## DCPI 807/2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 807 OF 2007

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##### BETWEEN

LI TING FAI Plaintiff

and

WOO CHI KEUNG Defendant

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##### Coram : Deputy District Judge K. Lo in Court

Dates of Hearing : 30th and 31st October 2007

Date of Assessment of Damages : 18th January 2008

### JUDGMENT

Background

1. This is the assessment of damages for personal injuries, arising out of a traffic accident at the midnight of 15th September 2005 when the taxi driven by the Plaintiff was hit from behind by another taxi driven by the Defendant and made subsequent to an interlocutory judgment on liability entered by consent against the Defendant on 15th December 2006.

Injuries and Treatment

1. This is a whiplash neck injury case.
2. The Plaintiff said at time of collision, he jerked abruptly hurting his neck and back.
3. The Plaintiff was sent to the Accident and Emergency Department of the Queen Mary Hospital where X-rays showed no fracture. He was discharged with analgesics and a protective neck collar on the same day.
4. He attended a private clinic the next day and on 20/9/05, he attended Sai Ying Pun Government Clinic.
5. He had also, on referral, received 23 sessions physiotherapy treatments between the period from 6/10/05 to 9/1/06.
6. He had subsequently received X-rays again and had MRI scan of the cervical spine due to persistent neck pain and dorsal numbness.
7. Between 16/5/06 and 15/8/06, the Plaintiff again received a total of 16 sessions of physiotherapy treatments.
8. Again, between 19/7/07 and 5/10/07, he received additional 10 sessions of physiotherapy treatments.
9. The second and third set of physiotherapy treatments were given to the Plaintiff after he complained.
10. The Plaintiff was granted sick leave for the following periods:

16/9/2005 to 6/10/2005 (Total of 6 sick leave certificates)

18/10/2005 to 20/10/2005

28/10/2005 to 30/10/2005

11/11/2005 to 17/11/2005 (Total of 2 sick leave certificates)

22/11/2005 to 25/11/2005

28/11/2005 to 1/12/2005

6/12/2005 to 8/12/2005

13/12/2005 to 15/12/2005

21/12/2005 to 23/12/2005

29/12/2005 to 31/12/2005

3/1/2006 to 5/1/2006

10/1/2006 to 12/1/2006

18/1/2006 to 20/1/2006

24/1/2006 to 26/1/2006

2/2/2006 to 8/2/2006

16/2/2006 to 18/2/2006

20/2/2006 to 26/2/2006

4/4/2006 to 21/4/2006

22/4/2006 to 4/7/2006 (Total of 4 sick leave certificates)

1. According to the medical report of Dr. Jenny Wong of Sai Ying Pun Clinic, the Plaintiff first attended the clinic on 20/9/05, presented with right shoulder pain, neck pain and right 4th, 5th finger numbness. Neck X-ray revealed degenerative changes only.
2. Physical examination showed right paraspinal muscular tenderness and there was no muscle weakness. The Plaintiff was treated for muscle sprain and was referred to physiotherapy department.
3. The report says that the Plaintiff returned on 23/9/05 and complained of neck pain and was given short course of analgesics.
4. The Plaintiff later returned on 18/10/05, 28/10/05 and 15/11/05. He also attended physiotherapy treatments several times but he said pain persisted and there was no improvement. There was no neurological deficits and movement of the neck was normal.
5. Again, on 6/12/05, 13/12/05, 29/12/05 and 3/1/06, the Plaintiff returned to Sai Ying Pun Clinic and made similar complaints of neck pain and numbness.
6. By 10/1/06, the Plaintiff had finished the first course of physiotherapy. He said his neck pain was much better but the numbness did not improve.
7. Later, the Plaintiff attended the clinic on 24/1/06, 2/2/06, 20/2/06 and 21/3/06 and presented with persistent numbness over his right upper back, neck pain, on and off right arm numbness and increasing left shoulder pain after prolonged driving.
8. Dr. Lam, a private practitioner said the Plaintiff consulted him on 17/9/05 and complained of neck and upper back pain. The Plaintiff complained pain was worse with movement and that it affected his sleep.
9. The Plaintiff also complained of numbness of right upper limb.
10. On follow up on 24/9/05, the Plaintiff complained of persistent neck pain and numbness of right upper limb and the upper back. He was admitted to St. Paul’s Hospital on 28/9/05 and magnetic resonance imaging of the cervical spine was done which showed no abnormality. X-ray of the thoracic and lumbo-sacral spine showed incomplete right hemivertebra of T6 causing scoliosis convex to the left. He received physiotherapy treatment and was discharged on 29/9/05.
11. In fact, in January 2006 after the Plaintiff had completed his first course of physiotherapy, his neck had full range of movement. He complained of mild tenderness on right side of C2 – C6, paraesthesia at the right scapula. He was reported to have overall 50 – 60% subjective impairment.
12. Dr. K. P. Chan, the orthopaedic expert of the Plaintiff in his report dated 16/9/06 said the Plaintiff had neck pain and dorsal numbness, the same being aggravated by turning the head or holding something up with right hand. Sometimes there were paraesthesia down the right arm to involve the hand.
13. When he tried to use the left hand for steering in order to lessen the strain, it resulted in pain at the left shoulder.
14. The Plaintiff was said to suffer from depression, insomnia and worsening of his hypersensitivity status with easy and frequent occurrence of generalized and extensive rashes. The depression surfaced after the prolonged ‘on and off work’, sick leave and treatment. Dr. Chan said the Plaintiff needed regular administration of anti-depressant medication.
15. He also said the Plaintiff had trouble sleep, occurring 3 to 4 nights per week, that the Plaintiff was wakened by pain and numbness.
16. It was also said his hypersensitivity problem started about one year prior to the accident from unknown cause. Since the accident, this status worsened, more easily provoked and occurring more often.
17. The Plaintiff was diagnosed by Dr. Chan to have a whiplash injury to the neck resulting in neck pain and stiffness.
18. Dr. Chan assessed the Plaintiff to suffer 8% for the neck symptoms and further 2% for impairment to annoying dorsal weakness and the worsening of his hypersensitivity, making a total of 10%.
19. In this case, the Plaintiff had sick leave on and off until 4/7/06 and thereafter in June and July 2007.
20. The Plaintiff had received a total of 48 sessions of physiotherapy treatments.
21. It was said as the Plaintiff still had this neck pain 2 years after the accident, the condition is permanent and the Plaintiff has to live with the neck pain and paraesthesia for the rest of his life.
22. The Plaintiff said he had no such problem before the accident.
23. The physiotherapy report of the Plaintiff authored by senior physiotherapist, Joseph Chiu of Queen Mary Hospital dated 12/4/06 stated that after the Plaintiff finished the first set of physiotherapy treatment on 5 January 2006, he did not further complain of neck pain and there was full range of movement for the neck.
24. Dr. Gardian Fong, specialist in Neurology was consulted by the Plaintiff for expert opinion, report of whom however was not made available to this Court.
25. The Plaintiff was also referred to orthopaedic clinic of Queen Mary Hospital in January 2006 but he failed to fix an appointment.
26. According to Dr. K.C. Lam, orthopaedic specialist for the Defendant, at time of interview i.e. 5/2/07, the Plaintiff complained of intermittent neck pain, the same being provoked by prolonged driving. There was also right little finger numbness provoked by prolonged flexion of elbow and right mid-back numbness on prolonged sitting.
27. There was no paraspinal tenderness or muscle spasm and no muscle wasting. Tinel’s sign was positive on tapping of the ulnar nerve behind the elbow.
28. Neck movement was said to be fair.

Assessment of medical evidence

1. Dr. K.P. Chan, the orthopaedic surgeon of the Plaintiff examined and assessed the Plaintiff on 13/9/06, i.e. 12 months after the accident.
2. He said the Plaintiff suffered whiplash injury to the neck resulting in neck pain and stiffness. He also suffered depression, trouble sleep, cognitive and behavioral problems as a result.
3. Dr. Chan said if those symptoms did not subside within 3 to 6 months after the accident, one would expect the Plaintiff to have such symptoms for rest of his life and chances of good and lasting recovery is slim.
4. He said the Plaintiff need psychotherapy and psychosocial supports.
5. He further said although the Plaintiff would return to his work, he needs adaptations and adjustments, such as more relative rest, practice of stretching and after remedial exercises.
6. He suggested more aggressive orthopaedic treatments such as hospitalization for continuous neck traction for a period of 2 weeks together with analgesics and anti-inflammatory medications including steroid injections.
7. There is no evidence before the court that the Plaintiff did heed to this advice and had sought for such orthopaedic treatments subsequent to such report of Dr. Chan.
8. Dr. Chan said as a result of symptoms of neck pain and development of psychiatric illness, clinical findings of tenderness, muscle spasm, asymmetrical painful restriction of neck motion and non-verifiable radiculopathy, X ray and MRI scan evidence of protective muscle spasms, numbness and worsening hypersensitivity, the Plaintiff should have 10% impairment of the whole person.
9. Dr. K.C. Lam interviewed and assessed the Plaintiff on 5/2/07, i.e. 16 months after the accident.
10. Dr. Lam said comparing the conditions of the Plaintiff as found by Dr. K. P. Chan (who assessed the Plaintiff on 13/9/06, i.e. 12 months after the accident), the neck symptoms of the Plaintiff was less, area of tenderness was different and the range of neck motion was much better.
11. Dr. Lam opined that the numbness of the right little finger (in the absence of objective abnormality of the upper limbs) might be due to ulnar neuritis caused by prolonged elbow flexion, commonly found in professional drivers, the cause of which is unrelated to the accident.
12. Dr. Lam also said that the mid-back numbness on prolonged sitting complained of by the Plaintiff is likely to be related to the intercostal nerve pathology as a result of the congenital deformity i.e. thoracic scoliosis.
13. Dr. Lam assessed the case to be a mild whiplash injury of the neck involving soft tissues only. There is no bony damage or radiculopathy due to neck injury. No further treatment is required.
14. Dr. Lam said the Plaintiff could return to his previous job as a taxi driver in full capacity.
15. He also opines that there is no hindrance for the Plaintiff to return to his social and recreation activities or perform any sort of domestic duties.
16. Dr. Lam considered the sick leave from 16/9/05 to 4/7/06 unreasonably long. He said that sick leave of 3 to 6 weeks in this case would be adequate for him to resume as a taxi driver and that there is no need to wait for all symptoms to subside before returning to the job.
17. He said in this case, there is no significant clinical findings, no muscle guarding, no neurological impairment, no significant loss of motion segment integrity and no indication of impairment related to injury or illness, no fractures, there is no impairment of the whole person.
18. In this case, the assessment by Mr. K.C. Lam compared to that of Dr. Chan is more updated.
19. I must say the objective medical findings clearly demonstrated that this is not a serious case of whiplash injury of the neck.
20. Although the sick leave given to the Plaintiff was very long, one could see that most of the sick leave certificates given to the Plaintiff on each of these occasions covered only 3 days. It meant that the attending doctors were of the view that 3 days was the appropriate sick leave for the Plaintiff on that occasion.
21. The Plaintiff had been consulting about 13 various doctors at Sai Ying Pun Clinic, private medical practitioner, including orthopaedic surgeons, gynaecologist, neurologist, etc. each time obtaining sick leave certificates.
22. In fact, he admitted in Court that he went to see the doctor for sick leave certificates. Of course, he also explained that the doctor at Sai Ying Pun Clinic advised that he could always return for consultation should he feel pain.
23. When cross-examined why the Plaintiff said he still had neck pain when he had previously told the physiotherapist after he finished the first set of physiotherapist treatments early in January 2006 that he did not further have neck pain, the Plaintiff explained the neck pain relapsed after prolonged driving.
24. However uncomfortable and serious the after effect of the accident, it is a fact that the Plaintiff did not use reasonable diligence to seek consultation from orthopaedic surgeon in Queen Mary Hospital or elsewhere, despite referral given. He did not queue for such appointment even up till trial. He explained that the doctor, whilst giving him a referral letter to see the orthopaedic surgeon told him that the same was really useless. This Court did not accept this explanation.
25. The Plaintiff was not found to be a reliable witness by this Court.
26. In his Statement of Damages, the Plaintiff asked for pre-trial loss of earning covering period starting from 16/9/05 i.e. date of accident up to 4/7/06 as if there were no income during the period.
27. In Paragraph 18 of the Statement of Damages, the Plaintiff said he resumed work as taxi driver on 5/7/06, i.e. after the sick leave periods.
28. In Court, he changed his evidence and said in fact he worked between intermittent sick leave given to him, even prior to 5/7/06 but he says because he could only work short time, there was actually no gain as the income derived was not enough to cover the overheads.
29. However, as early as 5 January 2006 after he finished the first set of physiotherapy treatments, the Plaintiff had informed Joseph Chiu, the senior physiotherapist of Queen Mary Hospital that the symptoms was provoked after prolonged driving. This clearly indicated he had prolonged driving before January 2006.
30. Dr. Jenny Wong’s report dated 30/3/06 said during consultation between January to March 2006, the Plaintiff complained of aggravating medical conditions when there was prolonged driving. This again contradicted what he said in Court.
31. In his Statement of Damages, the Plaintiff said from August 2006, he worked 7 hours instead of the normal 11 hours before the accident.
32. Nevertheless in the report of Dr. K.P. Chan, his own orthopaedic expert, it stated that the Plaintiff told Dr. Chan that he was able to resume “near full” duty as a taxi driver since August 2006. This Court would have thought 7 hours compared to a normal shift of 11 hours before the accident would not be described as ‘near full’.
33. The same report also stated that before the assessment by Dr. Chan, i.e. in September 2006, there was “on and off” work for about 10 months, it meant therefore that the Plaintiff must have resumed driving in October/November 2005.
34. Furthermore, although the Plaintiff said he had depressions, he admitted in Court that he only had medications for depression for 1 month and had well before the assessment by Dr. Lam ceased taking such medication. This again contradicts what he said in his witness statements in July 2007.
35. The Plaintiff clearly is neither credible nor reliable.
36. Both experts said the Plaintiff could return to his work as a taxi driver. Dr. Lam says he can work as a taxi driver in full capacity as before.
37. On evidence, this Court finds in fact the Plaintiff was able and did return to work as taxi driver shortly after the accident, although this Court is at a loss as to exactly when.
38. Whilst I accept that there is residual neck pain, I do not find any other symptoms complained of, if existed, attributable to the accident.
39. Dr. Chan had acknowledged that the cause for hypersensitivity of the Plaintiff is unknown, there is also no evidence that worsening of the same is attributable to the accident.
40. The extent of injury as found by the Court is the basis upon which the Court made its assessment.
41. As said earlier, however serious the Plaintiff says the after effect of this accident, it is a fact that he did not seek an appointment to consult any orthopaedic surgeon after referral was made and the excuse he gave was not accepted by the Court. It is contrary to any logic that a doctor would say so and yet making the referral.
42. As this Court had pointed out earlier, most doctor had chosen to give the Plaintiff only 3 days’ sick leave instead of a sick leave of a substantial period.
43. I accept Dr. Lam’s opinion that 3 to 6 weeks is the reasonable sick leave in this case.
44. In any event, this Court finds that the Plaintiff had returned to work shortly after the accident.
45. As Dr. Lam has said this is a mild case of whiplash neck injury affecting soft tissue only.

Pain, Suffering and Loss of Amenities (“PSLA”)

1. The Plaintiff was born on 23 May 1970 and was 35 years old at time of accident. At trial, he is aged 37 years old.
2. He claims $360,000 under the need.
3. As I prefer the evidence of Dr. Lam, the only after effect of the accident was the residual neck pain to the Plaintiff.
4. Accordingly, the case of *Fung Yuet Hing* DCPI 1706/2005 is not useful here. In that case, the Plaintiff suffered whiplash injury to the neck, contusion to the forehead and face, and possible contusion of the anterior left shin. There was residual neck pain and the Plaintiff was advised to practise regular neck and postural exercise and pay attention to her neck at work and at leisure. She received 11 sessions of physiotherapy treatments.
5. She was given $160,000 under this heading.
6. In the *Limbu Ramesh* case (28 April 2006, HCPI 1192 of 2005) quoted in the judgment of *Fung* case, the Plaintiff was struck the head by an object and was knocked unconscious for 2 hours. He was given intermittent sick leave of 95 days. He suffered post-concussional syndrome with symptoms of headaches and dizziness. He suffered soft tissue injuries and as a result, there is a loss of lordotic curvature of his cervical spine. There is also mild neck pain subsisting and there is limit to elevation of his head through pain. His award for PSLA was $250,000.
7. The *Leung Siu Ping* case (HCPI No. 195 of 2000 14 February 2001, Suffiad J.) was also considered in the *Fung* case, in that case, the Plaintiff suffered whiplash injury with deep lacerated wound on her right forehead and 2 small lacerated wounds over her mid-forehead. She had a swollen eye and was unable to open her eyelids due to periorbital haematoma. She had residual neck pain and muscle spasm from the whiplash injury. He was treated in hospital for 7 days and later had chiropractic treatments.
8. She was awarded $200,000.
9. In the case of *Jhuremalani v. Fajada* DCPI No. 134 of 2001 (9th May 2002 Carlson J.), cited to this Court, the Plaintiff suffered whiplash injury with soft tissue injury. He used to be a leading amateur tennis player but after the accident, he could only play once a week or less. He also had a dull, aching neck pain on rotation to the right, disturbed sleep, stiffness of neck rising in the morning. The condition was permanent. He was awarded $200,000 under this head.
10. That case clearly is a case which was more serious than the present case.
11. Again, in the case of *Tai Yuk Wong* DCPI 1405/2005 (8 March 2006) referred to this Court, the Plaintiff suffered whiplash neck injury, again with soft tissue injury. He had persistent neck pain and weakness on his upper limbs for about a year. He has been granted sick leave for 2 years. He has given up his skiing activity as a result of his injuries. The neck pain and upper limb numbness of the Plaintiff are permanent.
12. $150,000 was awarded to him under this heading.
13. The pain, suffering and loss of amenities in the above cases were all more serious than the present case.
14. Counsel for the Defendant referred the Court to the case of *Wong Kin Hung* (DCPI 1223/2006 Deputy Judge A.B. bin Wahab) where the Court relied on the case of *Chan Siu Youn v. Ng Kam Man* and others HCPI 533/1999.
15. The Plaintiff there had a sprained neck injury. He was hospitalized the same day and treated with physiotherapy, analgesic and neck collar. He was discharged 2 days later. He received physiotherapy for more than 3 months but there was no complete recovery. The Plaintiff suffered intermittent residual neck pain. It is also difficult for him to perform long hours of overhead ceiling work done to neck pain on prolonged neck extension, he was awarded $100,000.
16. I find in the present case the sum of $90,000 an appropriate award under the heading.

Pre-trial Loss of Earning

1. Although the Plaintiff claims he had been working at time of accident earning $13,000 per month nevertheless he did not produce any documentary evidence to support this contention.
2. He said he never filed any tax return with the Inland Revenue Department.
3. He relied solely on his memory when he gave evidence. He did not keep any record of his earnings.
4. His evidence as to when he actually returned to work is not accepted by this Court.
5. Although Counsel for the Plaintiff did produce to this Court survey result done by Transport Department regarding income of an urban taxi driver as at May 2005 being $531 per shift, this could not assist the Court as the Court is not in a position to conclude how soon he did return to his job as taxi driver.
6. In the circumstances, although this Court accepts the opinion of Dr. Lam and finds sick leave of 3 to 6 weeks was adequate for this case, the Court are not able to assess the loss of income during the pre-trial period.
7. No award was therefore made under this heading.

Future Loss of Earnings

1. As I accept the opinion of Dr. Lam which said the Plaintiff could return to his job with full capacity, I do not make any award under this heading.

Loss of Earning Capacity

1. This Court does not find the Plaintiff, a self-employed taxi driver disadvantaged in the labour market and accordingly, no award was made under this heading.

Other Special Damages

1. The claim for $15,469 medical expenses, $550 travelling expenses and $2,000 for tonic food have been agreed, totalling $18,019.

The Award

1. The awards are:-
   1. Pain and suffering and loss of amenities of life : $90,000
   2. Medical and travelling expenses and tonic food $18,019
   3. Interest on pain and suffering and loss of amenities at 2% per annum from date of writ to date of judgment
   4. Interest on special damages at half judgment rate from date of accident to date of judgment
   5. Interests on the sum of $18,019 at judgment rate from date of judgment rate from date of judgment till date of full payment.
2. I also make an order nisi that costs of and incidental to the assessment be paid to the Plaintiff, the same to be taxed if not agreed. This costs order nisi to be made absolute on the expiration of 14 days from today with certificate for counsel.

# (K. Lo)

Deputy District Judge

Representation:

Mr. Raymond Lau, instructed by Messrs. Mike So, Joseph Lau & Co., for the Plaintiff

Mr. K.C.Chan, instructed by Messrs. Simon C.W.Yung & Co., for the Defendant