## DCPI 2042/2016

[2019] HKDC 26

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2042 OF 2016

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##### BETWEEN

LUI KING TONG Plaintiff

### and

HOSPITAL AUTHORITY Defendant

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Coram : Deputy District Judge Elaine Liu in Court

Dates of Hearing : 3 and 4 January 2019

Date of Judgment : 10 January 2019

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JUDGMENT

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*Introduction*

1. The plaintiff’s claim was for damages arising out of an accident occurred on 6 September 2015 while he was employed by the defendant as a Health Care Assistant. His case was that while he was assigned to assist in the restraining of a mental patient in a hospital ward, his right hand was kicked by the mental patient (“the Accident”) and the plaintiff sustained injuries.
2. By consent of the parties, interlocutory judgment on liability was entered but the quantum of damages was in dispute. This is the hearing for the assessment of damages.

*Background facts about the plaintiff*

1. The plaintiff was 57 years old at the time of the Accident. He had been employed by the defendant since July 1996. His major duties were to take care of the patients’ basic needs, such as feeding, bathing, cleaning, moving things, and assisting in restraining mental patients.
2. After the Accident, the plaintiff remained in employment with the defendant in the same position until he reached the retirement age of 60. Thereafter, the plaintiff was employed by the defendant on a contractual term of 2 years under the Retire and Rehire Scheme. His job title was changed to Public Care Assistant but the job nature remained the same as before. Under the same scheme, the plaintiff’s employment may be further extended until he reaches the age of 65 if he applies for the extension and his performance is satisfactory.
3. It was agreed that the basic salary of the plaintiff at the material time was HK$16,890.

*The injury*

1. The plaintiff attended the Accident and Emergency Department of the Princess Margaret Hospital on 6 September 2015 (the date of the Accident) and 9 September 2015. He was diagnosed with right hand pain and mild swelling, with no bony injury. He was given sick leave and medication.
2. The plaintiff also consulted the Accident and Emergency Department of Caritas Medical Centre on 13 September 2015 for his right hand pain and was given medication.
3. Medical records for the period between 9 November 2015 and 29 February 2016 in regard to the plaintiff’s medical consultations and physiotherapy treatments for his right shoulder pain and the trigger fingers were produced.
4. After a joint examination by two medical experts, Dr Kong and Dr Lee, a joint medical report dated 9 January 2018 (“Joint Medical Report”) was issued.
5. It was stated in the Joint Medical Report that both experts agreed to the following:-
6. The plaintiff suffered contusion injury to his right hand.
7. The plaintiff has a number of pre-existing or co-existing conditions, including frozen shoulder and mild right trigger thumb, trigger index, middle and ring fingers. Both experts agreed that these pre-existing or co-existing conditions do not relate to the Accident.
8. The plaintiff’s social activities should not be affected by the Accident.
9. The plaintiff does not require further treatments or operations.
10. Dr Kong opined that at the time of the joint examination, the plaintiff has attained a relatively satisfactory recovery with minimal soft tissue residue pain and stiffness. The mild right trigger thumb and fingers may be aggravated by soft tissue sprain/contusion. Dr Lee took the view that the plaintiff has made a good and quick recovery. The trigger fingers found at the joint examination are not related to the Accident.
11. The plaintiff testified at court that he was still suffering from right hand pain including pain on the area of his fingers. When he felt painful, he would consult doctor. When the pain was less serious, he would use traditional Chinese ointment for self-remedy.
12. The plaintiff’s last medical consultation for treatments of his hand, shoulder and/or finger was on 29 February 2016. Accordingly, even if there was any residual pain on his right hand after 29 February 2016, the pain was not serious and could be treated by traditional Chinese ointment.
13. The plaintiff admitted that he had frozen shoulder prior to the Accident. However, he said that the pain at his shoulder before the Accident was different from the pain after the Accident. The plaintiff has not elaborated further.
14. Obviously, the plaintiff is not a medical doctor. His oral testimony about the differences of the shoulder pain was of little assistance. The court could not conclude from this oral testimony that the frozen shoulder problem was caused or aggravated by the Accident. There was however clear evidence from the Joint Medical Report that the frozen shoulder problem was not related to the Accident. This evidence in the Joint Medical Report was not challenged. The plaintiff has not proved that the injury suffered from the frozen shoulder was caused or aggravated by the Accident.
15. It was the plaintiff’s evidence that the trigger fingers were developed a few months after the Accident. Both experts agreed in the Joint Medical Report that the trigger fingers were not related to the Accident. Dr Kong stated that the mild right trigger fingers *may* be aggravated by soft tissue sprain or contusion, Dr Lee disagreed. There were no medical records suggesting that the right thumb was involved in the Accident. Dr Kong’s view on the possible aggravation was equivocal. Accordingly, I do not accept that the plaintiff’s trigger fingers problem was caused by the Accident.
16. The plaintiff said in court that after the Accident, the flexibility of his right hand was reduced. He could not play ping-pong nor drive motor-cycle. This assertion was again contrary to the Joint Medical Report in which both experts agreed that the plaintiff’s social activities should not be affected by the Accident. Even if there was any negative effect caused to the plaintiff’s ability to do the above leisurely activities, the plaintiff has not proved that this negative effect was caused by the Accident.

*Pain, Suffering and Loss of Amenities (“PSLA”)*

1. The plaintiff submitted that a sum of not less than HK$150,000 should be awarded for PSLA taking into account of the inflationary factor. The defendant submitted that the appropriate award should be HK$30,000.
2. In support, the plaintiff cited the following 8 cases in which the sum of PSLA awarded was from HK$100,000 to HK$250,000:-
3. *Ho Shuk Man v Norman Wong Wai Nok*, HCPI 314/2010, unreported, 8 September 2015;
4. *Chand Lok Kumar v Leighton-LNS Joint Venture*, HCPI 1380/2014, unreported, 29 April 2016;
5. *Ali Rafaqat v Wise Security Ltd and another*, DCPI 896/2009, unreported, 16 March 2010;
6. *Ko Hoi Seung Korin v Liu Kwok Keung,* HCPI 1206/2014, unreported, 12 August 2016;
7. *Ting Siu Ki v Wun Che Min*, DCPI 1463/2011, unreported, 13 December 2013;
8. *Yeung Tsz Man v Everbest Port Services Ltd*, DCPI 1607/2016, unreported, 30 August 2018;
9. *Yip Kwok Man v Chan Kim Kwan*, DCPI 2598/2014, unreported, 15 June 2018;
10. *Wong Lai Man v Eastern Terminal Ltd*, DCPI 1655/2011, unreported, 12 March 2013.

The injuries sustained in some of the above cases involved features not found in the present case, such as fracture, tearing of tendon, necessity for operations or long period of sick leave. I have only considered the cases without the above features.

1. The defendant cited the following cases in which HK$30,000 to HK$85,000 were awarded respectively for PSLA:-
2. *Singh Jagdeep v VSC Engineering Products Company Limited*, DCPI 391/2005, unreported, 17 June 2005;
3. *Lee Tsz Kin Ken v Climax Paper Convertors Ltd*, HCPI 504/2003, unreported, 24 June 2004;
4. *Khan Irram v Wai Hing Engineering Company Limited*, DCPI 1465/2009, unreported, 4 November 2011.

The above cases cited by the defendant were dated. The awards were made some 7 to 14 years ago, no direct comparison can be drawn from them.

1. Having considered all the cases cited by both parties and the injuries suffered by the plaintiff, I award a sum of HK$100,000 to the plaintiff for PSLA.

*Pre-trial loss of earning*

1. There was no dispute that the plaintiff was granted sick leave of 8 days and it was agreed that the plaintiff was entitled to pre-trial loss of earning in the sum of HK$5,922.76 [(HK$16,890 x 1.15 + 2,786.85)/30 days x 8 days].

*Post-trial loss of earning*

1. By an assessment made by the Employees’ Compensation (Ordinary Assessment) Board on 18 March 2016 and issued on 1 April 2016, the plaintiff was assessed to have right hand injury resulting in residual pain with 0% loss of permanent capacity. No appeal was lodged.
2. Loss of earning capacity is a claim to cover the risk that, at some future date during the plaintiff’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. (*Chan Wai Tong v Li Ping Sum* [1985] HKLR 176 at 183B). The plaintiff must show that the risk is “substantial” or “real” but not “speculative” and fanciful (*Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132).
3. During the period between 2004 and 2012, the plaintiff had reported 7 injuries sustained in the course of employment with the defendant. In 6 out of the 7 reports of injuries, the plaintiff obtained employees’ compensation. Some of the injuries suffered in these prior injuries were more serious than the present one. Despite these previous claims, the plaintiff was still employed by the defendant for the same job. Counsel for the defendant submitted that there was no risk of the plaintiff losing his job due to the Accident.
4. There was no dispute that after the injury, the plaintiff has not stopped working save for the period of sick leave. Although the job title was changed, the plaintiff was employed for the same or similar nature of works. The income of the plaintiff under the current contractual employment was based on the previous income received by the plaintiff.
5. There was no evidence to suggest that the plaintiff will suffer from any loss of earnings because of the injuries sustained in the Accident. Although his current employment is on a contractual term basis, this was because he has reached the retirement age, and has nothing to do with the Accident.
6. I do not award any sum under this item.

*Special damages*

1. The plaintiff claimed a sum of K$6,500 for special damages with the following breakdown:-
2. Medical expenses: HK$3,000;
3. Travelling expenses allowance: HK$500;
4. Tonic food: HK$3,000
5. The defendant submitted that if the court awards any future medical expenses, it should not be more than HK$500, the transportation expenses, if any, should not be more than HK$100. No allowances for tonic food should be awarded.
6. No receipts were provided by the plaintiff to support his claims for special damages.
7. The plaintiff accepted in evidence that he was entitled to medical service at the government hospital free of charge because of his employment with the defendant. He said that he may need to consult private practitioners as he did on 9 December 2015. It costs him about $700 to $800 for each visit.
8. The plaintiff also accepted in evidence that he took public transportation for the medical visits, and the tonic food consumed by him was not at the recommendation of medical practitioners.
9. Counsel for the plaintiff referred to the cases *Chan Si Mui v Kong Hung Keung*, HCA 4977/1991, unreported, 18 July 1994 and *Chan Chin To Chadow v Wing Fung Financial Group Limited*, HCPI 163/2015, unreported, 1 August 2017, and submitted that reasonable amounts of allowance for tonic food have been awarded even if there was no receipts provided by the plaintiff and the evidence adduced in support was not entirely satisfactory.
10. The injury suffered by the plaintiff was relatively minor and he has a good recovery from the injury. He has consulted private medical practitioner and I do not rule out the need for further medical consultation in the future. I award a sum of HK$1,500 for medical expenses, HK$500 for travelling expenses and HK$1,000 for tonic food.

*Summary of the damages awarded*

1. In summary, the damages awarded are:-

Pain, suffering and loss of amenities $100,000.00

Pre-trial loss of earning $5,922.76

Future medical expenses $1,500.00

Special damages $1,500.00

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Total $108,922.76

*Credit for payment of employees’ compensation*

1. The plaintiff received a payment of employees’ compensation in the sum of HK$104,591.26. This amount should be deducted from the damages awarded in this action.

*Interest*

1. I also allow an interest on the amount of awarded PSLA at 2% from the date of the writ (ie 3 October 2016) to the date of judgment; and on the amount of the awarded pre-trial loss of earnings and special damages at half judgment rate from the date of the Accident (ie 6 September 2015) to the date of judgment.

*Costs*

1. There be a costs order nisi that the costs of the plaintiff be paid by the defendant, to be taxed if not agreed, with certificate for counsel.

( Elaine Liu )

Deputy District Judge

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

Mr Leo Wong, instructed by Deacons, for the defendant