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DCPI 26/2010

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
PERSONAL INJURIES ACTION NO. 26 OF 2010**

BETWEEN

TAM CHI WA JOEMA

Plaintiff

and

BOTIN LIMITED
YUEN TAK MING

1st Defendant
2nd Defendant

Coram : Deputy District Judge Grace Chan in Court

Dates of hearing : 6 - 7 & 16 December 2011

Date of Plaintiff's written submission : 23 December 2011

Date of Defendant's written submission : 30 December 2011

Date of Plaintiff's written submission in reply : 4 January 2012

Date of handing down Judgment : 22 February 2012

JUDGMENT

INTRODUCTION

1. On 16 January 2007 at about 10.20 a.m., the Plaintiff (“**Madam Tam**”) was driving her motorcycle at Shek Ku Street junction with Sheung Shing Street, Kowloon. She stopped at the road junction when the traffic light turned from green into amber, but the 2nd Defendant could not stop in time and hit into the back of her motorcycle (“**Accident**”). She was thrown

out of her motorcycle onto the ground. As a result, she sustained spinal cord injury and urological impairment.

2. By this action, she claims against the 1st and 2nd Defendants damages for personal injuries arising out of the Accident. Judgment on liability was entered on 13th August 2011 by consent, leaving damages to be assessed in this trial.

3. The first day of trial was, undesirably, spent on the arguments in respect of last minute applications made by Mr. Lam, Counsel for Madam Tam, to amend the calculations in her Revised Statement of Damages and to adduce new medical evidence. Leave was granted by me at the end of the first day of the trial for amending only certain items in the Statement of Damages and Revised Statement of Damages, with costs of the first day of the trial (ie 6 December 2011) awarded to the Defendants in any event.

4. As a result of the approved amendments, the total sum claimed by Madam Tam was revised to \$1,288,400. Mr. Lam confirmed that Madam Tam would waive any amount which exceeded \$1 million in order to fall within the District Court's jurisdiction. Her claims covered such heads as (1) PSLA, (2) pre-trial loss of earnings; (3) loss of earning capacity; (4) impairment of ability to provide gratuitous services to family; (5) future medical expenses; and (6) special damages.

5. The Defendants took issue on all heads of claims. They argued that Madam Tam was exaggerating her injuries and thus her quantum. They relied on a surveillance video of Madam Tam taken by their surveillance agent on 14 and 15 January 2008 ("**Surveillance Video**").

6. Madam Tam is the only witness in this trial. The Defendants have not called any defence witness. The medical experts, being an orthopaedic and a urology expert from each side, are not called to give oral evidence in the trial due to a previous Court Order.

TREATMENT & INJURIES AT PUBLIC HOSPITALS

Initial Hospitalisation

7. After the accident, she was taken to the A & E Department of Queen Elizabeth Hospital (“**QEH**”) and then admitted into the orthopaedic department of QEH (“**Orthopaedic Department**”). Upon admission, her lower limb power was absent while sensation loss was corresponding to L1 dermatome. She suffered urinary retention. Urgent MRI showed edema of lower end of sacral spinal cord without fracture of the spine. She was diagnosed to suffer *spinal cord injury*. She was managed conservatively. Urinary catheter was inserted.

8. MRI on whole spine was performed on 17 January 2007 which revealed hyperintense T2 signal in or cauda equina of spinal cord that could be cord contusion or edematous change. She stayed in QEH until 22 January 2007.

9. On 23 January 2007, she was transferred to Kowloon Hospital (“**KH**”) for rehabilitation, including physiotherapy and occupational therapy, until 6 February 2007. On discharge, she showed satisfactory improvement in terms of pain, lower limb strength and walking capability. However, 30% loss of light-touch sensation was still noted over her left lower leg. The muscle strength of her left leg was weaker than her right. She could walk unaided and independently for 1.5 hours indoors or

outdoors. She was independent in self care. The catheter was removed and she could pass urine herself.

Low Back Pain

10. After discharge from KH, Madam Tam has been attending regular follow-up treatment at the Orthopaedic Department. Between **19 March 2007** and **15 May 2008**, she attended 5 follow-up sessions. In all sessions, she complained about “mild low back pain” and “on and off back pain” only.

11. However, on **30 October 2008**, despite medication and injection of lignocaine [a local anaesthetic], her back pain did not improve. The orthopaedic doctor thus decided to refer her to the pain clinic of QEH (“**Pain Clinic**”). She went to the first consultation at the Pain Clinic on **16 March 2009**. The pain clinic doctor suggested right away the possibility of facet injection into her lumbar joints to relieve her back pain, a strong indication of the seriousness of her back pain. The potential risk and complications were also explained.

12. In the next follow-up session of **23 July 2009** with the Orthopaedic Department, she complained of “increased back pain with stress incontinence”. Her condition must have deteriorated further by then; otherwise the orthopaedic doctor would not have decided to book an early MRI on her lumbar-sacral spine. Her condition went further worse on **3 September 2009**. Physical examination on that day showed that there was a decrease light touch sensation of left S2-4 and a rather significant reduction in the left leg power as follows: L2-3 was 3/5; L4 was 3/5; L5 and S1 was 2/5 (compared with the motor power of 4+/5 or 4/5 noted on all previous occasions). The MRI originally arranged for 7 November 2009

was further brought forward to 7 September 2009 in order to see if she was suffering from *subacute cauda equina syndrome*.

13. On **7 September 2009**, she was admitted into QEH for this urgent MRI. The result shows that there was no evidence of nerve root damage. The impression was *residual deficit from previous cauda equina damage*. She was discharged on 10 September 2009.

14. On **16 September 2009**, Madam Tam was admitted into QEH again for facet joint injection into her bilateral L4-5 and S1. She received 6 injections and was discharged on the same day.

15. After the facet joint injection, she continued to attend regular consultation with the Orthopaedic Department, the Pain Clinic and the spinal clinic of KH ("**Spinal Clinic**") between **22 October 2009** and **5 July 2010**. She mentioned improvement on her back pain during this period.

16. However, on **17 November 2010** (about 14 months after the facet joint injection), she complained of increased low back pain again to the Spinal Clinic. Physical examination on her left lower limb power was 3/5 (similar to that before the facet joint injection). The complaint on low back pain was repeated on **13 December 2010** and **2 March 2011**. But it was also recorded that she did not want to receive physiotherapy because it was far away.

17. In **mid-December 2011**, she received another facet joint injection, ie about 15 months after the 1st facet joint injection.

Urology Impairment

18. During hospitalisation at KH, an urodynamic study (“**UDS**”) to test Madam Tam’s bladder function was done on **5 February 2007** (“**1st UDS**”). Her bladder function was found normal.

19. There was no complaint on her sphincter problem prior to 7 June 2007. On **7 June 2007**, she complained about “mild urgency” only. She was reported to be able to self-void until at least the follow-up session of **24 January 2008**.

20. On **15 May 2008**, she complained of “increase urgency during attack of pain”. And on **30 October 2008**, it was recorded that she suffered from stress incontinence.

21. Since February 2009, her urinary problem got worse¹. Between **16 March 2009** and **23 July 2009**, she complained of stress incontinence repeatedly. She was thus referred to the Spinal Clinic for urology assessment due to her worsening urinary problem.

22. She attended first consultation with the Spinal Clinic on **5 August 2009**. She complained about increased urgency and occasional leakage in the past half year and that she needed to put on napkins sometimes. A UDS was arranged and performed on **10 August 2009** (“**2nd UDS**”). The result showed that her bladder functional capacity had turned from normal (in February 2007) to low (in August 2009). The bladder function capacity dropped to less than 150 ml only and she failed voiding². She was thus put on Oxybutynin [a urology medicine]. The consultation summary dated 10 August 2009 prepared by Dr. Fung Pui Man of the Spinal Clinic recorded this:

¹ See consultation summary of Spinal Clinic on p130 of Bundle E.

² See pressure-flow study [urodynamic] report on p142 of Bundle E.

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E	23.	She spoke of slight improvement in urgency/incontinence since consuming Oxybutynin on 9 September 2009 and 23 September 2009 , but bowel constipation was still reported.	E
F			F
G	24.	Despite her indication of satisfaction with present bladder management program, the Spinal Clinic arranged another UDS on her to see if drug needed to be increased. This UDS took place on 14 December 2009 (“ 3rd UDS ”). Her bladder functional capacity recorded a sharp drop to 50ml (from 150 ml on 10 August 2009). Here is what was written in the investigation memo of the 3 rd UDS:	G
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L		“Spinal cord contusion resulted in neurogenic bladder	L
M		Previous UDS showed DHIC and put on oral oxybutynin with minimal clinical improvement	M
N		For repeated UDS	N
O		O
P		Low functional capacity of less than 50ml	P
Q		Followed by phasic detrusor hyperreflexia	Q
R		Associated with urgency and clinical leakage	R
S		S
T		Failed voiding with significant RU	T
U			U
V			V

³ See investigation memo and progress sheet on pp151 & 152 of Bundle E.

26. The problem of stress incontinence was reported continually during the follow-up sessions with the Pain Clinic on **28 December 2009** and **5 July 2010**, whereas the Spinal Clinic recorded that she had occasional urinary leakage but no bowel incontinence on **24 February 2010** and **24 March 2010**. However, on **23 June 2010**, the Spinal Clinic decided to refer her to the Surgical Clinic for faecal incontinence.

27. One month later on **7 July 2010**, it was noted that she contracted urinary tract infection [UTI]. On **11 August 2010**, her urinary tract infection symptoms (haematuria, dysuria, frequency and leakage) improved after consuming levofloxacin, but still got urinary frequency of about 3-4 times per hour in daytime and occasional dysuria. It was recorded that her problem was “urgency of bowel opening rather than true incontinence”. Another UDS was suggested and fixed for 30 August 2010 but she defaulted. The consultation summary of **8 September 2010** recorded that she defaulted UDS twice and was reluctant to repeat UDS. Nevertheless, it was not disputed that a UDS was eventually performed in **May 2011**. Unfortunately, the result of this UDS was not made available to me in this trial.

28. On **19 November 2010**, she attended the Surgical Clinic for faecal incontinence on referral by the Spinal Clinic. It was recorded that her urinary incontinence was precipitated by urge; there was no stress component. There was also faecal incontinence. The impression was: *neurogenic bladder with destrusor hyperreflexia*.

29. She defaulted in the follow up session of the Spinal Clinic on **5 January 2011**. On **2 March 2011**, her case with the Spinal Clinic was closed as she was referred to the Urology Clinic for investigation.

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V***Sick Leave Period***

30. There is no dispute that the total sick leave granted by the public hospitals from the date of the Accident up to 4 December 2007 (except 17 July to 3 October 2007) was about 8 months.

THE SURVEILLANCE VIDEO

31. The Surveillance Video was played in the trial. The first part of the Surveillance Video shows Madam Tam on **14 January 2008** working at an automobile shop at Poplar Street, Shamshuipo, Kowloon. She was wearing a tight trousers and a pair of boots. She was seen to be able to take up and hold a wooden ladder onto her shoulder and deliver it into and out of the shop, single-handed. She then sat on a chair inside the shop for some time without showing any obvious sign of discomfort, such as constantly adjusting her sitting position.

32. The second part of the Surveillance Video depicts Madam Tam on **15 January 2008** also working at the same shop. She was seen to be able to bend her back to unlock a metal roller gate. She then rolled up the gate with the help of a man. She could bend her back down repeatedly for picking up things. She was able to pull a soft drinks vending machine out. Again, she also held a wooden ladder on her shoulder, single-handed.

THE ORTHOPAEDIC EXPERTS

33. Madam Tam's orthopaedic conditions were jointly assessed by Dr. Fu Wai Kee (for Madam Tam) ("**Dr. Fu**") and Dr. Chun Siu Yeung (for the Defendants) ("**Dr. Chun**") on **22 October 2010**, which is 2 ³/₄

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years after the Surveillance Video was taken or 13 months after the 1st facet joint injection was made.

34. On physical examination by both experts, she was found to have mild left lower limb muscle wasting; decrease of sensation by 50% from left groin down and at left saddle area; left lower limb motor power at grade 3 from hip to toe.

35. Both experts agreed that the diagnosis is *contusion injury to the sacral spinal cord* with no fracture. They agree that the contusion was Accident-related. The contusion resulted in absence of lower limb muscle power, urinary retention and sensory loss of L1 dermatome on the left side initially but alter left L2 to S1 were also affected. There was reduction of left side perianal sensation. They both agree that her condition had reached maximal medical improvement. No further active treatment was required.

36. However, Dr. Chun opined that Madam Tam was exaggerating her low back symptoms in the joint medical examination. He pointed out that she had quite rapid improvement after the Accident because she was able to take repeated home leave during initial hospitalization. The fact that her urinary symptoms did not associate with report of bowel functional deficit at the same time was highly unusual and very difficult to explain on neuro-physiological basis of trauma and recovery. He believed that the prognosis should be better than portrait and that she was able to return working as a saleslady. She might have very mild disability and some residual neurological deficit involving her left lower limb. The impairment to her whole person was 4% due to her left lower limb weakness and loss of sensation; 3% due to her neurogenic bladder; 1% due to the possible but unlikely neurogenic sexual dysfunction. He gave as reference an 8% to the

loss of earning capacity. Reasonable sick leave should be up to 16 July 2007 only.

37. Dr. Fu, on the other hand, did not make any concrete comment on her urinary and bowel problem. He suggested input from an urologist was more appropriate. On the lower limb condition, though he agreed that Madam Tam should be better than she presented during the joint medical examination, her muscle wasting in left lower limb indicated that there was genuine pathology in her left lower limb that could not be pretended. She had residual back pain expected from any patient suffering from spinal cord injury. The prognosis was that her condition should be static. Her current impairments would likely to persist and she would have on and off back pain that require treatment on a need to basis. She would have difficulty in long period of walking and thus she should take up sedentary type of work such as indoor saleslady. The total impairment to her whole person (for the back injury and left lower limb impairment) and the loss of earning capacity should both be 10%. The sick leave given to her was appropriate.

THE UROLOGY EXPERTS

38. Madam Tam's urology condition was jointly assessed by Dr. Wong Kwok Tin Martin (for Madam Tam) ("**Dr. Wong**") and Dr. Koo Chia Gee George (for the Defendants) ("**Dr. Koo**") on **29 April 2011**.

39. During the joint examination, both experts noted obvious waste in her left thigh; impairment of sensation around the left groin and left thigh; normal anal tone but impaired sensation over the left saddle area.

40. Both experts agreed that she suffered contusion injury of her sacral spinal cord from the Accident. The injury resulted in back pain, impairment of sensation in her left lower limb and urinary symptoms. These injuries were related to the Accident. They shared the same view that there was no pre-existing medical condition contributing to these symptoms. Both experts also agreed that urologically, the major disabilities were urge urinary frequency at first and later developed into *urge incontinence*. For hygienic and to avoid embarrassment, she needed to use napkin or incontinence pad both days and nights and especially when going out.

41. They pointed out that the 3 UDS showed a rather unusual progress from normal capacity and functional bladder in February 2007 to *hyperreflexic bladder* [or *detrusor hyperreflexia*] with reduced filling capacity in December 2009. Detrusor hyperreflexia, the experts explained, signified that the cause of the impairment being due to *neurological dysfunction*, ie the spinal cord injury resulted from the Accident. For her urological problem and urge incontinence, the experts both gave 15% as the percentage of loss of earning capacity. They endorsed the sick leave granted to her.

42. As the bladder dysfunction appeared to be deteriorating, the prognosis of the urological impairment was *poor*. Dr. Wong opined that given the functional bladder capacity of only 50 ml and the average rate of urine production as about 1-2 ml per minute, she literally needed to go to the toilet every 25-50 minutes. However, Dr. Koo opines that Madam Tam's functional bladder and alleged frequency figure was probably exaggerated because despite the results of 2nd and 3rd UDS, she was able to void herself or only poor voiding with large residual was found. Further,

she did not need catheterization all along. In fact, she acknowledged that her condition improved with Ditropan [ie Oxybutynin]. The Surveillance Video, Dr. Koo pointed out, did not support that she needed to use the toilet so often.

43. Dr. Wong rated Madam Tam's permanent urological impairment at 15% and impairment to her neurogenic sexual dysfunction at 8%. Dr. Koo, however, opines that for her residual urge incontinence after maximum medication, the impairment was 8%. Her sexual impairment was 5%.

44. As to future urology treatment, Dr. Wong opined that augmentation cystoplasty (a major surgical operation involving cutting and isolating a segment of the patient's small intestines and using it as material to expand the bladder volume by sewing it to the cut-opened bladder dome) might be required if her bladder capacity further deteriorated. She would need to stay in hospital for 7 – 10 days and the cost of the operation and hospitalisation was \$100,000 - \$150,000. Dr. Koo did not agree that such an operation was expected in her present condition, as she appeared to get along reasonably well with medication alone at this stage.

45. On employment, Dr. Wong said that Madam Tam had no confidence to resume her pre-injury job as a saleslady. He opined that any job involving customer services imposed a lot of stress on her. Alternative employment included indoor sedentary jobs such as cashier and clerk was possible. But her efficiency at work may be affected by her urinary frequency. Dr. Koo differed and opined that she could carry on her present job of saleslady in the automobile shop as demonstrated in the Surveillance Video.

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V**MADAM TAM's BACKGROUND AND EVIDENCE**

46. She was born on 18 October 1963. She was aged 43 at the time of the accident and is 46 years old at the time of this assessment. She studied up to Form 5. She enjoyed good health prior to the Accident.

47. She is married with 2 daughters, now aged about 14 and 18 respectively. She lives with her daughters in a public housing unit. Although she is not legally separated from her husband, her husband has since about the Accident left her and spends his time living in China now. He only comes back occasionally to see their daughters. When he comes back, she has tried to have sex with him but failed. She no longer has any sex climax.

48. Prior to the Accident, she was a part-time saleslady (paid on commission basis) earning about \$4,000 per month. She was sometimes required to make delivery of products. She also took care of all the household chores before the Accident.

49. She was shown the Surveillance Video during the trial. She agreed with what was shown in the Surveillance Video save and except the following: (1) She opened the lock of the metal roller gate only; the gate was actually rolled up by her friend, Mr. Lee, the owner of the automobile shop; (2) she did not pull out the soft drink vending machine all by herself, because Mr. Lee was pushing the machine from the other side of it. It was just that Mr. Lee could not be shown in the Surveillance Video; (3) she did bring along a walking stick to work but it was not shown in the Surveillance Video; (4) she further commented that the Surveillance Video was an edited one and did not depict everything she did during those hours of video-taking.

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50. She further explained that at the time when the Surveillance Video was taken, her low back pain was not too serious and had not reached her waist (“未有痛在腰仔”). As to her urology problem, she had mild urinary incontinence; she did not have bowel problem then. But one day in March 2008, when she was on her way to the toilet (which was situate outside the automobile shop), the bowel became loose suddenly and as a result, her trousers were contaminated. She said this sudden incident took her aback and caused her immerse embarrassment. She thus decided to quit the job in March 2008.

51. She was cross-examined at great length on the various consultation summaries or medical reports made between 2007 and 2011 given by various public hospitals and special clinics. In substance, she denied exaggerating her symptoms of back pain and urology problem to the attending doctors. In particular, she asserted that she had complained about her urology problem, such as bowel incontinence, to the attending doctors in many follow-up sessions. She had no idea why the attending doctors did not write down her complaints. She denied having refused physiotherapy on 13 December 2010; she said she would do anything which the attending doctors thought was helpful to her. She also denied that she refused to perform UDS in August 2010, or that she refused to intermittent catheterization. She missed the appointment because she had fever on one occasion and mixed up the appointment between QEH and KH on the other occasion.

52. However, she agreed that she did not relate her impairment of sex function and the inability to feel orgasm to any attending doctors. She explained that she was never asked on this topic and thus she would not volunteer such information to them.

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53. On her current condition, Madam Tam gave evidence to the effect that her back pain has become frequent and really serious since about October 2011. She finds her left leg lacking power. She does not wish to consume pain killer when the pain emerges, partly because she fears that the pain killer would lose effect on her in the long run and partly because the urology medicine has already given her a hard time (ie she has dry mouth but yet she is advised by the attending doctor(s) not to drink too much liquid). So, she tries not to consume pain killers until she cannot endure the back pain. Nevertheless, she now has to consume pain killers 3 times a week in order to get some sleep.

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54. The pain is sometimes so serious that urine just seeps out (“必尿”) even before she is aware of any urgency to go to the toilet. The urinary frequency is once every 45 minutes to 1 hour.

55. On her bowel problem, she said that the attending doctor(s) taught her to use laxatives to loosen her bowel in the morning so that more storage space would be created in her intestines. The storage space created would act as a buffer (“走棧位”) so that the stool would not be defecated at once when there was a feeling of urgency (“唔會一賴就賴出嚟”). But recently, when the back pain is serious, there is a feeling that the stool will come out even if there is no bowel urgency (“唔急大便嘅, 但係呢就痛到好似撬出嚟咁樣”).

56. Whenever she goes out, she has to wear diapers and she dares not go too far away from her home. She also brings along an umbrella as an aid, especially to crowded venue or just in case her lower limb feels sudden weakness.

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57. In mid-December 2011, she received a facet joint injection for the 2nd time. The next follow-up appointment with the Pain Clinic and Urology Clinic is March 2012.

ANALYSIS OF EVIDENCE

Madam Tam

58. In his closing submission, Mr. Chung, Counsel for the Defendants, sets out in great details the alleged “irreconcilable difference and contradictions” between (1) Madam Tam’s oral evidence and her witness statements; (2) her evidence and medical records; (3) her reaction to treatment and her alleged symptoms; and in (4) other general area, such as the Surveillance Video. He draws my attention to the opinions of both orthopaedic experts and both urology experts that Madam Tam was exaggerating or might be exaggerating her symptoms during the respective joint medical examinations. He further asks me to prefer the opinions of the Defendants’ orthopaedic and urology experts. In a word, he is adamant in submitting that Madam Tam has glaringly exaggerated her pre-2011 (prior to the various expert reports) and recent (after the expert reports) condition and disabilities in this trial. He asks me to disregard Madam Tam’s oral evidence and just rely on the objective medical records.

59. Mr. Lam, in reply, submits that Drs. Chun and Koo (for the Defendants) had placed heavy reliance on the Surveillance Video in concluding that Madam Tam exaggerated her disabilities; yet they had overlooked the fact that the Surveillance Video was not an updated one but taken in January 2008. Further, Mr. Lam does not agree that the wording in the expert reports prepared by Drs. Fu and Wong (for Madam Tam)

amounted to an opinion of exaggeration of Madam Tam. As to the discrepancies between Madam Tam's evidence and the medical records, Mr. Lam argues that it was probably due to the mistaken memory over almost 5 years of sufferings. He further submits that in case of any discrepancies, I should refer to and rely on the medical records.

60. I have carefully considered Madam Tam's evidence in the light of the documents, undisputed medical records, medical expert evidence, inferences based on inherent probabilities and/or undisputed facts, and submission from Counsel for both sides. I do not propose to dwell on each and every point submitted by Counsel for both sides. Suffice for me to say that I have considered all the points made by both Counsel in their submission, but will only deal with those points which are material and relevant points in the Judgment below.

61. I should start by saying that in considering any alleged inconsistencies on Madam Tam's evidence (be it her witness statements or her oral evidence in court) and the medical records, I do remind myself that almost 5 years have lapsed since the Accident. Over these 5 years, Madam Tam received or is still receiving follow-up treatment for the injuries sustained by her during the Accident at 7 different departments/clinics of 2 different hospitals. It is understandable and in fact expected that memories to minute and trivial details, such as the dates, what she said to or was told by various attending doctors may easily be forgotten or mixed up; leeway must be given to that.

62. I note Mr. Chung's submission that Madam Tam, when being confronted with the medical records, chose to deny the contents of the same, instead of saying that she could not recall the details. But I do not agree that would at once equate to telling lies or exaggeration on the part of

Madam Tam generally. First, it needs to point out that Madam Tam did not deny the content of *all* medical records that she was cross-examined on by Mr. Chung. Secondly, what she denied most in the cross-examination was the medical records on her bladder and bowel problem or incontinence. She asserted that she had told the attending doctors of her urology problems but the medical records did not show the same. Given summational nature of consultation summaries and the heavy workload of the attending doctors at public hospitals, I think it is not incredible that the attending doctors in question might not have recorded in details *all* the complaints of Madam Tam. Take for an example, on 5 August 2009, the consultation summary of the Spinal Clinic wrote: “referred by Ortho colleague for management of worsening urinary problem since 2-2009”. But the consultation records of the Orthopaedic Department prior to February 2009 did not record anything which signified “worsening urinary problem” of Madam Tam. Thirdly, without any disrespect to Madam Tam, I have the impression that she is not a particularly eloquent and smart lady. She was educated to Form 5 only. Therefore, when describing her condition to the attending doctors at the relevant times, one cannot expect her to be necessarily precise and technical in her choice of words. As such, her honest but subjective complaint of “incontinence” may not be taken as “real incontinence” upon an objective examination by the attending doctor(s). That may also explain why the consultation summary of the Spinal Clinic dated 11 August 2010 has this recorded: “*Urgency of bowel opening rather than true incontinence*”.

63. Of course I have not overlooked the medical records of Orthopaedic Department dated 13 December 2010 noting “dont [don’t] want PT [physiotherapy] because think difficult to go there”. Madam Tam in her oral evidence denied saying this and pointed out that physiotherapy

was not offered to her and that KH [the venue where physiotherapy would be done] was close to her home and thus would not be difficult to go there. On balance, I accept her evidence, because it would be against common sense for a patient to reject physiotherapy in 2010 but to accept a facet joint injection to relieve her back pain in 2011, given the latter must have more potential risk and complications than the former.

64. The alleged refusal to intermittent catheterization is also denied by Madam Tam. She said that she just missed the appointment to learn using catheterization. I note that the medical records of the Spinal Clinic on 10 August 2009 recorded that due to high detrusor hyperreflexia pressure, there was difficulty in inserting catheter. Besides, in my view, given Madam Tam is a lady in her mid-40s only and the insertion of catheterization would certainly cause embarrassment to her appearance, her unwillingness or refusal to catheterization, even if it is true, can be understood and excused. I am not persuaded by Mr. Chung's submission that such unwillingness or refusal amounts to an exaggeration or falsity of complaints on the part of Madam Tam.

65. The Defendants rely heavily on the Surveillance Video in attacking the credibility of Madam Tam. I accept that from what was shown in the Surveillance Video, Madam Tam's movement and actions looked natural and spontaneous. Thus, I would conclude that she did not have serious back pain problem as at January 2008. This is basically in line with what she related to the attending doctors around that time.

66. It is perhaps true that there are some discrepancies between Madam Tam's oral and written evidence or between her evidence and medical records on her back pain as well as her urinary or bowel symptoms. However, on the whole, I do not form the impression that she was seeking

materially to exaggerate her current condition of back pain and urology symptoms or how she has been affected by the Accident. I regard it as inherently unlikely that anyone would malingering or exaggerate for the sake of compensation to the extent of allowing herself to receive 2 facet joint injections in less than 2 ½ years and to face all potential risks and complications that may be brought by such injections into her spinal cord, for any failure or complication of the injection would likely lead to serious or irreparable consequences to her spine.

67. Further, regardless of any discrepancies submitted by Mr. Chung, the undeniable facts remains this:

(1) by 22 October 2010, even the Defendants' orthopaedic expert acknowledged that there was loss of sensation on her left L1 initially but subsequently her left L2 to S1 nerve roots were also affected. To relieve her back pain, facet joint injection was recommended by the attending doctor(s) and done on 16 September 2009 but was with temporary improvement only. Due to her back pain, she received another facet joint injection in mid-December 2011.

(2) by 29 April 2011, even the Defendants' urology expert acknowledged Madam Tam's urology symptoms was Accident-related and confirmed that she suffered from *detrusor hyperreflexia* and *urge incontinence* and would need to use napkins days and nights.

Orthopaedic Expert Evidence

68. It cannot be disputed that Dr. Fu (for Madam Tam) opined in the joint report that the lower limb condition of Madam Tam should be better than she presented on that day. Equally, it is beyond argument that as at the date of the joint medical examination by both orthopaedic experts (ie 22 October 2010), there was muscle wasting in her left limb. Further, even Dr. Chun (for the Defendants) could not rule out that there might be some residual neurological deficit involving her left lower limb. He gave a total of 4% to whole person impairment on the orthopaedic aspect. As such and as rightly pointed out by Dr. Fu, I accept that her left limb indicated a genuine pathology that could not be pretended.

69. It is Mr. Chung's submission that Dr. Fu's comment that Madam Tam's condition was static by itself contradicted with the evidence of Madam Tam that her recent condition at her lower back deteriorated. Despite this very tempting argument of Mr. Chung, I am not persuaded by him. I note, first of all, that Dr. Fu's comment on Madam Tam's condition was this: "Her condition *should be* static. Her current impairments will likely persist. She will have on and off back pain that requires treatment on a need to basis" (emphasis added). I do not read the words of Dr. Fu to mean that he was giving a firm conclusion that Madam Tam's back pain condition *was* static, nor do I take the words of Dr. Fu to mean that he was precluding any possibility of fluctuation of Madam Tam's back pain.

70. I go further to say that in my view, the recurring back pain of Madam Tam since or about October 2011 is not in a true sense fluctuation of her condition. It is because (1) neither the evidence of Madam Tam, nor the medical notes of the public hospitals indicated that her low back pain has healed completely by the date of the joint medical examination; (2) the so-called improvement or reduction of back pain after the facet joint

injection on 16 September 2009 was only on a temporary basis, which has to be distinguished from the situation that the low back pain was permanently or completely cured. This would mean more likely than not that once when the effect of the facet joint injection subdued after lapse of time, the back pain would become eminent again. This is exactly what Madam Tam told me in her evidence, which I accept. This is also exactly what the orthopaedic experts have noted in para 84 of the joint report.

71. On the other hand, I have to point out, with the greatest respect to Dr. Chun, that I think it was beyond his expertise to make comment on Madam Tam's urinary or bowel impairment (see para 91 and 92 of the joint report). That should be, as rightly pointed out by Dr. Fu, within the expertise of a urology expert. In fact, while Dr. Chun queried the alleged urology symptoms of Madam Tam was not compatible with the healing of the spinal cord injury and thus concluded that she was exaggerating her condition, both urology experts confirmed that she had neurogenic bladder with detrusor hyperreflexia. As such, Dr. Chun's comment does not seem to align with the urologists' opinion.

72. Further, Dr. Fu's opinion seems to be more in line with the medical records of Madam Tam.

73. Due to the matters aforesaid, I accept Dr. Fu's opinions set out in the joint report insofar as they relate to Madam Tam's condition and disability.

Urology Expert Evidence

74. Submission is made by Mr. Chung that Dr. Wong (for Madam Tam) opined that she might have exaggerated her urology symptoms. The

comment of Dr. Wong appears in para 5.22 of the joint report and it read like this: “The investigation report and DVD supplied by J & E investigation Co. were reviewed. *In spite of the suspicion* that Madam Tam *may* have been exaggerating her symptoms, the muscle wasting of her left lower limb cannot be pretended. Dr. Wong believe[s] that the neurological impairment is genuine” (emphasis added). When this comment of Dr. Wong is read in context, I do not see that the doctor formed an opinion that Madam Tam was exaggerating her disability. Rather, he was commenting that despite the investigation report and DVD might arouse suspicion of exaggeration, he opined and emphasized that the neurological impairment was genuine.

75. Dr. Koo (for the Defendants) commented that Madam Tam’s functional bladder capacity and alleged frequency figure was exaggerating. He based his view on the medical notes of the follow up in March 2010 (in which she “acknowledged improvement”) and the Surveillance Video. I do not think that the Surveillance Video could be heavily relied on given it was taken way back in January 2008 whereas Madam Tam’s functional bladder capacity started to deteriorate sharply only in mid-2009. Further, I note that the only follow-up session attended by Madam Tam in March 2010 was with the Spinal Clinic on 24 March 2010. There was no such records that “she acknowledged improvement” in the said consultation summary. It recorded, however, a reduction in residual urine, but one must not overlook the fact that such reduction took place only after she was put on maximum dosage oxybutynin.

76. Dr. Koo also questioned the real validity and severity of Madam Tam’s bladder patho-physiology based purely on the UDS. Mr. Chung picked up the point and commented that the UDS could not provide an

objective result in testing Madam Tam's functional bladder capacity because the test was subject to her subjective control. First, it needs to point out that despite Dr. Koo's comment on the UDS, he had not suggested any alternative test to be done. Secondly, the medical notes of the attending doctors did not record any unreliability of the UDS results or any exaggeration of Madam Tam during the tests. I find Dr. Koo's aforesaid comment on the UDS unsubstantiated.

77. Due to the matters aforesaid, I would prefer the opinion given by Dr. Wong to that of Dr. Koo.

MY FINDINGS AS TO INJURIES

78. In relation to the low back pain, I find that Madam Tam suffered contusion injury to her sacral spinal cord as a result of the Accident. The contusion resulted in absence of lower limb muscle power, urinary retention and sensory loss of L1 dermatome on left side initially. But subsequently the left L2 to S1 nerve roots were affected. She is still suffering from low back pain affecting the power and sensation of her left limb caused by the Accident.

79. I find that her back pain condition is likely to persist that requires treatment on a need to basis, such as facet joint injections. It is common ground of both experts that her condition has reached maximum medical improvement.

80. Due to her low back condition, she will have difficulty in long period of walking. Indoor saleslady, rather than outdoor saleslady, should be a more appropriate job to her. I find that her whole person impairment from an orthopaedic angle and loss of earning capacity is both 10%.

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81. On urology side, I find that Madam Tam is suffering from detrusor hyperreflexia with impaired contractility due to neurological dysfunction, ie spinal cord injury resulted from the Accident. With sharp decrease in functional bladder capacity since 2009, the prognosis is poor. She will continue to suffer from urge incontinence and will require diapers or incontinence pads both days and nights. I also find that she has urgency of bowel opening rather than true incontinence. I find that the urology impairment to her whole person is 15%.

82. Due to her urology impairments, she should take up indoor sedentary jobs such as clerk or cashier, but her work efficiency is likely to be affected by her urinary frequency. I accept that the loss of earning capacity (agreed by both urology experts) is 15%.

83. I believe and accept that her sexual function is affected as a result of the injury sustained in the Accident. I accept the impairment rating is 8%.

THE QUANTUM

PSLA

84. Mr. Lam submits that Madam Tam's injuries alone should put her within the category of serious injury of \$500,000. He cites to me the following cases: *Choi Wing Chai v Li Bing*, HCPI 30/1996 (PSLA: \$500,000); *黃錦康 v 黎敏漢*, HCPI 1091/2000 (PSLA: \$400,000). He says that Madam Tam's condition is worse than the plaintiff in *黃錦康*.

85. Mr. Chung submits that the case of 黃錦康 is far out of range. He asks me to award \$150,000 only by relying on *Lee Moon Lam v Chong Pong & Others*, DCPI 1589 of 2006 (PSLA: \$150,000); *Tsang Yu Wa v Li Sau Kam & Another*, DCPI 534 of 2009 (PSAL: \$150,000); *Chan Chung Keung v Greenroll Limited t/a Conrad Hong Kong*, HCPI 275 of 2005 (PSLA: \$180,000). He adds that *Tsang Yu Wa* is very close to the range.

86. I have considered all the cases cited by Counsel. I agree with Mr. Chung that the plaintiff in 黃錦康 initially suffered more serious injuries than Madam Tam in our case; however, he (probably due to his young age) experienced less serious residual problems than Madam Tam. On the other hand, the plaintiffs in the cases quoted by Mr. Chung, in my view, had far less serious injuries than those of Madam Tam. Take for an example in *Tsang Yu Wa*, the plaintiff basically had a whiplash injury with no neurological deficit, but Madam Tam suffered spinal cord injury with cauda equine damage.

87. Taking into account all evidence and the inflation factor, I think a proper award under the head of PSLA is \$300,000.

Pre-Trial Loss of Earnings

88. Madam Tam claims an award of \$4,000 per month for 42 months from the date of the Accident until the date of filing of the Statement of Damages. But Mr. Lam in his closing submission says that if the Court is not with Madam Tam for claiming 42 months of pre-trial loss of earnings, at least 24 months' loss of earnings should be awarded.

89. Mr. Chung, in response, submits that I should take a mean figure of Madam Tam's annual income in 2006, ie \$2,584.17, as the basis of

computing her monthly income prior to the Accident and award only 8 months to cover her loss of income during the sick leave period.

90. It needs to be noted that Madam Tam was not cross-examined on her allegation of pre-trial monthly income of \$4,000. Be that as it may, she still needs to prove her income. For this purpose, she has produced a letter dated August 2008 from her former employer setting out her monthly income from 2004 to February 2007. It seems to me clear that the income listed for a particular month in the employer's letter was actually the income of the preceding month, eg \$4,000 listed next to January 2007 is the income of December 2006; \$2,000 listed next to February 2007 is the income of January 2007 (as the Accident happened on 16 January 2007). The employer's letter showed that her monthly income prior to the Accident fluctuated. That said, I agree with Mr. Chung that an average monthly income in the last 12 months prior to the Accident should be adopted for the purpose of calculating her pre-trial income. I will thus adopt the figure of \$2,917.50, being an average monthly income listed from March 2006 to January 2007 in the employer's letter.

91. I do not think it will be disputed that I am not bound by the sick leave period as stated on the sick leave certificates (See: *Choy Wai Chung v Chun Wo Construction & Engineering Co. Ltd.*, CACV 172/2004).

92. The sick leave certificates (including the initial hospitalization) show that Madam Tam was given intermittent sick leave of about 8 months by public hospitals until 4 December 2007. A period from 17 July 2007 to 3 October 2007 (79 days) was not covered by the sick leave certificates. However, given on 7 June 2007 (when sick leave was granted to 16 July 2007), a follow-up appointment on 4 October 2007 was already provided to Madam Tam; and given some reasonable time should be allowed for her

to find a new job, I am of the view that she should be entitled to income loss for these 79 days (on top of the 8 months covered by sick leave certificates).

93. Her back pain turned bad at least from 16 March 2009, evident by the fact that the Pain Clinic advised her to receive facet joint injection right away in the first consultation with the Pain Clinic. Then, she was required to attend regular follow-up sessions once every 1 to 2 weeks between 23 July 2009 and 23 September 2009. She was referred to urgent MRI and was hospitalized for 4 days from 7 to 10 September 2009, followed by facet joint injection done on 16 September 2009. I am of the view that she should at the very least be entitled to loss of income from 23 July to 23 September 2009 followed by a subsequent reasonable period of say 2 months to look for a job, giving a total of another 4 months.

94. According to her evidence, her back pain became really serious again since October 2011 which led to another facet joint injection in mid-December 2011. I thus will award her loss of income from October 2011 for 4 months (including a reasonable period of 2 months to locate a new job after the facet joint injection).

95. Credit should be given to the income she earned during 2008 in the sum of \$4,500 (\$3,500 + \$1,000).

96. The total pre-trial loss of income is computed as follows:

$$\begin{aligned} \$2,917.50 \times (8 + 79/30 + 4 + 4) \text{ months} - \$4,500 &= \$49,862.75 \\ &\text{(say \$49,863)} \end{aligned}$$

Loss of Earning Capacity

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97. Madam Tam claims that there is a real risk that she will be handicapped in the general labour market by reason of her back pain and urinary frequency. She asks for a lump sum of \$150,000 as damages under this head.

98. Mr. Chung, however, argues that a sum equal to 3 months of income should be sufficient, say \$8,000.

99. I am satisfied that there is sufficient medical evidence to suggest that there is a real risk that Madam Tam may suffer a disadvantage in the labour market by reason of her back pain, the likely need to receive facet joint injections from time to time and urge incontinence. I am of the view that a lump sum award of \$50,000 should be appropriate here.

Loss of Gratuitous Services to Family

100. Mr. Lam argues that due to the injuries sustained by Madam Tam in this Accident, she ceases to be able to do much household since the Accident. She should thus be entitled to a sum of \$60 per hour for a future of 28 years (multiplier: 15) in the total sum of \$328,000 under this head.

101. Mr. Chung submits this head should be disallowed as there was no disability in doing housework on the part of Madam Tam; it is rather a matter of correct methods to be adopted.

102. No expert or attending doctors have commented directly on this topic. However, I note that according to the occupational therapy report dated 13 August 2007, the occupational therapist did advise, upon a pre-discharged home visit which took place on 31 January 2007, that assistance from Madam Tam's father and daughter "in performing cooking

A and household tasks due to her fair functional stability” was required. It is
B thus rather clear that Madam Tam was quite unable to perform household
C tasks and cooking when she was discharged from KH on 6 February 2007.
D The question is for how long she would be disabled from doing household
tasks by herself.

E 103. No further occupational therapy was suggested upon her
F discharge from KH, but she was advised to continue physiotherapy until 31
G May 2007. Doing the best I can, I will adopt the date of 31 May 2007 as the
H cut-off date when she would be assumed to be able to perform household
chores again.

I 104. I reject any compensation after 31 May 2007 because her elder
J daughter has attained majority age (and so would be the younger daughter
K in a few years). I take the view that it is more likely than not that her
L daughters will assist in daily household chores anyway regardless of the
Accident or not.

M 105. The award under this head is this:

$$N \quad \$60 \times 136 \text{ days} = \$8,160$$

O
P ***Future Medical Expenses***

Q 106. Mr. Lam refers to the opinion given by Dr. Wong (urology
R expert for Madam Tam) and submits that an award of \$125,000 be made to
cover the operation of augmentation cystoplasty.

S 107. Mr. Chung opposes and submits that there is no evidence to
T show that Madam Tam’s bladder capacity would further deteriorated to
warrant such an operation.

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108. The 2 UDS in 2009 showed that Madam Tam's functional bladder capacity decreased sharply. An updated UDS was performed in May 2011, but its result was not placed before me in this trial. In the cross-examination, Madam Tam said that she had mentioned this operation to the urology attending doctor in May 2011. The attending doctor told her that her condition had not yet reached that stage of doing the said operation, as she was just in her 40s only. In my view, what the attending doctor in effect meant was this: Madam Tam was still relatively young to receive this operation at this stage, but it was just a matter of time that she would need to do this operation in the future.

109. Taken into the account of the opinion of Dr. Wong (which I have accepted) and the attending doctor (described by Madam Tam in her oral evidence), I find that on balance, it is more likely than not that Madam Tam will have to receive this operation of augmentation cystoplasty. I accordingly award \$125,000 under this head.

Special Damages

110. In her Amended Revised Statement of Damages, Madam Tam claims a total of \$16,900 to cover her loss in medical expenses, travelling expenses and tonic food. The breakdown is set out in his witness statement dated 2 November 2010.

111. Mr. Chung has helpfully worked out the total medical expenses disclosed by Madam Tam in the sum of \$6,830 (excluding the costs for retrieving medical reports which should be regarded as costs of this case). He submits that the special damages should be reduced to \$5,000 only to

reflect her exaggeration. However, I am not persuaded by Mr. Chung on this argument.

112. I note that the medical receipts disclosed in the trial are up to 7 July 2010 only. But the consultation summaries show that there are 7 further consultations after 7 July 2010, which means that additional medical expenses must have incurred.

113. Likewise, further travelling expenses must have also incurred. Accordingly to her witness statement dated 2 November 2010, she incurred travelling expenses of \$3,240 for 53 sessions of follow-up treatment, or about \$61 per session.

114. There is no receipt on tonic food produced by Madam Tam in the trial. But taken into account her injuries and sick leave period, I am prepared to apply my discretion to allow \$5,000 for tonic food.

115. In the circumstances, I will award her with medical expenses of \$7,530; travelling expenses of \$3,660 and tonic food of \$5,000. The total special damages are \$16,190.

CONCLSION

116. I set out below the award allowed by me under each head:

PSLA	\$ 300,000
Pre-trial loss of earnings	\$ 49,863
Loss of earning capacity	\$ 50,000
Loss of gratuitous service to family	\$ 8,160
Future Medical Expenses	\$ 125,000

A			A
	Special damages	\$ 16,190	
B	TOTAL :	\$ 549,213	B
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117. Accordingly, I order that the damages assessed and awarded to Madam Tam in this case are \$549,213.

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118. Interest will be payable on PSLA at the rate of 2% per annum from the date of service of the Writ to the date of judgment, and on other special damages at half judgment rate from the date of the accident to the date of judgment.

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119. I will make a costs order *nisi* that the costs of the 2nd and 3rd days of the trial on quantum (ie 7 and 16 December 2011), including any costs reserved, if any, are to be paid by the Defendants to Madam Tam, to be taxed if not agreed, with certificate for Counsel. If there is no application to vary the costs order *nisi*, it will become *absolute* within 14 days from the date of this Judgment.

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Grace Chan
Deputy District Judge

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Mr. Simon Lam instructed by Messrs. Louis K.Y. Pau & Co. for the Plaintiff
Mr. Gary Chung instructed by Messrs. Winnie Leung & Co. for the Defendant