DCPI 41/2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES CIVIL ACTION NO. 41 OF 2009

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BETWEEN

LAU CHI LAM Plaintiff

and

CARITAS-HONG KONG Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung in court

Date of hearing: 21-22 January 2010

Date of judgment: 30 March 2010

**ASSESSMENT OF DAMAGES**

1. On 4 August 2007, **Lau**, the Plaintiff, was on duty as a workman at the elderly home operated by **Caritas**, the Defendant, in Tuen Mun, New Territories. While he was walking beside the in-house hydrotherapy spa, he slipped and fell with his buttock landing on the floor. Lau claims against Caritas for damages for his injuries.
2. Judgment on liability was entered by consent on 19 March 2009. This is the assessment of damages.

**Medical history, injuries and treatment**

1. At the time of the accident, Lau was 51 going on 52. He was employed by Caritas in 1996.
2. In May 2004, Lau had an accident at work causing back and right elbow injury. According to the relevant certificate of assessment issued by the Employees’ Compensation (Ordinary) Board then, Lau was assessed to have residual back pain accounting for 0.5% loss of earning capacity. He returned to work after 8 days of sick leave.
3. According to the government hospital records and the record of sick leave taken by Lau since his commencement of employment, Lau has other recurrent illnesses including gout, arthritis and cardio disease.
4. Upon the accident in 2007, Lau complained about back pain. He was sent to the hospital by ambulance. Examination revealed tenderness over the low back region. There was no neurological deficit over his lower limb. X-ray of the lumbar spine showed normal alignment and no fracture. He was discharged 2 days later.
5. Lau was subsequently re-admitted to the hospital for back pain. He was treated and discharged. He was referred to the orthopaedic department for further management. During the period between early December 2007 and mid January 2008, he attended the department for several times for low back pain and was treated and discharged on each occasion. He has since attended over 20 sessions of physiotherapy and over 10 sessions of occupational therapy. He has also consulted private doctor and bonesetter.
6. Lau complained about persistent low back pain. He was unable to walk for a long time or at quick pace. He felt discomfort after prolonged sitting. He could not return to work or his pre-accident leisure of going fishing.
7. X-ray and MRI done after the accident in 2007 revealed multiple lumbar level degenerative changes with no obvious theca sac or nerve root compression.

**Medical expert opinion**

1. On 28 April 2009, Lau was examined by the orthopaedic specialists engaged on his behalf and that of Caritas, namely, Dr Johnson C K Lam and Dr Jack W K Wong respectively. They produced their joint report dated 27 May 2009.
2. Examination of Lau by the experts revealed no spinal deformity, muscle spasm or neurological deficit. There was no spondylosis, minimal spondylolisthesis over L5/S1 and normal lordosis. Degenerative changes with multiple marginal bone spurs, slightly narrowed L4/5 disc and mild degenerative scoliosis were confirmed. The experts agreed that the degeneration was a pre-existing condition.
3. The experts agreed that the clinical picture was compatible with soft tissue injury of Lau’s lower back. They differed in their assessment of the severity of the injury.
4. Dr Wong opined that some residual pain in Lau was possible. But the doctor noted inappropriate signs that suggested sub-maximal effort during the assessment. Lau was previously tested positive in some of the Waddell’s Tests (3 out of 5) administered in October 2007. These suggested symptoms exaggeration. Hence, in Dr Wong’s opinion, any residual pain should be mild.
5. According to Dr Lam, the evidence suggested that Lau still had genuine pain and disability despite treatment several months after the injury. But he agreed that the degree of pain should not be as severe as Lau has complained about. The pain, he opined, should be mild to moderate.
6. Dr Lam also believed that the pre-existing condition of Lau was quite asymptomatic prior to the accident. The doctor noted the lack of a history of back pain of a significant degree, notwithstanding Lau’s pre-existing gouty arthritis, cardiac disease and other illnesses. Dr Lam also noted that the 2004 accident to Lau entailed only 8 days of sick leave and resulted in 0.5% loss of earning capacity. Lau also resumed and managed his job that involved at least medium physical demand on his back up to the time of the accident. It was only after the accident that he developed persistent and considerable pain in the low back.
7. On this basis, Dr Lam opined that but for the accident, it was likely that Lau should have enjoyed satisfactory and rather painless function in his back. The doctor concluded that the accident had likely aggravated the pre-existing degeneration over the low back, triggering and causing the persistent symptoms, pain and disability.
8. The experts agreed that Lau’s injury has attained maximal medical improvement. No further treatment is necessary. Dr Wong noted from the government hospital report that Lau’s condition has become static by early December 2007. He considered that the sick leave granted up to then was justified for the back injury whereas that given subsequently was for back pain due to his pre-existing degeneration. Dr Lam disagreed. Considering the severity of the injury, the need for rehabilitation, the progress of treatment and the pre-accident job demand, Dr Lam considered that the intermittent sick leave issued up to late September 2008 was appropriate.
9. The experts agreed that Lau should be able to resume his pre-accident occupation. Lau might have some back pain with excessive lifting or bending. He might need job modification and assistance from colleagues. In particular, Dr Lam recommended that Lau took more breaks for rest and avoided excessive lifting (over 30 lbs for a long duration) and bending of back.
10. Dr Wong opined that some reduction in his working capacity might be possible, but should be mild. Dr Lam opined that the reduction in work capacity would be moderate. Work involving light physical demand of the back, e.g., as a gas station worker or a watchman, was considered to be more suitable.
11. In terms of percentage, Dr Wong assessed that Lau suffered from not more than 1% impairment of the whole person and the same degree of loss of earning capacity. Dr Lam assessed the impairment of the whole person of Lau to be 3% and loss of earning capacity to be 4%. Dr Lam explained that this assessment has already taken into consideration the presence of pre-existing degeneration, the previous accident in 2004 and the presence of inappropriate signs demonstrated by Lau as mentioned above.

**Discussion**

1. There are 2 major issues: (1) Lau’s residual back pain; and (2) the pre-existing condition.

*The residual low back pain*

1. The experts did not differ substantially in their assessment of the residual pain of Lau. They acknowledged the existence of inappropriate signs in Lau’s demonstration of the residual pain and disability. Taking that into account, the experts’ opinion was that the genuine degree of the residual pain and disability was within the range of mild to moderate. Considering the evidence and seeing Lau in court, I accept that the residual pain is mild.

*Pre-existing condition*

1. The court of appeal in *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 4 HKC 523 (at 527E-G) recited the trial judge’s following categorisation of cases where pre-existing condition is in play:
   1. Where the plaintiff was almost certain to have gone through life unaffected by the condition, the defendant would be liable for all damage caused.
   2. Where there is a strong possibility that some other event, or natural progression of the condition, would have brought about the plaintiff’s present state, it would be necessary to assess the degree of the possibility in deciding what reduction is appropriate, as in assessing the effect of other vicissitudes of life.
   3. Where the present condition would be certainly have occurred at some stage in any event, clearly an allowance has to be made, the extent of which depends on the evidence as to when the precipitating event would have occurred.
2. After this case has been adjourned, Mr Kwok drew my attention to the recent case of *Wong Ching Yau v Group Yield International Development Limited*, HCPI 637/2008 (27 January 2010). In that case, the medical experts agreed that the accident had probably rendered the asymptomatic degeneration to become painful. The court applied a percentage reduction to the award to reflect the chances of the plaintiff’s pre-existing condition causing her to earn less regardless of the accident.
3. As Mr Sham submitted in reply, *Wong Ching Yau* did not set down any new legal principles. Each case has to be decided on its own facts according to the evidence. The court in *Wong Ching Yau* held the same view. It should also be noted that in that case, besides surveillance evidence, there was apparently medical expert opinion that the plaintiff would likely have experienced pain in 2011 due to her pre-existing condition, even without the accident.
4. In the present case, Dr Wong emphasized that the residual pain was partly due to his previous injury and the pre-existing degeneration. Dr Lam did not really disagree as he too opined that the accident triggered and aggravated the pre-existing condition and thus resulting in the persistent pain.
5. However, what Dr Lam went on to make clear was that the pre-existing condition would have remained quite asymptomatic as it has before, and Lau would have enjoyed a rather painless function in his back, but for the accident in 2007.
6. In support of Caritas’ case, evidence of *when* the pre-existing condition would have manifested itself into disability may not be a pre-requisite. However there must be evidence of *whether* this would likely happen in the absence of the accident. Dr Wong did not actually say that.
7. Objectively, the evidence also supports Dr Lam’s opinion. The record of Lau’s sick leave prior to the accident shows that he had various other recurrent illnesses, but they did not affect his back. The 2004 injury to Lau’s back entailed 8 days of sick leave and he resumed his pre-accident work afterwards. Lau has been managing his work until the accident in 2007. By then, he was nearly 52 years old. Now even triggered and aggravated by the accident, the pre-existing degeneration only contributed to mild residual pain in his back.
8. Notwithstanding Mr Kwok’s attempt to demonstrate by reference to the medical evidence that Lau’s back was not completely pain-free prior to the accident, I find that essentially the pre-existing condition of Lau’s back has been asymptomatic before the accident. I accept Dr Lam’s opinion that but for the accident, it was likely that the condition would have remained asymptomatic.
9. I agree with Mr Sham that in terms of legal causation of the present condition of Lau, the accident was the effective cause, though medically it was the result of the pre-existing degeneration of his back being triggered and aggravated.

**Pain, suffering and loss of amenities (PSLA)**

1. The amount of damages claimed for PSLA was last adjusted to HK$350,000. Mr Sham referred to *Yau Shing Tsan v Fai To Elderly Affairs Limited*, HCPI 168/2004 (9 August 2005); *Ng Lai Fan Fanny v The Hong Kong Golf Club*, HCPI 511/2005 (4 April 2007); *Shan Nisar v Wai Kit Engineering Company*, HCPI 1092/2003 (11 April 2005); *Yeung Sze v Win Art Design & Decoration Construction Ltd*, HCPI 6/2000 (27 June 2001); *Limbu Man Bahadur v Tsang Chan Fai and Another*, HCPI 486/2003 (29 July 2004).
2. Mr Kwok submitted that the best case of Lau should not exceed an award of HK$200,000. He referred to *Yip Piu v Chung Kam Fei Catherine & Anor*, HCPI 1168/1999 (27 November 2000); *Shek Kam Ching v Po Kee Construction Engineering Limited & Ors*, HCPI 434/2001 (28 November 2002; *Tsang Tat Fai v Kingland Concrete Drilling Company Limited*, HCPI 566/2001 (6 August 2003); *Ng Kong v Golden Caterers Limited*, HCPI 206/2004 (3 February 2005); *Chan Chun Keung v Greenroll Limited*, HCPI 275/2005 (20 December 2005); *Shea Lai Chuen v Federal Express Pacific Inc*, HCPI 1025/2003 (26 June 2006); *Ngai Sau Sen v Soabar Systems Hong Kong BV*, DCPI 163/2006 (17 January 2007) (where the award for PSLA was agreed); *Chimmalee On-Uma v Waylung Waste Services Limited*, DCPI 1945/2006 (4 July 2007).
3. Considering the medical evidence and Lau’s circumstances, I think the amount of HK$350,000 far exceeds what is appropriate. I award HK$200,000.

**Loss of earnings**

1. As Workman II, Lau was responsible for cleaning various parts of the elderly home such as the rooms, bathrooms, canteen and car park. Cleaning of the hydrotherapy spa, where he met his accident, was however not his normal duty. Lau also had to wash dishes, clean tables and chairs as well as sweep and mop the floor. He also had to handle cooking pots and trays of dining utensils during mealtime as well as water kettle. He had to collect garbage from the rooms for disposal. All of these were described as heavy tasks and during which much bending of his back was required. He worked in shifts and there were 2 different shifts a day. A typical daily work schedule was produced in evidence.
2. As a result of the accident, Lau was granted nearly 14 months of sick leave until late September 2008. On 10 September 2008, the Employees’ Compensation Assessment (Ordinary) Board issued the certificate of review of assessment in that such sick leave was certified. Lau was assessed to have suffered from 1% loss of earning capacity. This was said to have taken into account the assessment in respect of 2004 injury.
3. On the same day of the issue of the above certificate, Dr Lau Sing Ki Kenric issued a certificate of an employee’s permanent fitness for a particular type of work pursuant to the Employment Ordinance, Cap.57. The doctor certified that Lau was permanently unfit for his pre-accident job due to pain and stiffness in his low back. On this basis, Lau applied for early retirement from Caritas. The application was approved with effect from 23 September 2008.
4. It was argued on behalf of Lau that the acceptance of Lau’s application for early retirement on the above medical grounds amounted to an admission by Caritas of Lau’s loss of capacity to resume his pre-accident job.
5. I do not agree that one could draw such conclusion from Caritas’ decision to accept Lau’s early retirement. However, while the medical experts opined that Lau should be able to resume his pre-accident job and the reduction in work capacity should be mild to moderate, this was clearly with qualification. As mentioned above, the experts advised that Lau might need job modification, such as avoidance of excessive lifting and bending, and assistance from colleagues. It was also advised that Lau needed to take more breaks for rest.
6. Considering the daily duties of Lau and the work arrangement of workmen at the elderly home, I accept that it was probably not realistic to expect the kind of job modifications in Lau’s work as recommended. Objectively, Lau was not reasonably capable of returning to his pre-accident work.
7. On the one hand, Lau maintained that in his view, he was not able to return to work. On the other hand, he claimed to have looked for alternative employment after sick leave has expired. His evidence in this respect is far from credible. Even his counsel felt obliged to concede that Lau should and could have put in reasonable effort to find suitable alternative employment.
8. It was argued on behalf of Caritas that without the accident or his early retirement, Lau’s employment would have been terminated in any event due to his deteriorated work performance. According to the Principal of the elderly home, Miss Tsang, and the contemporaneous documents, Lau has since late 2004 been repeatedly warned, verbally and in writing, about his rude attitude towards the inmates and his colleagues as well as his failure to follow protocol at work. The last appraisal of Lau in early 2007 recorded that his work performance was so poor that he failed to meet the standard expected of an experience workman.
9. In court, Lau explained the circumstances surrounding these warnings and claimed that he had improved. This all sounded self-serving and did not impress me. Having said that, I cannot ignore the fact that notwithstanding the repeated warnings, including more than one “final” warning coupled with threat of termination of employment, over a period of 3 years, Caritas had not actually terminated Lau’s employment. Perhaps it should not have been, but Caritas was in fact quite prepared to tolerate Lau so far. In the circumstances, I cannot conclude that without the accident, Caritas would have already terminated Lau’s employment by now.
10. Reference was also made to the other illnesses of Lau. As mentioned above, Lau has over the years taken frequent sick leave for recurrent gout, arthritis and pain in the elbow, wrist and shoulder as well as cardiac disease. Taking too much sick leave per se might have impaired Lau’s fulfilment of his basic job duty. These illnesses might have affected his physical ability to handle his work. But the fact was that neither of these complaints has formed the gist of the warnings and appraisals mentioned above.
11. I am not convinced that but for the accident or his early retirement, Lau’s employment would have been terminated by now in any event. Nevertheless, proper weight should nevertheless be given to the above evidence when one considers whether Lau would have remained employed by Caritas until or even beyond the normal retirement age. This will be discussed below.

*Pre-trial loss*

1. I am prepared to allow his claim for the loss of earnings during the period of sick leave. But this is as far as I can accept.
2. According to Dr Lam, jobs such as gas station worker or watchman would be suitable for Lau. I was referred to the range of salaries for a watchman advertised by the newspapers and the Labour Department. I find HK$6,000 to be the amount reasonably obtainable from such alternative job since October 2008.
3. There is no dispute that at the time of the accident, Lau’s salary was HK$10,060. This was increased to HK$10,595 from 1 April 2008.
4. The loss of earnings would be as follows:

From 4 August 2007 to 31 March 2008

HK$10,060 x 7.9 months HK$79,474

From 1 April 2008 until now

HK$(10,595 x 24 months – 6,000 x 18 months) HK$146,280

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Total: HK$225,754

*Future loss*

1. The normal retirement age of a workman like Lau was 60. Lau contended that but for the accident and his early retirement, his employment would have been extended beyond the normal retirement age. He cited examples of a few former colleagues whose employment had been so extended by Caritas.
2. In court, Miss Tsang explained that she has not personally encountered such cases of extended employment; but she understood that Caritas would consider factors, including the supply of suitable candidates for the job in the market, when making its decision.
3. Lau did not say, but presumably the circumstances of these former colleagues were in no way like his prior to the accident. His performance record and physical condition might have yet to cause the early termination of his employment by now. However I am not convinced at all that Caritas would have considered him to be a suitable candidate for extension of employment beyond the normal retirement age. Retiring at the normal retirement age would have been the best that Lau could have achieved.
4. Lau explained in court that he lived alone and had to support his mother. Therefore if health condition permitted, he would have continued to work after retirement. The suggestion was that had it not been the accident, he would and could have changed to work for other employers, if necessary, after his normal retirement from Caritas.
5. I am not convinced either. Lau would have been retiring from Caritas with a fair amount of provident fund benefits. Realistically, given his age, minimal education background and pre-existing conditions, I am not convinced that he would have been gainfully employed after his normal retirement from Caritas, even in the absence of the accident.
6. Lau is now 54 years old and there are 6 year before Lau’s normal retirement age. Mr Sham suggested a multiplier of 4. Mr Kwok suggested 3, subject to further reduction in view of the extra vicissitudes of life in Lau’s case including the likely progression of his pre-existing condition and the possibility of termination of employment event prior to the normal retirement age.
7. I think a multiplier of 3 is appropriate after already taking into account the factor of accelerated receipt and the vicissitudes of life in Lau’s case.
8. The loss of future earnings would be:

HK$(10,595 – 6,000) x 12 x 3 = HK$165,420.

**Loss of provident fund benefits**

1. Caritas would have contributed towards Lau’s provident fund on the basis of his salary at the rate of 10% for the first 10 to 15 years of service and 15% for the subsequent years of service. Lau joined Caritas on 1 April 1996. He should have been entitled to the 10% contribution by Caritas from 2006 up to 31 March 2011.
2. When Lau took early retirement on 23 September 2008, Caritas paid him accrued provident fund benefits in the total sum of HK$201,277.04. Of this sum, HK$103,611.81 was the contributions made by Caritas up till then. Caritas’ case is that the length of contributory service for calculating the contributions should exclude any sick leave period. In that case, it could be assumed that the amount paid by Caritas to Lau did not include the contributions that would have been made for the days of his sick leave as a result of the accident. There was no suggestion otherwise during the trial.
3. On his pre-trial loss of earnings, Lau should be entitled to the provident fund benefits at the rate of 10% and thus:

HK$225,754 x 10% = HK$22,575.40.

1. On his loss of future earnings, Lau should have received provident fund contributions from Caritas at the rate of 10% up to 31 March 2011 and thereafter at the rate of 15%. I adopt a median percentage of 12.5% for calculation the loss of provident fund benefits during this period:

HK$165,420 x 12.5% = HK$20,677.50.

**Loss of earning capacity**

1. Considering Lau’s circumstances, I am satisfied that he would be subject to a disadvantage in the labour market in that he may have difficulty in staying employed. For that, I make a lump sum award of HK$30,000.

**Miscellaneous special damages**

*Medical expenses*

1. The amount of medical expenses claimed was HK$17,540. This was corrected to HK$17,480 in court. Relevant documents evidencing the expenses were produced. It was argued on behalf of Caritas that as the sick leave after early 2007 was unreasonable, so were the expenses after that date. In view of the above discussion and the documentary evidence, and not without reluctance, I allow the amount claimed.

*Travelling expenses*

1. An amount of HK$1,247 was pleaded. This was corrected to HK$1,217.80 in court. I allow this amount.

*Tonic food*

1. An amount of HK$21,494 was claimed. The documents produced suggested that substantial expenses have been spent on the item “花膠”. Lau explained in court that this was consumed upon the recommendation of the bonesetter who happened to be his friend. The apparent frequent bulk purchase of the item cries out for an explanation. It suffices for me to say that Lau’s explanation was far from credible.
2. Applying the relevant principles, I am prepared to award a sum of HK$5,000 for reasonable expenses on tonic food in the present case.

**Summary**

1. In summary, the quantum would be as follows:

PSLA HK$200,000.00

Loss of earnings

Pre-trial HK$225,754.00

Future HK$165,420.00

Loss of pension

Pre-trial HK$ 22,575.40

Future HK$ 20,677.50

Loss of earning capacity HK$ 30,000.00

Miscellaneous special damages

Medical HK$ 17,480.00

Travelling HK$ 1,217.80

Tonic food HK$ 5,000.00

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Total: HK$688,124.70

1. Interest on general damages (for PSLA) shall run at 2% per annum from the date of writ to today:

HK$200,000 x 2% x 14.8/12 = HK$4,933.33

1. Interest on special damages (excluding future loss) shall run at half judgment rate from the date of accident to today:

HK$(225,754 + 22,575.40 + 17,480 + 1,217.80 + 5,000) x 4% x 31.9/12 = HK$28,925.56.

1. The total amount of damages inclusive of accrued interest is:

HK$(688,124.70 + 4,933.33 + 28,925.56) = HK$721,983.59.

**Employees’ compensation**

1. Credit should be given to the employees’ compensation received by Lau in the total sum of HK$308,048. The net award will be:

HK$(721,983.59 – 308,048) = HK$413,935.59.

**Order**

1. Caritas shall pay damages in the sum of HK$413,935.59 with interest from today until full payment at the judgment rate. Caritas shall pay Lau’s costs of this action, including the costs of these assessment proceedings and any costs reserved. Costs shall be taxed, if not agreed, with certificate for counsel. Lau’s own costs shall be taxed according to legal aid regulations. This costs order is a nisi and shall become absolute in the absence of application to vary within 14 days from today.

Simon Leung

District Judge

Mr Walker SHAM instructed by Messrs W K To & Co for the Plaintiff upon the assignment of the Director of Legal Aid

Mr Tim KWOK instructed by Messrs John Lam, Law & Co for the Defendant