DCPI 313/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO.313 OF 2008

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BETWEEN

YEUNG TSOI KAN Plaintiff

and

WONG KEUNG KWONG Defendant

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

Coram: His Hon Judge Leung in court

Date of hearing: 13; 23 February 2009

Date of judgment: 15 June 2009

**ASSESSMENT OF DAMAGES**

1. This action arose out of a traffic accident on 20 April 2006. 18-year-old Yeung, the Plaintiff, was a passenger at the backseat of a car when the taxi driven by Wong, the Defendant, collided with it. Yeung suffered minor injuries. On 24 June 2008, judgment on liability was entered against Wong for damages to be assessed.

**Injuries and treatment**

1. Sent to the Tuen Mun Hospital after the accident, Yeung felt pain in her neck, shoulder and back. The diagnosis was soft tissue sprain. After 3 nights in the hospital, she was discharged with oral analgesic and appointment for follow up treatment and physiotherapy. Sick leave has been granted until the end of May 2007. But one year after the accident, in late April 2007, Yeung gave birth to a boy.
2. When she gave her statement in August 2008, Yeung still complained about:
   1. pain in the neck when moved suddenly;
   2. pain in the left back after sitting, standing and walking for over an hour; and
   3. pain in the left shoulder when moved in a big range and when moving weight of over 5 kg.

**Orthopaedic expert opinion**

1. Yeung was examined by Dr Peter M K Tio, the expert engaged on her behalf, in October 2007. His report was dated 25 October 2007. The expert arranged on behalf of Wong, Dr Lam Kwong Chin, examined Yeung in September 2008 and produced his report on 2 October 2008. The experts also gave evidence in court.
2. Both experts found that Yeung’s symptoms are consistent with soft tissue injury and whiplash injury as a result of the sudden impact of the vehicles in the accident.

*Dr Tio*

1. Dr Tio found no structural or bony abnormality, external deformity or neurological deficit in Yeung. The ranges of movements of her back were all above normal. There was no sign of impingement of the shoulders. The rotator cuffs were intact. The ranges of movements of her shoulders were comparable and normal except for the reduced 20 degrees in forward flexion. There was no muscle spasm in the neck.
2. But Dr Tio found tenderness over the left middle and lower lumbar region, left anterior and posterior aspect of the left shoulder as well as the left mid cervical region. Crepitus were felt in her left scapula spine. The readings of the ranges of motions of the neck were substantially subnormal.
3. Dr Tio described the prognosis in Yeung’s case as fair and opined that the pain would recur in the coming 5 years before complete resolution could be expected. The 405 days of sick leave granted were considered to be appropriate and reasonable. Further physiotherapy was recommended.

*Dr Lam*

1. Dr Lam examined Yeung nearly one year after Dr Tio’s examination. Dr Lam also recorded Yeung’s complaint about mild tenderness at the left side of the lower cervical spine. But he found that by that time, the marked limitation in the ranges of movements of the neck that Dr Tio recorded in his report had improved to normal and the rotation had also improved to only 10 degrees below normal. Also because of no loss of cervical lordosis or paraspinal muscle spasm, Dr Lam opined that the neck pain could not be a significant one.
2. Dr Lam also recorded her complaint about tenderness over the medial border of scapula and midline about T6 level as well as pain at scapula at end range of shoulder movement and on exertion. But he found that the tenderness over the left anterior and posterior aspect of the left shoulder and crepitus in her scapula noted by Dr Tio was no longer present. Nor was the tenderness over the lower lumbar region as noted by Dr Tio present.
3. Dr Lam explained that whiplash injury is a spectrum of injuries in various degrees, ranging from simple sprained neck muscles (which could recover in a few days) to cervical spine fracture-dislocation associated with neurological damage. He considered Yeung’s complaint about the pain to be vague and subjective. The intensity and chronic degree projected were out of proportion to the initial injury and unsupported by objective signs. In his opinion, Yeung’s case was one of minor neck sprain with soft tissue involvement, which has already recovered well. The prognosis was considered to be good.
4. Dr Lam considered that sick leave of up to 2 months would have been adequate in Yeung’s case. He disagreed with Dr Tio’s projection of recurrence of pain in the coming years. He went so far to assess that Yeung should suffer no permanent impairment or loss of earning capacity.

*In court*

1. In court, Dr Tio accepted that pain was subjective and patients tend to exaggerate a little bit in their complaint. But he maintained his opinion that Yeung’s complaint was genuine. He also agreed that Yeung’s pregnancy could somehow attribute to her shoulder pain.
2. Dr Tio agreed that Yeung’s condition had improved since his examination of her in October 2007, though in the absence of physiotherapy. He was prepared to reduce his assessment of her percentage loss of earning capacity by a little margin. In practical terms, Dr Tio believed that Yeung should be able to handle work as a waitress in a non-Chinese restaurant.

**Yeung’s evidence**

1. According to Yeung, soon after the accident, the pain caused her to wake up in the middle of the night. There was also pain on exertion. This happened once or twice every night then.
2. Yeung attended 5 sessions of physiotherapy in 2006. The therapy then stopped, according to her, for the fear that the ultrasound treatment in physiotherapy might affect her pregnancy.
3. Yeung had attended outpatient treatment at the Tuen Mun Hospital and had been given painkillers. According to her, the medicine prescribed by the government hospital was ineffective and had side effect. She changed to consult Dr Ng, a private general medical doctor in North Point, at the recommendation of a friend. She claimed that the medicine prescribed by Dr Ng was relatively better.
4. Apart from prescription of medicine, there is no evidence that Dr Ng provided any actual treatment to Yeung. Instead Dr Ng referred Yeung to a Dr Cheung twice, first in September and then in October 2006. Dr Cheung was thought to be a physiotherapist until Dr Lam in his evidence queried that. Indeed the referral letters from Dr Ng gave no clue as to the discipline that Dr Cheung specialises in. In any event, Yeung did not consult this doctor despite the repeated referrals. The fact was that since the last physiotherapy session at the hospital, Yeung has never sought physiotherapy even after giving birth to her son in 2007.
5. In January 2007, Yeung returned to the Tuen Mun Hospital for outpatient treatment. Yeung explained that she returned to the hospital for financial reason. But the 5 consultations with Dr Ng in 2006 cost less than $200 each. By then, she must have received allowance from the Social Welfare Department Traffic Accident Victim Allowance (TAVA).
6. In any event, Yeung again stopped attending outpatient treatment at the Tuen Mun Hospital at the end of May 2007. According to the medical report of the hospital, Yeung defaulted the last appointment.
7. Yeung said that by then, her pain still caused her to wake up in the middle of the night, though it had become less frequent, about once every 2 to 3 weeks. However, she made no such complaint when she was examined by Dr Tio in October 2007. Dr Tio confirmed that in court. She apparently considered that it was normal for her to forget to tell the doctor *all* her problems.
8. Between then and now, Yeung said she felt better and there was less pain. There was no more pain causing her to wake up in the middle of the night. She managed the pain from time to time by medication. She made use of her stock of painkillers prescribed by the hospital, precisely those she had once complained to be ineffective.
9. She said that now there is occasionally “needle pin” feeling at her shoulder, though less compared with the past. There is still numbness occasionally and does not necessarily occur after sitting for long. She is not able to carry a bag of rice weighing 5 kg. Her son weighs 30 lb and she has to put him in a baby stroller. As to how she manages to do just that, she explained that it is mainly her mother who does that.
10. At the time of the accident, Yeung worked as a waitress at a karaoke bar. While Yeung’s pregnancy after the accident could not legitimately have caused her to lose the job, I have reservation as to whether she would have continued working at the karaoke bar at some stage of her pregnancy or after giving birth to her son, in the absence of the accident. Even she said so much about how demanding the job was. She suggested the possibility of staying employed as a cashier after the accident, but there was no real discussion with her former employer about that.
11. Yeung claimed to have been unable to secure any other job because of her lack of qualification and limited working experience. She managed to obtain a job as a sales person only in June 2008 which was more than a year after the expiry of the sick leave period. She resigned after 1½ months, suggesting that the job was too demanding due to the need to travel to various shops and the long working hours.
12. Yeung claimed to be unable to work as a waitress in restaurants, but Dr Tio opined that she should be able to handle the work as a waitress in a non-Chinese restaurant. In court, she agreed she should manage the job as a restaurant receptionist.
13. Considering all the evidence and seeing Yeung testify, I am not impressed that Yeung has been serious about managing her physical condition since the accident. Nor am I impressed that she has been sufficiently serious about the medical advice and treatment either. Her pregnancy after the accident and its effect on her and her condition simply could not be underestimated. Though she is single and, according to her, her child does not have the support of his natural father, I have grave doubt as to whether it was her physical condition or her lack of initiative that has kept her jobless. According to her, she has so far been receiving financial support from her brothers.

**Pain suffering and loss of amenities**

1. HK$250,000 is claimed for Yeung’s pain suffering and loss of amenities. Miss Cheung for Yeung relied on these cases: *Tai Yuk Wong v Chong Kwok Fung & Anor*, DCPI 1405/2005; *Lung Kwong Ying v So Sai Lo & Anor* [2002] 3 HKLRD 185; *Anil Jhuremalani v Rodelio O Fajada*, DCPI 134/2001; *Chan So Kwan v Mak Siu Kwan Victor & Anor*, HCPI 1487/2000; and *Yeung Sze v Win Art Design & Decoration Co Ltd*, HCPI 6/2000.
2. Miss Tsui for Wong also referred to the cases of *Chan So Kwan*; *Anil Jhuremalani*; and *Tai Yuk Wong* (above). She also referred to numerous other cases: *Chiu Wing See v Cheung Ying Wai* [2001] 2 HKLRD 92; *Leung Chiu v Poon Tak Hing*, DCPI 2/2001; *Chan Siu Youn v Ng Kam Man*, HCPI 533/1999, 28 July 2000; *Wong Kin Hung v Chan Wai Ming*, DCPI 1223/2006; *Li Chi Lap v Tam Man Kuen*, DCPI 1228/2007; *Lai Ka Yin v Chan Yiu Kei*, DCPI 453/2008; *Chan Chun Wa v Wong Chiu Yuen Andrew*, DCPI 235/2007; *Mohammed Asha v Royal Honour Industrial Ltd*, DCPI 1586/2007; and *Siu Leung Shang Peter v Chung Wai Ming*, HCPI 43/2006. She submitted that the present case is more in line with the last 5 cases cited and suggested an award of HK$30,000-50,000.
3. Considering all the above cases and the circumstances of Yeung, I award HK$90,000 for her pain suffering and loss of amenities attributable to the accident and her injury.

**Loss of earnings**

*Pre-accident income*

1. According to Yeung, her pre-accident basic salary was HK$9,000. Inclusive of tips and overtime payment, her monthly income was allegedly HK$10,500. There is no documentary support of the alleged amount.
2. The monthly income she stated in her application for TAVA in May 2006 was HK$9,500. She said her former employer told her to put down this amount which was inclusive of overtime payment. In that case, the monthly income, inclusive of the alleged HK$1,500 tips, would have exceeded the pleaded amount.
3. However, the accuracy of the information stated in this application was called into question. In the application, she declared and her former employer certified that since the accident, she had not received salary and had suffered loss of income. The fact was that Yeung received payment from her former employer until the end of June 2006. According to the record of the Inland Revenue Department, Yeung effectively received her basic salary of HK$9,000 during the 3 months from April to June 2006.
4. According to the record of the Inland Revenue Department, her average monthly income for the year 2005/2006 should be HK$9,167 instead. But Yeung explained that this amount included the overtime payments but not the tips. Still, this would differ from what she declared in her application to TAVA.
5. It is not safe to rely on Yeung’s assertion of her pre-accident income. In the circumstances, I adopt the amount actually evidenced by the record of the Inland Revenue Department as Yeung pre-accident income. That would be HK$9,167.

*The loss*

1. According to Yeung, she was dismissed at the end of June 2006. She claims for the loss of income since July 2006 and the partial loss of income since she should have been able to obtain an alternative job, such as a shopkeeper or a clerk, 3 months after her sick leave expired at the end of May 2007. Yeung also claims such partial loss of income in the near future.
2. It was Yeung’s own evidence that she lacks the qualification or experience required to secure a job like that as a shopkeeper or a clerk. The proposed alternative job and the comparison of the income from such a job with her pre-accident income are simply unrealistic.
3. Dr Tio opined that Yeung should be able to work as a waitress in a non-Chinese restaurant. Yeung agreed that she should be able to manage the job as restaurant receptionist. The government statistics produced show that a restaurant receptionist would have earned a monthly income comparable to what Yeung used to earn before the accident.
4. I reject the claim that she would have suffered partial loss of earnings if she had resumed working. Likewise, I do not allow the claim for the alleged loss of future earnings.
5. Considering all the circumstances, I am only prepared to award damages which effectively represents Yeung’s loss of earnings during the sick leave until the end of May 2007, *and nothing more*. Credit should be given to the amount she had received from her former employer after the accident. Her loss of earnings was (HK$9,167 x 405/ 30 – HK$9,000 x 71/30) = HK$102,455.

**Loss of mandatory provident fund benefit**

1. Miss Cheung for Yeung conceded that there is no evidence of any MPF contributions by the former employer.

**Loss of earning capacity**

1. In view of her age and other circumstances, I am not convinced that Yeung would suffer any handicap in the labour market as a result of any physical disability. There will be no award for loss of earning capacity.

**Future medical expenses**

1. Dr Tio recommended a further course of physiotherapy at the interval of once every week for 4 months. In view of what was discussed above, I have reservation about the recommendation. In any event, in view of the history of medical attention and therapy that Yeung had and could have after the accident, I am not convinced that she would now be taking such recommendation seriously. I am not prepared to allow this item of claim.

**Miscellaneous special damages**

*Medical expenses*

1. I am prepared to allow the amount claimed in the sum of HK$2,340.

*Travelling expenses*

1. I am prepared to allow the amount claimed in the sum of HK$1,680.

*Other expenses*

1. These were allegedly expenses on nourishing food, ointment and medication. In the absence of documentary evidence and the support of medical expert evidence, I agree with Miss Tsui and allow HK$2,000.

**Summary**

1. In summary, the damages are assessed as follows:

PSLA HK$ 90,000

Pre-trial loss of earnings HK$102,455

Miscellaneous special damages

Medical expenses HK$ 2,340

Travelling expenses HK$ 1,680

Others HK$ 2,000

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Total: HK$198,475

1. Up to today, there will be interest on general damages at 2% per annum from the date of writ and on special damages at half judgment rate from the date of accident. Interest from today until full payment shall run at the judgment rate.

**Order**

1. Damages are assessed at HK$198,475 with interest as aforesaid. Wong has been ordered to pay costs on liability. I make a nisi order that Wong shall also pay Yeung’s costs of these assessment proceedings. Costs shall be taxed, if not agreed. For clarity, I certify the engagement of counsel. Yeung’s own costs shall be taxed subject to legal aid regulations. In the absence of appointment in 14 days to argue costs, this nisi order shall become absolute.

Simon Leung

District Judge

Miss Diana CHEUNG instructed by Messrs Au & Associates for the Plaintiff on the instruction of the Director of Legal Aid

Miss Jennifer TSUI instructed by Messrs Kenneth C C Man & Co for the Defendant