## DCPI 855/2018

[2022] HKDC 1184

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 855 OF 2018

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##### BETWEEN

MUHAMMAD ASGHAR Plaintiff

### and

KWOK KONG MOON formerly trading as

MAKOS ENGINEERING 1st Defendant

CASA 338 CATERING LIMITED 2nd Defendant

EMPLOYEES COMPENSATION ASSISTANCE

FUND BOARD 3rd Defendant

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Coram: Deputy District Judge Vincent Lung in Court

Date of Hearing: 31 August 2022

Date of Assessment of Damages: 12 December 2022

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ASSESSMENT OF DAMAGES

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*INTRODUCTION*

1. This is the trial for the assessment of damages in respect of the plaintiff’s personal injuries arising out of an accident which took place on 22 May 2016 in the course of his employment with the 1st and 2nd defendants.
2. Interlocutory judgments on liability were entered respectively against the 1st and 2nd defendants on 18 September 2019 and 8 November 2018 with damages to be assessed.
3. By Order dated 8 June 2021, the Employee Compensation Assistance Fund Board was granted leave to intervene and join as the 3rd defendant herein to contest the issue of quantum, as neither the 1st defendant nor the 2nd defendant appear to have insurance to cover their liabilities in this claim.
4. The 3rd defendant’s role in these proceedings is to test the plaintiff’s case and to assist the court in coming to a correct assessment. I bear in mind the principles set out by Ribeiro PJ in *Wo Chun Wah v Employees Compensation Assistance Fund Board* (2019) 22 HKCFAR 495 at §§43-45.
5. The 1st and 2nd defendants were absent at the hearing before me. I am satisfied that they have been duly notified of the trial and I therefore allowed the trial to proceed in their absence.

*THE ISSUES IN DISPUTE*

1. At the start of the trial, I was informed that the plaintiff and the 3rd defendant have reached consensus on various heads of damages. The only matters that separate the parties are:-
2. The proper award for PSLA; and
3. Whether the plaintiff should receive damages for loss of earning capacity.

*THE ACCIDENT AND THE MEDICAL FINDINGS*

1. The plaintiff was the only witness giving oral evidence. He adopted his 3 witness statements. Mr Tony Chow, counsel for the 3rd defendant, very sensibly indicated that no cross-examination was required.
2. There is also a single joint medical expert report dated 4 November 2021 from Dr Danny Tsoi Chi Wah (the “**SJR**”) which I have fully considered. Neither the plaintiff nor the 3rd defendant (nor myself) see the need to call Dr Tsoi to give oral evidence.

*The Accident*

1. The plaintiff was born in Pakistan on 12 March 1978. He was aged 38 at the time of the accident. He is now 44 years old. He is married with 5 children. He completed his primary education in Pakistan and came to Hong Kong in around 1994. He is right-hand dominant. He is a construction and demolition worker.
2. The accident happened at around 1:30 pm on 22 May 2016. The plaintiff was instructed to carry out certain renovation works. While he was standing on an A-shaped ladder, holding a hand-held drill and trying to break a concrete wall, the drill got stuck in the concrete. When he was trying to remove it from the concrete, the ladder slipped and he fell onto the ground.

*Injuries and treatments after the accident*

1. The medical treatments that the plaintiff received immediately after the accident are fully set out in the SJR.
2. In short, immediately after the accident, the plaintiff was sent to the Accident and Emergency Department of Yan Chai Hospital (“**YCH**”) for treatment. Physical examination revealed limited right shoulder abduction, bruise and swelling of right thumb with abrasion and limited thumb movement. The plaintiff also reported tenderness over right side neck and right arm. No neurological deficit was identified. X-ray of cervical spine and right shoulder did not reveal any fracture, but fracture proximal phalanx was detected in the X-ray of the right thumb. He was given pain killer injection and was admitted into the Orthopaedic Ward.
3. The plaintiff was discharged on 24 May 2016 (2 days later). Physical examination revealed limited neck range of motion due to pain and shooting pain down to right arm and fingers during neck movement. Range of motion of right shoulder was also limited due to pain. X-ray of right thumb revealed transverse fracture at mid shaft of proximal phalanx. The plaintiff was given thumb spica for protection and he was discharged with analgesics.
4. The plaintiff attended orthopaedic follow up on 15 June 2016. The plaintiff was advised to be re-admitted to treat the right thumb fracture with open reduction and internal fixation. This led to a surgical treatment of the right thumb at YCH on 17 June 2016. During this admission, the plaintiff was also given neck physiotherapy. He was discharged on 21 June 2016.
5. The plaintiff attended 2 follow-up sessions on 4 and 18 July 2016, and had the k-wires of the right thumb removed on 26 August 2016 when X-ray revealed a healed fracture with good alignment.
6. The plaintiff also attended the Medical Assessment Board on 14 December 2017 which assessed his loss of earning capacity to be 3.5%. The diagnosis was right thumb stiffness, pain, numbness, neck pain, stiffness, and shoulder pain, weakness and stiffness. A review was held on 19 April 2018 and the loss of earning capacity figure was revised to 11.75%.
7. Since the accident, the plaintiff was granted continuous sick leave until 4 October 2017. Thereafter the plaintiff was granted intermittent sick leave from time to time until 7 August 2021.

*Expert opinion as per the SJR*

1. Dr Tsoi carried out an examination of the plaintiff on 11 October 2021. His expert opinion on the extent of the plaintiff’s injuries is as follows:-
2. The plaintiff sustained fracture proximal phalanx of his right thumb. This was solely caused by the accident;
3. The fall could also cause soft tissue sprain injury to the plaintiff’s neck. However, it was very likely that the plaintiff had pre-existing advanced degeneration at C5-6 and C6-7 levels of his cervical spine with narrowing of the right side C5-6 intervertebral foramen, and there is a strong possibility that natural progression of the degeneration or some other events would in any event have brought about neck pain and right upper limb radicular pain after the age of 40-45;
4. The plaintiff could have sustained direct soft tissue contusion injury to his right shoulder from the accident, but the mechanism of the injury did not suggest serious structural injury;
5. If the plaintiff had complied with rehabilitative treatments suggested by his orthopaedic doctor, he might achieve a better and earlier recovery;
6. The diffuse generalized weakness of whole right upper limb (if genuine) was more related to the pre-existing degenerative cervical spine than the soft tissue injury;
7. The plaintiff’s delayed complaint of low back pain pointed against any causal link to the accident;
8. Assessment of range of motion and strength of the plaintiff’s right shoulder and entire right upper limb was difficult, as the plaintiff was apprehensive to both active and passive movements;
9. There was no muscle wasting, the muscle tone of the plaintiff’s right arm and forearm were normal, all reflexes were preserved and there were no signs suggestive of genuine nerve root dysfunction;
10. The surveillance captured in April/May 2020 revealed much better physical conditions than that of the plaintiff demonstrated during the assessment, including normal natural swing of right upper limb during walking, better range of motion of his neck, and the plaintiff was able to carry objects with his right hand. Dr Tsoi took the view that the plaintiff did not exert maximal effort during the assessment and the symptoms might not be as severe as he alleged;
11. The plaintiff has attained maximal medical improvement in respect of his thumb fracture, neck strain and contusion of soft tissue of his right shoulder. No further medical treatment is required;
12. Prognosis of the right thumb fracture is fair, and that of neck sprain and right shoulder contusion are good;
13. Assessment of whole person impairment caused by the accident was 3% for the right thumb fracture, 1% for the right shoulder contusion, and 2.4% for neck sprain (upon a 30% apportionment to the accident);
14. The plaintiff is able to resume his pre-injury job as a construction site unskilled worker, with impaired capacity in pinching objects with his right thumb and grasping heavy objects with his right hand for long periods;
15. Sick leave of around 15 months is adequate.

*QUANTUM*

*PSLA*

1. The plaintiff seeks HK$150,000 while the 3rd defendant submits that HK$100,000 is appropriate.
2. I have considered all the authorities relied on by the plaintiff and the 3rd defendant. I accept the plaintiff’s submission that the cases relied on by the 3rd defendant[[1]](#footnote-1) do not concern an injury to the thumb – in the present case, the plaintiff suffered an injury to the thumb on his dominant hand which required surgical intervention. There is arguably a difference between an injury to the thumb and an injury to the other fingers; without the thumb, motions such as pinching and grasping will be immensely difficult, but that is not the case if only (say) the middle or ring finger is injured. This has to be taken into account when reference is made to the PSLA awards in cases relied on by the 3rd defendant.
3. As to the authorities cited by the plaintiff, I consider 2 of them to be more relevant.
4. In *Cheung Wai Kar v Dragon Kings Development Ltd t/a Famous (Dragon Kings) Restaurant* (unreported, HCPI 880/2017, 23.12.2019), while the plaintiff was cleaning the metal filter of an exhaust hood at around 2 meters from the ground, his hand slipped and his right thumb was cut on the sharp edge of the filter. He suffered a laceration of the right thumb with cut flexor tendon and cut digital nerves on both sides, with no fracture. Emergency surgery was performed with a repair to the digital nerve and flexor pollicis longus tendon. The experts were of the view that the plaintiff would largely be able to return to his pre-injury work (as a cook) with some reduction in work efficiency (§§49-50 of the judgment). The PSLA award in that case was HK$350,000.
5. In *Ng Wan Kong v Kwan Siu Keung* (unreported, HCA 3036/1986, 16 February 1989),the plaintiff suffered a crush injury to his right thumb necessitating a revision amputation. He was awarded HK$60,000 for PSLA.
6. In my judgment, the injuries that the plaintiff suffered in this case is less serious than that in *Cheung Wai Kar*. As for *Ng Wan Kong*, I am cognisant that it concerned an amputation of the thumb which is quite different in nature to the plaintiff’s injuries, and considering that it was a case decided in 1989 there is an obvious need for upward adjustment based on inflation.
7. Considering the overall circumstances, in my view an appropriate award for PSLA should be HK$140,000.

*LOSS OF EARNING CAPACITY*

1. The plaintiff claims HK$50,000 for loss of earning capacity while the 3rd defendant submits that the plaintiff is not entitled to any damages under this head.
2. It is well established that this head of claim is to cover the risk that, ***at some future date during the plaintiff’s working life***, he would lose his employment and would then suffer financial loss because of his disadvantage in the labour market. The court has to evaluate the present value of that future risk: see *Moeliker v A Revrolle & Co Ltd* [1977] 1 WLR 132, 140.
3. There will be no loss of earning capacity if there is no substantial risk that the plaintiff will lose the present job or that he or she will have difficulty getting a similarly paid job.
4. I accept that that the plaintiff would suffer a handicap in the labour market as a result of injury to his right thumb. I note that Dr Tsoi was of the view that the plaintiff could still resume his pre-injury job as a construction site unskilled worker and but with some impaired capacity. I consider that with an injury to the thumb on his dominant right hand, coupled with deficiencies in certain actions such as pinching and grasping, is likely to lead to a significant disadvantage in the labour market, whether it is in the construction field or in other jobs.
5. I consider that an award of HK$35,000 (equivalent to around 2 months of the plaintiff’s monthly earnings) is appropriate in the circumstances.
6. The 3rd defendant also argues that the claim for loss of earning capacity is only available where the plaintiff is in employment ***at the time of trial***. Reliance is placed on *Moeliker* (at 140A-B) where Browne LJ held that “*[t]his head of damage generally only arises where a plaintiff is at the time of the trial in employment, but there is a risk that he may 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 job or an equally well paid job*” (underline added).
7. The 3rd defendant submits that since the plaintiff was not in employment at the time of trial – a fact which is not disputed, indeed the plaintiff confirms that he has not worked since the accident – the plaintiff is not eligible to make this claim.
8. I am unable to accept this argument. Whether a plaintiff is, or is not, in employment at the time of trial may be entirely fortuitous; he may have decided to enjoy a temporary break for a family vacation when the trial approaches, or he may have been unwell (unrelated to the accident in question) and wishes to take a rest from work. But these have nothing to do with the purpose and objective of the award, which is to compensate for ***a future risk during the plaintiff’s working life*** that he may suffer in the labour market. I am of the view that if the plaintiff is ***capable*** of being employed at the time of trial (regardless of whether he is ***actually*** employed), his working life remains, the future risk of him suffering a disadvantage in the labour market continues to exist, and I am unable to see why the award should not be available to him.
9. This is to be contrasted with the situation where, at the time of trial, the plaintiff is ***permanently incapable*** of being employed or ***permanently unwilling*** to be employed. Examples include where he is in retirement or is so seriously injured by the subject accident that he will never be able to work, or where there is clear evidence that he has no intention to ever work again. These circumstances necessarily indicate there is ***no future risk*** of him suffering a disadvantage in the labour market – there is no longer a working life – and on that basis this head of damage should not be available as a matter of principle.
10. This approach seems to me to be reinforced by the English Court of Appeal decision of *Cook v Consolidated Fisheries Ltd* [1977] ICR 635. There, Browne LJ (the same judge who decided *Moeliker*) at 640A-B specifically held that “*it does not make any difference in the circumstances of this case that the plaintiff was not actually in work at the time of the trial*”, because the plaintiff there was expected to obtain employment soon (which he did). The judge then went on to clarify that he made an error in *Moeliker*, such that in the version published in the All England Reports (as [1977] 1 All ER 9 at 15), the phrase cited in paragraph 31 above reads “*[t]his head of damage generally arises…”* with the word “only” deleted.
11. On the facts of the present case, there is no evidence that the plaintiff is unwilling to be employed on a permanent basis. Clearly he has the ability to work, as confirmed by Dr Tsoi (albeit with impaired capacity). Further, the implicit basis for the plaintiff ***not*** claiming for future loss of earnings is that he should be regarded as capable of joining the labour market after trial. Accordingly, in my judgment, this head of damage should be available to the plaintiff as he faces a future risk of suffering a disadvantage in the labour market during his working life.
12. The 3rd defendant also relies on *Chan Sai Chiu v Ching Yan Cheuk* (unreported, DCPI 2336/2011, 5 June 2013) at §67. There, in considering an award for loss of earning capacity, the court mentioned that the plaintiff “*was not in employment at the time of trial*”, and also held that the residuary mild impairment which the plaintiff may suffer would not cause material disadvantage to him in securing future employment. I do not think the court there intends to lay down a general principle that a plaintiff must be in employment at the time of trial. In any case, the court does not seem to have the benefit of full argument on the issue, and *Cook* was not considered at all.

*Agreed past loss of earnings and past expenses*

1. Past loss of earnings and special damages are agreed at HK$272,000 and HK$4,000 respectively.

***CONCLUSION***

1. In conclusion, the plaintiff is entitled to the following damages:-

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|  | HK$ |
| PSLA | 140,000.00 |
| Loss of earning capacity | 35,000.00 |
| Pre-trial loss of earnings and MPF (agreed) | 272,000.00 |
| Special Damages (agreed) | 4,000.00 |
|  | |
| **Total** | **451,000.00** |

1. I therefore order that the 1st and 2nd defendants do pay HK$451,000 as damages to the plaintiff plus interest as follows.
2. Interest on PSLA shall be 2% per annum from the date of service of the writ until judgment, and thereafter at judgment rate. Interest on pre-trial losses and special damages shall be at half judgment rate from the date of the accident to the date of judgment, and thereafter at judgment rate.
3. As to costs, I make an order nisi that:-
4. The 1st and 2nd defendants shall pay the plaintiff’s costs of the assessment (including all costs reserved if any) to be taxed if not agreed;
5. The 1st and 2nd defendants shall pay the 3rd defendant’s costs of the assessment (including all costs reserved if any) with certificate for counsel, to be taxed if not agreed;
6. There be no order as to costs as between the plaintiff and the 3rd defendant;
7. The plaintiff’s own costs shall be taxed in accordance with Legal Aid Regulations.

***POSTSCRIPT***

1. After this judgment was prepared but just before it was handed down, the Plaintiff’s solicitors notified the Court that it was discovered that the 1st defendant has ceased his business registration as a sole proprietorship. This led to the Plaintiff’s summons dated 28 November 2022 seeking to amend the name of the 1st defendant in the title of this action by adding the word “formerly” before the words “trading as”. There being no indication of opposition from any of the defendants, I dealt with the matter on paper and made an order in terms of the summons with minor amendments.

( Vincent Lung )

Deputy District Judge

Mr Burke, of Burke & Company, assigned by the Director of Legal Aid, for the plaintiff

The 1st and 2nd defendants were not represented and did not appear

Mr Tony H H Chow, instructed by Cheng, Yeung & Co, for the 3rd defendant

1. *Wong Yun San v Cheung Yue Yiu t/a Radio Engineering Co* (unreported, DCPI 1909/2007, 21 July 2008), *Zhang Hongli v Wong Kam Fuk* (unreported, DCPI 1571/2015, 21 March 2018), *Cheung Kit Ching v Mountains International Company Limited* [2018] HKDC 338, *Rai Tej Kumar v Fulcrum Engineering & Construction Ltd* [2020] HKCFI 2097, *Khan Irram v Wai Hing Engineering Company Limited* (unreported, DCPI 1465/2009, 4 November 2011), *Mohammad Wajed v Cheung Pik Chu Ruby* [2022] HKDC 574 [↑](#footnote-ref-1)