###### DCPI 455/2006

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 455 OF 2006

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##### BETWEEN

## WONG FUNG NUI Plaintiff

### and

#### LEUNG YAT HO 1st Defendant

SECURITY CENTRE LIMITED 2nd Defendant

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Coram: H.H. Judge Chow in Court

Date of Hearing : 13th and 15th August 2007

Date of Handing Down Judgment : 2nd November, 2007

Judgment

1. This is the Plaintiff’s application for damages due to injuries suffered by her as a result of assault by the 1st Defendant. The 1st Defendant was a resident, Heng Nga House, Hong Nga Court, Kwun Tong, Kowloon. At the commencement of the trial, the Plaintiff settled her claim against the 2nd Defendant.
2. The Plaintiff gave evidence and called no witness to testify for her. The 1st Defendant elected not to give evidence and did not call any witness to testify on his behalf.
3. The Plaintiff was assaulted by the 1st Defendant on 22nd July 2003 and sustained personal injuries. At the time she was carrying out her duty at the Lobby Area of Heng Nga House, Hong Nga Court, Kwun Tong as an employee of the 2nd Defendant. At about 8:15 a.m. on that day the Plaintiff was holding a lift at the Lobby Area for a resident. The opposite lift opened, and from there the 1st Defendant and his wife walked out. The 1st Defendant’s wife suddenly started to scold her. Then the Plaintiff walked away from them and paged the management office for help. The Plaintiff waited for about 10 minutes until a Madam Wong came. Madam Wong started to pacify the 1st Defendant and his wife. Suddenly, the 1st Defendant, walked towards the Plaintiff and strongly slapped her left face with his right hand. She could not hear any sound instantly and she felt hot on her face.
4. Subsequently the 1st Defendant was charged with an offence of “common assault”. He did not admit the offence, but was found guilty of the charge on 8th December 2004 after trial. He was bound over for 8 months in the sum of $500. He did not give evidence at the trial before me. Hence he did not discharge the burden of proof that he had not assaulted the plaintiff. I find that he did assault the Plaintiff on 22nd July, 2003 in the manners described by her.
5. During the trial, the Plaintiff and the Defendant agreed reached on the following agreement:
6. The monthly income of the Plaintiff before the assault was $5,800;
7. The medical expenses incurred by the Plaintiff for treatment in the United Christian Hospital, Lam Tin Polyclinic and Yung Fung Shee Psychiatric Centre were $5,135;
8. Travelling expenses for round trips to the United Christian Hospital and Yung Fung Shee Psychiatric Centre were $1,332;
9. The expense for tonic found was $5,000.
10. The 1st Defendant commented that the Plaintiff exaggerated her injuries caused by the assault. She complained of swelling on her left face and blood from the left corner of her mouth after the assault. The letter of the medical officer who attended to the injuries of the Plaintiff at the Accident & Emergency Unit of the United Christian Hospital made no finding of the said symptoms. Accident & Emergency Department is a very busy place. Swelling on her face was a relatively minor injury, compared with the more serious injuries of the perforations in her both ears. It is not uncommon that the treating doctor only noted down the relatively more serious injuries. I find that there is no clear evidence that she exaggerated her injuries.

The Plaintiff’s injuries

1. There is medical evidence to show that she suffered from vertigo, tinnitus, headache and adjustment disorder as a result of the injuries sustained by her.
2. There is clear evidence to show that the Plaintiff still suffers from hearing loss. The joint ENT Medical Report of Dr. Lo and Dr. Kwok states:-

“Pure Tone Audiogram (PTA) and Cortical Evoked Response Audiometry (CERA) on 25th April 2005 confirmed the captioned subject has an average sensorineural hearing loss of about 35.0 dB in her right ear and 43.3 dB in her left ear over the speech of frequencies.”

There is no evidence to contradict this piece of evidence. I accept this medical finding.

1. Under paragraph 20(2) of his written submission the Defence Counsel submitted that “The Plaintiff had exaggerated on the degree of force the 1st Defendant used to slap her.” But what the magistrate said is that she believed that the Plaintiff might have possibly exaggerated on the degree of force of the 1st Defendant used to slap her. But that is not a factual finding that the Plaintiff had exaggerate on the degree of force used by the Defendant.

Ear injuries

1. Paragraph 6 of the Joint Medical Report states: “it is more likely than not that the perforation noted in Ms Wong’s left ear on the day of the incident was an old perforation as a result of chronic otitis media.” Therefore the perforations of bilateral eardrums resulting in her hearing loss is not related to the accident.
2. Regarding tinnitus, both ENT experts state that as the Plaintiff “suffered from tinnitus in her right (uninjured) ear, it is likely that tinnitus was already present in both of ear prior to injury but it is likely that the injury has aggravated the symptom in the injured left ear.” Hence, the Plaintiff’s pre-existing tinnitus was aggravated by the injury. I accept this part of the medical report.
3. In respect of the psychiatric illness, I accept the expert opinions given by both psychiatrists Dr. Lai and Dr. Law. In paragraph 29 of the submission, the Defence Counsel submits that the findings of experts were based on the complaints made by the Plaintiff. The Plaintiff tended to exaggerate her injuries so that it renders the severity of her adjustment disorder doubtful. No test or advance techniques was applied to examine the truthfulness of these symptoms alleged. If the experts find that the Plaintiff exaggerated her injuries, I am sure both psychiatrists would be able to detect such exaggeration. If the Defence Counsel takes the view that this is the real situation, he should adduce expert opinion to refute the findings made by Dr. Lai and Dr. Law. But he has not done so. I accept the expert opinion of Dr. Lai and Dr. Law in full. According to both psychiatric experts, the Plaintiff is still suffering from an adjustment disorder.

Pain, suffering and loss of amenity (“PSLA”)

1. The Plaintiff suffered multiple injuries to her ear and mental state, namely, i) tinnitus in her left ear; ii) vertigo and headache, i.e. BPPV; and iii) adjustment disorder.
2. For her ear problems and adjustment disorder, she had attended numerous follow-ups and clinics, which had caused her to be in big inconvenience.
3. She has experienced pain and sufferings from her ear problems and adjustment disorder.
4. She still has headache, tinnitus and adjustment disorder, which required further treatment.
5. I accept the Plaintiff’s submission that there is no medical evidence/opinion from Dr. Lai and Dr. Law that the default of follow-up treatment might adversely affect her adjustment disorder. Therefore I will not take this point into account when smoking assessment of award.
6. The Plaintiff submits that the seriousness of the injuries sustained by the Plaintiff are similar to the cases of Poon Yat Chiu v AES Scaffold Engineering Limited (DCPI 223 of 2005), Yeung Tai Hung v Hong Kong Baptist Hosiptal Au Shue Hung Health Centre (HCPI 686/2004) and Fong Kam Chi v Wong Wai Shing (HCPI 910/1997). In Poon Yat Chiu, the Plaintiff fell from a height when he was on a truck and his body hit the “monkey head” by the side of the truck. He suffered tenderness and superficial abrasion over the right buttock, right shin and left hand. He had adjustment disorder as a result. He was awarded $180,000 for PSLA. The pain suffered by him when he struck the “monkey head” is definitely more serious than the pain suffered by the Plaintiff when hit by the Defendant.
7. In *Fong Kam Chi* the Plaintiff was assaulted by the Defendant. He claimed to have suffered from swelling and bruising over his nasal bridge region, abrasion and bleeding over the head, tinnitus to his left side, vertigo and hearing loss, intermittent dizziness and other symptoms of post-concussion syndrome, and intermittent pains in the chest. He was awarded $120,000 for PSLA.
8. In *Yeung Tai* Hung, the Plaintiff fell in the kitchen, and diagnosed to have degenerative changes to of his spiral column. He suffered a contusion and soft tissue to his lower back. He was diagnosed as having depressive disorder. He was awarded $300,000 for PSLA. The injuries he suffered differed from those suffered by the Plaintiff in the present case. Hence the decision in this case regarding the award of PSLA is not helpful to the present case.
9. In my view, taking into account all the circumstances of this case the appropriate award for PSLA should be $80,000.

Pre-trial loss of earnings

1. The Plaintiff’s claim is based on the number of intermittent sick leave granted to her, namely from 22 July 2003 to 12 January 2006. Dr. Lo and Dr. Kwok opined that a total of 180 days of sick leave would be more appropriate for patients under similar circumstances. Dr. Law and Dr. Lai opined that sick leave of 3 to 12 months after first consultation with psychiatrists would be appropriate. The first consultation with psychiatrists was on 14 May 2004. In my judgment the sick leave should begin on 22.7.2003 and expire 6 months after 14 May, 2004. Therefore her sick leave should be from 22 July 2003 to 13 May 2005 for a total of 486 (306 days + 180 days) days.
2. I adopt 486 days sick leave for calculation of loss of earnings. The amount is $93,960 (486 ÷ 30 x $5,800).

Loss of MPF

1. The amount that should be awarded under this head is:

$4,698 ($93960 x 5%)

Medical expenses

1. The Plaintiff’s claim is for:
2. UCH - $1,910 (agreed)
3. Lam Tin Polyclinic - $1,755 (agreed)
4. Yung Fung Shee Psychiatric Centre - $1,470 (agreed)
5. Dr. Lo Siu Fat - $9,905 (disputed)
6. Dr. Alfred T. Y. Lam - $1,250 (disputed)
7. The Defendant argues that medical expenses incurred for treatments from Dr. Lo and Dr. Alfred Lam were all related to chronic otistis media and perforated tympanic membranes. The medical report of Dr. Lo recorded the Plaintiff’s complaints on each visit. On most of the occasions, the Plaintiff complained of her symptoms of headaches, tinnitus and vertigo, which in the opinion of both ENT experts, are related to the injuries caused by the Defendant. Therefore I would allow her claim for medical expenses relating to Dr. Lo.
8. No medical report relating to the treatment by Dr. Lam has been adduced. I cannot judge to what extent the money spent by her on her visit to Dr. Lam was related to the injury caused by the Defendant. Therefore I would not allow the sum ($1,250) claimed in this respect. The total award under this head is $15,040 ($1910 + $1755 + $1470 + $9905).

Massage Charges

1. I agree with the 1st Defendant’s submissions that HK$800 per hour of masseur treatment in the Mainland is unimaginable. I could not see how the massage treatment can be beneficial to her for the treatment of her injury. The Plaintiff could have received treatment in Hong Kong for her injuries. It is not necessary to receive massage treatment in Mainland China. I would not allow any claim under this head.

Travelling expenses

1. The travelling expenses for relating to visit to Dr. Alfred Lam’s clinic and China for masseurs would not be allowed. The total amount to be awarded is $1,732 ($1,008 + $324 + $400).

Tonic food

1. The parties agreed that this sum is to be $5,000. The Plaintiff said that the tonic food could improve the bone and skin (the inner skin in her ears), and the tonic food could be beneficial to her perforated ear problems. I think it is reasonable for the parties to have agreed this sum at $5,000. Having regard to the evidence I would not allow a sum greater than $5,000.

Hearing test charges

1. Having regard to the Plaintiff’s evidence, I would allow this sum which is a reasonable sum. So I allow it at $280.

Future medical expenses

1. The Plaintiff could consult psychiatrists in public clinics in the future. It is not necessary for her to consult private psychiatrists. I therefore would only allow $1,800 under this head of claim.

Loss of earning capacity

1. The Plaintiff suffered 8.5% of loss of earning capacity by both ENT experts and 3-5% loss of earning capacity as assessed by both psychiatric experts, i.e. a total of 11.5% - 13.5%.
2. The Plaintiff’s Counsel submits that she would be at a disadvantage is the labour market. In view of the injuries, the residual disability and the job nature of the Plaintiff, she should be awarded a sum equivalent to 12 months’ earning of her monthly income prior to the accident. Therefore the loss of earning capacity should be $ 69,600 ($5800 x 12).

The Defence submits that during cross-examination, the plaintiff volunteered information that she had ended employment with the 2nd Defendant in January 2007. She is now is another employment. It is not known what the nature of the now employment way, when she started the new employment and what salary she is receiving under the new employment. There is a strong indication that, despite the loss of earning capacity as pleaded by the plaintiff, it took her less than 7 months to find a new job. Therefore, not more than 6 months worth of the plaintiff’s salary should be used to calculate the claim under this head. Therefore a sum of not more than $34,800 should be awarded.

1. In my view it is reasonable to award 6 months’ worth of the Plaintiff’s earning for the award claimed under this head. So she should be awarded $34,800 ($5800 x 6).

Deductions from total amount granted

1. The Plaintiff received $68,298.30 from the 2nd Defendant as employee’s compensation. She also receive from the 2nd Defendant $50,000. These 2 sums will have to be deducted from the final award.

Quantum of awards

1. The quantum of award is as follows:-
2. PSLA $80,000
3. Pre-trial loss of earnings $93,960
4. Loss of earning capacity $34,800
5. Loss of MPF $4,698
6. Future medical expenses $1,800
7. Special damages $22,052

($ 15,040 + $1,732 + $5,000 + $280)

Total: $237,310

1. From this award the sum of $118,298 ($68,298 + $50,000) is to be deducted. Therefore the final award is $119,012 ($237,310 - $118,298).

Interest

1. Interest will be awarded at 2% per annum for general damages for PSLA ($80,000) from 17.3.2006until judgment. Interest on pre-trial loss of earnings and for special damages will be awarded at half judgment rate from the date of accident to the date of judgment.
2. I order that the 1st Defendant do pay the sum of $119,012 within 14 days from today, with interest thereon, commencing from 3rd Nov., 2007, at judgment rate until satisfaction.

Costs

1. I make an order nisi for costs, to be made absolute within 14 days from today, that the 1st Defendant is to pay costs of these proceedings to the Plaintiff, to be taxed, if not agreed, with certificate for Counsel.

(S. Chow)

District Judge

The Plaintiff: represented by Mr. Steven Lau, instructed by M/s Huen & Partners, Solicitors.

The 1st Defendant: represented by Mr. David Chan, instructed by M/s To,

Lam & Co., Solicitors.