IN THE COURT OF APPEAL OF MALAYSIA

Coram: Umi Kalthum Abdul Majid, JCA; Abdul Rahman Sebli, JCA; Harmindar Singh Dhaliwal, JCA

Muhammad Yassein Bin Zuliskandar v Kerajaan Malaysia and 3 Others

Citation: [2018] MYCA 289 **Suit Number:** Civil Appeal No. J-01(IM)-119-04/2017

Date of Judgment: 31 July 2018

Professional liability – Medical negligence – Liability – Damages – General and special damages – Quantum

JUDGMENT

[1] This is an appeal arising out of a decision by the High Court at Johor Bahru given on 02 March 2017. The plaintiffs in the High Court had filed a suit alleging medical negligence on the part of the defendants. On 30 November 2010, the High Court found liability against the defendants and ordered damages to be assessed by the Deputy Registrar of the High Court ("DR").

[2] The assessment was undertaken by the learned DR who made awards of RM2,005,248.24 in damages and RM100,000.00 as costs together with interest at the rate of 4% per annum on both general and special damages. Against this decision, the plaintiffs appealed to the High Court Judge. On 2 March 2017, the learned Judge dismissed the plaintiffs' appeal save for increasing the amount of the medical expenses to RM7,353.81 and increasing the post-judgment interest to 8% per annum.

[3] The 1st plaintiff and the defendants appealed against the order of the High Court Judge. The appeal by the defendants was discontinued prior to the hearing of this appeal. This appeal is therefore an appeal by the 1st plaintiff against quantum only.

[4] The appeal was heard on 11 April 2018 and adjourned to a date for decision. This is now our decision. For convenience, the parties will be referred to as they were in the High Court. This appeal is by the 1st plaintiff through his father and for convenience will be referred to, for the most part, as the appeal by the plaintiff.

Brief Background

[5] The 1st plaintiff, Muhammad Yassien bin Zuliskandar, suffered brain damage during his birth on 8

October 2007 at Hospital Sultanah Aminah, Johor Bahru. In medical terms, his case was diagnosed as severe spastic quadriplegia cerebral palsy with cognitive motor, speech and vision impairments. He has been and will remain completely dependent on carers throughout his life for all aspects of daily living. The 2nd and 3rd plaintiffs are the mother and father respectively of the 1st plaintiff.

[6] A medical negligence suit was filed by the plaintiffs in 2008. After a lengthy trial, liability was pronounced against the defendants with damages to be assessed. An appeal against liability was initially filed by the defendants but later withdrawn. An assessment of damages was then undertaken by the learned DR from 18 July 2013 to 21 May 2014 and awards were made as mentioned earlier. On appeal, the learned Judge on 2 March 2017 dismissed the plaintiffs' appeal save for the matters stated earlier.

The Appeal

[7] Before us, the plaintiff's appeal was confined to the following matters:-

(a) that a "one-third practice" and the case of **Sathisvaran Chandrasegaran v Agilan a/l Vanmugelan & Anor** [2012] 4 MLJ 548 ("**Sathisvaran**") were wrongly applied in respect of various items of damages;

(b) that the plaintiff should be awarded damages for the cost of future living expenses after he attains the age of 18 years;

(c) that the plaintiff should be awarded damages for future pain and suffering arising out of future surgery;

(d) that the plaintiff should be awarded damages for the cost of future respite care; and

(e) that the plaintiff should be awarded damages for the additional cost of holidays.

Our Decision

[8] In respect of the claims which are the subject-matter of this appeal, it may be convenient to set out in tabular form the claims allowed by the learned DR and the learned Judge as well as the claims being sought in this appeal. For this purpose, Table A is set out at the end of this judgment. Table A also sets out the claims allowed by us. We now deal with the issues or claims as canvassed by the parties as follows.

Application of the "One-Third Rule"

[9] This issue concerns the application of the so-called "one-third rule" whereby medical costs and expenses incurred in a private hospital claimed by plaintiff would not be allowed in full if it can be shown that such treatment was available at government hospitals. In this context, it was submitted by the plaintiff that the learned DR has misunderstood the decisions of this Court in **Chai Yee Chong v Liew Thai** [2004] 2 MLJ 465 ("**Chai Yee Chong**") and **Gleneagles Hospital (KL) Sdn Bhd v**

Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and another appeal [2013] 4 MLJ 785 ("**Gleneagles Hospital**") to mean that a claimant can recover only one-third of the cost of private healthcare medical expenses.

[10] In this regard, we agree that in **Chai Yee Chong**, no such "one-third principle" was set out. Indeed, as was pointed out in the case itself, no such principle is provided under any written law. It has only become a matter of practice through the adoption of case precedents. Instead, it was decided that the test of reasonableness should be applied in deciding whether the claimant is entitled to recover the full sum of the private healthcare medical expenses.

[11] This test of reasonableness was recently affirmed by the Federal Court in **Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors** [2016] 2 MLJ 1 ("**Inas Faiqah**") where Abdull Hamid Embong FCJ, in speaking for the Court, observed as follows (at p 15):-

> "[36] In this respect, we are in agreement with the contention of the appellant that the case of *Chai Yee Chong* is not relevant to the present case. We respectfully say that the Court of Appeal had erred in coming to its conclusion that the award made by the learned trial judges was in line with the current practice on the strength of the decision in *Chai Yee Chong*, which is a case concerning a claim for past private medical treatment. In determining a claim for future medical treatment, be it at private, or at a public hospital, the question of reasonableness in making such a claim should always be the paramount consideration. The plaintiff not only needs to justify, for instance, why he chooses treatment at a private hospital over a public one, but he must also show that the amount claimed for such treatment is reasonable. Of course this can be satisfied by the production of compelling evidence for that purpose. It is to be noted that in claiming for the cost of future damage in Gleneagles, evidence was led as to the cost of rehabilitation care of the first respondent and the costing was obtained from the private hospitals/ centres."

[12] In other words, the test of reasonableness applies in two ways. First, the plaintiff must justify why he chooses treatment at a private hospital over a public hospital. Secondly, the plaintiff must show that the cost of treatment at a private hospital was reasonable. In determining whether it is, or was, reasonable or justifiable in resorting to treatment at a private hospital, there can be no fixed or inflexible rules simply because of the myriad of reasons or circumstances why treatment is sought or intended to be sought at a private hospital.

[13] For instance, a plaintiff, immediately after an accident, may be brought by a Good Samaritan to the nearest private hospital in the interest of getting quick and early treatment. It may then be unjust to expect the plaintiff to justify why his claims at the private hospital ought to be allowed.

[14] There may also be a case where a plaintiff is seriously injured and his only concern is to seek quick and effective treatment which he or she thinks is available at the private hospital only. At that moment, the plaintiff is hardly in a position to undertake a cost benefit analysis of any potential claim against possible tortfeasors. In those circumstances, it may be reasonable to allow such claims.

[15] In the end, there can be no fixed rule. It really depends on the peculiar circumstances of each case. With the **Inas Faiqah** decision, a claim instituted now for medical expenses cannot be denied purely on the ground that the particular treatment was available at a government hospital. A holistic consideration of the question of reasonableness is imperative before any decision can be made on whether such claims for private medical expenses can be allowed (see also **Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr. Navin Kumar & Ors** [2017] 4 MLJ 102).

[16] Reverting to the instant appeal, there are two claims as special damages which were the subject of the one-third rule. The first was the plaintiff's hospitalization and clinic expenses paid by the plaintiff's father's employer, Maybank, in the sum of RM17,121.06 and a further sum of RM4,940.37 which was paid by the plaintiff's parents for out-patient treatment. The learned DR disallowed the sum of RM17,121.06 by relying on the decision in **Sathisvaran**. A blanket one-third rule was then applied to award only one-third of the expenses paid by the parents.

[17] On appeal, the learned Judge allowed the sum paid by Maybank but applied the one-third rule. However, both the learned DR and the learned Judge did not provide any reasons for doing so apart from saying that it was unreasonable for the plaintiff to seek treatment at a private hospital instead of a public hospital.

[18] In coming to this view, it was submitted by learned counsel for the plaintiff that both the learned DR and the learned Judge failed to take into account the unchallenged evidence which justified the plaintiff's parents seeking private medical care and treatment. It was firstly asserted that the plaintiff received negligent treatment in the defendants' public hospital which led him to suffer the irreversible brain damage. Secondly, it was not disputed that there were insufficient resources in public hospitals to cater for the plaintiff's specific care and rehabilitation needs, resulting in long waits, infrequent appointments and lack of continuity in treatment. Thirdly, the plaintiff's parents were unable to take him to public hospitals as they were both working. The rehabilitation appointments in public hospitals were given only for weekdays and during office hours. In the circumstances, it was submitted that the plaintiff should be awarded the full sums incurred under this head.

[19] After careful consideration, we do not think that sufficient reasons have been given to show that it was justified and reasonable for the plaintiff to be awarded the full sum of treatment expenses at the private hospital. There was evidence that the treatment required and the expertise needed is available at government hospitals. It cannot be the case that government or public hospitals are unable to deal with cerebral palsy patients. The excuse that the parents are working during office hours applies to almost everyone these days.

[20] In our assessment, the courts below were entitled to hold that the plaintiff was not entitled to the full costs of a private hospital. We are not persuaded that we should interfere with the awards made by the learned Judge for past as well as future medical care and treatment. Those awards are therefore affirmed.

[21] We should also add that the learned Judge was right in allowing the medical expenses paid by the

employer, Maybank. With the Federal Court decision in **Dr Kok Choong Seng & Anor v Soo Cheng Lin** [2017] 10 CLJ 529, medical expenses paid by an insurer or employer or a benevolent third party are recoverable as damages by the claimant. In this context, the Federal Court followed the Supreme Court decision in **Frank Astle Ward v Malaysia Airlines System** [1991] 3 MLJ 317 instead of the case of **Sathisvaran**. The Federal Court noted that **Sathisvaran** was decided without the benefit of full argument and the extensive authorities made available to the Federal Court.

Claim for maid's living expenses

[22] The learned DR had allowed the monthly cost of hiring a maid at RM1,100.00 and awarded a sum of RM264,000.00 for the multiplier of 20 years. The multiplier was not disputed and it was based on life expectancy of 35 years. The plaintiff contends that an additional sum of RM700.00 ought to have been awarded for the maid's living expenses which would include the maid's accommodation, food and other consumables. In this regard, the maid hired will have to reside and live in the same dwelling as the plaintiff. We therefore consider the sum awarded as sufficient compensation. The sum awarded below is therefore affirmed.

Claim for disabled-friendly vehicle

[23] There was no dispute that the plaintiff needed the use of a disabled-friendly vehicle. The learned DR had allowed only one purchase of a such a vehicle at a price of RM120,000.00. A sum of RM20,000.00 was deducted to take into account the trade-in value of the existing vehicle. From the remaining sum of RM100,000.00, a further two-third deduction was made to cater for the incidental use of the said vehicle by family members. The amount awarded came to RM35,000.00.

[24] To this sum, an award of RM50,000.00 was allowed for petrol and vehicle maintenance and another RM20,000.00 for vehicle modification. The total then came to RM105,500.00. It was submitted that the learned DR had erred in making a two-third deduction instead of one-third which was more reasonable. It was further submitted that the award should be made for two vehicles as it would be unreasonable for one vehicle to be used for 20 years.

[25] In our considered view, there is merit in the plaintiff's submission. It would be more realistic and reasonable for the purchase of two disabled-friendly vehicles over the 20 year period taking into account the normal life-span of such a vehicle. The parties had agreed that a suitable vehicle was the Renault Kangoo which costs RM140,000.00 after the necessary modifications. The total sum for two purchases, which comes to RM280,000.00, should be deducted by only one-third to take into account use by other family members. The total after such deduction comes to RM186,666.00. We do not think any additional sum should be added to the RM50,000.00 awarded for petrol and maintenance for 20 years as such costs must also be contributed by the family members since they would also have use of the said vehicle. We therefore set aside the awards made by the courts below and allow the sum of RM236,666.00 under this claim.

Pain and suffering from future surgery

[26] The learned DR and the learned Judge had allowed the sum of RM25,000.00 for the cost of future surgery. The plaintiff claimed that a further sum of RM30,000.00 ought to have been allowed for pain and suffering arising out of the future surgery. Learned counsel for the plaintiff cited several cases to support his proposition.

[27] The learned Judge had agreed that this claim for pain and suffering for future surgery should be rejected following the case of **Inas Faiqah**. In **Inas Faiqah**, the Federal Court had disallowed the claim as the sum of RM350,000.00 awarded in that case for pain and suffering was for the whole period including future pain and suffering. For the same reason, we see no justification to interfere in the decision of the court below.

Claim for respite care, living expenses after 18 years and additional cost of holidays

[28] It was submitted that the plaintiff will need respite care so as to allow his carers to get a rest from the stress and strain of taking care of him. It was contended that such rest for the caregivers would be beneficial to the plaintiff. Learned counsel for the plaintiff cited several cases where this claim was allowed.

[29] Even so, we note that the Federal Court in **Inas Faiqah** had disallowed this claim on the basis that respite care could be best left to close family members. The claim for living expenses after the age of 18 years was also rejected by the Federal Court on the ground that a sufficient award had been made for the plaintiff's future need for accommodation, utilities and clothes and there was no necessity for a further award. The claim for cost of holidays was also disallowed as this cost would have been incurred in any event by the plaintiff's family. The circumstances prevailing in the instant appeal are the same and we therefore find that these claims were rightly rejected by the courts below.

[30] On the question of cost of holidays, however, there was a further claim that an additional cost would be incurred when the plaintiff goes for holidays. He will need to be accompanied by his parents and the maid. We see merit in this claim. But for the disability, the plaintiff would have been able to travel on holidays unassisted when he reaches adulthood. We accept that an additional cost will be incurred when he goes for holidays. We would therefore award a sum of RM1,000.00 for the multiplier period of 20 years. The total allowed comes to RM20,000.00.

[31] Finally, there is also an appeal on the costs awarded. The learned DR awarded costs in the sum of RM100,000.00. It was submitted that going by the trend of awards, the award should be increased to RM173,221.30 after taking into account the out-of-pocket expenses of RM23,221.30. After due consideration, we do not think the award on costs is inappropriate since the proceedings concerned the issue of quantum only. We therefore find no merit on this score.

Conclusion

[32] In the circumstances, and for the reasons we have just provided, we allow the appeal in part in the matters and amounts as stated and summarised in the following Table A. As agreed, there will be no order as to costs. Deposit to be refunded.

TABLE A

No.	Particulars of Damages	Deputy Registrar	High Court Judge	Plaintiff	Court of Appeal
A	**Special Damages**				
1	Hospitalisation and Clinic	1,646.79	7,353.81	22,061.43	7,353.81
2	Occupational therapy	400.00	400.00	1,200.00	400.00
B	**Pre-Trial Damages**				
	Clinics	1,035.00	1,035.00	3,105.00	1,035.00
C	**Future Damages**				
1	Hospitalisation	70,000.00	70,000.00	210,000.00	70,000.00
2	Clinics	1,200.00	1,200.00	3,600.00	1,200.00
3	Specialist consultation	10,800.00	10,800.00	32,400.00	10,800.00
4	Therapies	176,400.00	176,400.00	529,200.00	176,400.00
5	Maids	264,000.00	264,000.00	432,000.00	264,000.00
6	Disabled-friendly Vehicle	105,500.00	105,500.00	516,000.00	236,666.00
7	Pain and suffering arising out of future surgery	-	-	30,000.00	-
8	Respite care	-	-	100,000.00	-
9	Additional cost of Holidays	-	-	100,000.00	20,000.00
10	Living expenses after 18 years	-	-	288,000.00	-
E	**Costs**	100,000.00	100,000.00	173,331.30	100,000.00
F	**Interest**	-	-	-	-
	Post-judgment interest	5%	8%	8%	8%

Dated: 31 July 2018

Signed

HARMINDAR SINGH DHALIWAL
Judge
Court of Appeal
Malaysia

COUNSEL

For the Appellant/ Plaintiff: Manmohan Singh Dhillon (with him Karthi Kanthabalan) (M/s PS Ranjan & Co)

For the Respondents: SFC Nik Mohd Noor bin Nik Kar (with him FC Cik Salwati Binti Umar), Attorney-General's Chambers, Putrajaya

JUDGMENTS REFERRED TO:

Chai Yee Chong v Liew Thai [2004] 2 MLJ 465

Dr Kok Choong Seng & Anor v Soo Cheng Lin [2017] 10 CLJ 529

Frank Astle Ward v Malaysia Airlines System [1991] 3 MLJ 317

Gleneagles Hospital (KL) Sdn Bhd v Chung Chu Yin (an infant suing through her father and next friend, Chung Shan Yong) & Ors and Another Appeal [2013] 4 MLJ 785

Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors [2016] 2 MLJ 1

Rohgetana a/p Mayathevan (an infant suing through his father and litigation representative, Mayathevan a/l Mayandi) v Dr. Navin Kumar & Ors [2017] 4 MLJ 102

Sathisvaran Chandrasegaran v Agilan a/l Vanmugelan & Anor [2012] 4 MLJ 548