~~HC~~
~~GM 1 62~~

(43) 1964

IN THE PRIVY COUNCIL No.40 of 1962

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

JAG SINGH (an infant) suing by his father and next friend Sham Singh s/o Utam Singh (Plaintiff) Appellant

- and -

TOONG FONG OMNIBUS CO., LTD. (Defendants) Respondents

RECORD OF PROCEEDINGS

LE BRASSEUR & OAKLEY,
40, Carey Street,
London, W.C.2.

Solicitors for the Appellant.

LIPTON & JEFFERIES,
Princes House,
39, Jermyn Street,
London, S.W.1.

Solicitors for the Respondents.

IN THE PRIVY COUNCIL No.40 of 1962

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

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B E T W E E N

JAG SINGH (an infant) suing by his father and next friend Sham Singh s/o Utam Singh (Plaintiff) Appellant

- and -

TOONG FONG OMNIBUS CO., LTD. (Defendants) Respondents

RECORD OF PROCEEDINGS

INDEX OF REFERENCE

EXHIBITS AND DOCUMENTS REFERRED TO IN THE RECORD BUT NOT TRANSMITTED TO THE PRIVY COUNCIL

Description of Documents	Date
Plan (P.1.) Four photographs (P.2.) One photograph (P.3.)	Undated

DOCUMENTS TRANSMITTED TO THE PRIVY COUNCIL BUT NOT REPRODUCED

No.	Description of Documents	Date	
	IN THE SUPREME COURT OF THE FEDERATION OF MALAYA IN THE COURT OF APPEAL AT KUALA LUMPUR		
1	Notes of Evidence of Suffian, J.	24th November	1961
2	Notice of Motion	12th June	1962
3	Affidavit of Sham Singh	12th June	1962
4	Order Granting Conditional Leave to Appeal to His Majesty The Yang di-Pertuan Agong	2nd July	1962

IN THE PRIVY COUNCIL No.40 of 1962

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

JAG SINGH (an infant) suing by his father and next friend Sham Singh s/o Utam Singh (Plaintiff) Appellant

- and -

TOONG FONG OMNIBUS CO., LTD. (Defendants) Respondents

RECORD OF PROCEEDINGS

No. 1.

WRIT OF SUMMONS

In the Supreme Court of the Federation of Malaya.

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA

IN THE HIGH COURT AT KUALA LUMPUR

Civil Suit No. 66 of 1961

In the High Court at Kuala Lumpur.

No. 1.

Writ of Summons.

21st February, 1961.

BETWEEN:- Jag Singh (an infant) suing by his father and next friend Sham Singh s/o Utam Singh Plaintiff

- and -

Toong Fong Omnibus Co., Ltd. Defendants

DATO SIR JAMES THOMSON, P.M.N., P.J.K., Chief Justice of the Federation of Malaya, in the name and on behalf of His Majesty the Yang di-Pertuan Agong

To:

Toong Fong Omnibus Co., Ltd.,
No.30, Pudu Road, Kuala Lumpur.

WE COMMAND YOU, that within 8 days after service of this Writ on you, inclusive of the day of such service you do cause an appearance to be entered for you in an action at the suit of Jag Singh

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 1.

Writ of Summons.

21st February, 1961 - continued.

(an infant) suing by his father and next friend, Sham Singh s/o Utam Singh, No.5 Jalan Ampat off Chan Sow Lin Road, Kuala Lumpur.

AND TAKE NOTICE that in default of your so doing the Plaintiff may proceed therein and judgment may be given in your absence.

WITNESS, Mr. Sarwan Singh Gill Registrar of the Supreme Court of the Federation of Malaya, this 22nd day of February, 1961.

Sgd. Murphy & Dunbar, Plaintiff's Solicitors.

Sgd. Senior Asst. Registrar, High Court, Kuala Lumpur.

N.B. - This Writ is to be served within 12 months from the date thereof, or if renewed, within six months from the date of last renewal, including the day of such date, and not afterwards.

The defendant (or defendants) may appear hereto by entering an appearance (or appearances) either personally or by Solicitor at the Registry of the Supreme Court at Kuala Lumpur.

A defendant appearing personally may, if he desires, enter his appearance by post, and the appropriate forms may be obtained by sending a Postal Order for $2.00 with an addressed envelope to the Registrar of the Supreme Court at Kuala Lumpur.

THE PLAINTIFF'S CLAIM is for damages for personal injuries suffered by him and caused by the negligence of the servant or agent of the Defendants in the driving of a motor vehicle.

DATED this 21st day of February, 1961.

Sgd. Murphy & Dunbar,
Plaintiff's Solicitors.

This Writ was issued by Messrs. Murphy & Dunbar whose address for service is at No.44 Ampang Road, Great Eastern Life Building (2nd floor) Kuala Lumpur, Solicitors for the Plaintiff who resides at No.5 Jalan Ampat off Chan Sow Lin Road, Kuala Lumpur.

This Writ was served by me at on the Defendant on the day of 1961, at the hour of

Indorsed this day of 1961.

(Signed)
(Addressed)

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 2.

Statement of Claim.

21st February, 1961.

No. 2.

STATEMENT OF CLAIM

1. The Plaintiff is an infant and sues by his father and next friend.

2. On or about the 13th day of November, 1959 the Plaintiff was lawfully standing on the roadway at or near the bus stop at Pudu Road near the junction of Pudu Road and Sultan Street in Kuala Lumpur when he was knocked down and injured by Motor Bus No.BA.4384 which was being driven along Pudu Road in the direction of Sultan Street by the servant or agent of the Defendants.

3. The said collision was caused solely by the negligent driving of the servant or agent of the Defendants.

PARTICULARS OF NEGLIGENCE

(a) Failing to keep any or any proper look-out.

(b) Failing to observe the presence of the Plaintiff on the roadway.

(c) Driving at an excessive speed in the circumstances.

(d) Driving too near to the place where the Plaintiff was standing and knocking into him.

(e) Failing to stop, swerve, slow down or otherwise avoid the said collision.

4. By reason of the aforesaid negligence the Plaintiff has suffered injuries, has endured pain and has been put to loss and expense.

PARTICULARS OF PERSONAL INJURIES

(a) Admitted to the Hospital on 13/11/59 and discharged on 13/2/60.

(b) Right leg was amputated high at the thigh.

(c) Has to use crutches.

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 2.

Statement of Claim.

21st February, 1961 - continued.

PARTICULARS OF SPECIAL DAMAGE

Travelling expenses to and from Hospital	$150.00
Extra food and nourishment	150.00
Artificial Leg	480.00
	$780.00

And the Plaintiff claims damages.

Dated (and delivered) this 21st day of February, 1961.

Sgd. Murphy & Dunbar,
Solicitors for the Plaintiff.

To:

The above-named Defendants Messrs. Toong Fong Omnibus Company Ltd., No.30, Pudu Road, Kuala Lumpur.

No. 3.

Statement of Defence.

23rd March, 1961.

No. 3.

STATEMENT OF DEFENCE

The Defendants above-named state as follows:-

1. Paragraph 1 of the Statement of Claim is admitted.

2. Save and except that the Defendants admit that an accident happened at or near a bus stop at Pudu Road near the junction of Pudu Road and Sultan Street, Kuala Lumpur, between motor bus No.BA.4384 driven by the Defendants' servant or agent and the Plaintiff, all other allegations contained in paragraphs 2 and 3 of the Statement of Claim are denied.

3. The Defendants further deny each and every allegation of negligence set out in the particulars of Negligence in the Statement of Claim and put the Plaintiff to strict proof thereof.

4. The Defendants contend and will contend that the said accident was caused by the negligence of the Plaintiff or in the alternative, was substantially contributed to by the Plaintiff.

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 3.

Statement of Defence.

23rd March, 1961 - continued.

PARTICULARS OF NEGLIGENCE

The Plaintiff was negligent in that :-

(a) He did not wait for the motor bus to stop before he rushed out from the bus stop on to the road.

(b) He rushed at the motor bus when the same was still moving.

(c) He failed to pay any attention to the horn sounded by the driver of the motor bus.

5. With regard to paragraph 4 of the Statement of Claim the Defendants deny the allegation of negligence and will contend that they have no knowledge as to the nature and extent of the injuries alleged to have been sustained by the Plaintiff and put the Plaintiff to strict proof thereof.

6. The Defendants deny that they are liable to the Plaintiff whatsoever and pray that the Plaintiff's claim be dismissed with costs.

DATED this 23rd day of March, 1961.

Sgd. Bannon & Bailey,
Defendants' Solicitors.

Filed by Messrs. Bannon & Bailey, Solicitors for the Defendants abovenamed whose address for service is at Laidlaw Building, Mountbatten Road, Kuala Lumpur.

No. 4.

Judgment of Suffian, J.

6th December, 1961.

No. 4.

JUDGMENT OF SUFFIAN, J.

This is an action for negligence brought against a bus company by an infant suing by his father and next friend. On the 13th day of November, 1959, the Plaintiff was standing on the roadway at or near the bus stop at Pudu Road near the junction of Pudu Road and Sultan Street in Kuala Lumpur when (it was claimed) he was negligently knocked down and injured by motor bus No.BA 4383 which was being driven along Pudu Road in the direction of Sultan Street by a bus driver employed

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 4.

Judgment of Suffian, J.

6th December, 1961 - continued.

by the company. The bus ran over the Plaintiff's right leg which had to be amputated above the knee. The company denied negligence and claimed alternatively that if they had been negligent the Plaintiff was guilty of contributory negligence.

It is not disputed that the Defendant's driver owed a duty of care to the Plaintiff, but the question is, was he guilty of a breach of this duty to take care by failing to attain the standard of care prescribed by law?

What is the standard of care prescribed by law? In London Passenger Transport Board v. Upson 1949, 1 A.E.R., 60, Lord Uthwatt said at p.70:-

> "A driver is not, of course, bound to anticipate folly in all its forms, but he is not, in my opinion, entitled to put out of consideration the teachings of experience as to the form these follies commonly take".

Lord Du Parcq expressed the same opinion in these words (at page 72):-

> "A prudent man will guard against the possible negligence of others, when experience shows such negligence to be common ..... A driver is never entitled to assume that people will not do what his experience and common sense teach him that they are, in fact, likely to do".

Viscount Dunedin in Fardon v. Harcourt-Rivington (1932) 48 T.L.R. 215 said at p.216:-

> "If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions".

Stable, J., in Daly v. Liverpool Corporation 1939, 2 A.E.R. 142, stated at page 144;

> "My view is that the sooner it is recognised as being the law that a person who drives a motor vehicle under modern conditions is in precisely the same position as, for instance, that of a surgeon or a person who undertakes to perform an extremely difficult task, involving extremely dangerous consequences for

other persons, the better. The standard of care and skill which the law must demand from the driver of a motor car today is a very high one indeed. A motor car has become a lethal weapon".

The driver was approaching this bus stop. He saw a crowd of school children at the stop while he was about 60 feet away. As he neared the stop, many school children left the shelter of the sheds at the stop and swarmed into the roadway. It is alleged that as the bloodmark at the spot where the Plaintiff was run over was nine feet long the driver must have been going quite fast, but I do not believe that he was then driving fast. The length of the bloodmark can be explained by the fact that the driver did not see the child he had run over and he first knew about it only when he heard cries. During the interval between hitting the child and stopping the bus he must have travelled nine feet. Nevertheless the Highway Code by Section 25 provides:-

> "A driver must stop if by so doing he can avoid an accident or even the risk of an accident" and

Section 59(4) of the Road Traffic Ordinance No.48 of 1959 provides:

> "Failure on the part of any person to observe any provisions of the Highway Code ..... may in any proceedings, whether civil or criminal, be relied on by any party to the proceedings as standing to establish or to negative any liability which is in question in these proceedings".

Applying these tests, I am of the view that on the evidence the driver of the Defendant company was guilty of a breach of the duty to take care, which he owed to the Plaintiff, by failing to attain the standard of care prescribed by law.

The next question which arises is whether or not the Plaintiff was himself guilty of contributory negligence. As to this, Lord Simon in Nance v. British Columbia Electric Railway, 1951 A.C. 601 stated at page 611:-

> "When contributory negligence is set up as a defence, its existence does not depend on any

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 4.

Judgment of Suffian, J.

6th December, 1961 - continued.

duty owed by the injured party to the party sued, and all that is necessary to establish such a defence is to prove .... that the injured party did not in his own interest take reasonable care of himself and contributed by his want of care, to his own injury".

It will be noted that the Plaintiff at the time of the accident was 7 years old. Can a child of such tender years be guilty of contributory negligence? As to this, Charlesworth on Negligence, 3rd Edition, states at page 525:-

> "When a child is negligent, in the sense that he could by the exercise of 'reasonable care' have prevented or avoided the damage in question, he cannot recover; but in considering what is 'reasonable care' the age of the child must be considered. Infancy as such is not a 'status conferring right' so that the test of what is contributory negligence is the same in the case of a child as of an adult, modified only to the extent that the degree of care to be expected must be proportionate to the age of the child".

In this case the Plaintiff was waiting for the bus at this particular stop on his way home from school. There were many other school children waiting for the bus. On seeing the bus many of them surged towards it. It seemed that the Plaintiff was ahead of the crowd and in his eagerness to board the bus he went into the roadway 19½ feet from the kerb and two feet outside the lamp post marked A in the plan Exhibit P.1. He got into the path of the oncoming bus and was run over. He must have been stepping out at the time because of the location of the injuries suffered by him. They were crushing injuries suffered on the front part of his leg around and below the knee. Clearly in my view he had not in his own interest taken reasonable care of himself and contributed, by his want of care, by stepping so far out into the roadway, to his own injury although the driver himself could have avoided the accident by stopping in time.

The driver in his evidence stated that normally he stopped his bus at the head of the sheds marked P.1 and P.2 in Exhibit P.1. The Plaintiff claimed that sometimes the bus did stop near the

lamp post marked A in the plan, 17½ feet from the kerb. I am of the view that probably both parties are right. If there were no other buses in front of him, the driver would normally stop at the head of the sheds, but he would stop further back (sometimes as far back as at the lamp post) if there were other buses in front of him.

As to the apportionment of the blame between the Plaintiff and the bus driver, I am of the view that both parties were equally to blame and I so apportion the blame.

As to quantum, I award $390 being half of the amount of special damages claimed.

As regards general damages, Cockburn, C.J., in Phillips v. L. & S.W. Rly. 1879, 4 Q.B.D., 406, stated that the court should consider and take into account the following heads of damage in respect of which a Plaintiff complaining of a personal injury is entitled to compensation:-

> "These are the bodily injury sustained; the pain undergone; the effect on the health of the sufferer, according to its degree and its probable duration as likely to be temporary or permanent; the expenses incidental to attempts to effect a cure, or to lessen the amount of injury; the pecuniary loss sustained through inability to attend to a profession or business as to which, again, the injury may be of a temporary character, or may be such as to incapacitate the party for the remainder of his life!".

In attempting to place the Plaintiff in so far as can be done by money in the same position as he would have been in but for the negligence of the Defendant's driver, I am seriously handicapped by the fact that at the time of the accident the Plaintiff was only seven years of age and was not a working man earning money. His injuries were serious, his pain and suffering excruciating. Because of the amputation his mobility has been seriously affected, but not his mental capacity and if he does well at school there is nothing to stop him from earning a living in a sedentary occupation or even from achieving eminence in the professions or politics. Nevertheless I take into account the probability that he might not have the mental equipment necessary for these positions, in which

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 4.

Judgment of Suffian, J.

6th December, 1961 - continued.

event his lack of mobility would be a serious handicap to his future livelihood. Considering all these factors and considering the social class to which the Plaintiff belongs (his father is a watchman who sends two of his sons to an English school) and giving this matter the best consideration I can in the circumstances, I award $7,500/- general damages, that is, half the damages I would have awarded for 100% liability.

Mr. Murphy for the Plaintiff cited cases from England to persuade me to award thirty to forty thousand dollars. I am of the opinion, however, that awards made by English courts should not be slavishly followed in Malaya. As Thomson, C.J., said in Pahang Lin Siong Motor Co. Ltd. and Bishen Singh v. Cheong Swee Khai and Loh Soo Chai, F.M. Civil Appeal No.13 of 1961, unreported -

> " ..... local social, economic and industrial conditions are poles apart from conditions in England and Scotland and any tendency to take a particular line in relation to assessment of damages in cases of this type from a consideration of English and Scottish cases is not calculated to produce very useful results. Times may be changing but this is still not an industrial country. The economy is still, generally speaking, a peasant economy in which the typical figures are the small cultivator and the small trader. This in its turn, although of course strictly speaking it does not affect the value of money, produces the consequence that small sums of capital are more difficult to acquire and more sought after than in England and, when acquired, are much prized and are of much greater economic utility. In England the ordinary working man would not, generally speaking, be greatly attracted by the prospect of enough capital to acquire a small agricultural holding or open a small shop whereas in this country such an opportunity would generally be welcomed with avidity. For example $25,000 in this country will purchase enough rubber land or padi land to enable a family to live in very great comfort with very little exertion. It is only in the most exceptional circumstances that a sum of £3,000 would produce such a result in England or Scotland.

Again, it must be remembered that, generally speaking, money wages are lower in this country than in England".

As regards costs, the Plaintiff should get half his taxed costs.

MOHD. SUFFIAN BIN HASHIM,
Judge,
Federation of Malaya.

Kuala Lumpur,
6th December, 1961.

Messrs. Murphy and Tara Singh for Plaintiff.

Mr. Edgar for Defendants.

Certified true copy
Sgd. Illegible
(Wong Yik Ming)
Secretary to Judge,
Kuala Lumpur.

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 4.

Judgment of Suffian, J.

6th December, 1961 - continued.

No. 5.

FURTHER JUDGMENT OF SUFFIAN, J.

No. 5.

Further Judgment of Suffian, J.

22nd December, 1961.

In this case I found that both the Plaintiff and the driver of the Defendant Company were equally to blame for the accident in which the Plaintiff lost his right leg and accordingly I ordered that the Plaintiff should get only half his taxed costs. Owing to my sudden illness the judgment had to be read by the Senior Assistant Registrar and in my absence the Plaintiff was denied an opportunity to present arguments regarding costs. On 20th December, 1961 at his request I agreed to hear him on this point.

Mr. Edgar for the Defendant Company, argues that I have no power to re-open this matter. On the authority of the English Court of Appeal decision In re Harrison's Share under a Settlement. Harrison v. Harrison. (1955) 1 Ch.260. brought to my notice by Mr. Murphy for the Plaintiff, I hold that an order pronounced by a judge whether in open Court or in chambers can always be withdrawn, altered or modified by him, either on his own

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 5.

Further Judgment of Suffian, J.

22nd December, 1961 - continued.

initiative or on the application of a party, until such time as the order has been drawn up, passed and entered. In this case my judgment has not been perfected.

The next question which arises is whether I should vary the order regarding costs. Mr. Murphy cited MacCarthy v. Raylton Productions (1951) W.N. 376 for the proposition that, unlike in Admiralty cases, the practice in the Queen's Bench Division is that where the Defendant has been held to be partly to blame, the Plaintiff is entitled to the whole of his costs. I have considered the cases at pages 39-40 of Bingham's Motor Claims Cases, 4th Edition, which cases were also brought to my notice by Mr. Murphy, and I find that the practice is not of general application. Costs are awarded at the discretion of the Court and each case should be considered on its own merits.

I have carefully reconsidered this matter and I regret that I am unable to alter my original decision that in the circumstances of this particular case it is fair that the Plaintiff should get only half his taxed costs.

Sgd. Illegible
(Mohd. Suffian bin Hashim)
Judge,
Federation of Malaya.

Kuala Lumpur,
22nd December, 1961.

Messrs. Murphy and Tara Singh for Plaintiff.

Mr. Edgar for Defendants.

Certified true copy
Sgd. Illegible
Secretary to Judge,
Kuala Lumpur.
2.1.62.

No. 6.

Order of Court.

22nd December, 1961.

No. 6.

ORDER.

Before The Honourable Mr. Justice Suffian, Judge, Federation of Malaya.

IN OPEN COURT This 22nd day of December, 1961.

This action coming on for hearing on the 24th

day of November, 1961 before the Honourable Mr. Justice Suffian, Judge, Federation of Malaya in the presence of Mr. Denis Murphy and Mr. G. Tara Singh Sidhu of Counsel for the Plaintiff and Mr. Morris Edgar of Counsel for the Defendants above-named AND UPON READING the Pleadings herein AND UPON HEARING the evidence and arguments of Counsel aforesaid THIS COURT DID ORDER that this action do stand for judgment AND UPON this action coming on for judgment the 6th day of December, 1961 THIS COURT DID ADJUDGE that the Plaintiff and the Defendants are equally to blame AND IT WAS ORDERED that Judgment be entered for the Plaintiff against the Defendants for $390.00 as special damages and $7,500/- as general damages AND UPON HEARING Counsel for the Plaintiff and the Defendants on the 20th day of December, 1961 on the question of Costs IT WAS ORDERED that this matter do stand for judgment and upon this matter coming on for judgment this 22nd day of December, 1961 IT IS ORDERED that half the costs of this action as taxed by the proper officer of this Court be paid to the Plaintiff by the Defendants AND UPON HEARING THE APPLICATION of the Counsel for the Plaintiff for leave to appeal IT IS ORDERED that leave to appeal against the aforementioned order for costs be and is hereby granted to the Plaintiff.

GIVEN under my hand and the Seal of the Court this 22nd day of December, 1961.

Sgd. Illegible.
Senior Assistant Registrar,
Supreme Court,
Kuala Lumpur.

In the Supreme Court of the Federation of Malaya.

In the High Court at Kuala Lumpur.

No. 6.

Order of Court.

22nd December, 1961
- continued.

No. 7.

NOTICE OF APPEAL

IN THE SUPREME COURT OF THE FEDERATION OF MALAYA
IN THE COURT OF APPEAL AT KUALA LUMPUR

F.M. CIVIL APPEAL No.45 of 1961.

BETWEEN:- Jag Singh (an infant) suing by his father and next friend Sham Singh s/o Utam Singh Appellant

- and -

Toong Fong Omnibus Co. Ltd. Respondents

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No. 7.

Notice of Appeal.

23rd December, 1961.

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No. 7.

Notice of Appeal.

23rd December, 1961
- continued.

(In the Matter of Kuala Lumpur High Court Civil Suit No.66 of 1961

BETWEEN:- Jag Singh (an infant) suing by his father and next friend Sham Singh s/o Utam Singh Plaintiff

- and -

Toong Fong Omnibus Co. Ltd. Defendants)

NOTICE OF APPEAL

TAKE NOTICE that Jag Singh (an infant) suing by his father and next friend Sham Singh s/o Utam Singh the Appellant above-named being dissatisfied with the decision of the Honourable Mr. Justice Suffian given at Kuala Lumpur on the 22nd day of December, 1961 appeals to the Court of Appeal against the whole of the said decision including costs.

DATED this 23rd day of December, 1961.

Sgd. Murphy & Dunbar,
Solicitors for the
Appellant.

Sgd. Illegible
Appellant.

To:

(1) The Senior Assistant Registrar,
Supreme Court,
Kuala Lumpur.

(2) The Respondents or to their Solicitors,
Messrs. Bannon & Bailey,
O.C.B.C. Building,
Kuala Lumpur.

This Notice of Appeal was taken out by Messrs. Murphy & Dunbar, Advocates & Solicitors, 42 Mountbatten Road, Bajaj Building (2nd Floor), Kuala Lumpur, Solicitors for the Appellant above-named.

No. 8.

Amended Notice of Appeal.

29th December, 1961.

No. 8.

AMENDED NOTICE OF APPEAL

TAKE NOTICE that Jag Singh (an infant) suing by his father and next friend Sham Singh s/o Utam Singh the Appellant above-named being dissatisfied with the decision of the Honourable Mr. Justice

Suffian given at Kuala Lumpur on the 6th day of December, 1961 and the 22nd day of December, 1961 appeals to the Court of Appeal against the whole of the said decision including costs.

DATED this 23rd day of December, 1961.

DATED this 29th day of December, 1961.

Sgd. Murphy & Dunbar,
Solicitors for the Appellant.

Sgd. Illegible
Appellant.

To:

(1) The Senior Assistant Registrar,
Supreme Court,
Kuala Lumpur.

(2) The Respondents or to their Solicitors,
Messrs. Bannon & Bailey,
O.C.B.C. Building,
Kuala Lumpur.

This Amended Notes of Appeal was taken out by Messrs. Murphy & Dunbar, Advocates & Solicitors, 42 Mountbatten Road, Bajaj Building (2nd floor) Kuala Lumpur, Solicitors for the Appellant abcve-named.

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No. 8.

Amended Notice of Appeal.

29th December, 1961
- continued.

No. 9.

MEMORANDUM OF APPEAL

No. 9.

Memorandum of Appeal.

27th January, 1962.

The above-named Plaintiff-Appellant appeals to the Court of Appeal in Kuala Lumpur in the Federation of Malaya against all of the judgment of the Honourable Mr. Justice Suffian which held that the Defendants-Respondents were only liable for a total amount of $15,000/- in damages and that the Plaintiff-Appellant contributed to the accident in that he himself was negligent and against the Order that the Plaintiff-Appellant should only receive from the Defendants-Respondents half his costs on the following grounds:-

1. The learned Trial Judge was wrong in fact and in law in holding that the infant Plaintiff-Appellant could be liable for or guilty of contributory negligence as he did in fact so find.

2. The learned Judge was wrong in fact and in law in finding that the infant Plaintiff-Appellant was guilty of any contributory negligence at all.

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No. 9.

Memorandum of Appeal.

27th January, 1962 - continued.

3. The learned Judge was wrong in fact and in law in finding that the infant Plaintiff-Appellant was ahead of the crowd that surged forward to board the bus.

4. The learned Trial Judge was wrong in fact and in law in finding as he did find that the infant Plaintiff-Appellant was stepping out into the roadway at the time when he was knocked down by the bus.

5. The learned Judge was wrong in fact and in law in holding that the infant Plaintiff-Appellant had stepped so far that is to say 19½ feet out into the roadway. The distance which he had stepped beyond the permissible distance was 2 feet and not 19½ feet.

6. In view of the finding to the effect that the omnibus sometimes stopped as far back as the lamp post the learned Judge was wrong in fact and in law in holding that because the infant Plaintiff-Appellant was 2 feet beyond that lamp post he could have been guilty of contributory negligence at all or to the extent of 50 per cent.

7. There was no evidence on which the learned Trial Judge could have found that the infant Plaintiff-Appellant did anything that could in any way be described as negligent or that his conduct could in any way have contributed to the accident.

8. The amount of damages assessed for full liability at $15,000/- was so inordinately low that the learned Trial Judge must have failed to take into account matters which had to be taken into account in arriving at his assessment.

9. The amount of $15,000/- which the learned Trial Judge assessed as the proper damages for the injury suffered by the infant Plaintiff-Appellant in the event of full liability being established was entirely out of line with the general run of damages given by the Courts in the Federation of Malaya and in the State of Singapore for the injuries or the class of injury suffered by the Plaintiff-Appellant in this case.

10. The learned Trial Judge was wrong in fact and in law in thinking that the awards to which he referred between $30,000/- and $40,000/- for full liability were awards made in English cases. They were awards made in cases in Singapore and in the Federation of Malaya and they were awards which ought to have been followed.

11. The learned Trial Judge was wrong in fact and in law in comparing the price of rubber land or padi land or rice or small holdings to be obtained in this country with the amount of damages which ought to be awarded to the loss of amenities, the pain and suffering and the loss of the future prospects following on the loss of an arm or leg.

13. The learned Trial Judge failed to exercise his discretion judicially or at all in awarding the Plaintiff-Appellant only half his costs.

14. The learned Trial Judge ignored the established practice in these Courts with regard to the order for costs and failed properly to exercise his discretion in that in this case the Plaintiff-Appellant was an infant and that there was nothing in the case which could properly have persuaded the Judge to exercise a discretion contrary to the normal practice.

DATED this 27th day of January, 1962.

MURPHY & DUNBAR,

Appellant's Solicitors.

This Memorandum of Appeal was filed by Messrs. Murphy & Dunbar, Advocates & Solicitors, 14-1 Ampang Street, Bajaj Building (2nd Floor), Kuala Lumpur, Solicitors for the Appellant above-named.

No. 10.

No.10.

Notes of Argument of Thomson, C.J.

11th and 12th April, 1962.

NOTES OF ARGUMENT RECORDED BY THOMSON, C.J.

11th April, 1962

For Appellant: D.H. Murphy

For Respondents: M. Edgar.

Murphy: Appeal against:

(1) Quantum;

(2) Finding of contributory negligence;

(3) Costs - J. deprived Plaintiff of half his costs.

Accident 13.11.59. Plaintiff then aged 7.

In 127/58, Chua, J., awarded $35,000 to infant aged 17.

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No.10.

Notes of Argument of Thomson, C.J.

11th and 12th April, 1962 - continued.

In a Singapore case, Chua J. awarded $42,000 to young soldier.

Muar C.S. 32/60, Adams in c/s of boy aged 16 awarded $30,000. Appeal dismissed - but no appeal on quantum.

Plan is at 43. Position of lamp post is peculiar.

Traffic never leaves lamp post on left side. Pass it on near side and then go to shed.

At time Bus was as shown in Plan.

As regards costs J. did not exercise his discretion.

Since 1951 the practice of awarding all costs to Plaintiff has been always followed. Plaintiff has to bring his action to get his damages.

McCarthy v. Raylton Productions Ltd. & Another (1951) W.N. 376.

Since that case there has been no case in England where costs have been deducted from Plaintiff's costs.

The "Trivia" (1952) 1 Ll. R. 548.

Smith v. Smith (1952) 1 A.E.R. 528.

William A. Jay & Sons v. Veevers Ltd. (1946) 1 A.E.R. 646.

Barnes v. Port of London Authority (1957) 1 Ll.R.486. Civ. Suit 528/59.

As regards contributory negligence, Br. Fame v. Macgregor (1943) A.C. 197, 201 applies.

But here J. did not consider his own finding that buses sometimes stopped at the lamp post.

If he had borne in mind he would not have held a child to blame for being 2 ft. in front of the post. He thought child had gone 19 ft. out.

The award was in any event inadequate. I am in a difficulty because of:

Pahang Lin Siong v. Cheong Swee Khai (1962) M.L.J.29.

Bastow v. Bagley & Co. Ltd. (1961) 1 W.L.R. 1494.

Since 1954 local Courts have been following English assessments.

Low Ah Toh v. Yusof v. Kayab (1954) M.L.J.112.

There is no case where as little as $15,000 has been awarded for a leg.

Muar C.S. 32/60 (16 year old schoolboy - $30,000 - question of quantum not considered on appeal).

J.B. C.S. 8/62 ($15,000 awarded for chopped foot)

Edgar:

A child can be guilty of contributory negligence. Charlesworth (3rd Ed.) p.525. Halsbury XXVIII p.94.

There is a clear finding by the Judge here. But actually Plaintiff was 9 not 7.

As to boarding buses -

English and Empire Digest VIII p.92.

J's findings must be accepted -

Nance v. Br. Columbia Elec. Rlys. Co. Ltd. (1951) 2 A.E.R. 448.

On quantum I rely on:

Pahang Lin Siong v. Cheong Swee Khai (1962) M.L.J.29.

$15,000 is adequate compensation in all the circumstances. J. should not be interfered with.

As to costs, J. had a discretion which should not be interfered with.

C. A. V.

Intld. J.B.T.
12.4.62.

17th May, 1962

For Appellant: Tara Singh

For Respondents: Peddie.

Appeal dismissed with costs.

Order as to costs in the Court below is varied to give Plaintiff his full taxed costs.

Deposit to Respondents

Intld. J.B.T.
17.5.62.

True Copy
Sgd. Illegible
Private Secretary to Chief Justice.
20.8.62.

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No.11.

Notes of Argument of Hill, J.A.

11th and 12th April, 1962.

No. 11.

NOTES OF ARGUMENT RECORDED BY HILL, J.A.

11th April, 1962

Murphy for Appellant (Tara Singh with him).

Morris Edgar for Respondents.

Murphy: 3 points -

1. Quantum - $7,500 - half to blame.

2. Contribution.

3. Costs - half to Plaintiff.

Two cases referred to in p.11.

Muar 32/60 Adams J. - Plaintiff aged 16 $30,000.

Kemp & Kemp 2nd Edn. pp. 549-568.

12th April, 1962

Counsel as before.

Murphy: re costs discretion not exercised -

General application. All costs to Plaintiff since 1951. (Hands in photostatic copies of judgments)

Civil Suit 528/59 - 50% damages and all costs to Plaintiff -

Cannot find a case since 1951 to the contrary.

Bingham 39-40. Bingham p.34.

1943 A.C.197 - British Fame v. MacGregor.

Trial Judge overlooked that lamp post was at times a bus stop and otherwise he would not have blamed child. Driver should have known that children would be around the post.

Quantum - M.L.J. (1962) 29 - Pahang Siong Motor Co. & Another v. Cheong Swee Khai & Another - local cases too varied. (1961) 1 W.L.R. 1494 Bastow v. Bagley & Co. Ltd. Standard should be fixed.

(1954) 20 M.L.J. 112 Low Ah Toh v. Yusof bin Kayab

Muar Civil Suit 32/60 - $30,000.

Recently Civil Suit 8/62 Johore - $15,000 for dropped foot.

Edgar: Charlesworth 3rd Edition 525.
Halsbury Vol. 28 p.94.
Boy in habit of catching bus.
Attempted to board moving bus.
English and Empire Digest Vol.8 p.92.
Trial Judge's finding not perverse.
(1951) 2 A.E.R.448 - Nance v. British Electric Railway Co.

Quantum: Award sufficient in circumstances of this case - reasonable and proper.

Costs - discretion.

C. A. V.

Sgd. R.D.R. Hill
Judge of Appeal.

Certified true copy
G.E. Tan
(Mrs. G.E. Tan)
Secretary to Judges of Appeal,
Federation of Malaya.
6th August, 1962.

No. 12.

NOTES OF ARGUMENT RECORDED BY GOOD, J.A.

11th April, 1962

Murphy for Appellant (Tara Singh with him).

Morris Edgar for Respondents.

Murphy: Grounds of Appeal:

(1) Quantum: $7,500 (50% of $15,000).

(2) Contribution.

(3) Costs.

Plaintiff was a boy of 7. Accident 13.11.59.

I referred to two cases (both local) - p.11.

Adams J. in Muar Civil Suit 32/60. Plaintiff aged 16, leg amputated above the right knee, $30,000 damages, appeal (not on damages) dismissed.

Plan p.43; p.46, Exhibit P.3; lamp post 17½ feet out. Buses do not go inside the lamp post.

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No.12.

Notes of Argument of Good, J.A.

11th and 12th April, 1962 - continued.

The bus was 2 feet from the lamp post. The blood mark EHF 19½ feet out. (corner of footpath) is 41 feet from the lamp post.

P.13 - Plaintiff's evidence.

Boy not intelligent enough to take the oath, but 2 years previously he was intelligent enough to be guilty of contributory negligence.

To 12th April 1962.

Murphy continues:-

(Reads the judgment)

Grounds of Appeal (in reverse order).

(3) Costs (see further judgment p.33).

Award of full costs to Plaintiff where Defendant is partly liable is of universal application and is invariably followed.

McCarthy v. Raylton Productions Ltd. & Another (1951) W.N. 376.

Since that case I have not discovered a case in England in which costs have been deducted from the Plaintiff.

The "Trivia" (1952) 1 Lloyd R.548.

Smith v. Smith (1952) 1 A.E.R.528.

William A. Jay & Sons v. Veevers Ltd. (1946). 1.A.E.R. 646.

Barnes v. Port of London Authority (1957) 1 Ll.R. 486.

The learned Trial Judge in a subsequent case has given the Plaintiff the whole of his costs in a similar case.

(2) Contribution

British Fame v. MacGregor (1943) A.C.197 at 201. Trial Judge has not taken into consideration his finding that buses sometimes stopped at that lamp post. That is clearly why the children came out to the lamp post. If he considered that as a stop, he would not have regarded a child of 7 as being 50% to blame in being 2 feet out from the post. What he has regarded is that the child was 19½ feet out from the shed. If the child had been on the footpath at a bus stop and had stepped 2 feet out on to the roadway, it is unlikely that

the Judge would have held that the child was 50% negligent. If the bus is in the habit of frequently stopping at the lamp post the driver knows that there will be children around that lamp post.

(1) Quantum:

Pahang Lin Siong Motor Co. & Another v. Cheong Swee Khai & Another (1962) M.L.J. 29.

Not possible to assess damages for personal injuries except by reference to damages awarded in similar cases before.

Bastow v. Bagley & Co. Ltd. (1961) 1 W.L.R. 1494. Diplock J. at 1498, 2nd paragraph. We must have a standard. If there is no yardstick a judge can never be wrong.

The Singapore Court of Appeal held that pain and suffering and loss of social amenities was the same for all.

Low Ah Toh v. Yusof b. Kayab (1954) M.L.J.112. $24,000 for a dropped foot.

There is now some sort of trend - one Federation case and two Singapore.

The Federation case is:-

Muar High Court Civil Suit 32/60.

$30,000 (no appeal on the question of damages)

In the Pahang Lin Siong case this Court considered Singapore cases as local cases.

Khatijah binte Abdullah v. Lee Leong Toh & Another. (1940) M.L.J.87.

Johore High Court Civil Suit 8/62.

Chew Kim Poh v. Oh Siong Huat $15,000 for a dropped foot.

Loughram v. Armstrong (1956) 22 M.L.J. 137. $7,500 reduced to $4,000.

Drennan v. Greer (1957) M.L.J.77. $35,000 for a stiff knee.

Court of Appeal declined to intervene.

Aziz v. Easy (1958) M.L.J. 261. $16,000 for a shortening of the leg.

Tan Kwee Low v. Lee Chong (1960) M.L.J.212. $3,000 for shortening of the leg.

There is no case that can compare with the award made in this case.

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No.12.

Notes of Argument of Good, J.A.

11th and 12th April, 1962 - continued.

Edgar: (2) Contribution

Charlesworth 3rd Edition 525.

A child of tender years can be guilty of contributory negligence.

Halsbury 3rd Edition Vol.28 p.94.

Frasers v. Edinburgh Street Tramways Co.

Campbell v. Ord & Maddison

This boy was old enough to appreciate the danger and he was accustomed to boarding buses daily after school.

If he had stayed where he should have stayed he would never have been knocked down.

8 English and Empire Digest 92 S S 427.

If he had even stayed at the lamp post, Plaintiff would not have been knocked down.

The door of this bus is at the back.

The finding of the trial Judge is completely in accordance with the evidence and in no sense perverse.

Nance v. British Columbia Electric Railways Co. Ltd. (1951) 2 A.E.R. p.448.

No suggestion that the bus was driven at excessive speed.

(1) Quantum.

$15,000 in the circumstances of this case is sufficient compensation. Not out of proportion to the ordinary run of damages.

(3) Costs

Would the costs have been any less if the Plaintiff had filed a reply admitting contributory negligence?

Answer: Yes, because in that case the trial could have been cut down. We might then have confined ourselves to the question of apportionment.

Ground of Appeal 14 - there is no established practice, no general principle. There does not seem to be any evidence to justify depriving Plaintiff of 50% of his costs.

C. A. V.

Sgd.Good, J.A.

Certified true copy
G. E. Tan
(Mrs. G.E. Tan)
Secretary to Judges of Appeal,
Kuala Lumpur, 6th August, 1962.

No. 13.

In the Supreme Court of the Federation of Malaya.

JUDGMENT OF THOMSON, C.J.

In the Court of Appeal at Kuala Lumpur.

No.13.

Judgment of Thomson, C.J.

17th May, 1962.

This appeal arises from a running down case which was tried by Suffian, J., at Kuala Lumpur. The Plaintiff is a child who at the time of the incident from which the case arose was about 7 years of age and he sued by his father as his next friend.

On 13th November, 1959, the Plaintiff was knocked down by a large omnibus of the double-decker type belonging to the Defendant Company and suffered injuries in consequence of which his right leg had to be amputated above the knee. He claimed that the accident was due to the negligent driving of the bus driver and sued for general damages for pain and suffering and so forth and for $780 special damages, being hospital expenses and the cost of an artificial leg.

Suffian, J., found that there was negligence on the part of the driver but that there was also contributory negligence on the part of the Plaintiff which he assessed at 50%. He assessed the special damages at the amount claimed, $780, and the general damages at $15,000 but by reason of his finding of contributory negligence held that these sums should be reduced by one half. Judgment was accordingly entered for $7,890 and the Plaintiff was awarded half his taxed costs.

Against that judgment the Plaintiff has now appealed. He has appealed against the finding of contributory negligence, against the amount awarded as general damages as being inadequate and, by leave, against the order depriving him of half his costs.

The accident occurred at a bus station on one of the lanes of a somewhat complicated "roundabout" which leads from Pudu Road to Sultan Street and Cross Street, a part of the town where road traffic is always heavy and particularly so in the morning and early evening when people are going to and returning from work. On this lane traffic is permitted to travel one way only and on the left side of it, which is the near side of traffic using it, there is a sort of bay set back about 18 feet from the main portion of the roadway. On its outer aspect this bay is lined with shelters for the

In the Supreme Court of the Federation of Malaya.

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No.13.

Judgment of Thomson, C.J.

17th May, 1962 - continued.

convenience of waiting passengers and just opposite the first shelter and 17½ feet from it there is a lamp post. This is almost exactly on an imaginary line which would be the outer limit of the roadway if there was no bay.

There would seem to be little controversy as to what actually happened. About 6 p.m. when it was still broad daylight, the Plaintiff and a number of other school children were in the shelters at the bus station waiting for a bus. Apparently they were in the habit of waiting at the same place for a bus about the same time every day. The Defendants' bus approached and the driver said it was his intention to leave the lamp post on his near side and then draw in to the shelters to pick up passengers, although it would appear that buses do not always pull in to the shelters but sometimes stop at the lamp post to pick up their passengers if traffic conditions demand such a course. As the bus approached, the children came out from the shelters to intercept it at the lamp post. Whether they intended to board it while in motion or whether they thought it was going to stop at the lamp post is by no means clear. Be that as it may, the Plaintiff went beyond the base of the lamp post into the main portion of the roadway and came in contact with the near side front of the moving bus. At that time, according to measurements later taken by the Police, the near side of the bus was 2 feet from the lamp post and it could not have been going very fast because a blood mark found at the scene suggested that it had pulled up within 9 feet after striking the Plaintiff. It did, however, strike the Plaintiff and caused injuries to his leg, although it probably did not actually pass over the leg. In the event the leg had to be amputated above the knee.

On that the Trial Judge found that there was negligence on the part of the driver. He also found, and here he reminded himself that he was dealing with a young child, that the Plaintiff was himself negligent in going beyond the lamp post into the path of the approaching bus and he assessed the extent to which the Plaintiff's negligence contributed to the accident at one half.

There has been no appeal against the finding of negligence on the part of the driver.

The Plaintiff has appealed against the finding

of contributory negligence. It has, however, been conceded on his behalf that that part of his appeal has little prospect of success. As was said by Lord Wright in the case of British Fame v. Macgregor(1):-

> "It would require a very strong case to justify any such review of or interference with this matter of apportionment where the same view is taken of the law and the facts. It is a question of the degree of fault, depending on a trained and expert judgment considering all the circumstances, and it is different in essence from a mere finding of fact in the ordinary sense. It is a question, not of principle or of positive findings of fact or law, but of proportion, of balance and relative emphasis, and of weighing different considerations. It involves an individual choice or discretion, as to which there may well be differences of opinion by different minds. It is for that reason, I think, that an appellate court has been warned against interfering, save in very exceptional circumstances, with the judge's apportionment".

What the Plaintiff did here would clearly have been careless in the case of an adult. The learned Judge was well aware he was dealing with a child of tender years and for myself, in the absence of anything to the contrary in the evidence, I should be reluctant to say that a child who had sufficient discretion to travel to and from school had not sufficient discretion to appreciate that it is a rash and dangerous thing to get in the way of a moving omnibus.

The real matter of substance in the appeal is the question of the quantum of damage. I do not, however, think it is necessary to deal with that question at length for a great deal of what was said just over six months ago by this Court in the case of Pahang Lin Siong Motor Co. Ltd. v. Cheong Swee Khai(2) is applicable here. In that case, as regards the limits which should bind a Court of Appeal in dealing with questions of this nature, we

(1) (1943) A.C. 197, 201.

(2) (1962) M.L.J. 29.

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Judgment of Thomson, C.J.

17th May, 1962 - continued.

based ourselves on the cases of Flint v. Lovell(3) Bird v. Cocking & Sons Ltd.(4) and Scott v. Musial(5). As regards the consideration of awards for similar cases we accepted the views expressed by Birkett, L.J., in the case of Bird v. Cocking & Sons Ltd. (Supra) and Singleton, L.J., in the case of Waldon v. The War Office(6), which I do not propose to repeat here. We took the view that by reason of differences in oesological conditions a consideration of awards in English and Scottish cases is not calculated to produce very useful results in this country and with regard to such local cases as are reported we went on to express the view that in any event these "are so few in number and so diverse in their conclusions that they cannot afford any very reliable guidance".

The only reported case which has been cited to us here which was not cited in the case of Pahang Lin Siong Motor Co. Ltd. v. Cheong Swee Khai (Supra) is that of Bastow v. Bagley & Co. Ltd.(7) which was not decided until a few days after judgment was given in the former case.

What happened in that case was that the Plaintiff had been awarded £1,150 general damages for the loss of an eye. The Court of Appeal held that that sum was lower than they would themselves have awarded, but that it was not a case in which they should interfere. Two days later another division of the Court awarded £2,000 damages for the loss of an eye, in broadly similar circumstances, to a Plaintiff who had been awarded £850 by the trial Judge. The first appeal was restored to the list for hearing and it was held that the disparity between the award of £2,000 in the second appeal and that of £1,150 in the case before the Court was too great to be just and fair to the Plaintiff in all the circumstances. Having regard to the fact that the first Appellant's position was somewhat better than the second one he was awarded £1,800. On the second occasion on which the case was before the Court Sellers, L.J. said:-

(3) (1935) 1 K.B. 354.
(4) (1951) 2 T.L.R. 1260.
(5) (1959) 2 Q.B. 429.
(6) (1956) 1 A.E.R. 108.
(7) (1961) 1 W.L.R. 1494.

"In the present case the trial judge's award was £1,150, and having regard to established principles which guide this court in reviewing damages it left a doubt in the court's mind whether it would be proper to disturb it, but as three of our brethren in the other division have assessed the damages for the loss of an eye in their case at £2,000 we are now satisfied that the disparity between that and the award here under review is too great to be just and fair to the Plaintiff in all the circumstances".

Upjohn, L.J., agreed. Diplock, L.J. also agreed and said:-

"What can be said, however, if justice is to be done as between one victim and another and one tortfeasor and another, is that when all proper allowance has been made for what may be widely differing circumstances of the individual victims, the sum awarded to one should not be out of all proportion to the sum awarded to another in respect of similar physical injuries.

When this case was first argued, I expressed my own view that it was very close to the borderline at which an appellate court feels entitled to interfere with an estimate of damages made by a very experienced judge who had seen the victim and formed an obviously careful opinion as to the extent to which he, as an individual, would be handicapped by the disability of monocular vision. In the light of the almost contemporaneous award of £2,000 by another division of this court for a very similar injury to a Plaintiff in broadly similar circumstances to those of the Plaintiff in this case, I, like my Lords, have reached the conclusion that I was mistaken, and that the present case, although borderline, is nevertheless one in which we can and should interfere with the award made by the Trial Judge".

For myself I do not think this case detracts in any way from anything that has been said on the subject previously and in any event it must be considered in the light of its own special circumstances. It is clear that from the beginning the Court thought that the original award of £1,150

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No.13.

Judgment of Thomson, C.J.

17th May, 1962 - continued.

was too low. Sellers, L.J., said that that figure was less than he would himself have awarded for the injury and, though he was compelled by authority to dismiss the appeal, he did so "with some regret". Diplock, L.J., said:-

> "I agree. I think that the damages here were low, and very close to the border-line at which the Court would feel entitled to interfere; but, for the reasons given by Sellers, L.J., I think that 'very close' is not the right test".

On re-consideration the court increased the award to £1,800. That, it is to be presumed, is the award they originally had in mind as being suitable and it is to be noted that it represents an increase of 55% on the amount awarded by the trial Judge.

In the present case the trial Judge commenced his examination of the question of general damages with the case of Phillips v. South Western Railway(8) and then expressed his views as to the case before him as follows:-

> "In attempting to place the Plaintiff in so far as can be done by money in the same position as he would have been in but for the negligence of the Defendant's driver, I am seriously handicapped by the fact that at the time of the accident the Plaintiff was only seven years of age and was not a working man earning money. His injuries were serious, his pain and suffering excruciating. Because of the amputation his mobility has been seriously affected, but not his mental capacity and if he does well at school there is nothing to stop him from earning a living in a sedentary occupation or even from achieving eminence in the profession or politics. Nevertheless I take into account the probability that he might not have the mental equipment necessary for these positions, in which event his lack of mobility would be a serious handicap to his future livelihood. Considering all these factors and considering the social class to which the Plaintiff belongs (his father is a watchman who sends two of his sons to an

(8) 4 Q.B.D. 406.

English school) and giving this matter the best consideration I can in the circumstances, I award $7,500 general damages, that is, half the damages I would have awarded for 100% liability".

For myself, I agree with this course of reasoning. I think on the whole that if I had been trying the case I should, had there been no question of contributory negligence, have assessed the damages at a little more, something in the neighbourhood of $18,000 but certainly less than $20,000. And it cannot be said that such an award, although it might be less than sums awarded in other cases by individual Judges in similar but not necessarily identical circumstances, would be very much out of keeping with anything that has been said in the past by this Court, particularly when it is remembered that in the present case there was nothing to suggest that the injured boy had in fact suffered or would necessarily suffer any diminution of earning capacity by reason of his injury. In Pahang Lin Siong Motor Co. Ltd. v. Cheong Swee Khai (Supra) we did not interfere with an award of $25,000 in respect of the loss of an arm by a young adult, but $13,500 of that amount was given in respect of loss of earning capacity. In the case of Low Ah Tow v. Yusof bin Kayab(9) the Singapore Court of Appeal, of which the then Chief Justice of the Federation was a member, upheld an award of $24,000 to a young adult who had suffered a permanent disability of his leg, although they considered the damages on the high side. Of that award, however, $9,000 was in respect of loss of earning capacity. In the somewhat controversial case of Drennan v. Greer(10) this Court upheld an award of $35,000 in respect of loss of mobility of a leg. There, again, the injured person was a young man of settled habits and the trial Judge had found there was some loss of earning capacity, although he did not specifically allocate any part of his award to this head.

In all the circumstances of the case and having regard to the authorities I do not think it is open to this Court to interfere with the trial Judge's assessment.

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(9) (1954) M.L.J. 112.
(10) (1957) M.L.J. 77.

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17th May, 1962 - continued.

With regard to the question of costs, I think the learned Trial Judge was wrong in apportioning the costs as he did and thereby depriving the Plaintiff of half his costs. Costs, of course, is a matter which is in the discretion of the Court. That discretion must, however, be exercised judicially and the normal rule is that costs follow the event. In the present case there was no payment into Court which meant the Plaintiff had to go on with the case to get anything at all. It is true that he failed on the issue of contributory negligence, but the investigation of that issue did not increase the costs in any way, for, once negligence was denied and on this, of course, the Defendants failed, all the facts had to be gone into.

In the circumstances I would dismiss the appeal with costs except that I would vary the order of the Court below regarding costs so as to give the Plaintiff his full taxed costs.

Sgd. J.B. Thomson
Chief Justice,
Federation of Malaya.

Kuala Lumpur,
17th May, 1962.

D.H.Murphy, Esq., for Appellant.
M. Edgar, Esq., for Respondents.

True Copy
Sgd. Illegible
Private Secretary to Chief Justice.
May 28 1962.

No.14.

Judgment of Hill, J.A.

17th May, 1962.

No. 14.

JUDGMENT OF HILL, J.A.

I have had the advantage of reading the judgments of the learned Chief Justice and my learned brother Good. With these judgments I respectfully agree. It would be superfluous for me to add anything thereto.

Sgd. R.D.R.HILL
Judge of Appeal,
Federation of Malaya.

Kuala Lumpur.

17th May, 1962.

D.H.Murphy for Appellant.

M. Edgar for Respondents.

Certified True Copy
Sgd. G.E. Tan
(Mrs.G.E.Tan)
Secretary to Judges of Appeal,
Federation of Malaya.

5th June, 1962.

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No.14.

Judgment of Hill, J.A.

17th May, 1962 - continued.

No. 15.

JUDGMENT OF GOOD, J.A.

No.15.

Judgment of Good, J.A.

17th May, 1962.

I have had the benefit of reading the judgment of the learned Chief Justice, with which I agree. My additional observations are confined to the quantum of damages.

In a recent appeal, F.M. Civil Appeal No.21 of 1961, Lee Sai Chong v. Wan Lim Cheong, Administrator of the Estate of Wan Thai Thong, infant, deceased in which this Court had to consider the quantum of damages for loss of expectation of life, the learned Chief Justice in his judgment dealt with the difficulties with which Judges are faced, when they have to assess damages under that head, in attempting to find a monetary equivalent for the loss of the balance of enjoyment to which the deceased might have looked forward if his life had not been cut short.

In cases where the negligent act has resulted in personal injury, particularly if the disability is permanent, the difficulty of equating the injury and its consequences with a sum of money is almost as great as that which has to be resolved in fatal accident cases. It is an anxious and often distressing but always necessary task for Judges to have to answer the question "How much for an eye?" - to quote a headline which appeared recently in the Times over a report of the case of Bastow v. Bagley & Co. Ltd.(1) - or to assess the

(1) (1961) 1 W.L.R. 1494

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value of a limb removed from the living body of the injured party.

Many factors have to be taken into consideration (though they may not all arise in a single case); pain and suffering, much reduced by modern drugs, anesthetics and surgical techniques; disfigurement, and consequent social embarrassment, more serious probably for a woman than for a man and for a young girl than for an elderly woman; loss of actual earnings; impairment of potential earning capacity, depending to a large extent on the Plaintiff's education, social and economic background and intellect, and almost incalculable in the case of a young person whose potential is as yet unknown; and loss of amenity, which varies with the individual's tastes and abilities.

I mention these considerations not for the purpose of attempting to establish any general principles but merely to demonstrate the number and variety of the combinations of circumstances which may occur. When they are considered and weighed by individual Judges there are bound to be differences in the results, some judges placing more weight on this factor and others on that and all judges being at liberty to do so provided they do not manifestly depart from a reasonable sense of proportion. That, I think, is the answer to Mr. Murphy's constantly reiterated plea for standardisation of damages. It also suggests that the practice of assessing damages in one case by reference to the damages awarded in similar cases must be followed with caution, for the circumstances which may have to be taken into consideration are so numerous and so variable that an apparent analogy can too often turn out to be a fallacy.

There are, however, certain principles, based not on law but on what I hope is common sense, which appear to me to be of general application.

In the first place, it seems to me that a person born with a limb missing will be less handicapped in life than a person who loses a limb at some time in the course of his life, because he will be better adjusted, both physically and psychologically, to his handicap than the person who has to make the adjustments later. It follows that if a new-born child loses a limb through the negligence of another the quantum of damages should be less than if he were a youth or an adult.

Similarly, though not perhaps to the same extent, a young child is in a better position than a grown-up person because he can so adjust his life as to reduce the effect of the handicap. An elderly person's loss may not be so serious as that of a youth or a young or middle-aged adult because he has less to lose; his way of life will have tended to become sedentary in the normal course of events.

In the second place, as Sir Charles Murray-Ainsley, C.J., Singapore, pointed out in Low Ah Tow's case (to which I shall refer again later), the gravity of the loss varies with the trade or profession and the personal interests of the injured party: a barrister or an accountant may be less incommoded by the loss of a leg than the loss of an eye, or a surgeon or a craftsman by the loss of a leg or an eye than the loss of an arm. These examples can be multiplied ad infinitum.

Thirdly, new skills in the making of artificial limbs and new techniques in therapeutic training can give to limbless persons a useful and enjoyable life in many spheres of activity and even in the field of sport.

Fourthly, a child who receives substantial damages for the loss of an arm or a leg will, if the money is prudently invested and sensibly employed, be able to train himself for a profession or other more or less lucrative sedentary occupation.

In the present appeal we are asked to say that a sum of $15,000/- is inadequate compensation for a boy of 9 or 10 who was 7 years old when the cause of action arose and whose leg has been amputated above the knee. Mr. Murphy referred us to a number of cases for the purpose of comparison. The local cases which went to the Court of Appeal in the Federation or Singapore, on which I have made brief notes of the relevant facts, are as follows:

(1) Lim Ah Tow v. Yusof bin Kayab (1954) 20 M.L.J. 112. (C.A. Singapore) Lorry driver, aged 23, injury to right leg and hip, substantial permanent disability, $24,000/-. Held: Damages on the high side but no ground for interference.

(2) Loughran v. Armstrong (1956) 22 M.L.J. 137. (C.A. Singapore). Young woman, age not stated, damaged foot, permanent disability

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negligible. Damages $7,500/- reduced to $4,000/-.

(3) Drennan v. Greer (1957) 23 M.L.J.77. (C.A. Federation of Malaya) Insurance representative, aged 39, left leg shortened 2½", substantial permanent disability, $35,000/-. Held: Damages on the high side but not so wrong as to justify interference.

(4) Pahang Lin Siong Motor Co. Ltd. & Another v. Cheong Swee Khai & Another (1962) 28 M.L.J. 29 (C.A. Federation of Malaya) Male rubber tapper, aged 20, amputation of right arm. $25,000/-. Held: Damages may have been too generous but the award was not a wholly erroneous estimate of the damage suffered.

Speaking for myself, I do not know what comparison is to be drawn between the loss of a 7 year old schoolboy's leg and the various injuries sustained by adults in the cases mentioned. I cannot help thinking, with all respect to Mr. Murphy's industry and persuasiveness, that a comparison of the present case with those other cases gives us very little help. If those cases demonstrate anything that can be regarded as being of general application, they demonstrate the extreme reluctance of the Court of Appeal to interfere with the trial Judge's discretion even where the members of the Court thought that the damages awarded were not what they themselves would have given if they had been trying the case. It will be observed that the only case in which the Court of Appeal altered the amount of the award was where the permanent disability was negligible.

In the present case I find myself in a position similar to that of the Court of Appeal in Loughran v. Armstrong Drennan v. Greer and Pahang Lin Siong Motor Co. Ltd. & Another v. Cheong Swee Khai & Another, except that in those cases the damages were thought to be on the high side, while the sum awarded here seems to me to be on the low side. At the risk of appearing to be wise after the event, I do not think that $15,000/- is the amount I would have awarded. I feel sure that I would have awarded more, but not a great deal more. On the other hand I am not, as was said by Morris L.J. in Scott v. Musial -(2)

(2) (1959) 2 Q.B. 429, 437.

"satisfied that the Judge has ..... made a wholly erroneous estimate of the damage suffered".

nor do I feel disposed to say, adapting the words of Diplock L.J. in Bastow v. Bagley & Co. Ltd. (3) that the sum awarded is one which is out of all proportion to the sum awarded to others in respect of similar physical injuries.

For these reasons I would dismiss the appeal as regards the quantum of damages.

I do not wish to say anything on the question of contribution and costs, as to which I agree with what has been said by the learned Chief Justice.

(Sgd.) D.B.W. Good

Judge of Appeal
Federation of Malaya.

Kuala Lumpur.
17th May, 1962.

D.H. Murphy for Appellant.

M. Edgar for Respondents.

Certified true copy
Sgd. G.E. Tan
(Mrs. G.E.Tan)
Secretary to Judges of Appeal,
Federation of Malaya,
5th June, 1962.

No. 16.

ORDER OF COURT OF APPEAL

Before: The Honourable Dato Sir James Thomson, P.M.N., P.J.K., Chief Justice, Federation of Malaya.

The Honourable Mr. Justice Hill, B.D.L., Judge of Appeal; and

The Honourable Mr. Justice Good, Judge of Appeal.

IN OPEN COURT This 17th day of May, 1962.

ORDER

THIS APPEAL coming on for hearing on the 11th

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(3) (1961) 1 W.L.R. 1494, 1496.

In the Supreme Court of the Federation of Malaya.

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No.16.

Order of Court of Appeal.

17th May, 1962 - continued.

and 12th days of April, 1962 in the presence of Mr. Denis Hubert Murphy (with him Mr. Tara Singh) of Counsel for the above-named Appellant and Mr. Morris Edgar of Counsel for the above-named Respondents AND UPON READING the Record of Appeal filed herein AND UPON HEARING the arguments of Counsel as aforesaid for the parties IT WAS ORDERED that the Appeal do stand adjourned for judgment AND THIS APPEAL coming on for judgment this day in the presence of Mr. Tara Singh of Counsel for the Appellant and Mr. S.D.K. Peddie of Counsel for the Respondents IT IS ORDERED that this Appeal be and is hereby dismissed AND IT IS ORDERED that the Appellant to pay to the Respondents the costs of this Appeal as taxed by the proper Officer of the Court AND IT IS ORDERED that the order as to costs in the Court below be and is hereby varied so as to give the Appellant his full taxed costs of the action in the Court below, that is, of Kuala Lumpur High Court Civil Suit No.66 of 1961 AND IT IS LASTLY ORDERED that the sum of $500/- (Dollars Five hundred only) lodged in Court by the Appellant as security for the costs of this Appeal be paid out to the Respondents against their taxed costs of this Appeal.

GIVEN under my hand and the Seal of the Court this 17th day of May, 1962.

(Sealed)

Sgd. Shiv Charan Singh
Assistant Registrar,
Court of Appeal,
Federation of Malaya.

No.17.

Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong.

15th October, 1962.

No. 17.

ORDER GRANTING FINAL LEAVE TO APPEAL TO HIS MAJESTY THE YANG DI-PERTUAN AGONG

Before: The Honourable Dato Sir James Thomson, P.M.N., P.J.K., Chief Justice, Federation of Malaya;

The Honourable Mr. Justice Hill, B.D.L., Judge of Appeal; and

The Honourable Mr. Justice Syed Sheh Barakbah, P.J.K., B.D.L., Judge of Appeal.

IN OPEN COURT This 15th day of October, 1962

In the Supreme Court of the Federation of Malaya.

In the Court of Appeal at Kuala Lumpur.

No.17.

Order granting Final Leave to Appeal to His Majesty the Yang di-Pertuan Agong.

15th October, 1962 - continued.

O R D E R

UPON MOTION made to the Court this day by Mr.G.Tara Singh Sidhu of Counsel for the above-named Appellant in the presence of Mr. Thomas Lee of Counsel for the above-named Respondents AND UPON READING the Notice of Motion dated the 1st day of October, 1962 and the Affidavit of Sham Singh affirmed on the 29th day of September, 1962 and filed herein in support of the said Motion AND UPON HEARING the Counsel as aforesaid for the parties IT IS ORDERED that Final Leave be and is hereby granted to the above-named Appellant to appeal to His Majesty the Yang di-Pertuan Agong against that part of the judgment of the Court of Appeal herein dated the 17th day of May, 1962 relating to damages AND IT IS ORDERED that the costs of this application be costs in this Appeal.

GIVEN under my hand and the seal of the Court this 15th day of October, 1962.

Sgd. Illegible

S.L.

Registrar,
Court of Appeal
Federation of Malaya.

IN THE PRIVY COUNCIL No.40 of 1962

ON APPEAL

FROM THE SUPREME COURT OF THE FEDERATION OF MALAYA

COURT OF APPEAL AT KUALA LUMPUR

B E T W E E N

JAG SINGH (an infant) suing by his father and next friend Sham Singh s/o Utam Singh (Plaintiff) Appellant

- and -

TOONG FONG OMNIBUS CO., LTD. (Defendants) Respondents

RECORD OF PROCEEDINGS

LE BRASSEUR & OAKLEY,
40, Carey Street,
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Solicitors for the Appellant.

LIPTON & JEFFERIES,
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39, Jermyn Street,
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Solicitors for the Respondents.