## DCPI 1696/2014

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

**PERSONAL INJURIES ACTION NO. 1696 OF 2014**

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BETWEEN

|  |  |
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| CHUI WAI KAM MICHELLE | Plaintiff |
|  |  |
| and |  |
| GILLESPIE JOHN THOMAS | Defendant |

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Before: Deputy District Judge Alfred Cheng in Court

Dates of Hearing: 5 to 6 May 2016

Date of Judgment: 12 May 2016

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JUDGMENT

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*Introduction*

1. On 19 September 2011, the plaintiff was travelling as a passenger on board a taxi on Tsuen Wan Road (Tuen Mun bound). When the taxi slowed down because the private vehicle at the front reduced its speed, the private vehicle behind the taxi, driven by the Defendant, failed to stop in time. The defendant’s vehicle rammed into the rear of the taxi, causing the taxi to be pushed forward and collided with the first vehicle at the front (“the Accident”). The plaintiff was injured as a result.
2. The plaintiff commenced the present case to seek damages from the defendant. An interlocutory judgment on liability was entered into on 22 September 2014, leaving damages to be assessed.
3. This is the assessment of damages.

*Evidence obtained from the medical reports*

1. The plaintiff went home after the Accident as she did not appear to suffer any injuries.
2. But on the next day, i.e. 20 September 2011, she experienced pain in her neck. She thus went to the Accident & Emergency Department of Yan Chai Hospital (“YCH”). X-ray showed degenerative changes in her cervical spine, and loss of lordosis. She was treated and discharged on the same day. She was given a soft neck collar on 21 September 2011.
3. The plaintiff was called back to YCH on 24 September 2011, and was admitted to the orthopaedics ward. The doctors suspected that the retrolisthesis[[1]](#footnote-1) at the C5/6 level of her cervical spine was caused by trauma. Her condition remained stable, and she was discharged on 28 September 2011. She was then followed up by the orthopaedic specialists at YCH, and was given sick leave from 24 September 2011 to 17 February 2012.
4. The plaintiff started physiotherapy on 14 October 2011. The attending physiotherapist recorded her complaint as pain over her left neck region with burning sensation radiating down her left upper limb. There was also tenderness over her right neck. The active neck flexion and extension was noted to be 1/2 the normal range, and neck rotation was 1/3 the normal range. Muscle power over her right upper limb was noted to be slightly decreased. After 12 sessions of physiotherapy, the plaintiff reported 80% subjective improvement. The neck collar was removed. Her active neck flexion and extension was 2/3 of the normal range, and neck rotation to the right was full. Muscle power was full for her right upper limb and there was no more tenderness to her neck. Although it was suggested to the plaintiff that she should attend for another 1-2 treatment sessions, she did not turn up for treatment.
5. The plaintiff also received 7 sessions of occupational therapy at YCH between 7 October 2011 and 15 December 2011.
6. The plaintiff sought treatment from Dr Simon Lee, a chiropractor practising at California Pain Care Centre in Mongkok, starting from 23 April 2014. It was reported that the plaintiff experienced neck and back pain after the completion of physiotherapy. Up to the last treatment on 16 June 2014, the plaintiff was said to have 50% recovery. Dr Lee had a guarded view on the plaintiff’s prognosis as her injury was severe, and an MRI was recommended for further evaluation and treatment.
7. An MRI was done on 11 April 2015. Anterior marginal osteophytes at the C5 and C6 vertebrae were seen, with desiccation and narrowing of the C5/6 intervertebral disc, consistent with spondylosis. There was mild to moderate degree of broad-based posterior C5/6 disc protrusion, indenting the theca and anterior cervical cord. The protruded disc was also causing left foraminal stenosis with impingement on the left C6 exiting nerve root. There was mild right foraminal stenosis due to osteophytic encroachment by unco-vertebral joint marginal spur, but there was no significant impingement on the right C6 exiting nerve root.

*The plaintiff’s evidence*

1. The plaintiff gave evidence in court.
2. The plaintiff was 38 at the time of the Accident. She is now 43 years old. She was a receptionist, which she resumed after the expiry of sick leave. In fact, she earned more after the Accident.
3. She claimed that her neck pain and discomfort returned after the completion of physiotherapy. She thus visited a Chinese bonesetter seeking to alleviate her neck pain. She claimed that there was some relief to her pain and discomfort after 3-4 visits.
4. Ms Chrystal Choy, counsel for the defendant, argues that the visits to the bonesetter were unnecessary because the plaintiff defaulted the physiotherapy sessions recommended by YCH. The plaintiff explained that at the time when she finished the initial sessions of physiotherapy, her condition was much improved, so that she thought it not necessary to attend any further session. But the neck pain and discomfort slowly returned afterwards. When attempting to discredit the plaintiff by cross examination, Ms Choy cannot point to any evidence to show that the plaintiff was actually symptom-free when she visited the bonesetter. I find the plaintiff’s explanation credible, and I accept that it was reasonable for her to seek treatment from the bonesetter.
5. The plaintiff further stated that on a day in March 2014, she suddenly felt increased pain and numbness in her right leg, to the extent that she had difficulty in walking. She thus visited Adventist Hospital. She also had an X-ray taken. Despite the treatment she received, she still suffered from immense pain.
6. Thereafter, the plaintiff claimed there were recurrent episodes of pain and discomfort in her neck. When the pain became unbearable, she visited private practitioners near her home in Tsuen Wan or her office in Kwun Tong. Under cross examination, she stated that there were 4 such visits.
7. Ms Choy questions the genuineness of the plaintiff’s visits to Adventist Hospital and the private practitioners, because the plaintiff did not produce any medical report or receipt evidencing those visits. After considering the plaintiff’s evidence, and the medical evidence as a whole, I find the plaintiff credible. I find that she did pay visits to Adventist Hospital and those private practitioners as mentioned in her witness statement.
8. The plaintiff further claimed that there was still residual neck pain and discomfort after these visits. The pain and numbness even diffused to her right hand, waist, and thigh. She had difficulty in walking. Therefore, she consulted Dr Lee as referred to above. She was told by Dr Lee that there was shifting of her C6 and C7 vertebrae, with protrusions stimulating her nerves. This caused pain to her neck, which radiated down to her right hand and right leg. When cross examined, she added that Dr Lee said there was misalignment of her lumbar spine as well.
9. Ms Choy questions the genuineness of the plaintiff’s complaint about waist and leg pain, because these were never mentioned in Dr Lee’s report. She also cross examines the plaintiff on whether her recollection of Dr Lee’s assessment was accurate, as the same was absent in any other documentary evidence.
10. I find the plaintiff credible and her recollection accurate on this point. It can be seen from Dr Lee’s report that the plaintiff complained to him that there was neck and back pain. The receipts issued by Dr Lee also contained the diagnosis that there was sprain injury at the plaintiff’s cervical and lumbar spine. I find it more probable than not that Dr Lee did diagnose the plaintiff in the way she described.
11. The plaintiff then claimed that on 9 September 2014, her right hand suddenly became so weak that she could not even hold the handrail properly when she went down stairs. She sprained her right hand as a result. Hence, she visited a bonesetter (different from the first one she visited) for treatment. Her insurance reimbursed her expenses. But on the next day, her skin became sensitive to the Chinese medicine applied by the bonesetter. Thus, she consulted a private practitioner for treatment. There were receipts evidencing both treatments, and I find she did make those visits as well.

*The expert evidence*

1. A joint orthopaedic expert report dated 22 April 2015 was obtained from Dr Fu Wai Kee (instructed by the plaintiff) and Dr Pun Kam Wa (instructed by the defendant). The experts examined the plaintiff on 17 March 2015, i.e. around 3.5 years after the Accident. The joint expert report was admitted as evidence without calling the experts to give evidence in court.
2. The experts agreed that the plaintiff suffered from soft tissue injury of her neck as a result of the Accident. They also agreed that the degenerative changes in the plaintiff’s cervical spine were pre-existing, and the Accident caused the previously asymptomatic degeneration into a symptomatic one.
3. Dr Pun further opined that the right upper limb weakness and numbness complained by the plaintiff did not fall into any dermatome or myotome patterns suggestive of cervical radiculopathy. It was also inconsistent with the findings of the MRI because the latter revealed more extensive C6 nerve root impingement on the left rather than the right. Instead, Dr Pun opined that it was possible that the plaintiff suffered from cubital tunnel syndrome at her right upper limb, as the Tinel’s test was positive. This was unrelated to the injury the plaintiff suffered in the Accident. Dr Fu did not comment on Dr Pun’s opinion.
4. The experts agreed that the plaintiff reached maximal medical improvement. She would continue to suffer from some residual impairment in her neck, such as weakness, pain and numbness. She would need symptomatic treatment from time to time. Dr Fu assessed both the whole person impairment and loss of earning capacity at 4%, whilst Dr Pun assessed both at 1%.
5. Based on the above, I conclude that the plaintiff did suffer from soft tissue injury to her neck, which made the pre-existing degeneration in her cervical spine symptomatic. I find that 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. In my judgment, 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.
6. I now turn to the plaintiff’s claim for damages. In the Amended Revised Statement of Damages dated 28.01.2016 (“ARSD”), the plaintiff only seeks damages under 3 heads of claim: (i) Pain, Suffering, and Loss of Amenities (“PSLA”); (ii) special damages; and (iii) future medical expenses.

*PSLA*

1. In the ARSD, the plaintiff claims $350,000.00. This is revised down to $300,000.00 by the time of closing submissions. The defendant submits that a sum of $80,000.00 was reasonable.
2. I bear in mind that the lower end of the serious category of damages is now at $510,000.00: *Wong Man Kin v Golden Wheel (C&HK) Transportation Co Ltd* [2015] 5 HKC 570 at para.48. Hence, there should be upward adjustments of previous awards to reflect the inflationary changes to date.
3. Mr Geoffrey Chang, counsel for the plaintiff, refers me to 39 cases as comparables, and many more summarised in the *Hong Kong Personal Injury Service*. I find the following cases more useful:-
4. *Leung Siu Ping v Mak Sin Yee* HCPI 831/2000 (Master de Souza; 16 August 2002): the plaintiff was a receptionist, and she suffered whiplash injury as a back seat passenger in a traffic accident. She had a deep lacerated wound over her right forehead and 2 small lacerated wounds over her mid-forehead. She suffered from dizziness, headache and shoulder and neck pain. Damages for PSLA were agreed at $200,000.00.
5. *Tai Yuk Wong v Chong Kwok Fung & Another* (HH Judge Yuen; 8 March 2006): the plaintiff suffered whiplash injury with neck pain and upper limb numbness for around a year. There would be residual pain and upper limb numbness. The plaintiff had to give up skiing. Damages for PSLA were assessed at $150,000.00.
6. *Muhammad Saddiq v Cheung Chi Keung* HCPI 1018/2006 (Master Levy; 8 April 2008): the plaintiff developed pain in his neck and back after the accident. The diagnosis was sprained back and 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 $250,000.00.
7. Ms Choy refers me to 8 cases which she submitted to be comparable. Of those, I find the following cases more useful:-
8. *Leung Yiu Wing v Wong Lan Fun & Others* HCPI 806/2004 (Master de Souza; 26 November 2008): the plaintiff sprained his neck in a traffic accident. He complained of neck and back pain. The court found that the plaintiff suffered minor soft tissue injury to his neck and lower back, and there was no neurological deficit. The plaintiff exaggerated his symptoms. Damages for PSLA were assessed at $100,000.00.
9. *Wong Kin Kee v Ng Chi Lam* DCPI 555/2009 (HH Judge Mimmie Chan; 26 November 2009): the plaintiff suffered whiplash injury as a minibus passenger. There was C5/6 posterior disc prolapsed just impinging but not significantly compressing the spinal cord. The experts agreed that the plaintiff’s neck pain should be minor. The court found that the pre-existing degeneration contributed to the residual neck pain. Damages for PSLA were assessed at $90,000.00, after deducting 1/3 for the pre-existing degeneration.
10. *Ho Kin Lon v Wong Tin Chi* DCPI 57/2010 (Master K K Pang; 22 December 2010): the plaintiff complained of right hand, right knee and neck pain after a traffic accident. The experts concluded that there were soft tissue injuries to these areas. There was no neurological deficit. Damages for PSLA were assessed at $100,000.00.
11. *Au Suk Man v Chan Chi Wai* DCPI 1213/2013 (Deputy Judge W K Wong; 10 February 2015): the plaintiff suffered whiplash injury in her neck in a traffic accident. She was put on a neck collar for 2-3 months. The experts agreed that there was only soft tissue injury. The court found that the accident caused the pre-existing degeneration in the plaintiff’s C5/6 intervertebral disc to become symptomatic, but most symptoms were resolved by trial. Damages for PSLA were assessed at $80,000.00.
12. Ms Choy further submits that, as the plaintiff has pre-existing degeneration in her cervical spine, I should discount the award of PSLA by 30%, as per *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958. On the other hand, Mr Chang submits that no discount should be applied.
13. In my judgment, Mr Chang is correct to say that no discount should be applied in the present case. The experts accepted that the plaintiff’s pre-existing degeneration was asymptomatic before the Accident. They did not say that the pre-existing degeneration would become symptomatic even without the Accident. The defendant has not shown a strong possibility that the natural progression of the plaintiff’s pre-existing degeneration, in the absence of the Accident, would have brought about the same symptoms she now suffers.
14. Ms Choy refers to *Wong Kin Kee*, in which the learned Judge applied a 1/3 discount to reflect the effect the pre-existing degeneration had on the plaintiff. She submits that *Wong Kin Kee* is analogous to the present case.
15. With respect, I do not think Ms Choy reads *Wong Kin Kee* correctly. In that case, the learned Judge made a finding that the pre-existing degeneration contributed to the plaintiff’s residual neck pain by the time of the trial, even though there was no evidence to suggest that the plaintiff was so disturbed before the accident: see para.14 of the Judgment. But in the present case, the medical evidence does not suggest that the pre-existing degeneration independently brought pain and numbness to the plaintiff without the effect of the injuries sustained during the Accident, and would do so in the future. In my judgment, *Wong Kin Kee* is clearly distinguishable.
16. Hence, I hold that no discount ought to be applied to the award for PSLA.
17. Comparing with previous cases, I find the present case to be falling between *Muhammad Saddiq* on the one hand, and *Leung Siu Ping* and *Tai Yuk Wong* on the other in terms of the seriousness of the injuries and disability. I find the defendant’s authorities to be less serious, as neurological deficiencies were absent in those cases.
18. I find the suitable award for PSLA to be $225,000.00.

*Special damages*

1. In the ARSD, the plaintiff has grouped her expenditure under 18 items. It is convenient for me to go through this list when considering what ought to be the damages to be awarded to her.
2. The defendant agreed to items 1-5, which were the expenses incurred by the plaintiff at YCH. They come to $2,380.00.
3. Item 6 – the plaintiff claimed to have spent $1,500.00 at Adventist Hospital, and she revised the figure down to $1,400.00 under cross examination as she accepted that she only spent almost $1,500.00. I made a finding above that the plaintiff did visit Adventist Hospital. I further find that the plaintiff reasonably incurred such expenses, because she was suffering from pain and discomfort as a result of the Accident. I allow $1,400.00 for this item.
4. Item 7 – the plaintiff claimed to have spent $1,200.00 for visiting private clinics for 4 times between March and April 2014, when her neck and right leg pain became unbearable. Ms Choy accepts that it was reasonable for the plaintiff to incur this sum if I found the visits genuine. Based on my finding above, I allow $1,200.00.
5. Item 8 – the plaintiff incurred $8,600.00 as medical expenses for seeking treatment from Dr Simon Lee. The expenses are supported by receipts. As stated above, the plaintiff consulted Dr Lee at least because of the neck pain she was then suffering. I accept that she incurred these expenses as a result of the Accident, and the amount was reasonable. I allow $8,600.00 for this item.
6. Item 9 – the plaintiff produced 2 receipts showing that she purchased fish maw and cordyceps for $6,500.00. Ms Choy submits that these expenses were not necessary, and the amount was not reasonable.
7. It is trite that the court can award damages for tonic food if there is evidence to show that the expenses were spent, and the amount was reasonable: *Mak Yiu Keung v Ho Cheung Kat* [1995] 3 HKC 575 at 580A-C.
8. The plaintiff gave evidence that she purchased the fish maw on the advice of her mother-in-law, as she was told that it would aid bone growth and recovery. She purchased cordyceps pills on her friends’ advice that they would boost her immunity.
9. Despite Ms Choy’s submissions, I find the plaintiff’s evidence credible, and she purchased these items with the genuine belief that they would aid the recovery of her injuries. I also find the amount spent reasonable. I thus allow $6,500.00 for this item.
10. Item 10 – the plaintiff spent $4,000.00 for bonesetter treatment in March 2014. I find it reasonable for the plaintiff to seek such treatment to alleviate her neck pain. There is a receipt supporting the amount, which in my view was modest. I allow $4,000.00.
11. Item 12 – the plaintiff spent $270.00 for medical treatment when she developed skin allergy after seeking medical treatment on 9 September 2014. I agree with Ms Choy that there is insufficient evidence to show that the lack of strength in the plaintiff’s right hand was caused by the Accident. Therefore, I disallow this item.
12. Items 11, 13, 14, 14A & 14B – the plaintiff incurred a total of $4,221.00 as travelling expenses for attending medical appointments. The plaintiff gave evidence that she made most of those trips by taxi. She also produced some taxi receipts.
13. Under cross examination, the plaintiff admitted that sometimes she just found it convenient to take taxi home rather than by other public transport. She also felt too embarrassed to ride on public transport when she had a neck collar.
14. I accept Ms Choy’s submissions that the plaintiff’s evidence showed that not all taxi trips were necessary and reasonable. I will apply a broad brush approach, and allow $2,000.00 for these items.
15. Item 15 – the plaintiff spent $4,322.00 to purchase 2 pairs of shoes as recommended by Dr Lee. Since it is my finding above that the plaintiff’s back and leg complaints by April 2014 were not caused by the Accident, and there is an absence of expert evidence to support the need to purchase such shoes, I disallow this item.
16. Item 16 – the plaintiff claimed that she spent around $250.00 per month since her attendance at Adventist Hospital to purchase painkillers and analgesics tape for relieving her pain.
17. Whilst the experts agreed that the plaintiff would need treatment from time to time for her residual symptoms, I do not accept that the plaintiff would need to take painkillers or to use analgesics tape on a daily basis. Hence, I only allow $2,500.00.
18. In total, I award $28,580.00 to the plaintiff as special damages.

*Future medical expenses*

1. In the ARSD, the plaintiff claims $55,920.00 as the medical expenses she will incur in the future: (i) $15,000.00 as the cost of painkillers and analgesics tape for the next 5 years; (ii) $28,800.00 as the cost for 48 sessions of treatment from Dr Lee, at the frequency of 2 visits per week; (iii) $9,120.00 as the travelling expenses to be incurred for attending Dr Lee’s clinic; and (iv) $3,000.00 as the cost of 6 bottles of glucosamine pills, as recommended by Dr Lee.
2. The defendant argues that it is not necessary for the plaintiff to seek treatment from Dr Lee for the coming 5 years, as the experts agreed that she already reached maximal medical improvement. Similarly, the experts did not recommend the plaintiff to take glucosamine as an aid to relieve her symptoms. Ms Choy submits that at most I should only award $3,000.00 as future medical expenses.
3. In my judgment, a modest sum should be awarded to the plaintiff to cover the expenses to be incurred for the medical treatment and medication she will need from time to time for her residual symptoms. I find it reasonable for her to seek treatment in the private sector as she did before. I also take into account her age. I find $8,000.00 a reasonable sum for her future medical needs.

*Interest*

1. I award interest on the above sums as follows: (i) at 2% per annum on the damages for PSLA from the date of the Writ to the date of this judgment; (ii) at half judgment rate on the special damages from the date of the Accident to the date of this judgment; and at judgment rate for the above sums thereafter up to the date of payment.

*Conclusion*

1. I award the plaintiff $261,580.00 as damages (plus interest):-

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| --- | --- |
| PSLA | $225,000.00 |
| Special damages | $28,580.00 |
| Future medical expenses | $8,000.00 |
| Total: | $261,580.00 |

1. I also make an order *nisi* that the defendant is to pay the plaintiff’s costs (with a certificate for counsel), to be taxed if not agreed. It is to be made absolute unless there is an application to vary the same within 14 days from this judgment.
2. I thank counsel for their assistance.

( Alfred Cheng )

Deputy District Judge

Mr Geoffrey Chang, instructed by Messrs. Patrick Mak & Tse, for the Plaintiff

Ms Chrystal M S Choy, instructed by Messrs. Huen & Partners, for the Defendant

1. Displacement of a vertebral body compared to the adjacent one, but short of a dislocation. [↑](#footnote-ref-1)