Privy Council Appeal No. 20 of 1985

Lau Ho Wah *Appellant*

v.

Yau Chi Biu *Respondent*

FROM

THE COURT OF APPEAL OF HONG KONG

JUDGMENT OF THE LORDS OF THE JUDICIAL COMMITTEE OF THE PRIVY COUNCIL, DELIVERED THE 2ND OCTOBER 1985

Present at the Hearing:

LORD KEITH OF KINKEL
LORD EDMUND-DAVIES
LORD BRANDON OF OAKBROOK
SIR OWEN WOODHOUSE
SIR EDWARD EVELEIGH

*[Delivered by **Sir Owen Woodhouse**]*

This is an appeal from a decision of the Court of Appeal of Hong Kong. It raises a question concerning the entitlement to compensation under the head of permanent partial incapacity of an employee left with a disabling injury as the result of a work accident whose post-accident earnings exceeded his pre-accident earnings. There is virtually no dispute as to the facts so that in the end the issue for their Lordships becomes a straightout matter of construction of the relevant provisions of the Employees' Compensation Ordinance, (Cap. 282).

On 24th September 1982 the appellant Lau Ho Wah was working for the respondent when he fell from a lorry and his head struck the ground. As a result he suffered significant brain damage with consequential permanent impairment of both his physical and his mental faculties. He also faced the risk of epilepsy. Eventually an application was brought in the District Court to determine his entitlement to compensation under the Ordinance and at the hearing two medical specialists gave evidence. They were in general agreement concerning the serious and permanent effect of his incapacity in medical terms.
[32] And as well each expressly addressed the question as

to whether Lau had suffered any permanent loss of earning capacity. Again they were in substantial agreement. The neuro-surgeon called on his behalf assessed that loss at 60 to 70% of total while a neurologist who had examined him for the respondent provided the slightly lower figure of 50 to 60%.

After the accident Lau received treatment in hospital or as an out-patient for about 10 months and he was unable to work at all until April 1983. It happened that he then managed to find employment at a rather higher weekly wage than his pre-accident earnings; and he was so working at the time of the hearing. It is this fact which has become a central issue in the case. Despite the evidence of the two doctors that last matter has been relied on for the respondent to support an argument that there was no permanent loss of earning capacity at all.

In the District Court Judge Wong rejected the contention. Instead he accepted the medical evidence of the two doctors together with their further conclusion that the disability had produced a significant and permanent loss of earning capacity. He fixed that loss in percentage terms at 60% of total and the money compensation in respect of it in the sum of $91,238. But the Court of Appeal took a different view. On the basis that Lau had not suffered one of the injuries specified in the First Schedule to the Ordinance (each of which carries a fixed statutory calculation of lost earning capacity) but a non-schedule injury, and then by acting on the evidence of his post-accident earnings it was held that he had failed to show any loss of earning capacity. Accordingly, in respect of the claim for permanent partial incapacity a nil award was substituted for the District Court figure of $91,238. The question is whether the approach of the Court of Appeal is in accord with the Ordinance.

Compensation for "permanent partial incapacity" is provided by section 9(1) of the Ordinance but the concept of partial incapacity itself is explained in the interpretation of section 3. There it is said that, unless the context otherwise requires, "'partial incapacity' means ... where the incapacity is of a permanent nature, such incapacity (which may include disfigurement) as reduces [an employee's] earning capacity in any employment which he was capable of undertaking [at the time of the accident]". That meaning is immediately followed by a deeming provision which reads:-

> "Provided that every injury specified in the First Schedule except such injury or combination of injuries in respect of which the percentage or aggregate percentage of the loss of earning capacity as specified in that Schedule against

> such injury or injuries amounts to 100 per cent or more shall be deemed to result in permanent partial incapacity"

In the Court of Appeal importance was attached to the italicised words because in the case of each specified injury they avoid any need to prove actual incapacity (in the sense of the statutory test of lost earning capacity) while appearing to ignore all the injury conditions which are not so specified. There is in fact a subsequent requirement that an assessment of lost earning capacity in the case of a non-schedule injury shall be made "in conformity with the scale of percentages specified in the First Schedule". It is to be found in section 9(1) itself. However, the Court of Appeal thought there must first be "proof of some loss of earning capacity in fact". And on the uncomplicated basis that at the time there was no diminution in Lau's earnings it was held that this need had not been met.

It is true, of course, that when considering the purpose and effect of section 9(1) full weight must be given to the test of reduced earning capacity provided by section 3. And taken by itself the language of section 3 may seem to "oblige proof of some loss of earning capacity in fact" before an affirmative answer could be given to a claim in respect of a non-schedule injury. But their Lordships would make three observations about the approach adopted by the Court of Appeal. First, when read in context, the accent in those few words from the judgment of McMullin V-P. involves an emphasis upon present performance which is misleading. In ordinary language the concept of earning capacity is certainly not limited to the present or to be measured by some immediate and possibly quite fortuitous achievement. It is concerned with a continuing state, with the potential of an individual and so very much with the future as well. Secondly, the significance attached to the post-accident earnings has effectively resulted in the statutory references to loss of earning capacity being read down to mean an actual loss of earnings. This is made explicit in the judgment of Silke J.A. who said, "[Lau's] 'earning capacity' is not diminished in the sense that his earnings now are greater than his earnings at the time of the accident". The third point is that it must be borne in mind, that although section 3 gives meaning to the concept of permanent partial incapacity as a basis for compensation, the actual assessment of the relevant factor of reduced earning capacity is to be made in terms of the formulae outlined in section 9(1). It is done by reference to the two broad categories of injury already mentioned.

First there are the injuries listed in the First Schedule which are to carry compensation at a level

specified in that Schedule. Subject to certain provisions which are not relevant this is made clear by section 9(1)(a) as follows:-

> "9.(1) ... where permanent partial incapacity results from the injury the amount of compensation shall be -
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> (a) in the case of an injury specified in the First Schedule, such percentage of the compensation which would have been payable in the case of permanent total incapacity as is specified therein as being the percentage of the loss of earning capacity caused by that injury."

The First Schedule lists a series of physical impairments which for the most part amount to actual loss of some part of the body; and in each case the specified injury automatically carries a fixed "percentage loss of earning capacity". The loss of a leg at the knee, as an example, is regarded as producing a loss of earning capacity at a level of 70% whatever the real position in a given case and whether, for instance, it should involve an unskilled labourer or a sedentary office worker. To put the matter in another way, there is an irrebutable presumption concerning the loss regardless of the practical implications, in relation to future earnings for the individual. All this being so it will be seen that the calculations provided by the Schedule are intended to reflect a general expectation based on average experience and so provide reasonably swift answers in terms of broad justice.

The second category of injuries provided for by section 9(1) are those outside the Schedule. They are the subject of attention in paragraph (b) which reads:-

> "(b) in the case of an injury not specified in the First Schedule, such percentage of the compensation which would have been payable in the case of permanent total incapacity as is proportionate to the loss of earning capacity permanently caused by the injury in any employment which the employee was capable of undertaking at that time."

There are two provisos to paragraph (b) which make it plain that "the loss of earning capacity" referred to in that paragraph is to be assessed in order to stand in fair "conformity with the scale of percentages specified in that Schedule". The provisos read:-

> "(i) in the case of injury to any part of the body specified in the First Schedule not amounting to the loss of that part, the loss of earning capacity permanently caused

by that injury, expressed as a percentage, shall not exceed the appropriate percentage specified in the First Schedule in respect of the loss of such part;

(ii) in the case of injury not specified in the First Schedule, the loss of earning capacity permanently caused by such injury shall, so far as possible, be assessed in conformity with the scale of percentages specified in that Schedule."

Thus the assessed effect of a non-schedule injury must reflect the fixed statutory conclusions provided for the listed or schedule injuries. And that would not be possible unless the degree of bodily impairment itself could be compared with the various bodily losses listed in the Schedule. Nor would it be possible if the issue were to be decided in advance (as in the present case) on the sole basis of wages actually being earned at the time of the hearing. As a matter of construction the various parts of section 9(1)(b) are not to be read progressively so that the comparison required by the second proviso is made dependent, as the Court of Appeal thought, upon earlier "proof of some loss of earning capacity in fact". Instead they are inter-dependent and must be read together. Considered in this way it becomes clear, that while evidence of post-accident earnings may be taken into account as having some greater or lesser relevance when estimating the permanent significance of a non-schedule injury, such evidence cannot by itself exclude the wider implications of the lost bodily function when related to the Schedule injuries.

Finally, it is right to remark that the members of the Court of Appeal were troubled that the construction they had felt obliged to give the Ordinance could work an injustice. As McMullin V-P. pointed out such a claim as that advanced for Lau would have to be dealt with once and for all and within a period of two years. "Yet", as the Judge said, "if he should lose his present employment it may be that he subsequently will find himself at such a disadvantage in the market generally so that genuine loss of pre-accident earning capacity may result". On the view of the Ordinance taken by their Lordships that prospect and that risk will properly be taken into account at the time of assessment.

Their Lordships will humbly advise Her Majesty that this appeal ought to be allowed and the Judgment of the District Court of 24th July 1984 restored. The respondent must pay the appellant's costs here and in the Courts below, such costs to be taxed and certified if not agreed; but the order for costs is not to be enforced without the leave of the Court of Appeal.