DCPI 802/2018

[2021] HKDC 404

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 802 OF 2018

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BETWEEN

FUNG YAT MING (馮日明) Plaintiff

and

DISH JOCKEY (HONG KONG) LIMITED Defendant

(洗大餅(香港)有限公司)

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

Before: Master Matthew Leung in Court

Date of Hearing: 30 March 2021

Date of Assessment of Damages: 16 April 2021

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| ASSESSMENT OF DAMAGES |

1. This is an assessment of damages for personal injuries suffered by the Plaintiff at work on 30 April 2015 (“**the Accident**”).
2. In absence of any notice of intention to defend, interlocutory judgment was entered against the Defendant on 18 September 2019 with damages to be assessed.
3. The Notice of Appointment for Assessment of Damages dated 1 December 2020 was served on the Defendant on 1 December 2020 by post at the registered office of the Defendant. Affirmation of service was filed on 28 December 2020. Further, the Court sent a notice of hearing for assessment of damages to the Defendant on 1 December 2020.
4. The Defendant did not attend the assessment hearing. I was satisfied that notice of the assessment hearing had been duly given to the Defendant. It was the Defendant’s choice not to attend the assessment hearing. I proceeded with the assessment of damages in this case in the absence of the Defendant.

**The Plaintiff’s case**

1. The Plaintiff was employed by the Defendant as a dish washer in a factory since early March 2015. On 30 April 2015, when the Plaintiff was leaning forward to turn off a motor of a pumping machine in the course of the employment, he slipped and fell resulting in his face hitting the edge of a concrete sewage pool. Despite the accident, the Plaintiff continued with his shift of duty until completion of the work on that day and went home for a rest. He sought treatment from the Accident and Emergency Department at Tuen Mun Hospital (“**the Hospital**”) on 2 May 2015.
2. The Medical Report made by Dr Mak Yiu Kei of the Hospital dated 30 June 2016 stated that there was fracture of the right upper incisor and tenderness in the lower back of his neck. X-rays of cervical spine revealed suspicious radiolucent line in the C6 vertebra.
3. The Plaintiff attended the Dental Department of the Hospital for consultation on 4 May 2015, and was found to have tooth fracture, marginal gingivitis, and lower lip laceration.
4. On 11 May 2015, the Plaintiff sought treatment from Yan Oi General Outpatient Clinic. The Plaintiff was found to have mild abrasion of lower lip without signs of infection. The range of movement of his neck was limited by pain but no spinal tenderness was found.
5. The Plaintiff sought follow up treatments from the Hospital and Yan Oi General Outpatient Clinic. On 18 May 2015, the Plaintiff was admitted to the Department of Orthopaedics & Traumatology of the Hospital for further investigation. CT scan showed to have fracture of C6 vertebra. Halo vest was applied for immobilization for 2 months. The Plaintiff was discharged on 22 May 2015.
6. On 21 August 2015, posterior cervical fusion was performed at the O&T outpatient clinic of the Hospital. There was mild wound infection, and the Plaintiff was admitted for antibiotic treatment from 15 to 22 September 2015.

***Expert medical evidence***

1. Leave was granted that the Single Orthopaedic Expert Report made by Dr Wong Chin Hong (“**Dr Wong**”) dated 21 May 2020 be adduced as evidence without calling the maker at the assessment of damages.
2. The medical examination was performed at Dr Wong’s Clinic on 18 March 2020. Dr Wong opined that the Plaintiff’s recovery process was satisfactory, and the cervical spine fracture has united radiologically with implants in situ. The surgical scar was healed with central depression. During the medical examination, the Plaintiff still complained of intermittent pain over his neck with easy formation of rash around the surgical scar. Dr Wong considered that the stiffness in the Plaintiff’s neck would be permanent while the associated intermittent pain would not be resolved completely. The Plaintiff would need to switch to alternative jobs requiring no agile movement of his neck such as watchman or petty office assistant.
3. Dr Wong opined that the length of sick leave granted to the Plaintiff was reasonable. Considering the Plaintiff’s injuries including the broken upper incisor, lip abrasion and laceration, C6 vertebral fracture requiring surgical fixation and fusion of his cervical spine, the total impairment was assessed at 8%.

**The Plaintiff’s employment after the Accident**

1. The Plaintiff was aged 61 at the time of the Accident. As a result of the Accident, the Plaintiff was granted sick leave of 164 days during the period from 2 May 2015 to 14 October 2015 (166 days in total).
2. Notwithstanding the expiry of the sick leave period, the Plaintiff remained unemployed up to 10 February 2016. The Plaintiff started working as a security guard with ISS Adams Secuforce Ltd (“**ISS**”) thereafter. However, because of the persistent neck pain, the Plaintiff quitted the job in July 2016 and was unemployed until July 2017.
3. The Plaintiff then worked for Guardian Property Management Limited (“**Guardian**”) as a security guard. Again, because of the persistent neck pain, he quitted the job in March 2018 and remained unemployed until June 2019. On 11 June 2019, the Plaintiff resumed work as a security guard with another company, and on 26 June 2019, he shifted to work with REC Engineering Company Limited. He found the latter employment most suitable for him because the work did not involve patrolling nor moving of heavy objects, and his neck pain would be less severe.

**Factual findings**

1. The Plaintiff’s testimony is not subject to any challenge as the Defendant has not been present in these proceedings. The Plaintiff gave testimony in a straightforward manner. On the whole, I accept his evidence unless otherwise decided below. Separately, I also accept Dr Wong’s evidence in his Expert Medical Report.
2. Based on these factual findings, I now turn to each head of claim.

**PSLA**

1. In considering the appropriate damages for PSLA, I have taken into account the following judgments as referred to by the Solicitor for the Plaintiff.
2. In ***Boivin v Wong King Yin & Another***, HCPI 195 of 2000 (unreported, 14 February 2001), as a result of a traffic accident, the plaintiff sustained a severe whiplash injury with neck and back pain, limitation of neck movement and headaches, numbness in two fingers of her left hand and pain radiating down her left leg from the buttock region with a possible need for future surgery to fuse two cervical vertebrae. The plaintiff also suffered post-traumatic stress disorder and depression and it affected her work and personal social life. The injury was placed at the lower end of the serious injury category and PSLA was awarded at $475,000.
3. ***Lau Koon Loi v Wong Wai Sing & Another***, HCPI 445 of 2007 (unreported, 28 June 2011), is another traffic accident case in which the plaintiff suffered from neck stiffness, neck and shoulder movement restriction due to chest pain, right knee pain, pain when breathing and post-concussional headache and dizziness. There was disc protrusion at C5/6 level causing slight narrowing of the spinal canal and slight indentation on the anterior surface of the cervical cord. Degenerative changes were also identified at C5/6 junction endplates. The plaintiff also suffered adjustment disorder and erectile dysfunction. The court considered that the plaintiff's case was just below the lower end of the serious injury category and awarded $400,000 for PSLA.
4. The plaintiff in the case of ***Luk Yee Lam v Orasa Livasiri***, HCPI 394 of 2002 (unreported, 27 November 2003) suffered disc herniation at C5/6 level, with neck and back pain, and numbness and weakness in the upper limbs and hands and his right leg, and reduced sexual desire as a result of a traffic accident. The impairment of whole body was assessed at 16%, and $400,000 was awarded for PSLA.
5. In ***Chan Tak Chi v Wong Siu Tao***, HCPI 1223 of 1996 (unreported, 18 August 1998), the plaintiff, aged 29, sustained fracture to C5 spine and the right side facet, 5 cm laceration to left parietal area of the head, and multiple abrasions. He was hospitalized for 13 days for placing in a Halo ring with body jacket, then further 5 days for removal of the Halo ring and body jacket. The Halo ring and body jacket were put for 2.5 months. He complained of persistent pain in the neck and in the scapula region, and stiffness of the neck. He also suffered a frozen shoulder for about 2.5 years. There was a head concussion with a period of loss of consciousness, with post-concussion syndrome such as headaches and dizziness requiring painkillers. PSLA was awarded at $360,000.
6. For dental injury, the Plaintiff relied on the following cases.
7. In ***Wong Bik Chuen v Hua Min Tourism Automobile Transport Co Ltd***, DCPI 2164 of 2009 (unreported, 13 January 2011), the plaintiff met with a chain collision traffic accident and suffered from lower lip trauma with a wound of 3 x 2 cm; dislocation of two lower central incisors (teeth No. 31 and 41); and subluxation with grade II mobility of two lower lateral incisors, (teeth Nos. 32 and 42). He received root canal treatment and brace wiring for the affected teeth. PSLA was assessed at $130,000.
8. The plaintiff in ***Pang Wai Hung v MPC Express Services Company***, HCPI 1093 of 1995 (unreported, 14 May 1996) was tripped by some empty bags and fell onto the floor in the course of employment and as a result lost several teeth. Two other teeth were chipped, and another tooth suffered pulpal death. There was a laceration on the lower chin. PSLA was assessed at $80,000.
9. In ***So Sau Man v Leung Ming Kwong & others***, DCPI 376 of 2005 (unreported, 18 October 2005), the plaintiff suffered right lip laceration and loss of three teeth as a result of a traffic accident. PSLA was assessed at $100,000.
10. In the present case, considering the impact of the fracture of C6 vertebra, the broken teeth of the Plaintiff, as well as the subsequent complication and treatments, the appropriate figure for PSLA for the neck injury is $400,000 and the dental injury is $100,000, totalling $500,000.

**Loss of earnings**

1. According to the Revised Statement of Damages, the Plaintiff’s claim under this head is as follows:
2. Loss of earnings during the sick leave period: $8,400/30 x 166 = $46,480.
3. Loss of earnings during the various periods between different employments as a security guard:
4. From 15 October 2015 to 10 February 2016 (119 days): $8,400 /30 x 119 = $33,320.
5. From 29 July 2016 to 4 July 2017 (341 days): $8,400 /30 x 341 = $95,480.
6. From April 2018 to May 2019 (13 months): $12,500 x 13 months = $162,500.
7. The first issue is how much did the Plaintiff earn as a dishwasher prior to the Accident. The Plaintiff’s case is that he started working for the Defendant since early March 2015 at the hourly rate of $35. He worked for one shift (either the morning or afternoon shift) in March 2015 earning a sum of $3,990 only. Since April 2015, the Plaintiff was arranged to work for two shifts per day. The Plaintiff says that he could only earn a sum of $5,390 in April 2015 because he returned to China for Ching Ming Festival for about two weeks. The Plaintiff claims that normally he would work 26 days a month.
8. Mr Lau, Solicitor for the Plaintiff, submits that by adopting 8 working hours per day and 26 working days per month, the Plaintiff should be able to earn about $7,280 each month ($35 x 8 x 26) at the time of the Accident. In this regard, I have the following observations:
9. The Plaintiff’s work as a dish washer was paid on an hourly basis, and the Plaintiff was required to attend work on a need basis. The number of his working days each week was not fixed. This observation is supported by the Plaintiff’s own Declaration / Record of Interview dated 3 August 2017.[[1]](#footnote-1)
10. Likewise, the number of working hours each day was not fixed either. It depended on the Defendant’s request. That explained why, even in the month of April 2015 when the Plaintiff alleged that he worked 2 shifts per day, there were 5 working days in which the Plaintiff only worked 4 hours, namely 1-3, 9 and 25 April 2015.[[2]](#footnote-2)
11. The Plaintiff stated in his Witness Statement that he could only earn $5,390 because he returned to China for Ching Ming Festival for about 2 weeks.[[3]](#footnote-3) In fact, according to his own record, apart from the rest days on the Sundays, he worked every day in April 2015 except 10, 11, 13 and 14 April 2015. That is to say, he worked 22 days in the month of April.[[4]](#footnote-4) The Plaintiff’s own record did not reflect any absence from work for about 2 weeks in April as alleged. The Plaintiff’s Witness Statement is not consistent with his own record.
12. In the Declaration made by the Plaintiff in relation to the employees’ compensation claim dated 3 August 2017, the Plaintiff declared that he would work 22 days per month on average with the Defendant.[[5]](#footnote-5) When the Plaintiff testified in Court, the Plaintiff was asked by the Court for clarification as to why he claimed that he would work 26 days per month on the one hand, while he put 22 days in the Declaration on the other. The Plaintiff said that he could not offer any explanation.
13. In my judgment, there is no evidence to support the Plaintiff’s claim that the Plaintiff could work 26 days a month and 8 hours per day. The Plaintiff would be asked to work on a need basis, and as such, there is no guarantee that he could work 6 days a week and 2 shifts per day. I find that the Plaintiff would on average work 22 days a month prior to the Accident and the monthly salary would be $6,160 ($35 x 8 hours x 22 days). The Plaintiff was granted sick leave of 164 days in the period between 2 May 2015 and 14 October 2015 (a total of 166 days). I am prepared to award the Plaintiff loss of earnings during the whole period of 166 days. The loss of earning during the sick leave period is calculated as follows:

$6,160 /30 x 166 = $34,085.

1. Despite the severe injury suffered by the Plaintiff, the sick leave granted to him was 164 days only. In the Expert Report, Dr Wong did not comment on whether the sick leave period already granted to the Plaintiff was proportionate to the injury or whether a longer sick leave period should be deserved. Mr Lau attempted to explain by saying that there was in fact no mention or discussion about the sick leave period during the medical examination conducted by Dr Wong. I do not accept Mr Lau’s submissions. Dr Wong did specifically mention the details and the reasonableness of the sick leave period in the Medical Report, and he categorically stated his opinion that further sick leave was not required.[[6]](#footnote-6)
2. That said, as decided by Le Pichon JA in ***Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd*** [2008] 5 HKLRD 210, medical certificates were no more than a piece of evidence to be evaluated in the light of all available evidence including medical evidence. Hence, the end of sick leave period does not necessarily mean that a patient has recovered fully or he can immediately return to the pre-accident work or other gainful employment: see also ***Hu Wan v Sanwo International Co Ltd*** [2021] HKDC 237.
3. Given the severe injury suffered by the Plaintiff, and the fact that the Plaintiff had received follow up treatment up to July 2018, I accept that the Plaintiff’s physical condition has not reached maximum improvement during the period from 15 October 2015 to 10 February 2016, i.e. before the Plaintiff was able to find an employment as a security guard. The loss of earning for the period from 15 October 2015 to 10 February 2016 (119 days) should be allowed and the damages are assessed as follows:

$6,160 /30 x 119 = $24,435.

1. The Plaintiff worked with ISS since February 2016. According to the Employer’s Return, the total income of the Plaintiff from February to July 2016 (5.5. months) was $49,204. I agree that the average monthly earnings of the Plaintiff would be $8,946.
2. The Plaintiff claims that he could not cope with the work of a security guard and quitted the job with ISS. He elaborated further in Court that as a result of the injuries to the neck, he had difficulties in patrolling and moving heavy objects which were the day-to-day work of a security guard. Therefore, he stopped working with ISS in July 2016. After a rest for about one year, the Plaintiff resumed work as a security guard with Guardian in July 2017.
3. The question is whether the Plaintiff is entitled to loss of earning for the period when he was unemployed between July 2016 and July 2017. I note that at the time of the medical examination on 18 March 2020, Dr Wong considered that the stiffness in the Plaintiff’s neck would be permanent while the associated intermittent pain would not be resolved completely. The Plaintiff would need to switch to alternative jobs requiring no agile movement of his neck such as watchman or petty office assistant. Accordingly, I accept that the Plaintiff’s complaint about the neck pain during that period of time was genuine, and the injury and the associated pain would cause difficulties for him to perform the job of a security guard in that period.
4. The next issue is whether the Plaintiff should be entitled to loss of earnings when he started working as security guard in which the Plaintiff could even earn more than the pre-accident job. In this regard, the legal principle should be that, while a plaintiff could earn more, he may still claim for the loss on the basis that he could not earn the full salary of a fit person for his job, which he cannot earn because of his residual disability as a result of the accident: ***Li Wan Choi v Choi Wan Hing & Another*** [2000] 4 HKC 549.
5. Hence, I am prepared to allow the loss of earning for the period from 29 July 2016 to 4 July 2017 (341 days) as follows:

$8,946 /30 x 341 = $101,686.

1. From 5 July 2017, the Plaintiff worked for Guardian earning a monthly sum of $12,500 per month. He quitted the job in April 2018 because of the alleged persistent neck pain. The remaining question is whether the Plaintiff is entitled to the loss of earnings from April 2018 onwards (for a period of 13 months).
2. The Plaintiff testified that when he worked in ISS, he was required to patrol a shopping arcade of 4-5 storeys with a large floor area coverage, while in Guardian, the patrolling work covered a building of 30 storeys. He added that after a rest of about one year from July 2016 to July 2017, he could cope with the work in Guardian at first. However, in early 2018 he found to be difficult to perform the work because of the recurrent neck pain. He quitted the job in March 2018 and took a rest for almost 13 months before he found another job as a security guard. However, it is noted that in the Medical Report made by Dr Chan Chun Fung of Tuen Mun Hospital, it was stated that there was minimal neck pain with no neurological deficit in the latest follow up on 24 July 2018, and the Plaintiff was discharged from the clinic.[[7]](#footnote-7) Having considered all the medical reports and the expert evidence of Dr Wong, I am not convinced that the Plaintiff still had not reached the maximum improvement during the 13-month period (i.e. from March 2018 to June 2019). I am not prepared to grant the Plaintiff damages for loss of earning during the 13-month period.
3. The total amount of pre-trial loss is as follows:

$34,085 + $24,435 + $101,686 = $160,206.

**Loss of MPF**

1. Loss of MPF is assessed as follows:

$160,206 x 5% = $8,010.

**Loss of earning capacity**

1. The purpose of an award under this head is to compensate a plaintiff for the disadvantage that he may suffer as a result of the injuries caused by the accident (***Chan Wai Tong v Li Ping Sum*** [1985] HKLR 176 at 183B-D). I agree that the Plaintiff would suffer handicap in the labour market as a result of the injuries.
2. I note that in ***Chan Tak Chi’s*** case, the Court allowed the damage under this head on the basis of one year of the plaintiff’s income.
3. Having considered the medical condition of the Plaintiff, his age, and the work nature of his current employment, I consider that the damage shall be assessed on the basis of nine months of his current income:

$12,956 x 9 months = $116,604.

**Special damages**

1. The Plaintiff claims the respective sums of $6,000, $3,000, and $5,000 as medical expenses, travelling expenses and tonic food respectively.
2. The medical receipts produced by the Plaintiff showed that the medical expenses incurred shall be more than $5,400.[[8]](#footnote-8) A sum of $6,000 is considered reasonable, and the travelling expenses of $3,000 should also be allowed.
3. For tonic food, the Plaintiff did not produce any receipt nor any documentary evidence in support. However, the Court may award a reasonable sum for tonic food even no documentary proof has been produced: see ***Tang Yuet Yi, a minor by Tiu Kwai King v Leung Man Chow*** [2018] HKDC 985. I consider that a sum of $5,000 is appropriate.
4. Therefore, I allow a total sum of $14,000 under this head.

**Future dental expenses**

1. The Plaintiff claims the treatment costs for the extracted teeth no. 21 and 11 as advised by his dentist at the sum of $85,000 and the replacement costs of $20,000.
2. In the Dental Report dated 24 October 2016, Dr Lau Hau Yan advised that the extracted teeth no. 21 and 11 of the Plaintiff required prosthesis to restore their function and facial support. Two choices of prosthesis were open to the Plaintiff. First, six units ceramic bridge will be used to support the missing teeth. It would take 1-2 months to complete the treatment and the estimated costs would be $35,000 to $45,000. The prognosis would be fair, and the ceramic bridge requires replacement every 6-8 years which costs $35,000 to $45,000. The second choice would be a fixed prosthesis supported by two implant abutments with artificial bone augmentation. It would take 6-9 months to complete the treatment and the costs would be $75,000 to $85,000. Although it is more expensive, the prognosis is good and the implant can last for 10-15 years. The replacement costs would be $16,000 - $20,000.[[9]](#footnote-9)
3. In my judgment, the costs of the prosthesis can be recoverable and the Plaintiff is entitled to select the option with a better prognosis. I allow the respective sums of $80,000 and $18,000 for the costs of the prosthesis and the replacement costs. The total amount will be $98,000.

**Summary**

1. The damages awarded to the Plaintiff are summarised below:

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| --- | --- | --- |
| (a) | PSLA | $500,000 |
| (b) | Pre-trial loss of earnings | $160,206 |
| (c) | Loss of MPF | $8,010 |
| (d) | Loss of earning capacity | $116,604 |
| (e) | Special damages | $14,000 |
| (f) | Future dental expenses | $98,000 |
|  | Sub-total | $896,820 |
|  | Less: Employees’ compensation | ($45,607.67) |
|  | **Total** | **$851,212.33** |

**Interest and costs**

1. Interest will be awarded at 2% per annum on damages for PSLA from the date of the writ to the date of judgment. Interest on pre-trial loss and special damages will be awarded at half the judgment rate from the date of the incident to the date of judgment. The Plaintiff's Solicitors are directed to calculate the amount of interest to be included in the judgment.
2. I also make a costs order *nisi* against the Defendant in favour of the Plaintiff for the assessment of damages proceedings including all costs previously reserved in relation to the assessment of damages. As the Plaintiff is legally aided, his own costs shall be taxed in accordance with the Legal Aid Regulations.

(Matthew Leung)

Master of the District Court

Mr Lau Kar Wah of Messrs Lau & Chan, assigned by the Director of Legal Aid, for the Plaintiff

The Defendant is not represented and did not appear

1. See the Declaration / Record of Interview dated 3 August 2017 at [101] [↑](#footnote-ref-1)
2. See the Plaintiff’s own record marked on the calendar at [110] [↑](#footnote-ref-2)
3. See §5 of the Witness Statement of the Plaintiff at [59]. [↑](#footnote-ref-3)
4. See the Plaintiff’s own record at [110] [↑](#footnote-ref-4)
5. See page 2 of the Declaration at [98]. [↑](#footnote-ref-5)
6. See §48 of the Medical Report at [93]. [↑](#footnote-ref-6)
7. See the medical report at [83]. [↑](#footnote-ref-7)
8. See the schedule of medical expenses at [214-242]. [↑](#footnote-ref-8)
9. See the Dental Report dated 24 October 2016 at [80]. [↑](#footnote-ref-9)