
DEPENDING ON THE DEPENDENCY CLAIM

In 1846, the English Parliament enacted the first Fatal Accidents Act (Lord Campbell's Act) to create a major exception to the common law rule which was described in *Baker v Bolton*¹ as, "In a civil court the death of a human being cannot be complained of as an injury". The Act, prompted by the increasing number of railway accidents, created a new cause of action which allowed specified dependants of a deceased person to sue the person who caused the deceased's death and claim damages for the pecuniary support that they had lost. In Malaysia, this statutory cause of action (commonly called "the dependency claim" by Malaysian lawyers) is found in section 7(1) of the Civil Law Act 1957 (Act 67). Lord Blackburn² once described the dependant's aforesaid cause of action as "new in its species, new in its quality, new in its principle, in every way new". Nevertheless, a vast body of case law has emerged both in England and Malaysia on the claim, some of which were clearly judicial legislation to fill in the gaps left by the statute. A recent decision of the Supreme Court, *Chan Chin Ming v Lim Yok Eng*³ raises issues which are significant to such a claim and has prompted this note.

¹(1808) 1 Camp 493.

²In *Seward v The Vera Cruz* (1884) 10 App Cas 59.

³[1994] 3 MLJ 233.

At the outset it is necessary to note several matters which will have a bearing on the case. By virtue of sections 7(2) and 7(11) of the Civil Law Act 1957, the persons entitled to bring a claim under section 7(1) are a deceased's spouse, parents, children, step-children, grandchildren and grandparents. Also, an illegitimate or adopted child is treated as the legitimate child of his mother or reputed father or his adopters, as the case may be, for the purpose of deducing any of the above relationships. It will be noted that the class is restrictive and does not include brothers and sisters and collateral relatives, like uncles and aunts, or relatives by marriage like a mother-in-law.

Secondly, section 7(3) which originally provided that "the Court may give such damages as it thinks fit" to a dependant was substituted by a new provision by the Civil Law (Amendment) Act 1984. The substituted section 7(3) provides that the damages payable to the dependant shall be such as will compensate him for "any loss of support suffered".

Thirdly, the aforesaid Amendment Act made radical changes to the common law principles concerning the determination of the multiplier (or years of purchase) for computing the lost dependency by inserting a new provision (section 7(3)(iv)(d)) into the Civil Law Act 1956. The said section 7(3)(iv)(d) requires the court in determining the multiplier to

take into account that in the case of a person who was of the age of thirty years and below at the time of his death, the number of years' purchase shall be 16; and in the case of any other person who was of the age range extending between thirty one years and fifty four years at the time of his death, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time of death and dividing the remainder by the figure 2.

Against this background the facts of *Chan Chin Ming & Anor v Lim Yok Eng* may be stated. The plaintiff brought a claim under section 7(1) of the Civil Law Act 1956 in respect of the death of her unmarried son. The deceased was 25 years old at the time of his death on 5.11.1991. The learned trial judge assessed the plaintiff's monthly loss

of support as RM750. Before the learned trial judge the plaintiff admitted that she spent only half of the said RM750, namely RM375, on herself. She gave evidence that she spent the other half on her other three school-going children. The defendant argued before the trial judge that the plaintiff's actual loss of dependency was RM375 and not RM750, as the three children were not dependants of the deceased under section 7(2) of the Civil Law Act 1956. The trial judge rejected this argument. His Lordship awarded RM144,000 as damages for dependency, based on a multiplier of 16 years and a multiplicand of RM750. The defendant appealed to the Supreme Court.

I. THE PLAINTIFF'S DEPENDENCY

Peh Swee Chin SCJ, who delivered the majority judgment of the court, held that the trial judge's award of RM750 per month should be reduced to RM375 per month. His Lordship felt that the new expression "loss of support" had "not added anything new to the state of the law".⁴ Under section 7(2) the three children were not entitled to claim for loss of support. In the instant case, only the mother was entitled to make a claim. Loss of support must be translated into financial loss sustained by a dependant. A plaintiff can only claim "for financial loss which he sustains as a dependant and not in any other way".⁵ His Lordship then referred to the cases of *Sykes v North-Eastern Railway*⁶ and *Burgess v Florence Nightingale Hospital for Gentlewomen*.⁷ In his Lordship's view, the said cases

tend to lend great weight to the logical conclusion referred to above, analogically, of course, for the situation revealed in our instant appeal did not exist there so they could not be expected to have addressed themselves to the issue concerned here.⁸

⁴*Ibid* at p 240

⁵*Ibid* at p 241.

⁶32 LT 199; (1875) 44 LJCP 191.

⁷[1955] 1 QB 349; [1955] 1 All ER 511.

⁸[1994] 3 MLJ 233 at p 241.

Edgar Joseph Jr SCJ was also of the view that the plaintiff's dependency should be reduced to RM375 a month. His Lordship said,⁹

In my view, the plain, ordinary and grammatical meaning of the expression 'any loss of support suffered' appearing in section 7(3), must refer to the loss of support suffered by 'the party for whom and for whose benefit the action is brought'. In other words, the loss suffered must be personal to the class of dependants specified in section 7(2) so that a loss suffered by any other person not falling within that class must be excluded.

Having regard to the mother's admission aforesaid, the loss of support suffered by her was RM375 per month only. For the court to increase the value of the loss of support to RM750 per month, by adding the sum that was spent by the mother on the three school-going children, to the sum she had spent on herself, would amount to departing from the plain, ordinary, and grammatical meaning of the statutory language of section 7(2).

This part of the judgment raises important issues for consideration and comment. In the instant case it cannot be denied that the three school-going children relied on their deceased elder brother for their support. Unfortunately, as brothers and sisters of the deceased, they were not included in the restrictive list of persons entitled to sue in sections 7(2) and 7(11). This continued exclusion in Malaysia of brothers and sisters as dependants is most unfortunate. It does not reflect the realities of Malaysian family ties and family life. In Malaysia it is quite common for the older and working children to provide funds for the education and support of their younger siblings. In this context it may be noted that sections 7(2) and 7(11) are modelled on English provisions as they stood in 1957. They have become outdated and unrealistic. It is hoped that the legislature will intervene as soon as possible to enlarge the class of persons who can sue. In England, as a result of amendments in 1976 and 1982, the class has been widened to include a large number of persons.¹⁰

⁹*Ibid* at p 247.

¹⁰For a good account on this subject see Munkman, *Damages for Personal Injuries and Death*, 9th ed, pp 138-141.

Although it may not be necessary for Malaysia to adopt such a wide provision there is certainly a need to extend the Act's protection to other near relatives of a deceased (particularly brothers and sisters) who are dependent upon him.

Another matter that calls for comment is the Supreme Court's interpretation of the expression "loss of support". The Court held that "loss of support" must be financial loss personal to the dependant. As the mother had spent RM375 on non-dependants that sum was a loss not personal to her and therefore not claimable. In the view of the court the mother's loss of support should be restricted to the sum she spent on herself.

It is to be noted that the deceased's siblings were not claimants in the action and were not before the court as parties. The claimant was the deceased's mother. The contribution of RM750 was made to her and not to the siblings. There is nothing to show that the deceased had earmarked part of his contribution as support for the siblings. It was the mother who chose to spend half of it on her three school-going children. Thus, on a broad and flexible interpretation, the loss of RM750 was a loss personal to her and such an interpretation, it is submitted, would not offend the language of the statute.

There appears to be no authority which provides that a dependant in a dependency claim must show that he needed the whole of a deceased's contribution for his livelihood or that he actually spent it on his livelihood. It is submitted that the expression "support" in section 7(3) does not refer to the amount which a dependant actually spends for his personal support. "Loss of support" should be equated to the full financial loss to the dependant, provided always that the loss arises from a contribution made as a result of a family relationship. It should include the entire contribution provided by the deceased to the dependant. It is submitted that what the dependant did with the contribution is an irrelevant factor and should not be considered by the court.¹¹

¹¹See the approach taken by the trial judge in the instant case in [1994] 3 MLJ 233 at p 240.

It is also submitted, with respect, that the cases *Burgess v Florence Nightingale Hospital for Gentlewomen*¹² and *Sykes v North-Eastern Railway*¹³ are inapplicable to the instant case, even by analogy. The said cases established the rule that a contribution or benefit, to qualify under the Fatal Accidents Act, must be a contribution or benefit which arises from a family relationship between the parties. In *Burgess's* case the plaintiff and his wife were professional dancing partners. They earned their income by taking part in dancing competitions, giving dancing demonstrations and running a dancing school. The wife took her full share of their joint earnings. Following the wife's death the plaintiff suffered, *inter alia*, the following losses:

- (a) from the loss to the plaintiff of his wife as a dancing partner, £2500;
- (b) from the loss of the wife's contribution towards the joint household expenses, £1000.

Devlin J held that the first loss was not recoverable in a dependency claim as it did not arise from a husband and wife relationship. His Lordship said,¹⁴

I have, therefore, come to the conclusion that there were here no services that were rendered by the wife to the plaintiff, and there was no benefit arising in the dancing partnership that can properly be attributed to the relationship of husband and wife; and if *this claim were to be allowed, then any partner whose prospects were similarly affected by the death of the other, whatever their relationship was, ought logically to be compensated, too.*¹⁵

In *Sykes's* case the plaintiff, a master builder, employed his son as an employee and paid him full and fair wages. As a result of the son's death the plaintiff lost a most valuable and reliable employee. It was held that the plain-

¹²*Supra* n 6.

¹³*Supra* n 7.

¹⁴[1955] 1 All ER 511 at p 518.

¹⁵Emphasis added

tiff had no claim in respect of the son's services. Brett J said,¹⁶

There is no evidence that the plaintiff received any pecuniary benefit from the continuance of his son's life. The son was of full age, and worked for fair wages, the arrangements between father and son being purely matters of contract.¹⁷

These cases are inapplicable to *Cban Cbin Ming's* case. The son's contributions in *Cban Cbin Ming's* case were made to the mother as a result of a family relationship and from motives of filial affection. It was not made under a contract or a commercial arrangement. Where the lost benefit arose from a family relationship, a broad and flexible approach was adopted in *Malyon v Plummer*.¹⁸ In *Malyon's* case the plaintiff was a sinecure director in a company owned by her husband. She was paid £800 although the services she rendered was part-time and casual. The market value of the services she rendered was about £200. On her husband's death the liquidation of the company became inevitable. The Court of Appeal held that the difference of £600 (£800-£200) could be claimed as her dependency.

II. THE MULTIPLIER OR YEARS OF PURCHASE

The learned trial judge had applied the multiplier of 16 years in section 7(3)(iv)(d) to compute the plaintiff's damages. As indicated earlier the said provision prescribes a fixed multiplier of 16 years in cases where the deceased was of the age of 30 years and below at the time of his death.

In the Supreme Court, Peh Swee Chin SCJ, who delivered the majority judgment of the court, disagreed with the trial judge's decision to adopt 16 years as the multiplier. His Lordship referred to the legal position before section 7(3)(iv)(d) was enacted, namely that, where a parent

¹⁶32 LT 199.

¹⁷Emphasis added.

¹⁸[1963] 2 All ER 344 (CA).

claims dependency arising from the death of an unmarried child a contingency that must be taken into account is that the child may subsequently marry and thereupon reduce or cease the support altogether. Thus, in the pre-amendment case of *Phang Ah Cbee v Chong Kwee Sang*¹⁹ the Federal Court had reduced the trial judge's multiplier of 17 years to seven years in respect of a mother's claim for dependency arising out of an unmarried son's death. Peh Swee Chin SCJ said,²⁰

Having regard to the state of the general system of the law before the coming into force of sub-para (d) on 1 October 1984, sub-para (d) seems to be tailor-made for a claim by a spouse and children as dependants in respect of a deceased spouse, because under the general system of law, both before and after the enactment of sub-para (d), the duration of a claim for loss of support is usually as long as the deceased's loss of earnings which would have been earned had the deceased lived.

On the other hand, the state of the general system of law relating to a parent's claim as a dependant for loss of support in respect of an unmarried child before the enactment of sub-para (d) was that such loss of support would either cease or be reduced considerably on the almost invariable contingency of subsequent marriage of such unmarried child. If the learned judge was right, it would mean that this aspect of the law was swept away or changed.

Peh Swee Chin SCJ thereupon reduced the multiplier in the instant case to seven years "after taking into account the contingencies and circumstances in this case".²¹

Edgar Joseph Jr SCJ delivered a dissenting judgment on this point. His Lordship agreed with the trial judge that the fixed multiplier of 16 years must be applied in this case. In His Lordship's view to ignore the fixed multiplier of 16 years "would be to fly in the face of the mandatory provisions"²² of section 7(3)(iv)(d). It was manifestly clear that

¹⁹[1985] 1 MLJ 153.

²⁰[1994] 3 MLJ 233 at p 243.

²¹*Ibid* at p 244.

²²*Ibid* at p 248.

Parliament had intended to take away the courts' discretion to select an appropriate multiplier for a claim under section 7(1). His Lordship recognised that the application of a fixed multiplier of 16 years in the instant case may be hard on the defendants but in view of the clear and unequivocal language of the legislature the fixed multiplier must be enforced.

The dissenting judgment of Edgar Joseph Jr SCJ is preferred to the majority judgment. It is submitted that the words of section 7(3)(iv)(d) are manifestly clear and it would appear that the common principles on fixing a multiplier in a fatal accident case have indeed been swept away by the Civil Law (Amendment) Act 1984.²³ The manifest intention of the legislature to change many of the firmly established principles of the common law runs throughout the Civil Law (Amendment) Act 1984. Thus, after the Amendment Act no claim may be made for the loss of the services of a wife or a child. Again, a claim for dependency is no longer possible where the deceased had already attained the age of 55 years. Prospects of future dependency arising from the deceased's earnings being increased in the future must be ignored. Also, prospective dependency from young persons who will work in the future is no longer applicable as the deceased must have been "receiving earnings by his own labour or other gainful activity prior to his death".²⁴ It may be that the aged parents of a deceased, like the mother in *Chan Chin Ming's* case may receive a minor windfall (if damages for causing death could ever be considered a windfall) as a result of section 7(3)(iv)(d) but that is because the legislature in clear and unequivocal words has provided for it.

²³See the judgment of the Supreme Court on this point in *Tan Kim Chuan v Chandu Nair* [1991] 2 MLJ 42, a personal injury claim.

²⁴Section 7(3)(iv)(a) of the Civil Law Act 1956.

III. PRE-TRIAL AND POST-TRIAL LOSS OF DEPENDENCY

Must the award for dependency be divided into pre-trial and post-trial loss? Peh Swee Chin SCJ thought so²⁵ but Edgar Joseph Jr SCJ felt otherwise. Edgar Joseph Jr SCJ after stating that the court could not reduce the fixed multiplier provided under section 7(3)(iv)(d), said,²⁶

For the same reason, I do not consider that the court has a discretion to make any deductions from the number of years' purchase, the period for which the court might have awarded pre-trial loss of support up to the date of trial. To this extent, I would, with respect, disagree with the view of the majority of the members of this court expressed in their judgment in draft which I have had the advantage of reading.

In this context it is pertinent to note that section 7(3)(iv)(d) prescribes fixed multipliers based on the deceased's age at *the time of his death* and not at the date of the trial. Thus section 7(3)(iv)(d) seems to have removed the old distinction between pre-trial and post-trial loss of dependency and appears to support the dissenting judgment of Edgar Joseph Jr SCJ.

IV. ANNUITY TABLES OR DIRECT MULTIPLICATION?

Should the lump sum for dependency be determined by direct multiplication of the multiplier and multiplicand or by the use of the annuity tables? Peh Swee Chin SCJ opted for direct multiplication. His Lordship followed *Dirkje v Mohd Noor*,²⁷ a Supreme Court decision on a *personal injury* claim. *Chan Chin Ming's* case appears to be the first reported *fatal accident* case which deals with this point.

V. CONCLUSION

The dependency claim in Malaysia has its base in section 7 of the Civil Law Act 1956. Some of its provisions are clearly out of date and needs revision. Also, some of the

²⁵*Ibid* at p 244.

²⁶*Ibid* at p 250.

²⁷[1990] 3 MLJ 103.

amendments made in 1984 are too severe in that they have either removed or altered common law rights of dependants, rights won over the years from a cautious judiciary anxious not to overburden defendants in fatal accident claims. These statutory provisions do cause, and are bound to cause, difficulties to the judiciary in their attempts to strike a balance between the reasonable expectations of dependants of a deceased person and fairness to the tortfeasor who caused his death.

Chan Chin Ming v Lim Yok Eng is an example of the difficulties faced by judges in this area of the law. A thorough study and revision of the provisions of section 7 of the Civil Law Act 1956 is long overdue. Meanwhile it is hoped that, despite these difficulties, judges will strive to give a broad and flexible interpretation to its provisions.

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