#### DCPI 2318 / 2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES NO. 2318 OF 2006

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| BETWEEN | MA CHAK YAU | Plaintiff |
|  | and |  |
|  | CHAN WAI MAN | 1st Defendant |
|  | MAXSON TRANSPORTATION LIMITED | 2nd Defendant |

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##### Coram: His Honour Judge Thomas Au in Court

##### (open to public)

Date of Hearing: 3 September 2007

Date of Handing Down Judgment: 18 October 2007

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### JUDGMENT

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1. The is the hearing of assessment of damages of the Plaintiff’s claim for damages against the Defendants for personal injuries suffered by him in a traffic accident.

Background

1. The accident (“the Accident”) occurred on 20 October 2004. The Plaintiff was a passenger inside a minibus when the minibus was hit from behind by a private car driven by the 1st Defendant. The 2nd Defendant was the registered owner of the private car (“the Private Car”).
2. The 1st Defendant was subsequently convicted of careless driving in relation to the traffic accident.
3. The Defendants did not file any Defence, and interlocutory judgment was entered against them on 23 April 2007.
4. By reason of the Accident, the Plaintiff has suffered injury to his low back. He now claims against the Defendants for total damages in the sum of HK$154,240.00: HK$150,000.00 is claimed for pain, suffering and loss of amenities, and HK$4,240 for special damages.
5. For the purpose of the assessment, the Defendants’ principal contentions are that:
6. The Plaintiff’s complained pain and disabilities, if proved, are due to the Plaintiff’s pre-existing back injury and are unrelated to the Accident.
7. The Plaintiff has in any event exaggerated his disabilities and pain, in that his present complaints of disabilities are not genuine or are not as serious as he claims. The Defendants’ case is that the Plaintiff is only entitled to HK$30,000 as damages for pain, suffering and loss of amenities.

The issues

1. The issues arising are thus:
2. What are the Plaintiff’s subsisting disabilities, if any.
3. Whether these disabilities are caused wholly or partly by the injury suffered as a result of the Accident.
4. If so, what are the respective quantum of damages under various heads of the claim.

Issue 1: What are the Plaintiff’s subsisting disabilities

*Undisputed facts*

1. The following are undisputed or not uncontroversial.
2. The Plaintiff suffered a back injury in 1999, when he slipped and fell at the Racecourse. He had received various medical and physiotherapy treatments for that injury. In 2002, he received a payment for compensation from the Jockey Club in the sum of HK$220,000 odd.
3. He has not fully recovered from the previous injury. Before he was met with the Accident, he was still suffering from various symptoms and pain as a result of the previous back injury.
4. On 20 October 2004, the Accident occurred as follows.
5. At the material time, the Plaintiff was inside a minibus. When the minibus stopped behind a car, the Private Car driven by the 1st Defendant hit it from behind.
6. Because of the impact, the Plaintiff was thrown forward with his buttocks lifted up from the seat for about 1 foot. His forward momentum was stopped when his hands put protectively in front of himself hit against the back of the front seat. He then dropped weightily back to his seat on his buttocks.
7. After the Accident, he felt pain in his low back. He was sent to the Emergency Ward of Prince of Wales Hospital for consultation and treatments. He was hospitalized there for 4 days for treatment and rests. He had taken painkillers when hospitalized. On the first two days, he could not get down from the bed. Later, he had to walk with a walking frame.
8. He was referred to and attended physiotherapy on 25 October 2004. He was assessed by the therapist at that session and was asked to walk up and down staircase. He however did not return for any follow up treatments for physiotherapy.

*The Plaintiff’s present complaints*

1. The Plaintiff himself gives evidence. Together with his witness statement, his evidence on his present complaints on pain and disability arising from the low back injury can be summarized as follows.
2. He feels pain in his low back from time to time on a daily basis. He feels stiffness and pain in his low back when he tries to bend down when standing, and in any event he could not bend down much. He also feels pain when the weather changes. He feels pain if he sleeps in a bad position, and needs to change position to ease the pain.
3. If he walks for more than an hour, his legs would feel tired with ache. He cannot lift heavy things because of the back pain.
4. After the Accident, the Plaintiff has also stopped going for morning exercise and swimming as he used to do. He says he stopped doing that because, in light of the stiffness of the back, he is apprehensive that he will feel more discomfort by doing the exercise or swimming. However, he says he has not in fact tried to do it to see if it would really make him more uncomfortable.
5. When asked by the Court, the Plaintiff however confirms that he already had these kinds of symptoms and disabilities before the Accident as a result of the previous back injury. These have increased in severity after the Accident. He further says that, for a scale of 10 with level 10 most painful, his present pain and disability is of a severity level of 6, while his previous pain and disability of 5. There is thus an approximately 20% increase in his pain and disability after the Accident.
6. I accept the Plaintiff’s evidence. Insofar as his pain and disability is concerned, he gives firm and consistent evidence, which is not shaken under cross-examination. His evidence is also consistent with and supported by the medical evidence from the government hospital and clinics presented before me.
7. It is put to him under cross-examination that he did not follow up with his physiotherapy treatments after the first assessment session because he did not suffer much pain or disability. The Plaintiff explains that he did not go because he did not think it would help him. He also finds it inconvenient or troublesome to go and attend physiotherapy.
8. Given that for his previous back injury, he had previously received quite a number of sessions of physiotherapy, and was still suffering from residual pain and stiffness (which is not challenged), I do not find his above explanation unreasonable. I therefore accept it, and do not think the fact that he had defaulted in his physiotherapy treatments for the present injury shows that he did not suffer much pain or disability.
9. It is also put to him under cross-examination that his sleep is not disturbed by any back pain as he alleges, as it was recorded in the Emergency Ward records that he had slept well in the first few days of hospitalization. However, on re-examination, he confirms that he was given painkillers at the hospital.
10. In light of this evidence, I do not accept the Defendants’ submissions that these hospital records alone show that the Plaintiff’s sleep is not and could not have been disturbed by his back pain as he claims.
11. I therefore reject the Defendants’ submissions that the Plaintiff’s present complaints of pain and disability are not genuine or exaggerated.
12. For the above reasons, on balance, I find that:
13. The Plaintiff is suffering from pain in his low back and disabilities in the manner and extent as described by him in evidence.
14. Such pain and disabilities are about 20% more than those he had been suffering from before the Accident.
15. This 20% increase in pain and disabilities is a result of the back injury he suffered by reason of the Accident.

Issue 2: Whether these disabilities are caused wholly or partly by the injury suffered as a result of the Accident

1. Given that it is the Plaintiff’s own evidence (which I accept) that his present pain and disabilities are about 20% more than his previous similar pain and disabilities just before the Accident, I further find that 20% of the Plaintiff’s present pain and disabilities are contributed or caused by the injury suffered as a result of the Accident.

Issue 3: Quantum

1. The Plaintiff claims against the Defendants for (a) HK$150,000 as general damages under pain, suffering, and loss of amenities, and (b) a total sum of HK$4,240.00 as special damages for medical expenses, travelling expenses, tonic food and nourishing soups expenses. 8
2. Based on the above factual findings, my assessment of the quantum of damages under various heads of claims is as follows.

*Pain, suffering and loss of amenities*

1. Mr Peter Wong, counsel for the Plaintiff, initially submits that HK$150,000.00 is a proper quantum under this head by reference to the following authorities:
2. *Chan Kwei Duen v East Country Company Ltd t/a Gold River Vietnamese Food* Shop (unrep., DCPI 665/2005, 3 February 2006, H H Judge M Ng). In this case, the Plaintiff was found to have sustained a mild displaced fracture of the coccygeal spur. She had been suffering from back pain for over 9 months, and still had discomfort at the injured area. The learned judge awarded her HK$150,000.00 under PSLA.
3. *Fung Yuet Hing v Mok Sun* (unrep., DCPI 1706/2006, 3 November 2006, H H Judge CB Chan). The Plaintiff was injured in her left forehead, left neck and occiput. She was granted sick leave for 6 weeks and attended 10 physiotherapy sessions. She was awarded HK$160,000 as damages for PSLA.
4. *Wong Shuk Lei v Leung Ming Kwong* (unrep, DCPI 560/2005, Deputy District Judge E Yip, 29 December 2005). The Plaintiff suffered low back pain and injury to her face. It was found that the range of motion of her lumbar spine had substantially decreased because of the injury to her back. The Court awarded her HK$250,000.00 under PSLA.
5. *Yau Shui Ming v Excellent Development* Ltd (unrep., DCPI 147/2002, 28 May 2003, H H Judge Lok). The Plaintiff chef suffered injury to his back. He had since been suffering from persistent back pain with limited range of motion. There was also numbness in his back. The learned judge awarded him HK$200,000.00 as damages for PSLA.
6. *Tam Kwok Man v The Kwoloon Motor Bus Company (1933) Ltd* (unrep., HCPI 755/2001, 11 July 2003, Beeson J). The Plaintiff bus station regulator suffered a fall and injured his low back when his office chair broke and lost one of its wheels. He had tenderness at the lumbar and sacral region of his back. There was also reduced movement of the back. The Court awarded him HK$150,000.00 under PSLA.
7. However, unlike the present case, all these authorities are about disabilities and pain suffered by the respective plaintiff, which are wholly attributable to the subject matter accident. Given the Plaintiff’s own evidence that his pain and disabilities increased for about 20% after the Accident, Mr Wong fairly and readily accepts that these authorities are not directly relevant, and an appropriate discount should be made to assess the quantum for the present case. He further submits that, in such circumstances, the appropriate award under this head should be HK$100,000.
8. In addition to Mr Wong’s above concession, I am also of the view that the nature and degree of the injury and disability considered in these authorities are more serious than the Plaintiff’s present complaints.
9. At the same time, Mr Chan submits that the Plaintiff’s stopping of going for morning exercises and swimming is really a matter of his own choice. His submissions are as follows: As the Plaintiff confirms he has not even tried to carry out morning exercise or to swim after the Accident to see if they would really hurt him more, there is simply no factual evidence to support that his pain or discomfort would increase by swimming or doing morning exercise. There is also no medical evidence to support the same. As such, this cannot be regarded as the Plaintiff’s loss of amenities cause by the Accident.
10. I accept Mr Chan’s above submissions. I therefore do not consider the Plaintiff’s stopping to continue with his morning exercise and swimming can be properly regarded as his loss of amenities as a result of the Accident.
11. Having considered the authorities and my above findings and conclusions, and after making the necessary adjustment and discounts for the present case, I am of the view that an award of HK$80,000.00 as damages for the Plaintiff’s pain, suffering and loss of earning is appropriate.

*Special damages*

1. The Defendants in their Answer to the Revised Statement of Damages have put the Plaintiff to strict proof on these items.
2. However, the Plaintiff has provided no documentary evidence to support the expenses allegedly incurred as medical expenses, travelling expenses and expenses for tonic food.
3. The Plaintiff has also not given any further evidence orally and in his witness statement on how these expenses were incurred.
4. In the circumstances, I am not satisfied that the Plaintiff has proved his loss under this head for any of these items claimed. To be fair to Mr Wong, he also has not pursued these damages seriously in his submissions.
5. I would therefore disallow the Plaintiff’s claim for special damages.

Conclusion

1. For the above reasons, I grant judgment to the Plaintiff in the sum of HK$80,000. The Defendants shall also pay the Plaintiff interest on HK$80,000 at the rate of 2% from the date of the write to the date of judgment.
2. I further grant a costs order *nisi* that the Defendants do pay the Plaintiff costs of the assessment of damages (including all costs reserved if any) to be taxed if not agreed, with certificate for counsel.

# (Thomas Au)

District Court Judge

Mr. Mr. Peter K.C. WONG instructed by Messrs K.Y. Woo & Co. for Plaintiff.

Mr. Vod K.S. CHAN instructed by Kenneth C.C. Man & Co. for 1st & 2nd Defendants.