DCPI 2016/2015

[2020] HKDC 69

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONNAL INJURIES ACTION NO 2016 OF 2015

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BETWEEN

YEUNG KIU YING Plaintiff

and

FAIRWOOD FAST FOOD LIMITED Defendant

trading as FAIRWOOD

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Before: Her Honour Judge Phoebe Man in Court

Date of Hearing: 10-11 October 2019

Date of Submissions: 29 November 2019

Date of Closing Submissions: 27 December 2019

Date of Judgment: 23 January 2020

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JUDGMENT

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# *Introduction*

1. The plaintiff’s claim is for damages for personal injuries suffered by her in an alleged accident on 18 October 2012 in the course of her employment with the defendant as a concourse group leader. At the time the plaintiff was working at a branch of the defendant (a fast food restaurant) at the basement of Causeway Bay Commercial Building, 1-5 Sugar Street, Hong Kong. It is alleged that on 18 October 2012 at approximately 9 am, the food trays which were stacked up to a height of approximately 3 feet on the table suddenly fell down and hit the plaintiff’s right hand and as a result her right thumb was injured (the “Accident”).
2. The defendant disputes both liability and quantum. The defendant disputes that the Accident happened at all.
3. This is the trial for both liability and quantum of the plaintiff’s personal injuries claim arising out of the Accident.

*The plaintiff’s working background*

1. The plaintiff was born on 13 July 1957 and was aged 54 at the time of Accident and is currently 62 years old. She was educated in the PRC up to secondary school F4 level and can read and write simple Chinese. She moved to Hong Kong in 1992.
2. The plaintiff had been under the employ of the defendant since March 2007 as a server at Fairwood, the fast food restaurant chain. Her work duties include cleaning, collecting and emptying trays. Her usual working time is from 8 am to 5 pm daily, with a daily average of 5 hours over time work.

*Liability - Did the Accident Happen?*

1. The plaintiff gave evidence on her own behalf. The plaintiff’s account of the Accident is as follows: at around 9 am on 18 October 2012, she was collecting trays and clearing the tables after the customers finished their meals. She noticed there was a stack of about 70-80 dirty trays of about 3 feet high on a work table near the bar area. As the plaintiff saw that there were so many dirty trays and that the clean trays had almost been used up, she decided to take some of the dirty trays from the stack for cleaning. However, before the plaintiff touched the stack of dirty trays, the work-table swayed and 30-40 of the dirty trays from the stack fell and hit the plaintiff’s right hand. As a result, the right thumb of the plaintiff was injured. The plaintiff said she had immediately reported to the branch manager Ms Wong about the Accident after the trays fell on her. and that there should be colleagues who had witnessed the Accident.
2. The defendant denies the Accident having happened at all. The defendant says that the Alleged Accident is inherently improbable. Ms Wong, the branch manager of the branch at which that the plaintiff worked gave evidence for the defendant to the effect that:
   * + - 1. She was working at the bar area at the time and did not witness the Accident having occurred.
         2. The plaintiff did not report the Alleged Accident to her immediately after it happened.
         3. The plaintiff continued to work as normal after the Alleged Accident happened, other than the days of sick leave from 19 – 22 October 2012.
         4. The plaintiff had only handed the sick leave certificate to Ms Wong approximately a week after the Alleged Accident happened.
         5. Ms Wong did not hear of any sound of a stack of trays falling.
         6. Ms Wong had asked other staff on duty that day if they had heard of the plaintiff mentioning the Alleged Accident or had heard of the sound of trays falling. No one said that they had heard of either.
         7. Ms Wong also queried whether it was possible that according to the plaintiff the highest tray was stacked 173 cm from the ground. According to Ms Wong, it would take 160 trays to reach a height of 3 feet high. Usually only about 40 trays would be stacked together.
         8. The staff at the branch at which the plaintiff worked are on average not very tall and it would have been difficult for them to stack the trays to the alleged height. There would also be no reason for them to have done so as it would have been inconvenient. There was more than enough space to put the trays on multiple stacks on the work table.
         9. The time of the Alleged Accident was not during peak hours and there should have been no chaos during that time.
         10. Ms Wong had never seen trays being stacked too high or that there had been similar accidents in the past at the branch.
3. When assessing a witness’ credibility, this Court tests her evidence against contemporaneous documents and/or undisputed and/or indisputable and/or independent evidence. If that is impossible and the truthfulness of the evidence depends entirely on a witness’ credibility, the evidence will be assessed by reference to the consistency of her testimony with her prior answers/statements given orally or in writing. Whether a witness’ evidence is to be believed will also be assessed by reference to its inherent plausibility or implausibility taking into account the circumstances of the particular case. Further, when a witness is discredited when cross-examined on an issue, particularly on a material one, it throws light negatively on his/her overall credibility[[1]](#footnote-1).
4. I find the plaintiff to be an overall straightforward and honest witness and I accept her evidence on how the Accident happened. I accept and find that the trays had to be stacked on one column despite the table being a long one, as Ms Wong had during cross-examination admitted that during busy times, the rest of the table space could have been occupied by trays with bowls and utensils, leaving only space for one column of trays without bowls to be stacked up.
5. Ms Wong gave oral evidence for the defendant and I do not find her to be a truthful or reliable witness:
   * + 1. Ms Wong claimed that the plaintiff did not tell her she had an accident on 18 October 2012. At first, Ms Wong said that she could not remember if the plaintiff had left early on that day and disagreed that she had left at 2 pm that day. After being shown the records, she agreed that the plaintiff had in fact left at 14:03 on 18 October 2012, before her shift ended.
       2. Ms Wong agreed that usually when staff needed to leave early, they needed to seek permission from her and provide a reason. However, Ms Wong claimed that the plaintiff did not say she suffered an injury at work when she sought to leave work early. Ms Wong first claimed that the plaintiff sought permission to leave work early and said she was going to see a doctor (without mentioning she suffered from an injury at work). However, when she was asked why she did not ask the plaintiff for a sick leave certificate afterwards, she changed her answer and said she did not know the plaintiff had wanted to see a doctor. When pressed on whether the plaintiff in fact told her she was going to see a doctor, her answer became “I cannot remember”.
       3. She also claimed that she could not remember what was the reason the plaintiff gave to justify early leave on 18 October 2012. She later said during cross-examination that the plaintiff only said she had to do something and had to leave without giving an explanation. I find Ms Wong’s evidence in this regard contradictory and unreliable, if not dishonest. According to her, all staff would need to seek approval from her for early leave. It is incredible that Ms Wong would have allowed a staff to leave during her shift without having been provided by a legitimate reason.
       4. Further, the plaintiff was absent from work from 19 – 22 October 2012. The plaintiff indicated in a declaration to the Labour Department dated 25 April 2013 that she handed the sick leave certificate from Kwong Wah Hospital for 19 – 22 October 2012 to Ms Wong upon her return to work on 23 October 2012. Ms Wong said in her oral evidence that she first received the sick leave certificate on 31 October 2012. However, if indeed that was the case, Ms Wong could not provide any satisfactory answer as to why she did not ask for a sick leave certificate upon the plaintiff returning to work on 23 October 2012. It is incredible that Ms Wong would not have asked for any sick leave certificate after the plaintiff returned to work on 23 October 2012, after having been absent for 4 days.
       5. On the 2nd day of the trial, Ms Wong further gave evidence that she reported the plaintiff’s injury to the personnel office situated in Shenzhen on 31 October 2012. Ms Wong insisted that she reported the injury upon the plaintiff telling her about the injury for the first time on 31 October 2012. Ms Wong alleged that upon hearing about the plaintiff’s Accident, she had made enquiries with other staff and nobody else had witnessed it. However, Ms Wong could not explain why she reported the Accident despite the fact that she did not witness it and that none of the other staff had witnessed it and had doubts if the accident had happened at all. I have no hesitation in rejecting Ms Wong’s evidence in this regard. Ms Wong admitted that she was the one responsible for investigating any allegation of accident at work and she had the duty to inform the Shenzhen office if she had any doubt about the Accident. Ms Wong admitted towards the end of her oral evidence that if indeed she had harboured any doubt as to whether the accident did happen, she would have reported it to the Shenzhen office.
       6. The Accident is consistent with the information put forward by the defendant itself in Form 2, when the defendant reported the Accident to the Labour Department. There was no other contemporaneous document from the defendant denying the Accident took place.
6. Having considered the totality of the evidence, Ms Wong’s actions were more consistent with her having been informed by the plaintiff on 18 October 2012 of the Accident and having received the sick leave certificate upon the plaintiff’s return to work on 23 October 2012. I find that Ms Wong did know about the Accident on 18 October 2012, and that the Accident did happen. I reject Ms Wong’s evidence and accept the plaintiff’s evidence that she did inform Ms Wong that she was injured at work in the morning of 18 October 2012 and had told Ms Wong about it when she left early at 14:03.
7. Mr Cao, Counsel for the defendant urged the Court to dismiss the plaintiff’s claim as the plaintiff only mentioned in her oral evidence for the first time that it was an Indian female colleague that pushed the table causing the stack of trays to fall. Mr Cao said that this was one of the most important facts in the plaintiff’s case and she ought to have pleaded it or mentioned it in her witness statement. Mr Cao submitted that the defendant had no opportunity to deal with this and it would be unfair for the defendant if the Court were to accept the plaintiff’s “*radical departure of*” her case.
8. Whilst I agree that the plaintiff mentioned the Indian colleague having touched the table for the first time in her oral testimony, I disagree with Mr Cao’s submission that the plaintiff’s claim should thus be dismissed. The core facts behind the plaintiff’s case were that “*the food trays which were being stacked up to a height of approximately 3 feet on the table suddenly fell down and hit the Plaintiff’s right hand*”. It was not the plaintiff’s case (either in the statement of claim or the plaintiff’s witness statement) that the trays collapsed without anyone having touched the table. At most, one can say that there was no detail provided as to how the trays collapsed. This, if so desired, the defendant could have sought further and better particulars on.
9. The plaintiff had said during cross-examination that the table was not sturdy. It was also her evidence that the stacked trays were tilted and tumbled down before the Indian colleague had reached or touched the table. She said that there was someone working at the table and the table shook upon contact. She candidly agreed that this was not mentioned in her witness statement. However, I do not consider this to be a departure from or is inconsistent with the plaintiff’s case. At most it can be said that such detail was not mentioned in her witness statement.
10. Further, the defence case is that the Accident never happened at all. I do not consider that this particular additional detail provided by the plaintiff during cross-examination in any way prejudiced the defendant’s preparation of its Defence. Even if one were to disregard this new detail, I do not consider it was inherently improbable that the trays fell down without anyone touching the table, having accepted the plainitff’s evidence that the work table was not sturdy.

*Breach of Duty*

1. The test of an employer’s liability for common law negligence is trite. “*The common law demands that employers should take reasonable care to lay down a reasonably safe system of work. Employers are not exempted from this duty by the fact that their men are experienced and might, if they were in the position of an employer, be able to lay down a reasonably safe system of work themselves. Workmen are not in the position of employers. Their duties are not performed in the calm atmosphere of a board room with the advice of experts. They have to make their decisions on narrow window sills and other places of danger and in circumstances in which the dangers are obscured by repetition.”[[2]](#footnote-2)*
2. The plaintiff worked every day at the fast food restaurant where during peak hours, the condition of the work table (where dirty trays were collected and put) was such that trays (after bowls and utensils had been cleared off) were piled up in a single column waiting to be cleaned. The pile got so high that eventually it fell. The danger is plainly evident.
3. Ms Wong admitted that she was not sure if her predecessor had informed the plaintiff of the safety guidelines in relation to stacking trays to a high level. In any event, such guidelines were only oral guidelines, to be given only when a staff was seen stacking up trays. Also, Ms Wong admitted during cross-examination that she had seen trays being stacked up to a high level. Clearly there was no set system in place to warn the staff not to stack up trays to such a high level.
4. I find that the defendant was in breach of its common law duty as an employer for not having in place a system that warns against trays being stacked up to a height which poses as a danger in the workplace.
5. The defendant decided in its closing submissions not to pursue the issue of contributory negligence.

*Injuries and Treatment*

1. The plaintiff says she went to a private medical practitioner near her home on 18 October 2012, the day of the Alleged Accident. However, no medical report or record of attendance had been disclosed by the plaintiff for this consultation.
2. From the medical report, it seems that the plaintiff then went to Kwong Wah Hospital the next day on 19 October 2012 and was given sick leave from 19-22 October 2012. There are 2 medical reports issued by Kwong Wah Hospital:
   * + - 1. Report for employee’s compensation dated 31 January 2013 (first attended clinic on 26 October 2012) (“2013 KW Report”),
         2. Medical Report dated 20 March 2014 (first attended A&E department on 19 October 2012) (the “2014 KW Report”).
3. The plaintiff attended the A&E department of Kwong Wah Hospital the day after the Accident on 19 October 2012. The 2013 KW Report disclosed that “*History of injury at work: No … The* [plaintiff] *complained of right thumb pain for 3 months with no definite history of acute trauma. Decreased range of thumb motions was noticed by the patient.*” The 2014 KW Report contains statements to the similar effect: “*The* [plaintiff] *registered at our Emergency Department at 15:39 on 19/10/2012. She complained of right thumb pain for three months with no definite history of acute trauma.*”
4. The plaintiff then consulted Dr Ng Yuet Sun at St Teresa’s Hospital on 26 October 2012 and on 2 November 2012 she received right thumb operation there. St Teresa’s Hospital issued a medical report dated 31 January 2013 (the STH Report”). In the STH Report, it was stated that the plaintiff “*first attended on 26/10/2012 … History of injury at work: yes, right thumb sprain when a stack of plates fell onto her… Right thumb sprained while at work … pain and swelling and ↓ motion.*”
5. From the contemporaneous medical documents, it seems that the plaintiff did not mention the Accident to the doctors in Kwong Wah Hospital on 19 October 2012. The first medical documentation showing the plaintiff having mentioned suffered from injury at work was 22 October 2012 in the A&E notes from Kwong Wah Hospital: “*IOD (Injury on Duty)*”
6. Subject to the issue of history of injury at work, the 2013 KW Report and the 2014 KW Report and the STH Report as to diagnosis, treatment and care of the plaintiff are non-controversial and are thus treated as agreed evidence.

*Joint Medical Report dated 6 March 2017*

1. The plaintiff was jointly examined by the plaintiff’s expert, Dr Peter Tio (“Dr Tio”) and the defendant’s expert, Dr Arthur Chiang (“Dr Chiang”) on 3 January 2017. After the physical examination of the right hand and thumb, there were the following complaints from the plaintiff:
   * + - 1. There is diffuse tenderness of the whole right thumb.
         2. Stiffness over right thumb
         3. Sensation much reduced over whole right thumb.
         4. No more triggering.
         5. Complete loss of right hand grip strength
         6. Active 45° of right thumb, passive 60° of right thumb.
2. Dr Chiang opined that the diffuse tenderness was not anatomically explainable. To some extent Dr Tio agreed as he opined that any residual pain should only be localized to the volar aspect of the MCP joint rather than diffusely over the thumb. Dr Tio also opined that there should no longer be any numbness after surgical release. Dr Chiang also found that the grip strength shown was exceptionally low, not even in cases of trigger thumb with active symptoms. Dr Tio opined that the hand grip should also not be as minimal as shown in the examination. To that extent both experts seem to be of the opinion that there was some exaggeration by the plaintiff of her symptoms. Passive range of movement performed by the doctor was noted to be good, indicating good range of movement of the right thumb.
3. Both doctors agreed that further treatment is not required. They also agreed that at the time of the assessment, the plaintiff’s injuries have reached maximal medical improvement. Dr Tio was of the view that the plaintiff could resume her former duty as fast food chain cleaning worker, with mild reduction in work efficiency and capacity. Dr Chiang was of the view that the plaintiff should be able to resume pre-injury job with a satisfactory capacity. Dr Tio opined that the degree of whole person impairment and loss of earning capacity is 3% and Dr Chiang suggested 0.5% to 1% whole person impairment with no loss of earning capacity.
4. It is the plaintiff’s own evidence that she had been able to continue working for the defendant (and another fast food restaurant) after the Accident and related injuries. Taking into account the totality of the evidence, I find that the plaintiff had achieved satisfactory recovery with mild residual pain and stiffness over the right thumb and mild tenderness over the MCP joint.

*Causation*

1. The defendant disputes causation because the plaintiff had a pre-existing finger condition. The defendant said that even if the Accident did occur, it had only mildly aggravated the plaintiff’s pre-existing condition.
2. The principles governing the issue of causation and the quantification of loss suffered by a claimant have been set out in the case of *Yu Wai Kan v Law Cho Tai[[3]](#footnote-3)*:

*“(a) The burden is on the plaintiff to establish on the balance of probabilities that the accident caused or materially contributed to the loss and damages he has sustained (see CMY v Tam Siu Wing [2008] 4 HKLRD 604, 613).*

*(b) The law’s approach to causation is pragmatic where there are several concurrent factors operating to cause injury (see Lee Kin-kai, a patient by his father and next friend Li Wah v Ocean Tramping Co Ltd t/a Ocean Tramping Workshop [1991] 2 HKLR 232, 236). A material contribution to the outcome is sufficient to impose liability for that outcome. A contribution which does not fall within the exception de minimus non curat lex must be material; and a cause is sufficient, it does not need to be the sole cause (see CMY at p.612).*

*(c) Causation is essentially a matter for the judge and not for the doctors. The judge will be assisted by the medical evidence but is not bound by it; he is not confined to those matters which the doctors may individually have picked out in their consulting rooms. It is important to bear in mind that law and medicine apply different standards. In law, there is a causal connection if it is shown on the balance of probabilities that the accident is a substantially contributing cause of the injury. On the other hand, the doctors practice the science of aetiology and look for “clinical cause” or “irrefragable chain of causation” which is to be proved beyond reasonable doubt or beyond any doubt (see Lee Kin-kai, a patient by his father and next friend Li Wah at pp.235-236, Lee Sau Keung v Maxcredit Engineering Ltd & anor [2004] 1 HKC 434, 450, and Ansar Mohammad v Global Legend Transportation Limited CACV 162/2010 (unreported, 24 March 2011) at para.22(2)).*

*(d) The wrongdoer must take his victim as he finds him so that the wrongdoer remains liable even though the severity or extent of the damage has been increased due to the victim’s pre-existing weakness or susceptibility to harm. This “thin skull” rule (see Charlesworth & Percy on Negligence 12th ed para.5-26 at p.350) extends to “eggshell personality” (see Charlesworth & Percy on Negligence 12th ed paras.5-31 – 5-33 at pp.351-352, Lam Wing Ming v Dragages et Trauvaux Publics (HK) Ltd & anor HCPI 1090/1995, Master A Chung (as he then was) (unreported, 21 July 1998) at paras.14-17, CMY at pp.610-613 and Page v Smith [1995] 2 All ER 736). Thus, if the primary victim has a pre-existing propensity to depression or psychiatric illness which is activated or re-activated by physical injury caused by the wrongdoer’s negligence, the wrongdoer cannot escape liability for the loss caused by the activated or re-activated depression even in rare or aggravated form by pleading lack of foreseeability once the relevant duty of care is established and personal injury of some kind is reasonably foreseeable.*

*(e) When considering the effect of a pre-existing condition on an award of damages, there are 3 possible scenarios. The first is where the plaintiff is almost certain to have gone through life unaffected by the condition, and the defendant will be liable for all damage caused. The second is where there is a strong possibility that some other event or natural progression of the condition will have brought about the plaintiff’s present state, so it will be necessary to assess the degree of the possibility in deciding what reduction is appropriate in the same way as it is necessary to assess the effect of other vicissitudes of life that may abbreviate the plaintiff’s working life or lifespan and thus abridge his loss. The third is where this will certainly have occurred at some stage in any event so that clearly an allowance has to be made but the extent of which depends on the evidence as to when the precipitating event will have occurred (see Chan Kam Hoi v Dragages et Trauvaux Publics [1998] 4 HKC 523, 527).*

*(f) Where a pre-existing condition is likely to lead to disability and loss in the absence of the injury for which the plaintiff is entitled to recover, the usual method of assessing the recoverable loss is to take account of the risks by an appropriate assessment of general damages. Past loss of earnings may also be reduced if the risks during the years concerned are sufficiently high. For future loss of earnings, a reduced multiplier is usually the most accurate way of giving effect to the findings on the medical evidence, especially when a plaintiff’s working life is likely to be limited by a pre-existing condition (see Chan Kam Hoi at p.529 and Cheung Fat Tim v Wong Siu Ming trading as Kee Construction Company & anor HCA 5079/1991, Findlay J (unreported, 17 January 1995)).*

*(g) The principles in (e)-(f) above have been developed by the courts to give the plaintiff reasonable compensation in order to achieve restitutio in integrum, which is the key objective in awarding loss caused by negligence.*”

1. I will apply the above principles on causation and consideration of the quantification of damages.
2. The 2014 KW Report shows that when the plaintiff first presented to Kwong Wah Hospital on 19 October 2012, she complained of right thumb pain for 3 months with no definite history of acute trauma. This is consistent with information in the 2013 KW Report. It is mentioned in the 2014 KW Report that the plaintiff had received a right thumb injection in July 2012. As such, there can be little dispute that the plaintiff had been suffering from right trigger thumb prior to the Accident.
3. The plaintiff re-attended the Accident & Emergency Department on 22 October 2012 and was diagnosed as right trigger thumb. Physical examination noted that the plaintiff could not flex her thumb. She was given an injection and was referred to the orthopaedics specialist clinic and occupational therapy. The plaintiff then consulted Dr Ng Yuet Sun at St Teresa’s Hospital on 26 October 2012. On 2 November 2012 she received right thumb operation to release her right trigger finger.
4. Dr Tio, the plaintiff’s expert opined that as the plaintiff’s pain was relieved by injection in July 2012 and she was able to continue working until the Accident, the Accident had aggravated the pre-existing right trigger thumb to the extent that she needed an operation eventually in November 2012. Dr Tio thus estimated 30% of the current residual condition to have been attributable by the pre-existing element and70% by the Accident.
5. Dr Chiang, the defendant’s expert on the other hand opined that the uncertainty of the date of the injury suggested that the aggravation of the Accident on the pre-existing right trigger thumb was mild. The history of the pre-existing condition based on the natural course of trigger thumb also supported the estimation of 30% of the current residual condition to have been attributable by the Accident and 70% by the pre-existing element.
6. Having considered the totality of the evidence, in particular, the contemporaneous medical records, I agree with Dr Chiang’s reasoning and his estimate for the following reasons:
   * + 1. It is clear from the medical records that the plaintiff had received an injection to relieve her pain from right trigger thumb in July 2012, three months prior to the Accident. However, when she went to the A&E Departmemt of Kwong Wah Hospital on 19 October 2012, the triage notes said she had been suffering from thumb pain for 4 months and the doctor’s notes recorded thumb pain for 3 months. This shows that despite the injection in July 2012, the plaintiff was still in pain prior to the Accident. Contrary to Dr Tio’s suggestion, the pain had not resolved after the injection.
       2. The fact that the plaintiff did not mention upon her first consultation at Kwong Wah Hospital on 19 October 2012 that the pain she was suffering from was caused by the Accident also speaks volumes. If the plaintiff had thought that the pain that she was suffering from was substantially caused by the Accident, she would have mentioned it during consultation on 19 October 2012, one day after the Accident. She clearly only treated it as the same as the pre-existing pain for the past 3 or 4 months when she went to Kwong Wah Hospital on 19 October 2012 as it was recorded in the triage data as “*non- trauma*”. The plaintiff also did not mention the Accident when she consulted Dr Ng on 26 October 2012.
7. I find that the plaintiff was already suffering from thumb pain (which was not resolved by injection) prior to the Accident. I agree with Dr Chiang’s opinion and find that the plaintiff’s residual condition is 30% attributable by the Accident and 70% attributable by her pre-existing condition.

*PSLA*

1. The plaintiff claims HK$250,000 as damages under the head of PSLA.
2. When assessing PSLA, I take into account the trauma of the Accident, the plaintiff’s injuries and any loss of enjoyment and amenities. As set out above, I have found the plaintiff to be suffering from mild residual symptoms only.
3. Parties have referred me to the cases as listed in the Annex. Having considered them and compared the facts including (but not limited to) the mode of the accidents, the trauma suffered and the injuries suffered, I consider the facts and residual conditions of the current case to be most comparable to the case of *Ting Siu Ki* and *Singh Harpel*. Taking into account inflation, I consider an award of HK$140,000 to be appropriate under this head of damage. A 70% discount is to be applied for the plaintiff’s pre-existing condition. Thus the amount of damage under this head to be awarded is HK$42,000.

*Pre-trial loss of earnings and MPF*

1. Parties have agreed on the amount of HK$4,537.60 (net of advance payment of HK$9,520). This amount is the difference between the plaintiff’s 3 months of earnings (at her normal monthly earnings at HK$10,799.4) and the plaintiff’s actual earnings from October to December 2012, minus the advance payment of HK$9,520.
2. Although the plaintiff has a pre-existing condition, the sick leave awarded was for the days after the Accident when the plaintiff suffered from pain. It is arbitrary and inappropriate to divide the days of the sick leave awarded as to 30% *vs* 70% and I decline to do so. The sum awarded under this head will not be apportioned by pre-existing condition and Accident.

*Loss of Earning Capacity*

1. I agree with Mr Cao’s submission based on the case of *Bishwakarma Bhakta Bahadhur v Pacific Crown Security Services Ltd[[4]](#footnote-4)* that: “*Evidence to prove the risk of not being able to retain his job or to seek another job offering him a similar income level in the future due to his condition would be mandatory.*” The plaintiff has not adduced any satisfactory evidence to show that there is a risk of her losing her job. The case of *Gurung Bhakta Bahadur v Green Valley Landfill Ltd.[[5]](#footnote-5)* is distinguishable, as there is no back injury involved in the present case.
2. The defendant had not fired the plaintiff despite the Accident. For the past two years, the plaintiff had been working a second job at another fast food chain, other than working full time with the defendant, despite the residual symptoms. The reason given was that the plaintiff needed the income to make mortgage repayments. There is no indication that the defendant would fire the plaintiff from her job in future. Further, it is the plaintiff’s evidence that she would in any case retire in July 2020. Taking into account the totality of the evidence, I find that the plaintiff had achieved satisfactory recovery with mild residual pain and stiffness over the right thumb and mild tenderness over the MCP joint. I also find that there is no loss of earning capacity, as the plaintiff had clearly been able to return to work after the Accident and the expiry of the sick leave.
3. I am of the view that there is no satisfactory ground and evidence put forward to sustain a claim under this head.

*Special Damages*

1. I agree that the plaintiff is entitled to the medical expenses at Kwong Wah Hospital and the Hong Kong Traumatology and Orthopaedics Institute Limited at HK$800. I also allow travelling expenses of HK$500 and tonic food of HK$1,000 despite there being no receipts as such are reasonable sums claimed in the circumstances.
2. As discussed above，I find that before the Accident, the plaintiff was still in pain despite having received injections in July 2012. I am thus of the view that the operation will be necessary at some point, regardless of whether the Accident happened. As such I will also apportion the cost of HK$6,228 of the operation as to 30% attributable to the Accident and 70% attributable to the plaintiff’s pre-existing condition. The total amount of special damages is thus HK$800 + HK$500 + HK$1,000 + (HK$6,628 x 30%) = HK$4,288.40

*Summary of Damages*

|  |  |
| --- | --- |
| PSLA | HK$42,000.00 |
| Pre-trial loss of earnings and MPF  (advance payment already taken into account) | HK$4,537.60 |
| Loss of Earning Capacity | HK$0 |
| Special damages | HK$4,288.40 |
| Total: | **HK$50,826** |

*Interest*

1. I award interest on PSLA at 2% per annum from the date of service of the writ up to the date of judgment and interest on pre-trial loss of earnings and other special damages at half the judgment rate from the date of the Accident to the date of judgment herein, and thereafter at judgment rate until payment.

*Costs*

1. I grant a costs order *nisi* that the defendant do pay the plaintiff’s costs (including all costs reserved, if any) to be taxed if not agreed.

*Orders*

* + - 1. There shall be judgment in the sum of HK$50,826 with interest at 2% p.a. on the award for PSLA from the date of the service of the writ until the date of judgment and interest on pre-trial loss of earnings and other special damages at half the judgment rate from the date of the Accident to the date of judgment.
      2. The defendant do pay the plaintiff’s costs with certificate for counsel (including all costs reserved, if any) to be taxed if not agreed.

1. I thank Counsel for their assistance.

( Phoebe Man )

District Judge

Mr Simon Wong, instructed by Kenneth W Leung & Co, for the plaintiff

Mr Cao Yuan Shan, instructed by WMC Partners, for the defendant

Appendix

Cases referred to by parties on PSLA

*Ting Siu Ki v Wun Che Ming & Anor[[6]](#footnote-6)*

*Singh Harpel v Najib Transport[[7]](#footnote-7)*

*Tsang Ka Hung Barry v 鄧玉玲[[8]](#footnote-8)*

*Yu Yixin v Leung Chi Tin Andy[[9]](#footnote-9)*

*Singh Jagdeep v VSC Engineering Products Co Ltd[[10]](#footnote-10)*

*Lee Tsz Kin Ken v Climax Paper Converters Ltd[[11]](#footnote-11)*

1. *ONC Lawyers )a form) v Yiu Wing Ching John* [2019] 1 HKC 393 [↑](#footnote-ref-1)
2. *Ho Foon Cheung v Shun Yip Engineering Co Ltd* unrep. CACV 33/2011, 8/11/2011 at §17 quoting Lord Oaksey in *General Cleaning Contractors Ltd v Christmas* [1953] AC 180 at 189-190. [↑](#footnote-ref-2)
3. HCPI 62/2010, *unrep.* 11 May 2011, Master Marlene Ng (as she then was) [↑](#footnote-ref-3)
4. Unrep. HCPI 232/2015, 30/08/2018 [↑](#footnote-ref-4)
5. Unrep. HCPI 333/2009, 28/01/2011 [↑](#footnote-ref-5)
6. Unrep. DCPI 1463/2011, 13/12/2013 [↑](#footnote-ref-6)
7. Unrep. DCPI 494/2009, 23/11/2009 [↑](#footnote-ref-7)
8. Unrep. DCPI 525/2007, 20/1/2009 [↑](#footnote-ref-8)
9. Unrep. DCPI 1306/2007, 12/3/2008 [↑](#footnote-ref-9)
10. Unrep. DCPI 391/2005, 17/06/2005 [↑](#footnote-ref-10)
11. Unrep. HCPI 504/2003, 24/06/2004 [↑](#footnote-ref-11)