#### DCPI2757/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2757 OF 2008

BETWEEN

CHOW KAR WEI Plaintiff

and

TAKAHASHI DESIGN HONG KONG LTD Defendant

##### Before: His Honour Judge Lok in Court

Dates of Trial: 21 & 23 June 2010

Date of Judgment: 23 June 2010

## J U D G M E N T

1. This is a claim for damages for personal injury arising out of a work‑related accident on or about 12 October 2006.
2. Despite notification, the Defendant does not appear at the trial to contest the Plaintiff’s claim.

Liability

1. The Plaintiff is aged 33 now and he was 30 years old at the time of the accident. He was born in Hong Kong but moved to the United Kingdom as an infant. He is single with a Higher Diploma in Graphic Design. He returned to Hong Kong in 2003, and prior to his employment with the Defendant, he worked in the design and photography field.
2. The Plaintiff was employed by the Defendant between 8 March to 31 October 2006 as a photographer working an average of 22 days per month at a salary of $7,000. At the material time, the Defendant’s business premises were in Wanchai, however the Plaintiff had to work at various locations at the direction of the Defendant for photo shoots for advertising promotional purposes. In attending various premises for this purpose, the Plaintiff was required to carry equipment on his back weighing approximately 30 to 40 pounds to and from his office and he had to manipulate the equipment as necessary during the photo shoots.
3. On about 12 October 2006, the Plaintiff during the course of employment suffered a back injury. A few weeks prior to the accident, the Plaintiff’s workload almost doubled and he had to routinely carry out 3 or even 5 shoots a day. There were also occasions when he had to work at night performing overtime until 11 pm. Approximately 2 to 3 weeks prior to the accident, the Plaintiff had informed his boss, Mr Takahashi, that the increased workload was taking its toll and that travelling to more destinations with the backpack containing the photo equipment was too strenuous. Mr Takahashi agreed with the problem and he went with the Plaintiff to view some trolleys at a camera shop in Mongkok. However, Mr Takahashi said that they were too expensive and that he would look for an alternative at a later date.
4. On the day of the accident, the Plaintiff was directed to perform a photo shoot at Jordan inside an unfurnished restaurant which resembled a construction site. The Plaintiff had to take photographs in a small kitchen area without any seating or air-conditioning for 3 to 4 hours. On returning to the office, the Plaintiff felt exhausted, and while removing the heavy backpack, which weighed about 30 to 35 pounds, and putting it down, he felt a sharp pain in his lower back. He could not stand up. He rested in a chair for about 30 minutes but his condition did not improve. He then called Mr Takahashi who agreed that the Plaintiff could return home early to rest.

1. The pain in the Plaintiff’s lower back persisted over the next few days, during which time he was in touch with Mr Takahashi who agreed that the Plaintiff should stay at home until he was fit to return to work.
2. As a result of the accident, the Plaintiff suffered lower back pain and he claims that the accident was caused by the negligence and breach of statutory duty on the part of the Defendant.
3. In my judgment, the accident was clearly caused by the negligence on the part of the Defendant. The backpack that the Plaintiff had to carry weighed about 30 to 35 pounds. The Defendant should have been aware of the fact that carrying such heavy backpack could easily injure the back of his employee. In fact, the Plaintiff had expressly informed the Defendant of such risk 2 to 3 weeks prior to the accident. Without giving adequate warning and training to the Plaintiff relating to the carrying of such heavy load and without providing other staff or equipment to assist the Plaintiff in carrying out such task, the Defendant is clearly guilty of negligence in the present case.
4. Despite the allegation in the Defence, I do not find that the Plaintiff was guilty of any contributory negligence on his part. The Plaintiff had previous back pain problem and the Defendant claims that the Plaintiff should have disclosed such fact to the Defendant. However, the Plaintiff had suffered no symptoms after receiving treatments in the United Kingdom and in Hong Kong. Believing that he was well, it was only reasonable for the Plaintiff not to disclose such fact to the Defendant. Further, if an employee has to carry heavy equipment, it is the primary duty on the part of the employer to make sure that the work can be carried out in a safe manner. The risk of injury is present for every employee, even for those without any back pain. Hence, I do not find that the Plaintiff was guilty of any contributory negligence.

Quantum

1. The parties have engaged their own respective orthopaedic experts to examine the Plaintiff and they have prepared a joint medical report in respect of the injuries suffered by the Plaintiff.
2. According to the X-ray and MRI scan of the Plaintiff taken after the accident, there was narrow disc space of L4/5 and L5/S1, degenerative disc at L3/4, L4/5 and L5/S1, L4/5 spinal stenosis with hypertrophic ligamentum flavum, L5/S1 posterolateral disc protrusion causing left S1 nerve root compression.
3. The Plaintiff had a history of lower back pain 15 years ago in the United Kingdom. By that time, the CT scan showed that there was prolapse of intervetebral disc. After treatment, the Plaintiff had no more symptoms. There was another complaint of lower back pain when he was playing soccer in 2003. Again, the Plaintiff recovered after the treatment and he had remained symptom-free for 2 to 3 years before the subject accident.

1. The Plaintiff’s main complaint is lower back pain. He cannot sit for more than 4 hours a day and he cannot stand or walk continuously for about 30 minutes to an hour. He experiences pain in his back daily when he wakes up radiating down to his both legs. He also feels pain when bending forward or backwards. After observing and viewing the Plaintiff in the witness-box, I accept that his complaint is genuine.
2. According to both orthopaedic experts, the Plaintiff has suffered soft tissue injury to the back as a result of the accident. The Plaintiff has also suffered from spinal stenosis which is the narrowing of the spinal canal by bony or soft tissue exit of the nerve root that may cause impingement or pressure on nerve roots or cord itself. A patient with spinal stenosis will normally complain of back pain radiating down to the lower limb, especially after exertion like prolonged walking, standing or lifting heavy objects. The Plaintiff was noted to have this protrusion in his early 20’s. In such circumstances, it is likely for the Plaintiff to experience early degeneration of the spine.
3. Both experts agree that the back condition was pre-existing before the subject accident but the accident probably aggregated the pre-existing condition to some extent precipitating recurrent symptoms after he recovered reasonably well from his 2003 pain episode.
4. Both experts also agree that the prognosis of soft tissue injury is good but the aggregate spinal stenosisis is likely to cause persistent symptoms. The experts are of the view that if the subject accident had not occurred, the Plaintiff would probably have remained symptom-free for 5 years or more considering the previous symptom-free interval between his first and his second pain episodes.
5. The Defendant’s expert is of the view that the Plaintiff is able to resume his pre-accident employment. However, the Plaintiff’s expert opines that with the pre-existing condition aggregated, the Plaintiff is not fit to return to his pre‑accident job, though he assesses that the contribution from the subject accident should be in the region of one-third.

(i) Pain, Suffering and Loss of Amenities ( “PSLA”)

1. I first assess the quantum of PSLA based on the existing injury of the Plaintiff. After making the assessment, I will then consider the factor of pre‑existing spine problem.
2. As I see it, the Plaintiff’s complaint of lower back pain is serious and genuine. The Plaintiff experiences the pain frequently and it also limits the movement of the spine. The pain also seriously disturbs the daily activities of the Plaintiff. After considering the cases put forward by Mr Hemmings, counsel for the Plaintiff, including Chan Kam Hoi v Dragages et Travaux Publics, CACV 58/1997 Chan Kam Hong v Mohammad Riaz HCPI 938/2005, Chan Kwei Duen v East Country Company Limited t/a Gold River Vietnamese Food Shop DCPI665/2005, Tam Kwok Man v Kowloon Motor Bus Company (1933) Limited, HCPI755/2001, Yip Piu v Chung Kam Fei, Catherine & Chung in King Elizabeth HCPI 1168/1999, Shek Kam Ching v Po Kee Construction Engineering Limited & Others HCPI434/2001, Lam Wa Lai v Startlong Development Limited t/a Lai Ying Hair Salon DCPI624/2003, I accept the Plaintiff’s figure and award $250,000 as damages for PLSA had there been no pre-existing injury.

1. The effect of pre-existing condition on the assessment of damages has been considered by the Court of Appeal in Chan Kam Hoi v Dragages et Travaux Publics. In that case, the Court of Appeal approved the approach adopted by the trial judge, Deputy High Court Judge Woolley, regarding 3 possible scenarios. The first is where the plaintiff was almost certain to have gone through life unaffected by the condition; the second is where there is a strong possibility that some other event, or natural progression of the condition, would have brought about the plaintiff’s present state; the third is where this would certainly have occurred at some stage in any event. In the first, the defendant would be liable for all the damage caused; in the second, it would be necessary to assess the degree of the possibility in deciding what reduction is appropriate, as in assessing the effect of other vicissitudes of life; in the third, clearly an allowance has to be made, the extent of which depends on the evidence as to when the precipitating event would have occurred.
2. In Chan Kam Hoi, Deputy Judge Woolley found that the plaintiff’s condition was somewhere between the second and the third category. The plaintiff in that case was aged 45 at the time of the accident and he would have had to give up his pre-accident occupation by the time he was 55 by reason of his pre‑accident condition, Deputy Judge Woolley discounted the damages for PSLA by 45%. The Court of Appeal confirmed this approach of global percentage discount and the same approach should also be applied in assessing the damages for loss of earnings.

1. In my judgment, the pre-existing condition of the Plaintiff was serious. The Plaintiff was noted to have disc protrusion in his early 20’s and he is likely to experience early degeneration of the spine. Had there been no accident, the Plaintiff would probably have remained symptom-free for just a few more years. In other words, the Plaintiff is likely to experience the pain in the near future even if there had been no accident. In such circumstances, the Plaintiff’s case falls into the third scenario, and even the Plaintiff’s own expert estimates that the contribution from the accident to the loss of earning is only in the region of 33%. In any event, the assessment of the Plaintiff’s expert is not binding on this court. After taking into account all the circumstances of the case, including (i) the relatively young age of the Plaintiff and he may have a better chance to cope with the pain had there been no accident, and (ii) the Plaintiff should have been able to remain symptom-free for a few years had there been no accident, I follow Deputy High Court Judge Woolley and adopt the same discount of 45%.
2. The damages for PSLA is therefore reduced to $137,500.

(ii) Loss of Pre-trial Earnings

1. The Plaintiff accepts that his monthly earnings at the time of the accident was $7,000 as opposed to the figure of $8,000 put down in his witness statement.
2. After the accident, the Plaintiff was on sick leave for about 15 months. From 7 March 2008 to 13 May 2008, the Plaintiff worked as a full-time web designer earning about $12,500 a month. However, as he could not sit for a prolonged period of time, the Plaintiff could not continue with the full-time job. From June 2008 to 19 December 2008, the Plaintiff took up a part-time job in the same company earning about $6,000 a month. The Plaintiff was laid off in December 2008. Despite making various attempts, the Plaintiff could not find another job.
3. I accept that the Plaintiff has made genuine attempts to find a job after the accident. However by reason of his injuries, all his attempts failed. I therefore allow the Plaintiff to claim for the full pre-trial loss of earnings which can be assessed as follows:-

From 13 October 2006 to 6 March 2009:

$7,000 x 15 24/30 months x 1.05 (loss of MPF contribution) = $116,130

From 14 May to 18 December 2008:

($7,000 - $6,000) x 7.13 months x 1.05 = $7,490

From 19 December 2008 to 23 June 2010:

$7,000 x 18.16 months x 1.05 = $133,476

1. Mr Hemmings agrees for the damages to be discounted by the same percentage and so the total quantum for pre-trial loss of earnings is: ($116,130 + $7,490 + $133,476) x 55% = $141,403.

(iii) Future loss of earnings

1. Mr Hemmings accepts that for the purpose of assessing the damages of post-trial loss of earnings, the Plaintiff should have been able to take up a part-time job with a monthly income of about $6,000, the same as his previous part-time job. The Plaintiff is aged 33 now and I agree to adopt a multiplier of 15. In such case, the Plaintiff’s future loss of earnings can be assessed as follows:-

($7,000 - $6,000) x 12 months x 15 x 1.05 = $189,000

1. The Plaintiff agrees for a discount in the quantum by applying the same percentage of discount as that in assessing the damages of PSLA, and the so the quantum for future loss of earnings is $103,950.

(iv) Loss of Earning Capacity

1. As the Plaintiff is suffering from serious lower back pain and he cannot sit, stand or walk for a prolonged period of time, I agree that he suffers a disadvantage in the labour market and he has difficulty in seeking re-employment. I agree that the sum of $50,000 claimed by the Plaintiff, which is about eight months of the earnings of his part‑time job, is reasonable. As the same discount is applicable, the quantum for such head of damages is $27,500.

(v) Other Special Damages

1. The Plaintiff is claiming for medical expenses in the sum of $16,000, travelling expenses in the sum of $3,000 and tonic food expenses in the sum of $500. The claim for medical expenses is also supported by various medical receipts produced in the trial bundle. As the amounts claimed are reasonable, I allow such claims in full. As the Plaintiff would have to incur these expenses only because of the present accident, I do not seek to apply the same discount in assessing the damages for these other special damages.
2. The quantum of the Plaintiff’s claim can therefore be summarised as follows:-

1) PSLA $137,500

2) Pre-trial loss of earnings $141,403

3) Future loss of earnings $103,950

4) Loss of earning capacity $27,500

5) Other special damages $19,500

##### The total is: $429,853

1. The Plaintiff is also entitled to interest on the damages for PSLA at the rate of 2% annum from the date of the writ to the date hereof and interest on pre-trial loss of earning and other special damages at the rate of 4% per annum, which is half the existing judgment rate, from the date of the accident to the date hereof.

(David Lok)

District Judge

John Hemmings, instructed by Messrs Massie & Clement, for the Plaintiff

Defendant, in person, absent