## DCPI 2354/2014

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 2354 OF 2014

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BETWEEN

LEE KAM LIN Plaintiff

and

FULL WISE LIMITED trading as

FISHING BAY RESTAURANT Defendant

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Before: Master J Chow in Chambers (Open to Public)

Date of Hearing: 14 August 2015

Date of Assessment of Damages: 27November 2015

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ASSESSMENT OF DAMAGES

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*Introduction*

1. This is an assessment of damages heard in the District Court after the judgment of *Chi Yuk Pui v Grace Mind Corporation trading as Tsuno Japanese Restaurant*, HCPI 917 of 2014, 22 May 2015 (“*Chi Yuk Pui*”).
2. The plaintiff was injured in her employment with the defendant employer who has failed to get proper insurance cover. The case was then addressed to the Employees Compensation Assistance Fund Board. The plaintiff’s claim was undefended. An interlocutory judgment was entered against the Defendant on 7May 2015.
3. The defendant did not appear since the 1st checklist review hearing. I am satisfied the plaintiff has duly served the notice of hearing on the defendant for the hearing of assessment of damages today.

*The plaintiff’s claim & injury*

1. The defendant operates a local restaurant known as Fishing Bay Restaurant. The plaintiff was employed by the defendant as an assistant. She was responsible to look after the dim sum take-away counter including rendering assistance to the chef of the roast meat counter.
2. The accident happened on 6 February 2012. At about 12:20 pm, the plaintiff was returning from the kitchen to the take away counter carrying some clean bowls and plates. Her right knee was hit by the handle of an electric food mixing machine which was placed at the entrance of the kitchen (“the accident”). Although she felt pain on her right knee, she continued to work. The plaintiff applied some ointment on her right knee when she got home on the day of accident.
3. The plaintiff attempted to work on the following day but the pain on her right knee persisted. She went to the Accident and Emergency Department of Caritas Medical Centre (“Caritas”) in the afternoon. Examination revealed tenderness and bruising without fracture over her right knee. She was discharged with analgesics. The plaintiff attended the same A&E Department on 9 & 12 February 2012, 26 March 2012 and 17 April 2012 for further treatment.
4. The plaintiff had persisted pain on her right knee and had sought medical treatments in various medical institutions, including Chinese bonesetters. She had physiotherapy sessions with Caritas from 8 June 2012 until 11 July 2012. Subsequently, she attended the Department of Orthopaedics & Traumatology in Caritas from 28 September 2012.
5. The plaintiff was assessed by the Employees Compensation (Ordinary Assessment) Board to have suffered from 0% loss of earning capacity. The plaintiff appealed and she was re-assessed to have suffered from 7.5% loss of earning capacity.
6. For reason of the persisted pain, the plaintiff was depressed and developed suicidal idea. Her psychiatric symptoms surfaced in or about February 2013. Her condition was stabilised after relevant treatments.
7. Not until 20 July 2014, the plaintiff’s MRI scan revealed the plaintiff was suffering from grade 3 tear of posterior horn of medial meniscus. The plaintiff was given conservative treatments with anti inflammatory drug.
8. The plaintiff’s psychiatric condition improved around September 2014. She also sought medical treatments from Chinese medical practitioner for her insomnia problem.

*Medical expert evidence*

1. Dr Kong Kam Fu (“Dr. Kong”), the plaintiff’s orthopaedic expert interviewed her on 15 January 2015. Dr Kong agreed the plaintiff had right knee contusion with meniscus tear. He found the plaintiff’s previous medical treatments were reasonable. He advised the plaintiff to opt for surgery, either arthroscopic meniscus repair or menisectomy if symptoms persisted.
2. At time of examination, the plaintiff was still suffering from modest residual right knee pain from meniscus tear and a reduced range of motion of her right knee. Dr Kong opined the plaintiff would have difficulty to resume her previous job as a Chinese cafeteria worker. She was advised to take up some other work with sedentary nature, such as car park attendant, security guard or cashier.
3. Dr Kong agreed sick leave given to the plaintiff by her doctors of treatment and care were reasonable. The progress of medical prognosis was fair with mild degree of residual orthopaedic impairment. Dr Kong assessed the plaintiff to have suffered from 5% loss of earning capacity and 5% person impairment of whole person.
4. Dr Kwan Ka Lik (“Dr. Kwan”), the plaintiff’s psychiatric expert held an interview with her on 8 January 2015. The plaintiff was depressed but her speech was relevant and coherent. She had a good understanding of herself. The plaintiff’s thoughts were generally well and organized, only that she had negative thoughts on her future and a sense of worthlessness. Dr Kwan opined that plaintiff was suffering from major depressive disorder of which the stressor was the residual pain and long term consequence arising from her physical symptoms. The plaintiff was advised to receive further adjustment of pharmacological treatment by clinical psychologist.
5. Dr Kwan was of the view the chance the plaintiff could resume her previous job is low. He suggested the plaintiff to take up sedentary job on a part time basis. Dr Kwan advised the plaintiff to apply for supported environment services through medical social service. Dr Kwan said the plaintiff’s social functioning was impaired, she was considered to be unfit to perform some daily living activities and housework. Dr Kwan assessed the plaintiff’s impairment level caused by her mental problems ranging from mild to moderate, with 5% loss of earning capacity (due to mental problems) and 5% loss of permanent impairment of whole person.

*Pain, suffering and loss of amenities*

1. The plaintiff was born on 29 October 1956 and was aged 58 at time of the assessment of damages. Mr Lam, solicitor for the plaintiff submitted, the plaintiff should be awarded $300,000 as damages for PSLA. Mr Lam relied on the following authorities:-
2. *Yip Leung Hoi v Tin Wo Engineering Company Limited & Ors*, HCPI 1026 of 2004, Master KH Hui, 29March 2007;
3. *Chum Hok Chung & Ors v Chung Lai Chung*, DCPI 887 of 2011, HH Judge M Wong, 10January 2014;
4. *Wong Wai Man v Yi Wo Yuen Aged Sanatorium Centre Limited*, HCPI 77 of 2007, Suffiad J, 15 August 2008; and
5. *Ng Lai Fan Fanny v The Hong Kong Golf Club*, HCPI 511 of 2005, Saunders J, 4 April 2007.
6. I find Mr Lam’s submission on damages to be awarded on the high side. In *Yip Leung Hoi*, the plaintiff was awarded a sum of $180,000 for both shoulder and knee injury. In *Chum Hok Chung*, the plaintiff was awarded $180,000 for similar injury herein. Both *Wong Wai Man* and *Ng Lai Fan* *Fanny* are irrelevant, the plaintiff therein sustained back injury, not knee injury. In that solely for the plaintiff’s right knee injury, the appropriate damages for shall be $180,000.
7. Dr Kwan opined the plaintiff’s injury was the stressor of her psychiatric injury. I shall revise the damages of PSLA upwards so as to reflect her suffering in this area. I therefore assess damages for both her knee injury and psychiatric injury sustained, at $230,000.

*Pre-trial loss of earnings*

1. The plaintiff was 55 years old at time of the accident. The plaintiff had been on different jobs prior to the accident. She worked for the defendant since 2011 as an assistant in the dim sum take away counter. She was found to have earned $9,930 at time of the accident in the related employees’ compensation application[[1]](#footnote-1) (“the EC judgment”).
2. After the accident, the plaintiff was granted sick leave intermittently for a total of 363 days from 7 February 2012 to 22 June 2015. I accept Dr Kong’s opinion that the period of sick leave granted was reasonable. I shall award loss of MPF over this period as well. In that the pre trial loss of earning for sick leave period should be $9,930 x (363/365) x 12 months x 1.05 = $124,432.42.

*Post-trial loss of earnings*

1. I accept Dr Kong’s opinion that the plaintiff would be difficult to resume her pre accident job. She was advised to take up sedentary jobs such as car park attendant or security guard. I also accept Dr Kwan’s opinion that the plaintiff was able to resume her pre accident job without duties to handle heavy loads on a part time basis. Although the opinion of both experts differ to some extent, it is fair for me to take the plaintiff could have resumed jobs of sedentary nature.
2. The plaintiff said she was unable to secure a job because of her residual pain on her right knee. She had tried her best endeavour to get back to the workforce but was in vain.
3. The plaintiff was 58 at time of the assessment of damages. I relied on the “Chan Tables” referred to in *Chan Pak Ting v Chan Chi Kuen[[2]](#footnote-2)*, an appropriate multiplier should be 6.36[[3]](#footnote-3).
4. It is reasonable to take $6,000 as the possible monthly income the plaintiff is able to earn after the assessment of damages. The damages for the plaintiff’s post trial loss of earning should be ($9,930 - $6,000) x 12 months x 6.36 x 1.05 = $314,934.48.

*Loss of earning capacity*

1. For reason of the plaintiff’s injury, I agree the plaintiff suffers reduced competitiveness and is handicapped in the labour market. I accept both Dr Kong and Dr Kwan’s observations of the plaintiff’s present complaints. I also accept the plaintiff’s evidence that her right knee would be in pain when walking up the slope. Her claim of loss of earning capacity is justified. It is appropriate to award a sum equivalent to 6-months’ pre accident salary under this head, which is $9,930 x 6 months = $59,580.

*Future medical expenses*

1. Dr Kong suggested the plaintiff to undergo arthroscopic meniscus repair +/- meniscectomy. The operation costs $80,000 to $110,000 in the private sector.
2. Dr Kwan suggested pharmacological and psychological intervention which costs $36,000 to $40,000 in private sectors.
3. There is no reason to deprive of the plaintiff from future medical treatments. I shall opt for the median figure of the two sums accordingly, ie ($80,000 + $110,000)/2 + ($36,000 + $40,000)/2 = $133,000.

*Medical expenses and travelling expenses*

1. I accept the plaintiff has incurred $20,792 and RMB1,118.62 as hospitalization and medical expenses. Travelling expenses at $1,000. Damages under this head should be [$20,792 + (RMB 1,118.62 x 122.4/100[[4]](#footnote-4)) + $1,000) = $23,161.19.

*Summary of damages*

1. The plaintiff was awarded $181,127.80 as employees compensation in the EC judgment and I shall give credit to this sum. The plaintiff’s net sum of damages is calculated as follows:-

PSLA $230,000.00

Pre-trial Loss of Earnings $124,432.42

Post-trial Loss of Earnings $314,934.48

Loss of Earning Capacity $59,580.00

Future Medical Expenses $133,000.00

Special Damages $23,161.19

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Sub Total $885,108.09

Less: Employees Compensation $181,127.80

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Net award $703,980.29

1. I award interest on damages on general damages at a rate of 2% per annum from the date of service of the writ of summons on the defendant; and interest on pre trial loss of earnings and special damages at half of judgment rate per annum from the date of accident to the date of judgment.

*Summary assessment of costs*

1. I shall embark on summary assessment on costs in this action. Bharwaney J gave specific guidelines in *Chi Yuk Pui,*

“16. An important part of the case management of cases like the present case is to make a summary assessment of the costs incurred so as to protect, as much reasonably possible, against the depletion of the relief payment by excessive or unreasonably incurred costs.

19. .….. It seems to me to be unjust that a great, or greater, part of the amount paid by the ECAS Fund Board in order to compensate for loss and damage, and pain and suffering should be utilised to pay the legal costs incurred to obtain the judgment for damages.”

1. In *Chan Yuk Pui*, the costs of the related employees’ compensation proceedings were taxed and allowed at $175,000 as party and party costs. The plaintiff’s solicitors claimed $137,000 and disbursement in the personal injuries claim. Bharwaney J allowed 35 hours, costs of the action was assessed and allowed at $75,000 and disbursement at $1,764.
2. In the EC judgment, the learned judge made a costs order nisi that costs of the application be paid by the respondent (the defendant herein), to be taxed if not agreed. As the date of this judgment, the applicant (the plaintiff herein) has not yet commenced taxation proceedings. Without the benefit of considering the costs allowed in the employees’ compensation application, I should opt for summary assessment on a party and party costs in this action. The plaintiff’s solicitors (same solicitors for the employees’ compensation application) should alert this judgment to the taxing master in the taxation proceedings of the related employees’ compensation application.
3. The plaintiff’s solicitors submitted two statements of costs: one related to work done (prior to issuance of the writ of summons) by the plaintiff’s former solicitors, Messrs Leung, Tam & Wong (“the 1st statement of costs”); the other related to work done by the plaintiff’s solicitors (“the 2nd statement of costs”).
4. For the 1st statement of costs, the plaintiff’s former solicitors incurred fees by attendance on the plaintiff, her employer and the insurance company. The former solicitors claimed a total of 10.5 hours of work. I allow the usual hourly rate of $2,600 for Mr Cheng Yi Ming and for a total of 7 hours on attendance to various parties. I further allow one hour for the perusal of documents and $500 for photocopying charges. The costs allowed is therefore [($2,600 x 8) + $500] $21,300.
5. For the 2nd statement of costs, the plaintiff’s solicitors claim $108,300 being costs from drafting the writ of summons until the assessment of damages. The plaintiff’s solicitors claimed a total of 40.5 hours. I allow hourly rate $2,600 for Mr Chan Siu Chung and $2,300 for Mr Kenneth Lam. I allow 32 hours for all professional work done in this straightforward undefended claim. The number of hours included preparation, taking instructions, drafting documents, perusing documents, including expert report and correspondence, telephone attendances, legal research and court attendances. Within 32 hours of professional work, I allow 30 hours for Mr Chan Siu Chung and 2 hours for Mr Kenneth Lam. The costs would be [($2,600 x 30 hours) + ($2,300 x 2 hours)] $82,600. I further allow disbursement at $4,500 for obtaining medical report from Dr Chan Ka Wah, travelling expenses, company search, photocopying and miscellaneous charges. The total costs allowed is therefore ($82,600 + $4,500) $87,100.

( J Chow )

Master

Mr Kenneth Wai Ming Leung, of Kenneth W Leung & Co, for the plaintiff

The defendant was not represented and did not appear

1. DCEC 2005 of 2012, Deputy District Judge Joseph Vaughan, 5June 2015 [↑](#footnote-ref-1)
2. [2013] 1 HKLRD 634 and [2013] 2 HKLRD 1 [↑](#footnote-ref-2)
3. See: Personal Injury Tables Hong Kong 2013, Table for Calculation of Damages, “Table 10 Multipliers for loss of earnings to pension age of 65 (female)” [↑](#footnote-ref-3)
4. Exchange rate of Hong Kong Association of Banks recorded on 14August 2015. [↑](#footnote-ref-4)