

THE LIMITATION PERIOD FOR A FATAL ACCIDENT CLAIM UNDER SECTION 7 OF THE *CIVIL LAW ACT 1956* OF MALAYSIA: A CASE FOR REFORM

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This article attempts a critical examination of the limitation period for a fatal accident claim brought for lost support by the dependants of a deceased person under the *Civil Law Act 1956* of Malaysia. It aims to demonstrate that the said limitation period has caused, or is capable of causing, harsh and unfair results to litigants in Malaysia and that reform of the law is clearly necessary. Throughout the article, reference is made to the corresponding statutory provisions in the *Civil Law Act* of Singapore and where relevant, the proposals that have been made for reform in Singapore.

I. INTRODUCTION

The main statute of limitation in West Malaysia is the *Limitation Act 1953*.¹ As in the case of Singapore's *Limitation Act*,² a substantial part of the Malaysian statute is based on the *Limitation Act, 1939* of England.³ In East Malaysia, the principal periods of limitation are prescribed by the *Limitation Ordinance* of Sabah⁴ and *Limitation Ordinance* of Sarawak.⁵ In addition, two special periods of limitation are prescribed by Malaysia's *Civil Law Act 1956* (hereinafter referred to as "CLA of Malaysia"),⁶ a Federal statute which applies throughout Malaysia. The first limitation period, based on s. 3 of the *Fatal Accidents Act, 1846* (Lord Campbell's Act) of England,⁷ relates to a fatal accident claim brought for lost support by the dependants of a deceased person under s. 7(1) of the CLA of Malaysia. The corresponding provision in Singapore is s. 20(1) of the *Civil Law Act* (hereinafter referred to as "CLA of Singapore").⁸ This limitation period for the claim is found in s. 7(5) of the CLA of Malaysia and s. 20(5) of the CLA of Singapore. The second limitation period is

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¹ No. 254 of 1981, Malaysia.

² Cap. 163, 1996 Rev. Ed. Sing.

³ (U.K.), 2 & 3 Geo. VI, c. 21.

⁴ Cap. 72, Sabah.

⁵ Cap. 49, Sarawak. The East Malaysian Ordinances are based on the *Limitation Act 1877* and *Limitation Act 1908* of India.

⁶ No. 67 of 1972, Malaysia [CLA of Malaysia].

⁷ (U.K.), 9 & 10 Vict., c. 93. The present English equivalent is the *Fatal Accidents Act 1976* (U.K.), 1976, c. 30, but the limitation period in England is now found in s. 12 of the *Limitation Act 1980* (U.K.), 1980, c. 58.

⁸ Cap. 43, 1999 Rev. Ed. Sing. [CLA of Singapore].

created by s. 8(3) of the CLA of Malaysia. It deals with the limitation period for an action in tort brought by a plaintiff against the estate of a deceased person. Its equivalent in Singapore, s. 8(3) of the CLA (as it stood in 1982), was repealed by s. 2 of the *Civil Law (Amendment) Act 1982*.⁹

This article deals mainly with the limitation period under s. 7(5) of the CLA of Malaysia although it makes constant reference to the legal position in Singapore. Its main aim is to illustrate how the said limitation period has caused, or is capable of causing, harsh and unfair results to litigants and why reform of the present law is desired. In addition, this article examines the possible hazards that await a litigant when the limitation period under s. 7(5) of the CLA of Malaysia interacts with the limitation periods under other statutes such as the *Public Authorities Protection Act 1948* of Malaysia¹⁰ and the *Limitation Ordinances* of Sabah and Sarawak. The second Malaysian limitation period under s. 8(3) mentioned above will not be dealt with in this article except in cases where it interacts with s. 7(5).¹¹

The fundamental provisions on fatal accident claims in Malaysia and Singapore are inherited from English law, and as a result of this, references to English statutory provisions and case law are inevitable. Provisions based on the *Fatal Accidents Act, 1846* of England have also found their way into the statute books of many other common law jurisdictions¹² and this article may be of interest to lawyers in those jurisdictions.

II. THE STATUTORY CLAIM AND ITS LIMITATION PERIOD UNDER THE CLA OF MALAYSIA

By virtue of s. 7(1) of the CLA of Malaysia and s. 20(1) of the CLA of Singapore, where the death of a person was wrongfully caused by another person, the dependants¹³ of the deceased may claim for their loss of support resulting from the deceased's death from the person who caused the death. The claim by the

⁹ No. 15 of 1982, Sing.

¹⁰ No. 198 of 1978, Malaysia. The history and application and other features of the *Public Authorities Protection Act 1948* of Malaysia were considered in Sujata Balan, "The Limitation Period under the Public Authorities Protection Act 1948—A Case for Repeal" (2008) 34 *Journal of Malaysian and Comparative Law* 127.

¹¹ The history and application of s. 8(3) of the CLA of Malaysia, *supra* note 6, and its repealed counterpart, s. 1(3) of the *Law Reform (Miscellaneous Provisions) Act, 1934* (U.K.), 24 & 25 Geo. V, c. 41, were considered in an article by the present author bearing the title "The Limitation Period Prescribed by Section 8(3) of the Civil Law Act 1956 of Malaysia", published in 2008 in the *Civil Justice Quarterly* (see (2008) 27 C.J.Q. 342). Inevitably, some parts of the present article, particularly Parts V and VI, overlap with material published in some sections of that article. The *Civil Justice Quarterly* has kindly consented to the use of the said overlapping material in the present article.

¹² See for instance s. 3 of the *Fatal Accidents Ordinance* (Cap. 22) of Hong Kong.

¹³ The definition of "dependants" in s. 7(2) and s. 7(11) of the CLA of Malaysia, *supra* note 6, is restrictive. The persons who can claim are the deceased's spouse, son, daughter, father, mother, grandfather, grandmother, grandson, granddaughter, stepson and stepdaughter. It does not include brothers and sisters of the deceased and collateral relatives. See *Chan Chin Ming v. Lim Yok Eng* [1994] 3 M.L.J. 233 (S.C.). The definition of "dependants" under s. 20(8) of the CLA of Singapore, *supra* note 8, is wider and includes, among others, a former wife of the deceased, great-grandparents, great-grandchildren, and any person who is, or is the issue of, a brother, sister, uncle or aunt of the deceased.

dependants, commonly referred to as a 'dependency claim', is a special exception to the common law rule that no person has an interest recognised by law in the life of another.¹⁴ Dependency claims form an important and substantial part of civil litigation in Malaysia. Most fatal accidents cases in Malaysia arise from motor vehicle accidents. The importance of the dependency claim and the limitation period governing such a claim can be easily appreciated if one takes into account the number of fatal accidents per year on Malaysian roads.¹⁵

Section 7(5) of the CLA of Malaysia and its equivalent in s. 20(5) of the CLA of Singapore provide that a dependency claim shall be brought within three years after the death of the person deceased. Time is computed from the date of death of the deceased. This is fair and sensible as an injured person may sometime linger in his injured state for a considerable period before succumbing to his injuries.¹⁶ The current limitation period of three years is a great improvement over the original short limitation period of twelve months provided by s. 3 of the *Fatal Accidents Act, 1846* of England,¹⁷ the legislative ancestor of the statutory provisions in Malaysia and Singapore. However, it is still capable of causing hardship to the claimants. It will be seen in Part IV of this article that the limitation period has been held in Malaysia to be absolute and without exceptions. Once the three-year period has expired the court has no power to extend time, either under statute or under the court's inherent powers.

III. DECLINE OF THE ESTATE CLAIM AND THE IMPORTANCE OF THE DEPENDENCY CLAIM

Where a person's death is caused by the wrongful act, omission or default of another, two causes of action will arise. The first of these is what is commonly referred to in Malaysia and Singapore as an 'estate claim'. In both Malaysia and Singapore, the limitation period for this claim is found in the main statutes of limitation and is

¹⁴ See *Baker v. Bolton* (1808), 1 Camp. 493, 170 E.R. 1033; *Admiralty Commissioners v. Owners of Steamship Amerika* [1917] A.C. 38 (H.L.); *Burgess v. Florence Nightingale Hospital for Gentlewomen* [1955] 1 Q.B. 349. In *Venn v. Tedesco* [1926] 2 K.B. 227 at 229 [Venn], McCardie J. whilst referring to the *Fatal Accidents Act, 1846* of England, *supra* note 7, observed, "That Act was passed because at common law it was not a civil wrong to cause the death of a human being."

¹⁵ Statistics from the Malaysian Road Safety Department reveal that in 2009, motor vehicle accidents on Malaysian roads resulted in 6745 fatalities. See Malaysian Institute of Road Safety Research, "Road Facts" (4 December 2011), online: <<http://www.miros.gov.my/web/guest/road>> (last accessed 22 March 2012).

¹⁶ *Thangavelu v. Chia Kok Bin* [1981] 2 M.L.J. 277 is an example.

¹⁷ Two English case law examples which demonstrate the hardship caused by the original limitation period of twelve months under s. 3 of the *Fatal Accidents Act, 1846*, *supra* note 7, are *Hilton v. Sutton Steam Laundry* [1946] K.B. 65 (C.A.) and *Finnegan v. Cementation Co. Ltd.* [1953] 1 Q.B. 688 (C.A.) [Finnegan]. In *Finnegan* a widow's claim under the Act was set aside on procedural grounds. She could not file a fresh action as the twelve months mentioned in s. 3 of the Act had expired. Singleton L.J. in the English Court of Appeal expressed his lament with the following words (at 699):

I would add that these technicalities are a blot upon the administration of the law, and everyone except the successful party dislikes them. They decrease in numbers as the years go on, and I wish that I could see a way around this one. I do not know why the Fatal Accidents Act of 1846 contained a provision that the action must be brought within a year of the death. There is no such limiting period in the case of an injury, however serious.

subject to the provisions in those statutes which enlarge time in cases of disability, fraud, fraudulent concealment and mistake. The estate claim must be distinguished from the second cause of action, namely, the ‘dependency claim’ referred to above in Part II of this article. The dependency claim, a creature of statute, is brought solely for the benefit of the dependants of the deceased who have lost their support because of the deceased’s wrongful death. An estate claim is brought by the deceased’s personal representative for the benefit of the deceased’s estate against the person who caused the deceased’s wrongful death and the damages awarded will become a part of the deceased’s estate. The damages awarded may be used to pay creditors, as well as the inheritances of dependent and non-dependent beneficiaries of the deceased.

In 1982, the estate claim was propelled into prominence in Malaysia and Singapore by the decision of the House of Lords in *Gammell v. Wilson*¹⁸ which allowed the claim to include damages for “lost years”, that is, damages for lost earnings for the years after the deceased’s death. However, the claim lost its importance after the CLA of Malaysia was amended in 1984 by the *Civil Law (Amendment) Act 1984*¹⁹ and the CLA of Singapore by the *Civil Law (Amendment) Act 1987*.²⁰ As a result of the amendments in Malaysia in 1984, s. 8(2) of the CLA of Malaysia now provides that the damages recoverable for the benefit of an estate shall not include any exemplary damages, damages for bereavement, damages for loss of expectation of life and, significantly, damages for loss of earnings in respect of any period after the deceased’s death. In Singapore, s. 10(3) of the CLA now provides that a claim by the estate of a person shall not include any exemplary damages and “any damages for loss of income in respect of any period after that person’s death”.²¹

The decline of the estate claim has made the dependency claim the primary claim and the principal recourse for dependants of deceased persons. In Malaysia, many of the claimants in a dependency action are widows without means and their minor children. Often the deceased would have been the sole breadwinner of his family and his dependants’ entire financial support would have come from his income. The importance of the dependency claim to such needy dependants requires no elaboration. Consequently, this article would repeatedly stress that there is a need to ensure that the claim is subject to a fair limitation regime.

IV. HARDSHIP WHICH MAY ARISE FROM A LIMITATION PERIOD THAT IS ABSOLUTE

A severe feature of the limitation period under s. 7(5) of the CLA of Malaysia and s. 20(5) of the CLA of Singapore is that it is not subject to extension, enlargement or postponement of time. The limitation period has been held to be absolute and without exceptions in Malaysia by the Federal Court in 1965 in *Kuan Hip Peng*

¹⁸ [1982] A.C. 27 (H.L.). Applied in Malaysia in *Thangavelu v. Chia Kok Bin*, *supra* note 16; *Noorianty v. Tang Lei Nge* [1990] 2 M.L.J. 242 (H.C.) and *Lita Maddox v. Calito C Guinto* [1987] 2 M.L.J. 757. In Singapore the case was applied in *Low Kok Tong v. Teo Chan Pan* [1981-1982] S.L.R.(R.) 643 (C.A.).

¹⁹ No. A602 of 1984, which made sweeping changes to the law relating to damages for personal injuries and death and came into force in Malaysia on October 1, 1984.

²⁰ No. 11 of 1987.

²¹ CLA of Singapore, *supra* note 8, s. 10(3).

v. *Yap Yin*²² and more recently in 2004 by the Court of Appeal in *Lee Cheng Yee (suing as administrator of the estate of Chia Miew Hien) v. Tiu Soon Siang t/a Tiyor Soon Tiok & Sons Company*.²³ The harsh and unfair consequences which may ensue for litigants in Malaysia and Singapore as a result of this feature is discussed below.

A. *Provisions in the Main Statutes of Limitation That Enlarge Time Do Not Apply to the Limitation Period for a Dependency Claim*

Under the general law of limitation as found in West Malaysia's *Limitation Act 1953* and the *Limitation Act* of Singapore, time for the purpose of limitation is extended where a person entitled to sue is under legal disability. In West Malaysia and Singapore, a person is deemed to be under legal disability while he is a minor or of unsound mind.²⁴ Section 24 of the West Malaysian Act provides that an action may be commenced by a person under disability or on his behalf at any time before the expiration of six years from the date he ceased to be under disability or died, whichever first occurred. There is a similar provision in Singapore in s. 24 of Singapore's *Limitation Act*.²⁵ Unfortunately these provisions as well as other provisions that enlarge time in the West Malaysian Act and its counterpart in Singapore do not apply to a dependency claim and its limitation period in both jurisdictions. This is because of s. 3 of the *Limitation Act 1953* of Malaysia and its identical equivalent, s. 3 of the *Limitation Act* of Singapore, which provide: "This Act shall not apply to any action... for which a period of limitation is prescribed by any other written law".²⁶

In West Malaysia, the absolute nature of the limitation period in s. 7(5) of the CLA was first stressed in *Kuan Hip Peng*.²⁷ In this case, a minor sued by his next friend for lost support under s. 7(1) arising from the death of his father in a road accident. The minor's writ was filed four days after the period of three years prescribed in s. 7(5) had completed its run. Hashim J. struck out the writ at first instance and the plaintiff appealed to the Federal Court. Thompson L.P., who delivered the judgment of the Federal Court, dismissed the appeal saying:²⁸

The terms of section 7(5)... are absolute and contain no exceptions. They are that "such action shall be brought within three years after the death of the deceased

²² [1965] 1 M.L.J. 252 (F.C.) [*Kuan Hip Peng*].

²³ [2004] 1 M.L.J. 670 (C.A.) [*Lee Cheng Yee*].

²⁴ Section 2(2) of the *Limitation Act 1953* of Malaysia, *supra* note 1 and s. 2(2) of the *Limitation Act* of Singapore, *supra* note 2. The equivalent provisions in East Malaysia are dealt with in Part B below.

²⁵ In Singapore, time is extended by six years for causes of action other than those governed by ss. 24A(2), 6(4) or 8 of the *Limitation Act*, *ibid*. Section 24A(2) provides the limitation period for actions where the damages claimed consist of or include damages in respect of personal injuries (including latent personal injuries) arising from negligence, nuisance or breach of duty. Time is extended by three years for actions governed by s. 24A(2). In the case of actions stated in s. 6(4) (an action to recover any penalty or forfeiture or sum by way of penalty or forfeiture) or s. 8 (an action in respect of the revenue matters listed therein), time is extended by one year.

²⁶ In *Kuan Hip Peng*, *supra* note 22 at 255, Thompson L.P. in the Federal Court, whilst dealing with the limitation period under s. 7(5) of the CLA of Malaysia, *supra* note 6, was of the view that "there can be no question of importing" any of the saving provisions of the *Limitation Act 1953*, *supra* note 1, because of s. 3 of the Act.

²⁷ *Kuan Hip Peng*, *ibid*.

²⁸ *Ibid*. at 255.

person". It is true that, as Goddard L.J. said with reference to the corresponding section of the English Act, the section "merely prescribes a period of limitation" (*Lubovsky v Snelling* [1944] 1 KB 44, 47) and that it does not contain a condition precedent or anything of the sort. Nevertheless the period is absolute. There is no room for doubt as to when it begins to run. It runs from the death of the person of whose support the plaintiff has been deprived. The cause of action arises on death (see *Seward v "Vera Cruz"* (1884-5) 10 App Cas 59, 67, 70). There are none of the saving provisions in favour of a plaintiff that were found in the Statute of James I and are to be found today in the English Limitation Act of 1939 or our own Limitation Ordinance²⁹ of 1953. There is no question of infancy or disability or anything of the sort or of acknowledgment. The only way in which the consequences of the section could be avoided would be if there had been some agreement not to plead the statute and this would constitute a new cause of action (*Lubovsky v Snelling, supra*) and would require to be set out in the statement of claim.

Another adverse consequence that flows from s. 3 of the *Limitation Acts* of West Malaysia and Singapore (referred to above) is that the limitation period for a dependency claim is not subject to enlargement of time under s. 29 of both statutes. Under s. 29 of both statutes, where the plaintiff's action (a) is based upon the fraud of the defendant; (b) is concealed by the fraud of the defendant; or (c) is for relief from the consequences of a mistake, the period of limitation for any cause of action prescribed in the statutes does not run until the plaintiff has discovered the fraud or the mistake, as the case may be, or could have discovered it with reasonable diligence. As s. 3 of both statutes provides that their provisions shall not apply to any action for which a period of limitation is prescribed by any other statute, and as case law has held that the limitation period under the CLA of Malaysia is absolute and without exceptions, the beneficial provisions in s. 29 are not relevant to the limitation period for a dependency claim.

B. *The Legal Position in East Malaysia*

As stated earlier in this article, each of the East Malaysian states of Sabah and Sarawak has its own *Limitation Ordinance*. An unusual feature of each Ordinance is that the limitation periods it prescribes are found in a Schedule to each Ordinance. Both Schedules list classes of proceedings and state the limitation period for each proceeding, which may range from one year to sixty years, in its second column.³⁰

²⁹ Revised and reenacted as the *Limitation Act 1953*, *supra* note 1 in 1981.

³⁰ The manner in which the articles are presented in the Schedules can be appreciated from the reproduction below of art. 1 of Part I of the Sarawak Ordinance, *supra* note 5.

Description of Suit	Period of Limitation	Time from which period begins to run
PART I—ONE YEAR		
(1) Upon a Statute, Act, Regulation or Bye-law, for a penalty or forfeiture	One year	When the penalty or forfeiture is incurred

Extension of time where the person entitled to sue is under legal disability is dealt with in identical sections in each Ordinance.³¹ Under s. 6(1) of both Ordinances, a person under legal disability may “institute the suit within the same period after disability has ceased, as would otherwise have been allowed from the time prescribed therefor in the third column of the Schedule” in the Ordinances. However, s. 6(5) of the Ordinances provides that the maximum extension permitted is three years.³² Section 18 in both Ordinances extends time in cases of fraudulent concealment. Provision is also made for enlargement of time in the articles of both Ordinances for causes of action based on fraud and for cases where the plaintiff seeks relief on the ground of mistake.³³ As in the case of West Malaysia and Singapore, the provisions in the Ordinances which enlarge time do not apply to a dependency claim. This is because s. 5 of each Ordinance states that where any “special law” prescribes a period of limitation, the provisions of the Ordinances shall not affect or alter the period so prescribed.

C. *The Courts Have No Inherent Power to Extend Time*

Another pertinent question will be whether the court has the *inherent* power to enlarge time, for example, in a case involving fraudulent concealment. More than fifty years ago this question was considered by the (then) Court of Appeal of Malaya in *Lee Lee Cheng (F) v. Seow Peng Kwang*³⁴ whilst dealing with another limitation period prescribed under the *Civil Law Ordinance* of Malaya,³⁵ that is, by s. 8(3) of the Ordinance.³⁶ In that case, Thompson C.J., Rigby and Hepworth JJ. were unanimous in their stand that the court did not have any inherent power to extend the limitation period unless expressly permitted by statute. The decision emphasises the rule that limitation is a creature of statute and is only subject to exceptions that are expressly prescribed by statute. The case should also apply with equal force to the limitation period for a dependency claim under the CLA of Malaysia and the CLA of Singapore.

D. *The Need for Reform*

It is clear that reform of the present law associated with the limitation period for a dependency claim in Malaysia and Singapore is necessary. The prescribed period of

³¹ A person may make use of these sections if he is a person “reckoned a minor or insane or an idiot”. The inclusion of “an idiot” in the list is a curious feature of the Ordinances.

³² The disability provisions in the Ordinances are reproductions of provisions that were found in the *Limitation Act 1877* and *Limitation Act 1908* of India. In India, the statutory provisions have produced some complex case law. The Indian position is discussed in Naval Bhatia, ed., *Basu’s Commentary On Limitation Act (Act No. 36 of 1963)*, 6th ed. (New Delhi: Delhi Law House, 2004) at 121-130.

³³ Article 76 in Sarawak and art. 77 in Sabah provide a limitation period of three years for fraud from the date the fraud “becomes known” to the party wronged. For relief from the consequences of a mistake, art. 77 in Sarawak and art. 78 in Sabah prescribe a limitation period of three years from the date the mistake “becomes known” to the plaintiff.

³⁴ [1960] 1 M.L.J. 1 (C.A.) [*Lee Lee Cheng*]. It was noted earlier that there is no equivalent in Singapore to s. 8(3) of the CLA of Malaysia, *supra* note 6. The corresponding provision in Singapore, s. 8(3) of the CLA, *supra* note 8 (as it stood in 1982), was repealed by s. 2 of the *Civil Law (Amendment) Act 1982*, *supra* note 9.

³⁵ *Civil Law Ordinance*, 1956 (originally enacted as Ordinance No. 5 of 1956).

³⁶ The current provision is discussed in detail in Part VII of this article.

limitation for a dependency claim is a short period of three years and this fact when combined with the legislature's failure to provide exceptions can lead to harsh and unfair results.

It was seen from the case of *Kuan Hip Peng* that the failure of the CLA of Malaysia to provide extension of time to persons under disability had drastic consequences for a minor's claim for dependency. Minors and persons of unsound mind depend on others to sue on their behalf. The indolence, laxity or carelessness of the guardian of a minor or a person of unsound mind may sometimes cause the short limitation period of three years for a dependency claim to expire, causing the disabled person to lose his remedy for lost support.³⁷ Hardship may also arise because of the fact that no provision is made at present in the CLA of both Malaysia and Singapore for a case where the plaintiff-dependant's right to bring the statutory action is not discovered, or the identity of the person who caused the deceased wrongful death is not established, until the limitation period of three years has expired.

It is pertinent at this point to consider the present position in the United Kingdom ("UK"), the ancestral home of the provisions relating to fatal accident claims in Malaysia and Singapore. In the UK, the statute dealing with claims by dependants for lost support is the *Fatal Accidents Act 1976* but the limitation period for such a claim is now found in s. 12(2) of the main statute of limitation, the *Limitation Act 1980*. Placing the limitation period in the main statute of limitation makes the exceptions in the main statute applicable to the limitation period, unless the application is modified or excluded in the main statute.³⁸ It may be noted that a general provision on disability, s. 28(1) of the 1980 Act, extends time by six years where a plaintiff is a minor or of unsound mind. However, for the purpose of the limitation period in s. 12(2), the extension of six years is reduced to three years by s. 28(6) of the Act. Another feature of the 1980 Act is that s. 32 of the Act that postpones time in cases of fraud, concealment or mistake does not affect the limitation period under s. 12. However, s. 33, which gives the court an equitable discretion to exclude time in respect of cases of personal injuries or death, applies (subject to the qualifications stated in that section) to the limitation period under s. 12.

In Singapore, the Report of the Law Reform Committee of the Academy of Law on the Review of the *Limitation Act* ("the Committee's Report")³⁹ was cognisant of the fact that s. 20(5) of the CLA of Singapore does not provide for extension of time to persons under disability and that this may cause hardship to such persons. It has recommended that the limitation provision in s. 20(5) of the CLA of Singapore be repealed. If the Committee's recommendations are implemented, the limitation period for a dependency claim will be dealt with by a new provision (as provided in s. 6F of the draft Bill in Annex A of the Committee's Report) that would be inserted into the *Limitation Act*. This move would make the limitation period subject to

³⁷ See the Singapore Academy of Law, Law Reform Committee, "Report of the Law Reform Committee on the Review of the Limitation Act (Cap 163)" (February 2007), online: Attorney-General's Chambers <http://www.agc.gov.sg/publications/docs/Report_of_LRC_on_Review_of_Limitation_Act_February2007.pdf> (last accessed 24 March 2012) at para. 176 [Committee's Report].

³⁸ See for instance s. 12(3) of the *Limitation Act 1980* of England, *supra* note 7.

³⁹ *Supra* note 37.

extension of time under the disability provision in s. 24 of the Act but not to s. 29 which postpones time in cases of fraud, concealment or mistake.⁴⁰ The draft Bill in Annex A of the Committee's Report also contains a consequential amendment of the disability provision in s. 24 to make it clear that the extension of time for the purpose of a dependency claim is by three years.

It was seen that in the UK the limitation period for a dependency claim is provided in s. 12(2) of the *Limitation Act 1980*. Section 12(2) provides that the action shall not be brought after the expiration of three years from (a) the date of death or (b) the date of the knowledge (as defined in s. 14) of the person for whose benefit the action is brought, whichever is later. The section is helpful to dependants because it takes into account the fact that the existence of the cause of action for a dependency claim, or the identity of the wrongdoer who caused the deceased's death, may not be known or discovered until the expiration of three years after the deceased's death. Section 13 of the 1980 UK Act deals with a situation where a dependency claim is brought for the benefit of more than one person. In such a case, the 'date of knowledge' provision in s. 12(2) shall be applied separately to each of them. In Singapore, the Committee's Report has recommended that the aforesaid UK provisions (with the necessary modifications) be incorporated into the *Limitation Act*.⁴¹

In respect of Malaysia, there is no indication at this point in time whether reforms similar to those put into operation in the UK or advocated in Singapore will be initiated or implemented. This article submits that early action is necessary to protect the interests of claimants for dependency under the CLA of Malaysia. Apart from the fact that the limitation provision in s. 7(5) of the CLA of Malaysia is enacted without exceptions, another defect in the provision is that the limitation period runs immediately from the moment of the death and regardless of whether the dependants know or ought to know of the facts that are relevant to their claim. In this context it must be pointed out that at present the statutes of limitation in Malaysia do not contain any provisions which deal with the subject of latent personal injury similar to those contained in s. 11 of the *Limitation Act 1980* of the UK or s. 24A of the *Limitation Act* of Singapore.⁴² It is submitted that Malaysia should not delay the enactment of a limitation period for personal injury claims which is knowledge-based and which caters for latent injury. It is hoped that the authorities will ensure that such a limitation regime, when it is enacted, also covers dependency as well as estate claims.⁴³

⁴⁰ See s. 6F(4) of the draft Bill in Annex A of the Committee's Report, *ibid.*, which reads: "(4) An action under section 20 of the Civil Law Act shall be one to which section 24 applies; but otherwise Parts III and IV shall not apply to any such action." Section 29 of the *Limitation Act*, *supra* note 2 is included in Part III of the Act.

⁴¹ Committee's Report, *ibid.* at para. 178.

⁴² In Malaysia, the Supreme Court has held in *Credit Corporation v. Fong Tak Sin* [1991] 1 M.L.J. 409 that time for the limitation period for the tort of negligence will run although the identity of the tortfeasor was not known.

⁴³ This is the case today in the UK for estate claims under ss. 11(5)-(7) of the *Limitation Act 1980*, *supra* note 7. In Singapore, the Committee's Report, *supra* note 37 at para. 167, has recommended that the UK provisions be adopted and that new sections (ss. 6D(4), (5) and (6)) be inserted into the *Limitation Act*, *supra* note 2, for this purpose.

V. ISSUE WHETHER LIMITATION UNDER S. 7(5) MUST BE PLEADED

In Malaysia and Singapore, the rules of court, which have the force of delegated legislation,⁴⁴ contain provisions aimed at preventing surprise at the trial and at ensuring fairness to the parties. In Malaysia, O. 18 r. 8 of the *Rules of the High Court 1980*⁴⁵ (in Singapore, O. 18 r. 8 of the *Rules of Court*⁴⁶) and O. 14 r. 14 of the *Subordinate Courts Rules 1980*⁴⁷ provide that a party must, in any pleading subsequent to a statement of claim, plead specifically any statute of limitation which he alleges makes his opponents' claim not maintainable or which if not specifically pleaded, might take the opposing party by surprise.⁴⁸ The reference to "any relevant statute of limitation" in O. 18 r. 8 indicates clearly that the ambit of the rules also includes the limitation provisions in the CLA of Malaysia and the CLA of Singapore.

The starting point of the case law on the subject of whether the limitation periods in the CLA of Malaysia should be pleaded is *Kuan Hip Peng*, decided in 1965.⁴⁹ In this case, Thompson L.P. in the Federal Court expressed the view (*obiter*) that a defence of limitation need not be pleaded where the limitation is absolute. This was because of the argument that if the applicable limitation period was absolute, the plaintiff would not be able to raise any exception to counter the defence of limitation, even though he was given early notice of the defendant's intentions. In effect it meant that limitation under s. 7(5) need not be pleaded and that it may be raised at the trial without any prior notice to the plaintiff.

In 2004, Thompson L.P.'s *dicta* was applied in *Lee Cheng Yee*.⁵⁰ In this case, the defendants did not specifically plead limitation in their defence to the plaintiff's dependency claim under s. 7(1) of the CLA of Malaysia. They did not raise limitation as a preliminary issue at the commencement of the trial. During the course of the trial, the defendants conceded "total liability" but they argued that they were entitled to rely on limitation to defeat the plaintiff's claim. The learned judge held that the claim under s. 7 must fail on account of limitation and the plaintiff appealed to the Court of Appeal. In dismissing the appeal, the Court of Appeal rejected the plaintiff's argument that the defendants could not rely on limitation because it was not pleaded. Pajan Singh Gill J.C.A., who delivered the unanimous judgment of the Court of

⁴⁴ They are made in Malaysia under powers delegated by the *Courts of Judicature Act 1964* (No. 91 of 1972, Malaysia), s. 16 and the *Subordinate Courts Rules Act 1955* (No. 55 of 1971, Malaysia), s. 4. In Singapore, the rules of court are made under enabling powers in s. 80 of the *Supreme Court of Judicature Act* (Cap. 322, 2007 Rev. Ed. Sing.) and s. 69 of the *Subordinate Courts Act* (Cap. 321, 2007 Rev. Ed. Sing.).

⁴⁵ P.U.(A) 50/1980, Malaysia.

⁴⁶ Cap. 322, R. 5, 2006 Rev. Ed. Sing.

⁴⁷ P.U.(A) 328/1980, Malaysia.

⁴⁸ Independently of these rules, the courts in Malaysia have over the years developed and applied a well-known rule that a party may not raise a point at a trial where that point was not pleaded in the party's pleadings. See *Re Estate of Lee Siew Kow* [1951] M.L.J. 224; *Wong Eng v. Chock Mun Chong* [1963] M.L.J. 204; *Janagi v. Ong Boon Kiat* [1971] 2 M.L.J. 196; *Saraswatee d/o Arumugan v. Tan Chong & Motors Co.* [1985] 1 M.L.J. 327; *Lee Ah Chor v. Southern Bank Bhd.* [1991] 1 M.L.J. 428 (S.C.). A corollary to this is another rule that a judge must not decide on a point not pleaded: *The Chartered Bank v. Yong Chan* [1974] 1 M.L.J. 157.

⁴⁹ *Kuan Hip Peng*, *supra* note 22. For the facts of this case, see Part IV of this article.

⁵⁰ *Supra* note 23.

Appeal,⁵¹ said the court would be guided by the *dicta* of Thompson L.P. in the case of *Kuan Hip Peng* that a plea of limitation need only be pleaded where limitation is not absolute, such as under the *Limitation Act 1953*. It would not apply to a statute of limitation which is absolute, and without exceptions.

In 2006, in *Tengku Ismail bin Tengku Sulaiman (suing as father of Tengku Iskandar Shah) v. Sia Cheng Soon*,⁵² a different panel⁵³ of the Court of Appeal declined to be constrained by *Kuan Hip Peng* and came to a contrary conclusion on the issue of whether it was necessary to plead the limitation period under s. 7(5). Zaleha Zahari J.C.A. who spoke for the panel in the *Tengku Ismail* case emphasised the procedural unfairness to the plaintiff if his opponent was allowed to rely on a limitation point that was not pleaded. Her Ladyship distinguished *Kuan Hip Peng* on the ground that that case did not involve an issue related to pleading and therefore was “not an authority on non-pleading of limitation”.⁵⁴ Further, Zaleha Zahari J.C.A. declined to follow the earlier decision of the Court of Appeal in *Lee Cheng Yee* mentioned above. Her Ladyship said that that decision was made *per incuriam* because it was decided without consideration of O. 14 r. 14(1) of the *Subordinate Courts Rules 1980* and O. 18 r. 8(1) of the *Rules of the High Court 1980*, rules of procedure which had statutory force.

It is submitted that these conflicting decisions of the Court of Appeal⁵⁵ in Malaysia on the issue of whether limitation under s. 7(5) needs to be pleaded in a defence to a s. 7(1) claim do not serve the interests of claimants for dependency and that they may lead to wasteful litigation. Further, a regrettable effect of a failure to plead limitation is that it may induce the plaintiff to assume that the defendant did not intend to rely on the defence of limitation. This assumption may cause the plaintiff to proceed to trial without any prior warning that his suit may be dismissed with costs.

In Singapore, the issue as to whether limitation under the CLA must be pleaded before it can be raised as a defence, does not appear to have come before the courts. It was seen in Part IV of this article that the Law Reform Committee of Singapore has recommended that the limitation provision in s. 20(5) of the CLA of Singapore be repealed and its place be taken by a new section (s. 6F of the draft Bill in Annex A of the Committee’s Report),⁵⁶ which is to be inserted into the *Limitation Act*. This recommendation is commendable for two reasons. When implemented, the limitation period in the new section will be subject to the exception regarding disability in the *Limitation Act* and thus invalidate any argument that it may be raised even though it is not pleaded. Secondly, the incorporation of the limitation period into the *Limitation*

⁵¹ Mokhtar Sidin and Rahmah Hussain JJ.C.A. sat with his Lordship.

⁵² [2006] 5 M.L.J. 228 (C.A.) [*Tengku Ismail*].

⁵³ The panel members were Denis Ong, Hashim Yusoff and Zaleha Zahari JJ.C.A.

⁵⁴ *Tengku Ismail*, *supra* note 52 at para. 20.

⁵⁵ *Tengku Ismail*, *ibid.*, originated in the Sessions Court. By virtue of s. 96 of the *Courts of Judicature Act 1964*, *supra* note 44, an appeal on a case that originated in the Sessions Court ends in the Court of Appeal and there is no further appeal to the apex court, the Federal Court (see *Abdul Ghaffar v. Ibrahim Yusoff* [2008] 5 Current Law Journal 1). An aftermath of *Tengku Ismail* was an attempt made via *Sia Cheng Soon v. Tengku Ismail bin Tengku Ibrahim* [2008] 3 M.L.J. 753 (F.C.) “to refer” the decision in *Tengku Ismail* (that limitation under s. 7(5) need not be pleaded in a defence to a s. 7(1) claim) to the Federal Court. The Federal Court rejected the application without discussing its merits. Thus to date, there is no Federal Court authority on this point.

⁵⁶ *Supra* note 37.

Act will make it subject to s. 4 of the Act, the effect of which is to require a limitation period under the Act to be specifically pleaded before it can operate as a defence.⁵⁷ Similar benefits can be acquired in Malaysia if s. 7(5) of the CLA of Malaysia is repealed and the limitation period for a dependency claim is moved to the main statutes of limitation, that is, the *Limitation Act 1953* of West Malaysia and the *Limitation Ordinances* of East Malaysia.

VI. INTERACTION BETWEEN SECTIONS 7(5) AND 8(3)⁵⁸ OF THE CLA OF MALAYSIA

A brief account of the origins of s. 8(3) of the CLA of Malaysia is an essential prologue before its place in Malaysia's limitation laws can be understood.

A. *Origins of the Limitation Period in s. 8(3) of the CLA of Malaysia*

Until 1934, actions in tort by or against deceased persons were governed by an archaic common law rule known as *actio personalis moritur cum persona* ('a personal action dies with the person'). This rule prevented a personal representative of a deceased person from suing or being sued for a tort committed against or by the deceased before his death.⁵⁹ The rule continued to be in force in England until 1934 when, following the recommendations of the Law Revision Committee, the *Law Reform (Miscellaneous Provisions) Act, 1934* was enacted.⁶⁰ By virtue of s. 1(1) of the Act, the *actio personalis moritur cum persona* rule was abolished. Significantly, this belated measure of law reform allowed the survival of personal actions in tort for or against deceased persons, subject to a few exceptions.⁶¹ In addition, another provision of that new Act, s. 1(3), created a special limitation period where the personal representative of an estate of a deceased person was sued in tort. A provision based on s. 1(3) of the Act is found in s. 8(3) of the CLA of Malaysia. It

⁵⁷ *Limitation Act*, *supra* note 2, s. 4. The section reads:

Nothing in this Act shall operate as a bar to an action unless this Act has been expressly pleaded as a defence thereto in any case where under any written law relating to civil procedure for the time being in force such a defence is required to be so pleaded.

As has been seen earlier in Part V of this article, the *Rules of Court* in Singapore require limitation to be expressly pleaded.

⁵⁸ The equivalent of s. 8(3) of the CLA of Malaysia, *supra* note 6, in Singapore, namely, s. 8(3) of the CLA of Singapore, *supra* note 8 (as it stood in 1982), was repealed by s. 2 of the *Civil Law (Amendment) Act 1982*, *supra* note 9. In Malaysia, the section continues to be in force.

⁵⁹ The rule did not affect a claim under the *Fatal Accidents Act, 1846*, *supra* note 7, as that claim was based on an express statutory cause of action.

⁶⁰ *Law Reform (Miscellaneous Provisions) Act, 1934*, *supra* note 11. See the Law Revision Committee Report (Cmd 4540, 1934) on this subject. See also Noël Hutton, "Mechanics of Law Reform" (1961) 24 Mod. L. Rev. 18. The first thirty years of the twentieth century witnessed an alarming increase in motor vehicle accidents resulting in death and serious injury. It became evident that the *actio personalis moritur cum persona* rule could cause grave injustice as it prevented an injured victim of a negligent driver of a motor vehicle from obtaining compensation for his injuries if the driver died in the accident.

⁶¹ The exceptions are defamation, seduction, making one spouse to leave or remain apart from the other and damages for adultery.

reads:⁶²

No proceedings shall be maintainable in respect of a cause of action in tort which by virtue of this section has survived against the estate of a deceased person, unless proceedings against him in respect of that cause of action either—

- (a) were pending at the date of his death; or
- (b) are taken not later than six months after his personal representative took out representation.

It can be seen above that in the case of an action in tort against an estate of a deceased person, s. 8(3) provides an unusually short limitation⁶³ period of six months computed from the date the deceased tortfeasor's personal representative extracted his grant.⁶⁴ It has been held in both Malaysia and the UK⁶⁵ that this special period of limitation when it applies overrides the ordinary and longer period of limitation prescribed by the respective main statutes of limitation. Further, it has been held in Malaysia in *Mat bin Lim v. Ho Yut Kam*⁶⁶ that the limitation period prescribed in s. 8(3) is absolute and without any exceptions.

Case law has demonstrated that this short limitation period may sometimes be a trap for a victim of a tort or his solicitor.⁶⁷

B. *The Loo Khoo Chin Case*

The prospective perils that await a claimant for dependency when s. 7(5) and s. 8(3) of the CLA of Malaysia interact were demonstrated in a recent case, *Loo Khoo Chin v. Tan Cheng Hang*.⁶⁸ The case involved a collision between a motor lorry, a motorcycle and three motor cars. The collision caused the death of one Lu, his wife, Ooi, the motorcyclist, and two other persons. Lu and Ooi were survived by their only child, Tze Chern, an infant who was two years old at that time. The plaintiffs in this case were the personal representatives of Lu and Ooi, respectively. The first defendant was the driver of the motor lorry, whilst the second defendant was his employer. The third defendant was the personal representative of the deceased motorcyclist. The plaintiffs brought dependency claims under s. 7(1) of the CLA of Malaysia for the infant Tze Chern as well as estate claims on behalf of Lu and Ooi against all defendants. The claims, based on the alleged negligence of the defendants,

⁶² CLA of Malaysia, *supra* note 6, s. 8(3).

⁶³ See *Airey v. Airey* [1958] 2 Q.B. 300 (C.A.) and Jenkins L.J.'s statement (at 310) that the English equivalent clearly imposed a period of limitation.

⁶⁴ This short period had its genesis in the Law Revision Committee's fear, as expressed in its report in 1934, *supra* note 60, that the normal limitation period of six years for tort may delay the administration of the estates of deceased tortfeasors. Thirty-five years later, these fears were demonstrated to be without basis by the Report of the Law Commission of England (Cmnd 4010, 1969) which advocated the repeal of the English equivalent of s. 8(3) of the CLA of Malaysia, *supra* note 6.

⁶⁵ By the English Court of Appeal in *Airey v. Airey*, *supra* note 63 and the Malaysian Court of Appeal in *Lee Lee Cheng*, *supra* note 34.

⁶⁶ [1967] 1 M.L.J. 13 [*Mat bin Lim*].

⁶⁷ *Lee Lee Cheng*, *supra* note 34 and *Mat bin Lim*, *ibid.* are examples.

⁶⁸ [1997] 1 Current Law Journal 109 [*Loo Khoo Chin*].

were filed more than six months after the third defendant had obtained her grant of representation from the court. Mohd Hishamudin J. held that the dependency claim under s. 7(1) for the infant against the third defendant was time-barred under s. 8(3) read together with another provision of the CLA of Malaysia, namely, s. 8(5).

Section 8(5), a convoluted provision, reads:⁶⁹

The rights conferred by this section for the benefit of the estate of deceased persons shall be in addition to and not in derogation of any rights conferred on the dependants of deceased persons by section 7 and so much of this section *as relates to causes of action against estates of deceased persons*⁷⁰ shall apply in relation to causes of action under the said section⁷¹ as it applies in relation to other causes of action not expressly excepted from the operation of subsection (1).

His Lordship referred to the fact that the claims against the third defendant were filed six months after she had her grant of representation from the court, and said:⁷²

By reason of this time lapse, the claim for the benefit of the first and second deceased's estates are barred by s 8(3); and the claim for the benefit of their only surviving child, Lu Tze Chern—the sole dependant—is barred by s 8(5) of the Act (in this latter situation, I am relying on the words "... *so much of this section [8] as relates to causes of action against the estates of deceased persons shall apply in relation to causes of action under the said section [7]...*").

The decision in *Loo Khoo Chin* was inevitable bearing in mind the wording of s. 8(5). It has indicated that plaintiffs in a dependency claim may face grim consequences where s. 7(5) and s. 8(3) interact. The minor in the instant case would have suffered grave prejudice if it was not for the fortuitous fact that there were three defendants in respect of his dependency claim and that only the claim against the third defendant was affected by s. 8(5) and consequently, time-barred under s. 8(3).

C. *The Need for Reform*

It may be noted that in Malaysia, most s. 7 claims result from deaths caused by road accidents. In many a case, the same accident may also cause the death of the tortfeasor responsible for the accident. This may give rise to a possibility of a destructive interaction between s. 7(5), s. 8(3) and s. 8(5) of the CLA of Malaysia as was seen in *Loo Khoo Chin*. Section 8(3) serves no useful purpose today⁷³ and it is hoped that urgent steps would be taken to repeal this onerous inheritance from English

⁶⁹ CLA of Malaysia, *supra* note 6, s. 8(5) [emphasis added].

⁷⁰ That is, s. 8 of the CLA of Malaysia, *ibid.* and its subsections (1), (2) and (3).

⁷¹ That is, s. 7 of the CLA of Malaysia, *ibid.*

⁷² *Loo Khoo Chin*, *supra* note 68 at 119 [emphasis added].

⁷³ This and other negative features of the English equivalent were admirably illustrated in the Report of the Law Commission of England, *supra* note 64, which put forward an iron-clad case for the repeal of the equivalent English provision.

law. The English equivalent of s. 8(3), s. 1(3) of the *Law Reform (Miscellaneous Provisions) Act, 1934*, was repealed by the *Proceedings Against Estates Act 1970*.⁷⁴ It was seen that the corresponding provision in Singapore, s. 8(3) of the CLA (as it stood in 1982), was repealed by s. 2 of the *Civil Law (Amendment) Act 1982*. At this juncture, it may be noted that a verbatim equivalent of s. 8(5) of the CLA of Malaysia continues to be a part of the CLA of Singapore.⁷⁵ However, its interaction with the limitation period in s. 20(5) of the CLA of Singapore will not produce the harsh outcome demonstrated in *Loo Khoo Chin* because of the removal of s. 8(3) from the CLA of Singapore.

VII. INTERACTION IN MALAYSIA BETWEEN S. 7 OF THE CLA AND THE *PUBLIC AUTHORITIES PROTECTION ACT 1948*⁷⁶

In Malaysia, a special statute of limitation that is sometimes relied upon by public authorities and their servants is the *Public Authorities Protection Act 1948*.⁷⁷ Section 2(a) of the Act provides a limitation period of thirty-six months if the Act applies. The limitation period applies when the plaintiff's suit is "against any person for any act done in pursuance or execution... of any written law or of any public duty or authority",⁷⁸ and it may sometimes interact with the limitation period under s. 7(5) of the CLA of Malaysia. The thirty-six months referred to in s. 2(a) of the 1948 Act are computed from the occurrence of "the act, neglect or default complained of".⁷⁹ On the other hand, the limitation period prescribed by s. 7(5) of the CLA of Malaysia starts its run from the date of the death of the deceased. Where the two periods of limitation interact and there is an interval between the fatal injury and death, the limitation period under s. 2(a) of the 1948 Act would expire at an earlier date because it is computed from the time of the occurrence of the injury. Thus, where a person is injured by a public authority, it is possible for the limitation period under s. 2(a) to expire in his lifetime (if he lingers in his injured state for more than three years) before his death from the same injury.

⁷⁴ *Proceedings Against Estates Act 1970* (U.K.), 1970, c. 17.

⁷⁵ See s. 10(5) of the CLA of Singapore, *supra* note 8.

⁷⁶ Singapore does not have an equivalent of the *Public Authorities Protection Act 1948* of Malaysia, *supra* note 10.

⁷⁷ *Ibid.* The Act, which applies throughout Malaysia, is an offspring of the *Public Authorities Protection Act, 1893* (U.K.), 56 & 57 Vict., c. 61. The English Act was repealed by the *Law Reform (Limitation of Actions etc) Act, 1954* (U.K.), 2 & 3 Eliz. II, c. 36. Section 2(a) of the Malaysian Act reads:

Where, after the coming into force of this Act, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority, the following provisions shall have effect:

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

⁷⁸ *Public Authorities Protection Act 1948, ibid.*, s. 2.

⁷⁹ *Ibid.*, s. 2(a).

A. *Where the Injured Person Dies from His Injuries after the Expiry of the Limitation Period under the 1948 Act*

In Malaysia, where a person injured by a public authority or its employee, dies after the period of three years under s. 2(a) of the *Public Authorities Protection Act 1948* had expired during that person's lifetime, it is likely that a Malaysian court will hold that a dependency claim under s. 7(1) of the CLA by that person's dependants cannot be maintained. This is because of the manner in which s. 7(1) is constituted. The dependants are only entitled to sue under s. 7(1) in respect of a wrongful act, neglect or default which caused the deceased's death if such act, neglect or default "is such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages thereof".⁸⁰ In other words, an action under s. 7(1) of the CLA of Malaysia would not lie unless the deceased himself was capable of suing in respect of the injury that caused his death, at the time of his death. Thus, no action would lie for the benefit of the dependants if the injured person had, before his death, compromised his claim for damages for personal injury or if the limitation period had expired in respect of his personal injury claim.⁸¹

There is no Malaysian decision which deals with the situation where both s. 2(a) of the *Public Authorities Protection Act 1948* and s. 7(5) of the CLA of Malaysia have interacted in a fatal accident claim, but Malaysian courts may refer to English case law for guidance.⁸² In England, in *Williams v. Mersey Docks and Harbour Board*,⁸³ the plaintiff's husband suffered injuries in 1902 and died from the same injuries in 1904, that is, after the expiry (in his lifetime) of the limitation period of six months then applicable under the *Public Authorities Protection Act, 1893* of England.⁸⁴ The Court of Appeal held that where the deceased's cause of action was time-barred under the *Public Authorities Protection Act, 1893* during his lifetime, an action under the *Fatal Accidents Act, 1846* could not be maintained. There is no reason why a Malaysian court would come to a different conclusion if facts similar to those of *Williams* were to reoccur in Malaysia.⁸⁵

B. *Situation Where Time under the 1948 Act, Which Was Running against the Deceased before His Death, Completes Its Run after His Death*

In *Venn v. Tedesco*,⁸⁶ it was decided that if the period of limitation under the English equivalent of s. 2(a) in the *Public Authorities Protection Act, 1893* had not expired at the time of the deceased's death, its subsequent expiry after his death would not act as a bar on a claim under the *Fatal Accidents Act, 1846*.

⁸⁰ CLA of Malaysia, *supra* note 6, s. 7(1).

⁸¹ See *British Columbia Electric Railway Co. Ltd. v. Violet Gentile* [1914] A.C. 1034 (P.C.) [*Violet Gentile*] and the authorities discussed in that case.

⁸² The English Act was the subject of extensive and intricate case law before it was repealed in 1954. Some of these cases have been applied in Malaysian decisions.

⁸³ [1905] 1 K.B. 804 (C.A.) [*Williams*].

⁸⁴ *Supra* note 77.

⁸⁵ It may be of interest to note that in *Violet Gentile*, *supra* note 81, the Privy Council expressed the view (*obiter*) that *Williams*, *ibid.* was rightly decided.

⁸⁶ *Supra* note 14.

Venn was decided when the limitation period under the English equivalent of s. 2(a) in the 1893 Act was six months and the limitation period under the *Fatal Accidents Act, 1846* was twelve months. In that case, the deceased's death was allegedly caused by the negligence of medical officers protected by the 1893 Act. The alleged negligence occurred on or about April 26, 1922. The deceased died on June 15, 1922, that is, within the limitation period under the 1893 Act. The deceased's widow filed an action under the *Fatal Accidents Act, 1846* on December 6, 1922. It can be seen that the widow's action was filed within the limitation period under *Fatal Accidents Act, 1846*, as that limitation period would only expire in June 1923. However, the action was filed after the expiry of the limitation period under the 1893 Act, as that limitation period had expired on or about October 26, 1922. McCardie J. held that the widow's claim could be maintained. His Lordship adopted the reasoning in a Privy Council case, *Violet Gentile*,⁸⁷ although that decision was not binding on him. *Violet Gentile* involved two statutes in British Columbia which were materially similar to the English Acts of 1846 and 1893 mentioned above. They were the *Consolidated Railway Company Act*⁸⁸ which contained provisions protecting public authorities and the *Families Compensation Act*⁸⁹ which contained provisions on fatal accidents which were similar to those contained in the 1846 Act. Like in the case of the CLA of Malaysia, claimants under the *Families Compensation Act* were only entitled to sue if the deceased's death was caused by a wrongful act which was such "as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof".⁹⁰ In this case, the plaintiff's husband was knocked down by one of the defendant's tram cars on October 7, 1911. The deceased died from his injuries on the same day, that is, before the limitation period of six months protecting the defendant under the *Consolidated Railway Company Act* had expired. The plaintiff commenced her action for compensation on June 10, 1912, that is, within the limitation period of twelve months under the *Families Compensation Act* but after the expiry of the limitation period under the *Consolidated Railway Company Act*. The Privy Council held that the action was maintainable even though the limitation protecting the defendant as a public authority had expired. This was because the statutory action under the *Families Compensation Act* was a "new cause of action" which had sprung into existence at the moment of the deceased's death.⁹¹ Referring to the words "as would if death had not ensued have entitled the party injured to maintain an action and recover damages in respect thereof" in the *Families Compensation Act*, Lord Dunedin, who delivered the judgment of the board, said that the crucial point in time was the moment of death, with the fictional assumption that death had not taken place.⁹² If the deceased, had he survived at that moment, could not have successfully maintained his action against the public authority, then the action under the *Families Compensation Act* would not arise.

⁸⁷ *Supra* note 81.

⁸⁸ *Consolidated Railway Company Act*, 1896, c. 55 (British Columbia).

⁸⁹ *Families Compensation Act*, 1911, c. 82 (British Columbia).

⁹⁰ See *Violet Gentile*, *supra* note 81 at 1041.

⁹¹ *Ibid.* at 1040.

⁹² *Ibid.* at 1041.

The reasoning in *Violet Gentile* is sound and convincing and it is hoped that Malaysian courts would adopt the reasoning if similar facts were to occur in Malaysia.

C. *The Need for Reform*

In the UK, the *Law Reform (Limitation of Actions etc) Act* in 1954 put an end to the special protection enjoyed by public authorities and their servants and the cases mentioned above are no longer pertinent. Claims under the current *Fatal Accidents Act 1976* are regulated by a common limitation period found in s. 12 of the *Limitation Act 1980*. Neither are they relevant in Singapore which does not have a *Public Authorities Protection Act*. In Malaysia, the *Public Authorities Protection Act 1948* continues to remain in the statute book and there is no indication that it will be repealed.

Where a person is injured by a public authority and there is an interval of three years or more between his injury and his subsequent death from that injury, a claim for dependency by his dependants will be lost if the three-year limitation period under the 1948 Act applies to the injury. Such a case may be uncommon but the prospects of its occurrence cannot be ruled out. To protect claimants of dependency from any hazard that may arise when the 1948 Act and the CLA of Malaysia interact, this article suggests that the 1948 Act be amended to insert a provision that it shall not apply to a claim under s. 7(1) of the CLA. The enactment of such a provision may, in rare cases, result in public authorities having to face a stale dependency claim, but this article submits that the need to protect needy dependants of deceased persons outweighs the necessity to protect public authorities.

VIII. INTERACTION BETWEEN S. 7(5) AND THE *LIMITATION ORDINANCES* OF SABAH AND SARAWAK

The CLA of Malaysia is a Federal statute and its provisions operate throughout Malaysia. The limitation period found in its s. 7(5) is for a specific and clearly identified cause of action and should prevail over any conflicting period in a general statute of limitation. Nevertheless, it is possible for an interaction between s. 7 of the CLA of Malaysia and the *Limitation Ordinances* of Sabah and Sarawak to cause difficulties to claimants for lost dependency.

At this point in time in West Malaysia, the limitation period for a personal injury claim is six years from the date of accrual of the cause of action, but plaintiffs in Sabah and Sarawak face a more severe limitation regime. In these states, the limitation period “for compensation for injury to the person” is stated in art. 92 of the *Limitation Ordinance* of Sarawak and art. 94A of the *Limitation Ordinance* of Sabah. The limitation period under both articles is three years and it runs from the date “when the injury was committed”. If an injured person in East Malaysia does not sue for compensation within three years of the date of the injury, he will forfeit his remedy for personal injuries. Secondly, if he dies as a result of the same injuries on a date which is three years after the occurrence of the injuries, his dependants would not be able to bring a claim under s. 7(1) of the CLA of Malaysia. As has been seen, the dependants of a deceased are only entitled to bring a claim for lost support under

s. 7(1) if the act, neglect or default which caused the deceased's death is "such as would, if death had not ensued, have entitled the party injured to maintain an action and recover damages in respect thereof".⁹³ Admittedly, an interlude of three years between an injury to a person and the death of that person from that injury may be uncommon, but when it does occur, it will destroy the remedy of the dependants who wish to claim for lost support from the deceased. It may also be noted that at this point in time, the East Malaysian statutes of limitation do not contain any provisions dealing with the subject of latent personal injury and time will run from the date of the injury even though the plaintiff was unaware that he had suffered that injury.

As a measure of reform, this article would recommend that the amendments suggested for West Malaysia be also adopted for East Malaysia. Briefly the amendments would involve the repeal of the limitation provision in s. 7(5) of the CLA of Malaysia and the insertion into the *Limitation Act* of West Malaysia and the *Limitation Ordinances* of East Malaysia of new provisions to deal with the limitation period for a claim under s. 7(1) of the CLA as well as an estate claim. The new provision would prescribe a knowledge-based limitation period that also caters for latent injury.⁹⁴

IX. CONCLUDING REMARKS

The enactment of the *Fatal Accidents Act, 1846* in England was a major milestone in the history of civil remedies in common law jurisdictions. The Act created a new statutory cause of action for damages for the dependants of a deceased person against a defendant who had wrongfully caused that person's death. As a result of Malaysia's and Singapore's close bond with English law, the statutory cause of action, commonly referred to as a dependency claim, was adopted by the legislatures of the Straits Settlements and the Malay states in the early part of the twentieth century and today it is deeply embedded in s. 7 of the CLA of Malaysia and s. 20 of the CLA of Singapore.

This article has demonstrated that the provisions concerning the limitation period for a dependency claim in Malaysia and Singapore have not kept pace with the passage of time and that some of its present features are capable of causing hardship to claimants. One of these unfortunate facets stems from the fact that the limitation period prescribed for the claim is enacted without exceptions.⁹⁵ Another regrettable feature of the present law in both Malaysia and Singapore is that time for the purpose

⁹³ The legal position is somewhat similar to that when the limitation periods under the CLA of Malaysia, *supra* note 6, and the *Public Authorities Protection Act 1948*, *supra* note 10, interact. It was seen in Part VII(B) that in *Venn*, *supra* note 14, and *Violet Gentile*, *supra* note 81, it was decided that if the period of limitation under legislation which was the equivalent of s. 2(a) of the *Public Authorities Protection Act 1948* of Malaysia was running against the deceased at the time of his death, its completion after his death would not act as a bar on a dependency claim. It is uncertain as to what stand a Malaysian court would take if the limitation period of three years under the *Limitation Ordinances* of East Malaysia, *supra* notes 4 and 5, was still running at the time of the deceased's death but completed its run before the dependency claim was filed.

⁹⁴ This will be a major exercise as it would require existing provisions on personal injuries and estate claims in the Ordinances to be repealed.

⁹⁵ It was seen in Part V of this article that in Malaysia, this aspect of the limitation period has prompted the argument that it may be raised as a defence at the trial even though it was not pleaded in the defendant's statement of defence.

of limitation runs immediately from the date of death regardless of the state of the knowledge of the person for whose benefit the action is brought. In Singapore, the Law Reform Committee of the Academy of Law in its report on the review of the *Limitation Act* has addressed these matters and made specific recommendations to overcome them.

This article has also attempted to show that in Malaysia, claimants for dependency may face certain perils when the limitation period under s. 7(5) of the CLA interacts with the limitation periods under other statutes. The most serious of these occurs when s. 7(5) and s. 8(3) of the CLA of Malaysia interact. It was seen in Part VI that when this interaction occurs, the exceptionally short limitation period prescribed by s. 8(3) of the CLA of Malaysia will override the limitation period of three years found in s. 7(5) and may act to defeat a deserving claim for dependency.

In Malaysia, there is no indication at present as to when the limitation period under s. 7(5) of the CLA and the law associated with it will be reviewed. This article will conclude by reiterating that such a review is clearly necessary and that it must be undertaken as soon as possible bearing in mind the importance of the claim to needy dependants of deceased persons. Many of these dependants are widows and minor children of deceased breadwinners of families. Many pin their hopes for compensation and survival on the dependency claim.