

Suara Peguam

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Season's Greetings !
Merry Christmas & Happy New Year



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Editor's Note

Marching Towards Year End

Time does fly, as they say! Once again the time has come to share our chronicles with our beloved members of the Penang Bar.

In this 2nd edition it gives the editorial board an even more greater satisfaction, as we thank the kind support of the Penang Bar Committee with a special mention to our Chairman, Mr Tharuma, who has been so ever kind to acknowledge and support my editorial board. We are proud to present this edition in hard copy, something that we have mooted for long. It gives us a sense of joy when our efforts are appreciated, as nothing like a good dose of motivation is all that we ask for to continue with our crusade in providing an informative read to all members.

In this "Christmas edition" we have continued to think out of the box to provide you with more interesting features, may it be legal or of general interest.

Members' contributions for this edition have also been very encouraging and inspiring; there are also talented poets among our members. We are also in store for a treat in this edition from interesting travel tips and tales from our Globe Trekker, our beloved food writer's new interesting eateries and for the first time in this edition an Up, Close & Personal feature, where we were privileged to be granted an exclusive interview with Senior Penang High Court Judge the Honourable Y.A. Dato' Hadhariah Binti Syed Ismail, who shares her insight about her career and experiences. Well, dear members these are just some of the many interesting read in this edition!

This year also saw many more events taking place, most notably the inaugural Penang Bar Run which kicked off with much success, enthusiasm and fun. As the saying goes when there are good times, there are also the bad times, as Penang saw one of the worst years in its history with the recent catastrophic flood on the 4th November 2017 with lasting effects for almost a week that crippled the Island and mainland severely. I would also like to commend the valiant efforts of the Penang Bar Committee for its efficiency in providing assistance to the flood victims and also a special note of thanks to the Selangor Bar Committee for its kind contributions.

The legal year is almost at its very end and as always the many things may it be good or bad will always be remembered by us. Let us learn from the bad and be ever grateful for the good things we have achieved. Let us take pride in what we do and to be noble is what we all aspire for.

As always it is indeed a feeling of pleasure and satisfaction whenever I sit to type out my editor's note knowing that my team and I have successfully completed our edition. My note will never ever be complete without thanking all those whom had contributed to us, kindly and to my team whom I always trusted and am ever thankful for.

On behalf of the Board, I wish you all a Merry Christmas & Happy New Year!

Jayakamaran Thiagarajan
Editor
Saara Pegaan

ELEVATION CEREMONY SPEECH

Our legal year witnessed another historical event taking place at the Penang High Court on the 26/9/2017 in which we were privileged to witness the elevation ceremony of our Penang's very own, Y.A. Dato Lim Chong Fong. The event was indeed historical to all of us as there were very vague recollections or even records of such traditional legal events taking place in Penang. The following is the official speech from YA Dato Lim Chong Fong.

My fellow brother Judicial Commissioners, Justice Dato' Wahab, Justice Dato' Azmi and Justice Dato' Ahmad Shahrir.

Puan Zaharah Hussain, the Pengarah of the Penang Courts, and officers from the Penang High Court, Tuan Rahazlan Effendi bin Mohd Rahim, Senior Federal Counsel representing the Honourable Attorney General, Mr. Roger Chan Weng Keng, Secretary of the Bar Council Malaysia,

Mr. T. Tharumarajah, Chairman of the Penang Bar Committee, members of the Penang Bar Committee and members of the Penang Bar;

My beloved mum, Madam Chong Moon Lean, my uncle Mr. Fong Sin Whye and my brothers who are all present today; and Ladies and gentlemen.

Good morning,

First and foremost, I wish to convey my heartfelt thanks to the Penang Bar Committee for organizing this Elevation Ceremony to commemorate my confirmation as Judge of the High Court of Malaya on 30 January 2017. I understand that the ceremony today marks the revival of such ceremonies that were traditionally held in Penang in the past, the last being more than two decades ago. I am truly honoured and privileged to be the principal participant here today and I hope that this revived traditional ceremony will stay continued in the future.

I was transferred here from the Shah Alam High Court on 1 October 2015. It was a refreshing change for me as far as the Penang tradition is concerned. I was welcomed by way of a courtesy visit by all the Sessions Court judges, Magistrates and Court officers on 16 October 2015. The then State Legal Advisor, Dato' Aliza Sulaiman then came to greet me in chambers on 19 October 2015 (Dato' Anas likewise also came when he was posted here last year). I went with Justice Dato' Seri Zaki Yasin to pay a courtesy visit to the Tuan Yang Terutama Yang Di Pertua Negeri Pulau Pinang at Seri Mutiara on 18 November 2015. The Penang Bar Committee next came and greeted me in chambers

on 24 November 2015. Finally, the Penang Legal Aid Bureau visited me in chambers on 26 November 2015. That aside, I was pleasantly surprised when The Penang Club, The Penang Sports Club and The Penang Swimming Club all offered honorary membership to me.

I am proud to be the first Old Free and someone informed me that I am also the first Penangite to have served the Penang High Court as judge. Although it is a sacrifice for me in having to leave my immediate family back in Kuala Lumpur to serve in Penang, my beloved mum is elated because I had not been back home in Penang for long term stay in the family house in excess of a week since 1981. I know that my mum is praying that I continue to serve here for as long as possible.

I am happy to have served the Penang High Court for almost 2 years now. The cases here are varied and occasionally complex ranging from civil, commercial, criminal, family, public law, etc. They have certainly broadened my judicial exposure. I must confess that it has been nonetheless a very hectic experience if not also an endurance. In this regard, I have spent many nights and weekends reading files and writing the grounds of judgment or decision. The office hours were almost entirely devoted to hearing cases. Many cases came before me. The memorable ones include the following:

(i) the kin inquiry case of ***Khoo Guat Tee & Ors v. Lim Kim Neo & Ors*** reported in [2016] 8 MLJ 639 that involved the rare issue of polyandry with helpful submissions from senior counsels of the Penang Bar of M. Thayalan, Ong Eng Kuan, Balwant Singh Purba, Regina Daniel and Christina Siew;

(ii) the defamation case of ***Datuk Haji Shabudin Yahaya & Ors v. Dr. Afif Bahardin*** reported in [2016] LNS 191 where senior counsel Dato' CV Prabhakaran led the defence;

(iii) the paternity case of ***Lee Lai Cheng (suing as the next friend of Lim Chee Zheng and herself) v. Lim Hooi Teik*** reported in [2017] 6 CLJ 668 that involved the right to DNA testing with challenging but interesting submissions put up by senior counsels T. Tharumarajah and Tan Kah Hoo.

(iv) the battle over custody of parents case of ***Liew Ju Min v. Choo Wee Poh & 2 Ors and Another Case*** reported in [2017] 5 AMR 356 where senior counsels Yeoh Jin Aik and M. Thayalan led the defence. In that case, I also made site visits to the proposed homes to house the ailing parents, the Columbia Asia hospital in

Shah Alam as well as seeing the parents at the Penang Gleneagles hospital;

(v) the criminal defamation appeal of ***PP v. Mat Sabu*** reported in [2017] 7 CLJ 214 led by the Head of Prosecution of the State of Penang Dato' Razali Che Ani; and last but not the least

(vi) the judicial review case of ***Sunway City (Penang) Sdn Bhd v. Lembaga Rayuan Negeri Pulau Pinang & Ors and Other Appeals*** reported in [2017] MLJU 755 where intricate submissions on planning guidelines were advanced by senior counsels Christina Siew, Karin Lim Ai Ching, Dato' Lakhbir Singh and Dato' Mureli Navaratnam.

There is of course another very challenging wills case argued by senior counsels John Khoo, Ravin Velio and Elson Beh which has been deeply ingrained in both my conscious and subconscious mind analyzing it for the past 2 months. I have nonetheless promised to deliver my decision the day after tomorrow to have it out of my body system.

I have also undertaken many mediations with the hope to reduce the number of cases that go to trial. Looking back, I have been fairly successful in getting the parties to settle their disputes during these mediations. The most memorable one is the formidable divorce mediation involving a wealthy elderly couple where the wife was represented by Madam Lalitha Menon and the husband by Daphne Choy. I met them for nearly 10 sessions including getting them to allow me to appoint an accountant to value the worth of their businesses as part of the mediation process. I enjoyed their confidence that I was earnest in finding all possible ways to settle their disputes. As the result, I got them to compromise on many things. There was great satisfaction when the couple finally resolved their marital squabbles in entirety and both of them really thanked me at the end. I later shared my experiences with the members of the Penang Bar when I was invited to speak on Court-Annexed Mediation : The New Initiative Towards Rapid and Amicable Resolution of Civil and Commercial Litigation on 15 November 2016. I strongly advocate mediation to resolve the civil and commercial cases because I believe in its potential especially to cope with the increasing caseload filed in the Penang Courts. I have further encouraged the Council of Justices of the Peace, State of Penang and Kuala Lumpur Regional Centre for Arbitration to train and deploy the JPs to undertake mediations. Towards this end, they have recently launched their Mediation Bureau to offer pro bono pre-action mediation for Penang disputes. I believe that their success will reduce the number of litigation cases that would be filed in

the Penang courts. I have also appointed two JPs last year to undertake Court-Annexed mediations pro bono pursuant to the Chief Justice's Practice Direction no. 4 of 2016. I am glad that the Penang Bar Committee has also given me a list of their members who have likewise volunteered. I hope to deploy them when the opportunity arises.

I firmly believe that the administration of justice is best served by way of the Bench and the Bar working in close partnership. We, Judges and Judicial Commissioners, are now tasked to deliver decisions in good time as well as of high quality. Frankly speaking with our limited personal time and shortage of court officers assigned to us to undertake independent legal research, the quality of the judgment or decision is much dependent upon the quality of submissions of counsel.

During my initial years of legal practice in Kuala Lumpur, Penang lawyers were rumoured to be difficult. I had my early encounter with Dato' Mahinder Singh Dulku in a construction arbitration over a Penang project. He fought hard but fair. He was nonetheless so towering on my witness to the extent that the witness told me his heart stopped for one second under cross examination. I encountered Dato' Mahinder again in another construction arbitration that lasted 122 days over 10 years before Tan Sri Edgar Joseph Jr.. We became good friends and we jointly fought our third construction arbitration over another Penang project together as co-counsel before my elevation to the bench.

From my experience on the bench, I am happy to observe that many members of the Penang Bar are very dedicated in your work and have immensely facilitated my decision making both by your thorough written submissions as well as persuasive oral advocacy. I hope you will all keep that up. And that hope includes you also spending the time and effort to train the younger members of the Penang Bar to aspire to have the same dedication too.

On my part, I have taken the judicial oath twice to uphold the Federal Constitution and rule of law and I promise to do my utmost to discharge that in my daily work. I will also try my best to continue to share my knowledge and experience with members of the Penang Bar and in this respect, I look forward to speak to you all on the Construction Industry Payment and Adjudication Act 2012 (CIPAA), a topic that is close to me, as scheduled on 27 November later this year.

In closing, I wish to again thank the Bar Council, in particular the Penang Bar Committee for holding this very thoughtful and memorable event in my honour. May I reciprocate by inviting all of you present here today to tea after this at the Bar room.



THE 8th JAMES RICHARDSON LOGAN MEMORIAL LECTURE SERIES 2017

By
Archana Chandrasekaran

This year's edition of "The 8th James Richardson Logan Memorial Lecture 2017" was held on the 29 October 2017. It was indeed a great honour to have a renowned speaker this year, Prof Dato' Dr. Adeeba Kamarulzaman, the current Dean of the Faculty of Medicine, University of Malaya and an Adjunct Associate Professor at Yale University and Adjunct Professor at Tulane University, USA.

Prof Dato' Dr Adeeba's lecture was titled "**Why Malaysia Needs A Drug Policy Reform**". She shared her indepth research and experience in her efforts to change the Malaysian drug policy and highlighted the issues faced by her and her team.

Her lecture started off with a simple yet strong statement "**Drug addiction is a health issue, not a criminal one**". She explained that, dopamine, a neurotransmitter, will be released when we are doing something enjoyable and our brain will be signaled to do it again. Self-Administration of drugs causes a burst of dopamine. Our brain will have trouble in keeping up production when large amount of dopamine are released and can temporarily run out of dopamine. Depletion of dopamine will eventually lead a person to use drugs to feel the pleasure again. As such, Prof Dato' Dr Adeeba stressed that drug addiction is to be dealt by medical professionals and not by the police or prison department. Self-administration of drugs should not be seen as a crime unlike drug trafficking.

She further stated that drug laws in our country such as Dangerous Drugs 1952 and Drugs Dependants (Treatment & Rehabilitation) Act 1883 governs the drug crimes, where self-administration of drugs often leads to being sent to prison or narcotic rehabilitation centre which is counterproductive. It directly contributes to urgent public health crises leading to greater investments in health and social services for drug users.

In a comparative study for instance she opined that Indonesia under President Joko Widodo and Philippines under President Rodrigo Duterte, who launched anti-drug crackdown about a year ago, are well known for their harsh approach on drug offences. These drug policies have proven outdated and inadequate to solve drug problems. Former UN Secretary General Kofi Annan has said "**I believe that drugs have destroyed many lives but wrong government policies have destroyed many more.**"

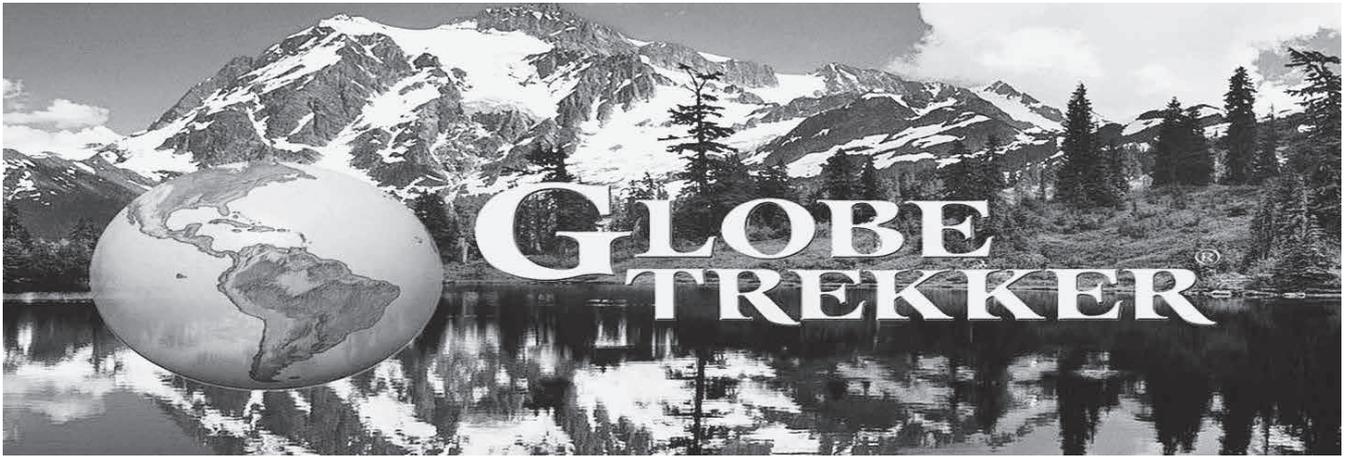
Thailand, however is moving towards a more appropriate approach.

However, in contrast she added that countries like Portugal has become a model for drug policy where the nation is winning the war against drug compassionately. Portugal decriminalized the use of all drugs in 2001, even heroin and cocaine, and conducted a major public health campaign to tackle addiction. Since then, drug addiction is treated as a medical issue rather than a criminal justice issue. As a result, the Portugal Health Ministry estimates that only about 25,000 Portuguese use heroin, compared to 100,000 when the policy began. Thus, despite all the mockery, the policy of decriminalizing use of drugs and substituting with programs that have been scientifically proven to work.

Prof Dato’Dr Adeeba ended her lecture by projecting a video of a drug addict, who admitted that he wishes to quit drugs but the desperation leads him back to it. He could not cope because no appropriate treatment was taken.

The lecture was an eye-opener and provided all those who attended a different perspective on the issues of drug addiction. Mr T. Tharumarajah, the chairman of the Penang Bar Committee gave a thank you speech and the souvenir plaque of appreciation was presented to Prof Dato’Dr Adeeba by Dato’Abdul Fareed Abdul Gaffor, the Vice President of the Malaysian Bar.





By Gowri Subbaiyah

Tale of Three Countries: Spain, France & Andorra



I love making the most of my time when visiting places, so when I saw I could visit three countries in a day on a website, I thought it was almost impossible! But then I made it!

Where else but in Europe can you visit three countries in one day? Before my family and I embarked on our luxurious Princess Liner for the Mediterranean cruise, we halted to endeavor the enchanting master pieces of Gaudi in the Spanish state of Barcelona. Having read about Andorra, a tiny country wedged between France and Spain, we decided to make a day trip to Andorra from Barcelona. Enroute to Andorra one gets to explore three different countries, three distinctly different atmospheres, stunning drives, and breathtaking scenery.

We discovered three countries in just one day, on a full-day trip, to Baga in Spain, Ax-Les-Thermes in France, and the tiny country of Andorra. We rented a car from Barcelona and with an early start we were in the medieval Spanish village of Baga, which is one and a half hour drive from Barcelona, before crossing the French border to the charming spa town of Ax-Les-Thermes.

As we were driving through the Pyrenees, there were plenty of photo opportunities. It was a shame we didn't stop anywhere to take some quick pictures as we were on a tight schedule, and luckily, I was able to snap a few from the car. As we entered Baga, it felt, like a ghost town. There are plenty of holiday homes here, so they are only occupied a few weeks per year. The first thing I noticed when stepping out of our car, was that the temperature was at least five degrees colder than in Barcelona, and I regretted not taking a small cardigan with me.



The Spanish village of Bagà is popular for a quick coffee and a chance to stretch your legs. Surrounded by the rocky peaks of the Cadi-Moixeró National Park, Bagà boasts a beautiful medieval quarter, with a perfectly preserved market square and church. And to my surprise the whole village of Bagà is wifi free! The whole village was rather quiet but I enjoyed my cuppa melting into the silence of the morning before the chimes of a nearby church broke my imagination.

After our short stop in Bagà, we hit the roads again for a one and a half hours journey to France. The views were stunning as we were driving deeper into the mountain ranges. After emerging from



quite a long tunnel, the scenery opened up and we were treated to a landscape of wide plain snow capped mountains as a backdrop. After entering France, it's still a half hour drive to Mont-Louis, a UNESCO World Heritage Site. Mont-Louis is a quaint walled town, with only a handful of streets offering cafés, B&B's, restaurants and small tourist shops. After my (second) breakfast, consisting of a croissant and a hot chocolate, my husband and I walked around the little town, taking numerous pictures of the beautiful views of the French Pyrenees. The guides recommend some of the best natural fountains to visit, and those best suitable for soaking your feet in. I enjoyed the healing waters, browsing the local artisan shops where buy local cheeses are sold as well as looking out for a souvenir to remember my visit.

Our time in Mont-Louis was quite short, and soon we were en route to our next stop: Andorra. The views were pretty stunning on this one and a half hour journey and I wished again we could stop for a little while to take some photos. As Andorra is a sovereign microstate and not part of the European Union, you do need a passport to enter the country. Or so I thought.

I'm not sure how it usually works, but we just drove through the border control area without any checks just like the way we do it in Asia. We stopped right after border control, and an Immigration officer collected the passports of the people who wanted an Andorra stamp. I thought this was a very thoughtful gesture, and I happily handed over my passport.

Even though it was quite cool inside our car, the temperatures had been rising outside, and I was instantly baking when I stepped out of the car.

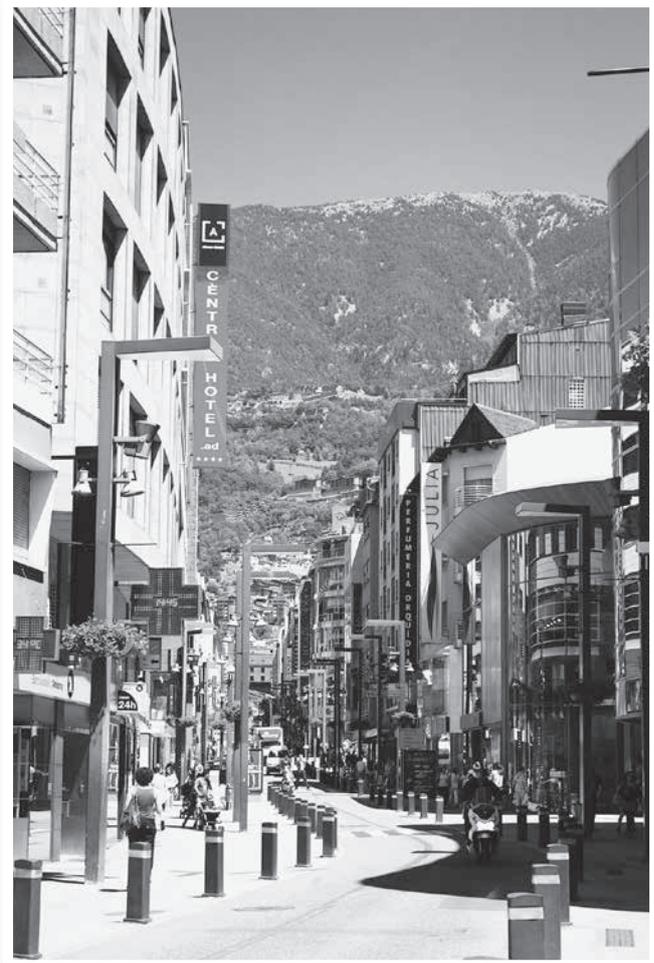
Andorra was nothing like what I expected it to be. We visited Andorra La Vella, the capital city, which looks quite modern. With tax free shops everywhere. It's a shopping paradise, so if you're looking for a few new things to buy, this is the place. Unfortunately, I wasn't there to shop, and I felt the city lacked a bit of character.

After our stroll around, we drove up the mountain slope to an old church with gorgeous views over Andorra La Vella. The view sparked my interest in Andorra again, and I felt slightly disappointed not being able to explore a few hidden gems Andorra was hiding behind its tax free shopping façade.

Our trip back to Barcelona took around two and a half hours, driving through stunning gorges with a quick stop along the road for some snacks and refreshments. As we took a different route back, we were treated to different landscapes of Catalunya.

I love mountain views and thus the Pyrenees was a perfect treat on my trip to Barcelona, and satisfied my needs. Even though we were spending quite a bit of time driving, there was never a dull moment as behind every bend, there's another great photo opportunity.

If you like to count countries (like I do), there's no better tour where you can add three countries to your list in one day, while still being able to explore the different places you're visiting



Stay tuned for more upcoming destinations in our next edition!



PART 2 : RECENT CHANGES IN MEDICAL LAW - MALAYSIAN CONTEXT

*By P A Sharon
Selangor Bar Member*

Hospital's liability

In the rise of healthcare business in Malaysia the number of cases where the hospital, as an institution, was found to owe a duty to its patient has also risen.

The institution may be held liable if it owes the patient a duty and breached the same or secondly if there was a special relationship with the institution and the tortfeasor and the tort arose out of that close relationship or finally where the institution has special relationship with the patient and is liable for the tortfeasor's wrong whether the institution is at fault or not.

Other than the first part which is a direct liability the second and the third part of the duty owed are liability of the institution for third parties and these third parties can come either from the nature of relationship or recognized categories under the law where the scope of the same is to be shaped by relevant policy considerations.

However this policy considerations will have an effect on the healthcare industry as the hospitals will want to protect their own business and may eventually pass down the extra burden to the end user i.e. the patient themselves.

Just as the Bolam principle above, the cases in Malaysia have gone on 2 tangents, there are cases that find the Hospital's vicariously liable for independent contractor and there are cases who upholds the principle.

The recent trend in the hospital been found vicariously liable to their consultant's action or omission has raised a concern over the application of a much accepted principle of law.

This has led to a question to the Federal Court which is pending.

In the past in a case of **Tan Eng Siew & Anor v Dr Jagjit Singh Sidhu & Anor [2006] 1 MLJ 57** Mr Justice James Foong highlighted that to find a Hospital liable plaintiff need to establish a special relationship. The learned Judge highlighted various test that must be satisfied which among them are the control test, organizational test or the **Ready Mixed Concrete (South East) Ltd v Minister of Pensions and National Insurance [1968]** which is based on a common sense approach to the resolution of the problem.

This made the court hesitant to find the hospital vicariously liable as seen in the case of **Wu Siew Yong v Pulau Pinang Clinic Sdn Bhd & Anor [2011] 3 MLJ 506** and the case of **Dennis Lee Thian Poh & Ors v Dr Michael Samy & Anor [2013] 3 MLJ 857. (please note Dennis Lee's case is pending appeal at the Federal Court)**

However, against the array of the above cases there has also been a judicial trend to find the hospital vicariously liable in **Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor [2012] 4 MLJ 260** (although the failure to produce the written agreement between the Doctor and the Hospital could have been persuasive factor for the Judge to find there was no independence).

In the Kota Kinabalu High Court's case of **Chai Beng Hock v Sabah Medical Centre Sdn Bhd & Ors** Suit No: K22-133 of 2015 the court found the Hospital to be vicariously liable to the third defendant for the breach of duty and Rahman Sebli J (as he then was) stated

'... a medical institution like Sabah Medical Centre Sdn Bhd (SMC) has a duty to ensure that doctors who practice at the hospital whether employed by them or otherwise have the necessary skill and competency to treat patients. It is no defence for SMC to say that it is not responsible for the wrongdoings of its 'independent contractors' if otherwise these doctors were allowed by SMC to run their practice at the hospital.' Further, the court was of the opinion that 'it is SMC that provides the medical services and not any individual doctor plying their trade at the hospital. SMC cannot allow doctors to practice at the hospital but at the same time unwilling to accept responsibility for their wrongdoings. There is no signboard at SMC's entrance which says in bold 'Treatment is at your own risk'. SMC's remedy if at all lies in claiming contribution from the doctors if they are found to be negligent and not by denying patients of their rightful claims.'

This shift in the judicial trend seems to suggest that the court is now scrutinizing the modus operandi of the hospital and was willing to challenge traditional ideas to uphold justice and fairness in which if one employs others to advance his business he should accordingly share the corresponding liability that comes with the benefit.

The case of **Soo Cheng Lian v Dr Kok Choong Seng & Sunway Hospital** (which is pending appeal in the Federal Court) the Court of Appeal has stated the following

“...The 2nd Defendant owes a non-delegable duty of care to the Plaintiff/patient for the simple reason that its, by its nature of existence as a healthcare service provider to the public, has undertaken to ensure that he or she is protected from harm’s way...”

In the Court of Appeal in ***Soo Cheng Lian’s*** case, the court chose to distinguish their own decision in the case of Dennis Lee Thian Poh (above) which was said to be based on the principle of vicarious liability and decided that based on the principle of non-delegable duty, found the Hospital liable to the patient.

As it stands now the Hospital seemed to owe a non-delegable duty to the patient based on the Court of Appeal’s decision in ***Soo Cheng Lian.***

This coupled with direct liability and occasionally the vicariously liability and non-delegable duty found against the Hospital seems to suggest that the patient’s rights against the hospital has expanded from what it was decades ago.

Consent in Medical Law

The area of consent in medical negligence cases is seen as the most difficult area, as what amount to consent seems to be a controversial area itself.

The learned and leading author of medical law in Malaysia Dr Puteri Nemie Jahn Kassim observed in one of her books,

“...the main issue before the Malaysian courts is often not whether the information given is adequate for the patient to make an informed choice but whether any information about the risks inherent in the proposed treatment was given to the patient in the first place...”

The following cases shows the development of the law of consent in relation to medical law in Malaysia.

In the case of ***Abdul Razak bin Datuk Abu Samah v Raja Badrul Hisham bin Raja Zezeman Shah [2013] 10 MLJ 34*** The husband of the late Fatimah @ Rohani Bt Zainal took up a case against the doctors and the hospital for alleged negligence on the part of the doctors, although the Judge found that the doctors acted within the standard required out of them, however, the failure to inform the deceased or the plaintiff (i.e. the husband) of the inherent and/or material risk was unacceptable.

The court found the anesthetist owed a separate duty to patient’s husband to inform of the risk so that the husband could have persuaded the patient to consent, this decision sent a shock wave to the doctors as it just extended the doctor patient relationship to the patient’s husband!

The Judge reasoned:-

“According to the plaintiff, the patient would not make any decision to go ahead with surgery without first having discussed the same with him. The Plaintiff in his testimony had stated that the first defendant had full and personal knowledge that the plaintiff was the one who made decisions with regard to the medical treatment of the patient...The first defendant in his testimony confirms some this assertion by the plaintiff...”

“...The first defendant asking the patient to call the plaintiff on the phone in the morning of the intended surgery and the first defendant speaking to the plaintiff informing him of his decision to perform the surgery on the patient further fortifies plaintiff’s assertion in this regard...”

Based on the evidence before the court his Lordship found that the failure of the first defendant to inform plaintiff was fatal to his defence.

This of course extends the duty owed by the doctor to the patient beyond herself to her next of kin or perhaps based on the facts of this case (hopefully, limited to the facts of this case) to an identified decision maker, which the doctor knew and had prior dealing.

In the case of **Gurmit Kaur a/p Jaswant Singh v Tung Shin Hospital & Anor [2012] 4 MLJ 260** Rosilah Yop JC (as she then was) stated;-

“ ...After I had scrutinized the consent form. I am of the opinion that, the consent form the husband should be obtained especially for this alleged type of operation (i.e. to remove the uterus of the plaintiff and there was not possibility of getting pregnant after the removal of the uterus). ...This is a major gynecological operation which is very important for a married couple....Furthermore, both the expert witness of the plaintiff and defendant had admitted that this consent form should have been signed by the husband which was not done here...”

If indeed the medical fraternity itself views that the consent of the husband is required in reproductive cases (as agreed by the experts in this case), it is quite alarming because it would mean the extension of the duty owed by the doctor to more than his patient but where does it stop?

This decision as it concerns family planning and given the Malaysian cultural context hopefully will be limited to the facts of the case as it seems to show that a Malaysian husband have a large role to play in his wife’s decision making process, (which ought not be, given the highly respected principle of autonomy).

Always wondered where to eat? Looking for the nearest place to eat after court? Not familiar with the location? well fret not as our special edition of Jalan –Jalan lawyer makan is here to guide you to the right eateries by our **foodie guide Marilyn Khoo Mei Lin.**

PINXIN VEGAN CUISINE

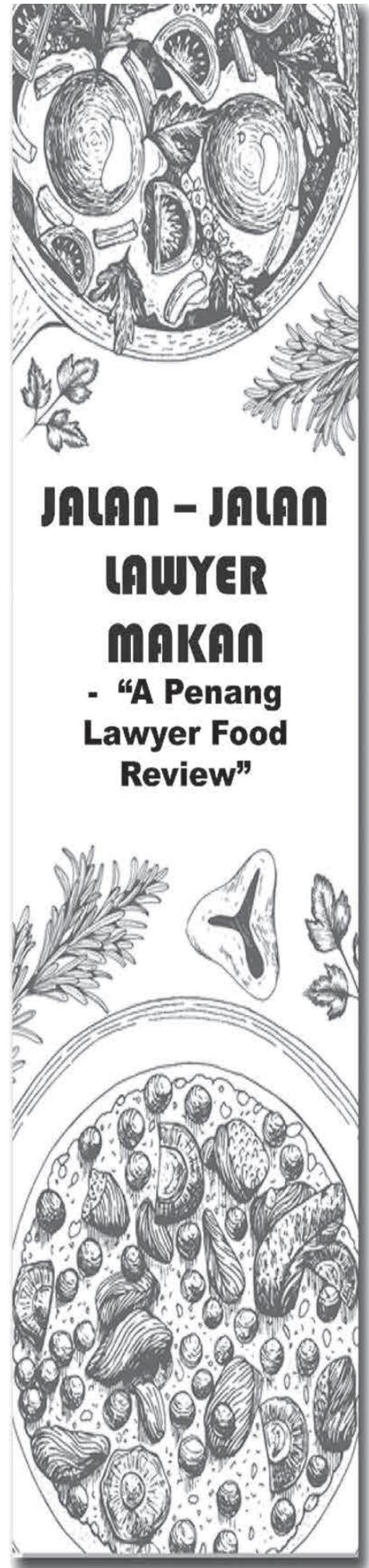
Healthy lifestyle is in vogue nowadays, In search for a healthier option, I was fortunate to discover Pinxin Vegan cuisine, located at Lebu Tye Sin in Penang Island. You may wonder what makes this place different from the many vegetarian restaurants we find in Penang, well in Pinxin it's all about being a holistic vegan!

The interior of the restaurant makes you feel like you've walked into a fine dining restaurant. The spacing between tables is just nice, and the dim lighting and chandelier exudes a grand vibe seldom seen nor experienced in most vegetarian restaurants in Penang. As for the menu, it has a little bit of everything to offer patrons from western food, Malaysian food, noodles, finger food, cakes and beverages, you just name it!



House recommendation was the hokkien mee, assam laksa and the green tom yum noodles, but my personal favourite has got to be the green tomyum noodles and the avocado slushie. The green tom yum noodle tasted better than some of the non-vegetarian dishes as it is not overly spicy nor sour, the noodles were springy and great for calorie watchers since it is not the usual unhealthy yellow noodle. As for the avocado slushie well what could I say...each slurp sent me to the moon and back!

That's how good it was. Milk was replaced with soy, and the house uses brown sugar to sweeten the drink. I could just hang out at Pinxin with my avocado slushie the whole day. So guys do give it a try.





Pinxin Vegan cuisine is located at 38, Lebu Tye Sin, Penang and is open from 11.00am to 10.00pm daily.

DELUXCIOUS HOTEL, SPA AND RESTAURANT

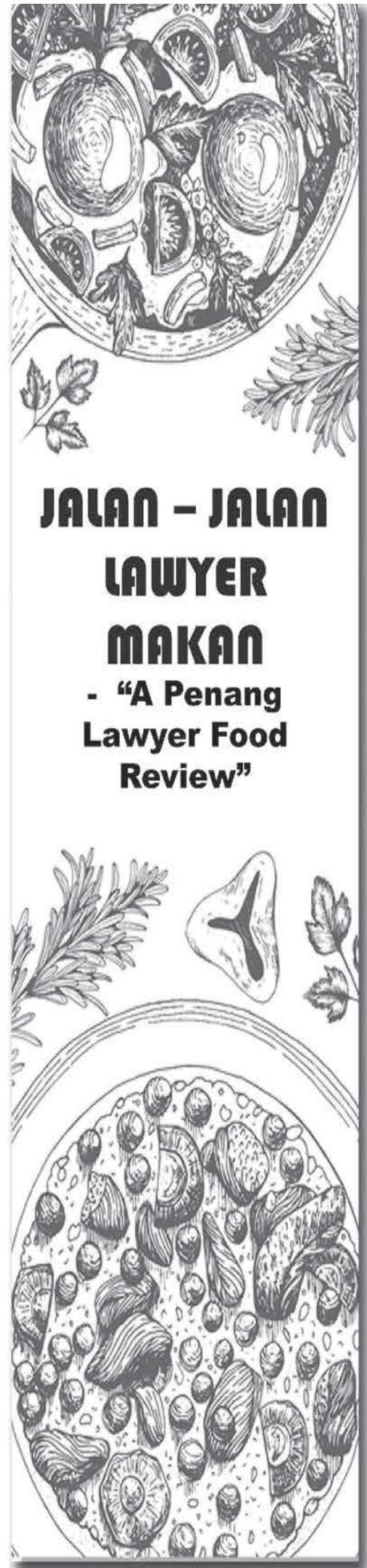


Call me superficial, but I was, initially, attracted to Deluxcious Hotel, Spa and Restaurant because of its attention grabbing logo. It is big, yellow, and impossible to miss if you travel along Northam Road, Penang.

One weekend my friend wanted an impromptu gathering, and we settled on meeting at Deluxcious for dinner. Driving into the compound of the colonial mansion that was built in the late 19th century, I was struck with a sense of awe, the exterior is tastefully refurbished and several ardent facebookers were busy taking photos at the beautifully lit garden and porch. I am too old for that, so I made my way to the foyer, instead.



The staff were attentive and eager to help, and I was led to my waiting friend, who did the honours of ordering for the both of us whilst waiting for me. She ordered a set dinner that consisted of salad, mushroom soup, salmon and dessert. She also ordered a seafood spaghetti and braised sake barramundi fish with broccoli and mushroom.





The salad came first, and I was pleased with the presentation. It came with slices of smoked duck and vinaigrette dressing. My friend and I were even fighting for the last slice of smoked duck. It was that good! Next up was the mushroom soup. I must say that the mushroom soup is worth ordering on its own. The soup was laden with chopped mushroom that every spoonful was chewy and flavourful. We ended up ordering another bowl of mushroom soup because it was too good to share between two people.

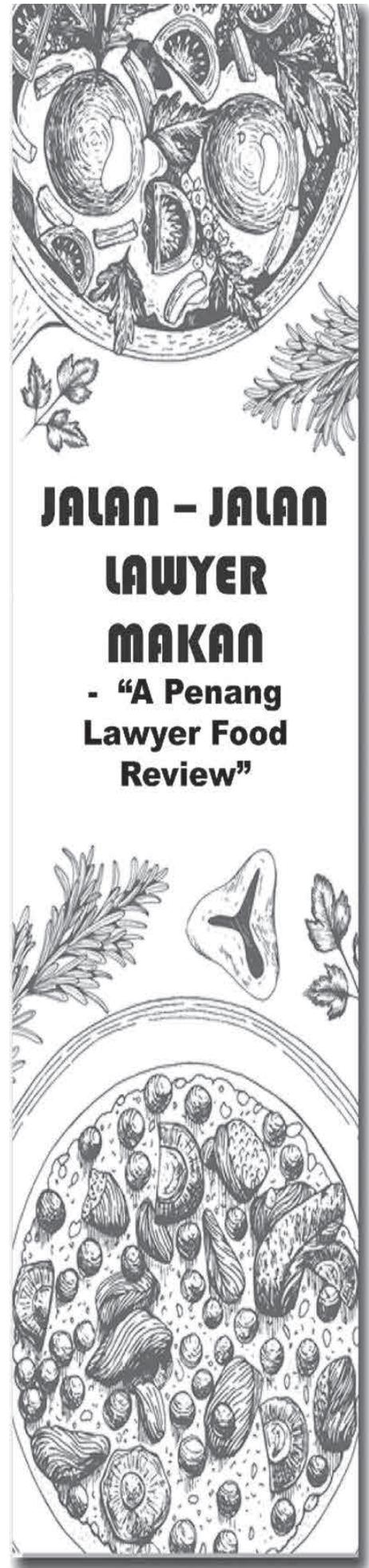


The main course of salmon fish came together with our ala-carte orders of seafood spaghetti and barramundi fish, so we started with the seafood spaghetti before it turned soggy. The pasta was swimming in a sea of tomato based sauce. The chef was certainly generous with the portion for the seafood, and the pasta was nicely done with springy texture. The sauce, however, lacked the extra kick that defines every pasta meal. It was passable for me, no second rounds though.

The salmon fish was, in my humble opinion, pretty cliché. It was too dry and not buttery enough for my liking. The dish was finely designed though, worthy of insta shots. Still, it was better than the barramundi fish with broccoli and mushroom. The barramundi fish was a fusion offering by the chef that comes with bok choy, cherry tomatoes, broccoli and mushroom. The gravy was too salty and watery, and one bite reminded me of the fish that I would normally enjoy at Chinese restaurants.

In a nutshell, Deluxious offers great ambience and warm service to its patrons, I would say that the main course was average, nonetheless, it is a place for catching up with friends or impress your other half, as the price is reasonable for such a dining experience.

Address : 15 -17A, Jalan Sultan Ahmad Shah, 10050 Penang





Penang Bar Run 2017

By

Lee Guan Tong & Selvi Neelakandan

After two previous unsuccessful attempts to hold this event and despite having a very slow response for registration initially, the inaugural Penang Bar Run finally took place on 6 Aug 2017 (PBR 2017)!

Participants of this maiden PBR consisted of members of the Bar, non-practising lawyers, members of the Judiciary, court staff and employees of Penang-based legal firms, and even our legal counterparts from neighbouring Singapore. There were altogether 171 participants forming 57 teams.

The PBR 2017 was flagged-off by Bar Council Vice-President, Abdul Fareed Abdul Gafoor at 7:10am from Jalan Tun Syed Sheh Barakbah after a warm up session led by Tay Chin Lee, a trainer from Warrior Fitness and Adventure. The runners clearly had fun with their early morning stretches, with excitement brewing in the air.

Armed with a baton in the form of a plastic gavel, each runner completed a loop of 3.2km along the historical streets of George Town which included the Esplanade, Light Street and Farquhar Street before passing the baton to his/her teammate to complete a relay of 3 runners/loops. The grimaces seen on all runners' face along the route vanished and turned into bright smiles as soon as they crossed the finish line, cheered on by other runners and supporters.

Upon conclusion of the Run, the crowd gathered at the ground floor foyer of the Civil Subordinate Courts Building, Bangunan Sri Pinang for the prize-giving ceremony where trophies and prizes were presented by our sponsors' representatives in the following categories:

Top 3 Judiciary Teams

1. The Juggernaut (Tuan Muhammad Iz'aan Bin Jasme, Kasturi a/p Verran, Mohamed Fairus Bin Zainul Abidin)
2. Road Runner (Irwan Bin Mohd Bidin, Puan Irza Zulaikha Binti Rohanuddin, Tuan Mohd Faiz Bin Ahmad Nadzri)
3. Sarbat Cream Soda (Tuan Khairul Anuar Bin Abd Halim, Nurkhairiati Khairudin, Mohd Thariq Bin Yunus)

Top 5 Fastest Women

1. Lim Yam Poh
2. Ng Ai Li
3. Alison Goh Chan Lyn
4. Moira Toh Siew Ling
5. Janet Chai Pei Ying

Top 5 Fastest Men

1. Lim Choo Hooi
2. Yau Yee Ming
3. Tan Loon Cheang
4. Amer Hamzah Bin Arshad
5. Mohd Felani Bin Yusof

Top 5 Teams

1. Vintage Runners (Lim Yam Poh, Yau Yee Ming, Amer Hamzah Bin Arshad)
2. Speedy Gonzales (Lim Choo Hooi, Ng Ai Li, Lee Guan Tong)
3. Triple Trouble (Teh Teong Phei, Ravindran Nekoo, Chong Mei-Yan)
4. Cool Moving Troop (Moirra Toh Siew Ling, Hoon Wen Tze, Tan Loon Cheang)
5. Tri Harder (Sathyananthan Sinnappan, Nurul Rafeeza Rahman, Samuel Loh)

The Organising Team and the Penang Bar Committee wish to record our gratitude and utmost appreciation to the following individuals and organisations for their support in making the PBR 2017 a success:

- Director of the Penang Courts, Puan Zaharah Binti Hussain and EO Tuan Haji Mazlan Bin Hanif for their strong support since the first day we approached the Court authorities for use of the Court Complex for the event. Many other additional facilities and equipment were also extended to us along the way and it made our job so much less burdensome and helped reduce our expenses tremendously. It is also worth mentioning that Puan Zaharah had helped to publicise the PBR among the Court Officers and staff which eventually resulted in 10 teams from Court competing.
- Pacific West Foods (M) Sdn Bhd – our Bronze sponsor.
- Messrs Zaid Ibrahim & Co - our Gold sponsor.
- BSG Property - our Platinum sponsor.
- Officers of the PDRM and volunteers from RELA who ensured that the safety and security of the runners were looked after.
- Malaysian Red Crescent Society for providing medical and first aid assistance.
- Lastly, all our volunteers consisting of members of the Bar, chambering pupils, staff of the Penang Bar Committee, non-members and photographers; without their commitment and hard-work the PBR 2017 could not have been successfully held.

Despite all the obstacles and contingencies, the PBR 2017 has proven to be a worthwhile addition to the Penang Bar's calendar of events as it brought members of the Bar, both senior and junior, and officers of our Penang Courts together sharing an enjoyable and healthy experience.

From the feedback and response, we can confidently claim that the event was a great success and many members have since informed us that they are now looking forward to the next PBR!

PBR 2017 Organising Team

Co-Organising Chair – Lee Guan Tong & Nuar Izwan Kamarudin

Race Director – Lim Choo Hooi

Head of Administration – Jo-Anne De Vries

Co-Technical Director – David Chen Wooi Teong & Edmund Anthony Hermon

PDRM Liaison – V. Parthipan

Executive Director – Selvi Neelakandan



UP CLOSE & PERSONAL: THE HONOURABLE Y.A. DATO' HADHARIAH BINTI SYED ISMAIL (SENIOR PENANG HIGH COURT JUDGE)

In this edition of Up Close & Personal we were privileged to be granted the valuable time of the Honourable Y.A. Dato' Hadhariah binti Syed Ismail (Senior Penang High Court Judge) as she shares her roots, journeys and experiences of her illustrious and respected legal career. The followings are the extracts of the exclusive interview facilitated by our editorial board members *Ramesh Rajadurai and Guhapria Kumaravellu*.

The interview was conducted in the comfort of Yang Arif's chamber.

RAMESH : Good afternoon, My Lady. It is a pleasure to meet you on a non-formal circumstance. On behalf of the Suara Peguam editorial board, we would like to extend our heartfelt thank you for giving us this opportunity. My Lady, could you please share with us a little on your tertiary education?

YA DATO' HADHARIAH : In 1970's, I completed my secondary studies at Sekolah Menengah Kebangsaan Dato' Onn, Butterworth and after my Form 6, I joined a Teacher's Training College. Subsequently, I was offered a place at University of Malaya to pursue my degree in Bachelor of Laws.

RAMESH : Glad you did not continue the Teacher's Training. Otherwise we would have missed a dedicated Judge. Did you practice as a lawyer upon the completion of your degree, My Lady?

YA DATO' HADHARIAH : No, after completing my final year of studies I did my attachment at the AG's Chamber. During my attachment I had the privilege to conduct a mock trial before Tan Sri Dato' Seri Mohtar Bin Abdullah, who was the head of prosecution then. Once the results were out, I joined the judiciary service in 1983.

RAMESH : The mock trial before Tan Sri Dato' Seri Mohtar was a good start, indeed. Where were you attached to, My Lady, during your initial days in the Judiciary Service?

YA DATO' HADHARIAH: I was under the legal aid bureau at Taiping. I had the opportunity to go into the rural/*kampung* areas to meet the people around there and to resolve the legal issues faced by them. In 1985, I was appointed as a Senior Assistant Registrar at Ipoh High Court and I was there for five years. Subsequently, I went to Johor Bahru as Deputy Public Prosecutor. Back then, there were only four DPP's for the entire state of Johor Bahru. Thus, it was a challenging experience for me to handle a large number of cases every month. After two and a half years, I came back to Perak and was appointed as a Sessions Court Judge. Following that, I was a Deputy Senior Registrar at Ipoh High Court for less than a year. From 1994 until January 2009 I was a Sessions Court Judge at Penang. Prior to my appointment as JC, I was at Kuantan as Sessions Court Judge for three months.

GUHAPRIA : My Lady, do you mind sharing with us the challenging cases that you have encountered in your legal career, thus far?

YA DATO' HADHARIAH : I faced the most challenges in handling cases when I was a JC at Kuala Lumpur High Court under *Bahagian Rayuan dan Kuasa-Kuasa Khas (RKKK)*. Most of the cases were fixed and my duty was only to dispose the cases. Everyday I would have a minimum of 18-20 cases. Moreover, the RKKK department covered numerous types of cases, which were different in nature. Hence, it was pertinent to study each file thoroughly and conduct a proper research before hearing or delivering a decision for a case.

RAMESH : A minimum of 18 - 20 cases of different nature to handle in a day!! That sounds difficult.

How long were you at Kuala Lumpur High Court and where were you posted subsequently?

YA DATO' HADHARIAH : I was at Kuala Lumpur High Court for three years. After I was appointed as a High Court Judge on 4.4.2012, I was transferred to Shah Alam High Court. After three years in Shah Alam High Court, on 1.1. 2016 I came to Penang High Court.

GUHAPRIA : My Lady, how do you find Penang lawyers? Would you like to give us any advice?

YA DATO' HADHARIAH : So far good. I expect all the lawyers to be sufficiently prepared for their cases and ensure all the documents are in order. Punctuality of time equally important. I would also stress that cases fixed for trial must be completed within the trial dates and no part heard.

GUHAPRIA : How about the young lawyers, My Lady?

YA DATO' HADHARIAH : They have to be extremely hard-working and diligent as the sky is the limit.

RAMESH : To wrap up our interview, a personal question, My Lady. Please share with us your plans once you retire from your legal career.

YA DATO' HADHARIAH : I would probably get myself involved in charity work with the less and unfortunate people.

RAMESH : A noble deed, My Lady! Thank you very much for your time.



LORD DENNING: WISDOM FROM ALL HIS YEARS ON THE BENCH

On family values: "There is a prevailing philosophy of 'anything goes' and the strength of family life is being eroded."

On honesty: "A lot of people have not got the same standards of conduct - uprightness or honesty - as they had in the past."

On religion: "Without religion, no morality; without morality, no law."

On divorce: "The divorce court should not penalise anyone and a wife should be entitled to an equal share of her husband's wealth."

On the armed forces: "A disabled former serviceman should not have to prove he was injured in the services to win the right to a pension."

On choosing a career in law: "Because I was ambitious and saw it as the best way to advancement."

On his role in the 1960s Profumo inquiry: "I have had to be detective, inquisitor, advocate and judge and it has been difficult to combine them."

Medley of Moments

Iftar Ramadhan - 2 June 2017



**Hari Raya Dinner At
The Light Hotel
- 15 July 2017**



**Talk: The Companies Act 2016
- Moving Forward - 27 July 2017**



**Talk:
Medical Law - Recent Changes
- 4 August 2017**



**Conveyancing Practice Committee
Meeting with
the Commissioner
of Building - 4 August 2017**



**Talk: Recent Amendments to The
Solicitors' Remuneration Order (SRO)
- 18 September 2017**



**Talk: Committal Proceedings and
Custody Proceedings -
26 October 2017**



**Dinner in Honour of
Y.A. Dato' Lim Chong Fong
on His Lordship's Elevation
to the Bench of the High Court of
Malaya as a Judge - 30 October 2017**



Penang Flood Victims Donations by Penang Bar Committee



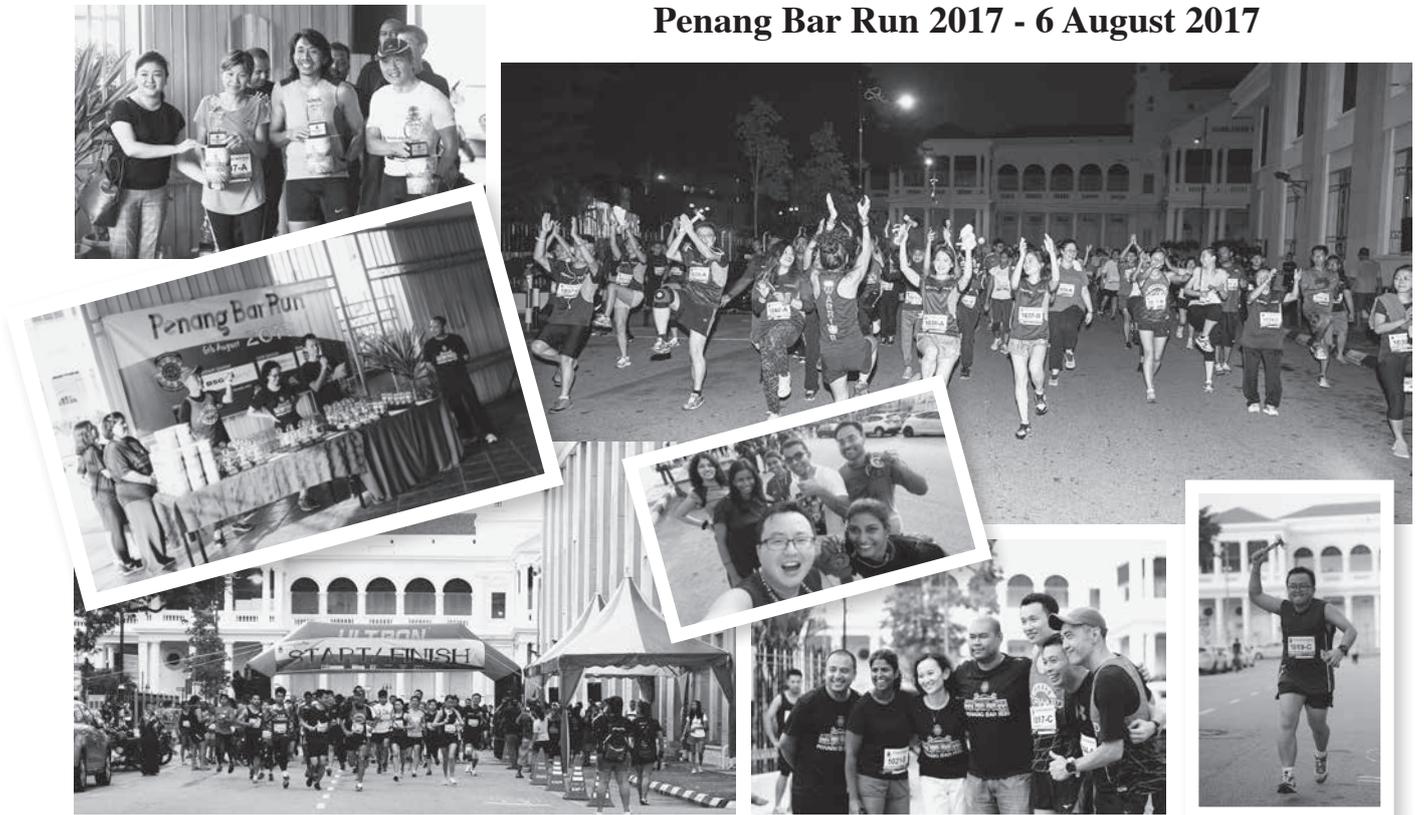
**Chief Justice of Malaya Officiates
the Opening of the Penang High Court Mediation Centre -
27 November 2017**



**Construction Industry Payment & Adjudication Act (CIPAA) 2012
by YA Dato' Lim Chong Fong - 29 November 2017**



Penang Bar Run 2017 - 6 August 2017



31st Penang Bar Annual Dinner & Dance 9 September 2017





Insolvency Act 1967

A pragmatic legal approach in dealing with debtors in Malaysia

By

Jayakumaran Thiagarajan

Let's face the fact! The alarming rate of people being declared Bankrupt in Malaysia has become critical as it is statistically shown that there are almost three hundred thousand (300,000) bankrupt Malaysians. The recent amendment to the Bankruptcy Act 1967 (now known as the Insolvency Act 1967) was touted as and deemed to be the salvation that is hoped to curb and control this situation. Is it a realistic measure i.e. the amendment or a mere buffer to control further damages?

Let us look into the salient points of the amendments made:

1. NOW KNOWN AS "INSOLVENCY ACT 1967"

The Bankruptcy Act will be now known as the Insolvency Act 1967. The Act will only regulate strictly insolvency and bankruptcy of an individual and a firm.

2. THRESHOLD

The minimum threshold for presentation of a bankruptcy petition will be increased from RM30,000 to RM50,000 under the Amendment Act. The rationale behind the increase of the threshold is presumed to create a more controlled cause of action.

3. SINGLE ORDER BANKRUPTCY

The Amendment Act also introduces a single order for bankruptcy (Bankruptcy Order), in place of the existing receiving and adjudication orders (ROAO).

4. VOLUNTARY ARRANGEMENT

The Amendment Act introduces the concept of a "voluntary arrangement", this is a pre-bankruptcy backup, which provides the debtor with the opportunity to negotiate and plan in dealing with his debts and his creditors before he is officially adjudged a bankrupt.

- (a) The voluntary arrangement with his creditors is initiated by the following manner:
 - (i) appointing a nominee ("nominee"), who must be a registered chartered accountant, an advocate and solicitor or a person approved by the Minister upon the recommendation of the Director General Of Insolvency (DGI), to monitor the implementation of the voluntary arrangement; and

- (ii) applying to the court for an interim order of voluntary arrangement (“interim order”).
- (b) The High Court will make an interim order upon receipt of an application for an interim order if there is no previous application for an interim order and the nominee is willing to act in relation to the proposal. An interim order operates to stay all bankruptcy and other legal proceedings against the debtor and is valid for Ninety (90) days, and may only be extended in limited circumstances for a further period of Thirty (30) days.
- (c) The debtor must submit a proposal for approval by his creditors during the subsistence of the interim order. The voluntary arrangement is subject to the approval by a majority in number and at least three-fourths in value of the creditors at a meeting of creditors, or in writing, and voting on the resolution. If the proposal is not approved by the creditors, the court may set aside the interim order.
- (d) Failure by the debtor to comply with any of his obligations under a voluntary arrangement, any creditor who is bound by such arrangement may file to proceed with a bankruptcy petition against the debtor for the balance of the debt due to him.

5. SUBSTITUTED SERVICE

- (a) The requirements under the Bankruptcy Rules 1969 for a bankruptcy notice and creditor’s petition to be served personally on a debtor will be expressly incorporated into the Act pursuant to the Amendment Act.
- (b) The Amendment Act introduces more specific provisions in relation to substituted service. The new provisions allow the court to grant an order for substituted service of a bankruptcy notice or a creditor’s petition on a debtor if the creditor satisfies the court that the debtor, with intent to defeat, delay or evade personal service:
 - (i) departs out of Malaysia or being out of Malaysia remains out of Malaysia; or
 - (ii) departs from his dwelling house or otherwise absents himself, or secludes himself in his house or closes his place of business.

6. GUARANTORS

As a result of the amendments, other guarantors will have the same protection currently accorded to social guarantors under the Act. A creditor must obtain leave of the court before commencing any bankruptcy action against a guarantor. To obtain leave, the creditor must satisfy the court that he has exhausted all modes of execution and enforcement

(including seizure and sale, judgment debtor summons, garnishment, bankruptcy or winding up proceedings) to recover the debts owed by the principal debtor.

7. PROTECTION FOR SOCIAL GUARANTOR

As known a creditor may commence a bankruptcy action against a “social guarantor”, i.e. a person who provides, not for the purpose of making profit, a guarantee for: (a) a loan, scholarship or grant for educational or research purposes; or (b) a hire-purchase transaction of a vehicle for personal or non-business use; or (c) a housing loan transaction solely for personal dwelling, only if he satisfies the court that he has exhausted all avenues to recover the debts owed to him by the principal debtor.

The Amendment Act will absolutely prohibit bankruptcy proceedings against a social guarantor.

8. PROHIBITED OBJECTIONS - DISCHARGE OF BANKRUPT

A bankrupt may be discharged if a certificate of discharge is issued by the DGI under Section 33 of the Act (“certificate of discharge”) after five years from the date of the receiving and adjudication orders. A creditor may object to the issuance of such a certificate. The Amendment Act prohibits objections against the discharge of a bankrupt who: (a) was adjudged a bankrupt because he was a social guarantor; or (b) has a disability under the Persons with Disabilities Act 2008; or (c) who has passed away; or (d) is suffering from a serious illness certified by a Government Medical Officer.

9. AUTOMATIC DISCHARGE

The Amendment Act provides provisions for an automatic discharge of a bankrupt upon the expiry of three years from the date of submission of the statement of affairs by the bankrupt if he has: (a) achieved an amount of target contribution of his provable debt; and (b) complied with the requirement to render an account of moneys and property to the DGI.

Food for thought: Have the objectives been met?

It must be taken cognizance that despite our observation on what the new Insolvency Act offers, to provide a more level playing field for debtors to reach a maximum level in dealing with their debt and settling with their creditors, the privileges and relaxation warranted by the amendment is not to be enjoyed by the existing bankrupts, but rather “an amendment for the future”. This initiative, i.e. the amendment, does without doubt provide a “large cushioning effect” for future debtors, but what happens to the current enormous statistics is still very much a problem and how it is solved is very much a mystery that beckons.

NOVELLA

COCKTAILS WITH CHARACTER

By
Krishnaveni Ramasamy

'Pop, pop, pop'.....The sound of the fire popping from the fireplace broke the pin drop silence of the cold winter night, its jig of joy held Val under a spell. Hmmm.....a momentary relief for her muddled mind. Her living room was a sanctuary of warmth for her. The aromatic smell of the freshly brewed coffee filled her nostrils, enticed her to keep sipping it as she continued working on her new novel after a long gap. Val is a famous novelist known for her articulate writings which had won her numerous awards. An immaculate woman too. Her arched eyebrows stretching gently to her black, Barbie like eyelashes, complimenting her alluring big brown eyes. Her enchanting smile showing off pearl white teeth, lighting up her whole face. Her tresses cascading, like a waterfall, down her back. Owning the qualities of a model but fate had made her a novelist. A true beauty beyond words. A beauty with brains.

Having barely managed a sentence, Val looked around her living room for some inspiration. To her dismay, sky blue walls stared at her, accompanied by the eerie ticking of the clock. She sighed. Her mind was a dense puzzle trying to connect all its pieces. She rose and walked to the window. Gazing out, gentle snow was falling from the pitch dark sky, transforming the landscape into a white, magical land, covering the trees with a blanket of cottony snow while the glistening street lights accentuated the serenity of the scene providing a feast for her eyes. The cold winter breeze whistling through spaces around the closed window gently kissed Val. She felt she was being kissed by a toddler. Chilly, though! Mesmerised with God's creation and its therapeutic effects. She stood by the window with her arms crossed.

Val came to her senses; "The novel!! What an unproductive night!! It's taking a million years to get inspiration!!!" she thought to herself.

This is so unlike her. Since her university days, she had been known to be meticulous and prompt. She had produced umpteen novels, never once encountering problems. The old, confident Val is lost in the midst of disarray.

Disappointed, she decided to wrap up for the night. She dashed to her bedroom and prepared to sleep. She tugged herself into a warm and cosy blanket and snuggled into it, willing herself to be enveloped by the night. She tossed and turned and she tossed and turned, her eyes refusing, despite her willing to stay shut. It was a futile attempt indeed to put herself to sleep. A navy blue diary that laid amongst a pile of books on her bed panel caught her attention. She reached for it. As she opened it to read, something fell out. Her heart sank as she picked the item up for closer inspection. Her eyes welled up with tears.

The item triggered a flood of memories that overwhelmed Val with emotions. As she broke down and wept, the phone rang. Val answered the call seeing her mother's number flashing on her mobile.

"Hey, hunny! How are you?" asked Deborah, Val's mom, affectionately.

"Hi, mom...I'm fine," answered Val as she tried hard to conceal her emotions.

"Are you sure? You don't sound good!" exclaimed Deborah, anxiously.

Val knew her mom would sense it, yet she attempted to convince her, "Just not been feeling well the past couple of days."

Deborah, being the typical mom, was unconvinced with Val's reply, "Hmm...Please come back home, Val, for Christmas...it's been three years now...Dad and I miss you so much."

After a brief silence, Val agreed to celebrate Christmas with her parents, much to Deborah's joy; though the thought of going back, stepping foot in that town, filled her with dread. Christmas at her parents' was usually filled with familiar tradition she used to look forward to. Val decided to join her parents on Christmas eve. She flew from New York to Minnesota, feeling jittery throughout the journey. Her parents lived in a small town on the east coast.

Val pressed the doorbell. Deborah opened it, delighted to see Val, she gave her daughter a tight hug. Val literally felt her mom's heartbeat and for a moment she felt so calm and safe in the arms of her mother.

"Honey, Val's here!!" Deborah called out to her husband, Paul. He rushed to the living room and was overjoyed to see his little girl, Valentina, after so long.

They had a brief chat over tea as Deborah was busy preparing dinner. Meanwhile, Val, instead of helping her mom, went around the house. Everything looked and felt the same for her. The whole house was so Christmassy and filled with a pageant of smells. The gorgeously decorated Christmas tree in the living room flickered with its dazzling lights and it had a rich harvest of beautifully wrapped gifts at the bottom.

“Ah..the angel....” looking at the angel that was perched on the top of the tree, “.....lovely,” thought Val. It was shimmering with its flash-silver lustre. She put the presents that she bought at the bottom of the tree.

Dinner was ready. Val helped to set the table that was packed with a platter of food. Deborah kept the family tradition alive and she didn't miss out the cranberry glazed turkey, Val's favourite. So much food for just the three of them as Loren, Val's brother, couldn't join them at the last moment. Despite the good company combined with good food and wine, there was an inexplicable silence each time the conversation touched on the past. Realising this, Val excused herself. She wanted to avoid any topic that would dampen the Christmas spirit. She went for a walk.

The crunch of her winter boots through the powdered snow, the jingles and the laughter from the neighbouring houses broke the silence of the winter night. The neighbourhood was lit with Christmas lights that glimmered out of the surrounding darkness. A picture-perfect scene worthy of admiration. As she walked, memories from the past flooded back into Val's mind, so strongly that she felt she might lose her mind at that moment. She continued walking. She saw a flash of bright light approaching her and something pulled her.....





Case Review: Restraint Of Trade

By

Siti Azizah Binti Mulian, Roshidah Binti Osman, Noor Asyimah Binti Ramli and Saidatul Muzalina Binti Mustafa

This article examines the developments on the principle of restraint of trade through judgments and precedents in Malaysia. There are no changes made by the Legislature to amend or verify the Contract Act 1950 since it has been passed for more than 50 years ago, however developments to this principle and doctrine has taken place through judgments by court.

1. INTRODUCTION

A contract in restraint of trade is void. Section 28 of the Contracts Act generally prohibits any restraint of trade. This Section provides that every agreement or covenant that restrained anyone from exercising a lawful profession, trade or business of any kind, is to the extent void. Alsagoff (2015) argues that the phrase "is to the extent void" indicates that the contract remains valid but the clause or covenant in the contract in restraint of trade is void.

Section 28 of the Contracts Act provides 3 exceptions in which this general rule does not apply. The said exceptions where restraint of trade may exist are:

1. Agreement for the sale of the goodwill business;
2. Agreement between partners prior to dissolution of partnership ;
3. Agreement between partners during the continuance of the partnership.

In the agreement for the sale of the goodwill business the vendor of the goodwill business may enter into an agreement which contains covenant not to carry on a similar and the same business in competition with the purchaser. And such covenant is valid under Contracts Act 1950. However the vendor must satisfies few conditions by the Act itself :-

1. The vendor is prohibits to carry on a similar business with the business bought over by the buyer from the vendor;
2. The area of restraint must be in specified local limit;
3. Such limits appear to the court reasonable, regard being had to the nature of the business.

In the agreement between the partners prior to the dissolution of partnership and during the continuance of partnership, the partner in order to rely on this exceptions must comply with the following requirements:-

1. It applies only to agreement made between partners. Which means that the party in dispute must be a partner at the time the partnership agreement is executed;
2. the covenant must be made upon or in anticipation of a dissolution of the a partnership; and
3. the validity of the restraint clause is subject to the reasonableness test as mentioned in Exception 1 as to be "within such local limits".

The exceptions in Section 28, laid down two major elements in determining an exception to restraint of trade that is local limit and reasonableness test as regard by the Court. These two elements was discussed by Wendy Low and Leon Foo (2016) that time and geography are two of the most common factors used to limit the application of restraint of trade clauses on the test of reasonableness. These approaches have been adopted by Malaysian Court especially in determining cases that involved doctrine of restraint of trade in the context of employment clauses for non-compete clauses and non-solicitation clauses.

Having said on the conditions as stated by Law of Contract in Malaysia , we now proceed to review cases of Law and the interpretations on restraint of trade principles made by Malaysian Courts .

2. LANDMARK CASES ON DOCTRINE OF RESTRAINT OF TRADE

The general rule is all agreements in restraint of trade are prima facie void unless the person who prepared the agreement could prove that the agreement was reasonable as between the parties. Once it was proven the agreement was reasonable for the parties, the burden to prove shifted to the person who was disputing to the agreement that the agreement was unreasonable to the public. Referring to one of the earliest cases i.e. **Thomas Cowan & Co Ltd v. Orme (1961) 1 MLJ 41** .

The judge has further referred to **Nordenfelt v. Maxim Nordenfelt Guns and Ammunition Co. Ltd (1894) AC 535** for applicable test to determine the validity of an agreement in restraint of trade as stated by Lord Macnaghten that restraints of trade may be justified by the special circumstances of a particular case as the agreement was reasonable to the interest of the parties concerned and to the public.

However there are 3 exceptions to Section 28 and exception 2 emphasize that the agreement between the partners must be executed before the dissolution of partnership and in **Wrigglesworth v. Wilson Anthony (1964) MLJ 269**, the High Court held that the agreement which was entered by the Plaintiff and Defendant was void as it is to restrain the Defendant from practising after the Defendant quit from the Plaintiff's firm. The Judge further held that the agreement was not fall under the exception two of the general rule of section 28 as the Defendant was not the partner to the firm when the agreement was executed..

Meanwhile in the case of **Polygram Records Sdn. Bhd. v. Hillary Ang & 4 Ors (1994) 3 CLJ 806** , the Defendant filed a counter claim against the Plaintiff inter alia seek for a declaration that the clause 6 (v) of the second contract is void in restraint of trade. One of the issues to be determined is whether the second contract was void as it was in restraint of trade.

The Judge laid down the principle in the present case that section 28 did not apply the same test of reasonableness as the English Courts to determine the validity of contract in restraint of trade. The English Courts has taken into consideration to determine the doctrine of restraint of trade in two different circumstances; (a) restraint of trade after the expiration of the contract; and (b) restraint of trade during the continuance of the contract. Whereas section 28 is only applicable where a person has been restrained from carrying his trade in the post-contract period and not during the continuance of the contract.

Further the Judge held that clause 6(v) of the second contract is to restraint of trade in the post-contract period and it is a covenant in restraint of trade. The clause was not fall under any three exceptions of section 28. Thus the clause was void.

In one case of **Nagadevan Mahalingam v. Millenium Medicare Services (2011) 3 CLJ 529**, the Appellant was admitted as a working partner at the Respondent's firm in pursuant of partnership agreement executed by the Appellant and the former partners of the Respondent's firm. Within 3 years of the agreement, the Appellant left the firm and joined another clinic which was within 15 km radius of the Respondent's firm. The Respondent brought the action against the Appellant for breach of the agreement.

The Court of Appeal was allowing the appeal and held that the agreement entered by the Appellant was a restraint of trade clause under section 28. The Appellant was not a partner of the firm when the agreement was initially executed. He joined the firm as a partner in pursuant of the said agreement. Thus, the agreement was not made in anticipation of the dissolution of the partnership.

Recently the Malaysian Court has interpreted Section 28 in a broader way. Hence we now proceed with the development on the Section 28 and its exception.

3. DEVELOPMENT ON DOCTRINE OF RESTRAINT OF TRADE

However, throughout the new era, Court has widened the interpretation from the general rule and landmark cases.

The principles on local limit and reasonableness test was further discussed in **Worldwide Rota Dies Sdn Bhd vs Ronald Ong Cheow Joon, [2010] 8 MLJ 297 [High Court]**, the judge decide to apply English common law to the reasonableness test in doctrine of restraint of trade. The judge held that in order to construing the restraint of trade clause, the test of reasonableness must be applied. The test of reasonableness must consider the interest of the parties and as well as the public. If the parties mutually agreed to incorporate the restraint of trade clause in their contract, the court must give effect to them. The judge finding was contrary with the view of Sinnadurai J in Polygram Records Sdn. Bhd, that the validity of such covenant is not subject to the “reasonableness test” under the common law. In this case the Judge has openly suggests for Legislature to amend the law on the doctrine of restraint of trade in Malaysia.

The principles of restraint of trade in employment was adopted in a case of **Raghunath Ramaiah Kandikeri v. Ecooils Sdn Bhd (2013) 1 LNS 360**, the Judges of Court of Appeal have developed the law to extend the confidential clause is a restraint of trade and was not enforceable. Further the Judges have agreed with principle which was quoted in Worldwide Rota Dies Sdn Bhd v. Ronald Ong Cheow Joon (2010) 1 LNS 444 i.e. the recipient was restraint to do the work which he is capable to do when he makes use of that particular confidential information.

However, in the case of **Vision Cast Sdn Bhd & Anor vs Dynacast (Melaka) Sdn Bhd & Ors [2014] 8 CLJ 884 [Court of Appeal]**. The judge held that the precedent applied in Worldwide Rota case was clearly wrong in importing reasonableness test applying Common Law to exception 1 of Section 28. In this case, the limitation set in the contract was agreed by both parties therefore since the appellant set up the company 15 month after resignation, to restrain appellant from pursuing a lawful trade or business were void.

Furthermore, in their motion for leave to appeal to Federal Court (**Dynacast (Melaka) Sdn Bhd & Ors vs Vision Cast Sdn Bhd [2016] 6 CLJ 176 [Federal Court]**), the Court confirms that the protection of confidential information has no limits. As long as there is an agreed contractual obligations between parties Court shall recognise it. The judge agrees with the case **Svenson Hair Centre vs Irene Chin** where the learned judge rationalised that a contrary view would mean that an ex-employee could exploit confidential information with impunity. All that is needed to do is to wait until the expiry of the restriction period. Such an outcome could not have been intended by only of the contracting parties as this would defeat the very purpose of having a confidentiality provision in an employment agreement. The judge wholly agrees with the rationale.

The court further confirms that in order partners to rely on the exception 2 and 3 of Section 28 they have to prove a dissolution clause and an anticipation clause in the Partnership Agreement as decided in the case of **Millenium Medicare Services vs Nagadevan Mahalingam [2016] 2 CLJ 36 [Court of Appeal]**, the court further agree with the judge in the Vision Cast that the concept of the reasonableness and fairness will not be applicable to agreements in restraints of trade in Malaysia as compared to the United Kingdom. Section 28 of the Contract Act is general in terms and unequivocally declares all agreements in restraints of trade void pro tanto, except in the cases specified in the exception. This section lays down a very rigid rule invalidating restraints, not only general restraints but also partial ones, and also restricts the exception to narrow lights.

4. LESSON LEARNED

In the early days Court has made a rigid and narrow findings regarding the doctrine of restraint of trade whereby the Court approached was that if a particular covenant is a covenant in Restraint of Trade, the Court has no discretion but to declare it to be void.

Furthermore, the Court held that Common Law (English Cases) on the issues of restraint of trade will not applicable and declined the importation of English principles of reasonableness test.

However the restraint clauses have over time evolved with elaborate permutations with due consideration being provided on how the clauses are to be drafted. There is no certainty on what clauses will be accepted by Court to be a restraint clause and what are not. The real test lies on legal practitioners to draft a well and crafted confidentiality clauses that can effectively achieve the protection that the employer seeks.

However in light of globalization and advancement of technology whereby business around the world can be conducted at a convenience of our home , the worldwide restraint must be taken into consideration by our Courts. The Federal Court of Australia in *Pearson v. HRX Holdings Pty Ltd* [2012] FCAFC 11 held that restraint was reasonable given that service could be provided to the company's clients across the world.

Therefore what we can learned from this judgment is that the application of local limit to the doctrine of restraint of trade must be constantly reviewed in light of today's technology.

Parties who wished to enter into a Partnership Agreement must not only highlight on confidentiality clause but must also look into the termination clause. There must also be an anticipation of dissolution of termination of the partnership agreement. This is pertinent to ensure their rights are protected under Exception 2 of the Section.

As we have discuss earlier, the Court also has taken its own approached in interpreting Section 28 particularly to its exception as enunciated in *Worldwide Rota and Dyna Cast*. Scholars and academicians strongly criticized *Worldwide Rota* principles in applying Common Law in reasonableness test but other countries such as Singapore, United Kingdom and Australia has more liberal and open in reviewing their principles in clauses that they considered to be restraint of trade.

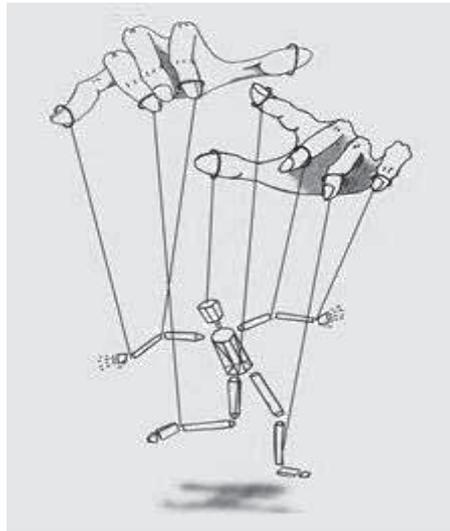
5. CONCLUSIONS

The interpretation of Section 28 of the Contracts Act remain unchange. However, on the exception itself Courts will have their own approach and interpretation and hence through it the law developed.

Constant reviewing on confidentiality clause and termination clauses in an employment agreement and a partnership agreement will helped our legal system to develop and evolve in accordance with current live style and technology.

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The Puppet Masters And The Prey

By Yeap Su Lynn

(as inspired by the poems of Robert Frost and Dylan Thomas)

For they were the Puppet Masters
The unseen hands behind the scene
Manipulation and instigation was their game
Which they perfected into an art form
Their Prey was on every occasion the helpless and the desolate

For they were the Puppet Masters
The Machiavellians who lay in wait behind the scene
Waiting for the opportunity
When they could pounce and attack
When their Prey was incapacitated and weak

For they were the Puppet Masters
The people pulling the strings behind the scene
With puppetry as their age old craft
They had designed a grand but subtle plan
Which was to be executed when their Prey was unsuspecting

For they were the Puppet Masters
The people who were masters of the art of control
But alas their subtle plan
Which they had honed to perfection
Was revealed when they went too far and showed their hands

For they were the Puppet Masters
The purveyors of the art of skilful manipulation
But they bade a hasty retreat into the shadows
When their Prey was alerted
And forewarned of their elaborate plan



Legal Aid in Malaysia: A Desperate Need for Awareness and Attention

By Guhapria Kumaravellu

Legal aid is paramount to a fair and decent society. For the past few decades, it has provided thousands of people with advice, support and representation, many of whom would otherwise have been denied access to justice because they could not have afforded to pay. In Malaysia, both the Government and Bar Council provide legal aid to ensure equal access of justice for all. There are two main organizations offering legal aid in Malaysia namely The Bar Council Legal Aid Center and The Legal Aid Bureau. The Bar Council Legal Aid Centre (LAC) was founded by the Malaysian Bar Council while Biro Bantuan Guaman is a governmental body under the Bahagian Hal Ehwal Undang-Undang, Jabatan Perdana Menteri (Legal Affair Division, Prime Minister's Department). Subsequently, the National Legal Aid Foundation, NLAFF/ Yayasan Bantuan Guaman Kebangsaan (YBGK) was incorporated on 25th January 2011 and launched by the Prime Minister on 25th February. The setting up of YBGK arose due to lack of legal representation for those who are tried in court for criminal offences. The Government legal aid is administered under the Legal Aid Act 1971 whereas the Bar Council provides legal aid under the provisions of the Legal Profession Act 1976.

Jabatan Bantuan Guaman deals with Syariah family matters, civil family matters, hire purchase/ inheritance consumer claim, mitigation for criminal cases, cases under Minor Offence Act and Child Act. Meanwhile, The Bar Council Legal Aid Centre deals with Family and Syariah cases, employment cases and several miscellaneous cases. Additionally, the Bar Council LAC also caters advices and legal representation in all criminal cases at arrest, remand, bail, mitigation and at trial stage of non-citizens. YBGK only deals with criminal matters. Legal aid organization in Malaysia had assisted thousands of people to overcome their respective legal problems.

There are people who are not aware of the existence of legal aid programs, the rate of illiteracy is still very high in the rural areas. People are still not aware of their basic rights and in absence of this legal awareness it leads to exploitation and deprivation of right and benefits of the poor. Bar Council Legal Aid Centre has been organizing several events to increase the awareness of basic legal knowledge among the society for instance visiting a number of schools to give a short talk on legal awareness. Though, more legal aid awareness programs should be conducted to let the public know about the existence of legal aid organizations. It is the need of the hour that the indigenous and illiterate people should be imparted with legal knowledge and should be educated on their basic rights.

Out of several millions of consumers of justice, how many of them had been benefited by the altruistic service of the legal aid centers? The Bar Council Legal Aid Centre and the Legal Aid Bureau does not deal with certain subject matter namely capital punishment, bankruptcy, debt collection, accident matters, probate matter, defamation and syariah criminal cases. Hence, one who is facing difficulties in any of the above stated subject matter will not be able to seek legal assistance from the legal aid centers which totally defeats the objective of legal aid organization. At the same time, resources of the Legal Aid Centre are not sufficient to accommodate legal assistance in all areas of law. The preparation cause papers are time consuming and the court filing fees are expensive.

Lawyers with the support of legal aid organization have been providing legal assistance to people who cry for justice. The late payment issue towards lawyers who assisted under the legal aid scheme is yet to be resolved completely and some of them are shying away from representing the needy as payments are not prompt. Subsequently, legal aid organizations are facing severe shortage of lawyers.

Many have benefited from the services rendered by Legal Aid Organization in Malaysia. Nevertheless, there are numerous concerns to be rectified beforehand in order to achieve the objective of legal aid successfully. The lack of legal awareness among the public is one of the major factor due to which they cannot raise their voice or can fight for their right accordingly. Active steps should be taken by both Bar Council and Government to increase awareness of and referrals for legal services. Simultaneously, both the Bar Council Legal Aid and the Legal Aid Bureau should offer legal assistance in variety fields of laws to avoid justice being denied to the poor and the needy.





Extracts Of The Penang Bar Committee Chairman's Speech On The Opening Of The Penang High Court Mediation Centre Penang On 27.11.2017.

The Chairman thanked the Director of the Sub-ordinates Courts for inviting the Penang Bar Committee for the official opening of the Penang High Court Mediation Centre. The Penang Bar Committee was represented by the Chairman Mr. Tharumarajah Thiagarajan, Honourable Secretary Mr. Elson Beh Hong Shien, Honourable Treasurer Mr. Lee Guan Tong, Miss Gowri Subbaiyah (Chairman of Editorial Board) and Mr. Arivanandhan (Co-Chairman for Courts Liason sub-committee).

The short address was made in the presence of the Honourable Chief Justice of Malaya Tan Sri Md Raus Sharif, the Chief Judge of Malaya Tan Sri Ahmad Maarop, Federal Court Chief Registrar Datuk Seri Latifah Mohd Tahar, Judges of the Penang High Court led by Justice Dato Hadariah, the Honourable Judicial Commissioners, Judges of the Sessions Court, Magistrates and other officials of the Penang High Court.

He supported the opening on the Penang High Court Mediation Centre and further stated that the Penang Bar is ready and prepared to support the Penang High Court Mediation Centre led by Justice Dato Lim Chong Fong. He stated that in fact the Penang Bar has submitted approximately one hundred and ten names (110) of trained mediators to offer mediation services on a pro-bono basis. The Malaysian Mediation Centre (affiliated with Bar Council Malaysia) has also volunteered to render assistance for the newly officiated Penang High Court Mediation Centre.

He further raised the issue of Practice Direction 4 of 2016 and offered his personal view that it has to be given more teeth. At the moment it is only an encouragement. Parties are encouraged to convene an amicable settlement. Hence there is no element of discretion given to Judges to ensure mediation is carried out at the onset.

Further, in his speech he suggested that mediation shall be encompassed and made part of the Rules of Court to enable Judges to direct parties concerned to mediate either through the Courts or privately at their own costs.

He quoted Lord Nueberger of Abbotsbury's (President of the Supreme Court of the United Kingdom) key note speech at the Civil Mediation Conference 2015 wherein he stated a survey in 2007 found that 47% of the respondents involved in litigation admitted that a personal dislike of the other side had been driving them into costly and lengthy litigation.

Further, he added Lord Nueberger's view that mediation is particularly attractive at present when litigation is becoming more expensive and time consuming and as the complexity of law deepens and legal aid is ever more attenuated. It was the Chairman's personal view that these views do apply here too as we see increased court fees and legal aid procuring severe financial stress.

The Chairman thanked the courts for the invitation and wished all concerned success in this endeavour.

(This is an edited version of actual short address by the Chairman.)

ATTORNEY HUMOUR

THE PROBLEM WITH MAKING JOKES ABOUT LAWYERS IS EVENTUALLY YOU GET SUED FOR SLANDER AND YOU HAVE TO HIRE A LAWYER TO DEFEND YOU.

ARGUING WITH A LAWYER IS LIKE WRESTLING A PIG IN MUD
SOONER OR LATER YOU REALIZE THAT THEY LIKE IT



"I wish you had tried to screw me this much while we were married."



"I see your lawyer stopped by."



"The important thing is not whether you did it... but whether you have enough money to PROVE you didn't."



"Actually, I'm a litigator."



A Dull Witness



Lawyer: "All your responses MUST be oral, OK?"
Witness: "OK."
Lawyer: "What school did you go to?"
Witness: "Oral".

Merry Christmas from your lawyer...

(But without any assumption of liability on our part)

Wishing you λ
reasonably
a Merry Christmas
(and/or festive period)
and a happy new year
for the avoidance of any doubt λ
12 (Twelve) months from the date hereof.

A Christmas Cookie Recipe: **Hot Cocoa Cookies**



Ingredients:

For the cookies-

1/2 cup (1 stick) unsalted butter
12 oz. semi-sweet chocolate
1 1/2 cups flour
1/4 cup unsweetened cocoa powder
1 1/2 teaspoons baking powder
1/4 teaspoon salt
1 1/4 cups brown sugar
3 eggs
1 1/2 teaspoons vanilla extract
25 (apx.) large marshmallows

For the icing -

2 cups powdered sugar
4 tablespoons unsalted butter, melted
1/4 cup unsweetened cocoa powder
1/4 cup hot water
1/2 teaspoon vanilla extract
Assorted sprinkles

Make the cookies-

- 1.) In a medium saucepan (or in a microwave safe bowl, using 50% power), melt the butter and chocolate, stirring frequently. Once melted, set aside to cool slightly.
- 2.) In a medium bowl, whisk together the flour, cocoa powder, baking powder and salt.
- 3.) In the bowl of an electric mixer, beat the sugar, eggs and vanilla on low speed until well combined.
- 4.) Add the cooled chocolate mixture and blend until just combined.
- 5.) While mixing, add the flour mixture slowly and blend until just combined. Scrape down the sides of the bowl, then cover the dough and refrigerate about 1 hour. If making the dough a day ahead, let sit at room temperature for 30 minutes before shaping.
- 6.) Preheat oven to 325°F and line 2 baking sheets with parchment paper. Use a tablespoon to scoop the dough, then roll the dough in your hands to create balls. Arrange the balls about 2 inches apart on your baking sheets, then flatten slightly.

Bake cookies about 12 minutes.

- 7.) While the cookies bake, cut the large marshmallows in half (crosswise). When the cookies have baked, remove from oven and press one marshmallow half (cut side down) into the center of each cookie. Return the cookies to the oven and bake another 2-3 minutes. Allow the pan of cookies to cool a few minutes, then transfer cookies to cooling rack.
- 8.) Prepare cookie icing by combining all ingredients in a medium bowl and mixing together with a whisk. Place wire cooling rack (with cookies on it) over a baking sheet (to catch any excess icing). Spoon a small amount of icing onto the top of each marshmallow, and use the back of the spoon to spread it a bit. After icing just a couple cookies, top with sprinkles before the icing dries.
- 9.) Allow icing to set up about 30 minutes before serving.

