#### DCPI 2084/2011

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 2084 OF 2011

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BETWEEN

LAM YIM FONG Plaintiff

and

ADVARA INVESTMENT LIMITED Defendant

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##### Before: His Honour Judge Alex Lee in Court

Dates of Hearing: 25 & 26 February 2013

Date of Judgment: 8 March 2013

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JUDGMENT

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*Introduction*

1. The plaintiff was walking along Parkes Street when she was suddenly hit by a signboard fallen from the outer wall of the 1st Floor, 39 Parkes Street. The accident occurred at about 2:30 pm on 4 June 2010 and the plaintiff was then aged 21 years. The signboard was a sizeable fluorescent light box, having a dimension of 3 metres in length and 1 metre in height. The plaintiff sustained personal injuries as a result and she claims damages against the defendant who was the owner of the signboard.
2. The defendant has admitted liability for negligence. The case comes up before me for assessment of damages only.

*The issues*

1. There are the following factual disputes in this case:
   * 1. Whilst the defendant accepts that the plaintiff was hit by the signboard at her right shoulder and sustained injuries, it is not accepted that she also suffered head injury or that the head injury was caused by the accident.
     2. The defendant disputes that the plaintiff earned $8,780 a month immediately before the accident as stated in her Statement of Claim.
2. As to the various heads of damages claimed, there are the following areas of disagreement:
3. PSLA. Mr Wong, counsel for the plaintiff, relying on several case authorities submits that the compensation under this head should be between $150,000 and $230,000. Mr Yeung for the defendant, on the other hand, submits that as there is no medical evidence of any head injury as alleged, the compensation relating to the right shoulder injury, which is not serious, should not be more than $20,000.
4. Pre-trial loss of earnings. The plaintiff’s case is that she was put out of her job as a cashier of a money exchange company as a result of the accident. Mr Wong submits that the plaintiff should be entitled to twelve months loss of earnings after the accident. Alternatively, in view of the joint opinion of the medical experts that the reasonable sick leave in the present case should be one of six months, Mr Wong submits that the plaintiff should be allowed at least six months plus such time that the plaintiff would need to find a job. On the other hand, Mr Yeung submits that the plaintiff should be awarded no more than six months.
5. Loss of earning capacity. Based on the opinion of the plaintiff’s medical expert, her limited education and lack of vocational training, Mr Wong submits that the plaintiff should be entitled to a compensation which is equivalent to 12 months of her pre-accident salary. Mr Yeung relying on the opinion of the defendant’s medical expert, however, submits that no compensation should be payable under this head as there is no real risk of the plaintiff suffering any disadvantage or handicap in the labour market over and above those of a normal healthy person. The plaintiff has not made any claim for future loss of earnings.
6. Special damages. The plaintiff is seeking $1,500 for painkillers and another $8,000 for tonic food. As there is no documentary proof of these expenses, the defendant is only prepared to accept a total amount of $1,500 for both items.

*The present complaints*

1. The plaintiff complaints that she is still suffering the following, namely (i) on and off headache and dizziness. The plaintiff describes the headache as like being jabbed by many needles. Its location varies as well as its intensity. Its frequency ranges from every second day to 3 to 4 times a month, with each bout lasting half a day to a few days; (ii) persistent neck and right shoulder pain and stiffness, which increase after sleep in the morning, or with rainy and windy weather; and (iii) memory impairment. The plaintiff says that memorizing a new telephone number is now beyond her. A shopping list cannot be kept in her mind. She may forget where she has placed her belongings.
2. Moreover, the plaintiff says that she has been observed by her friends to be slow in response. Besides, she used to enjoy normal sleep but has become insomniac after the accident. As to her daily life, the plaintiff says that her contribution to domestic chores is limited because such duty as mopping the floor would induce vertigo. The plaintiff says that her temper has got worse and she scolds her family members often.

*The medical evidence*

1. The following is a brief summary of the medical records and reports:
   * 1. After the plaintiff was hit by the signboard, she fell to the ground but maintained a sitting posture. She did not loss her consciousness but was dazed, dizzy and vertiginous. She was taken to the Accident and Emergency Department of the Queen Elizabeth Hospital and the plaintiff complained of “right shoulder pain and decrease in movement”. An X-ray examination did not reveal any fracture. She was treated and discharged on the same day.
     2. However, after the discharge the plaintiff felt dizzy and she vomited repeatedly. Moreover, pain persisted in the right shoulder and neckache and headache then began. After a number of attendances at the Accident and Emergency Department on the following days, on 7 June 2010 the plaintiff was eventually admitted to the Neurosurgical Ward of the Prince of Wales Hospital. A CT scan was conducted but no abnormality was discovered. The plaintiff was discharged “with reassurance” on 8 June 2010. However, she was re-admitted to the Neurosurgical Ward of the Prince of Wales Hospital on 13 June 2010 after an episode of dizziness and loss of consciousness for five minutes which was followed by sleepiness. Headache and dizziness remained her chief complaints. Another CT scan of her brain was conducted and again no abnormality was revealed. She was discharged on 15 June 2010 with a diagnosis of vasovagal syncope.
     3. Upon the joint examination by the medical experts (neurosurgeons) appointed by the parties, it was found that her tests of orientation, calculation and comprehension, concentration, registration, memory, general knowledge and abstract thinking were normal. Her speech was relevant and coherent. There were no signs of nerve impairment, except that brief vertigo – without nystagmus, was induced by Barany maneuver. There was no muscle wasting in the extremities. Muscle tone was normal, so was motor power – although there was a moderate degree of diffuse give-way weakness in the right arm that was likely to be related to her previous shoulder injury. Her co-ordination, gait and station were normal. Range of movement at the neck was full but there was some mild tenderness in the muscles on the right side. Tenderness over the Right Greater Occipital Nerve was also elicited. The experts agree that the plaintiff had a mild head injury at the time when she was hit by the fallen signboard. There was, however, no radiological evidence of any brain injury. The experts agree that there was no pre-existing medical illness that can account for her accident or her residual impairments or disability.

*Assessment of factual disputes*

*Head injury*

1. I have no hesitation to accept, on balance of probabilities, that the plaintiff had complained of headache at an early stage and that her complaint in that regard was not fabricated.
2. I note that although the first medical record of the Accident and Emergency Department of the Queen Elizabeth Hospital does not contain any complaint of headache, the plaintiff had told the police officer who took a witness statement from her that she had “headache but no swelling, swelling on right shoulder”（“頭痛，但無腫，右邊肩部有腫。”). The statement was taken about one hour after the accident. Furthermore, the Medical Report from the Department of Neurosurgery of the Prince of Wales Hospital, dated 28 July 2010, says that “Ms Lam presented (sic) to us for head injury on 5 Jun 2010.” Therefore, it would appear that the plaintiff did complain to the doctors of head injury as early as 5 June 2010. Lastly, both the medical experts agree in their joint report by saying that,

“We agree Madam Lam had a mild head injury at the time when she was hit by the fallen advertisement broad on 4th June 2010.”

In particular, Dr Ng, expert for the defendant, says,

“As a result of the accident, she complains of headache, dizziness and memory impairment which are consistent with the diagnosis of post-concussional syndrome.”

In short, there is nothing in the Joint Medical Report to suggest that the complaints of headache or head injury are false or that she has exaggerated her injuries. Also, the experts have expressed no doubt that the head injury was consistent with the accident. Their combined view, which is not contradicted by any other evidence, is that there was no pre-existing medical illness that can account for her accident or her residual impairments or disabilities.

*Level of income before accident*

1. The plaintiff produced a certificate signed by a Mr Cheng of Kinying Renminbi Exchange Co saying that the plaintiff was employed by them from March 2010 to June 2010 as a cashier, with a monthly salary of $8,700. The plaintiff also relies on her bank passbook which shows some transfer deposits which she said were from Kinying.
2. However, in cross-examination the plaintiff admitted that she drafted the certificate and presented it to her former employer Mr Cheng for signature. When asked why she put in the Revised Statement of Claim that her monthly salary was $8,780, the plaintiff said her salary actually comprised a basic salary of $8,500 and a hard-working bonus （“勤工奬”）of $300. As to the transfer deposits, the plaintiff said that she received $911 as her salary for March 2010, $7,783 for April 2010 and $8,093 for May 2010. She explained that she only began to work for Kinying in late March. As for April, she said that her salary was deducted because she made mistakes when giving changes to customers. As for May, she said that she took two days off.
3. As to the plaintiff’s employments prior to that of Kinying, there was a document from the Inland Revenue Department (“IRD”) showing that she was employed by Fairwood Fast Food Ltd between 15 June 2009 and 10 July 2009 making an income of $5,416. The plaintiff gave evidence saying that between Fairwood and Kinying, she worked as a salesperson of tea leaves making about $8,000 to $9,000 a month for about 8 months. However, the IRD record shows no source of income other than Fairwood for the financial years between 2009 and 2012. Also, the plaintiff was unable to give any details or documents about her job as a salesperson of tea leaves, not even the name of the person who employed her.
4. Mr Yeung cross-examined the plaintiff extensively on her employment history on the basis of the IRD record. As I said, the IRD had no records of the plaintiff’s employment with Kinying or the other employments which she said she had apart from Fairwood. The plaintiff’s answer to that was that she did not know why her employers had not reported her income to the IRD. The plaintiff said that she also worked for Vanguard Supermarket between October 2008 and January 2009 and even a big company like Vanguard also had not reported her income to the IRD.
5. Mr Wong in closing submission realistically accepts that there are discrepancies between what is pleaded in the Revised Statement of Claims and the plaintiff’s evidence as to her pre-accident income. As such, he does not insist that the Court adopt $8,780 as the monthly income of the plaintiff prior to the accident. Instead, he asks the Court to adopt the figure of $8,500. On the other hand, Mr Yeung submits that even that figure salary should be discounted because of the plaintiff’s failure to prove a stable and continued employment. Mr Yeung suggests a figure of $4,250 which is half of $8,500. However, Mr Yeung does not provide any authority to support his approach.
6. Having considered the evidence and the submissions of both sides, on balance of probabilities, I accept the plaintiff’s evidence that she was employed by Kinying immediately prior to the accident. Also, there is no reason for me to doubt that she would have remained so employed but for the accident. On the other hand, I do not accept the certificate she produced at its face value. Also, I place no weight on the plaintiff’s evidence about her other employments prior to Kinying which is not supported by any documents. Although I accept the plaintiff’s evidence that her basic monthly salary with Kinying was $8,500, the fact is that she had never received a full salary because of the various deductions made. Based on the bank records, I accept that the plaintiff made respectively $7,783 and $8,093 for the two months immediately prior to the accident. I ignore the $911 which was not the salary for a full-month’s work. In my judgment, the fair and proper way to determine the plaintiff’s pre-trial income is to take the average of $7,783 and $8,093 which is $7,938.

*Assessment of damages*

*PSLA*

1. In assessing damages under this head, I take into account the plaintiff’s age, overall injuries and disabilities, her medical condition and loss of amenities and suffering. I remind myself that, in doing so, previous authorities serve as a reference and not as a straitjacket.
2. Mr Wong draws my attention to the following cases which he says are comparables:
3. *Tsang Wai Ching v Iu Sau Ying, formerly trading under the business name of Cheong Shing Furniture Design Co*, DCPI 1433/2006 (unreported). In that case, which was a hit and fall case, the plaintiff suffered headache, shoulder pain and vomiting. The diagnosis was one of post-concussional syndrome. There was also medical evidence of depression. Besides, the plaintiff was left with a scar at the corner of her left eye. She was granted 5 months sick leave and was assessed to have a 1% impairment of whole body. The compensation for PSLA was awarded at $230,000.
4. *Hung Shing Kun v Yeung Chi Ming & Anor* [2006] 2 HKLRD 698. In that case, which was a case of assault, the plaintiff, who was in his 50s, suffered head injury and pain and episodes of blackout. He complained of residual pain over his left shoulder, elbow wrist and hand and the muscle group on the left upper limb was found to be grossly deficit. An amount of $180,000 would have been award for PSLA but for the fact that the plaintiff had a pre-condition which might have contributed to the blackouts.
5. *Chiu Wen Hsien v Tong Shuk Chung, formerly trading as Shun Tong Clearance and Repairs Construction Company & Others*, DCPI 1482/2009. In that case, a workman was hit at the head and right shoulder by a fallen brick. He suffered a 10 cm laceration on his head and his clavical bone was deformed. There were also complaints of residual pain, dizziness and vomiting. An award of $200,000 was made for PSLA.
6. *Chang Tsun Tein v Wai Lee Scaffolding Co Ltd*, DCPI 818/2008. In that case, a workman was hit by a bamboo pole at the head and he suffered a 2 cm laceration of the scalp. There were complaints of dizziness, headache, inability to concentrate, loss of memory and impairment of psychological and social functioning. It was found, however, that the head injury and the post-concussional syndrome were in fact mild and the impairment of psychological and social functioning was exaggerated. Despite that, an awarded of $150,000 was made for PSLA.
7. Mr Yeung, whilst contending that the above cases are all distinguishable, does not provide any comparables for consideration.
8. In the present case, although the plaintiff says that her temper has worsened after the accident which bears on her family relationship, there is no psychiatric evidence of depression. The plaintiff does not suffer any physical deformity. In my assessment, the injury suffered by the plaintiff and its consequences on her are not as seriousness as those in the cases of *Tsang Wai Ching, Hung Shing Kun* and *Chiu Wen Hsien*. In my judgment, the appropriate amount for PSLA in this case is $160,000. This is the sum I award.

*Loss of income pre-trial*

1. The plaintiff was granted sick leaves for the period between 4 June 2010 and 30 March 2011, during which she received no salary from Kinying. In fact, she was fired by them five months after the accident. Ever since the accident, apart from working for three days in a sushi shop and one day in a 7-eleven shop, which the plaintiff said that she was fired on both occasions because of her inability to cope with the work demand, she has been out of employment. In the Revised Statement of Claim, the plaintiff seeks loss of earnings from the date of accident (4 June 2010) up to the present.
2. However, there is the following evidence against the plaintiff in relation to this head of damages :
   * 1. Although the plaintiff had sick leave certificates covering the whole period between 4 June 2010 and 30 March 2011, the certificates covering various periods running from 20 September 2010 to 8 November 2010 were issued by a Chinese medicine practitioner who, according to the plaintiff, issued them only at the request of her father. The plaintiff admitted that the Chinese medicine practitioner would not have issued those certificates if her father had not made the request.
     2. As regards the sick leave certificate issued by the Surgical Clinic of the Prince of Wales Hospital dated 5 January 2011 covering the period between 5 January 2011 and 30 March 2011, it was simply stated on that certificate that the plaintiff suffered from “medical problem”. This certificate is not spoken to by any witness statement or oral evidence. There is simply nothing to indicate whether this long period of sick leave has anything to do with the plaintiff’s injury and on what basis the plaintiff was granted a 3 months sick leave in one go.
     3. Besides, in cross-examination the plaintiff admitted that she has ceased to look for employment since June 2011, not because of her injury, but because of her discovery then that she was one-month pregnant and also of her subsequent need to look after her daughter who was born in February 2012.
     4. The combined view of the medical experts is that most recovery of neurological functions after a mild head trauma occurs within the first 3 months of the accident, although some further, minor improvement can continue up to 6 months. With regard to the plaintiff’s head injury, her neurological conditions have stabilized. The experts say that the appropriate duration of sick leave here should be six months.
3. Faced with the above evidence, Mr Wong in closing submission significantly reduces the plaintiff’s claim under this head and submits that twelve months from the date of accident is a justified period for her loss. Alternatively, Mr Wong submits that the plaintiff should be given 6 months plus such further time for her to find employment. On the other hand, Mr Yeung submits that the plaintiff should get no more than 6 months.
4. Having considered all the relevant evidence and submissions, I would allow the plaintiff loss of earnings for a period of six months. This has already included the time that the plaintiff would need to seek employment after recovery.
5. Mr Wong asks that the Court should also award an additional 5% for the Mandatory Provident Fund (“MPF”). Mr Yeung objects on the grounds that it has not been pleaded in the Revised Statement of Claim. He submits also that the damages are notional rather than real, in the senses that the plaintiff was not in employment during the period. Lastly, he submits that the Plaintiff will not be paying any tax for such claimed amount.
6. In my judgment, the claim for MPF is in the nature of general damages and it comes under the head of pre-trial loss of earning which has been pleaded . It is not a separate head which needs to be specifically pleaded. Also, had the plaintiff remained in her employment with Kinying, she would have been entitled to a 5% contribution from Kinying towards her MPF. On the other hand, I do not think there should be any deductions for salary tax under this head, given the relatively small size of the money in question. Therefore, the damages for loss of earning is:

$7,938 x (1+5%) x 6 = $50,009.40

which I round off to $50,000.

*Loss of earning capacity*

1. The relevant legal principles are set out in *Moeliker v A Reyrolle and Co Ltd* [1977] 1 WLR 132 and also *Chan Chi Shing v Tsang Fook Metal Engineering & Anor*, CACV 238/1999. I note that the plaintiff has already lost her job with Kinying as a cashier. According to the plaintiff, she was dismissed 5 months after the injury while she was still on sick leave. She is not in the labour market at present as she has to take care of her daughter. The issue is what, if any, disadvantage or handicap she will suffer as a result of her injury in the future when she re-enters the labour market and how that disadvantage or handicap should be quantified in monetary terms.
2. Mr Wong submits that an award under this head representing 12 months’ income is appropriate. On the other hand, Mr Yeung submits that there is no quantifiable risk that the plaintiff would suffer any disadvantage or handicap in the labour market and therefore no compensation should be payable.
3. As regards the expert medical evidence:
   * 1. Dr Ng for the defendant gives the assessment that the plaintiff’s post-concussional syndrome accounts for 0.5% impairment of the whole person according to the Guides to the Evaluation of Permanent Impairment published by the American Medical Association. He opines that from the neurological perspective, the plaintiff should be able to resume her occupation as money exchange cashier with no loss of earning capacity.
     2. Dr Kan for the plaintiff gives separate considerations to the various impairments of the plaintiff. His overall assessment is that the plaintiff is totally impaired by 4% of the whole person. This is composed of 1% for cognitive impairment, 1% for headache, 0.5% for dizziness & vertigo, 0.5% for syncope, 0.5% for mood deterioration and 0.5% for insomnia. He opines that she should be able to resume gainful employment at positions that are commensurate with her educational and vocational background, but with a 5% loss of earning capacity due to her various impairments, particularly the cognitive defect.
4. In considering the medical evidence, I remind myself of the judgment of the Court of Appeal in *Tang Shau Tsan v Wealthy Construction Co Ltd*, CACV 58/2000 (unreported) that it is for the court to assess the percentage of loss of earning capacity, that medical opinion is useful, it is for the court to come to its own conclusion.
5. In my judgment, Dr Kan gives a more in-depth and comprehensive assessment of the plaintiff’s impairments than Dr Ng does. Having the opportunity to observe the plaintiff giving evidence in court, taking into account her evidence and the evidence of Dr Kan, I do not accept Dr Ng’s view that the plaintiff can resume her occupation as money exchange cashier with no loss of earning capacity. I find that the plaintiff is able to resume gainful employment but will face difficulties due to her various impairments.
6. I take into account that the plaintiff is still young, that she has received secondary education in Hong Kong with little vocational training and that she had worked in the past in different trades. I also take into account the following evidence of the plaintiff about her two attempts to seek employment:
   * 1. in January 2011 when she worked in a sushi shop as a waitress. She once felt darkness in front of her eyes and she had to sit down. On another occasion, she had broken things. She also made errors when giving changes to customers. As a result, after having worked for just 3 days, she was asked to leave; and
     2. after that, she worked in a 7-eleven shop but was told by the manager to quit on the first day because of her headache and her lack of strength in the arm.

These episodes are evidence in support of the plaintiff’s case that she has suffered some disadvantage and handicap in the labour market. However, I am alive to the fact that they occurred prior to the joint examination of the plaintiff by the experts in March 2012.

1. Based on all the relevant evidence before me, I find that the plaintiff will have some difficulties coping with jobs which are mentally or physically demanding. Although there are still other types of job open to her, she would need more time than others to find a suitable employment. Moreover, there could well be significant periods of unemployment in future. The plaintiff was aged 21 at the time of the accident and is now aged 24. There is still a long time to go before she reaches the retirement age. Doing the best I can, I adopt the plaintiff’s pre-trial average monthly salary as the kind of income that she would be able to make and multiply it by 12 so as to reflect the extent of her disadvantage and handicap in the labour market. Therefore, the amount of damages under this head is:

$7,938 x 12 = $95,256

which I round off to $95,000.

*Special damages*

1. The parties agree the plaintiff’s medical expenses, including those of bone setters and herbalist, at $6,000. They also agree the traffic expenses at $1,500.
2. As to the expenses on pain killers/plasters and tonic food, I adopt the approach in *Mui Ling Kwan v Wong Yin Wah* [1973] HKLR 45, which is applied in *Tsang Wai Ching’s case*, supra. I would allow a reasonable sum for these items which the plaintiff believed to be helpful to her recovery in the absence of the relevant receipts or evidence as to their advisability or suitability.
3. The plaintiff is claiming $1,500 for pain killers/plasters and $8,000 for tonic food. In my judgment, a reasonable sum for the former would be $1,000 and that for the latter would be $5,000. These are the sums that I award.

*Award*

1. The total award for damages is as follows:

PSLA $160,000

Loss of earning (including MPF) $50,000

Loss of earning capacity: $95,000

Medical expenses (including bone-setters

and herbalist) $6,000

Traffic expenses: $1,500

Pain killers/plasters: $1,000

Tonic food: $5,000

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Total $318,500

1. I also allow the plaintiff’s claim for interest on the award for PSLA at the rate of 2% per annum from the date of service of the writ to the date of judgment and interest on special damages at half of judgment rate from the date of accident to the date of judgment. The whole of the award carries interest at the judgment rate after the date of judgment.
2. I make an order nisi that the costs of the action are to be paid by the defendant to the plaintiff, to be taxed if not agreed, with certificate of counsel. The plaintiff’s own costs are to be taxed in accordance with legal aid regulations.

( Alex Lee )

District Judge

Mr Wong Chao Wai, Brian instructed by Peter KH Wong & Co, assigned by Director of Legal Aid, for the plaintiff

Mr Sam Yeung Lung Sang of Lennon & Lawyers, for the defendant