DCPI 857/2016

**IN THE DISTRICT COURT OF THE**

# **HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO.857 OF 2016

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BETWEEN

|  |  |  |  |
| --- | --- | --- | --- |
| POON CHI SANG LOUIS | | Plaintiff | |
| and | | | |  | |
| J.V. FITNESS LIMITED trading as  CALIFORNIA FITNESS | | Defendant | | | |

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Before : District Court Master S.H. Lee in Court

Date of Hearing : 25 Sept 2017

Date of Assessment of Damages : 3 Nov 2017

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**ASSESSMENT OF DAMAGES**

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1. On 17 Aug 2015, the plaintiff’s right shin was scratched and wounded by a broken pedal of a fitness bicycle (**the Accident**) he was riding at a center operated by defendant in Mongkok (**the Centre**). On 28 Apr 2016, he brought this action to recover damages for personal injuries he sustained in the Accident. Acknowledgment of service was filed by defendant’s former solicitors on 27 May 2016.
2. On 13 July 2016, Harris J. ordered in HCCW 209/2016 that Mr Kan Lap Kee, Mr Alan Chung Wah Tang and Ms Hou Chung Man, all of SHINEWING Specialist Advisory Services Limited (**the provisional liquidators**) be appointed as the Joint and Several Provisional Liquidator of the defendant.
3. On 5 Sept 2016, defendant’s former solicitors ceased to act on behalf of defendant. On 7 Sept 2016, Master S. Lo of High Court in HCCW 209/2016 granted leave to plaintiff to proceed with this action against the defendant notwithstanding the appointment of the provisional liquidators.
4. No defence having been served, interlocutory judgment was obtained by the plaintiff against the defendant for damages to be assessed on 21 Nov 2016. By Order of Master Michelle Soong dated 19 May 2017, this action was set down for assessment of damages before me on 25 Sept 2017 (**the Order**).
5. At the hearing before me, the plaintiff was represented by Mr Raymond Luk of Messrs. Raymond Luk & Co. (**Mr Luk**). None turned up to appear on behalf of the defendant.
6. Mr Luk confirmed before me that the Order has been served by post on the provisional liquidators[[1]](#footnote-1). Affirmation of service has also been filed proving service of assessment bundle, plaintiff’s skeleton submission and list of authorities on the provisional liquidators. In the circumstances, I am satisfied that the provisional liquidators have been properly notified to attend this hearing if they see fit and I decided to proceed with this assessment in the absence of the defendant.
7. Mr Luk adopted his written skeleton submission dated 18 Sept 2017 as his opening and proceeded to call his only factual witness i.e. the plaintiff.
8. With my leave, the plaintiff adopted his witness statement dated 20 Oct 2016 (**the Statement**) as his evidence-in-chief and was allowed to give further evidence on his conditions since the making of the Statement. Afterwards, he answered some questions from this court. Mr Luk raised no follow-up questions.
9. By the Order and with my leave, a medical report dated 10 Mar 2017 (**the Report**) prepared by Dr MIU Yin Shun Andrew (**Dr Miu**), a specialist in orthopedics & traumatology and who interviewed the plaintiff on 13 Jan 2017, was adduced into evidence without oral evidence.
10. The 4 heads of claim totaling $505,840 the plaintiff makes in this action are set out in Revised Statement of Damages filed on 23 Mar 2017 (**RSOD**). They are 1) pain, suffering & loss of amenities (**PSLA**); 2) loss of earning capacity; 3) special damages; and 4) future medical expenses. No Answer was filed thereto.

*Analysis*

1. I have fully and carefully considered all evidence, submissions and authorities brought to my attention. I am grateful to Mr Luk for his assistance.

*Assessment of evidence*

1. I accept, and give full weight to, all documentary evidence before me. I also accept, and give full weight to, the opinion of Dr Miu set out in the Report. In so far there is any conflict between the contents of the documents, including the Report, and plaintiff’s evidence, I prefer the former. That said, I am fully satisfied that plaintiff is an honest and reliable witness. I accept his evidence below.
2. My findings are as follows.

*Personal background*

1. At the time of the Accident, the plaintiff was, I find, close to 39, married and a sergeant of the Hong Kong Police Force (**the Force**). He has post-secondary qualification. He joined the Force as a constable in 1996. He was promoted to sergeant in 2010. At that time of the Accident, he worked in the Emergency Unit performing frontline duties on shift and earned a monthly income of around $30,000.

*Injuries & treatments*

1. After the plaintiff removed such parts of the broken pedal from his right lower leg at the Centre on the day of the Accident, I accept he found his right shin bleeding. He tried to control bleeding using towels but failed. He began feeling painful. Defendant’s staff came over to assist him controlling his bleeding using towels but it was also in vain. A photo at p.57 of the assessment bundle, I accept, captured his right lower leg wrapped in towels on that day with the wound seen.
2. Ambulance was called and, after arrival, ambulance man also took steps to control plaintiff’s bleeding. For fear of long waiting time at public hospital, the plaintiff elected to attend private hospital to seek immediate treatment.
3. The plaintiff arrived by taxi at St. Teresa’s Hospital (**STH**). By then, I accept, he found the wound very painful and unable to move his right lower leg. Physical examination showed a 6 cm linear laceration over his right shin. He received suturing (7 stitches) under local anesthesia and wound dressing in the out-patient department. First dose of tetanus vaccine was administered to him. He was discharged home with oral medication.
4. He attended follow-up at STH on 27 Aug 2015 and the wound was healed up. All stitches were removed. But he still felt painful and stiff at his wound. Another photo at p.56 of the assessment bundle captured his wound on that day.
5. He attended STH again on 19 Sept 2015. His pain has improved. Second dose of tetanus vaccine was administered and silicone gel sheet was given to him for scar reduction.
6. About 6 months later, the plaintiff received his third dose of tetanus vaccine.
7. The plaintiff added in the box, and I accept having regard to Dr Miu’s opinion below, that he now consults traditional Chinese medicine practitioners, acupuncturists and physiotherapists for symptomatic treatment of his wound on an irregular basis.
8. A total of 15 days of sick leave to 31 Aug 2015 was given to the plaintiff for the Accident.

*Medical assessment & prognosis*

1. Examined by Dr Miu in Jan 2017, save that his distal right leg showed a healed scar over its anterior surface running obliquely and measuring 8 cm, with slight increase in pigmentation but not hypertrophic and that there was mild swelling around it, the plaintiff was otherwise healthy and normal in all relevant respects.
2. Dr. Miu diagnosed that the Accident resulted in soft tissue wound laceration as well as contusion injury over the anterior and distal aspect of plaintiff’s right leg.
3. The plaintiff has received, in his opinion, standard and appropriate treatment and the wound had healed uneventfully. He has reached maximal medical improvement.
4. The prognosis, opined Dr Miu, would likely be satisfactory only. The right leg pain the plaintiff still suffers would most likely persist, with episodes of exacerbation of right leg pain after exertion, marching or prolonged work. He would require symptomatic treatment (in the form of medication and physiotherapy) on a need-to basis. His daily activities are essentially independent but his exercise tolerance has been affected after the Accident.

*Current disabilities*

1. The plaintiff now suffers, I accept having regard to opinion of Dr Miu above, from intermittent right leg pain. He described of feeling stiff and numb at times, sometimes lasting a few seconds, and sometimes lasting longer. If he is doing exercise when it strikes, he has to stop and rest. For relief, he performs massage himself using hot water, or applies medicinal pad on his wound.
2. That said, the plaintiff does not, I note, find himself so painful as to require taking painkiller.
3. And I think his conditions are improving. He complained to Dr Miu in Jan 2017 that his right leg pain is exacerbated after walking 30 minutes. By the hearing before me, he said in the box he feels numb after walking more than an hour.
4. Moreover, plaintiff’s activities of daily living today are essentially normal and unaffected by the Accident.
5. Of course, I have not overlooked that the plaintiff (a middle-aged married male) is now left with a scar about 2 to 3 inches long. The silicone gel sheet he used for scar reduction in the past, sadly, did not work well.

*Loss of amenities*

1. The plaintiff, I further accept, enjoys sports and used to be very active in sports. He did weight training, boxing and station bike, each of them 2 to 3 times per week (each lasting more than an hour) and running for 45 minutes twice a week before the Accident.
2. He often engages in sports together with his wife and enjoys much doing so. Indeed, they were both riding fitness bicycles at the Centre at the time of the Accident.
3. Before the Accident, he was particularly fond of riding fitness bicycle. He had thought of getting trained to acquire qualification as a part-time coach thereof in future.
4. As a result of the Accident and during the period of 1 year and 2 months between the date of the Accident and that of the Statement, the plaintiff, I accept, had once stopped sports activities altogether, had later reduced his sport activities for some time (and he regretted much for letting down his wife in these periods), and had ceased bicycle training altogether for some time as well.
5. By the date of the Statement, the plaintiff has, however, resumed some of his previous normal sporting activities, though he was still fearful of riding fitness bicycle.
6. By the hearing before me, the plaintiff has also resumed riding on fitness bicycle, albeit indoor and avoiding risky posture such as standing upright on the pedals. But, with further time and practice, his confidence will likely, I think, improve and there is still room, I believe, for further improvement in this respect.
7. Of course, I do not overlook that the current exercise performance and tolerance of the plaintiff has been impaired, due to intermittent exacerbation of pain caused by the Accident. And his plan of getting trained as a part-time coach of fitness bicycle has been deferred as a result of the Accident.

*PSLA award*

1. Mr Luk seeks a PSLA award of $300,000. He referred to the following PSLA comparable authorities, namely: -

(1) *Lee Yau Wai v. Yeung Kam Wing*, unreported, HCPI 281/2009, Master Marlene Ng (as she then was), 29 Mar 2011, reasonable prospect of obtaining an award of $300,000[[2]](#footnote-2);

(2) *Poon Man Chun v. Li Sau Yee*, unreported, HCA 2294/1992, Kaplan J., 19 Apr 1994, $250,000 awarded;

(3) *Ng Ka Ho (an infant) v Yeung Kwok Leung*, unreported, DCPI 28/2004, Deputy District Judge P. Li (as he then was), 4 May 2005, $250,000 awarded;

(4) *Wong Ming Kwan v. Wing Ming Electrical Company Limited and others*, unreported, HCPI 760/2003, Suffiad J., 30 Jun 2005, $350,000 awarded;

(5) *Mahmood Tariq v Kinway Engineering Ltd & Anor*, unreported, HCPI 149/2006, Deputy High Court Judge Gill, 17 May 2007, $200,000 awarded; and

(6) *Chung Wai Hung v Chung Wai Ming*, unreported, DCPI 2675/2007, H Judge Lok (as he then was), 18 Jul 2008, $180,000 awarded.

1. I have carefully compared plaintiff’s injuries, treatments, disabilities, diagnosis and prognosis I have found above against those of the comparable authorities above.
2. The injuries in (1) above are, I observe, *different*, and *more serious*, from those of the plaintiff. They involved several surgical procedures for right wrist and left knee, including wrist arthroscopy, reconstruction of ligament, debridement and left knee operation. The victim “gave up” various vigorous sports. The overall circumstances are, I think, *more serious* than those of plaintiff.
3. The award in (2) above is, I observe, one *within* the “serious injury” category at the time of its making in 1994. Such category was said to cover injuries which “leaves a disability which mars general activities and enjoyment of life, but allows reasonable mobility to the victim…”. An award *within* such category is *by itself* an indication of the overall severity of the injuries and their aftermath.
4. In comparison, the circumstances in (2) above are, I think, *worse* than those in (1) above and those of the plaintiff. The young and athletic female lifeguard in question had a large open wound over her right knee and leg area. She was operated on, with fractured knee-cap fixed with screws. Several more operations followed. Screws were later removed by operation. She managed at first to resume her job but was unable to continue. Medical board was convened to find her unfit for her duties and she was transferred. She walked with slight limp and was left with unsightly knee scars. She used to an excellent swimmer of various styles. But she could no longer swim breaststrokes or butterfly after her injuries. And she had to give up other sports she enjoyed.
5. The circumstances in (3) above are, I think, *distinguishable* from plaintiff’s circumstances. The victim there was a *minor*. Although he sustained head injuries without loss of consciousness, minor right knee injuries without fracture treated with suturing and discharged on same day, and had dizziness and vomiting subsided spontaneously, he had mild symptoms of *post-traumatic distress symptoms* according to the 2 psychiatrists called. Further, the accident aggravated the symptoms of *pervasive developmental disorder not otherwise specified* of the victim albeit not substantially.
6. Though not within the “serious injury” category, the injuries in (4) above are, I think, *worse* than those sustained by plaintiff. The victim had his right leg severely cut by some metal ducts, causing 3 2-cm laceration over upper and middle part of right shin with tendon exposed. The diagnosis was right leg lacerations with complete cut of right anterior tibial artery, deep peroneal nerve, anterior tibial tendon, extensor hallux longus tendon and extensor digitorum longus tendon. Operation was performed on general anesthesia to repair artery, nerve and tendons. Post-operatively, the right leg was put on a brace and the victim had a pair of crutches to assist walking. He was given ankle-foot orthosis, intensive physiotherapy and occupational therapy, and pressure stocking for right knee scars. He had over 2 years of sick leave and suffered from residual pain, stiffness and numbness in right leg.
7. The diagnosis in (5) above is again, I observe, *markedly different* from that of plaintiff. The victim fell from height. He had back sprain and right knee contusion. He was discharged after 2 days. He had analgesics and 15 sessions of physiotherapy, and total sick leave of over 12 months. Examined one and half year afterwards, both orthopedic experts noted local tenderness and reduced lumbar spine movement, no significant lower limb abnormality, and, significantly, signs of symptoms exaggeration.
8. Those injuries in (6) above are, I think, also *more serious* than those sustained by plaintiff. The blade of a handheld grinder broke and cut the left knee of the victim. It caused a 7-cm cut wound over left anterior knee, deep to proximal tibia with tear of patella tendon and contamination of the wound. The left knee was operated, with metal debris removed and wound debridement. Tendon was repaired and a knee brace was applied post-operation. He was discharged after 9 days. The wound healed after 2 weeks and brace taken off 6 weeks after operation. 14 sessions of physiotherapy were given. The victim suffers persistent left knee pain, walking with slight limp, inability to run or squat. He cannot straighten left leg, or ascend or descend stairs without pain. He was left with 6-cm scar. He can no longer play table tennis, swimming or riding bicycle.
9. All things considered, including inflation since the dates of the above comparable awards, I think an appropriate PSLA award in plaintiff’s favour should be in the sum of **$180,000**.

*Loss of earning capacity*

1. As was said by Lord Fraser of Tullybelton in the Privy Council in *Chan Wai Tong v. Li Ping Sum* [1985] HKLR 176 at 183B-D, this head of damages is intended:

“.... to cover the risk that, at some future date during the claimant’s working life, he will lose his employment and will 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. Reyrolle & Co. Limited* [1977] 1 WLR 132, 140, where Browne L.J. dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimant’s age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant’s earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an accountant.”

1. Hence, this head is never intended to compensate loss of promotional prospect which plaintiff has expressed concern in the Statement. Such concern, I believe, arose because, after the Accident, he was recommended by his superior, and was transferred, to work at the Road Safety Unit with lesser physical demands. It was by late 2016 that he was, at his request, transferred to work (and he has since worked) at the Police College as an instructor[[3]](#footnote-3) (**the Transfers**). He has so far not resumed working in the Emergency Unit, which he was very proud of. Before the Accident, he has, I accept, twice applied for promotion to become station sergeant. By reason of the Accident and the Transfers, he has withheld application for promotion in 2016 and 2017. That said, loss of promotional prospect was not pleaded in RSOD and cannot be considered in this assessment.
2. For loss of earning capacity pleaded in RSOD, Mr Luk has helpfully referred this court to the 2-stage approach Browne LJ said in *Moeliker*, supra,at 142A-C:

“The consideration of this head of damages should be made in two stages. 1. Is there a ‘substantial’ or ‘real’ risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff's chances of getting a job at all, or an equally well paid job.”

1. Mr Luk emphasized that there is no evidence that the plaintiff has worked in other jobs than that in the Force. There were, he stressed, the Transfers after the Accident. And, as was said by plaintiff and I accept, his frontline duties at Emergency Unit are very demanding in terms of physical strength and fitness. The Accident, Dr Miu opined and I accept, has an adverse effect on his working capacity for such demanding duties. His work efficiency has been impaired, though he should be able to return to his pre-Accident duties in the Force. He can now only manage physical workout on a less frequent basis. His ability to do patrolling and strenuous work has been adversely affected as his right leg pain would be exacerbated by the strenuous workload.
2. Mr Luk went on to submit that, given plaintiff’s current relative disadvantage in terms of physical strength and fitness with other colleagues, he may not be able to resume working in the Emergency Unit in future and it is highly likely that he will be losing his job in (or forced to leave) the Force before the end of his working life with it. As there is no evidence that he has other working experiences, it is anticipated that the plaintiff will not be able to get an equally well-paid job than an able-bodied in the general labour market.
3. As to quantum, a sum of $180,000 i.e. about 6 months’ of his current monthly earnings as a police officer was sought by Mr Luk for loss of earning capacity.
4. I have fully considered all such matters Mr Luk stressed above. However, one must, I think, equally bear in mind that plaintiff has worked with the Force for 20 years by the hearing before me. It is a relatively stable job with security of tenure. He is, he told me and I find, on pensionable terms with the Force, a large department with various positions (some less physically demanding) within the largest employer of Hong Kong, with a retirement age of 55. Though it is unclear if he will ever return to the Emergency Unit, there is no indication of any sort[[4]](#footnote-4) that he will or may be laid off from the Force in future for his relatively minor reduction in physical strength and fitness as a result of the leg wound he sustained in the Accident.
5. All things considered, notwithstanding the matters urged by Mr Luk, I conclude that there is no real or substantial risk that the plaintiff will lose his job with the Force at some time before his retirement with it.
6. That said, I have not overlooked that the plaintiff may continue working after retiring from the Force. He told me in the box he may work as a coach in fitness training or swimming after retirement. However, Mr Luk never put his case on the basis (and it was not pleaded in RSOD) that there is real or substantial risk of plaintiff losing such job of coach, if any and be it part-time or full-time, he manages to fetch after retirement, for the remainder of plaintiff’s working life after retiring from the Force[[5]](#footnote-5).
7. For the above reasons, I decline to make an award of loss of earning capacity to the plaintiff.

*Special damages*

1. A total sum of $15,840 was sought for special damages in RSOD.
2. Considering the documents before me, I accept plaintiff paid for medical expenses to STH as a result of the Accident in the total sum of $7,000 claimed in the Statement.
3. I also accept plaintiff has, due to the Accident, paid for taxi fares to and from STH, and in the total sum of $500, he said in the Statement despite no receipt was produced before me.
4. I further accept he paid for tonic food as he said in the Statement and I find the sum of $2,000 claimed in RSOD[[6]](#footnote-6) a reasonable amount to be allowed despite the absence of receipt.
5. Hence, I award special damages in sum of **$9,500** in favour of the plaintiff.

*Future medical expenses*

1. A sum of $10,000 was claimed in RSOD for physiotherapy fees in the coming 5 years.
2. While Dr Miu opined (and I accept) that plaintiff requires symptomatic treatment of physiotherapy on a need-to basis and the costs of such treatment in the private section would be around $800 to $1,000 per session, he gave no estimate of the duration such treatment is to be required and the plaintiff also said he now requires physiotherapy on an irregular basis.
3. Nonetheless, doing the best I could in the limited materials before me, I am prepared to award the sum of **$10,000** claimed by way of future medical expenses.

*Summary of assessment*

1. My assessments of the different awards I make are therefore as follows: - (1) PSLA - $180,000; (2) special damages - $9,500; and (3) future medical expenses - $10,000.
2. The total comes up to **$199,500**.

*Disposition*

1. Accordingly, I enter final judgment against defendant in the sum of $199,500in plaintiff’s favour.
2. I award interest on PSLA award of $180,000 at 2% p.a. from the date of the Writ of Summons (28 Apr 2016) to the date of this assessment of damages and also award interest at 4% p.a. on special damages of $9,500 from the date of the Accident (17 Aug 2015) to the date of this assessment of damages.
3. The total judgment of $199,500 would, of course, carry interest at judgment rate after this assessment of damages.

*Costs of assessment*

1. I see no reason not to award costs of the assessment of damages against defendant and I order defendant to pay plaintiff the costs of the assessment of damages, including all reserved costs thereof and this hearing before me.
2. Mr Luk elects to have summary assessment of the aforesaid costs instead of taxed costs. I agree it is appropriate to so proceed in the circumstances of this case.
3. Having considered statement of costs submitted by Mr Luk, I summarily assess such costs I award in plaintiff’s favour at para 72 above at a sum of $60,000.

(LEE Siu-ho)

Master, District Court

Mr Raymond Luk of Messrs. Raymond Luk & Co. for the plaintiff

The defendant was not represented and did not appear

1. Mr Luk also gave his undertaking to this court to arrange filing of affirmation to verify such service within 7 days from the hearing [↑](#footnote-ref-1)
2. This is a decision for determining the appropriate scale of costs after settlement of the action. [↑](#footnote-ref-2)
3. His duties are mainly performing demonstrations and giving instructions, with assistant helping him on physical trainings. They are performed on regular hours from Mondays to Fridays and not on shifts. [↑](#footnote-ref-3)
4. e.g. convening of medical board to assess his fitness for duties [↑](#footnote-ref-4)
5. Not to mention that it is possible that the plaintiff may decide not to work anymore after retiring from the Force by enjoying his pensions, if not enjoying his investments and savings. [↑](#footnote-ref-5)
6. which is smaller than that claimed in the Statement. [↑](#footnote-ref-6)