#### DCPI 1070/2007

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

#### PERSONAL INJURIES ACTION NO. 1070 OF 2007

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| BETWEEN | NG TING CHUN (吳廷駿) | Plaintiff |
|  | and |  |
|  | CHUNG MAN CHUN, PHILIP  (鍾文俊) | Defendant |

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##### Coram: Deputy District Judge J. Ko in Court

Dates of Hearing: 9th, 10th and 23rd April 2008

Date of Handing down of Judgment: 19th June 2008

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## ASSESSMENT OF DAMAGES

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1. This is the hearing for the assessment of the Plaintiff’s damages.

2. On 26th August 2005, the Plaintiff sustained personal injuries when the taxi in which he was traveling collided with a private car driven by the Defendant, his servant or agent at the junction between Ho Wong Street and Tsun Wen Road in Tuen Mun.

3. The Plaintiff commenced this personal injuries action against the Defendant for damages. Interlocutory judgment was entered on 14th November 2007 against the Defendant for damages to be assessed.

4. According to the Revised Statement of Damages, the Plaintiff is claiming the following heads of damages:

1. pain, suffering and loss of amenities;
2. pre-trial loss of earnings;
3. loss of earning capacity; and
4. special damages, including medical expenses, traveling expenses, tonic food, the cost of a massage machine; and future cost of treatment.

General credibility of the Plaintiff

5. The bulk of the Plaintiff’s claim (i.e. PSLA, pre-trial loss of earnings and loss of earning capacity) is dependent on the Plaintiff’s testimony. As such, the general credibility of the Plaintiff is highly relevant to this assessment.

6. In my view, the Plaintiff has performed badly as a witness. Under the careful and skilful cross-examination of the defence counsel, it is revealed that:

1. The Plaintiff was caught lying in paragraphs 28 to 30 of his witness statement. The Plaintiff painted a very bleak picture of his injury in his witness statement. Basically, he stated that the back pain caused by the accident had prevented him from returning to his pre-accident work. He claimed he had once tried to work as an audio technical supervisor in March 2006 but the back pain was so severe that he had to quit after working for just one day. He said he had not worked since then until May 2007 when he began working as an estate agent. He was confronted with some work passes during cross-examination and he has admitted that he was working (albeit on a piece-meal bases) as early as in January 2006.
2. The Plaintiff stated in his witness statement that he took tonic food such as “deer tail pork bone soup” (鹿尾巴煲豬骨湯) to aid his recovery. He produced some receipts in support of his claim for the cost of tonic food taken. However, those receipts were for “deer tail pills” (鹿尾巴丸). When the Plaintiff was asked how he could have used “deer tail pills” to make “deer tail pork bone soup”, he was completely lost for words. Eventually, the Plaintiff blamed his legal advisers for the incorrect statement in his witness statement. The Plaintiff had only just confirmed the truthfulness of his witness statement in the beginning of his testimony. There must have been no merit in the excuse offered as it was not followed that up in re-examination.

7. There are other points taken by the Defendant which point to the fact that the Plaintiff is less than truthful. I shall deal with them later in this judgment. Suffice it for me to state at the outset that having considered all the evidence I find the Plaintiff generally unreliable.

8. I shall now turn to each of the items of damages claimed.

PSLA

(a) Injuries and treatment

9. The Plaintiff was 23 years old at the time of the accident. He was an audio technical supervisor (or “soundman” as it is commonly called in the trade).

10. After the accident, he was sent to the Accident and Emergency Department of Tuen Mun Hospital (“TMH”) for treatment. According to the medical report of Dr. Wong Cheuk Kei of TMH, the chief complaint of the Plaintiff was lower back pain. The Plaintiff could walk unaided but with an antalgic gait. Medical examination revealed tenderness on the left side of the back at level L4-5. The range of movement of the back was mildly limited by pain. Straight leg raising test was 80 degree on the left and 90 degree on the right. X-ray of the lumbar spine showed good alignment with the disc spaces preserved. There was mild decrease in lordosis. The Plaintiff was treated and discharged and was granted sick leave of three days.

11. The Plaintiff says he felt severe back pain on the day following the accident. He took leave of absence from work and rested at home.

12. He consulted a general practitioner Dr. Tong Yung Man at the GHC Medical Centre on 1st September 2005. According to the medical report of Dr. Tong, there was tenderness over the lumbar spine region. The range of movement of the back in rotation, flexion and extension was reduced. The Plaintiff’s gait was normal and he had no urinary sphincter disturbance, lower limb neurology, superficial wound or bruising. Dr. Tong prescribed oral medication to the Plaintiff and referred the Plaintiff to the Prince of Wales Hospital (“PWH”) for further investigation and management of his lower back pain.

13. During subsequent follow-up treatments, Dr. Tong noted the Plaintiff had persistent lower back pain, tenderness and reduced range of movement with such symptoms aggravated when the Plaintiff was lifting heavy objects or bending his back. He said the Plaintiff had not made a very good recovery. Given the fact that lower back pain had a wide range of variation, he said it was difficult to tell how many sessions of treatment the Plaintiff would require. However, he made a rough estimation that the Plaintiff would require oral medication and physiotherapy for about a year. The Plaintiff was advised to avoid lifting heavy objects or doing vigorous exercise for a few months. Dr. Tong opined that there was no evidence that the Plaintiff would suffer any permanent impairment of the whole person or loss of earning capacity as a result of the accident. The Plaintiff was referred to orthopaedic specialist and physiotherapist for further treatment.

14. On 2nd March 2006, the Plaintiff consulted Dr. James Kong, a specialist in Orthopaedics and Traumatology. According to the Plaintiff, Dr. Kong only prescribed some analgesic to him. He did not further return to Dr. Kong as he thought he could receive similar treatment from Dr. Tong at a much cheaper price.

15. The Plaintiff also received some physiotherapy treatment although he is quite unable to recall the number of physiotherapy sessions he attended.

16. The Plaintiff also consulted a chiropractor Dr. Benny Tong since April 2006. The chiropractor noted that the Plaintiff’s chief complaint was severe lower back pain especially when carrying a heavy load and weakness in the lower back when performing daily activities. X-ray films of the Plaintiff’s lower back spine were taken on 6th April 2006 and the chiropractor said he could observe misalignment of the lumbar vertebrae and narrowing of the L5 joint. He opined that the Plaintiff was suffering from L5 disc compression and the lumbar pain was probably caused by disc herniation. The Plaintiff was recommended continuous chiropractic treatment for at least another 6 months for recovery and rehabilitation. The Plaintiff subsequently attended 10 more treatments with the chiropractor between April and May 2006.

(b) Experts’ assessment

17. The Plaintiff retained Dr. Jack Wong, a specialist in Orthopaedics and Traumatology, for the purpose of this claim. He was examined by the doctor on 8th June 2007.

18. In Dr. Wong’s first medical report, the doctor noted the Plaintiff’s complaint of intermittent back pain after sitting for 30 minutes, when holding a 10 kg sack of rice, bending his back, climbing up large steps of stairs, riding jerky vehicle, whilst sleeping and on rainy days. The Plaintiff also claimed to have pain during sex so much so that he could not finish. He also claimed not to be able to return to his pre-accident job.

19. Upon physical examination, Dr. Wong observed pain and tenderness over mid-line of lumbo-sacral function. There was slightly reduced active flexion. He reviewed the x-ray films taken on 6th April 2006 and observed no abnormality. Another set of x-ray of the lumbo-sacral spine was taken and the doctor still could not observe any abnormality. Simulation tests were positive.

20. Dr. Wong diagnosed the Plaintiff to be suffering from soft tissue injury of his back. He opined that the Plaintiff had attained maximal medical recovery and further treatment was not necessary. The Plaintiff would suffer from back discomfort and occasional pain when sitting, standing or walking for a prolonged period, or when he bend down or lift or carry heavy objects. However, he opined that such residual back pain should not have any significant negative impact on the Plaintiff’s social and recreational activities. The doctor also opined that the Plaintiff could not resume his pre-accident occupation as an audio technical supervisor in full capacity as he could not take up heavy manual work such as moving heavy equipment or work in a bending posture for a prolonged period of time. Dr. Wong considered the intermittent sick leave granted between August 2005 and June 2006 to be appropriate and assessed the Plaintiff to have suffered 2% whole person impairment.

21. The Plaintiff was later examined by Dr. David Cheng on 6th September 2007. Dr. Cheng is the specialist in Orthopaedics and Traumatology retained by the Defendant for the purpose of this action.

22. Dr. Cheng noted similar complaints of the Plaintiff. The doctor observed tenderness over L4/5 level in the mid-line, some paraspinal tenderness and stiffish of movement of the back. Radiological examination of the lumbar spine revealed slight reduction of lumbar lordosis. The doctor noted positive result of the Waddell’s tests.

23. Dr. Cheng also disagreed with the chiropractor that the Plaintiff might have a prolapsed disc. His diagnosis was that the Plaintiff was suffering from a mild and simple sprain of the back. He found it hard to understand the medical justification for a continuous sick leave of some nine months for such an injury. He considered 3 months of sick leave to be reasonable. He opined that the Plaintiff had reached a stabilized state. He noted that the Plaintiff was still complaining of reduction of spinal movement and on and off back pain. He considered that the symptoms would likely improve with the resumption of activities and back exercise. The doctor also opined that the Plaintiff should be able to resume his pre-accident occupation, as he considered that such a job would probably not involve high physical demand on the Plaintiff’s back.

24. In a supplemental medical report, Dr. Wong, after reviewing Dr. Cheng’s report, commented that:

1. The sites of tenderness noted by him and Dr. Cheng referred to the same location. So, there was no inconsistency.
2. He agreed with Dr. Cheng that the Plaintiff suffered a sprain of the back which was not severe.
3. He noted that the results from the Waddell’s tests conducted by Dr. Cheng and the simulation tests conducted by him were both positive. This was an indication of non-organic origin of the pain, which could represent symptom magnification.
4. He agreed with Dr. Cheng that there was no medical evidence to suggest disc compression, a prolapsed disc or disc herniation as diagnosed by the chiropractor.
5. He noted the different opinion expressed by Dr. Cheng on the question of sick leave. He said that generally speaking recommendation of sick leave depended on clinical judgment of the treating doctors and was usually justified as long as the patient was receiving treatment.
6. He noted the different opinion expressed by Dr. Cheng concerning whether the residual symptoms complained of by the Plaintiff was permanent.

25. The Plaintiff claims that he is still suffering from pain and discomfort and restriction of the movement of his back. He says such symptoms are particularly worse after sitting, walking or standing for 30 minutes, whilst holding heavy objects (such a 10 kg sack of rice), bending, climbing large steps of stairs, having sex, riding on jerky vehicle, and during change of weather. He says his sleep is being affected and he still wakes up in the middle of the night because of pain about 3 times a month. He claims he was previously active in sports and in Boy Scout activities but have not been able to participate fully since the accident as he has to avoid vigorous exercise.

(c) Discussion

26. I do not accept that the Plaintiff has suffered disc compression, a prolapsed disc or disc herniation as diagnosed by the chiropractor. The chiropractor was not called to explain his opinion. Both Dr. Wong and Dr. Cheng have reviewed the x-ray taken in April 2006 based on which the chiropractor gave his opinion but could see no abnormality. Dr. Wong took another x-ray in June 2007 to confirm that the discs spaces were indeed normal. Although Dr. Cheng noted slight reduction of lumbar lordosis from his radiological examination, he did not consider the Plaintiff to be suffering from a prolapsed disc.

27. Based on the diagnosis of Dr. Wong and Dr. Cheng, I find that the Plaintiff has only suffered a mild sprain of the back as a result of the accident.

28. I am not satisfied that the Plaintiff’s injuries is as serious as he would like us believe. I consider he has magnified his symptoms.

1. Simulation tests conducted by Dr. Wong and Waddell’s tests conducted by Dr. Cheng gave positive results. According to Dr. Wong, the results confirm non-organic origin of the pain which may represent symptom magnification.
2. As early as one week after the accident, Dr. Tong referred the Plaintiff to PWH to further investigate and manage his back pain. However, the Plaintiff did not attend PWH at all. When he was asked in court why he had not done so, he put up several excuses such as PWH had a long waiting time, PWH was too far away, it was too painful to attend PWH, and he thought the body would recover itself as he was young. In my view, if his back was as painful as he would have us believe, he would not have neglected Dr. Tong’s advice to seek treatment from PWH.
3. The Plaintiff says he kept going back to Dr. Tong because of severe back pain. After about 5 months of treatment, Dr. Tong referred the Plaintiff to Dr. Kong on 27th January 2006 for specialist treatment. However, the Plaintiff did not consult the specialist until about a month later. During the intervening period, the Plaintiff worked as a soundman on 29th January 2006. If the pain were as severe as he alleges, he would not have been able to work but would have sought specialist treatment straight away.

It is also the Plaintiff’s evidence that the treatment he received from the specialist Dr. Kong was not much different from that received from Dr. Tong. That was why he opted to go back to Dr. Tong for further treatment. The fact that the specialist did not give any special treatment to the Plaintiff is telltale that the Plaintiff’s injury could not have been serious.

1. The Plaintiff was repeatedly advised by Dr. Tong on 19th September 2005, 7th October 2005 and 19th March 2006 to seek physiotherapy treatment. When he was asked whether he had followed such advice, his answer was equivocal. He is unable to recount the number of physiotherapy sessions he actually attended.

He claimed in his witness statement to have attended 3 sessions. He told Dr. Jack Wong he attended 2 to 3 sessions and he told Dr. David Cheng he attended 2 sessions. In the end, the Plaintiff has only managed to produce one “re-issued” receipt for the physiotherapy session on 22nd March 2006. He says the clinic has refused to re-issue receipt for the other sessions as the physiotherapist who had treated him no longer worked there.

Normally, I would not be too concerned about minor discrepancy such as whether a patient has actually attended 1, 2 or 3 treatments. However, there is in fact an in-house physiotherapist at GHC Medical Centre (i.e. in Dr. Tong’s clinic). In fact, the only receipt the Plaintiff produced was issued by GHC Medical Centre. In my view, the Plaintiff’s alleged severity of his injuries is not consistent with the fact that he had been dilatory in seeking physiotherapy treatment to manage the pain.

1. The Plaintiff claimed in his statement that he tried to return to his pre-accident job in March 2006 but his back pain was so unbearable that he had to quit after just working for one day. However, it is revealed under cross-examination that he had in fact been working as a soundman and a photographer albeit on a piece-meal bases throughout 2006. It is not difficult to imagine that such activities involve long hours of standing or sitting.
2. The most significant treatment the Plaintiff received was from the chiropractor. It is now clear that the chiropractor had misdiagnosed the Plaintiff.
3. Notwithstanding his present complaint of back pain after sitting for more than 30 minutes, the Plaintiff did not display any sign of discomfort during this assessment. His testimony commenced at about 11 am on 9th April 2008 and did not conclude until the afternoon on the next day.

29. I do not accept that the injury has had a negative effect on the Plaintiff’s sex life. There had been no mention of such complaint until he was medically examined for the purpose of this claim. And even so, the doctors did not recommend further investigation. There is simply nothing to link such symptom (if it did exist) to the accident which happened almost 2 years ago.

30. According to Dr. Wong, the Plaintiff will experience some back discomfort and occasional pain especially when sitting, standing or walking for a prolonged period, when bending his back, or lifting, carrying or moving heavy objects. He will have difficulty playing soccer but will be able to take up swimming and hiking with reduced level of enjoyment. Dr. Wong opined that such symptom would be permanent. Dr. Cheng noted that the Plaintiff was still complaining of on and off back pain but thought that such symptom would likely improve with the resumption of activities and back exercise given the Plaintiff’s age.

31. As pointed by Dr. Wong, there is no organic origin of the alleged residual pain. Dr. Wong did not elaborate further in support his view that such pain and discomfort would be permanent. Dr. Cheng’s opinion tallies with that of Dr. Tong who commented that there was no sign of permanent impairment or loss of earning capacity. I put much weight on Dr. Tong’s opinion as he treated the Plaintiff for a long time and had ample opportunity to observe his condition and the progress of recovery. The Plaintiff is still young and I tend to agree with Dr. Cheng that his physical condition will likely improve with the resumption of exercise. In the end, I am not satisfied that the Plaintiff is suffering from any permanent injury.

32. I therefore make the following findings on the Plaintiff’s injuries:

1. The Plaintiff suffered mild sprain of the back as a result of the accident. He is not suffering from disc compression, a prolapsed disc or disc herniation as suggested by the chiropractor.
2. The Plaintiff was well enough to resume his pre-accident work by the end of January 2006.
3. He is not suffering from any permanent residual back pain.

(d) Quantum

33. The Plaintiff’s counsel cites *Yip Tung Fung*, DCPI 2149/2006 (HH Judge Ng, 23/11/07), *Lo Wing Kwong*, DCPI 1617/2007 (HH Judge Ng, 18/12/07), *Ng Yu Fu*, HCPI 252/2004 (Master J Wong, 21/2/06), *Chan Kwok Chu*, DCPI 355/2007 (HH Judge M Chan, 20/12/07), *Ahmed Masood*, DCPI 517/2003 (HH Judge Ng, 28/1/05), *Tam Kwok Man*, HCPI 755/2001 (Beeson J, 11/7/03), and *Lee Yuk Lan*, HCPI 187/1995 (Beeson J, 5/8/99) and suggests $230,000 for PSLA.

34. On the other hand, the defence counsel relies on *Mohammed Ashaq*, DCPI 586/2007 (HH Judge Wong, 27/11/07) and suggests $40,000.

35. Having regard to the Plaintiff’s injuries as found by me and the authorities cited, I award $80,000 as PSLA.

## Pre-trial loss of earnings

36. The Plaintiff is claiming $612,833 under this head, which is calculated as follows:

|  |  |  |
| --- | --- | --- |
| *Period* | Calculation | *Amount* |
| From 26/8/05 to 11/6/06  (i.e. the period covered by sick leave certificates) | $20,000 x 9 months 17 days | $191,333 |
| From 12/6/06 to 5/07 (date of writ) | $20,000 x 11 months | $220,000 |
| From 5/07 to 26/6/07 (notional trial date) | ($20,000 - $4,500) x 13 months | $201,500 |
|  |  | $612,833 |

37. Two issues fall to be decided:

1. What was the Plaintiff’s pre-accident monthly earnings?
2. For how long should the Plaintiff be compensated for loss of earnings?

(a) What was the Plaintiff’s pre-accident monthly earnings?

38. According to the Plaintiff, he worked as an audio technical supervisor for shows and events before the accident.

39. He did casual work for Chung Wai-Yuen between 18th November 2003 and 30th April 2005. When Mr. Chung received work orders for shows and events, he would engage casual workers such as the Plaintiff. Typically, the Plaintiff had to move audio equipment such as amplifiers and speakers from the warehouse to the venue, set up the equipment, manage the audio aspect of the show/event and provide technical support during the performance, pack up the equipment afterwards and transport them back to the warehouse. The Plaintiff would be paid about $400 to $500 for an 8-hour workday with overtime at $50 per hour. On average, the Plaintiff says he worked 20 to 25 days a month whilst being hired by Mr. Chung.

40. The Plaintiff changed to work for Live Sound Engineering Company (“Live Sound”) on a long-term basis on 1st May 2005. Live Sound was one of the companies giving work orders to Mr. Chung. The Plaintiff got acquainted with John Lui, the proprietor of Live Sound, whilst the Plaintiff was working for Mr. Chung. He eventually joined Live Sound when a long-term vacancy became available. The Plaintiff’s work at Live Sound was similar to his work under Mr. Chung. In addition, he was required to supervise a team of workers. The Plaintiff says he received a basic salary of $20,000 plus bonus.

41. The Defendant took issue with the pre-accident earning of the Plaintiff. The defence counsel submits that:

“Immediately apparent at the trial/assessment of damages hearing was a complete lack of contemporaneous documents that support the Plaintiff’s claim for pre-trial loss of earnings, i.e. no bank statements/passbooks, accounting records, salary slips, employer’s returns, MPF statements, employees’ compensation compulsory insurance records that show the Plaintiff had been earning a salary of $20,000 per month.

The accident in question happened on 26th August 2005. The only document to support the Plaintiff’s purported earnings of $20,000 per month was a short letter dated 5th December 2006 apparently issued by John Lui, manager and partner of Live Sound. Lui had prepared a witness statement and the Plaintiff intended to call him as one of his two witnesses. However, at the very last moment on day two of the trial, the Plaintiff’s counsel confirmed with the Court that the Plaintiff had decided not to call Lui to testify on his behalf.”

42. It is the Plaintiff’s case that he received his salary from Mr. Chung and Live Sound in cash and through his bank accounts in Hang Seng Bank and Bank of China. However, the Plaintiff has only produced his Bank of China passbook. From his Bank of China passbook, the Plaintiff could only positively identify a few entries as salary payments.

43. The Plaintiff says he has lost his Hang Seng Bank passbook about one and a half months before the assessment. I find this excuse unacceptable. The Plaintiff accepts that he had been advised by his legal advisers that he had to prove his claim. Yet, he did not disclose his Hang Seng Bank passbook earlier by way of general discovery. He should not have waited until one and a half months before the assessment to realize that he had to rely on his Hang Seng Bank passbook.

44. The fact that there is no contemporaneous record to confirm the Plaintiff’s pre-accident earnings has certainly made it difficult to assess his loss of earnings. However, any difficulty in accurately assessing quantum should not preclude the making of such an award if I am satisfied the Plaintiff has suffered such loss.

45. The Plaintiff has demonstrated in his testimony that he is familiar with different types of sound equipment, how they are set up, and how they are used. All these can only be gained through actual working experience. The thrust of the defence at the assessment has not been to challenge the pre-accident employment of the Plaintiff. The dispute lies in the amount he was making at that time.

46. Based on the few entries in the passbook which the Plaintiff attributed as salary payments, the defence counsel observes that the Plaintiff had only made $1,250 for August 2005 and submits that the Plaintiff could have survived financially on earning just a few hundred dollars a day once in a while given his circumstances.

47. I do not accept that submission. The fact that the Plaintiff had been jobless before and that he was residing with his family does not mean he did not earn a living. The Plaintiff was already 23 years old. He had been working in the trade since 2003. After the accident, he was introduced to do casual jobs and to attend concerts by his friends and former workmates. All these confirm that he was socially active prior to the accident. The Plaintiff would require more than a few hundred dollars once in a while to support himself socially.

48. However, the Plaintiff’s allegation that he was making $20,000 a month prior to the accident is not supported by documentary evidence. Mr. Lui did not testify at the assessment. Although the Plaintiff suggested that Mr. Lui might be unwilling to testify because he did not wish to be cross-examined on his tax liability, that remains his speculation and is not supported by evidence. The defence counsel has invited me to draw an adverse inference against the Plaintiff for failing to call Mr. Lui. I am not prepared to speculate on why the Plaintiff elected not to call Mr. Lui at the last minute. There can be many innocent reasons why Mr. Lui was not called, some of which may relate to Mr. Lui personally and has nothing to do with the Plaintiff. However, since Mr. Lui has not confirmed the truthfulness of his witness statement, the statement becomes inadmissible. I have also decided to place no weight on Mr. Lui’s letter confirming the pre-accident salary of the Plaintiff as the Defendant has not been afforded a chance to cross-examine Mr. Lui on it.

49. Mr. Chung, the Plaintiff’s former “employer”, however testified at the assessment. Mr. Chung confirms that the Plaintiff had been working for him since November 2003. Mr. Chung further confirms that the Plaintiff had attained the skill of a master in the trade and commanded a master’s wage of $800 a day when he decided to work for Live Sound. There are entries in the Plaintiff’s Bank of China passbook evidencing payments of a master’s wage of $800.

50. Mr. Chung testifies that the Plaintiff was making $10,000 odd in 2005. The defence counsel submits that such evidence is too vague and unreliable. In my view, that is understandable as Mr. Chung was testifying without the benefit of any documentary records. In any event, this part of Mr. Chung’s testimony was not challenged in cross-examination. When the Plaintiff was later asked why he had opted to work for Live Sound, he replied that it was more stable. He did not mention any pay rise. In my view, this is telltale of the fact that his salary in Live Sound should be comparable to what he was earning under Mr. Chung.

51. In the end, doing the best I can I have decided to adopt $18,400 as the Plaintiff’s pre-accident month salary. This is equivalent to the salary for working 23 days in a month at $800 per day.

(b) For how long should the Plaintiff be compensated for loss of earnings?

52. According to Dr. Cheng, a period of sick leave of 3 months was reasonable for the injury suffered by the Plaintiff. Dr. Wong initially considered that the sick leave granted up to June 2006 (i.e. about 10 months) was appropriate. After learning about Dr. Cheng’s opinion, Dr. Wong did not further defend his opinion in his supplemental report. He merely claimed that recommendation of sick leave would depend on the clinical judgment of the treatment doctors and that such recommendation was usually justified so along as the patient was under treatment. With respect, this is not a convincing explanation.

53. Although the Plaintiff claimed in his witness statement that apart from working for one day in March 2006, he had no work until May 2007 when he began working as an estate agent, he has since accepted that that was not truthful.

54. The Plaintiff produced some passes for shows, events or concerts in support of his claim. He was specifically cross-examined on some passes which the defence was able to identify the precise date of the event/show. The evidence reveals that:

1. On 29th January 2006, the Plaintiff worked as a soundman in the show called “Cathay Pacific International Chinese New Year Night Parade” earning a master’s salary of $800. I do not accept his evidence that he was merely “on show” and was not required to move heavy equipment. It is both his and Mr. Chung’s evidence that even a master would have to do some manual labour work.
2. On 11th or 12th March 2006, the Plaintiff worked as a soundman in the event called “Hong Kong Wedding Fair” earning a master’s salary of $800.
3. On 27th April 2006, the Plaintiff worked as a photographer in an event held in Two IFC earning a few hundred dollars.
4. On 23rd June 2006, the Plaintiff attended the concert of Jade Kwan. I do not accept his evidence that he was merely there as an audience. The pass produced at [Bundle 100-23] is clearly marked “Staff”.
5. On 19th July 2006, the Plaintiff worked as a photographer in an event called “‘Youth Ambassador’ Scheme Launching Ceremony and ‘I Pledge’ Campaign” earning $400.
6. On 1st October 2006, the Plaintiff attended the show called “慶祝中華人民共和國成立57周年港島歡騰賀國慶暨煙花欣賞晚會”. Although he denied working on that occasion, the pass produced at [Bundle 100-16] is clearly marked “工作人員”.
7. On 23rd December 2006, the Plaintiff attended the show entitled “The Greatest Love 無限的愛 – 全城同慶聖誕” held at Hong Kong Stadium. Again, I do not believe him when he said he was merely there watching the show as the pass produced at [Bundle 100-24] is clearly marked “Production 製作組”.

It is not unreasonable to assume that all these activities involve long hours of sitting or standing. In my view, the fact that the Plaintiff was able to work as a soundman as early as in January 2006 and earned a master’s salary shows that he was then well enough to return to gainful employment. All the subsequent works confirm his physical fitness to return to work.

55. In the circumstances, I find on balance of probabilities that the Plaintiff recovered from his injury and was able to resume working by the end of January 2006.

(c) Conclusion

56. For the above reasons, the Plaintiff should only be entitled to 5 months’ loss of earnings from the date of accident at $18,400 per month totaling $92,000.

Loss of earning capacity

57. An award for loss of earning capacity is intended to cover risks that at some future date during the plaintiff’s working life he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market.

58. Given my above finding that the Plaintiff is not suffering from any permanent injury, there is no basis for an award.

Medical expenses

59. Given my above findings, I will only allow the medical expenses expended between the date of accident and the end of January 2006. From the receipts produced, this comes to $3,520.

Traveling expenses

60. The Defendant is agreeable to the claim of $500.

## Tonic food

61. The Plaintiff is claiming $3,000 for tonic food and soup to aid recovery. He produced receipts for “deer tail pills” but is unable to explain how that can be used to make “deer tail pork bone soup” as alleged inhis witness statement.

62. In any event, there is no expert evidence to confirm the advisability and suitability of either “deer tail pills” or “deer tail pork bone soup”.

63. Be that as it may, courts are usually prepared to award a reasonable amount for tonic food depending on the circumstances of each case. Having regard to the nature of the injury, the treatment and the Plaintiff’s age, I consider that a reasonable award is $300.

## Massage machine

64. There is no expert evidence to confirm the advisability and suitability of the massage machine for the Plaintiff’s injuries. This claim is not allowed.

Future cost of treatment

65. Both Dr. Wong (the Plaintiff’s expert) and Dr. Cheng (the Defendant’s expert) are of the opinion that further treatment is not necessary. This claim is not allowed.

## Apportionment?

66. The Defendant’s contention that the Plaintiff might have encountered two accidents so much so that there should be an apportionment of the damages awarded is based on the medical report and referral letters of Dr. Tong of GHC Medical Centre. Dr. Tong has since accepted that the date of the accident should have been 26th August 2005 as confirmed by the medical report of Dr. Wong from TMH. Furthermore, there is also a confirmation from the police that the Plaintiff was not involved in any traffic accident on 31st August 2005. In the circumstances, I do not think the Defendant has made out a case for apportionment.

## Conclusion

67. For the above reasons, I assess the Plaintiff’s damages as follows:

|  |  |  |
| --- | --- | --- |
| PSLA |  | $80,000 |
| Pre-trial loss of earnings |  | $92,000 |
| Special damages |  |  |
| - Medical expenses | $3,520 |  |
| - Traveling expenses | $500 |  |
| - Tonic food | $300 | $4,320 |
| Total |  | $176,320 |

68. Interest will be awarded at 2% per annum on general damages from the date of the writ. Interest on special damages will be awarded at half the judgment rate from the date of the incident.

69. Costs normally follows the event. I make a costs order nisi that the Defendant do pay the Plaintiff the costs of this assessment, to be taxed if not agreed with certificate for counsel. Unless an application has been made to vary the costs order *nisi*, the order shall become absolute 14 days after the judgment is handed down.

# (J. Ko)

Deputy District Judge

Representation:

Mr. Victor Luk, instructed by Messrs. Fan & Fan, for the Plaintiff

Mr. Paul Leung, instructed by Messrs. Li, Kwok & Law, for the Defendant