DCPI 1121/2014

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1121 OF 2014

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BETWEEN

TONG YUK TAI Plaintiff

and

NEP HOLDINGS INTERNATIONAL (HK) LIMITED 1st Defendant

(Discontinued)

CHEW SOOI KUEN 2nd Defendant

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Before: Deputy District Judge D. Ho in Court (Open to Public)

Date of Hearing: 7-8 December 2015

Date of Judgment: 11 December 2015

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JUDGMENT

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1. The present personal injury claim of the plaintiff (“Tong”) arose from a road traffic accident on 11 June 2012 in which the vehicle driven by Tong and that driven by the 2nd defendant (“Chew”) collided with each other resulting in injury to Tong.
2. At the commencement of trial, Mr Brian Tsui, counsel for Chew confirmed that Chew conceded liability with quantum remaining in dispute. During closing submission, Mr Tsui further confirmed that Chew abandoned any claim of contributory negligence on Tong’s part. My only task here is therefore assessment of damages and it is only Tong’s evidence that matters for the present purposes.

*Tong’s case*

1. Tong was born on 27 June 1973 and aged 38 at the time of the Accident and is now 42. He was/is a majority owner of a shop selling, inter alia, second-hand prestigious watches. He also serves as a watch technician of the shop receiving a monthly salary.
2. On 11 June 2012 around 11:56 hours, Chew was driving along the outer lane of Fairview Park Boulevard towards Fairview Park while Tong was driving along the inner lane on Chew’s left rear position heading for the same direction.
3. On approaching Fairview Park Boulevard near the junction of Kam Pok Road and intending to drive onto the Visitor’s Path to the left of the entrance of Fairview Park, Chew steered to the left to pull into the inner lane from the outer lane during which manoeuvre the offside front Tong’s car bumped against the nearside rear of Chew’s car (“Accident”). As a result of the Accident, Tong sustained injury.
4. After the Accident, Tong attended the A&E Department of of Pok Oi Hospital and was found to have mild tenderness over the right side of his neck. He was treated and discharged.
5. As his neck pain became more serious, Tong sought treatment from his family doctor Dr Chan Ka Lung (“Dr Chan”) for about 25 times from 15 June 2012 to 31 May 2013. Physical examination of Tong by Dr Chan revealed right neck muscle swelling with tenderness. Tong was treated with analgesic, anti-inflammatory drug and hypnotic and discharged with sick leave. Tong had also consulted one Dr James Y.M. Wong on 30 July 2012 for neck pain.
6. Due to persistent neck pain, Tong was subsequently referred by Dr Chan to an orthopaedic surgeon Dr Au Kin Ming (“Dr Au”) for further treatment. Physical examination on 1 November 2012 revealed tenderness of right neck muscle and reduced range of motion of the neck. Tong also reported numbness of his right hand over the ulnar side. Conservative treatment with medication and physiotherapy were suggested and sick leave was granted. Reportedly, Tong further received physiotherapy treatment by an acquaintance for 10 times.
7. At the time he signed his witness statement in January 2015, Tong still complained of:
8. On-and-off neck pain, particularly during change of weather;
9. Neck pain being aggravated by bending the neck or the neck staying immobile for 15 minutes;
10. Right little finger numbness;
11. On-and-off pin prick sensation over right little finger; and
12. Increased neck pain when lifting heavy objects.
13. Tong said he would wake up 4 to 5 times a week due to neck pain and would need to stretch himself after prolonged immobility. He took 3 to 4 tablets of panadol daily to relieve pain. He was otherwise independent in his activities of daily living and could drive.
14. In cross-examination, Tong said by September 2012 he was still feeling pain but managed to return to work. When pain escalated subsequently, he sought treatment from Dr Chan again in late October 2012 when the doctor asked if anything had happened since his last follow-up that might have hurt his neck and opined that he might not have fully recovered from the previous injury. Tong admitted that apart from neck pain, he was also treated for anxiety and was prescribed with antidepressant drugs.
15. Between August 2012 and May 2013, Tong admitted, his pain, while fluctuating, had on the whole been decreasing. Apart from another period of sick leave for neck pain between May and June 2013, he managed to return to full-time work for the following 8 months. Since June 2013, he still experienced fluctuating neck pain but the same merely obliged him to take panadol and apply medicated plasters without going to the doctor.

*Medical evidence*

1. According to the joint medical report dated 8April 2015 of the parties’ orthopaedic experts, namely Dr Fu Wai Kee for Tong and Dr Arthur Chiang for Chew, Tong was found to have sustained soft tissue injury to the neck which should be due to the Accident and his current neck impairment would persist. Both experts agreed that:-
2. The clinical picture of Tong was compatible with the diagnosis of soft tissue injury of the neck due to the Accident;
3. Some degenerative changes in C4/5, C5/6 and C6/7 were observed in Tong’s X-ray;
4. The treatment received by Tong was appropriate;
5. Tong’s condition should be static and Tong had reached maximal medical improvement; and
6. Tong did not need further treatment except symptomatic one.
7. The major difference of the experts lies in their opinions on the effect of the degenerative changes.
8. Dr Fu’s view is that such kinds of degenerative changes are very common in the normal population of Tong’s age and most of them are asymptomatic or mildly symptomatic. There is no evidence to suggest such changes were symptomatic in Tong’s case before the Accident. The Accident is therefore not the cause of such degeneration and should have turned the asymptomatic degeneration into a symptomatic one.
9. The sick leave received by Tong came to 186 days. Dr Fu considers the same to be appropriate.
10. Dr Fu takes the view that Tong can go back to his original job with reduced efficiency due to neck impairment. He assesses Tong’s loss of earning capacity at 3%.
11. Dr Chiang, however, observes that Tong’s neck pain gradually decreased during the follow-ups between June and July 2012 and the neck pain was described as mostly resolved on 2 August 2012 with only neck muscle tightness in the afternoon. By 22 September 2012, Tong’s neck muscle spasm was found to have decreased and neck examination revealed nothing abnormal.
12. Dr Chiang therefore takes the view that the neck pain that arose from the Accident had likely resolved before the follow-up on 22 September 2012. The neck symptoms which Tong had noted for a few days before he saw Dr Chan again on 25 October 2012 “were less or unlikely to be directly related to” the Accident. The findings during the joint examination therefore “reflected more on the pre-existing degeneration rather than residues form the injury”.
13. Dr Chiang further takes the view that the new symptoms of numbness of the right hand Tong reported to Dr Au on 1 November 2012 were unlikely to be related to the injury caused by the Accident.
14. Dr Chiang concludes that given the time lapse since resolution of symptoms in mid to late September 2012, the symptoms of neck pain and right ulnar hand numbness that developed in October 2012 “were more likely to be arising from other events or aggravations that were not related to the injury, taking into consideration the presence of some degenerative changes in the cervical spine x-ray”. While accepting that the degenerative changes might be considered as not having regular symptoms before the Accident, “the presence of a decrease in endurance for prolonged stressful neck postures and in heavy lifting before the injury could not be ruled out”.
15. Dr Chiang opines that Tong should be able to return to his pre-injury job with his pre-injury capacity limited by the pre-existing degeneration. He assesses Tong’s loss of earning capacity at 1%.
16. Given his view that Tong’s symptoms arising from the Accident should have resolved by mid to late September 2012, Dr Chiang takes the view that sick leave required for recovery from the injury caused by the Accident should be limited to those given before mid to late September 2012.

*Role of pre-existing degeneration*

1. As will be seen, my determination of this issue will have bearing on various items of quantum.
2. I should say at the outset that I find equivocal Dr Chiang’s conclusion that Tong’s symptoms that developed in October 2012 “were more likely to be arising from other events or aggravations that were not related to the injury, taking into consideration the presence of some degenerative changes in the cervical spine x-ray”.
3. It could be that Dr Chiang meant to say Tong’s symptoms could or would have come about in any event through vicissitudes of life given the pre-existing degenerative changes. If that be the case, however, Dr Chiang must have somewhat resiled from that position when he accepted that the degenerative changes “might be considered as *not having regular symptoms before the accident*” and opined that “the presence of a decrease in endurance for prolonged stressful neck postures and in heavy lifting before the injury *could not be ruled out*”. (Emphasis added)
4. In any event, the expert was unable to point to any other events or aggravations that could have taken place between mid to late September and late October 2012 giving rise to the subsequently developed symptoms, which were clearly not dissimilar to those caused by the Accident.
5. For one thing, according to Tong, he was not asked to provide details of his current employment during the joint examination and what he told the court was not told to the experts.
6. For another, from the details given by Tong during cross-examination, one can hardly find anything arduous in his job duties. Tong spent about 7 hours a week adjusting the length/size of bracelets and repairing second-hand Rolex or Patek Philippe watches and another 6 hours or so going out for sourcing purposes. The rest of the week would be spent on awaiting business and managing his shop. At no time was Tong asked if any events in his daily life other than the Accident had taken place during the time lapse and gave rise to the symptoms noted in late October 2012.
7. Tong might have accepted in cross-examination that the injury caused by the Accident ceased to have any negative impact on his performance and/or productivity as early as August 2012. That, however, is not inconsistent with his evidence that in the ensuing period he was still feeling neck pain but was otherwise able to go to work until late October 2012 when he again sought treatment for neck pain.
8. In his medical notes for the same period, Dr Chan had all along maintained the diagnosis of “Road traffic accident on 11/6/2012 with neck sprain injury” during Tong’s follow-ups for neck pain. Tong said, and I have no reason to disbelieve him, Dr Chan did ask if anything had happened since his last follow-up that might have hurt his neck before he opined that Tong might not have fully recovered from the injury caused by the Accident.
9. In light of the analysis above, I am unable to accept Dr Chiang’s view insofar as he attributed Tong’s symptoms as from late October 2012 to causes other than the Accident. In finding the sick leave granted to Tong as being appropriate, Dr Fu clearly has attributed the full length of Tong’s sick leave to the Accident. On balance, it is Dr Fu’s opinions that I prefer.
10. I shall proceed to assess damages due to Tong accordingly.

*PSLA*

1. Mr Jackson Poon, counsel for Tong relies on *Limbu Ramesh v Chu Fung Man* (HCPI 192/2005) unrep., 28 April 2006, *Choi Sun Hong v China Harbour Enterprise Constructions Ltd* *& Anor* (HCPI 1084/2007) unrep., 20 January 2010, and *Tso Chun Cheong v Mak Chi Ming* (DCPI 766/2007) unrep., 8 January 2008 to support Tong’s claim for PSLA at HK$250,000.
2. In *Limbu Ramesh*, the plaintiff was knocked unconscious for about 2 hours after the accident and hospitalised for 1 day. He was found to have post-concussion syndrome with mild headache and dizziness and limitation of elevation of the head.
3. In *Choi Sun Hong*, the plaintiff suffered from injury to the back and upper limbs with post-traumatic stress disorder.
4. In *Tso Chun Cheong*, the plaintiff’s neck pain radiated down to his back and had caused other symptoms to hands and arms. The plaintiff also had right leg numbness and weakness with drop foot.
5. Mr Tsui submits, and I agree, that Tong’s injury is less serious than those sustained by the plaintiffs in those 3 cases.
6. In contending for a much lower award, Mr Tsui refers me to *Fan Jian Hui v Chan Hak Man and Anor* (DCPI 2095/2008) unrep., 1 June 2009 and *Siu Leung Shang Peter v Chung Wai Ming* (HCPI 43/2006) unrep., 16 March 2007, both involving road traffic accidents.
7. In *Fan Jian Hui*, the court found the plaintiff to have suffered from tenderness over the neck and both lower legs, as well as minor head injury as a result of the road traffic accident. He was hospitalized for 4 days and had residual neck pain, reduced neck movement and blurred vision. He received 30 sessions of physiotherapy treatment between October 2007 and January 2008. The court awarded $60,000 for PSLA.
8. In *Siu Leung Shang Peter*, the plaintiff was found to have soft tissue injury to his neck with mild effect and no permanent disability was expected. There was no intervening clinical observation until 3 years later when no deformity of the neck was noted other than tenderness over the neck with muscle spasms over the paraspinal muscle of the neck and limitation of neck movement. X-rays revealed calcification in the anterior spinal ligaments between C4 and C7. The plaintiff was awarded $30,000 for PSLA.
9. Mr Tsui submits that the PSLA award in the present case should be $30,000**,** on the assumption that the present condition of Tong is not wholly attributable to the Accident itself.
10. With respect, I am not greatly assisted by the authorities cited by either counsel. Instead, I find it more helpful to refer to *Li Ting Fai v Woo Chi Keung* (DCPI 807/2007) unrep., 18 January 2008 in which the court referred to, inter alia, *Tai Yuk Wong v Chong Kwok Fung & Anor* (DCPI 1405/2005), unrep., 8 March 2006; and *Wong Kin Hung v Chan Wai Ming* (DCPI 1223/2006) unrep., 16 Feb 2007.
11. In *Li Ting Fai*, the plaintiff, aged 37, suffered whiplash injury to the neck resulting in neck pain and stiffness in a road traffic accident. X-rays showed no fracture and he was discharged from hospital with analgesics and a protective neck collar on the same day. He received about 48 sessions of physiotherapy due to persistent neck pain and dorsal numbness and was granted intermittent sick leave from September 2005 to July 2006. Neck X-ray revealed degenerative changes. There was no neurological deficit and movement of the neck was normal. Since early 2006, there were persistent numbness over the right upper back, neck pain, on and off right arm numbness and increasing left shoulder pain after prolonged driving. The plaintiff further suffered from depression, insomnia and worsening of pre-existing hypersensitivity problem and had to use antidepressant medication. The court awarded $90,000 for PSLA.
12. In *Tai Yuk Wong*, in awarding $150,000 for PSLA, the court made the following findings:

“ As a result of the accident, the plaintiff suffered whiplash injury to his muscle and soft tissue. He had persistent neck pain and weakness on his upper limbs for about a year. He has been granted sick leave for about 2 years. He has given up his skiing activity as a result of his injuries. According to the medical opinion of Dr. Lau, the residuary neck pain and upper limb numbness of the plaintiff are permanent. According to Dr. Cheung a subjective neck and shoulder pain of a mild nature remained with the plaintiff about a year and 4 months after the accident. Dr. Cheng gave no projected forecast as to when the plaintiff’s residuary pain would subside. I accept the plaintiff still had residuary mild neck and shoulder pain at the date of the assessment hearing. …… I consider an award of HK$150,000 appropriate for the pain, suffering and loss of amenity suffered by the plaintiff in the present case.”

1. In *Wong Kin Hung*, the plaintiff, aged 40, sustained a sprained neck injury when his taxi was hit by another car from behind causing his taxi to topple. He was hospitalized for a few days and was prescribed with physiotherapy, analgesics and a neck collar. He received physiotherapy for over 3 months but there remained intermittent residual neck pain. He had difficulty in performing long hours of overhead ceiling work due to neck pain after prolonged neck extension. He was awarded $70,000 for PSLA.
2. I find the present case similar to *Li Ting Fai* and *Wong Kin Hung*. Allowing for inflation over the years, I award Tong $120,000 under this head.

*Pre-trial loss of earnings & MPF*

1. Mr Tsui does not challenge the validity of the sick leave granted to Tong and merely disputes whether any part or the whole of the sick leave period is attributable to the Accident in reliance of Dr Chiang’s opinion. Mr Tse has kindly indicated that he would agree to Mr Poon’s calculation of Tong’s pre-trial loss of earnings in case I am not with him.
2. Tong took sick leave for a total of 186 days. With credit being given to the 21-day salary he received during sick leave, Tong is entitled to ($34,500/30 x 186 days) - ($34,500.00/30 days x 21 days) = $189,750.00.
3. His pre-trial loss in respect of MPF would be $189,750.00 x 5% = $9,487.50
4. The total award under this head therefore comes to ($189,750.00 + $9,487.50) = $199, 237.50.

*Pre-trial expenses*

1. Tong’s medical expenses are well documented and Mr Tsui would not dispute the same if this court finds the full length of Tong’s sick leave period to be appropriate. A sum of $9,760 is awarded to Tong accordingly.
2. Tong further claims a sum of $1,800 for travelling expenses and Mr Tsui would not dispute the same if the full length of sick leave is taken into account. The same is awarded to Tong accordingly.
3. Mr Tsui, however, takes issue with Tong’s original claim for tonic food at $15,000 even if the full length of his sick leave period is appropriate. At trial, Mr Poon fairly accepts that downward adjustment should be made in view of Tong’s inability to produce any receipts and now seeks an award of $8,000. In light of the sick leave period of Tong and having heard his testimony on the food supplements he has taken, I award him $8,000 for tonic food.

*Loss of earning capacity*

1. Mr Tsui submits, and I agree, that this claim of Tong should not be allowed as Tong fails to satisfy the two-stage test set out in *Moeliker v A. Reyrolle & Co Ltd* [1977] 1 WLR 132 when Tong, as a majority owner of the shop he works for, managed to earn the pre-injury level of salary for 8 consecutive months from June 2013 to January 2014 and the impact of the Accident ceased to have any effect on his performance as early as August 2012. In his closing submission, Mr Poon accepted the objection and did not pursue this claim.
2. No award is therefore made under this head.
3. In summary, damages due to Tong are assessed as thus:

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| PSLA | $120,000.00 |
| Loss of pre-trial earnings (including 5% MPF) | $199,237.50 |
| Loss of earning capacity | $0.00 |
| Pre-trial expenses | $19,560.00 |
| Total | $338,797.50 |

*Order*

1. I order that judgment be entered in Tong’s favour with damages assessed as aforesaid.
2. Chew is ordered to pay to Tong the sum of $338,797.50. There will be interest on damages for PSLA at 2% per annum from the date of writ (23 May 2014) until judgment and thereafter at judgment rate. Interest on special damages at 4% per annum shall run from the date of accident to the date of judgment and thereafter at judgment rate.
3. There be an order nisi that Chew do pay Tong his costs of this action, to be taxed if not agreed.

(D Ho)

Deputy District Judge

Mr Jackson Poon instructed by Huen & Partners, for the plaintiff

Mr Brian Tsui instructed by Lim & Lok, for the defendant