

49/84

No. 22 of 1984

IN THE PRIVY COUNCIL

O N A P P E A L

FROM THE COURT OF APPEAL OF HONG KONG
(Civil Appeal No. 53 of 1983)

B E T W E E N :

CHAN WAI TONG

1st Appellant
(First Defendant)

- and -

WONG SHOK TING

2nd Appellant
(Second Defendant)

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- and -

LI PING SUM

Respondent
(Plaintiff)

CASE FOR THE APPELLANTS

RECORD

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1. This is an appeal from a judgment dated 13th October 1983 of the Court of Appeal of Hong Kong (Roberts, C.J., Barker, J.A. and Baber, J.)

p.43

allowing an appeal from an order dated 7th March 1983 of the Supreme Court of Hong Kong (Master Hansen) assessing damages and ordering that final judgment be entered for the Respondent for general damages in the sum of H.K. \$27,500 and for special damages in the sum of H.K. \$3,895, together with interest at a rate of 14% per annum on the said general damages from the date of service of the writ until judgment and at a rate of 7% per annum on the said special damages from 30th January 1981 until judgment.

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p.10, 11. 4-16	2. The action arose out of an accident on 30th January 1981 in which a Public Light Bus in which the Respondent was a passenger overturned after colliding with a goods vehicle. The Respondent alleged that at the time of the collision the Bus was being driven by the 1st Appellant as servant or agent of the 2nd Appellant who owned the Bus. The goods vehicle was owned and driven at all material times by the 3rd Defendant.	
p.10, 11. 17-20		
p.10, 11. 22-23		
p.10, 11. 24-25	3. In this action the Respondent claimed damages for the personal injuries which she suffered in the accident, alleging that they were caused by the negligence of the 1st Appellant and the 3rd Defendant.	10
p.11, 11. 1-33		
p.12		
p.17, 11. 12-13	4. On the application of, and by consent of, all the parties to the action the said Supreme Court (Master Wilson in Chambers) directed, by order dated 17th November 1982, that Interlocutory Judgment be entered for the Respondent against the Appellants and against the 3rd Defendant as to 75% and 25% respectively of the Respondent's claim. It was further ordered that the damages were to be assessed by a Master of the said Supreme Court in Chambers and that the Appellants should pay 75%, and the 3rd Defendant 25%, of the Respondent's costs, such costs to be taxed if not agreed.	20
p.17		
p.17, 11. 14-16		
p.17, 11. 17-18		
p.17, 11. 19-21		
pp.19-23	5. Pursuant to the said order, a hearing was held before Master Hansen in Chambers on 7th February 1983. According to medical reports produced at the said hearing, the Respondent had suffered compression fractures of the 11th and 12th thoracic vertebrae and of the 1st lumbar vertebrae.	30
p.54, 11. 12-14		
p.56, 11. 24-25		
p.25, 11. 19-20		
p.55, 11. 13-15	6. The medical report produced on behalf of the Respondent assessed the degree of her permanent disability at 25%, whereas that produced on behalf of the Appellants and 3rd Defendant assessed it at 15%.	
p.57, 11. 18-19		
p.25, 11. 22-25		
p.20, 11. 4-5	7. The Respondent gave evidence that she still suffered from pain and that she could not sit in the same position for long, which caused her particular difficulty as her employment as an accountant required her to sit for long periods. She also gave evidence that, in addition to the staff at the hospital where she had been treated, she had attended five different doctors and a bone setter.	40
p.21, 11. 31-34		
p.25, 11. 26-28		
p.25, 11. 29-31		
p.19, 11. 32-37		
p.20, 11. 1-4		

	8. It was submitted from the Respondent that an award in the region of H.K.\$35,000 should be made for pain and suffering and loss of amenity because such an award was supported by certain decisions of the Courts of Hong Kong namely: <u>Leung Hui Kin v. Lai Ping-Sum</u> H.C.A. 2579/76; <u>Yu Kam So v. Leung Hee and Lawrence v. China Motor Bus</u> H.C.A. 885/80. The Respondent also relied upon decisions in three English cases to indicate the proper range of award.	RECORD p.22, 11. 10-18 p.25, 1-35 p.26, 11. 1-3
10	(<u>Wheeler v. Remis</u>) (unreported), <u>Childs v. Crawley B.C.</u> (unreported), and <u>Hunter v. Traverol Laboratories</u> (unreported).	p.22, 11. 14-16 p.26, 11. 4-5
	9. The Learned Master found that the Respondent had greatly exaggerated her condition and that although she did suffer pain, it was not as bad as as she had claimed. Furthermore he held, following <u>Lee Ting-Lam v. Leung Kam Ming</u> [1980] H.K.L.R. 657, that the quantum of damages was to be assessed by reference to the awards made by the Courts of Hong Kong and that he could not take account of the level of awards made in the English or other foreign courts. Accordingly, the Learned Master accepted the submission made on behalf of the Appellants that an award in the region of H.K.\$25,000-30,000 was appropriate for pain and suffering and loss of amenity and, having allowed for inflation, he in fact awarded the Respondent H.K.\$27,000.	p.25, 11. 30-33 p.26, 11. 10-11 p.26, 11. 25-26
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	10. As regards special damages, the Learned Master held that the Respondent had failed to justify the need to see a bone setter and that her claim to recover the costs of such treatment should, therefore, be disallowed. Hospital expenses were agreed and awarded at H.K.\$45. In respect of the Respondent's claim for H.K.\$3,500 for the fees of the doctors other than the hospital doctors, the Learned Master held that, although it was proper for the Respondent to have sought a second medical opinion on her condition, she was not entitled to recoup the expense of attending all five of the doctors whom she had consulted. He therefore awarded H.K.\$500 in respect of doctor's fees.	p.26, 11. 6-10 p.26, 11. 11-12
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		p.26, 11. 17-18 p.26, 11. 19-20
40		p.26, 11. 21-26
	11. The Learned Master also awarded H.K.\$500 in respect of the cost of nourishing food allegedly required by the Respondent, although there was no evidence to support the allegation. The sum of H.K.\$250 was awarded for the Respondent's travelling expenses to and from hospital.	p.26, 11. 26-29 p.26, 1. 28 p.26, 1. 35

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p.26, 1.37		
p.19, 11.		
21-23		
p.27, 11.		
1-3		
p.53, 1. 17		
p.27, 1.		
3-4		
p.22, 11.		
31-33		
p.27, 11.		
3-6		
p.28	13. Accordingly, the Learned Master made the order dated 7th March 1983 recited in paragraph 1 hereof. By a notice of appeal dated 15th April 1983 the Respondent appealed to the Court of Appeal of Hong Kong. The appeal came before Roberts, C.J., Barker, J.A. and Baber, J. on the 13th October 1983, the Respondent acting in person.	20
pp.31-35		
p.37, 1.10		
p.37, 1.32		
pp.37-42	14. The judgment of the Court of Appeal of Hong Kong was delivered by Barker, J.A. on the 13th October 1983. The Learned Judges first expressed the view that the Respondent ought to have been allowed Legal Aid for the appeal. They then summarized the injury sustained by the Respondent and the tenor of the medical reports which had been before Master Hansen.	30
p.38, 11.		
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p.39, 11.	15. It had been submitted on behalf of the Appellants, relying on the decision in <u>Davies and Another v. Powell Duffryn Associated Collieries Ltd.</u> [1942] A.C. 601, that an Appellate Court should be slow to interfere with an assessment of damages unless it was wrong in principle or was otherwise a wholly erroneous estimate of the damage. The Learned Judges held that Master Hansen's assessment of damages for pain and suffering and loss of amenity was wholly erroneous.	40
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p.39, 11.		
7-8		
p.39, 11.	16. The Learned Judges referred to the case of <u>Lee Ting-Lam v. Leung Kam-Ming</u> (supra) and to a passage therein in the judgment of Cons, J. which stated that the appropriate level of award of damages was to be found in the decisions of the Courts of Hong Kong and not in those of England and Wales or of any other jurisdiction. The Learned Judges overruled that passage and held that in considering the level of awards to be given in	50
9-17		
p.39, 1.18		
p.39, 11.		
18-21		

		<u>RECORD</u>
	Hong Kong, the Court could consider the level of awards given in other jurisdictions, especially in England. The Learned Judges observed that it was apparent that the awards for pain and suffering given in England were of the order of three times as great as in Hong Kong and expressed difficulty in understanding why there should be such a disparity.	p.39, 11. 21-23 p.39, 11. 25-26
10	17. The Learned Judges further referred to Cons J's judgment in <u>Lee Ting-Lam v. Leung Kam-Ming</u> (supra) in which, inter alia, he set out a category of "Serious Injury" for which he stated that the proper range of award was H.K.\$60,000 to 80,000 and he stated that the value of awards must be updated from time to time to take account of the fall in the value of money. It was submitted on behalf of the Appellants that the Respondent's injuries were not within the category of "Serious Injury", but the Learned Judges rejected that submission and held that the injuries came at the bottom of the bracket of "Serious Injury". They further held that the quantum of award indicated by Cons, J. in <u>Lee Ting-Lam v. Leung Kam-Ming</u> (supra) should be updated, to take account of inflation, by being increased by 50%. Accordingly the Learned Judges awarded the Respondent H.K.\$90,000 for pain and suffering and loss of amenity.	p.39, 11. 27-33 p.39, 11. 34-38 p.40, 11. 7-9 p.40, 11. 9-14 p.40, 11. 1-6 p.40, 1.14
30	18. The Learned Judges also held that the Respondent was entitled to recover damages for loss of future earning capacity, despite the fact that no such loss had been pleaded and despite the fact that such loss had not been pursued before the Learned Master. They held that as there were no special circumstances which if not pleaded would take the Appellants by surprise, there was no bar to recovery on appeal by the Respondent of damages for loss of future earning capacity. It was submitted on behalf of the Appellants that there was no evidence upon which an award for loss of future earning capacity could properly be made. The Learned Judges, however, held that there was evidence before Master Hansen that the Respondent, from time to time was away from work altogether and then was off work for half-days. The Learned Judges were of the view that such a state of affairs was likely to continue and they therefore held that damages for loss of future earning capacity should be awarded.	p.40, 11. 15-21 p.40, 11. 37-38 p.40, 11. 24-26 p.40, 11. 27-29 p.40, 11. 37-39
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50	19. The Learned Judges assessed the quantum of damages to be awarded for loss of future earning	

RECORD

p.40, 11. 30-36	capacity by reference to the degree of permanent disability indicated by the medical reports. Those reports assessed the degree of such disability at 25% and 15% respectively. The Learned Judges adopted a figure half way between these assessments, namely 20%, as indicating the extent of the Respondent's loss of future earning capacity. They therefore held that the Respondent's said loss amounted to 20% of her salary per annum, namely H.K.\$7,200 p.a. They awarded 15 years purchase on that sum and thereby awarded H.K.\$108,000 to the Respondent for loss of future earning capacity.	10
p.40, 11. 35-36		
p.40, 11. 37-38		
p.41, 11. 2-4	20. In respect of special damages, it was conceded on behalf of the Appellants that the proper award for loss of earnings was H.K.\$5,200. Further, it was not disputed that there should be awarded the sum of H.K.\$250 for travelling expenses; H.K.\$500 for nourishing food and H.K.\$45 for hospital expenses. In respect of expenses incurred by the Respondent in consulting a bone setter it was submitted for the Appellants, relying on	20
p.41, 11. 7-8		
p.41, 11. 17-26	<u>Yu Shee Pui v. Urban Council</u> (High Court of Hong Kong, Action No. 252 of 1979) that damages should not be awarded for the cost of such treatment as there had been no expert evidence as to the nature and effect of the treatment. The Learned Judges rejecting that submission and following a dictum of the Learned Chief Justice in <u>Yu Ki v. Chin Kit-Lam and Another</u> (1981) H.K.L.R. 419, awarded damages of H.K.\$1500 for bone setter's expenses.	30
p.41, 11. 10-27		
p.41, 11. 33-37	21. The Learned Judges upheld the decision of the Learned Master in respect of the expenses incurred by the Respondent in consulting five doctors other than those who treated her in hospital. Accordingly they awarded H.K.\$500 for such expenses. Finally, following <u>Wright v. British Rail</u> [1983] 3 W.L.R. 211 the Learned Judges awarded interest on the damages for pain and suffering and loss of amenity at a rate of 2% p.a. from the date of service of the Writ until the date of judgment. No interest was awarded on the damages for loss of future earning capacity. On the special damages interest at a rate of 7% p.a. was awarded from the date of the accident to the date of judgment.	40
p.42, 11. 1-2		
p.42, 11. 12-18		
	22. The Appellants respectfully submit that the Court of Appeal erred in holding that the assessment of damages made by Master Hansen was an wholly erroneous assessment and that an Appellant's Court could therefore interfere with it.	50

23. The Appellants respectfully submit that the said Court of Appeal erred in holding that the injuries sustained by the Respondent fall within the category of "serious injury" set out in Lee Ting-Lam v. Leung Kam-Ming (1980) H.K.L.R. 657.

10 24. Further, the Appellants respectfully submit that the said Court of Appeal erred in holding that the level of awards indicated in Lee Ting-Lam v. Leung Kam-Ming (supra) should be increased to the same extent as the fall in the value of money. Furthermore, it is respectfully submitted that in increasing the award for pain and suffering and loss of amenity suffered by the Respondent, the said Court of Appeal failed to take into account that the Learned Master, in assessing the award to be made had already taken into account the effect of inflation.

p.26, 11.
11-12

20 25. The Appellants respectfully submit that the said Court of Appeal erred in holding that in assessing damages they could consider the level of awards given in England and in other jurisdictions.

30 26. Further the Appellants respectfully submit that the said Court of Appeal erred in holding that they could award damages for loss of future earning capacity despite the fact that a claim for such loss had neither been pleaded by the Respondent nor pursued before Master Hansen. If the Respondent had pleaded a claim for loss of future earning capacity, counsel for the Appellants would have cross-examined her as to the way in which her disabilities affected her future earning capacity. Further, the Appellants would not have consented to the Interlocutory Judgment made by Master Wilson had they known that a claim for loss of future earning capacity was to be made. Furthermore, a medical opinion expressly dealing with the effect of the Respondent's injuries upon her future earning capacity would have been produced on behalf of the Appellants.

40 27. The Appellants respectfully submit that the said Court of Appeal erred in holding that there was evidence before Master Hansen that the Respondent had suffered a loss of future earning capacity. The Learned Judges said that the Respondent "from time to time was away from work altogether and then was off work for half days. This is a situation which in our judgment, is likely to continue in the future." However the evidence before the Learned Master was that
50 although the Respondent had been off work for

p.40, 11.
27-29

RECORD

p.19, l.17
p.19, ll.
21-24
p.20, ll.
17-21

four months, and then had worked only half days until mid-September 1981, she had now returned to full work except Mondays. Further, the Respondent gave evidence before the Learned Master that she was then working the same hours each day as before the accident. No evidence was given that the fact that the Respondent was not working on Mondays was caused by her accident or disability.

p.40, ll.
30-36
p.55, ll.
13-15
p.57, ll.
18-19
p.38, ll.
7-9

28. Further, the Appellants respectfully submit that the said Court of Appeal erred in adopting, as indicative of the Respondent's degree of permanent disability, the figure of 20%; this figure was the median of 25% assessed by Dr. Dickinson and 15% assessed by Dr. K.P. Chan. By adopting the said figure, the said Court of Appeal ignored the fact that Dr. K.P. Chan's report was an agreed report, failed to take into account the fact that Dr. K.P. Chan examined the Respondent some nine months later than Dr. Dickinson and failed to take into account the evidence given by the Respondent before Master Hansen that between the date of the accident and her examination by Dr. K.P. Chan there had been an improvement in her condition.

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p.20, ll.
5-6
p.21, ll.
23-29

29. The Appellants respectfully submit that the said Court of Appeal erred in equating the degree of permanent disability which the medical reports suggested that the Respondent would suffer, with the degree of her loss of future earning capacity. By adopting the degree of disability as representing the degree of loss of future earning capacity the Learned Judges failed to take account of the conditions of the labour market and of the Respondent's qualifications and experience.

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30. Further, the Appellants respectfully submit that the said Court of Appeal erred in holding that the multiplicand for the award for loss of future earning capacity was to be calculated by multiplying the Appellant's impairment expressed as a percentage of her present monthly income, despite the fact that there was no evidence that she had suffered any loss of monthly income.

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31. On 24th November 1983 the Court of Appeal of Hong Kong made an order granting the Appellants leave to appeal to Her Majesty in Council.

32. The Appellants respectfully submit that the judgment of the Court of Appeal of Hong Kong was wrong and ought to be reversed, and this appeal

ought to be allowed with costs, for the following RECORD
(amongst other)

R E A S O N S

- 10 (1) BECAUSE the injuries sustained by the Respondent were not "serious injuries" as described in Lee Ting-Lam v. Leung Kam-Ming (1980) H.K.L.R. 657.
- (2) BECAUSE Master Hansen had already taken the effect of inflation into account in assessing damages for pain and suffering and loss of amenity.
- (3) BECAUSE in Lee Ting-Lam v. Leung Kam-Ming (1980) H.K.L.R. 657 Cons J. did not state that the level of awards should be increased to the same extent as the value of money fell.
- (4) BECAUSE the level of awards of damages for pain and suffering and loss of amenity in jurisdictions other than Hong Kong differ greatly as between each jurisdiction.
- 20 (5) BECAUSE the level of awards of damages for pain and suffering and loss of amenity made in any jurisdiction reflect the social and economic conditions and the public policy of that jurisdiction and cannot, therefore, be adopted or reflected in awards made by the Courts of Hong Kong which has its own distinct social and economic conditions and public policy.
- 30 (6) BECAUSE the Respondent did not plead any loss of future earnings or loss of future earning capacity and did not pursue such a claim before the Learned Master.
- (7) BECAUSE the Respondent did not establish any loss of future earnings or loss of future earning capacity.

ALAN RAWLEY

No. 22 of 1984

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O N A P P E A L

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- and -

WONG SHOK TING 2nd Appellant
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- and -

LI PING SUM Respondent
 (Plaintiff)

CASE FOR THE APPELLANTS

STEPHENSON HARWOOD,
Saddlers' Hall,
Gutter Lane,
London EC2V 6BS.
Appellants Solicitors.