

Sivakami d/o Sivanantham v Attorney-General
[2012] SGHCR 5

Case Number : Suit No. 992 of 2009/F-NA 2 of 2012
Decision Date : 01 June 2012
Tribunal/Court : High Court
Coram : Tan Sze Yao AR
Counsel Name(s) : Perumal Athitham and Seenivasan Lalita (Yeo Perumal Mohideen Law Corporation) for the plaintiff; Lee Hui Shan, Genevieve and Denise Wong (Attorney-General's Chambers) for the defendant.
Parties : Sivakami d/o Sivanantham — Attorney-General

Damages – Assessment

1 June 2012

Judgment reserved.

AR Tan Sze Yao:

Introduction

1 On Saturday 11 February 2006, the plaintiff, a school teacher, went to Zhangde Primary School to do some work and to prepare her classroom for the following week. Leaving her handbag in the teachers' staff room on the second storey, she remained in the classroom until after 12:30 pm. She then found that the roller shutters to the staff room and the ground floor exits of the staircases were all locked. Her mobile phone was in her handbag, so she tried instead to shout for help. Unfortunately, this was to no avail. In the event, the plaintiff climbed out of a ventilation gap at a staircase and jumped down some 3.7 metres. She injured her right ankle and had to be hospitalised as a result. The plaintiff later brought this claim for damages against the defendant. Interlocutory judgment by consent was subsequently entered on 31 January 2011 for 70% of the overall damages to be assessed to be paid for by the defendant.

2 The present proceedings for assessment of damages raise three interesting issues. First, to what extent should an award of damages for pain and suffering be qualified by a plaintiff's understandable but subjective reluctance to follow the advice of her doctors to undergo a particular course of necessary medical treatment? Second, how authoritative should a government officer's Current Estimated Potential grading be in assessing that officer's loss of future earnings? And third, how should a court view a claim for prospective damages that is premised upon a contingency entirely within the plaintiff's control? These issues will be dealt with as they come up under the pain and suffering, loss of future earnings and future medical expenses heads of damages respectively.

3 The plaintiff and the defendant have taken largely contrasting positions in terms of the proposed damages to be awarded. These are set out in the following table:

(a)	General Damages	Plaintiff	Defendant

	(i)	Pain, suffering and loss of amenities Orthopaedic injuries Psychiatric disorders	Unclear: \$130,000.00 \$203,000.00 - Unclear: \$80,000.00 \$153,000.00 - \$50,000.00	either \$34,000.00 or - \$30,000.00 - \$4,000.00 either or
	(ii)	Loss of future earnings and/or earning capacity Loss of future earnings for the next 10 years ("Stage I") Loss of future earnings after 10 years up to retirement age ("Stage II")	\$1,688,400.00 - \$487,200.00 - \$1,201,200.00	Nil - Nil - Nil
	(iii)	Future medical expenses	\$147,200.00	\$35,800.00
	(iv)	Future transport expenses	\$27,000.00	\$11,000.00
		<i>Subtotal</i>	<i>\$2,065,600.00</i>	<i>\$80,800.00</i>
(b)	Special damages		Plaintiff	Defendant
	(i)	Pre-trial medical expenses	\$6,688.48	\$6,688.48
	(ii)	Pre-trial transport expenses	\$10,560.00	\$4,806.50
	(iii)	Pre-trial loss of earnings	\$2,540.00	\$2,540.00
	(iv)	Miscellaneous expenses (ambulance service etc.)	\$640.00	\$640.00
		<i>Subtotal</i>	<i>\$20,428.48</i>	<i>\$14,674.98</i>
		Total	\$2,086,028.48	\$95,474.98

*Since there is some discrepancy between the figures submitted by plaintiff's counsel at the close of hearing and in their subsequent written submissions, I have taken the figures stated in the written submissions to be authoritative.

From the above, it may be seen that apart from agreement on three out of four items coming under special damages – specifically, pre-trial medical expenses, pre-trial loss of earnings and miscellaneous expenditures – parties are in great disagreement on the correct amount of damages to be awarded. I will now go through each of the heads of damages in turn.

Pain, suffering and loss of amenities

4 This head of damages is made up of two distinct components in the instant case: (a) damages for pain and suffering in respect of the plaintiff's orthopaedic injuries and the subsequent loss of amenity resulting therefrom; and (b) damages for pain and suffering in respect of the plaintiff's psychiatric disorders borne out of the accident, including but not limited to post-traumatic stress disorder ("PTSD").

5 Both the plaintiff and the defendant appear to be agreeable to considering the claim for loss of amenities together with the claim for pain and suffering arising out of the plaintiff's orthopaedic injuries (*viz*, component (a) in paragraph 4 above). In any case, even though pain and suffering and the loss of amenities are two distinct heads of damages, it is not unusual to see pain and suffering and loss of amenities being quantified together and a single award made, largely because it is difficult, as a matter of practice, to separate the two: see *Au Yeong Wing Loong v Chew Hai Ban & Anor t/a Kian Heng Hiring Equipments Co* [1993] 3 SLR 355. The courts will usually only make two distinct awards in extreme cases, such as where the plaintiff has been rendered blind, paraplegic or sexually incapable: see, for example, *Denis Matthew Harte v Dr Tan Hun Hoe & Anor* [2000] SGHC 248.

6 Separately, it would be best at this juncture to note that the exact amount claimed by the plaintiff for pain, suffering and loss of amenities is unclear. It appears from the plaintiff's submissions that two claim quanta are possible: a flat sum of \$80,000.00 as noted at paragraph 28, or a compound sum of \$153,000.00 arrived at by adding \$80,000.00 to three other sub-heads of claim for an open fracture to the plaintiff's right ankle (\$40,000.00), scarring (\$15,000.00) and osteoarthritis (\$18,000.00).

Damages for pain, suffering and loss of amenities in respect of orthopaedic injuries

7 The plaintiff was first advised in 2009 by Dr Wee Teck Huat Andy to undergo ankle fusion surgery if her symptoms worsened. Later, in September/October 2011, the plaintiff was advised by her own expert witness and attending physician, Dr Inderjeet Singh Rikhranj, to undergo ankle fusion surgery to overcome her pain. Dr Singh had then advised the plaintiff that because of her prior history of infection arising from the various operations that took place immediately after the accident in 2006, there would be a 20% risk of complications arising from non-union and infection, and a risk of the development of subtalar and midfoot arthritis as a result of the ankle fusion surgery. However, Dr Singh himself noted that the risk of an infection was an anticipated complication of surgery that could, for most part, be managed with antibiotics. The defendant's expert witness, Professor Shamal Das De, opined that while the risk of infection in the plaintiff's case would be higher than 1%, it was very unlikely for such an infection risk to reach 20% in the case of a fusion operation.

8 When the plaintiff was cross-examined on her doctors' recommendations to undergo ankle fusion surgery, she conceded that the surgery was necessary but that it was her intention to postpone the surgery for "as long as I can" because she was afraid of post-surgical infection and that her ankle would be "fixed" – that is to say, that her ankle would have a restricted range of motion due to fusion of the ankle joints. The following extract is instructive:

DC: Can I confirm that you've been offered ankle fusion surgery since 2009?

P: Yes.

DC: And your doctors have explained that this surgery will help overcome your pain.

P: Yes.

DC: **You have been refusing to accept the surgery, according to your doctors and lawyers?**

P: **Not refusing. Just postponing as long as I can.** I have gone through a previous infection the last time. It was very traumatic for me. I don't want to go through that again, at least until I really cannot take it anymore.

DC: You've experienced pain since 2009?

P: Before that. Since the accident. The pain has been getting worse and worse.

DC: So why are you waiting?

P: Buying time. **The surgery is necessary**, but the thought of going through everything again is just unbearable to me.

DC: You have been advised of the benefits?

P: It would alleviate the pain. But the chances of infection are there. And it is not a cure. My leg is not going to go back to its original state. Even if I go for surgery, the ankle will be "fixed". That will put more strain when I am walking. Not going to get any better. It's going to be worse.

DC: But it will address the pain, which is your chief concern?

P: It's the strain on both legs. My other leg is also suffering.

DC: I think you need to be very clear to the court. What is it that causes you to refuse the surgery? Risk of infection? Or the fact that your ankle will be "fixed"?

P: Both.

DC: **And so you are putting this off indefinitely and waiting to see how it goes.**

P: **Yes.**

DC: The risks of surgery are 20%, according to Dr Inderjeet Singh. So when you say you are afraid of surgery complications, what I want to understand is what exactly are you afraid of?

P: Pain from post-surgery complications. It was indescribable pain. You will never imagine it possible. Even with painkillers it was not coming down at all. Wriggling in pain. And the doctors could not do anything for me. My fever was up most of the time. I would just lie there so helpless and my hospital stay was so long, I had to bear with it for so long. It just got worse and worse. I really don't want to go through that again.

DC: Are you okay?

P: Yes.

DC: Have your doctors told you your risk of infection would change in the future?

P: Not that I know of.

DC: So the probability of success remains at about 80%.

P: Yes.

DC: **But notwithstanding this, for the reasons you've shared, you're still hesitant and not keen on the surgery.**

P: **Yes.**

[emphasis added]

9 From the above, it is evident that the plaintiff has been fully advised on and was (and is) aware of the benefits and risks of the ankle fusion surgery. She is also aware that there is a reasonable chance of success (between 80% to 99%, taking into consideration the views of both Dr Singh and Professor Das De) if she undergoes the ankle fusion surgery. There is, however, the reality that in medical circles, a 20% risk of complications or infection is an extremely high one. Dr Singh said as much while giving his testimony, stating that "for us [doctors] it is a very high risk", and that for a normal person undergoing ankle fusion surgery the risk of non-union is 5% and infection, less than 1%.

10 Nonetheless, it cannot be gainsaid that Dr Singh himself was of the view that the ankle fusion surgery was not only a viable option to help the plaintiff overcome the pain in her ankle – it was, from his perspective as an expert, *necessary*:

DC: **Is the ankle fusion surgery a necessary procedure for [the plaintiff]?**

PW1:**Yes.**

DC: **You advised her to consider it in 2009?**

PW1:**Yes.**

DC: She has not undergone it?

PW1:No.

DC: Given that this is a necessary procedure, do you think she should still go ahead with the surgery?

PW1:Every patient is different. We have to explain the risks to them. She has had multiple surgeries. Patients do develop a fear of surgery. Or fed up.

[emphasis added]

11 It is trite law that a plaintiff must take all reasonable steps to mitigate the loss to him or her consequent upon the defendant's wrong and cannot recover damages for any such loss which he could thus have avoided but has failed, through unreasonable action or inaction, to avoid. Here, the issue of mitigation is not as straightforward as in most normal circumstances: there is some rationale to the plaintiff's reluctance to embrace surgery. Nonetheless, it does appear that it would be unjust to make the defendant fully liable for the prolonged pain and suffering in respect of the plaintiff's orthopaedic injuries precipitated by the plaintiff's own refusal or delay in undergoing ankle fusion surgery. Quite simply, the loss here would not be caused by the defendant's negligence, but by the plaintiff's own fears.

12 In *Marcroft v Scruttons* [1954] 1 Lloyd's Law Reports 395 ("*Marcroft*"), the English Court of Appeal held that the plaintiff who baulked at the thought of going to a mental hospital for treatment was not justified in refusing to undergo medical treatment advised by his own doctors where there was a likelihood of substantial recovery had he accepted the given medical advice. Lord Justice Singleton opined as follows:

I do not wish to say anything that would hurt the feelings of a plaintiff in a case of this kind, but I believe it to be the duty of this Court to say that **if a man is recommended by his own medical advisers and by others to undergo a course of treatment, he ought to undergo it; if he is advised that it gives him a reasonable chance of recovery, and if the treatment is reasonable, he ought to undergo it; if he will not, and does not, he must see that it is a little hard upon the defendants if they are asked to pay damages in respect of a period extending afterwards.** If the general opinion is that treatment would cure him, or at least render him in a much better state in every way, then he ought to undergo the treatment.

[emphasis added]

13 A factor to distinguish the present facts from *Marcroft*, however, would be that the potential harm here to the plaintiff is very real and goes beyond merely abstract or financial disadvantage – should non-union or infection set in, the consequences would be visceral and physically unpleasant for the plaintiff, as opposed to simply blows to pride or terminated compensation payments as countenanced in *Marcroft*.

14 With all of the above in mind, it is my view that the defendant should only be liable for the pain, suffering and loss of amenities arising from the plaintiff's orthopaedic injuries for the period starting from 11 February 2006 up to October 2011, the time where it would have been clear to the plaintiff that the opinion of her own attending physician was that it was medically necessary for her to undergo the surgery. Any pain, suffering or loss of amenities suffered by the plaintiff beyond October 2011 would have been caused by the plaintiff's own unreasonable delay or refusal to undergo ankle fusion surgery to reduce the pain in her ankle, and an appropriate discount – taking into account the reservations expressed in the immediately preceding paragraph – should be applied in assessment calculations later. In this connection, I note that like in *Marcroft*, the plaintiff here is displaying an understandable subjective aversion to undergoing the necessary surgery. Nonetheless, as was the standard laid down in *Marcroft*, this aversion has to be *reasonable* in order for a finding to be made in the plaintiff's favour. Given all that I have heard from the various expert witnesses, and given the plaintiff's own concession regarding the necessity of the surgery, I find it difficult to conceive of the plaintiff's subjective aversion as reasonable.

15 In *Zakaria Bin Putra Ali v Low Keng Huat Construction Company (S) Pte Ltd and Ors* [1993] SGHC 277 ("*Zakaria*"), a case cited to the court by both parties, \$33,500.00 was awarded for the plaintiff's ankle fracture involving the compound dislocation of the talus. There, the plaintiff's ankle injury was complicated by avascular necrosis and the development of advanced osteoarthritis in his ankle and subtalar joints. The plaintiff in *Zakaria* also experienced pain in his ankle, suffered from gross stiffness in the right ankle and foot, and had gross atrophy in the lower right limb. He was unable to squat and walked with a limping gait.

16 Both the plaintiff and defendant here have drawn my attention to the similarities between the circumstances here and those in *Zakaria*. Both cases involve the dislocation of an ankle joint; both victims experienced complications in their injuries, with the plaintiff in *Zakaria* falling prey to avascular necrosis and the plaintiff here running a greater than average risk of developing a hospital-based infection of the wound post-surgery; both victims developed advanced osteoarthritis in their ankle joints; and both suffered similar disabilities in terms of a stiff ankle and the concomitant reduced range of motion, affecting *inter alia* squatting and walking capacities.

17 Accordingly, I find that *Zakaria* is a useful baseline to determine the relevant award in the present case. Controlling for inflation, and taking into account the discount countenanced at

paragraph 14 above, I am of the view that a sum of \$28,000.00 would be a fair amount to award as damages for the plaintiff's pain, suffering and loss of amenities arising out of her ankle injury and osteoarthritis. In reaching this conclusion, I have had the benefit of consulting various authorities cited to me by counsel for the defendant, which authorities set out the general range of awards for pain and suffering arising from ankle fractures as between \$12,000 [\[note: 1\]](#) and \$20,000 [\[note: 2\]](#) and the awards for osteoarthritis in the ankle as between \$3,000.00 [\[note: 3\]](#) and \$5,000.00. [\[note: 4\]](#) I have also given due consideration to the fact that the plaintiff has and will continue to suffer some reduction in her everyday quality of life as a result of her reduced mobility.

18 The plaintiff has also claimed damages for 7 scars on her lower limbs. From the authorities cited to me by both parties, it appears that awards for scarring in general range between \$2,000.00 [\[note: 5\]](#) and \$10,000.00. [\[note: 6\]](#) Interestingly, however, in *Seek Tiong Hock v Heng William (Wang William) and Another* [2005] SGDC 239, a case cited to me by counsel for the plaintiff, an award of \$7,500.00 was made for wrist, forearm and *facial* scarring. Given that the instant case deals only with scars to lower limbs, most of which are in the same region and 5 of which are relatively minor, it is in my view fair to award damages of \$2,000.00 for scarring.

19 For the avoidance of doubt, the plaintiff's claim for damages regarding the pain in her left knee is dismissed. Insufficient evidence was led on this point and it is unclear whether, on a balance of probabilities, the pain in the plaintiff's left knee was caused by a pre-existing knee deformity, the plaintiff's post-accident weight gain as a result of her immobility or a combination of these and other factors. In the same vein, it appears equally difficult, ostensibly, for the court to make a finding on the plaintiff's claim for prospective damages for pain and suffering arising out of subtalar and midfoot arthritis contingent upon the plaintiff actually undergoing ankle fusion surgery, a surgery from which the plaintiff has steadfastly demurred to date. Both the plaintiff's expert witnesses, Dr Singh and Dr Yegappan Muthukaruppan, gave evidence that the subtalar and midfoot arthritis might or might not be symptomatic. The defendant's expert Professor Das De, however, gave the following testimony on re-examination:

PC: Earlier, counsel for the plaintiff asked you a question regarding synovitis. Can you just clarify how usual is this condition for a patient who has osteoarthritis of the ankle?

DW1: It is an effect rather than a cause. The tendons get swollen when someone stresses them with a weak ankle.

DC: "Subtalar and midfoot arthritis". Probable?

DW1: When you fuse a joint, the adjacent joints have to do all the work. **So probable, if she undergoes the surgery. But even now, her ankle is practically stiff. She is already using the subtalar and midtarsal to a great extent.**

DC: The subtalar and midfoot joint arthritis, can it be symptomatic? Will it give her pain?

DW1: **Maybe she is not symptomatic now, but in time to come, any arthritis kept long enough will be symptomatic.**

[emphasis added]

The plaintiff has argued that based on the defendant expert's own concession, the subtalar and midfoot arthritis *will* become symptomatic as a matter of course. While this point is attenuated

somewhat by the fact of (a) the plaintiff's own vacillation with respect to the logically prior ankle fusion surgery and (b) the fact of the subtalar and midfoot arthritis going symptomatic eventually might be due to a variety of factors other than purely just the ankle fusion surgery, the point is nonetheless a valid one. In particular, Professor Das De's testimony that "even now, [the plaintiff's] ankle is practically stiff" and that "[s]he is already using the subtalar and midtarsal to a great extent" suggests that even *without* the ankle fusion surgery, the subtalar and midfoot arthritis – along with concomitant and attendant pain – will materialize sooner or later. The present claim may thus be distinguished from the earlier claim for damages relating to pain in the plaintiff's left knee.

20 Accordingly, I am of the view that the plaintiff has succeeded in showing that it is more probable than not that the subtalar and midfoot arthritis will cause attendant pain and suffering, regardless of whether the ankle fusion surgery takes place. In the circumstances, granting a small discount for the plaintiff's own contribution to the present uncertainty, I order that a sum of \$3,000.00 be paid by the defendant to the plaintiff for damages for pain and suffering attributable to subtalar and midfoot arthritis. This gives a total sum of \$33,000.00 be awarded for pain, suffering and loss of amenities arising out of the plaintiff's orthopaedic injuries.

Damages for pain and suffering in respect of alleged psychiatric disorders

21 The plaintiff claims that the accident in 2006 was responsible for causing her psychological distress and disability, manifested in particular through PTSD and chronic minor depression. The plaintiff therefore bears the burden of showing that the emotional symptoms she suffered from 2006 to date amount to a recognizable psychiatric illness. As was made clear in *Ngiam Kong Seng v Lim Chew Hock* [2008] 3 SLR(R) 674 at paragraph 97, such an illness must be distinguished from normal emotions such as sorrow and grief:

It is clear that, as an extremely important threshold requirement, the plaintiff must prove that he or she has suffered what has often been termed a "recognizable psychiatric illness" (see, for example, the English Court of Appeal decision of *Hinz v Berry* [1970] 2 QB 40 at 42 per Lord Denning MR). ... **Psychiatric illness must be distinguished from sorrow and grief (no matter how severe), for the latter are considered as constituting part of the vicissitudes of life.** It should be noted that proof of a recognizable psychiatric illness will depend, in the main, upon the relevant expert psychiatric evidence tendered before the court, which, of course, retains the ultimate supervisory responsibility of ensuring that such expert evidence is defensible as well as grounded in logic and common sense.

[emphasis added]

22 It is interesting to note at this point that the defendant only underwent psychiatric assessment from 2010 onwards *as a direct result of* this litigation. Psychiatric assessments were carried out on the plaintiff by Dr Ung Eng Khean on 13 March 2010, Dr Todd Tomita on 2 June 2010 and Dr Angelina Chan on 15 March 2012. As can be seen, there is a significant 4-year gap in the evidence in respect of the plaintiff's psychiatric condition immediately after the accident, from 2006 to 2010.

23 Accordingly, none of the psychiatric doctors who examined the plaintiff could have possibly known – even on a balance of probabilities – if the plaintiff had been suffering from any manner of psychiatric disorder between 2006 and 2010, let alone PTSD specifically. In particular, although the plaintiff's expert Dr Ung testified initially during cross-examination that the plaintiff was suffering from PTSD in 2006, his evidence changed subsequently upon closer pressing:

DC: You only saw the plaintiff in 2010. You didn't see the plaintiff in 2006 or 2007. Is it

your opinion that she had PTSD in 2006?

PW3:**Yes. Not just my opinion, but Dr Angelina and Dr Tomita.**

...

DC: You said that she had mild symptoms of impairment, so she's not suffering from any psychiatric disorder.

PW3:**She is not suffering from PTSD**, because she was sub-threshold. But she has chronic depression. In 2010.

DC: In 2012, is she suffering from PTSD?

PW3:No.

DC: So not in 2010 or 2012?

PW3:No.

DC: How about 2007 or 2008?

PW3:No.

...

DC: **I put it to you that in 2007 or 2008 or 2009, you couldn't have told whether she was suffering from PTSD.**

PW3:**Yes. She might have been, she might not have been.**

[emphasis added]

Dr Chan, the defendant's expert, also testified that she was in no position to opine on whether the plaintiff had been suffering from PTSD before 2012.

24 Given that the plaintiff's own expert has conceded that the plaintiff "is not suffering from PTSD", the remaining issue for the court to consider is whether there is any other recognizable psychiatric illness, such as "chronic depression" (as referenced by Dr Ung), pursuant to which the plaintiff may claim damages for pain and suffering.

25 According to the reports of both Dr Ung and Dr Chan tendered in 2012, the plaintiff was assessed to exhibit symptoms of depression. Both psychiatrists concurred that the emotional symptoms they observed were caused by the plaintiff's ongoing pain and impairment arising from her ankle injury. However, where Dr Chan found that the plaintiff was not suffering from a psychiatric disorder *per se* but instead was only displaying emotional *symptoms* of a chronic adjustment disorder that were not clinically significant, Dr Ung opined that the plaintiff was suffering from a chronic minor depression because the plaintiff fulfilled the criteria set out in the *Diagnostic and Statistical Manual of Mental Disorders* (4th Ed) (DSM-IV-TR), American Psychiatric Association (the "DSM-IV").

26 There is more here than meets the eye. The DSM-IV criteria set used by Dr Ung to diagnose

the plaintiff's chronic minor depression, or more accurately "minor depressive disorder" (as labelled in the DSM-IV itself), is set out in Appendix B of the DSM-IV, which

contains a number of **proposals for new categories and axes that were suggested for possible inclusion in DSM-IV**. The DSM-IV Task Force and Work Groups subjected each of these proposals to a careful empirical review and invited wide commentary from the field. **The Task Force determined that there was insufficient information to warrant inclusion of these proposals as official categories or axes in DSM-IV.** [\[note: 7\]](#)

[emphasis added]

27 It appears that the criteria set used by Dr Ung in assessing the plaintiff is one more for research purposes than the actual diagnosis of live patients. In other words, Dr Ung diagnosed the plaintiff to have a psychiatric illness that is not properly recognized by psychiatrists, as evidenced by the exclusion of "minor depressive disorder" from the DSM-IV. Dr Ung did not inform the court of the position of "minor depressive disorder" in Appendix B of the DSM-IV.

28 It is also significant that Dr Ung's evidence on cross-examination that the plaintiff's emotional symptoms had caused her "clinically significant distress or impairment in social, occupational or other important areas of functioning" runs directly counter to Dr Ung's own 2010 report on the plaintiff, where he stated that the plaintiff had "mild symptom or any (*sic*) mild impairment in social, occupational or school functioning". While it is possible that the plaintiff's emotional state was somehow better back in 2010, despite the ordeal of the accident being fresher in her mind and her body being earlier along the spectrum of physical recovery, it is nonetheless telling that Dr Ung did not prescribe the plaintiff any medication or psychotherapy, *throughout the entire duration of his association with the plaintiff*, to treat the plaintiff's "clinically significant" symptoms.

29 Given the foregoing, and taking into account Dr Ung's conflicting evidence with respect to PTSD earlier, I find it difficult to view Dr Ung as a reliable and credible witness. As such, on the issue of whether the plaintiff had been or is suffering from some recognizable psychiatric illness other than PTSD, this court prefers the testimony of Dr Chan. Dr Chan testified that the plaintiff did not experience marked distress which was in excess of what would be expected from exposure to her key stressor (*i.e.* the pain in the plaintiff's right ankle) and that there was no significant impairment in the plaintiff's social or occupational functioning. In this regard, I observe that Dr Chan's testimony finds concord with the plaintiff's consistent "C" performance grading at work from 2004 to 2011 and her promotion in 2009. I shall return to these matters in greater detail when considering the plaintiff's claim for lost future earnings and earning capacity later.

30 Accordingly, I find that no award based on pain and suffering for any manner of psychiatric disorder is to be granted, as the plaintiff has failed to make out her case on the balance of probabilities that any such psychiatric disorder did actually come to pass. As a matter of logic, the emotional symptoms experienced by the plaintiff would have already been taken into account during the earlier assessment of damages for pain and suffering arising from the plaintiff's orthopaedic injuries. However, in the light of the overall mental distress caused by the accident, I order that \$2,000.00 in nominal damages be awarded to the plaintiff for pain and suffering arising out of the plaintiff's (non-clinically significant) depression and anxiety.

Loss of future earnings and loss of earning capacity

31 Damages for *loss of future earnings* are intended to compensate a plaintiff for the difference between his or her post-accident and pre-accident income or rate of income. For the plaintiff to

succeed in her claim for loss of future earnings here, she must prove a “real assessable loss” on the evidence. On the other hand, an award of damages for *loss of earning capacity* seeks to compensate for the plaintiff’s risk of loss of present employment and the consequent disadvantage in competing in the employment market for another job. To succeed in her claim for loss of earning capacity here, the plaintiff must prove that there is a substantial or real risk that she could lose her present job at some time before the estimated end of her employable life and that she would be at a disadvantage in the open employment market because of her injuries.

32 The plaintiff is currently 41 years old and employed as an Education Officer with the Ministry of Education (“MOE”). This was her occupation before the accident in 2006 and is presently still her occupation as at time of writing, so any claim for loss of future earnings may be easily scrutinized. At the time of the accident, the plaintiff was teaching at Zhangde Primary School (the “School”). She continues to teach there after the accident. The plaintiff’s work performance has remained stable notwithstanding the accident and the plaintiff’s one-and-a-half year absence from work. This is evident from the consistent “C” performance gradings awarded to her in the rank-lists submitted by the School to MOE from 2004 to 2011. In addition, the plaintiff was promoted to grade GEO1A3 in October 2009, the highest grade for a classroom teacher.

Loss of future earnings

33 As was just intimated, we may first deal shortly with the plaintiff’s claim for loss of future earnings. As far as pre- and post-accident *income* is concerned, the plaintiff has no claim – her salary has been increased, not reduced, post-accident. What we are concerned with here, therefore, is the pre- and post-accident *rate of income*.

34 To begin with, the plaintiff contends that she will sustain a loss of promotion prospects and career advancement due to her inability to cope with the expectations of a Senior Teacher or Master Teacher as a result of her injuries and loss of amenities. In the first place, however, the plaintiff’s assertion that she has suffered a loss of promotion prospects to Master Teacher is misguided: she was *never* assessed by MOE to have the Current Estimated Potential (“CEP”) of a Master Teacher whether *prior to* (when there was no incentive for MOE to dissemble) or *after* the accident in 2006. CEP is the estimated highest appointment or level of work that an officer can handle competently before his retirement and is the indicator used by MOE, as well as many other ministries and government bodies, to assess an officer’s potential. In layman terms, one’s CEP grade is the grade at which one is predicted to retire.

35 Accordingly, it would be illogical to expect the defendant to be liable to pay damages for loss of future earnings arising from the plaintiff’s alleged loss of promotion prospects to Master Teacher. The plaintiff’s claim that she has lost promotion prospects to Senior Teacher, however, merits more attention, since this was the plaintiff’s main CEP throughout her pre- and post- accident years.

36 Before the accident, the plaintiff’s CEP fluctuated between P6 to P8, averaging as P7 (corresponding to the grade of a Senior Teacher). After the accident, the plaintiff was graded as having a CEP of P7 in 2007 and P8 in 2008 before settling at a consistent P7 from 2009 to 2011. Prima facie, therefore, the plaintiff does not appear to have suffered any loss in promotion prospects: her CEP has largely remained the same, even after the accident. However, at this juncture the plaintiff puts forward a subtle argument: since CEP is merely an estimate of an officer’s potential and not an entitlement or guaranteed eventuality (indeed this was the thrust of the defendant’s submissions), there is every possibility that due to her injuries the plaintiff will be unable to realize that potential. In other words, post-accident variations in CEP alone are insufficient to gauge whether the plaintiff has suffered any loss of future earnings. Other considerations ought to be taken into account.

37 This argument presents a challenge because by the defendant's own admission, the plaintiff "will still need to rise to the occasion and exert effort to secure the appointment (for example, by putting together a portfolio of activities outside the school curriculum in preparation for the interview to be nominated for the appointment of Senior Teacher)". So on the one hand, the defendant submits that the plaintiff "must have been assessed to have the competencies, skills and knowledge of a Senior Teacher before her superiors would grade her at P7 (S[enior] T[eacher]) for her CEP"; but on the other hand, the defendant agrees that additional work must still be done by the plaintiff before she can "secure [her] appointment" as Senior Teacher. There is some tension from the lacuna here, a lacuna borne largely of the semi-permanent but quasi-volatile "moving target" nature of CEP. If the plaintiff comes back one day to say that because of her injuries, she was unable to "rise to the occasion" to "secure the appointment" of Senior Teacher, would the defendant be able to categorically state that the reason for the plaintiff's failure was something entirely unrelated to her injuries?

38 The plaintiff's principal at the time of the accident, Madam Jaswant Kaur, gave the following testimony during cross-examination:

PC: Surely you would have seen signs that she is not able to cope with her teaching duties?

DW3: Which years are you referring to?

PC: From 2007 to 2011.

DW3: I disagree because if you look at all the reports submitted here, especially from 2009 to 2011, the plaintiff has shown good knowledge, subject mastery in science, innovative teaching, ability to integrate science into other subjects in a very consistent manner. In 2009 for example, as her role as a member of the science committee, she started HIP and HIS cards. In 2010, she enhanced the cards and brought it up to Primary Five. In 2011, she enhanced the cards further. This was an ongoing consistent approach by her to integrate science into the school gardens. Another example was her ability and enthusiasm and commitment in compiling notes as well as worksheets for the levels, starting 2009 with Primary 3, 2010 moving up to Primary 4, 2011 moving up to Primary 5. She did that diligently and displayed mastery in the science subject. Yet another instance that shows her ability to cope and cope well and display her competencies of a Senior Teacher was her CCA. **In 2008, she was in charge of the horticulture club. Somehow she found it difficult to perform in the club because of her lack of mobility. She approached the HOD for CCAs. She suggested starting a needlework club, which was granted. She, together with another teacher, initiated the club and brought the club up to a high level.** She has integrated Community Involvement Programmes (CIP), presented knitted things to the Children's Home etc. Just some examples from 2009 to 2011 that she is able to cope with the full load as a teacher and she has clearly shown competencies, skills and knowledge of a Senior Teacher. Since then her CEP has been that of a Senior Teacher.

[emphasis added]

39 While the above passage appears to vindicate the defendant's point that the plaintiff's CEP as Senior Teacher was carefully assessed and granted after due consideration of her work efforts in the years following the accident, a conflicting takeaway is that the plaintiff has had, in reality, certain avenues to prove or substantiate her Senior Teacher CEP taken away from her. An uninjured teacher could have continued with the horticulture club, secure in her CEP grading; the plaintiff, however, less confident in her CEP post-accident, had to think of an alternative CCA route to justify its

maintenance.

40 To break it down into abstract terms: prior to the accident, the plaintiff could have justified or earned her CEP through activities under categories A, B and C. Post-accident, as a result of her reduced mobility, the plaintiff only has categories B and C available to her. MOE can maintain that the plaintiff's CEP is unchanged, but the fact remains that the plaintiff will be deprived of certain courses of conduct that may help her to attain or even justify her CEP. This point may or may not have been taken into consideration by MOE: however, given MOE's non-amendment of the plaintiff's CEP, it appears that there has effectively been no allowance made for it. The difficulty lies in the fact that the CEP framework is ultimately as hindsight-based and future-blind as the next performance assessment system. Used in the present context it allows the defendant to claim, with every appearance of legitimacy, that the plaintiff has suffered no loss of promotion prospects and hence no loss of earnings; and then, when the plaintiff *actually* does struggle with her injuries to meet her CEP post-assessment, the defendant can simply revise her CEP downwards, casting the blame on the plaintiff for not "rising to the occasion" to "secure her appointment". While it is unlikely that this prospect will crystallize, and while no evidence has been led on such an inclination on the part of MOE, as an authority, the concept of CEP provides the defendant with perhaps a little too much room for manoeuvre. With other non-governmental organizations, this problem does not arise because the institutionalization of CEP is absent.

41 To be sure, it should be made clear that this point cannot be overstated. From the evidence of Madam Kaur and Dr Chan, it appears that the plaintiff will have no problems attaining her prescribed CEP, injuries notwithstanding. Indeed, I am encouraged by the description provided by Madam Kaur in the excerpt above: she paints a picture of a plaintiff very much in control of her life and career, acquitting herself in spite of an ankle injury. I also had the privilege of observing the plaintiff in chambers: what I saw was a plaintiff who appeared to be a completely normal, fully-functioning social being who accorded entirely with the descriptions given of her by Madam Kaur and Dr Chan. Additionally, the fact that the plaintiff was promoted in 2009 and not let go by MOE despite her long leaves of absence shows that, quite clearly, MOE does see value in the plaintiff and expects (I would expect) the plaintiff to attain her CEP as prescribed.

42 In any case, I should state for the record that my decision here gives weight to more than just the post-accident CEP of the plaintiff as predicted by the defendant, a prediction which, if one is cynical, carries with it potential for a conflict of interest. I have instead opted for a holistic consideration of all the circumstances of the case, including the plaintiff's pre- and post-accident CEP, her work performance prior to and following the accident, the general working environment of the plaintiff and also the human resources and appraisal policies of MOE. Accordingly, I order that nominal damages of \$10,000.00 be awarded to the plaintiff for loss of future earnings. For the avoidance of doubt, this lump sum is intended to cover *both* Stage I and Stage II.

43 In passing, I should point out that the plaintiff's conspiracy theory arguments about her alleged placebo promotion to GEO1A3 in 2009 and the "creation" of the grade to placate her were unsubstantiated by any kind of evidence. Similarly, the plaintiff's assertion that her being switched from the "leadership track" to the "teaching track" during her staff appraisal in 2006 amounted to a downgrade was not supported by any credible evidence. On the other hand, the defendant provided evidence rebutting these assertions in the form of testimony from Madam Kaur and Ms Ng Sin Lay, a member of the personnel division at MOE. Madam Kaur testified that:

In the years 2004 and 2005 when we gave her CEP as HOD [on the "leadership track"], there were platforms given to her to manifest some leadership skills and competencies which we did not see very much of. By nature, the plaintiff is a very quiet and reserved person

and she has always displayed this lack of confidence in assuming higher responsibilities. **As a panel, we felt that she was better on the teaching track than the leadership track.** It is not a downgrading. It is a shift from a leadership profile to a teacher's profile.

[emphasis added]

Separately, Ms Ng gave the following evidence on cross-examination:

PC: ... Was she sent for any interview before promotion to GEO1A3?

DW4:No.

PC: When was the grade created?

DW4:2007.

PC: **Why was it created?**

DW4:**It was the result of a review of the salary of the entire education service.**

PC: Would I be correct to say that a lot of teachers were stagnating at 1A2/2A2 and that is why this grade was created?

DW4:No. You would not be correct to say that. It was the result of a review.

[emphasis added]

Indeed, contrary to plaintiff counsel's proclamations of an overarching, sinister plot by the School and MOE to further inconvenience the life of the injured plaintiff, the plaintiff's consistent "C" performance gradings and her promotion in 2009 are surely proof that the School, and less directly MOE, are doing their level best not to unfairly deprive the plaintiff of her rightful and deserved earnings.

Loss of earning capacity

44 The plaintiff also contends that she will suffer a loss of employment sometime in the future because her injuries will eventually prevent her from continuing in her teaching job. She further contends that her long absence from work while recuperating from future surgeries would put her at risk of losing her present employment. These claims are not in the alternative. The onus, therefore, is on the plaintiff to show that there is a very real and substantive risk that she could lose her teaching job before the estimated end of her employable life (presently the stipulated retirement age of 62 years) as a result of either or both of the reasons cited. Once that is shown, the plaintiff may then go on to prove that she would be at a disadvantage in the open employment market because of her injuries. Only where these two elements are satisfactorily proven on the balance of probabilities will a court be justified in making an order for loss of earning capacity.

45 I will deal first with the plaintiff's argument on her potential loss of employment due to her injuries. Evidence from the various witnesses about the plaintiff's inability to do her job as well as she had been doing before the accident becomes largely irrelevant under this inquiry; what we are concerned with here is whether the plaintiff is at risk of *losing her job*. Insofar as the evidence of the plaintiff's poor performance at work points towards a high likelihood of her losing her job, that evidence is relevant; however, if the evidence is insufficient to push that likelihood beyond the loss-of-job threshold, that evidence should rightly be circumscribed to the analysis of the plaintiff's claim

for *loss of future earnings*, which analysis this court has already conducted above.

46 So, for example, Dr Muthukaruppan's opinion that the plaintiff's "disability limits teaching ability", notwithstanding his own concession that he was not qualified to assess whether the plaintiff is at any risk of losing her job, falls squarely into the category of evidence going towards the plaintiff's possible *loss of future earnings*, and not the loss of the plaintiff's earning capacity that we are concerned with here. Dr Muthukaruppan, who admitted that he had "no clue" what MOE's "exact requirements" for continuing to employ a teacher are, was unable on cross-examination to say anything that established that the plaintiff was at high risk of losing her job as a result of her injuries:

DC: You specialized in orthopaedic surgery from 1998 to now?

PW4:Yes.

DC: Have you been employed by the MOE to assess whether the plaintiff is able to meet her job requirements?

PW4:No.

DC: **Do you know what are the job requirements she has to meet for MOE?**

PW4:**No.**

DC: Would you be familiar with MOE's HR policies?

PW4:No.

DC: Yet you are able to assess that she has the prospect of losing her job?

PW4:I look at my own teachers from the past and assess. Common sense. The disability limits the teaching ability. So I just put it down. Obviously I have no clue as to what the exact requirements are.

DC: **I put to you that you are not qualified to opine on the fact that she has a risk of losing her job as a teacher.**

PW4:**Yes, agree.**

DC: **You are also not qualified to opine on whether or not she is able to continue her work as a teacher.**

PW4:**Yes.**

[emphasis added]

47 In contrast, Ms Ng from MOE gave evidence to say that the possibility of MOE terminating an education officer solely on account of his or her disabilities is remote if he or she continues to meet the base requirements of her teaching job and discharges her responsibilities to her students. Taking Ms Ng's testimony together with the fact of the plaintiff's consistent "C" performance average post-accident and her promotion in 2009, it is extremely difficult for this court to see where the risk of the plaintiff's job loss – at least as a result of injuries or disabilities arising from the accident – might lie.

48 Indeed, if anything it is more than likely that the plaintiff will be able to meet MOE's teaching requirements because her disabilities can and have largely been managed at work via teaching aids, trolleys to wheel classroom materials, the (incidental) installation of a lift and various other special exemptions for the plaintiff to help minimize her standing and walking time. The plaintiff did not lead any evidence to show that the physical demands of her job would increase in the future. I also note that since the plaintiff has held off the ankle fusion surgery since the idea was first broached in 2009, and since the plaintiff has been going to work since then, there is every possibility that, at the very least, the pain in her ankle has not and is not increasing beyond the threshold where it would be impossible for her to discharge her basic responsibilities as a teacher.

49 In the circumstances, I find that the plaintiff has failed to prove on the balance of probabilities that she will lose her employment as a result of the injuries sustained during the accident.

50 I move now to the plaintiff's claim for loss of earning capacity due to her prospective loss of employment as a result of a necessarily long leave of absence to undergo and recuperate from various future surgeries, including but not limited to the ankle fusion surgery. It is the plaintiff's contention that as a result of the amount of time she will have to take off work for these surgeries, her release from employment by MOE will be a virtual inevitability. Specifically, the plaintiff is worried that she will lose her present employment after being reviewed by an MOE Medical Review Board for exceeding her leave entitlement (both medical and vacation).

51 According to the plaintiff's expert Dr Singh, the estimated period of time required for the plaintiff to recover from ankle fusion surgery is 3 to 6 months in the normal course of things. In the event that the 20% risk of post-surgical infection materializes, the plaintiff could be absent from work for up to a year. In response to Dr Singh's evidence, the defendant submitted that

[c]onsidering the plaintiff's leave scheme (comprising of ordinary sick/hospitalization leave, extended sick leave and special sick leave) and the fact that school holidays and scheduled school holidays are not considered working days, the plaintiff is able to take 4 to 6 months to recover from her surgery without exceeding her leave entitlement. Given that the risk of post-surgical complications is only 20% and the uncertainty of the length of time the plaintiff would be away in the event of post-surgical complications, it is submitted that the plaintiff is unlikely to exceed her leave entitlement as she recovers from her future surgeries. It is therefore unlikely that the plaintiff would need to be subject to a review by the Medical Review Board.

52 From the above, we can surmise that while the plaintiff will be able to utilize her leave entitlement to offset a significant portion of her absence from work during the post-operation recovery period, there remains nevertheless a very real possibility that that leave entitlement would be insufficient, in particular where infection, non-union or any other complications arise. This fact, however, does *not* necessarily mean that there is also a corresponding and commensurate possibility that the plaintiff would be released from employment with MOE.

53 Indeed, from the evidence before the court, it appears that even if the plaintiff were to exceed her leave entitlement, thereby subjecting herself to review by an MOE Medical Review Board, the likely result on the balance of probabilities would be that MOE would grant her further extended sick leave, instead of unilaterally choosing to terminate her employment. There are two pieces of evidence that are relevant in this regard. First, the plaintiff's own witness and attending physician, Dr Singh, testified that as the plaintiff's treating physician, he would be sitting on the Medical Review Board reviewing the plaintiff and it would be highly unlikely that the Medical Review Board would make a decision contrary to the attending physician's recommendation:

DC: While she waits for fusion, will she be able to return to work?

PW1: On crutches, yes. But medically speaking, I won't allow her to go to work. I would give her medical leave. If she wants to take the risk to go to work, it's up to her. But I wouldn't recommend it.

...

DC: **If the plaintiff is asked to be reviewed by the Medical [Review] Board, and you as the attending physician were asked to sit on the Medical Board, you would give them your views on whether it is medically necessary for her to go on leave?**

PW1: **Every time a Medical [Review] Board is convened, it is MOH's [(Ministry of Health)] practice to send one of the treating physicians.**

DC: Have you ever sat on the Medical [Review] Board?

PW1: A number of times for other conditions.

DC: **Would the Medical [Review] Board take into consideration the views of the attending physician?**

PW1: **Sure. The attending physician knows best the clinical state of the victim.**

DC: **Is it normal for the Medical [Review] Board to find that the victim is unsuitable for further extended sick leave, despite the attending physician's advice to the contrary?**

PW1: **Very unlikely. Attending physician knows the state of the victim best.**

[emphasis added]

54 Second, it is important to note that Dr Singh's evidence above is not based on mere speculation: the plaintiff was able to take long and paid medical leave for one-and-a-half years from the time of the accident in February 2006 to August 2007. This was, in fact, the result of a Medical Review Board's decision to grant her further extended sick leave.

55 Given these two factors, it is extremely difficult for this court to find that there is any risk of the plaintiff losing her employment with MOE as a result of her anticipated leave of absence following the recommended (but as yet contingent) ankle fusion surgery. A fortiori the case for anticipated leaves of absence as a result of prospective surgeries to take place after ankle fusion surgery, which by definition are even more remote in terms of realization than the already inchoate ankle fusion procedure. Accordingly, there is no necessity for this court to proceed into the second stage of the inquiry into the plaintiff's loss of earning capacity, viz whether the plaintiff would be at a disadvantage in the open employment market because of her injuries.

56 In the light of the preceding and in conjunction with my finding at paragraph 49 above, I hereby order that no damages be awarded for the plaintiff's claim for loss of earning capacity.

Future medical expenses

57 Notwithstanding the plaintiff's own wavering on the issue, this court is of the view that the

costs of the contingent ankle fusion surgery, as well as the concomitant disbursements related thereto, may properly be ordered to be awarded to the plaintiff *given the concurrence of the three orthopaedic experts regarding the necessity of the procedure*. In the present context, there is minimal risk of moral hazard and should the plaintiff decide not to use the sum awarded to undergo the prescribed surgery, the prognosis is that she will continue to suffer a significant amount of discomfort for the rest of her life. In my view, the sum of \$10,000.00 quoted by the defendant, based on public-sector, government-subsidised ward rates, and informed by Professor Das De, is fair. This amount takes into account the plaintiff's greater than average risk of infection. I would also grant the plaintiff a further sum of two months' salary – *i.e.*, an additional \$12,880.66 – in the event that her paid sick leave (extended or otherwise) is insufficient to cover her absence from work during the recuperative period. Finally, for follow-up medication and X-rays, I award a lump sum of \$900. The total under this sub-head, therefore, comes to \$23,780.66.

58 The cost of the surgical fusion of the subtalar and midfoot joints, taking into account the reasoning at paragraph 19 earlier, should properly be awarded to the plaintiff, subject to a discount for the plaintiff's own contribution to the extant uncertainty. I fix this cost at \$4,000.00 each for the subtalar and midfoot joints respectively, giving a total of \$8,000.00. This figure was based off those given by the plaintiff's own expert, Dr Singh. Incidentally, the figure of \$30,000.00 quoted by the plaintiff's other witness, Dr Yegappan, included the cost of an ankle replacement which this court is not inclined to award. Insufficient evidence has been led to prove that the plaintiff will eventually require an ankle replacement. Indeed, it is perhaps impossible at this point in time to tell whether or not such a procedure would be required – and, more importantly, to tell if the need for such a surgery would be the *necessary consequence of ankle fusion surgery* (unlike the case of the subtalar and midfoot procedures, to which the defendant's own expert has testified would likely be necessitated even without the ankle fusion surgery). While all three orthopaedic experts do not discount the possibility that they might recommend the ankle replacement procedure in approximately 10 to 20 years' time, depending on advances in technology and on the specific bodily condition of the plaintiff at the relevant time, they are unanimous in concurring that the procedure is unsuitable for the plaintiff at present and in the short- to medium-term future.

59 I am therefore unable to allow the plaintiff to claim for costs of any prospective ankle replacement surgery. I pause to note that it has been possible that the complications concerning the necessity of the subsequent surgical procedures just discussed have been borne of multiple contingencies premised upon one another. Had the plaintiff gone for the recommended ankle fusion surgery sooner, the medical circumstances would surely have been one degree clearer, and a claim for relevant damages, prospective or otherwise, would certainly not have met with this much difficulty.

60 The award I have made aside, generally a plaintiff should not be granted leave to re-apply for the cost of discrete, latter-day surgical procedures and to haul the defendant back into court with his receipts some five or maybe even 25 years down the road, primarily since the plaintiff himself is in *complete control* of whether and when he undergoes any or all of the relevant surgeries. Such an order would run counter to the general public policy that dictates the necessity of certainty in the resolution of disputes. No defendant should be made to be held ransom – not just in terms of money, but also in terms of time and administrative disruption – by a plaintiff who has decided not only not to mitigate his existing losses, but who also equivocates between his future losses.

Future transport expenses

61 The defendant makes the point that it should not be liable for the plaintiff's transport expenses to attend hospital treatment sessions, surgeries, consultations and the like because of the plaintiff's own vacillation with respect to the ankle fusion surgery. Again, as mentioned at paragraph 57 above,

it should be noted that all three orthopaedic experts have recommended the surgery and that transport expenses to and from the hospital are reasonable disbursements arising therefrom. Accordingly, I order that \$1,000.00 be awarded for future transport expenses for the plaintiff to attend at the hospital pending the ankle fusion surgery. This figure is based off the \$406.50 and \$310.00 claimed by the plaintiff for, respectively, taxi fare and ambulance service fees incurred to attend hospital treatment and consultations in 2006 and 2007.

62 The plaintiff also claims for future continuing transport expenses to work at a rate of \$240.00 per month for 10 months a year for 10 years. This brings the total claim amount for future work transport expenses to \$24,000.00. The defendant has denied this claim, stating that "it has not been proven that it is medically necessary for the plaintiff to take the taxi to work" and that "it is purely for the plaintiff's own comfort ... that she is making this claim". Indeed, the plaintiff herself has testified that she goes home by bus or MRT if it is not the peak hour. In my view, however, the defendant's overall contention here is perhaps a tad unsympathetic. The medical evidence proffered before the court has left little doubt that the pain arising from the plaintiff's injuries, although insufficient to affect her ability to attain her prescribed CEP or to prevent her from holding down a semi-sedentary teaching job, would be sufficient to make the daily jostle during rush hour decidedly unbearable. I would therefore grant two-thirds of the \$24,000.00 claimed here, giving a resulting sum of \$16,000.00. A large part of my decision here is owed to the fact that \$240.00 per month for taxi rides is already an eminently reasonable figure, working out to \$12.00 per day return (assuming a 20-day working month, excluding weekends). This is far less than the plaintiff's own evidence in her affidavit that "the daily taxi fare comes to about \$10 one way". Nonetheless, a correction was necessary in my view to take into account the fact that the plaintiff will largely only have to take taxis to work in the mornings, and not coming back from work in the middle of the afternoon during non-peak hours.

Special damages

63 As has already been observed at paragraph 3, most of the special damages claimed have been agreed between parties. Only one item – the additional transport expenses to and from the School between June 2007 and October 2011 – remains in dispute.

64 The plaintiff claims for these 44 months' of transport expenses at the rate of \$240.00 per month, as before. Applying the logic employed at paragraph 62 above, the sum of \$7040.00 (two-thirds of 44 months multiplied by \$240.00) should be awarded to the plaintiff. However, there is one crucial distinction between this claim for special damages and the claim for future transport expenses above: in respect of this claim, it might have been possible for the plaintiff to have saved on taxi costs had she chosen to undergo the ankle fusion surgery *sooner*. The counter-argument might be made that it is illogical to penalize the plaintiff for costs already incurred when she was well and truly ailing (the special damages claim here) and to reward her excessively with taxi fare post-surgery where she will be, in all likelihood and by corollary of logic, more capable of braving the morning train and bus rush (the claim for future transport expenses above). But this argument misses the point. The court here is concerned with visiting proper censure upon the plaintiff for failing to mitigate her losses. The idea of justice as fungible does not and should not take root. How does one compare the inchoate savings on taxi fares to be had post-surgery with the subjunctive savings that should have but did not materialize due to an unreasonably delayed surgery? Both *quanta hew* to different matrices of probability and, more importantly, carry with them different burdens of moral stigma.

65 Accordingly, applying a discount for the plaintiff's own delay and refusal to undergo surgery, I award damages of \$4,000.00 for the additional transport expenses to and from the School between June 2007 and October 2011.

Conclusion

66 To summarize, the damages to be awarded are set out in the table below:

(a)	General Damages	Award
	(i) Pain, suffering and loss of amenities Orthopaedic injuries (including scarring) Psychiatric distress	\$35,000.00 - \$33,000.00 - \$2,000.00
	(ii) Loss of future earnings (Stage I and Stage II) Loss of earning capacity	\$10,000.00 \$0.00
	(iii) Future medical expenses Ankle fusion surgery Salary compensation during recovery Follow up medications and X-rays Subtalar and midfoot joint surgeries Ankle replacement	\$31,780.66 - \$10,000.00 - \$12,880.66 - \$900.00 - \$8000.00 - \$0.00
	(iv) Future transport expenses To and from hospital To and from work	\$17,000.00 - \$1,000.00 - \$16,000.00
	<i>Subtotal</i>	\$93,780.66
(b)	Special damages	Award
	(i) Pre-trial medical expenses	\$6,688.48
	(ii) Pre-trial transport expenses	\$4,000.00
	(iii) Pre-trial loss of earnings	\$2,540.00
	(iv) Miscellaneous expenses (ambulance service etc.)	\$640.00
	<i>Subtotal</i>	\$13,868.48
	Total	\$107,649.14

67 For the avoidance of doubt, the final award sum of \$107,649.14 is still subject to the 70%-30% apportionment of damages countenanced by the interlocutory judgment by consent entered on 31 January 2011. Accordingly, the total payable by the defendant to the plaintiff is the sum of \$75,354.40.

68 In relation to costs, I pause to observe that the plaintiff has succeeded on just slightly over 5% of its original claim amount (even *before* the 30% discount), so a commensurate scaling on the High Court scale would be appropriate. In the alternative, costs on the Subordinate Courts scale may also be apposite, given that the sum of \$107,649.14, without regard to any deduction made on account of contributory negligence, is below \$250,000 (s 39(2) of the Subordinate Courts Act (Cap

321, 2007 Rev Ed) read with O 59 r 27 of the Rules of Court (2006 Rev Ed)). In any case, I will hear parties on costs should no agreement be reached.

[\[note: 1\]](#) *Tan Swee Khoon v Balu A/L Sinnathamby* DC Suit No. 225 of 1998.

[\[note: 2\]](#) *Mohamad Aliman bin Kassim v Zulkifli bin Abdul Latib* [2012] Mallal's Digest 1588.

[\[note: 3\]](#) *Tan Swee Khoon v Balu A/L Sinnathamby* DC Suit No. 225 of 1998.

[\[note: 4\]](#) *Goh Feng Ji Mervin (an infant, suing by his father and next friend Goh Lip Meng) v Yeo Tze Phern* DC Suit No. 1686 of 1999.

[\[note: 5\]](#) *Wang Jia Cheng v Nakano Singapore (Pte) Ltd & Anor* DC Suit No. 429 of 2003.

[\[note: 6\]](#) *Gay See Leong v Tan Cher Cheng* DC Suit No. 4454 of 1999.

[\[note: 7\]](#) Appendix B, DSM-IV at p 759.