Loh Chia Mei v Koh Kok Han
[2009] SGHC 181

Case Number : Suit 564/2007, RA 38/2009

Decision Date : 11 August 2009

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Namasivayam Srinivasan (Hoh Law Corporation) for the plaintiff; Fazal Mohamed Bin Abdul Karim and Amy Lim Chiew Hong (B Rao & K S Rajah) for the defendant

Parties : Loh Chia Mei — Koh Kok Han

Tort – Negligence – Personal Injury – Assessment of Damages

11 August 2009

Judith Prakash J:

Introduction

1 This judgment sets out my reasons for the decision I made on an appeal from an assessment of damages conducted by Denise Wong, the Assistant Registrar ("the AR"), in respect of injuries sustained by the plaintiff, Ms Loh Chia Mei, in a road accident which occurred on 2 July 2006. The defendant, Mr Koh Kok Han, is the plaintiff's husband. On 18 February 2008, interlocutory judgment was entered against the defendant by consent. The matter came before the AR on 12 January 2009 for damages to be assessed.

2 The AR assessed the plaintiff's damages as follows:

(A) Pain, suffering and loss of amenities	$87,000.00
(B) Pre-trial loss of earnings, transport and medical expenses	$99,254.93
(C) Future medical expenses	$20,120.00
(D) Loss of future earnings	$581,940.00

3 The defendant appealed against the AR's award for loss of future earnings, on the ground that it was excessive. The defendant argued that the AR's award for loss of earnings should be reduced to $40,800, and that an additional award of $15,000 for loss of earning capacity should be made.

Background Facts

The Accident

4 On 2 July 2006, the plaintiff was riding pillion on the defendant's motorcycle when the defendant lost control of the motorcycle and it hit the roadside kerb. The plaintiff was flung off the motorcycle and sustained serious injuries as a result. She was taken to Changi General Hospital,

where she was treated by a Dr Leslie Leong ("Dr Leong"), who noted that the plaintiff suffered the following injuries:

(a) open fracture of the left femur midshaft,

(b) undisplaced fracture of the neck of the left femur,

(c) fracture of the left patella,

(d) fracture of the right elbow olecranon; and

(e) coccyx fracture dislocation.

5 The plaintiff was operated upon on 2 July 2006. During the operation, a metal plate was inserted into the open fracture of the mid-shaft of the plaintiff's left femur, and wires were fixed unto her left patella fracture. Screws were also inserted into the left neck of the plaintiff's left femur. On 11 July 2006, more wires were inserted into the plaintiff's right elbow. She was discharged on 15 July 2006. Subsequently, all of the plaintiff's fractures were found to have united, except her left femur fracture. Thus, the plaintiff had to be admitted again on 16 January 2007 for bone grafting surgery on her left femur to enable union of the fracture. She was then discharged on 18 January 2007. In a subsequent surgical procedure, the wires in the plaintiff's knees were removed due to the irritation they caused her.

The Plaintiff's Employment History

6 Prior to the accident, the plaintiff worked as a senior car sales executive in Sonata Auto Pte Ltd. Her average monthly income was $2,625 in 2005, $3,644.44 in 2006, and $4,033.33 in 2007. Her salary package consisted of an allowance of $300, and commission earned for successful car sales made by her. According to the plaintiff, as a car sales executive in Sonata Auto Pte Ltd was on duty in the car showroom every alternate day. When the plaintiff was not on showroom duty, she had to promote cars at outdoor road shows. On days when the plaintiff was scheduled for showroom duty, her typical working hours were from 9 am to 8 pm or 9 pm. If she was scheduled for road show duties, a typical work day would start at 9 am and end at around 10 pm.

7 The plaintiff testified that salespersons on showroom duty are required to wash cars in the morning before the showroom opens for business. At the showroom, they are required to greet customers at the door, and to welcome them into the showroom. A salesperson is frequently required to physically demonstrate car features by opening car bonnets, folding and unfolding car seats, and opening car boots. The plaintiff testified that the job required her to be on her feet for long hours because customers tend to stand around the car while car features are being explained to them. Often, customers will also ask for a test drive. In such situations, the sales person attending to the customer is required to take the customer out on a test drive of the car. After the customer confirms the order, the salesperson would need to drive the car to the workshop for installation of accessories.

8 After the accident, the plaintiff went on long medical leave until 17 March 2008. She was terminated from her employment due to her long absence from work. In any event, the plaintiff submitted that she was unable to continue working as a car sales executive due to her injuries and associated disabilities. For instance, she claimed that she is now unable to drive a manual car, and is thus unable to serve customers who request test drives of manual cars. Also, her present inability to lift heavy objects would mean that she cannot demonstrate car features to customers by lifting car

bonnets and boots, as well as folding or unfolding car seats. Also, the plaintiff claimed that she can no longer be on her feet for long, continuous periods while interacting with customers. Finally, she argued that the fact that she now walks with a limp creates a bad impression among customers, and will therefore interfere with her ability to work effectively.

9 After the accident, the plaintiff attempted to re-enter the car trade on several occasions by sending out her resume to various car companies. She submitted that her attempts did not succeed because car companies are very conscious about the image of salespersons, and therefore do not hire candidates with disabilities. Eventually, the plaintiff found employment as an administrative assistant for a monthly salary of $800. The plaintiff's current job is for the most part sedentary. However, there have been occasions when she was required to stand continuously for a few hours to accomplish a task. As a result, she suffered such great pain in her knee that she had to go on medical leave to rest in bed for the rest of the day. Thus, she was of the view that continuation of her previous employment as a car sales executive was no longer a reasonable option to her. The plaintiff's description of her injuries and resulting disabilities were further supported by an investigation report obtained by the defendant. Surveillance of the plaintiff was conducted for two days, 13 March 2008 and 12 April 2008. The plaintiff was seen massaging her left leg even while seated and having difficulty ascending a flight of stairs. Throughout the surveillance, the plaintiff was never seen standing for more than five minutes continuously before having to rest.

10 During cross-examination, the plaintiff was asked why she did not apply for other sales jobs such as property sales. The plaintiff replied that her disabilities prevented her from being mobile enough for such work. Furthermore, she testified that she lacked confidence in her ability to acquire the necessary skills for such work, given that she did not feel as passionate about property as she did about cars. The plaintiff further testified that she had in fact attempted to seek other types of employment by sending in her resume to other companies. However, she was not employed by these companies because of her disabilities.

The Expert Medical Evidence

11 Dr Leong noted that the plaintiff suffered from the following disabilities:

(a) limping gait, due to the shortening of her left leg by 1.5 cm,

(b) inability to walk at normal pace because she would otherwise feel pain in her left knee which would radiate up to her groin,

(c) left hip pain at the bone graft donor site on prolonged walking, and inability to walk for more than 15 minutes continuously without taking a rest break,

(d) left thigh aches and pain if she lies on her left side,

(e) left knee pain on squatting and inability to squat normally, because she can only keep the left knee flexed to about 90 degrees only,

(f) locking of her left knee cap every 1 to 2 months, after which she would need to rest for some time before she can move her left leg again,

(g) right elbow aches if she writes continuously on more than three-quarters of an A4 sized page, or does daily chores such as washing her hair and carrying her children; and

(h) multiple scarring, especially on the plaintiff's left leg.

12 Based on the plaintiff's description of her previous job scope, Dr Leong opined that the plaintiff's disabilities rendered her incapable of continuing to work as a car salesperson at her pre-accident working capacity. He opined that the plaintiff may at best be able to return to work on a part-time basis, selling only automatic cars. This is because the plaintiff's knee condition makes it impossible for her to drive a manual car. Given that her knee locks up occasionally, it would be highly dangerous for the plaintiff to take customers on test drives of manual cars. Also, Dr Leong opined that since the plaintiff has difficulty squatting, she is unlikely to function well as a car salesperson, given that the job requires a fair amount of climbing in and out of cars, and bending over. The plaintiff's knee pains would also prevent her from working for more than half a day at a time.

13 According to Dr Leong, the plaintiff's condition had reached a "stalemate", and was unlikely to improve more than marginally. This was because her leg muscles had been irreparably damaged, and no amount of physiotherapy can cause the muscle to regenerate. Nevertheless, Dr Leong recommended the following treatments to improve the plaintiff's condition. He recommended that the plaintiff should wear special raised shoes to reduce the visibility of her limp. To further reduce the appearance of a limp, he also suggested further physiotherapy to strengthen the plaintiff's hip muscles, so as to compensate for the plaintiff's weak leg muscles. But, given that two years had passed since the accident, and the plaintiff had already undergone much physiotherapy, he considered that further physiotherapy was unlikely to significantly improve the plaintiff's condition.

14 As for the plaintiff's knee problems, Dr Leong stated that he could prescribe the appropriate remedial surgeries only after he had obtained sufficient information about the plaintiff's condition. He believed that the plaintiff's left knee had sustained cartilage and menisci damage. Apart from that, Dr Leong also testified that the plaintiff was likely to suffer from early localised arthritis as a result of her injuries. Arthritis would cause the plaintiff to experience difficulty with knee bending activities, climbing big steps, squatting, sitting and standing repeatedly, and jogging or running on undulating terrain. In the long run, the plaintiff may experience decreased endurance and a cracking sensation. Thus, Dr Leong recommended knee arthroscopy surgery to determine the cause of the plaintiff's knee problems and the extent of damage to her shock absorbers. An arthroscopy would shed light on whether trimming of the plaintiff's menisci would be necessary to repair the damage. He also recommended that the plaintiff underwent an MRI scan so that the extent of damage to the plaintiff's cartilage may be assessed. If the plaintiff was found to be suffering from localised cartilage damage, further surgery would be required to re-implant cartilage cells.

15 When asked whether the proposed surgical procedures would allow the plaintiff to do more work, Dr Leong answered that the plaintiff "may get back to about 75 to 80% more". I found this statement ambiguous. In particular, it was unclear whether Dr Leong was stating that surgery would allow the plaintiff to regain around 80% of her pre-accident strength, recover sufficiently to do 80% of her previous job duties or that the plaintiff would be able perform all her previous duties at 80% of her pre-accident performance level. In any case, Dr Leong testified that even if the proposed operations were successful, he felt unable to conclude whether the plaintiff's condition would improve sufficiently to allow her to re-enter the car trade. Dr Leong also opined that even if the plaintiff could work at a reduced capacity, she would face great difficulty in finding employment in the car sale industry because Singaporean employers tend to avoid employing disabled persons.

16 Apart from Dr Leong, the plaintiff also consulted Dr Krishnamoorthy, a consultant orthopaedic surgeon. Dr Krishnamoorthy saw the plaintiff on 30 July 2008 after the plaintiff's fractures had united, and noted substantially the same disabilities suffered by the plaintiff as Dr Leong. Dr Krishanamoorthy opined that while the plaintiff's range of knee flexion had decreased from 115 degrees to 95 degrees,

her current range was still functional. Dr Krishnamoorthy opined that the plaintiff was likely to recover sufficient strength and agility to return to her pre-accident employment in about a year. Dr Krishnamoorthy was also of the view that the shortening of the plaintiff's left leg by 1.5 cm would not significantly compromise the plaintiff's activity, or deter her from continuing her pre-accident employment. However, he stated that she is likely to experience osteoarthritis within 10 to 15 years, after which it would be difficult for the plaintiff to work as a car salesperson. Upon re-examination by the plaintiff's counsel, Dr Krishnamoorthy acknowledged that his assessment of the plaintiff's ability to return to the car trade was based on his assumptions about the job requirements of car salespersons, and that he had no first-hand knowledge about such matters.

17 The defendant called Dr WC Chang ("Dr Chang"), a consultant orthopaedic and trauma surgeon. Dr Chang examined the plaintiff on 4 October 2007. Like Dr Krishnamoorthy, Dr Chang was of the view that the shortening of the plaintiff's left leg had no functional significance, because it could be corrected with a shoe lift. Thus, Dr Chang opined that the plaintiff should be able to return to her job as a car sales person, although she may have difficulty standing and walking for long periods of time. Unlike Dr Leong, Dr Chang was of the view that there was simply no evidence that the plaintiff suffered from any damage to her meniscus. However, Dr Chang agreed with Dr Leong's diagnosis of the plaintiff as suffering from early stage arthritis, knee cartilage damage, and significant muscle wastage in the plaintiff's left leg. Notably, Dr Chang based his assessment on his understanding that the plaintiff's job involved showroom duties "with either standing or sitting, not much walking, and occasionally showing the car". Thus, he opined that "[r]eturning to this job should not be too much of a bother". Later during cross-examination, Dr Chang agreed with plaintiff's counsel that although he was well-placed to advise the court on the plaintiff's disabilities, he did not have the expertise to advise the court about the nature of the plaintiff's job.

18 While I found the doctors' assessments of the plaintiff's disabilities and their effects useful, I placed less weight on their opinions about the plaintiff's ability to return to her previous employment because they lacked sufficient knowledge about the plaintiff's previous job scope. They also lacked personal knowledge about the considerations weighing on the minds of recruiters in car companies, and their methodology of selecting candidates. The evidence from all three doctors was, nevertheless, helpful in establishing that the plaintiff did in fact suffer from the disabilities of which she complained.

Assessment by Occupational Therapist

19 An occupational therapist, Ms Vicki Pang ("Ms Pang"), was appointed by the defendant to carry out a functional evaluation of the plaintiff to ascertain whether her injuries and resultant disabilities had any impact on her employability. Ms Pang possesses a Bachelor of Applied Science in Occupational Therapy, and has been in the field of occupational therapy for around 16 years. When Ms Pang assessed the plaintiff on 13 March 2008, she observed that the plaintiff constantly felt pain in her left knee, right elbow, and lateral aspect of her thigh, even when she was seated. Ms Pang also observed that the plaintiff needed a short rest break after every 10 minutes of continuous standing. Following several tests, Ms Pang reported that the plaintiff did not have the physical ability to lift objects weighing more than 5 kg to table height, and objects weighing more than 2.5 kg above eye level. Ms Pang also reported that the plaintiff had limited range of motion, weakness and instability in her left lower limb due to the 1.5 cm shortening of her left leg.

20 Based on her findings, Ms Pang opined in her report that the plaintiff could no longer meet all the demands of the job of a car salesperson, and was thus unfit to return to her previous job. In making this report, Ms Pang worked on the basis that the job of a car salesperson involves standing continuously for long hours and frequent test drives. Ms Pang assessed the plaintiff's previous job as

involving sitting 30% of the time, driving 30% of the time, and walking or standing for the remaining 40% of the time. Given the plaintiff's condition, Ms Pang opined that she is currently only suitable for jobs requiring little physical activity, such as multi level marketing sales of health products, or sedentary administrative work. Ms Pang was also of the view that the plaintiff could possibly be trained to become a legal secretary. During cross-examination, Ms Pang was asked to reassess the plaintiff's ability to re-enter the car trade assuming that surgery will allow the plaintiff to regain 75-80% of her pre-accident *strength*. Ms Pang testified that the assessment of an individual's capacity should not be made based on strength alone. The plaintiff's endurance and speed of performance were also very important indicia of her ability to resume her previous employment. At the time of the hearing, the plaintiff lacked the endurance and agility to cope with the demands of the job.

21 Ms Pang had the necessary qualifications to assist the court in determining the plaintiff's ability to return to her pre-accident employment. Since her assessment methodology was not challenged, her assessment that the plaintiff is currently capable of managing only sedentary administrative work stood. It also appeared from her evidence that the plaintiff may not be able to return to work even if she can regain 75-80% of her pre-accident strength as a result of Dr Leong's proposed operations because she lacked the endurance and agility to fulfil the demands of the job. It was significant that although Ms Pang was originally appointed by the defendant, in the event, the defendant did not ask her to testify. The plaintiff, therefore, had to procure Ms Pang's testimony.

Evidence from Former Co-workers

22 The plaintiff's former colleagues also gave evidence regarding the plaintiff's previous job scope. The plaintiff's former employer, Mr Tan Kim Leng ("Mr Tan") stated in his affidavit of evidence in chief that the plaintiff was an excellent car salesperson. However, he was unable to continue employing the plaintiff after the accident due to the plaintiff's injuries, despite her excellent work ethic. In his view, a salesperson's image and appearance are paramount in making a good impression on prospective clients. If he had to consider the plaintiff's application for the job of a car salesperson, Mr Tan testified that he would not hire the plaintiff, because the fact that she walks with a visible limp would make a bad impression on customers and interfere with her ability to make sales. Furthermore, Mr Tan was of the view that the plaintiff's scars on her left leg would appear very unsightly if she wore a skirt and saleswomen were required to wear skirts at road shows. He was of the view that employers would much rather employ able-bodied and physically attractive people for the job.

23 The plaintiff's former colleagues, Ms Peh Sher Hwee ("Ms Peh") and Mr Lim Swee Chye ("Mr Lim") were also called as witnesses. Both witnesses were of the view that the plaintiff's disabilities rendered her unsuitable for employment as a sales executive. They echoed Mr Tan's view that a salesperson's presentation and appearance are essential to make a lasting impression on prospective clients. Mr Lim reiterated during his cross-examination that car companies have no lack of applicants for the position of car sales executive, and would naturally prefer able-bodied candidates who are physically attractive. Both witnesses also testified regarding the strenuous nature of their jobs. Car salespersons need to be adequately groomed and are constantly on the move. Mr Lim confirmed the plaintiff's testimony that salespersons are required to wash cars before the start of every business day. Ms Peh also confirmed that salespersons are required to lift heavy objects very often. Both Mr Lim and Ms Peh were of the view that the plaintiff is unlikely to be able to handle the job, in light of her disabilities. The evidence of Mr Tan, Mr Lim, and Ms Peh was helpful in shedding light on the dynamics of employment in the car sales industry. Their evidence of their job scope as car salespersons was particularly useful.

The Decision Below

24 Before the AR, the defendant contended that the plaintiff should only be given an award of $40,800 for loss of earnings, it being the sum that represents what the plaintiff would have earned in a year, calculated based on the plaintiff's average monthly income over three years (2005–2007). The defendant submitted that the plaintiff should only be awarded the full value of her pre-accident earnings for one year because she would regain the ability to resume her pre-accident employment within a year with the aid of surgery. Thereafter, the defendant submitted that the AR should make allowance for the likelihood that the plaintiff may lose her job as a car salesperson, and suffer disadvantage in the labour market due to her disabilities. Therefore, the defendant submitted that an award of $15,000 for the plaintiff's loss of future earning capacity was a reasonable sum.

25 The AR held that damages for loss of earnings should be awarded in the present case, because the plaintiff had suffered real assessable loss of earnings as a result of the accident. The AR found for the plaintiff for three reasons. First, car salespeople are required to be on their feet for long hours and to carry out multiple physical tasks quickly and efficiently in showrooms. These tasks include driving cars to workshops to affix accessories, bringing potential buyers for test drives and lifting car bonnets, covers and car seats to demonstrate car features to customers. They are also required to travel outdoors to solicit business when they are not on showroom duty. The AR held that the plaintiff could not perform such tasks over a prolonged period, given the disabilities caused by the accident. Also, given that the plaintiff can no longer drive manual cars, this is an occupation that the plaintiff simply cannot sustain. Secondly, the AR held that the defendant was being unrealistic in expecting the plaintiff to return to her previous job on a part-time basis. Even if she could do that it would not be realistic to expect her to sell the same number of cars as she did before the accident. Thirdly, the AR found that the plaintiff is likely to continue walking with a pronounced limp, even if she can regain her strength with the help of surgery. The AR accepted the evidence of the plaintiff's former employer and colleagues that the plaintiff would not be hired in the car sales industry due to her physical handicap. The AR held that such evidence was credible in light of evidence that the plaintiff's applications had been rejected despite the fact that the car sales industry was actively hiring salespeople.

26 In arriving at the award of $581,940 for loss of future earnings, the AR adopted a multiplicand of $3,233. This amount was derived by taking the difference between $4,033, the plaintiff's monthly income immediately prior to the accident, and the plaintiff's monthly income of $800 at the time of the hearing. The AR also concluded that 15 years was an appropriate multiplier given that the plaintiff was 29 years old at the time of the assessment. No award was made for loss of earning capacity.

The Parties' Submissions on Appeal

27 The defendant submitted that the award made by the AR for the plaintiff's future loss of earnings should be set aside because it was excessive. Instead, an award of $40,800 for loss of future earnings and an award of $15,000 for loss of earning capacity should be made. Regarding the award for loss of future earnings, the defendant argued that for the first year, the court should adopt a multiplicand of $1,900 derived by taking the difference between $3,400, which was the plaintiff's average monthly income over three years, and $1,500, which was the amount which the defendant alleged the plaintiff could realistically be expected to earn in the first year after the trial. The defendant also argued that the plaintiff had failed to mitigate her losses by working as an administrative assistant, and should have sought higher paying work, such as legal secretarial work.

28 The defendant also submitted that the plaintiff would be able to return to the car trade and work at 80% of her previous capacity within a year, with the help of surgery. Therefore, the defendant submitted that after the first year, the plaintiff would enjoy 80% of her pre-accident earnings. The defendant asked me to disregard the evidence of Mr Tan, Ms Peh and Mr Lim, that

employers in the car sales industry will not hire the plaintiff because she walks with a visible limp. The defendant argued that little weight should be placed on their evidence because the affidavits of evidence in chief of the three witnesses were worded almost identically. Thus, the defendant urged this court to instead rely on the evidence of Dr Chang and Dr Krishnamoorthy and conclude that the plaintiff could return to her previous job within a year. Accordingly, the defendant submitted that for the next five years, the court should use a multiplier of $680, which is 20% of the plaintiff's average pre-accident monthly income over three years. The defendant also submitted that after the first 6 years, the plaintiff would have retrained herself to eliminate her loss of earnings, and therefore no further award should be made.

29 In response, the plaintiff urged the court to uphold the award made by the AR. First, the plaintiff argued that an award for loss of earnings and not loss of earning capacity was appropriate in the present case because the plaintiff had suffered a real and assessable loss. Secondly, the plaintiff argued that while the doctors were of the view that the plaintiff is likely to recover sufficiently within a year's time to re-enter the car trade, their views were based on their own assumptions about the job scope of car salespersons. The plaintiff submitted that greater weight should be placed on the testimony of occupational therapist, Ms Pang, and the plaintiff's former colleagues. This was because Ms Pang was better qualified to assess the plaintiff's ability to return to her former employment, and the plaintiff's former colleagues had first-hand experience about the demands of the job. Thus, the plaintiff submitted that the evidence showed that she could no longer find employment as a car salesperson. Even if she were able to find such employment, the plaintiff submitted that she would be unable to discharge her duties. Thirdly, the plaintiff argued that she had mitigated her losses because she had found employment as an administrative assistant which was the most suitable job she could do with her existing disabilities.

The Appeal

The Distinction between Loss of Earnings and Loss of Earning Capacity

30 The difference between loss of future earnings and loss of future earning capacity was explained by Scarman LJ in *Smith v Manchester Corp* (1974) 17 KIR 1. This dictum was accepted by the Singapore Court of Appeal in the case of *Chang Ah Lek v Lim Ah Koon* [1999] 1 SLR 82. Scarman LJ stated that:

> Loss of future earnings or future earning capacity is usually compounded of two elements. The first is when a victim of an accident finds that he or she can, as a result of the accident, no longer earn his or her pre-accident rate of earnings. In such a case there is an existing reduction in earning capacity which can be calculated as an annual sum. It is then perfectly possible to form a view as to the working life of the plaintiff and, taking the usual contingencies into account, to apply to that annual sum of loss of earnings a figure which is considered to be the appropriate number of years' purchase in order to reach a capital figure.
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> …
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> The second element in this type of loss is the weakening of the plaintiff's competitive position in the open labour market: that is to say, should the plaintiff lose her current employment, what are her chances of obtaining comparable employment in the open labour market? The evidence here is plain — that, in the event (which one hopes will never materialise) of her losing her employment with Manchester Corporation she, with a stiff shoulder and a disabled right arm, is going to have to compete in the domestic labour market with women who are physically fully able. This represents a serious weakening of her competitive position in the one market into which she can go to obtain employment. It is for that reason that it is quite wrong to describe this weakness as a 'possible' loss of earning capacity: it is an existing loss: she is already weakened to that extent, though fortunately she is protected for the time being against suffering any financial damage because she does not, at present, have to go into the labour market.

31 In the case of *Teo Sing Keng v Sim Bian Kiat* [1994] 1 SLR 634, Yong Pung How CJ, delivering the judgment of the Court of Appeal, gave the following guidelines on when an award for loss of earning capacity is more appropriate than an award for loss of future earnings (at [36]–[37] and [40]):

Although loss of earnings and loss of earning capacity have sometimes been used interchangeably, they are separate heads of damage. Lord Denning MR in *Fairley v John Thompson (Design & Contracting Division) Ltd* at p 42 alluded to this difference:

> It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation for loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution in earning capacity is awarded as part of general damages.

The above passage was quoted with approval by Browne LJ in the leading English case on loss of earning capacity, *Moeliker v A Reyrolle & Co Ltd* at p 15, where the learned judge said:

> This court made it clear in *Robert v Heavy Transport (EEC) Ltd* and *Herod v Birds Eye Foods* that *Smith v Manchester Corp* laid down no new principle of law, and I entirely agree. *Smith v Manchester Corp* is merely an example of an award of damage under a head which has long been recognized — a plaintiff's loss of earning capacity where, as a result of his injury, his chances in the future of getting in the labour market work (or work as well paid as before the accident) have been diminished by his injury. This court made an award under this head in *Ashcroft v Curtin* three years before *Smith v Manchester Corp*. This head of damage generally arises where a plaintiff is, at the time of the trial, in employment, but there is a risk that he may lose this employment at some time in the future and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial.

….

An award for loss of earning capacity, as opposed to an award for loss of earnings, is generally made in the following cases:

(1) where, at the time of trial, the plaintiff is in employment and has suffered no loss of earnings, but there is a risk that he may lose that employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job;

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

32 It is apparent from the authorities quoted above that an award of loss of earnings, and not loss of earning capacity ought to be made where a plaintiff is able to identify a measurable loss of earnings sustained as a result of injury.

The Appropriate Award

33 In the present case, the plaintiff faced no difficulty in showing that her loss of income was real and assessable. The medical evidence combined with evidence from the occupational therapist and the plaintiff's ex-colleagues showed that the plaintiff was no longer able to find employment as a car salesperson. In particular, the evidence of the plaintiff's ex-colleagues established that the plaintiff's

visible limp would deter car companies from hiring her as a salesperson. Even if the plaintiff were to be successful in finding employment as a car salesperson, I was satisfied that the AR was justified in holding that the plaintiff could not cope with the job of a car salesperson. The AR was correct to hold that the plaintiff cannot sustain a job which requires her to stand for long hours and to carry out multiple tasks quickly and efficiently. I was satisfied that the plaintiff would face difficulty discharging job tasks such as test-driving manual cars, and lifting car bonnets, boot covers and seats. Therefore, I agreed that the plaintiff had proved on a balance of probabilities that she had lost her job as a car salesperson as a result of the accident. As a result of the change in employment occasioned by the accident the plaintiff had, demonstrably, suffered a loss of income. This was, therefore, a case in which an award for loss of future earnings was appropriate.

Multiplicand

The Defendant's Proposed Method of Calculation

34 The defendant contended that for the first year that the appropriate multiplicand should be $1,900, to reflect the plaintiff's failure to mitigate her losses sufficiently. I was not satisfied that the defendant had discharged his onus of proving that the plaintiff had failed to mitigate her losses. In my opinion, the plaintiff had acted reasonably by seeking employment as an administrative assistant. It should be noted that the plaintiff was on long medical leave up to 17 March 2008. She managed to find employment on 17 December 2007, even before her medical leave had expired. Given that the plaintiff's highest education level is "O" levels, I was not convinced that the plaintiff had failed to mitigate her losses sufficiently. Further, there was no evidence that the plaintiff had the knowledge to become a legal secretary without further training.

35 After the first year, the defendant argued, the plaintiff would have regained sufficient capacity to return to her previous employment with the help of surgery. Next, the defendant made the curious argument that the plaintiff could return to her previous job and earn 80% of her pre-accident income, simply because surgery may allow the plaintiff to regain 80% of her pre-accident work capacity. Therefore, the defendant submitted that the plaintiff should be awarded 20% of her pre-accident earnings for the next five years. I found the defendant's argument extremely difficult to follow for the following reasons. First, it was unclear whether Dr Leong's testimony in fact established that the plaintiff will regain 80% of her pre-accident work capacity after surgery. Dr Leong's statement that the plaintiff can "get back about 80%" was ambiguous and did not guarantee such an outcome. Secondly, it simply does not follow that an 80% increase in capacity to work automatically translates to an increase in income to 80% of her pre-accident earnings. Finally, an increase in the plaintiff's capacity to work did not necessarily mean that she would actually be employed as a car salesperson again. There was no evidence that the plaintiff's limp would be eliminated by the further surgery and the weight of the evidence indicated that as long as she had a perceptible limp the plaintiff was not likely to be re-employed in her former occupation.

36 I considered that even if the plaintiff underwent the surgical procedures recommended by Dr Leong, there was insufficient evidence to establish that the plaintiff's condition will improve sufficiently such that she would be able to return to her previous job in the near future, whether on a full-time or part-time basis. In particular, Dr Leong had himself stated that he did not know whether surgery would allow the plaintiff to return to her previous job. Like the AR, I found unrealistic the defendant's contention that the plaintiff may in the future return to her previous job on a part-time basis to sell automatic cars. There was not enough evidence to show that the plaintiff's condition would improve sufficiently to allow her to be re-employed as a car salesperson, whether she underwent surgery or not. I was persuaded by the evidence of the plaintiff's former employer and colleagues that the plaintiff was unlikely to find employment as a car salesperson, because of her

disabilities.

37 For the sake of completeness, I would briefly dispose of the defendant's argument that little weight ought to be placed on the evidence of three ex-colleagues of the plaintiff because their affidavits of evidence in chief have been worded very similarly. It is true that the affidavits of the three witnesses contained rather similar language. However, in the absence of proof that the facts stated in the affidavits did not represent facts actually perceived by the witnesses, there is no reason to disregard their affidavits. Furthermore, the witnesses' answers during cross-examination also did not show that the witnesses lacked personal belief in the facts they had stated in their affidavits of evidence in chief. Thus, I was not persuaded that less weight on to be placed on their evidence.

The Appropriate Multiplicand in the Present Case

38 In the period immediately preceding the accident, the plaintiff was earning an average monthly salary of $4,033. This figure was derived by taking the monthly average of her total income for the year of 2006. The defendant urged this court to instead adopt the value of $3,400 as representing the plaintiff's pre-trial average earnings. This figure was arrived at by taking the monthly average of the earnings made by the plaintiff during the entire three years she worked in Sonata Auto Pte Ltd. In my view, the AR was correct to take $4,033 as representing the plaintiff's pre-trial income. The plaintiff's income had been on an upward trend over the years prior to the accident. There was no reason to doubt that her income would have continued to increase, given that she was very industrious, and was one of the best salesgirls in the company. Taking the difference between the plaintiff's pre-accident income of $4,033 per month and post-accident income of $800 per month, the appropriate multiplicand to use is $3,233.

39 I agreed, however, that it was not appropriate for the same multiplicand to be used throughout the 15 year period covered by the award. This was because the evidence showed, first, that the plaintiff's condition could be improved and her disabilities somewhat lessened if she undertook the recommended operations, and second, the plaintiff's own character and abilities. The plaintiff came across, both in her own evidence and in that of her ex-colleagues, as a very capable person who was determined and who had an attractive personality. With such traits, it appeared to me very likely that the plaintiff would, as her condition improved, be able to re-train and take on better paying jobs even if these would still be in the area of general administration. The plaintiff was, in my view, capable of earning quite a bit more than $800 a month as her condition improved with surgery even if she could no longer aspire to the earnings of a car salesperson.

40 I therefore split the duration of the award into two equal halves of seven and a half years each. For the first half, the multiplicand remained at $3,233 per month. For the second period of seven and a half years, however, the multiplier was reduced by $700 to $2,533 on the basis that by then the plaintiff would be capable of earning at least $1,500 a month.

Multiplier

41 I agreed with the multiplier of 15 years used by the AR in the present case. The plaintiff was 27 years old at the time of the accident and 29 at the time of the assessment. A similar multiplier has been adopted in previous cases involving plaintiffs of similar age. In *Teo Seng Kiat v Goh Hwa Teck* [2003] 1 SLR 333 G P Selvam J allowed a multiplier of 18 for a 28-year-old plaintiff. In *Suriaty Bte Mohamed Sabit & Anor v Ng Soon Sai* [1996] SGHC 187 Goh Joon Seng J used a multiplier of 15 for a plaintiff who was aged 25 at the time of the accident and 28 at the time of assessment. In *Delgro Corp Ltd & Anor v Chia Siew Kiong* [1999] 4 SLR 745, Warren LH Khoo J commented that a multiplier of

12 for a plaintiff aged 36 was 'quite conservative'. In *Fu Yik Min v Khoo Kim Thong* [2004] SGDC 110 the district court judge applied a multiplier of 14 in a case involving a 28 year old plaintiff.

42 Therefore, I held that the multiplicand of $3,233 should be adopted for the first seven and a half years, and a reduced multiplicand of $2,533 should be adopted for the next seven and a half years. Thus, the total award for the plaintiff's loss of earnings was reduced from $581,940 to $518,940 ($3,233 x 12 x 7.5 + $2,533 x 12 x 7.5).

Conclusion

43 For the reasons given above, I varied the award for loss of earnings made by the AR from $581,940 to $518,940. I also ordered that costs of this appeal, fixed at $7,500 were to be paid to the defendant by the plaintiff. Further, the plaintiff was to pay the defendant's disbursements.