Mykytowych, Pamela Jane *v* V I P Hotel
[2015] SGHC 113

Case Number : Suit No 703 of 2012 (HC/Assessment of Damages No 4 of 2015)

Decision Date : 19 May 2015

Tribunal/Court : High Court

Coram : Choo Han Teck J

Counsel Name(s) : Salem Bin Mohamed Ibrahim, Chew Yun Ping Joanne and Ismail Bin Atan (Salem Ibrahim LLC) for the plaintiff; Appoo Ramesh and Rajashree Rajan (Just Law LLC) for the defendant.

Parties : Pamela Jane Mykytowych — V I P Hotel

Tort – Negligence – Damages

[LawNet Editorial Note: The appeal to this decision in Civil Appeal No 125 of 2015 was allowed in part by the Court of Appeal on 14 July 2016. See [2016] SGCA 44.]

19 May 2015 Judgment reserved.

Choo Han Teck J:

1 The plaintiff is 51 years old and is a British citizen. She has been married to Andrew Mykytowych ("Mr Mykytowych") since 2008. She was working as a healthcare consultant in a company called "Care and Performance Ltd" ("CPL") which is wholly owned by her. Mr Mykytowych was posted to India and Singapore for work and so the plaintiff gave up her own job to be with him in Asia.

2 On 6 May 2011 they arrived in Singapore and stayed at the V I P Hotel ("the defendant"). On the morning of 7 May 2011, the plaintiff slipped and fell at the lobby of the defendant hotel. The plaintiff sued the defendant for damages in negligence and obtained interlocutory judgment against the defendant on the basis of 50% liability with damages to be assessed. Initially the suit was commenced in the State Courts about five months after the accident. The action was transferred to the High Court on 23 August 2012.

3 The assessment of damages proceedings was heard before me from 11 February to 13 February 2015. The general damages for the physical injury itself are not difficult to assess. The difficult issues concern, first, the plaintiff's claim that she suffered from "Complex Regional Pain Syndrome" ("CRPS"), and secondly, the amount representing her loss of future earnings which is being claimed as loss on the sale of her company.

4 The plaintiff's claims for the injuries suffered are as follows:

a.	Pain and suffering for fracture of knee (left patella)	$50,000.00
b.	Pain and suffering for abrasion to the left knee	$500.00
c.	Pain and suffering for strained left ankle	$5,000.00
d.	Pain and suffering for back pains	$50,000.00

e.	Pain and suffering arising from CRPS with secondary fibromyalgia	$65,000.00
f.	Pre-trial loss of earnings (less S$5,330 for part-time work)	£323,406.22
g.	Loss of future earnings (being £6,510.57 a month x 18 years)	£1,438,315.12
h.	Pre-trial medical expenses	$15,629.35
i.	Loss of future expenses	$746,622.00
j.	Loss of amenities	$150,000.00
k.	Loss in respect of inability to profit from the sale of the plaintiff's company, CPL	£312,305.00
l.	Costs of engaging a domestic help (being £2,880 a month x 18 years)	£622,080.00
m.	Costs of medical equipment	$1,360.43
n.	Costs of transportation	$5,628.86
o.	Costs of renovation of house	$359.20
p.	Difference between business and economy class air tickets	$8,945.60
q.	Husband's loss of income	£21,600.00

The total claimed against the defendant at 50% liability is thus $549,522.72 and £1,358,853.17 (being 50% of $1,099,045.44 and £2,717.706.34). I have used the plaintiff's individual amounts claimed to calculate the total and note that there are some inaccuracies in the plaintiff's calculation of the total amount. For ease of reference and for calculation purposes only, I will refer to the plaintiff's overall claim against the defendant as $3,267,229.06 being the total amount claimed with £1,358,853.17 converted to Singapore dollars at the rate of $2 to £1.

5 The injuries to the plaintiff namely, the fractured patella, the strained ankle and abrasion to the knee (leaving aside the claim regarding the back for the time being) are all closely connected and there would be a fair amount of overlap in the pain and suffering in such cases. Furthermore, the range of general damages for pain and suffering for such cases would normally be between $8,000 to $12,000. Since the total sum of $3,267,229.06 claimed by the plaintiff would probably make this the most expensive knee injury ever claimed, it is best to proceed by first setting out the basis of the plaintiff's case upon which the big amounts are claimed – which largely relate to her career record and social activities.

6 The plaintiff graduated from the University of Birmingham in 1985 with a Bachelor in Social Sciences degree in social administration and social work. She has a certificate from the Inns of Court School of Law to be an Expert Witness in the field of adult social care. She also has a "Certificate in Management" from the University of Brighton after completing her master's degree in business administration.

7 She set up CPL in 2004. From her position as the company's managing director, she had been commissioned to "work in senior posts typically in a 'trouble-shooting' type capacity", and "[had] been routinely commissioned to lead and assist local authorities and health agencies after serious failings in services such as the London Borough of Sutton". She also claimed to be involved in the managements of budgets of up to £180m. She said that she would have continued working at an Assistant Director

level in such agencies until about 2011 or 2012 whereupon she "would consider that [she] would have had sufficient experience to begin operating at interim Director level". She then foresaw herself in about 2016 or 2017 having enough experience to be able to operate at interim Chief Executive Officer level for the remainder of her working life.

8 The plaintiff also claimed that prior to the accident, she was an active person who enjoyed driving cars at car rallies. She is a "qualified racing driver" and has also written about her motor sporting activities in various magazines.

9 The plaintiff claimed that as a result of the accident, she was unable to lead the kind of lifestyle described above. She tried to mitigate her loss by applying for a part-time job as a social worker but did not receive any reply to her applications. She concluded that she was unsuccessful because she was not a registered social worker in Singapore. She claimed that she had applied to IKEA to work as a cashier but when the human resource manager "observed that I had a disability, she declined even to interview me". She found this "an extremely upsetting and humiliating experience" and decided to avoid subjecting herself to further similar experiences. She thus ceased looking for part-time work. She claims that she has "been unable to return to the UK to continue working there as [she is] not able to travel without assistance and [she has] no one to look after [her] there". Finally, she managed to get a part-time job at the Management Development Institute of Singapore ("MDIS") teaching English. For conducting classes in a three-week long English Summer Camp from 18 June to 6 July 2012, and for conducting two public seminars on business English in the period between 10 July and 17 July 2012, she received $5,330.

10 Assuming for the moment, that what she claims is true and proven, the next question is, how did a knee injury cost her so much loss in income? I will now consider this aspect of her injury before returning to the probability and reasonableness of her claims for pain and suffering in relation to her alleged loss of income. The plaintiff's only serious injury was the fracture of the knee cap on 7 May 2011. The medical evidence from Dr Ganesan Naidu ("Dr Ganesan") testified that he had advised her to try walking with support in order to stimulate the formation of new bone. He was of the view that the plaintiff's fracture was a "minimally displaced fracture" and that the "soft tissue of the patella was intact, meaning there was some stability already". He therefore wanted the plaintiff to move the limb. He confirmed that by February 2012 the fracture had completely healed. In fact, the knee had recovered sufficiently by 14 June 2011 for Dr Ganesan to refer the plaintiff for physiotherapy.

11 Dr Ganesan was the principal doctor looking after the plaintiff's principal injury. From his medical reports and testimony at trial, it is clear and obvious that the plaintiff's principal injury, the fractured patella, had completely healed. But the plaintiff insisted that the injury continued to cause her pain. Dr Ganesan, having made sure that there was nothing more that he could do for her, sent her to "pain management specialists". The plaintiff was subsequently attended to by Dr Nicholas Chua ("Dr Chua") and Dr Vincent Yeo ("Dr Yeo"), both of whom are anaesthetists. The plaintiff was referred to them on account of their claims to be pain specialists. Dr Chua diagnosed the plaintiff to be suffering from CRPS. He sent the plaintiff to Dr Yeo for confirmation. Dr Yeo, in turn sent the plaintiff for a psychiatric evaluation. Two psychiatrists, Dr Habeebul Rahman and Dr Yang Su-Yin testified that the plaintiff was not suffering from any "identified psychosomatic cause" for her condition. This condition they referred to was the CRPS that Dr Chua had diagnosed. Dr Chua was optimistic that patients with CRPS can recover with "cognitive behaviour therapy" ("CBT"). He diagnosed the plaintiff's CRPS as the "sympathetic[ally] non-mediated" type for which a lumbar sympathetic block procedure might work to diagnose and eventually stop the pain. He testified under cross-examination that though the other type – "sympathetic[ally] mediated CRPS" – might respond better to a lumbar sympathetic block procedure, there was still a 50% chance that this procedure would help patients with the

"sympathetic[ally] non-mediated type", like the plaintiff. Such a diagnostic procedure would enable the doctors to be able to tell whether the plaintiff had a good chance of further improvement or treatment. If the procedure were to show that the nerves are involved in the CRPS, the plaintiff could then consider going for a lumbar sympathectomy to ablate the nerves straightaway. It was not disputed that the plaintiff did not opt for a lumbar sympathetic block procedure even though she understood the benefits of it, citing a "fear of needles".

12 The plaintiff was subsequently examined by Dr Bernard Lee ("Dr Lee") on 23 July 2013. Dr Lee produced a medical report on 16 September 2013, and testified on the plaintiff's behalf. Dr Lee is a qualified anaesthesiologist and was described as a "pain specialist" by Mr Salem, counsel of the plaintiff. Dr Lee practises in his clinic known as "Singapore Pain Centre". He also diagnosed the plaintiff to be suffering from CRPS from the "seemingly mild trauma" of the fractured patella. He found that she had all the "signs and symptoms of a sympathetic[ally] mediated pain" including "automatic dysfunction and dystrophy of her skin, nails and surrounding soft tissue of her leg and foot". This diagnosis differed from that of Dr Chua who found that the plaintiff's CRPS was of the sympathetically non-mediated version. Dr Lee acknowledged that there are two versions but asserted under cross-examination that the plaintiff was suffering from the sympathetically mediated version.

13 In her affidavit of evidence-in-chief, the plaintiff claimed that she was in constant and severe pain and therefore had to stop the work she used to do in CPL. She also claimed that she could no longer enjoy driving cars in rallies as she had done in the past because she could no longer use her left knee to depress the clutch of the car. She is even unable to walk much. In court, she appeared at all times in a wheelchair.

14 The defendant disputes the diagnosis of CRPS. Its case is that there was no medical justification for that diagnosis. Secondly, the defendant avers that the plaintiff, despite her claims and diagnosis, is not truthful. The defendant relies on surveillance and other evidence to show that the plaintiff's claims regarding her pain and disability are false. But before I consider the defendant's evidence, it will be helpful to consider the nature and effect of the plaintiff's medical evidence.

15 The first and undisputed evidence is that the fracture of the patella has completely healed. To this end, I find the evidence of Dr Ganesan to be forthright, reliable and illuminating. From his evidence I am able to conclude with certainty that the plaintiff's knee injury was not an unusual one and physically, the plaintiff had made full recovery. What is disputed is whether the plaintiff suffers from CRPS and, if so, the effect that has on her work and private life. If the plaintiff does not have CRPS and has completely healed from her injury, then the only conclusion I can come to is that she is malingering and has grossly exaggerated her claim for damages.

16 It is incontrovertible that for the sympathetically non-mediated form of CRPS which the plaintiff was first diagnosed with, apart from tenderness, there are no specific symptoms or tests that can verify the diagnosis. Though the sympathetically mediated type of CRPS should display redness and hotness, which was what the plaintiff was later diagnosed with, I note that such symptoms were not observed on her by Dr Chua. A diagnosis of CRPS is thus largely based on a claim to pain by the patient. Hence, Dr Yeo sent the plaintiff for psychological and psychiatric examinations to rule out any psychiatric conditions. At this juncture, the medical evidence trails off.

17 Neither side produced sufficient evidence regarding CRPS generally and specifically in relation to this plaintiff. Mr Salem offered Dr Lee as his expert on CRPS but Dr Lee is an anaesthesiologist by training who now specialises in pain management. That does not necessarily make him an expert in CRPS. In fact, Mr Salem had not adhered to the requirements of experts' evidence in the Rules of Court (Cap 322, R 5, 2014 Rev Ed) which state that the expert evidence must be contained in a

report and signed and exhibited in an affidavit. The report should further begin with the expert's qualifications and cite authorities or material relied on for the report. This was not the manner in which Dr Lee's evidence was presented to the court, but rather as a doctor who had examined the plaintiff and diagnosed her to be suffering from CRPS. He did not provide the court with crucial evidence on the chances of recovery for the plaintiff specifically and for CRPS patients generally, or how to reconcile the two differing diagnoses of the type of CRPS the plaintiff had. I am therefore unable and reluctant to make a finding as to whether the plaintiff is indeed a true case of CRPS. I will proceed on the basis that on the face of the professional, but not expert, medical evidence from Dr Chua and Dr Lee, the plaintiff is suffering from CRPS. I have no evidence to assess whether she will remain so for a few months more or for life.

18 The plaintiff has the evidence of Dr Chua and Dr Lee (and to a lesser extent, Dr Yeo) to support her claim that she had CRPS. But there was no medical evidence from a doctor nominated by the defendant to the contrary. That is as wanting as the failure to produce a medical expert on CRPS. In such circumstances, the finding of the existence of CRPS must be in the plaintiff's favour albeit without expert evidence.

19 I go on to examine the consequences that CRPS has had on the plaintiff's private life and work. In this case, the manner in which the plaintiff testified and the evidence of the nature and history of her work, as well as the events after her fall led me to examine the evidence several times. I have considered the evidence from her point of view and compared it with the possibility of an exaggerated claim; bearing in mind that the importance of the evidence is that it has serious implications beyond the parties' interests alone. If the plaintiff's claim regarding the consequences of her CRPS is genuine, she must be properly compensated. If it is not, the injustice is not only that she would have made an unmeritorious gain and the defendant (or its insurers) would have suffered an unmeritorious loss. More than that, such insurance claims will drive premiums higher and other policy holders will bear the costs of increases in insurance premiums.

20 The defendant produced surveillance evidence of the plaintiff. The photographic and video evidence show that the plaintiff was ambulant with the use of a cane. There were pictures of her using a wheelchair but they were mainly from her trips to the hospital. The plaintiff also used the wheelchair when she appeared at trial. The video evidence shows that contrary to her much emphasised pain and how it prevents her from walking long distances to the extent that she is unable to work, she went on a long nature walk in July 2012. During the walk, the plaintiff also encountered some uneven terrain, including but not limited to sandy beaches and grassy areas. The surveillance also captured her climbing up and down the embankment at Pasir Ris beach. This was not done without any difficulty, but her ability to traverse such a walk is inconsistent with her claims that her condition had been steadily deteriorating since November 2011. Mr Salem argues that the private investigator, Mr Abdul Hadi bin Mohamed Salleh ("Mr Abdul Hadi"), measured the distance wrongly and that the plaintiff did not walk the 7.2km. Further, counsel submitted that the plaintiff had to take breaks in between.

21 There is no definitive measurement of the route taken by the plaintiff and her husband but the distance on the map and the evidence of the investigator Mr Abdul Hadi indicate that it would be about 5km at the very least. It may be that the plaintiff had stopped and rested along the way but she did not seem to stop because of pain. Even regular trekkers would stop to admire the scenery or just to rest. If the plaintiff had stopped because of pain, she would have stopped and then returned home; but she completed the walk.

22 Another significant evidence was the evidence of Dr Ganesan, corroborated by his medical notes that the plaintiff reported to him that she was pleased that she could drive a manual car and

she could use the clutch whilst in the UK. Realising that this evidence was inconsistent with her claim, she denied that she told Dr Ganesan all that. Mr Salem then produced evidence to show that it was the plaintiff's husband who had hired the car when they were in the UK. That does not prove that the plaintiff did not drive at all.

23 The plaintiff did not deny that she had travelled to the UK, Spain, Doha, Hong Kong and Malaysia on holiday since her accident. She also took a few trips with her husband to accompany him for work, to places such as Vietnam and Taiwan. Though she claims that she had to follow her husband because she "couldn't be really left behind" on her own, there is evidence to show that since the accident she had also made a few solo trips. These evidence must be assessed by a comparison of what the plaintiff says in her affidavits and in court. They are not consistent with the impression that she so fervently wanted to present to the court at trial – namely, that since the fracture of her left patella she was in such great and constant pain that she could not walk and could not work. She had to stop work and no longer enjoyed the life that she used to enjoy including driving cars in car rallies and going on holidays.

24 Upon considering the evidence presented by the plaintiff to show that she could not contemplate even part-time work, I find the evidence of the circumstances surrounding her work in MDIS troubling. The plaintiff claims that as a result of the "adverse impact on [her] health" she concluded her temporary freelance work with MDIS in July 2012. But if she was already in constant pain in July 2012 to the extent that she had to terminate her work with MDIS, why did she then sign and MDIS offer, another contract with MDIS on 3 January 2013 to teach further classes in business English? She was also listed as a trainer in the Corporate Training Calendar of MDIS for the year 2013. The plaintiff only addressed this contract signed with MDIS in 2013 in her closing submissions, but merely stated that she "was optimistic about her recovery" when she entered into the contract on 3 January 2013. This contradicted all previous evidence which was that by mid-2012, the plaintiff's condition had worsened to the extent that she could no longer work, and was steadily deteriorating.

25 I examined the overall evidence over and over to see if I could justify a finding in her favour, after all, she did fall and she did fracture a knee bone but I am of the view that the evidence shows that her claim to be grossly exaggerated so far as the effect of her CRPS was concerned.

26 Finally, I also find that her claims regarding the loss to CPL are unjustified. She claimed that she could no longer perform the work she used to do for CPL. First, although there are financial records as to the annual earnings of CPL, there is no clear evidence as to what the plaintiff's work for CPL entailed. On the one hand she says that she could work remotely using her laptop, but on the other she claims that her physical presence with the clients of CPL are vital. If that were so, she had to give them up to join her husband when his job brought him to Asia. When she disconnected from those clients, she was clearly prepared to give up that occupation. She made no attempt to continue her work with CPL after she left the UK to join her husband in Asia.

27 I therefore find that her claims as to her disability and loss of income to be untrue. I further dismiss the plaintiff's claim relating to pain and suffering for back pains as there is no evidence of a back injury which was caused by the accident. I find that the diagnosis of secondary Fibromyalgia cannot stand for the reasons above and because I note that Dr Lee has not examined the plaintiff for a sufficiently sustained period of time to be able to make such a diagnosis. Dr Lee had admitted under cross-examination that for a diagnosis of Fibromyalgia to be made, it has to be ascertained that such widespread pain occurred over a period of time, for example, over a period of three months. Dr Lee admitted that he simply based his diagnosis on the history the plaintiff gave, and not on any clinical examination of the plaintiff over a prolonged period of time. In fact, he had merely examined her once, on 23 July 2013 and based his diagnosis only on this examination. The plaintiff has also not been

clinically diagnosed with Deep Vein Thrombosis which would require her to choose to take business class over economy class for her flights, and has not been advised to engage a full-time domestic helper or purchase a TENS machine. I also find that her transport expenses were incurred whilst her husband was still working for his previous company, and that these expenses were paid by his company. I thus make the award of damages as follows:

a.	Pain and suffering for fracture of knee, abrasion to the left knee, and strained ankle	$12,000.00
b.	Pre-trial medical expenses (up to but not including February 2012)	$4,374.55
c.	Costs of transportation	$1,635.68

The total award of damages for the plaintiff's claims is $18,010.23. The final sum that the defendant is to pay to the plaintiff is half the amount, at $9,005.115. I will hear the parties on costs at a later date if they are unable to agree.