Kanuvunaidu a/l Subramaniam v Goh Chan How
[2006] SGHC 126

Case Number : DC Suit 2063/2001

Decision Date : 20 July 2006

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Ramasamy Chettiar (ACIES Law Corporation) for the plaintiff; Ramesh Appoo (Just Law LLC) for the defendant

Parties : Kanuvunaidu a/l Subramaniam — Goh Chan How

Civil Procedure – Appeals – Appeal from Registrar – Assessment of damages for personal injury – When appellate court will interfere with decision

Damages – Quantum – Personal injuries case – Claim for pain and suffering and loss of earnings – Quantum to be awarded

20 July 2006 *Judgment reserved.*

Judith Prakash J:

Introduction

1 The plaintiff, Mr Kanuvunaidu a/l Subramaniam, was injured in a collision between his motor cycle and a motor car driven by the defendant, Mr Goh Chan How, on 4 April 2000. The main injury sustained by the plaintiff was an open fracture of the right tibia and fibula, close to the ankle. At the time of the accident, the plaintiff, a 27-year-old Malaysian citizen living in Johor, was working in Singapore.

2 This action was commenced in the District Court in 2001 and the issue of liability was resolved by consent. Interlocutory judgment for damages to be assessed was entered against the defendant with liability apportioned at 90:10 in favour of the plaintiff. The assessment of damages was heard over a number of days between January and October 2005. On the 17 October 2005, Deputy Registrar Tan May Tee made the following awards in respect of damages:

Pain and suffering and loss of amenities

(a) open fracture of the right tibia and fibula with residual disabilities including left ankle pain and lower back pain	$25,000
(b) osteoarthritis	$8,000
(c) scars, grafting and loss of radial artery	$20,000

Special damages – pre-trial

(a)	medical expenses	$2,372.73
(b)	loss of overtime (April 2000 – December 2000)	$4,839.88
(c)	loss of allowance (August 2003 – November 2003)	$1,200
(d)	loss of salary for April 2003	$2,800
(e)	loss of earnings (May 2003 – 15 October 2003)	$14,580
(f)	loss of earnings from November 2003 up to date of assessment	NIL

Future medical expenses

(a)	Future surgery	$6,000
(b)	Consultation fees and medication for pain	$3,000

Loss of earning capacity	$50,000
Loss of future earnings	NIL

Interest

Interest on $78,792.61 at 6% per annum (31 May 2001 – 17 October 2005)	$20,736.49

Total	$158,529.10
At 90%	$142,676.19

3 Neither party was wholly satisfied with the award. Both appealed to the district judge in chambers. On 23 December 2005, District Judge James Leong dismissed both appeals with no order as to costs. The parties remained dissatisfied and lodged further appeals to the High Court. These

appeals were as follows:

(a) The plaintiff appealed against the awards made in respect of his pre-trial loss of earnings, loss of future earnings and the loss of earning capacity.

(b) The defendant appealed against the awards made in respect of the plaintiff's pain and suffering, certain portions of the pre-trial loss of earnings and the medical expenses.

Pain and suffering

4 The plaintiff claimed damages for the following injuries resulting from the accident:

(a) open fracture of right tibia and fibula;

(b) osteoarthritis;

(c) multiple scars;

(d) muscle wasting;

(e) left ankle pain; and

(f) lower back pain.

He also alleged that the injuries had resulted in his suffering from the following disabilities:

(a) difficulty in carrying out work;

(b) swelling of, and pain in, the leg;

(c) difficulty in climbing stairs, squatting and walking; and

(d) lack of concentration and poor work performance due to pain.

5 The defendant did not accept that the pain in the plaintiff's left ankle and in his lower back had been caused by the accident. He also disputed that the plaintiff had been disabled to the extent alleged. In his view, the disabilities had not affected the plaintiff's work performance as alleged or at all.

6 There was a great deal of medical evidence in the case. Four doctors testified, three on behalf of the plaintiff and one on behalf of the defendant. There were numerous medical reports as many of the doctors had examined the plaintiff more than once. There were also some medical reports from doctors who did not give evidence but the evidentiary status of these reports was not clear.

7 Immediately after the accident, the plaintiff was admitted to the National University Hospital where he underwent emergency surgery. The procedure included debridement of the open wound and open reduction and internal fixation of the fracture. Two screws held the fracture at the lower end of the tibia together whilst a plate and screws were also inserted to hold the fracture at the lower third of the fibula. A few days later, the plaintiff underwent a procedure involving skin grafting in which his leg wound was covered by a free radial forearm flap. His radial artery had to be removed for this purpose. On 26 July 2000, the plaintiff's wound was noted to have healed. Subsequently, on 12 September 2000, one of the screws previously inserted was removed due to pain experienced by

the plaintiff. This was the last procedure at the National University Hospital. Thereafter, the plaintiff was seen on 27 November 2000. The doctor who saw him on that occasion stated that the wound had healed. No complaints by the plaintiff were noted. Further, it was not noted that the plaintiff's wound (either the original one or that caused by the removal of the screw) required dressing nearly every day and sometimes twice a day as the plaintiff subsequently alleged had been the case during the period from August to December 2000. In total, after the accident, the plaintiff was on medical leave for about nine months.

8 Dr John Chia ("Dr Chia"), the doctor who initially treated the plaintiff at the National University Hospital did not testify. In August 2002, however, the plaintiff's case was taken over by Dr Shamal Das De ("Dr De"), Professor and Senior Consultant at the Department of Orthopaedic Surgery of that hospital. Dr De had access to Dr Chia's notes and gave evidence on them. In relation to the plaintiff's allegation that dressing of the wound was required for some time, Dr De commented that there was nothing in the notes to show that there had been discharge from the wound requiring frequent dressing. He stated that if the plaintiff had had a bad infection, he would have been readmitted. Additionally, it was Dr De's view that Dr Chia would have picked up a persistent infection when he saw the plaintiff on 27 September 2000. At that stage, Dr Chia was quite happy with the plaintiff's condition and asked him to come back in six months; so, Dr De opined that whatever Dr Chia observed had not alarmed him very much. Dr Chia had said that the plaintiff could go back to work and no longer needed to be put on light duties. As regards the last visit to Dr Chia on 27 November 2000, Dr Chia's notes were "flap good", "good movements", "donor site good".

9 Dr De also put up a report of his own based on his own examination of the plaintiff, in which he stated that the plaintiff had difficulty in walking, had pain over the antero-lateral aspect of his right ankle and the range of motion in that ankle was restricted because of the secondary osteoarthritic changes that had taken place because of the fracture of the lower leg. In Dr De's view, the plaintiff's complaints of pain on walking were consistent with the injury sustained in the accident. His symptoms had deteriorated and if they worsened further, he might require surgery of his ankle joint. In court, Dr De elaborated that x-rays taken in August 2002 (when the plaintiff was almost 30) showed that the plaintiff had started to develop osteoarthritis and that this was uncommon. This was a very bad injury with much loss of tissue.

10 Dr De stated that he had last seen the plaintiff on 2 April 2003. During that visit, the plaintiff had said that he was also experiencing pain in his left ankle, that the distance that he could walk without pain had decreased to less than the distance between two bus-stops and that he could not run. In Dr De's opinion, the development of pain in the left ankle, although the right ankle was the injured one, was quite possible as a person with pain on one side would throw his weight onto the opposite side to compensate. Back pain would also be a possible result of such an injury. Whilst he stated that in April 2003, he did not think that the plaintiff required physiotherapy as once the osteoarthritis had stabilised, physiotherapy for the ankle would not be so helpful, Dr De was of the opinion that the plaintiff needed to be on regular pain medication though it should be taken only on bad days.

11 Under cross-examination, Dr De was asked about the plaintiff's condition in April 2003. It was put to him that he was happy with the plaintiff's condition at that examination. The doctor replied that he gave the plaintiff some advice regarding lifestyle and advised the plaintiff to come back and see him if the latter had any problems. The plaintiff, however, had not turned up for a subsequent appointment six months later. Dr De confirmed that based on his records and on the symptoms that the plaintiff had reported to him, the plaintiff's symptoms had become worse between the time of the accident and the time of his previous review.

12 Dr Lai Chan See ("Dr Lai"), a specialist in occupational health medicine saw the plaintiff in February 2002 and again in January 2003. On the first occasion, the plaintiff's main complaint was the pain experienced in his right ankle. He said that it did not hurt at rest but began to be painful when he walked for any distance further than 20 to 30 metres. Because of the ankle pain, the plaintiff had difficulty climbing stairs, he could not run or squat fully, and had difficulty pressing on the accelerator and brake pedals of a car. In January 2003, the plaintiff complained that he still had pain in his right ankle, aggravated by walking and climbing stairs and also experienced pain in his left ankle and backache. Much of Dr Lai's evidence dealt with the issue of the effect of the plaintiff's injuries on his ability to work and I will refer to that aspect of the evidence later.

13 Dr Ling Chaw Ming ("Dr Ling"), an orthopaedic surgeon appointed by the defendant, examined the plaintiff on 20 July 2004. On this occasion, the plaintiff complained of inability to run and walk long distances, difficulty in using a squatting toilet, inability to play games like badminton or football which he had played before the accident, inability to drive a car for more than an hour without developing pain in the ankle joint and lower back pain. After a physical examination and consideration of the previous medical reports, Dr Ling formed the opinion that the plaintiff had sustained a severe injury to the right ankle joint. The latest x-rays of the joint had shown evidence of early osteoarthritic changes. There was also evidence of a lateral shift of the talus giving rise to mild varus deformity of the ankle joint. The movement of the ankle joints was restricted to a significant degree. The plaintiff would not be able to play badminton or football or do any running because it would give rise to pain in the ankle joint. The plaintiff was unable to squat fully and would have some problem using a squatting toilet. Dr Ling anticipated that the plaintiff may have occasional attacks of pain that may require pain medication. In his opinion, there was a high risk that over the years, the osteoarthritic changes in the joint would progress and eventually the plaintiff might need an ankle arthrodesis.

14 In court, Dr Ling confirmed that he had ordered x-rays to be taken of the plaintiff's right ankle and lumbar spine on 20 July 2004 and the significant findings resulting from those x-rays had been noted in his report. He highlighted, however, that the right ankle was still slightly swollen and there was restriction of its movement. He agreed that because of the osteoarthritis, the plaintiff might experience symptoms like pain and restriction of movement and often there would be some swelling of the joint. He also agreed that these symptoms would wax and wane and therefore there would be good days and bad days. When Dr Ling was asked whether he had any reason to doubt Dr De's evidence that the plaintiff's symptoms of pain were getting worse, he agreed he had not. He confirmed that swelling would be a permanent feature and that the plaintiff's complaints of pain and walking with a limp were genuine. On the issue of lower back pain, Dr Ling said that he had not been able to make any positive finding on the basis of the clinical examination and the radiological evidence. No abnormality had been detected. When it was put to him that the opinion of one Dr Yeo Khee Quan ("Dr Yeo"), the plaintiff's private orthopaedic surgeon, was that lumbar pain for the plaintiff was consistent with his injury because the plaintiff could not balance his load on both legs and therefore had to shift his weight to the left side which resulted in loading on the lumbar spine, Dr Ling's comment was that that was a reasonable explanation but that it should not be forgotten that lower back pain is a very common complaint in the population. When pressed, however, as to the specific age group that sufferers would fall into, he said that it usually happened later in life. Dr Ling was then reminded that the plaintiff was 32 years old and that the history was that he had had an accident in April 2000, went through several procedures, went back to work and had developed the back pain 20 months later. On this basis, Dr Ling acknowledged that it was possible that the lower back pain could be attributed to the leg injury.

15 Dr Yeo saw the plaintiff on at least three occasions: first in January 2001, then in August 2003 and finally in January 2005. He testified that the plaintiff's symptoms of pain, limitation of movement and stiffness experienced between 2001 and 2005 were consistent with the nature and

type of injury sustained in the accident. Under cross-examination, he confirmed that he had carried out a clinical examination of the plaintiff's lower back. This examination did not reveal any spasm of the paravertebral muscle or any deformity of the lumbar spine. The plaintiff had a normal range of spinal movement. In re-examination, Dr Yeo gave the explanation for the plaintiff's lower back pain that I have cited in [14] above.

16 The defendant submitted that any assessment of the plaintiff's pain and suffering should take into account the fact that his fracture and operation wounds had healed well without any complication. Further, the defendant submitted that the plaintiff's condition had not deteriorated and was stable. His complaints that his injuries had deteriorated were subjective complaints that the doctors could not verify. Counsel pointed out that Dr Ling had confirmed in cross-examination that the range of motions of the plaintiff's ankle had not deteriorated. Dr De had confirmed that the plaintiff did not complain of pain to the left ankle in October 2002. Also, the major nerves had not been injured and only the small nerve supply had been injured. The plaintiff himself had confirmed an item in Dr Ling's report where he was reported to have told Dr Ling that it was only after walking for two to three kilometres that he would experience pain in the ankle joint and had to stop before he could walk again. Dr Lai's evidence that the plaintiff had normal reflexes for both the knee and ankle should also be considered. Apart from the decreased sensation over the scarring on his leg, there were no neurological deficits in the leg. From the evidence, it was clear that the plaintiff had not lost any of the basic functions of his injured leg. The plaintiff could walk a considerable distance and climb stairs though perhaps not as easily as before. The evidence of the defendant's private investigators showed that the plaintiff was able to drive, shop and walk about without any difficulty. The plaintiff was coping well with his injuries, was able to ambulate and was independent.

17 Whilst there may have been some degree of exaggeration in the plaintiff's account of his injury and resultant disabilities, the doctors agreed on most of the basic details. All agreed that the plaintiff had sustained a serious injury and had had to undergo various procedures to ameliorate his condition. They also agreed that as a result of the injury, early osteoarthritis had set in. The plaintiff walked with a distinct limp and had some difficulty in walking, squatting and climbing stairs. There was no dispute that the range of motion of the right ankle had been reduced by the injury though there was a dispute as to whether the situation had deteriorated further over the years and Dr Ling's finding was that it had not. Dr Lai too had remarked in January 2003 that clinical examination of the plaintiff's ankle showed little change in the physical findings as compared with a year earlier. The doctors agreed that the plaintiff could expect to experience pain for the rest of his life although not continually as there would be good days and bad days. A further development over the years was that due to the difficulty the plaintiff had in using his right ankle he had put additional weight on his left leg and this had resulted in stress on the left ankle. Therefore, he experienced pain from that ankle as well. The other main dispute was whether the lower back pain experienced by the plaintiff had resulted from the injury to the ankle. The doctors called for the plaintiff agreed that it was. Dr Ling was more sceptical but conceded that this was a possible result of the injury. I also noted that the defendant's private investigators had commented that the plaintiff walked with a limp. They had noticed too that after driving for an hour the plaintiff had yielded the driver's seat to someone else and appeared to be experiencing some pain in his leg.

18 Apart from Dr De, the other doctors did not deal with the plaintiff's complaint of requiring frequent medical attention during the period from August to December 2000 due to infection of his wounds. Dr De himself had no direct evidence to give on this. He simply dealt with what was stated in Dr Chia's notes and responded, in a somewhat speculative way, to questions put by counsel for the plaintiff. The plaintiff produced medical reports and receipts from two doctors in Johor whom he said had treated him during this period but he did not call either doctor to testify and therefore neither the reports nor the receipts were admissible in evidence. The defendant had at all times reserved his right

to cross-examine these doctors. There was therefore no evidence that supported the plaintiff's testimony of continuing problems with his wound.

19 The defendant's position was that the amounts awarded were too large. Instead, he submitted, a total amount of $25,000 should be awarded for the fracture of the right tibia and fibula, osteoarthritis, scars and muscle wasting. Various authorities were cited. *Durai Dhanaraj v Tan Tuan Kok* District Court Suit No 2295 of 1998 (26 January 1999) was a case where the plaintiff suffered an open fracture of the right tibia and fibula and had subsequent scarring. The fracture was treated by surgical fixation with plating. The tibia fracture did not show signs of healing. The plaintiff suffered from pain in his right leg after walking for ten minutes and was unable to carry heavy objects. His right leg became swollen and painful after he stood for half an hour and he needed support climbing up and down stairs. There was a restriction in the range of motion of his ankle. The court awarded $18,000 for the fracture and $2,000 for the scars. No separate award was made for the bone grafting procedure that Mr Durai Dhanaraj had to undergo. In contrast, said the defendant, in the present case, the plaintiff could walk for two to three kilometres before experiencing pain and did not need support climbing stairs. His fracture had also healed well.

20 Next cited was the case of *Yeo Hwee Hong v Wong Soong Kit* District Court Suit No 4429 of 1996 (23 September 1997) ("*Yeo Hwee Hong*") where the plaintiff had an open fracture of the left lower tibia and fibula, laceration and wasting of the left quadriceps and loss of dorsiflexion. The plaintiff suffered pain when running or walking fast and was awarded $15,000 as a global sum for pain and suffering. Another case of fracture of the tibia and fibula, where the plaintiff walked with a limp and was unable to squat normally or fully and had mild deformity in the outline of the right shin, was *Shela Devi d/o Perumal v Ravi bin Nahrawi* Suit No 1191 of 1999 ("*Shela Devi d/o Perumal*"). The plaintiff there was awarded $15,000 for the fracture and $2,000 for muscle wasting. The defendant also cited two cases in which awards of $3,000 for osteoarthritis were made, *viz*, *Mohamed Shaib s/o Malukumian v Thiruppanalwar Veerasamy* District Court Suit No 3310 of 1998; District Court Appeal No 37 of 1999 (18 September 1999) and *Tan Swee Khoo v Balu a/l Sinnathamby* District Court Suit No 225 of 1998 (3 September 1999). In the latter case, in fact, the award was in respect of a pre-disposition to osteoarthritis only as the condition had not set in at the time of the award.

21 In supporting the awards made at first instance, the plaintiff cited *Alagamalai s/o Veerasamy v Chan Liau Chuan* [1994] SGHC 267, digested at [1994] Mallal's Digest (4th Ed) 1214. The plaintiff had a comminuted fracture of the tibia and fibula of his left leg resulting in a 2cm shortening of the leg, deformity and swelling of the lower half of the leg, depressed abrasion marks on the front of the leg, 2.5cm wasting of the left calf and some restriction in the movement of his ankle. The plaintiff limped and could not squat fully. There was mal-union at the fracture site with disuse atrophy of the bones. He was awarded $20,000 for the fracture and $2,000 for multiple abrasions. In another case decided in the mid-1990s, *Ramdas s/o Achiddappan Naidu v Chua Ben Cheong* Suit No 702 of 1993 (22 May 1996), digested at [1996] Mallal's Digest (4th Ed) 989, the plaintiff was awarded $22,000 for open fractures of the left tibia and fibula that had been treated by external fixators and debridement of the wounds and a further $10,000 for scars and skin grafting. The third authority relied on by the plaintiff was *See Gim Tin v Gopalan Chandran* Suit No 51 of 1995 (11 April 1996), digested at [1996] Mallal's Digest (4th Ed) 992, where the plaintiff was awarded $20,000 for fracture of the left tibia/fibula with open wound and chronic osteomyelitis. The plaintiff here had suffered extensive injuries with fractures of her pelvis and femur in addition to the tibia/fibula fracture. She lost motion of her left knee and left ankle due to the severe bone, soft tissues and nerve injury. She had persistent left lower limb infections and non-union of the left fractures. Persistent infection carried the risk of the plaintiff being required to decide on amputation. She was also awarded $8,000 for left peroneal nerve palsy, foot drop and osteoarthritis in foot and ankle. Abdominal scars and scars at donor sites received another $20,000. The plaintiff also relied on the award of $6,000 for

osteoarthritis made in favour of the plaintiff in *Norman bin Mujeyat v Chan Kwong Meng* District Court Suit No 2532 of 1994 who had a fracture of the right femur and consequently developed osteoarthritis, probably of the knee, though this is not stated in the report which is very brief. In *Swaran Singh v Lim Soon Lee* Suit No 2409 of 1996 (27 October 1996), digested at [2000] Mallal's Digest (4th Ed) 1017, the High Court awarded $15,000 for osteoarthritis of the knee and ankle but the report gives no further details of the injury. The plaintiff also cited two cases, *Norani binte Abdul Rahim v Lau Kim Woh Kevin* District Court Suit No 3611 of 1998 (11 November 2000) and *Soh Eng Wah v Saifuddin bin Sulaiman* [2000] 1 SLR 721 where the plaintiff was awarded $4,000 on the basis that osteoarthritis would set in at a later date though in the second case, the award was set aside on appeal on the basis that the evidence did not prove this potential disability.

22 The plaintiff relied on Dr Yeo's evidence that he had three permanent residual scars measuring 15x17cm, 11x7cm and 16cm over the right ankle, right forearm and right iliac crest respectively. Dr Ling had also noted the plaintiff's scars and had given a similar description of them. The plaintiff submitted that his injuries and residual disabilities were much worse than the cases cited above. In addition, he had diminished sensation over the patch of scars over his right ankle. As the cases cited had been decided a decade previously, some increment should be given for inflation.

23 In *Low Swee Tong v Liew Machinery (Pte) Ltd* [1993] 3 SLR 89 at 91, [6], MPH Rubin JC stated that in order to justify any reversal of the trial judge's decision on the amount of damages, it would be necessary for the appellate court to be convinced either that the judge acted upon some wrong principle of law or that the amount awarded was so extremely high or very small as to make it in the judgment of the appellate court, an erroneous estimate of the damages to which the plaintiff was entitled. He also cited with approval (at 92, [7]) the statement of Greer LJ in *Owen v Sykes* [1936] 1 KB 192 at 198 that an assessment of damages was necessarily an estimate and that an estimate was necessarily a matter of degree and therefore unless the first instance judge had taken an erroneous view of the evidence as to the damage suffered by the plaintiff or gave weight to something that ought not to have affected his mind or left out of consideration something that ought to have affected his mind, the appellate court should not interfere.

24 In considering the arguments of counsel, the authorities and the facts, I am therefore conscious that I should not readily interfere with the award on damages. Having regard to all the circumstances, however, I am of the view that the first award of $25,000 for the fracture of the tibia and fibula was excessive. On the admissible evidence, the plaintiff's injury healed well and the details of the injury and treatment were far more akin to those of the *Yeo Hwee Hong* and *Shela Devi d/o Perumal* cases ([20] *supra*) than to the authorities cited by the plaintiff. There was, however, the additional pain caused by compensating for this injury and that element would justify a somewhat higher award than those made in the cases cited though not as high as $25,000. I therefore reduce the award under this head to $20,000. The award for osteoarthritis is at the high end of the range but bearing in mind the plaintiff's relative youth when it first set in and the agreement of the doctors that he will experience varying levels of pain for the rest of his life, I cannot accurately describe the award as excessive. This is not the case, however, in relation to the award of $20,000 for scars, grafting and loss of radial artery. There did not seem to be any reason to make an award for the loss of the artery. The plaintiff's counsel argued that the only source of blood to the plaintiff's hand is now from the ulnar artery and that an arm with less blood would feel colder in cold weather. I consider that a rather feeble argument especially in the face of the lack of medical evidence establishing that the loss of the radial artery caused the plaintiff to suffer a physical or other deficit. The plaintiff's doctors carried out the procedure that removed the artery in order to improve his recovery from the wound sustained in the accident. That decision implies that the doctors considered that there would be little or no injury to the plaintiff from the removal of the artery. The plaintiff was scarred but the award was out of proportion to the number and extent of the scars. I reduce the third award in

respect of pain and suffering to $10,000 and would state that that award is for the scars and the grafting alone. No award should have been made for the loss of the radial artery.

Pre-trial medical expenses

25 The deputy registrar awarded $2,372.73 as pre-trial medical expenses. The plaintiff said that he had incurred these expenses when he sought treatment in various clinics in Malaysia. He adduced various receipts in support of this claim. The defendant's contention was that this was a bogus claim and should not have been allowed. The defendant then made submissions on various parts of the evidence that he considered established the *mala fides* of the claim.

26 The defendant pointed out that one receipt dated 15 October 2000 was issued by a clinic located in Klang, a town, which the plaintiff himself testified, is some 380km from Skudai, the area in Johor where the plaintiff lives. The plaintiff had also submitted two receipts for the same date, 29 September 2000, which was a Friday and a working day. One receipt was for an injection he received in a clinic in Masai, Johor Bahru, whilst the other was for "medical treatment" obtained from a clinic in Skudai. The plaintiff testified that Masai was about 30 to 35km away from Skudai and when asked why he had gone to two different clinics on the same day, he said that he went to the clinic in Skudai for "normal treatment – clean wound" and had gone there in the morning. That clinic was closed at night and therefore when he experienced pain on the same night, he had gone to the Masai clinic for an injection. The plaintiff, however, had also told the court that another clinic in the Skudai area, Klinik Rama, was open until 10.00pm. The defendant wondered why in that case the plaintiff had had to go to Masai for his injection.

27 The plaintiff had also claimed that on 2 November 2000 and 5 November 2000 he had sought treatment twice on the same day. When asked why he had done this on 2 November 2000, he replied that once he had gone for treatment and the other time had been for an injection. This had been the case again on 5 November 2000. He informed the court that Klinik Rama was open between 9.00am and 10.00pm and at first said he had visited that clinic at night but subsequently, stated he could not remember whether he had been there at night or in the morning. The defendant pointed out that by the plaintiff's own admission, he had returned to work after his medical leave expired on 12 September 2000 and that during the period when he was allegedly in need of medical treatment on a daily basis, the plaintiff had worked overtime.

28 The defendant submitted that the fact that the plaintiff could and did do overtime work suggested that he could not have been in a condition that required him to seek treatment on a daily basis. It was difficult to understand how he found the time to consult doctors in Malaysia when he was working overtime and why he did not visit his employer's doctors since that clinic was across the road from his place of employment. The plaintiff had confirmed that on many of the days on which he made claims for medical expenses incurred in Malaysia, he had been working in Singapore. He was also aware that if he had gone to see his company doctor, the bill would have been sent directly to his employer for payment and he would not have needed to settle it. His reason for not seeing the company doctor was that Singapore doctors did not give him good painkillers. The defendant did not accept this reason and also relied on Dr De's evidence in relation to the notes made by Dr Chia that indicated that on 27 November 2000, the donor site was found to be good and the plaintiff was not given any medication. At this time, the plaintiff was still visiting his Malaysian doctors and yet he had not made any complaints of requiring regular dressing or pain medication to Dr Chia. The defendant also pointed out that the removal of the screw in the plaintiff's leg on 12 September was, according to Dr De, a minor procedure that would not have required the plaintiff to seek dressing for the wound from then up to December 2000.

29 In response, counsel for the plaintiff pointed out that Dr De had stated that since the plaintiff sustained a severe injury, he would not be surprised if the plaintiff had had a low grade infection which required dressing. Counsel noted that Dr De had said that he would have expected Dr Chia to have made a note of such an infection but counsel argued that the absence of such a record in the clinical note did not mean that the plaintiff did not have a low grade infection that warranted dressing and medication for pain. The plaintiff had no reason to put up a bogus claim in respect of his Malaysian medical expenses. He also stated that the fact that at the end of 2000, Dr Chia was happy with the plaintiff's progress and did not prescribe medication did not mean that he was unaware that the plaintiff was getting medication elsewhere.

30 In my judgment, the award of $2,372.73 must be set aside. The plaintiff had the onus of proving that he did incur those medical expenses as a result of the injury and not for any other reason. He did not discharge that onus. The plaintiff did not call the doctors whom he consulted in Malaysia. He did not give a satisfactory explanation as to why after 12 September 2000, he could not have seen the company doctor or as to why he needed to see doctors on an almost daily basis (and sometimes twice a day) at a time when he was in full-time employment and doing fairly well at his job. The plaintiff did not explain also why he did not complain to his doctors in Singapore about his pain and infection. The natural inference from such omissions was that the medical charges incurred, even if on the level, were not related to the accident.

The claims for loss of earnings

The plaintiff's employment history

31 The plaintiff filed three affidavits of evidence-in-chief. In his first affidavit, affirmed on 18 February 2003, the plaintiff said that his highest standard of education was to the level of the GCE "O" levels (Malay stream). He also knew something about computer operation which he had learnt on the job. In 1997, he had been employed by Asian Micro (S) Pte Ltd ("APL") as a storekeeper. He was promoted several times and, by the date of the accident, his appointment was that of senior planner. He commuted daily from his home in Skudai to APL's premises in Tuas, Singapore.

32 APL was in the business of assembling computer components and producing polyethylene products. The plaintiff's duties included receiving orders from customers, meeting customers at various locations in Singapore, checking raw materials received in the warehouse, issuing materials from the warehouse and supervising 40 production workers. According to what he told Dr Lai in February 2002, the plaintiff sometimes had to handle bags weighing up to 25kg and to drive the company's forklift truck. He had to climb the staircase in the factory from level 1 to level 3 about two dozen times a day and had to drive all over Singapore to meet customers.

33 As a result of the accident, the plaintiff was on medical leave until 28 June 2000. APL paid him his basic salary but he lost out on overtime earnings for some months. He also said that as a result of injury to his leg, he found it more and more difficult to carry out his work. His leg constantly swelled up and the pain became unbearable at times. He had consulted APL's doctors several times and all they had done was to give him some painkillers and time off. He was concerned that if he went on medical leave too often he would lose his job. Therefore, he had put up with the pain and discomfort as he needed the job to support his family.

34 The plaintiff also stated that Dr Lai had advised that he ought to seek alternative employment and that his doctors had advised him that the deterioration of his leg was due to the nature of his job. He had therefore seen his superiors and informed them of his dilemma. APL did not want to let him go but he was not able to continue working there at the same pace as before

because of the pain in his leg. The plaintiff said that his solicitors had forwarded his doctor's reports to his employer but APL had not yet made a decision as to whether it would be able to offer him an alternative job that would suit his disabled condition. At the time of this affidavit, the plaintiff was earning a gross salary of $2,800 a month which included a travel allowance of $300.

35 On 30 August 2003, the plaintiff affirmed a supplementary affidavit. He stated that on 1 March 2003, APL had decided to terminate his services on medical grounds. After this, he had made several attempts to look for a sedentary job that would not put too much stress on his injured leg. He was not able to find a suitable job in Singapore because of his educational qualifications and injuries. Therefore, he had to look for work in Malaysia and it was only on 2 May 2003 that he was able to find employment with U Motor Workshop ("U Motor") as a general clerk at a monthly salary of RM700 plus allowance of RM100.

36 In his third affidavit made in March 2004, the plaintiff said that he had left U Motor on 15 October 2003. Originally, his job duties there had been to prepare invoices and occasionally make deliveries to customers. Subsequently, he found himself running errands like collecting spare parts from suppliers that required him to drive for long periods of time and to carry heavy equipment. On some days, he had to make several trips in a day and drive distances of more than 100km. As he started to experience pain in his leg, he resigned from the job. Thereafter, he had been unemployed. He was scheduled to get married in November 2003 and his parents had told him to look for a job after marriage. He was also experiencing pain and wanted to take a break. He started looking for a new job in January 2004 but without success as when he told prospective employers that he had medical problems, they were not interested in employing him.

37 When the plaintiff came to court in November 2004, he stated that since July 2004, he had been helping his brother in the latter's transportation enterprise. His job was to help his brother settle complaints made by customers. This was his only duty. The plaintiff's brother operated his business from his home but the plaintiff was not required to go to the home and maintain office hours. He needed only to deal with phone calls from the customers which he could do from his own home. He testified that in the four months that he had been working for his brother, he had had to settle five or six customers' complaints. His brother paid him RM800 per month for this work.

Pre-trial loss of earnings

38 At the assessment hearing, the plaintiff made claims for pre-trial loss of earnings in respect of five different periods. The first period was from April to December 2000 and the claim here was for loss of overtime earnings. The deputy registrar awarded him $4,839.88 under this head. Neither party appealed against that award.

39 The awards made in respect of the other four periods were the subject of appeal. The deputy registrar awarded the plaintiff $1,200 as loss of allowance for the period of August to November 2000, $2,800 for the month of April 2003 and $14,580 for the period between May and October 2003. The defendant appealed against these three awards. The final period for which the plaintiff claimed loss of pre-trial earnings was from November 2003 to 17 October 2005. No award was made in respect of this period and the plaintiff appealed against the holding that he had not proved any loss of earnings during that period.

40 I deal first with the defendant's appeals. The first item involved the sum of $1,200 which comprised four months' travel allowance of $300 a month. The defendant submitted that this amount should not have been awarded. The claim for the alleged loss of allowance of $300 from August 2002 to November 2002 had not been pleaded nor referred to in any of the three affidavits of evidence-in-

chief filed by the plaintiff. It had only been brought up by the plaintiff in the course of cross-examination. He had then alleged that when he was experiencing pain in his leg, APL had agreed to lighten his workload and had done so by relieving him of the sales work. As a result, the $300 transport allowance for this work had been halted. In December 2002, however, the plaintiff was reassigned to sales and the allowance was restored. The defendant argued that no award should have been made as the loss was not specifically claimed nor was the plaintiff's account supported by Ms Ang Geok Pheng Jenny, the human resource manager of APL who had testified on his behalf. When asked about the allowance, Ms Ang said that she had no information why the plaintiff had not been paid the allowance from August to November 2002. There was no information on the plaintiff's personal file on this allowance and no record that it was stopped because the plaintiff did not go out on sales jobs during that period. Ms Ang would have expected a record of the modification of the plaintiff's duties and his allowance to appear in the personal file.

41 I consider that the arguments of the defendant on this point are well-founded. Whilst the plaintiff may not have received any allowance for the period in question, that does not mean that the allowance was stopped because of his medical condition. There could have been other reasons for the stoppage. The plaintiff had the onus of proving how his condition and the non-payment of the allowance were related. The plaintiff did not see fit to make this claim in either his pleadings or his evidence in chief so that it could be examined by the defence. The only evidence of the reason for the stoppage was the plaintiff's assertion in cross-examination. During the same period, the plaintiff was driving to and from work everyday, and each journey covered a distance of 40km and took him 45 minutes. He therefore should have been able to drive to meet APL's customers as well. The plaintiff's personnel records did not have any information that supported his assertion. There was no medical evidence to support it either. In any case, the plaintiff resumed sales work in December 2002 and continued to receive the allowance and to do the sales work until he left the company in March 2003. If his condition was worsening, he would not have been able to take up those duties again. This award is therefore set aside.

42 The rest of the pre-trial loss of earnings awards can be considered together. The first was the award of $2,800 made in respect of the month of April 2003. This was the month that the plaintiff was out of work after leaving APL and before joining U Motor. The deputy registrar assessed it on the basis of the plaintiff's last drawn salary from APL. The next was for the period between May 2003 and October 2003 when the plaintiff was working with U Motor and the deputy registrar awarded him the difference between what he would have earned had he continued working with APL and the salary he received from U Motor. The final award was in respect of the period from November 2003 up to the date of the trial. In fact this was a "nil" award in that the deputy registrar decided that the plaintiff was not entitled to make a claim for this period. This decision of the deputy registrar was appealed against by the plaintiff.

43 The defendant submitted that no award should be made for any pre-trial loss of earnings for April 2003 or any period subsequent thereto because the termination of the plaintiff's employment had been prematurely brought about by the plaintiff himself. The defendant argued that on 27 September 2000, Dr Chia had certified the plaintiff as being fit to resume work. In December 2000, the plaintiff was promoted by APL to the position of assistant planning manager and then continued to perform well enough to be given an increment in May 2002. The plaintiff's colleague and superior, Mr Kamaruddin, had given evidence that he was pleased with the plaintiff's performance up to July 2002. Thereafter, there was no evidence whatsoever that the plaintiff's performance had deteriorated at all or that APL was unhappy with it. There was therefore, the defendant submitted, no reason for APL to suddenly issue a notice terminating the plaintiff's employment.

44 To the defendant, it appeared that the plaintiff had brought about the termination of his own

employment in order to maximise his claim when the case came up for hearing in March 2003. The plaintiff had said that he was terminated because his work performance had deteriorated and his employers were dissatisfied with his work. The defendant submitted that the plaintiff's evidence apart, there was no evidence to show that APL was dissatisfied with him. There was no evidence that he was frequently absent from work due to the injury. There were no warning letters issued to the plaintiff by APL in respect of his work. APL had not asked him to obtain further medical reports. On his own account, however, the plaintiff had obtained further reports from Dr De and Dr Lai to assess whether he was able to continue working with APL and had presented them to APL under a cover letter from his solicitors dated 18 February 2003. It was significant, said the defendant, that this letter was not disclosed or alluded to until Ms Ang testified in court and that the defence therefore had no knowledge of it until that date.

45 The defendant observed that the letter had stated that the plaintiff's right ankle would further deteriorate if he continued with his present job and that Dr Lai had recommended that the plaintiff look for alternative employment in a sedentary job. The letter went on to enquire whether APL would be able to offer the plaintiff a sedentary administrative type of job and, in the event it could not do so, whether in view of the recommendation in Dr Lai's report, it was likely to terminate the plaintiff's employment on medical grounds. In the defendant's submission, the letter was an invitation to APL to terminate the plaintiff's employment and was prompted by a desire to maximise the plaintiff's claim in the case. If it was otherwise, the defendant questioned why it had been necessary for the plaintiff to make up the story that his work performance had deteriorated. The plaintiff's failure to disclose this letter which explained why his employment had been terminated was, said the defendant, not only a breach of the discovery procedure for the plaintiff, but also an illustration of the fact that the plaintiff would not hesitate to suppress information adverse to him. If the plaintiff had continued working in APL, he would not have been eligible to make any claim for loss of future earnings as his salary in February 2003 was higher than what he was earning before the accident. The defendant therefore submitted that the plaintiff's termination from APL was contrived to enable him to mount a claim for loss of future earnings.

46 The defendant further submitted that no award should have been made in respect of the reduction in the plaintiff's salary while he was working with U Motor because the latter employment was not *bona fide*. The plaintiff had given the impression in his second affidavit of evidence-in-chief made in August 2003 that he was formally employed by U Motor as a general clerk. He exhibited his letter of employment that set out his salary and notice period. No one from U Motor had, however, testified to corroborate these facts. In the defendant's submission, the plaintiff had merely given the impression that he was working with U Motor so that he could avoid taking on a proper job. The plaintiff told the court that the owner of U Motor was his friend and that he had shown the latter his various medical reports. Despite having seen these, during the plaintiff's first week of employment with U Motor he had been asked to collect spare parts and drive to various locations. Further, from the second week of May 2003, according to the plaintiff, U Motor had made him drive for long periods over distances of more than 100km and carry heavy spare parts. So, from the time he started work with U Motor, he had experienced pain in his leg. On the other hand, according to Dr Yeo, he had seen the plaintiff on 14 August 2003 (a date on which the plaintiff was still working with U Motor) and the plaintiff had said then that he was able to cope with his work at U Motor. In regards to his salary at U Motor, the defendant made much of the fact that the plaintiff had said in court that he was paid RM700 as salary and RM100 as allowance and when asked to explain what the allowance was for, he said it was an attendance allowance for going to work. Finally, despite the fact that his letter of employment specified the terms of termination, the plaintiff confirmed that he had not given written notice of his resignation but simply told his friend at U Motor that he was leaving.

47 The defendant also made lengthy submissions on the plaintiff's credibility. Various areas

where the defendant considered the plaintiff's evidence to be unsatisfactory were identified. One of these related to the plaintiff's purchase of a BMW car. In his affidavit, the plaintiff said that he had bought this car on 14 March 2003 but in court when it was pointed out that the purchase was made after he had received APL's letter of termination, the plaintiff said that the car was actually purchased in February 2003 as it was then that he had booked it and it was only the registration that had taken place in March 2003. The BMW was sold the next year and a Mercedes Benz car was then purchased and registered in the plaintiff's name. The plaintiff said he had taken a loan in order to purchase this car which cost over RM200,000. He said that he could not remember whether he was working at the time he took the loan but he had used the same documents he had earlier used (*ie*, documents relating to his employment at APL) to obtain a loan for the purchase of the Mercedes Benz. Subsequently, the plaintiff said that the repayment instalments for the loan were paid by his father and brother and that the car was simply registered in his name. In cross-examination, however, he had said that he had to pay RM3,000 a month in hire-purchase charges. There was also some inconsistency in the evidence relating to the plaintiff's educational qualifications. In his affidavit, the plaintiff had said that his highest standard of education was the GCE "O" levels (Malay stream) but in cross-examination he admitted that he did not have a full certificate because he had failed the examination. Then when it came to what he was earning for assisting his brother, the plaintiff initially said that he earned RM800 a month but subsequently stated that his salary was not fixed and that it was "RM800 – 1,000/- depends". When asked what the amount depended on, his reply was "Depends on profits, I think; he pay I just take."

48 The plaintiff did not accept that he had contrived his departure from APL. He relied on Dr Lai's evidence. Dr Lai first saw the plaintiff in February 2002. At that stage, he conducted detailed interviews with the plaintiff on his training, occupational history and present job responsibilities. He also visited APL's premises so that he could ascertain the plaintiff's working conditions. After examining the plaintiff, he considered that the plaintiff had a 20% permanent impairment of his lower right leg due to limitation in the range of motion of his right ankle joint. He noted that the plaintiff's job involved much travel. The plaintiff had to commute from his home in Skudai and had to travel to meet customers in Singapore. He also had to move about the three-storey factory building occupied by APL because he was in charge of production. Each day he had to climb up and down the staircase many times and occasionally he had to handle bags of heavy materials. Dr Lai stated that all this intense activity on the plaintiff's feet not only caused pain in his ankle but could also be expected to accelerate degeneration in the joint ultimately leading to osteoarthritis. Ultimately, the plaintiff would be obliged to seek a sedentary job.

49 Dr Lai reviewed the plaintiff in January 2003. He noted that since his last examination, the plaintiff had not changed his job. Clinical examination of the ankles showed little change in the physical findings. However, it was not surprising that osteoarthritis had progressed since 2001 given the amount of walking and climbing the plaintiff had to do in the course of his work. The doctor said that the pain the plaintiff experienced in his left ankle and lower back could have been caused by unequal weight bearing on his legs. In Dr Lai's view, continual excessive usage of the injured right ankle would only hasten the further progression of osteoarthritis in this joint and eventually lead to the need for fusion (arthrodesis) of the joint. It would therefore be advisable for the plaintiff to look for alternative employment in a sedentary, administrative type of job. It was this report that the plaintiff's solicitors sent to APL under cover of their letter of 18 February 2003.

50 The plaintiff submitted that the decision to terminate his employment by APL was made on medical grounds because it could not offer him another job suitable to his disabled condition. Further, the defendant had not disputed that the condition of the plaintiff's leg had worsened because of his duties at APL. The real question in the case, the plaintiff argued, was whether he should have continued in the same line of work even if that caused further deterioration in the condition of his leg

or whether it was reasonable for him to want to avoid further deterioration by informing APL of his condition. In this regard, the plaintiff relied on the following:

(a) objective medical evidence that the condition of his leg worsened as a result of his performing normal duties at APL;

(b) the various doctors' evidence that the plaintiff's symptoms of pain and swelling in his right leg were genuine; and

(c) that the plaintiff made a formal attempt to obtain a more sedentary job at APL but was not successful.

The plaintiff further submitted that he had a duty to mitigate his loss by increasing his chance of recovery by seeking medical treatment and also conducting himself appropriately. Recovery was not limited to seeing an improvement but would also include preventing his physical condition from deteriorating. The plaintiff had acted to preserve his physical condition and it was not for the defendant to insist that the plaintiff should continue to work at a job that would result in his eventually ending up in a worse state.

51 Counsel for the plaintiff also submitted that there was no substance in the aspersions made against the plaintiff's credibility. The plaintiff had admitted that he had a car in Malaysia. It was purchased by his father for the family's use and registered in the name of the plaintiff because he was highest-earning member of the family at that time and, since he was much younger than his father, the family was able to secure a seven-year loan. The plaintiff had given evidence in English though not well versed in the language and that had led to some difficulty in understanding but he had given answers to the best of his ability. As regards the application for financing, the plaintiff had said that documents were submitted before his employment with APL was terminated. By the time the family changed to another car, the plaintiff was able to obtain credit facilities from another finance company based on "his" track record which meant his prompt payment of previous instalments. The plaintiff's answers in this respect were logical and reasonable and there was no evidence to suggest any misrepresentation to the finance company. Regarding the discrepancy in relation to his educational qualifications, it was submitted that no conclusion that the plaintiff was untruthful could be reached based on what was said in the plaintiff's affidavit, a document drafted by solicitor albeit on the client's instructions. The plaintiff did go through the equivalent of GCE "O" levels in Malaysia. That could be interpreted to mean that he had attended a course that led to the equivalent of GCE "O" levels. As for the plaintiff's evidence on his earnings from his brother, what had to be noted was that the plaintiff had said that he was earning RM800 per month on 3 November 2004 and that hearing was adjourned and it was only when the plaintiff took the stand again on 16 February 2005 that he said that he was earning between RM800 and RM1,000 per month. Though the plaintiff was not asked for details, his brother could have paid him more during the period between the first and second hearings. Thus, the slight difference in the evidence could be reconciled and was not an instance of untruthfulness on the part of the plaintiff.

52 Having considered the submissions, I think that the deputy registrar came to the right conclusion in relation to the pre-trial loss of earnings both in respect of the amounts awarded and of the periods for which such amounts were due. The plaintiff's evidence was, in certain respects, not very reliable but there was sufficient objective evidence to justify those awards. The fact that the plaintiff supplied his employers, APL, with his medical records should not be held against him. It should be noted that he did this on two occasions, first in 2002 and thereafter in 2003 shortly before his employment was terminated. It appeared to me that on the second occasion the plaintiff was trying to ascertain whether he would suffer a loss of income in the future by eliciting his employer's views on

his medical condition. I do not think that the plaintiff was trying to lose his job on purpose. The medical evidence supported the plaintiff's request in 2003 to APL for a change in the type of job he had to do and it was not reasonable for the defendant to expect the plaintiff to continue to work at a job which his doctors had advised him would eventually lead to a deterioration in his medical condition. The plaintiff had performed well in his job after the accident but continuing to place such stress on his ankle would, Dr Lai testified, make his condition worse. The fact that the plaintiff had been able to put up such a good show for some time could not mean that he had to go on doing it at the risk of his health. The plaintiff owed no such duty to the defendant.

53 When the medical report was sent to APL in 2003, the plaintiff could not have expected that his employment would be so quickly terminated. The job at U Motor was an acceptable short-term employment bearing in mind that the plaintiff did not have much time to search for a better-paying job. He would also have been hindered in his search for a sedentary job in the Singapore market by his lack of paper qualifications. Whilst the defendant did submit that the loss in the plaintiff's income should have been assessed on the basis that he earned only $1,250 a month while he worked for APL (because while the plaintiff was there his services and salary were shared by APL and its associate) I find no merit in that argument. As far as the plaintiff was concerned, he was doing one job and it made no difference to him that APL and its associated company shared his salary. The basic income he lost (excluding the allowance) was $2,500 a month and not simply $1,250.

54 I also agree that the plaintiff was not entitled to recover any loss of earnings after he left U Motor. First, he deliberately suspended his search for employment in order to get married and to have his honeymoon. During this period, his loss of earnings was entirely voluntary. Thereafter, there was no credible evidence of the plaintiff having looked around for suitable alternative employment. Although the plaintiff said that he had done so, he did not show evidence of what kind of positions he had applied for. He claimed to have made several applications for a job in Malaysia but was unable to provide any details of these applications and was evasive when cross-examined on the point. It was also clear that after he joined U Motor he did not look for any further employment in Singapore. It was rather odd that he should have notified potential employers at the outset that he had medical problems. One would have expected him to apply for jobs which he could do notwithstanding his medical condition and then, at the interview, if any, only reveal his medical condition for the purposes of reassuring the potential employer that it would not affect his working ability. Instead, the plaintiff seemed to have followed a course which would guarantee him not being short-listed for interview and/or seriously considered for the position.

55 Additionally, there was evidence supporting the defendant's submission that the plaintiff's employment with his brother's transport company was only a pretext to conceal the fact that he was not looking for a genuine job. The nature of the job itself was suspect. He did not have to be present at any office to perform it nor did he work during normal office hours. His duty was to handle complaints but there were hardly any complaints for him to handle or to justify his alleged salary of RM800 to RM1,000. In four months, he had handled only five or six complaints. There was no documentary evidence supporting the alleged salary paid by his brother and there was also the plaintiff's own inconsistency in evidence on the amount of such salary. Finally, when it was put to the plaintiff by counsel for the defendant that his current job with his brother was not a genuine job and that he was simply assisting his brother as and when the brother called him, the plaintiff agreed. He also agreed that he simply took whatever money his brother gave him for that assistance.

56 Obviously, the deputy registrar had concluded that the plaintiff had not made any genuine attempts to look for alternative employment either in Singapore or in Malaysia after he had returned from his honeymoon. There was more than enough evidence to support that conclusion and I therefore cannot interfere with the decision not to award any pre-trial earnings for the period from

November 2003 to the date of the trial.

Future loss of earnings

57 The deputy registrar refused to make an award for future loss of earnings. She held that no credible evidence had been adduced by the plaintiff regarding the amount that he could have earned but for the accident. Instead, she awarded the plaintiff the sum of $50,000 for loss of earning capacity. The plaintiff appealed against this award.

58 The established legal position is that compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Where there is no evidence of what the actual loss of earnings would be, the court cannot make an award under this head. If, however, it is clear from the medical evidence that the injury sustained by a plaintiff would handicap him in his search for employment, the court will make an award for loss of future earnings. In this case, the medical evidence disclosed that the plaintiff's ability to do certain physical tasks had been limited by reason of the accident. Whilst he could still walk and do a certain amount of climbing, he could not walk for long distances or often carry heavy loads. He required a job that was mainly sedentary. The plaintiff's employment with APL required a certain amount of physical exertion that became more and more difficult for him after the accident. Definitely, in his search for alternative employment, he would be handicapped by not being able to draw on all the experience that he had had with APL since he could no longer perform all the tasks required by a job of a similar nature. An award for loss of earning capacity was therefore eminently justified.

59 I cannot disagree with the conclusion of the deputy registrar that there was no credible evidence of the amount that the plaintiff could have earned but for the accident. Many of the reasons for this conclusion were the same as those that prompted her not to make an award for pre-trial loss of earnings after November 2003. My reasons for coming to a similar conclusion have been set out above and there is no need to rehearse them here.

Conclusion

60 In the event, the defendant's appeal in relation to the awards for pain and suffering succeeds but the defendant's appeal in relation to the awards for pre-trials loss of earnings fails. The plaintiff's appeals in respect of the awards for pre-trial loss of earnings and for future loss of earnings fail and must be dismissed. As the defendant has been partially successful, he is entitled to costs. I will hear the parties on the quantum.