

HONG KONG / JUDGMENT

# CHIMMALEE ON-UMA v. WAYLUNG WASTE SERVICES LTD

COURT

District Court

DECIDED

4 July 2007

CASE / FILE NUMBER

DCPI1945/2006

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bjbj DCPI1945/2006 IN THE DISTRICT COURT OF THE HONG KONG SPECIAL ADMINISTRATIVE  
REGION PERSONAL INJURIES ACTION NO. 1945 OF 2006

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BETWEEN CHIMMALEE ON-UMA Plaintiff and WAYLUNG WASTE SERVICES LIMITED Defendant

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Coram: Deputy District Judge K Lo in Court Dates of Hearing: 11 and 12 June 2007 Date of  
Delivery of Judgment: 4 July 2007

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## JUDGMENT

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The plaintiff, a divorced woman now aged 45, seeks damages against the defendant for an injury sustained by her on 5 May 2004, such injuries being occasioned during the course of her employment with the defendant. It is agreed that at the material times, the plaintiff was working as an employee for the defendant doing jobs including cleaning and watering plants at the North District Park Phase 2 (hereinafter called The Park). It was also agreed that the defendant, at the material times, was the contractor of the Leisure and Cultural Services Department of the Hong Kong SAR performing, inter alia, cleaning, sweeping and plant watering work in the Park. The Plaintiff's Case In the Statement of Claim, the plaintiff pleaded that on the day in question, she was assigned by the defendant and/or his agents to use a water hose to water the plants in the Park. She said, A heavy metal water ejector weighing about 5 pounds was connected to one end of the hose. The weight of the hose, including the metal water ejector was about 10 pounds in total. While the plaintiff was pulling the hose on the slope in the park to water the plants in the course of employment, she sprained her back and therefore sustained injuries. The plaintiff pleaded that the accident was caused by the defendant's breach of contract of employment and/

or the negligence of the defendant. The same was pleaded as including:

- (a) Failure to provide any proper and/or sufficient safety equipment and/or appliances including a safe hose to the plaintiff whilst carrying out her duties.
- (b) Exposing the plaintiff to a risk of injury, which the defendant and/or his employees and/or servants and/or agents knew or ought to have known.
- (c) Causing or permitting the plaintiff to pull the hose alone when the defendant and/or its servants and/or agents knew, or ought to have known, that the hose was heavy and prone to accidents.
- (d) Failing to arrange any co-worker to assist the plaintiff in pulling the heavy hose, despite the plaintiff's repeated requests and/or complaints made to the defendant.
- (e) Failing to provide a safe system of work, including a safe working environment.
- (f) Failing to provide a safe place of work.
- (g) Failing to take any adequate precautions for the safety of the plaintiff when she was carrying out her duties.
- (h) Failing to properly instruct and/or supervise the plaintiff as to how to perform her duties in the park in the safe and/or proper manner to ensure the safety of the plaintiff. The plaintiff also pleads in the Statement of Claim, that the accident was caused by negligence and/or breach of general duty of care and/or breach of common law duty of care as an occupier of the park on the part of the defendant and/or its servants and/or agents. Furthermore, the plaintiff also pleads in the Statement of Claim the accident was caused by breach of statutory duties under the Occupational Safety and Health Ordinance on the part of the defendant. The allegations included that the defendant did fail to ensure the safety of the plaintiff in the Park, fail to provide safe plant and systems of work, fail to make arrangements for ensuring the plaintiff's safety in connection with handling of the hose, fail to provide information, instruction, training and supervision as may be necessary to ensure the plaintiff's safety at work and failing to provide a safe working environment for the plaintiff. The plaintiff, of course, relies on the doctrine of *res ipsa loquitur* against the defendant, its servants and/or agents and/or employees. The Plaintiff's Evidence The plaintiff has filed two witness statements, i.e. 15 March 2007 and 21 2007. In her first witness statement, she said after she came to Hong Kong from Thailand in 1980, she had been a full-time housewife for about 21 years until 2001, when she started working as a security guard. She has since the end of 2002 become a cleaning worker. She has been in employment with the defendant since 2 January 2004, i.e. four months prior to the accident, earning \$4,088 per month as a cleaning worker. She said on the day, she was instructed to water plants with the hose and according to her first witness statement, the hose was 24 inches in length, 1.5 inch in diameter and weighed about 5 pounds. She said the weight of the hose, together with the metal ejector, weighed about 10 pounds. She said on the day when she was pulling the hose on the slope in order to start watering the other end of the slope, she sprained her back. She said the heavy weight

of the hose and the water ejector had caused the injury. She said she felt great pain in her back and was not able to move. She said prior to the accident, she had on many occasions asked Man Che and supervisor Miss Chan, that as the hose was too heavy, that an extra person should be employed to assist her to pull the hose or sweep the ground. She said she was ignored. In the second witness statement she corrected the weight and the dimension of the hose in question. She said on the day, as the area for watering was far from the tap, she connected two short plastic hoses to form the said plastic hose. The said plastic hose was about 50 metres in length in total, one inch in diameter and about 30 pounds in weight. The metallic nozzle was about 11.5 inches in length, 1 inch in diameter and about 8.5 ounce in weight. She denied in this statement that the water hose was not heavy. She said that the hose, when filled with water, was very heavy. She said the defendant had never provided any safety training course for her, nor had the defendant taught her the right method and posture of pulling the hose. In this second witness statement, the plaintiff mentioned for the first time that at the material times, in order to gain access to the water tap and connect the hose, one had to lift the iron cover on top of an iron pole. Plaintiff had not pleaded this previously. She had also exhibited to the second witness statement, a photo showing a similar iron pole with a new iron cover design, compared to the design of the iron cover at the material time. In court, the plaintiff clarified that the water tap of the Park was situate at the bottom of that slope, and not on the slope as she has said in her second witness statement. When asked in examination-in-chief, the plaintiff again corrected and said that the metallic water ejector was actually five and a half inches long and not 11.5 inches long as she has said in her second witness statement. She also said that her claim for \$20,000 spent on tonic food included Lingzhi and some pills supplement. She said after the accident, despite her efforts, she was only able to find work for one month as a cleaning lady, despite the fact that she had registered herself with the Labour Department to locate a job. When cross-examined as to why the plaintiff said the metallic ejector which part of the hose weighed 5 pounds, when in fact it only weighed 8.5 ounces, the plaintiff said she was wrong. She explained that she was not quite familiar with the weighing units. In court, plaintiff said the length of the hose she used on the day was two times the length of the courtroom. It was agreed that the length of the courtroom is 11.6 metres and therefore her evidence was that the hose she used on the day was 23.2 metres long. The plaintiff was asked why, in her first witness statement, she said the length of the hose was 24 inches. She said she did not know much about feet and inches. In court, when asked, she indicated her concept of 1 inch is about one-third length of her index finger. The plaintiff produced the metallic water ejector as Exhibit P1 and she further said that the materials of the hose used on the day were of the same material and size and dimension as Exhibit P1. In court, plaintiff demonstrated how she was holding P1 in her left hand and pulling the hose with her right hand whilst walking. She agreed that whilst she walked, most part of the hose would lie on the ground. She says she was injured while she was walking and she said that she heard the lark sound and she felt pain. She says she was about 20 odd feet from the water tap then. She denied she was squatting down at the time when she was injured. The plaintiff also denied telling Dr Tung Wo-kin, resident doctor of North District Hospital on 22 September 2005 that she was

injured while she pulled a water pipe in squatting position, although Dr Tung did put this in his consultation notes. The plaintiff agreed that other people working at the Park also watered the plants by working alone. After lunch break during trial, the plaintiff returned and insisted that the hose in question was in fact 50 metres in length. The plaintiff said it should be four times the court length, rather than two times as she previously mentioned before the lunch adjournment. She said that the reason why she corrected herself was because her foreman told her so in late 2006. When counsel for the defendant told the plaintiff that, in fact, she only filed her first witness statement in March 2007, the plaintiff then corrected and said that the foreman only told her this information during the period between her making of the two witness statements, i.e. between March and May 2007. She also said that when she took this hose from the bucket, the same was filled up by this hose. She said the same bucket would hold 50 metres of water hose. The plaintiff admitted that she had not asked her colleague such information and merely gave rough estimate in saying the hose weighed 10 pounds in the first witness statement. The plaintiff says the new hose, Exhibit D1, produced by defendant witness Lam, is not of the same material as that of the hose she had been using on the day, as the material was thinner and a bit lighter. As for her injury, the plaintiff said because of her back pain she could only sit for five minutes before she had to change position. She denied that she was able to sit a long time in court during trial without changing posture. The plaintiff admitted that on the day of accident, the physician in attendance did tell her that she had decreased lumbar lordosis and decreased joint space between L3 and L4 at vertebrae, therefore the pain in the lower back. The plaintiff denies she had told Dr Chan Tun-kut, resident doctor of North District Hospital on 20 July 2004, that she suffered injuries while she pulled the hose in squatting position, as Dr Chan wrote in his consultation notes on page 49 of the bundle of medical records. She also denied that when the said Dr Chan examined her on 20 July 2004, i.e. two-odd months after the accident, that her straight leg raising test results was 90 degrees for both legs. She disagreed to the consultation notes by the said Dr Chan in saying that, save for the power of the big toe, limited by back pain, the other part of lower limb power was normal. She also disagreed to the finding by the said Dr Chan that her neck had full range of movement on the same day. Plaintiff, however said at the time when Dr Chan examined her in July 2004, her condition was somewhat similar to her condition during trial. Plaintiff in court said that she now needed the aid of walking stick whilst walking in public area. She disagreed to the suggestion by counsel for the defendant that she did walk from the public gallery in the courtroom to the witness-box without the aid of walking stick. The plaintiff admitted in cross examination that in June 2005, she did not need the walking stick and that it was only as from August 2005 that she needed the same. Again, plaintiff disagreed that on 22 September 2005, when Dr Tung Wo-kin, resident doctor of Orthopaedics and Traumatology Department of North District Hospital examined her, the result of straight leg raising test was again 90/90. She also denied the finding of the said Dr Tung, that even on plantarflex of her ankle, the plaintiff did not voice out in pain. She denied the positive 5/5 Waddle Signs finding by the said Dr Tung. Plaintiff denies she had exaggerated the effects of the injury when she was examined on 3 November 2004 by Mr Wong Kwok-ying of the Physiotherapy

Department of North District Hospital. Mr Wong said in his report on 5 July 2006, referred to in page 127 of the bundle of medical reports, that Waddle Signs were positive, including tests of axial loading, simulated rotation, long sitting, discrepancy with straight leg raising and superficial tenderness. Plaintiff said that when her medical expert, Dr Chien, performed the straight leg raising test for her, there were different test results for the supine straight leg raising and the sitting straight leg raising tests. Plaintiff disagreed to Dr Chien's finding of inappropriate signs under his report, paragraph 7.2.8.1 and 7.2.8.2, i.e. positive pain over the lumbar spine on compression of the head and the shoulder. She admitted, however, that the weakness she complained regarding the lower limb was unrelated to the injuries from the accident. On being cross-examined as to why she had full straight leg raising test result, and yet she complained of pain, even on slight touch, plaintiff disagreed to the finding of Dr Chan Wai-kit, Medical Officer of Orthopaedics and Traumatology Department of North District Hospital on 20 February 2006. Plaintiff denied throughout that she had injured herself accidentally on the accident day due to her own personal reasons. Plaintiff said, One needed more strength in order to pull something uphill. In this case, plaintiff did not call any fellow worker to give evidence. Defendant's Evidence Mr Lam Kin-ching the operations manager of the defendant, testified in court and adopted the contents of his witness statement dated 27 February 2007. He said all workers at the Park water the plants themselves alone, without the assistance of any co-worker. He produced to court Exhibit D1, a hose of 23 metres in length, which he said was of the same material and dimension as Exhibit P1, produced by the plaintiff. He said the same weighed 6 kilograms when empty, and weighted 10 kilograms when filled with water. According to Mr Lam, the spot where the plaintiff sustained injury was two courtrooms length from the tap. He said, although the plaintiff said Exhibit D1 was of a different material than Exhibit P1, this was not true, as they were both of the same material and dimension. He explained they look a bit different because the material of the hose would harden after long time exposure to sunlight and on the effluxion of time. The diameter of the hose would also widen, due to water pressure from within the hose, as time went by. He said the pulling of the 23 metres hose, even with water uphill, was not particularly heavy task and can be handled by one person alone. He said he was told by the colleague worker that pulling the hose on wet grass, as in this case, was much easier than pulling the same on concrete, as the wet grass was more slippery. He said when one watered the plant, one only needed to take above ground the part of the hose similar to Exhibit P1 and few feet of hose and not the entire length of the hose. Mr Lam also disagreed that the length of the hose which filled up the bucket was 50 metres. He said the length of the hose required to fill up the bucket depended on how they were curled within the bucket and could be 20 metres to 30 metres long or 70 to 80 metres long.

**Conclusion - Liability** The question we need to ask is how did the accident occur? In this case, evidence came only from the plaintiff. She was the only one present at the time. The plaintiff was of Thai nationality and an illiterate, and it was submitted that although inconsistent evidence were found at times in her testimony, that we should give special allowance to her as she had not the benefit of education, and possibly due to language difficulty that this would affect her sense of judgment, understanding of certain facts such as measurements as well as

communication skills. E.g. She gave evidence that she was pulling a hose of 24 inches at the time of accident in her first witness statement. It was also said by counsel for the plaintiff that plaintiff's description of tools in the first witness statement, such as metallic water ejector alleged to be 1 inch and weighing 5 pounds etc., could not be taken seriously. Counsel also submitted that what the plaintiff finally said that the hose was 50 metres long, should be accepted as she got the information from a colleague, and that she also based her judgment on the fact that a hose of 50 metres would fill up the space of a plastic water bucket. As for her earlier indication in court that the hose was twice the length of the courtroom, counsel for the plaintiff said the plaintiff had made a genuine mistake. Counsel for the defence, however, said that the weight of the hose was changed from 5 pounds to 30 pounds in the plaintiff's supplemental witness statement and that for the first time, the plaintiff said she connected two hoses together in her supplemental witness statement. The length of the hose was changed from 24 inches to 23 metres, and later to 50 metres. The weight of the nozzle was changed from 5 pounds to 8.5 ounces. Counsel for the defendant said in the court, although plaintiff said the length of hose was 50 metres when she was asked by the court to describe the length of the hose by reference to the courtroom, she said it was only two times of the courtroom's length, which was agreed between the parties as being 23.2 metres. It was only after the lunch break then she changed her evidence and insisted on the figure of 50 metres or four times the court's length. He said that the plaintiff was actually able to say in court that one inch was around one-third the length of her index finger, yet she could not explain why she described the length of the hose to be 24 inches in the first witness statement. It was submitted that the plaintiff did not call any colleague to give evidence, although she said colleague told her that the hose was of 50 metres. It was submitted further, that although in her supplemental witness statement she said she connected two short hoses to make a total of 50 metres, she had not mentioned about the same in court. Counsel for the defendant asked this court not to accept the evidence of the plaintiff as being reliable or credible. Although plaintiff denied having told Dr Chan Tun-kut that she was injured while she pulled the hose in squatting position, this court has strong suspicion that she did so inform Dr Chan. Plaintiff has, at various times, given different versions as to how the accident occurred. Different versions were given regarding the weight of the hose she was holding at the time, the posture that she was having at the time when she was injured, the length of the hose she was holding at the time and the weight of the same, etc. I'm afraid this court is at a loss as to how the accident occurred. Counsel for the defendant referred this court to the case of *Tsang Yip Kwong v Ng Kwong Yui trading as Ng Yiu Kee Transportation Co.*, HCPI 1186 of 2004, where Carlson DJ was not satisfied with the plaintiff's allegation as to how she was injured and dismissed the injured person's claim. The learned Judge found that the evidence of the injured person had not persuaded him that he was injured on the alleged day of accident, not in the way that he had suggested. Again, in the case of *Tam Yuen Hoi v Chan Muk Sing & Others*, HCPI 983 of 2001, Deputy High Court Judge To found that despite he was satisfied that an accident had occurred, he found the plaintiff a very exaggerating witness and that account of the accident given to a doctor in Princess Margaret Hospital was consistent with his evidence in court. He said, as the

plaintiff bears the burden of proving how the accident occurred, he has failed to discharge that burden, i.e. failing to prove breach of duty on the part of any of the defendants. The plaintiff's claim was therefore dismissed in that case. This court was also referred to Lord Oaksey in the case of *Winter v Cardiff Rural District Council*, 1950 1 AER819, where he said, at page 822 to 823: In my opinion, the common law duty of an employer of labour is to act reasonably in all circumstances. One of those circumstances is that he is an employer of labour and it is therefore reasonable that he should employ competent servants, to supply them with adequate plant and should give adequate directions as to system of work or mode of operation. But this does not mean that an employer must decide on every detail of a system of work or mode of operation. There is a sphere in which the employer must exercise his discretion and there are other spheres in which foremen and workmen must exercise theirs. Where the system or mode of operation is complicated or highly dangerous or prolonged or involves a number of men performing different functions, it is naturally a matter for the employer to take the responsibility of deciding what system shall be adopted. On the other hand, where the operation is simple and the decision how it shall be done has to be taken frequently, it is natural and reasonable that it should be left to the foreman or workman on the spot. Leong J, adopting this stance in the case of *Cheung Suk Wai v Attorney General*, 1996 4 HKC 288 at 295(H) to 296(B), he said: The plaintiff has to prove the defendant failed to take reasonable care. The law requires the defendant had to provide safe tools, a safe system of work and not to subject the plaintiff to risk which the defendant was or should have been aware of but the plaintiff has to show that the defendant failed to do so in order to succeed. The learned Judge dismissed the plaintiff's claim and held at page 296, Putting bags of refuse into refuse bins is a simple operation which the plaintiff had performed since she took up the employment as a cleaning worker, and before she started working in the two parks and playgrounds. Here the plaintiff alleged that she was injured while watering plants with a rubber hose. I do not see, in the absence of other evidence how this simple task could warrant any training from the defendant. The plaintiff was free to carry out this simple task in the manner best suited to her own physical ability. It is not proved therefore, that in this case the defendant was under a duty to provide someone to assist her, or that training should be provided to her as to how she should water the plants with the plastic hose on the slope. Indeed, I do not see any breach of duty alleged by the plaintiff being proved. The present case can be easily distinguished from the case of *Li Mei Yung v Eastern Pacific Circuits (HK) Limited*, DCPI 1683 of 2005. The physical handling of circuit boards in that case was not easy and the plaintiff in that case was under serious time constraint and pressure. In any event, it would appear that even if this court should accept, which this court did not, that the hose was on the day, 50 metres in length, connected with a metallic nozzle, this court does not find this task of watering plants, in the circumstances, require an additional co worker, nor that the weight of the hose should demand special training and direction by the employer, i.e. the defendant in the circumstances, or that it would present an unsafe environment or unsafe system of work. I do not find anything unacceptable regarding the whole arrangement of work by the plaintiff. The claim of the plaintiff is not proved and the claim is dismissed. Quantum For the sake of completeness, I

now deal with the issue of quantum. The plaintiff is now aged 45 years old. She was 42 at the time of the accident. She said prior to the accident, she used to enjoy outdoor activities such as swimming, jogging and walking in the parks. Injuries and Treatment According to the plaintiff, immediately after the accident, the plaintiff was admitted to the Accident and Emergency Ward of the North District Hospital for emergency treatment. She later attended the Orthopaedics and Traumatology Department of the same hospital for further management of her back. She also attended Shek Wu Hui Jockey Club Clinic for treatment. Throughout the incident, she attended about 14 sessions of follow up treatment between 20 July 2004 to 12 February 2007. She was also referred to outpatient physiotherapy of North District Hospital and she attended 28 follow-up treatments at the clinic between 8 May 2004 and 2 June 2006. It was said that due to on and off exacerbation of back pain an MRI scan was performed which showed a prolapsed intervertebral disc at L4/5 causing bilateral lateral recessive stenosis. The plaintiff was therefore referred to the pain clinic of Alice Ho Miu Ling Nethersole Hospital for further management. Between 27 July 2004 and 3 November 2004 the plaintiff received 15 sessions of therapy at the Physiotherapy Department of North District Hospital, which consisted of a lumbar traction, electrotherapy, heat therapy, active and passive back mobilizing exercises. Between 14 March 2006 and 25 May 2006, the plaintiff was again referred to Physiotherapy Department for treatment, and after attending four sessions of therapy, not much improvement was shown. Between 22 November 2005 and 6 January 2006, the plaintiff attended 12 sessions of work rehabilitation therapy at OTD of NDH. There was no significant improvement in her activity tolerance and trunk flexibility as pain had limited her endurance in training and performance. On 9 December 2005, she was first treated at pain clinic of the Alice Ho Miu Ling Nethersole Hospital and she received four sessions of physiotherapy. She later visited the Hung Shu Sum Bonesetter and she also received medical treatment by two other private practitioners and a registered China Herbalist. Sick leave from 5 May 2004 up to 10 June 2004 and then from 20 July 2004 up to 24 July 2006 was granted by various public and private practitioners. It was stated in the Certificate of Review of Assessment by the Employees Compensation (Ordinary Assessment) Board, issued on 29 December 2006 that a period of absence from duty was necessary as a result of the injury. Medical Reports by Plaintiff's Medical Expert According to the medical expert, Dr Chien, the plaintiff complains of tingling sensation of her upper limbs, which radiates from her neck to fingers on both sides. She also complains of tingling sensation of both lower limbs, which radiates from her hip to her toes on both sides. It is persistent in character and is not related to activities. It is particularly worse when she is lying on the extremity. It disturbs her sleep. Dr Chien, in this report, follows and quote the complaints of the plaintiff, that she complains of weakness of four limbs, that she complains that she would drop chopsticks, bowls and cups. She complains of weak lower limb with occasional giving way and fall episodes. In his report, it was mentioned that the plaintiff also complains of pain over the both knee caps. It is not related of her posture, including sitting, standing and walking. She complains about pain sensation over her neck and shoulder. She also noticed pins and needle-like sensation over same area. She also complains of pain over both arms, forearms and fingers. The plaintiff complains of pain constantly over the back - spinal

area. She noticed this continuously for 24 hours a day, she complains of needle-like dull ache sensation occasionally radiating down from the back of her thighs to both heels. She complains of a sense of being tied by others, she needs medication to relieve it. She complains of sense of numbness over both buttocks. She complains of difficulty in swallowing. She notice frequent sense of choking. She has to attend Accident and Emergency Department of Hospital for the feeling. She complains of both eye pain with disturbed vision. She has to attend hospital and she was managed with eye drops. She complains of blurring of vision and diplopia. She was assessed by ophthalmologist at the hospital and later referred to the eye clinic in Prince of Wales Hospital for follow-up. Dr Chien, after considering all medical reports of the plaintiff, said in his report dated 14 November 2006, and as corrected on 14 February 2007 and 14 April 2007, that L4/5 disc protrusion is compatible with the mechanism of injury that the plaintiff described, i.e. injured when pulling a hose. He said the injury had caused her some trauma and contributed to her present back and pelvic problems. The symptoms of pain over the back and parallel spinal area are compatible with the MRI findings of L4/5 disc protrusion. He also said inappropriate signs were absent on two straight leg raising tests, despite the test results were 60 degrees, 70 degrees and 80 degrees. Dr Chien says that plaintiff might not be able to resume pre-accident job with her limited spinal movement, sitting and standing tolerance. She might take up part-time jobs such as office assistant, doing clerical work. Dr Chien said, even with allowance of frequent change of posture and rest period between activities, plaintiff would have limited performance and efficiency. She might need physiotherapy occasionally if these activities would produce exacerbation of her back pain. Dr Chien, however, said that the complaints of the plaintiff over the upper limb, eyes and dizziness, could not have been accounted by the described mechanism of injury, and he would not consider these complaints as part of the assessment of her physical impairment. He estimated the impairment of the whole person of the plaintiff is the DRE lumbar category 2, with reference to the fifth edition, America Medical Association, having regards to evaluation of permanent impairment and her loss of earning capacity would be 10 per cent. Dr Chien says he gives this figure solely to indicate his impression on the severity of the plaintiff s injury. Medical Report by Defendant s Medical Expert Dr Ho Ching lun, Henry, the medical expert of the defendant said the plaintiff probably did sprain her back at the time of injury resulting in acute back pain and positive finding in the initial lumbar spine X ray on 5 May 2004. He says she was noted to have loss of lumbar lordosis on the day, which was consistent with pain due to muscle spasm in the spine. He said nevertheless, that the mechanics of the injury would not have caused a fracture of the sacrum, as concluded by Dr Chien in his original medical report. He also said that the plaintiff had pre existing degeneration of the cervical and lumbar spine with degenerative spurs present in both regions. He said the injury could have aggravated the pre-existing degenerative condition. But it is also likely that a prolapsed L4/5 disc was already present before the injury. He was of the opinion that the present complaints of the plaintiff were unrelated to the injury. He said the present diffuse symptoms were grossly exaggerated and non-organic and out of proportion to the mechanism of the injury. He said there were many inconsistencies in

examination and the history of the plaintiff. For example, he said the plaintiff even complained of increased back pain when chewing and swallowing, upper limb weakness to the extent that she was dropping things in the kitchen while she had normal upper limb neurological function and normal upper limb muscle bulk. She was said to have normal lower limb neurology and normal lower limb strength, sensation and reflexes and no sign of nerve compression in the spine. The protrusion of the disc also was not causing any clinically significant nerve root compression. Dr Ho said the plaintiff is fit to resume work as a cleaning worker, so long as she avoids prolonged forward bending of the spine. She did not have to do any heavy lifting in the past and she would also be suitable for jobs, for example, office messenger, clerk, telephone operator. Dr Ho recommended a sick leave period of three months in this case. Dr Ho said the plaintiff should continue with back exercises to improve the strength and flexibility of the spine, avoid prolonged sitting and standing for more than one hour at a time and observe proper posture. Her prognosis is fair and given the presence of pre-existing spinal degeneration at L4/5, disc protrusion with narrowing of the lateral recesses, she would develop probably, some symptoms of bilateral leg fatigue when standing or prolonged walking in the future. Conclusion - Quantum It is obvious that the medical experts from both sides have different views on the impact of the injury on the plaintiff. The plaintiff attended the orthopaedic clinic on 30 June 2005. She was able to walk unaided. As pointed out by the counsel for the defendant, when the plaintiff attended the follow-up treatment on 22 September 2005 after the MRI, the straight leg raising test was 90/90. She did not voice out pain, even when plantarflexed the ankle. Waddle signs were positive 5/5. When the plaintiff attended follow-up treatment on 20 February 2006, the straight leg raising test was full. Even when the plaintiff attended Dr Chien on 10 October 2006, she made a lot of complaints which Dr Chien commented could not have been caused by the described mechanism of the injury. Dr Chien also recorded the inappropriate signs and the inconsistent straight leg raising test in his report. Dr Chien noted the power of the plaintiff's hips, knees, ankles and toes are normal, the lower limb tendon jerk response at knee and ankles are normal and symmetrical. Range of movement of shoulders and elbows are normal and upper limb tendon jerk responses at elbows and wrists are normal and symmetrical. These findings have great contrast to the plaintiff's complaints. To some extent, Dr Chien's supports Dr Ho's view that the plaintiff's present diffuse symptoms are grossly exaggerated and non organic and out of proportion to the mechanism of the injury. This court observed the plaintiff while she was in court. She was able to sit for a long time in court without much change of posture and she was able to walk from the gallery to the witness-box without any walking aid. It was only when she was questioned about her ability to sit in court for long time without change of posture, that she began to shift her posture and only for a short time before she again reverted back to sitting without much change of posture. She again managed to sit as before. This court, having the benefit of seeing the plaintiff in court and having heard her evidence, and even having considered her personal background, does not find her either credible or reliable. Her evidence shifted from time to time and was substantially different on important aspects of the case, in particular, as to how the accident occurred. She denied numerous findings by different doctors of Hospital

Authority. She denied that she did tell the doctor in attendance that she was in squatting position when she pulled the hose. Furthermore, most of her complaints are not supported by medical assessment. Dr Chien, in his original medical reports has mixed up the injury of the plaintiff with that of another patient. He also did not really deal with the pre-existent degenerative spine issue of the plaintiff in his report. In the circumstances, I prefer and accept Dr Ho's report, and accept that the plaintiff could return to her previous job as a cleaning worker, albeit with certain limitations in performing her duty. Pain, Suffering and Loss of Amenities (PSLA) It was said that although Dr Chien had admitted the finding of inappropriate symptoms, he did not express in his medical report the interpretation of this inappropriate symptoms. In addition, it was said that a number of government doctors' medical reports all indicated that the plaintiff had pre-existing degenerative back, although Dr Chien failed to address the same in his report. It was submitted that the plaintiff's pre-existing back degeneration may have caused the plaintiff's alleged symptoms. Dr Chien diagnosed that the sprain caused the protrusion of L4/L5, did not consider that there was also the loss of height of L5/S1, nor did he consider the finding of the A&E Department that the X ray of the plaintiff showed decreased joint space between L3 and L4 vertebrae. It was pointed out that the loss of height of several levels of vertebrae indicates degeneration. It was also said that the issue of degenerative back had not been considered by Dr Chien. I agree to these observations. Counsel for the plaintiff submitted that since the accident, plaintiff can no longer enjoy leisure activities including swimming, jogging, having strolls in the park, which she used to enjoy before the accident. The plaintiff is claiming \$400,000 under this head and she relied on the case of *Law King Sang v Law Yin Sang*, HCPI 923/1995 by Master Donnell, decided on 19 February 1997. In that case, plaintiff sprained his back and could not sit or stand for long periods or swim or lift heavy objects. He was awarded \$375,000. Counsel for the plaintiff also referred this court to the case of *Lai Kin Wah v Hip Hing Constructions Ltd*, HCPI 255/1996, Hartmann DJ, deciding on 31 January 1997 where plaintiff sprained his back and was hospitalised twice. He was seen on a regular basis for check-ups, physiotherapy and hydrotherapy. The diagnosis was prolapsed disc at L4 and L5 where the disc material has been impinging on his nerve roots. The plaintiff in that case had low back pain, sciatica and weakness in one leg and his lumbar movements are materially restricted. Plaintiff can expect periodic exacerbation of his condition forcing him to have bed rest for periods of time. An award of \$400,000 for PSLA was made. On the other hand, counsel for the defendant submitted that in this case, plaintiff only suffered minor sprain of her pre-existing degenerative back. This court was invited to adopt the principle in the case of *Chan Kam Hoi v Dragages Et Travaux Publics*, 1998 2 HKR, page 958, where it was said that the court should give a discount of the award for PSLA for plaintiff with pre-existing degenerative back. Counsel for the defendant said a figure not exceeding \$50,000 was appropriate here. After considering all these authorities submitted to me, I find the injuries of the plaintiff in the present case, compared to the injuries of the plaintiff in the case of *Law King Sang*, less serious. The plaintiff in this case can sit for long time without great discomfort and the situation is likewise, much less serious than the plaintiff in the case of *Lai Kin Wah*. The injuries of the plaintiff in this case fell short of the serious category. The

plaintiff is clearly exaggerating, in my view, her post injury condition. I must also consider the case of *Tam Yuen Hoi v Chan Muk Sing & Ors*, HCPI 983/2001, referred to me by counsel for the defendant. In that case, the plaintiff, aged 36 at the time of the accident, was found to be exaggerating and the court did not accept his evidence about the pain he had. He also had a degenerative back, and at the time of the accident he was found by the court to have a good recovery. His injury was considered a minor one. He does not suffer any disc prolapse or bone fracture as a result of the accident. He was awarded \$50,000 under this head by Deputy High Court Judge To. In our case the plaintiff, aged 43 at the time of accident, did not suffer any fracture also, as already stated in Dr Chien's report. She has pre-existing degeneration of the cervical lumbar spine with degenerative spurs present in both regions. The injury could have aggravated, as Dr Ho said, the pre-existing degenerative condition. In another case referred to me, *Lai Ching v Wong Chiu Kwai trading as Wing Lai*, HCPI 1192 of 1996, Suffiad J awarded \$210,000 to the plaintiff who also had degenerative back before the accident. In that case, the plaintiff had to undergo operation to reduce the pain, though not quite successful, and his prolapsed disc at L4/5 level with compression of the nerve root, total impairment of the person is 24 percent. Clearly the pain and suffering of the plaintiff in that case is much more serious than the plaintiff in the present case. After considering all these authorities, this court finds that the appropriate sum under this head is \$120,000. Pre-trial Loss of Earnings Counsel of plaintiff submitted that as sick leave was granted to the plaintiff up to 5 August 2006, loss of earnings should be awarded at the agreed pre-accident earnings of \$4,088 per month. For period commencing 5 August 2006, counsel for the plaintiff submitted that plaintiff should be able to earn \$3,000 per month, and therefore pre-trial loss of earnings should be calculated accordingly. Counsel for the defendant, on the other hand, invited this court to adopt the stance of Suffiad J in the case of *Tong Chun Chung v Pud Chi Keung*, HCPI 183 of 2003. It was held in that case that for the pre trial loss of earnings, having found that there was a large degree of exaggeration by the plaintiff as to his medical condition, Suffiad J was not prepared to give effect to the sick leave period which the plaintiff was actually granted by government doctors, but preferred to make the finding from the combined opinions given by Dr Yu, Dr Woo and Dr Wong that a reasonable sick leave period would be no more than one year. The learned Judge refused to allow further loss of earnings, but only allowed a loss of earning capacity for the period following the 12 months period. As this court also finds the plaintiff exaggerating in her symptoms, based on this finding I am persuaded to adopt the view of Dr Ho, that three months is a reasonable sick leave granted to the plaintiff in the circumstances. Accordingly, I will also adopt the stance of Suffiad J in the case of *Tong Chun Chung*, the pre-trial loss of earnings is three months of \$4,088 each totalling \$12,264. Future Loss of Earnings Having accepted Dr Ho's opinion that the plaintiff can return to her pre-existing job as a cleaning worker, there should be no award for future loss of earnings under this head. This court finds the plaintiff unreliable and not credible and I am not persuaded or believe that she has not been able to find a steady job doing cleaning work, due to her injuries. Special Damages Parties have agreed the same at \$18,000. Loss of Earning Capacity In view of Dr Ho's finding that though the plaintiff can return to her pre accident job, she has to refrain from prolonged sitting and

standing, she is to a certain extent disadvantaged in the job market. One must of course also consider the same in light that she has pre existing degenerative spine. An award of \$36,792, being nine months of pay, is appropriate in the circumstances. Summary on Quantum To sum up, had the defendant been found liable for the accident, which is not the case here, the award to the plaintiff will be:

- (a) PSLA \$120,000;
- (b) pre-trial loss of earnings \$12,264;
- (c) Loss of earning capacity \$36,792;
- (d) Special damages \$18,000. Interest is to accrue on award for PSLA at 2 per cent from day of writ to the day of judgment, and for pre-trial loss of earnings and special damages, interest is to accrue at half judgment rate from date of accident till date of judgment. Interest on final judgment sum is to run from today to date of payment at judgment rate. There will also be credit given to the defendant for the ECC payment of \$104,245.22 previously made. As plaintiff has failed in her claim, costs should follow the event. Accordingly, I order that that the plaintiff shall pay the defendant costs of the proceedings (including all costs reserved) with certificate for counsel. Plaintiff s own costs to be taxed in accordance with Legal Aid Regulations. (K Lo) Deputy District Judge Miss Eliza Yiu, instructed by Messrs Yip, Tse & Tang (assigned by Director of Legal Aid), for the Plaintiff Mr Wong Chi-kwong, instructed by Messrs Deacons, for the Defendant. PAGE PAGE ES-10/4.7.2007/CP DCPI1945/2006/Judgment ES-10/4.7.2007/CP DCPI1945/2006/Judgment PAGE - A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V A B C D E F G H I J K L M N O P Q R S T U V & `#\$ ;Z2d DCPI1945/2006 setup Normal.dot setup Microsoft Word 9.0 DCPI1945/2006 Title Microsoft Word Document MSWordDoc Word.Document.8

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Prepared on 26 October 2026 · Esheria