DCPI 74 OF 2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 74 OF 2009

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BWTWEEN

RANA BIMLA Plaintiff

and

HONG TAK (SHING FAT) HOME FOR

THE AGED COMPANY LIMITED Defendant

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Coram : H. H. Judge YUNG in Court.

Dates of Hearing : 6th , 9th to 11th & 20th November, 2009

# Date of Handing

Down of Judgment : 4th February 2010

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## J U D G M E N T

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1. The Defendant is the operator of a nursing home for the aged. The Plaintiff was working as a nursing assistant there. One of her many duties included showering the inmates. On the day of the alleged accident, she injured her back while preparing an amputee inmate for shower. She said she wanted to move the inmate from his bed on to a wheelchair. In the course of doing it, somehow because of the movement of the inmate, her leg slip slightly and she found her back injured. The Plaintiff is now seeking damages for her personal injury.
2. The Plaintiff has not called her colleagues to give evidence in support. She is the only witness of the accident in which she sprained her back and suffered injury. Not surprisingly her evidence was subject to the scrutiny and criticism of Mr. Pang, counsel for the Defendant.
3. The Plaintiff’s evidence is unsatisfactory. Counsels have different views on the demeanour of the Plaintiff. Mr. Sadhawani, her counsel argued that her demeanour suggested she was a truthful witness as she answered questions readily. I agree that she answered questions quite readily but it was the answers themselves, not the readiness with which they were delivered, which justify the criticism by Mr. Pang on her credibility. Sometimes it was exactly this readiness, so to speak, which made her appear even more argumentative than the answers themselves would have done. Her answers, though always readily given, were often inconsistent with earlier ones or her witness statements, or some other contemporary documents and pleadings. At times, when pressed to explain these inconsistencies, she readily came up with reasons, pointing an accusing finger at others, including even her lawyers when earlier answers were shown not too plausible. At other times, she appeared to be not frank with the court. The most conspicuous example pointed out by Mr. Pang is about her employment in a hair saloon. She should have disclosed that before she was confronted with a document. It is not unfair for Mr. Pang to criticise her on that.
4. To play down the significance of the unsatisfactory features of the Plaintiff’s evidence, Mr. Sadhawni submitted that no one could give perfect evidence. For illustration, he cited quite a number of cases. Mr. Pang’s response is as simple as it is appropriate. He submitted that every case turns on its own facts. Indeed it is not Mr. Pang’s point that the Plaintiff’s evidence should be perfect. His point is unambiguous. He just sought to persuade me that the Plaintiff’s evidence is not credible. To do so he demonstrated the unsatisfactory features of her evidence. The ultimate issue is the credibility of the Plaintiff. It is trite law that the burden of proof is on the Plaintiff to prove her case. It is also trite law that the burden of proof is one of balance of probability and that, to discharge that burden of proof, perfect evidence is not required. Mr. Sadhwani would not have done any worse without citing those cases.
5. I cannot accept Mr. Sadhawni submission that all these flaws or imperfections were immaterial. They are material for two reasons. The simple one is that they affect critically the general credibility of the Plaintiff. The other reason is more complicated. For the Plaintiff to succeed in her claim, among those flaws and imperfections, a credible version of event with sufficient details has to emerge.
6. Mr. Pang challenged the credibility of the Plaintiff on three fronts, the accident, the date of accident, and, her pain and suffering. As a general explanation for all the unsatisfactory features of the Plaintiff’s evidence, Mr. Sadhawni submitted that she was at a disadvantage. He argued that it was because she was not permitted to adopt her witness statements as evidence in chief. This is a lame excuse. In any event this is not her explanation. Witnesses should refresh their memory of the events and should go over their statements before the trial. If they have not done so and cannot remember details of any matter, they should frankly admit it. The court on application by counsel would certainly allow them to refresh their memory from witness statements. In the instant case I do not find any link between the unsatisfactory performance in cross-examination and her not being permitted to adopt her statements as evidence in chief.
7. As to the accident, the Plaintiff gave different versions of how she handled the amputee and how she sprained her back in the course. She shifted from one version to another and then back to the one in her witness statement. Mr. Pang used a rag doll to pose as the inmate for the Plaintiff to show what her movements were in relation to the patient. The Plaintiff could not have been confused by the questions or there was anything lost in the translation. She demonstrated her movements using the rag doll and the demonstrations were clear giving no room for doubt. Mr. Sadhawni submitted the accident occurred long time ago and it was not unreasonable for her to be mistaken about the details. Be that as it may. The way she demonstrated with accompanying descriptions did not suggest at the time she had difficulty in remembering the details. She was at least not frank in admitting she was not clear about the details. Looking at her evidence one cannot be sure which version she described was in fact correct.
8. The other front of attack was the date of the accident. In the pleadings it was alleged that the accident occurred on 13th January. In her evidence she did not say clearly when the accident occurred. However she was adamant that she went to Pok Oi Hospital the same morning and which date is 14th January. She described in great logical details how and why she went to hospital for treatment. Mr. Sadhawni explained that she could have been mistaken about the date of going to the hospital as it was a long time ago. What she maintained was that the time was near 11 am and she was under pressure to finish showering the inmates. She sprained her back and felt the sharp pain which she could not endure and therefore she called up her husband to take her to Pok Oi Hospital. In the meantime some one at nursery home made a report to the management. Needless to say she had to leave her work very early that day. The hospital record indicated it was sometime before 10 am. on 14th January that she arrived at the hospital. Mr. Sadhawni argued that she made a mistake about the date she went to hospital, a common mistake made by anyone. This is not just a mistake about the date. If she went to the hospital the next day after the injury, all evidence in details about events from the moment she suffered injury to arriving at the door of Pok Oi Hospital must have been made up by her.
9. The record of 14th January consultation showed the Plaintiff described the injury was two days old. The Plaintiff suggested what she said was ‘today’ and it was misheard by the doctor as ‘two days’. I asked her to say the word ‘today’. The result is not very helpful either way. It the date of accident was in fact on 14th January, the lawyers for the Plaintiff must have made some mistakes about her instructions. Such is exactly the allegation the Plaintiff made against her lawyers and she has not retracted it. Mr. Sadhawni adopted the position that the accident was on 13 January. In effect he urged me to accept two things. Firstly, it was a mistake on the part of the Plaintiff as to which day she went to the hospital. He submitted that she in fact went to the Pok Oi the next day Secondly, the doctor did not mishear ‘today’ as ‘two days’. The two things fit in well with the Plaintiff’s case. The accident occurred on 13th January with the support of consultation record on 14th January. I do not accept his argument as I do not accept that such mistake could have been genuine and honest when she described in great logical details how and why she had to leave her post to seek immediate treatment. The Plaintiff’s case bases on one single incident. If she was not believed that she had to stop work to seek immediate medical treatment, she could not be believed at all that she suffered injury in some other day while working.
10. I do not find that the Plaintiff has discharged the burden of proof by her evidence standing alone. I have to consider her evidence in the light of other evidence including the defence’s. The Plaintiff had sought treatment for her back pain. It is true that she did not report any trauma to the doctor examining her in Pok Oi Hospital. She admitted that she knew the meaning of trauma. She really did not offer any explanation for her omission. Nor did she blame anyone. I find it is a genuine omission. Sometimes people simply cannot explain their omission. Another strange matter she could not explain is her visit to Tuen Mun Hospital later on the same day, i.e. 14th January. According to the consultation record, she mentioned an industrial accident. This would certainly help her case and yet she denied she ever visited Tuen Mun Hospital on that day. Her denial would be quite inconsistent with the suggestion that she was making a false claim against the Defendant. I find she genuinely forgot about that particular visit and this might be due to the pain and suffering she had on that particular day.
11. The Plaintiff was adamant that she went to the hospital on the day she sprained her back while working for the Defendant. This gives rise to discrepancies which can be conveniently explained away as the mistakes of her legal team. Her counsel was not willing to acknowledge any such mistakes but the Plaintiff maintained that it was. In these circumstance, I should be slow in finding for the Plaintiff on this matter. However my paramount duty is to determine if there is any truth in the Plaintiff’s assertion. It might well be the case that she herself and not the lawyer made a mistake when giving instructions. I have to consider other matters when coming to any finding.
12. The Plaintiff alleged that she went back to nursing home on 17th January but could not finish the day because of the back pain. She was not paid for that day’s work. Her version was simply that the management knew about her injury on day of accident and was informed of her injury or at least of her back pain after 14th January. The defence denied that she or anyone knew about the incident or her back pain. She gave evidence that the last day of her employment was on the 13th January, the expiry date of 7 days’ notice given by the Plaintiff. It must be a co-incidence if the defence version was true that the Plaintiff sprained her back on her last day of work. The alleged notice was orally given by the Plaintiff and no record was made or produced at the trial. Nor attendance record of 14th January was produced. The suspicion does not stop there. Dr. Chan who medically examined the Plaintiff before her re-employment happened to run out of the usual printed standard bills of health. This is a co-incidence. Another is that he used a hand-written one which omitted the condition of the spine. Taking into account of all these matters, I preferred the evidence of the Plaintiff to the Defence witness in so far the events after the injury are concerned.
13. As to occurrence of the accident, though she failed to tell exactly what movements she was making at what stage. She was consistent in one respect. It is that the body of the inmate moved on losing balance. To help to secure the inmate, she made a jerky movement and she then slipped lightly because the floor was slippery. The Plaintiff did not pursue her claim for compensation soon enough and by the time she did she might not remember the exact details of the incident or the visit to Tuen Mun Hospital. I find that the Plaintiff sprained her back in a jerking movement on the slippery floor and she went to the hospital on the same day as she described. I also found that it happened on 14th January and the date of injury was mistakenly recorded as ‘two days’ when it should be ‘today’.
14. The Defence alleged that the usual and safe procedure required two persons. I accept that employees, including the Plaintiff had been instructed about the procedures. The procedures were for the safety of aged inmates rather for the protection of the employees. I find that equally for the safety of the employees two persons should be deployed to transfer an inmate from the bed to the wheelchair. Giving such instructions from time to time as alleged would not be sufficient to discharge the employer’s duty of care, especially the sole emphasis of such instructions was only for safety of the inmates. The employees were never told that the instructions were for their own safety as well. Enforcing it with the help a reasonable system is necessary or else the employer would be negligent in failing to provide a safe system of work. I find the Defendant negligent in failing to provide such safe system of work. Furthermore, I found that if two persons were doing the job, the accident could have been avoided. The accident was caused by the negligence of the Defendant.
15. The Plaintiff alleged she did not understand those instructions in the meeting held by the Defendant and attended by her. She said it was because of her language barrier. I do not accept that. Apparently she understood what was going on in other meetings when some employees were criticised for their behaviour. The instructions were simple and she should have no problem in understanding them. Indeed she knew about the procedure. She explained she did it alone on the day of accident because she did not think others would help her. She said if two persons were to carry the inmates, she could not finish the showering job before 11am. Looking at the procedures of taking the inmates to shower, I do not believe her. Though the risk of injuring her back is not great, such risk is obvious. She failed to take reasonable care for herself. I find she is 20% contributorily negligent. I would have found her share of blame higher if not for the slippery floor. The slippery floor had a part, though a very small part, to play in the causation of the accident.
16. The medical evidence is the joint report of the two experts. They do not differ much in their opinion. Both agreed that the Plaintiff should be able to return to her pre-accident work. I agree that the Plaintiff should be able to return to pre-accident work. I find the Plaintiff exaggerated her symptoms if she meant that the symptoms prevented her from returning to her pre-accident job. The experts do not agree entirely on the causation of the radiculopathy. In this regard I preferred the opinion of Dr. Lau as his analysis is more convincing.
17. In assessing the damages for pain, suffering and loss of amenities, I take into consideration of the Plaintiff’s young age and the effect of the injury on her hobbies. As to the medical evidence, I prefer Dr. Lau’s opinion to that of Dr. Chan. I also find the Plaintiff exaggerated her injuries and disabilities. Back pain when it comes, even not as frequent and as severe as exaggerated to be by the Plaintiff, must be nasty and can cause unspeakable suffering. Allowing for the exaggeration of the Plaintiff’s evidence and for the pre-existing degenerative condition of her spine, a sum of $200,000 is the appropriate award.
18. Both doctors were of opinion that the Plaintiff can return to her pre-accident job. The Plaintiff did not agree. However I find her not a reliable witness. Looking at the medical evidence, and the nature of jobs she had taken, I find she is able to return to her previous employment or similar ones without any loss of earning. The Plaintiff failed to prove she will suffer any future loss of earnings.
19. Given the finding that she is able to return to her previous employment and her degenerative condition, I find that the handicap in the job market attributable to the injury is minimal. A nominal compensation of $30,000 is reasonable.
20. There is no evidence to support the claim for loss of service of her husband. I am asked to assess the amount purely on the fact that the husband had accompanied her on an unascertained number of times to medical treatment. I am not prepared to speculate on that. The Plaintiff simply failed to prove this item of loss.
21. Special damages are agreed to be $9,011.
22. As to the pr-trial loss of earnings, she was able to return to her previous employment. In fact she was caught out in cross-examination that she in fact at one time she worked in a hair saloon. Her evidence is not reliable and she failed to discharge the burden of proof. No award should be made under this head.
23. In the premises, I give judgment for the Plaintiff for the above-mention sums (discounted with 20% contributory negligence ) with usual interest and I order the Plaintiff to give credit for the amount of Employees Compensation received. There also be an order nisi for costs in favour of the Plaintiff with Certificate for Counsel. Lastly I order the Plaintiff’s own costs be taxed according to the Legal Aid Regulations.

(Y. W. YUNG)

District Judge

Mr. Kamlesh Sadhwani instructed by M/S Lee & So Assigned by D.L.A. for the Plaintiff.

Mr. Robert Pang instructed by M/S Susan Liang & Co. for the Defendant.