding the rate aforesaid as the Court shall direct (unless the rate has been otherwise agreed upon between the parties), such interest to be calculated from the date of judgment until the judgment is satisfied. (*emphasis added*)

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<sup>292</sup> Rules Committee and the Subordinate Courts Rules Committee.

These provisions stated ‘every judgment debt **shall** carry interest at the rate of 4 per centum...’ The term ‘shall’, raised the presumption that judges were obligated to award post-judgment interest and plaintiffs were entitled to the same as of right.<sup>293</sup>

The notion that post-judgment interest is mandatory has deep-rooted origin. From the historical point of view, the Malaysian Legislature seems to have always intended to make post-judgment interest mandatory upon the judges and the absolute right of the successful plaintiff. An analysis of the provisions that preceded Order 42 Rule 12 of the Rules of Courts 2012, Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 12 of the SCR 1980 indicates that awarding pre-judgment interest had always been made mandatory upon judges by statutory provisions and court’s rules. Order 34 Rule 41 of the Rules of Supreme Courts 1937 for example reads:

The Court **shall**, on the trial of any action in which interest is recoverable or in the hearing of any application for judgment in such action **give judgment for interest at the rate**, if any agreed upon by the parties, and if no rate has been agreed upon, at such rate not exceeding **six per centum per annum**, as the Court or judge thinks fit. (*emphasis added*)

The mandatory nature of post-interest was further strengthened by Order 39 Rule 13 of the same rule of court. The provision stated:

Unless it has been otherwise agreed between the parties, **every judgment debt shall** carry interest at the rate of **6 per centum per annum** or at such rate not exceeding the rate aforesaid as the court of judge directs, such interest to be calculated from the **date of judgment until the judgment is satisfied**. (*emphasis added*)

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<sup>293</sup> Dass, K.S., *op. cit.*, at 11. See also Yeo Yang Poh, “A Matter of Interest”, (1986) 2 *Malayan Law Journal* clxxiii – clxxxix, at clxxvii where he concluded that the effect of Order 42 Rule 12 of the HCR 1980 is that “interest is to be imposed on every judgment (“shall”) unless the court otherwise orders.”

The Rules of the Supreme Court 1937 was later superseded by the Rules of Supreme Courts 1957. Order 40 Rule 11(2) of the Rules of Supreme Courts 1957 established the mandatory effect of post-judgment interest by stating that “every judgment for the payment of money shall bear interest...” KS Dass contended that although the mandatory nature established by the Rules of the Supreme Court 1937 was reduced to discretionary by Order 40 Rule 11(1) of the Rules of Supreme Courts 1957, the application of Rule 11(1) was limited to pre-judgment interest only. Since Rule 11(2) is not confined to any specific period, it was applicable to post-judgment interest. The courts were obligated to award post-judgment interest by virtue of the term ‘shall’ in the provision.<sup>294</sup> For convenience purpose, the provision in Order 40 Rule 11 is reproduced below:

- (1) In any proceedings tried in the Supreme Court for the recovery of any debt or damages, the Court **may**, if it thinks fit, order that there shall be included in the sum for which judgment is given interest as such rate as it thinks fit on the whole or any part of the debt or damages for the whole or any part of the **period between the date when the cause of action arose and the date of the judgment:**

Provided that nothing in this section—

- (a) shall authorize the giving of interest upon interest;
- (b) shall apply in relation to any debt upon which interest is payable as of right whether by virtue of any agreement or otherwise; or
- (c) shall affect the damages recoverable for the dishonor of a bill of exchange.

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<sup>294</sup> Dass, K.S., *op. cit.*, at 8.

(2) **Every judgment** for the payment of money **shall** bear interest at the **rate of six per cent per annum.** (*emphasis added*)

The mandatory effect of Order 40 Rule 11(2) of the Rules of Supreme Courts 1957 on post-judgment interest was further emphasized by Order 42 Rule 16 of the same rule of court. The provision stated:

**Every** writ of execution for the recovery of money **shall** be indorsed with a direction to the sheriff, or other officer or person to whom the writ is directed, to levy the money really due and payable and sought to be recovered under the Judgment or order, stating the amount, and also to levy interest thereon, if sought to be recovered at the rate of **6 per cent per annum, from the time when the judgment or order was entered or made**, provided that in cases where there is an agreement between the parties that more than 6 per cent interest shall be secured by the judgment or order, then the endorsement may be accordingly to levy the amount of interest so agreed. (*emphasis added*)

Therefore, by virtue of Order 42 Rule 12 of the RHC 1980, Order 29 Rule 12 of the SCR 1980, Order 34 Rule 41 of the Rules of Supreme Courts 1937, Order 39 Rule 13 of the Rules of Supreme Courts 1937, Order 40 Rule 11(2) of the Rules of Supreme Courts 1957 and Order 40 Rule 11(2) of the Rules of Supreme Courts 1957 awarding post-judgment interest was mandatory upon the presiding judges. It also became the absolute right of the plaintiffs.

KS Dass however is of the opinion that there is nothing in Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 12 of the SCR 1980<sup>295</sup> which create mandatory obligation on the judges to award post-judgment interest or allowed interest as of right to the litigants.<sup>296</sup> He argued that the mandatory nature of these provisions was irrelevant since the provisions themselves were invalid on the ground of them being substantively *ultra vires*.<sup>297</sup> Both of these provisions had exceeded the power conferred by their enabling Act; the CJA 1964 and the SCA 1948. Since section 25 (2) read together with para 7 of the CJA 1964 and section 99A read together with para 21 of 3<sup>rd</sup> schedule of the SCA 1948 only confer power to the judges to award interest as an additional power, the CJA 1964 and SCA 1948 do not in any way make it compulsory for judges to award interest. Copies of the above provisions are reproduced below:

Section 25 (2)CJA 1964:

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule:

Provided that all such powers shall be exercised in accordance with any written law or rules of court relating to the same.

Para 7 of the CJA 1964:

Power to direct interest to be paid on debts, including judgment debts, or on sums found due on taking accounts between parties, or on sums found due and unpaid by receivers or other persons liable to account to the Court.

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<sup>295</sup> Note that since the wordings in Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 12 of the SCR 1980 are substantially similar to Order 42 Rule 12 of the Rules of Court 2012 especially with respect to the terms 'every judgment' and 'shall' the same arguments applies with regard to the effect of Order 42 Rule 12 of the Rules of Court 2012 on the issue of mandatory post-judgment interest.

<sup>296</sup> Dass, K.S., *op. cit.*, at 9. .

<sup>297</sup> *Id.*, at 9.

Section 99A of the SCA 1948:

In amplification and not in derogation of the powers conferred by this Act or inherent in any court, and without prejudice to the generality of any such powers, every Sessions Court and Magistrates' Court shall have the further powers and jurisdiction set out in the Third Schedule.

Para 21 of 3<sup>rd</sup> schedule of the SCA 1948:

Power to direct interest to be paid on debts, including judgment debts or on sums found due on taking accounts between parties or on sums found due and unpaid by receivers or other persons liable to account to the court.

KS Dass also opined that in enacting Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 12 of the SCR 1980, the Rules Committees had acted beyond the power conferred by their enabling Acts. Since both section 16(i) of the CJA 1964 and section 4(g) of the SCRA 1955 only grant the discretionary power to the Rule Committees to regulate the rate of interest, the Committees has acted beyond the power conferred to them when they imposed the mandatory post-judgment interest in Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 12 of the SCR 1980. This line of arguments was agreed upon by the High Court of Kuching in *Pelita Leisures Sdn. Bhd. v Tsai Chee Jung*.<sup>298</sup> Copies of section 16(i) of the CJA 1964 and section 4(g) of the SCRA 1955 are reproduced below:

Section 16(i) of the CJA 1964:

Rules of court may be made for the following purposes:

- (i) for regulating the rate of interest payable on all debts, including judgment debts, or on the sums found due on taking accounts

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<sup>298</sup> [2007] 8 MLJ 205.

between parties, or on sums found due and unpaid by receivers  
or other persons liable to account to the Court:

Provided that in no case shall any rate of interest exceed eight per  
centum per annum, unless it has been otherwise agreed between  
parties;

Section 4(g) of the SCRA 1955:

Subject to any rules of court made under the Courts of Judicature Act  
1964 (Act 91), the Committee may make rules for the following purposes:

(g) for regulating the rate of interest recoverable on debts,  
including judgment debts, or on the sums found due on taking  
accounts between parties:

Provided that in no case shall any rate of interest exceed eight per  
centum per annum, unless it has been otherwise agreed between  
parties;

KS Dass's attack on the validity of Order 42 Rule 12 RHC 1980 and Order 29 Rule 12  
SCR 1980 was however disputed by Yeo Yang Poh.<sup>299</sup> Yeo Yang Poh's main  
contention rest on the fact that the enabling provision in section 25(2) and para 7 of  
CJA 1964 is subject to other existing provisions or rules of courts. As such, the  
discretionary power granted by the section is subject to the mandatory power by the  
Order 42 Rule 12 of the RHC 1980.<sup>300</sup> The position in the Subordinate Courts is a bit  
tricky since section 99A and para 21 of the 3<sup>rd</sup> Schedule to the SCA1948 do not contain  
similar proviso as in section 25(2) of the CJA 1964. However, according to Yeo Yang  
Poh, since all power of the court must be exercised in accordance with other provisions  
and rules, the application of section 99A and para 21 of the 3<sup>rd</sup> Schedule must also be

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<sup>299</sup> Yeo, Yang Poh, *op. cit.*, at clxxviii.

<sup>300</sup> See proviso to section 25(2) of the CJA 1964.

subjected to Order 29 Rule 12 SCR 1980. He further elaborated that the discretionary power conferred by section 16(i) and section 4(g) of the SCRA 1955 is confined only to the fact that the Rule Committees cannot be forced to make rule in pursuance to the sections. It does not limit the power of the Committees from making any rule as they see fit in the attempt to regulate interest. He concluded that by virtue of the above arguments, Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 12 of the SCR 1980 were not *ultra vires*. Thus, the validity of these provisions cannot be the ground for arguing that awarding post-judgment interest is not mandatory on the judges or not the right of the successful plaintiffs.

On this point, the researcher humbly submits that looking at the provisions as well as the reasoning given by the writers above, too much attention has been given to the term ‘shall’ that we forget “that rules of procedure could not create substantive rights”.<sup>301</sup> Order 42 Rule 12 of the Rules of Court 2012, Order 29 Rule 12 of the SCR 1980, Order 42 Rule 12 of the RHC 1980, Order 34 Rule 41 and Order 39 Rule 13 of the Rules of the Supreme Courts 1937 and Order 40 Rule 11(2) and Order 42 Rule 16 Rules of the Supreme Courts 1957 are merely rules of procedure. They cannot impose mandatory post-judgment interest. Therefore, the provisions in these rules should not be read as granting absolute right to post-judgment interest to all successful plaintiffs in personal injury and fatal accident claims arising out of motor vehicle accidents. “Any form of interpretation to give mandatory effect to rules of procedure would be against procedural jurisprudence”.<sup>302</sup>

The right to interest originates from the provisions conferring additional power to High Courts and Subordinate Courts in section 25 (2) read together with para 7 of the CJA

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<sup>301</sup> Per Hamid Sultan JC in *Pelita Leisures Sdn. Bhd. v Tsai Chee Jung*, *op. cit.*

<sup>302</sup> *Ibid.*

1964 and section 99A read together with para 21 of 3<sup>rd</sup> schedule of the SCA 1948. Since these provisions only provide that the courts shall have the power to direct interest, it should be read as an enabling provisions without any obligatory effect. The term ‘shall’ in Order 42 Rule 12 RHC 1980 and Order 29 Rule 12 of SCR 1980 should also be read in the same vein. Hamid Sultan JC in *Pelita Leisures Sdn. Bhd. v Tsai Chee Jung*<sup>303</sup> to the researcher’s mind had correctly interpreted the term ‘shall’ as (even in statutes) not necessarily conveying mandatory or imperative obligation. It may be interpreted as conferring discretionary power only. He referred to *Re Davis*,<sup>304</sup> where Starke J opined:

“The word ‘shall’ does not always impose an absolute and imperative duty to do or omit the act prescribed. The word is facultative: it confers a faculty or power. ... The word ‘shall’ cannot be construed without reference to its context.”

Similarly to *State of UP v Babu Ram*,<sup>305</sup> where Subba Rao J opined:

“The relevant rules of interpretation may be briefly stated thus: when a statute uses the word ‘shall’, prima facie it is mandatory, but the court may ascertain the real intention of the Legislature by carefully attending to the whole scope of the statute. For ascertaining the real intention of the Legislature the court may consider, inter alia, the nature and the design of the statute, and the consequences which would follow from construing it one way or the other, the impact of other provisions whereby the necessity of complying with the provisions in question is avoided, the circumstances, namely, that the statute provides for a contingency of the non-compliance with the provisions, the fact that the non-compliance with

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<sup>303</sup> *Op. cit.*

<sup>304</sup> [1947] 75 CLR 409.

<sup>305</sup> AIR [1961] SC 751.

the provisions is or is not visited by some penalty, the serious or trivial consequences that flow therefrom, and, above all, whether the object of the legislation will be defeated or furthered.”

It should also be noted that before the enactment of the Rules of Supreme Courts 1937 and the Rules of Supreme Courts 1957, the earliest piece of uniformed legislation which regulated the award of interest in civil suits in Malaysia was section 207 of the Civil Procedure Code (Cap 15) 1918.<sup>306</sup> The section gave clear discretionary power to the judges to award interest for pre-trial, pre-judgment and post-judgment period.<sup>307</sup> The section provided that the courts, in addition to pre-trial and pre-judgment period, may award interest for post-judgment period up to the date of payment or any earlier date at a maximum rate of eight (8) percent *per annum*. The section reads:

- (i) Where and in so far as a decree for the payment of money, the Court **may** in the decree order interest at such rate, not exceeding eighteen per cent per annum, as the Court deems reasonable to be paid on the principal sum adjudged from the date of the suit to the date of decree in addition to any interest, which shall in no case exceed eighteen per cent per annum, adjudged on such principal sum for any period prior to the institution of the suit, with further interest at such rate as the Court deems reasonable, **not exceeding eight per cent per annum, on the aggregate sum so adjudged from the date of the decree to the date of payment** or to such earlier date as the Court thinks fit.

- (ii) Where such a decree **is silent** with respect to the **payment of further interest** on such aggregate sum as forsaid **from the date of the decree**

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<sup>306</sup> Loh, Siew Cheang, “Order 42 Rule 12 of the Rule of High Courts 1980, and All That”, (1987) 2 *Malayan Law Journal* ccxxxiv, at ccxv.

<sup>307</sup> See *Tara Singh v T.M. Banerji Sewa Singh* 7 F.M.S.L.R 58.

**to the date of payment** or other earlier date, the **court shall be deem**  
**to have refused such interest**, and separate suit therefore shall not lie.

*(emphasis added)*

Aside from granting power to the courts to award interest in all civil suits, there was nothing in the provision which made post-judgment interest mandatory. Sub-section (ii) reiterated the discretionary nature of post-judgment interest by stating that should the judge refuse to allow post-judgment interest, no further suit may be file on the matter of interest.

As such, it is clear that other than the provisions in the Rules of Court 2012, the RHC 1980, the SCR 1980, the Rules of Supreme Courts 1937 and the Rules of Supreme Courts 1957, all of which are merely rules of procedures, there is no primary Act which imposes mandatory pre-judgment interest and provides that the pre-judgment interest as the absolute right of the plaintiffs. Therefore, it is concluded that notion that post-judgment is mandatory was made under the mistaken interpretation of the term ‘shall’ in Order 42 Rule 12 of the Rules of Court 2012, Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 12 of the SCR 1980. Judges are under no obligation to award post-judgment interest in personal injury and fatal accident claims arising out of motor vehicle accidents. Plaintiffs are entitled to post-judgment interest only when judges choose to award the same.

On the other hand, even if the term ‘shall’ does carry a mandatory effect with regard to post-judgment interest, it is submitted that judges still retain the discretion to decide on the rate of interest. There is nothing in Order 42 Rule 12 of the Rules of Court 2012 which indicates that the rate of interest is fixed at the rate which the Chief Justice

determined. The five (5) percent *per annum* is the maximum rate that judges may allow for post-judgment interest. Judges is at liberty to vary the rate to any amount as they see fit. As such, should judges decide that the facts of the case justifies no post-judgment interest, they can always award zero (0) percent interest. By virtue of allowing zero (0) percent interest they have discharged their duty to award post-judgment interest although at zero (0) percent.

### 5.5.2 Rationale

Aside from the above, the answer to the question of whether awarding interest in personal injury and fatal accident claims arising out of motor vehicle accidents is mandatory upon the judges can also be derived using logic. Theoretically, many believe that interest is compulsory because plaintiffs' right to damages arises at the date when the cause of action arose or at the very least the date the writ was issued.<sup>308</sup> Since interest is awarded to compensate the plaintiffs for the delay in receiving the damages due to them, plaintiff's right to interest should also arise at the same time. The learned RK Nathan J in the final point of his judgment in *Tan Phaik See v Multi Purpose Insurance Berhad*,<sup>309</sup> endorsed similar notion by saying that a plaintiff is entitled to 'his judgment debt' once his suit was filed. The insurance company should be held accountable for withholding the damages owed to the plaintiff.

On this point, it is humbly submitted in order to determine whether judges are required to award interest (thus, making interest an absolute right of the plaintiffs), it is of upmost importance to first determine whether the damages is plaintiffs' to begin with. Since the defendants' liability to pay damages in fault-based personal injury and fatal

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<sup>308</sup> Cane, Peter, *Atiyah's Accidents, Compensation and the Law*, (Butterworth : London, 1993), at 123.

<sup>309</sup> [2004] 6 MLJ 474.

accident claims arising out of motor vehicle accidents depends on the decision of the court, unless and until the issue of liability<sup>310</sup> had been decided by the court, there is no obligation on the defendants to pay damages to the plaintiffs. The pronouncement of liability is the act which establishes the plaintiffs' right.<sup>311</sup> As such, damages does not belongs to the plaintiffs until the final pronouncement of liability. This negates the theory that plaintiffs' right to damages in fault-based personal injury and fatal accident claims arising out of motor vehicle accidents arises at the date the cause of action arose or the date the writ is filed. There is no issue of keeping the plaintiffs out of their damages<sup>312</sup> since the damages is yet to become plaintiffs' until final judgment is delivered.

Arguing on the same ground, the notion that awarding interest is mandatory upon the judges was also challenged by T.S.T.<sup>313</sup> T.S.T, in his article asked some rather provocative questions in relation to the rationale submitted by the plaintiff in *G Sivarajan v Swee Lam Estate (M) Ltd, op. cit.*<sup>314</sup> In his submission, plaintiff's counsel submitted that a plaintiff's right to interest is derived from the "inequity of keeping the plaintiff out of the use of money legitimately due to him for unconscionably long time." In respond to this submission, T. S. T. asked "whose iniquity?", "whose money?" and "whose conscience?" do the plaintiff referred to. Since "an award of interest is not to compensate a successful party for any damage done but for him being kept out of his money,"<sup>315</sup> T.S. T. concluded that defendant's conscience is clear as there is no inequity of keeping the money from the plaintiff as long as the final judgment is yet to be delivered. Therefore, interest is not the absolute right of the plaintiff. Judges cannot be compelled to award interest.

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<sup>310</sup> Who caused the accident.

<sup>311</sup> *Ex parte Fewing* (1883) 25 Ch. D 338

<sup>312</sup> Rutter, Michael F., *op. cit.*, at 414. Unless the liability has been conceded or agreed upon by the parties prior to the date of judgment.

<sup>313</sup> T.S.T., *op.cit.*, at xxxiii.

<sup>314</sup> [1966] 1 MLJ xvii.

<sup>315</sup> Edgar Joseph Jr J (as he then was) in *United Malayan Banking Corp v Sykt Perumahan Luas Sdn. Bhd.* [1991] 3 MLJ 181.

At the same time, it is also humbly submitted that the plaintiffs' right to interest by virtue of 'judgment debt' as mentioned by R K Nathan J in *Tan Phaik See v Multi Purpose Insurance Berhad*<sup>316</sup> above is also arguable. The argument originates from the definition of the term 'judgment debt' itself. The term 'judgment debt'<sup>317</sup> which gives rise to plaintiff's right to his damages basically depends on whether there is an obligation on the defendants to pay the damages to the plaintiffs. Since the Session Court and the High Court in the case had rejected the plaintiff's claim for loss of dependency, there was no obligation on the defendant's insurer to pay damages to the plaintiff. The obligation only arose after the appeal was allowed by the Court of Appeal. Thus, it is perplexing why the learned judge commented that it was 'inequitable for the defendant's insurer to sit on the moneys due to injured person and accrue interest on that sum for their own benefit'<sup>318</sup> when the obligation to pay arose after the appeal was allowed.

Plaintiffs' right to interest in fault-based personal injury and fatal accident claims arising out of motor vehicle accidents must be distinguished from their right to interest under contract. Defendants' liability in contract is apparent and ascertainable via the contract signed. In cases where the plaintiffs had been kept from the use of his money, judges should award interest at a commercial rate on the basis that if the money had been paid to the plaintiff, he would have had the use of it.<sup>319</sup> However, in personal injury and fatal accident claims arising out of motor vehicle accidents, there is no 'iniquity' to the plaintiff since the damages is yet to be determined prior to the

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<sup>316</sup> *Op. cit.*

<sup>317</sup> Idris Yusoff J in *Perumal a/l Manickam v Malaysian Co-Operative Insurance Society Ltd.* [1995] 2 MLJ 144, referred to Stroud's Judicial Dictionary and Oxford Companion to Law, held that the term 'debt' is defined as a sum 'payable in respect of a liquidated money demand, recoverable by action' and 'that which is owed by one person to another, particularly money payable arising from and by reason of a prior promise or contract' respectively. As such, the term 'debt' generally has one or other of two meanings: it can mean obligation to pay money or it can mean a sum of money owed.

<sup>318</sup> Per RK J Nathan, in *Tan Phaik See v Multi Purpose Insurance Berhad.*, *op. cit.*

<sup>319</sup> See *Kemp v Tolland* (1956) 2 Lloyd's Rep 681.

judgment. Plaintiffs have no absolute right to interest until judgment is pronounced.<sup>320</sup> Raja Azlan Shah J (as he was then) in *Yee Boon Heng v Tan Chwee*<sup>321</sup> also distinguished plaintiffs' right to interest in contract and personal injury and fatal accident claims arising out of motor vehicle accidents by saying:

“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.”

Furthermore, generally, the ‘actual defendant’ in personal injury and fatal accident claims arising out of motor vehicle accidents is the insurance company insuring the vehicle at fault. It is only reasonable that the company requires the issue of quantum and liability to be settled before paying the damages.<sup>322</sup> It would not be equitable for the insurance company to be liable for interest before the quantum and liability have been ascertained. As such, interest is not the absolute right of the plaintiff unless final judgment had been given. In a Singaporean case of *Lim Cheng Wah v Ng Yaw Kim*<sup>323</sup>

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<sup>320</sup> See *Ban Pet Hock v Ong Ah Ho* [1966] 2 MLJ 253, Choor Singh J in dismissing the plaintiff's application for interest under section 8 of the Singapore Civil Law Ordinance (*in pari materia* with section 11 of the CLA 1956), held that the defendant's position in suits for personal injury motor accident claims and contract are not similar.

<sup>321</sup> *Op cit.*

<sup>322</sup> Section 96 of the Road Transport Act 1987 (Act 333) states that the insurance company has a statutory duty to satisfy the judgment once the plaintiff obtained the same against the defendant (person insured by the policy) and a notice had been sent to the insurance company. The insurer will be bound by section 96 and their undertaking in the policy to satisfy the judgment by paying direct to the plaintiff after the existence of liability of insured or his authorized driver toward the plaintiff had been established either via court judgment, arbitration or agreement (consent settlement).

<sup>323</sup> [1985] 2 MLJ 82.

the court held that the award of interest on the amount for which the judgment is given is fully within the discretion of the court. Only after the final pronouncement of judgment or in situations where defendant admits his liability at appropriate stage prior to the judgment that the plaintiff's right to interest arises, the compensation becomes his. The courts however still retain the discretion to determine the rate of interest to be paid.

“In every case, whether it be one on contract or tort, where a judgment for payment of a certain sum is given against a defendant it is given on the basis that the defendant should have admitted the claim and paid the appropriate sum at the appropriate time, i.e. when it is due and payable. In the case of a claim for a liquidated sum under a contract, the precise amount is ascertained and once liability is established judgment will be given for that amount. In the case of a claim for damages -- it may be one on tort or on contract both the liability and the quantum will have to be determined and once determined, judgment will be given accordingly. In both cases *if judgment is given, it is given on the basis that the plaintiff is entitled to the sum adjudged and should have been paid by the defendant.* Section 9 of the Civil Law Act applies to "recovery of any debt or damages", and there is nothing in this section to suggest that recovery of damages in a tortious claim should be excluded. An award of interest on the amount for which judgment is given is a matter fully within the discretion of the Court. In a claim for damages on tort, *if the defendant admits liability at the appropriate stage and assessment of the quantum is delayed owing to no fault of the defendant, the Court will no doubt take this into account in deciding whether or not to award interest.*”

In conclusion, it is humbly submitted although the provision in the Rules of Court 2012 is expressed in the imperative ‘shall’, it is certainly not the intention of the Rules Committees to impose compulsory interest in all personal injury and fatal accident claims arising out of motor vehicle accidents. To do so would be contrary to the discretionary power granted by section 11 of the CLA 1956, section 25(2) read together with para 7 to the CJA 1964 and section 99A read together with para 21 of the 3<sup>rd</sup> schedule to SCA 1948. Since there is no equivalent provision in Malaysia to section 22 of AJA 1969 or section 17 of the Judgment Act (1838), interest remains at the discretion of the presiding judge and only become the plaintiff’s right once the judge orders it to be paid. The discretion which the courts have is “as unfettered as any discretion can be”.<sup>324</sup>

## 5.6 ASSESSING THE INTEREST RATE

Interest rate is defined as the price of money.<sup>325</sup> Just like the price of any goods, the rate of interest is derived based on the interplay of market forces depending on the supply of and demand for money.<sup>326</sup> The local judges have been steadfast in applying the rules in *Jefford v Gee*.<sup>327</sup> Interest is to be awarded at the appropriate rate for pain and suffering and loss of amenities from the date of service of writ, half of the appropriate rate on special damages from the date of the accident to date of trial and no interest for future losses. The problem however lies in what constitutes ‘appropriate rate’ and whether judges have the discretion to vary the rate? The problems were recognized by the

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<sup>324</sup> Per Raja Azlan Shah J in *Yee Boon Heng v Tan Chwee*, *op cit*.

<sup>325</sup> Syed Ahmad Idid, “Interest”, [1993] 1 *Malayan Law Journal*, 1 – lvi, at li.

<sup>326</sup> *Ibid*.

<sup>327</sup> *Op. cit*.

Penang High Court in *Sinnatamby Seahomes Sdn. Bhd. v Perwira Habib Bank Malaysia Bhd.*<sup>328</sup> The judge referred to Halsbury's Law of Malaysia Vol. 1 for the definition of appropriate rate:

“As to the rate of interest, it has been said that there is no such thing as a correct or proper rate or ordinary rate of interest. The award should be realistic, and there is no distinction between the interest awarded on a limitation fund in an Admiralty action and that awarded on damages for personal injuries.”

The answer to the question of whether judges have the discretion to vary the rate is best explored by analyzing the followings:

### 5.6.1 Pre-Judgment Interest Rate

Prior to the introduction of the Rules of Court 2012, the discretionary power of the Subordinate Courts judges was regulated by the SCR 1980 when a maximum rate of four (4) percent *per annum* was imposed by Order 28 Rule 18 of the SCR 1980. However, the term ‘may’ in the provision signified that although the maximum rate was fixed, judges still have the discretion to vary it provided that the new rate does not exceed four (4) percent. Unlike the SCR 1980, there was no provision regulating pre-judgment interest in the RHC 1980. Section 11 of the CLA 1956 remains the only provision governing pre-judgment interest for the High Court. The High Court had been allowing pre-judgment interest at the rate not exceeding eight (8) percent per annum.<sup>329</sup> The High Court’s judges have the discretion to vary this rate since there was nothing in the local legislation which prevented them from doing so.

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<sup>328</sup> [2001] 2 MLJ 450

<sup>329</sup> See *Abdul Wahab Jam Jam v Abdul Wahab bin Abdullah* [2008] 7 CLA 741, *Noor Famiza bte Zabri & Anor. v. Awang bin Muda & Anor.* [1994] 2 CLJ 418, *Maimunah bte Hassan (Sebagai Wakil Harta Pusaka Rozita Bte Khamis) & Anor. v. Marimuthu s/o Samanathan & Anor.* [1993] 1 CLJ 119 and *Lim Eng Kay v Jaafar b Mohamed Said*, *op. cit.*

The introduction of the Rules of Court 2012 in August 2012 has amended the rule governing the assessment of interest rate. Order 42 Rule 12 of the Rules of Court 2012 does not contain any provision relating to pre-judgment interest. Therefore, currently, High Court and Subordinate Courts are not governed by any court's rule in respect of the assessment of pre-judgment interest rate. The only available provision in respect of pre-judgment interest rate is section 11 of the CLA 1956. Since there is no longer any maximum pre-judgment interest rate applicable, judges have a wide discretion to determine the rate of pre-judgment interest to suit the circumstance of the case.

It is submitted that the absence of specific court's rule on the assessment of pre-judgment interest rate is deliberate. It serves two purposes. It stops the arguments on the validity of the maximum pre-judgment interest rate<sup>330</sup> as well as maintains the discretionary power of the High Court's judges<sup>331</sup> to determine the rate. The discretionary power is now extended to the Session Courts' judges. Based on the above, it is concluded that the discretionary power of the judges to determine the rate of pre-judgment interest which originates from section 3 of the Law Reform 1934 and developed by the case of *Jefford v Gee*<sup>332</sup> is still intact. Section 11 of the CLA 1956 is merely an enabling provision which allows judges to award pre-judgment interest. Instead of restricting, the section actually solidifies the discretionary power of the judges to determine the rate for pre-judgment interest on damages in personal injury and fatal accident claims arising out of motor vehicle accidents.

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<sup>330</sup> The validity of the maximum four (4) percent pre-judgment interest rate set by Order 28 Rule 18 of the SCR 1980 was often argued upon. *Supra*, at 389 - 391.

<sup>331</sup> The RHC 1980 had omitted any provision for pre-judgment interest for the High Court. The omission was deliberate since the predecessors to the RHC 1980, i.e., Rules of Supreme Court 1937 and the Rules of Supreme Courts 1957 provided for pre-judgment interest although no specific rate was stated.

<sup>332</sup> *Op. cit.*

### 5.6.2 Post-Judgment Interest Rate

Traditionally, Malaysian judges rarely venture to assess the rate of post-judgment interest. The rates prescribed in the SCR 1980 and the RHC 1980 were commonly accepted as the rate for post-judgment interest in personal injury and fatal accident claims arising out of motor vehicle accidents.<sup>333</sup> This was acknowledged by the Sibu High Court in *Lau Kung Kai v Abu Serah bin Bol & Anor.*<sup>334</sup> where Hamid Sultan JC held:

“However, the court normally awards 8% per annum in respect of judgment sum from the date of judgment until the date of realization.”<sup>335</sup>

Dato' Syed Ahmad Idid<sup>336</sup> in his article commented that the Malaysian judges “have not been called upon to exercise much imagination or sophistication when granting interest or in determining the rate of interest”. The Supreme Court’s judges in *New Zealand Insurance Co Ltd v Ong Choon Lin (t/a Syarikat Federal Motor Trading)*<sup>337</sup> for example awarded interest at the rate of eight (8) percent per annum<sup>338</sup> post-judgment interest merely on the ground that there is “no direction from the learned judge that a lower rate be used”.<sup>339</sup> The judges’ reluctance to depart from the rate prescribed in the RHC 1980 and SCR 1980 can be attributed to the mandatory nature of the term ‘shall’ in Order 29 Rule 12 of the SCR 1980 and Order 42 Rule 12 of the RHC 1980. Both of these provisions stated ‘every judgment debt shall carry interest at the rate of four (4)

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<sup>333</sup> See *Abdul Wahab Jam Jam v Abdul Wahab bin Abdullah, op.cit.*, *Noor Famiza bte Zabri & Anor. v. Awang bin Muda & Anor., op. cit.*, *Maimunah bte Hassan (Sebagai Wakil Harta Pusaka Rozita Bte Khamis) & Anor. v. Marimuthu s/o Samanathan & Anor., op.cit.*

<sup>334</sup> *Op. cit.* See also *See Lau Ee Ee v Tang King Kwong* [1086] 1 MLJ 308, *Mahat bin Abdul Majid v Lau Kui* [1986] 2 MLJ 191, *Yaakub Foong v Lai Mun Keong* [1986] 2 MLJ 317, *Nani v WG Williams* [1986] 2 MLJ 68, *Lee Ann v Mohamed Sahari bin Zakaria* [1987] 1 MLJ 252.

<sup>335</sup> The eight (8) percent rate was prior to the 2011 amendment which reduces the rate to four (4) percent.

<sup>336</sup> Syed Ahmad Idid, *op. cit.*

<sup>337</sup> *Op. cit.*

<sup>338</sup> The case was decided prior to the amendment to the interest rate in 2011. Hence the eight (8) percent rate was still applicable.

<sup>339</sup> In *Chang Min Tat in Murtadza bin Mohamed Hassan v Chong Swee Pian, op. cit.* choose to follow the decision in *Foong Nan v Sagadevan*, [1971] 2 MLJ 24 and interpreted ‘appropriate rate’ as 6% due to “the absence of any advice for any increase from this rate”.

*per centum per annum...*”.<sup>340</sup> The term ‘shall’ was often read as restricting judges’ discretion to award the rate of post-judgment interest to the rate prescribed in the provisions only. In fact, there had been an attempt to insinuate that the rate prescribed in the provisions was compulsory rate for all post-judgment interest. The Respondent in *Lim Eng Kay v Jaafar bin Mohamed Said*,<sup>341</sup> relied on the general practices of the local courts as well as the mandatory nature of the term ‘shall’ in Order 42 Rule 12 of the RHC 1980<sup>342</sup> argued that not only post-judgment interest was mandatory, the maximum rate of eight (8) percent *per annum* was similarly compulsory.<sup>343</sup> Yeo Yang Poh also to some extent seemed to advocate the notion that the rates prescribed in the Rules were mandatory. He commented that should judges award post-judgment interest without specifying the exact rate for the same, the rate specified in Order 29 Rule 12 of the SCR 1980 and Order 42 Rule 12 of the RHC 1980 will be automatically implied.<sup>344</sup> Unfortunately he did not elaborate further on the basis of his opinion. As such, the reason behind the above opinion remained uncertain.<sup>345</sup>

The provision in Order 42 Rule 12 of the Rules of Court 2012 is almost an exact copy of Order 29 Rule 12 of the SCR 1980 and Order 42 Rule 12 of the RHC 1980.<sup>346</sup> The provision gives the discretion to the Chief Justice to determine the rate to be applied. It also gives the discretion to the preceding judges to depart from the rate prescribed by the Chief Justice should they see it necessary to do so, provided that the new rate does not exceed the prescribed rate. Unfortunately, the use of the term ‘shall’ in the provision raises the possibility that the rate prescribed by the Chief Justice is mandatory for all post-judgment interest. At the same time, the wording in the Practice Direction

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<sup>340</sup> *Supra* at 214-215

<sup>341</sup> *Op.cit.*

<sup>342</sup> Similar argument can be used with regard to Order 29 Rule 12 of the SCR 1980 since the provision is similarly worded.

<sup>343</sup> The argument however was rejected by the Federal Court.

<sup>344</sup> Yeo, Yang Poh, *op. cit.*, at clxxviii.

<sup>345</sup> Yeo, Yang Poh, *id.*, at clxxix.

<sup>346</sup> The only difference is, while Order 42 Rule 12 of the Rules of Court 2012 gives the power to determine the maximum interest rate to the Chief Justice, Order 29 Rule 12 of the SCR 1980 and Order 42 Rule 12 of the RHC 1980 specifically fixed a maximum rate of four (4) percent *per annum*.

also seems to negate the discretionary power of the judges to assess pre-judgment interest rate. The Practice Direction is worded in such a way that it can be read as making the five (5) percent interest compulsory for all post-judgment.<sup>347</sup>

On this point it is submitted that despite the arguments above, the power to assess post-judgment interest is always been discretionary upon the presiding judges. This had been recognized by the Federal Court in *Lim Eng Kay v Jaafar bin Mohamed Said*.<sup>348</sup> In rejecting the Respondent's submission for a mandatory eight (8) percent post-judgment interest, Salleh Abbas FJ held:

“Although the Order is expressed in imperative “shall”, it is certainly not intended to be so; because to give effect would be incompatible with the discretionary power of the Court to order interest under s. 11 of the Civil Law Act 1956. We do not think that O. 42 r. 12 can override the provision of the Act. This Order can only mean that the Court may order interest at 8% if the Court thinks that circumstances justify such rate. In no sense must this order be understood as obliging the Court to award interest at 8% and 8% only. We cannot therefore accept the submission of Counsel for the respondent and as such the award of interest by the learned Judge is upheld”

While agreeing with the above decision on two points; first, on the principle that post-judgment interest rate should remain at the discretion of the presiding judge and second, that Order 42 Rule 12 of RCH 1980 did not have any effect in making the eight (8) percent rate compulsory, it is with utmost respect submitted that the decision was flawed on one aspect. Salleh Abbas FJ had based his argument on the discretionary

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<sup>347</sup> “... Saya degan ini **mengarahkan** kadar bunga di bawah peruntukan-peruntukan di atas **ditentukan pada kadar 5% setahun**.”

<sup>348</sup> “I hereby **direct** the interest rate under the provisions of the above **specified at a rate of 5% per annum**.”(translate)

<sup>348</sup> *Op.cit.*

power to assess interest provided by section 11 of the CLA 1956. According to him, since section 11 of the CLA 1956 has given judges' the discretion to assess interest, Order 42 Rule 12 of RHC 1980 cannot limit this power by making the eight (8) percent rate compulsory. It is humbly submitted that section 11 of the CLA 1956 is not a bar for Order 42 Rule 12 of the RHC 1980.<sup>349</sup> As discussed earlier, section 11 of the CLA 1956 and Order 42 Rule 12 of the RHC 1980 are applicable for two (2) separate periods. As such, the two provisions do not overlap. The discretionary power granted to the judges to assess pre-judgment interest rate in section 11 of the CLA 1956 therefore cannot be extended to post-judgment interest rate.

The discretionary power should be derived from either section 25(2) read together with para 7 of the CJA 1964<sup>350</sup> or the provision in Order 42 Rule 12 of the RHC 1980 itself. 25(2) read together with para 7 of the CJA 1964 only gives the power to the judges to award interest. It does not provide any specific rate for the interest. At the same time, the phrase 'or at such other rate not exceeding the rate afore said' in Order 42 Rule 12 of the RHC 1980 signify that judges may award post-judgment interest a rate they think suitable depending on circumstances of the case provided that the amount does not exceed four (4) percent. Since Order 42 Rule 12 of the RHC 1980 had been replaced with Order 42 Rule 12 of the Rules of Courts 2012 with almost similar wordings, the same argument above can be extended to the provision in Order 42 Rule 12 of the Rules of Courts 2012. Therefore, judges are not under any obligation to award post-judgment interest at the rate prescribed by the Chief Justice in the Practice Direction. They still have the discretion to assess the rate according to the facts of the case provided that the new rate does not exceed the prescribed rate.

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<sup>349</sup> Also not applicable to Order 29 Rule 12 SCR 1980 which govern post judgment interest for Subordinate Courts.

<sup>350</sup> For Subordinate Courts it is section 99A read together with para 21 to the SCA 1948.

To conclude, it is always assumed that due to the different circumstance in all personal injury and fatal accidents claims arising out of motor vehicle accidents and the discretion given to the judges in determining interest, the award of interest in Malaysia vary from case to case. The reality however is far from that. Based on decided cases thus far, the judges seem to have considered the rate of interest as mechanical. This undoubtedly negates the spirit behind the award for interest. Judicial discretion should run free in relation to the determination of interest rate. Judges must be encouraged to depart from the common prevalent rate should the circumstances of the case warrant it. It can either be within the five (5) percent rate or lower, as commented by Hamid Sultan JC in *Lau Kung Kai v Abu Serah bin Bol & Anor.*:<sup>351</sup>

“However, the court normally awards 8% per annum in respect of judgment sum from the date of judgment until the date of realization. That does not necessarily mean that the court cannot award higher rate of interest within the parameters of the law taking into consideration the prevailing rates of interest.”

## 5.7 COMPOUNDED INTEREST

Compounded interest<sup>352</sup> is interest which is assessed on principal sum together with the accumulations of other interest.<sup>353</sup> While simple interest is calculated based on principal sum only, compounded interest is interest awarded on top of interest on principal sum already awarded. The issue on compounded interest arises only in respect

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<sup>351</sup> *Op. cit.*

<sup>352</sup> Also known as interest upon interest, compound interest or compounding interest.

<sup>353</sup> Syed Ahmad Idid, *op. cit.*, at l.

of the assessment of post-judgment interest; whether judges in assessing post-judgment interest should assess the post-judgment interest over damages awarded during pre-judgment and post-judgment period together with the pre-judgment interest? In other word, whether the pre-judgment interest is to be assessed as part of the ‘judgment debt’ in which post-judgment interest is to be awarded?

It is generally assumed that the law prohibits the award for compounded interest. This assumption however is not conclusive. So far there is no authoritative judgment on this matter.<sup>354</sup> Judges are split into two camps on the issue of simple and compounded interest; one in favour of the simple interest while another allowing for compounded interest. The introduction of the Rules of Court 2012 also does not offer any solution to the problem. Since the provision in Order 42 Rule 12 of the Rules of Court 2012 is almost similar to the provisions in Order 29 Rule 42 of the SCR 1980 and Order 42 Rule 12 of the RHC 1980, the same quandary still persist even with the introduction of the new court’s rule.

Section 11 of the CLA 1956 is often cited as the provision which prohibits judges from awarding compounded interest.<sup>355</sup> The argument is based on proviso (a) to the section which states ‘*nothing in this section shall authorize the giving of interest upon interest.*’<sup>356</sup> In *Yeng Hing Enterprise Sdn. Bhd. v Datuk Dr Ong Poh Kah*<sup>357</sup> the Kota Kinabalu Supreme Court presided by Lee Hun Hoe Cj (Borneo), Seah and Mohamed Azmi SCJJ held:

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<sup>354</sup> Rutter, Michael F., *op. cit.*, at 429. Sees also comment made by Salleh Abas FJ in *Terengganu State Economic Development Corporation v Nadevinco Ltd.* [1982] 1 MLJ 365 where he said “there seems to be a dearth of local authorities concerning the issue I am now called upon to decide.”

<sup>355</sup> See Davidson, W.S.W, “Claims For Interest On Delayed Contract Payments By Way of General or Special Damages - An Opinion”, (1993) 1 *Current Law Journal*, xxxvii, Pawancheek Marican, “The Arbitrator’s Power to Award Interest”, (1997) 1 *Malayan Law Journal* lxxix – lxxiv and Dass, K.S., *op. cit.*, (1980).

<sup>356</sup> The proviso is similar to the proviso found in Order 28 Rule 18 of the Subordinate Court Rules 1980.

<sup>357</sup> [1988] 2 MLJ 60. See also *Balasubramaniam v Venkitasan* [1986] 2 MLJ 55 and *Citibank NA v Lee Chew Kok & Anor* Civil Suit No D3-23-2277-87 Kuala Lumpur High Court (27 April 1989) cited in *Mallal’s Digest of Malaysia and Singapore Case Law 1808-1988*, 4<sup>th</sup> ed., vol. 2, (Kuala Lumpur: Malayan Law Journal, 1994)

“Having regard to the provisions of section 11 of the Civil Law Act 1956 and in particular proviso (a) which forbids the giving of interest upon interest...”

Similarly, in *Foo Sey Koh & Ors. v Chua Seng Seng & Ors.*,<sup>358</sup> the court allowed post-judgment interest from only the principal sum still owing to the plaintiff. The pre-judgment interest was not included in the assessment of the sum in which the post-judgement interest was assessed on. Shankar J in his judgment held:

“It is well established that in all cases where in the opinion of the court, the payment of a just debt has been improperly withheld and it seems to be fair and equitable that the party in default should make compensation by the payment of interest, it is incumbent upon the court to allow interest for such time and at such rate as the court may think right. The law precludes that granting of interest upon interest.”

Recently, however, judges in several cases were seen to have adopted a different approach to the issue of compounded interest. The basis of the departure from the general presumption that compounded interest is prohibited rests on three (3) main points:

#### **5.7.1 Restrictive interpretation of proviso (a) to section 11 of the CLA 1956**

Proviso (a) in section 11 of the CLA 1956 is interpreted as only prohibiting judges from using the section as the authority for allowing compounded interest. The proviso does not extend to prevent the judges from awarding compounded interest *in toto*. By applying this interpretation, judges are not totally prohibited from awarding

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<sup>358</sup> [1986] 1 MLJ 501.

compounded interest.<sup>359</sup> Should the judges are able to find any reason or authority which allows compounded interest, the same can be awarded. This interpretation was accepted in *Re Woo Yoke San @ Woo Yoke Sam; Ex P Ocbc Bank (M) Bhd v Crescent Court Management Corp.*<sup>360</sup> The Kuala Lumpur High Court held that while section 11 of the CLA 1956 deals with the power to award interest on debt and damages, it does not declare that interest upon interest or compounded interest is illegal or invalid. Judges have the discretion to award compound interest provided that they can find other authority which allows such award. Ramli Ali J stated:

“Section 11 effect is just enabling provisions giving powers to the court to award interest for the whole or any part of the period “between the date when the cause of action arose and the date of judgment”. Proviso (a) of the said s.11 specifically states that the provision does not authorize the giving of interest upon interest. What it means is that s. 11 is not an authority for awarding interest upon interest. If the award of interest upon interest is to be made then the court has to find other form of authority to do so but not on the authority of s.11.”

Similar interpretation was also adopted by the court in Singapore in dealing with section 12 of the Civil Law Act (cap 43) which is *in pari materia* with section 11 of the CLA 1956. In *The Oriental Insurance Co. Ltd. v Reliance National Asia Re Pte. Ltd.*<sup>361</sup> Chan Seng Onn J held the following:

“Section 12 of the Civil Law Act (Cap 43, 1999 Rev Ed) did not expressly prohibit the court from granting compounded interest per se or from granting damages assessed with reference to the actual compounded

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<sup>359</sup> Rutter, Michael F., *op. cit.*, at 429.

<sup>360</sup> [2006] 5 MLJ 638.

<sup>361</sup> [2009] 2 SLR 385.

interest lost or foregone by the plaintiff who had suffered those damages as a result of a debt. The courts in Singapore had an unfettered discretion to award simple or compounded interest as damages which was appropriate to justly compensate any loss suffered.

As such, it seems that judges are starting to depart from the traditional approach relating to compounded interest. Section 11 of the CLA 1956 is no longer considered as the provision which prohibits the award of compounded interest. By virtue of this new interpretation of the section, compounded interest is no longer prohibited.

#### **5.7.2 The broader interpretation of term ‘judgment debt’**

As mentioned earlier in this chapter, the award for post-judgment interest is regulated by Order 42 Rule 12 of the Rules of Court 2012. The provision allows post-judgment interest to be awarded on ‘judgment debt’. Since the term ‘judgment debt’ is not defined, it is generally assumed that it refers to the judgment sum (damages) awarded by the courts. This judgment sum is not inclusive of the pre-judgment interest.

Perusal of the local cases however shows that in several cases, the interpretation of term ‘judgment debt’ in Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 42 of the SCR 1980<sup>362</sup> had been widened to represents the judgment sum (damages) and the pre-judgment interest. By merging the judgment sum and pre-judgment interest to form ‘judgment debt’, judges are allowed to award post-judgment interest for both the

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<sup>362</sup>Since the Rules of Court 2012 is fairly recent (it was gazette in August 2012), there is no case relating to the application of the provision with respect of compounded interest reported. However, since the wordings in the provision is similar to Order 42 Rule 12 of the RHC 1980 and Order 29 Rule 12 of the SCR 1980, the decisions which concerns with the application of the repealed Rules are still relevant.

judgment sum and pre-judgment interest.<sup>363</sup> Thus, allowing for compounded interest. The same was stated by the Kuala Lumpur High Court in *Trans Elite Equipment Rental Sdn. Bhd. v Psc-Naval Dockyard Sdn. Bhd.*<sup>364</sup> The plaintiff in this case appealed against the Senior Assistant Registrar's decision in not allowing post-judgment interest on the pre-judgment interest. The issues before the court were whether the post-judgment interest was to be imposed on 'judgment debt' which included judgment sum and pre-judgment interest and whether there was a bar against granting compounded interest. Abdul Malik Ishak J in allowing the appeal held that the judgment sum and the pre-judgment interest make up for 'judgment debt' and post-judgment interest was to be awarded on the 'judgment debt'. He offered the following reasons for his decision:

- “(1) that both the principal sum claimed and the pre-judgment interest (which represents damages for the period which the plaintiff could not use the principal sum) merged into the judgment debt on 24 June 2002 and that could be the date of judgment.
- (2) that this is prescribed by statute, namely, O 42 r 12 of the RHC and that there is no room, at all, for the exercise of discretion by the learned SAR to award post-judgment interest on only the principal sum and not the judgment debt; and
- (3) that the award of post-judgment interest on both the principal sum claimed and also the pre-judgment interest are practiced in our country as well as in Singapore.”

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<sup>363</sup> Yeo, Yang Poh, *op. cit.*, at clxxxviii.

<sup>364</sup> [2003] 4 MLJ 30.

Similar interpretation was also adopted by the Penang High Court in *Tan Phaik See v Multi Purpose Insurance Bhd.*<sup>365</sup> Upon succeeding in his appeal for loss of support by the Court of Appeal, the Appellant claimed for the total judgment sum, cost, interest on the judgment sum as well as interest over the interest on the total judgment sum (compounded interest) amounting to RM 299, 104. The Respondent paid RM 278, 269. The Respondent refused to pay the balance and argued that the balance was compounded interest which was prohibited under section 11 of the CLA 1956. The High Court allowed the Appellant's appeal for the balance on the ground that 'judgment debt' consists of the principal sum and pre-judgment interest. As such, the post-judgment interest must be assessed on this 'judgment debt'. RK Nathan J held:

“To my mind, once the defendant had agreed that the amount due to the plaintiff as at 30 September 1994 was the principal sum of RM 197,443 and the interest of RM 29,616 amounting to RM 197,779 the said total become a debt due and owing to the plaintiff from the defendant. In other words the interest had merged with the damages awarded, as a new judgment debt owed to the plaintiff by the defendant.

The plaintiff is therefore entitled by law that is O 42 R 12 of the Rules of the High Court 1980, which states that every judgment debt shall carry interest at the rate of 8% per annum, to the said interest at 8% on the unpaid judgment debt.”<sup>366</sup>

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<sup>365</sup> [2004] 6 MLJ 474.

<sup>366</sup> It is however submitted that the above decision should be treated with caution. Although it allows the award of compounded interest for personal injury and fatal accident claims, one very significant point in this judgment need to be considered. The learned RK Nathan in his decision mentioned; “When the defendant paid a sum of RM 266,482 out of the total of RM 278,269, the defendant had in other words acknowledged that the damages and interest had merged to form a fresh judgment sum. *It would have been otherwise* if the defendant had only paid the principal sum of RM 167,443 specifically and the accrued admitted interest of RM 29,616 specifically. Here by paying a cheque for RM 266,482 the defendant had not specifically raised the issue of interest being paid upon interest.

Its seems like the decision to allow the appeal for compounded interest in this case was based on the fact that the respondent had ‘admitted’ the appellant’s entitlement for compounded interest by paying a sum which exceed the principal sum and interest on principal sum (pre-judgment and post-judgment interest). It was not due to the obligation to merge judgment sum and interest on judgment sum to create a ‘judgment debt’. By paying RM 266,482 out of the total of RM 278,269 claimed by the appellant, the respondent had agreed to the appellant’s claim for compounded interest and thus was estopped from pleading against it in the appeal.

The broad interpretation of the term ‘judgment debt’ allows judges to award compounded interest. Unless and until the term is properly defined, judges will have the discretion to award compounded interest under Order 42 Rule 12 of the Rules of Court 2012.

### **5.7.3 Limited application of section 11 of the CLA 1956.**

The notion that compounded interest is prohibited is also negated by the limited application of section 11 of the CLA 1956. Section 11 of the CLA 1956 is applicable for pre-judgment interest only. It does not extend to post-judgment interest.<sup>367</sup> Although the esteemed KS Dass suggested that proviso (a) to section 11 of the CLA 1956 conveys the general intention of the Legislature to prohibit compounded interest for type of interest,<sup>368</sup> the literal interpretation of the section does not support his suggestion. Section 11 of the CLA 1956 specifically states ‘the period between the date when the cause of action arose and the date of the judgment’ i.e. pre-judgment interest. Had the Legislature intends the section to include post-judgment interest, it would have either omitted the phrase or extend it to include period after judgment until date of realization.

Furthermore, section 3(1) of the Law Reform 1934 from which section 11 of the CLA 1956 is patented from was also limited to pre-judgment interest. Since the section co-

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The learned judge did not comment on whether the appellant would still be entitled to compounded interest had the respondent only pay the principal sum and the interest on principal. He did however mentioned something to the effect that had it not been the due to the defendant own agreement to the compounded interest, he would not have come to the decision. As such, it is therefore submitted that the basis for allowing compounded interest in this case was due to the respondent being estopped from arguing what they had initially agreed upon rather than the merger of the principal sum and pre-judgment interest to create ‘judgment debt’. Consequently, it is further submitted that this decision should be restricted to the particular fact of the case namely defendant having accepted the compounded interest by paying more than the principle amount and not as an authority to support that the term ‘judgment debt’ in Order 42 Rule 12 of the RHC 1980 (repealed) is a merger of principal sum and pre-judgment interest. Therefore, the decision also cannot be used as an authority to support that the term ‘judgment debt’ in Order 42 Rule 12 of the Rules of Courts 2012 is also a merger of judgment sum and pre-judgment interest.

<sup>367</sup> Yeo, Yang Poh, *op.cit.*, at clxxvii.

<sup>368</sup> Dass, K.S., *op cit.*, (1980), at 17.

exist together with section 17 of Judgment Act 1838 which specifically provides for post-judgment interest, the application of section 3(1) of the Law Reform 1934 cannot be extended to post-judgment interest.

Based on the above, any attempt to impute additional power to section 11 of the CLA 1956 cover post-judgment interest would be contrary to the literal interpretation of the section as well as the origin of the provision. Consequently, since proviso (a) to section 11 of the CLA 1956 is applicable only to pre-judgment interest, the proviso cannot be the authority against compounded interest as compounded interest is awarded via post-judgment interest. In a Singapore case of *The Oriental Insurance Co. Ltd. v Reliance National Asia Re Pte. Ltd.*,<sup>369</sup> the court in dealing with the question of whether section 12 of the CLA (cap 43)<sup>370</sup> have removed the power of the High Court to direct post-judgment interest to be paid on compounded basis held:

“Has s 12 also taken away or emasculated the power of the High Court to direct compounded interest to be paid on (a) debts or damages from date of judgment till date of satisfaction of the judgment sums awarded (ie, post-judgment interest); (b) sums found due on taking accounts between parties; and (c) sums found due and unpaid by receivers or other persons liable to account to the court? I do not think so.

Although s 12(2)(a) of the Civil Law Act makes clear that the section itself does not authorise the giving of compounded interest for debts and damages covering the pre-judgment period, it does not expressly prohibit the court from granting compounded interest per se or from granting damages assessed with reference to the actual compounded

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<sup>369</sup> *Op. cit.*

<sup>370</sup> *Imparimateria* with section 11 of the CLA 1956.

interest lost or forgone by the plaintiff who has suffered those damages. I do not think that s 12 of the Civil Law Act is meant to be exhaustive concerning the power of the courts to award interest on debts and damages in any specified manner, ie, only on a simple basis and on no other.”

In conclusion, judges in many occasions had departed from the traditional view that compounded interest is totally prohibited. Although the law does not specifically allow the judges to award compounded interest, there is also nothing in it which prevents judges from allowing compounded interest. The judges therefore have the discretion to award compounded interest in personal injury and fatal accident claims arising out of motor vehicle accidents if they find it fair, reasonable and necessary to do so. In the words of Salleh Abbas FJ in *Terengganu State Economic Development Corporation v Nadeфинco Ltd.*:<sup>371</sup>

“The fact that the court is not authorized does not mean that it is prevented from doing so.”

## 5.8 CONCLUSION

Salleh Abbas J’s observation in *Lim Eng Kay v Jaafar b Mohamed Said*,<sup>372</sup> on the effect of the Law Reform 1934 can be referred to with regard to the award for interest for damages in personal injury and fatal accident claims arising out of motor vehicle accidents in Malaysia;

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<sup>371</sup> *Op. cit.*

<sup>372</sup> *Op. cit.*

“Prior to the passing of the Law Reform (Miscellaneous Provisions) Act 1934, under common law the court had always had discretion to award interest as a compensation for a party who has been deprived of the use of its money to which it is legally entitled. The enactment of the judicial discretion by the statute simply gives statutory effect thereto...”

The enactment of various provisions and rules of procedures merely give a statutory nod to the long accepted Common Law practices of allowing judges to exercise their discretion. Section 11 of the CLA 1956 confers statutory power to the judges to exercise their discretion in awarding pre-judgment interest. Since currently there is no other specific provision or rule of procedures governing pre-judgment interest, judges have the discretion in determining whether or not pre-judgment interest is to be awarded, at what rate, on which part of damages and for which period (between date of cause of action arise to date of judgment).

The discretionary power is also extended to post-judgment interest. The term ‘shall’ in the provision and the Chief Justice’s directive in the Practice Direction should not be read as making post-judgment interest mandatory. Similarly, Order 42 Rule 12 of the Rules of Court 2012 and the Practice Direction only place a ceiling rate of five (5) percent. Judges still have the discretion to vary this rate provided that the new rate does not exceed five (5) percent.

The uncertainties and confusions with regard to the issues highlighted in this chapter are the result of fragmentary and piecemeal development of the law on interest in Malaysia. Lack of consistent and well-argued decisions further complicate the problems. The best way forward is to amend all the provisions relating to the law on

interest to suit and complement each other. The provisions must also be defined correctly to avoid wrong interpretation and application. The uncertainty in the interpretation and application of the provisions not only leads to injustice to the parties involved but also to the insurance companies who have to pay the judgment sum as well as the interest for all personal injury and fatal accident claims arising out of motor vehicle accident.

## CHAPTER 6

### THE EFFECTS OF THE STATUTORY PROVISIONS IN SINGAPORE AND BRUNEI ON JUDICIAL DISCRETION AND THE QUANTUM OF DAMAGES IN PERSONAL INJURY AND FATAL ACCIDENT CLAIMS ARISING OUT OF MOTOR VEHICLE ACCIDENTS

#### 6.1 INTRODUCTION

Initially, the law on the assessment of damages for personal injury and fatal accident arising out of motor vehicle accidents in Singapore, Brunei and Malaysia were more or less similar to each other. The similarities were due to their common origin. Aside from adopting the English Common Law the statutory provisions in the three (3) countries were also patented from the Fatal Accident Act 1846<sup>1</sup> and the Law Reform (Miscellaneous Provisions) Act 1934<sup>2</sup> in England. The introduction of the Civil Law (Amendment) Act 1975<sup>3</sup> and the Civil Law (Amendment) Act 1984<sup>4</sup> to amend the Civil Law Act 1956 (Rev 1972)<sup>5</sup> in Malaysia put an end to the similarities in the law. The differences in the law between the three (3) however were later reduced by the introduction of the Civil Law Act<sup>6</sup> and the Fatal Accidents and Personal Injuries Act.<sup>7</sup> These Acts bring the statutory provisions on the assessment of damages for personal

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<sup>1</sup> (9 & 10 Vict. cap.93). Hereinafter referred to as “the Fatal Accident Act 1846.

<sup>2</sup> (cap 41). Hereinafter referred to as “the Law Reform 1934”.

<sup>3</sup> (Act A308). Hereinafter referred to as “the CLAA 1975”.

<sup>4</sup> (Act A602). Hereinafter referred to as “the CLAA 1984”. The CLAA 1975 and the CLAA 1984 were consolidated with the CLA 1956 (Rev 1972) to form the current Civil Law Act 1956 (Act 67).

<sup>5</sup> (Act 67). Hereinafter referred to as “the CLA 1956 (rev 1972)”.

<sup>6</sup> (cap 43). Hereinafter referred to as “the CLA (cap 43)”.

<sup>7</sup> (cap 160). Hereinafter referred to as “the Fatal Accidents and Personal Injuries Act”.

injury and fatal accident claims arising out of motor vehicle accidents in Singapore and Brunei closer to the provisions in Civil Law Act 1956.<sup>8</sup>

The CLA (cap 43) and the Fatal Accidents and Personal Injuries Act are the results of the massive statutory revamps in Singapore and Brunei respectively. They contain almost the same provisions as in the CLA 1956. At the same time, there are also many provisions in the CLA 1956 such as provisions on the assessment of damages for loss of future earnings and loss of support which are not available in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act. The assessment of these heads of damages in Singapore and Brunei are still in the hands of the judges guided by the Common Law principles and decided cases. Nevertheless, despite not having certain provisions which are available in the CLA 1956, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act still have some effects on the exercise of judicial discretion in the assessment of damages as well as quantum of damages for personal injury and fatal accident claims arising out of motor vehicle accidents.<sup>9</sup>

Again, it must be born in mind that the following discussion is not intended to discuss the assessment of all heads of damages for personal injury and fatal accident claims in Singapore and Brunei. This chapter, like the previous three (3) chapters deals solely with effects of the statutory provisions on the discretionary power of the judges in assessing damages as well as the quantum of damages in personal injury and fatal accident claims arising out of motor vehicle accidents in Singapore and Brunei. The discussion includes an analysis of the strength and weaknesses of the provisions CLA (cap 43) and the Fatal Accidents and Personal Injuries Act. Comparative analyses of

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<sup>8</sup> (Act 67). Hereinafter referred to as “the CLA 1956”.

<sup>9</sup> The amount of damages being awarded in Brunei are claimed to be very high, unmatched and unprecedented in Malaysia and Singapore and perhaps on the rest of Common Law world. See Chew, Leslie *et al.*, “A Comparative Analysis of Various Aspects in the Law of Personal Injuries in Brunei, Malaysia and Singapore”, (2008) 3 *Malayan Law Journal*, i-xliii, at 19.

the provisions in these Acts with the provisions in the Malaysian CLA 1956 are also included.

The discussion in this chapter will focus only on the heads of damages which are governed by the provisions in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act. The assessment of damages for heads of damages not regulated by the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act will not be discussed as they are in the hands of the presiding judges guided by the Common Law principles and decided cases. They are beyond the scope of this research. There are however several instances where the discussion includes some of the heads of damages which are not provided for in either the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act.<sup>10</sup> This is necessary for the purpose of making complete comparative analyses of the provisions in Malaysia, Singapore and Brunei since the CLA 1956 contains some provisions which are not found in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act.

## **6.2 THE DEVELOPMENT OF THE LAW ON PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN SINGAPORE**

The assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents in Singapore is governed by the CLA (cap 43). The Common Law principles and decided cases serve as guides on matters which are not provided for

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<sup>10</sup> For example the assessment of damages for loss of support and loss of future earnings.

by the CLA (cap 43). The decisions in English cases are however are relevant only on questions of principles of assessment and not the actual quantum of damages.<sup>11</sup>

### 6.2.1 The English Common Law

The general reception of the English law<sup>12</sup> in Singapore is by virtue of the Letters Patent establishing the Court of Judicature at Prince of Wales Island, Singapore and Melacca<sup>13</sup> in 1826 which came into effect on 20 March 1827.<sup>14</sup> Prior to the introduction of the Charter of Justice, there was a period of legal uncertainty where no proper legislative instrument available to govern the island.<sup>15</sup> Although the Charter of Justice merely established a court system<sup>16</sup> modelled by the English courts without specifying that the English law was to be the territorial law in Singapore, a series of decisions after the introduction of the Charter concurred that the English Common Law, equity and statutes were to be the prevailing law of the land.<sup>17</sup> The reception however was subjected to three conditions:

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<sup>11</sup> Rutter, Michael F., *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia*, 2<sup>nd</sup> ed. (Hong Kong: Butterworth Asia, 1993) at 10 – 17.

<sup>12</sup> Chan, Helena HM, *The Legal System of Singapore*, (Singapore: Butterworth, 1995), at 6.

<sup>13</sup> Also known as the Second Charter of Justice. Hereinafter referred to as “the Charter of Justice”. The ‘reception’ of English Law in Singapore is still a point of contention. Some argued that the reception of English Law in Singapore begins when Sir Thomas Stamford Raffles was granted the authority to establish factories on the island. By virtue of the English Common Law, when British subjects settled in a territory which has no local legal system, the English Law would apply. On the other hand, since Singapore was part of Johor Sultanates, the law of the land at that time would be the local law applicable in Johor. As such the English Law was not ‘received’ by virtue of Raffles settlement but by virtue of specific instrument such as the Second Charter of Justice. In response to Mohan Gopal opinion in the article “English Law in Singapore: The Reception That Never Was” [1983] 1 *Malayan Law Journal* xxv – xxxiv, that the English Law was never formally introduced in Singapore, Andrew Phang Boon Leong in his article “English Law in Singapore : Precedent, Construction and Reality or ‘The Reception That Had To Be’” [1986] 2 *Malayan Law Journal* civ – cxx, argued that the existing case laws, the language of the Charter and the attitude of the colonial judges towards the English Law all support the notion that English Law was indeed imported to Singapore by the Second Charter of Justice.

<sup>14</sup> The Charter was however dated 27 November 1826.

<sup>15</sup> Phang, Andrew Boon Leong, *The Development of Singapore Law*, (Singapore: Butterworth, 1990), at 34. Although Raffles had made some attempts at law making by enacting several Proclamations in 1819 and ultimately the Raffles’ six Regulations in 1823 after the island was placed under Bencoolen’s jurisdiction, the Proclamations and Regulations were *ultra-vires* since Raffles was only granted the authority to established a factory on the island. While the factory was within the Bencoolen’s jurisdiction, Raffles have no authority to place the entire island under the same law. Even after the island was ceded to the East India Company in 1824, the establishment of Court of Request and Resident’s Court in Singapore by John Crawford was still illegal since the company have no power to establish a legally constitutes courts in Singapore as the Treaty of Cession 1824 was not ratified by the English Parliament until 1926.

<sup>16</sup> The Charter extended the jurisdiction of the Recorder’s Court in Penang to Singapore and Melacca.

<sup>17</sup> See *R v Willans* (1856) 3 Ky 16. Also see Rutter, Michael F, *Applicable Law in Singapore and Malaysia*, (Singapore: Butterworth, 1989), at 116.

- a. The law must be of common and general policy. Any law which was specific and designed to cater to the circumstances in England was not applicable.<sup>18</sup>
- b. The law must be suitable to the local circumstances, custom, religion and legislations. Statutes, cases law or principles which were not suitable or would (if applied) caused injustice and oppression were either rejected or modified to suit local conditions and needs.<sup>19</sup>
- c. Only those laws which stood as at 27 November 1826 were to be applied.

In reference to English statutes, it is clear that only those statutes of general application which were already in application in England prior to 27 November 1826 and not repugnant to the local condition in Singapore were applicable. The situation however was not so clear with regard to the Common Law. Despite Walter Woon,<sup>20</sup> Andrew Phang<sup>21</sup> and Rutter's<sup>22</sup> opinions that the "cut-off" date<sup>23</sup> also governed the Common Law, there were many decisions where judges seemed to adopt the developments in the Common Law even after the "cut-off" date.<sup>24</sup> The intricate tie between the courts in Singapore and the Common Law was further complicated by Article 100 of the Constitution of the Republic of Singapore 1980 and the Judicial Committee Act<sup>25</sup> which made all decisions of the House of Lords (up until the colonial period) and the

<sup>18</sup> See *Choa Choon Neo v Spottiswoode* (1869) 12 Ky 216 and *Yeap Cheah Neo v Ong Cheng Neo* (1875) LR 6 PC 381.

<sup>19</sup> However, it was argued that the condition is only applicable to the areas of family law and related issues. The law relating to commercial, contract, evidence and other commercial interest, the English law will prevail. For detailed discussion see Chan, Helena HM, *op. cit.*, at 9.

<sup>20</sup> Woon, Walter, ed., *The Singapore Legal System*, (Singapore: Longman, 1989), at 120.

<sup>21</sup> Phang, Andrew Boon Leong, *op cit.*, (1990), at 40.

<sup>22</sup> Rutter, Michael F, *op. cit.*, (1989), at 117.

<sup>23</sup> 27 November 1826.

<sup>24</sup> The continuous application of Common Law and English decisions in Singapore probably due to convenience and comity which arise out of the long standing deference and reliance on the English principles and cases. See Rutter, F. Michael, *op.cit.*, (1989) at 117.

<sup>25</sup> (Cap 148).

Privy Council (on all appeals from Singapore) binding on the judges under the doctrine of *stare decisis* or binding precedent.

Section 3 of the Application of English Law Act<sup>26</sup> finally managed to resolve the issue.<sup>27</sup> The section allows the continuous application of the English Common Law and principles of equity applicable in England as at 12<sup>th</sup> November 1993 which has been part of the law in Singapore as at 12<sup>th</sup> November 1993. The application of the Common Law and principles of equity however must be suitable to the circumstances in Singapore and its inhabitants. Any further developments in the Common Law after 12<sup>th</sup> November 1993 will not affect the courts in Singapore. The passing of this Act sets the Common Law principles applicable for the assessment of damages for personal injury and fatal accident claims in Singapore slightly apart from those applicable in Malaysia. While the Malaysian judges can only apply the Common Law principles administered in England up to 7<sup>th</sup> April 1956,<sup>28</sup> the Singaporean judges are allowed to apply the Common Law principles applicable in England up to 12 November 1993.<sup>29</sup> Thus, allowing the Singapore judges the benefit of the development in the Common Law principles up to 12 November 1993.

### 6.2.2 The Civil Law Act

The first ever statutory provision relating to the assessment of damages for personal injury and fatal accident claims were enacted vide the Civil Law Act.<sup>30</sup> Similar to the

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<sup>26</sup> (Cap 7A).

<sup>27</sup> During the Second Reading of the Application of English Law Bill in Parliament in October 1993, Professor S. Jayakumar, the Minister for Law, described the Bill as “one of the most significant law reform measures since independence”. See Singapore Parliament Reports, Vol 61, 12 October 1993, col 609.

<sup>28</sup> Section 3 of the CLA 1956. Different “cut-off” dates are applicable to Sabah and Sarawak.

<sup>29</sup> Chew, Leslie *et al.*, *op. cit.*, at iii.

<sup>30</sup> (Cap 30). Hereinafter referred to as “the CLA (cap 30)”.

Malaysian Civil Law Enactment 1937,<sup>31</sup> the Law Reform 1934 and the Fatal Accident Act 1846 - 1976 also played important roles in the formation of the CLA (cap 30). The CLA (cap 30) gave statutory recognition to two (2) causes of actions under fatal accident claims; the estate claim<sup>32</sup> and the claim for loss of support.<sup>33</sup> Similar to the Civil Law Act 1937, the CLA (cap 30) also did not contain any provision on the assessment of damages for personal injury claims. The CLA (cap 30) was later superseded by the CLA (cap 43) in 1985.<sup>34</sup> The provisions relating to the assessment of damages for estate claims and loss of support in section 8 and 12 of the CLA (cap 30) are adopted by the CLA (cap 43).

The statutory reforms on the law relating to the assessment of damages for personal injury and fatal accident claims in England brought by the AJA 1982 were not adopted by the CLA (cap 43) until 1987. The passing of the Civil Law (Amendment) Act 1987<sup>35</sup> on 1<sup>st</sup> May 1987<sup>36</sup> amended the CLA (43) and made the provisions relating to the assessment of damages for personal injury and fatal accidents claims in the Act almost similar to the provisions in the AJA 1982 and the CLA 1956. The amendment was primarily an attempt by the Singaporean Legislature to keep abreast with the development in the law on assessment of damages in personal injury and fatal accident claims in England.<sup>37</sup> The amended CLA (cap 43) abolishes the awards for loss of earnings in lost years<sup>38</sup> and loss of expectation of life.<sup>39</sup> It introduces a new head of

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<sup>31</sup> (F.M.S. no 3 1937).

<sup>32</sup> Section 8 of the CLA (cap 30) is identical to the provisions in the Law Reform 1934 which provides damages claimable by the estate of the deceased person.

<sup>33</sup> Section 12 of the CLA (cap 30) is a carbon copy of the Fatal Accident Act 1846 which allows dependants of a deceased person to claim for the loss of financial support suffered due to deceased's demise.

<sup>34</sup> The latest edition to the CLA (cap 43) is the 1999 Edition which was done via the Civil Law (Amendment) Act 1998 (Act 45 of 1998) that came into force on 1<sup>st</sup> January 1999.

<sup>35</sup> (Act 11 of 1987). The Act was consolidated into the CLA (cap 43) forming the current CLA (cap 43).

<sup>36</sup> Republic of Singapore Government Gazette, Subsidiary Legislation Supplement, No 19, 30 April 1987, S 128/87.

<sup>37</sup> See statement by the Second Minister of Law of Singapore, Professor S. Jayakumar during the second reading of the Civil Law (amendment) Act 1987 on 4<sup>th</sup> March 1987.

<sup>38</sup> Section 10(3) of the CLA (cap 43).

<sup>39</sup> Section 11(1) of the CLA (cap 43).

damages known as bereavement<sup>40</sup> and made several amendments to the provisions relating to the assessment of damages for loss of support.<sup>41</sup> Similar to the CLA 1956, the CLA (cap 43) also chose to omit the provision which allows for interim or provisional payment in personal injury cases.

The provisions in the CLA (cap 43) can be distinguished from the CLA 1956 by the absence of any provision regulating the assessment of multiplier and multiplicand for loss of support and loss of future earnings. It also has no provision for the abolition of damages for loss of service and consortium of wife as well as damages for loss of service of child. The assessments of damages under these headings are still governed by the Common Law principles and decided cases.

The latest amendment to the provision on the assessment of damages for personal injury and fatal accident claims in the CLA (cap 43) was done in 2009 via the Civil Law (Amendment) Act 2009<sup>42</sup> that came into force on 1<sup>st</sup> March 2009. The Act amended sections 20, 21 and 22 of the CLA (cap 43). Other than inserting several new provisions in respect of the assessment of damages for loss of support in section 20 and 22 of the CLA (cap 43), the Act increased the quantum of damages for bereavement and transferred of the power to vary the quantum damages for bereavement from the President of Singapore to the Minister for Law.

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<sup>40</sup> Section 21 (1) of the CLA (cap 43).

<sup>41</sup> Section 20 and 22 of the CLA (cap 43). These amendments however are not as extensive as section 7 of the Malaysian CLA 1956.

<sup>42</sup> (Act 7 of 2009).

## **6.3 THE DEVELOPMENT OF THE LAW ON PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN BRUNEI**

Unlike Malaysia and Singapore, Brunei is technically not part of British Colony. However, due to its status as British Protectorate, the country had a very strong tie with England<sup>43</sup> especially with regard to its legal and judicial system. Although Brunei's dependence on England came to an end with the termination of the protectorate status in 1971, the tie between Brunei and England continued until it 1984 when it became a fully independent nation. Similar to its neighboring countries, Brunei's law on the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents is also heavily influenced by the English law. Other than the Common Law, Brunei also applied several English statutes dealing with personal injury and fatal accident claims such as the English Fatal Accident Act 1846 - 1976, Fatal Accident (Damages) Act 1908, Law Reform (Miscellaneous Provisions) Act 1934 and Law Reform (Married Women and Tortfeasors) Act 1935. These Acts were applicable by virtue of the Application of Law Act.<sup>44</sup> The Acts however were replaced by the Fatal Accidents and Personal Injuries Act in 1991.

### **6.3.1 The English Common Law**

The English Common Law and rules of equity were introduced in Brunei by the Court Enactment of 1906 and 1908.<sup>45</sup> The Enactments also introduced the Straight Settlement law which provided for the law on criminal procedures, penal codes, civil codes and

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<sup>43</sup> The relationship between Brunei and England started when the Sultan of Brunei sought the help of British Government in fighting pirates along the coast of Brunei. Both countries signed the Treaty of Friendship and Commerce in 1856 which among others allowed English official to hear cases involving British subject in the presence of local judge. After becoming a British Protectorate in 1888, British judges were allowed to hear all cases involving British subjects on their own. By virtue of Supplementary Protectorate Agreement signed between the Brunei Sultanate and Britain in 1906 a British Resident was appointed to advise the Sultan on all matters other than religion and custom. For details see Azrimah binti Hj. Ayob, "Legal System In Brunei Darussalam After The Signing of The Supplementary Agreement 1905/1906 between Brunei and Great Britain", *National Day Seminar 2006*, 7 March 2012, [bruneiresources.com <http://www.bruneiresources.com/pdf/nd06\\_azrimah.pdf>](http://www.bruneiresources.com/pdf/nd06_azrimah.pdf)

<sup>44</sup> (cap 2). Hereinafter referred to as "the Application of Law Act".

<sup>45</sup> Black, Ann E. and Bell, Gary F. ed., *Law and Legal Institution of Asia: Tradition, Adaptation and Innovations*, (Melbourne: Cambridge University Press, 2011), at 299.

rule of contract.<sup>46</sup> However, it was only after the introduction of the Application of Laws Act that the English Common Law and rules of equity were formally received in Brunei. The Application of Laws Act also allowed the adoption of English's statutes of general application applicable in England as at 25 April 1951. By virtue of this Act, the laws and decisions of the English courts as at 25 April 1951 were binding on the judges in Brunei as long as they were not contrary to local circumstances, statutes or prior decisions.<sup>47</sup> The "cut-off" date was not absolute. The judges in Brunei on several occasions had applied some post-1951 statutes especially when there was lacuna in the local law. The court in *Baiduri Bank Bhd. v Pengiran Datin Hajah Za'baedah bte PRW Pg Hj Metussin & Anor.*<sup>48</sup> for example held that English Property Act is applicable when there is no relevant statute or case could be found in Brunei.

The Application of Law Act allowed suitable changes and amendments to be made to the English law being adopted in Brunei in order to suit local circumstances. In *Chen Fung Ying & Ors v Chee Hatt Sang*,<sup>49</sup> the court, in deciding whether the English Fatal Accident Acts 1846 – 1976 and the Law Reform 1934 were applicable as a whole in Brunei by virtue of the Application of Law Enactment, held that although a statute must be imported as a whole, the Application of Law Enactment does not prevent the local legislator from enacting new law which may amend part of the imported statute.

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<sup>46</sup> Hoffman, Thomas and Lucia Siebers, ed., *World Englishes – Problems, Properties and Prospect*, (Philadelphia: Benjamin Publishing Company, 2009), at 158.

<sup>47</sup> Cheong, Diana PP, "Administrative Accountability and the Law in Brunei Darussalam" *TINJAUAN, Policy and Management Review No 1, 2002*, The Centre for Strategic and Policy Studies, 7 Dec 2011, <[http://www.csps.org.bn/senior\\_researcher.html](http://www.csps.org.bn/senior_researcher.html)>

<sup>48</sup> [2001] BLR 241.

<sup>49</sup> [1982] 1 MLJ 370. While referring to a Privy Council's decision in a Singaporean case of *Shaik Sahied bin Abdullah Bajera v S T Sockalingam Chettiar* (1933) AC 342, Robert CJ held: "I accept that the effect of that decision is that if an English Act is to be deemed to have been imported into Brunei, by virtue of the 1951 Enactment, the whole of that English Act or none of it would be so imported. This does not, however, mean that a subsequent written law enacted in Brunei may not amend the English Act which has been imported as a whole, so as to leave parts of it thereafter in force. I see, therefore, no objection in principle to the method [sic] view reached by Pickering J that it is possible for part of an English Act to be in force in Brunei provided that originally the whole Act was incorporated into Brunei law and part of it later excised by some Brunei enactment."

### 6.3.2. Fatal Accidents and Personal Injuries Act

Unlike Malaysia and Singapore, Brunei has no Civil Law Act. The assessment of damages for personal injury and fatal accident claims is governed by the Fatal Accidents and Personal Injuries Act. The Act originated from the Emergency (Fatal Accidents and Personal Injuries) Order 1991 which came into force on 1<sup>st</sup> February 1991.<sup>50</sup> The Order abolished the Law Reform (Personal Injuries) Act<sup>51</sup> and the Law Reform (Contributory Negligence) Act.<sup>52</sup> Most importantly, the Emergency Order also abolished all pre-1951 English legislations relating to personal injury and fatal accident claims which were applicable in Brunei by virtue of the Application of Law Act.<sup>53</sup> As such, the English Fatal Accident Act 1846 - 1976, Fatal Accident (Damages) Act 1908, Law Reform 1934 and Law Reform (Married Women and Tortfeasors) Act 1935 are no longer applicable in Brunei starting from 1<sup>st</sup> February 1991.<sup>54</sup> The Common Law principles are still applicable in the absence of specific provision in the Fatal Accidents and Personal Injuries Act.

The provisions in the Fatal Accidents and Personal Injuries Act are almost similar to the CLA 1956 and the CLA (cap 43). Other than providing for the statutory causes of action for claims for loss of support<sup>55</sup> and estate claims,<sup>56</sup> the Act abolishes the awards for loss of earnings in lost years<sup>57</sup> and loss of expectation of life.<sup>58</sup> The Act also introduces the award for bereavement.<sup>59</sup> Similar to the CLA (cap 43), the Fatal Accidents and Personal Injuries Act does not contain provisions regulating the

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<sup>50</sup> Brunei is governed under the State of Emergency since 1962. The proclamations of emergency were renewed every two (2) years according to section 83 of the Constitution of Brunei. The proclamations enable any emergency order or any subordinates instruments conferred by any emergency order to have the force of law.

<sup>51</sup> (cap10)(1984 ed.).

<sup>52</sup> (cap 53)(1984 ed.).

<sup>53</sup> Section 23 of the Emergency (Fatal Accident and Personal Injuries) Order 1991.

<sup>54</sup> Lee, Yew Choh, "Recent Legal Development in Brunei Darussalam", *Singapore Journal of Legal Studies* [1993] 668-677, at 668.

<sup>55</sup> Sections 3 and 4 of the Fatal Accidents and Personal Injuries Act.

<sup>56</sup> Section 11 of the Fatal Accidents and Personal Injuries Act .

<sup>57</sup> Section 11(3)(a)(ii) of the Fatal Accidents and Personal Injuries Act .

<sup>58</sup> Section 12 of the Fatal Accidents and Personal Injuries Act .

<sup>59</sup> Section 4 of the Fatal Accidents and Personal Injuries Act .

assessment of multiplier and multiplicand loss of support and loss of future earnings. It also does not abolish the award for loss of service and consortium of wife and loss of service of child. The assessments of damages under these headings are still at the discretion of the judges governed by the Common Law principles and decided cases. However, unlike the CLA 1956 and the CLA (cap 43), the Fatal Accidents and Personal Injuries Act contains provisions allowing for interim or provisional payment in personal injury cases which is similar to section 6 of the AJA 1982.

#### 6.4. PERSONAL INJURY CLAIMS

The CLA (cap 43) and the Fatal Accidents and Personal Injuries Act have very minimal provision relating to the assessment of damages for personal injury claims. The assessment of damages for the majority of the awards is discretionary upon the presiding judges guided by the Common Law principles and decided cases. Unlike the Malaysian judges who are bound by the provisions in section 28A of the CLA 1956, judges in Singapore and Brunei have a wide discretion in assessing damages for loss of pre-trial earnings,<sup>60</sup> loss of future earnings,<sup>61</sup> loss of future earning capacity,<sup>62</sup> pain and suffering and loss of amenities.<sup>63</sup>

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<sup>60</sup> See *Tan Teck Boon v Lee Gim Siong* (2011) SGHC 169 (Singapore) and *Karuppiah Nirmala v Singapore Bus Services Ltd* [2002] 3 SLR 415 (Singapore), *Bijun Kalur v Pahayta Sdn. Bhd.* [2010] 5 MLJ 684 (Brunei) and *Hj. Hassan b. Munap v Petrodril (B) Sdn. Bhd.* [1988] 1 MLJ 388 (Brunei).

<sup>61</sup> See *Chai Kang Wei Samuel v Shaw Linda Gillian* (2010) 3 SLR 587 (Singapore) and *Ho Yiu v Lim Peng Seng* (2004) 4 SLR (R) 675 (Singapore), *Goh Eng Hong v The Management Corporation of the Textile Center* [2001] 1 SLR 209 (Singapore), *Murugasu Euan v Singapore Airlines Ltd, op. cit.* (Singapore), *Karuppiah Nirmala v Singapore Bus Services Ltd, op. cit.* (Singapore), *Bijun Kalur v Pahayta Sdn. Bhd. op. cit.* (Brunei) and *Awangku Muhammad Murshyid b Pengiran Hj Ali & Anor. v Makrami b. Hj. Md Noor & Another Appeal* [2010] 4 MLJ 662 (Brunei).

<sup>62</sup> See *Wong Kim Lan v Christie Kondalasamy* (2004) SGDC 234 (Singapore) and *Koh Soon Pheng v Tan Kah Eng* (2003) 2 SLR (R) 536 (Singapore). *Tiong v Vinetti* [1984] 2 MLJ 169 (Brunei).

<sup>63</sup> See *Tan Teck Boon v Lee Gim Siong, op.cit.* (Singapore) and *R J McGuinness v Ahmad Zaini* [1980] 2 MLJ 304 (Brunei).

#### 6.4.1 Abolishing the Award for Loss of Expectation of Life

Similar to the situation in Malaysia before the CLA 1956, plaintiffs in personal injury claims in Singapore and Brunei were originally entitled to claim for loss of expectation of life. The introduction of section 11(1) of the CLA (cap 43) and section 12 of the Fatal Accidents and Personal Injuries Act however completely abolished this head of damages from being part of the damages claimable by a living plaintiff in a personal injury claims. The abolition is similar to section 28A (2)(a) and (b) of the CLA 1956. The sections are direct adoption of section 1(1)(a) of the AJA 1982.

Section 11 (1) of the CLA (cap 43) is almost similar to section 28A (2)(a) and (b) of the CLA 1956 except for the use of the term ‘injured person’ instead of ‘plaintiff’ and the arrangement of para. The section reads:

In any action for damages for personal injuries, **no damages shall be recoverable in respect of any loss of expectation of life caused to the injured person by the injuries**, except that if the injured person’s expectation of life has been reduced by the injuries, the court, **in assessing damages in respect of pain and suffering caused by the injuries, shall take into account any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced.** (*emphasis added*)

Section 11(1) of the CLA (cap 43) is echoed by section 12 (2) of the Fatal Accidents and Personal Injuries Act albeit with slight difference in the arrangement of para. While the wordings in Section 12(1) of the Fatal Accidents and Personal Injuries Act is similar to section 11(1) of the CLA (cap 43), the arrangement of para is similar to

section 28A (2)(a) and (b) of the CLA 1956. Section 12(1) of the Fatal Accidents and Personal Injuries Act reads:

(1) in an action for damages for personal injuries –

(a) **no damages shall be recoverable in respect of any loss of expectation of life** caused to the injured person by the injuries; but

(b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, **shall take account of any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced.** (*emphasis added*)

The effect of section 11(1) of the CLA (cap 43) and section 12 (1) of the Fatal Accidents and Personal Injuries Act is very much similar to section 28A (2)(a) and (b) of the CLA 1956. Despite the heading and the marginal note in the sections which state “abolition of damages for loss of expectation of life” and the explicit phrase ‘no damages shall be recoverable’, the sections did not abolish the award for loss of expectation of life *in toto*. The effect of the first part sections in abolishing the award for loss of expectation of life is negated by the second part of the sections which allows judges to take into consideration of plaintiff's suffering due to the loss of his life's expectation while assessing damages for pain and suffering. Judges therefore have the discretion to award damages for loss of expectation of life although the amount is to be merged into the assessment for pain and suffering. KS Rajah JC recognized this in his

decision in *Au Yong Wing Loong v Chew Hai Ban & Anor*.<sup>64</sup> He held that in claims for damages for personal injury, section 11(1) of the CLA (cap 43) only abolishes the award for loss of expectation of life as a separate heading, the award can still be recovered under the award for pain and suffering should the plaintiff is aware of the diminution in his life expectation.

The second part to the sections also allows judges to retain their discretion in the assessing damages for loss of expectation of life in personal injury claims. Since the Acts did not provide how an ‘account for the suffering caused by plaintiff’s awareness that his life expectation has been reduced’ is to be assessed, judges will have to use their discretion in assessing the same. The assessment take into consideration plaintiff’s personal circumstances, his attitude to the loss and the number of years of life which he had been deprive.<sup>65</sup> All of which is speculative in nature. As such, judges not only have the discretion to award damages for loss of expectation of life, they also have the discretion to assess the damages to be awarded and to factor that amount in the assessment of damages for pain and suffering.<sup>66</sup>

The quantum awarded is usually based on local cases or cases decided by the courts in the neighboring countries. This was acknowledged by Roberts CJ in a Brunei case of *R J McGuinness v Ahmad Zaini*.<sup>67</sup> While deciding on the quantum to be awarded for pain and suffering and loss of amenities for amputation of one leg, the judge took into consideration the quantum awarded in Singapore and Malaysia as well as the Common Law principles. He held:

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<sup>64</sup>[1993] 3 SLR 355 (Singapore).

<sup>65</sup> Lim, Audrey, *et. al*, *Assessment of Damages: Personal Injuries and Fatal Accidents* (Singapore: Butterworth, 2001), at 154.

<sup>66</sup> In *Cheng Chay Choo v Wong Meng Tuck & Anor*. (unreported, 22 may 1992: suit 1573 of 1989)(Singapore) the court accepted that the respondent with her qualifications and mental faculty would have been aware of her diminishing expectation of life even though no medical evidence was produced. The court allowed SD 120,000 for pain and suffering after taking in to account the loss of expectation of life.

<sup>67</sup> *Op. cit.*(Brunei)

“The currencies of Singapore, Malaysia and Brunei are virtually on a par, which prima facie suggests that the purchasing power of each of the three dollars is roughly the same. I, therefore, consider that Brunei awards should, in general, follow those of Singapore and Malaysia, provided that the awards in Singapore and Malaysia are based upon the same principles of law which are applicable to Brunei...

The correct approach at common law has been set out by the Court of Appeal in *Walker v John McLean and Sons Limited* [1979] 2 All ER 965. In that case, the trial judge awarded to the plaintiff damages of £35,000 for pain, suffering and loss of amenities, including loss of expectation of life and of sexual function...

I also take into account the fact the plaintiff has lost more than the average person would do by way of loss of amenities, even if his determination to overcome his difficulties has enabled him to make a better recovery than the average injured person with this disability.”

Similar to the circumstances in Malaysia, section 11(1) of the CLA (cap 43) and section 12 (1) of the Fatal Accidents and Personal Injuries Act also have no noticeable effect on the amount of damages being awarded for personal injury claims in Singapore and Brunei. In Singapore, despite recognizing plaintiff’s right to be compensated for loss of expectation of life, damages for loss of expectation of life was rarely awarded.<sup>68</sup> In the rare cases where the award was allowed such as *Au Kee Tuang v Lightweight Concrete Pte Ltd.*,<sup>69</sup> *Tan Teck Chye v Chua Mee Sieng*<sup>70</sup> and *Mohamed Fami Hassan v Swissco Pte Ltd.*,<sup>71</sup> the damages awarded was relatively low. The standard and moderate amount

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<sup>68</sup> Verupillai, Jeyaratnam, “Loss of expectation of Life and the Living Plaintiff”, 1 (1982) *Malayan Law Journal*, lxix – lxx, at lxix.

<sup>69</sup> [1984] 2 MLJ xxix (Singapore).

<sup>70</sup> [1988] 2 MLJ xxvi (Singapore).

<sup>71</sup> [1986] 1 MLJ 461 (Singapore).

of damages was recognized by the Minister of Law in his speech to move the Civil Law (Amendment) Bill. The Minister stated that \$6500 was the amount generally awarded for this head of damages.<sup>72</sup> The same amount was still awarded in 1993 in *Au Yong Wing Loong v Chew Hai Ban & Anor*,<sup>73</sup> and three years later in *Chua Seng Lee v Ang Teow Koon & Anor*.<sup>74</sup> Therefore, the abolition of the award for loss of expectation of life as a separate head of damages in personal injury claims results in minimal reduction in the quantum of damages being awarded under personal injury claims in Singapore.

There is an absence of reported cases which allowed damages for loss of expectation of life to a living plaintiff in Brunei. As such, the abolition the award as a separate heading by section 12 of the Fatal Accidents and Personal Injuries Act also does not carry much effect to the amount of awards being awarded for personal injuries in Brunei.

It is also submitted that unlike section 28A (2) of the CLA 1956, section 11(1) of the CLA (cap 43) and section 12 (1) of the Fatal Accidents and Personal Injuries Act are not intended to abolish the award for loss of expectation of life in personal injury claims. The actual intention behind section 11(1) of the CLA (cap 43) is to prevent the beneficiaries of deceased's estate from capitalizing from deceased's demise. Allowing the estate to claim for loss of expectation of life would amount to undeserved

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<sup>72</sup> See decisions in *Chan Heng Wah v Peh Thiam Choh*, [1986] 2 MJ 175 (Singapore) and *Mohamed Fami Hassan v Swissco Pte. Ltd.*, *op. cit.* (Singapore) where only \$6500 was awarded for loss of expectation of life. See also *Au Kee Tuang v Lightweight Concrete Pte Ltd*, *op. cit.* (Singapore) and *Tan Teck Chye v Chua Mee Sieng*, *op. cit.* (Singapore).

<sup>73</sup> *Op. cit.* (Singapore).

<sup>74</sup> [unreported – suit no 2103 of 1996] (Singapore) cited in Lim, Audrey, *et. al.*, *op. cit.*, at 29.

enrichment.<sup>75</sup> KS Rajah JC in *Au Yong Wing Loong v Chew Hai Ban & Anor.* acknowledged his by saying:

“Section 8 (as it was then) of the said Act abolishes loss of expectation of life as a separate head in claims of non-pecuniary loss in an action for damages for personal injuries, in claims by the estate, and not by a living plaintiff. The estate should not receive compensation meant for living plaintiff.”

Similarly, section 12 (1) of the Fatal Accidents and Personal Injuries Act is also arguably not meant to govern the award for loss of expectation of life in personal injury claims. The section is listed under Part IV - ‘EFFECT OF DEATH’. Therefore, it is supposed to govern damages for loss of expectation of life under fatal accident claims, (i.e., estate claims) and not personal injury claims. Furthermore, section 1(1)(a) of the AJA 1982 from which section 11(1) of the CLA (cap 43) and section 12 of the Fatal Accidents and Personal Injuries Act were patented from is also not intended for living plaintiff.<sup>76</sup> The section was enacted due to the insignificant amount of damages awarded to deceased estate under this heading. The amount was viewed as an insult to the loss suffered by deceased’s family<sup>77</sup> that it should be removed rather than allowed to subsist.

It is therefore concluded that section 11(1) of the CLA (cap 43) and section 12 of the Fatal Accidents and Personal Injuries Act have little effect on the discretionary power

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<sup>75</sup>Based on the explanatory statement by the Singaporean Minister of Law during the tabling of the Civil Law (Amendment) Bill, the 1987 statutory amendment is intended to reform the law relating to damages payable in fatal accident cases specifically for claims by the estate of the deceased.

<sup>76</sup> Velupillai, Jeyaratnam, *Damages: Loss of Expectation of Life Survival and Deductibility*, (Singapore: Malayan Law Journal, 1984), at 19.

<sup>77</sup> The Lord Chancellor of the House of Lords in the Hansard Parliamentary Debates, 8 March 1982, Vol 428, Col 43 commented that the award is “of little financial significance and has often been criticized as derisory in respect of the death of husbands, wives and children”.

of the judges to assess and award damages for loss of expectation of life in personal injury claims arising out of motor vehicle accidents. The sections only abolish the award as a separate head of damages. Judges however still have the discretion to allow damages for loss of expectation of life as part of damages for pain and suffering. Since the damages is not abolished altogether, the sections have minimal effect in reducing the quantum of damages in personal injury claims arising out of motor vehicle accidents.

#### **6.4.2 The Absence of Any Provision on the Assessment of Damages for Loss of Earnings**

Unlike the CLA 1956, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act did not contain any provision on the assessment of damages for loss of pre-trial earnings, loss of future earnings and loss of future earning capacity. These damages are still assessed based on the Common Law principles and decided cases.

##### **(a) Loss of Pre-trial Earnings**

The assessment of damages for loss of pre-trial earnings in Singapore and Brunei is based on the Common Law multiplication method; plaintiff's income multiplies with the length of time he was unable to earn that income. The sum obtained by deducting income-tax, expenses incurred in producing income<sup>78</sup> and collateral benefits received due to incapacity<sup>79</sup> from plaintiff's pre-injury earning<sup>80</sup> is generally accepted as the multiplicand. The multiplier on the other hand is usually based on his medical leave

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<sup>78</sup> Inclusive of travelling, food and lodging *etc.*

<sup>79</sup> Inclusive of worker's compensation, unemployment benefits, wages or sick pay *etc.*

<sup>80</sup> Inclusive of allowances, overtime, bonuses *etc.*

given by the doctors.<sup>81</sup> In cases where the plaintiff is totally unable to return to work, the multiplier is calculated from the date of injury to the date of trial.

### **(b) Loss of Future Earnings**

The assessment of damages for loss of future earnings in Singapore and Brunei also uses the Common Law multiplication method. The multiplicand and multiplier are derived by projecting plaintiff's probable future earnings and expected working life. The multiplication of these figures will generate an amount which constitutes the projected future loss that already took into consideration the many possibilities and contingencies in life. Since there is no statutory provision in Singapore and Brunei with regard to the assessment of loss of future earnings, the need for judicial discretion is most apparent. It can be viewed from three (3) perspectives:

#### ***(i) The assessment of multiplicand***

Unlike the CLA 1956, the CLA (cap 43) and Fatal Accidents and Personal Injuries Act allow judges to award damages for loss of future earnings to plaintiffs who are not earning any income at the time of injury. Judges have the discretion to assess and award damages for loss of future earnings to plaintiff who was unemployed, not earning income at the time of injury, a student or a minor. The absence of the requirement of earning income at the time of injury also allows judges the discretion to award the damages to plaintiff who was in between employment, on unpaid leave or have a good prospect of earning income in the future to claim for loss of future earnings. Although these persons were not receiving earning at the time of the injury,

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<sup>81</sup> See *Wee Sia Tian v Long Thik Boon* [1996] 3 SLR(R) 513 (Singapore) and *Hj Hassan bin Munaf v Petrodril (B) Sdn. Bhd., op. cit.* (Brunei).

they have the foreseeable probability to earn income in the future. As such, allowing these persons damages for loss of future earnings is one of the advantages of the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act that the CLA 1956 is lacking.

However, in order to assess the multiplicand for loss of future earnings to persons who were not earning income at the time of injury, an extensive use of judge's discretion and a large degree of speculation<sup>82</sup> is required. Judges usually will have to take into consideration plaintiff's academic qualifications,<sup>83</sup> skills,<sup>84</sup> pass achievements, family and social backgrounds<sup>85</sup> or even the national salary average statistic<sup>86</sup> in order to arrive at a hypothetical figure which is to be regarded as the multiplicand. Estimating the multiplicand in the absence of current income as a starting point for the assessment creates a lot of difficulties, uncertainties and varying results due to the many variables involved. The difficulties were apparent in *Peh Diana v Tan Miang Lee*.<sup>87</sup> The judge in this case had to assess the multiplicand for plaintiff who was a student with below average school results. The judge had to assess plaintiff's hypothetical future income by taking into consideration the commencing salary of a stenographic secretary in Singapore and the National Statistic published by the Labour Ministry. Similarly, in *Eddie Toon Chee Meng v Yeap Chin Hon*,<sup>88</sup> the judge had to balance plaintiff's good academic results and his lack of good family and social background in assessing the multiplicand.

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<sup>82</sup> *Lee Wei Kong (By his litigation representative Lee Swee Chit) v Ng Siok Tong*, op. cit., (Singapore).

<sup>83</sup> In *See Soon v Goh Yong Kwang* [1992] 2 SLR 242 (Singapore), the court awarded a multiplicand at superscale level in Civil Service despite plaintiff a doctor being new to the service.

<sup>84</sup> *Tiong Ing Chiong v Giovanni Vinetti*, op. cit. (Brunei).

<sup>85</sup> *Eddie Toon Chee Meng v Yeap Chin Hon* [1993] 2 SLR 536 (Singapore).

<sup>86</sup> See *Peh Diana v Tan Miang Lee*, [1991] 3 MLJ 375 (Singapore) and *Eddie Toon Chee Meng v Yeap Chin Hon*, op. cit. (Singapore) where the national average was considered based on The Report on the Labour Force Survey published by the Labour Ministry authorized under the Statistic Act (cap 317) 1991 Rev Ed. The national median starting pay of a university graduate was used as multiplicand in *Lee Wei Kong (By his litigation representative Lee Swee Chit) v Ng Siok Tong* [2012] SGCA 4. (Singapore).

<sup>87</sup> Op. cit. (Singapore).

<sup>88</sup> Op. cit. (Singapore).

Even in cases where plaintiff is working with regular periodic pay, with specific career path and salary advancement such as those in the public service, judges in Singapore and Brunei still need to exercise their discretion in assessing the multiplicand. Since there is no requirement for the multiplicand to be assessed based on plaintiff's income at the time of injury only,<sup>89</sup> judges in Singapore and Brunei are allowed to consider any possible future increases in plaintiffs'. They generally adopt a figure as a starting point of the assessment based on plaintiff's earning, allowances, bonuses and other fringe benefits received at the time of trial. This figure is later revised to a hypothetical figure after taking into account possible prospect for promotion, salary increment, bonuses, allowances, career advancement as well as any negative contingencies. Since the prospect of future increase in earnings or negative contingencies are difficult to prove and predict let alone to confirm with certainty, the assessment of this hypothetical figure is highly speculative in nature and riddle with conjectures and presumptions. Winslow J in *Ngui Kee Siong v Guan Soo Wee*<sup>90</sup> recognized this by stating:

“It is odious to make comparisons based on promotion prospects and salaries as between different departments of the Government service as sometimes service in one department, though promising in the early stages, may as a result of changing conditions, turn out to be less rewarding while service in another department with a seemingly less promising future may turn out to be more fruitful than originally expected...

...There are always a number of other factors, both tangible as well as intangible, to be considered in assessing future prospects and chances of

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<sup>89</sup> The CLA 1956 requires that any increase in plaintiff's income in the future should not be considered in the assessment of multiplicand for loss of future earnings.

<sup>90</sup> [1970] 2 MLJ 48 (Singapore).

promotion. Some officers have been known to stagnate for reasons only known to their immediate superiors and the promoting authority. However, in view of the unfortunate accident which has, nevertheless, reduced his immediate chances, I would assess, for what it is worth, doing what I can in the realm of little more than speculation, damages under this head in the round sum of \$ 7,000 at the very most.”

The application of judges’ discretion in arriving at a hypothetical figure as multiplicand also causes variations in the amount of multiplicand being awarded in cases with almost similar facts and circumstances. Since the considerations which the judges take into account in arriving at the hypothetical figure are largely depending on the judges’ discretion based on the facts of the case guided only by the Common Law principles and decided cases, the figure arrived at vary according to what the judges’ believe to be plaintiffs’ possible earnings in the future. To illustrate, the decisions in *Chan Heng Wah v Peh Thiam Choh*,<sup>91</sup> and *Lai Chi Kay & Ors v Lee Kuo Shin*.<sup>92</sup> which concerned claims for loss of future earning by medical students (albeit at different years of study) is compared. In *Chan Heng Wah v Peh Thiam Choh*,<sup>93</sup> the multiplicand for a second year medical student was calculated at the salary of a hospital registrar while in *Lai Chi Kay & Ors v Lee Kuo Shin*<sup>94</sup> plaintiff who was in his fourth year of medical school was awarded a multiplicand which was a median between the maximum and minimum salary in the Hong Kong medical service. Although plaintiffs in these cases were medical students, the considerations in the assessments and the amount of multiplicands greatly differed from one another. The variation in the considerations on

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<sup>91</sup> *Op. cit.* (Singapore).

<sup>92</sup> [1981] 2 MLJ 167 (Singapore).

<sup>93</sup> *Op. cit.* (Singapore).

<sup>94</sup> *Op. cit.* (Singapore).

assessment and the amount of multiplicand in like cases create uncertainty and variation in the awards for loss of future earnings in Singapore and Brunei.

The application of judges' discretion in arriving at a hypothetical figure as multiplicand also brings with it the risk of over-compensation. Since the multiplication method requires the multiplicand to be directly multiplied with the multiplier, it operates as if the plaintiff will receive the increases in earning in the future as a matter of right and the amount will be consistent thorough out the balance of plaintiffs' working life. In reality, annual salary increments, bonuses and promotions are not certain and depending on many external factors aside from plaintiffs' personal skills and capabilities. As such, judges have to constantly remind themselves of the possibility that plaintiffs might not be able to earn the same hypothetical figure throughout their working life. This concern was reflected in the decision of the Brunei's Court of Appeal in *Bijun Kalur v Pahayta Sdn. Bhd.*<sup>95</sup> In assessing the multiplicand for loss of future earnings, the judges took into consideration plaintiff's future salary increment. This increase however was done with some caution that said increment will not continue throughout plaintiff's whole working life. Instead of awarding the projected \$4200, plaintiff's projected salary was reduced to \$3600 after taking into consideration the possibility that plaintiff's earning might not constantly increase until he retires. Similarly, in *Awangku Muhammad Murshyid b Pengiran Hj Ali & Anor. v Makrami b. Hj. Md Noor & Another Appeal*,<sup>96</sup> the Court of Appeal also took into account plaintiff modest education level and estimated that his salary would have increase from \$900 to \$1800 a month after contemplating the possibility that plaintiff could not have expected to receive an increment of \$100 every year throughout his working life. To calculate

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<sup>95</sup> *Op. cit.*(Brunei).

<sup>96</sup> *Op. cit.*(Brunei).

the increment just so would “introduce an arithmetic certainty in a completely uncertain future and would be likely to lead to error and over compensation.”<sup>97</sup>

### *(ii) The assessment of Multiplier*

The absence of statutorily prescribed method of assessing the multiplier as provided in section 28A (2) (d) of the CLA 1956 made it necessary for the judges in Singapore and Brunei to continue applying the Common Law principle in the assessment of multiplier for the award for loss of future earnings. The multiplier is arrived at by deducing plaintiffs’ probable remaining working life which is generally based on plaintiffs’ age at the date of trial to retirement age<sup>98</sup> after taking into consideration their age, nature of employment, retirement age, health, social and family background *etc.*

The absence of statutory multiplier in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act allow flexibility in the assessment of multiplier for loss of future earnings for personal injury claims arising out of motor vehicle accidents. The multiplier can be adjust to suit the circumstances of plaintiff’s employment, financial needs and obligations, the changes in the employment market and the current national life expectancy. Recently, the judges in Singapore have increased the traditional maximum multiplier of sixteen (16)<sup>99</sup> years to eighteen (18)<sup>100</sup> and twenty (20)<sup>101</sup> years to reflect their considerations for the revision in the national age of retirement, increasing life expectancy and changes in work conditions. The court of Appeal in a 2012 appeal case of *Lee Wei Kong (By his litigation representative Lee Swee Chit) v*

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<sup>97</sup> Per Mortimer JA at 670.

<sup>98</sup> Chan, Gary Kok Yew and Lee Pey Woan, *The Law of Tort in Singapore*, (Singapore: Academy Publishing, 2011), at 741.

<sup>99</sup> Audrey, Lim, *op. cit.*, at 18.

<sup>100</sup> *Teo Seng Kiat v Goh Hwa Teck* (Suit no 2224 of 1998) (unreported).

<sup>101</sup> Pundit, “Loss of Future Earning Payout Raise for Student Hit by Taxi”, *The New Straits Times*, 21st January 2012.

*Ng Siok Tong*<sup>102</sup> for example had allowed twenty (20) years of multiplier for loss of future earnings to the plaintiff who was eighteen (18) years old junior college student.

The flexibility in the assessment of multiplier also allows the courts to adopt the split multiplier approach. Since future increases in plaintiff probable future earnings are taken into consideration in the assessment of multiplicand, the courts sometimes end up with several sets of multiplicands. Therefore, the multiplier also needs to be split up in order for it to be applied to the different sets of multiplicand.<sup>103</sup> In situations where there are possibilities that plaintiffs' possible future income vary due to certain reasons such as health improvement which likely to reduce the loss of future salary,<sup>104</sup> changes in plaintiffs employment or in cases involving foreign national working in the countries,<sup>105</sup> the flexible multiplier allows judges to split the multiplier to suit the changes in plaintiffs' future earning period.<sup>106</sup> As such, it can be concluded that the absence of specific provision regulating the assessment of multiplier for loss of future earnings enable the judges to adjust the multiplier to suit the plaintiffs and the current employment market. It is an advantage that the judges in Malaysia don't have.

On the other hand, the absence of specific statutorily prescribed method of assessing the multiplier can lead to uncertainty and variation in the assessment of the same. Since loss of future earnings are future losses, the number of years is essentially speculative depending on what the judges presume to be appropriate depending on plaintiff's age, nature of employment, retirement age, health, social and family background *etc.* The extensive use of judicial discretion in factoring in the above considerations results in a

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<sup>102</sup> *Op. cit.*, (Singapore).

<sup>103</sup> Chan, Gary Kok Yew and Lee Pey Woan, *op. cit.*, at 742.

<sup>104</sup> *Loh Chia May v Koh Kok Han* [2009] SGHC 181 (Singapore).

<sup>105</sup> *Visvalingam a/l Arumugam v Toh Gim Choon* [1998] 3 SLR 974 (Singapore), *Xu Jin Long v Nian Chuan Construction Pte. Ltd.* [2001] 4 SLR 624 (Singapore) and *Liu Haixiang v China Construction (South Pacific) Development Co. Pte. Ltd.* [2009] SGHC 21 (Singapore). This is based on the probability that the foreign worker is expected to return to his own country and no longer earning the same amount of income he earn in Singapore.

<sup>106</sup> See illustration in Chan, Gary Kok Yew and Lee Pey Woan, *op. cit.*, at 742.

hypothetical figure which is highly speculative. This fact was recognized by the Privy Council in an appeal from Brunei in *Tiong Ing Chiong v Giovanni Vinetti*<sup>107</sup> where Lord Brandon of Oakbrook while delivering the judgment of the Privy Council for an appeal on the award for loss of future earnings held:

“Their Lordships think it right to emphasize that, even when a court has the best possible evidence (which was far from being the case here), the selection of an appropriate multiplier can never be a matter of precision...”

***(iii) Deductions for accelerated payment, contingencies and investment value***

The fact that plaintiffs are receiving the damages lump sum in advance calls for the necessarily discounts to be made to the hypothetical future earnings to cater for the conjectural aspect of the assessment. These discounts are made in view of possible contingencies and vicissitudes in life which might happen to the plaintiffs and affect their future earnings<sup>108</sup> such as sickness, pre-mature death, demotion, unemployment, economic downturn, the possibility that they might not work until normal retirement age and the possibility that the employment may not be sustainable over their normal working life.<sup>109</sup> Similarly, discounts are also need to be made to the hypothetical figure to cater for the possibility that the money if invested will generate interest.<sup>110</sup>

Since there is no specific provision regulating the assessment of damages for loss of future earnings in Singapore and Brunei, there is also no specific method in assessing

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<sup>107</sup> *Op. cit.*, (Brunei)

<sup>108</sup> Rutter, Michael F., *op. cit.*, at 257.

<sup>109</sup> See *Zaiton Bee Bee Bte Abdul Majeed v Chan Poh Teong* [2010] SLR 697 (Singapore).

<sup>110</sup> The discount is also known as discount for investment value or accelerated payment.

the deductions available. The assessment of the deductions is left in the hand of the presiding judges guided by the Common Law principles and decided cases. The judges' approach to this issue in Singapore and Brunei is not consistent. While it is common for judges in Singapore and Brunei to deduct the discounts for contingencies, investment value and accelerated payment,<sup>111</sup> there were also cases which shows that deductions for these items were not made.<sup>112</sup> In cases where discounts were made, the methods adopted by the judges to arrive at the discounted value were also inconsistent. The most common method of deduction are by deducting certain percentage out of the total figure arrived at after multiplying the multiplicand and multiplier,<sup>113</sup> by adopting the multiplier in like cases<sup>114</sup> and by adopting a set of tables known as "tables of present value" or "annuity tables."<sup>115</sup>

Tables of present value or annuity tables represent the number of working years that the lump sum money will be able to 'purchase' if invested.<sup>116</sup> The tables generally operate under the assumption that the money awarded in lump sum will generate four (4) to five (5) percent interest when invested. As such, a deduction for this interest value is configured into the tables. Unfortunately, although the application of the tables are said to be relatively accurate,<sup>117</sup> the risk of double discounting caused the judges to abandon the method and reapply the method of deducting certain percentage from the figure arrived at after multiplying the multiplicand and multiplier.<sup>118</sup> The percentage

<sup>111</sup> See *Lai Wee Lian v Singapore Buss Service (1978) Ltd. op. cit.* (Singapore), *Tominam bte Tukiman v Toh Kai Chup* [1985] 2 MLJ 345 (Singapore)

<sup>112</sup> See *Tham Yew Heng v Chong Toh Cheong* [1985] 1 MLJ 408. (Singapore)

<sup>113</sup> See *Timong binti Musing (Administatrix of the Estate of Madam bin Musing dcd) v Chui Han Hwa & Anor. Suit Civil Suit No 336 of 1987* (Brunei) where a 1/3 deduction was made to the deceased future earnings for contingencies. In *Tiong Ing Chiong v Giovanni Vinetti, op. cit.* (Brunei), it was held that while the normal deduction is 10% ,the figure can be revised to 15% in cases involving hazardous employment.

<sup>114</sup> The court in *Owners of MV 'Kohekohe' & Ors v Supardi bin Sipan, (The 'Kohekohe') op. cit.* (Singapore) the court refers to the multiplier in *Low Kok Tong v Teo Chan Pan* [1982] 2 MLJ 299 (Singapore), *R J McGuinness v Ahmad Zaini, op. cit.* (Brunei) and *Lai Chi Kay & Ors v Lee Kuo Shin, op. cit.* (Singapore).

<sup>115</sup> The practice starts form the beginning of 1960's.

<sup>116</sup> For example the Messrs Murphy and Dunbar, Solicitors table entitled "Table Computing Capital Sum Required When Invested at 5% Interest Per Annum to Provide Monthly Payments Over a Given Period of Years..."

<sup>117</sup> Rutter, Michael F., *op. cit.*, (1993), at 286.

<sup>118</sup> See *Lai Wee Lian v Singapore Buss Service, op. cit.*, (Singapore) and *Tay Cheng Yan v Tock Hua Bin and another* [1992] 1 SLR(R) 779.

deduction method necessitate the judges to build in a “rough and ready (albeit with somewhat arbitrary) reduction in the number of years of future earnings (in the multiplier), based on past experience and convention”.<sup>119</sup> All the methods above necessitate an extensive application of speculation, conjecture and guesswork which leads to uncertainty and variation in the assessment.

### **(c) Loss of Future Earning Capacity**

The CLA (cap 43) and the Fatal Accidents and Personal Injuries Act also did not contain any provision with regard to the assessment of damages for loss of earning capacity. The judges in Singapore and Brunei rely on the Common Law principles and decided cases to guide them in assessing damages under this heading. Generally, the approach is; when there is a ‘substantial risk’ that a plaintiff’s capacity to earn will be effected, plaintiff will lose his present job or that plaintiff’s capacity to compete in the job market will be reduced in the future, the judge will estimate:

“The present value of the risk of the financial damages which the plaintiff will suffer if that risk materializes, having regard to the degree of the risk, the time when it may materialise and the factors both favourable and unfavourable which in a particular case will or may affect the plaintiff’s chances of getting a job at all or an equally well paid job.”<sup>120</sup>

Plaintiff’s age, skills, nature of disability, ability to adapt to other type of employment, the nature of employment and job market *etc.*<sup>121</sup> are commonly use as guides in order to arrive at a figure which in the judges’ estimation will commensurate the ‘risk’. Since

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<sup>119</sup> Rutter, Michael F., *op. cit.*, at 257.

<sup>120</sup> Per Brown LJ in *Moeliker v A Reyrolle & Co Ltd.* (1977) 1 All ER 9.

<sup>121</sup> *Ibid.*

the assessment is by estimating the risk of future financial loss, the outcome is only a hypothetical figure derived based on the judge's projection of the loss.

The absence of specific statutory provision to differentiate the assessment of awards for loss of future earnings and loss of future earning capacity creates confusion on whether the judges should allow damages for loss of future earnings or loss of future earning capacity. The issue was raised in *Karuppiah Nirmala v Singapore Bus Services Ltd.*<sup>122</sup> where the Singapore High Court had to decide whether the plaintiff was entitled to the award for loss of future earnings or loss of future earning capacity. Further, it also creates the risk of awards of damages for loss of future earnings and loss of future earning capacity being used interchangeably. In situations where it is difficult to assess future earnings due to unavailability of evidence on pre-accident earning, unemployed plaintiff, or when it cannot fix a proper multiplier,<sup>123</sup> the award for loss of future earnings are often substituted with loss of future earning capacity. The Singapore High court in *Tan Teik Boon v Lee Gim Siong & Ors.*<sup>124</sup> recognized this in its judgement:

“The Court must also be wary of the fact that some of the older cases before *Chai Kang Wei Samuel* operated on the premise that loss of future earnings and loss of earning capacity were awarded as *alternatives* and did not see them as conceptually distinct heads of damages.”

The absence of specific statutory provision for the assessment of damages for loss of earning capacity also creates uncertainty as to the method of assessment. The courts in Singapore and Brunei have been adopting two (2) methods of assessment; the

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<sup>122</sup> [2002] 3 SLR 415. (Singapore). See also *Koh Soon Pheng v Tan Kah Eng, op. cit.* (Singapore) where the court substituted loss of future earnings with loss of earning capacity since it was too speculative to determine how the plaintiff's business would perform in the future.

<sup>123</sup> *Tan Teik Boon v Lee Gim Siong & Ors., op. cit.* (Singapore).

<sup>124</sup> *Op. cit.*

multiplication<sup>125</sup> and the lump sum<sup>126</sup> methods. Both of these approaches are not perfect. The lump sum method is riddled with speculation due to the arbitrary nature of arriving at the estimated lump sum loss. Similarly, the multiplication method is also speculative. It requires a specific date as a starting point in order to estimate the multiplier. Since loss of future earning capacity is based on the ‘risk’ of future loss, it is difficult to estimate with certainty when the ‘risk’ will translate into specific date. As such, the assessment of multiplier is just another speculation. This was noted by Lord Scarman LJ in *Smith v Manchester Corp.*<sup>127</sup> where he said:

“It is clearly inappropriate, when assessing this element of loss, to attempt to calculate any annual sum or to apply to any annual sum so many years’ purchase. The court has to look at the weakness so to speak ‘in the round’, take a note of the various contingencies, and do its best to reach an assessment which will do justice to the plaintiff.”

## 6.5 FATAL ACCIDENT CLAIMS

Unlike the situation in personal injury claims, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act contain more provisions relating to the assessment of damages for fatal accident claims. These provisions regulate the assessment of damages for estate claims, claims for loss of support and bereavement in fatal accident claims arising out of motor vehicles accidents. The provisions are almost similar to the

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<sup>125</sup> See *R J McGuinness v Ahmad Zaini*, op. cit., (*Brunei*) for example the damages was assessed by taking the multiplicand multiply it with 12 years multiplier and minus one third (1/3) for contingencies.

<sup>126</sup> See *Chang Ah Lek & Ors. v Lim Ah Koon* [1999] 1 SLR 82. (Singapore).

<sup>127</sup> (1974) 12 KIR 1. Referred to in *Chang Ah Lek & Ors. v Lim Ah Koon*, op. cit., (Singapore).

provisions in the CLA 1956. The provisions in these two (2) Acts are however not as extensive and far reaching as those in the CLA 1956.

### **6.5.1 Estate Claim**

The current position in Singapore and Brunei with regard to estate claim is very much similar to the position in Malaysia. Perusal of the section 10 and 11 of the CLA (cap 43) as well as section 11 and 12 of the Fatal Accidents and Personal Injuries Act shows that the provisions in the sections are almost identical to section 8 of the CLA 1956. Similar to the position in Malaysia, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act in 1991 had abolished two important features of the old law in Singapore and Brunei with regard to estate claims:

#### **(a) Abolishing the award for loss of earnings in lost years**

Section 10(3)(a)(ii) of the CLA (cap 43) and section 11(3)(a)(ii) of the Fatal Accidents and Personal Injuries Act abolishes the right of the deceased's estate to claim for loss of earning for the period after deceased's demise or better known as 'claim for lost years'. The abolition is in order to avoid double compensation in situation where the claim for loss of earnings in lost years and loss of support are brought together by beneficiaries of deceased estate who were not his dependants<sup>128</sup> and to avoid unjust windfall to beneficiaries of deceased estate who are not dependants.<sup>129</sup> Section 10(3)(a)(ii) of the CLA (cap 43) reads:

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<sup>128</sup> See the Court of Appeal decision in *Low Kok Tong v Teo Chan Pan*, *op. cit.*, (Singapore) where the court had called for the abolishment of award for loss years.

<sup>129</sup> See statement by the Second Minister of Law of Singapore, Professor S. Jayakumar during the second reading of the Civil Law (Amendment) Act 1987 on 4<sup>th</sup> March 1987.

Where a cause of action survives as specified under subsection (1) for the **benefit of the estate of a deceased person**, the damages recoverable for the benefit of the estate of that person —

(a) **shall not include** —

(ii) any damages for **loss of income in respect of any period after that person's death**; (*emphasis added*)

Almost with similar wording, section 11(3)(a)(ii) of the Fatal Accidents and Personal Injuries Act also abolished the award by stating:

Where a cause of action survives as aforesaid for the **benefit of the estate of a deceased person**, the damages recoverable for the benefit of the estate of that person -

(a) **shall not include-**

(ii) any damages for **loss of income in respect of any period after that person's death**; (*emphasis added*)

Similar with the effect of section 8(2)(a) of the CLA 1956, the above provisions also abolish the discretionary power of the judges in assessing and awarding damages for loss of earnings in lost years altogether. Since the award under this heading is usually large,<sup>130</sup> the provisions had significantly reduced the amount of damages being awarded under fatal claims in Singapore and Brunei.

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<sup>130</sup> In *Chan Heng Wah v Peh Thiam Choh*, *op. cit.* (Singapore), loss of earnings in lost years was awarded at SD\$125,000. *Roslan bin Haji Bongso v Belait United Traction Co Ltd & Anor.* Civil Suit No 83 of 1989 High Court, (Brunei) deceased's estate was awarded B\$ 454,995, in *Hj. Hassan b. Munap v Petrodril (B) Sdn. Bhd*, *op. cit.*, (Brunei) B\$134,000 was awarded.

**(b) Abolishing the award for loss of expectation of life**

Another important feature of the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act with regard to estate claim is the abolition of the award for loss of expectation of life. The abolition is brought by section 11(1) of the CLA (cap 43) and section 12(1) of the Fatal Accidents and Personal Injuries Act. Section 11(1) of the CLA (cap 43) reads:

In any action for damages for personal injuries, **no damages shall be recoverable** in respect of **any loss of expectation of life** caused to the injured person by the injuries, except that if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take into account any suffering caused or likely to be caused to him by awareness that his expectation of life has been so reduced. (*emphasis added*)

Section 12(1) of the Fatal Accidents and Personal Injuries Act states:

In an action for damages for personal injuries –

(a) **no damages shall be recoverable** in respect of **any loss of expectation of life** caused to the injured person by the injuries; but

(b) if the injured person's expectation of life has been reduced by the injuries, the court, in assessing damages in respect of pain and suffering caused by the injuries, shall take account of any suffering caused or likely to be

caused to him by awareness that his expectation of life  
has been so reduced. (*emphasis added*)

Since the award for loss of expectation of life is abolished, judges' discretionary power to assess and award damages for loss of expectation of life is similarly abolished. The effect of these sections was recognized by the court *Au Yong Wing Loong v Chew Hai Ban & Anor.*<sup>131</sup> where the judge held:

“ Section 8 [as it was then] of the said Act abolishes loss of expectation of life as a separate head in claims of non-pecuniary loss in an action for damages for personal injuries, in claims by the estate, and not by a living plaintiff. The estate should not receive compensation meant for living plaintiff.”

However, despite the above, the question of whether these sections have indeed abolish the damages for loss of expectation of life from being awarded under estate claims and remove the discretionary power of the judges in Singapore and Brunei in assessing and awarding damages under this heading is worth to be explored. Unlike section 8(2)(a) of the CLA 1956 which expressly excludes the award for loss of expectation of life from estate claim, section 11 (1) of the CLA (cap 43) and section 12 (1) of the Fatal Accidents and Personal Injuries Act merely state that damages for loss of expectation of life shall not be awarded in personal injury claims. While it is clear from these sections that claim for loss of expectation of life by a living plaintiff is barred, the sections does not specifies whether this abolition is extended to estate claim as well. This question was noted by Rutter in this book<sup>132</sup> where he commented:

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<sup>131</sup> *Op.cit.* (Singapore).

<sup>132</sup> Rutter, Michael F, *op. cit.*, (1993) at 668.

“The reform [the Civil Law (Amendment) Act 1987] is unsatisfactory. It fails to make clear whether it is directed solely at claims by living plaintiffs or by the estate or at both.”<sup>133</sup>

Looking from the perspective of the CLA (cap 43), Rutter’s observation is justifiable. Although the intention behind the introduction of section 11(1) of the CLA (cap 43) is to prevent the beneficiaries of the deceased’s estate from benefiting from deceased demise,<sup>134</sup> there is nothing in the section which state that the estate is barred from claiming this head of damages. It is also not listed under section 10(3)(a) of the CLA (cap 43) which provides for the list of damages not recoverable under estate claims. Had the Singaporean Legislature really intended to abolish the award for loss of expectation of life in estate claim,<sup>135</sup> it would have specifically state it as such in section 10(3)(a) of the CLA (cap 43). Since the inclusion of section 11 was made at the same time as the amendment to section 10(3) of the same Act, it is a wonder why the Singaporean Legislature omitted to include award for loss of expectation of life into the list of damages not claimable under estate claim.

On the other hand, although the abolishment of this award in Brunei by section 12(1) of the Fatal Accidents and Personal Injuries Act is also arguable on similar grounds above,<sup>136</sup> the intention of the Legislature in Brunei to abolish this award from being awarded under estate claim is more apparent. Since section 12 of the Act is listed under part IV - EFFECT OF DEATH, it can be impliedly understood that the section is meant to deal with the effect of death on the cause of actions for loss of expectation of life

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<sup>133</sup> Unfortunately Rutter did not elaborate on the issue. Although Rutter’s comment was made in reference to section 11(1) of the CLA (cap 43), similar observation can be extended to section 12 of the Fatal Accidents and Personal Injuries Act since the wordings in the sections are almost identical.

<sup>134</sup> Supra at 270 – 271.

<sup>135</sup> Rutter, Michael F, *op. cit.*, (1993), at 670. See also statement by the Second Minister of Law of Singapore, Professor S. Jayakumar during the second reading of the Civil Law (amendment) Act 1987 on 4<sup>th</sup> March 1987.

<sup>136</sup> There is nothing in section 12(1) of the Fatal Accidents and Personal Injuries Act which indicate that the section is to be applied to estate claims. Similarly, section 11(3)(a) also did not list damages for loss of expectation of life as among the damages which cannot be recovered under estate claims.

which are vested on the deceased prior to his demise. Thus, when section 12(1) of the Fatal Accidents and Personal Injuries Act abolishes the award for loss of expectation of life, it can be understood that such abolition is meant for the award for loss of expectation of life under estate claims. However, it is still incomprehensible why the award is not listed in section 11 (3)(a) of the Act which categorically abolish the awards for exemplary damages and loss of earning for lost years from being awarded under estate claim if similar abolition is intended for loss of expectation of life as well.

Apart from the above, the effect of sections 11(1) of the CLA (cap 43) and 12(1) of the Fatal Accidents and Personal Injuries Act in abolishing the award for loss of expectation of life under estate claims is also negated by the second part of the sections. The second part of the sections allow judges to include the damages to compensate the plaintiff for his suffering due to his awareness that his expectation of life had been shortened in the assessment of damages for pain and suffering. This part allows judges to exercise their discretion to assess damages for loss of expectation of life and to include it into the assessment of damages for pain and suffering. Similar to their effect in personal injury claims sections 11(1) of the CLA (cap 43) and 12(1) of the Fatal Accidents and Personal Injuries Act merely abolish the award for loss of expectation of life from being awarded as a separate heading under estate claim. The damages may still be awarded by including it into the award for pain and suffering. Thus, in reality, the award for loss of expectation of life under estate claim is not totally abolished in both Singapore and Brunei.

It is therefore concluded that the absence of specific provision abolishing the award from being awarded under estate claims such as in section 8(2)(a) of the CLA 1956 and the inclusion of the second part of the sections negates the intention of the Legislature

in Singapore and Brunei to abolish the award for loss of expectation of life from being awarded in fatal accident claims arising out of motor vehicle accidents in the countries. The judges' discretion to assess and award damages under this heading is also intact.

### **6.5.2 The Award for Loss of Support**

The provisions allowing for damages for loss of support in Singapore and Brunei are provided by section 20(1) of the CLA (cap 43) and section 3(1) of the Fatal Accidents and Personal Injuries Act respectively. Both of these sections are literally identical.

Both states:

If death is caused by any wrongful act, neglect or default which is such as would (if death has not ensued) have entitled the person injured to maintain an action and recover damages in respect thereof, the person who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured.

Similar to section 7 of the CLA 1956, section 20(1) of the CLA (cap 43) and section 3(1) of the Fatal Accidents and Personal Injuries Act allow for the dependants of deceased victim to claim compensation for the loss of monetary support due to the death of the deceased. However, unlike the CLA 1956, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act did not specify in detail how the award for loss of support is to be assessed. The Acts only laid down the right to claim,<sup>137</sup> persons who may benefit from the claim,<sup>138</sup> persons who may bring the claim<sup>139</sup> and the time

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<sup>137</sup> Sections 20(1) and 22(1) of the CLA (cap 43). Sections 3(1) and 6(1) of the Fatal Accidents and Personal Injuries Act.

<sup>138</sup> Section 20 (2), (8), (9) and (10) of the CLA (cap 43). Section 3(2), (3), (4) and (5) of the Fatal Accidents and Personal Injuries Act.

<sup>139</sup> Section 20(3) and (4) of the CLA (cap 43). Section 5 (1) and (2) of the Fatal Accidents and Personal Injuries Act.

limitation in which the claim is to be filed.<sup>140</sup> There are several key features in which the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act seems to differ from their Malaysian counterpart. Below are the analyses of the differences;

#### **(a) Different Measure of Damages**

Section 22(1) of the CLA (cap 43) and section 6(1) of the Fatal Accidents and Personal Injuries Act use the term ‘damages proportion to the losses resulting from the death’ as the measure of damages for loss of support. Section 22(1) of the CLA (cap 43) reads:

In every action brought under section 20, the court may award such *damages as are proportioned to the losses resulting from the death* to the dependants respectively except that in assessing the damages there shall not be taken into account... (*emphasis added*)

Section 6(1) of the Fatal Accidents and Personal Injuries Act states:

In the action such damages, other than damages for bereavement, may be awarded *as are proportioned to the injury resulting from the death* to the dependants respectively. (*emphasis added*)

The term ‘damages proportion to the losses resulting from the death’ in the sections brings to mind a broader range of damages which judges in Singapore and Brunei are allowed to award under the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act. While judges in Malaysia is limited by section 7(3) of the CLA 1956 only to award damages for loss of support, sections 22(1) of the CLA (cap 43) and 6(1) of the Fatal Accidents and Personal Injuries Act seems to allow judges in Singapore and

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<sup>140</sup> Section 20(5) of the CLA (cap 43).

Brunei the discretion to awards any damages which proportionate to the loss suffered by the dependants' which was caused by deceased demise.

It is however submitted that the differences in the measure of damages have no effect on judges' discretionary power to assess and award damages for loss of support in Singapore and Brunei. The measure of damages in section 22(1) of the CLA (cap 43) and section 6(1) of the Fatal Accidents and Personal Injuries Act is not interpreted as 'all losses suffered by the dependants as the result of deceased's demise'. Judges in Singapore and Brunei has been interpreting the measure of damages as only the pecuniary losses suffered by deceased's dependants in their capacity as dependants and not for other loss. The judge in *Chan Yoke May v Lian Seng Co. Ltd.*<sup>141</sup> for example had applied this interpretation by stating that step two (2) in the assessment of loss of support is to calculate "what sum during these years (deceased expectation of life if he had not been killed) he (deceased) would have applied to the support of his wife and children...".<sup>142</sup> As such, the interpretation of 'losses resulting from death' in Singapore and Brunei is similar to 'loss of support' in section 7(3) of the CLA 1956 as defined by the Malaysian courts.

#### **(b) No Provision Regulating the Assessment of Multiplier and Multiplicand**

Similar to the situation in Malaysia, the assessment of damages for loss of support in Singapore and Brunei also uses the Common Law multiplication<sup>143</sup> method.<sup>144</sup> However, unlike in section 7(3) of the CLA 1956, the CLA (cap) and Fatal Accidents

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<sup>141</sup> (1962) MLJ 243.

<sup>142</sup> Rutter, Michael F, *op. cit.*, (1993), at 596 – 597.

<sup>143</sup> The projected loss of annual support (multiplicand) to be multiplied by the expected period in which the support is expected to be lost (multiplier).

<sup>144</sup> The current law in Singapore and Brunei with regard to the assessment for multiplier and multiplicand for loss of support are more or less similar to the situations prior to the enactment of the CLA (cap 43) and the Fatal Accidents and Personal Injuries Acts. As such, the pre-1987 and 1991 cases on these matters are still relevant to date.

and Personal Injuries Act did not contain any provision regulating the assessment multiplicand and multiplier for loss of support. While section 7 (3) of the CLA 1956 focuses primarily on the circumstances surrounding the deceased<sup>145</sup> as the basis of assessment, judges in Singapore and Brunei have the discretion to take into consideration the circumstance surrounding the deceased and the dependants in order to come up with suitable multiplicand and multiplier. The claim by each dependants are assessed separately and the damages is given to each of them individually and not as a group.<sup>146</sup> The absence of specific provision in the Acts and the individuality of assessment of damages necessitate an extensive application of judicial discretion. It can be viewed from three (3) perspectives:

***(i) Allowing the Dependants to Unemployed Deceased to Claim for Loss of Support***

Unlike proviso (i)(a) to section 7(3) of the CLA 1956, there is not requirement that deceased must be earning income at the time of his demise in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act. The CLA (cap) and Fatal Accidents and Personal Injuries Act allows judges the discretion to award damages for loss of support even to dependants of deceased who was not earning income at the time of demise. To do so, judges will usually make a calculated presumption as to deceased's projected future earnings and to deduce from that figure the portion in which he would have in probability contribute to his dependants.<sup>147</sup> The contributions is a hypothetical figure assessed based on the circumstances surrounding the deceased and his dependants.

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<sup>145</sup> Income, living expenses and age at the time of demise.

<sup>146</sup> See *Dobb v Dobbs* (1976) 1 QB 143 and *Wong Fook Cheong v Hj. Abd. Khani b. Hj. Abd. Kadir* [1996] 1 LNS 570 (Brunei).

<sup>147</sup> In *Tan Ngo Hwa v Siew Mun Phui, op. cit.*, (Singapore) the court allowed the claim for loss of support by the parent of a sixteen (16) years old deceased who have yet to take her GCE "O" Level Examinations. The court accepted that the deceased could have graduated from an overseas university and awarded multiplicand based on median salary. See also *Ho Yeow Kim v Lai Hai Kuen* [1999] 2 SLR 246 (Singapore) and *Man Mohan Singh s/o Jothirambal Singh v Dilveer Singh Gill s/o Shokdarchan Singh* [2007] SGHC 73, [2007] 4 SLR 843 (Singapore).

The absence of pre-condition of earning income prior to demise is beneficial in situations where the deceased was not earning income at the time of his demise but have the possibility of contributing in the future especially in cases involving dependants who are deceased's spouse, children and parents. The dependants will not be precluded from obtaining damages for loss of support merely on the ground that deceased was not earning income at the time of injury.

Assessing deceased's possible future income and contribution to the dependants requires an extensive use of estimation and speculation. In order to estimate deceased's probable future earnings, the national salary average, deceased's education levels, skills, family and social background are often used as reference. The Singapore's Court of Appeal in *Ho Yeow Kim v Lai Hai Kuen*<sup>148</sup> for example, estimated the future salary of a seventeen (17) year old final year engineering student studying at Institute of Technical Education at SD \$1,784.50. Deceased prospective earnings was assessed by taking the mean salary of a Mechatronics Engineering graduate (deceased was studying mechatronics at the time of his death) after six to nine months of employment and the mean salary of such a graduate after five years of employment.

The speculative nature of the assessment is doubled when the projected earning is used as the basis to estimate the probable future contribution to deceased's dependants. Judges will have to estimate the portion of his future income which the deceased in all probability will contribute to his dependants after taking into consideration the estimated value of various factors such as his own personal expenses, joint benefits<sup>149</sup> possibility of marriage (in claim by parents to unmarried deceased), dependant's needs

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<sup>148</sup> *op. cit.* (Singapore). Similarly in *Man Mohan Singh s/o Jothirambal Singh v Dilveer Singh Gill s/o Shokdarchan Singh op. cit.*, (Singapore) the average median monthly salary were derived from the Ministry of Manpower's "Report on Wages in Singapore, 2005" after taking into consideration the average median monthly commencement salary based on gender and types of employment. (Affirmed by the Court of Appeal in *Man Mohan Singh s/o Jothirambal Singh and Another v Zurich Insurance (Singapore) Pte. Ltd. (now known as QBE Insurance (Singapore) Pte Ltd) and Another and Another Appeal* [2008] 3 SLR 735; [2008] SGCA 24).

<sup>149</sup> Expenses paid for benefits enjoyed by both deceased and dependants as a whole such as house rental, car loan, house whole expenses etc.

*etc.* In *Man Mohan Singh s/o Jothirambal Singh v Dilveer Singh Gill s/o Shokdarchan Singh*<sup>150</sup> the judge reduced deceased's estimated contribution to their parents from forty (40) percent to thirty five (35) percent in view of the likelihood that deceased would have married and established their own families thus reducing their contributions to their parents.

***(ii) Allowing Future Increase in Earnings to be Included in the Assessment of Multiplicand***

The assessment of multiplicand for loss of support is based on judges' discretion guided by the Common Law principles and decided cases. The judges in Singapore and Brunei usually adopt two (2) Common Law methods of assessment. In situation where evidence of deceased's contributions to his dependants is available, judges will directly adopt the amount as multiplicand. However, when such evidence is lacking, the multiplicand is assessed based on the amount of deceased earnings which is available to be spent on the dependants.<sup>151</sup> The 'available amount' is arrived at by deducting deceased probable expenses<sup>152</sup> from his income.<sup>153</sup> At the same time, the dependency aspect such as the number of dependants, age, nature of dependency *etc.* are also taken as part of the considerations.<sup>154</sup>

Unlike proviso (iv)(a) to section 7(3) of the CLA 1956 which limits the assessment of multiplicand to only the amount received by the deceased at the time of his demise, the

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<sup>150</sup> *Op. cit.* (Singapore). In *Ho Yeow Kim v Lai Hai Kuen, op. cit.* (Singapore) the Court of Appeal estimated that the deceased would probably be allocating forty (40) percent of his future monthly earnings considering that he would have to support his parent and a younger brother. See also *Tan Harry v Teo Chee Yeow Aloysius* [2004] 1 SLR 513.

<sup>151</sup> See *Hanson Ingrid Christina v Tan Puey Tze* [2008] 1 SLR 409.

<sup>152</sup> Includes food, clothing, expenses in earning income, hobbies and vices *etc.* See list of deceased's expenditures in *Rutter, Michael F., op. cit.*, (1993), at 606 - 607.

<sup>153</sup> Includes earnings, fringe benefits, positive contingencies (bonuses, raises, overtime) and negative contingencies (demotion, salary decreases).

<sup>154</sup> In *Wong Fook Cheong v Hj. Abd. Khani b. Hj. Abd. Kadir, op. cit.* (Brunei) for example, the Brunei Court of Appeal deducted plaintiff expenditures from her monthly salary and uses that figure as the basis to calculate her probable contributions to her parents, husband and children. The Court also took into consideration the contributions by other family members for the upkeep of her parents as well as the fact that her husband was not depending on the deceased for his livelihood except for a small degree of contribution for household expenses.

assessment of multiplicand in Singapore and Brunei may include possible future increases or decreases in deceased's income.<sup>155</sup> To do so, judges have to predict the probable future increases or decreases in earning for the period after the trial. The assessment is usually based on the nature of employment, career path, age, health and skills. The discretionary power granted to the Singaporean and Brunei judges in the assessment of multiplicand makes the amount of multiplicand awarded very realistic. Since a person's contribution to his dependants would not be static as time goes, the probable raise and fall of future contributions should be taken into consideration.

The discretion to factor in future increases or decreases in earnings however causes an extensive amount of speculations, conjectures and guesswork. Various considerations such as the nature of deceased's employment, career path, age, health, education level, skills and social background are taken into account. Further, it also requires multiple calculation of multiplicand. Since judges can take into consideration future increases or decreases in deceased future earnings, judges not only have to speculate deceased's probable future income, he also will have to assess the multiplicand according to the possible future variations in deceased's earnings. In the claim for loss of support by deceased's parents in *Tan Ngo Hwa v Siew Mun Phui*,<sup>156</sup> the judge had to assess two (2) sets of multiplicand after taking into consideration the possibility that deceased's contribution to her parents increasing along with the possible increase in her income. The multiplicand was fixed at \$900 for the first two and a half (2½) years and \$1,000 for the next seven and a half (7½) years. The need to make separate assessments for different set of dependants or different period in deceased's working life makes the assessment of damages very tedious and time consuming.

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<sup>155</sup> Rutter, Michael F., *op. cit.*, (1993), at 608. Any increases or decreases in deceased's earnings between the dates of demise to the date of trial are automatically included into the assessment of multiplicand. Furthermore, judges in these countries are also at liberty to consider the possible future increases or decreases in deceased's earning in the future which may affect his future contributions to his dependants.

<sup>156</sup> [1998] SGHC 376 (Singapore).

### *(iii) The Assessment of multipliers*

Similar to the assessment of multiplicand, judges in Singapore and Brunei also have the discretion to assess the multiplier for loss of support. The absence of any statutorily prescribed method of assessing the multiplier as provided by proviso (iv)(d) to section 7(3) of the CLA 1956, necessitates an extensive exercise of judicial discretion guided by the Common Law principles. The followings are usually taken into consideration in the assessment:

- a. Deceased life expectation – for how long deceased would have lived, had he not been prematurely killed.<sup>157</sup>
- b. Deceased earning life expectation - for how deceased would be earning the income to support the dependants.<sup>158</sup>
- c. Period of dependency – for how long the deceased would have supported the dependants.<sup>159</sup>

At the same time judges also have to make deductions for the possible contingencies in deceased's life<sup>160</sup> as well as the investment value of the money receive lump sum. Necessary discount or reduction in the multiplier must be main view of those contingencies.

Once again, it is submitted that the assessment of multiplier for loss of support in Singapore and Brunei is more realistic compared to their Malaysian counterpart. Staying true to the purpose of the award for loss of support which is to compensate the

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<sup>157</sup> Bearing in mind the discount for contingencies such as sickness and premature death of deceased.

<sup>158</sup> Bearing in mind the discount for contingencies such as the possibility of unemployment, demotion and strikes.

<sup>159</sup> Bearing in mind the discount for contingencies such as premature death of dependants, dependants becoming self-supporting, adoption (children), and prospect of marriage of the deceased which would affect the ability to support dependants (parents).

<sup>160</sup> Lord Diplock in *Mallett v McMonagle*, (1970) AC 166 held "The stating point in any estimate of the number of years that a dependency would have endured is the number of years between the date of the deceased death and that at which he would have reach normal retiring age. that falls to be reduced to take account the chance, not only that she might not have lived until retiring age, but also the chance that by illness or injury she might have been disabled from gainful occupation." Contingencies may include sickness, unemployment, pre-mature death, prospect of marriage (affecting a son's contribution to his parents) etc.

dependants for the loss of support which would have been provided by the deceased had he did not die, the length of time over which the dependant would be needing the support plays an essential role in determining the multiplier. For example, instead of automatically allowing a maximum sixteen (16) years of multiplier to dependants to a deceased who was at or below the age of thirty (30) year old,<sup>161</sup> judges in Singapore and Brunei are have the discretion to consider whether the dependants will actually be depending on the deceased for the following sixteen (16) years. Thus, seventy (70) years old parents of a twenty nine (29) years old deceased will not be receiving the maximum sixteen (16) years of multiplier in consideration of their advance age.

On the other hand judges in Singapore and Brunei are also not restricted to the maximum of twelve (12) years multiplier for deceased who was beyond thirty years (30) year old at the time of demise.<sup>162</sup> As such, a one (1) year old child of thirty one (31) years old deceased would be entitled to more than twelve (12) years multiplier considering his young age and the possibility of him being continuously depending on the deceased for at least another seventeen (17) years (18 being the general age of majority). This double-factor (deceased – dependants) considerations enable judges to adjust the multiplier to the age and needs of deceased and dependants after taking into account the age, life span and expected working life of both.<sup>163</sup>

The double-factor method is not without its own problems. Since the assessment of multiplier is not a “scientific or exact process,”<sup>164</sup> an extensive exercise of judicial

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<sup>161</sup> Proviso (iv)(d) to section 7(3) of the CLA 1956 stipulates that the multiplier for loss of support for deceased who was or below the age of thirty (30) years old is sixteen (16) years.

<sup>162</sup> Proviso (iv)(d) to section 7(3) of the CLA 1956 stipulates that the multiplier for loss of support for deceased who had passed the age of thirty (30) years old is calculated according to the formula of ‘fifty five (55) minus the age at the date of demise divided into two (2). The maximum multiplier is twelve (12) years and minimum is six (6) months.

<sup>163</sup> Hwang, Michael and Fong, Lee Cheng, “Loss of Inheritance or Savings : A Proposal For Law Reform”, April 2008, 1-67, Law Reform Committee Singapore Academy of Law, 18<sup>th</sup> May 2011, <<http://www.sal.org.sg/digitalibrary/Lists/Law%20Reform%20Reports/Attachments/27/Loss%20of%20inheritance%20-%20proposal%20for%20reform%20-%20final.pdf>>

<sup>164</sup> Rutter, Michael F., *op. cit.*, (1993), at 616.

reasoning, as well as “considerable extend of “impression and discretion”<sup>165</sup> is required. The whole process can also be very tedious. In the effort to simplify the assessment of multiplier, the esteemed Denys Roberts of the Brunei High Court had even ventured to formulate his own table for the assessment of multiplier. This table was first applied in *Chan Chi Fook v Spennex Stainless Steel Industries*.<sup>166</sup> The application of the table was later extended to the assessment of multiplier for loss of support in *Wong Fook Cheong v Hj. Abd. Khani b. Hj. Kadir*.<sup>167</sup>

The double-factor assessment of multiplier also sometimes necessitates multiple assessment of multiplier. In situation where the age, health and circumstances of each dependant are different from each other, the double-factor method requires multiple multipliers to be assessed. The Singapore Court of Appeal in *Man Mohan Singh s/o Jothirambal Singh & Anor. v Zurich Insurance (Singapore) Pte Ltd (now known as QBE Insurance (Singapore) Pte Ltd) & Anor.*<sup>168</sup> for example had to deliberate two sets of multipliers since there were two different dependants claiming for loss of support (deceased’s’ father and mother). Applying the separate multiplier method for each, Andrew Phang JA commented that a broad-brush approach<sup>169</sup> taken by the Assistant Registrar in the assessment of multiplier:

“would tend to obscure dependant-specific factors, such as age and life expectancy, which are important considerations when setting the multiplier. For example, a mother would typically have a longer life expectancy than a father and, if she was a housewife, she would also for that reason have a greater need for financial support.”

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<sup>165</sup> *Robertson v Lestrangle* [1985] 1 All ER 950.

<sup>166</sup> (1995) BJ 208. (Brunei).

<sup>167</sup> *Op. cit.* (Brunei).

<sup>168</sup> *Op. cit.* (Singapore).

<sup>169</sup> Allowing the same multiplier for all dependants.

The judge accordingly awarded eight (8) years multiplier to the father and thirteen (13) years to the mother after taking into consideration the national life expectancy and the fact that the father would be able to support himself while the mother who was unemployed would be totally dependant on her husband and deceased had they not been prematurely killed.<sup>170</sup> Similarly, the courts in Brunei also employed the double-factor approach. In *Wong Fook Cheong v Hj. Abd. Khani b Hj. Kadir*<sup>171</sup> the Brunei High Court had to assess five (5) sets of multiplier for deceased's parents, two (2) children and husband after considering deceased's age, working life and dependency aspect each dependants separately.

### **(c) Death Benefits to Be Excluded in the Assessment of Multiplicand**

Both the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act provide for the exclusion of benefits which the dependants will receive as a result of deceased's demise from the assessment of damages for loss of support. Section 22 of the CLA (cap 43) states:

In every action brought under section 20, the court may award such damages as are proportioned to the losses resulting from the death to the dependants respectively except that in assessing the damages there shall not be taken into account —

- (a) any sum paid or payable on the death of the deceased under any contract of assurance or insurance;

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<sup>170</sup> Also see *Tan Ngo Hwa v Siew Mun Phui*, *op. cit.* (Singapore), multipliers of eight years (8) for the father and ten (10) years for the mother were given to a forty six (46) year old parents. Similarly in *Sim Hau Yan v Ong Sio Beng* [1996] SGHC 256 (Singapore), where the deceased was a 26 year old unmarried man, the Singapore High Court awarded a multiplier of nine (9) years for the deceased's fifty six (56) years old father and twelve (12) years for the fifty three (53) year old mother. The Assistant Registrar in *Lee Kwan Kok v Wong Chan Tong* [2004] SGHC 211 (Singapore) awarded a multiplier of ten (10) years to the fifty (50) year old father and twelve (12) years to the forty six (46) year old mother of a twenty five (25) year old deceased after taking into consideration the dependency factors of the dependants.

<sup>171</sup> *Op. cit.* (Brunei).

- (b) any sum payable as a result of the death under the Central Provident Fund Act (Cap. 36); or
- (c) any pension or gratuity which has been or will or may be paid as a result of the death.

The provision is almost an exact copy of proviso (i) to section 7(3) of the CLA 1956. The CLA (cap 43) however did not contain any provision similar to proviso (i)(d) to section 7(3) of the CLA 1956. As such, the Singaporean Courts are only required to exclude benefits received by way of insurance or assurance, benefit received out of deceased contributions in the Central Provident Fund and any pension or gratuity received as the result from deceased death. Any benefits received from sources other than stated above may be considered in the assessment of damages for loss of support; i.e; must be deducted from the amount to be awarded as damages for loss of support.<sup>172</sup> The inclusion of this provision into the CLA (cap 43) has no significant effect on the assessment of damages for loss of support in Singapore. It has always been the practice of the Singapore judges to disregard these benefits even prior to the enactment of CLA (cap 43).<sup>173</sup>

The Fatal Accidents and Personal Injuries Act on the other hand provides a very general provision regarding this matter. Unlike the CLA 1956 and the CLA (cap 43), the Act did not contain specific provision listing the death benefits to be excluded in the assessment of damages for loss of support. Section 7 of the Act merely states that any benefits received by any person as the result of deceased's demise is to be excluded from the assessment of damages for loss of support. The section reads:

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<sup>172</sup> *Tan Harry v Teo Chee Yeow Aloysius* (2004) 1 SLR (R) 513.

<sup>173</sup> Rutter, Michael F., *op. cit.*, at 672. See *Singapore Buss Service (1978) Ltd. v Lim Soon Yong* [1983] 2 MLJ 306. (Singapore).

In assessing damages in respect of a person's death in an action under this Part, benefits which have accrued or will or may accrue to any person from his estate or otherwise as a result of his death shall be disregarded.

As such, judges in Brunei are totally prevented from taking into consideration any benefits which the dependants may receive as a result of deceased's demise in the assessment of damages for loss of support. The absence of specific provision listing the benefits however has no obvious effect to the law on fatal claims in Brunei since the section is broad enough to cover all the benefits that deceased's dependants may receive out of deceased's demise.

**(d) Benefits to Be Included in the Assessment of Multiplicand**

The CLA (cap 43) specify that any benefits either monetary or non-monetary which the dependant would likely receive from the deceased by way of bequest, gift or succession had deceased did not die is to be considered in the assessment. This was provided by section 22(1A) to the Act. The section states:

In assessing the damages under subsection (1), the court shall take into account any moneys or other benefits which the deceased would be likely to have given to the dependants by way of maintenance, gift, bequest or devise or which the dependants would likely to have received by way of succession from the deceased had the deceased lived beyond the date of the wrongful death.

The section was introduced in 2009 by clause 5 (i) to the Civil Law (Amendment) Act 2009 (no 7 of 2009). By virtue of the section, the principle laid by *Lassiter v To*<sup>174</sup> which stated that loss of savings or inheritance cannot be awarded in a dependency claim was abolished.

The introduction of this section solves the issue of dependants not being compensated for the loss of monetary benefits which may come in form of deceased saving, gift, maintenance or any other forms which the dependants can expect to receive if deceased had not succumbed to the injuries. The multiplicand for loss of support in Singapore can either be the actual amount received by the dependants or the available amount out of deceased income (after deducting deceased expenses). Should the judges adopt the first method, a portion of deceased income which he set aside for saving is lost to the dependants. Since deceased saving will usually be utilize for his dependants in the future or given to his dependants by way of bequest, this portion is possibly the rightful loss of the dependants. As such, by ensuring that these items are considered in the assessment of damages, the CLA (cap 43) is ensuring that the dependants will be compensated for the loss of a portion of deceased income which in most probability will be spent on them in the future.

There is no equivalent provision in England, Malaysia or Brunei on this matter. This however does not prevent the judges from including deceased's saving as part of multiplicand. In a Malaysian case of *Chan Yoke May v Lian Seng Co Ltd.*,<sup>175</sup> the judge accepted that an amount equal to what the deceased would have saved should be added in the assessment of damages but after taking into consideration the possibility that the may have died the deceased and would not be able to benefit from deceased's saving.

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<sup>174</sup> [2005] 2 SLR 8; [2005] SGHC 4 (Singapore).

<sup>175</sup> *Op. cit.* (Malaysia).

### (e) Persons Allowed to Claim for Loss of Support

Similar to the CLA 1956, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act limit the power of judges to award damages for loss of support to deceased's dependants only. This is provided in both Acts by sections 20(2) and 3(3) respectively. The sections are identical except for their referral to the connected provisions in the respective Acts. Section 20(2) of the CLA (cap 43) reads:

Subject to section 21 (2), every such action **shall be for the benefit of the dependants** of the person (referred to in this section and in sections 21 and 22 as the deceased) whose death has been so caused. (*emphasis added*)

Section 3(2) of the Fatal Accidents and Personal Injuries Act states:

Subject to section 4, every such action **shall be for the benefit of the dependants** of the person ("the deceased") whose death has been so caused. (*emphasis added*)

Although the sections did not limit the beneficiaries to the persons listed in the section,<sup>176</sup> the absence of specific list of persons in section 20(2) of the CLA (cap 43) and section 3(2) of the Fatal Accidents and Personal Injuries Act makes not much difference to the law since the interpretation of the term 'dependants' is provided in section 20(8) of the CLA (cap 43) and section 3(3) of the Fatal Accidents and Personal Injuries Act.

Compared to Malaysian judges, judges in Singapore and Brunei have the power to award damages for loss of support to a broader range of people. While the Malaysian

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<sup>176</sup> Unlike section 7(2) of the CLA 1956 which limits the beneficiaries to deceased's spouse, parent and children. See also section 7(11) of the CLA 1956 for the definition of the term spouse, parent and children.

judges are only allowed to award damages for loss of support to deceased's spouse, parents,<sup>177</sup> grandparents, children, grandchildren and stepchildren, the Singaporean judges are allowed to extend the damages to deceased's former wife, great grandparents, great grandchildren, siblings, nieces and nephews, uncles and aunts as well as cousins.<sup>178</sup> This power is granted by section 20(8) of the CLA (cap 43) which reads:

In this section, "dependant" means —

- (a) the wife or husband or former wife of the deceased;
- (b) any parent, grandparent or great-grandparent of the deceased;
- (c) any child, grandchild or great-grandchild of the deceased;
- (d) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- (e) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

Section 3(3) of the Fatal Accidents and Personal Injuries Act allow for an even wider range of beneficiaries compared to the CLA 1956 and the CLA (cap 43). Other than the persons mentioned above, judges in Brunei can extend the damages to deceased's

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<sup>177</sup> Includes parents to an illegitimate child and legally registered adoptive parents.

<sup>178</sup> At the Second Reading of the Bill to amend the Civil Law Act, Prof S Jayakumar stated that "the expansion of the definition of dependants is in order to ensure that other relatives who are actually dependant on the deceased but did not fall within the then existing categories could claim for loss of dependency". See Hwang, Michael and Fong Lee Cheng, "Loss of Inheritance or Savings : A Proposal For Law Reform", April 2008, 1-67, Law Reform Committee Singapore Academy of Law, 18<sup>th</sup> May 2011, <<http://www.sal.org.sg/digitalibrary/Lists/Law%20Reform%20Reports/Attachments/27/Loss%20of%20inheritance%20-%20proposal%20for%20reform%20-%20final.pdf>>

See also *Singapore Parliamentary Debates, Official Report* (4 March 1987) vol 49 at cols 66 – 69.

former husband, de-facto spouse,<sup>179</sup> and adoptive parents who are not legally registered as deceased's adoptive parents.<sup>180</sup> The section reads:

In this Part 'dependant' means -

- (a) the wife or husband or former wife or husband of the deceased;
- (b) any person who-
  - (i) was living with the deceased in the same household immediately before the date of the death; and
  - (ii) had been living with the deceased in the same household for at least two years before that date; and
  - (iii) was living during the whole of that period as the husband or wife of the deceased;
- (c) any parent or other ascendant of the deceased;
- (d) any person who was treated by the deceased as his parent;
- (e) any child or other descendant of the deceased;
- (j) any person (not being a child of the deceased) who, in the case of any marriage to which the deceased was at any time a party, was treated by the deceased as a child of the family in relation to that marriage;
- (g) any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

One of the interesting feature in the definition of dependants in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act which is absent from the CLA 1956 is the

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<sup>179</sup> Provided that he or she had been living with the deceased as husband or wife immediately prior to deceased's demise in the same house for a minimum period of two (2) years.

<sup>180</sup> Unlike the proviso to section 7(11) of the CLA 1956 and section 20(10) of the CLA (cap 43), the Fatal Accidents and Personal Injuries Act did not specify that the "parent" must be a legally registered adoptive parent. It allows damages to be awarded to anybody who was treated by the deceased as his or her parents.

inclusion of deceased's former wife<sup>181</sup> or husband<sup>182</sup> as dependants. While judges in Malaysia can only award damages for loss of support to deceased's spouse, judges in Singapore and Brunei can extend the damages to deceased's former spouse together with deceased's existing spouse. However, Section 22(3A) of the CLA (cap 43), limits the judges' power to award damages for loss of support only to deceased's former wife. As such, unlike in Brunei, judges' in Singapore have no power to award damages for loss of support to deceased's former husband. Section 22(3A) of the CLA (cap 43) also limits the power of the judges to award this damages to only those former wife who had obtained maintenance order against the deceased prior to his demise. Section 22(3A) of the CLA (cap 43) reads:<sup>183</sup>

In an action brought under section 20, the damages payable to a former wife of the deceased **shall only be in respect of a subsisting maintenance order** against the deceased at the time of his death.

Judges in Brunei are not similarly restricted. The Fatal Accidents and Personal Injuries Act did not contain any provision similar to section 22(3A) of the CLA (cap 43). The problem with section 3(3)(a) of the Fatal Accidents and Personal Injuries Act is, while one may presume that the intention of the legislature in Brunei is to allow damages for loss of support to be awarded to deceased's former wife or husband who has been supported by the deceased prior to his death pursuant to maintenance orders, there is nothing in the whole Act which state the same. The absence of specific provision limiting the power of the judges to award damages for loss of support only in pursuance of maintenance order may open up the interpretation of the provision to include

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<sup>181</sup> The CLA (cap 43) only include deceased's former wife. The inclusion was introduced by clause 3 to the Civil Law (Amendment) Act 2009 (no 7 of 2009).

<sup>182</sup> Brunei only.

<sup>183</sup> The limitation was introduced by clause 5(ii) to the Civil Law (Amendment) Act 2009 (no 7 of 2009).

deceased's former spouse irrespective of whether or not a maintenance order had been obtained.

**(f) Prospect of Remarriage**

Unlike the CLA 1956, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act contain specific provision relating to the effect of a widow's remarriage on the assessment of damages for her claim for loss of support. Both Acts specify that a widow's remarriage or prospect of remarriage should not be considered in the assessment of damages for loss of support. Section 22(3) of the CLA (cap 43) reads:

In an action brought under section 20 where there fall to be assessed damages payable to a widow in respect of the death of her husband, there **shall not be taken into account the remarriage** of the widow or her prospect of remarriage. (*emphasis added*)

In almost exact wording, section 6(3) of the Fatal Accidents and Personal Injuries Act states:

In an action brought under the Part where there fall to be assessed damages payable to a widow in respect of the death of her husband, there **shall not be taken into account the remarriage** of the widow or her prospect of remarriage. (*emphasis added*)

Both of these sections are the carbon copy of section 3(3) of the AJA 1982. All three (3) sections remove the Common Law practice of considering subsequent remarriage of a widow or her prospect of remarriage as one of the negative contingencies which a

judge needs to take into consideration in the assessment of multiplier for loss of support.<sup>184</sup> By specifying that subsequent marriage or prospect of marriage is not to be considered in the assessment of multiplier, judges are barred from reducing the amount of multiplier to be awarded solely on the basis that the widow has already remarried at the time of trial or have the prospect of re-marrying in the future. The introduction of these two (2) sections is crucial to the law on the assessment of damages for loss of support in Singapore and Brunei. Although it was viewed that remarriage among Asian widows are generally accepted as a rare occurrence,<sup>185</sup> the situation have now changed and remarriage is a common occurrence. As such, to continue taking in account a widow's remarriage or prospect of remarriage in the assessment of damages for loss of supports would inflict more uncertainty onto the already hypothetical amount.

Nevertheless, despite the forethought by the Singaporean and Brunei's legislature, both sections failed to include the widower's remarriage or prospect of remarriage. The omission brings to mind the possibility that a widower's remarriage or the prospect of him remarrying after deceased demise should still be considered as one of the negative contingencies which may affect the assessment of multiplier for loss of support in Singapore and Brunei. This omission was noted by Sir Danys Roberts J in *Wong Fook Cheong v Hj Abd Khani b. Hj Abd Kadir*<sup>186</sup> where he held:

“By section 6(3) of the Order,<sup>187</sup> if damages are payable to a widow, in respect of the death of her husband, her re-marriage, or prospects of it, shall not be taken into account. This sub-section does not refer to the possible re-marriage of the husband of the deceased.”

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<sup>184</sup> See *Mead v Clarke Chapman & Co. Ltd.* [1956] 1 All ER 44, *Goodburn v Thomas Cotton Ltd.* (1968) 1 QB 845 and *Curwen v James* (1963) 1 WLR 748. See also summary of contingencies affecting dependants in the assessment of damages for loss of support in Rutter, Michael F., *op. cit.*, at 619.

<sup>185</sup> Per Yong Pung How CJ in *Ooi Han Sun & Anor. v Bee Hua Meng*, *op. cit.* (Singapore).

<sup>186</sup> *Op. cit.* (Brunei).

<sup>187</sup> Emergency (Fatal Accident and Personal Injuries) Order 1991. *In pari materi* with section 6(3) of the Fatal Accidents and Personal Injuries Act.

The need for a specific provision on the same is crucial if a widower remarriage or prospect of remarriage is to be officially ignored in the assessment of multiplier for loss of support.

### **6.5.3 Bereavement**

Similar to Malaysia, the award for bereavement is also available in Singapore and Brunei. The award was introduced by section 21(1) of the CLA (cap 43) and section 4(1) of the Fatal Accidents and Personal Injuries Act. These two (2) sections are the carbon copies of section 1A of the AJA 1982. Section 21(1) of the CLA (cap 43) reads:

An action under section 20 may consist of or include a claim for damages  
for bereavement.

Almost with identical wording, section 4(1) of the Fatal Accidents and Personal Injuries Act states:

An action under this Part may consist of or include a claim for damages  
for bereavement.

Similar to section 7(3) of the CLA 1956, the term ‘may’ in section 21(1) of the CLA (cap 43) and section 4(1) of the Fatal Accidents and Personal Injuries Act also does not allow any form of discretion to the judges in the assessment of the award. Since both Acts contain specific provisions in respect of right to claim,<sup>188</sup> persons entitled to claim<sup>189</sup> and the amount to be awarded,<sup>190</sup> judges in Singapore and Brunei have no

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<sup>188</sup> Section 21(1) of the CLA (cap 43) and section 4(1) of the Fatal Accidents and Personal Injuries Act.

<sup>189</sup> Section 21(2) of the CLA (cap 43) and section 4(2) of the Fatal Accidents and Personal Injuries Act.

<sup>190</sup> Section 21(4) of the CLA (cap 43) and section 4(3) of the Fatal Accidents and Personal Injuries Act.

discretion in the matter. Nevertheless, these are several pertinent features in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act which set these two (2) Acts apart from the CLA 1956. The features are as follows:

**(a) Beneficiaries to the Award**

Although the provision in section 4(2) of the Fatal Accidents and Personal Injuries Act is very much similar to section 7(3B) of the CLA 1956,<sup>191</sup> the beneficiaries to the award for bereavement is confined only to deceased's spouse and parents (or deceased's mother if deceased was illegitimate). Unlike section 7(11) of the CLA 1956, section 4(2) of the Fatal Accidents and Personal Injuries Act did not include grandparents in the definition of parents. The provision is an exact copy of section 2 of the AJA 1982. As such, judges in Brunei are barred from awarding damages for bereavement to deceased's grandparents even in the absence of deceased's parents. Section 4(2) of the Fatal Accidents and Personal Injuries Act reads:

A claim for damages for bereavement **shall only** be for the benefit-

(a) *of* the wife or husband *of* the deceased; and

(b) where the deceased was a minor who was never married -

(i) *of* his parents, if he was legitimate; and

(ii) *of* his mother, *if* he was illegitimate. (*emphasis added*)

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<sup>191</sup> The section limits the beneficiaries to the award for bereavement only to deceased's spouse and parent (only if the deceased is a minor and unmarried at the time of demise).

Compared to section 7(3B) of the CLA 1956 and section 4(2) of the Fatal Accidents and Personal Injuries Act, section 21(2) of the CLA (cap 43) lists down a wider range of beneficiaries for award. The section states:

A claim for damages for bereavement **shall only** be for the benefit of such of the following persons as survive the deceased:

- (a) the wife or husband of the deceased;
- (b) where there is no spouse by or for whom a claim can be made under paragraph (a), the children of the deceased;
- (c) where there is no person by or for whom a claim can be made under paragraph (a) or (b), the parents of the deceased or, if the deceased was illegitimate, his mother;
- (d) where there is no person by or for whom a claim can be made under paragraph (a), (b) or (c), but the deceased was at the date of his death a minor, any person who during any marriage to which that person was a party treated the deceased as a child of the family in relation to that marriage; or
- (e) where there is no other person by or for whom a claim can be made under this subsection, any brother or sister of the deceased. (*emphasis added*)

Unlike the CLA 1956 and the Fatal Accidents and Personal Injuries Act, the CLA (cap 43) allows deceased's children to receive damages for bereavement in the absence of deceased's spouse. Only in their absence that deceased's parents, siblings or extended families are entitled to receive the damager for bereavement. The Act also allows

deceased's adoptive parents<sup>192</sup> and siblings are also allowed to receive the award of bereavement. Their right to claim however only arises in the absence of deceased's spouse, children and parents.

Similarly, unlike the CLA 1956, and the Fatal Accidents and Personal Injuries Act, deceased's age at the time of his or her demise is immaterial. Judges in Singapore are allowed to award damages for bereavement to deceased's parents and siblings even if deceased had already reached the age of majority.<sup>193</sup> Deceased's age is only material when awarding damages for bereavement to deceased's adoptive parents. In this situation, judges are only allowed to award the damages if the deceased was still a minor at the time of his demise.

It is submitted that the wider range of beneficiaries for the award for bereavement in Singapore makes the award in Singapore more reasonable and oriented to the local circumstance. Family relationship is an integral part of the local social scenario. It is only reasonable that deceased's parents (irrespective of deceased age at the time of his demise), children and siblings should be compensated for the loss, grief and sorrow suffered due to deceased demise. These persons would have been devastated by deceased's demise. As such, barring them from receiving damages for bereavement is repugnant to the local social make-up.<sup>194</sup> Similarly, including these people into the list of beneficiaries for the award also ensure that the objective behind the introduction of the award for bereavement is met. Since the intention behind the introduction this award is to give some solace or consolation to the close relative of the deceased in respect of his demise in lieu of the award for loss of expectation of life in estate claim

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<sup>192</sup> Only if the deceased is a minor at the time of demise.

<sup>193</sup> Under the CLA 1956 and the Fatal Accidents and Personal Injuries Act, deceased parent are allowed to claim damages for bereavement only if deceased was a minor and unmarried at the time of demise

<sup>194</sup> Under the CLA 1956 and the Fatal Accidents and Personal Injuries Act, only deceased's spouse and parent (provided that deceased was a minor and not married at the time of demise) are allowed to receive damages for bereavement,

which had been abolished by section 11(1) of the CLA (cap 43),<sup>195</sup> the inclusion of deceased's parents, children and siblings as beneficiaries to the award allows these persons who are deceased's close relative to be comforted or consoled.

#### **(b) Amount to be Awarded**

Similar to the CLA 1956, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act also specifically provide for the amount of damages to be awarded for bereavement. This amount is fixed and judges have no discretion to vary the same. The power to vary the amount of damages for bereavement is accorded only to the Minister.<sup>196</sup> Section 21(4) of the CLA (cap 43) provides that the award for damages in Singapore is SGD 15,000. The section reads:

Subject to subsection (6), the sum to be awarded as damages under this section **shall be \$15,000**. (*emphasis added*)

In Brunei, the amount of damages to be awarded for bereavement is provided by section 4(3) of the Fatal Accidents and Personal Injuries Act. The section limits the amount to BD 10,000:

Subject to subsection (5), the sum to be awarded as damages under this section **shall be \$10,000**. (*emphasis added*)

Unlike in Malaysia and Brunei, the amount of damages for bereavement in Singapore has been revised on one occasion. The amount which was initially set at SGD 10,000

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<sup>195</sup> See speech by Dr. S. Jayakumar during the second reading of the Civil Law (Amendment) Bill 1987 (Bill 1 of 1987) in *Singapore Parliamentary Debates, Official Report* (4 March 1987) vol 49 at col 68).

<sup>196</sup> See section 21(6) of the CLA (cap 43) and section 4(5) of the Fatal Accidents and Personal Injuries Act. In Singapore, the power to vary the amount was initially given to the President of Singapore. This power was later transferred to the Minister in 2009 via section 4 (ii) of the Civil Law (Amendment) Act 2009 (no7 of 2009). In Malaysia, such power is accorded only to the Yang Dipertuan Agong.

was revised to SGD 15,000 in 2009.<sup>197</sup> The revision was done in order to suit the circumstance and monetary value of the country.<sup>198</sup> The Malaysian Yang Dipertuan Agong and the Brunei Minister of Law, although accorded with the same power have yet to grant any revision to the amount in Malaysia and Brunei. The amount still stands at RM 10,000 and BD 10,000 from 1984 and 1991 respectively when the award was first introduced.

#### **6.5.4 Loss Service of Wife and Child**

In the absence of any provision in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act similar to that of section 7(3)(iii) of the CLA 1956, the Common Law head of damages known as damages for loss of service is still available in both Singapore and Brunei. It is awarded to compensate the husband and the parents for the loss of the service of his wife or their child respectively. Since neither the CLA (cap 43) nor the Fatal Accidents and Personal Injuries Act contain any provision on the assessment of this head of damages, the damages is assessed based on the judge's estimation of a reasonable value of the loss. Thus, requiring an extensive exercise of judicial discretion especially when there is no indicator of the monetary value for the service rendered. In *Ng Siew Choo v Tan Kian Choon*,<sup>199</sup> for example, the High Court of Singapore had to estimate the value of 'service' given by a son to his mother by working at her ice-water stall.

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<sup>197</sup> The amount was revised via section 4 of the Civil Law (Amendment) Act 2009 (no7 of 2009). See also the Second Reading Speech on Civil Law (Amendment) Bill by Senior Minister of State Assoc Prof Ho Peng Kee published in < <http://app2.mlaw.gov.sg/News/tabid/204/currentpage/8/Default.aspx?ItemId=67> >

<sup>198</sup> See the Explanatory Statement to the Civil Law (Amendment) Bill 2008 (no 38 of 2008).

<sup>199</sup> [1990] 2 MLJ 333 High Court. (Singapore).

### **6.5.5 Loss of Consortium**

Similar to the award for loss of service above, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act also have no provision pertaining to the abolishment of the award for loss of consortium. However, it should be noted that the absence of provision abolishing the award for loss of consortium have no effect onto the law on fatal accident claims in either Singapore or Brunei. Since this head of damages had never been recognized under the Common Law, and it was never statutorily recognized in the CLA (43) and the Fatal Accidents and Personal Injuries Act, the courts in these countries are not in the habit of allowing damages under this heading in fatal accident claims.

## **6.6 PROVISIONAL DAMAGES FOR PAIN AND SUFFERING**

Another interesting feature of the law governing the assessment of damages for personal injury and fatal accident claims in Singapore and Brunei is the discretionary power granted to the judge to award provisional damages for pain and suffering and loss of amenities in personal injury claims. This award is awarded in situations where plaintiff can prove that his injury, physical or mental disabilities is expected to get worse in the future although at unspecified date.<sup>200</sup> The discretionary power to award provisional damages is a departure from the traditional lump sum once and for all approach in assessing damages for pain and suffering and loss of amenities. The court will assess the value of plaintiff's injury as it stands at the time of the trial, and at the

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<sup>200</sup> There is nothing to indicate that provisional damages can be awarded in fatal accident claims.

same time order that plaintiff to be allowed to come back to court should the his injury or disabilities gets worse in the future.

In Brunei, this power is provided in by section 21(1) and (2) of the Fatal Accidents and Personal Injuries Act. The section reads:

(1) This section applies to an **action for damages for personal injuries** in which there is prove or admitted to be **a chance** that **at some definite time in the future** the injured person will, as a result of the act or omission which gave rise to the cause of action, **develop some serious disease or suffer some serious deterioration in his physical or mental condition.**

(2) Subject to subsection (4) of this section, as regards any action for damages to which the section applies in which a judgment is given in the High Court, provision may be made by rules of court for enabling the court, in such circumstances as may be prescribed, to award the injured person -

(a) damages assessed on the assumption that the injured person will not develop the disease or suffer the deterioration in his condition; and

(b) **further damages at a future date if he develops the disease or suffers the deterioration.**

In Singapore, the discretionary power to award provisional damages is granted to the High Courts by paragraph 16 of the First Schedule to the Supreme Court of Judicature Act (cap 322).<sup>201</sup> The para reads:

Power to award in any action for damages for personal injuries, provisional damages assessed on the assumption that a contingency will not happen and further damages at a future date if the contingency happens.

The Subordinate Courts in Singapore on the other hand are granted such power by section 32 and 52 of the Subordinate Courts Act (cap 321). Section 32 reads:

A District Judge shall have power in any civil proceeding pending in a District Court to make any order or to exercise any authority or jurisdiction which, if it related to a proceeding pending in the High Court, might be made or exercised by a Judge of the High Court in chambers.

Section 52 of the Act states:

Subject to subsection (1A), a Magistrate's Court shall have all the jurisdiction of the High Court to hear and try any action in personam where -

(a) the defendant is served with a writ of summons or any other originating process —

(i) in Singapore in the manner prescribed by Rules of Court; or

(ii) outside Singapore in the circumstances authorised by and in the manner prescribed by Rules of Court; or

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<sup>201</sup> Tan, How Teck, "The Gourley Principle and The Income Tax Element in Awards of Damages: Some Tax Aspects in Singapore", 17 issue 1 (2007) *Revenue Law Journal*, at 9.

(b) the defendant submits to the jurisdiction of a Magistrate's Court.<sup>202</sup>

Such power is not available to the Malaysian judges. Damages for personal injury and fatal accident claims in Malaysia are awarded once and for all. As such, judges have to assess the damages for pain and suffering and loss of amenities based on plaintiff condition at the time of trial.

However, despite the power granted by the above provisions, there are very few cases in which this award is allowed in either Brunei or Singapore. To the researcher's knowledge, there is no reported case which involves provisional damages in Brunei. While in Singapore, there are only two (2) reported cases thus far where the courts find it suitable to award order for provisional damages; *ACD (by her next of friend B) v See Mun Li*<sup>203</sup> and *Koh Chai Kwang v Teo Ai Ling (by her next friend, Chua Wee Bee)*<sup>204</sup>. The application of the provision in the Supreme Court of Judicature Act (cap 322) (2007 Rev Ed) is still uncertain and calls for further clarification.<sup>205</sup>

## 6.7 CONCLUSION

The laws on personal injury and fatal accident claims in Singapore and Brunei are still relatively similar to the law applicable in England. Although the 1987 and 1991

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<sup>202</sup> The above power is further regulated by Order 37 Rule 8 of the Rule of Court (cap 322) (2006 rev Ed).

<sup>203</sup> [2009] SGHC 217. (Singapore).

<sup>204</sup> [2011] SGCA 23.

<sup>205</sup> See discussion by Fordham, Margaret, "Providing for Contingencies – the Award of Provisional Damages in Singapore", [Nov 2011] *Singapore Journal of Legal Studies*, 250 -259.

statutory revamp to the laws on personal injury and fatal accident claims in both countries had altered many facets of the laws, the changes brought by the statutory amendments are not as extensive as the ones introduced by the CLAA 1984 in Malaysia. The amendments merely amended the provisions in the old laws to be more in line with the provisions in the AJA 1982. Therefore, the English Common Law principles are still extensively applied in the assessment of damages for personal injury and fatal accident claims in Singapore and Brunei.

Compared to the situation in Malaysia, the application of judicial discretion is still an integral part of the assessment of damages for personal injury and fatal accident claims in Singapore and Brunei. Other than abolishing the award for loss of earnings in lost years and loss of expectation of life, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act only regulate the assessment of damages for loss of support and bereavement. Other heads of damages are not statutorily regulated. The assessment of which are still left in the hands of presiding judges guided by the Common Law principles and decided local cases. Even in respect of the assessment of damages for loss of support, judicial discretion still plays an important role in calculating the multiplier and multiplicand. The only head of damages in which judges have no discretion over is the award for bereavement.

As seen above, the application of judicial discretion in the assessment of damages allows judges to adjust the amount of damages to suit the plaintiff. As such, the amount awarded is realistic and suitable to the circumstances. Nevertheless, in order to arrive at a figure which is reasonable to compensate the loss suffered by the plaintiff, a myriad of considerations need to be factored in into the assessment. This makes the whole process of assessing damages for personal injuries and fatal claims arising out of motor vehicle

accidents in Singapore and Brunei more tedious and time consuming if compared to Malaysia. Furthermore, the extensive use of judge's personal reasoning in the assessment of damages also makes the amount of damages being awarded uncertain and speculative.

## **6.8 COMPARATIVE TABLE OF THE LAW ON PERSONAL INJURY AND FATAL ACCIDENT CLAIMS IN MALAYSIA, SINGAPORE AND BRUNEI**

<b>HEADS OF DAMAGES</b>	<b>EFFECTS</b>	<b>MALAYSIA</b>	<b>SINGAPORE</b>	<b>BRUNEI</b>
		Civil Law Act 1956 (Act 67)	Civil Law Act, (Cap 43)	Fatal Accidents and Personal Injuries Act (Cap 160)
Personal Injury Claims	Abolition of the award for loss of expectation of life for living plaintiff	s. 28A (2)(a) s. 28A (2)(b)	s. 11 (1)	s. 12
	The cause of action for loss of future earnings	s. 28A (2)(c)	-	-
	i. Pre- conditions in the assessment of award	s. 28A(2)(c)(i)	-	-
	ii. Future increases in earning not to be considered	s. 28A(2)(c)(ii)	-	-

	iii. Deduction for living expenses in the assessment of multiplicand	s. 28A(2)(c)(iii)	-	-
	iv. Compensation benefits from other compensation funds not taken into consideration	s. 28A(1)	-	-
	v. Fixed multiplier	s. 28A (2)(d)	-	-
	Abolition of the award for loss of pre-trial earnings	s. 28A (2)(d)	-	-
	The assessment of damages for loss of future earning capacity	(plaintiff must be earning income at the time of injury)	-	-
Estate Claims	Cause of action for estate claims	s. 8	s. 10	s. 11
	Abolition of the award for loss earnings in lost years	s. 8 (2)(a)	s. 10 (3)(2)	s. 11 (3)(a)(ii)
	Abolition of the award for loss of expectation of life for estate claim	s. 8 (2)(a)	s. 11 (1)	s. 12
Claims for Loss of Support	The cause of action for loss of support	s. 7	s. 20	s. 3
	Measure of damages	s.7 (3) loss of support	s. 22 (1) loss resulting from death	s. 6 (1) loss resulting from death
	i. Pre- conditions in the assessment of award	s. 7 (3)	-	-
	ii. Future increases in earning not to be considered	s. 7 (3)(iv)(b)	-	-

	iii. Deduction for living expenses in the assessment of multiplicand	s. 7 (3)(iv)(c)	-	-
	iv. Compensation benefits from other compensation funds not taken into consideration	s. 7 (3)(i)	s. 22 (1)	s. 7
	v. Fixed multiplier	s. 7 (3)(iv)(d)	-	-
	vi. Defining dependant	s. 7 (2) s. 7 (11)	s. 20 (8) s. 20 (8) s. 22 (3A) (Wider)	s. 3 (2) s. 3 (3) s. 3 (3) (Wider)
	vii. Consideration for Remarriage or prospect of remarriage	-	s. 22 (3)	s. 6 (3)
Bereavement	The cause of action for bereavement	s. 7 (3A)	s. 21(1)	s. 4(1)
	i. Person entitled to claim for Bereavement	s. 7 (3B)	s. 21 (2) (Wider)	s. 4 (2)
	ii. Amount awarded	s. 7 (3A)	s. 21 (4) (Revised)	s. 4 (3)
Claim for Loss of Service of Child and Wife	Abolition of award for Loss of Service of child and wife	s. 7 (3)(iii)	-	-
Claim for Loss of Consortium of Wife	Abolition of award for loss of consortium of wife under fatal claims	s. 7 (3)(iii)	-	-
Provisional Damages		-	-	s. 21

## **CHAPTER 7**

### **CONCLUSIONS AND RECOMMENDATIONS**

#### **7.1 RECAPITULATION**

It is accepted that the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents in Malaysia is not totally dependant on the Common Law principles. The Malaysian Legislature has developed our own rules to govern the assessment of damages under this type of claim via the Civil Law Act 1956.<sup>1</sup> The CLA 1956 is supplemented by the Common Law principles and decided cases in situations where there is a lacuna in the provisions of the Act. Judges' discretion also plays an integral part in the assessment of damages. Since the assessment process involves the consideration of multitude of elements which form the basis of the award, judges' discretion is necessary in order to ensure that the damages and interest awarded reasonably commensurate the loss suffered by plaintiff and bearable by the defendant (or in actuality the insurance company insuring the vehicle at fault) while at the same time adhering to the letters of the law.

In Malaysia, judges' discretionary power in assessing damages for personal injury and fatal accident claims arising out of motor vehicle accidents was initially regulated by the Civil Law Act 1956 (rev 1972).<sup>2</sup> The introduction of the Civil Law (Amendment)

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<sup>1</sup> (Act 67). Hereinafter referred to as "the CLA 1956".

<sup>2</sup> (Act 67). Hereinafter referred to as "the CLA 1956 (rev 1972)". The Act replaced the Civil Law Enactment of 1937(F.M.S no 3 of 1937) and the Civil Law Ordinance 1956 (F. of M. No 5 of 1956).

Act 1975<sup>3</sup> and the Civil Law (Amendment) Act 1984<sup>4</sup> which amended the CLA 1956 (rev 1972) had altered many facets of the law on the assessment of damages for personal injury and fatal accidents claims arising out of motor vehicle accidents. The current provisions on the assessment of damages for personal injury and fatal accident claims in the CLA 1956 are unique. They contain several elements which are distinctively ours and not parallel to the provisions in any other statute relating to the assessment of damages for personal injury and fatal accident claims elsewhere.

The changes to the law and practices brought by the CLAA 1984 are so immense that the current provisions in the CLA 1956 has been castigated as an attempt by the Legislature to restrain or fetter judicial discretion in the assessment of damages. This is due to the fact that the provisions in sections 7, 8, and 28A of the CLA 1956 abolish several Common Law heads of damages, impose pre-conditions before damages can be awarded, specify precise methods of assessment as well as introduce and regulate a new head of damages. Due to the strict regulatory nature of the sections, the discretionary power of the judges in assessing damages for personal injury and fatal accident claims and the quantum of damages is somewhat effected. Similarly, the quantum of damages being awarded under this type of claims is also affected.

The assessment of interest on damages for personal injury and fatal accident claims arising out motor vehicle accidents is also generally at the discretion of the judges. This discretion is granted by section 11 of the CLA 1956, the Courts of Judicature Act 1964,<sup>5</sup> the Subordinate Courts Act 1948<sup>6</sup> and the Subordinate Courts Rules Act 1955.<sup>7</sup>

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<sup>3</sup> (Act A 308). Hereinafter referred to as “the CLAA 1975”. The amendments were consolidated into the CLA 1956 (rev 1972).

<sup>4</sup> (Act A 602). Hereinafter referred to as “the CLAA 1984”. The amendments were consolidated into the CLA 1956 (rev 1972) forming the current CLA 1956.

<sup>5</sup> (Act 91). Hereinafter referred to as the “the CJA 1964”.

<sup>6</sup> (Act 92). Hereinafter referred to as the “the SCA 1948”.

<sup>7</sup> (Act 55). Hereinafter referred to as the “the SCRA 1955”.

However, the Rules of High Court 1980,<sup>8</sup> the Subordinate Court Rules 1980<sup>9</sup> and later the Rules of Courts 2012<sup>10</sup> have to some extent restricted the discretion of the judges by providing specific provisions regulating the assessment and the award of interest on damages. These provisions have also led to some issues, all of which are inter-related with judges' discretionary power.

The findings of this research show that the criticism leveled at the CLA 1956 by many writers<sup>11</sup> are not without basis. The discretionary power of the judges in assessing certain head of damages for personal injury and fatal accident claims arising out of motor vehicle accidents has indeed been abolished by the provisions in sections 7, 8 and 28A of the CLA 1956. The abolition however does not extend to all heads of damages available this type of claims. Sections 7, 8 and 28A of the CLA 1956 still allow judges to apply their discretion in assessing the majority of the heads of damages. Some of the provisions in the sections allow judges to exercise their discretion as it was before the introduction of the CLAA 1984 while others allow judges to exercise their discretion but with minimal statutory regulation. Similarly, the effects of sections 7, 8 and 28A of the CLA 1956 in reducing the quantum of damages for personal injury and fatal accident claims arising out of motor vehicle accidents are also mixed. Some provisions result in major reduction of the quantum while others produce minimal reduction or no reduction at all. Therefore, it is concluded that the application of the provisions in the CLA 1956 has led to mixed results on discretionary power of the judges in the assessment of damages and quantum of damages being awarded by the courts in personal injury and fatal accident claims arising out of motor vehicle accidents.

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<sup>8</sup> [PU (A) 50/1980]. Hereinafter referred to as "the RHC 1980 (repealed)". Repealed and substituted with the Rules of Courts 2012. Governed the civil procedures in the High Court.

<sup>9</sup> [PU (A) 328/1980]. Hereinafter referred to as "the SCR 1980 (repealed)". Repealed and substituted with the Rules of Courts 2012. Governed the civil procedures in the Subordinate Courts.

<sup>10</sup> [PU(A)205/2012]. Hereafter referred to as "the Rules of Court 2012".

<sup>11</sup> *Supra*, at 5 – 6.

The research also finds that the discretionary power of the judges in assessing and awarding interest for damages personal injury and fatal accident claims arising out of motor vehicle accidents is still intact. The discretionary power accorded by the CLA 1956, CJA 1964, SCA 1948 and SCRA 1955 has not been abolished by any statutory provision or court's rules. Judges generally still have the discretion to decide whether interest is to be awarded, at what rate, on which part of damages and within which period.

The followings are the summary of the analysis on the effects of the statutory provisions on judicial discretion and quantum of damages in personal injury and fatal accident claims arising out of motor vehicle accidents.

#### **7.1.1 Effects of sections 7, 8, 11 and 28A of the CLA 1956 on Judicial Discretion**

From the discussion in Chapters three (3), four (4) and five (5), it is observed that the effects of sections 7, 8, 11 and 28A of the CLA 1956 on the exercise of judicial discretion in the assessment of damages and interest in personal injury and fatal accident claims arising out of motor vehicle accidents can be categorized into four (4) main categories; total abolition of the discretionary power, maintaining the discretionary power, maintaining the discretionary power but with restrictions and finally, mere codification of existing practice.

This research observes that section 7 and 8 of the CLA 1956 have totally abolished the power of judges to exercise their discretion the assessment of damages for the awards for loss of consortium of wife, loss of services of child and wife, loss of expectation of life under fatal accident claims and loss of earnings in lost years. Since these heads of

damages were totally abolished by the CLA 1956, the discretionary power of the judges to assess and award damages for these heads of damages is also abolished. The award for bereavement is another area in which judges' have no discretion over. This head of damages was introduced complete with specific provisions regulating the quantum of damages to be awarded, the beneficiaries to the award as well as how the damages is to be divided among the beneficiaries. As such there is not much room left for judges to exercise the discretion in assessing damages for bereavement.<sup>12</sup> The abolition of judges' discretionary power in the assessment of damages for loss of services of child and wife however is not absolute. Although judges can no longer award damages under these headings, they still have the discretion to assess and award damages to compensate the plaintiff for the expenses incurred to replace the loss of services provided by the child or wife. As such, if plaintiffs can prove that they suffered monetary loss in order to replace the services which their child or wife, judges still assess and award damages to compensate the loss. The damages however will not be itemized as damages for loss of service of child or wife, but damages for hiring maid, helper, babysitter *etc.*

The research also perceives that apart from the five (5) heads of damages mentioned above, the CLA 1956 does not take away the discretionary power of the judges in assessing damages for the other heads of damages. The assessment of damages is still arguably<sup>13</sup> discretionary. In fact, judges still maintain their discretion in the assessment of damages for loss of future earning capacity and loss of expectation of life for living plaintiff as it was prior to the CLA 1956. The assessment of these heads of damages is in the hands of the presiding judges based on the facts of the case and guided by the

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<sup>12</sup> However, the absence of specific interpretation of the term 'husband' and 'wife' allow a small amount of leeway in which judges may exercise their discretion in interpreting the same.

<sup>13</sup> Arguable since the discretionary power of the judges although still applicable, it is regulated by the provisions in section 7, 8, and 28A of the CLA 1956.

Common Law principles and decided cases. There is nothing in section 28A of the CLA 1956 which provides for the award for loss of future earning capacity. Although there is a pre-condition that judges can only award damages for loss of future earning capacity to plaintiff who was earning income at the time of injury, this pre-condition is not imposed by the CLA 1956. Section 28A (2)(c) of the CLA 1956 did not incorporate the award for loss of future earning capacity into the parameters of the section. It was the judges themselves who chose to widen the scope of the section to include the award for loss of future earning capacity and adopt the pre-condition of earning income at the time of injury as the pre-condition for the award.

Similarly, the assessment of damages for loss of expectation of life in personal injury claims is also discretionary. Judges are only prohibited by section 28A (2)(a) of the CLA 1956 from awarding the award as a separate head. Judges still have the discretion to award damages for loss of expectation of life as part of damages for pain and suffering. Similarly, section 28A (2)(b) of the CLA 1956 also calls for judges' discretion. The section did not specify how plaintiff's suffering due the awareness that his expectation of life has been reduced is to be assessed. It also did not indicate how the plaintiff's suffering is to be taken into account in the assessment of damages for pain and suffering. Judges have the discretion to assess the loss as they deem fit based on the facts of the case guided by the Common Law principle and decided cases.

However, with regard to the assessment of interest for damages, damages for loss of support, damages for loss of future earnings and damages for loss of pre-trial earnings, the research found that the discretionary power of the judges is still intact. The discretionary power however is somewhat regulated by the provisions in the CLA 1956. In Chapter Five (5), it was observed that although section 11 of the CLA 1956

allows judges the discretion in determining whether interest is to be allowed, at which period of time, at which part of the award and at what rate, the discretion is regulated by the three (3) provisos in the section and confined only to the award for pre-judgment interest only. It cannot be extended to post-judgment interest, interest for contractual debt and interest for damages recoverable for bill of exchange which had been dishonoured. Judges also have the discretion to award compounded interest. Contrary to common interpretation, proviso (a) to section 11 of the CLA 1956 did not take away judges' discretion in awarding compounded interest. It only prohibits judges from using the section as the authority to allow compounded interest.

Judges' discretion in assessing damages for loss of support and loss of future earnings has also been regulated by the CLA 1956. The discussions in Chapters three (3) and four (4) showed that the CLA 1956 had introduced several provisions which have mandatory effect. Sections 7 and 28A of the CLA 1956 laid down the pre-condition to the awards for loss of support and loss of pre-trial earnings, the methods for the assessment of multiplier and multiplicand, the items to be considered and ignored in the assessment of multiplicand as well as the beneficiaries to the awards.<sup>14</sup> As such, although judges have the discretion to assess the damages based on the fact of the case, the assessment must be based on the provisions in the sections. Nevertheless, there were many attempts made by the courts and legal scholars over the years to depart from following the strict letter of the provisions and revert back to the practice of using the judges' discretion. These attempts have been made possible due to several vague and ambiguous wordings in the provisions which allow for disparity in interpretation.

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<sup>14</sup> Sections 7(2) and 7(11) of the CLA 1956 provide the beneficiaries to the award for loss of support.

Chapter three (3) concluded that the assessment of damages for loss of pre-trial earnings also falls within the third category. Despite some opinions which state that this head of damages has been abolished by section 28A (2)(d) of the CLA 1956, there is nothing in the section which clearly states the same. Judges still have the discretion to assess and award damages for loss of pre-trial earnings provided that the multiplier for the loss is assessed out of the multiplier assessed for loss of future earnings. If there is no loss of future earnings awarded, the assessment of the multiplier must be assessed based on the actual period of incapacity where plaintiff was not able to earn his pre-trial income.

Finally, the research also finds that the provisions in provisos (i) and (iv)(c) to section 7, sections 28A (1) section and 28A92)(c)(iii) of the CLA 1956 which provide lists of benefits not to be taken into consideration in the assessment of multiplicand for loss of support and loss of future earnings as well the deduction for living expenses fall within the fourth category. The provisions are mere codification of existing practices. Judges, even without the provision have been taking these factors into consideration assessing damages for loss of support and loss of future earnings.

### **7.1.2 Effects of sections 7, 8 and 28A of the CLA 1956 on the Quantum of damages**

Based on the discussion in Chapters Three (3) and Four (4), the research observes that sections 7, 8 and 28A of the CLA 1956 also furnish mixed results in respect of the amount of damages being awarded under personal injury and fatal accident claims arising out of motor vehicle accidents. The provisions in the sections which abolished the award for loss of earning in lost years, regulate the assessment of damages for loss of support and loss of future earnings by introducing the pre-conditions of earning

income before the injury or death and below the age of fifty five (55) years old, imposing fixed multiplier and prohibiting judges from taking into account future increases in earnings in the assessment of multiplicand have greatly reduced the quantum of damages being awarded. Other than the effects stated above, the provisions in sections 7, 8 and 28A of the CLA 1956 did not cause significant effect in reducing the quantum of damages in personal injury and fatal accident claims arising out of motor vehicle accidents.

### **7.1.3 Analysis of the Provisions on Assessment of Damages in Singapore and Brunei**

Singapore's Civil Law Act<sup>15</sup> and Brunei's Fatal Accidents and Personal Injuries Act<sup>16</sup> retain much of the Common Law methods in the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents. The 1984 and 1991 statutory revamps of the laws in Singapore and Brunei did not result in many changes in respect of the judges' discretion. The assessment of damages for personal injury and fatal accident claims in Singapore and Brunei is still largely depending on the discretion of the presiding judges based on the facts of the case and guided by the Common Law principles and decided cases. The only significant changes brought by the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act on the assessment of damages are the abolition of the award for loss of expectation of life and the award for loss of earnings in lost years as well as the introduction of the award for bereavement.

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<sup>15</sup> (cap 43). Hereinafter referred to as "the CLA (cap 43)".

<sup>16</sup> (cap 160). Hereinafter referred to as "the Fatal Accident and Personal Injuries Act".

It is observed in Chapter Six (6) that the provisions in CLA (cap 43) and the Fatal Accidents and Personal Injuries Act in Singapore and Brunei have the advantage of being flexible and amendable to suit the circumstance or matrix of each case, the claimants and the changing social and economic circumstances. By leaving the assessment of damages at the discretion of the presiding judges guided by minimal statutory regulation, the Common Law principles and decided case, the assessment of damages for personal injury and fatal accident claims arising out of motor vehicle accidents can be tailor-made to suit the circumstances of each case.

The absence of specific statutory provisions regulating certain aspects of the assessment of damages, however, sometimes leads to difficulties and complications. Since the method of assessing the damages is not built into the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act, judges have to make an estimation of the damages based on variety of factors. This requires more judicial time and effort. The absence of specific provisions in the Acts also results in variations and fluctuations in the assessment of damages.

Compared to the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act, the CLA 1956, on the other hand, has indeed altered many aspects of the law relating to the assessment of damages and interest in personal injury and fatal accident claims arising out of motor vehicle accidents in Malaysia. Although the provisions in sections 7, 8, 11 and 28A of the CLA 1956 have regulated or in some cases abolished the discretionary power of the judges in assessing several heads of damages, these provisions have to some extent accorded some degree of certainty and consistency in the assessment. This benefits not only the judges but also the plaintiffs and the insurance industry. Although the application of the provisions in the CLA 1956 sometimes leads to plaintiffs not

getting full compensation for the loss suffered, this drawback have some extend be tolerated in view of the need to provide a fair compensation scheme to both the plaintiff and the insurance industry. Motor vehicle insurance should not be perceived the same way as personal or life insurance. It is merely a scheme to ensure that victims of motor vehicle accidents can be compensated for the loss of suffered due to the accident. It balances the interest of both the plaintiffs and the insurance industry since the effect of the claim pay-out will affect the public by way of possible increase in motor insurance premium.

## **7.2 RECOMMENDATIONS**

Having analysed the effects of the provisions in the CLA 1956 on judicial discretion in the assessment of damages and interest in personal injury and fatal accident claims arising out of motor vehicle accidents in Malaysia and comparing them with the corresponding provisions in Singapore and Brunei, it is apparent that some aspects of the provisions in the CLA 1956 need to be reviewed. The revision is necessary in order to solve the problems arising from the current provisions and hopefully improve the effectiveness of those provisions. Some of the recommendations will affect the use of judicial discretion in the assessment of damages.

### **7.2.1 Revising the Pre-Condition that Plaintiff or Deceased Must Be Below the Age of Fifty Five (55) Years Old**

It is suggested that proviso (iv)(a) to section 7(3) and section 28A(2)(c)(i) of the CLA 1956 relating to the pre-condition that the deceased in the claim for loss of support and the plaintiff in the claim for loss of future earnings must be below the age of fifty five (55) years old before the award for loss of support and loss of future earnings can be awarded need to be revised. The current provisions in proviso (iv)(a) to section 7(3) and section 28A(2)(c)(i) of the CLA 1956 limit the award for loss of support and loss of future earnings only to the dependant of a deceased and to a plaintiff who have yet to reached the age of fifty five (55) years old at the time of demise or injury. By virtue of the pre-conditions in the sections, while a person is generally allowed to work beyond the age of fifty five (55), his dependants will not compensated for the loss of support once he (the deceased) have reached the age of fifty five. Similarly, a person who has reached the age of fifty five (55) will not be compensated for the loss of his future earnings even if he was still working at the time of injury.

While fifty five (55) years old is probably a reasonable retirement age when the provisions were introduced in 1984, they however are ‘draconian’<sup>17</sup> or arbitrary at present. A revision to proviso (iv)(a) to section 7(3) and section 28A(2)(c)(i) of the CLA 1956 is essential to enable the CLA 1956 to catch-up with the current trends in the national retirement age. The retirement age of the Malaysian civil servants had been adjusted from fifty five (55) to fifty six (56)<sup>18</sup> in 2001 and later revised to fifty eight (58) in 2008.<sup>19</sup> It was further revised to sixty (60) years old in 2012.<sup>20</sup> The maximum

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<sup>17</sup> Dass, K.S., *Quantum of Damages in Personal Injury, Parliament v Common Law, A critical Examination of the 1984 Amendment to the Civil Law Act 1956*, (Kuala Lumpur: Legal Circle Book Sdn. Bhd, 1997), at 93.

<sup>18</sup> Section 12 (3B) of the Pension Act 1980 (Act 227). See also Pekeliling Perkhidmatan Bilangan 3 Tahun 2001. Effective only with regard to civil servant appointed on or after 1<sup>st</sup> October 2001.

<sup>19</sup>This was declared by the Prime Minister in Parliament on 10<sup>th</sup> May 2008. See *New Straits Times*, 11th May 2008. See also Pekeliling Perkhidmatan Bilangan 6 Tahun 2008. Effective only with regard to civil servant appointed on or after 1<sup>st</sup> July 2008.

retirement age in the private sector has also been revised to sixty (60) years old in 2012.<sup>21</sup>

A revision in the maximum working age in proviso (iv)(a) to section 7(3) and section 28A(2)(c)(i) of the CLA 1956 is also necessary to cater for situations where the deceased or the plaintiff were engaged in a type of employment where age is immaterial, if they were self-employed or if they were working on contract basis after retirement. The rise in the national life expectancy and employment age, the current employment market<sup>22</sup> and the advancement in medical science<sup>23</sup> have caused many people to work beyond the age of fifty five (55) years old. The present trend in delaying marriage in favour of pursuing higher education<sup>24</sup> and career development also increases the possibility that a person could still be working and supporting his family at an advanced age. In these circumstances, setting or fixing fifty five (55) years old as the maximum age for the award for loss of support and loss of future earnings would be unjust especially when the deceased or the plaintiff was still gainfully employed beyond that age.

While it is understandable that the introduction of the pre-condition that the deceased or the plaintiff must be below the age of fifty five (55) by the CLAA 1984 was necessary in order to prevent judges from awarding damages for loss of support or loss of future earnings to the dependants of a deceased or plaintiff who was not working at the time of accident, it creates a dilemma to the dependants of a deceased or plaintiff who were actually working *albeit* being over fifty five (55) years old. To continue applying the

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<sup>20</sup> Under the New Civil Servant Scheme (SSM). See Pekeliling Perkhidmatan Bilangan 11 Tahun 2011. Effective only with regard to civil servant appointed after 2012.

<sup>21</sup> Section 4 of the Minimum Retirement Age Act 2012 (Act 753). The Act was *gazetted* on 16 August 2012.

<sup>22</sup> The working age population (15 to 64 years) increased from 62.8 per cent in year 2000 to 67.3 per cent in 2010.

<sup>23</sup> The Malaysian Department of Statistic forecast that Malaysian men are expected to live up to 71.9 year of age while women will live up to 77 years

<sup>24</sup> Pinvader, "LPPKN Pandang SeriusTrenWanitaLambatKahwin", *Utusan Malaysia*, 23 May 2011, *Utusan Malaysia Online*, 23 May 2011, 28 Disember 2011, <<http://www.utusan-malaysia-online.com/lppkn-pandang-serius-trend-wanita-lewat-kahwin>>

pre-condition at a time when more and more people are working beyond fifty five (55) years old would be detrimental to their financial wellbeing. Even countries such as the United Kingdom and the United States of America where old age pensions and unemployment benefits are provided still adopt higher retirement age.<sup>25</sup>

On this point, it should be noted that by looking at the development in the employment market nowadays, it is fair to say that more and more people are working beyond their retirement age.<sup>26</sup> This is not only due to financial demand, but also due to the fact that there is greater appreciation for the talent and skills people over the age of fifty five (55) can offer. The test employed by Chang Min Tat FJ in *Murtadza bin Mohamed Hassan v Chong Swee Pian*<sup>27</sup> is a good illustration to show that retirement age is governed by the nature of the profession. With life expectancy rising over the recent decades due to much improved quality of life, medical breakthrough and health awareness, it is unrealistic to consider Malaysians over the age of fifty five (55) to be past their prime and unable to engage in gainful employment. It is, therefore, submitted that the injustice and financial burden borne by the dependants or the plaintiffs due to the application of this pre-condition far outweighs the mischief the Legislature wanted to rectify. If the pre-condition must remain, the maximum age should be amended to follow the changes in the current general retirement age and the development in the employment market.

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<sup>25</sup>Reiss, Seth M., "Quantum for Future Loss in Personal Injury and Fatal Accident Cases After the Civil Law (Amendment) Act 1984", (1985), 2 *Malayan Law Journal* lxii – lxxi, at lxv. In *Gilbertson v Harland and Wolf Ltd* (1966) 2 Lloyd's Rep. 190. It was decided that a 70 years old victim is likely to continue working until the age of 75 years old. See also *Cavanagh v Ulster Weaving Co Ltd* (1959) 2 All ER 745.

<sup>26</sup>Also see comments made in Parliamentary Debates, Representative, Sixth Parliament, Second Session, 19 July 1984, at 3326 - 3337 and Parliamentary Debates, Senate, Sixth Parliament, Second Session, 3<sup>rd</sup> August 1984, at 138 -152 where the members of the Parliament had voiced their discontentment with the proposed Bill.

<sup>27</sup>[1980] 1 MLJ 216.

It has also been suggested by several writers that the age limit is to be removed altogether.<sup>28</sup> It would allow judges to have the discretion in assessing damages for loss of support and loss of future earnings in cases involving the dependant of a deceased or plaintiffs who have reached the age of fifty five (55) years old. Where there is sufficient evidence to show that the deceased or the plaintiffs were working at the time of accident, the award for loss of support or loss of future earning can be awarded irrespective of their age at the time of demise or injury. This proposition, however, would open up the possibility that while the dependants of a deceased or plaintiffs who were fifty-four (54) years old at the time of demise or injury have to be contend with a maximum multiplier of six (6) months,<sup>29</sup> the dependants of a deceased or plaintiffs who have reached the age of fifty five (55) may receive longer multiplier based on judge's discretion. Abolishing the maximum retirement age will cause injustice to the dependants of a deceased or plaintiffs who have to follow the statutory multiplier. As such, a total revamp of the statutory multiplier is required should the maximum retirement age is to be abolished. The proposal to remove the maximum retirement age must be treaded carefully as it will open the possibility of speculation and varying awards<sup>30</sup> in respect of dependants of a deceased or plaintiffs who was fifty five (55) year old at the time of demise or injury. It also will cause injustice to the dependants of a deceased or plaintiffs who were below the age of fifty five (55) years old if the statutory multiplier is maintained as it is.

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<sup>28</sup>See suggestions by Dass, K.S., *op. cit.*, (1997), Balan, P. "Loss of Future Earnings, Loss of Earning Capacity and the Civil Law (Amendment) Act, 1984", 17 (1990) *Journal of Malaysian Comparative Law*, 169 – 180, Bar Council Malaysia, "Civil Law (Amendment) Act 1984", (1984) 2 *Current Law Journal*, 209 – 216 and Etican Ramasamy, "Difficulties Suffered by Accident Victims", (2000) *INSAF*, 35-51.

<sup>29</sup> The assessment of multiplier for deceased or plaintiff who have reached fifty four (54) years old under sections 7(3)(d) and 28A(2) (d) of the CLA 1956 is fifty five (55) minus fifty four (54) and divided with two (2).

<sup>30</sup> Since the assessment of multiplier is not regulated by any provision and left at the discretion of the judges.

### **7.2.2 Revising the Maximum Age in the Assessment of Multiplier**

Should the pre-condition of below the age of fifty five (55) be revised, the maximum age of fifty five (55) years old in the multiplier provided by proviso (iv)(d) in section 7(3) and section 28A (2) (d)(ii) of the CLA 1956 for the assessment of damages for loss of support and loss of future earnings must also be similarly revised. The reason applicable in respect of revising the pre-condition in para 7.2.1 above is also applicable to this matter *mutatis mutandis*. If the maximum age in the pre-condition is revised, the maximum age in the assessment of multiplier should also be revised to correspond with the revised age in the pre-condition. For example, if the pre-condition age is revised to sixty (60) years old, the assessment of multiplier for the person or deceased who had passed the age of thirty years old must also be sixty (60) minus the age at the date of accident or demise and divide by two (2).

### **7.2.3 Revising the Fixed Multiplier**

From the discussions in Chapters Three (3) and Four (4), it has been observed that the statutory multiplier is flawed in many aspects. It fails to take into consideration the many factors which may affect the length of time in which the plaintiff should be compensated for their loss. It is also stagnant and not flexible to suit the facts of the case as well as the changes in the society. Further, the multiplier does not differentiate the classes of dependants claiming for the damages. This leads to injustice to the claimants. In addition, the provisions in proviso (iv)(d) in section 7(3) and section 28A (2) (d)(ii) of the CLA 1956 multiplier is also vague and does not properly reflect the real intention of the Legislature. As such, in order to address these defects, the followings proposals are suggested:

**(a) Amending proviso (iv) to section 7(3) of the CLA 1956 to better reflect the compulsory nature of the statutory multiplier**

It is suggested that the wording in proviso (iv) to section 7(3) of the CLA 1956 needs to be amended. The current provisions do not sufficiently convey the compulsory nature of the provision. Instead of specifically stating that the multiplier in para (d) is to be used for loss of support, proviso (iv) states that para (d) is to be used in assessing the multiplier for loss of earning. The use of the term ‘loss of earning’ in proviso (iv) seems to be deliberate since it is not used in other part of section 7. Therefore, it opens up the possibility the proviso being read as only making the multiplier compulsory only in respect of assessing the multiplier for deceased’s earnings and not for assessing the multiplier for loss support.

As such, it is suggested that the wording in proviso (iv)(d) to section 7(3) of the CLA 1956 should be amended from “in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section” to “in assessing the loss of support,”. The intention of the Legislature to confine the application of proviso (iv) to section 7(3) of the CLA 19546 will be conveyed clearly. It will also better reflect the compulsory nature of the statutory multiplier in the assessment of multiplier for loss of support.

**(b) Differentiating the multiplier for different types of dependants**

The findings in Chapter Four (4) show that section 7(3)(iv) of the CLA 1956 sometimes causes injustice to the different classes of dependants. Since the multiplier

did not differentiate the different classes of dependants,<sup>31</sup> there are times when the application of the multiplier results in under or over compensation to the dependants. For example, in situations involving claims by the parents of an unmarried deceased and claims by wife of young children where the deceases were of the same age, the multiplier for loss of support in both cases will be similar despite the possible difference in the length of dependency period<sup>32</sup> and the possibility that an unmarried child would cease providing for his parent or at least reduce his contribution after he marries.<sup>33</sup> As such, to accord similar multiplier to the parents and the wife or young children would under compensate the wife and children whose dependency would normally be about the same as deceased's working life. It would also be an over compensation to the parent.<sup>34</sup>

Similarly, in cases of elderly parents, it is only reasonable to accept that the parents will only be supported during their lifetime and not the deceased's working life. To allow sixteen (16) years of multiplier to elderly parents whose deceased child is below thirty (30) years old would be excessive considering the parents' age and possibility of them dying and no longer depending on the deceased for long. VT Singham J in *Marimuthu Velappan v Abdullah Ismail*<sup>35</sup> rightfully pointed out:

“It is regrettable however that one thing seemed to have not been considered or made clear by the amendment and which is not an issue or argued in the instant appeal, it is, the advanced age of the dependants/parents, like 75 years and above. Did the legislature intend that

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<sup>31</sup> The multiplier for damages for loss of support suffered by deceased's wife, child, grandchildren, parents' of married and unmarried deceased as well as grandparent is calculated in the same way.

<sup>32</sup> The length of dependency period for parent is generally not as long as the period for wife and young children.

<sup>33</sup> As observed by Peh Swee Chin SCJ in *Chan Chin Ming v Lim Yoke Eng* [1994] 3 MLJ 233 stated that “it is an undisputable fact that the duration of loss of support sustained by parent of unmarried child ordinarily and simply cannot be ever so long as the duration of the loss of support sustained by the widow and children.”

<sup>34</sup> Dass, S. Santhana, “*Chan Chin Min v. Ibrahim Ismail - the Unsettled Dispute as to Whether the Court Has the Authority to Reduce the Statutory Multiplier in Dependency Claim*”, (2006) 3 *Current Law Journal*, i-xliii, at xxiv – xxv.

<sup>35</sup> High Court Malaya, Ipoh [Civil Appeal No: 12-9-05]

the 16 years statutory multiplier should still be applied in those circumstances? The statutory multiplier does not seem to have taken into considerations or made allowance for this factor on parents' advanced age as the contribution may not continue for 16 years had the deceased been alive as this will depend on the health status of the aged parents who may be considered under the category of advanced age, eg, 75 years and above 'since good health' is also a relevant consideration in a claim for loss of future earnings by a claimant who was injured. The amendment in fact, with respect, has become a live issue and resulting in constant debates and has caused more uncertainties especially when the legislature had decided to take away the discretion given to the courts which no doubt would be exercised judicially.

This court is of the considered view that the damages to be awarded for dependency actions to parents of an unmarried deceased should have been left open to the discretion of the courts. The reason being, the amendment on the formula for the multiplier seemed not have taken into consideration two factors, the prospect of marriage had the deceased continued to live and the chances of the contribution being reduced or diminished and the advanced age of the parents who may not live to receive the contribution for 16 years."

Should the parents pass away, the damages for loss of support will go into estate and ultimately to deceased's siblings or other beneficiaries who are not 'dependant' as defined in section 7(3) of the CLA 1956. As such, not only that the elderly parent is overly compensated, the non-dependant would also receive a windfall out of the claim.

Therefore, it is the researcher's suggestion that the multiplier for loss of support must not only concern the expected working life of the deceased but also the anticipated length of the dependency relationship. The multiplier must stay true to the prefatory clause limiting the dependant's recovery to 'such as will compensate the party... for any loss of support suffered ...'. Thus by implication, the multiplier must also take into consideration the length of dependency relationship.<sup>36</sup> Dependants should not be allowed to receive more than what they would have expected to receive from the deceased had the deceased did not succumbed to his injuries. As such, it is suggested that an amendment section 7(3)(iv) of the CLA 1956 is necessary. The amendment however should take the following into consideration:

***(i) In relation to claims for loss of support by parents of unmarried deceased***

Irrespective whether it was the "general system of law"<sup>37</sup> or that "para (d) of section 7(2) is tailor made for only claims by spouse and children,"<sup>38</sup> which allow judges to differentiate the multiplier for loss of support by parent of unmarried deceased from other classes of dependants, the fact remains that the multiplier for loss support by parents of unmarried deceased is generally not as long as the multiplier for other classes of plaintiffs.<sup>39</sup> Although the nature of local society does not support the general presumption that a child's contribution to his parent would cease once he marries,<sup>40</sup> the researcher submits that the subsequent marriage of a child may to some extent have some effect on his contribution to his parents although not to the point of ceasing it altogether. As such, necessary adjustment should be made to the multiplicand and

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<sup>36</sup> Reiss, Seth M., "Quantum for Future Loss in Personal Injury and Fatal Accident Cases After the Civil Law (Amendment) Act 1984", (1985), 2 *Malayan Law Journal* lxii – lxxi, at lxix.

<sup>37</sup> Per PehSwee Chin SCJ in *Chan Chin Ming v Lim Yoke Eng*, *op. cit.*

<sup>38</sup> *Ibid.*

<sup>39</sup> Even prior to the 1984 amendment, it was generally accepted and practiced that the multiplier in these cases was only seven (7) to eight (8) years.

<sup>40</sup> See *Pang Ah Chee v Cheng Kwee Sang* [1985] 1 MLJ 153 where the multiplier for loss of dependency claimed by mother of a deceased unmarried son was reduced from 17 to 7 years.

multiplier to reflect the period in which the child may have gotten married and his contributions to his parents would somehow reduce in view of his additional financial obligations.

Because of this, it is suggested that instead of reducing the statutory multiplier, the existing multiplier should be divided into two (2) periods; before and after marriage. The amount of multiplicand also should be similarly differentiated to reflect the possible changes in the contributions. By applying this method, judges will still adhere to the statutory multiplier in section 7(3)(iv) of the CLA 1956, while at the same time cater for the possibility that deceased contributions to his parents may reduce after getting married.

Dividing the multiplier is not new to the judges in Malaysia. This method is being used to divide the multiplier for loss of future earnings to reflect pre-trial and post-trial period. However, unlike the division in pre-trial and post-trial earnings where there is a definitive division date (i.e. the date of judgment), the application of judicial discretion is crucial in order to divide the multiplier for loss of support since judge will have to determine the possible date in which deceased could have gotten married.

***(ii) In relation to claims for loss of support by elderly dependants***

In cases where the dependants are elderly persons, such as parents or grandparents, necessary consideration should be given to the period of dependency in view of their old age and the imminent demise of the dependants. Thus, ending the need for support from the deceased. This consideration was one of the key factors in the assessment of multiplier in pre-1984 cases. The pre-1984 cases showed that the courts allowed lesser multiplier for elderly dependants compared to young ones. To allow the same

multiplier for elderly dependant where the period of dependency is shorter than those of younger dependants leads to undue enrichment to the elderly dependants.

It is, therefore, suggested that necessary deduction should be made to the multiplier in order to limit the compensation to an amount which will cover only the period in which the elderly dependant is expected to live. The number of multiplier to be reduced should be left at the discretion of the judges after taking into account the dependant's age.

### **(c) Consider Applying Actuarial Approach to the Assessment of Multiplier**

The actuarial approach is widely applied in the United Kingdom, United States Australia and Canada to provide some kind of guidance for the judges in determining the economic loss in personal injury and fatal accident claims. The multipliers are assessed based on the expected present value of all future losses and expenses.<sup>41</sup> The Government Actuary's Department, United Kingdom, for example, had produced a table listing a set of multipliers in named "Actuarial Tables with Explanatory Notes for Use in Personal Injury and Fatal Accident Cases"<sup>42</sup> or also known as the "Ogden Table"<sup>43</sup> in 1984. The table is based on the assumption that a victims would invest his or her award in index-linked gilts, which are a risk-free vehicle producing an income in accordance with the fluctuations of the Retail Price Index.<sup>44</sup> Since 1998, the actuarial approach has been accepted evidence in assessing the multiplier for personal injury and

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<sup>41</sup>Chan, Wai Sum, *et. al.*, "Actuarial Approach To Assessing Personal Injury Compensation in Singapore : Theory and Practice", *China International Conference on Insurance and Risk Management 2011*, (Beijing, 5 July 2011).

<sup>42</sup>Currently in its 7<sup>th</sup> edition.

<sup>43</sup>Named after the first chairman the working party that developed the actuarial tables, Sir Michael Ogden.

<sup>44</sup>Haslifah Hashim and Massita Mohamad, "Factors in Estimating Compensation in Personal Injury and Wrongful Death using Actuarial Approach", *2011 International Conference on Financial Management and Economics*, 2-3 July 2011, ( Singapore : IACSIT Press, 2011), 334 -337.

fatal claims cases rather than viewing it as a mere check.<sup>45</sup> This approach is also currently being promoted in Singapore.

The demographic factors, mortality rates, differences in retirement age, work-life expectancy, investment returns, accelerated payment, education level, employment, disability and economic activity are several of the considerations that need to be factored in while developing the table. This proposed table can be improved and updated based on current or prevailing situations. When new data or statistics which may affect the multiplier is published, the table should be revised to suit or reflect the current variables. The application of revisable table such as Ogden Table allows for adjustment to suit current situations and prevent the assessment of damages from being archaic and draconian. Since the route to a statutory provision is a long and tedious process, the application of revisable table is the answer to the static nature of the fixed multiplier in sections 28A (2) and 7(3) of the CLA 1956. The revisable nature of the table is not new to the CLA 1956. Section 7(3B) of the CLA 1956 has adopted similar approach by allowing a revision to the amount awarded for bereavement at the discretion of the Yang Dipertuan Agong. Similarly, the Rules of Court 2012 also empowers the Chief Justice to revise the rate for post-judgment interest.

#### **7.2.4 Amending the Pre-Condition of Good Health**

Good health is one of the pre-conditions for the award for loss of support and loss of future earnings stated in sections 7(3)(iv) and 28A(2)(c) of the CLA 1956 respectively. The findings in Chapters Three (3) and Four (4) indicate that there are two (2) main problems in respect of this pre-condition. Firstly, the absence of definitive definition to

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<sup>45</sup>Chan, Wai Sum, *et. al.*

the term ‘good health’ and secondly, the split views in interpreting the requirement of proving that deceased or plaintiffs was in good health prior to demise or injury. In view of these problems, this research suggests:

**(a) Provide a definitive interpretation for the term good health.**

A definitive interpretation to the term ‘good health’ must be provided so as to avoid confusion and unnecessary speculation. It is proposed that good health is to be defined as a state of health in which a person is able to lead a normal life and engage in gainful employment. In the event that the person has some problems relating to his health, the person should still be considered as in good health to satisfy the requirement in sections 7(3)(iv) and 28A(2)(c) of the CLA 1956 as long as the problem does not interfere with his employment.

**(b) Allowing a reduction in multiplier on account of poor health**

The research also proposes that judges should be given the discretion to reduce the statutory multiplier for loss of support and loss of future earnings in situations where there are evidence indicating that while the deceased or plaintiff was able to work at the time of demise or injury, he however has some medical problems which may affect his earnings in the future. A reduction in the multiplier is necessary in order to cater for the possibility of him being unable to work in the future.

The recommendation above is not something new to the assessment of damages for personal injury and fatal accident claims arising in motor vehicle accidents in Malaysia.

The pre-1984 cases showed that while deceased or plaintiff's existing poor health might impaired his prospects of having a normal working life, it would only operates to reduce the quantum of damages for loss of support or loss of future earnings. Judges in the past used their discretion in assessing the gravity of deceased's or plaintiffs' medical problem and adjust the multiplier to a figure which they considered reasonable for a person with that particular medical issue. The dependants or plaintiffs were not precluded from obtaining compensation merely due to poor health unless the poor health bars them from earning altogether.

The consideration of poor health should only act as a ground to reduce the multiplier but not a total bar for the damages. This way, dependants of a deceased who was unhealthy prior to demise or plaintiffs who have some medical problems prior to his injury will not be totally precluded from being compensated. At the same time, they will not be receiving the full statutory multiplier in view of their medical conditions.

### **(c) Removing the requirement of proving good health**

The requirement of proving good health has been commonly criticized as imposing a heavy burden on the dependants of the deceased or plaintiffs since it requires the production of medical records or expert witness to prove deceased's or plaintiffs' good health. This is why judges sometimes refuse to adhere to this requirement. As long it can be proven that the deceased or the plaintiffs were working at the time demise or injury, judges will assume that they were in good health. This assumption is rebuttable by the defendants if they can prove to the contrary.

It is suggested that the pre-condition of proving good health should be removed. Instead, deceased's or plaintiffs' good health is to be presumed.<sup>46</sup> Therefore, sections 7(3)(iv) of the CLA 1956 and 28A(2)(c) of the CLA 1956 should be amended to convey that deceased's or plaintiffs' good health is to be presumed if the deceased or the plaintiffs were gainfully employed at prior to their demise or injury. Judges should only direct deceased's dependants or the plaintiff to prove good health if the presumption is challenged by the defendant.<sup>47</sup> However, it is submitted that the proposition that good health is to be presumed would necessitate not only an amendment to sections 7(3)(iv) and 28A(2)(c) of the CLA 1956, but also to section 114 of the Evidence Act 1956 as well. Section 114 of the Evidence Act 1956 should include the presumption of good health as part of the general presumption.<sup>48</sup>

#### **7.2.5 Amending the Pre-Condition of Earning Income at the Time of Accident or Demise**

The pre-condition in sections 7(3)(iv)(a) and 28A (2)(c)(i) of the CLA 1956 requiring that deceased or plaintiffs must be earning income at the time of demise or injury before damages for loss support and loss of future earnings can be awarded are often criticized. The criticism centres mainly on the fact that they restrict the discretionary power of judges to award damages for loss of support and loss of future earnings in situations where the deceased or plaintiffs were not earning at the time of the accident or demise. While it is understandable that the sections intend to prevent judges from speculating on the deceased's or plaintiffs' possible income, it is proposed that some amendments are to be made to the sections.

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<sup>46</sup> See also Rajasooria, J. Edwin, "Necessity of Proving Good Health", 9<sup>th</sup> July 2010, The Malaysian Bar 8<sup>th</sup> November 2010, <[http://www.malaysianbar.org.my/index2.php?option=com\\_content&do\\_pdf=1&id=30358](http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=30358)>

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid.*

The sections should be re-defined in order to allow dependants of a deceased or plaintiffs who had been earning before his (although not at the precise date of) demise or injury to claim for loss of support and loss of future earnings. The requirement that deceased or plaintiffs must be 'receiving earning 'prior/before his demise or injury' should not be narrowly interpreted as 'earning at the time of demise or injury' or 'on the day of demise or injury'. It should whenever suitable be loosely construed to encompass any previous income which is not too remote to the deceased or plaintiffs. The dependant to a deceased or plaintiffs who were on unpaid leave, on sabbatical leave, in between employment or about to start another employment in the near future should be allowed to claim for loss of support or loss of future earnings. Although deceased or plaintiffs were not receiving any earning at the time of demise or injury, they have the foreseeable possibility of earning income in the future. The calculation of multiplicand can be based on his previous income. Thus, it will not involve too much speculation or guesswork on the part of the judge.

The proposed interpretation had been used by the Kuala Lumpur High Court in *Low You Choy v Chan Mun Kit*.<sup>49</sup> The judge refused to interpret the term 'prior' in section 28A(2)(c)(i) of the CLA 1956 as 'at the time of injury' and allowed the claim for loss of future earnings even though the plaintiffs were in-between jobs at the time of injury.<sup>50</sup> Although the judge conceded being an odd-job labourer, the plaintiff's income depended on whether they were able to secure another job, he still chose to distinguish the case from *Dirkje Pietenella Halma v Mohd Nor bin Baharom & Ors*.<sup>51</sup> on the ground that the plaintiffs had been working before the injury. The fact that the plaintiffs were not working on the day of the injury does not constitute 'not receiving earnings'.

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<sup>49</sup> [1992] 3 CLJ 1550.

<sup>50</sup> Both plaintiff did not have permanent job and only work for eight to ten months a year depending on contract.

<sup>51</sup> [1990] 3 MLJ 103,

It is therefore proposed that this line of reasoning should be adopted in interpreting the pre-condition of receiving earning ‘prior/before’ the injury or demise.

#### **7.2.6 Amending the Provisions Relating to the Award for Bereavement**

The award for bereavement was introduced by section 7(3A) of the CLA 1956. Sub-sections 7(3B) to 7(3E) to the section deal with various matters relating to this head of damages. However, despite the precise wordings in the sub-sections, there are several areas in which some amendments are proposed in order to make the provisions clearer, precise and in line with the current situation.

##### ***(a) Revising the amount to be awarded for bereavement***

The amount awarded for bereavement under section 7(3A) of the CLA 1956 has remained static at RM 10,000 for the past twenty eight (28) years. Although the Yang di-Pertuan Agong has the discretionary power to vary the amount under sub-section 3D, this power has never been exercised. An example should be drawn from the CLA (cap 43) of Singapore where the amount to be awarded for bereavement was revised from SGD 10,000 to SGD 15,000 to better suit the current circumstances and value of money in the country. Therefore, it is submitted that the amount specified in section 7(3B) of the CLA 1956 should be similarly be reconsidered so as to commensurate with the current socio-economic condition in the country.

***(b) Revising the list of beneficiaries to the award***

Section 7(3B) of the CLA 1956 specifically lists the persons entitled to the award for bereavement. Only deceased's spouse and parent<sup>52</sup> are entitled to claim. In the event that deceased was not survived by his parent, his grandparent may claim for bereavement by virtue of sub-section 11 of section 7 of the CLA 1956. The limited number of people entitled to claim for bereavement causes injustice to several classes of people who are similarly aggrieved as deceased's spouse or parents. These people will not be able to claim for bereavement despite suffering from the same emotional loss, sadness and sorrow. It is, therefore, suggested that the provision in section 7(3B) of the CLA 1956 is to be amended to include deceased's children and siblings as part of persons entitled to claim for bereavement. It is only reasonable that deceased's children and siblings would be devastated when deceased passed away. Allowing damages to parent for the grief suffered due to the demise of their children while barring the children from receiving the same when their parent passed away is incomprehensible and defies logic.

If deceased's children and siblings are to be included in the list of beneficiaries to the award, the order of beneficiaries should also be amended to better suit the degree of grievance suffered. The provision in section 21(2) of the CLA (cap 43) of Singapore may serve as guide for the amendment.<sup>53</sup> In the proposed order of beneficiaries, it is suggested that the deceased's children's entitlement to bereavement should arise only in the absence of deceased's spouse. In the event the deceased not survived by spouse or children, his parent's will be able to claim for bereavement followed by his siblings.

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<sup>52</sup> Provided that the deceased is a minor and unmarried at the time of demise.

<sup>53</sup> The section lists the order of persons who are entitled to claim for bereavement as follows; deceased's spouse, followed by his children, parent and siblings.

At the same time, it is also proposed that section 7(3B)(b) of the CLA 1956 is to be amended to remove the portion which allow deceased's parent to claim for bereavement only if the deceased was a minor. It is incomprehensible why the section bars parent to a deceased who had attained the age of majority from claiming bereavement. The grief and sorrow suffered would still be the same irrespective of deceased's age. The parent's entitlement to bereavement should only be subject to deceased's marital status. Only in the event that deceased is survived by his spouse and children should the parent's entitlement to bereavement be barred.

***(c) Defining the term 'spouse'***

Section 7(3B)(a) of the CLA 1956 did not provide any definition to the term 'spouse'. Although it is generally understood to signify the husband or wife of the deceased, the absence of specific interpretation to the term invite attempts to insinuate that in cases of Muslim polygamous marriage, each of deceased wives is entitled to RM 10,000. The arguments in the cases highlighted in Chapter Four (4) on this matter are not without merits. Especially when sub-section 3C of the section made no mention that the amount that RM 10,000 is to be divided equally among deceased's wives.<sup>54</sup> As such, in order to avoid any further complication, it is suggested that the term spouse is to be specifically defined as referring to deceased's husband, wife or wives (in cases involving valid polygamous marriage). At the same time it is also suggested that sub-section 3C is to be amended to convey the meaning that in the event of valid polygamous marriage,<sup>55</sup> the amount specified under sub-section 3B is to be divided equally among the wives.

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<sup>54</sup> Note that section 7(3C) of the CLA 1956 specifies that in claims for bereavement by deceased parent, the damages is to be divided equally among the parent.

<sup>55</sup> The marriage must be a legally recognized and registered marriage under the prevailing law.

### **7.2.7 Amending the Provision on ‘Statutory Dependant’**

The findings in Chapter Four (4) lead to the conclusion that the provisions in sections 7(2) and 7(11) of the CLA 1956 had left out several classes of dependants in the list of ‘dependant’ entitled to claim damages for loss of support. Compared with these sections, the term ‘dependant’ in Singapore and Brunei respectively comprises of a wider range of dependants. The CLA (cap 43) of Singapore and the Fatal Accident and the Bruneian Personal Injuries Act’s definition of ‘dependant’ include deceased’s siblings and extended family. As such, these classes of people are allowed to claim for loss of support in Singapore and Brunei. By doing this, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act ensure that these people will be taken care of after deceased’s demise. This makes the assessment of damages for loss of support in these countries more oriented to the local conditions compared with their Malaysian counterpart. It is, therefore, suggested that the list of ‘dependant’ in section 7(2) of the CLA 1956 is to be widened to enable the CLA 1956 to provide for a wider range of people who may be very well depending on the deceased.

However, unlike the extensive definition of ‘dependant’ in the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act, it is suggested that only deceased’s siblings and former spouse should be included in the list of ‘dependant’ in section 7(2) of the CLA 1956. Siblings are a person’s close relatives. Their dependence on the deceased may come in two forms; either them being the dependant of the deceased or dependant of their parent who are depending on the deceased for the upkeep of the family. As such, by including sibling in the list of ‘dependant’ in section 7(2) of the CLA 1956, the sibling will be compensated for the loss of support suffered due to deceased demise.

It is also suggested that deceased's former spouse should also be included in the list of 'dependant'. Unlike the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act, the provision allowing former wife to receive damages for loss of support is absent in the Malaysian CLA 1956. Hence, a former wife in Malaysia will be deprived of support despite having obtained a maintenance order from by the court. However, instead of including only former wife in the list of dependant as in sections 20(8) of the CLA (cap 43) and 3(3) of the Fatal Accidents and Personal Injuries Act, the CLA 1956 should be amended to include both former wife and husband (former spouse). As such, the right to claim for loss of support can also be extended not only to deceased former wife but also to former husband if they were indeed receiving financial support from their former spouse. At the same time, a provision similar to section 22(3A) of the CLA (cap 43) restricting the former spouse's right to claim for loss of support only when a maintenance order had been obtained against the deceased prior to his demise should be also inserted into the CLA 1956.

The findings in Chapter Four (4) also shows that in several cases the absence of specific interpretation for the term wife and husband in section 7(2) of the CLA 1956 allows spouse who was not legally married under the prevailing law of the land to claim for loss of support. The courts in *Joremi bin Kimin & Anor v Tan Sai Hong*<sup>56</sup> and *Chong Sin Sen v Janaki a/p Chellamuthu (suing as the widow of Muniappa Pillai a/l Maritha Muthoo, deceased, on behalf of herself and the dependants of the deceased)*,<sup>57</sup> set aside the issue of validity of marriage and allowed deceased's' wives to claim for loss of support even though the wives were not legally married. It is humbly submitted that this interpretation of the term 'wife' is be contrary to notions of family law. Under family law or the law of succession, a wife's or a husband's right to

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<sup>56</sup> [2001] 1 AMR 675 (CA).

<sup>57</sup> *Op. cit.*

their spouse' assets or any other rights which come with marriage depends on the validity of their marriage. As such, it would be unacceptable if the judge is to take the stand that the validity of a marriage is immaterial for a claim under section 7(3) CLA 1956. It is understandable that the motivation behind these decisions was to achieve moral and social justice;<sup>58</sup> that a dependant should not be deprived of their entitlement merely on the basis of technicalities. The judges in these cases were trying to find ways in which a dependant may claim for loss of support without going beyond the letter of the law. However, such liberal interpretation of the term 'wife' would allow more people to claim for loss of support.

While the Federal Court's decision *Chai Siew Yin v Leong Wee Shing*<sup>59</sup> which established that customary marriage which was not registered under the Law Reform (Marriage and Divorce) Act 1976 as void may bring a closure to the dilemma brought about by the absence of specific interpretation of the term 'wife', a suitable amendment to the section is imperative in order to give more definite interpretation to the section. The term 'wife' and 'husband' in section 7(2) CLA 1956 should be defined as the legal wife or husband of the deceased according to the prevailing law at the time of death.

#### **7.2.8 To Specifically Exclude the Effect of Spouse's Remarriage in the Assessment of Damages for Loss of Support**

Unlike sections 3(3) of the Fatal Accident Act 1976, 22(3) of the CLA (cap 43) and 6(3) of the Fatal Accidents and Personal Injuries Act, section 7 of the CLA 1956 did not contain any provision on the effect of widow's remarriage or prospect of remarriage

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<sup>58</sup> Also see Muhammad Altaf Hussain Ahangar, *Damages Under Malaysian Tort Law: Cases and Commentary*, (Petaling Jaya: Sweet & Maxwell Asia, 2009) at 95.

<sup>59</sup> Civil Appeal No 02-10 of 2003 (W).

on the assessment of damages for loss of support. The absence of such provision in the CLA 1956, however, does not mean that the widow's remarriage or prospect of marriage is taken into consideration in assessing damages for loss of support in Malaysia. Although under the Common Law, remarriage or prospect of remarriage is one of the negative contingencies which may cause a reduction in damages being awarded for loss of support, the Malaysian judges have long disregard widow's remarriage or prospect of remarriage in the assessment of damages for loss of support.

Nevertheless, it is suggested that a specific provision excluding the consideration of spouse remarriage or prospect of remarriage from the assessment of damages for loss of support is to be included in the CLA 1956. Although such provision would tantamount to a codification, what have been generally practised by the local courts, the codification will ensure that this practice is strictly adhered to, so as to avoid future confusion or departure from the generally accepted practice. It is also suggested that instead of stating that the a widow's remarriage or prospect of remarriage must not be taken into consideration in the assessment of damages for loss of support, section 7 of the CLA 1956 should state that spouse's remarriage or prospect of remarriage should be excluded from the assessment of damages. It should be noted that sections 3(3) of the Fatal Accident Act 1976, 22(3) of the CLA (cap 43) and 6(3) of the Fatal Accidents and Personal Injuries Act make no mention of the effect of a widower's remarriage or prospect of remarriage on the assessment of damages. The omission to include widower's remarriage or prospect of remarriage may lead to some confusion as to whether his remarriage or prospect of remarriage has any effect on the quantum of damages. Therefore, in view of consistency and comprehensiveness of the CLA 1956, it is suggested that the new provision should read as follows:

Where there fall to be assessed damages payable to a spouse in respect of the death of his or her spouse, there shall not be taken into account the remarriage or prospect remarriage of the widow or widower.

Using the term ‘widow or widower’ instead of ‘widow’ as used in provisions in the Fatal Accident Act 1976, the CLA (cap 43) and the Fatal Accidents and Personal Injuries Act will ensure that a widower remarriage or his prospect of remarriage will similarly be excluded. As such, the weakness of section 6(3) of the Fatal Accidents and Personal Injuries Act by not providing for effect of widower remarriage or prospect of remarriage as noted by Sir Danny Roberts J in *Wong Fook Cheong v Hj. Abd. Khani b. Hj. Abd. Kadir*<sup>60</sup> will not be repeated in the CLA 1956.

#### **7.2.9 Amending the Provision in Section 28A Relating to Deduction for Living Expenses**

Based on the findings in Chapter Three (3) it is submitted that para (iii) to section 28A (2)(c) of the CLA 1956 should be amended to state that the expenses incurred by the plaintiffs to earn their income need to be deducted from the assessment of multiplicand for loss of future earnings. This amendment is necessary to better reflect the current practice of the judges. Although para (iii) to section 28A (2)(c) of the CLA 1956 requires that plaintiffs’ living expenses must be deducted from the assessment of damage, judges are reluctant to do so. They prefer to interpret the term ‘living expenses in the para as ‘expenses in earning income’ instead of the actual day to day expenses spent by the plaintiffs.

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<sup>60</sup> [1996] 1 LNS 570.

The courts reluctance to deduct actual day to day living expenses from the assessment of multiplier is understandable since such deduction is unfair to the plaintiffs. Unlike the deceased's contributions to his dependants under loss of support,<sup>61</sup> the amount spent for living expenses is part of plaintiff's earnings which will be lost to the plaintiffs. Plaintiffs would still be paying for their living expenses even when they are no longer able to work in the future. In fact, their living expenses would probably increase considering their injuries and incapacity. If living expenses are deducted from the multiplicand, plaintiffs will have to use the balance of their earnings to pay for their expenses, thus they would be losing double the amount for living expenses.<sup>62</sup> Such being the case, it is dumbfounding why the legislature saw it fit to equate the deduction living expenses in the award for loss of support with the award for loss of future earnings<sup>63</sup> when these two (2) heads of damages involve different set of losses.

Living expenses under loss of future earnings also need to be distinguished from living expenses for loss of future earnings in lost years. Since lost years are the years in plaintiff's life which in most probability be shortened due to the injuries suffered, it is only reasonable that his living expenses in the years in which he might already succumbed to his injuries be deducted.<sup>64</sup> The plaintiff is expected to be dead in the lost years, he would definitely not be spending this amount for 'living'. This is not so in respect of the award for loss of future earnings. Since the plaintiff will still be living the years following his injuries, he will still be incurring the same amount of living expenses. However, the approach of Malaysian courts on deduction for living expenses

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<sup>61</sup> *Amar Singh v Chin Kiew* (1960) 26 MLJ 77. Deceased living expenses are deducted in the award for loss of support since the amount is used by the deceased on himself. It is not part of the deceased contribution to the dependants. The dependants therefore are not entitled to that amount.

<sup>62</sup> Rutter, Michael F. , *op. cit.*, at 300 and Balan, P., *op. cit.*, (1992), at 230.

<sup>63</sup> Harun Hashim SCJ in *Chan Chong Foo & Anor. v Shivanathan*, *op. cit.*, at 480 held "It will be seen that the same language is used in both s 7(3)(iv)(c) and s 28A(2)(c)(iii). It follows that the legislature intended that the same principle be applied in both cases, that is to say, in respect of a dependency claim for loss of earnings arising out of a fatal accident and in respect of a claim for loss of future earnings for personal injury. We are accordingly of the view that the term 'living expenses' in s 7 and s 28A bear the same meaning."

<sup>64</sup> *Ibid.*

for loss of future earnings in lost years cannot be ascertained since there is no reported case which allows for the award for loss of earning for loss years for a living plaintiff.<sup>65</sup>

Therefore, it is proposed that para (iii) to section 28A (2)(c) of the CLA 1956 is to be amended to change the term ‘living expenses’ to ‘expenses in earning income’. This would be more in line with the interpretation generally adopted by the judges. It would also distinguish the assessment of multiplicand for loss of future earnings from loss of support. Plaintiff’s day to day expenses should not be deducted in loss of future earnings. It should be limited only to expense in earning income.

#### **7.2.10 To Include any Increase in Plaintiffs’ Earning at the Time of Trial in the Assessment of Multiplicand**

It is also proposed that in assessing the multiplicand for loss of future earnings, any increase in plaintiffs’ earning from the date of injury to the date of trial (date of judgement) is to be taken into consideration. Instead of excluding any increase in plaintiffs’ earnings from the date of injury, the assessment of multiplicand for loss of future earnings should exclude any increase in plaintiff’s earnings from the date of trial onwards.

Currently para (ii) to section 28A(2)(c) of the CLA 1956 specifies that only plaintiffs’ earning at the time of injury can be assessed as multiplicand for loss of future earnings. Any increase in the earnings after the date of injury should not be considered. As such, not only any prospects of plaintiffs’ earning after the date of trial is excluded, any increase in plaintiffs’ earnings between the date of injury and date of trial is also excluded from the assessment. The introduction of para (ii) to section 28A(2)(c) of the

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<sup>65</sup>Rutter, Michael F., *op. cit.*, at 249.

CLA 1956 by the CLAA 1984 was done in order to prevent high and oscillating awards caused by speculative and discretionary assessment by the courts. In order to do so, the Legislature imposes several regulations in the assessment of damages. Among them is the provision which requires judges to base their assessment on hard fact and actual monetary value of the loss. Hence the prohibition against taking into account future increases in plaintiff's earnings.

However, since any increase in plaintiff's income from the date of injury to the date of trial is something which is actual and not speculative, the Legislature could not have intended to ignore this tangible and obvious increase in the assessment of multiplicand.

Ian Chin J had rightfully concluded:

“The language of that section also makes it clear that when it talks of ‘prospect of earning as aforesaid being increased at sometime in the future’ which the court must not speculate. It does not say that the Court should ignore the reality of the situation where the appellant's basic salary, a constituent of part of the ‘earnings’, had been increased at the date of trial. The increase in that part of the ‘earnings’, actual, not prospective. Therefore, I am of the view that section 28A(2)(c)(ii) of the Act does not prevent the court from taking into account the actual increase in the basic salary which the respondent was earning at the date of trial in order to arrive at a just award since that section applies to a prospective or speculative situation and not the actual.”<sup>66</sup>

Besides being a total departure from the Common Law accepted principles relating to the assessment of multiplicand for loss of future earnings, the prohibition against taking

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<sup>66</sup> *Chang Ming Feng v Jackson Lim @ Jackson ak Bajut, op. cit.*

into consideration any increase in plaintiffs' earnings from the date of injury to the date of trial fly in the face of the principle of compensation. Should there is an increase in plaintiffs' earnings at the time trial compared to the time of injury, it is only reasonable that his loss of future earnings would be the loss of the amount he was earnings at the time of trial, not at the time of injury.<sup>67</sup> Therefore, if the assessment of damages it to be based only on plaintiffs' earnings at the time of injury, the compensation would be less than the amount which he would be receiving in the future even without taking into account any increase in his earnings from the date of trial.

By amending para (ii) to section 28A(2)(c) of the CLA 1956 to include any increase in income at the time of trial, plaintiffs' loss can be more accurately assessed. The consideration for the increase in plaintiffs' earning from the date of injury to the date of trial will not in any way open up the assessment of damages for loss of future earnings to speculation. This is due to the fact that increase in earning already occurred and it can be calculated based on the deceased's earnings at the date of trial. Therefore, it is submitted that para (ii) to section 28A(2)(c) of the CLA 1956 should be amended so as to allow increase in plaintiffs' earnings from the date of injury to the date of trial to be included in the assessment of multiplicand for damages for loss of future earnings in personal injury motor accident claims. Should there is no increase in plaintiffs' earning within this period, only his earning at the time of injury is to be assessed.

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<sup>67</sup> The law requires that 'plaintiff must give credit for what he will actually receive'. See *Billingham v Hughes* (1949) 1 KB 643. *Tiong Ing Chiong v Giovanni Vinetti* [1984] 2 MLJ 169; *Owners of MV 'Kohekohe' & Ors v Supardi bin Sipan (The 'Kohekohe')* [1985] 2 MLJ 422.

### 7.3 CONCLUDING REMARKS

Although it is commonly accepted that judicial discretion is “the life blood of the living law”<sup>68</sup> and disparity in the awards for damages is accepted<sup>69</sup> as part and parcel of the law on personal injury and fatal accident claims arising out of motor vehicle accidents, some degree of statutory regulation over the exercise of judicial is needed to ensure that the assessment of damages is fair, reasonable, consistent and certain. The provisions are not intended to fetter or restrict the use of judicial discretion. They serve as the outer parameters in which judicial discretion should operate. As such, judges can still use their discretion provided that it is within the confines of the statutory provisions.

Nevertheless, the provisions in the CLA 1956 are far from perfect. A number of weaknesses of the provisions in the CLA 1956 have been highlighted in this research. Any attempt to revamp the personal injury and fatal claims arising out of motor vehicle accident scheme<sup>70</sup> will be futile if the provisions in the CLA 1956 remain as it is. As such amendment to section 7, 8 and 28A of the CLA 1956 is necessary. With proper application, the combination of the exercise of judicial discretion and a properly amended provisions in the CLA 1956 would allow judges in Malaysia to ensure that the law keep abreast with the changing social and economic condition and ultimately to ensure that ‘justice’ as is understood by all is achieved and meted out from case to case.

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<sup>68</sup> Bar Council Malaysia, “Editorial: The Uncivil Act”, (1984), 17 No 3 Oct *Journal of the Malaysian Bar (INSAF)*, 3.

<sup>69</sup> Dass, K.S., *Quantum in Accident Claims*, (Kuala Lumpur: Malaysian Law Publishers, 1975), at 10.

<sup>70</sup> A Joint Working Committee was formed by the General Insurance Association of Malaysia (PIAM) in 2010 to develop methods to enhance the motor insurance scheme. The enhancement measures proposed includes the establishment of specific timelines to produce medical and police reports, promotion of court or independent mediation and legal aid service, setting up guidelines on compensation awards, revision of interest rates for court’s judgment, devising simpler and transparent claims notifications and settlement processes, and establishing a centralized call centre to assist road accident victims.

## BIBLIOGRAPHY

### Books

- Ahmad Ibrahim, *Towards a History of Law in Malaysia and Singapore*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1992).
- Anwarul Yaqin, *Legal Research and Writing*, (Petaling Jaya: LexisNexis, 2007).
- ASEAN Law Association, *ASEAN Legal System*, (Singapore: Butterworth Asia, 1995).
- Atkins, Burton and Mark Pogrebin, ed., *The Invisible Justice System: Discretion & the Law*, (Denver: Anderson Publishing, 1978).
- Barak, Aharon, *Judicial Discretion*, (London: Yale University Press, 1989).
- Badariah Sahamid, *Jurisprudens dan Teori Undang-Undang Dalam Konteks Malaysia*, (Petaling Jaya: Sweet & Maxwell Asia, 2005).
- Black, Ann E. and Bell, Gary F. ed., *Law and Legal Institution of Asia: Tradition, Adaptation and Innovations*, (Melbourne: Cambridge University Press, 2011).
- Cane, Peter, *Atiyah's Accidents, Compensation and the Law* (Butterworth : London, 1993).
- Chan, Gary Kok Yew and Lee Pey Woan, *The Law of Tort in Singapore*, (Singapore: Academy Publishing, 2011).
- Chan, Shick Chin, *Personal Injury Law Practice and Precedents*, (Kuala Lumpur: Malayan Law Journal, 2001).
- Chan, Wai Meng, *Third Party Rights in Insurance Law in Malaysia*, (Petaling Jaya: Sweet & Maxwell Asia, 2008).
- Chan, Helena HM, *The Legal System of Singapore*, (Singapore: Butterworth, 1995)
- Chatterjee, C., *Methods of Research in Law*, 2<sup>nd</sup> ed., (London: Old Bailey Press, 2000).
- Chin, Anthony and Alfred Choi, eds., *Law, Social Science and Public Policy: Towards a Unified Framework* (Singapore: Singapore University Press, 1998).

- Dass, K.S., *Quantum in Accident Cases*. (vol. 1- 3) (Kuala Lumpur: Malaysian Law Publishers, 1975 – 1984).
- Dass, K.S., *Quantum of Damages in Personal Injury, Parliament v Common Law, A critical Examination of the 1984 Amendment to the Civil Law Act 1956*, (Kuala Lumpur: Legal Circle Book Sdn. Bhd, 1997).
- Dass, K.S., *The Law on Interest*, (Batu Pahat: New Law Publishers, 1980).
- Dass, S. Santhana, *Personal Injury Claims*, (Petaling Jaya: Alpha Sigma, 2000).
- Dworkin, Ronald, *Taking Rights Seriously*, (Cambridge: Havard Law Press, 1977).
- Galligan, J.D., *Discretionary Powers*, (Oxford: Clarendon Press, 1992).
- Hamid Sultan Abu Backer, *Janab's Series to Law, Practice and Legal Remedies*, (Kuala Lumpur: Janab (M) Sdn. Bhd., 2005).
- Harun Mahmud Hashim, *Motor Vehicle Accident Claims – The Case of No-Fault Liability*, (Kuala Lumpur: Kuok Foundation, 1995).
- Hawkins, Keith, ed., *The Use of Discretion*, (Oxford: Clarendon Press, 1992).
- Hoffman, Thomas and Siebers, Lucia ,ed., *World Englishes – Problems, Properties and Prospect*, (Philadelphia: Benjamin Publishing Company, 2009)
- How, Kok Cheng, *Personal Injury : Citator*, (Kuala Lumpur: Malayan Lay Journal, 2001).
- Hughes. J, *et all.*, *The Law of Torts in New Zealand*, 2<sup>nd</sup> ed., (Wellington: Brookers Ltd, 1997).
- Ison, Terence G., *Accident Compensation A Commentary on the New Zealand Scheme*. (London: Croom Helm Ltd, 1980).
- Jai, Janak Raj, *Motor Accident Claims Law and Procedures*, (Delhi: Universal Law Publishing, 2000).
- Julian Chin et al, *Assessment of Damages: Personal Injuries and Fatal Accidents* (Singapore: LexisNexis, 2nd Ed: 2005).
- Kemp, David and Peter Mantle, *Damages for Personal Injury and Death*, 7<sup>th</sup> ed., (London: Sweet & Maxwell , 1999)
- Kemp; David, *The Quantum of Damages*, (London: Sweet & Maxwell, 2004).

- Legal Research Board, comp., *Civil Law Act 1956 (Act 67) [With Notes on Cases] Practitioner's Referencer*, (Petaling Jaya: International Law Book Services, 2001).
- Lim, Audrey, *et. all, Assessment of Damages: Personal Injuries and Fatal Accidents*, (Singapore: Butterworth, 2001)
- Lim, Heng Seng, *Assessment of Damages in Personal Injury and Fatal Accident Claims: Principles and Practices*, (Kuala Lumpur: Marsden Law Book, 1995).
- Luntz, Harold, *Assessment of Damages for Personal Injury and Death*, 3<sup>rd</sup> ed., (Melbourne: Butterworth, 1990).
- Lunney, Mark and Ken Oliphan, *Tort Law Text and Materials*, 4<sup>th</sup> ed. (New York: Oxford University Press, 2010).
- Mahdi Zahraa, *Research Methods for Law Postgraduate Overseas Students*, (Kuala Lumpur: Univision Press, 1998).
- Massey, I.P., *Administrative Law*, 3<sup>rd</sup> Ed., (Lucknow : Eastern Book Company, 1990).
- McGregor, Harvey, *McGregor on Damages*, (London: Sweet & Maxwell, 2003).
- Muhammad Altaf Hussain Ahangar, *Damages Under Malaysian Tort Law: Cases and Commentary*, (Petaling Jaya: Sweet & Maxwell Asia, 2009).
- Nathan, R.K., *Practical Approach To Assessment of Liability and Damages in Tort*, (Singapore : Malayan Law Journal Pte. Ltd., 1986)
- Nathan, R.K., *Quantum of Damages*, (Kuala Lumpur: Malayan Law Journal 1991).
- Nasser Hamid and Hamid Ibrahim, eds., *Road Accident Citator*, (Petaling Jaya: Gavel Publications, 2007).
- Nasser Hamid, *Personal Injury & Fatal Accident Claims: Civil Law Act 1956*, (Petaling Jaya: Gavel Publications, 2008)
- Netto, Joseph Brian Ruben, *No Fault Liability : What the Public Needs to Know*, (Kuala Lumpur: Marsden Law Book, 2007).
- New Zealand, Accident Compensation Corporation, *Unintentional Injury New Zealand's Accident Compensation Scheme*, (Wellington: Accident Compensation Corporation, 1987)

- Nik Ramlah Mahmood, *Insurance Law in Malaysia*, (Kuala Lumpur: Butterworths, 1992).
- Ogus, A. I., *The Law of Damages*, (London, Butterworth, 1973).
- Phang, Andrew Boon Leong, *The Development of Singapore Law*, (Singapore : Butterworth, 1990).
- Poh, Chu Chai, *Law of Insurance*, 2<sup>nd</sup> ed., Singapore: Longman, 1990).
- Rao, C. Kameshwara, *Law of Damages and Compensation*, 5<sup>th</sup> ed., 3 vols., (Allahabad: Law Publishers (INDIA), 1999).
- Rutter, Michael F., *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia*, 2<sup>nd</sup> ed. (Hong Kong: Butterworth Asia, 1993).
- Rutter, Michael F, *Applicable Law in Singapore and Malaysia*, (Singapore: Butterworth, 1989).
- Salleh Buang, *Statutory Interpretation*, (Ampang: Central Law Book Corporation Sdn. Bhd., 1996).
- Sidhu, Mahinder Singh, *Penanggung dan Pengambil Insurans Motor dan Hak Pihak Ketiga*, (Kuala Lumpur: Dewan Bahasa dan Pustaka, 1997).
- Sidhu, Mahinder Singh, *Casebook on Motor Insurance Law in Malaysia and Singapore*, (Kuala Lumpur: International Law Book Services, 1995).
- Sidhu, Mahinder Singh, *The Motor Insurer, Insured and Third Party Rights*, (Kuala Lumpur: International Law Book Services, 1993).
- Simon, Andrew Christopher, ed., 2 vols. *Personal Injury Quantum, Cases and Materials (vol 2)*, (Petaling Jaya: LexisNexis Malaysia, 2008).
- Syed Ahmad Alsagof, *The Law of Tort in Malaysia and the Syari'ah*, (Gombak, Syed Ahmad S A Alsagof, 2004).
- Tan, Kevin Yew Lee, ed., *The Singapore Legal System*, 2<sup>nd</sup> ed., (Singapore: Singapore University Press, 1999)
- Todd, Stephen, et al., eds., *The Law of Torts in New Zealand*, 2<sup>nd</sup> ed., (Wellington: Brooker's Ltd, 1997).
- Walker, R.J., *The English Legal System*. 6<sup>th</sup> ed., (London: Butterworths, 1985).

Verupillai, Jeyaratnam, *Damages: Loss of Expectation of Life Survival and Deductibility*, (Singapore: Malayan Law Journal, 1984).

Woon, Walter, ed., *The Singapore Legal System*, (Singapore: Longman, 1988).

Wu, Min Aun, *The Malaysian Legal System* (3<sup>rd</sup> ed.), (Petaling Jaya: Pearson, 2005).

*Mallal's Digest of Malaysia and Singapore Case Law 1808-1988*, 4<sup>th</sup> ed., vol. 2, (Kuala Lumpur: Malayan Law Journal, 1994)

## Articles

Abdul Aziz Bari, "Kuasa-Kuasa Budi Bicara, Teori dan Pemakaiannya dalam Undang-Undang Perlembagaan dan Undan-Undang Pentadbiran", (2004) 8 *Jurnal Undang-Undang dan Masyarakat*, 39-57.

Baduyah Obeng, "Insurans Motor Pihak Ketiga Yang Diwajibkan di Malaysia", (1998) 1 *Current Law Journal*, supp i-xxii.

Baduyah Obeng, "Hak Pihak Ketiga Untuk Membuat Tuntutan Dan Menguatkuasakan Penghakiman Yang Diawardkan KEPADANYA Terhadap Syarikat Insuran Motor (Insurer)", (1998) 1 *Current Law Journal* supp xxiii – xl.

Balan, P., "Damages for Personal Injuries Causing Death: A Critical Survey", (2004) *Journal of Malaysian and Comparative Law*, 45 – 67.

Balan, P. "Loss of Future Earnings, Loss of Earning Capacity and the Civil Law (Amendment) Act, 1984", 17 (1990) *Journal of Malaysian Comparative Law*, 169 – 180.

Balan, P. "Damages for Personal Injury and the Civil Law (Amendment) Act, 1984", (1989) *Journal of Malaysian Comparative Law*, 181 – 191.

Balan, P., "Deduction of Living Expenses From Damages for Loss of Future Earnings", (1992) 4 *Journal of Malaysian Comparative Law*, 229 – 235.

Bar Council Malaysia, "Civil Law (Amendment) Act 1984", (1984) 2 *Current Law Journal*, 209 – 216.

Bar Council Malaysia, "Editorial : The Uncivil Act", (1984), 17 No 3 Oct *Journal of the Malaysian Bar (INSAF)*, 3.

- Choy, PN, Dadang Mohamad Ma'soem, Hejar Abd Rahman, *et.all.* (2007), "Research on the Development of Malaysian Road Traffic Injury Surveillance System", (2007) 6 *Eastern Asia Society for Transportation Studies*.
- Chelliah, Kandiah, "The Need for an Accident Claims Court/Tribunal for Fatal/Personal Injury Claims", (1995) 3 *Current Law Journal* lxix.
- Chelliah, Kandiah, "No Fault Liability For Motor Vehicle Accident Claims: Tan Sri Harun Hashim's Proposal And Other Factors That Need Consideration", (1996) 4 *Current Law Journal*.
- Chelliah, Kandiah, "Section 7(3)(iv)(d) of the Civil Law Act 1956 and Fatal Accident Claims : Does the Multiplier Differ From a Claimant Who is a Parent (s) and One Who is a Spouse with Children?", (1995) 1 *Current Law Journal*.
- Chelliah, Kandiah, "Should the Award for Damages be Controlled in Order to Prevent the Increase in Insurance Premium?", (1998) 2 *Journal of the Malaysian Bar (INSAF)*, 30-43.
- Chew, Leslie *et al.*, "A Comparative Analysis of Various Aspects in the Law of Personal Injuries in Brunei, Malaysia and Singapore", (2008) 3 *Malayan Law Journal*, i-xliii.
- Cumaraswamy, Param, "The Bar Council Memorandum on the Civil Law (Amendment) Act 1984", (1984) 17 No 3 Oct *Journal of the Malaysian Bar (INSAF)*, 4 -9.
- Dass, K. S., "Interest on Damages", (1980) 1 *Malayan Law Journal*, lxxxv – lxxxvii.
- Dass, S. Santhana, "*Chan Chin Min v. Ibrahim Ismail - the Unsettled Dispute as to Whether the Court Has the Authority to Reduce the Statutory Multiplier in Dependency Claim*", (2006) 3 *Current Law Journal*, i-xliii.
- Davidson, W.S.W, "Claims For Interest On Delayed Contract Payments By Way of General or Special Damages - An Opinion", (1993) 1 *Current Law Journal*, xxxvii
- Editor, "No Fault on Our Roads", (1975) 9(3) *Journal of Malaysian Bar (INSAF)*, 1-3.
- Etican Ramasamy, "Difficulties Suffered by Accident Victims", (2000), *Journal of Malaysian Bar INSAF*, 35-51.
- Fardeen Bhaig Sadar Bhaig and Ashgar Ali Ali Mohammed, "Civil Claim Involving Motor Vehicle Accident: Whether Court of Appeal the Apex Court", (2009) 1 *Malayan Law Journal*, xxii-xxxviii.
- Field, Andrew, "Personal Injury Compensation since the 'Crisis in Insurance'", (2008) 13 *Deakin Law Review* 67-98.
- Franklin, Marc A., "Accidents, Money and the Law: A study of the Economics of Personal Injury Litigation", (1961) 61 *Columbia Law Review*, 1-39.

- Fordham, Margaret, "Providing For Contingencies – the Award of Provisional Damages in Singapore", [Nov 2011] *Singapore Journal of Legal Studies*, 250 - 259.
- Gopal, Mohan, 'English Law in Singapore: The Reception That Never Was' [1983] 1 *Malayan Law Journal*, civ – cxx.
- Greenawalt, Kent, "Discretion and Judicial Decision: The Elusive Quest for the Fetters that Bind Judges", (1975) 75 *Columbia Law Review*, 359-399.
- Hoffmaster, Barry, "Understanding Judicial Discretion", (1982) 1 *Law and Philosophy* 21- 55.
- Khoo, Guan Huat, "Assessment of Damages in Fatal Accident Claims and a Commentary of the Civil Law (Amendment) Act 1984", (1993)1 *Malayan Law Journal* cxxix – cxxxviii.
- Krishnan, R. and Radin Sohadi, Radin Umar, (1997), "An Update on Road Traffic Injuries in Malaysia", (1997) 2 **JUMMEC** 39 – 41.
- Lee, Yew Choh, "Recent Legal Development in Brunei Darussalam", *Singapore Journal of Legal Studies* [1993] 668-677.
- Loh, Siew Cheang, "Order 42 Rule 12 of the Rule of High Courts 1980, and All That", (1987) 2 *Malayan Law Journal* ccx-ccxxxiv.
- Muhammad Altaf Hussain Ahangar, "Dependability of Dependency Claims: the Malaysian Perspective", (2004) 1 *Malayan Law Journal* xxii – xxxi.
- Muhammad Altaf Hussain Ahangar, "Damages for Loss of Earning in Malaysia: the Need for a Just Multiplier", (2003) *Malayan Law Journal*, lxxxi – xcvi.
- Pawancheek Marican, "The Arbitrator's Power to Award Interest", (1997) 1 *Malayan Law Journal* lxix – lxxiv.
- Phang, Andrew Boon Leong, 'English Law in Singapore : Precedent, Construction and Reality or 'The Reception That Had To Be' [1986] 2 *Malayan Law Journal* civ - cxx
- Putri Naemi Jahn Kassim, "No Fault Compensation for Medical Injuries : The New Zealand Experience", (2003) 11 *International Islamic University Malaysia Law Journal*, 83-96.
- Ravi Nekoo, "The Extent Of The Application Of The Maxim 'Ex Turpi Causa Non Oritur Actio' In Considering Illegal Earnings In Tort Actions", (1999) 2 *Malayan Law Journal*, xl – xlviii.
- Reiss, Seth M., "Quantum for Future Loss in Personal Injury and Fatal Accident Cases After the Civil Law (Amendment) Act 1984", (1985), 2 *Malayan Law Journal* lxii – lxxi.

- S. Radhakrishnan, "Quantum of Damages in Personal Injury Claims" (1995) 3 *Malayan Law Journal* xxix – xl.
- S. Radhakrishnan, "Is the Deep Pocket Syndrome is Spreading Out to Asia?" Trends in Liability Insurance", (1997) XXVI No 3, *Journal of Malaysian Bar (INSAF)* 62-72.
- Sidhu, Balwant Singh, "Married or Not Married? – That is The Question", (2002) 3 *Malayan Law Journal*, cxxix – cxlii.
- Smith, R., "The World Best System of Compensating Injury?", (1982) 284 *British Medical Journal* 1243.
- Sossin, Lorne, "Discretion and the Culture of Justice", (2006) *Singapore Journal of Legal Studies*, 356-384.
- Sugarman, Stephen D., "A Century of Change in Personal Injury Law", (2000) 88 *California Law Review* 2406 – 2436.
- Syed Ahmad Aidid, "Achieving Consistency in Sentencing", (1995) 3 *Current Law Journal*, xlv – xlviii.
- Syed Ahmad Aidid, "Interest", (1993) 1 *Malayan Law Journal*, 1 - lvi
- T.S.T., "Interest in Damages in Running-Down Cases" (1966) 1 *Malayan Law Journal* xxxi- xxxiii.
- Tan, How Teck, "The Gourley Principle and The Income Tax Element in Awards of Damages: Some Tax Aspects in Singapore", (2007) 17 issue 1 *Revenue Law Journal*, 1- 9.
- Verupillai, Jeyaratnam, "Loss of expectation of Life and the Living Plaintiff", (1982) 1 *Malayan Law Journal*, lxix – lxx.
- Williams, D.G.T., "Administrative Discretion and Education", (1977) 36 *The Cambridge Law Journal*, 1-4.
- Woon, Walter, ed., *The Singapore Legal System*, (Singapore: Longman, 1989)
- Yeo, Yang Poh, "A Matter of Interest", (1986) 2 *Malayan Law Journal* clxxiii – clxxxix.

### **Conference Paper**

- Cumaraswamy, Param, "No-Fault Liability in Motor Accident Cases", 4<sup>th</sup> *Malaysian Law Conference*, (Kuala Lumpur, 19 – 21 October 1977).

- Dass, S. Santhana, "Is There a Need for Review after a Decade of the Civil Law (Amendment) Act 1984 on Damages?", *11<sup>th</sup> Malaysian Law Conference*, (Kuala Lumpur, 8-10 November 2001).
- Foo, Christopher, "The Civil Law Act 1984 and its Effect", *Towards Consumer Oriented Insurance Industry*, (Petaling Jaya, 14 October 1985).
- Muhammad Altaf Hussain Ahangar, "Judicial Responses to Damages Law in Malaysia: An Analysis", *5<sup>th</sup> Asian Law Institute Conference*, (Singapore, 22-23 May 2008).
- Norila Abu Hassan, "No Fault Liability Scheme: A Malaysian Perspective to Avoid Delays in Claims for Damages in Road Traffic Accidents", *3<sup>rd</sup> ASIAN Law Institute (ASLI) Conference*, (Shanghai, China, 25-26 May 2006).
- Rajeshwaran, R., "Civil Law Amendment Act and Its Implication", *Seminar on Insurance in Malaysia – For Journalist*, (Kuala Lumpur: 2, 9, 16, 23, and 30 March 1985).
- Sidhu, GTS., "Commentary on No-Fault Liability in Motor Accident Cases", *4<sup>th</sup> Malaysian Law Conference*, (Kuala Lumpur, 19 – 21 October 1977).
- S. Radhakrishnan, "Quantum of Damages in Personal Injury Case", *Joint Malaysia / Singapore Legal Seminar* (Kuala Lumpur : 8<sup>th</sup> April 1995).
- Zaleha Zahari, "Commentary on No-Fault Liability in Motor Accident Cases", *4<sup>th</sup> Malaysian Law Conference*, (Kuala Lumpur, 19-21 October 1977).
- Haslifah Hashim and Massita Mohamad, "Factors in Estimating Compensation in Personal Injury and Wrongful Death using Actuarial Approach", *2011 International Conference on Financial Management and Economics*, 2-3 July 2011, ( Singapore : IACSIT Press, 2011), 334 -337.

### **Thesis and Dissertation**

- Baduyah Obeng, *Insurans Motor: Perlindungan Kepada Pengambil Insurans dan Pihak Ketiga*, LLM Dissertation, Faculty of Law, UM, 1994/1995.
- Chan Wai Meng, *Rights of Third Parties in Insurance Law in Malaysia*, PhD thesis, Faculty of Law, UM, 2007.

### **Newspaper Publication**

- Pundit, "Loss of Future Earning Payout Raise for Student Hit by Taxi", *The New Straits Times*, 21<sup>st</sup> January 2012.

## **Parliamentary Debates**

Parliamentary Debates, Representative, Sixth Parliament, Second Session, 18 July 1984,

Parliamentary Debates, Senate, Sixth Parliament, Second Session, 3<sup>rd</sup> August 1984.

## **Internet Sources**

Queensland Law Reform Commission, “A report of the Law Reform Commission in Relation to an Examination of the Law Relating to Interest on Damages”, *Queensland Law Reform Commission Report*, September 1971, 6<sup>th</sup> May 2010 < [http://www.qlrc.qld.gov.au/reports/r10.pdf](http://www qlrc.qld.gov.au/reports/r10.pdf) >.

“Parliamentary debate YB Lim Guan Eng (Kota Melaka) for passing of Insurance Act 1996”, 20<sup>th</sup> February 2009 <<http://www.parlimen.gov.my/hindex/pdf/DR10.7.1996.pdf>>

Bank Negara Malaysia, *Bank Negara Malaysia Insurance Annual Report 2004*. 10<sup>th</sup> October 2008, <<http://www.bnm.gov.my/files/publication/dgi/en/2004/pdf>>

The Star, “Ten-year-old Girl Awarded Highest Accident Claim in the Country”, *The Star Online*, 4<sup>th</sup> May 2009 <<http://thestar.com.my/news/story>>

“Court dispute Resolution”, 5<sup>th</sup> July 2009  
<<http://app.subcourts.gov.sg/subcourts/page.aspx>>

Ambiga Sreenevasan, “Press Statement: No Fault Liability Scheme”, Bar Council Malaysia, 28<sup>th</sup> July 2009 <[http://www.malaysianbar.org.my/press\\_statement](http://www.malaysianbar.org.my/press_statement)>

“Data Kemalangan Jalan Raya 1995 – 2007”, Malaysian Institute for Road Safety, 16<sup>th</sup> October 2008 <<http://www.panducermat.org.my/statistik-Data-Kemalangan-Jalan-Raya-1995-2007.html>>.

“General Road Accident Statistics and Fatality Index in Malaysia”, Malaysian Institute for Road Safety, 6<sup>th</sup> October 2008 <<http://www.miros.gov.my/statistic.htm>>.

“Guidelines For Awards In Personal Injury Claim”, Kuala Lumpur Bar, 7<sup>th</sup> May 2009  
<<http://www.klbar.org.my/dir/CC/200848104832.pdf>>.

“Private vehicle policy”, Kurnia Insurance (M) Berhad, 21<sup>st</sup> January 2009  
<<https://www.kurnia.com/malaysia/transactions/motorproduct.do>>.

“Motor Insurance Policy Description”, Malaysian Assurance Alliance, 24<sup>th</sup> January 2009 <<https://www.maa.com.my/MAAAS/pages/ProductInfo.aspx?ProdID=40>>.

“Circular no 242/2007: Memorandum on the No-Fault Liability Scheme”, Bar Council Malaysia, 6<sup>th</sup> June 2009  
<[http://www.malaysianbar.org.my/index.php?option=com\\_docman](http://www.malaysianbar.org.my/index.php?option=com_docman)>.

‘Attorney General Wants to Introduce a No-Fault Liability Scheme for Motor Vehicle Accident’, 6<sup>th</sup> June 2009 from  
[http://www.malaysianbar.org.my/index.php?option=com\\_docman](http://www.malaysianbar.org.my/index.php?option=com_docman)./>.

“Circular no. KLBC 15-08: Courtesy Call on the Chief Judge of Malaya on 02.04.2008”, Kuala Lumpur Bar, 6<sup>th</sup> June 2009 <<http://www.klbar.org.my/dir/CC/200922491643.pdf>>.

Bernama, “General Insurance Companies to Face Challenging Year”, *Banking & Finance Special Page*, 12 January 2009, BERNAMA, 24<sup>th</sup> May 2009,  
<<http://finance.bernama.com/news.php?id=38315>>.

“General Insurance Industry Faces Challenging Times”, Persatuan Insuran Am Malaysia, 17<sup>th</sup> January 2009  
<<http://www.piam.org.my/news/piamnews/p029.htm>>.

PIAM, “Impact of Price Increases on the General Insurance Industry”, *PIAM Annual Report*, Persatuan Insurans Am Malaysia, 2<sup>nd</sup> June 2010  
<<http://www.piam.org.my/annual/2008/002.htm>>.

Yeo, Yang Poh, “Interview with the Chief Justice, YAA Tun Dato’ Seri Zaki bin Tun Azmi, on 19/11/2009”, Bar News, 23<sup>rd</sup> November 2009, The Malaysian Bar, 18<sup>th</sup> March 2010,  
[http://www.malaysianbar.org.my/bar\\_news/berita\\_badan\\_peguam/interview\\_with\\_the\\_chief\\_justice\\_yaa\\_tun\\_dato\\_seri\\_zaki\\_bin\\_tun\\_azmi\\_on\\_19/11/2009.html](http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/interview_with_the_chief_justice_yaa_tun_dato_seri_zaki_bin_tun_azmi_on_19/11/2009.html)>.

Malaysianinsurance, “The National Third-Party Bodily Injury Liability Scheme.... jumping the gun or what?”, ed., Malaysia Insurance Online, 6<sup>th</sup> March 2010, Malaysian Insurance Entrepreneurs, 30<sup>th</sup> March 2010<  
<http://www.malaysiainsurance.info/?p=3063> >.

“Development of new Third Party Bodily Injury and Death Scheme”, The Star Online, 23<sup>th</sup> March 2010, The Star, 30<sup>th</sup> March 2010,

<<http://biz.thestar.com.my/news/story.asp?file=/2010/3/23/business/5911932&sec=business>>.

“Proposed Third Party Insurance Scheme Still at Early Stage”, Banking & Finance Special Page, 5 March 2010, BERNAMA, 30 March 2010,  
<<http://www.bernama.com/finance/news.php?id=480061>>.

“Bar Council Submit Memo Opposing Insurance Scheme”, The Star Online, 24 March 2010, The Star, 30<sup>th</sup> March 2010,  
<<<http://thestar.com.my/news/story.asp?file=/2010/3/24/nation/5923066&sec=nation>>

Rajasooria, J. Edwin, “Necessity of Proving Good Health”, 9<sup>th</sup> July 2010, The Malaysian Bar 8<sup>th</sup> November 2010,  
<[http://www.malaysianbar.org.my/index2.php?option=com\\_content&do\\_pdf=1&id=30358](http://www.malaysianbar.org.my/index2.php?option=com_content&do_pdf=1&id=30358)>.

Bank Negara Malaysia, “Proposed Basic Cover Framework Discussion Paper”, 23<sup>rd</sup> April 2010, Bank Negara Malaysia, 1<sup>st</sup> June 2010  
<<http://www.bnm.gov.my/index.php?ch=216&pg=701&ac=54>>.

Bank Negara, Conventional Interbank Rate, Bank Negara Malaysia, 26<sup>th</sup> July 2010,  
<<http://www.bnm.gov.my/index.php?ch=12&pg=622>>.

Accident Compensation Cooperation, “Introduction to ACC”, 20 December 2008, Accident Compensation Cooperation, 4<sup>th</sup> August 2010,  
< <http://www.acc.co.nz/about-acc/overview-of-acc/introduction-to-acc/index.htm>  
>

Accident Compensation Cooperation, “Making A Claim – What Support Can I Get – Loss of Potential Earnings”, 13<sup>th</sup> October 2009, Accident Compensation Cooperation, 20<sup>th</sup> August 2010,  
< <http://www.acc.co.nz/making-a-claim/what-support-can-i-get/ECI0028>>

Accident Compensation Cooperation, “Making A Claim – What Support Can I Get – Loss Potential Earnings”, 25<sup>th</sup> June 2010, Accident Compensation Cooperation, 20<sup>th</sup> August 2010,  
<<http://www.acc.co.nz/making-a-claim/what-support-can-i-get/ECI0029>>

Accident Compensation Cooperation, “Making A Claim – What Support Can I Get – Weekly Compensation Accidental Death”, 9<sup>th</sup> March 2010, Accident Compensation Cooperation, 20<sup>th</sup> August 2010,  
<<http://www.acc.co.nz/making-a-claim/what-support-can-i-get/ECI0041>>

Accident Compensation Cooperation, “Making A Claim – What Support Can I Get – Independent Allowance”, 25<sup>th</sup> June 2010, Accident Compensation Cooperation, 20<sup>th</sup> August 2010,  
<<http://www.acc.co.nz/making-a-claim/what-support-can-i-get/ECI0035>>

Accident Compensation Cooperation, “Making A Claim – What Support Can I Get – Lump Sum Payment”, 20<sup>th</sup> June 2008, Accident Compensation Cooperation, 20<sup>th</sup> August 2010,  
< <http://www.acc.co.nz/making-a-claim/what-support-can-i-get/ECI00354>>

Shanmugam, M., “Insurance: Next Merger Push”, Business Service Industry, *The CBS Interactive Business Network*, 1<sup>st</sup> November 2000, 27<sup>th</sup> August 2010,  
<[http://findarticles.com/p/articles/mi\\_qn6207/is\\_20001101/ai\\_n24903686/?tag=content:coll](http://findarticles.com/p/articles/mi_qn6207/is_20001101/ai_n24903686/?tag=content:coll)>

Consumer Association of Penang, “Bank Negara’s Basic Motor Cover Framework: What’s Wrong And What’s The Alternative”, 14<sup>th</sup> May 2010, 30 September 2010, <<http://www.consumer.org.my/focus/no-fault-insurance/427-bank-negaras-basic-motor-cover-framework-whats-wrong-and-whats-the-alternative->.>

“You and the Law : Road Accidents”, The Law Society of Singapore, 18 April 2011  
<[http://www.lawsociety.org.sg/public/you\\_and\\_the\\_law/default.aspx](http://www.lawsociety.org.sg/public/you_and_the_law/default.aspx)>

Hwang, Michael and Fong Lee Cheng, “Loss of Inheritance or Savings : A Proposal For Law Reform”, April 2008, 1-67, Law Reform Committee Singapore Academy of Law, 18<sup>th</sup> May 2011,  
<<http://www.sal.org.sg/digitallibrary/Lists/Law%20Reform%20Reports/Attachments/27/Loss%20of%20inheritance%20-%20proposal%20for%20reform%20-%20final.pdf> >

“Muslim Widow to Share Equally Bereavement Payment”, *The New Straits Times*, 17<sup>th</sup> April 2007, : 18, *NST News Archive*, New Straits Times, 28<sup>th</sup> October 2011,  
<[http://www.nib.com.my./cross-search/search/\\_1319771486/](http://www.nib.com.my./cross-search/search/_1319771486/)>

Cheong, Diana PP, “Administrative Accountability and the Law in Brunei Darussalam” *TINJAUAN, Policy and Management Review No 1, 2002*, The Centre for Strategic and Policy Studies, 7 Dec 2011,  
<[http://www.csps.org.bn/senior\\_researcher.html](http://www.csps.org.bn/senior_researcher.html)>

Pinvader, “LPPKN Pandang Serius Tren Wanita Lambat Kahwin”, *Utusan Malaysia*, 23 May 2011, *Utusan Malaysia Online*, 23 May 2011, 28 Disember 2011,

<<http://www.utusan-malaysia-online.com/lppkn-pandang-serius-trend-wanita-lewat-kahwin>>.

Azrimah binti Hj. Ayob, "Legal System In Brunei Darussalam After The Signing of The Supplementary Agreement 1905/1906 between Brunei and Great Britain", *National Day Seminar 2006*, 7 March 2012, bruneiresources.com

<[http://www.bruneiresources.com/pdf/nd06\\_azrimah.pdf](http://www.bruneiresources.com/pdf/nd06_azrimah.pdf)>

Witt, John Fabian, *From Loss of Service to Loss of Support: the Wrongful Death Statutes, the Origin of Modern Tort Law and the Making of the Nineteenth-Century Family*, 23 March 2012,

<[http://www.law.yale.edu/documents/pdf/Faculty/Witt\\_From\\_Loss\\_of\\_Service\\_to\\_Loss\\_of\\_Support.pdf](http://www.law.yale.edu/documents/pdf/Faculty/Witt_From_Loss_of_Service_to_Loss_of_Support.pdf)>

Brunei Darussalam, Judiciary Brunei Darussalam, History, 9<sup>th</sup> May 2012

<[http://www.judicial.gov.bn/index.php?option=com\\_content&task=view&id=28&Itemid=129](http://www.judicial.gov.bn/index.php?option=com_content&task=view&id=28&Itemid=129)>.

Che Wan Zaidi bin Che Wan Ibrahim "Siaran Akhbar Kaedah-Kaedah Mahkamah 2012", 2 July 2012, Malaysian Bar, 4<sup>th</sup> December 2012,

<[http://www.malaysianbar.org.my/notices\\_for\\_members/siaran\\_akhbar\\_kaedah\\_kaedah\\_mahkamah\\_2012.html](http://www.malaysianbar.org.my/notices_for_members/siaran_akhbar_kaedah_kaedah_mahkamah_2012.html)>

Devaney, Margaret, "Comparative Assessment of Personal Injuries Compensation Schemes: Lesson for Tort Reform", (2009) 13.3 *Electronic Journal of Comparative Law*, 24<sup>th</sup> August 2010, <<http://www.ejcl.org/133/art133-2.pdf>>.

Menyawati, Hassan El, "Public Tort Liability : an Alternative to Tort Liability and No-Fault Compensation", (2002) 9 no 4, *Murdoch University Electronic Journal of Law*, 8<sup>th</sup> August 2010,

< <http://www.murdoch.edu.au/elaw/issues/v9n4/menyawi94.html>. >