DCPI 1307/2016

**A**

**B**

**C**

## D

**E**

**F**

**G**

**H**

**I**

**J**

**K**

**L**

**M**

**N**

**O**

**P**

**Q**

**R**

**S**

**T**

**U**

### V

[2018] HKDC 1368

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1307 OF 2016

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

|  |  |  |  |  |  |  |
| --- | --- | --- | --- | --- | --- | --- |
| BETWEEN | |  |  |  |  |  |
| FUNG LAI KWAN | | | | | Plaintiff |
| and | | | | |  |
| HOSPITAL AUTHORITY | | | | | Defendant |

**A**

**B**

**C**

## D

**E**

**F**

**G**

**H**

**I**

**J**

**K**

**L**

**M**

**N**

**O**

**P**

**Q**

**R**

**S**

**T**

**U**

### V

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

|  |  |
| --- | --- |
| Before: | Deputy District Judge W. Y. HO, in Court |
| Dates of Hearing: | 3rd and 5th September 2018 |
| Date of Judgment: | 26th November 2018 |

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

J U D G M E N T

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

1. This is an assessment of damages in an action for personal injuries suffered by the plaintiff in an accident that happened at the workplace. By way of a consent order dated 13 July 2016, judgment was entered against the defendant on liability.

*BACKGROUND*

1. The plaintiff was 57 years old on the day of accident and was 61 years old on the day of the trial hearing. She was employed by the defendant as a Healthcare Assistant since 26 February 1996 and remained in employment in the same position until her retirement on 1 January 2017.
2. On 22 April 2014 at around 6:30 p.m., the plaintiff was working in Ward E3 of Our Lady of Maryknoll Hospital. In the course of stacking 2 piles of dirty linen, the plaintiff lost her balance and fell forward. As a result, she sustained injuries to her lower back, right wrist and right leg. She sought medical treatment the next day (23 April 2014).
3. On 24 April 2015, the plaintiff was assessed by the Employees’ Compensation (Ordinary Assessment) Board to be suffering from 1% loss of earning capacity permanently caused by the injury. The plaintiff commenced the employees’ compensation action DCEC 2028 of 2015 against the defendant in respect of the Accident. Eventually the employees’ compensation case was settled in which the defendant paid a sum of $131,243.70 to the plaintiff.
4. The plaintiff was jointly examined on 18 May 2017 by Dr Kong Kam Fu James (the plaintiff’s expert) and Dr Chiang Si Chung Arthur (the defendant’s expert). The doctors set out their findings and opinion in the joint orthopaedic expert report dated 16 November 2017 (“the Joint Expert Report”).

*PRE AND POST-ACCIDENT INJURIES*

1. There is no dispute the plaintiff suffered workplace injuries prior and subsequent to the Accident in question. On 18 June 2006, the plaintiff suffered a right shoulder injury (“Pre-Accident Injury”). On 12 July 2016, she injured her back and left wrist (“Post-Accident Injuries”).
2. The parties agreed there is no issue of apportionment of damages by reason of the plaintiff’s pre-existing injuries. Mr Cheng, for the defendant, accepted the defendant must take the plaintiff as they find her. However, Mr Cheng submitted the purported pain and disability currently suffered by the plaintiff are not caused by the Accident because the nature of the injuries caused by the Accident are minor and any consequential pain should only be temporary and transient.
3. In so far as to whether the injuries caused by the Accident are transient and temporary as submitted by defence counsel, I shall deal with the same later in this judgment.

*JOINT EXPERT REPORT*

1. During the joint medical examination, the plaintiff complained of right wrist pain, right low back pain and right posterior scapular pain. Upon general examination, the doctors found the plaintiff to have walked with a normal gait. She was able to perform both tip-toe walking and heel walking, though she complained of low back pain. There was no deformity to her back and lordosis was preserved. She was able to bend to her right and left both at 30 degrees. According to the Waddell’s Signs, she was tested positive on pelvic rotation and arm elevation, and negative for vertical compression. It was observed that she had moderate pre-existing degenerative changes of lumbar spondylosis and narrowing of disc spaces of the lumbar spine.
2. In respect of her wrist examination, there was no obvious deformity or swelling found. The tests show that the range of movement of both wrists were the same, save and except supination on the right wrist was 5 degrees less compared to the left wrist.
3. The neurological examination found the motor power of the plaintiff’s lower and upper limbs to be normal. Sensation and reflexes were also found to be normal.
4. The following matters are agreed to by both doctors
   1. The diagnosis of the plaintiff is back sprain;
   2. The treatments received by the plaintiff (rest, medication and physiotherapy) are reasonable;
   3. The intermittent sick leave granted during the period from 23 April 2014 to 25 September 2015 are reasonable;
   4. No assessment by a psychiatrist is necessary;
   5. The pre-existing cervical spondylosis is not related to the Accident;
   6. The right scapular pain is unrelated to the Accident; and
   7. The plaintiff’s social activities are not affected by the Accident.
5. The difference in opinion of the doctors primarily rest on the extent of the injuries caused by the Accident. I have set out their differences below:

|  |  |  |
| --- | --- | --- |
|  | **Dr Kong** | **Dr Chiang** |
| **Whether the plaintiff’s pre-existing condition was aggravated by the Accident** | Yes. The back sprain injury has likely aggravated the pre-existing lumbar spondylosis and caused an increase in soft tissue residue back pain with right sciatica symptoms: See paragraph 89 of the report. | No. Raises doubt on whether the described injury had actually happened: see paragraph 85 of the report.  The back pain described would much more likely be a relapse or exacerbation of the symptomatic lumbar spine degeneration rather than arising directly from the described injury: see paragraph 88 of the report. |
| **Working capacity** | There is a mild degree of reasonable reduction of working efficiency and endurance because of the residual orthopaedic impairments: see paragraph 100 of the report. | The injury sustained in the Accident would not have affected her pre-injury capacity in working in the pre-injury job. The pre-injury capacity being limited by residues from the 2006 right shoulder injury and pre-existing lumbar spine and cervical spine degeneration: see paragraph 101 of the report. |
| **Whole person impairment** | 1% | 0.5% |
| **Loss of earning capacity** | 1% | No loss. |

1. I note that although the joint medical examination of the plaintiff took place after the accident of 12 July 2016, there was no mention or assessment of the Post-Accident Injuries in the Joint Expert Report. The doctors were only concerned with the pre-existing conditions and the injuries sustained as a result of the Accident without mentioning or considering the effects of the Post-Accident Injuries.

*EXTENT OF INJURIES*

1. The defendant questions the true extent of the plaintiff’s injuries and whether the Accident could have caused injuries as claimed to be suffered by the plaintiff.
2. I have considered the plaintiff’s evidence and, on the evidence before me, I do not doubt she has been suffering from some back pain since the Accident. However, given both medical experts agree the plaintiff’s prognosis was good and that there was no further orthopaedic treatment needed, I have doubts as to whether the pain is currently as extensive as complained of by the plaintiff.
3. In so far as the medical experts differ in their opinion on whether the injuries caused by the Accident are transient or have aggravated her previous pre-existing lumbar spondylosis, I prefer the opinion of Dr Kong for reasons set out below.
4. Firstly, I find it hard to reconcile Dr Chiang’s opinion on the appropriateness of the sick leave given to the plaintiff and his opinion on whether the back pain suffered in 2015 and 2016 are related to the Accident.
   1. Dr Chiang opined at paragraph 88 of the report:

*“With respect to the description records for the onset of the repeated episodes of back pain in 2015 and 2016, they would most unlikely be or should not be related to being sequelae from the 4.2014 injury.”*

* 1. He further opined, in the same paragraph of the report, the pain described by the plaintiff in the HA staff clinic on 23 April 2014:

*“would much more likely be a relapse or exacerbation of the symptomatic lumbar spine degeneration rather than arising directly from the described injury”*

(paragraph 88 of the report)

* 1. Yet at paragraph 102 both doctors agreed the sick leave granted during 23 April 2014 to 25 September 2015 are reasonable. At paragraph 103 of the report, it is stated:

*“In taking a combine view from the mode of described injury, the estimated extent of the injury, the natural course of similar extent of relapse/exacerbation, the progress as noted from the records and reports, Dr Chiang believes that the sick leave required for the described 22.4.2014 injury is estimated to be of within 2 months.”*

1. If the back pain complained of in 2015 and 2016 is not related to the Accident, then as a matter of logical conclusion, Dr Chiang would not have concluded the sick leave granted in 2015 was reasonable in all the circumstances because the Joint Expert Report is clearly assessing the impact of the injuries suffered as a result of the Accident and not any other injuries suffered. Hence Dr Chiang’s conclusion that 45 days of sick leave spanning from 2014 to 2015 to be reasonable cannot be consistent with his opinion that the back pain suffered in 2015 is not related to the Accident. Furthermore, it is not clear what is meant by Dr Chiang when he opines that the sick leave required for the Accident is within 2 months and yet he agreed the sick leave granted intermittently over the period of almost 1.5 years is reasonable.
2. Secondly, Dr Chiang’s opinion relating to causation and therefore the extent of injuries caused by the Accident should be carefully scrutinized. Dr Chiang expressed doubt as to whether the described injury had actually happened: see paragraph 85 of the report. His opinion throughout the report is therefore premised on the fact that the injuries may not have happened as described by the plaintiff. He even speculated in paragraph 113 of the Joint Expert Report:

*“there is a strong possibility that Ms Fung would encounter other events that caused another episode of back pain from the lumbar spine degeneration within a few months’ time and resulted in her present state.”*

1. There has been no basis nor even explanation provided by Dr Chiang in support of his speculation and underlying postulation regarding possible future events. Furthermore, the defendant has admitted liability and has therefore admitted the plaintiff had suffered injuries caused by the Accident.
2. Having considered the Joint Expert Report and the difficulties I have with Dr Chiang’s opinion as set out above, I prefer the opinion of Dr Kong. Hence, I do not accept defence counsel’s submissions that the injuries caused by the Accident are temporary and transient such that the effects would have subsided in a short period time.
3. Mr Lun, for the plaintiff, asked the court to consider the existence of right wrist pain and depression in the assessment of damages. However, I note Dr Kong has stated in his report that right wrist pain and depression complained of by the plaintiff are not related to the Accident: see paragraphs 83 and 84 of the report. Moreover, both doctors agreed there was no need for any psychiatric assessment of the plaintiff. I therefore do not accept this court should have regard to the same in considering the appropriate damages to award.

*PAIN, SUFFERING AND LOSS OF AMENITIES (“PSLA”)*

1. Mr Lun submitted an award of $220,000 should be made under this head of damages. He cited the following authorities:
   1. *Lee Wai Hing v Main Plan Ltd*, (unrep), DCPI 519/2014: PSLA award $250,000;
   2. *Muhammad Saddiq v Cheung Chi Keung*, (unrep), HCPI 1018/2006: PSLA award $250,000;
   3. *Chau Chin To Chadow v Wing Fung Financial Group Ltd*, (unrep), HCPI 163/2015: PSLA $250,000;
   4. *Altaf Ahmed v Innovative Network Engineering Co Ltd and another*, (unrep), HCPI 237/2008: PSLA $280,000;
   5. *Thapa Surendra v E W Cox Hong Kong Ltd and another*, (unrep), HCPI 451/2009: (for the proposition that back pain affects mood, self-esteem and curtails leisure activities);
   6. *Wong Yun Chiu v Union Printing Co Ltd*, (unrep), HCPI 282/2009: PSLA $200,000;
   7. *Chan Chun Keung v Greenroll Ltd trading as Conrad Hong Kong*, HCPI 275/2005 (unrep): PSLA $180,000; and
   8. *Lam Wa Lai v Startlong Development Ltd*, DCPI 624/2003: PSLA $170,000.
2. Mr Cheng submitted that since the injuries are transient and of a minor nature, an award of $50,000 would be reasonable and cited the following authorities in support:
   1. *Fazal Ahmed v MTR Corporation Ltd*, DCPI 29/2011 (unrep): PSLA $50,000;
   2. *Gurung Kamala v Hong Wei Ltd*, DCPI 1660/2010 (unrep): PSLA $50,000;
   3. *Lai Ka Yin v Chan Yiu Kei*, DCPI 453/2008, (unrep): PSLA $50,000;
   4. *Chan Shui Fong v The Executive Committee of the Alice Ho Miu Ling Nethersole Hospital and another*, DCPI 874/2007, (unrep): $70,000; and
   5. *Tam Yuen Hoi v 陳牧成 and others*, HCPI 983/2001, (unrep) $50,000.
3. Having considered the authorities and noting that both doctors opine the plaintiff’s social activities should not be affected, I am of the view the condition of the plaintiff is one that falls in-between that described in *Chan Shui Fong* and *Lam Wa Lai*.
4. *Lam Wa Lai* is a slip and fall case. The plaintiff of that case was working as a hairstylist prior to the accident and suffered a back sprain as a result of the accident. She was assessed by the medical experts to be suffering from a 3.5% or 5% permanent impairment to the whole person. *Chan Shui Fong* is also a case in which the plaintiff suffered a back sprain. The plaintiff of that case was employed as a personal care worker and the judge of that case found the plaintiff to be suffering a 1% permanent impairment to the whole person as a result of the injuries. The plaintiff was awarded 2 days of sick leave and resumed employment after sick leave.
5. After factoring inflationary rates of the judgments relied on by the parties, I consider the appropriate award under this head of damages to be $150,000.

*PRE-TRIAL LOSS OF EARNINGS*

1. I note at the outset that although the pleaded pre-accident monthly salary is $17,953.88, Mr Lun takes no issue with the defendant on the proposed figure of $17,953.87 (a difference of 1 cent) as being the correct monthly salary and accepts that any loss of earnings to be calculated should be based on the said sum.
2. In paragraph 5.2 of her Revised Statement of Damages, the plaintiff pleads a claim of $66,339.68 for her pre-trial loss of earnings based on her pre-accident monthly salary. This was calculated on a notional trial date in June 2018.
3. Mr Lun now asks this court to grant a sum of $264,254. The new sum is calculated based on the projected income the plaintiff could earn as a waitress earned from the date of post-retirement until the date of trial. The plaintiff’s breakdown is set out as follows:

50 days’ sick leave from April 2014 to September 2015 (including MPF): $34,412

18 days’ sick leave from July 2016 to September 2016 (including MPF): $14,089.

Post-retirement income of 18 months calculated on $14,500 per month: $215,753

TOTAL: $264,254

1. In respect of the sick leave taken from 2014 to 2015, the defendant concedes that the plaintiff did sustain loss of earnings in the 45 days of sick leave. Having examined the sick leave certificates, I find the correct number of days given are 45 days, instead of 50 days as proposed by the plaintiff.
2. As for the sick leave taken in 2016, Mr Lun asks this court to attribute approximately 1/3 of the 54 days of sick leave taken in 2016 to the present Accident (equivalent to 18 days of sick leave).
3. I note the medical experts have not been asked to specifically comment on whether sick leave taken during July to September 2016 is reasonable in light of in the injuries caused by the Accident and whether such sick leave is related to the Accident. Clearly, the doctors could have covered this period of sick leave in their report as the report was written in 2017, yet they were not asked to do so.
4. In absence of any expert evidence supporting Mr Lun’s submissions on the same, I am unable to speculate how many days of sick leave taken during 2016 should be attributable to the injuries caused by the Accident or the Post-Accident Injuries. Moreover, I am unable to determine whether the rough estimate of 1/3 adopted by Mr Lun is a correct and/or reasonable estimate.
5. In respect to the post-retirement income, Mr Lun submitted the court should award the sum of $215,753 (based on the estimated salary the plaintiff would earn if employed as a personal care assistant IIIA minus the monthly average of her part-time waitress’ salary). However, I note the same has not been pleaded in the Revised Statement of Damages. The Revised Statement of Damages was filed on 30 January 2018 and the plaintiff had retired from the defendant’s employment since 1 January 2017. It is clear at the time of the filing of the Revised Statement of Damages, the plaintiff had retired and yet decided, for whatever reason it may be, not to plead any post-retirement loss of income. Furthermore, there has been no application to amend the Revised Statement of Damages to include the said post-retirement loss of earnings.
6. Paragraph 18/12/52 of *Hong Kong Civil Procedure 2018 Vol 1* clearly states a statement of special damages takes the character of a pleading and cannot be departed from at the trial, unless prior leave to amend is obtained. I am therefore not prepared to consider sums which have not been specifically pleaded in the Revised Statement of Damages.
7. I would also add that even if I were entitled to consider the post-retirement income loss, for reasons set out in the section below, I am not satisfied the plaintiff is able to prove she could secure employment as a personal care assistant IIIA (“PCA IIIA”) with the defendant after retirement.
8. I therefore assess the pre-trial loss of earnings as follows:

$17,953.87/30 x 45 days x 1.15 = $30,970.43.

*FUTURE LOSS OF EARNINGS*

1. The sum claimed in the Revised Statement of Damages under this head of damages is $416,745 based on the assumption that the plaintiff would be able to work until 65 years old with an average monthly salary of $15,000. In the closing submissions, Mr Lun submitted the claim for future loss of earnings is now $287,664. This sum is based on the assumption the plaintiff would be employed by the defendant as a PCA IIIA after her retirement, with an average monthly salary of $14,500. Mr Lun adopted a discounted multiplier of 2 (instead of 4.01 as per the Chan Tables) but has not been able to explain why the multiplier is an appropriate or correct one.
2. In considering whether an award should be made for future loss of earnings, the court must consider whether the plaintiff would suffer such a loss and whether the claim is supported by evidence. In the case of *Moeliker v A Reyrolle and Co Ltd* [1977] 1 All ER 9 at page 15, Browne LJ stated:

*“This head of damage* [loss of earning capacity] *generally arises where plaintiff is, at the time of trial, in employment, but there is a risk that he may lose this employment at some time in the future and may then, as a result of injury, be at a disadvantage in getting another job or equally well paid job. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of trial. Lord Denning MR said in Fairley v John Thompson (Design and Contracting Division) Ltd: ‘It is important to realize that there is a difference between an award for loss of earnings as distinct from compensation of loss of earning capacity. Compensation for loss of future earnings is awarded for real assessable loss proved by evidence. Compensation for diminution of earning capacity is awarded as part of general damages.’”*

1. The same principle is reiterated in the recent Court of Appeal decision in *Chau Chin To Chadow v Wing Fung Financial Group Ltd* [2018] HKCA 573, where Hon Kwan JA stated at paragraph 34 of the judgment:

*“It is incumbent on the plaintiff to establish that he would suffer loss of earnings assuming that he has to take up employment as a cashier or carpark attendant owing to his injuries and disabilities. . . . Positive evidence should have been adduced by the plaintiff to support his case that he would suffer a monthly loss of $3,352 assuming that he has to take up other jobs.”*

1. Having considered the evidence and the submissions of counsel, I find the plaintiff unable to prove her claim for future loss of earnings on 2 fronts:
   1. Firstly, I am not satisfied the multiplicand of $14,500 is correct and/or should be adopted because the plaintiff is unable to prove on a balance of probabilities she would have earned the said sum after her retirement.
   2. Secondly, I am not satisfied the plaintiff is able to prove the multiplier of 2 is correct or appropriate to adopt in all the circumstances.
2. There is no dispute the plaintiff did not apply for the post-retirement post of PCA IIIA. There is also no dispute the plaintiff retired from her position with the defendant when she reached 60 years old.
3. She claims that despite wanting to apply for the job, she did not apply because her supervisor did not give her the application form and she did not know of the proper application procedure. Yet, the plaintiff conceded she knew, and was told by her friends, that she had to submit an application for the job. She also conceded that she did not ask for the proper application form.
4. I find it difficult to believe that the plaintiff genuinely intended to apply for the position of PCA IIIA after her retirement. She knew she had to fill out an application form and go through some sort of recruitment exercise in order to get the job. Hence she must have known that in order for her to have any chance of employment with the defendant after her retirement, she would have to, at the very least, submit an application form. If the plaintiff genuinely intended to apply for the said position, she could have easily asked the human resources department for the proper application form. Having been in the employment with the defendant for over 22 years, it would be impossible for the plaintiff not to know she could approach the human resources department for any questions relating to employment.
5. By reason of the matters set out above, I find the plaintiff’s assertion she intended to apply for the post of PCA IIIA to be unbelievable and disingenuous. I do not accept the plaintiff is able to prove, on a balance of probabilities, she genuinely had the intention to apply for the said position and I therefore do not accept she had any real prospect of earning $14,500 after her retirement with the defendant.
6. Furthermore, even if the plaintiff was able to prove she had the genuine intention to apply for the post, the plaintiff is unable to prove that any uncertainty in obtaining employment as a PCA IIIA is related to or caused by the injuries sustained in the Accident. According to the evidence of Ms Hui of the defendant, there was no guarantee the plaintiff would get the job. The plaintiff would have to go through the normal recruitment procedures and an assessment would have to be made on whether the plaintiff is considered to be a suitable candidate. Hence even if the plaintiff had applied for the position, there is no certainty the plaintiff would continue to be employed after her retirement. There is no evidence the plaintiff would be disadvantaged by reason of her injuries in her job application and there is no evidence that the uncertainty of recruitment is attributable to the plaintiff’s injuries.
7. In absence of any evidence before me on the possible prospects of the plaintiff being employed as a PCA IIIA after her retirement and in absence of any evidence to show the uncertainty in gaining employment is related to the injuries sustained in the Accident, I find the plaintiff is unable to prove the multiplicand of $14,500 (based on the average monthly salary of a PCA IIIA worker) is appropriate and/or correct.
8. As for the multiplier of 2 proposed by Mr Lun, I am not satisfied the plaintiff has shown it is an appropriate multiplier to be adopted for 2 reasons:
   1. Firstly, Mr Lun concedes he is unable to explain why the multiplier is appropriate. In absence of any explanation on the adoption of a discounted multiplier, I am unable assess whether the propose multiplier is a correct or an appropriate one. Furthermore, I am unable to determine whether the multiplier can be justified on the evidence before me.
   2. Secondly, there is no evidence to prove, on a balance of probabilities, the plaintiff would continue to be employed by the defendant after she reached retirement age of 60 years old.
9. By reason of the matters set out above, I find the plaintiff unable to prove her claim for future loss of earnings as pleaded and submitted. I therefore do not make an award for future loss of earnings.

*LOSS OF EARNING CAPACITY*

1. Mr Lun submitted that the injuries from the Accident has limited the plaintiff’s employment opportunities. He further submitted that but for the Accident, the plaintiff could well continue with her “previous occupation in similar capacity”. I am unable to accept such submissions. I shall not repeat my reasoning as to why I find the plaintiff unable to prove she would be employed by the defendant after her retirement with an average salary of $14,500 per month.
2. The proper question for this court to consider is whether there is a substantial or real risk the plaintiff will lose her job before the end of her working life due to the injuries caused by the Accident: see *Moeliker v A Reyrolle and Co Ltd* [1977] 1 All ER 9. The assessment is to be based on the loss of the job the plaintiff was currently employed in at the time of the trial.
3. As correctly submitted by Mr Lun, this court is to make an independent assessment on whether there is loss of earning capacity and any comments or percentage given relating to the whole person impairment is only something for the court to consider in its assessment.
4. There is no dispute that the plaintiff did resume her pre-accident employment with the defendant until the age of retirement and that the plaintiff’s employment ended with the defendant because she reached the retirement age, not because of any factor relating to the Accident. Although light duties were assigned to her after the Accident and despite Dr Kong’s opinion there would be “*a mild degree of reasonable reduction of working efficiency and endurance*”, there is no dispute she remained employed with the defendant in the same position until retirement and her salary was not affected by the assignment of light duties. Her “loss” of employment with the defendant is not attributable to the Accident but to her age and her failure to apply for the post-retirement job.
5. At the time of the trial, the plaintiff was working as a part-time waitress earning $50 per hour. There is no evidence to show she is or will be unable to continue in her current employment. The current employment does not require her to lift heavy things, her job allows her to take short breaks whilst not serving customers, and she conceded she finds the current employment duties manageable. Even if I accept Dr Kong’s assessment there would be a mild degree of reduction in working efficiency and endurance, I am not satisfied this would constitute a substantial or real risk that the plaintiff would lose her current employment as a part-time waitress before she reaches 65 years old.
6. As for her short employment with the elderly home, I am not satisfied the plaintiff was unable to continue with the employment due to the injuries suffered in the Accident. She conceded no one asked her to leave and that no one complained of her work. Though she claims she felt unable to handle some of the duties assigned to her, she did not discuss the same with her employer to see if alternative work arrangements could be made whilst retaining her employment. Instead, she chose to leave on her own accord. There is no evidence her employer found her unsuitable for the job or that employment had to be terminated on the basis the plaintiff was unable to carry out the necessary duties.
7. In all the circumstances, I am not satisfied the plaintiff has proven she suffers a loss of earning capacity as caused by the Accident. I therefore do not make an award under this head of damages.

*SPECIAL DAMAGES*

1. I am satisfied the chiropractor fees (17 visits) should be allowed. As for the attendance at Dr Lau’s clinic for tendinitis, I am not satisfied those visits are related to the Accident. As for the attendance at Dr Lau Wing Fong’s clinic for back pain, there is no evidence as to the fees spent at Dr Lau’s clinic. Hence I only allow a total sum of $10,400 for the chiropractor fees incurred.
2. As for tonic food, I am prepared to accept the approach followed in the cases of *Chan Si Mui v Kong Hung Keung*, (unrep), HCA 4977/1991, and *Chan Chin To* *Chadow* and order a nominal sum for tonic food in absence of receipts. Having considered the overall condition of the plaintiff, I am only prepared to allow a nominal sum of $1,000.
3. In respect of travelling expenses, I agree the plaintiff would have incurred travelling expenses in attending Dr Lau’s clinic, the chiropractor, and various public hospitals. I allow $3,000 for travelling expenses.
4. Hence the total sum awarded for special damages is $14,400.

*SUMMARY OF AWARDS*

1. A summary of the sums awarded to the plaintiff are as follows:

|  |  |
| --- | --- |
| PSLA | $150,000 |
| Pre-trial loss of earnings | $30,970.43 |
| Special damages | $14,400 |
| LESS: Employees’ compensation | ($131,243.70) |
| **TOTAL** | **$64,126.73** |

1. I award interest in the following manner:
   1. on damages for PSLA at 2% per annum from the date of service of the writ until date of judgment;
   2. interest at 4% per annum on pre-trial loss of earnings and special damages from the date of the Accident until the date of payment of employees’ compensation; and
   3. post-judgment interest on the balance of the awarded sum (awarded sum after deducting the employees’ compensation received) at judgment rate.

*COSTS*

1. I note that although I have disallowed claims under 2 heads of damages, I consider the plaintiff to be overall successful in her claim. I note the defendant’s contention was that there should be no extra sums due to the plaintiff after the employees’ compensation was deducted. However, I have ordered damages in a sum exceeding the employees’ compensation. I therefore order that costs follow the event.
2. I therefore make a costs order *nisi* that the defendant do pay the plaintiff’s costs of this action to be taxed if not agreed, with certificate for counsel. Unless any party applies to vary the costs order *nisi* within 14 days hereof, the costs order shall become an order absolute.

(W. Y. HO)

Deputy District Judge

Mr Edward Lun, instructed by Cap Chan & Co, for the plaintiff

Mr Alfred C P Cheng, instructed by Deacons, for the defendant