DCPI 1068/2019

[2019] HKDC 1321

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1068 OF 2019

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BETWEEN:

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| TO KA WONG (杜家旺) | Plaintiff |
| and |  |
| WORLD GOLD INTERNATIONAL LIMITED (威金國際有限公司) | 1st Defendant |
| EMPLOYEES COMPENSATION ASSISTANCE FUND BOARD | 2nd Defendant |

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| Coram: | His Honour Judge Harold Leong in Court |
| Date of Hearing: | 18 and 19 September 2019 |
| Date of Assessment of Damages: | 3 October 2019 |

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ASSESSMENT OF DAMAGES

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1. This is a personal injuries claim regarding an accident at work. Default judgment was entered against the 1st defendant (on 19 April 2017), which was since ordered by the court to be wound up. The Employees’ Compensation Assistance Fund Board has applied to intervene as the 2nd defendant on 2 May 2017.
2. The corresponding employees’ compensation has been settled. The total EC award received was HK$273,800.

*Background*

1. The accident happened on 8 October 2013 and the plaintiff, a waste-recycling worker who was 56 at the time, was crushed under a large load of re-cycling material inside a container.
2. The plaintiff was admitted to A&E at Tuen Mun Hospital and he was founded to have suffered multiple rib fractures, multi-level transverse process vertebral fractures (with unstable double column fractures involving L1 and L3), sternum fracture, bilateral lung contusion with small pneumothoraxes and a small left pleural effusion, a small haematoma / oedema under the sternum fracture, and superficial lacerations to the left scalp and left side of the face.
3. His pneumothoraxes were treated by bilateral chest drains and lacerations were sutured. He was admitted to ICU. Fractures were treated conservatively. During the admission, he developed the complication of rhabdomyolysis and acute renal failure. He recovered and was discharged after 22 days with a walking stick and a spinal support.
4. After discharge, the plaintiff underwent 12 sessions of occupational therapy and was followed up as an outpatient until October 2014. His sick leave expired on 14 October 2014. He has not returned for any further follow-ups or sought medical treatment since.
5. The plaintiff was examined by orthopaedics experts Dr. Lam Chi Keung, Johnson and Dr. Wong See Hoi on 27 July 2017. The experts were in broad agreement that the plaintiff had made good recovery from his injuries. His daily living activities were not affected. Although he subjectively complained of various pains in lower back, chest and on the scars, he was not taking any pain-killers. There was no objective sign to support severe pain and simulation tests were positive, indicating symptoms exaggeration. X-rays showed fractures healed at L1 and L3 with mild to moderate compression of the vertebral body.

*PSLA*

1. The plaintiff claimed HK$600,000 under this claim which is within the “serious category”. The 2nd defendant argued that this should be HK$400,000.
2. I have no doubt that the plaintiff has suffered a serious injury involving multiple fractures and multiple organ injuries, and his recovery was also complicated. But he has, nevertheless, made a good recovery. Of course, the lack of objective evidence and positive simulation tests does not necessarily mean that the plaintiff suffers no residual symptoms, it only means that his subjective complaints may be unreliable. Overall, the plaintiff may still have some residual symptoms but I do not think that these are severe, otherwise he would have sought medical treatment.
3. Despite his relatively satisfactory recovery, I find that the plaintiff has suffered a serious initial injury causing multiple fractures and organs injuries. His recovery was also complicated (acute renal failure) and required a rather lengthy hospitalisation. Overall, I think this would be a case in the lower end of “serious injury” category.
4. Both counsels have helpfully provided with “multiple injury” cases which might point towards the range of awards. No two cases are alike but I think this case is far less serious that *Phoon Ka Wai v Wong Ka Chung and Anor* HCPI 768/2003 (which required “a series of operations” and much longer hospitalisation) but more serious than *Chan Chi Ming v Sze Hing Sang* HCPI 531/2011 (which was another case of multiple rib and transverse process vertebral fractures, but with less complications and hospitalization time).
5. I agree with Ms. Tjia, counsel for the plaintiff, that the range for “Serious Injuries” in July 2019 should lie between HK$566,000 and HK$764,000 taking the 2018 figure published in Personal Injury Tables Hong Kong 2019 and taking into account the inflation rate up until July 2019.
6. As such, I think the plaintiff’s claim of HK$600,000 puts it in the lower end of “serious category” and is therefore reasonable.

*Loss of earnings and MPF*

1. There was no dispute that the plaintiff’s daily wage was HK$700 plus HK$40 as food allowance as stated in Form 2 (Trail Bundle page 148).
2. However, Form 2 was ambiguous: on one hand, under the title (as I translate) “Details of employee’s income”, for “average working days per month” there was a tick under “26”. This would have made the plaintiff’s monthly salary HK$740 x 26 = HK$19,240. This is the plaintiff’s claim.
3. However, under the section which stated (as I translate), “the average monthly income in the past 12 months…”, it was stated “work for 16 days plus 4 hours of overtime, total HK$12,240 per month”. The 2nd defendant argued that this should be the figure to use.
4. Although we have no witness from the 1st defendant to explain this discrepancy, I agree with Ms. Tjia that the latter must be an erroneous entry: there is a document from the 1st defendant setting out the calculations of employee’s compensation under section 10 of the ordinance and this was clearly based on salary of 26 (and not 16) working days per month. The 1st defendant’s bank statements showing the periodic payment also support this. Ms. Tjia has further demonstrated that the employees’ compensation settlement sum was also based on the figure of monthly salary of HK$19,240 and not HK$12,240. This was, of course, at the time when the 1st defendant was represented by a law firm so there is no reason to suspect that the figure has not been properly assessed.
5. The other dispute concerned with whether the court should allow MPF claimed by the plaintiff. The 2nd defendant argued that the plaintiff’s previous employers had never paid for MPF so one might expect that the plaintiff similarly would not be able to obtain this in future employments.
6. However, I think that the plaintiff is entitled by law to obtain MPF and he, indeed, can take action against employers for such recovery. The fact that the plaintiff’s previous employers have all broken the law does not mean that the court should penalise the plaintiff by suggesting that future employers would break the law too.
7. The plaintiff’s pre-injury employment at the recycling yard required him to load various material onto pellets and to stack such to a certain height before wrapping the material with plastic film. The recycled material could be of various sizes and weights (including, as the plaintiff told the court, small fridges or TVs). This is a physically demanding work. Both experts did not think that the plaintiff could perform heavy manual duties after the accident, so I think it unrealistic that the plaintiff could return to his previous job.
8. The plaintiff has not worked since the accident but both experts agreed that the plaintiff could perform more sedentary jobs. I am not convinced that he has made any reasonable attempt to look for work after the sick leave period expired. He claimed in court that he had looked for a job as a cleaner in the local shopping mall but was refused on the basis of his age. This alleged attempt pre-dated his witness statement but there was no mention of such there. And if this actually happened at all, it would be his first attempt to seek a job after the expiry of his sick leave some 3 years ago.
9. His other two “attempts” were an occasion when he took a course for working as a security guard (but he failed the licence examination), and another occasion when a friend asked him to come to meet someone (downstairs from his home) for a job as a casual worker in a construction site (which was unsuccessful because of his age, as he claimed).
10. I would think that 3 alleged attempts in some 5 years is not reflective of someone making any reasonable effort to obtain employment. The plaintiff’s wife had a part-time job. He also admitted that the reason why he was not looking for a job was because two of his children were now working and could help support the family.
11. During cross-examination, it was suggested to the plaintiff that with the nature of work in his previous employment, wear and tear on his back would mean that he would not be able to work until 65 years. The plaintiff agreed that once he reached 60 years, he would not have the strength to compete with the youngsters.
12. Further, there is also a question as to the real extent of the plaintiff’s residual symptoms after the injury. If he really has much concern about it (including any concern that such symptoms have been preventing him from finding a suitable job), one would expect that he would seek further medical treatment. But he has not done so for some 5 years since the sick leave expired.
13. After considering all the evidence, I would find that, even in the absence of the injury, the combination of deterioration of physical strength and children coming of age would mean that the plaintiff would retire by 60 (or by mid-August 2017) in any case.
14. The loss of earning (excluding MPF) by the plaintiff during his sick leave period (8 October 2013 to 14 October 2014, or about 12.2 months) should be HK$19,240 x 12.2 = HK$234,728
15. It would be reasonable to expect that the plaintiff might use 3 months to look for a job after the expiry of sick leave and should have obtained a job as a cleaner or equivalent around mid-January 2015 earning, say, HK$8,000 (roughly the salary of a general cleaner for the period of time) before retiring at 60 (around mid-August 2017 or in 31 months).
16. His loss of earnings (excluding MPF) until retirement would be HK$19,240 x 3 + HK$(19,240 – 8,000) x 31 = HK$406,160
17. His total loss of earnings including MPF would be: HK$(234,728 + 406,160) x 1.05 = HK$672,932.40
18. There will be no future loss of earnings since I find that the plaintiff would retire in any case by mid-August 2017.

*Loss of earning capacity*

1. This is to cater for any disadvantage of the plaintiff in the open labour market if he had looked for and found a sedentary job. I will allow HK$24,000 or 3 months of salary under this claim.

*Medical expenses*

1. This has been agreed at HK$3,400.

*Travel expenses*

1. I will allow a reimbursement of travel expenses of HK$1,000 which is reasonable under the circumstances.

*Tonic food*

1. The plaintiff has no receipts and it is not unusual for the court to allow something under this head of claim. I will allow HK$3,000 which is not unreasonable.
2. In summary, the quantum should be:

HK$

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| --- | --- |
| PSLA | 600,000 |
| Loss of earnings and MPF | 672,932.40 |
| Loss of earning capacity | 24,000 |
| Medical expenses | 3,400 |
| Travel expenses | 1,000 |
| Tonic food | 3,000 |
| Sub-total: | 1,304,332.40 |
| Less: EC award | (273,800.00) |
| Total: | **1,030,532.40** |

*Interest*

1. There be interest at 2% per annum for general damages from the date of the Writ to the date of trial and there be interest at half judgment rate per annum for special damages and loss of earnings from date of accident to date of trial.

*Costs*

1. There be an order *nisi* for costs of the action be to the plaintiff to be taxed if not agreed with certificate for counsel. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(Harold Leong)

District Judge

Miss Josephine Tjia, instructed by Cheung Fung & Hui, for the plaintiff

The 1st defendant is not represented and did not appear

Miss Susanna Leong, instructed by P C Woo & Co, for the 2nd defendant