DALAM MAHKAMAH TINGGI MALAYA DI KUALA LUMPUR
DALAM WILAYAH PERSEKUTUAN
(BAHAGIAN SIVIL)

GUAMAN SIVIL NO : 21 NCvC-168-07/2012

ANTARA

GANGA GOURI A/P RAJA SUNDRAM
[mendakwa bagi dirinya sendiri serta mendakwa sebagai Pentadbir Sah Harta Pusaka Mendiang Gunasegaran a/l Raja Sundram, Simati] **... PLAINTIF**

DAN

1. **MOHD FAIZAL BIN MAT TAIB (RF 151345)**
2. **RAJINDER SINGH A/L KARTAR SINGH (RF 10513)**
3. **NORAZMAN BIN MOHAMED (RF 111524)**
4. **SUBARI BIN SARNO (RF 91353)**
5. **MOHD ZAHIR BIN ISMAIL (RF 128740)**
6. **ROHAIZAD BIN IBRAHIM KONI (RF 122589)**
7. **MOHD AZRUL HADI BIN MOKHTAR (I 18774)**
8. **MOHAMAD IDRIS BIN OMAR (G/15431)**
9. **ACP ZAKARIA BIN PAGAN (G8293)**
10. **KETUA POLIS NEGARA MALAYSIA (TAN SRI MUSA BIN TAN SRI HJ HASSAN, pada masa material)**
11. **PEGAWAI YANG MENJAGA MAYAT**
12. **KERAJAAN MALAYSIA** **... DEFENDAN-DEFENDAN**

GROUNDS OF JUDGMENT

PLAINTIFF'S ACTION

1. This is a Writ action filed by the Plaintiff for general damages, special damages (including funeral expenses), exemplary damages, aggravated damages, interest and costs arising from the death of her brother, Gunasegaran a/l Rajasundram ("the Deceased" or "Guna"), 31 years old at the material time, whilst under Police arrest and custody.

2. For ease of reference, the 1st to the 12th Defendants shall be referred to as D1 to D12 respectively.

BRIEF FACTS

3. On 16.7.2009 at about 3.00 p.m. a team of Police officers headed by D2 left the Sentul Police station to carry out an anti-drugs operation in the Sentul Manis area. 5 persons, including the Deceased, suspected of being involved in dangerous drugs activities, were arrested and brought back to the Sentul Police station.

4. D3 made a Police report i.e. Sentul Report No. 9232/09 (ID Pt B pg 551) regarding the arrests of 4 of the suspects, but excluding the arrest of the 5th suspect i.e. the Deceased.

5. The Deceased was required to undergo a urine test and the documentation process, but he died when he was at the lockup of the Sentul Police station.

6. The 1st Post-Mortem report ("the 1st PM report") of Hospital Kuala Lumpur (ID Pt A pg 4 to 9) stated that the cause of death of the Deceased is a "Drug Related Death".

7. The Plaintiff was dissatisfied with the 1st PM report and vide an Order of the Kuala Lumpur High Court dated 18.8.2009 obtained by the Plaintiff, a 2nd Post-Mortem was conducted by the University of Malaya Medical Centre ("UMMC") on 28.2.2009. The 2nd Post-Mortem report ("the 2nd PM report") (ID Pt B pg 561 to 563) stated that the cause of death of the Deceased "IS CONSISTENT WITH THE FINDINGS OF THE FIRST POST MORTEM".

8. The Magistrate, sitting as the Coroner, who conducted the Inquest (Notes of Proceedings/NOP in ID Pt A pg 77 - 483) regarding the Deceased's death gave an Open Verdict on 21.10.2010 (ID Pt A pg 484 to 489 at pg 488).

9. Upon the Plaintiff's application for criminal revision of the Coroner's decision (ID Pt A pg 490 - 509), the Kuala Lumpur High Court (Criminal Division), inter alia, made the following findings:

> "(b) Simati telah meninggal dunia antara jam jam 5.30 hingga 7.20 petang pada 16/7/2009 berkemungkinan berlaku di Balai Polis Sentul atau sekurang-kurangnya dalam perjalanan antara Balai Polis Sentul ke Hospital Kuala Lumpur;
>
> (c) Sebab kematian Simati adalah berkemungkinan akibat dari kecederaan kerana dipukul dan ditendang dan/atau akibat mengambil dadah chloroquine yang berlebihan;
>
> (d) Sebelum kematiannya, Simati telah dipukul dan ditendang oleh SI 8, L/Kpl. 151345 Mohd Faizal Bin Mat Taib. Walau bagaimanapun tiada bukti konklusif dan saintifik bahawa perbuatan tersebut sebagai punca sebenar menyebabkan kematian atau telah mempercepatkan kematian Simati." (see ID Pt A pg 528 and 529).

10. The learned High Court Judge confirmed the Open Verdict of the Coroner (see Grounds of Decision dated 19.7.2012 in ID Pt A pg 509 to 529).

THE PLAINTIFF'S CLAIMS

11. The Plaintiff's claims against the Defendants are as follows:

D1:

The Plaintiff alleged that D1 had caused serious injury to the Deceased which led to his death.

D2 to D6:

The Plaintiff alleged that D2 to D6 had failed in discharging their duties in preventing and or stopping the Deceased from being assaulted by D1 which led to his death.

D1 to D7:

The Plaintiff alleged that D1 to D7 failed to report the death of the Deceased at that material time or at any time as required by law.

The Plaintiff had also alleged that all these Defendants failed to give emergency assistance to the Deceased. All these Defendants had put the Deceased in serious danger in view of the injuries caused to the Deceased.

The Plaintiff further alleged that all these Defendants failed to comply with their directions and legal duties, regulations and practices as Police officers.

D8:

The Plaintiff alleged that D8, the Investing Officer ("IO"), failed to conduct a proper investigation in finding the cause of death, to consider that D1 to D7 had violated the law of the country when they failed to report the death of the Deceased. D8 had failed to consider the

Statutory Declaration by 3 witnesses who were arrested with the Deceased on what had actually happened during that day of the incident. D8 was further alleged of failure in discharging his legal duties in conducting the investigation.

D9 and 10:

The Plaintiff alleged that D9 and D10 had failed to ensure that D1 to D7 complied with the law, in particular the Police Regulations and practices.

D11:

The Plaintiff alleged that D11 had intentionally failed to keep properly the corpse of the Deceased and to ensure that it would be in a good condition while under his custody. D11's failure to do so had caused the corpse to be so badly decomposed that it produced an extreme smell to the extent that the Plaintiff could not give the Deceased the customary funeral and burial ceremony.

D12:

The Plaintiff alleged that D12 is vicariously liable for the acts of D1 to D11.

LOCUS STANDI

12. The Defendants raised the issue that the Plaintiff has no locus standi to commence this action. Counsel for the Plaintiff submitted that the Defendants had never pleaded anywhere in their Defence that the Plaintiff lacks the locus standi to bring this action against the Defendant.

13. Notwithstanding the fact that locus standi was not pleaded by the Defendants, the Court is of the view that this issue, being a legal issue,

has to be determined by the Court first. The Plaintiff must prove to the Court that she has locus standi to commence this action and maintain it.

14. From the intitulement of this suit, the Plaintiff is suing on behalf of herself and also as the valid Administrator of the Estate of the Deceased. Thus, the Plaintiff had commenced this suit pursuant to s.7 and s.8 of the Civil Law Act 1956 ("the CLA").

15. S.7(1) and (2) of the CLA provide:

> "**Compensation to the family of a person for loss occasioned by his death**
>
> **7.** (1) Whenever the death of a person is caused by wrongful act, neglect or default, and the 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 in respect thereof, the party who would have been liable if death had not ensued shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death has been caused under such circumstances as amount in law to an offence under the Penal Code [Act 574].
>
> (2) Every such action shall be for the benefit of the wife, husband, parent, and child, if any, of the person whose death has been so caused and shall be brought by and in the name of the executor of the person deceased.".

16. Applying s.7(2) of the CLA to this suit, the Court holds that since the Plaintiff is not the wife, parent or child of the Deceased, but is the sister of the Deceased, the Plaintiff is not allowed to file this action on behalf of herself.

17. The Plaintiff is now only left with her claim under s.8 of the CLA ("s.8") which is an estate claim. The question is whether the Plaintiff has locus

standi to maintain the action under the same s.8 in order to succeed in her claim. To determine this, the Court has to consider two situations:

(a) at the time of filing of the suit; and
(b) at the time the Letter of Administration ("LA") was obtained.

(a) At the time of filing of the suit

18. S.2(a) of the Public Authorities Protection Act 1948 ("the PAPA") provides:

"**Protection of persons acting in execution of statutory or other public duty**

2. 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 the case of a continuance of injury or damage, within thirty-six months next after the ceasing thereof; ".

19. In order to succeed in claiming against the Defendants, namely, persons who are acting in execution of a statutory or other public duty, the Plaintiff's action "shall not lie or be instituted unless it is commenced within thirty-six months after the act, neglect or default complained of". The Deceased died on 16.7.2009 allegedly from such acts, neglect or default of the Defendants. The suit was filed on 13.7.2012 which is within the 36 months required under s.2(a) of the PAPA. Therefore, in

terms of the time limit for filing the suit, the Plaintiff has complied with the requirements of s.2(a) of the PAPA.

(b) At the time when the LA was obtained

20. However, the next issue is whether the Plaintiff can institute this action in the 36 months after the death of the Deceased but before the grant of the LA by the Court.

21. The Plaintiff's reason for not being able to commence this suit within the 36 months with the LA in hand, is that the LA was only granted to her on 2.8.2012 i.e. 26 days after the Writ of Summons had been filed by her on 13.7.2012 (see Notes of Proceedings/NOP at pg 21 lines 1 – 21).

22. In **Ang Hoi Ying V. Sim Sie Hau** [1969] 2 MLJ 3 at page 4, Lee Hun Hoe J. (as he then was) referred to **Comptroller of Income Tax V. Yan Tai Min [1965] 1 MLJ 255** and then, inter alia, stated:

> 'The defendant had obtained an order for the grant of letters of administration to him of the estate of Yan Koon Wing deceased but he had not extracted the grant. Ali J. held that only on extracting the grant of letters of administration could a person be said to be duly clothed with a representative character and to have acquired a title to the estate so as to make him an administrator within the meaning of O.16 r.8 of the Rules of the Supreme Court. Therefore the defendant was not the administrator and the action could not be brought against him as administrator.
>
> A similar question whether a person who had obtained an order from the registrar for the grant of letters of administration to issue could be sued in a representative capacity before the grant was extracted arose in the earlier case of P Govindasamy Pillay & Sons v Lok Seng Chai & Ors [1961] MLJ 89 at p 91. Following the decision of Ingall v Moran [1944] 1 KB 160; [1944] 1 All ER 97 Ismail Khan J. (as he then was) said: -

> "In my opinion, it is only on extracting the grant of letters of administration that the petitioner can be said to be duly clothed with a representative character and to have acquired a title to the estate.".
>
> ……From the authorities it seems clear that the law on the matter is the same whether a person sues as administrator or is being sued as such if he has not extracted letters of administration at the commencement of action. The writ must be regarded as a nullity from the beginning and be set aside.'.

23. Similarly, in the present case, the Plaintiff should first extract the LA before she could be duly clothed as the legal representative of the Deceased in order to commence this suit. At the time when the suit was filed by the Plaintiff, the Plaintiff had no locus standi because she had not yet been legally appointed as the representative or administrator of the estate of the Deceased.

24. Counsel for the Plaintiff relied on the Federal Court decision in **AL Rashidi Kassim & Ors V. Rosman Roslan** [2007] 3 CLJ 361 where the Federal Court held that there existed special circumstances for the beneficiaries to commence legal action against the respondent even though they did not have the locus standi, namely, for the limited purpose of protecting and preserving the assets of the estate.

25. In **Ooi Jim & Anor V. Al EIT & Ors** [1977] 2 MLJ 105, the Federal Court decided:

> "….. it was not necessary for the first plaintiff to takeout such letters of administration in order to bring ….. an action for a declaration as to the status of her husband. The question of taking out letters of administration would only arise when it

became necessary for the first plaintiff to claim her share in the estate of the said intestate.".

26. I am of the opinion that **A/L Rashidi Kassim** (supra) and **Ooi Jim** (supra) ought to be distinguished here. In the present case, there is no asset of the estate of the Deceased to be protected. Counsel for the Plaintiff submitted that the Plaintiff filed this action prior to extracting the LA not to administer the estate or to seek benefit from the Deceased's estate but rather merely for preserving and protecting the interests of the Deceased's estate. To my mind, this is not a good ground because such interests of the Deceased can still be protected after the Plaintiff has been given the LA. There is no urgency for her to file this action before that. Therefore, since there are no assets to be protected or preserved, the Plaintiff has failed to show that there are special circumstances to allow her to file this action without the LA.

27. The Court holds that the Writ of Summons filed by the Plaintiff, claiming to be the administrator of the estate of the Deceased at the material time, is a nullity and ought to be dismissed since the LA was obtained after and not before the date of filing of the Writ.

DETERIMINATION OF LIABIBILITY

28. At the outset of the Hearing, both parties informed the Court that they have agreed that the Court hears the case and determine the issue of liability first. Should the Defendants be found liable, the matter of proof and assessment of damages would be heard before the Senior Assistant Registrar. The Court proceeded on this basis.

EVALUATION AND FINDINGS

(1) Whether D1 had inflicted the serious injuries on the Deceased, and whether he was assisted in or prevented from committing such acts by D2 to D6

29. The Plaintiff relied on the evidence of the 2 suspects who were arrested together with the Deceased on 16.7.2009 i.e. Selvach a/l Krishnan (PW2) and Ravi a/l Subramaniam (PW3). PW2 and PW3 had earlier also made their respective Statutory Declaration ("SD") on what they had seen regarding the arrest and assault of the Deceased (SD of PW2 is in ID Pt B pg 556 – 557; SD of PW3 is in ID Pt B pg 553 – 555).

30. Both PW2 and PW3 stated, in their oral evidence in Court and in their SDs, that the arrest of the Deceased, together with PW2, PW3 and 2 others, in the area of the Toddy Shop was on 16.7.2009 at about 5.30 p.m. by a team of Police officers who were not in uniform. However, D2, the Police officer who led the Operation, "Operasi TAPIS" ("the Operation"), stated that the Operation started around 3.00 p.m. and the suspects were brought back to the Sentul Police station at about 5.45 p.m. The Court notes that in the Station Diary of the Police (ID Pt B pg 548), it is recorded that the Operation started at 3.00 p.m.

31. The Plaintiff contended that the Deceased died at about 5.30 p.m. after being assaulted by D1 while at the Sentul Police station at the time when the Deceased was required to undergo a urine test. The Plaintiff relied on 2 documents, namely:

    (i) the Form, "Permintaan Pemeriksaan Mayat" dated 17.7.2009 (ID Pt A pg 16), where Inspector Fazrul requested the Hospital Kuala Lumpur ("HKL") for a Post-Mortem ("PM") to be done on the

Deceased, and stating that the Deceased died at 5.30 p.m. in the fingerprint room at Jabatan Siasatan Jenayah Narkotik IPD Sentul.

(ii) the 1st PM report (ID Pt A pg 45-50) where the doctor, Dr. Nurulhasanah binti Mustapar (DW9) ("Dr. Nurul") who did the 1st PM at page 5 under "HISTORY (From the Police)" stated "I was informed by the police that on 16/07/2009 at about 1730 hrs, the deceased had died while at Jabatan Siasatan Jenayah Narkotik, IPD Sentul in Kuala Lumpur.".

32. Even though the Defendants, in particular D1 and D2, contended that at 5.30 p.m. on 16.7.2009, the Deceased was still alive and the Deceased fell down and became unconscious at about 6.40 p.m., DW2 under cross-examination admitted that the Deceased was "BID" or Brought In Dead at 7.40 p.m. on 16.7.2009 to HKL (see "Rekod Pesakit Yang Dirawat" of HKL in ID Pt B page 572).

33. The Court finds that it is more probable that the Deceased died at 5.30 p.m. on 16.7.2009 and not at a later time as alleged by the Defendants. However, what is more important in this case is not the exact time that the Deceased died on 16.7.2009, but rather the issue whether the Deceased was assaulted by D1, and D2 to D6 to the extent that he died from the injuries resulting from such assault.

The evidence of PW2 and PW3

34. PW2 stated that at about 5.30 p.m. on 16.7.2009, he was in the vicinity of the Toddy shop in Sentul. He was arrested together with the Deceased by 6 Police officers i.e. D1 to D6. He saw the Deceased being kicked by a Police officer in a green shirt and the same officer also used a piece of wood to beat the Deceased twice before the

Deceased was made to get into the Police van at the place of the Operation and arrest.

35. When they were brought to the Police station, again PW2 saw the same Police officer using a rubber hose to beat the Deceased on the head. The Police officer also accused the Deceased of running away fast before he was arrested. The Police officer then kicked the Deceased on his back which caused the Deceased to fall down flat on his face and could not get up. PW2 was not sure whether the Deceased was still alive then. PW2 was released at 6.30 p.m. on the same day after his urine test confirmed that he was not a drug addict.

36. PW3 stated that at about 5.30 p.m. on 16.7.2009 he was also arrested, together with the Deceased and 3 other persons, by 6 Police officers i.e. D1 to D6.

37. While at the lockup at the Sentul Police station, he saw a Police officer in a green shirt kicking the Deceased and beating the Deceased with a rubber hose. He heard the Police officer mocking at the Deceased "u kuat lari" "Sini u mari bikin wayang". PW3 heard the Deceased screaming and crying "Takda cikgu" several times. PW3 also heard the sound of a chair falling and a table moving. Later he did not hear anything.

38. After that one of the Police officers came to PW3's lockup and told PW3 "satu India keluar dan bagi tau dia suruh bangun. Cakap dia boleh balik.".

39. PW3 went out of his lockup and tried to wake up the Deceased. The Deceased did not move and PW3 felt that the Deceased's body was cold. PW3 informed the Police officers that the Deceased could not

wake up. PW3 then went back to his lockup. The Deceased was put on a stretcher and placed infront of the lockup. PW3 heard a Police officer saying “perut tak gerak”. Another person then said “masih gerak”. They then took the Deceased out on a stretcher.

40. PW3 said that he did not see any Police officer trying to help the Deceased by giving emergency assistance. After about an hour, a Punjabi Police officer came to PW3’s lockup and spoke to PW3 in Tamil. He requested PW3 that if PW3 was asked by anyone, PW3 should say that the Deceased fell while walking to give his urine for the urine test. The Police officers told PW3 not to tell anyone that the Deceased was beaten by anyone, and instead the Deceased died on his own. The Police officers promised to let PW3 be released early if he co-operated with the Police. PW3 gave a statement to the Police regarding the Deceased’s death at 3.00 a.m.

41. Both PW2 and PW3 in their SDs did not name the Police officer who kicked and beat the Deceased. However, in Court they identified that Police officer as D1. PW3 identified the Punjabi Police officer as D2.

42. The Court bears in mind that PW2 and PW3 were arrested together with the Deceased for alleged involvement in dangerous drug activities, and their evidence should be treated with caution since they may have a personal interest in the matter. However, after considering the evidence of PW2, PW3, and D1 to D7, on a balance of probabilities, the Court finds that it is more probable that PW2 and PW3 were telling the truth, and not fabricating a story. It is highly probable that the Deceased was kicked by D1 at the time of his arrest near the Toddy shop, and later he was also kicked and further beaten with a rubber hose by D1 at the Sentul Police station.

43. The Deputy Public Prosecutor ("DPP"), at the Inquest, submitted that as a matter of consistency and logic, the arrest of the Deceased would have taken place at 3.00 p.m. of 16.7.2009, and the Deceased would have died at 5.30 p.m. and not at 7.40 p.m. There was abuse of power by the arresting Police officers on that day in that they did not comply with procedure in carrying out their duties which, inter alia, include the following:

- failure to make a Police report early after the Deceased was arrested;

- taking statements from the suspects at 2.30 a.m. in breach of the Police lockup rules;

- not masking a Police report on the Deceased's death even until today;

- not maintaining notes in the pocket book of the Police officers;

- the records in the station diary showed a discrepancy between the time the Police officers left the Sentul Police station for the Operation and the other suspects (see NOP of Inquest in ID Pt A pg 442 – 449).

44. Whatever was adduced as evidence in the Inquest was further adduced in material particulars in the Hearing in the present case. From the totality of the evidence adduced, the Court agrees with the submissions of the DPP at the Inquest. Further to that, the Court finds as follows:

- the only thing that the Police officers did, by way of giving emergency assistance in order to try to revive the Deceased after he had become unconscious, was to sprinkle some water on the Deceased, purportedly by either D2, D5, or D7 (note: they were

not consistent with each other's testimony as to who actually did the sprinkling). After that, D2 and his officers put the Deceased on a stretcher and brought him to hospital. It cannot be confirmed at what point the Deceased died, whether at the Sentul Police station or on the way to HKL, but the Deceased was brought in dead to HKL.

- even though the D5 alleged that the Deceased fell down and became unconscious when he was at the fingerprint office at the Sentul Police station, the fingerprint report has not been produced in Court.

45. D2 stated that the Deceased's name was not included in the first Police report made by D3 on the arrests of the suspects made on 16.7.2009 (ID Pt B pg 551) because just before the Deceased's arrest, when he was running away, D3 saw the Deceased throwing on to the ground a package wrapped in newspapers. The Deceased stopped to pick up the package and was arrested. Subsequently, D3 found that the package contained 8 straw tubes which are suspected to be heroin ("the 8 straw tubes"). According to D2, the usual practice or procedure for dangerous drugs cases is that the arrest report would only be made after the urine test. In this case, even before the urine test could be done, the Deceased fell down and fainted, and later passed away. If what D2 stated is true, Court questions why at the Inquest and at this Hearing, the 8 straw tubes were not produced in Court by the Police.

46. The 2nd Police report lodged by D2 at 7.32 p.m. on 16.7.2009 (ID Pt A 181) merely stated that the Deceased fell down and was unconscious when he was undergoing the documentation process at Bahagian Siasatan Jenayah Narkotik at the Sentul Police station.

47. None of the Defendants, D1 to D7, knew where the fingerprint report and the 8 straw tubes of the Deceased are. Even the IO, DW8, did not know about these 2 matters. He did not know why there was no Police report made on the Deceased's death. DW8 also confirmed that no investigations were conducted in respect of the 2 Police reports which were lodged on 28.7.2009 and 25.10.2010 respectively by the Plaintiff after the Deceased's death (ID Pt A pg 3 and ID Pt B pg 565 and 566).

48. D4 only made a Police report on the arrest of the Deceased at 8.27 p.m. on 16.7.2009 after the Deceased had died (see police report 9237/09 in ID Pt A pg 2). This report is only regarding the arrest, but not the death of the Deceased. If what D2 had testified is true, that the arrest report of the Deceased would be made only after the urine test for drugs was done, then it does not make any sense for D4 to make the Police report on the Deceased's arrest after the Deceased's death and no urine test was done in the first place.

49. D9 stated that he formed a special team to investigate the death of the Deceased. They took statements from several witnesses including PW2, PW3 and Arfisha ("the 3 witnesses"), and D1 to D7. The 3 witnesses informed the Police that they did not see any Police officer beating or using force on the Deceased at the time of arrest or at the Sentul Police station. D9 was directed to call the Coroner/Magistrate, Tuan Nazran, and Unit Forensik PDRM to assist in the investigation that night of 16.7.2009. On the same night, the Coroner and Unit Forensik PDRM went to the HKL mortuary and examined the body of the Deceased. The Coroner confirmed that no injuries were found on the body of the Deceased. The Police maintained that all investigations regarding the Deceased's death were already completed and there was no reason to conduct further investigations pursuant to the 2 Police

reports made by the Plaintiff (see also the Witness Statement and evidence of DSP Lim San Aik/DW12).

50. The Court is of the opinion that the Police have a duty to investigate further in view of the suspicions and serious doubts raised by the Plaintiff regarding the death of the Deceased. It is a breach of the statutory duties of the Police under the Criminal Procedure Code and the Police Act 1967 and the subsidiary legislation made thereunder for the Police to ignore the Complainant's / Plaintiff's Police reports which were made on valid grounds and concerns. However, to date there is no proof of further Police investigations regarding the Deceased's death after the Plaintiff had lodged her 2 Police reports.

51. From the evidence adduced, notwithstanding the Press Conference held on 17.7.2009 by ACP Zakaria bin Pagan (DW11/D9), the Head of the Sentul Police station, to make public the death of the Deceased so that the Deceased's next of kin would contact the Police, it is clear from the totality of the evidence that there is no full and frank disclosure by the Police officers regarding the time and place of death of the Deceased, and the kicking and beating of the Deceased by D1 before his death.

52. The evidence also shows that no disciplinary action or any appropriate action has been taken by D10 and D12 regarding the acts, omissions, neglect or default of the Police officers concerned.

53. The Plaintiff blamed the Police for causing the delay in allowing the 2nd PM to be conducted. Here, the Court agrees with the submissions of Counsel for the Defendants that the Police had already discharged their duties when they ensured that the 1st PM was done. There is no legal duty on the Police to arrange for a 2nd PM. It is entirely up to the

initiative of the Plaintiff and/or the Deceased's family to get the Court Order and make the necessary arrangements for the 2nd PM. The Plaintiff does not require the approval of the Police for the 2nd PM to be done. In any case, the Police had informed the Plaintiff that they had no objections to the 2nd PM. Thus, the Police should not be made liable if the Plaintiff and the Deceased's family could not have the usual customary rites for the Deceased's funeral due to the bad decomposition of the Deceased's body. Neither should the Defendants be blamed for the findings of the doctor for the 2nd PM.

(2) Whether the Deceased's death was caused by the injuries inflicted by D1 and the other Police officers who were with D1 i.e. D2 to D6

The 1st PM report

54. In the 1st PM report made by Dr. Nurul, the Court notes, inter alia, the following:

"MARKS OF INJURY

1. No significant external marks of injury seen." ;

"INTERNAL EXAMINATION

HEAD

Scalp	No laceration of the scalp or subgaleal contusion noted.
Skull	No fracture of the skull vault or the basis of the skull." ;

"MOUTH, THROAT & NECK STRUCTURES

Cervical muscles	No contusion.
Cervical spine	No fracture." ;

"THORAX

Ribcage	No fracture of the sternum. The ribs were intact. ".

55. From the 1st PM report, it is shown that there were no external injuries or internal injuries found on the Deceased's body.

56. Dr. Nurul took specimens of blood for alcohol and toxicology studies, and urine for alcohol and toxicology studies.

57. The rapid tests for blood showed that the Deceased was HIV positive.

58. The rapid tests for urine of the Deceased showed a positive for methamphetamine, morphine and cannabis.

59. Dr. Nurul concluded that "There were no significant marks of injury or trauma on the body that could have caused or contributed to his death.". The cause of death of the Deceased was stated as "Drug Related Death".

The 2nd PM report

60. The 2nd PM report on the Deceased was done by Dr. Prashant N Samberkar of UMMC ("Dr. Prashant"). Dr. Prashant came to the same conclusion as Dr. Nurul when he stated:

> "CAUSE OF DEATH:
> IS CONSISTENT WITH THE FINDINGS OF THE FIRST POST MORTEM.".

61. Dr. Prashant was not called as a witness. Thus, the Court had to consider the 2nd PM report according to its contents and also the evidence of Dr. Prashant given during the Inquest.

62. The Plaintiff relied on the fact that Dr. Prashant, in doing the 2nd PM, found, inter alia, the following:

"INTERNAL INJURIES:

A 28 cm x 08 cm x 05 cm soft tissue haemorrhage due to resuscitation efforts on the anterior surface of left chest wall." ("the injury mark").

63. Dr. Nurul who was present during the 2nd PM with Dr. Prashant agreed that there was such an injury mark there on the Deceased's body.

64. The Plaintiff contended that in the "Borang Untuk Diisi Bagi Semua Kes Kematian" of the Emergency Department of HKL dated 16.7.2009 at 7.40 p.m. (ID Pt B pg 573) ("the HKL Emergency Form"), it was recorded "Pemulihan (Resuscitation) : Tidak dilakukan". The Plaintiff submitted that since there was no resuscitation done on the Deceased, it is unlikely that the injury mark was due to any efforts made in trying to resuscitate the Deceased.

65. Dr. Prashant, in the Inquest (ID Pt A pg 342 – 360), was cross-examined on the fact that no resuscitation efforts were done and whether he would then review his opinion. Dr. Prashant replied:

> "No. The opinion that I have arrived to that this is an injury related to resuscitation is a result of the entire external and the internal examination where no other injury on the body was found ….. if I find some blood on the left chest surface, yes, it is some resuscitation must have occurred. But if my learned colleague is saying that no resuscitation has occurred then during the process of transport somebody must have resuscitated it.".

66. Dr. Prashant concluded that there were resuscitation efforts, and "it is possible during the transfer that somebody resuscitated him". He further stated "A simple resuscitation can also cause such injuries. …. All possibilities can be taken into consideration.".

67. Dr. Prashant, after seeing the toxicology report of the Deceased, gave the 2nd PM report. The toxicology report stated that morphine is detected and also multiple drugs. So the cause of death, according to Dr. Prashant, is "cause of multiple drugs.".

Both PM reports, which are consistent, must be accepted

68. During the Hearing in the present case, Dr. Nurul, under cross-examination admitted that had she been informed that the Deceased had been kicked and beaten before his death, she could have conducted further tests such a urine test to find out whether there was blood/bleeding in the urine, and done some X-rays on the Deceased's body, but she did not do so. Notwithstanding this, she informed the Court that the injury mark on the Deceased's body was minor/not serious to the extent that it could have caused the Deceased's death (see NOP Vol 4 pg 84 at lines 12-26, and pg 85 at lines 1-28). Dr. Nurul also informed the Court that the injury mark could have been due to post-mortem changes.

69. Dr. Nurul confirmed that it was not due to the HIV that the Deceased died.

70. On record, there are 2 PM reports which are consistent with each other that the Deceased died from a drug-related cause of death.

71. There is no PM finding that the Deceased died from internal and external injuries caused by the kicking and beating by D1. While the Court accepts the evidence of PW2 and PW3 that D1 did kick the Deceased and beat him with the rubber hose, there is no medical evidence to show that resulting from such kicking and beating, injuries

were caused to the Deceased and the Deceased died from such injuries.

72. Even though Dr. Prashant found the injury mark on the body of the Deceased, despite the fact that the HKL Emergency Form stated that no resuscitation was carried out, it is highly probable, as Dr. Prashant had explained, during the process of transporting the Deceased from the Emergency Department, that resuscitation was done and that resulted in the injury mark on the Deceased's body. It is not proper for this Court to reject Dr. Prashant's findings since he was the one who did the 2nd PM. The Court bears in mind that even though Dr. Prashant saw the injury mark on the Deceased's body, he could not find any internal injuries in the Deceased.

73. Pursuant to s.45 of the Evidence Act 1950, the expert evidence of Dr. Nurul and Dr. Prashant should be accepted by the Court. As submitted by Counsel for the Defendants, it is not open to this Court to import its own knowledge to determine the cause of death. Here, there are 2 PM reports which are consistent with each other regarding their findings on the cause of death. Dr. Nurul was then a Medical Officer in the Department of Forensic Medicine at HKL. She is not a Pathologist but she did the PM guided by her superior who is a Pathologist. Dr. Prashant is a Forensic Pathologist. The Plaintiff did not challenge the evidence of Dr. Nurul and Dr. Prashant by adducing other expert evidence. It must also be noted that Dr. Prashant is in fact an independent Pathologist appointed by the Deceased's family to conduct the 2nd PM. Yet, Dr. Prashant's findings are consistent with and support Dr. Nurul's findings on the cause of death of the Deceased.

74. The Court is fully sympathetic with the Plaintiff and the Deceased's family regarding the Deceased's death. However, but for as long as the

1st and 2nd PM reports are consistent with each other and the findings of the 2 doctors are that the cause of death of the Deceased was related to drugs, and not due to injuries caused by the kicking and beating by D1, the Plaintiff's claim cannot be allowed.

D10 and D12 not vicariously liable

75. Since it was not proved to the satisfaction of this Court that the kicking and beating by D1 resulted in injuries that caused the Deceased's death, it follows that the Court is unable to find D1 – D9 liable for causing the Deceased's death. Accordingly, D10 and D12 cannot be made vicariously liable for causing such death.

Whether D11 can be made liable

76. The Plaintiff cited "Pegawai yang menjaga mayat" as D11.

To succeed in her claim, the Plaintiff is required to identify the Public Officer who was assigned to perform the duties alleged to have been breached and to prove that such person had breached the duties imposed on him. Here, the Plaintiff did not name in the suit the tortfeasor i.e. the Public Officer who was in charge of the corpse of the Deceased at the mortuary in HKL.

In **KERAJAAN MALAYSIA & ORS V. LAY KEE TEE & ORS [2009] 1 MLJ 1**, the Federal Court stated:

"….the officer of the government who was responsible for the alleged tortious act must be made a party and his liability be established.".

On this ground alone, the Plaintiff's claim against D11 must fail.

77. Apart from this, the Plaintiff failed to rebut the evidence of Abu Bakar Bin Lajis (DW10), the Supervisor at the Forensic Department at HKL at the material time, that the Deceased's corpse was properly stored at the right temperature for coldness of between 4˚ celsius to 8˚ celsius and this is in accordance with international standards practised throughout the world for keeping corpses at mortuaries. DW10 further stated that the Deceased's corpse, due to the HIV, would decompose at a faster rate than one which was not infected with the HIV.

78. What Counsel for the Plaintiff offered as evidence was merely by putting to DW10 in his cross-examination certain information on the correct temperature to store a corpse based on his own Wikipedia search in the Internet. As pointed out by Counsel for the Defendants, there is a general disclaimer by Wikipedia stating that "the content of any given article may recently have been changed, vandalized or altered by someone whose opinion does not correspond with the state of knowledge in the relevant field.".

There is also a legal disclaimer stating that "Wikipedia does not give legal opinion. …… There is absolutely no assurance that any statement contained in an article touching on legal matters is true, correct or precise".

The Court does not accept such search results from the Internet as satisfactory evidence to rebut DW10's evidence since the Plaintiff did not adduce the information through an expert's evidence in Court. Thus, DW10's evidence on the right procedure and temperature to store the Deceased's corpse stands unrebutted and is accepted by the Court.

79. For the above reasons, the Court holds that D11 is not liable for the acts of negligence alleged by the Plaintiff against him in the manner of storing the Deceased's corpse at the HKL mortuary.

It also follows that D10 and D12 are not vicariously liable for the Plaintiff's claim against D11.

DECISION

80. Based on the above considerations, the Court is satisfied, on a balance of probabilities, that the Defendants are not liable. Therefore, the Plaintiff is not entitled to the damages claimed. Accordingly, the Plaintiff's claim against D1 to D12 is dismissed.

81. In view of the circumstances of the case, the Court does not think that the Defendants are entitled to any costs. There is therefore no Order as to costs.

Dated 19 December 2013

-sgd-

(DATIN YEOH WEE SIAM)
Judge
Civil Division
High Court, Malaya, Kuala Lumpur

Counsel/Solicitors for the Plaintiff

Mr. M. Visvanathan
Messrs Saibullah MV Nathan & Co.

Counsels/Solicitors for the Defendant

Mr. Khairul Nizam bin Abu Bakar, Senior Federal Counsel
Ms Nur Hasmanita binti Abd. Manap, Federal Counsel
Ms Nur Aqilah binti Ishak, Federal Counsel
Attorney-General's Chambers, Malaysia