Teddy, Thomas *v* Teacly (S) Pte Ltd
[2014] SGHC 226

Case Number	: Suit No 33 of 2012 (Registrar's Appeal No 367 of 2013)
Decision Date	: 06 November 2014
Tribunal/Court	: High Court
Coram	: Judith Prakash J
Counsel Name(s)	: Nagaraja S Maniam, M Ramasamy and Gokul Haridas (M Rama Law Corporation) for the second defendant/appellant; Andrew John Hanam (Andrew LLC) for the plaintiff/respondent.
Parties	: Teddy, Thomas — Teacly (S) Pte Ltd

Damages – Assessment

6 November 2014 Judgment reserved.

Judith Prakash J:

Background

1 This matter came before me as an appeal by the second defendant in the action against the assessment of damages payable to the plaintiff who had been injured in an accident caused by both defendants. The first defendant settled the plaintiff's claim separately and is not a party to this appeal. I will therefore refer in this judgment to the second defendant simply as "the defendant".

2 On 15 November 2010, the plaintiff, Mr Thomas Teddy, was travelling as a passenger in a taxi driven by Mohd Is'hak bin M Noor ("the taxi-driver") when a lorry belonging to the defendant collided into the rear of the taxi. The plaintiff claimed that as a result of the impact he was "jerked forward and then … flung backwards into the seat". However, he did not feel any pain immediately after the accident. After exchanging particulars with the lorry driver, the taxi-driver continued the journey dropping the plaintiff off at Orchard Parade Hotel. Later that evening, the plaintiff experienced loss of sensation in both his hands and arms.

The plaintiff's medical history

3 Prior to the accident, the plaintiff had suffered a stroke on 10 October 2009. He managed to recover from the stroke by December 2009. However, as of March 2010, he began experiencing pain in the neck, weakness in both hands and progressive gait instability. He consulted a neurologist, Dr Tang Kok Foo ("Dr Tang"), on 11 May 2010. Dr Tang carried out an MRI of the plaintiff's cervical spine. His assessment of the plaintiff's then medical condition is summarised in a report dated 14 May 2010. In gist, he diagnosed the plaintiff as suffering from cervical myelopathy and diabetic neuropathy and recommended surgery to stop the cervical myelopathy from getting worse. He stated:

> His other medical problems are:
>
> 1. Diabetes mellitus for the past 30 years
>
> 2. Diabetic neuropathy (distal symmetrical sensory-motor neuropathy)

> Examination revealed poor dexterity in the right upper limb, minimal loss of motor power (grade 4.75/5) and very poor 2 point discrimination. The deep tendon reflexes were absent in the upper and lower limbs except for the biceps jerks. There were no increased reflexes and no ankle clonus (due to the peripheral neuropathy).
>
> MRI brain: no new infarct.
>
> MRI cervical spine: 3 level disc prolapse (C3/C4, C4/C5 and C5/C6) with very severe cord compression at the lower two levels.
>
> He will require surgical decompression of the cervical spinal cord as soon as practicable. …

While this report states that the plaintiff was suffering from disc degeneration at three levels, Dr Tang's position in his Specialist Medical Report dated 12 November 2012 and under cross-examination, was that he had disc degeneration at four levels (*ie*, C3/C4, C4/C5, C5/C6 and C6/C7).

4 The plaintiff approached a neurosurgeon, Dr Premkumar Kandasamy Pillay ("Dr Pillay"), for a second opinion on 7 July 2010. Dr Pillay also ordered an MRI of the plaintiff's cervical spine to be carried out ("the July 2010 MRI"). On the basis of the MRI findings, Dr Pillay diagnosed the plaintiff with cervical myelo-radiculopathy and also recommended surgery. On 14 July 2010, Dr Pillay performed an "anterior cervical microdisectomy and fusion for C4/5 and C5/6 significant disc protrusions [that were] causing the myelo-radiculopathy" ("the first surgery"). According to the plaintiff, he felt a dramatic improvement in his condition after the first surgery. He claimed that he had completely recovered from the first surgery by October 2010.

Series of events after the accident

5 The day after the accident, the plaintiff went to see Dr Pillay because he was concerned that the accident might have had an impact on his spine. An MRI of his cervical spine was conducted on the same day ("the November 2010 MRI"). In his MRI report, the consultant radiologist, Dr Gan Yu Unn, stated the following conclusions:

> There are fractures of the C4 to C6 vertebral bodies with postoperative changes present.
>
> Posterior central/paracentral disc protrusions at C3/4 to C7/T1 are seen. These result in indentation of the spinal cord. There is associated raised intramedullary spinal cord signal at C4 to C6, possibly due to oedema or myelomalacia.

6 The plaintiff was scheduled for urgent surgery on 26 November 2010. Dr Pillay carried out "cervical laminectomy, laminoplasty with posterior stabilization implants from C3/4 to C6/7" ("the second surgery"). The plaintiff claimed that he could not feel his hands and that "everything was numb" before the second surgery. According to him, there was little improvement after the surgery. Dr Pillay's medical report dated 18 March 2011, a few months after the second surgery, estimated that the plaintiff had "a 70% permanent disability". At the time of the assessment of damages hearing, the plaintiff was wheelchair bound. He gave evidence that in September 2012, "the bottom part" of his legs gave way and that he can now only take about three to four steps at a time.

The plaintiff's employment history

7 The plaintiff was 58 years old at the date of the accident. Prior to the accident, he was employed in various different organisations in different capacities. From 1983 onwards he spent a lot

of time working in the oil and gas and shipbuilding industries. Among other things, he was a Quality Control Manager assigned first to a shipyard and then to an oil refinery and the managing director of a building company which had a large workforce deployed at several worksites.

8 In 2007, he set up his own contracting company, Tedjo Engineering Pte Ltd ("Tedjo"). In July 2007, Tedjo landed a contract in connection with the building of a bio-diesel fuel plant in Jurong Island for an Australian company. After this project ended, Tedjo was unable to secure any other contracts and it was wound up in 2009.

9 The plaintiff gave evidence that about a month after his first surgery (*ie*, in August 2010), he started marketing and looking for opportunities in the oil and gas industry again. He also produced in evidence a Memorandum of Understanding ("MOU") between himself and a number of other parties for a joint venture project in India, cleaning pipes in the oil and gas industry. The defendant disputed the admissibility of the MOU on the ground that none of the other parties who had signed it, including an individual resident in Singapore, were called to prove its authenticity. The MOU was admitted in evidence on the basis that the failure to call the other parties to give evidence would affect the weight assigned to the MOU but not its admissibility.

10 According to the plaintiff, his role in the joint venture was to train workers to carry out pipe-cleaning and to provide the specialised equipment that was required for the project. He maintained that the joint venture had fallen through as a result of the accident since he was no longer physically capable of going to the site to train the workers. The MOU was signed on 25 June 2010 (*ie*, about a month before his first surgery). The plaintiff's position was that the MOU showed that he had every intention to continue to work after recovering from the first surgery. To that end, he also claimed that on the day of the accident, he was headed to Orchard Parade Hotel because he had an important meeting with the "Managing Director of a petroleum company not in Singapore". According to him, this was indicative of his intention to resume working after recovering from the first surgery. His evidence was that the work that he did required "a lot of climbing and walking" and that the success of the projects that he undertook was "largely based on close supervision and attention to details". Since the accident had incapacitated him, he was prevented from working in the oil and gas industry.

The proceedings

11 The plaintiff commenced proceedings against the taxi-driver and the defendant on 16 April 2011. He claimed damages for, among other things, pain and suffering, medical expenses, future medical expenses, loss of pre-trial earnings, loss of future earnings and loss of earning capacity. Liability was agreed between the plaintiff, the taxi-driver and the defendant at 10:10:80 respectively. The assessment of damages took place over five days in April and June 2013 before an Assistant Registrar ("the AR"). After the assessment of damages hearing, the plaintiff and the taxi-driver arrived at a settlement between themselves.

12 The AR delivered judgment on 28 October 2013. She assessed the damages as follows:

General Damages

Pain and suffering : $60,000

Future medical expenses : $3,000

Loss of future earnings : $166,064.16

Special Damages

Medical expenses : $78,598.81

Pre-trial loss of earning : $200,660.86

Total : $508,323.83

The defendant has appealed against the awards for pain and suffering, and loss of earnings (*ie*, pre-trial earnings and future earnings).

Decision Below

Pain and suffering

13 One of the most hotly contested issues was whether the plaintiff's injuries and disabilities were caused by the accident or were pre-existing conditions. The AR found that the injuries sustained by the plaintiff were caused by the accident because:

(a) the plaintiff experienced pain and weakness shortly after the accident although he was not suffering from pain and had good strength in his hands before the accident;

(b) she accepted Dr Pillay's evidence that the plaintiff's current problems are a direct consequence of the accident; and

(c) the November 2010 MRI showed fractures to the C4 to C6 vertebrae and indentations at the C3/4 and C6/7 levels of the plaintiff's spinal cord.

14 She referred to the Charlene Chee *et al*, *Guidelines for the Assessment of General Damages in Personal Injury Cases* (Academy Publishing, 2010) ("*Guidelines*") and noted that the injuries sustained by the plaintiff brought him within the category of cases involving "severe neurological symptoms resulting in difficulty in movement; considerable pain in the cervical spine area; pain radiating to the limbs; significant disabilities where the neck movement is severely restricted despite physiotherapy; and an increased vulnerability to future trauma". The *Guidelines* recommend damages between $50,000 and $70,000 for such cases. She considered it reasonable to award the plaintiff $60,000 in respect of pain and suffering.

Loss of earnings

15 The AR was of the view that the plaintiff was entitled to damages for loss of earnings. She rejected the argument that the plaintiff should not be so entitled since his underlying medical conditions would have prevented him from working, even if the accident had not occurred. The AR accepted (a) the plaintiff's evidence that he felt no pain after the first surgery and had resumed making overseas business trips with a view to re-enter the oil and gas industry; and (b) Dr Pillay's opinion, which he expressed with the benefit of having reviewed the plaintiff on six occasions after the first surgery, that the plaintiff had shown good improvement, had good strength in the upper and lower extremities, and was walking normally after the first surgery and prior to the accident.

16 The AR applied the approach adopted in *Ng Chee Wee v Tan Chin Seng* [2013] SGHC 54 ("*Ng Chee Wee*") to calculate the appropriate multiplicand to be applied. She observed that the court in that case had taken into account available evidence as to the plaintiff's income over a significant

period of time to determine the plaintiff's average monthly income. The AR considered that a figure that is so obtained would be a fair indication of what the plaintiff would have earned monthly when there is an "absence of clear evidence" of his actual monthly earning capacity. Applying that approach, she totalled the plaintiff's annual income from 2004 to November 2010, as set out in his income tax assessments for Years of Assessment ("YA") 2005 to 2010 and divided the figure obtained ($673,905) by 83 months, and derived an average monthly income of $8,119.34. She then deducted $1,200 being what he would have earned at a sedentary job (*eg*, as a taxi-driver) which was the type of vocation that occupational physician Dr Thio Yauw Leng Bernard, Bertin ("Dr Thio") found him suitable for in his physical condition after the accident. Therefore, his pre-trial loss of earning was assessed as follows: ($8,119.34 – $1,200) × 29 months. This came up to a total of $200,660.86.

17 In respect of loss of future earnings, the AR took into account the plaintiff's age, the statutory retirement age, the plaintiff's line of work, his various pre-existing medical conditions, the possibility of downturn in his business, and the need to apply a discount to take into account the fact that he would be receiving a lump sum payment. She came to the conclusion that a multiplier of two was appropriate. Therefore his loss of future earnings was assessed as follows: ($8,119.34 – $1,200) × 24 months. This came up to a total of $166,064.16.

The appeal

18 The broad issues that fall to be decided on appeal are whether the awards in respect of pain and suffering and loss of earnings should be upheld.

Damages for pain and suffering

The defendant's submissions

19 The defendant's contention is that the AR erred in concluding that the plaintiff's pain and suffering was caused by the accident. Rather the defendant argues, relying on the opinion of Dr Sarbjit Singh ("Dr Singh"), a Senior Consultant Orthopaedic Surgeon called by the defendant to give evidence at the hearing, that the plaintiff only suffered a "soft tissue injury" or "whiplash injury" as a result of the accident. Thus, the damages he is entitled to for pain and suffering have to be assessed on that basis rather than on the basis that his injuries fell within the category involving among other things "severe neurological symptoms resulting in difficulty in movement" and "significant disabilities where the neck movement is severely restricted despite physiotherapy" as held by the AR.

20 In particular, the defendant maintains that the AR erred in coming to the conclusion that the accident had caused fractures of plaintiff's C4 to C6 vertebrae. It relies on Dr Tang's opinion that what seemed like fractures in the November 2010 MRI, could simply have been post-operative changes from the first surgery. The defendant points out that in a letter sent to the defendant's counsel on 31 May 2013, the plaintiff's counsel had conceded that they had not proven that the fractures were caused by the accident and therefore, they would not be claiming damages for the fractures. Hence, the defendant argues that the AR should not have taken into account the fractures when awarding damages for pain and suffering.

21 The defendant also argues that the AR should not have taken into account the indentations at the C3/4 and C6/7 levels of the plaintiff's spinal cord which were evident in the 16 November MRI. It relies on Dr Singh's opinion that these indentations were pre-existing.

22 The defendant says that the fact that the plaintiff had to undergo a serious second operation is not indicative of the extent of the damage that the accident caused his spine. Even though the

condition of the plaintiff's spine after the accident, as evidenced by the November 2010 MRI, meant that he needed a second operation, he may well have needed that surgery even if the accident had not occurred. This is because the plaintiff was suffering from cervical myelopathy and the degeneration of the plaintiff's cervical spine was not arrested by the first surgery since Dr Pillay did not decompress the posterior parts of his cervical spine during that surgery. The first operation simply ameliorated the pain that the defendant experienced by reducing the "internal movement of [the] spine". However, the progress of the myelopathy was not arrested. Therefore, the second surgery would have been necessary at some point regardless of whether the accident occurred.

23 The plaintiff's pre-existing medical conditions, namely, his cervical myelopathy and diabetic neuropathy, must have contributed to the pain and physical disabilities he experienced after the accident. Therefore, the damages awarded for pain and suffering should be reduced to reflect the fact that he would have experienced the onset of some of the pain as well as the physical disabilities regardless of whether the accident occurred. The most that can be said is that the accident brought forward the occurrence of the inevitable. The defendant does not agree that the first surgery had the effect of curing the plaintiff of all his pre-existing physical ailments because (a) as mentioned above, Dr Pillay did not operate to decompress the plaintiff's spine and hence the progression of the myelopathy was not arrested; and (b) in any event, it was Dr Tang's expert opinion that the effects of severe myelopathy and severe diabetic neuropathy are near irreversible. Dr Tang also opined that myelopathy will progress and patients will "get weaker over the years" even if there has been "very successful surgery".

24 The defendant relies on *Pang Tim Fook Paul v Ang Swee Koon* [2005] SGDC 258 to support its contention that damages awarded for pain and suffering should be reduced to take into account the plaintiff's pre-existing medical conditions which would have brought about the pain and disabilities even had the accident not happened. In that case, the plaintiff had age-related, pre-existing, degenerative changes caused by cervical spondylosis. In awarding damages for pain and suffering, District Judge Laura Lau Chin Yui noted that the underlying degenerative changes were "minor" and "asymptomatic", and therefore any impact which the pre-existing degenerative changes would have on the plaintiff "in the future, if at all, will not be very significant". Her reasoning envisages that where the pre-existing conditions are severe, as in the present case, such that they would likely contribute to the pain and suffering in the future, then the quantum of damages should accordingly be lowered.

Was the plaintiff's suffering caused by the accident?

25 I agree that the defendant should not have to compensate the plaintiff for any pain or disabilities he would have suffered regardless of the accident. To decide whether that was indeed the case, the following matters have to be considered:

(a) The effectiveness of the first surgery in relieving the pain the plaintiff experienced prior to that surgery.

(b) The effectiveness of the first surgery in preventing the plaintiff's cervical spine from degenerating further.

(c) The effect of the accident on the plaintiff's cervical spine.

(1) First surgery's effectiveness in relieving pain

26 The plaintiff's own evidence was that after the first surgery, for the first time in many years, he

had "totally no pain". He could even undertake overseas business trips again. He claimed he travelled to India to give presentations of the technology used to clean congealed pipes to state-owned Indian oil and gas companies with a view to secure a three-year contract to clean pipes. His evidence of the improvement that he experienced is corroborated by Dr Pillay who reviewed his condition on six occasions after the first surgery. Dr Pillay stated that by 30 August 2010, the plaintiff had "shown good improvement" and "had good strength in upper and lower extremities and was walking normally".

27 Dr Singh, however, suggested that there was reason to disbelieve the plaintiff. He stated that on the average, motor weaknesses take six months or more to improve and damaged motor nerves take one to two years to recover. Therefore, he stated that it was quite unlikely that the plaintiff experienced the type of improvement he claimed he did within the four months between the first surgery and the accident. On the other hand, Dr Singh accepted that he had expressed his opinion without having examined the plaintiff and that it could be that the plaintiff "[fell] out of the general pattern of patients".

28 The plaintiff's evidence that he was completely pain-free after the first surgery is probably an exaggeration. Notwithstanding that, I accept that he experienced dramatic improvement in his physical condition after the first operation. First, the improvement is corroborated by the evidence of Dr Pillay, who was the only physician who had the benefit of examining the plaintiff after the first surgery and before the second. Therefore, Dr Pillay's views should be preferred over those of the other physicians whose opinions were based on medical probability and not what they had actually observed concerning the plaintiff's condition. Second, I find it noteworthy that no MRI was done in the interim period between the first surgery and the accident. Dr Singh stated that MRIs are not routinely done unless the patient deteriorates. Therefore, the fact that no MRI was done tends to suggest that the plaintiff's condition was at the very least not deteriorating (as suggested by the defendant) and more likely than not improving. Third, after his consultation with Dr Pillay on 30 August 2010, the plaintiff did not go for any further consultations with Dr Pillay until after the accident. Dr Pillay's evidence was that the plaintiff was not discharged but rather that he was "supposed to come back when he was free". The fact that he did not return for further consultations suggests that the plaintiff's physical condition had improved. It was likely because he had seen improvement in his condition that he found it unnecessary to return for further reviews. Fourth, the plaintiff chose to consult Dr Pillay again after the accident. He could have done so simply because Dr Pillay was familiar with his medical history and had all his records. But this also shows that he had confidence in Dr Pillay which again tends to suggest that his physical condition had improved after the first surgery. It is less likely that he would have returned to Dr Pillay if he was not satisfied with the results of the first surgery. Therefore, I accept that the first surgery was effective in relieving the pain the plaintiff experienced.

(2) First surgery's effectiveness in arresting the deterioration of the plaintiff's cervical spine and the effect of the accident on the plaintiff's cervical spine

29 Dr Tang was of the opinion that it was possible for the first surgery to have relieved the plaintiff's pain without actually rectifying the underlying problem. He opined that the first surgery did not arrest the progression of the myelopathy because Dr Pillay had not decompressed the posterior parts of the plaintiff's cervical spine. He expressed his view in the following terms in his Specialist Medical Report dated 12 November 2012:

> I am surprised that Mr. Thomas Teddy's surgery on 14 July 2010 was "anterior cervical microdisectomy and fusion for C4/C5 and C5/6" without a more extensive decompression of the cervical spinal cord. Without more extensive surgery, much of posterior osteophytes and calcified posterior longitudinal ligament would have continued to severely narrow the cervical spinal canal

and continue to expose Mr. Teddy Thomas to a higher probability of spinal cord injury from any cervical spine trauma.

30 However, Dr Pillay was of the view that the first surgery was "adequate" for the plaintiff. He explained that he operated on the C4/5 and C5/6 levels of the plaintiff's cervical spine because there were significant impingements on the spinal cord at those levels. He did not operate on C3/4 and C6/7 levels because they were not severely impinging on the spinal cord. The defendant's other expert, Dr Thio, accepted that there was a possibility that the other two levels of the cervical spine could have continued to degenerate, causing problems for the plaintiff. On the other hand, he also advised that that was not an inevitable outcome because deterioration could have been prevented if the patient had taken the "right measures" post-surgery.

31 Part of the difficulty in ascertaining whether the first surgery was effective in preventing further degeneration of the plaintiff's spine arises from the fact that there was no MRI done on the plaintiff's cervical spine in the interim period between the first surgery and the accident that can be used to compare the condition of his spine before the first surgery on the one hand and after the first surgery but before the accident on the other. The best that can be done is to compare the July 2010 MRI with the November 2010 MRI. When Dr Singh was asked to explain the differences between the two, his evidence was that cord compression at the C4/5 and C5/6 levels had improved after the first surgery and that C3/4 and C6/7 had remained "fairly similar" except that there was a "worsening of the right paracentral disc protrusion" at the C6/7 level. He stated that the indentation was possibly the result of either a soft tissue injury caused by the accident or the "progression of the disease".

32 Dr Tang's evidence was that there was in fact an improvement to the C3/4 level of the plaintiff's cervical spine. This tends to support Dr Pillay's view that the first surgery was adequate not just in relieving pain but also in reversing the degeneration of the plaintiff's cervical spine.

33 Dr Pillay's evidence was that the November 2010 MRI revealed indentations at the C3/4 and C6/7 levels of the plaintiff's cervical spine which impinged on the spinal cord. These were not present prior to the first surgery. He opined that these indentations were caused by the accident. They were indicative of increased pressure on the plaintiff's spinal cord and this necessitated the second surgery. He expressly disagreed with the proposition that even without the accident, C3/4 and C6/7 levels of the plaintiff's cervical spine would have deteriorated to such an extent that the second surgery would have been needed. Dr Singh's view was that these indentations were likely pre-existing because if they had been due to the accident, there would have been an "acute tear, and fresh disc protrusion [or] prolapse".

34 On the balance of probabilities, it appears to me that the first surgery was effective in arresting the deterioration of the plaintiff's spine. Dr Pillay's opinion that the first surgery was adequate must be accorded adequate weight in light of the fact that he is an experienced neurosurgeon. Dr Singh was not able to conclusively say that the worsening of the C6/7 level of the plaintiff's cervical spine, which he noticed in the November 2010 MRI, was caused by the progression of the disease. He conceded that it could have been caused by the accident as well. Further, Dr Tang noted some improvements in the C3/4 level of the plaintiff's cervical spine in the November 2010 MRI. This tends to suggest that the condition of the plaintiff's spinal cord was improving prior to the accident. Lastly, the conclusion that the degeneration of the spinal cord was arrested by the first surgery is aligned with the fact that the plaintiff was relatively pain-free after the first surgery. Had the indentations at the C3/4 and C6/7 levels been the result of the progression of the disease (*ie*, present even before the accident), he would, most likely, have continued to feel the type of pain that he experienced prior to the first surgery. Therefore, the first surgery was effective in arresting the deterioration of the plaintiff's cervical spine. Hence, the subsequent pain and disabilities that the plaintiff experienced can

be attributed fully to the accident.

35 The defendant's contention that the AR erred in taking the fractures of the plaintiff's C4 to C6 vertebrae into consideration in deciding this issue, even if it is correct, does not affect my conclusion. This is because Dr Pillay made clear that the fractures were not the cause of the pain that the plaintiff experienced. He did not carry out the second surgery as a result of the fractures. Rather, he operated to relieve the pressure on the spinal cord caused by the indentations at the C3/4 and C6/7 levels of the plaintiff's spinal cord. The fractures merely indicated that "some energy, force, had been applied to the spine". Dr Pillay's evidence under cross-examination was:

> Q: So are you saying that the fractures to C4, C5, C6, as seen in Dr Gan's MRI report was caused by the accident on 15 November?
>
> A: Yes, I am.
>
> Q: And that has nothing to do with the fact that the so-called fractures are a normal side effect of the first surgery?
>
> A: No, it has nothing to do with that.
>
> …
>
> Q: Can I say this: assuming that the accident on 15 November caused the fractures, those fractures were so minor that nothing needs to be done, no big deal?
>
> A: If I can clarify. The fractures were not major, causing major instability to spine that would have put nerves at risk. But the fractures indicated some energy, force, had been applied to the spine, and that is why they appeared on the scans, that was an index to an acute injury to the spine. But the fractures themselves were not severe enough to disrupt the spine and cause instability that would require fixing them directly.
>
> …
>
> Q: If fractures are caused acutely by trauma, is it fair to say that one would expect a certain amount of pain to set in almost immediately?
>
> A: That is a fair statement in normal people, if injury caused purely to bone, there will be pain. But if an injury is also caused to the nerves, as in spine nerves in this case, there can be less pain or lack of pain because of nerve injury.

Therefore, it would not have been fatal to the plaintiff's case if he had not proved that the fractures were caused by the accident.

36 The evidence does show, however, that the fractures were likely caused by the accident. Dr Tang postulated that what seemed like fractures in the November 2010 MRI, could simply have been post-operative changes from the first surgery. Dr Thio accepted that there could have been fractures as a result of the first surgery if the surgeon had deliberately broken the bones to put screws into them. He suggested that Dr Pillay should be asked if he had done so. When this question was posed to Dr Pillay, he responded that during the first surgery, "a non-metal implant without any metal screws or plates was placed in between the vertebra" and hence, he had not fractured or damaged the plaintiff's bones during surgery. He emphasised that "there were x-rays done after this surgery

which showed no fractures". There is no reason to disbelieve his evidence. Therefore, the fractures were more likely than not caused by the accident.

(3) Conclusion on pain and suffering

37 In the circumstances, the AR's findings in relation to the pain and suffering are fully supported by the evidence. The AR had regard to the right range of awards and her decision to award the plaintiff $60,000 which was the median of the range suggested by the *Guidelines* must be upheld.

Damages for loss of earnings

The parties' contentions

38 The defendant contended that the AR erred in calculating the multiplicand that was used to assess the damages that the plaintiff was entitled to for loss of pre-trial earnings and loss of future earnings. The defendant says that the multiplicand should not have been calculated on the basis that the plaintiff would have continued to have been involved in the oil and gas industry. The defendant points out that (a) the plaintiff had not been gainfully employed in the oil and gas industry for a period of at least 23 months before the accident; and (b) the expert opinion of Dr Thio, Dr Tang and Dr Singh was that the plaintiff would have suffered from numerous disabilities even if the accident had not occurred, rendering him unfit to perform any further work in the oil and gas industry. Therefore, the defendant contends that the multiplicand should have been calculated on the basis of the earning capacity of a "58 year old man with a Secondary 2 education with all the [pre-existing] ailments" that the plaintiff suffered from. The earnings of a taxi-driver (*ie*, $1,200 per month) would be an appropriate multiplicand, according to the defendant. I note here that the defendant's argument is premised on a finding that the first operation did not help the plaintiff and his condition did not improve after the surgery. As I have held that to be the wrong premise, much of the defendant's argument falls away.

39 The plaintiff has not made any fresh arguments on this point. He is content to rely on the AR's reasoning and calculations. He does say that the multiplier of 2 given by the AR was on the low side, citing a case decided in 2000 where a multiplier of 3.5 was used for a 58 year-old plaintiff. In his view, therefore, there is no need to interfere with the AR's award.

Is loss of earnings the correct measure in this case?

40 The first surgery was successful in preventing the deterioration of the plaintiff's cervical spine and the plaintiff was making a good recovery thereafter. It thus seems likely that had the accident not intervened, the plaintiff would have been capable of implementing his plans for business in India. He would have had the opportunity to earn money from the pipe-cleaning business. He is no longer capable of carrying out any work in the oil and gas industry and should be entitled to damages in respect of this loss of ability. The only issue is whether the damages should have been awarded on the basis of loss of earnings. The difficulty here is in determining what income the plaintiff could have earned, given that he had been out of work for two years and his new venture was in the planning stage and had not yet got off the ground.

41 An award for loss of earnings is made to compensate the plaintiff for the difference between his post-accident and pre-accident income, whereas an award for loss of earning capacity is meant to compensate the plaintiff for the weakening of his competitive position in the labour market: *Chai Kang Wei Samuel v Shaw Linda Gillian* [2010] 3 SLR 587 ("*Samuel Chai*") at [14]. An award for loss of earning capacity as opposed to an award for loss of earnings should be made where "there is no

available evidence of the plaintiff's earnings to enable the court to properly calculate future earnings": *Samuel Chai* at [16]; *Teo Sing Keng v Sim Ban Kiat* [1994] 1 SLR(R) 340 at [40]. The Court of Appeal in *Samuel Chai*, however, made clear that this does not mean that a lack of sufficient evidence would by itself convert a claim for loss of future earnings into a claim for loss of earning capacity because the two heads of losses are meant to compensate for different losses (at [20]). In the present case, it is impossible to calculate either the plaintiff's pre-trial earnings or his loss of future earnings on the basis of the multiplicand/multiplier method based on the available evidence.

42 The AR acknowledged the "absence of clear evidence" of the plaintiff's monthly earnings. However she took the view that the evidential gap could be filled by adopting the approach in *Ng Chee Wee* to calculate the appropriate multiplicand. I consider that the approach adopted in *Ng Chee Wee* does not fit this case because of the wide fluctuations in the plaintiff's monthly earnings over the period for which evidence as to his income is available and the different sources from which that income was derived. This fact sets the present case apart from *Ng Chee Wee* where the claimant's monthly earnings had been fairly stable.

43 The plaintiff's earnings for the period January 2004 to November 2010 (being the period that the AR considered in calculating the appropriate multiplicand) are set out below:

YA	Earnings	Monthly Average
2004	$42,540	$3,545
2005	$95,653	$7,971.08
2006	$44,960	$3,746.67
2007	$186,194	$15,516.17
2008	$305,558	$25,463.17
2009	$0	$0
2010 (January to November)	$0	$0

44 Not only did the plaintiff's monthly income vary widely during the period but he also left paid employment in 2007 to start his own business which was only profitable for two years. Thereafter, right up to the time of the accident, he earned nothing. In such circumstances, totalling the plaintiff's annual income from 2004 to November 2010 and dividing it by the total number of months in that period does not yield a fair indication of what his average monthly income would have been but for the accident.

45 The plaintiff's evidence was that the global financial crisis in 2008 affected his business. He also testified that he intended to continue to be self-employed after the first surgery. As such, his average monthly income from 2004 to 2006 (when he was an employee) was no guide to what he would have made but for the accident. His income cannot be calculated based just on what he earned in 2007 and 2008 either, because those could have been exceptional years and, in any case, he was intending to move into a new field overseas. The plaintiff did not provide the court with figures and supporting documents showing the income he could have earned from his pipe-cleaning project and what the expenses would have been, so as to show his net profit. All he said was that he had quoted a price of €22 for every pipe cleaned and was bidding for a three-year contract. This was far from the kind of evidence the court needs to make any reasonable projection as to what his average monthly income would have been but for the accident. It is not inconceivable either that his

new business could have ended in a financial loss for him.

46 The plaintiff's main marketable skill was his familiarity with field work in the oil and gas industry, and his ability to "manage in the field … on site". Essentially, he offered the service of supervising field work in the oil and gas industry. As a supplier of services the income of his business would be affected by general economic conditions and this is another factor that makes it difficult for the court to settle on a multiplicand. In the circumstances, loss of earnings was not the correct way to measure the plaintiff's damages.

Quantifying damages to be awarded for loss of earning capacity

47 In *Samuel Chai*, the Court of Appeal opined that a "conservative approach" should be taken in the quantification of this head of damage (at [38]). It has also been stated that damages awarded under this head are "hugely speculative and difficult to assess" and hence a "large amount will not be given under this category" except where clear evidence is adduced: *Teo Seng Kiat v Goh Hwa Teck* [2003] 1 SLR(R) 333 at [10]. In *Clark Jonathan Michael v Lee Khee Chung* [2010] 1 SLR 209, I said at [91]:

> … The assessment for damages for loss of earning capacity can be *an exercise in speculation* as often the court does not know the extent to which a plaintiff will be disadvantaged by his disabilities if he has to seek a new position. In the end, it is clear from the cases that *the assessment is a rather rough and ready one which really reflects the amount that the particular court thinks is reasonable in the particular circumstances to compensate the particular plaintiff for the disadvantage he has been put into in the job market by his disabilities.* [emphasis added]

In the present case, the speculative element arises primarily due to the fact that the court cannot reasonably predict what the plaintiff's average monthly income would have been if the accident had not occurred.

48 The plaintiff's competitive position in the labour market has been weakened as a result of the accident and the disabilities that he now suffers. His weakness in the hands, especially the left hand, restricted neck movements, and inability to walk more than three or four steps make it almost impossible for him to go back into the field. The plaintiff himself emphasised that in his line of work, he had to be physically present at the worksite and be capable of moving about the worksite with ease. In this situation where the plaintiff cannot compete in his area of expertise but may still be able to earn an income in a sedentary job, as opined by Dr Thio, damages for loss of earning capacity would be more appropriate.

49 The plaintiff claimed that, had it not been for the accident, his average monthly income would have been $9,357.79. That figure is far too speculative because it was based in part on his earnings in 2007 and 2008 which were derived from his own business and from a particular project which ended without a replacement. Given that a "conservative approach" ought to be taken, except where there is clear evidence, the remaining possibilities are either to calculate his average monthly income on the basis of his income from 2004 to 2006 (when he was an employee) or to base it on his income on the last of those years for the reason that this is what he was earning at the age of about 54 when he left the job market to set up his own business. Calculating the average monthly income according to the plaintiff's income tax returns gives a figure of $5,087.58. As for the second possibility, the plaintiff's evidence was that he was earning $7,000 a month at his last job which he left after eight months. I think that to take the last figure would be too high. The plaintiff was out of the job market for about three years up to the time of the accident and, if he had re-entered it at the age of 57, might have found himself required to take a pay cut. Accordingly, it would be fairer to use the

average of $5,087.58 which for present purposes, as it is an estimate only in any case, can be rounded down to $5,000.

50 I next have to consider a multiplier. The plaintiff was 58 at the time of the accident. His evidence was he was intending to work to 70. He may have been able to do so in a self-employed capacity but it is highly unlikely that he would be employed by others until that age, bearing in mind the physical requirements of the industry he worked in. One has also to take the plaintiff's own pre-existing ailments into account. However, Dr Thio opined that he was suitable for a sedentary job and he also suggested that there was a possibility that the plaintiff may be employed as a consultant, working in an office environment, on oil and gas projects because of his years of experience in that industry.

51 I have concluded that overall a period of 36 months would be reasonable. I have noted the AR's assessment of a multiplier of two years but this assessment was made on the basis of the plaintiff's age at trial and after an award for pre-trial loss of earnings was made whereas I am taking a more broad approach based on the plaintiff's age at the time of the accident. The award does not represent loss of actual earnings but is compensation for the plaintiff's reduced ability to earn a living. On the basis of $5,000 for 36 months the award comes up to $180,000.

Conclusion

52 For the reasons stated above, the appeal is allowed in part. I set aside the awards made by the AR in respect of loss of pre-trial earnings and loss of future earnings. Instead, the plaintiff is awarded $180,000 as loss of earning capacity. The award for pain and suffering made by the AR stands.

53 I will hear the parties on costs.