MALAYSIA

IN THE HIGH COURT IN SABAH AND SARAWAK

AT KUCHING

CIVIL APPEAL NO. KCH-12B-13/11-2014

BETWEEN

SITI NUR SYAHIRA BINTI ABDULLAH
(WN. KP. 830818-13-5538)
[The Administratrix of the Estate of
MAHIDI BIN AKUN *(1st Deceased)*]
No. 36 Kampung Serpan Laut
94600 Asajaya, Sarawak … **1ST APPELLANT**

KAMRI BIN JINI
(WN. KP. 490628-13-5205)
[The Administrator of the Estate of
SABDIE BIN KAMRI (*2nd Deceased*)]
Kampung Asajaya Tengah
94600 Asajaya, Sarawak … **2ND APPELLANT**

AWAN BINTI SAINI
(WN. KP. 611212-13-5592)
[The Administratrix of the Estate of
MOHAMMAD ZOOLNEEZAM BIN ALON (*3rd Deceased*)]
Kampung Asajaya Laut
94600 Asajaya, Sarawak … **3RD APPELLANT**

AND

SELLI BIN SA'IET
(WN. KP. 700627-13-5441)
Kampung Tanjong Tuang
94300 Kota Samarahan, Sarawak … **1ST RESPONDENT**

MARJA TRANSMEDIC
(Company No: 64144/Q [SKT])
No. 6, 1st Floor Gaya Centre
L7412 Section 64
Jalan Simpang 3
93300 Kuching, Sarawak … **2ND RESPONDENT**

(IN THE MATTER OF KUCHING SESSIONS COURT

SUMMONS NO: KCH-A53KJ-15/10-2013

BETWEEN

SITI NUR SYAHIRA BINTI ABDULLAH
(WN. KP. 830818-13-5538)
[The Administratrix of the Estate of
MAHIDI BIN AKUN (1st Deceased)]
No. 36 Kampung Serpan Laut
94600 Asajaya, Sarawak … **1ST PLAINTIFF**

KAMRI BIN JINI
(WN. KP. 490628-13-5205)
[The Administrator of the Estate of
SABDIE BIN KAMRI (2nd Deceased)]
Kampung Asajaya Tengah
94600 Asajaya, Sarawak … **2ND PLAINTIFF**

AWAN BINTI SAINI
(WN. KP. 611212-13-5592)
[The Administratrix of the Estate of
MOHAMMAD ZOOLNEEZAM BIN
ALON (3rd Deceased)]
Kampung Asajaya Laut
94600 Asajaya, Sarawak … **3RD PLAINTIFF**

AND

SELLI BIN SA'IET
(WN. KP. 700627-13-5441)
Kampung Tanjong Tuang
94300 Kota Samarahan, Sarawak … **1ST DEFENDANT**

MARJA TRANSMEDIC
(Company No: 64144/Q [SKT])
No. 6, 1st Floor Gaya Centre
L7412 Section 64
Jalan Simpang 3
93300 Kuching, Sarawak … **2ND DEFENDANT)**

JUDGMENT

1. This is an appeal against the decision of the Sessions Court Judge, given on 27th October 2014, in dismissing the claim of the Appellants.

2. The Appellants who are Plaintiffs in the Court below instituted the action in their capacity as administrators for the estate of the 3 Deceased.

3. In this Judgment, I shall refer to the parties as in the original action.

4. The action arose from a road accident which happened on 3rd October 2010 at about 6.40 a.m. involving a Kancil car presumably driven by the 1st Deceased with the 2nd and 3rd Deceased as passengers and a school bus driven by the 1st Defendant. It was a fatal accident which claimed the lives of the three persons, thus leaving only the 1st Defendant [who escaped unscathed] to tell the story of what happened on that fateful day.

5. It is common ground that at the time of the accident, the Kancil car and the bus were travelling in opposite direction, it was drizzling and the road was slippery.

6. The 1st Defendant [DW1] told the Court that he was negotiating the bend but keeping within his path of travel prior to the accident and he could see the oncoming Kancil. Then out of the blue the Kancil encroached onto the bus' lane, it was so sudden and in the agony of moment, he tried to brake and swerved to avoid the collision but to no avail. The collision happened at the point "Z". Upon impact the bus continued to push forward

dragging the Kancil across the Kancil's lane until it hit the metal railing by the edge of the road.

7. PW1, a traffic assistant investigating officer with Kota Samarahan police station, visited the accident scene at 6.45 a.m. and he prepared a sketch plan [page 717 Record of Appeal] based on his observation at the scene. It can be seen from the sketch plan that the resting place of both the Kancil and the bus was in the Kancil's path of travel. PW1 said that there were glass debris seen on both sides of the road and he marked them with "A" [in the bus's path of travel] and "B" [in the Kancil's path of travel]. PW1 said that the impact of the collision was powerful and, therefore, the vehicles' glasses were scattered on the right and left side of the road. PW1 was not sure of the point of impact – when cross-examined by counsel for the Defendants, he agreed that the impact point was at the place marked "A" but during re-examination, he said that it could be at point "B". PW1 frankly said that there was nothing in the sketch plan which could suggest the point of impact.

8. The trial Judge made a finding that the impact point was at point "A". In arriving at this finding the trial Judge implicitly accepted DW1's version of the accident, namely, that the Kancil encroached onto the bus' lane and after the collision, the bus did not stop immediately but continued in forward momentum dragging the Kancil along until it hit the railing at the edge of the road on the Kancil's lane. This, in the opinion of the trial Judge, explained why glass debris were found in the Kancil's lane at point "B". As for the absence of dragging mark on the

road, the trial Judge opined that there was none because it was drizzling at that time.

9. The crux of the whole of appeal, as I can decipher from the petition of appeal, is whether the trial Judge had fallen into error in deciding that the point of impact happened at point A.

10. It is observed from the Judgment that the trial Judge did not consider whether the collision could have happened at point "Z" which was the place DW1 said the accident happened. Based on DW1's testimony, all the four wheels of the car were already in the bus' lane. Based on what I have googled, the width of a Kancil is 1395 mm [1.4 meters] and based on the sketch plan, the whole width of the road is 6 meters and half of which is 3 meters. In the premise, it is fair to say that the car had occupied almost half of the bus' lane when the collision happened. Point "Z", as can be seen from the sketch plan, is in the middle of the bus' lane. Based on the fair inference that the Kancil was already occupying half of the road and DW1's assertion that the bus was keeping within its lane, the collision between the bus and the Kancil was in all probability a head on collision. In this situation considering that the bus was negotiating a left turn, it is more probable for the bus to push the car forward or to its left and not to its right towards the Kancil's lane as shown in the sketch plan. Further, there is no glass debris at point "Z" to support DW1's version of the accident.

11. For the above reasons, I find DW1's testimony that the accident happened at point "Z" to be highly improbable.

Point "A' or "B"?

12. The complaints of the Plaintiffs are that the trial Judge had erred in law and misdirected himself in deciding the point of impact; and for holding that there is no plausible explanation as to how the accident happened, thereby holding that the Plaintiffs had failed on the balance of probabilities to establish negligence on the part of the Defendants in causing the accident and the death of the three persons. The Plaintiffs complained that the trial Judge had fallen into error and misdirected himself for failing to appreciate the sketch plan and the evidence of PW1 and DW1's own evidence that there is no evidence that the collision occurred in the bus' path of travel.

13. In Ng Aik Kian & Anor v Sia Loh Sia [1997] 2 CLJ SUPP 218 [HC], Justice Abdul Malek Ishak [as he then was] held:

> *It is now well known that the position of broken pieces of glass would show the point of impact or the ultimate resting place of the vehicle after impact.*

14. It is PW1's unchallenged evidence that there was glass debris found on the left and right side of the road which he marked as "A" and "B" respectively. PW1 opined that the point of impact could possibly be at point "A" as well as "B" as depicted by the presence of glass debris at these two points. When asked in re-examination whether there is any marking on the sketch plan to indicate that the bus dragged the Kancil from the bus' lane across to the Kancil's path and crashed at the railing, PW1 replied, "*From the plan I cannot see anything but when I reached the scene, what I saw is like the one inside this plan"'*

15. It is regrettable that other than the sketch plan, there is no photographs nor reports from Puspakom to assist the Court to find out who caused the accident.

16. Counsel for the Plaintiffs submitted that based on the debris found at Point "B" where the majority of the debris were found compared to Point "A", it is highly probable that the collision occurred on the Kancil's lane because the majority of the debris was found at point "B", citing Fatimah bte Derakman v Wan Jusoh bin Wan Kolok 15 & Anor [1994] MLJU 190. In this cited case, Lamin FCJ held: "*In the absence of evidence to the contrary, it is always a safe guide to adopt that the point of impact is at or around the point where the pieces of glass are mostly found*."

17. Counsel for the Plaintiffs submitted that the glass debris at point "A" was at the middle line of the road and not on the bus' lane. It was pointed out that PW1 never said that point "A" is the point of collision. Point "A" is merely a reference to the dotted marks on the middle of the road against the left rear portion of the bus, and the dotted marks which denoted the debris were not in the bus' lane but in the middle of the road.

18. On the other hand, counsel for the Defendants submitted that the Plaintiffs' submission that point "A" is merely referring to the dotted marks on the middle of the road, which denotes debris, is the Plaintiffs' desperate attempt to sway the Court in their favour. It was submitted that the Plaintiffs had failed to re-examine PW1 on this and it is, therefore, unreasonable and unfair to bring out this point in the submission in the appeal.

19. PW1 had said in cross-examination that he was not sure where the point of impact was but there were glass debris on the left and right side of the road, then he was asked to mark "A" for the glass debris on the left side and "B" for the glass debris on the right side. A close perusal of the sketch plan showed there were dots seen around the bus at two places – (1) majority of the dots where PW1 marked "B" and (2), much less dots next to the left rear of the bus near where PW1 marked "A".

20. I believe that it is fair to say that these dotted marks denote the glass debris. It cannot be at the spot where PW1 wrote "A" because there were no dots there. By reason that PW1 was asked to indicate the glass debris on the left side of the road, it is logical to say that "A" referred to the dots found at the left rear of the bus which is very close to the middle of the road.

21. Is it probable for the collision to have happened at point "A" as found by the trial Judge? Counsel for the Defendants submitted that the trial Judge was correct to find that point "A" is the more probable point based on PW1's evidence. It was further submitted that if the impact was at point "B", there would be no debris at point A, this is because upon a forceful impact, glass debris from the bus would have been flung forward and it is highly improbable that the debris could have ended up behind the bus at point "A".

22. In my opinion, it is quite futile to rely on PW1's testimony because he had frankly admitted that he did not know where the point of impact was and he was of the view that it was either at point "A" or point "B".

23. It is to be noted that the glass debris at point "A" was right at the end of the left rear side of the bus. One cannot tell whether the debris there was from the collision of the two vehicles or it was from the left rear glass window of the bus when the vehicles hit the metal railing. It is regrettable that there is no photograph of the bus to show the condition of the bus after the accident.

24. In my view, if the point of impact was at point "A" and, according to DW1, the bus did not stop immediately upon collision but dragged the Kancil across the Kancil's path until both vehicles hit the railing, regards being had to the fact that the Kancil is made of metal, one would expect a tell tale sign of drag mark from point "Z" or "A" until the final resting position on the road. No drag mark was drawn on the sketch map. PW1, who arrived at the scene half an hour after the accident, said that what he drew on the sketch plan was based on what he saw at the scene. In other words, he did not see any drag mark on the road.

25. The trial Judge explained the absence of drag mark on the road by saying that it was drizzling and that was why there was no drag mark seen on the road. In my view, the trial Judge had misdirected himself with this speculation in the absence of evidence that the drag mark was washed away by the drizzling rain. If indeed there was a drag mark to substantiate DW1's version of the accident but somehow it was washed away by rain before PW1 arrived, DW1 would surely have stated it in his witness statement or during trial that there was a drag mark but it was washed away by the rain before PW1 arrived. But when asked in cross-examination what evidence was there to show that

the accident happened at point "Z", DW1 could not offer any. See page 117 Record of Appeal.

26. In my opinion, the collision had most probably happened at Point B for the following reasons: Although DW1 denied that he was speeding prior to the accident that fatal morning, I am inclined to believe that he was speeding as the evidence showed that DW1 was required to pick up students from the school at 7.00 a.m. for an outing. When DW1 reached the place of the accident at around 6.40 a.m. he was still 25 minutes away from the school. Although DW1 said that he need not have to speed as the traffic was not heavy on that Sunday morning, I am inclined to think that with less traffic there is an even greater tendency to drive faster to beat the time.

27. It must be borne in mind that prior to the accident DW1 was negotiating a left turn and DW1 admitted that as such it is more probable for him to drive the bus towards the right. DW1 also agreed that the Kancil would be moving to its left when negotiating the bend. See page 120 Record of Appeal. This means that the probability for the bus to go over to the Kancil's lane is higher than for the Kancil to encroach onto the bus' lane. This version is more consistent with regard to the concentration of the glass debris at point "B" and the resting position of the bus.

28. I am of the view that DW1 was in all probability speeding as he was running late and there was not much vehicles on the road, and in the process he has encroached onto the Kancil's lane. This

explained why he did not even brake or swerve to avoid the accident. See page 115 of Record of Appeal.

29. For all the reasons stated above, it is clear that the accident which claim the lives of the three persons was caused solely by the negligence of the 1st Defendant. Under the circumstances, the trial Judge had misdirected himself in deciding the point of collision.

30. Accordingly I allow the appeal against liability and hereby set aside the order of the Sessions Court Judge and substitute it with an order that the Defendants be wholly liable for the negligence.

APPEAL ON QUANTUM

A. GENERAL DAMAGES

1st Deceased

i. Loss of Dependency for the 1st Plaintiff

31. The trial Judge awarded RM49,363.20 based on the take home pay of RM385.65 per month minus 1/3 for personal expenses for 12 months multiply with 16 years purchase.

32. Counsel for the Plaintiffs submitted that the sum of RM385.65 is not the take home pay but it is only the nett salary of the 1st Deceased. It was submitted that as all the deductions to the 1st Deceased's salary was for the benefit of his family, the Court should consider the gross salary and not the nett salary. Thus, the trial Judge had erred in deciding that the take home pay of the 1st Deceased was RM385.65.

33. Counsel for the Plaintiffs submitted that PW2 [the wife of the 1st Deceased] testified that the 1st Deceased gave his dependents

[wife and two children] a sum of RM1,000.00 per month prior to his untimely death.

34. Pursuant to section 7(3)(iv) (d) of the Civil Law Act 1956 and given that the 1st Deceased was below 30 years old at the time of death [he was 25 years old], the multiplier is 16 years. Thus the loss of dependency should be calculated on the following multiplicand :

> RM1,000.00 per month x 12 months x 16 years = RM192,000.00.

35. On the other hand, counsel for the Defendants submitted that the trial Judge was correct in law in the light of the case of Shahrizam Bin Damsah v Mahathir Bin Mohd Isa & Anor [2014]10 MLJ 490 for the following reasons:

> *(a) there is no doubt that the multiplicand to be used to calculate the loss of dependency should be the 1st Deceased's take home pay because this is the amount that the 1st Deceased would had received; and*
>
> *(b) the monthly earning is the monthly take home earnings because it was this income that the 1st Deceased took home every month and from which the deductions for living expenses would be made; and*
>
> *(c) the multiplicand should be the take home pay of the 1st Deceased and not the gross income.*

36. Counsel for the Defendants further submitted that the trial Judge was correct to deduct 1/3 of the 1st Deceased's income for living expenses. Section 7(3)(iv)(c) of the Civil Law Act 1956 states:

> *3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for*

whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):

Provided that—

(iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall—

(a) ..... ;

(b) ..... ;

(c) take into account any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the person deceased at the time of his death;

37. Pursuant to section 7(3)(iv)(c) of the Civil Law Act 1956, submitted counsel for the Defendants, there should be a deduction of approximately 1/3 of the 1st Deceased's earning to account for living expenses, citing Jub'il Mohamed Taib Taral & Ors v Sunway Lagoon Sdn. Bhd. [2001] 6 MLJ 669 and Shahrizam Bin Damsah, supra.

38. For the definition of take home pay, I refer to Longman Dictionary of Contemporary English which defined "take home pay" as the amount of money that you receive from your job after taxes etc. have been taken out.

39. The 1st Deceased's salary slip at page 671 of Record of Appeal showed there were deductions for "PERUNTUKAN",

"KOPERASI", "INSURAN KELOMPOK", "ITAT", "PERNAMA", BIL API/AIR and "PEL KELAB SUKAN AT".

40. PW8 , sergeant from Semenggo army camp, Kota Sentosa who is familiar with pay slips issued to the army, explained the purpose of the deductions in the salary slips of the 1st Deceased and 2nd Deceased as follows:.

a. Peruntukkan – deduction for the wife and mother.

b. Koperasi Tentera – a kind of saving.

c. Insuran Kelompok – Army insurance.

d. KPAT [Koperasi Tentera] – withdrawal saving.

e. LIAT [Lembaga Tabung Angkatan Tentera] is saving for the Army.

f. PERNAMA (Perniaga Malaysia) – loan for purchase of electrical and household goods, sundry goods.

g. Bil air api – electricity and water bill for married army officers.

h. BIRO – external insurance.

41. Based on the unchallenged evidence of PW8, the deduction of "Peruntukkan" was solely for the benefit of the wife and mother. As such this deduction should not be deducted from the take home pay of the 1st Deceased. Consequentially the take home pay of the 1st Deceased should be RM296 + RM257 [RM385.00 minus 1/3 living expenses] = RM553.00.

42. In view that the take home pay is RM553.00, it is unlikely that the 1st Deceased was able to give RM1,000.00 to PW2 [the 1st Plaintiff]. PW2 said that the 1st Deceased worked part time for

an army friend doing food catering and supplying canopy earning RM150.00 – RM200.00 in cash. There is however, no evidence to substantiate this assertion that the 1st Deceased had worked part time. Thus the trial Judge was not misdirected in rejecting the claim for income from the part time job.

43. In my view, the multiplicand to calculate the loss of dependency for the 1st Plaintiff is as follows:

RM553.00 x 12 months x 16 years = RM106,176.00.

Loss of Income of Part Time Job for 1st Plaintiff

44. I have earlier given my reasons why I find that the trial Judge did not err in disallowing this claim and shall not repeat it here.

2nd Deceased

Loss of Dependency for the 2nd Plaintiff

45. The trial Judge awarded RM87,052.80 based on the take home pay of RM680.00 minus 1/3 for the 2nd Deceased living expenses for 12 months multiply with 16 years. There is no dispute as to the years of purchase of 16 years.

46. Counsel for the Plaintiff submitted that RM680.00 is not the take home pay but only the nett salary of the 2nd Deceased. As all the deductions to the 2nd Deceased's salary was for the benefit of his family, the gross salary should be taken into consideration.

47. The deduction to the 2nd Deceased's salary were "KOPERASI TENTERA", "INSURAN KELOMPOK", "LIAT", "RAMSUM",, "KPAT", " YURAN KOIR", "PERNAME", "BIRO" AND "PEL KELAB SUKAN ATM".

48. None of the above deductions were solely for the benefit of the 2nd Plaintiff whereby the loss could be considered as loss of dependency.

49. Based on the take home pay of RM680.00, I cannot find fault with the multiplicand applied by the trial Judge to calculate the sum of loss of dependency.

Loss of Income of Part Time Work of the 2nd Deceased

50. PW3 [the 2nd Plaintiff – father of the 2nd Deceased] said that the 2nd Deceased, who was a bachelor, used to give him and his wife a sum of RM1,300.00 per month. When asked in cross examination how the 2nd Deceased could give him RM1,300.00 when his take home pay was only RM680.00, PW3 said that the 2nd Deceased worked part time at his friend's coffee shop and was paid RM400.00 in cash.

51. It is a bare assertion without any substantiation. There is no reason why the 2nd Plaintiff did not want to call this friend to testify. In the circumstances, I am of the view that the trial Judge had not misdirected himself in disallowing the claim under this head.

3rd Deceased

Loss of Dependency for the 3rd Plaintiff

52. The trial Judge awarded RM320,006.40 using the multiplicand of RM2,500.00 [take home pay of the 3rd Deceased] minus 1/3 of the 3rd Deceased's living expenses for 12 months and 16 years. (RM1,666.67 [RM2,500.00 - RM833.33 [1/3 deduction]] x 12

months x 16 years). There is no dispute as to the years of purchase of 16 years.

53. PW4, the mother of the 3rd Deceased, who was a bachelor, said that 3rd Deceased gave her RM2,500.00 per month prior to his death. Counsel for the Plaintiff submitted that the 3rd Plaintiff is, therefore, entitled to claim for loss of dependency in the sum of RM2,500.00 per month, which would be RM480,000.00 [RM2,500 x 12 months x 16 years].

54. In my view, based on the take home pay as shown in the salary slip, the trial Judge did not misdirect himself in the multiplicand applied to arrive at the loss of dependency for the 3rd Plaintiff.

Loss of Income from Part Time Job

55. PW4 testified that after teaching in school, the 3rd Deceased sold sugar cane drinks in front of his house and he earned RM20 - RM30 per day during weekdays and RM100.00 per day during weekends.

56. PW7, Penghulu of Asajaya Laut, testified that he knew the family of the 3rd Plaintiff and that her family planted sugar cane on a piece of land and they sell sugar cane. He said that the 3rd Deceased used to sell sugar cane drinks at weekends and after office hours.

57. Counsel for the Plaintiffs submitted that the trial Judge erred in disallowing the loss of income from selling sugar cane.

58. It is clear from the testimonies of PW4 and PW7 that the planting and selling of sugar cane is essentially a family business in which the 3rd Deceased was involved in the selling of sugar cane.

Other than the bare assertion of PW4 that the 3rd Deceased gave her RM2,500.00 per month, there is no evidence from PW4 what were the family's expenses that warrant the 3rd Deceased giving such a sum to the mother as the family have the sugar cane plantation and sale of sugar cane drink business.

59. In the circumstance, I do not find it fit for the Court to disturb the trial Judge's award considering that the trial Judge had the benefit of seeing and observing PW4.

B. <u>SPECIAL DAMAGES</u>

<u>Funeral expenses for the 1st Deceased</u>

60. The 1st Plaintiff claimed as follows:

a. Kain kapan and mandi jenazah	RM 800.00
b. Batu nisan and grave plot	RM 1,000.00
c. Food and drink for prayer during 7th day, 20th day and 100th days	RM 8,288.90

	RM10,088.90
	==========

61. The trial Judge disallowed the above claim on the ground that the sums claimed were not substantiated.

62. PW2 testified that it is not the practice in the kampong to issue receipts. However, through PW6, some of the receipts for food and beverages [pages 719 - 722 Record of Appeal] were produced.

63. I have not lost sight of the general principle regarding proof of special damages, which is that it must be strictly proven. See, <u>Sam Wun Hoong v Kader Ibramshah</u> [1981] 1 MLJ 295 and

Manivannan Nalaamby & Ors v Wong Siew Ling & Ors [2014] 1 LNS 292.

64. However, it is without gainsaid that the family of the 1st Deceased would have given the 1st Deceased a decent burial which would incur cost. The fact that no receipt was produced for the tomb stone and burial site, burial clothes and food for people who came for prayers, does not mean that no money had been expended but that the actual expenditure cannot be exactly quantified.

65. In Tan Ah Hoong v Mahalingam [1962] MLJ 250, it was held that general expenses which have been reasonably incurred can be received.

66. In Wong Li Fatt William (an infant) v Haidawati bte Bolhen & Anor [1994] 2 MLJ 492, it was held that the Plaintiff's failure to produce receipts of purchase was not fatal considering he was just a village folk.

67. In my view, the sum of RM10,088.90 claimed by the 1st Plaintiff is not unreasonable nor excessive considering the station of the 1st Deceased. Thus, this sum ought to be allowed.

68. In the premise, I hold that trial Judge had misdirected himself in disallowing the claim for funeral expenses.

Funeral Expenses for the 2nd Deceased

69. The 2nd Plaintiff claimed the following as funeral expenses for the 2nd Deceased:

a. Kain kapan and mandi jenazah RM 800.00

b.	Batu nisan and grave plot	RM1,100.00
c.	Food and drink for prayer during 7th day, 20th day and 100th days	RM4,480.00
d.	Rental of canopies, chairs, tables	RM2,100.00
e.	Rental for serving utensils	RM 400.00
f.	Rental of cooking utensils	RM 700.00

		RM9,581.00
		=========

64. The trial Judge disallowed the claim under this heard on the ground that the 2nd Plaintiff had failed to prove the expenses.

65. Even though the 2nd Plaintiff did not produce receipts to substantiate the claim for the funeral expenses, I adopt the same view as expressed above when dealing with the claim for the funeral expenses for the 1st Deceased.

66. As such, I hold that the trial Judge had erred and misdirected himself in disallowing the claim under this head.

Funeral Expenses for the 3rd Deceased

70. The 3rd Plaintiff claimed the following as the funeral expenses for the 3rd Deceased:

a.	Transportation of 3rd Deceased's body	RM 500.00
b.	Kain kapan and mandi jenazah	RM 800.00
c.	Batu nisan and grave plot	RM1,100.00
d.	Food and drink for prayer during 7th day, 20th day and 100th days	RM4,500.00
e.	Rental of canopies, chairs, table	RM2,100.00
f.	Rental for serving utensils	RM 400.00

g. Rental of cooking utensils	RM 700.00

	RM9,581.00
	==========

64. The trial Judge disallowed the claim under this head on the ground that the 3rd Plaintiff had failed to prove the expenses.

65. Even though the 3rd Plaintiff did not produce receipts to substantiate the claim for the funeral expenses, I adopt the same view as expressed above when dealing with the claim for the funeral expenses for the 1st Deceased.

66. As such, I hold that the trial Judge had erred and misdirected himself in disallowing the claim under this head.

INTEREST

71. The trial Judge awarded interest at the rate of 5% per annum each for special and general damages from the date of the accident until full judgment.

72. In my view, the trial Judge has misdirected himself and the interest to be awarded should be:-

a) At 5% per annum on general damages from the date of service of Writ to the date of judgment, thereafter at 5% per annum until full payment.

COSTS

73. Counsel for the Plaintiffs submitted that it is generally accepted in Sarawak, in particular Kuching, that when parties reached an amicable settlement in motor vehicle accident without going for

trial, the cost to the Plaintiff agreed by parties is usually 10% of the judgment sum.

74. Where there is a full blown trial, it is unfair to award costs of merely 10% of the total judgment sum. It was submitted that the Plaintiffs' costs should be in the region of 20% of the total claim.

75. Thus, the costs should be RM192,760.00 based on the total claim of RM963,802.00.

76. Counsel for the Defendants submitted that the cost of RM192,760.00 is too high in running down case and without basis; and quoted the following cases and rules in support:

1. *In* ***Canopee Investment Pte. Ltd. & Ors. v. Landmarks Holdings Bhd. & Ors. [1990] 1 CLJ (Rep)***, his Lordship held:-

> *"For the purposes of taxation of costs running actions could be considered to be the* ***simplest of cases - it would attract the getting-up amount arrived or by applying the Subordinate Court Rules Scale (i.e. costs of suing and costs of advocacy)****. For the complicated case and those not so commonplace as running down actions there should be a gradual scaling upwards of costs for getting up from the starting point of what should be awarded in a running down action.*
>
> *When it is not possible to readily give a monetary value to the subject matter of the action the taxing officer should ask himself or herself how much more or less getting-up has to be done in the case than would have been done in a running*

down action and use the answer as a guide to adjust the quantum of the award."

2. *Further, in* ***JP Finance (M) Berhad v. Tanswan Brothers Enterprise Sdn. Bhd. & 3 Ors. [1994] 3 CLJ****, the High Court held:-*

> *"... At the low end would be the running down and simple goods sold and delivered type of cases and at the other end the complicated cases. This Court would suggest in the simpler cases, applying the Subordinate Court Rules Scale, where the value of the claim is from, say..."*

3. ***Order 59 rule 23 (1) Rules of Court 2012*** *which provides for the Scale of Costs for Trial in the Subordinate Courts:-*

> ***23. Scale of costs for trial in the Subordinate Courts (O. 59 r. 23)***
>
> *(1) Subject to the provisions hereunder, upon the conclusion and determination of any trial in the Subordinate Courts, the party entitled to costs shall, unless the Court otherwise orders, be paid fixed costs in accordance with the following scale:*

77. In my opinion, guided by the above authorities, costs in running down cases should be paid according to Order 59 rule 23(1) of the Rules of Court 2012 which provides for the scale of costs for trial in the Subordinate Court, as follows:-

> ***Scale of costs for trial in the Subordinate Courts (O. 59, r. 23)***
>
> *23. (1) Subject to the provisions hereunder, upon the conclusion and determination of any trial in the Subordinate Courts, the party entitled to costs shall, unless the Court*

otherwise orders, be paid fixed costs in accordance with the following scale:

……..

……..

Exceeds RM500,000	*Discretionary but shall not exceed RM40,000*

CONCLUSION

78. I allow the appeal against liability – 100%.

79. I allow the appeal against quantum, as follows:-

A. General Damages

(i) Loss of dependency: for 1st Plaintiff — RM106,176.00

B. Special Damages

i. Funeral expenses for 1st Deceased: RM10,088.00

ii. Funeral expenses for 2nd Deceased: RM 9,581.00

iii. Funeral expenses for 3rd Deceased: RM 9,581.00

80. In summary, the total awards are as follows:

(a) ***1st Plaintiff*** :

a.	Bereavement	RM 10,000.00
b.	Loss of dependency as awarded upon appeal	RM106,176.00
c.	Special damages as awarded by the SCJ	RM 722.00
d.	Funeral expenses	RM 10,088.90
	Total:	RM126,986.90

(b) ***2nd Plaintiff***

a.	Bereavement	RM 10,000.00
b.	Loss of dependency as awarded by SCJ	RM 87,052.80
c.	Special damage as awarded by SCJ	RM 690.00
d.	Funeral expenses	RM 9,581.00

	Total:	RM107,323.80
		==========

(c) ***3rd Plaintiff***

a.	Bereavement	RM 10,000.00
b.	Loss of dependency as awarded by SCJ	RM320,006.40
c.	Special damages as awarded by SCJ	RM 790.00
d.	Funeral expenses	RM 9,581.00

	Total:	RM340,377.40
		==========
	Grand Total:	RM574,688.10
		==========
	Bereavement:	- (RM 30,000.00)
		==========
	Total for Taxation:	RM544,688.10

81. Based on the scale of cost under Order 59 rule 23(1) Rules of Court 2012, costs for a claim which exceeds RM500,000.00 will be discretionary but shall not exceed RM40,000.00.

82. Having regard to the facts of the case which does not involve complex issues of law and revolved around factual matrix of the case only, I consider RM20,000.00 to be a reasonable amount as costs to the Plaintiffs for both the main action and the appeal. I do so order.

(DATUK YEW JEN KIE)
Judge

Date of Delivery of Judgment: 21.8.2015

Date of Hearing: 18.12.2014
27.2.2015
9.3.2015
10.4.2015
15.7.2015

For the Appellant: Mr Sarbjit Singh Khaira
Ms Catherine David
Messrs Khaira & Co. Advocates
Kuching

For the Respondent: Mr Allan Lau
Mr Norman Prima
Messrs David Allan Sagah & Teng Advocates
Kuching

Notice: This copy of the Court's Reasons for Judgment is subject to editorial revision.