

DAMAGES FOR LOSS OF FUTURE EARNINGS FOR FOREIGN WORKERS IN MALAYSIA: A LESSON TO BE LEARNED FROM SINGAPORE

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ABSTRACT

True to the concept of justice and equality, the law on the assessment of damages for loss of future earnings in Malaysia do not differentiate between the classes of people claiming for compensation. Section 28A (2) of the Civil Law Act 1956 (Act 67) provide similar method of assessment for both Malaysian and foreign workers working in Malaysia. This paper discusses the possibility of over-compensating the foreign workers especially those coming from countries with lower income level than Malaysia. The study finds that the law in Malaysia leave no avenue for judges to adjust the assessment of damages for loss of future earnings to take into account the possibility that these workers will be returning to their home countries before the end of their working life and in all probability earning less than what they were receiving in Malaysia. Because of this rigidity in our law, the foreign workers will receive damages for loss of future earning in the amount which represent their income as if they would be earning the same income throughout their working life. Therefore it is hoped the proposal to amend the provisions regarding the assessment of damages for personal injury and fatal accident claims in the Civil Law Act 1956 currently being considered by the Law Revision and Law Reform Division of the Attorney General Chambers will take into account this phenomenon and formulate suitable method to prevent over-compensation

Keywords: damages for loss of future earnings, foreign workers, over-compensation

INTRODUCTION

Malaysia is home to a significant number of legal and illegal foreign workers. During the last legalization and amnesty exercise known as 6P in 2012, the government recorded 3.1 million² foreign workers in the country working mostly in the plantation, agriculture, construction, manufacturing, service and domestic sectors.³ Indonesian workers made up the highest number of foreign workers with 405,312 legal and 640,609 illegal workers, followed by Bangladeshis amounting to 132,897 legal and 267,803 illegal workers while Nepalese consisted of 221,617 legal and 33,437 illegal ones.⁴ Among the many disadvantages of having too many foreign workers is the out-going flow of money to their home countries. One of the contributors to this phenomenon is the lump-sum money received from compensation for loss of future earnings under third party personal injury claims. With this introductory remarks, this paper attempt to

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² According to the Malaysian Home Minister Datuk Seri Hishammuddin Tun Hussein, as of 31st July 2012, there were 1,581,264 (one third of 3.1 million) legal foreign workers in Malaysia.

³ Augustin, Sean and Koi, Kye Lee, "Time to Weed Out the Illegals", New Straits Times Online, 12 April 2012, New Straits Times, <10th September 2013, <http://www.nst.com.my/nation/general/time-to-weed-out-the-illegals-1.73181>>

⁴ BERNAMA, "More Than 2.3 Million Foreigners Registered Under 6P Programme", Council for Anti-Trafficking in Persons and Anti-Smuggling of Migrants, 5th September 2012, Minister of Home Affairs, 10th September 2013, <<http://mapo.bernama.com/news.php?id=611630>>

address the question of whether section 28A (2) of the Civil Law Act 1956 (Act 67)⁵ has caused over-compensation in the assessment of damages for loss of future earnings by subjecting the assessment of this head of damages to the fixed multiplication method without taking into consideration the possibility that the foreign workers will not be working in Malaysia throughout their working life.

ASSESSING DAMAGES FOR LOSS OF FUTURE EARNINGS

The award for loss of future earning is awarded when the plaintiff is incapable of resuming his employment due to the injuries suffered. It is to compensate the plaintiff of the loss of prospective earnings which he would have received in the future but for the injuries. It is also awarded when there is a real risk that the plaintiff, although able to continue working after the injuries unable to earn the same amount of income he expects to receive in the future had he did not suffered the injuries. The assessment of damages is based on the estimated annual value of reduction in earnings (multiplicand) and the period or the duration of the loss (multiplier). In Malaysia, the cause of action for loss of future earnings is provided under section 28A (2) of the CLA 1956. Section 28A(2)(c)(ii) and (iii) provide for the assessment of multiplicand while section 28A (2)(d)(i) and (ii) provide for the assessment of multiplier. The assessment is based on the multiplication method of multiplying the multiplicand with the multiplier.

Prior to Section 28A(2) of the CLA 1956, there was no statutory provision in Malaysia providing for the assessment of loss of future earnings. The assessment for this head of damages was left at the discretion of the judges guided by the Common Law principles and decided cases. The multiplier was calculated based on the type of employment, skills, education level, health, normal retirement age, life expectancy, and plaintiff's age at the date of trial. The estimated figure was then scaled down for negative contingencies⁶ such as the possibility of poor health, retrenchment and economic down-turn which may affect the length of plaintiff's working life. A few common methods were employed in deriving the multiplier; either by extracting the multiplier from comparable cases, by deducting one third from the amount arrived at using the formula plaintiff's age of retirement minus his age at the date of trial or by applying the annuity table. The multiplicand on the other hand was calculated based on plaintiff earning at the date of trial.⁷ Future possible increases in that earning such as promotional prospect, annual salary increment, future bonuses, overtime, allowances and fringe benefits were also taken into consideration. Similarly, any factors which may reduce plaintiff's future income such as demotion and retrenchment were also factored in.⁸

In 1984, a major statutory revamp was done to the CLA 1956 via the Civil Law (Amendment) Act 1984 (Act A602). Section 5(b) of the Act amended section 28A of the CLA 1956 by introducing section 28A (2). The section regulates the assessment of multiplicand and multiplier

⁵ Hereinafter referred to as the CLA 1956

⁶ Also known as the general vicissitudes of life.

⁷ see *Lim Eng Kay v Jaafar b Mohamed Said* [1982] 2 MLJ 156.

⁸ The speculative nature of the assessment were highlighted by Lord Reid in *British Transport Commission v Gourley* (1956) AC 185. "If he had not been injured, he would have had the prospect of earning a continuing income, it may be, for many years, but there can be no certainty as to what would have happened. In many cases the amount of income maybe doubtful, even if he had remained in good health, and there is always the possibility that he might have died or suffered from some incapacity at any time. The loss which he had suffered between the date of trial may be certain, but this prospective loss is not. Yet damages must be assessed as a lump sum once and for all, not only in respect of loss accrued before the trial but also in respect of prospective loss. Such damages can only be an estimate, often a very rough estimate of the present value of his prospective loss."

for loss of future earning. The multiplicand is arrived at by deducting plaintiff living expenses⁹ from his income at the time of injury.¹⁰ The multiplicand is then multiplied with the fixed multiplier provided in the Act. If the plaintiff was thirty years old or below at the time of injury, the multiplier will automatically be sixteen (16).¹¹ If the plaintiff was more than thirty one (31) years old, the multiplier is assessed by deducting his age from a figure of fifty five (55) and divide the remainder by two (2).¹² The multiplier will a range between the maximum period of twelve (12) years and minimum of six (6) months depending on plaintiff's age at the time of injury. This method will render a single multiplicand and multiplier.

For convenience, section 28A (2)(c) (ii) and (iii) and section 28A(2)(d)(i) and (ii) of the CLA 1956 is reproduced below;

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

(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 at 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 fifty five (55), minus the age of the person at the time when he was injured and dividing the remainder by the figure 2.** (*emphasis added*)

The primary effect of this amendment is the abolition of judge's discretionary power in the assessment of multiplier. Judge is no longer at liberty to assess the multiplicand and multiplier according to the old considerations. By virtue of the above provision, there shall only be one multiplicand and multiplier. Any possible increase or diminution to plaintiff's earning will not be considered. Similarly, anyprospects of future increase or reduction in plaintiff's working life arealso presumed to be built-in into the fixed multiplier. By adopting 55 years old as the maximum working age, the fixed multiplier presumes that a person will be working at least to the minimum age of 55 years with the same income he was receiving at the time of injury.

⁹ Section 28A(2)(c)(iii) of the CLA 1956.

¹⁰ Section 28A(2)(c)(ii) of the CLA 1956.

¹¹ Section 28A(2)(d)(i) of the CLA 1956.

¹² Section 28A(2)(d)(ii) of the CLA 1956.

'WINDFALL' RECEIVED BY FOREIGN WORKERS IN MALAYSIA

The third party statutory compensation scheme allows foreign workers in Malaysia to be compensated similar to local workers if they were injured. The fixed multiplier presumes that these foreign workers will continue to work in Malaysia earning the same income until he retires. Hence the single multiplicand and multiplier to be used to assess their probable future earnings through out their working life. It does not take into consideration the possibility that the foreign workers might not continue to be working in Malaysia in the future. To illustrate, a twenty two (22) years old construction worker from Indonesia with two (2) years working permit earning RM 1,000 a month was injured due to a motor vehicle accident and no longer able to work. He will be awarded RM 153,000 for loss of future earnings based on a multiplicand of RM 800 a month (after deducting RM 200 for living expenses) and a multiplier of sixteen (16) years. The fixed multiplier more or less assumes that he will be working in Malaysia and earning the same income as he was earning at the time of injury until the end of his working life.

It is submitted that the use of single multiplier and multiplicand with regard to the assessment of damages for loss of future earnings for foreign worker working in Malaysia is flawed. There are many factors which may prevent foreign workers to continue working in Malaysia until they retire. When they cease to work in Malaysia and return to their home country, in all probability they would not be able to earn the same amount of income they were earning in Malaysia. This is due to the differences in income level. Therefore, unlike the local workers, these foreign workers have no foreseeable expectations to continue earning the same amount of income they were earning at the time of injury until the end of their working life. Allowing a lump-sum damages for loss of future earnings based on single multiplicand and multiplier approach would be an over-compensation. To illustrate, the same Indonesian construction worker above would in all probability be returning to Indonesia after the expiration of his work permit. As such, there will be an over compensation for the loss of his future earning since he have no expectation of earning RM 1,000 a month working in Indonesia.

The problem above is brought by the rigidity in the application of section 28A (2) of the CLA 1956. The use of the phrase "shall" in the provisions convey the compulsory nature of section 28A (2)(c)¹³ and (d)¹⁴ of the CLA 1956. It made it compulsory for judges to consider only plaintiff's earnings 'at the time of injury' as the basis of calculation of multiplicand.¹⁵ It also configured the prospect of plaintiff's working life, retirement and contingency "into the statutory

¹³ High Court in *Chew Sheong Yoke v Lawrence Su Chu Seng & Anor.* [1996] MLJU 40 for example rejected the appeal on loss of future earnings and upheld the decision by the Senior Assistant Registrar and excluded the prospect of the plaintiff's earning in the future which constitute of flying allowance, gratuity and pension on the ground that they are prohibited by para (ii) to section 28A(2)(c) of the CLA 1956.

¹⁴ The Court of Appeal in *Ibrahim Ismail & Anor. v Hasnah Puteh Imat & Anor.* [2004] 1 CLJ 797. is very adamant in saying that the statutory multiplier is fixed and cannot be altered by the judge in any way. Gopal Sri Ram JCA held; "Further, the language of the statues is imperative. It says the 'the number of years' purchase shall be 16. The mandatory tenor of this phrase employed by Parliament to convey its message excludes any pretended exercise of judicial power to substitute some other multiplier for that intended."

¹⁵ Prior to the introduction of para (ii) to section 28A (2)(c) of the CLA 1956, the plaintiff's current income was assessed at the time of trial and not at the time of injury. (see *Lim Eng Kay v Jaafar b Mohamed Said* [1982] 2 MLJ 156) Since the pre-trial earnings are calculated based on plaintiff's earnings at the time of injury, post-trial earnings was calculated based on plaintiff's earning at time of trial. Although generally the earnings at these two (2) periods are more or less the same, there are cases which show a marked difference in the amount received especially if the case took a long time to be tried. As such, this difference must be taken into consideration. For example, in *Chang Ming Feng v Jackson Lim @ Jackson ak Bajut*, [1999] 1 MLJ 1, the Plaintiff received RM 1657 for basic salary and RM 775.28 for off-shore allowances at the time of injury. His basic salary however was increased to RM 2009 but allowances reduced to 247.78 at the time of trial.

formula".¹⁶ As such, a judge has no liberty adjust the multiplicand and multiplier for loss of future earnings regardless of the foreseeable probability that the foreign workers will be returning home to their home countries and will not be earning the same income they were earning in Malaysia.

THE LAW ON LOSS OF FUTURE EARNINGS IN SINGAPORE

The problem of over-compensation in respect of damages for loss of future earning for foreign workers due to the use of single multiplicand and multiplier method has long been recognized by the courts in Singapore. Unlike the CLA 1956, the statutory revamp of the Civil Law Act (cap 43) in 1987 did not include any provision with regard to the assessment of damages for loss of future earnings. As such, the assessment is still based on the Common Law method. The assessment of multiplicand can take into consideration future increases or decreases in plaintiff earnings while the multiplier is assessed by "calculating the probable working life remaining prior to injury and to calculate and subtract the actual working life now remaining (if any)"¹⁷ after taking into consideration plaintiff's age, skills and education level, health, nature of employment, normal retirement age and life expectancy. The figure arrived at will then be reduced for contingencies and investment value.¹⁸

The application of the Common Law method of assessment allows the courts in Singapore to adjust the multiplicand and multiplier to suit the circumstances surrounding plaintiff's employment. Instead of allowing the normal single multiplicand and multiplier, the courts in Singapore are at liberty to split the multiplicand and multiplier to suit the foreign workers' earnings for the period in which they would be working in Singapore and the period in which they would have returned to their home countries. Two considerations are taken into account; the differences in the foreign workers' income between the host and home countries as well as the period they would be working in the host and home countries. This was apparent in *Visvalingam a/l Arumugam v Toh Gim Choon (S. Vickneswaran, Third Party)*.¹⁹ The Singapore High Court accepted that the level of earning in Malaysia is lower than Singapore and split the multiplier to suit the differences in earnings in both countries. Similarly, In *Tan Woei Jinn v Thapjang Amorthap & Anor.*,²⁰ the High Court accepted the possibility that the appellant would not be working in Singapore throughout his working life. As such, the multiplicand and multiplier were split into the periods the appellant would be working in Singapore and his home country.

The split multiplicand and multiplier approach in Singapore is both logical and flexible.²¹ It allows the assessment of damages to be adjusted to suit the actual circumstances surrounding the foreign worker's working condition. Unlike the single multiplicand and multiplier approach in Malaysia, the split multiplicand and multiplier approach in Singapore does not limit the multiplicand to the amount of earning the foreign workers' were receiving in host country. It also

¹⁶ Per Edgar Joseph Jr. SCJ in *Chan Chin Ming v Lim Yok Eng* [1994] 3 MLJ 233.

¹⁷ Rutter, Michael F., *Handbook on Damages for Personal Injuries and Death in Singapore and Malaysia*, 2nd ed. (Hong Kong: Butterworth Asia, 1993), 274.

¹⁸ The Singapore High Court in *Ng Kum Thong v Moktar Yusoff* [2012] SGHC 254 in deciding the multiplier for loss of future earnings for a 54 years old cleaning supervisor who was injured in a motor vehicle accident considered plaintiff's life expectancy, nature of work and retirement age. See also *Karupiah Nirmala v Singapore Bus Services Ltd* [2002] 3 SLR 415

[1998] SLR 974.

²⁰ [2005] SGHC 53, [2005] 2 SLR 553. See also *Xu Jin Long v Nian Chuan Construction Pte. Ltd.* [2001] 4 SLR 624 where the District Court split the multiplicand and multiplier for loss of future earnings into two. One for his earnings in Singapore and another for his earnings in China.

²¹ Chew, Leslie *et al.*, "A Comparative Analysis of Various Aspects in the Law of Personal Injuries in Brunei, Malaysia and Singapore", (2008) 3 *Malayan Law Journal*, i-xliii.

allows the multiplier to be divided into the period which the foreign workers' would be in the host and home countries to suit the different amount of multiplicands. Further, the split multiplicand and multiplier approach also enables the damages to be more accurate since it takes into consideration the probability that the foreign workers' earning would be lesser once they return to their home countries.

SUGGESTIONS AND CONCLUSION

Due to the risk of over compensation in the single multiplicand and multiplier approach and obvious advantages in the split multiplicand and multiplier approach, it is respectfully submitted that the assessment of damages for loss of future earning for foreign workers in Malaysia should also be made according to the split multiplicand and multiplier approach. To do so, the provision in section 28A(2)(c)(ii) of the CLA 1956 should be amended to allow increase or decrease in plaintiff's earning to be taken into consideration in the assessment of multiplicand²² for loss of future earnings in respect of foreign workers. Although allowing consideration for increase or decrease in plaintiff's earnings in the assessment of loss of future earnings could possibly open up the floodgate of judges' applying their discretion, the degree of speculation or guesswork often attached to the notion of judicial discretion is reduced if the assessment is done according to the steps taken in *Tan Woei Jinn v Thapjang Amorthap & Anor.*²³ The court in assessing the split multiplicand and multiplier should take into account the obvious differences in levels of earnings in Malaysia and the worker's home country,²⁴ the plaintiff's age at the time of injury,²⁵ evidence of plaintiff intention to continue working in Malaysia²⁶ as well as the legal constrain involved in obtaining valid working permit in Malaysia.²⁷ Each case has to be looked at on its facts. Should the evidence lead to the conclusion that the foreign workers have the foreseeable probability to return to their home countries and cease to earn the same amount they were earning in Malaysia, the multiplicand should be split to reflect the differences in earning.

An amendment to section 28A(2)(d)(i) and (ii) of the CLA 1956 to allow for split multiplier is however not necessary. There is nothing in the provisions which prevent the fixed multiplier from being split into the period the foreign workers are to be expected to work in Malaysia and the period where they would return to their home countries. This split multiplier approach had been adopted by the Malaysian courts in several cases in order to allow damages for loss of pre-trial earnings despite the arguments that damages for loss of pre-trial earnings is abolished

²² Note that although section 28A(2)(c)(ii) of the CLA 1956 only prohibits any increase in plaintiff's earning to be included in the assessment of damages, the phrase 'only the amount relating to his earnings as aforesaid at the time when he was injured' impliedly put similar prohibition on the courts to reduce the amount of multiplicand to suit the probable reduction in plaintiff's future earnings.

²³ *Op. cit.*

²⁴ In *Tan Woei Jinn v Thapjang Amorthap & Anor.*, although no precise statistic on earning level was produced, the differences in earning levels between Singapore and Brunei is a well known fact that the Court took judicial notice of the same.

²⁵ In *Tan Woei Jinn v Thapjang Amorthap & Anor.*, the Court differentiates the multiplicand and multiplier for a worker who was twenty two (22) years old and had only been working in Singapore for less than two (2) years from those of a (50) years old who had worked in Singapore for thirty (30) years.

²⁶ In *Tan Woei Jinn v Thapjang Amorthap & Anor.*, while the court may presume that the fifty (50) years old worker would continue to work in Singapore due to his long employment in the country, the length of employment period for the twenty two (22) years old cannot be similarly presumed.

²⁷ In *Tan Woei Jinn v Thapjang Amorthap & Anor.*, the Court took into consideration whether the economic condition, national policy and interest as well as the current law relating to foreign worker registration in Singapore will encourage the continuation of the demand for foreign workers.

by section 28A(2)(d)(i) and (ii) of the CLA 1956.²⁸The courts in *Asiah bte Kamsah v Dr Rajinder Singh & Ors*,²⁹*N Vijaya Kumar v Voon Chen Lim*³⁰ and *Soton Bili & Anor. v Khajjah Led & Ors*.³¹ managed to award damages for loss of pre-trial earnings together with loss of future earnings while still adhering to the assessment of multiplier specified in section 28A(2)(d)(i) and (ii) of the CLA 1956.³²

In view of the proposal to amend the provisions regarding the assessment of damages for personal injury and fatal accident claims in the Civil Law Act 1956 currently being considered by the Law Revision and Law Reform Division of the Attorney General Chambers, it is hoped that the issue of compensation for loss of future earning for foreign workers will be taken as one of the considerations in formulating an amendment to section 28A of the CLA 1956. The continued use of one multiplicand or multiplier to suits all is not suitable when it comes to foreign workers working in Malaysia. A suitable amendment to section 28A of the CLA 1956 is crucial in order to ensure suitable, fair and accurate assessment of damages for loss of future earnings for foreign workers.

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²⁸ *Nagarajan a/l Veerapan v Ananthan a/l Parama Sivam* [1989] 2 CLJ 1243, *Mohd Yusof Abdul Ghani v Tee Song Kee & Anor* [1995] 3 CLJ 738, *Tan Swee Tiong v Khor Chin Hau* [2002] 1 CLJ 486 and *Dirkje Peiternella Halma v Muhd Noor bin Baharom & Ors.* [1990] 3 MLJ 103.

²⁹ [2002] 1 MLJ 484.

³⁰ [1989] 3 MLJ 255.

³¹ [2008] 9 CLJ 304.

³² Such approach is possible since there is nothing in the section which prevents the judge from dividing the sum to be awarded as loss of future earnings into pre-trial and post trial loss after the multiplier had been assessed. Once the multiplier for loss of future earnings is assessed, it was divided into pre-trial and post trial period in order to separate the award for loss of pre-trial earnings and loss of future earnings.