

49/84

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)

- and -

LI PING SUM

Respondent
(Plaintiff)

CASE FOR THE RESPONDENT

1. This is an appeal from the judgment of the Court of Appeal of Hong Kong (Sir Denys Roberts, Barker and Baber JJ) dated the 13th day of October 1983 allowing with costs the Respondent's appeal from an assessment of damages of Master Hansen in Chambers on the 7th day of March 1983 where it was ordered that the Respondent be awarded General Damages of \$HK 27,500,00 and Special Damages of \$HK 3895.00, liability having been admitted by the Appellants and the Third Defendant.

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p.43

pp.25-27

p.27

2. There are four main issues in this appeal:

(1) Decisions from other jurisdictions

(i) whether, in assessing general damages in personal injury actions, it is permissible for the courts in Hong Kong to have any and if so what regard to decisions from other jurisdictions, in particular England

(ii) whether the Court of Appeal departed from the proper approach.

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(2) General damages for pain, suffering, and loss of amenity

- (i) whether the Court of Appeal were wrong in concluding that the Respondent's injury was a 'serious injury' as defined in Lee Ting-Lam v. Leung Kam-Ming (1980) H.K.L.R. 657
- (ii) whether such awards for general damages should be updated in accordance with the fall in the value of money
- (iii) otherwise whether the Court of Appeal's assessment of general damages for pain, suffering and loss of amenity should be disturbed

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(3) General damages for loss of future earning capacity

Whether in the absence of a pleaded averment of loss of future earnings capacity and probably absence of argument or submissions thereon at first instance and whether on the evidence the Court of Appeal were wrong to award any sum for loss of future earning capacity and if not, whether their award of H.K.\$108,000 should be disturbed.

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(4) Special damage: Medical expenses

Whether the Respondent was entitled to receive bonesetter's expenses of H.K.\$1,500

3. Decisions from other jurisdictions

This question is academic. While the Court of Appeal disagreed with previous observations made about decisions from other jurisdictions and while it made passing reference to the comparative level of awards in England, no English decisions appear to have influenced their judgment. On the contrary, the Court of Appeal specifically relied upon Lee Ting-Lam v. Leung Kam-Ming (1980) H.K.L.R.657 as decisive for the purposes of determining the level of awards of general damages for pain, suffering and loss of amenity.

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4. If the question is more than academic, it is submitted that the following principles apply :

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- (1) regard may be had to the range of awards in other cases which are comparable although as a rule such cases should be those which have been determined in the

same jurisdiction or in a neighbouring locality where similar social, economic and industrial conditions exist:
Jag Singh v. Toong Fong Omnibus Co.Ltd.
[1964] 1 W.L.R. 1382, 1385 (P.C.)

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10 (2) It is for the courts of Hong Kong to determine whether to accept guidance from modern English authority and if so to what extent. In a jurisdiction in which it is commonplace for English decisions on matters of principle to be relied on as persuasive authority, there may be limited circumstances in which regard to the range of awards for general damages in England for comparable injuries may be helpful.

5. General damages for pain, suffering and loss of amenity

20 Lam is : The definition of 'serious injury' in Lee Ting-

"where the injury leaves a disability which mars general activities and enjoyment of life, but allows reasonable mobility to the victim".

The Respondent suffered

- 30 (a) compression fractures of two thoracic and one lumbar vertebrae producing permanent wedging of the vertebrae and changing the mechanics of the whole spine which manifested itself in pain and soreness of the low back (as well as at the fractured site) leaving permanent disabilities of back pain, and of abilities to lift, sit and walk.
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| | p.53 | 1.14 |
| | p.54 | 1.12 |
| | p.56 | 1.33 |
| | p.57 | 1.1 |
| | p.54 | 1.24 |
| | p.56 | 1.31 |
- 40 (b) continuous back pain. She needed a cushion to sit. She could not sit for more than an hour. At work she needed to stand up and walk around to relieve the pain. She was unable to pursue badminton, hiking, skating or bowling. Previous to the accident she had been sportingly inclined.
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| | p.20 | 1.5 |
| | p.25 | 1.33 |

6. The evidence supported the Court of Appeal's conclusion that the Respondent had suffered a 'serious injury' as defined. In any event 'serious injury' is the lowest category in

Lee-Ting-Lam. Once it was accepted that there was permanent disablement, as it was, it is difficult to see what other category was appropriate.

7. Updating of figures: Lee Ting-Lam was decided at the end of May 1980. In that case itself the Court of Appeal emphasised the need to update awards, and indicated that they had arrived at their guidelines updating awards as best they could in relation to the fall in value of money. It is submitted that this is entirely consistent with not only the proper but also the necessary approach. Damages for non-economic loss should be assessed by reference to the value of money at date of trial and not at some other and lower sum calculated by reference to an earlier and higher value of money: Walker v. John McLean and Sons Ltd. [1979] 1 W.L.R. 760, 765, (C.A.): Wright v. British Railways Board [1983] 3 W.L.R. 211 (H.L.).

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0.40 1.3

8. Between May 1980 and August 1983 the fall in the value of money in Hong Kong was well over 40%. It is submitted that the Court of Appeal were correct in updating the figures set out in Lee Ting Lam by about 50%, and by holding that the Respondent's injuries came at the bottom of the relevant bracket and that the appropriate award for this head of damage was H.K.\$90,000, and that their decision ought not to be disturbed.

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9. General Damages for loss of future earning capacity

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Pleading: while it is preferable to plead a claim for loss of future earning capacity, it is nonetheless a claim for general damage and as such does not require to be pleaded. Alternatively, in a case such as this where no special circumstances liable to take the Appellants by surprise are relied on, it is not essential to plead it. Moreover the effect of the Respondent's injuries on her future (including her future working life) was something which the Master should have considered in any event.

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10. If the absence of a pleaded averment of loss of future earning capacity is fatal to recovery :

- (a) the Respondent would and should have been given leave further to amend her Statement of Claim accordingly

and/or

(b) the matter should have been remitted to the Master for re-assessment if the Appellants had sought and required further opportunity to deal with the point, which it seems they did not.

The Respondent was unrepresented before the Court of Appeal (albeit not by choice) and should not suffer for any failure to deal with a technical argument.

- 10 11. Argument below: it is unclear from the record whether the claim for loss of future earning capacity was advanced before the Master, but providing there was proper and sufficient evidence to support it, the Master should have awarded damages in respect thereof (either in the absence of an averment of such loss or after requiring and giving leave to amend to make such an averment). p.22
- 20 12. It is submitted that the Court of Appeal were right in their approach. Alternatively, if they were precluded from considering the matter, they should have remitted the issue to the Master for re-assessment of damages, if need be putting the Respondent on terms as to costs. p.40 1.20
- 30 13. Evidence: this general damage claim is not susceptible of measurement in money and must be basically a conventional figure derived from experience and from awards in comparable cases. The nature of the evidence to support the claim will be circumscribed accordingly.
- 40 14. The Respondent was a 27 year old accountant earning H.K.\$36,000 per annum by October 1983. She was off work for four months after the accident (February-May 1981), and from June to mid-September 1981 she worked half days only. Thereafter she worked full time except for Mondays. Her job involved a lot of sitting down and this was particularly difficult for her. She needed to stand up and walk around to relieve the pain every hour. p.19 1.20
p.20, 1.13
p.40, 1.31
p.19, 1.17
p.19, 1.24
p.21, 1.23
p.25, 1.27
p.20, 11.6-8
15. It was a proper inference to draw from the evidence that the Respondent's employment was at greater risk than if she had been perfectly fit and that if she should find herself seeking work she would be at a disadvantage; she might thus experience longer periods of unemployment than a fit person or she might have to accept a less well paid job than if she was

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fully fit. Providing this risk was more than negligible, an award of general damages should have been made. In the absence of any apparent consideration of these matters by the Master, the Court of Appeal were best placed to assess such damages in accordance with the standards and decisions prevailing in Hong Kong.

p.40, 1.30 16. It is accepted that it is unusual to apply a percentage of physical disability to a present income in order to arrive at the appropriate assessment, as the Court of Appeal did, but looked at in the round, it is submitted that their assessment should not be disturbed. 10

17. Alternatively, if there was no sufficient evidence to enable this claim to be assessed, the Court of Appeal either

p.33, 1.15 (1) should have required and permitted the Respondent to adduce fresh evidence on this point, the general nature of which was set out in the notice of appeal 20

or

(2) should have remitted the matter to the Master for re-assessment, if need be putting the Respondent on terms as to costs.

18. Alternatively, if the decision of the Court of Appeal was wrong, the assessment of damages should be remitted to a Master in Hong Kong since correct assessment depends on local conditions, particularly the uncertainties prevalent in the Colony and their effects and the effects of the recession on the local economy and local employment prospects. 30

p.41, 1.5 19. Bonesetter's expenses: It was not disputed that the Respondent had sought and paid H.K.\$1500 for medical treatment from a bonesetter because of the pain in her back. It cannot be disputed that she would not have incurred that expense but for the Appellants' negligence. The issue is whether she acted reasonably in seeking such treatment: she was then (February-April 1981) in pain and significantly disabled. There was no evidence that the Respondent acted unreasonably nor does it seem to have been suggested to her that she did so. It is submitted that the approach of the Court of Appeal was right. 40

p.41, 1.28

20. The Respondent humbly submits that

(1) the assessment of damages or alternatively of damages for loss of future earning capacity should be remitted to a Master in Hong Kong and/or otherwise

(2) this appeal should be dismissed and that the order of the Court of Appeal of Hong Kong should be affirmed for the following among other

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R E A S O N S

(1) BECAUSE the assessment of general damages for pain, suffering and loss of amenity fell to be determined by standards or guidelines appropriate to Hong Kong as set out in Lee Ting-Lam v. Leung Kam-Ming (1980) H.K.L.R.657 and that applying those standards or guidelines, the Court of Appeal's assessment was right and should not be disturbed.

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(2) BECAUSE the evidence showed that the Respondent was or was liable to be at a disadvantage on the open labour market and that general damages should have been awarded for loss of future earning capacity and that the Court of Appeal's assessment thereof should not be disturbed

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(3) BECAUSE the evidence showed that the Respondent had not acted unreasonably in incurring the medical expenses claimed of HK\$1500

(4) BECAUSE the Court of Appeal were right.

PATRICK TWIGG

IN THE PRIVY COUNCIL

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KONG
(Civil Appeal No. 53 of 1983)

B E T W E E N:

CHAN WAI TONG 1st Appellant
 (First Defendant)

- and -

WING SHOK TING 2nd Appellant
 (Second Defendant)

- and -

LI PING SUM Respondent
 (Plaintiff)

CASE FOR THE RESPONDENT

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