

Ong Derrick v Sim Chong Nam
[2013] SGHC 171

Case Number : District Court Suit No 2337 of 2008 (Registrar's Appeal from Subordinate Courts No 30 of 2013)
Decision Date : 10 September 2013
Tribunal/Court : High Court
Coram : Choo Han Teck J
Counsel Name(s) : Ramasamy s/o Karuppan Chettiar (Acies Law Corporation) for the plaintiff; Susila Ganesan (Just Law LLC) for the defendant.
Parties : Ong Derrick — Sim Chong Nam

Civil Procedure – Offer to Settle

Civil Procedure – Costs – Principles

10 September 2013

Judgment reserved

Choo Han Teck J:

1 The plaintiff obtained interlocutory judgment against the defendant for damages to be assessed. The defendant had admitted liability for causing a road accident on 5 February 2006 at the junction of Ang Mo Kio Street 22. The plaintiff was the driver of a motorcar that was stationary at the material time. A car driven by the defendant collided into the plaintiff's car from the rear.

2 The defendant made an Offer to Settle ("OTS") under O 22A of the Rules of Court (Cap 322, R 5, Rev Ed 2006). The defendant's offer was in the sum of \$23,078.26. The plaintiff was awarded \$8,000 by the Deputy Registrar for his whiplash injury. On appeal, the District Judge ("DJ") increased the amount to \$10,000. The plaintiff was asking for \$20,000. This was the main item in dispute. The plaintiff appealed against the DJ's order on the ground that the damages for whiplash were inadequate.

3 Mr Ramasamy Chettiar ("Mr Chettiar"), counsel for the plaintiff submitted that the plaintiff's wife who was with him as a passenger at the time of the accident suffered a similar injury but her claim was settled for a total sum of \$37,000, including interest and interim payment. Mr Ramasamy thus argued that the plaintiff ought to receive more because his work profile was higher and he earned more than his wife. The plaintiff was not satisfied with the fact that the OTS made to him was lower than that made to his wife. He rejected the OTS and proceeded to assessment of damages.

4 The plaintiff's initial complaint when admitted to the Tan Tock Seng Hospital on 10 February 2006 was that he experienced pain over his right wrist extending to his right index finger and which had worsened over the past five days. Secondly, he had lower back pain worsening over the past five days. He also had neck pain that gave him trouble sleeping. A magnetic scan was performed on 17 February 2006. The radiologist report stated as follows –

There is normal alignment of the cervical spine. No subluxation is seen.

At C3-4 level, there is diffuse decreased T2 weighted signal of the intervertebral disc, suggestive

of disc desiccation. There is minimal posterolateral marginal osteophytic bone ridging. No significant central spinal canal or neural foraminal stenosis is seen.

There is no evidence of focal disc protrusion. The rest of the intervertebral discs are fairly well preserved. There is no significant central spinal canal or neural foraminal stenosis.

The craniovertebral junction is normal in configuration. No abnormal intramedullary signal is seen in the visualised cervical and upper thoracic spinal cord.

The bone marrow signal is within normal limits. No vertebral body compression fracture is seen.

Impression:

There is minimal degenerative change at C3-4 level with diffuse disc desiccation and minimal posterolateral marginal osteophytic bone ridging. No other significant abnormality is seen.

5 The plaintiff consulted a private medical doctor, Dr Li Yung Hwa ("Dr Li") on 19 March 2010 for the purposes of his claim. Dr Li noted that the plaintiff was treated "conservatively with regular follow up at Tan Tock Seng Hospital and had physiotherapy. He continued to have neck pain and stiffness and the symptoms had some impact on his activities of daily living". Dr Li was of the view that the plaintiff "is likely to have chronic neck pain and his residual pain is likely to be permanent".

6 On 8 September 2010, Dr Li wrote to the plaintiff's lawyers and wrote as follows:

[The Plaintiff] sustained a whiplash injury which was mainly muscular-ligamentous injury and the MRI done in 2006 did not show any significant disc prolapse. There were only minimum degenerative changes in C3/4 which is consistent with his age and not of any significant degenerative change. A repeat MRI recently shows similar changes which is again not surprising as this is consistent with the normal finding of a person with his [age] group. His symptom was that of a neck discomfort aggravated by exertion and lifting of heavy load which had affected his activity of daily living as well as his ability to drive and work. This is a problem of a whiplash injury that happened to some patients who had the injury and developed into a chronic stage. It is likely to continue to affect him on a long term basis and his treatment will be as and when needed when the symptom is significant.

Dr Li saw the plaintiff again on 18 November 2010 with the view to preparing a medical report for the purposes of the assessment. That report is found at page 12 of the Bundle of Medical Reports.

7 The plaintiff was examined by another doctor, Dr Peter Lee ("Dr Lee") on 21 July 2010. This was at the defendant's request. Dr Lee's report dated 29 July 2010 stated as follows:

Investigation

MRI of the cervical spine was performed on 21/07/2010. These showed a mild disc bulge of C3/4 level with mild marginal lipping and bilateral mild exit foraminal narrowing.

Opinion

1. Mr Ong sustained an injury to his cervical spine as a result of the road traffic accident on 06/02/2010.
2. The mechanism of this injury and the clinical findings as reported by attending doctor in Tan

Tock Seng Hospital Emergency Department is consistent with a whiplash type injury to the cervical spine.

3. Mr Ong still complains of recurrent neck discomfort precipitated by prolonged sitting and standing.
4. Although Mr Ong had stiffness in his neck on clinical examination, there was no evidence of neurological impairment in the upper or lower limbs.
5. MRI of the cervical spine done on 21/07/2010 showed early degeneration in the C3/4 level of the cervical spine. These changes were also noted in the MRI performed in February 2006 and there was no significant progression over the past 4 years.
6. As degenerative changes take time to develop, the changes noted at C3/4 in the MRI performed in Feb 2006 indicated that Mr Ong had pre-existing cervical spondylosis prior to the accident on 06/02/2006.
7. Mr Ong currently does not require oral medical for pain or physiotherapy treatment. He is not likely to require any further treatment in the future.

8 At the assessment, Dr Yeo Tseng Tsai ("Dr Yeo") gave evidence that he examined the plaintiff ten days after the accident. Dr Yeo and Dr Li differed only on the point as to whether the disc degeneration was normal or spontaneous. Another doctor, Dr Yu Chun Sing ("Dr Yu") was asked to comment (see NE page 167). He placed emphasis on the minimal disc degeneration as reported. He testified that in medical terms, it meant that it was "hardly present" and he did not appear to think it was significant. Dr Yu was the only medical expert who, according to counsel for the defendant, Mrs Susila Ganesan ("Mrs Ganesan"), had the benefit of perusing the case notes of the plaintiff's injuries. His own notes reflected that he found that the plaintiff had "freedom of movement" of his neck when examined in February 2006. He was also of the view that the plaintiff was not severely disabled by the whiplash.

9 The Deputy Registrar considered the medical evidence and referred to the "Guidelines for Assessment of General Damages in Personal Injury" with specific reference to neck injuries and concluded that an award of \$8,000 was fair. The general guideline was between \$7,000 and \$8,000. On appeal, the District Judge increased the award to \$10,000. The DJ based his award on the finding that the whiplash was a "grade 2" injury. The DJ might have erred on the side of sympathy and classified the injury as falling within the category of minor "strains, sprains, disc prolapse, soft tissue injuries with full recovery within about five years" and thus fell within the range of \$2,000 to \$10,000.

10 I am of the view that in no case would the plaintiff be justified in claiming more than \$10,000 for his whiplash injury given the evidence. Two MRI scans were carried out. One shortly after the accident and the other about four years later. Neither showed any damage to the spinal discs at C3/4 other than a deterioration of the discs that the court below accepted as normal degenerative deterioration. The court below asked Dr Yu to "give an answer and explanation in a helpful manner to assist the court" after disallowing a question by Mr Ramasamy. Dr Yu then answered, "It means that the MRI is practically normal." The plaintiff was not involved in work that required lifting heavy weights but his job, as Mr Ramasamy submitted, required long hours at the computer. That activity is known to hasten disc degeneration and prolapse. I agree with the court below that the whiplash suffered by the plaintiff was not sufficiently major as to warrant damages beyond \$10,000. The plaintiff's appeal was therefore dismissed.

11 Counsel then informed the court that the defendant had made an OTS which was above the amount of \$22,853.02 awarded. I asked counsel to make their submission on costs. Mr Ramasamy submitted that even if the rules prescribed indemnity costs, the court still had a discretion under O 22A r 12. Mr Ramasamy cited *Singapore Airlines Ltd v Tan Shwu Leng* [2001] 3 SLR(R) 439 in which the Court of Appeal awarded nominal costs of \$1,000 for post OTS work. One of the reasons was that the final judgment was only slightly higher than the OTS amount. In the present case the OTS amount was \$225.24. Mrs Ganesan referred to my judgment in *Zhu Shan Fu v China Construction Builders Pte Ltd* [2012] SGHC 54 in which I held the following view:

The purpose behind the rules regarding the offer to settle is to ensure that parties do not exaggerate their respective cases. If the courts do not enforce the usual cost consequences of offers to settle under O 59 r 9 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), litigants like the appellant will have no incentive to accept reasonable offers. The fact that the appellant's failure to do so here has led to the appellant having virtually no compensation should be a reminder to lawyers and litigants that the court's discretion not to enforce the usual cost consequences of offers to settle will not be exercised lightly. The circumstances of this case do not merit intervention.

12 The court in *Singapore Airlines Ltd* was of the view that the very small difference between the damages assessed ordered and the OTS amount was sufficient in that case to warrant intervention. That was within the court's discretion although it is not to be taken as a rule. In the present case before me, there is another factor that is relevant. Here, the plaintiff's wife who was involved in the same accident and suffered the same injury was offered \$37,000 more. The defendant did not offer any explanation why the offer to the plaintiff was lower. It was not unreasonable for the plaintiff in the circumstances to have rejected the offer. From his point of view, the offer to him was not a reasonable offer. Mrs Ganesan was only able to say that it was the defendant's prerogative to make such offers.

13 I am of the view that this is an exceptional case. The appeal is dismissed but I will award fixed costs of \$1,000 post-OTS to the defendant. Costs pre-OTS including the costs of the doctors are to be paid by the defendant and to be taxed.