#### DCPI703/2004

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## **PERSONAL INJURIES ACTION NO. 703 OF 2004**

BETWEEN

MA KWAI LAN Plaintiff

and

CHIU YUN YAU 1st Defendant

YIP WAI BUN 2nd Defendant

##### Coram: H H Judge H C Wong in Court

Dates of Hearing: 11and 12 July 2005

Date of Delivery of Judgment: 13 July 2005

## J U D G M E N T

1. In this action, the Plaintiff claims against the Defendants for compensation for injuries sustained due to a road traffic accident on 2 August 2001 at 4.05 pm.
2. The accident occurred near the junction of Hong Lok Yuen Road and the slip-road of Fan Ling Highway in Tai Po, New Territories. The Plaintiff is and was at the time a cleaning worker at Hong Lok Yuen, and on the day of the accident, she and a colleague had just finished work on their way home. They were standing next to the railings at the said junction, waiting to cross the road after dismounting from a colleague’s bicycle. The 1st Defendant was driving the Defendant’s vehicle, a light goods vehicle, registration number JF5166, along the slip-road of Fan Ling Highway when it lost control close to the said junction and mounted the pavement of Hong Lok Yuen Road, crashing into the metal railings which collapsed and hit the Plaintiff and her colleague.
3. As a result of the said traffic accident, the Plaintiff was rendered unconscious and suffered multiple injuries on her head, cheek, chest, neck, shoulder and knee.
4. The 1st Defendant was convicted of careless driving at the Fan Ling Magistracy on 3 May 2002. At the beginning of this trial, the defendants conceded liability.
5. The Plaintiff was aged 47 at the date of the accident. She is now 51 years old.

The Plaintiff’s Injuries

1. It is not disputed that the Plaintiff suffered the following injuries as a result of the said accident:

(a) head injury with loss of consciousness and amnesia;

(b) facial abrasion with penetrating injury;

(c) left chest wall contusion;

(d) right abdominal pain;

(e) neck perispinal muscle spasm with decreased range of movement, otherwise described as neck sprain and contusion;

(f) left knee contusion and abrasion;

(g) CT scan of the abdominal area revealed a 2-cm hyper‑dense area at the upper pole of the right kidney consistent with intra-renal haematoma.

1. The medical reports from the Alice Ho Miu Ling Nethersole Hospital, (hereinafter referred to as “the Nethersole Hospital”), were produced without having to call the makers, the same applies to the reports of the joint medical experts, Dr Danny Choi, the orthopaedic, and Dr George Ku, the neurologist.
2. The orthopaedic, Dr Choi’s medical report described the Plaintiff’s problems at the time of his examination of the Plaintiff as follows:

“(1) There is neck pain over the left side;

(2) the pain radiates up to affect the left side of the head, face and left upper limb;

(3) she is unable to elevate her left arm to overhead level mainly because of shoulder pain;

(4) there is left knee pain after walking for a long distance and is often associated with left calf muscles cramps;

(5) she has difficulty in climbing stairs, slopes and squatting;

(6) there is residual left side chest wall pain, especially when lifting heavy objects;

(7) she is unable to sleep on her left side;

(8) there is a painful and ugly scar over her right face. This will affect her ability in speaking and chewing.”

1. Dr Choi found upon examination with the aid of x-rays on the plaintiff’s left knee and neck that she suffered from advanced patello-femoral joint degeneration of both knees, and to a certain extent, there was degeneration of the cervical spine.
2. A summary of his comments of the plaintiff’s various injuries are as follows: (1) neck injury:

“The neck injury probably involved soft tissue sprain injury. All along, she received conservative treatment but the symptoms were not totally relieved. In this examination, there was residual but diffuse tenderness over the left side neck muscle. The range of motion on rotation and lateral flexion were restricted probably by pain when stretching the injured neck muscle. Radiologically, apart from natural degeneration, no other abnormality was detected.”

1. He further commented that the Plaintiff “complained of pain radiating down to left upper limb; physical examination did not reveal objective neurological sign of suggest nerve injury”. The pain is considered to be “a form of referred pain that originated from the injured neck muscle.”
2. He further considered the prognosis to be good. The neck condition should have reached a static state after two years. He attributed the residual neck pain and associated stiffness to account for 3 per cent permanent impairment of the whole person.
3. As to the left shoulder injury, Dr Choi considered it likely that the soft tissue around the left shoulder was also injured during the accident, and he considered the pain was mainly due to the residual inflammation of the contused muscle which in turn restricted the shoulder motion. He considered the overall prognosis to be good. For the stiffness of the left shoulder, he accorded 5 per cent permanent impairment of left upper limb or 3 per cent permanent impairment of the whole person. As to the chest wall injury, he found that apart from vague tenderness over the left lower chest, no other abnormality was detected and the chest expansion on respiration was unaffected.
4. He considered the prognosis to be excellent. The residual pain, in his opinion, accounts for about 1 per cent permanent impairment of the whole person. As to the left knee injury, Dr Choi considered the reports from the doctor at Nethersole Hospital and found the plaintiff had suffered from contusion injury of the left knee, and there was no internal structural damage according to the Nethersole Hospital reports.
5. In Dr Choi’s opinion, after two years since the accident, as the Plaintiff still complained of considerable pain over the left knee, upon examination, he found the following, and I quote from page 9 of his report which appears at page 95 of the bundle:

“On examination, crepitus were detected over both patello-femoral joints. This was mainly due to natural degeneration of the patello-femoral compartment as well-demonstrated in the x‑ray of both knees. However, it was noted that only the left knee, which was the injured side, was painful and tender. Besides, Miss Ma declared that her knees were symptom-free prior to the accident. In this connection, it is reasonable to assume that the bilateral patello-femoral degeneration was asymptomatic before the accident and that the contusion injury over the left knee triggered off onset of subsequent left knee symptoms.”

1. Dr Choi found that there were some wasting of the left thigh and calf muscles, suggesting the Plaintiff was unable to use her left lower limb in a normal way, a condition known as disused atrophy.
2. He further considered the Plaintiff’s current left knee condition to be stable and she was advised to avoid activities, including squatting, weight lifting and staircase climbing. However, these recommendations were given mainly for the purpose of slowing down the rate of pre-existing degeneration applicable even without the occurrence of the accident. He further added that the accident had rendered the Plaintiff to suffer from additional 5 per cent permanent impairment of her left lower limb or 2 per cent permanent impairment of the whole person.
3. Adding up all the permanent impairments, he attributed the overall permanent impairment at 9 per cent of the whole person.
4. The Plaintiff is considered, according to Dr Choi, physically fit to resume her pre-injury job. Although she may encounter difficulty in lifting heavy objects, he considered that she should be able to find jobs which would not require heavy duties. His assessment of her loss of earning capacity is 10 per cent. He further considered that the sick leave for five months to be reasonable.
5. The neurologist, Dr Ku, stated in his report dated 8 March 2004:

“My conclusion after reviewing the above test results is that the right renal haematoma resulted from the accident has not resolved completely. Although it is smaller and improved, it is still undergoing reactive changes. It is my opinion that he (she) will need to have further neurological follow-up in the form twice a years, specialist consultation with urine analysis and CT scan once a year unless the lesion is stabilised by resolutions, scarring or definite cyst formation. The yearly cost for such a regime will be around HK$6,000 per year. For the persistent, yet-unresolved renal haematoma and associated partial loss of renal tissue, I would assess a permanent impairment of 4 per cent of the whole person. To this should add any orthopaedic impairments. With the residual lesion and her persistent mild renal pains, there would be some effect on her earning ability from this. I would thus add 2 per cent to her orthopaedic assessment, giving a combined estimation of 12 per cent loss of her earning capacity.”

1. In spite of the repeated reference by Doctors Choi and Ku, of the Plaintiff’s right facial problems and her conspicuous scar on the right cheek which have been described as “the penetrating injury to her cheek” or/and “the oblique and unsightly sunken scar over her left right cheek or left cheek should be right from the laceration,” a direct quote from Dr Ku’s medical report.
2. I have also heard the Plaintiff complaining in court of the persistent pain and difficulties experienced when she spoke and ingested food. No medical reports have been produced on this aspect of her injuries. I notice though that reference has been made to the fact that her right cheek laceration has been treated by suturing, and in the statement of damages, the Plaintiff did plead and refer to the penetrating injury to the right cheek with references to the scar being unsightly and painful which has had adverse effect on her appearance and her ability to speak and chew.
3. It is unfortunate that no expert has been consulted on the resolution of this complaint. According to the Plaintiff’s evidence, she made special references to the pain on her cheek and that saliva would escape whenever she spoke and ate. This condition was confirmed by Dr Choi on page 3 of his medical report which appears on page 89 of the bundle. This is clearly an oversight of the Plaintiff’s legal representatives who, in my opinion, have failed to follow Dr Choi’s advice and sent the Plaintiff to a plastic surgeon. It is obviously more than just a cosmetic problem and that the deep wound sustained by the Plaintiff on her right cheek has the effect of causing the Plaintiff a great deal of discomfort on a daily basis. It affected her food ingestion and speech apart from the scar being unsightly.
4. Without any medical expert evidence such as that from a maxillofacial surgeon on the management of the Plaintiff’s complaint and condition, it is impossible for the court to assess to what extent her pain and discomfort and the degree of disability should be accorded to this condition.
5. The court is further prevented from awarding any medical expenses for the management of this aspect of the Plaintiff’s condition. It is a matter for the Plaintiff to consider whether she should pursue this matter any further due to the obvious negligence of her legal representatives.

The Plaintiff’s Disabilities

1. From the medical reports of the two joint medical experts’ reports, the Plaintiff’s disability is said to be a 13% permanent impairment of the whole person and a 12 per cent loss of earning capacity, and these include under “Permanent Impairment”:

(1) neck injury 3%;

(2) left shoulder injury 3%;

(3) chest wall injury 1%;

(4) left knee injury 2 %;

(5) kidney injury 4%

total 13%

Loss of Earning Capacity

1. The two medical experts considered that

(1) orthopaedic injury 10% loss of earning capacity;

(2) kidney injury 2%;

total 12%.

The aforesaid is concluded without taking into account the permanent disability and unsightly scar on the Plaintiff’s right cheek.

1. Mr Cheung, counsel for the Plaintiff, has urged the court to take into account the permanent disability and scarring of the right cheek of the Plaintiff when I assess the pain and suffering loss of amenities award. He further submitted that I should disregard the Plaintiff’s pre-existing degenerative changes in her cervical spine i.e. her neck, and her left knee when assessing the general damages caused by the accident.
2. Miss Lau, counsel for the Defendants, on the other hand submitted that the court must give regard to the pre-existing conditions of the Plaintiff on the Plaintiff’s cervical spine and left knee. She suggested a 20% reduction because of the pre-existing degenerative condition.
3. Both Mr Cheung and Miss Lau referred to the case of *Chan Kam Hoi v Dragages et Travaux Publics* reported in [1998] 4 HKC 523 where the Court of Appeal in Hong Kong upheld the trial judge’s award for PSLA and the loss of pre-trial earnings basing on a 45% reduction due to a pre-existing condition of the Plaintiff in that case.
4. In this connection, Miss Lau referred to Dr Choi’s comments in his medical report that “crepitus were detected on both patello-femoral joints. This was mainly due to natural degeneration of her patello-femoral compartment.” See Dr Choi’s supplementary medical report dated 6 September 2004 which appears on page 108 of the bundle. In his supplementary medical report, Dr Choi made the following comments:

“(1) Natural degenerative changes of the cervical spine and patello-femoral joint of the knee may not be symptomatic.

(2) However, patients with degenerative joint disease are at higher risk of developing symptoms of the involved area / joints.

(3) For assessment purpose, I tend to estimate that Miss Ma will have developed knee symptoms by the age of 50 and neck symptoms by the age of 55 to 60, assuming that she had not met with the subject accident.

(4) Once knee symptoms develop, Miss Ma will have difficulty in climbing staircases or performing activities involving squatting and rising up. She may not be able to continue her pre-injury job as a cleansing worker after 50.

(5) The neck degeneration is of mild degree, and I believe that she can continue her job till her normal retiring age, say, around 60.”

1. Consequently, according to Dr Choi, the neck pre-existing condition would not have any effect on the future employment or cause a loss of earnings of the Plaintiff, while the left knee may have more significant effect.
2. In the Court of Appeal case of *Chan Kam Hoi*, the plaintiff in that case was 45 at the time of the accident. He sustained injury to his back while working at a construction site, dismantling formwork on two separate accidents within three months. He was found to have a degenerative condition of the spine which, up to the time of the accidents, had presented no symptoms. The Court of Appeal held that so far as it related to the future loss of earnings:

“(1) Where a pre-existing condition was likely to lead to disability and loss in the absence of the injury for which the Plaintiff was entitled to recover, the usual method of assessing the recoverable loss was to take account of the risks by an appropriate assessment of general damages. The pre-trial loss earnings might also be reduced if the risks during the years concerned were sufficiently high (at page 529, C to D).

(2) When calculating the damages for future loss of earnings, a reduced multiplier was usually the most accurate way of giving effect to the findings on the medical evidence. This was particularly so when a Plaintiff’s working life was likely to be limited by a pre-existing condition as in this case. (See page 529 E of the report)”

1. Careful reading of Deputy High Court Judge Woolley’s judgment, in paragraph 11, he said:

“However, the medical evidence here is overwhelming. Immediately after the second accident on 6 September, an x-ray was taken of his back. The report dated the same day notes ‘degenerative changes’ to the lumbar spine. Dr David Lee, the Plaintiff’s own witness, said in evidence that there were degenerative changes which were ‘quite severe’ and which must have been pre-existing. In his report of 18 December 1991, he said, ‘A heavy manual labouring worker tends to have degenerative changes of the lumbar spine due to wear and tear but not necessarily to give rise (to) any symptom.’ An MRI scan, performed in December 1991, showed small posterior protrusions of L4 to 5 and L5-S1 discs, and interior herniations of L2 to 3, L3 to 4, and L4 to 5, although no significant pressure effect onto the spinal tecal sac which encloses the nerves of the spinal cord. Dr Lam Kwong-chin said that the fact that there was prolapse on four levels indicated that the more likely cause was degeneration rather than trauma. Trauma, he said, would be unlikely to cause more than one.”

1. It is clear therefore that the Plaintiff in the *Chan Kam Hoi* case had a pronounced pre-existing degenerative condition before the two accidents, and the accidents had induced or caused the pre-existing condition to become symptomatic.
2. Mr Cheung submitted that a discount due to the pre-existing condition is only called for in cases where the degeneration would certainly lead to symptoms where the risk of development of symptoms is significantly high. This is consistent with the judgment in *Chan Kam Hoi*’s case.
3. Mr Cheung referred me to the decision in the High Court decided after *Chan Kam Hoi*, in the case of *Ng Sing Kwai v Chan Yu Chuen & Another* reported in [2002] 3 HKLRD 514 and the case of *Rena v Aoki Corporation* reported in [2003] 1 HKLRD A16 where the court did not apply a discount.
4. Upon careful reading of Master de Souza’s judgment in *Ng Sing Kwai*’s case, he awarded the sum of $320,000 under “pain, suffering loss and amenities” after taking into account Dr Danny Choi’s medical report which reduced the 16 to 17% permanent impairment of the whole person to 7% impairment after taking into consideration the pre-existing degenerative conditions of the Plaintiff while V Bokhary J in the case of *Rena v Aoki* took into account the early onset of symptoms of degenerative changes and awarded the sum of $350,000 under PSLA.

Quantum

PSLA Award

1. In Dr Choi and Dr Ku’s joint expert opinion, in spite of the pre‑existing degenerative changes to the Plaintiff’s knees and neck, she was assessed to have suffered a 13% impairment of the whole person and 12% loss of earning capacity.
2. Miss Lau referred to the case of *Chu Cheung Wah v Ng Tung Pak & Another* HCPI Action 547 of 2003 where the victim was assessed by the defendant’s medical expert to have suffered from 1% impairment of the whole person and 1% loss of earning capacity. On the other hand, the Plaintiff’s own medical expert assessed the plaintiff to have suffered 5% permanent impairment of the whole person.
3. Looking at the different degree of disability and impairment of the whole person, the Plaintiff in the present case obviously suffered much more serious injuries than the plaintiff in the case of *Chu Cheung Wah*. Her injuries were multiple. Her hospitalisation period was no less than 14 days. She had physiotherapy of over 65 sessions. In fact, if not for the SARS outbreak in February and March 2003, her physiotherapy sessions would have carried on, and this was over 18 months after the accident. Her pain ranged from her head and cheek and neck, shoulder, abdomen, to her loin and left knee. All of these areas are still painful according to the Plaintiff, these complaints have not been ruled out by the two medical experts.
4. From my own observation in court, I can see that her right cheek scar is conspicuous. It may be or can be improved in appearance with the help of plastic surgery, but it is not known if her pain can be relieved unless she consulted a medical expert and without which it is impossible for anyone to gauge the exact degree of her permanent impairment.
5. However, it would be unfair to the Plaintiff not to take into account her existing and continuous suffering on her right cheek. I am satisfied that her suffering is genuine and true. The left knee pre-existing condition represented a mere 2% impairment of the whole person. On the other hand, so far as the left knee is concerned, it is obvious that it would not have been symptomatic for at least a few more years if not for the accident. This can be judged on the fact that her right knee remained to date asymptomatic. At least, in my opinion, the fact that she has to rely on the handrails to climb up the stairs is evidence of the extent of the permanent injury to her left knee. It is not expected for any normal person at the age of 50 to require the assistance of handrails in climbing up stairs.
6. Furthermore, judging from the wasting of muscles of the Plaintiff’s left thigh and calf, it was obviously caused by the disuse of the left leg. One would expect that greater reliance on the uninjured leg and knee would be placed after the accident since the left knee was painful. In spite of that, the Plaintiff did not complain that her right knee was causing her any pain. Therefore, the onset of the pre-existing condition has not begun. This is in spite of Dr Choi’s estimation that the Plaintiff’s knee pre‑existing condition will become symptomatic by the age of 50. Of course, Dr Choi’s assessment remained an estimate. As he put it, “I tend to estimate that Miss Ma would have developed knee symptoms by the age of 50 had she not met with the subject accident.”
7. I look at the Plaintiff’s evidence on whether her injury has affected her general activities and enjoyment of life, and I notice that obviously it has to a certain extent. She said she felt depressed and, because of the constant pain, she felt she required to be looked after constantly instead of looking after her husband and son. She now no longer goes out after work. Before the accident, she used to be, according to her, a sociable person.
8. These, coupled with the various pain and aches the Plaintiff suffers from, I consider the Plaintiff’s suffering and injuries put her at the lower end of the serious injuries category. And for the reason that the two joint experts’ assessment has failed to take into account the Plaintiff’s pain and suffering caused by the deep injury to her right cheek, and the unsightly scar on her face, I do not propose to make any reduction in my award of the PSLA of the Plaintiff because I have taken into account the degree of her discomfort; her permanent disability has been rated as 13% by the two doctors, not including the right cheek injury and the pain related to that. I feel that an appropriate award similar to the award in the case of *Yu Pun Yuen v Ng Kwok Man* awarded by Suffiad J to be appropriate. The Plaintiff in that case had 68 sessions of physiotherapy and a number of operations.
9. I consider the Plaintiff’s pain and suffering to be no less serious than the Plaintiff in that case. In fact, her pain and suffering and loss of amenities is more. Therefore, I award the sum of $450,000 under this head.
10. As to the item of loss of earnings and MPF, I accept the Plaintiff’s evidence that she had used up her own annual leave as part of her sick leave period, and therefore the loss of earnings since the accident should be calculated, as the Plaintiff’s counsel has put it, $7,269.15 with 4% interest of 48 months at $1,163.06.
11. As to the loss of earning capacity, it was because the Plaintiff has a considerate employer and supervisor that she was put on light duties soon after her sick leave which took place five months after the accident. It was because of her industry that she was able to maintain the same job. I am informed that she is still given lighter duties than others which do not require her to carry heavy garbage up the hill or climb the stairs. I am satisfied that her fear that she may lose her job when the economy is down or when there is a reduction of manpower in her present job is real. Therefore because of her disability, she does suffer a disadvantage in the job market.
12. I also accept that she would have to retire earlier than the normal retirement age which Dr Choi put at the age of 60. Dr Choi considered her loss of earning capacity together with the renal problem to be 12%. The renal problem constitutes 2% and the orthopaedic problem to be 10%, and this did not take into account the cheek injury which must have obvious effect on her employability because, to say the least, the cheek injury has affected the Plaintiff’s speech and her appearance.
13. In spite of the pre-existing condition of her neck, left knee and her cervical spine, she would no doubt have to retire at an earlier age. The knee impairment and the neck pain together, according to Dr Choi’s assessment, constituted 5% of the permanent impairment of the whole person. Even if the pre-existing condition of both areas of her anatomy has been taken into account, the reduction of loss of earning capacity should not be more than 2%. On top of that, one has to take into account the cheek injury. On that basis, I assess the loss of earning capacity of the $100,000 suggested by Mr Cheung to be reasonable.

Future Medical Expenses

1. There is no evidence from the Hospital Authority or the Nethersole Hospital as to what would be the annual fee for the Plaintiff’s renal analysis, the CT scan. It is not disputed that the Plaintiff continued to be followed up by the neurologist at the Nethersole Hospital. However, I have not seen any medical receipts from the Nethersole Hospital on the annual treatment.
2. On the other hand, I do not see why the Plaintiff should have to resort to the Hospital Authority for her treatment, and not receive private treatments. She has given the reason that she would have difficulty getting leave from her boss to seek the Hospital Authority treatments which would require her to wait in the queue. It is obvious to me that the Nethersole Hospital doctors have neglected the Plaintiff’s complaint of her right cheek. The constant pain and dripping of saliva whenever she spoke and ate have not been managed according to the medical reports I have been shown. Dr Choi did suggest consultation of a plastic surgeon. For some unknown reason, this has not been done. And because of this oversight, I am unable to make an award for such treatments for the complaints of the Plaintiff’s right cheek injury.
3. As to the renal problem, I award to the Plaintiff the sum of $6,000 per year to cover her future medical expenses. Dr Ku has suggested a follow-up of three years, an estimation for the resolution of the Plaintiff’s complaint. In total, the medical expenses in future come to $18,000.

The Special Damages

1. Special damages have been agreed at $17,348.70, interest at 4 per cent for 48 months, which comes to $2,775.79. In summary:

PSLA 450,000.00

Interest at 2% for 12 months 9,000.00

Loss of earnings and MPF 7,269.15

Interest at 4% for 48 months (2/8/2001 - 2/8/2005) 1,163.06

Loss of earning capacity 100,000.00

Special damages 17,348.70

Interest at 4% for 48 months (2/8/2001 - 2/8/2005) 3,775.79

Future medical expenses 18,000.00

Total: $605,556.71

1. Costs to the Plaintiff, to be taxed if not agreed, with certificate for counsel.
2. Leave to Plaintiff to take payment out of court.

# (H C Wong)

# District Court Judge

Mr Anthony Cheung, instructed by Messrs David Ravenscroft & Co., for the Plaintiff

Mrs J Hong, of Messrs Lau, Chan & Ko, for 1st and 2nd Defendants