Shaw Linda Gillian v Chai Kang Wei Samuel
[2009] SGHC 187

Case Number : Suit 639/2006, RA 119/2009, 121/2009

Decision Date : 19 August 2009

Tribunal/Court : High Court

Coram : Chan Seng Onn J

Counsel Name(s) : P E Ashokan (KhattarWong) for the plaintiff; Anthony Wee (United Legal Alliance LLC) for the defendant

Parties : Shaw Linda Gillian — Chai Kang Wei Samuel

Damages

19 August 2009 Judgment reserved.

Chan Seng Onn J:

Brief Facts

1 The plaintiff sustained severe multiple traumatic injury with residual disabilities as a result of a road traffic accident on 6 December 2003. After the accident, the plaintiff pursued a full time degree course in the University of South Australia and obtained an Honours Degree in Health Science. After graduation, the plaintiff was unable to cope with full-time work at ACHA Health Inc ("ACHA") and obtained alternative part-time work in physiotherapy at PhysiOne instead.

2 Interlocutory judgment was entered in favour of the plaintiff. At the hearing for the assessment of damages, the plaintiff was awarded, *inter alia*, (a) S$135,000.00 as general damages for pain and suffering and loss of amenities; (b) A$209,078.66 for pre-trial loss of earnings; (c) A$305,715.04 for loss of future earnings; (d) A$15,000.00 for loss of earning capacity; (e) A$49,346.70 for cost of future medical expenses; and (f) A$91,804.99 for loss of annual leave. The plaintiff appealed against the quantum awarded for (a) to (e) and sought further relief for transport expenses in Singapore and Australia and expenses incurred by her parents and relatives during her recovery. The defendant sought to set aside the award for loss of future earnings, and appealed against the quantum awarded for (b), (d) and (f).

General Damages

Pain, suffering and loss of amenities

3 After careful evaluation of the evidence, I increased the damages for pain, suffering and loss of amenities by S$65,000 to a total of **S$200,000** for the reasons stated below. For clarity, I had considered and included the damages for future pain and suffering arising from future medical treatment and knee replacement surgery under this same head of general damages. This is separate from the future cost of medical treatment and knee replacement surgery.

Head Injury

4 The Assistant Registrar ("AR") adopted a component approach under structural, psychological and cognitive domains in the assessment of the damages under the above head of claim. I agree with

that approach.

(1) Structural head damage

5 In the award for structural head damage, the AR found that the plaintiff had sustained a fracture of the base of skull, traumatic brain injury ("TBI"), a right parietal scalp haematoma and a 3 cm long indentation on the right side of her head, and ordered a composite sum of S$29,000.

6 Broadly, I agree that the above injuries have been classified correctly under the structural domain.

7 The plaintiff sought a much higher composite award of S$108,000 claiming S$25,000 for base of skull fracture, S$75,000 for TBI, and a further S$4,000 each for right parietal scalp haematoma and right head indentation respectively.

8 In arriving at the proper award under this claim, I have given due consideration to the fact that the severe TBI sustained by the plaintiff did result in a total loss of consciousness with a GCS score of 3/15 (which I understand is the lowest possible). It was indeed so severe that she was rendered unable to sustain her own breathing and required life-saving emergency intubation and she had to rely on external ventilation from 6 December 2003 to 13 December 2003 to stay alive. She suffered traumatic subdural and subarachnoid haemorrhage, developed such significant cerebral oedema as to require invasive monitoring of her intracranial pressure.

9 In my view, a higher award should be given in the light of the extensive structural head damage and I therefore raised the award to **S$54,000**.

(2) Psychological damage

10 In the award for psychological damage, the AR found that the plaintiff had suffered depression, emotional lability and amnesia and awarded a composite sum of S$10,000.

11 Again, I agree that the above injuries have been correctly classified under the psychological domain. The plaintiff sought to increase the composite award to S$40,000.00.

12 In arriving at the proper quantum under this head, special consideration was given to the psychologist's evidence that the plaintiff was still suffering from depression and this was further complicated by denial 5.5 years after the accident. I accept the psychologist's testimony that denial can exist in depressed patients as a coping strategy and its existence makes further psychological treatment difficult. I therefore find that the plaintiff's non-compliance with psychological therapy as a result of her denial of her depression cannot be taken against her. Further consideration was given to the expert's assessment that her depressive symptoms would likely continue to have a significant impact on her daily life (see p1570 ABOD).

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

(3) Cognitive damage

14 In the award for cognitive damage, the AR found that the plaintiff had recovered well from her injuries. Any residual disability in this regard is likely to be mild and is unlikely to extensively affect all or even most of her cognitive abilities. After the injury, she further completed an honours degree in

the university, albeit with some difficulty. I accept the psychologist's finding that there remain residual cognitive difficulties, with moderate impairment in information processing and mild impairments in verbal abstract reasoning, new learning, memory and verbal fluency. However, it is also the plaintiff's own expert witness's assessment that her cognitive impairments do not appear to have a significant impact on her daily life. Finally, due regard was also given to the expert's evidence that it was in fact her depressive symptoms, and not cognitive impairments that would continue to have a significant impact on her daily life.

15 Looking at the totality of the evidence before me, I am of the view that the quantum of the award under cognitive damage should reflect its relative contribution to the impact on her daily life. This being less than that of depression, I find the AR's award of **S$10,000** reasonable and shall not disturb it.

Laxity of right anterior cruciate ligament and meniscal injury

16 I agree with the AR's finding that the injuries to the right anterior cruciate ligament ("ACL") and meniscus had in fact resulted from the accident. In her appeal, the plaintiff sought to increase the AR's award of S$5,000 to S$20,000 by submitting that the injuries were serious and would thus affect the stability of the right knee joint. Anatomically, the stability of the knee joint is contributed by the strength of the muscles around the knee (chief of which include the quadriceps femoris anteriorly and the hamstring muscles posteriorly), its associated ligaments (the ACL, posterior cruciate ligament and the medial and lateral collateral ligaments) and the two menisci. Dr A Pohl's evidence was that the plaintiff had sustained quadriceps wasting, laxity of the anterior cruciate ligament and an associated meniscal injury. Functionally, the plaintiff had also sustained a loss of ten degrees of flexion in that knee. I accept Dr Pohl's evidence that the ACL injury and its associated meniscal injury would predispose the plaintiff to early or accelerated degeneration of the right knee, which may necessitate total knee replacement and even a further revision surgery in future. In the presence of muscular (*i.e*. quadriceps wasting), ligamentous (*i.e*. ACL laxity), and meniscal injury, it would not be unreasonable to accept that the stability of the right knee joint would be affected. This is consistent with the ample documentation of residual functional impairment and weakness of the right lower limb. I accept Dr Pohl's evidence on cross-examination that there was in fact instability to the right knee as a result of the injury. The defence has also not produced any evidence to the contrary.

17 On the other hand, I must emphasise that Dr Pohl had only pointed to a laxity but not an overt tear of the right ACL. Dr Pohl had also not recommended that the patient undergo any procedures to reconstruct the damaged ligament. Furthermore, his own assessment of the other ligaments that support and contribute to the stability of the right knee joint, namely the posterior cruciate, medial and lateral collateral ligaments was that these were all stable and strong. Moreover, Dr Pohl's evidence on cross examination was that an operation to excise the torn meniscus (*i.e*. meniscectomy) would in fact help to increase the stability of the right knee joint. The plaintiff had already been separately awarded the full sum for such treatment.

18 I thus arrived at my conclusion that although there was instability resulting from the accident, such instability is not likely to be so extensive that it would warrant an award to the full quantum that was submitted by the plaintiff. However, as the award by the AR was on the low side, I shall increase the award to **S$10,000**.

Foot injuries

19 The plaintiff suffered a severe degloving injury to the right foot and the right ankle (see p369 PCBD). This was further complicated by the development of *Pseudomonas* and methicillin resistant

Staphylococcus aureus wound infections of her right foot wound which necessitated prolonged treatment with intravenous antibiotics, repeated operations for wound debridement, application and re-applications of Vacuum Assisted Closure suction dressing. As a result of the injury, she required a split skin graft of tissue harvested from her right thigh for closure of a tissue defect in the right foot. The plaintiff further sustained a 4x15 cm scar around the sides and bottom of the right foot. She further developed muscle wasting in her right foot and mild flexion contractures of four of the toes in her right foot.

20 The AR awarded **S$12,000.00** for the pain and suffering caused by the degloving injury and the scar. This award includes pain and suffering caused by the initial injury and its associated treatment. The plaintiff sought to increase the award to S$25,000.00 but offered no justification other than to assert that the AR's award was too low. The defendant did not contest the award under this head of claim.

21 I find no reason to disturb the AR's award. The award for muscle wasting in her right foot and mild flexion contractures shall be subsumed under the head of claim for muscular weakness below.

Reduced dexterity, muscular strength, tone and coordination

22 Under this head of claim, there was considerable contention as to whether the plaintiff had indeed suffered "right hemiparesis". The plaintiff's counsel further pointed out that the AR had erred in finding that the term "right hemiparesis" does not appear anywhere. A key component of the definition of hemiparesis is that there must be a neurological basis for the weakness, as the plaintiff's counsel had rightly point out in his submissions. The weakness sustained by the plaintiff in her right upper limb and lower limb had obviously been caused by a combination of both musculoskeletal and neurological components. The plaintiff had after all sustained injury to the bones, muscles, nerves and other soft tissues, all of which were amply documented. Where there may be a variety of factors contributing to a functional deficit, the court need not overly concern itself with the precise mechanisms on how the deficit had been caused. This is an exercise reserved for the medical professionals involved in the plaintiff's care for such understanding has important implications on her treatment. Rather, the court should focus its attention on understanding the severity of the functional deficits that had resulted from the sum of all her injuries, however complex their underlying mechanisms may be. In other words, the court seeks to broadly understand how severe her weakness is and how the functional impairments arising from this weakness would affect the plaintiff, and not trace precisely which neuronal pathways, muscles or bones were damaged that resulted in the weakness. Accordingly, the debate on whether there was in fact "right hemiparesis" or "right hemiplegia" was quite unnecessary. I therefore agree with the AR's approach in making an award in terms of overall impairment of the function of the upper limbs, trunk and lower limbs.

23 In arriving at the proper award, I have decided to look at the impact of the above deficits on both her work and her daily life.

24 Reduced dexterity, muscular strength and coordination would affect a physically demanding job such as physiotherapy more than it would to a more sedentary desk job. I accept the plaintiff's evidence that repeated exposure to prolonged standing, awkward postures, lifting of heavy patients and equipment could cause chronic pain and fatigue and may in fact expose her to risk of further injury as she performs her work as a physiotherapist on a daily basis. An award for pain and suffering and loss of amenities at work is separate and distinct from an award for degradation of work efficiency and/or capacity.

25 In terms of the impact on her daily life, I note that she has impaired ability to perform

housework and has been rendered unable to partake in many of the activities that she was previously able and active in doing like tap dancing, softball or tennis. At the age of 26, the plaintiff had been rendered unable to run. This is a significant impact to a young person who has to carry this burden with her for the rest of her life. I also agree with the plaintiff that her ability and willingness to engage in recreational bushwalking (albeit slower and for shorter durations than before) should not be construed against her. An elderly 80 year old who as a result of an accident can now only do bushwalks might not have suffered much impediment compared to his peers. But a 26 year old who as a result of her accident, can now only do short and slow bushwalks has unquestionably sustained significant restrictions to her daily life compared to other peers of her age.

26 In summary, I find that the reduced dexterity, muscle tone, coordination and weakness which had resulted from the sum of all her various injuries have caused considerable pain and suffering and caused significant loss of amenities, with significant impact on both her work and her daily life. As these will continue indefinitely into the future and are long term in nature, I therefore increase the AR's award to the full amount asked for by the plaintiff of **S$40,000**.

Loss of future earnings

27 The AR awarded damages of A$448,195.04 (the AR's Grounds of Decision stated the damages under this heading as A$305,715.04 due to an error in calculation) for the loss of future earnings. Both the plaintiff and defendant appealed against the award. The plaintiff submitted that the award should be increased to A$593,650.10. The defendant contended that damages should only be awarded for loss of earning capacity and not loss of future earnings.

Whether the plaintiff is entitled to damages for the loss of future earnings

28 The defendant argued that since the plaintiff was earning a higher salary after the accident, the plaintiff had not suffered a loss of future earnings. The AR disagreed with the defendant because the plaintiff would have suffered a loss of future earnings if it could be shown that her earnings in the future in her post-accident condition were likely to be lower than what her earnings in the future would be if the accident had not happened. The AR noted that based on the last available information when she was working at ACHA prior to the accident, there were periodic raises in the plaintiff's hourly rate. Therefore, I agree with the AR that the plaintiff is entitled to damages for the loss of future earnings. I shall now deal with the more difficult issue, which is to derive a fair and best estimate of the loss of future earnings based on the available evidence before me.

Multiplier

29 The AR used a multiplier of 16 in calculating the award of damages for the loss of future earnings. The AR felt that this was appropriate given that the plaintiff is presently 31 years old. She was 26 years old at the time of the accident. There is no evidence of what the retirement age is in Australia, the country in which the plaintiff is now living. In Singapore, the Minister has prescribed under s 4 of the Retirement Age Act (Cap 274A, 2000 Rev Ed) that the minimum retirement age for employees is to be 62 years of age. In the absence of such evidence, I shall therefore adopt 62 years as the retirement age for the plaintiff, which then gives the plaintiff a further 31 years of working life.

30 The plaintiff appealed against this and submitted that the multiplier should be increased to 18 on the basis that the plaintiff would likely work up to at least the age of 65 if not more. Given the lower labour participation rates for women, the possibility of marriage and the husband subsequently becoming the sole breadwinner with the wife staying at home to look after the children, it may be a bit too optimistic to use 65 years as the age at which the plaintiff is likely to stop working. In my

view, using 62 years as the likely retirement age is already generous. I therefore agree with the AR that a multiplier of 16 is appropriate.

31 To guide me in the assessment of the multiplier, I note that the amount of damages is not assessed in Singapore dollars but in Australian dollars and it is fair to have cognisance of the higher rate of interest per annum in Australia for Australian dollars over that in Singapore for Singapore dollars. I computed that the number of years' purchase to afford the required rate of interest of 4 % p.a. rate of interest for an annual income in Australian dollars with 31 years to run is 17.59 years. (This figure may be calculated or obtained from a present value annuities table.) Using a multiplier of 16 essentially discounts 1.59 years off the multiplier of 17.59 years for uncertainties in the future due to the vicissitudes of life (*e.g*. ill health, accident, death and so forth). In ascertaining the multiplier value, I have to factor into my assessment the vicissitudes of life and give a minor discount because the assumption - that had the accident not happened, the plaintiff will with one hundred percent certainty be in continuous good health and be able to work until she reaches the full retirement age - may not necessarily hold true. Accordingly, the adoption of 16 years as the multiplier is not unreasonable in the circumstances of this case.

Estimate of yearly earnings

32 In calculating the yearly loss of future earnings, the AR took the last available evidence of the hourly rate for both ACHA and PhysiOne and applied this same hourly rate throughout the next 31 years of the plaintiff's working life. The AR found that the plaintiff had, in cross-examination, stated that she was "near top increment" in her job in ACHA before her accident. The AR was of the view that this could suggest that the plaintiff's hourly rate at ACHA had she not had the accident could have plateaued in the future, but in my view, there was insufficient evidence to suggest either way. Thus, the AR decided to err on the side of caution and calculated the loss of future earnings on the basis of the last available hourly rate for both ACHA and PhysiOne.

33 However, the plaintiff argued that the AR was wrong in doing so. The plaintiff submitted evidence that the plaintiff's hourly rate at her job in ACHA before her accident rose from time to time, and thus argued that different rates should be applied to different periods of the multiplier. On the evidence, the plaintiff argued that the plaintiff's future hourly rate at ACHA had she not had the accident would have been a predicted increase of A$3.00 per hour every 6 years.

34 I note that in the plaintiff's calculations, the plaintiff failed to take into account the possibility that the plaintiff's current hourly rate at PhysiOne would also increase in the future. There was evidence that when the plaintiff started her casual work at PhysiOne after the accident in February 2007, her hourly rate was A$32.00. In March 2008, it increased to A$35.00. This increase should also be taken into account. Therefore the amount deductible from the award of damages should be higher than what the plaintiff had submitted. In other words, the plaintiff's calculations ought be amended such that the plaintiff's predicted future hourly rate at her post-accident job at PhysiOne (which was shown to have increased over time) would be deducted from the plaintiff's predicted future hourly rate at ACHA had she not had the accident (which the plaintiff predicted to be an increase of A$3.00 per hour every 6 years).

35 However, even if the plaintiff's calculations were to be amended as such, there remains the difficulty of properly quantifying the future increase in the plaintiff's hourly rate at PhysiOne. From the evidence, it can be seen that the plaintiff's hourly rate at PhysiOne had increased by A$3.00 per hour from 2007 to 2008. Thus, it may be reasonable to predict that in every few years, the plaintiff's future hourly rate at PhysiOne will increase by at least A$3.00 per hour. If it is assumed that the plaintiff's future hourly rate at PhysiOne will increase at almost the same rate as the plaintiff's

predicted future hourly rate at ACHA had she not had the accident (*i.e*. a predicted increase of A$3.00 per hour every 6 years), the computed damages should be no different from the AR's calculations (*i.e*. damages computed by applying the same hourly rate of both ACHA and PhysiOne for all periods of the multiplier). This is because the difference between the hourly rates at ACHA and at PhysiOne will remain constant if it is assumed that both hourly rates increase at the same rate over time.

36 Therefore, I uphold the AR's award of **A$448,195.04** (after correction of the mathematical error in the AR's computation) for loss of future earnings. This is because the AR's method of computation would likely have come to the same result as using the plaintiff's method of computation but taking into account the possibility that the plaintiff's current hourly rate at PhysiOne would also increase in the future.

Loss of earning capacity

37 The AR awarded damages of A$15,000 for loss of earning capacity. The plaintiff appealed against this and asked that it be increased to A$200,000. The defendant submitted to the contrary that the AR's award should be decreased to A$10,000 as per the "cumulative approach", or alternatively that a sum of between A$50,000 and A$60,000 be awarded as per the "alternate measure" approach should the loss of future earnings not be awarded.

38 In my opinion, loss of earning capacity can still be awarded if it can be shown that there is an appreciable risk that the plaintiff would lose her post-accident job and subsequently, as a result of her disabilities or injuries, be unable to find a similar paying job. The defendant has raised the concern that there may be overlapping compensation if both loss of future earnings and loss of earning capacity are awarded at the same time. It should be noted that in the calculations of loss of future earnings above, it was assumed that the plaintiff would continue working at her post-accident job until retirement age. The award for loss of future earnings does not take into account the risk that the plaintiff may lose her post-accident job and again face disadvantages in the job market due to her disabilities or injuries. If it can be shown that this risk is a real one, the risk can be taken into account by an award for loss of earning capacity. As such, there will not be overlapping compensation by awarding both loss of future earnings and loss of earning capacity since the latter takes into account a risk which the former does not.

39 I agree with the AR that to show there is a risk that the plaintiff may lose her post-accident job and face disadvantages on the job market, the plaintiff must show two things: first, that there is a risk that the plaintiff would lose her current post-accident job; and second, that the plaintiff will likely be disadvantaged in finding a similar paying job (*i.e*. with equivalent remuneration as her current post-accident job) because of her injuries or disabilities.

40 In response to the first question, the AR found that the plaintiff had not shown that there was any appreciable risk whether now or in the future that she would lose her present part time jobs. As for the second question, the AR could not find any conclusive evidence that the plaintiff would be much disadvantaged by her injuries from finding commensurate part time employment. Thus, the AR gave a conservative award of A$15,000.

41 However, the AR may have overlooked the fact that the plaintiff might have to undergo total knee replacement and revision knee replacement sometime in the future. After her knee surgery, there is a likelihood that the plaintiff might not be able to continue with her present rather physically demanding job of being a part time physiotherapist. It is not easy to assess how much difficulty the plaintiff will have in finding an alternative sedentary desk job, which pays just as well as her present

post-accident job. With an Honours Degree in Health Sciences and given her disabilities, my assessment is that there will be some difficulty, but not insurmountable, in securing an alternative desk job. It may take her a longer time perhaps to find suitable alternative employment which therefore means a loss of income whilst looking for another job. Given her older age at the time of the knee surgery and having to start a new and different career in which she may not have much experience, she might well have to be contended with a pay lower than her current post-accident job. Although it is difficult to price these uncertainties, I am of the view that the award of A$15,000 is on the low side. I shall increase it to **A$50,000**.

Loss of annual leave

42 The plaintiff no longer has the paid annual leave she enjoyed in her pre-accident full time job. Thus, the plaintiff proposed that she be compensated for annual leave according to the figures provided in the Australian Workplace Agreement document: *i.e*. 4 weeks of paid annual leave per year. Using this proposed figure of 4 weeks of paid annual leave per year, the last available evidence of her weekly income at ACHA prior to the accident, and a multiplier of 16 years, the AR awarded damages of A$91,804.99 for loss of annual leave. The computation is as follows:

Loss of annual leave (4 weeks annual leave per year = 2 pay periods per year)

= A$38.769 per hour x 74 hours per pay period x 2 pay periods per year x 16 years multiplier

= A$91,804.99

43 The defendant appealed against this award and submitted that (i) the claim for loss of annual leave should not be allowed; or (ii) alternatively, if the claim was allowed, a deduction should be given to avoid overlapping compensation.

44 The defendant argued that the claim for loss of annual leave should not be allowed because the Australian Workplace Agreement produced by the plaintiff did not pertain to ACHA but pertained to a company called McCole & Schapel Pty Ltd trading as PhysioOne. I disagree with the defendant since the Australian Workplace Agreement is a standard document which would most likely have applied to ACHA as well.

45 The defendant argued in the alternative that if the claim for loss of annual leave was allowed, a deduction should be given to avoid overlapping compensation. The defendant used a quick hypothetical to explain this point. Assume:

(a) A man earns A$100 a week;

(b) That as a result of some injuries and disabilities, his earnings drop to A$80 a week; and

(c) The tortfeasor is made to compensate the man the difference of A$20 a week,

it follows that the man suffers no loss.

46 Assume further that he goes on leave for a week during his current job which does not have any paid leave, then he would not be paid at all, whereas he would have been paid A$100 in his previous job. His loss might at first glance appear to be A$100 for a week but he would have been compensated A$20 a week during that period. His further loss due to taking the current job that has no paid leave would therefore be A$80 and not A$100 since he had already been compensated A$20

in any event.

47 I agree with the defendant based on the hypothetical used. I note that I have already awarded the plaintiff damages for loss of future earnings (which is analogous to the A$20 compensation paid by the tortfeasor in the hypothetical). If I were to award loss of annual leave based on the plaintiff's last available evidence of her weekly income at ACHA prior to the accident (which is analogous to the A$100 rate a week), there would be overlapping compensation since I have already awarded loss of future earnings. Instead, the loss of annual leave should be computed based on the plaintiff's last available evidence of her weekly income at her post-accident job at PhysiOne (which is analogous to the A$80 rate a week) as follows:

> A$35 per hour x 34 hours per week x 4 weeks of annual leave per year x 16 years multiplier = **A$76,160**

Cost of future medical expenses

48 The plaintiff appealed against the award made for (i) operative total knee replacement and revision knee replacement; (ii) neurophysio visits; and (iii) podiatry treatment.

Operative total knee replacement and revision knee replacement

49 The AR awarded A$8,500 for the operative total knee replacement treatment but gave no award for the revision knee replacement. The plaintiff claimed A$17,000 for the operative total knee replacement treatment and A$18,000 for the revision knee replacement.

50 With regard to the operative total knee replacement treatment, the expert had said that there was a 50% or slightly higher chance that the treatment would be necessary 15 to 20 years from now, if there was meniscal injury. The AR thought it fair to discount 50% off the A$17,000 to reflect the possibility that it was not certain such treatment would be needed, and cited *Soon Pook Seng Arthur v Oceaneering International Sdn Bhd* [1995] 3 SLR 531 for such a proposition.

51 The AR gave no award for the revision knee replacement. Dr Pohl's evidence was that if the plaintiff went for total knee replacement at an early stage in life, she "may well require" revision knee replacement surgery in about 15 years after the initial total knee replacement. The AR was of the view that this was a contingency of a contingency, making the plaintiff's claim too speculative to make any award.

52 With regard to the operative total knee replacement treatment, I agree with the AR that it is fair to discount 50% off the A$17,000 to reflect the probability that such treatment would even be needed in the first place. As for the revision knee replacement, I note that the expert Dr Pohl had explained that the expected longevity of a primary or revision total knee replacement is approximately 15 years (see the plaintiff's bundle of documents pg 18). Given the plaintiff's young age at the time of the injury and in the event the plaintiff does undergo the operative total knee replacement treatment, there becomes a real possibility (and not merely a speculative one) that a revision knee replacement will be needed in about 15 years since that is the expected longevity of the primary knee replacement. In fact, Dr Pohl's evidence is that the plaintiff may in fact even require two or more such revision procedures during her lifetime. Again, none of the above evidence was ever challenged by the defendant. Based on the evidence before me, I am satisfied that it is entirely plausible and likely that the plaintiff would have to undergo at least one revision surgery after her initial total knee replacement prosthesis wears out approximately 15 years after the initial operation. Thus, I have chosen to view the operative total knee replacement and revision knee replacement together as a

continuous series of treatment costing A$35,000 (A$17,000 + A$18,000) in total. However, because there is approximately a 50% chance that the knee replacement is even necessary to begin with, this should be reflected by a 50% discount off the A$35,000.

53 I therefore award **A$17,500** for the combined claim of medical expenses for the operative total knee replacement and revision knee replacement procedure during her lifetime.

Neurophysio visits

54 Three to four neurophysio visits are required annually to monitor balance, coordination and prevention of secondary joint strain at A$110 per visit for 20 years. The AR used a multiplier of 13 years and awarded:

A$110 x 4 x 13 years = A$5,720

55 The plaintiff submitted that the award should be increased to A$8,800 on the basis that a multiplier of 20 years was more appropriate.

56 I agree with the AR that a multiplier of 13 years is more appropriate given that the treatments will last 20 years. As a rough check that the 13 years multiplier is not unreasonable, I computed that the number of years' purchase to afford the required rate of interest for Australian dollars in Australia of 4 % p.a. rate of interest with 20 years to run is 13.59 years. (This figure may also be obtained from a present value annuities table.) Therefore I uphold the AR's award of **A$5,720**.

Podiatry treatment

57 The AR awarded A$10,800 for podiatry treatment after giving a discount because of the multiplier effect. The plaintiff asked for A$12,600 on the basis that a multiplier of 20 years without any discount would be appropriate.

58 I agree with the AR that there should be a discount given because of the multiplier effect, and thus uphold the award of **A$10,800**.

Medical leave for future treatments arising from accident injuries

59 The plaintiff claimed 1 week's medical leave for the arthroscopy treatment and 3 months leave each for the total knee replacement and the revision knee replacement. The plaintiff asked for an award of:

A$1,297.10 (for 1 week MC for the arthroscopy treatment) +

A$15,565.20 (for 3 months MC for the total knee replacement) +

A$15,565.20 (for 3 months MC for the revision knee replacement)

= A$32,427.50

60 The AR did not give any award for medical leave for treatment. This was because the AR was not referred to any evidence that prescribed such medical leave for the treatments other than an unsubstantiated reference to one "Dr Tony Spriggins" who did not provide any report.

61 I agree in principle that the plaintiff would be entitled to claim for paid medical leave for her

future surgeries as it is clear in my mind that such leave will in all probability be given. However, I am of the view that the quantum of medical leave claimed is rather extravagant. I assessed that the medical leave for arthroscopy treatment should be halved and that for the knee replacement should be reduced to one month. This is calculated to be A$11,025.35. However, as there is a 50% chance that the knee surgeries may not be required, I will discount the above calculated amount by half.

62 Accordingly, I will allow an award of **A$5,500** for medical leave for future treatments arising from the accident injuries.

Cost of future transport expenses

63 The AR did not make any award under this heading. The plaintiff appealed against this and asked for A$5,000.

64 I agree with the plaintiff that since the plaintiff requires future medical treatment, the plaintiff will incur future transport expenses when she goes for her future medical treatment and surgeries. I think a fair amount would be about **A$3,000**. In assessing the amount to be awarded, I took into account the following:

(a) The wide range of parking charges from A$2 to A$25 (refer to NE1 page 25 line 5 to 9).

(b) Where parking is needed for several hours or even the whole day (for instance), then the plaintiff in mitigating the damage ought to consider taking public transport where the parking charges would far exceed the cost of public transport.

(c)As the award is an amount to be paid upfront, a discount must be given to obtain the "present value" amount paid now as damages for the cost of transport expenses to be incurred in the future.

Special Damages

Pre-trial loss of earnings

65 The AR gave an award of A$209,078.66 for the plaintiff's pre-trial loss of earnings. The plaintiff appealed against this award and submitted that it should be increased to A$233,456.44. The defendant cross-appealed for this award to be lowered by A$25,500.00.

Pre-trial loss of earnings from ACHA

66 The plaintiff suggested that the pre-trial loss of earnings should be calculated based on the average number of hours worked by the plaintiff in her 5 month-long job at ACHA as a full time physiotherapist (which ended with the accident) times the basic hourly rate applicable. The basic hourly rate apparently increased from time to time.

67 The defendant however suggested that the pre-trial loss of earnings should be calculated based on the average of total annual incomes from July 2000 to June 2004, which amounted to A$51,943.00. The plaintiff had been working as a physiotherapist since 1999, but the defendant accepted that the period before July 2000 was when she was just starting out in her career and thus was not reflective of her true income.

68 The AR adopted the plaintiff's method of calculation. I agree with the AR that often the last available salary figure is most representative of what the plaintiff earned closest to the period for

which the court must make an assessment. This is true in the case at hand, and furthermore the AR had found clear evidence that the plaintiff's hourly rates increased from time to time. Thus, I agree with the AR that the plaintiff's method of calculation would be more accurate.

(1) 0.4 instead of 0.8 occasions per pay period

69 However, there remain certain differences between the AR's and the plaintiff's computation of the pre-trial loss of earnings from ACHA. One of them is due to the computation using different numbers for the occasions per pay period. The AR found that the plaintiff was on call for 4 occasions (and not 8 occasions) over weekends at A$15 per occasion. Thus, I will adopt the AR's calculations based on 0.4 occasions per pay period instead of the plaintiff's calculations based on 0.8 occasions per pay period.

(2) Paid annual leave

70 During the period from 6 December 2003 to 10 January 2004, the plaintiff was on paid annual leave as she was holidaying in Singapore when she met with the accident on 6 December 2003. The defendant argued that since the plaintiff was on paid annual leave, she did not suffer any loss at all during this period.

71 The AR awarded the amount of A$6,017.58 in damages for the period from 6 December 2003 to 10 January 2004.

72 However, I agreed with the defendant that the plaintiff did not suffer any loss of earnings for this period since she was on paid annual leave. The AR's award under this item of damage should therefore be reduced by A$6,017.58.

(3) Casual work performed by the plaintiff

73 There was some evidence that the plaintiff did some casual data entry and data analysis work for a few months at the end of 2004 and earned some income (in spite of being on medical leave). According to the plaintiff's income tax documents, she earned A$3,410.00 during the period of 1 July 2004 and 30 June 2005, which the defendant surmised must be from the casual work performed. I agree with the AR that a plaintiff cannot claim for losses she has mitigated. Therefore, the AR was correct in deducting from the total pre-trial loss of earnings the income earned by doing casual work.

(4) Full time honours university degree

74 For the period from January 2005 to March 2006, the plaintiff was taking a full time Honours Degree in Health Science at the University of South Australia. The defendant argued that the plaintiff should not be awarded any damages during this period because she would not have been working anyway and also because she was bettering herself. However, the plaintiff submitted that she would not have undertaken the full time degree but for the fact that she was unable to go back to work full time as a physiotherapist due to her injuries.

75 I agree with the AR that the plaintiff should be awarded damages for the period from January 2005 to March 2006. During this period, the plaintiff was on medical leave. If she had not undertaken the full time degree, she would have been unable to work in any case. Thus, the plaintiff is entitled to loss of earnings during this period regardless of whether she had remained idle or used her time to undertake a degree course. I also add that with an Honours Degree in Health Science, it increases her chances of finding another equivalent paying job in the future should she be unable to continue

working in her present physically demanding post-accident job as a physiotherapist due to the injuries sustained and the consequences of the future knee surgeries. If I had felt that the plaintiff would have great difficulty finding another replacement post-accident job that paid as well, I might well have increased substantially the A$50,000 award for loss of earning capacity that I have given above. Looking at things from a different perspective, getting a degree to improve herself has helped to mitigate the damages for loss of earning capacity in the future, particularly, after her knee replacement surgery. Otherwise, the defendant would have to pay much higher damages for loss of earning capacity had the plaintiff not used her medical leave to study and better prepare herself for alternative jobs in the future. It would not be right for the defendant to use that against her now.

Pre-trial loss of earning from Sportsmed.SA

76 The plaintiff claimed that she worked for Sportsmed.SA part time before the accident. However, the AR could not find any conclusive documentary evidence of such employment and made no award for any pre-trial loss of earning from Sportsmed.SA.

77 The plaintiff appealed against the AR's decision and as supporting evidence of her part time work at Sportsmed.SA before the accident, she submitted a statement of income from Sportsmed.SA for services rendered from 2007 to 2008 (which were after the accident) totaling A$909.60 (which the plaintiff in her submissions rounded up to A$1,000).

78 I agree with the AR that evidence of employment at Sportsmed.SA after the accident is not evidence of employment at Sportsmed.SA before the accident. I also agree with the AR that the plaintiff's income from her part time employment at Sportsmed.SA after the accident should actually be deducted from the award of damages payable by the defendant. As the AR omitted to factor this into his calculations, I shall deduct A$1,000 from the sum arrived at by the AR.

Total sum for pre-trial loss of earnings

79 For the plaintiff's pre-trial loss of earnings, I award the following:

> A$209,078.66 - A$6,017.58 (the paid annual leave immediately after the accident) - $1000 (the mitigation from the part time employment).= **A$202,061.08**

Transport expenses incurred in Australia and Singapore

80 The AR only awarded A$147.90 for the plaintiff's transport expenses incurred in Australia because this was the only item which had documentary proof in the form of a receipt.

81 The plaintiff asked for A$1,000 for transport expenses incurred in Australia, and for A$1,000 for transport expenses incurred in Singapore. Since the plaintiff was unable to provide any other documentary evidence, for instance in the form of taxi receipts, I uphold the AR's award of **A$147.90**.

Expenses incurred by the plaintiff's parents in Australia and during their visits to Singapore to help her in her recovery

82 The AR did not make any award under this heading. The plaintiff appealed against this and asked for A$6,211.06 and S$3,308.04 for her claim for expenses incurred by her parents in Australia and Singapore respectively to help in her recovery.

83 To substantiate her claim, the plaintiff produced evidence of Dr Wong Merng Koon's opinion that "having…her parents being around supervising her other needs would contribute to her physical recovery despite the fact that she would recover". However, Dr Wong Merng Koon was unable to quantify the percentage of recovery which could be attributable to the presence of her parents with any scientific precision.

84 It would be unfair to expect the plaintiff to prove this aspect with scientific precision. However, Dr Wong Merng Koon's opinion indicated that the plaintiff would still have recovered even if her parents were not by her side. As such, these were unnecessary expenses which the defendant should not have to pay.

Conclusion

85 Set out in bold in the last column of the table below are the amounts I awarded for the various items:

No.	Item Description	Amount awarded by the AR	Plaintiff's submission on appeal	Defendant's submission on appeal	**Amount awarded**
1. GENERAL DAMAGES (Total for general damages = $200,000 + A$641,201.74)					
1.1	**Pain, suffering and loss of amenities**				
	Head injury				
	- structural head damage	$29,000	$108,000	No appeal	**$54,000**
	- psychological damage	$10,000	40,000	No appeal	**$25,000**
	- cognitive damage	$10,000	30,000	No appeal	**$10,000**
	Tongue and throat muscle injuries	$8,000	No appeal	No appeal	$8,000
	Leg injuries				
	- tibia and fibula injuries	$28,000	No appeal	No appeal	$28,000
	- ACL laxity and meniscal injury	$5,000	$20,000	No appeal	**$10,000**
	- Foot injuries	$12,000	$25,000	No appeal	**$12,000**
	- Popliteal fossa injuries	$7,000	No appeal	No appeal	$7,000

	- Other lower body injuries	$6,000	No appeal	No appeal	$6,000
	Muscular weakness (reduced dexterity, muscular strength, tone and coordination)	$20,000	$40,000	No appeal	**$40,000**
		Subtotal for pain, suffering and loss of amenities: $200,000			
1.2	**Loss of future earnings**	A$448,195.04 (With calculation error in AR's Grounds of Decision of A$305,715.04 corrected)	A$593,650.10	$0	**A$448,195.04**
1.3	**Loss of earning capacity**	A$15,000	A$200,000	A$10,000	**A$50,000**
1.4	**Loss of annual leave**	A$91,804.99	No appeal	Appealed for amount to be reduced	**A$76,160**
1.5	**Cost of future medical expenses**				
	Intermittent physiotherapy	A$580	No appeal	No appeal	A$580
	Counselling and neuropsychological review	A$3,300	No appeal	No appeal	A$3,300
	Anti-depressants	A$818.80	No appeal	No appeal	A$818.80
	Right knee MRI and arthroscopy	A$3,072	No appeal	No appeal	A$3,072
	Excision of meniscus	A$2572	No appeal	No appeal	A$2572
	Operative total knee replacement	A$8,500	A$17,000	No appeal	**A$17,500**
	Revision total knee replacement	A$0	A$18,000	No appeal	
	Compression stockings	A$5,627.30	No appeal	No appeal	A$5,627.30

	XMA skin cream	A$3,036.60	No appeal	No appeal	A$3,036.60
	Gym and pool membership	A$5,320	No appeal	No appeal	A$5,320
	Annual neurophysiotherapist visit	A$5,720	A$8,800	No appeal	**A$5,720**
	Podiatry treatment	A$10,800	A$12,600	No appeal	**A$10,800**
		Subtotal for cost of future medical expenses: A$58,346.70			
1.6	**Medical leave for future treatments**	A$0	A$32,427.50	No appeal	**A$5,500**
1.7	**Cost of future transport expenses**	A$0	A$5,000	No appeal	**A$3,000**
2. SPECIAL DAMAGES (Total for special damages = $73,092.92 + A$253,100.79)					
2.1	**Pre-trial loss of earnings**	A$209,078.66	A$233,456.44	A$183,578.66	**A$202,061.08**
2.2	**Transport expenses incurred in Australia and Singapore**	A$147.90	A$2,000	No appeal	**A$147.90**
2.3	**Expenses incurred by the Plaintiff's parents in Australia and during their visits to Singapore to help her in her recovery**	A$0	A$9,519.10	No appeal	**A$0**
2.4	**Medical expenses incurred in Singapore**	S$73,092.92	Agreed	Agreed	S$73,092.92
2.5	**Medical expenses incurred in Australia**	A$50,331.96	Agreed	Agreed	A$50,331.96
2.6	**Damaged personal effects**	A$559.85	Agreed	Agreed	A$559.85

86 I will hear the parties on costs if these cannot be agreed.