

35/82

No. 36 of 1980

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 :

1. YEW BON TEW ALSO KNOWN AS
YONG BOON TIEW
2. GANESAN S/O THAVER (AN INFANT)
SUIING BY HIS GUARDIAN AND NEXT
FRIEND, YEW BON TEW ALSO KNOWN
AS YONG BOON TIEW

Appellants
(Plaintiffs)

- and -

KENDERAAN BAS MARA

Respondent
(Defendant)

RECORD OF PROCEEDINGS

Le Brasseur & Bury,
71 Lincolns Inn Fields,
London WC2A 3JF.

Solicitors for the
Appellants

Coward Chance,
Royex House,
Aldermanbury Square,
London EC2V 7LD.

Solicitors for the
Respondent

IN THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL

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- Appellants
(Plaintiffs)

- and -

KENDERAAN BAS MARA

Respondent
(Defendant)

RECORD OF PROCEEDINGS

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Affidavit of Cheah Kau Chiew in support of Motion	19th December 1979
Order granting conditional leave to appeal	7th January 1980

35/92

No. 36 of 1980

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 :

- 1. YEW BON TEW ALSO KNOWN AS
YONG BOON TIEW
 - 2. GANESAN S/O THAVER (AN INFANT)
SUIING BY HIS GUARDIAN AND NEXT
FRIEND, YEW BON TEW ALSO KNOWN
AS YONG BOON TIEW
- Appellants
(Plaintiffs)

- and -

KENDERAAN BAS MARA

Respondent
(Defendant)

RECORD OF PROCEEDINGS

No. 1

Writ of Summons - 20th March, 1975

In the High
Court in Malaya

No. 1
Writ of Summons
20th March 1975

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT 1975 NO. 416

Between

- 1. Yew Bon Tew also known
as Yong Boon Tiew
 - 2. Ganesan s/o Thaver (an infant)
suing by his guardian and next
friend, Yew Bon Tew also known
as Yong Boon Tiew
- Plaintiff

And

Kenderaan Bas Mara

Defendant

THE HONOURABLE TAN SRI SARWAN SINGH GILL P.S.M.,
Chief Justice of the High Court in Malaya, in the

In the High
Court in
Malaya

No. 1
Writ of Summons
20th March 1975
(cont'd)

name and on behalf of His Majesty the Yang Di
Pertuan Agong.

To: Kenderaan Bas Mara,
Bangunan Mara,
Jalan Tuankua Abdul Rahman,
KUALA LUMPUR.

WE COMMAND you, that within 8 days after
the service of this Writ on you, inclusive of the
day of such service, you do cause an appearance
to be entered for you in an action at the suit of
1. Yew Bon Tew also known as Yong Boon Tiew 2.
Ganesan s/o Thaver.

10

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

WITNESS Noor Faridah, Senior Assistant
Registrar of the High Court in Malaya the 20th
day of March 1975.

Sd: K.C. Cheah & Co. L.S.
Plaintiff's Solicitors.

Sd: _____
Senior Assistant
Registrar,
High Court,
KUALA LUMPUR.

20

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

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

30

A defendant appearing personally, may, if
he desires, enter his appearance by post, and the
appropriate forms may be obtained by sending a
Postal Order for \$3/- with an addressed envelope
to the Registrar of the High Court at Kuala Lumpur.

The 1st Plaintiff is claiming for himself and
the 2nd Plaintiff is claiming through his guardian
and next friend, the 1st named Plaintiff for personal
and consequential loss and damage to themselves by
reason of the negligent driving of a motor bus
registration No. BQ 4205 by the Defendants' agent
or servant on the 5th day of April 1972 along the
Klang-Banting Road in the State of Selangor.

Dated this 20th day of March 1975.

Sd: K.C. Cheah & Co.
Solicitors for the
Plaintiffs.

In the High
Court in Malaya

No. 1
Writ of Summons
20th March 1975
(cont'd)

(This Writ is accompanied with the
Statement of Claim).

10 This Writ was issued by M/s K.C. Cheah &
Co. whose address for service is Room 12, 1st
Floor, Wing On Life Bldg., Kuala Lumpur,
Solicitors for the said plaintiff who resides at
No. 93 Jenjarom New Village, Selangor.

Endorsement to be made within three days
after service.

This Writ was served by me at
on the defendant
on the day of 19
the hour of

Indorsed the day of 19

(Signed)

(Address).....

20

No. 2

Statement of Claim - 20th March, 1975

No. 2
Statement of
Claim - 20th
March 1975

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 416 OF 1975

Between

- 1. Yew Bon Tew also known as
Yong Boon Tiew
 - 2. Ganesan s/o Thaver (an infant)
suing by his guardian and next
friend, Yew Bon Tew also known
as Yong Boon Tiew
- Plaintiffs

30

And

Kenderaan Bas Mara Defendants

STATEMENT OF CLAIM

1. On or about the 5th day of April 1972 at
about 7.40 a.m. the 1st Plaintiff was riding and
the 2nd Plaintiff was pillion on a motor cycle

registration No. BV 9443 travelling along the Klang-Banting Road in the state of Selangor in the direction of Banting when at or near its junction with the road leading to Pejabat Daerah, the Plaintiffs were knocked into by a motor bus registration No. BQ 4205 belonging to the Defendants and driven by the Defendants' servant.

2. The said collision was caused by the negligence of the Defendants' servant.

PARTICULARS OF NEGLIGENCE

10

- (a) Failing to keep any or any proper lookout;
- (b) Driving at an excessive speed in the circumstances;
- (c) Failing to give any or any sufficient warning of his approach;
- (d) Failing to notice the presence of the Plaintiffs' motor cycle on the highway;
- (e) Colliding with the Plaintiffs' motor cycle from the rear;
- (f) Driving onto the wrong side of the road;
- (g) Failing to stop, swerve, slow down or otherwise avoid the said collision;
- (h) Driving in a careless, reckless and negligent manner without any or any sufficient regard for motor cyclists on the road;
- (i) Failing to stop, to slow down, to swerve or in any other way so to manage or control the said motor bus as to avoid colliding with the Plaintiffs' motor cycle from the rear.

20

30

3. The Plaintiffs will further, if necessary rely upon the doctrine of res ipsa loquitur. So far as may be necessary, the Plaintiffs will also rely upon all the provisions of the Highway Code applicable to the drivers of motor vehicles.

4. By reason of the matters aforesaid, the Plaintiffs suffered pain and injury, loss and damage.

PARTICULARS OF INJURIES SUSTAINED
BY 1ST PLAINTIFF

40

He was admitted to the Hospital Besar, Kuala Lumpur on 5.4.72, and sustained the following injuries:-

1. Abrasions extensive over back of chest.
2. Oval puncture wound 3" left iliac crest.
3. Fracture 3rd, 4th, 6th ribs left chest with evidence of blood in left plural cavity.
4. Puncture wound 2" with torn muscle exposed in left forearm.
5. Laceration 1" left shin.
6. Swelling left iliac region with clinical evidence of retro-peritoneal haemorrhage.

In the High Court in Malaya

No. 2
Statement of
Claim - 20th
March 1975
(cont'd)

10

X-ray confirmed:-

1. Fracture ribs 3rd, 4th, 5th, 6th, 7th with haemothorax.
2. Fracture left ulna.
3. Fracture upper 1/3rd right femur.
4. Fracture left iliac bone.
5. Fracture transverse processes of 3rd, 4th lumbar vertebrae on the left side.

20

He was in plaster cast from 5.4.72 to 15.7.72. He was discharged as an outpatient on 15.7.72 and last seen on 2.10.72 when he was found to have 1" shortening of the right leg.

PARTICULARS OF INJURIES SUSTAINED
BY 2ND PLAINTIFF

He was admitted to the Hospital Daerah, Klang on 5.4.72 and discharged on 6.6.72.

30

Injuries:-

1. Extensive laceration with avulsion of skin of (R) foot.
2. Abrasion on dorsum of (L) ankle.
3. Abrasion (L) elbow.

He was in plaster cast from 5.4.72 to 20.9.72.

In the High Court in Malaya

PARTICULARS OF SPECIAL DAMAGES
BY 1ST PLAINTIFF

No. 2
Statement of
Claim - 20th
March 1975
(cont'd)

Loss of wages from 5.4.72 to 8.11.72 at \$300/- permonth	\$2,100.00	
Damage to motor cycle	300.00	
Medical fees and nourishing food	500.00	
Transport expenses to and from Hospital @ \$3/- per trip for 30 visits by wife and children	90.00	
Transport expenses to and from Hospital as an outpatient @ \$5/- per trip for 20 trips	<u>100.00</u>	10
	<u>\$3,090.00</u> =====	

PARTICULARS OF SPECIAL DAMAGE
BY 2ND PLAINTIFF

Loss of wages from 5.4.72 to 30.11.72 @ \$60/- per month	\$480.00	
Medical fees and nourishing food	250.00	
Transport expenses to and from Hospital as an outpatient @ \$5/- per trip for 20 trips	<u>100.00</u>	20
	<u>\$830.00</u> =====	

AND the Plaintiffs claim damages and interest thereon at 6% per annum from the 5th day of April 1972 to the date of Judgment and costs.

Dated this 20th day of March 1973.

Sd: K.C. Cheah & Co.
Plaintiffs' Solicitors.

No. 3

Defence - 19th March, 1976

In the High
Court in Malaya

No. 3
Defence - 19th
March 1976

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 416 OF 1975

Between

1. Yew Bon Tew also known as
Yong Boon Tiew
 2. Ganesan s/o Thaver (an infant)
suing by his guardian and next
friend, Yew Bon Tew also known
as Yong Boon Tiew
- Plaintiffs

And

Kenderaan Bas Mara

Defendants

Statement of Defence

1. Save that there was a collision on or about the 5th day of April 1972 at about 7.40 a.m. along the Klang-Banting Road, in the State of Selangor between M/Cycle BV 9443 and M/Bus BQ 4205, all allegations contained in Paragraph 1 of the Statement of Claim are denied.
2. Paragraph 2 of the Statement of Claim is denied and each and every particulars of negligence is denied. It is contended that the said collision was caused solely by the negligence of the rider of M/Cycle BV 9443 or in any event the said rider of M/Cycle BV 9443 substantially contributed in negligence.

PARTICULARS OF NEGLIGENCE OF THE
RIDER OF MOTOR CYCLE NO. BV 9443

- (a) Failing to keep any or any proper lookout;
- (b) Failing to observe the presence of the said M/Bus BQ 4205 on the said road;
- (c) Riding at an excessive speed in the circumstances;
- (d) Turning suddenly into the path of M/Bus BQ 4205 from the left to the right when it was unsafe to do so;
- (e) Turning as aforesaid without giving any or any sufficient warning of his intention to do so;

In the High
Court in Malaya

(f) Failing to exercise reasonable care and
skill in the circumstances.

No. 3
Defence - 19th
March 1976
(cont'd)

3. The Defendants have no knowledge of
Paragraph 4 of the Statement of Claim and put the
Plaintiffs to strict proof thereof.

4. Further or alternatively the Plaintiffs are
time barred from bringing this action by virtue of
the Public Authorities Protection Ordinance 1948.

Wherefore the Defendants pray that this
action be dismissed with costs.

10

Dated this 19th day of March 1976.

Sd: M/s Rithauddeen & Aziz
Solicitors for the
Defendants.

This Statement of Defence is filed on behalf
of the Defendants by M/s Rithauddeen & Aziz,
Advocates & Solicitors, whose address for service
is Tingkat 3, Wisma Batik, Jalan Tun Perak, Kuala
Lumpur.

No. 4
Notes of
Proceedings
13th April
1977

No. 4

20

Notes of Proceedings - 13th April 1977

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 416 OF 1975

Between

1. Yew Bon Tew also known as
Yong Boon Tiew
 2. Ganesan s/o Thaver (an infant) suing
by his guardian and next friend, Yew
Bon Tiew also known as Yong Boon
Tiew
- Plaintiffs

30

And

Kenderaan Bas Mara

Defendants

IN OPEN COURT

13th APRIL 1977

NOTES OF PROCEEDINGS

BEFORE MOHD. AZMI J.

Mr. R. Sethu for Plaintiffs
Encik Zainur Zakaria for Defendants.

10 Subject to preliminary legal point on limitation, liability has been agreed at 70/30 i.e. Defendants 70% to blame and Plaintiff 30%. Based on 100% liability, special and general damages agreed for 1st Plaintiff at \$24,000/- inclusive of interest and agreed costs of \$2000/- For 2nd Plaintiff (a pillion) a sum of \$1,000/- has been agreed as special and general damages based on 100% liability. Being a pillion rider, he is not guilty of contributory negligence. Based on 70%, judgment for Plaintiff should be \$16,800/-.

In the High Court in Malaya
No. 4
Notes of Proceedings
13th April 1977
(cont'd)

Submissions for Defendants

Submissions for Defendants

Encik Zainur submits on preliminary objection on point of law:

20 Refers to para 4 of Statement of Defence - action is time-barred by virtue of Public Authorities Protection Ordinance 1948.

It has been conceded that Defendants are a statutory body and entitled to the protection of the Ordinance. (Mr. Sethu confirms).

The issue is whether Plaintiffs can maintain this action against Defendants in respect of an act which occurred more than 12 months before coming into force of the Public Authorities (Amendment) Act 1974 No. A252 which came into force on 13.6.74 substituting a period of 3 years in place of 12 months under the original unamended provision.

30 The accident happened on 5.4.1972. The writ was issued by Plaintiffs on 20.3.75 and served on Defendants on 27.3.1975. Defendants applied by Summons-in-Chambers to have the issue tried vide Summons-in-Chambers dated 21.4.76. (enclosure 5 in file). The application was dismissed on ground it was premature. The issue was not decided.

Thus, the Plaintiffs brought the action almost three years after the date of accident.

40 The real issue in this case is whether the amended section 2(a) of the Ordinance applies (which means three years and therefore the suit is not time-barred) or whether the provisions of section 2(a) prior to amendment should apply (which means one year period of limitation and therefore the suit is time-barred).

The amending Act 252 came into force on 13.6.74. This is the effective date.

In order to succeed, Plaintiffs must show:-

In the High
Court in Malaya

No. 4
Notes of
Proceedings

13th April 1977
Submissions for
Defendants
(cont'd)

The amending Act is retrospective in character and revives their right to bring this action, which right had ceased to exist as on 4.4.1973, i.e. 12 months from accident 5.4.1972.

The questions are:-

Is the amending Act retrospective in character? Refers to Wright v. Hale (1860) 6 H & N 227 @ 232(158 E.R. 94 @ 96). Distinction made between amendment Act affecting vested rights and that which only regulate procedure. Wright v. Hale was referred to in Maxwell v. Murphy (1956-7) Vol. 96 C.L.R. 261 at 268 "The rule applicable to cases of this sort is that, when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the Enactment deals with procedure only, unless the contrary is expressed, the Enactment applies to all actions whether commenced before or after the passing of the Act".

10

20

Maxwell v. Murphy is on all fours with present case. (See Headnotes). The High Court of Australia held by majority that the amendment did not operate to revoke the Plaintiffs' right to mention an action which had been barred from 19.3.52. Accident happened on 19.1.51. Amendment was on 16.11.53. Action commenced on 30.11.54. Thus, before the amendment came into force on 19.3.52, the action was already time-barred. At page 270, 5th line from top.

30

- "(a) A statute divesting vested rights is to be construed as prospective.
- (b) A statute, merely procedural, is to be construed as retrospective.
- (c) A statute which, while procedural in its character, affects vested rights adversely is to be construed as prospective" per Dixon C.J.

In the present case, the amending Act comes under (c) category.

40

But William J. in the same case put the matter into two categories. See page 277 line 9 from top. Further down - "Statutes of limitation are often deemed as procedural statutes. But it would be unwise to attribute a prima facie retrospective effect to all statutes of limitation..... But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought

within the new time very different considerations could arise They would affect substantive rights".

In the High Court in Malaya

No. 4
Notes of Proceedings
13th April 1977
Submissions for Defendants
(cont'd)

10 Page 268 line 18 from bottom "The effect of these provisions..... was to confer a right of action which is to endure for twelve months from the death..... when the time expired, the right of action was terminated or defeated the situation is one falling within the application of the presumptive rule of construction" i.e. amending law should apply prospectively unless, it is expressly provided otherwise.

This principle has been applied in numerous cases:-

1. The Ydun (1899) C.A. 236 at 245 line 16 from bottom. "The rule applicable to cases of this sort is well stated by Wilde B. in Wright v. Hale"

20 Also page 246 line 15 from top "there is abundant authority that the presumption against a retrospective construction has no application to enactments which affect only the procedure and practice of the Courts.

In the present case, the acquired or vested right of Defendants is affected. They were no longer liable before the amendment.

30 2. The King v. Chandra Dharma (1905) 2 K.B. 335 at page 338 per Lord Alverstone C.J. Nothing was taken away from the prosecutor so it was held to be a mere matter of procedure and therefore should act retrospectively. Whereas in our case, it takes something from the Defendants which they had acquired prior to amendment, Therefore, the amending Act is not merely procedural, but it affects vested rights.

See also judgment of Channell J. at page 339.

40 Chandra's case and Ydun's case are distinguished by Dixon C.J. in Maxwell v. Murphy (1956-57) 96 C.L.R. 261 at 270. No hardship in Ydun. That was why Court held amending Act was retrospective. Nothing taken away or new obligation imposed.

In the present case, Defendants' liability had ceased to exist as of 4.4.73. The amendment came into force on 13.6.74. If the amending Act were to impose new obligations or destroy them, it must be construed as prospective only. If Court held amending Act is retrospective, it would be

In the High Court in Malaya
No. 4
Notes of Proceedings
13th April 1977
Submissions for Defendants
(cont'd)

- making the Defendants liable all over again.
3. Re Joseph Suche & Co. Ltd. (1875) C.D.
 4. Kimbray v. Draper (1868) L.R. 160.
 5. P.P. v. Datuk Haji Harun (1977) 1 M.L.J.

The amendment does not deal with procedure only but it also affected vested right of Public Authorities, i.e. Defendants in present case.

By section 29 MARA Act 20/1966, the provisions of Public Authorities Protection Ordinance are extended to MARA. 10

6. National Real Estate & Finance Co. Ltd. v. Hassan (1939) 2 K.B. 61 C.A.

7. J.S. Drinkhall v. Nam Hue Motor Hiring (1955) 21 M.L.J. 119.

The law must be construed at the date when the writ is issued. In our case, Plaintiffs issued writ after amendment came into force. In Drinkhall's case writ issued before amendment. Writ issued on 1.3.51. Amendment on 22.3.53. The case does not discuss question retrospectively. 20

Sd. Mohd. Azmi.

Time 1.10 p.m.
To 2.30 p.m.

Sd. Mohd. Azmi.

Hearing resumed

Parties as before.

Submissions for Plaintiffs

Submissions for Plaintiffs

Mr. Sethu submits:

The issue is whether the Plaintiffs' claim is time barred on the day it was filed. 30

1. Refers to Privy Council case Allah Rakhi v. Mohd. Abdur Rahim vol. 61 L.R. Indian Appeals 50 cited in Drinkhall's case (1955) M.L.J. 119. At page 55 of privy Council case - "the question whether it was then barred by limitation must depend upon the law of limitation which was applicable to the suit at that time, i.e. time suit was brought.

In the present case, suit filed on 20.3.75 40

and on that date, the amendment Act was already in force. Under section 34 Interpretation Act 1967 - amending law shall be read and construed as one with written law. The limitation period on that date was three years and the suit was filed within time.

In the High
Court in Malaya

No. 4
Notes of
Proceedings
13th April 1977
Submissions for
Plaintiffs
(cont'd)

10 2. The Public Authorities Protection Ordinance and amendment Act are procedural statutes and they do not deal with substantive rights. Ours are identical with the English Act of 1893. The only difference was - there, limitation was for six months. (See Halsbury's Statutes Volume 18 2nd Edition page 750). This Act came for interpretation in The Ydun (1899) P.236 @ 241 "I am not sure that it may not be said that in the present instance they are plain. But I feel on firmer ground in saying that the interference with vested rights suggested in this instance is hardly appreciable. I will not refer at length to the authorities, which are well collected in Maxwell on Statutes, but it is clear that what must be taken to be an improvement in procedure is not to be considered as interference with a vested right of those who would have preferred the procedure to remain in its unreformed condition". The Court held the Statute of 1893 was procedural and therefore retrospective. On appeal, decision was affirmed. Argument of appellant dealt with at page 243 (which is similar to argument put up by Encik Zainur). Court of Appeal dealt with it at page 245 - 3rd para. The Act of 1893 is an Act dealing with procedure only. Similarly, our Act deals with procedure only.

Chandra Dharma's case (1905) 2 K.B. 335 @ 337 although a criminal case. Statutes which make alterations in procedure are retrospective.

40 The fact that a party loses the benefit of a limitation is not a vested right but only a procedural right.

50 Maxwell v. Murphy (1956-7) 96 C.L.R. 259 deals with provisions equivalent to sections 7 and 8 of our Civil Law Ordinance. Lord Campbells Act introduced and the limitation was in that Act itself. At page 268. Thus, cause of action is conferred. The Compensation to Relatives Act and the period of limitation is also imposed by the Act. The right of action was dependent on condition it complied with provisions prescribed as to limitations. Whereas we are not dealing with a statute conferring cause of action. We are dealing with a statute which deals purely on procedure. Again at page 273 7th line - which describes the Compensation to Relatives Act of Australia. It is not a pure Act

In the High Court in Malaya

No. 4
Notes of Proceedings
13th April 1977
Submissions for Plaintiffs (cont'd)

dealing with procedure. It deals with both cause of action and the procedure.

As regards page 268 penultimate para, it refers to substantive right because the law itself gave it. Because of the nature of the Act, Dixon C.J. said at last para of page 268, "right to damages could not be separated from the right to recover them".

Our case is a clear case of The Ydun (1899) p. 236.

10

Statutes of limitation do not bar right. It only bars remedy. But in Murphy's case, it bars both remedy and right.

Sd. Mohd. Azmi.

Order of Mohd. Azmi J. on preliminary objection.

Order of Mohd. Azmi J. on preliminary objection

Ruling:

I find Maxwell v. Murphy is a case concerning Compensation to Relatives Act which deals with both cause of action and procedure. Whereas we are dealing with a statute similar in The Ydun's case which deals purely on procedure and, therefore, should operate retrospectively.

20

Following the judgment of Murray-Aynsley C.J. in Drinkhall's case (1955) M.L.J. 119, I hold that in cases of procedure, the test to be applied is, what is the law applicable at the time when suit was instituted.

Applying these two principles, preliminary objection overruled.

ORDER:

30

Defendants' preliminary objection overruled.

Sd. Mohd. Azmi

Order by Consent of Mohd. Azmi J.

ORDER:

By consent Judgment for Plaintiffs in the following terms:-

1. For the 1st Plaintiff, \$16,800/- as special and general damages inclusive of interest.
2. For the 2nd Plaintiff, \$1,000/- as special and general damages inclusive of interest.
3. Agreed costs of \$2,000/-.

40

Order by Consent of Mohd. Azmi J.

Money payable to 2nd Plaintiff to be deposited with Public Trustee in trust for his maintenance and education until he reaches the age of majority.

Sd. Mohd. Azmi.

In the High Court in Malaya

No. 4
Notes of Proceedings
13th April 1977
Order by Consent of Mohd. Azmi J.
(cont'd)

No. 5

Order of Mohd. Azmi J. - 13th April 1977

No. 5
Order of Mohd. Azmi J. - 13th April 1977.

IN THE HIGH COURT IN MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 416 OF 1975

10

(PERSONAL CLAIMS DIVISION)

Between

1. Yew Bon Tew also known as Yong Boon Tiew
 2. Ganesan s/o Thaver (an infant) suing by his guardian and next friend, Yew Bon Tew also known as Yong Boon Tiew
- Plaintiffs

And

Kenderaan Bas Mara

Defendants

20

BEFORE THE HONOURABLE MR. JUSTICE MOHD AZMI

THIS 13TH DAY OF APRIL 1977

IN OPEN COURT

O R D E R

30

THIS SUIT and the Defendants' preliminary objection as to the maintainability of this suit coming up for hearing this day and UPON HEARING Mr. R.R.Sethus of Counsel for the Plaintiffs and Encik Zainur b. Zakaria of Counsel for the Defendants and UPON READING the pleadings, the Agreed Statement of Facts and the Agreed Bundle of Documents IT IS ORDERED that the Defendants' preliminary objection be and is hereby overruled AND BY CONSENT IT IS ORDERED that the Defendants do pay the First Plaintiff the sum of \$16,800/- (Ringgit Sixteen Thousand Eight Hundred) only as general and special damages (inclusive of interest)

In the High
Court in Malaya

No. 5
Order of Mohd.
Azmi J. - 13th
April 1977.
(cont'd)

AND IT IS BY CONSENT ORDERED that the Defendants do pay the 2nd Plaintiff the sum of \$1,000/- (Ringgit One Thousand) only by way of general and special damages AND IT IS ORDERED that the said sum of \$1,000/- to be paid to the Public Trustee for the maintenance and education of the 2nd Plaintiff until he attains the age of majority AND BY CONSENT IT IS ORDERED that the Defendants do pay to the 1st Plaintiff the costs of this action agreed at \$2,000/- (Ringgit Two Thousand) only.

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GIVEN under my hand and the seal of the Court this 13th day of April 1977.

Sd: Illegible

Senior Assistant Registrar,
High Court, Kuala Lumpur.

This order is filed by M/S K.C. Cheah & Company, Solicitors for the Plaintiffs whose address for service is Room 12, 1st Floor, Wing on Life Building, Jalang Silang, Kuala Lumpur

No. 6
Grounds of
Judgment of
Mohd. J. Azmi
13th March
1979.

No. 6

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Grounds of Judgment of Mohd. J. Azmi
13th March, 1979

IN THE HIGH COURT OF MALAYA AT KUALA LUMPUR

CIVIL SUIT NO. 416 OF 1975

Between

1. Yew Bon Tew also known as
Yong Boon Tiew
 2. Ganesan s/o Thaver (an infant) suing
by his guardian and next friend,
Yew Bon Tew also known as Yong
Boon Tiew
- Plaintiffs
- AND
- Defendants
- Kenderaan Bas Mara

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GROUND OF JUDGMENT OF MOHD. AZMI J.

This is a claim for damages for personal injuries sustained by the Plaintiffs in a motor accident that took place on April 5, 1972 along Klang/Banting Road. A motor cycle ridden by the 1st Plaintiff with the 2nd Plaintiff as a pillion rider came into collision with the Defendants' bus. On liabilities, the parties have agreed that the Defendants as owners of the bus are 70% to blame and the 1st Plaintiff 30% for contributory negligence. No liability is attached to the 2nd Plaintiff as he was merely a

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million rider. On 100% liability, the parties also agree that special and general damages should be assessed at \$24,000/- for the 1st Plaintiff, and \$1,000/- for the 2nd Plaintiff. These figures are inclusive of interest. Costs of \$2,000/- are also agreed.

In the High
Court in Malaya

No. 6
Grounds of
Judgment of
Mohd. J. Azmi
13th March
1979.
(cont'd)

10 The Court is, however, asked to determine a preliminary objection on point of law raised by the Defendants. By paragraph 4 of the Statement of Defence, it is pleaded that the Plaintiffs are time-barred from bringing the present action by virtue of the Public Authorities Protection Ordinance 1948. It is not clear whether the Court can entertain the preliminary objection since the same point was raised by the Defendants in their application by Summons-in-Chambers dated April 21, 1976 pursuant to Order 25 Rule 2 of the Rules of the Supreme Court. The matter came up for hearing on June 20 3, 1976, and the application was dismissed with costs. The Defendants should be estopped from raising the same matter again. Counsel for the Plaintiffs did not raise any objection presumably on the ground that the point of law was not actually adjudicated at the previous hearing and that the Court dismissed the Plaintiffs' application because the Plaintiffs and their counsel failed to appear at the hearing.

30 Be that as it may, the defence contention that the Plaintiffs' claim is time-barred is based on the proposition that the Public Authorities Protection (Amendment) Act 1974 (Act A252), which has enlarged the period of limitation from twelve months to thirty-six months, is prospective and not retrospective in its application. The Amending Act came into force on June 13, 1974. If the Amending Act is prospective as contended by the Defendants, then 40 the Plaintiffs' action which was commenced on March 20, 1975 would be time-barred under the original provision of section 2(a) in view of the fact that the writ was issued more than twelve months from the date of accident - April 5, 1972. On the other hand, if the Amending Act is retrospective, as contended by the Plaintiffs, then the action is within the new period of limitation. There is no dispute that the Defendants, being a statutory body, are entitled to the protection of the Act.

50 Before the amendment, section 2(a) of the Public Authorities Protection Act, 1948 reads:

"Where, after coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the

In the High
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No. 6
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(cont'd)

Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect -

- (a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof".

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As stated earlier on, the Amending Act of 1974 merely extended the period of limitation from twelve months to thirty six months.

From authorities cited, it is my considered judgment that whether the prospective or retrospective rule of construction should apply depends on the nature of the new statute or amending statute. If it is purely a procedural statute and does not deal with substantive rights then the retrospective rule of construction should apply. But where the statute deals with substantive rights, or deals with both procedural and substantive rights, then the prospective rule of construction is applicable. In either case, however, it is subject to any express provision to the contrary in the statute in question.

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In the case of THE YDUN (1), the court had to consider the provision of section 1 of the English Public Authorities Protection Act 1893, which is in pari materia with out section 2(a), except that under the English Act, limitation period was six months. (See Halsbury's Statutes of England, Volume 8, Second Edition, page 750). In that case, the facts are somewhat similar to the present case. By the Public Authorities Protection Act 1893, which was passed on December 5, 1893 and came into force on January 1, 1894 an action against any person in respect of any alleged neglect or default in the execution of any Act of Parliament or of any public duty or authority, must be commenced within six months next after the act, neglect or default complained of. The Plaintiffs, owners of a barque "YDUN" issued a writ on November 4, 1898 in an admiralty action against the harbour authority for the port

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(1) (1899) P.236

of Preston, for damages sustained by the grounding of their vessel on September 13, 1893 within the port area through the alleged negligence of the Defendants. In short, the cause of action arose on September 13, 1893, i.e. before the limitation statute was passed and came into force, but the action was commenced on November 14, 1898 i.e. more than four years after the statute became law. The president (Sir F.H. Jeune) dismissed the action on the merits and also held that the Plaintiffs' action was statute barred. On appeal, the decision of the President was affirmed and the Court of Appeal held that the Defendants were acting in pursuance of their public duties, so that section 1 of the 1893 Act applied, and as the statute, dealing with procedure only, was retrospective, the action was barred after expiration of six months from the default complained of. In the course of his considered judgment, the President had this to say at page 241:

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"There remains another point. The cause of action in that case arose on September 13, 1893, and the Act with which we have to deal was passed on December 5, 1893, to come into force on January 1, 1894. It is, therefore, urged that a retrospective force should not be given to the Act so as to make it include the subject-matter of the present action. There is no doubt of the soundness of the principle appealed to. In Reid v. Reid Bowen L.J. spoke of "The trite maxim omnis nova constitutio futuris formam imponere debet non praeteritis" - that is, that except in special cases 'the new law ought to be construed to interfere as little as possible with vested rights'; but he added that this rule of construction is valuable only when the words of an Act of Parliament are not plain. I am not sure that it may not be said that in the present instance they are plain. But I feel on firmer ground in saying that the interference with vested rights suggested in this instance is hardly appreciable. I will not refer at length to the authorities, which are well collected in Maxwell on Statutes, but it is clear that what must be taken to be an improvement in procedure is not to be considered as interference with a vested right of those who would have preferred the procedure to remain in its unreformed condition....."

In an unanimous decision, the Court of Appeal held that the Statute of 1893 was procedural and,

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(cont'd)

therefore, retrospective. The argument for the appellant at page 243 regarding vested right, is similar to the argument put up by counsel for the Defendants in the present case. In answer to that argument, A.L. Smith L.J. said at page 245:

"It is, however, secondly said that even if this be so, still the Act has no retrospective operation, and only applies to actions brought after the Act came into force on January 1, 1894; but in that view I cannot agree, and, in my opinion, that point was correctly dealt with by the learned President in the Court below. The rule applicable to cases of this sort is well stated by Wilde B. in Wright v. Hale (2), namely, that when a new enactment deals with rights of action, unless it is so expressed in the Act, an existing right of action is not taken away. But where the enactment deals with procedure only, unless the contrary is expressed, the enactment applies to all actions, whether commenced before or after the passing of the Act. The Act of 1893 is an Act dealing with procedure only".

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Thus, although the cause of action arose before the statute of limitation came into force, it was held that the action commenced after the enactment of the statute was time-barred because the statute dealt with procedure only and, therefore, retrospective. It would also appear that the important factor is the law of limitation applicable when the action was commenced and not when the cause of action arose. The latter is only relevant for the purpose of computing when time starts to run. A statute of limitation merely denies remedy to a litigant who fails to comply with its procedure or mode of enforcing a right, but it does not confer any right or cause of action. In the light of all these, in the present case, I think it is clear that the Public Authorities Protection (Amendment) Act 1974 is purely a procedural statute and, therefore, retrospective, and it cannot be said that the Defendants have acquired a vested right before the amendment. It is argued that the Defendants' liability had ceased to exist as of April 4, 1973 i.e. twelve months from date of accident. They were no longer liable before the amendment. That would have been true if the Plaintiffs had commenced proceedings from April 5, 1972 until June 12, 1974. But the writ was issued after the amendment came into operation. The original section 2(a) did not extinguish the Defendants'

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(2) (1860) 6 H & N 227 @ 232.

liability. It merely denies remedy to the Plaintiffs by suspending the Defendants' liability as from April 4, 1973. That section is purely procedural.

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(cont'd)

10 From the authority laid down in THE YDUN, I am of the view that the Amending Act deals only in procedure. In the absence of any express provision to the contrary, the Amending Act should, therefore, apply retrospectively. The Defendants would, of course, prefer the procedure to remain in its unamended form, but the legislature has thought it fit to amend the period of limitation. The amendment is essentially an improvement in procedure. As such, it should not be considered as an interference with the Defendants' vested right, but only an interference with procedural right. (See Rex v. Chandra Dharma (3)).

20 Counsel for the Defendants relies heavily on the authority of Maxwell v. Murphy (4) which dealt with the Australian statutory provisions equivalent to sections 7 and 8 of our Civil Law Ordinance on fatal accidents and survival of causes of action. The Compensation to Relatives Act 1897-1946 (N.S.W.) provided that every action under the Act should be commenced within twelve months of the death of the deceased person. Section 2(a) of the Compensation to Relatives (Amendment) Act 1953 amended the principal Act as from December 16, 1953 by providing that the words 'twelve months' be omitted and the words 'six years' inserted. On November 30, 1954, the Plaintiff brought an action in respect of the death of her husband on March 19, 1951. By a majority decision of the High Court of Australia, it was held that the amendment did not operate to revive the Plaintiff's right to maintain an action which had been barred from March 19, 1952. In my view, Maxwell v. Murphy is distinguishable from the present case. The Compensation to Relatives Act of Australia confers right or cause of action and as well as provides for procedure for enforcing such right. The right of action under the Act is dependent on compliance with special procedure on limitation. Whereas in the present case, as in THE YDUN, we are dealing with an amending statute which deals purely on procedure. The Public Authorities Protection Act does not confer any right or cause of action. The principal and amending Acts deal in procedure pure and simple. Both the principal Act and the amending Act do not create any right of action. There can be no

(3) (1905) 2 K.B. 335 @ 337.

(4) (1956-57) 96 C.L.R. 261

In the High
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No. 6
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(cont'd)

question of any right of action being revived as no such right is conferred by the Act. In the present case, the Plaintiffs' cause of action is conferred by section 3 of the Civil Law Ordinance 1956, viz. common law negligence in tort. Such action must be brought within six years from the date on which the cause of action accrued by virtue of section 6 of the Limitation Ordinance 1953. But because the Defendants in the present case are a statutory body and by virtue of section 29 of the MARA Act No. 20 of 1966, special procedure is provided by the Public Authorities Protection Act. Formerly, a litigant must bring any action in tort within twelve months against public authorities but by the amending Act, the period of limitation has been increased to thirty-six months. If the said period of limitation were provided for in the Civil Law Ordinance itself, then the amending Act must be applied prospectively unless there was express provision to the contrary. But the Plaintiffs' right or cause of action in the present case has not accrued under the Public Authorities Protection Act. Thus, unless it is expressly provided otherwise, the amending Act must take effect retrospectively. Further, section 34 of the Interpretation Act 1967 provides that where a written law amends another written law, the amending law shall be read and construed as one with the amended law. As such, the amending Act should be read retrospectively in the absence of any intention to the contrary. In this case, although the accident took place on April 5, 1972 and the amending Act came into force on June 13, 1974, the Plaintiffs' action was commenced on March 20, 1975 i.e. well within thirty six months from the date on which the cause of action accrued. The action is, therefore, not time-barred. Similar facts occurred in Rex. v. Chandra Dharma (ante) although it was a criminal case. There, a prosecution was commenced for an offence which at the time of its commission had to be commenced within three months. Before the three months had elapsed, the time for commencing the prosecution was extended to six months. The prosecution was commenced more than three months, but less than six months after the commission of the offence. The accused was convicted of the offence and it was held that the conviction must be upheld because the Act extending the time for launching the prosecution related to procedure only and was, therefore, retrospective. Similarly, in the present case, the writ was issued more than twelve months but less than thirty six months from date of accident. The only difference with the present case is that, when the amending Act came into force, the period of twelve months from date

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of accident had lapsed. But the test to be applied is not whether the original period of limitation had lapsed when the amending law came into force, but upon the law of limitation applicable when the writ was issued. Thus, in Mt. Allah Rakhi & Ors. v. Shah Mohammad Abdur Rahim & Ors. (5) the Privy Council held at page 78 that "the question whether it was then barred by limitation must depend upon the law of limitation which was applicable to the suit at that time". The Privy Council case was applied by Murray-Aynsley C.J. in J.S. Drinkhall v. Nam Hue Motor Hiring (6). In that case, an accident took place on February 4, 1950 in which the Plaintiff sustained personal injuries. A writ against the defendant was issued on March 1, 1951. At that time, the period of limitation for personal injuries was one year and the defendant pleaded limitation. On March 22, 1953 i.e. some two years after the writ was issued, the period of limitation was increased from one year to three years. It was held that the law must be considered at the date when the writ was issued and therefore, a claim barred at the time when the writ was issued was not revived by a subsequent amendment of the law. It should be noted that in that case when the amendment came into force more than three years had elapsed since the accident. It would appear that the claim was time barred not only under the original law but also under the amended law. Be that as it may and notwithstanding the fact that the learned Chief Justice was dealing with pending claim before amendment, he held, on the authority of Mt. Allah Rakhi's case, that the law of limitation to be considered was at the date when the writ was issued. In the present case, from April 5, 1972 until June 12, 1974 if proceedings had been taken by the Plaintiffs, the Defendants could have successfully raised a plea of limitation. But the writ is issued after amendment when the period of limitation has been increased from twelve to thirty six months. The writ is filed within thirty six months from date of accident. The limitation law applicable when the writ was issued on March 20, 1975, is the amended Public Authorities Protection Act and since the period of thirty six months has not lapsed from the date of accident, I hold that the claim is not time barred. As well put by counsel for the Defendants, the real issue in this case is whether the amended section 2(a) of the Act applies, which means thirty six months

In the High Court in Malaya

No. 6
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Mohd. J. Azmi
13th March
1979.
(cont'd)

(5) A.I.R. (1934) P.C. 77
(6) (1955) 21 M.L.J. 119

In the High
Court in Malaya

No. 6
Grounds of
Judgment of
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13th March
1979.
(cont'd)

and therefore, the suit is not time barred; or whether the provision of section 2(a) prior to the amendment should apply, which means twelve months period of limitation and therefore, the suit is time barred. As already stated, since the amending Act is purely procedural and therefore retrospective and must be read and construed as one with the principal Act, the amended section 2(a) should apply because that is the law of limitation applicable at the time when the writ was issued.

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The Defendants' preliminary objection on point of law is, therefore, overruled.

Since the Defendants are 70% to blame and based on the agreed quantum, judgment is accordingly entered for the 1st Plaintiff for \$16,800/- as special and general damages; and for the 2nd Plaintiff in the sum of \$1,000/- as special and general damages; and that both sums to be inclusive of interest. The Defendants are also to pay an agreed costs of \$2,000/-. Money payable to the infant 2nd Plaintiff is to be deposited with Public Trustee Malaysia in trust for his maintenance and education until he reaches the age of majority.

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Sd: Mohd. Azmi.
Judge,
High Court,
Kuala Lumpur.

Kuala Lumpur.
March 13, 1979.

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Mr. R. Sethu for Plaintiffs.
Encik Zainur Zakaria for Defendants.

Authorities cited but not mentioned in Judgment:

1. Re Joseph Suche & Co. Ltd.
(1875) C.D.48.
2. Kimbray v. Draper
(1868) L.R. 160.
3. P.P. v. Datuk Haji Harun
(1977) 1 M.L.J. 14.
4. National Real Estate & Finance Co.Ltd.
v. Hassan
(1939) 2 K.B. 61 C.A.

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In the Federal Court in Malaya

No. 7
Notice of Appeal
from Order of
Mohd. Azmi J. on
preliminary
objection
25th April 1977.
(cont'd)

To: The Registrar,
Federal Court, Malaysia,
Kuala Lumpur.

And to:

The Senior Assistant Registrar,
High Court,
Kuala Lumpur.

And to: The Respondents and/or their Solicitors,
M/s K.C. Cheah & Co.,
Room 12, 1st Floor,
Wing On Life Bldg.,
Jalan Silang,
Kuala Lumpur.

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This Notice of Appeal is filed on behalf of
the Appellants by M/s Rithauddeen & Aziz, Advocates
& Solicitors, whose address for service is Tingkat
3, Wisma Batik, Jalan Tun Perak, Kuala Lumpur.

No. 8
Memorandum
of Appeal
31st July 1979

No. 8

Memorandum of Appeal - 31st July 1979

IN THE FEDERAL COURT IN MALAYA HOLDEN AT KUALA
LUMPUR

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(APPELLATE JURISDICTION)

CIVIL APPEAL NO. 93 OF 1977

Between

Kenderaan Bas Mara

Appellants

And

1. Yew Bon Tew also known as
Yong Boon Tiew
2. Ganesan s/o Thaver (an infant)
suing by his guardian and next
friend, Yew Bon Tew also known
as Yong Boon Tiew

Respondents

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(In the matter of Kuala Lumpur High Court
Civil Suit No. 416 of 1975)

Between

1. Yew Bon Tew also known
as Yong Boon Tiew

2. Ganesan s/o Thaver (an infant)
suing by his guardian and next
friend, Yew Bon Tew also known
as Yong Boon Tiew Plaintiffs
And
Kenderaan Bas Mara Defendants)

In the Federal
Court in Malaya
No. 8
Memorandum
of Appeal
31st July 1979
(cont'd)

MEMORANDUM OF APPEAL

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KENDERAAN BAS MARA, the Appellants above-named appeals to the Federal Court against the decision of the Honourable Justice Mohd. Azmi on the preliminary objection raised by the Appellants given on the 13th day of April 1977 on the following grounds:-

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1. The Learned Judge erred in law in holding that the Public Authorities Protection (Amendment) Act 1974 (Act A 252) is purely procedural and therefore has a retrospective effect;
and
2. In coming to the above decision the Learned Judge failed to consider that by giving a retrospective effect to the Public Authorities Protection (Amendment) Act 1974 (Act A252), the Learned Judge was reviving or revived the Respondents' right of action which was already barred under the Public Authorities Protection Ordinance 1948; and which effect is clearly wrong in law.

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Dated this 31st day of July 1979.

Sd: M/s Rithauddeen & Aziz

Solicitors for the Appellants
abovenamed.

To: The Chief Registrar,
Federal Court,
Malaysia, Kuala Lumpur.

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And to:- The Respondents abovenamed and/or
their Solicitors,
Messrs. K.C. Cheah & Co.,
Room No. 12, 1st Floor,
Wing on Life Bldg.,
Jalan Silang,
Kuala Lumpur.

This Memorandum of Appeal is filed on behalf of the Appellants abovenamed by M/s Rithauddeen & Aziz, Advocates & Solicitors, whose address for service is Tingkat 3, Wisma Batik, Jalan Tun Perak, Kuala Lumpur.

In the Federal
Court in Malaya

No. 9

No. 9
Grounds of
Judgment of
Federal Court
in Malaya
27th November
1979.

Grounds of Judgment of Federal
Court in Malaya - 27th November
1979

IN THE FEDERAL COURT IN MALAYSIA HOLDEN AT
KUALA LUMPUR

(APPELLATE JURISDICTION)

FEDERAL COURT CIVIL APPEAL NO. 93 OF 1977

Between

Kenderaan Bas Mara Appellants 10

And

1. Yew Bon Tew also known as
Yong Boon Tiew
2. Ganesan s/o Thaver (an infant)
suing by his guardian and next
friend, Yew Bon Tew also known
as Yong Boon Tiew Respondents

(In the matter of Kuala Lumpur High Court
Civil Suit No. 416 of 1975

Between

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1. Yew Bon Tew also known as
Yong Boon Tiew
2. Ganesan s/o Thaver (an infant)
suing by his guardian and next
friend Yew Bon Tew also known
as Yong Boon Tiew Plaintiffs

And

Kenderaan Bas Mara Defendants

Coram: Raja Azlan Shah, C.J. Malaya.
Chang Min Tat, F.J. 30
Syed Othman, F.J.

JUDGMENT OF THE COURT

Paragraph (a) of section 2 of the Public
Authorities Protection Act 1948 which provided
that action shall not lie or be instituted
"unless it is commenced within twelve months
next after the act complained of," was amended
with effect from June 1974 by section 2 of the
Public Authorities Protection (Amendment) Act
1974 (Act A252) by the deletion of the words
"twelve months" wherever appearing in paragraph
(a) of section 2 and substituting therefore the
words "thirty six months". 40

In March 1975 the Respondents brought an action for damages for personal injuries sustained by both of them in a motor accident that took place in April 1972.

In the Federal Court in Malaya

No. 9
Grounds of
Judgment of
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in Malaya
27th November
1979.
(cont'd)

10 The question for decision in this appeal is whether the claim which was commenced after the expiry of the twelve months for bringing the action and therefore barred could be revived by the extended period of thirty six months in the Act. The Learned Judge expressed a view to which we are not prepared to subscribe. He answered the question in the affirmative. It is necessary to quote in extenso his reasoning:

20 "But the writ is issued after amendment when the period of limitation has been increased from twelve to thirty six months. The writ is filed within thirty six months from date of accident. Since the amending Act is purely procedural and therefore retrospective, the limitation law applicable when the writ was issued on March 20, 1975 is the amended Public Authorities Protection Act and since the period of thirty six months has not lapsed from the date of accident, I hold that the claim is not time barred".

30 The pertinent question for determination is the nature of Act A252 - does it affect rights or procedure. An act which makes alteration in procedure only is retrospective: see The Ydun. (1)

40 In our view there are no cases upon which differences of opinion may more readily be entertained, or which are more embarrassing to dispose of, than the cases where the court has to decide whether or not an amending statute affects procedure and consequently will operate retrospectively or affects substantive rights and therefore in the absence of a clear contrary intention, should not be read as acting retrospectively. The distinction between procedural matters and substantive rights must often be of great fineness. Each case therefore must be looked at subjectively; there will inevitably be some matters that are classified as being concerned with substantive rights which at first sight might be considered procedural and vice versa.

50 The Ydun (supra) was quoted to support the argument that Act A252 is procedural. In our opinion that case proceeded on the basis that it

(1) (1899) P.236 C.A.

In the Federal Court in Malaya

No. 9
Grounds of
Judgment of
Federal Court
in Malaya
27th November
1979.
(cont'd)

was one of procedure only. On the date of issue of the writ (November 14, 1898) the law in force was the Public Authorities Protection Act, 1893 (effective date January 1, 1894) which provided that action must commence by March 1894 which was the date within 6 months next after the act complained of. As the Act dealt with procedure only and therefore had retrospective effect, it applied to all actions commenced after the passing of the procedural statute to enforce rights, whether those rights arose before or after the passing of the statute. Since the action was commenced more than 6 months after the date of the act complained of, i.e. September 13, 1893, it was barred. In our opinion the Act dealt only with the mode in which a right of action for damages already existing should be asserted against the public authority. That seems to be in accord with the common law presumption that a procedural amendment is prima facie retrospective. The Act did not affect a vested right adversely. In the case of the latter, there is authority to suggest that the general principle is against retrospectivity.

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It seems to us that the Australian case of Maxwell v. Murphy (2) affords a close analogy. That case dealt with the Australian statutory provisions equivalent to sections 7 and 8 of our Civil Law Act 1956 (Act 67) on fatal accidents and survival of causes of action. The compensation to Relatives Act 1897-1946 (N.S.W.) provided that every action under the Act should be commenced within twelve months of the death of the deceased person. Section 2(a) of the Compensation to Relatives (Amendment) Act, 1953 amended the principal Act as from December 16, 1953 by providing that the words 'twelve months' be omitted and the words 'six years' inserted. On November 30, 1954 the plaintiff brought an action in respect of the death of her husband on March 19, 1951. The substantive right in that case was the right to bring an action within twelve months. On the expiry of that time, the right to bring the action lapsed and as a result there remained no substantive right. Consequently it was held that the amending statute did not apply to actions which prior to the amendment were statute barred. It can thus be seen that an Act which seemingly could otherwise be described as procedural and therefore have retrospective effect will not be so regarded if to do so would have the effect of depriving a party to a cause of his right of action. William J. put it admirably at pages 277-278:

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(2) (1957) 96 C.L.R. 261

10 "Statutes of limitation are often classed as procedural statutes. But it would be unwise to attribute a prima facie retrospective effect to all statutes of limitation. Two classes of case can be considered. An existing statute of limitation may be altered by enlarging or abridging the time within which proceedings may be instituted. If the time is enlarged whilst a person is still within time under the existing law to institute a cause of action the statute might well be classed as procedural.

In the Federal Court in Malaya

No. 9
Grounds of Judgment of Federal Court in Malaya
27th November 1979.
(cont'd)

20 Similarly if the time is abridged whilst such person is still left with time within which to institute a cause of action, the abridgment might again be classed as procedural. But if the time is enlarged when a person is out of time to institute a cause of action so as to enable the action to be brought within the new time or is abridged so as to deprive him of time within which to institute it whilst he still has time to do so, very different considerations could arise. A cause of action which can be enforced is a very different thing to a cause of action the remedy for which is barred by lapse of time. Statutes which enable a person to enforce a cause of action which was then barred or provide a bar to an existing cause of action by abridging the time for its institution could hardly be described as merely procedural. They would affect substantive rights".

40 We are satisfied that Act A252 is not truly procedural but affects vested rights. We say this because we are of the opinion that the Act is an amendment of a provision which operates to extirpate a liability and not merely to deny the procedure for the enforcement of a liability which nevertheless continues to subsist. Where as here a statute affecting procedure also affects vested rights adversely, it is to be construed as prospective. The case of Rex v. Chandra Dharma (3) which was relied upon by the Learned Judge, is to the same effect. In that case the prosecution had been commenced before the first time bar had expired. But "if the time under the old Act had expired before the new Act came into operation the question would have been entirely different, and in my view it would not have enabled a prosecution to be maintained even within six months from the offence". (per Channell J. at page 339).

(3) (1905) 2 K.B. 335

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Grounds of
Judgment of
Federal Court
in Malaya
27th November
1979.
(cont'd)

The matter does not end there. As the case must now be judged in prospect and not in retrospect, we must have regard to the trite maxim "omnis nova constitutio futuris formam imponere debet non praeteritis", that unless it is so expressed in the new law, a vested right is not taken away. We see nothing in the language of Act A252 to prevent its application. In any event the maxim is spelt out in the provisions of section 30(1) (b) of the Interpretation Act, 1967 which is as follows:

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"The repeal of a written law in whole or in part shall not '(b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law'."

In Hamilton Gell v. White (4) the Court of Appeal was concerned with an analogous problem under the language of section 38 of the U.K. Interpretation Act 1889. We are well content to quote the language used by Atkin L.J. at page 431 in that case:

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"It is obvious that that provision was not intended to preserve the abstract rights conferred by the repealed Act, such for instance as the right of compensation for disturbance conferred upon tenants generally under the Act of 1908, for if it were the repealing Act would be altogether inoperative. It only applies to the specific rights given to an individual upon the happening of one or other of the events specified in the statute. Here the necessary event has happened, because the landlord has, in view of a sale of the property, given the tenant notice to quit. Under those circumstances the tenant has "acquired a right," which would "accrue" when he has quitted his holding, to receive compensation".

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A passage from the speech of Lord Morris of Borth-Y-Gest in the Privy Council appeal from Hongkong in Director of Public Works v. Ho Po Sang(5) in considering an analogous section in the Interpretation Ordinance of Hongkong is to the same effect (page 731):

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"It may be ... that ... a right has been given but that, in respect to it, some investigation or legal proceeding is necessary. The right is then unaffected and preserved. It will be preserved even

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(4) (1922) 2 K.B. 422
(5) (1961) 2 A.E.R. 721

if a process of quantification is necessary. But there is a manifest distinction between an investigation in respect of a right and an investigation which is to decide whether some right should or should not be given".

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(cont'd)

10 That passage was adopted and applied by Lord
Evershed in a Privy Council appeal from
Ceylon in the case of Free Lanka Insurance Co.
Ltd. v. Ranasinghe. (6) The material facts are
as follows. The Respondent was injured while
driving a motor car which was in collision with
a lorry. The owner of the lorry was insured
against third party risks with the Appellants.
Section 133 of the Ceylon Motor Car Ordinance
of 1938 imposed liability on insurers directly
towards injured persons. In March 1950 the
Respondent commenced action against the owner
of the lorry. He also gave the Appellants
20 notice of the action as required under the
Ordinance. In September 1951 he was awarded
damages which were increased on appeal in May,
1956. In January 1957 he obtained leave to levy
execution. In September 1957 he commenced action
against the Appellants and obtained judgment.
Shortly before the September 1951 judgment the
Ordinance of 1938 was repealed and replaced by the
Ceylon Motor-Traffic Act 1951 which contained no
transitional provisions designed to preserve
30 rights or claims under the Ordinance of 1938 but
section 6(3) (b) of the Ceylon Interpretation
Ordinance of 1900 which is in pari materia with
section 30(1) (b) of our Interpretation Act 1967
preserved accrued rights. The Appellants
contended that the Respondent could claim only
by virtue of the statute, and, since the
Ordinance of 1938 had been repealed, could found
his claim only on the Act of 1951, which Act
could not, on a fair construction of section 6(3)
40 (b), cover it. It was held that by serving on
the appellants of the notice of his claim, the
Respondent had on the date of the repeal "acquired
a right" against the appellants within the meaning
of section 6(3) (b) of the Interpretation Ordinance,
although that right might fairly be called inchoate
or contingent; and therefore the Respondent's
right was not affected by the repeal of the
Ordinance of 1938.

50 We referred to those cases merely to
illustrate how courts in different jurisdictions,
with similar legislative provisions on the point,
have approached problems of interpretation. The
criteria adopted in those cases in the process of
determining "accrued right" seem to be this. It

(6) (1964) 1 A.E.R. 457

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(cont'd)

must depend on the happening of an event which is specified in the statute. Now, section 2(a) of the Public Authorities Protection Act, 1948 enacted that action must commence within twelve months. That section was designed to govern the rights of persons desirous of asserting claims against public bodies or persons performing public duties, and it controlled also the rights of the public bodies or persons to the limited protection which it conferred upon them. Prospective plaintiffs and prospective defendants were alike bound. There can be no distinction in principle between a right given by law to commence an action and a defence given by law which bars an action. In respect of causes of action already existing before the operation of Act A252, therefore, both prospective plaintiffs and prospective defendants possessed accrued rights on the happening of the necessary event as specified in the old Act. The necessary event that had happened in the present case is this. On the failure of the Respondents to commence action within the specified period the appellants had acquired an "accrued right" which was designed to give them immunity for acts done in the discharge of their public duties. That right was well preserved by the Interpretation Act 1967.

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The matter therefore resolves itself on the application of the law at the time the writ was issued. That that is the principle applicable in the instant appeal is well illustrated by the case of J.S. Drinkhall v. Nam Hue Motor Hiring (7) which was rightly referred to by the learned Judge, but which he had found difficulty in applying. Unless the contrary is provided for, the law of limitation applicable to the suit is the law in force at the date when such suit was instituted, in the instant case, Act A252. But this principle is subject to the condition that the rights sought to be enforced have not already been barred under the previous law: see Raman Kurup v. Chappan Nair. (8) "A claim barred at the time when the writ is issued is not revived by a subsequent amendment of the law". (see J.S. Drinkhall v. Nam Hue Motor Hiring (supra); Appasami Odayar v. Subramanya Odayar). (9)

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It therefore seems to us that in the circumstances of this case, the time for the claim was not enlarged by Act A252. The Act is not retroactive in operation and has no application to a cause of action which was barred before the

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(7) (1955) MLJ 119

(8) AIR (1918) Mad. 86

(9) (188) 15 L.R. Ind. Apps. 167.

Act came into operation.

We would allow the appeal with costs here and below.

(RAJA AZLAN SHAH)
CHIEF JUSTICE
MALAYA

Kuala Lumpur
27 November 1979

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(cont'd)

Counsel:

10 Encik Zainur Zakaria for Appellants
Solicitors: (M/s Rithauddeen & Aziz, Kuala Lumpur).

Encik K.C. Cheah for Respondents
Solicitors: (M/s K.C. Cheah & Co., Kuala Lumpur).

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Order of the Federal Court in Malaya
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IN THE FEDERAL COURT IN MALAYA HOLDEN AT
KUALA LUMPUR

(APPELLATE JURISDICTION)

20 CIVIL APPEAL NO. 93 OF 1977

Between

Kenderaan Bas Mara Appellants

And

1. Yew Bon Tew also known as
Yong Boon Tiew
2. Ganesan s/o Thaver (an infant)
suing by his guardian and next
friend, Yew Bon Tiew also known
as Yong Boon Tiew Respondents

30 (In the matter of Kuala Lumpur High Court
Civil Suit No. 416 of 1975

Between

1. Yew Bon Tew also known as
Yong Boon Tiew
2. Ganesan s/o Thaver (an infant)
suing by his guardian and next

In the Federal
Court in Malaya

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1979.
(cont'd)

friend, Yew Bon Tew also known
as Yong Boon Tiew Plaintiffs

And

Kenderaan Bas Mara Defendants)

CORAM: RAJA AZLAN SHAH, ACTING LORD PRESIDENT
MALAYSIA,
CHANG MIN TAT, JUDGE, FEDERAL COURT,
MALAYSIA,
SYED OTHMAN, JUDGE, FEDERAL COURT, MALAYSIA.

IN OPEN COURT

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THIS 27TH DAY OF NOVEMBER 1979

O R D E R

THIS APPEAL having come up for hearing on
the 25th of September 1979 in the presence of Incik
Zainur Zakaria of Counsel for the Appellants and
Mr. R.R. Sethu of Counsel for the Respondents AND
UPON READING the Record of Appeal AND UPON HEARING
the arguments of Counsel aforesaid IT WAS ORDERED
that Judgment be reserved AND THIS APPEAL coming
on for delivery of Judgment this 27th day of
November 1979 in the presence of Counsel as
aforesaid IT IS ORDERED that this Appeal be and
is hereby allowed AND IT IS ORDERED that the
Respondents do pay the Appellants the costs of the
hearing in the High Court and of the Appeal in the
Federal Court as taxed by a proper officer of the
Court AND IT IS LASTLY ORDERED that the Appellants'
deposit of \$500/- paid into Court be returned to
the Appellants.

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GIVEN under my hand and the Seal of the
Court this 27th day of November 1979.

30

Chief Registrar,
Federal Court,
MALAYSIA.

This Order was filed by M/s K.C. Cheah & Co.,
Solicitors for the Respondents, whose address for
service is at 1st Floor, Bangunan Wing on Life,
Jalan Silang, Kuala Lumpur.

In the Federal Court in Malaya
No. 11
Order of the Federal Court in Malaya granting Final Leave to Appeal
19th May 1980
(cont'd)

Cheah Kam Chiew affirmed on the 3rd day of April, 1980 and filed in support of the Notice of Motion AND UPON HEARING Counsel for the 1st and 2nd Respondents as aforesaid and Mr. Zainur of Counsel for the Appellants abovenamed IT IS ORDERED that the 1st and 2nd Respondents be and are hereby granted final leave to appeal to His Majesty the Yang Dipertuan Agung AND IT IS ORDERED that the costs of this application be costs in the Appeal.

GIVEN under my hand and the Seal of the Court this 19th day of May, 1980. 10

Sgd. Illegible
.....
Senior Assistant Registrar,
Federal Court,
Malaysia,
Kuala Lumpur.

This Order is filed by Messrs. K.C. Cheah & Company, Solicitors for the Respondents/Plaintiffs whose address for service is at Room 12, (1st Floor), Wing On Life Building, Jalan Silang, Kuala Lumpur. 20

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 :

1. YEW BON TEW ALSO KNOWN AS
YONG BOON TIEW
 2. GANESAN S/O THAVER (AN INFANT)
SUNG BY HIS GUARDIAN AND NEXT
FRIEND, YEW BON TEW ALSO KNOWN
AS YONG BOON TIEW
- Appellants
(Plaintiffs)

- and -

KENDERAAN BAS MARA

Respondent
(Defendant)

RECORD OF PROCEEDINGS

Le Brasseur & Bury,
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London WC2A 3JF.

Solicitors for the
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Coward Chance,
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Solicitors for the
Respondent