#### DCPI 1273/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1273 OF 2008

BETWEEN

MAK PO LING Plaintiff

and

YOUNG YAU YAU CECILIA Defendant

##### Coram: Deputy District Judge R. Yu in Court (Open to public)

Date of Hearing: 13 September 2010

Date of Delivery of Judgment: 13 September 2010

## J U D G M E N T

1. This is a medical negligence case.
2. The Plaintiff was a patient who consulted the Defendant, a registered dentist practising in Hong Kong. She was advised by the Defendant to have orthodontic treatment. After treatment, some problems entailed. As a result, the Plaintiff had to consult other dentists to improve her conditions.
3. She had also reported the matter to the Dental Council who had investigated into the matter.
4. The Plaintiff brings this action against the Defendant to recover her loss and damage.
5. At the very early stage of the proceeding, the Plaintiff failed to serve the pleadings on the Defendant. Application had been made to the District Court for substituted service against the Defendant, and by an order of Master Lo given on 28 April 2009, all proceeding herein shall be served on the Defendant by ordinary post and by leaving. That also include the service of all the proceeding up to today’s notice of hearing. Appropriate affirmation of service has been filed and I am satisfied that the Defendant has been properly served with these proceedings and on invitation of counsel I proceed with today’s application on ex parte basis.
6. And as background, on or about 22 June 2009, the Plaintiff had already obtained default judgment against the Defendant on liability. Accordingly, the only issue that comes before me this morning is to assess the damage.
7. There are basically three heads of claim. Firstly, for pain, suffering and loss of amenity; secondly, for the medical expenses that the Plaintiff has to incur in order to improve her dental condition; and thirdly, the costs for future medical expenses as advised by the medical expert.
8. On evidence, the Plaintiff has given evidence in court today. There is an expert evidence prepared by Dr David Tong and leave has been granted earlier on by the District Court Master for this medical report be adduced without calling the maker.
9. I now turn to consider the evidence before me. If I just start with the evidence of the Plaintiff. I refer to paragraph 4 of her witness statement which gives a background as how she come to be treated by the Defendant.
10. She said this: “In early 2004, I felt somewhat unsatisfied with my own orthodontic condition and, for this reason, I approached and consulted Dr Young in about April 2004. She told me that with her new technique, she could complete the orthodontic treatment to my satisfaction within a short time, if everything went as planned. I was rather impressed by what she said and I agreed to undertake the orthodontic treatment by paying her a sum of HK$26,480 on 23 April 2004. The actual orthodontic treatment began in June and ended in June 2005, when I began to have serious doubts about Dr Young’s competence to properly discharge her task, despite her repeated reassurance that the orthodontic treatment was in good progress. Three of my lower teeth were removed in the course of the orthodontic treatment. The lower left first bicuspid, (tooth 34), and the bridge pontic at tooth 45, (the lower right second bicuspid) were removed at the initial stage of the orthodontic treatment. The lower right first molar, (tooth 46) were later removed in March 2005.”
11. It is also helpful if I also refer a part of the report prepared by the Dental Council on the inquiry of this complaint. This gives a picture of the treatment that she received.
12. Paragraph 4 says that “the patient . . .”, referring to the Plaintiff, “. . . was a flight attendant. She felt that there was some abnormal arrangement for her teeth and consulted the Defendant in April 2004 to see whether she should receive orthodontic treatment. The Defendant told her that orthodontic treatment was required and suggested a unique method which could deal with her condition very quickly and could be completed in three to four months. The method was to retract the back teeth in initial stage so that no one would know that she was under orthodontic treatment, thus reducing the period with brackets on the front teeth to only two to three months. The patient paid the full amount of $26,480 for the treatment on 23 April 2004 as a discount was offered for full payment. The Defendant explained that some teeth would be trimmed and pointed out that there were impact teeth.”
13. Pausing here, I notice whether the Plaintiff was told about impacted teeth by the Defendant was in dispute.
14. The report goes on: “Treatment began in June 2004 as the patient wished to take some wedding photographs before treatment. Initially a lower tooth, i.e., 34, was extracted and the bridge pontic 45 was removed. The upper teeth were trimmed to reduce the size. Then treatment continued and was reviewed on weekly to fortnightly basis until June 2005 at times as frequent as once every three to four days. After about six months the patient found that the teeth arrangement was strange and abnormal. Some were tilted lingerly. Vertical alignment of the teeth became uneven. She experienced pain and difficulty in speech and sometimes bite her own tongue. When the patient asked, the Defendant repeatedly assured her that those were normal movement of the teeth. As people around kept asking the patient why her teeth looked so strange, the patient became more worried and kept asking the Defendant for the reason. The Defendant extracted a third tooth, i.e., 46, in March 2005 and with assurance that the condition would improve after extraction. However, the situation deteriorated even further. The Defendant insisted the development was normal. The patient eventually consulted other dentists in June 2006 for a second opinion.”
15. We are not going to the cause of the problem but some information may be helpful to my consideration later.
16. Paragraph 7 of this report said this: “The crucial issue is whether the Defendant had a proper and effective treatment plan to deal with the patient’s dental condition.” Now, what is the particular dental condition of this patient is that she had six impacted teeth on her upper jaw. So, it appears from this report that there must be special planning and that is one of the reasons that created the complication.
17. If I move back to paragraph 5 of the Plaintiff’s witness statement, she complained about her pain and suffering during the whole period of the treatment. She said her upper teeth cannot fit comfortably with her lower teeth. She suffered from ulcer of gum, causing serious pain.
18. She become inarticulate and could not discharge her responsibility properly as a flight attendant, including but not limited to the making of announcements to passengers. She has suffered from a serious loss of appetite and weight. She has suffered from psychological disturbance and/or depression. And, as a result, her wedding banquet has to be cancelled and her unsatisfactory orthodontic condition has seriously lowered her self-esteem.
19. These matters will be taken into consideration in the assessment.
20. When she was not satisfied with the treatment by Dr Young, the Plaintiff consulted Dr David Leung. Dr Leung, in a letter to the Dental Council, set out his clinical finding about the condition of the Plaintiff. Again, he is not an expert herein but it is as a background picture,
21. He said this: “The molars were in class 2 relationship. The overject was 4 mm with 60 per cent of overbite. The upper midline was to the right and the lower midline was to the left. The upper dentition was protruded. The upper left second molar was outwardly placed in complete labial crossbite with the lower and second molar and the upper left third molar is partially eroded. All the lower molars were seriously tipped. The lower right first bicuspid was crowned and was distally rotated outward. The lower left first bicuspid, lower right second bicuspid and left right first molar were extracted. She has full-mouth fixed appliance. Her oral health condition was acceptable. Her profile was converse.”
22. In the report of Dr Tong, he has this to say about the remedial treatment given by Dr Leung: On 10 September 2005, Dr Leung took record on Miss Mak and reassessed the case. He discovered that there were a total of six impacted teeth which Miss Mak had never been previously informed by Dr Young.
23. The Defendant is not present today and the Plaintiff giving evidence. I accept her evidence that she was not informed by Dr Young of the impacted teeth. I come back to the report of Dr Tong and he said, Dr Leung come with a treatment plan for Miss Mak. He suggested impact number 15 and number 25 and the ... (indistinct) shall be surgically removed to prevent root damage to the adjacent teeth during orthodontic tooth movement. However, Miss Mak, the Plaintiff, declined on that suggestion.
24. Dr Leung attempted and did his best to realign both upper and lower arches, upright teeth, reduce the overject/overbite and correct the midlines. After 41 months from September 2005 to February 2009 of remedial treatment, he eventually removed Miss Mak’s orthodontic appliance and prescribed an upper removable retainer and a lower free fixed retainer for her.
25. So, from this report, we can understand that Dr Leung understand the position of the Plaintiff and has designed a plan which as I was told this morning by the Plaintiff herself, she now only needs to have a removable retainer and there was a lower free fixed retainer.
26. I would take her condition has significantly improved from those condition after the treatment by the Defendant.
27. Dr Tong, the expert in our case moved on to set out in his report the detail of his finding. I do not intend to read out all the 15 findings starting from page 4 of his report. I believe, Mr Hui, counsel for the Plaintiff, wish me to record that finding 11 said, “There were evidence of generalised root resorption” and finding 12, “Evidence of interproximal ... alveolar bone loss.”
28. The Plaintiff also told me this morning that because of three teeth being removed from her lower jaw, generally, the space between the remaining teeth are wider than usual. And Dr Tong in his report also has this to say about the current condition of the Plaintiff when she was examined by him:-
29. “Miss Mak still complains that her lower jaw slides before coming to a halt when biting down (due to unstable occlusion and prematureocclusal contact). Food get caught between teeth after eating (due to spacings between teeth), she is unable to chew up food effectively and efficiently (due to poor occlusion), her teeth are sensitive to hot and cold (due to gingival recession, exposing roots of the teeth) and she has to constantly restrain herself from showing her front teeth when laughing. When the chewing force is not evenly distributed among all the teeth with the presence of an unstable occlusion and premature occlusal contact, the longevity of the affected teeth will be decreased. If the dentition does not function effectively and efficiently chewing up food, it can potentially cause problem to the digestive system. Presence of spacing between teeth may lead to earlier deterioration of the periodontium (gum and bones) which supports the dentition. As a flight attendant, greeting people with a big, bright smile is very important. Miss Mak has lost her self-confidence with the present condition and appearance of her teeth.”
30. So, this basically sum up the position of the Plaintiff’s condition after the remedial treatment given to her by Dr Leung.
31. I shall now turn to consider the claim for damages. The first head of claim is for pain, suffering and loss of amenity. Mr Hui, counsel, referred me to a case before Master Mak, being DCPI 1504/2007. This is another case by another Plaintiff, Wong Yuen Mei against the same Defendant, Young Yau Yau, Cecilia. It appears that the factual background is very much similar because the Plaintiff there, Miss Wong, is also an airline attendant and she has been again treated by the same doctor for orthodontic treatment. Again, the treatment was unsuccessful.
32. If I could just turn to paragraph 8 of the judgment where the learned master set out the complaints, which it include six items. They are: (1) her upper teeth could not fit comfortably with her lower teeth; (2) she suffered from ulcer of gum, causing serious pain when she ate, drank or spoke; (3) she also suffered from headache, depression, anxiety and insomnia; (4) due to the above problems, she could not discharge her duties properly as a flight attendant, including but not limited to the making of announcements to passengers; (5) she could not chew food properly.  By reason thereof, she have to cut food into small pieces and swallow the food without chewing; (6) that caused her to suffer from serious loss of appetite and serious loss of weight.
33. So, it appears that the problem is very similar to that of the Plaintiff. And in that case, the learned master referred to a judgment by Deputy Judge Poon, as he then was, in the case ***Lee Hau Chi Mariam Teresa v. Chung Chee Keung Peter*** DCPI 1594/2006. In this case before Deputy Judge Poon, that was a case where the Plaintiff undergoes orthodontic treatment and maxillofacial treatment.
34. If I read from paragraph 3 it is recorded, “The 1st surgery was successfully performed. However, in the course of receiving the orthodontic treatment from the 1st Defendant, it was noticed that there was a shift of midline of the Plaintiff’s lower front teeth . . . Consequently, the Plaintiff received another maxillofacial surgery (‘the 2nd surgery’) followed by another period of orthodontic treatment.”
35. There was complaint against the Defendants which is a team of medical professionals and in coming to his conclusion, the Deputy Judge Poon only found that the Plaintiff would be entitled to damages for pain, suffering and loss of amenity in having to undergo the second surgery and the special damages in relation thereto.
36. There are other complaints which is related to the first surgery, in particular root resorption and mobility of teeth which Deputy Judge Poon did not find liability on the part of the Defendants. So, when assessing the loss of pain, suffering and loss of amenity Deputy Judge Poon concluded that it should be for $180,000. But as an alternative finding, Deputy Judge Poon did say that in the event that he was incorrect in ruling that the Plaintiff is not entitled to damages in respect of root resorption and mobility of teeth, then he would notionally find that the loss for pain, suffering and loss of amenity shall be $300,000.
37. Mr Hui who is also the counsel who appeared before Master Mak in the said case of DCPI 1504/2007 has invited the learned master to adopt the award of $300,000 in that he submitted, as I was told this morning, the damage of the Plaintiff in DCPI 1504/2007 is more than her suffering for remedial treatment. She also suffered from other agony which resulted from the initial treatment and accordingly, a sum higher than the $180,000 should be awarded. And I believe the learned master adopted Mr Hui’s submission and accordingly instead of using the award given by Deputy Judge Poon in the said case, he used the notional figure assessed by the Deputy Judge Poon of $300,000.
38. Now, in this case, Mr Hui invited me to award not only for $300,000 but instead he invited me to award a sum of $400,000. I believe the starting point will be a figure around $150,000 to $200,000 for the additional surgery that the Plaintiff has to undergo in this case. As I was told and which is not disputed that it was a treatment for over 41 months. While it can be imagined that it is not painful for the whole period of time, there must be a lot of inconvenience and I was told from time to time, she would have to return to the doctor for follow up treatment.
39. Taking all this into account and given a gap of time between the judgment of his Deputy Judge Poon which was given in 2007 and with regard to the position of the Plaintiff, I do not find $200,000 to be on the high side.
40. Mr Hui invited me to bear in mind that as it was recorded in the report of the expert, Dr Tong, the Plaintiff also suffered from general root resorption and there was evidence of interproximal ... (indistinct) bone loss. The loss under pain, suffering and loss of amenity should be higher. To that I agree but the question before me is, should I grant an award as high as he suggested at $400,000?
41. Even taking into account the fact that there have to be some future treatment for the Plaintiff, I do not consider that $400,000 is an appropriate award.
42. Taking all the matters into consideration, I found that I go in line with the judgment of Master Mak and I would award loss for pain, suffering and loss of amenity at the sum of $300,000 only.
43. I shall now turn to the other heads of claim. For the claim for special damages, I have no problem with the fees for Dr Lee Man-pui. While there is no receipts, it was confirmed by the Plaintiff and I accept her oral evidence that she did pay that $1,000. Definitely, she should be reimbursed for the treatment fees by Dr Leung and I allow that at $33,980.
44. For Dr Yung and Dr Chow, I have some hesitation with this. It is, as set out in the report, at the stage when Dr Leung carried out the examination and decided the remedial treatment, he noticed that she has teeth impacted in her upper jaw. This would create complication. As revealed from the report, they should have been checked and discovered by the Defendant when she prepared the initial treatment for the Plaintiff.
45. The question I have for myself is, is this part of the remedial treatment for the Plaintiff or is it just another treatment that she should have been advised by the Defendant to take up but may very well incur additional costs had the Plaintiff discovered that at that stage? I tend to think the latter, but I have to give some credit for Dr Leung to reassess the position so in the position I would disallow these two heads of claims but I would allow a notional figure of $1,500 for reasonable fees to be incurred for a doctor to be referred by Dr Leung to check out the position.
46. For the claim for special teeth floss and mini brushes, I have no problem with that. And although there was no exact record of her travelling to and from clinics, I accept the evidence of the Plaintiff and so I award the $2,000.
47. The more tricky part is a claim for dental fees paid to the Defendant and disbursement. In this particular case, while the Defendant’s medical treatment is not fully satisfactory, there seems to be suggestion from the reports, especially for upper jaws, there is some improvement.
48. But more important is that on a pleading point, this is not a head of special damages. This is not something additionally that she would have to pay as a result of the treatment given by the Defendant. What, in truth, is that this is a claim for restitution. If the Plaintiff has to claim a full refund of dental fees, then it should be so pleaded and not as special damages.
49. So, given it is pleaded as a special damages, I am afraid it is technically wrong. And secondly, while Mr Hui tried to persuade me that the service is totally a failure, but at least I have no expert evidence to suggest that it is a total failure. What this report only directed to the effect that the Defendant may not have sufficiently assessed the position and, thus, she should be liable to the Plaintiff for the cost of the remedial work in order to keep her teeth healthy.
50. So, if I have to award this to the Plaintiff, I tend to think this is a double benefit. So, in line of these two arguments both from pleading and on equity, I declined to grant the claim for reimbursement of the dental fees paid to the Defendant.
51. Now I move on to the last item, which is the claim for future treatment. Again, the Plaintiff relied on Dr Tong’s expert report.
52. It said at page 5 of his report: “In my view, there can be two options to rectify, or at least to alleviate, [the Plaintiff’s] existing problems as mentioned above. Depending on the Plaintiff’s treatment objectives, option 1 is to restore or to improve [the Plaintiff’s] existing masticatory functions only. Option 2 is to aim for an optimum result which is esthetics and functions.” I do not go into details of these two options, but either or, the doctor said the treatment price would range from $40,000 to $60,000. So, all in all, he is suggesting that some figure of $40,000 to $60,000 would be appropriate for her future treatment. Accordingly, the Plaintiff claim $60,000. Surely, a bit unfortunate that I do not have much details on the cost of this treatment but with the expert evidence, I agree with the expert that this is necessary and I would take a broad-brush approach to allow $50,000 for the future treatment.
53. And so that would end up with my ruling on the assessment.

(Discussion re interest and costs)

1. Award for PSLA shall have interest at 2% per annum, and award for special damages shall have interest at half judgment rate both from 13 June 2008 to today, and there be interest on all judgment sum at judgment rate, from today until payment. I summarily assessed the Plaintiff’s case at $115,000 to be paid by the Defendant.

(R. Yu)

Deputy District Judge

Mr George Hui, instructed by Messrs Siao, Wen and Leung, for the Plaintiff.

Defendant, absent.