###### DCPI 235/2007

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 235 OF 2007

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##### BETWEEN

## CHAN CHUN WA Plaintiff

### and

#### WONG CHIU YUEN ANDREW Defendant

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

Dates of Hearing : 2nd – 4th October 2007

Date of Handing Down Judgment : 22nd November 2007

JUDGMENT

1. On 21st December 2004, at about 16:35 hours the Plaintiff, the driver of light goods vehicle registration No. LS 8347, was driving along Prince Edward Road West in the westbound direction towards Mongkok. After stopping at the lights at the junction of Prince Edward Road and Waterloo Road, the Plaintiff began to move his vehicle along the road when the traffic lights turned green. The Defendant’s motor vehicle registration No. JZ 967 suddenly moved into the Plaintiff’s path colliding with the offside front of the Plaintiff’s light goods vehicle. As a result of the collision, the Plaintiff suffered injuries to his neck. The Plaintiff claims against the Defendant for personal injuries sustained in the aforesaid accident on 21st December 2004 (“the accident”).
2. The Defendant was charged and convicted of the offences of careless driving and failing to stop after a traffic accident at the Kowloon City Magistracy on 28th November 2005. On 24th September 2007, some 9 days prior to the trial of this action the Defendant admitted liability. The issue remaining in the trial of this action is the quantum of damages of the Plaintiff’s claim.

Injuries and Disability sustained at the Accident

1. The Plaintiff was born on 7th January 1977, he was 27 years old at the time of accident. He was a self employed goods vehicle driver driving a lorry purchased in his father’s name with a bank loan. The Plaintiff was responsible for the monthly repayments of the bank loan. The Plaintiff claims for loss and damages for injuries sustained to his neck and the cost of repair to the lorry.
2. He was admitted to the Accident and Emergency Department of Kwong Wah Hospital after the accident. The medical report of Dr. Wong Ka Man of the A & E Department at Kwong Wah Hospital dated 12th August 2005 (page 167 of Bundle A) recorded the following:-

“The neurological examination was normal. Power of four limbs was normal. There was mild tenderness over the posterior neck with reduced range of neck motion. Chest and cardiovascular examination was normal. Xrays of cervical spines showed no fracture or dislocation. He refused analgesic and further observation at our department, and discharged himself against our medical advice. One day sick leave dated 21st December 2004 was granted and analgesic and antacid were prescribed.”

1. According to the A & E Department record of 21st December 2004, the doctor noted Mr. Chan had complained of neck pain but no lower or upper limb weakness or numbness. Mr. Chan was given a rigid collar to wear (page 273 to 274 of Bundle B), against medical advice, he discharged himself from the hospital.
2. Two days later on 23rd December 2004, Mr. Chan attended the A & E Department of Tseung Kwan O Hospital (“TKOH”) at 23:32 hours. Mr. Chan claimed he had gone back to work on 22nd December 2004 and he had also attended the police station to give a police statement on the next day. Because of the increasing pain in the neck, he decided to go to the A & E Department of TKOH at 23:32 hrs.
3. Dr. Ng Cham Chi, a medical officer at the A & E Department of Tseung Kwan O Hospital recorded in his report of 8th December 2005 that:-

“Mr. Chan complained of increasing pain in his neck and right elbow. Mr. Chan had muscle spasm over the right side of his neck which was tender on palpation. He also had mild pain over his right elbow. There was no neurological deficits detected in his upper limbs.”

1. The provisional diagnosis by Dr. Ng at the time was “sprained neck and right elbow contusion”. He was granted sick leave from 23 to 28 December 2004 on this occasion. In the same medical report, (pages 172 to 173 of Bundle A) Dr. Ng recorded all of Mr. Chan’s subsequent TKOH attendances from 29th December 2004 up to 8th April 2005. These hospital records showed that Mr. Chan was granted sick leave from 29th December 2004 up to 20th April 2005 at 14 A & E Department attendances. All of the attendances took place at the expiry of the sick leave granted at the last attendance.
2. The A & E on 1st April 2005 (pages 304 to 305) recorded that Mr. Chan was referred to the orthopaedic surgeon on 20 April 2005, he was advised to continue with physiotherapy. The orthopaedic surgeon Dr Chan Chi Fai recorded in his consultation summary of 20th April 2005 the following:-

“RTA 21/12/2004.

Driver of lorry, R side hit by another vehicle, non-IOD.

No loss of LOC.

Seen at A&E, no fracture on admission.

R side neck and shoulder pain.

Affect any movement of neck and involuntary elevation of shoulder noticed, persisted till now, but now said mildly improved.

Receiving PT treatment.

Also had numbness along elbow and down to ulnar side of hand and wrist, now said subsided.

Worried because once tried to remove an air-conditioner with difficulties.

Works as driver of lorry, small amount of manual work need.

On SL.”

1. He was given sick leave from 21st April to 17th May 2005 inclusive. At the 17th May 2005 follow-up clinic at the orthopaedic clinic, Dr. Chan recorded (page 315) the following:

“no physio notes- patient claimed missed and attended 2 sessions only

he will attend private physio and O&T doctor in June 2005

explained we need to know the progess and the SL period is for the physio pending NCV and EMG

previously numbness over ulnar two finger and now subsided for 2 weeks”

1. It is apparent that the reason Dr. Chan granted further sick leave period of 17th May to 28th June 2005 was for Mr. Chan to receive physiotherapy. There was a further attendance at the orthopaedic clinic on 28th June 2005, Mr. Chan was seen by Dr Lee Yuen Lun who recorded in the consultation summary:

“much improved

residual neck pain

now he only have self treatment at home

range today good only residual tightness and pain over R trapezius and SCM muscle

no UL neurology

RTA: non IOD

on no pay leave

also TARFFA stopped after May 05

not plan for any legal action

but scheduled for new job interview today

explain soft tissue injury

aim at more mobilization and regain elasticity

no problem with neck instability

NCT normal, xray normal

may further improve but residual pain expected

encourage self ex and find new job”

1. Dr Lee found Mr. Chan to have recovered well, he gave Mr. Chan sick leave up to end of July and no more. There was no further orthopaedic clinic or A & E consultation until Mr. Chan met with his second road traffic accident on 6th November 2005. At cross-examination, Mr. Chan admitted that the purpose of his repeated return visits to the A & E department was to get sick leave in support of his application for TAVA. He further admitted that on 31st January 2005, he had a slip and fall accident which resulted in increased neck pain and right hand injury (page 286 of Bundle B).
2. Mr. Lam, Counsel for the Defendant, submitted that Mr. Chan’s extended sick leave and return visits to the A & E and the Orthopaedic Department was to extend his sick leave. Therefore, it is likely that Mr. Chan would exaggerate his complaints to the doctors in order to obtain sick leave. Mr. Lam relied on the fact that as soon as TAVA (Traffic Accident Victims Assistance) stopped and the doctors refused to grant him any further sick leave, Mr. Chan did not return or seek further medical treatments from the A & E Department or the Orthopaedic Unit of TKOH. Mr. Lam further relied on the fact that Mr. Chan had only attended two physiotherapy sessions on 22nd February 2005 and 7th April 2005. The records showed that on both occasions no weakness was detected in Mr. Chan’s upper limbs (page A169 to 170). Furthermore, he was discharged from physiotherapy because his condition had improved to a satisfactory stage. He told the physiotherapist that his neck pain had reduced by 60-70% (page B360). He admitted in Court that he refused further physiotherapy treatments because he did not find them useful and they were uncomfortable. Mr. Lam further pointed out that Mr. Chan had lied to the orthopaedic surgeon that he was on no pay leave.

The joint medical report

1. The parties produced a joint medical report by Dr. Kong Kam Fu, James and Dr. Lam Kwong Chin. It was their joint opinions that the Plaintiff suffered whiplash injury of the cervical spine with residual pain and stiffness, that the diagnosis was consistent with the mechanism of the injury as a result of the accident which caused the persistent symptoms claimed. The doctors found at the time of examination, Mr. Chan still had residual pain and stiffness over his neck region and limitation of motions of the cervical region especially in lateral rotation. They found Mr. Chan’s recovery to be slow and his symptoms therefore were likely to persist. In Dr. Lam’s opinion (the Defendant’s doctor) Mr. Chan’s previous treatment was not sufficient. He recommended a more intensive course of treatment with weekly orthopaedic consultation and alternate day physiotherapy. In his opinion, there will be significant improvement after a treatment for 4 to 6 weeks. Dr. Kong (the Plaintiff’s doctor), on the other hand, commented that Mr. Chan had to take 10 minutes of rest on every hour of work and Mr. Chan may find difficulty to maintain a job as a driver because of the neck pain on rotation. Dr. Kong found the sick leave of 7.35 months between 21st December 2004 to 31st July 2005 reasonable while Dr. Lam considered that the Plaintiff should be able to return to work by April 2005. Dr. Kong further estimated the cost of further treatments on a need to basis would be about $300 per session of physiotherapy, 3 times a week for 3 months (page A174 to 186).
2. It is unfortunate that Mr. Chan failed to disclose to Drs. Kong and Lam that he had a second traffic accident on 6th November 2005. As a result of the non-disclosure at the 15th August 2006 examination, the doctors assumed his residual pain and stiffness had resulted from the first traffic accident in December 2004 and the pain had persisted throughout the period. They did not realize there was an intervention of a second traffic accident causing the same injuries to Mr. Chan’s neck. They had obviously not been shown the medical reports from Tseung Kwan O Hospital on 6th November 2005 (at page 307 of Bundle A) where the doctor recorded Mr. Chan’s second traffic accident on that day injuring his neck and causing pain to his elbow and shoulder.
3. Mr. Chan was referred to the orthopaedic clinic at TKOH and on the 5th January 2006 follow-up orthopaedic clinic, Dr. Lee Wai Keung recorded:

“1st RTA Dec 2004, after 6 months SL

2nd RTA Nov 2005, whip lash type of injury

XR C spine – C 56 IVD↓

Pain on getting up from recline position & cough induces a lot of posterior neck pain. Recent 5 days, woke up at night by a sudden burst of spasm over L shoulder.

Subject L hand weakness from pain.

Both flexion & extension induces pain.”

1. He was then sent to physiotherapy at TKOH at the 14th February 2006 follow-up orthopaedic clinic. Mr. Chan had a private MRI done, the doctor at TKOH commented:

“C5/6 L side prolapse with evidence of cord contusion. Small disc prolapse on top of a small cervical canal.”

The attending doctor, Dr. Lee advised him not to play risky sports and to drive safely to avoid further whiplash injury (page B321).

1. Dr. Lee at the 11th May 2006 consultation recorded:-

“L shoulder discomfort improved.

Neck – some symptomatic improvement.

Feels that L hand power grip is still weaken.

Physio stopped after last consultation.

He has found a job in Fortress as sales – a good option for the interim.

Can postpone decision for surgery if this new job can be tolerated.”

1. It is obvious from the joint medical report (page A179) that Drs. Kong and Lam was making an assessment on Mr. Chan’s condition based on his complaints on the day of the examination in August 2006 set out in paragraphs 22 to 24 of the report which recorded Mr. Chan’s complaint of left neck pain and tightness, left upper limb weakness and left posterior shoulder pain on elevation to the two experts.
2. It is important to note that from the TKOH records, references to left limb and shoulder and neck pain first appeared in the hospital records after his second traffic accident in November 2005. Since Mr. Chan had failed to inform Drs. Kong and Lam about the second accident that caused the neck pain on his left side and the left shoulder, their opinions were based on the information of Mr. Chan’s condition on the day they examined him in August 2006. They have clearly assumed the complaints had persisted after the first accident. Consequently, the court cannot accept in total the medical opinions of Drs. Kong and Lam because they were formed without the benefit of the knowledge that Mr. Chan had a second traffic accident and the injuries caused by it.
3. I have been assisted by the Tseung Kwan O Hospital A & E records and the orthopaedic clinic consultation summaries. It is clear that Mr. Chan no longer required any medical assistance after his last appointment at the orthopaedic unit on 28th June 2005. The record also showed that on his own admission, the numbness that he was complaining about had subsided by 20th April 2005. From the Tseung Kwan O Hospital records, there was only one early occasion when Mr. Chan complained about weakness of his right upper limb. Since he did not repeat the same complaint in his later follow-up clinics at TKOH, the inference must be that his right upper limb no longer suffered any weaknesses. There was a reference on the medical record on 29th December 2004 that Mr. Chan had paraspiral muscle spasm on the left side (page B280), but it also recorded that there was “no left upper limb weakness”. Other than the aforesaid recordings, there were no further references to any left upper limb weakness after the first accident.
4. Based on the aforesaid medical records, Mr. Chan should have recovered satisfactorily by the end of June 2005 at the latest, because, according to the records and from Mr. Chan’s own evidence, he was discharged from physiotherapy at early April 2005. The record also showed that he started to complain about left upper limb discomfort on 5th January 2006 (page B318).
5. I am far from impressed by Mr. Chan at the hearing. When questioned why he had omitted to inform the two medical experts Drs. Kong and Lam at the joint examination about the second traffic accident in November 2005, he said he had forgotten about the second accident when he was examined. Later on, he said he would not volunteer information to strangers unless he was specifically asked. He knew full well the reason for the joint medical examination was his claim against the Defendant for injuries suffered at the first traffic accident, yet he told the two doctors about his physical discomforts without disclosing the second traffic accident and the injuries caused by it. I find it is not a matter of whether he had forgotten about the second accident, it is an indication of Mr. Chan being less than full and frank with the two medical experts.
6. Mr. Chan also claimed he was told by the TKOH’s Orthopaedic surgeons that the first injuries had weaken his neck, as a result he was prone to further neck injuries. There was no such evidence from the two medical experts Drs. Kong and Lam. Nowhere in the TKOH records did it record Mr. Chan was so advised by any of the TKOH doctors. Furthermore, the second traffic accident happened over 4½ months after his last visit to the TKOH orthopaedic clinic. Mr. Chan told the court that he had not brought any legal action against the driver of the car that had collided with him at the second traffic accident. The concealment of the second traffic accident from the two medical experts could have resulted in the Defendant getting the blame for the discomfort and pain he felt after the second traffic accident.
7. I have taken into account that at the Shatin Magistrate Court hearing on 28th November 2005, some three weeks after the November 2005 traffic accident (the second accident), he had informed the Magistrate when questioned about the injuries caused by the first accident, his answer was “there is no problem now”. That answer indicated he had recovered from the first accident.
8. The fact that Mr. Chan had concealed the injuries he suffered at a second accident from the two medical experts had underminded the value of the joint medical report. Furthermore, Drs. Kong and Lam’s assessment of the whole person impairment to Mr. Chan due to the first traffic accident of 3% and 2% was a conclusion based on his complaints in August 2006 set out in paragraphs 22 to 24. It is apparent that these complaints of left neck pain and tightness, left upper limb weakness and left posterior shoulder pain on elevation only occurred after the second traffic accident. They were caused by the second traffic accident, not the first traffic accident.
9. I find therefore the permanent injury suffered by Mr. Chan after the first traffic accident would be negligible if any at all. Not only was Mr. Chan able to return work on the next day after the accident, he continued to work as a driver in the same month even though he did not work on each and every day in the last week of December and in the following month according to the log book kept by him. He did, however, work persistently during the rest of the period of the sick leave.
10. Mr. Chan complained in his witness statement that the power of his right upper limb had decreased and he had difficulties carrying heavy objects. Consequently, he claimed he had not been able to take up as many orders for his transportation business as he would have done. He claimed that 1½ month prior to the accident, he had changed from working as a scaffold worker to a transportation driver driving his own lorry. He claimed his orders came from his friends who are heavy goods vehicle drivers, and since these orders required him to help with loading and unloading of goods, he was not able to fill these orders after the accident.
11. On the claim that he was not able to carry heavy objects, I have not been able to find any support from the records of the Tseung Kwan O Hospital doctors or from the two medical experts Drs. Kong and Lam. The two experts, in fact, found the motor power of Mr. Chan’s upper limbs to be normal.
12. In the Plaintiff’s revised statement of damages of 4th August 2007, the Plaintiff claimed in para. 2.9 (iii) that he was still suffering from:

“Unable to sit, stand or walk for over 30 minutes”.

This was not supported by either his witness statement, the hospital records or the joint medical report. In paragraph 3.4 of the revised statement of damages, Mr. Chan claimed he used to enjoy playing football and swimming prior to the accident. He claimed he could no longer play football or swim due to the neck pain. However, he failed to mention this to the two medical experts because at page 2 of the joint medical report the doctors recorded:

“He has no regular hobby prior to the alleged accident.”

1. Mr. Chan could not give a reasonable explanation for the discrepancies between his evidence and what he told to the medical experts. Furthermore, he could not explain why he told the two medical experts he was unemployed (paragraph 7 at page 176A) at the medical examination in August 2006. The log book record of Mr. Chan showed he had been working throughout the period after the accident and he had returned to work as a scaffold worker after 24th November 2006. I am not convinced by Mr. Chan’s explanation that there was a misunderstanding or miscommunication with the two doctors which resulted in the doctors’ recording at paragraph 21 of the report that he had not resumed working, or that he merely told the doctors he was not able to find a suitable job.

Pain Suffering and Loss of Amenities (PSLA)

1. I have been referred to the case of *Chan Siu Youn v Ng Kam Man* HCPI 533/1999, a judgment of Mr. Recorder Wong S.C. on 28th July 2000. The Plaintiff sustained whiplash injuries in a traffic accident. He was hospitalized for two days and treated with physiotherapy, neck collar and analgesic. The Court found the accident had triggered off the plaintiff’s pre-existing degenerative changes. At the time of trial, he was still suffering from on and off residual neck pain and could not work long hours at the ceiling due to the neck pain as an interior decorator. He was awarded PSLA at $100,000.
2. In the case of *Chiu Wing See v Cheung Ying Wai* HKLRD 92/2001 where the 18 year old plaintiff sustained whiplash injuries to the neck at the traffic accident. She was hospitalized for observation for 10 days and treated with neck collar, manipulation and physiotherapy. She suffered from continuous pain at the neck with occasion numbness of the right hand and pain in the right gluteal region after walking 5 minutes. She further suffered from a linear crack of the transfer process of L5. She was assessed to have a permanent disability of the whole person of 5% and loss of earning capacity between 5% to 8%. She was awarded $100,000 for the whiplash injuries and $50,000 for the numbness injuries making a total $150,000 on the PLSA.
3. In the case of *Wong Kin Hung v Chan Wai Ming* DCPI 1223/2006 a decision by Deputy Judge Wahab on 16th February 2007 where he gave an award of $70,000 on PSLA to the plaintiff who suffered pain at the neck and simple contusion in the right leg near the knee. In the case of *Siu Leung Shang Peter v Chung Wai Ming* HCPI 43/2006, a judgement of Deputy High Court Judge Gill on 16th March 2007, the plaintiff complained of severe neck pain and pain in his right thigh as a result of the traffic accident. He was treated and discharged from the A & E Department of the hospital and given 2 days sick leave. He claimed the neck pain had persisted. The judge held that the plaintiff had only suffered a soft tissue injury to his neck, the effects of which were mild and of short duration and he awarded the sum of $30,000 on the PSLA.
4. The Plaintiff asked for $130,000 on PSLA. It was submitted that the Plaintiff’s case is similar to the case of *Leung Chiu v Poon Tak Hing* DCPI 2/2001 a judgment of Deputy Judge R. Yu on 11th April 2002 where the 63 years old school bus driver sustained neck injuries as a result of the traffic accident. Due to consistent neck pain and residual neurological stiffness in his upper limb, he had difficulties in returning to driving. He was awarded the sum of $120,000 on PSLA.
5. In that case, the plaintiff was hospitalized for 14 days. Other than attending follow-up treatments, he also received 50 sessions of bonesetter treatments to relieve the pain on the neck. The medical expert assessed the plaintiff’s impairment of the whole person at 5%.
6. Due to Mr. Chan’s concealment of the second traffic accident from the two medical experts, their assessments of the loss of earning capacity can no longer be a point of reference. I will base my assessment of Mr. Chan’s impairment after the first accident on the information from the Tseung Kwan O Hospital Orthopaedic Department and the A & E Department and the physiotherapy report.
7. Mr. Chan was not hospitalized after the accident and had returned to work immediately the day after the accident. The reason for the 14 visits to the A & E Department Mr. Chan admitted was the sick leave certificates. He admitted also he did not require any pain killers and he was further given a full discharge by the orthopaedic surgeons at the Tseung Kwan O Hospital in June 2005. He was told he suffered from soft tissue injury on his neck. I find he had fully recovered by then and would remain so if not for the second accident. An appropriate award should be the sum of $50,000.

Loss of Earnings

Pre-trial loss

1. Mr. Chan was a self-employed transportation driver 1½ month before the accident up to November 2006. He then returned to work as a scaffold worker. The reason he gave for returning to work as a scaffold worker was he would be earning more. He claimed that after the two accidents, he could not take the orders from his friends that involved carrying heavy objects. Consequently, he had less orders and income.
2. When asked why he waited until November 2006 to change jobs, he claimed that was the date he paid up the bank loan on the lorry and he had decided it would be his exit date as a lorry driver. The Defendant criticized the Plaintiff’s delay of his return to more lucrative employment when he should have recovered sufficiently to a job which seemed to be more physically demanding as a scaffold worker. Mr. Chan, however, denied being a scaffold worker is physically more challenging, he claimed it required skill rather than muscle.
3. Mr. Chan claimed his average pre-accident income net of petrol, car park expenses, call centre charges and vehicle hire purchase repayment was $18,786.89. The sum included a transport contract with Nelson Engineering Company at $12,000 per month. Nelson ceased its business on 31st July 2005. He claimed that if not for the accident, he would have been able to carry on working for Nelson until it ceased business in July 2005. The Nelson contract only required him to work on Mondays, Wednesdays and Fridays. After the work was completed on those days and on other days of the week, he was free to take other orders. He claimed in Court because the Nelson contract required him to carry heavy appliances, knowing he would not be able to cope with that after the accident he gave up the contract the day after the accident.
4. It is unfortunate that Mr. Cheung who purportedly represented Nelson, did not give evidence in Court. He wrote a letter on 21st January 2005 confirming that Mr. Chan was engaged as a driver at $12,000 per month on Mondays, Wednesdays and Fridays. His evidence had not been tested in Court. As the Defendant had served a notice of non-admission on the Plaintiff’s production of this document, I find I cannot give much weight to this document and its contents. Mr. Chan was further criticized for taking up other work orders on those 3 days of the week he was supposed to be under contract with Nelson in the month prior to the accident. Mr. Chan claimed he was free to do so after finishing the duties given to him by Nelson.
5. Mr. Chan’s evidence on his post-accident income showed that except for the months of January and February 2005 when his income dropped to $4,000 or below, he was in fact making between $7,450 to $12,870 per month gross. In spite of the termination of the Nelson contract at Mr. Chan’s own request and his claimed inability to take up orders from his friends, the orders from the call centre continued to come in during the sick leave period.
6. I refer to the authority of AG. v. Chun Yat Nam [1995] 1 HKC 218 at 238I where the Court of Appeal held the test is one of ‘reasonableness’ so far as loss of future earnings is concerned. The burden is on the Plaintiff to show it was reasonable for him to resign from the Nelson job and refused to take up orders from his friends which he claimed involved carrying heaving objects.
7. While it may be reasonable for Mr. Chan to take a reasonable period of sick leave after the accident, when he returned to work, he could have obtained assistance from casual labourers if it meant a difference of $12,000 per month from Nelson plus other orders from his friends. The Nelson contract required him to make deliveries only 3 days a week between 9 – 5 p.m., he could easily have carried on with the contract if he had hired help on those 3 days a week and he could still have been able to make a good profit. It is unreasonable for him not to have considered the option of hiring casual labourer to help carry heavy objects, instead, he was content with a net income of $3,553.39 per month between 22 December 2004 to 16 November 2006. I find that to be unreasonable and difficult to believe.
8. Mr. Chan further claimed the reason for the delay in his returning to his old job as a scaffolder which paid an average of $9,853.30 per month from 24th November 2006 to 11th September 2007 was the bank loan repayment on the lorry. In fact, the date of the end of the bank loan makes little difference if it meant he would be making $6,299 less a month for 10.6 months after the second accident. This delay may have been due to the injuries to his left shoulders at the second accident, it clearly had nothing to do with the first accident. It is therefore not an issue I should take into account on Mr. Chan’s loss of income during this period.
9. Mr. Chan failed to explain why he did not mention the difficulties in carrying heaving objects after the accident to the two medical experts. Neither did he refer to it in his revised statement of damages, this complaint was only mentioned for the first time in his 21st July 2007 witness statement 3 months before the trial.
10. On his own admission and according to the log book record, he had performed jobs which required loading and unloading goods by hand during the sick leave period on 22nd December 2004, 28th February 2005, 24th April 2005, 3rd, 13th and 20th May 2005 and 6th June 2005 for which he charged a higher fee.
11. I do not find Mr. Chan to be an honest witness who had disclosed to the Court the whole truth. He had deliberately concealed the second accident to the two medical experts; he told them he was out of work; he had asked the doctors at TSKH repeatedly for sick leave, telling them he was not employed while he was working as a lorry driver throughout the period of the sick leave, he even told the doctors he was taking a job at Fortress, he admitted in Court he had not done so.
12. I am not impressed by his claim that he had terminated the Nelson contract the day after the accident because he did not wish to delay Nelson looking for another contractor to take up the work. He could have obtained casual labourer to carry on with the Nelson contract during the sick leave period if it was a genuine long term contract that paid $12,000 for only 3 days of work a week. His evidence on the Nelson contract was not supported. The log book income is completely self-serving and further he did not produce any business accounts for his transportation business.
13. After considering all the evidence, I am satisfied that Mr. Chan should have recovered fully and returned to full time work by 28th June 2005. If not for the second accident, there would not have been any further loss of income. Furthermore, in spite of the second accident, his income in October 2006 was $16,565, it was one month before he returned to work as a scaffold worker on 24th November 2006. He returned to work as a scaffolder working between 6 days a month to 22 days a month between 24th November 2006 and 30th August 2007 and his average monthly income was $9,853. It could hardly be said to have offered him a more stable income than the lorry business as he claimed. The reason for the change of jobs must be entirely personal.
14. I assess Mr. Chan’s loss of income to be:

$18,786.89 - $[(2,466 + 3,970 + 3,990 + 9,949 + 12,810 + 7,450 + 9,740) ÷ 6.32 months] = $10,816.00

for the period of the sick leave of 6.32 months, making a total loss of $68,357.12.

1. I am not convinced that Mr. Chan had suffered any further loss after the sick leave period, the fluctuations in his income is to be expected when he was a self employed goods vehicle driver doing delivery work.

Loss of Earning Capacity

1. I am not satisfied that Mr. Chan has shown he had suffered any loss of earning capacity because the 2 medical experts’ report was based on the disabilities suffered by him after the second accident. He had chosen to return to work as a scaffolder, the records on his income showed that if he was working 24 days a month, his income would come to $16,800 (March 2007) when his daily wage was $700 in early 2007. It would have gone up to $20,400 when his daily wage was increased to $850 in September 2007. Therefore, he suffered no loss of future income when compared with the month of December 2004 before the accident. Furthermore, the fact that he could carry out skilled work as a scaffolder using both his arms and shoulders on the scaffold is strong evidence of his full recovery from the injuries sustained at the accident.

Special Damages

Medical expenses

1. The Kwong Wah Hospital and Tseung Kwan O Hospital A & E department expenses are well documented, I allow them in full at $1,900 and the physiotherapy treatments of $120.
2. There is no medical evidence in support of the claim that be required massage treatments in China. This claim is not allowed. I will however allow the claim for the bonesetter and Chinese herbalist at $250 each because this type of treatments are common amongst the local population after sustaining injuries.

Travelling expenses

1. I allow the travelling expenses by taxi to Kwong Wah Hospital and the Tseung Kwan O Hospital at $1,670. I will also allow the taxi fare to the bonesetter and the herbalist at $140 and $220.

Tonic Foods

1. Mr. Chan was not able to specify what kind of tonic foods he had consumed; neither were receipts produced in support of this claim. Given the minor nature of his injury after the accident, the sum of $500 should suffice.

Pillow and vibrator for neck (Health Aid)

1. I accept the claim for these two items as a genuine claim and would allow the claim of $278 and $138 respectively.

Repair to vehicle

1. Mr. Chan did not produce any receipt or quotation of the repair to the lorry, he claimed he had spent $3,500 on repair. There was no survey report in support of this claim. From the photograph at p.164 of the bundle, the damage to the bumper to the lorry was extremely minor. I find the claim of $3,500 repair cost not proved.

Post-trial Medical Expenses

1. Dr. Kong had suggested Mr. Chan to receive physiotherapy treatments for 4 weeks at 3 visits per week. However, his recommendation was for the disabilities suffered by Mr. Chan after the second accident. Mr. Chan had also been discharged by the physiotherapist at Tseung Kwan O Hospital after the first accident. I am not satisfied this claim is relevant to the first accident, I reject this item.

Summary

1. PSLA $50,000.00

Pre-trial loss of earnings 68,357.12

Medical expenses 2,020.00

Travelling expenses $(1,670 + 140 + 220) 2,030.00

Tonic food 500.00

Health Aid 416.00

Total $123,323.12

Interest

1. Interests on general damages at 2% p.a. from the date of writ to date of judgment, thereafter at full judgment rate.

Costs

1. Cost nisi – to the Plaintiff to be taxed if not agreed with certificate for Counsel.

(H.C. Wong)

District Judge

Parties :

Mr. Osmond Lam instructed by Messrs. Au Yeung, Cheng, Ho & Tin for the Plaintiff.

Mr. Paul T.K. Lam instructed by Messrs. Tsang, Chan & Wong for the Defendant.