DCPI 500/2008

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 500 OF 2008

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BETWEEN

HA KIT YING KITTY Plaintiff

and

NG KA KI Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung in court

Date of hearing: 26 February 2009

Date of judgment: 27 February 2009

**JUDGMENT**

1. This was a traffic accident happened in Ching Cheung Road, Kowloon on 9 December 2006. The private car driven by Ng, the Defendant, lost control in his lane and collided with several other vehicles in the opposite lane. 29-year-old Ha, the Plaintiff, was the front seat passenger on board one of these other vehicles. She sustained multiple injuries and for which she now claims damages against Ng.
2. At the commencement of the trial, Mr Chan for Ng conceded liability.

**Injuries and treatment**

1. After the accident, Ha was sent to the hospital. Apart from multiple abrasion wounds, there was local tenderness over the thoraco-lumbar junction and the lumbar region of her spine as well as the soft tissue swelling over the mid-shin of her left leg. X-rays of the thoraco-lumbar spine revealed a compression fracture of the L1 vertebra. There was no neurological deficit in either limb.
2. Ha was treated conservatively with analgesic medications. She had to wear a thoraco-lumbar-sacral orthosis to stabilise the vertebral fracture. She was discharged from the hospital after 6 days. This was followed by outpatient treatment and physiotherapy. During the last follow-up, she still had mild tenderness over the thoraco-lumbar junction but the range of back movement was satisfactory.
3. Subsequent X-rays showed anterior wedging deformity with some reduction of anterior and right vertebral height in L1 body, compatible with the fracture. There was also minimal lateral deviation of the backbone with slight left convexity at the fractured region.
4. Ha was granted sick leave until 10 April 2007, i.e., just about 4 months.

**Present condition and medical expert opinion**

1. Ha still complains about back pain and traction. There was soreness after standing or walking for about an hour. After sitting for over an hour and a half, she would need to lean back for support. The pain would increase during weather change and menstruation. If necessary, she would take analgesics. This affects her work and causes some adjustment in her pre-accident daily and sport activities. In court, she also described the traction and onset of pain when she bends her body to wash hair and to wash the dog.
2. The orthopaedic expert engaged on her behalf, Dr Johnson Lam, examined her in May 2008. In his report, Dr Lam noted that the multiple abrasions of Ha had healed. The compression fracture L1 had united with collapse. There was about 40% decrease of the vertebral height at L1. X-rays revealed scoliosis and kyphosis at L1 as well as increased lordosis in the rest of the lumbar spine. The normal alignment was affected.
3. Dr Lam also found tenderness at T-L junction and the facet joint at that level, with the tenderness being more severe on the left side. There was paraspinal muscle guarding, tightness and tenderness, more severe on the left side. Ha could bend down to reach the top of her shoes with complaint of some traction feeling over the left paraspinal area of the back. But this does not mean that the impairment and disability was mild.
4. Considering the alteration of the spinal alignment and the physical findings, Dr Lam opined that considerable residual impairment and disability at the back would be expected. Activities that increase stress to the back would cause soreness and pain. She would experience more pain if she becomes pregnant.
5. Ha was examined by Dr Arthur Chiang, the expert engaged on behalf of Ng, in August 2008. Dr Chiang also had the chance of perusing Dr Lam’s report. Dr Chiang found moderate compression in the vertebral body. The degree of loss in the vertebral height in the L1, the absence of neurological deficit in the lower limbs and the physical findings suggested a reasonable recovery from the compression fracture. He opined that Ha would have a satisfactory capacity for daily activities including walking and standing and on and off carrying of weights. The limitation and residues would mainly be in the aspect of some but likely mild decrease in the endurance for prolonged walking and standing, and some decrease in the endurance for prolonged and continuous handling of heavier objects. With unduly prolonged sitting, the back could develop some tiredness, and could be adapted by attention to acquiring good sitting posture and frequent change of sitting posture.
6. Both experts opined that the treatment received was appropriate and that Ha has reached maximal medical improvement. They also agreed that the sick leave granted was reasonable.

**Pain, suffering and loss of amenities (PSLA)**

1. The sum of HK$200,000 claimed was conceded at the trial.

**Loss of earnings**

1. At the time of the accident, Ha was working as an office secretary during daytime and as a part-time beer promoter at night. From the daytime job, she earned HK$11,000 per month while from the part-time job, she earned HK$6,250 per month. These were agreed between the parties. There was also no challenge regarding the claim for the loss of MPF benefits at 5% of her income.
2. Ha received 4/5 pay during her sick leave period. Her loss during the sick leave period, inclusive of the MPF benefits, was HK$(11,000 x 1/5 x 1.05) + (6,250 x 1.05) x 4 months = HK$35,490. This amount was not disputed.
3. Ha resumed her daytime job after the sick leave but not the part-time job. There is dispute as to whether she should be able to resume her pre-accident part-time job or similar part-time job as well after the sick leave.
4. As mentioned above, she now has to lean back for support after prolonged sitting in office during daytime. She feels tired and sometimes traction and pain after a day’s work. She would want to go home for rest after that. Dr Lam in his report opined that while Ha was able to resume her daytime job, she would experience more back discomfort and soreness with prolonged sitting, and more frequent rest would be needed. She would feel more tired at the back after a day’s work as compared with before the accident. Some reduction in work capacity and endurance is expected. If Ha had resumed her part-time job too after the sick leave, she would have had to start the evening under such physical condition after office hours.
5. Her part-time job required her to attend different locations mainly restaurants. A typical night required her to stand and walk on high heels of 2 to 3 inches for 3 hours without break. She also needed to handle bottles of beer ranging from one bottle to a bucket of bottles with ice and water frequently. She might also need to handle cartons of bottled beer each of which weighs about 8 kg. Dr Lam opined that Ha should not be able to resume such part-time job because of the back soreness, weakness and pain associated with prolonged standing and walking in high heels.
6. My interpretation of Dr Chiang’s opinion about the endurance of prolonged standing, walking and sitting as mentioned above does not lead to a materially different conclusion from that of Dr Lam. In his report, Dr Chiang went on to comment that there would be a reduction in Ha’s capacity to resume her part-time job as a beer promoter precisely because such job required continuous and prolonged standing and some handling of weight. He commented that particularly the time of continuous standing appeared to be long for her back. Dr Chiang suggested that she should be able to handle *on and off* lifting of boxes of beer. But this was not quite the frequency and weight involved in the job that Ha described in court. While Dr Chiang also suggested that she should be able to work in similar part-time jobs with shorter continuous standing hours, this was premised on the assumption *if they are available*. As Mr Lim submitted, it is only reasonable to interpret such suggestion to mean that practically Ha is not able to resume her pre-accident part-time job.
7. In court, Ha said she has sought part-time job as a telephone operator and computer data input operator after her sick leave. These are jobs that allow her to sit during work. But she failed for lack of relevant experience. Mr Chan questioned whether she should have sought alternative part-time job as a saleslady, something she has relevant experience in. After all, it was her own evidence (as per her supplemental statement) that but for the accident, she would have planned to change to some other part-time jobs involving sale or promotion of products by the time when she might not be preferred at the beer promotion job. I do not see how Mr Chan’s suggestion is really a more manageable job for Ha. Considering the evidence, I am not satisfied that Ha is proved to have failed to mitigate her loss in her circumstances.
8. The loss of income from the part-time job, inclusive of the MPF benefits, since the end of the sick leave period until now was therefore: HK$6,250 x 1.05 x 20 months = HK$131,250.

*Future loss*

1. The dispute in respect of the claim for future loss lies in whether and, if yes, for how long Ha would have continued to work in her part-time job but for the accident. Ha is certain about her intention to continue to work part-time on top of her daytime job. As mentioned above, she has such plan even if she might not be able to continue with her beer promotion job one day due to age. Mr Chan for Ng questioned such intention and the need to carry on with a part-time job at all for too long.
2. According to Ha, she lived with her family. The father is retired and her mother earned a monthly amount of HK$6,000 from a part-time job. The mother is due to retire in 2 years. Ha’s younger brother studied overseas. The family financial burden was substantial. Ha contributed HK$10,000 of her monthly income. After the accident, the family had to borrow HK$400,000 in order to continue to support the brother. Ha is now responsible for repaying the loan at HK$3,000 every month. Mr Chan pointed out that the brother just graduated last year and should be financially independent. This might be true. Yet there is really no evidence as to his actual financial situation. The offsetting effect of the mother’s retirement should not be ignored either.
3. Mr Chan also suggested that Ha would in the normal course of events get married and bear child soon. Yet Ha said that there is no set plan for marriage in the near future. Even if she is married, she plans not to bear child. When asked, she explained her concern about the associated financial burden.
4. Ha impressed me that she is an industrious person who is always keen to support the family. I also note that she has been working in her daytime job for her employer since 2002 and has been a part-time beer promoter since 2000. I am convinced that but for the accident, Ha would have continued to keep her part-time job.
5. Ha is now 31 years old and has the appearance of being able to continue in the field of sales and promotion for quite a number of years, had she not met the accident. I accept Mr Lim’s submission that a multiplier of 5 for calculating the future loss is in her circumstances fairly reasonable. The amount of loss will therefore be HK$6,250 x 1.05 x 5 x 12 = HK$393,750.

**Loss of earning capacity**

1. On the basis of the medical expert evidence, I am satisfied that that she will be subject to the risk of not being able to stay employed or to be re-employed due to her disability. The dispute lies in the amount to be awarded for Ha’s handicap in the labour market.
2. Counsel apparently accepted that the lump sum award under this item could be assessed with reference to 6 month’s income. But they differed in whether the multiplicand should be Ha’s daytime job income or part-time job income. Mr Lim submitted that it should be the former whereas Mr Chan submitted that it should be the latter. This head of claim is for compensation on the basis of the job that the plaintiff is currently doing or, if he or she is unemployed, what he or she should have been doing. Mr Lim is right.
3. I therefore award the amount of HK$60,000 as claimed.

**Miscellaneous special damages**

*Medical expenses*

1. The amount claimed was HK$4,000. There is no receipt evidencing the amount claimed save and except one for X-ray in the amount of HK$900. Mr Lim acknowledged that Ha’s evidence in court supports only a total sum of HK$2,900. Mr Chan suggested HK$2,500. I allow HK$2,900.

*Travelling expenses*

1. Mr Chan conceded during his closing submission that the amount of HK$2,000 claimed was not unreasonable. I allow it.

*Bonesetter’s fee*

1. The amount of HK$2,000 claimed was agreed at the trial.

*Tonic food*

1. An amount of HK$10,000 is claimed. No documentary evidence of this amount was produced. According to Ha in court, the amount was spent by her mother on vitamins (calcium supplements) and nutritious soup that she took. She added that her treating doctors had also recommended her to take calcium supplements. Applying well-known principles, I have discretion in making an award reasonable in the circumstances like the present one. I allow a sum of HK$6,000.

**Summary**

1. In summary:

PSLA HK$200,000

Loss of earnings

Pre-trial HK$131,250

Future HK$393,750

Loss of earning capacity HK$ 60,000

Miscellaneous special damages

Medical expenses HK$ 2,900

Travelling expenses HK$ 2,000

Bonesetter’s fee HK$ 2,000

Tonic food HK$ 6,000

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HK$797,900

LESS interim payment received HK$100,000

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TOTAL: HK$697,900

**Interest**

1. Until today, interest on general damages (PSLA) runs at 2% per annum from the date of writ; and interest on special damages (pre-trial loss of earnings and miscellaneous special damages) runs at half judgment rate.

**Costs**

1. On the eve of the trial, parties’ solicitors engaged in correspondence and counsel filed written submission in connection with the request by Ng’s solicitors to vacate the trial date. Through Mr Chan, those instructing him undertook to personally bear the costs so occasioned to the parties. Subject to that, Ng shall bear and pay the costs of this action including any costs reserved.

**Order**

1. I give judgment in the sum of HK$697,900 in favour of Ha. Interest up to today as aforesaid. Interest from today shall run at the judgment rate until full payment. Costs of this action as aforesaid. Costs shall be taxed, if not agreed. For the avoidance of doubt, I certify the engagement of counsel. Ha’s own costs shall be subject to legal aid taxation.

Simon Leung

District Judge

Mr Patrick D Lim instructed by Messrs Leung & Lau for the Plaintiff on the assignment by the Director of Legal Aid

Mr David Chan instructed by Messrs So, Lung & Associates for the Defendant