DCPI 676/2016

[2018] HKDC 1558

**IN THE DSTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 676 OF 2016

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BETWEEN:

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| --- | --- |
| LIU YUK LIN | Plaintiff |
| and |  |
| JOHNSON CLEANING SERVICES  COMPANY LIMITED | Defendant |

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| --- | --- |
| Coram: | His Honour Judge Harold Leong in Court |
| Date of Hearing: | 23-26 October 2018 |
| Date of Judgment | 18 December 2018 |

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JUDGMENT

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1. This is a personal injury claim.

*Background*

1. The plaintiff was employed by the defendant as a patroller in Wo Hop Shek public cemetery (“the Cemetery”).
2. On 6 May 2013, the plaintiff had a slip and fall accident whilst walking down some steps in the Cemetery.
3. The steps in question were carved out of a slope between the “1988” and “1989” area of the Cemetery (“the Steps”). It is not in dispute that the Steps were muddy, mouldy, and uneven.
4. The plaintiff attended the A&E department (“AED”) of North District Hospital (“NDH”). The AED recorded showed that she attended around 11:35 and gave a history of missing some steps and falling down around 6 steps with no loss of consciousness. On examination, some abrasions at the neck and lower face regions but no neurological deficit were found. X-ray of cervical spine showed no fracture. CT scan of the brain showed no fracture or haemorrhage. She was given panadol at 13:50 and was noted to be stable after observation. She was then discharged home with panadol. Sick leave was given from 5 to 10 May 2013.
5. The plaintiff then attended Shek Wu Hui GOPC (“SWHGOPC”) on 10 May 2013 complaining of left neck pain, right shoulder pain, left side head pain and back pain. On examination, the left neck abrasions were dry and healing and tenderness were noted over various regions. According to the records, no medication was prescribed but the Plaintiff was given sick leave from 11 to 14 May 2013.
6. The plaintiff attended AED of NDH again on 13 May 2013 at 23:11. She complained of dizziness for 1 day, vertigo for 2 days and various pains. No focal neurological deficit was found. She was admitted to the AED observation ward and given injections for dizziness and oral painkillers. Her condition improved with decreased dizziness and pain and she was discharged with various mediations at around 21:29 on 14 May 2013. Sick leave was given from 13 to 16 May 2013.
7. The plaintiff continued to attend various clinics, was followed-up in neurological and orthopaedics departments and has undergone physiotherapy for alleged persistent headaches, dizziness, neck, shoulder and back pains etc. She has also consulted clinical psychology.
8. The plaintiff has been on sick leave continuously from 6 May 2013 to 30 November 2016 (total 1305 days), and then from 18 May 2017 until 21 September 2017 (another 127 days) (according to the Revised Statement of Damages).

*Liability*

1. The plaintiff’s case was, in summary, that the defendant had failed to take all reasonable measures to prevent the accident, in particular, that there were inadequate warnings, safety trainings and provision of anti-slip shoes.
2. Much of the evidence is a “he says, she says” scenario. For example, there are disputes regarding whether the employees have been repeatedly warned against the use of the Steps (which, according to the defendant, were one of many unauthorized stairways constructed by grave workers to help their own access to various parts of the cemetery), whether anti-slip shoes were provided, and whether there was an admission from the plaintiff after the accident that she “had taken the short-cut for a momentary wish for convenience” etc.
3. As to the dispute regarding the safety training sessions, the plaintiff all along stated that she has never attended any training session related to workplace safety provided by the defendant (see her supplemental witness statement paragraph 1, page 85 of the Trial Bundle). The plaintiff only admitted in court that she has attended such a training programme. She claimed that her memory has been “refreshed” after seeing the Attendance List with her own signature produced by the defendant.
4. This raises a question on how reliable the plaintiff’s memory is.
5. There are other aspects which raise questions on the credibility on the plaintiff’s evidence.
6. Firstly, I found the plaintiff evasive when she was asked about the details of her job. I need not go into details here but it was clear that she was trying to paint a picture that she had a heavier work load than she actually had. She claimed to be working under time pressure in an attempt to justify using the Steps (as a short-cut) instead of taking the “proper” route with pathed staircases and railings. Further, under cross-examination, she was exaggerating the time it would take her to take the “proper” route instead of the Steps.
7. Having heard all the evidence, I would find that the plaintiff did not have a heavy work load schedule nor time pressure. There was certainly no need to take a short-cut. I accept that taking the proper route would only take a 5 minutes’ walk.
8. There is also issues with the plaintiff’s other witness, Ms. Wong Sin Man (“Ms. Wong”), who was the partner of the plaintiff on the day of the accident. In court, Ms. Wong appeared to be recounting an accident that was more serious than what actually happened.
9. For example, Ms. Wong said that the plaintiff fell into the gutter on the side of the steps so she had to stand in the gutter to prevent the plaintiff from falling further into the well. She also said that she did not have the strength to help the plaintiff out of the gutter so she could only stand in the gutter supporting the plaintiff.
10. However, in the accident report signed by Ms. Wong dated 8 May 2013 (2 days after the accident), she clearly stated that, after the plaintiff fell (as I translated): *“I immediately helped her up and sat her down at the concrete well near the year 89 section...”*
11. I think that Ms. Wong should have a better recall of the accident 2 days after the accident. Further, this version of event was more in line with the evidence of Chan Yuen Fei (“Mr. Chan”), another patroller at the time and one of the defendant’s witnesses who went up to the site of the accident to assist the plaintiff on the day. He told the court that when he arrived, he saw the plaintiff sitting on the concrete well.
12. On the whole, I would prefer the evidence of Mr. Chan and Ms. Ma Ng Mui (“Ms. Ma”), the defendant’s other witness. Ms. Ma was the supervisor of the plaintiff at the time of the accident. Both Ms. Ma and Mr. Chan are no longer working for the defendant (which does not have the contract for patrolling the Cemetery) so they can be regarded as independent witnesses. They are still working at the Cemetery for another company which holds the contract.
13. I would therefore accept that Ms. Ma has been giving repeated warning against taking such unauthorised routes including the Steps. Nevertheless, Ms. Ma admitted fairly that it was common practice that employees still used these routes. Mr. Chan even admitted that he used them himself. On passing, I think that such admissions support the credibility of the witnesses.
14. I also accept that anti-slip shoes were provided but, as again fairly admitted by Ms. Ma, they were rather heavy and cumbersome so employees mostly wore their own shoes.
15. There was also a dispute on whether the defendant was an occupier of the Cemetery and thus in a position to put up barriers or signs to stop employees from using the Steps. The defendant’s position was that the occupier was the Food and Environmental Hygiene Department (“FEHD”).
16. Nonetheless, even if the defendant’s position was correct, there was no evidence before the court that the defendant has taken the issue to the FEHD to seek installation of any safety measures despite Ms. Ma being aware of the common non-compliance of the employees.
17. As such, despite various safety measures, the defendant should be aware that non-compliance was rife and one could argue that it would be reasonable for the defendant to enforce the safety measures (including mandatory wearing of anti-slip shoes) more strictly, and to notify FEHD regarding reasonable measures to prevent the use of the Steps.
18. On the other hand, there is also no doubt that, due to her own non-compliance to the safety measures, the plaintiff was contributorily liable for the accident. Considering all the evidence before me, I would hold the defendant to be 50% liable.

*Quantum*

1. The plaintiff’s case is, in short, that she suffered from persistent headache and dizziness, as well as neck pain, shoulder pain and other complaints since the accident. She is therefore claiming that such symptoms had persisted for more than 5 years.
2. In fact, the plaintiff told the court that she was, at the very moment of giving evidence, suffering from a constant 5-6 degrees (on the “pain scale”) of headache. (It was explained to her that in the “pain scale”, 0 degree means “no pain” and 10 degrees means “the greatest degree of pain she could imagine, or, as some may say, like “childbirth” pain).
3. When asked further, the plaintiff said that currently she suffered from a constant headache of 5-6 degrees on the “pain scale” but there would be episodes of headache of 10 degrees lasting about 2 seconds during which she could not move her hands (and had to drop everything), and such episodes could occur between once every 3-4 days (when the weather was good) to twice a day (when the weather was bad).
4. The plaintiff added that, currently, painkillers would reduce the pain to 3-4 degrees but the relief would only last 2-3 hours.
5. The plaintiff also said that her condition was better now because at the period for up to a year or more after the accident, she suffered from headache of 10 degrees (she later said it was more like 8 degrees, but it was severe pain in any case) lasting several hours. She was taking painkillers which reduce the pain to 7-8 degrees but even such “partial” relieves would only last for 2-3 hours.
6. When asked how she would cope since the painkillers was supposed to be taken every 6 hours, the plaintiff repeatedly told the court that she took medications whenever she had pain.
7. It was therefore put to her that she was, in effect, over-dosing herself with pain-killers, taking twice the prescribed amount or more every day. The plaintiff said she did not count.
8. When it was to put to her that, since she was taking the medications prescribed at a faster rate, her medication would have run out in roughly half the time. She explained to the court that she would go to “Seven Eleven” to buy more painkillers, especially the ones she called “extra strength” painkillers.
9. In any case, she confirmed to the court that during this period after the accident, she could not sleep *at all* every single night because of this severe pain. She could only sleep better after a year or so when she started doing physiotherapy and other “spa exercises”. But even with this improvement, she could only sleep for about 2 hours every night. In other words, the plaintiff confirmed that she had suffered from insomnia for some 5 years and even now, she thought that being able to sleep for a bit more than 2 hours was considered a good night.
10. The plaintiff was then asked about the first attendance at AED of NDH when only oral panadol was prescribed. The plaintiff said that during the time at AED she still had severe pain of 10 degrees despite the panadol but the doctor had still asked her to be discharged. And so she obliged.
11. When asked whether she told the AED doctor that she still had severe pain, the plaintiff initially said she did not, claiming that she was “too painful to express herself”. However, when asked again, she changed her story and claimed that she did tell the doctor that she had severe pain and that the Panadol did not help, but the doctor simply said that “it would be like that!”. She said that she did not know that she was discharged with Panadol.
12. I found the plaintiff’s story, even at the first attendance, simply incredible.
13. Firstly, in her “first version” of events, I cannot see how a fully conscious person under severe pain would somehow be unable to express herself, or that a doctor would somehow fail to detect the symptoms and signs (which I imagine must be obvious). Her “second version” of events would also be rather incredible: a patient told the doctor that she was in severe pain and that the medication had not help but the doctor still discharged her on the same medication. I would imagine that there must be plenty of stronger pain-killers than Panadol, and I would also imagine that a patient suffering from continuous “childbirth-like” pain would not likely agree to go home!
14. The plaintiff then told the court that when she went home, she took her Panadols but they did not help: her severe pain persisted and she could not sleep at all that night.
15. Despite this, she continued to take the Panadols and remained sleepless for 5 nights, and she did not attend the SWHGOPC until 10 May 2013, which happened to the last day of the sick leave given by the AED of NDH.
16. According to the SWHGOPC, no prescription was given but the plaintiff told the court that medications were given “every time she saw a doctor”.
17. I do not think so. I think it is more likely that the doctor at SWHGOPC did not see the need to prescribe any painkillers, perhaps because the plaintiff still had her own supply and that the pain control was adequate (but of course, if the plaintiff’s evidence was to be believed, she should have used up all her previously prescribed painkillers very quickly because of her alleged “overdosing on painkillers”), or that the doctor simply did not see any clinical justification to prescribe any further pain-killers, even mild ones like Panadol.
18. In any case, she was given a sick leave from 11 May to 14 May 2013.
19. Whether or not she was prescribed with any medications, it was the plaintiff’s case that she continued to take whatever medications prescribed, which continued to fail to treat the severe pain, and she continued to be unable to sleep for another 6 nights before she returned to AED of NDH on 13 May 2013, the day before her sick leave ran out. This time, she was complaining of dizziness (amongst others). She told the court that the injections for dizziness given at A&E did not help because the dizziness was still “on and off”, and the painkillers only helped to reduce pain slightly, but only for 2-3 hours.
20. She was discharged with Panadol and anti-dizziness medications. Sick leave was given from 13 to 16 May 2013.
21. Despite the medications not curing her (still with severe pain and another 3 sleepless nights), the plaintiff did not return to SWHGOPC until 16 May 2013, the last day of the sick leave.
22. In fact, this pattern of behaviour continued and the plaintiff had attended some 74 times at the Fanling Family Centre over the next 2 years or so, on many occasions prescribed with essentially similar medications (Panadols or Diclofenac, and Stemetil etc.) and on other occasions with no medications (because, as recorded, she still had existing stock of medications). The plaintiff would attend the clinic every time, punctual as clockwork, just as the sick leave was running out despite the fact that none of the treatment appeared to be effective in curing her condition.
23. When asked why she would not attend the doctor earlier (when the prescribed treatment did not cure her severe symptoms) instead of waiting to the end of the sick leave before attending, the plaintiff provided various answers.
24. At one point, she said she did not know that she could do so before she finished the medications (despite agreeing that the medications did not help to cure her).
25. The plaintiff was clearly lying because she gave evidence that she was, in effect, overdosing herself on painkillers all the time so it was clear that her medications should have ran out well before the next consultations each time. She had admitted earlier that when the medications ran out, she went to “Seven Eleven” to buy more.
26. At another point, perhaps more tellingly, the plaintiff admitted that she needed to get sick leave. But then she quickly corrected herself that it was “not just for the sick leave, but also to tell the doctor of the pain.”
27. At yet another point, the plaintiff admitted that despite the medications not working and that she was unable to sleep for months because of the pain, she did not know that she could consult another doctor (including any doctors in the private sector). She said she simply did not know how to do so.
28. This is simply unbelievable: the plaintiff was quite able to consult various doctors including AED at NDH, SWHGOPC and Fanling Family Centre during this period.
29. Thus, it is the plaintiff’s case that the plaintiff continued to see these doctors despite all the doctors apparently completely failed to cure her severe symptoms. And, despite the plaintiff (as she claimed in court) repeatedly informing the doctors that the medications did not work, the doctors continued to prescribed essentially similar medications and the plaintiff continued to take them obediently, and she continued to suffered from bad sleep every night due to severe pain for many years.
30. The plaintiff was later referred to neurosurgeons and orthopaedics amongst others. There is no need to go into details of all the management here, but suffice to say that the neurosurgeons found no objective evidence and had treated her on the basis of her subjective complaints *(“…She was arranged regular follow-up with continuation of the symptomatic treatment of her symptoms.”*) (see P.118 of the Trial Bundle) and the clinical psychologist management was also based on her subjective complaints (see P.123 and 124 of the Trial Bundle).
31. Further, it was perhaps telling that (as stated in the plaintiff’s second supplementary witness statement) she had obtained a full year of sick leave from the Orthopaedics & Traumatology Department from 11 January 2018 to 10 January 2019. However, despite her evidence that she continued to be suffering from such severe pains, insomnia and other symptoms, she also confirmed in court that she had not returned to see any doctor at any time during this ongoing sick leave period. She appeared quite content to take the 1-year sick leave and all the prescribed medications (which clearly still failed to cure her alleged severe symptoms).
32. Whilst I agree that “pain is subjective” (in a way, so is the complaint of dizziness and many “symptoms”), but a patient’s response to pain can be subjected to a “reasonableness” test to see if the complaint is genuine.
33. I have observed a similar “consultation behaviour” in the case of *Subba Alvin also known as Gurung Yadap Chandra v Houng Kee (Asia) Limited & Others* HCPI 154/2010. I stated in the judgment of that case:

*“A person who actually suffers such a severe and life-crippling illness should be very concerned about recovery and return to a normal life (and work). Logically, one would expect him to return to seek medical help immediately once he realised that he was not getting better with the existing treatment without waiting for the 4 or 5 days since of sick leave to expire before returning. On reattending the doctor, he might question the diagnosis, demand stronger medications, further investigations, change of doctors, urgent referrral to specialists etc.*

*...And when after a few reattendance failed to cure such a serious illness, one would also expect any reasonable person to become extremely worried, with questions like; “Why am I not getting better? Would it be something more serious? Is the doctor being careless? Did he miss something serious? Can it be cancer? Will this get worst? Will I be paralyzed? Am I dying?””*

1. Thus, the last thing that one expects a reasonable patient would do was to return to the same doctors taking the same medications for years without a cure in sight, especially when her repeated protests of ineffective treatment were, as it appeared, continually ignored, and, during all this time, she continued to suffer from life-crippling symptoms.
2. I am therefore not convinced that the plaintiff had actually suffered from any serious symptoms, or at least to the extent that she was concerned about herself. Right from the first AED consultation, she appeared to be more interested in obtaining sick leaves than seeking medical treatment for curing any alleged persistent and severe symptoms (see *Gurung Kamala v Hong Wei Limited* DCPI 1660/2010).
3. It is trite that the court need not be bound by any sick leave certificates prescribed by treating doctors: *“...sick leave certificates are no more than a piece of evidence that has to be evaluated in the light of all the available evidence including medical evidence before the court.”* (*Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd* [2008] 5 HKLRD 210).
4. I note that both orthopaedics experts found that there were degenerative changes in the x-ray studies of the plaintiff’s cervical and lumbar region. However, they agreed that these were pre-existing and cannot be caused by one single accident (see paragraph 4 on page 139 of the Trial Bundle).
5. Given that I find that the plaintiff had grossly exaggerated her injuries, residual symptoms and disabilities, both experts’ conclusions must be viewed with some caution since they have based it on accepting that the plaintiff’s subjective complaints of symptoms after the accident were truthful, at least to some extent. Dr. Fu simply accepted that *“it is now more than 3 years after the said accident. Her condition should be static. Her current impairment will persist. She will have on and off pain over the injured areas...”* Dr. Yeung opined that *“it was possible for the subject accident to aggravate the pre-existing changes and she became symptomatic after the subject accident.”*
6. In general, whilst the court should seek assistance from the experts regarding the *objective* medical evidence (e.g. interpretation of a physical examination finding, an x-ray or an MRI scan), the court is often in a better position than the experts, after reviewing all relevant evidence including hearing all the evidence in court, to assess the truthfulness of the *subjective* complaints of the plaintiff, especially in cases where such were essentially “stand-alone” evidence not supported by objective medical evidence advanced by the experts.
7. In this case, both the experts appeared to have based their diagnosis of soft tissue injury on her subjective complaints after the accident. The experts did not point to any objective evidence that support such soft tissue injury, at least to the severity and persistence that she complained about. In fact, Dr Yeung pointed to some objective findings (absence of muscle wasting, the inconsistent leg raising test and the simulation tests) which raised a suspicion of “symptom amplification” (see paragraph 8 of page 140 of the Trial Bundle). This would support the findings of the court based on “consultation behaviour” as stated above. Dr. Yeung also opined that there was *“no objective neurological deficit”* (see paragraph 12 of P. 141 of the Trial Bundle).
8. In summary, I find that the plaintiff only suffered from abrasions to her neck and lower face with mild soft tissue injuries to her head (amongst perhaps some other areas). She should have very much recovered fully and could not have suffered from any persistent severe pain, dizziness and other symptoms as she alleged, and such persisting symptoms, if any, would not be significant to an extent that she has any concern about all along.

*The issue of causation based upon the case of Chan Kam Hoi*

1. This issue was meant to address the pre-existing degeneration of the plaintiff’s spine on the assumption that she was suffering from her alleged symptoms.
2. However, as stated above, I find that the plaintiff, at all periods of time, did not suffered from any significant symptoms. Thus, the inevitable logical conclusion must be that any degeneration of the spine was not significantly affected by the accident because there was no significant symptoms all along.

*PSLA*

1. As such, I think the injury is less serious than a typical whiplash injury and I think HK$75,000 is appropriate (see *Tam Fu Yip Fip v Sincere Engineering & Trading Co. Ltd* , CACV208/2007).
2. I note that the defendant did not plea that the plaintiff was malingering. Nevertheless, it was for the plaintiff to produce evidence to convince the court that the symptoms alleged by the plaintiff were accurate.
3. If the plaintiff’s case was that any such inaccuracies were *subconsciously* advanced by the plaintiff because she suffered from some form of “psychosomatic” disease, and further that such a disease was caused by the accident, this needed to be pleaded and supported by medical opinion (perhaps from a psychiatric expert).
4. This was not pleaded by the plaintiff and no such expert evidence was adduced before the court. As such, there is no need for the court to find the cause of the inaccuracies of the plaintiff’s evidence, and the court will award quantum in accordance with its own fact finding exercise.

*Pre-trial loss of earnings*

1. I note that Dr. Yeung opined that there was “symptoms amplification” but *“most patients with similar problems of the cervical and lumbosacral spine and no objective neurological deficit would be able to return to work after sick leave of about 2 years”* (see page 141 of Trial Bundle) whilst Dr. Fu endorsed all the sick leave.
2. Of course, as stated above, both experts had made the assumption in accepting that her subjective complaints, to some extent, were truthful. Dr. Yeung was simply comparing her complaints (perhaps after consideration of some degree of “amplification”) to patients with *“similar problems”*.
3. However, after assessing all the evidence, I find that the plaintiff must have largely recovered much earlier than 2 years after the accident. It is not easy to assess the exact extent of the inaccuracies or exaggeration given that the evidence only came from the plaintiff’s own mouth. Nevertheless, given that I find that the “consultation behaviour” of the plaintiff shows that she has little concern with curing her (alleged) condition even right after the accident, I would allow a period of 3 months of sick leave which would be generous.
4. There was no dispute that her average income for the past 12 months immediately preceding the accident was around HK$7,696. I would therefore award HK$7,696 x 3 = HK$23,088.

*Post-trial loss of earnings*

1. Given the factual findings on the subjective complaints of the plaintiff, I need not agree with the expert opinion of either experts as stated above. Her “consultation behaviour” simply showed that she has no intention to return to her previous job despite, as I find, that she suffered no significant and persistent symptoms. I would not allow any claim under this head.

*Loss of earning capacity*

1. Similarly, I would not allow any awards under this head of claim.

*Special damages*

1. I find that much of the plaintiff’s medical expenses have been incurred for obtaining unjustified sick leave and not for any genuine attempt to seek medical cure. I would allow a lump sum of HK$3,000 for reimbursement of any medical expenses, traveling expenses and any claims for tonic food for the first 3 months after the accident.

*Employees Compensation*

1. It is not in dispute that the plaintiff already received HK$133,872.20.

*Summary*

HK$

PSLA 75,000

Pre-trial loss of earnings 23,088

Post-trail loss of earnings 0

Loss of earning capacity 0

Special damages 3,000

Subtotal: 101,088

Discount for 50% contributory negligence (50,544)

Less Employees’ compensation (133,872.20)

Total: 0

*Order*

1. As I find that the plaintiff has been more than adequately compensated by Employees’ Compensation, I would order that the plaintiff’s claim be dismissed with costs of the action to the defendant with certificate for counsel. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(Harold Leong)

District Judge

Mr Peter Wong, instructed by K Y Woo & Co, for the plaintiff

Mr Timothy Lau, instructed by Chung & Kwan, for the defendant