

Tan Yu Min Winston (by his next friend Tan Cheng Tong) v Uni-Fruitveg Pte Ltd
[2008] SGHC 123

Case Number : Suit 859/2004, RA 195/2008
Decision Date : 01 August 2008
Tribunal/Court : High Court
Coram : Chan Seng Onn J
Counsel Name(s) : Ramasamy K Chettiar (Acies Law Corporation) for the plaintiff; Mahendra Prasad Rai (Cooma & Rai) for the defendant
Parties : Tan Yu Min Winston (by his next friend Tan Cheng Tong) — Uni-Fruitveg Pte Ltd

Damages – Measure of damages – Personal injuries cases – Assessment of damages – Head injuries from road traffic accident – Appeal from Registrar to judge in chambers – Whether component or global approach to assessment – Whether to substitute exercise of discretion

1 August 2008

Chan Seng Onn J:

1 The plaintiff sustained serious head injuries in a road traffic accident on 31 July 2003. Interlocutory judgment was obtained on 12 January 2005 against the defendant with damages to be assessed and costs to be reserved to the registrar.

2 The plaintiff was 13 years old at the time of the accident and a student in secondary 1. At the time of the assessment in May 2008, he was aged 17 and a student at Temasek Polytechnic.

3 The particulars of the personal injuries in the plaintiff's claim were based on the medical reports of three doctors attached to the statement of claim:

(a) Dr Charles Seah, the Senior Consultant and Neurosurgeon, Department of Surgery at Changi General Hospital;

(b) Dr Ho Ching Lin, the Associate Consultant, Division of Ophthalmology at Changi General Hospital; and

(c) Dr Karen Chua, Consultant, Department of Rehabilitation Medicine, Tan Tock Seng Hospital.

Medical Report of Dr Charles Seah

4 In his medical report dated 5 September 2003, Dr Charles Seah stated that the plaintiff was admitted to Changi General Hospital after the accident with the following injuries:

(a) The left eye globe was ruptured with severe oedema surrounding tissue.

(b) There were multiple lacerations over the face with bleeding from the nostrils and mouth due to multiple nasal bone fractures and an orbital bone fracture.

(c) CT head scan showed a left temporal extradural haematoma with subdural and traumatic subarachnoidale haematoma and brain oedema and brain contusion.

5 An operation was done to remove the blood clot and the bone flap. Suture and toilet facial lacerations, packet nasal bleeding and repair of the ruptured left eye globe were done by the eye surgeon.

6 After the operation, the plaintiff's condition improved gradually and he regained his consciousness. He was able to see but with blurring of vision. Occasionally, the plaintiff became violent and he developed some depression. Neurosurgically, the plaintiff required to be followed-up for 6 to 12 months and his bone flap needed replacement.

Medical Report of Dr Ho Ching Lin

7 Dr Ho Ching Lin in her medical report dated 31 October 2003 described her treatment and prognosis, and assessed the multiple injuries to both eyes sustained by the plaintiff to be as follows:

(a) Multiple lid lacerations were repaired on 31 July 2003. The plaintiff had visible scars as well as mild left lagophthalmos with no exposure keratopathy.

(b) Left globe was ruptured. There was a stellate corneal laceration with loss of a significant portion of the iris tissue in the left eye at the time of the injury. Prolapse of vitreous gel through the corneal wound was observed at the time of primary repair. Toilet and suture of the corneal laceration, as well as limited vitrectomy and anterior chamber reformation was performed on 31 July 2003. He has a left traumatic aniridia with only a residual stump of iris from 10 to 3 o'clock.

(c) There was a right traumatic optic neuropathy with optic atrophy.

(d) There was bilateral choroidal rupture with right vitreous haemorrhage and left sub-retinal haemorrhage. The right vitreous haemorrhage was still present in the inferior portion of the right posterior segment and was bleached. The left sub-retinal haemorrhage had resolved. Crescentic scars at the site of the choroidal ruptures were seen at the posterior pole of both eyes. A risk of later development of sub-retinal neovascular membranes associated with these ruptures exists.

(e) There was a right traumatic cataract. Anterior and posterior sub-capsular opacities of the right crystalline lens were seen secondary to the blunt trauma.

(f) At the last ophthalmic outpatient review on 17 October 2003, the plaintiff had unaided visual acuities of 6/18 in both eyes, which pinholed to 6/12p on the right and 6/9p on the left. There was no anterior segment inflammation and the intraocular pressures were normal. The left corneal sutures were intact. Bleached vitreous haemorrhage was seen in the right eye.

Medical Report of Dr Karen Chua

8 In Dr Karen Chua's medical report dated 18 October 2004, she gave an overview of the injuries of the plaintiff, his treatment, rehabilitation and the progress he achieved in his recovery from the injuries, including the condition of the plaintiff as at 22 June 2004. She wrote:

The above named suffered severe traumatic brain injuries at the age of 13 on 31 July 2003 after being involved in a road accident as a front seat belted passenger. He had a left temporal extradural haematoma with craniotomy and evacuation, rupture of the left eye, tear of the right eye retina, multiple facial lacerations and multiple nasal bone fractures and orbital wall fractures.

He completed inpatient rehabilitation at TTSH rehabilitation centre from 22 August 2003 to

2 September 2003. He had emerged from post traumatic amnesia after 1 month duration and was discharged functionally independent with residual emotional lability.

I have reviewed him as an outpatient at TTSH rehabilitation centre on 30 September 2003, 22 December 2003, 30 March 2004, and 22 June 2004. He has returned to school (secondary 2 express stream) since January 2004 and has scored borderline results since his head trauma. He has functional vision with refractive glasses and has hypermetropia. He had plastic surgery for facial scar reduction and eyelid repositioning, elective cranioplasty to replace his bone flap in December 2003.

He is independent in the community and has slowed processing and impaired memory retrieval. He requires anti-depressant therapy for agitated depression and anger management. He has responded positively to this medical management and psychological counseling. Detailed cognitive testing on 30 March 2004 using the Weschler Intelligence Scale for Children showed overall low average performance on all cognitive domains and this represents a significant reduction from estimated premorbid status. He has reduced insight into his deficits and problems with high level planning.

In summary, he has suffered residual cognitive and behavioural deficits following severe head injury in 2003 and has facial scarring and visual impairment from bilateral eye trauma.

He will continue to benefit from remedial tutoring at the school level, psychological counseling and psychiatric interventions at the Child Guidance Clinic at IMH. Please obtain detailed reports from his plastic and eye surgeons and psychiatrists.

Other Medical Reports

9 To help understand the extent and permanence of the plaintiff's injuries, the progress of the plaintiff in his recovery from the severe head injuries and how the injuries affected the plaintiff, counsel for the plaintiff very helpfully summarised the other reports from various doctors in his submissions as follows, which I had carefully considered:

(d) PB10 – This report is dated 10.1.05 from Dr. Daniel Fung a Consultant Psychiatrist at IMH. Dr. Fung noted that the Plaintiff has poor anger control. Neuropsychological testing revealed below average function in memory and verbal skills. The poor anger management may be related to several factors, the serious brain injury to the temporal lobe which is associated with emotional control, the cosmetic injuries which make the Plaintiff the subject of teasing and ridicule, as well as his having to cope with educational demands, which is made difficult by missing half a year in school in 2003. The Plaintiff is diagnosed to have a head injury resulting in memory and temperamental changes. He is currently placed on medication at night to help control his anger and is being seen for individual counselling by a medical social worker. Due to the Plaintiff's poor verbal memory, he has suggested to teachers that they employ new memory strategies using visual cues which can utilise his fairly intact visual memory and help him learn better.

(e) PB11-14 – This is the neuropsychological report done on 19.4.04 by Ong Li Min. Under opinion at PB14, it is reported that the test results indicated mild intellectual decline, particularly in verbal reasoning skills, as well as specific impairment in verbal memory and verbal fluency, with other aspects of cognitive functioning being generally consistent with pre-morbid intellectual and cognitive functioning. The Plaintiff's parents and teachers will need patience and understand that he may currently have more difficulties in the areas of impairment which affect his academic

performance. Stress and anger management skills may help the Plaintiff cope with his frustrations and adjust to the changes that he has to face after the accident.

(f) PB15 – This report from Dr. Por dated 29.6.05 shows that the Plaintiff sustained nasoethmoid orbital fractures. As of that date the Plaintiff had bone graft reconstruction of cranioplasty defect, frontal sinus, bilateral medial orbital walls and transnasal canthopexy. More treatment will be required for orbital deformity.

(g) PB52-53 – This is a memo from Ms. Judy Yap (psychologist). She noted that the Plaintiff has visual problems and has requested the school teacher to allow the Plaintiff to be seated at the front of the class so that he is able to see the blackboard. Ms. Yap also evaluated the Plaintiff for exam stress. She observed that the Plaintiff's method of learning was by memorisation rather than meaningfully understanding the material. This could explain his difficulties in learning some of the subjects that require conceptual processing of the information.

(h) PB55 – This is a memo from Dr. Charles Seah dated 21.2.06. It is stated that the Plaintiff sustained a right eye traumatic cataract and vocal cord injury (one side not functioning). Dr. Seah asks that the Plaintiff be allowed an extra hour for all examinations as he requires a longer time to read and answer all questions on the paper.

(i) PB58 – This is a memo from Dr. Annette Ang dated 19.9.06. In this report it was noted that the Plaintiff had right vocal cord palsy after his head injury. Though his recovery is good, he may still have difficulty pronouncing certain words.

(j) PB60-61 – This report dated 10.11.06 is from Dr. Karen Chua of TTSH. It was noted that the Plaintiff's anger management has improved with medication and counselling. The Plaintiff is now going to sit for his GCE 'O' level examinations. Dr. Chua has said that the Plaintiff was given 25% extra time in a quiet place for optimal examination conditions. The Plaintiff has problems with memory and understanding of facts though according to his mother his anger has improved. The Plaintiff is receiving private tuition at home, which has helped. Dr. Chua noted that the Plaintiff had weaker attention span and vocabulary knowledge (English). In addition his processing speed was severely impaired. The Plaintiff tended to learn by memorisation rather than by understanding the facts first. In conclusion the Plaintiff suffers moderate residual cognitive impairments from his head injury particularly in the areas of verbal comprehension, processing speed and attention to tasks. His increased anger and reduced ability to cope with stress and frustration are also consequent from his brain injury affecting the temporal lobe and also compounded by his facial appearance. These deficits are likely to be long-term and permanent. Dr. Chua recommends that the Plaintiff be allowed access to clinical and psychological therapy and counselling at TTSH Rehabilitation Centre for 2-3 times a year at an approximate cost of \$500 per year and an annual rehabilitation review with her at \$50 per year until he completes his basic education. The Plaintiff's performance and grades have been affected by his head injury and it is evident that functional capacity, multi-tasking, ability to manage academic stress and processing speed are reduced despite his nearly average IQ scores. She recommends that the Plaintiff has access to appropriate remedial classes, private tuition, stress management or mind mapping classes to help him improve his academic performance and factual analysis as his parents have limited resources.

(k)_PB62 – This report from the Consultant Psychiatrist, Dr. Daniel Fung dated 10.11.06 shows that the Plaintiff has a head injury resulting in memory and temperamental changes. This has been a continuing problem. Dr. Fung has tried to wean the Plaintiff off his medications but his temper continues to be a problem. The Plaintiff has been verbally and physically assaultative towards his family, in particular towards his younger brother.

(l) PB64 – Dr. Charles Seah in his report dated 14.11.06 says that the Plaintiff has severe head injury and was operated several times [sic]. The damage to his brain would cause multiple long term problems. This includes impairments with cognitive function, behaviour changes and memory concentration. As a result his academic performance is likely to be affected.

(m) PB66 – This is a report dated 26.12.06 from Dr. Andrew Tay from SGH. He is a plastic surgeon and he has recommended that further surgeries to correct the facial deformities are required. The estimated cost of surgical treatment and follow-up care is approximately \$25,000. Despite surgical correction, it is likely that there will be residual permanent facial deformities and scars.

(n) PB68 – This report is from Dr. Ho King Hee dated 20.4.06. Dr. Ho is a Consultant Neurologist. At PB70 Dr. Ho sets out the Plaintiff's complaints which are change of voice due to vocal cord paralysis, poor vision in both eyes worse on the left side, scarring of the scalp with persistent inability of hair to grow from the scalp areas, shortness of temper and a tendency to violence, total loss of the sense of smell, diminished memory. At PB71 Dr. Ho has particularised the multiple scars. Under opinion Dr. Ho said that the Plaintiff sustained multiple severe facial and ocular injuries. He had severe head injuries with intra cranial bleeding requiring life saving surgery. There was prolonged post-traumatic amnesia. The injuries had left him with cosmetic deficits, impaired vision as well as cognitive, mood and memory problems. There is persistent right vocal cord injury and total anosmia (complete loss of smell). These deficits should be regarded as permanent and unlikely to improve further. Dr. Ho went on to say that the degree of permanent memory and cognitive deficits are consistent with the severe head injury that the Plaintiff sustained. Given that the Plaintiff's appearance has improved slightly, his intellectual function is still not normal, and some permanent impact on his academic performance is expected. It is likely that the Plaintiff would be unable to handle multiple tasks at once and he would also have problems responding in a flexible manner to new situations. This will imply that he will only be able to perform simple repetitive jobs. As regards employability, the Plaintiff's impaired vision would not allow him to work in an area where fine visual work is required. Furthermore the Plaintiff's poorly controlled temper and mood disturbance would make it difficult for him to work as part of a team. His cosmetic deficits and speech difficulties would be a disadvantage when applying for positions requiring face to face contact or speak with customers [sic]. His inability to smell would make a position in the food and beverage industry very difficult.

(o) PB78-79 – This is a specialist report from Dr. Chuah Chin Tek of CGH. Dr. Chuah is a consultant in the division of Ophthalmology. In his report dated 9.2.07, he has given further details of the eye problems faced by the Plaintiff. In respect of the left eye, the Plaintiff is likely to complain of photo phobia (a condition of dislike of light). The right traumatic cataract has reduced the visual acuity to the level at the present moment. The multiple lid lacerations that he sustained and which were repaired as a result of the scarring process had caused the inability to close his eyes, resulting in slight cornea exposure. With reference to the right traumatic cataract, he has recommended a cataract extraction which would cost approximately \$2,500 to \$2,900. Due to the loss of the iris, it would result in the Plaintiff complaining of bright light all the time and sometimes find it a nuisance and may even affect his concentration [sic].

(p) Page 54 of PBMR – This is the second report of Dr. Ho dated 4.9.07. Dr. Ho noted the following complaints –

- i. Eye - Blurred vision worse on the left side. This symptom is intermittently worse possibly because he spent more time in front of a computer screen in his IT course.
- ii. Headaches – 2 to 3 times a month, more on the left than the right side. Episodes

lasted up to 1 hour and had to be treated with medication. The headaches were severe in intensity (pain in the medical rating scale of 6-7/10). The headaches were associated with nausea and giddiness. He felt more giddy with exposure to bright sunlight.

iii. Pain in the upper abdominal scar resulting from an operation in February 2007 to replace the tissue at the bridge of his nose. The pain was graded as 6-7/10 in intensity.

iv. Disturbed sleep.

v. Change of voice with slurring when he speaks quickly.

vi. Shortness of temper and still tended to be violent and physically abusive.

vii. Total loss of the sense of smell.

viii. His memory was slightly better and that is because he had to write everything down in order to retain facts.

ix. The Plaintiff still has gastric pains on and off but these were not frequent or severe.

x. Dr. Ho administered the mental state examination and found that the score represents a deterioration from the score 10 months ago. In conclusion Dr. Ho found that the Plaintiff had frequent post traumatic headaches that have not improved from the time of the accident. He agrees with the Defendant's medical expert on the nature and permanence of these disabilities.

xi. As regards employability, Dr. Ho says that the Plaintiff is still not able to handle multi-task at once and to respond in a flexible manner to new situations. However the Plaintiff would be more likely to be able to perform a job that will involve a moderate level of complexity rather than only simple, repetitive jobs.

q) PA29 – This is the report of Dr. Lai Chan See dated 23.10.07. In his report, Dr. Lai sets out the complaints of the Plaintiff. At PA31 Dr. Lai sets out the 9 scars in this case which are of various sizes and shapes. Dr. Lai is an Occupational Health Consultant and he was called to give his assessment as to the Plaintiff's ability and fitness to work. Dr. Lai noted that the Plaintiff's preferred course of study was in design but because of his poor vision he was advised against this and instead was admitted to the Temasek Polytechnic for a course in Information Technology. After graduation he hopes to make a career in computer software design and programming. Dr. Lai observed that the scope of his work in these fields would depend much on the nature and size of the organisation he joins. While narrower specialisation would be possible in bigger companies, in smaller organisations he would be expected to function in multiple roles. In the Plaintiff's chosen field of software design and programming, the software designer has to find out what the customer or end-user wants, and then determine the technical specifications that can fulfil these requirements. From these specifications the programmer writes the computer programs necessary to achieve the completion of tasks to the customers' satisfaction. At various stages there is a need to interact with end-users and other programmers as larger projects will involve integration of programs that can function seamlessly as a whole. Customers often have high expectations and set tight deadlines so that software designers and programmers have to be able to manage this without being subjected to undue stress. The work of a software designer and programmer requires logical thinking and analytical skills, and computing can also be visually demanding. After noting the Plaintiff's handicaps, Dr. Lai concluded that it would be difficult for

the Plaintiff to cope with the demands of a software designer or programmer. In school, the Plaintiff has been accommodated with extra time during examinations but in the competitive commercial world such benevolence may not be so easily forthcoming. In the further reports of Dr. Lai, he has evaluated the percentage of permanent disability of the Plaintiff. Comparing the various tests done to ascertain the loss of vision, Dr. Lai has opined that it would not be wrong to take a percentage of impairment between 49% and 51%.

The defence

10 Defendant's counsel submitted that it was not disputed that the plaintiff suffered from the following injuries in the unfortunate accident:

- (a) severe head injury with left temporal extradural haematoma and subarachnoid haematoma associated with brain contusion and oedema;
- (b) rupture of the left eye globe with corneal laceration and loss of a significant part of the iris and choroidal rupture as well as sub-retinal haemorrhage;
- (c) right eye choroidal rupture and vitreous haemorrhage;
- (d) multiple facial lacerations with bleeding from the nostrils and mouth; and
- (e) Multiple fractures of the nasal and orbital bones.

11 However, counsel contended that the plaintiff made a good recovery and his current disabilities were as follows:

- (a) Loss of sense of smell;
- (b) Right traumatic cataract and optic neuropathy with optic atrophy;
- (c) Left lagophthalmos with corneal opacity at 7 to 8 o'clock position; and
- (d) Right vocal cord paralysis with no significant effect on his voice.

12 Counsel for the defendant submitted that the correct approach was to make a global award for general damages, which would take into account the composite effect of all the injuries to the same part of the body *i.e.* the head. In this way, overcompensation for the common pain and suffering connected with all the injuries could be avoided.

Pain, suffering and loss of amenities

13 The Assistant Registrar, Tan Wen Hsien ("AR"), who heard the witnesses and assessed the damages at the first instance noted that the plaintiff had suffered multiple lacerations over the face, and had multiple fractures over the nasal bone and orbital bone. He had haematomas and brain contusion. He also suffered injuries to the eye, leaving him with poor vision and frequent tearing. He suffered a reduction in memory and IQ, with a deficit in high level planning. There was also resultant mood and memory change in the plaintiff. The AR also took into account the plaintiff's young age at the time of the accident. While the injuries were certainly serious in nature, the AR noted however that he had healed well from most of them and the residual damage to the plaintiff was not unmanageable.

14 The AR then awarded a total figure of \$90,000 for the collective injuries to the head region using the global approach. In doing so, she had made adjustments to take account of any overlapping injuries/amounts. The global award of \$90,000 for the head injuries covered the pain and suffering for the fractures and other injuries, scarring to the head and face region, loss of smell, impairment of mental capacity and mood, and the eye injuries.

Component approach versus the global approach to assessment

15 I did not think that the AR's approach to make one global award for all the injuries to the head would *per se* be wrong. But without breaking the discrete injuries down into its manageable components, it would be much more difficult to arrive at an appropriate and fair award for the damages and it might lead to an undercompensation or overcompensation as a result. Furthermore, were the court to look towards precedent cases for assistance, it would also be much harder to find similar cases or comparables with matching or similar injuries to the head as a whole (i.e. on a global basis) than on a component basis, and the court might then have to decide without the benefit of the precedent cases. This of course was not the main reason why I chose not to use the global basis of award for the injuries to the head in this case.

16 The component approach was preferable largely because the multiple injuries to the head spawned a discrete loss of several important distinct and separate functions and amenities, which were located there. After making an assessment based on the component approach, it would still be useful to total up the component awards and perform a further check on (a) whether the aggregate amount awarded for the injuries to the head as a whole remained reasonable and was not excessive; and (b) whether some discounting or adjustment would be needed in case there was some degree of overlapping (for instance where two or more of the injuries were in so close physical proximity to each other that the pain would not likely be distinguishable by the plaintiff although the injuries resulted in a loss of separate functions).

17 In the human body, many sensory faculties are located on the head: the eyes for the sight function; the ears for the hearing function; the nose for the smell function; the tongue for the taste function; and the vocal cord for the speech function. A loss or degradation in the performance of each of these important faculties represents a separate and discrete loss of amenities, each with its own attendant pain and suffering experienced by the plaintiff (which includes, *inter alia*, not only the physical pain, its duration, the degree of permanence of that injury or disability, the inconvenience associated with the loss of that function and the debilitating effects of that disability, but also the mental anxiety and anguish, fear, embarrassment, frustration, and the further pain and suffering from future operations or medical treatments, if any, to correct the disability or improve the condition), which is quite separate from the head injuries to the brain, the skull and other bone structures in the head.

18 Accordingly, for injuries to the head which result in loss or degradation in the performance of each one of these important sensory faculties, I would be inclined to adopt the component approach in awarding the damages.

19 Having said that, I must stress that at the component level of the eyes and the ears, one should generally assess the damages or loss on a global basis for each of these two sets of components (which nature had fortunately provided the human body in pairs) and not on the basis that the left eye is one component, the right eye is another component, or that the left ear is one component and the right ear is another component. It would be wrong to simply double the compensation for the loss of both eyes based on the quantum that would normally be awarded for the loss of the function in one eye. Similarly, for the ears, the global approach would be necessary as the

composite effect of the loss of hearing in both ears is far greater than the aggregate for the loss of hearing in each ear if independently assessed.

20 After a consideration of the totality of the medical evidence in this case, I assessed the damages separately (based on the approach that I had set out above) for the total loss of smell, the vocal cord injury, the eye injuries, the scars and facial disfigurement, and the other "head injuries" which were principally related to the injuries to the brain and the fractures to the skull and other bone structures in the head.

21 I varied and increased the award of the AR for pain, suffering and loss of amenities to \$173,000.00 made up as follows:

(a) Head injuries	- \$90,000.00
(b) Total loss of smell	- \$18,000.00
(c) Vocal cord injury	- \$10,000.00
(d) Eye injuries	- \$40,000.00
(e) Scars & facial disfigurement	- \$15,000.00

\$90,000 awarded for the other "head injuries"

22 The impairment or degradation of the critical brain organ arising from an accident injury may affect the thinking processes, the memory and other analytical functions. The brain injury may, *inter alia*, cause loss of consciousness, memory impairment, mood swings, depression, amnesia, cognitive deterioration, impairment of spatial memory, short and long term visual memory, residual cognitive dysfunction resulting in borderline full scale IQ and so on.

23 Depending on the facts and circumstances of each case, the brain damage may, for example, also result in the impairment or loss of use of the limbs, the hands or the feet through paralysis. If so, then the resulting loss or impairment of the use of the limbs, though it might have originated from the same injury to the brain as a whole, would have to be separately compensated. Indeed, the human body in particular the brain is extremely complex, to put it mildly.

24 The proper way of damage assessment is not to look merely at the initiating injury, but rather at what are the real and definable manifestations of that initiating injury. Head injuries to the brain in my view should be judged in terms of the resulting deficits arising from that injury, and each of these deficits ought to be separately awarded.

25 The correct and perhaps more scientific way to look at the head injuries to the brain resulting from an accident is to properly classify them into the following three separate domains: structural, psychological and cognitive.

1. "Structural" injury (e.g brain oedema, subdural, extradural subarachnoid haematoma, brain contusion, loss of consciousness), which is the specialisation of neurosurgeons;

2. "Psychological" injury (e.g. depression, mood swings, anger, anxiety), which is the specialisation of psychiatrists; and

3. "Cognitive" impairment – (e.g. loss of spatial, visual, long and short term memory, intellect (in terms of IQ), learning ability), which is the specialisation of clinical psychologists.

26 The deficits in each of the above domains are clearly separate and distinguishable and in my view should be assessed separately if it is possible to do so. I can see another benefit that this approach can bring from an evidentiary point of view. I believe that it will be clearer and more streamlined for the experts from each of the three different specialisations to give evidence within their own specialisation as to the degree of pain, suffering and loss of amenities due separately to the "structural" injury, the "psychological" injury and the "cognitive" impairment arising from the accident injury, trauma or damage to the brain. Quantification of the loss for each of the three quite different types of injuries can then be made.

27 However, I would not attempt to do so for this case because (a) counsel at the hearing of the assessment had not led expert evidence with such an approach in mind; (b) the focus during the hearing was more on a global assessment; and (c) I did not have the benefit of counsel's submissions for the assessment of the pain, suffering and loss of amenities for the head injuries to the brain based on each of the above three separate domains. As such, I would stick with the assessment of damages on a "global" basis for the head injuries to the brain based on the three domains **collectively**.

28 To assist me in making a global award for the other "head injuries" comprising mainly the injuries to the brain (assessed collectively) together with the fractures to the skull and other bone structures in the head, counsel referred me to the following comparables which were conveniently compiled in a tabular form in *Practitioners' Library: Assessment of Damages: Personal Injuries and Fatal Accidents* (Lexis-Nexis, 2nd Ed, 2005).

29 In *Ang Siam Hua v Teo Cheng Hoe* [2004] SGHC 147, the award for pain and suffering for head injuries (including memory impairment, loss of consciousness for 16 days, and an injury to the temporal lobes of the brain triggering fits and post-traumatic epilepsy, with a 5 to 10% chance of relapse even when on a life-long course of anti-convulsants) was \$50,000 based on a global award. The award for visual impairment in the left eye (traumatic subluxated cataract, with at least 180 degrees of angle recession and visual blurring with 4 to 9% risk of developing glaucoma in the left eye) was \$15,000.

30 In *Muhamad Ilyas bin Mirza Abdul Hamid v Kwek Khim Hui* [2004] SGHC 12, the plaintiff was awarded a global amount of \$80,000 taking into account the memory loss, diffuse axonal brain injury (where he was admitted in coma, with Glasgow Coma Scale of 8), right orbital wall fracture, right malar fracture and bilateral mandible lower jaw fractures. He had to re-learn many basic skills including speech. He also suffered from depression and a deterioration of memory.

31 In *Teo Seng Kiat v Goh Hwa Teck* [2003] 1 SLR 333, the male 25 year old accident victim was awarded (a) \$90,000 for pain and suffering for head injuries (comprising right extradural and parietal subdural haematomas, impaired olfactory sense on the right, residual mild right hemiparesis, impaired verbal memory and complex calculation skills, 20% permanent disabilities of his high level cognitive functions); and (b) \$10,000 for his reduced sense of smell by the assistant registrar. Counsel for the plaintiff (who represented one of the parties in that case) informed me that on appeal, Selvam J reduced the award for the head injuries from \$90,000 to \$72,000, and also lowered the award for the reduced sense of smell from \$10,000 to \$8,000 but this was not apparent in the judgment of the

reported case.

32 After considering the above comparables and after taking into account the fact that those awards of damages were made several years earlier and hence, some adjustments due to inflation must be made, I decided that a fair and appropriate global amount to award for the other "head injuries" was \$90,000, as the present case was not too dissimilar from that of *Teo Seng Kiat*.

Loss of earning capacity

33 The plaintiff confirmed that he was an average student before the accident and he continued to fare as an average student after the accident. He also conceded that there were many students in his class who performed worse than him, although they did not suffer from similar disabilities.

34 After the accident, the plaintiff's performance was reasonably good. He passed his GCE 'O' Levels with fairly good results, including a "B" grade for mathematics. In his polytechnic course, he received an "A" for computing mathematics, although it was an analytical and not an easy subject at the polytechnic level. For his academic year 2007/2008, the plaintiff secured 1 "A" and 3 "B"s out of 8 subjects in the October semester term of his polytechnic studies. His cumulative grade point average for the April and October semesters was 2.76, which was between "Good" and "Competent" under the system of classification of the polytechnic. As the maximum or the perfect cumulative grade point was 4, a grade point average of 2.76 was to my mind a slightly above average performance in comparison with other students in the same course as the plaintiff.

35 The plaintiff had no tuition to assist him, which showed that he had the ability and drive to learn by himself. It also indicated that the plaintiff had recovered fairly well in respect of his ability to study and pass his examinations, and it further underlined the fact that the plaintiff might continue to do well for the remainder of his course (provided of course he does not wallow in self-pity but he continues to put in reasonable effort and work reasonably hard in line with his duty to mitigate his loss). In my view, his residual disabilities from the accident should not be a major stumbling block preventing him from making further progress and achieving his employment goals. If there was any severe and permanent memory loss or mental handicap, I doubt he would be able to achieve the slightly above average grades in the polytechnic which he did. I accepted that perhaps he would need a longer time to commit facts to memory than a normal person and he would need a longer time to perform analytical tasks, but he would at least be able to overcome those residual handicaps. I did not believe that the plaintiff was labouring under any severe and permanent mental handicap.

36 Counsel for the defendant submitted that the course on Information Technology (IT) that the plaintiff was attending is a very popular course with huge potential. Temasek Polytechnic's website promoted the course as follows:

The Course

In this course, you will learn to create your own software programs such as instant messaging, personal blogs, computer games and build your very own e-commerce websites to buy, sell and do other transactions. You will also be able to effectively lead, define, design and implement business improvement projects in banking and finance, sales and marketing, trade and logistics, as well as technopreneurship sectors.

...

Career Opportunities

The Infocomm Development Authority has forecast a steady growth in demand for IT professionals. As such, your employment prospects are very good. You will be able to fill positions in areas such as project management, software design and development activities in software houses, large multi-national companies, banks, insurance companies, transport companies, logistics companies and many more. You will also be well-equipped to be a technopreneur or your very own boss. You may also further your studies at a wide range of universities that offer our graduates advanced standing.

37 Counsel for the defendant produced an exhibit B, showing the high demand for polytechnic graduates with IT graduates generally earning higher starting salaries. I did not doubt that with the large scale and widespread use of IT both commercially and non-commercially in a relatively technologically advanced economy such as Singapore's, the demand for IT graduates would remain robust for a host of IT-related jobs in many commercial enterprises and even in the Government. The plaintiff recognized the potential in this field of study and he agreed in his evidence that the employment prospects for a graduate like him 'should be quite good'.

38 The occasional headaches, giddiness and poor memory should not have a major impact on his employability in my judgment. The plaintiff could, without any serious difficulty, mitigate the effects of his poor memory by making sure that as a habit, he would write down on paper, what a normal person might commit to memory when performing his job. In that sense, I did not believe that the impairment of his memory due to the accident should have a significant impact on his employability as there was available a ready solution (i.e. pencil and paper), albeit an inconvenient one. It should be noted that I had already compensated the plaintiff for the inconvenience arising from his poor memory (including the occasional headaches and giddiness) in the fairly large award I had made of \$90,000 under the category of the other "head injuries".

39 In my view, the scars and disfigurement of his face, the loss of smell, his eye injuries and his vocal cord injury (all of which had been compensated separately under the item of "pain, suffering and loss of amenities") should also not appreciably impact on his employability and employment prospects in the growing IT industry, but his uncontrollable short temper and anger would. His poor vision on his useful right eye could in part be alleviated with the use of proper spectacles.

40 As counsel for the defendant had rightly pointed out, the only substantive aberration in relation to the rosy employment prospects in the future for the plaintiff was his uncontrollable short temper and anger. Dr Lai Chan See confirmed that the plaintiff had to control his temper with nightly dosages of 75mg of Fluvoxamine medication. I inferred that this medication was working and that at least with continuous medication, the risk of job loss in the future would be lowered – i.e. the risk of the defendant (a) losing his temper and venting his anger at his working colleagues; (b) quarrelling unnecessarily with his colleagues; or (c) causing trouble at work due to his hot temper, thereby leading to the defendant being thrown out of his job.

Loss of future earning versus loss of earning capacity

41 To assist the court, counsel for the defendant referred me to *Chang Ah Lek v Lim Ah Koon* [1999] 1 SLR 82 where Karthigesu JA delivering the judgment of the Court of Appeal explained that there was a conceptual difference between loss of (future) earnings and loss of earning capacity as shown in the passage from Lord Denning's judgment in *Fairley v John Thompson (Design and Contracting Division) Ltd* [1972] 2 Lloyd's Rep 40 at p 41, which was quoted by Lai J in her grounds of judgment and which the Court of Appeal approved at [25] on hearing the appeal from her decision:

It is important to realise there is a difference between an award for loss of earnings and

compensation for loss of earning capacity. Damages for loss of future earnings are for *real assessable loss sufficiently provable by evidence*. For loss of earning capacity compensation is given by way of general damages. [The learned judge's emphasis.]

42 It was the plaintiff's weakened competitiveness in the labour market, and the reduction in his potential earning capacity as a result, that was being compensated here under the heading "Loss of Earning Capacity". The Court of Appeal in order to clarify the law had explained the difference at some length, and I think it would be appropriate for me to set it out in full below, so that the error that the Court of Appeal had highlighted would be avoided:

26 We now return to Scarman LJ's judgment in *Smith v Manchester Corporation* and the passages quoted by the learned judge. They are:

Loss of future earnings or future earning capacity is usually compounded of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident rate of earnings. In such a case there is an existing reduction in earning capacity which can be calculated as an annual sum. It is then perfectly possible to form a view as to the working life of the plaintiff and, taking the usual contingencies into account, to apply to that annual sum of loss of earnings a figure which is considered to be the appropriate number of years' purchase in order to reach a capital figure.

...

The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market? The evidence here is plain — that, in the event (which one hopes will never materialise) of her losing her employment with Manchester Corporation she, with a stiff shoulder and a disabled right arm, is going to have to compete in the domestic labour market with women who are physically fully able. This represents a serious weakening of her competitive position in the one market into which she can go to obtain employment. It is for that reason that it is quite wrong to describe this weakness as a 'possible' loss of earning capacity: it is an existing loss: she is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market.

27 Had the learned judge continued from where she had stopped quoting from Scarman LJ's judgment, she would have read the following paragraph:

It is clearly inappropriate, when assessing this element of loss, to attempt to calculate any annual sum or to apply to any annual sum so many years' purchase. The court has to look at the weakness so to speak 'in the round', take a note of the various contingencies, and do its best to reach an assessment which will do justice to the plaintiff. ...

28 Although the learned judge purported to compensate the respondent for loss of earning capacity, she did not to borrow Scarman LJ's words look at the weaknesses in the round by taking note of the various contingencies and doing the best she could to arrive at an assessment which would so do justice to the respondent; instead she calculated the respondent's loss by reference to a monthly sum for a 16 years' purchase that is to say awarded him damages for loss of future earnings.

29 The method the learned judge adopted was clearly inappropriate to assess loss of earning capacity.

....

31 With respect, the learned judge clearly misunderstood Scarman LJ's judgment in *Smith v Manchester Corporation*. A case for compensation for loss of earning capacity would arise only if the respondent had been employed as an ironmonger, full time on a fixed remuneration, by Hock Seng Engineering Works and Hock Seng Engineering Works continued to employ him after the accident, notwithstanding his disability, as an ironmonger or in some other capacity without any loss in his emoluments. In this case if for some reason Hock Seng Engineering Works terminated the respondent's employment then he would be thrown on to the labour market and his competitive edge to find employment as an ironmonger or indeed any labour intensive work would be severely handicapped by his disability. In this case it would be proper to compensate the respondent for loss of earning capacity by looking at the weaknesses in the round and by taking note of the various contingencies and doing the best one could to arrive at an assessment which would do justice to the respondent (per Scarman LJ in *Smith v Manchester Corporation*). But this is not the case here.

43 With the law settled on this issue, counsel for both parties agreed before the AR, and rightly so, that on the facts of this case, the issue to be considered was a claim for loss of earning capacity and not a claim for loss of (future) earnings. The plaintiff was not yet working and there would be no evidence of any pre-accident earnings or evidence of any post-accident drop in earnings from which a loss of future earnings could be computed. This of course was no fault of the plaintiff as he had not entered the employment market as yet. Hence, the proper award to be made was solely for loss of earning capacity following *Chang Ah Lek v Lim Ah Koon* ([41] *supra*). The burden of course was on the plaintiff to produce some credible evidence on his loss of earning capacity and not leave everything for the court to speculate.

44 I accepted the submission of counsel for the defendant that the loss of earning capacity was generally to compensate a plaintiff for the risk of loss of his present employment and the consequent disadvantage, due to his disabilities, in competing in the labour market for another job or an equally well-paying job, and that the "risk of loss of employment" or "handicap" must be real and substantial, not speculative or fanciful: *Practitioners' Library: Assessment of Damages: Personal Injuries and Fatal Accidents 2nd Ed* at 4-9. The courts would usually take into account, among other factors, the age and sex of the plaintiff, his skills and training, the nature of his disabilities, the kind of job he was holding (if any) before the accident, the degree of the risk of him losing his job, the time when the loss of employment might occur, the general employment situation for his type of job, the kind of job he could do or could hold now or in the future, and the earnings he would likely command: *Practitioners' Library: Assessment of Damages: Personal Injuries and Fatal Accidents 2nd Ed* at 4-13. Finally, an award for loss of earning capacity should be assessed "in the round" and not using a strict multiplier/multiplicand method: *Chang Ah Lek v Lim Ah Koon* ([41] *supra*).

45 I would hasten to add that it did not mean that the court could not, merely for the purpose of doing a very rough check, determine if the amount that was assessed "in the round" was within a reasonable range (i.e. neither manifestly inadequate nor too excessive). That check could be achieved by computing what that lump sum amount to be awarded would have in effect produced, if it was distributed as a stream of income per month in the future over the period of the working life of the plaintiff, assuming a certain rate of interest to be used as a discount rate for the computation. The result from such a simple mathematical computation or annuity analysis provides, in my view, a

useful parameter to make a very rough check on whether or not the assessment of the lump sum "in the round" so to speak, could have gone simply too far wrong either way. I believe it would help avoid an overly excessive or manifestly inadequate estimate of a ball-park figure by the court for the loss of earning capacity assessed primarily on the relevant facts and circumstances of the case.

46 In relation to the AR's reasoning in support of her award of \$60,000 for the loss of earning capacity ("LEC"), I would state that I generally agreed with her qualitative analysis based on what she had said below:

There is no doubt that the Plaintiff would have suffered some loss of earning capacity as a result of the injuries. This is especially due to the injuries to the head suffered which has affected his cognitive and memory skills. The fact that the IT market is doing well currently, or is likely to do well in the future, is a factor to be taken into account in determining the quantum of LEC, as the Plaintiff is likely to be employed in the IT sector.

I accept the evidence of Dr Ho King Hee, that he is likely to be unable to handle multiple tasks at the same time, and to respond in a flexible manner to new situations. He would however still be able to handle a job of moderate level of complexity. I accept also that his unstable mood may affect the nature of the job he is suitable for, or his ability to hold down a job for a long period of time.

I accept that it is difficult, given the Plaintiff's age, to assess the LEC. However, this figure should be arrived at 'in the round', and taking into account all the facts and circumstances of the case, I am of the view that \$60,000 is an appropriate figure.

47 As with most assessments of damages, the real difficulty is not in the qualitative analysis, but in the actual quantification of the award. This quantification is a process in which I, sitting as a judge in chambers dealing with an appeal from the registrar as though the matter was before me for the first time, am in a position to substitute my exercise of discretion for the AR's discretion based on my own analysis of the relevant evidence: *Chang Ah Lek v Lim Ah Koon*.

48 I must state that I was initially reluctant to change the AR's quantification of the award for loss of earning capacity at \$60,000 as she had rightly taken into account (a) the degree that the head injuries had affected the plaintiff's cognitive and memory skills; (b) the evidence of Dr Ho King Hee that the plaintiff was not likely to be able to handle multiple tasks at the same time and to respond in a flexible manner to new situations; and (c) the plaintiff's unstable mood which might affect the nature of the job he was suitable for or his ability to hold down a job for a long period of time.

49 But as the "loss of earning capacity" especially for a young man who has not even entered the job market was one item of damage that would be very difficult to render an appropriate quantification (let alone with any accuracy as the court would have to peer far into the future with all its attendant unknown variables and contingencies), I thought perhaps that with so much uncertainty that I should err on the side of generosity, factor some margin in the plaintiff's favour, and exercise my discretion to increase the AR's award on the loss of earning capacity to a lump sum amount of \$100,000.

50 As a rough check and to give an idea of what the equivalent monthly amount would be if \$100,000 were to be distributed and paid out monthly over a period of 35 years instead of a lump sum immediate payment, I calculated that the \$100,000 award would effectively translate into a tax free difference of about \$530.30 per month added to his salary over the next 35 years of his working life span based on a discount interest rate of 5.33% p.a. (which is the interest rate normally used by the

court). As a percentage of the median income of a network manager earning \$3,954 pm and an IT security specialist earning \$2,644 pm in the 25 to 29 age group based on MOM's wage statistics, the top-up of \$530.30 pm would amount to between 14% and 20% of the respective monthly salaries. Having done the check, I did not think that the amount that I had "assessed in the round" was too far wrong. It was neither on the side of extravagance nor on the side of manifest inadequacy.

51 On the whole, I was satisfied that the award of \$100,000, albeit on the generous side, was more than a reasonable award for loss of earning capacity for the plaintiff. Essentially, the plaintiff would be getting a compensation for his loss of earning capacity by way of a "bonus" of \$530.30 per month to top up his salary every month for 35 years should he later start work after his graduation from the polytechnic and after his completion of national service. But the plaintiff remained dissatisfied with this amount and had since appealed against my decision on this lump sum award of \$100,000. Counsel for the plaintiff submitted to me that the award for loss of earning capacity should be \$564,900, which would be nearly 6 times more. I certainly did not think that an award of \$564,900 would have been justifiable on the facts of this case having regard to the significant finding of the AR that while the injuries were certainly serious in nature, the plaintiff had healed well from most of them and the residual damage to the plaintiff was not unmanageable, a finding that I agreed entirely with.

52 As a comparable, I was referred to *Muhamad Illyas v Kwek Khim Hui* ([30] *supra*). The plaintiff, *Muhamad Illyas*, suffered from memory loss and diffuse axonal brain injury. He was only 20 years old at the time of the accident. He was a bright and outstanding student who had secured an EDB scholarship and admission into University of California (Berkeley) to pursue a course in Electrical Engineering and Computer Science. As a result of the accident, he could not pursue his scholarship studies and instead he had to re-learn many basic skills including speech. He suffered from depression and memory loss. The bright future ahead of him was dashed. The award for his loss of earning capacity was only \$100,000 (for the loss of memory function). By comparison, this case was far worse than the plaintiff's in terms of the loss of earning capacity. I had to agree with the qualitative submission of counsel for the defendant (though not with counsel's quantification of \$50,000) that the plaintiff here had recovered relatively well with only some residual disabilities that would not materially or substantially affect his education, his employment performance or his prospects in the future.

53 For the reasons given, the lump sum award of \$100,000 was in my judgment more than a fair, adequate and realistic compensation to the plaintiff as general damages for his loss of earning capacity.

Awards made

1. Accordingly, I varied and increased the award for pain, suffering and loss of amenities to **\$173,000.00** made up as follows:

- | | |
|-------------------------|---------------|
| (a) Head injuries | - \$90,000.00 |
| (b) Total loss of smell | - \$18,000.00 |
| (c) Vocal cord injury | - \$10,000.00 |

(d) Eye injuries – \$40,000.00

(e) Scars & facial disfigurement – \$15,000.00

2. By consent, the award for pre-trial transport expenses was varied and increased from \$920.00 to **\$1,800.00**;

3. The award for loss of earning capacity was varied and increased from \$60,000.00 to **\$100,000.00**;

4. The award under the item of “future medical and transport expenses” for the follow-up care (apart from those at [5] below) was varied and increased from \$4,200.00 to **\$11,000.00** based on \$550.00 per annum for 20 years.

[This was calculated based on Dr Karen Chua’s medical report dated 10 November 2006 in which she estimated the cost of the future follow-up psychological therapy and counselling sessions at TTSH Centre at \$500 per year with a review with the doctor at \$50 per year. I accepted the AR’s findings that even if the current displays of violence were only towards his family members, it was envisaged that the plaintiff might need psychological and medical care in this respect in the future. I also accepted A/Prof Daniel Fung’s expert opinion that the plaintiff needed ongoing psychiatric support. I believed that anger management would probably be needed on a long term basis if he were to remain successfully employed on a long term basis because the plaintiff would not likely last very long in any job if he were to be hot-tempered and quarrelsome with his fellow colleagues at work, bearing in mind that he would invariably have to face work pressures and demands.

For that, I allowed a period of 20 years for his medical follow-up which should take him perhaps to the more mellowed age of about 40. Strictly speaking, for the computation of the amount, I ought to make a present value discount because the amount of \$11,000 damages awarded was to be paid upfront and it was meant to represent the present value of the stream of payments of \$550 per annum that would have to be incurred yearly in the future for the next 20 years. But I would have to factor in the inflation element which would likely creep in from one year to the next, and also the likelihood of increases in the general cost of medical care in the future. It was not likely that the quantum of the cost of psychological therapy and counselling at TTSH Centre would remain at \$550 for the next 20 years. As the inflationary effects would probably offset the discounting, I did not perform any present value discounting nor any inflation adjustment, but simply allowed a straightforward multiplication of \$550 p.a. x 20 yrs, which would, I believe, on the whole fairly compensate the plaintiff for this item of expenditure in the future.]

5. There was no appeal on the AR’s award of **\$27,700** for the medical expenses for the cost of surgical treatment and follow-up care to correct facial deformities, which was estimated at \$25,000 by Dr Andrew Tay; and a cataract extraction, which the AR allowed at an estimated cost of \$2,700 based on the average of Dr Chua Chin Teck’s recommended cost of between \$2,500 to \$2,900 for the cataract operation.

6. I fixed the costs of the appeal at **\$8,000.00** inclusive of disbursements to be paid by the defendant to the plaintiff with the usual consequential orders to follow.