CHAI YEE CHONG v. LEW THAI
COURT OF APPEAL, KUALA LUMPUR
ABDUL HAMID MOHAMAD, FCJ; MOHD NOOR AHMAD, FCJ; ABDUL AZIZ MOHAMAD, JCA
CIVIL APPEAL NO. A-02-476-99
18 MARCH 2004
[2004] 2 CLJ 321

***TORT**: Negligence - Duty of care - Duty of one Employee owed to another - Whether special relationship in existence*

***DAMAGES**: Special Damages - Medical expenses - Expenses at private Hospital - Principles of recoverability*

The respondent (plaintiff in the High Court) and the appellant (defendant in the High Court) were employees of a tin mine. The respondent was the mine's 'kepala' whereas the appellant was its manager and director. On 14 October 1982, the respondent was instructed by the appellant to use a tractor to increase the height of the bund to prevent an overflow of water from the mining pool into the mining pit. It was raining heavily at the material time and the only way the overflow of water into the mining pool could be checked was by increasing the height of the bund at the parts where the water overflowed. It was important to stop the overflow of water into the mine pit because if it flooded, the mine would have to cease operations for sometime thereby causing financial repercussions. As the respondent was working on the bund, the bund collapsed as a result of which the respondent was buried and suffered serious injuries. The cause of the bund's collapse was not established. At first the respondent filed an action against the tin mine operator as his employer and the appellant as the servant or agent of the employer. However the claim against the employer was discontinued as not maintainable under the Employees' Social Security Act 1969. The writ and statement of claim were also amended so that the action was maintained only against the appellant as a co-employee of the respondent. The High Court found the appellant liable in negligence for injuries suffered and awarded the respondent damages. The appellant appealed to the Court of Appeal in respect of the High Court's finding of liability; the award of RM15,028 for medical expenses and the award of RM10,000 for loss of earning capacity.

Held (allowing the appeal)

Per Abdul Hamid Mohamad & Mohd Noor Ahmad FCJJ:

[1] The Court of Appeal would agree with the finding of the High Court that the amendment to the Employees' Social Security Act 1969 that bars a claim against a fellow employee (that came into force on 1 July 1992) was not applicable since the accident happened and the action was filed long before that date.

[2] The Court of Appeal would agree with the High Court that there was a special relationship between the appellant and the respondent and that there was a duty of care

on the part of the appellant towards the respondent. However the Court of Appeal was unable to agree with the High Court's finding of negligence on the part of the appellant.

[3] In the instant case, the question was whether a reasonable man, considering the nature of work of the respondent which included raising the bund and taking measures to save the mine from flooding, would think that to do the work at the time of the accident under the conditions then prevailing was so dangerous that to allow the respondent to do it or not to stop him from doing it would constitute negligence. On the facts, it was not reasonable to find negligence on the part of the appellant for allowing or for not stopping the respondent from doing the work he was doing at the time of the accident.

[4] Every person has a right to seek medical treatment at a hospital of his choice, be it at a government hospital or at a private hospital. When it comes to awarding damages for such treatment, if the treatment sought is at the government hospital, the full amount expended and paid by the person should be awarded. If the person seeks treatment at a private hospital, he has to prove firstly that he was justified to seek the treatment at the private hospital, and secondly the amount incurred was reasonable. With regard to the first hurdle, he has to prove: (a) that the particular treatment required was not available at the government hospital due to the unavailability of necessary equipment or qualified doctors or other sufficient reasons; (b) though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This could be due to the congestion at government hospitals or other sufficient reasons; or (c) that the treatment at government hospitals though available, is grossly inadequate.

[5] If the court is not satisfied that a plaintiff is justified to seek treatment at a private hospital, then depending on the facts and figures of the case, the court should either dismiss the claim or award an amount not exceeding one third of the expenses. The one third principle is not fixed by any written law. It is a matter of practice. If one third is excessive an amount of less than one third may be awarded.

[6] If the court is satisfied that a plaintiff is justified in seeking medical treatment at a private hospital, the plaintiff must prove that the expenses incurred and the amount claimed are reasonable taking into consideration normal charges at other local private hospitals. The court may then award what it considers to be a reasonable amount which may even be the full amount claimed.

[7] In the case of treatments at private hospitals at Singapore, the test applicable would be that applicable to justify treatment at a private hospital locally, except that the test is applied to local private hospitals instead of a government hospital.

[8] In the instant case, there was ample evidence to show that the plaintiff was justified in seeking further treatment at Fatimah Hospital - a private hospital after his discharge from the General Hospital. Had liability been found in the respondent's favour he should have been awarded the full amount of the medical expenses.

[9] The respondent was able to work and indeed worked as a tractor driver with a number of employers after the accident and was earning more than before the accident. He had therefore not suffered any loss of earning capacity.

Diputuskan (membenarkan rayuan)

Oleh Abdul Hamid Mohamad & Mohd Noor Ahmad HHMP:

[1] Mahkamah Rayuan bersetuju dengan dapatan Mahkamah Tinggi bahawa pindaan kepada Akta Keselamatan Sosial Pekerja 1969 yang menghalang tuntutan terhadap rakan sekerja yang berkuatkuasa pada 1 Julai 1992 adalah tidak terpakai kerana kemalangan berlaku dan tuntutan difail lama sebelum tarikh tersebut.

[2] Mahkamah Rayuan bersetuju dengan Mahkamah Tinggi bahawa ada hubungan istimewa antara perayu dan responden dan bahawa wujud kewajipan berjaga-jaga di pihak perayu terhadap responden. Mahkamah bagaimanapun tidak bersetuju dengan dapatan Mahkamah Tinggi bahawa terdapat kecuaian di pihak perayu.

[3] Dalam kes semasa, persoalannya adalah sama ada seorang yang munasabah, mengambilkira sifat tugas responden yang termasuk tugas meninggikan batas dan mengambil langkah-langkah untuk menyelamatkan lombong dari dibanjiri, akan berfikir bahawa melakukan kerja-kerja yang disuruh itu dalam halkeadaan yang wujud adalah sebegitu merbahaya sehinggakan membenarkan responden melakukannya atau tidak menghalang beliau dari melakukannya adalah satu kecuaian. Berdasarkan fakta, bukanlah sesuatu yang tidak munasabah untuk mendapati kecuaian di pihak perayu kerana membenarkan ataupun kerana tidak menghalang responden dari membuat kerja-kerjanya semasa kemalangan berlaku.

[4] Setiap orang berhak untuk mendapatkan rawatan perubatan di hospital pilihannya, sama ada di hospital kerajaan mahu pun swasta. Berkaitan pemberian award bagi rawatan sedemikian, sekiranya rawatan yang dibuat adalah di hospital kerajaan, jumlah yang ditanggung dan dibayar oleh orang berkenaan harus berikan award sepenuhnya. Jika orang tersebut mendapatkan rawatan di hospital swasta, ia harus membuktikan, pertama, bahawa ia mempunyai justifikasi untuk mendapatkan rawatan di situ, dan kedua, bahawa jumlah yang ditanggungnya adalah munasabah. Berhubung dengan halangan pertama, ia harus membuktikan: (a) bahawa rawatan yang beliau perlukan itu tidak terdapat di hospital kerajaan disebabkan ketiadaan peralatan-peralatan perlu atau doktor-doktor yang berkelayakan ataupun sebab-sebab lain yang memadai; (b) bahawa walaupun rawatan itu terdapat di hospital kerajaan, ia tidak dapat diperoleh dalam waktu yang munasabah mengambilkira kecemasan yang wujud bagi mendapatkan rawatan. Ini mungkin disebabkan oleh kesesakan di hospital kerajaan atau pun lain-lain sebab yang memadai; atau (c) bahawa rawatan di hospital kerajaan, walaupun ada, adalah sangat-sangat tidak mencukupi.

[5] Sekiranya mahkamah tidak berpuas hati bahawa seorang plaintif mempunyai justifikasi untuk mendapatkan rawatan di hospital swasta, maka, bergantung kepada fakta kes dan butiran-butiran perbelanjaan, mahkamah harus sama ada menolak tuntutan atau mengawardkan satu jumlah yang tidak melebihi sepertiga perbelanjaan. Prinsip sepertiga tidak ditetapkan oleh undang-undang. Ia sebaliknya adalah satu perkara amalan. Jika sepertiga juga terlampau banyak maka jumlah yang kurang dari itu boleh diawardkan.

[6] Sekiranya mahkamah berpuas hati bahawa seseorang plaintif mempunyai justifikasi untuk mendapatkan rawatan di hospital swasta, plaintif tersebut perlu membuktikan

bahawa perbelanjaan yang ditanggung dan jumlah yang dituntut adalah munasabah dengan mengambilkira perbelanjaan biasa di hospital-hospital swasta lain. Mahkamah kemudian akan mengawardkan apa yang ia anggap sebagai jumlah yang munasabah yang mungkin juga merangkum sepenuhnya jumlah tuntutan.

[7] Dalam kes rawatan di hospital swasta di Singapura, ujian yang dipakai adalah sama seperti ujian yang terpakai kepada hospital swasta dalam negara, kecuali bahawa ujian tersebut terpakai kepada hospital swasta dalam negara dan tidak kepada hospital kerajaan.

[8] Dalam kes semasa, terdapat keterangan yang banyak yang menunjukkan bahawa responden mempunyai justifikasi untuk mendapatkan rawatan lanjut di Hospital Fatimah - sebuah hospital swasta, selepas dibenarkan keluar dari Hospital Awam. Oleh itu, sekiranya liabiliti diputuskan secara yang memihak kepada responden beliau harus diberikan award yang penuh bagi perbelanjaan perubatannya itu.

[9] Responden mampu bekerja dan selepas kemalangan telah bekerja sebagai pemandu traktor dengan beberapa majikan dengan menikmati pendapatan yang lebih lumayan dari yang diperolehinya sebelum kemalangan. Beliau dengan itu tidak menanggung apa-apa kehilangan daya pendapatan.

Reported by AC Simon

Case(s) referred to:

Chin Lin Soon lwn. Mad Daud Mat Zain & Satu Lagi [1996] 1 LNS 198; [1996] MLJ U 346 HC ***(refd)***

Chong Chee Khong & Anor v. Ng Yeow Hin [1997] 4 CLJ Supp 17 HC ***(refd)***

Chong Kam Siong v. Herman Baharuddin [1995] 2 CLJ 413 HC ***(refd)***

Ellis v. Home Office [1953] 2 All ER 149 ***(refd)***

Harcharan Singh Saudagar Singh v. Hassan Ariffin [1990] 2 CLJ 393; [1990] 2 CLJ (Rep) 99 HC ***(refd)***

Hehir v Harvey [1949] SASR 77 ***(refd)***

Hj Ariffin Hj Ismail v. Mohamad Noor Mohamad [2001] 2 CLJ 609 CA ***(refd)***

Johnson v. Rea Ltd [1962] 1 QB 373 ***(refd)***

Lew Thai v. Chai Yee Chong [1997] 1 CLJ Supp 13 HC ***(refd)***

Lim Wee Heong dan Satu Lagi lwn. Nai Wah Hing dan Satu Lagi [1996] 1 LNS 232; [1996] MLJ U 394 HC ***(refd)***

Mooi Kim Ming & Anor v. Tang Sia Bak [1988] 2 CLJ 797; [1988] 2 CLJ (Rep) 30 HC ***(refd)***

Ng Aik Kian & Anor Siah Loh Sia [1997] 2 R 1996 ***(refd)***

Pengarah Institut Penyelidikan Perubatan & Anor v. Inthra Devi & Anor [1987] 2 CLJ 420; [1987] CLJ (Rep) 275 SC ***(refd)***

Peraganathan Karpaya v. Choong Yuk Sang & Anor [1996] 1 CLJ 622 ***(refd)***

Romuloo Appalasamy & Anor v. Tan Seng Kee & Anor [2000] 2 CLJ 611 HC ***(refd)***

Sambu Pernas Construction v. Pitchakkaran [1982] 1 CLJ 151; [1982] CLJ (Rep) 299 FC ***(refd)***

Suriyati Takril v. Mohan Govindasamy & Anor [2001] 2 CLJ 101 HC ***(refd)***

Tajuddin Sheikh Daud v. Wong Kim Yin [1989] 2 CLJ 237; [1989] 2 CLJ (Rep) 546 HC ***(refd)***

Tang Kia Bak v. Mooi Kin Meng & Anor (Supreme Court Civil Appeal No. 249 of 1987, Unreported) ***(refd)***

Yaakub Foong Abdullah v. Lai Mun Keong [1986] 1 CLJ 355; [1986] CLJ (Rep) 790 HC ***(refd)***

Other source(s) referred to:

Clerk & Lindsell on Torts , 17th edn, pp. 243, 246, 247

Counsel:

For the appellant - V Vijayasegaran; M/s Maxwell Kenion Cowdy & Jones

For the respondent - R Siva Dharma (Sharmini Navaratnam); M/s Matthew Thomas & Liew

Case History:

High Court : [1997] 1 CLJ 13

JUDGMENT

Abdul Hamid Mohamad FCJ:

The respondent (plaintiff in the High Court) sued the appellant for damages for negligence on the part of the appellant. The learned judge (as he then was) gave judgment for the respondent. The appellant appealed to this court. We allowed the appeal with costs in this court and in the court below.

Both the appellant and respondent were employed by Chai Kim Kong & Sons Sdn. Bhd ("the company"). The appellant was employed as a manager of the company for fifteen years prior to the accident. He was also a director of the company which was owned by his father.

The respondent was employed by the company for sixteen years before the accident. He was at first employed as a tractor driver but was promoted to be a "kepala" about three months before the accident.

It was raining heavily on the day of the accident and the town of Malim Nawar in which the tin mine in question was situated was flooded partially.

According to the respondent, after dinner, he went to the mine and saw that water in the mine pit was rising. He informed the appellant. The appellant took him in a land rover to the kongsi house. There the appellant and the respondent each took out a tractor "to do the work" in connection with the rising water.

The respondent drove a tractor to the bund. On one side of the bund was the mining pit and on the other side there was an existing mining pool. The respondent started working by increasing the level (ie, height) of the part of the bund where flood water was flowing over the bund into the mining pit. It was dark. There was no light except for the light of the tractor he was driving. The bund was built of sand and it was broad enough for a lorry or a tractor to be driven on it. His tractor's weight was ten tons.

At that time the appellant was doing similar work nearer the "kongsi" house.

The respondent increased the height of the bund by taking sand from the side of the mine and putting it on top of the bund with his tractor. While reversing his tractor to get more sand, the bund collapsed. The tractor fell into the mining pit. He was pinned down by the tractor. He shouted for help and was rescued by the workers. He suffered injuries.

The appellant had claimed and had received compensation under the Employees' Social Security Act 1969. The present claim is against the respondent as a co-employee for negligence for an "omission to do some act or acts".

The learned judge held that an action lies against a co-employee. The learned judge relied on the judgment of the Federal Court in*Sambu Pernas Construction v. Pitchakkaran [1982] 1 CLJ 151; [1982] CLJ (Rep) 299*. The learned judge noted that the amendment to the Employees' Social Security Act 1969 that bars a claim against a fellow-employee that came into force on 1 July 1992 (*vide* Employees' Social Security (Amendment) Act, 1992) was not applicable as the accident happened and the action was filed long before that date. That issue was not taken before us. I agree with the learned judge.

On the issue of liability, the learned judge said:

> Very generally, *inter alia* in connection with negligence, the general duty of care is that

one must take care not to cause injury or damage to one's neighbour, (neighbour as explained in *Donoghue v. Stevenson,* [1932] AC 562).

On the other hand, the law does not impose a general duty of care to save the neighbour from such injury or damage for which one is not responsible, save in one exception. Barring the exception, and carried to its logical conclusion, it has been said that a bystander can watch a small child drown in one foot of water without doing anything to save the child, and yet he will not have incurred any civil liability for damages, though he will be, of course, roundly condemned by all right thinking-members of society and will have to be answerable to God in due course. The law has never imposed a duty on anyone to be a "do-gooder" or a good Samaritan.

...

To continue, the exception above-mentioned is when there is a special relationship between the parties, (independently of any contractual relationship of course), where the law will impose such a duty of care in regard to such failure or neglect to save one's neighbour from injury or damage even where one is not responsible for such injury and damage to such neighbour.

When such special relationship arises, the law will impose a duty of care of a special kind, it being a duty to act affirmatively to protect the said neighbour or plaintiff from such injury or damage. Such duty to protect the plaintiff, or for that matter, such special relationship arises, it appears, from certain situations when, eg, the defendant is responsible for placing the plaintiff in a position in which it is forseeable that the plaintiff may be injured; or where the plaintiff creates a danger, even though innocently, he has failed to take steps to remedy or prevent it, see *Johnson v. Rea* [1962] 1 QB 373 (about slippery floor causing a fall). The situations just stated are not conclusive, but any other situation, to give rise to such special relationship ought to be of a similar nature, the essence being on danger.

Thus generally speaking, in other words, when any such situation exists to give rise to such duty to protect the plaintiff, the special relationship between the plaintiff and the defendant comes into being. Such special relationship has been held to arise in a good number of cases, just to give some other examples, eg. Between a carrier and a passenger; and in *Ellis v. Home Office* [1953] 2 all ER 149 (about assault on a fellow-prisoner). There was *Carmarthenshire Country Council v. Lewis* [1955] AC 549 about a 4-year old boy of a nursery school under the management of the local authority, running onto a public highway in temporary absence of the teacher, causing a fatal accident to some driver who tried to avoid the boy.

Lastly, in regard to the standard of the duty of care on a defendant in connection with the duty to protect the plaintiff imposed by law, from such actionable omission it is equivalent to or is demonstrated by what the plaintiff has to prove, according to a test laid down by Lord Dunedin in *Morton v William Dixon Ltd* [1909] CS 807, 899; "either (a) to show that the thing the defendant did not do was a thing commonly done by other persons in like circumstances or (b) to show that it was a thing which was so obviously wanted that it would be a folly in anyone to neglect to provide it". In so showing, the obviousness stated above must be such as appears to a prudent and reasonable man, see *Paris v. Stepney Borough Council,* [1951] AC 367, 382 which approved and adopted the

dictum of Lord Dunedin. The word "folly" above-mentioned refers to something which is imprudent or unreasonable, see *Cavanagh v. Ulster weaving Co* [1960] AC 145, 162 in which both Morton and Paris were approved.

The court may just as well mention here, if it is of some help, that on a given set of facts which attract the operation of the above principles, plaintiff may sue, of course, on the basis of such principles, but he may be able also to sue concurrently or in the alternative, on the basis of some other specific tort involving sometimes substantially similar principles such as an occupier's liability to an invitee or licensee etc. Overlapping of the laws exists in many fields.

To revert to the evidence and bearing in mind the applicable general principles stated above, I am satisfied, that there was fairly heavy rain on that day from 2.00 pm right up to about 8.00 pm when the mining town of Malim Nawar in which the mine was situated was even flooded partially.

I am further satisfied that there was flood water overflowing the bund and into the mining hole of the tin mine in question, and the plaintiff informed the defendant who was his superior at the mine, and the defendant had told him to remedy it by asking the plaintiff to go to the place of overflowing flood water "to have a look" at it. I am satisfied, all on balance of probabilities, that by saying so to the plaintiff, the defendant meant that the plaintiff should increase the height of the bund, and this is fortified by the defendant seeing the plaintiff take a 10-ton tractor to do the work on a bund with overflowing water, at a place in darkness save relieved somewhat by the lights of the plaintiff's tractor. Defendant never took any step to stop the plaintiff from taking a tractor to go there, he had every opportunity to do so if he wanted, while in fact, he wanted the plaintiff to do the work in question with a tractor, such work being work not done usually at night. Plaintiff wanted to save the mine from being flooded and being closed consequently for a about one week if it was flooded. Loss of profit was regarded by him as more serious than danger to life.

In the circumstances, I think with reference to some of the particulars of negligence alleged by the plaintiff in that statement of claim, that the defendant on that night had indeed failed to take any precaution (a) for safety of the plaintiff; (b) for not exposing the plaintiff to risk of injury of which the defendant knew or ought to know and (c) such precaution consisting of not instructing the plaintiff to increase the height of the bund when he knew or ought to know of any probable landslide.

Facts in this case could quite naturally constitute the situation that gives rise to a special relationship between the plaintiff and the defendant. The defendant, being under the control of the plaintiff, the mine manager, had to be on duty at the mine that night in a position that it was foreseeable that the plaintiff might be injured that night.

I further hold more specifically that the defendant had failed to take the said precaution in the following ways; (a) by failing to ask the plaintiff to stop work and (b) by failing to tell the plaintiff not to drive a tractor there to raise the height of the bund over which flood water flowed, in view of the conditions of great danger there prevailing that night as set out above. Such specified precaution "was a thing which was so obviously wanted that it would be a folly" for the defendant to neglect to provide such precaution. I find

the defendant liable."

I agree with the learned judge regarding the law. I also agree with the learned judge that there was special relationship between the appellant and the respondent and that there was a duty of care on the part of the appellant towards the respondent. However, with respect, I am unable to agree with him on his finding of negligence on the part of the appellant.

The learned judge appears to have placed a lot of emphasis on the fact that the appellant had failed to stop the respondent from driving the tractor to raise the height of the bund and for failing to tell the respondent to stop work.

I accept that the condition under which the work was being done at that time was quite dangerous, more dangerous than on normal days. But we must also remember that even under normal circumstances some works are more dangerous than others. At times the same work can be more dangerous than under normal circumstances. Does it mean that the same type of work should not be allowed to be done when it is more dangerous than under normal circumstances? I think the answer may be "yes" or "no" depending on the nature of work and the particular circumstances at that particular time.

The question is: would a reasonable man, considering the nature of work of the respondent which includes raising the bund and taking measures to save the mine from flooding, think that to do the work at the time of the accident under the conditions then prevailing was so dangerous that to allow the respondent to do it or not to stop him from doing it, constitutes negligence?

We must bear in mind that in this case the respondent himself took out a tractor under similar conditions and at the same time and was doing the same type of work himself. It goes to show that to do the work under such conditions was not so inherently dangerous that he himself would not do but asked the respondent to do. The respondent himself did not object to it. Nor did he stop work because he thought it was too dangerous. He had, prior to the date, worked in the mine for 16 years. He was an experienced worker. He himself would have known if it was too dangerous to do the work then. With greatest respect to the learned judge, I am of the view that he had not paid sufficient attention to the factors mentioned above. Had he done so, he might have come to a different conclusion. In any event, I am of the view that, on the facts on this case, it would not be reasonable to find negligence on the part of the appellant for allowing or for not stopping the respondent from doing the work he was doing at the time of the accident.

On damages two issues were raised, the first concerning an award for medical expenses at a private hospital and the second, on loss of earning capacity.

Regarding the award for medical expenses both parties agreed that the amount of RM15,028 was incurred as medical expenses by the respondent. The learned judge awarded that amount as special damages. Before us, it was argued that the full amount should not have been awarded because part of it was medical expenses incurred at a private hospital. Learned counsel for the appellant submitted that the learned judge had failed to consider whether, in the circumstances of the case, it was reasonable for the respondent to seek medical treatment at a private hospital. Instead the learned judge had imported his personal knowledge of the hospital and concluded that the amount claimed was reasonable.

On this point, this is what the learned judge said:

> The other ground for disputing liability is that 1/2 of the medical expenses was incurred in Fatima hospital instead of the Ipoh General Hospital. Fatima Hospital is a private hospital run by a Christian mission and I have every reason to believe from my 6 years as a resident Judge in Ipoh before, it has never aimed to make profit for the sake of making profit and though it is a private hospital; but it is closer to being a charitable institution. Fatima hospital is a poor man's second choice of hospital in Ipoh being unlike one of those expensive private hospitals. I do not think therefore I need even further to delve into question of reasonableness of his getting treatment at a private hospital.

It was complained that the learned Judge had imported his personal experience of his long stay in Ipoh to make the conclusion that he did regarding Fatima Hospital.

I shall now discuss the so-called two lines of authorities or two schools of thought regarding the right to get treatment at a private hospital and to be paid the full amount for it as special damages. I shall first deal with cases in which the full expenses at private hospitals were allowed.

Yaakub Foong Abdullah v. Lai Mun Keong [1986] 1 CLJ 355; [1986] CLJ (Rep) 790 was a High Court, Johor Bahru case. The plaintiff was first admitted to the General Hospital at Johor Bahru. Later he was transferred to Singapore General Hospital. The learned defence counsel submitted that the plaintiff should get himself treated at the Government Hospital in Johor Bahru because it is cheaper by half. M Shankar J (as he then was) held:

> As to this view, it is my view that a claimant is entitled to have himself treated in a private hospital if in all the circumstances that is not an unreasonable thing for him to do.

The learned judge allowed the claim. Unfortunately the learned judge did not state the facts on which he found the circumstances reasonable in that case.

In *Tajuddin Sheikh Daud v. Wong Kim Yin [1989] 2 CLJ 237; [1989] 2 CLJ (Rep) 546*, the plaintiff was transferred from the General Hospital to Fatima Hospital against medical advice. The claim for the expenses incurred at the Fatima Hospital was allowed. Based on the evidence adduced before him, Peh Swee Chin J (as he then was) found that:

> Because of the grossly inadequate attention and rather inadequate treatment, coupled with a great deal of apprehension as to the possible computation of his right leg which Dr. Mathews had told him in General Hospital, the plaintiff was simply quite entitled to try to seek great recovery from his injuries and reduce his residual disabilities by discharging himself from General Hospital and admitting himself to Hospital Fatima.

According to Chin Fook Yen JC (as he then was) in *Peraganathan Karpaya v. Choong Yuk Sang & Anor [1996] 1 CLJ 622*, an appeal against this judgment of Peh Swee Chin J was dismissed. It must have been by the Supreme Court. Unfortunately, we do not have the benefit of a written judgment of the appellate court and, therefore, we do not know the grounds for the decision.

In *Chong Kam Siong v. Herman Baharuddin [1995] 2 CLJ 413*, the plaintiff who met with an accident in Johor Bahru sought treatment at a private hospital in Singapore. Counsel for the defendant argued that the plaintiff was not entitled to compensation for hospital expenses as claimed as he acted unreasonably in discharging himself from a government hospital and not giving the medical personnel at the government hospital in Johor Bahru a chance to treat him.

On the question whether a plaintiff was entitled to medical treatment in a private hospital, James Foong J said:

> .... I am of the view that the yardstick to determine whether a claimant is entitled to medical expenses expended by him in a private hospital of his choice rather than seeking treatment from a government hospital where it is practically free, is not on whether the government hospital at that material time could or could not provide adequate care and attention to him.

The learned judge held that the plaintiff was entitled to seek medical treatment at a private hospital. The learned judge also held that because of the proximity and linkage to Singapore it was not unreasonable for a person who suffers injuries as a result of a road accident in the state of Johore to seek medical treatment in Singapore.

Chin Lin Soon lwn. Mad Daud Mat Zain & Satu Lagi [1996] 1 LNS 198; [1996] MLJ U 346 is another case involving an accident in Johore and the plaintiff sought medical treatment in Singapore. Haidar J (as he then was) held:

> Mengenai kos perubatan di Singapura pula, saya berpendapat bahawa SP1 berhak mendapat rawatan yang sebaik-baiknya bagi kecederaan yang dialami oleh beliau dan memandangkan bahawa Singapura adalah berdekatan dengan Johor, saya berpendapat kos perubatannya di Singapura boleh dituntut oleh SP1.

In short, he was of the same view of James Foong J in *Chong Kam Siong (supra)*.

Lim Wee Heong dan Satu Lagi lwn. Nai Wah Hing dan Satu Lagi [1996] 1 LNS 232; [1996] MLJ U 394 is another Johore case. The plaintiff was rushed to a government hospital but two days later, at his request, transferred to a private hospital for treatment. Mohd Ghazali H (as he then was), *inter alia* held:

> Saya tidak dapat menerima desakan peguam pihak defendan bahawa perbelanjaan perubatan hospital swasta yang dituntut seharusnya dikurangkan sebanyak satu pertiga. Plaintif kedua telah meninggalkan hospital awam tersebut dan membawa bersamanya plaintif pertama apabila ia berpendapat rawatan yang ia terima daripada hospital awam itu tidak sempurna dan tidak memuaskan baginya; ia telah menjelaskan ia khuatir kakinya akan dikerat dan berpendapat ada kemungkinan kakinya dapat diselamatkan dengan rawatan yang lebih rapi di hospital lain. Dalam keadaan demikian, saya berpendapat adalah munasabah baginya membawa anaknya sekali untuk menerima rawatan bersamanya di hospital lain. Saya berpendapat apa yang telah dinyatakan di dalam kes *Tan Sia Bak v. Mooi Kim Ming & Anor* merupakan dikta sahaja dan soalan sama ada ianya terpakai hendaklah tertakluk kepada fakta yang terdapat di dalam sesuatu kes dan tidak seharusnya dipakai secara am. Memandangkan demikian, saya membenarkan tuntutan plaintif pertama bagi perbelanjaan perubatan hospital swasta

tersebut tanpa apa-apa pengurangan.

It should be noted that the learned judge did not say that he considered it an absolute right of a person to seek medical treatment at a private hospital and get compensated in full for it. Instead he considered the reasons why the plaintiff got himself discharged from the government hospital and went to the private hospital and he found the reasons to be reasonable.

Romuloo Appalasamy & Anor v. Tan Seng Kee & Anor [2000] 2 CLJ 611 is another High Court of Johor Bahru case. In that case, after the accident, the respondent (plaintiff in the Sessions Court) was admitted to the Sultanah Aminah Hospital and was treated for 32 days. The respondent then sought treatment at Mount Elizabeth Hospital in Singapore for 67 days. On the question whether the medical expenses incurred at the private hospital in Singapore, Sulong Matjeraie JC (as he then was), confirming the judgment of the Sessions Court judge, allowed it in full.

The learned judicial commissioner considered the following factors in coming to the conclusion that he did:

(1) Although the respondent had spent 32 days in Johor Specialist Hospital his condition was still critical;

(2) Although there was a gazetted Nephrologist at the General Hospital Johor, the respondent was not sent there as the General Hospital did not have the machines;

(3) The Johor Specialist Hospital could not treat patient with renal wound;

(4) The respondent did not stay at Mount Elizabeth Hospital for any longer period than necessary

The learned judicial commissioner concluded:

Applying the authorities herein before provided by the judgments of the learned James Foong J in *Chong Kam Siong v. Herman bin Baharuddin* and the unreported case of *Chin Lin Soon v. Mat Daud bin Mat Zain & Anor* (JBHC CS No. 23-151-1993) as decided by Haidar J (as he was then), which with respect this court prefer to follow, the respondent should be given the opportunity to get the best medical treatment available. This is his basic right and because of the proximity of Singapore to Johor it is therefore not unreasonable for the respondent to go to Mount Elizabeth Singapore to seek treatment. He has produced the necessary invoices for the expenses incurred, which again are also not unreasonable and as such should be fully paid by the appellant.

Even applying solely the principle of reasonableness on the claim of medical expenses incurred in private hospital, this court is of the view that as the Johor Specialist Hospital cannot treat patient with renal wound and although the General Hospital may have a gazetted Nephrologist but as it did not have the necessary machine, it is only reasonable for the respondent to go to Mount Elizabeth Hospital Singapore, where they have the necessary expertise and facilities. Further, the fact that the respondent was unconscious for more than 30 days at the Johor Specialist Hospital and for the other reasons outlined above it is only reasonable that he be allowed to go to Mount Elizabeth Hospital,

Singapore.

As can be seen, while the learned Judicial Commissioner said that he preferred the view expressed by James Foong J in *Chong Kam Seng (supra)* and Haidar J (as he then was) in *Chin Lim Soon (supra)*, the learned Judicial Commissioner also applied "the principle of reasonableness" and, on the facts, found that it was reasonable, under the circumstances for the respondent (in that case) to seek treatment at the private hospital in Singapore and he also found, as a fact, that the expenses incurred was reasonable.

In *Suriyati Takril v. Mohan Govindasamy & Anor [2001] 2 CLJ 101*, another Johor Bahru High Court case, Abdul Malik Ishak J had occasion to consider the issue again. In that case, the Sessions Court, *inter alia*, awarded the appellant RM3,000 for the appellant's cost of a knee replacement surgery at a government hospital although the appellant requested for the surgery at a private hospital. The learned judge relied on *Yaakub Foong bin Abdullah (supra)* and *Chong Kam Siong (supra)* and held that "a victim of a road accident need only show a semblence of reasonableness to be entitled to seek medical treatment at a private hospital". The learned judge also found the RM11,000 as recommended by two private specialists for the costs of the appellant's knee replacement surgery at a private hospital was reasonable. From the judgment it appears that the only reason why the appellant wanted the surgery to be done in a private hospital was because "it could be done fast."

It is to be noted that even amongst cases where the full amounts for medical expenses at private hospitals were allowed, there exists two approaches. The first is that a person has an absolute right to seek medical treatment at a private hospital and get compensated in full for it. He does not have to prove that the reasons for his seeking medical treatment at a private hospital is reasonable, or that the expenses incurred is reasonable. This is the approach taken by James Foong J in *Chong Kam Seng (supra)* and Haidar J in *Chin Lin Soon (supra)*.

On the other hand, the other approach is that plaintiff is entitled to be compensated in full for medical expenses in a private hospital if it is reasonable. The question then is: what is it that should be reasonable? Is it the reasons for seeking medical treatment at a private hospital or the amount charged by the private hospital and claimed by the plaintiff or both? In *Yaakub Foong bin Abdullah (supra)*, Shankar J. appears to have considered the reasons for getting treatment at a private hospital. In *Tajuddin bin Shaik Daud (supra)*, Peh Swee Chin J very clearly considered the reaosns for getting treatment at a private hospital, in particular "the grossly inadequate attention and rather inadequate treatment coupled with a great deal of apprehension as to the possible amputation of his right leg...." Similarly, in *Lim Wee Heong (supra)* and in *Romuloo Appalasamy & Anor (supra)* Mohd Ghazali J and Sulong Matjeraie JC respectively, also considered the reasons for seeking medical treatment at a private hospital. From these cases it appears that once the court is satisfied that the reasons for seeking medical treatment at a private hospital is reasonable, then the amount charged by the hospital and claimed by the plaintiff should be allowed in full. However, Sulong Matjeraie did mention that based on the invoices produces, he was also satisfied that the expenses incurred was also reasonable. The courts do not appear to consider whether even if the reasons for seeking medical treatment at a private hospital is reasonable, the amount charged and claimed is reasonable, taking into consideration the "normal" charges for similar treatment in other private hospitals.

I shall now consider "the other line of cases," ie, where the claim is not allowed at all or where only part of the claim is allowed. In *Pengarah Institut Penyelidikan Perubatan & Anor*

v. Inthra Devi & Anor [1987] 2 CLJ 420; [1987] CLJ (Rep) 275 (SC), the trial judge had, *inter alia*, awarded RM80,000 as general damages and RM46,152 as cost of plastic surgery and RM10,500 as cost of psychiatric therapy at a private clinic. On appeal, the Supreme Court disallowed both the awards in respect of plastic surgery and psychiatric therapy as the treatment was available in any government hospital and they should be regarded as absorbed in the award for general damages.

In *Mooi Kim Ming & Anor v. Tang Sia Bak [1988] 2 CLJ 797; [1988] 2 CLJ (Rep) 30* (HC), the second plaintiff had discharged himself from the government hospital against medical advice and had admitted himself into a private hospital on the same day. Anuar J (as he then was) held that the second plaintiff's action of discharging himself from a government hospital and readmitting himself into a private hospital could not be regarded as unreasonable. The reason given by the learned Judge was that the plaintiff "did so apparently to get better treatment at Hospital Fatimah." He therefore allowed the claim for the medical expenses incurred by him for the treatment at Fatimah Hospital, the same hospital in issue in the instant appeal.

But, Abdul Malek Ahmad J (as he then was) in *Harcharan Singh Saudagar Singh v. Hassan Ariffin [1990] 2 CLJ 393; [1990] 2 CLJ (Rep) 99* (HC), pointed out that the case under discussion went up to the Supreme Court under the name of *Tang Kia Bak v. Mooi Kin Meng & Anor*, Supreme Court Civil Appeal No. 249 of 1987. According to Abdul Malek Ahmad J the Supreme Court held that "where a plaintiff transfers himself from the general hospital to a private hospital on his own, he should only be entitled to one-third of the amount claimed." Unfortunately we did not have the advantage of reading the judgment of the Supreme Court.

In *Harcharan Singh Saudagar Singh v. Hassan Ariffin [1990] 2 CLJ 393; [1990] 2 CLJ (Rep) 99* after the accident, the plaintiff was immediately rushed to Teluk Intan District Hospital and then taken by ambulance to the Ipoh General Hospital. There he was told that his leg might have to be amputated. His family immediately transferred him to a private hospital. The private hospital is Fatima Hospital, the same hospital as in the instant case.

Abdul Malek Ahmad J (as he then was) held that, as for medical expenses, since the plaintiff had transferred himself from the General Hospital to a private hospital on his own accord, the award must be reduced. How much was it reduced to? The headnote says that only two-thirds of the amount claimed was allowed. The judgment on that point, with respect, is quite difficult to follow even though my understanding is that only one-third was allowed, following *Tang Kia Bak v. Mooi Kim Ming & Anor* (Supreme Court Civil Appeal No. 249 of 1987.

In a subsequent case of *Peraganathan Karpaya v. Choong Yuk Sang & Anor [1996] 1 CLJ 622* Chin Fook Yen JC cited *Harcharan Singh Saudagar Singh's (supra)* case as awarded one-third of the amount claimed only. I take it that Abdul Malek Ahmad J had awarded one-third of the amount claimed in *Harcharan Singh Saudagar Singh's (supra)* case.

The next case is *Peragnathan Karpaya (supra).* In this case the plaintiff who was unconscious was brought to Teluk Intan District Hospital after the accident. His father arranged for a transfer to Fatima Hospital (again the same hospital in question) after being informed that the plaintiff's leg was to be amputated and his request to transfer to Ipoh General Hospital was turned down. Chin Fook Yen JC held:

> It is my opinion that when the Court is called upon to determine whether or not the expenses incurred in a private hospital should be allowed in such cases, it should not rely on medical advice solely as such, but whether in this particular circumstances of the case, the hospital concerned is ready and able to provide adequate facilities, expertise and treatment to the patient. In this connection, Dr. Awtar Singh (DW2) testified "There is nothing in the records to indicate that the (plaintiff's) leg was to be amputated. If such advice was given it would be recorded in the medical records. In normal cases, where the District Hospital cannot handle the case, it will be referred to General Hospital Ipoh, as the latter has a Resident Orthopaedic Surgeon." In the instant case, it turned out that there was no necessity to have the plaintiff's leg amputated. The plaintiff had not produced any evidence to satisfy the Court that the state of affairs existed in T/I Dt. Hospital then to give rise to such apprehension. The case of Tajuddin and this case are distinguishable. The claim of RM11,629.90 is therefore reduced to RM4,000 (round figure).

The next case is another Johor Bahru case and that is the case of *Ng Aik Kian & Anor Siah Loh Sia* [1997] 2 R 1996). In that case, the plaintiff was admitted to the Hospital Sultanah Aminah for less than an hour and initial treatment was provided by the nurse. No evidence was adduced to show that Hospital Sultanah Aminah had no facilities like that of a private hospital. Abdul Malik Ishak J held:

> It would be most unfair for this Court to speculate whether the treatment accorded by Hospital Sultanah Aminah was inadequate as there was no evidence adduced in that direction.

Following *Peraganathan Karpaya (supra)*, the learned judge awarded one-third of the amount claimed. However, we have seen that in a subsequent case, *Suriyati Takril v. Mohan Govindasamy & Anor (supra)*, the learned Judge appears to have changed his mind on the issue.

In *Chong Chee Khong & Anor v. Ng Yeow Hin [1997] 4 CLJ Supp 17*, learned counsel for the defendant submitted that the court should allow only one-third of the amount claimed for medical expenses at a private hospital. The learned counsel relied on *Peraganathan Karpaya (supra)*. RK Nathan JC (as he then was) had this to say:

> On principle, I accept and endorse the view expressed by my learned brother, Chin Fook Yen JC. I decline to follow the decision in *Chong Kan Siong v. Herman bin Baharuddin* Mallal's Digest 609 (May 1992) relied on by the plaintiff, where according to the editor's note, the learned Judge is reported to have allowed a claim of RM43,070 which was equivalent to the sum spent by the plaintiff who discharged himself form a Government hospital in Johor Bahru and had himself admitted to a Singapore hospital. His Lordship is reported to have held that the hospital in Singapore should be treated like other private hospitals in Malaysia and thereby allowing for the full medical expenses.
>
> The District Government hospitals of today are equipped with sufficient manpower and equipment to treat victims of accidents. However, if further expertise or sophisticated equipment are required in a particular case, the victim is invariably sent by ambulance to the main referral centre in the State. Therefore it cannot be gainsaid that treatment from Government hospitals is second to none. Needless to say that paying patients of private hospitals are accorded personal facilities and accommodation in conformity with their

> paying status. What should be considered by the Court is the treatment accorded, not the accommodation provided.
>
> In any event, in the case before me, the reason the 1st plaintiff went to the Tawakal Hospital where he expended a sum of RM15,429 was because the University Hospital did not attend to an injury to his right leg. Yet, he did not provide any report or letter from Tawakal Hospital to show that such was indeed the case. A mere assertion without documentary evidence must result in this Court rejecting this claim totally.

The claim for medical expenses at the private hospital was dismissed.

In *Hj Ariffin Hj Ismail v. Mohamad Noor Mohamad [2001] 2 CLJ 609*, this Court dismissed the claim for medical treatment in London on a number of grounds including that the treatment could have been done in Malaysia.

We see that in this line of cases, there is one judgment of the Supreme Court *(Pengarah Institut Penyelidikan Perubatan & Anor. (supra))* which did not allow medical expenses at a private hospital (Fatima Hospital) because the treatment was available at a government hospital. There is another judgment of the Supreme Court (*Tan Kia Bak (supra)*) that allowed only one third the amount claimed because the plaintiff transferred himself to a private hospital (also Fatima Hospital) on his own accord. There is also a judgment of this Court (*Hj. Ariffin Hj. Ismail, supra*) which dismissed the claim for medical expenses in London, on the ground, *inter alia*, that the treatment could have been done in Malaysia. High Court Judges have also been following *Tan Kia Bak (supra)* and awarded one-third. However, where only a mere assertion of the expense incurred was made without documentary evidence, RK Nathan JC rejected the claim totally (*Chong Chee Khong (supra)*).

It is interesting to note that both the cases that had gone up to the Supreme Court (*Tajuddin bin Shaik Daud (supra)* and *Tang Kia Bak (supra)* involve Fatima Hospital, the hospital in question in the instant appeal. In the former case the full amount was awarded. In the latter case only one-third was awarded. But, on principle, the two cases seem to me to be reconcilable. True that in *Tajuddin bin Shaik Daud (supra)*, the plaintiff transferred himself to Fatima Hospital against medical advice from the General Hospital, but the learned High Court judge (whose judgment was confirmed by the Supreme Court but we do not have the written judgment of the Supreme Court) found as a fact that under the circumstances the plaintiff was "simply quite entitled" to get himself admitted to Fatima Hospital. In *Tang Kia Bak (supra)* the reason for the transfer is not known and the Supreme Court awarded one-third. So, there is really no conflict in principle as far as the two judgments of the Supreme Court are concerned. Even the other Supreme Court judgment in *Pengarah Institut Penyelidikan Perubatan (supra)* is also reconcilable: if the treatment is available at the government hospital, then the plaintiff is not entitled to seek medical treatment at a private hospital.

All the other cases from both lines, except for two High Court judgments, seem to follow the same principle ie, a plaintiff is not entitled to seek medical treatment at a private hospital if the treatment is available at the government hospital or if the treatment is not inadequate. Such allegation must be proved in every case.

I have mentioned earlier that there are two High Court decisions that say that a claimant is

entitled to medical expenses expended by him in a private hospital of his choice as a matter of right. The cases are *Chong Kam Seng (supra)* and *Chin Lin Soon (supra)*. From the earlier discussion of the authorities, in particular, in view of the three decisions of the Supreme Court ie, *Institut Penyelidikan Perubatan & Anor (supra)*, *Tang Kia Bak (supra)* and even *Tajuddin bin Shaik Daud (supra)* and the judgment of this Court in Hj. Ariffin Hj. Ismail, not to mention the judgments of the High Court, that view clearly cannot stand.

In my view, if a person is spending his own money, he has every right to seek medical treatment wherever he wishes. But, when he is claiming from somebody else in the form of damages, it is a different matter. The question of reasonableness cannot be separated from the issue of quantum of damages. It is a matter of principle that the quantum of damages awarded must be reasonable.

I also do not think that "the semblence of reasonableness" test advocated by Abdul Malek Ishak J in *Suriyati Takril v. Mohan Govindasamy & Anor*, being the only case that talks about such test, as far as I can ascertain, can stand.

To summarise my view on the issue, every person has a right to seek medical treatment at a hospital of his choice be it at a government hospital or at a private hospital. But, when it comes to awarding damages for such treatment, if the treatment is sought at a government hospital, the full amount expended and paid by the person should be awarded. But, if he seeks treatment at a private hospital, he has to prove, first that he is justified to seek treatment at a private hospital and, secondly, the amount incurred is reasonable. Regarding the first hurdle that he has to cross:

> (a) He must prove that that particular treatment is not available at the government hospital either due to the unavailability of the necessary equipment or qualified doctors or other sufficient reasons; or
>
> (b) He must prove that though the treatment is available at a general hospital, it is not available within a reasonable period considering the urgency of the treatment. This may be due to the congestion at the government hospital or for other sufficient reasons; or
>
> (c) He must prove that that the treatment at the government hospital though available, is grossly inadequate. This may be due to lack of trained doctors in that particular field or for some other good reasons. As pointed out by RK Nathan JC in *Chong Chee Kong (supra)* with whom I agree, we are concerned with treatment, not accommodation.

If the court is not satisfied that the plaintiff is justified to seek treatment at a private hospital then, depending on the facts and the circumstances of each case, the court should either dismiss the claim altogether as was done by the Supreme Court in *Pengarah Institut Perubatan & Anor (supra)* and by this court in *Hj Ariffin Hj Ismail (supra)* or award an amount not exceeding one-third of the expenses as was done by the Supreme Court in *Tang Kia Bak (supra)*. It must be noted that the one-third is nowhere fixed by any written law. It is a matter of practice. If it is shown that in a particular case, even one-third is excessive, considering the expenses that otherwise would have been incurred in a government hospital, an amount less than one-third may be awarded.

Now, assuming that the plaintiff has crossed the first hurdle and the court is satisfied that the plaintiff is justified in seeking medical treatment at a private hospital, the plaintiff must prove

that the expenses incurred and the amount claimed is reasonable taking into consideration normal charges at other local private hospitals. The court may award what it considers to be a reasonable amount which may even be the full amount claimed.

Even though this case does not concern treatment at a private hospital in Singapore, in view of the number of cases, all at High Court level, particularly from Johor, that involve treatment at private hospitals in Singapore, something has to be said about it. The courts in Johor have been treating the treatment in private hospitals in Singapore as equivalent to treatment in local private hospitals for one reason only: proximity between Johor and Singapore. In my view, that is overlooking other relevant factors. No one can deny that the cost of living in Singapore is higher, salaries are higher, rentals are higher than in Malaysia. No one can deny that one Singapore dollar is more than double the value of the Malaysian Ringgit.

So, in the case of treatment at a private hospital in Singapore, it must be proved to the satisfaction of the court as in the case of treatment at a private hospital locally. Then, it must be proved that the treatment is not available at private hospitals locally, or for some sufficient reasons, the treatment at a private hospital locally is inadequate. In other words, it is the same test as that applicable to justify treatment at a private hospital locally, except that the test is applied to local private hospitals instead of a government hospital.

If the court finds that the plaintiff is not justified to seek medical treatment at a private hospital in Singapore, but is justified to seek medical treatment at a private hospital locally, the court should only award an amount similar to that which would be awarded had the plaintiff sought medical treatment at a local private hospital.

But, if the court is satisfied that the plaintiff is justified in obtaining medical treatment in Singapore, then the court should consider the reasonable amount to be awarded which may be the full amount claimed or less.

In the instant appeal, even though the learned Judge in his grounds of judgment did not refer to the facts leading to the transfer of the respondent from the Ipoh General Hospital to Fatima Hospital but appears to have imported his personal knowledge regarding the expenses charged by Fatima Hospital, there is ample evidence to show that the respondent was justified in obtaining medical treatment at the Fatima Hospital. The respondent was hospitalised for 73 days at the Ipoh General Hospital where he underwent one major operation to his hand. No operation was done to the plaintiff's leg at the Ipoh General Hospital from the date of admission on 15 October 1982 until the date of his discharge on 26 December 1982. Indeed only after he was discharged from the Ipoh General Hospital that he on 30 December 1982 (4 days after the discharge) was admitted to Fatima Hospital. There muscle flap and skin graft operation was done to his right leg and he was discharged on 10 February 1983. He was again readmitted to Fatima Hospital on 25 April 1983 and underwent a vasculorised pedicle fibular graft and bone graft operation to bridge the bone gap in the right tibia. He was discharged on 23 July 1983. On 17 December 1984 he was again readmitted at the Fatimah Hospital on 17 December 1984. A third operation was done to remove screws, dead bone and necrotic tissue from the right leg. Garamycin beads were inserted along the infected right tibia. He was discharged on 4 February 1985. Altogether he was hospitalised at Fatimah Hospital for 183 days.

During his stay at the Ipoh General Hospital of 73 days, no operation was done to his leg.

Instead, he was discharged to follow up weekly at the clinic only for wound inspection.

So, there is ample evidence that he was justified in seeking further treatment at the Fatimah Hospital after his discharge from the General Hospital. Regarding the amount, it was agreed by both parties. In the circumstances, had liability been found in the respondent's favour, he should have been awarded the full amount of RM15,028 for medical expenses.

The other point argued was that the learned judge should not have awarded the sum of RM10,000 as damages for loss of earning capacity. The reason forwarded was that five years after the accident the respondent started working and was earning more than before the accident. This is what the learned judge said in his judgment.

"As for claim for loss of earning capacity, it cannot be awarded for taking the place of loss of future earnings where the latter is not justifiable by evidence. However as a mining worker for many years, he did not seem to have done any other type of work, and with the mining industry being on an irretrievably sharp decline, there is a residual risk, I am satisfied, the plaintiff will find himself somewhat handicapped to get work that would give him a good income as a mining worker, what with the weakness of the right leg, stiffness of the right ankle and some slight shortening. I award a sum of $10,000 as damages for loss of earning capacity."

From the respondent's own evidence, he was earning RM512 per month before the accident. After the accident he stopped working for 5 years and 8 days. He resumed work on 22 October 1987 as a tractor driver with one Chai Yew Kee, getting RM18 per day but later increased to RM20 per day. He worked for about 26 days a month. After that he worked for Kinta Amang Company getting a basic salary of RM600 and was paid allowance when working outside. He was getting between RM800 to RM900 a month. On 1 January 1990 he went to work with Peking Tin Mine getting RM30 a day plus RM100 allowance per month and a further 30 as food allowance. He worked for 26 days a month. Then he went to work with a company called Lad & Tun at Batu Gajah. There he was paid RM700 a month with overtime allowance of RM200 per month. After that he went back to work with Peking Tin Mine he was paid RM30 per day and food allowance of RM200 per month, also as a tractor driver.

I am of the view that, even if we have dismissed the appeal on liability, we would have allowed the appeal on the issue of loss of earning capacity. This is because the respondent who, at the time of the accident was a tractor driver was able to work and indeed worked as a tractor driver with a number of employers after the accident and was earning more than before the accident. In the circumstances I do not think that he had suffered any loss of earning capacity. The appeal is allowed with costs here and in the court below. The deposit is refunded to the appellant.

My brother Mohd. Noor Ahmad had read this judgment and had agreed with it. My brother Abdul Aziz Mohamad will prepare a separate judgment.