Pierre Gupson *v* Wong Kok Huay
[2014] SGHCR 9

Case Number : Suit No 772 of 2011

Decision Date : 14 May 2014

Tribunal/Court : High Court

Coram : Paul Quan AR

Counsel Name(s) : Mr Alvin Chang (M&A Law Corporation) for the plaintiff; Ms Renuka Chettiar (Karuppan Chettiar & Partners) for the defendant.

Parties : Pierre Gupson — Wong Kok Huay

Damages – Measure of Damages – Personal Injuries Cases

14 May 2014 Judgment reserved.

Paul Quan AR:

Introduction

1 On 26 January 2010, the Plaintiff, a pedestrian, was knocked down by the Defendant, a driver, whilst crossing the road. As a result, he sustained an open comminuted fracture of his left distal tibia and fibula, as well as contusion to his neck and back. This is his claim against the Defendant for personal injury and consequential losses that he had suffered. On the day of the trial, consent interlocutory judgment for the Plaintiff was entered with the Defendant bearing 85% liability and the matter subsequently came before me for damages to be assessed.

2 The assessment took five days. The last set of written closing submissions from counsel was tendered on 4 December 2013 after several extensions. On 17 January 2014, I requested further written submissions and the last of these submissions were tendered on 25 February 2014. After reviewing the evidence adduced during the assessment and counsel's submissions, I awarded damages in the sum of S$61,138.83 after apportionment to the Plaintiff:

General damages		
(a)	Pain and suffering	S$ 22,000.00
(b)	Loss of earning capacity	S$ 35,000.00
Special damages		
(a)	Hospitalisation and medical expenses	S$ 14,598.03
(b)	Transport expenses	S$ 330.00
Final award (at 85% of S$71,928.03)		S$ 61,138.03

I declined to award damages for pre-trial loss of earnings and loss of future earnings (collectively "loss of earnings") that the Plaintiff had sought.

3 The Plaintiff appealed against my assessment on 28 March 2014. As I have indicated to the parties that written grounds of decision will be published, I now set out in full the reasons for my decision.

The Plaintiff's claim

4 The Plaintiff eventually submitted that he should be awarded the following heads of damages: [note: 1]

(a)	Pain and suffering	S$ 30,000.00
(b)	Loss of pre-trial earnings	S$ 46,841.63
(c)	Loss of future earnings	S$ 511,000.00
(d)	Loss of earning capacity	S$ 255,500.00
(e)	Hospitalisation and medical expenses	S$ 14,667.03
(f)	Transport expenses	S$ 1,716.85
Total claim (at 100%)		S$ 859,725.51

Items (b) to (d) differed from his original claim and submissions in that he had claimed higher quanta of damages for loss of pre-trial earnings (S$75,833.29) and loss of future earnings (S$700,000) but had not claimed for loss of earning capacity previously. [note: 2] This increased his claim by S$37,508.34.

5 The Defendant submitted that the Plaintiff should not be awarded damages for his loss of earnings claims and should only be awarded the following heads of damages: [note: 3]

(a)	Pain and suffering and loss of amenities	S$ 16,500.00
(b)	Loss of earning capacity	S$ 20,000.00
(c)	Hospitalisation and medical expenses	S$ 14,598.03
(d)	Transport expenses	S$ 70.00
Total award (at 100%)		S$ 51,170.00

Items (c) and (d), which totalled S$14,668.03, were rounded off to S$14,670. [note: 4]

6 The main issues are: first, whether damages for the Plaintiff's loss of earnings claims should be awarded; and second, the appropriate award for his loss of earning capacity claim. Before addressing these issues, I will first explain my awards for the other less contentious heads of damages, namely the expenses that the Plaintiff had incurred, as well as the pain and suffering he had suffered, as a result of sustaining injury from the accident.

Hospitalisation and medical expenses

7 The Plaintiff submitted that he had incurred S$14,667.03 for hospitalisation and medical expenses, whereas according to the Defendant's computation, it should be S$ 14,598.03. [note: 5] During cross-examination, the Plaintiff accepted the Defendant's computation: [note: 6]

> Q: Refer to [33(a)] and [33(d)] of PA9. On your special damages you have claimed, you confirmed that the medical bills are as they appear on PA179-210? Refer to my tabulation.
>
> [Tenders tabulation]
>
> DC: Mark and admit tabulation as D1.
>
> PC: No objections.
>
> Court:D1.
>
> A: I wouldn't die for S$80. *I wouldn't dispute D1*.
>
> [emphasis added]

The Plaintiff was not re-examined on this. There is no basis for the Defendant to revert back to his original claim of S$14,667.03 for this head of damages when he had accepted the Defendant's computation in this regard. I therefore awarded S$14,598.03 for it.

Transport expenses

8 The Plaintiff claimed that he had "incurred transport expenses via taxi for attending at [the hospital] for treatment totalling about S$1,716.85". [note: 7] This was from 1 February 2010 to 20 April 2010 and within the period of his medical leave. The Plaintiff later conceded in his submissions that the claim amount should be S$1,015.30 as "some of the receipts are no longer readable". [note: 8] More specifically, the amounts shown on some of the receipts have become unclear. [note: 9] Although such a concession is sensible, it does not go far enough. The dates on some of the receipts have also become unclear and by the same token, these receipts should have been disregarded as well. As such, the claim amount that is supported by receipts with clear dates and amounts is only S$388.95.

9 During cross-examination, the Plaintiff conceded that during this period, he only attended seven follow-up appointments at the hospital, with each round trip costing S$10.00. [note: 10] As such, the Defendant submitted that the Plaintiff's claim should be limited to S$70.00. During cross-examination, the Plaintiff stated that apart from his trips to the hospital, he had made other trips to get his meals, attend physiotherapy and to visit his friends. [note: 11] The Defendant submitted that the Plaintiff did not give satisfactory reasons for his frequent travels when he was on medical leave. In any event, he also did not specifically plead that he was claiming transport expenses for reasons other than travelling to and from the hospital. [note: 12]

10 I was prepared to award damages for transport expenses that the Plaintiff had incurred for the other reasons that he had stated during cross-examination. However, this was done on a discounted basis because the Plaintiff was travelling not infrequently when he was put on medical leave to allow his leg injury to heal. Indeed, he was not supposed to weight-bear before 25 February 2010, he was then put on toe-touch weight bearing thereafter, and he was only allowed to partially weight-bear after 26 March 2010. [note: 13] Yet, for the period from 5 to 29 March 2010 when the most number of

trips were made and when more than half of the transport expenses were incurred, the Plaintiff travelled almost every day. As such, I discounted the sum of S$388.95 and awarded S$330.00 as damages for the transport expenses that the Plaintiff had incurred.

Pain and suffering

11 As a result of the accident, the Plaintiff suffered an open comminuted fracture of his left distal tibia and fibula, as well as contusion to his neck and back. [note: 14] He has also submitted that he now suffers permanent pain in his ankle, reduced range of movement and post-traumatic arthritis (osteoarthritis) of the ankle joint. [note: 15] His treating doctor was Dr Tay Keng Jin Darren from the Singapore General Hospital and he was re-examined by the Defendant's medical expert, Dr Chang Wei Chun, a private consultant orthopaedic and trauma surgeon.

12 The Plaintiff submitted that he should be awarded S$30,000 for this head of damages. On the other hand, the Defendant submitted that the Plaintiff should only be awarded S$16,500, being S$15,000 for the fracture, S$1,000 for the potential risk of osteoarthritis, and S$500 for the neck contusion. [note: 16]

Fracture

13 As a starting point, I found it helpful to refer to the *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Academy Publishing, 2010) ("the PI guidelines"), which classifies an open leg fracture as a severe injury, but places it at the lowest rung of that classification with awards for pain and suffering ranging from S$15,000 to S$25,000: see p 49. The PI guidelines also indicate that:

> [A]n award in the higher range is appropriate where there is a likely risk of degenerative changes in the future requiring further surgery as a result of damage to the articular surfaces of the tibia and/or fibula, malunion of fractures, muscle wasting, restricted movement and unsightly scars which cannot be removed completely by cosmetic surgery.

14 I next considered the case law authorities relied upon by the parties. The Plaintiff cited the case of *Kanuvunaidu a/l Subramaniam v Goh Chan How* [2006] SGHC 126 ("*Kanuvunaidu*"), where the High Court upheld an award of $20,000 as damages for pain and suffering to the plaintiff for an open fracture of the right tibia and fibula with residual disabilities. The salient facts relevant to the present assessment can be found at [7] and [17] of the judgment. Notably, the plaintiff in that case had to undergo three surgeries, one involving open wound debridement, open reduction and internal fixation of the fracture; another involving skin grafting to cover his leg wound with a free radial forearm flap and his radial artery had to be removed for this; and a third to remove one of the screws previously inserted to hold the fracture because it was causing him pain. The plaintiff was on medical leave for about nine months. As a result of the injury, early osteoarthritis had set in. He walked with a distinct limp and had some difficulty walking, squatting and climbing stairs. The range of motion of his right ankle was reduced. He could expect to experience varying degrees of pain for the rest of his life. Over the years, he also experienced pain in his left ankle because it had been stressed by the additional weight that he had placed on his left leg when he had difficulty using his right ankle. The defendant's private investigators had commented that the plaintiff walked with a limp and they also noticed that after driving for an hour, he had to ask someone else to take over and appeared to be experiencing some pain in his leg.

15 In contrast, I did not find the nature of the Plaintiff's injury and the details of his treatment in

the present case to be sufficiently similar to justify a similar award of S$20,000. He had undergone only one surgery to fix his fracture. He had healed well within a year. [note: 17] Both Dr Tay and Dr Chang agreed that the Plaintiff was suffering pain and Dr Tay attributed this to the osteoarthritis that had set in. [note: 18] Both doctors could not say for certain that the Plaintiff would require ankle arthrodesis in the future. [note: 19] They also recorded stiffness in his ankle with a reduced range of motion, [note: 20] but Dr Chang, who last examined the Plaintiff, subsequently qualified his assessment and attributed the stiffness to a lack of volition by the Plaintiff to move during the examination, when he learnt of the results of the surveillance conducted on the Plaintiff. [note: 21] According to the Defendant's private investigators, their surveillance on the Plaintiff revealed that he did not appear to labour under any major disability. [note: 22]

16 The Defendant relied on cases, which are also referred to in the PI guidelines, with awards of damages for pain and suffering relating to similar fracture injuries ranging from S$14,000 to S$18,000. However, these awards either did not factor in damages for scars that were awarded separately, or they were for cases where such damages were not sought. In the present case, the Plaintiff sustained eight scars, namely a 15cm scar over the fibula, six 1.5cm scars over the shin, and a 3.5cm transverse scar superior to the medial malleolus. [note: 23] There was also a slight decrease in sensation near the medial malleolus scar. [note: 24] All considered, I awarded S$18,000 in damages for pain and suffering to the Plaintiff for the fracture with scarring.

Osteoarthritis

17 Dr Tay stated in his medical report that there was osteoarthritis of the Plaintiff's ankle joint noted as evident from osteophyte formation at the front of the ankle. [note: 25] On the other hand, Dr Chang's opinion in his medical report was that the Plaintiff's ankle joint was only predisposed to osteoarthritis. [note: 26] During the assessment hearing, Dr Tay gave consistent evidence that osteoarthritis had already set in. [note: 27] Dr Chang's opinion was not put to Dr Tay directly so that he could respond to it. This was done more obliquely by asking him to comment on Dr Chang's report but he did not pick up on this aspect of the report. [note: 28] The closest instance was when Dr Tay stated during re-examination that osteoarthritis of the Plaintiff's ankle joint would be a permanent feature and would not resolve radiographically, when he was asked about its continued presence based on his clinical notes and review of Dr Chang's reports. [note: 29]

18 In contrast, Dr Tay's evidence of the onset of osteoarthritis was put directly to Dr Chang during cross-examination. Dr Chang attributed the irregularities of the articular surface of the Plaintiff's ankle joint to being a consequence of the fracture and there was no evidence of full-blown arthritis at the point of his examination as such. [note: 30] In re-examination, Dr Chang stated that certain criteria had to be fulfilled in order to make an observation of osteoarthritis radiographically, one of which was the presence of osteophytes. [note: 31]

19 Dr Tay was not asked the basis for his observation that the Plaintiff was already suffering from osteoarthritis, in particular the correlation between such an observation and the osteophyte formation at the front of the Plaintiff's ankle. Dr Chang's evidence of the criteria that need to be fulfilled before such an observation could be made was also not raised with Dr Tay. In any event, the presence of osteophytes in this case fulfilled one of the criteria that Dr Chang has postulated. The upshot of the medical evidence is that at the very least, the Plaintiff suffered from a potential risk of osteoarthritis given his ankle's predisposition to this, if it had not already set in. As Dr Tay was not given an

opportunity to comment on his observation in the light of Dr Chang's evidence, I decided, out of an abundance of caution, to accept Dr Tay's evidence that the Plaintiff was already suffering the onset of osteoarthritis.

20 The PI guidelines do not give direct guidance on the appropriate damages to award for pain and suffering relating to osteoarthritis. In the case of *Kanuvunaidu*, the High Court upheld at [24] an award of S$8,000 although this was at the high end of the range because the Plaintiff was relatively young (almost 30 years old) when osteoarthritis first set in and that he would experience varying levels of pain for the rest of his life. In the present case, given the circumstances under which I have accepted Dr Tay's evidence, and that the apparent seriousness or severity of the Plaintiff's osteoarthritis has to be properly balanced against his older age (43 years old) at the time when it first set in, I therefore awarded S$3,000 in damages for pain and suffering to the Plaintiff for osteoarthritis of his ankle joint.

Neck and back contusion

21 Although Dr Tay reported that the Plaintiff sustained neck contusion, he did not elaborate further on this injury in his medical reports or oral evidence. Dr Chang reported that the Plaintiff did not complain of any neck pain or related symptoms during his examination. [note: 32] As for the back contusion, Dr Tay reported that when the Plaintiff was admitted to the hospital following the accident, he had complained of back pain and there was some spinal tenderness over his thoracic spine. [note: 33] Dr Chang reported that the Plaintiff had the occasional back pain that did not require any treatment. Physical examination of the back was unremarkable and that this symptom should gradually settle. [note: 34]

22 Neck and back contusions are not specifically provided for in the PI guidelines. The general award for a single contusion on any part of the body is S$500, whereas the award ranges from S$500 to S$1,500 for multiple contusions on any part of the body. In the present case, the nature of the neck and back contusion appears to be unexceptional. Accordingly, I awarded S$1,000 in damages for this.

23 In all, I awarded a total of S$22,000 in damages for pain and suffering to the Plaintiff for his injury. I next proceed to address the more contentious issue of whether damages for his loss of earnings claims should be awarded.

Loss of earnings

24 Prior to the accident, the Plaintiff was a professional dancer and dance instructor. He performed and taught dance locally as well as overseas. He also ran a dance studio known as Attitude Dance Studio Pte Ltd ("ADS"). The Plaintiff submitted that after the accident, he was unable to resume dancing and instructing dance. He had suffered a calculable loss of income both pre-trial and in the future as could be seen from his income tax assessments, as well as the amount of deposits made into ADS' and his personal bank accounts ("the bank deposits"), before and after the accident. The Defendant submitted that the Plaintiff had failed to prove his alleged assessable loss of income and should not be awarded damages for his loss of earnings claims.

Multiplicand

25 The Plaintiff had claimed and originally submitted that the multiplicand for the loss of earnings claims is his entire pre-accident income. This implied that the Plaintiff was totally incapacitated and

was not earning any income for the relevant periods. In his further submissions, the Plaintiff put forth a lower multiplicand of S$4,258.33 per month or S$51,100 per annum. This was derived by reducing the Plaintiff's average pre-accident income by the same extent as the fall in the average post-accident bank deposits. This multiplicand is, however, flawed. The Plaintiff had miscalculated his pre-accident income and had also attempted to draw a correlation between the bank deposits on the one hand, and ADS' revenue as well the Plaintiff's income on the other, which is misconceived.

Pre-accident income

26 In his affidavit of evidence-in-chief ("AEIC"), the Plaintiff stated that he would earn S$5,833 per month or $70,000 per annum from ADS before the accident. [note: 35] He submitted that this was consistent with the total income that he had declared for 2006 to 2009, which averaged about S$68,212 per year: [note: 36]

Year of assessment ("YA")	**Calendar year**	**Income declared (S$)**
2007	2006	73,321
2008	2007	57,527
2009	2008	70,000
2010	2009	72,000

27 However, there are in fact discrepancies in the income declared for 2008 and 2009. For 2008, ADS' income and expenditure statement shows that S$32,959.38 was paid as salary, [note: 37] and the Plaintiff confirmed during cross examination that this was his employment income from ADS. [note: 38] However, he declared a higher employment income of $70,000 and claimed that this included the remuneration that he had received for all his paid engagements or "gigs" overseas. [note: 39] At first, the Plaintiff stated that he was unable to account for the sum in excess of the employment income that he had received from ADS. [note: 40] He then claimed to have tabulated the remuneration that he had received from his overseas gigs and would be able to produce it. [note: 41] Ultimately, he failed to do so and as such, no evidence was adduced to support the higher income that he had declared for 2008.

28 For 2009, ADS' income and expenditure statement shows that S$82,700.40 was paid as salary, [note: 42] and the Plaintiff confirmed that he had also been paid by way of director's salary that year. [note: 43] However, he declared a lower employment income of S$72,000, and claimed that he did so because he had discounted a sum of S$10,000 that he had given to a charity event. [note: 44] The Plaintiff did not deny that ADS should have incurred this expense, only that he had not known that this should have been done and would have otherwise asked for it to be reflected as such. [note: 45] Like his declared income for 2008, his declared income for 2009 is also inaccurate as the S$10,000 ought to have formed part of ADS' expenses and in any event, such a payment was also not supported by any corroborative evidence.

29 I make two minor observations about the Plaintiff's declared income for 2006 and 2007. The Defendant did not challenge the declared income for 2006 although it could not be verified against ADS' financial statements for that year since none was tendered in evidence. As for the declared

income for 2007, the Plaintiff's evidence was that the director's salary of S$32,959 that ADS had paid, [note: 46] which he had declared in full as his employment income, [note: 47] included a sum of S$6,000 that was paid to another director. [note: 48] However, nothing ultimately turned on this since there was no corroborative evidence of this alleged pay-out to the other director.

30 As such, the Plaintiff's total income for 2006 to 2009 should have been S$246,507, which will average S$5,135.56 per month or $61,626.75 per annum. This should be taken as the Plaintiff's pre-accident income.

Bank deposits

31 As the Plaintiff had used ADS' bank accounts as if they were his own, [note: 49] he submitted that bank deposits into ADS' and his personal accounts would show the true state of his income. [note: 50] The Plaintiff further submitted that [note: 51] the average post-accident bank deposits from 2010 to 2013 had been reduced to 27% of the average pre-accident bank deposits from 2007 to 2009. He then argued that his earnings or income would have correspondingly fallen and reduced his average pre-accident income to 27% to arrive at his multiplicand of S$4,258.33 per month or S$51,100 per annum. I found this approach to be problematic in several material aspects.

32 First, in respect of ADS' bank accounts, the Plaintiff relied on an incomplete set of bank statements. Statements were produced for only less than half (13 months) the duration of the pre-accident period from 2007 to 2009. As for the post-accident period from 2009 to 2013, there were six months without bank statements. The Defendant also correctly pointed out that when totalling the amount of pre-accident deposits, the Plaintiff should have disregarded deposits amounting to S$55,575 because they were inter-bank transfers between ADS' bank accounts and transactions relating to return cheques. [note: 52] By the same token, the Plaintiff should also have disregarded post-accident deposits amounting to S$10,800 relating to return cheques as well. [note: 53] As for the Plaintiff's personal bank account, bank records were produced for only one (2009) out of the three years in the pre-accident period. The Plaintiff also discounted S$15,000 worth of deposits when there was no corroborative evidence in support of his assertion that these should be excluded because they were loans. [note: 54] On the whole, it is simply not possible to draw any accurate conclusion, if at all, from the bank deposits.

33 Second, although the Plaintiff treated the bank deposits as revenue, they were in fact not a reliable proxy or indicator of revenue. The revenue figures in ADS' financial statements are irreconcilable with the bank deposits (excluding or including the deposits mentioned in [32], above, as the case may be):

Year	**Average revenue in financial statements (S$)**	**Average bank deposits (S$)**
2007	11,976.58	18,473.30
2008	11,976.60	No bank statements
2009	10,676.98	10,301.23
2010	13,835.21	10,709.16
2011	13,835.25	3,478.22

2012	5,166.29	3,482.08

No correlation can be drawn from the amount of bank deposits and revenue even when there was a complete set of bank statements and records for 2011.

34 Finally, it is fallacious for the Plaintiff to submit that because his post-accident average revenue (deposits) is now 27% of his pre-accident average revenue (deposits), his earnings or income (profit) would have correspondingly been reduced to 27% of his average pre-accident income. This also fails to take into account that expenditure is variable and assumes that profit is exactly declared as income. Even if expenditure were taken as constant (which is not the case here because ADS' expenditure varied over the years), a percentage fall in revenue does not translate to the same corresponding percentage fall in profit. The Plaintiff's declared income also did not equate exactly to ADS' profit for at least three years from 2007 to 2009.

35 I therefore did not think that the multiplicand should be premised on an analysis of the bank deposits and the multiplicand of S$4,258.33 per month or S$51,100 per annum put forth by the Plaintiff is erroneous from the outset as such. In any event, the loss of income is also not borne out or proven by evidence that has been adduced in the specific context of the Plaintiff's loss of earnings claims, to which I now turn to discuss.

Pre-trial loss of earnings

36 The Plaintiff submitted that he should be awarded pre-trial loss of earnings calculated based on the erroneous multiplicand of S$4,258.33 per month for a period of 11 months. [note: 55] I take it that the Plaintiff meant 13 months as the relevant period and multiplier because he had claimed that he was unable to dance or teach dance from the date of the accident on 26 January 2010 until sometime in February 2011. The Defendant did not dispute the 13-month period but submitted that the Plaintiff did not prove such loss. Damages for pre-trial loss of earnings are special damages that have to be strictly proved; otherwise they are not recoverable: *Wee Sia Tian v Long Thik Boon* [1996] 2 SLR(R) 420 at [15]. In this regard, I therefore turn to examine the Plaintiff's income tax assessment as well as ADS' income and expenditure statement for 2010.

37 Although the Plaintiff returned a nil income for 2010, I was unpersuaded that he did not in fact receive any income from ADS that year. First, ADS' income and expenditure statement shows that it paid a sum of S$85,750 as salary in 2010. [note: 56] The Plaintiff also did not deny receiving this sum of salary but claimed that it had been used to pay six instructors. [note: 57] However, such a payment was not reflected on ADS' income and expenditure statement and although he alleged that the instructors were paid by way of cheques, he did not produce the cheque butts or adduce any other evidence of payment to the instructors. [note: 58] They were also not called to give evidence in any event. Second, the Plaintiff also withdrew from ADS' bank account to pay for his personal expenses, but did not declare these drawings although he accepted that they formed part of his income. [note: 59] He claimed that he was told not to declare them because they were insignificant, and there was again no corroborative evidence on this. [note: 60] He also conceded that he had participated in the Malaysian Salsa Festival in August 2010 as a disc jockey but there were some prior arrangements such that no payment would be involved. [note: 61] No evidence of such arrangements was adduced. Third, the Plaintiff gave inconsistent evidence as to why he had declared a nil income. At first, he claimed that he did not declare the salary that he had received from ADS because it was used to pay

his instructors. In re-examination, his evidence was that he was operating at a loss in 2010 and had therefore declared a nil income. [note: 62]

38 An examination of ADS' financial statements revealed that ADS had earned higher revenue in 2010 after the Plaintiff's accident as compared to 2009 or any of the three preceding years prior to the accident:

Year	Revenue (S$)	Expenditure (S$)	Profit/ (Loss) (S$)
2007	143,719	120,095	23,624
2008	143,719.15	101,433.77	42,258.38
2009	128,123.80	187,573.25	(59,449.45)
2010	166,022.50	186,565.05	(20,542.55)

In fact, it grossed the highest revenue in 2010 during the period from 2007 to 2010. Although it was operating at a loss in 2010, this was also the case in 2009 a year before the accident. Indeed, ADS had incurred even greater losses then but nevertheless, the Plaintiff was able to declare an income of S$72,000. ADS had managed to perform better in 2010 than in 2009 by increasing its revenue and keeping expenditure constant, thereby reducing its losses.

39 The Plaintiff had not proven that he had suffered a loss in his earnings from 26 January 2010 to 28 February 2011 when first, he was paid more in 2010 as compared to 2009; second when ADS grossed its highest revenue in 2010 as compared to the three preceding years and nearly 30% more revenue than in 2009; third when ADS had performed better in 2010 than in 2009 and the Plaintiff had managed to declare an income in 2009; and fourth, when the average deposits registered a slight increase for 2010 as compared to 2009.

40 To bolster his claim that there was a loss in income, the Plaintiff had stated in his AEIC that he had to close ADS down in the middle of 2010. [note: 63] However, it is clear from the Plaintiff's evidence during the assessment hearing that the physical dance studio actually operated beyond that time. [note: 64] A letter of demand for unpaid rental also confirms that the studio premises were rented till at least February 2011. [note: 65] ADS' bank statements showed that there were NETS point-of-sale transactions from 26 January 2010 to 17 January 2011. Bank deposits continued to be made for the entire period from 26 January 2010 to 28 February 2011 amounting to S$120,936.03, even during the period of the Plaintiff's medical leave for slightly more than four months. In fact, more than half of the amount of deposits or S$72,459.60 was made during the period of the Plaintiff's medical leave. ADS therefore remained very much in operation during the period from 26 January 2010 to 29 February 2011.

41 I also wish to address the issue of the help that the Plaintiff allegedly had to hire during this period. According to the Plaintiff, he hired another four instructors in 2010, in addition to the two whom he had already employed, one since 2003 and the other since 2006 or 2007. [note: 66] He claimed to have paid the S$85,750 that he had received from ADS to these instructors. In *Tan Teck Boon v Lee Gim Siong & ors* [2011] SGHC 169 ("*Tan Teck Boon*"), despite an increase in the profitability of the plaintiff's business and his income, the court held that he was entitled to claim the cost of hiring a replacement to cover his courier assignments as loss of pre-trial earnings. This was

because he would not have otherwise been required to bear this additional cost of getting someone else to do the work that he himself could have done, had he not been injured. However, appropriate deduction would have to be made to factor in the value of his increased managerial role.

42 Even if the Plaintiff were to make a similar case in the present case, there was neither evidence of payment to the instructors nor AEIC or oral testimony from them as to the scope and terms of their engagement. There would have been no basis to compensate the Plaintiff for the cost of having to hire additional help to do what he could otherwise have done himself but for the accident. In any case, it would also have been difficult to do so. It would have been clear that the Plaintiff should not be compensated for the cost of hiring the existing instructors as this would have been incurred regardless of the accident. He should also not be compensated for the full cost of hiring the four additional instructors, as this would assume that the Plaintiff would have been able to single-handedly undertake all the work performed by them had he not been injured. However, beyond that, there would have been a risk of either under or over-compensating the Plaintiff when there was no evidence to assist the court in this regard.

43 All considered, I did not think that the Plaintiff has proven pre-trial loss of earnings and this is therefore not recoverable. I next proceed to examine the Plaintiff's loss of future earnings claim.

Loss of future earnings

44 The Plaintiff claimed damages for loss of future earnings calculated at the erroneous multiplicand of S$51,100 (or S$4,258.33 per month) for a period of 10 years. In *Chai Kang Wei Samuel v Shaw Linda Gillian* [2010] 3 SLR 587 ("*Samuel Chai*"), the Court of Appeal affirmed at [17] that:

> [A] plaintiff has the burden of proving his or her claim in damages… [L]oss of future earnings must be "real assessable loss proved by evidence"… 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.

The Defendant submitted that the Plaintiff had failed to do so. I therefore had to determine whether the Plaintiff's loss of future earnings is real and assessable in the context of the evidence that has been adduced.

45 As a preliminary point, Dr Tay's evidence was that the Plaintiff's ability to teach and demonstrate dance was not affected by his injury. [note: 67] Dr Chang's evidence was also that he could return to work as a dance instructor. [note: 68] The Plaintiff did not dispute either of the doctor's evidence. Indeed, he has returned to teaching and instructing dance. The question then is whether the Plaintiff has shown at the time of the assessment that there was a difference between his post-accident and pre-accident income for him to be compensated.

46 Like for 2010, the Plaintiff had also returned a nil income for 2011. This could not be verified because the Plaintiff was curiously unable to produce any of ADS' financial statements for 2011. [note: 69] During the assessment, the Plaintiff did not proffer any explanation for this exception when the financial statements for all the other years from 2007 to 2010 and 2012 were produced. The absence of ADS' financial statements for 2011 is therefore stark and of concern. This is compounded by the fact that the Plaintiff sought to rely on the information from one such financial statement that was declared in ADS' corporate tax return form for 2011, the details of which are reproduced: [note: 70]

(a)	Revenue	S$ 166,023
(b)	Gross profit	S$ 166,023
(c)	Director's Fees and Remuneration	S$ 0
(d)	Total Remuneration excluding (c)	S$ 85,750
(e)	Transport/ travelling expenses	S$ 45,752
(f)	Medical expenses	S$ 0
(g)	Entertainment expenses	S$ 0
(h)	Approved donations in financial year	S$ 0
(i)	Inventories	S$ 0
(j)	Trade receivables	S$ 0

47 I was not satisfied that I should rely on such information for the purposes of this assessment. The Plaintiff was unable to explain who ADS had remunerated in the sum of S$85,750 when no director's fee and remuneration were paid. [note: 71] I note that this figure is in the same sum as the salary that ADS had paid to him in 2010. The Plaintiff was also unable to explain at first during cross-examination why ADS had declared a loss of S$41,085 for 2011. [note: 72] He was, however, able to say that the travelling and transport expenses were incurred for him to see a physician in Montreal for his injury, which should not have been declared as a company expense in any case. In re-examination, after being referred to the relevant documents, he then stated that ADS' income and expenditure statement for 2010, which shows a loss of S$20,542.55, and an ADS' tax computation document that shows a loss of S$20,542.50, [note: 73] would explain the loss of S$41,085. [note: 74] This explanation is not entirely satisfactory. The tax computation document is reflected as for year of assessment ("YA") 2011, ie for year 2010. This could well have been for 2011 because I note that there is a similar document for YA 2012 (which could have been for YA 2013), [note: 75] which reflects a profit of S$6,085.92, but this is in fact the profit for 2012. [note: 76] Even if this were so, there was nevertheless no financial statement to show how the loss of S$20,542.50 for 2011 was derived, especially on the face of items (a) to (j) in [46] above that might suggest otherwise. I was therefore similarly unpersuaded that the Plaintiff did not receive any income for 2011.

48 The Plaintiff's nil income return for 2011 is also suspect when the evidence showed that he had drawn from ADS' accounts to pay for his personal expenses that formed part of his salary. [note: 77] He had also received remuneration from his overseas gigs, [note: 78] some consultancy fees from Mosaic Dance Studio [note: 79] and payment from Nanyang Polytechnic for conducting classes. [note: 80] Even if ADS were operating at a loss in 2011, the Plaintiff's case at best is that ADS had not fared better or worse in 2011 than in 2010. As such, the Plaintiff's contention that he had declared a nil income return because ADS was operating at a loss rang hollow when he had previously declared income in 2009 despite ADS suffered even greater losses then. After all, the Plaintiff's own evidence was that ADS could suffer a loss but that would not affect his income. This was because he used to travel frequently and had overseas contracts that generated a lot of income for him as well. [note: 81] However, no evidence was led as to the kind of engagements or gigs or the mileage that he had travelled before the accident, [note: 82] which would show the change in circumstances if any after the accident. There is also uncertainty as to the nature of his present engagements: see [50], below.

49 For 2012, the Plaintiff declared an income of S$6,085. This represented ADS' net profit for 2012. [note: 83] Although it grossed lower revenue at S$61,995.50, this would be the first time in three years since 2008 that ADS had netted a profit, if ADS were indeed operating at a loss in 2011 as the Plaintiff had alleged. The extent of that profit, however, was affected by the expenses that ADS had had to incur, about 41% of which were for new categories of entertainment and show expenses that never featured in the preceding years. Nonetheless, the upshot of all this is still that ADS had performed better in 2012 than in 2011.

50 I was similarly concerned that the declared income for 2012 could have been lesser than what it should have been because like in 2011, the Plaintiff had also not declared certain income that he had received. [note: 84] Even if they were somehow taken into account as revenue which was suggested to and echoed back by him, [note: 85] there still exists considerable uncertainty about the nature of the Plaintiff's engagements that gives rise to a risk of under declaration of income, the extent of which is unknown. First, the Plaintiff had conducted some workshops for Mosaic Dance Studio after the accident but claimed that they were in exchange for studio rental and choreography for his dance team. [note: 86] No corroborative evidence was adduced in support of such an agreement. Second, he travelled frequently [note: 87] and apart from several gigs, the Plaintiff claimed that the rest of his overseas engagements were not on a paid but on an exchange basis for air-fare, accommodation and meals. [note: 88] Again, no corroborative evidence was adduced in support of such arrangements. Third, apart from the bare assertions of the remuneration that he had received for these gigs, [note: 89] there was also no corroborative evidence as to how much he was in fact paid. Last, no evidence was led from his instructors or assistants as to the fee-sharing arrangements that the Plaintiff allegedly had with them for assisting him to teach his classes.

51 On balance, I found that there was insufficient evidence on which to assess a loss of future earnings and I therefore declined to make an award for it. Finally, I come to the Plaintiff's claim for loss of earning capacity.

Loss of earning capacity

52 In addition (as opposed to in the alternative) to his claim for loss of future earnings, the Plaintiff also claimed for loss of earning capacity calculated based on the erroneous multiplicand of S$51,500 per annum for a period of 5 years. The Defendant submitted in favour of a nominal award, if at all, and in any event an award of no more than S$20,000.

53 The Court of Appeal in *Samuel Chai* has reiterated at [20] and [36] the basis for such an award. If there is a substantial or real risk that the plaintiff could lose his present job at some time before the estimated end of his working life, and that he will, because of his injuries, be at a risk or disadvantage of securing an equivalent job in the open employment market, loss of earning capacity can be awarded to compensate him for that risk or disadvantage but not otherwise. Loss of earning capacity is also assessed "in the round" rather than using the multiplicand/multiplier approach: *Chang Ah Lek v Lim Ah Koon* [1998] 3 SLR(R) 551 at [28].

54 Dr Chang's prognosis was that the Plaintiff's condition could only get worse and not better and it was therefore reasonable to make provisions for ankle arthrodesis. [note: 90] Dr Chang stated that arthrodesis would not be conducive to the Plaintiff's career because it would stiffen up the ankle joint. [note: 91] Dr Tay's evidence was that the Plaintiff would lose all motion at the ankle joint after arthrodesis. [note: 92] His opinion was that the Plaintiff would have a higher possibility of requiring

arthrodesis because his profession imposed quite a heavy demand on his ankle. [note: 93] However, arthrodesis will only be considered as a last resort if the Plaintiff does not respond to conservative treatment. [note: 94] There is also the option of debriding the ankle joints arthroscopically. [note: 95] Beyond that, both doctors could not say for certain that the need for ankle arthrodesis would materialise in the future.

55 Since I have accepted that the Plaintiff was already suffering from the onset of osteoarthritis, which was apparently "fairly severe" or "rather serious", I found that there was a real risk that the Plaintiff would deteriorate to the extent that he would be unable to continue to teach or instruct dance effectively. [note: 96] He would be disadvantaged in the open employment market if he were to seek job opportunities in the same industry without a nimble and mobile ankle, especially those involving dance that requires a lot of ankle movement such as Pachanga. [note: 97] Alternative employment options would also be limited as he only has formal dance qualifications. [note: 98] As such, I was more inclined towards the Plaintiff's claim for loss of earning capacity.

56 In *Samuel Chai*'s case, the Court of Appeal agreed at [38] with a conservative approach taken in quantifying damages for loss of earning capacity in that case, when there was an appreciably lower risk that the plaintiff would be unable to get another job since she was not very much disadvantaged by her injuries to find commensurate employment. I found this to be the case here as well. Notably, the Plaintiff could still capitalise on the goodwill in his name, [note: 99] which would have developed to a significant extent for the last 15 years since he first set up his dance studio in 1999. He had also shown himself to be entirely capable of seizing business opportunities and forging business partnerships. [note: 100] In addition, he was able to tap on his other abilities and had taken on overseas engagements as a music director, disc jockey and emcee, [note: 101] provided consultancy services and choreographed dance that he could do seated down. [note: 102] The Plaintiff was also 46 years old at the time of the assessment.

57 The Plaintiff's claim of S$255,500 for this head of damages is excessive. In the case of *Kanuvunaidu*, the High Court upheld an award of $50,000 for a plaintiff, a senior planner of a company whose duties required him to be mobile and constantly on his feet. He had found it increasingly difficult to carry out his work. His leg would constantly swell up and the pain was unbearable at times. His employment was eventually terminated about three years after his accident. He was 32 years old at the time of the assessment. The court took into account (at [58]) the fact that the plaintiff's ability to do certain physical tasks had been limited, he required a job that was mainly sedentary and he would be unable to draw on the experience that he had had with his previous company since he could no longer perform all the tasks required by a job of similar nature.

58 In the case of *Tan Teck Boon*, the High Court upheld an award of S$30,000 for a plaintiff, a sole proprietor running his own courier business, who personally carried out courier assignments together with another paid employee. The court's view (at [47]) was that he would be "seriously disadvantaged" if he were unable to run his business and had to seek alternative employment. He had been driving all his life and he would be unable to tap on this experience whilst having only primary education. Any sedentary job in the open market would pay him lesser than his current earnings. He was 33 years old at the time of the assessment.

59 Having found that the Plaintiff would not be that disadvantaged by his injury to find commensurate employment to the extent of concluding that there was an appreciable risk that he would be unable to get another job, I felt that S$35,000 would be a fair award to make in the circumstances for the Plaintiff's loss of earning capacity claim.

Interest and costs

60 As the final award fell below the offer to settle served on 6 May 2013, I awarded interest on the special damages and the damages for pain and suffering at 5.33% per annum from the date of service of the writ to 6 May 2013. The computation of interest has to take into account the fact that the Defendant had previously made an interim payment of S$25,000 to the Plaintiff.

61 I also heard the parties on costs. Since the final award was well within the District Court limit, I ordered the Defendant to pay costs to be agreed or taxed to the Plaintiff on the District Court scale up to 6 May 2013. I feel constrained to say that the Plaintiff has grossly overstated his claim. In fact, the quantum was even belatedly revised upwards from what was originally claimed and submitted. After the first tranche of the assessment, the Plaintiff was already in possession of most of the relevant documents and evidence that had been adduced to make an informed assessment of his case. A careful, close and thorough review of the Plaintiff's case would have shown that his loss of earnings claims were untenable and that he should not have pressed on with his case. It was also still open for him then to consider accepting the Defendant's offer to settle. The Plaintiff was given ample opportunity to consider whether he should proceed with his claim at various junctures of the assessment. He elected to press on and ultimately, he only managed to recover damages that were way below the High Court limit, but has put the Defendant to unnecessary costs and expense of having damages assessed in the High Court. I therefore eventually ordered the Plaintiff to pay costs to be agreed or taxed on an indemnity basis to the Defendant on the High Court scale after 6 May 2013.

[note: 1] See the Plaintiff's submissions of 26 September 2013 ("PS1") at [45] and the Plaintiff's further submissions of 5 February 2014 ("PS2") at [34].

[note: 2] See the Plaintiff's bundles of affidavits of evidence-in-chief ("PA") at p 9 at [31]-[33]. See also PS1 at [45].

[note: 3] See the Defendant's submissions of 11 November 2013 ("DS1") at [138].

[note: 4] See DS1 at [137].

[note: 5] Exhibit D1.

[note: 6] See Notes of Evidence ("NE"), 9 May 2013, at p 8 lines 6-18.

[note: 7] See PA at p 9 at [33(b)].

[note: 8] See PS1 at [44(b)(i)].

[note: 9] See the Plaintiff's bundle of documents ("PB") at pp 140-142. See also PB at pp 143-158.

[note: 10] See NE, 9 May 2013, at p 8 lines 23-31 and p 9 lines 26-31.

[note: 11] See NE, 9 May 2013, at p 10 lines 15-24.

[note: 12] See DS1 at [135] and [136].

[note: 13] See NE, 29 August 2013, at p 4 lines 11-12, 23-25, and 30-32.

[note: 14] See PA at p 243.

[note: 15] See PS1 at [5].

[note: 16] See DS1 at [93]-[96].

[note: 17] See NE, 29 August 2013, at p 15 line 24.

[note: 18] See NE, 29 August 2013, at p 14 lines 14-15; 30 August 2013, at p 14 lines 18-24.

[note: 19] See NE, 29 August 2013, at p 16 lines 19-23; 30 August 2013, at p 3 lines 2-6.

[note: 20] See PA at p 245; the Defendant's Bundle of Affidavits of Evidence-in-Chief ("DA") at p 77.

[note: 21] See DA at p 85.

[note: 22] See DA at pp 2-4 at [7].

[note: 23] See DA at p 76.

[note: 24] See DA at p 77.

[note: 25] See PA at p 245.

[note: 26] See DA at p 82.

[note: 27] See NE, 29 August 2013, at p 6 line 6-7, p 10 line 4 and p 14 line 12.

[note: 28] See NE, 29 August 2013, at p 12 lines 23-28.

[note: 29] See NE, 29 August 2013, at p 14 lines 17-20.

[note: 30] See NE, 30 August 2013, at p 9 lines 13-20.

[note: 31] See NE, 30 August 2013, at p 16 lines 24-32.

[note: 32] See DA at p 76.

[note: 33] See PA at p 244.

[note: 34] See DA at p 81.

[note: 35] See PA at p 8 at [28].

[note: 36] See the Plaintiff's Bundle of Documents Volume (III) ("3PB") at pp 96-99.

[note: 37] See the Plaintiff's Bundle of Documents Volume (II) ("2PB") at p 49.

[note: 38] See NE, 10 May 2013, at p 19 lines 23-28.

[note: 39] See NE, 10 May 2013, at p 20 lines 1-5.

[note: 40] See NE, 10 May 2013, at p 20 lines 13-14.

[note: 41] See NE, 10 May 2013, at p 21 line 27 to p 22 line 2.

[note: 42] See 2PB at p 50.

[note: 43] See NE, 10 May 2013, at p 18, lines 16-18.

[note: 44] See NE, 10 May 2013, at p 22 lines 4-8.

[note: 45] See NE, 10 May 2013, at p 22 lines 10-20.

[note: 46] See 2PB at p 59.

[note: 47] See 3PB at p 97.

[note: 48] See NE, 10 May 2013, at p 16 lines 18-28.

[note: 49] See NE, 29 August 2013, at p 18 lines 23-27.

[note: 50] See PS1 at [20].

[note: 51] See PS2 at [15] and [18].

[note: 52] See DS2 at [12].

[note: 53] See 2PB at pp 240, 269, 274, and 326.

[note: 54] See NE, 10 May 2013, at p 31 lines 1-5; 28 August 2013, at p 15 lines 8-10.

[note: 55] See PS2 at [22].

[note: 56] See 2PB at p 51.

[note: 57] See NE, 10 May 2013, at p 23 lines 5-8 and lines 15-16.

[note: 58] See NE, 28 August 2013, at p 19 lines 5-10.

[note: 59] See NE, 10 May 2013, at p 24 lines 15-24.

[note: 60] See NE, 10 May 2013, at p 25 lines 4-6.

[note: 61] See NE, 9 May 2013, at p 26 lines 9-24.

[note: 62] See NE, 28 August 2013, at p 24 lines 2-6.

[note: 63] See PA, at p 8 at [27].

[note: 64] See NE, 28 August 2013, at p 6 lines 26-29. See also NE, 10 May 2013, at p 11 lines 17 to p 12 line 3.

[note: 65] See 3PB at p 90.

[note: 66] See NE, 10 May 2013, at p 30 lines 13-18.

[note: 67] See NE, 29 August 2013, at p 13 lines 7-16.

[note: 68] See NE, 30 August 2013, at p 11 line 15.

[note: 69] See NE, 10 May 2013, at p 15 lines 27-29; 28 August 2013, at p 6 lines 4-5.

[note: 70] See Exhibit P1 at page 3 of Form C-S.

[note: 71] See NE, 28 August 2013, at p 4 lines 10-18.

[note: 72] See Exhibit P1 at page 1 of Notice of Assessment and page 2 of Form C-S.

[note: 73] See 2PB at p 79.

[note: 74] See NE, 29 August 2013, at p 18 lines 10-11.

[note: 75] See 2PB at p 82.

[note: 76] See Exhibit 2PB at p 80.

[note: 77] See NE, 28 August 2013, at p 14 lines 4-20.

[note: 78] See NE, 28 August 2013, at p 16 lines 20-22.

[note: 79] See NE, 28 August 2013, at p 20 line 26-33.

[note: 80] See NE, 28 August 2013, at p 12 lines 6-8.

[note: 81] See NE, 10 May 2013, at p 18 lines 12-14.

[note: 82] See NE, 9 May 2013, at p 23 lines 25-28.

[note: 83] See 2PB at p 80.

[note: 84] See NE, 28 August 2013, at p 16 lines 30-33, p 23 lines 22-23 and p 24 at lines 24-27.

[note: 85] See NE, 28 August 2013, at p 24 lines 29-31.

[note: 86] See NE, 10 May 2013, at p 9 lines 5-13.

[note: 87] See NE, 9 May 2013, at p 12 lines 19-21.

[note: 88] See NE, 9 May 2013, at p 22 lines 1-2, p 29 line 5 and line 9, and p 30 lines 20-21.

[note: 89] See NE, 10 May 2013, at p 34 lines 1-2 and lines 23-27; 28 August 2013 at p 20 lines 11-14.

[note: 90] See NE, 30 August 2013, at p 13 lines 16-22.

[note: 91] See NE, 30 August 2013, at p 2 lines 26-28.

[note: 92] See NE, 29 August 2013, at p 15 lines 8-9.

[note: 93] See NE, 29 August 2013, at p 15, lines 15-17.

[note: 94] See NE, 29 August 2013, at p 15, lines 13-14 and lines 17-18, and p 16 lines 12-13; 30 August 2013 at p 2 lines 24-25.

[note: 95] See NE, 29 August 2013, at p 16 lines 13-14.

[note: 96] See NE, 28 August 2013, at p 18 lines 28-31.

[note: 97] See NE, 9 May 2013, at p 19 lines 24-25.

[note: 98] See PA at p 8 at [26].

[note: 99] See NE, 28 August 2013, at p 18 lines 29-31; 29 August 2013, at p 19 lines 12-17.

[note: 100] See NE, 29 August 2013, at p 20 lines 11-13.

[note: 101] See NE, 9 May 2013, at p 16 lines 27-28, p 17 lines 2-3, line 21 and line 29, and p 29 lines 23.

[note: 102] See NE, 28 August 2013, at p 19 lines 28-31.