Ho Yiu v Lim Peng Seng
[2004] SGHC 28

Case Number : Suit 1604/2001, NA 60/2002

Decision Date : 12 February 2004

Tribunal/Court : High Court

Coram : Teh Hwee Hwee AR

Counsel Name(s) : Ramasamy K Chettiar for plaintiff; B Rao (leading counsel) and Kwok-Chern Yew Tee for defendant

Parties : Ho Yiu — Lim Peng Seng

12 February 2004

Assistant Registrar Teh Hwee Hwee:

Facts

The Plaintiff, now 33 years old, claimed against the Defendant for damages arising from a road traffic accident on 7 November 2000. The Defendant had admitted liability and the parties were before the Court for the assessment of the Plaintiff's damages.

At the time of the accident, the Plaintiff was employed as an Art Director at Grace Communications Pte Ltd (Grace), a business engaged primarily in print, media, design and advertising work. His employment was terminated on 30 November 2000 as a result of the accident and he had remained unemployed since.

Agreed and disputed claims

In the course of the assessment proceedings, the parties agreed upon the following items that were claimed by the Plaintiff:

1. Pre-trial medical expenses $60,411.66
2. Pre-trial transport expenses $4,575
3. Pain and suffering $75,000

The following claims that were made by the Plaintiff were in dispute and various issues arose thereunder:

1. Loss of pre-trial earnings;
2. Loss of future earnings;
3. Future medical expenses; and
4. Future transport expenses.

Loss of pre-trial earnings

The Plaintiff was employed by Grace on 3 May 1999 at a salary of $3,000 per month with CPF benefits. He was put on probation for a period of 6 months. 6 months later, on 1 November 1999, his employment was confirmed and his salary was increased to $6,000 per month. These figures were supported by documents previously issued by Grace and the Plaintiff's CPF statements. The Plaintiff was further given a transport allowance of $300 from November 1999 onwards.

The Plaintiff contended that, if not for the accident, his monthly salary would be increased in November 2000 to $8,000, to 10,000 in November 2001 and to $12,000 in November 2002. Adding CPF and bonuses, his projected monthly salary would correspondingly translate to $8,960, $10,960 and $15,660. The Plaintiff called his employer, one Alfred Yeo, to testify in support of his salary projections.

In Yeo's first affidavit filed on 23 October 2002, he described the Plaintiff's overall performance as "good". However, in his second affidavit filed on 19 August 2003, he described the Plaintiff's performance as "exemplary", which was really quite different from "good".

On 19 November 2002, Yeo gave evidence on how he, Yeo, increased the gross revenue of Grace from $1.9 m in 1999 to more than $4m in 2000. However, on 21 November 2002, Yeo attributed a significant portion of the business growth no longer to himself, but mainly to the vision, efforts and contributions of the Plaintiff. He also attempted to clarify that he was not referring to his own efforts on the first occasion when he took the stand and that he was referring to the efforts of the company as a whole. He explained that he did not mention the significant contributions of the Plaintiff earlier as he was not aware that it was important for him to do so.

I accepted that the Plaintiff was in charge of the design department in Grace and that he contributed to the overall growth of Grace. I also noted that the Plaintiff was well regarded by his clients. However, I found it hard to accept that he was mainly responsible for the very rapid expansion of the business. I made this finding based on the following evidence:

Firstly, the Plaintiff's bonus for 2000 was less than a month. I noted from a letter from Yeo to the Plaintiff's lawyer dated 25 September 2002 that "normal staff [would] receive a one month bonus" and the Plaintiff was given less than a month's bonus because he had failed to complete the work year. It seemed therefore that the Plaintiff might be given only a month's bonus if he had completed the work year, and hence was considered a "normal staff" member.

Secondly, the Plaintiff's employment was promptly terminated on 30 November 2000, less than a month after the accident on 7 November 2000. Grace also did not offer the Plaintiff any other position, junior or otherwise, at the time when the Plaintiff was job hunting or at any point in time. This did not seem to be the kind of treatment that one would reasonably expect for a key and highly valued employee.

Thirdly, Yeo did not offer a satisfactory explanation as to why the extent of the Plaintiff's contributions was not made known right from the beginning. I found his explanation that he did not know that the information was important incredible. Further, my assessment of his reliability as a witness was adversely affected by another material inconsistency in his evidence with respect to the Plaintiff's contributions - Yeo said in cross-examination on 19 November 2002 that the Plaintiff had initially asked for a starting salary of $5,000. At that time, Yeo told the Plaintiff to start at $3,000 and informed the Plaintiff that the salary would be increased to $6,000 after a 6-month probation.

However, Yeo deviated from that position in his second affidavit filed on 19 August 2003 where he stated that the Plaintiff's performance "was exemplary and that [was] why his salary was doubled to $6,000 per month after the 6 months probation period".

Finally, there was evidence that Grace continued to flourish for some time, even after the Plaintiff left the company in November 2000.

In view of the above, I did not accept the Plaintiff's or Yeo's projections of the Plaintiff's loss of income. Their evidence was not collaborated by any employment contract or document. Further, the Plaintiff was in fact not paid $8,000 in November 2000. Instead, I would base my assessment on the evidence of the parties' experts and other objective indicators.

The Plaintiff's first expert witness was of the opinion that if the Plaintiff had indeed increased the gross revenue of Grace from $1.97 m to $4.3 m from May 1999 to April 2000, he would agree with the Plaintiff's salary projections, and that he would pay the Plaintiff between $10,000 and $12,000 per month. However, this witness said that he paid his own designers a salary of only $2,300.

The Plaintiff's second expert witness said he would pay the Plaintiff between $8,000 to $10,000 a month and offer to share his profits with the Plaintiff. This witness paid his own senior designer, who did some of the work of an Art Director, a salary of $4,200 per month. When queried by the Court, he admitted that his own partner was paid only $5,000 per month.

The Defendant called Julian Tan and Ian Richard Barnes as their experts. I did not find Tan to be an objective witness. He also appeared evasive at times. I have therefore disregarded his evidence. Mr Barnes, on the other hand, came across as knowledgeable and experienced although he did not have much formal training in design and advertising. He filed an affidavit to say that he was of the view that the Plaintiff should be paid between $5,000 and $6,000. However, when he was shown more pieces of the Plaintiff's work in Court, he adjusted his assessment to $4,000 to $5,000.

The opinions of the experts could only be one guiding factor as such opinions were highly subjective. That accounted for the range of the Plaintiff's estimated salary, at between $4,000 and $12,000. As such, I looked to other factors, such as the median and mean salary of creative directors that were published in the Report on Wages in Singapore 2002. They were $6,000 and $7,821 respectively. I also noted from Yeo's evidence that Grace attempted to fill the Plaintiff's position twice, and one replacement was paid $6,000 and the other was paid $10,000. Finally, I considered what the experts actually paid their employees and partner. In this regard, I observed that the Plaintiff's experts were more generous in their assessment of what they would pay the Plaintiff as compared to what they were paying their staff members. Also, in view of the fact that their estimates were based on the premise that the Plaintiff was primarily responsible for Grace's vast increase in gross revenue, a premise I could not accept, I discounted their estimates. Having regard to all the aforesaid factors, and the fact that the Plaintiff's salary would be periodically adjusted as he gained experience and seniority, the fluctuating nature of the economy and the labour market, I assessed the Plaintiff's average salary to be $6,500 plus CPF from 1 December 2000 to-date if not for the accident.

Loss of future earnings

The Defendant submitted that the Plaintiff should be awarded damages for loss of earning capacity rather than for loss of future earnings. I did not agree. In *Teo Sing Keng v Sim Ban Kiat* [1994] 1 SLR 634, the Court observed as follows:

An award for loss of earning capacity, as opposed to an award for loss of earnings, is generally made in the following cases:

(1) where, at the time of trial, the Plaintiff is in employment and has suffered no loss of earnings, but there is a risk that he may lose that employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job;

(2) where there is no available evidence of the Plaintiff's earnings to enable the Court to properly calculate future earnings, for example, young children who have no earnings on which to base an assessment for loss of future earnings.

In *Karuppiah Nirmala v Singapore Bus Services Ltd* [2002] 3 SLR 415, the Court awarded damages for loss of earning capacity instead of loss of future earnings on the ground that "the Plaintiff was not disabled from pursuing her vocation in which she had adequate training and plenty of experience".

On the facts of this case, the circumstances identified by the Court of Appeal in *Teo Sing Keng* were not applicable and the situation of the Plaintiff here was certainly different from that in *Karuppiah Nirmala*. The Plaintiff here was unemployed since the accident, could not undertake the same type of work he was engaging in before the accident and there was ample evidence for the Court to assess what the Plaintiff could have earned if not for the accident.

I did not accept that the Plaintiff's monthly salary would be $15,660 from 1 November 2002 in the absence of objective evidence that it was the practice of Grace or the print, media, design and advertising industry to grant big salary increments in rapid succession. Even if Grace had such a practice, which I did not believe it had, my assessment of the Plaintiff's damages was not based on any assumption that the Plaintiff would always be working for Grace or that Grace would continue to be in existence. As a matter of fact, there was evidence before the Court that the economic downturn had affected the advertising industry adversely, and that Grace had implemented a wage freeze in July 2002 and eventually had to close down in July 2003.

In assessing the Plaintiff's loss of future earnings, I adopted a multiplier of 14, which seemed to be fair and reasonable in view of the authorities submitted by both parties. In deciding on the multiplicand for loss of future earnings, I considered the evidence set out under the heading for loss of pre-trial earnings, and in particular, the evidence of the experts and the Report of Wages in Singapore 2002 for Creative Directors. Accordingly, I awarded the Plaintiff an average monthly salary of $7,300 plus CPF for the first 10 years and $9,000 plus CPF for the last 4 years.

The Plaintiff's duty to mitigate

I found that the Plaintiff had the training, abilities and experience to be an accounts executive, particularly in the print, media, design and advertising industry. He had himself testified on the stand that he would be able to do the job although he would find it undesirable to have to do so. He did, however, qualified that statement by saying that there would be difficulties in view of the effects of his injuries.

I found in the alternative that the Plaintiff could take a sales job or a simple clerical job that did not require the extensive use of computers. This finding was supported by the evidence of Dr Ho King Hee and Dr Douglas Kong, who were the doctors still treating the Plaintiff. Further, Dr Pauline Cheong testified that most of her patients who had double vision were employed.

The Court recognised that it would be harder for the Plaintiff to find employment and that his salary

would probably be lower than any other person with his training and experience. The Plaintiff suffered from, *inter alia*, headaches, bruxism and myofascial pain dysfunction, and experienced uncoordinated eye movements and double vision (near vision double vision had since resolved). He also laboured under depression and post-traumatic syndrome disorder (PTSD). As such, the Plaintiff could not fairly be expected to compete and perform like any other member of the workforce who was not constrained by such physical conditions.

In view of the type of work that the Court found the Plaintiff could undertake, a reasonable pre-trial monthly salary that he should have earned in mitigation would be $1,500, and for the post-trial period, a monthly salary of $2,000 for the first 10 years and $3,000 for the 4 years thereafter would be fair.

Income Tax

The Court had to make provision for the Plaintiff's income tax liability and deduct it from his pre-trial and post-trial loss of earnings. With respect to the point on income tax, the Court of Appeal in *Teo Sing Keng* followed *British Transport Commission v Gourley* [1956] AC 185, which held that the Court "must do its best to arrive at a reasonable figure, even though it cannot be said to be an exact one."

Counsel for the Plaintiff submitted that the Court should deduct 1 to 2% to provide for the Plaintiff's income tax liability. The Defendant submitted that the Court should deduct 5% for pre-trial earnings and 2.5% for future earnings. In view of these submissions, the actual tax liability of the Plaintiff for Year of Assessment 2001 and taking a broad brush approach, I found a reasonable provision for income tax could be made by a 3% deduction from the Plaintiff's income (excluding CPF contribution).

The detailed calculations for the award for loss of pre-trial and future earnings were as follows:

Calculation for pre-trial loss of earnings

December 2000

Salary	$6,500	
Add bonus ($6,000 - $2,500)	$3,500	
	_____	$10,000
Less income tax (3% on 80% of $10,000)		$240
		_____
		$9,760
Add CPF 12% on $10,000		$1,200
_ _ _ _ _ _ _		
		$10,960

January to December 2001

Salary and bonus ($6,500 x 13)	$84,500	
Less		
Mitigation (from July 2001 @ $1,500 p.m.	$9,000	
for 6 months)		$75,500

January to December 2002

Salary and bonus ($6,500 x 13)	$84,500	
Less		
Mitigation ($1,500 x 13)	$19,500	
		$65,000

January to September 2003

Salary ($6,500 x 9)	$58,500		
Less			
Mitigation ($1,500 x 9)	$13,500		
		$45,000	
			$185, 500
Less income tax (3% on 80% of $185,500)		$4,452	
			$181,048
Add 16% CPF on $185,500		$29,680	
			$210,728

October to December 2003

Salary and bonus ($6,500 x 4)	$26,000		
Less			
Mitigation ($1,500 x 4)	$6,000		
		$20,000	
January to mid-February 2004			
Salary and bonus ($6,500 x 1.5)	$9,750		
Less			
Mitigation ($1,500 x 1.5)	$2,250		
		$7,500	
		$27,500	
Less income tax (3% on 80% of $27,500)		$660	
		$26,840	
Plus 13% CPF on $27,500		$3,575	
			$30,415
Total loss of pre-trial earnings	*$252,103*		
Calculation for loss of future earnings			
First 10 years			
Salary and bonus ($7,300 x 13 x 10)	$949,000		
Less			
Mitigation ($2,000 x 13 x 10)	$260,000		
		$689,000	

Less income tax (3% on 80% of $689,000)		$16,536	
			$672,464
Add 13% CPF on $689,000		$89,570	
			$762,034
Next 4 years			
Salary and bonus ($9,000 x 13 x 4)	$468,000		
Less			
Mitigation ($3,000 x 13 x 4)	$156,000		
			$312,000
Less income tax (3% on 80% of $312,000)		$7,488	
	$304,512		
Plus 13% CPF (but capped at $715 p.m.)		$37,180	
			$341,692
Total loss of future earnings		*$1,103,726*	

Whether Plaintiff reasonable to refuse squint surgery/surgeries

The Defendant took the position that the Plaintiff should mitigate his damages by going for a squint surgery. They relied on Dr Low Cze Hong's evidence that surgery would not worsen the Plaintiff's condition and that it would make him look better cosmetically. Further, it was argued that any

degree of success was likely to reduce the Plaintiff's headaches. The Defendant also relied on Dr Pauline Cheong's evidence that the success rate of the squint surgery would be between 60 to 70%. Finally, the Defendant contended that the Plaintiff had a non-paralytic squint and therefore his chances of success would be even better.

With respect, the Defendant was selective in considering Dr Low's evidence. Dr Low also said that the result of squint surgeries would be hard to predict and many risks would have to be managed. Moreover, he testified that the Plaintiff would need at least 2 surgeries and that the functional disturbances might still remain after such surgeries. Dr Cheong similarly gave evidence that the Plaintiff might need more than 1 surgery. She was not asked about the risks associated with such surgeries but she pointed out that her patients would usually wear prisms and elect other non-surgical options to deal with the squint. Only the minority would opt for surgery.

In *Selvanayagam v University of the West Indies* [1983] 1 All ER 824, the Privy Council held that in considering whether a Plaintiff acted reasonably in refusing an operation, the Court would look at all the circumstances of the case, including particularly the medical advice received. The burden was on the Plaintiff to show that he acted reasonably and that he did not breach his duty to mitigate his damages by refusing surgery.

In this case, I found that the Plaintiff had discharged this burden, whether or not his was a paralytic squint. The Plaintiff refused surgery after being advised by Dr Low (NE 20 August 2003 at page 25 paragraphs 19 to 23). The Plaintiff's view that the trauma and risks of the squint surgeries far outweighed the possible benefits was reasonable since the medical evidence was that his double vision could never be fully corrected, no matter how successful the surgeries. This was due to a fusional range deficit that could not be corrected. There was also the evidence of Dr Yeo Poh Teck that surgery would "not be very useful and [he would] not recommend it".

The nature of the Plaintiff's squint and future medical expenses

The nature of the Plaintiff's squint would affect the multiplier that the Court would adopt in awarding costs for future medical treatment. The Plaintiff's case was that the squint was caused by a structural brain injury whereas the Defendant's case was that the Plaintiff had a latent squint that was decompensated by the accident.

The Plaintiff relied on the opinion of Dr Low Cze Hong, Dr Ho King Hee, Dr Raymond Phua and Dr Yeo Poh Teck, who gave evidence that the Plaintiff's double vision was caused by a 6th nerve palsy. The evidence of the doctors was supported by MRI findings, which indicated the presence of haemosiderin deposit in the left pons of the Plaintiff. Another doctor, Dr Yeo Tseng Sai, was of the opinion (see PB 197, paragraph 3) that the pontive scarring seen on the MRI scans was attributable to the Plaintiff's head injuries. I accepted the views of the doctors, in particular Dr Yeo Poh Teck, who came across as a very impartial and competent witness. On the whole, the evidence was that the haemosiderin deposit could be related to the Plaintiff's complaints of visual disturbances. Further, the result of a blink reflex test conducted by Dr Ho could be co-related to the abnormalities observed on the MRI scans. I noted also that both the MRI scans and the blink reflex test were objective tests, and that the results from these tests were consistent with the clinical picture presented by the Plaintiff.

I did not accept the evidence of Dr Yeow Yew Kim, the Defendant's medical expert, who was the only doctor who took the view that the Plaintiff had a latent squint that was decompensated by the accident. He alternated between saying that the dot seen on the MRI scans represented "an abnormality" (NE 27 November 2003 at p 45, lines 16 to 17; NE 15 Jan 2004, p 7 lines 12 and 23) and that it appeared normal (p 47, lines 21 to 22) and did not represent an injury to the brain. He also

said that the MRI scans did not show any haemosiderin deposit and that the dot could be "anything". He further took the view that the dot could be there for "any reason". I noted that Dr Yeow did not and could not provide any acceptable explanation for the existence of the dot nor any reasonable basis for his opinion that the dot was not caused by the accident.

Further, Dr Yeow testified that the dot showing on the MRI scans could not represent injuries that caused the Plaintiff's double vision as it was not found at a location that would cause such a condition. However, I favoured Dr Ho's explanation that the dot represented only the "tip of the iceberg" as far as the Plaintiff's brain injury was concerned, and that the impact of the injury was greater than what we could see from the MRI scans. This view would be in line with the opinion of the majority of the doctors.

I therefore found the Plaintiff's squint to have an organic basis. As such, he would need medical attention for certain aspects of his condition for the rest of his life. In this regard, I adopted a multiplier of 16 for his treatments (by Dr Ho) for headaches, and for his treatment (by Dr Tay) for bruism and myofacial pain dysfunction. I adopted a multiplier of 8 for his treatment by Dr Kong for PTSD. This would be reasonable in view of Dr Kong's evidence that if the squint and headaches were a result of the Plaintiff's brain injury, long-term treatment would be required. He estimated the treatment to last 5 to 10 years for practical purposes, or for the rest of the Plaintiff's life.

In relation to the multiplicand to adopt for the monthly treatments by Dr Ho and Dr Kong, I took the average monthly medical costs incurred previously and rounded it upwards to the nearest hundred. From the evidence, it would be reasonable to award a multiplicand of $600 per month. For the treatment by Dr Tay, it would be reasonable to use a multiplicand of $350. I allowed the Plaintiff 3 visits annually for the first 5 years, 2 visits annually from the 6th to 10th year and 1 visit annually for the 11th to 16th year. This would be reasonable in view of Dr Tay's opinion that the number of reviews required each year would be reduced as the Plaintiff's condition stabilised or improved. The detailed calculations for future medical expenses were as follows:

Calculation for future medical expenses

Headaches and pain management		
$600 p.m. x 12 months x 16 years		$115,200
PTSD and depression		
$600 p.m. x 12 months x 8 years		$57,600
Bruism and myofacial pain dysfunction		
$350 per visit x 3 times each year x 5 years	$5,250	
$350 per visit x 2 times each year x 5 years	$3,500	
$350 per visit x 1 time each year x 6 years	$2,100	
		$10,850

Total future medical expenses *$183,650*

Future transport expenses

I divided the period of award for future transport expenses into 2 as the Plaintiff would not be consulting with Dr Kong from the 9th year onwards. On the evidence, I found it fair to make the following award:

For first 8 years

$25 per round trip x 36 trips each year x 8 years $7,200

For the next 8 years

$25 per round trip x 24 trips each year x 8 years $4,800

Total future transport expenses *$12,000*

Summary of award

The Court ordered as follows:

1. By consent, pre-trial medical expenses were assessed at $60,411.66;

2. By consent, pre-trial transport expenses were assessed at $4,575;

3. By consent, pain and suffering was assessed at $75,000;

4. Loss of pre-trial earnings was assessed at $252,103;

5. Loss of future earnings was assessed at $1,103,726;

6. Future medical expenses were assessed at $183,650;

7. Future transport expenses were assessed at $12,000;

8. Interest at the rate of 6% for general damages (except for loss of future earnings and future medical and transport expenses) from the date of the writ to the date of judgment, and at 3% for special damages from the date of accident to the date of judgment;

9. The Defendant to pay the Plaintiff costs of the assessment to be taxed if not agreed; and

10. The usual and consequential order to apply.