Teo Ai Ling (by her next friend Chua Wee Bee) *v* Koh Chai Kwang [2010] SGHC 54

Case Number	: Suit No 421 of 2007 (Registrar's Appeal Nos 383 and 385 of 2009)
Decision Date	: 12 February 2010
Tribunal/Court	: High Court
Coram	: Steven Chong JC
Counsel Name(s)	: Tang Gee Ni and Chris Chng (GN Tang & Co) for the plaintiff; Madan Assomull and R Radikamalar d/o Rada Krishnan (Assomull & Partners) for the defendant
Parties	: Teo Ai Ling (by her next friend Chua Wee Bee) — Koh Chai Kwang

Damages – Assessment

12 February 2010 Judgment reserved.

Steven Chong JC:

Introduction

1 Both appeals before me are appeals against damages awarded by the Assistant Registrar ("the AR") to the plaintiff. The plaintiff was crossing Woodlands Avenue 3 when she was struck and knocked down by the defendant riding motorcycle No AX 7777H along the same road towards Bukit Timah Expressway on 12 July 2004. At the time of the accident, the plaintiff was 17 years old. The issue of liability for the accident was settled between the parties and by consent, interlocutory judgment was entered at 60% in favour of the plaintiff on 27 November 2007.

2 The appeals raised interesting questions, in particular, whether the plaintiff who was a student at the time of the accident and the assessment should be limited to a claim for loss of earning capacity instead of loss of future earnings.

3 Damages were assessed by the AR on 6 October 2009. The AR awarded general damages of $286,000 on a 100% basis, broken down as follows:

(a) $70,000.00 for pain and suffering for her physical head injuries;

(b) $25,000.00 for her cognitive injuries;

(c) $5,000 for hearing loss;

(d) $8,000 for fracture of right clavicle;

(e) $32,000 for eye injuries;

(f) $12,000 for pelvic fractures;

(g) $14,000 for open fracture of left tibia; and

(h) $120,000 for loss of earning capacity.

4 In addition, the AR awarded special damages of $16,563.14 for medical bills and expenses, $345.20 for transport and $534.10 for tuition fee paid to Ngee Ann Polytechnic. As liability was agreed at 60%, the general damages and special damages awarded to the plaintiff were $171,600 (60% of $286,000) and $10,465.46 (60% of $17,442.44) respectively totalling $182,065.46. Interest at half of 5.33% from date of service of writ to date of judgment was awarded for the special damages while interest at 5.33% was awarded from date of service of writ to date of judgment for the damages for pain and suffering.

5 In Registrar's Appeal No 383 of 2009, the plaintiff's appeal was for an increase in the award for pain and suffering for the head and cognitive injuries, and for an award based on loss of future earnings instead of loss of earning capacity or alternatively for an increase in the award for loss of earning capacity. Registrar's Appeal No 385 of 2009 is the defendant's appeal against the quantum awarded for all the heads of damages awarded by the AR. The defendant submitted that the total amount awarded was too high and should be reduced to $135,442.47. This is even lower than the amount of $185,442.47 submitted by the defendant before the AR. This becomes even more apparent when the individual heads for pain and suffering are examined below. It is not good practice for counsel to submit a sum which is substantially lower than that submitted in the court below unless there is some compelling and good reason to do so. No explanation was provided by the defendant's counsel for the lower figure in the appeal before me. I should add that the chances of succeeding in the appeal or resisting a cross-appeal are not improved by adopting such a position.

Background Facts

6 The plaintiff achieved good academic results in her primary education and scored 243 in her Primary School Leaving Examinations ("PSLE") in 1999. She then achieved seven 'O' level passes in her GCE 'O' Level Examination in 2003. At the time of the accident, the plaintiff was a first year student at Ngee Ann Polytechnic and was pursuing a Diploma in Business Studies. After the accident, Ngee Ann Polytechnic allowed her to defer her studies. She was permitted to resume her education almost 3 years later in April 2007.

7 After the accident, the plaintiff was admitted to National University Hospital ("NUH") where she remained warded until 17 August 2004. She was subsequently transferred to Tan Tock Seng Rehabilitation Centre and was discharged on 6 October 2004. Therefore, she spent a total of 36 days in hospital and 51 days in rehabilitation. Thereafter, she was on hospitalisation leave until 13 August 2005.

8 For the assessment, the plaintiff called two witnesses of fact, the plaintiff and her mother, and six medical experts. They were Dr Yeo Seng Beng ("Dr Yeo"), Dr Chong Piang Ngok ("Dr Chong"), Dr Chou Ning ("Dr Chou"), Dr Stephen Teoh Charn Beng ("Dr Teoh"), Ms Elizabeth Pang Peck Hia ("Ms Elizabeth Pang") and Dr Lim Yun Chin ("Dr Lim"). The defendant only called one witness, Dr Calvin Fones Soon Leong ("Dr Fones"), as an expert witness. In respect of the defendant's other expert witness, Dr W C Chang, the parties had agreed to the admission of his reports, dispensing with his attendance in court.

Extent of the plaintiff's injuries

9 Dr Chou is Head of Neurosurgery Division and Senior Consultant Neurosurgeon at NUH and Alexandra Hospital and a Clinical Senior Lecturer at the National University of Singapore. According to Dr Chou, the plaintiff's Glasgow Coma Score when she was first admitted to NUH on 12 July 2004 was 10. She was immediately intubated and ventilated. X-Rays revealed that she had a fractured right clavicle, pelvic fracture and an open left tibia fracture. She was bleeding from both nose and ears.

There was a scalp haematoma over the right occipital region and a cerebral oedema with a base of skull fracture. She had to undergo an insertion of intra-cranial pressure monitor and an external fixation of her left tibia and pelvis. She also underwent a craniectomy with an evacuation of clot for a large extradural haematoma. Post-operatively, she underwent ventilation and sedation. A tracheostomy was carried out for bronchial toilet and airway control.

10 The plaintiff was warded at NUH until 17 August 2004 when she was transferred to Tan Tock Seng Hospital ("TTSH") where she required ophthalmic and ENT care. According to Dr Teoh, an Associate Consultant in the Department of Ophthalmology at TTSH, the plaintiff suffered a left traumatic facial nerve palsy complicated by lagophthalmos, vitreous haemorrhage to left eye, right corneal scar secondary to exposure keratopahthy and traumatic right optic neuropathy. She is now blind in the right eye.

11 According to Dr Yeo, who is a Senior Consultant in the Department of Otolaryngology at TTSH, the plaintiff was diagnosed with left facial weakness from traumatic seventh cranial nerve palsy and bilateral conductive hearing loss from the temporal bone fractures. She required left ear surgery on 28 April 2005 and right eye surgery on 13 October 2005 to correct these problems.

12 Dr Chong is a consultant neurologist and physician with P N Chong Neurology Clinic at Mount Elizabeth Medical Centre. Dr Lim is a consultant in psychological medicine at Raffles Hospital. Ms Elizabeth Pang is a consultant clinical psychologist with the Raffles Counselling Centre at the Raffles Hospital. Their expert evidence was primarily in the area of the cognitive injuries suffered by the plaintiff.

13 Dr Chong conducted an examination of the plaintiff on 10 April 2008. He was of the opinion that although blindness in the eye is a serious handicap, the more serious problems related to her cognitive dysfunction. The cognitive deficits will affect most jobs which require mental judgment. Her bad mood can affect relationship in working places.

14 According to Dr Lim, who conducted a mental state examination of the plaintiff with reference to the reports prepared by Dr Yeo, Dr Teoh, Dr Chou and Dr Chong, there was a deterioration of the plaintiff's intellectual functioning from her pre-accident state. Her memory impairment appeared to be more severely affected even with her current low level intellectual functioning. According to Dr Lim, apart from cognitive disability, her social competence would also be impaired because of her emotional instability as well as her understandable reluctance to engage in social interaction.

15 Ms Elizabeth Pang examined the plaintiff on 11 and 14 June 2008 some four years after the accident. She conducted a number of tests to determine the plaintiff's intellectual functioning. According to Ms Elizabeth Pang, the plaintiff's overall current functioning was within the Low Average intellectual range. This was likely to be a deterioration from her estimated pre-morbid level of functioning. She had greater difficulty in retaining complex visual material. Based on her pre-morbid academic functioning, it was estimated that the plaintiff would have to be functioning at least within the average range in order to attain her academic qualifications. There had been an overall deterioration in her memory functioning. In respect of her memory, the plaintiff was performing at a level that was lower than expected given her current intellectual functioning. All of the memory indices, except for one, were within the extremely low to borderline range. According to Ms Elizabeth Pang, the greatest cognitive gains would have been achieved within the first six months after the onset of an acute non-progressive brain condition. The patient's functioning would have stabilized somewhat by the third year after the accident. Since it had already been four years after the accident, Ms Elizabeth Pang opined that it was unlikely that the plaintiff would demonstrate further substantial improvement in her cognitive functioning. The defendant's expert shared the same view

that the plaintiff's cognitive condition was unlikely to improve after all these years.

16 Dr Calvin Fones is a Consultant Psychiatrist in private practice. He is also an Adjunct Associate Professor with the Centre for Biomedical Ethic & Department of Pyschological Medicine at the Yong Loo Lin School of Medicine, NUS. Dr Fones examined the plaintiff on 4 August 2008. He also had copies of the inpatient discharge summary from TTSH, as well as the reports from Dr Yeo, Dr Teoh, Dr Chou Ning, Dr Chong, Ms Elizabeth Pang and Dr Lim.

17 Dr Fones came to the conclusion that the plaintiff probably suffered from traumatic brain injury with cognitive deficits and personality change. He was of the opinion that some degree of cognitive deficit including memory loss would commonly be expected following a moderately severe traumatic brain injury such as that suffered by the plaintiff. Her Glasgow Coma Scale score of 10 indicated a moderate severity of brain injury. Dr Fones opined that the plaintiff's assertions of angry outbursts, sudden shifts of dysphoric moods, irritability and changes in memory were consistent with the site of injury at the temporal lobes. He concluded that the findings from the psychometric testing done to measure the cognitive decline were consistent with the clinical presentation of moderately severe traumatic brain injury with prolonged post traumatic amnesia.

Non-compliance with O 40A of the Rules of Court

18 The six medical experts who were called by the plaintiff to testify at the assessment hearing did not depose in their affidavits of evidence in chief that in preparing their respective reports, they were aware that their primary duty was to the court and not to the plaintiff from whom the instructions were received.

19 On the basis of this omission, the defendant's counsel submitted that due to the non-compliance with O 40A r 3 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), the plaintiff's expert evidence "ought to be disregarded and or not to be given the weight it otherwise may have".

20 In my view, the purpose of O 40A r 3 of the Rules of Court is to remind the expert preparing the report that his duty to assist the court would override any obligation to the party from whom the instructions emanated. However, the overriding obligation of an expert to assist the court is in substance and not mere form. There is no "magic" in the expert's written acknowledgement of his paramount duty to the court. The presence or absence of the written acknowledgment in the expert's report cannot *per se* determine the admissibility or probative value of the report.

21 All the six medical experts testified at the hearing and were extensively cross-examined by the defendant's counsel. The AR who heard their evidence was able to assess their evidence and attach the appropriate weight to it.

22 In this case, the omission by the experts to comply with O 40A r 3 of the Rules of Court was probably due to a drafting oversight by the solicitors. In any event, the objection was raised by the defendant's counsel before the AR. I agree with the AR that there was no prejudice to the defendant. Each of the six medical experts confirmed at the assessment hearing that they were aware of their primary duty to the court and that they had duly complied with the duty.

23 I dismissed the objection when it was raised afresh by the defendant's counsel during the appeal.

Head injuries

24 The AR took the following factors into account when assessing the quantum for the head injuries; the bleeding from nose and ears, the Glasgow Coma Score of 10, the scalp haematoma over the right occipital region, the cerebral oedema with base of skull fracture, the large extradural haematoma, the fractures to the medial and lateral walls of both orbits, the fracture of the right zygomatic arch, the minimal left facial weakness from traumatic seventh cranial nerve palsy, the 2.5 cm keloid scar on the front of her throat from tracheostomy and other scars on the side of her tracheotomy scar and the craniectomy scar over the left parietal region. He also took into account the treatment which the plaintiff had to undergo, *ie* the intubation, sedation and ventilation, the insertion of intra-cranial pressure monitor, the tracheostomy, the titanium cranioplasty and craniectomy.

25 The defendant submitted that based on the decision in *Eng Ah Wah v Cheng Kiem Sang* [2003] SGDC 263 a sum of $20,000 should be awarded instead. In that case, the plaintiff suffered a fracture of left squamous temporal bone, left temporo-parietal extradural haematoma hemorrhage contusion of right temporo-frontal lobe, traumatic subarachmoid hemorrhage, *mild* cerebral edema and fracture base of skull with lower motor neuron injury to left facial nerve. As a result of these injuries, the plaintiff suffered *slight* forgetfulness and *mild* giddiness. The court awarded $25,000 for these head injuries. The defendant submitted that the injuries in that case were more severe than the injuries in this case and therefore only a sum of $20,000 should be awarded here. From the description of the injuries, I do not agree that they were more severe than those suffered by the plaintiff in the present case.

26 Before me, the plaintiff submitted that a total sum of $136,000 should be awarded for the head injuries, together with the cognitive injuries. I will deal with cognitive injuries separately below.

27 It is instructive to refer to previous awards for similar injuries. In *Teo Seng Kiat v Goh Hwa Teck* (Suit No 2224 of 1998, unreported), the Assistant Registrar awarded $90,000 to the plaintiff for head injury consisting of right extradural and parietal subdural haematoma. On appeal, G P Selvam J upheld the award for the head injury: see *Teo Seng Kiat v Goh Hwa Teck* [2003] 1 SLR(R) 333. In *Jaya bin Abdul Hamid v Radin Nornikman bin Abdul Ghani* (DC Suit No 4293 of 2001, unreported), the court awarded $60,000 to the plaintiff for head injury with left extradural haematoma and traumatic subarachnoid haemorrhage. The plaintiff had suffered a residual cognitive dysfunction resulting in borderline full scale IQ. The plaintiff underwent emergency craniectomy and evacuation of extradural haematoma.

28 From the evidence, it is clear that the plaintiff's head injuries were quite serious. Even the defendant's expert witness agreed that the plaintiff had suffered a moderately severe traumatic brain injury. She suffered a *large* extradural haematoma and extensive fractures of the skull and intracranial injuries. The sum of $70,000 awarded by the AR appears to be a reasonable amount for the head injuries and is consistent with the previous awards. I found no reason to depart from the AR's decision on his award for the head injuries.

Cognitive Injuries

29 The AR awarded a sum of $25,000 for her cognitive injuries. He noted that the experts from both parties agreed that there was some deterioration in the plaintiff's cognitive abilities, in particular her memory faculties and complex information processing. The AR took into account the fact that the plaintiff had deteriorated from the "average" range to the "lower average" range and that even the defendant's expert agreed that any improvement was not likely after all these years. However, the AR declined to make an award for personality change as he was not sure if these changes were a result of the injuries or whether they arose out of frustration with her other cognitive impairments.

30 Before me, on one hand, the plaintiff argued that the AR erred in not taking the personality change into account because there was uncontroverted evidence that the plaintiff's personality change was a direct result of the injuries sustained by the plaintiff. On the other hand, the defendant argued that there should have been no award for cognitive dysfunction.

31 According to the plaintiff's expert, Ms Elizabeth Pang, who assessed the plaintiff on 11 and 14 June 2008, the plaintiff's overall current functioning was within the low average intellectual range and there had been an overall deterioration in her intellectual functioning. She found that various aspects of her memory functioning was significantly below that expected of someone with her current intellectual functioning and that there had been a significant deterioration in her memory functioning. Even the defendant's expert was of the opinion that some degree of cognitive deficit including memory loss would commonly be expected following such an injury.

32 In my opinion, in either event, it is clear that the injuries or her frustration arising from the injuries were caused by the accident. Her personality change should have been taken into account in awarding damages for her cognitive injuries. The defendant's expert, Dr Fones, found that the plaintiff's assertions that she had experienced changes in her learning and behaviour, including irritability, with angry outbursts were consistent with the site injury at the temporal lobes. Further, under cross-examination, Dr Fones accepted that the plaintiff's personality change was the direct result of her injuries.

> Q: Dr. Fones can I then ask you to turn to BA236? Will I be right to say that arising from your examination of the plaintiff, your diagnosis of the plaintiff which you have highlighted in bold under the heading "Diagnosis" was that she suffered from "traumatic brain injury with cognitive deficit and personality change (temporal lobe syndrome)". Is that right?
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> A: That is correct.
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> Q: Can you help us --- help us to understand the meaning of the phrase "traumatic brain injury"? How is it different from the phrase "brain injury"?
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> A: "Traumatic" would imply the etiology, i.e. the cause which is trauma which is, er, erm, a force that is applied to the brain, a trauma--- in this case, which was sustained during a road traffic accident, hence trauma causing the brain injury.
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> Q: And can you also help us to understand the phrase "temporal lobe syndrome" that you have used?
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> A: The temporal lobes refer to a part of the brain which, erm, controls or, erm, er--- erm, controls certain functions including memory, erm, emotional regulation, erm, planning and, erm, this distinguishes the functions of the brain from, erm, other parts which may govern other functions. Er, therefore, temporal lobes, because of the purported, erm, site of the injury, er, we refer specifically to whether these, erm, anticipated, er, domains of functioning had been affected because of that---that---the site of injury, so i.e. the site of--- the specific site of the brain that was involved.
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> Q: So, Dr Fones, then based on your diagnosis, would it be right to say that this particular plaintiff, in your opinion, has suffered cognitive deficit and there has also been personality change?
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> A: Yes, based on the history and the findings, that---that was my conclusion."

33 In *Er Hung Boon v Law Shyan En* (DC Suit No 1567 of 1997, unreported), a sum of $20,000 was awarded for memory impairment. The cognitive injuries in the current case were more severe than just memory impairment. In my opinion, the claim for cognitive injuries should be increased to $40,000 to take into account the personality change.

Fracture of Right Clavicle, Pelvis and Left Tibia

34 The AR awarded a sum of $8,000 for the fracture of the right clavicle after taking into account the disabilities caused, *ie* the pain over the right shoulder when carrying sling bags and the fractured clavicle which united satisfactorily with local thickening and local deformity. He awarded a sum of $12,000 for the pelvic fractures. He took into account the fracture of the right acetabulum and the fracture of the right superior and left inferior pubic rami. He awarded a sum of $14,000 for the open fracture of left tibia. He noted that there were multiple abrasions and superficial lacerations of both lower limbs, some stiffness of joints but the rest of her lower limbs had normal power and no deformity. He also took into account a number of scars. For all these injuries, the AR awarded a total sum of $34,000.

35 The defendant submitted that a sum of $20,000 should have been awarded for this head of claim. Interestingly, before the AR, the sum advanced by the defendant was $30,000 for these injuries. The defendant referred to the following cases in support of his submission before me:

(a) Chin Swey Min (a patient suing by his wife and next friend Lim Siew Lee) v Nor Nizar bin Mohamed [2004] SGHC 27 where a sum of $10,000 was awarded for the fracture of the right clavicle.

(b) Chua Chuan Seng v Chua Eng Hwee (DC Suit No 2258 of 1997, unreported) where a sum of $8,000 was awarded for the fracture of the left clavicle.

(c) Lim Mei Cheng v Lim Siew Choo (DC Suit No 4952 of 2001, unreported) where a sum of $7,000 was awarded for a fracture of the left superior and inferior pubic rami.

(d) Huang Junhao (an infant, by Ng Beng Teck, his father and next friend) v Peck Teck Siong & Another (DC Suit No 600694 of 2000, unreported) where a sum of $12,000 was awarded for a fracture of the left tibia and a 19cm scar.

36 On the other hand, the plaintiff relied on the case of *Yong Kim Yuen v Mohamed Romzi bin Mohd Ali & Another* (DC Suit No 3175 of 1996, unreported) where a sum of $15,000 was awarded for the fracture of the left tibia and right pubic rami. In *Mohamed Shaih s/o Malukumian v Thiruppanalwar Veerasamy & Another* (DC Suit No 3310 of 1998, unreported), a sum of $14,000 was awarded for the open fracture of the left tibia.

37 In my view, the sums awarded by the AR under this category were not excessive and I decline to interfere with his award particularly since it is very close to the amount submitted by the defendant before the AR.

Eye injuries and hearing loss

38 The AR awarded $32,000 and $5,000 for the eye injuries and hearing loss respectively. In this appeal, the defendant submitted that the amount should be reduced to $$25,000 and $3,000 respectively.

39 I have noted that before the AR, the defendant actually submitted a higher figure of $30,000 for the eye injuries. This is very close to the amount awarded by the AR. In my view, the amounts awarded by the AR for the eye injuries and for hearing loss are fair and reasonable and I see no reason to disturb his award.

Loss of earning capacity or loss of future earnings

The decision below

40 The AR held that since the plaintiff is still schooling and has not worked before, it was more appropriate to award damages for loss of earning capacity rather than loss of future earnings. He found that it would be too speculative to award damages using the multiplier–multiplicand approach for loss of future earnings as submitted by the plaintiff. In his Grounds of Decision ("GD"), there does not appear to be any analysis by the AR on the decisions involving loss of earning capacity or loss of future earnings for students. He appeared to have decided that the plaintiff's claim should be based on loss of earning capacity solely because she was a student at the time of the accident.

41 He awarded the plaintiff a lump sum of $120,000 for loss of earning capacity taking into account the following findings:

(a) the plaintiff's most significant disabilities arising from the accident were the cognitive and visual ones;

(b) although the cognitive impairment was not so serious, he took into consideration the "real possibility" that the plaintiff might fail her polytechnic examinations leaving her with only her secondary school results to rely on. Accordingly, he accepted that there will be a "diminution of her earning capacity from that of a polytechnic diploma holder to that of a secondary school certificate holder";

(c) the plaintiff's memory and information processing abilities have been lowered from average to below average range.

The appeals

42 Both the plaintiff and the defendant appealed against the decision of the AR. The plaintiff submitted that damages should have been awarded based on loss of future earnings instead of loss of earning capacity. In support, the plaintiff cited *Lai Chi Kay & Others v Lee Kuo Shin* [1981] 2 MLJ 167 ("*Lai Chi Kay*") that the multiplier-multiplicand approach is appropriate even if the claimant was a student at the material time. After the hearing, at my invitation to both parties to submit additional authorities on claims for loss of future earnings by students, the plaintiff also referred to *Tham Yew Heng & Another v Chong Toh Cheng* [1985] 1 MLJ 4008 ("*Tham Yew Heng*") and *Peh Diana & Another v Tan Miang Lee* [1991] 1 SLR(R) 22 ("*Peh Diana*") that loss of future earnings can be awarded for students.

43 The plaintiff submitted that given the nature and extent of her injuries, it is not unreasonable for the court to find that she would in all probability not be able to complete her polytechnic course. The plaintiff quantified her claim for loss of future earnings (on a 100% basis) at $576,000 based on a multiplier of 20 years and a multiplicand of $2,400.

44 The defendant did not specifically challenge the appropriateness of the multiplier of 20 years or the multiplicand at $2,400. No other figure was advanced by the defendant for either the multiplier or

the multiplicand. Instead, the defendant's challenge was solely at the threshold level that damages should be based on loss of earning capacity and therefore it is neither relevant nor necessary to determine the appropriate multiplier or multiplicand. The defendant maintained that there was no evidence before the court that the plaintiff would not pass her polytechnic course as a result of the accident. In fact, the defendant submitted that the AR had erred when he found that there was a "real possibility that she might fail her polytechnic exams" since the "evidence points to the contrary". Accordingly, the amount awarded was too excessive and should instead be limited to $50,000. Before the AR, the defendant had submitted a higher amount of $80,000.

45 The defendant relied on several authorities for the proposition that damages for loss of earning capacity is the appropriate mode to quantify compensation for students who have not started working at the time of the accident: see *Tan Yu Min Winston v Uni-Fruitveg Pte Ltd* [2008] 4 SLR(R) 825 ("*Winston Tan*"), *Lim Yuen Li Eugene v Singapore Shuttle Bus Service Pte Ltd & Another* [2005] SGHC 189 ("*Eugene Lim*"), *Muhamad Ilyas Bin Mirza Abdul Hamid v Kwek Khim Hui* [2004] SGHC 12 ("*Muhamad Ilyas*") and *Clark Jonathan Michael v Lee Khee Chong* [2009] SGHC 204 ("*Clark Jonathan Michael*").

The law

46 An appeal to a judge in chambers from a decision of the AR on an award of damages is not treated as an appellate court hearing an appeal from a decision of a trial judge. The judge reviews the decision "*as though the matter came before him for the first time*": see *Chang Ah Lek & Others v Lim Ah Koon* [1999] 1 SLR(R) 82 ("*Chang Ah Lek*") and *Ho Yeow Kim v Lai Hai Kuen & Another* [1999] 2 SLR(R) 246. I will accordingly address the issues before me and assess the appropriate level of damages *de novo*.

47 The expressions "loss of future earnings" and "loss of earning capacity" are sometimes confused for each other and at times used interchangeably: see *Teo Seng Kiat v Goh Hwa Teck* [2003] 1 SLR(R) 333 ("*Teo Seng Kiat*"), *Teo Sing Keng v Sim Bian Kiat* [1994] 1 SLR(R) 340. It is, however, important to recognise that there is a fundamental difference between the two when computing damages. Compensation for loss of future earnings is awarded for real and assessable loss proved by evidence while compensation for diminution in earning capacity is awarded as part of general damages: see *Fairley v John Thompson (Design & Consulting Division) Ltd* [1972] 2 Lloyd's Rep 40 at 41.

48 The difference between the two methods of compensation was succinctly explained in *Smith v Manchester Corp* (1974) 17 KIR 1 cited with approval by the Court of Appeal in *Chang Ah Lek* at 91:

> 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.
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> ...
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> 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.

49 Arising from the above cases, the following principles can be extracted:

(a) Loss of future earnings is awarded for real and assessable loss which must be proved by evidence.

(b) Loss of earning capacity is typically awarded when the plaintiff retains employment post-accident and has not suffered any immediate loss of earnings but may as a result of the injury be at a disadvantage in securing an equally well paid job should he subsequently lose that employment. This is sometimes referred to as "handicap" or "loss of competitive edge" or "weakening of his competitive position" in the labour market.

(c) Loss of earning capacity may be awarded if there is no available evidence of the plaintiff's earnings to facilitate a proper computation of future earnings.

Are damages for students restricted to loss of earning capacity?

50 In considering this issue, I have analysed a series of decisions involving compensation for personal injuries to students. From my review, it is clear to me that there is no hard and fast rule that students with no employment at the time of the accident and/or assessment are invariably restricted to a claim for loss of earning capacity. Ultimately the issue is whether the loss of future earnings can be proved on the evidence before the court.

(a) In *Lai Chi Kay* ([42] supra), a fourth year medical student was awarded damages for loss of future earnings of $622,800 using a multiplier of 15 years and a multiplicand of $5,000 per month.

(b) In *Tham Yew Heng* ([42] supra), a nine year old boy was awarded loss of future earnings. A multiplier of 20 years was adopted with a multiplicand of $200 per month.

(c) In *Peh Diana* ([42] supra), a 14 year old was also awarded loss of future earnings with a multiplier of 15 years and a multiplicand of $800 per month.

51 Following the above review, loss of future earnings can be used in appropriate cases to assess damages as compensation to students *provided* the loss is real and assessable. As it is a claim for special damages, it must be proved by evidence.

52 The defendant's counsel, on the other hand, referred to a number of decisions that loss of earning capacity is the correct mode to compute damages suffered by a student:

(a) In *Winston Tan* ([45] supra), the court awarded damages for loss of earning capacity to a polytechnic student who suffered serious head injuries in a road traffic accident. However, notwithstanding the injuries, the court found that the plaintiff continued to pass his examinations

and his grades were above average in comparison to other students who did not suffer from the same disabilities. Although the plaintiff suffered from some impairment to his memory, the court also found that it should not have a material bearing on his employability as an IT graduate. Accordingly, both parties agreed that the plaintiff's claim was rightly a claim for loss of earning capacity.

(b) In *Muhamad Ilyas* ([45] supra), the court also awarded damages for loss of earning capacity to the plaintiff who was a full-time national serviceman at the time of the accident. He suffered serious head injuries. Prior to the accident, he had an excellent academic record throughout his school life and was awarded a scholarship to pursue a course in Electrical Engineering in the United States. After the accident, he was accepted by University of California (Berkeley). He was unable to complete the course in the requisite three years and as a result lost the scholarship. However he continued with the course despite losing the scholarship. Although he would have taken a longer time to complete the course, there was no dispute that he would have eventually graduated. At the time of the assessment, the plaintiff was between his third and fourth year at the university having successfully passed his technical and elective courses.

(c) In *Eugene Lim* ([45] supra), the plaintiff graduated from his polytechnic course in spite of the accident and was employed with a salary above the national average for diploma holders. He brought a claim for loss of future earnings on the basis that but for the accident, he would have gone on to obtain a university degree like his two friends. He sought to bring a claim for the difference in salaries between a diploma holder and a university graduate. The court, however, found that there was no evidence that he had any intention to pursue a university course or that the injuries would prevent him from so doing. Accordingly, the court only awarded him loss of earning capacity. His injuries had not caused him any loss of future earnings since he managed to pass the polytechnic course and obtain employment in spite of the accident.

(d) Finally, in *Clark Jonathan Michael* ([45] supra), the plaintiff who was a nursing student managed to graduate with a nursing degree and was employed after the accident. He brought a claim for loss of future earnings on the basis of what he would have earned in the United States as a nurse practitioner or nurse anaesthetist. The court, however, rejected the claim and awarded him damages for loss of earning capacity instead because there was simply no evidence that the plaintiff had intended to return to the United States to work as a nurse given that he chose to live in Singapore and pursued the nursing course in Australia.

53 From the above analysis of the cases, it is apparent that in each of them, the students who were injured from the accident still managed not only to complete the course but also gained employment with comparable remuneration. Under those circumstances, it was indeed understandable why loss of earning capacity was awarded in those cases. Since the plaintiffs in those cases were still able to earn what they would otherwise have earned but for the accident, there could be not have been any loss of future earnings.

54 The plaintiff's claim for loss of future earnings is premised as follows:

(a) But for the accident, it is likely that she would pass her polytechnic examinations and graduate with a diploma in Business Studies.

(b) The mean monthly gross starting pay for such a graduate in 2006 was $1,610 and it may reach a maximum of $6,600 per month in the Civil Service.

(c) Given the nature and extent of the plaintiff's injuries, it is probable that she would not be

able to complete the polytechnic course.

(d) It is appropriate to use the mean between the minimum and maximum wage for a diploma holder to calculate the multiplicand. The mean would be $4,105. However, as the plaintiff's claim is for loss of future earnings, she claimed a multiplicand of $2,400.

(e) As she was only 17 years old at the time of the assessment, a multiplier of 20 years is reasonable.

55 Therefore unlike the decisions relied on by the defendant, the plaintiff's claim in the present case is founded on an entirely different basis. The plaintiff's case is that it is likely that she would not be able to complete the course as a result of the accident and therefore would suffer a real assessable loss in her future earnings. My inquiry is therefore to determine whether the plaintiff's loss of future earnings is real and assessable by reference to the evidence before the court.

Is it probable that the plaintiff would fail her polytechnic course as a result of the accident?

56 The plaintiff's claim for loss of future earnings is premised on the fact that but for the accident, it is likely that she would graduate with a diploma in Business Studies but would probably fail the course as a result of the accident. This would leave her with only a Singapore-Cambridge General Certificate of Education (Ordinary Level) (" 'O' Level") Certificate.

57 Accordingly, the starting point is to examine whether, on the evidence before me, the plaintiff is likely to pass her Business Studies course if not for the accident.

58 The plaintiff achieved above average results in her PSLE in1999. She scored 243 points. In 2003, she achieved seven 'O' Level passes. She then decided to pursue the Business Studies course in Ngee Ann Polytechnic instead of undergoing the GCE 'A' Level course in a junior college. She was accepted for the academic term which commenced on 28 June 2004. Barely two weeks into the course on 12 July 2004, the plaintiff was struck by the defendant's motorcycle while crossing Woodlands Avenue 3.

59 As aptly observed by Chao Hick Tin J in *Peh Diana*, "it is never an easy task to assess loss of future earnings". The assessment would inevitably involve "a double exercise in the art of prophesying not only what the future holds for the injured plaintiff but also what the future would have held for him if he had not been injured": see *Paul v Rendell* (1981) 55 ALJR 371 at 372.

60 In this regard, I have noted that it is the defendant's case that in spite of the serious injuries sustained by the plaintiff, the evidence suggests that she would still pass her polytechnic course. It must logically follow that the defendant is not disputing that the plaintiff would likewise have graduated from the course even if she was not injured by the accident. Given her academic results in both her PSLE and 'O' Level examinations (which are the only available materials to assess the probability of her passing the polytechnic course), it was understandable for the defendant to have adopted this position. In fact, the cross-examination of the plaintiff by the defendant's counsel before the AR also proceeded on the basis that she would graduate in spite of her injuries:

Q: You think you won't be able to get a diploma?

A: Yes, I think.

Q: Even though you won't be able to get a diploma, you were still working very hard for it.

Therefore you believe there is some chance of you getting it, otherwise you won't be working so hard.

A: No I just feel that I don't wish to give up this chance to have the study life in NP, I just want to try.

Q: The reason why you're trying very hard is because you yourself believe that you can make it.

A: I disagree.

Q: You have proved that you can make it, because you passed your two fail subjects once.

A: Yeah right.

Q: And if you did it before, you can do it again.

A: Disagree.

Q: You were able to get an A for one subject.

A: Yes.

Q: This means that if you concentrate and work hard, you can succeed.

A: Disagree.

Q: If and when you get your diploma, you will be able to earn a starting salary of $1,600.

A: Yes.

Q: And in the civil service you can reach a maximum of S$6,600 per month.

A: Yes.

Q: You understand what you are claiming her [*sic*]: loss for future earnings.

A: Yes.

Q: What are you claiming for? If you are getting a Diploma from NP, there is no loss that you will suffer. You will get from $1,610 to $6,600.

A: But what if I don't.

Q: If you do get your diploma, this is what you will get?

A: Yes.

61 The main dispute before the AR on this issue was whether, given the nature and extent of the injuries, the plaintiff is likely to fail the polytechnic course. In this regard, the AR, having heard the testimony from six medical experts called by the plaintiff and one medical expert by the defendant, found that there is a "real possibility that she might fail her polytechnic examination". The defendant submitted that the AR had erred in that he made findings on "possibility" and not "probabilities" as he

was obliged to do so. In the context of his GD, it is clear that the AR was indeed satisfied on a balance of probabilities that the plaintiff would fail her polytechnic course.

62 Having reviewed the evidence, I am satisfied that there is sufficient evidence to support the AR's finding. The plaintiff was examined by three medical experts,*ie* Dr Chong, Ms Elizabeth Pang and Dr Lim, on her cognitive injuries. They testified that the plaintiff suffered serious cognitive disabilities which have impaired her intellectual and memory functions such that she was likely to find difficulties to succeed at the polytechnic course.

(a) Dr Chong concluded in his report as follows:

(b) But I am quite certain that *she will have permanent disability in her mental functions*.

(c) *The injuries will affect her studies. In fact, this has happened*.

(d) The main problem is the cognitive deficits, which will affect most jobs which require mental judgment. Her bad mood can also affect relationships in working places. The blindness in the right eye can affect stereoscopic vision and therefore jobs which require clear focus.

[emphasis added]

(b) Ms Elizabeth Pang assessed the plaintiff on two occasions and arrived at the following clinical conclusion on her intellectual and memory functions:

16 The assessment indicated that *Ai Ling was currently functioning within the Low Average intellectual range, this was likely to be a deterioration from her estimated pre-morbid level of functioning*. Various aspects of her memory functioning was significantly below that expected of someone with her current intellectual functioning. She had greater difficulty in retaining complex verbal material and general memory ability that are required for day-to-day tasks. Hence, *compared to estimated pre-morbid memory functioning (estimated to be at least within the Average range), there was a more significant deterioration in her memory functioning*.

17 It is generally believed that the greatest cognitive gains will be achieved within the first six month[s] after onset of an acute non-progressive brain condition and that patients' functioning will stabilize somewhat over the next three years (Lezak, 1983). As it is already almost four years after the accident, *it is unlikely that Ai Ling will demonstrate further substantial improvement in her cognitive functioning*.

18 With her current intellectual and memory functioning, although Ai Ling has some capacity to learn and has shown a lot of persistence in her pursuit of her studies, *she is likely to find it difficult to succeed at her current studies without a lot of extra effort and time*.

[emphasis added]

(c) Finally, Dr Lim reviewed her independently and arrived at a similar conclusion:

Her memory impairment appeared to be more severely affected even with her current low level of intellectual functioning. She has difficulty in retaining complex verbal material and general memory ability that are required for day to day tasks.

It is unlikely that further cognitive improvement could be attained because most gain occurred within the first six months following the accident and the victim's functioning will stabilize over the next 3 years. The accident occurred about 4 years ago.

Apart from the cognitive disability her social competence will also be impaired because of her emotional instability as well as her understandable reluctance to engage in social interaction.

[emphasis added]

63 Due to the seriousness of the plaintiff's injuries, she was allowed to defer her course in Business Studies. She only resumed her studies almost three years later in 2007. The impact of the accident on her studies was best exemplified in her examination results. In the first semester, she failed two out of six modules, namely business statistics and micro economics. She repeated the two modules and managed to pass with Grade D. In the third semester, she failed three modules, namely business law, macro economics and principles of accounting. At the time of the assessment, she was repeating the three modules in her fourth semester. She was informed by Ngee Ann Polytechnic that should she fail in any one of the repeat papers, she would be dismissed from her course.

64 These three medical experts who testified on the extent of the cognitive impairment suffered by the plaintiff were subjected to intensive cross-examination by the defendant's counsel. It is relevant to highlight that the AR observed that the defendant's counsel tried unsuccessfully to assail the tests which were carried by the experts on the plaintiff on the ground that they were either incomplete or out-dated. The AR found, which finding I accept, that "the tests were adequate and their results were an accurate reflection of the Plaintiff's condition."

65 Before me, counsel for the defendant sought to attach weight to the fact that she scored an A grade in the module, "Creativity and Applied Thinking Skills" in her first semester. This was no different from the defendant's position before the AR. However, I note that unlike the other papers which she failed, creativity and applied thinking skills is a non-core subject with two units compared to the other four-unit modules. In the third semester, she scored a B grade in another two-unit module in business etiquette and image. For all the other papers, she either failed or scored a D grade with the exception of one four-unit module in computing and information processing in which she scored a C grade. From the grades, it is clear that the accident has had a negative impact on her studies.

66 The defendant's counsel also referred to the cross-examination of the plaintiff's expert, Dr Chou. Unlike the other 3 medical experts whose reports on the plaintiff's cognitive disabilities were referred to above, Dr Chou's report was essentially on the physical injuries which the plaintiff suffered from the accident. Dr Chou concluded in his report that she had made a remarkable recovery from the accident. However, it is clear from the evidence that Dr Chou's observation about the plaintiff's remarkable recovery was in connection with her physical recovery. When Dr Chou was asked whether he would agree that the plaintiff's cognitive impairment was very mild, he was hesitant to provide a blanket agreement. It should be observed, however, that Dr Chou, unlike Dr Chong, Ms Elizabeth Pang and Dr Lim, did not subject the plaintiff to a battery of tests to determine the extent of her cognitive impairment. Therefore it is understandable why Dr Chou was unable to provide a more definitive opinion of the plaintiff's cognitive injuries.

67 In re-examination, Dr Chou testified that he was not surprised with the clinical conclusions by the plaintiff's other medical experts following neuropsychological assessments and other tests that the plaintiff had suffered cognitive deficits as a result of the accident:

Q If I were to tell you that she has, through her own psychiatrist, gone through a battery of tests and she has confirmed that she is of the "below average" range and that she thus in fact suffer[s] from cognitive deficit and that conclusion is reinforced by the defence's own psychologist, what do you have to say professor?

Assomull: Your Honour, I'm objecting to that question. It is leading. It is not a matter that arose on cross-examination in terms of clarification or explanation. It goes into a new terrain altogether, and it is providing an answer to the witness in the question itself which is the ambit of cross-examination and not re-examination.

Court: No, proceed.

Chng: Sorry?

Court: Proceed. Yes, witness?

A: I wouldn't be surprised. I mean if you tell me that the psychiatrist has done neuropsychological assessments and have indeed confirmed deficits, I wouldn't be surprised at all.

68 I agree with the plaintiff's counsel that the more relevant evidence concerning the extent of the cognitive injuries to the plaintiff would be the evidence of Dr Chong, Ms Elizabeth Pang and Dr Lim. I note that the defendant's expert, Dr Fones, did not qualify or disagree with the conclusion reached by the plaintiff's experts. In fact, the defendant's expert report corroborated the plaintiff's experts' report:

> [The plaintiff] has been reported presently to have changes in her memory, learning and behaviour, including irritability, with angry outbursts and sudden shifts of dysphoric moods. These are consistent with the site of injury at the temporal lobes.
>
> …
>
> Based on the psychologist's report of 18 June 2008, this revealed that [the plaintiff] was functioning in the low average range of intellectual functioning. There were also suggestions of poor memory functioning. *This suggests that there was a significant deterioration from her estimated pre-morbid level of intellectual functioning. These findings are consistent with the clinical presentation of moderately severe TBI with prolonged PTA*.
>
> [emphasis added]

69 The defendant also relied on Dr Chou's evidence when he agreed under cross-examination that the plaintiff's intellectual functioning was unlikely to deteriorate further. However the more relevant inquiry is whether her condition is likely to improve. In this connection, all the experts including Dr Fones were *ad idem, ie* it is unlikely to improve. Therefore it is appropriate for the court to rely on the expert evidence of the plaintiff's intellectual and cognitive deficits at the time of the assessment.

70 On a balance of probabilities, I therefore find on the evidence that the plaintiff is likely to fail her diploma course in Ngee Ann Polytechnic as a result of the serious injuries which she sustained from the accident. So long as she fails any one of the three repeat modules, she will be dismissed from the course. Accordingly, it must follow that the plaintiff will suffer a loss of future earnings being the difference between what she would earn with a diploma in Business Studies compared with just

her "O" Level certificate. In fact this was precisely what the AR found at page 6 of his GD where he held that there "would be a diminution of her earning capacity from that of a polytechnic diploma holder to that of a secondary school certificate holder." Where he erred was that having made that finding, he should have gone down to examine the multiplier and the multiplicand to determine the loss of future earnings. It bears mentioning that the plaintiff is not claiming for loss of future earnings on the basis that she would have gone on to pursue a university degree course after graduating from Ngee Ann Polytechnic. That may have been speculative as the court had found in *Eugene Lim*.

71 For completeness, I should add that subsequent to the assessment hearing and prior to the rendering of the award, the plaintiff wrote to the AR for leave to admit fresh evidence to show that the plaintiff had failed her polytechnic examination. The examination results were only released after the hearing. The AR disallowed the plaintiff to adduce the fresh evidence on the basis that the plaintiff had not adhered to the timelines for the filing of the closing submissions. The AR observed that there was delay on the part of both parties in meeting the timelines for the closing submissions. The AR was of the view that the plaintiff bore the greater fault in failing to pursue her claim with vigour. While I appreciate that the AR was keen to ensure that the matter should be dealt with expeditiously and without any undue delay, that should not have precluded the court from examining fresh evidence which only came into existence after the hearing. The delay, if any, could have been compensated by way of an appropriate cost order or reduction in the period for calculating interest. It appears that the AR was of the opinion that the fresh evidence may not have been necessary since he was able to find on the basis of the evidence before him, that there was a "real possibility that the plaintiff might fail her polytechnic examinations". When the appeal was heard before me, counsel for the plaintiff submitted that the plaintiff had failed her examination. An objection was raised by the defendant's counsel since leave had not been granted to admit the fresh evidence. I informed the plaintiff's counsel that if he wished to rely on her examination results, he would be required to apply for leave. However, the plaintiff did not apply to formally admit the examination results. As the results were only released after the assessment hearing, I can see no reason why the evidence should be excluded. If the application had been made by the plaintiff's counsel, it is likely that I would have allowed it subject to the right of the defendant to cross-examine her on the results if necessary. However, I must make it clear that I was able to arrive at my decision without reference to the examination results which were released after the assessment hearing.

Multiplier and multiplicand

72 The plaintiff's claim for loss of future earnings is based on a multiplier of 20 years and a multiplicand of $2,400 per month. Although the defendant has not put forward any alternative figures, I shall nevertheless examine whether the plaintiff's claims are borne out by the evidence and supported by law.

Multiplier

73 The plaintiff was 17 years old at the time of the accident. In determining the appropriate multiplier, it is relevant to take into account the retirement age. In this regard, it is important to note that the retirement age was raised to 62 years from 1 January 1999. It was observed by Judith Prakash J in *Ang Leng Hock v Leo Ee Ah* ("*Ang Leng Hock*") [2004] 2 SLR(R) 361 that the pre-1999 cases may not provide an accurate yardstick for the multiplier as they were decided prior to the change in 1999. At [54], Prakash J stated as follows:

> The retirement age under s 4 of the Retirement Age Act (Cap 274A, 2000 Rev Ed) had been raised to 62 as from 1 January 1999. Most of the authorities on the calculation of the length of the multiplier had been decided prior to the change in 1999. He cited the cases of *Wee Sia Tian v*

Long Thik Boon [1996] 2 SLR(R) 420, where an eight-year multiplier had been used for a 48-year-old plaintiff, *Shela Devi d/o Perumal v Rawi bin Nahari* (Suit No 1191 of 1995, unreported) where an 11-year multiplier was used for a 41-year-old…

74 I am mindful that the plaintiff is a woman and that she may marry and stop work before the normal retirement age. However, as rightly observed by Chao J in *Peh Diana*, the court cannot ignore the fact that the government is constantly encouraging women to join the workforce and to contribute positively to the economic growth of the country. Therefore, no reduction to the multiplier should be made on account of the fact that the plaintiff may stop work after marriage. I should also add in passing that the severity of her injuries might also affect her chances of marriage.

75 Although the retirement age is now 62 years old, the multiplier is not calculated by deducting the retirement age from the plaintiff's age. It is always discounted to take into account the investment of an immediate lump sum and the vicissitudes of life which may affect the plaintiff.

76 The plaintiff relied on *Teo Seng Kiat* ([47] supra]). This was a post-1999 decision. In that case, the plaintiff was 28 years old and the multiplier that was awarded was 18 years. Given that the plaintiff in the present case was 17 years old at the time of the accident, in my view, the multiplier of 20 years is fair and reasonable.

Multiplicand

77 The plaintiff's unchallenged evidence is that the average monthly gross starting salary for a diploma holder in Business Studies in 2006 was $1,610. Furthermore, it was not challenged that, in the Civil Service, such a diploma holder will reach a maximum of $6,600 per month. In *Lai Chi Kay*, the court held that the mean between the maximum and the minimum salaries would be a reasonable measure for the multiplicand. In this case, the mean salary would be $4,105 (($1,610 + $6,600) ÷ 2 = $4,105). This would be relevant as a measure for *total* loss of future earnings. I accept the AR's finding that the plaintiff's cognitive impairments would not prevent her from working altogether. She should be able to get a job with her 'O' Level results. The AR found that the plaintiff would be more suitable to jobs which are largely routine in nature involving repetitive tasks instead of jobs which require decision making and large amounts of information. This is entirely consistent with the AR's finding that she is likely to fail her polytechnic course. Obviously, she will earn less than what she would otherwise earn with her diploma in Business Studies. I note that the plaintiff is only claiming $2,400 per month and not the mean salary of $4,105. After taking all the circumstances into account, I have decided to use the mid-point of the mean between the maximum and minimum salaries $4,105 ÷ 2 = $2,052.50 rounded to $2,050 as the multiplicand. In *Peh Diana*, in calculating the multiplicand, the court held that it was entitled to factor in a 13th month bonus and employer's CPF contributions. This was not specifically claimed by the plaintiff. In adopting the multiplicand of $2,050, I have taken note that I am entitled to take these two additional factors into consideration. However, I believe the multiplicand of $2,050 is fair and reasonable.

78 In the circumstances, it cannot be suggested that the plaintiff's claim for loss of future earnings is too speculative. The loss is real and assessable by reference to what she would have earned as a diploma holder compared to what she is likely to earn with just her 'O' Level results. There is sufficient evidence and basis to support the multiplier of 20 years and the multiplicand at $2,050 per month.

79 The plaintiff, in the alternative, submitted that even if the damages are to be assessed on loss of earning capacity, the amount awarded should be increased. The plaintiff submitted that the court is entitled to use the multiplicand/multiplier approach to arrive at an approximate figure for loss of

earning capacity. This approach did not find favour in the Court of Appeal's decision in *Chang Ah Lek*. It held that when assessing a claim for loss of earning capacity, it would not be appropriate to use a multiplier/multiplicand approach. The correct approach instead is to "look at the weaknesses in the round by taking note of the various contingencies and doing the best ... to arrive at an assessment which could so do justice", at [28]. In the present case, I do not believe that it would be fair or reasonable to award the plaintiff a global sum for loss of earning capacity by choosing a figure "in the round". In my view, an award based on loss of future earnings is fairer to better reflect the real loss of the plaintiff.

80 Accordingly, I assess her loss of future earnings to be $2,050 x 12 x 20 = $492,000. As liability was apportioned at 60% in favour of the plaintiff, her award for loss of future earnings would be $295,200.

Interest

81 I will not disturb the AR's decision on interest. The defendant's counsel submitted that interest should not be awarded for loss of future earnings or loss of earning capacity. He directed my attention to *Clarke v Rotax Aircraft Equipment Ltd* [1975] 3 All ER 794 where it was stated at 798 that:

> The statement in question I take from the judgment of Lord Denning MR in Jefford v Gee [[1970] 1 All ER 1202 [1970] 2 QB 130] where under the heading of 'Loss of future earnings' he says:
>
> > 'Where the loss or damage to the plaintiff is future pecuniary loss, eg loss of future earnings, there should in principle be no interest. The judges always give the present value at the date of the trial, ie, the sum which, invested at interest, would be sufficient to compensate a plaintiff for his future loss, having regard to all contingencies. There should be no interest awarded on this because a plaintiff will not have been kept out of any money. On the contrary, he will have received it in advance.'
>
> In my judgment, that same principle ought to be applied to the damages awarded for loss of earning capacity.

82 Loss of future earnings and loss of earning capacity both represent damages for future losses. Interest should not be awarded in either case because the victim is actually receiving his future losses in advance and the lump sum payment can be invested to earn interest.

83 It is far from clear to me why this submission was made in this case. Initially I thought, on the strength of this submission, that the AR had awarded interest for loss of earning capacity. However when I reviewed his GD, I noted that interest for loss of earning capacity was not awarded. Furthermore, the plaintiff is not appealing for interest to be awarded either. On principle, the proposition of law cited by the defendant's counsel is correct though it has no immediate relevance to both appeals.

Conclusion

84 In the circumstances, I allow the plaintiff's appeal and revise the award on a 100% basis as follows:

(a) General damages for pain and suffering for the physical head injuries – $70,000 as below

(b) Cognitive injuries – increase from $25,000 to $40,000

(c) Hearing loss– $5,000 as below

(d) Fracture of right clavicle – $8,000 as below

(e) Eye injuries – $32,000 as below

(f) Pelvic injuries – $12,000 as below

(g) Open fracture and let tibia – $14,000 as below

(h) Loss of future earnings – increase from $120,000 to $492,000

(i) Medical expenses – $16,563.14 as below

(j) Transport – $345.20 as below

(k) Tuition fee – $534.10 as below

Total – $690,442.44

As liability was agreed at 60% in favour of the plaintiff, the amount awarded to the plaintiff is $414,265.46. Interest would be awarded at 5.33% for items (a) to (g) from the date of service of writ to the date of judgment. Interest on items (i) to (k) would be at half of 5.33% from date of service of writ to the date of judgment. As a consequence of the above order, it follows that the defendant's appeal must be dismissed. As both appeals covered essentially the same ground, I will only allow one set of costs to the plaintiff to be taxed if not agreed.