DCPI 349/2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 349 OF 2009

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BETWEEN

YIP KIN FUN Plaintiff

and

LAU HON KIT Defendant

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

Coram: His Hon Judge Leung in court

Date of hearing: 12-13 October 2010

Date of judgment: 13 December 2010

**ASSESSMENT OF DAMAGES**

1. A traffic accident happened on 13 March 2006 when the taxi driven by **Lau**, the Defendant, hit 49-year-old **Yip**, the Plaintiff. This resulted in the present action by Yip against Lau for damages. By consent, judgment on liability for damages and interest to be assessed was entered on 3 September 2010 to the extent of 65%. Lau also consented to paying the costs of this action up to the date of the judgment. This is the assessment of the damages.

**Injuries and treatment**

1. After the accident, Yip was sent to the Accident and Emergency Department of the hospital. Examination showed localised tenderness on her left chest and left hip. After X-ray, the diagnosis was closed fractured left superior pubic ramus and fractured (6th to 8th) ribs.
2. Yip was transferred to the Orthopaedic and Traumatology Department for further treatment. She was given conservative treatment including analgesic and physiotherapy. No surgery was carried out. She was discharged 5 days later. During follow up, her progress was found to be satisfactory. X-rays revealed that the fractures had healed. She was last seen by the Department in early April 2009.
3. The hospital’s physiotherapy report recorded that Yip complained about pain at her left shoulder, left lower chest and left groin when she was seen by the department 2 months after the accident. The treatment included pain relief with hot pad to the left trapezius and left chest wall, pain relief to the left shoulder, leg strengthening exercises, shoulder mobilising exercises, upper limb strengthening exercises and manual therapy to the neck.
4. In October 2006, Yip complained about pain over the left axilla. In the same month, Yip defaulted the physiotherapy session scheduled. By then, she had 27 sessions of physiotherapy. For complaint about elbow pain, she had received another 7 sessions of physiotherapy to her elbows before again defaulting the last appointment in May 2008.
5. The hospital’s occupational therapy report recorded that Yip was referred for work assessment and hardening exercise in late August 2006. She complained about increased tenderness over her left shoulder after operating the sewing machine for 30 minutes. Her demonstrated bilateral lifting capacity from the floor to knuckle level was just half of the weight that she was allegedly required to lift during work.
6. Rehabilitation course was designed for her. During the re-assessment in early October 2006, Yip demonstrated her capacity to lift and to carry weight matched the pre-accident job demand marginally. She was advised to try to resume work. By then, she had attended 14 sessions of occupational therapy.
7. Yip has also been referred to the clinical psychologist for care and assessment in February 2008. Due to her attempt to resume work, her sessions were spaced out to October 2008. She complained that the chest pain caused her insomnia with broken sleep. She also complained about noise, though in a quiet environment. During the last 2 sessions, she was very depressed with suspicion after confirmation of high risk of cancer. She was distressed by the lack of support from her husband. The clinical impression was that Yip was suffering from chronic pain and mood depression. The unemployment has affected her self-esteem and family status.
8. Sick leave had been given by the specialist department since the accident until 22 October 2006.

**Medical expert evidence**

*Orthopaedic experts*

1. Yip was examined by the orthopaedic experts engaged on behalf of the parties, namely, Dr Chan Sai Keung and Dr Lam Kwong Chin respectively, on 30 December 2009. The experts produced their joint report dated 8 January 2010.
2. During the examination, Yip complained about frequent pain at the lower chest pain, left groin pain and left shoulder. There was no more complaint about her elbow; but there was complaint about low back pain after prolonged sitting.
3. The experts agreed that there was evidence of fractured 6th to 8th ribs and left superior public ramus with slight displacement as a result of the accident. Progressive bone healing was shown in the X-rays. By late September 2006, the fractures were in satisfactory union with good alignment. There was no evidence of fracture or joint dislocation of left shoulder in the X-ray taken 2 days after admission to the hospital. There were degenerative changes with marginal ostesphytosis in the lower lumbar spine.
4. The experts agreed that for Yip’s injuries, the standard treatment should mainly be conservative including adequate analgesia, physiotherapy and rest. The treatment given was appropriate. The prognosis was generally good. Most people could have satisfactory functional recovery in a few months. As the multiple fractures would heal simultaneously, the recovery time would be similar to that required for a single fracture site.
5. Regarding the complaint about the elbow and low back pain, the experts agreed that neither of them was due to the accident. This was probably tennis elbow and natural degeneration of the back.
6. Regarding Yip’s complaint about frequent left lower chest pain and left groin pain, the experts seem to hold different views. Dr Lam opined that the chronicity and intensity of such complaints were out of proportion to similar fractures sustained almost 4 years ago. The present complaints were said to be vague and subjective. Upon examination, there were minimal objective signs to support such complaints. However, Dr Chan opined that mild residual pain over the chest and pelvis could be the result of the scarring after the healing of the fractures.
7. As to the complaint about the left shoulder pain after the accident and also right shoulder pain for a year, Yip reported tenderness at both shoulders with motion much limited in flexion and abduction. She had impingement pain at biceps on left and at supraspinatus on right. The experts noted that in March 2008, the Medical Assessment Board apparently considered that her left shoulder pain developed after and was probably unrelated to the accident.
8. The experts had different views in respect of Yip’s complaint about her left shoulder condition. Dr Lam opined that as shoulder injury was not mentioned in the early part of the treatment; and the shoulder condition apparently became worse gradually, it should be due to ageing and chronic inflammation, i.e., tendinitis and constrictive capsulitis (frozen shoulder), rather than the trauma of the accident.
9. On the contrary, Dr Chan noted that left arm contusion was recorded on the date of admission. 2 days later, X-ray of the left shoulder was taken. Physiotherapy involving the left shoulder followed. Therefore Dr Chan opined that Yip had probably sustained soft tissue injury to her left shoulder during the accident.
10. The experts agreed that no further treatment would be necessary. Yip has reached maximal medical improvement. The experts agreed that sick leave since the accident until 22 October 2006 was acceptable.
11. Dr Lam opined that as far as the rib and pubic fractures were concerned, these injuries should cause minimal physical hindrance to work. Yip should be able to continue her pre-accident job in a manner comparable to other workers of her age and general physical health. The permanent adverse influence from the fractures should be minimal; and should not cause her significant disadvantage in the labour market or higher chance of losing her job.
12. Dr Chan agreed that Yip should be fit to resume her pre-accident job. But there would be reduction in efficiency due to the residual pain over her chest wall, pelvis and left shoulder. The left shoulder pain would cause her some disadvantage in the labour market.
13. For the pubic pain and chest wall discomfort, the experts agreed that Yip suffers from 2% total impairment of the whole person. Dr Chan would add 1% for the left shoulder pain and stiffness.

*Psychological experts*

1. Yip was examined by the psychological experts, namely, Dr Anita Leung engaged on behalf of Yip and Professor Peter Lee engaged on behalf of Lau, on 21 and 28 January 2010. The experts produced their joint report dated 11 February 2010.
2. The experts reported that Yip used to work as a full time garment factory worker for 30 years with stable income. She was responsible for all the household work. She was socially active. Her marital relationship had been discordant for years.
3. After the accident, she failed to sustain stable employment. Due to the pain, she refused sex with her husband most of the time. The marital relationship became more strained and cold. Yet she did not get her husband’s support as desired. Periodically she was accused of being useless. She felt like a servant and uncared for. She had to tolerate a low standard of hygiene condition at home for fear of over-exertion and possible deterioration of her conditions. She had limited social life, feeling anxious and depressed.
4. Pain Disability Questionnaire was administered to ascertain her pain related impairment, which the experts assessed to be 1%. But the experts added a word of caution: Most of Yip’s complaints were subjective. Her actual behaviour did not reflect actual loss of interest. Such activities, whilst reduced, were not due to lack of interest or the subjective pain but her dependency on her husband, lack of chance to generate income and reduced spending power. She over-estimated the adverse degree of pain and often simplistically and solely blamed her residual pain for her problems instead of also realistically taking into account the adverse impact of her other pre-existing life difficulties.
5. Yip was assessed to be suffering from adjustment disorder. The injuries have affected her work capacity, lowered her sense of worth and dignity, accentuated her sense of loneliness and limited her social activities. She had her difficulties prior to the accident; and the difficulties were intensified and further life stressors were caused by the accident.
6. The experts recommended an intensive course of 15 sessions by a clinical psychologist to help enhance Yip’s ability to cope with the stressors and pain; and to help alleviate her depressed mood.
7. From the psychological perspective, Yip should be able to resume work with some assurance from the experts. Active work resumption together with generation of income would expectedly increase her self-esteem, reduce her sense of insecurity and dependency and eventually benefit her psychological well-being.

**Discussion**

1. One major dispute is whether Yip injured her left shoulder during the accident.
2. Miss Loh pointed out that in the medical reports of the Accident and Emergency Department, the Pain Clinic and the Orthopaedic and Traumatology Department of the hospital, no mention was made of any injury to Yip’s left shoulder during the accident.
3. However, Mr Lee pointed out that there was record of Yip’s complaint about multiple contusions on the left side of her body upon her admission to the hospital. He also pointed out the orthopaedic experts’ reference to the X-ray apparently taken of Yip’s left shoulder 2 days after her admission to the hospital. Yip confirmed that in court. He also referred to Yip’s complaint about her left shoulder when she was seen by the physiotherapy department afterwards as recorded in the relevant report.
4. In fact, both counsel’s observation from the medical reports is correct. However, even assuming that Yip might have mentioned her left shoulder in her complaint upon her admission to the hospital, I infer from the lack of mention of that in the contemporaneous clinical management sheet and the subsequent medical reports that nothing abnormal was actually detected in her left shoulder. This was also the orthopaedic experts’ conclusion after analysing the X-ray taken on 15 March 2006. It was from the outset the left chest wall and groin pain that the treating doctors found it necessary to attend to at the time.
5. Left shoulder discomfort was recorded in the consultation summary of the hospital in late April 2006. Pain and tenderness of her left shoulder was first recorded when she was seen by the physiotherapy and occupational therapy departments later.
6. In March 2008, the Medical Assessment Board recorded its view that Yip’s left shoulder pain developed after and probably unrelated to the accident. I think such view is understandable in the circumstances mentioned above.
7. Dr Chan opined that it was likely that Yip had sustained soft tissue injury to her left shoulder during the accident. Yet there was no record of even tenderness in her left shoulder, despite the record of Yip’s complaint about multiple contusions of her left body. Dr Chan did not actually suggest that there was a delayed onset of pain from the suspected soft tissue injury to the left shoulder, if there was indeed such a possibility.
8. Considering all the medical evidence, I am more inclined to accept Dr Lam’s opinion that Yip’s complaint about her left shoulder was not due to injury inflicted by the trauma in the accident.
9. There seems to be difference between the orthopaedic experts in respect of the degree of pain and impairment of Yip’s chest wall and pelvis. But the experts agreed on the quantitative assessment of Yip’s degree of impairment. Dr Chan described the residual pain as mild.
10. I also give full weight to the word of caution from the psychological experts about Yip’s tendency to over-estimate the adverse effect of her subjective physical pain on her personal functions.

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

1. The actual degree of physical pain and psychological suffering discussed and found above are taken into account. I also bear in mind that some of the complaints that Yip has also made are unrelated to the accident.
2. Mr Lee referred to the following cases as comparables:
3. *Chan Yuet Ling v To Sum Fai & Anor* HCA A3545/1981 (1 December 1981);
4. *Rosemary Sun Ho v Lau Chak Kuen* HCA 10635/1982 (8 February 1985);
5. *Fan Shuit Lui v Shing Wah Chai & Anor* HCA 6239/1984 (30 April 1986);
6. *Law Hing v Leung Tin Kan & Anor* HCA A4267/1987 (14 December 1988);
7. *Ip Yiu Fai v Chan Che Kwong* HCPI 445/1998 (16 January 1999);
8. *Lee Tin Yeung v Chiu Chow Association Secondary School & Anor* HCPI 201/1999 (27 August 2002);
9. *Mo Hee Yuk v Gammon Skanska Limited & Anor* HCPI 502/2004 (1 March 2006);
10. *Yeung Tai Hung v Hong Kong Baptist Hospital Au Shue Hung Health Centre* HCPI 686/2004 (20 July 2006);
11. *Li Yik Wing v Secretary for Justice* HCPI 565/2006 (5 August 2008);
12. *Wong Wai Man v Yi Wo Yuen Aged Sanatorium Centre Limited* HCPI 77/2007 (15 August 2008);
13. *Suen Kum Fung Candy v Tsang Cham Kuen* CACV 75/2008 (29 August 2008).
14. Miss Loh also cited the following cases for comparison:
15. *To Sai Wo v Yim Wai Cheung & Anor* HCA A1149/1987 (4 February 1988);
16. *Yan Yi Chai v Cheng Kam Shing & Anor* HCA 1788/1984 (12 March 1985);
17. *Choi Siau Bon v Chevalier Construction (HK) Limited & Ors* HCPI 913/2000 (20 February 2002);
18. *Limbu Muni Parsad v Hyundai Engineering & Construction Company Limited* HCPI 1167/2003 (19 August 2004);
19. *Rai Bina v Pacific Crown Engineering Ltd & Ors* HCPI 338/2001 (26 February 2003);
20. *Chan Wai Leung v Mo Sheung Wah & Anor* DCPI 66/2001 (8 October 2001).
21. I find cases nos. (1) to (5) cited by Mr Lee above to be more serious cases than the present one; though the others cited have reference value. Case no. (11) was cited for the effect of the injuries on the matrimonial relationship. Considering the facts and the psychological expert evidence, the present case is simply distinguishable from that case.
22. The award for PSLA in case no. (1) cited by Miss Loh above was an agreed sum. The other cases cited involved injuries that were materially different the present case.
23. Yip became affected by many conditions during the past years since the accident, some of which are found to be unrelated to the accident. Taking into account the injuries, the treatment, the period of hospitalisation, the recovery progress as well as the actual degree of physical and psychological suffering of Yip caused by the accident, I make an award of HK$300,000.

**Loss of earnings**

1. As mentioned above, Yip had been a garment worker for 30 years prior to the accident. According to her, she was supposed to be paid at a notional daily wage rate of HK$210. But she would be paid this amount only if her output to be paid at a piece rate actually reached that notional daily rate. There were high and low seasons; and hence high and low income, during the year. But the average monthly income was HK$5,361.55, which is agreed between the parties.
2. Yip’s sick leave lasted until 22 October 2006. She resumed her pre-accident job on 24 October 2006. There is no dispute that from the accident until then, Yip suffered total loss of earnings.
3. Yip described the need to lift the garments bundle by bundle onto the sewing machine during work. She claimed to be unable to do that without assistance after the accident. She also described the need to work fast to meet the threshold output in order to earn the notional daily wage rate. She claimed to be unable to meet that too after the accident. Her average monthly income during this period was about HK$4,266.
4. Yip was eventually dismissed by her pre-accident employer in January 2007. According to her, her pre-accident employer had the practice of laying workers off and then re-employing them. She claimed to know that *all* the workers laid off then had been re-employed except for her.
5. During the periods between May and August 2007, mid-September and early November 2007 as well as May and July 2008, Yip found similar work as a sewing worker for various other companies. She earned various levels of earnings during those periods, some lower and some close to her pre-accident average monthly income.
6. It was in late August 2008 when Yip changed to find a job as a sales assistant in the vegetable section at a supermarket chain. She resigned 8 days later. Since then, Yip had as a part time assistant at a congee shop in October 2008, January and February 2009. For these other jobs, Yip was paid at hourly rates. According to her, she could not handle the heavy duties and long standing hours.
7. Yip claims that the reduction in her efficiency as a sewing worker resulted in her lower income than before, whether during high or low seasons, after the accident. She also believed that it was the same reason that prevented her from being re-employed by her pre-accident employer after she was laid off in January 2007.
8. Since March 2009, Yip has been unemployed, though she has attended trainings and looked for jobs such as domestic assistant, cleaning worker and waitress. According to her, despite the strenuous nature of these jobs, she hoped to take them up. The evidence shows that some of these jobs attracted monthly pay more than that from her pre-accident job.
9. Yip was keen at resuming work. She had made an effort in doing so; and I believe she had certain difficulty in coping. However the key issue is whether her condition that caused her such difficulty was actually the result of the accident for which Lau should be liable.
10. As mentioned above, the occupational therapist and Dr Chan suggest that it was Yip’s left shoulder that caused her difficulty in managing her pre-accident job. The evidence is also that Yip was treated for pain in both of her elbows for months during 2008. She also had low back pain for 1 to 2 years after the accident. All these conditions are in fact not caused by the trauma of the accident. Nevertheless it would be unrealistic to expect those problems to have no adverse effect on Yip’s ability to handle her work after the accident. In the recent year, Yip also complained about other conditions such as dizziness, nausea or low blood pressure that, according to her, also prevented her from successfully finding work.
11. On balance, I am not satisfied that the suggested reduction in earning or ability to resume her pre-accident job was due to the injuries sustained in the accident.
12. Mr Lee suggested that due to her injuries and resultant reduction in working capacity, she has suffered and would continue to suffer partial loss of earnings on a permanent basis. His suggestion was premised on his calculation of the average monthly amount of those post-accident earnings from being a sewing worker between 2006 and 2008 mentioned above. This, according to him, came down to an amount of about HK$4,000. For what I stated above, I do not agree with his suggestion.
13. I agree with Miss Loh that Yip’s pre-trial loss of earnings should be assessed up to the end of October 2006. The amount, inclusive of mandatory provident fund benefit, was HK$5,361.55 x 1.05 x 7.5 months = HK$42,222.21.
14. Yip admitted in court that she received sick leave pay in the sum of HK$3,738 towards the end of April 2006. Giving credit to such an amount, the actual loss was HK$(42,222.21 – 3,738) = HK$38,484.21.
15. In view of the above finding, I agree with Miss Loh and make no award for any loss of future earnings resulting from the accident.

**Loss of earning capacity**

1. Considering her circumstances, including her current age, education level, past work experience, and the residual disabilities actually caused by the accident, I am prepared to accept that she could be disadvantaged in the labour market. Different from what counsel proposed, I make an award of HK$30,000.

**Miscellaneous special damages**

1. The travelling expenses of HK$3,500 are agreed. So are cost the tonic food in the sum of HK$5,000, medical expenses in the sum of HK$6,000 and future medical treatment in the sum of HK$30,000.

**Summary**

1. In summary, the quantum as assessed is as follow:

PSLA HK$300,000.00

Loss of earnings (& MPF) HK$ 38,484.21

Loss of earning capacity HK$ 30,000.00

Miscellaneous special damages

Medical HK$ 6,000.00

Travelling HK$ 3,500.00

Tonic food HK$ 5,000.00

Future medical expenses HK$ 30,000.00

Total: HK$412,984.21

1. Interest on general damages (HK$300,000) runs at 2% p.a. from the date of writ (18 February 2009) to today, i.e.: HK$300,000 x 2% x 22/12 = HK$11,000.
2. Interest on special damages (HK$38,484.21 + 6,000 + 3,500 + 5,000) x 4% p.a. from the date of accident (13 March 2006) to today, i.e., HK$52,984.21 x 4% x 4.75 = HK$10,067.
3. The damages inclusive of interest will be HK$(412,984.21 + 11,000 + 10,067) = HK$434,051.21.
4. 65% of the damages amount to HK$282,133.29.

**Order**

1. Lau shall pay to Yip damages in the sum of HK$282,133.29 with interest from today at the judgment rate until payment. Costs of this action since the interlocutory judgment be to Yip, to be taxed if not agreed, without certificate for counsel. In the absence of application within 14 days to vary, the costs order shall become absolute. Yip’s own costs shall be taxed in accordance with legal aid regulations.

Simon Leung

District Judge

Mr Paul T T LEE instructed by Messrs Ma Tang & Co for the Plaintiff upon the assignment by the Director of Legal Aid

Miss Phillis LOH instructed by Messrs Deacons for the Defendant