

Koh Soon Pheng v Tan Kah Eng
[2003] SGHC 112

Case Number : Suit 419/2001, RA 45/2003

Decision Date : 14 May 2003

Tribunal/Court : High Court

Coram : Judith Prakash J

Counsel Name(s) : Mr Monoj Kumar Roy (Roy & Partners) for the Plaintiff; Ms Sivakolunthu (M Dass & Co) for the Defendant

Parties : Koh Soon Pheng — Tan Kah Eng

Damages – Measure of damages – Personal injuries cases – Loss of future earnings – Whether award of loss of earning capacity more appropriate than award of loss of earnings

Damages – Measure of damages – Personal injuries cases – Loss of pre-trial earnings – Quantum

Legal Profession – Duties – Court – Citation of authorities by counsel – Authorities cited must reflect updated state of law at time of citation

1 The plaintiff was injured in a road traffic accident that took place on 17 June 2000. His injuries were serious. Both his wrists were fractured as were his left clavicle, right humerus and one rib. There were deep lacerations and abrasions in his right shin and right forearm. His foot was also injured but not fractured. He suffered from concussion.

2 On 29 June 2001, interlocutory judgment was entered against the defendant for 90% of the damages to be assessed. The assessment took place before the Assistant Registrar in January this year and the plaintiff was awarded the following:

(1) GENERAL DAMAGES	\$
A. Pain and suffering	108,000.00
B. Cost of future surgery	25,500.00
C. Loss of Earning Capacity	180,000.00

(2) SPECIAL DAMAGES

A. Pre-Trial loss of earnings	73,495.75
B. Expenses	21,416.70

The plaintiff was not satisfied with the award in respect of his pre-trial loss of earnings. He also considered that he should have received an award on the ground of loss of future earnings and not on the ground of loss of earning capacity. Hence this appeal.

Background

3 At the time of the assessment, the plaintiff was about 42 years old. He was the owner of a motorcycle workshop called 'Perfection Motorcycle' which had been in business for about ten years.

The main business of the workshop was to repair large motorcycles having an engine capacity of between 400 cc and 1,200 cc. The plaintiff is a skilled motorcycle repairer and most of the time was the only worker in the business. At times he had help from his father, a retired mechanic, and also from a younger general worker.

4 The plaintiff explained that the motorcycles he repaired were large and heavy and the repair work involved a great deal of physical effort. The plaintiff used to carry the motorcycles up to a ramp for servicing and repair. Since the accident, he had found it difficult to carry the motorcycles in the same way as previously. He also had difficulty repairing the servicing them as the nuts and bolts in the engine were located in tight corners and in awkward positions. The plaintiff said that he no longer the strength to twist and turn the screws and bolts and to apply the proper pressure on the plates and panels of the motorcycles and their engines.

Loss of pre-trial earnings

5 The total sum of \$73,495.75 which the Assistant Registrar awarded as loss of pre-trial earnings was made up as follows:

(a)	for the period from mid June to December 2000	\$16,550.65
(b)	for the whole of 2001	\$27,333.65
(c)	for the whole of 2002	\$27,333.65
(d)	for January 2003	\$ 2,277.80

The plaintiff accepted the assessment in respect of the first and last periods but, on appeal, contended that the Assistant Registrar had erred in assessing his loss at \$27,333.65 for each of the years 2001 and 2002. His counsel submitted that the loss should have been assessed at \$50,769.65 for 2001 and at \$37,333.65 for 2002.

6 After the accident, the plaintiff was given the following periods of medical leave by his doctors: from 17 June 2000 to 19 March 2001 and subsequently from 13 December 2001 until 27 February 2002. According to the plaintiff, however, he did go back to work one and a half months after his accident. He felt an obligation to reopen his workshop as a service to his customers. The plaintiff himself was unable to do major servicing and repairs due to his injuries. He hired workers but they were only able to do simple servicing and simple repair jobs. His father worked for him for some time and there was also a younger man to assist. The plaintiff, however, stated that he had great difficulty in getting suitable workers as very few Singaporeans or Malaysians are interested in motorcycle repair work.

7 As evidence of his loss of income, the plaintiff produced his income tax returns to the Inland Revenue Authority of Singapore ('IRAS') for the years from 1995 up to and including 2001. He also produced some of the notices of assessment issued by IRAS and also copies of the accounts of his business that he had submitted to the IRAS. From these documents the following income figures were derived during the submissions before the Assistant Registrar:

- (1) for 1995, the business turnover was \$224,964, the gross profit was \$84,12, and the net profit was \$19,932;
- (2) in 1996, the turnover was \$265,193, the gross profit was \$109,113 and the net profit

was \$52,073;

(3) for 1997, the turnover was \$244,375, there was a loss of \$6,797 but the plaintiff was able to pay himself \$15,547;

(4) for 1998, the turnover was \$219,877, the gross profit was \$85,441 and the net profit was \$23,826;

(5) for 1999, the turnover was \$229,059, the gross profit was \$73,426 and the net profit was \$25,290;

(6) for 2000, the turnover was \$237,852, the gross profit was \$65,782 and the net profit was \$10,783;

(7) for 2001, the turnover was \$172,530, the gross profit was \$33,332 but there was a net loss of \$23,436; and

(8) for 2002, during the 11 months commencing in January and ending in November, the business had a turnover of \$180,408, a gross profit of \$56,591 and a net loss of \$4,935.

The gross profit figure was derived by subtracting the cost of purchases (ie motorcycle spare parts) from the turnover figure. Thereafter, the other costs of doing business such as rental, insurance, utilities and labour charges were deducted in order to arrive at the net profit figure or the net loss figure.

8 The Assistant Registrar assessed the plaintiff's loss of earnings for 2001 and 2002 by taking the average of his total earnings for the five years preceding the accident ie the years from 1995 to 1999. On this basis, the plaintiff earned \$27,333.65 per year from his business. Accordingly, he was awarded \$27,333.65 for each of the two years, ie 2001 and 2002, in which the business showed a loss.

9 The plaintiff took issue with this method of assessment. He agreed that his average annual income had been \$27,333.65 but submitted that simply awarding him this figure did not compensate him for what he lost by reason of the accident. His income had, he said, as shown by the figures, been on the increase and if it had not been for the accident it would have continued to increase annually. The only factor which affected his performance and ability to earn was the incapacity resulting from his illness. The plaintiff's business had not been affected by the Asian Economic Crisis since his annual income had increased steadily from 1997 up till 1999. The plaintiff pointed out that in 1999, he had a turnover of \$229,059.85 whereas in 2000, his turnover had been \$237,852. He submitted that this turnover was for the first six months of the year ie for the period before his accident. He further submitted that if he had worked throughout the year, his turnover would have been even higher. In 2001, instead of earning a profit the plaintiff suffered a loss of \$23,436. His true loss of earnings was therefore the \$23,436 plus the average income he would have made otherwise ie \$27,333.65. The total income which the business lost therefore was not \$23,436 alone but \$23,436 plus \$27,333.65 ie \$50,769.65. As for 2002, his figures for the first 11 months of that year showed a small loss. The plaintiff submitted that if he had not been injured the business would have earned not only the average \$27,333.65 but also an additional \$10,000 and therefore his loss of earnings for 2002 should be assessed at \$37,333.65.

10 The defendant on the other hand submitted that the Assistant Registrar had erred on the generous side in taking the plaintiff's income as the average of his total earnings for the five years

between 1995 and 1999. His counsel pointed out that no explanation had been given by the plaintiff as to why in 1996 his earnings were \$52,073 based on a gross profit of \$109,113 whilst in 1997, his earnings had dropped to \$15,547 when the business had a turnover of \$244,374 and a loss of over \$6,797. Counsel argued that these two figures were the highest and lowest for the five pre-accident years and therefore were aberrations in the earnings trend of the plaintiff. They should have been ignored for the purpose of calculating his average pre-accident earnings and instead only the earnings for 1995, 1998 and 1999 should have been taken. If that had been done, the average would have been \$23,154.33.

11 The defendant pointed out that the plaintiff's business had improved in 2002 as compared with 2001. For 11 months in 2002, the turnover had been \$180,408, the gross profit \$56,591 and the loss sustained only \$4,935. This compared favourably with 2001 where the plaintiff's turnover had been some \$8,000 less for the whole year (at \$172,500), his gross profit had been some \$23,000 less (at \$33,332) and his losses had been an extra \$18,500 (at \$23,436). It was submitted that these figures showed that the plaintiff's annual earnings could vary greatly because of operational factors. Thus, it was submitted that the Assistant Registrar's assessment was correct in principle though generous in quantum.

12 I agree that in order to get a more accurate picture of the earning potential of the plaintiff's business, the correct course would be to discard the highest and lowest earnings figures and take the average of the remaining earnings figures. I therefore agree with the submission that only the earnings in 1995, 1998 and 1999 should have been considered for the purpose of obtaining the average and trying to ascertain what the plaintiff would have earned in 2001 and 2002. The figures for 2000 itself are not helpful because they are not broken down so as to show what the business earned before the plaintiff's accident and what it earned for the rest of the year. Although it was submitted that the figures given represented the earnings of the first six months of 2000, there was no supporting documentation for this. This assertion was also contradicted by the plaintiff's admission that he did reopen his business one and a half months after his accident in order to accommodate his clients, although the work that he did, with the assistance of his father and one worker, was restricted. Accordingly, one cannot infer that if the accident had not happened the business would have had additional earnings in 2002 of more than \$150,000 (as the plaintiff's counsel submitted).

13 The average earnings from the plaintiff's business should, therefore, have been assessed at \$23,154.33 per year. The plaintiff, however, was correct in his submission that simply to give him that amount would not compensate him for the losses he suffered in 2001 since instead of making that amount, his business lost \$23,436. I agree with the plaintiff that his loss of earnings for 2001 has to be computed as being the total of the amount that he lost and the amount that he would otherwise have made as profit. With respect, the Assistant Registrar erred by not considering the amount that the business lost when she computed the plaintiff's loss of earnings. For 2001, therefore, the plaintiff's loss of earnings amounted to \$46,590.33. Up to November 2002, the plaintiff's business showed a loss of \$4,935. It is not unreasonable to infer that the loss for the whole year would not have been much larger, perhaps \$6,000. Accordingly for 2002, the plaintiff's loss of income would have been in the vicinity of \$23,154.33 plus \$6,000 giving a total of \$29,154.33.

14 The appeal with regard to the pre-trial loss of earnings is therefore allowed and the awards for the years 2001 and 2002 are set aside and replaced with the amounts of \$46,590.33 and \$29,154.33 respectively.

Future loss of earnings or loss of earning capacity

15 The Assistant Registrar made an award of \$180,000 in respect of the plaintiff's loss of earning capacity. The plaintiff submitted that he was entitled to an award of future earnings and argued that this should be quantified on the basis of \$27,333.65 per year for 14 years so that the total award would be \$320,671.10.

16 The medical evidence showed clearly that the plaintiff's hands and right shoulder had been badly injured and that these injuries had affected his ability to work as a motorcycle mechanic. As regards the shoulder injury, the plaintiff experienced significant pain when he lifted his elbow above the level of the shoulder. The medical evidence adduced for the plaintiff showed that he was no longer capable of working strenuously for any length of time. After working for an hour, he would need several hours rest before starting again. Further, because of the seriousness of the injuries to his wrists, he would have difficulty in dealing with motorcycle repair work involving screwing and unscrewing of nuts and bolts and tightening of the engine. The doctor who appeared for the defence agreed that the plaintiff could not do the heavier work involved in motorcycle repairs and that his working capacity would never go back to normal. While this doctor testified that the plaintiff would be able to do quite a lot of work by using pneumatic tools, he also stated that the constant vibration of such tools would cause the plaintiff pain and, even if his wrists were strengthened by a fusion operation, the effects of the operation might not last very long.

17 The medical evidence supported the plaintiff's submission that his ability to work at the trade that he had followed all his working life had been severely impaired. That did not mean, however, that the plaintiff was entitled to an award based on loss of future earnings. Since the accident, the plaintiff had carried on his sole proprietorship business offering motorcycle maintenance and repair services. The evidence showed that initially the income of this business had been severely affected by the plaintiff's inability to work at his former pace. By the time of the hearing of the assessment, however, the plaintiff had managed to overcome some of the disadvantages arising from his disability and had brought the business back to a break even level. There was a reasonable prospect that he plaintiff would be able to improve his business even further. As the proprietor of a business which must have had a substantial amount of goodwill and as a person with expertise, the plaintiff would be in an excellent position to train and supervise younger men to carry out the more physically demanding aspects of the motorcycle repair business. Although the plaintiff did complain about difficulty in getting workers, there was no real evidence of a lack of manpower. No doubt the plaintiff would earn a little less because he would have to incur wages which would not have been payable had he remained able to do the work on his own, but this does not mean that the plaintiff's business cannot still be brought back to a profitable situation.

18 In these circumstances, I cannot fault the Assistant Registrar for choosing to make an award of loss of earning capacity rather than loss of earnings. The plaintiff still has his business. The workshop is still capable of attracting a substantial amount of business. In the last year for which figures were available, 2002, sales amounted to \$180,000, a not inconsiderable sum. How the plaintiff will do in the future is highly speculative. He may do reasonably well. Whilst any loss he may suffer in income will probably be because he himself cannot do as much work as previously, there is not enough evidence on which to fix a multiplier and thus make an award of loss of earnings rather than loss of earning capacity. As a supplier of services, whatever the plaintiff may say, the income of his business will be affected by general economic conditions, and this too makes it difficult for the court to settle on a correct multiplier. The award of \$180,000 for loss of earning capacity is in fact equivalent to nearly eight years worth of earnings on the basis of an average annual income of \$23,000. I think this award was reasonable and must be upheld.

Conclusion

19 The plaintiff's appeal is therefore allowed in part. He shall have the costs of the appeal as taxed or agreed.

20 There is one other matter I wish to deal with. In her submissions, counsel for the defendant urged the court to be guided by the principle enunciated by Edmund Davies LJ in *Povey v Jackson* [1970] 2 All ER 495 as follows:

As a general observation, a party who is considering appealing on quantum is unwise to concentrate simply on one item of damage. A more prudent course is to look at the damages awarded as a whole and not to seek to impeach a particular sum unless it is, after careful consideration, demonstrably manifest that the global sum awarded ought not to stand.

Counsel went on to submit that the plaintiff had not shown in any way that the global sum awarded by the Assistant Registrar was so demonstrably wrong that it called for interference by the appellate court and therefore that the appeal should be dismissed.

21 The argument appeared attractive but a quick check in *McGregor on Damages* (16th Ed) showed that *Povey v Jackson* is no longer considered good law. It was qualified by two subsequent decisions of the English Court of Appeal, *George v Pinnock* [1973] 1 WLR 118 and *Smith v Manchester Corporation* [1974] 17 KIR 1. Paragraph 2126 of *McGregor* states that it must follow from the approach in these latter two cases, which is that pecuniary loss and non-pecuniary loss have to be considered quite separately, that *Povey v Jackson* is no longer an acceptable decision. It is clear from the authorities cited that the global sum approach is outdated and each head of pecuniary loss has to be considered on its own merits and the amount awarded to the plaintiff in respect of such a head after consideration of all relevant circumstances should not be reduced by reason of the other awards made in his favour.

22 There is a duty on counsel to place before the court all matters relevant to the court's decision and also to ensure that all authorities that they cite represent the current state of the law as at the date of citation. Before submitting on the law, counsel must check that whatever passage they find particularly attractive in any particular decision has not been reversed or even critically commented on by subsequent judicial authority. The older the authority, the more careful counsel must be to ensure that the legal principles it establishes still stand. In this particular case, the error could have been avoided if reference to a standard textbook had been made. I trust that in future such mistakes will not recur.