DCPI 880/2010

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION DCPI 880 of 2010**

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BETWEEN

TA A SAM Plaintiff

And

HO KA CHI APRIL trading as FANTASTIC

INTERIOR DESIGN COMPANY

(滙俊居裝飾工程公司) Defendant

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

Coram: Before Master G. Own in Court

Date of Hearing: 6th December 2010

Date of Handing Down Decision : 16th December 2010

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ASSESSMENT OF DAMAGES

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Introduction

1. This is the assessment of damages of the Plaintiff’s claim against the Defendant in respect of injuries suffered whilst at work on 27 February 2008.

1. Interlocutory Judgment was entered on 12 April 2010 under High Court PI No.840 of 2009 (“the High Court proceedings”) for damages to be assessed and costs to be taxed upon the Defendant’s failure to give notice of intention to defend.
2. The Defendant had never attended to any part of these proceedings nor to the prior employees compensation proceedings under DCEC No.484 of 2009 (“the ECC case”). Default Judgment was entered against the Defendant in the ECC case with damages assessed by Her Honour Judge Anthea Pang on 30 March 2010. Judgment was delivered on 3 May 2010 in the sum of HK$1,239,222 with interest and costs.
3. Credit was given to the aforesaid Judgment in the ECC case and hence bringing the amount of damages claim under common law in these proceedings within the jurisdiction of this Court. By an Order of Master J Wong of the High Court dated 9 June 2010, the High Court proceedings were transferred to this Court. By an Order of this Court dated 2 September 2010, today’s hearing was scheduled for assessment of the common law damages.
4. The Notice of Appointment for Assessment of Damages was duly served on the Defendant by ordinary post to the Defendant’s usual and last known address. I am satisfied that the Defendant has had notice of today’s hearing which was continued in the absence of the Defendant.

The Plaintiff’s case

1. The Plaintiff is a welder. On 27 February 2008, he was employed by the Defendant and was instructed to work in a shopping arcade in Tseung Kwan O, New Territories. He was required to climb up an A-shape wooden ladder to cut some I-beams at the cockloft using an oxy-ace hose. The ladder was about 4 meters in height and 1.5 meters in width after opening. The 2 sides of the ladder were tied up by red nylon strings. The Plaintiff climbed and stood on the ladder carrying with him a welder to cut the I-beams. In the course of his work, some I-beams suddenly fell from the cockloft and hit the ladder. The ladder inclined to the left and fell down. The Plaintiff fell down with the ladder and landed on his right buttock with his left knee hit against some I-beams and right elbow hit against the ground.
2. The Plaintiff was then taken to Tseung Kwan O Hospital for immediate treatment. X-ray showed fracture of the right inferior pubic rami. He was hospitalized and discharged on 29 February 2008 for follow up treatment.

Pain, suffering and loss of amenities

1. The Plaintiff’s solicitor Mr. Ng referred me to the case of San-To Po Yuk Hilter –v- Wing Kwong Painting Co. Ltd, HCPI No.387/2002 where the Plaintiff in that case fell from a ladder from a height of about four to five feet landing on his buttocks whilst doing some painting work. The injuries involved significant disc extrusion at L4/5 causing severe spinal canal narrowing. There was also mild postero-central disc bulge at L5/S1 level that caused moderate spinal canal stenosis. The Plaintiff there was medically assessed to have suffered 10% impairment of the whole person. The trial Judge awarded $350,000 under this head.
2. The next case is Ng Koon Ki Peter –v- Hilti (Hong Kong) Ltd & Anor, HCPI No.628/2002 where the Plaintiff twisted his back and injured himself whilst grabbing a plank. Because of the weight of the plank, he was unable to hold it with one hand and he dropped the plank. He was awarded $350,000 for PSLA.
3. The other case referred to me is Choi Chi Hung –v- Wong Kuen Bor trading as Bor Kee Electroplating Factory, HCPI No.1026/1995 where the Plaintiff slipped over whilst at work and injured his back. Medical examination revealed injuries over the lumbar spine at L4 and L5. The award for PSLA is HK$300,000. As this case was decided back in October 1996, Mr. Ng for the Plaintiff urged me to take the view that HK$350,000 would be about right if the factor of inflation was taken into account of.
4. Mr. Ng conceded that though the Plaintiff complained about psychiatric injuries in addition to the orthopaedic injuries, there are no psychiatric reports to support and the amount of PSLA submitted to this Court for consideration had already taken into account of the psychiatric problems. Moreover, in view of the medical opinion of Dr. Johnson Lam that the pain and disability at the back of the Plaintiff was attributed to both pre-existing degeneration and to the subject accident, Mr. Ng also conceded with the opinion of Dr. Johnson Lam (at page 17 of the Report) that 25% should be apportioned for the pre-existing degeneration factor when deciding the PSLA award.
5. I have considered the authorities submitted by Mr. Ng. I have also considered the case of Chan Chi Shing –v- Chan Siu Kuen & others, DCPI No.229/2007. The Plaintiff in that case was a 45-year old painter who, in the course of his work, fell from a height of some 4.5 metres from the top of a scaffold that collapsed. X-ray revealed collapse and compression fracture of L4 vertebra and comminuted intra-articular fracture of calcaneum of the right ankle. He was awarded HK$350,000 for PSLA.
6. The Plaintiff in this case was aged 49 at the time of the accident. Though I accept the San-To Po Yuk Hilter –v- Wing Kwong Painting Co. Ltd case cited by Mr. Ng (which was decided in 2004) resembled to the present case and ought to be considered as comparable, I find the case of Chan Chi Shing –v- Chan Siu Kuen & others also useful since this case was decided only last year. The Plaintiff there Mr. Chan Chi Shing (“Chan”) injured himself at the age of 45 when he fell from a height of about 4.5 metres which resembles to the factual situation in this case. There is also resemblance in that both Chan and the Plaintiff here are unable to lift heavy objects after the accident though Chan experienced persistent right ankle pain and has difficulty in balancing his body due to pain in his right leg which the Plaintiff here does not have.
7. Taking into account the present condition of the Plaintiff as diagnosed by Dr. Johnson Lam in his report and the cases of San-To Po Yuk Hilter and Chan Chi Shing (supra), I find that an Award of HK$330,000 to the Plaintiff in this case would be proper and appropriate. With the concession of 25% by Mr. Ng to reflect the back pain due to pre-existing degeneration, I would therefore order $247,500 as PSLA for the Plaintiff.

Pre-trial Loss of Earnings

1. At the time of the accident, the Plaintiff was earning $750 per day with an average income of $19,500 per month ($750 x 26 days). The Plaintiff was given a total of 673 days of sick leave for the periods from (i) 27/2/2008 to 20/8/2009; (ii) 17/9/2009 to 10/11/2009; and (iii) 12/11/2009 to 27/1/2010.
2. Mr. Ng referred me to the Judgment of Her Honour Judge Anthea Pang dated 3 May 2010 (at pages 219 to 227 of the Bundle) where the learned Judge made various findings of fact which includes the following :-
3. The Plaintiff’s average monthly income at the time of

accident was $19,500 (at paragraph 23 of Judgment at

page 224); and

1. All the 3 periods of sick leave was occasioned by the

present accident and are reasonable ( at paragraph 27 of

Judgment at page 225).

1. Mr. Ng fairly conceded that for calculating the period for loss of income, the 2 intermittent periods not covered by sick leave certificates should be disregarded; namely, from 21/8/2009 to 16/9/2009 (27 days) and 11/11/2009 (1 day). Mr. Ng further submitted that a period of 3 months for convalescence should be added to the sick leave period.
2. The Plaintiff in his oral evidence testified that he had attempted work with one Chung Siu Keung, one Cheng Ming and one Chun Yee Company. The income received was around $800. The Plaintiff’s solicitors agreed to deducting $800 from the claim of pre-trial loss of earnings of HK$487,500 if the suggested 3 months convalescence period was going to be accepted by the Court.
3. The Plaintiff also testified that due to his inability to lift heavy object such as carrying the oxy-ace cylinders, he could not return to his pre-accident job. I noted Dr. Johnson Lam at paragraph 8 of his Report also opined that the Plaintiff should not be able to return to his pre-accident work which required heavy physical demand on his back. This supported the evidence of the Plaintiff.
4. In relation to those findings of facts referred to under paragraph 16(a) and (b) above, Mr. Ng urged me to consider adopting them for this assessment as they are facts so found by the Court. I agree that those findings should be adopted for this assessment. I am also satisfied that the Plaintiff is unable to return to his pre-accident job.
5. Considering the extent of injuries and the substantial period of sick leave given to the Plaintiff, I accept a period of convalescence should be given to the Plaintiff and that 3 months is reasonable and proper.
6. In the Plaintiff’s Statement of Revised Damages, it was submitted that given the educational background of the Plaintiff and his condition, he could only take up jobs with light physical demand and it was suggested he could not find a job with more than $5,000 per month. I accept Plaintiff’s submission.
7. Hence, the total loss of earnings calculated up to the date of assessment is as follows :
8. From 27/2/2008 to 27/4/2010 for 26 months (with 3 months convalescence period added) : –

HK$19,500 x 26 = $ 507,000

Less :- (i) $800 ; and

(ii) $19,500 x 0.93 months (i.e. 28 dates with no sick

leave certificates)

= $18,135

Sub-total = $507,000 - $800 - $18,135 = $488,065

1. From 28/4/2010 to 6/12/2010 (7.3 months)

(HK$19,500 - HK$5,000) x 7.3 = $105,850

Total Pre-trial loss of earnings : $488,065 + $ 105,850 = $593,915

Post-trial Loss of Earnings

1. Mr. Ng in his skeleton submissions cited a few cases similar to the Plaintiff’s situation as comparables all suggesting a multiplier of 6 to be adopted in calculating this head of damages.
2. In the Plaintiff’s case and considering the line of authorities, I agree in the circumstances of the Plaintiff, a multiplier of 6 is reasonable and appropriate.
3. Hence, the future loss of earnings will be (HK$19,500 – HK$5,000) x 12 x 6 which equals to HK$1,044,000.

Loss of Earning Capacity

1. It is submitted that by reason of the Plaintiff’s injuries, he would suffer a handicap in the labour market should he lose in any appropriate job he managed to find or would be at a disadvantage when promotion prospects are to be considered.
2. I accept that the Plaintiff does so suffer and will award the sum of HK$60,000 as claimed.

Loss of MPF benefits

1. There is a claim for the Plaintiff’s loss of MPF benefits on the amount of his loss of earnings, both pre-trial and future.
2. The Plaintiff is a welder by occupation and his wages at the material time was HK$750 per day. At the time of the accident, it was only the 2nd day of employment by the Defendant. There is no evidence before me that there had ever been any MPF contribution over the previous years.
3. Damages are compensatory and it is the Plaintiff’s burden to prove his loss rather than seeking assumed entitlement. Hence, I am not satisfied that on balance the Plaintiff has discharged the burden of proving this item of loss. Therefore, I do not allow this item of claim.

Special Damages

1. The Plaintiff claims medical expenses at HK$5,680; travelling expenses at HK$2,000 and tonic food at HK$5,000.
2. I accept all these items are necessarily incurred and the amounts are reasonable and are not excessive. I therefore allow all these three items in full.

Summary

1. In summary, the Award will be as follows :

PSLA HK$ 247,500

Loss of Pre-trial earnings HK$ 593,915

Loss of Post-trial earnings HK$ 1,044,000

Loss of Earning capacity HK$ 60,000

Special Damages HK$ 12,680

Total : HK$ 1,958,095

Less : ECC Award HK$ 1,239,222

Total : HK$ 718,873

Interest

1. Interest on general damages, namely, PSLA and Loss of earning capacity runs at 2% per annum from the date of Writ to the date hereof. Interest on special damages, namely, loss of pre-trial earnings, medical expenses, travelling expenses and tonic food runs at half judgment rate from the date of the accident to the date hereof.

Costs

1. I order that the Defendant shall pay to the Plaintiff the costs of this action including costs of the Assessment of Damages, to be taxed if not agreed. I also order that the Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.

(Signed)

(G. Own)

District Court Master

Representation :

Mr. Ng Kwok Wai Peter of Messrs. W.K. To & Co., Solicitors for the Plaintiff

The Defendant being absent