

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

O N A P P E A L

FROM THE FEDERAL COURT OF MALAYSIA
(APPELLATE JURISDICTION)

B E T W E E N :

K. RATNASINGAM Appellant
(Plaintiff)

- and -

10 1. KOW AH DEK & KOW LIAN POI Respondents
(Defendants)
2. YONG DO & YUEN LOY CHOY
(t/a CHOP FUNG LEE HENG)

CASE FOR THE APPELLANT

RECORD

1. This is an appeal from a Judgment and Order of the Federal Court of Malaysia (Suffian, L.P., Salleh Abas, F.J., and Abdul Hamid, F.J.) dated the 21st day of February 1981 which allowed the Respondents' appeal from a Judgment and Order of the High Court in Malaya at Seremban (Ajaib Singh, J.) dated the 10th day of August 1979, in which the Appellant was awarded damages for personal injuries arising out of a car accident, as follows:

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(a)	For pain suffering and loss of amenities of life	\$70,000.00	pp.42-48
(b)	Loss of future earnings prior to retirement	\$112,722.80	p.29 1.20- p.30
(c)	Loss of future earnings after retirement	\$60,908.00	
30 (d)	Loss of gratuity	\$10,000.00	
(e)	Special Damages for transport	\$500.00	
		<u>\$254,130.80</u>	

RECORD

- p.47
ls.9-14
- p.47 1.19
2. On appeal to the Federal Court, the awards of \$70,000 and \$500 under (a) and (e) above were upheld, but the Court set aside the awards for loss of future earnings and gratuity under (b) (c) and (d) above and substituted an award of \$31,172.23, making a total amount of \$101,672.23 in lieu of \$254,130.80. The appeal to the Federal Court was allowed with costs.
3. The principal issue for determination in this appeal is whether the Federal Court was right in reducing the award as aforesaid; in particular in reversing the trial judge's findings that but for his injuries, the Appellant would in all probability have passed the remaining 3 papers of the Bahasa Malaysia examinations and would have gained promotion to Superscale G. 10
- p.3
1.14-p.6
- p.4 1.5-
p.6 1.14
p.6
ls.15-19
4. The motor accident concerned took place on the 4th May 1973 on the Seremban/Tampin Road. The Appellant, then aged 37, was driving his motor car when he was driven into by a lorry driven by the First Respondent as servant or agent of the Second Respondent. In his Statement of Claim dated 16th September 1974, the Appellant pleaded that the said accident was caused by the negligence of the First Respondent as servant or agent of the Second Respondent and that by reason of the said negligence, he has suffered injuries, has endured pain and has been put to loss and expense (paragraphs 4 and 5 of Statement of Claim). Under paragraph 6, he pleaded: 20
- "6. Further and in addition due to the accident and the injuries the Plaintiff has lost the opportunity of promotion and his ability in the teaching profession has been affected for which he claims damages."
- pp.7-8
- p.9 1.15
5. Although the Defendants denied negligence in their Statement of Defence, they admitted liability at the trial which commenced on 4th December 1975 and the only issue for decision was on the question of quantum of damages. 40
- p.9 1.19-
p.10 1.10
6. Evidence for the Plaintiff was given by (1) P.W.l. - Ong Ten Keng, the Assistant Director of Schools in the Ministry of Education who had been the Director of Education at Negri Sembilan from 1969 to 1973. The witness testified that the Appellant had been transferred from the Victoria Institution, Kuala Lumpur (where he was a Division I Time Scale Officer) to be Headmaster of the Tunku Besar School, Tampin, in 1969 and remained Headmaster of that school till 1973. He continued 50

10 "While I was here I found his work good - he was a good officer and efficient. During my time I had initiated a lot of projects which he carried out on my behalf. He did a good job to assist me. We built an extra block of classroom, a science laboratory, a new school hall and a new tuck shop and a new playing field. I was very satisfied with the standard of the school. The Plaintiff is a Division 1 Officer - he is a graduate. He is a B.A. (hons). The next step for him would be Superscale G - before the Aziz Report. Now we have the Senior Timescale and other scales in between. Superscale G still remains. To get C-part of the experience is to be a Headmaster. As far as I know one has to be a Headmaster to get Superscale G. There are some administrative officers holding G posts. A Headmaster with a G post must have Form Six Classes. According to the needs of the country it is the policy of the Government to build more Form Six Schools.

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Division 1 Officer goes up to \$1,800/- timescale at an increase of \$50 per month. There are one or two bars - on recommendation. The Plaintiff's chances for promotion were considered good from what I observed when he worked under me. In normal circumstances, he could have been promoted to Superscale G - at a salary scale of \$1,900/- and then \$2,000/-. When I was in Negri Sembilan the Plaintiff had not passed his Malay Examination.

30 Cross-examination:

Q. You strictly know the Plaintiff from 1969 to late 1973?

A. Yes.

I have found him a good officer. I had not met him before. I do not know if he was a good officer before I knew him. From Victoria Institution, Kuala Lumpur to Tampin was a promotion. It is a promotion, it gives wider experience. He was not Senior Timescale in the Victoria Institution. He was a timescale teacher. I do not have his service records.

40

The projects were my work - the Ministry work - it was J.K.R. work. He assisted me in the works. The planning was very important. I do not know now what the situation of the school was before Plaintiff became the Headmaster. Promotion to G grade also depends on vacancies. Yes, you must also pass your Bahasa to get confirmed.

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Q. That point is - that preference is for Malay Officer?

A. I do not know about that.

Q. Chances of promotion - his conduct after 1975 would also be taken into account?

A. Yes

It was my opinion that the Plaintiff was an efficient officer - a good officer.

Re-examination

By giving an opinion I am comparing him all the other officers in the State. 10

By Court

The Tunku Besar School is a Secondary School."

p.11 1.14- (2) P.W.2 - Idris bin Haji Tain, the Director of
p.12 1.11 Education in Negri Sembilan from 1973 to 1975 who said that he saw the Appellant in 1974 and he "appeared forgetful. He was not so active ... he was not capable of doing very heavy work".

p.12 1.13- (3) P.W.3 - N. Kulasingam, the Examination
p.13 Secretary, Education Department, Selangor, said that the Appellant was attached to his section in March 1973 after his accident. He gave him light work. The Appellant "appeared somewhat uncomfortable, restless and often found him depressed, keeping to himself, sometimes I found him quite talkative ... on topics not related to office work ... he had moods of depression." 20

p.14 1.16- (4) P.W.4 - V. Murugesu, was the Headmaster of
p.16 1.13 Victoria Institution, Kuala Lumpur, in 1969. From there, he said that the Appellant went as Headmaster of Tunku Besar School, Tampin. By going there, there was no increase in his salary, but it was a more responsible job and in that sense a promotion. The witness spoke highly of the Appellant as a teacher in Forms IV, V, VI, and as the hockey master and assisting in cricket. 30

p.16 1.30- (5) P.W.5 - Tuan Syed Sainal Abidin Syed Abdul
p.19 1.17 Rani gave evidence as follows:

"I am attached to the Education Department, Seremban as Executive Officer. I have particulars the Plaintiff was drawing \$1000/- per month under the Aziz report. Under the present Cabinet report his salary would be converted to \$1,225/- 40

on probation. Under the Aziz scheme the Superscale G scale is \$1,800 to \$1,900. Under the Cabinet scheme Superscale G salary scale is from \$2,305 to \$2,425/-.

Plaintiff is on probation because he has not passed his Malay examination according to the Scheme of Service. He did pass his Paper I Malay on 6.6.72. He has to do Paper II, III and IV.

10 Paper I is essay and letter writing. Paper II is grammar. Paper III is history and culture and paper IV is oral.

Yes, the Plaintiff is a B.A. Graduate in history. If he got through all his papers his increments would be back-dated to the date he passed his Paper I.

20 Under the Aziz Scheme a pensionable officer must serve at least 10 years. If a person is drawing \$1,800 for 25 years service he would receive a pension of about \$700 to \$800 and gratuity of about \$20,000 odd.

Under the new Cabinet report there are better pension benefits - pension would be half of salary and \$30,000 gratuity for a person who is on the maximum of timescale. (Exhibit P I - Record of service)

30 The plaintiff was confirmed on 1.7.62 and he opted for the Aziz scale and therefore had to pass Malay. He was placed on the pensionable establishment as a college trained teacher. He graduated in 1969 and was appointed as an Education Officer on 5.9.69 and had to undergo a probation period again. As a graduate he was required to pass Malay.

Cross-examination

Until today he has not passed the Malay. He is still on probation. In 1971 he did not sit for the examination - the examination was held on 21st and 22nd June 1979. He was required to sit for Standard II examination consisting of four papers. In June 1971 he was not present for the examination. Again on 13th and 14th December, 1971 he did not turn up for the examination.

40 The examinations are held every six months. On 25.1.72 there was an examination for one paper on Standard II but the Plaintiff did not turn up. The examinations were held again on 5th and 6th June 1972. He passed Paper I and failed Paper II and he just did not turn up for Paper III.

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Yes, the Ministry extended his probation period on 5.9.72 with a warning to pass the prescribed examinations. The extension was for one year from 5.9.72. If he did not pass within a year the Ministry might give him another chance and give another extension of the probationary period for another year. If the Ministry does not extend the probationary period any further after giving two or three extensions there is a possibility that the Ministry might terminate his services.

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On 12th and 13th December, 1972 despite the warning he was not present at the examination.

Yes, the Plaintiff met with an accident on 4th May 1973.

Q. Did the Ministry give any further warning?

A. Yes, a warning and another extension for one year on 5.9.73.

After his second warning he was transferred. He was given another warning on 5.9.74 and again a further extension for two years. Yes in all he was given three warnings. It depends on the Teachers' Service Commission how many warnings they would give - basing on special grounds.

20

Yes I think Paper III Malaya culture is a tough paper - tough of all the papers. He would be confirmed in his appointment when he finishes all his papers - from the date of passing his last paper. In terms of his salary - it would be adjusted as though he had passed the examinations at the proper time. He would not get any arrears-only notional increments.

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Now before any Division I officer can be confirmed in his appointment he has to pass yet another paper known as Pepereksaan Am Kerajaan. This is in substitution of the Malay Standard II examination. This has not been implemented so far by the Government.

The 10 years to entitle him to pension would be from the time he joined service although he is placed on the pensionable scheme later.

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I do not have his records up to date. I have the record until 1973.

Re-examination

The Passing of Standard II was introduced by the Public Service Department. He was made a

Education Officer on 9.9.1969. He had to pass Standard II after that. In 1971 he had two opportunities to sit for the examination. Yes, in June, 1972, he sat for the examination and passed one paper.

The warnings - Yes they are to the effect that the increments are stopped. Paper I is not as difficult as the culture Paper III.

10 Q. A person who has done B.A. History would he not be in a better position to pass?

A. Yes in English - but in Bahasa it may be difficult.

The general paper I mentioned earlier is also in Bahasa Malaysia."

20 (6) P.W.6 - Datuk Dr. N. Arumagasamy, Head of the Department of Neurosurgery at the Kuala Lumpur Hospital, referred to the two reports he made about the Appellant on 11th January 1974 and 6th January 1976. The doctor took the view that the Appellant "cannot be relied upon to carry on normal work - his persistent feeling of not being well. I do not think he can be in a position to concentrate on studies..." p.20 l.10-
p.21 l.24

Going back to teaching? I wrote to the Ministry of Education to keep him away from teaching for six months. It is still early to say for sure... Yes, the Plaintiff is somewhat forgetful too."

30 The latest medical report dated 24th May 1979, and put in by consent, by Dr. Teoh Hin Inn, Consultant Psychiatrist, summarises the Appellant's condition thus:- p.57 l.14-
p.59

"Mr. Ratnasingam's problem are summarised as follows: p.59 ls.11-
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- 1) Minimal brain damage with epilepsy;
- 2) A chronic disease personality whereby he has become a changed personality i.e. from that of an active extroverted person to that of a sad hypochondriacal and isolated person.
- 40 3) A depression reaction due to his physical handicaps and injuries and constant pain (which can be aggravated by a chronic disease personality)

There is no doubt that the motor vehicle accident

RECORD

he sustained in May 1973 has had a devastating effect on his life and has physically and mentally handicapped him to a vast extent."

p.22 - (7) P.W.7 - A. Krishnan, an Assistant Teacher at
p.23 1.25 Tunku Besar School, Tampin, spoke of the good work of the Appellant as Headmaster at the school and produced an article in the School Magazine about the Appellant.

During the Appellant's period as Headmaster, he said that a School hall, a block of five classrooms, 10 a School shop and a canteen were built and the Appellant was also responsible for procuring a new school field of 10 acres. The witness said that after the accident, the Appellant was "not the same Mr. Ratnasingam."

p.23 1.28- (8) P.W.8 - Kamali Devi, said that the Plaintiff
p.24 1.21 was her younger brother and she testified how her brother became a changed man after the accident.

7. The Defendants called no evidence.

p.25 1.27- 8. At the conclusion of Counsels' submissions 20
p.28 on the 10th August 1979, Ajaib Singh, J. made an
p.30 Order awarding damages as indicated in paragraph 1 herein.

pp.31-32 9. The learned trial judge gave grounds for his judgment on the 19th September 1979. He held, it is submitted rightly, as follows :-

p.31 1.27- "Upon his promotion to head master the Plaintiff
p.32 had to pass Bahasa Malaysia consisting of four papers. He had passed the first paper which was essay and letter writing but not the other three 30
papers. On the evidence which was adduced in this case I accepted the submission of counsel for the plaintiff that the plaintiff would in all probability have passed the remaining three papers if not for the injuries which he had received. He is now in no position to sit for any paper and he has thereby lost all chance of further promotion. Dato' Dr. Arumugasamy (PW 6) describe clearly the injuries and their effect on the plaintiff which tends to show that "the spring has gone out of his life". (Jenkins v Greenwood as reported in Kemp & Kemp 3rd Edition Volume 1 page 230). 40

In all the circumstances of this case I agreed with counsel for the plaintiff as to the amount of damages which should be awarded to the plaintiff but I disagreed with him as to the numbers of years purchase in respect of future loss of earnings. For the injuries, pain and suffering and loss of

amenities as well as his vast change in personality and depression that he is now suffering I awarded a sum of \$70,000. I also held that the Plaintiff was entitled to future loss of earnings as he would have been earning more after he had passed his Bahasa Malaysia Examination. For this I awarded \$1,000.00 per month for a period of 13 years which came to \$112,722.80. The Plaintiff was also losing retirement benefits. If not for his injuries he would have climbed up the Superscale G salary scale. The evidence of Tuan Syed Sainal Abidin bin Syed Abdul Rani (PW 5) on this point was as follows:

"Prior to the accident the plaintiff was drawing \$1000/- per month under the Aziz report. Under the present Cabinet report his salary would be converted to \$1,225 on probation. Under the Aziz scheme the superscale G scale is \$1,800 to \$1,900. Under the Cabinet scheme Superscale G salary scale is from \$2,305 to be \$2,425.

Under the Aziz scheme a pensionable Officer must serve at least 10 years. If a person is drawing \$1,800 for 25 years Service he would receive a pension of about \$700 to \$900 and gratuity of about \$20,000 odd.

Under the new Cabinet report there are better pension benefits - pension would be half of salary and \$30,000 gratuity for a person who is on the maximum of time-scale."

I awarded a sum of \$1,000 a month for six years for loss of earnings after retirement including the pension factor. This came to \$60,908.00. Similarly the loss he is going to suffer on the gratuity factor was awarded at \$10,000. Lastly I awarded \$500 as travelling expenses which were agreed plus the usual interest."

10. In their Judgment dated 21st February 1981, pp.42-47 the Federal Court (Suffian, L.P. Salleh Abas, F.J., and Abdul Hamid, F.J.) upheld the award of \$70,000 for pain, suffering and loss of amenities. But as regards loss of future earnings, the Federal Court held that the trial judge was wrong in holding that but for his injuries, (a) that in all probability the Appellant would have passed the remaining three papers of the Bahasa Malaysia examination and (b) would have gained promotion to Superscale G.

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- p.45 ls.1-35 11. As regards the Bahasa Malaysia examination, the Federal Court referred to the evidence that the Appellant had the opportunity to sit for the examination in 1970 and 1971, and in January 1972, but he did not; and that on his only attempt i.e. in June 1972, he passed in Paper I (essay and letter writing), but failed in Paper II (grammar). The Federal Court took the view that the fact that the Appellant may have been too busy as Headmaster
- p.45 ls.35-51 to sit for the examinations was a "lame excuse, because we know for a fact from our own experience as Civil Servants that there are thousands of other busy officers like the respondent who sit and pass the examinations. He was injured on 4th May 1973, i.e. one month before the June 1973 examinations. There is no evidence on record to show what preparations he had made in order to sit for these examinations, but judging from his previous attitude it is safe to conclude that he made no preparations at all. In the circumstances, we are of the view that the learned judge's assumption that the respondent would in all probability have passed the examinations cannot be sustained. The evidence completely negates such probability". 10
12. The Appellant respectfully submits that the Federal Court was wrong in taking the above view and in reversing the finding of the trial judge which was correctly based on the evidence before him, in particular: 20
- pp.73-80 (a) that the Appellant had excellent testimonials for his work as a student and as a teacher and headmaster; 30
- p.75 (b) that as part of his training as a teacher, he had passed the examination in the "NATIONAL LANGUAGE" i.e. Bahasa;
- (c) that he was a graduate teacher with B.A. Hons. in History;
- (d) that during the period in question i.e. 1971 to 1973, he was very busy extending the School and personally supervised the building and extension stages; 40
- (e) that failure to sit for an examination is not necessarily evidence that if the candidate did sit he would not have passed;
- (f) that of the four papers in the examination, the Appellant had passed Paper I (essay and letter writing).

13. As regards the chances of promotion to Superscale G, the Federal Court held as follows:

"The loss of future earnings assessed by the learned judge is the difference between the respondent's present salary and what he could get as a Superscale G officer, and this assessment began from the date of the accident as if he was already in Superscale G. In our view such assessment is untenable as it is contrary to evidence and common experience. It is a well known fact that the passing of the prescribed Bahasa Malaysia examinations only entitles an officer to confirmation in the service. It does not however automatically promote him to Superscale G. Promotion to this scale depends upon vacancies. Thus a confirmed officer has to wait for at least eight to ten years for a vacancy to occur before he can be expected to act in Superscale G. In the present case the respondent was not even confirmed, much less promoted to Superscale G which is as remote as it is purely speculative. The correct view should be that as he suffers no diminution in salary, but continues to be paid his accident salary he loses nothing, although he is now no longer the headmaster. We therefore hold that the learned judge's award of \$112,722.80 calculated at the rate of \$1,000 per month 13 years as loss of future earnings from the date of the accident to date of retirement cannot be sustained."

p.45 1.52-
p.46 1.23

The Federal Court, for the same reasons, reduced the award of \$60,908 for loss of future earnings after retirement to \$31,172.23 and quashed the award of \$10,000 for loss of gratuity.

p.46 1.24-
p.47 1.4

14. It is respectfully submitted that the Federal Court was again wrong to disturb the trial judge's finding of fact on the question of promotion. In particular:

(a) Although there was evidence that promotion to Superscale G depends on vacancies, there was no evidence that

"A confirmed officer has to wait for at least eight to ten years for a vacancy to occur before he can be expected to act in Superscale G."

On the contrary, all the evidence was to the effect that the Appellant's promotion to Superscale G would have come quickly after he passed the Bahasa examination. To that extent the Federal Court wrongly held that the Judge's view was "untenable and contrary to common experience."

(b) In any event, the Federal Court wrongly held that the learned judge assessed the loss at \$1,000 per month from the date of the accident to the age of retirement. The Appellant was 37 at the date of the accident. The retirement age is 55, so that there was a possible maximum of 18 years of purchase. Counsel's submission at the trial was for a 15 years purchase but the learned judge awarded a 13 year period.

The Appellant therefore respectfully submits that the trial judge must have taken into account, in reducing the maximum years of purchase from 18 to 13, the time it would take the Appellant both to pass the Bahasa examination and to be promoted to Superscale G. 10

p.49 1.25-
p.50

15. On the 2nd November 1981, the Federal Court made an Order granting leave to the Appellant to appeal to H.M. the Yang Di Pertuan Agong.

16. The Appellant respectfully submits that this appeal should be allowed with costs for the following, among other 20

R E A S O N S

- (1) BECAUSE the learned trial judge's awards of damages for loss of future earnings prior to retirement and after retirement and for loss of gratuity were right.
- (2) BECAUSE the trial judge was right in holding that upon the evidence the Appellant would in all probability have passed the remaining three papers of the Bahasa Malaysia examination if not for the injuries which he had received. 30
- (3) BECAUSE the Federal Court erred in reversing that finding.
- (4) BECAUSE the trial judge was right upon the evidence in holding that but for his injuries the Appellant would have gained promotion and climbed up to Superscale G.
- (5) BECAUSE the Federal Court was wrong in reversing that finding and in holding that it would have taken 8 to 10 years for that to happen. 40
- (6) BECAUSE the trial judge correctly found that the proper years of purchase prior to retirement was 13 years.

- (7) BECAUSE that 13 years purchase period was not, as the Federal Court wrongly assumed, from the date of the accident to the date of retirement.
- (8) BECAUSE the Federal Court, for the same reasons given in reasons 4 to 7 above, wrongly reduced the award of damages for loss of earnings after retirement and wrongly quashed the award for loss of gratuity.
- (9) BECAUSE the judgment of Ajaib Singh, J., in the High Court is right and the judgment of the Federal Court is wrong.

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EUGENE COTRAN

IN THE JUDICIAL COMMITTEE OF THE PRIVY
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(t/a CHOP FUNG LEE HENG)

CASE FOR THE APPELLANT

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