DCPI 2342/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 2342 OF 2008

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BETWEEN

##### LEE PO FOON Plaintiff

##### and

##### AU CHI KIN Defendant

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Coram : Her Honour Judge H.C. Wong in Court

Dates of Hearing : 9 – 10 December 2009

Date of Handing Down of Assessment of Damages : 8 January 2010

**ASSESSMENT OF DAMAGES**

1. The Plaintiff claimed against the Defendant for damages and losses suffered at a traffic accident on 8 September 2006 at 9 p.m. in the 1st floor of the car park area A of Royal Ascot, 1 Tsun King Road Shatin, New Territories.
2. The Plaintiff, Madam Lee Po Foon, was a front seat passenger in her husband’s private car JK 1386 when the Defendant driving his private car JA 5359 collided and hit the right side of the Plaintiff’s car, pushing it to the opposite side of the road. As a result of the collision, Madam Lee suffered injuries to her person. The Defendant was subsequently convicted of the offence of careless driving on 12 February 2007.
3. Interlocutory judgment against the Defendant was entered on 5 June 2009.

Injuries

1. After the accident, Madam Lee was admitted to the Prince of Wales Hospital neurological ward (“PWH”) for 2 days after the initial examination at the Accident and Emergency Department at 22:02 hours on the night of the accident. The record of finding on admission revealed she suffered from right forehead haematoma. X ray of the cervical spine and C.T. scan of the brain revealed no abnormality. Though fully conscious, she was found to have retrograde amnesia on arrival to the Accident and Emergency Department. After observation for 2 days, she was discharged home. The doctor recorded a diagnosis of minor head injury, she was given symptomatic treatment and the prognosis was ‘good with minimal permanent disability’.
2. Madam Lee complained that she had suffered contusion in the right shoulder and thigh and whiplash in the cervical spine at the accident. Even though she was wearing a seat belt at the time, her head hit violently against the windscreen of the car at the time of collision. The impact had caused injuries to her head, lower jaw, neck and shoulder. The accident was also a stress factor that caused a relapse of her depression.

Post-accident medical treatments

1. A few days after her discharge from the PWH, she consulted orthopaedic surgeon Dr. Baldwin Chan at the Union Hospital and received physiotherapy treatments at the Union Hospital. She attended Dr. H.B. Lam’s psychiatric clinic on 22 September 2006 complaining of depressed mood, poor memory and fragmented sleep. On 6 October 2006, she consulted Dr. Chow Kwok Fai, an oral and maxillofacial surgeon complaining of temporomandibular joint (TMJ) clicking and recurrent facial pain since the accident. Dr. Chow diagnosed she was suffering from post-traumatic temporomandibular disorders (TMD). Dr. Chow treated her with botox injection to relieve the pain at the right and left masseter muscles.
2. Madam Lee returned to work as a clerk at the dental clinic of North District Hospital on 15 November 2006. Madam Lee, however, claimed she was not given work after she returned to the clinic due to her mental and physical conditions particularly because of poor memory she made some important mistakes and a temporary assistant had been engaged to take up the duties. She began to consult Dr. Johnson Lam at the Union Hospital in November 2006 and was given physiotherapy treatment at the Union Hospital.
3. On 2 February 2007, Dr. H.B. Lam of Shatin Hospital reported that Madam Lee’s mood and sleep had improved but had difficulty with her memory. His diagnosis of Madam Lee was “recurrent depressive disorder” and the differential diagnosis was “post-concussional syndrome”. She was given sick leave on 14 February 2007.
4. Dr. K.F. Chow reported after a MRI scan of Madam Lee’s TMJ on 20 March 2007 the following: “TMJ derangement with anterior disc displacement on the right side. Diagnostic arthroscopy was suggested ….… preferred to continue with the conservative treatment.”
5. Madam Lee consulted a private psychiatrist Dr. Leo Chiu for her depressed mood and insomnia on 25 April 2007, his diagnosis was “major depressive disorder”. She was put on no pay sick leave on the recommendation of Dr. Chiu on 1 July 2007.
6. Dr. K.F. Chow referred Madam Lee to physiotherapy for her TMJ disorder and myofacial pain dysfunction on 14 July 2007. Madam Lee consulted Dr. Johnson Lam again on 31 October 2007 complaining of neck and right shoulder pain. She received physiotherapy at the Union Hospital and hydrotherapy at the PWH. At the same time, she continued to consult Dr. Johnson Lam for her neck and shoulder pain, Dr. Leo Chiu for her depression and insomnia and Dr. K.F. Chow for recurrent episodes of TMJ pain.
7. Dr. Lam Kwong Chin, orthopaedic specialist, prepared a medical report on Madam Lee at the joint appointment of the Plaintiff and Defendant on 31 March 2009. He recorded all the medical consultations and treatments received by Madam Lee. His conclusion of Madam Lee’s injuries was:

Madam Lee (a) had a neck injury at the accident which should be a minor neck sprain with soft tissue injury which had recovered at the time of examination; (b) scapular pain due to a sprain or contusion of the region during the accident. No sign of shoulder joint involvement found.

1. In Dr. Lam’s opinion, Madam Lee has reached maximum medical improvement of injuries from the accident and no further orthopaedic treatment would be required. That she should be encouraged to build up her muscle strength and joint mobility with exercise to help facilitate and cope with her work and daily activities. He believed Madam Lee should be able to return to her pre-accident work. However, his opinion is solely on her orthopaedic conditions not taking into account the psychiatric and TMJ complaints. In his opinion, on the orthopaedic injuries alone, sick leave up to November 2006 was adequate.
2. According to the joint psychiatric medical report on Madam Lee of Dr. Chung See Yuen of 19 May 2009, Madam Lee had a relapse of depression in August 2006 triggered by her worries over her daughter’s illness for which she had sought treatments before the accident. He believed she was suffering from some symptoms of depression at the time of the accident given she has a history of relapses of depression disorder between 1993 and 2008.
3. In Dr. Chung’s opinion, Madam Lee is prone to developing depression whenever she is under stress due to her pre-existing dysthymic disorder. After the accident, she suffered from (1) post concussional disorder with impairment in cognitive functioning accompanied by specific neuro behavioural symptoms that occurred as a consequence of closed head injury concussion. The symptoms she suffered included headache, depression and sleep problems; (2) she also suffered from a relapse of dysthymic disorder after the accident on 8 September 2006. The physical injuries and problems at work due to the impairment to her cognitive functions were stress factors that triggered a relapse of her depression. These were manifested in her depressive mood, pessimism, worries about the psychosocial stresses, anxiety when traveling in motor vehicles, difficulty in concentration, poor memory and sleep problems. Some of the symptoms overlapped with the post concussional disorder. Dr. Chung found the relapse of Madam Lee’s depressive illness to be consistent with the circumstances of the accident.
4. Though Madam Lee’s symptoms of the post concussional disorder should have stablised after 2 years of the accident, Dr. Chung believed she is currently suffering from residual symptoms of the disorder. Dr. Chung nevertheless believed she is mentally capable of performing all daily activities and house work and child minding. He further believed she should return to her pre-accident job and try to overcome her worries at work. He believed the adverse effect of her mental problems on her work efficiency to be mild. He did not consider Madam Lee should be given long sick leave because it would have an adverse effect on her confidence and efficiency. He also considered Madam Lee’s condition had improved since 2008 and the completion of litigation would mean the disappearance of another stress factor. He recommended Madam Lee to receive a monthly psychological treatment for 1 year which could take place after her return to work.

Quantum

Pain and Suffering, Loss of Amenities

1. Madam Lee was treated orthopaedically for her right shoulder and neck injuries on 29 occasions and received 29 sessions of physiotherapy. She further received 20 sessions of acupuncture and 15 bonesetter’s treatments. She was granted 387 days of sick leave.
2. She further suffered from TMJ pain and had consulted Dr. K.F. Chow on 14 occasions. During which time, she had botox injection to her jaw muscles and received an MRI on the TMJ which confirmed her TMJ derangement and anterior disc displacement on the right side.
3. She suffered from post concussional disorder and a relapse of the dysthymic disorder after the accident. Consequently, she developed poor marital relationship with her husband.
4. Mr. Lam, Counsel for Madam Lee, relied on a number of authorities. In the case of Tsoi Wing Tak v. Lau Sze Ni (HCPI 926 of 2005 date of judgment: 8 June 2007 by Saw J.), the 27 year old plaintiff suffered chest contusion and a whiplash injury for which she wore a neck brace for 6 months. She suffered from pain over her chest, back and neck. The sum of $180,000 was awarded under PSLA.
5. In the case of Chan Ka Ming v. Lee Wai Kong (DCPI 1478 of 2005, Judge Lok’s judgment of 12 January 2007), the plaintiff suffered tenderness over his right knee, neck and cervical spine. Due to the persistent pain on his neck and lower back and weakness of the right limb he was granted 14 months sick leave. The sum of $160,000 was awarded under PSLA.
6. In the case of Yau Kwok Yue v. Dong Shu Kei Beau (HCPI 923/2000, judgment of Deputy High Court Judge Longley on 22/1/02), the 35 year old plaintiff sustained injuries to his head and back at an attack. 19 months after the attack on him he was still suffering from depressed mood, poor sleep, lacking in concentration and interests. He was diagnosed to have suffered from post-traumatic disorder, post concussional syndrome and depressive disorder. He was awarded $500,000 for PSLA.
7. In Joan Carol Boivin v. Wong King Yin and anor. (HCPI 195/2000), Suffiad J awarded the sum of $475,000 to the 35 year old plaintiff who received a severe ‘whiplash’ injury to her neck and back. The plaintiff’s psychiatrist diagnosed her to have suffered from post-traumatic disorder, post-concussional syndrome and depressive disorder. The defence psychiatrist only agreed she suffered from post-concussional syndrome or a depressive disorder. She was awarded $475,000 for PSLA.
8. From the authorities referred to above, I am satisfied Madam Lee’s pain and suffering caused by the traffic accident and the post-concussional disorder which had triggered a relapse of the dysthymic disorder indicated her suffering and loss of amenities to be of a more serious nature. I assessed the award to be $250,000.

Loss of Earnings

1. Madam Lee is a civil servant. Due to her long sick leave, with the support of medical advice, she was given no pay sick leave from 2 July 2007 by her employer, the Hong Kong Government. She asked for compensation from 2 July 2007 to the date of trial at her last salary $14,990 p.m. I am satisfied that compensation for the 29 months of sick leave to be reasonable. The sum comes to: $(14,990 x 29) = $434,710. I allow the award because I believe Madam Lee genuinely believed she could not return to work and to cope with the duties at the dental clinic at North District Hospital. Because of her depression and mood changes, her anxiety of poor work performance due to her forgetfulness, the gradual return to lighter duties is not unreasonable in her case.

Loss of Future Earnings

1. According to Dr. Chung, Madam Lee can and should return to work, he believed it would be of benefit to her mentally if she is so occupied. In view of the fact that she is a civil servant, she can return to work if her health condition permitted her to do so with no change to rank and salary. Madam Lee believed she may be told to retire for medical reason, in which case she will be entitled to receive a pension payable at the usual retirement age. Whether Madam Lee could return to work depends on her regaining the confidence to do so. I believe she can and should be encouraged to regain her confidence.
2. I find Dr. Leo Chiu’s opinion to be unreliable because Madam Lee failed to give him the background history of her mental illness prior to the accident. I accept Dr. Chung’s opinion and I will make no award under this head.

Loss of Earning Capacity

1. According to Dr. Chung, Madam Lee will be able to return to her pre-accident job in spite of her mental illness. Orthopaedically, she is also fit to return to work. As a civil servant, it is unlikely she would be dismissed if she could be transferred to a light duty clerical job. For this reason, I make no reward under this head.

Medical Expenses

1. I can see no reason why Madam Lee should not be given the choice of seeking private medical care. There were a number of medical practitioners in different disciplines she had consulted, I accept they were genuine and did help to relieve her pain and suffering at the time. For the aforesaid reason, I allow all the medical expenses she had incurred in the sum of $125,845.50.

Future Medical Expenses

1. Dr. Chung recommended Madam Lee to receive 12 months of treatments for her mental condition which he assessed will cost $25,000. I find it is necessary and reasonable if she is to return to work full time. The sum of $25,000 is allowed in full.

Travelling Expenses

1. Madam Lee asked for $7,010 as travelling expenses she had spent seeking medical treatments. Considering the number of medical treatments she received which exceeded 130, I find the claim to be a reasonable one.

Nourishing Food

1. The sum of $3,907 is a reasonable sum in view of the injuries suffered by Madam Lee and the duration of the treatments received.

Hiring Domestic Helper

1. Madam Lee claimed she had to hire a helper on Sundays, the day her domestic helper was on leave. I find the claim to be reasonable under the circumstances. I award the sum of $40,000 in full.

Summary

1. PSLA 200,000.00

Loss of earnings (no

pay sick leave) 434,000.00

Medical Expenses 125,845.50

Travelling Expenses 7,010.00

Nourishing Food 3,907.00

Domestic Help 40,000.00

Future Medical Expenses 25,000.00

835,762.50

Interests

1. I allow interests on the PSLA award at 2% per annum from the date of service of writ to date of judgment; interests on special damages at half judgment rate from the date of accident to the date of judgment, thereafter at judgment rate.

Costs

1. I order costs nisi to the Plaintiff to be borne by the Defendant to be taxed if not agreed with certificate for Counsel.

( H.C. Wong )

District Court Judge

Parties :

Mr. Lam Ming Yiu Allen instructed by Messrs. S.H. Chan & Co. for the Plaintiff.

Mr. Adonis Cheung instructed by Messrs. Kenneth C.C. Man & Co. for the Defendant.