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COMPENSATING THE YOUNG PERSON FOR LOSS OF FUTURE EARNINGS: SUBJECTIVE CONSIDERATIONS IN ASSESSING THE MULTIPLICAND

This article examines the problems in quantifying the future periodic income loss of a young plaintiff who is entitled to damages for lost future income. Most young plaintiffs would not have a relevant pre-injury salary that could be used in the computation. It is argued that a national "average" wage should be used unless there is evidence to support a different figure.

I. INTRODUCTION

IN actions for damages for personal injuries,[1] damages may be sought for various types of losses. In cases where serious injuries are involved, the ability of the plaintiff to earn a living is often affected, and damages may be sought for the loss of earnings.[2]

Past losses or losses prior to the claim are not difficult to quantify. However, the same cannot be said of future losses. The basic approach for quantifying future losses will involve a comparison of earnings (actual or potential)[3] before and after the injury. Since it is not always right to assume that the plaintiff's earnings prior to the injury would remain unchanged, the court may also have to consider what would have been the future economic prospects of the plaintiff had he not suffered the injury. In some cases, evidence may be adduced to show the probability of promotions and salary changes in the future. The judge is then required to take a position as to the future, which he does by making a finding to the best of his ability on the available evidence. This exercise is not based on a precise science, and different judges may well come to different conclusions and awards on the same available evidence.

Since the plaintiff is to be compensated for his own loss, the quantification of such future loss is technically wholly subjective, based on the circumstances of the specific plaintiff. With adults, much emphasis will be placed

1 Even though most cases involve tort claims arising from motor vehicle accidents, the actions can arise in other situations, *eg*, medical negligence and breach of contract.

2 This article is concerned with claims by living plaintiffs.

3 There is a technical distinction between loss of earnings and loss of earning capacity. See Part II, *infra*.

on indicative factors like qualifications (academic and technical), past work experience and the evaluation of the plaintiff by third parties. Standard career paths may also be considered in suitable cases, for example, in the civil service. Often, evidence will be introduced to show what a comparable person could expect in terms of career development and advancement.

The quantification of lost future earnings for an adult is not an easy task. Unless the plaintiff is one whose salary is not likely to increase significantly,[4] his pre-injury salary should not, in theory, be used as the measure of all his future loss. It should only be the starting point. In real life, however, the starting point may often become the ending point. This is because the onus is on the plaintiff to show that he would have advanced economically, for example, through promotion. In many cases, he would not be able to do so. This would leave no option but to use the pre-injury salary only.

Arguments based on an assumed general rise in wages with time do not seem to be accepted by the courts. In *Mitchell* v *Mulholland*[5] actuarial calculations used at first instance included the assumption of a 5% rise in wages every year. This approach was not accepted by the English Court of Appeal. While one may question how an exact percentage could be derived, few will dispute that wages do in fact rise over time, and the position that a general rise should be assumed is more realistic than one which assumes that wages do not rise. As an illustration, the average (*ie,* arithmetic mean) wages in Singapore for 1990, 1991 and 1992 were $1,528, $1,669[6] and $1,749[7] respectively.[8] The upward trend is clear in the statistics, but the common law does not seem to take such facts into account. The courts in Singapore do not seem to have been asked to consider an approach which assumes a general increase over time.

The quantification of the future loss of earnings for a young person is much more difficult. A young person may not even have completed his basic education, and he will usually not be gainfully employed. Where infants are concerned, even basic pre-school education may not have commenced. The subjective factors that play an important part in assessing

4 *Eg*, if he were already well established in his career or his occupation is one in which there are no advancement prospects.

5 [1972] 1 QB 65. See Prevett, 35 MLR 140.

6 An increase of 9.2% from the previous year.

7 An increase of 7.5% from the previous year.

8 Median salaries also increased significantly upwards. The median salaries for 1990, 1991 and 1992 are $818, $919 (an increase of 12.3% from 1990) and $1002 (an increase of 9% from 1991) respectively. Sources: *Yearbook of Statistics Singapore 1992* published by the Department of Statistics, Ministry of Trade and Industry; *Report on the Labour Force Survey of Singapore 1991* and *Report on the Labour Force Survey of Singapore 1992*, both published by the Ministry of Labour, at 19 and 17 respectively. The rate of the increases is higher than the rate of inflation in Singapore, which is generally low.

the future financial loss of an adult will not be very helpful, and in almost all cases, there will be no relevant pre-injury salary to use as a base. For example, should a student be seriously injured, it is difficult to assess the child's potential career on the basis of what would probably be the most objective available evidence, namely, the testimony of his school principal. Even a favourable assessment of the child by the principal may not be a sufficient base for a confident finding as to what the child might have achieved in adult life.[9] In a less common case where the child is in receipt of a considerable salary (the often used examples being that of young artistes and actors), the earning capacity would not necessarily follow into adult life.[10]

Fairly strong judicial statements can be found which support the view that damages for the loss of future earnings of young children should either not be awarded at all, or assessed at a low value. The main reason for this is the high degree of speculation involved.[11] There are also some judicial statements to the effect that no attempt should be made to actually compute on the basis of a multiplier or multiplicand, but that a conventional sum should be awarded instead.[12] These views in effect allow difficulty of assessment to deprive the plaintiff of a substantial sum of money that would be useful, if not needed, in the future.

The negative statements do not represent the law. There are many more cases where the courts have computed with a multiplier and multiplicand.[13] Some of the negative statements have been distinguished as applying only to claims for income in "loss years".[14] While the end result may be desirable, the "lost years" distinction itself is not entirely logical. No significant

9 In *Peh Diana* v *Tan Miang Lee* [1991] 3 MLJ 375, the school principal of a secondary three student gave evidence that the student would have done well enough to have the opportunity to receive tertiary education. The court did not award damages on that basis.

10 Even if a relatively modest income is earned, *eg,* by giving tuition or working in a fast-food restaurant, such income would also bear little relationship with the income of the same person in adult life.

11 See the speeches of Lords Wilberforce and Salmon in *Pickett* v *British Railways Board* [1980] AC 136, at 156 and 169. See also Lord Devlin's speech in *West* v *Shephard* [1964] AC 326, at 357.

12 See, *eg*, *Joyce* v *Yeomans* [1981] 1 WLR 549 (where different views were expressed) and *West* v *Shephard* [1964] AC 326, at 357 *per* Lord Devlin. "Conventional sum" invariably means a sum which has to be arbitrarily fixed and which is relatively small.

13 In the UK, it has been said that the task is difficult but that courts frequently do so: see, *eg*, *Taylor* v *Bristol Omnibus* [1975] 1 WLR 1054; *Croke* v *Wiseman* [1982] 1 WLR 71 (21 months old); *S* v *Distillers Co (Biochemicals) Ltd* [1970] 1 WLR 114 (various ages). Courts here have not declined to attempt to compute: see, *eg*, *Yang Salbiah* v *Jamil bin Harun* [1981] 1 MLJ 292 (Federal Court), [1984] 1 MLJ 217 (Privy Council) (7 years old); *Jag Singh* v *Toong Fong Omnibus Co* (1962) 28 MLJ 78 (7 years old); *Tan Chwee Lian* v *Lee Ban Soon* (1963) 29 MLJ 149 (9 years old).

14 *Croke* v *Wiseman* [1982] 1 WLR 71 (CA), *Jamil bin Harun* v *Yang Kamsiah* [1984] 1 MLJ

difference can readily be found, and just as much speculation could be involved in claims by plaintiffs who are expected to live a normal life span. Even if one were disposed to accept that there is a difference in the speculative element, it would only be a difference in degree.

The present law is that the court must assess the future loss by doing its best on the available evidence.[15] Even a 21-month-old boy has been able to recover such damages in England.[16] This article attempts to examine some of the practical approaches that may be adopted when assessing the periodic loss or multiplicand[17] used to quantify the lost future earnings of a young person. In general, it will be argued that the subjective factors are of limited use in most cases. A more general approach will be suggested. This approach is based on the identification of a broad class or group to which the plaintiff can be associated with on the available evidence, and to use the general position of members of that group as the base for quantifying the lost future earnings of the plaintiff. In some cases, a distinct group may be identified, but in most cases, there would not be any clear evidence to point towards any particular group, in which case the relevant class would be so broad as to be based on society as a whole.

The young person can be of various ages, from that of a new-born baby,[18] to that of someone who is studying in a junior college or performing National Service.[19] No attempt will be made here to deal with the issues on the basis of a clear upper age limit. The difficulty of the problem does not necessarily decrease when one approaches the age of majority of 21.[20] A younger person may sometimes present a less difficult problem than an older person. For

217, at 220, *per* Lord Scarman, acting as a Privy Councillor and advising on a decision of the Malaysian Federal Court. This article does not deal with the question of income in lost years. However, it should be noted that it is difficult to maintain that such income should not be recoverable by living young persons when living adults can now recover such income as damages (see *Pickett* v *British Railway Board* [1980] AC 136). There would not be any significant increase in the degree of speculation with "lost" post death income over "lost" pre-death income.

15 There are many judicial statements to this effect. For an example, see *Jamil bin Harun* v *Yang Kamsiah* [1984] 1 MLJ 217, at 220.

16 *Croke* v *Wiseman* [1982] 1 WLR 71 (CA).

17 In brief, the multiplicand is the periodic income loss of the plaintiff. It is multiplied by a multiplier (which basically represents the period of loss, discounted to take into account various factors) to produce the total loss of income. In real life, the periodic loss may also be reduced to take into various factors like overlapping and expenses (*eg*, expenses in going to work) which would otherwise have been incurred. The predicted income will be reduced by whatever income can be actually earned by the plaintiff after the injury as the loss is the difference between the two.

18 The issues arising from the case of an unborn child are not considered here.

19 Under the Enlistment Act (Cap 93, 1985 Rev Ed).

20 This is the age of majority in Singapore at common law. However, different statutes may specify different ages for specific rights and obligations.

example, a 16-year-old person who has left school and who is already gainfully employed as a shop assistant may not present as difficult a problem as a 20-year-old national serviceman with a reserved place in a local University. However, at higher ages, more useful subjective factors will be found, particularly in the areas of academic and technical qualifications.

II. Damages for Loss of Earnings or Loss of Earning Capacity

The distinction between "loss of earnings" and "loss of earning capacity" is theoretically important. In some cases, the distinction may not lead to practical differences. The two are, however, technically different.

Damages for loss of earnings compensate for a real assessable loss of earnings, while damages for the loss of earning capacity compensate for a reduction in the capacity of the plaintiff to earn income. A plaintiff who is able to earn the same salary after recovering from his injuries may not be able to sue for damages for the loss of future earnings. However, if his injuries will result in a lower salary sometime in the future, he will be able to recover damages for the loss of earning capacity. This is a subtle distinction as the loss of earning capacity can only be quantified by reference to a lost income as well. Even in the case of a plaintiff who is earning a lower salary after recovering from his injuries, the loss for the next month is not an "actual" loss in the strict sense of the word because the future income is not "lost" until after the next month. In this sense it is not very different from a loss that is expected a few years later. The distinction is not based on a different level of probability.

In law, the main significance of the distinction arises in the field of taxation. Damages for the loss of income is of an income nature (being compensation for an income loss) while damages for the loss of earning capacity is of a capital nature (being similar to compensation for the loss of a capital asset). Gains and profits of an income nature are subject to income tax under the Income Tax Act,[21] while capital receipts are not.[22] In general, damages which compensate for an income loss (*ie,* damages for loss of income) would constitute an income receipt that is liable to income tax. However, damages for the loss of capacity to earn income, being of a capital nature and not compensating for the loss of taxable income, would not be liable to income tax.

The rule in *British Transport Commission* v *Gourley*[23] states that if damages are awarded to compensate for the loss of income that would have been subject to tax, and the damages when received would not be taxed in the hands of the plaintiff, then the damages awarded should be the lost

[21] S 10(1), Income Tax Act (Cap 134, 1992 Rev Ed).
[22] There is no tax on capital gains in Singapore.
[23] [1956] AC 185.

income reduced by the amount of the tax that would have otherwise been paid. The reduction is based on the compensatory nature of damages. The plaintiff should be in the same position as he would have been without the wrong. If tax were not deducted from the award in such a case, plaintiff would be better off (by retaining the amount of the tax) than if no wrong had been suffered and he had actually earned the lost income and paid the tax.

The position in Singapore must also include a reference to section 13(1)(i) of the Income Tax Act[24] which states that a "sum received by way of death gratuities or as consolidated compensation for death or injuries"[25] is exempt from tax. "[C]onsolidated compensation for death or injuries" probably simply means damages for personal injuries and death as it is difficult to see what else it could mean. The provision therefore excludes personal injuries damages from income tax liability, and consequently helps to automatically satisfy the second requirement of *Gourley's* rule. The rule in *Gourley* would then apply in cases of compensation for loss of taxable income. This is because the income would have been subject to tax had it been actually earned, but the damages would not (because of section 13(1)(i)) be taxed in the hands of the plaintiff. There would therefore be a deduction for tax in cases of compensation for loss of income, but not in cases of compensation for loss of earning capacity as the receipt would be of a capital nature and not subject to tax in the first place. The applicability of *Gourley's* case and the interpretation just set out, were both recently confirmed by the Court of Appeal in *Teo Sing Keng* v *Sim Ban Kiat*.[26]

The Court of Appeal in *Teo Sing Keng*[27] also emphasised the distinction between damages for loss of income and damages for loss of earning capacity. Goh Joon Seng J, delivering the judgment of the court, observed that an award for loss of earning capacity is generally made in two main cases, one of which included cases where "there is no available evidence of the plaintiff's earnings to enable the court to properly calculate future earnings, for example, young children who have no earnings on which to base an assessment for loss of future earnings."[28] The distinction may be somewhat loosely stated as even if damages are to be awarded for the loss of earning capacity, it would have to be done "properly" on the available evidence. On the formulation of the Court of Appeal, most of the damages sought by young plaintiffs for loss of future earnings would technically

[24] *Supra*, note 21.
[25] As amended by the Income Tax (Amendment) Act 1993 (No 26 of 1993).
[26] [1994] 1 SLR 634. The High Court decision ([1993] 2 SLR 155) is not very clear on the effect of s 13(1)(i) of the Income Tax Act, *supra*, note 21.
[27] *Ibid*.
[28] *Ibid*, at 646-7.

be damages for the loss of earning capacity. The rule in *Gourley's* case would not, despite some earlier cases where tax was deducted, apply to such cases. Even if such damages are for loss of income rather than for the loss of earning capacity, a minimal deduction would be made in most cases today because the income tax liability of "average" wage earners is now very low.[29] This is due to the fact that most Singaporeans would pay very little or no income tax at all after the restructuring of the tax system here upon the implementation of a Goods and Services Tax from 1 April 1994. In fact, the majority of then existing income taxpayers ceased to be income taxpayers.

The practical effect is that the multiplicand used to compute the lost future earnings for a young plaintiff would not, in most cases, be significantly reduced to take income tax into account even if the damages are of an income nature.

The main concern here is how to determine the periodic loss for young persons. *Gourley's* case is of relatively little significance here for two main reasons. First, a capital sum is usually awarded for a capital loss, and no tax would have been paid anyway. Second, young plaintiffs would not normally receive awards on the basis of high-assumed salaries, which mean that they would be on the lowest income tax bands, if at all. Only a nominal deduction would be made for income tax in most cases even if *Gourley's* case applied.

In practical terms, the quantification of loss of earning capacity can only be achieved by reference to an assumed periodic "loss", and in that sense, is not very different from cases involving straightforward losses of income. The rest of this article is concerned with the determination of the periodic loss.

III. Totally Subjective Personal Considerations

An absolutely subjective approach will not always produce useful results with young persons. In strict theory, the claim has to be proved by the plaintiff. Judges tend not to speak in the same literal terms when the liability issue has been decided on a balance of probabilities. This is almost to the point of treating the quantification issue as being quite separate. If the same strict onus were to be placed on the plaintiff during the quantification stage,

[29] The Registrar in *Eddie Toon Chee Meng* v *Yeap Chin Hon* [1993] 2 SLR 536, cited at 550, made a deduction for taxes in the award to a young plaintiff. The High Court, however, did not refer to any such deduction. In *Peh Diana* v *Tan Miang Lee* [1991] 2 MLJ 375, the High Court observed that for most Singaporeans, the income tax rate of about 3% of nett income after various deductions meant a minimal effect for the plaintiff in that case. The Court of Appeal in *Teo Sing Kiat, supra*, note 26, noted that with the Goods and Services Tax (GST) a nominal deduction would be made in many of the cases where the rule applied.

the consequence would be that the plaintiff would only recover damages based on events in the future which he can prove on a balance of probabilities. In strict terms, very little can be proved when young plaintiffs are involved. What can probably be proved would be that the plaintiff is a normal person, being just like any other young person in his or her age group, with a wide and diverse potential set of careers ahead of them. It is usually not possible to prove a specific career path for young plaintiffs. However, there are some subjective factors that courts could and do consider. These factors are not exclusive, and may sometimes be considered in combination.

1. *Skills and qualifications*

Unless the young person is shown not to be normal prior to the accident there should, in practice, be no difficulty in getting the court to at least assess lost future earnings on the basis of an unskilled manual labourer's wage. There is no minimum wage legislation in Singapore, so one would assume that the plaintiff would be able to at least earn just about the lowest wage there is for a healthy adult person, even if he received no education at all.[30] This is strictly not a subjective approach as the result is not determined by the actual circumstances of the person. The resultant wage here is of course very low, and would be an unjust award for most plaintiffs.

When one attempts to move away from the very minimum, to consider the actual position of the plaintiff, one would of course look at the skills and qualifications that the person either already possesses or is likely to possess in the future. Some young people may possess vocational skills, for example, in carpentry or plumbing, in which case it is possible to adopt the earnings of workers with such skills. However, most would not have such skills as basic education is not vocational. A child in primary school could have any one of many different careers ahead of him. The same can be said of those in secondary schools and junior colleges. It would not be wrong to maintain that the further one has progressed in the basic education scheme, the higher the potential in terms of earning capacity. However, translating that proposition into a precise figure is a difficult task. Taking the example of a student in a secondary school or even a junior college, one can see the difficulty of trying to derive an income figure for a particular student which one could sensibly defend. Evidence of how well or badly the student was last doing in school could be adduced, but one cannot confidently conclude that a top student would become a doctor or that the lazy one would eventually drop-out and become a manual labourer.

[30] This seems to have been the approach in *Daish* v *Wauton* [1972] 2 QB 262, where the English Court of Appeal assumed that the plaintiff would become a labourer earning £20 a week.

In real life, it is possible for those who do not do well in school to later become very successful in business. Many successful businessmen do not have university degrees. It is also possible for a top student in a primary school to later become an average student in a secondary school. In such cases, one would find it difficult to adopt a purely subjective approach, and maintain confidently that on the evidence, a particular student would have had a certain career.

In *Peh Diana* v *Tan Miang Lee*[31] a student was injured in an accident when she was in a secondary three class under the normal stream. The learned appeal judge observed her 25th position in class of 36 and went on to assume that she would not have progressed past secondary school, and used (on what he considered to be a favourable view of the facts) the commencing salary for stenographic secretaries as a base to compute her lost future earnings.[32] With respect, even if the finding that she would not have gone beyond secondary school is accepted, one could equally have used the salary of any occupation that is open to people with secondary education. While it is true that the judge did not actually find that she would have become a secretary, he was implicitly making a finding that she was, at best, of such level in economic terms, even though the principal of the student had given evidence that the student would have gone on to receive tertiary education.

Such an approach does not involve a totally subjective evaluation of future prospects. The court did not find that she would actually have become a secretary. What the court could only realistically do was to find what *similar* people could expect: not what that particular plaintiff would have obtained. In this sense, the quantification is subjective only in the sense that the plaintiff is assumed to be no different from the set of people who are used as a benchmark.

The position of those with (or about to complete) professional or tertiary education is theoretically not different. However, there would be an obvious group to make comparisons with. A medical student would have such damages measured by reference to medical salaries, and there will be little dispute that such would be the most appropriate, even if a doctor might choose not to practise medicine in the future. The only obvious exception to this would be when the relevant teachers testify unequivocally that the student is unlikely to qualify. Where executive and professional work are involved, the courts have been known to even provide for promotion prospects on the basis of standard career paths of people with similar abilities in the civil service. For example, in *Chan Heng Wah* v *Peh Thiam*

[31] *Supra*, note 9.

[32] The court found that the plaintiff should be able to earn a small salary after recovering, and the difference between the salaries was awarded.

[33] [1986] 2 MLJ 175 (HC), [1988] 1 MLJ 74 (CA).

Choh[33] the prospects of a second-year medical student was assessed on the basis of the salary of a Registrar in a hospital. The court, however, declined to consider the prospects of the plaintiff going beyond that level because of the amount of speculation involved. The courts may be more willing to go further once the plaintiff has already attained a basic professional medical qualification. For example, in *See Soon* v *Goh Yong Kwang*[34] the future salary of a newly qualified doctor in a government hospital was quantified up to superscale level[35] salary in the Civil Service.[36]

Most young plaintiffs would, however, not possess any special skills or qualifications which would make quantification less difficult. In this regard, those at lower secondary level and below would raise the most difficult problems. It is unlikely that a judge would be able to confidently use a specific class of occupations as a yardstick. Performance in school at that level may be considered, but it is likely to produce controversial results at this stage.

2. Intelligence

The intelligence of the plaintiff is a relevant factor. But it does not by itself help to produce a tangible figure. The best use of this consideration is probably to justify treating the plaintiff as a member of a specified class. So, for example, a judge might conclude that a student who is said to be of average intelligence would pass the examinations that he would have had to sit for in the next few years. For an undergraduate, the court might then conclude that the plaintiff would have gained the degree he was pursuing. In extreme cases, this factor can make a significant difference, for example, with a person of low-level intelligence.

3. Achievements and failures

Another obvious factor that might influence a court's decision is the past academic performance of the plaintiff. This is highly subjective, and overlaps with some of the other factors discussed here. Academic successes and failures at a young age are not entirely reversible, and they might not

[34] [1992] 2 SLR 242. The doctor died as a result of the accident.

[35] This is the high end of the rank scale in the Civil Service, and involves expected promotions for more than ten years of service.

[36] There are many more cases where prospects within specific careers were considered. There are several recent cases involving relatively older military personnel. *Eg*, in *Low Yoke Ying* v *Sim Kok Lee* [1991] 2 MLJ 104, a Lieutenant in the Singapore Armed Forces (SAF) was assumed to be promoted to the rank of Major (two full substantive ranks above that of Lieutenant) before retirement. In such cases, the distinction between income and capital (see Part II, *supra*) is important. Higher salaries are involved, and the tax element would not be nominal.

provide a concrete picture of the future.

The basic question here is how much weight should be placed on the academic successes and failures of a young person in determining his future. This is an exercise that can only be highly subjective and controversial, even if some general assumptions are accepted. In practice, one would really be looking at examination performance, the stream that the student has been placed, and the school that the plaintiff is in.

Even if one were inclined to accept that a top student in the special program for "gifted children" of a leading independent secondary school would be likely to achieve more than a weak normal stream student in a lowly ranked neighbourhood school, one would find it extremely difficult to quantify the difference in terms of actual potential earnings. One possible approach is to use a common denominator like national average earnings, and distinguish cases on different factors of it. For example, one could assume that the top student would earn two times the national average, while the weak student would earn half of the same. One might just be able to do this with some confidence in the upper secondary and pre-university level, but at a lower level, it would be extremely speculative and difficult to defend. Another approach would be to use the national average wage for a group of professionals for the top student, and the national average for some other "lower" group for the other. However, it would be far from obvious what the actual groups should be. It might be better to distinguish on the basis of a segment of wage earners, for example, the salary of the top 10%, 20% or 25% of wage earners.

With the help of statistics, it may be possible to draw up profiles of former students of specific schools. For example, it may be shown that students of certain schools rarely qualify for a place in the University. It may also be shown that most students of the same school may reach a certain economic level at best. For example, it may be that the attainment of secretarial status would be considered an achievement. In such cases, it may be argued that the law should take account of these facts in assessing the economic future of a student in the school. Such an approach may be used to explain the *Peh Diana* case,[37] where the judge referred to the placing of the student in her class and the career of a clerk before using the salary of a stenographic secretary on the basis of a "favourable view of the matter".[38] Several difficulties arise from such an approach. In real life, anyone may be over-influenced by his own perceptions of the quality of the school in question. It is also not clear how reliable evidence of such facts can be produced without the trial turning into a trial of the quality of the school itself. In addition, it will still be necessary to place the student

[37] *Supra*, note 31.
[38] *Ibid,* at 380.

within the school in terms of abilities, which would require some form of ranking. Even if this could be done, it is not clear how the ranking of a particular student would place the student relative to the general statistical position. Considering the difficulties, any attempt to use students of the school as the most appropriate group for benchmark purposes is not likely to be profitable in most cases.

The least controversial and most acceptable approach here is to adopt the national average wage generally, with a different approach to be used only in cases where the national average is clearly not appropriate, for example, when a particular school has a very clear profile (whether above or below the national average), or when a weak student has dropped out of school, and is earning the wage of a labourer. The concept of "national average" will be discussed later.[39]

4. Personal environment

There are English cases where the courts have considered the social status and environment of the plaintiff to decide what he would have achieved by way of a career. This involves factors like the social status of the family, the profession of parents, and the existence of a family business. Such an approach implicitly involves an assumption that those from economically well-off families would do better than those from less privileged ones.[40]

It does not appear from the judgment, but this may well have been the reason for the use of a labourer's wage in *Daish* v *Wauton*.[41] If the boy had come from a family of London solicitors, it would be quite unlikely that the wage of a labourer would have been used as a benchmark. In similar fashion, but with a different result, the court in *Moser* v *Enfield*[42] looked at the background of the plaintiff and concluded that he would have been above the labourer level, and used the national average wage for all workers rather than that for labourers alone.

There are cases where the courts have expressly placed great emphasis on the social background of the young plaintiff. In one case involving a 5-year-old, the court assumed that the victim would follow in his father's footsteps, and used the earnings of the boy's father in the plastering trade as a yardstick.[43]

[39] This term is used loosely at this point. The distinction between the mean and median will be discussed later in Part IV, *infra*.

[40] See the mainly English cases discussed later, and Linda Rainaldi (ed) *Remedies in Tort*, Vol 4, paras 72 and 73 for a view of some Canadian cases.

[41] *Supra*, note 30.

[42] Cited in Kemp and Kemp, *Quantum of Damages,* Vol 1 Cap 6, para 6-040.

[43] *Connolly* v *Camden and Islington Area Health Authority* [1981] 3 All ER 250.

[44] 1979, cited in Kemp and Kemp, *supra,* note 42, at para 6-041.

In *Taylor* v *Glass*[44] the court went so far as to look at the excellent home the boy plaintiff came from, and concluded that he would have become a higher than average wage earner. It then used one and a half times the national wage as a base, with a tax factor for a married man with two children. *Cassel* v *Riverside*[45] goes much further. Rose J assessed the future of a boy on the basis of his excellent family background, with explicit references to entrepreneurial genes and a family history of effort and success. The lost income of the "Eton bound" 8-year-old child, years away from even an "O" level, was computed on the basis of a partner in a medium sized city firm of solicitors or accountants after detailed evidence of the background of his family history, which included three Queen's Counsel. The resulting £35,000 multiplicand was upheld by the English Court of Appeal.

In the Malaysian case of *Yang Salbiah* v *Jamil bin Harun*,[46] which involved a 7-year-old girl who was run down by a bus, Raja Azlan Shah J commented that it was unfortunate that there was no evidence of her "social and economic background or her prospects".[47] For a 7-year-old girl, who would have just entered school if at all, the idea of "prospects" would probably be tied to the economic background of the family. It would seem that the statement is underscored by the view that social and economic background play an important role in a person's future. However, there is no suggestion in the judgment itself that the multiplicand used was based on such factors.

While some may not like the obvious inferences from such a correlation, few can deny that in real life, environmental and social circumstances can provide an advantage to a young person of certain abilities when compared to another of equal abilities from a less financially privileged background. Also, the less than intelligent son of a millionaire entrepreneur is not likely to become a labourer even if he does not make the grade in school. The distinction is not based only on wealth. Two graduate parents with a keen interest in education can make a difference over two much wealthier but lesser educated ones with no personal attention to the education of their children.

A meritocratic education system, which provides as near equal opportunities for all, is a goal that few would dispute. In larger countries, there may be physical limitations to this goal. Different regions may be at different levels of economic development, and the location of the plaintiff's home might still play a role in determining the economic future of a plaintiff. In some areas, it may be natural for a son to take over his father's trade. However, conditions in Singapore are rather different, and the effect of

[45] [1992] PIQR Q1, cited in Kemp and Kemp, *supra,* note 42, at para 6-035.
[46] [1981] 1 MLJ 292.
[47] *Ibid*, at 295.

these factors here should be of a much lesser degree.

The few Singapore cases that exist do not place great emphasis on such background factors. In *Eddie Toon Chee Meng* v *Yeap Chin Hon*,[48] the Assistant Registrar expressly rejected the argument that the plaintiff lived within socio-economic conditions which were adverse to his chances of developing and attaining a good educational level.[49] However, the factors which the Registrar used to come to that conclusion included personal subjective ones like the plaintiff's primary one examination results and the support given by his mother at home. These factors pointed to an average person, who could not be assumed to have a lower chance of succeeding.

While it is theoretically open to Singapore lawyers and judges to consider these environmental factors in strong cases, the fact that there is fairly good social mobility here within a meritocratic educational system means that children from low income families cannot be presumed to be trapped within the same social level, even if the statistical probability of moving upwards economically may not be as high as for someone at a higher material starting point. In plain terms, the son of a labourer certainly should not be assumed to follow in his father's footsteps, and there should be little difficulty in assuming the national average wage for children with humble backgrounds.

It is of course possible that in some cases, poverty coupled with poor school performance and other negative factors at home might lower the chances of the plaintiff succeeding as even an "average person".

The more difficult issue here is with children who have a better environment or who are higher up the social ladder. They may argue for a higher than average wage.

It is difficult to deny that such children may have some advantages in having a better home environment with greater financial resources. The same can also be said of families with parents of good educational backgrounds, and who take a very active interest in the upbringing and education of their children. The advantages may make it more likely for an identified person, relative to another of equal intelligence with a "lesser" environment, to have a better potential economic future. However, it does not follow that in general, one could conclude that children from "better homes" should be assumed to earn a higher than average wage in the future.

It might be argued that it is not desirable for a judge to evaluate social mobility in Singapore on a case-by-case basis. On the whole, not everyone would agree that because of the advantages, such children would obviously be more likely to succeed, and obtain a higher than average wage. On a point of policy, it is not desirable for courts to be involved in passing

[48] [1993] 2 SLR 536.
[49] *Ibid,* cited at 550.

judgments on such questions of equal opportunity within our society. There may well be statistical data that can confirm or refute some of these assumptions. Problems of proof will have to be tackled if an attempt is made to prove such a fact.

The fairest general approach is to use the national average wage unless there is fairly clear evidence that it would not be appropriate. The case of the only son of a millionaire with a strong likelihood of inheriting the family business might be used as an example of a case that calls for a different measure. However, it must be conceded that there will be less dramatic situations where a court might accept the argument that the environment of the plaintiff (possibly coupled with other evidence of intelligence, *etc*) justifies a higher measure. It might be argued that the function of the law here is to compensate, and not to take a moral position on equal opportunities. It will not be easy to translate the advantage into a multiple of the national average. For example, one could equally criticise or justify one and a half or twice the national average wage.

It is difficult for the law to deal with non-wage earning potential and most of the cases assume that the plaintiff would become (as most of the population) a wage earner. It is possible to quantify such damages on the basis of self-employment in a vocation or profession. However, from a practical perspective, it would be near impossible to accurately quantify damages on the basis of the plaintiff subsequently becoming an entrepreneur.

5. Summary

A single firm rule with a fixed formula cannot be prescribed because the quantification of lost future earnings is legally subjective. There cannot be a fixed rule which stipulates the use of a national average wage in all cases. A court would always be free to consider the factors discussed above, and make findings on its own view of the evidence. However, there is much to be said for a clear and consistently applied general position for the majority of cases where one cannot confidently make a specific finding as to the future. Such a rule would be beneficial as it would facilitate fair and speedy settlements through a clear legal position. The usage of court time by cases that are actually litigated would also be reduced.

It has already been argued that in most cases, the multiplicand should be determined by identifying a group or class that the plaintiff can best be associated with on the available evidence, and that the prospects of members of such group would be used as a base in computing the lost future earnings of the plaintiff. In cases where there is suitable evidence, a specific group (for example, a trade or profession) may be identified.

In the absence of evidence that would point to a specific group, the group that would be used would have to be society at large. This would then bring us to average salary statistics for society as a whole.

IV. The National Average

Singapore does not suffer from a shortage of income statistics. Statistics on income can be found in many publications that are available to the public. Every population census includes questions on income. However, the norm is to have a decade between each census.[50] The Department of Statistics of the Ministry of Trade and Industry publishes statistics which include information on wages in its yearly *Singapore Yearbook of Statistics* series. The Ministry of Labour also publishes wage statistics in their annual *Report on the Labour Force of Singapore* which is based on surveys on the work force in Singapore. The Labour Ministry also publishes an annual report entitled *Report on Wages in Singapore* which presents the main findings of the "Survey on Annual Wage Changes and the Occupational Wages Survey". The Singapore National Employers Federation (SNEF) publish an annual *Salary Survey* based on their own survey.

There are no regional variations that may pose a problem in large countries with various regions at different levels of prosperity. The official statistics here are not totally based on self-declaration, and on that ground may be more accurate than those of other countries without any effective means of cross-checking. There is no reason why any of the mentioned publications could not be used for reference, but in terms of breath of sampling and accuracy, official statistics from the Department of Statistics or the Ministry of Labour may be more suitable. Technical arguments based on the law of evidence, for example, the hearsay rule, may be raised against the admission of such tables, but defendants would have little to gain by questioning the admissibility or accuracy of the official tables.

The *Singapore Yearbook of Statistics* does not give as much detail as the Ministry of Labour reports. Of the two Labour Ministry publications, the more useful one would be the *Report on the Labour Force Survey*, which is based on surveys conducted under authority given by the Statistics Act.[51] It provides detailed information for various occupations, as well as the median wage. The average or mean wage will be found in the *Singapore*

[50] The last two were in 1980 and 1990 respectively.

[51] Cap 317, 1991 Rev Ed.

[52] It is based on data obtained from records of Central Provident Fund (CPF) contributions. The occupational wages data are derived from annual surveys of the private sector conducted by the CPF Board on behalf of the Ministry of Labour.

Yearbook of Statistics.[52]

There are two reported Singapore cases which consider the "average" Singaporean approach. The first is *Peh Diana* v *Tan Miang Lee*,[53] and the second is *Eddie Toon Chee Meng* v *Yeap Chin Hon*.[54] Although both cases support the use of statistics, they do not do so at the broadest level of generality.

1. The eternally young plaintiff?

In the *Peh Diana* case, the Senior Assistant Registrar assessed the loss of future earnings of a 16-year-old girl[55] on the basis of the average monthly earnings of a Singaporean in all industries. The figure of $1,361 used was from the statistics published by the Ministry of Labour. On an appeal, which involved other issues, the High Court ruled that the use of the average monthly earnings for all Singaporeans was wrong. Chao Hick Tin J remarked that he found "great difficulty in accepting that in the case of a person who has never worked, the national average wage should be used for the purposes of working out his loss of future earnings."[56] His honour observed that in *Croke* v *Wiseman*[57] the English court had used the national average wage for a young man rather than just the national average wage for all. His honour then said that he should find the national average wage for a young woman. However, as no such data was available, he used the mean commencing salary of stenographic secretaries, which was $764 per month. His honour then rounded it off to $800. This finding was ostensibly on the basis that "it would not be unlikely that if the plaintiff had not been injured she could have become a stenographic secretary."[58]

With all respect, it is more difficult to justify the use of the average wage of a stenographic secretary for someone who has never worked. There is no hint in the report of any evidence which would indicate that the plaintiff was training or even aspiring to be one. The use of the class of secretaries as a benchmark in this case is therefore questionable. It is precisely because it was not possible to confidently predict what the plaintiff would otherwise have done that a general average wage was used. The use of the national average wage is not premised on the finding that the plaintiff would have earned that figure. It is based on the view that the

53 *Supra*, note 31.

54 *Supra*, note 48. The report of the case indicates that an appeal was filed against the High Court decision (Civil Appeal No 42 of 1993).

55 The plaintiff was fourteen years old at the time of the accident.

56 *Supra*, note 53, at 380.

57 [1982] 1 WLR 71.

58 *Supra*, note 53, at 380. His honour made this finding on hearing the appeal, without having heard the original evidence.

average wage would be the fairest one to use in the circumstances.

In the *Eddie Toon* case, the plaintiff was seven and a-half years old at the time of the accident. He suffered severe injuries, including irreparable brain damage. In assessing his loss of future earnings, the Assistant Registrar used a multiplicand of $1,220 a month, which was based on the average monthly earnings of all Singaporeans for all occupations.[59] The approach of the Assistant Registrar was different from the approach of the High Court in the *Peh Diana* case, which used the commencing salary for stenographers. In general, the basis of the Assistant Registrar's approach was the fact that it would have been equally possible for the plaintiff to have become a professional as it was to become an unskilled worker. On that premise, the Assistant Registrar thought that the national average figure was the "*fairest one to consider*".[60] On appeal, the use of the national average wage for all workers was once again rejected. Goh Phai Cheng JC held that even if he were to adopt the approach of the Registrar, he would use the mean commencing salaries of all occupations for young workers rather than that for all workers. The average commencing wage for all occupations was shown to be $783.85.[61] The learned Judicial Commissioner rounded that to $800 (by coincidence, the same base used in *Peh Diana*), and used it to compute the lost earnings.[62] This case is more realistic in that a general average wage was used. However, the average starting wage for young workers was used.

It is interesting that both cases adopted an average *commencing or starting* salary. This seems to be based on *Croke* v *Wiseman*[63] where the average salary for a young man was used. No convincing discussion of why it should be used will be found in the judgments, and the English Court of Appeal did not discuss this point at all. In fact, most of the judgment centres on a national average wage without reference to that for a young man until the end. It should be pointed out that the commencing salary

[59] The relevant year here was 1990. The damages were assessed in 1991, and presumably, the figures for 1991 were not available yet.

[60] The learned Assistant Registrar is cited in the *Eddie Toon* case, *supra*, note 48, at 550. [Emphasis added.]

[61] *Report on Wages in Singapore 1991*, at 17.

[62] The learned Judicial Commissioner also criticised the Registrar for finding that the plaintiff might have gone to University, mainly for its speculative basis. This seems to be based on a misunderstanding of the reason for the statement by the Registrar that the plaintiff might have done so. The statement seems to be in response to an attempt by the defendant to suggest that the plaintiff would not have done well in formal education. The Registrar did not find that the plaintiff would have taken a degree. In fact, he also said that he might have taken a degree and that he might have become an unskilled worker. This really was the basis for using the average wage for all workers, including both degree holders and unskilled workers.

[63] [1982] 1 WLR 71.

for a young person is not the same thing as the average for all "young" people, however defined. There are other English cases that used overall national averages.[64]

Chao Hick Tin J in *Peh Diana* objected to the average for all workers on the ground that it did not distinguish between "age, experience, different occupational groups and supply and demand", and also (since most women earn less than men), the sex of the worker as well.[65] Goh Phai Cheng JC in *Toon Chee Meng* objected because the average monthly salary for all takes into account the salaries of those near retirement age as well.[66] In theory, the difference is in identifying the most relevant group to use. The different groups identified could be used if there is evidence to allow the court to identify such a group as being the most relevant to the plaintiff. However, if there is no clear evidence, which would be the case with most young plaintiffs (including those in the two cases), it would be difficult to justify the use of a narrower group as a benchmark. The distinction based on sex can be disputed. Even if women generally earn less than men, some women do earn more. Unless there is evidence to show that the particular female plaintiff would be on a particular side, it might be fairer to adopt an average that is based on the relevant data of both sexes.

The use of a starting salary for a loss that spans a working lifetime is difficult to defend. It assumes that the salary of the plaintiff would not increase, which is unrealistic. Since the plaintiffs had not even started to work, the courts were using an existing starting wage as the projected starting wage for a time in the future, when the actual starting wage is likely to be different.[67] Even if the starting wage is correctly assumed to be correct, the starting wage would not be the wage earned by the plaintiffs throughout their careers until they retire.[68] It is true that the actual wages would be difficult to predict, but difficulty of assessment has never deterred courts from attempting to estimate when the damages payable would be reduced.[69] For example, in a *Gourley*[70]-type case, the court that deducts tax from an award would theoretically be speculating on the income tax rates over years

64 See the section "Personal Environment", in Part III, *supra*.

65 *Supra*, note 31, at 380.

66 *Ibid*, at 551.

67 In Singapore, significantly higher as well. See Part I, *supra*.

68 In the *Eddie Toon* case, *supra*, note 48, at 551, retirement was assumed to be at the age of 40 because of the injuries.

69 *Teo Sing Keng* v *Sim Ban Kiat, supra*, note 54, at 645.

70 See Part II, *infra*. Judges usually have no choice but to assume that the existing tax rates would not change as they would otherwise have to decide what the new rates would be. If the Second Schedule of the Income Tax Act (Cap 134, 1992 Rev Ed) were to be examined, it will be seen that tax rates have in fact changed significantly over the years, particularly at the higher bands. It is practically impossible to predict future changes over an extended period of time.

if not a few decades.

It is not difficult to use past data to compute a rate of change for wages. This rate can be used to project the starting salary for the relevant time, when the young plaintiff would actually begin to work. Some may, however, consider this to be speculative, and it may not produce a better or more accurate result.[71] A workable alternative is to use existing wages by finding a representative figure that takes into account incomes at different ages. This would be found in the national average wage for workers of all ages.

Viewed from this angle, the use of an average figure that includes those near retirement age is a strength rather than a weakness because it is influenced by wages of people of different ages with different types of work. With the use of an overall national average wage, most plaintiffs may be assumed to earn more than they would have earned at the beginning of their career. However, the use of an overall average is based on it being impossible to predict what he would have earned over his whole working life, and does not pretend to be right at any point of the plaintiff's career. Under the starting salary approach, the "correct" starting salary might be awarded, but it would then probably become "wrong" all the rest of the plaintiff's career.

The use of the national average salary based on all occupations and ages can be summarised thus. Since (i) the plaintiff might have had any one of a large number of careers in the future; and (ii) the plaintiff would have worked for an extended period of time until retirement, with his wages generally rising with time, the fairest approach is to find and use a representative figure that is derived from the wages of all occupations earned by people of various ages. There is no pretence that the resulting figure is correct in even a loose sense of the word.

2. Mean or median and other considerations

The weak arguments used, and the obvious reluctance of the judges to use the national average wage (*ie*, the arithmetic mean wage) for all occupations and ages, warrant careful consideration. The average wage has been assumed to be the arithmetic mean wage which is obtained by adding all wages and dividing the result by the number of wages.

An examination of wage statistics will reveal that most Singaporeans earn *significantly less than the national average*. The average is based on all wages, including both high and low wages. With the income distribution

[71] This depends on the facts of individual cases. If, *eg*, a three-year-old were involved, the child might not have started to work until more than 15 years later. It may be quite unfair to use the existing wage to compute his loss. However, it would also be difficult to predict what it would be 15 years later.

here, the high wages raise the average wage to a higher figure than most would actually earn. For example, in 1992, the average wage was $1,794 while the median was almost $800 less, at only $1,002. If the sexes are considered separately, the median for women was only $832 while that for men was $1,166.[72] From this point of view, there may be a reluctance to use the average because, without considering any other personal factors, there is a high statistical chance that the plaintiff would be awarded more than he would have otherwise earned. In fact, the median wage is more often used to indicate what the "average person" in Singapore earns.

The median wage is considered by some to be a better indicator of the wages of the general population. It is literally the middle wage, with as people many earning it or less than there are earning it or more. It is interesting to note that the $800 used in both *Eddie Toon* and *Peh Diana* is close to the median salary of $818 in 1990.[73] The income distribution consideration might have influenced the judges who used the commencing salaries for young people instead. It has already been argued that the quantification of lost future earnings should not be based on starting salaries.

While it cannot be said that either is right or wrong, the use of the median rather than the arithmetic mean might produce more realistic results for the majority of potential plaintiffs here. The median wage is also based, as the mean wage (but of course in a different way), on all wages earned by people of different ages. When one is at the stage of looking for an "average", one would implicitly have conceded that it is not possible to find a specifically correct answer. There is much to be said for adopting an "average" that would fit the bill better for the majority of potential parties. The use of the median may also make judges less reluctant to use a figure based on all workers of all ages. The significant difference between two acceptable results (*ie,* arising from the mean and the median) demonstrates and reinforces the point that there is no right answer here, only a fair one.

The use of the middle point of the full spectrum of wages could also bring about a clearer way to distinguish the plaintiff with better prospects from the "average" plaintiff. If the evidence can support the use of a specific career, the salary within that career could be used. However, in most cases, this will not be the case. There are then two approaches. The first is to use a multiple of the mean wage. This would result in the difficult question of what multiple to use. The second approach, which is based on an examination of the full spectrum of wages, would be to place the plaintiff within a higher part of the spectrum. For example, the "average" would be at the middle or median wage. The court would then try to place the plaintiff within the spectrum, for example, say within the top 25th percentile.

[72] *Supra*, note 8. The same general pattern will be seen in earlier years.
[73] *Supra*, note 8.

This would of course be open to the same difficulties as with the use of a multiple of the mean wage. However, it does have the advantage of showing the relationship of the placement relative to society as a whole. For example, the use of twice the national mean wage does not show how the plaintiff is placed relative to the rest of society, but the use of the 75th percentile wage would indicate that he is placed in the top 25 per cent of wage earners. One practical problem with this approach is the fact that the wage statistics are not published in such a way, although there is every reason to believe that some government departments would have such data in their databanks.

V. Conclusions

1. The quantification of the loss of future earnings of a young person is theoretically a subjective exercise.
2. In most cases, it is necessary to identify a suitable group of people to use as a base in computing the loss of income of the plaintiff. The plaintiff is assumed to have the same prospects as members of such identified group.
3. The relevant group will be society as a whole unless there is sufficient evidence to identify the plaintiff with a narrower group.
4. When the group comprising the whole of society is used, the national mean or median wage for all occupations and ages should be used as the base for the computation. While neither is more correct than the other, the use of the median wage for all Singaporeans should be preferred.

Soh Kee Bun*

Postscript

An appeal against the High Court decision in *Toon Chee Meng* v *Yeap Chin Hon* [1993] 2 SLR 536 has been allowed. The author was unable to obtain a copy of the written judgment before this article went to press.

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