

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28
29
30
31
32
33
34
35

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

1 **(IN THE MATTER OF KUCHING SESSIONS COURT**

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

3 **BETWEEN**

4 **SITI NUR SYAHIRA BINTI ABDULLAH**

5 (WN. KP. 830818-13-5538)

6 [The Administratrix of the Estate of

7 MAHIDI BIN AKUN (1st Deceased)]

8 No. 36 Kampung Serpan Laut

9 94600 Asajaya, Sarawak

... **1ST PLAINTIFF**

10 **KAMRI BIN JINI**

11 (WN. KP. 490628-13-5205)

12 [The Administrator of the Estate of

13 SABDIE BIN KAMRI (2nd Deceased)]

14 Kampung Asajaya Tengah

15 94600 Asajaya, Sarawak

... **2ND PLAINTIFF**

16 **AWAN BINTI SAINI**

17 (WN. KP. 611212-13-5592)

18 [The Administratrix of the Estate of

19 MOHAMMAD ZOOLNEEZAM BIN

20 ALON (3rd Deceased)]

21 Kampung Asajaya Laut

22 94600 Asajaya, Sarawak

... **3RD PLAINTIFF**

23 **AND**

24 **SELLI BIN SA'IET**

25 (WN. KP. 700627-13-5441)

26 Kampung Tanjong Tuang

27 94300 Kota Samarahan, Sarawak

... **1ST DEFENDANT**

28 **MARJA TRANSMEDIC**

29 (Company No: 64144/Q [SKT])

30 No. 6, 1st Floor Gaya Centre

31 L7412 Section 64

32 Jalan Simpang 3

33 93300 Kuching, Sarawak

... **2ND DEFENDANT)**

34

JUDGMENT

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

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

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

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

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

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

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

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

1 **Point "A' or "B"?**

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

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

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

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

- 1 15. It is regrettable that other than the sketch plan, there is no
2 photographs nor reports from Puspakom to assist the Court to
3 find out who caused the accident.
- 4 16. Counsel for the Plaintiffs submitted that based on the debris
5 found at Point "B" where the majority of the debris were found
6 compared to Point "A", it is highly probable that the collision
7 occurred on the Kancil's lane because the majority of the debris
8 was found at point "B", citing Fatimah bte Derakman v Wan
9 Jusoh bin Wan Kolok 15 & Anor [1994] MLJU 190. In this cited
10 case, Lamin FCJ held: *"In the absence of evidence to the*
11 *contrary, it is always a safe guide to adopt that the point of*
12 *impact is at or around the point where the pieces of glass are*
13 *mostly found."*
- 14 17. Counsel for the Plaintiffs submitted that the glass debris at point
15 "A" was at the middle line of the road and not on the bus' lane.
16 It was pointed out that PW1 never said that point "A" is the point
17 of collision. Point "A" is merely a reference to the dotted marks
18 on the middle of the road against the left rear portion of the bus,
19 and the dotted marks which denoted the debris were not in the
20 bus' lane but in the middle of the road.
- 21 18. On the other hand, counsel for the Defendants submitted that the
22 Plaintiffs' submission that point "A" is merely referring to the
23 dotted marks on the middle of the road, which denotes debris, is
24 the Plaintiffs' desperate attempt to sway the Court in their favour.
25 It was submitted that the Plaintiffs had failed to re-examine PW1
26 on this and it is, therefore, unreasonable and unfair to bring out
27 this point in the submission in the appeal.

- 1 19. PW1 had said in cross-examination that he was not sure where
2 the point of impact was but there were glass debris on the left
3 and right side of the road, then he was asked to mark "A" for the
4 glass debris on the left side and "B" for the glass debris on the
5 right side. A close perusal of the sketch plan showed there were
6 dots seen around the bus at two places – (1) majority of the dots
7 where PW1 marked "B" and (2), much less dots next to the left
8 rear of the bus near where PW1 marked "A".
- 9 20. I believe that it is fair to say that these dotted marks denote the
10 glass debris. It cannot be at the spot where PW1 wrote "A"
11 because there were no dots there. By reason that PW1 was asked
12 to indicate the glass debris on the left side of the road, it is logical
13 to say that "A" referred to the dots found at the left rear of the
14 bus which is very close to the middle of the road.
- 15 21. Is it probable for the collision to have happened at point "A" as
16 found by the trial Judge? Counsel for the Defendants submitted
17 that the trial Judge was correct to find that point "A" is the more
18 probable point based on PW1's evidence. It was further
19 submitted that if the impact was at point "B", there would be no
20 debris at point A, this is because upon a forceful impact, glass
21 debris from the bus would have been flung forward and it is
22 highly improbable that the debris could have ended up behind
23 the bus at point "A".
- 24 22. In my opinion, it is quite futile to rely on PW1's testimony
25 because he had frankly admitted that he did not know where the
26 point of impact was and he was of the view that it was either at
27 point "A" or point "B".

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

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

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

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

3 26. In my opinion, the collision had most probably happened at
4 Point B for the following reasons: Although DW1 denied that
5 he was speeding prior to the accident that fatal morning, I am
6 inclined to believe that he was speeding as the evidence showed
7 that DW1 was required to pick up students from the school at
8 7.00 a.m. for an outing. When DW1 reached the place of the
9 accident at around 6.40 a.m. he was still 25 minutes away from
10 the school. Although DW1 said that he need not have to speed
11 as the traffic was not heavy on that Sunday morning, I am
12 inclined to think that with less traffic there is an even greater
13 tendency to drive faster to beat the time.

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

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

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

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

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

11 **APPEAL ON QUANTUM**

12 **A. GENERAL DAMAGES**

13 **1st Deceased**

14 **i. Loss of Dependency for the 1st Plaintiff**

15 31. The trial Judge awarded RM49,363.20 based on the take home
16 pay of RM385.65 per month minus 1/3 for personal expenses for
17 12 months multiply with 16 years purchase.

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

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

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

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

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

10 35. On the other hand, counsel for the Defendants submitted that the
11 trial Judge was correct in law in the light of the case of
12 Shahrizam Bin Damsah v Mahathir Bin Mohd Isa & Anor
13 [2014]10 MLJ 490 for the following reasons:

14 *(a) there is no doubt that the multiplicand to be used to*
15 *calculate the loss of dependency should be the 1st*
16 *Deceased's take home pay because this is the amount that*
17 *the 1st Deceased would had received; and*

18 *(b) the monthly earning is the monthly take home earnings*
19 *because it was this income that the 1st Deceased took home*
20 *every month and from which the deductions for living*
21 *expenses would be made; and*

22 *(c) the multiplicand should be the take home pay of the 1st*
23 *Deceased and not the gross income.*

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

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

1 *whose benefit the action is brought shall, subject to this*
2 *section, be such as will compensate the party for whom*
3 *and for whose benefit the action is brought for any loss*
4 *of support suffered together with any reasonable*
5 *expenses incurred as a result of the wrongful act,*
6 *neglect or default of the party liable under subsection*
7 *(1):*

8 *Provided that—*

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

13 *(a) ;*

14 *(b) ;*

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

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

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

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

1 “KOPERASI”, “INSURAN KELOMPOK”, “ITAT”,
2 “PERNAMA”, BIL API/AIR and “PEL KELAB SUKAN AT”.

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

7 a. Peruntukkan – deduction for the wife and mother.

8 b. Koperasi Tentera – a kind of saving.

9 c. Insuran Kelompok – Army insurance.

10 d. KPAT [Koperasi Tentera] – withdrawal saving.

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

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

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

17 h. BIRO – external insurance.

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

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

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

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

8
$$\text{RM}553.00 \times 12 \text{ months} \times 16 \text{ years} = \text{RM}106,176.00.$$

9 **Loss of Income of Part Time Job for 1st Plaintiff**

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

12 **2nd Deceased**

13 **Loss of Dependency for the 2nd Plaintiff**

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

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

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

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

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

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

8 50. PW3 [the 2nd Plaintiff – father of the 2nd Deceased] said that the
9 2nd Deceased, who was a bachelor, used to give him and his wife
10 a sum of RM1,300.00 per month. When asked in cross
11 examination how the 2nd Deceased could give him RM1,300.00
12 when his take home pay was only RM680.00, PW3 said that the
13 2nd Deceased worked part time at his friend's coffee shop and
14 was paid RM400.00 in cash.

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

20 **3rd Deceased**

21 **Loss of Dependency for the 3rd Plaintiff**

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

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

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

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

12 **Loss of Income from Part Time Job**

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

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

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

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

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

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

9 **B. SPECIAL DAMAGES**

10 **Funeral expenses for the 1st Deceased**

11 60. The 1st Plaintiff claimed as follows:

12	a. Kain kapan and mandi jenazah	RM 800.00
13	b. Batu nisan and grave plot	RM 1,000.00
14	c. Food and drink for prayer during	
15	7 th day, 20 th day and 100 th days	RM 8,288.90
16		-----
17		RM10,088.90
18		=====

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

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

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

1	b. Batu nisan and grave plot	RM1,100.00
2	c. Food and drink for prayer during	
3	7 th day, 20 th day and 100 th days	RM4,480.00
4	d. Rental of canopies, chairs, tables	RM2,100.00
5	e. Rental for serving utensils	RM 400.00
6	f. Rental of cooking utensils	RM 700.00
7		-----
8		RM9,581.00
9		=====

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

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

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

18 **Funeral Expenses for the 3rd Deceased**

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

21	a. Transportation of 3 rd Deceased's body	RM 500.00
22	b. Kain kapan and mandi jenazah	RM 800.00
23	c. Batu nisan and grave plot	RM1,100.00
24	d. Food and drink for prayer during	
25	7 th day, 20 th day and 100 th days	RM4,500.00
26	e. Rental of canopies, chairs, table	RM2,100.00
27	f. Rental for serving utensils	RM 400.00

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

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

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

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

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

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

14 *“For the purposes of taxation of costs running*
15 *actions could be considered to be the simplest of*
16 *cases - it would attract the getting-up amount*
17 *arrived or by applying the Subordinate Court*
18 *Rules Scale (i.e. costs of suing and costs of*
19 *advocacy). For the complicated case and those*
20 *not so commonplace as running down actions*
21 *there should be a gradual scaling upwards of*
22 *costs for getting up from the starting point of*
23 *what should be awarded in a running down*
24 *action.*

25 *When it is not possible to readily give a monetary*
26 *value to the subject matter of the action the*
27 *taxing officer should ask himself or herself how*
28 *much more or less getting-up has to be done in*
29 *the case than would have been done in a running*

1	(b) <u>2nd Plaintiff</u>	
2	a. Bereavement	RM 10,000.00
3	b. Loss of dependency as	
4	awarded by SCJ	RM 87,052.80
5	c. Special damage as	RM 690.00
6	awarded by SCJ	
7	d. Funeral expenses	RM 9,581.00
8		-----
9		Total: RM107,323.80
10		=====
11	(c) <u>3rd Plaintiff</u>	
12	a. Bereavement	RM 10,000.00
13	b. Loss of dependency as	
14	awarded by SCJ	RM320,006.40
15	c. Special damages as	RM 790.00
16	awarded by SCJ	
17	d. Funeral expenses	RM 9,581.00
18		-----
19		Total: RM340,377.40
20		=====
21		Grand Total: RM574,688.10
22		=====
23		Bereavement: - (RM 30,000.00)
24		=====
25		Total for Taxation: RM544,688.10

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

