[English translation – 英譯本]

## DCPI 135/2017

[2021] HKDC 729

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 135 OF 2017

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BETWEEN

YU CHUN KIT （余俊傑） Plaintiff

and

WONG WING YAU formerly trading as

VIEWBOND CARGO SERVICE COMPANY

（黃泳祐前經營偉邦貨運公司） 1st Defendant

EMPLOYEES COMPENSATION

ASSISTANCE FUND BOARD 2nd Defendant

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Before: Deputy District Judge Kay Seto in Court

Dates of Hearing: 28, 29 April and 11 June 2021

Date of Judgment: 22 June 2021

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J U D G M E N T

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*A. Introduction*

1. This is an assessment of damages in respect of a traffic accident which occurred to the plaintiff on 23 January 2014 during the course of his employment with the 1st defendant. On 21 September 2018, interlocutory judgment on liability was entered against the 1st defendant in default of notice of intention to defend, leaving damages to be assessed at this trial.
2. At the time of the accident, the plaintiff, then aged 19, was a casual delivery worker and the front seat passenger of a medium goods vehicle driven by the 1st defendant. When the vehicle was travelling along Tolo Highway near Chainage 10.5(1A), Ma Liu Shui Bridge, Tai Po, New Territories, it collided with a container truck at the front, as a result of which the plaintiff suffered multiple injuries.
3. By the order of Master Peony Wong dated 23 December 2019, the Employees Compensation Assistance Fund Board (“**Board**”) was joined in these proceedings as the 2nd defendant to contest the issue of quantum only.
4. The trial was originally set down for 2 days. On the first day of the trial (28 April 2021), the plaintiff was absent and incommunicado. Upon hearing from Mr Yim, counsel for the plaintiff, I acceded to his application for an adjournment of the trial until the following day on the ground that the plaintiff would be the only witness testifying at the trial. The plaintiff appeared on the second day of the trial (29 April 2021) and explained through counsel that he had been ill and thus could neither attend the trial nor receive the phone calls made by his solicitors on the previous day. The costs thrown away by the adjournment would be addressed below.
5. At the beginning of the trial, the plaintiff and the Board confirmed that they had reached an agreement on quantum. On such basis, on the second day of the trial, I excused the attendance of the Board for the remainder of the trial.
6. During the trial, a preliminary issue arose as to the *locus standi* of the 1st defendant[[1]](#footnote-1) to appear at the trial, leading to extensive arguments from the parties which are to be addressed in the following section.

*B. Locus standi of the 1st defendant*

1. After the accident, on 16 September 2014, the 1st defendant was adjudged bankrupt upon a bankruptcy petition presented by himself in HCB 5794/2014.
2. The plaintiff commenced these proceedings on 20 January 2017. Thereafter, upon the consent of the plaintiff and the joint and several trustees in bankruptcy of the 1st defendant’s estate (“**Trustees**”), Master M Wong made an order in HCB 5797/2014 granting leave to the plaintiff to carry on these proceedings against the 1st defendant.[[2]](#footnote-2) The Trustees have indicated that they would not contest these proceedings on behalf of the 1st defendant.
3. On 16 September 2018, the 1st defendant was discharged from bankruptcy under section 30A(1) and (2)(a) of the Bankruptcy Ordinance (Cap 6) (“**BO**”).
4. Generally speaking, a bankrupt has no *locus standi* to appear in proceedings involving claims for debt or damages in which he is a defendant, by reason that the only assets out of which the claim can be satisfied will have vested in his trustee in bankruptcy. He is protected by his bankruptcy from the claim which lies only against his estate, and has therefore no recognised interest in defending it: see *Heath v Tang* [1993] 1 WLR 1421, 1424E-F, *per* Hoffmann LJ (as he then was); *Schaw Miller and Bailey: Personal Insolvency: Law and Practice* (5th ed, 2017), §19.42.
5. It is noteworthy that the learned authors of *Schaw Miller and Bailey* also stated in the same passage (at §19.42) that “[o]ne would also assume that [the bankrupt] would retain standing to appeal in cases involving debts that are not discharged by bankruptcy”.
6. Section 32 of the BO provides for the effect of an order of discharge and bankruptcy debts[[3]](#footnote-3) which are not thereby discharged as follows:

“(1) An order of discharge shall not release the bankrupt –

…

(aa) from any liability to pay any amount under a confiscation order made under the Drug Trafficking (Recovery of Proceeds) Ordinance (Cap. 405) or under an external confiscation order registered under that Ordinance.

…

(2) Subject to subsections (1) and (3) to (8), where a bankrupt is discharged, the discharge releases him from all the bankruptcy debts, but has no effect –

(a) on the functions (so far as they remain to be carried out) of the trustee and the operation of the provisions of this Ordinance for the purposes of carrying out those functions; or

(b) on the liability of the discharged bankrupt to make continuing contributions to his estate pursuant to an order made under section 30A(9).

(3) Discharge does not affect the right of any secured creditor of the bankrupt to enforce his security for the payment of a debt from which the bankrupt is released.

(4) An order of discharge shall not release the bankrupt from any debt or liability incurred by means of any fraud or fraudulent breach of trust to which he was a party, or from any debt or liability whereof he has obtained forbearance by any fraud to which he was a party.

(5) Discharge does not release the bankrupt from any liability in respect of a fine imposed for an offence or from any liability under a recognizance except, in the case of a penalty imposed for an offence under an enactment relating to the public revenue or of a recognizance, with the consent of the Financial Secretary.

(6) Discharge does not, except to such extent and on such conditions as the court may direct, release the bankrupt from any bankruptcy debt which consists in a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty being damages in respect of personal injuries to any person.

(7) Discharge does not, except to such extent and on such conditions as the court may direct, release the bankrupt from any bankruptcy debt which consists in a liability to pay damages for negligence, nuisance or breach of a statutory, contractual or other duty being damages in respect of personal injuries to any person.

(8) Discharge does not release any person other than the bankrupt from any liability (whether as partner or co-trustee of the bankrupt or otherwise) from which the bankrupt is released by the discharge, or from any liability as surety for the bankrupt or as a person in the nature of such a surety.”

1. For the present purposes, the relevant provision is section 32(6) of the BO, providing that, except to such extent and on such conditions as the court may direct, an order of discharge does not release the bankrupt from any bankruptcy debt which consists in a liability to pay damages for, among other things, negligence in respect of personal injuries to any person. This provision is modelled on section 281(5)(a) of the (UK) Bankruptcy Act 1986. Despite thorough research by this court and counsel, no relevant authorities have been found that shed light on the effect of section 32(6) of the BO or its English equivalent on the *locus standi* of a discharged bankrupt.
2. Nevertheless, it appears to me that, in this respect, the court may consider the relevant authorities in relation to other debts which are not discharged by bankruptcy under section 32 of the BO. In particular, section 32(4) of the BO provides that any debt incurred by means of fraud or fraudulent breach of trust shall not be released by an order of discharge. This provision is modelled on section 28(1)(b) of the (UK) Bankruptcy Act 1914, which in turn was based on section 49 of the (UK) Bankruptcy Act 1869.[[4]](#footnote-4) In this context, Mellish LJ held in *Cobham v Dalton* (1874-75) LR 10 Ch App 655 (at 657-658) that:

“… as soon as the order of discharge has been obtained, then, as [the Bankruptcy Act 1869] says that a debtor is not released from a debt of this description, the creditor can enforce his remedy against the after-acquired property or the person of the debtor.”

James LJ used language to the same effect. He said (at 656):

“When the order of discharge has been obtained, or the bankruptcy has been closed, the right of creditors whose debts are not barred to the future assets accrues, the creditors whose debts are barred having lost all remedy. When that time arrives the creditor whose debt is not barred will have a right against the debtor’s property, independently of the bankruptcy, and may resort to his remedy against the person in order to enforce it.”

1. In *Ex parte Hemming, In re Chatterton* (1879) 13 Ch D 163 (at 166-167), the English Court of Appeal applied the above principles laid down in *Cobham v Dalton*. Thesiger LJ, delivering the judgment of the Court, explained (at 167-169) that the property acquired by a bankrupt after his discharge does not vest in his trustee, and that a creditor whose debt has been incurred by means of fraud is entitled to sue the discharged bankrupt (as opposed to his trustee) for the amount of the debt. Should the creditor have received any dividend in the bankruptcy, the discharged bankrupt would only remain liable for the unpaid balance of the debt; if no dividends have been paid, the discharged bankrupt, if he pays the creditor in full, is entitled to stand in the latter’s place in respect of any dividend which may be declared on the debt in the bankruptcy.
2. In *Emma Silver Mining Company v Grant* (1880) 17 Ch D 122, Jessel MR (at 130-131) similarly ordered a discharged bankrupt to personally pay the debt incurred by means of fraud to the creditor, or so much thereof as should not be received by the creditor in the bankruptcy.
3. In the premises, a discharged bankrupt shall remain liable to pay any debts incurred by fraud out of his property acquired after discharge. Such liability falls under the same category of excepted debts in section 32 of the BO as those incurred in respect of damages for personal injuries. Accordingly, in my view, the authorities cited at §§14-16 above are applicable by analogy to a discharged bankrupt’s liability to pay damages for personal injuries under section 32(6).
4. Applying these legal principles to the present case, since the 1st defendant’s liability herein has not been released by his discharge from bankruptcy, he remains personally liable to pay any damages as assessed at this trial out of his property acquired after discharge. In the premises, I am of the view that the 1st defendant has sufficient interest, and thus *locus standi*, to appear at this trial and make submissions on the quantum of the plaintiff’s claim.
5. In my view, the authorities relied on by Mr Yim do not seem to assist the plaintiff’s case in challenging the 1st defendant’s *locus standi* in these proceedings:
   1. First, Mr Yim submitted that the closest case he could find on this issue is *Ord v Upton* [2000] 2 WLR 352. In *Ord v Upton*, the English Court of Appeal held (at 371B) that the right of action of a bankrupt in relation to a hybrid claim for damages for pain and suffering (which involved the bankrupt’s person) and damages for past and future loss of earnings (which involved the bankrupt’s property) vested in his trustee in bankruptcy. Since the present case concerns the *locus standi* of a discharged bankrupt as a defendant rather than his right of action as a plaintiff during bankruptcy, with respect I do not think that *Ord v Upton* is relevant for the present purposes.
   2. Mr Yim also relied on *Wan Po Jun Mary Pauline v Au Yeung Yee Man* [2017] 1 HKLRD 94 and *Re Chang Sze Ling, bankrupt*, HCB 4104/2004 (3 March 2016). Both cases are, in my view, distinguishable from the present case on the ground that they concerned the issue of whether a bankrupt retains any beneficial interest in, and right to claim, landed property which has been vested in the trustees in bankruptcy.
   3. In relation to the counterclaim referred to in §14 of *Wan Po Jun Mary Pauline*, *supra*, Lam VP explained that since the plaintiff had been discharged as a bankrupt, she did not need her trustee’s consent to defend the counterclaim against her. But it is noteworthy that such counterclaim involved a continuing cause of action, which is different in nature from a breach *simpliciter* giving rise to a single cause of action in the present case. It is thus my view that the principles enunciated in *Wan Po Jun Mary Pauline* are not applicable to the present case.
6. For the above reasons, I allowed the 1st defendant to appear, make submissions and cross-examine the plaintiff at this trial.

*C. The plaintiff’s injuries and medical treatment*

1. As a result of the accident, the plaintiff was trapped inside the vehicle driven by the 1st defendant and had to be extricated by firemen. Thereafter, he was immediately sent to the Department of Accident and Emergency of Prince of Wales Hospital (“**PWH**”). Physical examination showed that he sustained abrasion wounds over both knees, and his right lower limb was foreshortened and internally rotated. He was diagnosed to be suffering from right posterior hip dislocation. Closed reduction was done under deep conscious sedation. He was then transferred to the Department of Orthopaedics and Traumatology (“**O&T**”) of PWH for further management.
2. At O&T of PWH, the plaintiff received physical and X-ray examinations, showing that he suffered from (i) right hip dislocation with no neurological deficit; (ii) right knee contusion with soft tissue injury; (iii) left knee abrasion; and (iv) 5th metatarsal phalangeal joint contusion. Computed tomography scan done on the same day (*viz.* 23 January 2014) further revealed that the plaintiff sustained a fracture of the anterior right femoral head, and a fracture of the posterior lip of the right acetabulum.
3. On 18 February 2014, the plaintiff received a magnetic resonance imaging scan of his right knee, showing (i) a tear of the body and posterior horn of the medial meniscus; (ii) a partial tear of the posterior cruciate ligament; (iii) bursitis (*viz.* inflammation of a bursa sac); and (iv) bone bruise in the lateral tibial plateau.
4. The plaintiff was treated conservatively with skeletal traction, hip spica, right knee brace and a course of physiotherapy. He was discharged from PWH on 28 February 2014 after 36 days of hospitalisation.
5. Thereafter, the plaintiff continued to attend follow-up consultations at the O&T outpatient clinic of PWH until 27 February 2015. He also received a course of physiotherapy treatment as an out-patient at the Physiotherapy Department of PWH between 4 March 2014 and 21 May 2014.
6. During the period from 30 April 2014 to 31 December 2015, the plaintiff received 48 sessions of private physiotherapy treatment at Hong Kong Spinal and Sports Therapy Centre.
7. Between March and May 2015, the plaintiff consulted Dr Lau Hoi Kuen, a private orthopaedic specialist, and Dr Cheng Hing Fai, a private specialist in general surgery, for his hip injury.
8. The plaintiff was granted intermittent sick leave totalling 491 days between 23 January 2014 and 16 June 2015.

*D. Expert orthopaedic evidence*

1. The plaintiff instructed Dr Tio Man Kwun Peter, an orthopaedic specialist, who examined the plaintiff on 25 November 2016 and prepared orthopaedic expert reports dated 9 December 2016 and 5 January 2019. Both expert reports of Dr Tio have been admitted as evidence without calling the maker.
2. In Dr Tio’s expert reports, he made the following relevant findings and opinion:
   1. The plaintiff sustained multiple injuries in the right hip and right knee at the accident. At the time of the examination (*viz.* 2 years and 10 months after the accident), he still suffered from mild pain, stiffness and weakness in the right hip and right knee.
   2. In relation to the plaintiff’s complaint of low back pain, although there was no reference of any back pain or injury in the contemporaneous medical records, it is not uncommon for patients with hip or knee problems to present with secondary low back pain due to the poor weight bearing of their hip and knee.
   3. The plaintiff’s prognosis is fair, but he would continue to suffer residual pain, stiffness and weakness in the right hip and right knee.
   4. The plaintiff should be able to resume his pre-accident job as a delivery worker. Reduction in work efficiency is expected due to his right hip and right knee pain, weakness and stiffness, and his limited endurance in heavy lifting and carrying. He would require intermittent breaks of 15 minutes each after every 2 hours of work.
   5. The plaintiff did not have any pre-existing degeneration in his right hip and right knee, but in view of the injuries sustained in the accident, he would have a higher chance of developing symptomatic degeneration in those areas in the future, such that he may eventually require a total hip or knee replacement in 15 to 30 years’ time.

*E. Assessment of quantum*

*E1. The agreed heads of claim between the plaintiff and the Board*

1. As stated above, the plaintiff and the Board have reached an agreement on quantum. Their agreement may be summarised as follows:

|  |  |  |
| --- | --- | --- |
| Pain, suffering and loss of amenities (“**PSLA**”) | | $460,000 |
| Pre-trial loss of earnings and MPF | | $121,827 |
| Future loss of earnings and MPF | | Nil |
| Loss of earning capacity | | $35,100 |
| Special damages | | $60,000 |
| Future medical expenses | | Nil |
|  | | $676,927 | |
| (Less: Employees’ Compensation received) | | ($232,236) | |
| Total: | | $444,691 | |

1. Generally, the court may give effect to the agreed figures if they are within the range of damages payable by the 1st defendant and are substantiated by evidence before the court: see e.g. *Lai Yuk Tsan v Poly Chance (Asia) Limited and Anor*, DCEC 2601/2014 (31 October 2017), §15; *Lam Hoi San, the person appointed to represent the estate of Lam Yiu Wah, deceased v Win Lee Auto Engineering Company Limited and Anor* [2021] HKDC 502, §16.
2. In the present case, while I am satisfied that the agreed figures on (a) pre-trial loss of earnings and MPF, (b) loss of earning capacity and (c) special damages are within the range of damages payable by the 1st defendant and also substantiated by evidence, I am not satisfied that the agreed amount of PSLA at $460,000 is substantiated on the medical evidence before me.
3. In relation to the claim for PSLA, Mr Yim submits that the plaintiff’s injuries fall at the bottom end of the Serious Injury category as defined in *Lee Ting Lam v Leung Kam Ming, an infant by his next friend Leung Shu-wing* [1980] HKLR 657. But it seems to me that the quantum agreed at $460,000 shows that the plaintiff’s injuries are much less serious than those defined as falling within the Serious Injury category. In *David John Slater v Commissioner of Police*, HCPI 646/2012 (7 July 2017), Bharwaney J held (at §22) that the starting point of PSLA awards for the Serious Injury category was $530,000 as of July 2017. Applying the formula as adopted by his Lordship in *David John Slater* (see §22 and footnote 1 thereof), the present starting point of PSLA awards for the Serious Injury category should be $569,000,[[5]](#footnote-5) which far exceeds the agreed figure of $460,000 herein.
4. Mr Yim has cited 7 cases in support of the plaintiff’s claim for PSLA at $460,000. In my view, all of those cases involved injuries and disabilities which are more serious than those of the plaintiff in the present case:
   1. In *Wong Yui Lun v Lee Wai Ming* [2020] HKCFI 3120 (28 December 2020), the plaintiff, aged 50 at the time of the accident, sustained right hip dislocation with sciatic nerve contusion injury, open fracture of right tibia shaft, right index finger injury with extensor tendon cut, L2-L4 lumbar spine transverse process fracture, and right rib fracture with pneumothorax. He was treated by the Intensive Care Unit and underwent 3 operations. Damages for PSLA were assessed by Deputy High Court Judge Dawes SC at $450,000.
   2. In *Chan Long Kin v Lam Kam Cheong*, HCPI 1186/2014 (17 November 2016), the plaintiff, aged 29 at the time of the accident, sustained fractures of the right superior pubic ramus, L5 lumbar vertebrae transverse process, and left distal fibular, and soft tissue left shoulder injury. He underwent open reduction internal fixation surgery on the ankle. He later developed adjustment disorder, with some clinical symptoms of post-traumatic stress disorder and obsessive compulsive disorder. Damages for PSLA were assessed by Recorder Coleman SC (as he then was) at $475,000.
   3. In *Wong Kai Fun v Sun On Logistics Limited and Anor*, HCPI 196/2015 (26 May 2017), the plaintiff, aged 51 at the time of the accident, sustained severe cerebral haemorrhage, fractured temporal bones, bleeding in bilateral ears, bilateral vertigo and episodic tinnitus. He also developed post-traumatic amnesia and cognitive impairment including loss of concentration and memory as a result of the accident. Damages for PSLA were assessed by Master S Lo at $480,000.
   4. As for the other 4 cases, namely:
      1. *Wong Kwok Wa v Hung Tin Sun and Others*, HCPI 1153/2004 (28 October 2005; Deputy High Court Judge Saunders);
      2. *Siu Leong Ching v Professional Scaffolding Engineering Company Limited and Ors*, HCPI 70/2003 (2 November 2004; Suffiad J);
      3. *Chau Sut Nga a patient by his next friend Chau Cheung Tung v Hop Lee Construction Engineering and Anor*, HCPI 300/2000 (9 March 2001; Deputy High Court Judge Gill); and
      4. *Chiu Tak Sang v Kwan Hon Lam*, HCA 4462/1994 (28 November 1996; Master Jennings),

they all involve injuries falling with the Serious Injury category, and are thus not comparable to those of the plaintiff herein.

1. In the present case, the plaintiff’s injuries were limited to his right hip and right knee with no neurological involvement. He was treated conservatively without any need to undergo surgery. He has undergone a fair recovery and, according to the expert opinion of Dr Tio, should be able to return to gainful employment. He did not develop any psychiatric impairment as a result of the accident. In my judgment, his injuries are clearly less serious than those in the cases referred to by counsel, and even taking into account the possibility that he may develop symptomatic degeneration in the right hip and right knee in the future, a sum of $420,000 would be reasonable for his claim under this head.
2. On the other hand, I am prepared to accept the agreement reached between the plaintiff and the Board in respect of the other heads of claim, with reasons as follows.
3. First, the plaintiff’s claim for pre-trial loss of earnings and MPF is calculated on the basis that the plaintiff earned a monthly income of $5,850 ($450 daily wage x 13 days)[[6]](#footnote-6) at the time of the accident, and that he was unable to work during the entire sick leave period from 23 January 2014 to 16 June 2015. Loss of earnings for an additional 3-month period upon the expiration of sick leave is also provided for him to secure alternative employment. Thus, the plaintiff’s total loss under this head should be:

$5,850 x 19 months and 25 days x 1.05 = $121,827

1. Secondly, the plaintiff’s claim for loss of earning capacity is based on 6 months’ loss of his pre-accident earnings, *viz.* $5,850 x 6 months, totalling $35,100, which I consider to be a reasonable sum under this head in the light of his residual disabilities in the right hip and right knee.
2. Thirdly, the plaintiff’s claim for special damages at $60,000 ($55,000 of which is medical expenses and $5,000 is travelling expenses) is supported by medical receipts and attendance records, which I find to be reasonable and would allow the same in full.

*E2. Future loss of earnings and MPF*

1. In addition to those heads of claim as agreed with the Board, the plaintiff also asks the court to allow his claim for future loss of earnings and MPF. His claim under this head has evolved as follows:
   1. In the revised statement of damages and opening submissions, the plaintiff claimed a sum of $793,152 ($10,800 x 12 months x 6.12) on the basis that he would have earned a monthly income of $10,800 ($600 daily wage x 18 days) but for the accident, and that as a result of the accident, he would continue to suffer full loss of earnings with a multiplier of 6.12. No explanation was given as to how this multiplier of 6.12 was arrived at.
   2. During the trial, Mr Yim clarified that the plaintiff’s claim under this head would be revised to be $429,624 ($5,850 x 12 months x 6.12) on the basis that he would suffer loss of earnings at $5,850 per month (see §38 above). But he was unable to clarify exactly how the multiplier of 6.12 was arrived at, except to say that it was based on a multiplier of 25.04 which was then divided by 4 (which result should be 6.26 rather than 6.12) to reflect the plaintiff’s permanent loss of earning capacity at 25% as assessed in the related EC proceedings in DCEC 1787/2015.
2. The plaintiff testified at the trial. He explained that, after the accident, he has no longer been able to work as a delivery worker because his right hip would be painful when he walks or stands for a long time. He also has intermittent pain in his right knee and low back. He said he had tried to seek alternative employment as a salesperson but was unsuccessful thus far because the prospective employers found that it would be inconvenient if he were to be employed. He said he has a low education level and therefore is not qualified for office work. He has been relying on his parents for living expenses since the accident.
3. On the whole of the evidence, I am not satisfied that the plaintiff would suffer any future loss of earnings and MPF for the following reasons:
   1. The plaintiff is now aged 26. He is in the prime of his working life. The sick leave issued by his treating doctors long expired in June 2015 (*viz.* 6 years ago). In the light of his relatively mild residual disabilities in the right hip and right knee as evidenced in the government medical reports and opined by Dr Tio, I am of the view that he should be able to resume gainful employment and, at the very least, perform sedentary work such as working as a security guard, salesperson or junior clerk. In DCEC 1787/2015, HH Judge KW Wong made the same observation in relation to the plaintiff’s working capacity in §39 of the Judgment dated 5 June 2017.
   2. In his witness statement, the plaintiff stated that he was educated up to Secondary 4 level. Thereafter, he worked in different positions, including as a waiter, a clerk of a real estate agency, and a shampoo boy in a hair salon. As he had experience working as a clerk of a real estate agency, it is not open for him to claim that he is not qualified for office work because of his education level.
   3. The plaintiff accepts in his testimony that he has failed to mitigate his loss by securing alternative employment after the sick leave period expired. He has never sought employment as a caretaker or junior clerk or jobs of a similar nature. He also accepts that the reason why he is out of work is not because of his injuries and residual disabilities in the right hip and right knee, but because he has not tried his best to look for a job.
   4. According to the latest Quarterly Report of Wage and Payroll Statistics (as of December 2020) published by the Census and Statistics Department, a security guard employed for non-airport work under 3-shift system could earn an average monthly income of $11,391, whereas a general office clerk and an office assistant could earn an average monthly income of $16,166 and $11,902 respectively. Each of these jobs can yield monthly earnings which far exceed the plaintiff’s pre-accident income and alleged future loss of earnings at $5,850 per month.
   5. The plaintiff accepts in his testimony that, should he work in any of the above positions, he would not suffer any loss of earnings and MPF during the post-trial period at all.
   6. Despite the plaintiff’s claim that he has tried to seek alternative employment as a salesperson or a waiter, no supporting documents, such as application letters, documents showing his attendance of job interviews, and registration record with the Labour Department for job placement, have been produced to substantiate his claim.
4. Furthermore, the plaintiff has not proffered any explanation as to why, on the one hand, he accepts that his loss of earnings during the pre-trial period was limited to those between January 2014 and September 2015 (see §38 above), and on the other hand, he would somehow suffer future loss of earnings with a multiplier of 6.12 years from the date of this judgment in respect of the same injuries. In my view, the plaintiff’s case on the alleged future loss of earnings is inconsistent and incredible as a whole.
5. For the above reasons, I am unable to accept the plaintiff’s evidence that he would suffer any loss of earnings and MPF in the post-trial period because of his residual disabilities in the right hip and right knee. Clearly, there are jobs available in the labour market which are suitable for his education level and physical capabilities. His failure to resume gainful employment after the sick leave period expired in June 2015 is entirely one of his own making and is not attributable to the accident. In my view, the plaintiff’s claim under this head is unsustainable on the objective evidence available and must be rejected.

*E3. Summary on quantum*

1. In my judgment, the plaintiff is entitled to damages in the sum of $404,691, with details as follows:

|  |  |
| --- | --- |
| PSLA | $420,000 |
| Pre-trial loss of earnings and MPF | $121,827 |
| Future loss of earnings and MPF | Nil |
| Loss of earning capacity | $35,100 |
| Special damages | $60,000 |
| Future medical expenses | Nil |
|  | $636,927 |
| (Less: Employees’ Compensation received) | ($232,236) |
| Total: | $404,691 |

*F. Conclusion*

1. In view of my decision above, there shall be judgment against the 1st defendant in the sum of $404,691. The 1st defendant shall pay interest on (a) the award for PSLA at 2% per annum from the date of service of the writ to the date of judgment, and (b) pre-trial loss of earnings and MPF and special damages at half of the judgment rate from 23 January 2014 to the date of judgment, thereafter at the judgment rate until full payment.
2. On the issue of costs, generally the court may exercise its discretion to order costs against the 1st defendant where a settlement has been reached between the plaintiff and the Board: see e.g. *Lai Yuk Tsan*, *supra*, §§26-27; *Lam Hoi San*, *supra*, §22. However, I am of the view that the 1st defendant should not be held liable for the entire costs of these proceedings in the light of the following matters.
3. First, as accepted by Mr Yim, the plaintiff should bear the costs thrown away by his absence at the trial on 28 April 2021, resulting in an adjournment of the trial. Having considered the statement of costs of the Board and the list of objections of the plaintiff, I summarily assess the Board’s costs thrown away by the adjournment at $37,000. I further summarily assess the 1st defendant’s costs thrown away by the adjournment at $1,000.
4. Secondly, I consider that the plaintiff has acted unreasonably at the trial. His legal representatives sought to challenge the *locus standi* of the 1st defendant without any authorities in support at the first instance, thus prolonging the length of the trial. The plaintiff also saw fit to pursue a claim for loss of future earnings and MPF which is clearly unsubstantiated by the undisputed medical evidence as well as his own testimony. As a result of these unsubstantiated claims by the plaintiff, the trial was substantially lengthened. In my view, the 1st defendant should not be held liable for the costs occasioned by the plaintiff’s unreasonable conduct of the trial.
5. In the premises, I make an order *nisi* that:
   1. the plaintiff do pay the 1st and 2nd defendants’ costs thrown away by the plaintiff’s application for adjournment of the trial on 28 April 2021, summarily assessed at $1,000 and $37,000 respectively;
   2. save as provided for in sub-paragraph (1) above, the 1st defendant do pay (a) the plaintiff’s costs incurred in these proceedings up to the trial, including all costs reserved and the costs of and occasioned by the 2nd defendant’s joinder, and (b) 50% of the plaintiff’s costs of the trial, with certificate for counsel, to be taxed if not agreed;
   3. save as provided for in sub-paragraph (1) above, the 1st defendant do pay the costs of the 2nd defendant in these proceedings, with certificate for counsel, to be taxed if not agreed; and
   4. there be no order as to costs between the plaintiff and the 2nd defendant.

The costs order *nisi* shall become absolute upon the expiry of 14 days after the date of this judgment if there is no application to vary the same within the 14-day period.

( Kay Seto )

Deputy District Judge

Mr Foster Yim, instructed by Tung, Ng, Tse & Lam, for the plaintiff

The 1st defendant, unrepresented, appeared in person

Mr Roger Phang, instructed by P C Woo & Co., for the 2nd defendant, excused from attendance on 11 June 2021

1. The 1st defendant had been absent in these proceedings prior to the trial. He only appeared for the first time on the first day of the trial. [↑](#footnote-ref-1)
2. The order provided that (a) no judgment or order obtained by the plaintiff shall be enforced against the 1st defendant without the leave of the court; and (b) the plaintiff shall not apply for any order for costs personally against the Trustees in these proceedings. [↑](#footnote-ref-2)
3. “Bankruptcy debt” is defined in section 2 of the BO to mean (a) any debt or liability to which he is subject at the commencement of the bankruptcy; and (b) any debt or liability to which he may become subject after the commencement of the bankruptcy (including after his discharge from bankruptcy) by reason of any obligation incurred before the commencement of the bankruptcy. [↑](#footnote-ref-3)
4. See also the equivalent provision in section 281(3) of the (UK) Insolvency Act 1986, providing that “an order of discharge shall not release a bankrupt from any debt or liability incurred by means of any fraud or breach of trust”. [↑](#footnote-ref-4)
5. I take judicial notice that, according to the Composite Consumer Price Index, the year-on-year inflationary increase in June 2018, June 2019, June 2020 and April 2021 (the June 2021 figure is not yet available) has been +2.4%, +3.3%, +0.7% and +0.8% respectively. Applying the percentage increases to the starting point of PSLA awards for the Serious Injury category, the current figure should be $569,000 ($530,000 x 102.4% x 103.3% x 100.7% x 100.8%, rounded up). [↑](#footnote-ref-5)
6. This figure was found to be the plaintiff’s monthly income in §25 of HH Judge KW Wong’s Judgment dated 5 June 2017 in DCEC 1787/2015. [↑](#footnote-ref-6)