Ong Zern Chern Philip v Wong Siang Meng
[2004] SGHC 256

Case Number : Suit 53/2004
Decision Date : 12 November 2004
Tribunal/Court : High Court
Coram : Gillian Koh Tan AR
Counsel Name(s) : Andrew Hanam (Attorneys Inc) for plaintiff; Nagaraja S Maniam (Just Law LLC) for defendant
Parties : Ong Zern Chern Philip — Wong Siang Meng

12 November 2004 *Judgment reserved.*

AR Gillian Koh Tan:

1 The plaintiff, a tank commander in the Singapore Armed Forces ("the SAF"), is presently 26 years old. The plaintiff was injured in a road traffic accident on 28 March 2001 when a car collided into his motorcycle while he was riding along the Pan Island Expressway. The car was driven by the defendant and the plaintiff brought the present suit against the defendant, claiming damages arising from the accident. Interlocutory judgment was entered against the defendant on 16 April 2004.

Agreed claims

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

General damages

Retrograde amnesia with headaches	$5,000.00
Right temporal bone fracture	$18,000.00
Abrasion over the back of the upper right arm	$1,500.00
Right clavicular fracture	$12,000.00
Bruise over left knee and torn posterior cruciate ligament	$10,000.00
Neck pain with residual symptoms	$1,500.00
Scarring	$4,000.00

Early osteoarthritis of the left ankle and knee	$5,000.00

Special damages

Pre-trial medical expenses	$1,625.10
Pre-trial transportation expenses	$314.70
Damaged handphone	$246.39
Damaged motor cycle gloves	$280.00

Disputed claims

3 A number of claims remained in dispute, including loss of future earnings and loss of earning capacity. In addition, the defendant disputed three heads of special damages involving certain sums payable to the SAF upon the termination of the plaintiff's employment.

Background facts

4 It was undisputed that the plaintiff had enlisted in the SAF under the Joint Polytechnic-Singapore Armed Forces Diploma Scheme ("the JPSD Scheme"). Under the terms of the JPSDS Scheme, the SAF paid the plaintiff's diploma course fees and provided the plaintiff with a monthly allowance while he was a student at the Nanyang Polytechnic. In consideration of this, the plaintiff covenanted to work with the SAF for a period of six years. The plaintiff graduated with a Diploma in Information Technology in May 1999 and commenced employment with the SAF on 31 May 1999. His bond period will therefore expire on 31 May 2005.

5 Prior to the accident, the plaintiff was a tank commander. The plaintiff's Physical Employment Status ("PES") was PES B and he was therefore classified as "fit for most vocations".

6 As a result of the accident on 28 March 2001, the plaintiff suffered a disruption of the left ankle syndesmosis and a fracture of the right clavicle. He also sustained a torn posterior cruciate ligament in his left knee. The plaintiff's medical expert, Dr Yeo Khee Quan ("Dr Yeo"), an orthopaedic surgeon in private practice, testified that the plaintiff suffered from neck pain whenever he remained in a sitting position for more than 20 minutes. Dr Yeo further noted that the plaintiff's complaints of neck pain were supported by objective clinical evidence such as muscle spasms. Dr Yeo also confirmed that the plaintiff had difficulty squatting, running and jumping, and was unable to carry weights of more than 10kg as a result of the accident.

7 Due to these injuries, the plaintiff was downgraded to PES E9L9 and classified "unfit for any form of physical activities" and "suitable for sedentary duties at bases" in February 2003. Following this, the plaintiff was given a one-year reprieve from termination in the hope that his medical condition would improve. His PES was, however, revalidated by the SAF on 26 April 2004.

8 I should point out that the plaintiff was involved in a second road traffic accident on 20 March 2004. However, Dr Yeo testified that this second accident did not in any way affect the

injuries to the plaintiff's ankle, shoulder and collarbone caused by the first accident. I also noted that the defence did not submit that certain injuries should be disregarded for the purposes of the assessment due to the second accident.

The plaintiff's claim for loss of future earnings and loss of earning capacity

9 The plaintiff's claim for loss of future earnings was in respect of a gratuity of $31,716.92 payable under the SAF's Specialist Account to Reward Ten Years Engagement ("START") scheme. In support of this claim, the plaintiff led evidence from Major Lai Wing Chong ("Major Lai"), Head (Career Planning) in the SAF, who testified that the START scheme formed part of the plaintiff's benefit package as a military warrant officer and specialist. Major Lai confirmed that the plaintiff would be entitled to the gratuity on the completion of ten years' employment with the SAF, i.e. on 31 May 2009.

10 The plaintiff also sought an award for loss of earning capacity. Counsel for the plaintiff submitted that the plaintiff had a long working life ahead of him and highlighted the fact that the plaintiff's vocational training as a tank commander had been rendered useless by the accident. Looking forward, the plaintiff would not be able to work in jobs which were physically demanding or which would require him to sit for long periods of time, as Dr Yeo had indicated in his evidence.

11 Counsel for the plaintiff also submitted that while the plaintiff had a Diploma in Information Technology, the plaintiff was unlikely to earn more than $1,600 per month if he worked as a computer technician. This estimate was based on the Ministry of Manpower's figure for the median monthly gross wage for a computer technician as of June 2003, which was $1,917. In respect of the appropriate quantum to award for loss of earning capacity, counsel for the plaintiff urged me to adopt the multiplier/multiplicand approach that is generally used in loss of future earnings cases. It was argued that an appropriate multiplicand was $12,000 (based on the plaintiff earning $1,000 less than his present salary of $2,800 each month) and that an appropriate multiplier was 18. Counsel therefore submitted that an award of between $216,000 to $224,000 for loss of earning capacity should be made.

12 At this juncture, I should point out that at the time of the assessment of damages hearing, the plaintiff was still employed by the SAF. The defendant highlighted this and submitted that the plaintiff had not shown that there was a real and substantial risk that the plaintiff's contract of employment would be terminated. The defendant therefore urged me to make nil awards for loss of future earnings and loss of earning capacity. The defendant submitted, in the alternative, that if an award for loss of earning capacity was to be made, an appropriate award would be $72,000, based on *Mukhtiar Singh v Belwyndarjeet Singh* [1993] 3 SLR 741 which the defendant submitted was "*in pari materia*" with the present facts.

13 I now turn to the disputed issue of whether there was a real and substantial risk that the plaintiff's contract of employment would be terminated.

Whether there was a real and substantial risk that the plaintiff's contract of employment would be terminated

14 In assessing the arguments raised by both parties on this point, I was guided by the following passage from Warren Khoo J's judgment in *Soon Pook Seng Arthur v Oceaneering International Sdn Bhd* [1995] 3 SLR 531; [1995] SGHC 146 at [58]:

> The only thing certain about the future is that it is fraught with uncertainties. One cannot deal

with it on the basis of a finding, based on one's view as to what would be or what would have been likely. *So long as there is or was a fair possibility, as opposed to a mere fanciful speculation, that something will or would have happened, that possibility must be taken into account, with due allowance made for the possibility that it might not happen or that it might not have happened.* There need not be an 'all or nothing' sort of dilemma. A solution can and should be found somewhere in between. [Emphasis added]

15 Applying these principles to the present case, I was of the view that the evidence revealed that it was highly likely and indeed almost certain, that the plaintiff's employment with the SAF would be terminated. In this regard, I took into account Major Lai's evidence that the SAF had already begun to process the termination of the plaintiff's employment. Specifically, Major Lai explained that a joint decision had been made by the SAF's Career Planning Department and the plaintiff's parent unit to adopt a particular termination approach. This was likely to lead up to the giving of notice to the plaintiff on 1 November 2004.

16 I further noted Major Lai's testimony that, barring any "compelling reasons", the plaintiff's employment would be terminated in January 2005. When asked by counsel for the plaintiff to elaborate on this, Major Lai said that while it would be possible for the plaintiff to appeal against the SAF's decision to terminate, he could not see, "from the SAF's viewpoint", any compelling reason to extend the plaintiff's employment. I also noted the evidence given by Major Lai in cross-examination:

DC: Is there any possibility in your opinion that the SAF is prepared to extend the period of termination?

PW3: I cannot see any compelling reason to keep him in service. The SAF has already given him a reprieve period and taken into account his absence from work where he continued to draw a regular combat pay. Looking at his medical status, I could not find any compelling reason why we should extend.

DC: It is not that the plaintiff cannot work in an administrative job, for example. It is that he cannot remain in the job vocation he was recruited under?

PW3: He was recruited under the vocation of Tank Leader. That is his primary duty. He has not been able to fulfil his primary duty. Because of his medical status, he is excused from all physical activities, so there are no compelling reasons to keep him in the SAF further.

DC: Did the plaintiff approach SAF to ask for SAF to revocationalise him?

PW3: There is no record that the plaintiff has officially approached SAF. However, at E9L9 status, there is no vocation in the SAF that can accommodate him.

17 In light of the evidence presented, I disagreed with the defence's suggestion that the plaintiff had not shown a substantial and real risk that his employment would be terminated in January 2005. Indeed, the evidence clearly showed that termination was imminent and that the plaintiff's employment with the SAF would be terminated in January 2005.

Loss of earning capacity or loss of future earnings?

18 It is trite law that compensation for loss of future earnings is awarded for real assessable loss which can be proved by evidence at trial: *Teo Sing Keng and another v Sim Ban Kiat* [1994] 1 SLR 634; [1994] SGCA 20, *Moeliker v A Reyrolle & Co Ltd* [1977] 1 All ER 9 and *Fairley v*

John Thompson (Design & Contracting Division) Ltd [1973] 2 Lloyds Rep 40.

19 In *Teo Sing Keng and another v Sim Ban Kia,* the following passage from Syed Agil Barakbah FJ's judgment in *Ong Ah Long v Underwood* [1983] 2 MLJ 324 was endorsed by the Court of Appeal:

> Now, the general principle is that an injured plaintiff is entitled to damages for the loss of earnings and profits which he has suffered by reason of his injuries up to the date of the trial and for the loss of the prospective earnings and profits of which he is likely to be deprived in the future. *There must be evidence on which the court can find that the plaintiff will suffer future loss of earnings, it cannot act on mere speculation*. If there is no satisfactory evidence of future loss of earnings but the court is satisfied that the plaintiff has suffered a loss of earning capacity, it will award him damages for his loss of capacity as part of the general damages for disability and not as compensation for future loss of earnings. [Emphasis added]

The START gratuity

20 I was of the view that the plaintiff's loss of the START gratuity was a real assessable loss which was supported by available evidence and which could not be regarded as speculative in nature. The START gratuity was not a performance bonus or some other type of bonus which was dependent on a plethora of disparate and speculative factors. In fact, the only pre-condition which had to be satisfied for the START gratuity to be paid out was that the plaintiff was still working for the SAF on 31 May 2009. I could see no reason to doubt that, but for the injuries suffered as a result of the accident, the plaintiff would still be employed by the SAF on that date.

21 In my view, Major Lai's quantification of the START gratuity was a fair and accurate one as his estimate was based on the assumption that the plaintiff would be promoted only once between the present and May 2009. I accepted Major Lai's evidence that this was a realistic projection. Bearing in mind, however, that the plaintiff would receive the sum awarded for loss of future earnings in a single lump sum, it was necessary to make an appropriate discount for the usual contingencies and for the value of a lump sum in advance. I therefore assessed the plaintiff's loss of future earnings at $29,000.

Other loss of earnings

22 The plaintiff's claim under the head of loss of earning capacity was premised on the assertion that the plaintiff, while currently still employed by the SAF, would be disadvantaged in the job market if he were to lose his job, due to his injuries sustained in the accident. In light of my earlier finding that the termination of the plaintiff's employment with the SAF was imminent, this claim might have been assessed as future loss of earnings. However, I was of the view that there was no satisfactory evidence of future loss of earnings, such as evidence of an alternative job offer made to the plaintiff, for example. This made it difficult to ascertain, with any measure of precision, what the plaintiff's loss of earnings would be.

23 However, I was of the view that an award for loss of earning capacity was appropriate as there was a substantial risk that the plaintiff would lose his current job and would then be at a disadvantage in finding another job or an equally well-paying job as a result of his injuries: *Teo Sing Keng and Another v Sim Ban Kiat* [1994] 1 SLR 634 at [40]. It is established law that the plaintiff should be compensated for loss of earning capacity where there is clear evidence that he would not earn as much in the future, but there is nevertheless no measurable annual loss to find an award for loss of future earnings on a multiplier/multiplicand basis: *Ariffin bin Omar v Goh Beng Kee & Anor*, unreported, Suit 1063 of 1988 at p 83.

24 In connection with this, I noted Major Lai's testimony that the plaintiff's PES E9L9 certification meant that he would not be able to work as a tank commander or indeed, in any military vocation. I also accepted Dr Yeo's evidence that the plaintiff continues to face difficulty sitting or walking for extended periods of time, cannot lift heavy objects, has pain and instability in his left knee and persistent neck pain. In my view, this would make it extremely difficult for the plaintiff to take on jobs which are even remotely physically demanding or clerical jobs which required the plaintiff to be seated for prolonged periods of time. While the plaintiff's injuries are not of such a degree to prevent him from engaging in paid employment altogether, only a limited range of jobs are now open to him and he would certainly earn less once he lost his job with the SAF. In my view, the plaintiff would be at a distinct disadvantage in obtaining a job with similar remuneration to that which he currently enjoys.

25 I was not, however, persuaded by the submissions of counsel for the plaintiff that I should adopt a multiplier/multiplicand approach to assess the plaintiff's loss of earning capacity. It is established law that loss of earning capacity is assessed "in the round" and the courts have generally held that it is inappropriate to adopt the multiplier/multiplicand approach to the assessment: *Chang Ah Lek v Lim Ah Koon* [1999] 1 SLR 82 at [27]. Thus, in *Smith v Manchester Corporation* [1974] 17 KIR 1, Lord Scarman opined that:

> It is clearly inappropriate, when assessing this element of loss [of earning capacity], to attempt to calculate any annual sum or to apply to any annual sum so many years' purchase. The Court has to look at the weakness so to speak "in the round", take a note of the various contingencies, and do its best to reach an assessment to do justice to the plaintiff.

26 In determining an appropriate award for loss of earning capacity, I took into account the fact that the plaintiff would not be able to engage in military-related work again and would never be able to rejoin his current military employment "salary track" along which he had been progressing since his graduation over five years ago. His vocational training as a tank commander is now wholly useless to him as he will be unable to work in the military. I also accepted Dr Yeo's evidence that a number of the plaintiff's disabilities, including the neck pains, the pain in the right clavicle and his inability to sit for extended periods, are likely to be permanent.

27 I also took into account the award of $75,000 made in *Mukhtiar Singh*. In this case, the 21-year old plaintiff suffered injuries to the right upper arm and lost his right thumb, resulting in a 50% loss of the function of his right hand. He was downgraded from PES A to PES C2 and was no longer able to perform his duties as a RSAF aircraft technician. The RSAF offered to revocationalise the plaintiff as a clerk or librarian. Some five years after the accident, the plaintiff's wage was $1,288.76 per month. A lump sum payment of $76,000, which included a sum of $4,000 for any possible loss of gain from overseas assignments, was awarded for loss of future earnings.

28 As I noted earlier at [12], counsel for the defendant submitted that an appropriate award for loss of earning capacity was $76,000, an equivalent sum to that awarded in *Mukhtiar Singh.* The plaintiff countered that a higher sum should be awarded as the plaintiff in *Mukhtiar Singh* was earning a monthly gross wage of $1288.76, whereas the plaintiff currently earns $2800 per month. The plaintiff also urged me to consider that his injuries were "more extensive" than those suffered by the plaintiff in *Mukhtiar Singh*.

29 While I agreed that the plaintiff in the present case suffered injuries in a greater number of localities than the plaintiff in *Mukhtiar Singh*, I did not agree that the present plaintiff's injuries were likely to disadvantage him to a greater degree in the employment market, as compared to the injuries suffered by the plaintiff in *Mukhtiar Singh*. While the present plaintiff suffered certain disabilities, he

has not lost the central function of his limbs, unlike the plaintiff in *Mukhtiar Singh* who lost 50% of the function of his right hand, an essential body part in almost any type of employment.

30 As to the difference in wages between the present plaintiff and the plaintiff in *Mukhtiar Singh*, it appears from the judgment in *Mukhtiar Singh* that the likely decrease in income was approximately $600 (derived by subtracting $700 – the monthly wage of a security guard – from the plaintiff's monthly gross wage of $1288.76). Counsel for the plaintiff in the present case submitted that the plaintiff was unlikely to earn more than $1,600 per month as a computer technician, based on the Ministry of Manpower figure for the median monthly gross wage of a computer technician. Using this figure supplied by the plaintiff, the plaintiff's likely decrease in monthly income would be $1,200 (derived by subtracting $1,600 from the plaintiff's current income of $2,800).

31 However, I did not accept that the plaintiff's prospects were as bleak as the picture painted by his counsel. As a holder of a Diploma in Information Technology, the plaintiff has marketable skills in information technology which he could easily harness to upgrade himself and to find employment in the information technology industry. While the median monthly gross wage for a computer technician is one factor which could be taken into account when assessing the plaintiff's loss of earning capacity, it was important to remember that this was but one possible job in the range of jobs in the employment market which would be available to the plaintiff. The plaintiff's intellectual abilities and his capacity for learning have not been impaired by the accident, and he could easily upgrade himself to take on a job with better remuneration prospects than that available to a computer technician, such as an computer systems operator or a computer programmer.

32 Taking into account future contingencies, the factors listed at [24], [26] and [29]-[31], the award in *Mukhtiar Singh,* as well as all the circumstances of the present case, I assessed the plaintiff's loss of earning capacity at $80,000.

Special damages

33 The plaintiff's claims for special damages were in respect of three sums which he will have to repay the SAF upon the termination of his employment in January 2005.

34 The first claim was for liquidated damages amounting to $1951.95 which the plaintiff would have to pay to the SAF due to his inability to complete the last four months of his bond period under the JPSD Scheme.

35 The second claim was in respect of an engagement bonus of $3,300 which the plaintiff had been paid when he signed on as a tank commander. The plaintiff would have to repay this sum to the SAF, together with interest and CPF contributions, making a total payment of $5,247.38.

36 Similarly, the third claim under special damages was for $1,153.07 which the plaintiff would have to refund to the SAF. This comprised a sum of $981 which was paid to the plaintiff under the SAF's Contracts Service Scheme, together with interest.

37 In respect of all three claims, Major Lai gave clear evidence that the plaintiff would have to refund the sums detailed above upon the termination of his employment in January 2005. His oral testimony was supported by documentary evidence exhibited in his affidavit of evidence-in-chief, including detailed calculations prepared on software used by the SAF in deriving the amounts payable to its employees under the various schemes. I therefore awarded the sums prayed for by the plaintiff, for a total award of $8,352.40.

Conclusion

38 In conclusion, I assessed the damages on a 100% basis to the plaintiff as follows:

Loss of future earnings	$29,000.00
Loss of earning capacity	$80,000.00
Special damages	$8,352.40

By consent

Pre-trial medical expenses	$1,625.10
Pre-trial transportation expenses	$314.70
Damaged handphone	$246.39
Damaged motor cycle gloves	$280.00
Retrograde amnesia with headaches	$5,000.00
Right temporal bone fracture	$18,000.00
Abrasion over the back of the upper right arm	$1,500.00
Right clavicular fracture	$12,000.00
Bruise over left knee and torn posterior cruciate ligament	$10,000.00
Neck pain with residual symptoms	$1,500.00
Scarring	$4,000.00
Early osteoarthritis of the left ankle and knee	$5,000.00

39 I awarded interest at 6% per annum from the date of service of the writ to the date of judgment on general damages for pain and suffering and loss of amenities. I awarded interest at 3% per annum from the date of the accident to the date of judgment on special damages already incurred.

40 The usual consequential orders will apply. I also made orders as to costs.