# Ng Chee Wee *v* Tan Chin Seng
# [2013] SGHC 54

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| **Case Number** | : Suit No 302 of 2004 (Registrar's Appeal No 320, 323 and 333 of 2012) |
| **Decision Date** | : 28 February 2013 |
| **Tribunal/Court** | : High Court |
| **Coram** | : Vinodh Coomaraswamy JC |
| **Counsel Name(s)** | : N Srinivasan (Hoh Law Corporation) for the plaintiff; Low Tiang Hock (Low & Co) for the defendant. |
| **Parties** | : Ng Chee Wee — Tan Chin Seng |

*Damages – Assessment*

28 February 2013

**Vinodh Coomaraswamy JC:**

1 On 31 July 2012, the Assistant Registrar ("the AR") assessed damages in this action. He assessed the defendant's loss and damage at $956,599.03. That comprised special damages of $301,048.91 and general damages of $655,550.12. The defendant had been adjudged liable for 75% of the plaintiff's loss and damage. So the AR ordered the defendant to pay the plaintiff $717,449.27 – being 75% of the loss and damage assessed – plus interest and costs.

2 On 3 August 2012, the Defendant appealed against the whole of the AR's order by way of RA 320 of 2012. On 7 August 2012, the plaintiff cross-appealed against parts of the AR's order by way of RA 323 of 2012. On 10 August 2012, the plaintiff filed a second appeal by way of RA 333 of 2012 covering the same ground as RA 323 but going further by including a specific challenge on the AR's award of interest.

3 All three appeals came up for hearing before me on 30 August 2012. At the outset, counsel for the plaintiff sought leave to withdraw RA 323 of 2012 with no order as to costs because it had been superseded by RA 333 of 2012. I granted leave by consent. I therefore need say no more about RA 323 of 2012.

4 I considered both parties' oral and written submissions, the authorities cited and the evidential record. On 31 August 2012, I dismissed the defendant's appeal in RA 320 of 2012 and allowed in part the plaintiff's appeal in RA 333 of 2012. I allowed the plaintiff's appeal in part on a point more of arithmetic than of principle. Both parties appealed against my decision. I now set out my reasons.

**Background to the Appeals**

5 On 29 June 2003, a lorry driven by the defendant collided into a motorcycle ridden by the plaintiff. As a result of that collision, the plaintiff sustained several injuries, including a degloving injury to his right foot, right frontotemporal subdural haemorrhage and a closed facture to his neck.

6 On 16 April 2004, the plaintiff commenced these proceedings to secure compensation for his injuries from the defendant. On 4 October 2004, the plaintiff obtained interlocutory judgment against the defendant by which the defendant was adjudicated liable for 75% of the plaintiff's damage, with

the damages to be assessed.

***The Assistant Registrar's decision***

7 The AR assessed the special damages amounting to $301,048.91 as follows:

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|---|---|
| (a) Pre-trial medical expenses | $118,554.39 |
| (b) Pre-trial transport expenses | $7,721.36 |
| (c) Pre-trial loss of earnings | $174,773.16 |
| (d) Loss of motorcycle | $0 |
| Total special damages: | $301,048.91 |

8 The AR assessed the general damages amounting to $655,550.12 as follows:

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|---|---|
| (a) Pain and suffering and loss of amenity | $204,000.00 |
| (b) Future medical expenses | $318,900.00 |
| (c) Future transport expenses | $5,000.00 |
| (d) Loss of future earnings | $127,650.12 |
| (e) Total general damages: | $655,550.12 |

9 The AR also awarded the Plaintiff interest at:

(a) 3% per annum on the sum payable by the defendant as special damages (or $225,786.68 being 75% of $301,048.91) from the date of the accident (29 June 2003) to 31 December 2007; and

(b) 6% per annum on the sum payable by the defendant for the plaintiff's pain and suffering (or $153,000 being 75% of $204,000) from the date of service of the writ (16 April 2004) to 31 December 2007.

10 The AR also ordered costs to the plaintiff fixed at $45,000 including GST but excluding disbursements, which were to be agreed or taxed.

**This Court's Decision**

11 After considering the parties' submissions and the evidential record, I was not inclined to vary the AR's decision either way save for a minor arithmetical point relating to the multiplicand used in the AR's award for pre-trial and future loss of earnings. I shall deal with this point in more detail when I discuss these heads of damage below.

12 I shall now discuss the various heads of damages which were awarded in sequence, starting with special damages and then moving on to general damages.

***Special damages***

*(1) Pre-trial medical expenses*

13 The AR awarded the plaintiff the sum of $118,554.39 for pre-trial medical expenses. This was based on the evidence presented of his medical bills. The defendant did not dispute the accuracy of these sums. Instead, the defendant raised a point of principle: the defendant contended that this large sum was incurred as a result of the plaintiff's decision to seek medical treatment at a private hospital, namely, Raffles Hospital ("Raffles"), rather than at a restructured hospital. In support of his submission that medical care at a private hospital was not recoverable in principle, counsel for the defendant referred me to Harvey McGregor, *McGregor on Damages* (15th ed, 1988) ("*McGregor*") at paragraph 1497:

> The plaintiff is entitled to damages for the medical expenses reasonably incurred by him as a result of the injury… The only condition is that they should be reasonable, a condition implied in the provision of section 2(4) of the *Law Reform (Personal Injuries) Act 1948* [(UK)] stating, in its current form, that in personal injury claims "there shall be disregarded, in determining the reasonableness of any expenses, the possibility of avoiding those expenses or part of them by taking advantage of facilities available under the National Health Service Act 1977".

14 Counsel for the defendant further relied on the decision of the House of Lords in *Lim Poh Choo v Camden and Islington Area Health Authority* [1980] AC 174 ("*Lim Poh* Choo") which was cited by the learned authors of *McGregor*. In *Lim Poh Choo*, the defendant argued that in considering the damages to be awarded, the court must take into account the availability of care for the victim at public expense under the English National Health Service ("NHS"). However, the House of Lords noted that section 2(4) of the *Law Reform (Personal Injuries) Act 1948* (UK) meant that when an injured plaintiff in fact incurs expenses which are reasonable, that expenditure is not to be impeached on the ground that, if he had taken advantage of the facilities available under the *National Health Service Act 1946* (UK), those reasonable expenses might have been avoided (*Lim Poh Choo* at 187-188). Although the House of Lords recognised the force of the case for repealing section 2(4) of the *Law Reform (Personal Injuries) Act 1948* (UK), they recognised too that this was not within the courts' purview. I do not consider *Lim Poh Choo* of assistance in the Singapore context. First, it was decided in a jurisdiction in which the defendant had available a free healthcare system. That is not the position in Singapore. Further, I do not consider that the existence of section 2(4) of the English 1948 Act suggests that the position at common law is the contrary.

15 Unfortunately, counsel for the defendant was unable to point me to any local authority to support his submission. On the contrary, this argument was rejected by the High Court in *De Cruz Andrea Heidi v Guangzhou Yuzhitang Health Products Co Ltd and others* [2003] 4 SLR(R) 682 at [203] ("*De Cruz*"). In *De Cruz*, the plaintiff suffered liver damage as a result of consuming slimming pills produced, imported or distributed by the various defendants. The defendants suggested that she ought to have mitigated her loss by having her liver transplant done at a restructured hospital, National University Hospital ("NUH"), rather than at a private hospital, Gleneagles, as NUH could have given her a subsidy upon application. Tay J roundly rejected this suggestion, saying that (at [203]):

> This suggests that a person gasping for air should go around shopping for the cheapest oxygen tank and that cannot be right. What the plaintiff (or the people making the decision for her then) decided in the very trying days before the transplant was completely reasonable.

This holding was not disturbed on appeal to the Court of Appeal (see *TV Media Pte Ltd v De Cruz Andrea Heidi and another appeal* [2004] 3 SLR(R) 543 ("*TV Media*")). Although the context of Tay J's remarks was a patient seeking life-saving medical care in an emergency or near-emergency situation,

I hold that this principle is of general application. It applies to the plaintiff. It is a questionable of reasonableness in all cases.

16 Mr Low was also unable to point to any evidence showing that it was unreasonable for the plaintiff to have sought treatment from Raffles after sustaining the injuries he did as a result of the accident. Quite the contrary: I found the plaintiff's reason for seeking treatment from Raffles rather than NUH entirely reasonable. After the accident, the plaintiff was first treated in NUH where he underwent a left *latissimus dorsi* free vascularised flap procedure to save the degloved part of his foot. However, the operation did not go well and the plaintiff sustained an infection of the flap which forced him to be hospitalised for an extended period. Because of the infection of the flap, the plaintiff had to undergo further wound debridement surgery to remove the affected parts, and further to undergo skin graft surgery to cover the exposed tissue.

17 Although this is no criticism of NUH, the plaintiff's experience with NUH involved several unsuccessful treatments leaving him in great pain and discomfort and cost the plaintiff a lot of time and money. By contrast, when the plaintiff was referred to Raffles, his treatment went well and looked promising. Further, the doctors at Raffles were of the view that the plaintiff's foot could be salvaged, in contrast with the doctors at the NUH who recommended an amputation.

18 In the circumstances, I found it entirely reasonable for the plaintiff to have sought treatment from Raffles instead of NUH after the initial phase of treatment. Therefore, I affirmed the AR's award of $118,554.39 for pre-trial medical expenses.

*(2) Pre-trial transport expenses*

19 The AR awarded the plaintiff the sum of $7,721.36 for pre-trial transport expenses based on the transport receipts in evidence. The defendant did not dispute the accuracy of these receipts. I saw no reason to disturb this award of damages.

*(3) Pre-trial loss of earnings*

20 The AR awarded the plaintiff the sum of $174,773.16 for pre-trial loss of earnings. He arrived at this amount by using a multiplier of 108 months representing the period from June 2003 (when the accident happened and when the Plaintiff sustained the injuries) to July 2012 (the date of the assessment of damages) and a multiplicand of $1,618.27.

(a) Multiplier

21 The defendant submitted that the multiplier of 108 should be reduced because the plaintiff failed to mitigate his damage during the pre-trial period.

22 First, the defendant argued that the plaintiff acted unreasonably in taking 9 years to progress his action from the accident to the assessment. The defendant's submission was that the plaintiff deliberately lengthened the pre-assessment period to enlarge his pre-trial loss of earnings. I rejected this argument. The law contemplates that a plaintiff in an action seeking compensation for personal injuries can commence his action at any time within the 3-year limitation period after the injury was sustained. The plaintiff here commenced his action within one year of the accident. The delay thereafter cannot affect his substantive claim for pre-trial loss of earnings. But it may, as here, be taken into account on the question of interest.

23 That leaves the 8-year period between the commencement of the action and the assessment.

Lost earnings is conceptually a single head of loss. Our method of assessing damages for loss of earnings splits the exercise into two stages: pre-trial or actual loss of earnings and post-trial or future loss of earnings. It does so to facilitate assessment, not because there is a conceptual difference between the two types of loss. Each stage is assessed on the multiplier/multiplicand method. Any increase in the pre-assessment multiplier is accompanied by a reduction in the post-assessment multiplier, though not on a month-for-month basis. The assessment of *past* lost earnings applies an undiscounted multiplier to reflect the fact that this is an actual loss which has been incurred. By contrast, the assessment of *future* lost earnings employs a discounted multiplier to reflect the fact that it is not an incurred loss but one which will be incurred in the future and which must therefore be discounted to account for accelerated receipt and the vicissitudes of life. Therefore, the date on which lost earnings are assessed, in principle, makes no difference in the compensation beyond drawing the line which separates the loss which has actually been incurred from the loss which has not yet been incurred.

24 Next, the defendant said that the plaintiff had unreasonably refused to accept the medical advice of doctors to amputate his leg below the knee which could have allowed him to resume work earlier. In considering whether a plaintiff acted reasonably in refusing an operation, the court must look at all the circumstances of the case, including particularly the medical advice which the Plaintiff received (*Selvanayagam v University of the West Indies* [1983] 1 All ER 824 (PC), applied in *Ho Yiu v Lim Peng Seng* [2004] SGHC 28 ("*Ho Yiu*")). If his own or other medical advisers advise a plaintiff to undergo a reasonable course of treatment which gives him a reasonable chance of recovery, the plaintiff ought to undergo that treatment to mitigate his loss; if the plaintiff refuses to do so without reasonable grounds, the defendant should not be made to compensate the plaintiff for damages in respect of a period extending after the projected time of recovery had that treatment been received (*Sivakami d/o Sivanantham v Attorney-General* [2012] SGHCR 5 ("*Sivakami*") applying *Marcroft v Scruttons* [1954] 1 Lloyd's Law Reports 395).

25 In *Ho Yiu*, a plaintiff sustained injuries after a road traffic accident for which the defendant admitted liability. The plaintiff was left with double-vision caused by a squint as a result of the accident. The defendant argued that the plaintiff should have mitigated his damage by undergoing surgery to correct his squint. The AR at first instance rejected this argument, finding that the plaintiff had acted reasonably in refusing to undergo the operation. First, the plaintiff had refused the surgery after taking advice from two doctors, one of whom was of the opinion that the surgery would not be very useful. Secondly, the plaintiff's conclusion that the trauma and risks of the corrective surgery far outweighed the possible benefits was reasonable: the medical evidence was that his double vision could never be fully corrected, even if he had successfully undergone the surgery. This finding was not disturbed on appeal to the High Court (see *Ho Yiu v Lim Peng Seng* [2004] 4 SLR(R) 675).

26 The same issue also came before the High Court in *Karuppiah Nirmala v Singapore Bus Services Ltd* [2002] 1 SLR(R) 934 ("*Karuppiah*"). In *Karuppiah*, the defendant's employee drove the defendant's bus into the plaintiff's car in July 1998, causing injuries to the plaintiff's shoulders and cervical spine. The AR awarded the plaintiff damages for pre-trial loss of earnings set at $1,500 a month for 33 months. At the time of the accident, the plaintiff held two jobs: that of an editor with a publishing house, and that of a part-time lecturer in a children's learning centre. Shortly after the accident, in March 1999, the plaintiff resigned from her job as an editor due to her injuries, but carried on as a part-time lecturer and in fact also took on an additional role as a practicum supervisor in the learning centre.

27 Prakash J agreed that plaintiff was entitled to compensation for loss of earnings prior to the trial. However, she disagreed with the multiplier of 33 months which the AR used, representing the period from April 1999 (when the loss of pre-trial earnings commenced) to October 2001 (the date of

the assessment of damages hearing). The plaintiff was advised by a doctor in March 2001 that she could undergo an operation to deal with her shoulder pain. Prakash J found that it was reasonable to assume that if the plaintiff had taken this advice and acted fairly expeditiously she would have recovered from the operation by the end of June 2001 by which time she would have been much better. She accordingly reduced the multiplier by 6 months to represent pre-trial loss of earnings from April 1999 to March 2001 (at [28]).

28 In the more recent case of *Sivakami*, the plaintiff injured her ankle. The court had to consider whether she acted unreasonably in refusing to undergo ankle fusion surgery. On the facts and evidence before it, the court found it evident that the plaintiff was fully advised on and at all times aware of the benefits and risks of ankle fusion surgery. The plaintiff was aware that the risk of non-union of the ankle for a normal person undergoing ankle fusion surgery was 5% but there was a reasonable chance of success (quantified at 80% to 99%) for her if *she* underwent the ankle fusion surgery. She was also aware that there was a risk of complications or infection, but that could be effectively managed with antibiotics. More importantly, the plaintiff's attending physician was of the view that the ankle fusion surgery was not just a viable option to help the plaintiff overcome the pain in her ankle but was, from his perspective as an expert, *necessary* for the plaintiff. In the circumstances, the court found that the plaintiff's subjective aversion to the prospect of ankle fusion surgery was not a reasonable one. Although the appeal in *Sivakami* did not proceed because the plaintiff accepted an offer to settle, I do not think that this undermines the persuasiveness of the case.

29 In these appeals, I was of the view that the plaintiff did not act unreasonably in refusing to have his right leg amputated below the knee.

30 First, unlike *Sivakami*, amputation here was not a procedure which was *necessary* for the plaintiff to undergo. The ulcer on the sole of his right foot had healed by the time he was contemplating the heel replacement surgery. The possibility of further infection of his foot was remote (see reports of Associate Professor Lim Beng Hai ("A/P Lim") dated 13 May 2008 and Associate Professor Paul Ananth Tambyah dated 16 March 2009). Further, while Dr Aymeric Lim ("Dr Lim"), one of the plaintiff's attending doctors from NUH, was of the view that the plaintiff should have his right leg below the knee amputated, he also opined that "it was ok [sic] for [the plaintiff] to keep his leg" and that it was not against medical advice for the plaintiff not to amputate his leg below the knee. [note: 1] He was also equivocal on the benefits of amputation for the plaintiff as, in his view, amputation is not always better for all patients. [note: 2] The defendant's orthopaedic expert, Dr Chang Wei Chun ("Dr Chang"), was of the view that the plaintiff should have had his right leg amputated below the knee because the risk of reactivating inflammation of the bone in the plaintiff's right foot was "significant" or "not small" (see reports of Dr Chang dated 19 June 2009 and 14 February 2012). However, he too conceded on cross-examination that given the medical advice the plaintiff had received thus far, there was nothing medically wrong with the plaintiff's refusal to have his leg amputated. [note: 3]

31 Second, the plaintiffs in *Karuppiah* and *Sivakami* were advised to undergo therapeutic medical procedures intended either to heal or to have a very high chance of healing each plaintiff's ailment. Here, the medical procedure proposed to the plaintiff and advocated by the defendant was not therapeutic. Amputation of the plaintiff's right leg below the knee would not have healed the plaintiff's foot: amputation is an irreversible procedure which would eliminate any possibility of his right foot healing. It is not unreasonable for the Plaintiff to try alternative therapeutic procedures instead of agreeing to an irreversible amputation.

32 In the circumstances, I found that the plaintiff was not unreasonable in refusing to consent to an amputation of his right leg below the knee. The focus in this part of the inquiry is not on whether the heel replacement surgery would have been successful (that is, however, a relevant consideration when considering whether the plaintiff was entitled to recover the cost of such surgery; see [53] below), but on whether the plaintiff *unreasonably refused* to have his right leg amputated below the knee. Accordingly, I saw no reason to disagree with the multiplier of 108 months representing the period of June 2003 to July 2012 which the AR used in assessing pre-trial loss of earnings.

(b) Multiplicand

33 The AR derived the monthly multiplicand of $1,618.27 by considering the plaintiff's annual pre-trial earnings as evidenced by his Inland Revenue Authority of Singapore notices of assessment for Years of Assessment ("YA") 2000, 2001 and 2002, working out the average income per month for each of the three years, then taking an average of the three monthly-income figures for each year. Thus, the plaintiff worked 12 months in YA 2000 and earned $15,344.60, giving an average monthly income of $1,278.72 for YA 2000. The plaintiff worked 12 months in YA 2001 and earned $24,498, giving an average monthly income of $2,041.50 for YA 2001. The plaintiff worked 3.5 months for YA 2002 and earned $5,371, giving an average monthly income of $1,534.57 for YA 2002 (cf the figure of $1,534.64 derived by the AR). The average of $1,278.72, $2,041.50 and $1,534.57 is $1,618.26 (cf the figure of $1,618.27 given by the AR).

34 In my view, this is not the best method of choosing the multiplicand on the information available. This method gives equal weight to the plaintiff's average income for YA 2002 as it does to his average income for YA 2000 and YA 2001 even though the plaintiff worked a full year in each of YA 2000 and YA 2001 but only 3.5 months in YA 2002. This gives disproportionate weight to the 3.5 months of work in YA 2002 as compared to the other 24 months of earnings in YAs 2000 and 2001. In my view, the better approach is to take the plaintiff's total income for the whole period in question and to divide that total figure by the total number of months comprised in that period. This involves dividing $45,213.60 by 27.5 months yielding a marginally higher average monthly income of $1,644.13 (with rounding). Applying that new multiplicand (without rounding) to the same multiplier of 108 months for pre-trial loss of earnings yields a marginally higher figure of $177,566.14 instead of $174,773.16.

35 In the circumstances, I substituted this sum of $177,566.14 for the AR's award for pre-trial loss of earnings of $174,773.16.

*(4) Loss of motorcycle*

36 The AR made no award on the plaintiff's claim for damages for the loss of his motorcycle. The AR found that there was no evidence supporting this claim. After reviewing the records, I was similarly satisfied that there was no evidence to support this head of damages.

***General damages***

*(1) Pain and suffering and loss of amenities*

37 The AR awarded the plaintiff the sum of $204,000 as general damages for the plaintiff's pain and suffering and loss of amenity. The breakdown for this was as follows:

| | |
|---|---|
| (a) Head injury | $90,000 |

| | |
|---|---|
| (b) Depression and cognitive deficiency | $10,000 |
| (c) Right femur fracture | $6,000 |
| (d) Multiple scars and head defect | $8,000 |
| (e) Degloving injury to right foot | $90,000 |
| Total: | $204,000 |

The AR arrived at these figures after considering the precedents submitted by parties and having referred to *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Singapore: Academy Publishing, 2010) ("*Guidelines for AD*").

(a) Head injury and depression and cognitive deficiency

38 Before me, counsel for the defendant did not object to the award of $6,000 as damages for the plaintiff's right femur fracture. He did, however, object to the sums assessed for each of the other injuries. The AR awarded $90,000 for the plaintiff's head injury and $10,000 for the plaintiff's depression and cognitive deficiency, giving a global sum of $100,000 for head- and brain-related injuries. Mr Low argued that this figure was too high as the plaintiff still retained his cognitive functions and was able to recall, express himself and even prevaricate in cross-examination. However, I did not accept this argument. The evidence before me shows that the plaintiff did suffer diminished cognitive function from at least February 2007. Choo Han Teck J in *Chong Hwa Yin (committee of person and estate of Chong Hwa Wee, mentally disordered) v Estate of Loh Hon Fock, deceased* [2006] 3 SLR(R) 208 at [5] noted that "compensation for pain and suffering is predominantly the compensation for the pain and suffering endured while it lasts". Thus, *even if* the plaintiff is no longer suffering from cognitive deficits today, he is still entitled to be compensated for pain and suffering endured previously (see *TV Media* at [166]).

39 Further, it is established law that damages for pain and suffering in relation to head injury is not premised *only* on deficits in cognitive function. In *Tan Yu Min Winston (by his next friend Tan Cheng Tong) v Uni-Fruitveg Pte Ltd* [2008] 4 SLR(R) 825 ("*Winston Tan*"), Chan Seng Onn J made the following observations about assessing damages for head injuries (at [24]-[25]):

> 24 The proper way of damage assessment is not to look merely at the initiating injury, but rather at what are the real and definable manifestations of that initiating injury. Head injuries to the brain in my view should be judged in terms of the resulting deficits arising from that injury, and each of these deficits ought to be separately awarded.
>
> 25 The correct and perhaps more scientific way to look at the head injuries to the brain resulting from an accident is to properly classify them into the following three separate domains: structural, psychological and cognitive:
>
> (a) "structural" injury (eg, brain oedema, subdural, extradural subarachnoid haematoma, brain contusion, loss of consciousness), which is the specialisation of neurosurgeons;
>
> (b) "psychological" injury (eg, depression, mood swings, anger, anxiety), which is the specialisation of psychiatrists; and
>
> (c) "cognitive" impairment (eg, loss of spatial, visual, long and short term memory, intellect

(in terms of IQ), learning ability), which is the specialisation of clinical psychologists.

Hence, damages for pain and suffering arising from head injury comprise the "structural" and "psychological" components of such injury and not just the resulting cognitive impairment.

40 After reviewing the medical reports before me, and having considered the recent authorities involving awards for injuries of a similar nature, I was not inclined to alter the sums of $90,000 and $10,000 which the AR awarded for the plaintiff's head injuries and depression and cognitive impairment respectively. I note that the plaintiff has suffered severe structural damage to his head as a result of the accident. He suffered a right frontotemporal subdural haemorrhage which necessitated an evacuation of the bleeding and injury to his skull at the right parietal region which required a craniectomy titanium implant to fill the defect. [note: 4]

41 The plaintiff also suffered moderate "psychological" injury. Ms Marina Yap, a clinical psychologist, noted that the plaintiff was not suicidal when assessed and does not suffer from Post-Traumatic Stress Disorder. However, she also observed that the results of a Depression-Anxiety-Stress Scale questionnaire which the plaintiff completed in November 2011 showed that he was moderately anxious, severely depressed, and was suffering from "extremely severe" stress. Similarly, the results of a Beck Depression Inventory (Second Edition) test also showed that the plaintiff was suffering from moderate depression (see report of Ms Yap dated 20 November 2011). Ms Yap also observed that the plaintiff seemed to have difficulties coping with his emotions and life in general.

42 Finally, contrary to the defendant's submission, the plaintiff also suffers from moderate "cognitive" impairment. Dr David Oon Poh Kwang, a consultant psychologist from Gleneagles Medical Centre, made the following findings after reviewing the plaintiff in February 2007 (see Dr Oon's report dated 13 February 2007):

(a) the plaintiff "displayed good attention and concentration and established good rapport with the assessor" (based on the Wechsler Adult Intelligence Scale (Third Edition) test);

(b) the plaintiff's performance profile showed consistently average scores in all non-verbal tests involving his visual perceptual, visual sequencing, visual-motor and visual-spatial skills;

(c) the plaintiff's assessment results are commensurate with his estimated premorbid average intellectual level and this would suggest no possible deterioration in his intellectual functioning.

(d) the plaintiff showed no impairment in his immediate recall and mild impairment in his delayed recall (based on the Rey Complex Figure test);

(e) the plaintiff suffered from significant impairment of his visual memory (immediate and delayed) (based on the Wechsler Memory Scale (Third Edition) test).

43 The plaintiff's wife, Ms Ang Mui Lin, also gave evidence that after the accident, the plaintiff became "very temperamental and impatient" [note: 5] and had "frequent mood swings". [note: 6] Ms Ang also noticed a change in the plaintiff's manner of speech, observing that the plaintiff now talks more slowly and often pauses between sentences. [note: 7]

44 Turning to recent authorities where the plaintiff suffered comparable injuries, I first considered the decision in *Winston Tan*. In *Winston Tan*, an award of $90,000 was given for the following disabilities arising out of a head injury:

(a) slowed processing;

(b) impaired memory retrieval;

(c) anger management problem which required treatment with anti-depressants;

(d) significant reduction from estimated pre-morbid status;

(e) below average function in memory and verbal skills;

(f) temperamental changes;

(g) mild intellectual decline;

(h) overall low average performance on all cognitive domains representing significant reduction from estimated pre-morbid status;

(i) problem with higher level planning;

(j) difficulties with learning subjects which require conceptual processing; and

(k) inability to perform tasks beyond simple repetitive jobs.

45 The plaintiff in *Koh Chai Kwang v Teo Ai Ling (by her next friend, Chua Wee Bee)* [2011] 3 SLR 610 ("*Teo Ai Ling*") suffered similar disabilities following a motor accident. She was awarded a global sum of $110,000 for pain and suffering in relation to her head injuries. The Court of Appeal did not think that this sum was clearly excessive (at [68]).

46 In *Wu Shaolin (suing by litigation representative Wu Yongyun) v Cheng Kim Heng* (unreported, Suit No 22 of 2009), the plaintiff was awarded a global sum of $130,000 for pain and suffering in relation to his head injuries. This comprised $100,000 for structural injury which consisted of fractures to his frontal lobe, scarring to his head region and large right frontal lobe haemorrhage and $30,000 for post traumatic epilepsy.

47 In the present case, I found that the plaintiff suffered injuries substantially similar to those suffered by the victims in the cases cited above. In the circumstances, I agreed with the AR that a sum of $90,000 and $10,000 for pain and suffering in relation to the plaintiff's head injuries and the plaintiff's depression and cognitive deficiency were just sums to be awarded.

(b) Multiple scars

48 The plaintiff was left with, *inter alia*, the following scars after the accident: [note: 8]

(a) A 38cm scar at his left postero-lateral chest wall;

(b) A scar of approximately 14cm by 3cm at the medial side of his inner right thigh (this was the place where skin was taken for skin-grafting);

(c) Three linear scars at the upper, middle and lower parts of his right shin measuring approximately 4cm by 1.5cm, 1.5cm by 0.5cm and 1.5cm by 1cm respectively;

(d) A scar at the base fifth metatarsal right foot measuring 2cm;

(e) A scar at the base first metatarsal right foot measuring 2cm;

(f) A 26cm U-shaped craniotomy scar starting from the front of the right ear and curving forward to the right forehead just below the hairline; and

(g) A scar on his left arm/forearm measuring approximately 33cm by 3cm.

49 I agree with the AR that the sum of $8,000 he awarded for the plaintiff's multiple scars is a just sum. In arriving at this conclusion, I take into consideration the *Guidelines for AD* which show a range of $5,000 to $15,000 awarded as damages for multiple scars.

(c) Degloving injury to right foot

50 Counsel for the defendant argued that the sum of $90,000 awarded for the plaintiff's degloving injury to his right foot was too high. He pointed to the *Guidelines for AD* which indicate that in relation to below-knee amputation of one leg, the damages award for pain and suffering is $40,000 – $70,000. Counsel for the defendant submitted that the range for the award should be lower where, as here, no amputation was involved.

51 I did not find the defendant's analogy appropriate. Instead, I found that the decision of the High Court in *Mei Yue Lan Margaret v Raffles City (Pte) Ltd* [2005] 4 SLR(R) 740 ("*Margaret Mei*") a more useful starting point. In *Margaret Mei*, the plaintiff ("Margaret") was injured when a metal sheet attached to the bottom of the door to one of the toilets in the defendant's building fell onto and cut her right leg. As a result of the incident, she sustained nerve injury which led her to develop a condition known as Reflex Sympathetic Dystrophy ("RSD"). Margaret underwent numerous operations and treatments as a result of her injury. This included the implant of a spinal cord stimulator to control the pain from the RSD. Woo Bih Li J awarded Margaret the sum of $100,000 for pain and suffering in relation to RSD. Woo J observed (at [54]) that "[w]hile Margaret's injury was not life-threatening and she did not lose her right foot, *the pain and suffering she had to go through was more severe and for a longer period than an amputee's*" (emphasis added).

52 In the present case, because of the degloving injury, the plaintiff similarly underwent a very trying period of pain and suffering where he had to undergo extensive surgery and treatment to treat the degloving injury to his right foot. In particular, I was reminded that the plaintiff had to undergo a left *latissimus dorsi* free vascularised flap procedure to save the degloved part of his foot. Unfortunately, this operation turned out to be unsuccessful. The failure of this operation resulted in an infection of the said flap which forced him to be hospitalised for an extended period of time and further caused the plaintiff to have to undergo further wound debridement surgery to remove the affected parts and further skin graft surgery to cover the exposed tissue. In the circumstances, I was of the view that the pain and suffering endured by the plaintiff was more severe and for a longer period than an amputee's. I thus found that a sum of $90,000 for such pain and suffering was a just award. Further, although the result of the plaintiff's choice not to undergo an amputation has had the effect of increasing his pain and suffering award, as explained above, I found that the plaintiff acted reasonably in declining to amputate his right leg below the knee (see [29]-[32] above). For all these rasons, it is therefore not wrong in principle to award the plaintiff a higher sum for pain and suffering for his degloving injury than is the prevailing range for pain and suffering awards for an amputation.

*(2) Future medical expenses*

53 The AR awarded the plaintiff the sum of $318,900 for the various medical expenses the plaintiff had to incur following the accident. He applied a multiplier of 15 years. The AR declined to award a sum of $59,920 for heel replacement surgery which the plaintiff wanted to undertake. He held that this surgery "goes against the weight of medical opinion that was presented" at the assessment.

54 Having considered the evidence before me, I found no reason to disagree with any of the AR's findings. First, the plaintiff is 38 years of age. For someone of this age, a multiplier of 15 years is consistent with precedent (see *eg*, *Ho Yiu v Lim Peng Seng* [2004] 4 SLR(R) 675 at [20] where the plaintiff was 33 years old at the time of assessment and a multiplier of 15 years was applied and *Ng Song Leng v Soh Kim Seng Engineering & Trading Pte Ltd* [1997] SGHC 289 where the plaintiff was 32 years of age at the time of assessment and a multiplier of 17 years was adopted).

55 The AR made no award on the plaintiff's claim for $59,920 to undergo heel replacement surgery. I agreed with the AR that the surgery was against the weight of the medical opinion available to the court. In coming to my decision, I considered the medical advice rendered to the plaintiff. Only one medical expert, A/P Lim, was optimistic about the surgery's chances of success, placing it in the region of 90% (see A/P Lim's reports dated 13 May 2008 and 18 March 2009). In contrast, Dr Lim – who like A/P Lim, is a specialist in micro-vascular surgery or reconstructive surgery – would not advise heel replacement surgery for the plaintiff as such a procedure has not been performed and is not a conventional evidence-based treatment. Dr Lim also advised the plaintiff against the surgery because he was of the view that it has a "very low success rate". [note: 9] Dr Sittampalam Krishnamoorthy, a consultant orthopaedic surgeon of Raffles Orthopaedic Centre, gave evidence that the chances of failure of a titanium implant for the plaintiff is at 70-80%. [note: 10] Finally, Dr Chang, a consultant orthopaedic and trauma surgeon, was of the opinion that "it is very doubtful that implantation of a customised titanium implant to the heel will ever work" due to the significant risk of reactivating osteomyelitis of the left-over calcaneus in his foot. [note: 11]

56 In the circumstances, I found that the AR was right to have declined to make an award of $59,920 for the plaintiff's desired heel replacement surgery.

*(3) Future transport expenses*

57 The AR awarded the sum of $5,000 for the plaintiff's future transport expenses, using a multiplier of 5 years and a multiplicand of $1,000 per annum.

58 The multiplicand of $1,000 per annum was derived from averaging the plaintiff's transport expenses for seven years and 6 months from the time of the accident (June 2003). This was a reasonable basis on which to derive the multiplicand and I saw no reason to disturb it.

59 As for the multiplier, the plaintiff submitted that a multiplier of 15 years be adopted. I did not agree with this submission. The plaintiff intimated that if he underwent heel replacement surgery and it was unsuccessful, he would agree to having his right leg amputated below the knee. [note: 12] But regardless of whether the plaintiff underwent heel replacement surgery and regardless of whether it was successful, the plaintiff would not require extraordinary transportation for more than a few years after the assessment. Thus, I found that a multiplier of 5 years was appropriate. The defendant did not dispute this award. Accordingly, I agreed with the AR's award of the sum of $5,000 for future transport expenses.

*(4) Loss of future earnings*

60 The AR awarded the plaintiff the sum of $127,650.12 in relation to loss of future earnings based on a multiplier of 13 years and a multiplicand of $818.27 ($1,618.27 - $800) per annum. The deduction of $800 was because of the plaintiff's submission that he would be able to do sedentary work in the future albeit at a lower salary of $800 per month.

61 I found no reason to disagree with the multiplier of 13 years used by the AR. The multiplier was consistent with precedent. For example, in *Choong Peng Kong v Koh Hong Son* [2003] 4 SLR(R) 225, the court used a multiplier of 14 years for a plaintiff who was 35 years old at the date of the accident and 38 years old at the date of the assessment. As for the multiplicand, I have explained at [33]-[35] above why I believe the better figure is $1,644.13. After deducting $800 for alternative future income which the plaintiff would be able to earn, that leaves a multiplicand of $844.13 (rounded off). Applying this varied multiplicand (without rounding) to the multiplier selected, the award for loss of future earnings is $131,684.42 instead of $127,650.12. I varied the award accordingly.

*(5) Loss of earning capacity*

62 The AR made no award in relation to the plaintiff's claimed loss of earning capacity. The AR's reason was that there was no evidence that the plaintiff was in employment at the time of the assessment. The AR was also satisfied that the award for loss of future earnings would adequately compensate the plaintiff for his reduced chances in the job market.

63 The law on awards for loss of earning capacity was recently clarified by the Court of Appeal in *Chai Kang Wei Samuel v Shaw Linda Gillian* [2010] 3 SLR 587 ("*Shaw*"). In *Shaw*, the Court of Appeal clarified that loss of future earnings and loss of earning capacity compensate different losses and are thus separate and distinct heads of damages. An award for loss of future earnings compensates the plaintiff for the difference between his post-accident and pre-accident income, assessed over the remainder of his likely remaining economically productive life, discounted to account for accelerated receipt and the vicissitudes of life. An award for loss of earning capacity compensates a plaintiff for his disadvantage on the open employment market (*Shaw* at [20]). Following from this, the Court of Appeal clarified that there was no general rule which bars a plaintiff from being entitled to claim both loss of future earnings and loss of earning capacity, provided that the necessary evidence is present for each head of claim (*Shaw* at [24]). The Court of Appeal also rejected the appellant's argument that where there is sufficient evidence to justify a substantial award for loss of future earnings, only a nominal award for loss of earning capacity should be given, noting that (*Shaw* at [23]):

> In making this contention, the Appellant assumed that there was an inverse relationship between the two heads of damages. No authority was cited in support of this proposition. Given that we have pointed out earlier that the two heads of damages are separate and distinct, it must also naturally mean there is simply no remaining logical basis for such an argument to succeed. The Appellant's proposition of an inverse relationship seemed to assume that there was an overlapping loss component in *both* heads of damages. However, the Appellant failed to point out any overlapping compensatory factor to support a proposition that such an inverse relationship existed.
>
> [emphasis in the original]

64 Having set out the underlying bases of both heads of claim, the Court of Appeal went on to state the conditions on which the court will award a plaintiff damages for loss of earning capacity (at [36]):

> It is trite that an award for loss of earning capacity (in the context where the plaintiff is

currently employed) can only be awarded *if there is a substantial or real risk* that the plaintiff could lose his or her present job at some time before the estimated end of his or her working life and that the plaintiff will, because of the injuries, be at a disadvantage in the open employment market. It is a cumulative test.

In [*Moeliker v A Reyrolle and Co Ltd* [1977] 1 All ER 9], Brown LJ stated (at 17):

> I do not think one can say more by way of principle than this. The consideration of this head of damages should be made in two stages. 1. Is there a 'substantial' or 'real' risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (*but not otherwise*), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job.
>
> [emphasis added by the Court of Appeal]

Following from this, no award for loss of earning capacity should be granted if there is no risk of the Respondent's post-accident employment being terminated.

[emphasis in the original]

65 The AR in the present case made no award for this head of damage. That was undoubtedly correct on the facts. There was no evidence that the plaintiff was engaged in employment at the time of the assessment hearing and hence *no* risk that the plaintiff could lose his or her *present* job at some time before the estimated end of his or her working life.

66 Insofar as the AR was of the view that the plaintiff's employment at the time of the assessment of damages was a prerequisite in law for an award of damages for loss of earning capacity, I disagree with the AR. Whether an award for loss of earning capacity is available in particular case does not turn on whether the plaintiff is employed at the time of the assessment. It turns on whether, for some reason, an award for loss of future earnings calculated in the usual way fails adequately to compensate the plaintiff for his loss. This will generally happen if the multiplicand for calculating the plaintiff's loss of future earnings is depressed by a current income which is greater than the plaintiff's likely income in the open employment market. This might, for example, occur if the Plaintiff is currently employed by an exceptionally charitable employer. But that need not be the only reason. For example, in this case, I have deducted $800 from the plaintiff's multiplicand. Assume that that estimate of his future income was overly generous for some reason (for example, because it was based on a standing offer, not yet accepted, from an exceptionally charitable employer prepared to pay the plaintiff more than his market income). If there was a risk that the plaintiff might lose that opportunity and might not because of his injuries be able to find a job which yielded a similar income, then an award for loss of earning capacity should in principle be available even though the plaintiff is not currently employed.

67 Although the Court of Appeal in *Shaw* set a two-stage test – the first stage considering the likelihood of the plaintiff losing his current employment and the second stage considering the extent of the plaintiff's economic handicap on the open employment market – that analysis was in the context of a plaintiff who was employed at the time of the assessment of damages hearing.

68 There is ample authority that a court may award damages for loss of earning capacity even if the plaintiff is not employed at the time of the assessment (see *eg*, *Cook v Consolidated Fisheries Ltd*

[1977] I.C.R. 635 at 640 *per* Browne LJ). In such a case, there is simply one question, namely, whether there is a real risk that the plaintiff will be at a disadvantage in the open employment market because of the injury sustained in the accident (*A and Others v The National Blood Authority and Others* [2001] 3 All ER 289 at [221]). Care must also be taken not to double compensate the plaintiff through an award for loss of future earnings which overlaps with the award for loss of earning capacity. Of course, in all cases, a claim for damages for loss of earning capacity must be pleaded and proved (*Shaw* at [22]).

69 In the present case, the plaintiff failed to show a real risk that he will be at a disadvantage in the future in securing sedentary work (which he submitted he would be able to find) because of the injuries he sustained in the accident. Accordingly, I agreed with the AR that no award should be made for this head of damage, though – as I have explained – for different reasons.

***The interest awards***

70 The AR awarded the plaintiff interest at 3% per annum on special damages from the date of the accident to 31 December 2007, and at 6% per annum on the defendant's 75% liability for the pain and suffering award from the date of the service of the writ to 31 December 2007. That approach was consistent with the Court of Appeal's approach in *Teo Sing Keng and another v Sim Ban Kiat* [1994] 1 SLR(R) 340. Having considered the evidence before me, I found no reason to disagree with the AR's approach.

71 I agreed with the AR that interest should be awarded only up until 31 December 2007 rather than up until the date of the assessment of damages. It is established law that an award of interest in a personal injury case should not function as compensation to a plaintiff for the loss and damage suffered but only as compensation to a plaintiff for being kept out of money which ought to have been paid to him timeously, but was not (*Lee Soon Beng v Wee Tiam Sing* [1985-1986] SLR(R) 799 at [5]). Given this rationale, it is clearly a factor to be taken into account in the award of interest that the assessment of damages took inordinately long to complete due to no fault of the defendant (*Tan Siew Bin Ronnie v Chin Wee Keong* [2008] 1 SLR(R) 178 ("*Ronnie Tan*")).

72 In *Ronnie Tan*, Chan Seng Onn J observed that (at [36]):

> It is trite that if the assessment of damages is delayed owing to no fault of the defendant, the court will take this into account in the award of interest: *Lim Cheng Wah v Ng Yaw Kim* [1983-1984] SLR(R) 723. As pertinently observed by Justice Kan in [*Nirumalan V Kanapathi Pillay v Teo Eng Chuan* [2003] 3 SLR(R) 601], *a plaintiff's claim to pre-trial interest is diminished if the plaintiff is slow to prosecute his case since the defendant had not kept him out of his money and the defendant should not have to compensate the plaintiff for the latter's own actions*.
>
> [emphasis added]

Having regard to the exceptional delay in *Ronnie Tan*, Chan Seng Onn J then went on to reduce the length of pre-judgment interest awarded, taking into account the time required for the actual assessment hearing given the numerous witnesses.

73 In the appeals before me and on the evidence before me, I agree with the AR that the assessment of damages hearing should have been concluded at the latest by the end of December 2007. By that time, all the affidavits of fact, all of the defendant's medical evidence and most of the plaintiff's medical evidence was ready and filed. Accordingly, I was of the view that the interest awarded for all of the plaintiff's damages – both special and for pain and suffering – should cease on

31 December 2007.

***Costs***

74 The AR awarded the plaintiff costs fixed at $45,000 including GST but not including disbursements, which were to be taxed or agreed. Counsel for the defendant submitted that this figure on costs was high and should be reduced. In *Slide & Hide System (S) Pte Ltd v Chua Seng Guan* [2009] SGHC 191, this Court ordered costs for the assessment at $30,000 but awarded the plaintiff only 75% thereof (i.e. $22,500) to account for the issues which it was not successful in (at [43]). In *Yip Holdings Pte Ltd v Asia Link Marine Industries Pte Ltd* [2012] 1 SLR 131, the AR hearing the assessment of damages lasting three days awarded costs for the assessment at $53,000 excluding disbursements and this costs award was not disturbed on appeal (at [8]). In light of these authorities, and given that the assessment of damages hearing in the present case spanned 6 days and that the plaintiff succeeded in virtually all of his claims, I agree with the AR that a costs order of $45,000 excluding disbursements is appropriate.

75 On the appeals themselves, I consider that both parties failed in their appeals. The only variation of the AR's decision was an arithmetical one which did not result from the submissions made by either party. I therefore ordered that each party to the appeals before me was to bear its own costs.

**Conclusion**

76 In the circumstances, I made the following orders:

(a) I dismissed RA 320 of 2012 with each party to bear its own costs.

(b) I gave leave to the plaintiff to withdraw RA 323 of 2012 with no order as to costs.

(c) I dismissed RA 333 of 2012 save for the following:

(i) The multiplicand for pre-trial loss of earnings and loss of future earnings was varied to $1,644.13 per month.

(ii) The award for pre-trial loss of earnings was consequentially varied to $177,566.14.

(iii) The award for loss of future earnings was consequentially varied to $131,684.42.

(d) Each party was to bear its own costs of RA 333 of 2012.

77 I saw no reason to disturb the AR's costs order for the matter below. In the present appeals, since both parties had not substantially succeeded in their respective appeals, I ordered each party to bear its own costs for the appeals save for RA 323 of 2012 (which was withdrawn with leave with no order as to costs).

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[note: 1] Notes of Evidence ("NE"), 16 February 2012, p 11 lines 18-29

[note: 2] NE, 16 February 2012, p 8 lines 25-30

[note: 3] NE, 17 February 2012, p 10 lines 1-3

[note: 4] See report of Dr W N Cheng from Cheng Orthopaedic, Mount Elizabeth Medical Centre dated 20 July 2004 at p 2

[note: 5] Para 19 of Ms Ang's AEIC (25 January 2012)

[note: 6] Para 22 of Ms Ang's AEIC (25 January 2012)

[note: 7] Para 29 of Ms Ang's AEIC (25 January 2012)

[note: 8] Para 60 of the Plaintiff's written submissions; see also reports of Dr Ho King Hee from K H Ho Meurology & medical Clinic, Gleneagles Medical Centre dated 27 April 2004 at p 5, Dr Krishnamoorty from Raffles Hospital dated 12 may 2004 at p 3, Associate Professor Fong Poh Him from the Institute of Plastic Surgery (Singapore) dated 9 December 2005 and Dr W C Chang from Orthopaedic & Traumatic Surgery Pte Ltd, Gleneagles Medical Centre dated 1 October 2007 at p 3.

[note: 9] NE, 16 February 2012, p 11 lines 15-16

[note: 10] NE, 15 February 2012, p 2 lines 24-26

[note: 11] See report of Dr Chang dated 14 February 2012

[note: 12] Para 50 of Mr Ng's AEIC (17 January 2012)