## DCPI 988/2016

[2019] HKDC 230

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 988 OF 2016

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BETWEEN

NG KAI HO Plaintiff

and

WONG KING FAI trading as WING TAK 1st Defendant

CONSTRUCTIONS AND ENGINEERING

（王經輝經營永達建築材料）

WONG MING HO 2nd Defendant

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Before: Deputy District Judge Rebecca Lee in Court

Date of Hearing: 11 February 2019

Date of Handing Down Assessment of Damages: 6 March 2019

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ASSESSMENT OF DAMAGES

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*A. Background*

1. The plaintiff (born on 4 May 1975) claims damages for personal injuries arising from an accident at work on 5 June 2013.
2. At the material times, the plaintiff was employed by the 1st defendant as a driver-cum-manual worker. The 2nd defendant is the father of the 1st defendant having the management and control of the 1st defendant’s business.
3. It is pleaded that on 5 June 2013, the plaintiff was instructed to drive a medium goods vehicle to deliver his fellow workers to Plover Cove Garden, 3 Plover Cove Road, Tai Po, New Territories, Hong Kong, to carry out works related to demolition of structure and to dispose of the refuse thereafter. The plaintiff was to park the vehicle at the loading area and his fellow workers would load the refuse onto the cargo compartment of the vehicle. The plaintiff would have to lift baskets of refuse and to move the refuse inside the cargo compartment. [A49]
4. At about 5pm on the day in question, the plaintiff’s forearm was hit by parts from a broken toilet urinal which fell off from a pile of refuse placed by his fellow workers (“the Accident”). He was granted sick leave from 5 June 2013 to 7 July 2014 (approximately 13 months) as a result of the Accident.
5. Interlocutory judgment on liability was entered on 31 August 2018 against the 1st and 2nd defendants with damages to be assessed.
6. The related Employees Compensation Case under DCEC 969 of 2015 has been settled on 1 August 2017 at HK$111,066.80.

*B. Issues*

1. As submitted by Counsel for the plaintiff, the plaintiff’s claim is categorized as follows:-

(a) PSLA in the sum of HK$200,000.00 (as supposed to HK$250,000.00 claimed under the Statement of Damages);

(b) Pre-Trial Loss of Earnings for 7 months’ salary at HK$16,250.00 per month (instead of 8 months’ salary claimed under the Statement of Damages);

(c) Loss of Earning Capacity for 6 months’ salary at HK$16,250.00 per month; and

(d) Special Damages for:

(i) Medical Expenses in the sum of HK$1,500.00 (as supposed to HK$27,140.00 claimed under the Statement of Damages);

(ii) Travelling Expenses in the sum of HK$1,000.00; and

(iii) Expenses on Nourishment and Tonic Food in the sum of HK$5,000.00.

1. It is common ground that the plaintiff has received a sum of HK$55,000.00 from the defendants on 10 June 2013. The said sum was deducted from the settlement sum of HK$111,066.80 under DCEC 969 of 2015. [A111B – C]
2. The parties have jointly appointed Dr Tio Man Kwan, Peter as the single orthopaedic expert.
3. The gist of the Defence case is that the plaintiff has worked for employers other than the defendants (including a firm or company called Sun Fat) before the sick leave period expired in July 2014.
4. It is common ground that the plaintiff has resumed working for the defendants in August 2013 until February 2014 (ie a period of 6 months).
5. The defendants contend that the plaintiff should not be entitled to any damages for PSLA. The defendants’ case is that the plaintiff was able to resume working for the defendants 2 months after the injury, and the plaintiff did not complain about pain and discomfort at all, and carried out manual duty as he did before the Accident.
6. For Pre-Trial Loss of Earnings, the defendants said that the plaintiff should not be allowed to claim the full 7 months’ loss (13 months sick leave less the 6 months the plaintiff resumed working for the defendants) as he has worked for other employer(s) during the 13 month sick leave period.
7. For Loss of Earning Capacity, the defendants’ stance is that no award should be made.
8. On Special Damages, the defendants insisted that the sum of HK$55,000.00 the plaintiff received on 10 June 2013 should have “covered everything”.
9. The main dispute is whether the plaintiff did work for employers other than the defendants during the sick leave period.

*C. Evidence*

*C.1 Medical Evidence*

*C.1.1 Injuries and Treatments*

1. The plaintiff attended the Accident & Emergency Department of Alice Ho Miu Ling Nethersole Hospital (“AHMLNH”) on 5 June 2013. Physical examination revealed a 3cm laceration on the left arm. No neurovascular deficit was noted. He was then admitted to the Orthopaedic ward of AHMLNH where 60% cut of flexor carpi radialis (FCR) tendon at musculotendinous junction was revealed and repaired. Splint was fitted after the operation.
2. The plaintiff was discharged from AHMLNH the following day, ie on 6 June 2013.
3. He was referred to the physiotherapy department at United Christian Hospital (“UCH”) on 15 July 2013. He defaulted treatment after 31 July 2013. [A129]
4. He was referred to occupational therapy department at AHMLNH on 23 September 2013 for work capacity evaluation.
5. During the intake assessment on 28 October 2013, the plaintiff claimed that he did not have sufficient strength to resume work as his job as driver and material handler requires (a) driving truck with capacity of more than 3 tones; (b) loading and unloading construction wastes such as concrete by hand up top 45 kg and (c) transferring construction waste such as concrete by hand up to 45 kg.
6. Mr Patrick K Chan, the occupational therapist conducted the evaluation, noted that during the rapid alternate grip test, the plaintiff had “significant inconsistent performance and submaximal effort”. Mr Chan was unable to comment on his work capacity performance [A132].
7. On 16 July 2015, the plaintiff was assessed to have suffered from 3% loss of earning capacity for “left forearm laceration resulting in left forearm pain, stiffness and weakness” by the Medical Assessment Board [A149-150: Form 7 dated 30 July 2015]. The Board maintained the same assessment at the review held on 4 February 2016 [A151-152: Form 9 dated 18 February 2016].
8. The Medical Assessment Board certified the sick leave from 5 June 2013 to 7 July 2014.

*C.1.2 Orthopaedic Expert*

1. The plaintiff was examined by Dr Tio Man Kwan, Peter, single joint orthopaedic expert appointed by the parties, on 29 March 2017 (about 2 years and 9 months after the Accident). Dr Tio compiled an expert report dated 18 April 2017 [A134-141].
2. The plaintiff told Dr Tio that his left forearm was hit by parts from a broken toilet.
3. Under “Personal and Past Health History”, Dr Tio stated the following:-

“(a) He is *right handed*;

(b) At the time of the accident he had been a *13T lorry driver mainly for delivering rubbles* for more than 10 years. Apart from driving, he also had to do manual work like handling basketful of rubbles. *Maximal weight would be 50kg.* 80% manual work and remaining 20% driving. He was working from 7:30am to 6:30pm for 6 days a week.

(c) He resumed duty 2-3 months after injury. He was driving only. Manual work was done by a helper. He continued driving for 8 months till he was fired. It was because he was asked to do manual work by his boss and he refused. He then worked part-time for 1 year with similar duty. He was working 1-2 days a week. Lifting was needed occasionally. He then worked as *private car driver* for 2 weeks. He then became a *10T lorry driver* for 3 months, *driving only, no manual work*. For the past year, he has been a *24T lorry driver, driving only, no manual work, working 12-13 hours a day for 6 days a week*.”

(emphasis added)

1. The complaints made by the plaintiff at the examination were:-

“(a) Numbness around scar with sense of discomfort.

(b) Left hand weakness.

(c) No pain.

(d) He is independent with activities of daily living. He is able to take public transport. However, he avoids using this left upper limb. *The maximal weight he can lift is around 30kg*. Moreover, he is unable to resume sports, but he cannot explain why.”

(emphasis added)

1. Dr Tio’s examination of the plaintiff’s left upper limb shows:-

“(a) 6 cm oblique scar over volar aspect of mid forearm, well healed.

(b) Tenderness at scar over flexor carpi radialis (FCR) area.

(c) No adhesion to underlying tissue.

(d) No scar pain.

(e) 50% reduction in sensation to touch over volar forearm and distal to scar.”

1. Dr Tio opines the diagnosis of left forearm laceration with tendon cut (60% cut of FCR tendon) was compatible and consistent with the mechanism of the injury given by the plaintiff. The treatments the Plaintiff received were reasonable and appropriate.
2. Dr Tio found full range of motion of the left upper limb. Examination of his left forearm revealed a well healed 6 cm scar over volar aspect associated with tenderness at scar over FCR area. *No obvious left hand weakness* was detected in the handgrip examination and there was *no muscle wasting of the left upper limb*. (emphasis added)
3. Dr Tio opines that his residual scar discomfort and sensory deficit are compatible with post laceration status. The plaintiff has reached maximal medical improvement and does not need any further active treatment.
4. Dr Tio concludes:-

“For his current condition, he should be able to resume his pre-injury job as lorry driver cum manual worker. However, with residual left forearm scar discomfort, he is expected to have *reduction in work efficiency and capacity chiefly on heavy manual work or when he has to operate vehicles fitted with manual fear*. His present job that involves driving a lorry only and no manual work is a suitable alternative.”

(emphasis added)

1. Dr Tio considered sick leave granted reasonable and appropriate. Dr Tio assessed the impairment of whole person and loss of earning capacity both at 4%.

*C.2 Factual Witnesses*

*C.2.1 The Plaintiff*

1. The plaintiff confirms his witness statement as his evidence in chief.
2. He maintained his version of events under cross examination. He was adamant that he did not work for other employers (including Sun Fat) during the sick leave period. He also said that he has complained to the defendants about pain after he resumed working for them in August 2013.
3. I questioned the plaintiff about his “significant inconsistent performance and submaximal effort” in performing the rapid alternative grip test during the occupational assessment on 28 October 2013.
4. The plaintiff explained that he has tried his best but he was unable to do so.
5. He was also questioned as to why he defaulted physiotherapy treatment after 31 July 2013.
6. His explanation was that he was asked by the defendants to resume working on 5 August 2013.

*C.2.2 Defence Witnesses*

1. The defendants called two witnesses: Mr Tse Ka Yuk (manual worker employed by the defendants) and Mr Wong King Sin (younger son of the 2nd defendant who runs the day to day business of the 1st defendant). Both of them confirmed their 2 respective witness statements as their evidence in chief.

*C.2.2.1 Mr Tse*

1. Mr Tse testified that he and Mr Wong saw the plaintiff working for another company called Sun Fat in Sai Wan after the plaintiff left the defendants’ employment in February 2014 while he was still under sick leave (ie before 7 July 2014). Mr Tse said that when he and Mr Wong were travelling on a moving vehicle, he saw plaintiff working on a lorry with Sun Fat’s name on it.
2. Mr Tse also testified that he has made inquiry with Mr Tsang, the owner of Sun Fat, during a subsequent telephone conversation some months afterwards. He was told by Mr Tsang that the plaintiff has worked for Sun Fat for 3 months.
3. Mr Tse came up with several versions as to when exactly he saw the plaintiff working for Sun Fat.
4. He did not mention the date or month in his 2 witness statements [A124-127]. When cross-examined by Counsel for the plaintiff, he said that it was one month after the plaintiff left the defendants’ employment, which would have been March 2014.
5. During further cross examination, he said it was “approximately 6 months after the plaintiff left the defendants’ employment, more than 5 months”. That would have been August 2014, after the sick leave has expired.
6. In re-examination, he changed to 3 or 5 months (三丶五個月) and then 3 months or so (三幾個月). It could be anytime in May 2014 to July 2014.
7. At the end he said that he was not sure during which month he saw the plaintiff, and that he wanted to ask Mr Wong for clarification. However, he maintained that it should not be too long after the plaintiff left the defendants’ employment in February 2014.

*C.2.2.2 Mr Wong*

1. Mr Wong confirms that the plaintiff was paid HK$55,000.00 on 10 June 2013 and was asked to resume working for the defendants in August 2013.
2. He agreed that it was his (or defendants’) subjective view that the plaintiff should be able to resume working 2 months after the Accident.
3. Mr Wong testified that he saw the plaintiff working for other employers one month after the plaintiff encountered the Accident, ie July 2013. He said he saw the plaintiff working on a truck in Wan Chai while he was travelling on his own truck. Mr Tse was not present on this occasion.
4. Mr Wong noted that the plaintiff was doing manual work at the time.
5. When being cross-examined by Counsel as to why he asked other workers to assist the plaintiff in doing manual work when he resumed working on 5 August 2013 if the plaintiff was, according to him, able to perform manual work in July 2013, Mr Wong said that the plaintiff complained about pain.
6. However, when being further questioned by Counsel, Mr Wong said that he could not recall whether the plaintiff has complained about pain, and that he simply “let the workers sort out the workload amongst themselves”.
7. Mr Wong also testified that in March 2014, he and Mr Tse, while travelling in a vehicle in Sai Wan, he saw the plaintiff for a second time. The plaintiff was working on a truck (doing manual work) for some other employer.
8. That was supposedly the same occasion when Mr Tse said he saw the plaintiff working for Sun Fat in Sai Wan.
9. However, the timing of March 2014 was not mentioned in Mr Wong’s 2 witness statements. He also did not mention the name Sun Fat. He only stated “I knew he keeps on working for someone else”/“本人亦知道他有繼續在外工作”in his statement [A121].
10. He said that he did not think the timing of March 2014 is a piece of important information.

*C.3 Analysis of Evidence*

*C.3.1 Medical Evidence*

1. Dr Tio is jointly engaged by the plaintiff and the defendants. The defendants agreed to the 4% assessment by Dr Tio on loss of earning capacity and whole person impairment.
2. Their only comment is that Dr Tio’s examination was conducted almost 3 years after the Accident, which made the expert’s opinion “seem insignificant” / “好似沒有代表性”.
3. The defendants did not raise any issue in relation to the other medical evidence relied on by the plaintiff during the hearing.
4. The defendants’ stance is that the plaintiff was well enough to resume working for them in August 2013 and he was able to perform manual duty as before. It is repeatedly said by the defendants that the plaintiff was working for other employer(s) during the sick leave period and thus his injury should not be a serious one.
5. However, the defendants did not come up with evidence contradicting Dr Tio’s report and the other medical evidence.
6. Considering all the evidence before me, I see no reason not to accept Dr Tio’s expert opinion as stated in his report dated 18 April 2017 and the other medical evidence relied on by the plaintiff in proving the extent of the plaintiff’s injury.
7. I am satisfied that the plaintiff did suffer the injury as described by Dr Tio and accepts Dr Tio’s opinion.

*C.3.2 Evidence of Witnesses*

1. The plaintiff’s evidence has all along been consistent. The available medical evidence shows the extent of his injury and the number of treatments he attended.
2. I have some concern over the remarks made by Mr Patrick K Chan, the occupational therapist of AHMLNH, on the plaintiff’s “significant inconsistent performance and submaximal effort” in the rapid alternative grip test, as well as the fact that he has defaulted physiotherapy treatment after 31 July 2013.
3. The plaintiff said that he has tried his best in performing the test. He also explained that he defaulted physiotherapy treatment because he was asked by the defendants to resume working in August 2013, which is agreed by Mr Wong.
4. As submitted by his Counsel, Dr Tio did not make any adverse comments about those remarks made by Mr Patrick K Chan. There is also no suggestion by Dr Tio that the failure to continue physiotherapy treatment had affected the plaintiff’s recovery and seriousness of the residual discomfort.
5. As I have accepted Dr Tio’s expert opinion, I see no reason to doubt the plaintiff’s explanations in these respects.
6. What is more important for the purpose of this hearing is whether the plaintiff had worked for other employer(s) during his sick leave period (5 June 2013 to 7 July 2014).
7. The first period was July 2013 when Mr Wong said he saw the plaintiff working on a truck and doing manual work in Wan Chai.
8. Mr Wong also said that the plaintiff was able to carry out manual work when he resumed working for the defendants in August 2013. Despite that, Mr Wong has asked his other workers to help out the plaintiff to carry out such duty.
9. Mr Wong at one stage mentioned that the plaintiff complained about pain. But he subsequently said that he could not recall whether the plaintiff did complain about pain.
10. The medical record [B198] shows that the plaintiff had his splint removed on 15 July 2013.
11. I agree with Counsel for the plaintiff that it is quite unlikely that the plaintiff was able to do heavy manual work in July 2013 as alleged by Mr Wong.
12. In the light of the medical evidence, and on balance of probabilities, it is more likely than not that the plaintiff was not able to carry out heavy manual work as at July 2013.
13. Considering all the evidence, I find that the plaintiff was not working for other employer(s) in July 2013.
14. The second period was when Mr Tse and Mr Wong saw the plaintiff working on a truck bearing the name of Sun Fat in Sai Wan.
15. As discussed above, Mr Tse has come up with several versions of when exactly he saw the plaintiff working for Sun Fat. It spanned from March 2014 to August 2014.
16. Mr Tse kept changing his answers no doubt with a view to fitting the time within the sick leave period.
17. I find Mr Tse not a reliable witness and do not accept his evidence.
18. Mr Wong’s evidence is not satisfactory in this regard. He only came up with March 2014 when giving evidence in court (after Mr Tse). He did not mention any date or time in his 2 witness statements.
19. I too find Mr Wong not a reliable witness and do not accept his evidence.
20. In any event Mr Tsang of Sun Fat was not called as a witness, nor was there any documentary evidence to support the defendants’ assertion that the plaintiff has worked for Sun Fat for 3 months during the sick leave period.
21. As noted by Counsel for the plaintiff, no valid explanation was offered by the defendants for their failure to produce such evidence.
22. In the circumstances, the Court is unable to determine whether the plaintiff did work for Sun Fat (for 3 months or at all) during the 13 month sick leave period.
23. Considering all the evidence, I find that the plaintiff did not work for any employer (including Sun Fat) other than the defendants during the 13 month sick leave period.

*D. Damages*

*D.1 PSLA*

1. Counsel for the plaintiff submitted that a sum of HK$200,000.00 is reasonable by relying on the following authorities:-
2. *施仲霖 對 許耀棠經營許耀棠裝修工程*, DCPI 1541 of 2010, 31 January 2012 (PSLA awarded at HK$120,000.00 for multiple flexor tenders cut at the right wrist with neurovascalur bundle intact);
3. *Bitto v Cheng How Kiu t/a Union Travel Company*, HCPI 823 of 2008, 8 March 2010 (PSLA awarded at HK$250,000.00 for left forearm laceration wound resulting in 70% cut of ulnar artery, complete cut of flexor carpi ulnaris tendon and 90% cut of flexor digitorum profundus tendon to little finger); and
4. *Amar v Wong Chui Yi*, DCPI 1696 of 2008, 14 December 2009 (PSLA awarded at HK$180,000.00 for complete cut of right flexor carpi radialis and partial cut flexor digitorum superficialities).
5. Counsel agreed that the injuries in *Bitto* are far more extensive than the plaintiff’s and is not a suitable reference for the purpose of this assessment.
6. It is submitted that the plaintiff’s injuries are similar to those in *施仲霖* and *Amar* is a useful guidance.
7. The plaintiff is right handed. He suffered 60% cut of the FCR tendon on the left forearm. The plaintiffs in *施仲霖* and *Amar* are both right handed and suffered right hand injuries.
8. Considering all the evidence and the authorities cited, I find a reasonable award for PSLA in this case to be HK$150,000.00.

*D.2 Pre-Trial Loss of Earnings*

1. At the material time the plaintiff was working as a driver-cum-manual worker earning HK$16,250.00 per month (HK$650 per day x 25 days).
2. The said monthly earnings were consistent with the List of Earnings filed by the defendants under DCEC 969 of 2015 [A111A].
3. The plaintiff was granted sick leave from 5 June 2013 to 7 July 2014 (13 months). The plaintiff’s case is that he returned to work for the 1st and 2nd defendants from August 2013 to February 2014 (6 months) earning the same salary as before.
4. The plaintiff claims Pre-Trial Loss of Earnings for 7 months’ earnings at HK$16,250.00 per month. Loss of MPF is not claimed.
5. As I do not accept the evidence of Mr Tse and Mr Wong that the plaintiff had for employers other than the defendants during the 13 month period, I find that the plaintiff did suffer Pre-Trial Loss of Earnings for 7 months as claimed.
6. I award Pre-Trial Loss of Earnings in the sum of HK$113,750.00 [HK$16,250 x 7].

*D.3 Loss of Earning Capacity*

1. Loss of Earning Capacity is claimed at HK$97,500.00 being 6 months loss of earnings at HK$16,250.00.
2. Dr Tio in his report [A137] noted that the plaintiff has worked as a private car driver, a 10T lorry driver with no manual work and a 24T lorry driver with no manual work.
3. As noted by Dr Tio in his report, according to the plaintiff, the maximal weight he can lift is around 30 kg [A138].
4. Dr Tio found no obvious left hand weakness and no muscle wasting of the left upper limb [A140].
5. Dr Tio opined the plaintiff may suffer reduced work efficiency and capability “chiefly on heavy manual work or when he has to operate vehicles fitted with manual gear”.
6. Considering the evidence as a whole, I do not see there is any disadvantage suffered or likely to be suffered by the plaintiff in the labour market. He is able to secure driving jobs ranging from private car to 24T lorry (with no manual work). In any event, he himself said that he could lift weight up to 30kg.
7. The claim for Loss of Earning Capacity is disallowed.

*D.4. Other Special Damages*

1. The plaintiff claims the sums of HK$1,500.00 for Medical Expenses, HK$1,000.00 for Travelling Expenses and HK$5,000.00 for Tonic Food and Nourishment.
2. The plaintiff is only able to produce one receipt [A164-165] for hospitalisation on 5 June 2013 (in the sum of HK$100.00) and one receipt [A166] for follow-up treatment /consultation on 17 June 2013 at AHMLNH (in the sum of HK$60.00).
3. The plaintiff’s evidence is that he attended a total of 11 follow up treatments and was hospitalised for 2 nights.
4. The same is not contested by the defendants.
5. Counsel for the plaintiff submitted Medical Expenses in the sum of HK$1,500.00 is reasonable, as they should have covered hospitalization, follow up treatments and consultations as well as medication.
6. Considering the number of follow-up visits and the length of hospitalization, the sum of HK$1,500.00 claimed is reasonable and I shall so award.
7. As for Travelling Expenses, since the plaintiff had to travel to AHMLNH in Tai Po from his residence in Kowloon Bay, I agree that the sum of HK$1,000.00 claimed is reasonable and I shall so award.
8. The plaintiff’s claim of HK$5,000.00 for Nourishment and Tonic Food is not supported by any evidence. While there may be some benefit to his recovery, I do not see that it warrants HK$5,000.00.
9. I shall award a sum of $1,000.00 for Nourishment and Tonic food.
10. Total award for Special Damages is therefore:-

HK$1,500 + HK$1,000 +HK$1,000 = HK$3,500.00.

*E. Summary*

1. Damages assessed to be payable by the 1st and 2nd defendants to the plaintiff is summarised as follows:-

Items Amount (HK$)

PSLA 150,000.00

Pre-Trial Loss of Earnings 113,750.00

Loss of Earning Capacity NIL

Special Damages 3,500.00

267,250.00

LESS: DCEC 969 of 2015 compensation (111,066.80)

156,183.20

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1. I award damages to the plaintiff in the sum of HK$156,183.20, together with interest on damages for PSLA from date of writ to date of judgment at 2% per annum and interest on the Pre-Trial Loss of Earnings and Special Damages at half of the judgment rate from date of Accident to date of judgment. Interest at judgment rate is to be paid on the net amount of HK$156,183.20 from judgment until payment.
2. Costs of the plaintiff in respect of the assessment, including all costs reserved (if any), shall be paid by the 1st and 2nd defendants, with Certificate for Counsel and to be taxed at District Court scale if not agreed. The plaintiff’s own costs is to be taxed in accordance with the Legal Aid Regulations.
3. As the defendants are not legally represented, I order that an interpreter be present when judgment is handed down.

( Rebecca Lee )

Deputy District Judge

Mr Damian Wong, instructed by LKC Lawyers, for the plaintiff

The 1st and 2nd defendants were not represented and were acting in person.