DCPI 1218/2019

[2021] HKDC 468

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1218 OF 2019

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BETWEEN

CHAM CHI MING JOIE Plaintiff

and

SCENIC RESTAURANT Defendant

operated by 9288 LIMITED

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Before: Master Matthew Leung in Court

Date of Hearing: 13 April 2021

Date of supplemental submission of the Plaintiff: 26 April 2021

Date of Assessment of Damages: 7 May 2021

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| ASSESSMENT OF DAMAGES |

1. This is an assessment of damages in a personal injury case in which the Plaintiff slipped and fell from a staircase in the course of employment with the Defendant.
2. Interlocutory judgment was entered against the Defendant on 11 June 2019 leaving damages to be assessed.
3. The Notice of Appointment for Assessment of Damages was served on the Defendant on 24 December 2020 by post at the registered office of the Defendant. Further, the Court sent a notice of hearing for assessment of damages to the Defendant on 28 December 2020.
4. The Defendant did not attend the assessment hearing. I was satisfied that notice of the assessment hearing had been duly given to the Defendant. It was the Defendant’s choice not to attend the assessment hearing. I proceeded with the assessment of damages in this case in the absence of the Defendant.

**The Plaintiff’s case**

1. The Plaintiff himself was the only person who testified at the hearing. He adopted as evidence in chief his witness statement filed herein.
2. The Plaintiff was born in 1966. At the time of the Accident, the Plaintiff, aged 50, was a lorry driver earning a monthly sum of $23,000.
3. On 21 December 2016, the Plaintiff, in the course of employment, slipped and fell from a staircase sustaining back contusion and minor head injury. After the Accident, the Plaintiff was sent to the Accident & Emergency Department of North District Hospital (“**the Hospital**”) for treatment. Medical examination revealed tenderness at the lower back. He was prescribed with analgesic and was discharged with 4 days’ sick leave.
4. As a result of persistent pain and discomfort, the Plaintiff attended Shek Wu Hui General Out-patient Clinic from time to time during the period between 25 December 2016 and 3 October 2018. He also received physiotherapy treatment from the Hospital since 7 April 2017. He was further referred to the out-patient Orthopaedic Clinic of the Hospital for treatment since 8 October 2018.
5. Computer tomography of the whole body revealed that the Plaintiff suffered from right hydro pneumothorax with associated right lung contusion and right chest wall emphysema. Right chest drain was inserted.
6. Sick leave was granted to the Plaintiff from the date of the Accident, i.e. on 21 December 2016, to 28 August 2019.

**Expert evidence**

1. The Court directed on 26 November 2020 that expert medical evidence is limited to one orthopaedic expert for each party, and the medical report made by Dr Tio Man Kwun Peter for the Plaintiff dated 15 April 2020 be adduced as evidence without calling the maker at the assessment hearing.
2. Dr Tio interviewed the Plaintiff on 11 March 2020, i.e. 3 years and 4 months after the Accident. Examination of the Plaintiff’s back showed tenderness over sacrococcygeal region. He was noted to have generalized weakness of left lower limb 4+/5 and sensory deficit of 20-30% of the left lower limb. X-ray of lumbar spine showed moderately severe pre-existing lumbar spondylosis. Despite the presence of weakness and sensory deficit, there was no genuine sign of neurological deficit such as muscle wasting or reflex abnormality. Examination of the Plaintiff’s neck showed tenderness over paracervical while x-ray of cervical spine showed pre-existing cervical spondylosis.
3. The Plaintiff informed Dr Tio that he had suffered a previous back injury in 2000’s. Dr Tio assessed that the Accident may have advanced the Plaintiff’s signs and symptoms by an estimated duration of 7 years. Dr Tio opined that the neck symptoms were not related to the Accident, while he apportioned 30-40% of the Plaintiff’s back condition due to pre-existing spondylosis. The loss of earning capacity of the Plaintiff’s neck condition was assessed at 5%.
4. Dr Tio was of the view that the Plaintiff would be independent with his daily activities and should be able to resume his pre-injury work as a lorry driver and delivery worker. However, with residual back pain and stiffness, the Plaintiff is expected to have reduced work efficiency. He may need intermittent breaks of 15 minutes after work of 1.5 hours.

**Factual findings**

1. The Plaintiff’s testimony is not subject to any challenge as the Defendant has not been present in these proceedings. The Plaintiff gave testimony in a straightforward manner and I accept his evidence. Separately, I also accept Dr Tio’s evidence in his Expert Medical Report.
2. Based on these factual findings, I now turn to each head of claim.

**PSLA**

1. The Plaintiff claims a sum of $300,000 for damages for PSLA. Mr Chou, Solicitor for the Plaintiff, referred me to the following cases on PSLA.
2. In ***Chan Yuet Keung v Harmony (International) Knitting Factory Ltd*** [2010] 3 HKLRD 599 (2 November 2010), the plaintiff had a slip and fall accident resulting in tenderness at the lower back around L4/5 region. MRI showed that there was mild disc degeneration at L5/S1. The Single Joint Expert, Dr Johnson Lam, considered that 10% of the plaintiff’s condition should be apportioned to the pre-existing degeneration. In granting a sum of $300,000 for PSLA, Bharwaney J stated in the judgment that a slightly higher amount was awarded but for the fact that there was pre-existing degeneration of the back.
3. In ***Wong Yun Chiu v Union Printing Company Limited*** HCPI 282/2009 (unreported, 29 July 2011), the plaintiff injured his back when he lifted a heavy basket of scarp paper. He was diagnosed with back contusion. CT scan revealed L4/5 bulging disc causing mild indentation of the thecal sac. Considering the asymptomatic degenerative spine, the court awarded a sum of $200,000 for PSLA.
4. In ***Ali Shoukat v Hang Seng Bank Ltd unreported***, HCPI 3/2003 (unreported, 23 June 2004), the plaintiff suffered a sprain back injury whilst unloading heavy cash boxes from a van in the course of his employment as a bank security guard, and suffered 5% impairment of the whole person. He still suffered some residual pain and loss of lordosis in the lumbosacral area where the pain existed and some muscle spasm. The pain was not so debilitating as to affect his activities of daily living. He was able to return to his pre-accident work. He was awarded $250,000 for PSLA.
5. In ***Altaf Ahmed v Innovative Network Engineering Company Limited & Another***, HCPI 237/2008 (unreported, 21 December 2010) the plaintiff slipped when he used a jackhammer to remove concrete. He sustained a back injury resulting in pain and prolapsed intervertebral discs at L3/4 and L4/5 levels with loss of earning capacity of 5% as assessed by the Employees’ Compensation (Ordinary Assessment) Board. The experts regarded the several levels of lumbar disc protrusion were degenerative disc prolapses and one of the degenerative disc was aggravated by the injury. PSLA was allowed at $280,000.
6. In ***Chau Chin To Chadow v Wing Fung Financial Group Limited***, HCPI 163/2015 (unreported, 1 August 2017), the plaintiff suffered from soft tissue injury of the back after heavy-lifting. He had on and off low back pain and would have difficulty in manual lifting. He was allowed sick leave of 405 days which was considered appropriate. There was no evidence of pre-existing pathology. PSLA at $250,000 was allowed.
7. After due consideration of the authorities, and having considered, *inter alia*, that the nature of the plaintiff's injuries, the duration of his healing process, and the pre-existing spondylosis, I assess that PSLA should be $300,000.

**Pre-trial Loss of Earnings**

1. The Plaintiff’s claim for pre-trial loss of earnings is set out below:
   1. From 21 December 2016 to 30 April 2019: $23,000 x (28 + 10/30) x 1.05 = $684,245.
   2. From 1 May 2019 to 21 December 2020: $23,000 x (19 + 21/30) x 1.05 = $475,755.
2. Mr Chou explained at the assessment hearing that the calculation in (a) above was made on the basis of Dr Tio’s Expert Report, in which, Dr Tio commented that sick leave up to April 2019 was reasonable. However, as a matter of fact, the Plaintiff did not resume the pre-accident job or any other employment after the Accident. That gives rise to the claim for pre-trial loss in (b) above.
3. In fact, sick leave was granted to the Plaintiff from 21 December 2016 to 28 August 2019. Dr Tio examined the Plaintiff on 11 March 2020, and by that time, the Plaintiff should have already been granted sick leave up to 28 August 2019. Notwithstanding that, Dr Tio stated in the Expert Report that sick leave granted to the Plaintiff was up to April 2019 which was considered reasonable and appropriate. Mr Chou explained to the Court at the assessment hearing that it was not until the preparation of the witness statement[[1]](#footnote-1) that the updated sick leave certificates were provided to him. That explanation is of course unsatisfactory. It should be the Plaintiff’s Solicitors’ duty to ensure that all relevant documents, including all sick leave certificates, should be collated in good time and be provided to the expert for comment before compiling the Expert Report. Mr Chou also unable to explain why he did not go back to Dr Tio for his opinion when updated sick leave certificates were available to him.
4. In any event, the Court is not bound by the expert opinion of Dr Tio. Having considered the injuries suffered by the Plaintiff and the sick leave certificates, I am satisfied that the sick leave period from 21 December 2016 to 28 August 2019, i.e. about 32 months, should be considered reasonable.
5. Dr Tio assessed that the Accident may have advanced the Plaintiff’s signs and symptoms by an estimated duration of 7 years. Dr Tio opined that the neck symptoms were not related to the Accident, while he apportioned 30-40% of the Plaintiff’s back condition due to pre-existing spondylosis. Mr Chou submitted that it would be unlikely that the degeneration would turn symptomatic on or before 31 October 2019. Having considered the medical records and the expert report, I find that the Accident either caused or triggered the otherwise asymptomatic degeneration of the Plaintiff’s back condition, the apportionment under ***Chan Kam Hoi v Dragages et Travaux Publics*** [1998] 2 HKLRD 958 is not engaged.
6. The pre-trial loss of the Plaintiff should be assessed as follows:

$23,000 x 32 months x 1.05 = $772,800.

**Loss of earning capacity**

1. The Plaintiff claims a sum of $130,000.
2. I consider that the Plaintiff would clearly suffer from a handicap in the labour market. The physical limitation suffered by the Plaintiff would adversely affect him in securing a suitable employment as well as make him vulnerable to losing any such employment he managed to secure. A sum of $138,000, i.e. 6 months’ wages of the Plaintiff’s pre-accident earning, should be appropriate to compensate him in this regard.

**Special damages**

1. The Plaintiff claims the following special damages:

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| (a) | Medical expenses | $5,000 |
| (b) | Travelling expenses | $3,000 |
| (c) | Tonic food | $3,000 |
|  | **Total:** | **$11,000** |
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1. I accept that the amounts claimed by the Plaintiff are reasonable and should be allowed in full.

**Summary**

1. The Plaintiff’s damages should be assessed as follows:

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| (a) | PSLA | $300,000 |
| (b) | Pre-trial loss of earnings | $772,800 |
| (c) | Loss of earning capacity | $138,000 |
| (d) | Special damages | $11,000 |
|  | Sub-total | $1,221,800 |
|  | Less: Employees’ compensation | $637,806.48 |
|  | **Total:** | **$583,993.52** |

**Interest and costs**

1. Interest will be awarded at 2% per annum on damages for PSLA from the date of the writ. Interest on other pre-trial loss and special damages will be awarded at half the judgment rate from the date of the incident. The Plaintiff's Solicitors are directed to calculate the amount of interest to be included in the judgment.
2. I also make a costs order *nisi* against the Defendant in favour of the Plaintiff for the assessment of damages proceedings including all costs previously reserved in relation to the assessment of damages.  As the Plaintiff is legally aided, his own costs shall be taxed in accordance with the Legal Aid Regulations.  The above order *nisi* shall become absolute after 14 days from the date hereof unless any party applies to vary them within the 14-day period.

(Matthew Leung)

Master of the District Court

Mr Chou Sing Hong, of S.H. Chou & Co, assigned by the Director of Legal Aid, for the Plaintiff

The Defendant is not represented and did not appear

1. The Witness Statement of the Plaintiff was signed on 22 July 2020. [↑](#footnote-ref-1)