

Client Alert

Insurance

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Blameless employer claiming against the wrongdoer – how much can the employer recover?

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The Employees' Compensation Ordinance Cap. 282 is a non-fault based system of compensation. Under this scheme, compulsorily-insured compensation is speedily paid to injured employees or their family members. A blameless employer who has paid the compensation upfront may find consolation in s.25(1)(b) of the Ordinance which confers the employer a right of recovery against the wrongdoer. The problem is: how much the employer can recover?

The Court of Appeal held in *Wah Kwong Construction Material v Wong Man-Yip* [1995] 1 HKLR 85 that the employer can recover from the wrongdoer not only the compensation paid but also legal costs paid to the claimant and his own defence costs. At the same time, the proviso to s.25(1)(b) places a cap on the extent of the employer's recovery so that the wrongdoer will never be liable for more than the damages the claimant would have recovered from him in the proceedings in tort. Another limitation to the recoverable amount is also imposed by s.27 if the employee himself was at fault.

From the proviso to s.25(1)(b) two issues arise. First, is this cap applicable to the compensation paid only? Second, will the Court make its own assessment on the amount of common law damages if the claimant reached an out-of-court settlement with the wrongdoer?

The Court tackled the first issue in the recent decision of *Kan Che Sing v Hop On Management Co Ltd* [2020] HKDC 292 (DCPI 393/2016, 4 May 2020). Before deducting the amount of the compensation already received, the employee was found entitled to common law damages of HK\$103,706.21. The employer's outlays however totalled HK\$376,403.78, with HK\$183,483.78 being the compensation paid. In the end, the Court found that the cap in provision to s.25(1)(b) should apply to all the outlays. The employer can only recover HK\$103,706.21 from the wrongdoer.

The proviso to s.25(1)(b) seems to envisage the possibility that a claimant may agree the amount of common law damages with the wrongdoer. It however remains open for a Court to determine the amount of damages in an employer's recovery action. Without directly addressing the second issue, the Court in *Hong Kong Red Cross v The Hong Kong Federation of Youth Groups* [2010] HKEC 225 (DCCJ 2233/2007, 12 February 2010) assessed the common law damages the employee would have been awarded, even though the employee had already reached settlement with the wrongdoer. The actual settlement amount was not applied as a cap to the employer's recovery claim against the wrongdoer.

Under the present scheme, a blameless employer faces a risk that it cannot seek full recovery from the wrongdoer.

Other Recent Decisions

- In cases where the Plaintiff worked in an industry which is "impacted by the COVID-19 pandemic in a significantly adverse way", the court is prepared to adopt a reduced multiplier for future loss of earnings during the COVID-19 pandemic: *Lam Hon Keung v Hong Kong Aero Engine Services Limited* [2021] HKDC 212
- Solicitor in charge of a PI action should not pursue a hopeless case on behalf of his client, lest the Court make him pay the costs of the successful defendant when it is apparent that his client is unable to pay those costs: *So Kam v Guildford Limited & Another* [2021] HKDC 340

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