Mohd Taufikafifi bin Abdul Talib & 2 Ors
v
Mohamad Azza bin Mohamad Zaini & Anor

Sessions Court, Ipoh – Summons No. A53KJ-120-03/2014
D Sunita Kaur Jessy scj

[6] Quantum – *Abdomen – Intra-abdominal injury – Abrasion and laceration – Laceration wounds and abrasion – Laceration wound over left temporal parietal region – Head – Heamatoma with base skull fracture – Concussion syndrome – Bilateral parasymphysis mandible fractures – Upper limb – Fracture distal end of left radius – Muscle wasting*

Quantum – *Fatal accident – Dependency claim*

Date of accident
October 20, 2011

Date of grounds of judgment
May 20, 2015

Judgment received
July 20, 2017

Brief description of plaintiff's injuries

(First plaintiff)
1. Bilateral parasymphysis mandible fractures
2. Concussion syndrome
3. Fracture distal end of the left radius
4. Laceration wounds and abrasion

(Third plaintiff)
1. Heamatoma with base skull fracture
2. Intra-abdominal injury
3. Laceration wound over the left temporal parietal region

Disabilities

(First plaintiff)
1. Muscle wasting in the left arm
2. Stiffness of the wrist
3. Swelling of the left wrist with deformity
4. Unable to lift heavy weights or use force with the left arm
5. Weakness of the left hand grip with Grade 3 muscle power

(Third plaintiff)
1. Tenderness of the cervical spine

Plaintiff's age

(a) As at date of accident : NA
(b) As at date of hearing : NA

Plaintiff's occupation

(a) As at date of accident : NA
(b) As at date of hearing : NA

Plaintiff's earnings

(a) As at date of accident : NA
(b) As at date of hearing : NA

Liability

Plaintiffs' claim dismissed; counterclaim by defendants, dismissed

Award (Based on 100% liability)

(First plaintiff)
1. *General damages*
   (a) Bilateral parasymphysis mandible fractures – RM15,000.00
   (b) Concussion syndrome – RM 5,000.00
   (c) Fracture distal end of the left radius (Note: The plaintiff as a result suffers from swelling of the left wrist with deformity, stiffness of the wrist, weakness of the left hand grip with Grade 3 muscle power and inability to lift heavy weights or use force with the left arm) – RM20,000.00
   (d) Laceration wounds and abrasion – RM 3,000.00
   (e) Muscle wasting in the left arm – RM 3,000.00

2. *Special damages*
   (a) Cost of treatment (RM30.00 x 19) – RM 570.00
   (b) Loss of earnings (RM1,300.00 x 2 months) – RM 2,600.00
   (c) Medical expenses – RM 1,156.00
   (d) Travelling expenses incurred by the plaintiff's family whilst visiting the plaintiff at the hospital (11 times) – RM 200.00

(Second plaintiff)
1. Funeral costs – RM 3,000.00
2. Loss of support (RM100.00 x 12 x 16 years) – RM19,200.00

(Third plaintiff)

1. *General damages*
   (a) Heamatoma with base skull fracture and tenderness of the cervical spine – RM15,000.00
   (b) Intra-abdominal injury – RM10,000.00
   (c) Laceration wound over the left temporal parietal region – RM 1,000.00

2. *Special damages*
   (a) Follow up treatment (RM30.00 x 5 times) – RM 150.00

Note

An appeal was lodged by the plaintiffs at the High Court against the Sessions Court's finding on liability and quantum.

Interest

(a) 2.5% per annum on special damages from date of accident until date of judgment.
(b) 5% per annum on general damages from date of service of summons until date of judgment.
(c) 5% per annum on total judgment sum from date of judgment until date of full settlement.

Cases referred to by the court

Ahmad Syafiq b Kamarulzaman & Anor v Chew Kim Seong [2010] 1 PIR [21], sc
Annamalay Retnam v Mah Chong Peng & Anor [2010] 6 AMR 193; [2010] 6 CLJ 487, CA
Chang Chong Foo & Anor v Shivanathan Perumal [1992] 1 AMR 119; [1992] 4 CLJ 1939, SC
Dang Lay Heng v Balakrishnan a/l Munusamy & Anor [2010] 1 PIR [49], sc
Dato' Seri Anwar Ibrahim v Datuk S Nallakaruppan & 2 Ors [2014] 1 AMR 647; [2013] 1 LNS 991, HC
Lee Hock Lai v Yeoh Wah Pein [1998] AMEJ 0310; [1999] 5 MLJ 172; [1998] 1 LNS 364, HC
Lim Ah Toh v Ang Yau Chee & Anor [1969] 2 MLJ 194
M Kumaresan a/l Muniandy v Gan Yew Peng [2011] 2 PIR [35], sc
Mariam bt Mansor v JD Peter [1975] 1 MLJ 279
Md Shaat b Abd Jalil v Rusita bt Jerai & Anor [2011] 2 PIR [59], sc
Muhammad Iqmal b Mohd Idrus (seorang budak yang menuntut melalui bapanya dan sahabat wakilnya, Mohd Idrus b Mohd Nor) & Anor v Masjudin b Muhammad Ali & Anor [2012] 1 PIR [23], sc
Muhammad Wafi b Mahayadin v Logeswaran a/l Subramaniam & 3 Ors [2011] 2 PIR [79], sc
Nasuruddin b Amsa & Anor v Muhamad Zul Helmi b Abdul Rahim [2009] 1 PIR [43], sc

Norazira bt Adnan & Anor v Abd Hadi Kamil b Mukhtar & Anor [2011] 1 PIR [7], sc
Ong Ah Long v Dr S Underwood [1983] CLJ 300
Robins v National Trust Co [1927] AC 505, PC
See Keng Wah v Lim Tew Hong [1957] MLJ 137
Zaini bt Hasan (isteri atau balu yang sah mendakwa tuntutan ini sebagai tanggungan dan benefisiari kepada Ahmad b Ismail, si mati) & 4 Ors v Thangaraja a/l Sanmugam & Anor [2011] 1 PIR [67], sc

Legislation referred to by the court

Civil Law Act 1956, s 7
Evidence Act 1950, s 74
Road Transport Act 1987, s 41(1)

Other references

Compendium of Personal Injury Awards

Solicitors

Amarjit Singh (Darshan, Syed, Amarjit & Partners) for plaintiffs
V Anushia (V Anushia & Assoc) for defendants

D Sunita Kaur Jessy scj

Introduction

[1] This accident occurred at a traffic light junction at Jalan Baru Bemban, Batu Gajah on October 20, 2011 at 11.00 a.m. involving a car driven by the first plaintiff (Mohd Taufikafifi bin Abdul Talib) (No. AGG 5745) and a lorry trailer driven by the defendant (No. BXD 6795). Both parties alleged that the traffic light was green at their respective lanes.

[2] As a result of the collision, the first and third plaintiff sustained injuries whilst another passenger (Mohd Sazmi bin Mohd Zahir) died at the scene. The plaintiffs now claim for their injuries and dependency (for the second plaintiff) against the defendants.

[3] Liability was decided 100% against the first plaintiff and the claim was dismissed with the usual costs and interests. The counterclaim by the defendant was also dismissed with cost. The plaintiffs filed an appeal against this decision on the issue of liability and quantum.

Plaintiff's version

[4] The first plaintiff allege that the traffic light at the junction on his side was green and as he was turning right, the defendant collided into his car.

Defendant's version

[5] The defendant's version is that the traffic light on his side was green and when he was driving past the junction, the collision occurred.

Findings of this court on liability

[6] The first plaintiff was the driver of the car with two passengers (the second plaintiff sustained injuries and the third plaintiff as the dependant of Mohd Sazmi bin Mohd Zahir (deceased)). The investigation officer testified that based on his investigation he could not confirm with certainty which side of the junction light was green.

Q – Arah perjalanan kereta?

Kereta dari atas belok ke kiri di rajah. Lori trailer dari bawah ke atas menurut rajah.

Q – Kawasan kemalangan adalah persimpangan lampu isyarat. Kawasan persimpangan ini adakah kecil atau besar?

Ia biasa sahaja.

Q – Kawasan itu ada trafik light?

Ya. Masa kemalangan itu tiada kamera.

Q – Bolehkah kamu pastikan lampu mana hijau atau merah?

Masa kemalangan tidak boleh pasti. Saya datang bila kemalangan telah berlaku.

Q – Adakah saksi bebas?

Tiada. Cuma ada rakam percakapan oleh Insp Carelo. Saya tiada pengetahuan mengenai apa yang di rakam yang saya tahu ada saksi.

Q – Akhirnya mengikut hasil siasatan dan keputusan?

Kes dibicarakan di Mahkamah Majistret di kenakan penjara dua tahun dan denda s 41. Selepas itu kes dirayu di Mahkamah Tinggi dan ke Mahkamah Rayuan.

[7] Based on this, there is no certainty which side of the junction the light was green. The subsequent investigation officer, Inspector Carelo (as this was a fatal accident) was never called to testify. Inspector Carelo was the main investigation officer and should have been called as a witness. He would have been able to testify on the independent witness and the entire investigation.

[8] The initial investigation officer ("SP1") confirmed that there was an independent witness present at the scene. Inspector Carelo could have verified the presence of the independent witness and as to why a charge under s 41(1) of the Road Transport Act 1987 was preferred against the first plaintiff. SP1

testified that he merely conducted the initial investigation but the subsequent investigation was continued and completed by Inspector Carelo:

> Saya jalankan siasatan awal. Apa yang saya buat dalam kes ini di tempat kejadian ialah rakam gambar, lakar rajah kasar dan kunci, kerosakan kenderaan dan cuba dapat saksi bebas di tempat itu. *Ya ketika itu ada seorang lelaki yang lihat dan saya catit nama dia. Saya jumpa saksi ini di tempat kejadian. Nama saksi ini ialah Abdul Latif bin Faizal Din*. Alamat dia saya tidak tahu cuma ambil No. talifon dia 0123764113. Statement saya tidak ambil dari saksi ini. *Percakapan saksi ini diambil oleh Insp Carelo*.
>
> Q – Adakah jumpa kesan serpihan di jalan?
>
> Ya ada di tempat kemalangan di mana ia berlaku. Impak perlanggaran adalah di sebelah kiri. Gambar kereta ini dijumpai di tebing kiri antara jalan susur dan jalan lurus. *Ketika kemalangan pemandu kereta jika ada lesen saya tidak pasti. Semua jawapan ini boleh diberikan oleh Insp Carelo*.
>
> *Q – Kamu jumpa saksi ini ditempat kejadian?*
>
> *Ya saksi berada di tempat kejadian*.

[9] Inspector Carelo would have been able to inform this court of his complete investigation on this accident as he recorded the statement of the independent witness. There were questions left unanswered by the failure to call the main investigation officer especially on the preferred charge of s 41(1) against the first plaintiff for reckless and dangerous driving, s 41(1) of the Road Traffic Act 1987:

> 41. (1) Any person who, by the driving of a motor vehicle on a road recklessly or at a speed or in a manner which having regard to all the circumstances (including the nature, condition and size of the road, and the amount of traffic which is or might be expected to be on the road) is dangerous to the public, causes the death of any person shall he guilty of an offence and shall on conviction be liable to a fine not exceeding ten thousand ringgit or to imprisonment for a term not exceeding five years or to both.

[10] This is a serious charge preferred against the first plaintiff and the investigation officer should have been called to testify on this. It is more crucial because there was evidence to show that the first plaintiff was convicted and sentenced accordingly under this section for reckless and dangerous driving. The conviction was subsequently affirmed by the High Court of Ipoh on appeal.

[11] The plaintiff testified when the light turned green on his path, he was turning right when the defendant's lorry collided into him. This version contradicts what the defendant contends. Therefore for this court to accept either version it must substantiated by evidentiary proof. The other passengers in the car, could not testify with certainty of the light being green on their side, therefore the independent witness who was present at the scene would have been helpful had he been called give the truth as to whose side the light was

green. Although the independent witness did not lodge a police report on this accident but he did give his statement to Inspector Carelo. Therefore Inspector Carelo should have been called to testify and confirm his investigation on this accident. The plaintiff's failure to call Inspector Carelo was fatal as the burden lies on the plaintiff to prove its case.

[12] The passenger (third plaintiff) in the first plaintiff's car was not able to tell with certainty as to whose side was the light green. The failure to call Inspector Carelo and the independent witness together with the evidence from other witnesses called by the plaintiff failed to prove their case on liability against the defendant. No reasons were given as to why these witnesses were not called. This court cannot assume that the light on the plaintiff's side was green. Reference to the evidence given by the third plaintiff (passenger) in the car:

> Q – Kamu lihat kemalangan itu?
>
> Ya. Saya sedar lori itu langgar kita dan lori itu brek dari jauh. Jarak lihat lori brek dari sini ke sana pintu depan mahkamah. Lori itu belum keluar dari simpang dia. Saya tidak dengar bunyi brek.
>
> Q – Walaupun kamu lihat lori brek dari jauh tapi kawan kamu tidak lihat?
>
> P1 tidak lihat saya lihat. Dia tidak bercakap dengan abang.
>
> Q – cdng – Memandangkan kamu lihat lori brek jadi P1 cuai?
>
> Tidak.

[13] This witness could only verify seeing the lorry applying brakes but nothing significant to show with certainty on the issue of whose side the light was green. Although this witness testified that the light on his path was green, the defendant also states the same. Therefore it can only be the duty of the plaintiff to show on a balance of probability that his side the light was green. The plaintiff must proof what it asserts and not for the defendant to rebut the allegation.

[14] The sketch plan shows long brake marks by the defendant in its own path. The defendant could not be located during trial and this was confirmed by the adjuster. However, by looking at the long brake marks again I find that there is a high probability that the light on his path was green and when he saw the plaintiff's car suddenly making a turn, he applied brakes which resulted in the long brake marks. This cannot be a situation where the defendant lorry was beating the red light (from a distance) which would in all probability caused it to collide into a few cars at the very least. In this instance only the plaintiff's car was involved in the collision. The other possibility would be that the fact there was an independent witness at the plaintiff's side (and he testified in the criminal trial) shows that the light at their side was red

otherwise all vehicles would have moved on and away and there would have been no witness at all. The independent witness was there at the traffic light (his position was beside the plaintiff) and he confirmed it was red. This shows it was highly probable that it was the first plaintiff who drove past the traffic light junction when the light was red.

[15] The defendant then tendered the notes of evidence from the Magistrate's Court on the charge of s 41(1) of the Road Traffic Act 1987. This was allowed by virtue of s 74 of the Evidence Act 1950 (Act 56) as follows:

> 74. *Public documents*
>
> The following documents are public documents:
>
> (a) Documents forming the acts or records of the acts of –
>
> (i) The sovereign authority;
>
> (ii) Official bodies and tribunals; and
>
> (iii) Public officers, legislative, judicial and executive, whether Federal or State or of any other part of the Commonwealth or of any foreign country;
>
> And
>
> (b) Public records kept in Malaysia of private documents.

[16] From the notes of evidence the following were noted as evidence from the said independent witness (Abdul Latif bin Faizal Din):

> saya daripada rumah abang dari Ipoh hendak ke Batu Gajah ziarahi kubur ayah saya di sini. Sampai di simpang jalan saya ingin belok ke kanan. Sesampai saja, lampu merah. Saya naik motor masuk celah antara dua kereta, satu nak belok ke kanan. Satu nak ke atas terus. ***Kereta viva sebelah kanan saya belok ke kanan dengan laju tapi saya lihat trafik light masih merah***. *Kemudian kemalangan berlaku, saya dengar bunyi perlanggaran yang kuat*. Bila saya toleh, kereta dah engage dengan lori dan kereta berpusing terbalik, selepas lampu hijau saya parkir motor saya sebelah kanan, call 911 dan orang awam bantu.

[17] With this evidence it was clear that the light on the plaintiffs' side was indeed red and that would mean an absolute prohibition to move forward. However on the issue of liability, this court did not rely totally on the (notes of) evidence of the magistrate, but rather took into consideration the entire evidence here before coming to a conclusion. The plaintiff failed to show on which side the light was green as it could not have been possible for the light to be green on both sides of the junction. No reason was given as to why the independent witness was not called to testify here. Reference made to the following case:

See Keng Wah v Lim Tew Hong [1957] MLJ 137:

> The court is entitled to the best evidence available before it can be called upon for a decision and if the defendant failed to call a material witness or essential witness and did not give any explanation why such a witness was not called then, I think, the court is entitled to presume, in his absence, that the evidence of Han Hun Juan would not support the defendant's case (s 115 illustration (g) of the Evidence Ordinance (Cap 4)). In other words, I do not think the defendant has discharged the onus thrown upon him.

[18] The first plaintiff conviction under s 41(1) of the Road Traffic Act 1987 was subsequently affirmed by the High Court Ipoh on appeal. On this issue of the charge and subsequent conviction for reckless and dangerous driving in causing death at the Magistrate's Court, arguments were heard from both sides. The plaintiff's argument was that it was highly prejudicial to his client for this court to consider the conviction on the issue of liability. The defendant of course argued that this was the same accident which resulted in this civil suit and caused the death of a passenger. Reference made to the case below (especially on the arguments put forth by the defence):

Dato' Seri Anwar Ibrahim v Datuk S Nallakaruppan & 2 Ors [2014] 1 AMR 647; [2013] 1 LNS 991:

> In this case the defendant sought to put in their statement of defence certain statements taken from a previous criminal case. This was objected to by the plaintiff and accordingly an Order 18 application was put in to strike out certain paragraphs from the statement of defence. The plaintiff argued that a certificate of conviction cannot be tendered as evidence in a subsequent civil proceedings. The plaintiff relied on s 43 of the Evidence Act 1950 is the embodiment of the common law principle that in a civil proceeding a verdict or judgment in a criminal case is no evidence of the fact upon which the judgment was founded. The English Court of Appeal in *Hollington v F Hewthorn & Co Ltd* [1943] 2 All ER 35 reiterated this principle in the following terms:
>
> > " … *a certificate of conviction cannot be tendered as evidence in civil proceedings, and in the present case*, the certificate was rightly rejected. On a subsequent civil trial, the court should come to a decision on the facts before it without regard to the proceedings before another tribunal."
>
> The Court of Appeal rationalised the principle of exclusion of such evidence on the premise that:
>
> > "The court which has to try the claim for damages knows nothing of the evidence that was before the criminal court: it cannot know what arguments were addressed to it, or what influenced the court in arriving at its decision. Moreover the issue in the criminal proceedings is not identical with that raised in claim for damages."
>
> The case of *Hollington v Hewthorn* was cited with approval in the local cases of *She Eng Gek v DA De Silva* [1957] MLJ 55; [1956] 1 LNS 113 and *Ong Tua Chor v Lee Beng Tong* [1976] 1 MLJ 187; [1975] 1 LNS 116 where in both cases

the court held that a criminal conviction is inadmissible as evidence in civil proceedings to prove the truth of the findings in the criminal court.

The defendant however disagrees with this and argued that *Hollington v Hewthorn* is no longer good law and that the conviction of a person in a criminal case should be allowed in a civil suit.

[19] Reference to the case of *Dato' Seri Anwar Ibrahim* above (the arguments put forth by the defendants in that case):

[16] Lord Denning revisited the rule in *Hollington*'s case in *Barclays Bank Ltd v Cole* [1966] 3 All ER 948. The defendant in that case was charged with robbery of the plaintiff bank. The jury found him guilty and the court sentenced him to 15 years' imprisonment. The defendant's appeal to the Court of Criminal Appeal was rejected. The plaintiff then sued the defendant for the refund of the loot from the robbery in an action for monies had received. The plaintiff pleaded facts leading to the robbery. Despite, his conviction for robbery, the defendant denied each and every allegation in the statement of claim. This meant that under the rule in *Hollington*, the plaintiff would have to prove the fact of robbery all over again. In this regard, Lord Denning opined as follows:

"So the defendant denied the robbery and is determined to have it tried again. He wishes to canvass again his guilt or innocence, but this time before a jury in a civil case. There is too much of this sort of things going on: Hinds, Goody, Rondel and now the defendant. It is made possible by the unfortunate decision of this court in *Hollington v F Hewthorn & Co Ltd* where it was held that a conviction in a criminal court cannot be used as evidence, not even prima facie evidence, in a civil case. I hope that it soon will be altered. So what it means here. In order to be able to bring this civil action Barclays Bank had first to make sure that Cole was prosecuted in the criminal court: see *Smith v Selwyn* [1914] 3 KB 98, CA. Now after seeing him duly prosecuted and convicted, they are asked to prove his guilt all over again in this civil suit."

[20] However, this court did not just rely on the conviction as a basis to find liability against the plaintiff but rather due consideration was given to all other relevant evidence before this court. Here is a situation of the same accident decided by a criminal court for causing death and in a civil suit for damages initiated by the plaintiffs (in the same accident). The function of this court is not to find the first plaintiff negligent in the same accident (all over again) but rather to make an award for damages and a finding on liability. The finding on liability is on the party who allege a fact (that the light at the junction on the plaintiff's side was green) to prove on a balance of probability and they failed to show that.

Lee Hock Lai v Yeoh Wah Pein [1998] AMEJ 0310; [1999] 5 MLJ 172; [1998] 1 LNS 364, His Lordship Mohd Hishamudin J at pp 4-5 (AMEJ); pp 175-179 (MLJ) said as follows:

With respect, the learned Sessions Court judge was fundamentally wrong in her approach. *The case she was dealing with – a normal road accident case – essentially concerns the tort of negligence. The proper manner of approaching the case, as with all*

cases of similar nature, was for the court to evaluate the whole evidence and to make a finding of mixed law and fact (after applying the principles governing the law of negligence to the facts of the case – among which was whether there was a breach of a legal duty to take care by the defendant) *as to whether or not the defendant was liable in negligence*. If the court were to find that the defendant was not guilty of negligence, then it must dismiss the plaintiff's claim. And in view of the fact that in the present case there was no counterclaim by the defendant against the plaintiff for negligence, that would be the end of the matter! But if, on the other hand, she were to come to a finding that the defendant was liable in negligence, then since in the present case the defendant, in his pleading, has pleaded contributory negligence, she must also consider and make a finding of mixed law and fact (after applying the principles governing contributory negligence to the facts of the case) whether or not the plaintiff was guilty of contributory negligence. And assuming that she were to find the plaintiff guilty of contributory negligence, then the damages recoverable by the plaintiff are to be reduced to such extent as the court thinks just and equitable having regard to the plaintiff's share in the responsibility for the damage.

[21] Therefore relying on the reasoning given by the defence *Dato Seri Anwar Ibrahim*'s case above, it is practicable to be applied in the present set of facts. The first plaintiff was already convicted for the very same accident and his convicted (to date) has not been set aside. The notes of evidence was tendered under s 74 of the Evidence Act 1950. The purpose the defendant tendered it was to show his negligence tried and convicted of the same accident. But the notes of evidence cannot be relied wholly and the duty was on the party who asserts to proof. This court went on further to evaluate other material evidence before making a finding. The case below was referred to and followed:

Annamalay Retnam v Mah Chong Peng & Anor [2010] 6 AMR 193; [2010] 6 CLJ 487, Court of Appeal, Putrajaya, Low Hop Bing JCA, Heliliah Mohd Yusof JCA, Abdul Malik Ishak JCA (Civil Appeal No. B-04-200-2004):

[24] Next, the motor vehicle accident in *Tabarani Mohd Arshad* (supra) reveals a charge of careless and inconsiderate driving under s 43, but the outcome of the charge was not known as there was no material in the appeal record. Abdul Malik Ishak J (now JCA), also a member of the instant panel, *accepted the charge under s 43 as an admissible admission which weighs against the plaintiff bearing in mind that the charge under s 43 must have been instituted with the concurrence of the deputy public prosecutor*. His Lordship drew an analogy from two High Court judgments delivered by Raja Azlan Shah J (now HRH the Sultan of Perak) viz *Chock Kek Ling v Patt Hup Transport Co Ltd & Ors* [1965] 1 LNS 25; and *Lim Ah Toh v Ang Yan Chee & Anor* [1969] 2 MLJ 194.

[25] Our reading of *Chock Kek Ling* (supra) leads us to the following passage:

"Evidence was brought to show that the fourth defendant had pleaded guilty to driving without due care and attention in respect of the accident. *Although this was not conclusive evidence of the fourth defendant's negligence, it is an admissible admission which supports the plaintiff's case and which weighed against the fourth defendant*: see *Noor Mohamed v Palanivelu* [1956] MLJ 114; [1955] 1 LNS 78." (Emphasis added.)

[26] In *Lim Ah Toh* (supra) the pertinent portion of the judgment at p 196 reads:

> "The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the plaintiff's case and which weighs against the defendants: see *Noor Mohamed v Palanivelu* [1956] MLJ 11; [1955] 1 LNS 78, *EA Long v Wong Chin Wah* [1957] MLJ 165." (Emphasis added.)

[27] The above passages in *Chock Kek Ling* (supra) and *Lim Ah Toh* (supra) respectively have been approved by the (then) Supreme Court through the judgment of Harun Hashim SCJ in *Chang Chong Foo & Anor v Shivanathan Perumal* [1992] 1 AMR 119; [1992] 4 CLJ 1939; [1992] 1 CLJ (Rep) 27 where the evidence of the plea of guilty by the defendant to a charge of dangerous driving was admitted as evidence. The (then) Supreme Court also held that it was proper for the learned judge to admit the evidence of the plea of guilty by the defendant therein.

[22] Therefore by reference to the above cases, I find that the conviction of the first plaintiff by the Magistrate's Court on the charge of s 41(1) for reckless and dangerous driving and causing death strongly weighed against the first plaintiff on the issue of liability taken together with other evidence in this suit. The first plaintiff also failed to call material witness to further support their allegation that the light on their path was green at the material time. This court was left with no other conclusion than to make a finding of liability against the plaintiff after due consideration of all relevant evidence before this court.

[23] It is trite law that in a civil suit the burden of proving the case lies on the plaintiff and the plaintiff failed to discharge this on a balance of probabilities. The principles in s 101 of the Evidence Act 1950 is that, a party who wishes the court to believe in its existence of a fact as pleaded and to deliver a decision on the basis of the pleadings, he or she has to prove that facts as pleaded:

> 101. *Burden of proof*
>
> (1) Whoever desires any court to give judgment as to any legal right or liability, dependant on the existence of facts which he asserts, must prove that those facts exists.
>
> (2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

Robins v National Trust Co [1927] AC 505 at 510, PC, Viscount Dunedin said:

> Onus is always on a person who asserts a proposition or a fact which is not self-evident …

[24] The plaintiff failed to show the light was green at the material time on his side. The difficulty in this case was that both were alleging the light was green on their respective sides and since the onus is on the plaintiff it was for them to prove. This court did not rely wholly on the conviction and notes of

evidence from the Magistrate's Court but rather considered all other relevant evidence before making a decision. Reference to this case would confirm this:

i. *Chang Chong Foo & Anor v Shivanathan Perumal* [1992] 1 AMR 119; [1992] 4 CLJ 1939, Supreme Court, Kuala Lumpur

Held:

(1) Although it was proper for the learned judge to admit the evidence of the plea of guilty by the appellant/defendant in this case, ***the finding of negligence against the appellant did not rest entirely on the admission of this evidence but on the totality of the evidence before the court***.

ii. *Lim Ah Toh v Ang Yau Chee & Anor* [1969] 2 MLJ 194 Raja Azlan Shah J (as he then was) at p 196 – The plea of guilty by the first defendant to a charge of inconsiderate driving is an admissible admission which further supports the plaintiff's case and which weights against the defendants.

Held:

(1) The point is if the red signal was against the defendant, the defendant had no business crossing the road, as pointed out in *Ward v London County Council* [1938] the red signal is a signal of absolute prohibition. And the defendant's liability in the accident, in the event, would be absolute, not partial.

(2) *The learned judge had found as a fact that the traffic lights were in working order and that the opposing traffic lights could not be green simultaneously*.

(3) ***The court took the view that it was unjustified for the judge to put liability at all on the defendant when the plaintiff had not discharged the onus of proof on him on balance of probabilities that the accident was caused by the negligence of the defendant either wholly or partially***.

[25] Therefore on the totality of the evidence before this court I find the plaintiff failed to prove his case on a balance of probabilities that the light of his side was green and liability was decided against the first plaintiff. The plaintiff's claim was dismissed with costs. The counterclaim filed by the defendant was also dismissed with costs.

Quantum (on a 100% basis)

[26] The amount of award given by a court would depend on each case. Damages for personal injuries are given merely to compensate for the injuries so that the plaintiff can lead a better life post injury. Reference to the case below:

i. *Ong Ah Long v Dr S Underwood* [1983] CLJ 300:

> it must be borne in mind that damages for personal injuries are not punitive and still less a reward. They are simply compensation that will give the

injured party reparation for the wrongful act and for all the natural and direct consequences of the wrongful act, so far as money can compensate.

ii. *Mariam bt Mansor v JD Peter* [1975] 1 MLJ 279:

in considering what compensation the court shall award, it is impossible to arrive at an accurate figure, however, all the court can do is to award her a sum which would compensate her for pain and suffering she had undergone and will, in all probability, continue to undergo. I feel that the sum awarded should be a fair sum to compensate the plaintiff for the injuries suffered, but it should not be too excessive to constitute an injustice to the defendant. It is trite law that any claim for special damages must be specifically pleaded and strictly proved as opposed to general damages which is subject to assessment (see *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 at 297; [1981] 1 LNS 103, FC). In *Yeap Cheng Hock v Kajima-Taisei Joint Venture* [1973] 1 MLJ 230 at 236; [1971] 1 LNS 155, Syed Agil Barakbah J held:

"The general principle is that the plaintiff must be prepared to prove his special damages unless it has been agreed. It is not enough for him to write down the particulars and leave them for the court to decide. It is for him to prove them."

[27] An award is made (on a 100% basis) based on reference to the latest *Compendium of Personal Injury Awards* as a guide, submissions by all parties as well as the relevant case laws.

[28] Damages assessed as below:

(1) General damages: first plaintiff

(a) Laceration wounds and abrasion – RM3,000.00

[29] By reference to this case law and in view that the laceration wound and abrasion did not cause him to any disabilities therefore I find this award is most reasonable.

Hairol Azman b Abdullah v Ooi kee Loon & Anor [2013] 1 PIR [5] – where the court awarded RM1,000.00 for laceration wound.

(b) Fracture distal end of the left radius – RM20,000.00

(fracture of the ulna not included as plaintiff had on November 12, 2014 asked to withdraw this claim)

[30] The plaintiff here sustained as a result of this injury the following disabilities:

- Swelling of the left wrist with deformity;
- Wasting of muscle in the upper arm and forearm;

– Stiffness of the wrist;

– Weakness of the left hand grip with Grade 3 power (normal: Grade 5).

[31] This court took into consideration the fracture of only radius and I find this amount is reasonable and fair and is within the range as provided for by the *Compendium*. These cases were referred to:

Md Shaat b Abd Jalil v Rusita bt Jerai & Anor [2011] 2 PIR [59] – where RM20,000.00 was awarded closed fracture distal end of the left radius (without disability)

(c) Bilateral parasymphysis mandible fractures – RM15,000.00

[32] The fracture to the mandible did not cause any serious disabilities to the plaintiff. It was noted from the specialist report that "*healed fracture of the mandible with microplating done. Asymmetry of the lower jaw on opening of the mouth*". Therefore this award is fair as noted by the specialist that there are no further disability. This award is also within the range as provided for by the *Compendium*. Case below referred to.

Muhammad Iqmal b Mohd Idrus (seorang budak yang menuntut melalui bapanya dan sahabat wakilnya, Mohd Idrus b Mohd Nor) & Anor v Masjudin b Muhammad Ali & Anor [2012] 1 PIR [23] at p 144 – where RM10,000.00 was awarded for fracture of the mandible.

(d) Concussion syndrome – RM5,000.00

[33] This is a reasonable figure and is within the range of the *Compendium*.

(e) Muscle wasting in the left arm – RM3,000.00

[34] Muscle wasting as noted by the specialist is not significant and therefore this is a reasonable figure.

i. *Ahmad Syafiq b Kamarulzaman & Anor v Chew Kim Seong* [2010] 1 PIR [21] at p 117 – where RM2,000.00 was awarded for muscle wasting (3 cm in the left thigh and leg).

ii. *Dang Lay Heng v Balakrishnan a/l Munusamy & Anor* [2010] 1 PIR [49] at p 237 – where RM2,000.00 was awarded for muscle wasting (2 cm in the left upper limb)

(2) Special damages – first plaintiff

Item (a) Damage to clothing – dismissed

Item (b) Cost of family visits to hospital from Bota to Ipoh for 11 times – a reasonable sum of RM200.00 is given in the absence of proof by receipt

Item (c) Cost of plaintiff's hospital treatment – RM30.00 x 19 = RM570.00

Item (d) Medical expenses incurred for treatment – RM1,156.00

Item (e) Loss of earnings

[35] Future loss of earnings was not allowed as the plaintiff testified that the reason for him not looking for employment was because his drivers' license was suspended after conviction under s 41(1) of the Road Traffic Act 1987. There was no evidence to suggest he is unable to work in the future as the specialist clearly stated:

> he is not fit to do work involving lifting heavy weights or using force with the left arm. He is only fit for a light job

therefore I find the plaintiff must mitigate his own loss.

[36] However, the plaintiff was given rest due to his injuries for two months by the hospital (pp 38-39 ikatan A). The medical certificates for two months were produced in court. Therefore this claim was allowed for two months (based on the medical certificates) with the monthly salary of RM1,300.00 (refer to salary slips). The calculation is as follows: RM1,300.00 x 2 = RM2,600.00.

Item (f) Cost of documents and specialist reports – under solicitor's cost

Item (g) Other items were dismissed as they were not proven

(3) Dependency claim: second plaintiff

(a) Loss of support

[37] The deceased worked as a general worker at the Ladang Felcra Berhad Nasaruddin with a net pay of RM488.40 to RM681.91 per month. The father of the deceased testified that:

> saya peneroka Felcra. *Saya ada sumber pendapat sendiri*. Selain itu dia mesti gunakan RM200 untuk kegunaan sendiri seperti makan dan minuman dan pakaian dan telefon? Ya setuju. ***Jadi dia ada baki RM100 sahaja untuk berikan pada kamu? Ya setuju***.

[38] Therefore with all the above evidence before this court I find it impossible for the deceased to contribute RM300.00 to his father as his net pay was already low. A more reasonable figure is RM100.00 and this was also agreed to by the father during cross-examination. The father during re-examination said that he did not understand the questions put to him when he agreed that the deceased gave him RM100.00:

> *tadi kenapa setuju anak berikan RM100? Tidak faham. Anak berikan RM300. Dia anak yang baik hati.*

[39] I find this unacceptable as the questions were put to him in Bahasa Melayu.

The deceased was 23 years old hence the years of purchase is 16 years: RM100.00 x 12 x 16 = RM19,200.00.

(b) Bereavement – not allowed

[40] The deceased at the time of death was 23 years old therefore this claim was not allowed under the s 7 of the Civil Law Act 1956 (Act 67).

Compensation to the family of a person for loss occasioned by his death

7. (3B) A claim for damages for bereavement shall only be for the benefit –

(a) of the spouse of the person deceased; and

(b) where the person deceased was a minor and never married, of his parents.

(c) Funeral costs

[41] The plaintiff in their submission stated an amount of RM4,000.00 as funeral expenses. However no receipts or any documentary proof was provided to show the expenses incurred. In the absence of any proof, this court still made an award of RM3,000.00 as a reasonable figure for funeral expenses.

(d) Other items – dismissed as they were not proven

(4) General damages: third plaintiff

(a) Laceration wound over the left temporal parietal region – RM1,000.00

[42] This injury did not cause any disabilities hence an award of RM1,000.00 is reasonable.

(b) Haematoma with base skull fracture – RM15,000.00

[43] Based on the specialist report it was stated that:

the fracture has healed well. He has recovered well from his injuries. The patient also complained of dizziness on and off. There was no neurological sequelae of the intra-cranial injuries. He will be fit for normal work in the future.

[44] On the disabilities suffered by him the specialist stated:

healed laceration over the left temporal region of the scalp. Tenderness of the cervical spine.

From this it can be concluded that this injury did not cause any serious disabilities hence the amount of award given is fair.

i. *M Kumaresan a/l Muniandy v Gan Yew Peng* [2011] 2 PIR [35] at p 187 – where RM15,000.00 was awarded for fracture of the right temporal bone.

ii. *Norazira bt Adnan & Anor v Abd Hadi Kamil b Mukhtar & Anor* [2011] 1 PIR [7] – where RM30,000.00 was awarded for mild head injury. The plaintiff suffered from immediate loss of consciousness at the time of accident as well as retrograde amnesia and post concussion symptoms like headache, giddiness, memory impairment, repetition of words and insomnia.

iii. *Nasuruddin b Amsa & Anor v Muhamad Zul Helmi b Abdul Rahim* [2009] 1 PIR [43] at p 243 – where RM15,000.00 was awarded for fracture of the left occipital bone.

[45] Reference to the *Compendium* shows a range of between RM11,000.00 to RM16,500.00 as a reasonable award. Therefore taking into consideration that there were no serious and permanent disabilities resulting from this injury, I find this award of RM15,000.00 is fair.

(c) Intra-abdominal injury – RM10,000.00

[46] The specialist did not list any disability arising from this injury therefore this award is reasonable and fair. Reference to the cases below also suggests the a similar award:

i. *Zaini bt Hasan (isteri atau balu yang sah mendakwa tuntutan ini sebagai tanggungan dan benefisiari kepada Ahmad b Ismail, si mati) & 4 Ors v Thangaraja a/l Sanmugam & Anor* [2011] 1 PIR [67] at p 273 – where RM10,000.00 was awarded for intra-abdominal injury.

ii. *Muhammad Wafi b Mahayadin v Logeswaran a/l Subramaniam & 3 Ors* [2011] 2 PIR [79] at p 386 – where RM10,000.00 was awarded for left pneumothorax with right lung contusion.

(5) Special damages: third plaintiff

Item (a) Cost of documents and specialist report – under solicitors' cost

Item (b) Follow up treatment

[47] It was not proven with certainty as to how many times this plaintiff had gone for follow-up treatments. However this plaintiff testified that he had gone for follow-up treatment of not more than five times. The calculation is as follows: RM30.00 (reasonable figure as he travelled from Bota) x 5 times = RM150.00.

Item (c) All other items dismissed

[48] The counterclaim filed by the defendants against the plaintiffs was dismissed with costs.

[49] The awards made out to the plaintiff here I find is a fair and justified figure as the very true meaning of compensation as a result of an injury is to compensate a person not only for the pain and suffering but also for the difficulties or disabilities which he has to endure. The amount of money given out as compensation would entirely depend on each facts of the case. Case laws and the *Compendium* are taken as a guide for the amount of award to be given. I now refer to this case which had very clearly given the meaning of compensation:

Mariam bt Mansor v JD Peter [1975] 1 MLJ 279:

> in considering what compensation the court shall award, *it is impossible to arrive at an accurate figure, however, all the court can do is to award her a sum which would compensate her for pain and suffering she had undergone* and will, in all probability, continue to undergo. *I feel that the sum awarded should be a fair sum to compensate the plaintiff for the injuries suffered, but it should not be too excessive to constitute an injustice to the defendant* …

[50] The award given is not and cannot be an accurate figure but would definitely compensate the plaintiff for the injuries which he has suffered and difficulties which he now has to endure.

[51] Cost to the plaintiff and interests on special damages run with 2.5% interest per annum from the date of accident to the date of judgment, general damages with 5% interest per annum from the date of the summons was served until date of judgment and 5% per annum on total judgment sum from the date of judgment until date of full settlement.