###### LA/RD/15310/2008 (CG 31)

###### DCPI 1051/2009

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1051 OF 2009

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##### BETWEEN

## LI YIU HUNG PHILIP Plaintiff

### and

#### MAN KING SUN Defendant

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Coram: H.H. Judge Chow in Court

Hearing dates: 14th & 15th September 2010

Date of handing down Judgment: 29th October 2010

Judgment

1. In this action, the Plaintiff claims against the Defendant for damages in respect of the injuries sustained by him in an accident (“the Accident”) which occurred on 28.7.2006.

The Plaintiff’s evidence

1. At about 5:30 p.m. on 28.7.2006, the Plaintiff, a senior police constable, was riding a police motorcycle “the Motorcycle”) on duty along the 2nd lane (from the left) of southbound Lai Chi Kok Road, which has 2 lanes in one direction, at about 50 kph. The Motorcycle had its blue blinking light and siren on. Upon approaching the junction (“the junction”) of Cedar Street, after passing a double-decker bus, he saw a light goods vehicle stopping behind the give-way lines at the junction. There was no other vehicle on Cedar Street. He proceeded ahead. When he reached the junction he saw the Defendant’s public light bus come out of Cedar Street into the junction at a high speed from his left without stopping behind the give-way lines, cross the slow lane (the first lane from the left) and go into his lane on Lai Chi Kok Road. The left turn indicator light of the Defendant’s public light bus was not on, and the Defendant was looking to his left. He immediately braked hard, but still the offside front of the Defendant’s public light bus hit the nearside front of the Motorcycle; it fell down and he was thrown onto the ground.
2. On 1.12.2006, the Defendant pleaded guilty to a charge of careless driving in connection with this Accident. He was convicted of the charge and was fined $2,000. Paragraph 2 of the Brief Facts of this case reads:-

“PW2 was a driver who witnessed the accident. At the time he was driving a goods van on Cedar Street. He slowed down on approach to the give-way marking, and saw the defendant’s public light bus overtook him on the right and drove out into the road junction directly.”

The Defendant must have admitted the Brief Facts before he was convicted. He drove out into the road junction without stopping behind the give-way marking. It is this manner of driving which caused the Accident.

1. The Defendant admits liability, but claims that there was contributory negligence on the part of the Plaintiff on the following grounds:-
2. Admittedly he was on his way to attend another traffic accident at the relevant time. So he must have been driving in a hurry; in fact he even had the siren on;
3. The Defendant had obstruction to his view by a bus in the 1st lane of Lai Chi Kok Road, but the Plaintiff was going along a straight line: the Plaintiff should have seen the public light bus easier than the Defendant saw the Motorcycle.

Regarding ground (a), the phrase “in a hurry” does not necessarily mean driving carelessly. Ground (b) does not show how the Plaintiff was negligent.

1. The Defence Counsel submits that the Plaintiff was driving too fast under the circumstances and failed to keep a proper look out for the traffic condition ahead, including the emerging traffic from junctions. He did not specify at what speed the Plaintiff was driving so that it can be concluded that he was driving too fast in the circumstances. There is no evidence to show how he failed to keep a proper look out for the traffic condition ahead. The allegation of contributory negligence is simply not supported by evidence.

Application for amendment

1. On the first day of the trial, the Plaintiff made an application for further amendments to the Plaintiff’s revised statement of damages by adding the following items to it:-
2. Pre-trial loss of driving allowance $24,206
3. Loss of congenial employment $120,000
4. Future loss of driving allowance $41,076

No explanation was given by the Plaintiff’s Counsel as to why the amendments were made at that stage. She told me that she had just obtained the brief on the previous day, obviously less than 24 hours before the trial. That may explain why she had to make the application without any support of any affirmation/affidavit.

1. The Defendant argues that the application being made in the course of the trial, if granted, the Defendant will inevitably have little or no time to react. If it had asked for an adjournment to have time to consider its position in order to challenge the evidence in support of the Plaintiff’s application, I certainly would have granted it. The application was made on 14.9.2010, and the case continued on the next day. The Defendant had sufficient time to consider its position. It did not ask for an adjournment to consider its position in relation to the amendment application. I simply cannot see how it will suffer any real prejudice. On the other hand, if I do not grant the application, the Plaintiff certainly would suffer prejudice because some issues in his case will not be looked into. Accordingly I allow the application.

Injuries and treatment

1. As a result of the Accident he was thrown off the Motorcycle and landed on his back. Subsequently he suffered injuries to his neck and back, right shoulder and hip. He was admitted to the Kwong Wah Hospital and hospitalized until 1.8.2006. He had right shoulder, hip and persistent back pain. He continued to have physiotherapy and occupational therapy. He has been attending orthopaedic follows-up. He has been referred for a further physiotherapy course later this year. He had to walk on a crutch for more than a year due to residual back and right hip pain. To ease the pain he constantly took painkillers and medicine.
2. Shortly after the Accident he had psychological and psychiatric treatments arranged by the police force, and since 20.9.2006, he has been attending the Yung Fung Shee Psychiatric Clinic regularly. He is on daily psychiatric medication two times a day. The medication causes side effects of fatique and loss of concentration. He could not sleep, and lost his appetite. His weight has reduced from 130 odd to 110 pounds.
3. Shortly after the Accident he developed bedwetting and sexual dysfunction. He has to wear diapers at night. He told the doctors about these problems. He was told that these problems might be caused by his psychological impairment. But no specific treatment was prescribed. After the Accident he has not had sex with his wife. He is worried and depressed about these problems. He has been referred to attend urological treatment for nocturnal inconvenience and sexual dysfunction scheduled for 2014.
4. The Defence Counsel submits that the orthopaedic experts stated that the Plaintiff’s alleged urinary leakage and constipation had no neurological basis and was not caused by his injury. The claim for adult diapers should therefore not be allowed on the basis that urinary leakage was not caused by the Accident”. The orthopaedic experts are not experts in neurology. There is no evidence from the two experts to show the connection between “associated neurological damage and urinary leakage and constipation”. It is difficult for me to accept their finding. On the other hand, he did not suffer from urinary leakage before the Accident. The urinary leakage occurred shortly after the Accident. It must be due to the Accident that he suffers from it.
5. On 9.1.2008 and 7.5.2008 he attended medical board assessments for the employees’ compensation claim. Permanent loss of earning capacity was assessed at 16%.
6. On 10.12.2009, he was examined by Dr. Law Wun Tong (for the Plaintiff) and Dr. David Tsai (for the Defendant). In their joint report dated 19.1.2010, Dr. Law comments that the Plaintiff has adjustment disorder with mixed anxiety and depressed mood caused by the Accident. Dr. Tsoi agreed with the diagnosis, but pointed out that health issues of hamily members and his son’s poor school performance were contributing stressors that prolonged his psychiatric condition.
7. The Plaintiff was jointly examined by Dr. Danny Tsoi Chi wah (for the Plaintiff) and Dr. Lam Kwong Chin (for the Defendant) on 22.1.2010. In their report dated 26.1.2010, as cited by the Defence Counsel, both experts stated the following comments:-

“58. We agree that in summary, Mr. Li may have residual back pain and right hip discomfort due to the accident, but the magnitude should be much less severe than what he has described and demonstrated.

59. We agree that the symptoms magnification is very likely a somatic manifestation related to the psychiatric illness.”

Their comments are supported by observations during the examination. I accept their comments.

Pain, suffering and loss of amenities (“PSLA”)

1. The Plaintiff has been working as a police officer since the age of 18. Before the Accident he was physically fit and active. But now he cannot do exercises, take his children out or help his wife to do household chores. He loses his temper easily. His marital relationship has deteriorated greatly.
2. He suffers from serious orthopaedic and psychiatric disabilities. Such disabilities have a great impact on him. In particular he has not had sexual life with his wife. He said in court that whenever attempts were made in this regard, his waist became painful, and he had to abandon the acts. This must be true. It is not known when the waist pain would disappear. For a man of 42 years old (at the time of the Accident) the loss of sexual life can hardly be compensated by money. I have considered the Plaintiff’s authorities No. 6 to 10. Item No. 10 is the case of *CMY v. Tam Siu Wing* [2008] 4 HKLRD 604. In this case, the Plaintiff sustained neck sprain in a traffic accident. She suffered from soft tissue sprain injuries to her neck and back, and contusion to left knee. She had mild physical trauma, and psychiatric problems later. She was awarded $400,000 for PSLA.
3. In the present case, the Plaintiff was thrown off from the Motorcycle, and he had to walk on a crutch for more than a year because of residual back and right hip pain. His inquiries are more serious than those suffered by the Plaintiff in *CMY v. Tam Siu Wing*. Furthermore there was no element of sexual dysfunction in that case. Therefore an award of $500,000 would be reasonable.
4. The injuries sustained by the Plaintiffs in the cases cited by Defence Counsel are too light as compared with those suffered by the Plaintiff in the present case. The circumstances of their sustaining injuries are different from the Plaintiff’s case. I would not adopt the Defendant’s authorities in assessing the award under PSLA.

Loss of earnings and MPF during sick leave

1. Form 5 shows his salary to be $22,058.25 per month for the first 12 months before the Accident, and $23,122 per month 12 months after the Accident. His evidence in court is that his pre-trial monthly earnings is about $24,000. Salary statements show $23,000 to $24,000. the pleaded figure of $23,000 in the Revised Statement of Damages is a reasonable figure. His sick leave is from 28.7.2006 to 14.3.2008. Hence his loss of earnings and MPF during the sick leave period is $470,925 ($23,000 x 1.05 x 19.5 months).

Loss of driving allowance

1. Before the Accident, he used to receive regular driving allowance in the sum of $489 per month. After the Accident he could not drive, and has been posted to do indoor clerical activities. As a result he lost the driving allowance. The pre-trial period is 49.5 months (28.7.2006 – 14.9.2010). Hence the loss of driving allowance for the pre-trial period is $24,206 ($489 x 49.5 months).
2. The loss of driving allowance for the post-trial period is $41,076 ($489 x 12 x 7 years). The total loss of driving allowance is $65,282 ($24,206 + $41,076).

Loss of earning capacity

1. Under this item, the Plaintiff’s Counsel made the following submissions:-

“In the Plaintiff’s evidence, there is a real and substantial risk that he will lose his present employment. Had it not been for the accident, he had plans to work in jobs requiring moderate strenuousness such as a full-time driver or security guard after the normal retirement age of 55. This is reasonable and should be accepted given he was a physically fit and well-trained traffic police officer. With the residual disabilities, his choice of work or chance of a second career is much restricted and reduced. He will be disadvantaged and will have difficulty finding and retaining employment. An award for loss of earning capacity is appropriate.”

If he had had plans to work in jobs requiring moderate strenuousness such as a full-time driver or security guard after the normal retirement age of 55, it would have been natural for him to reflect this in his witness statement or statement of damages. Accordingly this part of his evidence cannot be accepted. The amount of $200,000 claimed for this item of damages is premised on such “plans”. In January and July 2007, he attended two special medical board assessments arranged by the police. He was told recently by his superior that he may have to attend a special medical board assessment in the near future and he may be advised to take compulsory early retirement on medical grounds. He worries that he may lose his present employment. In my view, an amount of around 6 months’ salary under this head of claim would be reasonable. I make an award of $140,000 in this respect.

Loss of congenial employment

1. Sick leave was granted from the date of the Accident until 14.3.2008. He resumed work in April 2008. He was posted to do indoor clerical duties. He cannot carry a gun and other heavy accessories which weigh 20 to 30 pounds. He was looked down upon by his colleagues. He was reduced from a respectable police officer to a police officer doing indoor clerical work and is looked down upon by his colleagues. As a result of the Accident, the Plaintiff lost a job he enjoyed. It is reasonable to compensate him for loss of congenial employment. I make an award of $100,000 under this item of claim.

Miscellaneous expenses incurred

1. The Defence Counsel submits that the evidence regarding the claim of $30,000 which included expenses on painkillers and analgesic plasters is not acceptable because it is totally unsupported by documentary evidence. This is completely absent from his witness statement and thus cannot be allowed in as supplemental evidence. It is a matter of weight to be attached to his evidence. It must be truthful that he suffers pain in his waist. It would then be natural for him to buy painkillers and analgesic plasters to get relief from pain. In the absence of documentary evidence, I would make an award of $15,000 for this item.
2. He claims a total of $10,000 for travelling expenses. He attended about 50 various sessions for treatment. He spent $40, $80, $120 to $300 per round trip. The average figure for each round trip is $135 [($40 + $80 + $120 + $300) ÷ 4]. A lump sum of around $7,000 ($135 x 50) should be allowed.
3. He claims $30,000 for nourishing food. There is no documentary support for this item. There is no medical evidence to show that such nourishing food is necessary. I would only grant $12,000 under this item.
4. The total award granted for miscellaneous expenses is $34,000 ($15,000 + $7,000 + $12,000)

Summary of awards

1. (1) PSLA $500,000

(2) Loss of earnings and MPF during sick $470,925

leave

(3) Loss of driving allowance $65,282

(4) Loss of earning capacity $140,000

(5) Loss of congenial employment $100,000

(6) Miscellaneous expenses incurred $34,000

$1,310,207

Less employees’ compensation received — $665,321.35

$644,885.65

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1. I order that the Defendant do pay to the Plaintiff, within 14 days from today, the sum of $644,885.65, with interests thereon; interest at 2% p.a. on the sum of $500,000 from 31.3.2009 to 29.10.2010, and interest at judgment rate on $644,885.65 from 30.10.2010 until satisfaction.
2. The aggregate amount of pre-trial special damages is $529,131 ($470,925 + $24,206 + $34,000). These sums were already fully covered and satisfied by the employees’ compensation in the sum of $665,321.5. Therefore no interest is to be awarded on these sums.

Cost

1. I make an order nisi, to be made absolute in 14 days’ time, that the Defendant do pay costs of this action to the Plaintiff, to be taxed, if not agreed, with certificate for Counsel. The Plaintiff’s own costs to be taxed in accordance with Legal Aid Regulations.

(S. Chow)

District Judge

The Plaintiff : represented by Miss Phillis Loh, instructed by Messrs

Damien Shea & Co., Solicitors.

The Defendant: represented by Mr. Martin Wong, instructed by Messrs

Kenneth C.C. Man & Co., Solicitors.