DCPI107/2004

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 107 OF 2004

|  |  |  |
| --- | --- | --- |
| BETWEEN | Lau Yuk-sim | Plaintiff |
|  | and |  |
|  | Wong Yuk Chun | Defendant |

Coram: H H Judge H C Wong in Court

Dates of Hearing: 1 and 2 September 2004

Date of Delivery

of Judgment: 3 September 2004

Present: Mr Nick Lee, Legal Aid Counsel of Legal Aid Department, for the Plaintiff

Mr Geoffrey P Chang, instructed by W K To & Co., for the Defendant

JUDGMENT ON ASSESSMENT OF DAMAGES

1. The plaintiff claims against the defendant for damages sustained as a result of the defendant’s physical assault inflicted on the plaintiff by the defendant on 13 November 2001 at the defendant’s office at about 11.30 am.
2. Interlocutory judgment was entered against the defendant by the plaintiff on 27 April 2004 in default of defence. Substitute service was ordered on 1 March 2004 on a basis of the plaintiff’s failure to effect postal service or personal service on the defendant. The plaintiff’s solicitor had difficulty to locate the defendant to serve personally on her.
3. The present hearing is on assessment of damages. The defendant was represented by Mr Chang of counsel on the instructions of Messrs W K To & Company.

Background

1. The plaintiff was a divorced saleslady with custody of three children. The defendant was a director and shareholder of a company called Fountain Grow Limited, with the registered address at Roxy Industrial Centre, 58-66 Tai Lin Pai Road, in Kwai Chung. She is the younger sister of the plaintiff’s ex‑husband.
2. The plaintiff claims that she had finance her ex‑husband’s transportation business in the sum of $300,000 before they were divorced. She was separated from her husband in 1996.
3. In the same year, she developed depression and was admitted into Castle Peak Hospital for one month and the next year, 1997, she was readmitted into Castle Peak Hospital. Thereafter, she received follow-up treatments at an outpatient clinic at the Prince of Wales Hospital.
4. In or about 1998, she obtained a divorce decree to divorce her husband and she was granted custody of all her three children. Her husband was ordered to pay a monthly sum of $12,000 as maintenance for herself and her three children.
5. The plaintiff claims that her ex-husband failed to keep up maintenance payments and she had been trying to locate him and chase him up for the unpaid maintenance.
6. It is the plaintiff’s claim that in November 2001, her daughter had been accepted to pursue a course of studies in Queensland, Australia, and she required $40,000 to pay for her subsidised course. The plaintiff then went to the defendant’s office at Roxy Industrial Centre on 13 November 2001 in an attempt to locate her ex-husband.
7. She had hoped to talk with him and persuade him to give her some money for their daughter’s tuition fee in Australia, and as she was unable to locate him, she hoped the defendant would give her his telephone number in mainland China.
8. The meeting resulted in a quarrel between the plaintiff and the defendant, and the defendant and the plaintiff then involved in a fight.
9. It is the plaintiff’s claim that the defendant assaulted her by slapping her face, grabbed her by her hair and pulled her into the reception area, attacked her on the back of her head with a high heeled shoe for over 10 times.
10. Subsequently, the defendant was charged and was later bound over at the Tsuen Wan Magistracy on 1 December 2002.

The Plaintiff’s Condition

1. As a result of the assault, the plaintiff was admitted into the Princess Margaret Hospital. She was found to have sustained abrasions over her right cheek, right shin and haematoma on the scalp near the occipital region.
2. She was assessed by a psychiatrist at the Princess Margaret Hospital to be suffering from depressive illness after the physical assault on her. These can be seen from the medical report of Dr Lee Kwok-kuen on pages 1 and 2 of bundle C.
3. She was referred to be followed-up at the Li Ka‑shing Psychiatric Clinic after a prescription of anti-depressant was given to her. She was discharged after a stay of one day at the Princess Margaret Hospital.
4. The plaintiff was admitted to Tai Po Hospital on 15 December 2001, approximately one month after her discharge from Princess Margaret Hospital, where she stayed for about seven days.
5. In August 2002, she was readmitted to Tai Po Hospital for one week.
6. In April 2004, she submitted herself for admission to Tai Po Hospital for one month. She claimed that she was admitted to the Tai Po Hospital because she was depressed and she suspected she was under surveillance and would be harmed by the defendant.

Medical Evidence

1. According to the medical reports of Dr Lee Kwok‑kuen, of Princess Margaret Hospital, and Dr Benjamin Lai, the plaintiff has a record of admission to Castle Peak Hospital in 1996 and 1997 due to depression related to marital stress. She was followed up at the Li Ka-shing Psychiatric Clinic after discharge up to January 2001.
2. After the assault on 13 November 2001, she was hospitalised at the Princess Margaret Hospital for one day where she was diagnosed to be suffering from depression. Dr Lai said in his report of 31 July 2003 - and I quote from paragraph 5 onwards, on page 8 of bundle C:

“The in-patient case summary recorded that she had unstable mood in July 2001 because of financial problem.

In November 2001, she meant to ask for the contact number of her ex-husband from her sister-in-law. She was slapped and hit.

Madam Lau said that she was very frightened during the incident. She said that her sister-in-law threatened that she would be shot to death if they were in the United States.

Since the incident Madam Lau had recurrent fearful thoughts of the incident. She had dreams of the incident initially. She also developed fear on seeing women who looked like her sister-in-law. She had to return to the psychiatrist for treatment.

The in-patient case summary recorded that she became insomniac and tearful as her husband did not give money to her and that she was disappointed as her sister-in-law was guilty but put on probation. There had been mild disturbance to her function and performance at work.

According to the outpatient psychiatric notes, Madam Lau had anxiety, insomnia and fear. She had impairment in performance in her part-time work.

According to the in-patient case summary of Tai Po Hospital, she had another episode of hospital treatment from 8 to 12 August 2002. She had low mood, poor appetite, insomnia and intensified anger towards her ex-husband and sister-in-law.

Her husband had then just told her he would not provide further financial support to her. She could not manage her housework and her job. She had unstable mood and chest pain. She was admitted for inpatient treatment. She was noted to be irritable, agitated, unco-operative, miserable and tired looking and low in mood.

She was said to be low in volition. Dose of medicine was increased to help her sleep.

Subsequently, according to the outpatient notes, Madam Lau had weeping spells and poor concentration. She was observed to be tearful, distressed and miserable during follow‑up.

She reported that her application for Legal Aid was rejected. She also reported that her courtship was affected because of her mental condition.

Clinical examination showed that Madam Lau was tense and agitated when the incident of being hit by her sister-in-law was talked about. She said she still had a recurrent thought of the incident about seven to eight times a month. She felt she had lost her interest.

In my opinion, Madam Lau is suffering from an adjustment disorder with anxiety and depressive features. She is also suffering from spontaneous and recurrent fearful thoughts of the incident of being hit.

I believe that the incident of being hit has contributed to the current psychiatric condition of Madam Lau. Further psychiatric treatment is required. The goal of the treatment should include helping her to resolve the feelings related to the incident of being hit. Both medication and psychotherapy are required.”

1. The defendant called Professor Tang to give evidence. Professor Tang is an Assistant Professor of Psychiatry at The Chinese University of Hong Kong. Professor Tang had also written a medical report on the plaintiff based on the information gathered from medical records at the Li Ka‑shing Psychiatric Clinic at the Prince of Wales Hospital.
2. Professor Tang explained that he had never examined the plaintiff and the medical report was written by him because he was the person in charge of the clinic and the doctor who saw the plaintiff was on leave at the time the report was requested.
3. He further explained that he had not been supplied with the Princess Margaret Hospital records or Dr Lai’s report of the details of the incident of the assault. He is therefore unable to make any comments, particularly on Dr Lai’s conclusions and findings. And this is particularly so since he was not the plaintiff’s course doctor.
4. Professor Tang, however, agreed that the assault is one of the life events that could cause depressive mood, similar to other life events such as divorce, death of a loved one and financial problems, etc.
5. In his opinion, the patient - that is the plaintiff - had been dealing with a lot of problems before, such as of her divorce and financial problems, and if she was preoccupied with the assault event, this could be one of the factors that caused the relapse of her condition.
6. On the other hand, from the medical records of the plaintiff, Professor Tang noticed that the plaintiff’s condition in July 2001 was unstable and if she had stopped her medication for one year before the incident, the assault incident could have aggravated her condition.
7. The fact that she was admitted into Tai Po Hospital after the incident indicated the worsening of her condition.
8. It is Professor Tang’s evidence that the chance of relapse of patients who have poor drug compliance within three years is 70 per cent. He considered that the plaintiff, however, can manage her financial affairs and properties and could live an independent life and that her illness is not serious enough to interfere with her work before the assault incident.

Findings

1. Both Dr Lai and Professor Tang, after reviewing the particulars on the plaintiff, concluded that the incident of assault had affected the plaintiff mentally.
2. Dr Lai was more detailed on the effects because he had examined her on no less than three occasions at the time he prepared the report on 31 July 2003. He had the benefit of reading the medical records and the psychiatric outpatient clinic’s notes from the Prince of Wales Hospital, covering the period between January 2002 and March 2003, the Tai Po Hospital in-patient case records of 15 to 22 December 2001 and 8 to 12 August 2002 and the medical report of Dr Connie Chan of 10 April 2003 and the plaintiff’s sick leave certificates.
3. The two episodes of in-patient treatments at Tai Po Hospital since the assault are particularly relevant as they took place within one month of the assault and nine months after the assault and they recorded her mental conditions at the time.
4. Consequently, Dr Lai was able to give a full report on the mental condition and the effect of the assault on the plaintiff with the assistance of her outpatient records since the incident.
5. Mr Chang, counsel for the defendant, has submitted that based on Professor Tang’s evidence, 70 per cent of the patients with poor drug dependence will suffer a relapse within three years. And since the plaintiff had refused to take her medication for one year before the assault incident, her deteriorated mental condition would more likely be due to her poor drug reliance and her suffering a relapse would be due to her non-compliance of drugs rather than the assault.
6. I find that this is contrary to the medical records of the plaintiff and Dr Lai’s findings. And since the medical records referred to by Dr Lai were all relevant to the period after the assault, I find the suggestion that the plaintiff’s aggravated medical condition was due to her failure to take her medicine to be unreliable.
7. I am satisfied based on the medical evidence before me that the plaintiff suffered from anxiety, insomnia, fear after the assault as she had low mood, poor appetite and intensified anger towards both her ex-husband and her sister-in-law.
8. I also accept that she had weeping spells, poor concentration and she had recurrent thought of the incident, up to eight times a month since the incident. These were all recorded conditions of the plaintiff based on the in-patient and outpatient records kept by the Tai Po Hospital and the Li Ka‑shing Psychiatric Clinic at the Prince of Wales Hospital.
9. For these reasons, I accept the medical findings of Dr Lai, that the plaintiff suffered from an adjustment disorder with anxiety and depressive features. She also suffers from spontaneous and recurrent fearful thoughts of the incident of assault. And I accept that the incident contributed to her current psychiatric condition.

Quantum of Damages

1. I have been referred to the cases of Chan Wai-lun v Mo Sheung-wah & Anor, DCPI 166/2001, date of judgment 8 October 2001, a judgment of my brother Judge Carlson, and the case of Wong Siu-shan v Tsang Hin-sum, DCPI 181/2002, date of judgment 18 December 2002, a judgment of my brother Judge Lok.
2. In Chan Wai-lun’s case, the lorry driver plaintiff was assaulted and sustained eight broken ribs, head injuries and bruising on his abdomen. He suffered from post-concussional syndrome and headaches several times a month which affected his work performance. Judge Carlson awarded to the plaintiff, under pain and suffering, loss of amenities, a sum of $180,000.
3. In Wong Siu-shan’s case, the plaintiff suffered laceration to his head, arm and leg at the assault. He suffered from headaches, dizziness, fatigue, irritability, memory loss, insomnia and reduced tolerance to stress and emotional excitement. The pain and suffering, loss of amenities awarded was $180,000.
4. Mr Chang, counsel for the defendant, referred me to the ‘thin skull rule’ and he cited Butterworth’s Hong Kong Personal Injury Service, at page 253, Volume 2, paragraph 451 - C. ‘The Thin Skull Rule’:

“This rule is summarised as being ‘you take your victim as you find him’. The consequence of the rule was set up by Kennedy J in Dulieu v White.

If a man is negligently run over or otherwise negligently injured in his body, it is no answer to the sufferer’s claim for damage that he would have suffered less injury or no injury if he had not had an unusually thin skull or an unusually weak heart.”

This meant that damages could be recovered for an injury which was greater than expected because of a particular deficiency of the plaintiff and for harm which was not of a reasonably foreseeable kind or type. These consequences of the ‘thin skull rule’ would appear to be in conflict with Wagon Mound (No. 1), which held that the type or kind of damage must be reasonably foreseeable and that otherwise, it is too remote. It has now been established that Wagon Mound (No. 1) does not displace the ‘thin skull rule’ - the defendant is liable even if the extent of the harm is not reasonably foreseeable. The effect of the principle ‘take your victim as you find him’ in assessing damages for personal injury was recently considered by Findlay J in Cheung Fat-tim v Wong Siu-ming & Shui On Civil Contractors. In this case, the plaintiff fell whilst working on a construction site and suffered a minor injury to his elbow. The defendants were found liable for the fall. At the time of the fall, the plaintiff’s elbow was severely arthritic and possibly injured by an earlier trauma. The fall led to a total elbow replacement with several severe complications. The main issue that Findlay J had to determine the extent to which the pre-existing condition would affect the damages to be assessed. He stated that:

“There is no doubt as to the principle involved: the defendants are liable for the damages suffered as a direct consequence of the accident, even if these were more serious than they might have been if the plaintiff had not suffered from the already damaged elbow, but they are not responsible for what the plaintiff would have suffered from his pre-existing condition without the intervention of the accident on 14 July 1988.

It is submitted that the application for the two principles referred to by Findlay J produce profoundly different results, depending on the nature of the pre-existing condition or injury. Where the pre-existing condition is benign or not likely to cause injury to the plaintiff but is triggered off by the injury inflicted by the defendant, the plaintiff is entitled to recover in full all the damage resulting from the negligently inflicted injury. Thus, for example, the plaintiff in Robinson v Post Office who had an unknown pre-existing allergy, which was triggered off when given an anti-tetanus injection for a minor injury negligently inflicted by the defendant, was entitled to recover damages for all the consequences of his severe allergic reaction.

Where the pre-existing condition is one of which, in time, would have itself caused injury to the plaintiff and ‘the injury negligently inflicted by the defendant has merely accelerated the process of degeneration, the damages assessed will be reduced to take the pre-existing condition into account. In this situation, the pre‑existing condition is treated as one of vicissitudes of life to be taken into account in assessing damages. The situation is well illustrated by the Cheung Fat‑tim case itself.”

1. Mr Chang further referred to the case of Chan Kam-hoi v Dragages et Travaux Publics, HCPI 815/1995, date of judgment 7 March 1997, a judgment by Deputy Judge Woolley.
2. The learned judge said, on page 4 of the judgment:

“When considering the effect of a pre-existing condition on an award of damages there are three possible scenarios. The first is where the plaintiff was almost certain to have gone through life unaffected by the condition. The second is where there is a strong possibility that some other event or natural progression of a condition would have brought about the plaintiff’s present state. The third is where this would certainly have occurred at some stage in any event. In the first, the defendant would be liable for all damages caused. In the second 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. In the third, clearly an allowance has been made, the extent of which depends on the evidence as to when the precipitating event would have occurred.

The existing condition of the plaintiff’s spine here and the nature of his employment, takes this case certainly into a second category and possibly into the third...”

And later on in his judgment he continued:

“I accept the defendant is not responsible for what the plaintiff would have suffered from his pre‑existing condition had the incident not happened as it did and that there should be some discount in the damages to reflect this...”

And further down the page he said:

“The evidence is that it is certain that the plaintiff would have suffered a deterioration in his condition in any event, and that it is likely that this would have cost him to give up his pre-accident occupation by the time he was 55. I consider in these circumstances an appropriate discount to be 45%.”

1. In appeal of this case (the Chan Kam-hoi case), in the Court of Appeal [1998] 2 HKLRD 958 - at page 965 Mortimer VP said this, at E:

“Where a pre-existing condition is likely to lead to disability and loss in the absence of the injury for which the plaintiff is entitled to recover, the usual method of assessing the recoverable loss is to take account of the risks by an appropriate assessment of general damages. The pre-trial loss of earnings may also be reduced if the risks during the years concerned are sufficiently high.

When calculating the damages for future loss of earnings, a reduced multiplier is usually the most accurate way of giving effect to the findings on a medical evidence. This is particularly so when a plaintiff’s working life is likely to be limited by a pre-existing condition as in this case.”

1. Based on the Court of Appeal’s adoption of Deputy Judge Woolley’s assessment in the Chan Kam-hoi case, and based on the two authorities cited by Mr Lee, representing the plaintiff, I will adopt the Pain and Suffering, Loss of Amenities award of $180,000 for the damage and suffering of the plaintiff (PSLA) for I consider that psychological trauma is no less injurious as physical injuries.
2. The plaintiff is known to the defendant to be suffering from depression since her separation with the defendant’s brother. The assault on her and the violence and force exerted by the defendant was totally uncalled for.
3. I have observed the plaintiff’s behaviour and her anger and hatred expressed when she was giving evidence on the conduct of both her husband and the defendant. Almost three years after the incident, she still obviously harboured anger and hatred. This indicates that she is still affected by the incident. Clearly she requires treatment to help her to resolve this condition medically.
4. I would also adopt the deduction of 45 per cent of the PSLA as a contributing factor of the plaintiff’s failure to take her medication, thus exposing her to a possible early relapse of her depressive condition.
5. As to the plaintiff’s failure to mitigate raised by Mr Chang, namely her deliberate non-compliance of medication and self-admitted discarding of anti-depressant drugs prescribed by the doctors resulting on the slow or non-improvement of her mental condition, it is not an uncommon phenomenon amongst mental patients to have poor drug compliance possibly due to the side effects of the drugs.
6. The plaintiff had stopped taking medication for about one year before the assault incident. Her poor drug compliance did not happen after the incident. In fact, this factor have been taken into account in the contribution on her part of her present mental condition, resulting in the deduction of the liability mentioned above. Therefore I shall not make any further deduction.
7. The pain and suffering, loss of amenities, therefore, less 45 per cent, is $99,000.
8. As to the loss of pre‑trial earnings, this is calculated based on her job as a saleslady of physiotherapy equipment, working for a company called Medex. The evidence adduced was that her income was an average of $8,000 per month.
9. It is her evidence that she would earn more if she sold more products for the company because she would get commission on a profit basis.
10. Based on the evidence before me, I will take the $8,000 a month as the median income on basis of her monthly income. And as the sick leave certificate certify that she was given 233 days sick leave, the total would come to 8,000 multiplied by 2,330, divided by 30. It comes to $62,132.
11. As to loss of future earnings, Mr Lee, the Legal Aid Counsel representing the plaintiff, submitted that 25-per-cent reduction in income would be a reasonable amount since the evidence was that the plaintiff was earning an average of $8,000 per month before the assault incident and after the incident her income dropped to $6,000 a month.
12. It is Professor Tang’s evidence that the plaintiff should be able to carry on working in spite of her previous mental condition and she would be expected to live a relatively normal life. And based on the medical evidence, I would accept the multiplier of 10 and therefore the loss comes to $8,000 minus $6,000, multiplied by 12, multiplied by a multiplier of 10. It comes to $240,000.
13. There’s a loss of MPF. The figures are $62,133, plus $240,000, times 5 per cent. It comes to $15,106.

Special Damages

1. Hospitalisation charges at Princess Margaret Hospital and Tai Po Hospital: these are supported by medical evidence, and the total comes to, including Dr Lai’s treatments, $8,664.
2. As for travelling expenses, I shall allow in full, it is $978.
3. As to the head of “Tonic Food”, these were not supported by any medical evidence that, particularly the bird’s nest soups, have any special beneficial effect on a patient suffering from depression. I would, however, allow the usual tonic food of nourishing soups because the plaintiff suffered from both physical and mental injuries after the assault. I think that $3,000 is a reasonable amount.

Loss of Earning Capacity

1. I do not propose to grant an award under this head for the actual loss of future earnings have taken into account such a factor. Further, the plaintiff has been suffering from mental illness since 1996. Her earning capacity have been limited before the assault because of pre-existing condition. The plaintiff did not support this claim with any authorities as to the basis of the amount claimed of $18,000. Therefore, I make no award under this head.

Future Medical Expenses

1. According to Dr Lai’s report, he considered the plaintiff should benefit from a course of psychiatric treatment of four to five months. This was expressed in Dr Benjamin Lai’s 1 June 2004 letter.
2. It is Dr Lai’s opinion that during the treatment of four to five months, the plaintiff will receive 10 sessions of psychotherapy of one hour each, with medication of $200 per week. The total costs comes to $29,000.
3. According to the plaintiff’s evidence, she admitted she preferred seeing and talking to the doctor to taking medication because the drugs made her unwell, and this indicated she is willing to go for psychotherapy sessions. I would therefore allow this item of future medical expenses.
4. It is perhaps not expected that by going to 10 sessions of psychotherapy the plaintiff would instantly be cured completely of her mental depression, but these sessions should help her to resolve the weeping spells, the repeated thoughts of the recurrence of the assault and the anger she has of her ex‑husband and the defendant caused by the assault.
5. Interests - interest on general damages at 2 per cent per annum from date of writ to date of judgment and on special damages at half judgment rate from date of accident to date of judgment, thereafter at judgment rate until full payment.
6. Costs to follow the event, to be taxed if not agreed; the plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.
7. In summary, the award is as follows: pain, suffering, loss of amenities, $99,000; pre-trial loss of earnings, $62,133; future loss of earnings, $240,000; loss of MPF, $15,106; special damages, $12,642; future medical expenses, $29,000. The total comes to $457,881.

H H Judge H C Wong

District Court Judge