HJ ARIFFIN HJ ISMAIL v. MOHAMAAD NOOR MOHAMMAD
COURT OF APPEAL, KUALA LUMPUR
HAIDAR MOHD NOOR, FCJ; ABDUL HAMID MOHAMAD, JCA; ABDUL KADIR SULAIMAN, JCA
CIVIL APPEAL NO: K-02-82-1998
23 MARCH 2001
[2001] 2 CLJ 609

***CIVIL PROCEDURE**: Damages - Loss of future Earnings - Whether proved - Whether evidence to the contrary Civil PROCEDURE: Damages - Loss of Earnings capacity - Assessment made by trial judge - Whether rightly made Civil PROCEDURE: Damages - Personal injuries as a result of road accident - Costs of Medical treatment abroad - Whether proved - Whether Medical treatment could be done locally Civil PROCEDURE: Damages - Special Damages - Omission to plead – Consequences*

This appeal arose from a judgment of the High Court in a claim for damages arising from a road accident as a result of which the appellant suffered serious injuries including loss of sight. The respondent had admitted liability and the learned trial judge had granted damages accordingly. However, the appellant's claim for loss of earnings and the costs of hiring a driver and for nursing care had been dismissed. In this instance, the appellant claimed the following: (1) loss of future earnings; (2) loss of earning capacity; (3) costs of medical treatment in London; and (4) costs of hiring a driver and costs of nursing care.

Held:

Per Abdul Hamid Mohamad JCA

[1] The loss of future earnings was not proved. In fact, it was clear that the appellant did not suffer any loss at all. There was overwhelming evidence that the appellant was earning more after the accident than before the accident.

[2] There was no submission made by the appellant in the High Court regarding the loss of earning capacity. The learned trial judge appeared to have made the assessment based on the concession made by the respondent. In fact, the learned trial judge had awarded RM25,000, *ie*, RM15,000 more than the amount suggested by the respondent. Further, the learned trial judge was in a better position than this court to make the said assessment. Therefore, there was no basis to disagree with the decision of the learned trial judge on that issue.

[3] In his evidence, the appellant had glaringly contradicted himself as to whether he was recommended to seek medical treatment in London. Further, the medical report submitted by the appellant showed that the medical treatment done in London could have been done in Malaysia. The appellant also claimed that he was seeking reimbursement for the expenditure for

medical treatment from his employer and there was no evidence that the employer had not made the said reimbursement. Apart from that, the expenditure claimed was not supported by documentary evidence and there was no breakdown of the said expenditure. Special damages must be specifically pleaded and strictly proved. Although the expenditure was pleaded, it was not strictly proved. Therefore, the learned trial judge had rightly dismissed that claim.

[4] The claim for costs of hiring a driver and costs of nursing care was not pleaded by the appellant. That claim was a claim for special damages which must be pleaded and proved. In the circumstances, the learned trial judge had rightly dismissed that claim.

*[**Bahasa Malaysia** Translation Of Headnotes]*

Rayuan ini berbangkit daripada penghakiman Mahkamah Tinggi dalam satu tuntutan untuk gantirugi yang berpunca daripada sebuah kemalangan jalanraya di mana perayu telah mengalami kecederaan termasuk kehilangan penglihatan. Responden telah mengakui tanggungan dan hakim perbicaraan yang bijaksana telah memberikan gantirugi sehubungan itu. Walaubagaimanapun, tuntutan perayu untuk kehilangan pendapatan dan kos mengambil seorang pemandu dan rawatan penjagaan telah ditolak. Kini perayu menuntut yang berikut: (1) kehilangan pendapatan masa depan; (2) kehilangan mata pencarian; (3) kos rawatan perubatan beliau di London; dan (4) kos mengambil seorang pemandu dan rawatan penjagaan.

Diputuskan:

Oleh Abdul Hamid Mohamad HMR

[1] Kehilangan pendapatan masa depan tidak dibuktikan. Malahan ianya jelas bahawa perayu tidak mengalami sebarang kehilangan sama sekali. Terdapat keterangan yang amat ketara bahawa perayu memperolehi pendapatan yang lebih selepas kemalangan itu daripada sebelum kemalangan itu.

[2] Tiada hujahan dibuat oleh perayu dalam Mahkamah Tinggi berhubung kehilangan mata pencarian. Hakim perbicaraan yang bijaksana nampaknya telah membuat taksiran berdasarkan konsesi yang dibuat oleh responden. Malahan hakim perbicaraan yang bijaksana telah memberikan RM25,000, iaitu RM15,000 lebih daripada jumlah yang dicadangkan oleh responden. Lagipun, hakim perbicaraan yang bijaksana berada dalam kedudukan yang lebih arif daripada mahkamah ini untuk membuat taksiran tersebut. Oleh itu, tiada asas untuk tidak bersetuju dengan keputusan hakim perbicaraan yang bijaksana atas isu itu.

[3] Dalam keterangan perayu, beliau telah dengan jelasnya memberikan keterangan yang bercanggah berhubung dengan samada beliau telah disyorkan supaya mendapatkan rawatan perubatan di London. Lagipun, laporan perubatan yang dikemukakan oleh perayu menunjukkan bahawa rawatan perubatan yang dilaksanakan di London boleh dilaksanakan di Malaysia. Selanjutnya, perayu menuntut bahawa beliau sedang memohon untuk

mendapatkan bayaran balik bagi perbelanjaan untuk rawatan perubatan daripada majikan beliau dan tiada keterangan bahawa majikan tersebut telah tidak membuat pembayaran balik tersebut. Juga, tuntutan perbelanjaan tersebut tidak disokong oleh keterangan dokumentar dan tiada pecahan bagi perbelanjaan tersebut. Gantirugi khas semestinya diplidkan dengan khususnya dan terbukti dengan sesungguhnya. Meskipun perbelanjaan tersebut telah diplidkan, ianya tidak terbukti sesungguhnya. Oleh itu, hakim perbicaraan yang bijaksana telah menolak tuntutan itu dengan betulnya.

[4] Tuntutan untuk kos mengambil seorang pemandu dan kos rawatan penjagaan telah tidak diplidkan oleh perayu. Tuntutan tersebut adalah tuntutan untuk gantirugi khas yang mana seharusnya diplidkan dan dibuktikan. Dalam keadaan kes tersebut, hakim perbicaraan yang bijaksana telah dengan betulnya menolak tuntutan itu.

[Rayuan ditolak.]

Reported by Usha Thiagarajah

Case(s) referred to:

Lai Chi Kay & Ors v. Lee Kuo Shin [1981] 1 LNS 53, [1981] 2 MLJ 167 ***(refd)***

Ngooi Ku Siong & Anor v. Aidi Abdullah [1984] 2 CLJ 163; [1984] 1 CLJ 294 (Rep) ***(foll)***

Counsel:

For the appellant - PM Mahalingam; M/s VP Nathan & Partners

For the respondent - Dasaratharaj; M/s Shook Lin & Bok

JUDGMENT

Abdul Hamid Mohamad JCA:

This appeal arose from a judgment of the High Court in Alor Setar in a claim for damages arising from a road accident. Unfortunately no grounds of judgment were written by the learned trial judge who has now retired.

The accident occurred on 18 July 1978 at about 9.30am at about the 18th milestone Alor Setar/Sungai Petani trunk road. At the time of the accident the appellant was a passenger in motor car PAB 525 driven by his driver. The respondent was driving his motor car PQ9966. The two cars were travelling in the opposite direction. As a result of the accident the appellant suffered serious injuries, including loss of sight.

From the record it appears that on 25 July 1987, the respondent admitted liability and the case proceeded to assessment of damages. The appellant gave his evidence-in-chief. He was cross-examined on 12 November 1988 and was only re-examined on 15th February 1995. Partial judgment was given on 22 August 1995. The rest of the judgment was given on 14 February 1995. The order can be summarised as follows:

> (a) the respondent to pay RM95,000 as general damages for injuries with interest at 8% per annum from the date of service of the writ to the date of payment;
>
> (b) the appellant's claim for loss of earnings was dismissed;
>
> (c) the respondent to pay RM25,000 for loss of earning capacity with no interest;
>
> (d) The respondent to pay RM9,500 as special damages with interest at 4% per annum from the date of the accident to the date of judgment;
>
> (e) The appellant's claim for the cost of hiring a driver and for nursing care was dismissed;
>
> (f) The respondent to pay the appellant the costs of the action.

The appellant appealed to this court. Mr. P.M. Mahalingam, counsel for the appellant submitted to us on four issues:

> (a) loss of future earnings;
>
> (b) loss of earning capacity;
>
> (c) costs of travel to and from London for medical treatment;
>
> (d) Costs of hiring driver and nurse.

Law On Loss Of Future Earnings And Loss Of Earning Capacity

All that we need do is to refer to the judgment of the then Federal Court in *Ngooi Ku Siong & Anor v. Aidi Abdullah[1984] 2 CLJ 163; [1984] 1 CLJ 294 (Rep)*. Syed Agil Barakbah FJ (delivering the judgment of the court) said, *inter alia*, at p. 165 of the report:

> Loss of future earnings and loss of earning capacity distinguished.
>
> There is also a difference between loss of future earnings and loss of earning capacity although both items are under general damages. Future loss of earnings or loss of prospective earnings are awarded for real assessable loss ie, loss that is capable of assessment at the date of the trial. It must be proved by evidence and not by mere speculation. In the absence of such evidence if the court is satisfied that the plaintiff has suffered a loss of earning capacity, he will be awarded a sum as part of the general damages for his disability suffered as a result of the injuries sustained, instead of compensation for loss

> of future earnings. It arises where there is a residual risk that the plaintiff might be thrown out of work altogether at some future date. The risk must be real and not speculative or fanciful. Any loss of money is relevant, whether the money is properly described as "earnings" or not, provided that the money is more than a "mere possible contingency." Thus loss of possible contract as opposed to loss of probable contract is not recoverable. (See *Kemp and Kemp on the Quantum of Damages*, vol. 1, 4th edn on pp. 122 and 123). Generally both items need not be specifically pleaded as in the case of special damages but averred in general terms in the pleadings.

Loss Of Future Earnings

As stated above, for loss of future earnings there must be evidence of a real and substantial loss which must not be remote and speculative.

Learned counsel for the appellant admitted that the appellant was not entitled for loss of future earnings for the period prior to 18 May 1984. However, he submitted that the appellant was entitled from 18 May 1984 until February 1994 (date of retirement) at RM3,915 per month for about ten years. The reason he gave was that during that period there was no evidence that the appellant was employed. On the other hand, learned counsel for the respondent argued that the appellant was not entitled for damages for loss of future earning because the appellant was employed for 18 years from 1 January 1980, which period would surpass his date of retirement. In other words, there was no loss whatsoever.

The only issue here is whether the appellant is entitled to the claim for loss of future earnings for about 10 years (from 18 May 1984 to February 1994) at RM3,915 per month. Learned counsel for the respondent did not argue on the amount or that the period should be shorter. He argued that the appellant is not entitled to it at all. In the circumstances we do not have to discuss the amount nor the period, but only whether in the circumstances of this case, he is not entitled to it at all.

At the time of the accident the appellant was 39 years old. That was on 18 July 1978. He was employed by Perbadanan Kemajuan Negeri Kedah ("PKNK") from 1st March 1974. At that time he would have been about 35 years old and would have retired in 1994.

According to his own evidence, under cross-examination, either in 1979 or 1980 (ie, after the accident) he incorporated a company by the name of Pakar Perunding Peladang Sdn. Berhad. The principal business of the company was to give advice to the management of an estate. However, that company was taken over by KPM Khidmat Sdn. Berhad ("KPM Khidmat"). On 1 January 1980 he signed an agreement with KPM Khidmat. He was appointed advisor to KPM Khidmat for a period of 18 years. His remuneration was provided in cls. 7, 8 and 9 of the agreement.

> 7. (a) The remuneration for the Advisor for services rendered hereunder except for Clause 6 above shall be as follows:
>
> (i) The sum of Malaysian Ringgit Fifteen Thousand Only

(M$15,000/-) per month.

(ii) Where the total acreage of KPMK's Estates exceed 20,000 acres then and in such an event KPMK shall pay to the advisor in addition to the aforementioned sum of Malaysian Ringgit Fifteen Thousand Only (M$15,000/-) a sum calculated at the rate of Malaysian cents 25 (25 cts.) per acre per month on such acreage up and above the 20,000 acres (such calculation to be in units of 100 acres rounded off to the nearest 100th preceeding).

(iii) 24% of the net audited profit of the Division such rate to hold good until all accumulated losses of the Division have been fully recovered. Thereafter the Advisor shall be paid 32% of the net audited profit of the Division so long as the Division remains profitable such rate to hold good until all accumulated losses of KPMK have been fully recovered. Thereafter the Advisor shall be paid 40% of the net audited profit of the Division so long as the Division remains profitable.

(Note:- Net profit in this respect shall be defined as the profit after deduction of all salaries, operating expenses and out goings of whatsoever nature including taxation).

(b) The sums mentioned in sub-clauses (i) and (ii) shall be paid monthly at the end of each month and the sum mentioned in sub-clause (iii) shall be paid within 3 months from the end of KPMK's financial year provided always that the accounts shall have been audited.

8. For the services rendered by the Advisor as visiting agents referred to in Clause 6 thereof, KPMK shall pay to the Advisor half of all fees payable to KPMK by the Owners of such estates after deduction of all expenses reasonably incurred in the performance of the duty as visiting agents.

9. The Advisor shall be entitled to be reimbursed in full for all out-of-pocket and other expenses and disbursements payment for which has been duly authorised by KPMK.

In his evidence in court, under cross examination, he said

I was paid $15,000/- per month as an allowance. It was for the company to pay the salaries of the employees. I was also paid a sum based on 25 cents (per acre) on such acreage up and the 20,000/- acres.

I was paid on percentage basis on a scale, on the profits of KPM Khidmat. I was paid every item of expenditures and disbursements ie, for and on behalf of the company.

Even my assessment was paid by KPM Khidmat. The salary is about $3,600-

> p.m. Even the maintenance of my telephone in Sungai Petani Office was paid by KPM Khidmat for the KPM employees.
>
> The maintenance of KPM Khidmat Office is in Sungai Petani was paid by KPM Khidmat. I had to travel to K.L. quite often when I was working. KPM Khidmat paid reasonable expenses.... (typographical errors corrected).

He also owns another company by the name of Haji Ariffin Hj. Ismail Rubber Plantations Sdn. Berhad. The company owns 800 acres of rubber land. It is a family company and is still a going concern. However, later on in his evidence he said "Ariffin Hj. Ismail Rubber Plantation Sdn. Bhd. is still functioning but it is waiting to be auctioned off and under receivership."

There is another company called Haji Ariffin bin Hj. Ismail Planting Advisory Sdn. Berhad. The shareholders are himself 227,500 shares and his two wives: Cik Puteh owned 32,500 shares and Hajah Rokiah owns 65,000 shares. However, he said that that company was "no longer functioning. It ceased in 1984."

There is yet another company by the name of Niffira Pertanian Sdn. Berhad, which was incorporated in 1979. However, he said:

> I lent my name to the company. I was the first man of the company. I have normal (nominal? added) shares in the company under the Policy.

We must admit that we are handicapped by the absence of the grounds of judgment of the learned judge. It is for this reason that we take the trouble to reproduce the evidence of the appellant as much as we think are useful for us to come to a conclusion.

As can be seen, sometime in 1979 or 1980 the plaintiff incorporated the company called Pakar Perunding Perladangan Sdn. Bhd. From the reports and accounts for the period ended 31 December 1981 (exh. D8) there were only two shareholders of the company, the appellant holding 67,001 shares and one Azhali bin Hamzah holding 33,001 shares. There were three directors, the two of them and another person. It is to be noted that in the "Detailed profit and loss account for the period from 1 October 1980 to 31 December 1981," directors salaries and allowances amount to RM138,056. As has been noted there were only two directors. Even if they were equally paid (which is unlikely as the appellant was a major shareholder) each of them would still get RM4,930 per month (RM138,056 - 14 - 2). Another item "Travelling and accomodation-director" shows that for the period 30th September 1980, the amount paid was RM181,823 which if divided equally between the two directors, assuming that it is for a period of nine months, is RM10,101.27 per director. The amount paid under the same item for the period ending 31 December 1981 is much less ie, RM8,862. It is sufficient just to look at these two items. So, until the end of 1981, there appears to be no loss to the appellant whatsoever.

After that the appellant was appointed advisor to KPM Khidmat. If he was paid as provided in the agreement (as it should be) the salary alone was RM15,000 per month. Again this is not taking into account other payments based on the scale provided for in the agreement. Even if we were to take the amount stated by him in his oral evidence as his salary (RM3,600) the amount plus the allowances would still exceed his previous income.

Exhibit D11 shows his claim for transport incurred in September, October and November 1983 totaling RM8,460. His claim dated 31 May 1983 for board and accommodation incurred whilst performing official duties was RM3,728.48. Debit notes dated 19 September 1983 for the period starting from 2 June 1983 to 31 August 1983 amounted to RM67,898.15 ie, RM22,632.71 per month.

So, there is overwhelming evidence that he was in fact earning more after the accident than before the accident.

However, he said that his services as Advisor was terminated by KPM Khidmat on 18 May 1985. The question is what was the reason?

The reason is to be found in his statement of claim in Suit No. P1458 of 1984 in which he sued KPM Khidmat for wrongful termination. He said he had been found guilty on six charges. Unfortunately we do not know what the charges were. But, whether his services was lawfully terminated or not is a matter for the court to decide in that suit. Whichever way the decision goes it will not affect his claim under present discussion. That is because, if he succeeds he will get damages for the loss of income that he suffers as a consequence thereof. If he fails, it means that the termination is justified, in which case, it was due to his fault and the respondent should not be made to pay for it.

From the discussion above, it is clear that this is not only a case where the loss is not proved but it is clear that he did not suffer any loss at all. In fact he was earning more after the accident than prior to it.

In the circumstances, even though we do not know the reasons why the learned trial judge dismissed this claim, we are satisfied that he had made the correct decision on the issue, for the reasons we have just given.

Loss Of Earning Capacity

The learned judge had awarded a sum of RM25,000 for loss of earning capacity.

Reading the submission of the learned counsel for the appellant in the High Court, there appears to be no submission made at all regarding loss of earning capacity. Even the summary of the damages "recommended" by the learned counsel for the appellant makes no mention of it. So is his reply to the submission of the learned counsel for the respondent.

On the other hand, learned counsel for the respondent in his written submission addressed the issue. He submitted that considering that the appellant was earning substantial income up to 18 May 1984 and was certainly earning an income thereafter but the amount was difficult to ascertain the court might award a nominal sum of about RM10,000 for loss of earning capacity, if the court was minded to do so.

Before us learned counsel for the appellant said that the award should be calculated on a ten year basis. He did not elaborate.

Perhaps, it was because of the suggestion made by the learned counsel for the respondent that the learned trial judge award a sum of RM25,000.

The law is clearly stated by Syed Agil Barakbah FJ in *Ngooi Ku Siong & Anor v. Aidi Abdullah[1984] 2 CLJ 163; [1984] 1 CLJ 294 (Rep)*:

> It is therefore immaterial whether the plaintiff was in or out of employment at the time of the trial so long as the court is satisfied there is substantial or real risk that he will some time at the end of his working life lose his job or get a less paid employment. (See Denning MR in *Cook v. Consolidated Fisheries Ltd*...).

In our view, no one can honestly say that the loss of sight does not and will not affect the appellant's capacity in any way. Neither can anyone honestly say that there is no substantial or real risk that he will some time at the end of his working life lose his job or get a less paid employment because of his loss of sight. But, unfortunately learned counsel for the appellant did not in the High Court assist that court to arrive at its decision. No submission was made on the issue. Even learned counsel for the appellant who appeared before us in this court could not say much to assist us besides saying that it should be calculated on the basis of ten years. Why ten years we do not know. Neither could he suggest how much.

Anyway, considering the facts of this case discussed earlier and the fact that the learned trial judge was in a better position than us to make the assessment, which assessment appears to have been based on the concession made by the learned counsel for the respondent rather than the submission of the learned counsel for the appellant (there was in fact none), we do not think we have any basis to disagree with the learned trial judge. Indeed, he had awarded RM15,000 more than the amount suggested by the learned counsel for the respondent. In the circumstances the appeal on this issue should also be dismissed.

Medical Treatment In London

This item was pleaded.

There is no dispute that the appellant went to London to see an eye specialist for medical treatment. He claims RM10,972.50 for medical and travelling expenses.

The first question is whether it is necessary for him to go to London for the treatment. In his evidence, the appellant, *inter alia*, said:

> I remember that I was advised to go to London for treatment. The treatment was recommended to me by Dr. Fernandes, an eye specialist. He was then in Sungai Petani. I don't know what sort of operation it was to be. He was afraid that any surgical intervention may aggravate the situation. If I'm not mistaken, I was told to go to London for operation. Dr. Fernandes did not recommend. I went to London to see an eye specialist... I underwent an operation to fix a socket eye. It is true that Dr. Fernandes said it could be done in Malaysia... I agree that in respect of my left eye I was advised not to undergo any surgery. With regard to my trip to London I upgraded my fare from economy fare to First Class.

It should be noted that the appellant has very glaringly contradicted himself as to whether Dr. Fernandes recommended him to go to London for treatment. In one breadth he said Dr. Fernandes did recommend. In another he said Dr. Fernandes did not recommend it. Further

he admitted that Dr. Fernandes told him that the operation to fix the eye socket could be done in Malaysia. He also agreed that in respect of the left eye he was advised not to undergo any surgery.

Learned counsel for the appellant in his written submission in the High Court also relied on the medical report on the appellant made by Dr. Fernandes dated 2 November 1979 (exh. P1) to support his contention that it was recommended by Dr. Fernandes. But, this is what Dr. Fernandes (he was not called as a witness) said in his report:

> Remarks:
>
> The right eye which has gone soft will eventually shrink and cause a cosmetic problem. This eye will require another operation to establish a socket for an artificial eye. This operation could be done in Malaysia.
>
> The left eye vision (3/60 with glasses) will not improve, it is likely to deteriorate further and the eye will eventually go blind due to increased tension which is uncontrollable...
>
> In my opinion any surgical intervention on the left eye to lower the tension entails very great risks of losing the little vision he has ie, 3/60 with thick glasses.

We see clearly that nowhere in his report did Dr. Fernandes recommend the appellant to go to London for treatment. In fact the very operation that the appellant subsequently did in London could be done in Malaysia, according to him.

Learned counsel for the appellant, in his written submission in the High Court, also relied on a letter written by Dr. Fernandes dated 8 February 1979 to the appellant's employer then to support his contention that Dr. Fernandes recommended the treatment in London.

In the first place, that letter is not an exhibit, most probably because Dr. Fernandes was not called as a witness, nor was it an agreed document. According to learned counsel for the respondent in his written submission in the High Court, that letter was only marked as ID2B for identification. It was attached by the learned counsel for the appellant to his written submission in the High Court. It is also not included in the appeal record prepared by learned counsel for the appellant, for obvious reasons ie, it was not properly produced as an exhibit. So it should be disregarded.

In any event, the appellant himself, in his evidence said:

> I did go to London to see an eye specialist in London for further treatment. To make the trip I spent RM10,972.50. I am now seeking reimbursement of this amount **from my employers**...

As submitted by the learned counsel for the respondent in the High Court, there is no evidence that the employer has not made the reimbursement.

The other point about this expenditure is that it was not supported by documentary evidence. However, it appears that he went with his wife and he had himself "upgraded" to first class.

We do not know whether he paid extra or not for the "upgrading". If he did not, well and good. If he did, we think it is unnecessary as his wife was with him. We do not even know the breakdown of the expenditure. These are all matters that should be proved by the appellant. It is trite law that special damages must be specifically pleaded and strictly proved *Ngooi Ku Siong & Anor v. Aidi Abdullah[1984] 2 CLJ 163; [1984] 1 CLJ 294 (Rep)*. In this case the expenditure was pleaded, but cannot be said to have been strictly proved.

On all these grounds, even in the absence of a written judgment of the learned judge, we are of the view that the learned judge had correctly dismissed this particular claim.

Cost Of Hiring A Driver And For Nursing Care

The claim under this item was not pleaded at all. However, in his written submission, learned counsel for the appellant claimed RM135,000 for employment of a driver for the period from 1 July 1979 to 30 June 1994, and RM151,000 for person to provide nursing care and help.

In his written submission in the High Court, learned counsel for the respondent submitted that this is special damages and must be pleaded and proved.

We agree with him. Learned counsel for the appellant argued that the amount could not be quantified yet at the time of filing the suit. But it should be remembered that the accident happened on 18 July 1978, the suit was filed in late 1979. Surely, some expenses, would have been incurred, if incurred, by then. Anyway the case took 16 years before the recording of the appellant's evidence (he was the only witness) was completed. During the long period, the statement of claim could have been amended. It was not done.

Be that as it may, regarding the driver, the appellant was involved in a number of companies. Clause 9 of his agreement with KPM Khidmat contains a clause giving him full reimbursement for all out-of-the-pocket and other expenses and disbursements. That would cover the use of motor car for his official purposes.

Regarding the helper, the appellant said in his evidence.

> ... I was paying RM1,200.00 for two helpers from 1978 to 1984. I need one person to attend to my need and my convenience. The helper also helped me to write letters. The helper was a part time assistant.
>
> ... I was personally paying my personal assistant after office hours. He put medicine on my eyes. He is like a nurse. He took care of my eyes and my tension. There were two assistants looking after me. The same helper is being paid $600/- p.m. i.e. 50% cut in salary. This was since 1985. The helper is an Indian lady. Her name is Raja Lakshmi. She has been secretary to my company too. She is looking after me when I went out of my house. She is not the company secretary. I was forced to reduce pay $1,200/- to $600/- to my nurse maid.

In the High Court, learned counsel for the respondent submitted that the appellant did not employ anyone to look after his personal needs. In any event there was no medical evidence to suggest that he needed such care. He further submitted that after the accident the appellant was "involved in lots of business in various companies," and if we may add, did a lot of

travelling, besides having two wives who could surely take turn to attend to help him around and "put medicine in his eyes." The learned counsel relied on the case of *Lai Chi Kay & Ors v. Lee Kuo Shin[1981] 1 LNS 53*, [1981] 2 MLJ 167 for the proposition that such claim must be supported by evidence that the services of such care is medically necessary.

The learned trial judge dismissed this particular claim, even though we do not know his reasons for so doing. However, considering the fact that these damages, being special damages, must be pleaded and proved and in the light of the facts of this case, we are satisfied that he had come to a right conclusion.

In the circumstance we dismissed the appeal with costs.