DCPI 654/2010

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 654 OF 2010

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BETWEEN

##### LO YIM FONG (羅艷芳) Plaintiff

##### and

HO PO YIN 1st Defendant

##### HO CHUN WAI, RAYMOND 2nd Defendant

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Coram : Deputy District Judge Thomas LEE

Date of hearing : 16 June 2011

Date of handing down Judgment 4 July 2011

JUDGMENT

Introduction

1. In this personal injuries action, interlocutory judgment was entered on 15 July 2010 by the Plaintiff against the 1st and 2nd Defendants, no notice of intention to defend having been given by them.
2. What remains in this action is the assessment of damages.
3. Most of the heads of damage claimed have been agreed, both as to entitlement and quantum. These are as follows:
4. Pre-trial loss of earnings HK$ 1,654.00
5. Medical expenses HK$ 14,726.00
6. Travelling expenses HK$ 3,000.00
7. Tonic food HK$ 2,500.00

4. The heads of damage that remain in dispute are those of PSLA and loss of earning capacity. The issues in relation to these two heads are as follows:

1. PSLA – how much should be allowed under this head.
2. Loss of earning capacity – whether any damages should be awarded for such loss at all and, if so, how much.

Background

5. The Plaintiff was born on 14 April 1979. At the date of the accident that gave rise to this action, on 25 April 2009, she was 30 years old. At the date of trial, she was 32 years old.

6. The Plaintiff was educated to Form 4 level. Her initial employment was in primary school tutoring and in cinema ticket sales.

7. In 1998, the Plaintiff was employed as a clerk by Hong Kong Product Promotion Company Limited (whom I shall refer to as her employer) and was continuously employed in that capacity until very recently. Her latest monthly salary was HK$4,300.00. There was passing reference in her oral evidence to commissions but this was not explored. She said she worked a 6-day week, and that her daily work hours were 9.30 a.m. to 7 p.m.

8. The Plaintiff’s employer was in the business of collecting information regarding litigation and litigants from the courts’ daily cause lists and selling, or offering to sell, such information to customers. The Plaintiff speaks, reads and writes both English and Cantonese/Chinese. Her duties were to sort such information, translate documents into Chinese, proof-read draft information notices regarding litigation and litigants and distribute them to customers of her employers. Her duties also included answering the telephone.

9. On the evening of 25 April 2009, the Plaintiff boarded a vehicle driven by the 1st Defendant. At about 11.15 p.m., the vehicle had an accident at the Tuen Mun Highway. The Plaintiff was asleep at the time, suffered personal injuries as a result of the accident, and was taken to Yan Chai Hospital for treatment. The accident, and the Plaintiff’s injuries, did not occur during the course of her employment.

10. The Plaintiff has been treated and/or examined by 5 separate medical institutions, mostly in the months immediately following her accident, but also subsequently for the purposes of assessment of damages. I have reviewed the reports prepared by staff of those institutions.

11. I have also reviewed a joint medical report by Dr Wong See Hoi and Dr Lam Kwong Chin, orthopaedic specialists, dated 6 January 2011, following an examination of the Plaintiff on 13 December 2010. No issue has been taken by either party with the narrative or conclusions set out in the joint report.

12. The Plaintiff suffered the following injuries as a result of the accident:

(1) soft tissue sprain of her neck, with no bony fracture or neurological deficit;

(2) soft tissue sprain of her back, with no bony fracture or neurological deficit;

(3) abrasions at right upper chest and right lower leg.

See para. 52 of the joint report.

1. The Plaintiff’s complaints, as at the date of her examination by the medical experts, are summarized paras 38 – 40 of the joint report:

“38. On and off neck soreness.

* Worse with prolonged computer usage (over 15 minutes).
* Better after a rest for 5 minutes.
* Sometime with radiation to bilateral temporal region.
* Improved by 50% after treatment.

39. On and off lower back pain

* Worse with prolonged sitting or walking (30 minutes), sleeping
* Better after a rest for 10 minutes.
* No improvement despite treatment.

40. On and off bilateral patella soreness

* Worse with prolonged walking, especially in staircase.
* Onset 3 months ago.”

1. The Plaintiff expressly adopted this summary of her current conditions at trial. In addition, she said that she has reduced her badminton games from twice to once a week.

15. I should note that the medical experts agreed that the Plaintiff’s complaint as to patella soreness is probably due to degeneration of the patella cartilage, which is common among women of the Plaintiff’s age. It is not related to the accident.

16. The medical experts further agreed as follows, at paras 65 to 68 of the joint report:

“65. We agree that as it is now 20 months after the accident and the present physical condition is a satisfactory one, further institutional treatment is not required. MRI scan or surgery is not indicated.

66. We agree that orthopaedically, Ms. Lo could be considered as having reached maximal medical improvement from the accident and she is suitable for assessment.

67. We agree that in view of Ms. Lo’s present physical condition, she should be able to continue with her pre-injury work as a clerk. She might have some residual neck or back symptoms upon prolonged working, but the overall adverse effect should be mild.

68. We note that she had indeed returned to work as such in early May, after about 10 days of sick leave.”

PSLA

17. In assessing damages under this head, the approach I take is to consider the Plaintiff’s overall injuries and disabilities, her medical condition and her loss of amenities and suffering in order to assess the award. I remind myself that, in doing so, previous authorities serve as a reference and not as hard boundaries.

18. It was submitted by Mr Felix Ho, appearing on behalf of the Plaintiff, that a reasonable award for PSLA in this case should be between HK$150,000.00 and HK$200,000.00.

19. In *Chiu Wing Sze Karby v Chan Ying Wai & Anor* [2001] 2 HKLRD 92, the plaintiff was 19 at the date of the accident and 21 at trial. She suffered neck (whiplash) and lumbar injuries. There was no evidence of continuing physical abnormality in either the neck or lower back but it was accepted that her complaints about lower back symptoms could not be discounted. The awards for the whiplash and lumbar injuries were HK$100,000.00 and HK$50,000.00 respectively, making a total HK$150,000.00 for PSLA.

20. In *Lam Chiu v Poon Tat Hing & Anor* (DCPI No. 203 of 2001, Deputy District Judge R. Yu, 11 April 2002, unreported) the plaintiff was 62 at the date of accident and 63 at the date of trial. He suffered neck and head injuries and was hospitalized for 14 days. He was on unpaid sick leave for about 18 months. HK$120,000.00 was awarded.

21. In *Tai Yuk Wong v Chong Kwok Fung & Anor* (DCPI No. 1405 of 2005, HH Judge Yuen, 8 March 2006, unreported) the plaintiff was 33 at the date of the accident and 35 at the date of trial. Neck and shoulder injuries were suffered. There was whiplash and persistent neck pain and weakness in the upper limbs for about a year. Sick leave had been granted for about 2 years. There was residual mild neck and shoulder pain at the date of the assessment hearing. An award of HK$150,000.00 was made.

22. The other cases on PSLA cited on behalf of the Plaintiff involved much more serious injuries and I have not found them very helpful.

23. I have also reviewed the cases cited by Mr Martin Wong on behalf of the Defendants. He has suggested an award for PSLA in the region of HK$60,000.

24. In *Li Kam Wah v Ng Ying Tuen & Anr* (DCPI 386/2001, 9 August 2002, unreported), the plaintiff suffered injuries to neck, back and lower back following a traffic accident. He had resumed his pre-accident job. The Court accepted that there was still mild pain. The Court awarded $50,000.00.

25. In *Lai Ka Yin v Chan Yiu Kei* (DCPI 453/2008, 7 January 2009, unreported), the plaintiff suffered injuries to her neck and back. She was hospitalized for 3 days, and given sick leave for little more than 1 month. There was soft tissue injury to her neck and back. She was fully recovered 2 months after the accident. $50,000 was also awarded in this case.

26. In *Wong Kin Hung v Chan Wai Ming* (DCPI 1223/2006, 16 February 2007, unreported), the plaintiff suffered a sprained back and was hospitalized for 2 days and eventually lost his job. There was physiotherapy for 3 months but no complete recovery. The plaintiff suffered intermittent residual back pain. HK$70,000 was awarded in this case.

27. In summary, the Plaintiff in this case has suffered relatively minor, but unpleasant, injuries involving neck and back sprain following a traffic accident and has mild residual problems. She has consulted a number of medical institutions for treatment and assessment. She was able to return to work after 10 days – though I accept the Plaintiff’s evidence that this was at least partly due to her employer not being willing to grant further sick leave and partly due to her own initiative. She is relatively young. Doing the best I can, I would place her injuries and her present situation as closer to, but slightly more serious than, those recorded in the cases cited on behalf of the Defendants.

28. In this case I would make an award of $80,000.00 for PSLA.

Loss of earning capacity

29. The approach I take under this head is set out in *Moeliker v A. Reyrolle and Co. Ltd* [1977] 1 WLR 132, 141:

“Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? I think the question is whether this is a ‘substantial’ risk or is it a ‘speculative’ or ‘fanciful’ risk … If the court comes to the conclusion that there is no ‘substantial’ or ‘real’ risk of the Plaintiff’s losing his present job in the rest of his working life, no damages will be recoverable under this head.”

30. The rationale for an award under this head is explained in *Iau Kau Ih v Wan Kei Geotechnical Engineering Co. Ltd & Ors* (HCPI No. 130 of 2001, Deputy Judge B. Yu SC, 16 July 2002, unreported) at para. 45:

“[The claim of loss of earning capacity] is made on the ground that even assuming that the plaintiff would be able to find a job which he is able to cope with, he would nevertheless be placed in a disadvantage in the market for such jobs by reason of his disability. Mr. Ng relied on the judgment of Deputy Judge Chu (as she then was) in **Ng Chi Chung v. Lau Kam Ping** [2002] 2 HKC 759. It seems to me that the plaintiff would be placed at a disadvantage in the market not only because of his disabilities but also because, as a result of this accident, he has to look for work in a market that he was not accustomed to and would have to compete in that market with others who may be much more experienced than he.”

31. The Plaintiff therefore has to satisfy me of 2 matters before any award under this head can be made: first, that there is a real risk that she will lose her job and, if yes, that she would be at a disadvantage in finding another such job.

32. It is submitted on behalf of the Plaintiff that there is a real risk of the Plaintiff being thrown on the labour market. The Defendant says that the risk of the Plaintiff actually losing her job is at best speculative or fanciful.

33. The principal factors I take into account here are as follows:

(1) The Plaintiff has been, until recently, in continuous employment with her employer since 1998, including the 2 years that have elapsed since the accident.

(2) She returned to work after having taken 10 days of sick leave, although here again I take into account that her employer did not allow her any further sick leave.

(3) Adjustments have apparently made in her work place to compensate for the residual effects of her injuries. First, there is a co-worker who is able to operate computers and fax machines, making the minor disabilities suffered by the Plaintiff in doing this work less inconvenient to her employer. The Plaintiff is at least partially engaged in telephone duties in any event. Second, the Plaintiff is able to take rest periods as and when needed after prolonged periods of sitting.

(4) The Plaintiff began maternity leave on 28 May 2011. She stated in her oral evidence that her employer has suggested that she take a break, after her maternity leave, and rest for a while before returning to work next year. The Plaintiff said that she expected to return to work with her employer. There was no suggestion of doubt on her part that she would not be able to do so.

34. In the joint report, at para. 69, Dr Wong, who was appointed on behalf of the Plaintiff, stated that he believed that reduced work efficiency was expected on prolonged computer work and prolonged sitting. I do not read Dr Wong’s comments as suggesting that that he at all believed there was a substantial risk of the Plaintiff losing her job as a result of her injuries.

35. I have also noted that, in para. 75 of the joint report, Dr Wong has suggested a 3 to 5% whole person impairment for residual neck and back pain caused as a result of the accident. At para. 76, Dr Lam (appointed on behalf of the Defendants) stated that, based on the minor nature of the injury and its minimal permanent adverse effect on her future working potential, the loss of earning capacity was assessed to be 1%.

36. Having regard to all of these factors, I find that there is no real or substantial risk of the Plaintiff being thrown back on the labour market.

37. Further, the Plaintiff is engaged in general clerical duties, is relatively young and professes ability in English as well as Chinese/Cantonese. There is no reason of which I am aware to believe that, if hypothetically she lost her job, she would be at a disadvantage in finding new clerical work due to her minor residual problems.

38. I am not prepared to make any award for loss of earning capacity.

Award

39. The total award for damages is as follows:

1. Pre-trial loss of earnings HK$ 1,654.00
2. Medical expenses HK$ 14,726.00
3. Travelling expenses HK$ 3,000.00
4. Tonic food HK$ 2,500.00
5. PSLA HK$ 80,000.00
6. Loss of earning capacity HK$ 0

40. I will accordingly enter judgment against the Defendants for the total sum of HK$101,880.00.

41. I also allow the Plaintiff’s claim for interest on the award for PSLA at the rate of 2% per annum from the date of service of the writ until the date of judgment, and on the awards of special damages at half the judgment rate, from the date of the accident until the date of judgment.

42. I make an order *nisi* that the costs of the action are to be paid by the Defendants to the Plaintiff, to be taxed if not agreed, with certificate for counsel.

( Thomas W.M. Lee )

Deputy District Judge

Plaintiff : represented by Felix C.Y. Hoe, instructed by

M/S Kenneth W. Leung & Co. , Solicitors

1st and 2nd Defendants : represented by Martin Wong, instructed by

M/S Leo Cheng & Co., Solicitors