# DCPI 2469/2014

[2018] HKDC 526

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2469 OF 2014

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BETWEEN

WU KIN HO（胡健豪） Plaintiff

and

WONG KONG HOP KENNETH（黃剛俠） Defendant

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##### Before: His Honour Judge Andrew Li in Court

Date of Hearing: 5 January 2018

Date of Delivery of Assessment of Damages: 11 May 2018

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ASSESSMENT OF DAMAGES

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*INTRODUCTION*

1. This is an assessment of damages in relation to the personal injury caused to the plaintiff by the defendant in a traffic accident occurred on Mau Tan Street, Yuen Long, New Territories on 17 March 2014 (“the Accident”).
2. Liability in relation to the Accident is not in dispute and interlocutory judgment has been entered against the defendant since December 2014.
3. It has been directed that medical reports from various hospitals and clinics are to be adduced as agreed evidence without calling the makers. A joint medical report on the plaintiff’s condition has been prepared by Dr Lau Yan Kit (“Dr Lau”) (appointed by the plaintiff) and Dr Lam Kwong Chin (“Dr Lam”) (appointed by the defendant) in July 2016. They are not required to give evidence in court.
4. Hence, at the assessment hearing, the plaintiff was the only witness who gave evidence.

*BACKGROUND*

1. The plaintiff was the driver of a light goods vehicle (“the LGV”) and the defendant was the driver and registered owner of a private car (“the Private Car”). During the course of reversing, the nearside rear of the Private Car hit the offside rear of the LGV. As a result, the plaintiff suffered personal injuries.
2. The plaintiff was 31 years old at the time of the Accident. He was a self-employed LGV driver. After the Accident, the plaintiff continues to work as a self-employed LGV driver.
3. Immediately after the Accident, the plaintiff was sent to the Accident & Emergency Department of Pok Oi Hospital (“POH”) for treatment. He was discharged after treatment without hospitalization. Thereafter, the plaintiff received follow-up treatments at the hospital and at different out-patient clinics.
4. A total 58 days of sick leave was granted to the plaintiff from 17 March 2014 to 13 May 2014.
5. In the medical report complied by Dr Wong Yu Kit of A&E of POH dated 19 August 2014, it has been recorded that:-

“Medical examination revealed the following conditions:

There was tenderness over cervical and lumbar region.

There was no numbness over lower limbs.

The power of 4 limbs was full.”

1. Prior to the Accident, the plaintiff had previous history of sustaining neck/cervical injuries from a road traffic accident in 2011 (“the 2011 Accident”) and the joint medical report has commented that there might be some residual damage left from the 2011 Accident.
2. After the expiry of the sick leave, the plaintiff continues to work as a self-employed LGV driver with a monthly income of around HK$10,000, which is $2,000 more than his pre-accident monthly average income.

*Issues in dispute*

1. The plaintiff claims damages under the following heads: (i) pain, suffering and loss of amenities (“PSLA”); (ii) pre-trial loss of earnings; (iii) loss of earning capacity; and (iv) special damages.
2. The defendant disputes the amount claimed by the plaintiff under the heads of PSLA, pre-trial loss of earnings and special damages. The defendant further suggests that no award shall be allowed under the head of loss of earning capacity.

*DISCUSSION*

*Joint medical expert report prepared by Dr Lau and Dr Lam*

1. The joint medical examination was carried out at Dr Lam’s clinic on 6 June 2016, which was about 2 years after the Accident. A joint expert medical report dated 13 July 2016 was written by the experts (“the Joint Report”).
2. Prior to the joint examination, the plaintiff had received treatments, including medication and physiotherapy, from various clinics and at POH, details of which can be found in the Joint Report.
3. Upon the joint examination by the experts, the plaintiff complained on and off back stretching pain provoked by prolonged sitting (1 hour), lifting weight (up to 6 kg) and sleeping (3-4 hours).
4. Both experts agree that the injury was at soft tissue level and there was no suggestion of any bony damage or neurological deficit.
5. It was revealed that the plaintiff had suffered from pre-existing injury resulting from the 2011 Accident. Both experts agree that there might be residual damage from the 2011 Accident. However, the plaintiff declined to provide further information in this regard.
6. During the examination, the experts had reviewed the MRI provided by the plaintiff. The MRI showed that the intervertebral disc at L5/S1 level loses its normal signal, consistent with desiccation changes. The experts agree that was due to pre-existing degeneration of the disc.
7. Dr Lam opines that the disc changes are natural course of ageing and degeneration. He further opines that a disc bulge from a single accident is highly unlikely. Dr Lau also opines that the disc bulging and desiccation is most likely degenerative in origin but the Accident may increase its severity and might have caused the annular tear. I prefer Dr Lam’s view on this. In any event, both experts agree that disregarding the causation, the disc changes do not have much clinical significance.
8. In the Joint Report, Dr Lam opines that the plaintiff’s claim of no improvement on his pain was not consistent with the reported progress. Upon examination, there were minimal objective signs to support.
9. Hence, the back pain complained by the plaintiff is largely related to the degenerative status of the spine, if genuine, as opined by Dr Lam.
10. Dr Lau opines that although the back pain is not very severe, it could be possible that the plaintiff is still suffering from residual back pain due to soft tissue injury of the plaintiff's lumbar spine.
11. Despite the minor disagreement between Dr Lam and Dr Lau, they both agree that no further institutional treatment is required and the plaintiff had reached maximal medical improvement from the Accident.
12. Both experts agree that the plaintiff should be able to continue with his pre-injury work as a LGV driver. They further agree that the present back condition of the plaintiff would have minimal adverse effect on his daily activities.
13. The percentage of impairment and loss of earning capacity was assessed at 1% by Dr Lam and 2% by Dr Lau.

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

1. The plaintiff claims a sum of $220,000 under this head. The defendant disagrees with the amount claimed and submits that a reasonable sum in view of the injuries sustained by the plaintiff in the Accident should be at no more than $30,000.
2. The plaintiff relies on the following cases for the PSLA claim where he says the victims suffered from similar injuries: -
3. *Muhammad Saddiq v Cheung Chi Keung,* unrep., HCPI 1018/2006 (Master Levy; 8.4.2008):

The plaintiff developed pain in his neck and back after the accident.  The diagnosis was sprained backand whiplash injury to the neck. The accident caused degeneration in his lumbar spine.  He could not resume work requiring heavy lifting.  Damages for PSLA were assessed at $250,000.

1. *Chui Wai Kam Michelle v. Gillspie John Thomas,* unrep., DCPI 1696/2014 (Deputy District Judge Alfred Cheng; 12.5.2016):

The plaintiff suffered from soft tissue injury to her neck, which made the pre-existing degeneration in her cervical spine symptomatic.  There was pain in her neck, and also pain and numbness in her upper limbs, back and right leg as an aftermath of the accident.  However, the substantial pain and numbness in her right upper limb and right leg, particularly those resulting in her seeking medical treatment in March and April 2014, were not contributed to by the accident. The plaintiff did suffer from right cubital tunnel syndrome, which caused her pain and numbness in her right upper limb.  The sprain to the plaintiff’s lumbar spine, which contributed to her right leg pain and numbness, was not caused by the accident. PSLA was awarded at $225,000.

1. *Chan Chung Keung v. Greenroll Limited trading as Conrad Hong Kong,* unrep.,HCPI 275/2005 (Deputy High Court Judge Carlson; 20.12.2005):

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.  He was diagnosed to have soft tissue contusion of the lower back which exacerbated a pre-existing weakness caused by natural ageing process.  The injury caused the Plaintiff to suffer from some psychological problems leading to impression.  But he was able to carry out all activities of daily living and there was a real element of exaggeration of symptoms.  The court awarded $180,000 for PSLA.

1. *Khan Shafiq v. Cheng Hip Ming,* unrep., DCPI 1378/2007 (HHJ Chow; 2.5.2008):

The Plaintiff was instructed to unload cartons of yearns from a go-down and load them onto a truck located a few metres away.  In the course of lifting up a carton of yarns, the edge of the carton struck a wooden pellet on the ground, and his back was sprained because of that.  The medical finding of examination on him is that he is expected to have mild residual back pain possibly with exacerbation from time to time upon heavy exertion or prolonged walking.  The Court awarded him $200,000 under PSLA.

1. The defendant relies on the following authorities:-
2. *Lai* *Ka Yin v Chan Yiu Kei,* unrep., DCPI 453/2008 (HHJ Mimmie Chan; 7.1.2009):

The defendant drove a light goods vehicle and hit the plaintiff’s vehicle from behind. The plaintiff suffered from neck and back injuries. The court allowed 42 days in respect of the sick leave of the plaintiff. As a result of the accident, the plaintiff was hospitalized for 3 days and received physiotherapy thereafter. Both orthopaedic experts agreed that the plaintiff suffered from soft tissue injury of her neck and back and no evidence of any more serious injury. She was able to return to her pre-accident job as a kindergarten school bus attendant. PSLA was awarded at HK$50,000.

1. *Cheung Yu Tin Alvin v Ho Hon Ka,* unrep., DCPI No.853/2004 (Deputy Judge W Lam; 9.6.2005):

This action involved a collision between a bus and a taxi which the plaintiff in this action is a passenger of the bus and suffered low back pain, with granted minor soft-tissue injury with recovery normally expected within 2 weeks to 2 months. The plaintiff was granted 4 days sick leave and assessed to have suffered from 1% of whole person impairment. The plaintiff was awarded HK$25,000 under the head of PSLA.

1. *Sulakhan Singh v Federal Securities Limited,* unrep., DCPI 231/2007 (HHJ H C Wong; 6.6.2008):

The plaintiff in this action suffered injuries in an industrial accident of stepping on a piece of metal pipe on the floor and falling forward onto to the ground. He suffered soft tissue injuries to his right knee and lower back. He was granted 167 days of sick leave. PSLA was awarded at HK$60,000.

1. *Mohammed Ashaq v Royal Honour Industrial Limited,* unrep., DCPI 586/2007 (HHJ H C Wong; 27.11.2007):

The plaintiff in this action worked as a forklift driver and was injured when a gas cylinder of the forklift car broke loose and hit the back of the driver’s seat, which in turn hit the plaintiff’s back, causing him to fall onto the ground. The plaintiff was found to have suffered soft tissue injuries to his left shoulder and low back. He was treated with analgesic and physiotherapy. He was hospitalized for 4 days. He was granted 9.4 months of sick leave. PSLA was awarded at HK$50,000.

1. *Tam Fu Yip Fip v Sincere Engineering & Trading Company Limited,* unrep., HCPI 473/2006 (Hon Saw J; 6.6.2007):

This action involved the injuries resulting from the plaintiff’s slip and fall from the container onto the ground. The plaintiff was found to have suffered from soft tissue injury to his back. The plaintiff was also found to have suffered from pre-existing degenerative back disorder. He was granted 913 days of sick leave. PSLA was awarded at HK$75,000.

1. According to the Joint Report, the plaintiff only suffered from soft tissue injuries as a result of the Accident. He was granted 58 days of sick leave and did not require any surgery or hospitalization. In short, he has only suffered minor impairments as a result of the Accident.
2. Both experts also confirmed that the plaintiff suffered from pre-existing degeneration of the intervertebral disc at L5/S1 level. This was not related to the Accident.
3. Having observed the plaintiff when he gave evidence and judging his evidence against the opinions expressed by the experts in the Joint Report, I find that the plaintiff might have exaggerated the residual pain and problems caused by the Accident. I also consider that he was not completely frank with the experts or the court regarding the true extent of his injuries resulted from the 2011 Accident. I find that while he did suffer from genuine pain and discomforts as a result of the soft tissue injuries sustained by him in the Accident, I am of the view that most of his current symptoms are caused by the disc bulging due to ageing and degeneration as opined by Dr Lam.
4. In the circumstances, I find the plaintiff’s injuries are more in line with the less serious cases cited by the defendant rather than those cited by the plaintiff. In particular, I find the injuries sustained by the plaintiff in the current case are similar to *Lai* *Ka Yin, Sulakhan Singh and Tam Fu Yip Fip* cited above. As they are all quite old cases, I shall make the necessary upward adjustments for inflation and general increase on PSLA awards over the years.
5. In my judgment, an appropriate PSLA award in this case should be at HK$100,000.

*(ii) Pre-trial loss of earnings*

1. The defendant does not challenge the validity of the 58 days of sick leave granted to the plaintiff. However, the defendant disputes the calculations made by the plaintiff on his pre-trial loss of earnings.
2. The plaintiff claims that he was a self-employed “Go-Go Van” driver. He did not adduce any documentary evidence like tax return or MPF contribution notice in support of his pre-accident income. This is perhaps not surprising given his modest income and nature of his work. I accept his evidence that he was earning an average sum of $8,000 per month as a LGV driver at the time of the Accident. I also accept his evidence that he was only able to return to work after the expiry of the sick leave period.
3. Thus, I shall award the loss of pre-trial earnings of the plaintiff at:-

HK$8,000 x 58/30 = HK$15,467

*(iii) Loss of earning capacity*

1. The plaintiff claims a sum of HK$30,000 under the head of loss of earning capacity. The defendant denies that the plaintiff should be entitled to any damages under this head.
2. In *Moeliker v A Reyrolle & Co Ltd* [1977] 1 All ER 9; [1977] 1 WLR 132, the court laid down a “two-stage” test regarding the claim under the head of loss of earning capacity. They are:-
3. what is the risk that he will at some time before the end of his working life lose that job and be thrown on the labour market? Whether there is a “real” or “substantial” risk of the plaintiff losing his present job - (a) how great his risk is; and (b) when it may materialize (C-H on p 141);
4. How far the plaintiff would be handicapped by his disability if he was thrown on the labour market - his chances of getting a job - and an equally well paid job.
5. As stated in the plaintiff’s revised statement of damages, the plaintiff is actually earning HK$10,000 per month after the Accident, which is $2,000 more than his pre-accident average monthly income.
6. In the Joint Report, Dr Lam opines the plaintiff suffered 1% loss of earning capacity while Dr Lau opines that the LEC is at 2%. Both experts agree that the present back condition would have minimal adverse effect on the plaintiff’s activities of daily living. Dr Lam further commented that the plaintiff does not have substantial disadvantage in the labour market or higher chance of losing his job due to the injury. In my view, whatever discomforts or alleged disabilities complained by the plaintiff, they are most likely related to his disc bulge at L4/5 and L5/S1 levels rather than the soft tissue injuries sustained by him in the Accident.
7. Under such circumstances, I find there is no real or substantial risk that the plaintiff will lose his present job during his working life and therefore will suffer a handicap in the labour market due to the injuries sustained by him in the Accident.
8. Therefore, I am of the view that the plaintiff is not entitled to any award under the head of loss of earning capacity in this case.

*(iv) Special damages*

1. The plaintiff claims a total of $23,400 under this head. They comprised of $16,900 for medical expenses, $1,500 for travelling expenses and $5,000 for tonic food.
2. The defendant does not take any issue on the medical expenses claimed by the plaintiff as they are all supported by documentary evidence. Hence, a sum of $16,900 for medical expenses will be allowed.
3. Regarding the travelling expenses of the plaintiff in attending various medical treatments, the plaintiff has failed to provide any documentary proof in support of his claim nor has he provided any breakdowns in the revised statement of damages or witness statement. While it is not surprising that he could not produce any receipts for public transport, I find it difficult to understand why he could not have provided those details in his witness statement. It was not until he gave evidence at the hearing that he mentioned for the first time that he mainly took public light bus for the follow-up treatments and had taken taxi on a few occasions during the initial period after the Accident.
4. Given the number of follow-up treatments at public hospital and clinics (on 9 separate occasions) and consultation with a private orthopaedic surgeon (on 2 occasions), I consider that a reasonable sum to represent travelling expenses in this case should be at no more than $800.
5. Hence, I shall award a sum of $800 as travelling expenses in this case.
6. In respect of the claim for tonic food, the plaintiff has failed to produce any documentary evidence in support of his purchase for such food. In evidence, he claims that he used special ointments like “Tiger Balm” to relieve his pain and had consulted a Chinese medical practitioner during the initial period after the Accident for about 2 months. He claims that he had spent $150 on alternative days for boiling special herbal soup in order to help with his condition.
7. Of course, all these claims are not supported by any receipts nor any evidence to show why they were considered to be necessary or reasonable.
8. Given the relatively minor nature of the injuries as opined by the experts and in the absence of any documentary evidence, I consider that a nominal sum of $2,000 should be regarded as reasonable to represent tonic food consumed by the plaintiff in this case.
9. In the premises, I find the plaintiff is entitled to a sum of HK$19,700 ($16,900 + $800 + $2,000) as special damages.

*CONCLUSION*

1. In conclusion, I assess the damages the plaintiff is entitled to as a result of the Accident as follows:-

1. PSLA HK$100,000
2. Loss of pre-trial earnings $ 15,467
3. Loss of earning capacity Nil
4. Special damages $19,700

HK$135,167

1. On top of the above assessed sum, the plaintiff is entitled to interest at the usual rates of 2% for general damages from date of issue of writ to date of assessment; and at half of the judgment rate at 4% for special damages from date of accident to date of assessment.
2. I shall also make an order nisi that the defendant to pay the costs of the assessment with certificate for counsel, such costs to be taxed if not agreed. In the absence of any application by the parties to vary the same within 14 days, the costs order will become absolute.

( Andrew SY Li )

District Judge

Mr Jacky Jim, instructed by Au Yeung, Chan & Ho, for the plaintiff

Mr Poon Chi Ming Keith, instructed by C W Chan & Co, for the defendant