

HONG KONG / JUDGMENT

SIU WING CHUEN v. KA HING TRANSPORTATION ENGINEERING CO LTD

COURT

Court of First Instance

DECIDED

28 February 2007

CASE / FILE NUMBER

HCPI994/2004

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1. This is an application for assessment of damages. The notice of today s hearing has been served on the Defendant, but he was absent. The Plaintiff proceeded to prove his damages.
 2. The Plaintiff gave evidence himself and had not called any other witness. Medical reports were produced without calling the makers in accordance with the direction of Master B. Kwan given on 13th June 2006.

Background

3. According to the evidence of the Plaintiff, at all material times he was employed by the Defendant as a vehicle attendant-cum-transportation worker.
4. On 5th August 2003, the Plaintiff was instructed by the Defendant to work at Ka Hing Car Park in Tung Chung. His duty included delivering some pre-cast building parts from container truck to crane truck. He was responsible for climbing onto the container truck and then to the top of the pre-casted building parts to hook them with the hook of the crane truck for hoisting them up. The Defendant did not provide him with a ladder for climbing and he had to use some metal bars as a ladder to climb onto the top of the building parts. When he was climbing these bars to get to the top, he slipped and fell down to the ground from a height of about 15 feet and suffered injuries.
5. The Plaintiff took out these proceedings to recover his loss and damage. Interlocutory judgment has been entered for the Plaintiff against the Defendant for damages to be assessed. The Injuries and Treatment

6. According to his evidence, the Plaintiff could not move for about 2 to 3 minutes after the accident. He then rested for 10 minutes and left to see a bonesetter. Later in the evening, he felt great pain and was taken to Yan Chai Hospital for treatment. He was hospitalized until 10th August 2003 but did not receive any operation.
7. From 1st to 9th September 2003, the Plaintiff was admitted to hospital again for examination of his right leg. It was found that the bone of his right lower leg was fractured. No operation was done. He was followed up at the Orthopedic Department of Yan Chai Hospital and received physiotherapy treatment from August 2003 to March 2004, 3 times a week.
8. Since April 2004, the Plaintiff was referred to have occupational therapy at Princess Margaret Hospital for 3 months, 3 times a week. In or about July 2004, the Plaintiff was referred to the Orthopedic Department of the North District Hospital for continued treatment.
9. In September 2004, the Plaintiff was referred by the North District Hospital to Princess Margaret Hospital for physiotherapy treatment. He received treatment on a regular basis till August 2006. He attended regular follow up treatment with the Orthopedic Department of North District Hospital every one to two months until November 2006.
10. The Plaintiff has been referred to the ANA Review Clinic in Tai Po since December 2006 and is still receiving treatment. He had painkiller for relieving the persistent pain in his right knees.
11. Since the date of the accident, the Plaintiff was given sick leave until 16th January 2006.
Medical Evidence
12. A number of medical reports were produced including two medical reports on the condition of the Plaintiff prepared by Dr. Lau Hoi Kuen. In the 2nd report of Dr. Lau dated 9th May 2006, it is noted that the Plaintiff when attended the North District Hospital, he was found to have marked quadriceps wasting of his right knee, tenderness around the patella and medial femoral condyle as well as limitation of the end range of flexion and extension movement of his right knee. The diagnosis was crack fracture of lateral tibial plateau complicated by complex regional pain syndrome.
13. In spite of a long period of physiotherapy, the Plaintiff had persistent pain in his right knee. Right knee arthroscopy shows pathological medial plica, old small chondral lesion, and osteomalacia change over medial facet of patella.
14. The Plaintiff has pain in the right knee, of grade 6-7/10 at rest and increase to 10/10 by walking for 10 minutes, stepping into a shallow depression on the ground, sudden stop or turning of his body during walking, and climbing slopes and stairs. The pain is disturbing his sleep for 3 to 4 night a week. He had weakness of his right leg and he had to use a stick as walking aid.

15. Dr. Lau was of the view that the prognosis for the Plaintiff's right knee injury must be considered as poor. Most, if not all of his problem would be permanent. Dr. Lau opined that the Plaintiff suffered 15% impairment of the whole person. He cannot return to his pre-injury job as a transportation worker. At the best, he can only have sedentary jobs such as cashier or lift operator. He opined that the Plaintiff suffered 15% loss of earning capacity.
16. I accept the opinion of Dr. Lau on the injuries of the Plaintiff. Special Damages
17. The Plaintiff claims a total of \$20,929.40 for the special damages he suffered, including medical fees, transportation to and from hospital, and tonic food. The sum has been slightly reduced by his solicitor, Ms. Chan, to \$18,164.40 and the detail has been set out in the skeleton submission of solicitor. I do not intend to repeat the particulars of the items. There is no receipt for the tonic food purchased. Given for the length of the treatment period, a sum of \$5,000 would be reasonable.
18. In conclusion, I award special damages to the Plaintiff for the sum of \$14,164.40. Damages for PSLA
19. Solicitor for the Plaintiff submitted that the award should be in the region of \$400,000. She relied on 2 High Court cases, Luk Chi Yin v. Wong Fung Shing, HCPI 496 of 1997 and Lai Chi Ming v. Ng Pak Chuen and Li Brothers Container Service Limited, HCPI 1085 of 1999.
20. As in all assessment cases, no case is on all four with the facts of any case under review. The authority cited would helpfully provide me with some indication of how the damages should be assessed. Having taken into account the medical evidence, I am satisfied that the Plaintiff's injuries fall within the lower end of the serious injury category. The Plaintiff has not been hospitalized and there is no operation. But the out patient treatment is a long process.
21. Balance all the factors, I agree with Ms. Chan that the award for PSLA should be \$400,000. Loss of Earnings
22. According to the evidence of the Plaintiff, before the accident, he was paid \$300 a day by the Defendant, working between 8 a.m. to 6 p.m. Usually he had to work overtime for one hour at \$50 per hour. He had to work each day except Sunday and public holidays. His average monthly income was \$8,925, being $(300 + 50) \times [(25+26)/2] = 8,925$. I accept the evidence of the Plaintiff that his pre-trial earning was \$8,925 per month.
23. The Plaintiff was granted sick leave up to 16th January 2006. He had no income from date of accident to 16th January 2006 and should be so compensated.
24. The Plaintiff has not been able to find any work and is still unemployed. I accept the submission that he should be allowed 3 years from date of accident to recover and to find a new job. Hence, he should be compensation at his former salary from 5th August 2003 to 4th August 2006.

25. According to the expert opinion of Dr. Lau, the Plaintiff could not return to his pre-accident work. The Plaintiff accepted that he should be able to take up sedentary work as a cashier or caretaker.
26. It is difficult to assess the pay that the Plaintiff could earn and his solicitor suggested a sum of \$5,000 would be appropriate. I accept the sum would reflect the earning of a cashier or caretaker. The loss of earning of the Plaintiff is \$(8,925
- 5000) = \$3,925 per month after 5th August 2006.
27. The Plaintiff's pre-trial loss of earning is 5/8/03 4/8/06: $\$8,925 \times 36 = \$321,300$ 5/8/06 5/2/07: $\$3,925 \times 6 = \$23,550$
28. The Plaintiff was 37 when I am writing this judgment. The Plaintiff sought to use the multiplier of 14 for assessing his future loss of earning. Ms. Chan relied on *Kwan Wing Sang v. Chi Chiu Engineering Co. Ltd.* HCPI 1045 of 1995. The victim therein was also aged 37 at the time of trial, and was a driver and delivery worker. In the *Lai Chi Ming*'s case, the victim was aged 33 at the time of trial, and he was a driver-cum-delivery worker.
29. I bear in mind that the Plaintiff is not a driver. He is a vehicle attendant and transportation worker. He is more a manual worker and I expect his years of working as such is shorter than the victims in the 2 cases quoted. I therefore adopt the multiplier of 12. The post-trial loss of earning of the Plaintiff is $(\$3,925 \times 12 \times 12) = \$565,200$. Loss of Earning Capacity The Plaintiff is seeking loss of earning capacity, as he would have difficulty in finding suitable job. According to his evidence, he had been looking for jobs but is yet not successful. I accept the opinion of Dr. Lau that he suffered a loss of 15% earning capacity. I accept that the injury of the Plaintiff has an adverse effect on his ability to look for alternative job. It could be compensated by a period to reflected the longer period required to look for laternative job. Ms. Chan suggested a sum of \$100,000 which represents 20 months earning. I consider that on the high side. A period of 12 months would be reasonable and I therefore award \$60,000 for the loss of earning capacity. Loss of Provident Fund
31. The Plaintiff would be entitled to the employer's contribution to mandatory provident fund. I assessed the pre-trial loss at \$17,242.50 and the post-trial loss at \$28,260. Future Expenses
32. The Plaintiff is receiving treatment at ANA Review Clinic and it is anticipated that he would visit the Clinic 8 times a year, for a period of 5 years. He only claimed traveling expenses. I accept his evidence and allow the sum claimed at \$680. Set off against ECC Award
33. The Plaintiff claimed against the Defendant for compensation under the Employer Compensation Ordinance. In DCEC 506 of 2004, Deputy Judge Poon granted a judgment to the Plaintiff against the Defendant for \$331,234. Upon reading the judgment, His Honour Judge Poon has taken into account the payment already made by his Defendant before the award was granted. The sum recovered by the Plaintiff under the Employee Compensation Ordinance is \$339,834 and this amount should be set off against the common law damages. Summary of the Sums Awarded Special Damages \$14,164.40 PSLA \$400,000.00 Pre-trial loss

of earning \$344,850.00 Post-trial loss of earning \$565,200.00 Loss of earning capacity \$60,000.00 Loss of Provident Fund Pre-trial \$17,242.50 \$45,502.50 Post-trial \$28,260 Future Expenses \$680.00 Less ECC award (\$339,834.00) Total: \$1,090,562.90 Interest

34. There be interest on PSLA at 2% per annum and at half judgment rate on pre-trial damages from date of service of the writ to judgment.
35. The Plaintiff should have costs of the assessment to be taxed if not agreed and the Plaintiff's own costs be taxed in accordance with Legal Aid Regulations. (Roy Yu) Master Ms. C. Chan of Messrs. Leung, Chan & Pang for the Plaintiff. Ka Hing Transportation Engineering Company Limited, the Def 1udk 1udk oR%TH~2 oR%T & 6" Normal.dot setup Microsoft Word 9.0 Judiciary Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 24 October 2026 · Esheria