

Tang Chiew Ping v Abdul Rashid Bin Razali
[2003] SGHC 129

Case Number : Suit 951/2000, RA 86/2003

Decision Date : 16 June 2003

Tribunal/Court : High Court

Coram : Woo Bih Li J

Counsel Name(s) : B Rao (B Rao & K S Rajah) for the plaintiff; Avashan (B Rao & K S Rajah) for the plaintiff; Sushila Ganesan (Yu & Co) for the defendant; Kuldip Singh (Yu & Co) for the defendant

Parties : Tang Chiew Ping — Abdul Rashid Bin Razali

Damages – Measure of damages – Personal injuries cases – Correct basis for calculation of pre-trial earnings

Damages – Measure of damages – Personal injuries cases – Whether loss of future earnings approach or loss of earning capacity approach

1 The plaintiff Tang Chiew Ping (“Mdm Tang”) was a front seat passenger in a car driven by her husband along the Pan Island Expressway on 30 November 1997. Mdm Tang sued the defendant Abdul Rashid Bin Razali (“Abdul Rashid”) as the driver of another vehicle which collided into the rear of the car her husband was driving, causing her to sustain whiplash injury. Her husband was joined as a third party in her suit. Interlocutory Judgment was entered against Abdul Rashid on the basis of 85% liability on his part.

2 Mdm Tang was the Head of the Mathematics Department at St Hilda’s Primary School. As a result of her injury, she ceased her employment on 28 June 1999 i.e with 27 June 1999 being her last day of employment. It was common ground among all the medical experts that she could not carry on as a teacher in a school.

3 At the assessment of damages before an Assistant Registrar, Mdm Tang was granted, inter alia:

(a) \$216,021.10 as pre-trial loss of earnings, and

(b) \$319,250 as post-trial loss of earnings.

4 Abdul Rashid appealed against these two items and his appeal was heard by me. After hearing arguments, I dismissed the appeal. He has since filed an appeal to the Court of Appeal.

Pre-trial loss of earnings

5 Ms Sushila Ganesan, Counsel for Abdul Rashid, submitted that the pre-trial loss of earnings should be based on Mdm Tang’s last drawn salary of \$3,908.61 per month and not on her salary as head of department (“HOD”) in the school which was \$4,643.24 per month. Ms Ganesan submitted that there was no evidence to establish why Mdm Tang had to step down from her post as HOD on 1 January 1999, about six months before her employment ended, and consequently, Mdm Tang had stepped down as HOD voluntarily. Accordingly, Ms Ganesan submitted that \$3,908.61 should be the monthly base figure for calculating pre-trial loss of earnings.

6 Ms Ganesan then submitted that from July 1999, \$2,000 per month should be deducted from the monthly base figure as the \$2,000 was the tuition fee Mdm Tang should have earned per month

even though, according to Mdm Tang, it was only some time after her employment stopped that she started to give tuition and not immediately from July 1999 onwards.

7 Ms Ganesan then submitted that the pre-trial loss of earnings should be $(\$3,908.61 - \$2,000 \text{ per month}) \times 34 \text{ months (being the pre-trial period)} = \$64,892.74$, instead of the \$216,021.10 granted by the Assistant Registrar.

8 On the other hand, the Assistant Registrar did not use \$3,908.61 per month as the base figure. What she did was to adopt the calculations of the Ministry of Education ("MOE") from January 1999 to June 2002. The total for that period was \$284,021.10 (being \$255,088.10 + \$28,933, see p 68 of the submission of Mdm Tang's Counsel, Mr B Rao). This was much more than taking a monthly salary multiplied by 34 months because MOE's calculations included, inter alia, bonus, performance bonus and CPF which Mdm Tang would have earned. Using \$284,021.10 as the aggregate base figure, the Assistant Registrar accepted that Mdm Tang should have started giving tuition earlier i.e from July 1999. Using \$2,000 per month as the tuition fees Mdm Tang should have earned, the Assistant Registrar multiplied \$2,000 per month by 34 months resulting in a figure of \$68,000. She then deducted this \$68,000 from \$284,021.10 resulting in the \$216,021.10 I have mentioned.

9 It seemed to me that Ms Ganesan's approach of trying to start with a base monthly salary multiplied by a number of months was overly simplistic. It ignored all the other items which Mdm Tang would have earned, for example, bonus, performance bonus and CPF.

10 There was, however, one item in MOE's calculations which initially caused me some doubt. MOE's calculations had included a sum of \$3,116.14 and \$160 for CPF, for the period 1 January to 27 June 1999. At first blush, it seemed that these figures should not have been included since the pre-trial loss of earnings period had commenced on 28 June 1999. However, I concluded that the \$3,116.14 and \$160 were rightly included in MOE's calculations and taken into account by the Assistant Registrar because although the pre-trial loss of earnings period, as used by the Assistant Registrar, commenced only from the date Mdm Tang had ceased employment on 28 June 1999, she had already suffered a loss before 28 June 1999 because she had stepped down as HOD since 1 January 1999.

11 As for Ms Ganesan's submission that there was no reason for Mdm Tang to step down as HOD from 1 January 1999, it seemed to me that this submission was made on the presumption that Mdm Tang had continued working as a teacher until 27 June 1999. Since she could continue working as a teacher, there was no reason why she could not continue functioning as HOD. However, as Mr Rao pointed out, Mdm Tang did not continue working from 1 January 1999 to 27 June 1999. She was in fact on medical leave for those six months. It was not a case of Mdm Tang voluntarily stepping down as HOD.

12 There is one other point I should mention about the issue of pre-trial loss of earnings. Although the Assistant Registrar and Counsel for each side had proceeded on the basis that the pre-trial loss of earnings period was 34 months, it has since come to my attention that this is not correct. I have learned that the Assistant Registrar made two errors. First, the pre-trial period of July 1999 to June 2002 (both months inclusive), as stated in the oral judgment and reasons below, is actually 36 months and not 34 months. Secondly, the assessment commenced on 4 July 2002, instead of 4 June 2002 as stated by the Assistant Registrar, and ended on 5 July 2002. This means that the pre-trial period was actually 37 months (rounded to the nearest whole month). Accordingly, the Assistant Registrar should have deducted \$74,000 (instead of \$68,000) from \$284,021.10 resulting in a figure of \$210,021.10 (instead of \$216,021.10) and the appeal should have been allowed to the extent of the difference of \$6,000.

Post-trial loss of earnings or loss of future earnings

13 As regards post-trial loss of earnings or loss of future earnings, Mdm Tang was born on 11 November 1949. At the commencement date of assessment of damages on 4 July 2002, she was about 52 years and 8 months old. The retirement age for teachers was 60 years, with an option of carrying on for another two years to 62. The Assistant Registrar used a multiplier of five years.

14 As for the multiplicand, there was evidence from MOE that Mdm Tang's gross salary per month would have been:

(a)	July 2002 to March 2003	-	\$6,334
(b)	April 2003 to March 2004	-	\$6,653
(c)	April 2004 to October 2009	-	\$6,972.

The Assistant Registrar used a median figure of \$6,500 per month as the base figure for the multiplicand. However, she was of the view that there should be a deduction of \$2,000 per month as Mdm Tang could give and was giving tuition. Mdm Tang's evidence was that she was giving tuition to three students individually at \$250 per month but the Assistant Registrar was of the view that Mdm Tang should be able to give tuition to eight students a week at \$250 per month making a total of \$2,000 per month.

15 The Assistant Registrar then took into account income tax, CPF, bonus, Long Service Award and Connect Plan and used the following formula to derive Mdm Tang's loss of future earnings:

$$[(\$6,500 - \$2,000) \times 13.5 \times 5] + [\$2,700 \times 5] + \$2,000 = \$319,250.$$

16 Ms Ganesan started her submission on loss of future earnings by saying that she did not dispute the Assistant Registrar's figures provided it was correct for the Assistant Registrar to have adopted a loss of future earnings approach as opposed to a loss of earnings capacity approach. Ms Ganesan submitted that the latter approach would have resulted in a figure of between \$25,000 to \$30,000 only.

17 The reason for Ms Ganesan's submission was that Mdm Tang could still carry on teaching as a tuition teacher, although not as a school teacher. Ms Ganesan relied primarily on the case of *Karuppiah Nirmala v Singapore Bus Services Ltd* [2002] 3 SLR 415 where Judith Prakash J granted the plaintiff damages for loss of earning capacity rather than on a loss of future earnings basis even though the plaintiff was no longer able to work as a full-time editor.

18 However, it seemed to me that the facts in that case were different from those before me because the plaintiff there had been a full-time editor for one and a half years only out of a total career period of 15 years. Since her accident, she had gone back to what she had been doing before her stint in editing. This is what Prakash J said, at p 422 H to 423 D:

Post-trial loss of earnings

29 The issue here is whether the plaintiff should have been awarded future loss of earnings or whether the correct award would have been one for loss of earning capacity. The plaintiff's submission below was that she was entitled to future loss of earnings because she was no longer able to work as a full-time editor due to her medical condition. This argument was accepted

below.

30 On appeal, the defendants submitted that the editorial work on the basis of which the plaintiff claimed the loss of future earnings, took up a period of one and a half years out of a total career period of 15 years. Since the accident, she had gone back to what she had been doing before her stint in editing. They submitted that the plaintiff was not disabled from pursuing her vocation in which she had adequate training and plenty of experience and in fact was now carrying on. That work would pay comparably to her editor's work once she was able to take on additional assignments. At the time of the hearing she was giving two or three lectures a week and working as a practicum supervisor between one and three times a week. She had quite a number of free hours a week and it would not be difficult for her to work up to three hours a day and there would be reasonable opportunities for her to take up work assignments for up to five days a week. This would be particularly so if her shoulder injury is corrected.

31 I accepted the defendant's submissions. In my opinion, although the accident has meant that an editing career would be difficult for the plaintiff to maintain, it has not affected her main skills or her ability to exploit those skills profitably. At the same time, there may be some restriction on her ability to work long hours on a continuous basis even after the shoulder operation since she has to take care of her neck in order to avoid complications in that area. Whilst her earning ability has been adversely affected by the accident the *circumstances of the case* make an award for loss of earning capacity more appropriate than one for the loss of future earnings. The editing path was one that was new to the plaintiff and it is not possible to be certain that she would have continued in that line. There are other remunerative avenues still open to her.

[Emphasis added]

19 I accepted Mr Rao's submission that, generally, loss of earning capacity was used when a plaintiff is able to continue in his employment without loss of emoluments but would be handicapped by his injury if he should have to seek alternative employment (see the judgment of the Court of Appeal in *Chang Ah Lek & Ors v Lim Ah Koon* [1999] 1 SLR 82 at para 31).

20 Furthermore, "Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages", per Lord Denning MR in *Fairley v John Thompson (Design and Contracting Division) Ltd* [1973] 2 Lloyd's Rep 40 at p 42, which was cited with approval by the Court of Appeal in *Chang Ah Lek* at para 25. The Court of Appeal also noted, at para 32, that the judge below was able "to fix a multiplicand and select the multiplier, from the evidence" and considered this to be another reason why an award based on loss of future earnings was appropriate. In the case before me, the Assistant Registrar was likewise able to do the same.

21 In the circumstances, I was of the view that the Assistant Registrar was correct in making an award based on loss of future earnings.

22 However, in the course of her submission, Ms Ganesan changed tact and submitted that even if loss of future earnings was to be used, a deduction of \$2,000 a month, for the tuition fees Mdm Tang should be able to earn, was too low.

23 Based on a surveillance report over a few days, Ms Ganesan submitted that on a Sunday, Mdm Tang had left home at 7.30am for church. She left church after 10.30am, went to a supermarket to buy groceries and drove to her residence where a maid carried most of the groceries from the car. Mdm Tang claimed to have visited a nephew after that and returned at about 2.30pm.

That was a total of seven hours on what was presumably a good day for Mdm Tang. On the next day, a Monday, Mdm Tang remained home. On the following day, a Tuesday, she gave her daughter a lift to Copthorne Hotel at Havelock Road, then drove to see her gynaecologist and then went home. The total duration was three to three and a half hours. According to Mdm Tang, that was also a good day for her. Ms Ganesan then took the average of seven hours and three to three and a half hours to be five hours, for a good day. She then submitted:

Average of 7 hours and 3 to 3½ hours is 5 hours, for a good day. Assuming tuition lesson of 2 hours, she can have 2 sessions of 2 hours on a good day. This is assuming one student per session. If Plaintiff can see 2 students per session and 1 student for the other session, then that is 3 students on a good day. 4 good day a week, as Plaintiff says sometimes 3 and sometimes 4 good days a week, she can have 12 students. 12 students x \$250 per student is \$3,000 per month.

[Notes of Argument p 4]

24 As for the multiplier, Ms Ganesan accepted that Mdm Tang could have carried on working until the compulsory retirement age of 62 but submitted that Mdm Tang also could have retired earlier. So, Ms Ganesan submitted that the multiplier should be two years.

25 Accordingly, even in her about-turn, Ms Ganesan was challenging only the multiplier and one aspect of the multiplicand, and not the other aspects of the formula used by the Assistant Registrar regarding the median, income tax, CPF, bonus, Long Service Award or Connect Plan.

26 On the other hand, Mr Rao submitted that the medical evidence of Dr Don showed that Mdm Tang's condition had deteriorated. Mdm Tang had also said she took one student at a time and she was not cross-examined as to whether she could have taken more than one student at a time. Furthermore, Mdm Tang's evidence was that she taught only nine months a year as she did not teach on school holidays. Where she did so, it was to make up for lessons missed. Mr Rao submitted that by applying the multiplicand over the full 12 months each year, the Assistant Registrar had already attributed a higher income to Mdm Tang, after her employment had ceased, than was correct.

27 Mr Rao also submitted that even the eight students per week attributed by the Assistant Registrar was too much. In his written submission, at p 27 and 28, Mr Rao said:

vi. Going by the tuition record itself, the Plaintiff's evidence was that she was able to take 3 students and charge them \$250 per month. This is borne out in the tuition records submitted by the Plaintiff whereby she works on the average of 4½ hours per week. In March and April 2002, the Plaintiff worked 16.5 hours giving private tuition in the former month and 19.5 hours in the latter month to derive an income of \$750 per month. It should be noted that she did not take more than 1 student on each of the tuition days and did not work for more than an hour and a half on each of the said tuition days. Thus the Plaintiff was physically able to give private tuition for a total of 36 hours for the months of March and April 2002. She earned a total of \$1500 from the 2 months i.e. this would give an hourly rate of \$41.66. Based on the Learned Assistant Registrar's reasoning that the Plaintiff should have earned \$2000 per month she would have had to work (\$2000 divided by \$41.66 = approximately 48 hours per month or 12 hours a week to derive the take away sum of \$2000 from the multiplicand). Even with teaching 4½ hours a week the Plaintiff had cancelled days. It is therefore respectfully submitted that the Plaintiff would not have been able to teach 12 hours per week 12 months a year from July 1999 when she retired to June 2002, the assessment having commenced on the 4 July 2002.

28 Although this submission was in relation to pre-trial loss of earnings, it was equally applicable to loss of future earnings. Accordingly, Mr Rao submitted that although Mdm Tang had not appealed

against the decision of the Assistant Registrar, that decision was already unfair to Mdm Tang.

29 I was of the view that the multiplicand and multiplier used by the Assistant Registrar for loss of future earnings should not be varied for various reasons:

- (a) Ms Ganesan herself had initially accepted that they were correct before she changed her mind.
- (b) The pre-trial loss of earnings had used a multiplicand which had deducted \$2,000 per month as the tuition fees Mdm Tang should have earned. I saw no reason why this deduction should be increased to \$3,000 per month for loss of future earnings, especially when Mdm Tang's condition had deteriorated.
- (c) Besides, it seemed to me that the Assistant Registrar may have already attributed too much to what Mdm Tang should have earned, for the reasons Mr Rao had advanced.
- (d) For the multiplier, it was speculative to suggest that Mdm Tang might have voluntarily retired earlier. According to the evidence of Mdm Tang's husband, she loved her job and she would have lost her pension if she was to resign (see p 21 of Mr Rao's submission). According to Mdm Tang's daughter, Mdm Tang was devastated when she could not teach in school anymore (see p 23 of Mr Rao's submission). According to the school principal, Mdm Tang "really enjoyed teaching" (see p 29 of Mr Rao's submission).

Defendant's appeal dismissed.

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