

Ho Wah Nam v Tan Kim Siang Luke
[2012] SGHCR 17

Case Number : Suit No 130 of 2010
Decision Date : 07 November 2012
Tribunal/Court : High Court
Coram : Tan Teck Ping Karen AR
Counsel Name(s) : Mr Prabhakaran Nair (Derrick Wong & Lim BC LLP) for the plaintiff; Ms Mak Wei Munn & Ms Jacqueline Chua Sin Yen (Allen & Gledhill LLP) for the first and second defendants; Mr Lek Siang Pheng & Mr Benjamin Yam (Rodyk & Davidson LLP) for the third defendants.
Parties : Ho Wah Nam — Tan Kim Siang Luke

Damages – Assessment

7 November 2012

Judgment reserved.

Tan Teck Ping Karen AR:

Background

1 The Plaintiff is a retiree and suffers a hearing ailment.

2 On or about 4 June 2008, the Plaintiff consulted the 1st Defendant, a Ear Nose and Throat Consultant, in respect of the hearing ailment. The 1st Defendant examined the Plaintiff and advised him to undergo a stapedectomy (“the procedure”).

3 The Plaintiff agreed to undergo the procedure and the procedure was scheduled for 5 August 2008 at the 3rd Defendant’s hospital. The 2nd Defendant was the anaesthetist who assisted in the procedure.

4 The Plaintiff went into cardiac arrest during the procedure and the procedure was aborted. The Plaintiff was resuscitated and was discharged from the 3rd Defendant’s hospital on 14 August 2008.

The issue in the Assessment of Damages

5 The Assessment of Damages was held pursuant to an Order of Court dated 1 December 2010, ordering that “[the] amount of damages to be awarded to the Plaintiff against any or all of the Defendants in this action at trial, be determined at trial before a Registrar pursuant to Order 36 Rule 1 of the Rules of Court without any finding of liability against any or all of the Defendants”.

6 Therefore, the role of the court in this assessment of damages is limited to the determination of the amount of damages to be awarded to the Plaintiff against any or all of the Defendants. It is not the role of this court to make any determination on the issue of liability.

The Plaintiff’s case

7 The Plaintiff's claim was for "... *pain, trauma and suffering as a consequence and been put to loss and expense [sic]. He has also suffered irreparable and permanent damage to his heart.*

PARTICULARS OF GENERAL DAMAGE

- (i) *The Plaintiff has suffered permanent and irreversible damage to his heart as a result of which he has now to live with a permanent fear of exerting himself in any way. It has affected his lifestyle and his ability to function as a healthy individual.*
- (ii) *He now suffers from fear and trauma of any kind of surgical procedure or intervention. He was so traumatized that he could not undergo an Open Heart Bypass Surgery (CABG) for fear that the anxiety would lead to another heart attack or cardiac arrest. The Plaintiff was also advised to undergo further invasive cardiac intervention procedures but because he was severely traumatized and afraid by his previous experience, he could not undergo the same. He finally underwent a Transthoracic Echocardiogram on the 3rd of November 2009 at the National University Hospital.*
- (iii) *Having literally come back from the dead, he is mentally traumatized and suffers from frequent headaches and pains. He has consulted psychiatrists and has been on prescription medication for anxiety, fear, depression and suffers from disruptive sleep.*
- (iv) *Future and continual medical care and expenses."*

The Defendants' case

8 It was the Defendants' case that the Plaintiff has not proven his case in damages, on a balance of probabilities, or at all.

The Law

Burden of Proof

9 It is trite law that the burden of proof lies with the Plaintiff to provide evidence that will support his claim for damages.

10 In *Cheong Ghim Fah and another v Murugian s/o Rangasamy* [2004] 1 SLR(R) 628 ("Cheong Ghim Fah") at [30], V K Rajah JC (as he was then) said:

It is axiomatic that in negligence cases, as in all other civil cases, the burden of proof lies on the plaintiff to establish facts that will precipitate a decision in his favour. Our courts deal with facts and do not base their decisions on considerations of sympathy.

11 The only witness called to give evidence on behalf of the Plaintiff was the Plaintiff himself. None of the doctors who examined the Plaintiff were called to give evidence on the Plaintiff's behalf, though their medical reports were included in the agreed bundle of documents.

12 In *Jet Holdings Ltd and others v Cooper Cameron (Singapore) Pte Ltd and another and other appeals* [2006] 3 SLR(R) 769 ("Jet Holdings") it was held by the Court of Appeal at [44] :

...However, it must be emphasised that whilst formal proof of the document concerned is dispensed with by an agreed bundle of documents, the *truth* of their contents will still have to be

proved in the absence of any agreement or admission to the contrary... [emphasis in the original]

13 The Court of Appeal in *Jet Holdings* went on to observe at [51] that:

...if these documents are in fact marked and admitted into evidence without that party in fact satisfying the requirements in the Evidence Act *and* where there has been *no objection taken by the other party at that particular point in time*, then that other party *cannot object* to the admission of the said documents later...[emphasis in the original]

14 It was clearly established during the hearing of the assessment of damages that there was no agreement between parties to dispense with the attendance of Plaintiff's doctors. The solicitors for the 1st and 2nd Defendants clearly stated that the medical reports of the doctors that had examined the Plaintiff had been agreed to only in respect of authenticity. There was no agreement as to the content of the medical reports. This point was brought to the attention of the Plaintiff's solicitor during the hearing:

Notes of Evidence, 25 June 2012, page 5, line 17-30 and page 6, line 1-25

1/2DC: I wish to make my client's position clear. Plaintiff's Counsel says that he has no experts and relies on the medical reports (MR). The MR are agreed to on authenticity and it is for the Plaintiff to prove his case and if he relies on the content of the report, he has to call the doctors to come and prove the report. The psychologist and psychiatrist that have seen him in the course of his medical treatment and management. As well as the cardiologist who has seen him and who can give evidence on his heart condition. Apart from expert witnesses, these are witnesses of fact. The purpose of Dr Lim and Dr Cheok was to deal with the Plaintiff's evidence. If the Plaintiff has no objective evidence on his medical condition, then we can be done with the hearing quickly but I will have to put my client's position on the medical evidence to the Plaintiff when they could be more appropriately be put to his treating doctors.

PC: Dr YT Lim report makes clear reference to the body of medical reports that was forwarded to him by the Defendants and he studied it and put up his reports. I do not see why we should be calling all these doctors when Dr Lim had relied on these doctors. This attempt to ask me to call all these doctors is an attempt to thwart the case. There were no issues raised by them on these reports and we saw no need to call these doctors to give evidence on reports that the Defendants rely on.

Ct: Was there any agreement between parties that the Plaintiff's doctors do not need to be called?

PC: We did not discuss it. The Defendants have extensively relied on the reports.

Ct: At the end of the day, the Plaintiff has to show the damages that he suffered.

PC: Yes, it is in the medical reports. Are the Defendants saying that they are disputing it now?

Ct: Since there is no agreement that the Plaintiff's doctors' attendance have been dispensed with, the onus will lie on the Plaintiff as to whether he wishes to call these doctors. I will not say anything more on this point.

15 Since the Defendants had raised an objection at the time the documents were marked and

admitted into evidence, it is clear that the truth of the contents of the medical reports will have to be proved by the Plaintiff. However, the Defendants have accepted that, insofar as their expert, Dr Lim Yean Teng, had relied on parts of the medical records and reports of the other doctors, in forming his expert opinion, and any other medical records and reports relied on by the Defendants in their submission, there was no dispute on the contents, and there was no need for the Plaintiff to prove its contents, subject to the Plaintiff accepting Dr Lim Yean Teng's reading of the report and the conclusions drawn by Dr Lim Yean Teng and the submissions made by the Defendants.

16 At the close of the Plaintiff's case, the Defendants withdrew the Affidavits of Evidence-in-Chief of the 1st and 2nd Defendants as well as Dr Cheok Cheng Soon Christopher, Senior Consultant Psychiatrist and Head of Department for Psychological Medicine at Khoo Teck Puat Hospital. The only witnesses that gave evidence on behalf of the Defendants were:

- (a) Dr Lim Yean Teng, Senior Consultant in Cardiology Associates Pte Ltd and a Visiting Consultant to National University Hospital; and
- (b) Mr Tan Keng Chew, a private investigator.

Adverse Inference

17 The Plaintiff asked the Court to draw an adverse inference against the 1st and 2nd Defendants for failing to give evidence or subject themselves to cross-examination after filing their affidavits of evidence-in-chief.

18 I wish to emphasise that the decision by the 1st and 2nd Defendants not to give evidence does not in any way reduce the burden on the plaintiff to prove his case.

19 The principles to be considered in drawing an adverse inference were set out by the High Court in *Cheong Ghim Fah* at [42]. The High Court agreed with the English principles to be considered in drawing an adverse inference as follows:

- (1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
- (2) If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
- (3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
- (4) If the reason for the witnesses' absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if not wholly satisfactory, the potential detrimental effect of his/her absence or silence may be reduced or nullified.

[*per* Booke LJ][emphasis added]

20 At the close of the Plaintiff's case, the 1st and 2nd Defendants took the position that, since the Plaintiff had not produced any evidence relating to the cardiac arrest and resuscitation, the 1st and 2nd Defendants did not have to give evidence as there was nothing for them to rebut in terms of factual evidence. This was a legitimate reason for not calling the evidence of the 1st and 2nd Defendants and I find that no adverse inference should be drawn against the 1st and 2nd Defendants.

21 I now turn to consider the heads of damage that have been claimed by the Plaintiff.

General Damages

22 The Plaintiff's claim for general damages was for:

- (a) the cardiac arrest and damage to his heart;
- (b) Mild post traumatic stress disorder;
- (c) Aches, pains and headaches;
- (d) Anxiety and Depression; and
- (e) Brain injury.

Cardiac arrest

23 It is not disputed that the Plaintiff suffered a cardiac arrest during the procedure. The 1st and 2nd Defendants, however, take the position that save for the particulars of general damages that has been stated in paragraph 8 above, the Plaintiff is not entitled to any award of damages which has not been specifically pleaded. Therefore, since the Plaintiff did not provide particulars of the cardiac arrest, resuscitation and subsequent recovery, the 1st and 2nd Defendants submitted that no award should be made in respect of this item.

24 The Plaintiff has pleaded that he "*has had to endure pain, trauma and suffering as a consequence and been put to loss and expense [sic]*" as a consequence of the Defendants' negligence and breach of duty of care. Since the cardiac arrest, resuscitation and subsequent recovery were consequences arising from the alleged negligence and breach of duty of care, I am of the view that there was no need to plead full particulars of these heads of damage.

25 However, the Plaintiff's evidence in his affidavit of evidence-in-chief and which he confirmed during cross examination was that he had no recollection of the events that he had gone through during the procedure. Since the Plaintiff had no awareness of the cardiac arrest and subsequent resuscitation, no award is made in respect of this item. See *H. West & Son Ltd and Another v Shepherd* [1964] AC 326.

26 However, I do accept that the Plaintiff would have suffered some pain and suffering during the recovery period arising from the cardiac arrest and resuscitation.

27 The authority relied on by the Plaintiff in quantifying his claim for damages is the Australian case of *Dobler v Kenneth Halverson and Ors* [2007] NSWCA 335 ("Dobler") in which the Plaintiff, a boy of 18 years old, suffered a cardiac arrest and hypoxic brain damage and was left with

catastrophic injuries. The Australian courts awarded the sum of AUD\$8,086,000. While the Plaintiff conceded that this case is significantly different from the present case as the Plaintiff was 18 years ago and suffered irreversible brain damage, the Plaintiff argued that this case may be relied on as the common fact was that both Plaintiffs suffered a cardiac arrest through no fault or contribution of their own. Based on this common fact, the Plaintiff submitted that "it would not be unreasonable to seek compensation for a sum of S\$1 million for the cardiac arrest, Post Traumatic Stress Disorder, Brain Injury, headaches, aches and pains and the anxiety and depression." The Plaintiff also submitted that "the Court should also take note that [the father of the Plaintiff in *Dobler*] received \$550,000.00 (Australian) for nervous shock alone. Mr Ho (the Plaintiff) suffered much more than nervous shock and as such should be awarded much more."

28 With respect, I fail to see how *Dobler* assists the Plaintiff in any way in his claim. It is a flying leap of logic to claim that the Plaintiff should be awarded the sum of S\$1 million for the alleged damages that he has suffered just because the Plaintiff suffered the cardiac arrest through no fault of his. There is also no basis for saying that, since the father of the Plaintiff in *Dobler* was awarded AUS\$550,000 for nervous shock, the Plaintiff here should be awarded much more. There is no evidence before this court that the Plaintiff here suffered nervous shock or that he "suffered much more than nervous shock".

29 The Defendants submitted that a reasonable award for this item would be the sum of \$3,000. This is consistent with the *Guidelines for Assessment of General Damages in Personal Injury Cases* (Subordinate Courts and Academy Publishing 2010) where it is stated at p 40 that "[g]enerally, \$2,000 per rib although overlapping must be taken into consideration, adding \$3,000 - \$4,000 for pneumo-thorax or haemo-thorax (where the rib bone pierces the lung or heart)" in cases involving "[b]ruises and fractures of ribs, causing serious pain and disability over a period of weeks but there are no lasting disabilities. Prognosis is good and full recovery is achieved in a few weeks."

30 While I do not have any medical evidence of the Plaintiff's condition during the recovery period following the cardiac arrest and resuscitation, I am of the view that it would be reasonable to award some damages on the basis that there was probably some bruising and tenderness of the chest following the cardiac arrest and the resuscitation. Therefore, I award the sum of \$4,000 for the pain and suffering consequent to the cardiac arrest and resuscitation.

Damage to the heart

31 The Plaintiff claimed that he suffered permanent and irreversible damage to his heart as a result of the procedure.

32 At this point, I would emphasis again that the burden of proof is on the Plaintiff to adduce medical evidence that he has suffered permanent and irreversible damage to his heart caused by the cardiac arrest. Since the Plaintiff has not called any doctor to give evidence on his behalf, the only evidence before this court was the evidence of Dr Lim Yean Teng.

33 Dr Lim Yean Teng's evidence was that "the clinical findings [at the review on 22 February 2012] indicated that the patient did not have signs of enlarged heart or heart-pump failure, which are some of the common physical findings in a patient with significant heart muscle damage from a heart attack."

34 The Plaintiff had produced medical reports diagnosing triple vessel coronary artery disease (CAD). Dr Lim Yean Teng's expert opinion was that the CAD pre-existed the procedure. Dr Lim Yean Teng explained that "whilst heart attack, which is due to sudden formation of a occlusive blood clot,

may occur suddenly and in minutes, atherosclerotic plaques (or atheromas), may require 10-15 years for full development and hence, significant blockage in heart arteries is not a condition that can develop in weeks or months.”.

35 It was also Dr Lim Yean Teng’s expert opinion that the CAD was not worsened by the cardiac arrest.

36 I have no reason to doubt Dr Lim Yean Teng’s evidence and accept that there was no significant heart damage arising from the cardiac arrest and that the CAD was a pre-existing condition that was not caused by the cardiac arrest. Therefore, no award is made for the Plaintiff’s claim for permanent and irreversible damage to his heart.

Psychiatric illness

37 In the written submissions, the Plaintiff made a claim for mild post traumatic stress disorder, anxiety and depression. In the pleadings, the Plaintiff pleaded that he suffers from fear and trauma of any kind of surgical procedure or intervention and that he is mentally traumatized.

38 The Plaintiff did not call any medical experts to give evidence on his behalf to substantiate the above claims.

39 The Defendants had initially filed the Affidavit of Evidence-in-Chief of Dr Cheok Cheng Soon Christopher but this was subsequently withdrawn. Therefore, Dr Cheok Cheng Soon Christopher’s evidence was not before me and the court will not take cognisance of his medical evidence as urged by the Plaintiff in his written submissions. At this point, I would also add that if the Plaintiff had wanted to rely on Dr Cheok Cheng Soon Christopher’s evidence, it was open to the Plaintiff to subpoena Dr Cheok Cheng Soon Christopher to give evidence on the Plaintiff’s psychiatric conditions. Having not done so, the Plaintiff cannot now argue that the Court should rely on Dr Cheok Cheng Soon Christopher’s evidence, which was withdrawn.

40 Since there is no evidence before this court that the Plaintiff suffered from any psychiatric illness, no award is made for this item.

Aches, pains and headaches

41 The Plaintiff faced a similar problem with his claim for aches, pains and headaches. There was no medical evidence that these were caused by or arose from the procedure.

42 While Dr Lim Yean Teng did confirm that the Plaintiff complained of pain and headaches when he was examined. Dr Lim Yean Teng’s evidence is that the chest pain is not exertion related and is due to breathing in. Dr Lim Yean Teng also stated that he was not in the position to assess the headaches.

43 In fact, the Plaintiff’s solicitor acknowledged in his submissions that the source of the pain could not be determined with accuracy.

44 Since there is no evidence that the pain and headaches were caused by or arose due to the procedure, no award is made for this item.

Brain Injury

45 The Plaintiff made a claim for brain injury in his written submissions. However, the Plaintiff did

not include a claim for this nor has he provided any particulars for brain injury in his pleadings. The Plaintiff has also not led any evidence of this during the hearing. Therefore, the claim in respect of this item is not allowed.

Future medical care and expenses

46 The Plaintiff has included a claim for future medical care and expense under his claim for General Damages. However, no evidence was produced by the Plaintiff as to the future medical care and expenses that may be incurred. In addition, it appeared from the Plaintiff's written submissions that he was not pursuing this claim as this claim was not included in the heads of general damages in the submissions.

47 I would also add that the medical evidence from Dr Lim Yean Teng was that any medical expenses incurred after 17 September 2008 was not related to the procedure.

48 Therefore, there is no award for future medical care and expenses.

Special Damages

49 The Plaintiff's claim for special damages as pleaded in the Statement of Claim is as follows:

- (a) Hospitalisation fees (NUH) - \$1,419.85
- (b) Consultation Fees/Medicines/Laboratory - \$4,623.43
 - (i) Fees, Test etc
- (c) Medical Reports - \$ 321.00
- (d) Taxi fares (60 trips x \$15 per trip) to Hospitals, Clinics, etc) - \$ 900.00

50 **The Defendants have agreed to items (a), (c) and (d).** In respect of item (b), there have been no invoices or documents in support of the same. Therefore, the claim in respect of **item (b) is not allowed.**

51 On 19 April, 2012, the Plaintiff wrote to the Defendants setting out further special damages as follows:

S/No.	Date	Description	Amount
1)	18.05.2010	Invoice from Tan Tock Seng Hospital	\$9.00
2)	13.08.2010	Invoice from Tan Tock Seng Hospital	\$25.00
3)	13.08.2010	Invoice from Tan Tock Seng Hospital	\$4.50
4)	10.11.2010	Invoice from National University Hospital	\$298.80
5)	14.02.2011	Invoice from National University Hospital	\$448.20
6)	14.02.2011	Invoice from National University Hospital	\$28.00

7)	23.06.2011	Invoice from Tan Tock Seng Hospital	\$4.20
8)	26.06.2011	Invoice from Tan Tock Seng Hospital	\$25.00
9)	04.07.2011	Invoice from National Heart Centre	\$43.00
10)	04.07.2011	Invoice from National Heart Centre	\$240.15
11)	04.07.2011	Invoice from National Heart Centre	\$73.50
12)	11.10.2011	Invoice from National Heart Centre	\$161.00
13)	11.10.2011	Invoice from National Heart Centre	\$51.95
14)	24.10.2011	Invoice from National Heart Centre	\$29.00
15)	18.11.2011	Invoice from National Heart Centre	\$56.05
16)	18.11.2011	Invoice from National Heart Centre	\$105.00
17)	29.11.2011	Invoice from National Heart Centre	\$32.00
18)	08.11.2011	Taxi fares (\$10.80 + \$13.75)	\$24.55

52 The items claimed in the above paragraph were not pleaded as special damages in the pleadings and, therefore, should not be allowed. However, since the Defendants are agreeable to items 1 to 3, 7 and 8, I will allow these items. No award is made in respect of the balance of the items in the above table.

53 Therefore, the total amount awarded for special damages is \$2,708.55.

Conclusion

54 In conclusion, the amount awarded is as follows:

- (a) General Damages - \$4,000.
- (b) Special Damages - \$2,708.55.
- (c) Interest at half of 5.33% on special damages from the date of service of the writ to the date of judgment and interest at 5.33% on general damages for pain and suffering from the date of the service of the writ to the date of judgment.
- (d) Costs on the Magistrates' Court scale to be agreed or taxed.
- (e) The usual consequential orders to apply.