DCPI 158/2007

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 158 OF 2007

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BETWEEN

CHEUNG YIU KWONG Plaintiff

and

YU WING HONG Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung in Court

Date of hearing: 15-16 May 2008

Date of judgment: 26 June 2008

**ASSESSMENT OF DAMAGES**

1. On 30 November 2005, Cheung (the Plaintiff) was injured in a traffic accident. Cheung commenced the present action for damages against Yu (the Defendant), another driver involved in the accident. On 31 May 2007, Yu consented to judgment against him for damages to be assessed. Hence this hearing.

**INJURIES AND TREATMENT**

1. As a result of the accident, the motorcycle (or more precisely, the motor scooter) that Cheung was riding at the time was damaged and he was injured. Upon admission to the Prince of Wales Hospital (PWH), he was found to have injured his left knee. There was tenderness, swelling and a 2-cm laceration. There was no effusion or fracture. Range of movement was normal. He was discharged after the wound was sutured. Sick leave was granted for 8 days.
2. Days later, he attended the Tai Po Jockey Club Clinic (TPJC), complaining about neck and right shoulder pain. Examination showed mild tenderness with full range of movement. During follow up in the following week or so, it was found that his leg has been healed; but he still complained about mild tenderness over his neck. Sick leave was granted up to 16 December 2005.
3. On 17 December 2005, Cheung started to consult Dr S K Wong, a private practitioner. According to Dr Wong’s report, Cheung consulted him for right shoulder and left knee pain as a result of the accident. He was given analgesic and physiotherapy. In his follow up 2 weeks later, the right shoulder pain was found to be better. The left knee was swollen and tender with bruise. Analgesics were again given. There were regular consultations in the following 3 months. Progress was satisfactory. The right shoulder pain became lesser and the left knee scar was soft.
4. On 28 March 2006, Cheung still complained to Dr Wong about left knee pain especially when walking upstairs. He attributed this to humid and rainy weather. He had no more shoulder pain. Examination showed tender and mild swollen left knee. Joint stability was preserved. Range of movement was normal. But in view of his complaint of recurrent left knee pain, Dr Wong urged him to attend the orthopaedic unit of the PWH as soon as possible.

**MEDICAL EXPERT OPINION**

1. The medical experts retained on behalf of the parties (i.e, Dr James Kong for Cheung and Dr S Y Chun for Yu) examined Cheung in May 2007. They produced their joint report in June 2007.
2. The experts considered that Cheung has fully recovered from his right shoulder contusion. As to the left knee, Cheung still complained about mild intermittent pain. Examination revealed that Cheung’s function of the lower limbs was relatively well preserved. No obvious muscle wasting could be identified. X rays of the knee were essentially normal. Also observing the surveillance report on Cheung in April 2007, the experts agreed that Cheung has made a remarkable recovery with only a mild soft tissue residue of left knee laceration secondary to the accident.
3. Dr Kong opined that only relatively mild residual symptoms are likely to persist. Further physiotherapy and training would probably not be very useful. He advised Cheung to take break to stretch his knee after every 2 hours of work and driving. Dr Chun did not believe such break would be required. Both experts recommended quadriceps exercise but no future operation. Both agreed that Cheung has reached maximum medical improvement. Both agreed that Cheung could resume his pre-accident job as a pizza deliveryman. As to the reduction in the working capacity and efficiency, Dr Kong described that as “relative mild reasonable” while Dr Chun described that as modest. Sick leave granted so far were considered to be reasonable.
4. The experts reviewed their assessment and produced the supplemental joint report in August 2007. Both noted Dr S K Wong granted Cheung sick leave until early April 2006 and further sick leave from February to end of April 2007. Both did not consider that sick leave in 2007 were necessary. Dr Chun opined that sick leave up to 28 March 2006 (i.e., less than 4 months) was very adequate and within acceptable limit, though this was already longer than the normal 4-8 weeks for the recovery of such type of injury. Dr Kong opined that sick leave for up to 4 months should have adequately addressed his shoulder contusion and knee laceration with a regular course of rehabilitation treatment.
5. Both Dr Chun and Dr Kong believed Cheung should be able to return to his *alleged* daytime job of interior decoration work. Dr Chun believed there would be little restriction and Dr Kong believed there would be only relatively modest activity limitation as mentioned in the last report. Dr Chun believed Cheung should be able to carry on his evening job as a pizza deliveryman as well. But Dr Kong suggested that it would not be in the best interest of Cheung to be engaged in two different jobs at the same time. It would be far easier and less strenuous for him to take up either one of the posts instead.
6. Mr Wright for Yu criticised Cheung for withholding from the medical experts the fact that he was injured in 2 traffic accidents in March and August of the same year before the present accident. The medical notes in respect of his previous accidents reveal that Cheung was injured at his left shoulder and neck in his first accident and his left foot and ankle in his second accident. The diagram in the notes seems to point to his left knee as an injured part as well. But this remains unclear. Cheung denied his left knee was injured in his previous accidents. In the absence of further investigation, Mr Wright for Yu could only suggest that Cheung’s left knee was *possibly* injured then. Also in the absence of medical expert evidence in this regard, I should not speculate whether Cheung’s previous accidents and injuries in fact have any bearing on the causation between the present accident and condition of Cheung.

**CHEUNG’S COMPLAINT**

1. Cheung now complains about pain in his left knee, especially when walking along staircases. He claims that he has become unable to resume soccer game or fitness training, his favourite pastime before the accident. Cheung claims that prior to the accident, he worked as a daytime decoration worker and a night time pizza deliveryman. He was given over 180 days of sick leave and was allegedly out of work during this period. He claims that due to his condition and disability, he has become unable to resume his alleged pre-accident daytime job at all and was only able to resume work as pizza deliveryman and occasional courier contractor after the sick leave.
2. Yet, the objective medical findings mentioned above do not suggest that Cheung has suffered any significant physical impairment as a result of the present accident. After follow-up at the TPJC in December 2005, Cheung’s knee was found to have healed. He consulted Dr S K Wong upon introduction by someone. According to his report, Dr Wong provided no special treatment other than analgesics and physiotherapy to address Cheung’s complaint. Eventually, in March 2006, Dr Wong even urged Cheung to consult the orthopaedic unit of the PWH as soon as possible, in view of his constant complaint about knee pain. However Cheung did not revisit the PWH until 2007.
3. Further, the experts opined that Cheung should not be suffering any but relatively mild residual symptoms in the left knee. There was never suggestion of possible complication of his condition. As mentioned above, they did not find the sick leave granted to Cheung in 2007 was warranted. They basically agreed that 3 to 4 months would be the acceptable limit of sick leave for Cheung to fully recover from his injury. Mr Wright for Yu drew my attention to the fact that during the last direction hearing before His Hon Judge Lok this January, Cheung’s solicitors actually indicated their readiness to accept that assessment. The record of that hearing confirms Mr Wright’s observation. Sick leave in excess of 3 or at most 4 months was unreasonable.
4. I prefer the objective medical findings and expert opinion to Cheung’s own assertions about his condition. Notwithstanding Cheung’s allegation that he was not able to resume his fitness training, he appeared in court as a man with a fairly strong build. Considering the surveillance recording and report on him, I am not impressed that he had such difficulty or pain coping with his daily life activities or work as he alleged.

**PAIN SUFFERING AND LOSS OF AMENITIES (PSLA)**

1. In support of the claim for HK$200,000 for the PSLA, Mr Sujanani for Cheung relies on the following cases: *Kwok Wing Ming v Wong Lin Lung*, HCPI 1341/1996, 22 October 1998; *Man Ying Chu v Leung Kwok Wing*, HCPI 1062/2004, 19 December 2006; *Leung Po Chun v Yat Lee Booth-Construction Co Limited*, HCPI 1099/2006, 14 September 2007; and *Ko Kam Wai v Sze Hak Fung t/s Chung Fung Company & Anor*, HCPI 292/2005, 11 July 2006.
2. Mr Wright for Yu submitted that an appropriate award should be HK$25,000. He relies on *Luk Ho Yuen v Lo Kwok Hung & Anor*, HCA 4150/1983, 12 October 1983; *Lee Chung & Anor v Pang Lap Hung & Anor*, HCA 2764/1985, 6 November 1985; *Hong Kong Macao Hydrofoil Co Ltd v Ng Chun Wai & Ors* (1989) HKLD L55, 8 December 1989; and *Fong Wai Mui v Cheung Fung Lan*, DCCJ 24639/1998, 18 December 2000.
3. On the one hand, the cases cited by Mr Wright for Yu are not close comparables to the present case. On the other hand, the cases cited by Mr Sujanani for Cheung are clearly more serious than the present case in various essential aspects. Perhaps *Ko Kam Wai* may be considered as relatively close to the present case. Yet in that case, the experts recommended surgical intervention to improve the condition of the worker’s knee. Comparing with the objective medical findings and expert opinion mentioned above as well as Cheung’s personal circumstances, that case is still more serious than the present one.
4. It is clear to me that an award in either amount proposed by counsel for the parties would not reflect the reality. Considering Cheung’s personal circumstances and the degree of genuine pain and suffering, I award HK$90,000 under this head. See also the relatively older cases of *Chang Ping Nam v Choi Kwai Kun* (1981) HKLJ 412; *Yun Man Chiu v Chow Chi Fan* (1983) HKLJ 116.

**LOSS OF EARNINGS**

1. Cheung alleges that he used to work during daytime as a decoration worker for 20 days a month. He allegedly used to earn from such daytime job a daily wage of HK$450 or a monthly income of HK$9,000. He also worked for 26 days as a pizza deliveryman and earned an average monthly income of HK$3,000. His total monthly income was therefore said to be HK$12,000. He claims total loss of income for 184 days of sick leave. He also claims that he could no longer resume his daytime job at all and could only resume his night time job after the sick leave.

**The alleged daytime job and income**

1. No detail about Cheung’s alleged daytime job was provided until somehow in his supplemental statement. There he stated that he has followed his father to do carpentry work since he was very young. In 2003, he started to work as a decoration worker on a casual basis. He started to work as a self-employed since October 2004 until the month in which he met the present accident.
2. Cheung could only say that he has worked for days at an apartment in Shau Kei Wan in May 2005; at a factory warehouse in To Kwa Wan in June 2005; and at an apartment in Tai Po in October 2005. He was really unable to name any of the contractors or co-workers he has ever worked for and with. He was unable to produce a single document that might have directly or indirectly substantiated his allegations about such job or income from such job. He explained that he was always paid in cash and never by cheque. He never deposited his earnings in the bank. He never had a business registration. He never filed tax return.
3. After his 2 previous accidents, Cheung has applied for traffic accident victims assistance. In both his application forms to the Social Welfare Department, no mention was made at all about his alleged daytime job as a decoration worker. In his application after the second previous accident, pizza delivery was stated to be his proper occupation whereas being a self-employed courier contractor was stated to be his part-time occupation. This is hard to explain if such daytime decoration work had always been his major source of monthly income as he now alleges.
4. Faced with the complete lack of documentary support, Cheung’s argument boils down to be this: He supported the family consisting of his girlfriend, their son and his father and was responsible for the monthly family expenses of slightly over HK$11,000. It follows that he must have made not less than HK$12,000 every month for the family to sustain. While I do not rule out that in appropriate cases, this may be an acceptable way of finding or inferring the monthly income, I do not believe this is an acceptable way in the circumstances of this case.
5. In court, Cheung at one point apparently agreed that he could not be sure whether he managed or would have managed to work 20 days as a daytime decoration worker or to make HK$9,000 a month as alleged. Even prior to the present accident, in August 2005, Cheung decided to work as a self-employed courier. He explained in court that he tried such new job for one day to see if he could switch to this job. He described this as a way out to make more money. He explained that carpentry work and/or the income from such work was not steady. For that day’s courier work, he was paid HK$250 only. He claimed he could have expected a higher pay from such new job, had he continued in it.
6. When asked how the family expenses were met during his sick leave, Cheung explained in court that his girlfriend had substantial savings. He later changed to say that his girlfriend had a certain amount of savings but she also had to do part time job to help out. He said his girlfriend funded this litigation. He could not tell the details. His girlfriend could have explained and was supposed to be his witness. She has indeed filed her statement for such purpose. At the last minute, she was not called.
7. Considering the evidence, even assuming that Cheung might have taken up work as a decoration worker before, I am not satisfied such work was in fact fairly regular or gave him an average income of HK$9,000 every month. I am also not satisfied that but for the accident, he would have engaged himself in such decoration work during the 3 to 4 months of sick leave. It is always Cheung’s burden to prove his alleged loss of income. The court is not obliged to make a finding, if the evidence is really not satisfactory. I do not accept as a matter of fact and cannot assume that Cheung has lost *some* income from the alleged daytime job during that period; and somehow proceed to make an award for *some* amount anyway.

**The night time job and income**

1. There is no dispute regarding the fact that Cheung had a night time job as a pizza deliveryman. Cheung pleaded that he worked from 6 pm to 10 pm during weekdays and from noon to 10 pm during weekends for 26 days a month. His average monthly salary was HK$3,000 monthly. He was once ordered to disclose his attendance records dated before and after the present accident. But he filed an affirmation, saying that he had not kept the attendance records and his manager informed him that the company had not kept his attendance records.
2. The company referred to is in fact Pizza Hut Hong Kong Management Limited, one of the established pizzeria chains in Hong Kong and a member of the Swire Restaurant Group. Not surprisingly, the then solicitors for Yu were not satisfied with Cheung’s answer and obtained an order that they be authorised to obtain such attendance records from Pizza Hut directly. As expected, the records exist and were produced by Pizza Hut.
3. I doubt how seriously Cheung has requested, if at all, for the attendance records. After all, he was at all times represented legally. I wonder how Cheung could be allowed to make such affirmation just like that. In any event, now the records are available and they reveal something. For the purpose of applying for the traffic accident victims assistance after his previous accidents, the monthly income from such job that he stated was apparently higher than that actually received by him around then. More importantly, Cheung claims total loss of income since the accident, saying that he was unable to work at all during the sick leave period. The records directly contradict this allegation. The fact was that he met the present accident on 30 November 2005. He resumed his pizza delivery work on 3 December 2005. The claim for total loss of income during this period must fail.
4. Cheung has since resumed working as such for roughly similar number of hours as immediately before, i.e., slightly less than 80, every month. The number of Cheung’s working hours per month had remained at about 80 since early 2006. There were variations but there is no proof that the slight variation in the number of working hours per month was attributed to Cheung’s condition or ability to handle the work. In the circumstances, I am also not satisfied that the present accident has caused him any loss of income from this part time job except for the HK$300 for the couple of days he in fact did not work as such.

**After the reasonable sick leave**

1. Even assuming that Cheung would have wanted to take up decoration work after the sick leave period, I am not satisfied that he has become unable to do so. Cheung attributed his inability to carry out such work to the residual pain in his knee when carrying weight and climbing stairs. To begin with, Cheung never alleged to have worked in construction sites. There is no suggestion that his alleged decoration or carpentry work normally entails carrying heavy weight (such as the example of carrying 20 cans of drinks he gave in court) to climb stairs or ladders. I have insufficient, if any, evidential basis to accept his suggestion in court that it would be unsafe for him in his condition to simply stand on a ladder or a working platform, if necessary, to carry out such work. The objective medical findings are against such assertion of inability in any event. The fact is that he has not done any sort of decoration work at all since the accident.
2. Cheung gets no support from the medical experts either. The experts believed that Cheung should be able to resume his alleged daytime job as a decoration worker and his night time job as a pizza deliveryman. The activity limitation should be relatively modest. Dr Kong opined that it would not be *in the best interest of* Cheung to be engaged in two different jobs at the same time and it would be *far easier and less strenuous* for him to take up one job only. However I do not accept what Dr Kong stated should be the proper test of Cheung’s ability to do so.
3. In the circumstances, I am not satisfied that Cheung should suffer any future loss of earnings attributable to the present accident.

**LOSS OF EARNING CAPACITY**

1. Considering the above, I am also not satisfied that Cheung would really be subject to any disadvantage in the labour market in the form of the risk of losing his job or remaining unemployed as a result of his condition.

**MISCELLANEOUS SPECIAL DAMAGES**

**Medical expenses**

1. Expenses incurred for treatment at the hospital and TPJC are agreed at HK$510. Claim for private consultation fees in excess of HK$6,000 is disputed. While I am not prepared to rule that it was unreasonable for Cheung to consult Dr Wong at all, the number of consultations was more than necessary and reasonable. I award a lump sum of HK$3,000 under this head.

**Travelling expenses**

1. HK$2,000 is claimed for travelling expenses allegedly incurred for Cheung to attend medical treatment. There was no breakdown but explanation in court that taxi was taken. I allow HK$800.

**Damaged motorcycle**

1. Cheung was not the owner of the damaged motorcycle. HK$6,800 is claimed for its repair. The survey report in December 2005 recommended the damaged motorcycle to be treated as a total loss. HK$6,800 was the pre-accident market value of the motorcycle and the scrap value was HK$300. In court, Cheung said that the damaged motorcycle was never repaired. Instead the owner was paid HK$6,500 (presumably HK$6,800 – HK$300) as compensation. The incidental survey report fee was HK$750.
2. Cheung said his girlfriend paid the compensation for him. No document was produced to evidence such payment. As mentioned above, his girlfriend, who was supposed to a witness, was eventually not called. Also in the statement she has filed, no mention was made about such payment. However, strangely, the owner of the motorcycle by letter in as late as June 2007 stated that Cheung has repaired the motorcycle at his own cost. Cheung did not say when his girlfriend allegedly compensated the owner. But this in any event could not explain why the owner stated that Cheung has repaired the motorcycle at his own cost. The letter came into existence when Cheung was legally represented and the present action has already been commenced.
3. I do not have a credible clue as to whether Cheung had indeed compensated the owner of the vehicle and, if yes, whether it was really HK$6,500 as alleged. On the other hand, Cheung himself denied having repaired the motorcycle. Again, it is Cheung’s burden of proof. I am most reluctant to allow this item of claim simply because of the undisputed fact that the motorcycle was damaged in the accident.

**SUMMARY**

1. The award falls remarkably short of the amount projected in the claim. In summary, the award is:

PSLA HK$90,000

Loss of earnings HK$ 300

Miscellaneous special damages HK$ 3,800

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Total: HK$94,100

1. Yu shall pay damages in the sum of HK$94,100 together with interest at 2% p.a. on HK$90,000 from the date of writ to today; and at half judgment rate on HK$4,100 from the date of accident to today. Interest from today shall run at the judgment rate until payment.
2. I make a nisi order that Cheung shall have costs of this action, to be taxed, if not agreed. I certify the engagement of counsel. This order shall become absolute, in the absence of an appointment within 14 days to argue costs.

Simon Leung

District Judge

Representation:

Mr Sajan Sujanani instructed by Messrs Alan Wong & Co for the Plaintiff

Mr John Wright instructed by Messrs Burke & Co for the Defendant