#### DCPI1064/2008

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1064 OF 2008

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| BETWEEN | MANOHAR CHUGH | Plaintiff |
|  | and |  |
|  | YOGA PLUS LTD | Defendant |

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##### Coram: H H District Judge Marlene Ng in Court

Date of Hearing: 20th November, 2008

Date of Handing Down Judgment: 8th December, 2008

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ASSESSMENT OF DAMAGES

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###### I. Introduction

1. The Defendant was a limited company that previously carried on business of a yoga centre at 5-7/F, Lan Kwai Fong Tower, 33 Wyndham Street, Central, Hong Kong (“Premises”). The Defendant commenced winding up on 11th July 2008. Messrs Au Wai Keung and Wong Kam Wah were appointed its Joint and Several Liquidators (“Liquidators”) pursuant to a special resolution of the Defendant and a resolution of creditors of the same date. In the circumstances, the Defendant is now in creditors’ voluntary liquidation.
2. By a membership agreement dated 5th May 2007 (“Agreement”), the Plaintiff became a member of the Defendant to learn to perform yoga. The Plaintiff acts in person in the present case although he has sought advice and/or assistance from solicitors.
3. According to the Writ of Summons and the Statement of Claim, the Plaintiff claims he had made clear to the Defendant at the material time that he was 62 years old with no previous experience of yoga, so he specifically asked to be assigned to a beginner’s yoga class. However, during the morning yoga session at the Premises on 27th May 2008, he was assigned to an intermediate class which was a “tough class” and unsuitable for an absolute beginner. The Plaintiff further claims that whilst practising yoga at the instruction of the Defendant’s yoga teacher, he sustained personal injuries to his right leg and low back (“Accident”) for which he was hospitalised for several days.
4. The Plaintiff claims that at the material time he was a lawful visitor to and the Defendant was the occupier of the Premises within the meaning of the Occupiers Liability Ordinance Cap.314, so the Defendant was “responsible for the system of safety of all students, including that of the Plaintiff, while attending yoga classes at the Premises”.
5. The Plaintiff further claims the Accident was caused by breach of the implied terms of the Agreement, breach of the common duty of care and/or negligence of the Defendant and its servants or agents in that the Defendant :
   1. failed to take any reasonable care or any adequate precaution for the safety of the Plaintiff whilst he was practising yoga;
   2. failed to provide the Plaintiff with adequate, full and/or proper training, instructions and/or supervision, and safe/proper system of control for him to practise yoga safely;
   3. failed to explain and warn of the dangers associated with yoga performance, and teach the Plaintiff steps that must be taken to prepare for such dangers;
   4. failed to teach the Plaintiff properly and make him aware of the dangers associated with performing yoga;
   5. caused/permitted the Plaintiff to practise yoga at an intermediate class when the Defendant knew or ought to have known there was a risk of causing injuries to beginners and when the Plaintiff had no previous experience in practising yoga;
   6. failed to carry out a risk assessment before assigning the Plaintiff to a yoga class.
6. In short, the Plaintiff claims the Defendant exposed him or caused him to be exposed to a risk of damage or injury which the Defendant knew or ought to have known.

*II. Procedural matters*

1. Although the Statement of Claim averred that a Statement of Damages was served therewith, in fact the Statement of Damages was not served together with the Statement of Claim.
2. On 16th June 2008, the Defendant wrote to the court claiming it had suffered significant operation loss and was unable to pay the debts and salaries of its employees. The letter goes on to say that an extraordinary general meeting and a meeting of creditors for the purpose of voluntary winding up would be held on 11th July 2008, and notice of meeting would be sent to all known creditors (including the employees) in due course.
3. No notice of intention to defend was filed by the Defendant, so on 24th June 2008 interlocutory judgment in favour of the Plaintiff was entered against the Defendant for damages to be assessed. In the circumstances, I am no longer concerned with the issue of liability.
4. As explained in paragraph 1 above, the Defendant commenced creditors’ voluntary winding up on 11th July 2008. The relevant special resolution passed at the extraordinary general meeting on 11th July 2008 and the Notification of Appointment of Liquidator or Provisional Liquidator of the same date were lodged with the Companies Registry on 18th July 2008.
5. On 2nd July 2008, the Plaintiff issued a Notice of Appointment of Assessment of Damages (“Assessment Notice”) returnable on 18th July 2008. There was difficulty in serving the Assessment Notice in light of the Defendant’s creditors’ voluntary winding up, so the hearing of the Assessment Notice was adjourned to 7th August 2008 for service to be effected by the Bailiff. According to the affirmation of service of the Bailiff dated 22nd July 2008, the Assessment Notice was served on the Defendant by leaving the same at 7/F, Lan Kwai Fong Tower, 33 Wyndham Street, Central, Hong Kong being the usual or last known address of the Defendant.
6. The Defendant was absent at the adjourned hearing of the Assessment Notice on 7th August 2008. Deputy District Judge Richard Khaw directed the Plaintiff to file and serve a Statement of Damages, a List of Documents, all necessary medical reports (including reports from government hospitals and private medical practitioners) which he intended to rely on, an expert medical report (if any) and witness statement within 21 days from the date thereof. The learned judge further directed that service of the above documents on the Defendant be effected by leaving the same at the registered address of the Defendant and at the address of the Liquidators, and that the assessment of damages be adjourned for Check List Review (“CLR”) on 8th September 2008.
7. On 28th August 2008, the Liquidators wrote to advise the court they would not attend the CLR hearing on 8th September 2008, and they had sent proof of debt form and other relevant documents directly to the Plaintiff for him to register his claim.
8. On the same day, the Plaintiff filed his Statement of Damages, his List of Documents and his own witness statement (collectively, “Plaintiff’s Documents”).
9. At the hearing of the CLR on 8th September 2008, the learned PI Master adjourned the hearing *sine die* with liberty to restore. On the same day after the CLR hearing, the learned PI Master directed as follows :

“Further to the checklist review hearing this morning, this Court now clarifies that as the Defendant is in creditors’ voluntary liquidation, section 186 of Company Ordinance does not apply.

Your (sic) are at liberty to proceed for Assessment of Damages in the District Court without applying for leave from the Court of First Instance.

Kindly approach this Court for restoring the checklist review date when you have decided to proceed in the District Court as opposed to filing proof of debt.

In the meantime, you are urged to seek independent legal advice to make your election.”

1. The Plaintiff wished to proceed with the assessment of damages, and restored the CLR before the learned PI Master on 20th October 2008. By a letter dated 15th October 2008, the Liquidators informed the court they would not attend the adjourned CLR hearing.
2. Not unexpectedly, the Defendant was absent at the adjourned CLR hearing on 20th October 2008. The Plaintiff confirmed he would not adduce any expert medical evidence. The learned PI Master granted *inter alia* the following directions :

“1. The Appointment of Assessment of Damages be adjourned and fixed at 9:30am on 20th November 2008 in Court 9 of the District Court, with 1 hour reserved;

* + 1. The Plaintiff shall file an affirmation within 5 days from today to the effect that he has complied with paragraphs 1, 2, 6 and 7 of the [order of Deputy District Judge Richard Khaw dated 7th August 2008];
    2. Unless the Defendant shall file and serve witness statement as to quantum within 7 days from service of this order, the Defendant shall be debarred from adducing any evidence in respect of quantum;
    3. Liberty to apply; and
    4. Costs of today be costs in the cause of the assessment of damages.”

1. According to the records in the court file, the District Court sent sealed copies of the orders made by the learned PI Master on 8th September and 20th October 2008 to the Defendant at 5/F, Lan Kwai Fong Tower, 33 Wyndham Street, Central, Hong Kong and to the Liquidators at Unit 2601, 26/F, China Insurance Group Building, 141 Des Voeux Road Central, Hong Kong by ordinary post under cover of several letters dated 28th October 2008.
2. On 29th October 2008, the District Court registry issued a Notice of Hearing addressed to both parties specifying *inter alia* that the adjourned hearing returnable before me on 20th November 2008 (“Hearing”) was “for assessment of damages” (“Hearing Notice”).
3. According to the affirmation of service by the Bailiff dated 4th November 2008, the orders of the learned PI Master dated 8th September and 20th October 2008 and the Hearing Notice were served on the Defendant by leaving them at 5/F, Lan Kwai Fong Tower, 33 Wyndham Street, Central, Hong Kong on 4th November 2008.
4. The Liquidators were apparently aware of the Hearing for they wrote to the court on 7th November 2008 stating they would not attend the Hearing. I am satisfied the Liquidators did receive the Hearing Notice as well as the sealed copies of the orders of the learned PI Master dated 8th September and 20th October 2008.
5. The Defendant did not file any list of documents or witness statement as to quantum, and the Liquidators did not express any interest in the present proceedings except to intimate they would adjudicate on any proof of debt submitted by the Plaintiff.
6. Several matters are of note. First, the Hearing was described in the daily cause list as “Pre-Trial Review”, and it appeared from the records of the hearing on 20th October 2008 in the court file that the learned PI Master did mention about “Pre-Trial Review”. However, the sealed copy of the order of the learned PI Master dated 20th October 2008 made no reference to any Pre-Trial Review. Rather it expressly provided (as did the Hearing Notice) that the assessment of damages be heard before me at the Hearing on 20th November 2008.
7. Since the Defendant through its Liquidators expressed disinterest in attending the Hearing even though the Hearing Notice and the sealed copy order of the learned PI Master dated 20th October 2008 both specified such Hearing was for “assessment of damages”, and given that the Plaintiff assured the court at the Hearing he was ready to proceed with the assessment of damages, I directed that the Hearing on 20th November 2008 be held in open court for full hearing of the assessment of damages.
8. Secondly, at the hearing on 20th October 2008 the learned PI Master directed the Plaintiff to file an affirmation to confirm compliance with paragraphs 1, 2, 6 and 7 of the order of Deputy District Judge Richard Khaw dated 7th August 2008. Paragraphs 1, 2 and 6 of such order required the Plaintiff to file and serve the Plaintiff’s Documents, and paragraph 7 thereof provided for the mode of such service.
9. In compliance with the learned PI Master’s directions, the Plaintiff on 3rd November 2008 filed an affirmation stating briefly that he had complied with paragraphs 1, 2, 6 and 7 of the order of Deputy District Judge Richard Khaw dated 7th August 2008. But even without such affirmation, it is quite evident from the court file that the Plaintiff did file the Plaintiff’s Documents in late August 2008 (see paragraph 14 above). But notwithstanding such affirmation, it remains unclear how the Plaintiff’s Documents were served.
10. When the Plaintiff gave evidence at the assessment hearing, he affirmed that some time prior to the CLR hearing before the learned PI Master on 8th September 2008, he attended the Premises with a view to serve the Plaintiff’s Documents and discovered the Defendant no longer occupied the Premises. The Premises were then occupied by another yoga centre, and he was asked to approach the Liquidators. However, in compliance with the order of Deputy District Judge Richard Khaw of 7th August 2008, he left a set of the Plaintiff’s Documents at the Premises. The Plaintiff then delivered a set of the Plaintiff’s Documents to the Liquidators, who acknowledged receipt of the same in writing (see exhibit P2). I am therefore satisfied that the Defendant had received the Plaintiff’s Documents.
11. At the assessment hearing, the Plaintiff was the sole witness, and he adopted his witness statement as part of his evidence-in-chief.

III. Injuries and treatment

1. The Plaintiff claims that as a result of the Accident he sustained injuries to his right leg and low back, and suffered “problem with smooth urine flow”.
2. According to the statement of the Plaintiff’s attending physician Dr David T W Ho (“Dr Ho”) dated 10th June 2007, the Plaintiff was admitted to Canossa Hospital (“CH”) on 28th May 2007 (ie the day following the Accident) and was discharged on the following day. According to Dr Ho’s statement, the Plaintiff complained of right calf muscle pain for one day after yoga exercise, and the diagnosis was right calf muscle tear as confirmed by MRI examination. Dr Ho prescribed conservative treatment, and the Plaintiff was discharged with analgesics.
3. The bill from CH dated 29th May 2007 showed that apart from the MRI investigation, the Plaintiff was also charged for *inter alia* “dressing procedure and materials”, “injection/drip – in ward” and “physiotherapy”. CH also lent a pair of elbow crutches to the Plaintiff.
4. According to the medical report of Dr Mak Kin Cheung (“Dr Mak”) of Queen Mary Hospital (“QMH”) dated 27th August 2008 (“QMH Report”), the Plaintiff’s past medical history included chronic low back pain, acute appendicitis and cholecystitis.
5. On 31st May 2007, the Plaintiff was admitted to the ward of QMH’s Department of Orthopaedics and Traumatology (“DOT”). At that time, the Plaintiff complained of right calf pain, which was later associated with right thigh pain. The Plaintiff told QMH that such pain was related to a yoga session he attended two days prior to admission, and he attended CH for MRI examination of his right leg on 29th May 2007. Such MRI investigation “reported minor muscle tear or strain in the proximal peroneus longus and the adjacent lateral head of the gastroenemius”. Right thigh pain developed one day before admission to QMH.
6. Upon admission to QMH, tenderness was noted over the right proximal peroneus and lateral gastroenemius, but muscle power was intact. According to Dr Mak, this was consistent with a minor tear of these muscles as described in the MRI. Generalised right lower limb weakness (power of about grade 4 out of 5) was noted upon admission.
7. On the second day the Plaintiff developed acute retention of urine, and he was noted to have limited straight leg raising on his right side suggestive of compression on a lumbar nerve root. The per rectal examination revealed normal anal tone and grip, and normal perianal sensation.
8. A standby MRI was arranged on 31st May 2007 and showed L5/S1 prolapsed intervertebral disc impinging on the right side S1 nerve root. According to the Discharge Summary dated 31st May 2007, the MRI showed “degenerative changes in L4/5 and L5/S1 levels”, but there were no tension in conus medullaris, no intraspinal mass lesions and no vertebral collapse. According to the QMH Report, the Plaintiff actually had chronic back pain, and comparison with a previous MRI of the lumbar spine taken in 2005 showed the L5/S1 disc had progressed.
9. DOT’s spine division was consulted. Right sciatica due to compression on the right S1 nerve root was diagnosed. Since there was no significant motor or sensory deficit, non-operative treatment was prescribed. The Plaintiff was discharged with out-patient physiotherapy once he could ambulate.
10. In view of the acute retention of urine, urologists were also consulted. They noted a nodule in the median ridge of the prostate upon per rectal examination. Their diagnosis was benign prostatic hypertrophy with retention of urine precipitated by pain. The Plaintiff was able to urinate after a few days after he was started on an alpha-blocker (Cardura XL).
11. Back physiotherapy and walking exercise commenced, and the Plaintiff’s pain improved. He was eventually discharged on 5th June 2007 with follow-up at Professor Kenneth Cheung’s private clinic at QMH three weeks after discharge.

*IV. Pain, suffering and loss of amenities (“PSLA”)*

1. The Plaintiff claims that as a result of the Accident he suffered pain and frustration for several months, and his quality of life has changed since he could not enjoy a normal life as before.
2. I accept the description of the Plaintiff’s injuries and treatment in paragraphs 30-39 above as set out in Dr Ho’s statement and the QMH Report, and further accept the Plaintiff suffered right calf muscle tear as a result of the Accident and consequently had right leg and low back pain.
3. However, I am not persuaded that the residual back pain was wholly caused by the Accident. It is plain from the QMH Report that the Plaintiff all along had chronic back pain and the Discharge Summary reveals he had degenerative changes in L4/5 and L5/S1 levels of the spine. The QMH Report refers to a comparison of the MRI taken in 2005 and just after the Accident, which shows that the problem with the L5/S1 disc was *pre*-existing but (in the words of the QMH Report) has progressed. I am satisfied the injury sustained by the Plaintiff as a result of the Accident aggravated an already *pre*-existing condition, and such aggravation is evidenced by the limited straight leg raising observed by the QMH medical personnel and the impingement of the right side S1 nerve root shown in the MRI taken on 31st May 2007.
4. Whilst I accept there was aggravation to the Plaintiff’s *pre*-existing back condition, I find the residual disability caused by the Accident to be mild. There was no suggestion of reduction of sitting, standing or walking tolerance. The complaint of on and off back pain is not inconsistent with the Plaintiff’s *pre*-existing history of chronic back pain. In my view, the Plaintiff’s evidence that he now avoids lifting heavy objects (eg lifting his suitcase out of a taxi) is a wise precaution as much for his *pre*-existing condition of chronic back pain as for residual discomfort arising from the Accident.
5. The Plaintiff also claims he had to stop playing badminton for 8-9 months after the Accident. When he picked up the sport again, he had to wear back support, and could only play doubles and not singles. I have no reason to doubt this aspect of the Plaintiff’s evidence, but I find that both the Plaintiff’s chronic degenerative back condition and residual discomfort from the Accident were contributing causes.
6. According to the QMH Report, the urologists found a nodule in the median ridge of the prostate, and their diagnosis was benign prostatic hypertrophy. It appears that the nodule caused compression/obstruction that interfered with the normal flow of urine leading to urine retention. This was confirmed by the prescription of an alpha-blocker, which enabled the Plaintiff to urinate after a few days. Quite clearly, such condition was not caused by the Accident.
7. The Plaintiff claims that although his urine flow had recovered, his feeling was not the same as before. Sometimes he would not feel the need to pass urine, so he would go to the toilet after a lapse of time. However, I am not persuaded this condition was caused by the Accident. There is no medical evidence before the court to suggest that such condition is related to calf muscle tear or aggravation of back condition and not to benign prostatic hypertrophy.
8. The Plaintiff claims that as a result of his injury he missed an important meeting with the Chief Executive on 1st June 2007. As an advocate for anti-discrimination law, he was disappointed in not being able to attend the meeting to contribute efforts to persuade the Chief Executive to look into such matter.
9. On 16th May 2007, the Plaintiff received an invitation from the then Secretary for the Environment, Transport and Works to join as a guest at the World Environment Week Kick-off Ceremony on 3rd June 2007 delivered through a one-hour TV programme and to join the mini-catwalk dressed in cool business casual wear at the ceremony. He accepted the invitation, but as a result of his injury was unable to attend the “Cool Biz” Fashion Show as guest performer.
10. Although the Plaintiff fairly concedes it is difficult to put a value for these missed appointments, I accept he was disappointed in losing an opportunity to advocate a cause he believes in and to participate in a meaningful event as a member of the business community.
11. In assessing the award for PSLA, I have considered the following authorities :
    1. *Yip Piu v Chung Kam Fei Catherine & anor* HCPI1168/1999, Cheung J (as he then was) (unreported, 27th November 2000);
    2. *Li Fat Tsang v Aquality Engineering Co Ltd* HCPI558/2002, V Bokhary J (unreported, 15th July 2002);
    3. *Shek Kam Ching v Po Kee Construction Engineering Limited & ors* HCPI434/2001, Deputy High Court Judge To (unreported, 28th November 2002);
    4. *Lai Kam Wah v Wing & Kwong Co Ltd* HCPI1131/2002, Sakhrani J (unreported, 28th November 2003);
    5. my judgment in *Lam Wa Lai v Startlong Development Limited trading as Lai Ying Hair Salon & anor* DCPI624/2003 (unreported, 14th April 2005);
    6. *Ho Wing Sai v Wong Muk Hung trading as Lake Fat Transport Company* HCPI787/2000, Tong J (unreported, 31st May 2005);
    7. *Chan Chung Keung v Greenvoll Limited t/a Conrad Hong Kong* HCPI275/2005, Deputy High Court Judge Carlson (unreported, 20th December 2005);
    8. *Wong Wai Man v Yi Wo Yuen Aged Sanitorium Centre Limited* HCPI77/2007, Suffiad J (unreported, 15th August 2008).
12. In *Yip Pui*, the plaintiff suffered minor head and back injuries with dorsal back pain. Although muscle spasm was indicative of back pain, the court felt he exaggerated his impairment. The court concluded he only suffered mild back injury with slight restriction in lumbar spine movement and no restriction in leg movement. It was found that a healed disc herniation caused scarring of the nerve which in turn caused pain at the back and leg. The court awarded HK$100,000.00 for PSLA.
13. In *Li Fat Tsang*, the plaintiff suffered persistent low back pain with weakness/numbness of right leg. His sex life was adversely affected by his back pain, and he suffered emotional distress. Total body impairment was 8% and loss of earning capacity was 12%. The court awarded HK$300,000.00 for PSLA.
14. In *Shek Kam Ching*, the plaintiff suffered a sprained back with a small prolapsed intervertebral disc at L5/S1 level with no compression of the nerve root. He complained of persistent low back pain, but there was good recovery with conservative treatment. After 26 months of sick leave, he was unable to return to his *pre*-accident work but his ordinary daily activities were not affected. Such injuries fell short of the “serious injury” category, and the court awarded HK$150,000.00 for PSLA.
15. In *Lai Kam Wah*, the plaintiff sustained a back injury and was diagnosed to suffer from low back pain. There was a small annular tear in the L5/S1 intervertebral disc. He became depressed and anxious, and suffered from insomnia and suicidal thoughts. He was found to suffer from adjustment disorder with symptoms of anxiety and depression. The award for PSLA was HK$350,000.00.
16. In *Lam Wa Lai*, the plaintiff fell down a staircase and suffered persistent residual back pain and left leg weakness/numbness, which condition was aggravated by activities requiring back movement or by standing, sitting or walking for a prolonged period. She received physiotherapy, occupational therapy and follow-up treatments. By the time of trial, no further medical treatment were required except for symptomatic pain relief. But her residual disability interfered with her work as a hairstylist. The injury fell short of the “serious injury” category, and HK$170,000.00 was awarded for PSLA.
17. In *Ho Wing Sai*, the plaintiff injured his back, and suffered back pain and numbness in left calf area. The pain would sometimes disturb his sleep and he had to take painkillers once or twice a month. Expert medical evidence suggested the injury caused “disc protrusion” which impinged on the left L4 exiting nerve root resulting in symptoms of L4 radiculopathy. It was held that the injury was more than a minor contusion of the back, and there was residual pain and discomfort. An award of HK$300,000.00 was made.
18. In *Chan Chung Keung*, the plaintiff fell and landed on his buttocks. He suffered soft tissue injury with persistent back pain, left wrist pain and numbness in his left leg/thigh. The diagnosis was soft tissue contusion of the lower back which exacerbated a pre-existing weakness caused by natural aging process. The injury also caused the plaintiff to suffer from some psychological problems leading to depression. But he was still able to carry out all activities of daily living and there was a real element of exaggeration of symptoms. The court awarded HK$180,000.00 for PSLA.
19. In *Wong Wai Man*, the plaintiff suffered a sprained back and sought medical treatment due to back pain. There was tenderness of paraspinal muscle over low back with decreased range of movement. There was soft tissue injury with no evidence of nerve root impingement. MRI showed degenerative changes and possibly protruded disc at L4/5 and L5/S1 which were developmental in origin. The accident aggravated the degenerative changes and rendered the back painful. The plaintiff received occupational therapy and physiotherapy treatment as well as psychiatric treatment for adjustment disorder with depressed mood which diagnosis was revised to major depressive disorder. Although her mood improved substantially after increase of medication dosage and surveillance evidence revealed she exaggerated her disability and condition, she did suffer some back pain and her psychiatric condition was caused by the accident. The court considered HK$250,000.00 to be reasonable compensation to the plaintiff for PSLA.
20. No two cases are the same. Taking into account all the above matters (but noting that the Plaintiff’s *pre*-existing chronic back pain and spine degeneration was not caused by the Accident and that the residual disability from the Accident was not severe) and reviewing the above authorities (but bearing in mind the Plaintiff here suffered from compression of lumbar nerve root as well as minor muscle tear, but not psychological disability), I find that an award of HK$190,000.00 for PSLA is appropriate.

###### V. Pre-trial loss of income

1. The Plaintiff was the chairman of his own company, Nisha Electronics Industries Limited (“Nisha”), which carried on business of importing/exporting consumer electronics. In his Statement of Damages, the Plaintiff claimed he received nominal remuneration as employed director for HK$25,000.00 *per* month. But when he gave evidence at the assessment hearing, he said such nominal salary was reduced to HK$20,000.00 *per* month some two years ago (ie at about the time of the Accident) because he spent less time on Nisha’s business and more time on his own personal investment. At that time, Nisha was operating at a loss. Nevertheless, the Plaintiff said he received a nominal fixed sum monthly salary for his services for running the company, which was not dependent on Nisha’s profitability or otherwise.
2. However, even though the Defendant did not appear at the assessment hearing, the Plaintiff still carries the burden of adducing evidence to prove his *pre*-Accident earnings on the balance of probabilities. The Plaintiff’s assertions as to his salaried earnings set out in the above paragraph are not evidenced by any supporting document, such as his tax return, employer’s return by Nisha, employment contract, salary payment records, Nisha’s accounting ledger etc.
3. In this respect, I refer to the principles for the maxim *omnia praesumuntur contra spoliatorem* set out in *Tullett & Tokyo International Securities Ltd v APC Securities Co Ltd* [2001] 2 HKC 713. Such maxim “…… is a simple rule of thumb that a court is likely to draw adverse inferences against a party who fails to produce an item in circumstances where the item should have been produced and an adequate explanation for its non-production is not forthcoming” (see *PC International Marketing Limited v Best Power Enterprises Limited* CACV208/2004 (unreported, 10th May 2005) *per* Rogers VP). There is no doubt that the Plaintiff has been given an opportunity to file/serve List of Documents including documents supporting his claim, but such documents have not been produced and no explanation was forthcoming for such failure.
4. Nevertheless, I have no reason to doubt the Plaintiff’s evidence that he was in practical terms the beneficial owner of Nisha, and in 2007 he was responsible for making all business decisions to operate Nisha with the assistance of only two part-time employees. As evident from the letter from the then Secretary for the Environment, Transport and Works dated 3rd June 2007 referred to in paragraph 48 above, the Plaintiff was at the time of the Accident a general committee member of the Hong Kong General Chamber of Commerce, and an active member of the business community in promoting their interests. In the circumstances, I accept on the Plaintiff’s evidence that his monthly salary as Nisha’s employed director at about the time of the Accident was HK$20,000.00.
5. The Plaintiff claims that one of the main reasons for reducing his monthly salary from HK$25,000.00 to HK$20,000.00 was because he was spending more time on handling his personal investment portfolio in the Hong Kong, USA and India equity markets rather than on growing Nisha’s business. He gave evidence that at the material time he spent about 50% of his time on his personal investments.
6. The Plaintiff produced two statements of account with Phillip Securities (HK) Limited dated 31st December 2007 and 30th May 2008 (ie about half year and a year *after* the Accident) showing equity trading for the relevant month in Indian and local stock (“Phillip Statements”). Such statements show the Plaintiff’s trading transactions and stock holdings with this stockbroker for December 2007 and May 2008 respectively, but do not reveal with any clarity his profits for the given month from stock trading. In any event, the Plaintiff did not adduce any document to support his allegation that his monthly profits from equity investments in the Hong Kong, India and United States markets *at about the time of the Accident* were (as he alleged) on average approximately HK$135,000.00 even though it is quite plain from the Phillip Statements that monthly statements from his brokers/bankers for the relevant period would have existed. Indeed, the Plaintiff could not even say in evidence whether he bought or sold shares in May 2007, let alone whether he made any profit (and if so the amount of such profit) from such trading if any. More importantly, the Plaintiff has not produced his monthly statements from his stockbrokers or private/investment bankers for the months before and after the Accident to prove (a) the pattern/trend of his investment profits over the relevant period and (b) any reduction in stock trading (and hence reduction in profits) for the few weeks after the Accident. I therefore have to bear in mind the aforesaid maxim *omnia praesumuntur contra spoliatorem*.
7. Further, although in Plaintiff’s Statement of Damages and witness statement averred that his monthly investment earnings of about HK$135,000.00 and monthly salary of HK$25,000.00 made up a total monthly income of about HK$160,000.00, it is interesting to note the *pre*-action letter issued by the Plaintiff’s former solicitors Messrs Jal N Kharbari & Co to the Defendant dated 29th December 2007 stated that the Plaintiff’s monthly income was only about HK$150,000.00. The Plaintiff did not offer any explanation for the difference.
8. In light of the above, even though I accept on balance the Plaintiff had a personal investment portfolio at the time of the Accident and carried on stock trading to earn profits, I am unable to accept his bare claim that his monthly income was HK$135,000.00 in/about May 2007. Since the Plaintiff increased the time he spent on handling his personal investment portfolio at about the time of the Accident to about 50% of his time, I find it fair to say he made more from his investments than from his salary earnings as Nisha’s director. But there is simply no or no sufficient evidence for the relevant period at/about the time of the Accident to suggest or to extrapolate the conclusion that the Plaintiff would have made more from his investments than double his monthly salary. In all the circumstances, I am only prepared to accept for present purposes monthly profits in the region of HK$40,000.00 from his investments.
9. The Plaintiff claims he was hospitalised between 28th May and 5th June 2007. After discharge, he was on bed rest for two weeks, so he was entirely off work for three weeks. Thereafter he worked half days for two weeks before returning to full-time work. I see no reason to doubt the Plaintiff’s evidence in this respect in light of the medical evidence. He was on crutches when discharged from CH, and just able to ambulate when discharged from QMH. He only started outpatient follow-up and physiotherapy treatments three weeks later and in late June 2007 respectively.
10. The Plaintiff claimed for loss of salary payment for the period he was off work. Since he was off work for three weeks on full-day basis and for two weeks on half-day basis, practically speaking he was off work for about a month and suffered loss of HK$20,000.00.
11. As regards the Plaintiff’s loss of income from his investments, I accept he would have difficulty in managing his investment portfolio whilst laid up in bed. But I see no reason why he could not have followed the market and given trading instructions when he was back to half-day work. Such activities are not physically strenuous, and given the importance the Plaintiff attached to his investments, I am persuaded he would have given them priority attention. In the circumstances, I am only prepared to award HK$40,000.00 ÷ 4 weeks x 3 weeks = HK$30,000.00 under this head.
12. In the circumstances, the Plaintiff’s *pre*-trial loss of earnings are HK$20,000.00 + HK$30,000.00 = HK$50,000.00.

*VI. Special damages*

*(a) Medical expenses*

1. In respect of medical expenses, the Plaintiff claims the sums of HK$12,388.00 and HK$39,900.00 for medical treatment by CH and QMH respectively. The claim for medical expenses at CH is supported by a bill dated 29th May 2007. In respect of medical expenses at QMH, I will allow a total sum of HK$36,101.00 being (a) HK$100.00 for item HN070428xxx, and (b) (HK$39,900.00 – HK$3,899.00) = HK$36,001.00 for item HN078007xxx in the bill dated 25th June 2007. I therefore award HK$12,388.00 + HK$36,101.00 = HK$48,489.00 under this head.

*(b) Chiropractor/back massage treatments*

1. The Plaintiff claims for chiropractor/back massage treatment expenses in the total sum of HK$19,900.00. For chiropractor treatments, he asks for HK$7,000.00 for 10 sessions at HK$700.00 *per* session. For back massage treatments, he claims for 50 treatment sessions totalling HK$12,900.00.
2. The Plaintiff gave evidence that he attended two chiropractors; he saw one chiropractor once and attended the other one regularly. However, he stopped seeking chiropractor treatment a few months after the Accident. For back massage treatments, he attended two spas about twice a month, but sometimes he would take advantage of credit card promotional spa treatments at discounted rates.
3. Notwithstanding item 13 in the index of his List of Documents, the Plaintiff did not produce any invoice/receipt in respect of his chiropractic or back massage treatments. There is also no medical evidence to support the advisability or suitability of such treatments that serve a therapeutic purpose. However, in following *Yu Ki v Chin Kit* *Lam* [1981] HKLR 419, and judging from the nature of the Plaintiff’s injuries and period of hospitalisation and physiotherapy, I am prepared to accept that other than conventional medicine chiropractic and back massage treatments were “beneficial” and reasonable in the sense that the Plaintiff had some faith in their possible efficiacy in providing relief, in my view, for his residual discomfort from the Accident as well as for his *pre*-existing chronic back pain which does not result from the Accident. Although I accept the Plaintiff did attend the chiropractic and/or back massage treatment sessions and money was in fact spent, there is not even a single invoice/receipt to evidence the expenses he incurred. In the circumstances, I am only prepared to allow a global sum of HK$10,000.00 as reasonable reimbursement of his expenses under this head as a result of the Accident.

*(c) Agreement*

1. The Plaintiff claimed for reimbursement of the sum of HK$2,000.00 paid under the Agreement. According to the Agreement, the Plaintiff purchased a class package for three months from 6th May to 5th August 2007 for the sum of HK$2,000.00 for 10 yoga classes. In his witness statement, the Plaintiff said he had attended two beginner-class yoga sessions, and the Accident happened at the third session on 27th May 2007. Since the Plaintiff had enjoyed the first two sessions without injury, there is no justification for refunding the cost thereof. As regards the other 8 sessions, I accept the Plaintiff could not attend or enjoy such sessions as a result of the Accident. I therefore award HK$2,000.00 ÷ 10 x 8 = HK$1,600.00 under this head.

*(d) Solicitors’ fees*

1. According to the Statement of Damages, the Plaintiff claims for legal fees already paid to Messrs Lovells and Messrs Jal N Kharbari & Co in the sum of HK$5,000.00 for each firm and “balance to be paid depending on the recovery of amount from [the Defendant]”.
2. On the face of such claim, it is suggestive of a contingency fee or conditional fee arrangement which is unlawful as being against public policy (see *Wallersteiner v Moir (No.2)* [1975] 1 QB 373, 393-394 and 402). However, the Plaintiff clarified in evidence that he knew the two solicitors firms well from the business circle he moved in. They had advised him in respect of his present claim against the Defendant and had written letters on his behalf to and discussed settlement with the Defendant (see, for example, the pre-action letter from Messrs Jal N Kharbari & Co to the Defendant dated 29th December 2007). The two solicitors’ firms therefore issued bills of costs, and the Plaintiff had settled them in part. These firms maintained their bills for work done, but agreed to accept deferral of payment until completion of the present litigation. The Plaintiff expected that because he knew these firms so well they would allow him to make payment as he considered appropriate without insisting on full settlement of the billed sums. In short, he expected friendly discounts from his former solicitors.
3. In the circumstances, I am satisfied the above is not a contingency or conditional fee arrangement. But other than the Plaintiff’s bare assertions, no solicitors’ bill, receipt for part payment or his cheque payments were produced to evidence the extent/scope of the professional work undertaken by these two solicitors’ firms or the cost and/or part payment thereof. But in any event, I do not consider it appropriate to make any award under this head for this is not a claim for damages but for costs, which should properly be dealt with by way of a costs order.

*(e) Summary*

1. The total special damages awarded are HK$48,489.00 + HK$10,000.00 + HK$1,600.00 = HK$60,089.00.

*VII. Future earnings*

1. There is no claim for loss of future earnings or loss of earning capacity. Given that the Plaintiff ran his own business and manages his own investment portfolio, there is no evidence of any real risk of being thrown onto the labour market.

*VIII. Future medical treatment*

1. In the Statement of Damages, the Plaintiff claims for “future treatment” expenses to be decided by the court. He frankly admitted in evidence that he did not know what future treatment was required as he did not know if pain would recur due to the bulging of the disc in his spine.
2. First of all, cost of medical treatment as a result of progressive degenerative changes to the spine cannot be laid at the Defendant’s door. Secondly, although the Plaintiff said he would seek chiropractic treatment on a need basis, there is no evidence that he sought such treatment again after he ceased chiropractic treatment a few months after the Accident. Thirdly, the Plaintiff failed to adduce sufficient medical or other evidence to satisfy the criteria of awarding costs for future treatment. The burden is on the Plaintiff to satisfy the court that the future treatment is on medical or other proper advice, that it is necessary or reasonably required for the purpose of recovery or improvement of the injuries sustained or for relief of persistent pain and suffering, and that the expenses to be incurred are reasonable. Since there is no evaluation of the need for future treatment and no evidence of the likely cost of any such treatmemt, I am not prepared to make any award under this head of claim.

*IX. Costs claims*

1. In the Statement of Damages, the Plaintiff claims for the following heads of claim to be assessed by the court :
   1. several hours of communications with the Defendant, solicitors and hospitals;
   2. costs and expenses for attending court on several occasions;
   3. court fees of HK$702.00 and HK$774.00;
   4. his entitlement to costs under costs orders which specified costs to be in the cause;
   5. transportation charges of about HK$200.00 for trips to the court;
   6. photocopying charges of about HK$200.00;
   7. company search fee in respect of the Defendant of about HK$60.00;
   8. cost of obtaining medical reports from QMH in the total sum of HK$860.00.
2. The above items are costs and disbursements/expenses in relation to the Plaintiff’s claim herein against the Defendant. As such, they are not part of the Plaintiff’s loss and damages, but part of his litigation costs. In such circumstances, it is inappropriate to make award of damages for these items of claim.

*X. Conclusion*

1. I summarise the award for the Plaintiff’s loss and damages as follows :

|  |  |
| --- | --- |
|  | HK$ |
| PSLA | 190,000.00 |
| Pre-trial loss of earnings | 50,000.00 |
| Special damages | 60,089.00 |
| Total : | 300,089.00 |

1. I therefore order the Defendant do pay the Plaintiff the sum of HK$300,089.00. Interest is payable on the award for PSLA at 2% pa from the date of the Writ of Summons to the date of judgment herein, and on pre-trial loss of earnings and special damages from the date of the Accident to the date of judgment herein at half judgment rate and thereafter at judgment rate until payment.
2. There is no reason why costs should not follow event. I therefore make a costs order *nisi* that the Defendant shall pay the Plaintiff costs of the assessment of damages (with all costs reserved, if any) to be taxed if not agreed.

# (Marlene Ng)

District Court Judge

Representation:

The Plaintiff in person and present.

The Defendant in person and absent.