Tan Teck Boon *v* Lee Gim Siong and others
[2011] SGHC 76

Case Number	: Suit No 563 of 2009 (Notice of Appointment for Assessment No 69 of 2010)
Decision Date	: 31 March 2011
Tribunal/Court	: High Court
Coram	: Eunice Chua AR
Counsel Name(s)	: Joseph Chia Chon Heng (J Chia Associates) for the plaintiff; Patrick Yeo and Lim Hui Ying (KhattarWong) for the first defendant; Shirley Lim (M Rama Law Corporation) for the second and third defendants.
Parties	: Tan Teck Boon — Lee Gim Siong and others

Damages – Assessment

31 March 2011 Judgment reserved.

Eunice Chua AR:

Introduction

1 On 26 December 2006, the 1st Defendant's car travelling in the opposite direction crossed the centre of the road and collided into the front and right side of the Plaintiff's car. The 2nd Defendant's lorry travelling behind the Plaintiff then collided into the rear of the Plaintiff's car. The Plaintiff sued for his injuries, which included fractures to his right thigh bone, right forearm and left wrist. On 14 December 2009, by consent of the parties, interlocutory judgment was entered for the plaintiff, with damages to be assessed by the Registrar, at 90% as against the 1st Defendant and 10% as against the 2nd and 3rd Defendants. Having considered the evidence and closing submissions of all parties, I now set out my judgment.

Factual background

2 Before the accident, the Plaintiff was a sole proprietor of Tom Express, a courier business. Under the terms of a "DHL Owner Operator Agreement", Tom Express provided express transportation services for the benefit of DHL Express (Singapore) Pte Ltd ("DHL") over certain routes. The Plaintiff personally carried out the courier assignments in the Changi South Lane and Bedok North areas, and he paid one Ahmadkalil Bin Mohamed to carry out the assignments within the Tampines Central area from September 2005.

3 After the accident on 26 December 2006, the medical report of the Plaintiff's treating doctor, Dr David Paul Bell, dated 27 March 2009 stated that the Plaintiff was admitted to Changi General Hospital where he underwent surgical fixation of the following injuries: (1) closed fracture of the shaft of the right femur; (2) closed fracture of the right ulna; and (3) closed fracture of the left distal radius. The Plaintiff was discharged from hospital on 3 January 2007 but due to complications with the healing of the right femur, he had two further surgeries for revision of fixation and bone grafting on 22 February 2007 and 3 October 2007. These surgeries left the Plaintiff with multiple scars on his right forearm, left wrist, both hips and right knee cap; as well as residual pain in his right groin (also referred to interchangeably as his right inner thigh) and left wrist. His right leg was shortened by 1

cm. He was given hospitalisation leave continuously over a period from 26 December 2006 to 14 September 2010.

4 These facts and events were not disputed. Rather, the disagreement between the Plaintiff and the Defendants centred on how well the Plaintiff had recovered from his injuries and their impact on his work in Tom Express.

The parties' positions

5 The Plaintiff's case was that the Plaintiff was left unable to care for himself after the accident and was only able to move around in a wheelchair up to August 2008. Relying on the evidence of Dr Bell and Dr Kevin Yip, the Plaintiff argued that he continued to have pain in his right thigh when standing, sitting or walking for more than 20 minutes and on getting into the driver's seat of a vehicle. He had pain in his left wrist and was unable to carry heavy loads. There was a risk of osteoarthritis developing in his left wrist. Further, according to Dr Yip, the Plaintiff had weakness in his right forearm and was at risk of osteoarthritis in his right hip and right knee; he also required pain medication indefinitely. Although the Plaintiff continued to be the sole proprietor of Tom Express, both Dr Bell and Dr Yip opined that he was unable to personally carry out courier assignments due to his injuries. Consequently, the Plaintiff had to subcontract his courier assignments out to one Neo Say Seong as well as a company, i.Supplies (when Neo was not available), to assist him. The Plaintiff further argued that his occupation was at risk because DHL could choose not to renew their contract with Tom Express due to the Plaintiff's inability to personally carry out courier assignments.

6 The Defendants argued that the Plaintiff and his father were unreliable witnesses – the former, *inter alia*, because he had admitted under cross-examination to claiming various types of tax relief without basis and making false statements to the CPF Board such that he was paid CPF for no work having been done; and the latter because he simply could not recollect the details he gave in his affidavit of evidence in chief. The Defendants also pointed out that the Plaintiff's claims as to the period he was confined to a wheelchair and the amounts he paid to his subcontractors were either not backed up by documentary evidence or were backed up by documents created specifically for the trial. Although agreeing that the Plaintiff continued to experience intermittent pain in the right groin that was unlikely to resolve due to the fracture of the right femur, the Defendants' expert, Dr Chang Wei Chun took the position that the Plaintiff had recovered uneventfully from his other injuries, would only need pain medication such as Paracetamol on and off and could return to courier work though he might require assistance to carry heavy loads.

7 Generally, I agreed with the Defendant that the Plaintiff's evidence did not appear to be reliable in a number of respects. As to the medical experts, I found Dr Bell's expert testimony to be the most reliable. Unlike Dr Yip and Dr Chang who at times took rather extreme positions on certain matters under cross-examination, Dr Bell appeared to be the most objective and reasonable. Additionally, Dr Bell was the Plaintiff's treating physician and hence had the benefit of a prolonged period of contact with the Plaintiff as well as familiarity with his condition.

Heads of claim

8 The Plaintiff and the Defendants managed to agree on two items of special damages: (1) medical expenses of $8,203.00 and; (2) transport expenses of $1,911.30. The other claims were disputed.

Pain and suffering

9 The Plaintiff claimed a total of $84,000 for pain and suffering whereas the Defendant contended that the amount awarded ought to be $38,000. In my view, an amount of $55,000 was suitable. I proceed to deal with each injury in turn.

Closed fracture of the shaft of the right femur

10 The Plaintiff claimed $30,000 for the closed fracture of the shaft of his right femur taking into account the implant failure associated with this injury, the delayed union of the right femur, the multiple surgeries the Plaintiff had to undergo, the Plaintiff's difficult recovery, the 1 cm shortening of the Plaintiff's right leg and the Plaintiff's residual pain. The Defendants argued that an amount of $17,000-$19,000 would be more than adequate as the objective evidence did not clearly support the Plaintiff's account of having been wheelchair bound up to August 2008 and as the Plaintiff did not suffer permanent functional impairment from his right leg being shortened by 1 cm.

11 In my judgment, the Plaintiff should be awarded $25,000. This amount was above the $22,000 awarded in *Loh Chee Wang v Ong Leong Chye*, DC Suit No. 4300 of 2003 where a 54-year old claimant had fractured the neck of his left femur with 1.5 cm shortening, was left with residual disabilities similar to that of the Plaintiff, but did not undergo a complicated recovery; and substantially below the $35,000 awarded in *Chiam Kim Loke v Lee Wing Hoong* [2004] SGHC 37 where the claimant had a severe comminuted fracture of his right femur resulting in shortening of 6cm (that was later reduced to 1.5cm to 2cm after further surgery) and where there was severe deformity with osteoporosis of the hip and knee joints.

12 Although the 1 cm shortening of the Plaintiff's right leg *per se* did not leave the Plaintiff with functional impairment, nevertheless, the injury as a whole was a serious one and resulted in a slow and complicated healing process. It was not disputed that because of implant failure and delayed union of the right femur the Plaintiff required two further surgeries. The injury also left the Plaintiff with residual pain in his right groin or inner thigh. According to Dr Bell's report dated 19 November 2010, on reviewing the Plaintiff on 27 October 2010, the Plaintiff continued to have:

> Right inner thigh pain, aggravated by prolonged standing, walking on uneven ground and getting into and out of the driver's seat...

13 Dr Chang also agreed with Dr Bell that the Plaintiff's pain in his right groin was due to soft tissue injury that was unlikely to resolve, and that the Plaintiff's right hip and knee were not as flexible as the left. The evidence further showed that the Plaintiff continued to walk with a limping gait.

14 The Plaintiff also argued for a separate sum of $8,000 to be awarded for the risk of osteoarthritis in the Plaintiff's right hip and knee observed by Dr Yip. On this point, I agreed with the Defendant that the risk of osteoarthritis was not adequately proved. Dr Bell had not mentioned any risk of osteoarthritis in the Plaintiff's right hip and knee but only in the Plaintiff's left wrist where the fracture had occurred at a joint. Dr Chang also opined that a mid-shaft fracture which had adequately healed and resulted only in a 1 cm shortening of the leg would not lead to a risk of osteoarthritis. I preferred the evidence of Dr Bell and Dr Chang in this respect.

Closed fracture of the right ulna

15 The Plaintiff claimed $15,000 for the closed fracture of his right ulna, which according to Dr Yip had malunited. Dr Yip's evidence was supported by an X-ray taken on 5 November 2009. Dr Yip also noted in his report dated 18 November 2010 that the Plaintiff's right forearm felt weak when trying to exert strength and that the Plaintiff complained of tremors to his right wrist at times. He further

opined that the Plaintiff may have a future operation to remove the implant. The Defendants argued that $10,000 was a more suitable award because according to Dr Chang in his report dated 26 April 2010, the right ulna fracture had united without complication and the Plaintiff had recovered full function of his right forearm. The Defendants also pointed out that Dr Bell, like Dr Chang, had stated in his report dated 27 March 2009 that the right ulna fracture had "united without complication" and had stated that no future surgery was planned for the Plaintiff.

16 I decided to award the Plaintiff $10,000 for the closed fracture of his right ulna, consistent with the authority of *Lim Juat Teng v Tan Hong Cheng*, DC Suit No. 3711 of 2003. I accepted Dr Bell and Dr Chang's evidence that the fracture had healed without complication and that the Plaintiff had normal flexibility in his right forearm. The sum of $10,000 adequately took into account the severity of the injury and the remaining weakness in the Plaintiff's right forearm when gripping and holding heavy objects.

Closed fracture of the left distal radius

17 The Plaintiff claimed $12,000 for the closed fracture of his left distal radius due to the continued weakness the Plaintiff experienced in his left wrist and his difficulty in carrying and moving heavy objects. The Plaintiff also claimed an additional $5,000 for the risk of osteoarthritis in the Plaintiff's left wrist based on the evidence of both Dr Bell and Dr Chang. The Defendants argued for a figure of $10,000 and took the position that because the susceptibility to osteoarthritis was expressed by Dr Bell as a "moderate risk", which he had accepted on cross-examination was a probability of 10-20%.

18 In my view, an award of $13,000 for the injury to the Plaintiff's left distal radius, taking into account that there was a moderate risk of the Plaintiff developing osteoarthritis in the future, was appropriate. All three expert witnesses agreed that the Plaintiff was at risk of developing osteoarthritis in his left wrist. I further accepted the evidence of Dr Bell and Dr Yip that the Plaintiff continued to experience pain in his left wrist on performing strenuous activity, many years after the accident.

Scarring

19 The Plaintiff asked for a separate award of $14,000 for scarring, comprising the following:

(a) one 15 cm broadened scar on the right forearm - $3,000

(b) two 2 cm scars on the left wrist - $1,000

(c) multiple scars on the right and left legs - $10,000 – as follows:

(i) 9 cm broadened surgical scar on the right iliac crest

(ii) 9 cm slightly broadened surgical scar on the left iliac crest

(iii) 35 cm surgical scar on the right hip

(iv) 2.5 cm scar on the right knee cap

(v) 1 cm scar on the right knee cap.

20 The Defendants took the position that no separate award for scarring was necessary.

21 Given the numerous and sizable scars on the Plaintiff's limbs as well as the authorities cited to me by the Plaintiff where separate awards for scarring were made, I decided to award a total of $7,000 for scarring, taking into account that apart from the 15 cm broadened scar on the Plaintiff's right forearm and small scars on his left wrist and right knee cap, the other scars would not ordinarily be visible.

Nursing and care

22 The Plaintiff claimed $46,400 for nursing and care, calculated at the sum of $1,600 per month over a period of 29 months from 3 January 2007 when he was first discharged up to May 2009 when he alleged that he was able to walk without crutches. The Plaintiff's evidence was that he was wheelchair bound until August 2008. The figure of $1,600 per month was, according to the affidavit of evidence in chief of the Plaintiff's father, his monthly pay for his work as a house painter.

23 Although I accept that it was possible for a court to award as special damages a sum for the value of services rendered by a parental caregiver calculated with reference to his or her lost wages (*Donnelly v Joyce* [1974] QB 454), it is trite that the amount of the lost wages must be proven. This was not the case here.

24 Under cross-examination, the Plaintiff's father could not recollect the periods he had stopped work to care for his son and could not give any estimate of how much he usually earned a month. He could only say that he would earn around $60 to $70 a day when he had jobs to do. On the other hand, the Plaintiff had claimed parent relief for his father in his income tax returns since 2006. This meant that he had represented to the tax authorities that his father's taxable income was $2,000 or less per annum. Both the Plaintiff and his father, however, admitted that this representation was false. There was therefore no reliable evidence on the actual earnings of the Plaintiff's father.

25 Nevertheless, the Defendants were prepared to accept, and reasonably so, that an award may be made under this head based on the cost of employing a maid or a nurse, following *Lee Wei Kong v Ng Siok Tong* [2010] SGHC 371 at [29]. The Defendants submitted that such a cost would be within the range of $750 to $800 a month. I chose to take the average of these figures to represent the reasonable cost of employing a maid or a nurse, which was $775 a month.

26 As for the time period the Plaintiff required a full time caregiver, the Defendants argued that the Plaintiff had not furnished sufficient proof that he required someone to take care of him full time for 2.5 years following the accident as the evidence of the Plaintiff and his father were not reliable and not supported by any documentation. The Defendants relied on an inpatient discharge summary dated 6 October 2007 after the Plaintiff's third surgery, which recorded that the Plaintiff was "able to ambulate with toe-touch crutches". I agreed with the Defendants that there was insufficient evidence available to justify an award for nursing and care over a period of 2.5 years.

27 As an alternative to their primary position that the Plaintiff would not be entitled to claim any damages under this head, the Defendants submitted that a reasonable period for nursing care would be 16-22 months at the very most, adding on 6-12 months recovery time from October 2007. In light of the medical evidence regarding the Plaintiff's complicated recovery and slower than average return to walking, I decided to award the Plaintiff the cost of employing a maid or a nurse at $775 per month for a period of 16 months, giving an allowance of six months from the time of the Plaintiff's last operation after which he was recorded as being able to ambulate with toe-touch crutches. This was a sum of $12,400.

Future medical and transport expenses

Future medical and transport expenses

28 The Plaintiff's claim for future medical and transport expenses comprised $60,000 for pain medication, $17,500 for surgery to remove the fixation plates in his right forearm and right femur, and $400 for transport. The Plaintiff relied on Dr Yip's expert opinion in relation to the estimation for future medication (calculated at $500 per month for 12 years) and surgery. The transport costs were an estimate based on the average of a taxi fare of $10 per trip (substantiated by taxi receipts for past trips) for 20 return trips.

29 The Defendants did not appear to dispute the $400 claim for future transport expenses in their submissions. In my view this was a reasonable sum and I accordingly award it to the Plaintiff.

30 In relation to future medical expenses, the Defendants argued that Dr Yip's evidence in relation to pain medication was misguided in two respects. First, Dr Yip's conclusion that the Plaintiff suffered from neuropathic pain and requiring medication such as Lyrica and Celebrex was indefensible given that both Dr Bell and Dr Chang were unequivocal that the Plaintiff did not suffer from neuropathic pain. Consequently, relying on Dr Chang's evidence, the Defendants submitted that analgesics such as Paracetamol were sufficient and would cost no more than $100 per month. Second, Dr Chang also opined that a period of three years would be generous.

31 The Defendant also pointed out that Dr Bell, the Plaintiff's treating doctor, had in his report dated 19 November 2010 estimated that the Plaintiff would require medication of about $300 per month for a period of at least three years. Under cross-examination, Dr Bell stated that he had derived these figures from the list of pain medication that the Plaintiff was currently prescribed at that time and conceded that the Plaintiff's pain management specialist would be the most appropriate person to give an opinion on future treatment.

32 Given the absence of any evidence from the Plaintiff's pain management specialist, the next best evidence was that of Dr Bell who was personally aware of the most recent medication the Plaintiff was prescribed. I decided to take the figure of $300 per month as the most accurate estimate of the Plaintiff's monthly expenses on medication.

33 As to the period for which this sum should be awarded, I was not inclined to accept Dr Yip's estimation of 10-12 years as the period the Plaintiff would likely require pain medication. According to the evidence, the Plaintiff's pain was intermittent in nature. There was no evidence that the Plaintiff was required to take pain medication on a daily basis or was likely to require the medication for the rest of his life. This was unlike the case of *TV Media Pte Ltd v De Cruz Andrea Heidi* [2004] 3 SLR(R) 543 on which the Plaintiff had sought to rely, in which a multiplier of 17 was used to assess the future medical expenses of the plaintiff who had undergone a liver transplant and required to be continuously on immune-suppressants for her entire life. In the present case, I was prepared to use a multiplier of 3 placing weight on Dr Bell's evidence that the Plaintiff would require to be on medication for at least 3 years. This would bring the sum to be awarded the Plaintiff for future medical expenses to $10,800.

34 Finally, in relation to future surgery for the removal of the fixation plates or implants, I accept the Defendants' argument that the Plaintiff had not proven that he would require future surgery to remove the implants in his right femur and right forearm. When cross-examined, Dr Yip's explanation for the need to remove the implants despite it being more than four years since the accident was not convincing. Dr Yip merely stated that some patients may not want to have implants and that implants may cause infection, irritation and stress fractures. There was, however, no evidence that any of these factors were applicable to the present Plaintiff. In contrast, Dr Bell confirmed that no further surgery was planned for the Plaintiff. Dr Chang had also stated in his report dated 15 July 2010 that

the implants may be left in-situ permanently as: (1) the optimal time for implant removal from the forearm (12 months after fixation) and that of the femur (18 to 24 months after fixation) had well past; and (2) the Plaintiff already had three major surgeries to the right femur. Given these circumstances, I made no award on future expenses for surgery to remove the fixation plates.

35 The total award for future medical and transport expenses was therefore $11,200.

Loss of pre-trial earnings

36 The Plaintiff claimed a total of $146,661 for loss of pre-trial earnings. This figure comprised $117,271 paid to Neo Say Seong and $29,390 paid to i.Supplies. The Plaintiff argued that because of his injuries, he was unable to personally carry out courier deliveries and hence sustained a loss of earnings because he had to pay Neo and i.Supplies to carry out courier assignments on his behalf.

37 The Defendants argued that the Plaintiff had failed to prove that he had suffered any real, assessable drop in earnings as a result of his injuries and alleged disabilities because the tax returns and profit and loss accounts of Tom Express showed an upward trend in its profitability and consequently the Plaintiff's income. The Defendants did not dispute that the Plaintiff had paid Neo and i.Supplies to cover the deliveries Tom Express had been assigned by DHL, but emphasised that the Plaintiff had not adduced any evidence to show the value of his contribution to Tom Express while he was doing the courier work himself as compared to while he was only managing Tom Express without doing the courier work himself after the accident.

38 In my judgment, it was not necessary for the Plaintiff to prove that his business had suffered losses after his accident in order for him to claim pre-trial loss of earnings. In *Chai Kang Wei Samuel v Shaw Linda Gillian* [2010] 3 SLR 587 at [29] ("*Chai Kang Wei Samuel*"), the Court of Appeal had held in the context of assessing a future loss of earnings:

> The court must examine the circumstances of each case to determine whether there is loss of future earnings. It was therefore overly simplistic to suggest that the court should merely constrain itself by comparing the absolute figures *vis-à-vis* what the plaintiff earned pre-accident and post-accident and nothing else. Such an approach may be used without injustice in some cases, but not all. Whether such an approach should be used in a particular case must depend on the facts of the case in question. ... The overarching objective of awarding damages is to *compensate* the injured victim by restoring him or her to the position that he or she would have been (in a monetary sense) had the accident not happened. [emphasis in original]

39 The proposition that the assessment of a claimant's loss of earnings did not depend on comparing the claimant's yearly average income before and after the accident but rather on restoring the claimant to the position that he or she would have been (in a monetary sense) had the accident not happened ought to hold equally true to pre-trial loss of earnings as it does for post-trial loss of earnings.

40 In the present case, had the accident not happened, the Plaintiff would have continued to personally carry out deliveries and would not have needed to pay others to cover his courier work. Putting the Plaintiff in the position he had been before the accident (in a monetary sense) meant that he should be compensated for the cost of paying someone to do his work. This was regardless of the increase in the Plaintiff's business. I therefore rejected the Defendants' argument that the Plaintiff was not entitled to claim a loss of earnings because his business increased in profitability and that the Plaintiff was required to show the difference in value of his contribution to the business before and after the accident.

41 Nevertheless, I did not accept the Plaintiff's argument that he should recover for the sums paid *both* to Neo and to i.Supplies as pre-trial loss of earnings. In my view, the sums paid to Neo more accurately reflected the Plaintiff's loss of earnings. The evidence was that i.Supplies only came into the picture when Neo was not able to carry out deliveries. The Plaintiff also conceded that when he was personally doing courier assignments before the accident, he would hire someone else to take on his duties during the times he could not report to work. It seemed unbelievable that the Plaintiff would have singlehandedly been able to do all the work that Neo and i.Supplies did. Finally, and this was most telling, the Plaintiff himself relied on the yearly contract fee paid only to Neo as comprising the multiplicand in respect of his claim for future loss of earnings. I therefore awarded the Plaintiff $117,271.00 as pre-trial loss of earnings.

Future loss of earnings

42 The Plaintiff claimed $495,000 for future loss of earnings taking, as mentioned, the yearly contract sum paid to Neo ($33,000) as the multiplicand. The Plaintiff argued for a multiplier of 15 taking into account the Plaintiff's relatively young age (he was presently 33) and relying on the case authorities of *Ho Yiu v Lim Peng Seng* [2004] 4 SLR(R) 675 and *Chang Ah Lek v Lim Ah Koon* [1998] 3 SLR(R) 551 where multipliers of 15 and 16, respectively, were used for plaintiffs who were 33 and 31, respectively, at the date of the assessment of damages.

43 As with the issue of loss of pre-trial earnings, the Defendants submitted that because the Plaintiff did not suffer any drop in his assessable income (his income in fact increased since the time of the accident), no award of loss of future earnings should be made. Further, the Defendants argued that although the Plaintiff had difficulty getting into and out of a vehicle and carrying loads with his left arm, he could still continue to manage his business, drive a vehicle and carry light loads. The Plaintiff could therefore continue in his courier work, albeit at a slightly reduced capacity.

44 Following from the reasoning in [37] – [40] above, the fact that the Plaintiff earned more in absolute terms post-accident than pre-accident was not determinative in assessing whether there was any loss of future earnings. Rather, what was important was that but for the accident, the Plaintiff could have earned even more by carrying out courier assignments himself rather than paying Neo to do so on his behalf. In my judgment, the Plaintiff was unlikely to be able to return to carrying out courier assignments personally in the near future and would continue to need to hire someone to cover him. Both Dr Bell and Dr Yip agreed that it was not advisable for the Plaintiff to return to his original work particularly because of the pain in his right inner thigh when getting into and out of a vehicle and when sitting, standing or walking for extended periods, as well as the pain in his left wrist when carrying heavy loads. I did not think Dr Chang's suggestion that the Plaintiff could continue doing courier assignments at a reduced capacity by hiring an assistant to carry heavy loads or to structure his scope of work such that he avoided carrying heavy loads was realistic or borne out on the evidence.

45 Whether or not an award of loss of future earnings was appropriate depended very much on the factual matrix of individual cases (*Chai Kang Wei Samuel* ([38] above)). In my view, there was sufficient evidence before me to fix a multiplier and multiplicand and the authorities cited by the Defendants in which various sole proprietors were not awarded damages for a loss of future earnings but for a loss of earning capacity either did not contain a clear statement of principle that could be applied to the present case or were distinguishable.

46 In *Lee Chou Ming v Chua Kok Chai*, Suit No. 1320 of 2001, summarised in *Assessment of Damages: Personal Injuries and Fatal Accidents*, 2d ed (LexisNexis, 2005) at 735, the claimant was a sole proprietor of a company specialising in the design of temple shrines and was aged 37 at the time

of the accident. The High Court awarded him $30,000 for loss of earning capacity. The grounds of the High Court were not published in this case; hence, the reason for awarding the claimant damages based on a loss of earning capacity rather than a loss of future earnings is unclear.

47 In *Wong Kim Lan v Christie Kolandasamy* [2004] SGDC 234 ("*Wong Kim Lan*"), the District Court awarded a sole proprietor a sum of $45,000 for loss of earning capacity. The sole proprietor in that case designed jewellery for manufacture within her own factories and recommended designs to customers. Her injuries required her to take constant rest and inhibited her ability to concentrate. She therefore employed additional designers to assist her. Unfortunately, she failed to adduce any evidence of her post-accident income, resulting in the Court drawing the inference that she earned more after the accident than she did before despite having to employ more designers. Although there were certainly similarities to the present case, a key distinguishing factor was my finding that the Plaintiff's injury post-accident resulted in him being completely unable to personally carry out courier assignments. The loss of earnings to the Plaintiff could therefore be clearly identified with his cost of hiring a replacement to cover his courier assignments. This was not so in *Wong Kim Lan*. There, although it was mentioned that the claimant needed to employ more workers to assist her with design, there was no mention of any evidence on how many of these additional designers were required or what the cost to the claimant was of having to employ these additional designers.

48 Finally, I deal with *Koh Soon Pheng v Tan Kah Eng* [2003] 2 SLR(R) 538 ("*Koh Soon Pheng*"). There, the High Court upheld the Assistant Registrar's award of $180,000 for loss of earning capacity to a 42-year old claimant who owned a motorcycle workshop and whose specific skill was repairing large motorcycles with high capacity engines. The Court (at [18]) held that it could not fault the Assistant Registrar for choosing to make an award of loss of earning capacity rather than loss of future earnings, for *inter alia* the following reasons:

> The plaintiff still has his business. The workshop is still capable of attracting a substantial amount of business. In the last year for which figures were available, 2002, sales amounted to $180,000, a not inconsiderable sum. How the plaintiff will do in the future is highly speculative. He may do reasonably well. *Whilst any loss he may suffer in income will probably be because he himself cannot do as much work as previously, there is not enough evidence on which to fix a multiplier and thus make an award of loss of earnings rather than loss of earning capacity. As a supplier of services, whatever the plaintiff may say, the income of his business will be affected by general economic conditions, and this too makes it difficult for the court to settle on a correct multiplier*. The award of $180,000 for loss of earning capacity is in fact equivalent to nearly eight years worth of earnings on the basis of an average annual income of $23,000. I think this award was reasonable and must be upheld. [emphasis added]

Similar to *Wong Kim Lan* ([47] above), this case may be distinguished because the loss of earnings of the claimant was based on his loss of business income; this fluctuated from year to year. The Court therefore encountered difficulty in fixing a multiplier. The Plaintiff's loss of earnings, however, could be determined by taking the cost to the Plaintiff of paying Neo to carry out his courier assignments as the multiplicand, and applying a suitable multiplier to it.

49 The Plaintiff contended that the multiplicand ought to be $33,000, which was $2,750 (Neo's monthly pay since January 2008) multiplied by 12. However, this did not take into account the periods that Neo was unable to work and his pay was reduced. A more accurate reflection of the Plaintiff's loss, in my view, was to take the average of Neo's annual pay in 2008 and 2009, which were the only available figures of Neo's actual annual pay available to the court. Averaging out the figures of $31,403 for 2008 and $29,915 for 2009 gave me the multiplicand of $30,659.

50 As for fixing a multiplier, I considered that the evidence showed that the Plaintiff had worked as a courier since 1998 mainly for DHL – he was an employee of DHL for many years before leaving to set up Tom Express in 2005 to take advantage of DHL's owner operator scheme. DHL's contract with Tom Express gave the Plaintiff a fairly stable and steady stream of business. But for the uncertainties introduced by the accident, there was every indication that the Plaintiff would continue as a contractor for DHL using Tom Express. However, the multiplier of 15 submitted by the Plaintiff, based on *Ho Yiu v Lim Peng Seng* ([42] above) and *Chang Ah Lek v Lim Ah Koon* ([42] above) was too high. Age was not the only factor to be taken into account in fixing an appropriate multiplier. An important consideration in this case was the nature of the Plaintiff's job. As a sole proprietor of a business, there were inevitable business fluctuations and there was no fixed retirement age. In fact, Tom Express' contract with DHL could be terminated due to numerous reasons, such as a failure to meet performance targets, far in advance of the Plaintiff reaching retirement age. This was not an unlikely scenario given the evidence before me concerning the Plaintiff's conduct of his business. The profit and loss statements of Tom Express showed that the costs of the business were high, with certain items of expense appearing obviously inflated and not supported by any documentary evidence. The multiplier should be reduced to take these circumstances into account. In my view, a multiplier of 7, just under half of that submitted by the Plaintiff, would be fair.

51 This would bring the award for loss of future earnings to $214,613.

Loss of earning capacity

52 Further, or in the alternative, the Plaintiff claimed loss of earning capacity based on comparing the Plaintiff's current earnings with sedentary occupations that he may be qualified for multiplied by a period of 10 years. The Plaintiff argued that his business was entirely dependent on DHL renewing its owner operator agreement with Tom Express. The testimony of Gee Say Liang, a manager of DHL, under cross-examination was that the spirit and purpose of the owner operator scheme was to allow former staff of DHL who had acquired a certain level of skill and experience in carrying out services for DHL to set up their own business and work as independent contractors. They would be paid based on the amount of shipments they did, hence incentivising them to bring in more customers for DHL. Because the Plaintiff was no longer personally able to carry out courier assignments and his ability to meet customers and cultivate more business for DHL was significantly reduced, there was a risk that Tom Express's contract with DHL may not be renewed.

53 The Defendants submitted that the court should award a sum in the range of $30,000 to $40,000 taking into account that the Plaintiff was not facing any imminent risk of losing his contract with DHL. The Defendants argued that the contractual documents between Tom Express and DHL contained no requirement that the Plaintiff had to carry out the courier work himself. Hence, if Tom Express continued to perform satisfactorily in meeting DHL's targets, DHL would likely continue to renew the contract. Further, the fact was that after the accident in 2006, DHL had renewed its contract with Tom Express twice despite knowing that the Plaintiff had stopped carrying out courier assignments himself.

54 As stated in *Chai Kang Wei Samuel* ([38] above) at [36]:

> It is trite that an award for loss of earning capacity (in the context where the plaintiff is currently employed) can only be awarded *if there is a substantial or real risk* that the plaintiff could lose his or her present job at some time before the estimated end of his or her working life and that the plaintiff will, because of the injuries, be at a disadvantage in the open employment market. It is a cumulative test. [emphasis in original]

The Court of Appeal also reiterated that loss of earning capacity and loss of future earnings compensated different types of losses and, in suitable cases, both could be awarded (at [22] and [25]). This was such a case.

55 Based on the evidence before me, there was a real risk that the Plaintiff could, because of his injuries, lose his contract with DHL (the sole business of Tom Express) before the estimated end of his working life. I found Gee to be a neutral witness with no personal interest in the case and accepted his evidence as to the original intent of the owner operator scheme established by DHL. Gee was a member of the panel of decision-makers involved in renewing Tom Express' contract with DHL and he frankly stated that renewal was a matter of judgment and the panel would take into account factors such as the Plaintiff's length of service, his unfortunate personal circumstances, the ability of Tom Express to meet key performance indicators, as well as the spirit and purpose of the owner operator scheme. However, given that Tom Express' contract with DHL had been renewed twice despite the Plaintiff being unable to personally carry out courier assignments, this risk should be assessed conservatively.

56 Should Tom Express lose its contract with DHL, the Plaintiff's ability to compete in the labour market would certainly be diminished whether he chose to continue running Tom Express and seek alternative sources of business or chose to apply for a different job. Because of the Plaintiff's inability to personally carry out courier assignments, Tom Express would naturally have higher costs than its competitors since it would always have to pay for one additional courier. The Plaintiff would also suffer because he would have little opportunity for physical contact with his customers. Further, the bulk of the Plaintiff's experience has been doing courier work for DHL. This would be another disadvantage to him in sourcing business for Tom Express from other courier companies. If Tom Express went out of business, the Plaintiff's disability would prevent him from resuming any employment as a courier and he would be limited to sedentary occupations. Given that the Plaintiff's highest education level was to complete his primary school examinations, the jobs he was eligible for would further be limited.

57 Taking into account the above circumstances, a lump sum award of $30,000 would be sufficient to compensate the Plaintiff for his loss of earning capacity and would be in line with the authorities cited to me by the Defendants.

Conclusion

58 In summary, the Plaintiff succeeded in the following:

(a) Special damages:

(i) Pre-trial medical expenses agreed at $8,203.00

(ii) Pre-trial transport expenses agreed at $1,911.30

(iii) Pre-trial loss of earnings assessed at $117,271.00

(iv) Pre-trial costs for nursing and care assessed at $12,400.00

(b) General damages:

(i) Pain and suffering assessed at $55,000.00

(ii) Future medical expenses assessed at $10,800.00

(iii) Future transport expenses assessed at $400.00

(iv) Loss of future earnings assessed at $214,613.00

(v) Loss of earning capacity assessed at $30,000

59 Interest is to be at half of 5.33% on special damages from the date of service of the writ to the date of judgment, and at 5.33% on general damages for pain and suffering from the date of service of the writ to the date of judgment. The usual consequential orders are to apply.

60 I will hear parties on the issue of costs.