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Some Notes on the Malayan Law of Negligence

A. E. S. Tay* and J. H. M. Heah**

THE TERM "MALAYA" COVERS what are now two distinct political units: the fully independent Federation of Malaya and the semi-independent State of Singapore, which have emerged from a tangle of British settlements and colonies and British-protected Malay states. The State of Singapore has sprung from the Crown Colony of Singapore, which between 1826 and 1946 formed part of the larger Crown Colony of the Straits Settlements. The two remaining Straits settlements—Penang (including Province Wellesley) and Malacca—together with nine Malay states¹ have become the Federation of Malaya. Although Penang and Malacca, as British territories, have a very different legal history from that of the Malay states, their welding together into a political unit has been followed by legislation giving statutory foundation for the application of the English common law throughout the Federation; the historical differences, then, have lost their practical point. The State of Singapore, on the other hand, has had a continuous history as a British colony since its modern foundation as a trading-post in 1819.

In the Federation of Malaya to-day, then, the application of common law is provided by Section 3(1) of the Civil Law Ordinance No. 5 of 1956, which states: "Save in so far as other provision has been made² or may hereafter be made by any written

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Abbreviations of Malayan law reports

F.M.S.L.R.: Federated Malay States Law Reports
 Ky.: Kyshe's Reports
 M.L.J.: Malayan Law Journal
 S.S.L.R.: Straits Settlements Law Reports

¹ Perak, Selangor, Negri Sembilan and Pahang (all British Protectorates since the 1870's and 1880's), Kedah, Perlis, Kelantan and Trengganu (all transferred to Great Britain by Siam in 1909, when they became protected states) and Johore, which asked for a British General Adviser in 1914.

² State and Federal legislatures have a wide range of enactments, including copies of modifications of certain Indian Acts like the Penal Code, Criminal

(Continued on next page)

law in force in the Federation or any part thereof, the Court shall apply the common law of England and the rules of equity as administered in England at the date of the coming into force of this Ordinance: ³ provided always that the said common law and rules of equity shall be applied so far only as the circumstances of the States and Settlements comprised in the Federation and their respective inhabitants permit and subject to such qualifications as local circumstances render necessary.” ⁴ In the absence of such legislation, it is true to say that the general law of England was never introduced or adopted in the Malay States and that “the most that could be said was that portions of that law were introduced by legislation which adopted, not English law, but English principles and models for local laws”; ⁵ nevertheless for many years the influence of a British-trained Bench and Bar has been such as to permeate the Malayan legal system with English rules applied either directly or indirectly through rules of statutory interpretation.⁶ This tendency to fall back on English law has been especially evident when judges are forced to fill in lacunae left by local law and legislation.⁷ In the par-

(Continued from preceding page)

Procedure Code, Evidence, Limitation and Land Acquisition Acts, and Civil Procedure, Probate and Administration, Negotiable Instruments, Contract and Specific Relief Acts.

³ 7th April, 1956.

⁴ For earlier application of the same principle to cases in the Straits Settlements, see: *Choa Choon Neoh v. Spottiswoode* (1869) 1 Ky. 216, at 221; In the matter of *Choo Eng Choon*, decd. (1908), 12 S.S.L.R. 120 (*The Six Widows' Case*); *Khoo Hooi Leong v. Khoo Chong Yeok* [1930] A. C. 346 P. C., where Lord Russell of Killowen said, at p. 355: “The modifications of the law of England which obtain in the Colony in the application of that law to the various alien races established there arise from the necessity of preventing the injustice or oppression which would ensue if that law were applied to alien races unmodified.” See also the general account by Sir Roland Braddell, 1 *Law of the Straits Settlements* (2d ed.) 62-88.

⁵ *Re Yap Kwan Seng's Will* (1924) 4 F.M.S.L.R. 313 at 316, per Sproule Ag.C.J.C.

⁶ Adverse comment by the Bench on counsel's indiscriminate importation of English rules may be found in: *Leonard v. Nachiappa Chetty* (1923) 4 F.M.S.L.R., 265, esp. 267-8 (*Negri Sembilan case*); *Haji Abdul Rahman v. Mohammed Hassan* (1915) 1 F.M.S.L.R. 290 at 298 (*Selangor case* at Privy Council); *re Chong Fong Shen* (1932) 1 M.L.J. 140 (*Selangor*; *Goh Chong Hin v. Consolidated Malay Rubber Estates Ltd.* (1924) 5 F.M.S.L.R. 86 at 90 (*Negri Sembilan case* in Court of Appeal).

⁷ See, e.g., *Kandasamy v. Suppiah* (1919) 1 F.M.S.L.R. 381 at 381-2 and the application of the rule against perpetuities in *Re Yap Kwan Seng's Will*, *supra*.

ticular field of tort, "the Court has always turned for guidance, as to fundamental principles, to English decisions."⁸

Singapore, we have noted, had a continuous history as a Crown Colony. There is some question whether Singapore (or for that matter, Penang) was a settled territory or a ceded acquisition for the purposes of the introduction of English law to the colony. The question is academic since the whole body of judicial authorities on the matter accepted as fact that Singapore was virtually uninhabited and certainly without law at the time of "settlement," and that the Charter of Justice granted by George IV on November 26, 1826, either introduced English law into the Straits Settlements or confirmed its existence there.⁹ The law applicable to Singapore as a result is as follows:¹⁰

- 1) The common law, equity, civil and statute law prevailing in England on November 26, 1826, so far as they are applicable to the circumstances of Singapore and modified in their application to these circumstances,¹¹ and so far as they have not been altered by:—
 - a) Statutes passed before April 1, 1867,¹² extending to India; or passed after that date extending to the Colony;
 - b) Indian Acts passed before April 1, 1867, and applying to the Straits Settlements;

⁸ *Government of Perak v. Adams* (1914) 2 F.M.S.L.R. 144, per Woodward J. C. Cf. *Panicker v. Public Prosecutor* (1915) 1 F.M.S.L.R. 169 (C. A.) at 183, where Sir Thomas Braddell C.J.C. referred to the common law of England as "the acknowledged guide [in questions of tort] to which we must turn in arriving at just decisions upon questions arising under that branch of the law." See also *Mohammed Gunny v. Vadwang Kuti* and support given there by Burton J. (1930) 7 F.M.S.L.R. 170.

⁹ The opinion of the Judicial Committee of the Privy Council in *Yeap Cheah Neo v. Ong Cheng Neo* (1875) L. R. 6 P. C. 381, sets out the history of the Straits Settlements at 392-4. See also Braddell, 1 *Law of the Straits Settlements* (2d ed.) 1-33; Kyshe's "Judicial-Historical Preface" in 1 *Kyshe's Reports* i-cxxi (1885); Napier's *Introduction to the Study of the Law Administered in the Colony of the Straits Settlements* (1898). The following cases also contain much interesting historical material: *Kamoo v. Bassett* (1808) 1 Ky. 1 (Penang); *In the Goods of Abdullah* (1835) 2 Ky. c.8 (Penang); *R. v. Willans* (1858) 3 Ky. 16; *Fatimah v. Logan* (1871) 1 Ky. 255; *Scully v. Scully* (1890) 4 Ky. 602 (Singapore); *R. v. Yeoh Boon Leng* (1890) 4 Ky. 630 (Penang); *Re Khoo Cheng Teow's Estate* (1932) 2 M.L.J. 119 (Singapore).

¹⁰ Cf. Braddell, *op. cit. supra* note 4, at 60-61.

¹¹ "Statutes relating to matters and exigencies peculiar to the local condition of England and which are not adapted to the circumstances of the particular colony, do not become a part of its law, although the general law of England may be introduced."—from the opinion in *Yeap Cheah Neo v. Ong Cheng Neo*, *supra* note 9, at 394. See also the cases cited in note 4.

¹² The date on which the Straits Settlements passed from the control of the India Office to that of the Colonial Office.

- c) Orders of the Crown in Council made under the Government of the Straits Settlements Act, 1866, 29 & 30 Vic. c. 115; or
- d) Ordinances of the Colonial Legislature of Singapore and its successors.
- 2) U. K. statute law extending to India which was passed before April 1, 1867, and statutes extending to the colony passed after that date.
- 3) Orders of the Crown in Council under the Government of the Straits Settlements Act, 1866 (*supra*) and subsequent Orders referring to Singapore.
- 4) Ordinances of the Colonial Legislature and of its successors in Singapore.
- 5) Such mercantile law as is introduced by section 5 of (Singapore) Ordinance No. 111 (Civil Law).¹³

The Federation of Malaya and Singapore, then, are as much within the common law tradition as Australia, Canada or the United States. While we have noted differences in the introduction and application of the common law in the two territories, these do not affect the use of English principles in tort or the manner of their application. Both territories, especially, are applying recent English developments in the law of tort.¹⁴ The standard of the judiciary in Malaya has not been sufficiently high or consistent¹⁵ to make Malayan tort decisions of great intrinsic interest, but they do indicate the way in which English decisions have been exported and common problems of tort faced. For all these purposes there is no significant distinction between cases from the territories that are now the Federation of Malaya and the territory that is now the State of Singapore. We have simply treated the relevant cases as "Malayan" cases, arranging them according to topics.

Nervous Shock

The practical difficulties besetting a claim for damages for negligence resulting in nervous shock or mental disturbance—proof of causal connexion, lack of confidence in medical knowl-

¹³ Now the Civil Law Ordinance (Cap. 24) of the Laws of the Colony of Singapore, revised ed. 1955.

¹⁴ While past colonial judges have generally treated English sources as sufficient, there is a growing tendency now to turn to helpful sources in the Dominions and the U. S. A. Indian decisions, of course, have a special place as historically, socially and legally relevant.

¹⁵ There has been a marked and socially interesting decline in the calibre of judges in Malaya since the end of the 19th century.

edge, suspicion of the all-too-easily simulated symptoms, and the difficulty in exposing a fake claim due to such factors as lapse of time between the event and the hearing—long stood in the way of Courts granting protection against nervous disturbance. Favourable judicial policy backed by greater reliance on medical knowledge, however, has gradually opened the way to serious consideration of the legal principles involved. In 1901, damages were awarded to a plaintiff who, though not hit by a vehicle which crashed into her house when carelessly driven by the defendant, was *within the foreseeable area of impact* and suffered nervous shock and a miscarriage through fear for her safety.¹⁶ The basis of this type of claims has now clearly devolved on to the defendant's *duty of care* to a plaintiff who comes within the reasonable foresight of the defendant. "The duty to take care," said Lord Macmillan in *Bourhill v. Young*,¹⁷ "is the duty to avoid doing anything or omitting to do anything the doing or omitting to do which may have as its reasonable and probable consequence injury to others, and the duty is owed to those to whom injury may reasonably and probably be anticipated if the duty is not observed." In this case, the plaintiff, a pregnant fishwife, was alighting from a tram when a motor cyclist sped past on the other side of the tram and collided with a car 40-50 yards away. The plaintiff did not see the accident and was out of the range of impact, but claimed that as a result of hearing the impact and later seeing some blood on the scene, she suffered a miscarriage. She failed in her action, the Court holding that there was no breach of duty to her. She could not "build on the wrong to someone else."¹⁸

¹⁶ *Dulieu v. White* [1901] 2 K. B. 669, where Kennedy J. stressed, however (at 675), that "the shock, where it operates through the mind, must be a shock which arises from a reasonable fear of immediate personal injury to oneself." Kennedy J., bound by the House of Lords and not by the Privy Council, was able to ignore the latter's decision in *Victoria Ry. Comrs. v. Coultas* (1888) 13 App. Cas. 222, which rejected a claim arising from nervous shock suffered as a result of fear of physical injury in the absence of actual impact on the ground of *remoteness*. Australian courts, being bound by the Privy Council decision, have restricted this decision to the finding that the nervous shock involved in the facts did not cause physical injury.
¹⁷ [1943] A. C. 92 at 104.

¹⁸ *Ibid.*, at p. 108, per Lord Wright. In the earlier case of *Hambrook v. Stokes* [1925] 1 K. B. 141 the plaintiff was allowed to succeed even though it had not been shown that the defendant owed any duty of care against physical or emotional impact on the mother who feared for the safety of her children. The Court, in fact, failed to deal with the problem, and established instead a semblance of duty by treating the negligent defendant as having a duty to all road-users.

An interesting Malayan case, while applying the same principle of duty of care, takes into account local social habits which would be unusual in many other countries in defining the area of foreseeability. The case is *Zainab binte Ismail v. Mari-muthu*,¹⁹ where the defendant had negligently driven a lorry down a quiet lane normally devoid of traffic and killed the plaintiff's daughter in front of a village stand-pipe (public water-tap). The plaintiff saw the accident, suffered shock and was sick for two years as a result. Mr. Justice Hill, specifically claiming to follow *Bourhill v. Young (supra)* and distinguishing *Hambrook v. Stokes (supra)*, and *Owens v. Liverpool Corporation*,²⁰ allowed the plaintiff to succeed and held that a person who recklessly drives a vehicle along a quiet and unfrequented lane could reasonably foresee that it was likely to cause villagers to look out and in doing so to see any accident. The defendant's shock and resultant illness, in these circumstances, were not too remote in law.

Res Ipsa Loquitur

Where the bald facts of an injurious event lead to a reasonable inference of other facts pointing to negligence on the part of the defendant, a *prima facie* case is established, and the plaintiff is not required to adduce direct evidence of the precise cause of the event. Thus, when *res ipsa loquitur*, the plaintiff is not required to prove duty, breach and causal connexion, but will be entitled to succeed unless adequate explanation is given by the defendant.²¹ In the Malayan case *Che Jah binte Mohammed Ariff v. C. C. Scott*,²² the Court allowed the plaintiff to rest her case on the principle of *res ipsa loquitur* on her evidence that she had been injured, as a passenger in the defendant's car, when it crashed into a stationary vehicle after the brakes had failed when it was going downhill. The defendant, however, set out the plea of inevitable accident, and gave evidence that 10 days earlier,

¹⁹ (1955) M. L. J. 22.

²⁰ [1939] 1 K. B. 394.

²¹ The conditions for the application of *res ipsa loquitur* have been stated as where "the thing is shown to be under the management of the defendant or his servants, and the accident is such as in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence in the absence of explanation by the defendant that the accident arose from want of care."—*Scott v. The London & St. Katherine's Docks Co.* (1865) 3 H. & C. 596, Ex. Ch.

²² (1952) M. L. J. 69.

after discovering that the brakes were bad, he had sent the car to a competent repair firm for general overhaul with specific instructions to attend to the brakes, that the day before the accident the plaintiff and defendant together had called at the repair firm to collect the car to be told that the foreman was then engaged in testing the brakes, and that when taking delivery the defendant had himself tested the brakes and found them in order. The Court held that the defendant had successfully shown that the accident was inevitable, due to a latent defect which could not be discovered by the exercise of reasonable care, and dismissed the plaintiff's suit. The learned judge, Jobling J., relied heavily on *Stennett v. Hancock*,²³ where Branson J. had said: ²⁴ "I cannot think, however, that it would be right to say that a person who employs a skilled and competent repairer to repair his vehicle is omitting any duty which he owes to himself or to anybody else if he trusts to that man having done his work properly, and, in reliance upon that fact, takes the vehicle upon the road."

In Malaya, the maxim *res ipsa loquitur* has also been applied where a lorry ran into the back of a stationary trishaw²⁵ and where a load of angle-irons fell from a loading sling on to a tonkang (river junk), causing it to sink.²⁶

Contributory Negligence

To amount to contributory negligence, the plaintiff's lack of care must be a *cause* of the damage. The history of contributory negligence at common law has been bedevilled by the problems that arise when the conduct of each party amounted to a cause; in order to avoid this outcome Courts were constantly tempted to introduce further and otherwise unnecessary refinements to the notion of a cause. In England, the matter was resolved by legislation enabling the Court to estimate the relative importance of the fault of each party, and to apportion the damages accordingly.²⁷ Identical legislation has been adopted in the Federa-

²³ [1939] 2 A. E. R. 578.

²⁴ *Ibid.*, at p. 579.

²⁵ Yap Kim Chye v. Seow Seng Choon, (1952) M. L. J. 168.

²⁶ S. S. Mydin Meerasahib v. K. M. S. Sultan Allaudin & Sons, (1949) M. L. J. 72.

²⁷ The Law Reform (Contributory Negligence) Act, 1945. Section 1(1) provides: "Where any person suffers damage as the result partly of his

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tion of Malaya and in Singapore.²⁸ This legislation has resolved the difficulties when the conduct of each party amounts to a cause; it has not affected the fundamental common law principles for determining what amounts to lack of reasonable care and when it is a cause of the injury.²⁹ These principles have also been followed, and are being followed, in Malaya. In 1949, Gordon Smith J. summarised the proper direction to a jury when the defence pleads contributory negligence in *Chaim Flanchaura v. Koh Peng Koon*:³⁰ (1) If it is established from his own evidence or by evidence produced on behalf of the defendant that the plaintiff could have avoided the collision by the exercise of reasonable care, then the plaintiff fails because his injury is due to his own negligence in failing to take care; (2) If it is established that although the plaintiff was negligent the defendant could have avoided the collision by the exercise of reasonable care, then it is the defendant's failure to take that reasonable care to which the resulting damage is due and the plaintiff is entitled to recover; (3) mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence: the plaintiff has no right to complain if in the agony of the collision the defendant fails to take care which might have prevented the collision, unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances.

In the earlier case of *Katijah binte Abdullah v. Lee Leong Toh*,³¹ the Court had before it the familiar elbow protruding from a bus. The plaintiff was sitting in a bus with her arm resting on the window-ledge and her elbow protruding when the bus collided with an oncoming vehicle, causing her injury in the

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own fault and partly of the fault of any other person or persons, a claim in respect of that damage shall not be defeated by reason of the fault of the person suffering the damage, but the damages recoverable in respect thereof shall be reduced to such extent as the Court thinks just and equitable, having regard to the claimant's share in the responsibility for the damage:"

²⁸ S. 12(1), Civil Law Ordinance No. 5 of 1956 (Federation of Malaya) and S. 3(1), Contributory Negligence and Personal Injuries Ordinance, No. 37 of 1953 (Chapter 25, Laws of the Colony of Singapore, 1955).

²⁹ Naturally, judicial policy on these matters has been affected by the difference that the legislation has made to the practical outcome of deciding one way or the other on these questions.

³⁰ (1949) M. L. J. 149. The learned judge refers to *Swadling v. Cooper* [1931] A. C. 1.

³¹ (1940) M. L. J. 87.

arm. Passengers were not warned against allowing their arms to protrude. The learned judge held that a passenger, who owes no duty to the driver of an oncoming vehicle, and seated in a normal manner, not infringing any prohibition or disregarding any warning, cannot be guilty of contributory negligence. Whether the same judge would have held this manner of sitting normal or reasonable in New York or London traffic conditions is another matter. In *Vellamee v. Eng. & Co.*,³² on similar facts but where the vehicles had not collided, the Court held that the substantial cause of the accident was the driving of the two vehicles too close together.

Contributory Negligence in Actions on Statutory Duties

Statutory duties imposed upon employers by such legislation as Mining and Factory Acts etc. for the protection of workmen and others, whether these are careless or not, do not create a statutory cause of action.³³ Where a plaintiff is suing for damages arising from a breach of a statutory duty, he must, as in all cases where damage is the gist of the action, prove not only a breach of duty to him but that his injury was due to the breach. It is thus that the defence of contributory negligence may also avail in this type of case,³⁴ to which, indeed, the legislation allowing apportionment of damages also applies. In *Ng Siew Eng and Another v. Loh Tuan Woon*³⁵ the deceased, riding a motorcycle along a side road shortly after dark, collided with an iron bar placed across the road by the defendant for the purpose of collecting tolls and suffered injuries from which he died. The estate of the deceased claimed that in placing the bar across the road the defendant was both negligent and in breach of a statutory provision.³⁶ The Court held that in respect to the non-statutory

³² (1940) M. L. J. 246.

³³ For the nature of such an action see *Caswell v. Powell Duffryn Associated Collieries Ltd.* [1940] A. C. 152, per Lord Wright at 177-8.

³⁴ See Lord Atkin, *ibid.* at 166.

³⁵ (1955) M. L. J. 89.

³⁶ S. 75 Road Traffic Ordinance, 1941 (Singapore) provides: "Any person who for any purpose places or causes to be placed any rope, wire, chain, tackle or similar apparatus across a road or any part thereof in such a manner as to be likely to cause danger to persons using the road shall, unless he proves that he had a lawful right or excuse so to do and that he had taken all necessary means to give adequate warning of the danger, be guilty of an offence against this Ordinance." This section, except for the requirement to prove lawful right, is similar to S. 55 of the (English) Road Traffic Act 1930, and thus enabled the Court to follow *London Passenger Transport Board v. Upson* [1949] A. C. 155.

issue of negligence, the defendant was not negligent to road-users since he had placed a red reflector light at the end of the bar, and that even if the bar could be said to constitute an unusual danger vis-a-vis the deceased *qua* licensee, it was one known to him. The defendant was in breach of a statutory duty in failing to provide more effective lighting, but the negligence of the deceased being the decisive cause of the accident, the claim must fail.

Acts Done in the Execution of Public Authority

In Singapore, an action against a person for an act done in pursuance of a public duty or authority, or for negligence in the performance of such duty, must be commenced within six months from the date of the cause of action.³⁷ The Singapore Ordinance is substantially the same as an English Act now repealed,³⁸ and Singapore Courts have relied on English authorities for the difficulties raised by the English finding³⁹ that not all *intra vires* acts are protected, *viz.* that "it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority."⁴⁰ In *Firestone Tire Rubber Co. (S. S.) Ltd. v. Singapore Harbour Board*,⁴¹ a cargo of rubber tyres consigned to the appellants-plaintiffs was discharged from a ship by the Singapore Harbour Board, the respondents-defendants, and received by the Board on various dates in July, 1946, in their godowns. There was short delivery to the extent of 17 tyres, and the appellants began action in June, 1948, claiming damages for the loss of these tyres. S. 73 of the Singapore Ports Ordinance⁴² provided that "the Board may . . . (c) carry on the business of . . . wharfingers and warehousemen . . ." The Judicial Committee of the Privy Council expressed its opinion that the Singapore Harbour Board, a public authority, did not cease to function as such in operating

³⁷ S. 2 (1) & (2), Public Authorities Protection Ordinance.

³⁸ Public Authorities Protection Act, 1893, now repealed by S. 1 of the Law Reform (Limitations of Actions etc.) Act, 1954.

³⁹ *Bradford Corporation v. Myers*, [1916] A. C. 242 and *Griffiths v. Smith* [1941] A. C. 170.

⁴⁰ Per Lord Buckmaster, in *Bradford Corporation v. Myers*, *supra* at 247.

⁴¹ [1952] A. C. 452 P. C.

⁴² Cap. 208 of the Laws of the Colony of Singapore, 1955.

the warehouses and engage upon some purely subsidiary activity of a non-public nature. Supplying facilities essential to the shipping and commercial community of Singapore in one of the ways authorised by the Ports Ordinance was to fulfill one of the main objects of the Ordinance. It was the opinion of the Judicial Committee, therefore, that the Board, in taking the appellants goods into their care and custody, were acting "in the course of exercising for the benefit of the public an authority or power conferred on them by the [Ordinance],⁴³ which was not merely an incidental or subsidiary power. In *Wee Hong Heng v. The Municipal Commissioners of Singapore*,⁴⁴ the defendants were under a statutory duty to construct, repair and maintain the streets. They used a lorry of their own to transport the labour force to and from work. On one such journey from the depot the driver of their vehicle collided with the plaintiff's motorcycle, injuring the plaintiff. The Court held that the defendants, in transporting the labour force to and from their quarters, were doing an act which they were not bound by an Ordinance to do, and were therefore⁴⁵ not protected by the Public Authorities Protection Ordinance.

Damages for Personal Injury; and Loss of Expectation of Life

The focus of interest on these issues has long been on the amount of damages awarded; the principles involved are wide and general, and while they have failed to resolve the practical problems of the judge or jury they have led to no subtle legal difficulties.⁴⁶ In Malaya, the familiar principles have been applied in the familiar way; only, as one might expect in an Asian country, life and comfort have been held cheap. In *Kang Bark Teng v. Lee Kwee Lim*,⁴⁷ the expectation of life of a healthy

⁴³ Cited by the Judicial Committee from *Griffiths v. Smith*, *supra* note 39, at 185, per Viscount Maugham.

⁴⁴ (1937) M. L. J. 207.

⁴⁵ If the report is sound, the law is defective in treating the absence of statutory duty to perform the action as *sufficient* to indicate that it is not protected; the real point is that the action was not one exercised for the direct benefit of the public or exercisable toward the public impartially.

⁴⁶ Some of the relevant English cases are: *Ruskton v. National Coal Board* [1953] 1 Q. B. 495, establishing that amounts awarded in similar cases should guide the Court; *Flint v. Lovell* [1935] 1 K. B. 354, establishing that damages may be awarded for loss of expectation of life and the conditions under which the Court of Appeal will vary the amount awarded by a judge sitting without a jury; *Davies v. Powell Duffryn Associated Collieries Ltd.* (No. 2) [1942] 1 A. E. R. 664; *Benham v. Gambling* [1941] A. C. 157.

⁴⁷ (1952) M. L. J. 27.

29-year-old hawker, earning M\$300 (U. S. \$100 a month), was valued at M\$1,000 (U. S. \$335). The same sum was awarded to a Chinese woman miner whose expectation of life was estimated at 20 years.⁴⁸ In *Manasseh v. Attorney-General*,⁴⁹ a schoolboy who suffered a fracture of the leg and wrist, which kept him from school for five and a half months, had caused him great discomfort up to the time of the hearing, and would leave a minor permanent disability, was awarded M\$1,250 (U. S. \$413) in general damages.

Survival of Causes of Action

At English common law it was the general rule (bearing some exceptions) that no executor or administrator could sue or be sued for any tort committed against or by the deceased in his lifetime: *actio personalis moritur cum persona*. The effect of the maxim was abolished in England by the Law Reform (Miscellaneous Provisions) Act, 1934. The relevant provisions were copied, in substantially similar words, by Singapore⁵⁰ and the Federation of Malaya,⁵¹ so that now, subject to certain provisions in the Ordinances, as in the English Act, all causes of action subsisting against or vested in a person at the time of his death shall survive against, or for, the benefit of his estate. The new rule does not apply to causes of action for defamation, seduction, inducing one spouse to leave or remain apart from the other or claims for damages on the grounds of adultery. The ordinances also provide that proceedings against the estate of a deceased person are not maintainable unless they were either (a) pending against him at the date of his death, or (b) taken out not later than six months after his personal representatives took out representation. Proceedings taken by the executor of the deceased have been affected by not always consistent piecemeal legislation;⁵² in general it seems likely that in the absence of clear statutory provision to the contrary, such proceedings are

⁴⁸ *Yee Kong v. Teh Seng*, (1941) M. L. J. 58. Though this case was decided before *Benham v. Gambling*, *supra* note 46, the principles upon which the award was made accorded with the latter case.

⁴⁹ (1949) M. L. J. 261

⁵⁰ S. 7(1), Civil Law Ordinance, Cap. 24 of the Laws of the Colony of Singapore, 1955.

⁵¹ S. 8(1), Civil Law Ordinance, No. 5 of 1956, consolidating earlier legislation.

⁵² See, for example, *Chan Chung Hoong v. Chew Vooi Peng* (1955) M. L. J. 135, where the Court had to settle the conflict between S. 3 of the Executors (Power) and Fatal Accidents Enactment and S. 4(i) of the Civil Law Enactment, 1937.

subject to a limitation of six years for most torts and three years for personal injuries.

Death as a Cause of Action

At common law no action could be brought by any person who suffered loss as the result of the death of another.⁵³ Malayan law has followed the English Fatal Accidents Act, 1846 (S. 1), in allowing an action to be brought (for the benefit of the wife, husband, parent and child in the Federation legislation)⁵⁴ where a person's death has been caused in such a way as would have given him, if alive, a cause of action.⁵⁵ Neither English nor Malayan legislation indicates the type of interests it is meant to protect; English courts have held that the basis of the action is pecuniary loss suffered by the dependents by virtue of the death, which may include the loss of a "reasonable expectation of pecuniary advantage"⁵⁶ but not a mere speculative possibility. Applying these principles, the Court held in *Yam binte Baba v. Loy Chim*⁵⁷ that where the deceased, aged 12, and his brother sold cakes in the morning and worked as golf caddies in the afternoons and evenings, the damages were to be assessed according to the length of time during which these earnings would be coming into the household.

In the annals of the spread of the common law to other lands and other ways, Malaya may deserve a modest place, but, as the above selection no doubt shows, so far it has made no significant contribution to the intellectual content of that law. It has neither produced nor harboured a Cardozo or a Dixon. At best, its judges have applied common law principles simply but soundly; they have never, at least in tort, been subtle or illuminating. Its legal history is of interest for its own sake; its legal achievement awaits us in the future, not in the past.

⁵³ *Baker v. Bolton* (1808) 1 Camp. 493.

⁵⁴ The English Act also includes grandparents, grandchildren, step-parents and step-children. There is a general tendency in Malayan legislation, in view of the extended Asian family, the difficulty of checking family relationships, and the frequency of formal and informal adoption, to avoid reference to "dependents" and to limit family relationships.

⁵⁵ S. 12 of the Civil Law Ordinance, Cap. 24 of the Laws of the Colony of Singapore, 1955, and S. 7 of the Civil Law Ordinance, 1956, of the Federation of Malaya.

⁵⁶ *Dalton v. S. E. Railway* (1858) 4 C. B. (N. S.) 296.

⁵⁷ (1939) M.L.J. 242.