DCPI47/2002

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 47 OF 2002

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| BETWEEN | Yau Shui Ming | Plaintiff |
|  | and |  |
|  | Excellent Development Limited | Defendant |

Coram: H H Judge Lok in Court

Date of Hearing: 28 May 2003

Date of Judgment: 28 May 2003

Present: Mr Peter K C Wong, instructed by Messrs K Y Woo & Co., for the Plaintiff

Defendant, in person (absent)

J U D G M E N T

1. This action arises out of an industrial accident on 20 January 2001. At the relevant time, the Plaintiff was employed as a barbecue meat chef by the Defendant to work in a restaurant at 52 Coi Yuen Lok Tsuen, Sha Tau Kok, New Territories. On the day of the accident, the Plaintiff was instructed to lift up and move a refrigerator weighing around 500 kilograms from the workshop next door to the restaurant together with some other workers. In the course of doing so, one of the Defendant’s employees lost his balance and lost grip of the said refrigerator, causing the same to land on the Plaintiff’s left thigh and waist. As a result, the Plaintiff suffered injury to the back.
2. The Plaintiff complains that the accident was caused by the negligence of the Defendant, his servant or agent, and asks for compensation. Interlocutory judgment was obtained by the Plaintiff on 24 January 2003, and this is the assessment of the Plaintiff’s damages.
3. The Plaintiff was born in 1961 and he was aged 40 at the time of the accident. He received education up to Primary 6 level, and he is married with one child aged 15.
4. After the accident, the Plaintiff went to seek treatment by bonesetter and attended follow-up treatments for the next two days. When he resumed work on 25 January 2001, his back pain became intolerable and he went to the Accident & Emergency Department of the Alice Ho Mui Ling Nethersole Hospital in Tai Po for treatment. The Plaintiff was subsequently referred to the Specialist Clinic for further treatment.
5. The Plaintiff first attended the Orthopaedic Specialist Clinic on 7 February 2001 and he was diagnosed to have suffered from left sciatica with nerve root compression. He always complained of pain in the back and the Plaintiff was hospitalised for 3 times to receive in-patient treatments, each time for a period of about a week. Despite various in-patient and outpatient treatments, the Plaintiff still complained of persistent pain the back.
6. The Plaintiff has a history of back pain. He was diagnosed to have prolapsed intervertebral disc more than 10 years ago and laminectomy was done for him. He recovered well after 2 operations. He resumed work after a rest of about 3 months and he remained symptom-free thereafter. For the purpose of the present assessment, I am prepared to accept that the Plaintiff’s present complaints are not caused by the pre-accident injury.
7. The Plaintiff’s present complaints can be summarised as follows:

(1) There is persistent back pain;

(2) the Plaintiff experienced pain after prolonged standing or sitting or when lifting heavy weight, sneezing or coughing;

(3) there is limited movement of spine and there is numbness in the back;

(4) the Plaintiff has to reduce the frequency of sex activities because of the back pain from 2 times a week previously to 2 to 3 times a month at present; and

(5) he cannot play snooker or jog as before.

1. Upon examination by the Plaintiff’s expert, Dr Li Wing-kin, it was found that the Plaintiff had significant signs of radiculopathy including sciatica pain, sensory loss in a dermatomal distribution, loss of ankle reflex and weakness of left ankle and big toe dorsiflexion. The accident also caused extensive damage to the soft tissue in the lower back and there was tenderness over a very diffused area. In the opinion of Dr Li, the Plaintiff is suffering from 13% impairment of the whole person. He also adds that the Plaintiff cannot return to his original job as a barbecue meat cook, but he can work as a security guard, watchman or a restaurant supervisor.

Pain, Suffering and Loss of Amenities (PSLA)

1. The Plaintiff accepts that his injury falls below the category of “serious injury” according to the Lee Ting Lam Scale. In Yeung Sze v Win Art Design and Decoration Co. Ltd, unreported, HCPI No. 6 of 2002 (decision of Master Yuen on 27 June 2001) and Chair Sai Sui v International Country Club Ltd & Anr., unreported, HCPI No. 522 of 1998 (decision of Master Kwan on 26 October 1999), Master Yuen and Master Kwan awarded $200,000 and $150,000 respectively for two Plaintiffs who suffered similar back injuries. After referring to these cases, I am of the view that the Plaintiff’s disabilities in the present case are more serious than those of the Plaintiff in the Chair Sai Sui case, at least the Plaintiff here suffers from limited movement of spine, weakness of left ankle and loss of ankle reflex. It seems that the Plaintiff’s disabilities are more similar to those suffered by the Plaintiff in the Yeung Sze case, and I therefore award $200,000 as damages for PSLA in the present case.

Loss of Pre-trial Earnings

1. At the time of the accident, the Plaintiff worked as a barbecue meat chef and his duties included the cooking and the preparation of barbecue meat and the lifting of various loads. By reason of his injury, the Plaintiff cannot resume his former employment, and his evidence in this regard is supported by the medical opinion of Dr Li.
2. After the accident, his employment was terminated by the Defendant at the end of the sick leave period on 19 September 2001. After that, the Plaintiff could only work as a casual worker for a few months. In my judgment, the Plaintiff should be able to claim for all the loss of earnings suffered by him during the period from the date of the accident to 31 December 2001, which was about 3 months after the end of the sick leave period. According to the second revised Statement of Damages, the loss of earnings during such period amounts to $113,133, and I therefore allow the Plaintiff to claim for such loss.
3. In January 2002, the Plaintiff found a job as a barbecue meat chef in a restaurant. However, by reason of his injury, he could not involve in the meat cooking process, and he could only stay in the barbecue counter chopping meat and preparing take-away food for the customers. As such kind of work did not require specialist skills, such as cooking the barbecue meat, the income for such kind of job would be less than that of his former employment, and his monthly income was only $13,000 by that time. The loss of income was therefore $2,000 a month, and the Plaintiff should be able to recover loss of earnings at such rate from 1 January 2002 to 19 March 2003, which can be calculated as follows:

$2,000 x 14  months = $29,226.

1. On 20 March 2003, the Plaintiff found a similar job in a restaurant in Ocean Park with a monthly income of $15,000. As such income was the same as that of his former employment, there was no loss of earnings after 20 March 2003 to the date of this assessment.

Loss of Future Earnings and Loss of Earning Capacity

1. As I have mentioned above, the Plaintiff worked as a barbecue meat chef in a restaurant in Ocean Park, earning an income which was the same as that of his former employment. However, by reason of the economic downturn and the recent outbreak of atypical pneumonia, the restaurant suspended his job on 26 April 2003, and the Plaintiff could only work as a casual worker in other restaurants.
2. For the purpose of the present exercise, it is clear that the Plaintiff can earn as much as his former employment but for some economic factors. His job is only suspended at this stage, and he should be able to resume his work after the recovery of the economy and the tourism industry. Hence, the present loss of income is caused by factors which are unrelated to the accident, and I am therefore of the view that the Plaintiff should not be allowed to claim for any future loss of earnings.
3. According to the evidence of the Plaintiff, of which I accept, the average income of his present job should be in the region of $12,000 to $13,000, and so the income of the Plaintiff’s employment with the restaurant in the Ocean Park is slightly higher than the current market rate. In such circumstances, there is a real risk that by reason of the Plaintiff’s back pain, the Plaintiff will suffer a handicap in the labour market or loss of income should he lose his current employment. Even if he remains in employment, he is likely to suffer from loss of earnings by reason of occasional inability to work, and his promotion prospect may also be affected. As the Plaintiff’s disabilities prohibit him to lift heavy loads, stand or sit for prolonged periods of time, such risks are real. In such circumstances, the Plaintiff should be able to recover substantial damages for his loss of earning capacity.
4. In the light of the facts of the present case, I assess the Plaintiff’s loss of earning capacity in the sum of $150,000, which is roughly equivalent to 10 months of the Plaintiff’s present salary with the job in the Ocean Park.

Other Special Damages

1. The Plaintiff claims a sum of $5,000 as transportation expenses in attending various medical treatments. Unfortunately, the Plaintiff cannot supply the court with a breakdown of such expenses. In such circumstances, I only allow the Plaintiff to claim a sum of $3,000 for such loss.
2. The amount of $3,931 claimed as medical expenses is reasonable and I allow the claim.
3. The sums claimed as bonesetter’s fee and tonic food are, in my view, excessive, and I only allow the Plaintiff to claim $1,000 and $3,000 respectively for such losses.
4. The Plaintiff’s loss can therefore be summarised as follows:

(1) PSLA $200,000

(2) loss of earnings $142,359

(3) loss of earnings capacity $150,000

(4) other special damages $ 10,931

Sub-total $503,290

less employees’ compensation payment $ 89,200

TOTAL $414,090

1. The Plaintiff is also entitled to interest: (1) on the damages of PSLA at the rate of 2% annum from 8 February 2002 to the date hereof and thereafter at judgment rate; and (2) on the damages of loss of earnings and other special damages at the rate of 4% per annum from 20 January 2001 to the date hereof and thereafter at judgment rate. The Plaintiff is also entitled to the costs of the action including the costs of the assessment of damages, to be taxed if not agreed.

H H Judge Lok

District Court Judge