##### DCPI 483/2007

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

#### PERSONAL INJURIES ACTION NO. 483 OF 2007

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| BETWEEN | HO SHUN HANG | Plaintiff |
|  | and |  |
|  | LAU HOI WING | 1st Defendant |
|  | GLORY SUCCESS TRANSPORTATION LIMITED 捷匯運輸有限公司 | 2nd Defendant |

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Before: Deputy District Judge R. Yu in Court

Date of hearing: 27 and 28 July, and 26 August 2010

Date of handing down Judgment: 7 January 2011

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JUDGMENT

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Background

1. The Plaintiff is and was at the time of the accident a tram driver (motorman) employed by the Hong Kong Tramways Limited (“the Tramways”). On 6 April 2004 at about 11:46 hours, the Plaintiff was driving tram no. 48 along the eastbound tram line of Johnston Road in Hong Kong Island. Near House Numbers 14-16 of Johnston Road, he collided with a public light bus registration number FG4761 driven by the 1st Defendant as agent for the 2nd Defendant. As a result, the Plaintiff sustained injuries.
2. The Plaintiff brings this action to recover his loss. Liability has been admitted by the Defendants and interlocutory judgment has been entered against the Defendants on 26 May 2008 with damages to be assessed. The parties appear before me for assessment of damages.

**The Issues**

1. The Plaintiff aged 30 at the time of the accident and is now 35 years of age. At the time of the accident, the Plaintiff was employed by the Tramways and he had to work 8.5 hours a day earning about $11,139 a month, taking into account his basic salary, overtime work, meal allowance and year end bonus, and after deducting 5% of his basic salary for contribution to the Provident Fund. In his supplemental witness statement, the Plaintiff has sought to claim $11,603 as his monthly earning.
2. The issue in dispute is the effect of the injury to the Plaintiff. The Plaintiff claims that after the accident, he suffered from sprained neck with limitation on range of motion. He also suffered from neck pain which woke him up at night. The neck pain affected his sleep and his psychiatric condition. And as a result, he also suffered from psychiatric illness. The Plaintiff claims that he is still on psychiatric sick leave.
3. In view of the injuries and the long period of treatment, the Plaintiff claims a sum of $350,000 as damages for PSLA and the Defendants argue that the sum should be $80,000.
4. Secondly, it is disputed that the Plaintiff suffered any loss of earning. It is not disputed that the Plaintiff was at all material and is employed by the Tramways and he has been paid monthly. The Plaintiff admits that he has been paid a sum of $648,315.00 by his employer from the date of accident until July 2010. His claim for loss of earning is calculated as follows –
5. Assuming that he earns $11,603 per month
6. There was 75 months from date of accident to July 2010
7. He should be able to earn $870,225
8. He now only earned $648,315 and the difference is his pre-trial loss of earning = $221,910
9. The Plaintiff also claims that part of the earnings is in fact his compensation under s. 10 of the Employees’ Compensation Ordinance. Accordingly, not all his award under the related Employees’ Compensation Action should be set off from the award herein. I shall come back to this point later.
10. The Plaintiff also claims for future loss of earning. He claims that due to his injury, he could not return to work as a tram driver and he would be dismissed by the Tramways. He could only work as a watchman. He claims a sum of ($11,603 - $6,500) x 12 x1.05 x 14 = $900,169.20.
11. If I found that the Plaintiff could return to work as a tram driver and suffers no loss of future earning, in the alternative, the Plaintiff claims loss of earning capacity in the sum of $300,000.00.
12. And there are miscellaneous claims for travelling, medical expenses, tonic food for $82,650.00.
13. I would first deal with the disability of the Plaintiff.

**Evidence on his Injuries**

1. It is not disputed that the Plaintiff had encountered 3 accidents in 2003 and 2004. The first accident occurred in February 2003 when his tram was hit by a bus, and he injured his neck. The second accident occurred in May 2003 when the Plaintiff hit a woman and she died. The third accident is the current accident. The background has been given to the medical experts when they examined the Plaintiff.
2. There is only one factual witness in this case, the Plaintiff himself. He adopted his witness statement dated the 30 September 2009 and a supplemental witness statement dated 30 March 2010 as his evidence in chief. According to his evidence, after the accident, he was rushed to Ruttonjee and Tang Shiu Kin Hospital for treatment. He was later transferred to Pamela Youde Nethersole Eastern Hospital (“Eastern Hospital”) and was admitted to the Department of Orthopedics and Traumatology. Physical examination showed tenderness on his neck region with limitation in range of motion. Radiological examination of his cervical spine showed loss of lordosis. The diagnosis was sprained neck. The Plaintiff was discharged on 7 April 2004 and was then followed up in the outpatient clinic of Eastern Hospital.
3. After discharge, the Plaintiff suffered from increasing neck pain and attended the orthopaedic department of Eastern Hospital again. He was referred to the physiotherapy unit of Eastern Hospital for further management. On 12 July 2004, the Plaintiff received physiotherapy treatment. He was then suffering from dizziness, neck pain with referred symptom down to the wrist. He stopped physiotherapy treatment after 13 August 2004.
4. The Plaintiff was given sick leave by Eastern Hospital from 6 April 2004 to 8 October 2004. In late October 2004, the Plaintiff returned to work for the Tramways as a motorman until May 2005.
5. The Plaintiff said he was re-admitted to the Eastern Hospital on 20 May 2005 because of exacerbation of neck pain. He was discharged on 24May 2005. The Plaintiff attended outpatient clinic of Eastern Hospital on 21 October 2005 and 20 January 2006.
6. The Plaintiff was referred for physiotherapy treatment for neck injury and attended another course of treatment from 2 August 2005 in Eastern Hospital. He was discharged from physiotherapy on 18 May 2006 with advice on home exercise. He claimed there was an overall 40% improvement and his condition became static.
7. Sick leave was granted by the Eastern Hospital for neck pain during the periods between 27 July 2005 to 10 September 2005, 20 September 2005 to 7 December 2005 for neck pain problem.
8. The Plaintiff also said in his evidence that after July 2005, his pain got worse with multiple waking up at night and worse after September 2005, as medication no longer worked. He had suicidal idea in July to September 2005 and on one occasion he cut his wrist.
9. He was referred to the psychiatry unit of Eastern Hospital in October 2005. He was diagnosed to have adjustment disorder with depressed mood and was referred to clinical psychologist for counseling and admitted to the Psychiatric Day Hospital on 30 November 2005. He continued to attend the Psychiatric Day Hospital until April 2006.
10. Sick leave was granted by Psychiatric Day Hospital from 30 November 2005 to 28 April 2006. Later his sick leave was extended from 29 April 2006 to 26 May 2006.
11. Sometime in July 2006, the Plaintiff resumed work for the Tramways and he was given light duties. He was not given overtime work and claimed to have suffered partial loss of earning.
12. It is noted that the Plaintiff has not returned to Eastern Hospital for treatment until late 2008. From 27 May 2006 to 24 October 2008, the Plaintiff visited Tse Kin Medical Clinic and Dr. Lee Wai’s Clinic, and was granted sick leave from time to time. (A schedule of the sick leave certificate granted by all the clinics up to 4 June 2010 is set out in paragraph 29 of the supplemental witness statement of the Plaintiff which I do not intend to repeat.) The reason for granting the sick leave as stated on the certificate is neck pain after road accident.
13. As a result, the Plaintiff could not work continuously for the Tramways. He also claims that he had to use his annual leave to take rest and suffered loss of the benefit of the holidays. By consent, a bundle of his attendance record was placed in the trial bundle for reference.
14. The Plaintiff attended the emergency department of Eastern Hospital on 1 December 2008 and was referred to the psychiatric unit. He was hospitalized until 10 December 2008 and followed up at the psychiatric unit of Eastern Hospital. The last sick leave certificate by psychiatric unit of Eastern Hospital is up to 4 June 2010. In evidence, the Plaintiff claims that he is still on psychiatric sick leave.
15. On his previous accidents, the Plaintiff admitted in cross examination that he injured his neck at about the same position when his tram collided with a bus in 18 February 2003, the first accident. He said he had fully recovered and returned to work in early May 2003 and met another traffic accident on 15 May 2003 when his tram hit a lady, who later died, the second accident. He was not injured but he felt dizziness and rested for a few days. He returned to normal work on 31 May 2003 and continued working until the accident of this action.
16. The Plaintiff said since the accident in February 2003, he had fully recovered. He had no neck pain except on one morning when he woke up he could not turn his neck.
17. Mr. Shum, counsel for the Defendants asked the Plaintiff that since he had suicidal ideas in July 2005, why he had not inform his treating doctor at Eastern Hospital when he visited them in July or August. The Plaintiff explained that he was afraid of being referred to the psychiatric unit.

1. Mr. Shum also put to the Plaintiff that according to the medical record of Dr. Tsui of Dr. Lee Wai’s Clinic, on 20 September 2005, Dr. Tsui refused to give sick leave, and the Plaintiff then informed Dr. Tsui on 29 September 2005 of his suicidal attempts. Mr. Shum put to the Plaintiff that he mentioned of his suicidal attempts because the doctor refused to give him sick leave. The Plaintiff denied the allegation.
2. Mr. Shum put to the Plaintiff that when he returned to work in October 2004, he did not have neck pain and was back to normal. This is denied by the Plaintiff. The Plaintiff also said when he felt painful at work, he would visit company doctor. But he could not explain why there was no record on his attendance record.
3. Mr. Shum also refers to the record of psychiatric unit of Eastern Hospital that on 27 May 2006, the doctor had remarked that “no more sick leave for psychiatric symptoms”. And the Plaintiff agreed that he did not return for follow-up until 2008. But on 27 May 2006, he had also visited Dr. Lee Wai’s Clinic who recorded “explained sick leave not beneficial to [the Plaintiff], patient agreed….” Sick leave was given for 27 May 2006. And on 28 May 2006, the Plaintiff visited Tse Kin Medical Clinic, and it was recorded that “he doesn’t want to have SL given by “psychi department”, just want SL from GP for “neck pain”.” The Plaintiff did not answer these questions directly and simply said he cannot recall.

**Defendants’ Evidence**

1. The Defendants have not called any witness, and by consent produced a surveillant tape, together with an investigation report. The video was taken on 18 August 2009, 4, 6, 11, 16 & 18 September 2009, and on 22 May 2010 on the activity of the Plaintiff. It is not disputed that these are videos of him. The videos show that the Plaintiff could walk around the city with no apparent difficulty or pain. After viewing the video, the Plaintiff said in his evidence in chief that after taking medicine, his neck would be less painful.
2. At cross examination, Mr. Shum put to the Plaintiff that from the video, he could walk and move around in the street with normal posture. But the Plaintiff said his neck could not move normally. He also explained that if he slept well the night, he would feel less pain on the following day. And on the days he felt better, he would go out to meet friend to keep him happier.
3. The Plaintiff has said his hand was seriously tremor in 2009. Mr. Shum put to the Plaintiff that his right hand did not tremor in the videos.

**Medical Evidence**

1. In light of the complaint by the Plaintiff that he suffered from orthopaedic injuries and psychiatric sickness, expert opinions on these 2 areas have been obtained.
2. There are 2 orthopaedic expert reports. The first is a joint report dated 5 September 2007 prepared by Dr. Lau Man Tsang Richard (acting for the Plaintiff in the related DCEC action) and Dr. Chan Kwok Pui Brian (acting for the Tramways in the related DCEC action). By consent, Master Lo on 2 March 2010 directed that the report be adduced at the assessment without oral evidence. The Plaintiff relied on the opinion of Dr. Lau.
3. From the report of Dr. Lau and Dr. Chan, the Plaintiff complained to them that for the neck pain, there was no pain at rest but he felt pain on neck movement. He also had pain when he walked fast due to the oscillating motion of the cervical spine. The experts were of the view that the Plaintiff suffered from abrasion of the left hand and sprained injury of the neck. The abrasions had recovered completely. The prognosis of sprain injury of the neck was satisfactory.
4. Dr. Lau and Dr. Chan are of the view that the treatment received by the Plaintiff is appropriate. They are aware of his sick leave but they have not commented if his sick leave is appropriate. Further, Dr. Lau and Dr. Chan concluded that the orthopaedic condition of the Plaintiff had reached maximal medical improvement and did not require further treatment for his orthopaedic conditions. They assessed the Plaintiff to have suffered a 1% to 2% impairment of the whole person. But they agreed that the assessment had to be combined with the assessment by psychiatrist.
5. Dr. Lau and Dr. Chan agreed that the Plaintiff should be able to resume his pre-accident job as a motorman. He should be able to do so within a few months of his accident. The experts agreed that as a result of the residual neck pain, the Plaintiff suffered from occasional exacerbation and needed to take a rest.
6. The Defendants instructed their nominated expert Dr. Lee Po Chin to examine the Plaintiff on 11 November 2008. Dr. Lee had reviewed all the medical notes and records of the Plaintiff, including those of his earlier accident. Dr. Lee had prepared a reported dated 22 September 2009, and by the said order of Master Lo, the report of Dr. Lee may be adduced without giving oral evidence.
7. Dr. Lee also referred to the accident on 18 February 2003, when the Plaintiff injured his neck. Dr. Lee commented that, though the Plaintiff claimed he had fully recovered from the February accident, the medical notes revealed that the Plaintiff had neck pain when waking up on 21 March 2004, about 2 and half weeks before the current accident. Dr. Lee opined that the previous neck injury also contributes to the current state of the neck condition of the Plaintiff.
8. Dr. Lee also referred to the medical note of Eastern Hospital that the Plaintiff complained of insomnia and abdominal discomfort after the traffic accident on 15 May 2003. Adjustment disorder was diagnosed and he was referred to the psychiatric out-patient clinic for further treatment. There were psychiatric symptom before the current accident that required psychiatric treatment, and probably also contributed to the Plaintiff’s current psychiatric condition.
9. Dr. Lee also opined that the Plaintiff had recovered significantly enough for the current accident to allow him to return to work in early 2005 as a tram driver. As far as his soft tissue injury of cervical spine is concerned, the Plaintiff had reached the state of maximal medical recovery. There is no need for further treatment. He also opined that, based on the Plaintiff’s cervical spine condition alone, he should be able to return to work as a tram driver without difficulty, subject to his psychiatric condition.
10. On sick leave, Dr. Lee opined that sick leave granted up to 8 October 2004 should be adequate for his recovery from his injury on 6 April 2004.
11. A joint psychiatric medical report is prepared by Dr. Law Wun Tong (nominated by the Plaintiff) and Dr. Benjamin Lai (nominated by the Defendants) dated 23 January 2010 and produced pursuant to the said order of Master Lo without oral evidence. The Plaintiff was examined by the experts on 11 December 2009.
12. The Plaintiff complained to the experts that he had neck pain if he moved his neck. The pain may last for ten odd minutes. Pain would be worse when he has sneezing, when he was sleeping at night, and when he woke up from sleep. He took analgesic medicine four times a day and every day.
13. The Plaintiff had insomnia. He woke up from sleep and could not resume sleep. It occurred about 2 to 3 nights a week for a few years. The Plaintiff also felt depressed and not happy. He also had suicidal idea in the past 3 to 4 years. It was usually present. He also heard sound of insect at both ears since 2006. He did not want to go out as he felt that people were laughing at him. He informed the experts that he required to be escorted when he got his medicine, took a bath, and walked in the street.
14. The Plaintiff said he felt dizziness during examination and could not read newspaper. The dizziness was present for a few years. He might wake up from sleep, feel serious dizziness, and almost faint.
15. At the examination, the Plaintiff had stuttering speech and right hand tremor.
16. The Plaintiff also informed the experts that what hindered him from returning to his pre-accident employment was his neck pain, poor sleep, and his feeling of unsure of how to face his passengers because he had mental illness. He felt people saying he was insane.
17. Dr. Lai has gone into great details in analyzing the medical notes and found that the Plaintiff is not reliable. Surely, his assessment is only the observation of a medical expert and the Court would have an independent assessment of the credibility of the Plaintiff’s evidence.
18. Dr. Lai also recorded that from the examination, there were inconsistencies observed. The Plaintiff complained of suicidal idea in the past 3 to 4 years, and it is usually present. Dr. Lai did not find any support of such complaints in the medical notes of his treating clinic.
19. The Plaintiff complained of stuttering speech. Dr. Lai opined that it cannot be explained on the basis of his psychiatric condition.
20. The Plaintiff complained of right hand tremor for 3 to 4 years. This is not supported by any medical notes or record. And when the Plaintiff was asked to stretch out his hands during the examination, there was no hand tremor. Dr. Lai opined that the hand tremor cannot be explained on the basis of any psychiatric condition, and suggested it is likely voluntary movement, and the hand tremor is presented to the doctors for the purpose of the examination.
21. The Plaintiff also said he required to be escorted when he went to get medicine, took a bath, and walked on the streets. Dr. Lai opined that this cannot be explained on the basis of his psychiatric condition.
22. And if the Plaintiff had suffered from symptoms of an adjustment disorder in 2005 as a result of neck pain, Dr. Lai considered the Plaintiff should have recovered from the adjustment disorder.
23. Dr. Law considered the symptoms of the Plaintiff reliable and he was still suffering from mild symptoms of adjustment disorder.
24. On the effect of the psychiatric condition on the permanent disability of the Plaintiff, Dr. Lai considered it to be none or slight. Dr. Law considered it to be mild. And both experts agree that the Plaintiff could return to his pre-accident job.
25. For sick leave, Dr. Law considered that the Plaintiff only needed a few weeks to a few months. Dr. Lai opined that 6 months is reasonable.
26. For completeness, I would also refer to 2 medical reports from psychiatric unit of Eastern Hospital. In a report dated 30 January 2007, Dr. Wong recorded that on examination of the Plaintiff on 6 October 2005, it revealed anxious and lowish mood. The Plaintiff no longer had suicidal idea. He admitted dreaming of talking with the deceased traffic victim at the accident investigation scenario. The Plaintiff was diagnosed to have adjustment disorder with depressed mood. He was referred to clinical psychologist for counseling and admitted to Psychiatric Day Hospital on 30 November 2005 for observation and rehabilitation. His attendance was not satisfactory.
27. The Plaintiff was discharged on 1 April 2006 from the Psychiatric Day Hospital. Dr. Wong examined the Plaintiff on 29 April 2006 and 27 May 2006. There was no depressive symptom during interview. The Plaintiff defaulted psychiatric clinic on 24 June 2006 and did not return despite tracing.
28. In a further report dated 11 June 2009, Dr. Ng of the psychiatric unit of Eastern Hospital recorded that on 1 December 2008, the Plaintiff was admitted to their unit for persistent neck pain, poor sleep, as well as recurrent suicidal ideas and attempts. On further examination, the Plaintiff claimed that his last suicidal attempt was in 2007. He denied genuine suicidal wish since then. He complained to the doctor of receiving a warning letter and had experienced derogatory comments by his supervisor. When he attended the psychiatric unit with his wife on 22 May 2009, he reported that his mental condition had improved. He had satisfactory sleep and appetite. But he still had trouble with neck pain.

**Discussion on the physical condition of the Plaintiff**

1. It is not disputed that the Plaintiff was injured in the accident and there is no dispute on his sick leave until 8 October 2004. Mr. Shum argued that the Plaintiff should have fully recovered on 8 October 2004, and therefore there is no loss thereafter.
2. I believe a better way to analyze the position of the injury of the Plaintiff is to consider his condition by stages. The first stage is from the date of accident to 8 October 2004. The Plaintiff suffered from injury to his neck and could not return to work. According to records, he had been hospitalized for one day on 6 April 2004 and discharged by Eastern Hospital. From records, he was also hospitalized from 20 May 2004 to 24 May 2004.
3. The Plaintiff received physiotherapy treatment in the first stage from 3 May 2004 to 19 May 2004, and from 12 July 2004 to 13 August 2004.
4. For the first stage, the Plaintiff suffered loss of earning, and his condition is relevant to his claim for PSLA.
5. The second stage is from 9 October 2004 to 9 July 2005. The Plaintiff had returned to work with the Tramways driving tram. No sick leave certificate is produced. According to the employee attendance report, the Plaintiff resumed duty on 23 October 2004. He worked full time for most of the days. He should have suffered no loss of earning for this period.
6. But the Plaintiff said after he returned to work in October, he said he has from time to time used his annual leave to take rest. And he only returned to work in October while his sick leave period as certified by Eastern Hospital ended in early July. If his condition justifies sick leave, medical evidence or sick leave certificate should be produced. Otherwise, it is the wish of the Plaintiff to take rest. Given there is no evidence on his rest being necessitated by his injury, I am not convinced that there needs to be any award for the annual leave he took to take rest. There should be no loss of earning for the second stage, and his condition is normal when I come to consider his claim for PSLA.
7. The third stage is from 10 July 2005 to 26 May 2006. The Plaintiff claims that his neck pain got worse after July 2005 with multiple waking up at night. A sick leave certificate issued by Eastern Hospital shows that he suffered neck pain and had been given 2 days sick leave. Further sick leave was granted until 26 July 2005 when the Plaintiff visited private practitioner as aforesaid and sick leave was extended to 7 December 2005 (for neck pain).
8. For the orthopaedic injuries, none of the 3 orthopaedic experts have suggested that the complaints in July 2005 are not genuine. While the pain gets more serious in July 2005, about 10 months after the Plaintiff returned to work, there is no evidence that he has another injury in between.
9. I accept that the worsened neck pain at the third stage is a residual pain from the current accident.
10. The Plaintiff received another course of physiotherapy treatment for his neck pain starting on 2 August 2005. According to a report by the physiotherapy unit of Eastern Hospital, the Plaintiff complained of dizziness and neck pain. He was discharged on 18 May 2006 and there was an overall 40% improvement. His condition became static.
11. It is from July to September 2005 when the Plaintiff has psychiatric symptoms. It is his evidence that he had suicidal ideas and attempts. Mr. Shum put to him that he could have informed the doctors whom he visited during this period and needed not to wait until sometime in October when he informed his doctor who then referred him to the psychiatry unit of Eastern Hospital.
12. The delay in informing his treating doctor is not sufficient to prove that the complaint of suicidal attempts is not genuine. I refer to the medical report of Dr. Wong of Eastern Hospital dated 30 January 2007 who examined the Plaintiff on 6 October 2005. He has been informed of the dates of the suicidal attempts and in summing up after examination, he diagnosed the Plaintiff to have adjustment disorder with depressed mood. I see no reason to doubt his finding.
13. So balancing all the evidence before me, I found the Plaintiff also suffered from adjustment disorder in the third stage.
14. I note that the Plaintiff’s evidence that he had dreamed of talking with the deceased traffic victim, which appears to refer to another accident, the second accident, when he knocked down a lady by his tram. Part of his psychiatric problem must be attributed to the second accident. On the balance, I found that his psychiatric condition is caused by the neck pain, contributed partly by the second accident. This is a matter I would take into account in assessing his PSLA.
15. The psychiatric problem at this stage is anxiousness and lowish mood. According to another report of Dr. Wong dated 30 January 2007, he recorded that the Plaintiff was referred to clinical psychologist for counseling and admitted to Psychiatric Day Hospital. But the attendance of the Plaintiff was poor. No depressive symptoms during interview on 29 April and 27 May 2006. There is no evidence to suggest that the Plaintiff suffered from psychiatric problem anymore. And indeed, he defaulted treatment and cannot be traced by Eastern Hospital.
16. From the evidence, I conclude that the Plaintiff has worsening of his orthopaedic injuries and psychiatric illness in the third stage. His orthopaedic illness has recovered to maximum improvement by May 2006 and the Plaintiff has recovered from his psychiatric sickness by May 2006. And there is no further treatment required for his neck pain.
17. The fourth stage is from 27 May 2006 to 24 October 2008. The Plaintiff had again returned to work with the Tramways on July 2006. The record shows that he would have to take occasion sick leave from time to time. The sick leave was granted by private clinic on the reason of neck pain. There is no evidence that he had any psychiatric problem or required any treatment during the fourth stage.
18. According to the joint report of Dr. Lau and Dr. Chan, the Plaintiff obtained painkillers, sleeping pills from private doctor after he defaulted treatment of Eastern Hospital, Department of Psychiatry. They have examined the Plaintiff on 2 February 2007. They opined that the Plaintiff had reached maximum medical improvement, for orthopaedic injuries. They were of the view that the Plaintiff should continue with the treatment at psychiatric unit of Eastern Hospital instead of obtaining sleeping pills from general practitioners.
19. Their opinion casts doubt on the sick leave certificate given by the private doctors for this period, mainly by Tse Kin Medical Clinic. There is no detail reason given by the private doctors in granting the sick leave. And I note that the doctor recorded that the Plaintiff requested for sick leave from a general practitioner of medicine and not psychiatric unit. I doubt if the doctor has fully considered the psychiatric condition of the Plaintiff before issuing these certificates. I do not accept these sick leave certificates reflect the medical condition of the Plaintiff.
20. For the fourth stage, there is no evidence that the Plaintiff suffered from any psychiatric illness. And he could return to his pre-accident work. There is residual pain in his neck as suggest by Dr. Lau and Dr. Chan and I would take that into account in assessing the PSLA. While the Plaintiff has produced a number of sick leave certificates which have been granted due to his neck pain problem, and is orthopaedic in nature. I bear in mind the opinion of all orthopaedic experts that his condition has recovered in the third stage, the Plaintiff failed to prove that his sick leave are justified.
21. The fifth stage runs from 1 December 2008 to now. According to a medical report of Dr. Ng of the psychiatric unit of Eastern Hospital dated 11 June 2009, the Plaintiff was admitted to psychiatric unit again on 1 December 2008 for persistent neck pain, poor sleep, and recurrent suicidal ideas. His suicidal idea was in 2007. He received warning letter and experienced derogatory comments of his supervisor echoing in his brain. There were no abnormal perceptions like hallucination and delusion. When he last attended the psychiatric unit, he reported that his mental condition had improved. He had satisfactory sleep and appetite. He was then still troubled by neck pain and occasionally waking in pain. From such report, it does not appear that the psychiatric condition is caused by the injury.
22. When he was examined by Dr. Lai and Dr. Law, he said he had suicidal ideas in the past 3 to 4 years. The frequency of the suicidal idea is about 2 to 3 times a month. This is in conflict with what he told the psychiatric unit of Eastern Hospital.
23. He also complained of stuttering speech which was present 3 to 4 years. And he had right hand tremor. Dr. Lai commented that these symptoms cannot be explained. Dr. Law did not dispute the comments by Dr. Lai. On these medical findings, it appears that the symptoms of the Plaintiff at the examination are not reliable.
24. Mr. Lam submitted that Dr. Lai biased against the Plaintiff. I do not agree. Dr. Lai has identified some conflicting information in the medical report. I agree with Dr. Lai that the Plaintiff has exaggerated his symptoms when being examined by the experts.
25. What Dr. Law commented is that the residual symptoms of mood turmoil, sleep disturbance and worries about his future income are consistent with adjustment disorder. But he also opined that this is a mild symptom of adjustment disorder. He made no reference to the matters like stuttering speech, hand tremor, and sound in the ear.
26. I also agree with Mr. Shum that from the observation on the surveillance tape, the Plaintiff appears to be able to travel and communicate with people normally.
27. Having read all the medical evidence, and have considered the evidence of the Plaintiff, I do not believe his evidence on his relapse of psychiatric injury. I agree with Dr. Lai that the Plaintiff has recovered from the adjustment disorder at least for the fifth stage. The Plaintiff failed to prove that his injury if any at the fifth stage is genuine or related to the accident.

**PSLA**

1. With that, I could now proceed to consider the award. The first item is for pain suffering and loss of amenity.
2. There are 2 heads of injuries. The direct injury is the neck whiplash. According to the orthopaedic experts Dr. Lau and Dr. Chan, the Plaintiff has reached maximum recovery in 2007 when they examined him. There is mild disability. And Dr. Lee opined that orthopaedical-wise, the Plaintiff has recovered in early 2005 to return to work, which I agree.
3. And for the psychiatric illness, it occurred between July 2005 to May 2006. I found that the relapse in 2008 had not proven to be related to the current accident. And part of the psychiatric illness is contributed to by the second accident.
4. Mr. Lam, counsel for the Plaintiff refers me to the following cases –
5. ***Gaby Anderson***HCPI 244/1998
6. ***Chan So Kwan***HCPI 1487/2000
7. ***Ken John Geissler***HCPI 1/2000
8. ***Luk Yee Lam***HCPI 394/2002
9. I consider the suffering of the Plaintiff is more serious than the Plaintiff in the above. And all the experts concluded that the Plaintiff could return to his pre-injury work and his disability is mild. I also take into account that the psychiatric illness is partly attributed by the second accident. And in conclusion, I found that the damages for PSLA should be $200,000.

**Loss of Earning**

1. The total sick leave including treatment for the first stage would be about 5 months, from 6 April 2004 to 8 October 2004. The Plaintiff was again given sick leave from 10 July 2005 to 10 September 2005, 20 September 2005 to 7 December 2005, 30 November 2005 to 26 May 2006 (partly overlapping with the sick leave granted by orthopaedic department of Eastern Hospital).
2. I have ruled against the sick leave given to him after 26 May 2006 and there would be no loss of earning.
3. The issue is the earning of the Plaintiff. At the closing, the parties agreed to adopt $11,139.00 as the Plaintiff’s monthly earning.
4. From April to October 2004, the Plaintiff was paid by Tramways. According to the witness statement of Yam Wai Man filed in DCEC1282/2005 and produced in the trial bundle by consent of parties, these are sick leaves paid under section 10 of the Employees’ Compensation Ordinance. For easy calculation, I would not treat these as his income. So the loss of earning for the first stage is ($11,139 x 4 x 1.05) = $46,783.80.
5. For the second stage, the Plaintiff returned to work as normal and there is no loss of earning.
6. For the third stage, the Plaintiff suffered loss for 10 ½ months. The loss of earning is ($11,139 x 10.5 x 1.05) = $122,807.48.
7. For the fourth and fifth stages, the Plaintiff has returned to work and as found above, he should no longer be entitled to any sick leave. He could return to his pre-accident work and have no loss.
8. The Plaintiff claims that he would be dismissed by the Tramways shortly. I see no basis for such allegation. And all the medical experts confirmed that the Plaintiff could return to work as a tram driver, and I found that he could. He would suffer no future loss of earning. The Plaintiff also claims loss of earning capacity for 2 years earning round up to $300,000. The disability according to the medical evidence is mild. I am not convinced that the Plaintiff would suffer disadvantage in the labour market. I would award a sum of $25,000 for this claim.
9. All medical expenses up to May 2006 at $16,095 would be allowed. I am grateful to Mr. Lam who prepared a table with his closing submission.
10. Travelling expense is claimed at $5,204. Part of it is beyond May 2006. I would give a rough estimate at $4,000. The claim for tonic food is not supported with any document. I would allow a sum of $5,000.
11. The Plaintiff also claims that he has used all his annual leaves, which amounted to about 118 days, to rest after the accident. As I found that the Plaintiff failed to prove that the annual leaves have been taken for the injuries, there is no award under this claim.

**Conclusion**

1. In summary, the award I made are as follows –
2. PSLA $200,000
3. Pre-trial Loss of Earnings $169,591.28
4. Future Loss of Earnings $0
5. Loss of Earning Capacity $25,000
6. Medical expenses $16,095
7. Travelling expenses $4,000
8. Tonic Food $5,000
9. Less part of award from DCEC

($227,444.94)

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Total : $192,241.34

1. At the closing, there have been some arguments if the whole award under the related DCEC action should be deducted from my award in this action. I agree with Mr. Lam that under section 25 of the Employees’ Compensation Ordinance, not all the award needs to be deducted. I should have regards to the award the Plaintiff recovered and determine the amount to be set off.
2. The problem is created by the way how Mr. Lam seeks to claim the pre-trial loss of earning. What I have done now is to differentiate monthly payment under Employees’ Compensation, which means sick leave allowance by the Tramways, and wages. I have not taken the payment for sick leave before 25 May 2006 as wages. Hence there would not be any possibility of double deduction as suggested by Mr. Lam.
3. I appreciate that for some months after 25 May 2006, the Tramways has paid sick leave allowance. But since I do not found that the Plaintiff is entitled to sick leave for these period, any payment after 25 May 2006 would not be Employees’ Compensation but to be regarded as his income. According to the witness statement of Yam Wai Man, the sickness paid after May 2006 amounted to $15,049.06. This amount should not be deducted and I only set off $227,444.94 from the final figure.
4. There shall be interest on PSLA at 2% per annum and only other damages at 4% per annum until today and thereafter at judgment rate until payment.
5. I also give an order nisi that the Plaintiff do have costs of this assessment with certificate for counsel and the Plaintiff’s own cost to be taxed according to Legal Aid Regulations, the order nisi to become absolute within 14 days from today.

( R. Yu )

Deputy District Judge

Mr Simon Lam, instructed by Messrs. Henry Wan & Yeung, for the Plaintiff.

Mr Edward Shum, instructed by Messrs. Y.T. Chan & Co., for the 1st and 2nd Defendants.