#### DCPI1012/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1012 OF 2008

BETWEEN

CHAN MAN KIT NICKY Defendant

and

MAK WAH FUNG Defendant

##### Before: Her Honour Judge H C Wong in Court

Date of Hearing: 23 November 2009

Date of Delivery of Assessment of Damages: 23 November 2009

## ASSESSMENT OF DAMAGES

1. The plaintiff claims against the defendant for damages and loss arising from a traffic accident caused by the defendant on 4 July 2006 at 9.20 am.
2. The plaintiff was riding on his motorcycle on the south-bound side of the Cross Harbour Tunnel when a car in front stopped due to traffic condition, the plaintiff, therefore also stopped his motor vehicle. However, the defendant failed to stop his car and crashed into the plaintiff’s motorcycle from behind, causing the plaintiff to be thrown from his motorcycle hitting into the back of the private car in front of him. The accident resulted in the plaintiff injuring his neck and spine and damages to the motorcycle and his personal items, including his watch.
3. The defendant was convicted of careless driving on 24 October 2006 at the Eastern Magistracy. Interlocutory judgment was entered against the defendant on 5 August 2008.
4. At today’s hearing of assessment of damages the parties agree to the following compensation:

(a) PSLA $230,000

(b) tonic foods, hospital and medical

expenses $11,995

(c) damage to motorcycle, survey fee and

watch $8,390

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Total: $250,385

1. The issues in the dispute remaining are:

(a) pre-trial loss of earnings;

(b) loss of future earnings;

(c) loss of earning capacity;

(d) compensation for future medical expenses.

1. The parties agree that should the court consider there to be loss of future earnings, the multiplier is agreed at 15.
2. At closing submission, the plaintiff’s counsel, Mr Lam, agreed that the amount on future medical expenses, the item for payment of massages in Shenzhen, is no longer pursued.
3. The plaintiff, Mr Chan, suffered from injuries included neck, back and left knee after the accident. These injuries were confirmed by the doctors’ reports from the Queen Mary Hospital where he was admitted for four days’ treatment after the accident. Dr Ng Fu Yuen of the Department of Orthopaedic Surgery reported the following on 12 January 2007:

“Clinical examination show diffuse weakness and numbness of left lower limb, diffuse neck and back tenderness and left knee abrasion. There was no ligamentous laxity of left knee. X-rays of cervical spine, lumbosacral spine, left knee and chest did not show any fracture or dislocation. MRI of lumbosacral spine was performed on 4 July 2007 and showed L5/S1 intervertebral disc degeneration with mild protrusion and encroaching right S1 nerve root. The prolapsed intervertebral disk L5/S1 with right S1 root compression could not explain his left lower limb subjective neurological symptoms. He was diagnosed as neck sprain, back sprain and left knee contusion. He was treated conservatively with analgesics and physiotherapy. He was discharged on 7 July 2006.

He was reviewed at our specialist out-patient clinic on 21 July 2006, 15 September 2006 and 22 December 2006 respectively. Repeated clinical examination did not reveal any positive tension sign of lower limbs bilaterally. There was no motor nor sensory deficit. He complained of residual back pain. He was advised to undergo physiotherapy.”

1. Mr Chan’s present complaint is:

(i) residual pain in the left foot, left knee and back and neck;

(ii) weakness of the left foot, left knee, back and neck;

(iii) difficulty and pain in prolonged walking and standing, walking up stairs and slopes;

(iv) L5/S1 intervertebral disc degeneration with mild protrusion and encroaching right S1 nerve root;

(v) inability in lifting heavy objects;

(vi) difficulties in having sex with his wife.

1. As the parties have reached an agreement on PSLA and special damages, I shall concentrate on the disputed areas of damages; i.e., pre-trial and future loss of earnings; loss of earning capacity and future medical expenses.
2. Mr Chan is able to return to his job as the supervisor in the roast meat section of a restaurant after the accident. Though his pre-accident monthly income was $17,000 his present salary in the same job is now $16,000. He does not blame his injuries for the reduction in income and he is not claiming the difference. However, he claims he is no longer able to earn an extra $2,000 per month in his four rest days a month when he worked part-time as a lorry attendant making $500 per day. He claimed he was paid in cash at the part-time job and there were no receipts given. He claimed he would tell his bosses ahead of time his work schedule so that work arrangements could be made for him to be a lorry attendant on the Mondays or Tuesdays he took as his rest days from the restaurant.
3. After the accident he could no longer lift heavy weights including furniture and electrical equipments he would be expected to move in his job as a delivery worker or lorry attendant.
4. I refer to Dr Lam’s medical report on 11 December 2008 where he said in paragraph 2:

“In the statement of damages dated 8 May 2008, Mr Chan alleged that he was also working as a part-time delivery worker. However, at the time of the examination on 10 October 2008 Mr Chan did not voluntee information on this aspect. According to Mr Chan, his job at the restaurant requires him to work from 10 am to 11 pm for six days a week. This would practically leave very little time for him to have any other work.”

1. In paragraph 6 he continued:

“6. In my earlier report I have pointed out that Mr Chan had:

Pre-existing right shoulder injury in 2002 which, with residual pain and limited range of movement.

Uncomplicated left knee contusion on 4 July 2006 which has recovered well.

Neck sprain and back sprain/contusion with soft tissue involvement on 4 July 2006 with satisfactory progress after treatment by 2007.

Right lower limb symptoms with onset two months after accident probably related to the pre-existing L5/S1 intervertebral disc degeneration.

Fracture of right big toe on 1 May 2007 unrelated to the subject accident.

7. I have also stated that Mr Chan should be able to continue working as a supervisor of the roasted meat section. He might have some reduction in work efficiency and endurance due to the subject back injury, especially when performing heavy manual work.

8. Whether Mr Chan could work as a part-time delivery worker would depend a lot on heaviness of the said job. As far as the injuries related to the alleged accidents are considered, with the residual problem mainly from the neck sprain and back sprain/contusion with soft tissue involvement, the physical hindrance for him to work as such should be mild only.

9. I have estimated Mr Chan to have a 2% impairment of the whole person and 2% loss in earning capacity. These assessments refer to the effect on the whole person including the possible effect on the job as a delivery worker.”

1. Mr Chan claimed it is up to the individual to decide whether one should take up part-time work on one’s rest day. He considered he has no choice because he is married and his wife is not working. He also has an obligation to contribute to his mother’s living expenses as well as to tend to his own and his wife’s needs. He is obviously eager to increase his income by working on his rest days.
2. I notice Mr Chan has a right shoulder injury in 2002 which took him one year to recover. He also has a left knee contusion due to the 4 July 2006 accident. Though these have less impact on his person than the injury to the neck and back, they too would have a bearing on his general health condition in the long run. The pre-existing degeneration of the L5/S1 intervertebral disc with right S1 root compression evidently complicated the effects on the injuries he sustained at the 4 July 2006 accident. Though Mr Chan’s QMH doctors and Dr Lam have isolated the injuries sustained at the 4 July 2006 accident with the pre-existing degeneration of the L5/S1 intervertebral disc, the fact that he had begun to suffer from the left lower limb subjective neurological symptoms two months after the accident showed the two are not necessarily unrelated; for example, the phenomenon of the right knee feeling tender after injury to the left knee is not a strange one for most people, the reason being one relies heavily on the right leg after injury to the left leg. Therefore, instead of sharing the weight between the two limbs, the uninjured limb took most of the weight became over-stressed. These symptoms usually appear sometime after the accident.
3. For Mr Chan, his pre-existing degenerative intervertebral disc may not have affected him much until he suffered injuries to his neck, back and left knee. The strain on his already degenerated spine therefore is magnified and the degeneration increased prematurely though the doctors did not explain this in their reports. Dr Lam did not say Mr Chan was faking his discomfort or limiting his movement and complained of his symptoms at the time he was examined by Dr Lam, therefore the discomfort and pain that Mr Chan feels must be real. The onset was two months after the accident, it is close enough for an association to be made.
4. However, I agree with Mr Gidwani that Mr Chan perhaps should not be taking up part-time delivery work at all, given his condition with his back.
5. On the other hand, I am not prepared to award the $2,000 per month pre-trial loss of earnings or the future loss of earnings because I am not satisfied that he has proved he was earning $2,000 a month working part-time four days or four times a month. I am not satisfied that he has produced sufficient evidence to support this claim. There were no tax return that showed he was making $2,000 extra per month. There were no receipts from his boss and none of his delivery work employers have come forward and give evidence in court. No evidence was produced in support, therefore, I am not awarding the pre-trial loss of earnings based on the extra $2,000 for delivery work a month, nor a loss of future earning based on the extra $2,000 a month.

Loss of earning capacity

1. On the other hand, I am prepared to award a sum equal to six months’ earning of Mr Chan’s pre-accident earning for his loss of earning capacity to protect him in the future should he need to seek alternative employment because I accept he has suffered in the labour market due to his injuries. Dr Lam has put it at 2% for his loss of earning capacity. The sum, therefore, is: 6 x $17,000 = $102,000.

Future medical expenses

1. I am not satisfied with the massage treatments Mr Chan received in Mainland China is a recoverable item. There is no medical evidence in support that these massages are curative rather than for temporary relief and relaxation. However, due to the discomfort he is currently suffering from and the fact that he is at present undergoing a course of physiotherapy at the Queen Elizabeth Hospital, in spite of the fact there is no physiotherapist’s report produced, I accept he may require future physiotherapy and medical treatments, and to cover the future medical expenses and physiotherapy expenses, I am awarding the sum of $10,000.
2. Summary

PSLA $230,000

Tonic foods and medical expenses $11,995

Damage to watch, motorcycle and survey fee $8,390

Loss of earning capacity $102,000

Future medical expenses $10,000

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Total $362,385

1. Interest on special damages at half judgment rate from the date of accident to the date of judgment, interest on general damages at 2% per annum from date of writ to date of judgment, thereafter at judgment rate.
2. Cost to the plaintiff to be taxed if not agreed with certificate for counsel.

# (H C Wong)

# District Court Judge

Mr Vincent Lam, instructed by Cham & Co., for the Plaintiff

Mr Victor Gidwani, instructed by Messrs Deacons, for the Defendant