IN THE COURT OF APPEAL OF THE REPUBLIC OF SINGAPORE

[2018] SGCA 80

Civil Appeal No 33 of 2018

Between

Yap Boon Fong Yvonne
(Ye Wenfeng Yvonne)

… *Appellant*

And

(1) Wong Kok Mun Alvin
(2) Lim Chuah Heng

… *Respondents*

Civil Appeal No 35 of 2018

Between

(1) Wong Kok Mun Alvin
(2) Lim Chuah Heng

… *Appellants*

And

Yap Boon Fong Yvonne
(Ye Wenfeng Yvonne)

… *Respondent*

JUDGMENT

[Damages] — [Assessment]

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v
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1 October 2018

26 November 2018 Judgment reserved.

Steven Chong JA (delivering the judgment of the court):

Introduction

1 These cross appeals arise from the High Court's assessment of damages suffered by Ms Yap Boon Fong Yvonne (Ye Wenfeng Yvonne) ("Ms Yap"), the appellant in Civil Appeal No 33 of 2018 ("CA 33") and respondent in Civil Appeal No 35 of 2018 ("CA 35"), following a road traffic accident between the parties. At the time of the accident, Ms Yap had left her salaried job as a finance manager to helm a nascent start-up business providing accounting and information technology ("IT") services. Similar to cases involving students and young adults with no employment history, the factual matrix in this case presents exceptional difficulties in terms of proving and quantifying the amount of pre-trial loss of earnings incurred by Ms Yap and her start-up as a result of her accident.

2 The High Court Judge ("the Judge") recognised these difficulties, but nonetheless found that Ms Yap had clearly suffered some loss. In these circumstances, he awarded Ms Yap a final judgment sum of $559,737.80, of which $265,000 was compensation for her pre-trial loss of earning capacity calculated by reference to her last-drawn salary as a finance manager, and $80,000 was in respect of her post-trial loss of earning capacity. Only these two heads of damages are disputed by the parties on appeal.

3 These appeals give rise to two challenging issues. First, if a plaintiff's claim in special damages for pre-trial loss of earnings is truly incapable of proof, can the court award general damages for *pre-trial loss of earning capacity* instead? We note that this would be a novel claim that has never been recognised by this court. Second, given the evidential difficulties arising from the fact that Ms Yap's business had not matured or stabilised, how should the court compensate her for her lost earnings and/or earning capacity?

Background

4 The background facts are set out in full in the High Court's judgment, *Yap Boon Fong Yvonne v Wong Kok Mun Alvin and another* [2018] SGHC 26 ("the Judgment").[1] We set out only the facts that are relevant to the appeals before us.

The accident

5 On 12 July 2011, the first respondent in CA 33 and first appellant in CA 35, Mr Wong Kok Mun Alvin ("Mr Wong"), was riding a motorcycle with Ms Yap as a pillion passenger. Their motorcycle collided into a lorry driven by the second respondent in CA 33 and the second appellant in CA 35, Mr Lim

[1] JCB vol I, p 5 *et seq*.

Chuah Heng ("Mr Lim"). As a result, Ms Yap fractured her right elbow, right radius and ulna, right kneecap and right tibia: Judgment at [1]–[2].

6 Following the accident, Ms Yap was bedridden for a few months. Her upper limb injuries healed without complications but she continued to have problems with her tibia which required bone grafting. In August 2013, she underwent reconstructive surgery to achieve equalisation of her shortened tibia with the use of a metal frame around her leg, followed by several related surgical procedures which lasted until July 2014. The procedures succeeded in achieving equalisation of her leg lengths and correction of her right tibia's external rotation, but her tibia was again fractured two weeks after the metal frame was removed. She had to use a wheelchair and crutches to get around, but her condition has since improved: Judgment at [2]–[3].

7 Ms Yap was given a total of 1,780 days (almost five years) of medical leave from the date of the accident to June 2016. She no longer requires a wheelchair for travelling short distances but occasionally uses a walking stick and experiences pain if she walks for a prolonged duration: Judgment at [3]–[4]. She was 34 years old at the time of the accident and is 41 years old now.[2]

Ms Yap's occupation and earnings

8 At the time of the accident in 2011, Ms Yap was one of two equity partners alongside Mr Wong in a firm named Resources XP ("the Partnership"). Ms Yap had joined the firm in November 2008 when it was a sole proprietorship under Mr Wong's name, and she later became a partner in February 2009. Until 2010, the firm was in the business of providing digital imaging services for Community Development Councils and SPRING Singapore. In early 2011, just

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2 JRA vol III-A, p 89.

months prior to the accident, the Partnership began operating under a different business model and started providing accounting and IT services instead: Judgment at [73] and [81].[3]

9 Mr Wong handled the operations and IT aspects of the businesses while Ms Yap was in charge of accounting, human resource management, sales and business development: Judgment at [73]. In order to meet clients, Ms Yap was required to travel frequently within Singapore and occasionally overseas.[4]

10 In June 2011, just a month prior to the accident, Ms Yap and Mr Wong incorporated a separate company known as Resources XP Pte Ltd ("the Company"). Each of them is a director and 50% shareholder of the Company. The Company carries on the same business as the Partnership; the only difference between the two entities is that the Company is goods and services tax ("GST") registered and can bill clients with GST where required. Where appropriate, we will refer to the collective business as "the Start-up". As the Company was still in the first month of its operations, Ms Yap and Mr Wong had agreed to draw a nominal salary each so as to foster the Company's growth and meet staff payroll requirements: Judgment at [125]. Ms Yap's monthly salary was thus only $850 at the time of the accident.[5]

11 Prior to joining the Partnership in November 2008, Ms Yap had been employed as a finance manager with J Walter Thompson (Singapore) Pte Ltd ("JWT") where she received a fixed monthly salary of $6,300 inclusive of bonuses: Judgment at [74]. She is a certified public accountant.[6]

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3 See also AC (CA 33), paras 22 and 24.

4 JRA vol III-A, p 11.

5 JRA vol III-A, p 12.

6 JRA vol III-A, p 15.

Procedural history

12 On 10 March 2014, Ms Yap commenced the present action against Mr Wong and Mr Lim. On 2 June 2014, interlocutory judgment in default of appearance was entered against Mr Wong, while interlocutory judgment in default of defence was obtained against Mr Lim, with damages to be assessed: Judgment at [5].

13 The Judge heard the trial on assessment of damages over five days in end-March and early April 2017. The parties agreed on the following items of damages (Judgment at [9]):

(a) $108,000 in general damages for Ms Yap's pain and suffering;

(b) $18,941.85 in special damages for her medical expenses; and

(c) $2,000 in special damages for her transport when seeking medical treatment.

14 The following items were disputed by the parties in the proceedings below (Judgment at [10]):

(a) special damages for pre-trial loss of earnings;

(b) special damages for domestic helper expenses;

(c) general damages for future medical expenses and future transport for medical treatment; and

(d) general damages for loss of future earnings and/or loss of earning capacity.

Decision below

15 The Judge awarded $52,980 in damages in respect of Ms Yap's future medical expenses and future transport for medical treatment, and $32,815.95 in respect of her domestic helper expenses: Judgment at [169]. The parties are not appealing against this aspect of the award.[7] This leaves only two items to be considered on appeal: (a) Ms Yap's pre-trial loss of earnings or earning capacity; and (b) her post-trial loss of future earnings or earning capacity, and we summarise here the Judge's findings in these two respects.

16 First, the Judge found that Ms Yap had in fact suffered a pre-trial loss of earnings from July 2011 to March 2017 because the Start-up was less profitable than it could have been, had she been able to develop the business without the disruptions caused by the accident and her injuries: Judgment at [82], [86] and [92]. The question, then, was how the court should compensate Ms Yap for her share of the net profit that the Start-up would otherwise have made.

17 The parties proposed several methods by which Ms Yap's pre-trial loss of earnings could be calculated. However, the Judge rejected all of them.

(a) Ms Yap's primary submission was that she had suffered a loss of $578,244.32 on the basis of her forecasts of the Start-up's net profits. The Judge held that these forecasts were admissible but found that they were built upon assertions of the Start-up's financial performance that were not supported by the documentary evidence. In particular, the Judge noted that the financial records for 2010 were not in evidence: Judgment at [102(b)] and [117].

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7 AC (CA 33), para 10.

(b) Ms Yap's alternative submission was that her pre-trial loss of earnings was at least $265,061.54 on the basis of her fixed monthly salary at JWT, but the Judge was not satisfied that she would have in fact earned at least $6,300 per month given the instability and the unprofitability of the Start-up in its early days: Judgment at [118]–[128].

(c) The defendants proposed taking the difference between the Start-up's net loss in 2011 and the Partnership's average pre-accident net profits in 2009 and 2010 (totalling $85,070.89), halving it to account for the fact that Mr Wong's injuries would also have contributed to the loss, and further halving it to account for Ms Yap's half-share in the profits, resulting in a final figure of $21,267.70. The Judge rejected this method as the Partnership had been engaged in a completely different business in 2009 and 2010 and also because the method failed to take into account business growth which is important for a start-up business: Judgment at [129]–[135].

18 In light of the difficulties in quantifying pre-trial loss of earnings in these exceptional circumstances, the Judge held that the better approach was to award Ms Yap damages for her pre-trial loss of *earning capacity*: Judgment at [136] and [146]. The Judge took reference from Ms Yap's last-drawn monthly salary at JWT and found that, on the basis of the significant improvement in the Start-up's performance over 2011 to 2017 despite the accident, she would have eventually started to draw $6,300 or more per month by 2017. The Judge thus awarded Ms Yap a sum of $265,000 for her pre-trial loss of earning capacity, which was close to the figure of $265,061.54 she had submitted under her alternative computation method: Judgment at [151]–[152].

19 Next, Ms Yap sought $585,000 in damages for her loss of future earnings on the basis that her earnings would peak at $12,000 per month and, in the alternative, $230,000 to represent her post-trial loss of earning capacity. The defendants argued that she was not entitled to any award for post-trial loss of earnings, and only $30,000 for her loss of earning capacity. The Judge remarked that the evidence in this regard was inadequate and rejected Ms Yap's claim for loss of future earnings. As for the claim for post-trial loss of earning capacity, the Judge found that the adverse impact of Ms Yap's injuries on her future earning capacity would be limited as she had shifted her business direction towards providing training courses, so as to accommodate her reduced mobility. The Judge accepted that Ms Yap's inability to stand for long periods of time would prevent her from conducting her training courses as she desired, but there was no evidence as to how much this would affect the effectiveness of her courses and her earnings. The Judge also found that the further medical procedures that Ms Yap had to undergo in the future would likely have an impact on a fraction of the remaining span of her working life. The Judge thus awarded her a sum of $80,000 for her post-trial loss of earning capacity: Judgment at [153]–[168].

20 In summary, the Judge awarded Ms Yap $265,000 for her pre-trial loss of earning capacity and $80,000 for her post-trial loss of earning capacity. Added to the other items which are not disputed on appeal, Ms Yap was awarded a final judgment sum of $559,737.80, plus interest in respect of her pre-trial loss of earning capacity and the items of special damages: Judgment at [169]–[171].

The parties' cases

21 Ms Yap contends on appeal that the Judge erred in rejecting her primary submission that she should be awarded $548,453.15 for her pre-trial loss of

earnings on the basis of her forecasts of the Partnership's and the Company's profits. We note that this figure differs slightly from her original submission of $578,244.32 in the proceedings below (see [17(a)] above), as she concedes that the Judge rightly pointed out a mathematical error in her original calculations: see Judgment at [116]. In any case, this sum is based on her forecasted year-on-year increases in the Start-up's aggregate income of 50% in 2011, 50% in 2012, 40% in 2012, and 25% in 2014.[8] She submits that although the Partnership's full financial documents for 2010 were not disclosed, the relevant 2010 figures showing total gross revenue, costs/expenses and net profits were stated in the table she had prepared and, in any event, were not disputed by the other side.[9] Further, she argues that the Judge erred in disregarding the Ministry of Manpower Occupational Wages Survey ("the MOM Survey") which shows that a business development manager typically earns an average monthly wage between $8,000 and $12,050; a company director between $13,039 and $20,000; and a sales and marketing manager between $7,391 and $10,646.[10]

22 Next, Ms Yap concedes that the Judge did not err in dismissing her claim for loss of *future earnings* because of the evidential difficulties, but submits that the Judge's award of $80,000 was inadequate to compensate for her *post-trial loss of earning capacity*, considering her residual disabilities and the inevitable future disruptions to her business due to the need for further surgeries. She submits that she should be awarded $180,000 for her loss of earning capacity, which would be in line with the awards given by the courts in past cases.[11]

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8 AC (CA 33), p 17.

9 AC (CA 33), paras 26–29.

10 AC (CA 33), para 36.

11 AC (CA 33), paras 61 and 71.

23 In response, Mr Wong and Mr Lim submit that there were "evidential failings" arising from Ms Yap's failure to prove her case. For instance, she could have given evidence showing how many more client meetings she would have attended but for the accident, and how many more clients the Start-up would have retained. They argue that in light of these evidential failings, Ms Yap had not satisfied her burden of proving her pre-trial loss of earnings.[12] Related to this, they submit that the Judge erred in law by awarding Ms Yap damages for pre-trial loss of *earning capacity*. They contend that the Judge should not have relied on *Chang Mui Hoon v Lim Bee Leng* [2013] SGHCR 17 ("*Chang Mui Hoon*"), as the Assistant Registrar ("the AR") in that case had misapplied or misinterpreted the views stated in an Australian textbook in recognising the principle that a plaintiff can seek general damages for loss of *pre-trial earning capacity* in cases where special damages for pre-trial loss of earnings would be difficult to quantify. Further, they point out that the issue of pre-trial loss of earning capacity was not raised by Ms Yap at the trial, and they therefore had no opportunity to test the evidence pertaining to such a claim. In short, Mr Wong and Mr Lim submit that Ms Yap's claim for pre-trial loss of *earnings* should be dismissed as she has not met her burden of proof, and the courts should not recognise pre-trial loss of *earning capacity* as a head of damages.

24 In the alternative, they contend that Ms Yap's JWT salary figures were inflated, because her annual 13th month bonus was discretionary under her JWT employment contract, and because $300 of the monthly $6,300 figure was only an allowance and should be disregarded. They argue that the Judge's $265,000 award for Ms Yap's pre-trial loss of earning capacity should accordingly be reduced to $212,800.

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12 AC (CA 35), paras 30–38 and 51.

25 Finally, Mr Wong and Mr Lim submit that the Judge's award of $80,000 in respect of Ms Yap's post-trial loss of earning capacity was excessive as her injuries do not affect her ability to work as an accountant. They maintain their submission below that an award of $30,000 would be adequate.

Issues to be decided

26 The two issues to be decided on appeal relate to the two heads of damages in dispute, and are as follows:

(a) whether the Judge erred in awarding Ms Yap $265,000 for her pre-trial loss of earning capacity; and

(b) whether the Judge erred in awarding Ms Yap $80,000 for her post-trial loss of earning capacity.

Pre-trial loss of earnings or earning capacity

27 At the outset, we agree with the Judge's finding that Ms Yap clearly did suffer some loss in earnings as a result of her injuries from the accident: see [16] above. This was a matter of natural inference from the evidence, including Ms Yap's medical reports which showed that she had suffered serious injuries that undoubtedly impaired her ability to work and meet clients, as well as the records of her surgical procedures and medical leave which had significantly disrupted her work schedule. However, the Judge found that none of the methods of computation proposed by the parties were founded on the evidence. In the circumstances, as an alternative to awarding special damages for Ms Yap's pre-trial loss of earnings, the Judge decided that it was appropriate to award general damages for pre-trial loss of *earning capacity*.

28 This raises two specific questions for our consideration:

(a) In cases where pre-trial loss of earnings is impossible to prove or quantify with precision, does our law recognise a claim in general damages for pre-trial loss of earning capacity?

(b) If not, how should the court assess the pre-trial loss of earnings suffered by Ms Yap in this case?

Whether our law recognises a claim for pre-trial loss of earning capacity

29 Before turning to the specific facts of this case, we deal with the question of whether the Judge erred in law by recognising a claim for pre-trial loss of earning capacity. At the outset, we note that this claim was not pleaded by Ms Yap,[13] nor was it raised during submissions below. Even on appeal, Ms Yap's case is still primarily based on a claim for loss of pre-trial earnings, and only falls back on the Judge's award for pre-trial loss of earning capacity as an alternative submission.

30 We begin by explaining the concepts of loss of earnings and loss of earning capacity. In *Chai Kang Wei Samuel v Shaw Linda Gillian* [2010] 3 SLR 587 ("*Samuel Chai*"), this court clarified at [20] that loss of earnings "compensates for the difference between the post-accident and pre-accident income or rate of income, while loss of earning capacity compensates for the risk or disadvantage, which the plaintiff would suffer in the event that he or she should lose the job that he or she currently holds, in securing an equivalent job in the open employment market". The two heads of damages are meant to compensate for different losses. We note that when describing the concept of loss of earning capacity, the courts consistently refer to the risk of "future" loss: see *Samuel Chai* at [15]–[16], citing *Teo Sing Keng v Sim Ban Kiat* [1994]

[13] See JRA vol II, p 51.

1 SLR(R) 340 at [40] and *Moeliker v A Reyrolle and Co Ltd* [1977] 1 All ER 9 ("*Moeliker*"). This, fundamentally, is what an award for loss of earning capacity is intended to compensate for.

31 While it is well established that damages may be awarded for *post-trial* loss of earning capacity, this court has never recognised any claim for *pre-trial* loss of earning capacity. This, to us, makes eminent sense because any loss actually incurred by a plaintiff prior to the date of the trial would already have been known, and must be capable of being proved by the plaintiff. This is also why our courts, when assessing pre-trial loss, have generally only recognised claims for pre-trial loss of *earnings*, which are treated as claims for special damages which attract the requirement that the plaintiff must provide strict proof of actual loss: see *Wee Sia Tian v Long Thik Boon* [1996] 2 SLR(R) 420 ("*Wee Sia Tian*") at [15]–[16]; *Teo Seng Kiat v Goh Hwa Teck* [2003] 1 SLR(R) 333 at [8]. The distinctions between pre-trial and post-trial loss, and between general and special damages, were succinctly explained by the House of Lords in *British Transport Commission v Gourley* [1956] AC 185 at 206:

> In an action for personal injuries the damages are always divided into two main parts. First, there is what is referred to as *special damage, which has to be specially pleaded and proved*. This consists of out-of-pocket expenses and *loss of earnings incurred down to the date of trial*, and is generally capable of substantially exact calculation. Secondly, there is general damage which the law implies and is not specially pleaded. This includes compensation for pain and suffering and the like, and, if the injuries suffered are such as to lead to continuing or permanent disability, compensation for loss of earning power in the future. [emphasis added]

32 The Judge, however, relied on the case of *Chang Mui Hoon* which the parties accept is the only precedent in local jurisprudence that recognises pre-trial loss of earning capacity as a compensable head of loss. The plaintiff in *Chang Mui Hoon* was a full-time housewife who met with a traffic accident.

She had intended to start a dog grooming business but could not do so due to her injuries from the accident. Although the plaintiff claimed special damages for pre-trial loss of earnings, the AR held at [53] that "the proper measure of damages to be applied in respect of the Plaintiff's claim for pre-trial earnings-related loss should be the Plaintiff's pre-trial loss of *earning capacity* attracting *general* damages" [emphasis in original]. In support of this, the AR cited an Australian textbook, Harold Luntz, *Assessment of Damages for Personal Injury and Death: General Principles* (LexisNexis Butterworths, 2006) ("*Luntz on Assessment of Damages*") at paras 6.2–6.5. The most relevant part of the passage excerpted by the AR at [51] reads:

> 6.4 … It is true that in some cases what the plaintiff would have earned to the date of the trial is as doubtful as what would have been earned after that date; or the defendant shows that despite the injury the plaintiff could have resumed the former employment. In such cases there may be little advantage in making a division between loss of earning capacity as part of special damages and loss of earning capacity as part of general damages; it should all be dealt with as part of general damages…
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> …
>
> One danger from the practice of treating pre-trial loss of earning capacity as a matter for special damages is that a plaintiff who is unable to prove with precision the earnings lost up to the date of the trial may wrongly be denied any compensation for loss of earning capacity during that period, whereas the law is clear that the court must estimate the loss of earning capacity as best as it can in the circumstances.

Having considered the above passage, the AR remarked at [52] that the law was not so rigid as to require the shoehorning of all claims for pre-trial loss of income as claims for special damages. He added that in situations where "what the plaintiff would have actually earned is as doubtful as what would have been earned post-trial, it is to be preferred that pre-trial loss of earning capacity attracting general damages and not pre-trial loss of income attracting special

damages be used as the proper measure of damages for the purposes of assessment" [emphasis omitted].

33 Mr Wong and Mr Lim submit that the AR misunderstood the views of the author in *Luntz on Assessment of Damages* as he did not appreciate that the Australian courts recognise claims for *only* "loss of earning capacity" and not "loss of earnings", whether in respect of pre-trial or post-trial loss. In this regard, we agree that there are clear conceptual differences between our law and Australian law. An explanation for this can be found in *Luntz on Assessment of Damages* itself, at para 6.4:

> The [Australian] High Court has repeatedly preferred to describe the loss sustained by a person who is unable to earn in consequence of injuries as "loss of earning capacity", rather than "loss of earnings". … The question has arisen whether it is appropriate to apply the distinction between 'special' and 'general' damages … to loss of earning capacity that is productive of economic loss up to the date of the trial and loss of earning capacity that may be productive of future loss.

The High Court of Australia also made clear in *Medlin v State Government Insurance Commission* (1985) 182 CLR 1 at [5.1.4] that "[i]n Australia, a plaintiff is compensated for loss of earning capacity, not loss of earnings."

34 The Canadian courts take the same approach as the Australian courts, in that they only recognise claims for loss of earning capacity – and not loss of earnings: see *Watkins v Olafson* [1989] 2 SCR 750 (where the Supreme Court of Canada upheld an award for pre-trial loss of earning capacity); S M Waddams, *The Law of Damages* (Canada Law Book and Thomson Reuters, 6th Ed, 2017) ("*Waddams on Damages*") at para 3.360. This approach is in contrast to that taken by the English courts which, like ours, deals with loss of earnings rather than loss of earning capacity solely: *Clerk & Lindsell on Torts* (Michael A Jones gen ed) (Sweet & Maxwell, 21st Ed, 2014) at para 28-36. We

note, however, that the authors of *Clerk & Lindsell on Torts* go on to remark that "the difference between loss of earnings and loss of earning capacity [across the various jurisdictions] appears to be purely a matter of terminology, nothing of substance should turn on it".

35 But with this context in mind, regardless of whether the distinction is more appropriately characterised as being a matter of terminology or differing conceptual underpinnings, we do not think the passage quoted by the AR in *Luntz on Assessment of Damages* can be read to mean that the courts should begin to recognise claims for pre-trial loss of *earning capacity* in the sense that would be understood by the local and English courts. In our view, *Luntz on Assessment of Damages* only goes as far as to suggest that a claim for pre-trial loss of earnings might be regarded as a matter of general damages in certain situations, although, as we will later explain, we have reservations as well about importing such a principle into our law.

36 We earlier observed at [32] above that aside from the decision in *Chang Mui Hoon*, our courts have never recognised a claim for pre-trial loss of earning capacity. Having said that, we note that there have been at least two instances where a claim for pre-trial loss of earning capacity was pleaded and dismissed by the High Court.

37 The first was *Nirumalan V Kanapathi Pillay v Teo Eng Chuan* [2003] 3 SLR(R) 601 ("*Nirumalan*"), where the plaintiff, a lawyer, was involved in a traffic accident and suffered whiplash injuries. He claimed against the defendant, among other things, damages for *pre-trial loss of earning capacity*, asserting that such an award must be made for the loss of earning capacity regardless of whether any loss of earnings was actually suffered. In support of this claim, he cited an earlier edition of *Waddams on Damages*, S M Waddams,

The Law of Damages (Canada Law Book, 3rd Ed, 1997) at para 3.360, for the view that "if the plaintiff is entitled to recover compensation for future loss [of] earning capacity, the plaintiff should be entitled to compensation on the same principle in respect of the period before the trial": at [34].

38 Kan Ting Chiu J did not appear to accept this proposition. Kan J raised a hypothetical example of a student who was injured and continued to be in full-time studies up to the date of the trial. That student might have suffered a loss of earning capacity, but he would have suffered no actual loss of earnings. Hence, any damages for the loss of that earning capacity, at most, would only have been nominal: at [35]. The upshot of Kan J's statements is essentially that the inquiry as to pre-trial loss must focus on the question of whether the plaintiff suffered any *actual loss that is capable of being specially proved*, which would be in line with the view that our courts have traditionally taken: see [31] above. On the facts of *Nirumalan*, Kan J focused on whether any loss of *earnings* had been proved, and dismissed the plaintiff's claim for loss of pre-trial earning capacity on the basis that the plaintiff had not stopped work and his pre-trial *earnings* were unaffected: at [36].

39 The second was *Tan Siew Bin Ronnie v Chin Wee Keong* [2008] 1 SLR(R) 178 ("*Ronnie Tan*"), which coincidentally involved a different lawyer who had sustained whiplash injuries after a traffic accident. The plaintiff brought claims for both pre-trial loss of earnings and pre-trial loss of earning capacity. Chan Seng Onn J found that the plaintiff had not presented any credible evidence of pre-trial loss of earnings. Chan J then went on to state (at [24]–[25]):

> 24 … Having assessed the "loss of pre-trial earnings" to be zero, there would be no reason, as will be seen from the cases below [which included *Nirumalan*], to award any amount for

> "pre-trial loss of earning capacity" on top of "loss of pre-trial earnings".
>
> 25 I shall explain further. The actual state of affairs between the time of the accident and the time of trial would be known. Hence, there would be no "unknown risks" or "unknown factors" exacerbating the loss which must be accounted for. In a sense, all such "unknowns" would be known and manifested in the actual income earned for the pre-trial period. For instance, if there was a risk of termination, and he was in fact never terminated during the pre-trial period, the probability of termination during that period would be zero as no termination took place. Hence, in most cases, the assessment of pre-trial loss of earnings could be made with a fair degree of accuracy on account of the facts being already available, unlike that for post-trial losses. As such, even if the "pre-trial loss of earning capacity" were to be quantifiable, it should have been subsumed under "loss of pre-trial earnings" to avoid any unintended double counting: see also the case of *Teo Seng Kiat* ([18] *supra*).

40 Similar to what was said in *Nirumalan*, these statements evinced the court's antipathy towards the idea of awarding compensation for loss which did not actually materialise. In Chan J's words, the probability of loss on the facts of the case was "zero", and there was therefore no basis to award any damages. Once again, we think this coheres with the established approach of examining whether any actual provable loss had been suffered by the plaintiff.

41 In our jurisprudence, our courts have clearly taken the position that a plaintiff must prove his pre-trial losses as a matter of special damages. Past events must be capable of proof. In the same vein, all pre-trial losses must be losses that have actually been incurred by the plaintiff and that can be specially proved. This, we think, also explains why the existing local authorities such as *Samuel Chai* refer to the concept of earning capacity only when the courts are making an inquiry that looks towards the future rather than the past.

42 We therefore decline to recognise claims for pre-trial loss of earning capacity. For the avoidance of doubt, this proposition applies equally to cases

where loss of pre-trial earnings would be difficult or impossible to prove, and also to cases where there would be no risk of double recovery of the sort envisioned by Chan J in *Ronnie Tan* by awarding damages for pre-trial loss of earnings and earning capacity at the same time. In our judgment, a contrary holding would risk muddying our existing jurisprudence which now clearly and correctly requires that a plaintiff must specially prove his pre-trial losses to recover damages. For similar reasons, we also do not think that a claim in respect of pre-trial loss of earnings can be treated as a matter for general damages, as this would otherwise blur the well-established distinction between general and special damages.

43 With respect, we therefore hold that the Judge erred by awarding Ms Yap general damages for her pre-trial loss of earning capacity when our law does not recognise such a claim, not to mention the fact that this head of claim was not even pleaded or argued below. We recognise that the Judge was at pains to award Ms Yap some compensation for the loss which had clearly been suffered, in spite of what he perceived as a lack of evidence to support her claim in special damages for lost earnings. Both the Judge in the present case and the AR in *Chang Mui Hoon* thus resorted to characterising the respective plaintiffs' claims as "loss of pre-trial earning capacity" as a way to avoid the requirement to prove special damages. It appears to us that they did so in the belief that unless the claim could be grounded in general damages, the plaintiffs in those cases would effectively have been left without a remedy.

44 We do not think that an adherence to established principles will make it unduly onerous for plaintiffs who find themselves in exceptional circumstances which make it difficult to precisely prove and quantify loss of earnings. The courts do not and will not rigidly or invariably demand the same type or amount of evidence in every claim for lost earnings, but will consider all the

circumstances of each case in determining whether the evidence that *is* available satisfies the court that the loss can be proved on a balance of probabilities.

45 We illustrate this with an example. In *Zaiton Bee Bee bte Abdul Majeed v Chan Poh Teong* [2010] 3 SLR 697 ("*Zaiton Bee Bee*"), the plaintiff was a henna artist who met with a traffic accident and sustained injuries which affected her level of productivity and the number of hours she could put into teaching henna each day: at [57]. Judith Prakash J (as she then was) recognised the difficulties in quantifying the plaintiff's pre-trial loss of earnings and the limitations in the plaintiff's evidence, but nonetheless recognised that the plaintiff had incurred losses in the first two years after the accident during which she was unable to work. The AR below had awarded the plaintiff $46,000 per year for pre-trial loss of earnings, with reference to the plaintiff's income tax assessments, but Prakash J found that this figure was too low given the plaintiff's enterprising spirit and the evidence of continuing business enquiries. However, it also would not have been fair to award the plaintiff $92,000 per year, which represented the profits earned for a full year's work, because the evidence indicated that the nature of her business was more casual in nature and not so sustained as to generate a full year's profits. Prakash J found it appropriate to take the average between $46,000 and $92,000, which yielded a "mid figure of $69,000 a year [which] would not be unreasonable based on the available evidence": at [65]. Hence, the plaintiff was awarded $138,000 for her pre-trial loss of earnings over the two years during which she was unable to work.

46 Despite the inherent difficulties in quantifying the loss incurred by the plaintiff prior to the date of trial, the court in *Zaiton Bee Bee* nonetheless found it possible to award the plaintiff special damages for pre-trial loss of earnings in a sum which it considered to be fair in all the circumstances and justified by the

available evidence. This adequately met the requirement that special damages must be strictly proved: see *Wee Sia Tian* at [15]–[16] and the State Court practitioner's guide, *Assessment of Damages: Personal Injuries and Fatal Accidents* (LexisNexis, 3rd Ed, 2017) ("the *Practitioner's Guide on Assessment of Damages*") at para 1-8.

47 As the *Practitioner's Guide on Assessment of Damages* further states at para 2-2, although pre-trial loss of earnings can be quantified with precision in most cases, in exceptional cases "where the loss may not be so quantified, such as where the plaintiff's monthly income fluctuates, the quantification may be an approximate". In *Ariffin bin Omar v Goh Beng Kee and Another* [1994] SGHC 15, K S Rajah JC was alive to this principle. He remarked:

> Special damages represent the plaintiff's pecuniary loss between the date of injury and the trial and the plaintiff must show that it can be calculated. Pre-trial loss of earnings must be pleaded and proved but every dollar claimed cannot always be proved with the same degree of certainty …
>
> …
>
> The degree of particularity required will depend upon the facts of each case. The object of pleading being to give the defendants notice of the case which he has to meet so that he can prepare for trial and if necessary make a payment into court. Minute accuracy is not expected and the pleading should make clear what measure of damage is relied on, and if the plaintiff is able to base his claim on a precise calculation he must give the defendants access to the facts which make that calculation possible.

48 Accordingly, we are not concerned that the law will be too strict by compensating plaintiffs only for their pre-trial loss of earnings (and as a matter for special damages) and not diminished earning capacity. We further clarify that the requirement of strict proof for special damages does not mean that the the plaintiff must meet a higher legal burden of proof than a balance of probabilities, only that the loss must be specially pleaded and proved: see

Rahman Lutfar v Scanpile Constructors Pte Ltd and another [2016] SGHC 41 at [13]; O 18 r 12(1A) of the Rules of Court (Cap 322, R 5, 2014 Rev Ed).

49 For the above reasons, we set aside the Judge's award of $265,000 in general damages for Ms Yap's pre-trial loss of earning capacity as there was no basis in law for such an award to have been made.

Our assessment of Ms Yap's pre-trial loss of earnings

50 Having rejected pre-trial loss of earning capacity as the legal basis to compensate Ms Yap, while having recognised at the same time that she did in fact suffer a pre-trial loss of earnings (see [27] above), how then should the court best assess and quantify her lost earnings on the basis of the available evidence?

51 In the proceedings below, the parties presented a total of three proposed methods by which Ms Yap's pre-trial loss of earnings was to be calculated, but the Judge rejected all three. We briefly explain each method in turn.

Ms Yap's primary proposed method

52 Ms Yap's primary proposed method, which she maintains as her main submission on appeal, is to subtract her actual earnings from the earnings she would have earned but for the accident, as set out in the following table (see Judgment at [95]):

Period	**Actual amount Ms Yap earned (A1)**	**Amount Ms Yap would have earned (A2)**	**Loss of earnings (A1) – (A2)**
2011 (Jul – Dec)	$2,203.50	$59,582.34	$57,378.84

2012	$17,229.26	$89,373.51	$72,143.55
2013	$60,270	$125,122.90	$64,852.90
2014	$38,799	$156,403.63	$117,604.63
2015	$34,636	$156,403.63	$121,767.63
2016	$39,000	$156,403.63	$117.403.63
2017 (Jan – Mar)	$9,000	$36,093.14	$27,093.14

The figures in the column marked "A2" (*ie*, the amounts that Ms Yap would have earned but for the accident) are in turn based on her 50% share of the Start-up's *forecasted profits* for each year.

53 The year-on-year increases in the Start-up's forecasted income and profits according to Ms Yap are set out in the following table:[14]

Year	**Forecasted income (B1)**	**Forecasted costs of sales (B2)**	**Forecasted expenses (B3)**	**Net profit (B1) – (B2) – (B3)** *Equivalent to 2 x (A2)*
2011	$341,500.92 *(based on a forecasted **50%** increase from 2010)*	$101,504.43 *(based on a 71% actual average gross profit margin)*	$120,831.82 *(based on an actual average of 35% of total income)*	$119,164.67
2012	$512,251.38 *(based on a forecasted **50%***	$152,256.64 *(based on a 71% actual average gross*	$181,247.73 *("based on last year + 35% increase in*	$178,747.01

[14] JCB vol II-B, pp 157–159.

	increase from 2011)	*profit margin)*	*costs")*	
2013	$717,151.93 *(based on a forecasted **40%** increase from 2012)*	$213,159.30 *(based on a 71% actual average gross profit margin)*	$253,745.82 *("based on last year + 35% increase in costs")*	$250,245.81
2014	$896,439.92 *(based on a forecasted **25%** increase from 2013)*	$266,443.13 *(based on a 71% actual average gross profit margin)*	$317,183.52 *("based on last year + 35% increase in costs")*	$312,807.26
2015 – 2017	Same as 2014; Ms Yap concedes that the Start-up's growth would have peaked in 2014.			

These year-on-year forecasted increases in income are supported only by brief explanatory notes by Ms Yap as to the Start-up's business models and goals, references to government initiatives and productivity innovation credits ("PIC") grants, and awards received: Judgment at [102] and [107].[15] In her submissions, Ms Yap refers to this proposed method as the "exponential moving average" method.[16]

54 We deal briefly with Mr Wong and Mr Lim's argument that the Judge erred in admitting Ms Yap's forecasts into evidence as statements of opinion by a non-expert witness under s 32B(3) of the Evidence Act (Cap 97, 1997 Rev Ed).[17] Section 32B(3) reads:

15 JCB vol II-B, pp 157–159.

16 AC (CA 133), para 20.

17 RC (CA 133), paras 10–35.

> Where a person is called as a witness in any proceedings, a statement of opinion by him on a relevant matter on which he is not qualified to give expert evidence, if made as a way of conveying relevant facts personally perceived by him, is admissible as evidence of what he perceived.

55 In our judgment, the Judge did not err in admitting Ms Yap's forecasts as opinion evidence under s 32B(3). First, we see no reason to disagree with the Judge's finding that Ms Yap was in charge of the Start-up's business development and was thus in the best position to render an opinion on the estimated profitability of her business. After all, she is a qualified accountant and her perception of her loss is premised on her informed understanding of her business. The fact that Ms Yap was a party was more properly a matter relating to the weight to be ascribed to the evidence, rather than one affecting the admissibility of that evidence. Second, we are not persuaded by Mr Wong and Mr Lim's submission that s 32B(3) limits admissible opinion evidence to opinions that are based on "common sense" or on facts that are "seen" by the witness. There is no basis to read such a limitation into the provision. Following the wording of s 32B(3), it suffices that Ms Yap's opinion was based on "relevant facts perceived by" her, such as awards and grants that had purportedly been given to the Start-up. Finally, we do not think Mr Wong and Mr Lim were prejudiced by the fact that Ms Yap had deviated from her pleadings by using the "exponential moving average" method in her closing statements, as this was ultimately still based on the Start-up's financial performance on which their counsel was able to cross-examine her during the trial. In any event, Ms Yap's forecasts were rejected by the Judge.

56 Notwithstanding the Judge's holding that the forecasts were admissible, he did not rely on them as he found them to have been built upon assertions that were not supported by the documentary evidence. We agree. For instance, the purported year-on-year forecasted increases in income of 50%, 50%, 40% and

25% appear to be entirely arbitrary. Ms Yap's explanatory notes for these figures contain no more than conclusory assertions about the Start-up's goals and business models, and as the Judge observed at [102(c)] and [107] of the Judgment, she had not addressed Mr Wong and Mr Lim's contention that there was "a near complete lack of primary evidence" in support of her statements about the Partnership's agreements with the Infocomm Development Authority of Singapore and its eligibility for PIC grants.[18] Furthermore, Ms Yap's forecasts were not based on any business plans or documents prepared *prior* to the accident; instead she had prepared them for the purposes of this litigation. Ms Yap's submissions on appeal do not advance any further explanation to address the problems identified by the Judge regarding the unreliability of the forecasts. We therefore see no reason to disagree with the Judge's rejection of Ms Yap's primary proposed method.

Mr Wong and Mr Lim's proposed method

57 On appeal, Mr Wong and Mr Lim no longer advance any argument in support of the method which they proposed in the proceedings below. This method involved taking the difference between the Start-up's net loss in 2011 and the Partnership's average pre-accident net profits in 2009 and 2010 (totalling $85,070.89), halving it to account for the fact that Mr Wong's injuries would also have contributed to the loss, and further halving it to account for Ms Yap's half-share, resulting in a final figure of $21,267.70. In any case, we agree with the Judge that there were insurmountable problems with this method as the Partnership had been operating under a very different business model in 2009 and 2010 (see [8] above) and its earnings then are not an accurate gauge of the Start-up's profitability in 2011 and beyond: see Judgment at [133]–[134].

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18 JCB vol II-B, pp 157–159.

58 This leaves the alternative method proposed by Ms Yap, which is based on her last-drawn salary at JWT. We will refer to this method below as we set out our findings on the appropriate award.

The appropriate award in this case

59 In seeking to determine the appropriate award to compensate Ms Yap for her lost pre-trial earnings, we take reference from two sets of figures which we consider to be the only sufficiently objective and reliable figures in evidence: (a) Ms Yap's last drawn salary at JWT; and (b) the earnings that the Start-up did in fact make from 2011 onwards.

60 At the same time, we recognise that there are obvious limitations in relying entirely on these two sets of figures. We hesitate to rely on Ms Yap's JWT salary as a proxy for the earnings she would have made from the Start-up but for the accident, because: (a) this figure is based on a salaried job and does not take into account business risks; and (b) the Start-up was in its early days and Ms Yap was unlikely to have earned as much in the first few years of the business as she did at JWT. On the other hand, the Start-up's post-2011 earnings represent its earnings *after* the accident (*ie*, with the effects of Ms Yap's physical impairments and absences) and it would not be fair to rely entirely on this to ascertain how well the start-up would have done but for the accident, without some further extrapolation.

61 However, Ms Yap testified that she believed that she would eventually have been earning more at the Start-up than what she used to earn at JWT. She explained that at her age, she would not have switched to a job that commanded a lower salary.[19] While this might well have represented a good faith belief on

[19] ROP vol III-E, p 110 at lines 8–10.

Ms Yap's part, it does not follow that the switch would necessarily be more profitable for her as compared to her salary at JWT at least at the start of the new venture. Having said that, we see no reason to disagree with the Judge's view that Ms Yap would have eventually earned at least $6,300 per month from the Start-up, thereby matching or exceeding her monthly salary at JWT. This was based on his finding that the Start-up's performance was commendable and that its growth was in large part due to Ms Yap's driven nature, which she had exhibited by working on her laptop even while hospitalised and attending meetings with clients and vendors while in a wheelchair and crutches: Judgment at [86] and [151].

62 In our judgment, there is further support for the Judge's finding that on a balance of probabilities, Ms Yap would have earned about $6,300 per month from January 2013 to March 2017 but for the accident. The Start-up's actual post-2011 earnings show that in 2013, just two years after the accident, it was doing well enough for Ms Yap to earn more than $5,000 per month despite her injuries and absences, indicating that a monthly income of $6,300 by 2013 was highly plausible. We observe that the nature of the services rendered by the Start-up (accountancy services and IT solutions) are not of the sort that would lend themselves to an inherently risky business model and are instead more likely to generate a stable income. At the hearing, we asked Mr Ramasamy, counsel for Mr Wong and Mr Lim, to state a figure which he reasonably thought Ms Yap could have earned per month had she not met with the accident. Mr Ramasamy made the candid and fair submission of $4,000 per month, and the Judge's figure of $6,300 per month is not significantly out of step with that submission.

63 In this regard, we note Ms Yap's contention that the Judge should not have disregarded the MOM Survey which sets out the average gross monthly

wages of a business development manager ($8,000 to $12,050), a company director ($13,039 to $20,000) and a sales and marketing manager ($7,391 to $10,646). We agree with the Judge's finding that the MOM Survey cannot be probative on its own as a gauge of Ms Yap's income. It has been reiterated in the case law that wage reports such as the MOM Survey must be regarded with caution: see *Quek Yen Fei Kenneth (by his litigation representative Pang Choy Chun) v Yeo Chye Huat and another appeal* [2017] 2 SLR 229 ("*Kenneth Quek*") at [106]; *Fong Khim Ling (administrator of the estate of Fong Ching Pau Lloyd, deceased) v Tan Teck Ann* [2013] SGHC 104 at [16]. In particular, the figures in the MOM Survey reflect the earnings of full-time salaried employees whereas Ms Yap's income is based entirely on the performance of the Start-up. Moreover, as Mr Wong and Mr Lim argued, reliance on such wage reports would be generally more appropriate in cases involving younger plaintiffs who have not embarked upon their careers.[20] Having said that, we nonetheless observe that the Judge's figure of $6,300 per month does not deviate significantly from the average monthly salaries of a business development manager (which ranges upwards of $8,000) and a sales and marketing manager (which ranges upwards of $7,391), the two categories of jobs in the MOM Survey that are most applicable to Ms Yap. We think this further shows that the $6,300 figure is within a reasonable range.

64 Although Ms Yap's JWT salary figures were considered by the Judge, our foregoing analysis shows that the Judge's finding that Ms Yap would have made at least $6,300 per month from January 2013 to March 2017 (but for the accident) is also independently justifiable. For this reason, we see little force in Mr Wong and Mr Lim's argument that the Judge should have subtracted the $300 monthly allowance for JWT employees from the $6,300 total figure. We

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20 RC (CA 33), paras 69–82.

also do not think it was unreasonable for the Judge's award to have factored in an annual 13th month bonus and we do not disturb his award in that regard.

65 However, Ms Yap conceded that the start-ups would have been unprofitable in their early years, and it was on this basis that the Judge found that she could not have reasonably expected to make $6,300 per month from the beginning: Judgment at [121]–[126]. But having recognised this, the Judge went on to adopt a straight-line approach without taking into account the "investment period" of at least two years before the Start-up would begin to generate profits. We do not think this can be justified on the evidence. Prior to the accident, Ms Yap and Mr Wong had made the decision as directors of the Start-up to each draw a salary of only $850 per month to cover their basic necessities, so as to give the Start-up a bigger head-start financially. From this, we do not think that it can be said that, on a balance of probabilities, Ms Yap would have earned more than she did in 2011 and 2012 but for the accident and we therefore do not think that any award for pre-trial loss of earnings should be made in respect of these first two post-accident years.

66 We summarise our findings as to Ms Yap's loss of earnings in the following table:

Period	**Actual amount Ms Yap earned (A)**	**Amount Ms Yap would have earned (B)**	**Loss of earnings (A) – (B)**
2011 (Jul – Dec)	$2,203.50	$2,203.50 *(no loss)*	$0
2012	$17,229.26	$17,229.26 *(no loss)*	$0

2013	$60,270	$81,900 *($6,300 x 13 months)*	$21,630
2014	$38,799	$81,900	$43,101
2015	$34,636	$81,900	$47,264
2016	$39,000	$81,900	$42,900
2017 (Jan – Mar)	$9,000	$20,475 *(pro-rated for three months)*	$11,475
Total pre-trial loss of earnings			$166,370

67 In summary, we award damages in the sum of $166,370 in respect of Ms Yap's pre-trial loss of earnings, being $6,300 per month (plus bonus) from January 2013 to March 2017 less the actual earnings she made from the Start-up.

Post-trial loss of earning capacity

68 We turn to the second disputed head of damages which relates to Ms Yap's post-trial loss of earning capacity. Although Ms Yap's case in the proceedings below was that she should be awarded loss of future *earnings* in the sum of $585,000, both sides now accept that Ms Yap should be compensated for her loss of earning capacity but differ as to the quantum of the appropriate award: see [22] above. Ms Yap argues that the Judge's award of $80,000 was inadequate to compensate her for her post-trial loss of earning capacity, and submits that an award of $180,000 would be appropriate. In response, Mr Wong and Mr Lim contend that the award was excessive and ought to be reduced to $30,000.

69 It is useful to return to this court's explanation in *Samuel Chai* of what an award for loss of earning capacity is intended to compensate for. "[L]oss of earning capacity compensates for the risk or disadvantage, which the plaintiff would suffer in the event that he or she should lose the job that he or she currently holds, in securing an equivalent job in the open employment market": at [20]. In other words, such loss refers to "the weakening of a plaintiff's competitive position in the open labour market": *Smith v Manchester Corporation* (1974) 17 KIR 1 at 8 *per* Scarman LJ.

70 As they did in the proceedings below, both sides cite several precedents in support of their respective positions. Ms Yap relies on past cases such as *Nirumalan* and *Ronnie Tan* where awards between $100,000 and $180,000 were rendered to compensate the plaintiffs for their post-trial loss of earning capacity,[21] while Mr Wong and Mr Lim attempt to counter this by citing precedents where awards between $45,000 and $60,000 were made.[22] We agree with the Judge's observation that there is "limited guidance in these cases which all concerned very different factual circumstances and can be distinguished on numerous grounds": Judgment at [159]. Indeed, the parties' submissions do not adequately explain why the facts of any particular case are especially relevant, and only go so far as to draw a parallel between the present case and precedents such as *Koh Soon Pheng v Tan Kah Eng* [2003] 2 SLR(R) 538 (cited by Ms Yap) and *Wong Kim Lan v Christie Kolandasamy* [2004] SGDC 234 (cited by Mr Wong and Mr Lim) which both involved self-employed plaintiffs who ran their own businesses. But this factor alone surely cannot be enough; the court must have regard to all the circumstances including "the plaintiff's age and qualifications; his length of service; his remaining length of working life; [and]

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21 AC (CA 33), para 72.

22 AC (CA 35), paras 124–125.

the nature of his disabilities": *Moeliker* at 16–17. The sizes of the awards in past cases have little significance when their factual matrices share little in common with Ms Yap's circumstances. The inquiry must be specific to *the facts of the case at hand*, which we now turn to.

71 The Judge arrived at his decision to award $80,000 for post-trial loss of earning capacity after having made the following findings of fact (Judgment at [160]–[167]):

> (a) The accident left Ms Yap with ankle pain among other sequelae. She had developed early ankle osteoarthritis and a 14% permanent incapacity for stiffness of her right ankle and knee.
>
> (b) Mobility is important to her job, but she is not required to walk long distances. She is also capable of driving unassisted.
>
> (c) She had started providing training courses in accountancy[23] in order to accommodate her residual disabilities. She is unable to remain on her feet for long periods but there is no concrete evidence showing how this affects the effectiveness of her training courses.
>
> (d) She will be required to undergo further surgeries and medical procedures and will inevitably suffer disruptions to her work. However, these procedures will only have an impact on a fraction of the entire remaining span of her working life.

We do not see any reason to disturb these factual findings.

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[23] JRA vol III-D, p 250.

72 Although the Judge did not provide any specific reasons justifying his award of $80,000, we think this award is nonetheless reasonable in these circumstances. We reach the same conclusion by adopting the multiplier-multiplicand approach used when assessing loss of earning capacity in non-fatal personal injury cases: *Kenneth Quek* at [42] and [113]. In this context, the *multiplicand* represents the quantum of loss in terms of a reduction in Ms Yap's annual earning capacity, and the *multiplier* is used to calculate the aggregate loss in earning capacity across Ms Yap's remaining working life on the basis that her 14% incapacity (see at [71(a)] above) is a permanent one.

73 We bear in mind the degree of Ms Yap's permanent incapacity and the need for her to undergo further medical procedures, and also consider these facts against the requirements of a job as a course facilitator where mobility and the ability to stand for longer durations would likely be advantageous albeit not crucial or necessary. We think it is appropriate to peg the multiplicand at 7% of her earning capacity, being half of the 14% figure in relation to her permanent physical incapacity. We use Ms Yap's last-drawn salary of $81,900 per annum (or $6,300 per month plus bonus) as the best available evidence of her earning capacity, which produces the sum of $5,733 as the multiplicand.

74 We now turn to the multiplier. Ms Yap was 40 years old at the time of the trial[24] and would have about 27 years remaining in her working life assuming she retired at the re-employment age ceiling of 67: see *Kenneth Quek* at [93]. We further apply a discount rate in the multiplier to account for Ms Yap's accelerated receipt of damages as well as contingencies that would affect the length of her remaining working life: see *Kenneth Quek* at [57]. In the circumstances, and in consideration of the multiplier discounts made in other

[24] JRA vol III-A, p 89.

cases involving loss of earning capacity (as surveyed in *Kenneth Quek* at [98]), we think a final multiplier of about 15 years would be appropriate.

75 Multiplying $5,733 by 15 years produces a sum of $85,995, which is close to the amount awarded below. Accordingly, we affirm the Judge's award of $80,000 in respect of Ms Yap's loss of earning capacity. For completeness, we clarify that the award of this lump sum in damages represents the present value of an annuity offering a rate of return that the plaintiff is assumed to be able to achieve by investing the lump sum award: see *Kenneth Quek* at [44]. We therefore roundly reject Ms Yap's submission that the award should be adjusted for inflation.[25]

Conclusion

76 For the above reasons, we dismiss Ms Yap's appeal in CA 33, and allow Mr Wong and Mr Lim's appeal in CA 35 in part.

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[25] See AC (CA 33), para 74.

77 In place of the Judge's award of $265,000 in damages for pre-trial loss of earning capacity, we award Ms Yap $166,370 in damages for pre-trial loss of earnings, plus interest. We affirm the Judge's award of $80,000 in damages for post-trial loss of earning capacity. The final judgment sum for Ms Yap is $461,107.80.

78 Although we dismissed Ms Yap's appeal and allowed Mr Wong and Mr Lim's appeal in part, Ms Yap's award for pre-trial loss of earnings remains substantial. Furthermore, we did not accept Mr Wong and Mr Lim's submissions that the post-trial loss of earning capacity should be reduced. In the circumstances, we think a fair order for costs is for each party to bear their own costs with the usual consequential order for the payment out of the security deposits to the respective parties.

Steven Chong
Judge of Appeal

Belinda Ang Saw Ean
Judge

Margaret Neo Kee Heng and Pang Khin Wee (Hoh Law Corporation) for the appellant in CA/CA 33/2018 and respondent in CA/CA 35/2018;
Narayanan Ramasamy, Shahira Anuar and Low Huai Pin (Tan Kok Quan Partnership) for the respondents in CA/CA 33/2018 and appellants in CA/CA 35/2018.