DCPI 852 / 2011

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 852 OF 2011

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BETWEEN

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| --- | --- | --- |
|  | LAW MUK YAU | Plaintiff |
|  | and |  |
|  | SO CHEUK PO trading as  PO KEE LOGISTICS | Defendant |

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

Coram: Before Master I. Wong in Court

Date of Hearing: 18th July, 2012

Date of Handing Down Judgment : 6th August, 2012

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**ASSESSMENT OF DAMAGES**

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1. This is an assessment of the Plaintiff’s damages in a work-related personal injuries case.

1. As the Defendant failed to give notice of intention to defend, Interlocutory Judgment on liability was entered on 21st November 2011 with damages to be assessed. As a matter of fact, the Defendant never appeared in the present proceedings.
2. I am satisfied that due notice of hearing of assessment has been given by both the Court Registry and the Plaintiff’s Solicitors to the Defendant.
3. The Plaintiff was the only witness in trial. He was medically examined by his expert Dr. Wong See Hoi, a specialist in Orthopaedics and Traumatology. By the direction of Master S.P. Yip dated 17th April, 2012, Dr. Wong’s medical report dated 13th January, 2012 was adduced without calling him to give evidence.

***The Accident***

1. The Plaintiff was a master baker. He was at the age of 41 at the time of the accident and is now 43 years old. He received education up to Form 3 and for the last 20 years before the accident, he was in the same occupation.
2. On 5th May, 2010 at about 7:15 am, the Plaintiff was on duty in the kitchen of the restaurant where he worked. He was accepting delivery of certain packs of root powder and white flour by an employee of the Defendant. The employee had a nickname called “Brother” and the Defendant was an independent contractor. In evidence, I was told that deliveries of these goods were normally made by Brother so on the date of the accident it was not the first time that Brother performed the task. At that time, 6 packs of root powder had been piled up on a pallet. The Plaintiff’s right hand was on the lateral of the stack and was about to push the pallet away and his left hand was on the top of the stack, obviously for the purpose of keeping the stack in place when the pallet was in motion. At that point, Brother suddenly threw a pack of white flour onto the top of the stack, thereby crushing the Plaintiff’s left wrist and causing him injuries. I was told that the pack of white flour weighted about 25 kg with a dimension of 1.5 feet (wide) x 2.5 feet (long) x 8-9 inches (thick).

***The Plaintiff’s Injuries and Treatment***

1. After the injuries, the Plaintiff continued to work for the rest of the morning. However, due to increased left wrist and hand pain, he attended the Accident & Emergency Department of Queen Elizabeth Hospital (“QEH”) the following day. On medical examination, tenderness and swelling over the left wrist were found. He was treated and discharged. He re-attended QEH on 9th May, 2010, 12th May, 2010 and 26th May, 2010 for persistent pain. Further X-ray of left wrist showed avulsion fracture of the triquetrum. Apart from receiving treatment from the follow-up clinic, the Plaintiff was referred to occupational therapy for management of wrist pain on 26th May 2010. A wrist resting splint was provided on the same day. He also received a total of 14 sessions of physiotherapy in QEH from 2nd July, 2010 to 1st September, 2010.
2. He was given sick leave of 82 days intermittently from 6th May, 2010 to 5th August, 2010.
3. The Plaintiff testified that the injuries have directly affected his work performance and ability as a master baker. Up until now, there are residual symptoms in his left hand and wrist such as occasional pain, decrease of the range of movement, weakness and cramp. The Plaintiff also stated that after kneading dough for one odd hour and moving heavy objects, his left hand would become painful. Hence, he needed to make adjustment in his work, but that had reduced his work efficiency and his competitiveness.
4. It is because of these limitations that he is now working as a baking assistant rather than returning to work as a master baker. As a master baker, he would be required to perform the full range of work including kneading dough and moving heavy objects such as butter which weights as much as 25 kg per pack and sugar, 30 kg per pack and mixing all these with flour and other ingredients in a large bin in order to prepare the dough. Now, as a baking assistant, the only significant process he is required to perform is to bake the bread and handling trays of bread. He is able to handle the work as each tray is merely several kilograms in weight. He is not required to prepare the dough as the same has already been prepared at the food factory. Because of this change, he is now earning $12,000 per month, roughly about $2,000 less than that before the accident.

*The Medical Expert Evidence*

1. Dr. Wong opined that the Plaintiff sustained left wrist injury in the accident. His diagnosis was avulsion fracture of the triquetrum. Dr. Wong considered that the diagnosis was compatible and consistent with the mechanism of injury given by the Plaintiff and that his fracture was solely attributable to the accident.
2. In Dr. Wong’s view, the Plaintiff’s condition with residual pain and weakness of left wrist was compatible with post fracture status.
3. In relation to the Plaintiff’s working capacity, Dr. Wong was of the view that the fracture, though not severe, would have considerable impact upon the Plaintiff’s work as a baker that required continuous kneading of dough for up to several hours a day. Dr. Wong considered that the Plaintiff might resume his previous job as a baker but work adjustment like taking break from kneading once every hour to rest and relax his left hand and wrist and seeking help from colleagues or working with appropriate tools such as trolley when handling heavy delivery work is required. Dr. Wong believed the Plaintiff’s competitiveness in the job market in general had been significantly affected as a result of the accident.
4. Dr. Wong further agreed to sick leave of 82 days.

***Pain and Suffering and Loss of Amenities (PSLA)***

1. I have heard the Plaintiff’s unchallenged evidence, which is clear and straight forward. There is nothing for me to cast doubt on his evidence. I accept that he has suffered the injuries as described and he is suffering from residual pain and weakness of his left wrist and that he has been trying hard to cope with all these in his work.
2. Though the Plaintiff is right-hand dominant, I accept that his work as a master baker required the skilful and prolonged performance of both of his hands.
3. I have carefully considered Dr. Wong’s report. It is comprehensively written and I find his opinion most helpful.
4. Mr. Luk, who appeared for the Plaintiff, referred me to the following cases:

(i) Lee Yuk Man v Hillbery Limited trading as Tsui King Lau Restaurant (FWS) (in liquidation), DCPI 1988/2006 (date of judgment: 6th June, 2007),

(ii) Tang Shu Shek v Leung Chi Kit & Anor., HCPI 219/2002 (date of judgment: 13th May, 2004),

(iii) Ho Bing Cheung v Lam Yin Tuk trading as Ocean Fast Food and Others, DCPI 66/2004 (date of judgment: 3rd December, 2004) and

(iv) Yu Yixin v Leung Chi Tin Andy, DCPI 1306/2007 (date of judgment: 13th March, 2008).

1. In Lee Yuk Man v Hillbery Limited trading as Tsui King Lau Restaurant (FWS) (in liquidation), *supra*, the plaintiff sustained right chest contusion and fracture triquetrum of the right wrist. Physical examination revealed mild tenderness over the triquetrum and examination of the chest showed tenderness in the right third costo-chrondral junction. The plaintiff still complained of residual pain at the right wrist and right chest. The orthopaedic expert agreed that the residual pain would make it difficult for the plaintiff to return to full duties as a chef because he was required to lift heavy weight in his job as a chef. He had to wear a splint for about 2 weeks. The Court accepted 19 days of total sick leave was related to the injuries. PSLA was awarded at $160,000.00.
2. In Tang Shu Shek v Leung Chi Kit & Anor., *supra*, the plaintiff, a formwork carpenter, suffered injuries to his left wrist. He was then found to have suffered a fractured left scaphoid and was hospitalized for 2 days. He was in plaster cast for 2 months. After the plaster cast was removed in June 1999, he had about 5 sessions of physiotherapy treatment. In April 2000, the plaintiff had a diagnostic arthroscopy of his left wrist, the result of which revealed degenerative changes of the Plaintiff's scaphoid and mild synovities of his radio carpal joint. Thereafter, the plaintiff had physiotherapy treatment on about 40 occasions including heat therapy and active wrist mobilization, until March 2001 when he was found to have satisfactory wrist movements and grip power. At the hearing, the plaintiff said that he still felt pain when he moved his left hand in an upward direction (which movement was agreed by both counsel to be medically described as radial flexion) or when the weather changed. PSLA was awarded at $180,000.00.
3. In Ho Bing Cheung v Lam Yin Tuk trading as Ocean Fast Food and Others, *supra*, the plaintiff slipped and fell because of stepping on a patch of oil on the ground. He suffered from fracture of his distal radius and ulna bone and sprained his back. Radiological examination of the right wrist showed displaced fractures of his right distal radius and ulna. His right wrist injury was treated by closed reduction and plaster immobilization on the same day. He was hospitalised for 2 days. His right wrist had healed with collapse, impaction and deformity. There were radial deviation, dorsal angulation and widening in antero-posterior dimension. There was also relative shortening of the radius compared with the ulna. The fracture was complicated with Complex Regional Pain Syndrome and shoulder hand syndrome. As to the back, there was residual but mild tenderness over the right paraspinal muscles. The other function of the back was unaffected. PSLA was awarded at $220,000.00.
4. Finally, in Yu Yixin v Leung Chi Tin Andy, *supra*, the plaintiff in that case suffered from a fall with right wrist and left forearm injury. Examination at the A&E Department showed swelling, deformity and decreased movements over right wrist. There was a 5 cm abrasion over left forearm. X-rays of right wrist showed fracture of right distal radius and ulnar styloid. He was treated with closed reduction and complete short arm Plaster of Paris cast. Post-reduction X-ray showed satisfactory alignment. The plaintiff was discharged the following day and regularly followed up at out-patient clinic. Serial X-ray of the right wrist showed satisfactory alignment, and the short-arm cast was removed in 6 weeks. The plaintiff still had residual pain at ulnar region of right wrist, but his right wrist stiffness and power grip strength had improved after a work rehabilitation training programme. He also received 14 sessions of physiotherapy treatment. He was granted sick leave of a total of 177 days. X-rays taken later confirmed a healed fracture of right distal radius and ulnar styloid process, with mild irregularity and narrowing of right distal radioulnar joint, but no focal bony lesion or abnormal soft tissue swelling. The court accepted that his residual disability might come in the form of early ostheoarthritis of the right wrist joint. PSLA was awarded at $170,000.00.
5. I agree with Mr. Kwok that the injuries sustained by the Plaintiff bear more resemblance to those of the plaintiff in Lee Yuk Man. Both suffered an avulsion fracture of the triquetrum, were given similar treatments, in particular, both were given a splint for protection and support, both were suffering from residual pain and both had deficiency in lifting heavy objects. The only marked difference is that the plaintiff in Lee Yuk Man also suffered right chest contusion injury and pain, and in this respect, Lee Yuk Man is a more serious case. Considering all these and doing the best I can, I assess the Plaintiff’s PSLA at $140,000.

*Pre-trial Loss of Earnings*

1. The Plaintiff said that at the time of the accident, he was paid a monthly income of $14,000.00. This is supported by the Form 2 dated 14th May, 2010 filed by his employer to the Labour Department pursuant to the Employees’ Compensation Ordinance, Cap. 282 and the MPF documents issued by the bank.
2. Furthermore, the Plaintiff was provided by his employer with a free meal while on duty. Mr. Kwok suggested a monetary value of $30.00 for the meal. I have no difficulty in accepting this.
3. There is authority to support that meal allowance or free meal provided by an employer to an employee ought to be counted as part of the pre-accident earnings. In Chan Kwun Tak v Kwok Chung Fong HCPI 676/1998, Suffiad J. took this view and said the following:-

“*There is no dispute that the plaintiff's basic salary at the time of accident was $11,700 per month and that he also received tips averaging $200 per month. Furthermore, the plaintiff gave evidence that he received four free meals each day that he performed his work. The defendant has submitted that these free meals received by the plaintiff at work should not be taken into account in assessing his pre-accident earnings. The four free meals received by the plaintiff is clearly a benefit associated with his pre-accident job. If authority be needed for this to be taken into account in assessing damages, in the case of* ***Harding v. Watts Tyre & Rubber Co. Ltd****, Hollis J awarded ￡3,028 for loss of benefits which included the plaintiff receiving free milk and other farming produce associated with his employment (see* Kemp & Kemp *Vol.1 5-125 footnote 3). Taking into account, the four free meals provided to the plaintiff in his pre-accident work, I assess his pre-accident earnings to be $14,000 per month.*” (Emphasis Added)

1. Hence, the meals provided by the employer should be counted as part of the Plaintiff’s pre-accident earnings. The Plaintiff worked 26 days per month. Hence, prior to the accident, his monthly earnings (including his basic salary and the free meal) were $14,780.00 ($14,000.00 + ($30.00 x 26 days)).
2. The Plaintiff was granted intermittent sick leave from 6th May, 2010 to 15th May, 2010 and from 26th May, 2010 to 5th August, 2010, totalling 82 days. On the strength of Dr. Wong’s opinion, I accept the length as reasonable. Therefore, his pre-trial loss would be: -

$14,780.00/30 x 82 days = $40,399.00

*Loss of Future Earnings*

1. The Plaintiff is not claiming any loss of future earnings.

*Loss of Earning Capacity*

1. This head of damages generally arises where a plaintiff is, at the time of the trial, in employment, but there is a risk that he might lose this employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another or an equally well paid job.
2. I accept Dr. Wong’s opinion that the Plaintiff might suffer reduction in efficiency and capacity and that “*his competitiveness in his line of business or the job market in general was significantly affected as a result of the accident”*. I accept that the Plaintiff’s residual disability would affect his working capacity and would place him to be at a disadvantage in the labour market.
3. In view of the injuries (avulsion fracture of the triquetrum of his left wrist) and the job nature of the Plaintiff, I would award a sum equivalent to 6 months’ pre-accident earnings. Therefore, the loss of earning capacity should be:-

$14,780.00 x 6 months = $88,680.00

*Loss of MPF*

1. The Plaintiff would be entitled to MPF contribution at 5% of his monthly earnings by the employer. His basic monthly wages was $14,000 per month. The quantum is therefore:-

$14,000/30 days x 82 days x 5% = $1,913.00

*Special Damages*

1. The Plaintiff claims the following special damages:-
2. Medical Expenses

i) A & E Dept. of QEH, 4 attendances $400.00

ii) Follow-up Clinic of A & E Dept. of

the QEH, 4 attendances $240.00

iii) Drug Charge $60.00

iv) Physiotherapy, 14 attendances $880.00

v) Occupational Therapy, 2 attendances $100.00

1. Travelling Expenses $517.70
2. Tonic Food $3,000.00

Total: $5,197.70

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1. In my view, these sums are reasonable. I would award in full.

*EC Compensation*

1. The Plaintiff received a sum of $53,580.00 as the Employees Compensation from his employer. Therefore, credit has to be given to this sum.

*Summary*

1. To summarise, the quantum is as follows:-

1) PSLA $140,000.00

2) Pre-trial Loss of Earnings $40,399.00

3) Loss of Earning Capacity $88,680.00

4) Loss of MPF $1,913.00

5) Special Damages $5,197.70

Sub-total: $276,189.70.

*Minus:* EC compensation $53,580.00

Total: $222,609.70

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1. The Plaintiff’s damages are therefore assessed at $222,609.70. I order that final judgment be entered against the Defendant for the sum of $222,609.70.

*Interest and Costs*

1. Interest will be awarded at 2% per annum for PSLA from the date of writ until judgment and thereafter at judgment rate. Interest on special damages will be awarded at 4% per annum, being half of the judgment rate from the date of accident to the date of judgment and thereafter at judgment rate.
2. I also order that the Defendant do pay the Plaintiff the costs of this action including the costs of assessment, to be taxed if not agreed. The Plaintiff is legally aided. His costs are to be taxed in accordance with Legal Aid Regulations.

(Signed)

I. Wong

Master of the District Court

Representation

Mr. Luk Kwok Wai of Messrs. K.W. Luk & Co., Solicitors for the Plaintiff on the instructions of the Director of Legal Aid

So Cheuk Po trading as Po Kee Logistics, the Defendant, in person, absent