## DCPI 1204/2010

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1204 OF 2010

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##### BETWEEN

ABU BAKKR SHIDDIK Plaintiff

### and

ELAHI MANZOR & YAVAR ALI

formerly trading as MM & CO AUTO

PARTS, DISMANTLING AND GENERAL (A FIRM) Defendant

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Before : HH Judge Wilson Chan in Court

Dates of Hearing : 16 & 17 September 2013

Date of Judgment : 18 October 2013

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JUDGMENT

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*Introduction*

1. The plaintiff claims damages for personal injuries against the defendant, his employer at the time of the accident. The plaintiff is a Bangladeshi National and was born on 29 December 1978. He is married with two children living in Bangladesh.
2. The plaintiff was 28 years of age at the date of the accident and is now 34.
3. The plaintiff entered Hong Kong illegally through the People’s Republic of China in May 2007. He found work with the defendant in early May 2007 as a labourer and suffered his accident on 27 August 2007, the details of which are set out below.
4. The plaintiff was put in custody when he was hospitalised after the accident. Whilst in Immigration custody, the applicant brought a Convention Against Torture (“CAT”) claim which was subsequently refused in November 2011. He has since raised a CIDTP claim which is now being processed by the Hong Kong Immigration Department.
5. As mentioned, the plaintiff lodged a CAT claim and he was subsequently released from custody. He has since then been allowed to remain at large in Hong Kong on the terms of a recognizance pursuant to section 36(1) of the Immigration Ordinance, Cap 115.

*Interlocutory judgment*

1. By the order of Master J Chow dated 28 May 2013, interlocutory judgment was entered for the plaintiff against the defendant with damages to be assessed.
2. In fact, throughout these proceedings, the defendant did not enter appearance. The defendant was also absent on the date of the assessment hearing. As such, the evidence adduced by the plaintiff was basically unchallenged.

*Circumstances of the accident*

1. The plaintiff was employed by the defendant on or about 4 May 2007 as a general labourer and was working at their scrap yard located at DD 111, Lot 2005, Kam Tin Road, Loo Uk Tsuen, Pat Heung, New Territories, Hong Kong (“the Yard").
2. The plaintiff's evidence is that he was paid HK$4,000 per month and was allowed to live in a container in the Yard and was provided with food.
3. On 27 August 2007, work was being carried out on a scrapped van inside the Yard. The wheels of the van had been removed and it was resting on its two axles and four wheel drums. The van was to be moved and a forklift truck was attempting to lift the van. On the first two attempts to lift the van, the van slipped off the two front forks of the forklift truck. At around 11:00 am on that day, the plaintiff, during the course of his employment, was instructed to climb underneath the van whilst it was being lifted and to place old tyres under the van for support. Whilst the plaintiff was under the van, it slipped off the forks of the forklift truck crushing the plaintiff beneath it.
4. The plaintiff was taken by private car to the hospital. He was later transferred to the Tuen Mun Hospital where he was admitted as an in-patient.

*Medical evidence*

1. The plaintiff sustained multiple injuries when he was crushed underneath the van. After being rescued, the plaintiff was taken to the Tuen Mun Hospital and admitted to the Accident and Emergency Department at around 14:07 hours on 27 August 2007.
2. On admission, initial examination showed that the plaintiff was alert and spontaneous movement of all limbs was observed. Various investigations were done and he was admitted to the surgical ward for further management.
3. The plaintiff was later transferred to the Department of Orthopaedics & Traumatology. Radiological examinations showed:-
4. CT thorax showed left haemopneumothorax with fractured ribs. Chest drain was inserted and managed by cardiothoracic surgery of Tuen Mun Hospital;
5. CT abdomen no free fluid;
6. CT brain showed fluid at sphenoid sinus and was managed by the Neurosurgical Department of the Tuen Mun Hospital;
7. CT cervical spine showed fractured 5th, 6th laminae and 7th spinal process, fracture of sternum and multiple fractured ribs. All these fractures were treated conservatively with analgesics;
8. X-ray and CT thoracolumbar spine showed bony chance fracture 11th thoracic spine, compression fracture of 12th thoracic spine and lumbar spine. All of these fractures were treated conservatively with analgesics;
9. X-ray pelvis showed fracture left superior and inferior pubic rami which were also treated conservatively.
10. The plaintiff was later transferred to the Department of Orthopaedics & Traumatology on 24 September 2007 for rehabilitation under custody. Physiotherapy was offered and he was discharged on 3 October 2007 and referred back to the Tuen Mun Hospital for follow-up.
11. The plaintiff was hospitalised for around 38 days. At the time of the plaintiff’s orthopaedic expert medical assessment, the plaintiff had reached Maximal Medical Improvement regarding his orthopaedic injuries.
12. The plaintiff was assessed by the Employees’ Compensation (Ordinary Assessment) Board on 6 April 2011 and assessed at 26% for both his orthopaedic and left eye injury.
13. According to the expert medical report of Dr Johnson Lam dated 21 July 2011, the plaintiff suffered from serious injuries to his back, neck, pelvis and chest and considering the severity of the injuries, a duration of sick leave of at least 12 months would be expected. His loss of earning capacity was assessed at 24%.
14. As a result of the accident, the plaintiff also suffered from blunt trauma to his left eye and was first seen at the Hong Kong Eye Hospital on 27 September 2007 where he was diagnosed to be suffering from macula comotio retinae with reduced VA of 1/6. The right eye was normal with normal VA of 6/5.
15. The plaintiff suffers from a 15% loss of central vision in his left eye which is equivalent to 3% acuity-related impairment of both eyes.
16. According to the Ophthalmological report of Dr Cheung Sek Hong dated 6 September 2011, the plaintiff’s residual left eye maculopathy is stable and does not require medical or surgical treatment. Sick leave for the left eye commotion retinae should be approximately 6 weeks to 2 months. His loss of earning capacity was assessed at 7.5%.
17. The combined loss of earning capacity assessed by the experts Dr Lam and Dr Cheung is therefore 31.5%.

*Quantum claimed*

1. The plaintiff's claim in this action is only for Pain, Suffering and Loss of Amenities (“PSLA”) and pre-trial loss of earnings. In particular, the plaintiff makes no claim for future loss of earnings or medical expenses.
2. The plaintiff's Employees’ Compensation claim against the defendant in DCEC 903/2009 resulted in an award for HK$120,960, for which the plaintiff will have to give credit in this action.

*PSLA*

1. The plaintiff claims HK$600,000 under this head. Mr Derek Middleton, solicitor acting for the plaintiff, submitted that the plaintiff’s injuries fall into the “Serious Injury” category as defined in *Lee Ting Lam v Leung Kam Ming* [1980] HKLR 657.
2. Mr Middleton referred me to the following cases in his submissions which he says provided useful guidance for the assessment of the general damages award under PSLA: *Christopher Gordon Young v Lee Chu*, HCPI 1484/2000 (Judgment of DHCJ Wright, as he then was, dated 15/04/2003); *Sin Kin Ming v Hsin Cheong Construction Co Ltd*, HCPI 740/2004 (Judgment of Mr Recorder J Fok, as he then was, dated 30/11/2005); *Chui Kam Sang v Tao Kee Eng Co Ltd,* HCPI 986/2006 (Judgment of Mr Recorder J Fok dated 21/07/2008); and *Marlene Susanne Courbet v Mandarin Divers Marine Services Ltd,* HCPI 677/2000 (Judgment of DHCJ Longley dated 16 October 2001).
3. Considering the authorities cited and having regard to the medical condition of the plaintiff as assessed, his present complaints as proved, the nature of the injuries, the history of the treatments received, as well as the residual disability and pain which affect on a continuous basis the quality and enjoyment of his life, I am satisfied that the plaintiff’s injuries come near the upper range of “Serious Injury”.
4. It was said in the case of *Lam Chan Hung v Hang Yue Engineering Ltd* [2013] 3 HKLRD 420 that since 2002, the award for “Serious Injury” ranges from HK$460,000 - 620,000.
5. In this case, I find it appropriate to award the plaintiff HK$580,000 under this head.

*Pre-trial loss of earnings*

1. As mentioned above, the plaintiff applied for Employees' Compensation against the defendant in respect of the accident in DCEC 903/2009 (“the EC Application”). The EC Application was heard before His Honour Judge Leung on 8 December 2011 and Judgment was delivered on 12 January 2012.
2. As part of the EC Application, the plaintiff claimed for compensation for the plaintiff's temporary loss of earning capacity, pursuant to section 10 of the Employees’ Compensation Ordinance, Cap 282. In *Abu Bakkr Shiddik v MM & Co Auto Parts, Dismantling and General (A Firm),* DCEC 903/2009 (Judgment of HH Judge Leung dated 12/01/2012), the learned Judge had this to say on the claim under section 10:-

“59. Section 10(1) makes clear that compensation is awarded on the basis that the employee would at least have been capable of earning in some suitable employment or business but for the temporary incapacity after the accident. If the person is not lawfully employable, he could not be said to be capable of earning income from any suitable employment or business during the period of temporary incapacity. That was the situation of Shiddik when he was detained first by the police and then by the Immigration Department after the accident.

60. Did Shiddik’s situation change upon his release on recognizance in October 2007? …

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64. The issue of whether a person in the circumstances of Shiddik may take employment in Hong Kong was actually considered in the recent case of *MA v Director of Immigration,* HCAL 75/2010 (6 January 2011). In that case, the applicants were 4 mandated refugees and 1 screened-in CAT claimant. The judgment recited the immigration policy in respect of permitting foreign nationals to come to Hong Kong to take employment; and mandated refugees and screened-in CAT claimant do not fall within any of the established categories in the immigration guidelines (see paragraphs 25-32). The constitutional challenge laid by the applicants there against such immigration policy failed.

65. I have no basis to believe that Shiddik was permitted to take employment while he remained in Hong Kong on the recognizance during the period of temporary incapacity. As it is not shown that Shiddik was capable of being lawfully employed during the period of temporary incapacity, the premise for awarding section 10 compensation is lacking.”

1. In my view, the same reasoning applies to the plaintiff’s claim for pre-trial loss of earnings under common law. The plaintiff was not permitted to take up any employment while he remained in Hong Kong on recognizance during the period of temporary incapacity. In the circumstances, it would, I think, affront the public conscience and offend the ordinary right-thinking citizen if damages were awarded for his loss of earnings during the period in question.
2. For the above reasons, I decline to award any damages to the plaintiff under this head.

*Summary on quantum*

1. In summary: -
2. Damages for PSLA HK$580,000
3. Less: Employees' Compensation HK$120,960

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Total: HK$459,040

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1. Interest is allowed at 2% per annum on damages for PSLA from the date of issue of writ until this judgment and thereafter at judgment rate until payment in full.

*Conclusion*

1. Damages are assessed at the sum of HK$459,040. The defendant is to pay such sum together with interest as aforesaid.
2. I make a costs order nisi that the defendant do pay to the plaintiff the costs of this action, such costs to be taxed if not agreed. The costs order nisi shall become absolute in the absence of application to vary within 14 days. The plaintiff's own costs be taxed in accordance with Legal Aid Regulations.
3. Lastly, I thank Mr Middleton for his helpful assistance in this matter.

( Wilson Chan )

District Judge

Mr Derek Middleton, of Massie & Clement, for the plaintiff

The defendant was not represented and did not appear