## DCPI 1819/2020

## DCEC 1593/2018

## (Heard together)

[2021] HKDC 1430

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURY ACTION NO 1819 OF 2020

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BETWEEN

NG WING KWONG Plaintiff

and

LEE WAI KIU trading as “好味道荼餐廳” 1st Defendant

EMPLOYEES COMPENSATION 2nd Defendant

ASSISTANCE FUND BOARD

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**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

EMPLOYEES’ COMPENSATION CASE NO 1593 OF 2018

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##### IN THE MATTER OF AN APPLICATION BETWEEN

NG WING KWONG Applicant

### and

LEE WAI KIU trading as “好味道荼餐廳” 1st Respondent

EMPLOYEES COMPENSATION 2nd Respondent

ASSISTANCE FUND BOARD

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(Heard together)

Before: Deputy District Judge Calvin Cheuk in Court

Date of Hearing: 12 November 2021

Date of Judgment: 12 November 2021

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JUDGMENT

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*A. INTRODUCTION*

1. On 12 July 2017 at or about 6:33 am, whilst in the employment of Mr Lee Wai Kiu (“**Mr Lee**”) trading as “好味道茶餐廳”, Mr Ng Wing Kwong (“**Mr Ng**”) was injured as a result of a petroleum gas explosion at the restaurant at Shop C, G/F, 35 Cheung Ning Street, To Kwa Wan, Kowloon. Mr Ng sustained severe burn injury as a result.
2. Subsequently, Mr Ng commenced two sets of proceedings against Mr Lee. The first one (ie DCEC 1593/2018) is an application by Mr Ng pursuant to the Employees Compensation Ordinance (Cap 282) (the “**ECO**”) for compensation under sections 9, 10, and 10A of the ECO. The second one (ie DCPI 1819/2020) is a personal injuries action in relation to the same accident.
3. Mr Lee did not take part in both sets of proceedings. On 10 July 2020 and 23 September 2020, interlocutory judgments were entered against Mr Lee in relation to DCEC 1593/2018 and DCPI 1819/2020 respectively.
4. Pursuant to an Order dated 10 July 2020 and an Order dated 29 March 2021, the Employees Compensation Assistance Fund Board (the “**Board**”) was allowed to join in DCEC 1593/2018 and DCPI 1819/2020 on the issue of quantum.
5. Before the court is the assessment of compensation and damages in relation to both sets of proceedings. Although there is no consolidation order of the two sets of proceedings, they are heard together because they arose out of the same accident.
6. At the hearing, Mr Alan Ho appears on behalf of Mr Ng. Mr Timmy Yip appears on behalf of the Board. Both Mr Ho and Mr Yip have submitted separate submissions and hearing bundles for each set of proceedings. For the avoidance of repetition, I will first deal with the common features of both sets of proceedings in Sections B and C below, followed by the claims in DCEC 1593/2018 and DCPI 1819/2020 more specifically dealt with in Sections D and E respectively below. Needless to say, although I set out the awards separately, Mr Ng is not entitled to double recovery. In DCPI 1819/2020, credit should be given by Mr Ng for the sums recovered in DCEC 1593/2018.

*B. WITNESS AND EVIDENCE*

1. Mr Ng has filed one witness statement for himself. He has no other witness to call. The Board has no witness to call in the hearing.
2. All hospital treatment reports are produced without calling the makers. Mr Ng and the Board have respectively engaged plastic surgery specialists, Dr Ian Nicolson and Dr Walter King, to examine Mr Ng’s injuries. Their two joint expert reports are also produced without calling the specialists. It is noted that there is no disagreement between the two specialists.

*C. MR NG’S INJURIES*

1. Briefly, due to the gas explosion, Mr Ng suﬀered blast injury with 50% body burn. He underwent debridement and skin graft to deeper wounds over right groin, right hand and left thigh. Other wounds were managed with dressing. He was discharged on 28 August 2017. His wounds healed up with hypertrophic scar.
2. On review by the Assessment Board, Mr Ng’s injury was confirmed as multiple injury resulting in scars over trunk, both lower limbs and both upper limbs.
3. It is the common diagnosis of the two plastic surgery specialists that Mr Ng suﬀered from about 50% Total Body Surface Area flame second degree burns injury to his face and four limbs.

*D. MR NG’S CLAIM IN DCEC 1593/2018*

*D1. Mr Ng’s earnings*

1. Before the accident, Mr Ng was employed by Mr Lee as a drinks bar / food & beverage worker. There was no written employment contract. He said his daily wage was HK$700 and he worked 26 days a month, that is, a monthly salary of HK$18,200.
2. Although I note that according to the Form 2 filled out by Mr Ng, his monthly salary was HK$16,800, there is no challenge to Mr Ng’s case that his earnings were in fact HK$18,200 under s 11 of the ECO. In these circumstances, I accept Mr Ng’s evidence and adopt the sum of HK$18,200 accordingly.

*D2. Section 9 Compensation*

1. At the time of the accident, Mr Ng was aged 57. According to s 7(1)(c) of ECO, compensation would be assessed with reference to 48 months’ earnings.
2. On review by the Assessment Board, Mr Ng’s loss of earning capacity was up-lifted to 8%.
3. The two plastic surgery experts have the common opinion / assessment that Nr Ng’s loss of earning capacity was 12%.
4. There is no challenge to the experts’ common opinion/assessment. Thus, I consider that the proper sum under section 9 of the ECO should be HK$18,200 x 48 x 12% = HK$104,832.

*D3. Section 10 Compensation*

1. After the accident, Mr Ng was granted sick leave intermittently from 12 July 2017 to 11 October 2020 (ie 39 months). Thereafter, he has not returned to any work. He claimed that he is not yet recovered.
2. The Assessment Board accepted sick leave intermittently from 12 July 2017 to 23 October 2019 (829 days).
3. Nonetheless, the two plastic surgery specialists criticised Mr Ng of visiting diﬀerent government outpatient clinics to see diﬀerent doctors with complaints of minor ailments like itching and aching discomforts in the ankles, causing him to have on and oﬀ sick leave of over 3 years. They both agreed that the granted sick leave period is excessive and the reasonable sick leave should be up to 27 September 2019, that is, 26 months.
4. The two plastic surgery specialists also agreed that Mr Ng has reached maximum medical improvement and he can engage in gainful employment with a reduced working eﬃciency. He is capable of returning to his pre-accident job or similar jobs as server, waiter or chef in a cafe style restaurant. However, the specialists pointed out that Mr Ng exaggerated his symptoms and lacked inertia and incentive to return to any gainful employment.
5. In the case of *Tse Tsz Chong v Law Sze Man* [2015] 1 HKLRD 1120, Lam, VP (as he then as) stated that (para 28, p 1130):-

“… In the context of employee compensation claims, the weight to be attached to sick leave certificate is governed by s 10(2) of the Employees’ Compensation Ordinance. … In a nutshell, the correct legal position is this: s 10(2) set out a **rebuttable statutory presumption** of temporary incapacity during the certified period in the context of an employee compensation claim. The burden is on an employer to rebut that presumption.” (emphasis added)

1. In his opening submissions, Mr Ho accepts that the appropriate period of sick leave for Mr Ng should be 26 months.
2. As such, the proper assessment under section 10 compensation is HK$18,200 x 26 months x 4/5 = HK$378,560.

*D4. Section 10A Compensation*

1. Both Mr Ho on behalf of Mr Ng and Mr Yip on behalf of the Board agree that the amount of incurred medical expenses of Mr Ng under s 10A should be at $12,000. I adopt this sum accordingly.

*D5. Summary*

1. Following the analysis above, the amounts of compensation under sections 9, 10 and 10A of ECOare:-

|  |  |  |
| --- | --- | --- |
| Section 9 | $18,200 x 48 x 12% | HK$104,832 |
| Section 10 | $18,200 x 26 months x 4/5 | HK$378,560 |
| Section 10A | $12,000 | HK$12,000 |
|  | Total: | HK$495,392 |

1. Mr Ng is also entitled to interest at half judgment rate from the date of the accident to the date of this judgment and thereafter at judgment rate until payment.

*E. MR NG’S CLAIM IN DCPI 1819/2020*

*E1. PSLA*

1. In the Revised Statement of Damages, PSLA was claimed at $800,000. It is revised to $500,000 in Mr Ho’s opening submissions.
2. Having regard to Mr Ng’s injuries and the following cases cited by Mr Yip on behalf the Board, including *Leung Hing Sum v Yau Lee Construction Co Ltd*, HCPI 422/2000 (12/10/01), *Lui Sheung Lok v Wah Wah Travel Services Ltd*, HCPI 1188/1999 (14/9/00) and *Yeung Hau Keung v Yip Wang Kit*, HCPI 691/2011 (7/5/14), I agree that $500,000 is a reasonable sum for PSLA and will adopt it accordingly.

*E2. Pre-trial loss of earnings*

1. As explained in Section D3 above, after the accident, Mr Ng was granted sick leave intermittently from 12 July 2017 to 11 October 2020 (ie 39 months). Thereafter, he has not returned to any work. He said he is not yet recovered.
2. The Assessment Board accepted sick leave intermittently from 12 July 2017 to 23 October 2019 (829 days).
3. Nonetheless, the two plastic surgery specialists criticised the plaintiﬀ of visiting diﬀerent government outpatient clinics to see diﬀerent doctors with complaints of minor ailments like itching and aching discomforts in the ankles, causing him to have on and oﬀ sick leave of over 3 years. They both agreed that the granted sick leave period is excessive and the reasonable sick leave should be up to 27 September 2019, that is, 26 months.
4. In *Tam Fu Yip Fip v Sincere Engineering & Trading Company Limited* [2008] 5 HKLRD 210, Le Pichon, JA of the Court of Appeal stated that:-

“Since the plaintiﬀ’s pre-trial loss of earnings is ascertained by reference to the period during which the plaintiﬀ was prevented by the injuries sustained from returning to work, what has to be ascertained and identified is the length of that period. In my view, that is an exercise that would not require evidence to suggest or imply that those who had granted sick leave to the plaintiﬀ did so improperly. Logically, if the finding is that the plaintiﬀ could have gone back to work after three months, that is the period that is relevant to the assessment and award of pre-trial loss of earnings and no other. 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. As Rogers VP observed in *Choy Wai Chung v Chun Wo Construction & Engineering Company Ltd*, unreported, CACV 172/2004, 15 July 2005 at § 9, the judge cannot be bound by the mere issue of sick leave certificates: the issuance of such certificates would be primarily because of the subjective symptoms reported to the doctors by the plaintiﬀ. ”

1. In Mr Ho’s opening submissions, the pre-trial loss of earning & MPF is claimed as HK$18,200 x 105% x 26 months = HK$496,860. There is no challenge to that sum. I will adopt the same accordingly.

*E3. Post-trial loss of earnings*

1. In Mr Ho’s opening submissions, there is no claim for post-trial or future loss of earnings. I therefore will not make any award under those heads.

*E4. Loss of earning capacity*

1. Loss of earning capacity is claimed at 6 months’ earnings, HK$18,200 x 6, that is, HK$109,200. There is no serious challenge to that sum and I will adopt the same accordingly.

*E5. Special damages*

1. Special or incurred expenses is claimed at the total sum of $42,500. There is no challenge to that sum and I will adopt the same accordingly.

*E6. Future medical expenses*

1. The plastic surgery specialists recommended the plaintiﬀ to use skin moisturiser for 3 years. The costs are estimated at $6,000. Future medical expenses are claimed at $10,000. There is no challenge to that sum and I will adopt the same accordingly.

*E7. Summary*

1. Following the analysis above, the various heads of awards are as follows:-

|  |  |
| --- | --- |
| PSLA | HK$500,000 |
| Pre-trial loss of earnings | HK$496,860 |
| Post-trial loss of earnings | - |
| Loss of earning capacity | HK$109,200 |
| Special damages | HK$42,500 |
| Future expenses | HK$10,000 |
| Total: | HK$1,158,560 |

1. Mr Ng is also entitled to interest as follows:-
2. In relation to PSLA (HK$500,000), the interest should be at 2% pa from the date of service of the Writ (15 June 2020) to the date of judgment;
3. In relation to Pre-trial loss of earning (HK$496,860) and special damages (HK$42,500), the interest should be at half of judgment rate from the date of the accident to the date of judgment;
4. There should also be interest at judgment rate on the total sum of HK$1,158,560 from the date of judgment until payment.

*F. COSTS*

1. I also make a costs order *nisi* as follows:-
2. Mr Lee do pay Mr Ng the costs of DCEC 1593/2018 and DCPI 1819/2020 (including all costs reserved, if any) to be taxed if not agreed with certificate for counsel;
3. There will be no order of costs between Mr Ng and the Board;
4. Mr Ng’s own costs to be taxed in accordance with the Legal Aid Regulations.
5. It remains for me to thank Mr Ho and Mr Yip for their assistance.

( Calvin Cheuk )

Deputy District Judge

Mr Alan Ho, instructed by Peter K H Wong & Co, for the plaintiff (DCPI 1819/2020) and the applicant (DCEC 1593/2018)

The 1st defendant (DCPI 1819/2020) and the 1st respondent (DCEC1593/2018) acting in person, being absent

Mr Timmy Yip, instructed by Gallant, for the 2nd defendant (DCPI 1819/2020) and the 2nd respondent (DCEC 1593/2018)