#### DCPI1795/2010

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1795 OF 2010

BETWEEN

ZHONG RUYIN （鍾汝銀） Plaintiff

and

FUK ON HOME OF THE AGED Defendant

LIMITED （福安老人院有限公司）

##### Before: Her Honour Judge H C Wong in Chambers (open to the public)

Date of Hearing: 27 March 2012

Date of Decision: 3 April 2012

D E C I S I O N

1. The defendant applies for leave to appeal against my judgment of 20 January 2012 and for a stay of the cost nisi order pending appeal to the Court of Appeal. The application is opposed by the plaintiff.
2. The defendant’s appeal is on the assessment of the quantum of damages in my judgment. On the basis that there is a corrigendum to my judgment of 30 March 2012, the remaining issues in the defendant’s grounds of appeal are: 1. whether the award on pain, suffering and loss of amenities was excessive; 2. whether the court is bound by the plaintiff’s revised statement of damages on the notional monthly earnings of the plaintiff after 1 January 2011 of $4,000 and the relating MPF award; and 3. whether the plaintiff’s right knee pain should be taken into account in assessing her loss of earnings.

*The Pain, Suffering and Loss of Amenities award*

1. The defendant compared the award for PSLA in the present case to the award of $50,000 in *Mohammed Ashaq v Royal Honour Industrial Limited* in DCPI 586 of 2007 under this head. The injuries suffered by the plaintiff in that case were very different from the plaintiff in the present case. Mr Ashaq suffered from very mild shoulder and residual low back pain from the accident. He admitted he was able to walk without aid and could carry weight of up to 5kg at the trial. The experts found Mr Ashaq had exaggerated his symptom at the examination. The surveillance video also showed he was walking naturally, swinging his cane like a hockey stick, rotating his torso and shoulders, lifting weight with no difficulties and pretending to be limping when he walked into the experts’ clinic at the examination. He was found to have suffered little or minor permanent disability; furthermore, he was 25 years old, much younger than the plaintiff in the present case who was 64 at the time of trial. In the surveillance video, the plaintiff was seen relying on her walking stick, resting at a park bench after walking, stopping and resting after climbing a few steps on the staircase etc.

*Whether the Court is bound by the Plaintiff’s revised statement of damages in its award*

1. The defendant relies on the judgment of the Hon Justice Suffiad in the case of *Lee Wai Man v Wah Leung Finance Ltd* [2004]1 HKC 1023, where the plaintiff was awarded $700,000 for the loss of accumulation of wealth in the fatal accident case. The learned judge said in paragraph 130 of his judgment that the deceased (who was a project manager of the defendant) that the sum awarded was probably on the low side, however, the plaintiff was bound by the pleaded sum of $700,000.
2. Order 18 rule 12 (1A), (1B) and (1C) are the relevant provisions under the Rules of Court in personal injuries actions. Rule (1C) defines ‘a statement of special damages’ to mean a statement giving full particulars of the special damages claimed for expenses and losses already incurred and an estimate of any future expenses and losses (including loss of earnings and of pension rights).
3. Mr Justice Rogers (as he then was) in the case of *Yau Lee Construction Co Ltd v Chan Yu Ho* (Administratrix of the Estate Wong Tai Hei, deceased) [1994] 3 HKC 560 set out as an example the form the statement of damages to include:
4. loss of earnings already suffered;
5. estimated loss of earnings stating how the estimate is made up;
6. expenses incurred include medical and other expenses in relation to the future care and attention, accommodation or appliances;
7. estimate of future expenses, stating how this is made up; and
8. pension rights.

(See also the Hong Kong Civil Procedure 2012 page 400 under 18/12/52.)

1. The basis of Mr Justice Rogers’s decision was founded on Order 18, rule 12(1C). He held at page 561 H that:

“But then, O 18 r 12(1C) goes on to say that the statement must also be an estimate of future expenses and losses, including loss of earnings and of pension rights, and that does not seem to me to be linked up with what might be narrowly defined as special damages before. What it is doing, quite broadly, is to say if any future expenses and losses are to be claimed, they are to be identified in this statement. This, it seems to one, ties in with s. 20(2)(b)(iii) of the Law Amendment and Reform (Consolidated) Ordinance (Cap 23) which provides that:

Where a cause of action survives as aforesaid for the benefit of the estate of the deceased person, the damages recoverable for the benefit of the estate of that person … shall where the death of that person has been caused by the act or omission which gives rise to the action … not include any damages for loss of property, whether income or otherwise, in respect of any period after his death except in so far as the court is satisfied that but for the act or omission that gave rise to the cause of action, the deceased would have achieved an accumulation of wealth by the time that he would otherwise have died, in which case damages may be awarded in respect of loss of that wealth: Provided that damages under this paragraph shall be subject to such deduction as the court considers it just to make in the circumstances of any particular case on account of the accelerated receipt of that wealth and in order to avoid over-compensation.”

1. The form referred to in Mr Justice Rogers’s judgment was taken from p 185 of the book: Pleadings: Principles and Practice by Sir Jack Jacob QC and Ian Goldrein as an example for clarity and convenience. Furthermore, the issue in the *Yau Lee Construction* case was the claim of loss of accumulation of wealth provided for under s 20(2)(b)(iii) of the Law Amendment and Reform (Consolidation) Ordinance. In the case of *Lee Wai Man v Wah Leung Finance*, Mr Justice Suffiad was also commenting in the context of the loss of accumulation of wealth claim in a fatal accident case when he made the observation. It is to be noted that s 20(2)(b)(iii) specifies that ‘the damages awarded under this paragraph shall be subject to such deduction as the court considers it just to make in the circumstances of any particular case on account of the accelerated receipt of that wealth and in order to avoid over-compensation.’ The legislation provided that the loss of accumulation of wealth claim pleaded is subject to a deduction by the court on account of the acceleration of receipt, there was no provision for an increase on the pleaded sum.
2. It is my view that the statement of special damages though serves as the further and better particulars of the allegation that the plaintiff has suffered loss and damage which the plaintiff cannot depart from, it is not meant to tie the court’s hand in its award on items such as loss of pre-trial and future earnings and medical expenses etc. It is not uncommon for the court to make an award over and above the amount set out in the plaintiff’s statement of special damages on items such as loss of pre-trial and future earnings and medical expenses, for these items are continuing losses up to the date of trial and beyond. While the loss of accumulation of wealth in a fatal accident claim is ascertained well before the trial commences.

*The defendant’s right knee pain and her loss of earnings*

1. The defendant’s grounds of appeal further asserted that I have failed to take into account the plaintiff’s reliance on a walking stick was due to her right knee pain which was unrelated to the accident. Though it was the plaintiff’s evidence that the defendant had told her she could not be re-employed because she was using a walking stick, it was not my finding that the defendant refused to re-engage the plaintiff because of her knee pain. It was clear the defendant simply did not wish to continue with her employment at the old age home after the accident for she was told to resign from her job by the defendant’s management staff after the accident in the first place.
2. Having observed the plaintiff giving evidence at the trial, taking into consideration her general health conditions, her age, the lack of formal education and skills as a former farmer in China prior to her immigration to Hong Kong at the age of 59 years, it is unlikely she would be employed by a new employer one and a half year after the accident at the age of 63 3/4. On the basis that the defendant had refused to re-employ her after the sick leave period and given her general health condition, it would be wrong to take into account a notional monthly earning of $4,000 after I have accepted that it would be difficult for her to return to gainful employment (paragraph 53 of the judgment).
3. For the aforesaid reasons, I am not convinced that the defendant’s appeal has any prospect of success. Leave to appeal is therefore refused.

*Interests on the Judgment sum and costs*

1. The plaintiff ‘s counsel, Mr Cheung, asks for an order of increased rate of interest on the judgment sum and interests of not exceeding 10% above the judgment rate after the latest date on which the defendant could have accepted the offer without leave of court. He further applies for the plaintiff’s costs of the action to be taxed on a party and party basis up to 17 August 2011 and from 18 August 2011 onwards be on an indemnity basis.
2. The affirmation of Wong Lily, the plaintiff’s solicitor, of 4 February 2012, confirmed the plaintiff had through her solicitor made a sanction offer of $200,000 under Order 22 rule 24(2) of the Rules of District Court to the defendant’s solicitor on 20 July 2011. The offer was rejected by the defendant through its solicitor by a letter issued on the same day. Mediation was also conducted on the same day, it failed. On the basis that the plaintiff was awarded $240,843.56, above the sanction offer of the plaintiff of $200,000, the plaintiff is asking for an enhanced interest rate on the award and the taxation of costs on a higher assessment basis.
3. O 22 r 24 of the RDC provides:

“Costs and other consequences where plaintiff does better than he proposed in his sanctioned offer (O 22, r 24)

(1) This rule applies where-

1. a defendant is held liable for more than the proposals contained in a plaintiff’s sanctioned offer; or
2. the judgment against a defendant is more advantageous to the plaintiff than the proposals contained in a plaintiff’s sanctioned offer.
3. The Court may order interest on the whole or part of any sum of money (excluding interest) awarded to the plaintiff at a rate not exceeding 10% above judgment rate for some or all of the period after the latest date on which the defendant could have accepted the offer without requiring the leave of the Court.
4. The Court may also order that the plaintiff is entitled to-
5. his costs on the indemnity basis after the latest date on which the defendant could have accepted the offer without requiring the leave of the Court; and
6. interest on those costs at a rate not exceeding 10% above judgment rate.
7. Where this rule applies, the Court shall make the orders referred to in paragraphs (2) and (3) unless it considers it unjust to do so.”
8. I agree the plaintiff is entitled to an enhanced rate of interest above the judgment rate. The sanction offer from the plaintiff was made on 20 July 2011, after the close of pleadings and witness statements and directions for setting down had been given by the Master on 16 June 2011. Mediation was held on the same day as the sanction offer but there was no settlement. Considering that the offer was inclusive of interests at $200,000 after deduction of the ECC payment, the offer was not excessive. It was unreasonable for the defendant to reject it out right on the same day. I therefore allow an enhanced interest at 2% above the usual rate of 2% on special damages from 18 August 2011 to the date of judgment.
9. As to cost assessment, based on the background in this case, I order that costs of the plaintiff be taxed on a party and a party basis up to 17 August 2011 if not agreed, and costs be taxed on an indemnity basis from 18 August 2011, if not agreed.

*Defendant’s Application for a stay of Costs Nisi Order*

1. The defendant’s application of stay of the cost nisi order is refused on the basis that leave to appeal was unsuccessful.
2. Costs of the application for leave to appeal will be borne by the defendant to be taxed if not agreed with certificate for counsel.
3. The plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

# (H C Wong)

# District Judge

Mr YL Cheung, instructed by Yip, Tse & Tang, assigned by Director of Legal Aid, for the plaintiff

Mr Wilson Hui, instructed by Winnie Leung & Co, for the defendant