DCPI 546/2011

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 546 OF 2011

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BETWEEN

LEE YU HEY Plaintiff

and

YUEN HIS CARL Defendant

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Before: Deputy District Judge Clement Lee in Court

Date of Hearing: 15 and 16 October 2010

Date of Judgment: 31 October 2010

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J U D G M E N T

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Introduction

1. This is the trial of assessment of damages as a result of the judgment on liability entered against the defendant on 19 May 2011. The traffic accident happened on 26 November 2009 (“the Accident”) when the private vehicle driven by the defendant hit the plaintiff’s vehicle from behind along the left lane of Lion Rock Tunnel towards Fo Tan in the New Territories. The plaintiff suffered injuries as a result.
2. It must be noted that the defendant has not prepared any answer to the plaintiff’s revised statement of damages nor he prepared any statement as to facts in relation to the issue of quantum. However, at the outset of the trial, the defendant prepared handwritten notes that reduced the scope of the issues.

Issues

1. The issues for determination at trial are :

(i) what is the appropriate amount of pain, suffering and loss of amenities (“PSLA”). The plaintiff suggested $450,000 while the defendant suggested $200,000 for this item;

(ii) in calculating the amount of pre-trial loss of earnings, whether the plaintiff has received “diligence bonus” of $500 monthly, if so, whether the said amount should be taken into account and whether the plaintiff’s “double pay” receivable in future should be taken into account;

(iii) regarding loss of earning capacity, whether there is a real risk of the plaintiff losing his present job during the rest of his working life, and whether the plaintiff is entitled to future medical expenses.

Treatment & findings of single joint expert

1. After the Accident, the plaintiff was sent to the Prince of Wales Hospital for treatment. He complained of neck pain and was given oral analgesics. Later at the same night, the plaintiff attended the A & E Department of Alice Ho Miu Ling Nethersole Hospital (“AHMLNH”) due to increased neck pain and low back pain that radiated to his right lower limb. He also suffered from reduced neck movement.
2. According to the medical report of Dr Pau Yuen of AHMLNH dated 28 November 2010, Dr Yuen opined that:-

“X ray of (the plaintiff’s) back showed osteoarthritic change. (The plaintiff) complained of low back pain with radiation to right leg. Physical examination found sign of nerve entrapment of the right lower limb at the back.”

1. The plaintiff was referred to physiotherapy department for pain relief and orthopaedic department for further treatment of his back problem. He was discharged on 1 December 2008.
2. Dr Hui Yuet Yum attended the plaintiff on 5 December 2008 and stated in her report dated 27 November 2010 as follows:-

“(The plaintiff) complained of persistent low back pain with the pain radiated to right leg and right lower limb numbness. On physical examination, there was tenderness on right lower back.”

1. Dr Wong Shuk Kwan attended the plaintiff on 9 December 2008 and stated in her report dated 27 November 2010 as follows:-

“Previous x-ray showed osteophyte L4/5. (The plaintiff) had back pain radiating to right leg. On examination, there was mild tenderness over lower back and mild decrease in right leg sensation.”

1. Dr Sieh Koon Man of the Department of Orthopaedics and Traumatology of AHMLNH stated in his report dated 9 December 2010 as follows:-

“…On examination, there was pain over lumbosacral spine with decreased motion range of the back. Straight leg raising test on the right side was limited and there was mild weakness of the right great toe motion. X-ray examination of the lumbar spine showed decreased intervertebral space of the L4/5 level…

There was persistent symptom after the physiotherapy. MRI of the lumbar spine showed protrusion of the intervertebral disc at the L5S1 level. Since his activities of daily living was very much affected, he was admitted on 21 Sept 2009 for discectomy of the L5S1 intervertebral disc on 22 Sept 2009…”

1. According to the medical report of Dr Ma Kwan of AHMLNH dated 27 November 2010 (who attended the plaintiff on 6 April 2009):-

“(The plaintiff) complained of increasing right leg pain on 6‑4‑2009. On physical examination there was weakness and numbness of right lower limb.”

1. Between 8 December 2008 and 2 February 2010, the plaintiff attended 3 courses of physiotherapy (28 sessions in total) at AHMLNH. The physiotherapists’ report dated 30 November 2010 includes these findings:

“Range of motion (ROM) of lumbar spine: flexion: touch knee back pain: extension: 20 degree with leg pain” (1st Course Physiotherapy)

“Range of movement (ROM) of lumbar spine was: flexion (mid shin without pain), extension (1/2 ROM with leg pain), right side flexion (knee level with leg pain), left side flexion (knee level without pain) right rotation (full without pain), left rotation (full with leg pain)…Straight leg raising (SLR): right 45 degrees with pain, left 70 degrees without pain…” (2nd Course Physiotherapy)

“Range of motion (ROM) of lumbar spine was: flexion (mid shin without pain), extension (1/2 ROM with leg pain)… Straight leg raising (SLR): right 50 degrees with pain, left 70 degrees without pain… His reported walking tolerance was about 3 to 4 minutes.” (Final Clinical Findings)

1. On 23 April 2009, MRI was conducted on the plaintiff’s lumbar spine. It showed “[b]road based posterior disc bulge is seen at L4/5 level… Small anterior marginal osteophytes and anterior disc bulges are seen at L4/5 and L5/S1 levels”.
2. As evidenced by various receipts, the plaintiff attended 6 sessions of treatment from a Chinese bonesetter between 9 and 14 March 2009. He also attended 2 sessions by acupuncturists of HKU SPACE Chinese Medicine Clinics and Pharmacies on 18 and 19 March 2009 and another 5 treatment sessions by another Chinese medical practitioner between 21 March and 9 April 2009.
3. The single joint expert, Dr Lau Chi Yuen (“Dr Lau”), prepared a medical expert report dated 11 November 2011 (“the Joint Expert Report”). The Joint Expert Report remarked that “(the plaintiff) had history of back injury about 20 years ago, when he was practicing Thai-boxing”.
4. Dr Lau diagnosed the plaintiff as suffering from “Sprained soft tissue injury of back region, with prolapsed disc of L5/S1 level”.
5. Dr Lau further estimated that the Accident would contribute 80% of the present condition of the plaintiff and that the possibility of the plaintiff’s pre-existing condition (including the back injury 20 years ago) that contributes to his present condition is not more than 20%.
6. Dr Lau concluded in the Joint Expert Report by stating the following:
7. The plaintiff may suffer from residual back pain and stiffness, as the result of the injury in the Accident.
8. He is estimated to have 7% whole person impairment for his residual symptoms after the apportionment of the pre-existing condition.
9. He is estimated to have 7% loss of earning capacity as a result of the injury.
10. He is able to resume duty as a lorry driver, provided that he should avoid lifting heavy object and prolonged sitting more than 2 hours.
11. The plaintiff was granted sick leave continuously since 26 November 2008 up to 13 July 2010 both dates inclusive. This is considered by Dr Lau to be appropriate. The defendant did not dispute that.

DISCUSSIONS

PSLA

1. The plaintiff was born on 15 October 1967 and was 41 years old at the time of the Accident. He reached his 45th birthday on the first date of this assessment hearing.
2. The defendant submitted that $200,000 is an appropriate starting point, and 20% discount should be given in the light of the plaintiff’s pre-existing degenerative condition and therefore he suggested $160,000 for this head.
3. To support his proposition, he said that the plaintiff has suffered injuries well below the serious category in *Lee Ting Lam v Leung Kam-Ming*[1980] HKLR 657. Out of these authorities, the defendant relied more onthe case of *So Chung Kwong* as stated below:
4. *Gauchan Som Prasad v Hin Wah Construction Co**Ltd****,*** DCPI 2398/2009 dated 26 July 2011***:*** the plaintiff injured his back as he tried to move a metal frame stuck in concrete. After the accident, X-rays showed degeneration in the lumbar spine and spondylolisthesis of L5/S1. He was granted 17 months’ sick leave. He complained of constant back pain which was worsen in the morning but improved during the day. He had inability to lift weights over 10-12 kg. He needed to take painkillers twice a day over a period of four years after the accident. Regarding PSLA, the plaintiff was awarded $220,000.
5. *Leung Kin Fai v IDS Logistics (HK) Ltd,* DCPI 2223/2007 dated 11 May 2009: the plaintiff injured his back, right heel, left foot and middle finger in a fall, and was given 824 days’ sick leave. There were degenerative changes in his L5/S1 region with lumbar lordosis. The plaintiff suffered from a previous back injury 12 years before the accident and a further sprain injury 2 years before the accident. There was no fracture but some residual back pain, together with pre-existing degenerative injury. The plaintiff was awarded for PSLA in the sum of $120,000.
6. *Choi Sun Hong v China Harbour Enterprise Constructions*, HCPI 1084/2007 dated 20 January 2010: The 24-year old plaintiff was injured in a traffic accident and suffered from mental trauma, neck and back injury. Three days after the accident, the plaintiff was discharged from hospital with a neck collar which remained for two months. The plaintiff suffered from back and neck pain, PTSD and AD, mild numbness in his forearms and pain in his right wrist. He also received psychiatric and clinical psychologist follow-up. There were pre-existing degenerative changes to the neck (C4-5, C5-6) and lower back (L4-5) which were triggered by the accident. The court assessed the PSLA at $280,000**,** after deducting 30% for pre-existing degeneration, the plaintiff was awarded $196,000.

(d) *Ng Lai Ping Carol v Tung Wah Group of Hospitals,* HCPI 374/2006 dated 10 April 2007: the plaintiff slipped and fell on her buttocks. She was found to suffer a slipped invertebral disc at L4/5, which revealed narrowing of the L4/5 space that triggered off subsequent degenerative changes. 24 months’ sick leave was accepted. She stopped her sporting activities after the accident. As the plaintiff was an enthusiastic sportslady, the plaintiff’s loss of amenity was particularly significant. The plaintiff was awarded for $225,000 for PSLA.

(e) *Shek Kam Ching v. Po Kee Construction Engineering Ltd* [2002] 3 HKLRD 795 handed down on 28 November 2002**:** theplaintiff sprained his back while lifting steel rod, suffered from prolapsed interverterbral disc at L5/S1; 26 months' sick leave was granted but he could not return to the pre-accident job because of persistent pain. There was still limited range of spine movement and tenderness over the lower end of the right paraspinal muscle four years after the accident. The plaintiff was awarded for $150,000 for PSLA.

(f) *So Chung Kwong v Ho Kuen* [2000] 3 HKLRD 241 handed down on 27 March 2000: the 43 year-old plaintiff was injured at work and suffered from sharp pain in lower back. After the accident, he was hospitalized for 10 days and then pain started radiating from his back to his legs. There was a prolapsed L4/L5 disc; surgery relieved some discomfort but his pain remained. Permanent disability was assessed at 10% - the plaintiff could never resume his former trade of carpentry and the loss of earning capacity was assessed at 20%. He was awarded $325,000 for PSLA.

1. On the other hand, the plaintiff relied on these authorities and suggested that the amount for PSLA should be $450,000. Among these authorities, the plaintiff’s counsel relied more on the case of *Tsang Tai Fat* because he said that it bears resemblance to the present case:
2. In *Tsang Tai Fat v. Kingland Concrete Drilling Co. Ltd*, HCPI566 of 2001, (unrep) 6 August 2003, the plaintiff suffered from back sprain which required anterior spinal fusion on L5/S1. It was held that an award of $450,000 appropriate for PSLA subject to reduction to $225,000 owing to pre-existing degenerative condition.

(b) In *Lai Kam Wah v. Wing & Kwong Co Ltd,* HCPI1131 of 2002, (unrep) 28 November 2003, the plaintiff suffered back injury with small annular tear in his L5/S1 disc. He also suffered from depression, anxiety, insomnia with suicidal thoughts requiring psychological and psychiatric treatment. The Court awarded $350,000 for PSLA.

(c) In *Ng Koon Ki v. Hilti (HK) Ltd & Anor* [2004] 2 HKLRD 634, an award of $350,000 for PSLA was made for injuries of sprained back caused by prolapsed invertebral disc with nerve root compression. There was associated pain in back radiating to buttock and heel as well as numbness over back of calf and sole of foot.

(d) In *San To Po Yuk v. Wing Kwong Painting Co Ltd* [2004] 2 HKLRD 169, an award of $350,000 for PSLA was made for back injury caused by significant disc extension of L4/5 causing severe spinal canal narrowing. It was observed that hypertrophic changes of apophyseal joints and ligamentum flava contributed to the degree of spinal canal narrowing. There was also mild postero-central disc bulge at L5/S1 level.

1. In terms of injuries and subsequent treatment, I agree that *Tsang Tai Fat* seems to be more similar to the present case than other authorities*,* in particular, the Plaintiff’s injuries required spinal operation of diskectomy during which he was hospitalized for 4 days. Dr Lau opined that this operation was appropriate.
2. Besides, the plaintiff in *Fong Kit Man v. Ng Tse Keung WP Company Ltd & Anor*, HCPI539/2005 (unrep), 3 April 2008also suffered from back sprain which aggravated an existing prolapsed intervertebral disc at L5/S1 from an earlier accident. As a result, the plaintiff underwent a posterior diskectomy of L5/S1. He was wheelchair bound and suffered from various symptoms of depressive mood, poor temper control and insomnia. He also suffered from the problem of erectile dysfunction. Suffiad J considered an award of $650,000 (for PSLA) is an appropriate starting point before an apportionment is to be done to determine how much is attributable to the previous accident and how much to the subsequent accident.
3. Although in the present case, the plaintiff’s injuries were not as serious as the plaintiff in *Fong Kit Man*, his conditions are apparently more severe than the defendant’s authorities whereby the claimants needed not undergo the operation of diskectomy.
4. In essence, I agree that an award of $450,000 is appropriate for PSLA, subject to a 20% discount in the light of Dr Lau’s opinion, namely, the possibility of the Plaintiff’s pre-existing condition (including the back injury 20 years ago) that contributes to his present condition is not more than 20%. Having said that, after deduction of 20%, the appropriate amount for this head should be $360,000.

Pre-trial loss of earnings

1. It is not in dispute that at the time of Accident, the plaintiff was a lorry driver, earning $8,800 as his basic salary monthly.
2. The plaintiff said that the monthly income shall be $9,300 by including a monthly diligence bonus of $500. The defendant disputed the existence of monthly diligence bonus of $500. He said that there is no written employment contract to that effect. He also relied on two sets of document, the notice dated 6 December 2008 prepared by his then employer (“the form 2 notice”) who only stated the plaintiff’s monthly salary as $8,800 without mentioning $500 diligence bonus or double pay. The defendant also relied on the certificate of compensation assessment issued by the Commissioner of Labour on 29 July 2010 (“the form 5 Certificate”) without mentioning $500 diligence bonus or double pay.
3. The plaintiff’s evidence was that he was told verbally at the time of the employment that if he was not absent or late in any working day in a given month, he would be entitled to a “diligence bonus” of $500 monthly. In fact, he recalled that he received the said bonus for about 2 to 3 times since he was employed until he encountered the Accident.
4. In my views, the plaintiff’s evidence seems to be inconsistent of the said form 5 certificate. I note that the said document was issued on behalf of the Commissioner of Labour so as to certify the amount payable by his then employer, Wilson Transportation Services Limited (“WTSL”) to the employee under the Employee Compensation Ordinance, Cap 282 (“ECO”). It adopts the monthly earnings of $8,800 without taking into account of diligence bonus and double pay. The plaintiff never disputed the said assessment that affects his interest. Had the plaintiff treated his earnings including diligence bonus and double pay, he should have raised the objection to the said assessment. In short, I shall adopt $8,800 as the monthly earnings in calculating this item.
5. The defendant disputed the plaintiff’s entitlement during the period from 1 November 2010 to 1 July 2012 (20 months) during which the plaintiff earned less (from $9,300 to $6,750) after he left Wilson and changed to work as a self-employed driver. Although the defendant accepted that the plaintiff left Wilson because Wilson deployed him to work in the warehouse that required frequent and heavy lifting tasks, he submitted that the plaintiff changed his job on his own volition and lesser earnings are not the result of the accident.
6. I do not agree with the defendant’s submissions. Firstly, as a result of the Accident, the plaintiff could not lift objects as heavy and frequent as before. Instead of worsening his physical condition in working in a warehouse, he chose to work as a self-employed driver for an average of 15 days per month. Secondly, this also suggested that the plaintiff chose to work as opposed to do nothing, to mitigate his loss of income so long as his physical condition permitted him to work.
7. The plaintiff claims pre-trial of earnings for 2 periods:-
8. From 26 November 2008 to 13 July 2010, the period of sick leaves that the defendant did not dispute (“1st period”);
9. From 1 November 2010 to 1 July 2012 during which the plaintiff earned less after he left Wilson (“2nd period”).
10. In brief, the calculation of this item should be :

(i) for the 1st period, $8,800 x 19 months + $8,800 x 5/30 (26-30 November 2008) + $8,800 x 13/31 (1-13 July 2010) = $172,357;

(ii) for the 2nd period, ($8,800 - $6,750) x 20 months = $41,000. The total sum for this head should be $213,357.00.

Loss of earning capacity

1. The plaintiff claims $120,000 for this head. The plaintiff’s counsel relied on *Ansar Mohammad v Global Legend Transportation Ltd* [2011] 2 HLLRD 985.
2. Although Dr Lau assessed the plaintiff of having 7% loss of earning capacity, the defendant submitted that the plaintiff could secure a higher paid job of driver earning $13,000 monthly since July 2012. He submitted that the plaintiff suffered no disadvantage in the labour market. As there is no substantial or real risk of handicap in the labour market, hence no damages should be awarded for this head.
3. The plaintiff testified that his present higher paid job was offered under the circumstances when the new employer knew his limitation to lift heavier objects and hence gave him lighter task accordingly. The plaintiff submitted that this tailor-made situation supports his claim that he did suffer certain disadvantage at the labour market despite the fact that he was able to find a full-time job with much better income than before. The defendant did not attack this part vigorously. I accept the plaintiff’s evidence on this aspect.
4. Dr Lau concluded in the Joint Expert Report by stating that the plaintiff may suffer from residual back pain and stiffness. As a result of the injury in the Accident the plaintiff is estimated to have 7% loss of earning capacity. He is able to resume duty as a lorry driver, provided that he should avoid lifting heavy object and prolonged sitting more than 2 hours.
5. Although the Occupational Therapy Department Medical Report dated 9 December 2010 (“OTD Report”) has these remarks: “During the work assessment, he was able to lift 12 kg of weight from floor to shoulder level. Therefore, his demonstrated work capacity could meet his work demands. Mr Lee was suggested to resume duty on 7 July 2010.”, it seems to me that no test is conducted on whether the plaintiff could lift 12 kg of weight of objects on a regular interval, the test is simply conducted on whether he was able to lift 12 kg object from floor to shoulder level.
6. It seems to me that in such circumstances, there is a real risk that by reason of the plaintiff’s back pain and stiffness, the plaintiff will suffer a handicap in the labour market or loss of income should he lose his current employment. The plaintiff’s disabilities may also prohibit him to lift heavy loads at a regular interval and his promotion prospect may be affected. This is similar to the situation in *Yau Shui Ming v. Excellent Development Ltd*, DCPI47/2002, (unrep), 28 May 2003.
7. In *Yau Shui Ming****,*** the plaintiff with history of prolapsed invertebral disc suffered back injury. Even though he was able to find a job with an average income of a restaurant worker, it was still held that there was a real risk of the plaintiff to suffer handicap in the labour market if he loses his current job. Such risks are reflected by possible loss of income due to occasional inability to work as well as adversely affected promotion prospects. It is further expressly stated that the plaintiff’s disabilities of lifting heavy objects or stand or sit for prolonged period render the said risks real rather than fanciful. An award of $150,000 was therefore made for loss of earning capacity.
8. In *Ansar Mohammad,*the Court awarded to the plaintiff a lump sum $30,000 for loss of earning capacity.
9. In this case, I am of the view that an award of $50,000 is appropriate bearing in mind that the possibility of the plaintiff’s pre‑existing condition (including the back injury 20 years ago) that contributes to his present condition is not more than 20%: *Ansar Mohammad*. Further, the plaintiff’s physical condition here is slightly more serious than the plaintiff in *Ansar Mohammad*.

Loss of MPF

1. The defendant did not challenge this item. The loss of MPF should be calculated as 5% of the loss of pre-trial income, ie 5% of $213,357.00 which is $10,667.85.

Future medical expenses

1. Dr Lau opined that “there is no further treatment necessary”.
2. Further, the plaintiff testified that he has not sought medical treatment after assessment by Dr Lau. He explained that his back pain could be relieved by doing stretching exercise at home. He found therapy treatment in public hospital ineffective but he could not afford therapy treatment in private sector.
3. While the plaintiff relies heavily on Dr Lau’s findings, his opinion of “no further treatment is necessary” cannot be ignored. The plaintiff’s failure to seek further treatment thereafter consistent with Dr Lau’s opinion. I found his explanation for the failure to seek treatment unreasonable.
4. Consequently, I refuse to award future medical expenses.

Special damages

1. This head is not disputed and is agreed at $15,750.00.

Conclusion on quantum

1. In summary, I allow these items:-

|  |  |
| --- | --- |
| PSLA | $360,000.00 |
| Pre-trial loss of earnings | $213,357.00 |
| Loss of earning capacity | $50,000.00 |
| Loss of MPF | $10,667.85 |
| Special damages | $15,750.00 |
| Total | $649,774.85 |

1. I therefore order the defendant to pay damages in the sum of HK$649,774.85 to the plaintiff. Interest is payable on the award for PSLA at 2% per annum from the date of the Writ of Summons (23 March 2011) to the date of judgment herein, and interest on pre-trial loss of earnings, loss of earning capacity, loss of MPF and special damages be payable from the date of the Accident (26 November 2008) to the date of judgment herein at half judgment rate and thereafter the total sum be at judgment rate until full payment.
2. There is no reason why costs should not follow event. I therefore make a costs order *nisi* that the defendant shall pay the plaintiff costs of the action (with all costs reserved, if any) to be taxed if not agreed. For the avoidance of doubt, certificate for counsel is granted. Unless any of the parties seeks to vary it by way of summons within 14 days, the said costs order *nisi* shall become absolute after the expiry of 14 days.

( Clement Lee )

Deputy District Judge

Mr Roland Lau, instructed by Mike So, Joseph Lau & Co, for the plaintiff

The defendant appeared in person