DCPI 1197 / 2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1197 OF 2009

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BETWEEN

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| --- | --- | --- |
|  | POON CHUN LAM | Plaintiff |
|  | and |  |
|  | YIP FUNG TEXTILES COMPANY LIMITED  (in liquidation) | Defendant |

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

Coram: Before Master D. Ho in Court

Date of Hearing: 18th April 2013

Date of Judgment: 25th April 2013

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**ASSESSMENT OF DAMAGES**

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1. This is an assessment of the Plaintiff’s damages in a personal injury case.

1. The Defendant went into liquidation shortly after the Plaintiff was injured and joint and several liquidators have since been appointed. Leave was granted by Master Hui of the High Court for the Plaintiff to proceed with these proceedings against the Defendant on 1st March 2010. No notice of intention to defend having been given, interlocutory judgment on liability was entered on 20th December 2011 with damages to be assessed and costs.

1. Being satisfied that due notice of the hearing of assessment was given to the joint and several liquidators of the Defendant, I proceeded with the assessment.
2. The Plaintiff himself was the only person who testified at the hearing. He adopted as evidence in chief his two witness statements filed herein which were prepared by his solicitor and explained to him. He was medically examined by Dr. Johnson C. K. Lam, a specialist in Orthopaedics and Traumatology (“Dr. Lam”). Pursuant to the Order of Master S.P. Yip dated 28th January 2013, Dr. Lam’s medical report dated 16th March 2012 (“Report”) was adduced as evidence without calling the author to give evidence.
3. The Plaintiff was a supervisor at the Defendant’s textile factory when the accident took place during night shift on 28th April 2006. Around 3:30 a.m., while the Plaintiff was working on a textile machine, a metal rod fell off from the machine and hit the Plaintiff’s left foot. There was no bleeding but the Plaintiff had to take a rest due to severe pain. As the pain in the swollen foot escalated, the Plaintiff attended the accident and emergency department of United Christian Hospital around 6:00 a.m.
4. X-ray revealed a fracture of the first metatarsal of the Plaintiff’s left foot, which Dr. Lam found to be consistent with the mechanism of injury described by the Plaintiff. The Plaintiff was treated with a slab for immobilizing the left foot and was issued with two crutches for walking. The slab was kept for about 2 months. The Plaintiff was referred to and attended the orthopaedic clinic three times. Further X-rays showed the fracture to have healed. There was no referral for physiotherapy as the Plaintiff opted for self exercise at home.
5. The Plaintiff was granted sick leave until August 2006. Dr. Lam considered the duration of sick leave to be appropriate and endorsed the same. The Defendant went bankrupt during the Plaintiff’s sick leave. The Report records the Plaintiff to have told the author that after expiry of his sick leave, the factory was already bankrupt and he did not go back to work and that the he rested further and resumed work around 2009 working as a part-time cleansing worker.
6. When examined by Dr. Lam on 8 March 2012, the Plaintiff still complained of left foot pain during rainy days and with prolonged standing and walking. Analgesics were occasionally taken. Examination revealed local tenderness and mild stiffness in the right big toe at the MTP joint but motion of the other joints was otherwise normal. There was no muscle wasting in the calf and the degrees of wear and tear of the soles of both shoes were similar. X-ray showed the previous fracture to have healed with no significant displacement. Dr. Lam opined that a mild degree of residual pain and disability was probable. On the other hand, the Plaintiff should be independent in activities of daily living and should be able to return to his pre-accident employment with a mild reduction in work capacity so that he would probably need to take more short breaks during work.
7. According to his supplemental witness statement, the Plaintiff was advised by his treating doctor to take up jobs involving less physical labour upon expiry of sick leave. In the first 6 months, he attended about 5 to 10 interviews for watchman, cleansing and delivery worker posts. He failed all interviews and believed it had to do with his limitation in movement (行動不太自如). Towards the end of 2006, he enrolled for a 135-day full-time tiling/plastering/bricklaying course run by the Construction Industry Training Authority (“CITA”).
8. Having passed the assessment and upon referral by the CITA, the Plaintiff started working for a construction company on a trial basis on 15 March 2007. A salary of $11,250 per month was offered for the post. However, having worked for about half an hour, the Plaintiff felt pain in the left big toe and heel and the problem went worse when moving heavy objects up and down between different floors. The Plaintiff took short breaks before resuming work but saw no improvement. He tried for about an hour before his employment was terminated.
9. During his testimony, the Plaintiff explained how he failed to secure the tiling job. The work site was a building under construction and he was required to carry to an upper floor tiling materials including bags of sand weighing about 100 catties each. He did not have sufficient strength and dropped one bag of sand. The supervisor then terminated his employment. He did not look for other another tiling job as he felt that he was not fit for the job.
10. As a textile factory supervisor, the Plaintiff was also required to carry raw materials like yarns to the textile machine but the materials weighed only half as heavy and only a short distance on the same floor was involved. The tiling job that the Plaintiff failed to secure clearly involved much heavier physical labour.
11. During his testimony, the Plaintiff elaborated on his other job interviews. He said he failed to secure a delivery worker job (跟車) because the job would require carrying loads and he did not have enough strength for the same. As to cleansing worker jobs, he did not know why he failed to secure one but suspected it had to do with his age. He also said the interviewers could see him limping but no one had asked about his legs. After 6 to 7 failed attempts, he did not try looking for a job again until 2009.
12. According to his supplemental witness statement, the Plaintiff worked as a part-time cleansing worker at a public hospital at a daily rate of $500 between March and May 2009. He worked for about 10 days during that period. Since June 2009, he has been employed by a decoration company, initially as a cleansing worker up to the end of 2011 and thereafter as a tiling worker. According to the Revised Statement of Damages, the Plaintiff’s monthly income between June 2009 and May 2011 was $8,580, which was increased to $10,920 between May and December 2011 after the minimum wage legislation came into effect. As a tiling worker, his income has much improved since January 2012 and currently he can work about 20 days a month at a daily rate of $1,000.
13. In his testimony, the Plaintiff added that the demand for tiling workers had been high since the second half of 2011 and at times he would work the whole month. Now 60, he said he planned to work another 6 to 7 years as he had fully recovered from the injury.

**Pain and Suffering and Loss of Amenities (PSLA)**

1. Mr. Liu, Counsel for the Plaintiff, referred me to the following authorities:
2. Sin Fu Yan v. Cheung Kwok Leung & Ors., (DCPI 1081/2005), unreported, 20th April 2007

(ii) Lee Sze Wai v. Law Chi Kin (DCPI 44/2001), unreported, 10th May 2002

(iii) Yip Yuen Neung Shirley v. Lee Sze Wai t/a 蝦碌美食 (DCPI 2012/2008), unreported, 21st August 2009

(iv) Singh Chamkaur v. Richard Ethan Latker t/a Sino-Indian Trade Enterprises (DCPI 323/2009), unreported, 31st May 2012

(v) Wong Sam Mui, the administratrix of the estate of Tam Wan Loong, deceased v. Fan Yiu Sum trading as Fan’s Stevedores (HCA 1817/1994), unreported, 6th March 1995

1. In *Singh Chamkaur*, on or about 15 June 2006, the plaintiff was placing certain brick column onto a platform when the brick column fell down and hit his left foot causing fracture at the head of proximal phalanx of the left second toe. He briefly received occupational therapy and then physiotherapy between August and September 2006. His condition had reportedly improved by 70 to 80% by September 2006. $90,000 was awarded for PSLA.
2. In *Yip Yuen Neung Shirley*, the plaintiff sprained her right ankle at the entrance to a toilet on 5 March 2008. X-ray showed a fracture of the 4th metatarsal bone in the right foot. A short leg plaster was adminstered for 3 weeks while a course of physiotherapy was prescribed. Sick leave was granted up to 23 May 2008 when the Plaintiff was still having mild residual right ankle pain. Occasional intake of analgesic was necessary. She could no longer practise aerobics or step dance as she used to do and could not wear high heels. $100,000 was awarded under this head.
3. The plaintiffs in *Sin Fu Yan* and *Lee Sze Wai* suffered more serious injuries and were awarded $160,000 and $150,000 respectively. In *Wong Sam Mui*, the plaintiff’s right foot was struck and injured by some iron tubes causing fracture to the 2nd and 3rd right metatarsal bones and $50,000 was awarded in 1995.
4. Mr. Liu submitted that the present case lied somewhere between *Singh Chamkaur* and *Yip Yuen Neung Shirley* and, after taking into account inflation, the appropriate award should be $110,000. I agree and award $110,000 for PSLA accordingly.

Pre-trial Loss of Earnings

1. According to the employer’s return of remuneration and pensions filed by the Defendant, the Plaintiff’s total income for the year 2005/2006 was $97,006 so that his average daily income and monthly income would be $265.77 and $8,083.83 respectively. These figures form the basis of the Plaintiff’s claim for pre-trial loss of earnings in the Revised Statement of Damages as follows:
2. Loss during sick leave from 28 April 2006 to 7 August 2006 at $27,108.53 ($265.77 x 102 days);
3. Loss between 16 March 2007 to 16 June 2009 at $298,750 ($11,250 x 27 months less $5,000); and
4. Loss between 16 June 2009 to notional trial date (1 January 2013) at $62,715 (i.e. ($11,250 - $8,580) x 22.5 months + ($11,250 – 10,920) x 8).
5. As Dr. Lam found the sick leave granted to the Plaintiff to be reasonable, I have no problem awarding $27,108.53 as the Plaintiff’s loss during sick leave.
6. No claim is made for the period after expiry of sick leave up to the Plaintiff’s completion of the CITA training course in mid March 2007.
7. The problem is with the use of the monthly salary offered for the tiling job that the Plaintiff failed to secure in mid March 2007 as the basis for calculation of the Plaintiff’s loss during the periods in (b) and (c) above.
8. The general object of an award of damages is to compensate the plaintiff for the losses, pecuniary and non-pecuniary, sustained as a result of the defendant’s tort. The general principle is that the court should award that sum of money which will put the injured party in the same position as he would have been in if he had not sustained the injury, which can readily be applied in the case of pre-trial loss of earnings. See para. 28-07, *Clerk and Lindsell on Tort*, 20th Edition.
9. Here, the Plaintiff is effectively asking the Court to put him in an entirely different position, namely, a trained tiling worker who could have earned $11,250 per month, instead of the same textile factory supervisor’s position as he would have been in had he not sustained the injury. This is against the general principle and Mr. Liu, Counsel for the Plaintiff, cited no authorities in support of the contention.
10. It also appears that the tiling worker’s job that the Plaintiff tried to take up was one which involved a lot more physical labour than his pre-accident job. The job when performed in a building under construction required not just skills (for which the Plaintiff was trained) but also strength (which the Plaintiff lacks). The Plaintiff did not impress me as a man of strong build. That the Plaintiff dropped a bag of sand weighing 100 catties calls into question as to whether the Plaintiff was physically fit for the job even without the injury. There is no reason why the Defendant should be held accountable for the Plaintiff’s inability to take up a job for which the Plaintiff might not have been physically fit even before the accident.
11. Mr. Liu accepted that, by putting the Plaintiff in the same position as he would have been in had there been no injury, he would have lost his pre-accident job in any event as the Defendant went into liquidation even before the Plaintiff’s sick leave expired. Mr. Liu further accepted that the Plaintiff might have been unable to return to his pre-accident employment due to the decline of the local textile industry coupled with the economic downturn in 2008, which was unrelated to the injury. That the Plaintiff did not look for a similar job in the textile industry may well bear testimony to the possibly inevitable outcome.
12. Furthermore, the Plaintiff had a duty to mitigate his loss. Dr. Lam opined that the Plaintiff should be able to return to his pre-accident employment albeit with a mild reduction in work capacity. In his testimony, the Plaintiff said he had attended only 6 to 7 job interviews after expiry of sick leave and had simply made no attempts in 2008. And of those job interviews, I do wonder if the Plaintiff was physically fit for the delivery worker jobs even before the accident. No attempt was made to find a similar job in a textile factory to which he was supposed to be able to return.
13. Indeed, Dr. Lam reported the Plaintiff to have said that after expiry of sick leave, he did not go back to work and instead rested further and resumed work around 2009 as a part-time cleansing worker. I am not satisfied that the Plaintiff had mitigated his loss prior to securing the current employment in June 2009 from which point he started to earn more than his average monthly income prior to the accident.
14. I therefore reject the claims in (b) and (c) above and the award under this head is therefore limited to $27,108.53.

Loss of Earning Capacity

1. The Plaintiff claims $45,360 under this head.
2. It it trite law that for an award under this head, there has to be a substantial or real risk that the Plaintiff will lose his present job at some time before the estimated end of his working life, and may then, as a result of his injury, suffer a disadvantage in the labour market.
3. The Plaintiff intends to work another 6 to 7 years. The problem with this claim is that there is simply no evidence to suggest any risk of his losing his present job before the end of his working life. In any event, even if he were to lose his present employment, the Plaintiff should suffer no disadvantage in the labour market as in his own admission he has fully recovered by now.
4. I therefore see no basis for making any award under this head.

Special Damages

1. The Plaintiff claims, and I allow in full, the following items:-
2. Medical expenses (with receipts) $340
3. Travelling by taxi between home and

hospital ($29 x 5 times x 2) $290

1. Tonic Food $5,000

Total: $5,630

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1. Credit should be given to the employees’ compensation already received by the Plaintiff at $37,940.00

Summary

1. In summary, I assess the Plaintiff’s damages at:-

1) PSLA $110,000.00

2) Pre-trial Loss of Earnings $27,108.53

3) Loss of Earning Capacity Nil

4) Special Damages $5,630.00

Sub-total: $142,738.53

Less: ECC $37,940.00

Total: $104,798.53

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1. The Defendant is ordered to pay to the Plaintiff the sum of $104,798.53. There will be interest on damages for PSLA at 2% per annum from the date of writ until judgment and thereafter at judgment rate. Interest on special damages at 4% per annum shall run from the date of accident to the date of judgment and thereafter at judgment rate.
2. The Defendant do further pay the Plaintiff’s costs, to be taxed if not agreed.

Master D. Ho

District Court

Representation

Mr. Jerome C W. Liu, instructed by Messrs. Yeong & Co., Solicitors for the Plaintiff

The Defendant, in person, absent