Chai Kang Wei Samuel *v* Shaw Linda Gillian
[2010] SGCA 22

Case Number	: Civil Appeal No 115 of 2009
Decision Date	: 27 May 2010
Tribunal/Court	: Court of Appeal
Coram	: Chao Hick Tin JA; Andrew Phang Boon Leong JA; V K Rajah JA
Counsel Name(s)	: Anthony Wee (United Legal Alliance LLC) for the appellant; P E Ashokan and Susie Ann Smith (KhattarWong) for the respondent.
Parties	: Chai Kang Wei Samuel — Shaw Linda Gillian

Damages

[LawNet Editorial Note: The decision from which this appeal arose is reported at [2009] SGHC 187.]

27 May 2010

Chao Hick Tin JA (delivering the grounds of decision of the court):

Introduction

1 The proceedings that led to this appeal arose out of a road accident involving Mr Chai Kang Wei Samuel ("the Appellant") and Ms Linda Gillian Shaw ("the Respondent"). The Appellant did not contest his liability for the injuries the Respondent suffered as a result of the accident, and interlocutory judgment was entered in favour of the Respondent at an early stage of the proceedings. What remained to be determined was the appropriate quantum of damages to be awarded to the Respondent for the injuries she had sustained. The assistant registrar who presided over the assessment of damages proceedings ("the AR") made his award on 26 March 2009. Dissatisfied with the AR's decision, both parties appealed. The High Court judge ("the Judge"), who heard the appeals, allowed both appeals in part. Dissatisfied with the Judge's decision, the Appellant appealed to this court. We heard the appeal on 3 February 2010 and allowed the appeal in part. We now give the reasons for our decision.

Background facts

2 The accident in question occurred on 6 December 2003 at about 12.44am at the junction of Paterson Road and Orchard Road. The Appellant had lost control of the car which he was driving. It mounted the pavement and collided with a number of people, including the Respondent who was waiting at the pavement to cross the road. The Respondent, an Australian national aged 26 at that time, was then on vacation in Singapore. On 1 July 2004, the Appellant pleaded guilty to a charge of dangerous driving (see *Public Prosecutor v Chai Kang Wei Samuel* [2004] SGDC 198). On 15 November 2006, interlocutory judgment for full liability was entered by consent against the Appellant, with damages to be assessed.

3 As a result of the accident, the Respondent sustained a fracture at the base of her skull which resulted in traumatic brain injury. This, in turn, caused, *inter alia*, muscular weakness on the right side of her body, weakness in her tongue and throat muscles, vocal cord paralysis, amnesia, and cognitive impairments. Other injuries suffered by the Respondent included:

(a) right leg, metatarsal and cuboid bones fractures;

(b) severe degloving of the right foot and lateral ankle; and

(c) multiple bruises, abrasions and haematoma.

The extensiveness of the Respondent's injuries caused her to be on medical leave from 6 December 2003 to 28 February 2006 – this being a total of 816 days.

4 Prior to the accident, the Respondent worked as a full-time physiotherapist at Adelaide Community Healthcare Alliance Incorporated (Ashford Hospital) ("ACHA"), and as a self-employed physiotherapist contracted to another health care provider, Sportsmed SA ("Sportsmed"). However, she only started work at ACHA on 16 June 2003, barely six months before the date of the accident, working an average of about 38 hours a week with a wage of AUD$28.01 per hour as at the time of the accident. There was no concrete evidence on the income that the Respondent was receiving from her contract with Sportsmed.

5 Following the accident, the Respondent decided to make better use of her idle time on medical leave. For a few months towards the end of 2004, she did some casual data entry and analysis work. From January 2005 to February 2006, she studied full-time in the bachelor of health science course at the University of South Australia.

6 At the beginning of March 2006, following the completion of her degree course and the expiry of her medical leave, the Respondent returned to work at ACHA, but on a part-time basis and performing only light duties. On 2 January 2007, the Respondent returned to full-time work at ACHA. However, she soon found that she was not able to perform her duties as well as she could before the accident, and also that her work was too painful and exhausting to cope with. As a result, on 4 February 2007, the Respondent resigned from her full-time work at ACHA. From 5 February 2007 onwards, the Respondent joined a private outpatient physiotherapy practice, PhysioONE. There, she initially worked on a casual basis for up to five hours a day for three days a week. Over time, she increased her working hours. As at the time of the assessment of damages proceedings, she worked for an average of 34 hours a week with the most recent documentary evidence on her salary indicating that her wage was AUD$38.769 per hour. On 25 June 2007, the Respondent rejoined her previous employer ACHA on a part-time basis. Thus, it would appear that at the time of the assessment of damages proceedings, the Respondent held two part-time jobs. In her tax returns for the year ending 30 June 2007, the Respondent reportedly earned AUD$53,701 (although she stated in her closing submissions before the AR that she was earning AUD$67,449.20).

Proceedings before the AR and the Judge

7 After hearing the parties, the AR made the following awards (in addition to two agreed items and two very small sums which we need not be concerned about) in favour of the Respondent:

(a) S$135,000 for pain, suffering and loss of amenities;

(b) AUD$209,078.66 for pre-trial loss of earnings;

(c) AUD$305,195.04 for loss of future earnings;

(d) AUD$15,000 for loss of earning capacity;

(e) AUD$49,346.70 for future medical expenses; and

(f) AUD$91,804.99 for loss of annual leave.

Dissatisfied with several components of the damages awarded, both parties appealed. The Appellant, we would mention in particular, sought to have the award for loss of future earnings set aside, as well as to have the quantum awarded for pre-trial loss of earnings, loss of future earning capacity and loss of annual leave reduced. On appeal, the Judge, *inter alia*, reduced the quantum awarded for pre-trial loss of earnings to AUD$202,061.08, increased the amount awarded for pain, suffering and loss of amenities to $200,000 (an increase of $65,000), and increased the quantum awarded for loss of earning capacity to AUD$50,000. The Judge's detailed reasons for his decision are set out in *Shaw Linda Gillian v Chai Kang Wei Samuel* [2009] SGHC 187 ("the Judgment").

Issues on appeal

8 In his Notice of Appeal to this court, the Appellant raised the following grounds of appeal against the Judge's decision:

(a) whether the quantum awarded for pain, suffering and loss of amenities arising from the Respondent's head injuries was excessive;

(b) whether the quantum awarded for loss of future earnings was correct in law;

(c) whether the quantum awarded for loss of earning capacity was excessive, when loss of future earnings was also awarded; and

(d) whether there was sufficient basis to support the quantum awarded for pre-trial loss of earnings.

In addition to these grounds, the Appellant raised two other grounds in relation to the quantum awarded for the damage to the Respondent's anterior cruciate ligament and for the Respondent's medical leave for future treatment. However, prior to the hearing before us, the Appellant decided to abandon these two additional grounds.

Loss of future earnings and loss of earning capacity

General principles

9 It will be apposite to begin by setting out our views on certain general principles concerning

loss of future earnings and loss of earning capacity. The Appellant made extensive submissions on the nature and distinction between loss of future earnings and loss of earning capacity. The Appellant contended that, in the circumstances of the present case, the Respondent should be awarded loss of earning capacity and not loss of future earnings. He contended that where the evidence of a victim's loss of future earnings was either sketchy or speculative, which he submitted was the case here, a lump sum award for loss of earning capacity would be the correct award to make, as opposed to an award for loss of future earnings. He also submitted that even if the court should find that there was sufficient evidence *vis-à-vis* the Respondent's loss of future earnings, the award for loss of earning capacity should not be a significant sum if the amount awarded for loss of future earnings was substantial. In reply, the Respondent did not disagree with the principles of law advanced by the Appellant, but she disagreed with the way the Appellant sought to apply them to the circumstances of this case.

10 It would be useful if we address the true nature of loss of future earnings and loss of earning capacity. The two heads of damages are not strictly alternative to each other, although in an appropriate case, if the plaintiff should fail in his or her claim for loss of future earnings, he or she could nevertheless be awarded damages for loss of earning capacity. The two heads of damages do not necessarily share any symbiotic relationship, as they are distinct and are meant to compensate different losses suffered by an injured plaintiff. A good starting point for an understanding of these two heads of damages is the case of *Ashcroft v Curtin* [1971] 3 All ER 1208 ("*Ashcroft*"). In that case, the plaintiff was a skilful precision engineer who had his own successful one-man sole proprietorship converted into a limited company in which he and his family held all the shares. Unfortunately, he met with an accident when the defendant's van collided into his car as he stopped at a crossing to let pedestrians cross. As a result of the injuries he sustained from the accident, he could no longer work as hard as he used to. He was noted to be slower and less efficient. For four years after the accident, there was a reduction in the profits of the plaintiff's company.

11 The trial judge quantified the loss suffered at £1,500 per year and applied a multiplier of seven years, giving a total award of £10,500 for loss of future earnings. On appeal, the English Court of Appeal reduced the trial judge's award for loss of future earnings to £2,500. Edmund Davies LJ, who delivered the main judgment, held that although the evidence pointed to both a decrease in the profitability of the company and that the decrease was due to the injuries and disabilities sustained by the plaintiff in the accident, the evidence was so vague that it was quite impossible to quantify the loss. Edmund Davies LJ then went on to address the alternative allegation stated in the amended statement of claim, *viz*, that "by reason of his injuries the plaintiff has been permanently prevented from working as an engineer" (at 1214). Finding in favour of the plaintiff, he held that the plaintiff's capacity to engage himself outside the company, in respect of finding the sort of work for which he had been trained since the age of 14, had been virtually extinguished. This was the basis for the award of £2,500. In our view, although the award was termed as loss of future earnings, it was clear that the court in *Ashcroft* was actually referring to what is now known as loss of earning capacity.

12 While the boundaries between a claim for loss of earning capacity and that for loss of future earnings appears hazy, Lord Denning MR pointed out in the later case of *Fairley v John Thomson (Design and Contracting Division) Ltd* [1973] 2 Lloyd's Rep 40 ("*Fairley*") that these two heads of damages are indeed separate and distinct. In that case, the plaintiff sued his employers for serious injuries sustained at his workplace. After he returned to work with his pre-accident employers, his employment was later terminated. The plaintiff subsequently managed to find a higher paying job. Notwithstanding this increase in the plaintiff's earnings, the trial judge went on to award the plaintiff loss of future earnings. However, on appeal, the English Court of Appeal found this to be clearly wrong. In the court's view, since the plaintiff managed to get a higher paying job, there was no loss on which the award for loss of future earnings could be based. In overturning the decision of the

lower court, Lord Denning outlined the differences between these two heads of damages (at 42):

> It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. *Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages*. If I may give an instance, a manual worker may be incapacitated for manual work, but after the accident he may learn a clerical trade. At his new trade he may actually earn more than he would have done before. He will have diminished earning capacity, but he has not lost any future earnings. [emphasis added]

On the facts of that case, the English Court of Appeal found that the plaintiff did not suffer any loss of future earnings, but, rather, a loss of earning capacity.

13 While Lord Denning made it clear that there *was* a difference between loss of future earnings and loss of earning capacity, it was only in the even later English Court of Appeal case of *Smith v Manchester Corporation* [1974] 1 KIR 1 ("*Smith v Manchester*") that the conceptual principles demarcating the two heads of damages were established. In that case, the plaintiff, after sustaining an injury at work, retained her job with her pre-accident employers and was paid the same pre-accident pay. However, that injury had caused the plaintiff to suffer from a "frozen shoulder" syndrome and she was rendered severely disabled. The plaintiff, as a result, could not carry out most of her duties that required the use of both hands. Notwithstanding her resulting disabilities, the plaintiff was fortunate to have the opportunity to return to her pre-accident work only because her employers and colleagues were compassionate and considerate.

14 Although Scarman LJ did not expressly define it as such, it was clear that he viewed loss of future earnings as referring to a loss arising from a situation where a victim of an accident finds that he or she can no longer, as a result of the accident, earn his or her pre-accident rate of earnings (see 7). In other words, loss of future earnings refers to the difference between post-accident and pre-accident income or rate of income. Obviously, if the victim earns a post-accident income or rate of income which is more than his or her pre-accident income or rate of income, no award for loss of future earnings should be made. In contrast, loss of earning capacity, as Scarman LJ indicated, addresses the loss arising from the weakening of the plaintiff's competitive position in the open labour market (see 8).

15 Lastly, in *Moeliker v A Reyrolle and Co Ltd* [1977] 1 All ER 9 ("*Moeliker*"), the English Court of Appeal reaffirmed that a claim for loss of earning capacity arises where a plaintiff is in employment at the time of the trial, but there is a risk that he or she may lose this employment at some time in the future, and may then, as a result of his or her injury, be at a disadvantage in getting another job or an equally well paid job (see 17). In this regard, the English Court of Appeal indicated that the use of a formula (*ie*, the multiplicand/multiplier method) would not be appropriate to reflect the above-mentioned risk. For such a situation, a global sum award would be the correct option to take.

16 In so far as the law in Singapore is concerned, this court had the occasion to consider the differences between loss of future earnings and loss of earning capacity in the case of *Teo Sing Keng and anor v Sim Ban Kiat* [1994] 1 SLR(R) 340 ("*Teo Sing Keng*"), and the principles elucidated in the English cases dealt with in the preceding paragraphs were affirmed. This court concluded (at [40]):

> An award for loss of earning capacity, as opposed to an award for loss of earnings, is generally made in the following cases:
>
> (a) where, at the time of trial, the plaintiff is in employment and has suffered no loss of

earnings, but there is a risk that he may lose that employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job; or

(b) where there is no available evidence of the plaintiff's earnings to enable the court to properly calculate future earnings, for example, young children who have no earnings on which to base an assessment for loss of future earnings.

The "alternate measure" view

17 The Appellant took the view that if there was insufficient evidence to establish the Respondent's loss of future earnings, loss of earning capacity should be awarded instead. In this connection, the Appellant seemed to assume a relationship between the failure to prove loss of future earnings and an award for loss of earning capacity, *viz*, that an award for loss of earning capacity is an "alternate measure" when a plaintiff lacks sufficient evidence to prove his or her loss of future earnings.

18 This "alternate measure" view appears to have originated from the case of *Choy Kuo Wen v Soh Chin Seng* [2008] SGHC 113 ("*Choy Kup Wen*"), where the court, in dealing with the circumstances in which an award for loss of earning capacity would be appropriate, said (at [37]–[39]):

> 37 There is another category of cases where the court have [*sic*] stated that it awards damages for loss of earning capacity as a *substitute measure in preference to awarding for loss of future earnings. This is where the evidence of a plaintiff's loss in future earnings may not be available or ambiguous, making it impossible for a proper calculation of loss of future earnings, on the basis of the multiplicand/multiplier method*.
>
> 38 In essence, the courts in such situations find it more appropriate to award a figure in the round as compensation for the reduction in a plaintiff's earning ability. The damage on a plaintiff is more effectively assessed in terms of his reduced ability to work and/or maintain a certain level of income.
>
> 39 This second category can be described as the "*alternate measure*" category. …
>
> [emphasis added]

19 We would make three observations in relation to the above passage. First, it is trite law that a plaintiff has the burden of proving his or her claim in damages (see *Bonham-Carter v Hyde Park Hotel, Limited* (1948) 64 TLR 177 at 178). That said, as Lord Denning MR clearly pointed out in *Fairley*, loss of future earnings must be "real assessable loss proved by evidence" (at 42). Therefore, if a plaintiff should fail to provide sufficient evidence of loss of future earnings, his or her claim for loss of future earnings cannot succeed.

20 Secondly, in the event that there is a lack of sufficient evidence proving loss of future earnings, this cannot, by itself, *convert* a claim for loss of future earnings into a claim for loss of earning capacity. These two heads of damages are meant to compensate for different losses – loss of future earnings compensates for the difference between the post-accident and pre-accident income or rate of income, while loss of earning capacity compensates for the risk or disadvantage, which the plaintiff would suffer in the event that he or she should lose the job that he or she currently holds, in securing an equivalent job in the open employment market. Since loss of future earnings and loss of earning capacity are separate and distinct, the Appellant's suggestion that the failure to prove loss of

future earnings should lead to an award for loss of earning capacity is conceptually erroneous.

21 Thirdly, this confusion could have been due in part to some of the past cases where awards for both loss of future earnings and loss of earning capacity were plausible on the given set of facts. For example, in *Ashcroft*, as interpreted by *Moeliker*, the English Court of Appeal decided to award loss of earning capacity, overruling the lower court's decision to award loss of future earnings. The court reasoned that the evidence to prove loss of future earnings was extremely vague. The injuries suffered by the plaintiff made him slower and less efficient, thus increasing the risk that he might not be able to find a similar income-generating job had he been forced into the labour market. Such a risk justified the grant of an award for loss of earning capacity. However, an award for loss of future earnings was also a possibility. The evidence pointed to a correlation between the injuries and the plaintiff's loss in profitability. In light of all the evidence before it, however, the court felt that the evidence was too vague to be of assistance to quantify the alleged loss of future earnings. *Ashcroft*, therefore, is illustrative of the fact that it is the evidence which will determine whether the court should, upon refusing to grant an award based on loss of future earnings, additionally grant an award based on loss of earning capacity.

22 What we would emphasise is that there is no substantive link between a lack of evidence to substantiate a claim for loss of future earnings and the granting of an award for loss of earning capacity as appeared to have been suggested in *Choy Kup Wen*. Perhaps the way it was put in *Choy Hup Wen* was simply a *descriptive practical effect* of a case where there was the possibility of awards based on both heads of damages, but the evidence, in the end, was sufficient to justify only one award based on one or the other of the two heads. This would be supported, albeit implicitly, by the reasoning of the Malaysian Federal Court decision in *Ong Ah Long v Dr S Underwood* [1983] 2 MLJ 324 ("*Ong Ah Long*") where the court stated (at 333):

> There must be evidence on which the court can find that the plaintiff will suffer future loss of earnings, it cannot act on mere speculation. If there is no satisfactory evidence of future loss of earnings *but the court is satisfied* that the plaintiff has suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for future loss of earnings. [emphasis added]

23 We should also address the Appellant's argument that in the event that the court found that there was sufficient evidence to award loss of future earnings, then only a nominal award for loss of earning capacity should be given where a substantial award was made for loss of future earnings. 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.

24 Finally, there is one other general comment which we would make. There is nothing in principle which bars a plaintiff from being entitled to claim for both loss of future earnings and loss of earning capacity, provided that the necessary evidence is present. In this connection, we would refer to the judgment of Browne LJ in *Moeliker* where he said (at 15):

> This court made it clear … that [*Smith v Manchester*] laid down no new principle of law, and I entirely agree. [*Smith v Manchester*] is merely an example of an award of damages under a head which has long been recognised – a plaintiff's loss of earning capacity where as a result of his

> injury his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury. … This head of damage generally arises where a plaintiff is, at the time of the trial, in employment, but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings *which can already be proved at the time of the trial*. [emphasis added]

25 To reiterate again, loss of future earnings and loss of earning capacity compensate different losses. We can best illustrate the point by an example. Suppose an injured person was taken back by his pre-accident employer to do a less demanding job due to his disabilities but at a lower pay. If the employer cannot guarantee how long he will be so employed but will do so as long as possible, it seems to us that the injured victim should be entitled to awards based on both heads of damages.

Our decision on loss of future earnings

26 We now turn to consider the arguments of the Appellant which touched on the quantum of AUD$448,195.04 awarded by the AR for loss of future earnings which the Judge subsequently affirmed. The Appellant argued, firstly, that the Respondent did not suffer any loss of earnings after she recovered from her injuries, and secondly, in the alternative, that there was no assessable loss proved by the evidence to allow the court to make an award for loss of future earnings without going into the realm of speculation. The Appellant also raised a third issue of whether the Respondent's part-time work at ACHA after the accident should have been deducted from the award of loss of future earnings.

27 On the first argument, it was our view that the Respondent did in fact suffer from a loss of future earnings. As correctly pointed out by the AR and the Judge, such a loss stemmed from the difference between the plaintiff's post-accident earnings and the earnings she would have made at the time of the assessment of damages proceedings, but for the accident. Between the submissions of both parties, the dispute largely centred on the determination of "post-accident income". The argument of the Appellant was to the effect that since what the Respondent earned some four years later was slightly more than what was her average yearly income over a period of four years before the accident, she had therefore suffered no loss of future earnings. The Appellant's view might seem rational had it not been for the special circumstances of this case. It will be recalled that the Respondent worked as a physiotherapist and *she was paid at an hourly rate*. Due to inflation and natural progression, the hourly rate she was paid had increased by the time of the assessment of damages proceedings.

28 The loss which the Respondent alleged was that, due to her injuries, she was no longer able to work 38 hours a week, which was what she was able to do before the accident. It would therefore be wholly inequitable to say that because what she earned in absolute figures post-accident was the same or slightly more than what was her average yearly income pre-accident, she had thus suffered no loss. This failed to take into account inflation and the fact that with greater experience she would, in the normal course of events, be paid a higher rate of remuneration for her work.

29 The court must examine the circumstances of each case to determine whether there is loss of future earnings. It was therefore overly simplistic to suggest that the court should merely constrain itself by comparing the absolute figures *vis-à-vis* what the plaintiff earned pre-accident and post-accident and nothing else. Such an approach may be used without injustice in some cases, but not all. Whether such an approach should be used in a particular case must depend on the facts of the case in question. In our view, there was no merit to the Appellant's argument. The approach taken by

the AR and the Judge provided a more accurate reflection of the losses that the Respondent had suffered. The overarching objective of awarding damages is to *compensate* the injured victim by restoring him or her to the position that he or she would have been (in a monetary sense) had the accident not happened. As Lord Blackburn in *Livingstone v The Rawyards Coal Co* (1880) 5 App Cas 25 stated (at 39):

> I do not think there is any difference of opinion as to its being a general rule that, where any injury is to be compensated by damages, in settling the sum of money to be given for reparation of damages you should as nearly as possible get at that sum of money which will put the party who has been injured, or who has suffered, in the same position as he would have been in if he had not sustained the wrong for which he is now getting his compensation or reparation.

In our view, the Appellant's method of determining loss unfairly prejudiced the Respondent by crystallising her income as at the date of injury. In contrast, the approach taken by the AR and the Judge accurately reflected the number of hours the Respondent would have worked had the accident not occurred. Such an approach, in our view, satisfied the compensatory principle of damages, as it fairly and accurately reflected the loss that the Respondent suffered as a result of the accident.

30 We also found no merit to the Appellant's argument that there was insufficient evidence to assess a loss of earnings. The quantum awarded for loss of future earnings was calculated based on the *actual* number of hours the Respondent had worked before the accident and the *actual* rate that the Respondent was earning after the accident. In other words, the quantum awarded was calculated based on figures that were not plucked out of thin air. Cumulatively, the evidence was concrete enough for the AR and the Judge to utilise. Accordingly, the Appellant's argument in this respect was not a sufficient basis for us to disturb the determination of the Judge.

31 As for the third argument, the Appellant averred that both the AR and the Judge erred by failing to deduct the additional part-time work that the Respondent undertook at ACHA after the accident in determining loss of future earnings. We were unable to accept this argument. To begin with, the AR had, in fact, held that the income from the additional part-time work done was to be deducted in the calculation of loss of future earnings. In addition, the part-time income was clearly factored into the award for loss of future earnings.

32 Let us explain. The Respondent submitted that her post-accident income was AUD$58,490.85, (an amount that was made up of income from her part-time work at ACHA *and* PhysioONE), which was to be used to calculate her pre-trial loss of earnings. The AR instead adopted the higher figure of AUD$59,525.39, submitted by the Appellant, to ascertain the final award for pre-trial earnings for the period of 1 July 2007 to 30 June 2008. Although these figures were initially used to determine the pre-trial loss of earnings, it was used again to determine loss of future earnings. It was the original intention of the AR to continue using the same figure of AUD$59,525.39 to represent the Respondent's post-accident income. However, the AR decided to utilise the higher figure of $67,449.20, which the Respondent had set out in her closing submissions. The usage of that figure was to the disadvantage of the Respondent since the higher the post-accident income, the lower would be the loss of future earnings to be awarded. In our view, since the lower figure already did take into account the Respondent's part-time work at ACHA, the higher figure eventually adopted must have included that amount as well. Accordingly, in our view, no error was made in the calculation of the award for loss of future earnings.

Our decision on loss of earning capacity

33 With reference to loss of earning capacity, the Appellant raised two issues. First, whether loss

of earning capacity could be awarded if there was no risk of the Respondent losing her post-accident job. Second, whether there was sufficient basis for the Judge to increase the award for loss of earning capacity. It would be recalled that the Judge increased the quantum for this head from AUD$15,000 to AUD$50,000. In response, the Respondent took the position that such an award could be granted even though there was no outright risk that she might lose her current jobs. She argued that such an award could be justified given the part-time nature, and thus, volatility of the income she was earning.

34 The AR felt that a conservative amount should be awarded for this head to reflect the following:

(a) The Respondent had not shown that there was any appreciable risk that she would lose her post-accident job.

(b) The Respondent would not be disadvantaged greatly by her injuries when finding commensurate part-time employment. In this regard, although the Respondent had applied unsuccessfully for a physiotherapist job application at Hampstead Rehabilitation Centre, it was unclear whether the rejection was due to her injuries. Also, the evidence showed that Respondent was handling longer working hours as time passed, and this would be a factor that would add to her marketability.

35 However on appeal, the Judge thought that the AR did not adequately appreciate the fact that the Respondent might have to undergo total knee replacement and revision knee replacement sometime in the future. After such surgery, there would be the likelihood that she might not be able to continue her currently physically demanding physiotherapist job. Taking into account her disabilities and the nature of her degree, the Judge held that the Respondent would have some difficultly in securing an alternative desk job. He concluded that the AR's award was on the low side and increased it to AUD$50,000.

36 Both the AR and the Judge seemed to take the view that loss of earning capacity could be awarded even if there was no risk that the injured victim might lose his or her current post-accident job. Such an award could be granted so long as the injured victim would be disadvantaged in finding a similar paying job because of the injuries and resulting disabilities. This approach would appear to run contrary to the principles discussed above and adopted in *Teo Sing Keng*. 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*, 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]

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.

37 That said, we must emphasise the fact that we were not dealing with the normal situation where the injured person was in full-time employment with a fixed monthly salary. Here, the Respondent was engaged in part-time employment at hourly rates. While her employers, ACHA and PhysioONE, had not given any indication that they would terminate her part-time employment on account of her disabilities, this was no indication that they would keep her in such employment for what would have been her normal working life. The fact of the matter was that she was under disabilities, and could not, for example, work long hours, attend to patients in wards, and physically assist patients. To suggest that these negative factors would not make the Respondent's risk of losing her post-accident employment a real risk would be to ignore the obvious. It must also be borne in mind that the Respondent was not a long-standing part-time employee of ACHA and PhysioONE. She was a fairly new employee, especially in respect to PhysioONE. Equally pertinent was the fact that, even if her employment at ACHA and PhysioONE were not terminated, her disabilities could also affect the number of hours of work that she presently could undertake. There was clearly some degree of uncertainty regarding the Respondent's post-accident employment that could not be disregarded. That said, if the Respondent was to be compelled to re-enter the labour market, her disabilities would, no doubt, put her at some disadvantage. Accordingly, we were of the view that an award for loss of earning capacity was justified.

38 Quite rightly, the AR took a conservative approach in the quantification of this head of damages. Having found the Respondent was not very much disadvantaged by her injuries to find commensurate part-time employment, he concluded that there was an appreciably lower risk that she would be unable to get another job. Given the lower risk, only a low award was warranted (see, also, *Moeliker* at 18). The sum of AUD$15,000 awarded for loss of earning capacity was only a fraction of her post-accident yearly income and could hardly be considered to be excessive. We could not, in contrast, agree with the Judge's reasoning in increasing the award for loss of earning capacity to AUD$50,000. He stated (see the Judgement at [41]):

> However, the AR may have overlooked the fact that the plaintiff [*ie*, the Respondent] might have to undergo total knee replacement and revision knee replacement sometime in the future. After her knee surgery, there is a likelihood that the plaintiff might not be able to continue with her present rather physically demanding job of being a part time physiotherapist.

First, as noted by the AR and the Judge, the need for knee replacement surgery in the future was about 50%. Second, even if there was such surgery, it did not necessarily follow that the Respondent's condition would get worse. The Judge seemed to assume that such a possibility amounted to a likelihood. We did not think that such an assumption was justified. Accordingly, we allowed the appeal on this head of damages and reinstated the amount awarded by the AR.

Our decision on pre-trial loss of earnings

39 For this head of damages, the AR awarded a total amount of AUD$209,078.66 for the various periods between the date of the accident and the date of the assessment of damages proceedings. On appeal, the Judge reduced this amount to AUD$202,061.08. Before us, the Appellant argued that this sum was excessive for two reasons. First, he questioned whether any loss of earnings should be awarded for the period when the Respondent was pursuing her degree course. Second, the income which the Respondent had earned doing data entry work for a few months towards the end of 2004 prior to the Respondent's commencement of her degree course should be regarded as income which she could have earned for the whole of 2005 and beyond.

40 The duration of the degree course that the Respondent had undertaken was from January 2005 to March 2007. Before us, as before the AR and the Judge, the Appellant argued that the Respondent

should not be compensated for her loss of earnings during this period of time since she could have found a job and should have mitigated her losses. In reply, the Respondent averred that she should not be deprived of her loss of earnings simply because she chose to keep herself occupied. In our view, the Respondent's decision to enrol for a degree course was a reasonable consequence of the accident. If not for the accident, the Respondent would not be on medical leave and would therefore not have the necessary amount of free time to undertake the course. If not for the accident, the Respondent would not have the opportunity or inclination to enrol in the course. Accordingly, there was no legal basis to deprive the Respondent of her loss of earnings for the period in question.

41 The second reason related to certain data entry work which the Respondent undertook for a few months prior to her commencement of her degree course, *ie*, at the end of 2004. During this period, the Respondent managed to earn a total of AUD$3,410 from doing such work. Both the AR and the Judge agreed with the Appellant and held that this amount constituted the Respondent's mitigated losses and should be deducted accordingly from the quantum for loss of pre-trial earnings to be awarded. What the Appellant contended further was that this amount earned should be pro-rated and extended to cover the entire period under review. If she could undertake the data entry work for those few months, there was no reason why she could not continue with that work into 2005. The Respondent was under a duty to mitigate, and if she had, the amount of damages which the Appellant would have to bear would be reduced.

42 In our view, the Appellant's argument was flawed. It must be borne in mind that during the period in question, the Respondent was, due to the injuries she suffered, on medical leave. She therefore had no duty to mitigate her losses. Although the Respondent worked for a few months towards the end of 2004, her salary had been appropriately and properly taken into account. Moreover, the Respondent was not asked why she did not continue working on a part-time basis. There could well have been a reasonable explanation in this connection. If the Respondent was questioned on this, she could very well have provided acceptable answers, and it would be unfair if the Appellant's argument was to succeed without her having the opportunity to provide answers.

43 Having dismissed the Appellant's submissions pertaining to this head of claim, we had no further reason to disturb the award of the Judge for pre-trial loss of earnings.

Our decision on pain and suffering arising from the head injuries

44 Both the AR and the Judge adopted a component approach to assess the damages to be awarded for the Respondent's head injuries. In such an approach, a court would analyse the various components of damage caused by a head injury, namely, structural damage, psychological damage, and cognitive damage. Utilising such an approach, the AR awarded the Respondent the amounts of $29,000 for structural damage, $10,000 for psychological damage, and $10,000 for cognitive damage. However, on appeal, the learned Judge increased the quantum to $54,000 for structural damage, $25,000 for psychological damage, but left the amount for cognitive damage unchanged.

45 In deciding to increase the award for the component of structural damage, the Judge reasoned (see the Judgment at [7]–[9]):

> 7 The plaintiff [*ie*, the Respondent] sought a much higher composite award of S$108,000 claiming S$25,000 for base of skull fracture, S$75,000 for TBI [*ie*, traumatic brain injury], and a further S$4,000 each for right parietal scalp haematoma and right head indentation respectively.
>
> 8 In arriving at the proper award under this claim, I have given due consideration to the fact that the severe TBI sustained by the plaintiff did result in a total loss of consciousness with a

GCS [*ie*, Glasgow Coma Scale] score of 3/15 (which I understand is the lowest possible). It was indeed so severe that she was rendered unable to sustain her own breathing and required life-saving emergency intubation and she had to rely on external ventilation from 6 December 2003 to 13 December 2003 to stay alive. She suffered traumatic subdural and subarachnoid haemorrhage, developed such significant cerebral oedema as to require invasive monitoring of her intracranial pressure.

9 In my view, a higher award should be given in the light of the extensive structural head damage and I therefore raised the award to **S$54,000.00** .

[bold and underlining in original]

46 And with reference to the increase in the award for the component of psychological damage, the Judge stated (see the Judgment at [12]–[13]):

12 In arriving at the proper quantum under this head, special consideration was given to the psychologist's evidence that the plaintiff [*ie*, the Respondent] was still suffering from depression and this was further complicated by denial 5.5 years after the accident. I accept the psychologist's testimony that denial can exist in depressed patients as a coping strategy and its existence makes further psychological treatment difficult. I therefore find that the plaintiff's non-compliance with psychological therapy as a result of her denial of her depression cannot be taken against her. Further consideration was given to the expert's assessment that her depressive symptoms would likely continue to have a significant impact on her daily life ….

13 In view of the prolonged suffering and the high likelihood that this depression would continue into the future, I shall increase the award to **S$25,000** .

[bold and underlining in original]

47 The arguments which the Appellant made in relation to the quantum awarded for pain and suffering for the head injuries suffered were twofold. First, it was wrong for the AR and the Judge to adopt a component approach to assess the damages to be awarded for the head injuries. Second, the increases in the quantum awarded for the structural damage and psychological damage components made by the Judge were unwarranted.

48 For the first argument, the point made was that the component approach did not have sufficient regard to the fact that the injuries, and resulting disabilities, were all essentially caused by one single injury. It was emphasised that such an approach would lead to a high possibility of over-compensation as a result of sub-itemisation. As we see it, such sub-itemisation was no more than an instrument to aid the court to determine what would be a fair and reasonable quantification for a particular injury or disability having regard to precedents. It enables the court to address the different aspects of pain, suffering and loss of amenities arising out of an injury systematically. The benefits of such an approach were clearly stated in *Tan Yu Min Winston (by his next friend Tan Cheng Tong) v Uni-Fruitveg Pte Ltd* [2008] 4 SLR(R) 825 (at [25]–[26]):

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.

26 The deficits in each of the above domains are clearly separate and distinguishable and in my view should be assessed separately if it is possible to do so. I can see another benefit that this approach can bring from an evidentiary point of view. I believe that it will be clearer and more streamlined for the experts from each of the three different specialisations to give evidence within their own specialisation as to the degree of pain, suffering and loss of amenities due separately to the "structural" injury, the "psychological" injury and the "cognitive" impairment arising from the accident injury, trauma or damage to the brain. Quantification of the loss for each of the three quite different types of injuries can then be made.

49 Damages are awarded on the basis of the injuries sustained and the resulting pain and suffering and loss of amenities *that followed*, and not merely on the number of injuries inflicted. Admittedly the problem of overlapping or under-compensation can occur when there are multiple injuries causing similar, if not the same, disabilities. However, for the purposes of this appeal, the Appellant failed to show to us why and how the Respondent was over-compensated for her head injuries through the component approach. Properly applied, the component approach could indeed prevent over-compensation rather than encourage it. Nevertheless, in awarding damages by way of the component approach, courts should always be mindful that the overall quantum must be a reasonable sum reflective of the totality of the injury.

50 With regard to the second argument, we agreed with the Appellant that the Judge should not have increased the amount awarded for pain, suffering and loss of amenities pertaining to the Respondent's head injuries. In deciding what would be an appropriate amount to award for an injury, the court ought to consider the full circumstances of the case. Not only are the injuries suffered by the victim relevant, the recovery after the accident must also be considered. In the present case, though the initial position looked ominous, the Respondent made significant recovery. Immediately on her return to Australia she was admitted to the Brain Injury Rehabilitation Unit at the Hampstead Rehabilitation Centre in January 2004, and her physiotherapist noted that she was progressing well in the span of a few weeks. Slightly over a year after her accident, the Respondent had recovered sufficiently to be able to drive. Moreover, the clinical neuropsychologist report dated 2 July 2005 noted that the Respondent was demonstrating good cognitive recovery. By the time the Respondent was re-assessed on 22 February 2008, she was again reported to have made significant improvements. In increasing the award, the Judge appeared very much minded by the serious injuries that the Respondent suffered as a result of the accident. In our view, insufficient consideration was given by him to the significant recovery made by the Respondent. Accordingly, we were of the view that there was no real basis for the Judge to increase the award for pain, suffering and loss of amenities. We therefore reinstated the award made by the AR.

Conclusion

51 In the light of the considerations set out above, we allowed the appeal in part, to the extent that we restored the AR's awards for loss of earning capacity and for pain and suffering arising from the head injuries. As the Appellant had only succeeded partially in this appeal, we ordered that each party was to bear his/her own costs of the appeal.