# DCPI 560/2005

## IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES NO. 560 OF 2005

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# BETWEEN

## WONG SHUK LEI Plaintiff

and

#### LEUNG MING KWONG Defendant

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## ASSESSMENT OF DAMAGES

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##### Coram : Deputy District Judge E. Yip in Court

###### Date of Hearing : 22 December 2005

Date of Judgment : 29 December 2005

##### Introduction

1. On 9 November 2003, the plaintiff was sitting at an aisle seat in a coach. The defendant negligently drove a car, which hit the coach. She was thrown forward with her left face hit against her front seat. She rebounded and hit her back against her own seat. She was sent to the hospital. She suffered back, face injuries and subsequently psychological impacts. Having obtained default judgment on liability, she now seeks assessment of damages.

*Plaintiff’s heads of claim*

2. Up to the present date, which is 2 years after the accident, she still suffers back pain, face injury (eye twitching), and psychological impacts. In her Revised Statement of Damages *[dated 21 October 2005 Trial Bundle “TB” 27-39]*, she claims *[TB 37]*:

1. Pain, suffering and loss of amenities *(“PSLA”)*;
2. Pre-trial loss of earnings;
3. Post-trial loss of earnings;
4. Loss of earning capacity;
5. Loss of MPF;
6. Special damages *(see Appendix 1 hereto for details*).

###### Details of her claim

*PSLA*

3. She claims $250,000 for PSLA.

4. Her orthopaedic specialist, Dr. Li Wing Kin, wrote a report after consultation on 19 March 2005 *[TB 50-58]*. He found tenderness elicited at the L4/5 and L5/S1 levels, maximal over her left paraspinal regions. The range of motion of her lumbar spine, in terms of flexion, extension, left and right lateral bending, had substantially decreased. She had reached a state of maximum medical improvement.

5. Her work as a machine operator in a factory was not of heavy duty. She used to work 14 hours per day. He recommended her not to work more than “two-thirds” of the pre-accident hours.

6. In Court, her solicitor, Ms. Cheung, puts forward several comparable cases on PSLA. The closest analogy is *Chan Siu Lun v Hui Cho Yee & Anor. HCPI 120/1997* *[Annexure Bundle “A 7” p. 24]*. There the plaintiff was found to suffer:

1. Fractured odontoid which has healed;
2. Soft tissue injury at left side and low back;
3. Mild pain or discomfort which might increase slightly as he got older;
4. Mild depressive mood which was likely to dissipate upon conclusion of trial.

7. Nguyen J. awarded $250,000 under this head. In our present case, the plaintiff says she had suffered anxiety and fear. But she dared not go to consult a psychologist because she was afraid to go by hersself. I do not see her daily life being affected in any major way, given that both she and her husband have not thought it necessary to be more proactive in seeking treatment. I do not think her case was that serious as she purports to suggest. I award $250,000 under this head.

*Pre-trial loss of earnings*

8. The plaintiff claims $146,000 under this head.

9. She states *[in her Revised Statement of Damages, dated 21 October 2005 TB 34]* that her pre-accident salary monthly salary was $10,000. This is not supported by her salary slip *[for October 2003, TB 75(5)]* for $7,150. According to her solicitor’s Submissions [para. 13.3, dated 21 December 2005], $7,150 was higher than her average *(of only $7,014.92)* over the previous 12 months. In fact, $7,150 was the highest figure she could opt for. I take $7,150 as her pre-accident monthly salary.

10. Dr. Li regarded that 1 month’s sick leave was reasonable. After that, she could only work not more than “two-thirds” of the working hours. In line with this, she did not work her usual, pre-accident 14 hours per day. She only worked 9 hours. As a result, she earned only $6,000 per month *[para. 14 of her Statement, dated 22 September 2005 TB 42]*. Thus she earned $1,150 less per month. She was dismissed by the factory in July 2005, namely 5 months before today. She has remained jobless so far. The accident was 26 months from today. She had lost earnings for 6 months *(being 1 months of sick leave plus 5 months of unemployment after dismissal)* of $42,900 in all *(being $7,150 multiplied by 6 months)*. She had also lost earnings for 20 months of $23,000 in all *(being $1,150 multiplied by 20 months)*. The total is $65,900 *(being $42,900 plus $23,000)*.

11. I award $65,900 under this head.

*Post-trial loss of earnings*

12. Her solicitor says that I need not assess this because it overlaps the loss of earning capacity,

*Loss of earning capacity*

13. She claims $100,000 under this head.

14. She was a farmer for over 20 years. She had a low education. She had worked for as another machine operator for 3 years before. Then she worked for this employer for 5 years until dismissal. After the accident, she could not stand long or sit low due to her back pain.

15. Dr. Li regarded that she should be able to work not more than “two-thirds” of the working hours. She actually worked less and had her salary reduced to $6,000 per month. Thus she earned $1,150 less per month. The claim of $100,000 will represent a stunning 87 months’ loss of such earnings *(being $100,000 divided by $1,150)*.

16. I understand that the award is going to be arbitrary. This head of claim is to compensate for her handicap in the labour market, as for example, she may be more easily dismissed and less likely to be re-employed if dismissed. In *Tang Shau Tsan v Wealthy Construction Co Ltd CACV 58/2000* the Court of Appeal adopted a formula based on the percentage of loss of earning capacity. In *Christopher Gordon Young v Lee Chiu CACV 131/2003* Reyes J. pointed out the difficulty with working on the percentage of loss of earning capacity and looked to a rough and ready lump sum instead.

17. I think the general trend is to look to a lump sum figure unless a formula is clearly helpful. I award $30,000 under this head.

*Loss of MPF*

18. She claims $21,700.00 under this head.

19. Her pre-trial loss of earnings hence loss of MPF at 5% is as follows:

1. Nov. 2003 – Dec. 2003, 1 month’s sick leave (at salary of $7,150) = *$357.50* ;
2. Dec. 2003 – Jul. 2005, 20 months’ reduced salary (at $1,150 per month) = *$1,150.00*;
3. Aug. 2005 – Today, 5 months’ being jobless (at cost of $7,150 per month) = *$1,787.50*

The total is $3,295.00. I award this amount under this head.

*Special damages*

20. She claims under this head *[as per Revised Statement of Damages, dated 21 October 2005 TB 37]* as follows:

(1) Medical expenses $1,480.00 (updated today from $1,380)

(2) Dr. Chan Sze Kin’s fee $220.00

(3) Chinese herbalist $1,040.00

(4) Tonic food $80,996.00 (updated today from $25,996)

(5) Traveling expenses $650.00

(6) Medicine $10.00

21. I find Items (1) Medical expenses $1,480.00 *[TB 60-68(1) and see Appendix 1 hereto for details]*, and (2) Dr. Chan Sze Kin’s fee $220.00 supported by documentary proof. I find Items (3) Chinese herbalist $1,040, (5) Traveling expenses $650, and (6) Medicine $10 reasonable.

22. The remaining item (4) Tonic food $80,996 concerns high-priced nourishment like bird’s nest, etc. There is only her oral evidence that such tonic food was taken on medical advice. She does not provide further and better particulars.

23. Master B. Kwan in *Tsai Shih Chieh v Mok Siu Fai HCPI 198/1998 [Annexure Bundle “A 10” p. 93]* cited from Briggs CJ’s observation in *Mui Ling Kwan v Wong Yin Wah [1973] HKLR 465* as follows:

At least since *Shearman v. Folland* it has been customary to claim as special damages a sum for extra nourishment. And the courts have almost invariably allowed a reasonable sum for such a claim.

She awarded $5,000 in the absence of proof. Nguyen J. in *Chan Siu Lun v. Hui Cho Yee, ibid.* awarded $5,000 likewise. I regard $5,000 reasonable for tonic food.

24. I award $8,400 in total under this head as follows:

(1) Medical expenses $1,480.00

(2) Dr. Chan Sze Kin’s fee $220.00

(3) Chinese herbalist $1,040.00

(4) Tonic food $5,000.00

(5) Traveling expenses $650.00

(6) Medicine $10.00

Total: $8,400.00

*Conclusion*

25. I award $357,595.00 in total under all heads as follows:

1. PSLA $250,000.00
2. Pre-trial loss of earnings $65,900.00
3. Post-trial loss of earnings nil
4. Loss of earning capacity $30,000.00
5. Loss of MPF $3,295.00
6. Special damages $8,400.00

26. I award interest at 2% per annum on general damages from the date of service of the Writ of Summons to today, and interest at half of the prevailing judgment rate on special damages from the date of the accident to today.

27. There is no apparent reason why costs should not follow the event. I order costs *nisi* to the plaintiff. The order shall become absolute 14 days from today.

Dated this 29 December 2005

EDDIE YIP

DEPUTY DISTRICT JUDGE

Appendix 1

Medical Treatments at Hospitals

Date Subject-matter Venue Charge

9.11.03 Back pain, face injury A & E QEH $100

13.11.03 Back pain, leg pain A & E QEH $100

3.12.03 Back pain A & E QEH $100

11.12.03 X-ray of lumbar spine TKOH $100

Admitted from 30.5.04 to 1.6.04

Anxiety and fear Psychlogical TKOH $200

7.6.04 Anxiety and fear Psychlogical TKOH $100

21.6.04 Anxiety and fear Psychlogical TKOH $60

5.7.04 Anxiety and fear Psychlogical TKOH $60

19.7.04 Anxiety and fear Psychlogical TKOH $60

4.8.04 Back pain Orthopaedic TKOH $60

16.8.04 Back pain Physiotherapy TKOH $60

23.8.04 Back pain Physiotherapy TKOH $60

8.9.04 Back pain Physiotherapy TKOH $60

2.11.04 Back pain Orthopaedic TKOH $60

22.2.05 Back pain Orthopaedic TKOH $60

19.4.05 Eye twitching OphthalmologicalTKOH $60

12.7.04 Back pain Orthopaedic TKOH $60

19.7.04 Eye twitching OphthalmologicalTKOH $60

29.11.04 Back pain Orthopaedic TKOH $60

“A & E QEH” means Accident and Emergency Department of Queen Elizabeth Hospital.

“ TKOH” means Tseung Kwan O Hospital.

Miss Cheung Wai Man, of Messrs. Christopher Li & Co., for the Plaintiff

Defendant: Leung Ming Kwong, acting in person, absent