IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 182 OF 2001

|  |  |  |
| --- | --- | --- |
| BETWEEN | Mak Sau-fun | Plaintiff |
|  | And |  |
|  | Kwok Pui‑Chun Estates Limited  & 22 others | Defendants |

Coram: H H Judge Carlson in Court

Date of Hearing: 9 May 2002

Present: Ms S W Hung, of Messrs Ip Kwan & Co., for the

Plaintiff

Mr John Ip, of Messrs John Ip & Co., for D1

Mr David Cheung, of Messrs Ivan Tang & Co., for D22

Date of Ruling: 10 May 2002

Present: Ms S W Hung, of Messrs Ip Kwan & Co., for the Plaintiff

Messrs John Ip & Co. (absent) for D1

Ms Ranny Lai, of Messrs Ivan Tang & Co., for D22

R U L I N G

1. This is an application for an interim payment of damages against the 22nd defendant, judgment on liability having been obtained by consent. The amount asked for of $50,000 is modest enough.

2. The complication, if I can put it in this way, is that the plaintiff has already received compensation of $130,000 from her employer consequent upon an application by her for compensation under the Employees Compensation Ordinance. The employer is not a defendant in this matter, and it is not said that the plaintiff’s injuries were caused by the employer’s negligence or breach of statutory duty.

3. The question here is whether any amount of damages obtained in this action must be reduced to take into account that payment of $130,000.

4. The situation is covered by section 25(1) of the Employees Compensation Ordinance, which is as follows:

“(1). Where the injury in respect of which compensation is payable was caused in circumstances creating a legal liability in some person other than the employer (in this section referred to as the third party) to pay damages to the employee in respect thereof:

(a) the employee may both claim compensation under this ordinance and take proceedings against a third party in the Court of First Instance or, subject to the provisions of the District Court Ordinance (Cap. 336) relating to the limits of jurisdiction of the District Court to recover damages: provided that where any such proceedings are instituted, the court in which the action is tried shall, in awarding damages, have regard to the amount which, by virtue of paragraph (b), has become or is likely to become payable to the employer by the third party; and

(b) the employer by whom compensation is payable and any person who may be called upon to pay an indemnity under section 24 in the case of an employee employed by a subcontractor shall have a right of action against the third party for the recovery of any sum which he is obliged to pay as a result of the accident, whether by way of compensation or indemnity or by virtue of any agreement made with the employee prior to the accident and may exercise such right either by joining in an action begun by the employee against the third party or by instituting separate proceedings: provided that the amount recoverable under this paragraph shall not exceed the amount of damages, if any, which in the opinion of the court would have been awarded to the employee but for the provisions of this ordinance.”

5. The situation, therefore, is that the plaintiff will receive damages which do take that $130,000 into account and the defendants in this action will be liable to the employer for the amount of compensation that he has already paid to the plaintiff. This payment of $130,000 is therefore significant and must have a considerable impact on any amount that I decide to award by way of interim payment.

6. The note to order 29 rule 11 of the Rules of the District Court (see paragraph 29/11/4 of Hong Kong Civil Procedure 2002) addresses the matter in this way:

“The problem is aggravated if there is uncertainty as to quantum of damages. The court must not risk overpaying the plaintiff (rule 11(1)) since a final adjustment under rule 17 may not be effective in such a case.”

7. Although there is the power to order repayment of an interim payment which exceeds the final award of damages, a plaintiff may prove to be financially unable to repay the excess and so, for that reason, the court is enjoined to err on the side of conservatism when ordering an interim payment.

8. The medical evidence is contained in the reports from Queen Mary Hospital, Dr Choi, that of a physiotherapist, Mr Mak, and from Dr Lam, the defendant’s medical expert. The main injury was a fractured collar-bone which was treated conservatively. There is some residual pain for which future physiotherapy has been recommended. Dr Lam, for the defendant, is far more bullish. So far as he is concerned, recovery is full and the one-month period off work was ample.

9. Taking everything into account, I would have thought that damages will be relatively modest. I propose to order $30,000 as an interim payment, and I do so having regard to what has already been paid to the plaintiff under the Employees Compensation application.

(Submissions re costs)

10. Costs will be in the assessment of damages as between the plaintiff and the 22nd defendant, so costs in the cause of that assessment.

Ian Carlson

District Court Judge