

**DALAM MAHKAMAH RAYUAN MALAYSIA  
(BIDANGKUASA RAYUAN)  
RAYUAN SIVIL NO: K – 04 – 270 – 2004**

ANTARA

SODAH BINTI HAJI SAAD,  
SEBAGAI ISTERI DAN WARIS KEPADA  
HAJI ABDULLAH BIN AHMAD, SIMATI

... PEMOHON/  
PERAYU

DAN

1. SALEH BIN BAKAR
2. TOH POH HOCK & RAKAN  
T/A ENG CONSTRUCTION

... RESPONDEN-  
RESPONDEN

(Dalam Mahkamah Tinggi di Alor Setar  
Dalam Negeri Kedah Darul Aman, Malaysia  
Rayuan Sivil No. 11-20-1998

Antara

1. Saleh bin Bakar
2. Toh Poh Hock & Rakan  
T/A Eng Construction

... Perayu-Perayu

Dan

Sodah binti Haji Saad,  
sebagai isteri dan waris kepada  
Haji Abdullah bin Ahmad, simati

... Responden)

(Dalam Mahkamah Tinggi di Alor Setar  
Dalam Negeri Kedah Darul Aman, Malaysia  
Rayuan Sivil No. 11-21-1998

Antara

Sodah binti Haji Saad,  
sebagai isteri dan waris kepada  
Haji Abdullah bin Ahmad, simati

... Pihak Perayu

Dan

1. Saleh bin Bakar
2. Toh Poh Hock & Rakan  
T/A Eng Construction ... Responden-  
Responden)

(Dalam Mahkamah Mahkamah Majistret di Alor Setar  
Guaman Civil No. 73-374-1996

Antara

Sodah binti Haji Saad,  
sebagai isteri dan waris kepada  
Haji Abdullah bin Ahmad, simati ... Plaintiff

Dan

1. Saleh bin Bakar
2. Toh Poh Hock & Rakan  
T/A Eng Construction ... Defendan-  
Defendan)

Coram: Gopal Sri Ram, J.C.A.  
Abdull Hamid bin Embong, J.C.A.  
Hasan bin Lah, J.C.A.

**JUDGMENT OF GOPAL SRI RAM, J.C.A.**

1. The appellant (plaintiff at first instance) is 51 years old. She is a widow. Her husband was killed in an accident. He was 71 years old at the time of his death. The magistrate found the first respondent (first defendant at trial) 90% to blame for that accident. Amongst the claims made by the plaintiff was one for the loss of services rendered by her deceased husband. She gave evidence that her deceased husband assisted her at home. He used to go to the market. He swept the surroundings of their home. He would help her buy sundry goods. After his death she had to do all these things herself. This evidence was never challenged at trial. The magistrate nevertheless refused to make an award under this head of

claim on the ground that having regard to the deceased's age it was he who required to be attended to.

2. The defendants were unhappy with the findings of the learned magistrate. They appealed to the High Court. The plaintiff appealed against the magistrate's refusal to make an award for loss of services. The High Court allowed the defendants' appeal and reduced the apportionment of liability by 10%. It also dismissed the plaintiff's appeal. The plaintiff has appealed to us against both these findings.

3. Let me take the apportionment issue first. The grounds upon which an appellate court may interfere with an order apportioning liability are set out in the oft-quoted case of **Kerry v Carter [1969] 1 WLR 1372** where Lord Denning MR said this:

“We have been referred to cases on this subject, particularly in the recent case of *Brown v Thompson* [1968] 1 WLR 1003. Since that case it seems to have been assumed in some quarters that this court will rarely, if ever, alter an apportionment made by the judge. Such is a misreading of that case. I think that the attitude of this court was correctly stated in that case at page 1012 by Edmund Davies L.J., when he quoted from the judgment of Sellers L.J., in *Quintas v National Smelting Board* [1961] 1 WLR 401 at page 409. This court adopts in regard to apportionment the same attitude as it does to

damages. We will interfere if the judge has gone wrong in principle or is shown to have misapprehended the facts: but, even if neither of these is shown, we will interfere if we are of opinion that the judge was clearly wrong. After all, the function of this court is to be a Court of Appeal. We are here to put right that which has gone wrong.”

4. Note the language employed by the Master of the Rolls. The narrow grounds on which appellate correction is available are (i) where there is an error in principle or (ii) where there is a misapprehension of the facts or (iii) where there is a clear error on the part of the trial judge. In my judgment the mere fact that each member of this Court sitting alone or together may have apportioned liability differently from the way in which the trial court did is no ground for us to interfere. The error of which the Master of the Rolls spoke of must be a manifest error of such a kind that would make an appellate court look askance at the way in which liability was apportioned. In my judgment the present case is not one which comes within any of the categories postulated by Lord Denning. It is apparent that the High Court judge thought that a further 10% reduction ought to have been made. That did not, in my respectful view, entitle him to intervene. It may have been quite different if the case warranted an apportionment of 90% against the plaintiff. It follows that the High Court was in error when it interfered with the apportionment made by the learned magistrate.

5. That brings me to the claim for loss of services. Here the third proviso to section 7(3) of the Civil Law Act 1956 is relevant. It provides, inter alia, that –

“no damages shall be awarded to a husband on the ground only of his having been deprived of the services or society of his wife...”

Be it noted that it does not say that no damages shall be awarded to a wife on the ground only of her having been deprived of the services or society of her husband. If Parliament had intended to extend the proviso to wives, it could have easily done so by employing the word “spouse”. Yet it has chosen not to do this. It follows, in my judgment, that a wife is entitled to recover damages for the services performed by her husband before his death. Statute apart, the common law makes no distinction in this regard between the loss of services rendered by a wife or a husband. All that the common law requires is that the loss should result from the relationship between the dependant and the deceased. And it admits of compensation for the loss of gratuitous services rendered by the deceased. Support for these propositions may be found in **Clerk & Lindsell on Torts**, 18<sup>th</sup> edition page 1603.

6. The question here is whether the plaintiff wife has proved the value of the services provided by her deceased husband. I have already referred to her uncontradicted evidence about the type of services provided. However, she did not lead any evidence to enable the court to evaluate the monetary value of those services. Does that relieve the court of the duty to make an assessment? I do

not think it does. Once there is credible evidence of a loss there is a duty on the court to make an assessment based on its understanding of prevailing conditions. And the authorities appear to support the view I take of the matter. In **Lim Ah Chi v Tan Ah Mui [1969] 1 MLJ 215**, a self employed “pow” seller died in a motor accident caused by the negligence of the defendant in that case. There was paucity of credible evidence of the deceased’s earnings. Nevertheless, the court used its own understanding of conditions prevailing in Singapore in regard to a one-man business of the kind in question to arrive at a reasonable figure. Again, in **Chan Peng Fook v Kan Pak Lee [1974] 2 MLJ 197**, the factum of employment as a carpenter was proved although the quantum of the wage earned was not. Yet, that did not prevent Hashim Yeop A Sani J (as he then was) from making an assessment based on his view of what an average carpenter would have earned. Lastly, in **Abdul Rahman bin Abdul Karim v Abdul Wahab bin Abdul Hamid [1996] 4 MLJ 623**, there was evidence that the plaintiff there was a self-employed log broker and later the driver of an unlicensed private car. His salary slips were not adduced in evidence. Yet, Abdul Malik Ishak J was able to make an assessment. These cases illustrate the rule at common law that difficulty in assessing damages is no bar to the court making a reasonable award based, if necessary, on its own experience. After all judges is not cloistered in an ivory tower. They are but ordinary members of society, armed with the knowledge of life’s experiences. Hence they reentitled to utilise matters of common knowledge and notoriety to make an assessment of damages in cases of this sort.

7. What is the sum that should be awarded? Learned counsel for the appellant submitted that a sum of RM150 per month as the multiplicand would be reasonable. I do not agree. Given the economic conditions in Kampong Alor Ganu, Kepala Batas, in Kedah, that sum is excessive. I would consider a sum of RM80 to be more in the region of what you would have to pay a part time helper there. Now, for the multiplier. The deceased was 71 when he died. It is notorious that rural folk live for much longer than their city counterparts because of their health, their quality of life and food habits. Given the vicissitudes of life, I think that the deceased would have lived on quite comfortably until he was 75. I would therefore select a multiplier of 4. Applying a direct multiplier, the figure I get is RM3840. I would award that sum to the appellant together with interest on it from the date of the accident until the date of payment.

8. For the reasons already given, I would allow the appeal. The High Court's orders are reversed. The magistrate's order of apportionment of liability is restored. The orders of both courts below are reversed in respect of their refusal to make an award for loss of services. I would grant damages for loss of services in the sum and upon the terms mentioned earlier. The appellant shall have its costs at all levels. The deposit shall be refunded to the appellant.

9. My learned brother Hasan bin Lah, J.C.A. has seen this judgment in draft and has expressed his agreement with it.

Dated this 19<sup>th</sup> day of February 2009.

Gopal Sri Ram  
Judge, Court of Appeal  
Malaysia  
Putrajaya

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Solicitors for the appellant: Tetuan Syarikat Baldev Bhar

Counsel for the respondents: Thomas Mathews (G. Balakrishnan  
with him)

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