## DCPI 453/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 453 OF 2008

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##### BETWEEN

LAI KA YIN Plaintiff

### and

CHAN YIU KEI Defendant

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Coram : Her Honour Judge Mimmie Chan in Court

Date of hearing : 12 November, 2008

Date of handing down Judgment : 7 January, 2009

# JUDGMENT

**Background**

1. Madam Lai was driving a private car along Ma Tau Chung Road at 8 a.m. on 25 September 2006, when a light goods vehicle owned and driven by the Defendant, Mr. Chan, hit her car from behind. Madam Lai sustained injuries to her neck and the back as a result, and was hospitalized for 3 days. She was diagnosed with a whiplash injury, and received physiotherapy treatment from October 2006 to November 2006.

1. Mr. Chan concedes liability for the accident, and the only issue for determination relates to assessment of the damages payable to Madam Lai as a result.

**Injuries sustained and medical treatment**

1. Madam Lai was 32 years old at the time of the accident. According to the report issued by Dr. Yip of the Department of Orthopaedics and Traumatology of the Queen Elizabeth Hospital ("**Hospital**"), Madam Lai had complained of neck, back and right shoulder pain at the time of admission on 25 September 2006. She had mild tenderness over her neck region, without any neurological deficit. Her right shoulder could move freely with no swelling or external bruise. There was no fracture of the cervical spine. Her neck pain was improved with physiotherapy and painkillers before discharge from the Hospital on 28 September 2006. She was granted sick leave by the Hospital from 25 September 2006 to 1 November 2006, and received further physiotherapy treatment from Kowloon Hospital on 20 November 2006, 22 November 2006, 27 November 2006 and 1 December 2006.
2. From 21 November 2006, Madam Lai started to attend the clinic of a general practitioner, Dr. Chu, on a weekly basis. According to the receipts issued by Dr. Chu, Madam Lai was treated for neck injury and was prescribed with medication on each visit, and given 7 days sick leave on each occasion. These consultations with Dr. Chu continued until 7 June 2007, with sick leave granted to 14 June 2007. There were altogether 27 of such visits to Dr. Chu, at the cost of $300 per visit.
3. Madam Lai was examined by Dr. Fu and Dr. Lam on 23 June 2008, and a joint medical report was issued on 7 July 2008. Both doctors agree that Madam Lai suffered from soft tissue injury of the neck, and soft tissue injury of the back. They consider that there was no evidence of any more serious injury. They agree that the treatment received by Madam Lai at the Hospital was appropriate, and that she had reached maximum medical improvement. Both doctors also agree that Madam Lai should be able to return to her work prior to the accident, as a kindergarten school bus attendant.
4. Dr. Lam considered that Madam Lai had overstated her symptoms from the start. Although she had complained of limb numbness at the Hospital, no actual neurological deficit was found by the orthopaedic surgeons at the Hospital. Dr. Lam pointed out that the attending doctors there had noted that Madam Lai's neck pain had improved with physiotherapy and painkiller within a few days of hospitalization, which showed that the sprain was a very minor one. The physiotherapist had noted that Madam Lai had multiple Waddell signs, indicating magnification of symptoms.
5. Although Madam Lai had consulted Dr. Chu from November 2006 after the expiry of the sick leave granted by the Hospital, I have taken note of the observation made by Dr. Lam in the joint medical report (which is not challenged by Madam Lai) that Dr. Chu had only prescribed common anti-inflammatory agents or painkillers during the period of his treatment of Madam Lai. Throughout Dr. Chu's course of treatment from November 2006 to June 2007, Madam Lai was not referred to take any x-ray, nor was she referred to any physiotherapy treatment until March 2007 (which she did not follow up).
6. When asked why she had continued to seek treatment from Dr. Chu, a general practitioner, in respect of her alleged neck injury for such an extensive period, which tends to suggest that the treatment from Dr. Chu was not effective, the only explanation given by Madam Lai was that she knew Dr. Chu who was her husband's doctor, that she did not have trust in government hospitals, and further, that the waiting list at government hospitals was too long. She also claims that the painkillers and medication prescribed by Dr. Chu was effective in reducing her pain.
7. If Madam Lai had truly experienced pain in her neck during the period from November 2006 to June 2007, I do not accept that she would have been content with simply seeking and continuing the treatment from a general practitioner such as Dr. Chu, who only prescribed her with painkillers which she could have obtained over-the-counter from a pharmacist or store. When Dr. Chu finally recommended her to go to a physiotherapist in March 2007, Madam Lai did not take such advice. Nor did she attend the appointment fixed for 13 December 2007 at the O&T – Spine section of the Hospital.
8. On the evidence, I can only conclude that Madam Lai had not suffered from any genuine pain after November 2006, and that she had recovered from her injuries by then. I am not satisfied that her visits to Dr. Chu were reasonably necessary. It is likely that she continued these visits for the purpose of obtaining the sick leave certificates.
9. At the time of her examination by Dr. Fu and Dr. Lam in June 2008, Madam Lai was reported to have no paraspinal muscle spasm, despite her complaint of tenderness over the bilateral trapezius muscles. She was reported to have a good range of neck movement and back movement, despite her complaint of tenderness over the L3/L4 region. There was no neurological deficit of the upper or lower limb. Dr. Lam was of the opinion that Madam Lai's complaints of on and off pain over her neck, both trapezius muscles and back were largely subjective, without good objective evidence to support her claim.
10. Dr. Fu and Dr. Lam agree that no further physiotherapy or other surgery is required for Madam Lai. Dr. Fu was of the opinion that Madam Lai would still have on and off pain in the neck and back, which will he aggravated by exertion, and which will require medical attention when the pain is severe. He also considered that Madam Lai would have some difficulty in excessive movements of the neck and back. On the other hand, Dr. Lam was of the opinion that Madam Lai would have no residual disability, and although she might have pain during exertion at home or at work, in a manner similar to other workers of her age and physical build, such pain is not caused by the accident.

**Compensation payable**

***Pain suffering and loss of amenities***

1. I consider that Madam Lai had only sustained a minor injury as a result of the accident, from which she had, on the evidence, fully recovered by November 2006. Her injuries were far less serious than those suffered by the plaintiffs in *Fung Yuet Hing v. Mok Sun* DCPI 1706 of 2005 and *Tai Yuk Wong v. Chong Kwok Fung & Ors* DCPI 1405 of 2005 cited by Counsel for Madam Lai. After considering the authorities referred to by counsel, including *Siu Leung Shang Peter v. Chung Wai Ming* HCPI 43 of 2006 and *Yip Tung Fung & Ors v. Pun Chi Leung* DCPI 2149 of 2006, I will allow an award of **$50,000**.

***Pretrial loss of earnings & MPF***

1. Madam Lai is a secondary school graduate. She studied textile merchandising, although she said that she did not complete her diploma course. Madam Lai claims that at the time of the accident, she was earning $6,000 a month as an attendant of a school bus for children attending kindergarten. She claims that she had to do some lifting at this job, which involved her helping small children on and off the bus.
2. Madam Lai claims that she was only able to resume work on 15 July 2007. This was when summer school classes commenced for primary school children for the 2007 school term. However, Madam Lai claims that she could not return to her job with her employer, Madam Jim, as an attendant of a school bus for kindergarten children because by the time she had recovered from the injury and could work, her former post had been given to someone else during the 2006 school term. She claims that because an attendant has to be familiar with the school children, it is normally difficult to find work or persuade an employer to change an attendant once the school term had started with an attendant engaged.
3. More importantly, Madam Lai claims that she could no longer work as an attendant for kindergarten children because she could no longer lift small children as a result of her back pain. She could only work as an attendant in a school bus for primary school children, which involved only 2 trips a day as opposed to 3 trips a day for kindergarten children. Madam Lai accordingly claims that her monthly salary has been reduced to $4,000 a month.
4. Madam Lai has congenital abnormality of the left forearm, without the part of her limb from the forearm downwards. She claims that she cannot do office or clerical work.
5. Madam Lai admitted that she did not make any attempt to look for a job as a bus attendant for kindergarten children. She did not even ask Madam Jim to get her old job back, claiming that she felt that she would not be able to do the work. Counsel for Mr. Chan has referred to the letter of reference issued by Madam Jim, which stated that Madam Lai was employed by her from September 2003 until the date of the letter, which was 27 November 2007. Counsel highlights the fact that this letter is inconsistent with Madam Lai's claim that she had not worked during her sick leave period. However, it is Madam Lai’s case that she did continue to work for Madam Jim from July 2007 as an attendant, but for primary school children, and that whilst she was on sick leave in 2006, someone else was working for Madam Jim in Madam Lai's place.
6. Both Dr. Fu and Dr. Lam agree that Madam Lai should be able to return to her original work as a school bus attendant. Dr. Fu considered that her efficiency might be decreased due to the neck and back pain, and that she should avoid heavy manual lifting. Dr. Lam, however, considered that Madam Lai's physical condition enabled her to work as a school bus attendant on full capacity. He was of the view that if Madam Lai's lifting capacity was affected and she had to do light work, such limitation is only a result of Madam Lai's upper limb disability. Dr. Lam was of the opinion that with Madam Lai's education level, she is able to undertake sedentary jobs at higher pay.
7. I am not satisfied that if Madam Lai wished to work after November 2006 and before July 2007 (when summer school commenced for the primary school children in the 2007 school term), she would not be able to find any employment. With her education background, and notwithstanding her congenital problem, she should have been able to find suitable and sedentary work at a salary higher than $4,000 which she earned as an attendant for primary school children. This is so even if Madam Lai should avoid work which requires manual lifting, as Dr. Fu recommended. It appears from the evidence that Madam Lai preferred and chose to work as a school bus attendant, so that she would have more time to look after her son. This is of course laudable but since that is her choice, the consequential drop in salary is caused not by the accident but by her own preference.

1. Accordingly, I will only allow Madam Lai's claim for pre-trial loss of earnings at **$8,400** ($6,000 x 42 days) in respect of the period of sick leave up to 1 November 2006, together with the 4 days required for physiotherapy treatment in November 2006 and on 1 December 2006. There is no evidence of any loss of Mandatory Provident Fund benefits.

***Future loss of earnings***

1. For the same reason as that set out in paragraph 20 above, I am not satisfied that there is any reduced earnings suffered as a result of the accident.

***Loss of earning capacity***

1. I am not satisfied that there is any real or substantial risk that Madam Lai will lose her current job, which she has held since July 2007. It is her own evidence that once a bus attendant is secured after the commencement of the school term, an employer would not wish to make any changes. Madam Lai also admits that her knowledge of English (and her ability to converse with English speaking caregivers of the school children) gives her an advantage in her work. I am not prepared to make any award under this head.

***Special damages***

1. Medical expenses have been agreed at **$1,721**. I am not prepared to allow Madam Lai's expenses incurred in relation to her visits to Dr. Chu.
2. Towing fees and the motor survey report fee, totaling $**1,050**, are also agreed.
3. According to Madam Lai, the vehicle which she was driving at the time of the accident was lent to her for her use by a friend of her husband. As a result of the accident, the vehicle was written off, and Madam Lai's evidence is that her husband had paid the value of the vehicle, assessed at $39,500, to the owner of the vehicle. Counsel for Mr. Chan has challenged this aspect of Madam Lai's claim on the basis that, not being the owner of the vehicle, she has no right to claim for the value of the vehicle. Nor has Madam Lai produced any evidence of her payment of the sum of $39,500 to the owner or her husband, as representing her loss. I agree that on the evidence available, Madam Lai has not been able to establish any loss sustained by her in relation to the damaged vehicle, and I will not make any award in favor of Madam Lai in this regard.

**Award**

1. The total award for damages includes :
   1. PSLA $ 50,000
   2. Pre-trial loss of earnings $ 8,400
   3. Other special damages $ 2,771

Total : **$ 61,171**

1. I will accordingly enter judgment against Mr. Chan for the total sum of $61,171. I also allow Madam Lai's claim of interest on the award of $50,000 at the rate of 2% per annum from the date of the service of the Writ to the date of judgment, and on the award of special damages at half the judgment rate from the date of the accident to the date of judgment.

1. I will further make an order nisi that the costs of the action are to be paid by Mr. Chan to Madam Lai, to be taxed if not agreed, with Certificate for Counsel.

(Mimmie Chan)

District Judge

*Mr. K.C. So, instructed by Messrs. Alan Wong & Co. for the Plaintiff*

*Mr. Felix Li, instructed by Messrs. Kenneth C.C. Man & Co. for the Defendant*