#### DCPI 220/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO.220 OF 2012

|  |  |  |
| --- | --- | --- |
| BETWEEN |  |  |
|  | LEUNG HIU YAN HILDA | Plaintiff |
|  | and |  |
|  | LAU KAM HUNG | Defendant |

##### Before: Deputy District Judge S P Yip in Court

Dates of Assessment of Damages: 17& 18 April 2013

Date of Judgment: 15 May 2013

## J U D G M E N T

*Background*

1. This is an assessment of damages of a personal injury case arising from a traffic accident happened on 13 April 2010, involving a rear-end collision against a taxi in which the plaintiff, Madam Leung, was a passenger, suffering from neck and lower back injuries. Interlocutory judgment was entered for Madam Leung against the Defendant on 16January 2013.

*The Accident*

1. At the time of the accident, Madam Leung was sitting at the back seat of the taxi wearing a seat belt. The taxi stopped in compliance with the red traffic light ahead, but the defendant’s car failed to stop in time and rammed into the rear of the taxi.
2. Madam Leung complained of injuries to her abdomen, neck and back as a result of the accident and was taken to the A&E Department of Alice Ho Miu Ling Nethersole Hospitial (“AHNH”).

*Injuries and Treatment*

1. According to the Standard Medical Report dated 10 March 2011, of the A&E Department, AHNH, Madam Leung’s general condition on initial presentation was satisfactory. The diagnosis was sprain of back and neck without loss of consciousness or vomiting.
2. The report further states “*on physical examination, she was fully conscious. There was tenderness over right neck and lower back. No focal neurological deficit elicited”.* X-rayrevealed that “*skull, lumbosacral spine and cervical spine were unremarkable.*”
3. Madam Leung was discharged on the same day with one day’s sick leave on 14 April 2010.
4. As soon as her discharge from AHNH, Madam Leung attended Shatin International Medical Centre of Union Hospital (“UH”) at 11:31 pm the same night. According to the medical report by Dr Tjiu Cheung San of UH dated 15 March 2011, Madam Leung’s conditions were as follows:
5. no abdominal tenderness, guarding nor rebound tenderness;
6. tenderness and swelling over cervical spine (C7 level) and lumbar region (LS junction);
7. no neurological deficit in the upper or lower limbs;
8. MRI scan of the cervical spine and the lumbar spine showed straightening of the cervical lordosis, otherwise unremarkable finding.
9. Dr Tjiu’s clinical diagnosis of Madam Leung was “*whiplash injury and sprain back*”. Madam Leung was given analgesics and referred to orthopaedic surgeon (Dr Ng Yuet Sun) and physiotherapist for follow-up. Madam Leung was discharged home at night on 14 April 2010.
10. Madam Leung attended UH on 15, 17 & 21 April 2010 for physiotherapy and was granted further sick leave until 23 April 2010.
11. Madam Leung encountered a subsequent traffic accident on 12 May 2012 and suffered from neck and back sprain again. She attended A&E Department of AHNH and UH. X-ray was done at AHNH with no fracture in cervical and lumbar spine. MRI was done on 15 May 2012 at UH. Madam Leung also received physiotherapy at AHNH from 16 May to 1 August 2012.
12. On 24 August 2012, the joint medical examination of Madam Leung was conducted by parties’ orthopaedic experts, namely Dr Bong Shu Chun for Madam Leung and Dr Lau Hoi Kuen for the defendant, and their Joint Medical Report was dated 27 September 2012.
13. Madam Leung complained to the orthopaedic experts at the joint examination of suffering from intermittent residual pain in the midline area of her neck and low back and such pain prevents her from lying on her back to sleep and such limit on her sleeping posture disturbs her sleep. Some causes of the pain are:

* climbing stairs;
* manual exertion like erecting the guzheng (Chinese zither) before practice;
* after standing/sitting for ½ hour;
* after playing piano or guzheng for ½ hour.

1. Madam Leung also told the orthopaedic experts that as a result of the residual pain, she could not enjoy playing badminton and has to reduce the time for playing piano and guzheng at home.
2. Physical examination of Madam Leung by the experts revealed the following:

|  | Neck | Low Back |
| --- | --- | --- |
| Tenderness at | upper cervical spine and the right trapezius muscle | paraspinal muscles on both sides |
| Muscle spasm | Not detected | |
| Range of movement | Limited mainly in extension | Slightly limited |
| Neurological deficit | Not detected at either the upper / lower limbs | |
| X-ray | Cervical / lumbosacral spine revealed no degenerative change and the lordotic curvature of both areas preserved | |

1. The orthopaedic experts agree on the following:
2. the condition of Madam Leung’s neck and back has reached the stage of MMI;
3. the conservative treatment so far consisting of drug and physiotherapy is considered as appropriate and further institutional treatment is not required;
4. the sick leave granted is considered as reasonable;
5. the MRI of Madam Leung’s cervical spine and lumbar spine done after the subsequent road traffic accident showed early degenerative change of quite a number of discs in the cervical and lumbar region, apart from reduction of the cervical lordosis;
6. there is no evidence of pressure effect on the neural tissues of the cervical and lumbar spine before 2010;
7. the disc degeneration is related to the effect of ageing in the past 2 years and not due to trauma;
8. the injury to her neck and back in the subsequent road traffic accident in May 2012 should have been again on the soft tissues (muscles and ligaments) of her neck and back;
9. Madam Leung can work as a research assistant;
10. Madam Leung should have little problem with daily activities;
11. examination by other medical specialists is not required;
12. the surveillance recording shows that Madam Leung being able to drive a car during which she could turn her head freely and to extreme range without expression of pain, walking in a normal fashion (including stairs), able to do yoga exercise, performing and playing guzheng;
13. the surveillance recording confirms the experts’ observation and impression of the present conditions of Madam Leung’s neck and back.
14. However, the orthopaedic experts disagree on the following:

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| --- | --- |
| 1. *The implication of stopping treatment to the neck and back (except for Chinese medicine) and resumption of work 10 days after the accident:* | |
| *Dr Bong* | *Dr Lau* |
| Madam Leung’s lack of appropriate treatment and adequate rest soon after the accident should have a worsening effect on the soft tissue injury to her neck and back. | The condition of her neck and low back improved much in such short period of sick leave. |
| 1. *Madam Leung managed to resume to work as a research assistant despite the neck and back pain and Madam Leung’s change of occupation to a primary school teacher in August 2010:* | |
| *Dr Bong* | *Dr Lau* |
| No comments | * The sprain was rather minor, and Madam Leung had recovered well within a very short time (about 10 days). This is evident from the early return to work and absence of treatment. |
| * The fact that Madam Leung was able to start working as a teacher shortly after her resignation would suggest that her change of job was a personal preference rather than a medical one. |
| * Judging from her description of the duties as a teacher, the physical demand and stress to her neck and back should be greater in her present job than the previous job as a research assistant. |
| 1. *The residual neck and back pain:* | |
| *Dr Bong* | *Dr Lau* |
| * Since Madam Leung did not have any neck or back symptoms before the accident and it was only after subject accident Madam Leung started to have neck and back pain, the present mild to moderate neck and back pain should be mainly due to the subject accident. | * The residual neck and low back pain is more likely due to the subsequent accident in May 2012 or related to her work, study and playing musical instrument. |
| * There is no positive finding to suggest that Madam Leung is exaggerating her symptoms and signs. | * At the joint examination, Madam Leung’s neck and back complaints were rather vague and subjective. They are out of proportion to similar sprain injury sustained 2 years ago. |
| * Upon examination, there were no objective signs to support her claim. |
| * The preservation of lordosis and absence of muscle spasm in her back suggest that the spinal condition is satisfactory now. |
| (iv) *Degree of permanent impairment and working capacity:* | |
| *Dr Bong* | *Dr Lau* |
| * No comments | * Madam Leung has been putting too much stress on her neck and back muscles by her job as a teacher, studying for her doctor degree, and her interest in playing piano and guzheng, both involving sitting upright without back support and such activities certainly result in neck and back pain in any event. |
| * Madam Leung can continue to work as a research assistant but will continue to suffer mild degree of decrease in efficiency at work due to the residual neck and back pain. | * Madam Leung should be able to work in almost full capacity in her pre-injury job as a research assistant of the HKIE. * She does not have any disadvantage in the labour market or higher chance of losing her job due to the accident. |
| * No such comments | * Able to continue to play badminton. |
| * Permanent impairment of the whole person for neck and back injury & loss of earning capacity: 3% for each. | * Permanent impairment of the whole person for neck and back injury & loss of earning capacity: each at 1%. |

*Pain, Suffering, & Loss of Amenities (PSLA)*

1. Madam Leung was born in 1979, aged 31 at the time of the accident. She alleged suffering from neck and back pain since the accident and the pain is still persisting. Such pain makes her unable to walk or stand for long time, or to squat. It also affects her work and sleep. Madam Leung herself gave evidence in court without calling any other witnesses.
2. The defendant has elected not to call any witnesses at the assessment of damages but relying on the Joint Medical Report, surveillance recording and the self-conflicting evidence of Madam Leung to establish that Madam Leung has either fully recovered or exaggerated her neck and back pain to a large extent.
3. Madam Leung stated in her witness statement that she could not run. When she was cross-examined on this point, she admitted that she has never tried to run after the accident. It seems to reflect that Madam Leung is overstating such “disability” if she has never tried to run at all after the accident.
4. When Madam Leung gave her witness statement dated 31 July 2012, she has been teaching in St Joseph’s for about one academic year. Madam Leung testified that she has fewer teaching hours in Jordan Valley St Joseph’s Catholic Primary School (“St Joseph’s”) than her previous job with Po Leung Kuk Tin Ka Ping Millennium Primary School (“the Po Leung Kuk school”) in return for the extra administrative work of being the Music Panel Head.
5. Madam Leung described how she carried out her administrative duties in court without mentioning delegation of work to her colleagues, contrary to what she said in paragraph 9 of her witness statement that majority of her work being shared by her colleagues: “*現在大多數工作要由其他同事分擔*”.
6. As Madam Leung’s feeling of pain is subjective, the self-rating pain assessments by Madam Leung shall be consistent and reflect her feeling of pain accurately. However, the self-rating assessment done on 1 August 2012 before the physiotherapist of AHNH which Madam Leung rated back pain of 2-3/10 is inconsistent with the similar self-rating assessment done just 3 weeks later on 24 August 2012 at the joint medical examination, which Madam Leung rated 8/10 for both neck and back pain while she rated grade 7/10 & 8/10 for neck and back pain respectively before the subsequent accident in May 2012 and 9/10 for both neck and back pain after the subsequent accident.
7. I do not accept Madam Leung’s explanation of the discrepancy is because of the stress and workload from attending the meetings in preparation for the new academic term. It is inconceivable that the workload or pressure of such preparation meeting(s) would increase her pain tremendously in such short period of time especially during the summer vacation.
8. I agree with both orthopaedic experts’ comments on the surveillance recording that Madam Leung seen to be able to drive a car during which she could turn her head freely and to extreme range without expression of pain and walking in a normal fashion (including stairs). The video also shows that Madam Leung going out for Yoga exercise and performing guzheng in the town hall. It appears that the daily life of Madam Leung has not been adversely affected by her pain.
9. In paragraph 16 of page 12 of the Joint Medical Report, Dr Lau opines that Madam Leung’s neck and back complaints are rather vague and subjective at the joint examination and they are out of proportion to similar sprain injury sustained 2 years ago and there are no objective signs to support her claim. Dr Lau further states that the preservation of lordosis and absence of muscle spasm in her back suggest that the spinal condition is satisfactory now.
10. Although Dr Bong said that there is no positive finding to suggest that Madam Leung is exaggerating her symptoms and signs, Dr Bong has said nothing further to contradict Dr Lau’s above opinion.
11. In the circumstances, I accept Dr Lau’s opinion as to Madam Leung’s residual neck and back pain.
12. Having considered all the evidence before me and in light of the above analysis, I accept the self-rating assessment done before the physiotherapist on 1 August 2012 as a more accurate reflection of the residual back pain. I reject the conflicting self-rating assessment results done at the joint medical examination.
13. I find that Madam Leung has in general overstated the degree and the impact of residual neck and back pain and in particular the self-rating assessment in the Joint Medical Report.
14. Although I cannot rule out residual neck and back pain is persisting, in light of the nature of the accident, the relatively minor injury at the outset, expert medical evidence and the entire circumstances, I find that any such persisting pain should be mild, far less serious than as alleged and Madam Leung could probably live with it.
15. Miss Lee for Madam Leung submitted the following 5 cases for comparison. Having considered the 5 cases, I find that they all involve more serious injuries than the present case with the following aggravating factors:
16. *Ali Shoukat v Hang Seng Bank Limited*, HCPI 3/2003, unreported, 23 June 2004, by Suffiad J: involving loss of lordosis of the lumbar spine indicating muscle spasm in action; and the 12-month sick leave considered as reasonable by both experts;
17. *Anil Jhuremalani v Rodelio O Fajada & Anor*, DCPI 134/2001, unreported, 9 May 2001, by HH Judge Carlson: the plaintiff’s neck pain on the rotation to the right is a permanent condition and the social life has been seriously affected;
18. *Chiu Wing Sze v Chan Ying Wai & Anor* [2001] 2 HKLRD 92, by Deputy Judge Muttrie: a linear crack of the transverse process of L5 revealed by x-ray and the plaintiff was treated with neck collar;
19. *Law Tze Ho v Li Man Kin & Anor*, HCPI 692/2009, unreported, 15 November 2011, by Master R Yu: aggravated by acute psychiatric disorder;
20. *Tai Yuk Wong v Chong Kwok Fung & Anor*, DCPI 1405/2005, unreported, 8 March 2006, by HH Judge M Yuen: aggravated by permanent residuary neck pain and upper limb numbness and 2-year sick leave granted.
21. Mr Wright for the defendant submitted 4 unreported cases for comparison:
22. *Yip Tung Fung & 2 Others v Pun Chi Leung,* DCPI 2149/2006, 23 Nov 2007, by HH Judge Marlene Ng;
23. *Chan Kin Man v Cheuk Siu Tong,* DCPI 1970/2008, 16 Nov 2009, by HH Judge Mimmie Chan (as she then was);
24. *Lai Ka Yin v Chan Yiu Kei,* DCPI 453/2008, 7 Jan 2009, by HH Judge Mimmie Chan (as she then was); and
25. *Lo Yim Fong v Ho Po Yin & Anor,* DCPI 654/2010, 4 July 2011, by Deputy District Judge Thomas Lee.
26. After consideration, I find that *Lai Ka Yin* case& *Lo Yim Fong* case are more compatible for comparison.
27. The *Lai Ka Yin* case involves a rear-end collision of a private car driven by the plaintiff Madam Lai and the defendant’s light goods vehicle. Madam Lai, who was 32 years old at the time of the accident, sustained whiplash injuries to her neck and back as a result, hospitalised for 3 days, and received physiotherapy afterwards. There was no fracture of the cervical spine. Both orthopaedic experts agreed that Madam Lai suffered from soft tissue injury of the neck and back with no evidence of any more serious injury. Madam Lai was considered as reaching the maximum medical improvement and able to return to her pre-accident job as a kindergarten school bus attendant. PSLA in the sum of $50,000 was awarded.
28. In *Lo Yim Fong*, the plaintiff Madam Lo, who is of the same age as Madam Leung in the present case, was a passenger of the vehicle driven by the 1st defendant and was asleep at the time of traffic accident occurred at the Tuen Mun Highway. Madam Lo suffered from soft tissue sprain of her neck and back, without bony fracture or neurological deficit. She was able to return to work as a clerk after 10 days. $80,000 was awarded for PSLA.
29. In light of the above and taking all the circumstances into consideration including inflation which parties agree that I should take into account, I award the sum of $80,000 for this head.

*Loss of Earnings*

1. Madam Leung was a senior research assistant of the Hong Kong Institute of Education (HKIE) when the accident happened. She resumed her work at the HKIE after the sick leave ended on 24 April 2010 and she claimed for loss of 10 days’ salaries and MPF for the period 14 April 2010 to 23 April 2010 covered by sick leave certificate.

1. Mr Wright for the defendant contended that Madam Leung did not suffer any loss of the above earnings, as the bank passbook and MPF statement show that she was fully paid for her salary and MPF in April 2010.
2. Madam Leung testified to explain that she has actually used her annual paid leave to take the sick leave, but for the accident, she would have been entitled to more payment in lieu of the annual paid leave when she left the HKIE in August 2010.
3. The bank passbook does show two entries of salary in August 2010, one being the normal salary in arrears of that month when Madam Leung resigned and the other sum representing the payment in lieu of the annual leave, according to Madam Leung.
4. According to the Leave Application form dated 26 April 2010, Madam Leung only applied for 8 days’ sick leave for the period of 14 – 23 April 2010 excluding the rest days on 17 & 24 April 2010.
5. In the absence of any evidence to the contrary and on balance of probabilities, I accept Madam Leung’s evidence to the extent that she has suffered loss of 8-day annual leave during the sick leave period and allow such loss of earnings in the sum of HK$5,655 ($21,500 × 8/365 × 12 months).
6. However, I agree with Mr Wright’s submission that Madam Leung suffered no loss of MPF for that month as evidenced by the MPF statement.
7. Madam also claims for loss of earnings for another 14 days of absence from work during the period from August to September 2010.
8. According to the HKIE’s reference letter dated 23 August 2010, Madam Leung’s last working day with the HKIE is the same date of the letter, and according to Certificate of Service by the Po Leung Kuk school, Madam Leung’s service began on 1 September 2010. Therefore Madam Leung was only out of work for 8 days instead of 14 days during the transitional period between her two jobs.
9. Madam Leung confirmed in court that she actually had to attend meeting or meetings with the Po Leung Kuk school during such period. Therefore Madam Leung might not be able to work for the HKIE until 31 August 2010 in any event if she was required to attend meetings with the next employer. Besides, such period was not covered by any sick leave certificates.
10. In the circumstances, I am not satisfied on balance of probabilities that Madam Leung’s 8-day out of work in August 2010 is a result of any suffering of pain caused by the accident. Therefore, Madam Leung is not awarded for any damages for loss of earnings during such period of time.
11. The third sum of claim under this head is the loss of income from teaching guzheng in the sum of $3,500 for 7 lessons from 18 April to 30 May 2010. As I have allowed Madam Leung’s loss of earnings during the sick leave period covered by sick leave certificates, I am prepared to allow part of this head during such period only, i.e. from 14 – 23 April 2010. Madam Leung has not provided the schedule of the 7 missed lessons but claimed such loss incurred during the time until 30 May 2010 i.e. about 5 weeks beyond the expiry of sick leave certificate. Doing the best I can, I allow $1,000 for such loss.

*Loss of Earning Capacity*

1. Madam Leung left the HKIE in August 2010 and became a primary school teacher of the Po Leung Kuk school on 1September 2010. In July 2011, she switched to St Joseph’s, working as a teacher and panel head of the music department up to present.
2. Madam Leung admits that she earns more by working as a teacher than her previous employment with the HKIE. Besides, she enjoys the benefit of teaching fewer lessons in the present school than the previous one and a higher status as a panel head now. Although Madam Leung said she could obtain the present job is partly because she knows the school headmaster and she worries the situation would be different if there is any change of headmaster one day, I consider her worry being too remote and not substantiated.
3. After all, the teaching profession is generally regarded as a relatively secured and stable job. I fail to see Madam Leung is facing a “real or substantial risk” of losing her employment at some time in the future as stated in the leading authority *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132 (CA). In the circumstances, Madam Leung is not entitled to any award for loss of earning capacity.

*Special Damages*

1. Parties agree on the medical expenses of $22,332.50 and the defendant agrees on travelling expenses of $650.80 totalling $22,983.30, so I make the award of these expenses accordingly rounded up to $22,983.
2. The remaining item is a claim of loss of tuition fees for yoga and piano lessons in the sum of $3,237. Madam Leung has failed to give any breakdowns in either the pleadings or in her witness statement and failed to provide any supporting documents for this sum either, save and except for a faxed copy of an attendance record of yoga lessons apparently from Pure Yoga at [218] of the trial bundle which serves as a proof of Madam Leung’s absence for one month after the traffic accident in April 2010, according to the handwritten words on that document.
3. However, the document in fact contradicts Madam Leung’s assertion, as there are 3 “signed in” records in April 2010 (2 Saturdays and 1 Monday) and 2 records in May 2010 (a Monday & a Wednesday), but the exact dates could not be seen. Therefore, I am not satisfied that Madam Leung has suffered any loss of yoga lesson fees.
4. As for of the claim of loss of piano lessons, I find it is no more than a bare assertion without support by any proof and is vague at the outset. Thus, I am not prepared to make any award for this head of claim as well.

*Summary of Award*

1. Accordingly, I enter judgment against the defendant in favour of the plaintiff for a total award of $109,638 including the following:

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| --- | --- |
| Items | Award Amount (HK$) |
| 1. PSLA | 80,000 |
| 1. Loss of Earnings & MPF (full-time job) | 5,655 |
| 1. Loss of Earnings (part-time job) | 1,000 |
| 1. Loss of Earning Capacity | 0 |
| 1. Medical & Travelling Expenses | 22,983 |
| 1. Other special damages | 0 |
| Total: | 109,638 |

*Interest*

1. The interest awarded to Madam Leung includes:
2. 2% per annum on PSLA of $80,000 from the date of service of the Writ to the date of judgment;
3. half judgment rate on special damages from the date of accident to the date of judgment; and
4. post-judgment interest on the whole sum at judgment rate until payment.

*Costs*

1. Lastly, I make an order *nisi* that the costs of this action be to the plaintiff, to be taxed if not agreed, with certificate for counsel.

# (S P Yip)

# Deputy District Judge

Miss Amanda WY Lee, instructed by Messrs WT Law Offices, for the plaintiff

Mr John Wright, instructed by Messrs Winnie Leung & Co, for the defendant