DCPI 1514/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO.1514 OF 2008

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BETWEEN

KHAN ZUBAIR Plaintiff

and

HUNG KEE CLEANING ENVIRONMENT

RECYCLE LIMITED Defendant

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Coram: His Hon Judge Leung in court

Date of hearing: 31 March 2009

Date of judgment: 1 April 2009

**ASSESSMENT OF DAMAGES**

1. On 19 June 2006, 23-year-old Khan (the Plaintiff) was assigned to collect rubbish outside a supermarket for his employer, Hung Kee (the Defendant) which is in the cleaning and recycle business. In the course of his work, his left index finger was punctured by the sharp spikes of a durian shell inside a garbage bag. His finger became swollen which necessitated hospitalisation and surgical operation.
2. Khan claimed employees’ compensation and common law damages against Hung Kee. In the employee’ compensation case, Khan obtained default judgment and subsequently compensation was assessed and awarded in October 2008 in Hung Kee’s absence. Default judgment in the present action was given on 17 September 2008 for damages to be assessed with costs. Hung Kee remained absent from this assessment hearing. In view of the history of this matter and the affirmations of service filed on behalf of Khan, I see no reason to prevent him from proceeding to prove quantum.
3. Khan gave evidence in court. The medical records of the government hospital and the report of the orthopaedic expert, Dr Patrick Wong, were adduced as evidence without having to call the makers to testify.

**Injuries and treatment**

1. Khan was diagnosed to have left index finger infection with abscess formation. It was treated by incision and drainage and antibiotics. He was followed up with occupational therapy. According to the hospital’s report, Khan’s finger condition gradually recovered. During the follow up in October 2006, Khan had slight finger stiffness. According to occupational therapist report, there was mild reduced movement of the finger and Khan was reported to have avoided using the finger for daily activities. Khan was arranged to have occupational therapy 3 times a week but he only attended 4 sessions within the 6-week duration. Treatment was stopped due to poor compliance.
2. Khan still complains about pain in the finger particularly when he has to lift heavy objects. He was on sick leave from 20 June 2006 to 8 October 2008.

**Medical expert opinion**

1. Dr Wong examined Khan in April 2008 and gave his report in May 2008. Dr Wong opined that the treatment received by Khan were standard, adequate and appropriate. Khan’s injury has attained maximal medical improvement and no further treatment was necessary. Dr Wong considered that the overall prognosis for functional use of Khan’s injured finger was expected to be at least satisfactory. Only mild residual pain, weakness and stiffness were expected.
2. During the examination, Khan graded the severity of his finger pain at Grade 8/10. Khan also reported to be taking medication 2 to 3 times a week. Finger stiffness and left hand weakness were demonstrated. However physical examination showed no muscle wasting of the left upper limb compared to the right. The surgical scar has healed well. There was subjective tenderness and much reduced sensation all over the left index finger from the MCPJ distally. Dr Wong found that Khan demonstrated minimal active movement of the finger, which was even much less than those documented by the occupational therapist before. Khan did not allow any passive testing of his finger, fearing that this would cause pain. He did not flex his finger at all when Dr Wong asked him to make a fist. However updated x-rays showed no actual abnormality.
3. In conclusion, Dr Wong found no objective sign to substantiate Khan’s claim of severe pain. He found the degree of stiffness and pain that Khan claimed could not be explained by orthopaedic pathology documented. He estimated that the degree of impairment of the whole person of Khan for the residual pain, stiffness and weakness of his left index finger was 2-3%. Dr Wong considered the sick leaves issued to Khan to be reasonable.
4. Dr Wong considered that Khan is able to manage his daily activities and to return to play football. His social life is unlikely to be affected by his finger injury. From the orthopaedic perspective, Khan should be able to return to his pre-accident job as a general labourer, possibly on other occasions with mild reduced work efficiency.

**Pain, suffering and loss of amenities (PSLA)**

1. HK$150,000 is claimed for PSLA and reliance was placed on the following 2 cases:
   1. *Wong Yun San v Cheung Yue Yiu*, DCPI 1909/2007 (21 July 2008); and
   2. *Yiu Pau Yau v Co-Ray Design & Construction Limited*, DCPI 864/2006 (3 May 2007).
2. Considering the recital of the injuries, treatment, period of hospitalisation, residual disability and the degree of impairment in *Wong Yun San* (at paras.5-15) and *Yiu Pau Yau* (at paras.9-25), I am of the view that they are relatively more serious than the circumstances of Khan in the present case as summarised above. Mr Clement referred to the infection and operation that Khan has experienced. No doubt that was painful. But the medical evidence shows that the injury has healed with only mild residual pain and stiffness. I do take into account the personal circumstances of Khan including his age and that he is left-handed. However, it is clear to me that the amount claimed exceeds what the circumstances justify. I award HK$120,000.

**Loss of earnings**

1. According to Khan, he received an average monthly income of HK$8,000. The court in the employees’ compensation assessment hearing accepted such evidence of Khan. His same evidence in the present hearing was unchallenged. Also considering the amount of sick leave payment that he has received from his former employer, I also accept this as his pre-accident income.
2. In view of the medical expert evidence, I find that Khan should be compensated for the whole sick leave period from 20 June to 8 October 2006, which was nearly 4 months.
3. Khan did not manage to resume work after the sick leave has ended. In the revised statement of damages, 4 months were suggested to be a reasonable period of time for him to be employed again. In his submissions, Mr Clement suggested more than 5 months. In this regard, Khan gave evidence that he has approached the Labour Department and friends for all job opportunities including cleaning work and restaurant work. He confirmed in court that he considered himself capable of doing these jobs. I am prepared to accept his limitation in terms of his lack of qualification and language skills. I am therefore prepared to give him a longer than usual reasonable period of time for seeking employment.
4. Inclusive of his loss during the sick leave period, I award damages for his loss of income for a total period of 9 months. The amount was HK$8,000 x 9 months = HK$72,000.
5. Mandatory provident fund benefits were also claimed on top of the income that Khan would have obtained. But Khan confirmed in court that there was no MPF arrangement or holiday. Damages are compensatory. In the absence of any evidence as to the MPF status and arrangement in the present case, I am not prepared to allow this part of the claim on the alleged basis that Khan would have been entitled to such contribution.
6. There is no claim for future loss of earnings or loss of earning capacity.

**Miscellaneous special damages**

1. Medical expenses in the sum of HK$7,343 is claimed. In court, it was revealed that a sum of HK$6,600 being payment for maintenance ward fee for Khan’s hospitalisation on 14 August 2006 for 2 days was in fact unrelated to his finger injury. This amount must be taken out of consideration. That leaves the amount of HK$743 which I allow.
2. Travelling expenses in the sum of HK$500 is claimed and I allow the same as being reasonable.

**Summary**

1. The amount of damages assessed above is summarised as follows:

PSLA HK$120,000

Loss of earnings HK$ 72,000

Medical expenses HK$ 743

Travelling expenses HK$ 500

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Total: HK$193,243

1. Credit has to be given to the employees’ compensation award in the sum of HK$28,793 net of the sick leave payment in the sum of HK$18,560 that Khan has received from his employer. Therefore a total amount of HK$47,353 needs to be deducted. The balance is HK$145,890.
2. Up to today, there shall be interest on general damages at 2% per annum from the date of writ and on special damages at half judgment rate from the date of accident. Interest from today will run at the judgment rate until full payment.

**Order**

1. Damages are assessed at HK$145,890. Interest as aforesaid. Khan has obtained judgment on costs. Such costs shall now include those of these assessment proceedings. Costs shall be taxed, if not agreed. Khan’s own costs shall be subject to legal aid taxation.

Simon Leung

District Judge

Mr Richard Clement of Messrs Massie & Clement for the Plaintiff on the instruction of the Director of Legal Aid

The Defendant, in person, absent