###### DCPI 2032/2007

### IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2032 OF 2007

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##### BETWEEN

## CHENG WAI HUNG 1st Plaintiff

LEUNG WING MAN 2nd Plaintiff

### and

#### KWOK FUK KWAN JAMES 1st Defendant

#### YICK TUNG MOTOR COMPANY 2nd Defendant

#### LIMITED

#### TUGU INSURANCE COMPANY 3rd Defendant

#### LIMITED

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Coram: H.H. Judge Chow in Court

Hearing dates: 19th and 21st August 2009

Date of handing down Judgment : 15th October 2009

Judgment

1. In this action, the Plaintiffs claim for damages arising out of a traffic accident which occurred on 25.03.2005 between the 1st Plaintiff’s vehicle and the vehicle driven by the 1st Defendant. On 11 February 2008, judgment on liability was entered against the 1st and 2nd Defendants due to their failure to give notice of intention to defend. On 30.9.2008, the 3rd Defendant obtained Court’s leave to be added as the 3rd defendant in this case.
2. In its closing submission, Miss Lau, Counsel for the 3rd Defendant, submitted that “final judgment” on the issue of liability against the 1st and 2nd Defendants should be made, because the judgment entered on 11 February 2008 had not been set aside. There has been no application to have it set aside; so the judgment stands. It is unnecessary for this Court to make any “final” judgment.

Quantum

Injuries and treatment of the 1st Plaintiff

1. As a result of the traffic accident, the 1st Plaintiff suffered a sprained neck. After the accident had happened on 25.3.2005, he was detained by the police until the afternoon of the next day. On 29.3.2005, he found that his neck pain became serious, and he attended the Accident and Emergency Department of the Queen Elizabeth Hospital for treatment. On examination he was diagnosed to suffer soft tissue injury on the back of his neck. He was discharged on the same day. Because of persistent neck pain, he attended the Robert Black evening clinic for further treatment. He received 3 sessions of physiotherapy in April and May 2005. He was granted sick leave from 29.3.2005 to 9.4.2006 intermittently, for a total of 182 days.
2. He had on and off neck pain, which would occasionally wake him up at night. He suffered from restricted neck movements and neck stiffness. He had numbness on his left upper limb intermittently. His left hand cannot raise or carry heavy objects. He has stopped to play sports like basketball, badminton, table tennis and soccer after the accident. Before the accident he could endure long hours of working, but he cannot now, because long hours of working would cause him to have neck pain numbness of the upper limbs.
3. Dr. Lau Man Tsang (“Dr. Lau”) and Dr. Wong Kwok Shing (“Dr. Wong”) examined him in November 2006 and November 2008 respectively. Dr. Lau opined that he should be able to resume his pre-accident job as a CD-salesperson. He would not require specific or regular long-term treatment, but he would require to take pain-killer occasionally. The reasonable length of sick leaves is 6 months from the date of accident. It was reasonable for him to take sporadic sick leaves when symptoms worsened. Dr. Wong opined that “Considering the mild nature of Mr. Cheng’s injury and his pre-accident job as a shopkeeper as well as medical information available, the intermittent sick leaves issued to Mr. Cheng within the first 3 months after the accident were reasonable.”
4. When Dr. Lau examined him in November 2006, it was nearer to the time of the accident. The conditions of his neck were then closer to the conditions of the neck at the time of the accident. Dr. Wong examined him in November 2008. By that time the conditions of the neck had improved. So he could not physically examine the conditions of the neck nearer to the time of the accident. But Dr. Lau could, and because of this, Dr. Lau’s examination could more accurately reflect the conditions of his neck nearer to the time of the accident. He could thereby assess more accurately the length of sick leave he required. Further he had a total of 182 days’ sick leave. On the days he was given sick leave for his neck injury, he was attended to by various medical doctors at different times. There is no suggestion that the sick leaves were not seriously given. There is no evidence that those sick leaves were not reasonably given by various medical doctors. The total length of 182 days of sick leave is equivalent to 6 months’ sick leave. Hence I accept Dr. Lau’s opinion that the sick leave period should be 6 months from the date of the accident.

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

1. Mr. Law, the Plaintiff’s Counsel, cited the case of *Chiu Wing Sze Karby v Chan Ying Wai* & Another (Personal Injuries Action No. 616 of 1999) to support his submission that a sum of $150,000 should be awarded to the 1st Plaintiff. In that case, a female suffered a whiplash injury to her neck due to a road traffic accident. She had continuing pain in the neck with occasional numbness of the right hand and pain in the right gluteal region after walking for 5 minutes. She was treated with neck collar, manipulation and physiotherapy. She was awarded $150,000 for PSLA.
2. Mr. Law also cited the case of *Tai Yuk Wong v. Chong Kwok Fung* and Another (DCPI 1405/2005). In this case due to a road traffic accident, the Plaintiff suffered whiplash neck injury, with soft tissue injury. He had persistent neck pain and weakness on his upper limbs for about a year. He was granted sick leave for 2 years. He gave up skiing activity as a result of his injuries. He was awarded $150,000 for PSLA.
3. In the first case, the Plaintiff had to wear a neck collar. In the second case, the sick leave given to the Plaintiff was 2 years. It is obvious that the injuries in both cases are more serious than those suffered by the Plaintiff.
4. Miss Lau cited 5 cases to support her contention that under this head of PSLA $50,000 and $80,000 should be awarded to the 1st Plaintiff and the 2nd Plaintiff respectively. One of the cases cited is *Ng Yu Fu v. Wong Shek Ming* and Another (HCPI 252/2004). In that case, due to a traffic accident the Plaintiff suffered minor injuries. His back was tender on the sacral region; no neurology was identified. The Court made an award of $100,000.
5. The other case cited by Miss Lau is *Li Kam Wah v. Ng Ying Tuen* and Another (DCPI 386/2001), where the Plaintiff suffered neck, back pain and stiffness after a traffic accident. The pain was aggravated after sitting for 5-15 minutes. The Court awarded him $50,000 as general damages.
6. After considering these cases, I adjudge that a reasonable award to be made to the 1st Plaintiff for PSLA should be $80,000.

Loss of earnings

1. At the time of the accident the 1st Plaintiff was a salesman selling CD, VCD and electronic components in the V Theatre. He worked 26 days per month, from 9:00 a.m. to 6:00 p.m. If overtime was required, he worked up to 9:00 p.m. or mid-night. He earned $9,000 as his basic salary and about $3,000 overtime allowances per month. So for the 6 months’ sick leave from the day of accident to the end of September 2005, the loss of earnings is $72,000 ($12,000 x 6 months).
2. There is a letter (dated 23 April 2005) produced by the 1st Plaintiff which stated that commencing from 1 May 2005, the V Theatre would keep him in employment without pay, because of his constant applications for sick leave. So he must have been paid by the V Theatre for the month of April, 2005. In any event the V Theatre recognized that it was liable to pay to the 1st Plaintiff the salary of April 2005. That being the case, the V Theatre was liable to pay him the salary for April, 2005, and the Defendants are only liable to pay for 5 months’ wages to the 1st Plaintiff, in the sum of $60,000 ($12,000 x 5), for the period from the beginning of May 2005 to the end of September 2005.
3. Miss Lau argues that there is no documentary evidence to corroborate the 1st Plaintiff’s contention that he earned $12,000 per month at the time of the accident. This is true. But such kind of evidence is not necessarily proved by documentary evidence. So long as his evidence is credible, the 1st Plaintiff will succeed. His evidence is credible. I accept it. The evidence given by his witness (a Mr. Lok Shing Yip) supports his evidence generally. I accept the evidence of the 1st Plaintiff in respect of his monthly income.
4. Miss Lau cast doubt on the circumstances under which the sick leave were obtained by the 1st Plaintiff. His employment was terminated by his former employer and he was not working since May 2005 there was no reason he needed to continue to obtain sick leave certificates (same and except for compensation purpose). There is nothing wrong about this. The most important thing is: was the 1st Plaintiff genuinely troubled by the pain caused by the traffic accident? The doctors who examined him were in the best position to tell this. They must have felt that he was genuinely troubled by the pain and discomfort before they issued him the sick leave certificates. Different doctors diagnosed him. They could not have all been wrong. There is no suggestion or evidence of collusion between him and the medical doctors on the issuance of sick leave certificates.
5. At the end of 2008 and in early 2009, the 1st Plaintiff was able to obtain driving work with a van, earning about $8,000 a month. But he accepts that he could earn $9,000 per month. So he suffered a loss of $3,000 per month. After the V Theatre had ceased business, he was not in employment, save for assisting his parents’ shop affairs occasionally.
6. Mr. Law submits that the frequent and intermittent sick leaves from October 2005 to April 2006 (6 months) would interrupt him from having a continuous employment from October 2005 onwards. The last sick leave certificate was from 7 April 2006 to 9 April 2006.
7. He only got a driving work at the end of 2008. From May 2006 to end of 2008, he did not attend outpatient clinic. So he was in a position to look for a job. But there is scanty any evidence that he put in serious effort to find a job during this period. There was no loss of earning during this period. As for the period from October 2005 to April 2006, he did have intermittent sick leaves. Some of the sick leave dates are set out as follows:-

08.10.2005 - 11.10.2005

21.10.2005 - 23.10.2005

25.10.2005 - 27.10.2005

01.11.2005 - 04.11.2005

10.11.2005 - 13.11.2005

………………….

22.11.2005 - 23.11.2005

08.12.2005 - 08.12.2005

23.01.2006 - 23.01.2006

07.02.2006 - 09.02.2006

24.02.2006 - 25.02.2006

14.03.2006 - 15.03.2006

17.03.2006 - 18.03.2006

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07.04.2006 - 09.04.2006

1. For the period from October 2005 to the beginning of April 2006, it can be seen that there a gap of 9 days between 11.10.2005 – 21.10.2005, a gap of 14 days between 23.11.2005 and 8.12.2005, a gap of 14 days between 8.12.2005 and 23.01.2006, a gap of 14 days between 23.01.2006 and 07.02.2006, a gap of 14 days between 09.02.2006 and 24.02.2006, a gap of 16 days between 25.02.2006 and 14.03.2006. On the assumption that he did not go to seek the job as a salesperson of CD and similar products because it was inconvenient for him to do so during the periods of sick leaves, what about the days he was not having sick leave? He should have looked for a new job. There is no evidence that he did so. He did not have a job, and so there could not be any loss of wages from October 2005 to April 2006. No award should therefore be made for loss of wages during this period. The award under this head is $60,000. The loss of MPF is $3,000 ($60,000 x 5%); so the total loss is $63,000.

Loss of earning capacity

1. The injuries are minor. There is no real or substantial risk that he will loss his job because of his injuries. So there will be no award for loss of earning capacity.

Special damages

1. The 1st Plaintiff made a claim of $171,015 for special damages. The 3rd Defendant admits a sum of $15,000 for this claim. The 1st Plaintiff accept this amount. So I make an award of $15,000.
2. The total award payable to the 1st Plaintiff is $158,000 ($80,000 + $63,000 + $15,000).

The 2nd Plaintiff

1. On 25 March 2005, she attended the A & E Department of Queen Elizabeth Hospital as she suffered dizziness after the accident. Her range of movement of neck and back was full. There was no external wound. She was given some pain-killers to be taken and discharged. On 30 March 2005, she attended the A&E Department of United Christian Hospital and complained of tenderness over her right neck and lower back. She was treated and discharged.
2. She had occasional neck and low back pain upon prolonged walking and sitting for 2-3 hours. The pain was relieved by changing of her posture and movement of her body. She felt dizzy a few times a week, which lasted for half a day. She could tolerate it and was capable of working normally.
3. Dr. Wong believed that she probably sustained soft tissue sprain/contusion injury to her neck and low back as a result of the accident. He believed that the injuries were likely to be mild as she could walk to the ambulance on her own after the accident and initial A & E examination revealed no significant abnormal physical sign.
4. Having regard to the cases cited by both parties, it is reasonable for me to make an award of $90,000 for PSLA.

Pre-trial loss of earnings

1. At the time the accident occurred, she was a sales administrator of RDL Electronic Co. Ltd. (“RDL”). Her monthly salary was about $11,500. She found it difficult to cope with her job because it frequently required her to work overtime. She was required to work overtime for 3 days every week when she served RDL. On occasions she was required to work overtime until midnight. This resulted in her persistent neck and back pain. She gave one month notice of resignation to RDL, to take effect from 2 August 2005. In her resignation letter, she said that it was difficult for her to sit in front of the computer for a long period of time. She resigned because of her health problems relating to her pain neck and vertebra.
2. From 1 September 2005 onwards, she had another job with lesser working hours. She was invited by one of her former bosses of RDL to join the new company. The number of days of work of her present job is less than that of RDL. It is a newly set up company at that time, with not much work to do. She worked from 9:30 a.m. to 6:00 p.m. daily, and from Monday to Friday only. Up to November 2007, her monthly salary was $9,000. From 1 December 2007 it was revised to $11,000.
3. Miss Lau submitted that the change of job is not a result of the minor injuries she sustained in the accident. Rather, it is a conscious decision made on her part to change job for reasons unrelated to the accident and the claim should thus not be allowed. It is very clear that when she changed to the new job, her monthly salary would only be $9,000, $2,250 below her previous monthly salary. $2,250 amounts to 19.7% ($2,250 ÷ $11,400 x 100%) of the former monthly income. So she suffered a wage loss of 19.7%. According to medical practitioners’ opinion, she should be able to continue her job which she was doing prior to the accident. She said that as it was a new company she would not have that much to do as compared with the workload at RDL. Also she did not have to work on Saturdays. That would alleviate her neck pain. The issue is: is it truthful that she was still having neck pain at around the time she resigned from her job with RDL? Her sick leaves would reflect on this. Some of her sick leaves after July 2005 are set out below:-

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| --- | --- |
| 23.08.2005 | 26.08.2005 |
| 29.08.2005 | 01.09.2005 |
| 05.09.2005 | 08.09.2005 |
| 09.09.2005 | 12.09.2005 |
| 13.09.2005 | 16.09.2005 |
| 17.09.2005 | 20.09.2005 |
| 20.09.2005 | 23.09.2005 |
| 24.09.2005 | 27.09.2005 |
| 28.09.2005 | 01.10.2005 |
| 04.10.2005 | 05.10.2005 |
| 06.10.2005 | 09.10.2005 |
| 25.10.2005 | 27.10.2005 |
| 01.11.2005 | 03.11.2005 |
| 10.11.2005 | 12.11.2005 |
| 15.11.2005 | 16.11.2005 |
| 22.11.2005 | 23.11.2005 |

1. It can be seen that she was given a number of sick leaves in August, September, October and November 2005. This reflects that when she began her job with the new company, she still attended clinics for medical treatment for her neck injuries. I am satisfied that she was still having neck pain at the time when she changed to work in another company, and the change was a conscious decision so that she would be less troubled by the neck pain caused by the traffic accident. She knew that the new company would give her a much lower salary. It is difficult to imagine that a person would go to join a new company at a much lower salary unless there is a good reason for doing so. The reasons for resignation as stated in her resignation letter must be genuine. There is no evidence to support the submission that she changed job for reasons unrelated to the accident. Miss Lau did not suggest what these reasons are. The change of job was a reasonable one; she is entitled to protect herself by alleviating her neck pain. Hence the Defendants are liable for the losses in her monthly salaries as a result of the change.
2. She said that when she was working for RDL, she took a few days of sick leave each month to take rest at home in order to ease off her pain over her neck and back. She said that when she was working for RDL she received no pay for the sick leaves (save for 2 days per month); alternatively she had to deduct her own entitled leaves for the sick leaves taken by her. Dr. Lau commented that the appropriate period of sick leave for her neck and back injury should be about 3 month. I accept this medical opinion. Up to 30 June 2005, there were 60 days of sick leave. Deducting 2 days per each month during this period, there were 54 (60-6) days of sick leave without pay. The loss of earnings is $10,284.07 ($11,426.75 x 54 ÷ 60).
3. From 1 September 2005 to 31 March 2006, her loss in salary is $16,987.25 (($11,426.75 - $9,000) x 7). From 1 April 2006 to 31 March 2007, the loss is $20,121 ($11,426.75 - $9,750) x 12). From 1 April 2007 to trial the loss is $19,341.51 (($11,426.75 - $10,750) x 28.58). The total pre-trial loss of earning is $66,733.83 ($10,284.07+ $16,987.25 + $20,121 + $19,341.51). The MPF loss on $66,733.83 is $3,336.69 ($66,733.83 x 5%). Hence the pre-trial loss of earnings is $70,070.52 ($3,336.69 + $66,733.83).

Future loss if earnings

1. Since 1.12.2007, her salary was adjusted to $11,000. This is $426.75 ($11,426.75 - $11,000) short of her pervious monthly salary of $11,426.75. I would estimate that in or about 1 years’ time her salary would be adjusted to her former level. Therefore I would award $5,121 ($426.75 x 12) for her future loss of earnings. The loss of MPF for $5,121 is $256.05. So the total loss if earnings is $5,377.05 ($5,121 + $256.05).

Special damages

1. The 2nd Plaintiff claims special damages in the sum of $2,560. This sum is admitted by the Defendants.

Future medical treatment

1. Dr. Lau recommended medical treatment in the future. He estimated such treatment costs about $8,000 to $10,000, in the private sector, and 3 weeks’ leave. I would allow $9,000 for such treatment. The loss of wages for 3 weeks’ leave (15 working days) would be $5,375 ($10,750 ÷ 15/30). The total award under this head is $14,375 ($9,000 + $5,375).

Loss of earning capacity

1. The injuries she suffered are minor. There is no real or substantial risk that she will be suffer disadvantage in the market. So there will be no award under this head of claim.
2. The total award made to the 2nd Plaintiff is $182,382.57 ($90,000 + $70,070.52 + $5,377.05 + $2,560 + $14,375).
3. I order that the 1st and 2nd Defendants do pay, within 14 days from today, to the 1st Plaintiff the sum of $158,000 with interests; interest at 2% p.a. on the sum of $80,000 from 28.9.2007 to 14.10.2009; interest at 50% judgment rate on the sum of $78,000 ($63,000 + $15,000) from 25.3.2005 to 14.10.2009; interest on the sum of $158,000 from 15.10.2009 to satisfaction at judgment rate.
4. I order that the 1st and the 2nd Defendants do pay, within 14 days from today, to the 2nd Plaintiff, the sum of $182,382.57 with interests thereon; interest on the sum of $90,000 p.a. from 28.9.2007 to 14.10.2009; interest on the sum of $72,630.52 ($70,070.52 + $2,560) from 25.3.2005 to 14.10.2009 at 50% judgment rate; interest on the sum of $182,382.57 from 15.10.2009 to satisfaction at judgment rate.

Costs

1. Subject to orders for costs already made, I make the following order nisi for costs, to be made absolute within 14 days’ from today:-
   * + 1. the 1st and 2nd Defendants do pay the 1st and 2nd Plaintiffs costs of this action incurred for the period prior to 30 September 2008, to be taxed, if not agreed.
       2. the 1st, 2nd and 3rd Defendants do pay costs of this action to the 1st and 2nd Plaintiffs incurred for the period commencing from 30 September 2008 to the conclusion of this action, to be taxed, if not agreed, with Certificate for Counsel.
       3. The Plaintiffs’ own cost in this action to be taxed in accordance with Legal Aid Regulations.

(S. Chow)

District Judge

The 1st and 2nd Plaintiff: represented by Mr. Dennis Law, instructed by M/S Andrew Chan & Co., Solicitors.

The 1st Defendant: in person, unrepresented (present on 19.8.2009, but absent on 21.8.2009)

The 2nd Defendant: in person, unrepresented (present on 19.8.2009, but absent on 21.8.2009)

The 3rd Defendant: represented by Ms. Julia Lau, instructed by M/S T.S. Tong & Co., Solicitors