Zaiton Bee Bee bte Abdul Majeed *v* Chan Poh Teong
[2010] SGHC 116

Case Number : Suit No 731 of 2006 (Registrar's Appeals No 266 of 2008 and 275 of 2008)

Decision Date : 20 April 2010

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : B Ganeshamoorthy (Colin Ng & Partners LLP) for the plaintiff; Mark Seah (Rodyk & Davidson LLP) for the defendant.

Parties : Zaiton Bee Bee bte Abdul Majeed — Chan Poh Teong

Damages – Assessment

Damages – Measure of Damages – Personal injuries cases

20 April 2010 Judgment reserved.

Judith Prakash J:

1 On 22 April 2005, the plaintiff, Zaiton Bee Bee Binte Abdul Majeed, was injured due to a traffic accident which occurred whilst she was a passenger in a taxi driven by the defendant, Chan Poh Teong. On 6 June 2007, the plaintiff obtained interlocutory judgment against the defendant for damages to be assessed.

2 The assessment hearing took place in March 2008 before the Assistant Registrar ("the AR"). Eight persons testified at this hearing. Apart from the plaintiff and her friend, Azizah bte Chalan Hassan ("Ms Azizah"), who was also injured in the accident, there were five doctors and a private investigator hired by the defendant to conduct surveillance on the plaintiff.

3 The AR subsequently assessed the plaintiff's damages as follows:

(a)	Pain, suffering, and loss of amenities	$33,000.00
(b)	Loss of future earnings (Post-trial loss of earnings)	No award
(c)	Medical expenses	$16,051.63
(d)	Pre-trial loss of earnings	$138,000.00
(e)	Taxi rides to medical appointments	$1,000.00
(f)	Medical items	$95.00
	Total award	$188,146.63

4 The AR made no award for post-trial loss of earnings or for loss of earning capacity. She had two reasons for this refusal. First, the AR held that the plaintiff had claimed "in excess of $5m on the basis that she had a business plan to develop her henna business" but there was "no concrete evidence … that the business was on an upward trend, or that the projection was to become a reality

given past business patterns."

5 Second, the AR was not satisfied that the plaintiff could no longer work as a henna artist. Her findings in relation to this issue were as follows:

> Furthermore, I am not satisfied that the plaintiff is as inhibited as she claims to be. I am not persuaded that she is unable to work as a henna artist anymore, as she claims. Even if she is not able to sit for extended periods, she is still able to teach henna, or perform demonstrations. ***There was also video evidence of her actually applying henna for an extended period*** , ostensibly without much difficulty. ***Dr Chang's evidence also supports the contention that she is able to work, with some adjustment for her inflexibility*** . In this regard, it is perhaps fortuitous that she paints on moveable figures, who are malleable enough to accommodate the plaintiff's reduced range of movement ***. There is also no suggestion that the plaintiff cannot travel overseas to develop her business*** , as she had envisaged. And [there is] nothing to stop her from pursuing her dreams or business ideals.
>
> [emphasis added]

6 In respect of the claim for "psychological trauma", the AR found that "there was no objective evidence that [the plaintiff's] was a particularly severe case or that she was unable to function due to her psychiatric condition." No award was made under this head.

7 On the issue of pre-trial loss of earnings, the AR referred to the plaintiff's Notice of Assessment for the year 2006, which showed an assessable income of $46,122.00 earned over a period of five and a half months. Relying on that, she awarded the plaintiff $46,000 for each year from the date of the accident up till the date of the trial (three years).

8 The AR then ordered costs against the plaintiff on two grounds: (1) that the plaintiff's claim for damages was not meritorious because the actual amount of damages assessed was much lower than her claim for over $6 million; and (2) that the case should not have been brought in the High Court for that reason.

The appeal to the High Court

9 The plaintiff appealed against the award for pre-trial loss of earnings and against the orders that there should be no award of post-trial loss of earnings and that she should pay the costs of the assessment. The defendant lodged a cross-appeal against the award for pre-trial loss of earnings.

10 In the course of the appeal, the plaintiff sought leave to adduce additional evidence from Dr Hee Hwan Tak, the doctor who had treated her when she was warded at the National University Hospital immediately after the accident. This application was granted. Additionally, I granted leave to the defendant to recall Dr Chang Wei Chun who had given evidence earlier before the AR. The purpose of recalling Dr Chang was to enable him to deal with Dr Hee's evidence.

11 The appeal dealt primarily with the plaintiff's ability to conduct her profession after the occurrence of the accident. The medical evidence was vital in this respect as it affected the court's assessment of the plaintiff's right to claim both pre-trial and post-trial loss of earnings and of the alternative right to claim loss of earning capacity.

The plaintiff's evidence and her claim

12 The plaintiff was born in July 1981. At the time of the accident, she was almost 24 years old and at the time of the assessment hearing, she was some months short of 27 years old. She holds a diploma in business studies which she obtained from the Nanyang Polytechnic on graduation at the age of 20.

13 During her studies at the Polytechnic, the plaintiff started a small business as a henna artist. This involved painting designs in henna on the bodies (mainly the hands and legs) of her customers. In November 2000, she met Ms Azizah and they became close friends and partners in the henna business. In 2003, the plaintiff and Ms Azizah made two long trips to Japan (staying a total of almost six months) during which they conducted henna art classes and applied henna to clients. These were very successful trips and after their return from Japan, they registered a business called MiztiQ Henna & Body Art ("MiztiQ"). The services provided by the business included teaching henna art and applying henna to clients for events such as weddings.

14 According to the plaintiff's affidavit, by April 2005, MiztiQ had provided services from 1 October 2004 to 22 April 2005 which had earned it a total of $57,652. The plaintiff's share of the profits amounted to $46,122 being 80% thereof while Ms Azizah earned $11,530. The plaintiff believed that if not for the accident, business would have picked up considerably. She stated that the plan was for Ms Azizah to be stationed in Japan and she was confident that if this had happened, she herself would have earned a monthly income of $14,400. In her view, MiztiQ had the potential to earn $8,386 per month from its Singapore business and $10,000 per month from its Japanese business (of which her share would be $8,000 per month). These figures were stated to be net figures exclusive of expenses.

15 The plaintiff asserted that after the accident, she was no longer able to carry on the business of MiztiQ. She stated that even after two and a half years had passed, she constantly felt pain in her back. Travelling in a taxi for longer than half an hour would cause her extreme discomfort and excruciating pain on her spine and lower back as well as general pain over her body.

16 On the day of the accident, the plaintiff was admitted into the National University Hospital and she remained there until 6 May 2005. She was found to have sustained the following injuries:

(a) fracture/dislocation of the thoracic 12th vertebra and the lumbar first vertebra (T12/L1) (this was a fracture of the spine with dislocation in the region of the middle back);

(b) fracture of her right rib; and

(c) fracture of the fifth metatarsal of her left foot.

17 After discharge, the plaintiff was sent to Dr Yeo Khee Quan, an orthopaedic surgeon, for the purposes of a specialist medical report. She was first seen by Dr Yeo on 6 July 2005. At the time of this visit, the plaintiff complained of constant pain in the back which was made worse when she walked and sat. She was on medication daily and experienced shooting pains in both legs which lasted two to three minutes. She also had pain in both ankles and her left shoulder. She had a left-sided headache daily and blurring of vision. Three times a week, the plaintiff experienced pain and tightness in the left chest and breathlessness (lasting five to ten minutes). There was also constant pain on both sides of her neck and in her left toes. The plaintiff's daily activities were impaired. She could not stand or walk for more than 20 minutes at a time. She was unable to squat and needed support when climbing stairs. Dr Yeo observed that the plaintiff walked with an "antalgic gait" which meant she had a guarded way of walking, arising from pain. She needed help to get onto the examination couch and had difficulty lying down and getting up.

18 Dr Yeo examined the plaintiff again on 19 January 2006. At that stage she complained of still experiencing constant pain at the back which worsened when she walked or sat for a prolonged period of time. The shooting pains in her legs had lessened but the pain in both ankles remained as well as the headache on the left side. The pain in her shoulder had settled down but had been replaced by numbness of both hands. She still had constant pain in both sides of her neck. The difficulties in walking, standing and climbing steps remained as did her inability to do a full squat. On this occasion, however, the plaintiff was able to get on the examination couch by herself and was able to get up from a lying position but only sideways.

19 On her next visit to Dr Yeo on 27 September 2006, the plaintiff's complaints were similar to those made previously and the restrictions in her physical abilities remained.

The medical evidence

20 Of the five doctors called to testify before the AR, three were orthopaedic surgeons. These were Dr Yeo (who had 23 years' experience), Dr Lee Soon Tai (20 years' experience) and Dr Chang Wei Chun (30 years' experience). The other two doctors were psychiatrists but since their evidence is not relevant to the issues arising in the appeal, I need not consider the same. On the appeal, there was additional medical evidence from Dr Hee Hwan Tak who was an associate professor and senior consultant of orthopaedic surgery at the National University Hospital.

21 Dr Yeo referred to his three medical reports issued after the three examinations of the plaintiff that I have referred to above. He also stated that he had seen the plaintiff again on 6 March 2008 and had not found any marked changes in her condition from the time of his examination on 27 September 2006. In Dr Yeo's report issued after that last examination, he stated that the plaintiff was unable to stand for more than 20 to 30 minutes, unable to walk for more than 30 minutes and unable to squat. When climbing steps, she had to hold on to the railing but was able to climb up two storeys. The report also gave the following opinion of the effect of the plaintiff's injuries on her working abilities:

> Ms Zaiton was doing body painting before the injury. The job involved sitting, squatting and a lot of bending. She also did modelling before the injury. In her present condition, it is unlikely that she will be able to return to modelling and body painting.

He stated in court that his opinion was based on his examination of the plaintiff and on her explanations. As regards the modelling, he stated that it was his perception of modelling that this occupation was related to appearance and the scars sustained by the plaintiff would prevent her from following it. Also, it was a strenuous occupation involving rehearsals and requiring the plaintiff to assume specific physical positions for photography which she might find difficult because her stiff back made her unable to assume fixed positions for long. He testified that the symptoms which the plaintiff complained of could not be independently verified but that they were symptoms that could arise as a result of the injuries she had sustained. The same applied to the various complaints made by the plaintiff in relation to her difficulties in walking and standing. They were complaints that could have arisen from the type of injuries sustained but he was not able to independently verify whether the complaints were true.

22 The witness also clarified that his opinion in relation to the plaintiff's future inability to practise henna art was based on her explanation that her painting involved painting different parts of the body and required her to assume positions in which she had to bend, stand or squat for fairly long periods of time.

23 Dr Lee Soon Tai first saw the plaintiff in July 2005 and attended to her many times thereafter. His last examination of her before the assessment hearing was in January 2008. He was given copies of Dr Yeo's reports and the MRI scans conducted at the National University Hospital. He himself did not conduct new scans but limited himself to physical examination. He adopted Dr Yeo's opinions as stated in Dr Yeo's report.

24 In court, Dr Lee stated that the plaintiff had come to see him because she was in pain. He had prescribed two types of medication which had helped her and thereafter she had attended his clinic numerous times for review and to obtain medicine. After the accident, surgery had been performed to stabilise her vertebrae by fusing two levels above the fracture and two levels below the fracture and by inserting screws and long rods into her spine. The surgery had provided stability for the spine but did not relieve her of the pain which came from the injured spine, both at the bones as well as the nerves. Her pain was relieved by the medicine that he prescribed to remove neuropathic pain. As a result of the operation, she had stiffness in the spine which would make bending over and squatting difficult. Dr Lee opined that because the plaintiff had much pain and stiffness, she required long term medication to get through a normal day and working in a job as a henna painter would be difficult since she would have to bend and squat to get to different parts of her client's body.

25 Dr Hee issued two medical reports in respect of the plaintiff. The first was issued in June 2005 and was a short account of her injuries and the treatment given and the second was a memorandum addressed "To Whom it May Concern" dated 19 September 2007. In this document, his diagnosis of the plaintiff was set out followed by a recommendation which stated that the plaintiff was unfit to work in "moderate to heavy capacity" and that this unfitness was permanent due to residual pain despite bone healing. In March 2008, Dr Hee filled up a form for an insurance company in which he stated that the plaintiff was suffering from chronic back pain and was unable to sit/stand for prolonged periods. One of the questions in the form asked "To what extent does his condition prevent him from performing all normal duties of his usual occupation?" and Dr Hee's answer was that the plaintiff was "unable to perform in job of any kind due to severe pain in back". He further stated that she was physically disabled from ever continuing in any employment and had a total disability.

26 Dr Hee testified that he had treated the plaintiff as an in-patient on admission and had subsequently seen her on several occasions in 2005, 2006 and 2007. In 2008, he saw the plaintiff on three occasions, the last being on 8 October 2008. After May 2005, most of the visits included x-rays of the plaintiff and in August 2007, a further MRI of the spine was done because the plaintiff had significant back pain which also involved her right leg.

27 Dr Hee stated that the plaintiff had told him that she was doing some form of designing or artist's work which she could not carry on after the accident. He did not pursue it and did not know the details of the job. Whilst he did not know whether the job involved standing, sitting or bending, he noted that the plaintiff had mentioned that she had difficulty in these activities because of the pain in her back and her leg. She said that she could not do any work because these limitations made it difficult for her to do any work.

28 During his testimony, Dr Hee was shown video footage that was taken of the plaintiff on 14 December 2006 and 23 February 2007. He was asked whether he agreed that the video showed that the plaintiff was able to do henna art. His response was that doing this at one moment was different from doing it as a full time occupation. Doing henna art for five minutes was all right but there would be problems carrying on this as a full time occupation. The plaintiff had sustained a fractured dislocation of the spine which was the most severe spinal injury and she was one of the rare few who were not paralysed. He agreed that technically the plaintiff could do henna art and was able to demonstrate it for teaching purposes. He also agreed, having seen the video, that she had no

problem with staircases and was able to walk briskly across the road. Further, she had not demonstrated any signs of discomfort during these activities.

29 Regarding her working life, Dr Hee said that in August 2006, he had advised the plaintiff that she should try and increase her activity. It was his assessment then that she was not yet fit to go back to work and he gave her medical leave for another year. In that year he wanted her to gradually increase her activity in order that she could reach her pre-injury status by August 2007. In August 2006, he was not sure that she would be able to return to her previous level of work in August 2007 but hoped for that. In August 2007, the plaintiff was given a medical certificate for a month until the review date of MRI scan. After September 2007, no further medical certificate was given.

30 In relation to the document of March 2008 (see [25] above), Dr Hee testified that most likely the plaintiff had told him that she needed that document because she could not work. He agreed that he wrote it because she had gone to him, complained of back pain and told him that she could not work. He, however, disagreed that he had simply recorded what she had told him. The memorandum was based on her overall condition. He felt that because of the chronic pain in her back, she would feel it in all activities of daily living and it would be difficult for the plaintiff to hold a full time job on a long term basis. He opined that part time work would be reasonable. He also was not ruling out work on a freelance basis. Dr Hee was asked to agree that when he wrote "She is unable to work on a permanent basis" he had not meant that the plaintiff could not work at all. His response was that that was right, that the letter was meant to say that the plaintiff could not work permanently on a long term basis in her previous full time job. He meant that she could not work at full capacity at a full time job. In relation to his statement that the plaintiff was "unable to perform job of any kind due to severe pain in back", Dr Hee replied that this referred to her inability to work in a full time job. He agreed that she would be able to do jobs which were simple enough and did not require sitting for long periods of time. She would need a part time job that did not require prolonged sitting or standing or carrying things. He also agreed that after sitting for too long she could stand up and stretch and this might help alleviate the pain. The witness further confirmed that in relation to his statement that the plaintiff "was unfit for work in moderate to heavy capacity", what he had meant was that she could not work full time but could consider part time or freelance work. Later, he clarified that she could work for one or two hours a day.

31 The defendant's medical expert was Dr Chang Wei Chun. He examined the plaintiff twice, firstly on 21 February 2007 and secondly on 25 September 2007 which was two years and five months after the accident. He did a physical examination and tested the limits of the plaintiff's ability to move. He accepted that the plaintiff had been injured in the manner described by Dr Hee. According to his report dated 21 February 2007, on her first visit the plaintiff complained of chronic backache, which was aggravated by protracted sitting and walking, and also of recurrent headaches and neck stiffness associated with shooting pains and discomfort round the right arm and hand. She told him that she was still at follow-up at the National University Hospital and taking medication for the pain. She had no complaints in relation to her rib and metatarsal fractures. She told him that she had not been able to return to her job as a body painter because of the physical movements it required.

32 On examination, Dr Chang observed that the plaintiff walked normally. There was no obvious deformity of her spine. He observed that movements of her cervical spine were full with some pain at end of the range and movements of the thoracolumbar spine were restricted. Her straight leg raising was normal and there was no neurological deficit in the limbs referable to the spine. There was no pain in regard to her fractured right sixth rib and her fractured fifth metatarsal bone had united.

33 Dr Chang's opinion on this first visit was that as a result of the accident, the plaintiff had residual chronic back pain and stiffness. The stiffness was not expected to settle but the pain should

improve with the passage of time as the surgical fusion consolidated. Her neck symptoms were secondary to the back injury. No specific surgical treatment was required but provision for pain medication for about ten years was recommended. The plaintiff had recovered from the rib and toe fractures and no long term consequences were expected. Dr Chang stated that the plaintiff would not be able to return to modelling. She would still be able to do body painting but need to be sitting down predominantly with occasional standing and bending. It would be reasonable for her not to be able to work for about 12 months after her injury and to have a maid to look after her for this first six month following the accident.

34 Following his second examination of the plaintiff, Dr Chang issued a supplementary report on 25 September 2007. He noted that on examination, the plaintiff walked normally and that her cervical spine was essentially the same as at the previous visit with the range of movement being unchanged. Most of Dr Chang's report related to his views on Dr Yeo's opinion set out in the latter's report of 30 November 2006. Dr Chang did not change his opinion that it was reasonable for a maid to look after the plaintiff for the first six months following her accident but asserted that such care would not be reasonable thereafter. The plaintiff was independent in the activities of daily living. She would have difficulty doing her share of housework at home but that did not translate into a need for a full time personal maid.

35 When he appeared before the AR, Dr Chang testified that in his opinion the plaintiff could work. While her injury had been a serious one, there had been no nerve damage or paralysis and her upper limbs had remained intact. Based on these injuries, there was no reason why she could not work. It was reasonable for her to not work at all for about 12 months but after that she could be gainfully employed. To do body painting, she would have to shift her body around sometimes and bend forward to paint etc. She would have some degree of difficulty with these postures but this was not insurmountable as the plaintiff could sit down most of the time and occasionally bend over. If sitting was painful she could always get up and stretch so whilst the plaintiff might experience some difficulty in doing her job at full capacity, his view was that she could still be gainfully employed doing the job that she was good at. He confirmed his view that it would be reasonable to expect the plaintiff to suffer pain for at least ten years. He considered that pain would lessen with the passage of time and that it was highly unlikely that the plaintiff would be in some form of agony for the rest of her life.

36 As far as Dr Chang was concerned, the only difficulty that he saw for the plaintiff was with regard to sitting for protracted periods of time. As long as she was allowed to stand up and stretch every half an hour or every hour, he thought she would be capable of doing sedentary work. She was a 26 year old woman with normal limbs and only one section of her spine fused. Dr Chang found it hard to believe that the plaintiff was not able to work. The AR asked Dr Chang whether the plaintiff's condition would be permanent. His response was that for the next two to three years, she would have pain in her back but with the passage of time, the pain would become more tolerable and would even disappear. He stated that pain was more or less confined to when the particular aggravating action was being carried out.

37 After Dr Hee gave evidence before me, Dr Chang was recalled to comment on Dr Hee's opinion. In examination in chief he stated that the plaintiff had told him that if she sat or stood for 45 minutes to an hour, she could get a backache but if she changed her position and stretched, she could accommodate the back pain. She was able to continue her job as a henna artist even though there would be some discomfort when she performed her henna painting and teaching. If she stretched herself and changed her position, she could accommodate the backache and also since her work was artistic in nature she could do it at a pace that suited her. He agreed that the slower pace might limit the type of henna painting that the plaintiff could do. Dr Chang estimated that the plaintiff should be

able to work for four or five hours at a stretch but would work at a slower pace and would not be as productive as before. He was told that the plaintiff had testified that the basic henna teaching course took two hours and a professional course lasted 12 to 15 hours over a period of five or six days *ie* two to three hours a day. Dr Chang took the view that the plaintiff should be able to manage to teach henna art over that period.

38 Dr Chang disagreed vehemently with Dr Hee's statement in the insurance document that the plaintiff was unable to perform a job of any kind due to severe pain in the back. He said it was a totally inaccurate presentation of her condition. He also disagreed that she was physically disabled from continuing in any employment or that her disability was total. He considered that 12 months would be a generous period for the plaintiff to recover from any disability.

39 Dr Chang also referred to the surveillance video and reports on the plaintiff given by the private investigator. He stated that he had viewed these and considered that they corresponded with his own opinion in relation to what she could and could not do in relation to henna painting and teaching. Dr Chang agreed that the video showed only one incident of the plaintiff doing painting but his conclusion was that if she was able to do it once, she should be able to do it twice and so on. He agreed that the video did not show that the plaintiff was capable of doing henna painting and teaching as a professional day in and day out. However, the fact that she did such work on one occasion would imply that she was not incapable of doing such work.

The private investigator's evidence

40 Mr Tan Tien Hwee, the operations manager of Nemesis Investigations Private Limited, gave evidence in relation to his company's engagement to conduct discreet surveillance on the plaintiff and to prepare a report on how she managed her life and work activities after the accident. Surveillance was conducted on 14 December 2006 and 21 and 23 February 2007.

41 The report of such surveillance indicated that on 14 December 2006, which was a Thursday, the plaintiff's home was watched and she remained at home the whole day. A telephone call was made to her mobile phone and during the conversation the plaintiff was alleged to have claimed that she was working from home. In court, Mr Tan confirmed that he was the person who had spoken to the plaintiff on this occasion.

42 On 21 February 2007, the plaintiff was seen at about 2 o'clock in the after when she, accompanied by Ms Azizah, arrived at Dr Chang's clinic at Gleneagles Medical Centre. She was watched thereafter. After leaving the clinic, she travelled by taxi to the Hotel Plaza on Scotts and from there she later went to Far East Plaza where she had a meal. The surveillance team lost sight of her at about 5.30 in the evening.

43 On 23 February 2007, the plaintiff left her home in the afternoon and walked to a nearby shopping centre. She then climbed two flights of stairs to the second level without holding on the railing for support. The plaintiff then met a couple at the McDonald's restaurant there. For the next two and a half hours, she was observed giving a lesson on henna painting to the couple as well as painting on their upper limbs. At about 6pm, the plaintiff left the restaurant to return to her residence. She walked down the stairs without holding on to the railing and subsequently walked briskly across the road.

Analysis

44 All the experts agreed that:

(a) the plaintiff's injuries were serious and of a permanent nature;

(b) she could easily have been paralysed and was fortunate to escape such a fate;

(c) although there was no neurological damage to the spine, there would be pain due to the nature of the injury;

(d) the pain would be most intense right after the accident and would usually subside over time but may last for up to 10 years after the accident (or 20 in a minority of cases);

(e) pain is difficult to assess objectively and any assessment is based primarily on patient feedback, which can be exaggerated by the patient;

(f) her spine has restricted movement;

(g) it will be difficult for her to stay or even sit in the same position for extended periods of time and some form of bending or standing is required to relieve pain caused;

(h) she is unable to do stressful physical activities such as bending to lift heavy objects;

(i) she was completely incapacitated from working for a period of one year from the accident.

45 Dr Chang disagreed with the other doctors on the following:

(a) the actual extent of the plaintiff's pain and discomfort; and

(b) the length of time during which she could work;

46 Regarding the actual extent of pain suffered by the plaintiff, both Dr Hee and Dr Chang candidly admitted that they based their assessments on patient feedback which is subjective in nature. Dr Hee was satisfied however that the level of pain, as described by the plaintiff, was not unreasonable based on the seriousness of her injuries. Whilst Dr Hee appeared to be a rather patient-sympathetic witness who was not inclined to treat his patients' claims with much scepticism, his view in this case was corroborated to some extent by Dr Lee's evidence. Dr Lee had prescribed pain medication for a nerve problem based on the plaintiff's descriptions of the pain and the medication had worked. This goes to show that the plaintiff's descriptions of her pain did have some physical basis.

47 Dr Chang did not suggest that Dr Hee was wrong on this basis. After all, Dr Chang conceded that the plaintiff did suffer some pain and discomfort and suggested that pain medication be provided for at least ten years. However, he thought that the pain was not at a level that would completely prevent her from doing her work. His opinion was based largely on his impression of the nature of the plaintiff's previous job and the surveillance video.

48 Dr Chang suggested that the plaintiff could work up to 4-5 hours at a stretch doing henna painting. He said that she can put in the "normal hours she put in previously" (he imagined an artist would not work for a long period usually) but at a slower pace and lower rate of productivity. He also suggested that teaching henna for two to three hours per day was something manageable for the plaintiff, and that taking painkillers before starting work would help.

49 Dr Hee suggested that the plaintiff would not be able to hold a full-time job. He said that she would need to find a job that would allow her to lie down on occasion when standing and stretching

did not help alleviate her pain. He agreed that working part-time for one to two hours a day was within the plaintiff's abilities provided that she had the know-how for the job. It should be noted, however, that Dr Hee said all this in the context of trying to explain his written statements in the various documents that the plaintiff was incapable of working in any job at all. It appeared to me that after seeing the video footage, Dr Hee realised that he had been over generous to the plaintiff in making those statements. He therefore tried in court to resile from them without entirely damaging the plaintiff's position. It appears to me that Dr Hee in an attempt to assist the plaintiff had been liberal in his assessment of the effect of the injuries on her capacity to work. I therefore cannot put much weight either on those written statements or on his subsequent evidence in court that she could only work part time for one to two hours a day.

50 Both Dr Chang and Dr Hee drew their conclusions from what they believed to be the number of hours the plaintiff would need to put in to do henna painting or teaching on a full-time basis. Dr Chang believed that because the plaintiff could do four to five hours of painting, or two to three hours of teaching per day, that would already amount to doing it on a full-time basis. On the other hand, Dr Hee believed that one to two hours of work a day is really no more than a part-time job, and that the plaintiff would struggle to work daily. Neither doctor, however, gave any conclusive reason to support how he arrived at those exact numbers.

51 Dr Chang's suggestion that the plaintiff was able to work four to five hours a stretch for every day was based on the assumption that she was allowed to stand up and stretch, perhaps every half an hour, and that she had taken painkillers beforehand. The plaintiff had testified that the painkillers caused drowsiness and this does not seem unlikely since medication that is used to relieve pain emanating from spinal nerves could have such a side effect. On this view, perhaps Dr Chang's opinion is a bit too demanding, especially if one were to take into account Dr Lee's evidence showing that the plaintiff's descriptions of her pain are not without basis, and the fact that the video, which had influenced Dr Chang's opinion, only showed the plaintiff working for two and a half hours.

52 The most damaging piece of evidence to the plaintiff's case was not the expert evidence, but the video that showed her teaching henna painting to a couple for two and a half hours. The AR was sufficiently persuaded by this to state that the plaintiff could apply henna "for an extended period, ostensibly without difficulty."

53 In rebuttal, the plaintiff said that she had to make an excuse to get a drink and also she had to stand once or twice more and shift her position during that particular session. She claimed that she had to rest for two to three days after that because it was too "tough" for her. She also claimed that she would be unable to teach once a week because it was her "restricted movement" that was bothering her. The AR does not seem to have given any weight to the plaintiff's claims. I agree: the plaintiff's responses seem weak in the light of the evidence. Going by what was observed it would be difficult to accept her claim that she is incapable of working even once a week.

54 The video evidence is too strong to ignore. If the AR and the doctors, after watching the video, were able to agree that the plaintiff appeared to have no obvious difficulties teaching henna painting for two and a half hours, it has to be concluded that the plaintiff should have no trouble doing the same again, especially when the medical evidence suggests that her pain should subside as time goes by. Whilst I did think that Dr Chang's opinion that she can work for four to five hours a stretch was too demanding, this does not mean that the plaintiff could only work one session per day. It is not unreasonable in my view, in the light of the evidence (the plaintiff did not show signs of great discomfort immediately after the lesson but was able to walk briskly across the road to avoid the rain), to expect the plaintiff to be able to teach henna painting for two to three hours at a stretch twice a day.

55 The next question concerns the frequency or regularity with which the plaintiff can teach henna painting. Here the video evidence is of no assistance and the experts' opinions do not provide much help. Dr Chang opined that the plaintiff would be able to work on a daily basis without giving any conclusive reason. Dr Hee disagreed but did not offer an opinion as to how regularly she could work. The plaintiff herself claimed that she would need two to three days of rest after every long day (9am to 5pm). If what she says is accepted, and assuming that she only works two sessions a day (following the video evidence) at a slower pace, she would probably only need to rest for one day after every three days of work.

56 This would give her some benefit of the doubt without accepting her claims wholesale. One reason why the plaintiff's claims cannot be accepted wholesale is that her figures appear inflated and she seemed highly optimistic about what she and Ms Azizah could earn together on the basis of limited experience. She was also assuming that she would be able to continue to receive the bulk of Ms Azizah's earnings for a protracted period. Her evidence must be treated with some circumspection. However, some benefit of the doubt should still be given to the plaintiff because it appears from the media articles, interviews, and her correspondence with her clients that she had made real efforts from the time she was in polytechnic to develop her henna art business and she was definitely very enthusiastic about this profession and willing to pursue it.

57 On the evidence, the plaintiff has probably suffered some loss in terms of the number of hours she can put into teaching henna but not by much. It was the plaintiff's evidence that a basic class only lasted two hours, whereas a professional course lasted 12-15 hours over a period of five to six days. This would come to around two to three hours of teaching for each day per course. She may need to take a break of one day within a period of five to six days and that can probably be taken into account. Additionally, the plaintiff can no longer work at the same level of productivity as before. This much was admitted by Dr Chang. This can also be taken into account. Whilst it is difficult to make an exact estimate of how much productivity the plaintiff has lost, going by her apparent ability to climb stairs, walk and sit normally and the fact that there is no neurological deficit, the loss of productivity would probably not exceed 20%.

Assessing the damages

58 This is the most difficult question of this appeal. The plaintiff claimed the following in damages:

(a) between $8,000 and $10,000 per month for pre-trial loss of earnings for 3 years amounting to an award of between $96,000 and $120,000; and

(b) between $10,000 and $15,000 per month for post-trial loss of earnings for a period of 18 years amounting to an award of between $2.16m and $3.24m.

(a) Pre-trial loss of earnings

59 Counsel for the defendant argued that the AR erred by awarding three years for pre-trial loss of earnings because there was no basis for her to do so. I agree, although as can be seen from the discussion below, this agreement does not result in a change in the quantum of the award. By assessing the award of pre-trial loss of earnings for a period of three years up till the date of assessment of damages, and by not awarding any post-trial loss of earnings, the implication to be drawn is that the AR made a finding of fact that the plaintiff could return to work on the date of assessment of damages.

60 Whilst I accept that the plaintiff has regained the capacity to work, I do not agree with the

position that she only regained it at the time of the assessment. I note there was no definitive medical evidence as to when she regained this capacity. Dr Chang's evidence was that she should have been able to work 12 months after the accident. On the other hand, when Dr Hee saw her in August 2006, he gave her medical leave for the period of another year. He must have believed at that stage that she was not yet capable of working and although, as I have stated, he was somewhat inclined to take his patient's complaints at face value, I do not think I can disregard that action entirely since in issuing medical certificates doctors do also use their medical expertise and knowledge of the patient's condition. On the other hand, the video showed the plaintiff conducting a two and a half hour teaching session in February 2007. I think therefore that I can safely infer that by 22 April 2007, two years after the accident, the plaintiff would have regained her ability to work. On this basis, the plaintiff should only have been awarded pre-trial loss of earnings for two years and not three. Such an award may be fairly generous to the plaintiff since she was probably capable of working at least part time before that date but in this respect, given the severity of the plaintiff's injuries and the doctors' agreement that pain would persist for quite some time, I do not think that the generosity is undue.

61 The AR awarded the plaintiff $46,000 per year for pre-trial loss of earnings. This was in reference to her Notice of Assessment for the year 2006 which showed her assessed income as $46,122 for around five and half months. The AR considered, however, that the income of $46,122 did not take into account the plaintiff's business expenses and overheads, or the unpredictability of the market, and therefore determined that a more realistic award would be $46,000 for a full year.

62 With respect, the AR was not entirely correct to say that the figure of $46,122 did not take into account the plaintiff's business expenses and overheads. The audited accounts for the period of October 2004 to April 2005 clearly show that the business expenses were deducted before the plaintiff's share of the profits was calculated. It is also probably true that due to the nature of plaintiff's business, it is unlikely to incur substantial overheads. While it may be true that the figure of $46,122 would not take into account the uncertainties of the market, it is still real and assessable evidence of the plaintiff's income prior to the accident. The AR may have underestimated the earnings of the plaintiff. What may have influenced the AR was the fact that the plaintiff's business was a relatively young start-up and in 2005 had only started to show signs of making the kind of profits that the plaintiff was claiming. There was no guarantee that the plaintiff's business would have continued to produce the same level of income. However, the fact that the plaintiff's business picked up significantly over the period of October 2004 to April 2005 means that there was always the possibility that the plaintiff's business could have continued growing for some time at least if not for the accident.

63 The figure of $46,000 a year was, I consider, too low a figure on which to base the pre-trial loss of earnings award. The evidence indicated that the plaintiff was active and enterprising and had generated a lot of interest in henna painting in the period just prior the accident. She also gave evidence of continuing enquiries that had come in as late as 2008. There was therefore a reasonable likelihood that the plaintiff's business would have continued to make a similar profit over the ensuing period of two years. This would mean that for a full year's work, the plaintiff would have earned $92,000. I am not sure, however, whether it would be reasonable to award the plaintiff pre-trial loss of earnings calculated on the basis of a multiplicand of $92,000 because it would imply accepting that the plaintiff would have carried out sustained business over the period when the evidence appeared to indicate that the nature of the business was more casual and was not something that was done day in and day out.

64 An alternative manner of approaching this problem is to consider whether the average figure of the plaintiff's earnings over the lifetime of the business might be the correct multiplicand. The

plaintiff's business was registered in 2003. To calculate an average over the 3 years would give a multiplicand of $32,038.33 per year. The problem with calculating an average of the plaintiff's business earnings is that there was a large disparity between the annual figures. Further, the business had only been registered for the relatively short period of three years. There was no evidence to show any sort of stabilising trend that can be more safely relied upon.

65 In the end, I think that a more accurate and fairer multiplicand would be something lower than $92,000 but higher than $46,000. As a compromise, it appears to me that the mid figure of $69,000 a year would not be unreasonable based on the available evidence. If the award had been made on this basis for a period of two years, the plaintiff would have received $138,000. That is the same amount that was awarded by the AR. Accordingly, although my basis for the award is different from that of the AR, I would not interfere with the same.

66 As the plaintiff said that she did not return to work before the trial and as she could have returned to work from 22 April 2007 onwards, there is no reason to make an award for loss of earnings for the period between that date and the date of the assessment.

Post-trial loss of earnings

67 As discussed above, due to the nature of her injuries, the plaintiff would have suffered a 20% reduction in the number of hours during which she could work. This reduction can be used to provide the basis for an award of post-trial loss of earnings.

68 The first sub-issue is what the appropriate multiplier is. At the time of the assessment, the plaintiff was 26 going on 27. The plaintiff submitted that the appropriate multiplier was 18. The multiplier of 18 years was used in the case of *Teo Seng Kiat v Goh Hwa Teck* [2003] 1 SLR 333 where the 28 year old plaintiff was totally unable to work until the end of his working life. The figure of 18 years may, however, be too long in this case since the plaintiff herself had testified that she saw herself working till the age of 35 or so and then travelling the world. She also stated that she had made a claim for loss of earnings for the period from the assessment until she reached the age of 70 on the basis of her lawyer's calculation but agreed that she did not see herself working until she was 70 though she foresaw (rather over-optimistically in my view) that there would be passive income coming in from her business until then.

69 Although the plaintiff is fairly young, I think that in the circumstances of this case where she did not have a fixed intention to carry on the same business until normal retirement age of between 60 and 65, it would be more suitable to fix the multiplier at ten rather than 18. The reduction in the multiplier is also justified because there was no evidence to substantiate a sustained demand for the henna painting business over the decades to come. I cannot rule out the possibility of henna painting becoming less popular in the future as fashion trends change. Additionally, since the evidence of Dr Chang was that the plaintiff's pain should improve and even disappear over time, it is likely that her loss in productivity will no longer exist in the future. Accordingly, it would be reasonable in this case to award the full multiplicand for the first half of the multiplier and award half the multiplicand for the next half of the multiplier as in *Loh Chia Mei v Kok Kok Han* [2009] SGHC 181. On this basis, the amount to be awarded to the plaintiff for loss of future earnings would be $103,500 derived as follows:

$69,000 x 20% x 5 years = $69,000

$34,500 x 20% x 5 years = $34,500

Costs

70 It would be recalled that the AR ordered that the plaintiff pay the costs of the assessment. In my view, it was not correct to make such an order in the circumstances of this case.

71 Section 39 of the Subordinate Courts Act (Cap 321, 2007 Rev Ed) provides that where an action founded on contract or tort or any written law is commenced in the High Court which could have been commenced in a subordinate court, and the plaintiff recovers a sum not exceeding the district court limit ($250,000), the plaintiff will only be entitled to the costs on the Subordinate Court scale. As the AR made a damages award of $188,146.63 in favour of the plaintiff, the AR could have awarded costs on the District Court scale to the plaintiff.

72 The AR was perhaps influenced by the way the claim was brought, in that the plaintiff had included a number of items without basis, and had claimed for an inflated sum of more than $6m. Even then, it was somewhat harsh to have ordered costs against her. By comparison, the Court of Appeal had held in *Swee Hong Investment Pte Ltd v Swee Hong Exim Pte Ltd* [1994] 3 SLR(R) 259 that the successful appellants were entitled to half the costs because the court was not able to draw much assistance from their submissions.

73 Even though the plaintiff had grossly overstated her claim, as a successful claimant, she should have been entitled to some amount of costs, unless there was some other ground on which to reproach her. As liability had already been established, and there was no offer to settle, the plaintiff was entitled to have costs of the assessment ordered in her favour. I therefore allow the plaintiff's appeal in relation to costs and set aside the costs order made below.

74 The total amount which the plaintiff will recover by reason of this appeal is as follows:

(a)	Total of amounts awarded by the AR against which there was no appeal	$50,146.63
(b)	Pre-trial loss of earnings	$138,000
(c)	Post-trial loss of earnings	$103,500
	Total	$291,646.63

75 The plaintiff has overcome the District Court jurisdiction. She is therefore entitled to recover the costs of the action and the assessment on the basis of the High Court scale.

Conclusion

76 In the circumstances, the plaintiff's appeal is allowed in relation to the claim for post-trial loss of earnings and costs. Whilst I have agreed with the defendant that the award in respect of pre-trial loss of earnings was wrongly made, I have not in the ultimate analysis changed the amount of that award. Accordingly, I make no order on the defendant's appeal. The costs of the plaintiff's appeal were complicated by the calling of additional evidence. To a large extent, the additional evidence has not assisted the plaintiff. I will therefore hear the parties on how the costs of the appeal should be dealt with.