

VOLUME I



BRICKFIELDS LAW REVIEW

ARTICLES

- Minority Oppression in Malaysian Company Law 7
Lavinia Kumaraendran
- From Collision To Compensation:
A Legal Guide To Personal Injury Claims In Malaysia 41
Mala P. Doraisamy & Thanessha Gunalan

COMMENT

- Medical Negligence In Malaysia: Rights In Theory, Hurdles In Practice 73
Nivashini Sai Naidu A/P Bavanandam Naidu
-

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The Editorial Board expresses its sincere gratitude to the following reviewers for their invaluable contribution to the inaugural volume of the Brickfields Law Review (BLR):

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Their expertise has been instrumental in upholding the academic standards of this publication.

We also acknowledge Magdalena Jayne Louis and Lavanya Sekar for their contributions to this volume.



Editorial Preface

Welcome to the inaugural volume of the Brickfields Law Review.

We founded this journal with a simple belief: the opportunity to contribute to legal scholarship should be accessible to all, and we wanted to bring this to BAC.

Legal writing is a skill to be honed. It sharpens your thinking and tests your research skills. Yet too few law students have a dedicated space to write about the legal issues and areas that genuinely interest them, beyond regular coursework.

BLR was founded to offer that space.

This volume brings together articles from experienced practitioners across different practice areas, as well as a student-written comment.

We sought contributors who could offer both fresh perspectives and established expertise to relevant legal issues, believing that scholarship gains depth when multiple voices and experiences engage in dialogue.

What you hold is the beginning, and we hope you find it useful.

Read critically. Challenge boldly. Contribute your thinking to this conversation.

Thank you for reading.

Branden Murray & Nickyta Mohan
Founders,
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MINORITY OPPRESSION IN MALAYSIAN COMPANY LAW

*Lavinia Kumaraendran*¹

ABSTRACT

This article undertakes an examination of the doctrine of minority oppression as embodied in Section 346 of the Companies Act 2016 ('CA 2016'), a statutory mechanism designed to safeguard shareholders against oppressive, unfairly prejudicial or discriminatory conduct in corporate affairs. It also draws comparative insights from English, Australian, and Singaporean jurisprudence to contextualise the Malaysian position. The doctrinal analysis is complemented by a practice-oriented perspective, informed by the author's professional experience in corporate and shareholder disputes. No empirical data are collected; instead, the discussion synthesises legal authorities, judicial trends, and practical considerations to evaluate how the oppression remedy is applied in Malaysia and what lessons can be drawn for both practitioners and courts.

Beginning with the principle of majority rule in corporate governance, the article emphasises the structural risks within the principle that are faced by minority shareholders, specifically in private companies lacking in share liquidity. It points out the similarity between Section 346 of the CA 2016, and Section 181 of the Companies Act 1965 ('CA 1965'), and includes an analysis of the scope of standing to petition for relief, including the emerging recognition of beneficial ownership and the interplay with the doctrine of estoppel in oppression proceedings. The discussion moves further to discuss subsidiary-level oppression, the possibility of majority shareholders being oppressed, and the wide range of conduct which can amount to oppression. Such examples include exclusion from management in quasi-partnerships, mismanagement, misappropriation of company assets, denial of dividends, and unfair conduct within the board in general meetings. Finally, it delineates the distinction between remedies under Section 346

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and Section 347 CA 2016, drawing upon recent judicial developments that clarify the operation of each provision. Through this comparative and analytical lens, the article underscores the Malaysian judiciary's increasingly nuanced and equitable approach in addressing shareholder grievances and preserving fairness within the corporate governance framework.

The article extends to judicial remedies, underlining the courts' array of equitable discretion to grant relief, which includes governance restructuring, damages, winding up, as well as compulsory buy-outs at a fair value without minority discounts. It studies valuation challenges, which include timing, and adjustments to restore fairness. Referring to Malaysian, English, Australian and Singaporean authorities, the article shows that courts aim to prevent commercial unfairness by adopting a more contextual approach, rather than following rigid legal protocol.

In conclusion, the article highlights that while courts provide solid statutory safeguards, proactive protection for minority shareholders should be prioritised in carefully drafted shareholders' agreements. These agreements should include participatory rights, anti-dilution protections, dividend policies, exit rights, and governance mechanisms to prevent abuse. Ultimately, the balance between majority rule and minority protection is best achieved by way of a combination of law as well as contractual safeguards.

I. INTRODUCTION

The distribution of ownership within a company is often determined by shareholding. As companies are often owned by several shareholders, a fundamental rule in corporate governance is the principle of ‘majority rule’. This means that the decisions within a company are typically made based on the majority vote of its members (or in some cases, a supermajority vote). This enables a company to function without requiring the unanimous agreement of all shareholders.

However, this very principle also presents a structural vulnerability: the interests of minority shareholders may be overlooked or outrightly disregarded by the majority. Taking up equity in a company as a minority shareholder can be both an opportunity and a risk. A shareholder who holds less than half of the company’s issued and paid-up capital, typically classified as a minority shareholder, lacks the voting power to control or significantly influence the company’s direction over strategic decisions, board composition, dividend distribution, and other key matters. Internally, the general dynamics of a company and its affairs are dictated by the majority principle, with the majority’s view prevailing over that of the minority. In some situations, the majority may even abuse their position to actively harm the interests of minority shareholders. This power imbalance can sometimes give rise to conduct that is oppressive, prejudicial, or unfairly discriminatory towards the minority.

Oppressive conduct against minority shareholders is especially common in private companies, where there is no ready market for the sale of shares. They may find themselves excluded from crucial corporate decisions, denied access to information, or subjected to actions that disproportionately benefit the majority at their expense, such as dilution of shares, denial of dividends, or misuse of company assets. This lack of liquidity traps minority shareholders in an unequal dynamic, leaving them with few options for redress. As such, the oppression remedy under Section 346 of the Companies Act 2016 (‘CA 2016’) is aimed at providing a form of protection to minority shareholders facing oppressive acts.

II. THE OLD AND THE NEW PROVISION

For context, Section 346(1) of the Companies Act 2016 is reproduced:

“...346(1) Any member or debenture holder of a company, may apply to the court for an order under this section on the ground –

- a. That the affairs of the company are being conducted or the powers of the directors are being exercised in a manner oppressive to one or more of the members or holders of debentures including himself or in disregard of his or their interests as members, shareholders, or holders of debentures of the company; or
- b. That some act of the company has been done or is threatened or that some resolution of the members, holders of debentures or any class of them has been passed or is proposed which unfairly discriminates against or is otherwise prejudicial to one or more of the members or holders of debentures (including himself).”

In *Auspicious Journey Sdn Bhd v Ebony Ritz Sdn Bhd & Ors* [2021]² (“*Auspicious Journey*”), the Federal Court expressly acknowledged that Section 181 of the CA 1965 is identical in form to Section 346 CA 2016:

“...Section 181 of our then Companies Act 1965 that is now Section 346 of the CA 2016 are *both identical in form*. This statutory provision comprises one of the broadest and most comprehensive statutory shareholder remedies available in the common law world. Section 181 (now Section 346) provides for the broad involvement of the courts in fashioning a wide-ranging series of remedies for the beleaguered shareholder/s who are able to establish oppression, prejudice or discriminatory acts or omissions by those in control, generally the majority.”

2 3 MLJ 549

III. WHO HAS THE RIGHT TO FILE AN OPPRESSION PETITION?

Before a shareholder can claim relief under S346 CA 2016, they must first demonstrate that oppression has actually occurred. The courts have developed a test to guide this assessment, most notably in the case of *Re Khong Thai Sawmill (Miri) Sdn Bhd v Ling Beng Sung* [1978]³ where it must be satisfied that there is a visible departure from standards of fair dealing and violation of conditions of fair play which the shareholder is entitled to expect. In order to successfully raise a claim on minority oppression, the court held that:

1. There must be an identifiable conduct that is deemed to be unfair against the minority shareholder before that conduct is deemed to be oppressive against the minority; and
2. The oppression must not be a past oppression i.e. it must be a present one that continued on to the day of the proceedings.

Minority shareholders bear the burden of proving that their interests have been compromised, adversely affected, abused or unduly prejudiced by the decisions and actions of the majority shareholders.

“It is only when majority rule passes over into rule oppressive of the minority, or in disregard of their interests, that the section can be invoked. As was said in a decision upon the United Kingdom section there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play which shareholder is entitled to expect before a case of oppression can be made.”

Before examining what conduct amounts to oppression, it is essential to first address a key procedural requirement, that is the capacity to bring an oppression petition. In legal terms, this is referred to as having *locus standi* to file such a petition.

3 2 MLJ 227

It is important to note that early in the development, Malaysian authorities adopted a stricter interpretation of locus standi and the scope of “affairs of the company.” In *Verghese Mathai v Telok Plantations Sdn Bhd & Ors* [1988]⁴, the court held that relief under Section 181 CA 1965 was strictly limited to registered members of the subject company. The petitioner in that case, who was not a member of the company against which relief was sought, was denied standing despite being a shareholder in related entities.

Similarly, in *Ng Kok Pooi v Brunswood ID Sdn Bhd* [2006]⁵, the court reaffirmed that only a person whose name appears in the register of members may file an oppression petition, and beneficial ownership or indirect interest was insufficient. These cases supported a formalistic approach to the membership requirement and treated group structures as separate legal entities without regard to business realities.

The decision of *Gue See Sew & Ors v Heng Tang Hai & Ors* [2020]⁶, decided by Ong Chee Kwan JC, is of great importance in clarifying the issue of standing under Section 346 CA 2016.

Central to this issue is the definition of ‘member’, as only a person whose name has been entered on the register of members as the holder of one or more shares in the company for the time being. This is especially important because, although one may be a shareholder of a company, if the person’s name has not been entered on the company’s register of members, they will not fall within the definition of a member under Section 2(1). This very definition has led to oppression petitions being dismissed simply because one did not satisfy the statutory requirement of being a ‘member’ of the company, despite the fact that they may be a shareholder or that oppression could have been proven.

This strict statutory pre-requisite was the centre of contention in *Gue See Sew*. Here, the Plaintiffs presented the originating summons in their capacity as beneficial shareholders of the subject company by way of trust deeds executed between the Plaintiffs and the 1st and 2nd Defendants who were directors of the company. The Defendants

4 3 MLJ 216

5 7 MLJ 365

6 MLJU 46

contended that the Plaintiffs' contentions were baseless as the Federal Court decision in *Jet-Tech Materials Sdn Bhd & Anor v Yushiro Chemical Industry Co Ltd & Ord* [2013]⁷ previously held that one who claims to have a beneficial interest in the shares of a company through a registered member does not have the requisite locus standi to present a petition under Section 181 which was the then governing provision concerning oppression petitions.

However, Ong Chee Kwan JC was reluctant to apply *Jet-Tech* and instead referred to the Federal Court decision of *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996]⁸ which essentially held that although it is a requirement that a petitioner must be a 'member', the said requirement is not a universal rule, but rather a general one. The Federal Court here was reluctant to set in stone these strict pre-requisites, accounting for exceptional situations where it would be unfair or unjust to uphold these requirements.

A. Estoppel and Beneficial Ownership

The Federal Court referred to the doctrine of estoppel in these exceptional cases, where, although the petitioner's name had not been entered into the register of members, the company had always treated the petitioner as a member. To quote, it was held that: -

“it does not lie in the mouth of the alleged wrongdoers to say that the appellant has no ground to stand on after having cut the very ground from under his feet.”

Ong Chee Kwan in *Gue See Sew* applied the dicta in *Owen Sim* in deciding that the Plaintiffs, although beneficial owners of shares of the company, still had the requisite locus standi to file their petition. The following are the reasons and considerations the Judge took into consideration to arrive at his judgment.

- The 1st and 2nd Defendant (“D1 and D2”), who were directors of the company, had previously acted in a manner that recognised the Plaintiffs as members of the company. This was done through regular meetings between the parties as

⁷ 2 MLJ 297

⁸ 1 MLJ 113

shareholders.

- D1 and D2 dealt with the Plaintiffs in accordance with the Shareholders' Agreement, where they obtained the Plaintiff's approval for certain matters such as the Managing Director's salary and allowance.
- D1 and D2 had also acknowledged that the Plaintiffs were entitled to receive dividends by certifying and paying said dividends directly to the Plaintiffs.

It was also stated that in relation to beneficial owners of shares, they would have locus standi to bring an action for oppression in circumstances where their membership is yet to be perfected. From the above, Ong Chee Kwan's dicta primarily aims to reconcile the strict requirements of the CA 2016 and prevent unjust and unfair circumstances. Therefore, although the case of *Gue See Sew* concerned beneficial owners, it may also be applicable in other instances where the defendants should be estopped from challenging the plaintiff's locus standi in light of past conduct which recognizes the Plaintiff as a member.

B. Subsidiary-Level Oppression

Building on that trend, Malaysian courts have interpreted "affairs of the company" quite broadly – extending even to subsidiary or holding-company contexts where oppressive conduct at one level inevitably impacts the other.

Courts recognise that the definition of "affairs of the company" in Section 346(1) of CA includes the affairs of the subsidiary company or holding company. Some authorities demonstrate that oppression at the subsidiary company level (where it affects the holding company) can become the affairs of the holding company.

It was in *Tob Chee Hoong v Tob Chee Choong & Ors* [2017]⁹ per Mohd Nazlan Mohd Ghazali J (as His Lordship then was), where the High Court found that the affairs of the subsidiary company are also that of the parent company:

‘...[55] It bears repetition that the existence of the holding and subsidiary structure may not necessarily mean that the affairs of the latter will always be those of the former in all cases (or vice versa). It is still a question of evidence. It is fact-sensitive. The predominant question must thus turn on whether it can be shown that the affairs of the subsidiary actually truly affected the holding company.

[56] Accordingly, in the instant case, it is my finding that the phrase ‘affairs of the company,’ stated in Section 181 (1) (a) of the CA, which is the affairs of the subject fourth defendant company, must include the affairs of Orchard Circle because of the former’s 100% ownership of the latter, the common directorship of two directors from the controlling block as well as the fact that the parent is purely an investment holding company and that the subsidiary, which is a property development company, is its one and only business investment.’

Therefore, in *Tob Chee Hoong*, the High Court departed from this rigid approach by recognising that in a group structure—especially where the holding company is a mere investment vehicle and the subsidiary is its only operating business—the affairs of the subsidiary may constitute the affairs of the holding company for an oppression claim. Mohd Nazlan J explained that such an interpretation is consistent with commercial reality and necessary to prevent wrongdoers from exploiting technical corporate structures to shield oppressive conduct from judicial scrutiny.

This was also applied in *Nuraslina bt Zainal Abidin v Dagang Net Technologies Sdn Bhd & Ors* [2022]¹⁰, Ong Chee Kwan J clarified that the Courts will consider circumstances if the oppression occurs at the subsidiary company level and of which it affects the holding company:

9 MLJU 1303

10 MLJU 2670

‘...[116] In fact, the Courts will intervene even when the oppressive conduct takes place at the subsidiary of a holding company where the plaintiff is the shareholder if the same impinges or affects the affairs of the holding company. For all intents and purposes the oppression at the subsidiary level has become the affairs of the holding company.

...

[119] The upshot was that the phrase ‘affairs of the company’ found in Section 346(1) of the CA 2016 be construed widely, to encompass the affairs of entities which are not themselves the subject of the oppression action, but which affairs of those entities, affect the subject company in the nature and to the extent which is beyond the inconsequential, be it a parent or a subsidiary.’

A similar approach was adopted in Singapore. In *Ng Kek Wee v Sim City Technology Ltd* [2014]¹¹, the Court of Appeal held that oppressive conduct within a subsidiary company may form the basis of an oppression claim at the holding company level, so long as the conduct materially affects or impacts the holding company. The court rejected a rigid, form-over-substance approach and affirmed that the phrase “affairs of the company” must be interpreted in light of commercial reality, especially where the holding company’s operations are closely tied to its subsidiaries.

‘...[42] In our view, the balance between these competing interests would be properly drawn by a requirement that commercially unfair conduct in the management of a subsidiary would be relevant so long and to the extent that such conduct affected or impacted the holding company whose member was the party claiming relief from oppression.’

11 SGCA 47

Likewise, in *Thio Syn Kym Wendy & Ors v Thio Syn Pyn & Ors* [2017]¹², the High Court recognised that conduct occurring within subsidiaries may be relevant in an oppression petition involving the holding company, provided that the conduct demonstrably affects the holding company’s business or interests. However, the court cautioned against blanket “group oppression” claims, emphasising the need for clear evidence showing how the subsidiary-level conduct specifically impinges on the affairs of the parent entity.

Therefore, once a court has accepted that subsidiary-level oppression counts as the “affairs of” its holding company, petitioners may push for any of the remedies under Section 346, including, in the most extreme cases, winding up the holding company itself under Section 465. In those scenarios, the logic is simple: if the holding company exists solely to hold and profit from its subsidiary, and that subsidiary has been eviscerated by oppression (loss of business substratum, asset-stripping, management collapse), winding-up the parent is the only effective way to end the entire enterprise’s downfall as will be explored further below.

IV. CAN MAJORITY SHAREHOLDERS BE OPPRESSED?

It is first pertinent to note that the wording of both Section 346 CA 2016 and Section 181 CA 1965 do not confine the application of the provision to minority shareholders.

The Federal Court in *Owen Sim Liang Khui v Piasau Jaya Sdn Bhd & Anor* [1996]¹³, made it clear that majority shareholders who (1) are not in control of the management of the company; and (2) are unable to control the board for whatever reason, can also be oppressed and be entitled to the statutory remedy provided for under Section 346 of CA 2016 and Section 181 CA 1965.

The majority shareholder may not have actual control over the management or board due to the shareholders’ agreement or the constitution of the company.

12 SGHC 169

13 1 MLJ 113

In such situations, even though the majority shareholders have more than 50% of the voting control in a company, the exercise of their rights is illusory. In *Sturges v Dunphy* [2014]¹⁴, the shareholder agreement vested governance in the Board of Directors, whose decisions must be unanimous. Further, the shareholder resolutions therein required the votes of an ordinary or special majority of shares in each of the 3 shareholder groups (2 by the majority, and 1 by the minority). In effect, any one director or shareholding group can veto any decision by the majority shareholders.

Singaporean authority takes the same principled stance. In *Ng Kek Wee v Sim City Technology Ltd* [2014]¹⁵, the Court of Appeal held that a majority shareholder may petition under Section 216 only if he genuinely lacks the power to right the wrongs himself. The claim failed on the facts because the 53 % owner could still muster the votes; nevertheless, the Court made clear that majority status is no automatic bar, but it is the reality of control that counts.

Australian cases go further in demonstrating remedial flexibility. *Fedorovitch v St Aubins Pty Ltd* [1999]¹⁶ involved a 75 % owner locked out by minority directors. The court ordered the minority wrong-doers to buy out the majority's shares at fair value, emphasising that the oppression remedy is equitable and can require the oppressor to exit if that is fairest.

Ultimately, the concept of shareholder oppression is broad and equitable in nature, so long as there is evidence of a concerted pattern of conduct that causes commercial unfairness or prejudicial harm in which the shareholders' expectations as members of the company are unfairly frustrated, the remedies will be available.

14 NZCA 266

15 SGCA 47

16 NSWSC 776

V. WHAT COUNTS AS OPPRESSION?

Despite the seemingly simple concept, defining what constitutes oppression is a challenging task.

‘...With the wide wording employed in the statute, it is clear that the categories or examples of actions which would constitute oppression are not closed or limited. Having said that, oppression of minority shareholders usually occurs when an act of the majority infringes upon the rights of the minority shareholders.

Usually, this involves actions which are unfair or actions which depart from standards of fair dealing.’

[Kumagai Gumi Co Ltd v Zenecon-Kumagai Sdn Bhd [1994]¹⁷.]

To put it plainly, oppressive conduct can be found where the complainant can demonstrate that the majority was aware of the complainant’s rights and interests but has deliberately chosen to ignore or act against those interests.

Oppression does not necessarily mean illegal or fraudulent nor does it require fraud (*Jaya Medical Consultants Sdn Bhd v Island & Peninsular Bhd & 13 Ors* [1993]¹⁸) or a mere breach of fiduciary duty per se does not equate to oppression or disregard of interest but it must be established that any such breach constitutes oppressive conduct, conduct in disregard of interest, unfairly discriminatory conduct or prejudicial conduct; and a mere fact that majority shareholders that manage a company make policy or executive decisions, with which the complainant does not agree is also not oppression unless this majority rule passes over into rule oppressive of the minority.

As it is challenging to define what actions constitute the oppression of minority shareholders, it is essential that we draw on examples and lessons from case laws that have examined this question.

17 2 MLJ 789

18 1 LNS 32

A. Breach of Legitimate Expectation to be Involved in Management

A common ground for a complaint of oppression is found when the majority denies the minority its legitimate expectations that they will be involved in the management of the company. This often occurs in small private companies. These legitimate expectations are often found when a company is formed by shareholders with an understanding that parties will be able to be involved substantially in the management and running of the company. As such, where a minority shareholder is excluded or removed from management without cause, an act of oppression would have occurred. This principle is known as the Ebrahimi principles, derived from a House of Lords decision (HOL) in *Ebrahimi v Westbourne Galleries Ltd* [1973]¹⁹.

The HOL held that although the company was formally registered, it operated as a quasi-partnership due to several features such as a small number of shareholders, mutual confidence between the parties and participation of all shareholders in management. Ebrahimi had a legitimate expectation to remain involved in the management of the company. However, he was removed as a director through lawful procedures. The court held that, despite the legality of the removal, it was commercially unfair given the nature of the company and the relationship between the parties. This case established that where such quasi partnerships exist, equitable principles can be applied by the court, including granting remedies like winding up on just and equitable grounds, even in the absence of formal legal wrongdoing.

Thereafter, in another English decision of *Re a Company* [1987]²⁰, the court addressed the issue of unfair prejudice in a quasi-partnership style private company. The petitioner, a shareholder who had originally participated in the management, was excluded from the company's operations. The court held that such conduct was unfairly prejudicial, even though it was legally permissible under the company's constitution. It emphasized that in small private companies resembling partnerships, shareholders often have legitimate expectations, such as the expectation to remain involved in management or be consulted on key decisions.

19 AC 360

20 BCLC 94

The exclusion without proper cause, even if done in accordance with legal formalities, could still be considered inequitable. The case clarified that for conduct to amount to unfair prejudice, it must be both prejudicial, which is causing harm to the shareholder's interests and unfair, which is usually through breach of legitimate expectations. This approach demonstrates that what is unfair is not confined to what is unlawful, a crucial distinction in shareholder disputes.

Interestingly enough, in *CJ Polymers Sdn Bhd v Sim Chin Hu & Ors* [2025]²¹ although the legal shares of CJ Polymers stood in the names of the founders' wives, Sim and Kerk ran the business as equal quasi-partners, sharing fees, salaries and perks. When Sim was removed as director and deprived of his agreed management benefits, with no genuine offer to buy out his stake at fair value, the Court of Appeal held that this "locked-in" exclusion fell squarely within Section 346(1) CA 2016 as oppressive. The majority must not be allowed to frustrate legitimate participatory expectations by hiding behind a formal share title.

In *Tan Kian Hua v Colour Image Scan Sdn Bhd* [2004]²², the High Court found that removing a minority shareholder from management when there is an agreement that the said minority shareholder would be involved in the management of the company would be an act of oppression. Similarly, the Singapore High Court also found oppression in the case of *Tan Choon Yong v Goh Jon Keat and Others and Other Suits* [2009]²³ where the majority directors arranged for the removal of the company's minority shareholder as the CEO and director of the company for ulterior motives. The Court found that the former CEO and director had a legitimate expectation that he would have a major role in running the company.

Whether under the HOL Ebrahimi framework or Malaysia's own decisions, such as *Tan Kian Hua* and *CJ Polymers*, courts will strike down any majority attempt to shut a genuinely co-managing shareholder out of the business without offering a fair exit.

21 MLJU 1551

22 6 CLJ 174

23 3 SLR 840

In *Rosdin bin Anang v Kombinasi Bumi Solar Sdn Bhd & Ors* [2025]²⁴, the High Court granted an injunctive relief to protect minority shareholders against the abuse of majority power in corporate governance. There was prima facie evidence of conspiracy to defraud and oppress the Plaintiff. The actions of the Defendants, particularly the 6th Defendant's orchestration of share dilution and director changes, raised real concerns of oppression. In conclusion, this court has found that the company is a quasi-partnership in which the plaintiff had a legitimate expectation to remain in management while she is a shareholder of the company.

The first defendant therefore liable under Section 346 of the CA 2016 for the following conduct.

Similar recent decisions in Malaysia, such as in *Tan Lae Peng v Khoo Thean San & Ors* [2025]²⁵, found oppression in the complaint acts by the Plaintiff, which amongst others, was an attempt to oust her from management. The conduct of the first defendant in calling for an EGM on 28 May 2024 to remove the plaintiff as a director fortifies the plaintiff's contention that she was forced out of management. The 1st Defendant's majority power in the company was exercised in violation of the conditions of fair play based on the several calculated steps taken to oust the plaintiff from the company. On a balance of probabilities, the conduct by the 1st Defendant deprived the plaintiff of the benefits she received as a director and did amount to oppression.

Following this attempt, the petitioner included the company secretary as a defendant in the petition and implicated him in the preparation and issuance of the EGM notice on 28 May 2024 to remove the plaintiff as a director and that he was colluding with the 2nd Defendant. The plaintiff takes the position that where Section 346 of the CA refers to the act or threatened act of the company, it necessarily implicates all other officers, including the company secretary, as the company can only act through their human agents.

24 MLJU 1937

25 8 MLJ 1

As a point of law, relying on the Federal Court decision in *Auspicious Journey*, the Court agreed that the company secretary is a third party, but sought to distinguish its role from that of an officer of a company dealing with the “affairs of the company” in the context of Section 346 CA 2016. The court held that the company secretary had merely taken instructions from the board of directors. The company secretary was not expected to know what was contentious and what was not between the plaintiff and the 1st Defendant. There is no basis to suggest that the company secretary should exercise independent judgment to comply with some instructions and not others.

B. Misappropriation of Company Assets and Other Breaches of Fiduciary Duties

Another common act of oppression is where the majority of director-shareholders misuse their power to divert assets of the company to themselves or to use the company’s assets in a manner which does not benefit the company. This is an act which infringes upon the rights of the minority shareholders, as all shareholders are entitled to have the company’s assets used for the benefit of the company and all shareholders.

In the case of English Case of *Scottish Co-operative Wholesale Society Ltd v Meyer* [1959]²⁶, the Court found that the actions of its majority director-shareholders who used their power to transfer the company’s business away from the company, causing the depreciation of the company’s shares, were found to have committed an act of oppression against the minority shareholders. However, it should be borne in mind that the Court will examine whether the alleged misappropriation could have been prevented if the minority had undertaken its due diligence.

For instance, the Court of Appeal in *Wang Chih Tsang & Ors v Cheng Pi Chun* [2018]²⁷ applying *Re Five Minute Car Wash Service Ltd* [1966]²⁸ did not find that the majority committed an act of oppression through misappropriation as the transactions undertaken by the majority could not have been done without

26 AC 324

27 2 MLJ 777

28 1 All ER 424

the knowledge of the minority (the minority shareholder, in this case, was also a co-signatory of the company cheques).

In *Chin Chee Fui v Kong Yin Siong & Ors* [2017]²⁹, the act of a director of treating the company as his own company by causing the company to pay all his personal tax liabilities and obligations (including payment of professional service tax for tax computation and charge by his personal auditor), depositing company's money into his personal account, using the company's assets to finance personal investment and recorded the money expended by the company as an advance to him as a director, all without approval from the board of directors was held to be not only a breach of fiduciary duty, but also an act which is so serious because it indirectly inflated the costs of the company in doing business to the extent that it becomes unfair and prejudicial and disregards the plaintiff's rights and interests as the minority shareholders.

The Federal Court explained in *Auspicious Journey* that Parliament intended judges to go beyond the letter of the statute—to bind directors or even third parties if that is what endures the prejudice. It held that directors may be implicated to be personally liable for acts of oppression in situations that warrant the imposition of such liability as provided in Section 346(1)(a) CA 2016 as it involves internal disputes within the company and would naturally implicate the directors who have actively participated or brought about decisions and acts which are deemed oppressive. In summary, the Federal Court accepted the concept of a director being an agent of the company in relation to contractual or tortious claims against the company in the context of an oppression suit.

C. Mismanagement

Apart from the above circumstances, it is also possible for oppression to be found where the majority shareholder-directors have mismanaged the company to the detriment of the minority. In *Ng Chee Keong v Ng Teong Kiat Highlands Plantations Limited* [1980]³⁰, the company's assets consisted of a tea plantation. The directors had neglected the tea plantation and failed to pay the quit rent, putting the plantation at risk

²⁹ MLJU 791

³⁰ 1 MLJ 456

of being forfeited by the state government. The Court found that the indifferent conduct of the majority directors, which allowed the company's tea plantation to deteriorate from a profitable concern to the brink of insolvency, clearly shows that the affairs of the company were being conducted oppressively.

D. Non-payment of Dividends

While the general rule is that a shareholder has no automatic right to dividends, there are certain cases where the conduct of the majority in refusing to declare or pay out dividends to its shareholders would constitute oppressive conduct. Where a petitioner is no longer or never has been a director, a common cause of complaint is that the directors are paid excessive remuneration, resulting in a diminished (or no) dividend.

For instance, it is common for smaller companies not to declare dividends, as all director-shareholders are usually paid salaries. However, the non-payment of dividends becomes oppressive when a shareholder is removed from management, as that said shareholder loses their ability to receive any financial entitlement from the company. In *Re Gee Hoe Chan Trading Co Pte Ltd* [1991]³¹, the High Court found that the refusal of the directors to declare dividends to the company's shareholders was oppressive conduct, particularly since the directors continued to pay themselves substantial salaries.

E. Oppressive Conduct of Board / General Meetings

Another example of oppressive conduct occurs when the directors of the company opt to conduct the board / general meetings of the company in a manner which is unfair to the minority shareholders. For instance, the directors are acting oppressively if they decide to deliberately schedule a meeting at a time when the minority shareholders are not able to attend as was held in *Chew Sang Hai v Intan Kinabalu Sdn Bhd & Ors* [2012]³², or when the directors deliberately caused the notice period for such meetings to be insufficient, *Chow Kwok Ching v Chow Kwok Chi and Others and Other Suits* [2008]³³.

31 3 MLJ 137

32 3 MLJ 244

33 4 SLR 577

Such actions are oppressive as they completely undermine the rights of minority shareholders to participate and vote at such meetings.

Another tactic of minority oppression is the dilution of the minority's ownership stake in the company. This can happen when majority shareholders issue new shares or create a new class of shares that carry enhanced voting rights, reducing the voting power of the minority shareholders relative to their investment. Dilution reduces the influence minority shareholders can exert in governance decisions, especially when it limits their ability to challenge or vote against the majority's actions.

A recent Malaysian illustration is *Concrete Parade Sdn Bhd v Apex Equity Holdings Bhd & Ors* [2021]³⁴. There, Apex Equity agreed to issue 100 million new shares to Mercury Securities and a further 20 million placement shares to Mercury-nominated places as part of a "reverse take-over" merger. The exercise would leave Mercury with de-facto control of about 37 % of the enlarged capital and the minority's 4.68 % stake drastically diluted.

The Court of Appeal held that pushing through the allotments without honouring the minority's statutory pre-emptive rights (Section 85 CA 2016) and without proper timing of shareholder approvals (Section 223) amounted to oppression, emphasising that "...denial of a shareholder's fundamental right to vote is itself oppressive..." and that the allotment was designed to entrench a new controller at the minority's expense. The court allowed the appeal and granted relief, confirming that dilution orchestrated for control-shifting purposes is a textbook form of minority oppression.

VI. DIFFERENCE BETWEEN A MINORITY OPPRESSION ACTION [SECTION 346 CA 2016] & A DERIVATIVE ACTION [SECTION 347 CA 2016]

There is sometimes a grey area with this type of complaint. It is usually whether the complaint is actionable by way of oppression action under Section 346 of the CA 2016 or derivative action under Section 347 CA 2016. The Federal Court’s decision in *Low Cheng Teik v. Low Ean Nee* [2024]³⁵, delivered on 28 February 2024, serves as a significant precedent for future shareholder disputes in Malaysia.

By clarifying the distinction between oppression actions and derivative actions, the Federal Court has provided a roadmap for minority shareholders seeking redress. Section 347 CA 2016, allows a shareholder to bring a claim on behalf of the company against third parties (or sometimes against the company itself) for wrongs done to the company. It is primarily used to address wrongs committed against the company where the company’s management or directors are unwilling or unable to pursue the claim.

This case concerns the dispute among the shareholders of SNE Marketing Sdn Bhd (“the Company”). In the High Court, one Low Ean Nee (“the Respondent”), who holds 50% of the Company’s shares, commenced oppression action against the 3 Appellants who collectively hold the remaining 50% shares.

All of them were directors of the company, with the 1st Appellant holding the position of Chairman. Despite being a director of the company, the Respondent did not participate or play any role in running the company’s business. At all material times, the Company was managed and operated by the 1st to 3rd Appellants.

35 5 MLJ 580

The High Court rejected all complaints of oppression, dismissing the action. Notably, the Respondent, before commencing the oppression action, issued a statutory notice to seek leave to initiate a derivative action on behalf of the company under Section 348(2) of the CA 2016, alleging that the Appellants were in breach of their fiduciary duties. Despite the notice, the Respondent filed the oppression action instead.

The High Court ruled that the disposal of the SNE Trademarks, whilst detrimental to the company, did not, *ipso facto*, amount to oppression against the Respondent. The court noted that the assignment equally affected all shareholders and thus was not unfairly discriminatory against the Respondent.

Additionally, since the SNE Trademarks were owned by the Company, the proper claimant for any loss should be the Company, not the Respondent. Therefore, the Respondent should have initiated a statutory derivative action with the court's leave. Consequently, the High Court dismissed the Respondent's claim.

On appeal, the Court of Appeal reversed the High Court's decision on what it determined as one complaint of oppression. The Appellants were accordingly found liable for oppression, which entails a buy-out order of the Respondent's shares.

Before the Federal Court, the question to be determined led the Court to lay down the following criteria to ascertain whether a shareholder's complaint is actionable under Section 346 or Section 347 CA 2016, which was a much-needed clarity:-

- What is the act or omission that one or more of the shareholders complain of?
- Can the act(s) or omission(s) be characterised as being:
 - oppressive to;
 - in disregard of the interests of;
 - unfairly discriminatory against; or
 - otherwise, prejudicial to one or more of the shareholders?

- Does the cause of action vest in the shareholder or in the company?
- Who has suffered loss or damage from the wrong done – the shareholder in his capacity as a shareholder, or the company?
- Is the loss suffered by the shareholder as plaintiff separate and distinct to the plaintiff in his capacity as a shareholder, or is it a loss suffered by all the shareholders?

The integral difference between an oppression action and derivative action lies in the nature of the claim. An oppression claim under Section 346 CA 2016 is a personal claim made by the minority shareholder who suffers a direct, distinct, and personal loss. On the other hand, a derivative action under Section 347 CA 2016 is brought on behalf of the company by a shareholder in representative capacity, if the wrongdoing affects the company as a whole, thereby causing a loss to the company.

VII. WHAT DO COURTS DO? AVAILABLE REMEDIES

Section 346(2) CA 2016 gives Malaysian courts the “widest equitable discretion” to fashion remedies that end oppressive or prejudicial conduct. Once an oppressed shareholder shows that the company’s affairs have been conducted in a manner unfairly prejudicial to their interests, the court shifts from fault-finding to “remedial engineering.” Sub-section (2) sets out five illustrative heads of relief:

- a. Direct or prohibit any act or cancel or vary any transaction or resolution
- b. Regulate the conduct of the affairs of the company in the future
- c. Provide for the purchase of the shares or debentures of the company by other members or debenture holders of the company or by the company itself
- d. In the case of a purchase of shares by the company, provide for a reduction accordingly of capital of the company

- e. Provide that the company be wound up

But those five options are merely a menu, not a limit. In *Datuk Kasi Palaniappan & Anor v Setia Haruman Sdn Bhd & Ors* [2019]³⁶, the court held that they have wide discretion to grant any reliefs that they consider fit in the circumstances before them. However, such remedies should be aimed at bringing an end or remedying the aggrieved matters instead of jeopardising the running of the company.

Likewise, in *Tai May Chean v New Way Capital Sdn Bhd* [2020]³⁷, the Court of Appeal emphasised that Section 346 empowers “a wide latitude to fashion various remedies” tailored to the facts.

Two guiding principles shape how relief is granted. First, proportionality: the remedy must cure unfairness, not punish. Liquidation—the ultimate “nuclear option”—destroys going-concern value and is reserved for deadlock, insolvency, or when no lesser remedy can restore equity. Second, balancing: courts weigh the conduct of both sides.

As Zabariah Mohd Yusof JCA put it in *Toralf Mueller v Alcim Holding* [2019]³⁸, ‘...[43] It is to be borne in mind that in cases of minority oppression, Courts are tasked with carrying out a balancing exercise. Any act/misconduct on the part of the minority may result in prejudicial conduct by the majority as not being unfair.’

In practice, the targeted buy-out order has become the workhorse remedy. It preserves the business’s value by allowing one side to exit for cash rather than liquidating the company. Once a buy-out is ordered, the court must fix a fair value for the unwilling seller:

- The starting point is usually the petition-filing date, since that marks the trust breakdown;

36 9 MLJ 32

37 12 MLJ 471

38 MLJU 2152 (CA)

- But the valuation date can shift if earlier oppression depressed value or if post-petition gains ought to count;
- Methodologies mirror commercial practice—net-asset-value for property holding companies (“NTA Value”), capitalised maintainable earnings for stable traders, discounted cash-flow (or a hybrid) for growth ventures;
- Expert evidence is routine, and the court may even appoint its own valuer;
- Crucially, no minority discount applies: because the minority is forced to sell, the price must include part of the control premium that a voluntary sale would attract.

Buy-out orders are often accompanied by ancillary directions, for example, interest on the purchase price from the valuation date, staggered payments secured over the shares being sold, or injunctions to stop further asset-stripping while the valuation is underway. In rare cases, courts will award damages alongside a buy-out when the oppression causes a separate, quantifiable loss.

There is no general rule on the date at which the shares are to be valued. Does the valuation have to be current or retrospective, or even prospective? Cases appear to suggest that the overriding requirement is that the valuation must be fair on the facts and circumstances.

A. Date on which the petition is made

The date of valuation is of great significance because it may substantially affect the valuation awarded for the minority’s shares. The value of the shares may have increased after the petition date or diminished considerably as a consequence of the unfair prejudice. It was held in *Re A Company* (No 002612 of 1984)³⁹ that the correct starting point should be the date of the petition.

39 2 BCC 99

This is primarily because “it is the date on which the petitioner elects to treat the unfair conduct of the majority as in effect destroying the basis on which he agreed to continue to be a shareholder and to look to his shares for his proper reward from participation in a join undertaking”.

Even when it is impractical to prepare a balance-sheet on a particular date, the case of *Nikhil Rubbers Private Ltd* [2002]⁴⁰ shows that the date of annual balance-sheet would be used as the date of valuation if it is proximate to the date of petition.

B. Date before the petition is made

The argument to the converse is that there are situations where the date for valuation other than the date of the purchase order was chosen because fairness to one side or another requires as such.

The basis or premise would be to consider whether the unfairly prejudicial conduct has affected the share value, taking a date earlier than that of the petition would then be justifiable.

A classic example of backdating valuation is the case of *Re OC (Transport) Services Ltd* [1984]⁴¹, where the valuation was held to be on the date when the shares were allotted because the subsequent participation of another company as a shareholder may have affected the value of the shares. Similarly, in the Federal Court of Australia, in *Dynasty Pty Ltd & Ors v Coombs* [1995]⁴², the valuation was ordered at the date of the oppression.

C. Date on which the buyout order is made

Although *Re London School of Electronics Limited* [1985]⁴³ held that there is no general rule on the valuation date, Nourse J pointed out that “an interest in a going concern ought to be valued at the date on which it is ordered to be purchased”.

40 108 Comp Cas 438

41 BCLC 251

42 138 ALR 64 at 85

43 3 WLR 474

However, this may not be allowed if the increase in value of the shares after the petition is made is attributable exclusively to the efforts of the majority, as is the case in *Re London School*.

Ultimately the discretion that lies with the Judge must always be with regard to all relevant facts and circumstances. The crux of the question and the prevailing factor to be considered seems to be when it is fair to value the shares.

This is particularly so when the company in question has no Net Tangible Assets and it is not profitable at the time when his complain was made. In this instance, the buyout order would be in his favour if the date of valuation is to be deferred to consider future profitability arising from the business of the company instead. By merely taking into account the current financial situation of the business, based on its latest Financial Audited Statements of the Company, the minority shareholder would not be able to value his shares at a value he perceives as fair. His argument is that, had he not been oppressed by the majority, he would be able to enjoy the future growth and earnings of the company, which would significantly increase the value of his shares.

The crux of the question and the prevailing factor to be considered seems to be when it is fair to value the shares of the Oppressed Minority Shareholder.

There are also instances when, although the oppressive conduct took place earlier and thereafter the company was left valueless, it will only then be fair to take the date before the oppressive acts. This leads to concerns or reluctance of the minority shareholder to file for an oppression petition where the value of the company is close to nil or the company is on the border of insolvency. This will undoubtedly reveal a very low value on the shares and therefore not be in the interest of the minority.

Interestingly, the Singapore Court of Appeal decision in *Wei Fengpin v Raymond Low Tuck Loong and others* [2022]⁴⁴ reinforced that minority shareholders are entitled to protection from oppressive conduct by majority shareholders,

44 SGCA 32

even if the company is insolvent or wound up.

Wei, a minority shareholder and director of Lateral Solutions Pte Ltd, brought an oppression action against the majority shareholders (Low and Sim), alleging unfair and prejudicial conduct. Before the trial, Low and Sim caused the company to be voluntarily wound up.

Although the High Court found that there were multiple acts of oppression by Low and Sim, including unlawful dividend payments to themselves, excessive bonuses paid out to themselves, diverting business opportunities and failing to audit accounts and hold meetings, the High Court did not grant a buyout order citing lack of audited accounts and potential redress by liquidators. Instead, the court ordered Low and Sim to return certain sums to the company.

On appeal, the Court of Appeal ordered a buyout of Wei's shares at \$5 million USD, the price he paid in 2014 to acquire them on the grounds that oppression was clear and unchallenged and that insolvency does not bar a buyout.

The judgment emphasized that audited accounts are not a prerequisite for determining share value. Courts can rely on purchase price or expert evidence when financial records are lacking, especially if the lack of records is due to misconduct.

The case highlights the importance of contextual fairness over rigid legal formalism in shareholder disputes.

D. Problems that may arise if the valuation date is taken to be a subsequent date

On the contrary, there are instances where the value of the company has substantially increased, but without the participation or involvement of the minority shareholder. In *Re Clearsprings Management Ltd Re* [2003]⁴⁵, it was held that it is unlikely that the court would allow the valuation date to be deferred because the

45 EWHC 2516

company's future profitability is dependent on some uncertain future events. The case of *Profinance Trust SA v Gladstone* [2001]⁴⁶ also emphasises that it is important for the valuation date to be close to the actual sale date to reflect the actual value of the shares.

Despite that, it is worth noting that the judges in two English cases mentioned that it will only be fair if the shares are to be valued on a willing buyer & willing seller basis. It could be argued that a willing buyer would not only look at the current value of the shares but also the potential profitability of the business, which would ultimately lead to future value appreciation. Another instance would be that the future profitability of the Company may be considered in new contracts the Company enters into without the involvement of the minority shareholder.

So the question arises as to why the minority shareholder must benefit from the revenue and profit derived from a contract without his participation and upon his exit.

As this is concerned with the way shares are to be valued, the following discussion will look into the method of valuing shares.

E. Method of valuation

The fact that the company has little to no Net Tangible Assets is not fatal to the claim. The value of intangibles may be worth much more than the tangible asset. In an English decision of *Re Bird Precision Bellows Ltd* [1984]⁴⁷, the Courts allowed the inclusion of goodwill, which is an intangible asset, in the process of valuing the shares of a minority shareholder.

This case also leads us to the method of valuing shares. This case endorsed the method of multiplying profits using the Profit/Earnings ratio. This allows the valuer to consider not only the current value of the shares, but also their potential or future appreciation in value.

46 EWCA Civ 1031

47 Ch 658

In *Re Bird Precision*, it was decided that in cases where a company has a small asset base but huge earnings and considerable goodwill, and when there are no true comparables, or where no or low dividends are distributed, an approach based on the Profit/Earnings Ratio is appropriate. The first step is to identify the maintainable profit and then multiply it by a P/E ratio (representing the yield which a purchaser on a willing buyer, willing seller basis would expect on his investment).

In another English decision of *Elliot v Planet Organic Ltd* [2000]⁴⁸, the company had very few tangible assets, the judge upheld the valuers' view that the correct approach is to multiply maintainable profits by a price/earnings ratio. The Singaporean Court of Appeal took a similar approach in *Yeo Hung Khiang v Dickson Investment (Singapore) Pte Ltd* [1999]⁴⁹, that the valuation on the basis of capitalisation of future maintainable earnings was appropriate when valuing the company as a going concern.

In ordering valuation for a buyout, Courts can also order adjustments to be made during the valuation as if no oppressive conduct has taken place. This may include:

- Adding back to the assets, company monies taken out without proper justification; [*Lloyd v Casey & Ors* (2001)]⁵⁰
- Adjusting valuation upwards by adding back loss of income through failure to pay dividends or loss of salary through employment; [*Re Bagot Well Pastoral Pty Ltd* (1992)]⁵¹ – affirmed by the Supreme Court of South Australia].
- Adding back losses made by the company due to misconduct [*Chiew Sze Sun & Anor v Cast Iron Products Sdn Bhd & 4 Ors* (1994)]⁵².

48 BCC 610

49 2 SLR 72

50 BCLC 454

51 9 ACSR 129

52 1 CLJ 157

Although an award of damages is not included under Section 346(2) of the 2016 Act, the Federal Court has the power to make such order if it is in the view that such order can remedy the matter complained of. In *Toralf Mueller v Alcim Holding Sdn Bhd* [2015]⁵³, the complaint was awarded compensatory damages in respect of all loss suffered.

In short, Malaysian courts tackle minority-oppression petitions as equity's problem-solvers. They stand ready to sculpt any order governance overhauls, transaction reversals, damages awards, or most commonly, a fair-value buy-out without minority discount, which will restore commercial justice while minimising collateral damage.

Liquidation remains on the table, but only when all other routes to fairness prove closed.

In *Auspicious Journey*, AJSB, as the Plaintiff, sought a declaration that Hoe Leong Corporation Limited, as the majority shareholder, and the Kuah brothers, as directors:

- Conducted the affairs of Ebony Ritz in a manner that was oppressive to AJSB and in disregard of its interests as a member of Ebony Ritz; and
- Had procured and/or caused to be done and/or threatened to procure or cause to be done to Ebony Ritz an event(s) which unfairly discriminated against, or which was or is prejudicial to AJSB as a member of Ebony Ritz.

The High Court made findings of facts which resulted in a finding in law that the affairs of Ebony Ritz were conducted in a manner oppressive to, and which discriminated against or prejudiced AJSB, the minority shareholder. The High Court also decided that the most appropriate course of action was to wind up Ebony Ritz, having regard to the financial situation of Ebony Ritz and disagreement between the shareholders; it was not viable to keep it as a going concern.

The relationship between the shareholders had broken down completely, and it was neither just nor equitable for the company to proceed. Moreover, the ultimate purpose for the joint venture had not been and could no longer be met.

The Court of Appeal held that to order a buy-out would unjustly enrich AJSB, and that it should not be allowed to use these proceedings to divest itself of a bad bargain. It concurred with the High Court that the breakdown in the relationship between the parties was a factor that was relevant and correctly applied by the High Court to order that Ebony Ritz be wound up. The Court of Appeal additionally expressed the view that it would not be appropriate for the court to make a buy-out order when such an order would not be meaningful because the company was no longer a going concern.

The Federal Court upheld both the decisions of the Court of Appeal and High Court to wind up the company and held that although a buy-out may be efficient and practical, winding up should not be precluded as a remedy given the unique factual matrix of the case. Nallini Pathmanathan FCJ held at page 829:

“...The courts have ordered a winding up where there is a deadlock between the parties such that the business cannot effectively continue. This signifies a breakdown in the relationship between the parties which is the case here. Coupled with the potential statutory contravention and Ebony Ritz’s insolvent state, winding up is justified.”

VIII. WHAT LESSONS CAN BE DRAWN?

As can be seen above, there are myriad instances where the courts could find that oppressive acts have occurred against the minority shareholders of a company. It must be borne in mind, however, that the courts often assess the actions complained collectively and not individually when attempting to determine whether or not oppression has occurred.

It is also clear that the majority shareholders must always attempt to act as fairly as possible when considering the rights and interests of minority shareholders. While their interests may not always align with the interests of the majority, majority shareholders should not act rashly to punish the minority.

The law recognises that minority shareholders are particularly vulnerable to exploitation or marginalisation. It is for this very reason that minority shareholders must have, in effect, key measures to safeguard their rights and interests. It is of utmost importance and extremely crucial for shareholders to have a robust Shareholders' Agreement.

The most effective tool for protecting minority shareholders is a carefully drafted shareholders' agreement. This agreement should not merely govern commercial arrangements, but serve as a framework that guarantees participation rights in that it serves to ensure minority shareholders have a voice in significant decisions (e.g. via reserved matters or veto rights). Other further terms may include access to information, granting rights to inspect financial records and other company documentation, Anti-dilution protections to prevent the unfair issuance of shares that would reduce the minority's stake. Further, it is also important to include an exit rights clause or put options that allow minority shareholders to exit on fair terms if majority shareholders sell or trigger fundamental changes in control.

Company constitutions and shareholders' agreements should also contain express provisions that prohibit discriminatory treatment. This ensures that minority shareholders are not unfairly treated in terms of dividend policy, distribution of profits, or corporate governance practices. Where feasible, minority shareholders should negotiate for representation on the board of directors. This not only provides oversight but also ensures that their interests are considered at the highest level of decision-making.

Ultimately, it is through a combination of contractual foresight, statutory protection, and ethical corporate practice that the rights of minority shareholders can be meaningfully protected and enforced. Investors should ensure clear agreements and

governance structures when entering companies, especially SMEs or closely held firms.

By fostering a fair and transparent environment where all shareholders' voices are respected, companies can attract a broader base of investors, encourage collaboration, and ensure that decisions are made with a diverse array of perspectives in mind.

FROM COLLISION TO COMPENSATION: A LEGAL GUIDE TO PERSONAL INJURY CLAIMS IN MALAYSIA

Mala P. Doraisamy & Thanessha Gunalan¹

ABSTRACT

Personal injury, protected under tort law comprises injuries to the body or mind as opposed to damage to property. This would include but is not limited to car accidents, slip and falls, medical malpractice, defective products; all of which result from another party's negligence or wrongdoing causing harm to another person's body or mind. In Malaysia, motor vehicle collision remains one of the leading causes of personal injury claims, often leaving victims not only with physical injuries but also with complex legal and financial challenges.

This article examines the legal framework governing personal injury claims arising from motor vehicle collisions; outlining the procedural steps required for a successful claim (i.e., from gathering evidence all the way to filing a claim in Court). The discussion further considers judicial approaches to compensation including general damages and special damages.

The experience of victims such as Adam, a fictional character discussed below in this article who sustained serious injuries due to a road accident, illustrates the challenges faced by such victims when navigating the legal system in pursuit of compensation. By integrating both practical guidance and legal analysis, this article seeks to provide clarity to Claimants navigating the aftermath of an accident while serving as a useful reference for practitioners handling personal injury litigation.

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I. INTRODUCTION

Adam, 35, is a father of three kids and the sole breadwinner for his family. Every morning, he rides his motorcycle through the congested streets of Kuala Lumpur to get to work as a full-time mechanic. One rainy evening, as he was making his way home, a car driven by Ben, abruptly switched lanes without signalling and collided into the rear of Adam's motorcycle. Due to the impact of the collision, Adam flew off his motorcycle and was rushed to the nearest hospital. Adam was admitted for approximately one week at the hospital. After the collision, the next thing Adam remembers is waking up in a hospital bed with a fractured tibia, femur, multiple abrasions, multiple scars and a pile of medical bills.

Like many Malaysians involved in road accidents, Adam now faces not just physical pain, but a confusing legal and financial aftermath. What should Adam do next? Who will cover his medical expenses? Can he claim compensation for his loss of income while he recovers at home? What if he is unable to work anymore due to the accident? Who shall bear the expenses of his family? Who will provide for his children if he cannot return to work?

Understanding the legal process following an accident is essential not only for personal injury lawyers but also for any individual seeking redress. From the initial steps taken at the scene to the eventual resolution of a personal injury claim, each stage carries legal significance. This discussion aims to provide a clear overview of the relevant procedures, rights, and legal principles involved; equipping injured parties like Adam with the knowledge necessary to navigate the path towards just compensation.

The legal foundation for motor-vehicle collision and personal injury claims is found in the tort of negligence which is guided by both statutory instruments and common law principles. In order to raise a successful negligence claim, one would have to prove that the defendant owed a duty of care, breached that duty, and caused injury or loss as a result.

Malaysian courts apply established English common law doctrines, including the

‘neighbour principle’ from *Donoghue v Stevenson*², and the three-stage test from *Caparo Industries plc v Dickman*³. A number of key statutes further regulate this area which consist of Sections 7 & 28A of the Civil Law Act 1956, Road Transport Act 1987, Motor Vehicles (Third-Part Risks) Act 1959, and Limitation Act 1953.

In civil claims, the standard of proof is the balance of probabilities, which requires the claimant to establish that it is more likely than not that the defendant’s negligence caused the injury. The combination of case law and statutory obligations continues to shape how personal injury claims are assessed and decided in Malaysia.

II. IMMEDIATE AFTERMATH OF THE ACCIDENT: WHAT VICTIMS MUST KNOW

In order to raise a claim, the victim must take several critical and immediate steps after the accident:

A. Lodging a Police Report

As required by Malaysian law, the victim must lodge a police report within 24 hours of the occurrence of the said accident.⁴ This police report serves as the primary official record of the incident. Any delay in lodging the police report has been viewed adversely by the Courts unless some reasonable explanation is specified for the delay.⁵

For example, Norhanum Hassan M opined that any delay in filing a police report may significantly weaken a Plaintiff’s case.⁶ Such delays could cast doubt on the reliability of the plaintiff’s version of events (e.g. possibility of fabrication or embellishment in the contents of the report), particularly where liability is disputed.⁷

² *Donoghue v Stevenson* [1932] A.C. 562

³ *Caparo Industries Plc v Dickman* [1990] UKHL 2

⁴ Road Transport Act 1987, Section 52(2)

⁵ *Abdul Kadir Mohamad v Kamarulzaman Mohd Zin & Anor* [2001] 5 CLJ 249; *Lim Ah Lak v Charan Singh a/l Mohan Singh* [1994] 4 CLJ 324; *Panirselvi d/o A.N. Manickam v Toh Bee Lian* [1995] 4 CLJ 567; *Azri Shahimi b Abd Karim v Azman bin Hantan* [2003] 6 MLJ 713

⁶ *James a/l Divit v Cho Chun Choong* [2025] MLJU 595

⁷ S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book 2023, p.1150.

However, if there is a bona fide explanation for the delay (i.e. hospitalised due to the accident), then it will not affect the credibility of the party or witness.⁸

In many personal injury cases, including Adam's, the victim may be physically unable to lodge a police report within the required 24-hour timeframe due to hospitalization or unconsciousness. It is noted they would most likely be seeking medical attention immediately after an accident. This would be considered as an exceptional circumstance and Courts would accept such a delay as reasonable as seeking prompt medical attention is equally important, not only for Adam's health but also to ensure that the extent of his injuries are well documented.

For example, this can be seen in *Muhamad Zairul bin Yahya v Zail bin Badrol Hisham & Ors* [2024], where the Appellant attributed the reason for the delay of one month in making the police report to the fact that the appellant had 'gone to seek treatment'. The Court acknowledged the grounds for such delays and held that the delay was reasonable.⁹ Similarly, in *Muhamad Qamarul bin Munsyiaqbal @ Yusri v Md Nor bin Md Zain & Anor* [2020], the Court found that the Plaintiff's delay in lodging the police report was sufficiently and satisfactorily explained as the Plaintiff was hospitalised for a week and after that was on medical leave due to the serious injuries the plaintiff had sustained resulting in complete paraplegia.¹⁰

In the present example of Adam's case, it is noted that Adam was admitted in the hospital for 7 days. In fact, due to the severity of Adam's injuries, it is highly likely that Adam would receive medical leave for several days or weeks upon his discharge. Thus, it would be reasonable for Adam to be expected to lodge a police report upon discharge from the hospital or immediately after the medical leave has ended and not within the 24-hour period set by the law.

⁸ Ooi Chai Chen v Lee Jen Tiek [2021] 1 LNS 1372 HC

⁹ Muhamad Zairul bin Yahya v Zail bin Badrol Hisham & Ors [2024] MLJU 2780

¹⁰ Muhamad Qamarul bin Munsyiaqbal @ Yusri v Md Nor bin Md Zain & Anor [2020] MLJU 106

B. Contents of a police report

When possible, Adam should visit the nearest police station where the accident took place. The contents of a police report are crucial in determining the outcome of the case. Police reports albeit being essential documents are still usually lodged by layman victims and people from all walks of life. Hence, Adam's police report does not need to be in great detail.

This was reiterated by Raja Azlan Shah J who held that a police report cannot and will not contain everything held under the sun but it merely is the first step to bringing the police machinery into effect.¹¹ This is because additional details of the accident would be contained in the statement given to the police officer after the report had been lodged.

However, with that being said, when lodging a police report, the contents of the said report, even when not required to be in great detail, must still be factually true. Otherwise, Adam may be liable for the criminal offence of making a false report.¹² Adam's report must be accurate and consistent in its essential details where Adam would be required to mention relevant facts leaving the precise details, explanations, and particulars of the accident to be covered by his police statements.¹³

If Adam fails to do so, any omitted material fact cannot later be added to the police report even by way of oral testimony during the trial of the case in court.¹⁴ Such additions would be inadmissible as it would breach Section 92 of the Evidence Act 1950, which broadly prohibits the use of oral evidence to contradict, modify, supplement, or detract from the terms of a written document.¹⁵ This is why it would be advisable for Adam to lodge the police report as soon as possible upon discharge or at the end of the medical leave, as Adam would not be able to go back and supplement, reverse, or replace the crucial contents of the police report with conflicting versions.

11 Cheok Kok Ling v Fatt Hup Transport & Co [1966] 1 MLJ 120

12 UNILEVER (Malaysia) Holdings Sdn Bhd v Anthony Samy A/L Muthusamy [1998] MLJU 26

13 S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book Sdn Bhd 2023, p.1142.

14 Pan Kar Chun lwn Radin Zalinah bt Radin Othman [2017] 8 MLJ 424; Suriyati Takril v Mohan Govindasamy & Anor [2001] 2 CLJ 101 HC

15 Evidence Act 1950, s. 92

This would also mean that if Adam's report lacks detail and a different version is presented as part of evidence in Court, it may be considered as an afterthought even if it may be true.

For example, in *Kosnan v Phua Huat Choy* [1966], the Plaintiff while giving evidence in Court stated that the accident took place when a lorry coming from the opposite direction collided into the plaintiff whilst the lorry was overtaking a bus. However, the fact that the lorry was overtaking the bus was not mentioned in the police report. The Plaintiff only added this point during oral evidence. Thus, Winslow J did not accept the Plaintiff's version and held as follows:

“While I have considerable sympathy for the gravity of his condition at the time he made his first report, I find it difficult to accept his version that the lorry was overtaking a bus at the relevant time and, in my opinion, this additional information should be regarded as an afterthought invented to improve his chances of success. I think that...at the time he made the report it never occurred to him to blame the lorry for the simple reason that it was then, according his reckoning blameless.”¹⁶

Similarly, Mohamad Zahir J was of the view that:

“...if there was indeed such a lorry which caused the obstruction to his view and which accounted for the accident, he would not have failed to mention this in his police report when the facts were still fresh in his mind.”¹⁷

Such inconsistencies would also make Adam appear to lack credibility. For instance, in the case of *Mohd Zaki bin Zulkefle v Shahadat bin Jamauddin & Anor* [2019], the Court held that the Appellants version lacked credibility when there were discrepancies in the Appellant's police report.¹⁸ This would weaken Adam's case if the same were to occur.

¹⁶ *Kosnan v Phua Huat Choy* [1966] 2 MLJ 233

¹⁷ *Wan Norisah Binti Wan Abdullah v Che Haru Bin Che Daud* [1980] 1 MLJ 237 at 238.

¹⁸ *Mohd Zaki bin Zulkefle v Shahadat bin Jamauddin & Anor* [2019] MLJU 991

Similarly, any inconsistency in Adam's police reports (if more than one was lodged or Adam provides a different version of events when he gives evidence in Court) may also be contested by insurance companies as to liability. This would make an out of court settlement for Adam's claim a lot more challenging. Thus, it is important that Adam provides a detailed and accurate version of the events as to how the accident took place. Not only would this be determining liability in Adam's case, but Adam would also be unable to change the version of events during oral evidence at trial. This is on the basis that once a police report is made, the maker is estopped from denying or varying its contents subsequently.¹⁹

Anuar Zainal Abidin J was of a similar view when he stated:

'I do not think the Defendant could deny the truth of his own police report. I see that the Defendant had signed the report. He cannot now come to court and say the report is wrong.'²⁰

As per *Low Kean Giap & Ors v Shaik Alawdeen Shaik Dawood & Anor* [1999], the defendant gave evidence in court which was entirely inconsistent with the police report. When questioned as to the different versions of the events, the defendant explained that the police report version had been given under compulsion by four individuals.

The defendant then insisted that the version presented in Court was the correct version. However, the High Court rejected this explanation as a mere concoction.²¹ Even if Adam attempts to change the police report with the excuse of duress, the Court would still not allow such alteration.

This is because a party who comes to equity must come with clean hands, and the Court would not allow Adam to raise a claim without clean hands, as that would be unjust and inequitable.

19 S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book Sdn Bhd 2023, p.1146.

20 Mooi Kim Ming & Anor v Tang Sia Bak [1988] 2 CLJ 797

21 Low Kean Giap & Ors v Shaik Alawdeen Shaik Dawood & Anor [1999] 7 CIJ Supp 44

The Court explained that one cannot come to court demanding a pound of flesh when the owner of the flesh so sought has no inkling of such an arrangement.²²

C. Police investigation

After one of the parties has lodged their police reports (i.e. usually the defendant in most instances), the investigating police officer would conduct their investigation in order to determine which party caused the accident. This would mean the investigating officer would visit the accident site (i.e. usually immediately after the defendant lodges their police report), obtain photographs, draw a sketch plan and key of the accident site and obtain statements from parties involved. The evidence from the police is crucial not only in understanding how the accident took place but would also be of great use if a judge is faced with conflicting versions of events. In such instances the Court may apply the principle stated in *Ng Aik Kian & Anor v Sia Loh Sia* [1997] that silent evidence such as photographs, plans and measurements of the scene and the nature of the damage to each vehicle will provide the most reliable guide by which conflicting versions of an accident can be tested.²³

D. Sketch plan and key

The police sketch plan and key play a crucial role in determining the defendant's liability especially when the plaintiff's claim is based on the breach of the defendant's statutory duty.²⁴ Abdul Malik Ishak stated that it goes without saying that the Court is justified and entitled to rely on the sketch plan and from it draw the necessary inferences as to who is liable.²⁵ The said documents would assist the court beyond reasonable doubt in evaluating whether the physical evidence aligns with the accounts given by the parties, thus helping to establish which version is more credible.

²² *CIMB Islamic Bank Berhad v Ravichantiran a/l Ganesan and another case* [2020] MLJU 48

²³ *Ng Aik Kian & Anor v Sia Loh Sia* [1997] 2 CLJ Supp 218

²⁴ *Shiraz Mikael Khan bin Mohd Rafik Khan v Projek Lebuhraya Usahasama Bhd & Ors* [2022] MLJU 213

²⁵ *Tabarani B Mohd Arsad & Anor v Chan Tenn Yeu* [1999] MLJU 126

Namely, in *Lim Gaw Teong v Daniel* [1968], the Court found that the sketch plan and key confirmed the plaintiff's version of events as the markings of the petrol stain and broken glass pieces were discovered on the plaintiff's side of the road, reinforcing that the collision occurred there.²⁶

In the event that neither party provides a clear narrative of how the accident unfolded, the Court will be justified in relying on the sketch plan and key from which it can draw inferences as to who is liable.²⁷ In *Chan Sau Chuan v Choi Kong Chaw & Yap Yun Chan*²⁸ the High Court held that even if the sketch plan and key falls within Section 92 of the Evidence Act, but the trial judge is unable to accede to them, extrinsic evidence can still be permitted to be adduced to explain the contents of the same, firstly, if the Court is satisfied that the sketch plan and key are not complete and an explanation is required from the maker and secondly, by virtue of proviso (f) to Section 92 of the Act which states as follows: -

Exclusion of evidence of oral agreement

s92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to section 91, no evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest for the purpose of contradicting, varying, adding to, or subtracting from its terms:-

Provided that—

(f) any fact may be proved which shows in what manner the language of a document is related to existing facts.²⁹

²⁶ *Lim Gaw Teong v Daniel* [1968] 1 MLJ 277

²⁷ *Mohamed Salleh bin Awang & Anor v Low Han Leong & Anor* [1982] 1 MLJ 82, *Tabarani bin Mohd Arsaf & Anor v Chan Tenn Yeu* [1999] 3 CLJ 188.

²⁸ *Chan Sau Chuan v Choi Kong Chaw & Yap Yun Chan* [1991] 2 CLJ Rep 394 HC

²⁹ Evidence Act 1950, Section 92(f)

In such instances, the investigating officer who drew the sketch plan and key will be subpoenaed to Court to present the evidence and explain the same or any missing information or confusion from the said document to the Court.

E. Outcome of investigation

At the end of the investigation the investigating officer would issue an outcome of investigation which usually states which party is fined for their role in the accident. This often serves as a preliminary indicator of liability of the case. However, it is not conclusive since factors such as contributory negligence may also come into play depending on the contents of one's police report, subsequent further independent investigation by adjusters or other evidence.

There may also be instances where the investigating officer is unable to decide which party caused the accident. In such cases, the outcome of investigation will be deduced to 'Refer to Magistrate (RTM)'. In cases like these, parties may agree to a split liability for an out of court settlement. However, if the case proceeds with trial, the outcome of liability may change considering the evidence given by parties involved and the liability will be decided by the judge instead at the end of the trial.

An Investigating Officer (IO) may be summoned to give oral evidence in court regarding the findings of the investigation. Wong Kian Kheong J explained the role of an IO with reference to Section 45(1) of the Evidence Act 1950 which states:-

Opinions of experts

45. (1) When the court has to form an opinion upon a point of foreign law or of science or art, or as to identity or genuineness of handwriting or finger impressions, the opinions upon that point of persons specially skilled in that foreign law, science or art, or in questions as to identity or genuineness of handwriting or finger impressions, are relevant facts.

(2) Such persons are called experts.³⁰

30 Evidence Act 1950, Section 45

It was observed that while a police officer investigating a road accident may present factual findings such as the nature and extent of vehicular damage, physical observations at the accident scene (e.g. the presence of skid marks, the functionality of traffic or street lights, and the visibility of traffic signs), and a sketch plan of the incident — any conclusions regarding negligence are inadmissible. The Court cannot accept opinionated evidence unless there is a relevant issue before the Court which is beyond the Court's competence wherein the Court may accept an expert opinion under Section 45(1) of the Evidence Act 1950.³¹ Ong Hock Thye Ag CJ also opined that any evidence in which the inspector's enquiries led him to believe that the accused was owner of the machines, would rightly be struck out as hearsay.³²

This is because the question of legal liability is a matter reserved for judicial determination. Further, the IO's knowledge is not derived from personal observation but rather from the findings of their investigation, thereby rendering such evidence hearsay. As such, any assertion by the IO as to which party was negligent constitutes a mere opinion and cannot be afforded probative value unless it satisfies the requirements of expert evidence under Section 45(1) of the Evidence Act 1950.

F. Medical Evidence

It is imperative that Adam seeks medical treatment immediately after the accident to obtain an accurate diagnosis of the condition and injuries suffered due to the said accident. This ensures a clear causal link between the injuries and the accident, which is critical in a personal injury claim, can correctly be established. Adam must also compile and preserve all related medical documentation from the hospital including medical reports, bills, and certificates which form part of the supporting evidence for the claim.

Most medical reports will set out what injuries have occurred due to the accident, any pre-existing injuries affected, effects on work and lifestyle, recovery time and recommended treatment. Adam may have more than one medical report as part of his claim depending on the nature and complexity of his injuries.

³¹ Lim Jeh Haur v Nicholas Thomas Philip & Anor [2019] 1 LNS 1351 HC

³² Public Prosecutor v Siew Sung [1965] 1 LNS 140; 1966 1 MLJ 145 at 145

For instance, seriously injured clients who have suffered brain injury, amputation, chronic pain or severe breaks and lacerations can expect multiple reports from a range of specialists and various departments.³³

If Adam's injuries are severe, Adam may be referred to a specialist by legal representatives in order to obtain a more detailed and comprehensive examination of Adam's condition and the extent of the injuries sustained after the accident. A specialist report would help determine the severity of the injuries, the prospects of recovery, whether the injuries affect activities of daily living, and other related factors. Specialist reports typically address the severity of the injuries, prospects for recovery, long-term impairments, and any resulting limitations in daily activities and living. These reports also commonly outline the impact on employment and lifestyle, expected recovery timeline, and proposed treatment plans. Depending on the complexity of the injuries, such as in cases involving brain trauma, amputations, chronic pain, or severe fractures, a claimant may need to obtain multiple reports from various specialists to adequately substantiate the claim.

Apart from medical and specialist reports Adam should also gather official medical bills, and cost of treatment or medication accumulated due to the accident which may be claimed as special damages and will be further explained below.

G. Other Evidence

If possible, Adam should also gather as much evidence from the scene as possible. This includes taking photographs of the accident site, the motorcycle and the other vehicle, any visible injuries, skid marks, road signs, weather conditions, injuries, etc. These visual records may be used later to establish the circumstances of the accident and to rebut any contrary narratives.

Identifying and obtaining contact details from any witnesses who saw the incident unfold can further support Adam's version of events.

³³ Minister Law "All About Your Medical Report, Approving your medical report is a crucial step in your claim journey" <<https://www.minsterlaw.co.uk/help-advice/helpful-guides-to-making-a-claim/all-about-your-medical-report/>>

Lastly, Adam must inform both Adam's insurance provider and the insurance provider of the other driver about the accident without delay to preserve rights under any applicable insurance.

III. BEFORE RAISING A CLAIM: WHAT DOCUMENTS WILL ADAM NEED?

To support Adam's personal injury claim, Adam should gather the above-mentioned documents along with several other documents that clearly outline the nature of the accident, the injuries sustained, and the resulting financial impact. These documents would serve as the foundation of the claim and provide both insurers and the Court with the necessary evidence to assess liability and damages.

Firstly, Adam must ensure possession of certified copies of police reports, as these are often the first items requested by insurers and legal counsel. If obtaining such reports proves difficult or complicated, Adam may appoint a lawyer to do so and to file a claim. A lawyer will require Adam to sign a warrant to act, which is a document confirming the appointment of the said lawyer to act on Adam's behalf.³⁴ The lawyer would then record Adam's statement, examine all available documents, consider the evidence, and explain the types of claims and quantum of damages that may be granted. Following this, the lawyer would formally request copies of police reports and the sketch plan of the accident site from the relevant police station.³⁵

Adam would also need medical reports (including doctors' notes, discharge summaries, test results, prescriptions, and treatment plans, if available) to substantiate the claim. If such documents have not been obtained, the lawyer will write to the relevant hospitals to request the same. Adam should also gather all receipts for expenses incurred, primarily medical bills. Obtaining medical reports and bills is essential as these documents provide a complete picture of the injuries sustained, the extent of those injuries, and the medical care required, both current and future.

34 China Commercial Foreign Trade (Singapore) Pte Ltd v KLS Diversified (M) Sdn Bhd [2021] 9 MJL 274

35 Johore Bar, 'Road Accidents' <<https://johorebar.org.my/road-accidents/>> accessed 7 July 2025

Any other relevant receipts and bills should also be collected, such as transport charges, vehicle rental, repair bills, medication, assistive equipment like crutches, and physiotherapy sessions. These costs fall under special damages and must be proven with documentation.

In certain instances, receipts of public transportation used to attend treatment sessions may not be available. If direct proof of travel expenses cannot be obtained, but it can be demonstrated that such expenses were necessarily incurred, the Court may grant a ‘reasonable’ award for those expenses.³⁶ However, it must still be proven that the travel for treatment was necessary. Disputes typically arise where the most expensive mode of transport, such as a private hired car is chosen instead of more affordable alternatives like a bus or train. In such cases, justification must be provided as to why the chosen mode of transport was reasonable in light of the circumstances, including the nature of the injuries and the distance to the hospital.³⁷

In order to claim for loss of income, Adam must produce evidence of earnings prior to the accident. This may include payslips (covering at least three months before and/or after the accident),³⁸ bank statements, income tax filings, and a confirmation letter from his employer. For self-employed individuals, alternative documentation such as business records, client invoices, or statutory declarations may be relied upon. At a minimum, sufficient evidence must be adduced to enable the Court to make a fair and reasonable assessment of the loss.³⁹ The often-quoted dictum of Lord Goddard CJ in *Bonham Carter v Hyde Park Hotel* [1948] would be most apt in the context, and is worth reiterating as follows:

‘Plaintiffs must understand that, if they bring actions for damages it is for them to prove their damage; it is not enough to write down particulars and, so to speak, throw them at the head of the court, saying: ‘This is what I have lost, I ask you give me these damages’. They have to prove it’

36 Mat Jusoh bin Daud v Syarikat Jaya Seberang Takir [1982] 2 MLJ 71

37 S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book Sdn Bhd 2023, p.48

38 Dr Teh Bee Tee v Dr Joshua Mohanraj Daniel & Anor [2018] MLJU 117

39 Chong Shao Fen & Anor v Mehrzad Nabavieh & Ors [2021] MLJU 2239

Photographs also play a critical evidentiary role. Adam should provide images of the accident scene, vehicle damage, and visible injuries. These help recreate the accident and reinforce the claim's seriousness.

Finally, Adam should compile witness statements or contact details as well as any correspondence with insurance companies. Clear and well-organised documentation as such increases the likelihood of a successful claim and can significantly shorten the time it takes for Adam to receive compensation.

IV. WHAT CAN ADAM CLAIM FOR?

Adam would indeed want to claim for damages as a result of his accident. It is understood that the general objective of an award of damages is to compensate the plaintiff for the losses, pecuniary and non-pecuniary losses, sustained as a result of the defendant's tort. More specifically, the assessment process is said to aim at "*restitutio in integrum*".⁴⁰ However, The Federal Court in *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] at 238 deemed the assessment of damages in personal injury matters to be one of the most difficult things for either a judge in the first instance or a Court of Appeal.

Gill FJ went on to say that

"...When a man has lost his arm there is no sum in the world that can in the true sense compensate for it. Yet compensation in the form of money is the only way in which he can be granted redress for the injury he has suffered.

It is neither possible nor desirable for damages for the loss of an arm to be standardised or rigidly classified, as no two cases are ever alike. But in order to maintain some semblance of uniformity, the amount awarded in past cases, which bear reasonable comparison with the case under review, should serve as a useful guide."

⁴¹

⁴⁰ Clerk & Lindsell on Torts (16th Ed), at p 254 paragraph 5-04:

⁴¹ *United Plywood and Sawmill Ltd v Lock Ngan Loi* [1970] 2 MLJ 237 at 238

The Singaporean High Court was of the similar view in which it held:

“...an award should be in line with a describable trend or pattern of awards in reasonably comparable cases because it is highly desirable that in similar cases involving persons who are of similar age, social and working habits, earning capacities and intellectual as well as recreational pursuits, etc., there should be as much uniformity as possible to achieve. This will tell a suitor roughly what he can expect by way of compensation and at the same time enable defendants to anticipate what their liabilities are likely to be.”⁴²

The general principle is, in the words of Lord Blackburn, that the court should award ‘that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.’ The principle admits of application to losses which are capable of reasonable precise calculation in money terms.⁴³

When an individual suffers a personal injury following an accident, there is no way of placing a monetary value at the outset. For the individual concerned, it is a matter of discomfort, pain and suffering. There are occasions where though a loss is suffered or damage is experienced, it may not be possible at the outset for the aggrieved person to immediately quantify the damage or loss in monetary term. In the majority of instances, the claim is eventually a monetary one. Hence one often comes across the terms “general damages” and “special damages”.⁴⁴ If the injured is alive and suffered because of the accident, there are certain types of damages that can be claimed, namely: (i) pain and suffering and loss of amenities (ii) loss of future earnings, (iii) loss of earning capacity and (iv) future care expenses.⁴⁵ Therefore, in a personal injury claim, Adam would be able to claim for general damages and special damages.

⁴² Saw Tong Seng v Ong Kim Hoon [1980] 2 MLJ 203 HC

⁴³ Khairun Nizad bin Daud & Anor v Juprin Paul [2018] MLJU 176, para 42

⁴⁴ The Star, Articles of Law by Bhag Singh, Awarding damages in civil claims, <<https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/awarding-damages-in-civil-claims>>, accessed on 9 July 2025

⁴⁵ Siti Zubaidah Ismail, Shahidra Abdul Kahlil, Abudllah Saleh al-Mekhalafi, Siit Aisyah Samudin, “Damages for Personal Injuries and Causing Death Resulting from Road Traffic Accident: A Survey from Malaysia”, p. 1305 <<https://eprints.um.edu.my/18069/1/All.pdf>>

Lord Goddard in *British Transport Commission v Gourley* defined special damages as out of pocket expenses which is generally capable of a substantially exact calculation. This would need to be specifically pleaded and proved. Then, he explained that general damages are implied by the law and is not specially pleaded. He went on to iterate that general damages includes compensation for pain and suffering and if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future.⁴⁶ Syed Agil Barakbah FJ in *Ngooi Ku Siong & Anor v Aidi Abdullah* stated that general damages refer to the damage which the law “implies in wrongs actionable per se” and is averred in general terms in the pleadings without the necessity of the quantifying amount. They include future loss of earnings as well as damages for pain and suffering and loss of amenities.

Mohamed Azmi J in *Sam Wun Hoong v Kader Ibramshah* summarised what is claimable as damages for personal injury as “in an action for personal injuries, there are two classes for damages which have to be considered; special damages which have to be specifically pleaded and general damages which need not be specially pleaded. In both classes of damages, the burden of proof based on the balance of probabilities in the evidence, lies on the Plaintiff. Special damages consist of out-of-pocket expenses such as hospital bills and actual loss of earning during period of total incapacity and is generally capable of substantially exact calculation.

A. General damages

General damages are assessed by the courts based on prior case law, taking into account the nature and extent of injuries. Judicial precedents serve as a guide in awarding an appropriate amount for similar injuries. However, the courts also take into account factors such as recession and change of value of money and may not strictly follow previous case laws especially older ones. Still, the Courts do not depart far from the common law on damages as the Malaysian Courts often refer to the Personal Injury Compendium, compiled by a Task Force within the Malaysian Bar Council which provides a consolidated reference of previous awards for various types of injuries. In *Abdul Waffiy Bin Wahubbi & Anor v A K Nazaruddi Bin Ahmad* [2017], it was held that the court must endeavour to ensure that the sum awarded falls within the range as

⁴⁶ *British Transport Commission v Gourley* [1956] AC 185 at p. 206.

stipulated in the Compendium and it would be wrong for trial courts to ignore the range of damages recommended in the Compendium, and to pluck a quantum from the air and make an award for a particular injury which does not resonate with the range in the Compendium.⁴⁷ Similarly, in *Ngooi Ku Siong & Anor v Aidi Abdullah* [1985], the Federal Court held that it was not proper for the learned judge to discard the authorities and use her own experience in assessing the damages. Experience alone however long without resorting to comparable cases which are the best guides, may result in speculation.⁴⁸

Nevertheless, the Personal Injury Compendium is not binding and acts merely as a guideline intended as a quick reference for judges and lawyers. The Compendium has been a useful guideline in promoting out of court settlements and for judges in coming up with their decisions on damages awarded. It is noted that the Compendium is not meant to stifle the rights of the parties to submit below or above the stipulated quantum, nor is it meant to fetter the Court's discretion. As such, Judges and lawyers are at liberty to depart from the Compendium in the event case law or factual circumstances so dictate.⁴⁹

This compendium serves as an important benchmarking tool to promote consistency and predictability in judicial awards. In the words of S Nathan Bala J, "it is wrong for trial courts to ignore the range of damages recommended in the Compendium and to pluck a quantum from the air and make an award for a particular injury which does not resonate with the range in the Compendium."⁵⁰ Evrol Mariette Peters JC also stated that the Compendium is not cast in stone. The fact that it is revised from time to time is also an indication that it is not a static guide.⁵¹

In *Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal* [2018], the Court of Appeal laid down some factors to be considered in awarding general damages for personal injuries in car accident cases which includes but is not limited to the person's age, health and condition of the injured party pre-injury as compared with his condition after the injury.

47 Abdul Waffiy Bin Wahubbi & Anor v. A K Nazaruddi Bin Ahmad [2017] 2 PIR 1

48 Ngooi Ku Siong & Anor v Aidi Abdullah [1985] 1 MLJ 30

49 Task Force to Review Compendium of Personal Injury Awards, Bar Council Malaysia, Revised Compendium of Personal Injury Awards, p.2, accessed 9 July 2025.

50 Abdul Waffiyan Wahubbi & Anor v AK Nazaruddin Ahmad [2017] 5 LNS 52

51 Sabri Abdul Talib & Anor v Tiong Mee Kooi [2021] 1 LNS 2275 HC

The court also considers the need for medical, psychological or physical symptoms, and the impact on the plaintiff's conduct and lifestyle before apportioning the amount of damages.⁵²

B. How much General Damages can Adam Claim for?

As a result of the accident, Adam sustained a fractured tibia, a fractured femur, multiple abrasions, multiple scars. In order to quantify the amount of damages for these injuries Adam would need to produce relevant documents to substantiate these. In this context, this would include Adam's Initial Medical Report (i.e. Accident & Emergency Report, [also known as A&E Report]), any other medical reports and specialist Reports (if necessary). Such reports would help verify Adam's injuries and the extent of his disabilities.

Let's take a look at Adam's first injury which is a fractured tibia. The Personal Injury Compendium recommends an award of damages starting from RM18,000.00 and goes up to RM30,000.00 for a simple tibia fracture. So the question arises, how much exactly will Adam be able to claim for his fractured tibia? Now, just because Adam has a tibia fracture, he cannot simply claim for the maximum amount in the range provided by the Compendium, it has to be based on the extent and severity of his tibia fracture and this will usually be stated in Adam's medical and specialist reports. The reports would state whether Adam has to undergo future surgeries, whether he has any implants in place, whether his fracture has united, whether his fracture would affect his activities of daily living, would he be able to return to work and many more. For example, in *Nik Shamerul Hafizi bin Nik Mazlan & Anor v Khairulanwar bin Nawi & Anor* [2020], the Court awarded RM20,000.00 for a closed fracture of a right tibia plateau.⁵³

C. Loss of consciousness & retrograde amnesia

Considering the fact that after the accident Adam only remembers waking up at the hospital, he may be entitled to claim general damages for loss of consciousness and/or retrograde amnesia provided such injuries are also stated in his medical report, partic-

⁵² Sambaga Valli a/p KR Ponnusamy v Datuk Bandar Kuala Lumpur & Ors and another appeal [2018] 1 MLJ 784

⁵³ Nik Shamerul Hafizi bin Nik Mazlan & Anor v Khairulanwar bin Nawi & Anor [2020] MLJU 2331

ularly in his Accidents & Emergencies medical report. The Personal Injury Compendium awards a range of RM1,000.00 going up to RM3,000.00 for retrograde amnesia and RM6,000.00 for loss of consciousness.⁵⁴ This is usually awarded for victims who were unconscious upon impact of the accident, which will be stated in their initial medical reports. If it is not clearly stated, it would be rather difficult to claim for such injuries as it would need to be proven accordingly. For example, an initial medical report may state something along the lines of “Patient was unconscious on arrival at the emergency department and he was immediately intubated”. This would confirm the Plaintiff’s unconsciousness upon arrival at the hospital and which may entitle him to damages unless proven otherwise. The Court may vary its award depending on the extent of the injury as seen in *Chua Kheng Yik v Wong Zhen Yaik* [2022] where the Court awarded RM6,000 for the injury of cerebral concussion with retrograde amnesia whereas in *Tan Zhi Xiong dan satu lagi lwn Gopinath a/l Pathmanaban* [2024] the Court maintained the award of RM20,000.00 for the same injuries. Therefore, if Adam can prove in his medical report that he sustained both loss of consciousness and retrograde amnesia he would most likely be able to claim for damages within the range of the compendium unless proven otherwise.

D. Abrasion

Based on the facts it is noted that Adam sustained multiple abrasions and according to the Personal Injury Compendium the award for abrasions ranges from RM1,300.00 for a single abrasion going up to RM5,000.00 for multiple abrasions. For instance, in *Muhamad Izwan bin Muhamad Yunus v Haryati bt Ismail & Anor* [2023] the Court awarded RM5,000.00 for multiple abrasion wounds to the right elbow forearm, leg and foot suffered by the Plaintiff.⁵⁵ Another case example would be *Ismail bin Daud v Muhammad Syafiq bin Abd Jalil* [2023] where the Court awarded RM6,000.00 for the Plaintiff’s multiple abrasions.⁵⁶ Hence, depending on the severity of Adam’s injuries, he may be able to claim for the same.

⁵⁴ Task Force to Review Compendium of Personal Injury Awards, Bar Council Malaysia, Revised Compendium of Personal Injury Awards, p.20& 32, <https://www.malaysianbar.org.my/cms/upload_files/document/Circular%20No%20255-2018.pdf> accessed 9 July 2025.

⁵⁵ *Muhamad Izwan bin Muhamad Yunus v Haryati bt Ismail & Anor* [2023] MLJU 678

⁵⁶ *Daud v Muhammad Syafiq bin Abd Jalil* [2023] MLJU 2019

E. Scars

Another injury that was mentioned was that Adam sustained multiple scars due to the accident. The Personal Injury Compendium awards for this injury as such: -

Injury	Low (RM)	High (RM)
Minor scarring to leg	1,300	3,300
Minor scarring to arm	2,200	3,850
Extensive scarring to leg	9,500	18,000
Extensive scarring to arm	12,000	24,000
Facial Scarring	6,000	36,500
Operation Scars	2,750	12,000

Usually, the fact that one suffers from scarring would be stated in a medical report. However, Adam’s solicitor may refer Adam to a Specialist to note the length and amount of scars. This would help determine the severity of his scars and would allow for justifications of his claims for damages.

F. Damages for pain and suffering

Adam will also be able to raise a claim for pain and suffering caused to him due to the accident. Now, what is pain and suffering? It has been stated that “the expression ‘pain and suffering’ is almost a term of art insofar as the expression embraces different concepts. ‘Pain’, it is suggested, is used to describe the physical pain caused by or consequent upon the injury, while ‘suffering’ relates to the mental element of anxiety, fear, embarrassment and the like.”⁵⁷

Under the heading of pain and suffering and loss of amenities, the quantum is mainly assessed on the nature of injuries sustained and the period of hospitalization, and in arriving at a figure, the court is guided by previous awards in cases involving similar type of injuries with allowances being given to account for the Plaintiff’s age, marital status, his special position social or in business, depreciation or appreciation of money value and other relevant circumstances.

⁵⁷ Kemp & Kemp: ‘Damages for Personal Injury and Death’ 5th edn, p.76.

As regards to loss of future earnings and future loss of earning capacity, although such losses can be implied in appropriate cases, the award should be a nominal one, unless the Plaintiff can prove such future loss is in fact sufficiently severe to warrant a substantial award. In *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd* [2020], the Federal Court stated that nominal damages according to past Malaysian judicial precedents can range from RM 10 to RM 2,000.00.⁵⁸ Further such implied loss can be rebutted and if evidence does in fact disclose or sufficiently disclose no future loss of earning or loss of earning capacity, no award need be given under these headings.⁵⁹

Lord Scarman in *Lim Poh Choo v Camden & Islington Area Health Authority* said that damages for pain and suffering ‘depend on the Plaintiff’s personal awareness of pain, her capacity for suffering.’⁶⁰ This would mean that if Adam was unable to feel pain or was in a coma throughout his time at the Hospital, or was rendered unconscious and dies before regaining consciousness then he would not be entitled to claim for pain and suffering. It is said that no claim for pain and suffering will lie if the deceased was unconscious throughout the period between the injury causing death and death itself.⁶¹ Where there has been a relatively short period of consciousness between the accident and death, nominal damages can be granted.

In other words, Adam has to be aware of and able to feel his pain throughout his admission in the hospital in order for him to raise a claim for pain and suffering. The more conscious Adam is of his condition, the greater amount of damages awarded to him.

There have been instances where the Court awarded damages for pain and suffering where the Plaintiff was partially unconscious. Firstly, in *Thangavelu v Chia Kok Bin*, the Court awarded damages of RM20,000 for pain and suffering prior to death, to the Plaintiff, an infant who was in a coma but not totally unconscious, and who died 11 months later as damages of pain and suffering prior to her death.⁶² Secondly, in *Moo Ah Kow v TNB Distributions Sdn Bhd* [2009], the Plaintiff who was conscious but died after

58 *Pancaran Prima Sdn Bhd v Iswarabena Sdn Bhd* [2020] MLJU 1273

59 *Sam Wun Hoong v Kader Ibramshah* [1981] 1 MLJ 295 at 296.

60 *Lim Poh Choo v Camden & Islington Area Health Authority* [1979] 2 All ER 910 HL

61 David Kemp QC on Damages for Personal Injury and Death, 7th edn, at p. 124

62 *Thangavelu v Chia Kok Bin* [1981] 2 MLJ 227

one month was also awarded RM20,000 for pain and suffering.⁶³ However if one is totally unconscious and unaware of his condition, an award can still be made under loss of amenities because “for the rest of his/her life, the Plaintiff has lost everything that makes life worth living.”⁶⁴ However in cases where there is positive evidence or it is an agreed fact that the deceased died instantly in a collision, there can be no room for an award for damages for pain and suffering.⁶⁵

In order to determine this, the Court will take into account factors such the gravity of injuries sustained by Adam. The court may also consider the following: a) physical pain from the injury that includes past and prospective pain and pain from medical treatment; b) medical treatment undergone (i.e. the length of stay in the hospital, the number of operations); c) the total or partial loss of use of the affected parts of the body; d) the mental element of depression and e) reduction of the expectation of life.⁶⁶

There is also an emerging trend where Courts may grant compensation for pain and suffering in relation to future medical procedures. This was seen in *Mohamad Waddafi Tajuddin v Low Kin Foong & 2 Ors. (WCT Engineering Bhd.)* – Third Party where the Court awarded RM7,000 for pain and suffering.⁶⁷ Similarly in *Chong Kok Meng & Anor v Muhammad Zahirulzahar bin Zainudin*, the Court awarded RM20,000 since the Plaintiff had to undergo 4 future operations.⁶⁸ However damages for pain and suffering for future operations are not guaranteed as in the case of *Azami Ahmad & Anor v Mohd Yunan Che Ya*, the court rejected the claim for future pain and suffering due to the absence of evidence confirming that the plaintiff had undergone or would definitively undergo the recommended procedure; particularly since four years had elapsed between the specialist’s report and the trial date.⁶⁹

63 Moo Ah Kow v TNB Distributions Sdn Bhd [2009] 1 LNS 1472

64 Lim Poh Choo v Camden Health Authority [1980] AX 174; H West & Son v Shephard [1964] AC 326; Wise v Kay [1962] 1 QB 638; Tan Kok Lam (next friend to Teng Eng) v Hong Choon Peng [2001] 2 SLR 389 CA

65 Lee Ah Lai v Hj Sirat Duah [2006] 5 CLJ 505 HC Brunei, David John Leonard JC

66 S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book Sdn Bhd 2023, p.76, 77

67 Mohamad Waddafi Tajuddin v Low Kin Foong & 2 Ors. (WCT Engineering Bhd.) – Third Party [2021] 2 PR19

68 Chong Kok Meng & Anor v Muhammad Zahirulzahar bin Zainudin [2019] MLJU 1340

69 Azami Ahmad & Anor v Mohd Yunan Che Ya [2009] 1 LNS 851 HC.

G. Awarding General Damages

In this instance, assuming the total general damages to be awarded is RM100,000.00, if the liability is found to be 100% against Ben, then the Court may award Adam with the full sum of RM100,000 as general damages. However, if there is any evidence of contributory negligence on Adam's part, i.e. where Court finds Adam to be, for example, 10% liable for his role in the accident and Ben to be 90% liable for causing the accident, the Court will award Adam with 90% of RM100,000.00 which amounts to RM90,000.00. In instances where liability of the matter is categorised under RTM or the Court decides there is a 50:50 liability among parties, then Adam may be awarded 50% of RM100,000.00 which would entail him to RM50,000.00. In this regard, liability in a given case is extremely crucial as it will determine the total damages Adam will be awarded with.

1. Special Damages

In ordinary language, the term “special damages” may suggest something unusual or extraordinary. The Oxford Advanced Learners Dictionary defines the word “special” as meaning “not ordinary or usual” and also “different from what is normal”.⁷⁰

However, in legal terms, “special damages” refers to specific monetary losses resulting from another party's wrongful action, which can be clearly calculated. For example, if someone's property is damaged by another's wrongdoing, the financial loss (i.e. the cost of repair, replacement or restitution) would be referred to as special damages. Likewise, if someone is physically injured in an accident, their medical expenses at a clinic or hospital can be measured in monetary terms, which also constitutes special damages. Similarly, when someone claims a fixed amount for services performed, loans given, or goods delivered, that claim involves a “liquidated sum.”

Importantly, a claim for special damages is not automatically awarded. Just because it is a matter of special damages, it does not mean that the aggrieved person can get all that he wants. The claimant must not only demonstrate that the expenditure was

⁷⁰ Oxford Learner's Dictionaries, https://www.oxfordlearnersdictionaries.com/us/definition/english/special_1?q=special+>, accessed 16 November 2025

indeed incurred but also that it was reasonable in the circumstances.⁷¹ Moreover, under Section 74(1) of the Malaysian Contracts Act 1950, it must be proven that the loss is not too remote, that is, the damage must have been a direct consequence of the defendant's conduct.⁷² To simplify, Adam cannot expect to recover every expense; he must show both necessity and a clear causal link between Ben's actions and the loss suffered.

2. Medical Expenses

Adam may claim medical expenses that was and will be incurred as a result of Ben's tort, provided they are reasonable. The range of medical expenses that Adam may claim includes but is not limited to hospital bill, medication, plastic surgery, psychiatric treatment, etc. Whether such expenses are reasonable is a question of fact and degree to be determined by the Court based on the facts of the case.⁷³ The duty to prove such expenses are reasonable and to mitigate related losses lies on Adam.⁷⁴

In most cases, the victim of an accident will be sent to the nearest government hospital for immediate emergency treatment. However, victims like Adam are not necessarily confined to receiving treatment from government hospitals only. Adam has the freedom to seek treatment from private hospitals as well and the cost of treatment from private hospitals can be claimed provided it is reasonable.⁷⁵ The Court of Appeal laid down the test for seeking compensation for private medical treatment costs. Firstly, Adam must prove that it was justified for him to seek treatment at the private hospital and secondly that the amount spent was reasonable.⁷⁶ This was similarly followed by the High Court in *Suriyati Takril v Mohan Govindasamy and Anor* [2001]⁷⁷. In most cases where the victim was initially admitted in a government hospital and then later transferred to a private hospital for treatment, the court may grant compensation of only one

71 The Star, Articles of Law by Bhag Singh, Awarding damages in civil claims, <https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/awarding-damages-in-civil-claims>, accessed on 9 July 2025

72 Halim Hong & Quek, Monetary Compensation Awarded by The Court < <https://hhq.com.my/posts/monetary-compensation-awarded-by-the-court/> > accessed on 10 July 2025

73 Mohamed Ibrahim v Christopher Piff [1981] 1 MLJ 221; Seah Yit Chen v Singapore Bus Company [1990] 3 MLJ 144

74 Kasirin bin Kasmini v The Official Administration and Anor [1991] MLJU 22

75 Yaakub Foong v Lai Mun Keong & Ors [1986] 2 MLJ 317

76 Chai Yee Chong v. Lew Thai [2004] 2 MLJ 465 [2004] 2 CLJ 321

77 Suriyati Takril v Mohan Govindasamy and Anor [2001] 2 MLJ 275

third of the cost and not the full expense.⁷⁸ In fact, Adam must prove that the same treatment was not available at the relevant government hospital, failing which he may not be fully reimbursed.⁷⁹ A similar situation can be seen in *Dharam Singh Dhillon v Ibrahim bin Shaaban & Anor* in which the cost of medical operation which was incurred from an overseas hospital was not allowed as the similar operation could have been done locally.⁸⁰ The Court will also most likely award transportation expenses for Adam's family who visited him whilst Adam was admitted in the hospital and cost of transportation for any outpatient treatment Adam incurs.⁸¹

3. Loss of Earnings

(a) What Amounts to Earnings?

In Black's Law Dictionary, 'earnings' are defined as 'revenue gained from labour or services, from the investment of capital or from assets.'⁸²

If Adam was unable to work after the accident or is unable to continue working even after recovering from his injuries then Adam may be able to claim for loss of earnings by way of a fixed multiplier based on Section 28 A Civil Law Act 1956 and Civil Law (Amendment) Act 1984. Typically, loss of earnings is divided into actual loss and future loss.⁸³ A person who has never earned any income prior to the accident (i.e. unemployed, student, child) is not entitled to claim this. Similarly, anyone who is deceased but was aged 60 and above at the time of the accident would not be able to claim loss of earnings even if the person was gainfully employed.⁸⁴

(b) Proof of earning

Adam would also need to provide proof of his earnings in order to be able to claim for such a loss.

78 Heng Poh Kiatand Anor v Aphissit Sae Wong [2001] MLJU 13

79 Hong Teng Yong v Khaw Kim Seng [2011] 3 CL 401

80 Dharam Singh Dhillon v Ibrahim bin Shaabanand & Anor [1995] MLJU 51

81 Chan Kim Hee v Karam Singh & Anor

82 S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book Sdn Bhd 2023, p.352

83 Cookson v Knowles [1978] 2 All ER 604 HL

84 Civil Law Act, s.7(3)(iv)(a)

Documentation that will assist Adam include a letter of employment from Adam's employer, contract of employment (where applicable) and payslips before and after the accident. These documents would help eliminate the possibility of any false or exaggerated claims. In *Leng Yang Sua & Anor v Ng Yen Kee & Anor*, the Court held if there is no evidence available and is not produced, the Court should not be left to speculate what would be an appropriate sum to award.⁸⁵ In *Renhome Bricks Factory Sdn Bhd v Watah Umpin* [2008], it was held that formal proof such as Income Tax returns, EPF statements or SOCSO documents were not necessary.⁸⁶

Oral evidence may also be relied upon to prove the amount of earnings in some cases such as in *Abdul Ghani Hamid v Abdul Nasir Abdul Jabbar & Anor* [1995].⁸⁷ For example, in *Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund* [2022], the court accepted the Plaintiff's contract of employment which it held, sufficiently proved on a balance of probabilities, any alleged loss of earnings, despite the lack of formal Income Tax, EPF and SOCSO documents. This was because the Plaintiff, being a party to the contract of employment could be considered as a maker or co-maker of the document evidencing the contract of employment. Further, the Plaintiff's basic salary of RM4,000.00 per month was expressly stated in the contract of employment.⁸⁸

(c) How to determine the multiplicand

In order to determine the multiplicand, one must conduct the following: -⁸⁹

Step 1: Determine the gross monthly earnings

Step 2: Add fringe benefits (i.e. EPF contribution by employer, allowances, subsidies provided by employer, overtime and part time earnings)

Step 3: Deduct any compulsory contributions (i.e. SOCSO, EPF, pensions), income tax⁹⁰

⁸⁵ *Leng Yang Sua & Anor v Ng Yen Kee & Anor* [1986] CLJ 488 Rep HC; *Tah Tai v Hock Soon Co* [2011] 1 LNS 492

⁸⁶ *Renhome Bricks Factory Sdn Bhd v Watah Umpin* [2008] 4 MLRH 430

⁸⁷ *Abdul Ghani Hamid v Abdul Nasir Abdul Jabbar & Anor* [1995] 2 MLRH 795

⁸⁸ *Pantai Medical Centre Sdn Bhd v Fareed Reezal bin Arund* [2022] 2 CLJ 173 CA

⁸⁹ S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book Sdn Bhd 2023, p.34

⁹⁰ Yaakub Foong

Step 4: from the nett earnings, further deduct estimated living expenses⁹¹

(d) What amounts to living expenses?

For the purposes of deducting living expenses, Courts take into account expenses incurred by Adam in earning the income, i.e. expenses related to the work he does and not other expenses to maintain himself such cost of housing or clothing.⁹² This may include petrol expenses incurred to travel to and from work, meals at the workplace, maintenance of vehicles and taxi/ bus fares incurred in relation to work.⁹³ This definition was similarly followed in *Muralitharan Naraisamy & Anor v Ahmad Nowawi Saad* [2011].⁹⁴

However, the courts will not simply deduct any amount as living expenses if Adam himself does not admit the same or if the Defendant fails to prove through cross examination that Adam incurred living expenses at the time of the injury.⁹⁵ This was similarly stated by Abdul Malik bin Hj. Ishak J who held, “it is only logical that some part of the Plaintiff’s earnings must have been devoted to his own maintenance. But no matter how logical it may appear to be, it can only be deducted if the amount is either admitted by the Plaintiff or proved by the Defendant.”⁹⁶ For instance if Adam is earning RM1,500.00 it may be reasonable to deduct RM300 for his work related living expenses which leaves Adam with a total of RM1,200. However, this amount may not be automatically deducted and it would still be necessary for Adam to admit to this or for Ben’s lawyers to establish this during cross examination.

(e) Loss of Future Earnings

Loss of future earnings can be classified as partial loss or total loss depending on the extent of the injuries sustained by Adam. Partial loss of future earnings arises in situ-

91 Shahrizam bin Damsah v Mahathir bin Mohd Isa & Anor [2014] 10 MLJ 490

92 S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book Sdn Bhd 2023, p.3492

93 Chang Chong Foo v Shivanathan [1992] 2 MLJ 473.

94 Muralitharan Naraisamy & Anor v Ahmad Nowawi Saad [2011] 1 CLJ 201 HC

95 Idris bin Adam v Flecre Bhd [2014] 7 MLJ 629 HC

96 Abdul Ghani b. Hamid v Abdul Nasir bin Abdul Jabbar [1995] 4 MLJ 182; Tang Tiew Yong & Ors v Wong Jong Hoon & Anor [2002] 7 CLJ 455 HC

ations where Adam is able to return to some form of employment after the accident but is unable to earn the same income as he did prior to the accident. On the other hand, the total loss of future earnings applies when the injuries suffered are so severe that Adam is rendered permanently incapable of engaging in any form of employment after the accident. In order to claim for loss of future earnings there has to be real, demonstrable and quantifiable reduction in income potential. This cannot be based on mere assumptions or speculation and credible evidence must be provided to support the claim. Conversely, a claim for loss of earning capacity may still arise even if the Plaintiff continues working, where there exists a residual risk that the Plaintiff may be forced out of employment entirely due to the long-term impact of his injuries.⁹⁷

In assessing the loss of future earnings, the Courts typically apply the multiplier-multiplicand method. The multiplicand refers to the Plaintiff's projected annual earnings loss, while the multiplier reflects the number of years the Plaintiff is expected to remain in the workforce from the time of the accident but is now unable to earn due to the injury. These calculations are influenced by several factors including the nature and permanence of the injuries, the degree of disability and the Plaintiff's previous occupation and earning history. A fundamental requirement is that the Plaintiff must have been earning an income through employment or other gainful means before the accident.⁹⁸ The term 'before' is taken to mean 'at the time' of the accident.⁹⁹ This was similarly stated by Abdul Hamid Omar LP in which he mentioned "it is abundantly clear that the legislature, in its own wisdom, decided that an injured person ought not to get any damages in a claim either for loss of future earnings or loss of earning capacity unless before the accident (at the date of the accident) he was in fact receiving earnings."¹⁰⁰ This was also amended by Section 28A(2)(c)(ii) which changed the word before to 'at the time of the accident'.

97 S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book Sdn Bhd 2023, p.343 & 344

98 S. Santhana Dass, *Personal Injury Claims*, 3rd edn, Marsden Law Book Sdn Bhd 2023, p.343 & 344

99 *Dirkjie Peiternella Halma v Mohd Noor bin Baharom* [1990] 3 MLJ 103

100 *Tan Kim Chuan & Anor v Chandu Nair* [1991] 1 MLJ 42 SC

In a recent Federal Court decision in *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016], the Court considered the question of the standard of proof for future damage. Abdul Hamid Embong FCJ in delivering the judgment of the Federal Court said: -

“We are of the view that the standard of proof with regard to the assessment of future loss or damage is on the balance of probabilities, but with a lower degree of certainty as to the occurrence of such loss or damage in the future. From the authorities, one can say that such a lower degree to be attached is best termed by the word ‘possibility’, ‘chance’, ‘risk’, ‘danger’ or ‘likelihood’ of the future damage, which is still, in our opinion on a balance of probabilities.”¹⁰¹

With reference to the Civil Law Act 1956, one would not be awarded damages for loss of future earnings if the person was 60 years old and above at the time of the accident unless it is proved or admitted that the person was receiving earnings by his own labour or other gainful activity before he was injured.¹⁰² Hence if Adam was 60 years old at the time of the accident he would not be able to claim for loss of future earnings. Comparably, if Adam was 30 years or below at the time of the accident, Adam’s multiplier for his loss of future earnings will be capped for a duration of 16 years.¹⁰³ However, since Adam is 35 years of age at the time of the accident, Adam’s multiplier would be calculated as per Section 28A(2)(d)(ii) which states as follows:-

Damages in respect of personal injury

28A. (2) (d) in assessing damages for loss of future earnings the Court shall take into account that—

(ii) if the Plaintiff is aged between 31-59 years at the time, the number of years of purchase is calculated as follows [(60-age at the time of injury) divided by 2]¹⁰⁴

¹⁰¹ *Inas Faiqah bt Mohd Helmi (an infant suing through her father and next friend, Mohd Helmi bin Abdul Aziz) v Kerajaan Malaysia & Ors* [2016] 2 MLJ 1

¹⁰² Civil Law Act 1956, s.28A (2)(c)(i); Civil Law (Amendment) Act 2019 s.5(a)(i)

¹⁰³ Civil Law Act 1956, s.28A (2)(d)(i)

¹⁰⁴ Civil Law Act 1956, s.28A (2)(d)(ii)

(f) Loss of Earning Capacity

If the court is satisfied that one suffered a loss of earning capacity, he will be awarded a sum as part of the general damages for his disability suffered as a result of the injuries sustained, instead of compensation for loss of future earnings.¹⁰⁵

This is as per *Dirkje* (SC) in which a Dutch nurse who was on no pay leave for 2 years was not entitled to claim for loss of future earnings but the court awarded her loss of earning capacity instead.¹⁰⁶

Brown LJ explained that a loss of future earning capacity arises when “there is a substantial or real risk that one will at some time of his working life lose his job or get a less paid employment because of the effect of his injuries”.¹⁰⁷ The risk of losing his present job or not obtaining an equally well-paid job must be substantial or real not ‘speculative’ or ‘fanciful’.¹⁰⁸ This can be seen in *Chai Yee Chong v Lew Thai* [2004], in which the loss of future earning capacity was not allowed because the Plaintiff returned to work and was earning more than at the time of accident.

Therefore, in order for Adam to claim for loss of earning capacity, he may do so even if he has returned to his previous job but there must exist a real risk that he would either lose his job in the future and/ or he would only be able to obtain employment with lesser pay, or would be at a disadvantage in getting an alternative job. An example was iterated in the case of *Muhammad Asyraf Zulkifli v Muhammad Hafiz Zainal Abidin* [2019] where the High Court awarded RM35,000 as loss in earning capacity to an amputee who earned RM960 per month.¹⁰⁹ Similarly, in *Dirkje v Mohd Nor bin Baharam*, the Court awarded the Plaintiff who was on no pay leave RM20,000 for loss of earning capacity.

105 Syed Agil Barakbah FCJ in the Federal Court case of *Ngooi Ku Siong; Ngooi Ku Siong v. Aidi Abdullah* [1984] 1 CLJ Rep 294; [1985] 1 MLJ 30 at page 33, FC

106 *Dirkje Peiternella Halma v Mohd Noor Bin Baharom & Ors* [1990] 3 MLJ 103

107 *Moeliker v A Reyrolle and Co Ltd* [1977] 1 All ER 9

108 *Azizi bin Amran b Hizzam bin Che Hassan* [2003] 6 AMR 429 HC

109 *Muhammad Asyraf Zulkifli v Muhammad Hafiz Zainal Abidin* [2019] 1 LNS 47

V. CONCLUSION

For victims like Adam, the aftermath of an accident can be overwhelming. Beyond the physical pain and emotional trauma lies a complex legal landscape that can be difficult to navigate without proper guidance. Many accident victims may be unaware of their rights, unsure of the procedures involved, or intimidated by the prospect of dealing with insurance companies and legal professionals.

By understanding the key legal concepts and procedural steps from lodging a police report and seeking medical attention, to gathering documentation, issuing a letter of demand, and potentially initiating court proceedings; Adam and other victims like him can take control of their situation and begin the process of recovering losses, receiving compensation and rebuilding their life. The law offers a structured path for recovery, but it requires proactive participation, attention to detail, and timely decision-making.

Moreover, the importance of professional support cannot be overstated. Legal practitioners, medical experts, and even financial advisors can help quantify losses, establish causation, and ensure Adam receives the compensation he is lawfully entitled to. In a system where procedural missteps can jeopardise an otherwise valid claim, professional guidance often makes the difference between justice served and justice denied.

Ultimately, the legal process is designed not only to compensate but to restore, as far as money can, the dignity, security, and stability lost due to another's negligence. With the right knowledge and support, victims like Adam can move forward with confidence, knowing that the law stands ready to defend their rights, protect and offer a measure of relief in times of distress.

MEDICAL NEGLIGENCE IN MALAYSIA: RIGHTS IN THEORY, HURDLES IN PRACTICE

Nivashini Sai Naidu A/P Bavanandam Naidu¹

ABSTRACT

The Malaysian legal framework has extensive legislation on citizens' rights when it comes to medical negligence. However, exercising those rights in advocating for compensation or damages has endless complexities. The aim of this article is to scrutinise the gaps in the legislation whereby the consequences of being negligent seem straightforward only in theory, but not in practice. The hurdles that are showcased when pursuing to sue encompasses the substantial delay in making the court trials take place, and the complicated process of bringing the claim to sue for negligence that automatically discourages victims from seeking justice. This article utilises the doctrinal legal research methodology to critically analyse and decipher a few cases such as *Foo Fio Na v Dr Soo Fook Mun & Anor* and *Thinnagaran A/L Pechumuthu v Kerajaan Malaysia & Ors* to properly understand the direness of this legal issue. It was found that the unreasonably strict timeline, the exorbitant cost of the expert witness's testimony along with the fact that courts still heavily rely on medical discretion, indirectly limits a patient's freedom to seek justice. The existence of countless judicial reforms has also proved insufficient in bridging this gap in the legal system. Thus, this article offers detailed insights and case commentary that highlights loopholes in our law that require public attention. It also offers a student perspective and a fresh point of view of areas that are often overlooked and deemed unimportant.

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I. INTRODUCTION

The right to life is the foundation of any civilised legal system, and is shown prominently in Article 5 of the Federal Constitution of Malaysia. Article 5 states that no person shall be deprived of his life or personal liberty save in accordance with law.¹ ‘Life’ encompasses more than just physiological and metabolic function. It includes the quality of life. Article 5 clearly demonstrates one’s rights to an untroubled, content existence. However, when negligence in healthcare causes severe, grievous harm to a patient, that negligence has infringed their Article 5 rights. Therefore, seeking justice from medical negligence through litigation and alternative dispute resolutions (‘ADR’) is the only mechanism to safeguard this constitutional guarantee. This field in the law is currently undergoing countless jurisprudential reforms. Despite these progressive changes, an obvious dissonance remains.

It is evidently clear that substantive laws such as The Civil Law Act 1956 explicitly provides for damages and compensation. It promises that if a person is deceased or incapacitated due to malpractice, the immediate family members have a right to monetary compensation for loss of support and it symbolises a governmental guarantee that malpractice has a price.² The application of this act, however, is often overpowered by the limitation period set in Section 2 of the Public Authorities Protection Act 1948 which states that the plaintiff cannot sue the government or governmental officer unless a lawsuit is filed within the thirty-six month limitation period. The imposition of the limitation period is justified by ensuring finality. A strict 36-month limitation period protects public healthcare authorities from unnecessary and unpredictable liabilities.

1 Federal Constitution of Malaysia, Article 5.

2 Civil Law Act 1956, s.7.

Ensuring finality aids in efficient management of governmental resources allowing for more realistic fiscal planning in the healthcare sector³. However, this rigid time frame prioritises benefitting the government over the fundamental right to life established in Article 5. The judicial reviews performed encourage patients to fight for justice by amending rights in theory, but restricting them from pursuing claims by imposing substantial procedural obstacles. As long as procedural barriers exist, justice is only available to the affluent and no longer remains accessible to an average citizen. Thus, this paper comments on the three main hurdles faced by the plaintiffs, which are, the informational asymmetry between the victims and the healthcare officials, the restrictions caused by the timeline of occurred negligence, and the economic burden faced by the victims. It also highlights and stresses the upcoming legislative reforms in the medico-legal field. Finally, the core conclusion of this article establishes that without systemic amendments to the procedural medical law, Article 5 remains a resounding but hollow promise for victims of medical negligence.

II. BACKGROUND

The Malaysian legal framework that governs medical negligence is substantively known to protect patient rights. It is primarily centred around the Civil Law Act 1956 (CLA), a piece of legislation that acts as a statutory medium to aid in claiming damages. Specifically, Section 7 of the Act allows for compensation to the immediate family. It creates a system where the value of human life that has been extinguished by professional carelessness, can be quantified and distributed to the surviving dependents. The statute stated above is complemented by the Private Healthcare Facilities and Services Act 1998 (PHFSA), which was established to strictly monitor and subtly control the upcoming private medical industry. This statute obligates every single private institution, from ambulatory care centres to renowned hospitals, to adhere to strict and rigorous standards that involve licensing and operational safety.

³ S Balan, 'The Public Authorities Protection Act 1948: A Case for Repeal' [2007] 34 Journal of Malaysian and Comparative Law 87.

Both these legislations work in tandem in regulatory oversight. Under the PHFSA 1998, regulatory oversight is constantly managed with a compulsory licensing regime where the Director General of Health has the authority to impose safety standards outlined by the Ministry of Health.⁴

This system exists simultaneously with the CLA 1956, which provides guidance on the processes of litigation by demonstrating methods of calculating financial compensation once a breach of duty is established by the PHFSA 1998.⁵ Together, while the PHFSA 1998 identifies systemic errors and imposes corrective reforms through reviews and inspections, the CLA 1956 provides a structured guide to obtain remedies and calculate compensation. Ultimately, these statutes diligently uphold patient rights in theory. They primarily focus on guaranteeing the promise enshrined in Article 5 of the Federal Constitution, which states that ‘no person shall be deprived of his life or personal liberty save in accordance with law’. In terms of medical negligence, the term ‘life’ has been interpreted judicially to encompass more than just the biological aspects; it encompasses their sanity along with the quality of life. Thus, when the physician’s vigilance wavers, it does not only mean the doctor has breached the duty of care, the doctor has violated a constitutionally protected interest. However, as it has been continuously proven via legal history, statutes only protect patients in theory due to constant deference to the medical profession.

To understand the current state of the Malaysian judiciary, particularly the legislation related to medical negligence, one must fully comprehend the definition and role of the infamous ‘Bolam’s Test’. This doctrine obtains its origins from the 1957 English case of *Bolam v Friern Hospital Management Committee*. The facts of this case specifically centres on the state of the psychiatric field then. Mr Bolam, a patient diagnosed with depression, voluntarily agreed to undergo electro-convulsive therapy (‘ECT’). Prior to the procedure, the doctors did not administer any form of relaxants, nor did they restrain him while performing the ECT.

4 Private Healthcare Facilities and Services Act 1998

5 Civil Law Act 1956

When Mr. Bolam was going through the procedure, the violent convulsions caused by the shocks caused him to suffer from severe physical injuries, which include fractures to both hip bones. Due to this catastrophe, Mr. Bolam filed a lawsuit, arguing that a competent and eligible doctor would not perform such malpractice. However, the High Court of England delivered a verdict which became a landmark that symbolised a certain immunity and sovereignty possessed by doctors. The case was tried before Mr. Justice McNair and a jury who ultimately declared a foundational principle: a doctor is not negligent if he has acted in accordance with a practice accepted as proper by a ‘responsible body of medical men’ skilled in that particular art. The court declared that if there is a contrary body of opinion, the opinion is not sufficient to establish a breach of duty⁶. As long as doctors were performing a norm in their fraternity, even if the said norm is a form of malpractice, they are not considered liable for it. This indirectly established that a certain doctor’s standard of care towards their patient was no longer decided by the courts, but by the profession itself. For decades, the Malaysian legal system adopted the Bolam’s Test in countless medico-legal cases involving diagnosis, treatment, and the duty to advise on risks. In all these cases, the judiciary stepped back and allowed for the doctors themselves to take charge without second-guessing them. This created an imbalanced legal environment where the majority of power was given to the body who performed the negligence.

The opposition to the supremacy awarded to the medical fraternity occurred not in England, but in Australia, with the shocking case of *Rogers v Whitaker* in 1992⁷. This case caused a revelation in the concept of patient autonomy. Maree Whitaker was a woman who suffered right-eye blindness for over 40 years due to a childhood injury. On her routine checkup, her ophthalmologist, Dr Rogers, recommended to perform elective surgery to not only amend her visual impairment but also improve her facial appearance as well.

6 Bolam v Friern Hospital Management Committee [1957] 1 WLR 582.

7 Rogers v Whitaker [1992] 175 CLR 479.

During consultations prior to the surgery, she expressed significant concern and continuously questioned Dr. Rogers on the risks and complications bound to occur in her left eye. Dr. Rogers assured her that the surgery would be carried out smoothly and performed the surgery with utmost competence. However, he failed to warn Mrs Whitaker of an extremely rare risk known as sympathetic ophthalmia. Sympathetic ophthalmia is a condition where the immune system attacks the healthy eye after trauma has been inflicted on the damaged eye. The chance of facing such risk was microscopic, approximately 1 in 14000. Tragically, Mrs. Whitaker became a victim of such risk, leaving her visually impaired in both eyes. When she filed a negligence claim against Dr. Rogers, he invoked the Bolam defence. He summoned a team of competent surgeons from the same department to testify that they would fail to mention such risk to a patient as well. Supposedly, Dr. Rogers deserved to win under the Bolam test, However, the High Court of Australia refused to declare him as not liable and established that any risk is ‘material’ if a patient would perceive it to be significant to cause any damage to them. Thus, Mrs. Whitaker, who mostly relied on her left eye to see, would certainly perceive sympathetic ophthalmia as significant. The court established that ‘the law should recognize that a doctor has a duty to warn a patient of a material risk inherent in the proposed treatment’.

Furthermore, another significant case emerged to oppose the Bolam’s test by utilising sheer logic, which is the case of *Bolitho v City and Hackney Health Authority*⁸. This case commenced when two-year-old Patrick Bolitho was admitted to the hospital due to respiratory distress. The situation then swiftly escalated into croup and respiratory failure, but still the attending registrar failed to provide treatment to the child. Subsequently, he suffered cardiac arrest and irreversible brain damage. The case was then brought to court as a claim in negligence, where the attending doctor argued that even if she attended to the toddler, she would not have intubated him. This inaction was supported by fellow medical peers.

8 Bolitho v City and Hackney Health Authority [1997] UKHL 46

Based on the Bolam's Test, the expert opinion expressed by this 'responsible body' would have essentially protected the defendant. However, the House of Lords redefined the authority possessed by the medical fraternity by establishing the Bolitho qualification. Lord Browne-Wilkinson expressed that an expert opinion that does not satisfy logical analysis cannot be admissible in court. The Bolitho qualification essentially ensured that the role of the final arbiter of reasonableness returned to the judiciary. This confirmed that clinical jargon should never overpower the elements of justice in Malaysian medico-legal jurisprudence.

Despite the paradigm shift caused by *Rogers v Whitaker* and *Bolitho v City and Hackney Health Authority*, the Malaysian legal system diligently clung onto Bolam's test for another decade. They finally strayed away in 2007, with the Federal Court's watershed decision in *Foo Fio Na v Dr Soo Fook Mun & Anor*. This tragic case catalysed a legal reform to reduce the immunity awarded to negligent doctors⁹. Due to a catastrophic motor vehicle accident, the plaintiff suffered closed dislocation to her C4 and C5 vertebrae. Dr Soo performed an 'open reduction' surgery where the nape of her neck was surgically opened, the dislocated vertebrae moved into position, and then secured using a bone graft and a loop of wire to stabilize the spinal cord. However, he failed to warn her of the grave risk of paralysis that was miniscule but bound to happen if the surgery were to fail. Tragically, the surgery failed and caused her total paralysis because the wire was found to be pressuring the spinal cord. A laminectomy was performed by the same surgeon, to remove the wire loop that was causing the compression. The second operation did not remove the paralysis, and Foo Fio Na remained confined to a wheelchair.

9 Foo Fio Na v Dr Soo Fook Mun & Anor [2007] 1 MLJ 593.

At the lower courts, Bolam's test was applied and resulted in a miscarriage of justice for Foo Fio Na. However, when the case reached the Federal Court, the judges realised that the Bolam's test would not be suitable in granting Foo Fio Na justice. Thus, the Federal Court strongly opposed utilising the Bolam's Test. They decided to adopt the reasoning from *Rogers v Whitaker*, stating that the 'standard of care' regarding advising patients on surgical risks and complications, was fully up to the court's discretion, not the medical profession. The judgement indirectly declared that patients possess an autonomy to decide what they want to do with their body, and they can only do so with the knowledge of potential risks and complications.

III. MAIN ANALYSIS

The gap between the substantive part of Malaysian medical law and its procedural applications are strikingly obvious in the countless hurdles plaintiffs must face when pursuing a claim. While the theoretical part of the legal system has encouraged patients, the catastrophic reality involves challenges like informational asymmetry, inequalities in timelines, and destructive economic barriers.

There is a constant imbalance in information between a patient and the medical institution. While the patient is the primary subject of their own medical data, the hospital is the protector of the patient. In the adversarial litigation system, this custodial power is often weaponised. This requires a patient to establish causation in order to successfully plead for negligence. However, the process of establishing causation is nearly impossible without the access to their own medical records, which contains the detailed history of treatment and diagnosis. Yet, the legal system has granted the power to the potential defendant to impose a deadlock on the very information that can be used to find them liable. Theoretically, our legal framework has already tried to reduce the imbalance in information.

The High Court's ruling in *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors* marked a reform in this area. Judge Vazeer Alam Mydin Meera established that based on the sensitive and personal nature of doctor-patient relationships, patients possess an 'innominate and qualified right' to access their own records of medical history without a court order¹⁰.

The courts blatantly scrutinised the 'guarded conduct' of hospitals that compelled patients to pay unnecessary costs and filing court orders just to access records of their own data. To comprehend the direness of this situation, one must first understand the facts of the case of *Nurul Husna Muhammad Hafiz & Anor v Kerajaan Malaysia & Ors*. The mother of Nurul Husna had a history of emergency Lower Segment Caesarean Section ('LSCS'). Despite the history of high-risks, the doctors failed to inform her on the risks of undergoing Vaginal Birth After Caesarean ('VBAC') compared to just an elective Caesarean. Severe complications arose during the delivery, and the doctors did not immediately request for a paediatric specialist to attend to the newborn. This led to Nurul Husna suffering Hypoxic Ischaemic Encephalopathy which made her permanently disabled and wheelchair-bound. Thus, her parents decided to file a lawsuit claiming that her disability was due to negligence during the delivery.

Before filing the claim, the parents requested Husna's medical records to assess the strength of their case. The hospital blatantly rejected their request, mandating them to obtain a Court Order first. The High Court declared the refusal as completely unreasonable and established that patients have an 'innominate and qualified right' to access their own medical records. Eventually, the court found the defendants liable and awarded RM2.78 million in damages. The government even argued this sentence, claiming that Nurul Husna is eligible to receive 'free treatment' at government hospitals.

10 Nurul Husna Muhammad Hafiz v Kerajaan Malaysia [2015] 1 CLJ 825.

The court rejected the argument, saying that the plaintiffs have a right to not rely on the tortfeasor for future care. However, despite the precedent in Nurul Husna's case, implementing this in practice is still not prevalent. While Regulation 44 of the Private Healthcare Facilities and Services Regulations 2006 does allow patients 'qualified right' to their own medical records, this right is not absolute.

Ultimately, the disclosure of patients' medical information is entirely at the discretion of the medical facility.¹¹ By withholding original documents, facilities can even release mere summaries of information, rather than the substantive data required for a successful negligence claim. Moreover, the MMC Guideline 002/2006 on Medical Records and Medical Reports state that 'ownership' of medical data is by the hospital, not the patient.¹² This proves the 'qualified right' was just an illusion to show that patient rights are upheld substantively.

While the law does provide remedies for negligence, it simultaneously imposes strict limitation periods within which a plaintiff must initiate a claim. For patients who go to private hospitals, the Limitation Act 1953 offers a reasonable timeline, Section 6A establishes the 'Principle of Discoverability', It acknowledges that certain medical injuries caused due to malpractice may not manifest immediately. This section states that the limitation period does not commence until the injury is noticed by the victim¹³. This diligently upholds the patients' rights and declares that the negligence should not be ignored just because the patient did not notice it sooner. However, for the average citizen that relies on the government for healthcare services, this protection is not available. The High Court's decision in *Thinnagaran A/L Pechumuthu v Kerajaan Malaysia & Ors* showcases the harsh reality where the Court established that the Limitation Act 1953 does not override Section 2 of Public Authorities Protection Act 1948¹⁴. Any lawsuit filed against government hospitals must be filed within the 36-month limitation period regardless of when the victim discovered the

11 Regulation 44, Private Healthcare Facilities and Services (Private Hospitals and Other Private Healthcare Facilities) Regulations 2006 [P.U. (A) 138/2006]

12 Malaysian Medical Council (MMC), Guideline 002/2006: Medical Records and Medical Reports

13 Limitation Act 1953, s 6A.

14 *Thinnagaran A/L Pechumuthu v Kerajaan Malaysia & Ors* [2024] MLJU 3433.

effects of malpractice¹⁵. This indirectly just mindlessly protects the state from liability of negligence. This draconian concept is duly documented in the case of *Thinnagaran A/L Pechumuthu v Kerajaan Malaysia & Ors*. On 2nd January 2016, Mr Thinnagaran was admitted to Taiping Hospital after suffering a severe motor vehicle accident. Due to negligent monitoring, he ended up developing Fat Embolism Syndrome resulting in Hypoxic Ischaemic Encephalopathy. Unlike a private hospital patient who has 6 years to file a negligence lawsuit, Mr Thinnagaran was imposed with a rigid 36-month window to sue the hospital. Unfortunately, the filing of said claim was delayed and the courts refused to grant him justice. Unanimously, the Taiping High Court stuck to the literal meaning of the legislation. They stated that general laws like the Limitation Act cannot supersede special laws such as the Public Authorities Protection Act. Thus, this further justifies that the state enjoys special protection and immunity against medical negligence.

The process of presenting evidence for medical negligence claims varies from other types of claims. Generally, laypersons rarely testify in court during a medical negligence trial. Testimonies by a qualified, competent professional in that field hold a lot of value to determine if the defendant has breached the standard of care. This requirement by the courts imposes exorbitant costs on the plaintiff to obtain testimonies from expert witnesses. The burden of proof lies mostly on the plaintiff.

As shown in *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim*, the legal framework is built in a way where the courts exclusively rely on the expert witnesses to establish if the doctor has performed his duties below the standard of care¹⁶. Evidently, it is observable that the judiciary is striving to ensure fairness by protecting doctors from untrue claims in theory. However, in practice, this causes the B40 and M40 to face major economic burdens when obtaining a reliable expert witness. An expert witness, usually a senior consultant or specialist, imposes an exorbitant fee just for the preparation of documents and court testimony.

15 Public Authorities Protection Act 1948, s 2.

16 *Dr Hari Krishnan & Anor v Megat Noor Ishak bin Megat Ibrahim & Anor and Another Appeal* [2018] 3 MLJ 281 (FC).

While the imposed expense varies based on specialties, the expansive nature of the legal fee is an immediate effect of the legal requirement that the ‘only acceptable manner of proof’ is the testimony of an expert witness.¹⁷ This creates a network where a valid case of negligence is abandoned and justice is not served, not because of lacking facts, but lacking finances. The burden of the exorbitant costs imposed is exacerbated by the code of silence within the Malaysian medical fraternity.¹⁸ This refers to the unwritten code when colleagues in the same department refuse to testify against each other. As of late, finding a Malaysian consultant or specialist to testify against another in open court is an arduous ordeal. As a result, plaintiffs are required to seek external help from countries like Singapore, Australia and even the United Kingdom. For instance, in the landmark case of *Foo Fio Na*, an expert witness was brought in from the United Kingdom solely due to the code of silence between medical practitioners in Malaysia which compelled them to remain silent.¹⁹

This can indirectly increase their costs significantly as well due to the currency exchange. Additionally, the plaintiffs are required to pay not only their fee for the testimony, but also their travel, accommodation and allowances. In the case of *Dr Hari Krishnan*, the reliance on expert testimony was absolute. The court noted that without such evidence, a judge, who is a layperson in medicine, cannot determine liability. Thus, the only way to plead their case effectively is to obtain credible testimonies from reliable expert witnesses. For a B40 family earning minimum wage, this cost is an insurmountable barricade, effectively rendering the Civil Court a playground for the rich while the poor are left with no recourse but to suffer in silence.

17 M Ahmad and AR Rohana, ‘The Role of Expert Evidence in Medical Negligence Litigation in Malaysia’ (2016) 24(3) *Pertanika J Soc Sci & Hum* 1057.

18 Alex Ren Jye Kim and others, ‘What inhibits “speaking up” for patient safety among healthcare workers? A cross-sectional study in Malaysia’ (2024) 22 *Human Resources for Health* 35.

19 M Aiman, ‘Procedural Reform to the System of Expert Evidence in Medical Negligence Cases in Malaysia’ (2013) 39 *Journal of Malaysian and Comparative Law* 61-75.

IV. RECOMMENDATIONS

The analysis thus far has proven that our litigation system presents obvious duality. Progressive in substantive theory, yet regressive in procedural practice. To combat this issue, mere judicial reforms prove to be insufficient. Radical judicial overhauls need to be implemented to bridge this legislative gap.

As court trials take nearly decades to seek justice for the plaintiffs, the judiciary must implement Mandatory Mediation. Mediations should not be carried out as a mere procedural custom, but as a prerequisite to litigation. The current adversarial nature of our courts, often governed by the rigid rules and regulations of tort, acts as a medium to exacerbate conflict. It completely prioritises doctors' reputation over the victim's claims, deteriorating doctor-patient relationships and prolonging closure for long periods of time. Research also indicates that the adversarial system of litigation is not suitable because patients do not prioritise mere monetary compensation, they seek apologies, explanations and emotional validation.²⁰ The same study shows that 89.9% of respondents that comprises legal practitioners, medical professionals, and patients agree that mediation was a 'win-win' mechanism. Mediation allows for 'emotional ventilation', unlike the rigid courtroom setting which only allows dialogue regarding evidence and proof. Moreover, Malaysia should integrate elements of the 'Pre-Action Protocol' implemented in Singapore. Under Singaporean legislation, parties are obligated to undergo any form of ADR prior to the escalation of court litigation. Currently, the Malaysian Rules of Court 2012, specifically Order 34 Rule 2, states that mediation typically occurs during pre-trial case management. During this stage, hostility and costs have already been incurred. By shifting 'pre-trial' to 'pre-action', the judiciary can cause a paradigm shift and preserve the reputation of the medical profession and the sanity of the victim of negligence.

20 Hanna Ambaras Khan, Andriea Bastiampillai and Su Wai Mon, 'Mediation as a Suitable Dispute Resolution Method in Medical Negligence Cases: Special Reference to the Malaysian Position' (2020) 28 *Pertanika J Soc Sci & Hum* 2309.

The case of *Thinnagaran A/L Pechumuthu v Kerajaan Malaysia & Ors* has proven that governmental healthcare organisations enjoy the protection provided by the Public Authorities Protection Act 1948. Parliament needs to amend this legislation instantaneously to equalise the limitation periods between private and public healthcare institutions. There is no evident moral justification for the government to be provided an upper hand compared to private institutions when the negligence committed is equal and punishable. The legislature needs to perform reforms on the Public Authorities Protection Act 1948 to exclude medical malpractice claims from the strict 36-month limitation period. Alternatively, the Limitations Act 1953 should be reformed to express that Section 6A, specifically, the ‘Discoverability Rule’ applies not only to private hospitals, but also to the government, overriding the Public Authorities Protection Act 1948. Although the State is sovereign, it should not enjoy immunity over misconduct. The limitation period for filing a malpractice claim should not be accelerated merely based on the hospital’s public status.

V. CONCLUSION

The comments provided in this review suggest that the Malaysian legal framework for medical negligence suffers from a state of stunted growth. The substantive law continuously undergoes evolution, upholding patient autonomy through the famous case of *Rogers v Whitaker* and ensuring all medical institutions offer a non-delegable duty of care in *Siow Ching Yee v Columbia Asia Sdn Bhd*²¹. However, the procedural law remains stagnant without any development. This dissonance acts as a medium to further stress that the path to seeking justice is obstructed by these three main hurdles: the imbalance in power and information between the hospitals and the patient, the rigid timeline imposed to pursue a claim, and the prohibitive economic burden imposed on claimants. The recent case of *Siow Ching Yee v Columbia Asia Sdn Bhd* equips us with a glimmer of hope, proving that the judiciary is capable of reform that undeniably benefits the victims, and not only prioritises the reputation of healthcare institutions.

21 *Siow Ching Yee v Columbia Asia Sdn Bhd* [2024] CLJU 404

This substantive victory will remain merely theoretical unless it can be effectively exercised in the current legal system. Ultimately, if the legislature remains stagnant and refuses to remove these procedural barriers by performing actions such as extending the limitation periods and mandating mediation, the promise of Article 5 remains a hollow promise that hides behind a prominent façade. The law must take immediate action to be less labyrinthine to lay persons and prevent superior protection of the powerful. Until then, justice will remain a distant prospect on the horizon, constantly out of reach.

