

Nazli Binti Mahdzir<sup>1</sup>**Abstract**

The introduction of section 28A by the Civil Law (Amendment) Act 1984 (Act 602) on 1<sup>st</sup> October 1984 bring with it a married of issues pertaining to the award for loss of earning. While the section itself is simple enough to understand, the interpretation given to it by the judges is not similarly straight forward. The decision in *Dirke Peiternella Halma v Mohd Noor bin Baharom & Ors* [1990] 3 MLJ 103 and *Tan Kim Chuan & Anor v Chandu Nair* [1991] 1 MLJ 42 which dealt with the issue of the award for loss of earning capacity, raises the issue that the 1984 amendment had imposes several conditions to an otherwise an area reserved to the judges discretion. Where previously the judges have the discretion in awarding and assessing the award according to the principle of Common Law, these two Supreme Court cases held that the discretionary power of judges to award damages for loss of earning capacity to persons who are not earning at the time of accident was swipe away by section 28A (2)(c) of the Act. This paper attempt to address the question of whether the introduction of section 28A (2) has removed the discretionary power of judges in assessing the award for loss of future earning capacity by subjecting the award and the assessment of this head of damages to the same conditions and fixed multiplier as the award for loss of future earnings.

**INTRODUCTION**

Historically, the personal injury law in Malaysia was poor of rules and rich in discretion.<sup>2</sup> The determination of the awards is mainly left in the hand of the preceding judge with minimal legislative intervention. This situation however came to an end with the passing of the Civil Law (Amendment) Act 1984 (Act 602)<sup>3</sup> on 1<sup>st</sup> October 1984 in which several provisions pertaining to the assessment of damages for personal injury in the Civil Law Act 1956 (Act 67)<sup>4</sup> was amended. Although the amendments were couched with the intention of providing consistency in the assessment,<sup>5</sup> clarity in the purpose of the awards<sup>6</sup> and most importantly controlling the amount of damages being meted out by the courts<sup>7</sup> in order to prevent flood of personal injury claims in our courts,<sup>8</sup> the re-wording of several provisions, the abolition of a number of head of damages as well as the introduction of new head of damages and various conditions and guidelines in the assessment of damages subconsciously implies that the legislature is at the same time trying to divest some of the judges' discretion in the assessment of damages for personal injury. With this introductory remark, this paper attempt to address the question of whether the introduction of section 28A (2) of the CLA 1956 has removed the discretionary power of judges in assessing the

<sup>1</sup> Tutor, Collage of Law, Government and International Studies, Universiti Utara Malaysia. Tel 04-9284952, Fax 04-9284205, Email: mnazli@uum.edu.my

<sup>2</sup> Hawkins, Keith, ed. *The Use of Discretion*, (Oxford : Clarendon Press, 1992), at 48.

<sup>3</sup> Hereafter known as CLAA 1984.

<sup>4</sup> Hereafter known as CLA 1956.

<sup>5</sup> The Explanatory Statement to the Civil Law (Amendment) Bill 1984 stated that the motivation behind the amendments is to control the varying court awards "in respect of actions for damages for personal injuries including those resulting from death."

<sup>6</sup> Clause 2 of the Explanatory Statement explained that the changes made to section 7 of the Act were made in order to provide "for a more definitive statement of the purpose of the dependency claim, the abolition of the claim for loss of services, and the award for damages for bereavement which is fixed at RM 10,000, and it also provide for the method of assessing for the loss of earnings of the deceased person in respect of the period after his death." Also see Clause 3 of the Explanatory statement.

<sup>7</sup> During the second and third reading of the Civil Law (Amendment) Bill 1984, the then Deputy Home Minister stated that the amendment is to prevent the past practice of allowing large awards which is injurious to the insurance companies. He later expounded in *The Star* on August 14<sup>th</sup>, 1984 that 'the sole reason for the amendment Act is to restore the old principle of law relating to award of damages – judge not to give full compensation but only fair compensation. See decision by Gopal Sri Ram JCA in *Ibrahim bin Ismail & Anor v Hasnah bt Puteh Imat* (2004) 1 MLJ 525, Reiss, Seth M., "Quantum for Future Loss in Personal Injury and Fatal Accident Cases After the Civil Law (Amendment) Act 1984", (1985), 2 *Malayan Law Journal* lxii – lxxi, at lxiii and Rutter, Michael F., *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia*, 2<sup>nd</sup> ed. (Hong Kong: Butterworth Asia, 1993), at 844.

<sup>8</sup> Dr Mahathir Mohammed, the Prime Minister (as he was then), in supporting the amendment said in the *Straight Times of Saturday* on September 8<sup>th</sup>, 1984 that that the changes were necessary to prevent Malaysia from becoming a 'litigious society' which in the long run affects the society and not the insurance companies alone.



award for loss of future earning capacity by subjecting the award and the assessment of this head of damages to the same conditions and fixed multiplier as the award for loss of future earnings. For easy reference, the section is reproduced below;

### **Damages in respect of personal injury**

**28A.** (1) In assessing damages recoverable in respect of personal injury which does not result in death, there shall not be taken into account—

(a) any sum paid or payable in respect of the personal injury under any contract of assurance or insurance, whether made before or after the coming into force of this Act;

(b) any pension or gratuity, which has been or will or may be paid as a result of the personal injury; or

(c) any sum which has been or will or may be paid under any written law relating to the payment of any benefit or compensation whatsoever in respect of the personal injury.

(2) In assessing damages under this section—

(a) no damages shall be recoverable in respect of any loss of expectation of life caused to the plaintiff by the injury;

(b) if the plaintiff's expectation of life has been reduced by the injury, the Court, in assessing damages in respect of pain and suffering caused by the injury, shall take into account any suffering caused or likely to be caused by awareness that his expectation of life has been so reduced;

(c) in awarding damages for loss of future earnings the Court shall take into account—

(i) that in the case of a plaintiff who has attained the age of fifty-five years or above at the time when he was injured, no damages for such loss shall be awarded; and in any other case, damages for such loss shall not be awarded unless it is proved or admitted that the plaintiff was in good health but for the injury and was receiving earnings by his own labour or other gainful activity before he was injured;

(ii) only the amount relating to his earnings as aforesaid at the time when he was injured and the Court shall not take into account any prospect of the earnings as aforesaid being increased at some time in the future;

(iii) any diminution of any such amount as aforesaid by such sum as is proved or admitted to be the living expenses of the plaintiff at the time when he was injured;

(d) in assessing damages for loss of future earnings the Court shall take into account that—

(i) in the case of a person who was of the age of thirty years or below at the time when he was injured, the number of years' purchase shall be 16; and

(ii) 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 when he was injured, the number of years' purchase shall be calculated by using the figure 55, minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.

## Loss of Future Earning Capacity under the Common Law

The award for loss of future earning capacity is one of the Common Law damages which is recognized by our local courts. Traditionally, it is awarded when there is a real risk that the plaintiff, although working at the time of trial, may lose his current employment or being at a disadvantage in getting an equally paid job due to the injury suffered (although not immediately after resuming employment),<sup>9</sup> where claimant's capacity to earn is diminished<sup>10</sup> or where the claimant is unemployed or an infant.<sup>11</sup> It is immaterial whether or not the plaintiff was employed or earning income at the time of accident. The Common Law only concern with the possibility of plaintiff being at a disadvantage later in the work-market and unable to compete with others for the same employment or pay.<sup>12</sup> Brown LJ in *Moeliker v A. Reyrolle & Co. Ltd.* held that loss of future earning capacity is awarded to the plaintiff when;

“there is a substantial or real risk that he will at some time at the end of his working life lose his job or get a less paid employment because of the effect of his injuries”

## Loss of Future Earning Capacity under the Civil Law Act

It should be noted that this award is not statutorily provided for either in the old CLA 1956 or the newly amended CLA 1956. Although the marginal note to section 28A of the CLA 1956 which states “Damages in Respect of Personal Injury” may imply that the section would govern all headings of damages in respect of personal injury not relating to death, including loss of future earning capacity, nothing in the entire section 28A specifically provide for the assessment of this particular head of damages. It is however undisputed that the absence of provision relating specifically to loss of future earnings capacity in CLAA 1956 does not indicate that this head of damages is abolished by the Act. It must be distinguished from the award for loss of pre-trial earnings which was abolished by the 1984 amendment.<sup>13</sup> The abolishment of the award for loss of pre-trial earnings was not by virtue of the absence of specific provision regarding it in the CLAA 1984 but due to the wordings in section 28A(2)(c) and (d) which states that the calculation of future loss of earnings is to be calculated from the date of injury, indicating that the loss of pre-trial earnings is to be absorbed into the awards for loss of future earnings. Had the legislature intended that loss of future earning capacity to be similarly abolished, it would have done so either in specific wording such as those for the award for loss of expectation of life in section 28A(2)(a) or impliedly as the awards for loss of pre-trial earnings in section 28A(2)(c) and (d).<sup>14</sup> Since claim for loss of future earning capacity is clearly claimable, the question here is how loss of future earnings capacity is to be assessed? Does it follow similar assessment as loss of future earnings or does it still retain the assessment according to the Common Law principles in which judges have the discretion in the determination and assessment of the quantum?

## IS THE CONDITIONS IN Section 28A(2)(c) APPLICABLE TO LOSS OF FUTURE EARNING CAPACITY?

The issue of the award for loss of future earning capacity was first dealt with by the Supreme Court in *Dirkje Peiternella Halma v Mohd Noor bin Baharom & Ors.* The appellant, a nurse from Holland in this case was allowed an alternative claim of loss of future earning capacity when her initial claim for loss of future earning was rejected due to her being on unpaid leave and not receiving earning at the time of accident, thus barring her from claiming loss of future earning. The award for loss of future earning capacity was however awarded on the ground that the appellant who was practically a vegetable after the accident had lost the capacity to earn throughout her working life. In awarding the damages for loss of future earning capacity to the appellant who was

<sup>9</sup> *Moeliker v A Reyrolle & Co. Ltd.* (1977) 1 All ER 9.

<sup>10</sup> *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324.

<sup>11</sup> *Yang Salbiah v Jamil bin Harun* [1981] 1 MLJ 292.

<sup>12</sup> Lim, Heng Seng, *Assessment of Damages in Personal Injury and Fatal Accident Claims: Principles and Practices*, (Kuala Lumpur: Marsden Law Book, 1995), 64.

<sup>13</sup> See *Nagarajan a/l Veerapan v Ananthan a/l Parama Sivam* [1989] 2 CLJ 1243.

<sup>14</sup> Also see *Dirkje Peiternella Halma v Mohd Noor bin Baharom* [1990] 3 MLJ 103 (hereafter referred to as *Dirkje Peiternella Halma*) where the Supreme Court accepted the appellant argument that CLA 1956 did not expressly or impliedly abolish the award for loss of future earning capacity and awarded RM 200,000 for the same.

not receiving earning at the time of accident,<sup>15</sup> the Supreme Court seems to suggest that section 28A (2) is not applicable with regard to the claim for loss of future earning capacity<sup>16</sup> and that the Common Law assessment as applied in *Yang Yap Fong v Leong Pek Hoon & Anor*<sup>17</sup> is still applicable.

The Supreme Court case of *Tan Kim Chuan & Anor v Chandu Nair*<sup>18</sup> was where the debate starts from. The court in this cases decided that in enacting section 28A(2)(c)(i), the legislature intended that the condition that the claimant must be receiving earnings before the injury is extended to the claim for loss of future earning capacity. The appellant in this case was denied the claim for loss of future earning capacity on the ground him being a student and not earning any income at the time of injury. Abdul Hamid Omar LP held;

“The cardinal issue for us to decide is **did the 1984 amendments oust the discretion and powers and past practices of the Court based primarily on common law?** If we hold that the amendments clearly superceded the common law and previous statutory law, then the plaintiff is not entitled to any compensation either for loss of earnings or earning capacity as he was not earning anything at the material time of the accident...”

“The marginal note to s. 28A which reads "Damages in respect of personal injuries" suggests that the provisions are exhaustive and mandatory. The word "shall" in the opening sentence in para. (c) and the words "shall not be awarded" in sub-para. (i) of para. (c) and the words "shall not take into account" in sub-para (ii) of para. (c) in subsection (2) of s. 28A clearly indicate that it is an essential prerequisite that in awarding damages for loss of future earnings or loss of earning capacity there must be proof that the claimant was receiving earnings by his own labour or other gainful activity before he was injured...”

“ it is abundantly clear that the legislature , in its wisdom, decided that **an injured person ought not to get any damages in a claim either for loss of future earnings or loss of earning capacity unless before the accident (at the date of accident) he was in fact receiving earnings.** To hold otherwise would mean that the court is creating law to provide for something which the legislature has no intention to do.”(*emphasis added*)

If one were to ask Professor Muhammad Altaf, one would be presented with the opinion that section 28A CLAA 1956 is intended to govern the assessment of all damages relating to future earnings, inclusive of the award for loss of future earning capacity. The distinction between loss of future earnings and loss of future earning capacity is abolished by the section. Maintaining distinction between loss of future earnings and loss of future earning capacity to him is merely an attempt by the judiciary to avoid from having to follow the statutory multiplier in section 28A(2)(d)<sup>19</sup> which sometimes may lead to injustice to the claimant. He opined that to limit the scope of section 28A to the award for loss of future earning only would create an absurdity since it would impose more conditions upon claimant claiming for loss of future earning while allowing judges to use their discretion in assessing loss of future earning capacity.<sup>20</sup> Hence, the pre-conditions and the statutory multiplier provided in section 28A (2)(d) of the CLAA 1984 would also be applicable in the assessment of loss of future earning capacity.

<sup>15</sup> Note the inconsistency, earlier when dealing with the award for loss of future earning, the Court had defined 'receiving earning before he was injured' in section 28A(2)(c)(i) as being gainfully employed and receiving income 'at the time of the accident'. As such, the appellant was not entitled to the award for loss of future earning since she was not receiving income at the time of accident.

<sup>16</sup> Balan, P. "Loss of Future Earnings, Loss of Earning Capacity and the Civil Law (Amendment) Act, 1984", 17 (1990) *Journal of Malaysian Comparative Law*, 169 – 180, 176.

<sup>17</sup> [1987] 2 MLJ 201. See also *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985] 1 MLJ 30. Note that the cause of action in both cases occurs before 1 October 1984, thus affected by the CLAA 1984.

<sup>18</sup> [1991] 1 MLJ 42. (hereafter referred to as *Tan Kim Chuan*)

<sup>19</sup> Muhammad Altaf Hussain Ahangar, "Damages for loss of Earnings in Malaysia: the Need for a 'Just' Multiplier", (2003) 3 *Malayan Law Journal*, lxxxix – xcvi.

<sup>20</sup> *ibid*, lxxxix.

Despite decision in *Tan Kim Chuan* and Professor Altaf's opinion, various scholars had argued against this and opined that the assessment for loss of future earning capacity is not governed by section 28A(2)(c). Professor Balan opined that the Supreme Court decision in *Dirkje Pieternella Halma* indicate that the 1984 amendment preserves the judge's discretion in the award for loss of future earning capacity and that this head of damages is not regulated by section 28A(2). The reasoning given in *Tan Kim Chuan* in distinguishing itself from *Dirkje Pieternella Halma* that plaintiff in *Dirkje Pieternella Halma* was receiving earning prior to the accident was flawed since it was initially decided that the plaintiff was not 'receiving earning' to satisfy the requirement in section 28A (2) for the award for loss of future earning. As such, it was incomprehensible how the same plaintiff would be 'receiving earning' to satisfy the requirement of loss of future earning capacity should the same definition of 'receiving earning... before he was injured' in the section is to be similarly applicable to the award for loss of future earning capacity.<sup>21</sup> Almost similar view was given by the esteemed K.S. Dass. He commented that the fact that the Supreme Court in *Tan Kim Chuan* merely distinguished itself from *Dirkje Pieternella Halma* and did not totally overruled it is an indication that the Supreme Court recognized that the legislature had not swept away the judge's discretion in the assessment of damages. Judges still retain their discretion in the assessment of loss of future earning capacity since going by the strict interpretation of section 28A (2) would be unjust to the plaintiff.<sup>22</sup> Santhana Dass also contended that section 28A (2)(c) is not applicable for claim for loss of future earning capacity and that the three conditions enunciated in the section are not relevant to the award.<sup>23</sup> Rutter also had presented a very strong argument on this point. He opined that it is settled law that loss of future earnings and loss of future earning capacity are two separate and distinct head of damages. Since the very foundation of the principle of statutory interpretation that the legislature have full awareness of the state of law at the time of the construction of statute, it must be presumed that the legislature was aware of the effect of the amendment to the award for future loss of earning and that in omitting to include loss of future earning capacity into the wording of the section, the legislature deliberately and consciously excluding loss of future earning capacity from subjecting to the same conditions.<sup>24</sup>

In addition to the above well argued opinion, it is submitted that the most obvious reason is the absence of any indication that the section is intended to govern award for loss of future earning capacity. Section 28A(2) specifically mention that para (i) to (iii) to section 28A(2)(c) and para (i)-(ii) to section 28A(2)(d) deal only with the assessment of damages for loss of future earning alone. Eventhough the term 'shall' in para (c), 'shall not be awarded' in in para (c)(i) and 'shall not take into account' in para (c)(ii) in section 28A(2) indicate that the condition of receiving earnings before the injury' is pre-requisite before an award under the section can be made, the opening sentence in para (c) clearly states 'in awarding damages for loss of future earnings'. Thus, indicating that the provisions deals solely with the assessment for loss of future earnings. Since the task of the court is to give effect to the plain and ordinary meaning of the statute when the words are clear and unequivocal, the author failed to see how the assessment of loss of future earning capacity is to be read into the section. The notion that the distinction between loss of future earnings and loss of future earning capacity was put to an end by the incorporation of section 28A as opined by Prof. Altaf<sup>25</sup> is also insupportable due to the obvious dissimilarities between the two awards.

The notion that section 28A (2) is not applicable to loss of future earning capacity is further reinforced by the absence of discussion on the whether the conditions of 'below the age of 55' and 'in good health' is applicable in loss of future earning capacity. Perusal of the relevant local literature relating to the claim for loss of future earning capacity<sup>26</sup> reveals that the discussions on the assessment of the loss of future earning capacity are mainly confined to the issue of condition

---

<sup>21</sup> Balan, P., *op.cit.* (1990), 179.

<sup>22</sup> Dass, K.S., *Quantum of Damages in Personal Injury, Parliament v Common Law, A critical Examination of the 1984 Amendment to the Civil Law Act 1956*, (Kuala Lumpur: Legal Circle Book Sdn. Bhd, 1997), 104.

<sup>23</sup> Dass, S. Santhana, *Personal Injury Claims*, (Petaling Jaya: Alpha Sigma, 2000), 113.

<sup>24</sup> Rutter, Michael F., *op.cit.*, 314.

<sup>25</sup> Muhammad Altaf Hussain Ahangar, "Judicial Responses to Damages Law in Malaysia: An Analysis", *5<sup>th</sup> ASEAN Law Institute Conference*, (Singapore : 22-23 Mei 2008).

<sup>26</sup> Balan, P., *op. cit.*, Muhammad Altaf Hussain Ahangar, *op.cit.*, Dass, K.S., *op. cit.*, Rutter, Michael F.. *op. cit.*, Dass, S. Santhana, *op. cit.*, Muhammad Altaf Hussain Ahangar, *Damages Under Malaysian Tort Law: Cases and Commentary*, (Petaling Jaya: Sweet & Maxwell Asia, 2009).

of 'receiving earnings... before the injury'.<sup>27</sup> Even Professor Altaf made no observation on whether the other two conditions are similarly applicable. The decisions in *Tan Kim Chuan* and *Dirkje Pietenella Halma* were also limited on the similar issue and made no mention of whether the requirements that claimant is below 55 years old and of good health at the time of injury is also applicable for the assessment of this head of damages. Similarly, the court in *Chong Chee Khong & Anor v Ng Yeow Hin*<sup>28</sup> while citing section 28A (2)(c)(i) and decided that the section places the necessity of proving that the claimant was receiving earning as before the injury as a prerequisite for the award for loss of future earning capacity, made no mention on the other two conditions. Kamalanathan Ratnam JC stated;

"Before the Civil Law Act 1956 was amended in 1984, it mattered not whether the plaintiff was in employment or not at the time of the accident so long as the court was satisfied from evidence adduced that there was a real or substantial risk that his earning capacity would be affected in the future. **However, after the amendment, it is an essential prerequisite of s 28A (2)(c)(i) that in awarding damages for loss of future earning capacity, there must be proof that the claimant was receiving earnings by his own labour or other gainful activity prior to the accident.** In this respect I rely on the clear enunciation of this principle by the (then) Supreme Court in *Tan Kim Chuan & Anor v Chandu Nair* [1991] 2 MLJ 42 where in the then Lord President, Abdul Hamid Omar LP said at p 44:... We reiterate that s 28A(2)(c)(ii) which states that 'only the amount relating to his earnings as aforesaid at the time when he was injured and the court shall not take into account any prospect of earnings aforesaid being increase at sometime in the future', makes the intention of the legislature abundantly clear and indeed the legislature had the prospect of future earnings (whatever label attached to it) in mind when the law was enacted. The use of the words 'whatever label attached to it' in my view provides for an awards of loss of earning capacity notwithstanding the fact that evidence discloses no loss of future earnings." (*emphasis added*)

### **Do Judges Have Absolute Discretion in the Assessment of Loss of Future Earning Capacity As Per Common Law?**

While maintaining that the award for loss of future earning capacity is not subject to the conditions in section 28A (2)(c), to allow that the award is still entirely govern by the Common Law principle and judges discretion<sup>29</sup> is also unacceptable. On this point, Professor Altaf's observation that to make the condition of earning income compulsory to the award for loss of future earning only would be unjust and illogical to some extent is not without merit. To do so would impose more conditions upon claimant claiming for loss of future earning while allowing judges to use their discretion in assessing loss of future earning capacity.<sup>30</sup> Therefore it is humbly submitted that the actual effect of *Tan Kim Chuan* is limited to asserting that a child or persons who is not receiving earning at the time of injury is prevented from claiming loss of future earning capacity, it does not however extend to adopting the entire section 28A (2) into the award. Hence, other than the need to prove earning at the time of injury, CLA 1984 still preserve the Common Law principles and judges discretion with regard to this head of damages.

The requirement of proving income enacted by the Supreme Court in *Tan Kim Chuan*, although a departure from the Common Law, is understandable since the court need to ascertain that the claimant is actually earning at the time of injury and that the injury would hinder his capacity to earn similar income in the future. The court also would need to ensure that the claimant have the capacity to work and would indeed be working but for the injury. To allow a child or persons who have yet to earn income or was not earning any income at the time of injury would subject the court to guesswork and uncertainty, something akin to the award for 'loss years' which is abolished by the CLAA 1984.

<sup>27</sup> Santhana Dass briefly commented that the conditions are not applicable by virtue of section 28A not applicable to loss of future earning capacity.

<sup>28</sup> [1997] 5 MLJ 786. Also see *Shanmugam Gopal v Zainal Abidin Nazim & Anor.* [2003] 3 MLJ 76.

<sup>29</sup> Dass, K.S., *op. cit.*, 104.

<sup>30</sup> Muhammad Altaf Hussain Ahangar, *op. cit.*, (2003), lxxxix.

While it is understandable that it is necessary to preclude those who have yet to commence employment thus having no foreseeable earning in which a multiplicand can be derived from claiming loss of future earning capacity, persons who have prior to the injury had been engaged in gainful activity although at the precise point he was not so engaged should not be similarly barred from claiming. These persons will definitely be receiving income in the future and the calculation of multiplicand can be based on his previous income. As such, it is humbly submitted that the requirement of 'receiving earning before the injury' should not be narrowly defined as 'earning at the time of injury' or 'on the day of injury' as defined in *Dirkje Pietenella Halma*. It should whenever suitable be loosely construed to encompass any previous income which is not too remote to the claimant. For example, a person who was on unpaid leave, sabbatical, in between employment or about to start another employment in the near future should be entitled to loss of future earning capacity since his previous income can be used as the basis for the calculation of multiplicand. The assessment for these persons would not be too much difficulty or guesswork. This line of reasoning was adopted by the Kuala Lumpur High Court in *Low You Choy v Chan Mun Kit*<sup>31</sup>. The court allowed the claim for loss of future earnings even though the claimants were not working on the day of the injury, thus not receiving any earning on that particular day. Both claimants were labourers, did not have permanent job and only work for eight to ten months a year. Although the court conceded that both claimant's income depended on whether they were able to secure another job with a different employer or whether their current employer able to get another contract, it still chose to distinguish the case from *Dirkje Pietenella Halma* on the ground that the claimant were working the day before the injury and the fact that the claimant was not working on the day of the injury does not constitute not receiving earnings. Should the principle in *Dirkje Pietenella Halma* applied in this case, both claimants would not be entitled to loss of future earnings since they were not working at the time of injury.

#### **IS THE STATUTORY MULTIPLIER IN S.28A(2)(d) APPLICABLE TO LOSS OF FUTURE EARNING CAPACITY?**

Having discussed that the judges' discretion are not removed by section 28A (2)(c) and that award for loss of future earning capacity is only subject to the condition that plaintiff was receiving earning at the time of injury, we now have to deal with the issue of whether judges have similar discretion with regard to the assessment of the quantum. Prior to the 1984 amendment, the assessment of loss of future earning capacity was done either lump sum or via multiplier and multiplicand method. The lump sum method is usually applicable in cases involving young children or person who was unemployed at the time of injury where the multiplicand cannot be assessed due to absence of any evidence of earnings. As such, the award will be based on the court's assessment of the disadvantages that the claimant would be suffering in the labour market as well as contingencies in order to do justice to the claimant.<sup>32</sup> The multiplier and multiplicand method on the other hand is usually applicable when there is evidence of claimant's earnings at the time of injury. The multiplicand will be according to the claimant's earnings and personal expenses while the multiplier is to be calculated based on the nature of claimant's employment and future contingencies. In *Ong Ah Long v Dr. S Underwood*,<sup>33</sup> for example, the court awarded a 52 year old surgeon a 6 years multiplier after taking 60 years as his estimated active working life.

If we take the cue from *Tan Kim Chuan* that section 28A governs all damages relating to loss of future earnings regardless of 'whatever label attached to it',<sup>34</sup> the assessment for loss of future earning capacity would not only govern by sub-section 2(c) but also sub-section 2(d)(i) and (ii). As such, the statutory multiplier would also be applicable in the assessment of loss of future earning capacity. The Supreme Court in *Dirkje Pietenella Halma* had applied the fixed multiplier for loss of future earning capacity by calculating the multiplier of 16 years according to section 28A (2)(d)(i). The 25 years old appellant was awarded RM 200,000 for loss of future earning capacity. Hamid Omar LP held;

<sup>31</sup> [1992] 3 CLJ 1550.

<sup>32</sup> Dass, S. Santhana, *op.cit.*, (2000), 114.

<sup>33</sup> Also see *Krishnan & Anor. v Chow Wing Khuan* (1987) 2 MLJ 691.

<sup>34</sup> Per Abdul Hamid Omar LP.

"In this case the appellant has suffered total loss of earning capacity. Such loss in her case would last for the rest of her working life which is roughly another 30 years. **Taking into account all past and future contingencies, the fact that the appellant was earning \$ 1,270 per month, her ages at the time of the accident and the multiplier fixed by the legislature in the case of loss of future earnings,** we would assess the financial damage the appellant would suffer by first calculating her annual loss of earnings (\$ 1,270 x 12) arriving at the figure of \$ 15,240. We would then deduct 12 1/2% or 1/8 of that sum for income tax which the appellant might have to pay. That of course would be speculative because we do not know if she would have to pay any income tax, and if so, how much. The appellant's net annual income would be \$ 13,335. We would then round up that figure to \$ 13,000 and multiply it by 16 years purchase which works out to \$ 208,000. We were therefore of the view that an award of \$ 200,000 for loss of earning capacity in her case would be fair and adequate. That sum does not include the \$ 80,000 already awarded for pain and suffering which has been agreed upon by the parties. The appellant is therefore entitled to a total of \$ 280,000 as a fair and reasonable award under general damages together with interest thereon at the rate of 8% pa from the date of service of the writ to the date of payment. The amount awarded by the High Court for special damages plus interest at 4% pa from the date of the accident to the date of judgment remains, and the appellant is also entitled to half the costs of this appeal." (*emphasis added*)

Similar to the arguments in the sub-heading above, it is submitted that the assessment for loss of future earning capacity should not be subjected to the statutory multiplier in section 28A (2)(d)(i) and (ii). Unlike the assessment for loss of future earning where the calculation of multiplier and multiplicand can be based on claimant's income at time of injury and the nature of claimant's employment, loss of future earning capacity is subjective since it is not a loss that the claimant is suffering during at the trial date. David Kemp in his book<sup>35</sup> stated

"In this [handicap in the labor market] class of case, the multiplier / multiplicand approach cannot be used. For since the plaintiff is not suffering from a current loss, there is no relevant multiplicand to be ascertained. The court has to assess the probability and the gravity of plaintiff's future loss owing to his handicap in the labor market."

Based on above, a parallel observation can also be made as for the calculation of multiplier. Since the loss is not current, it would be a matter of guesswork as to when the claimant would actually be suffering from the loss. Thus, making the calculation of multiplier based on the fixed table in section 28A (2)(d) impossible. Take for example a 35 years old labourer who suffered severe injury to his leg and face the possibility of losing his job in the future due to osteoarthritis resulting from the injury. He would undoubtedly entitle to loss of future earning capacity. However, to calculate the multiplier according to section 28A(2)(d)(ii) (55 minus 35 and divide by two) would be allowing for more than he would have lost since the loss does not start at the time of injury but in the future (exact date unknown). As such, a fix multiplier as in 28A(2)(d) would not be suitable for a loss which is prospective in nature.

## CONCLUSION

Many had commented that the CLAA 1984 is poorly and sloppily drafted resulting in many harsh comments and call for amendments. While it may be so with regard to other head of damages, the 1984 amendment have no effect on the award for loss of future earning capacity. Instead of the statute imposing conditions and statutory multiplier, it was the courts themselves who came up with the condition of 'receiving earning' to an otherwise an area which is still in the purview of judicial discretion in order to achieve the intention of the legislature to prevent speculative awards such as those awarded for loss years.

<sup>35</sup> David Kemp, *Damages for Personal Injury and Death*, 7<sup>th</sup> ed. (London, 1999), 184.



## BIBLIOGRAPHY

### Book

Dass, K.S., *Quantum of Damages in Personal Injury, Parliament v Common Law, A critical Examination of the 1984 Amendment to the Civil Law Act 1956*, (Kuala Lumpur: Legal Circle Book Sdn. Bhd, 1997).

Dass, S. Santhana, *Personal Injury Claims*, (Petaling Jaya: Alpha Sigma, 2000).

David Kemp, *Damages for Personal Injury and Death*, 7<sup>th</sup> ed. (London, 1999).

Hawkins, Keith, ed. *The Use of Discretion*, (Oxford : Clarendon Press, 1992).

Lim, Heng Seng, *Assessment of Damages in Personal Injury and Fatal Accident Claims: Principles and Practices*, (Kuala Lumpur: Marsden Law Book, 1995).

Muhammad Altaf Hussain Ahangar, *Damages Under Malaysian Tort Law: Cases and Commentary*, (Petaling Jaya: Sweet & Maxwell Asia, 2009).

Rutter, Michael F., *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia*, 2<sup>nd</sup> ed. (Hong Kong: Butterworth Asia, 1993).

### Articles

Balan, P. "Loss of Future Earnings, Loss of Earning Capacity and the Civil Law (Amendment) Act, 1984", 17 (1990) *Journal of Malaysian Comparative Law*, 169 – 180,

Balan, P., "Damages for Personal Injuries Causing Death: A Critical Survey", (2004) *Journal of Malaysian and Comparative Law*, 169 – 180.

Muhammad Altaf Hussain Ahangar, "Damages for loss of Earnings in Malaysia: the Need for a 'Just' Multiplier", (2003) 3 *Malayan Law Journal*, lxxxi – xcvi.

Reiss, Seth M., "Quantum for Future Loss in Personal Injury and Fatal Accident Cases After the Civil Law (Amendment) Act 1984", (1985), 2 *Malayan Law Journal* lxii – lxxi, at lxiii

### Conference Papers

Muhammad Altaf Hussain Ahangar, "Judicial Responses to Damages Law In Malaysia : An Analysis", 5<sup>th</sup> ASEAN Law Institute Conference, (Singapore : 22-23 Mei 2008).