## DCPI 956/2019

[2019] HKDC 1179

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 956 OF 2019

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##### BETWEEN

CHAU KWAI HUNG Plaintiff

and

LUK HING YU THOMAS Defendant

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Before: Her Honour Judge Winnie Tsui in Court

Dates of Hearing: 29 and 30 August 2019

Date of Assessment of Damages: 30 August 2019

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Assessment of Damages

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1. This is the assessment of damages of the plaintiff’s personal injuries claim.
2. The plaintiff was a night-shift taxi driver. In the early hours on 17 August 2015, he was assaulted by the defendant in Tin Shui Wai, New Territories after he refused the latter’s request for a taxi ride. At that time, the plaintiff was about to hand over the taxi to the driver of the next shift and had earlier put up the “Out of Service” sign. The plaintiff suffered injuries as a result of the assault.
3. In May 2017, the plaintiff commenced the present personal injuries action against the defendant in the Court of First Instance, at that time claiming a sum of just under $1.8 million.
4. The defendant then lodged an acknowledgment of service, indicating that he would contest the proceedings. Notwithstanding that, the defendant has since not participated in these proceedings at all, including the present hearing.
5. Interlocutory judgment was entered against the defendant on 12 December 2017 in default of defence, leaving damages to be assessed.
6. By order dated 28 February 2019, Master Roy Yu transferred the action to the District Court and granted leave for this case to be set down for assessment. The transfer was initiated by the plaintiff following the enlargement of the jurisdiction of the District Court to cover personal injuries claim of up to $3 million.
7. By letter dated 30 April 2019, the plaintiff’s solicitors invited the defendant to attend the Listing Office to have the date of assessment fixed. The defendant did not turn up on the appointed day. The date of assessment, ie yesterday’s date, was fixed in his absence. Subsequently, a notice of trial was sent to the defendant by the court. The letter was not returned.
8. The plaintiff has filed an affirmation of service deposing to the serving of the assessment bundle and his opening submissions on the defendant.
9. I am therefore satisfied that the defendant has had notice of this assessment hearing and the assessment has proceeded in his absence.
10. The plaintiff gave evidence. He also relied on the single orthopaedic report prepared by Dr Lam Chi Keung Johnson in support of his claim. By an earlier order of the court, Dr Lam’s report is to be adduced as expert evidence without oral testimony.

*The plaintiff’s case*

1. The plaintiff was 61 years old at the time of the assault.
2. At about 4:40 am on the day, the plaintiff had finished his shift and stopped his taxi at No 3 Tin Kwai Road waiting to hand it over to the morning shift driver. When he was about to get out of the vehicle, the defendant boarded the rear seat and demanded the plaintiff to take him to his destination. The plaintiff said he was off-duty. He alighted from the taxi. The defendant also alighted.
3. The defendant then approached the plaintiff from behind and pulled his backpack. He then punched the plaintiff’s left face, kicked his chest and punched his left face again. The plaintiff fell down with the back of his head knocking on the ground. The defendant then kicked the plaintiff’s right face. The plaintiff managed to get up. He tried to run away, yelling for help. The defendant chased him from behind. Soon after, the police arrived and arrested the defendant.
4. On 29 October 2015, the defendant was convicted of common assault on the plaintiff in the Tuen Mun Magistrates’ Court.
5. The plaintiff was taken to the A&E Department of Tuen Mun Hospital. He complained of head injury, right hand and right knee injury. On examination, the doctor found that there was tenderness and/or redness over the occipital area, face, right knee and right hand. X-ray and CT scan did not reveal any fracture. He was treated and discharged.
6. Due to persistent pain in his right wrist and left middle finger, he attended out-patient clinics for treatment over the following two months or so.
7. Subsequent examination revealed mild swelling and tenderness over the radial side of his right wrist with decreased range of movement. There was tenderness and swelling at the proximal interphalangeal joint of his left middle finger with limited active range of movement. He was treated conservatively with medication. He also attended a number of physiotherapy sessions.
8. He was granted intermittent sick leave from 17 August 2015 to 16 October 2015.
9. At present, the plaintiff still suffers from residual pain in his right wrist, left middle finger and neck.
10. Before the incident, the plaintiff drove six days a week and earned a monthly income of about $24,000. He was granted sick leave of about two months after the assault and did not work during that period. He resumed driving after that. However, due to residual pain and impairment, initially he could only work about one to two days a week. According to his witness statement, later on, he was able to work for about three to four days a week. However, in his oral testimony, he said that due to his injuries, he could only drive for one day, followed by two days’ rest (「做一日，休一日」). And, during his day of work, he would work throughout the shift so as to maximise his earnings for the day. He explained that he needed the two days’ rest to recover from the pain that would ensue from the one day of driving. Given safety concerns, he considered that two days’ rest to recover was required.
11. Furthermore, he previously worked six days a week regularly. He would have no problem hiring a taxi from the owner on that regular basis. Post-accident, as he worked much fewer days, whether he could work for the day would also be subject to availability of taxis for hire.
12. He confirmed in his oral testimony that post-accident and up to August 2018, he was earning on average $10,000 a month.
13. In his oral testimony, he revealed for the first time in this action that he met with a traffic accident in August 2018, that is, 48 months after the assault incident. He was driving a private vehicle when he was knocked by a bus from behind. He suffered injuries to his neck and shoulder. The injuries were more serious than his injuries caused by the assault. He was given 10 months’ sick leave and underwent physiotherapy treatment. However, even up to now, he still feels pain in his shoulder and because of that, since the traffic accident, he has not resumed working as a taxi driver at all. While there is no medical evidence before me on those injuries, the plaintiff said that he would not be able to drive a taxi for the next half year or one (「一年半載」).

*The expert evidence*

1. On 11 May 2018, the plaintiff was examined by Dr Lam. (That was before the traffic accident in August 2018.) Dr Lam’s diagnosis is that the plaintiff sustained moderate degree of soft tissue injury to the right wrist, the left middle finger, the neck, the head/face, and he also had other minor limb injuries.
2. Dr Lam considered that the assault is likely to be the sole cause of the injuries. They had been treated appropriately. No surgery was required. The injured parts have reached maximum medical improvement by the time of Dr Lam’s examination.
3. Dr Lam referred to mild degenerative changes in the plaintiff’s cervical spine and opined that they were pre-existing and it is likely that the plaintiff had enjoyed rather painless and satisfactory function in his neck before the incident.
4. Separately, Dr Lam noted in his report that according to the medical records, the plaintiff had a traffic accident on 12 May 2015, ie about three months before the assault incident. The records however reveal no significant injuries with persistent problem arising from that traffic accident.
5. At the time of examination, the plaintiff no longer complained of residual pain or impairment in his left middle finger or his head/face. But he still complained of residual pain and impairment in his right wrist/hand and neck. This would manifest in the form of intermittent pain which would be worse with activities, such as prolonged driving and controlling the steering wheel.
6. It was the opinion of Dr Lam that:-
7. Activities which cause increased stress to the right wrist/hand (eg controlling the steering wheel for over three hours) and neck (eg prolonged driving for say over three hours) can cause discomfort or even pain in the right wrist/hand or neck.
8. His injuries would not affect his usual sport activity of jogging.
9. Whole person impairment was estimated to be 2.5%.
10. On the plaintiff’s ability to return to his job as taxi driver, Dr Lam said this:-

“- Dr. Lam considers if the residue pain and impairment in the right wrist/hand and neck was so severe that Mr. Chau could only work 1/3 of the days he used to work, it is likely that he could have sought further specific treatment such as treatment from GP’s/ orthopaedic specialist/ physiotherapist/ bonesetters etc. There was no evidence suggesting he had sought further treatment.

- Considering the evidences reviewed and findings at this assessment, Dr. Lam estimates that Mr. Chau should be able to resume his previous job as a full-time (about 5-6 days a week) taxi driver if he wishes to; however, he would probably need more short breaks for rest after prolonged driving, say, preferably after 2 hours or so; his endurance and working capacity would be decreased.”

*Factual findings*

1. The plaintiff’s testimony on the extent of his injuries and the residual pain and impairment still presently suffered by him is not subject to any challenge as the defendant has not been present in these proceedings save for the lodging of the acknowledgment of service at the beginning of the action.
2. I accept his factual case in full. The plaintiff gave testimony in a clear and straightforward manner. He was able to explain credibly the difficulties in resuming his work as a taxi driver after the assault incident and why he could only work about two to three days a week. The explanation is inherently plausible.
3. Furthermore, in his oral testimony, the plaintiff was forthcoming about the traffic accident in August 2018 and its impact on his working ability. Such evidence would likely adversely affect the quantum of his claim in this action. Nevertheless, he was not evasive about it and was prepared to answer questions without reservation.
4. Dr Lam appeared to be harbouring some doubt about his working ability, as alleged by the plaintiff. However, it should be borne in mind that there were practical considerations affecting the plaintiff’s ability to work, which were not within the knowledge of Dr Lam (eg, the availability of taxis for hire in the plaintiff’s special situation).
5. Separately, I accept Dr Lam’s evidence and find that the plaintiff’s injuries and his symptoms were caused by the assault incident and were not attributable to the pre-existing degenerative changes or the earlier traffic accident in May 2015.
6. Based on these factual findings, I now turn to each head of claim.

*PSLA*

1. Having considered the authorities cited by the plaintiff, namely *Fu Hoi Lin v Tsoi Kam Ching* [2019] HKDC 488; *Yip Kwok Man v Chan Kim Kwan* [2018] HKDC 693; and *Muhammad Riaz Khan v Commissioner of Correctional Services* DCPI 2039/2013, 29 September 2017, I allow a sum of $120,000 for PSLA.

*Loss of earnings*

1. I consider a sick leave period of about two months is reasonable. The plaintiff is entitled to claim his loss of earnings in full for this period. After that, I have found that he was earning on average $10,000 a month from October 2015 to August 2018.
2. He has therefore suffered a monthly loss of $14,000 for that period. Mr Timmy Yip, counsel for the plaintiff, confirmed at today’s hearing that in light of the latest traffic accident, the plaintiff no longer claims any loss of earnings after August 2018. That would include any future loss of earnings. The plaintiff is entitled to the sum of $524,000 for loss of earnings, calculated as follows:-

[$24,000 x 2 months] + [($24,000 - $10,000) x 34 months]

*Loss of earning capacity*

1. In light of the plaintiff’s age, his residual disabilities caused by the assault and also having regard to the latest traffic accident, I allow a sum of $20,000 for loss of earning capacity under this head.

*Special damages*

1. I allow a sum of $945 for medical expenses. The expenses are documented in the statement of account issued by the Hospital Authority.
2. The plaintiff incurred travelling expenses to attend medical treatment and follow-up sessions. He is entitled to claim a sum of $3,880 for travelling expenses.
3. The plaintiff makes a claim for $12,000 in respect of tonic food. He has not produced any receipt or itemised the expenditure. There is no evidence on the suitability of tonic food in respect of his injuries. In the circumstances, following *Yu Ki v Chin Kit Lam* [1981] HKLR 419 (at 421), I consider that it is proper to award a sum of $3,000 for tonic food.
4. When he was assaulted, the plaintiff’s mobile phones were damaged and he suffered a loss of $4,800. He is entitled to that amount.
5. In sum, I award a sum of $12,625 for special damages.

*Summary*

1. The total award, excluding interest, is $676,625, as tabulated below:-

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| --- | --- |
| PSLA | $120,000 |
| Pre-trial loss of earnings | $524,000 |
| Future loss of earnings | $0 |
| Loss of earning capacity | $20,000 |
| Special damages | $12,625 |
| **Total** | **$676,625** |

1. Interest should accrue at 2% per annum on the general damages from the date of the writ to today, and at half the judgment rate on the special damages from 17 August 2015 to today; and, in each case, after that at judgment rate until payment.

*Conclusion*

1. Accordingly, damages be assessed in the sum of $676,625, together with interest.

*(Submissions on costs)*

1. I further order that the plaintiff do have costs of the assessment, which should be assessed on the District Court scale from the commencement of the action. I grant a certificate for counsel.
2. The plaintiff’s solicitors having waived their right under Order 62, rule 9C(1)(b) of the Rules of the District Court, the plaintiff’s costs for the whole action are summarily assessed at $330,000.
3. The plaintiff’s own costs are to be taxed in accordance with the Legal Aid Regulations.

( Winnie Tsui )

District Judge

Mr Timmy C H Yip, instructed by Yu & Associates, assigned by the Director of Legal Aid, for the plaintiff

The defendant, acting in person, was absent