###### DCPI 1092/2010

### IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1092 OF 2010

--------------------

##### BETWEEN

## TAM OI LIN Plaintiff

### and

#### SIU HON MING Defendant

--------------------

Coram: H.H. Judge Chow

Hearing dates: 7th and 8th December 2011

Final date of written submission: 22 December 2011

Date of Judgment: 10 February 2012

Judgment

1. On 13.8.2010 interlocutory judgment was entered in favour of the plaintiff against the defendant in respect of the injuries sustained by her at a traffic accident which occurred on 18.5.2008 when she was knocked down by a private car driven by the defendant.
2. As a result of the traffic accident, she suffered a fracture (vertical split) of the right tibial plateau, with medial tibial plateau displaced posteromedially. Open reduction and plating was performed on 24.5.2008. Artificial bone substitute was used. She was wheelchair bound for 2 months; then she could do limited walking with the assistance of a rollator for 4 months. After that she resumed walking with the help of a walking stick for another 2 months. She could walk unaided by the end of December 2008. A surgery was done in September 2009 to remove the implants. She has a surgical scar over the right knee. She attended a total of 32 physiotherapy treatment sessions. Sick leave was granted to 31.12.2008. She had a total of 243 days (8.1 months) of sick leave.
3. When medically examined on 28 February 2011 by Dr. Lau Hoi Kuen and Dr. Wong See Hoi, she was found to have intermittent attacks of stretching pain from outer aspect of right leg to buttock associated with change of weather, fast walking, prolonged walking, and prolonged standing for over 2 hours. She had right knee stiffness upon kneeling and squatting. She suffered from right calf cramp 2 times a month at night time, which were relieved by stretching and drug. Loss of efficiency is expected at work on squatting and climbing. According to Dr Wong See Hoi, she is expected to develop early degeneration, and right knee pain is expected on exertion. The early degeneration will inevitably increase her symptoms and disabilities. This has affected her sporting activities. Dr Chun Siu Yeung said that there was an increased chance of osteoarthritis of 10%. She was assessed to suffer a 4% loss of earning capacity.

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

1. In the revised statement of damages (“RSD”) the plaintiff claimed $500,000 under this head. The plaintiff’s counsel cited the case of *Cheng Chi Ming v Li Chau Wan & another* HCPI 1028/2002. In that case the plaintiff suffered a fractured tibia in his right leg and knee. Medical expert opined that there was a high chance of accelerated degenerative authorities of the right knee as a result of the damage to the tibial side of the knee joint. This led to increasing pain and stiffness in the right knee. The court made an award of $250,000.
2. The plaintiff’s counsel also relied on the case of *Tse So Kam v Guardian Property Management Limited* (DCPI 856/2005). But this case is not helpful to this court because the damages for PSLA was agreed between the parties at $350,000.
3. *The* defence counsel submitted that the case of Cheung Kwong Hon v Nixon Cleaning Company Limited (DCPI 1876/2009) bears resemblance to the present case. In that case the plaintiff suffered a fracture at his right distal tibia. Open reduction and internal fixation were done. Intermittent sick leave totaling 10 months was granted. The plaintiff went back to his original work. It was expected that he would have on and off pain, especially after prolonged walking, stair climbing and heavy lifting, or when there was change of weather. The whole person impairment was assessed at 4-5%. Under PSLA, a sum of $200,000 was awarded. That case bears the most resemblance to the present case. It was decided in February 2011. Taking into account inflation, I make an award of $210,000.

*Pre-trial loss of earnings*

1. The plaintiff’s counsel submits that there is an additional claim for loss of earnings during the sick leave in her part-time employment as an accounts clerk in a company in Sham Shui Po. She worked there from 2002 onwards. She has resumed working there and she is still working there. She is paid on cash basis. She earns about $840 per month. This was lost during her sick leave period. The loss is $6,300 ($840 x 7.5). However, in the revised RSD, she stated that “she is prepared to claim only on her pre-trial loss of earning in her full time job, therefore the sum of HK$67,713.50 under this head.” She did not include the figures for her part-time income in the calculation of pre-trial losses in the RSD. There is no amendment sought in the RSD. On 29.6.2011 the plaintiff’s former solicitors expressly confirmed that she would only claim for pre-trial loss of earning in regard to her full time job. Therefore this court would only assess the pre-trial loss of income with respect to her full-time loss at Keysun Industrial Co Ltd (“Keysun”).
2. At the time of the traffic accident, the plaintiff was an accountant clerk of Keysun. According to her witness statement, her basic salary was $11,300 per month plus travelling allowance of $500 per month and meal allowance of $25 per working day. The defence counsel submits that the evidence contradicts her case that she was in receipt of travelling allowance and/or meal allowance; there is no reason why Keysun would not record the travel and meal allowance on the salary receipts, if they really existed. She explained that they were recorded in a separate sheet. The defence counsel submits that her explanation was incapable of belief. The issue is whether she was given the travel and meal allowances over the years. She was not shaken in her evidence. She told the court through her counsel that there were documents which support the existence of such allowances. Her counsel offered to retrieve them when she was asked about them. The defence counsel opposed the offer. So he cannot complain the existence of such allowances. I accept her evidence that she was given such allowances.
3. As she did not go to work during her sick leave period, she should not get the benefit of the travelling allowance. When she went to work she incurred travelling expenses. When she did not go to work, no travelling expenses were incurred. So there should be no award for travelling allowance. But meal allowance is different. She had to take meals, whether she went to work or not. Her injuries prevented her from going to work, when she would have the meal allowance. Therefore for meal allowance she would have an award of $5,265 ($26 x 8.1 x $25). She had 243 days of sick leave. But her employer only paid her 120 days out of these 243 days, at the rate of $301.33 ($11,300 / 30 x 4/5) per day. So her pre-trial loss of income plus is $55,370 ($11300/30 x 123 + $11300 / 30 x 1/5 x 120). The loss of MPF on $55,370 is $2,768.5 ($55,370 x 5%). The total award is $63,403.5 ($5,265 + $55,370 + $2,768.5).

*Loss of earning capacity*

1. In *Mocliker v Reyrolle & Co Ltd* [1977] 1 WLR 132, it was held that an award for loss of earning capacity should only be made where a plaintiff is still in employment, and where there is a real risk of his losing that employment, when being thrown on to the job market with a disability. The Plaintiff has been working for the same employer for 19 years. Keysun has been affected by the economic situation. Its annual profit has been decreasing. In 2010-2011, the annual profit dropped from $100,000 to $50,000 - $60,000. In early 2010, 1 staff member was dismissed and no replacement has been made. There is no fresh capital injection. She will have difficulty in finding a commensurate employment because she requires assistance when lifting heavy objects. She would be less able to compete when she looks for a job, as a result of her right knee condition. She suffers limitation when travelling to and working in Mainland China where she will have to carry files up and down the storeys of buildings. She also has to face keen competition for jobs. The minimum requirement is Form 5, but her education level is only Form 5.
2. She said that there is a 50% chance of the company closing. Will there be a substantial risk of her suffering a loss of competitiveness if her company closes down? Keysun’s deteriorating past performance and the substantial drop in future orders increase the likelihood that it will shut down and she will be out of work. The defence counsel submits that these matters were not mentioned in her witness statement. That depends on whether she was asked such information when the witness statement was prepared. The absence of such information in the witness statement is not per se an indication that she made up such information. If Keysun is closed down, she will suffer a loss of competitiveness in the labour market, because of her abilities. She has no other skills, and she will not be able to find a job which requires long hours of walking or weight lifting, such as security guard. Hence her employment will be confined to working as an accounts clerk. But her residual disabilities reduce her working efficiency.
3. She has cosmetic disability in both hands when she was born. She has no other skills. She was born on 9.12.1965. When the accident occurred on 18.5.2008, she was 42 years old. She considers that she will only be able to earn $8,000 per month, because of her reduced efficiency at work after the accident. She will retire at 65. She is now 45. She has about 20 years ahead of her for working. In my judgment, an award of $100,000 under this head would not be unreasonable.
4. The defence counsel submits that the gloomy picture she painted does not accord with the reality that she got a pay rise in April 2010, and that her salary has not been reduced today. But the pay rise in the sum of $400 is minimal. There was no deep cross-examination on the reasaons for her pay rise. I am not able to make any finding in favour of the argument raised by the Defendant.
5. The defence counsel submits that there is no evidence that her employer has ever become unsatisfied because she might ask for assistance from her colleagues for moving things too big for her to handle. It is not whether her employer was satisfied with her work. The point is whether her conditions aggravated by the disabilities caused by the traffic accident would be a handicap for her to find a job in the future.
6. The defence counsel refers to the case of *Cheung Kwong Hon*, in which the court held that, for similar injuries, similar recovery, and similar permanent loss of earning capacity as assessed by the experts, there might be no award for loss of earning capacity. In *Cheung Kwong Hon*, the plaintiff was a cleaning worker; his work was to clean streets. There was no difficulty for him to look for a similar. He resumed his pre-injury occupation and was paid more by the new company which employed him. There was no risk of losing his job, which did not require any special skill or high education. That case involves an entirely different scenario from the present one.

*Special damages*

1. The plaintiff underwent two operations and her mobility was impaired for many months. She spent $46,000 for acupuncture and tonic food. The former helped her with the cramps and the tonic food helped her to build her strength. She found the acupuncture sessions useful.

*Expenses paid to acupuncturist*

1. The defendant submits that the applicable test is whether the expenses were honestly and reasonably incurred by her for the injuries caused by the accident. Even accepting that the plaintiff did incur the expenses for acupuncture treatment, her claim for nearly 300 acupuncture treatments is grossly excessive in light of her condition. The objective examination on her leg supported the view that her condition by early December 2008 was already just below the normal condition. Coupled with other objective evidence, the defence counsel submits that she had not made out a case for the continuous acupuncture treatment beyond December 2008. There is no medical support for her to continue to do so after she recovered in December 2008. A nominal award of $2,000 should be awarded. I do not accept this argument. The defence counsel did not put forward a yardstick to show how the number of acupuncture is excessive. She sought the acupuncture treatments because she found that the physiotherapy sessions did not bring fast and substantial profess. She would like to use acupuncture to aid her recovery. She subjectively thought that she recovered 80-90%. It would not be wrong for her to continue to receive acupuncture treatment until she fully recovered. Accupuncture is Chinese traditional way of medical treatment. One does not need a medical report to support his / her receiving acupuncture treatment.

*Tonic food*

1. The defence counsel submits that the plaintiff’s consumption of tonic food was not medically supported by her treating doctors. The sum claimed for tonic food ($30,195.5) is simply out of proportion with respect to the injuries suffered by her. There is no basis for such a contention. The defendant submits that a reasonable award for tonic food should be no more than $2,500. I do not accept the argument.
2. As for the taxi expenses in the sum of $4,000, she incurred such expenses for being out during every other day during the sick leave period. She is under no duty to shut herself up and stay at her residence all the time. She took taxi for treatment and for family meals in restaurants. She had difficulty in walking. So it is reasonable to take taxi when she went out. The receipts come to around $2,500. She must have gathered the receipts to prove the amount spent on taking taxi. I would make this award, namely, $2,500.
3. She paid her aunt $4,000 for taking care of her over 2 months. This was not pleaded in the RSD. I would not make the award. She did not apply for future medical expenses.

*Award of damages*

1. The following damages are to be awarded:-
2. PSLA $210,000
3. Loss of earnings for full-time job + MPF

+ meal allowances $63,403.5

1. Special damages

(a) Government Hospital fees $5,143

(b) Acupuncture fees $78,620

(c) Tonic food $30,195.5

(d) Travelling express $2,500

(e) Future medical expenses Nil

1. Loss of earning capacity $100,000

$489,862

1. I order that the Defendant do pay the plaintiff, within 14 days from today, the sum of $489,862 with interests thereon; commencing from 16.7.2010 to 9.2.2012, interest on $210,000 be calculated at 2% p.a.; interest on the sum of $179,862 ($63,403.5 + $5,143 + $78,620 + $30,195.5 + $2,500) from 18.5.2008 until 9.2.2012 be calculated at 50% judgment rate; from 10.2.2012 until satisfaction, interest on the sum of $489,862 at judgment rate.

*Costs*

1. I make an order nisi, to be made absolute within 14 days, that the defendant do pay the plaintiff costs of this action, commencing from 1 September 2009, until conclusion of this case, to be taxed, if not agreed, with certificate for Counsel.

(S. Chow)

District Judge

The Plaintiff : represented by Mr Askok Sakhreni, instructed by M/S

Cheung & Liu, Solicitors.

The Defendant: represented by Mr Alfred C.P. Cheng, instructed by

M/S Winnie Leung & Co, Solicitors.