## DCPI 2732/2017

[2019] HKDC 1531

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 2732 OF 2017

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BETWEEN

AU YEUNG MUI FAN Plaintiff

and

FOOD CONCEPT CO. (sued as a firm) Defendant

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Before: HH Judge KC Chan in Court

Date of Hearing: 6 November 2019

Date of Assessment of Damages: 13 November 2019

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ASSESSMENT OF DAMAGES

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1. On 21 April 2017 at about 11am, working in the defendant’s restaurant as a waitress, the plaintiff was climbing up an A-shaped ladder to fetch some coffee and fell onto the ground as she stepped onto one of the steps which was loose. She suffered injuries and now claims against the defendant for loss and damage.
2. The plaintiff was educated up to form 4. She was aged 37 at the time of the accident. She is about 5 feet 1 inch in height and in evidence she confirmed that she weighed about 185 lbs at the time of the accident.
3. On 8 March 2018, an interlocutory judgment on liability was entered against the defendant by consent, with damages to be assessed.
4. This is the assessment of damages. The plaintiff was the only witness for her case while the defendant did not call any witness.

*Injuries, treatment, present complaints and my findings*

1. After the fall the plaintiff was taken to Accident and Emergency Department of Pamela Youde Nethersole Eastern Hospital (“**PYNEH**”). The medical report from that department dated 16 June 2017 said that there was found no direct head or neck injury, that she did not lose consciousness, that she complained of weakness and numbness at left upper limb and right lower limb. Physical examination showed power of left upper limb and right lower limb reduced to grade 2/5, while power of right upper limb and left lower limb were full, and that there was pinprick sensation loss at left C4 to T1 dermatomes and right L2 to S1 dermatomes and there was diffuse tenderness on the abdomen with no guarding tenderness noted.
2. CT scan of the whole body was performed showing no major injury or fracture. In evidence, the plaintiff confirmed that there was no open wound or bruises found.
3. She was then admitted into Department of Orthopaedics and Traumatology of PYNEH (“**O&T PYNEH**”) for investigation and treatment. According to the report from that department dated 18 September 2017, there was left upper limb and right lower limb weakness to around power grade 3 with reduced pinprick sensation over the entire limb, while neurological examination of other parts was unremarkable. An urgent MRI over cervical spine was performed which showed no abnormality.
4. It was further reported that in view of “*the unexplainable limb weakness*”, investigations such as nerve conduction test and MRI of the branchial plexus and lumbar spine were arranged.
5. As there was gradual recovery of limb power during hospitalization, the plaintiff was discharged on 25 April 2017. She was able to walk with frame upon discharge.
6. The plaintiff recalled that she attended physiotherapist for treatment on a weekly basis at some point in time, but that is not borne out by the plaintiff’s Summary of Medical Expenses which listed out the dates medical treatments were received. There is also no report from any physiotherapist placed by the plaintiff before the court.
7. There is proffered only one Physiotherapist Progress Note from PYNEH dated 18 May 2017. It was there noted that on that day the plaintiff complained of left upper arm and right lower limb numbness, and back and neck pain and pain over right lower limb at a VAS scale of 6-7/10 for all areas; and that range of movement of neck could not be assessed and right lower limb power could not be tested because of pain, and further that she could only walk with frame with quite some pain with poor tolerance.
8. 5 days later on 23 May 2017, the plaintiff was to attend a follow-up consultation with O&T PYNEH. She was surveilled that day, among other days.
9. The 3 Surveillance Reports proffered by the defendant respectively dated 17 July 2017, 10 November 2017 and 22 June 2018 were not disputed by the plaintiff.
10. The Surveillance Report regarding the plaintiff’s activities on 23 May 2017 said that she arrived at PYNEH at 11:30 hours, left there at 12:52 hours, went to Chai Wan, then to Southorn Centre in Wanchai to attend the office of Employees’ Compensation Division and then to Tiu Keng Leng, where she had a meal in Choi Ming Shopping Centre. She then purchased some pet products and from there walked to Shin Ming Estate in Tiu Keng Leng where she lived, arriving there at 16:08 hours.
11. The video shown in court depicted that at about 16:00 hours that day the plaintiff bought a pack of diapers for dogs from a pet shop in Choi Ming Shopping Centre, which she then carried in her left hand while she was carrying a foldable walking frame (which was folded) and a walking stick in her right hand. She also carried on her shoulders a small backpack. She then walked from the shopping centre, passed a flyover and descended 3 flights of steps (about 10 steps in each) and walked some further distance before finally arriving home. The whole walk lasted about 8 minutes. While descending the steps, she walked in the middle – not along either side where there were handrails, carrying the items as above described, without any need to hold onto the handrail or to stop for rest. She did not need to take a rest after the descent either, but walked on, only stopping briefly to take a phone call, standing without any support while so doing.
12. Though I am prepared to accept that her gait might not appear entirely normal during the last 20 feet or so while walking up a very slight slope, it is clear that in the whole walk, she did not appear to be painful or having any difficulty, whether in regard to the use of her left upper limb or the right lower limp. This is particularly telling when the above walk occurred after the plaintiff had already had hours of travelling and activities.
13. When cross-examined, the plaintiff accepted that she did not open the foldable frame the whole afternoon that day, and her explanation for not so doing was that she had used it while in the hospital but she did not afterwards because it was very inconvenient (“好吾方便” in her own words). Pausing here, if she could give up using the frame because it was inconvenient, it shows that she did not really have a genuine need for it. When pressed, it was only after a long pause of silence that she disagreed with defence counsel’s suggestion that she carried and used the frame in the hospital to make her condition appear more serious than it was. She added the explanation that she did use it as a walking stick. Bearing in mind she also carried a walking stick at the same time, I find her explanation disingenuous.
14. On 20 June 2017, a nerve conduction test was performed in PYNEH in relation to her bilateral upper limbs and the lower limbs which showed no significant abnormalities. Electromyography was not performed as there was no focal deficits found.
15. Another surveillance on 30 June 2017 showed that the plaintiff left her residence from 11:30 hours, had a meal in the shopping centre of Metro Town and did some shopping in Choi Ming Shopping Centre, including buying a similar pack of diapers for dogs before she returned home at 12:49 hours. The surveillance video showed that she was able to stand without support while getting her wallet out to pay for purchases. She did not bring the walking frame. She used a walking stick but did not appear to need to lean onto it for support while walking. In the whole time, she did not appear to be in pain.
16. On 20 July 2017, by the arrangement of the insurer the plaintiff was examined by Dr Chun Siu Yeung, an Orthopaedics Specialist. It was noted in his report dated 4 August 2017 that the plaintiff’s present complaints were, among others, “*Low back & bilateral buttock pain, continuous and nonstop and of somewhat constant intensity, from grade 7 to grade 8, according to Visual Analog Scale*” and “*Uses the right-handed stick when in rainy days; otherwise, using the walking frame to walk, uses it at home and at all time*”. (my emphasis)
17. It was further reported by Dr Chun that on physical examination, “*Walking : limping of the right LL [lower limp] with the right handed stick (then needed to rest after a few steps)*”. (my emphasis)
18. The constant and intense pain in her low back and bilateral buttocks complained of by her before Dr Chun on 20 July 2017 clearly was not seen to be present during the surveillance on 23 May 2017 and on 30 June 2017. Regarding her poor walking performance before Dr Chun, the plaintiff insisted in evidence that she had given her best effort before Dr Chun but could not give any explanation as to the marked discrepancy when compared with her walking performance as shown in the surveillance of the said 2 days. It seems to me that the only plausible explanation is that the poor performance was the result of sub-maximal effort on her part.
19. Apart from seeing one Dr Yuen, an Orthopaedics Specialist, one time on 26 June 2017 (which visit was mentioned in Dr Chun’s said report dated 4 August 2017; but there is before the court no report from Dr Yuen), the plaintiff has not sought any further medical help save attending periodic follow-ups in O&T PYNEH. The defendant submits that such lack of effort to seek medical help is very unusual if she really suffered from such constant and intense pain and weakness.
20. On 18 April 2018, MRI was performed in PYNEH over her left brachial plexus and lumbosacral spine. No substantial abnormality was detected.
21. On 13 July 2018, the plaintiff was examined by the parties’ orthopaedics experts - Dr Jacky Lau for the plaintiff and the same Dr Chun Siu Yeung for the defendant. In their joint expert report dated 21 March 2019 (“**the Joint Expert Report**”), it was noted that she made the following complaints of her present conditions to the 2 experts:-

“*31. Low back pain, continuous and nonstop and of fluctuating intensity from grade 7 to grade 8, according to the Visual Analog Scale … pain increases to grade 8 when standing up from sitting or with movement to grade 8…*

*…*

*35. Used* [sic] *right hand stick at all time, even at home.*

*38. She stated her activities of daily living (ADL) being :*

*(i) walking tolerance with stick : 10 minutes and need rest on site for 5 minutes …*

*(ii) standing tolerance of 10 minutes and rest for 5 minutes (weeping at this point at 11:17 hour)”*

1. The following were there reported on the physical examination of the plaintiff:-

*“…*

*(iii) Got up from chair slowly, stood for 10 seconds when being requested to demonstrate walking.*

*(iv) Walking; limping on the right lower limb with the right-handed stick.*

*…*

*(vi) unable to walk without the stick.”*

1. In that context, the plaintiff was confronted by the defence with the surveillance on 29 May 2018, which was about a month and a half before the said examination by the experts. The plaintiff was seen that day arriving at PYNEH at 13:00 hours and leaving there at 15:06 hours, and after that she went to have a meal in Chai Wan and she then traveled to and arrived at Block 1 of Stanley Prison Staff Quarters at 16:24 hours. The video shown in court showed that the plaintiff walked at a brisk pace to a minibus stop, carrying on her shoulders a backpack and in one of her hands a white plastic bag. She got on and off the minibus perfectly normally. All along she did not need any walking aid. A walking stick was seen contracted and tucked inside her backpack.
2. It is therefore in my view clearly demonstrated that the plaintiff around that time did not suffer the ailments she complained of to the experts, and that the seeming difficulty in getting up from a sitting position, limping while walking and the inability to walk without the aid of a stick she demonstrated to the experts were all but a sham.
3. In the premises, I find the plaintiff an incredible and unreliable witness and disbelieve her over her subjective complaints and presentations during physical examinations. I find she has been malingering to her treating doctors, to Dr Chun when he examined her on 20 July 2017 and to the experts on 13 July 2018.
4. Before turning to the experts’ opinions, and without the need to tediously set out all the findings, suffice it for me to state that in the Joint Expert Report, the experts did not find anything objectively abnormal with the plaintiff’s left upper body, back or lower limbs. Particularly and rather, the motor power of the lower limbs was found to be full and there was no muscle wasting in the right lower limb; in fact, the measurements of her right thigh and right leg girth were longer than those of the left.
5. Regarding diagnosis, Dr Lau opined quite tentatively. At paragraph 65, he said:-

“*I cannot give a definite diagnosis.*

*Besides the self exacerbation of symptoms, she was possible* [sic] *suffered from left shoulder brachial plexus injury and right lower limb soft tissue injury.*”[[1]](#footnote-1)

Then in paragraph 67, Dr Lau clarified that he meant “brachial plexus irritation” rather than injury, and that he only suggested it as a possibility.

1. Dr Chun opined that the diagnosis should be buttock/low back contusion with a slight possibility of minor neck sprain. Dr Chun disagreed that the plaintiff has brachial plexus injury based on the lack of objective evidence.
2. I prefer the diagnosis of Dr Chun, particularly since I reject the plaintiff’s subjective claims of pain and weakness and her poor performance during physical examinations, basing on which Dr Lau was trying to come up with an intelligible diagnosis. I therefore find that the plaintiff has suffered soft tissue injury from buttock/low back contusion with a possibility of minor neck sprain.
3. For the same reasons, I also prefer the opinion of Dr Chun over that of Dr Lau in the other respects and find that the plaintiff’s prognosis was good, that there was no significant residual and she was able to return to pre-accident work without limitation or restriction.

*Sick leave*

1. The treating doctors gave the plaintiff sick leave totaling 747 days, evidently based on the plaintiff’s complaints and subjective narrative or presentation of her condition. Dr Lau similarly opined a sick leave period of 12 to 18 months “*according to her clinical presentation*”.
2. It is trite that the court is not bound by the treating doctors’ sick leave. As I reject the plaintiff’s subjective complaints and presentations, I would not endorse the sick leave of the treating doctors or follow the opinion of Dr Lau.
3. Dr Chun opined that reasonable sick leave should be 1 week. Looking at the matter in the round, I am unable to accept that sick leave should be that short.
4. In this regard, I find the submission of Mr Wong, counsel for the plaintiff, persuasive that even though the surveillance on 23 May 2017 showed that the plaintiff managed to walk down the stairs and walked for a total of 8 minutes without rest, it is still inconclusive as to whether the plaintiff has recovered sufficiently to undertake the work demand of a waitress. Both counsel were agreed that there was no medical evidence around that time that could be used as a good pointer, though I agree with Mr Ho, counsel for the defendant, that the surveillance on 23 May 2017 showed the plaintiff has shown very good progress in recovery in just about a month after the accident, even if her initial complaints were believed. Mr Ho advocated that thus a sick leave period of 4 to 6 months was reasonable. In the round, I agree with that position and find that a sick leave of 4 months is reasonable.

*Pain, suffering and loss of amenities*

1. The plaintiff claims a sum of HK$250,000 under this head, citing the following cases as comparable : *Cheng Kwing Yeung v Hong Kong Ham Holdings Limited[[2]](#footnote-2)* (PSLA: HK$275,000), *Chau Chin To Chadow v Wing Fung Financial Group Limited[[3]](#footnote-3)* (PSLA: HK$250,000) and *Ng Lai Fan Fanny v The Hong Kong Golf Club*[[4]](#footnote-4) (PSLA: HK$250,000). In these cases, the plaintiffs all suffered more pain and serious injuries, either substantiated by objective pointers like muscle wasting or was so believed and found by the court.
2. The defendant submits that award under this head should be HK$80,000 and should not exceed HK$100,000, relying on : *Sulakhan Singh v Federal Securities Limited and Another*[[5]](#footnote-5) (PSLA: HK$60,000), *Leung Hiu Yan Hilda v Lau Kam Hung[[6]](#footnote-6)* (PSLA: HK$80,000), *Yip Mau Kei v Wong Kam Tim[[7]](#footnote-7)* (PSLA : HK$90,000) and *Yip Kwok Shing v Fung Chau Tim[[8]](#footnote-8)* (PSLA: HK$60,000).
3. Despite my finding of malingering above, I am prepared to accept that the plaintiff suffered certain extent of pain and discomfort as a result of the soft issue injury caused by the buttock/low back contusion and possibly a sprain neck. In the round, I would award her HK$100,000 under this head.

*Pre-trial loss of earning*

1. It is common ground that she earned HK$15,300 a month on average prior to the accident and, as found above, she is entitled to 4 months’ sick leave, the plaintiff’s pre-trial loss of earning therefore is:-

HK$15,300 x 4 x 1.05 (including MPF) = HK$64,260.

*No loss of future earning*

1. The plaintiff has not made any claim for such loss in her Revised Statement of Damages.

*Loss of earning capacity*

1. In her Revised Statement of Damages, the plaintiff however claims a sum of HK$183,600 equivalent to 12 months’ earning under this head, alleging that she would suffer in the future a disadvantage in the labour market, based on Dr Lau’s opinion that she suffers from whole person impairment of 3% and hence loss of earning capacity also of 3%[[9]](#footnote-9). Mr Wong, in my view rightly, has not pushed for an award under this head in his final submissions. As above said, I prefer the opinion of Dr Chun who opined that the plaintiff is able to return to work as a waitress without any limitation or restriction and therefore she does not suffer any loss of earning capacity. I think it is amply clear that this is not a case that an award should be made under this head.

*Special damage – medical and travelling expenses and tonic food*

1. Mr Wong accepts that medical expenses should be paid up to the end of the sick leave period – late August 2017. From the plaintiff’s Summary of Medical Expenses, which the defendant does not dispute, the medical expenses up to the end of August 2017 totalled to HK$1,140. I am also prepared to award to the plaintiff the costs of consulting with Dr Yuen on 26 June 2017. I award HK$2,500 as medical expenses.
2. I think travelling expenses and tonic food in the respective sums of HK$1,500 and HK$2,000 are reasonable and I so award.

*Summary of award and interest*

1. The total amount of damages assessed therefore is:-

HK$100,000 + HK$64,260 + HK$2,500 + HK$1,500 + HK$2,000 = HK$170,260.

1. The plaintiff is entitled to the usual interest - on general damages at 2% per annum from the date of writ to the date of this assessment, on pre-trial loss of earnings and special damages at half judgment rate from the date of the accident to the date of this assessment, then on all sums at judgment rate from date of this assessment until full payment.

*Credit to the sum received as employees’ compensation*

1. It is common ground that in around October 2017, the plaintiff has received a total sum of HK$300,000 in full and final settlement of her claim under Employees’ Compensation Ordinance, for which she must now give credit.
2. Though the precise amount of interest on the said total award of HK$170,260 has not been calculated out, it is beyond doubt that even with such interest the total amount due from the defendant to the plaintiff would not exceed HK$300,000.

*Disposal*

1. In the premises, I make no award under this assessment and dismiss it with a costs order *nisi* that the plaintiff do pay the defendant its costs of this assessment with certificate for counsel to be taxed if not agreed. This costs order *nisi* would become absolute unless an application by summons to vary is taken out within the next 14 days.
2. I thank both counsel for their able assistance.

( KC Chan )

District Judge

Mr Martin Wong, instructed by Raymond Lam & Associates, for the plaintiff

Mr Leon Ho, instructed by Au & Associates, for the defendant

1. Paragraph 65 at p 16 of the report [↑](#footnote-ref-1)
2. DCPI 736/2011, [2018] HKDC 1631 [↑](#footnote-ref-2)
3. HCPI 163/2015, unrep., 1 August 2017 [↑](#footnote-ref-3)
4. HCPI 511/2005, unrep., 4 April 2007 [↑](#footnote-ref-4)
5. DCPI 231/2007, unrep., 6 June 2008 [↑](#footnote-ref-5)
6. DCPI 220/2012, unrep., 15 May 2013 [↑](#footnote-ref-6)
7. DCPI 1905/2013, unrep., 10 Feb 2015 [↑](#footnote-ref-7)
8. DCPI 2627/2015, unrep., 26 June 2017 [↑](#footnote-ref-8)
9. At para 81 of the Joint Expert Report [↑](#footnote-ref-9)