

**THE UNCERTAINTY IN CALCULATING DAMAGES FOR LOSS OF EARNINGS IN THE
CIVIL LAW ACT 1956**

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ABSTRACT

An amendment was made in 1984 to the Civil Law Act 1956 pertaining to claim damages for loss of earnings as a consequence of injuries sustained in an accident. In section 28A and 7 any loss of earnings is determined at time of accident or death to assess the amount of damages payable (multiplicand) and the period of loss (multiplier). In the sections, the calculation for the multiplier for loss of earnings is already fixed by the ages of the injured or deceased. If the injured or deceased is below 30 years, his entitlement to loss of earnings is 16 years, whereas if the injured or deceased is between the ages of 31 to 54 years, a statutory formula is applicable. This paper aims at highlighting the problems faced by legal practitioners and judges in determining the appropriate multiplier to assess damages for loss of earnings. This study uses the legal research methodology. Decided cases are analysed by looking at the legal reasoning of judges. The finding of this study suggests that the inclination of the courts in Malaysia is to use their discretion to reduce the multiplier by considering contingencies thus rendering the calculation to determine the multiplier uncertain.

Keywords: *Earnings; Damages; Multiplier*

1. INTRODUCTION

In Malaysia, every year the number of those injured or deceased rises despite many attempts made by the authorities to curb the toll of motor vehicle accidents. The system applicable in Malaysia is the tort liability system and most motor vehicle accidents are based on negligence as a cause of action. An accident victim who is unable to establish that the accident was caused by the defendant's negligence is not entitled to common law damages, even though he or she may not be blamed for the accident. The government delivery system also is a contributing factor in the delay to settle claims for damages. All vehicle owners are required to take a compulsory third party insurance which covers bodily injury, death, and vehicle and property damage. The eventual paymaster for claims by the plaintiff is the insurance companies of the defendant. The insurance claims process too can contribute further delay especially through the process of claiming from the defendant's insurance company. Further with the amendment made in 1984 to the Civil Law Act 1956, provisions pertaining to claims for loss of earnings were introduced which restricted claimants to certain age category and other requisites before losses can be compensated. The number of years to be compensated for the loss of earnings is restricted by a fixed multiplier depending on the ages of the injured or deceased.

2. MULTIPLICAND AND MULTIPLIER IN THE CIVIL LAW ACT 1956

Upon its introduction, the Civil Law (Amendment) Bill had been widely criticized by civil groups, trade unions and opposition parties. The Malaysian Bar Council and the Federation of Malaysian Consumers Association claimed that the Bill favoured insurance companies at the expense of accident victims. Despite the objections, the Civil Law (Amendment) Act 1984 came into force on 1st October 1984. The 1984 Act amended various sections of the Civil Law Act 1956, including section 28A (which was added by the Civil Law (Amendment) Act 1975, Act A308), section 7 (claims by widows and orphans for support) and section 8 (actions by estate).

The process of assessing damages consists of (a) applying the relevant principles of assessment to the facts of the case, and (b) by deciding on the appropriate amount or quantum of damages. The Civil Law (Amendment) Act 1984 divested the courts of most of its discretion through detailing preconditions and procedures. The 1984 Act sought to regulate the figuring of quantum for the categories in three ways i.e. it laid down specific criteria, which must be established before any entitlement to an award can be shown; it imposed limiting factors upon the assessment of annual loss; and it provided the method to be used for determining the duration of the prospective loss (Reiss, Seth M.)ⁱ

Out of the several changes made by the 1984 Act, the head of loss of earnings under section 28A and section 7 proved controversial as specific conditions must be met before a claim can be made

by a living plaintiff and dependants of those who died as a result of the "wrongful act, neglect or default" of the defendant. The 1984 Act required a triple pre-condition i.e. the injured person or deceased had not attained the age of 55, was in good health, and was actually earning by his own labour at the time of injury or death before a claim can be made for loss of earnings or support (Sections 7 (3) (iv) (a) and 28A (2) (c) (i) Civil Law Act 1956). The pre-condition of limiting the claim to a claimant of 55 years old seemed to follow the retirement age of a government servant in Malaysia. This was reflected in some Malaysian cases prior to the amendment (*RJ McGuinness v Ahmad Zaini* (1980)ⁱⁱ; *Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir Sdn Bhd* (1982)ⁱⁱⁱ) but subject to variation if there was evidence to the contrary (*Yaakob bin Mohamad & Anor v Sintat Rent A Car Service (M) Sdn Bhd & Anor* (1983)^{iv} where a multiplier of 7 years was applied for healthy 60 years old farmer.

With the amendment, those who reached an age above 55 years old at the time of the accident would be barred from seeking a claim under this head (*Tan bin Hairuddin & Anor v Bayeh a/l Belalat* (1990)^v as the plaintiff was 59 years old at the time of injury. As the dependants of a person who succumbed to his death as a result of the wrongful act of the defendant, this head would similarly be inapplicable if the deceased was over 55 years old at the time of death (*Jennifer Anne Harper (sued in her own capacity and as executrix of the estate of Bernard Alfred Harper, decd) v Timothy Theseira* (2009))^{vi}

The pre-condition of the living plaintiff or person deceased "was in good health but for the injury" at the time of injury or death was a further requisite for a claim of loss of earnings or support. Under the pre-amendment law, good health was a relevant consideration otherwise the consequential damage would be too remote or that no factual causation could be established (*Bourhill v Young* (1943).^{vii} Although the Act did not define "good health" but in cases such as *Osman Effendi b. Mahmud & Anor v Mohd Noh b. Khamis* ((1998) ^{viii} good health can be established if the person is gainfully employed at the date of accident. In *Loh Hee Thuan v Mohd Zani bin Abdullah* (2003)^{ix} per Kamalanathan Ratnam J at p.221, "The fact that he had led a normal life up to the time of the accident and had led evidence that he was 'receiving earnings by his own labour or other gainful activity before he was injured' was sufficient to satisfy the requirement of proof as stated in section 28A (2) (c) (i) of the Act" clearly accepted the plaintiff's health if it did not interfere with his employment.

The last pre-condition requires a living plaintiff or deceased victim was receiving earnings before he was injured or death, the word 'before' was construed to mean 'at the time' of the injury. In *Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors* (1990)^x, the Supreme Court considered the above pre-condition whereof the plaintiff failed in her bid to claim for loss of future earnings at the time of the accident while on a biking tour around the world, as she was on no pay leave. The court in a later case *Tan Kim Chuan & Anor v Chandu Nair* (1991)^{xi} did not make an award for loss of future

earnings to a child of 12 years old, as he was not employed at the time of injury. The implication meant that children, students, those temporarily out of work and those on no pay leave would be excluded from making a claim for loss of future earnings.

Further, any prospective increased in earnings is not considered as provided in sections 28A (2) (c) (ii) and 7(3) (iv) (b) unlike the pre-amendment stage which recognised promotions though did take into account contingencies such as redundancies. In arriving at the exact multiplicand; a deduction was to be made for "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 he was injured (section 28A (2) (c) (iii)) or of the person deceased at the time of his death (section 7 (3) (iv) (c)). At common law, living expenses are not deducted from damages awarded to an injured person for loss of future earnings unless damages are awarded for loss of earnings suffered during the "lost years" (*Pickett v British Rail Engineering Ltd* (1980)).^{xiii} Section 28A (2) (c) (iii) is a general provision applicable to a living plaintiff and it is not restricted to deduction of living expenses of damages for the "lost years" (Harun Hashim SCJ in *Chang Chong Foo & Anor v Shivanathan* (1992)).^{xiii} However, living expenses are not deducted from the damages awarded for loss of future earnings unless proven by the defendant or admitted by the plaintiff as illustrated by the cases of *Marappan a/l Nallan Koundar & Anor v Siti Rahmah bt. Ibrahim, Harcharan Singh v Hassan bin Ariffin and Ismail bin Haji Manap & Yg Ln v Onn Swee Imm* (1990)^{xiv}.

Once the exact multiplicand is established, the court needs to determine the multiplier. Multipliers are the number of years the living plaintiff or the dependants are entitled to claim for the loss of future earnings or support from the defendant. Section 28A (2) (d) (i) fixed the multiplier at 16 for all victims of 30 or below (fixed multiplier) and for those victims between the ages of 31 and 54, under section 28A (2) (d) (ii) the multiplier is "...calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2" (fixed formula). As for the claims by the dependants of the deceased victims, similar provisions were made under section 7(3) (iv) (d) of the 1984 Act. Prior to the amendment, the court would apply separate multipliers for pre-trial loss and post-trial loss of earnings. For pre-trial loss of earnings, the court would take the period between the date of the accident and the date of judgment as the multiplier. As for post-trial loss of earnings, the balance of the working years, which the plaintiff or deceased would have had, but for the accident was used as the multiplier. In arriving at this figure, the court would take the normal retirement age, usually 55 years and deducting from it the plaintiff's age at the date of the trial. One-third for normal contingencies peculiar to the plaintiff's or deceased's personal condition would further reduces this balance of working life. The amendment abolished the significance of pre-trial and post-trial loss of earnings; both were subsumed into loss of future earnings as indicated by the Federal Court in the case of *Dirkje Pieternella Halma*. However, only for

the purposes of awarding interest, the court preferred to divide damages for loss of earnings into pre-trial and post-trial (*Chang Chong Foo v Shivanathan (1992); Chan Chin Ming v Lim Yoke Eng (1994)*)^{xv}.

3. PROBLEMS AND ISSUES

a) On the question of quantum of damages, the Civil Law (Amendment) Act 1984 brought about changes that found disfavour for the plaintiff. Although the aim was to achieve consistency in the awards made to the victim or plaintiff but the means of getting it has caused outcry among practitioners and academicians. The pre-condition of the injured plaintiff or deceased victim must be below 55 years old in order to claim for loss of future earnings or loss of support is unrealistic in view of the fact that many now work beyond that age. Recently, the retirement age for government servants is raised to 60 years old thus making it rather odd to still abide by the requirement of 55 years as the age limit for making a claim. Many would feel that the putting of age limit would go against the very principle of fair and adequate compensation for loss suffered by the plaintiff and in turn assist the defendant in not meeting the responsibility to compensate the plaintiff.

The requirement that the plaintiff or deceased "must be earning at the time of the accident" was an unfortunate change made since it might wipe out all possibility of claiming for loss of future earnings or loss of support. This might mean depriving a large number of persons especially those about to enter the workforce i.e. students, graduates. In view of the affluence of the population and the ease of buying vehicles, many parents can afford to buy motorcars or motorcycles for their children. It is with much regret that a great number of accidents involved young drivers and statistics have shown that motor vehicle accidents form the most common source of personal injury and death (The Malaysian Insurance Institute reported the highest vehicular accident involved those between the ages of 18-24).

In the event of an accident involving such young people, the parents would suffer considerable hardship as they would be saddled with looking after him and also deprived of enjoying all their labour in educating him up to that level. Most Malaysians consider the family unit as most important and a dutiful son or daughter would normally contribute to the parents once they started working. In cases of would be graduates or graduates about to enter the workforce, surely that can be considered as sufficient evidence to award damages for loss of future earnings or loss of support. The deduction of living expenses for personal injury claims completely lacks foundation, as the living plaintiff will still incur his personal expenses as long as he lives. In the event of the living plaintiff spending his entire income, there is the possibility of a nil award for damages under the head of loss of future earnings. 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 (P.Balan, *Deduction of Living Expenses from Damages for Loss of Future Earnings*).^{xvi}

The living plaintiff will suffer greater hardship especially if he is totally disabled and cannot earn a living as a consequence of the accident. It therefore cannot be a blanket application for both a claim for personal injury and dependency, surely the treatment should be different, it would be appropriate for a claim based on loss of dependency but not for personal injury (Norila Abu Hassan, *Law of Tort: Is There A Need for Review after a Decade of the Civil Law (Amendment) Act 1984 on Damages?*).^{xvii} However, the Supreme Court in *Chang Chong Foo & Anor v Shivanathan* (1992) held the view that section 28A(2)(c)(iii) was clearly intended to apply to a living plaintiff and living expenses must be given their ordinary meaning.

b) The case of *Chan Chin Ming & Anor v Lim Yoke Eng* (1994) brought about some confusion in respect of determining the multiplier where the mother claimed for loss of support as a consequence of the death of her 25 years old son in an accident. By virtue of section 7(3)(iv)(d), the correct multiplier would be 16 years purchase as was then applied by the High Court hearing the case. Unfortunately, when the case went on appeal, the multiplier was reduced to 7 years purchase by a majority decision of the Supreme Court as the deceased was unmarried and once married would cease to support the mother.

Many have expressed their views that the dissenting judgment of Edgar Joseph Jr. SCJ in that case represented the true intention of Parliament (C.Kandiah, *Section 7 (3)(iv)(d) of the Civil Law Act 1956 and fatal accident Claims: Does the multiplier differ for a claimant who is a parent(s) and one who is a spouse with children?* (1995)^{xviii}; Etican Ramasamy, *Difficulties suffered by Accident Victims*, (2000)^{xix}; Muhammad Altaf Hussain Ahangar, *Damages for Loss of Earnings in Malaysia: The Need for a 'Just' Multiplier* (2003)).^{xx} The said Judge expressed his disagreement as the statutory multiplier of 16 years should be applied following the mandatory tenor of the provision in section 7 (3) (iv) (d). The majority decision brought back the common law principles in determining the correct multiplier. As it was a Supreme Court decision, the Court of Appeal in the case of *Takong Tabari @ Takung Tabari v Government of Sarawak & 2 Ors* (1998)^{xxi}, felt that they were bound by the principle of stare decisis to accept the majority decision in the case of *Chan Chin Ming*. The latter case involved a claim for loss of dependency by the plaintiff whose husband died as a result of an explosion at the premises of a Bank in Miri, Sarawak. Applying the statutory formula in section 7(3) (iv) (d) the trial judge calculated the deceased's loss of earnings by applying the multiplier of 9 years to a multiplicand of RM 2,500 per month arriving at a total of RM 270,000 as general damages. This would have been the proper approach taken in respect of applying the statutory provision. But, in this case, the trial judge went on to deduct a sum of RM 90,000, which is equivalent to 1/3 (for

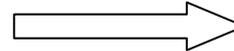
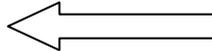
contingencies, other vicissitudes of life and accelerated payment) from the total sum of RM 270,000 leaving a balance of RM 180,000 payable as loss of support for the dependants. Upon appeal, the Court of Appeal upheld the decision, as the court is bound "...by the principle of stare decisis to accept the majority decision in Chan's case" (Per Siti Norma Yaakob JCA (then) at p. 523). It should be noted that in *Chan Chin Ming*, Peh Swee Cheng in his judgment clearly stated that the statutory multiplier in the section was meant for claims by a widow and children of the deceased. In other words, courts should not deduct the multiplier already stipulated in the section.

Therefore, the provision in section 7(3)(iv)(d) had clearly taken into account all contingencies and Parliament in enacting the said provision had intended to take away the discretion of the court to select the appropriate multiplier as stated by Edgar Joseph Jr. SCJ in his dissenting judgment in *Chan Chin Ming*. In a recent case of *Ibrahim bin Ismail v Hasnah Puteh Imat & Anor* (2004)^{xxii}, the Court of Appeal held that the majority decision in *Chan Chin Ming* was wrong while the minority judgment was correct and went on to hold that the statutory multiplier was not subject to any deduction for the purposes of calculation loss of earnings. Moreover, the Court of Appeal is the apex court for all claims pertaining to motor vehicle accidents (*Abdul Ghaffar bin Md Amin v Ibrahim Yusoff & Anor* (2008)^{xxiii}), thus *Chan Chin Ming* a Supreme Court decision can never be reviewed. Subsequent cases such as *Muniyandi a/l Periyar v Eric Chew Wai Keat* (2003)^{xxiv}, refused to follow *Chan Chin Ming* and *Takong Tabari*; and allowed a multiplier of 16 years in full. However, the case of *Tan Leong Wei & Ors v Omar bin Ahmad* (2005)^{xxv} at p.578, the High Court Judge awarded the dependants of a 21 years old deceased RM 300 per month for a period of 10 years following the decision in *Chan Chin Ming* as he felt that "...the then Supreme Court admirably dealt with the issue as to why the courts can reduce the multiplier from 16 to a figure it felt was reasonable and appropriate". There is clearly a conflict between applying strictly the statutory multiplier or Judges can still exercise their discretion in choosing the appropriate multiplier. The following indicates the dichotomy of cases which followed and which did not follow the case of *Chan Chin Ming*.

c) Judicial Activism

CHAN CHIN MING (1990) (CCM)

Supreme Court-a majority decision



Followed CCM

Did not follow CCM



TAKONG TABARI (1994)

Court of Appeal

-unanimous decision



ROHANI A/P TENGAH (2004)

Sessions Court



TAN LEONG WEI (2005)

Sessions Court



ESAH BTE ISHAK (2006)

Sessions Court



IBRAHIM BIN ISMAIL (2004)

Court of Appeal

- unanimous decision



CHENG BEE TEIK (2005)

Court of Appeal



NORAINI OMAR (2006)

Court of Appeal

-majority decision



MARIMUTHU A/L VELAPPAN

High Court

4. ANALYSIS OF THE UNCERTAINTY IN THE MULTIPLIER

The case of *Marappan a/l Koundar v Siti Rahmah* (1990)^{xxvi} (Supreme Court-a unanimous decision) was not considered in *Chan Chin Ming* (1994) (Supreme Court) where in that case the judges refused to accept the contention of both counsels for the appellant and respondent to a multiplier of 15 years. Instead the court brought their attention to the wordings of section 28A (2) (d) (i) whereof for a plaintiff 30 years and below at the time of the accident, the multiplier **shall be 16**. Although *Marappan a/l Koundar* was in reference to a case of personal injury claim whereas *Chan Chin Ming* was for a dependency claim, the fact remains that the express provision of sections 7 (3) (iv) (d) and 28A (2) (d) (i) of the Civil Law Act 1956 on the multiplier is in pari materia.

The case of *Takong Tabari v Government of Sarawak & 2 Ors* (1998) (CA) as stated was a claim by the deceased's spouse and children; however, it contributed to the uncertainty in the law as the court felt that it was bound by the doctrine of stare decisis to accept the majority decision in *Chan Chin Ming* (even though this case involved an unmarried deceased). In his book, S.Santhana Dass, *Personal Injury Claims*, extended the application of deducting further the multiplier by 1/3 for loss of future earnings (personal injury claims). This clearly goes against the decision of *Marappan a/l Koundar* as stated above, he relied on the case of *Takong Tabari*. As we know *Takong Tabari* was a case on dependency claim therefore do not apply to a personal injury claim. The case of *Loh Hee Thuan* (on personal injury claim) clearly stated that the decision in *Takong Tabari* did not apply to cases involving personal injury.

In *Rohani a/p Tengkah (suing on behalf of herself and on behalf of her two children as dependants of Zanuddin bin Sipoh, decd) v Zainal bin Lani & Anor* (2004)^{xxvii}, the learned judge of the High Court with great reluctance had to decide in line with the decision of *Chan Chin Ming* and *Takong Tabari*. We note in the obiter dictum, he remarked on the merit of the argument put forward in *Marappan a/l Koundar* and the minority decision of Edgar Joseph Jr SCJ in *Chan Chin Ming*. He expressed hope that the Federal Court "will have the opportunity to consider *Takong Tabari* and to reconsider *Chan Chin Ming*. Therefore, the judiciary is in a state of dilemma as rightly put by the Honourable VT Singham J in *Marimuthu a/l Velappan* (2007)^{xxviii} as the matter of deciding whether the court should continue to follow *Chan Chin Ming* in view of the latest trend set by *Ibrahim bin Ismail*. The uncertainty cannot remain unresolved, "... the legal argument on the multiplier to be awarded to the parents of unmarried deceased in dependency action still continues to be a live issue and has been repeatedly found to be the subject of discontentment and under academic scrutiny and judicial disagreement and debated, as a result, the legal practitioners themselves are in a state of uncertainty in addition to the dilemma and strain faced by judicial officers."(per VT Singham in *Marimuthu a/l Velappan* (2007)).

Chan Chin Ming which was ardently followed in *Takong Tabari* by the High Court and confirmed by the Court of Appeal on the basis of the doctrine of stare decisis, plagued many cases involving claims by parents of an unmarried deceased. However, on the other hand, the courts should not: "...rewrite the statute, or brush aside statutory provisions and select, in the exercise of its discretion, a suitable multiplier. This proposition is, in my view, quite untenable, and has only to be stated to be rejected, bearing in mind that when a question of statutory interpretation arises, the duty of the court is simply to give effect to the will of Parliament as expressed in the law."(per Edgar Joseph Jr in *Chan Chin Ming* (1994)).

5. CONCLUSION

The numerous calls for review of the pertinent (amended) sections in the Civil Law Act 1956 on age limit, 'earning at the time of the accident', deduction of living expenses from earnings for personal injury claims and the certainty on the correct multiplier are still unanswered to this date from the legislators. The Bar Council and the Law Academia put many suggestions forward on possible reforms to achieve a fair compensation payable to victims and their family but all have come to no avail.

In view of the above suggestions, after 28 years currently there is a research being conducted to review sections 28A and 7 Civil Law Act 1956 on the various uncertainty and appropriate amendment can be made so as to achieve just award of damages for the injured and the dependants of the deceased.

ⁱ Reiss, Seth M. (1985) Quantum for future loss in personal injury and fatal accident cases after the Civil Law (Amendment) Act 1984, *Malayan Law Journal*, August, 1985, *lie*).

ⁱⁱ 2 MLJ 304 at 308

ⁱⁱⁱ 2 MLJ 71 at 77

^{iv} 2 MLJ 283

^v 2 CLJ 773

^{vi} 7 MLJ 711

^{vii} AC 92

^{viii} 4 AMR 3687 SC

^{ix} 1 MLJ 213

^x 3 MLJ 103

^{xi} 1 MLJ 42 SC

^{xii} AC 136

^{xiii} 2 MLJ 473

^{xiv} 1 MLJ 99

^{xv} 3 CLJ 687

^{xvi} Balan,P. (1992) Deduction of Living Expenses from Damages for Loss of Future Earnings, *Jurnal Undang-Undang* 229

^{xvii} Norila Abu Hassan, (2001) Law of Tort: Is There A Need for Review after a Decade of the Civil Law (Amendment) Act 1984 on Damages? *Paper presented at the 11th Malaysian Law Conference, 8th—10th November, 2001, Kuala Lumpur*

^{xviii} Kandiah, C. (1995) Section 7 (3) (iv)(d) of the Civil Law Act 1956 and fatal accident Claims: Does the multiplier differ for a claimant who is a parent(s) and one who is a spouse with children? *1 CLJ cxcix*

^{xix} Ramasamy, Etican. (2000) Difficulties suffered by Accident Victims, *INSAF xxvix No.3 35*

^{xx} Muhammad Altaf Hussain Ahangar, (2003) Damages for Loss of Earnings in Malaysia: The Need for a 'Just' Multiplier, *3 MLJ lxxxi*

^{xxi} 4 MLJ 512

^{xxii} 1 CLJ 797

^{xxiii} 3 MLJ 771 (FC)

^{xxiv} 3 MLJ 527

^{xxv} 2 MLJ 576

^{xxvi} 1 MLJ 99

^{xxvii} 5 MLJ 289

^{xxviii} 1 CLJ 436

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