DCPI126/2003

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 126 OF 2003

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| BETWEEN | Cheung Sik Kwan | Plaintiff |
|  | and |  |
|  | Lam Sau Mui | Defendant |

Coram: H H Judge H C Wong in Court

Dates of Hearing: 28-30 June 2004

Date of Judgment: 30 June 2004

Present: Miss Yuen, of Messrs Angus Tse, Yuen & To, for the Plaintiff

Defendant: Ms Lam Sau Mui, in person, present

J U D G M E N T

Assessment of Damages

1. In this matter, the Plaintiff claims against the Defendant for common law damages resulting from an assault on him by the Defendant. Interlocutory judgment was entered by consent on 28 May 2003 with damages to be assessed. The hearing before me is on the assessment of damages.

Background

2. The Plaintiff was working as a property officer in the management office of the incorporated owners of Connie Tower. The Defendant’s husband worked at the management officer of the incorporated owners as an accountant. The Defendant is also an owner of a unit in Connie Tower and she resided and resides there.

3. On 12 April 2002 at about 2.40 pm, the Plaintiff was on duty and was having a meeting with the chairman of the incorporated owners of Connie Tower, Mr Tam, and the District Board member, Mr Tsui Wing-tsuen, at Tsui’s office when the Defendant rushed in and pushed the Plaintiff with force, causing him to fall onto the door and the flowerpot, crashing the flowerpot, which was broken from the weight of the Plaintiff.

4. The Plaintiff, Mr Cheung, got up from the wreckage but the Defendant continued to hit Mr Cheung with her shopping bag on his chest and arms.

5. The Defendant denies that she had continued to hit the Plaintiff, she admitted only to have pushed the Plaintiff. As she did not give evidence and there were no brief facts from the Magistrates Court hearing exhibited, there is no way for me to ascertain what facts she had admitted to. Other than the evidence of the Plaintiff, there was no further evidence adduced.

6. In any event, we are concerned with the assessment of damages only, not on the issue of liability, the issue of liability having been admitted at an earlier stage.

Injuries

7. The Plaintiff was found to suffer from tenderness of the scrotum and testes, the doctor also found mild tenderness over the sacro-iliac region of his back at the Accident and Emergency Department of the United Christian Hospital on 12 April 2002, which Mr Cheung attended at 4.30 pm.

8. Mr Cheung returned to the United Christian Hospital the next day complaining of chest wall tenderness. It is Mr Cheung’s evidence that the chest wall tenderness was caused by the assault on 12 April executed by the Defendant.

9. The Medical Assessment Board Certificate of Review of Assessment under section 16G of the Employees’ Compensation Ordinance, Cap. 282, certified Mr Cheung’s injuries to be back and buttock injury resulting in back pain and left lower limb pain and weakness. The assessment was made on 4 February 2003. The Medical Assessment Board assessed Mr Cheung’s loss of earning capacity permanently caused by the injury to be 2 per cent.

10. Mr Cheung was examined by three private medical experts for the purposes of the present proceedings. Dr Chun Siu-yeung, an orthopaedic surgeon, was appointed by the Plaintiff. His report was prepared on 8 August 2003. At the time, Mr Cheung complained of intermittent pain at left buttock, pulling down the back and inner side of left thigh down to the back of left knee. He was then relying on a walking stick to walk. Dr Chun found Mr Cheung had a 50 per cent decrease of sensation on the whole left thigh. But Dr Chun found the use of the walking stick by Mr Cheung on his left hand to be difficult to explain. For most people, they would use a walking stick on the right hand for a left lower limb disability. Neither could Dr Chun explain orthopaedically the 50 per cent reduction of sensation on left thigh, which he found did not fall into normal neuro-anatomy.

11. Mr Cheung was found to have tenderness at the left ischium, although x-ray showed no abnormality related to the injury or abnormality on the lower back. Due to the tenderness over the left ischium, he gave an assessment of 1 per cent impairment of the whole person.

12. Mr Cheung was found to be able to work as a housing manager with minor inconvenience. This was Dr Chun, the orthopaedic surgeon’s, conclusion.

13. A second doctor, Dr Ho Kwan-kam’s, report is dated 12 August 2003. Dr Ho confirmed Mr Cheung’s pain and weakness of his left lower limb and, according to Dr Ho, Mr Cheung’s complaints of haemospermia and erectile dysfunction was examined by Dr Ho. It is Dr Ho’s belief that the haemospermia could be trauma-induced, causing the granulation tissue in the genital urinary tract to bleed more easily than normal tissue when congested during sex. Dr Ho attributed haemospermia as a definite cause for Mr Cheung’s erectile dysfunction.

14. The pain and numbness of the left lower limb was another cause that the injury could have caused subtle vascular damage to the erectile organ, contributing to his erectile dysfunction. However, it is Dr Ho’s conclusion that this condition can largely be corrected by taking Viagra before sex. Dr Ho found no other urological disability.

15. The third medical opinion came from Dr Ng Siu-kai. Dr Ng, like Dr Ho, is a urologist. His report was made on 16 April 2004, this is the most recent medical report obtained on the Plaintiff. Dr Ng was appointed by the Defendant. His examination confirmed Mr Cheung to have been suffering from tenderness of the left lower limb at passive flexing of the hip, and decrease in power due to pain. But he found the jerks and sensory of Mr Cheung’s left limb to be normal. He found no local tenderness at the lower back region. It was Dr Ng’s opinion that he cannot entirely rule out that haemospermia of Mr Cheung may have existed before the incident because he had not previously looked at his own semen.

16. In any event, in Dr Ng’s opinion, haemospermia has no harmful effect, nor causes any permanent disability. Neither is there any effective specific treatment. Dr Ng agreed with Dr Ho that haemospermia is the contributing factor of Mr Cheung’s erectile dysfunction. Dr Ng, however, considered erectile dysfunction increases with age, and he referred to the Massachusetts Male Ageing Study in 1949 for reference. The study found that erectile dysfunction occurs in 46 per cent of males between 50 and 60 and 70 per cent for males over 70 years of age. He considered that Mr Cheung may require the use of Viagra even if there were no injury. He also considered that sexual function and the number of times of sex is expected to decrease with age. He estimated the use of extra Viagra due to injury to be 3 years.

Pain and Suffering Loss of Amenities

17. Under this head of compensation, I look at the medical opinion concluded on Mr Cheung’s left limb pain and numbness to be 1 per cent impairment of the whole person. This is according to the orthopaedic surgeon, Dr Chun’s, opinion. While the Employment Compensation Ordinance Medical Assessment Board assessed Mr Cheung’s loss of earning capacity to be 2 per cent, in fact, from the condition observed at the hearing of Mr Cheung and the admission through his counsel Mr Wong, Mr Cheung no longer required the aid of the walking stick. Neither did he complain about any pain or discomfort while he sat all day in the courtroom in the witness-box giving evidence.

18. Furthermore, from the records, he had only taken nine days of sick leave out of the 42 days approved by the doctors after the assault. In fact, he had returned to work immediately after consulting the doctor on 12 April 2002 and on 13 April 2002. That is the day of the accident and the day after the accident. He did not take any sick leave until 23 April 2002, and when he did on 23 April, he took eight days, which lasted until 30 April 2002, and one further day on 9 June 2002. This shows that he was able to carry on working in spite of the injuries.

19. Mr Wong referred me to a number of authorities on the PSLA award in the High Court in the last few years. While there is no doubt that the Plaintiff’s injuries in the present case fall far short of the established guidelines for serious injuries set out in the case of Lee Ting-lam v Leung Kam‑ming [1980] HKLR 657 as to the degree of the seriousness of Mr Cheung’s injuries, I have been referred to the following cases as a comparison. In the first case referred to me by Mr Wong, the case of Lee Yuk-lam v Royaltelle International Limited trading as The Royal Garden HCPI187/1995, a judgment of Madam Justice Beeson on 5 August 1999, where the then 26 year old hotel cashier slipped and fell on the corridor of the hotel, suffering from a sprained back, her residual back pain was assessed to be 1 per cent impairment of the whole body, and her loss of earning capacity assessed at 5 per cent. The judge allowed the period of 12 months for full recovery, though she was given over 20 months of sick leave by various doctors at the time. The PSLA awarded was $150,000.

20. In the case of Leung Yui-man v Yee Hing-kee Plumbing Works Company Ltd and Another HCPI923/1996, Deputy Judge Li awarded on 13 February 2000 the sum of $192,000 to the Plaintiff in that case under PSLA. The Plaintiff was a plumber who fell down while fixing a pipe, and the heavy pipe hit his back, wounding his back. The learned judge accepted his loss of earning capacity to be 25 per cent.

21. In the case of Yeung Sze v Win Art Design and Decoration Company Ltd HCPI6/2000, the date of judgment 27 June 2001, an assessment of damages by Master Yuen. Master Yuen awarded the sum of $200,000 under PSLA to the decorator plaintiff who had fallen down two feet and suffered from back pain as a result. He was assessed to have a disability of 20 per cent of the whole person.

22. In the case of Yuen Yiu-kwong v Chan Kwok-chuen HCPI1356/1999, a judgment by Mr Recorder Edward Chan on 20 December 2002, the air-conditioning technician fell from a platform and injured his back. Mr Recorder Chan awarded $200,000 to him. He was found to have prolapsed intervertebral disc at L4/5 and L5/S1 levels. He was certified not fit for work for 75 days.

23. In the case of Tam Kwok-man v Kowloon Motor Bus Company 1993 Limited HCPI755/2001, the date of judgment was 11 July 2003, a judgment by Madam Justice Beeson. Madam Justice Beeson awarded the bus station regulator the sum of $150,000 in PSLA. The Plaintiff had fallen from his office chair when one of its wheels broke, and his back hit against the door seal of the kiosk where he was working. He took 24 months’ sick leave, but in the joint medical reports the doctors considered a 9 to 12 months’ sick leave should be appropriate.

24. In the present case, the Plaintiff was assessed by the orthopaedic surgeon to have suffered from 1 per cent impairment of the whole person. He was assessed by the Medical Assessment Board under the Employees’ Compensation Ordinance to have suffered loss of earning capacity at 2 per cent. He admitted his left limb had improved since the doctors saw him. For one thing, he no longer required to walk with a stick; and most of important of all, he was shown to have, and also on his own admission, returned to work immediately after the incident and in spite of the sick leave given by various doctors to him, he was able to work throughout after the accident, having taken only nine days of sick leave of the 42 days given to him.

25. His present complaint seemed to be his haemospermia and erectile dysfunction. The cause of haemospermia is considered unknown to the doctors. The doctors considered the injury sustained may have been the contributing factor. However, it is a consensus amongst the three doctors that it has no harmful effect. It became a cause of concern though to the Plaintiff, and therefore a contributing factor to his erectile dysfunction. This condition, both urologists agreed, can be rectified with the use of Viagra.

26. In the case of Ghulam Hussain v Lam Wah-chau and Another HCPI422/2002, a judgment of Madam Justice Verina Bokhary on 30 May 2003, the headnote of that judgment is of relevance to the present case on the issue of the use of Viagra. This is the reason I shall read the note of the learned judge on this issue, the second paragraph of the headnote:

“The first of the established general principles relevant to a claim for the cost of Viagra must be the most basic of all principles on damages, which is that the purpose of an award of damages is to put the plaintiff, as far as money can do it, in the position that he would be in but for the wrong done to him by the defendant. Next comes the principle, then an award for the cost of medicine past and/or future. It is one of the awards that a court can make for that purpose. On these principles, an award for the cost of Viagra, past and/or future, can be made in certain circumstances which are as follows. It must be proved that a wrong done to the plaintiff by the defendant has resulted in an adverse medical condition which Viagra can put right or at least alleviate. Then it must be proved where pre-trial use is concerned that Viagra was reasonably prescribed and taken to put right or at least alleviate that adverse medical condition, or it must be proved, where future use is concerned, that Viagra will probably be reasonably prescribed and taken to put right or at least alleviate that adverse medical condition. In such circumstances, making an award for the cost of Viagra in a sum appropriate to the facts and figures of the case would accord with principle and be fair to both sides. It must be remembered that the court will, when assessing the award for pain and suffering and loss of amenities, take into account in the defendant’s favour what the use of prescribed Viagra has done and/or will do for the plaintiff so as to reduce the award to be made under that head of damages.”

27. The injury sustained by the plaintiff in Hussain’s case was very different from Mr Cheung’s injury in the present case. Hussain’s case was cited on the issue of the court’s consideration for taking the use of erectogenic medication by the plaintiff.

28. Having taken into consideration Mr Cheung’s apparent disability to work without much interruption after the incident and the injuries sustained, and that he had only taken nine days to rest, and that Dr Chun considered that he could return to work at his old job, I have also considered in the cases cited to me all of them had a much higher percentage of disability than Mr Cheung. The disability ranges from 5 per cent to 25 per cent in those cases of authority cited to me. The lowest degree of disability in those cases was 5 per cent, and compared to them, Mr Cheung had only a 1 per cent impairment of the person and, according to the Employees’ Compensation Ordinance, a 2 per cent loss of earning capacity.

29. I shall therefore adopt the 2 per cent loss of earning capacity, and on top of that, I would add 1 per cent for his sexual inconvenience, the pain he suffered, and the necessity of using Viagra, and his haemospermia condition. Considering that his sexual problems can be rectified by the use of Viagra, I consider the appropriate award for pain and suffering loss of amenities to be $100,000.

Pre-trial Loss of Earnings

30. The Plaintiff was paid in full for the 42 days of sick leave period. In fact, he had worked most of those sick leave days and taken only nine days of leave during that period of time. What the Plaintiff now asks for is the compensation for the loss of his employment contract after the expiry of his then contract in June 2002. He claims he would have been awarded another year’s contract had it not been for certain decisions of the committee of the incorporated owners. He also claims had the assault not taken place, he would have his contract extended for another year, and therefore he claims one year’s contract wage of $153,720.

31. After careful consideration of the evidence before me, I am not satisfied that the Plaintiff would have his employment contract extended for a further year after his then existing contract expired in June 2002. It is too remote, in my opinion, for it is the Plaintiff’s own evidence that the incorporated owners held two meetings. The first meeting, his employment was approved, but on the next day, the incorporated owners declared this first meeting void and held a second meeting, and at that second meeting his contract was not renewed.

32. The evidence of course is hearsay. It is what Mr Cheung was told. There was no records of meeting produced, neither did any members of the incorporated owners who attended the meeting give evidence. Whatever happened at the incorporated owners’ meetings is not of concern for this court. I am concerned only with the outcome of the Plaintiff’s contract, which was not renewed.

33. The Plaintiff attributed this to certain members of the incorporated owners being biased against him. Of course, this type of situation happens in everyday life. A person’s contract may or may not be renewed for certain reasons, and these reasons very often are unknown to the employee. Therefore, Mr Cheung’s failure to have his contract renewed is not an issue of relevance to the injury he suffered due to the assault, based on the evidence given by Mr Cheung.

34. Mr Cheung also claimed he had been looking for a job since June 2002, but he had failed to find a job. This may well be due to the fact that he was 66 years old by August 2002, beyond the normal retirement age of 65. It may also be due to the economic conditions in Hong Kong in the past few years to this day. It is not a secret that it is difficult for older persons to get gainful employment, let alone a person who is over the age of 65. Even younger university graduates have difficulties.

35. Under the circumstances, it is understandable that Mr Cheung would find his contract not renewed due to his age rather than any disability he may have suffered due to the assault, and because of the uncertainty of the reason for his contract not being renewed, I find I am unable to make any award under this head.

Future Medical Expenses

36. The two urologists confirmed that the Plaintiff would require medical supervision and medical prescription for the use of Viagra. There would be a four times a year supervision by a urologist, and these will cost $500 a time and therefore there will be an annual cost of $2,000. It is a required annual check-up with ECG, urinalysis and blood test, and this will cost $4,000 a year. The cost of Viagra, at $95 per 100 mg tablet, which is what Mr Cheung himself admitted it would cost from Watsons Chemist, will come to: 52 weeks in the year, twice a week, multiplied by $95; therefore, the cost of Viagra will be $9,880 a year. The annual medical expenses will be $15,880 a year.

37. After due consideration of the evidence before me and the opinion of the urologists, I allow a multiplier of 3 instead of the Plaintiff’s claim for 5, the reason being that the Plaintiff will be in his 70s in 3 years’ time. His condition of haemospermia may have improved during this time, or he would have accepted his condition sufficiently as to not let it affect his erectile function. In any event, according to the doctors, sexual activity is bound to diminish and decrease with age. Either way, it is expected that the reliance on an erectogenic medication would be lessened, and therefore I would only allow the multiplier of 3 for future medical expenses, and this amount comes to $27,640.

Special Damages

38. The medical expenses supported by vouchers and receipts comes to $4,081.60; travelling expenses, $2,201; tonic food, $2,920. This is also supported by vouchers. I accept the travelling expenses were necessary for the Plaintiff himself to visit the doctors and for him to be accompanied by his family members. The tonic food supported by vouchers I also allow, and there is the cost of the walking stick, $350. The total of the special damages comes to $9,552.60, which I allow in full.

39. In summary, the pain and suffering loss of amenities awarded is $100,000; future medical expenses, $47,640; special damages $9,552.60. The total is $157,192.60. Deducting the $11,712 from compensation paid under the Employees’ Compensation Ordinance, the total comes to $145,480.60.

Interest

40. Interest on the PSLA is 2 per cent per annum. The general damages is also 2 per cent per annum from date of writ to date of judgment. Interest on special damages at half judgment rate from the date of accident to the date of judgment. Thereafter at judgment rate until full payment. Costs are awarded to the Plaintiff to be taxed if not agreed.

H H Judge H C Wong

District Court Judge