Document (1)

1. *Nur Zulaikha bt Dzulzali (Suing by her father and litigation Representative Dzulzali bin Muhammad Nor) v Medi-Circle Sdn Bhd & Ors [2021] MLJU 3158*

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NUR ZULAIKHA BT DZULZALI (SUING BY HER FATHER AND LITIGATION REPRESENTATIVE DZULZALI BIN MUHAMMAD NOR) v MEDI-CIRCLE SDN BHD & ORS

CaseAnalysis
| **[2021] MLJU 3158**

Nur Zulaikha bt Dzulzali (Suing by her father and litigation Representative Dzulzali bin Muhammad Nor) v Medi-Circle Sdn Bhd & Ors [2021] MLJU 3158

Malayan Law Journal Unreported

HIGH COURT (KUALA LUMPUR)

MOHD SOFIAN ABD RAZAK J

CIVIL SUIT NO WA-22NCVC-144-03 TAHUN 2018

8 February 2021

Manmohan S Dillion (with Karthi Kanathabalan and Ashwin Kumar) (P S Rajan & Co) for the plaintiff.
Syazwan Hasim (with Azeel Iskandar) (Syazwan Hasim & Azeel Iskandar) for the first defendant.
Auzan Hasanuddin bin Sazali (with Marwan bin Abdullah) (Mu'az Aiman Halem Azuan & Assoc) for the second and third defendants.

Mohd Sofian Abd Razak J:

JUDGMENT

Background facts:

Plaintiffs summary case:

The Plaintiff's claim against the Defendants and each of them is for medical negligence and breach of duties. The Plaintiff's mother was seen antenatally at the 1st Defendant's hospital at various occasions. On 24. February, 2003, during a scheduled antenatal visit the Plaintiff's mother (PW3) was seen by a locum doctor to whom she complained of abdominal pain, difficulty in walking, standing, painful urination and that was not moving much and was sent home without further treatment.

On 26 February, 2003, at about 7.00 am the Plaintiff's mother (PW3) was brought to the 1st Defendant's hospital by PW4 on an emergency basis due to severe abdominal pain and was attended to by healthcare personnel which included the 2nd and 3rd Defendants. PW3 was discovered to be in an advance stage of labour. The 3rd Defendant who was on call doctor conducted vaginal examination (VE) on PW3 and found out that the cervix dilated or OS opening was at 6 ctn. PW3 was given an intramuscular Dexamethasone injection. A decision was made by the 3rd Defendant (DW6) to utero-transfer PW3 to Putrajaya Hospital which have the Neonatal Intensive Care Unit Facility ('NICU') because the Plaintiff was an extremely premature baby which is under 28th week age of viability and for further management of her pregnancy. However, while doing the preparation to transfer PW3 to Putrajaya Hospital, PW3 suddenly has urged to push. The 3rdDefendant later conducted a 2nd VE and found out that the membrane Is bulging and the cervical dilation was at 10cm which is fully dilated.

The 3rd Defendant later changed her decision to transfer PW3 to Putrajaya Hospital and decided to deliver Plaintiff

at the 1st Defendant hospital. The 3rd Defendant then conducted an Artificial Rupture Membrane ('ARM') on PW3 for her to deliver the Plaintiff.

Nevertheless, after conducting ARM, PW3 no longer has urged to push and the cervix dilatation was regressed back at 6cm. Due to that, the 3rd Defendant proceed with her original p)an to send PW3 to the Putrajaya Hospital.

PW3 arrived at the Putrajaya Hospital at about 9.18 am and gave birth to the Plaintiff at about 10.20 am.

Later, the Plaintiff was diagnosed suffering from Cerebrum Paisy because she was born severely premature which is under 28th week age of viability ie 26th week of pregnancy. Cerebral Palsy refers to a group of neurological disorders that appear in infancy or early childhood and permanently affect body movement, muscle coordination, and balance. It affects the part of the brain that controls muscle movements.

The brain damage was caused by the Plaintiff's avoidable premature birth on 26.2.2003 at about 26 weeks of gestation. The Defendants were negligent in not prolonging Plaintiff's mother (PW3) gestational period so as to avoid the risks and sequelae of prematurity.

It is the Plaintiff's pleaded case that if there were protocols and guidelines for premature deliveries it would have helped the midwives, consultant obstetrician and gynaecologist and the premature delivery could have been avoided. The 2nd and 3rd Defendants were therefore negligent in diagnosing and treating PW3 which had resulted in the Plaintiff's present medical condition and that the 2nd and 3rd defendants' have breached the duty and standard care they owed to the Plaintiff. As for the 1st Defendant, the Plaintiff claimed direct negligence on the part of the 2nd and 3rd Defendants' and vicarious liability for the 2nd and 3rd Defendants medical negligence.

1st Defendant's summary case as stated fn 1st Defendant case Synopsis dated 2.5.2018.

The 1st Defendant is a company deemed incorporated under the Companies Act, 2016 and owns and manages a private hospital known as *'Pusat Rawatan Islam Az-Zahrah'.* The said hospital provides medical services including Cardiology, Obstetrics & Gynaecology, Orthopaedic and Traumatology, Surgery, Ophthalmology, Physiotherapy and Paediatrics. The 2nd and 2rd Defendants'are medical specialists in Obstetrics & Gynaecology. The 1st Defendant provides service for 2nd and 3rd Defendants to manage their medical specialist at the 1st Defendant's premise and they pay the monthly rental to the 1st Defendant, The medical records which expired more than twelve (12) years shall be disposed of by the 1st Defendant. On 26.2.2003 the 2nd Plaintiff requested herself to be transferred her to the Putrajaya Hospital for further examination of her pregnancy, The administering of intra - muscular Dexamethasone is a common injection and has been fulfilled by the doctors and it is safe and harmless to the patients.

Summary case for 2ndDefendant as in the Summary case dated 30.1.2019.

The 2nd Defendant was at all material time a consultant at the 1st Defendant. That the 2nd Defendant was not the doctor on duty who handled PW3 on 26.2.2003. The 2nd Defendant did not owe any duty of care towards the Plaintiff.

Summary case for 3rdDefendant as in the Summary case dated 30.1.2019.

The 3rd Defendant at all material time was renting the 1st Defendant's premise and facilities on a monthly basis. The 3rd Defendant had discharged her obligation with skill and observation in the interest of the patient including the Plaintiff's mother (PW3).PW3, the Plaintiff's mother had come to the 1st Defendant at about 7.00 am in the morning of 26.2.2003 in an emergency situation of labour. The 3rd Defendant was on call on the 26.2.2003 and had examined PW3 who was already in her advance stage of labour and conducted vaginal examination (VE) on PW3 and found out that the cervix dilated or OS opening was at 6 cm. The 3rd Defendant then conducted an Artificial Rupture Membrane ('ARM') on PW3 for her to deliver the Plaintiff. The 3rd Defendant then administered intra - muscular Dexamethasone is a common injection. A decision was made by the 3rd Defendant (DW6) to utero-transfer PW3 to Putrajaya Hospital which have the Neonatal Intensive Care Unit Facility ('NICU') because the Plaintiff was an extremely premature baby which is under 28th week age of viability and for further management of her pregnancy, However, while doing the preparation to transfer PW3 to Putrajaya Hospital, PW3 suddenly has urged to push. The 3rdDefendant later conducted a 2nd VE and found out that the membrane is bulging and the cervical dilation was at 10cm which is fully dilated.

The 3rd Defendant later changed her decision to transfer PW3 to Putrajaya Hospital and decided to deliver Plaintiff at the 1st Defendant hospital. The 3rd Defendant then conducted an Artificial Rupture Membrane ('ARM') on PW3 for her to deliver the Plaintiff.

Nevertheless, after conducting ARM, PW3 no longer has urged to push and the cervix dilatation was regressed back at 6cm. Due to that, the 3rd Defendant proceed with her original plan to send PW3 to the Putrajaya Hospital.

PW3 arrived at the Putrajaya Hospital at about 9.18 am and gave birth to the Plaintiff at about 10.20 am.

The Trial:

The trial was concluded after 10 non consecutive days. The Plaintiff called 4 witnesses namely:

i) PW1- Dr. Milton Lum Siew Wan ,a consultant obstetrician and gynaecologist;

ii) PW2- Dr.Kavitha Uma Ratnalingam, a consultant physician;

iii) PW3- Puan Hilwana binti Mohd Shafie;

iv) PW4- father and litigation representative of the Plaintiff.

The 2nd and 3rd Defendants called 6 witnesses as follows:

i. DW1 (2nd Defendant)- Dr. Fatimah binti Mustafah;

ii. DW2 - Mohd Norazmi bin Ismail - head of Medical Records of 1st Defendant;

iii. DW3- Dr. Rohana binti Jaafar;

iv. DW4- Dr. Imeida Nasreen binti Nasaruddin;

v. DW5- Date-' Dr. Mukundan a/l Krishnan;

vi. DW6 - (3rd Defendant) -Dr.Ariza binti Mohamed.

The 1st Defendant did not call any witnesses. All the Defendants have denied liability.

The issues to be tried (Plaintiff) are as follows:

1. Whether the Defendants have acted with proper care and skills in treating the Plaintiff;
2. Whether the diagnosis management, care , treatment, advice and rehabilitation provided to the Plaintiff by the Defendants are in accordance with generally accepted and accepted practices among medical practitioners of the expertise relevant in 2003;
3. Whether the diagnosis ,management, care , treatment, advice and rehabilitation to the Plaintiff by the Defendants' Hospital are in accordance with he generally accepted and acceptable practice;
4. Whether a contractual relationship exists between the Defendants and the Plaintiff and if so, whether Defendants have breached their contractual obligations to the Plaintiff;
5. Whether the Defendants owe a duty of candour and good faith to the Plaintiff and if so whether the Defendants have breached the obligation;
6. Whether the Plaintiff suffered such injury as claimed;
7. If the Defendants, are negligent and /or have defaulted on the contractual obligations and/or their duty of candour and good faith, whether the negligence or breach of such duties has caused or contributed materially to the damages suffered by the Plaintiff;
8. Whether the Plaintiff are entitled to special damages, general damages, aggravated damages, benefits and costs as pleaded.

Before the Court considered the submissions of the parties, it is to be noted that, Messrs A.M Zaharil & Co was appointed to represent the 1st Defendant throughout the trial for the 10 days. However at the conclusion of the trial the Court had given directions to all the parties that they are to file their respective written submissions and the reply within the timeline for filing. Except the solicitors for the 1st Defendant, the Plaintiff and the 2nd and 3rd Defendants have filed their respective written submissions. It was only on the daythe Plaintiff counsel was to submit, the Court was informed that the Messrs Syazwan Hasim & Azeel Eskandar had been appointed as the new solicitors acting for the 1st Defendant and had asked for time to file their written submission after counsel for the Plaintiff and counsel for the 2nd and 3rd Defendants have submitted. The Court allowed the 1st Defendant to file in its written submission after both counsels for the Plaintiff and the 2nd and 3rd Defendants have submitted.

The Law on Medical Negligence:

The elements of Negligence:

It is trite law that in order to prove negligence, four (4) essential elements need to be proven which includes:

1. The Defendant owes the Plaintiff the duty of care;
2. The Defendant had breach the duty;
3. The alleged breach had cause damage/ injury (causal link);
4. The Plaintiff has suffered damage /injury.

These elements were stated in *Shalim Kanagaratnam v Pusat Perubatan Universiti Malaya & Anor* (2016) 5 MLR A 67 and states as follows:

> *[9] In cases of professional negligence and/or medical negligence, the plaintiff has to prove four elements. They are: (i) duty of care (ii) breach of standard of care (iii) breach of duty of care (iv)caused damages. In consequence, the plaintiff has lead evidence to show the standard of care has been breached '*

Burden of proof.

It is also trite law that, the burden to establish the elements of negligence always lie with the Plaintiff on the balance of probabilities, (see *Dato' Loo Son Yong v Vista Laser Eye Center Sdn Bhd & Anor* (2019) MLRHU 600)at paragraph 24:

> [247 *It is also trite that the burden to establish the above elements of negligence always lies with Plaintiff. '*

The Court shall deal with the issue of liability:

The Plaintiff took umbrage at the 1st Defendant for its failure to keep a proper medical record of PW3 for the year 2003. PW3's medical records for an earlier pregnancy in 2002 were available. The Plaintiff realising that the medical records of PW3 in 2003 is crucial, had filed a pre-action discovery of the medical records in 2016 against the 1st Defendant. The 1st Defendant said that it is their policy that all medical records were to be destroyed after having kept them for 8 years. Not only did the 1stDefendant fail to produce PW3's medical record but have also failed to produce the patients' register, the 2nd and 3rd Defendants respective patients' appointment diaries and other documents that could have assisted the parties and the Court as to who had attended to PVV3 on 24.2.2003. In the midst of the trial the 1st Defendant had made discovery of documents in staggered manner. The documents which the 1st Defendantdisclosed in Court were the patients' appointment diaries (Bundle B9) of medical officers Dr. Rahaya and Dr. Aziani.

The Plaintiff cited the case of *Skeiton V Lewisham and North Southwark Health Authority* (1998) QBD 324 @ page 329, the Court had said that poorly written medical records can give rise to an inference of negligence.

'In my judgment the evidence is clear: these notes were welt below the standard which was acceptable in 1983 and Mr Irwin submits either Dr. Casson was habitually poor noter (which I doubt) or as *seems likely, for some reason he fell below his own normal standards (emphasis supplied)'*

The 1st Defendant on the issue of liability had submitted that the previous solicitors chose not to cross -examine on liability because it was contended that that during the trial, the Plaintiff's solicitors was directing its case on establishing 2nd and 3rd Defendants negligence. It was the 1st Defendant contention that the Plaintiff failed to lead evidence on the 1st Defendant's liability.

However during the trial, 2nd and 3rd Defendant's solicitors had cross-examined the Plaintiff's witness on liability, it was contended that since all Defendants have the same issues, the 1st Defendant's solicitors might opt not to cross-examine the Plaintiff's witnesses. The solicitors for the 1st Defendant could cross-refer to the evidence led by the parties during the trial for submission purposes, *(Halsbury's Laws of Malaysia- Civil Procedure (Vol 7(1).* The issues relating negligence between the 1st Defendant and 2nd and 3rd Defendants are different. In the case of the 1st Defendant the negligence alleged by the Plaintiff relates to the system failure as well as organisational failure. In the case of the 2nd and 3rd Defendants the alleged negligence relates to the treatment administered on PW3.

The limitation period issue:

The Plaintiff submit that in general the limitation period for bringing a claim in negligence is 6 years from the date the cause of action accrues. However in a case of a minor, the limitation period will ordinarily begin once the minor attains the age of majority that is 18 years old. In the instant case, the limitation period starts to run once she ceases to be under disability. Since the Plaintiff herein had suffered from severe brain damage the limitation period for the Plaintiff would be once she recovers from severe brain damage. The Court agrees with the principle of law that the limitation period under disability from severe brain damage accrues once the Plaintiff recovers.

Failure to keep proper records: (1st Defendant)

From the evidence adduced by the Plaintiff and the admission of DW2 it is the finding of the Court that the 1st Defendant had simply failed to keep any of the medical records as regards the Plaintiff's ante-natal care and birth. Such failure had resulted in the poor treatment and management given. The witness for the 2nd and 3rd **Defendants DW2 - Mohd Nor Azmi bin Ismail** - head of Medical Records of 1st Defendant stated that the records would be destroyed after keeping it for 8 years. However the 1st Defendant case summary stated that the medical records which expired more than twelve (12) years shall be disposed of by the 1st Defendant.

The 2nd and 3rd Defendants' treatment on the Plaintiff.

As for the 2nd and 3rd Defendants being specialists attached to the 1st Defendant's Hospital, they too were under a duty to see that the medical records were kept by the 1st Defendant for the duration of the limitation. If the medical records of the Plaintiff were kept properly by the 1st Defendant, then perhaps the 2nd and 3rd Defendants would know how to treat the Plaintiff prior to labour. They could not shift the fault for not keeping the medical records on to the 1st Defendant The 2nd Defendant was aware that the limitation period will not run if the child patient has suffered brain damage. PW1 Dr, Milton Lum in his testimony stated that in cases of brain- damaged patients the medical report are kept forever.

The Court was of the view that the medical records with regards to the Plaintiff should have been kept by the 1 ^Defendant until the Plaintiff reaches the age of majority ie 18 years or when she recovers from her brain damage.. The Court is perplexed as to how the medical records of PW3 for the year 2003 could not be traced when the other medical record for the year 2002 was available.

The Pleadings:

The 2nd and 3rd Defendants have argued that neither of them had attended to PW3 on the date 24.2.2003. This issue was submitted extensively by the Defendants in their written submission in that the fact that PW3 was alleged to have gone to the 1st Defendant hospital on 24.2.2003 and was attended to be a locum medical officer was not pleaded in the Statement of Claim. The Plaintiff's Amended Statement of Claim pleaded as follows:

> [13] *On 26 February, 2003 the 2nd Plaintiff's mother was attended to by healthcare personnel in the Hospital and a decision was made there to send the 2nd Plaintiff mother to Putrajaya Hospital for further management of her pregnancy.'*

The Defendants submitted that the Plaintiff's effort was mainly focusing to establish the events that happened on 24.2.2003. PW3 and PW4 respectively testified that 24.2.2003 was the date of appointment for 6th month pregnancy. The Defendants submitted that the Plaintiff failed to prove the event on 24.2.2003 existed, Hence there were no documentary evidence to say that the 6th Antenatal Check-up was scheduled on the 24.2.2003.

PW4 in his evidence during cross-examination was referred to Dairi Temujanji at page 53 where PW4 was asked whether he agreed that the ante-natal was schedule on the 21.2.2003, PW4 agreed that the appointment date in the *Notis Temujanji* was on 21.2.2003. PW4 had also agreed that the 24.2.2003 was not fixed by the 1st Defendant. DW2 in examination in chief stated that based on the hospital's record which was under his care there was no clinic Anc-MO opened and any appointment on 24.2.2003 was brought forward to the 21.2.2003. In the pleadings, the Plaintiff did not plead any event which happened on 24.2.2003.

Reference was made to *Amal Bakti Sdn Bhd & Ors v Affin Merchant Bank (M) Bhd* (2012) 4 MLRA 434 where inter alia the COA held that ' *Our preliminary observation is that three matters were not pleaded and consequently ought not to have been considered by His Lordship,'*

The 1st Defendant averred that in the instant case, the event of the alleged 6th antenatal check up on 24.2.2003 was only raised by PW3 and PW4 during the trial. During cross-examination of PW4 when he was referred to B9 at page 53, PW4 agreed that the 6th antenatal check-up was on 21.2.2003 not on 24.2.2004

The Plaintiff conceded that the date 24.2.2003 as the date PW3 had gone to the 1st Defendant hospital and was attended to by a locum doctor was not pleaded in the Amended Statement of Claim. However the Plaintiff argued that by way of cross-examination of PW3 by counsel for 2nd and 3rd Defendants where the learned counsel referred to the date 24.2.2003.

> Q. *Puan , saya pergi kepada insiden untuk 2 hari sebelum 26.2.2003 , which is check-up pada 24.2.2003 iaitu soalan no: 21,22,23,24,25,26 dan 27 untuk merujuk kepada insiden pada 24.2.2003, Puan setuju dengan saya, apabila Puan merujuk kepada jawapan soalan no: 22 (Soalan no; 22 dibaca). So Puan setuju dengan saya, jawapan ini tidak merujuk kepada Dr. Ariza mahupun Dr. Fatimah, Defendan Ketiga dan Defendan Kedua?*
>
> *A. Betul.*

This excerpt from the Notes of Evidence of proceedings held on 13.2.2019 @ 165.

Further at page 167 of the same Jilid and date also during cross-examination by counsel for 2nd and 3rd Defendants as follows:

> Q. *Dan saya cadangkan kepada Puan, pada hari itu, 24.2.2003 ujian airkencing dibuat kepada Puan ,setuju tak?*
>
> *A. Katau pada 24.2.2003 itu, dia ambil ujian air kencing saya setuju, tapi dia tak ambil ujian itu selalunya.*
>
> *Q. Puan ,pada tarikh 24.2.2003 itu, masa Puan check-up itu, hari itu Puan kerja ke bercuti Puan.?*
>
> *A. Saya tak ingat dah.*
>
> *Q. Kemudian Puan maklumkan pada 24.2.2003, Puan rasa tak selesa sakit dibahagian perut Saya rujuk jawapan no: 24 (AHS reads out the answer to Q&A 24 of PW3(A).*
>
> *Q. Bila selesai Puan jumpa doctor pada 24.2,2003 pulang ke rumah, rasa sakit itu masih berterusan tak Puan?*
>
> *A. Sakit keadaan yang saya terangkan disini, masih. (at page 168)*
>
> *Q. Pada 25.2.2003, Puan ingat iagi tak Puan masih lagi berterusan sakit macam 24.2.2003 atau pun tak sakit dah Puan?*
>
> *A. Masih sakit masih dalam keadaan macam 24.2.2003 tu.*

The learned counsel for the 1st Defendant submitted that the Plaintiff failed to prove the event on 24.2.2003 ever happened. No documentary evidence to support that there was a 6th Antenatal Check-up scheduled on 24.2.2003. The material fact of 24.2.2003 that PW3 had gone for an Antenatal Check-up was not pleaded in The amended Statement of Claim. It was further contended that the parties are bound by their pleadings and a complete manoeuvre and/or departure from pleading is fatal, (see *Dennis Lee Thian Poh & Ors v Michael Samy & Anor* (2018)6 MLRA 1**)**

In *Liziz Plantation Sdn Bhd v Hong Yik Trading* (2016) 3 MLRA 131 where the COA held inter alia:

> [19] *In deciding a matter before the court, the court must rely solely on the pleadings prepared by the parties to the proceedings....]*

The Court was of the considered view notwithstanding that the date of 24.2.2003 where PW3 was alleged to have been to the 1st Defendant's hospital for antenatal check-up but the parties was not taken by surprise. The Plaintiff relied on paragraph 12 of the Amended Statement of Claim which states as follows:

> *'12. The 2nd Plaintiff's mother was seen ante-natally in the Hospital on various occasions.*

The learned counsel for the Plaintiff referred to the words 'on *various occasions'* to suggest that it included the date on 24.2.2003 as the date PW3 had gone to the 1st Defendant's hospital for antenatal check-up.

The learned counsel for the Defendants did not even suggest to PW3 in cross-examination that on 24.2.2003 she did not go to the 1st Defendant's hospital for an ante-natal check-up. However DW2 had stated that according to the patients' register, there was no antenatal check-up because the ANc Clinic was not opened On 24.2.2003. Even when the Plaintiff's counsel started referring to the 24.2.2003 as the date PW3 had gone to the 1st Defendant's hospital, no objection was raised by the Defendants.

It was further contended by the 1st Defendant that even if the alleged medical check-up 24.2.2003 had taken place, PW3 in examination in chief states that she was unsure of the identity of the doctors who attended to her that day.

Learned counsel then cited the case of *Krishnan Nambiar Perabakaran & Ors v Dr Mahendran & Anor* (2008)1 WILRH 89 where the court held as follows:

> *'[11] It is noteworthy that s.101* of the *Evidence Act, 1950 provides for the burden of proof. Section 101 (1) specifically states whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist'*

It Is the view of the 1stDefendant that failure to plead material facts is fatal and should be disregarded by the Court.

The Court wish to refer to the case of *Superintendent of Lands and Surveys (4th Di) & Anor v Hamit bin Matusin & Ors* (1994) 3 MLJ where the Supreme Court held inter alia that the *\1) the underlying well -known rational for requiring material facts to be pleaded is to prevent the opposing party from being taken by surprise by evidence which departs from pleaded material facts. However, when evidence represented a departure from the pleadings, it should be objected to when and where it was adduced, and would be too late when it was only objected to later on, as in the final submission at the close of evidence in the instant appeal. Otherwise, in the event of such objection being accepted by the court, the party adducing such evidence may face the risks of being denied leave to amend the pleadings at that stage.'*

In this regard, the medical records of PW3 should have been tendered as an exhibit in Court if the 1st Defendant have kept the records. It would be untenable to insist that the Plaintiff to produce the said medical records when it should be kept by the Defendants.

The 1st Defendant also submitted that the Plaintiff failed to plead specifically the 1st Defendant's negligence, it was contended that the Plaintiff's claim against the 1st Defendant was for direct negligence and various liability from the conduct of the 2nd and 3rd Defendants. This relates to the principle of non-delegable duty of care which has to be specifically pleaded. Learned counsel referred to *Kee Boon Suan & Ors v Adventist Hospital &Clinical Services (M) &Ors and Other Appeals* (2018) 6 MLRA 110 where the court held as follows:

> [60] *More importantly, we note that the issue of non-delegable duty of care was not even pleaded by the patient and her parents in the first place. Therefore, the issue ought not to have been considered by the learned JC when it was raised at the late stage of the submissions '*

In *Dr. Hari Krishnan & Anor v Megat Noor Ishak Megat Ibrahim & Anor and Another Appeal* (2018) 1 MLRA 535 was referred to in Kee Boon Suan where it was held:

> *[109] It was contended before us that the issue of non-delegable duties should not be allowed to be raised, since the plaintiff had not pleaded direct liability on the Hospital's part for negligence. From a careful reading of the pleadings, this is not the case. We note that the plaintiff had pleaded particulars of the Hospital's own negligence in the Statement of Claim; in his reply to the Hospital's Defence, the plaintiff had also alluded to the Hospital duty of care to the plaintiff to ensure that a competent standard of practice is exercised during the operation.*

The Plaintiff has failed to plead the particulars of the 1st Defendant's own negligence. What the Plaintiff has done is to plead in general the particulars of negligence of all the Defendants.

The Plaintiff contended that it has sufficiently pleaded in the Amended Statement of Claim the 1st Defendant's negligence inter alia as can be seen in paragraphs 18.1 to 18.12 namely as follows;

> 18.1 *failed to have a safe and reliable system on advising pregnant patients including the 2nd Plaintiff's mother or delivery options and the risks and benefits associated with each of these options;*

The Court agrees with the Plaintiff that it had sufficiently pleaded the 1st Defendant's negligence in the Amended Statement of Claim.

In *Pyu Pyu Ma v Dr. Lim Soo How & Ors* (2019) 11 MU 628 at page 644 the court held inter alia that with regard to the system in the hospital:

> '[29] *...it is a worthwhile noting that under common law there is also direct liability for not having a proper and effective system as well as for organisational failures (see: Bull and Another v Devon Area Health Authority* (1993) 4 Med LR 117 *and Lybert v Warrington Health Authority* (1996) 7 Med LR 71*...'*

The 1st Defendant at the material time had two (2) specialists in obstetrics and gynaecology and medical officers and midwives to attend to obstetrics and gynaecology patients.
Duty of care:

The learned counsel for the 1stDefendant had submitted that the 1st Defendant only provides a healthcare centre in which the 3rd Defendant uses the facility at the 1st Defendant's Hospital and paid the rental for the facilities and rooms by monthly payment. The Plaintiff has failed to cross examine the 2nd and 3rd Defendants on the issue that the 2nd and 3rd Defendants' averred that they were not the employees for the 1st Defendant. As for the 3rd Defendant it was clarified that she was a consultant for the 1stDefendant and she has reasonably discharged her duty of care to the Plaintiff in accordance with standard medical practice with what had happened on 26.2.2003. The incident on 26.2.2003 was rather complicated for 3rd Defendant because the Plaintiff was only 26 weeks of pregnancy and had come to the Hospital on an emergency basis. PW3 was in severe pain and about to give birth and had described the pain as *'sakit yang teramat -amat seperti hendak bersaiin.'W* was also admitted in cross-examination that PW3 was having a contraction and was about to give birth on 26.2.2003. It was also not in dispute that the cervical dilatation of PW3 at the material time was at 6cm which shows that PW3 was already at the stage of advance labour. The testimony of DVV4 (Dr. Imelda Nasreen) a Consultant of Obstetrician and Gynaecology on the condition of PW3 on 26.2.2003 stated that not only was PW3 at the stage of advance labour but also was in an imminent birth for 26 weeks of pregnancy where the cervical dilatation was at 6 to 6 *%om* in diameter and all PW3 need is to continue contractions and when she starts pushing the baby's head will come out.

On the 1st Defendant's liability, the Plaintiff had pleaded in paragraph 23 of the Statement of Claim that the 1st Defendant was vicariously liable for the negligence of its servants and agents, The Plaintiff further avers that is not in dispute that the 1stDefendant was a provider of healthcare hence it owes a duty of care under statute regardless of the status of 2nd and 3rd as an independent contractor. In this instant the Court was of the considered view that the 2nd and 3rd Defendants on the facts, cannot be said to be independent contractors as both were consultant obstetrician and gynaecology at the 1st Defendant's hospital.

In *Dr. Kok Chong Seng & Anor v Soo Cheng Lin & another appeal* *(2018) 1 ML J 1* *685*. In Dr. Kok Chong Seng (supra) the appellant, a consultant orthopaedic surgeon had advised the respondent to undergo an operation to remove the lump. The operation was performed at Sunway Medical Centre Sdn Bhd. After the operation, the respondent complained to Dr. Kok of pain and numbness at the area of his forearm which was operated upon. The respondent was referred to Dr, Ranjit Singh, a hand and micro surgeon from Pantai Medical Centre. The respondent was diagnosed as having lost 6cm or 90% of his left median nerve. Dr. Ranjit Singh conducted a microscopic reconstruction on the respondent left median nerve using a nerve graft from his left leg. The respondent sued Dr. Kok and the hospital for negligence and breach of contract.

The issue arose at the trial inter alia was whether the hospital owed non-delegable duty of care and whether the hospital was vicariously liable for the action of Dr. Kok. Whether there was a relationship akin to employment between hospital and doctor. Whether Dr. Kok was an independent contractor of the hospital in conducting operation.

In Dr. Kok Choong Seng (supra) the Federal Court considered the doctrine of non-delegable duty of care as expounded in *Woodland v Swimming Teachers Associations and others* *(2014) AC 537* which has been applied by our court.

The brief facts of Woodland's case is that the claimant was a pupil at a school for which the defendant educational authority was responsible. Pupils at the school had swimming lessons, which was part of the national curriculum, during normal school hours at a pool run by another local authority, The lessons were taught by a swimming teacher with a lifeguard in attendance neither of whom were employed by the educational authority. Their services were provided to the authority by an independent contractor. During one such lesson, the claimant suffered a serious brain injury and brought a claim for damages for personal injury alleging negligence on the part of the swimming teacher and the lifeguard and a non-delegable duty of care on the part of the educational authority.

The English Supreme Court held that the educational authority was not vicariously liable for the negligence of the independent contractors. However on the facts the Supreme Court held that the education authority had assumed a non-delegable duty to ensure that the claimant's swimming lessons were carefully conducted and supervised, by whomever they entrusted to perform those functions. The control over the claimant that went with the school's teaching function was delegated to the contractors for the purposes of the swimming lessons. Since the alleged negligence occurred in the course of the very functions which the school assumed an obligation to perform, the education authority was found to be in breach of duty for the contractors' negligence in performing those functions.

Reverting to the facts in the instant case, the Court was of the view that the **1st** Defendant had assumed a non-delegable duty to ensure that the Plaintiff was seen antenatally at the 1st Defendant's hospital at various occasions were carefully conducted and supervised, by whomever the 1st Defendant had entrusted to perform those functions. The **author of Principles of Medical Law 3rd Edition** on non-delegable duty had stated that where reasonable care or skill is not taken of a patient by an employee or independent contractor, the institution will be liable for breach of a primary, non-delegable duty owed to the patient.

In respect of *'organisational errors'the* learned author opined that the second form of duty which was identified by Lord Phillips MR judgment in A as emerging from the case law is that which he described as 'organisational' in character, namely *'a duty to use reasonable care to ensure that the hospital staff, facilities and organisation provided are those appropriate to provide a safe and satisfactory medical service for the patient'.*

The 3rd Defendant said that they will undertake risk profiling of pregnant women and that high risk pregnant women will be seen onlyby the specialist. The 3rd Defendant also said that all deliveries will be undertaken by the specialists. The medical officer and midwives were therefore under a duty to refer to the specialist all high risk pregnant women. The 3rd Defendant too had agreed that PW3 had a higher risk profile because of the poor spacing of her pregnancies and should have at some time of her pregnancy to be seen by a specialist. PW3 should have been referred to the two specialists despite such higher risk profiling if the 1st Defendant had a proper and effective system keeping the medical records coupled with protocols and guidelines for premature deliveries.

On 24.2.2003, when PW3 went to 1st Defendant hospital and was examined by a locum doctor and she said to the doctor she had severe abdominal pain.

DW4 had described the situation on 26.2.2003 as liken to a 'time bomb' as PW3 was on the verge of giving birth, based on the fact that the cervical dilatation was at 6 to 6 *V%* cm in diameter and all PW3 need is to continue contractions and when she starts pushing the baby's head will come out The 3rd Defendant in asserting that she had discharged her duty of care to the Plaintiff by reasons of the following conduct namely,

i) Upon arrival at the 1st Defendant's hospital, the 3rd Defendant who was on call doctor at that time has conducted vaginal examination 'VE' on PW3 and found that the cervical dilatation or OS opening was 6 cm which means that the Plaintiff was at the stage of advanced labour;

ii) Upon giving advice to the Plaintiff, the 3rd Defendant decided to utero -transfer PW3 by ambulance to the nearest hospital which have a Neonatal Intensive Care Unit Facility {'NICU') where at that particular time was Putrajaya Hospital because the Plaintiff was an extremely premature baby which is still at 26 weeks of pregnancy.

iii) Before transferring PW3 together with the Plaintiff (Utero transfer) the 3rd Defendant after advising the Plaintiff had administered corticosteroid which in the instant case refer to Dexamethasone on PW3 to mature the Plaintiff's lung so that the Plaintiff will not experience the difficulty to breath upon birth at the Putrajaya Hospital.

iv) However, while doing the preparation to transfer PW3 to Putrajaya Hospital, PW3 suddenly has urged to push.

v) The 3rd Defendant later conducted second VE.

vi) The 3rdDefendant later change her decision and decided to deliver the Plaintiff at the 1st Defendant. This decision was made to prevent the membrane to be ruptured spontaneously in the ambulance when transferring PW3 to the Putrajaya Hospital by which it can cause more harm to the Plaintiff.

vii) The 3rd Defendant later conducted 'ARM' on PW3 to expedite the delivery.

viii) However, after conducting ARM. PW3 has no longer has the urge to push and cervical dilatation has regressed back to 6cm due to Ferguson reflex.

ix) Since there is opportunity to transfer PW3 and Plaintiff (utero transfer) to Putrajaya Hospital which have NICU facilities, the 3rd Defendant proceed with the original plan to send PW3 to the Putrajaya Hospital.

x) The Plaintiff has arrived at Putrajaya Hospital at 9.18 and soon deliver the Plaintiff at 10.20 am on 26.2.2003.

The 3rd Defendant submitted that she has discharged ail of her duty of care on PW3 and has tried as best as she could in providing her medical services on the Plaintiff at that moment in time. The conduct of the 3rd Defendant has been agreed by DW4 when she stated that there was no harm caused to the Plaintiff and PW3 due to the Artificial Rupture Membrane (ARM) which was conducted by the 3rd Defendant and hence there was no breach of standard duty of care by the 3rd Defendant.

Tocoiysis and Dexamethasone:

The Plaintiff submits that experts had agreed that if there were signs and symptoms of early premature labour, the pregnant mother should be given tocoiysis drugs with a view to suppressing the labour and prolonging the pregnancy and also be given Dexamathasone so as improve the lung function of the foetus.

The experts have also agreed that the best opportunity to give Tocolytic drugs and Dexamethasone would have been on 24.2.203 when PVV3 had signs and symptoms of early premature labour.

The Plaintiff submitted that the premature delivery of Zulaika on 26.2.2003 could have been avoided only of PW3 had been advised on 24,2.2003 regarding tocoiysis and dexamethasone.

As for the 2nd and 3rd Defendants, that on 26.2,2003 PW3 was in advanced labour and that dexamethasone to work to improve the function of the foetus lung.

The Court is also mindful of the role of the expert which is to assist the Court and to ensure that the expert evidence is reasonable, respectable and responsible and stands up to a logical analysis. The evidence must be based on facts either admitted or proven.

In the instant case, parties have called their respective expert witnesses.

The medical expert witnesses had given evidence that the events of 24.2.2003 and have noted the following namely: 1stly, the signs and symptoms of an early premature labour, 2ndly what is the standard of care applicable on 24.2.2003 in a case of early premature labour, 3rdly, the missed opportunity on 24.2.2003 to use Tocolytic drugs and dexamethasone so as to prolong the pregnancy and to improve the lungs function of the foetus; 4thly, the joint responsibility of the specialist, medical officers, midwives in a case of premature labour 5thly, the duty to provide advice and information on 24.2.2003 and lastly, to ensure a safe systems that should have been available in a specialist maternity hospital.

The evidence of the expert witnesses:

PW1, Dr. Milton Lum is a senior and experienced obstetrician and gynaecologist gave evidence on clinical negligence on behalf of the Plaintiff. PW2, Dr. Kavitha Uma Ratnalingam is a consultant rehabilitation physician. The Defendant called Dr. Imelda Nasreen binti Nasruddin (DW4) and Dato' Dr, K. Mukudan (DW5) a senior obstetrician and gynaecologist and Defendant also called Dr. Rohana binti Jaafar is a paediatric expert called by the 3rd Defendant.

From the analysis of the medical evidence by the witnesses, the Court was of the considered view that in certain aspect, the Defendants' witnesses had agreed to the following facts namely:

i) There were signs and symptoms of early labour;

ii) The standard of care applicable on 24.2.2003 in Malaysia in a case of early premature labour;

iii) That the missed opportunity on 24.2.2003 to use tocolytic drugs and dexamethasone so as to prolong the pregnancy and to improve the lung function of the foetus;

iv) The joint responsibility of the specialist , medical officers and midwives in a case of premature labour;

v) The duty to provide advice and information on 24.2.2003; and

vi) The safe system that should have been available in a specialist maternity hospital.

The Court therefore found the medical evidence from the Plaintiff's witnesses are more acceptable and reliable to the facts of the instant case.

Standard of care applicable:

What is the standard of care applicable as regard the provisions of advice and information? The Federal Court in *Zulhasnimar binti Hasan Basri and Anor v Dr Kuppu Velumani P and 2 Others* *(2017)5 MLJ 438* states inter alai that the standard of care is that of the 'patient' standard and as regards diagnosis and treatment is that of the 'doctor' standard as stated in the Bolam test , subject to the Bolitho qualification. The FC in Zulhasnimar (supra) accepted and applied the decision of the Supreme Court of the UK in *Montgomery (appellant) v Lanarkshire Heath Board* (2015) 2 Ail ER 1031 where the relevant passage is as follows:

> '[A] adult person of sound mind was entitled to decide which treatment to undergo and her consent should be obtained before any treatment was carried out. A doctor had a duty to take reasonable care to ensure that the patient was informed about any material risks involved in the recommended treatment and of any reasonable alternative treatments....'

In Montgomery, the pregnant mother was short and had gestational diabetes and was expecting a big baby, her first baby. She was not advised to undergo a Caesarean delivery as opposed to a vaginal delivery. She was not told of the risks of the baby being too big to pass through her vaginal passage. The Supreme court reversed the finding of the trial court and of the COA and found the doctor liable in negligence for failing to advise the pregnant mother that she should have undergone a Caesarean delivery instead of avaginal delivery. During vaginal delivery process Mrs Montgomery's baby had suffered shoulder dystocia meaning that her baby's head had come out but the baby's shoulders were struck in the vaginal passage.

Causation Link:

The learned counsel for the Plaintiff submitted that there is no doubt that the prematurity has caused Zulaika's brain damage. The premature birth could have been avoided only if she was evaluated properly on 24.2.2003 and given tocoiysis and dexamethasone.

The learned counsel for the 1st Defendant submitted that based on the Defendants' expert medical witnesses, the action and/or treatment administered by the 3rd Defendant on the event 26.2.2003 was not negligent. The 3rd Defendant had reasonably discharge her duty of care to the Plaintiff by providing the best medical treatment to the Plaintiff and according to her best medical judgment she was right in not giving tocoiysis because tocoiysis is contraindicated in the advance stage of labour and does not in any way prevent the extremely premature birth and it was affirmed by DW4.

The Court's finding of liability:

The Court has meticulously examined the evidence by all the witnesses and also the documents tendered and also have read the written submissions by the parties, and found that on the balance of probability, the Plaintiff has succeeded in proving its claim against the 1stDefendant, the 2nd and 3rd Defendants on liability.

The Court was of the considered view that the 1st Defendant as a provider of healthcare to the plaintiff was negligent in that it had breach its duty of care to the Plaintiff in not keeping any of the medical records as regards the Plaintiff's ante-natal care and birth in particular medical records of 24. 2. 2003. The 1st Defendant cannot delegate its non-delegable duty of care to the 2nd and 3rd Defendants respectively. Such failure had resulted in the poor treatment and management given. The Court was also of the view that since the Plaintiff was born premature and has suffered brain damage the medical records should be kept until the Plaintiff reaches the age of majority or recovers from brain damage. The evidence of DW2 who was in charge of keeping the record informed the Court that the medical records were only kept for 8 years and thereafter be destroyed is unacceptable with regards to the Plaintiff's case.

As for the 2nd and 3rd Defendants being specialists attached to the 1st Defendant's Hospital and on the facts were not independent contractors. They too were under a duty to see that the Plaintiff's medical records were kept by the 1st Defendant for the duration of the limitation. They could not shift the fault for not keeping the medical records on to the 1st Defendant. The 2nd Defendant was aware that the limitation period will not run if the child patient has suffered brain damage. PW1 Dr, Milton Lum in his testimony stated that in cases of brain- damaged patients the medical report are kept forever. The Court found that both the *2nd* and 3rd Defendants have failed to discharge their duty of care to the Plaintiff in accordance with standard medical practice with what had happened on 26.2.2003.

The 3rd Defendant has failed to discharge her duty of care to the Plaintiff when she did not administer tocoiysis to prolong her pregnancy.

On the quantum

In respect of special damages, the Court is guided by trite law that a claimant claiming damages must prove that he has suffered the damage. The claimant has the burden of proving both liability and quantum of damages. However the Court has the discretion to award nominal damages if the claimant failed to prove the claim. The rationale behind the award is to compensate the plaintiff and not to punish the defendant.

As stated in **Bon ham -Carter v Hyde Park Hotel (1984/ 64 R 177)** Lord Goddard CJ observed:

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

In the instant case, the special damages period claim is for 15 years and 6 months or 186 months. It is to be noted that our courts in brain damage claim, have accepted the oral evidence of the parents as regards special damages.
Plaintiff's current condition:

Learned counsel for the Plaintiff submitted that since birth on 26.2.2003, she has been totally dependent on others for all activities of her daily living. From the evidence adduced, it is unfortunate that she has no prospect at all of recovering from her disabilities. She had hydrocephalus which is accumulation of cerebrospinal fluid (CSF) within the brain, it requires surgical insertion of a ventriculoperitoneal (VP) shunt. The VP shunt works by draining the CSF from within the brain into the abdomen. The Draining of CSF lowers the pressure and swelling in the brain caused by the hydrocephalus. The VP is a lifelong requirement for the Plaintiff and in the past 15 years, she has had a few surgeries to revise the VP shunt.

Her parents have been taking her for follow-up and therapy appointments at Putrajaya Hospital and later to Kuala Lumpur Hospital (HKL). Her parents have had to stop all appointments, save for her neurosurgical follow -up at HKL due to their inability to take time off from work to attend these appointments.
The hospital and medical expenses.

Of the RM63, 000 hospital and medical expenses:

> Expenses at Az-Zahrah of RM47.000 is disallowed because this was paid for by the employer from the medical insurance policy taken. In the case of Dr Kok where the plaintiff was allowed to claim for medical insurance from the insurance policy taken and paid for by the plaintiff. That being so there is a contractual relationship between the plaintiff there and the insurance company. In the instant case no proof was shown that PW3 paid for the insurance premium.

The Court however allowed the cost of RM3, 500 being expenses incurred at HKL and RM12, 000.00 at the NCI (National Cancer Institute)
Travelling expenses;

Following the brain damage suffered on 26.2.2003, the Plaintiff remained at Putrajaya Hospital for 3 months until 5.5.2003 and required further admission at HKL and was finally discharge home on 17.5.2003. Following her discharge, the Plaintiff's parent had to travel to various places to purchase her supplies and necessities. The Court is appraised that it is not possible to quantify these expenses with precision and accuracy but suffice to say that a reasonable monthly expenses on this item is around RM125 per month and/or about RM1500 per is reasonable,

The proper calculation would be RM125 per month for 186 months equals RM22,500. The Court was of the view that the amount of RM22,500 for 186 months is a reasonable amount and would allow this claim for travelling expenses.

Machines, appliances and equipment:

For this item the Plaintiff was claiming the sum of RMRM10,000 however no receipts were produced in Court. Nevertheless the Court of the view that notwithstanding no receipts were shown, a reasonable sum could be awarded. In the circumstances in the absence of documentary proof, the Court would allow the sum of RM5.000 as nominal sum for this claim.

Medicines and nutritional supplements:

This claim by the Plaintiff includes supplements such as Epilim, Lactulose, and Ravine enema and other supplements such as Spirulina, Minyak Anugerah, Heating Gamat, Jus Delima Scott Emulsion, Olive oil. The learned counsel has itemised the cost incurred in paragraph 217 of the Plaintiff's written submission which totalled RM73,596.00, 000.00. No receipts were produced but the Court was of the considered view that the sum of RM30.000, for the year 2004-2017 was a reasonable sum and will allow payment for the sum of RM30,000.00.

Diapers, cream wet tissues:

For this item the Plaintiff is claiming the sum of RM20,496.00 from 2003 to 2017. No receipts were produced. Nevertheless the Court will allow a reasonable sum of RM10,000.00

Costs of therapies:

In her oral evidence PW3 said she had been taking the Plaintiff for therapies at various places from the year 2004. For each session of therapies it cost between RM80 and RM100 and had incurred an estimated cost of RM80,160.00. Again no receipts were tendered in Court. In the absence of any receipts, the Court awarded a nominal sum of RM 15,000.00 as a reasonable sum for this item.

Cost of Maid:

The evidence by PW3 showed that she and her husband had to employ maid since the Plaintiff's discharge from the hospital in May 2003. The parents are working and the Plaintiff had to be looked after until her parents return from work. The learned counsel for the Plaintiff in the written submission at paragraph 227 to 230 had had item the amount for two (2) years which comes to a figure of RM31,800. For this item the Court allows the claim for RM30,000. However the Court disallowed the total cost of maid for special damages for the period from May, 2003 for 184 months in the sum of RM243,800 for lack of documentary proof. The claim was substantia] so some form of documentary proof had to be shown to Court. Since the Plaintiff could not substantiate this claim, the Court has refused to allow the said claim based on the said figure.

Additional costs of holidays:

The Plaintiff was claiming the sum of RM45,000.00 as additional expenses for bringing the Plaintiff for a holiday. The court has in some cases allowed the claim for holiday. In the instant case, the Plaintiff has failed to produce receipt and/or invoices showing the cost for the Plaintiff and her parents. In view of the fact that no receipts or itinerary were tendered in Court, the Court was inclined to allow the sum of RM20,000 as nominal cost incurred.

Cost of acquiring a suitable car for the Plaintiff:

The parents of the Plaintiff had informed the Court that they have bought a new car which could accommodate the Plaintiff's need to travel, namely a Hyundai Matrix. The cost of acquiring the said car was the sum of 48,493,00, however since the said car would also be used by the family when not in use for the Plaintiff's need, In the circumstances, a 1/3 share should be deducted from the said claim. The Court therefore would allow the sum of RM32,328.00 as a reasonable amount claimed.

The costs of acquiring medical records and reports in the sum of RM8,400.00 on a solicitors and client costs should be allowed. The Court allowed the claim for this item as they are required for purposes of initiating this claim against the Defendants.

The cost of renovation:

The evidence led by PW3 showed that the bathroom and toilet in the house where the Plaintiff and her parents stayed had to be renovated. PW3 had shown to Court pictures of the bathroom cum toilet which had been renovated. The costs of renovation incurred by the parents of the Plaintiff was the sum of RM 15,000.00 of which the Court allowed.

Costs of Formula milk:

The Plaintiff's parent continued to purchase 8 tins of Ensure Formula milk every month and each tin cost RM78.00, The total sum for the pre-trial period will be RM13,040.00 multiplied by 26 months. The Court was of the view the amount claimed was justified and will allow the said sum of RM13,040.00.

There is also a claim under heading **Future Damages:**
Life expectancy and multiplier:

On this aspect , the Federal Court in Inas Faiqah (supra) had decided that the standard of proof of future damage is on a balance of probabilities, but with a lower degree of certainty which can be described as a 'possibility' 'chance' 'risk' 'danger' or 'likelihood'
Once and for all assessment:

The rationale behind this principle is that once damages are assessed, the Plaintiff could not return to Court to seek for damages for her disabilities and needs.

In England and Wales provisional damages were introduced by legislation following the criticism by Lord Scarman in *Lim Poh Choo v Camden and Islington Area Health Authority* (1979)2 All ER 910. Lord Scarman had this to say:

> 'The course of the litigation illustrates with devastating clarity, the insuperable problems impltcits in a system of compensation for personal injuries which (unless the parties agree otherwise) can yield only a lump sum assessed by the court at the time of judgment. Sooner or later and too often later rather than sooner, if the parties do not settie, a court (once liability is admitted or proved) has to make an award of damages. The award which covers past, present and future injury and loss must, under our law, be of a lump sum assessed at the conclusion of the legai process. The award is final; it is not susceptible to review as the future unfolds, substituting fact for estimate. Knowledge of the future being denied to mankind so much of the award as it is to be attributed to future loss and suffering (in many cases the major part of the award) will almost surely be wrong, There is really only one certainty: the future will prove the award to be either too high or too low'

Our Courts have adopted the same principle in considering 'once and for all assessment' with the assistance of the experts. The Plaintiff's witness, PW2 Dr, Kavitha Uma Ratnalingam a consultant rehabilitation physician testified by reference to her report under the heading 'Prognosis and Estimated Life Expectancy'. PW2 testified that the Plaintiff has about 48 years of expectancy taking into account the Plaintiff was 15 years old at the time of trial which should be life expectancy of 63 years. PW2 had given a detail account of how the estimated life expectancy of the Plaintiff was derived at and the Defendants did not challenge PW2's evidence.

As for the multiplier it should be 48.45 which is to the nearest denominator of 49 years.
Future General Damages:

The learned counsel for the Plaintiff has asked the Court to allow the claim under the following heading namely:

i) Cost of hospital admission;
ii) Cost of medications;
iii) Cost of specialist consultations;
iv) Costs of therapies;
v) Cost of hygiene;
vi) Cost of nutrition and supplements;
vii) Cost of assistive devices;
viii) Cost of maids and training of the careers;
ix) The valve of care by her parents;
x) Cost of home modification;
xi) Cost of modified vehicles;

xii) Additional cost of holidays;

xiii) Living expenses and accommodation in adulthood.

The Court has allowed most of the Plaintiff's above notwithstanding that in some of the items, where receipts could not be reproduced, and nominal award were made.

For **special damages under heading care by the family members,** the Court allowed the said claim of RM2000 per month multiplied by 186 months equals RM372,000.00

For **pre-trial damages** under the following items were allowed by the Court namely:

i)	Travelling cost (RM300 per month x 26 months)	- RM7800.00;
ii)	Medicine and supplements	RM5000.00;
iii)	Diapers and cream	RM2000.00;
iv)	Therapy	RM5000.00;
v)	Maid	RM10,000.00;
vi)	Cost of family care (RM2000 x 26 months)	RM52,000.00
vii)	Formula milk	RM16,224.00

Future General Damages:

i) Cost for future therapy and medicine RM1,390,000.00;

ii) Medicines - RM343.686.00;

iii) Cost of assisting devices- RM1,344,600,00;

iv) (for this item the Court adopted the submission of the Plaintiff under G3 'Assistive Devices' item No:1 to item 19.);

v) Cost of hiring maid 1% maid at the @ of RM1925 per month multiplied with 49 years = RM1,697.850.00;

vi) Cost of vehicle MPV at RM1078,000.00 less 1/3 for family use fitted with hydraulic lift RM224,000 and petrol of RM294,000.00) gives a round figure of RM1,236,666.67;

vii) Care by the parents at RM500 per month for 49 years equals RM294,000.00;

viii) Additional holidays @ RM3000 per month gives the sum of RM147,000.00;

ix) Accommodation cost and childhood of-RM564,000.00;

Damages for pain and suffering and loss of amenities-RM400,000.00

Getting up costs:

i) As against the 1st Defendant, the Court ordered cost of RM50,000 to be paid to the Plaintiff subject to allocator fee;

ii) As against the 2nd Defendant, the Court ordered cost of RM70,000 to be paid to the Plaintiff subject to allocator fee;

iii) As against the 3rd Defendant, the Court ordered cost of RM70.000.00 to be paid to the Plaintiff subject to allocator fee.;

iv) The Court allowed the Plaintiff's out of pocket expenses of RM34,000.00

Interest:

The Court allowed interest on special damages at the rate of 4% per annum from 26.2.2003 to date of judgment. The Court also awarded interest on pre-trial general damages for pain and suffering and loss of amenities at the rate of 8% per annum from the date of service of the Writ ie on 4.4.2018 till date of judgment.

The Court also awarded interest on the judgment sum including the cost at the rate of 5% per annum from the date of judgment till realisation.

The Court also made the Consequential Order as follows: That the judgment sum be held by the Plaintiff's parents as litigation representative on trust for the benefit of the Plaintiff pursuant to Order 76 rule 12 of the *Rules of Court, 2012*.

It is Further Ordered that:

The amount of expenses incurred inclusive of the cost of instituting this action and the legal fees on the 'solicitor client cost' be deducted from the judgment sum and payable.

That the said judgment sum be deposited in the trust account for the Plaintiff until she reaches the age of 30 years in the following manner namely:

i) The sum of RM200,000.00 be deposited in the unit trust in Amanah Saham Nasional (ASN);

ii) The sum of RM200.000.00 be deposited in the unit trust in Amanah Saham Bumiputra (ASB);

iii) The sum of RM200,000.00 be deposited in the unit trust in Amanah Saham Malaysia (ASM);

iv) The sum of RM200,000.00 be deposited in unit trust in Amanah Saham Malaysia 2 Wawasan (ASM2);

v) The sum of RM3.000.000.00 be deposited in the Tabung Haji;

vi) That any withdrawal of the money from any of the said account shall be with the leave of the Honourable Court,

vii) The trustees are at liberty to apply.

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