

DEDUCTION OF LIVING EXPENSES FROM DAMAGES FOR LOSS OF FUTURE EARNINGS

In 1984, the law relating to damages for personal injuries and for causing death experienced significant and far - reaching changes as a result of the Civil Law (Amendment) Act (hereafter referred to as the "1984 Act").¹ The 1984 Act was severely criticised by lawyers, laymen and consumer associations because it removed or altered some common law principles which benefited injured persons or the dependents of deceased persons.² Since the enactment of the 1984 Act, a number of important decisions on the interpretation of its novel provisions have emerged from the Supreme Court.³ Some of the said decisions were discussed in earlier case comments published in this journal.⁴ In this short note a recent decision of the Supreme Court, namely *Chang Chong Foo & Anor v Shivanathan*⁵ is discussed. This case deals with a controversial provision created by the 1984 Act, namely section 28A(2)(c)(iii), which it inserted into the parent Act, the Civil Law Act, 1956.⁶ The said provision deals with the deduction of the living expenses of an injured person from the damages to be awarded to him for loss of future earnings. It states that in awarding damages for loss of future earn-

¹Act A602 which came into force on 1.10.1984.

²See for example Param Kumaraswamy, *The Uncivil Act* INSAF Vol XVII, No 3, October 1984; Seth M Reiss, *Quantum For Future Loss in Personal Injury and Fatal Accident Cases After the Civil Law (Amendment) Act, 1984* [1985] 2 MLJ 1xii; P Balan, *Damages For Personal Injuries and the Civil Law (Amendment) Act, 1984*, [1989] JMCL 181.

³*Marappan a/l Nallan Koundar & Anor v Siti Rahmah bt Ibrahim* [1990] 1 MLJ 99; *Dirkje Peitemella Haina v Mohd Nor bin Baharom & Ors* [1990] 3 MLJ 103; *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42.

⁴See [1989] JMCL 181 and [1990] JMCL 169.

⁵[1992] 2 MLJ 473.

⁶By section 5 of the 1984 Act. The amendments mentioned in this note were achieved by adding a new subsection (2) to section 28A of the parent Act, Civil Law Act 1956.

ings the court is required to take into account "any diminution ... by such sum as is proved or admitted to be the living expenses of the plaintiff at the time he was injured." The expression "living expenses" was not defined in the 1984 Act.

The general principle regarding the assessment of damages for an injured person's pecuniary loss was stated thus by Lord Goddard in *British Transport Commission v Gourley*:⁷

The basic principle so far as loss of earnings and out of pocket expenses are concerned is that the injured person should be placed in the same financial position, so far as can be done by an award of money, as he would have been had the accident not happened.

Fair compensation has been the foundation on which the principles for damages for personal injuries were worked out by the courts in the last two centuries. Needless to say, at common law, living expenses are not deducted from the damages awarded to an injured person for loss of future earnings. Indeed it is well recognised that his expenses may increase as a result of his injuries, for example where he needs continuous nursing care or future medical treatment or medical equipment.

At common law, deduction of living expenses from the damages to an injured person for loss of future earnings is permitted where the said damages are awarded for loss of earnings suffered during "the lost years", namely during the life span that is reduced as a result of the injury. In 1979, the House of Lords in *Pickett v British Rail Engineering Ltd*⁸ overruled *Oliver v Ashman*,⁹ a 1961 decision of the Court of Appeal, and allowed a living plaintiff to recover damages for loss of earnings during "the lost years". In doing so, it was made clear that the plaintiff's living expenses should be deducted from such damages. This approach was sensible because as the injured person may not be alive during the reduced span of life he may not need living expenses to support his life. Lord Edmund Davies explained the reason in *Pickett's* case as follows:

⁷[1956] AC 185 at p 206, [1955] 3 All ER 796 at p 804. See also Syed Agil Barakbah FJ in *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 at p 325.

⁸[1980] AC 136; [1979] 1 All ER 774.

⁹[1962] 2 QB 210; [1961] 3 All ER 323.

For, macabre though it be to say so, it does not seem right that, in respect of those years when *ex hypothesi* the injured plaintiff's personal expenses will be nil, he should recover more than that which would have remained at his disposal after such expenses had been discharged.¹⁰

The decision in *Pickett* and other subsequent cases on "the lost years" probably inspired the draftsman of the 1984 Act. Unfortunately, section 28A(2)(c)(iii) is a general provision, which applies to all injured persons. It is not restricted to deduction of living expenses in respect of damages for "the lost years." A learned writer commented thus on section 28A(2)(c)(iii):¹¹

The new Malaysian provision is not limited by its terms to living expenses in the lost years. Theoretically, a defendant could present evidence of living expenses for the future in respect of actual years remaining and seek a reduction in the award accordingly. However, this would not make much sense, because the plaintiff would actually incur such expenses as he continued to live, and would suffer a double deduction if an amount was also taken off the damages. It is to be expected that the courts will not sanction such an absurd result, and will limit the scope of the provision to living expenses in the lost years.

The point whether living expenses should be deducted when making an award for damages for future earnings came up for consideration in the very first case decided on the 1984 Act, namely *Marappan a/l Nallan Koundar & Anor v Siti Rahmah bt Ibrahim*.¹² The trial judge in that case was urged by counsel for the plaintiff to make a ruling on the "constitutionality" of section 28A(2)(c)(iii).¹³ The learned trial judge felt that it was unnecessary for him to do so because the deduction of living expenses of the injured person did not arise in that case. This was because the plaintiff's living expenses were neither proved (by the defendant) nor admitted (by the plaintiff). On appeal to the Supreme Court, Gunn Chit Tuan SCJ said,¹⁴

¹⁰[1980] AC 136, at p 163.

¹¹Rutter, MF, *Handbook on Damages For Personal Injuries And Death in Singapore and Malaysia*, 2nd Ed p 300.

¹²*Supra* n 3.

¹³[1989] 1 CLJ 252 at p 257.

¹⁴*Supra* n 3 at p 101.

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

The point came up again in the High Court in *Harcharan Singh v Hassan bin Ariffin*¹⁵ in 1990 and *Ismail bin Haji Manap & Yg Ln v Onn Swee Imm*¹⁶ in 1992. In both cases, the defendants' contention that living expenses must be deducted was rejected by the respective trial judge on the ground that it was neither proved nor admitted. The aforesaid cases clearly reflected the cautious attitude of the courts over the application and interpretation of section 28A(2)(c)(iii). The only exception was the High Court case of *Chan Sau Chan v Choi Kong Chaw & Yap Yun Chan*.¹⁷ In *Chan Sau Chuan's* case, the learned trial judge applied section 28A(2)(c)(iii) and deducted the plaintiff's living expenses from the damages for loss of earnings of an injured person. The learned judge said,¹⁸

Bearing in mind that at the date of the trial the plaintiff had reached the age of 50 years I think two years' purchase is the proper multiplier to be used for assessing the loss of future earnings. Out of his monthly earning I have held that his living expenses amount to Rgt 1000. Therefore he would have only Rgt 2500 which he could use to give to his family. The award for loss of future earnings is therefore Rgt 250 x 12 x 2 = Rgt 60,000.

It is not clear from the aforesaid judgment whether the plaintiff's living expenses were proved or admitted. It is respectfully submitted that in a personal injury case the question of deduction of living expenses does not arise at all unless such living expenses are proved or admitted, and this is made clear by section 28A(2)(c)(iii).

The latest development in this area of the law is the Supreme Court's decision in *Chang Chong Foo & Anor v Shivanathan*.¹⁹

¹⁵[1990] 2 CLJ 393.

¹⁶[1992] 2 CLJ 1157.

¹⁷[1991] 1 CLJ 297.

¹⁸*Ibid* at 307.

¹⁹*Supra* n 5.

On 13.9.1986 the plaintiff was injured as a result of a motor accident caused by the defendant's negligence. The plaintiff's right leg was amputated above the knee. Since the date of the accident the plaintiff was unemployed although he tried to obtain employment after being fitted with an artificial limb. The trial judge determined the plaintiff's loss of earnings per month as \$310.00 and based his computations for loss of future earnings on that figure. During the trial the plaintiff had given evidence that he was a daily rated worker and that he spent \$60.00 a month on petrol for his motor-cycle and \$5.00 per day for his meals at the place of work. The aforesaid expenses for petrol and meals were not deducted by the trial judge in determining the damages for loss of future earnings. Before the Supreme Court counsel for the defendant submitted that the aforesaid expenses were living expenses and therefore should be deducted from the plaintiff's monthly earnings. Counsel for the defendant objected arguing that "living expenses can only be deducted if a person is dead, if alive he needs living expenses in order to live."²⁰

Harun Hashim SCJ, who delivered the judgment of the Supreme Court referred to section 28A(2)(c)(iii) and said:²¹

What concerns us presently is sub-section (2)(c)(iii) which states

In awarding damages for *loss of future earnings* the Court shall take into account:

...
any *diminution* of any such amount as aforesaid by such sum as is provided or admitted to be the *living expenses* of the plaintiff at the time when he was injured. (Emphasis added).

Such amount referred to in (iii) is the amount of his *earnings* at the time of the injury referred to in (ii). The *diminution* referred to in (iii) is the *living expenses* of the plaintiff at the time he was injured.

On a plain reading of the sub-section we are of the view that by the use of the word *diminution* in (iii) the intention of the legislature is that in awarding damages for loss of future earnings the *entire sum*

²⁰Supra n 5 at p 479.

²¹Ibid at p 478.

of his *earnings* should not be used to calculate the amount payable under sub-section 2(c) ... This diminution, however, is subject to proof by the defendant or admitted by the plaintiff.

The Supreme Court was of the view that section 28A(2)(c)(iii) was "clearly intended" to apply to a living plaintiff and that it applied to the facts of the case.²² It was of the view that the words "living expenses" in that section must be given their ordinary meaning. In this context the Court referred to section 7(3)(iv)(c) of the Civil Law Act. Harun Hashim SCJ said,²³

In fatal accident cases in respect of a dependency claim, the deceased's own expenses have to be deducted: see *Amar Singh v Chin Kiew* (1960) MLJ 77 CA. This was the position at common law. It made sense because the deceased before his death could not have contributed the whole of his earnings towards the maintenance of his wife and children and that at least some part of his earnings must have been devoted to his own maintenance. This principle is now reflected in section 7(3)(iv)(c) which came into force on 1.10.84 and states:

'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 take into account any diminution of any such amount as aforesaid by such sums as is proved or admitted to be the living expenses of the person deceased at the time of his death.'

It will be seen that the same language is used in both section 7(3)(iv)(c) and section 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 section 7 and section 28A bear the same meaning.

Reference was also made by the Court to the English cases of *Harris v Empress Motor Ltd*²⁴ and *White v London Transport Executive*²⁵ to illustrate the meaning of "living expenses".

²²*Ibid* at p 479.

²³*Ibid*.

²⁴[1983] 3 All ER 561.

²⁵[1982] 1 All ER 410.

Based on the facts of *Chang Chong Foo's* case the Supreme Court held that the respondents' petrol expenses of \$60.00 per month and his meal expenses of \$5.00 per day should be deducted. For the purpose of computation his monthly expenses for meals was computed as \$130.00 (\$5.00 x 26 days). This sum (\$130.00) and his petrol expenses (\$60.00) when deducted from his monthly earnings of \$310.00 gave a figure of \$120.00, which was used as the multiplicand. The said figure was directly multiplied with a multiplier of 172 months to give \$20,640.00 as the damages for loss of future earnings.

Chang Chong Foo & Anor v Shivanathan is another manifestation of the unfortunate difficulties created for injured persons by the 1984 Act. To be fair to the Supreme Court it may be commented that in the face of the plain and clear words of section 28A(2)(c)(iii) the Court could not but give effect to the intention of the legislature. The case vindicates section 28A(2)(c)(iii) and one may now expect defendants and their insurers to display more vigour in pressing their claims for deduction of living expenses from the multiplicand for damages for loss of future earnings. The deduction of living expenses from the multiplicand may substantially reduce the damages that are awarded under this head. The effect on injured persons can sometimes be severe and may even result in a nil award for damages under this head. A nil award under this head is the logical consequence if an injured person had, before his injury, spent his entire income as his living expenses and saved no part of his earnings. Thus if the plaintiff in *Chang Chong Foo's* had spent the remaining RM120 of his income as rent his living expenses would have equalled his income. The hardship will be aggravated in the case of persons who suffer total disability and are therefore unable to earn a living after suffering their injuries. Section 28A(2)(c)(iii) ignores the avowed principle that damages are awarded to compensate an injured person for the loss that he has suffered. The section appears to be based on a fallacy that an injured person will not incur living expenses after suffering his injuries.

Chang Chong Foo's case is another reminder that it is necessary to seriously reconsider the provisions created by the 1984 Act. A thorough examination of the provisions of the 1984 Act is long overdue.

