VOIX D' ADVOCAT

THE SAME VOICE, A LAWYER'S VOICE

2022 ISSUE
FOR MEMBERS ONLY

REACHING HIGHER GROUND

PENANG BAR COMMITTEE 2022/2023

Chairman: Ravi Chandran Subash Chandran

Treasurer: Jo-Anne De Vries

Secretary: Gowri Subbaiyah

Elected Committee:

1. Mohd Azizan bin Mat Nayan
2. Muhammad Arif Shaharuddin
3. Devkumar Kumaraendran
4. Robiaaton Adawiyah Safri
5. Mohamad Redzuan Idrus
6. Teh Ee Teng
7. V. Parthipan
8. Sharifah Nur Hanim Syed Hamid (resigned on 15.8.2022)

Co-opted Committee Member: Hng Huey Koon (Quiin)

Bar Council Representative: Lee Guan Tong

TABLE OF CONTENTS

A WORD FROM THE EDITOR

"Refuse to be average.
Let your heart soar as high as it will."

-Aiden Wilson Tozer-
Author

Dear all,

Let us be grateful that we see some light at the end of the tunnel as we have moved into the endemic phase of Covid-19, embracing the new normalcy, although we are still not entirely disentangled from the wrath of it.

December is a perfect time for most of us to reflect on the good and the bad that the year has brought upon us, planning and setting goals for the coming year. Let us aspire to reach higher ground as we usher in the New Year, 2023!

The Voix d'Advocat, which will be published annually, is presented to the members of the Penang Bar, capturing memorable moments and articles on various areas of law alongside the usual segments. My team and I have strived to provide an insightful edition. We believe it will be beneficial to the members of the Penang Bar. Once again, the Editorial Board urges the members of the Penang Bar to contribute and participate in order to keep the Voix d'Advocat alive!

Finally, I would like to tip my hat to my team for their incredible work. The production of this edition would have been impossible without their willingness and unfaltering effort while juggling the busy schedule. The Editorial Board also welcomes our new members: Carina Tan, Hemeswary Veera Vijayan, and Piriya Subramaniam.

Wishing the members of the Penang Bar,

Merry Christmas and Happy New Year!

Warm regards,

Krishnaveni Ramasamy

Editor
Dec 2022
voixdadvocat@gmail.com

LET'S NOT FORGET ABOUT DOMESTIC VIOLENCE

By: Lee Jing Yao

As far as courtroom drama goes, the live feed of the defamation trial between blockbuster actor Johnny Depp and his ex-wife, movie star Amber Heard had caused quite a stir among social media users, making this case one of the latest popular topics on the internet. While this article will be avoiding the merits of that trial, it has inspired food for thought, mainly on the topic of domestic violence in the family home. Correlating this topic closer to home, this article thus serves to explore domestic violence in our Malaysian legal context.

Domestic violence, also termed "domestic abuse" or "intimate partner violence", as explained by the Women's Aid Organisation, is a pattern of violence, abuse, or intimidation used to control or maintain power over a partner who is or has been in an intimate relationship. Domestic violence comes in various forms, including physical, emotional, psychological, sexual, social, and financial abuse. While domestic violence victims often face more than one form of abuse, it is plausible that a victim may be faced with only one form. Fundamentally, domestic violence is about power and control.

The starting point for how Malaysia tackles domestic violence is recognising that Malaysia has acceded to the Convention on the Elimination of All Forms of Discrimination against Women, with reservations on certain articles in view of the provisions of Syariah Law and the Federal Constitution. This is a global movement in enforcing fundamental human rights which aims to ensure equal rights for both men and women in law. Malaysian laws combating domestic violence were enshrined in the Domestic Violence Act 1994 whereby the 1994 Act has set out eight (8) forms of acts that fall within the definition of domestic violence such as, *inter alia*, wilfully or knowingly placing, or attempting to place, the victim in fear of physical injury; causing physical injury to the victim by such act which is known or ought to have been known would result in physical injury, etc. What is noteworthy is the specific wording of the definition of domestic violence, which recognises that both males and females (including children) are

equally vulnerable to domestic violence. Other legislation relevant to domestic violence incidents is the Penal Code, Sexual Offences against Children Act 2017, Child Act 2001 and the Married Women Act 1957. One example is that Section 4A of the Married Women Act 1957 recognises that either a husband or wife can sue their spouse in tort for damages in respect of injuries to their person.

Domestic violence is very real and a bane to our Malaysian community. Our Women, Family and Community Development Minister Datuk Seri Rina Harun stated that 9,015 police reports were lodged for domestic violence beginning from March 2020 until August 2021, essentially during the movement control order (MCO) for the Covid-19 pandemic. It should be reiterated that the numbers are based on reported complaints, and it is not a far stretch to assume that there are plenty of cases that went unreported. While domestic violence in the form of physical beatings and/or sexual abuse is much easier to identify, the psychological and emotional aspects of domestic violence are a lot more subtle. In such scenarios, it is potentially difficult for victims to even identify being involved in an abusive relationship. Where domestic violence is only in the form of emotional and psychological abuse, the relationship is generally interspersed with "good moments" and without realising it, the victim ends up trapped in this cycle of abuse, going through the stages of – tension, incident, reconciliation, calm – which repeat themselves over and over again.

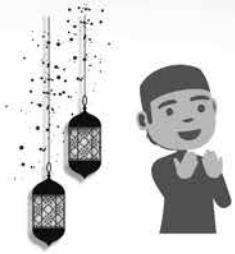
In terms of the legal remedies, Part II of the Domestic Violence Act 1994 provides for civil protection orders which can be categorised as Emergency Protection Order (EPO), Interim Protection Order (IPO) and Protection Order (PO). Broadly speaking, the Courts can make any of the following protection orders which generally is to prohibit the perpetrator from committing any acts of domestic violence against the victim. In the event that the Court finds it necessary, the Court can further provide for restrictions such as granting the right of exclusive occupation to a protected person of a shared residence, determining a protected person's safe place, and prohibiting the perpetrator from entering such safe space, prohibit communication between the perpetrator and the protected person, etc. In fact, Section 7 of the Domestic Violence Act gives the Court the discretion to attach a power of arrest if they deemed it necessary and just. Where domestic violence has been found, the Court also has the power to award compensation in respect of injuries, damages, and/or losses if the Court deems it just and reasonable. In certain cases, the Court too can make an order to refer parties to a conciliatory body.

The above only covers the form of a civil approach to tackling domestic violence. Despite occurring in the private family sphere, it should be reiterated that domestic violence is still a crime under the Penal Code. The Malaysian police are empowered to investigate any complaints under Section 323 to Section 326 of the Penal Code for voluntarily causing hurt (depends whether the injury is minor or grievous hurt, with or without dangerous weapons) or Section 506 of the Penal Code for criminal intimidation. This carries a punishment such as a jail term ranging from seven (7) years to twenty (20) years (depending on which section of the Penal Code the perpetrator is charged with), fines and even whipping in more severe cases. Thus, if one does find oneself ever caught in the web of a perpetrator of domestic violence, the victim must make a police report immediately.

In the event one ever finds oneself in need of help, the following are some available avenues for assistance:-

- Nearest police station
- One Stop Crisis Centre (OSCC) at all government general hospitals
- Nearest Social Welfare Department
- Women's Aid Organisation
- Talian Kasih 15999

In short, the above is just a brief overview of the legal remedies Malaysia has to assist Malaysians caught in this very severe crime of domestic violence. Ultimately, this article is all about awareness. Domestic violence is pervasive and the more it is talked about, the more likely individuals would be able to build awareness and identify abusive behaviours. This could then lead to proactive preventive action to prevent harm to our community, friends, family, neighbours and even co-workers. Always remember that any individual can be a victim of domestic violence, regardless of age, gender, race, social status or religion.



UNDERSTANDING HUDUD LAW

By: Abu Bakar Kugaselva Bin Abdullah

In order to understand Hudud Law, we should know that Hudud is only one of the components of Islamic Criminal Law which comprises Hudud, Qisas and Tazir. Hudud is the plural for the singular Arabic word "Hadd" which means deterrent. Qisas is the branch of Islamic Criminal Law with the 'an eye for an eye' principle which includes the crime of murder and assault. Tazir is the branch of Criminal Law that gives discretionary punishment to the executive branch of the Islamic government. This includes cheating in business, criminal traffic offences and bribery.

In Hudud Law, let us find out how many criminal offences come within the ambit of Hudud sanction. Some Islamic scholars say there are only 4 Hudud offences, whereas others stipulate that there are 7 Hudud offences.

Why is there such a conflict of opinion?

The scholars who say there are only 4 offences, abide by the principle that Hudud Law is based on serious crimes which demand punishment to the body, wherein the punishment is clearly in the Al-Quran. Whereas others include all heinous crimes done to humanity.

The 4 Hudud offences, in which the punishment is stipulated in the Al-Quran are:

1. Theft (Surah Al Maidah verse 38)
   The punishment for theft is, as to the thief, male or female cut off their hands. (From fingertips to the wrist).

2. Robbery (Surah Al Maidah verse 33)
   The punishment for robbery is, cutting off hands and feet from opposite sides. If the robbery involves a dead victim, then the punishment is crucifixion.

3. Zina (which covers fornication) (Surah An Nur verse 2)
   The woman or man guilty of fornication, flog with 100 lashes of the cane.

4. Qazaf (criminal accusation of Zina)
   If those who launch a charge against a chaste woman do not produce 4 witnesses, flog them with 80 strokes of the cane.

The other scholars include 3 other crimes, namely drinking alcohol, revolution (causing an uprising against a legitimate Islamic government), and apostasy.

The Al-Quran does not have a specific punishment for these 3 offences:

1. Drinking alcohol (Surah Al- Baqarah verse 219) (Surah An Nisa verse 43) (Surah Maidah verse 90)
In Surah Baqarah verse 219, it is stated that drinking alcohol, in them a great sin and some profit to man. The sin outweighs the profit.
In Surah An Nisa verse 43, concerning drinking alcohol, don't engage in prayer while in the state of intoxication.
In Surah Al Maidah verse 90, there is a total prohibition of drinking alcohol.

2. When it comes to revolution or Baghi (Arabic term) the offence is in Surah Al Hujarat verse 9. If two parties fight, try to make peace. If they go beyond bounds, track them down and deal with them in a just manner.

3. The offence of apostasy is stated in 2 surahs. Surah Al Baqarah verse 217 and Ali Imran verse 90.
In Surah Al Baqarah Verse 217, it is stated that; 'and any of you turn back from your faith and die in unbelief. Their works will not bear any fruit in this life and hereafter.'

In Surah Ali Imran verse 90, it is stated that; 'But those who reject Faith after having accepted it…never will their repentance be accepted for they are those who have gone astray.'

It is with utmost importance to note that certain practices were carried out during Prophet Mohammad's lifetime and these punishments continue to be part of Islamic Law in the name of the Sunnah which is the second source of Islamic Law.

For example, the punishment for Zina which is stipulated in the AL-Quran is 100 lashes and the practice for punishment for adultery is stoning. During the time of the Prophet, stoning was only a last resort after a clear, unequivocal confession of the doer.

For the offence of rape, "Zina Al-Jbrr" the punishment is tazir (discretion of judiciary)
Why is that so?
This is due to the fact that in a rape situation, one party is the victim.

In summary, Hudud offences should act as a deterrent to those who even just intend to commit them. If the punishment is very grave, then society will enjoy freedom. This experience is felt in Mecca where traders just leave their goods and perform prayers without locking up their shops but no one dares to steal. In order to protect society from social ills, these punishments are necessary to prevent the beastly elements in human beings from emerging.

SHOULD ARTIFICIAL INTELLIGENCE (AI) BE APPLIED FOR SENTENCING?

By: Hemeswary Veera Vijayan

1.0 What is sentencing?

Sentencing is the imposition of a sentence involving a punishment element. Sentencing will only occur when the accused person is found guilty and convicted of a crime. Thus, there must be a conviction to warrant a sentence. Under the Malaysian criminal justice system, sentencing could include imprisonment, whipping, death sentence, rehabilitative counselling, community service, fines, police supervision, compensation and costs, and a good behaviour bond. Statutory provisions governing sentencing can be found in Chapter XXVII specifically from sections 281 to 299 of the Criminal Procedure Code. Section 173(b) and section 173(m)(ii) of the Malaysian Criminal Procedure Code provide that the court shall pass a sentence in accordance with the law where the accused pleads guilty and is found guilty. If someone has committed a crime and is found guilty, he shall be punished. This is because he has committed a crime and he deserves to be punished for doing so in order to deter the offender from committing crimes in the future and to prevent others from committing such offences. In theory, the purpose of punishment includes deterrence, rehabilitation, prevention, and retribution.

2.0 Should Artificial Intelligence (AI) be applied for sentencing?

The Covid-19 pandemic has increased the requirement for various industries to start utilizing digital transformation. Even the traditionally conservative judicial system has accepted this by conducting court trials online. However, getting used to technological change is not something new to the Malaysian judiciary.

Earlier this year, even before the pandemic forced industries to get used to digital transformation, the Sabah and Sarawak courts launched a pilot artificial intelligence (AI) tool as a guide to assist judges to pass sentences. Apart from Malaysia, according to Science and Technology Daily, artificial intelligence is booming in China's judicial system as well, assisting judges. To standardize the process of sentencing, the Hainan High People's Court has implemented an intelligent system that uses big data and AI technologies such as natural language processing, knowledge graphs, and deep learning to automatically identify and select key facts in a case and form a written judgement after analysing the data based on previously decided cases. In order to increase efficiency and advance standardization in judicial services, the Hainan High Court is encouraging lower-level courts throughout the Hainan province to use the system.

Artificial Intelligence (AI) is a machine that is capable of making decisions with human-like intelligence and tackling tasks that are difficult to do manually. To answer the issue of whether artificial intelligence should be applied for sentencing, the advantages and disadvantages of doing so should be taken into consideration.

A robot serving as a court guide and offering litigation information attracts media attention in Beijing. CAO LU / XINHUA

2.1 Advantages of applying artificial intelligence for sentencing

Applying artificial intelligence to sentencing can make sentencing determinations faster and more convenient. Apart from that, the application of artificial intelligence allows sentences to be more transparent, predictable, and consistent. Consequently, this will have the additional advantage of saving considerable public expenditure, reducing the amount of court time and resources spent on sentencing decisions. Another advantage of an algorithm for sentencing is that it will reduce subconscious bias in decision-making. This is because, in contrast to humans, computers have no instinctive or subconscious bias. Generally, computers are not capable of inadvertent discrimination and are not influenced by extraneous considerations or by assumptions and generalizations that are not embedded in their programs. They operate through the application of variables that have already been programmed.

2.2 Disadvantages of applying artificial intelligence for sentencing

Apart from the advantages, applying artificial intelligence for sentencing does give rise to some disadvantages. Although the algorithm for sentencing will reduce subconscious bias in decision-making, there still exist chances that AI might replicate and exaggerate bias. This is because AI technology still relies on human engagement for input data. Therefore, technology such as computers and robots are not immune to society's prejudices since it is rather challenging to remove human bias from algorithms themselves, partly because technologies need humans to develop them.

Other than that, it is indeed taxing to define the subjective concept of fairness in quantifiable, mathematical terms. The issue that needs to be addressed is how fair a computer/robot can ever be. For instance, one of the issues in the AI tool is whether the victim of a rape case has "suffered psychological distress". It can also be argued that all rape victims suffer different levels of psychological distress. However, the

AI tool's algorithm only recognizes the binary inputs of "yes" or "no". This shows the application of mathematical principles clashing with the law where nuances and subtleties in individual cases are indeed significant.

Experiencing such weaknesses in AI, the Sabah and Sarawak judiciary has only used the AI tool as a guideline where the judges will be the ones who finally pass the sentence. An analysis of the cases heard in Sabah and Sarawak as of 29 May 2020 shows that judges departed from the AI sentencing recommendation in 67% of the cases because the AI tool is not capable of considering mitigating factors and the sentence recommended by the AI tool is not considered to be deterrent enough for the accused. This depicts the limitations of an algorithm and affirms that the human element is still required in sentencing.

While some have a positive view that applying artificial intelligence could ensure transparency in sentencing, there are however some who view AI has an issue with transparency and accountability. This is because the judiciary is unable to provide explanations on how exactly the algorithm derives certain patterns, and why the algorithm gives more importance to one variable over another. Eventually, the judiciary will not be able to derive the reasoning behind the sentence recommended by the computer/robot.

On that note, in order to enhance accountability, the Sabah and Sarawak judiciary practise a standard operating procedure (SOP) to regulate how respective judges respond to the recommendations of the AI tool. For instance, judges are required to give their respective reasoning for why they decided to follow or depart from the AI tool's recommendation in their sentencing decisions.

Applying AI for sentencing also poses a high risk of affecting important elements of the rule of law and judicial systems. This is because the common law system practised by Malaysia depends on flexibility in the courts to dole out case-by-case reasoning to adapt to changing needs, and not be bound by precedent if there is good reason to depart. The EU Charter emphasizes that in common law systems, "legal rules, therefore, do not evolve linearly, distinguishing them from empirical laws…in legal theory, two contradictory decisions can prove to be valid if the legal reasoning is sound". The Sabah and Sarawak judiciary opines that the AI tool is compatible with the sentencing principles since it incorporates the thought process of sentencing within its parameters, for instance, accounting for previous criminal convictions. However, it is crucial to consider the extent to which AI sentencing recommendations may disregard individual mitigating or aggravating circumstances.

The application of AI in sentencing could also affect the parties' right to a fair trial. Hence, the technology which is being used should be programmed to consider the fundamental rights laid out in the Federal Constitution. When the AI tool was used in the first case, the accused's lawyer argued that it is unconstitutional and the sentencing recommendations could influence the court's decision despite being a

mere guideline. However, the judge continued to use the AI tool but passed a more severe sentence compared to the one suggested by the AI tool. The result of the challenge by the accused's lawyer is yet to be concluded.

To sum up, artificial intelligence may be applied for sentencing. However, since it has its pros and cons, the judiciary should be cautious in utilizing AI to prevent any form of injustice.

References

Journal Articles

"European Ethical Charter on the Use of Artificial Intelligence in Judicial Systems and Their Environment." 2018. Strasbourg: European Commission for the Efficiency of Justice. https://rm.coe.int/ethical-charter-en-for-publication-4-december-2018/16808f699c.

Lim, C., & Gong, R. (2020). Khazanah Research Institute. Artificial Intelligence in the Courts: AI Sentencing in Sabah and Sarawak, 1–8. http://krinstitute.org/assets/contentMS/img/template/editor/200821%20AI%20in%20the%20Courts%20v3_02092020.pdf

Stobbs, D. N., Hunter, D., & Bagaric, M. (2017). Swinburne Law School. Can Sentencing Be Enhanced by the Use of Artificial Intelligence?, 1–45. https://eprints.qut.edu.au/115410/10/CLJprooffinal25Nov2017.pdf

Walker, N. (1971). Conceptualizing the Principles of Sentencing in Criminal Offences in Malaysia: Bridging Theory and Reality. Sociology, 5(2), 287–289. https://doi.org/10.1177/003803857100500245

Newspaper articles

Khairah N. Karim. 2020. "Court of Appeal Goes Virtual for the First Time [NSTTV]." New Straits Times, April 23, 2020. https://www.nst.com.my/news/crime-courts/2020/04/586873/courtappeal-goes-virtual-first-time-nsttv.

Shenggao, Y. (2019, April 18). AI-assisted sentencing speeds up cases in judicial system. China Daily. http://www.chinadaily.com.cn/cndy/2019-04/18/content_37459601.htm

The Star. 2020. "Coded Justice: Courts Start Use of AI to Aid Sentencing, Lawyer Claims It Is Unconstitutional," February 19, 2020. https://www.thestar.com.my/news/nation/2020/02/19/coded-justice-courts-start-use-of-aito-aid-sentencing-lawyer-claims-it-is-unconstitutional.

Websites

"Speech By Justice David Wong Dak Wah Chief Judge Of Sabah And Sarawak On The Opening Of The Legal Year 2020 In Kuching." 2020. Kuching: The High Court in Sabah and Sarawak. https://judiciary.kehakiman.gov.my/portals/web/home/article_view/0/1705/1.

FRICTION IN TRANSMISSION

By: Roshunraj Rajendran

Certain offences under the Dangerous Drugs Act 1952 ("DDA 1952") are exclusively triable by the High Court, for instance, if the accused is charged for an offence of drug trafficking under section 39B DDA 1952[1] as it is punishable with death under section 39B(2) DDA 1952.

For such an offence, the special provision relating to transmission of a case to, and trial by, the High Court is under the purview of Section 41A DDA 1952 [2].

Section 41A(1) DDA 1952 states as follows:

> *Where any case in respect of an offence under this Act is triable exclusively by the High Court or is required by the Public Prosecutor to be tried by the High Court, the accused person shall be produced before the appropriate subordinate court which shall, after the charge has been explained to him, transmit the case to the High Court without holding a preliminary inquiry under Chapter XVII of the Criminal Procedure Code, and cause the accused person to appear or be brought before such Court as soon as may be practicable.*

Briefly, section 41A DDA 1952 provides that when an accused person is charged for an offence under section 39B(1) DDA 1952, the subordinate court is under an obligation to transmit the case to the High Court.

It would seem that this would entail a straightforward application of the law whereby the subordinate court merely needs to transmit the case to the High Court upon production of the accused before the said subordinate court.

However, issues arise in situations where the prosecuting officer has yet to obtain the consent of the Public Prosecutor to prosecute. This leads to instances where an accused person is detained until the said consent is obtained, the length of which may exceed any period of lawful detention authorized by the law.

It is a statutory requirement that the consent of the Public Prosecutor under section 39B(3) DDA 1952 is required before a prosecution under section 39B(1)(a) or (b) or (c) of the DDA is instituted. Consent is said to be "an act of reason, accompanied with deliberation, the mind weighing, as in a balance, the good and evil on each side" (**Abdul Hamid v. Public Prosecutor [1956] MLJ 231** [3]).

Section 39B(3) DDA 1952 states as follows:

> *A prosecution under this section shall not be instituted except by or with the consent of the Public Prosecutor:*
>
> *Provided that a person may be arrested, or a warrant for his arrest may be issued and executed, and any such person may be remanded in custody notwithstanding that the consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, but the case shall not be further prosecuted until the consent has been obtained.*

The natural question that follows from the above mentioned provision would be, at which point is a prosecution instituted? This was explained in paragraph 18 of the case of **Public Prosecutor v Toha bin M Yusuf & Ors [2006] 4 MLJ 63** [4]:

> *In view of the Federal Court decision in Perumal v Public Prosecutor, as to the meaning of the phrase 'institution of prosecution' vide sub-s (1) and the new sub-s (2) of s 26 of the Prevention of Corruption Act 1961, which is identical to subsection (3) and subsection (4) of section 39B of the DDA, a prosecution is instituted within the meaning of s 39B(3) DDA only when the accused is called upon to plead to the charge. However, there must be a consent of the Public Prosecutor when the accused is called up to plead, irrespective of what happened prior to that stage. Therefore, in respect of a charge under s 39B(1) DDA the question of obtaining the consent of the Public Prosecutor at the stage, immediately prior to the transmission, is a 'non-issue', as the accused cannot be called up to plead to the charge at that stage, a prosecution for an offence under s 39B(1) is instituted only when the accused is called to plead to the charge in the High Court. An accused person can only be called to plead to the charge when he appears at the High Court pursuant to the provisions of s 41A(1) DDA. When the accused is produced in the High Court, upon the case being transmitted pursuant to s 41A(1) DDA, the question of any consent (written or oral) of the Public Prosecutor to institute a prosecution under s 39B is academic, as his deputy always appear personally in the High Court, and thus, there is necessarily an implied consent to the prosecution (see Perumal v Public Prosecutor).*

An examination of the passage above would tell that an accused person can only be called to plead to the charge under section 39B(1) DDA 1952 in the High Court upon appearing at the High Court pursuant to a transmission from the lower court, as provided by section 41A(1) DDA 1952. Additionally, since the Deputy Public Prosecutor appears personally in the High Court, there exists an implied consent of the Public Prosecutor, which would ultimately render the question of consent to institute a prosecution under section 39B(1) DDA 1952 academic.

The case of Toha (supra) also considered the *proviso* to section 39B(3) DDA 1952 at paragraph 19 which states the following:

> *The provisions in the proviso to s 39B(3) DDA relating to the remand in custody of a person arrested, notwithstanding that a consent of the Public Prosecutor to the institution of a prosecution for the offence has not been obtained, and the last 11 words 'shall not be further prosecuted until the consent has been obtained', must be read in its proper context and in conjunction with s 31B DDA and s 117 Criminal Procedure Code, relating to the procedure where investigation cannot be completed within twenty-four hours by an officer of customs or a police officer. The said last 11 words cannot be interpreted to authorize customs officers and police officers, effecting arrest of any person for an alleged offence under s 39B(1) DDA, to remand in custody any person indefinitely, on the purported ground or pretext that the consent*

of the Public Prosecutor has not been obtained. Such detention would lead to abuse and mal-practices by customs and police officers effecting arrest of any person for an alleged offence under s 39B(1) DDA, and deny an accused person, arbitrarily, his fundamental right to a speedy and just trial in the court of competent jurisdiction. Section 3IB DDA and s 117 Criminal Procedure Code make it clear that the magistrate can only authorize detention in custody, from time to time, of any person arrested by the customs or police, for a term not exceeding 15 days in the whole, from the date of the arrest. It would be a complete abuse of the law if the last 11 words of the proviso to s 39B(3) DDA is read and interpreted to enable, to authorize, and legitimize detention in custody of any person by the customs or police until the consent of the Public Prosecutor is obtained, notwithstanding the expiration of any period of lawful detention authorized by a magistrate under s 31B DDA or s 117 Criminal Procedure Code.

Similarly in the case of **Public Prosecutor v Thayalan a/l Maniam [2007] 4 MLJ 239** [5] at paragraph 6, the following was propounded:

[6] There is no provision in the DDA that enables the magistrate to remand an accused, charged with an offence under s 39B(1)(a) DDA for two months, for the purpose of enabling the DPP to obtain a chemist report after the said charge has been framed, read and explained to the accused on his first appearance before the magistrate (after the expiry of his period in custody for investigations on the suspected trafficking charge for which he had been arrested and remanded, in the first instance). A magistrate can only remand an accused (for a maximum of 15 days and not two months) in proceedings under s 31B DDA or s 117 CPC on grounds investigations cannot be completed, pending a chemist report as to the nature of the substance in the alleged possession of the suspect.

[7] It is unlawful and unconscionable conduct for a DPP to frame a charge under s 39B(1)(a) DDA without first studying a chemist report to ascertain the nature of the substance in the possession of the accused. Prosecutors are to prosecute and not persecute!

[8] Section 41A(1) DDA does not mandate any consent of the Public Prosecutor to be produced before the magistrate as a condition precedent for the magistrate to transmit the case to the High Court. All that the magistrate has to do is satisfy himself that the Public Prosecutor has framed a charge against the accused for an offence under the DDA which is triable exclusively by the High Court and that the same has been read and explained to the accused without his plea taken. Thereafter, the magistrate must transmit the case to the High Court and cause the accused to appear before the High Court in order for the High Court to fix a date for his trial.

These cases, clearly, assert that the consent of the Public Prosecutor is not an essential pre requisite to effect a transmission by the subordinate court for a case triable exclusively by the High Court. It would be an affront to the basic tenets

of our legal system if the Public Prosecutor is allowed to usurp judicial powers by withholding the consent to prosecute. It would also lead to untold confusion and chaos within the legal system if a failure to comply with statutory provisions is allowed to go unchecked as elucidated in **Public Prosecutor v Krishnan A/L Letchumanan & Anor [1994] MLJU 514** [6]:

> *In my judgment, the maxim de minimis non curat lex (the law does not concern itself with trifles) can have no application in construing the mandatory requirements of section 41A(1) of the Act. I am reminded of what his Lordship Mohd. Eusoff Bin Chin SCJ, now the Chief Judge of the High Court of Malaya, said in the case of Syarikat Telekom Malaysia Bhd. v. Business Chinese Directory Sdn.Bhd. (Judgment Today No. 19/94) while construing the mandatory provision of Order 92, rule 1 of the Rules of the High Court, 1980 to the effect that: "Failure to comply with them will lead to chaos in the conduct of litigation." Likewise, applying the same principle, an utter state of confusion will result in not complying with the mandatory provision of section 41A(1) of the Act.*

The courts should, therefore, not disregard a lengthy pre trial detention of an accused person charged under section 39B DDA 1952 as it would lead to an erosion of fundamental rights enshrined under the Federal Constitution. To prevent such occurrences, the Court of Appeal in **Public Prosecutor v Marwan bin Ismail [2008] 3 MLJ 51** [7] at paragraph 13 enumerated the following guidelines with respect to transmission under section 41A(1) DDA 1952:

> *In our view therefore, this special provision governs the procedure to be followed in respect of a person charged under s 39B(1) of the DDA. The magistrate has no option but to strictly adhere to the steps to be undertaken thereunder. If an accused person charged for an offence under s 39B(1) of the DDA is produced before a magistrate, he must do the following:*

(i) have the charge read to him;
(ii) explain to him the charge;
(iii) not to record any plea by the accused, even if he chose to make one;
(iv) transmit the case to the High Court;
(v) cause the accused person to be brought before the High Court as soon as is practicable.

References

[1] Section 39B DDA 1952
[2] Section 41A DDA 1952
[3] Abdul Hamid v. Public Prosecutor [1956] MLJ 231
[4] Public Prosecutor v Toha bin M Yusuf & Ors [2006] 4 MLJ 63
[5] Public Prosecutor v Thayalan a/l Maniam [2007] 4 MLJ 239
[6] Public Prosecutor v Krishnan A/L Letchumanan & Anor [1994] MLJU 514
[7] Public Prosecutor v Marwan bin Ismail [2008] 3 MLJ 51

THE MURDER OF PREESHENA VARSHINY

By: Nurul Hidayah binti Tajuddin

Just as the media shone the spotlight on Nurin Jazlin's case and the people were waiting for the updates, the nation once again was shocked by the news of the brutal murder of an unfortunate child, Preeshena Varshiny. She was believed to have fallen from the balcony of her home in Casa Mila Tower Condominium in Selayang. Preeshena's body was found sprawled on the ground by a security guard, clad in a blue T-shirt and shorts, with the keys to her condominium found next to her body.

Who would have thought that being in a safe, gated, and well-guarded residence would not have ensured the safety of a child? The child's murder could have been potentially plotted by a sick sadist living nearby her residence. Preeshena was home alone the day the murder took place, unlike the norm when her mother was present all the time. Her mother had decided to obtain employment to increase the family's income. That was the beginning of a new routine where the mother left for work, the older brother was away at school and the younger sister was left with a babysitter. Preeshena was the only one left at home until her parents returned.

The forensic report had confirmed that there was an injury to the head and her right hand was broken. Preeshena's body was also covered in bruises from the impact of the fall. However, what was shocking to both her parents and the nation after the post-mortem report was obtained was the fact that the girl had been raped and sodomized before her body was thrown from her condominium. This quashed the earlier speculation that this case was an accident since there was no sign of forced entry to the residence. Preeshena was only 9 years old when her life was taken from her. She was an innocent child who crossed paths with a brutally sick person who sexually ravaged and murdered her. The case was reopened and the police confirmed that the girl had been abducted from her condominium before she was taken to a vacant unit where all of the heinous deeds took place.

There was no other clue to help the case, except for the fact that Preeshena did inform her father of an unknown person coming to their home and knocking loudly on the front door while Preeshena was alone at home. Her father had told the girl not to open the door and ignore the knocking but Preeshena might have finally opened it only for the assailant to rush in and take her away or Preeshena was possibly lured out of her own home. The latter theory was confirmed by her parents as they knew that Preeshena would not have left the house without her slippers. Yet, on the same day that her death took place, her slippers were still there at their unit.

Following the police's investigation, four suspects had been arrested and DNA samples were taken from them to test against the semen samples that were taken from Preeshena's private parts. All four suspects were the security guards and general workers at the condominium, and all were said to be foreigners. All of them were in their twenties when they were remanded to assist in the investigation. Nevertheless, they were released once the DNA results did not show any match to the ones taken from the girl's body.

A possibility arose that Preeshena knew the person who violated her and that she could have allowed the perpetrator to enter the house and kidnap her. She allowed entrance although the little girl was more than aware of the need to call her father when the door was banged loudly before this incident took place. There was also a question raised on whether Preeshena had put up a fight when she was taken away from her condominium unit. Did she scream for anyone to respond to her or was she knocked unconscious first before the assailant took her away in the first place?

If the above speculation was believed to be true, it would be impossible for anyone not to notice a man carrying a girl into a vacant unit, especially an unconscious one. For a secured residence that can only be accessed by a special key, there was also a possibility that this was a job of an insider since the police did confirm that there was no forced entry. All these questions remained unanswered and one thing that we can confirm is that Preeshena's murderer is still at large, possibly lurking on a new victim.

Sources

Pembunuhan Preeshena Varshiny (blog.azhad.com, 2007/11)
Tragic News for Housewife Who Went To Work, The Star (Monday, 05 Nov 2007)

Preeshena Varshiny

THE NEW SECTION 17A OF THE MACCA 2009

By: Tan Jing Xuan, Carina

With reference to the ISO 37001 International Standard for Anti-Bribery Management Systems – Requirements with Guidance for Use (hereinafter referred to as 'ISO 37001'), bribery is a widespread phenomenon. It raises serious social, moral, economic, and political concerns while it undermines good governance, hinders development, and distorts competition. It also erodes justice, undermines human rights, and is an obstacle to the relief of poverty at the same time. Throughout the years, governments have made progress in addressing bribery and corruption through several international agreements, for example, the United Nations Conventions and their national laws. In most jurisdictions, it is an offence for an individual and/or an organisation to engage in bribery.

The key anti-corruption legislation in Malaysia is the Malaysian Anti-Corruption Commission Act 2009 (hereinafter referred to as 'MACCA'), which came into force on 1st of January 2009. The relevant authority in charge of the MACCA is the Malaysian Anti-Corruption Commission (hereinafter referred to as 'MACC').

Definition of Bribery and Corruption

Bribery can be defined as 'the offering, promising, giving, accepting or soliciting of an undue advantage of any value (which could be financial or non-financial), directly or indirectly, and irrespective of location(s), in violation of applicable law, as an inducement or reward for a person acting or refraining from acting in relation to the performance of that person's duties.

In practice, this means offering, giving, receiving or soliciting something of value in an attempt to illicitly influence the decisions or actions of a person in a position of trust within an organization. Bribery may be 'outbound' where someone acting on behalf of a company attempts to influence the actions of someone external, such as a Government Officer, etc. On the other hand, it may also be 'inbound', where an external party is attempting to influence someone within the company such as a decision maker or someone with access to confidential information.

On the other hand, though the MACCA does not define 'corruption', it was referred to in Section 16 of the MACCA which allows for the recognition of gratification as an offence. In summary, corruption can be regarded as an act of giving or receiving of any gratification or reward in the form of cash or in-kind of high value for performing a task within a person's job description.

While the definition of 'bribery' and 'corruption varies in their uses and contexts, they all have a negative connotation.

Section 17A

The law alone is not sufficient to solve this problem. Not only the government, but organisations also have a responsibility to proactively contribute to combating bribery. Prior to Section 17A of the MACCA coming into force, the MACCA only focused on the prosecution of individuals engaged in bribery and corruption. Due to the doctrine of separate legal entity, the company will not be liable for crimes committed by its members and vice versa. As such, the company and its senior management were previously exempted from such liability.

For one period, the law sought a way around this through the recognition of the doctrine of attribution, but soon the judges found that the doctrine of attribution posed a limitation. The doctrine of attribution focused on the identification of the key personnel who had been the main controller of the company, but this was very difficult for the prosecution to prove.

Sometime in 2007, the UK legislators decided to disregard the doctrine of attribution and did not include this doctrine when they drafted the Bribery Act 2010. They went far beyond the doctrine of attribution to avoid the limitation of identifying the key personnel of the company. Section 7 of the Bribery Act 2010 imposed strict criminal liability on a company that failed to adhere to this section, i.e. imposed and communicated adequate procedures to prevent bribery and corruption.

Similar to the Bribery Act 2010, the Malaysian Government has been trying to further reduce the corruption in Malaysia by inserting Section 17A into the MACCA. Section 17A was implemented to 'enable commercial organizations involved in corruption activities to be subjected to legal action and also persons associated with the commercial organization will be deemed to commit a corrupt act in order to obtain or retain business or an advantage in the conduct of business for the commercial organization unless the commercial organization can prove that it had adequate policies and procedures in place and had effectively implemented the same to prevent such happenings'.

Section 17A of the MACCA is applicable to not only all companies (including foreign firms and/or companies) operating in Malaysia, but also all Malaysian companies/partnership firms operating businesses outside Malaysia.

To constitute an offence under Section 17A of the MACCA, the gratification must be given/carried out by a 'person associated' with the commercial organisation. The term 'person associated' was defined very widely in the MACCA. This means one commercial organisation would not only be responsible for its management teams

but also its employees who are engaged in bribery and/or corruption, regardless of his/her status, functions, or positions within the commercial organisation; unless it can be proven that the offence was committed without consent and that due diligence to prevent the commission of the offence was exercised (Section 17A(3)).

The burden of proof then lies on the commercial organization to prove that the commercial organisation had in place adequate procedures to prevent persons associated with the commercial organization from committing an act of corruption.

Adequate Procedures

The term 'adequate procedures' was not defined in the MACC Act 2009 (Amendment 2018), but the National Centre for Governance, Integrity and Anti-Corruption of Prime Minister's Department had issued the Guidelines on Adequate Procedures (hereinafter referred to as '**GAP**') pursuant to Section 17A(5) of the MACC Act 2009 (Amendment 2018) to assist commercial organizations in understanding what adequate procedures should be implemented to prevent the occurrence of corrupt practices in relation to their business activities. GAP took a similar approach to the guidance issued by the UK Ministry of Justice pursuant to the Bribery Act 2010.

With reference to the GAP, a commercial organisation's adequate procedures shall be formed based on five (5) key principles i.e. Principle of TRUST, which consists of: -

T	Top-Level Commitment
R	Risk Assessment
U	Undertake Control Measure
S	Systematic Review, Monitoring and Enforcement
T	Training and Communication

Top management shall have overall responsibility for the implementation of, and compliance with, the anti-bribery management system in the commercial organisation. They shall demonstrate leadership and commitment with respect to the anti-bribery management system not only by deploying adequate and appropriate resources for the effective operation of the anti-bribery management system and also to encourage the use of reporting procedures for suspected and actual bribery.

The intention of risk assessment is to enable the commercial organisation to form a solid foundation for its anti-bribery management system. The assessment will identify the bribery risks that the management system will focus on, i.e. bribery risks which the commercial organisation should prioritise for risk mitigation, control implementation, and allocation of resources. Having assessed the risks, the commercial organisations can then determine the type and level of anti-bribery controls being applied to each risk category and can assess whether existing controls are adequate.

Further, the purpose of training and communication is to help in ensuring that relevant personnel understands, as appropriate to their role in or within the commercial organisation the bribery risks they and their department are facing, the internal anti-bribery and anti-corruption policy, the aspects of the anti-bribery management system relevant to their role and functions, and any necessary preventive and reporting actions they need to take in relation to any bribery risk or suspected bribery.

Conclusion

One of the significant consequences of bribery and corruption is that it adds to the cost of doing business, but without adding any corresponding value. Only a portion is productively employed instead of the full contract amount going towards the delivery of the product or service. As such, this can in turn has many consequences such as compromising quality. Moving forward, looking at the consequences of bribery and corruption at a national level, this risks tainting the country's reputation. A poor ethical reputation may cause a reduction in foreign investment, decreased tourism, and the loss of our top talent to other countries. The consequences above reflect that the costs and consequences of bribery are high, far higher than a country or any organisation can even afford.

Anyway, the efforts and initiatives of the Malaysian Government to tackle bribery and corruption are commendable, and their commitment to combat bribery and corruption can also be seen via the new insertion of Section 17A into the MACCA. It is always important to bear in mind that providing a good piece of law alone is not sufficient and adequate, it must also come with strong and rigorous enforcement. Though it is still quite a long way to go, the Malaysian Government has shown its effort to achieve the aim to be one of the world's top 10 'cleanest' nations by 2030.

References

1. *Malaysian Anti-Corruption Commission Act 2009*
2. *Bribery Act 2010 (UK Legislation)*
3. *ISO 37001 International Standard for Anti-Bribery Management Systems – Requirements with Guidance for Use*
4. *ISO 19011 International Standard – Guidelines for auditing management systems*
5. *Sharijia Che Shaari, Unboxing Corporate Liability: Section 17A MACC Act 2009*
6. *Armando Castro, Nelson Phillips and Shaz Ansari, Corporate Corruption: A Review and Research Agenda Journal: Academy of Management Annals Academy of Management Annals*
7. *Lennard's Carrying Co Ltd v. Asiatic Petroleum Co Ltd [1915] AC 705 at 713*
8. *R v. P & O European Ferries (Dover) Ltd [1990] 93 CR App R 72*
9. *SFO v Sweett Group PLC (2016)(unreported)*

Medley of Moments

Team Build 1 (Raya Dinner 22)
(8 Apr 2022)

Iftar Ukhuwwah 6
(22 Apr 2022)

Team Build 2 (Ipoh Trip) & Tripartite (KL-Perak-Penang) (YLPC Networking) (14 & 15 May 2022)




Jamuan Hari Raya Kali ke-21:Gurindam Syawal (28 May 2022)









Back to Basics: A Practical Conveyancing Guideline and Understanding Your Land Title and Land Dealings (31 May 2022)
















Penang Bar Sports & Games Fiesta 2022
Badminton (11 Jun 2022)
Darts (11 Jun 2022) Pool (25 Jun 2022)
Basketball (25 Jun 2022)
Chess & Board Games (25 Jun 2022)
Fun Run (2 Jul 2022)









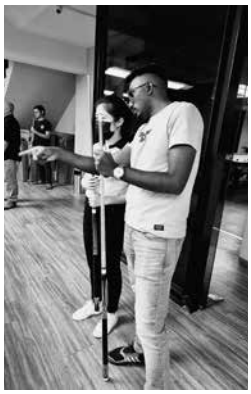






Team Build 3 (Macallum Cafe)
(25 Jun 2022)

Interstate Bar Games 2022 (29 & 30 Jul 2022)



Penang-Perak Bar Games 2022
(9 & 10 Sep 2022)










Penang Inaugural Conveyancing Conference 2022 (29 Sep 2022)










Courtesy Call with Newly-Appointed Judicial Commissioners (20 Oct 2022)

Team Build 4 (Hin Bus Depot) (29 Oct 2022)

Penang Bar Annual Dinner
(12 Nov 2022)














THE SPIRIT AND OBJECTIVES OF THE ROAD TRAFFIC ACT 1987, VIS-À-VIS THIRD PARTY CLAIMS WERE SUPERBLY EXEMPLIFIED BY THE FEDERAL COURT ON 5 AUG 2022 IN EIGHT (8) APPEALS

By: Kandiah Chelliah (Selangor Bar)

1. The apex Court heard jointly the Questions of Law in eight (8) appeals, all involving road traffic accident claims on 11 and 13 Jan 2022, and handed its decisions on 5 Aug 2022.

   It is reported as **AmGeneral Insurance Bhd v Sa'Amran Atan and other Appeals (2022) 8 CLJ 175.**

2. In the landmark and unprecedented decisions, all eight (8) third-party claimants succeeded in their claims for loss and damages with an extraordinary award of costs in the sum of RM150,000-00 to each claimant. The panel of three Federal Court Judges took around six (6) months for their deliberations, and in-depth analysis of numerous earlier High Court and Court of Appeal decisions, and as a result, several significant and exceptional issues troubling the High Courts, Court of Appeal and legal practitioners were laid to rest impeccably, the relevant laws well-elucidated, and the statutory provisions of the Road Traffic Act 1987 (**"RTA 1987"**) were methodically examined.

   Added to this, the relevant decisions of other Commonwealth jurisdictions especially the U.K., India, Australia, and Canada, too, were exhaustively referred to.

3. **Negligence Liability**

   "The primary importance of carelessness as the relevant fault engaging liability in tort naturally lies in the tort of negligence itself. The defendant will be liable for negligence if he falls below the standard of care demanded by the duty of care that he owes the claimant. What constitutes that standard of care can be said to be the degree of care, competence, and skill to be expected from a person engaging in the activity or function undertaken by the defendant."

   "The standard of care applied to the tort of negligence is objective since it does not depend on the defendant's subjective state of mind"

   (per para 1-66: Clerk & Lindsell on Torts – 23ed - 2020).

4. Now, let us superimpose on the above definition of 'negligence liability', the thoughts of the Federal Court Panel in its findings headed **"Abstract"**

   "The Road Transport Act 1987 must be construed to protect innocent third party road users against risks caused by motor vehicles. In a claim involving motorists and insurance companies, the Court is bound to weigh the competing interests of both parties to ensure that neither party is victimized

by the other. In the event that the loss has to be borne by a party, that party has to be the insurance company, as it is compulsory for all vehicle owners to obtain insurance coverage … In order for the Road Transport Department to issue road taxes for the motorists; the insurer should automatically step in and indemnify the victim without the victim having to sue the insurer."

In these vital and significant words, the Court is attempting to examine and explain the spirit and purpose underlying the RTA 1987 and the factors and reasoning behind Parliament enacting this Act of 1987 (and amending the earlier Road Traffic Ordinance 1958) that attempts to lay the groundwork and cover all aspects concerning road traffic, i.e., the roads, the vehicles and member of the public using roads, lanes etc., as drivers, passengers, etc.

The crucial, decisive words contained in the "Abstract" are as follows:-

(a) **"… must be construed to protect innocent third party road users… ."**

(b) "… the Court is bound to weigh the competing interests of both parties to ensure neither party is victimised… ."

(c) "In the event, the loss has to be borne by a party, that party has to be the insurance company, as it is compulsory for all vehicle owners to obtain insurance coverage… ."

(d) '… the insurer should automatically step in and indemnify the victim without the victim having to sue the insurer".

5. Obviously, it ought to be understood that the "Abstract", is merely an Obiter or that which exists in thought only.

Nonetheless, it is an idea/concept being floated or thrown about by the apex Court, with a modicum of rational basis in law. Some legal practitioners would gladly raise that this 'Abstract' contains elements of the system of 'No Fault liability', but arguably it's not the issue here.

6. **Next, let us examine the thrust or the crucial issue being given its decisive force in these '5 Aug 2022 Decisions" of the Federal Court.**

The apex Court is conspicuously, and in all abundance of seriousness, conveying the message to all insurers of motor vehicles (and probably to other general insurers) that the contractual and other issues/problems between the Insurer and their Insured (i.e.: the purchasers of their policies), ought not to be tossed or hurled at the innocent third party victims of road traffic accidents who have suffered injuries, death and are seeking compensation for negligence liability from their insured, i.e.: the negligent party.

Common examples are:

a) Transfer of interest, i.e.: vehicle sold, without complying with legal requirements as per the RTA 1987 and the Hire Purchase Act 1967. Thus, Insurers in this instance would claim the new owner/buyer is

continuing to use the existing insurance policy, and settling the monthly instalment to the Finance Company or Bank under the name of the previous owner, and/or continuing to obtain further yearly policies in previous owner's name.

b) Third party claim is doubtful or elements of fraud exist.

c) Judgment or default judgment obtained: Is there a necessity for a "Recovery Action"?

d) Insurable interest has ceased to exist.

Misrepresentation

(Note: The following issues/cases were not dealt with in the eight appeals)

e) Obtaining insurance policy for a motorcycle but using it on a motorcar/ motorbus or other vehicles or vice-versa (See **Berjaya Sompo Insurans Bhd v Shamisa Holiday & Travel Sdn Bhd and 2 ors. (2022) 1 LNS 1946 Hg. Ct**) or obtained subsequent to an accident giving rise to the claim (See **Pacific & Orient Insurance v Hameed Jagubar (2018) 9 CLJ 691 FC)**.

f) Continuing to obtain policies on a deceased person. (A common occurrence by family members of a deceased) See **Balamoney Asoriah v MMIP Services Sdn Bhd (2020) 1 CLJ 476**.

7. In the above instances, the Motor Insurance companies concerned, on being notified by its Adjusters would at speed instruct their Solicitors to secure a declaration pursuant to Section 96(3) of the RTA 1987, declaring their policy as null & void and unenforceable. Thus the injured third party claimant's claim in the trial Court is thrown in jeopardy.

8. Addressing issue (a) as above, the Federal Court in **Appeal No. 1: Amgeneral Insurance Bhd v Sa'Amran & Ors (2022) 8 CLJ 179** (at para 1) ruled as follows:-

a. The Court had not been shown which clause of the Third party risks insurance policy, was the insured in breach of, that rendered the policy null & void.

b. The policy did not even contain a clause that required the insured to notify the insurer of the sale of the car, not that the existence of such clause would absolve, the insurer of liability.

c. The insurer failed to prove the transfer of ownership of the car.

d. Transfer of interest is not Transfer of ownership.

e. A valid Transfer must comply with the mandatory procedure laid down by Section 13(1) of the RTA 1987.

f. The Court under Headnote 2 clearly emphasized that Section 109 RTA 1987, applies clearly to Civil and criminal proceedings.

g. Being the registered owner at the material time, the insured was deemed by Section 109(2) of the RTA 1987, to be liable for the act or omission of the third respondent (driver) in causing the accident.

h. The proviso to Section 109(2) is intended to shield the registered owner from prosecution for the driver's contravention of Sections 41 to 49, and not the driver's tortious acts such as negligent driving.

i. In Headnote 3, the Panel members distinctly ruled that Section 109 (1) (2) and (3) leaves no room for doubt that it applies to civil and criminal proceedings alike…"

j. In para 4, the apex Court ruled that by accepting premiums from their insured for issuing third party risks insurance policy, the Insurers could not resile from their promise to indemnify the insured when the indemnity become due by raising the technical ground that the insured had **no insurable interest, in the motor vehicle at the time of the accident, unless the insurance policy had expired or had been lawfully terminated**.

Section 96(3) RTA 1987 and mandatory requirements for a Declaration.

9. On the common practice of Insurers, resorting to obtaining a Declaration unilaterally pursuant to Section 96 (3) RTA 1987, to declare their insurance policy as null & void, and unenforceable, the Court ruled (at headnote 5):

"5. In Appeal No.2, the insurer despite knowing about the pending Magistrate's Court proceedings, chose not to comply with the statutory requirements laid down by the proviso to Section 96(3). Neither the notice nor the cause papers for the Section 96(3) applications were served on the respondents in breach of the proviso… Thus the declaration order for the High Court is unsustainable in law…"

The Court of Appeal decisions in Rasip Hamsudi (2016) and Letchumanan Gopal in 2011: Is there a contradiction?

10. The salient facts in **Letchumanan Gopal v Pacific & Orient Insurance Co (2011) 5 CLJ 806** are:-

a) The issue before the Court of Appeal was a Recovery Action. The claimants, i.e.: the family/dependents of one Kanisan (deceased) succeeded in the Sessions Court in securing damages against the defendant lorry owner and driver, subsequent to full trial.

b) The Insurers refused payment of the judgment sum on the grounds that they are not liable as per the policy terms/clauses since the deceased is not an employee of the Insured.

c) Thus the Recovery Action was filed.

d) The Sessions Court allowed the Recovery Action but the High Court and COA held in favour of the Insurers.

11. The main facts in **Pacific & Orient Insurance Co v Rasip Hamsudi & Ors (2017) 4 CLJ 572,** are:

    a) While the Sessions Court's proceeding was still pending, the appellant, i.e., the Insurer applied to the High Court successfully vide an originating summons and secured a declaration pursuant to Section 96 (3) RTA 1987, that the Insurer is not liable to pay any judgment sum under the policy issued to the owner of motorcycle WFE 1937 which was involved in an accident with another motorcycle No. WET 275.

    b) Judgment in the sum of RM6,453,550-00 with costs was entered in the Sessions Court.

    c) The injured Plaintiffs in the Sessions Court and Respondents here, then filed an Originating Summons, and sought for a **declaration to quash the declaratory order obtained by the Appellant insurer** under Section 96(3) RTA 1987.

    d) The High Court held, that the appellant insurers were not entitled to the benefit of the declaratory order, against the judgment obtained in the Sessions Court.

12. **Issues before the Court of Appeal**

    a) Whether the Respondents (i.e.: Plaintiffs in the Sessions Court) had sufficient interest to commence their Originating Summons (referred to as 0S-2) to negate the effect of the declaratory order obtained by the appellant insurers, in their Originating Summons (referred to as OS 1).

    b) Whether on a proper interpretation of Section 96(3) of RTA, in particular, the proviso thereto, it was incumbent upon the appellant insurer to give notice to the Respondents before or within seven (7) days after the commencement of OS. 1, and if so whether this had been complied with.

13. **The COA held as follows:-**

    a) The appellant had not served the requisite notice to the respondents, therefore the declaratory order was clearly a violation of the provisions in Section 96(3).

    b) Once **judgment had been entered** in the Sessions Court's proceedings (**unless stayed or overturned**) the respondents (i.e.: Plaintiffs were entitled to enforce the judgment obtained against the insured motorcycle owner.

    (Note: This enforcement of a judgment of any Court, which had not been stayed or appealed, is clearly laid out in Section 96(1) RTA 1987)

14. On considering the above factual matrix, the provisions in the RTA 1987, and the Court's decisions / judgments therein in these two (2) cases, the Federal Court, (in Appeal No. 2) ruled as follows: (See para 87-96)

"(87). There was nothing wrong for the Court of Appeal in **Rasip Hamsudi** refusing to follow or to omit to refer to the decision of another Court of Appeal in **Letchumanan Gopal v Pacific & Orient Insurance** although referred to it by learned counsel in his submissions.

"(88). In any event, we are inclined to agree with the reasoning in **Rasip Hamsudi** rather than the reasoning in **Letchumanan Gopal**. In the first place, the issue in Letchumanan is markedly different from the issue in Rasip Hamsudi. In Letchumanan the focus of the Court of Appeal's attention was on the issue of whether the victim of the road accident was in the employment of the company which owned the lorry involved in the accident. Since he was not, it was held that the insurance company was not liable for the negligent act of the lorry driver."

(Note: But in **Malaysian Motor Insurance Pool v Tirumeniyar (2019) 10 CLJ**, the Federal Court ruled that in all motor Insurance Policies there is a "two-contract" principle i.e.: one that covers the lorry owner (the insured) and the other the lorry driver.

See the Article: "Two Contract Approach: Tirumeniyar", in Vol. 1 - 2020 Ad Rem, page 29) by this writer.

15. One significant issue posed in Section 96(3) are the words **"before the date the liability was incurred".**

At first glance it means before the judgment in the tortious claim by the Third Party claimant is obtained against the insured as the tortfeasor.

Thus, it is not surprising that the Insurers, even though the proceedings are continuing at the trial Court, could proceed with the application for a declaration without serving or giving notice to the claimant and on securing one, instruct their Solicitors in the trial Court to discharge themselves.

But the Federal Court's findings on 5 Aug 2022 in Appeal No. 2 were as follows:- (as per paragraphs in its judgment).

"(95). The point to note is that while Section 96(3) gives the insurer the right to obtain a declaration that the insurance policy is void and unenforceable, Section 96(1) makes it mandatory for the insurer to make payment after judgment has been obtained against the insured by the Third party claimant…

"(96). What Section 96(3) mandates is that where the insurer intends to repudiate liability under the policy, it must comply with the following procedural requirements:

i) Notice must be given to the plaintiff in the tortious claim action before liability is incurred.

ii) The notice must state the grounds relied on by the Insurer to obtain a declaration.

iii) The notice must be served on the Plaintiff in the tortious claim within seven days after the commencement of the claim.

iv) The notice must be served on the parties who have interest in the proceedings."

16. **Is Pacific & Orient Insurance Co v Azhar Azizan 1 LNS 1097, a High Court decision, relevant & binding?**

The High Court Judge interpreted "liability" in Section 96(3) RTA 1987, to mean judgment, thus a declaration could be granted since there is no judgment obtained as yet, against the Insured negligent party.

"Section 96(3). No sum shall be payable by an insurer under subsection (1) (i.e.: 96(1) if before the **date of liability** was incurred, the insurer had obtained a declaration…"

The learned HCJ's interpretation may be correct but he failed to examine the applicable proviso. Unfortunately the same can be said of numerous other High Court Judges who failed to grasp this significant issue prior to granting the declarations.

The apex Court referred to this High Court decision and cast it aside by saying:

"(99). Thus the 1st Appellant's failure to comply with the proviso to Section 96(3) disentitled it to the benefit of the provision. It was however urged upon us, that the High Court case of **Azhar Azizan** should be accepted as good law…

"(100). With due respect we do not see how **Azhar Azizan** is relevant to the issue before us as the facts are poles apart from the facts of the present case… (i.e.: Appeal No. 1: AmGeneral Insurance v Sa'Amran)

"(101). **Of more significance to note is that the learned Judge, in that case, failed to direct his mind to the mandatory requirements laid down by the proviso to Section 96(3). The Judgment was therefore made per incuriam…**

17. **As a consequence, it shall be concluded, that at the end of the day, the insurer was concerned with and relied on the contractual provisions as per the insurance policy between them and their insured but failed to sufficiently appreciate the intent and impact of the statutory provision, i.e.: Section 96(3) especially its proviso which clearly states that such Applications must be served on a then third-party claimant who is an interested party.**

18. **Is there a necessity for a Recovery Action against Insurers**

The heading to Section 96(1) RTA 1987 states:

"96. Duty of Insurers to satisfy judgments against person insured in respect of third party risks."

It must be conceded that the Insurer may have legitimate grounds for refusing to pay the judgment sum and they are:

i) The Claimant/Plaintiff failed to give **Notice of proceedings** pursuant to Section 96(2)(a) of the RTA 1987.

ii) The Judgment has been **stayed or pending appeal** or has been **set aside**.

iii) The Policy issued by the insurer has been **cancelled or revoked** prior to the road accident that gave rise to the claim/action.

iv) The Policy was issued subsequent to the road accident that gave rise to the claim i.e.: **backdated by a few hours or a few days**. See **P & O Insurance Co v Hameed Jagubar,** decided by the Federal Court on 24-09-2018 (2018) 9 CLJ 69-FC.

v) The Judgment Sum is **not a "disputed"** debt.

19. In **Pacific & Orient Insurance Co v Muniammah Muniandy (2011) 1 CLJ 947** the Court of Appeal ruled as follows:- (headnote 3)

"(3). Nowhere does Section 96(1) say that the respondent must first obtain another judgment against the appellant before she could proceed to enforce the said judgment against the insured. Therefore the question of the respondent having to file recovery proceedings under Section 96(1) against the appellant did not arise at all…

20. In **Pacific & Orient Insurance v Rasip Hamsudi (2017) 4 CLJ 572** the COA ruled as follows: (headnote 3)

"(3). Once a judgment has been entered in the Sessions Court's proceedings (unless stayed or overturned) the … respondents (i.e.: Plaintiffs) were entitled to immediately enforce the judgment obtained against the insured by any appropriate execution mode levied on the Insurer".

(See Article by this writer in AD Rem"- Selangor Bar Committee publication titled: "Section 96(1) RTA 1987: Is there a necessity for a Recovery Action gainst Insurers", at page 56 – Vol.1-2019)

21. The Federal Court's (05-08-2022 decisions) dealt with 'Recovery Action' in Appeal No. 1 (**Amgeneral Insurance Bhd v Sa'Amran Atan & Ors** and other Appeals) and ruled as follows:- (as per paragraphs numbered therein)

"(102). The first appellant had another argument, it was contended that the respondent as the Third party claimant could not apply to set aside the order (declaration) pursuant to O35r1(2) Rules of Court 2012 because he had a specific remedy provided by Section 96(1) RTA, to file for **'recovery action'** against the Insurer. The argument must fail. **There is nothing in Section 96(1) to say that the third-party claimant must first obtain another judgment against the insurer before**

he could proceed to enforce the judgment that he had earlier obtained against the Insurer. After all, the judgment debt of the insured becomes the judgment debt of the Insurer. See Pacific & Orient Insurance v Kamacheh Karuppan (2015) 4 CLJ 54."

As a consequence, the insurer is bound to settle the judgment sum without the need for another action by the third party claimant i.e.: 'recovery action' against the Insurer once the conditions on Section 96(2) and (3) are fulfilled."

(Note: Section 96(2)(a) requires the third party claimant to give notice of proceedings to Insurers and 96(3) contains the provision for declaration)

22. With this one stroke, the **Federal Court has demolished the concept or action i.e.: the so-called "Recovery Action"** that has been the practice for all these decades among road accident claims practitioners.

This writer criticised and raised the issue of:

"Where is the basis for "Recovery" proceedings against Insurers?"

In, the earlier referred Article in 'Ad Rem' it was commented "it is not provided by any statute since Section 96(1) RTA 1987 circumvents the privity concerns as per our Contract Act 1950, as exemplified in **P & O Insurance v Kamacheh** Case. Further, it must be acknowledged that it is the Insurer who is appointing Solicitors and defending the third party's claim in the trial Court.

To agitate and seek another action against the Insurers concerned can be surmised as a duplicitous effort.

Or is it due to the long-held practice of legal practitioners who saw the need for another action against the unnamed Insurance Company in the judgment obtained. This writer fails to see any substantive supporting evidence for such a second adventure in the Common Law System. If so, this is a classic example of the proverbial 'second bite at the Cherry' syndrome.

23. **The case for 'Recovery Action'**

As seen earlier (in paragraphs 12-14), the Federal Court over-ruled to a large extent **Letchumanan Gopal v Pacific & Orient Insurance, vis-à-vis Rasip Hamsudi.**

Letchumanan Gopal decided by the COA panel of Abdul Hamid Embong JCA; Abdul Malik Ishak JCA and Kong Hwee Gee- JCA on 14-04-2011 ruled as follows in headnotes (3) and (4).

"(3). The **liability** and **recovery action** were distinct from each other. The former was a claim in tort whereas the latter was based on a **statutory right provided under the provisions of the RTA.** For these reasons alone it would be unjust to bar the insurers from raising afresh the issue of liability … "

"(4) Pacific & Orient Insurance was not a party in the liability action … "

24. Most senior practitioners acting for road accident claimants, fail to understand to this day what the COA panel in headnote (3), meant by these words.

"(3). The liability and recovery actions …… Whereas the latter was based on a **statutory right provided under the provisions of the RTA.**

The big question to be posed is, which Section in RTA contains this "statutory right"

The COA Panel failed to point out which Section contains this right. Thus, it is, obviously, decided 'per incuriam".

It is submitted that **Letchumanan** on this specific issue was wrongly decided, and is absolutely devoid of any legal basis.

25. **The thrust of the Federal Court's eight appeal decisions on 05-8-2022 (AmGeneral Insurance Bhd v Sa'Amran (2022) 8 CLJ 175 and seven (7) other appeals) is to convey to the motor Insurance Industry, the spirit and purpose of the provisions in the Road Transport Act 1987, and their proper interpretation vis-à-vis the various issues that arise in third party claims.**

They are:

26. **Statutory or Contractual provisions**

i) All matters between the Insurer and their Insured (i.e.: those buying an insurance policy) the terms, conditions, and clauses in the policy, its coverage, the payment of premium thereof, etc. are matters of contract between these two (2) parties;

ii) Statutory provisions are those contained in the Road Transport Act 1987, the Financial Services Act 2013, and the Civil Law Act 1956;

iii) The apex Court's findings in the eight (8) appeals are quite extraordinary and the Panel of FCJs concluded that issues between the insured and the insurer, should not be thrown or cast against the innocent third party claimants as a bulwark to resist the claims. The Court will only strictly examine and deliberate the provisions applicable in the statutes when a third party's claim comes before it.

iv) Insurers ought to strictly comply with the RTA 1987 provisions especially from Sections 91 to 97, since by virtue of Section 90, they are collecting vast sums for premiums for issuing compulsory motor insurance policies for all vehicles using roads in the Country. It has been stated, some Motor Insurers' premium collections run into billions of ringgit. And the sums paid out as compensation to third party victims is only about 50 to 60% of the premiums collected from motorists.

Available data indicates that the number of registered vehicles with the Malaysian Road Transport Department is 17,728,482 as of December 2021, whereas in Australia it was 19,229,139 in 2020, and 22,587,923

in Indonesia in 2021, according to CEIC data (Census and Economic Information Centre)

27. **Aims and Objectives of Compulsory Motor Insurance System.**

The 'Abstract' as formulated by the apex Court was referred to earlier in para 4 hereinabove:-

The Court at para 263, stated:

"(263)…… There are two competing interests (i.e.: victims to be compensated and insurers challenging liability). Having regard to the object and purpose of the RTA, which a to protect innocent third parties …… we are inclined to the view that the conflicting interests must be resolved in favour of innocent third party accident victim."

28. In these stinging words, deliberately and carefully chosen, the apex Court is attempting to send a message to all Motor Insurance Companies that the innocent third party or dependents of the deceased ought not to be further victimized or burdened subsequent to suffering injuries or death.

Enormous sums are collected as premiums for such insurance policies, but the insurers too have a mandatory obligation to settle the requisite compensation to these victims.

The FC panel went on to quote the following observations by **Justice Sarkar of the Supreme Court of India in British India General Insurance v Capt. Itbar Singh (1960)(1) SLR 168 on 15-5-1959:**

"…… the loss has to fall on someone and the statute has thought fit that it shall be borne by the insurer. That also seems as to be equitable for the loss falls on the insurer in the course of carrying on his business, a business out of which he makes a profit…… "

29. **Issue of insured to act with utmost good faith – the principle of '*uberrimae fidei*", when applying for a motor Insurance policy.**

(i) The insurer referred to Section 96(5) of the RTA 1987, which is a codification of the requirement to make full and frank disclosure on the part of the insured.

The Court in para 12, found as follows:

"(12). In any case, the doctrine of *ubberrimae fidei* is a common law doctrine that is only applicable between the insured and the insurer and does not affect the rights of third parties under the provisions of Sections 94 and 95 of the RTA, which protects third parties against risks arising out of the use of motor vehicles".

Section 129 and Schedule 9 of the Financial Services Act 2013

This Section and schedule deal with Pre-Contractual disclosure and representations and remedies for misrepresentation.

(i) Schedule 9 sets out the pre-contractual duty of disclosure & representations for contracts of insurance…… ”

(ii) Rule 1 Sub-rule 3 in **Schedule 9 of the Financial Services Act 2013**, states as follows:

“(1)(3). For the purposes of obtaining a declaration under Section 96(3) of the Road Transport Act 1987, this schedule shall apply to determine if a consumer insurance Contract which provides cover for third party risks, may be avoided by a licensed insurer for **misrepresentation.**

Rule 5: Pre-Contractual duty of disclosure for consumer insurance Contracts.

This rule provides for both the insurer to request all pertinent facts and the consumer to provide all or answer all in the Proposal Form.

And Rule 5 (9) states:

Nothing in this Schedule shall affect the duty of utmost good faith to be exercised by a consumer and licensed insurer in their dealings with other…… ”

Rule 5(5):

“If a licensed insurer does not make a request in accordance with sub paras (1) and (3) as the Case maybe, compliance with the consumer’s duty of disclosure in respect of those sub paras, shall be deemed to have been waived by the insurer”.

30. This pre-contractual duty to disclose by both the Insured and Insurer was deliberated extensively in **Balamoney Asoriah v MMIP Services S/B (2020) 1 CLJ 476** by the Court of Appeal on 14-10-2019 and further appeal to the Federal Court was dismissed on 03-09-2020.

The main issues were:-

a) Failure of disclosure

b) Policy renewed in the deceased’s name after the death of deceased

c) Whether the insurance policy is null & void

d) Whether there was a fundamental breach of the principle of *uberrimae fidei*

e) Whether there was the mutual duty of utmost good faith owned by both insurer and consumer

f) Whether the insurer was deemed to have waived the right to complain and failed to safeguard its own interest and obligations.

g) Whether the insurer failed to comply with Section 129 of the F.S.A. 2013 and Schedule 9.

The Court of Appeal ruled as follows:

Headnote 1 (in brief)

The appellant (the third party claimant and mother of the deceased who died in the motor vehicle collision) was not a party to the insurance policy, and the circumstances and conditions regarding the renewal of the policy were unknown to her.

Headnote 2 (in brief)

Schedule 9 of the F.S.A 2013 applied to this appeal.

Headnote 3 (in brief)

The duty of utmost good faith was owed at all times by both parties to the insurance contract. The 'doctrine of waiver' operates to the insurer, when they fail to undertake the exercise of posing questions to the intended insured i.e.: the proposer for insurance, prior to issuing the policy.

Headnote 5 (in brief)

Failure and omissions by the Insurer to comply with Section 129 and Schedule 9 of the F.S.A 2013, would disentitle him from the Declaratory Order granted by the High Court, which declared the policy null & void and unenforceable, with regards to the claim by the third party.

It would bring untold injustice and prejudice to innocent third parties such as the appellant in this appeal.

31. But in **Etiqa General Takaful Bhd v Personal Representative of Fatimah Adam (deceased) (2022) 6 CLJ 385,** decided on 20-4-2022 the High Court Judge distinguished or appears to challenge Balamoney and ruled:

Headnote 5 (in brief)

"…… As far as the Plaintiff was concerned, the policy was renewed by Fatimah who was already dead at the time of the renewal of the policy. As there could be no Contract that could validly exist as a matter of law, when the policy was issued to Fatimah, it must follow that the Plaintiff was entitled to the declarations prayed for…… "

With due respect, the learned HCJ failed to understand. Section 129 and schedule 9 of the F.S.A 2013, as exemplified in Balamoney by the COA and Federal Court.

32. **Insurer (and his Insured) ought to contest the claim at the trial Court and not by way of collateral action in High Court by obtaining a declaration etc and consequently discharging themselves from the ongoing Trial Court proceedings.**

    (i) It must be noted that when the Solicitors for the insured discharged themselves, the Plaintiff, i.e.: third party claimant's Solicitors would proceed in the trial Court to obtain a default judgment.

In Appeal No. 6 (Pacific & Orient Insurance v Yeap Tick In), the Court ruled: (Headnote 12)

"(12). In Appeal No. 6, the default judgment obtained by the third party claimant from the Sessions Court was a regular and enforceable judgment, which has not been set aside nor appealed against. Under Section 96 (1) of the RTA, the insurer was bound to pay the judgment sum to the third party claimant. The question of the insurer's entitlement to a permanent injunction (to prevent execution proceedings to recover the judgment sum) does not arise……..

Also, there was no necessity for a third party claimant who had obtained a judgment from the trial Court against the insured to obtain another judgment against the Insurer (i.e.: Recovery action) before enforcing the trial Court's judgment against the Insured."

ii) **And in Appeal No. 8 (Pacific & Orient Insurance v Navin Naicker), the Court ruled: (Headnote 14).**

"(14) The evidence of fraud in Appeal No. 8, could and should have been produced at the trial in the High Court but was not made available by the appellant. Hence the finding of the High Court after the Sessions Court entered judgment against the insured should not be allowed to stand in the way of the decision of the Sessions Court which was never appealed against (nor set aside).

Under Headnote 10, the Court ruled (in Appeal No. 4)

"(10) The trial in the Sessions Court was to determine, among others, if the third respondent was involved in the accident, and if so, whether he was negligent in causing the accident. It was not viable for the appellant to convert the originating summons to a writ action. There was to the insurer's knowledge already an ongoing trial in the Sessions Court, when it filed the application under Section 96 (3) of the RTA …… **A Section 96(3) application is only for determining the issues of voidness and unenforceability of an insurance contract and not to determine core issues in the tort of negligence.**

33. **MIB Guidelines and the substituted Domestic Agreement**

The Court referred to the MIB Guidelines as per the letter dated 18 Jan 1985 and the later Agreement and stated as follows in Headnote 11.

"(11) In Appeal No. 5, the insurer was bound by the MIB guidelines vide letter dated 18 Jan 1985 which makes insurers liable under the policy for motor vehicles. …… Even assuming there was a breach of policy conditions by the insured for failing to inform the insurer of the Sale of the Car, the insurer could not deny liability by virtue of the Statutory requirement under Section 91(1)(b) read with Section 99 & 95 RTA. The Court of Appeal was not wrong in referring to the MIB guidelines as an additional issue in determining liability…… "

34. **Allegation of fraudulent claims by third party victims.**

On the allegations of fraud raised by the Insurers, the Court took the view that these matters and all facts/evidence ought to be presented and thrashed out at the trial Court stage.

The insurer's action by way of a declaration under Section 96(3) to declare the relevant policy void and unenforceable or such other courses of action supported by Affidavit evidence was deemed improper.

And further, if the insured or insurer's Solicitors discharge themselves from the trial and a default judgment is obtained, the Court ruled that it is a valid and regular judgment of the Sessions Court which has the necessary powers and jurisdiction.

In view of the above the FCJ's under headnote 13, declared:-

"(13) The issue of fraud raised by the appellant must be considered in light of the decision of the Sessions Court which found liability to have been established against the rider.

…… This finding of fact must be accepted as the truth as it was not appealed against…… "

In headnote 14, the court held:-

"(14) **The evidence of fraud in Appeal No. 8 could and should have been produced at the trial in the High Court but was not made available by the appellant**. Hence, the finding of the High Court, delivered after the Sessions Court entered judgment against the insured, should not be allowed to stand in the way of the decision of the Sessions Court, which was never appealed against…… "

35. **"Transfer of ownership and Transfer of Interest"**

And motor vehicles sold by a private deal/arrangement and the system of "sambung bayar' to the hire purchase owner

Transfer of interest is not a transfer of ownership. A valid transfer of ownership can only be affected by following strictly the procedure laid down by Sect. 13 (1) of the RTA and not merely by selling the car to a third party.

Under Headnote 1, the Court ruled that "…… The policy did not even contain a clause that required the insured to notify the insurer of the sale of the car, not that the existence of such a clause would absolve the insurer of liability, in the event of an accident involving the car.

The procedure under 13(1) is mandatory, and is meant to ensure that there is a proper transfer of the motor vehicle…… "

As per headnote 2, the precise interpretation of Section 109(2) of the RTA was explained.

"Being the registered owner of the car at the material time (as per JPJ records)

the insured was deemed by Section 109(2) to be liable for the act or omission of the third respondent (i.e.: the driver / new owner) in causing the accident. The proviso to 109(2) is intended to shield the registered owner from prosecution for the driver's contravention of Sections 41 to 49 (of the RTA) **and not for the driver's tortious acts such as negligent driving. The registered owner is still liable for the negligent act or omission of the driver.**

The Court quoted **Muhammad Haqimie Hasim v Pacific & Orient Insurance (2018) 1 LNS 627** and agreed with the finding of the Court of Appeal : (at para 24 page 206 of this case)

"(i) The central issue for consideration here is whether the alleged transfer of interest from Normala to Lalmiya had the effect of rendering the policy ineffective or causing it to lapse.

(ii) Section 13 of the RTA sets out the procedure to be adopted upon change of possession upon transfer pursuant to a Sale …… which must be done within seven days of such change in possession…… "

(iii) Further, the Court too observed in para 24(vi) one pertinent statutory provision as per the Hire Purchase Act 1967 especially Section 12 (1), in this vehicle 'sold' and 'Sambung Bayar' to the owner i.e.: the finance companies/Bank, situation.

(iv) Section 12(1): The right, title, and interest of a hirer under a hire purchase agreement may be assigned with the consent of the owner, or if his consent is unreasonably withheld without his consent".

(viii) The principle governing a vehicle under hire purchase had also been set out by this Court in **Ong Siew Hwa v UMW Toyota Motor Sdn Bhd (2018)** as follows:-

"under this hire purchase agreement, the Plaintiff is "the hirer" of the car and the second defendant is the 'owner'. Under the law what was obtained by the Plaintiff under P5 was possession not ownership of the car, which remained with the second defendant…… "

36. **Conclusion**

The Federal Court panel at the end of their arduous task in deciding the various questions of law in these eight (8) appeals had this to say in their concluding paragraph:-

"(263) …… Having regard to the object and purpose of the RTA, which is to protect innocent third parties…… We are inclined to the view that the conflicting interest (between Insurers and Claimants) must be resolved in favour of the innocent third party accident victims".

Thus it is rather explicit that the apex Court in the Country is leaning towards

the innocent third party claimants who had suffered injuries (or death in a claim by dependents).

And the panel quoted Justice Sarkar of the Supreme Court of India again in their concluding remarks that are:

"…….. The loss has to fall on someone and the statute has thought fit that it shall be borne by the insurer. That also seems to be equitable **for the loss falls on the insurer** in the course of carrying on his business out of which he makes a profit……."

37. It must be emphasized that the High Court Judges' paramount duty is to place the law in its proper perspective as per the relevant, applicable statutes and other appropriate laws, and decided cases, here and from other commonwealth jurisdictions.

As observed above, that duty has indeed, in numerous instances, fallen on the Court of Appeal and the Federal Court.

Legal Practitioners involved in third party claims have declared their tremendous appreciation to the Federal Court's panel in their arduous task involved in deciding these eight (8) appeals. This writer who was called to the English Bar at Lincoln's Inn in July 1978 and the High Court of Malaysia on September 1979, and who was the Counsel in Appeal NO. 6- **Pacific & Orient Insurance v Yeap Tick In**, did in fact on behalf of all Counsel present, conveyed sincere appreciation to the F.C. panel on their decisions for placing the law in its proper perspective brilliantly in these appeals. The Panel's ninety five (95) pages grounds are well deliberated, insightful, and erudite.

It must be commented that Magistrates, Sessions Court Judges, and High Court Judges in the conduct of motor accident claims, ought to appreciate that the Road Traffic Act 1987 is a Social Legislation attempting to lay out the format, to compensate innocent third party victims. This I believe was the intention of Parliament when the earlier RTO 1958 was amended to the RTA 1987. Strict rules that maybe relevant in other contractual matters in banking, financial or corporate fields ought not to be imposed or considered here. The Court should be guided by one principle, that Insurers collect vast sums in premiums and as a consequence, their primary aim should be to compensate innocent road traffic accident victims.

Correspondingly the not-so-innocent victims may not be compensated.

It is no small matter when the apex Court used these final words in its 'Abstract'.

"…….
the insurer should automatically step in and indemnify the victims, without the victim having to sue the insurer."

Extraordinary and fitting words indeed.

THE JUDICIAL CONTROL OVER CONTRACTUAL UNFAIRNESS ARISING OUT OF EXCLUSION CLAUSES IN MALAYSIA: CASE STUDY OF CIMB BANK BERHAD V. ANTHONY LAWRENCE BOURKE [2019] 2 MLJ 1 (FC) PART 1

By: Piriya A/P Subramaniam

1. Introduction

It is important that parties to a contract enter into the contract by his or her free will and uphold the terms as stated in the contract. The role of the law in accommodating the reasons for the law to enforce such voluntary undertakings made by the parties that give rise to the kind of rights and obligations they would have accepted is always a contentious question among legal scholars, practitioners and litigators. Nonetheless, problems emerge when one party is unaware of the presence of specific conditions that may limit the rights of another party and when the other party is oblivious of the risks at the time the contract is made (Razak and Yee, 2019). Over the decades, commercialism has mushroomed with people contracting in buying and selling goods and so the need for protection against contractual unfairness is also in an alarming state. It is presumed that the Contracts Act 1950 has laid down the necessary requirements and elements for the formation of a contract and it is also assumed that the parties to the contract are aware of all the terms of the contract upon signing the agreement.

Due to 'the principle of freedom of contract' (P.S. 1979), the courts have often refused to interfere in any contract to declare the entire contract as void or to strike down the terms of the contract. This situation has led to many unfair contract terms in the consumer contracts since the consumers[1] often find themselves in a weaker bargaining position where they are left with no other choice than accepting the terms. Most of the time, such clauses are in the form of exclusion clauses. "Unfair contract terms", which are also known as "weapons of consumer oppression", are frequently used to oppress customers by limiting, denying, and restricting their consumer rights in general, and they may be easily found in

1 Consumer is being defined in section 3 of the Consumer Protection Act 1999 (Act 599) as "a person who acquires or uses goods or services of a kind ordinarily acquired for personal, domestic or household purpose, use or consumption; and a person who does not acquire or use the goods or services, or hold himself out as acquiring or using the goods or services, primarily for the purpose of (i) resupplying them in trade; (ii) consuming them in the course of a manufacturing process; or (iii) in the case of goods, repairing or treating, in trade, other goods or fixtures on land".

invoices, receipts, and other consumer contracts and sale agreements. Whereas an exclusion clause has been defined as any clause in the contract or term in a notice that purports to restrict, exclude or modify a liability, duty, or remedy which would otherwise arise from a legally recognised relationship between the contracting parties.[2] Exclusion clauses are classified into (i) clauses that exclude primary obligations (the legal obligations arising from the contractual relationship between the parties to the contract) (ii) clauses that exclude secondary obligations (where the clause limits or excludes the liabilities incurred as a result of a breach of contract).

The focus of this paper is to conduct a case study on the landmark Federal Court case of CIMB Bank Bhd v Anthony Lawrence Bourke & Anor ('the CIMB Case') and it is very significant to have a case study on this case because this is the first ever time the exclusion clause in a contract that has been struck down under Section 29 of the Contracts Act 1950[3] by the Malaysian Court. The purpose of this study is to see how far a court will go in refusing to enforce terms in exclusion clauses that are considered to be "unconscionable" in furtherance. It raises the question of whether the court is interpreting the provisions in accordance with its own sense of justice, which could jeopardize the integrity of a contract made freely by the parties. I will further explore the aftermath of this case and whether consumers are being adequately remedied by the court and justice has been served via the judgement of the case. A comparative study has been made on other jurisdictions to come out with recommendations to protect the consumers better from the oppression of exclusion clauses in the standard contracts. The scope of this paper is limited to the judicial control over contractual unfairness arising out of exclusion clauses in Malaysia and does not cover statutory control over this issue.

2. CIMB Bank Bhd v Anthony Lawrence Bourke & Anor

This CIMB Case focuses only on a particular situation where the particular clause, Clause 12 of the loan agreement, absolutely restricts the rights of the other party to the contract to enforce the contract by usual legal proceedings or limiting the time of claim for the claimant to file the action which contravenes Section 29 of the Contracts Act 1950.

a. Background Facts

In December 2018, the Federal Court had given a landmark decision in the CIMB Case. The background facts of this case is that a married couple (the

2 Yates, D., & Hawkins, A.J. (1986). *Standard Business Contracts: Exclusion and related devices*. London: Sweet & Maxwell, 4.

3 S.29 of the Contracts Act 1950 reads as "*Every agreement, by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extend.*"

appellant/borrowers) purchased a home from a developer. The Appellant then obtained a loan from the bank (the respondent/financial service provider) to finance the purchase. The Respondent was required by the loan arrangement to pay the developer in instalments once the certificate of completion was issued. However the Respondent failed to make the payment as provided in the loan agreement and so the developer terminated the agreement with the Appellants regarding the purchase of the property.

The developer terminated the sales and purchase agreement with the Appellants when the respondent bank failed to pay the payment after almost one year. The Appellants then brought a suit against the Respondent bank. The Appellants claimed for damages caused by the termination of the sale and purchase agreement between the developer and the Appellants on the basis of breach of contract and fiduciary duty and the negligence of the Respondent. The issue in this case is whether the provisions of Section 29 of the Contracts Act 1950[4] can be used to strike down an exclusion clause in a contract between a house buyer and a bank? What was expounded in this case is whether the bank can rely on the exemption clause to escape liability.

The Respondent bank argued in the High Court that Clause 12[5] of the loan agreement between the Respondent and the Appellants exempted the bank of all duty for any damages incurred by the Appellants. The court then had to determine whether Clause 12 of the loan agreement released the Respondent from any obligation towards the Appellants. The High Court found in the Respondent bank's favour and the Appellants appealed to the Court of Appeal. In the Court of Appeal, the appellant's counsel argued that Clause 12 of the loan agreement was void under Section 29 of the Contracts Act 1950. However, the Court of Appeal did not apply the doctrine of undue influence or bargaining power to strike down the exclusion provision; instead it referred to the case of **New Zealand Insurance Co Ltd v Ong**

Choon Lin (t/a Syarikat Federal Motor Trading)[6] and applied Section 29 of the Contracts Act to render the exclusion clause void. The Court of Appeal held that:-

1. The Respondent had breached its primary responsibility when it failed to

---

4 Section 29 of the Contracts Act 1950 "Agreements in restraint of legal proceedings void: *Every agreement, by which any party thereto was restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights is void to that extend".*

5 Clause 12 of the loan agreement provided as "*Notwithstanding anything to the contrary, in no event will the measure of damages payable by the Bank to the Borrower for any loss or damage incurred by the Borrower include, nor will the Bank be liable for, any amounts for loss of income or profit or savings, or any indirect, incidental consequential exemplary punitive or special damages of the Borrower, even if the Bank had been advised of the possibility of such loss or damages in advance, all such loss and damages are expressly disclaimed."*

6 *[1992] 1 CLJ Rep 230*

pay the invoice because it was a breach of a fundamental term of the loan agreement that went to the root of the contract.

2. The Respondent had breached its duty of care to its customer, the Appellants, in processing the loan disbursement, resulting in the Appellants incurring loss and damages following the developer's termination of the sales and purchase agreement.

3. Clause 12 of the loan agreement absolutely restrained legal proceeding and was void under Section 29 of the Contracts Act 1950.

b. The case discussion in the Federal Court

Dissatisfied with the decision of the Court of Appeal, the Respondent Bank then appealed to the Federal Court. The Federal Court affirmed the Court of Appeal's judgement and dismissed the respondent's appeal. The main issues dealt with by the Federal Court were (i) Whether Section 29 of the Contracts Act 1950 can be used as a ground to invalidate an exclusion clause which absolved a contract breaker of liability for a breach of contract *(*the exclusion clause that absolves primary obligations) and (ii) Whether Section 29 of the Contracts Act 1950 can be used to strike down an exclusion clause which relieves the contract breaker's liability to pay compensation for the non-performance of the contract (the exclusion clause that excludes general secondary obligations).

The Respondent Bank claimed that Clause 12 of the loan agreement was just an exclusion of the Appellant's right to sue the Respondent for some sort of damages, not a complete denial of the court's jurisdiction, and thus did not violate Section 29 of the Contracts Act 1950. However, as per the Federal Court, Clause 12 precludes the Appellants from their rights of claiming any loss, or damage and the Respondent cannot be held liable for any loss of income or profit or savings or any indirect or incidental, consequential, exemplary or special damages. As a result, the court determined that Clause 12 nullified the Appellants' rights to claim for damages, and that the damages mentioned in Clause 12 encompass and cover all types of damages arising from a breach of contract or negligence suit. In other words, the provision imposes an absolute restriction on the Appellant in cases where the Appellant's claim against the Respondent has been rejected, necessitating the application of Section 29 of the Contracts Act.(Rahim and Azman n.d.)

The Federal Court was of the same view as the Court of Appeal on the reference made to the case of **New Zealand Insurance Co Ltd v Ong Choon Lin**[7] that clause 12 was caught by Section 29 of the Contracts Act 1950 and that a contract can never be disassociated from its remedy. The Federal Court rejected the Respondent Bank's reliance on the case of **Pacific Bank Berhad v Kerajaan**

7 *[1992] 1 CLJ Rep 230*

Negeri Sarawak[8] where it was held in that case that Section 29 of CA 1950 invalidates agreements that limits the time for a person to practise his rights. To put it another way, the emergence of a cause of action must be distinguished from its enforcement. The Federal Court distinguished the case of **Pacific Bank** from the instant appeal because the instant appeal is about the enforcement of rights through legal proceedings under the first limb of Section 29 of the CA, while **Pacific Bank'**s case was about the limitation of time for the practice of right.

The Federal Court took the initiative to look into the distinctive argument of whether Clause 12 is against public policy. Referring back to the case of **New Zealand Insurance**, The Federal Court stated that "*the primary duty of a Court of law is to enforce a promise which the parties have made and to uphold the sanctity of contracts into which the parties have unfettered right to enter provided that they are not opposed to public policy or are not hit by any provision of the law of the land ...*". The court also referred to Pullock and Mulla on the Indian Contracts Act and Specific Relief Act, 10th Ed., where Lord Brougham defined the public policy principle "*as a principle where no man can lawfully do something that has the tendency to be injurious to the public welfare*". This was further established in the case of **ABS Laminart Pvt Ltd and Ausher v A.P, Agencies, Salem**[9] where the court ruled that an agreement to oust the jurisdiction of the court absolutely is unlawful and void since it is against public policy.

The Respondent Bank had relied upon the case of **CKR Contracts Services Pte Ltd v Asplenuim Land Pte Ltd and another appeal and another matter**[10] where it was held in that case that the courts should be meticulous enough to avoid applying illegality and public policy to all commercial transactions because this limits the contracting parties' rights and remedies and, in some cases, renders the contract void because it is against public policy. The Federal Court rejected the above arguments, and held that Clause 12 was an absolute exclusion clause because it completely denies the appellant's right to damages as opposed to the position taken in CKR Contract Services, which only sought to confine a contracting party's right to an injunction in equity and did not attempt to constrain or limit the innocent party's right to damages. As a result, the Federal Court in the case of CIMB dismissed the Bank's appeal, ruling that Clause 12 also ousted the court's jurisdiction as well as was an absolute exclusion clause, which excludes all primary and secondary responsibilities. Furthermore, the loan agreement's exclusion clause is unenforceable and unlawful since it was not only an agreement in restriction of legal proceedings as specified by Section 29 of the Contracts Act 1950 but also against public policy.

---

8 *[2014] 6 MLJ 153*

9 *[1989] AIR SC 1239*

10 *[2015] SGCA 24*

Therefore, the Federal Court has made a commendable effort to recognise the commercial reality in which the parties did not have equal bargaining power where the customer purchasing a product or service is obligated to accept the terms and conditions set forth in the agreement by the party with the greatest bargaining power. Referring to the principle of public policy, the Federal Court's interpretation of Section 29 of the Contracts Act 1950 limited the extent to which a party breaching its fundamental contractual obligations could escape liability under such a one-sided standard contract, preventing parties with greater bargaining power from abusing the freedom of contract. ((BD) 2019) Even while this decision dealt with a specific provision in a loan agreement, it has a greater impact on the validity of limitation of liability clauses in other types of agreements in Malaysia. As a result, the court can determine whether the contract's exclusion clause acts as an absolute limitation to a party's right to sue for damages.

Bibliography

(BD), Donovan & Ho. 2019. Are One-Sided Exclusion Clauses Enforceable? March 18. Accessed October 20, 2021. https://dnh.com.my/are-one-sided-exclusion-clauses-enforceable/.

P.S., Athiyah. 1979. "The Rise and Fall of Freedom of Contract." London : Oxford University Press.

Rahim, Abu Daud Abd, and Mohd Wafiy Azman. n.d. "Can Banks Rely on Exclusion Clause to Escape Liability? – CIMB Bank Bhd v Anthony Lawrence Bourke & Anor." @amilaw Newsletter. Accessed October 18, 2021. https://www.azmilaw.com/insights/can-banks-rely-on-exclusion-clause-to-escape-liability-cimb-bank-bhd-v-anthony-lawrence-bourke-anor/.

Razak, Ahmad Muzhaffar bin Abdul, and Teoh Shu Yee . 2019. "To What Extend Deciding the Validity of Exclusion Clause in a Contract [2019] 4 MLJ cxl." Malayan Law Journal Articles 1-11.

SKRINE. 2019. Federal Court Invalidates Exclusion of Damages Clause. January 10. Accessed October 19, 2021. https://www.skrine.com/insights/alerts/january-2019/federal-court-invalidates-exclusion-of-damages-cla.

WHAT CAN MALAYSIANS DO IF THEY ARE DECEIVED INTO ENTERING A BUSINESS AGREEMENT?

Compiled by: Ooi Tat Chen

Recently, the most common complaint we received from our clients involved the buying and selling of personal protection equipment ("PPE"). We have seen businesses fraudulently claiming that they have ready stock of gloves or misrepresenting themselves to be acting for major gloves companies. They also claim that they supposedly have direct access to these items.

Once payment is made, the Buyers would often realize that the Seller never had ready stocks of these PPEs in the first place and some even could not meet order requirements in time due to the global shortage of PPE items.

Hence, in this article, we will focus on one of the legal options you may have against Company Directors for fraudulent misrepresentation.

Lifting the 'Corporate Veil'

A Seller company is often a private limited company and a separate legal entity. At the same time, it is true that the Company, under normal circumstances, is solely liable for all the acts done and the debts incurred and not the Directors. However, we wish to point out that you can and should seek legal redress to **make these Directors personally liable for your loss and damages** if these Directors have made fraudulent representation to you in their capacity to induce you to pay his Company.

We call this the lifting of the Company's 'corporate veil'. By doing so, we aim to hold the Directors personally accountable for their fraudulent acts, notwithstanding the transaction is between 2 companies. The rationale is that nobody should be allowed to rely on the protection of a corporate veil (i.e. Sdn Bhd.), as a device or façade to conceal their own wrongdoings.

Test for fraudulent misrepresentation

In a nutshell, fraudulent misrepresentation is the most serious, where a false statement is dishonestly made to you upon which you rely and depend. As a consequence of relying on that (untrue or misleading) statement, you suffer damages.

Now suppose you wish to sue someone, or a business, for fraudulent misrepresentation. You should understand the elements you must prove in Court so that you are aware of the evidence you need to prepare in advance to introduce at trial to satisfy those legal requirements and hence, their required burden of proof.

If you are seeking to demonstrate that you relied on a misrepresentation made by others – a vital step in raising claims of fraudulent misrepresentation – you generally have to prove the following:-

1. There must be a representation of fact by words or by conduct, and mere silence is not enough;
2. The representation that was made to you must be made with the knowledge that it is false, i.e, it must be wilfully false or at least made in the absence of any genuine belief that it is true or recklessly (i.e, without caring whether his representation is true or false);
3. The representation must be made with the intention that it should be acted upon by you, in the manner which resulted in damage to you;
4. You must prove that you have acted upon the false statements; and
5. You must prove that you have sustained damage by so doing.

Practical Advice

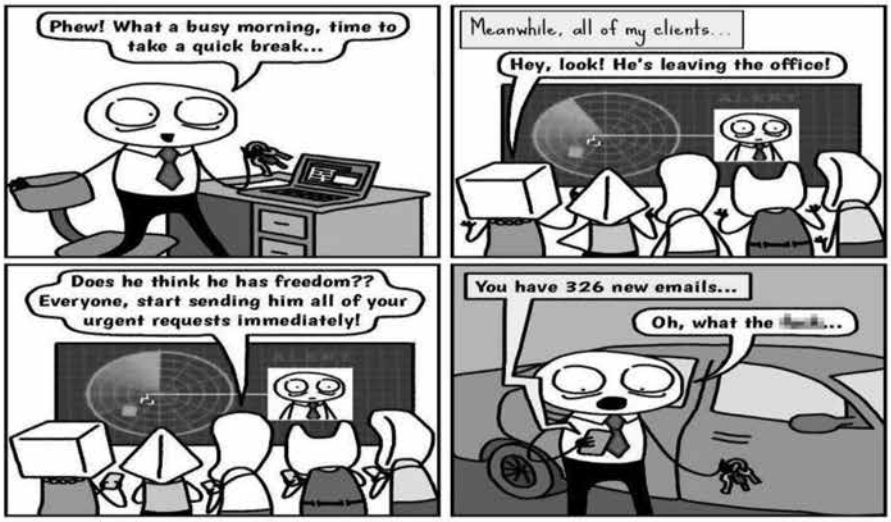
There are some practical points and best-practice tips arising from the law of misrepresentation generally, of which all businesses should be aware.

1. Having a Sale and Purchase Agreement (SPA) drafted out is highly recommended. At the very least, a SPA should act as a good checklist, providing a clear path for the transaction.
2. Always carry out due diligence on potential suppliers or vendors. But as we have experienced, it has its sets of challenges.
3. Always ensure you keep complete and accurate records of the trail of correspondence.
4. Take legal advice immediately if you think you may have suffered loss having relied on a misrepresentation.
5. Keep in mind that a misrepresentation that does not have a material effect on the agreement does not give rise to a legal action.
6. Finally, it may be helpful to remind ourselves of the age-old adage that 'if something seems too good to be true, it probably isn't'.

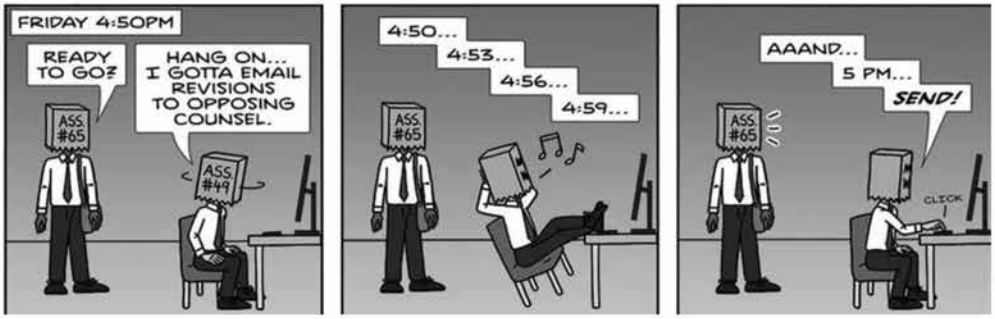
Whether you have been sued for fraudulent misrepresentation or believe you have entered into a contract under false pretences, the stakes are relatively high for your business and interest.

Attorney Humour

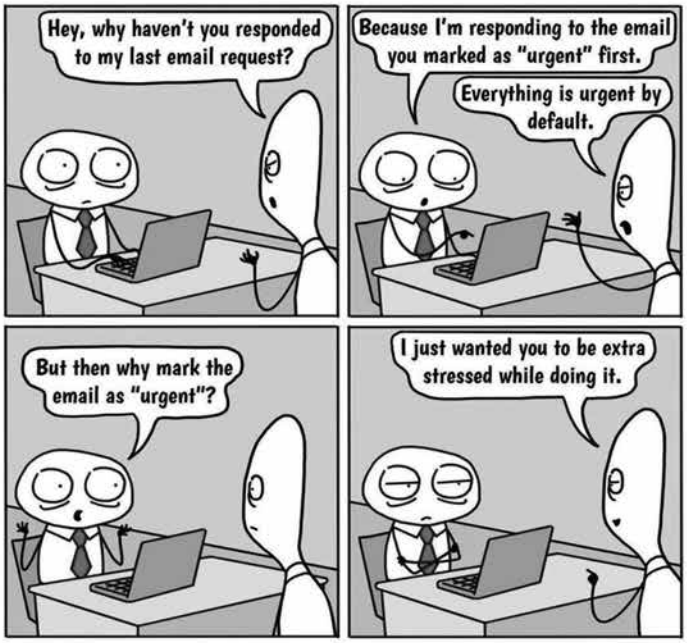
Compiled by Guhapria Kumaravellu

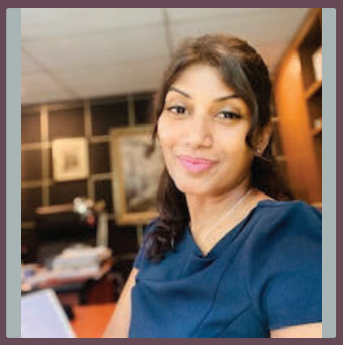


"Yes, he ate her grandma, that's not in dispute. But I intend to prove that Ms. Riding Hood, by mocking my client's eyes, ears, and teeth, provoked him!"



"I'd like to counter with the truth, mostly the truth, and the occasional little white lie."





Gowri Subbaiyah

CHAIRMAN OF THE PUBLICATION COMMITTEE

Krishnaveni Ramasamy

EDITOR

Sharmila Kaur

SUB-EDITOR

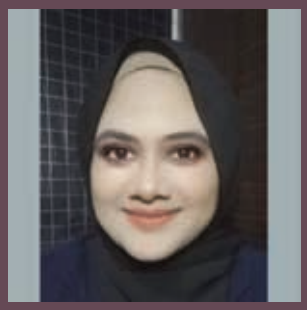
Farah Arabi

SUB-EDITOR

RESEARCH AND COMPILATION TEAM

Ramesh Rajadurai

Guhapria Kumaravellu



Nurul Hidayah bt Tajuddin

Lee Jing Yao

Ooi Tat Chen

Piriya A/P Subramaniam

Hemeswary Veera Vijayan

Carina Tan

Roshunraj Rajendran

GRAPHICS AND DESIGN TEAM

Phoebe Ng

Seffia Gan

INFINITAS

Infinitas Technologies

The Penang Bar Committee welcomes letters, articles, views and news (including photographs) for possible inclusion in the newsletter. Kindly forward any comments and contributions to voixdadvocat@gmail.com. However, the Penang Bar Committee and the Editorial Board reserve the right not to publish them or to edit those published as regards content, clarity, style and space considerations. Contributions from individuals that are published contain the personal views of the writers concerned and are not necessarily the views of the Penang Bar.

THANK YOU

to sponsors of
Penang Bar Sports & Games Fiesta 2022

“

Goh Chee Sun

Soon Ley Theng

Lim Seh Ping

Chen, Leong & Co

Tan Get Joo @ Tan Gaik Cheang

Ghazi & Lim

Jeffrey Ooi Ping Hong

Yeap Siew Fen

See Swee Sie

Teh Ee Teng

”