

**THE LAW OF DAMAGES IN MALAYSIA:
HAS THE LAW ON THE MULTIPLIER FOR
THE LOSS OF DEPENDENCY BEEN SETTLED?**

*Charles Nicholson**

ABSTRACT

The law applicable in a claim for loss of support by the dependants of a deceased victim in Malaysia is found in the relevant provisions contained in the Civil Law Act 1956, amended in 1984. It would have been thought that with the passing of these statutory amendments, the legislature had removed the judicial discretion, if any, with finality in the law being established. However, that was not how the courts interpreted these amendments to be and the resulting conflicting judicial approaches that evolved was observed to have created confusion in the application of these enacted provisions. The article examines the position of the law in Malaysia and in particular, the appropriate multiplier to be adopted when calculating the loss of support and how the law evolved through the exercise of judicial discretion observed from the number of reported judgements since the amendments. The article concludes that the recent judgments of the Federal Court may not have resolved these concerns observed in this area of the law.

* Senior Lecturer, University Tunku Abdul Rahman, Malaysia.

INTRODUCTION

This article attempts to examine the current position of the law for loss of dependency and the appropriate multiplier post the amendments to the Civil Law Act 1956 which came into effect on 1 October 1984. By these amendments, the legislature, amongst others, had decided to remove the judicial discretion given to the courts by setting a formula for the loss of future earnings and for loss of dependency. The article will look at a number of Court of Appeal judgments on this area of the law after the most controversial Supreme Court's decision in the case *Chan Chin Ming v. Lim Yoke Eng*.¹ Different Court of Appeal benches found that they were not bound by *Chan Chin Ming* and began delivering conflicting decisions which undoubtedly created confusion in the law. The writer will also examine the inconsistencies in the state of the law and the dilemma that these decisions produced making the law uncertain and therefore, unpredictable. This was eventually put to rest by the Federal Court in three recent judgements which shall be discussed.

AMENDMENTS TO THE CIVIL LAW ACT 1956

One of the most controversial amendments to the law on compensation for personal injuries was the amendments to the Civil Law Act 1956 which came into force on 1st October 1984.² It was passed at a time when the government was concerned with the excessive awards of damages by the courts in respect of claims for personal injuries and

¹ [1994] 3 MLJ 233.

² Etican Ramasamy, in his article "Difficulties Suffered By Accident Victims," INSAF (2000) XXVIX No. 3, 35 has highlighted the sufferings of victims of motor vehicle accidents due to the amendments to the Civil Law Act 1956 by the Amendment Act A602 in 1984 which amended Section 7 and introduced Section 28A. In his article, the author had examined the effect produced by these amended legislative provisions with supporting case laws and expressed concern over the hardships that these amendments have caused to all those affected by them. The writer had also proposed certain amendments to be made to the present law.

defamation in Malaysia. The Explanatory Statement which was contained in the Civil Law (Amendment) Bill 1984 stated, *inter alia*:

*“This Bill seeks to make certain amendments to the Civil Law Act 1956 in view of the vast variance of court awards in respect of actions for damages for personal injuries including those resulting in death.”*³

Prior to these amendments, the law for loss of dependency and personal injury claims was largely governed by common law based on English law and judicial precedents.⁴ The amendments were concerned primarily with the quantum of damages which consisted of items such as the loss of dependency, damages for pain and suffering, loss of past and future earnings, if any, and other special damages like medical expenses, costs of nursing care, and funeral expenses. It amended sections 7, 8 and 28A of the Act and removed from, or altered, the jurisdiction of the courts and the power to award compensation for loss suffered by injured persons and the estate of a deceased victim or his dependants under common law as a result of the negligence of another. An action for the loss of support to the dependants resulting from the death of the deceased can be brought under section 7 while a claim can be brought by the personal representative of the estate of the deceased in respect of the deceased’s cause of action that survives the deceased for the benefit of the estate under section 8. The relevant sections are reproduced below:

Section 7(3) reads:

The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the

³ Radhakrishnan. S., “Quantum of damages in personal injury claims,” [1995] 3 MLJ xxix; [1995] 3 MLJA 29; For further discussion on the amendments see also: Radhakrishnan. S., “Is the deep pocket syndrome spreading to Asia? Trends in liability insurance,” [1997] INSAF Vol XXVI No. 3.

⁴ Khoo G.H., “Assessment of damages in fatal accident claims and a commentary on the Civil Law (Amendment) Act 1984,” [1993] 1 MLJ cxxix; [1993] 1 MLJA 129; Ahangar M.A.H., “Damages for loss of earnings in Malaysia: The need for a ‘just’ multiplier,” [2003] 3 MLJ lxxxi.

action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1).

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:
 - (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 an 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 cause his death and was receiving earnings by his own labour or other gainful activity prior to his death;
 - (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;
 - (c) take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be living expenses of the person deceased at the time of his death;
 - (d) take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any

other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase 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 2.⁵

LOSS OF EARNINGS

The first major change brought about by the amendment involved injured persons who have attained the age of 55 years. The new section 28A (2)(c)(i) provides that no damages for loss of earnings will be awarded to a plaintiff who has already attained the age of 55 at the time of the accident. A plaintiff who is still gainfully employed beyond the notional retirement age and whose terms and conditions of service stipulate a later retirement age, e.g. judges of the superior courts who retire at 65 and public sector employees who now retire at the age 58 years, is now disentitled from recovering compensation for their loss of earnings.⁶ Prior to the amendments, the courts would take 55 years as the age of retirement but if there was evidence that the injured person was in actual employment and it was reasonably probable that he would go on working beyond 55 years, it was open to the courts to consider this factor in deciding on the computation of the multiplier when assessing loss of future earnings. In *Teh Hwa Seong v. Chop Lim Chin Moh*⁷ the plaintiff who was 53 years old at the time of the accident was allowed a multiplier of 8 years for loss of earnings which exceeded his normal retirement age of 55

⁵ See s.28A(2)(d) for the assessment of damages for loss of future earnings.

⁶ In the case of *Tan bin Hairuddin v. Bayeh a/l Belalat* [1990] 2 CLJ 773 the plaintiff had attained the age of 59 years at the time of his injury. It was held by the court that he was not entitled to both pre-trial and post-trial loss of earnings, even though he could prove such loss of earnings. See: Khoo G.M., "Assessment of damages in fatal accident claims and a commentary on the Civil Law (Amendment) Act 1984," [1993] 1 MLJ cxxix; [1993] 1 MLJA 129.

⁷ [1981] 2 MLJ 341.

years. The amendments had removed this discretionary element from the courts although it is quite common to find people from all professions working for some time after 55 years of age. It is noted that the retirement age in the civil service has already been raised from 55 to 56 and recently to 58 years.⁸

It is a prerequisite that the plaintiff is also in good health prior to his injuries and in *Osman Affendi v. Mohd Noh*⁹ KN Seegera J. said that there is always a presumption that the plaintiff was in good health in the absence of any challenge by the defendant raised in his pleadings or in his cross-examination of the plaintiff.¹⁰

To be entitled to damages for the loss of future earnings, the new section 28A (2)(c)(i) requires that the plaintiff must be “receiving earnings by his own labour or other gainful activity before he was injured” thereby excluding those categories of claimants who are temporarily out of employment, young persons just about to enter employment, and children. At common law, the fact that the victim was not receiving earnings at the time of the injury was not a bar to his claim for loss of future earnings. The section was applied by the Supreme Court in *Dirkje v. Mohd Noor*¹¹ where it was decided that as the plaintiff was on no pay leave at the time she was injured, she was not entitled to any award for loss of future earnings.

Prior to the amendments, the plaintiff’s claim for loss of earnings was not limited to his present earnings. The prospects of his earnings being increased had he continued with his employment, but for his injuries, was a relevant factor which the courts had taken into consideration when assessing the plaintiff’s loss of earnings.¹² This was changed with the amendments. The courts are now prohibited from taking into account the prospect of the plaintiff’s earnings being increased in the future had

⁸ Ahangar M.A.H., *ibid*.

⁹ [2003] 1 AMR 332. S. 28A(2)(c)(i) provides that damages for loss of earnings will not be awarded “unless it is proved or admitted that the plaintiff was in good health but for the injury.”

¹⁰ See also: *Loh Hee Thuan v. Mohd Zani bin Abdullah* [2003] 1 AMR 332.

¹¹ [1990] 3 MLJ 103.

¹² *Ratnasingam v. Kow Ah Dek & Anor* [1983] 2 MLJ 297; *Nordin bin Haji Abdul Wahab v. Mohamed Salleh bin Hassan* [1986] 2 MLJ 294.

he not been injured when assessing damages for loss of future earnings.¹³ The discretionary element of the court was removed notwithstanding that such considerations were taken into account at common law. In *Marappam v. Siti Rahmah*¹⁴ a 33 year old trainee teacher suffered complete paralysis in her 4 limbs as a result of a motor vehicular accident. At the time of the accident, she was receiving a training allowance of RM345. This figure was used as the multiplicand in computing her loss of future earnings. No consideration was given to the prospect of her earnings being increased to a trained teacher's salary upon completion of her training.

The Amendment Act further provided that the court in awarding damages for loss of future earnings shall deduct the living expenses of the plaintiff at the time when he was injured.¹⁵ A disabled claimant who will not incur travelling and meal expenses that were directly connected to earning his living which expenses he would now no longer incur, should be deducted.¹⁶

The Act changed the formula for the computation of the multiplier used in the assessment of damages for the loss of future earnings of an injured plaintiff. Prior to the amendments, the multiplier was obtained by taking the difference between the age of the deceased at the time of the accident and the retirement age less one-third to account for the accelerated lump sum payment, contingencies and other vicissitudes of life. With the amendment, section 28A (2)(d)(i) provides that for a person of the age of 30 years or below at the time of the accident, the multiplier or the years of purchase is fixed at 16.¹⁷ A comparison between the

¹³ Section 28(A)(2)(c) provides: 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 any prospect of the earnings as aforesaid being increased at some time in the future.

¹⁴ [1990] 1 MLJ 99.

¹⁵ Section 28A (2)(c)(iii) provides that the court shall 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 plaintiff at the time when he was injured.

¹⁶ *Chan Chong Foo v. Shivanathan* [1992] 2 MLJ 473.

¹⁷ 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

multiplier used prior to the amendment and the one fixed by the amendment, shows that the latter has in fact been reduced. For example, if the plaintiff was 25 years of age at the time of his injuries, the multiplier will be 20 prior to the amendment and 16 with the amendment. With the new section, Parliament had reduced the multiplier by 4 years.

THE DEPENDENTS' LOSS OF SUPPORT

Two claims for damages arise from wrongful death. A claim for the loss of support to the dependants resulting from the death of the deceased can be brought under s. 7(1) of the Act, while a claim can be brought by the personal representative of the estate of the deceased in respect of the deceased's cause of action that survives the deceased for the benefit of the estate under s. 8. The dependency claim is the more important of the two.

The persons entitled to bring a dependency claim for the loss of support are the deceased's spouse, parents, children, step-children, grandchildren and grandparents.¹⁸ In *Chan Chin Ming v. Lim Yoke Eng*.¹⁹ Peh Swee Chin SCJ, in applying s. 7(2), held that the three siblings of the deceased were not dependents of the deceased and were therefore not entitled to a claim for loss of support. He said that only the mother was entitled to make the claim. The Court was concerned in knowing how much of what the deceased son gave to his mother had actually contributed to her livelihood and was necessary for her food and sustenance. The Court was concerning itself with what the claimant did with the money.

The Amendment Act fixed the multiplier for loss of dependency claims under section 7(3) (iv)(d). Where the deceased had attained the age of 55 at the time of his death, the court was prohibited from awarding

figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2- S. 28A (2)(d).

¹⁸ s. 7(2) states that: Every such action shall be for the benefit of the wife, husband, parent and child, if any, of the person whose death has been so caused... s. 7(11) defines a 'child' to include son, daughter, grandson, grand-daughter, stepson and stepdaughter. A 'parent' includes father, mother, grandfather, grandmother.

¹⁹ [1994] 3 MLJ 233.

damages for loss of support to his dependants. Besides, the claimant must also prove that the deceased was of good health and that he was gainfully employed before his death. In assessing the loss of earnings in respect of any period after the death of a person, the Court is also not allowed to take into account any prospect of the earnings being increased at any period after the person's death.²⁰

The trial judge in *Chang Chin Ming & Anor v. Lim Yoke Eng*²¹ awarded 16 years purchase at RM 750 a month. The Supreme Court by a majority reduced the number of years of purchase to 7 and the dependant's loss of support to RM 350 stating that a parent's claim for loss of support in respect of an unmarried child would either cease or reduce considerably on the child's subsequent marriage. In his dissenting judgement, Edgar Joseph Jr. FCJ held that these contingencies were incorporated into the 16 years multiplier set by Parliament and the Court was therefore not at liberty to reduce this statutorily fixed formula. His Lordship stressed that Parliament in enacting the statutory multiplier had clearly intended to remove the discretion of the court.

A further surprising judicial inroad into the law applicable to a dependency claim was made by the Court of Appeal in *Takong Tabari v. Govt. of Sarawak & Ors.*²² when it decided against the statutorily fixed multiplier by making deductions for contingencies and other vicissitudes of life from the total sum awarded for loss of support. The decision caused confusion and uncertainty in the law concerning the years of purchase permitted in a dependency claim.

Here, a claim was brought by the lawful widow of the deceased who was killed in an explosion in Miri, Sarawak against the alleged tortfeasors for loss of support for herself and other dependants. The deceased was 37 years of age at the time of his death. The trial judge assessed the multiplicand as RM2,500 a month and the multiplier to be 9 years based on the formula provided by the amendment. Having arrived at a sum of RM270,000 as the total general damages for loss of dependency, the Court proceeded to deduct one-third for contingencies, other vicissitudes of life and accelerated payment from this figure, thereby leaving a balance payable in the sum of RM180,000. Although it was

²⁰ s. 7(3) (iv)(a).

²¹ See above n.19.

²² [1998] 4 MLJ 512.

contended by the appellant that the one-third reduction was already built into the statutorily fixed multiplier, the Court in finding itself bound by the principle of *stare decisis* to accept the majority decision in *Chang Chin Ming*²³ held that the trial judge had not erred in law.

Following the controversial decision in *Takong Tabari*²⁴ the Court of Appeal would seem to have resolved the uncertainty concerning the multiplier in the following two cases that came before it.

In *Ibrahim bin Ismail & Anor v. Hasnah bte. Puteh & Anor* and *Lai Wai Keet & Anor v. Looi Kwai Fong*,²⁵ (both cases were reported together in one judgement), the Court of Appeal approved the dissenting judgement of Edgar Joseph Jr SCJ in *Chang Chin Ming* and stressed that Parliament in enacting the statutory multipliers had clearly intended to take away the discretion of the courts as exercised prior to the amendments. The Court was of the view that the majority in *Chan Chin Ming* had failed to apply the appropriate guide to statutory interpretation and hence fell in error.

*Lai Wai Keet*²⁶ concerned a personal injury claim. The Sessions Court made an award for loss of future earnings for the plaintiff applying the statutory multiplier set out in section 28A (2)(d)(i). On appeal, the High Court reduced the multiplier by one-third following *Chan Chin Ming* and *Takong Tabari*. The Court of Appeal allowed the appeal and held that it was wrong for the High Court to have made a further reduction from the statutory multiplier.

The decisions in these cases were followed by a further two appeals in *Noraini bte Omar (wife of the deceased, Ku Mansor bin Ku Baharom and mother of the deceased, Ku Amirul bin Ku Mansor) & Anor v. Rohani bin Said and another appeal*.²⁷ The first appeal was a claim for loss of support brought by the lawful widow and son of the deceased. The deceased was 33 years of age when he died. The learned Sessions Court judge found the number of years of purchase to be 11 and, applying that to a multiplicand of RM500 per month, arrived at RM66,000 for loss of support. Since the deceased was found to be 20%

²³ See above n. 19.

²⁴ See above n. 22.

²⁵ [2004] 1 CLJ 797; [2004] 1 MLJ 525.

²⁶ *Ibid.*

²⁷ [2006] 3 MLJ 150.

contributorily negligent, the amount awarded for loss of support was RM52,800. On appeal to the High Court, the learned judicial commissioner ruled that there should have been a deduction of one-third on account of contingencies, vicissitudes of life and accelerated payment. He deducted RM17,600 from RM52,800 thereby reducing the final award to RM35,200. In the second appeal, the deceased was an unmarried man aged 23 when he died. A claim for the loss of support as a result of his death was brought by his mother. The learned Sessions Court judge found the number of years' purchase to be 16 and applying that to a multiplicand of RM600 per month, arrived at RM115,000 for loss of support. Since the defendant's liability was 100%, that was the award he made for loss of support. On appeal to the High Court, the learned judge reduced the number of years' purchase from 16 to 7, following the majority decision of the Supreme Court in *Chan Chin Ming & Anor v. Lim Yok Eng*²⁸ where the deceased was an unmarried man who was 25 when he died and the dependent who suffered loss of support by his death was the mother.

In both the appeals the common issue was whether under the present provisions of section 7 of the Civil Law Act, the court was permitted to make any deductions for contingencies, other vicissitudes of life and accelerated payment, as was the practice prior to the amendment of section 7 of the Act.

The Court by a majority allowed both the appeals. Arifin Zakaria JCA (now JFC) expressed agreement with the Court of Appeal decision in *Ibrahim bin Ismail & Anor v. Hasnah bte. Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya bin Ibrahim) & Anor*,²⁹ where the court regarded itself as the apex court for fatal accident and personal injury claims and was therefore at liberty to depart from the decision of the Supreme Court if the court thinks that the decision of the Supreme Court was wrong. It is to be noted that by virtue of section 96 of the Courts of Judicature Act 1964,³⁰ there is no right of appeal to

²⁸ See above n. 19.

²⁹ See above n. 25.

³⁰ Section 66 of the Courts of Judicature Act 1964 (Act 91) provides:- Subject to any rules regulating the proceedings of the Federal Court in respect of appeals from the Court of Appeal, an appeal shall lie from the Court of Appeal to the Federal Court with the leave of the Federal Court granted in accordance with section 97-(a) from any judgement or order of the Court of Appeal in respect of any civil cause or matter

the Federal Court against the decisions in *Ibrahim bin Ismail & Anor v. Hasnah bte. Puteh & Anor* and *Lai Wai Keet & Anor v. Looi Kwai Fong*³¹ since both cases originated in the Sessions Court.³² In following the decision of the court in the abovementioned cases, His Lordship held that no deduction ought to be made on account of contingencies, other vicissitudes of life and accelerated payment as was the practice under the common.

In the first appeal, the order of the learned Judicial Commissioner to deduct one third from the sum for loss of support was set aside and the award of the learned sessions court judge was reinstated. Similarly in the second appeal, the order of was set aside and the order of the learned sessions court judge was accordingly reinstated.

The dilemma emanating from conflicting judicial opinions on the position of the law relating to a dependency claim was once again evident in the recent decision of the High Court in *Marimuthu Velappan v. Abdullah Ismail*.³³ Here, the plaintiff who was dissatisfied with the multiplier of 7 years purchase awarded as loss of dependency by the Sessions Court, appealed to the High Court. His Lordship, VT Singham J, after studying the conflicting and inconsistent decisions of the Court of Appeal and the Federal Court and acknowledging the application of the doctrine of *staré decisis*, felt compelled not to follow the decision of the

decided by the High Court in the exercise of its original jurisdiction; and (b) from any decision as to the effect of any provision of the Constitution including the validity of any written law relating to any such provision.

³¹ See above n. 25.

³² “Having come to the conclusion that *Chan Chin Min* was wrongly decided by the majority in that case, are we entitled to depart from it? We think we are. *Chan Chin Min* was decided before the establishment of this court. It was decided at a point of time when the High court had original jurisdiction over personal injury and fatal accident claims. Appeals were preferred to the Supreme Court which stood at the apex of the judicature. That is not the case today. All personal injury and fatal accident claims are now solely within the jurisdiction of the Subordinate Courts. Appeals are to the High Court and finally to this court. We therefore stand at the apex in respect of these claims.” Per Gopal Sri Ram JCA in *Ibrahim bin Ismail & Anor v. Hasnah bte Puteh Imat & Anor and Another Appeal* [2004] 1 CLJ at 807.

³³ Civil Appeal No. 12-9-05 delivered on 13 December 2006.

Supreme Court in *Chan Chin Ming & Anor v Lim Yok Eng*³⁴ and proceeded to allow the appeal by setting aside the multiplier of 7 years and substituting that with 16 years.³⁵ V T Singam J in delivering the decision of the court, considered also the unanimous decision of the Supreme Court in *Marappan Nallan Koundar & Anor v. Siti Rahmah bte Ibrahim*³⁶ where a claimant who suffered injuries in a road traffic accident was awarded the statutory multiplier of 16 years for loss of future earnings by the High Court, even though the parties had agreed to a multiplier of 15 years. The case of *Marappan Nallan* was unfortunately not considered by the Supreme Court in *Chan Chin Min*.³⁷ In arriving at his decision, the learned judge also took into consideration the three decisions of the Court of Appeal, namely, *Ibrahim bin Ismail & Anor v. Hasnah bte. Puteh & Anor* and *Lai Wai Keet & Anor v. Looi Kwai Fong*³⁸ *Cheng Bee Teik & Ors. v. Peter Selvaraj & Anor*³⁹ and

³⁴ See above n. 19.

³⁵ See: Ahangar, M.A.H., 'Dependability of dependency claims: The Malaysian perspective,' [2004] 3 MLJ xxii; [2004] 3 MLJA 22; Balan, P., *Damages for Personal Injuries and Causing Death: A Critical Survey*, [2004] JMCL 3.

³⁶ [1990] 1 CLJ 32; [1990] 1 CLJ (Rep) 174. His Lordship Gunn Chit Tuan SCJ for the Supreme Court said, "The next ground of appeal was that the learned judge had misdirected himself in that he awarded a multiplier of 16 despite the fact that both counsel for the plaintiff and the defendants had agreed and applied to him to record a multiplier of 15. The legislature has made its intention very clear by using mandatory language in s. 28A (2)(d) of the Act 'in assessing damages for loss of future earnings the court shall take into account that in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16.' The learned judge was therefore right in awarding a multiplier of 16 in this case."

³⁷ See above n. 19.

³⁸ See above n. 25.

³⁹ [2005] 2 CLJ 839 which comprised another bench of the Court of Appeal except for Tengku Baharuddin Shah JCA who was also a member of the bench in *Ibrahim bin Ismail*, had set aside the one-quarter deduction made by the High Court judge from the statutory multiplier of 16 years in respect of loss of future earnings, future cost of prosthesis and loss of dependency and instead awarded a multiplier of 16 years. In agreeing with the view expressed by Gopal Sri Ram JCA in *Ibrahim bin Ismail* at 806, Arifin Zakaria JCA (now FCJ) said, "It is the very principle that the

*Noraini bte Omar (wife of the deceased, Ku Mansor bin Ku Baharom and mother of the deceased, Ku Amirul bin Ku Mansor) & Anor v. Rohani bin Said and another appeal.*⁴⁰

Four months prior to the case of *Marimuthu Velappan v. Abdullah Ismail*, in the case of *Esah bte Ishak (a mother and legal dependant of Nazri bin Ahmad Ramli, deceased) & Anor v Kerajaan Malaysia & Anor*,⁴¹ another High Court in Ipoh heard an appeal from the plaintiffs/appellants against the decision of the learned sessions' court judge on the quantum of damages awarded to them in a dependency claim. The award was made on the basis of 100% liability on the respondents. Counsel for the appellants had submitted, *inter alia*, that the learned Sessions' Court judge had erred in awarding the multiplier of seven years in relying on the decision of the Supreme Court in *Chan Chin Min v Lim Chong Eng*.

Balia Yusof J adopting the maxim *staré decisis et non quieta movere* (to stand by decisions, and not to disturb settled matters), felt bound by the majority decision of the Supreme Court and affirmed the decision of the learned Sessions Court judge in fixing a multiplier of seven years instead of sixteen years as provided in s 7(3) (iv)(d) of the Civil Law Act 1956. Both the deceased were nineteen years of age at the time of death and unmarried. Counsel for the appellants had contended that the multiplier should be 16 years and urged the court to follow the

majority in *Chan Chin Min* breached when purporting to interfere with the pre-determined statutory formula applicable in calculation of loss of earnings in dependency and personal injury claims. With great respect, the majority in *Chan Chin Min* were exercising legislative and not interpretive jurisdiction. There is the further point that the majority in *Chan Chin Min* overlooked. The language of the statute is imperative. It says that "the number of years" purchase shall be 16. The mandatory tenor of the phrase employed by the Parliament to convey its message excludes any pretended exercise of judicial power to substitute some other multiplier for that intended."

⁴⁰ *Supra* n. 58.

⁴¹ [2006] 6 MLJ 1. See also *Tan Leong Wei & Ors. v. Omar Bin Ahmad* [2005] 2 MLJ 576 where Kamalanathan Ratnam J had also felt bound by the ruling in *Chan Chin Ming* and did not interfere with the decision of the Sessions Court judge in awarding the dependent father a loss of support of RM300 for ten years from the deceased who was 21 years and unmarried at the time of the accident.

dissenting judgment of Edgar Joseph Jr SCJ in the said case. Her Ladyship was further referred to two other decisions of the Court of Appeal namely, *Ibrahim Ismail & Anor v Hasnah Puteh Imat & Anor and Another Appeal*⁴² and *Cheng Bee Teik & Ors v Peter Selvaraj & Anor*.⁴³

THE RECENT DEVELOPMENT

After Parliament considered it necessary to amend the Act and remove the discretionary powers of the Court, one would have thought that certainty and predictability in the law would continue. The present conflicting decisions of the court suggests that this is clearly not the position. Fourteen years had passed since the infamous decision in *Chan Chin Min* when the Federal Court recently cleared the controversy surrounding the position of the law in the cases of *Abdul Gaffar Bin Md v. Ibrahim B. Yusoff and Saayah Bte. Abdullah* (Civil Application No. 08-149-2007(P)).

In dismissing the application of the appellant, the Federal Court in its judgement delivered by Abdul Hamid CJ on 12 May 2008 held that the suit having commenced in the Session Court, there is no further appeal to the Federal Court.

Here, the respondents who were the Plaintiffs in the Sessions Court filed an action in the Sessions Court claiming for general and special

⁴² See above n. 25.

⁴³ See above n. 39. Note that the majority decision in *Chan Chin Ming* was apparently not followed in *Manogharan a/l Veeramuthu & Anor v. Fauziah bte. Mohd. Isa* [2005] 5 MLJ 34. The case was concerned, *inter alia*, with the appropriate multiplier to be applied under s. 28A(2)(d)(i) for loss of earnings resulting from personal injuries suffered in a motor vehicle accident. Low Hop Bing J (as he then was) in affirming the decision of the Sessions' Court decided to follow the dissenting judgement in *Chan Chin Ming* and the decisions of the Court of Appeal in *Ibrahim Ismail* and *Ng Soo Ang v. Chai Chuan Seng* (Civil Appeal No. P-04-18 of 1998) unreported, and held that the number of years purchase shall be 16 years. The court had also referred to the Supreme Court decision in *Marappan & Anor v. Siti Rahmah bte Ibrahim supra* n. 32 which held that the mandatory language in s. 28A(2)(d) meant that when assessing damages for loss of earnings, the multiplier shall be 16.

damages, interest and costs. The claim was a dependency claim arising from an accident in which the deceased, pillion rider on a motor cycle had died. The Sessions Court decided in favour of the Respondents as follows:-

- a. Liability - Defendant wholly negligent
- b. Dependency - For seven years i.e.
 Pretrial 44 months x RM220 = RM8,800
 Post-trial 40 months x RM200 = RM8,000
- c. Funeral expenses - RM2,000

The Respondents, being dissatisfied with the multiplier and the multiplicand awarded, appealed to the High Court. The High Court dismissed the appeal and upheld the decision of the Sessions Court. The Respondents further appealed to the Court of Appeal. The Court of Appeal allowed the appeal in part. It did not allow the increase in the multiplicand but allowed the appeal in respect of the multiplier by increasing the multiplier to 16 years. The Applicant (who was the Defendant in the Sessions Court) then applied to the Federal Court for leave to appeal on the following issues, *inter alia*: whether the Court of Appeal is the apex court in respect of cases arising from motor vehicle accidents and has co-ordinate jurisdiction as the Federal Court?

The Court held that the Court of Appeal being a creature of statute,⁴⁴ it was not within the jurisdiction of the court to create appeals when the statute does not provide for it or does not permit it. The appeal has to be provided for by statute. The court went on to conclude that since there is no further appeal to the Federal Court, then the Court of Appeal becomes the apex court as far as actions and suits in respect of motor vehicle accidents are concerned.⁴⁵

⁴⁴ His Lordship referred to the case of *Auto Dunia Sdn. Bhd. v. Wong Sai Fatt & Ors.* [1995] 2 MLJ 549, where the Federal Court had said, "It is an elementary proposition that this court is a creature of Statute and that equally a right of appeal is also a creature of Statute, so that unless an aggrieved party can bring himself within the terms of a statutory provision enabling him to appeal, no appeal lies."

⁴⁵ This was applied by the Federal Court in dismissing the application in *Sia Cheng Soon & Syarikat N & S Enterprises Sdn Bhd v. Tengku Ismail Bin Tengku Ibrahim* (Permohonan Sivill No. 08-151-2007 (N)) where judgement was delivered on the same day as *Abdul Ghaffar bin*

The Federal Court once again unanimously decided that cases originating in the Sessions Court must end at the Court of Appeal.⁴⁶ The Court added that any injustice or abuse of the process of the court could only be corrected by the Court of Appeal as the apex court and that the Court did not have the jurisdiction and power to hear the application by the defendants under r. 137 of the Rules of the Federal Court.⁴⁷

The Federal Court reaffirmed the position of the law as stated by the Court of Appeal in *Ibrahim bin Ismail & Anor v. Hasnah bte. Puteh Imat (as beneficiary and legal mother of Bakri bin Yahya bin Ibrahim) & Anor*⁴⁸ where the court had regarded itself as the apex court for motor vehicle accident claims and was therefore at liberty to depart from the decision of the Supreme Court if the court thinks that the decision of the Supreme Court was wrong. By virtue of section 96 of the Courts of Judicature Act 1964, there is no right of appeal to the Federal Court against the decisions in *Ibrahim bin Ismail & Anor v. Hasnah bte. Puteh & Anor* and *Lai Wai Keet & Anor v. Looi Kwai Fong, supra* since both cases originated in the Sessions Court.

Md Amin v. Ibrahim bin Yusoff, supra i.e. 12 May 2008. His Lordship Abdul Hamid Mohamad C.J. said, "Jurisdiction of this Court is given by law i.e. the Constitution and statute. The law provides that an appeal from a decision of the Sessions Court ends at the Court of Appeal. There is no provision anywhere in our law (putting aside rule 137 for the time being) that allows such an appeal to this court. I have reaffirmed the position in *Abdul Ghaffar Bin Mohd. Amin.*"

⁴⁶ *Anantha Kiruisan PSR @ Anantha Krishnan & Anor v. Teoh Chu Thong* [2008] 4 MLJ 672 where the defendants filed an application pursuant to r. 137 of the RFC 1995 seeking, *inter alia*, an order that whether the Federal Court in the exercise of its inherent jurisdiction ought to intervene to give a final decision on this issue as to the right of the Court of Appeal to take unto itself the power to overrule a decision of the Federal Court, in stark conflict to the principle of *stare decisis*.

⁴⁷ Rule 137 of the Rules of the Federal Court 1995 provides as follows:- "For the removal of doubts it is hereby 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 orders as may be necessary to prevent injustice or to prevent an abuse of the process of the Court."

⁴⁸ See above n. 25.

CONCLUSION

When one would have thought that these decisions may have ended the controversy in the law on dependency claims, it could just create further uncertainties! The Court of Appeal is not bound by its own decisions. Judicial opinions concerning the interpretation of these amendments by different panels of judges who refuse to follow the earlier judgement of that Court may inevitably produce inconsistent results precipitating the very evil that the Federal Court, by its judgements may have thought that it had removed. But then the same happens in the Federal Court.⁴⁹ Hence, the confusion concerning the law may continue to prevail for the High Court and subordinate courts.

What would be the effect of such a legal position on the insurers of the defendant tortfeasor's vehicle where judicial decisions on a one-third reduction on loss of earnings in personal injury claims and seven years purchase on claims from dependents of an unmarried deceased victim of a motor accident has now been redefined?⁵⁰ The law places a duty on the insurer of a motor vehicle involved in a motor vehicle accident to satisfy the judgement obtained by the third party for personal injuries or death suffered as a result of the negligence of the insured driver or someone driving with his permission, or a his agent or employee.⁵¹

The award of damages in tort is aimed at restoring the injured victim to the position he or she would have been had the relevant tort not been committed.⁵²

⁴⁹ *Abdul Gaffar Bin Md v. Ibrahim B. Yusoff and Saayah Bte. Abdullah (Civil Application No. 08-149-2007(P))*.

⁵⁰ There is a requirement for compulsory motor insurance against third party risks for personal injuries and death arising from the negligence of the insured under Section 90(1) Road Transport Act 1967 and an obligation to satisfy the judgement sum obtained by the third party victim against the insured or his driver.

⁵¹ Section 96(1) Road Traffic Act 1987. The insurer's liability to satisfy any judgement sum is however subject to the requirement that the insurer was given notice of the proceedings at least before or within 7 days after the commencement of the proceedings.

⁵² See also *per Abdul Malik Ishak J in Appalassamy a/l Bodoyah v. Lee Mon Seng* [1996] 3 CLJ 71 at 78.

The fundamental principle of every system of civil law is the principle of justice, in the sense ‘to give each man that which is his right’ (*‘suum cuique tribuere’* as the Romans phrased it) which is essentially a matter of equality or even balance that has been depicted by the traditional scales of justice.

If the award of damages cannot restore the victim of the tort to his original position – *restitutio in integrum* - then the law must endeavour to provide a fair equivalent in terms of money, so far as money can be an equivalent, and in that way ‘make good’ the damage that was done.⁵³

⁵³ In the words of Lord Morris of Borth-y-Gest in *Perry v. Cleaver* “To compensate in money for pain and for physical consequences is invariably difficult but no other process can be devised than that of making a monetary assessment.”