## DCPI 1405/2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1405 OF 2005

(formerly HCPI No. 792 of 2004)

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##### BETWEEN

TAI YUK WONG Plaintiff

and

CHONG KWOK FUNG 1st Defendant

KERRY DISTRIBUTION(HONG KONG) 2nd Defendant

LIMITED

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Coram : Her Honour Judge Yuen in Court

Date of Hearing : 22 and 23 December 2005

Date of Handing Down of Judgment : 8 March 2006

J U D G M E N T

1. This is a personal injury compensation claim arising out of a road traffic accident.

### *The Traffic Accident*

2. The plaintiff was driving his private car along Ma On Shan Slip Road shortly before 6pm on 29 July 2003. The 1st defendant was driving a light goods vehicle behind the plaintiff and was heading towards the same direction. When the plaintiff slowed down his vehicle the 1st defendant failed to stop his vehicle in time and rammed into the rear of the plaintiff’s vehicle, causing damage to the plaintiff’s vehicle and injuries to the plaintiff.

3. On 4 March 2005 judgment on liability was entered in favour of the plaintiff against both defendants.

4. This is a hearing on assessment of damages.

### *The Plaintiff’s Injuries*

5. After the accident the plaintiff attended the Accident and Emergency Department of the Princes of Wales Hospital. He was treated and discharged on the same day.

6. The plaintiff felt pain on his neck, numbness and weakness on his right hand. The plaintiff subsequently sought treatments from the Chinese Medicine College of the Chinese University, Sai Kung Jockey Club clinic and the Tseung Kwan O Hospital.

7. On 21 August 2003 the plaintiff was admitted to the Orthopaedic ward of the Prince of Wales Hospital for a day for persistent neck pain and right hand numbness and weakness. Medical diagnosis on the day showed the plaintiff to have osteophytes at C-6. Medical examination confirmed tenderness over C7 to T-1 with weakness and numbness of the right upper limb. The plaintiff was given conservative treatment and was discharged the next day on 22 August 2003.

8. The plaintiff further consulted Dr. Danny W.H. Lee, a private general surgeon, on 28 August 2003. On the same day, magnetic resonance imaging (MRI) was done at St. Teresa Hospital and the findings on the plaintiff were: “ A tiny bony spur is observed at the antero-inferior corner of the C-6 vertebral body. It might represent a small old avulsion fracture or ossified anterior longitudinal ligament. However, this probable avulsion fracture is unlikely to be recent in nature as no bone marrow oedema or prevertebral soft tissue thickening is associated….. the lesion is probably not related to recent injury as no bone marrow oedema or prevertebral soft tissue swelling is associated. No prolapsed intervertebral disc, cord compression or nerve root impingement is noted on present MR study. No cord oedema or myelomalacia is observed.”

9. The plaintiff was admitted into St. Teresa Hospital between 28 August 2003 and 29 August 2003, on 3 December 2003, between 1 June 2004 and 4 June 2004 as well as between 9 August 2004 and 11 August 2004.

10. The plaintiff received physiotherapy treatments from St. Teresa Hospital and Tseung Kwan O Hospital. He also received regular acupuncture treatment at the Chinese University.

11. On 20 May 2004, about 10 months after the accident, the plaintiff attended Dr. Lau Hoi Kuen, for medical examination. On the day of his examination the plaintiff was wearing a soft neck collar. Dr. Lau found the plaintiff to be walking in a normal manner. Dr. Lau found no swelling nor deformity on the plaintiff’s neck. The plaintiff exhibited no muscle spasm. Nevertheless tenderness was diagnosed over the whole length of the plaintiff’s cervical spine, the whole length of his thoracic spine, all the muscles on his neck as well as the thoracic paraspinal muscles. There was also some decreased range of motion on the plaintiff’s neck for flexion, lateral flexion, extension and rotational motion.

12. Dr. Lau found the jerking reaction of the plaintiff on both of his upper limb to be normal. Dr. Lau found mild motor weaknesses on the two upper limbs of the plaintiff on account of increasing neck pain with exertion. There was a decreased touch sensation on both of his upper limbs. When shoulder compression test was carried out, Dr. Lau found the test brought upon increased pain on the plaintiff’s neck, shoulders and high back.

13. From the history of the events and the symptoms displayed by the plaintiff’s symptoms, Dr. Lau diagnosed the plaintiff to be suffering from whiplash injury in the form of a soft tissue injury of muscles and ligaments to the plaintiff’s neck. According to Dr. Lau, both the MRI results and the physical findings of the plaintiff showed no evidence of nerve root compression to account for the plaintiff’s complaint of numbness and weakness of his upper limbs. Dr. Lau believed the residual pain in the plaintiff’s neck and the numbness of his upper limbs are permanent. In Dr. Lau’s estimation the plaintiff have suffered a 5 % permanent impairment of his whole person as a result of his injuries in the traffic accident. Dr. Lau also estimated the plaintiff’s loss of earning capacity to be roughly 8%. Dr. Lau gave no explanation for the cause of numbness of the plaintiff’s upper limbs.

14. On 23 November 2004, about a year and 4 months after the accident, Dr. Cheng, an Orthopaedic Specialist, examined the plaintiff on behalf of the defendants. At the time of examination Dr. Cheng found the plaintiff to have full range of movement of his neck, with a diffuse tenderness remaining over the back of the plaintiff’s neck. Dr. Cheng formed the opinion that there was no objective sign to suggest any bony injury or neurological deficit and the plaintiff suffered no permanent injury. A subjective sensation of neck and shoulder pain of a mild nature remained in the plaintiff. Dr. Cheng accepted it is possible for the plaintiff to have some residuary aches and pains after the sprain to his neck in the accident and assessed the plaintiff to have sustained a 2% impairment of his whole person. Dr. Cheng gave no forecast as to when the residual aches and pain of the plaintiff would subside.

15. Neither Dr. Lau nor Dr. Cheng was called as a witness in court. In Dr. Lau’s opinion the residual pain in the plaintiff’s neck and the numbness on his upper limbs are permanent in nature. Dr. Cheng though formed the opinion that the plaintiff suffered no bony injury nor neurological deficit, accepted a subjective sensation of pain of a mild nature remained in the plaintiff’s neck and shoulder. Both Dr. Lau and Dr. Cheng were of the opinion that the plaintiff could resume his pre-accident occupation.

16. The plaintiff has been granted sick leave for the following periods:-

**2003** 30/7/03 – 13/8/03

21/8/03 – 31/12/03

**2004** 1/1/04 – 7/4/04

15/4/04 – 17/4/04

22/4/04 – 31/12/04

**2005** 1/1/05 – 17/8/05

17. At this assessment hearing the plaintiff described he was still suffering from neck and shoulder pain. Numbness remained in both of his forearms. His condition worsened when the weather was cold. When his pain aggravated he might not be able to sleep.

18. The tape recording of the plaintiff in November 2004 and May 2005 showed the plaintiff to have managed his daily affairs rather smoothly. A neck collar was no longer required.

***Issues in Dispute***

19. The major issues in dispute between the plaintiff and the

defendant are: (i) whether the plaintiff has fully recovered from the traffic accident; and (ii) whether the injuries in the accident were the reasons for the non-renewal of the plaintiff’s employment with the Lands Department as a Land Executive.

***The Plaintiff’s Employment***

20. The plaintiff was born on 12 June 1970 and was aged 33 at the time of the accident. He was a graduate from the Chinese University of Hong Kong in 1994 with a bachelor degree in Science. On 29 December 1997 he was offered an 18 months employment contract as a Land Executive with the Lands Department of the Hong Kong Government. He commenced his Land Executive work in March of 1998.

21. His contract of employment was renewed periodically. He remained with the Land Control Team of the Lands Department from the commencement of his employment until after the accident when he was posted to the Lease Enforcement team.

22. On 30 November 2000 the plaintiff’s Land executive employment contract was extended for 206 days from 8 March 2001 to 30 September 2001.

23. On 19 June 2002 the plaintiff was served with a notice of non-renewal of his contract of employment for the reason that it had not been possible to identify an established post in the Land Executive grade which could be made available to accommodate the plaintiff beyond 30

September 2002.

24. On 19 September 2002 the plaintiff was notified by the Lands Department that his contract of employment would be extended for a period of 6 months from 1 October 2002 to 31 March 2003.

25. On 19 March 2003 the plaintiff was given another extension of 263 days (from 1.4.03 to 19.12.2003) of his employment contract by the Lands Department.

26. On 22 October 2003 the plaintiff was given a further extension and his contract of employment was extended for another 103 days from 20 December 2003 to 31 March 2004.

27. On 30 December 2003 Lands Department decided not to further extend nor renew the plaintiff’s employment beyond 31 March 2004.

28. The plaintiff’s work performance had been graded as satisfactory and average with some deficiencies in organization and management skill when he remained with the Land Control Team. In his staff report of 21 March 2002 his superior gave him no grading for his suitability to take up higher job responsibility or for promotion to a higher rank, with the reason that the plaintiff needed further exposure to other duties in land work.

29. The appraising officer, in the staff report of the plaintiff of 5 February 2003, recommended extension of the plaintiff’s employment contract. The concluding paragraph of his comments read: “I consider Mr. Tai a very good Land Executive and provides a very good support to me. I therefore recommend extending his employment contract for continuing his service in our Department.”

30. The plaintiff’s sick leave periods suggested the plaintiff to have been working only for 1 week in the month of August 2003 and for a period of 2 weeks in the month of April in 2004. The plaintiff’s absence from his work gave his supervisor no chance to assess his suitability to work in the Lease Enforcement Unit.

31. I do accept the plaintiff’s evidence that the Land Executive post has not been removed from the Lands Department. In light of the generally positive comments of his supervising officers on the plaintiff’s work performance in the Land Control team in February 2003, I do accept the plaintiff’s employment contract would likely be extended in the Lands Department had the plaintiff been allowed a chance to exhibit his working ability with the Lease Enforcement Team. His sick leave, the validity of which is not contested by the defendants, prevented the plaintiff from attending to his work since the date of the traffic accident. I accept, on balance, the plaintiff’s injury and his sequential sick leave is causal to the eventual non-extension of the plaintiff’s employment with the Lands Department.

32. Though the plaintiff had been recommended on 2 occasions,

on 29 September 1999 and 21 March 2002 to be transferred to the pensionable service by his supervising officers, events showed that the plaintiff was only given an extension of his employment contract for specified durations rather than being offered a pensionable contract of employment. From the history of the plaintiff’s employment record, the plaintiff was offered an 18 months employment contract at the commencement of his employment in December 1997. He was given a total extension of 548 days (182 days + 263 days + 103 days), i.e. a total of 1 ½ years after his notice of termination of his employment was served on him on 19 September 2002. I accept, had the plaintiff not been prevented from work on account of his pain as a result of his injuries, he would likely have been given a further extension of another 1 ½ years for his employment contract with the Lands Department.

33. After the cessation of his Land Executive work the plaintiff secured the following temporary employments:-

1. as an invigilator with the HK Examination Authority for a day on 5 June 2004 with the wages of HK$214
2. as an invigilator with the HK Examination and Assessment Authority in the month of July 2004 for the income of HK$750
3. With the Education and Manpower Bureau

For April 2004 HK$4,440

4.10.2004 to 31.10.2004 HK$11,544

1.11.2004 to 30.11.2004 HK$18,648

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HK$35,596

34. On 13 December 2004 the plaintiff was employed on contract basis with the Department of Health as a research officer. His employment contract with the Department of Health expired on 12 December 2005. As a research officer, the plaintiff was paid a monthly salary of HK$24,830.

35. The plaintiff was given permission to engage in outside work for teaching extra-curricular activities and sports at HK$500 per hour for up to 16 hours per month from 20 May 2003 to 19 December 2003.

***P.S.L.A.***

36. The plaintiff is claiming a sum of HK$350,000 representing his pain, suffering and loss of amenities.

37. 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. Cheng 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 neck pain would subside. I accept the plaintiff still had residuary mild neck and shoulder pain at the date of the assessment hearing. Bearing reference to the various decisions cited to me by the plaintiff and the defendants (*Lai Kam Wah* HCPI-1131/2002; *Leung Siu Ping* HCPI-831/2000; *Lung Kwong Ying* [2002] 3 HKLRD 185; *Li Fat Tsang* HCPI-558/2000; *Anil Jhuremalani* DCPI-134/2001; *CHAN So Kwan* HCPI-1487/2000; *Yeung Sze* HCPI-6/2000; Lam Se Tuen (1985) HKLJ 243; Kung Kit Shing [1987] HKLR 749; Chan Siu Youn [2000] 2 HKLRD G9; Lam Chiu DCPI-203/2001) 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.

#### *Pre-trial Loss of earnings*

38. The parties have agreed that the monthly income of the plaintiff as a Land Executive at the time of the accident was HK$30,728.

39. I accept the plaintiff would likely have his contract extended for another 1 ½ years from 31 March 04 had he not been hampered from turning up for work on account of his injuries sustained in this accident. The pre-trial loss of earnings suffered by the plaintiff from 1 April 2004 to 30 September 2005 are:-

HK$30,728 x 18 months 553,104

Less

HK$22,965 (back pay from Lands Dept) 22,965

HK$17,683 (back pay from Lands Dept) 17,683

HK$35,596 (as stated in para 19 of revised

Statement of damages & para

31 of this judgment) 35,596

HK$14,897.99 (wages with Dept of Health

for 13.12.04 to 31.12.04) 14,897.99

HK$24,135 x 9 months (wages with Dept

of Health from 1.1.04 to 30.9.04) 217,215

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HK$244,747

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40. I accept the plaintiff did work as a skiing instructor in his leisure time, which he has given up after the accident. He had secured permission to engage in outside work from the Department of Health in March 2003. However the plaintiff kept no record of his income as a skiing instructor. He has filed no skiing instruction income on his tax return to evidence the quantum of his income as a skiing instructor. There is no documentary evidence which enables this court to form a view on the likely quantum of his outside work as a skiing instructor.

#### *Future Loss of Income*

41. There is no claim for future loss of income.

#### *Loss of Earning Capacity*

42. I accept the remaining mild pain and numbness suffered by the plaintiff would have lowered his general competitiveness in the job market and assessed his loss of earning capacity to be HK$25,000.

43. I accept the plaintiff’s capability to work as a skiing instructor on account of the injuries he suffered in this accident would have been affected. His loss of earning capacity to work as a skiing instructor, I assessed it at a sum of HK$25,000.

#### *Special Damages*

44. The parties have agreed the sum of special damages, inclusive of the medical consultation, travelling expenses and damage to the plaintiff’s vehicle, suffered by the plaintiff as a result of the accident was a sum of HK$68,000.

#### *Order for Compensation*

45. I do award the plaintiff his damages in the total sum of HK$512,747, being the aggregate of HK$150,000; HK$244,747; HK$50,000 and HK$68,000.

46. Interest on general damages is awarded at the rate of 2% per annum from the date of the writ to date of judgment. Interest on special damages is awarded at half judgment rate from the date of the accident to the date of the judgment.

#### *Costs Order*

47. I do grant a costs order nisi for the plaintiff to be awarded the costs of this action with the quantum to be taxed if not agreed between the parties.

( M. Yuen )

District Judge

Mr. Joeson Wong instructed by Messrs. Chau & Associates for Plaintiff.

Mr. Albert Yau instructed by Messrs. Li, Kwok & Law for D1 & D2.