## DCPI 1254/2014

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1254 OF 2014

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##### BETWEEN

KHAN SABZ ALI Plaintiff

### and

KO KIM DEVELOPMENT COMPANY LIMITED Defendant

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Before: Deputy District Judge D To in Court

Date of Hearing: 19 January 2016

Date of Judgment: 5 February 2016

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JUDGMENT

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1. The plaintiff brings this action against his employer for personal injuries sustained on 17 June 2011. Interlocutory judgment was entered with damages to be assessed. This is the assessment of damages.

*Injuries and treatments*

1. At the material time the defendant was a construction site general labourer. A dislodged compressor pipe hit him on his right leg; he fell and sustained injury to the lower back.
2. On examination at the Accident and Emergency Department of Tuen Mun Hospital immediately after the accident, the plaintiff was found to have mildly tender lower back and swelling on thigh and calf. X-ray showed no fracture. He was given analgesics injection and was discharged on the same day with sick leave of 3 days.
3. Thereafter the plaintiff was followed up at government hospitals. As seen from the medical records, he was continuously being treated with medication and was granted sick leave of 438 days in total. He has attended 13 sessions of physiotherapy.

*Expert examination*

1. The plaintiff was examined by the joint orthopaedic expert Dr Lee Po Chin (“Dr Lee”) 22 months after the accident.
2. Having conducted physical and radiological examinations, reviewed the medical records and considered the plaintiff’s complaints, Dr Lee diagnosed the plaintiff of suffering from a contusion injury of the right thigh, right calf and contusion or sprain injury to the back which was consistent with the mechanism of injury; and that the plaintiff probably suffered from a contusion injury to the soft tissue of right thigh and low back.
3. Dr Lee opined that the possibility of residual back pain could not be excluded, however the pain should be less than what the plaintiff described. The positive flip tests, the non-dermatomal impaired sensation and positive simulation tests are non-organic signs raising the suspicion of symptom magnification.

*Symptom magnification*

1. While the key issue in question is the degree of the plaintiff’s residual pain, it is necessary to consider the said suspicion of symptom magnification in light of evidence available.
2. The plaintiff testified orally that as compared to some 33 months ago when he was examined by Dr Lee, his condition has worsened. His current complaints include, *inter alia*, numbness on knees and left leg, constant pain and burning feeling in the lower back. At times he fell when getting up from sitting because he could not straighten his back; and he has fallen five to six times during the six-month period prior to this hearing.
3. Notably, the plaintiff was not injured on his left leg. The complaint of numbness on left leg was never lodged with Dr Lee; neither was it mentioned in the Re-Revised Statement of Damages nor in his witness statement. Further, I have seen the plaintiff in court and observed him getting up from sitting; there was no sign of instability or difficulty in straightening his back.
4. I find that the plaintiff has exaggerated his residual pain. Taking into account his current capability to work 30 days a month with very long hours, his residual pain should be mild.

*Pain, suffering and loss of amenities*

1. The plaintiff’s claim under this head was last adjusted to HK$150,000 to HK$180,000. The defendant said an award of HK$50,000 is reasonable.
2. Mr Chan for the defendant referred me to *Cheung Yu Tin Alvin v Ho Hon Ka*, DCPI 853/2004, unrep, Deputy District Judge W Lam, 9 June 2005; *Chan Sau Lan v Chesterton Petty Ltd*, HCPI 123/2002, unrep, Deputy High Court Judge Saunders, 3 November 2004; and *Wong Yin Wa Stonnie v Lee Tak Wong*, DCPI 2429/2008, unrep, Master S P Yip, 10 November 2011. Since the nature and extent of injuries are very different from that of the present case, these cited cases are not of assistance.
3. Considering the medical evidence and the plaintiff’s circumstances, I think the amount of HK$50,000 is far less than what is appropriate, albeit the residual pain is only mild.
4. Among the cases cited by Ms Leung for the plaintiff, she referred me in particular to *Lee Ping v Hong Kong Kartingsport Association Limited*, HCPI 436/2008, unrep, Chung J, 29 January 2010; and *Gurung Lachhoman v Gurung Chandra Prakash & Ors*, HCPI 672/2008, unrep, Master R Lai, 20 October 2010.
5. Having considered these cited cases and compared them with the plaintiff’s extent of the injuries, the treatments received, the sick leave granted, the residual disabilities and their impact on his daily activities, I award HK$140,000 under this head having adjusted inflation.

*Pre-trial loss of earnings*

1. Under this head of damages, the plaintiff claims for loss of earnings during sick leave period, partial loss of earnings post-sick leave and extra allowance for those intermittent periods of un-employment.

1. At the time of the accident, the plaintiff has worked for the defendant for only two months. His income in the first month was HK$11,800 (18 days x daily wage of HK$650); and he earned HK$7,150 (10 days x daily wage of HK$700) in the second month.
2. As regards the plaintiff’s pre-accident monthly income, the defendant only accepted the figure of HK$9,500, representing the average sum of the plaintiff’s two-month income. As rightly pointed out by Ms Leung, given the plaintiff’s industrious nature and the need to support his family of six, it would be unrealistic to expect him to consistently earning HK$9,500 per month, i.e. working only 14 days a month on average.
3. Although the amount of work offered to the plaintiff was uncertain and would vary in accordance with demand, it appears from the information amendment sheet returned by the defendant to the Labour Department that the defendant was willing and prepared to offer the plaintiff work up to 26 days a month.
4. Having considered the figures of 10, 18 and 26 being the plaintiff’s actual and possible numbers of working days in a month, I find that it is reasonable the plaintiff worked 18 days per month. Hence, his pre-accident monthly income should be HK$12,600 (18 days x HK$700).
5. As regards loss of earnings during sick leave period, the defendant asked the court to only allow sick leave of 9 months instead of 438 days. Notwithstanding Dr Lee’s view that sick leave for contusion injury or sprain is normally 9 - 12 months, there is no evidence that the sick leave continuously granted by the treating doctors in the public sector was unnecessary or unreasonable.
6. I allow sick leave of 438 days as granted. Hence, the plaintiff’s pre-trial loss of earnings during sick leave period inclusive of MPF is HK$193,158 (HK$12,600/30 x 438 days x 1.05).
7. Upon expiry of sick leave, the plaintiff made various attempts to look for jobs. He has resumed working in the following manner, albeit not as a labourer on construction sites.
8. 23 August 2013 to end of November 2013 as messenger, earning HK$9,000 per month;
9. 11 June 2014 to end of September 2014, as helper to boring machine operator, earning HK$20,866 per month on average;
10. from 5 January 2015 onwards as decoration labourer, earning HK$10,500 per month; and
11. from 24 March 2015 onwards as security guard, earning HK$16,000 per month.
12. I find that it was not unreasonable for the plaintiff not to resume working as a labourer on construction sites. As Dr Lee opined, the plaintiff was incapable of lifting weight over 20 - 25 kg; and that he would encounter impaired efficiency if he worked as a construction labourer. Hence, the plaintiff has suffered partial loss of earnings post-sick leave.
13. Ms Leung referred me to government statistics that wages for general labourer in October 2015 is HK$921.20. It is to be noted that the figure showing only labour costs in public sector construction projects is not meant to represent the overall situation of the construction industry. Further, while wage cost data may have included other elements such as administrative overheads, the rate may not reflect the wage received by the workers in the construction industry. Taking the figure as a reference, I adopt the figure of HK$880 as the plaintiff’s monthly earnings by late 2015.
14. In the premises, had the plaintiff not met with the accident, he would be able to earn HK$15,840 per month (HK$880 x 18 days). His pre-trial medium income would therefore be HK$14,220 (HK$15,840 + HK$12600)/2.
15. The plaintiff’s partial loss of earnings post-sick leave (inclusive of MPF) is hence assessed at HK$26,208 as follows :-
16. from 23.8.2013 to end of November 2013

[(HK$14,220 – HK$9,000) x 3 months] x 1.05 = HK$16,443

1. from 5.1.2015 to late March 2015

[(HK$14,220 – HK$10,500) x 2.5 months] x 1.05 = HK$9,765

1. As regards extra allowance for the non-working period post-sick leave and the gap between each period of employment, I accept that the plaintiff should be allowed time to look for work. Having considered *Wong Yun San v Cheung Yue Yiu t/a Radio Trading Co* DCPI 1909/2007, unrep, Deputy District Judge Khaw, 21 July 2008, I regard an extra allowance of HK$44,793 reasonable. It represents 3 months of the medium income plus MPF (HK$14,220 x 3 x 1.05).
2. Total pre-trial loss of earnings inclusive of MPF is assessed as follows :-
3. Loss during sick leave period HK$193,158
4. Partial loss of earnings post-sick leave HK$26,208
5. Extra allowance HK$44,793

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HK$264,159

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*Future loss of earnings*

1. The plaintiff now earns HK$16,000 a month as a security guard. No award is made under this head.

*Loss of earning capacity*

1. The plaintiff claims HK$96,000 under this head, representing 6 months of his current earnings.
2. Having considered the guidance given in *Moeliker v A. Reyrolle & Co. Limited* [1976] I.C.R. 253, nothing suggests that the plaintiff is at risk of losing his job or is disadvantaged in the labour market. Not only that the plaintiff has been at his current job stably for almost a year, there is evidence that his employer has continuously offered him opportunities to work and earn extra.
3. Since the defendant has agreed to pay HK$9,500 under this head, I so ordered.

*Special damages*

1. Tonic food and travelling expenses are claimed respectively at HK$1,700 and HK$300.
2. Taking into account the number of medical follow-up and treatment sessions the plaintiff had to attend, I find that travelling expenses of HK$300 are reasonable and not excessive. The sum is allowed.
3. On tonic food expenses, not only that no receipts are produced by the plaintiff, no particulars or description thereof was provided in his witness statement. I do not accept the sum of HK$1,700 as proven expenses. As pointed out in *Chan Chi Shing v Chan Shu Kuen* [2009] HKLRD 259, damages are compensatory and it is the plaintiff’s burden to prove his loss rather than assumed entitlement.
4. Since the defendant has agreed to pay HK$500 for special damages, I so ordered.

*Summary of award*

1. Damages (excluding interest) payable by the defendant to the plaintiff is assessed as follows:-

PSLA HK$140,000

Pre-trial loss of earnings HK$264,159

Loss of earning capacity HK$9,500

Special damages HK$500

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HK$414,159

Less EC payment (HK$144,293)

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Total: HK$269,866

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*Interest*

1. Interest on general damages shall run at 2% per annum from the date of writ to date of judgment. Interest on special damages shall run at half judgment rate from the date of accident to date of judgment. Post judgment interest of the assessed sum shall run at judgment rate until payment.

*Costs*

1. I make an order nisi that costs of this action be paid by the defendant to the plaintiff, with certificate for counsel, to be taxed if not agreed.
2. The order nisi shall become absolute unless an application to vary is made within 14 days from today.

( D To )

Deputy District Judge

Ms Pauline Leung, instructed by Lo, Wong & Tsui, for the plaintiff

Mr Chan Ching Hong, of Au, Thong & Tsang, for the defendant