## DCPI 555/2009

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 555 OF 2009

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##### BETWEEN

WONG KIN KEE Plaintiff

### and

NG CHI LAM Defendant

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Coram : Her Honour Judge Mimmie Chan in Court

Date of hearing : 5 November, 2009

Date of handing down Judgment : 26 November, 2009

# JUDGMENT

**Background**

1. At about 2 am on 5 May 2007, Mr. Wong sustained injuries when the public light bus driven by the Defendant, Mr. Ng, collided into the rear body of the taxi which Mr. Wong was driving. Mr. Wong was making a left turn when Mr. Ng's light bus, which was traveling behind Mr. Wong's taxi, failed to stop in time. As a result, Mr. Wong suffered a whiplash injury, in that the soft tissue in his neck was injured as a result of the hit from behind.
2. Mr. Ng does not dispute liability. The hearing on 5 November 2009 was for assessment of the damages payable to Mr. Wong.
3. Mr. Wong felt only mild neck pain after the collision, and did not seek immediate treatment. He went home to sleep, but felt increased pain afterwards. He therefore attended the Accident and Emergency Department of the Prince of Wales Hospital ("**Hospital**") at about 10:20 pm on 5 May 2007 to seek treatment. According to the records of the Hospital, Mr. Wong complained of neck pain. On examination, it was found that there was no neurological deficit. An x-ray taken showed normal alignment of the cervical spine. He was treated and discharged, and granted sick leave from 5 May 2007 to 8 May 2007 in respect of his neck sprain.
4. Mr. Wong attended the Accident and Emergency Department of the Caritas Medical Centre ("**CMC**") on 9 May 2007, complaining still of neck pain. Physical examination showed tenderness at bilateral neck region. He was discharged with analgesics. Mr. Wong returned to CMC on 13 May 2007, when he was again treated for his residual back pain. He was granted sick leave from 9 May 2007 to 14 May 2007.
5. Mr. Wong said that he had tried to obtain an appointment to see a specialist at government hospitals to treat his neck pain, but had not been successful in getting an appointment. He had no alternative but to consult private general practitioners between 14 May 2007 and 23 May 2007. He was granted sick leave to 26 May 2007 in respect of his neck sprain. Mr. Wong finally consulted an orthopedic surgeon, Dr. Wong Sze Hoi, and sought treatment as an outpatient at the Precious Blood Hospital ("**PBH**") between 26 May 2007 to 4 August 2007. He also received physiotherapy treatment at a private clinic in May 2007, and at PBH in mid-2007 for about 25 sessions.
6. Dr. Chiang and Dr. Lam, the medical experts who examined Mr. Wong for these proceedings, are in general agreement. Mr. Wong still complained of stiffness and weakness in his neck, which became worse with prolonged sitting or if the neck was kept in a stationary posture for 10 to 15 minutes. There was pain on rotation of the neck. According to what Mr. Wong informed Dr. Chiang in June 2008, his neck would feel very stiff after sleeping for a long duration of time. Mr. Wong also claimed that he had to lean backward when driving, to decrease the stiffness of the neck, and had to stop after driving for about an hour, to get out of the car to rest and to mobilize his neck. He avoided lifting or carrying heavy objects. Mr. Wong claimed to Dr. Lam in June 2009 that occasionally, the pain in his neck radiated to the left shoulder.
7. Both Dr. Chiang and Dr. Lam noted that there was no paraspinal muscle spasm at the cervical area, and no neurological deficit of the upper limbs. Nor was there wasting of the muscles of the upper limbs. There was a reduced range of movement in the neck, but Dr. Chiang noted that there was a reasonable range of neck movement preserved, other than a mild decrease in the end range of the right side-flexion and rotation to the right.
8. According to the MRI of Mr. Wong's cervical spine which was performed on 2 September 2008, there was C5/6 posterior disc prolapse just impinging but not significantly compressing the spinal cord. There was mild C4/5 posterior disc prolapse, with early degeneration of the cervical discs and mild spondylosis in the mid-cervical spine.
9. According to Dr. Chiang, the loss of the cervical lordosis as shown in the x-ray of the neck was "likely contributed partly by the degenerative changes and partly from the currently present residues as arising from the injury". Dr. Chiang also considered that in the absence of significant abnormal physical findings apparent from the examination, the current residues that had arisen from the injury were more likely to be of a mild extent.
10. Dr. Lam agrees that the delayed onset of neck pain and the preservation of neck motion showed that the next sprain suffered by Mr. Wong was a minor one. Dr. Lam pointed out that the MRI findings are very common in people of Mr. Wong's age. He agrees with Dr. Chiang that the disc prolapses were degenerative changes which developed slowly and gradually over a long period of time, and should be present before the injury. According to Dr. Lam, Mr. Wong's neck complaint is more likely related to the degenerative status of the cervical spine, rather than the sprain sustained in the accident.
11. Dr. Lam further pointed out that the minor neck sprain should have recovered within a short time, and that Mr. Wong's residual complaints were out of proportion to the simple neck injury, in the absence of demonstrable structural damage sustained. He considered Mr. Wong's neck complaint to be vague and subjective, unsupported by objective signs and common in professional drivers of Mr. Wong's age and degenerative status, even without any history of trauma.
12. In the light of such medical evidence, Counsel for Mr. Wong concedes that, following the approach adopted by the Court in *Chan Kam Hoi v. Dragages et Travaux Publics* [1998] 2 HKLRD 958, some discount has to be made to any award of damages, given the pre-existing state of Mr. Wong 's spine. Counsel submits that in the present case, neither expert has commented on whether the degenerative status of Mr. Wong's spine was such that he would definitely develop, in the future, a neck condition of the type which Mr. Wong now complains of. Counsel submits that as in the case of *Chan Kam Hong v. Mohammad Riaz* HCPI 938/2005, where neither medical expert was able to identify the relative contribution of the accident to the plaintiff's condition, and when the disability would have caused the plaintiff to give up his pre-accident occupation, the Court should adopt a smaller global discount of 25%, compared to the 45% discount adopted in *Chan Kam Hoi*.
13. Ultimately, each case must be decided on its own facts and evidence, and bearing in mind the relevant legal principles on causation of damages as illustrated in *Ocean Tramping Co. Ltd. v. Lee Kin Kai* [1991] 2 HKLR 232, the courts must adopt a common sense approach, assisted but not dictated by the medical opinion.
14. In the light of the medical examination conducted by Dr. Chiang and Dr. Lam and the findings they made, I accept that Mr. Wong did injure his neck at the time of the accident. However, the MRI scan shows clear degenerative changes which should have developed gradually over a period of time and were present before the accident. Although Dr. Chiang was not as explicit, it seems clear from Dr. Lam's report that he considered Mr. Wong's neck complaints to be very common in professional drivers of Mr. Wong's age (51 at the time of the accident in 2007), and that the degenerative status of the cervical spine was more likely than the accident itself to be the cause of Mr. Wong 's neck pain and stiffness. Yet, there is no evidence that Mr. Wong’s pre-existing degeneration of the cervical discs had caused him any major discomfort or pain before the accident. At most, I can conclude that the degenerative status had contributed to Mr. Wong's residual neck pain. On balance, I find that Mr. Wong's pre-existing degeneration accounted for a third of his overall condition.

**PSLA**

1. In respect of Mr. Wong's claim for pain, suffering and loss of amenities, having considered the authorities cited by both Counsel, I consider that his injury is not as serious as the injuries suffered by the plaintiffs in the cases relied upon by Counsel for Mr. Wong. After taking into account the discount for his pre-existing condition, I consider that a reasonable award for PSLA in respect of Mr. Wong's sprained neck injury is **$90,000**.

**Loss of pre-trial income**

1. Prior to the accident, Mr. Wong had worked 12 hour shifts driving his taxi, earning at least $500 per day. His average monthly salary was $13,000 per month. He was given 4 months' sick leave, which the medical experts consider to be appropriate. The parties agree that his loss of earnings during the period of 4 months is $52,000.
2. Upon expiration of his sick leave, Mr. Wong 's daily earnings were reduced as he was not able to work long hours. On the average, his monthly income has been reduced to $8,000. I accept his evidence, and allow his claim for loss of income from September 2007 to 5 November 2009 as $135,000 ([$13,000 - $8,000] x 27 months).
3. Taking the one-third reduction for the pre-existing degenerative condition, the total award for Mr. Wong's pre-trial loss of income is **$124,667**.

**Loss of post-trial income**

1. According to Dr. Chiang, Mr. Wong may continue to suffer a mild reduction in efficiency at his job, which will prevent him from driving continuously for long periods of time. This has caused Mr. Wong's earnings to drop significantly since September 2007. I accept the calculations submitted by Counsel for Mr. Wong, adopting a multiplier of 7 and a loss of earnings of $2,600 per month, giving a total loss of $218,400 ($2,600 x 12 months x 7). Adopting the one-third reduction, the award is **$145,600**.

**Special damages**

1. Mr. Wong's medical and hospitalization expenses have been agreed at $6,595. Traveling expenses are agreed at $1,500. In relation to the costs of Chinese herbal medicine and tonic foods, I consider the sum of $18,406 claimed as unreasonably high. I will only allow a reasonable sum of $2,000.

**Future medical expenses**

1. I prefer the opinion of Dr. Lam that a further course of physiotherapy is unnecessary, as Mr. Wong has failed to seek active treatment since August 2007.

**Award**

1. The total award is as follows :

PSLA $ 90,000

Pre-trial loss of earnings $124,667

Post-trial loss of earnings $145,600

Special damages $ 10,095

**$370,362**

1. I award to Mr. Wong the total sum of $370,362, with interest on general damages at 2% p.a. from the date of service of the Writ to the date of assessment of damages, and interest on special damages at half judgment rate from the date of the accident to the date of assessment of damages. I will make an order nisi that Mr. Ng is to pay to Mr. Wong the costs of the action, to be taxed if not agreed, with certificate for Counsel.

(Mimmie Chan)

District Judge

*Mr. Hylas Y.F. Chung, instructed by Messrs. T.K. Cheng & Co., for the Plaintiff*

*Mr. Adonis K.W. Cheung, instructed by Messrs. Kenneth C. C. Man & Co., for the Defendant*