DCPI 2795/2014

[2019] HKDC 823

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 2795 OF 2014

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BETWEEN:

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| TSANG YUET SHAN | Plaintiff |
| and |  |
| TSUEN KING HOME FOR THE AGED LIMITED | 1st Defendant |
| HOSPITAL AUTHORITY | 2nd Defendant |

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| Coram: | His Honour Judge Harold Leong in Court |
| Date of Hearing: | 6 May 2019 |
| Date of Assessment of Damages: | 18 June 2019 |

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ASSESSMENT OF DAMAGES

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1. This is an assessment of damages concerning an alleged slip and fall accident at work on 6 September 2012. The plaintiff, aged 36 at the time, was (and still is) a Registered Nurse employed by the 2nd defendant working at the premises of the 1st defendant. Judgment on liability has been entered by consent on 6 March 2019.
2. The plaintiff attended A&E of Yan Chai Hospital after the accident and the records showed that she had sustained buttock injury with tenderness at the coccygeal region but the x-ray revealed no fracture of the coccyx.
3. The plaintiff had since attended various doctors, pain clinic, physiotherapists and clinical psychologists but still complained of, amongst others, persistent coccyx region pain spreading to the lower back causing depressed mood.
4. The plaintiff also claimed that she was “bumped” on her left side by a colleague whilst manoeuvring a patient on 5 August 2015 (the “Second Accident”) which caused a strained back and increased her coccyx pain, but she is not claiming for the 2nd Accident in the current case.

*Pain, suffering and loss of amenities*

1. According to the Joint Medical Report by Orthopaedics experts Dr. KONG Kam Fu, James (instructed by the plaintiff) (“Dr. Kong”) and Dr. Ko Put Shui Peter (instructed by the defendant) (“Dr. Ko”) dated 16 October 2017 (“the JMR”), the plaintiff only suffered from a soft tissue contusion to the lower back and coccyx region.

1. Both experts agreed that the plaintiff had various pre-existing and co-existing conditions (e.g. stress incontinence and minimal degenerative changes of lumbar spine) which are not related to the accident (Trial Bundle page 411 paragraphs 172 and 173).
2. Further, a MRI was performed on 9 October 2012 which showed *“no significant abnormality except for a small annular tear”* which *“should not be related to the subject accident”* (as agreed by both Orthopaedics experts in the JMR: Trial Bundle page 412 paragraphs 179 and 180).
3. Another MRI was performed on 9 October 2012 which showed *“no significant pathology but pre-existing mild degenerative changes”*. (Dr. Ko at Trial Bundle page 412 paragraph 177).
4. Dr. Ko opined that the *“MRI had confirmed no significant abnormality or injury, or any structural derangement in her lumbar spine”* (Trial Bundle page 413 paragraph 181). Dr. Kong did not raise any dispute on this opinion.
5. There were also no features since the accident *“suggestive or suspicious of any neurological dysfunction / deficit arising from her low back / coccyx injury”* and, indeed, no such was found by the experts during the joint assessment.
6. In fact, there was no objective findings showing any significant residues from the accident. There was no neurological deficit or muscle wasting. There were *“mild tenderness on the coccyx”* and *“mild reduction of motion”* but these were essentially “subjective” evidence: both examinations would rely upon the subject being honest when complaining of pain on palpation, or pain or stiffness on certain body movements.
7. There was also a finding of positive Waddell’s sign (one manoeuvre was recorded as “positive” and two “mildly positive”). These were essentially manoeuvres that should not elicit pain. So when the plaintiff complained of pain, this might raise a suspicion of unreliability of the complaint: the patient might be consciously or subconsciously “over-reporting” the symptom. Of course, a positive Waddell’s sign would not necessarily mean that the plaintiff must have no pain, but these might render her subjective complaint unreliable.
8. Therefore, it would be all down to the plaintiff’s own subjective evidence regarding her symptoms.
9. During the hearing, the plaintiff claimed that she could cope with regular pain-killers but there were “flare-up” episodes when the pain was so bad that she had difficulties getting out of bed, putting on trousers or going to the bathroom. She then said that she had 1-2 degree (out of 10 degrees in the pain scale) of persistent pain. But when asked whether she had this pain constantly, she answered that when she was on pain-killers, there would be zero pain and pain came mainly when she had to exert effort (involving her back) when turning a patient or walking fast, but then the pain would be 4-5 degrees (and not 1-2 degrees).
10. The plaintiff also claimed she could cope with everyday activities with regular pain-killers but then said that the pain came on even if she carried a six-pack of lemon tea drinks or wiping a table-top, and that she could not change sheets on a bed, move a bed mattress, clean the floor, wash the dishes etc. At one point, the plaintiff said her pain was 30-40% better after her third caudal block injection but later said that the pain was the same.
11. Further, the plaintiff claimed that the pain would wake her up 1-2 times a week and she would need to do some stretching exercise before going back to sleep.
12. In short, the plaintiff’s case was that whatever treatment she had received over the last 6 ½ years (various pain-killers, injections, physiotherapy or clinical psychology sessions), none of which had cured her pain: she still needed to take regular pain-killers but, according to her, there were still severe “flare-up” episodes and regular disturbance of sleep, and that the pain prevented her to perform even the simplest of house work.
13. I would expect that any reasonable patient under such circumstances would be desperate, and would not repeatedly accept the same treatment (e.g. the same or similar pain-killers) when they have not cured her. One would not expect a reasonable patient who had been in such pain and disabilities to “sit out” a period of sick leave and only consult a doctor after the period of sick leave has run out. Instead, once the patient realised that the treatment was not working, he or she would likely immediately return to see a doctor complaining about the treatment, seeking more investigation and stronger treatment etc.
14. However, looking at the schedule of sick leave certificates (Trial Bundle page 457-1 to 457-4), it was clear from pattern of sick leaves that for many periods of time, she would consult the doctor precisely at the date the precious sick leave ran out, and then there were gaps when she did not consult any doctor after the sick leave ran out (presumably she returned to work during those times), but she had never returned to see a doctor *before* the sick leave ran out.
15. The plaintiff’s counsel, Mr. Edward Lun, sought to distinguish this case from *Liu Yuk Lin v Johnson Cleaning Services Co. Ltd* where this court adopted a “reasonableness” test on the plaintiff’s response to see if a subjective complaint was genuine.
16. I noted that the plaintiff in this case attended multiple doctors, Chinese Medical Practitioners and medical departments and had taken 2 MRIs scans on her own initiative.
17. In the case of *Liu Yuk Lin*, the pattern of consultation attendance was different in that the plaintiff had taken a sick leave lasting for a whole year and appeared quite content to take the prescribed medication without cure.
18. In the current case, the plaintiff did return to work very early (on 8 October 2012) but she alleged that it was the pain which made her take leave again. Her latter sick leaves were also of more intermittent in nature although, as stated above, during these periods where she tended to return to see the doctor immediately after the previous sick leave period expired.
19. The pattern of consultation attendance is not the only way to test the “reasonableness” of the patient’s response to an alleged subjective behaviour. There may be many reasons why the pattern of consultation attendance is different from case to case: for example, a doctor may refuse to give a long sick leave in one go because there is simply no objective medical evidence of any serious underlying illness, and a doctor in another case may give a longer period pending an “wait-listed” investigation or a follow-up consultation on suspicion of a more serious illness. The doctor not granting long periods of sick leave may be a reason why a patient wishes to return to work for a short while, and to take further (shorter) sick leaves later to maintain the sick role. Of course, there could also be many other reasons why a patient wish to return to work or to take sick leaves. There is no general rule and the court needs to assess all evidence in a case-by-case basis.
20. Besides looking at the pattern of consultation attendance, one can also look at the extent and effort which the plaintiff took to investigate the cause and to seek a cure of such a persistent and disabling illness.
21. It is striking that the plaintiff admitted that she did not ask any doctor about the cause of her persistent symptoms and only gave evidence that a Chinese Medical Practitioner and an OM nurse told her that it was something to do with “nerves”. She did not give any evidence on seeking any follow-up treatment after being told of this, or whether she asked her doctors about this, or whether she consulted (or sought a referral to), for example, a neurologist to see if there was really a “nerve” problem.
22. It was also striking that when cross-examined on whether she had asked the doctor for more aggressive treatment for her pain, she admitted that she had not. She said that she thought that the caudal block injections were invasive and that it had helped her.
23. But of course the injections did not actually help her in *curing* her illness: her pain was persistent and had recurred after each of the injections.
24. In fact, the court noted this pattern of evidence from the plaintiff: she was alternately trying to give an impression that her pain and disabilities were serious and persistent, but then said that they were not so serious enough because she could cope and need not seek further more aggressive or stronger treatment, but then the symptoms could not really be under control because they were serious and persistent despite the treatment.
25. The evidence was confusing and inconsistent because the plaintiff was trying to argue both ways in an attempt to explain her consultation behaviour: it was clearly an exercise in tailoring evidence rather than genuinely telling the truth.
26. Further, I disagree with any suggestion that because a patient is prepared to undergo any invasive procedures, the subjective complaints must therefore be genuine. One would imagine that self-interest in monetary compensation (and perhaps lighter work duties with the same pay) could also be a strong motivation force. The number and extent of invasive procedures would only be a factor to consider in the “reasonableness” test. Here, the plaintiff had received three caudal block injections.
27. In assessing the “reasonableness” of a plaintiff’s response to an alleged “purely subjective” complaint, one needs to look at all the evidence on a case-by-case basis. The overall test is whether the plaintiff’s “consultation behaviour” is more likely an attempt to maintain the impression of persistent and disabling symptoms (thus prolonging the sick leave period and maximizing compensation) instead of a genuine effort in seeking (and exhausting all reasonable means for) a *final* *cure*.
28. In this case, having considered the JMR (including the MRIs findings by the experts), the plaintiff’s “consultation behaviour” (including the pattern of consultation attendance, the extent of “invasive” treatment she received, the extent that she sought to investigate the cause and the cure of her alleged symptoms), and the inconsistencies of her evidence in court, I do not find the plaintiff a credible witness: she has failed to convince the court that she had suffered the subjective symptoms as alleged or at all, or at least to the extent she claimed.
29. Also on the question on credibility, I note that the A&E medical records dated 10 May 2013 showed that she had complained of another “slip and fall” accident a few days prior to that attendance (Trial Bundle page 1007) but the plaintiff had failed to mention this in her witness statement nor to the experts.
30. There were no great disputes between Dr. Ko and Dr. Kong regarding the plaintiff’s present condition.
31. However, it was clear that Dr. Kong based his opinion on the truthfulness of the plaintiff in her subjective complaint of *“residual back pain with stiffness”* and, as such, whilst opining that the plaintiff *“has attained a relative(ly) satisfactory recovery”*, he also opined that *“she has mild soft tissue residue of coccygeal pain with back stiffness, which is not uncommon after back /coccyx contusion”*.
32. Of course, in the absence of any positive and convincing evidence, the court cannot find that some event must have occurred on balance of probability simply because the event is *“not uncommon”*.
33. As stated above, I do not find the plaintiff a truthful witness regarding the extent, if any, of her residual symptoms. I would find that the plaintiff failed to prove to the court’s satisfaction of her “subjective” symptoms and complaints. I would therefore prefer the opinion of Dr. Ko, who opined that *“no significant residues”* was expected from the accident based on *“objective findings”*, and that *“in usual clinical situation”*, this *“soft tissue contusion”* would be adequately treated by conservative treatment *“up to about 6 months”*.
34. As for any alleged psychological / psychiatric damages, it was clear that this stemmed from the alleged subjective complaint of persistent pain and disabilities. (Trial Bundle page 350 paragraph 7 of the Psychological Report: *“…Ms. Tsang was impressed to be suffering from some psychological disturbance which were largely triggered by her pain and the impairment”*).
35. As I have found that the plaintiff’s subjective complaint was not credible evidence, I would therefore not accept that there was such consequential *“psychological disturbance”.*
36. Having considering the cases produced by both parties, I agree with Mr. Alfred Cheng, the counsel for the defendants that *Fazal Ahmed v MTR Corporation Ltd*,DCPI 29/2011 is the most comparable case and, allowing for inflation, I would give an award of HK$60,000 under this head of claim.

*Pre-trial Loss of Earnings*

1. There is no dispute that the plaintiff earned HK$42,848.95 a month at the time of the accident and that she was entitled to another 15% of her income as mandatory provident fund contribution.
2. For reasons stated above, the court would follow the opinion of Dr. Ko. He opined that *“in the usual clinical situation…conservative treatment…up to about 6 months should be adequate and appropriate”*. However, he further opined that (Trial Bundle page 415 paragraph 193) in this particular case, after considering her job nature, mechanism of injury, objective evidence and findings about her condition, 62 days of sick leaves was *“acceptable and appropriate”*. I think this is somewhat generous given that the sick leave spans over 9 months after the accident.
3. The pre-trial loss of earnings should therefore be HK$42,848.95 x 62/30 x 1.15 = HK$101,837.67

*Future Loss of Earnings and Loss of Earning Capacity*

1. As opined by Dr. Ko, the plaintiff should have adequately recovered after this period with be no loss of earning capacity and loss of earnings. There should be no award under these two heads of claim.

*Future medical expenses*

1. Accordingly, there should also be no award under this claim.

*Special damages*

1. The plaintiff claims HK$20,000 as past medical expenses spanning some 6 1/2 years (or 78 months) but as the court finds that the plaintiff would have recovered within 6 months (according to Dr. Ko) so a reasonable estimation of medical expenses is HK$20,000/78 x 6 = HK$1,538. I would round this up to HK$1,600.
2. The court would allow HK$2,500 as claim for tonic food but this would be generous given that this was a soft tissue contusion injury.
3. The court would allow HK$1,000 as traveling expenses.
4. The court would also take into account the compensation to the sum of HK$324,938.71 which the plaintiff has already received.
5. In summary:

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|  | HK$ |
| PSLA | 60,000 |
| Pre-trial loss of earnings | 101,837.67 |
| Future loss of earnings | 0 |
| Loss of earning capacity | 0 |
| Future medical expenses | 0 |
| Special damages | 5,100 |
| Less compensation | (324,938.71) |
| Total: | **0** |

*Conclusion*

1. The court will therefore give the order that:
2. The plaintiff’s claim against the defendants be dismissed.
3. The costs of the action be to the defendants to be taxed if not agreed with certificate for counsel.

(Harold Leong)

District Judge

Mr Edward Lun, instructed by Cap Chan & Co, for the plaintiff

Mr Alfred Cheng, instructed by Deacons, for the 1st and 2nd defendants