

DCPI 3510/2021
[2022] HKDC 1481

**IN THE DISTRICT COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION
PERSONAL INJURIES ACTION NO 3510 OF 2021**

BETWEEN

MAK, RACHEL WING NAM Plaintiff
and
CHING KAI CHUNG Defendant

Before: His Honour Judge Andrew Li in Court
Dates of Hearing: 3 & 5 October 2022
Date of Judgment: 15 December 2022

JUDGMENT

INTRODUCTION

1. This is a simple personal injury (“PI”) case involving 2
Yamaha R3A motorcycles on Shek O Road.

2. The plaintiff was represented by her present solicitors when the writ of the proceedings was first issued in the Court of First Instance of the High Court on 25 November 2019.

3. The case was transferred to the District Court by consent under an Order made by Master Kot of the High Court dated 15 November 2011.

4. Pursuant to the Order of Master Louise Chan on 9 May 2022, this case was originally set down for trial in the running list on 26 July 2022, not to be warned before 29 August 2022 before a judge without a jury.

5. On 9 August 2022, as a result of the plaintiff choosing to act in person and filed a notice to that effect on 27 July 2022, Master Louise Chan ordered that, notwithstanding §1 of the previous Order made by her on 9 May 2022, the case was to remain on the running list but not to be warned for trial before 27 September 2022, with an estimated length of 2 days.

6. Also on 9 August 2022, the plaintiff's solicitors filed a notice to act for the plaintiff. Hence, from that date onwards, the plaintiff was represented by the same firm of solicitors again.

7. On Wednesday, 28 September 2022, this case was placed on the warned list of the District Court to be tried before a judge in the week commencing on the following Monday, ie 3 October 2022. On the same day, the listing office of the Court issued a notice of trial to the parties

informing them that the case will be warned for trial commencing on Monday, 3 October 2022 (with 5 October 2022 reserved¹). Also on the same day, I issued directions to the parties through my Clerk requesting them to lodge their opening submissions and list of authorities on or before 4:00 pm on Friday, 30 September 2022.

8. The trial of the action commenced before me on Monday, 3 October 2022 as scheduled.

BACKGROUND

The Accident

9. On 2 December 2016 at about 9:36 pm, the plaintiff was riding a motorcycle bearing registration number UB7928 (“P’s M/C”) along the eastbound of Shek O Road, Hong Kong (“the Road”). At the same time, the defendant was riding his motorcycle bearing registration number UG8192 (“D’s M/C”) along the same road and in the same direction.

10. Both motorcycles are of the same make and model, namely, a Yamaha YZF-R3A. They are very sporty type of motorcycles like those one commonly sees on racing tracks. They both have a 321 cc cylinder capacity engine which is relatively powerful for motorcycles. Both motorcycles were quite new at the time. They were both manufactured in 2016 and first registered in Hong Kong respectively in May and August

¹ 4 October 2022 being a public holiday

that year. The only difference between the 2 motorcycles is that P's M/C is blue in colour while D's M/C is grey.

11. The plaintiff, who was a young lady of 25 at the time of the accident², was riding P's M/C in an eastbound direction of the Road towards the direction of Shek O. The defendant was riding D's M/C behind P's M/C in the same direction. Upon reaching a spot near to lamp post No 33746 where there was a deep left bend, the plaintiff swerved her motorcycle leftward. In the course of doing so, the plaintiff lost control of P's M/C and crossed the continuous double white lines, which separated the traffic on 2 opposite directions, and traversed onto the westbound lane. At this very moment, a taxi bearing registration number CX6338 ("the Taxi") was travelling along the opposite direction of the Road. As a result of the plaintiff losing control of her motorcycle, P's M/C crashed into the offside front of the Taxi on the westbound lane, causing extensive damage to both vehicles. The plaintiff also sustained serious personal injuries as a result of the collision. They included injuries to both of her hands, back, and pelvis ("the Accident").

12. It is important to note at this juncture that there was no collision or any physical contact between P's M/C and D's M/C during the entire course of the Accident.

13. As a result of the Accident, the plaintiff was charged by the Police for the offence of 'careless driving' in May 2017. On 13 July 2017, the plaintiff appeared before a magistrate in the Eastern Magistracy whereby she had pleaded guilty to the charge and agreed to the brief facts

² The plaintiff was born in February 1991

prepared by the prosecution for the purpose of the proceedings (“the Brief Facts”). In other words, she was convicted of the ‘careless driving’ charge on her own guilty plea (“the Conviction”).

14. When asked by the magistrate if there was anything she wish to say, the plaintiff answered “Ah, No” (「誒，冇。」). What is interesting about the Conviction is the fact that the magistrate at the end of the short hearing made the comments, amongst other things, that the plaintiff was “lucky” of not having been prosecuted for ‘dangerous driving’ by the Police as she had caused her motorcycle to cross onto the opposite lane³. The plaintiff was fined HK\$1,200 for the offence on that occasion.

The plaintiff’s case

15. One very peculiar feature in this case is that the plaintiff’s written opening submissions, which was lodged with the Court on Friday, 29 September 2022, was not written by Mr Mike Lam of counsel who represented the plaintiff at the trial. Instead, it was prepared and signed by Mr Jackson Poon of counsel and was dated 29 September 2022 (“P’s Opening”). I note that this was the day after this Court gave the directions to the parties to lodge their opening submissions and list of authorities. I shall return to this matter at the end of this judgment.

16. “It is the Plaintiff’s case that the injuries suffered by the Plaintiff was caused by the Defendant, therefore, the Defendant should be

³ 「喺，你都好彩呢控方淨係檢控你不小心駕駛呀，因為你迎頭行咗對方嘅路線呢，有機會嘅告你危險駕駛，如果告你危險駕駛嘅話呢，即使問你認罪呢，都有強制性六個月嘅停牌令嘅吓，咁所以小心啲喇。就住有關傳票罰款 1,200 元，7 字樓交錢，唔該。」

liable for the Plaintiff's damages. (D's M/C) kept following (P's M/C) too closely. The Plaintiff kept accelerating (P's M/C) to keep a safe distance resulting in loss of control and the Accident.”: see §7 of P's Opening.

17. The main allegations contained in P's Opening can be summarised as follows:-

(i) The defendant was driving D's M/C at a very close distance of 2-3 metres behind P's M/C: (see §3 of P's Opening);

(ii) Despite the plaintiff accelerating P's MC to keep a safe distance from D's M/C to about “at a distance of 2 to 3 meters (sic) collision (sic)”, the defendant kept following P's MC closely and the plaintiff was “forced to further speed up” P's M/C: (see §4 of P's Opening);

(iii) Consequently, the plaintiff could not slow down P's M/C upon negotiating the left bend ahead near lamppost no. 33746: (see §5 of P's Opening);

(iv) As the bend was a relatively sharp turn, the plaintiff tried to brake and swerve P's M/C back into the eastbound lane of the road: (see §5 of P's Opening);

(v) P's M/C crossed the double-white lines in the middle of the road, and went into the opposite lane (westbound): (see §5 of P's Opening);

(vi) P's M/C then clashed with the offside front of the Taxi travelling on the opposite lane: (see §5 of P's Opening); and

(vii) As a result, the plaintiff was "thrown to a distance onto the ground and sustained disastrous personal injuries": (see §6 of P's Opening).

The defendant's case

18. According to the amended defence filed by the defendant on 27 May 2022, the defendant's case can be summarized as follows:-

(i) D's M/C was over 10 metres away from P's M/C prior to the Accident: (see §5(b) of the amended defence);

(ii) P's M/C kept accelerating and the distance between the 2 motorcycles kept increasing: (see §5(c) of the amended defence);

(iii) While the defendant slowed down to prepare for a deep left bend, P's M/C was still in high speed and showed no sign of reducing speed: (see §5(d) of the amended defence);

(iv) After passing the blind spot at the deep left bend, the defendant saw P's M/C crossing onto the opposite lane

and crashing with the Taxi on that lane: (see §5(e) of the amended defence);

(v) The Accident and the injuries sustained by the plaintiff were not caused by the defendant. Alternatively, the Accident and the injuries were contributed to by the plaintiff's own negligence: (see §§7-9 of the amended defence); and

(vi) The plaintiff was convicted of "careless driving" upon her own guilty plea under the Conviction where she was fined HK\$1,200 as a result of the Accident: (see §10 of the amended defence).

Facts not in dispute

19. The following facts are not in dispute by the parties in this case:-

(i) The plaintiff was the driver of P's M/C and the defendant was the driver of D's M/C at the material time: (see §9(a) of P's Opening);

(ii) Date and time of the Accident: (see §9(b) of P's Opening);

(iii) P's M/C crashed with the offside front of the Taxi on the opposite lane: (see §9(c) of P's Opening); and

- (iv) The defendant was riding on D's M/C along the Road, and was travelling behind P's M/C: (see §9(d) of P's Opening).

Issues to be determined by the Court

20. Hence, the issues which have not been agreed by the parties and which need to be decided by the Court are as follows:-

- (i) Whether D's M/C was following P's M/C too closely (allegedly at a distance of about 2-3 metres) and had caused the plaintiff to accelerate and lose control of P's M/C;
- (ii) Whether it was the plaintiff or the defendant who had caused the Accident;
- (iii) Whether the plaintiff had been contributorily negligent in causing her own injuries? If so, to what extent; and
- (iv) The extent of her injuries and the damages she is entitled to if she succeeds on liability.

DISCUSSION

21. Both the plaintiff and the defendant gave evidence. They were the only witnesses at the trial.

22. The plaintiff relied on a very well-scripted witness statement (which was written in Chinese) dated 29 December 2020 (“P’s WS”) as her evidence-in-chief in this case. A late application made at the beginning of her testimony by the plaintiff’s counsel to “supplement” (i) her updated health condition; and (ii) the circumstances of the Accident by way of a newly prepared proposed supplemental witness statement was rejected by the Court. The refusal was on the basis that as P’s WS was made on 29 December 2020; the joint examination by the orthopaedic experts appointed by the parties was carried out in March 2021; and the joint medical report was prepared by the experts in July 2021 (“the JMR”), there was no valid reasons why the proposed supplemental witness statement could not have been prepared much earlier and application made to the Court to adduce that as part of the evidence well before the trial. To do so on the day of trial was simply not acceptable. After some exchanges between the bench and the bar, Mr Lam did not insist on perusing this matter any further.

23. In P’s WS, the contents of which she has adopted as her evidence-in-chief, the plaintiff stated that on the night of the Accident, after her work at about 9:56 pm, she and one of her male colleagues by the name of Chow Wing Chun (周永進) (“Chow”) were respectively riding P’s M/C and a white Yamaha Model 4V motorcycle (which was commonly

known by its nickname as “little sheep” (「綿羊仔」) in Chinese or “scooter” in English) (“the Scooter”) on the Road travelling towards the Shek O direction. According to the plaintiff, initially, the Scooter was travelling about 15 metres behind P’s M/C. Later, the plaintiff heard D’s M/C came from behind at a high speed. She also was able to see from her rear mirrors that D’s M/C had already overtaken the Scooter and was travelling behind P’s M/C at a distance of about 10 metres only. While D’s M/C continued to approach the plaintiff, she could hear the sound of the engine coming out from D’s M/C getting closer and closer. Further, she could also see from the rear mirrors of her motorcycle that D’s M/C was about 2-3 metres behind hers only. At that time, the plaintiff alleges that she was travelling about 50 kph. She estimates that the speed of D’s M/C was about 55-60 kph.

24. During this time, the plaintiff claims that D’s M/C continued to increase his speed or traveling at a high speed, closing the distance between the 2 motorcycles. Further, the plaintiff claims that the “*huge loud noise*” emitted by the engine of D’s M/C came closer to P’s M/C, causing her to feel “*under tremendous pressure*” (「被告人的 UG8192 發出大響亮的引擎聲及貼近本人的 UB7928，使本人承受巨大的壓力」): (see §6 of P’s WS). The plaintiff further says that, according to her judgement at the time, if she were to slow down her motorcycle to allow the defendant to pass her, D’s M/C probably would have crashed into P’s M/C. Therefore, she could only increase her speed in order to maintain the distance between the 2 motorcycles. Hence, according to the plaintiff, in order to keep a safe distance between the two motorcycles and to avoid the risk of collision, she had no alternative but to increase the speed of her motorcycle to around 55-60 kph. It was during the process of increasing

her speed and negotiating the left bend that she lost control of her vehicle; crossed the double white lines; traversed into the oncoming traffic lane; and crashed into the Taxi.

25. Thus, according to the plaintiff's claim, the cause of the Accident was due to D's M/C continuously driving closely behind P's M/C, by the defendant adopting the so-called "tailgating" (「隊車尾」) dangerous way of driving. Allegedly, she was "forced to increase her speed in order to avoid a collision" between the 2 motorcycles (「本人被逼加速以避免讓 UB7928 及 UG8192 發生碰撞。」). The plaintiff also explains that, before she entered the left bend, she could not reduce the speed of her motorcycle because, if she did, the defendant would have crashed into P's M/C. Therefore, under such circumstances, she was "*forced to keep to the same speed*" before negotiating the bend and thereby causing the Accident.

26. Under cross-examination, the plaintiff has basically repeated the same "theory" of hers regarding the cause of the Accident. She considered it was the defendant who had caused the Accident and was the main culprit. However, she admitted that she had never mentioned or complained to the Police of all these very unreasonable and dangerous behaviour of the defendant prior to the issue of the present proceedings. Her excuse was that at the time when she was making the statement to the Police, she had had several operations and her physical condition was poor. All she wanted to do was to go home quickly after making the statement to the Police. Therefore, as she did not want to have further troubles, she simply said that she had "*totally forgotten how the Accident happened*" to the Police.

27. I note when the plaintiff gave the long answer under cross-examination on this matter, her answer was very fluent and sounded heavily rehearsed. It does not have a ring of truth or conviction to it at all. Of course, the plaintiff denied this when pointed out by the Court. However, what she did admit to the defendant's counsel under cross-examination was that, when she told the Police that she was not able to remember anything about the Accident, the answer was "untrue". She also understood at the time when she signed the Police statement that it was a criminal offence to give a false statement. When being challenged by the defendant's counsel that, after her physical condition had improved, she could have gone back to the Police and tell them the truth, the plaintiff explained that after she recovered, she thought that the fault of causing the Accident did not lie with her. She thought it was the defendant's fault in causing the Accident when she had time to think about the Accident afterwards. She stated to the defendant counsel that she only wanted to recover reasonable compensation and was not clear about the legal procedures at the time. When asked by the Court why she did not go back to the Police to complain about the defendant's conduct, the plaintiff's explanation was that she did not know she could do that.

28. When asked why by July 2017 when she pleaded guilty to the 'careless driving' charge at the magistrates' court that she did not complain to the magistrate that there was another person who had chased after her motorcycle and which in turn had caused her to cross onto the opposite lane, the plaintiff's explanation was that she was not thinking clearly at the time. She reckoned at the time that as she was the person who had crossed the double white lines and therefore she was guilty of 'careless driving'. However, she insisted that crossing the double white lines was not due to

her own fault. It was the defendant who had “forced” her to do so. She also could not provide a plausible explanation as to why she had agreed to the Brief Facts prepared by the prosecution on the occasion when she pleaded guilty to the ‘careless driving’ charge.

29. The plaintiff admitted the first time she has ever accused the defendant was the person who had forced her to cross the double white lines was in 2019 when she instructed her present solicitors to issue a letter before action to the defendant which was dated 20 November 2019. The plaintiff however added that, *“in my heart, I was always thinking that he might be the one who had caused the Accident. I searched online and asked my friends”*.

30. The plaintiff also could not provide any plausible explanation as to why she could not have asked her former colleague Chow to provide a statement to the Police or to her solicitors and to come to Court to give evidence in support of her case.

31. Further, the plaintiff could not explain why if D’s M/C was driving so close to her, she could not have signalled or waved at him in order to indicate to him to drive pass P’s M/C first. She also could not explain why as the distance between the two motorcycles kept increasing, she could not have slowed down her motorcycle or to decrease the speed of P’s M/C with a view to bringing it to a complete stop. She simply stated that as the defendant closed up at the rear of P’s M/C, she increased the speed of her own motorcycle. As the defendant continued to chase after her, she could not reduce the speed before the bend anymore and had to

enter the bend in high speed. In other words, she admitted that she did not reduce the speed of her own motorcycle before entering the left bend.

32. When asked by the Court of whether she could think of any reasons why the defendant would choose to chase after her, the plaintiff could not provide any. She was however able to confirm that there was no vehicle around at the time on the particular stretch of the Road besides their 2 motorcycles. Her guess is that the defendant might be in a hurry and because the 2 motorcycles “*was of the same model*” or he was in a hurry, so he chased after her.

33. When further asked why if the defendant was the person who had caused the Accident, he would have chosen to stay behind at the scene and to assist her, the plaintiff thought that the defendant might have done so “*out of guilt*”.

The defendant’s evidence

34. Besides adopting his witness statement dated 5 October 2020 prepared for the purpose of the present proceedings (“D’s WS”) as evidence-in-chief in this case, the defendant further expanded his evidence about the Accident in Court when he testified. He was also subjected to extensive cross-examination by the plaintiff’s counsel Mr Lam.

35. The defendant confirms that he was the owner and rider of D’s M/C which was a 321 cc Yamaha Sporty R3, the same model as P’s M/C. Before the occurrence of the Accident, the defendant was not sure if the plaintiff’s motorcycle was the same as his as he had only noticed the

rear light was the same. It was only after the collision that he found out P's M/C was of the same make and model as his. The defendant confirms also that, at the time of the Accident, he was on his way to the Shek O Carpark to meet up with some of his motorcycling friends. However, there was no specific time that he was required or scheduled to do so. He was travelling on his own and not riding with any other motorcyclists in a group together.

36. Under cross-examination, the defendant admitted that D's M/C's maximum speed is at 178 kph (which of course is the same as the plaintiff's). He also admitted that he was familiar with the Road as he travelled on it about once a week at or around the time of the Accident. He used D's M/C only for leisure and for meeting up with friends in the WhatsApp group that he belonged to. He worked as an evangelist/pastor in a local church which did not require him to use his motorcycle. He met those friends socially to share their common interest in motorcycling and would meet up to have casual chats from time to time. However, there was no specific date, time or place they would meet.

37. In regard to the Accident, the plaintiff confirmed that at about 9:30 pm on that day, he was riding D's M/C along the Road with the intention to reach Shek O Carpark to look for his friends. He had no passenger on D's M/C. The weather was fine; the road condition was dry; the street lights were well lit; the lighting condition was adequate; and the traffic was scarce. The speed limit of the Road was at 50 kph.

38. Just prior to the Accident, he noticed that there were 2 motorcycles travelling ahead of him. One was P's M/C and the other one

was the Scooter which was white in colour. At that time, P's M/C was travelling ahead of the Scooter.

39. Having overtook the Scooter on the broken white lines, he then followed P's M/C. At that time, he noticed that P's M/C began to increase its speed while he was doing around 50 kph on his own motorcycle. He said he had no intention to chase after P's M/C and the distance between the 2 motorcycles initially was about 10 odd metres. As P's M/C continued to increase its speed, the distance between the 2 motorcycles became wider and wider. According to the defendant, before entering the left bend, the defendant reduced the speed of D's M/C while P's M/C had already travelled at quite a distance ahead of his with no sign of reducing its speed. When entering the bend, the defendant claims that he could no longer see P's M/C because it was a "blind bend" (「盲彎」). The bend was very deep according to the defendant, a fact not disputed by the plaintiff⁴. After D's M/C reached the center of the bend, he was able to see P's M/C again. But by this time P's M/C had already crossed to the opposite lane with its brake light on. He then saw P's M/C crashed into the Taxi which was travelling on the opposite lane. After the Accident, the defendant immediately stopped his motorcycle and went up to check on the plaintiff's condition and tried to provide assistance. Afterwards, the Scooter also arrived and the driver of the Scooter then reported the Accident to the Police. After the Police arrived the scene of the Accident, the defendant was asked by the Police of how the Accident occurred. He also left his contact details behind to the Police before leaving the scene.

⁴ but contrary to the allegation made under §5 of P's Opening

40. The defendant denied the allegations made against him by the plaintiff. He confirmed that he was not in a hurry at the time to meet his friends. He did not know the plaintiff personally and had no reason to increase the speed of his motorcycle in order to closely following P's M/C.

Findings of the Court on liability

41. Having heard the plaintiff and the defendant's evidence in Court, I have no hesitation to reject the plaintiff's allegations and to dismiss her claim on the issue of the liability based on the following reasons.

42. First and foremost, the plaintiff's allegations against the defendant were not only unsupported by the contemporaneous records which came into existence immediately or soon after the Accident, in fact they go directly against them.

43. For example, in the statement provided by the plaintiff to the Police about 3 months after the Accident, not only had she failed to mention anything about the alleged extremely unreasonable and dangerous behaviour of the defendant in chasing after her with D's M/C prior to the occurrence of the Accident (which she now claims had caused her to increase the speed and subsequently made her lose control of P's M/C), to the contrary, she actually told the Police that she had "*forgotten about the circumstances of the entire accident*" (「意外後，我唔記得晒個意外過程」).

44. I do not accept the explanation given by the plaintiff under cross-examination that she gave such an answer to the Police because she was tired at the time of giving the statement and just wanted to go home as soon as possible. Given the fact that it was not a voluntary police statement but was in the form of a “cautioned statement” that she was giving to the Police, when the plaintiff was suspected of committing a criminal offence, I do not think any reasonable driver, after having had 3 months to think over the matter, would have failed to provide to the Police the “true reason” of why she was being forced to cross the double white lines during the Accident.

45. In addition, as the plaintiff was well aware of her rights to amend or supplement the contents of her cautioned statement, she could have easily gone back to the Police to provide any supplemental information when she felt she was physically well enough to do so. However, the plaintiff had not done so, not even after she had the chance to obtain legal advice on the matter.

46. Furthermore, in July 2017, when the plaintiff appeared before the magistrate to plead guilty to the ‘careless driving’ charge, instead of disputing the contents of the Brief Facts, which essentially highlighted one particular matter, ie the fact that the plaintiff was unable to properly control her motorcycle which had directly led to the collision between P’ M/C and the Taxi, the plaintiff failed to mention anything about the “extremely unreasonable and dangerous behavior” of the defendant to the magistrate when she was given the chance to do so.

47. Again, I do not accept her self-serving statement given in evidence that, just because she had crossed the double white lines, therefore she must be at fault and would be fined anyway, so she might as well plead guilty to the criminal charge. I find that as a pathetic and floppy excuse. I find it difficult to believe that the plaintiff, being a very competent and experienced motorcyclist prior to the Accident, having possessed a driving licence to ride a motorcycle since she was 18 (and had been using a motorcycle for the purpose of transportation to and from work on a daily basis prior to the Accident) and having owned and driven such a powerful motorcycle like P's M/C since 2016, would not have chosen to say something to the magistrate about the fact that she was being "*chased at very closely distance behind by another motorcycle*" which had caused her to lose control of her own motorcycle when invited by the magistrate to do so.

48. Last but not the least, the fact that the current allegations were made against the defendant only appeared for the first time almost 3 years after the Accident in the form of her solicitors' letter before action dated 20 November 2019 made her allegations sound particular hollow to me. I find these are disingenuous arguments on the part of the plaintiff. In my judgment, these allegations have all the hallmarks of some persons who might have some legal knowledge (not necessarily her present lawyers) have planted such "ideas" in the mind of the plaintiff. In my view, they are clearly "afterthoughts" which were made up by the plaintiff or someone who had been advising and feeding her years after the Accident. In my opinion, the plaintiff or whoever had been advising her must have thought that if they could not sue the driver of the Taxi (who clearly was a victim

of her careless driving), they have to find someone to blame for causing the Accident.

49. Second, I find the plaintiff's allegations inherently improbable and therefore highly incredible for the following reasons.

50. The plaintiff's main case is that she was forced "*not to slow down*" because D's M/C was following her closely (at a distance of 2-3 metres only according to her evidence given in Court) while she was negotiating the left bend. This is in direct contrast to the admission she made in the amended reply when she claimed that "*the distance between the two motorcycles kept increasing shortly before the left bend*": (see §3(c) of the amended reply). If that was the case (as admitted in the amended reply), in my judgment, there was no reason for the plaintiff to worry about the distance between the 2 motorcycles at all. She could have slowed down her motorcycle and made the left bend turn in a safe and controlled manner. In my view, the fact that she had negotiated the left bend at a high speed is contrary to her own admission made in the amended reply. I have no difficulty to reject the plaintiff's claim made in Court in this aspect of the case at all.

51. Third, as the plaintiff was driving a powerful motorcycle of the same engine capacity as the defendant's, there was no reason in my view why she could not have proper control of P's M/C prior to the Accident. Even if it was true that the defendant was actually driving very close to the rear of her motorcycle (which I do not accept), there was no reason in my view why the plaintiff could not have made any indication, whether by way of light signal or hand signal, to allow the defendant to

drive pass her first. Further, there was no reason in my view why the plaintiff could not have slowed down her motorcycle or moved to or even stopped P's MC by the side of the Road in order to allow D's M/C to pass.

52. In my judgment, the very fact that the plaintiff had failed to slow down or indicate to let the defendant to pass her or to pull her own motorcycle by the side of the Road strongly suggest to me that she was the sole culprit of the Accident and the author of her own injuries. I so find that was the case.

53. Fourth, I find the way the plaintiff gave her evidence in the witness box and her demeanour in Court has left a lot of room to be desired for. When faced with questions that she could not provide any answers, the plaintiff became evasive and not forthcoming. On the issue of liability on questions like why despite her admission in the amended reply, she still did not slow down P's M/C; or why she could not ask Chow to provide a witness statement to the Police or call him to give evidence in Court in support of her case, the plaintiff simply has failed to provide any convincing and even plausible explanations and come across not as a truthful witness on such matters at all.

54. In contrast, on matters which she must have been anticipating that she would be asked questions on during the trial, for example, like why she did not inform the Police about the defendant's unreasonable conduct or why she had failed to mention to the magistrate about the facts that she was forced to travel at a high speed when negotiating the left bend, her answers sounded simply too perfect and too rehearsed to me. They appeared to be more like the plaintiff having memorized and read out a

script which had been prepared and written for her before she came to Court to give evidence. I find the plaintiff an incredible and unreliable witness.

55. Fifth, the plaintiff while maintaining that Chow had witnessed the Accident, has failed to call him to either assist the Police or to provide a witness statement in these proceedings in support of her case. To me, this seems to be wholly inconsistent with her stance that she was a victim of the unreasonable and reckless driving of the defendant. While admitting that Chow was her colleague at the time and of whom she still had contact with immediately after the Accident, she had failed to provide them to the Police. She further told the investigation officer ie PC1693 under caution that she had no witness to provide in relation to the Accident. Of course, despite having had the advantage of obtaining legal advice latest in November 2019 (when the letter of action was issued to the defendant by her solicitors), the plaintiff has failed to give any good reasons as to why she could not ask Chow to give evidence on her behalf at the trial. The suggestion that Chow was reluctant to do so in my view is not a good enough reason as she can always subpoena him to come to Court to give evidence.

56. When confronted by the defence counsel Mr Simon Wong in cross-examination on this matter, the plaintiff became evasive and tried to downplay her relationship with Chow. However, she could not provide any convincing answers as to why she had not kept the telephone numbers of Chow in the memory of her mobile phone which she could have provided to the Police or to her solicitors in order to contact Chow. When asked by the Court why she did not call Chow as her witness in this action,

her initial answer was she did not “*think of the matter*” (「我無諗過」). When further pressed on the matter, she then provided another explanation that Chow had told her back in 2017 that he was not willing to be a witness in this case. In my view, these 2 explanations clearly are contradictory to each other and I have no hesitation in rejecting both of them.

57. In my judgment, adverse influence can be drawn and should be drawn against the plaintiff who has failed to provide a crucial witness to give evidence when the person knows that the potential witness’s evidence would be inconsistent with or unfavourable to her case: *Wisniewski v Central Manchester Health Authority* [1998] PIQR 324 at 340 per Brooke LJ. I so draw such inference against the plaintiff in this case.

58. Sixth, in contrast to the plaintiff’s incredible account, I find the defendant’s evidence is fully supported by contemporaneous documents in that the statement he gave to the Police in less than 14 hours after the Accident was entirely consistent with the version he gave both in his witness statement and in Court.

59. I accept the defendant’s evidence that there was simply no reason for him to follow the plaintiff so closely as alleged by the plaintiff at the time and just prior to the Accident. Not only was he not in a hurry to go to Shek O Carpark to meet his friends, there was no particular reason why in my opinion the defendant would have chosen to ride so closely behind P’s M/C. He could have easily overtaken P’s M/C within 2 or 3 minutes before the Accident as both motorcycles are powerful machines. As the defendant was not travelling in a group nor was the plaintiff known

to him, there was simply no logical explanation as to why the defendant would choose to follow her so closely as claimed by the plaintiff.

60. In any event, if it was in fact true that the defendant was driving so unreasonably and dangerously and had caused the plaintiff to collide with the Taxi on the opposite lane, it was extremely unlikely, in my view, that he would have chosen to stay behind at the scene to provide assistance to the plaintiff and to wait for the Police to arrive the scene. It is also highly unlikely in my judgment that he would voluntarily leave his contact details behind to the Police and agreed to become a witness in the case. In my opinion, he could have simply left the scene or refused to become a witness for the Police as the plaintiff's colleague Chow had apparently did.

61. Last but not the least, I find the defendant was an honest and credible witness and had no reason to lie about the Accident in this case. The defendant grew up in Taiwan and came to Hong Kong to study theology in 2005. After graduating, he worked as an evangelist/pastor in a local church. He does not appear to me as the type of person who would drive in such irresponsible and dangerous manner as claimed by the plaintiff. The defendant did not know the plaintiff; had never met her before and had no grudges against her. In my view, there was simply no reason for him to keep chasing P's M/C in such manner and make up a story immediately after the Accident to the Police in order to falsely accuse the plaintiff.

Conclusion on liability

62. In the aforestated premises, I have no hesitation in dismissing the plaintiff's claim as it is not only lack of contemporaneous records in support; but also was inherently improbable and incredible in the circumstances. I have no doubt the plaintiff has, whether consciously or sub-consciously, made up a story after the Accident in order to find somebody to blame and hopefully to get the defendant or his insurer to cover the loss and damage sustained by her in the Accident.

63. Based on the discussions stated above, I will order the plaintiff's claim herein against the defendant to be dismissed.

QUANTUM

64. Given my above conclusions on liability, I will now deal with the amount of quantum which I would have awarded to the plaintiff had I not dismissed her claim. I do so in the unlikely event that I should be found to be wrong on my findings on the issue of liability and if this case were to go on appeal.

The plaintiff's injuries and recovery

65. The defendant does not dispute that the plaintiff did suffer multiple injuries in the Accident. She has, however, achieved good recovery as shown in the various medical reports from the public hospitals.

It is clear that the residual disabilities, if any, do not have significant impact on her daily life and functional capacity.

66. Dr Peter Ko, in the joint medical expert report (“JMR”), explained his conclusions on why he considered there was “good recovery” experienced by the plaintiff, which was based on a list of objective findings made by him⁵:-

(1) Regarding the plaintiff’s upper limbs, examinations showed full range of motion in her left and right wrist with a very slight decrease in the right side in dorsiflexion and palmar flexion. The range of motion of the right thumb was only mildly decreased. X-ray showed anatomic restoration of the left distal radius fracture and satisfactory alignment on the right side with mild incongruity of the distal radial carpal joint with implants in-situ;

(2) As to hips, examination showed essentially full range of motion of both hips and good motor power, with no feature of instability but hypertrophic scar. X-ray confirmed congruency of the sacroiliac joint and bilateral hip joints with reasonably anatomic restoration of the pelvic ring disruption; and

⁵ [C/139-140]

(3) As to her left knee, apart from mild weakness in the left knee motor power, she had essentially full recovery of her range of motion and no significant instability. X-ray confirmed congruent left knee joint with no features of arthritis, but probably likely to have some mild depression (less than 1-2 mm) over the medial tibial plateau.

67. The good recovery is further evidenced by the surveillance footages which the defendant relied on at the trial. Having looked at those footages, it is clear to me that whatever serious injuries the plaintiff might have suffered from in the Accident, it has not stopped her from riding on a motorcycle (albeit as a passenger as shown in the private investigators' video footages) and that she could carry on her daily activities (like shopping and working in her own shop) in a perfectly normal manner. Thus, I find she must have fully recovered from the multiple injuries sustained by her in the Accident.

Pain, suffering & loss of amenities ("PSLA")

68. The plaintiff claims HK\$750,000 as PSLA in this case, which would place her the injuries in the lower end of the "substantial injuries" category of disablement. The "substantial injuries" category as defined in *Lee Ting Lam* as "injuries which require treatment in hospital for many months and leave the victim with a much reduced degree of mobility, for example, a leg amputated from the thigh, so that an artificial leg cannot be used satisfactorily; or multiple injuries which leave a condition requiring regular treatment for the rest of the victim's life."

69. In my judgment, although she had sustained serious multiple injuries in the Accident, the plaintiff has clearly achieved good recovery and is now totally independent for all activities of daily living. The residual symptoms and impairments are evidently minor and not disabling. The plaintiff's injuries have not, in my view, seriously compromised the quality of life so much so that would leave her with a "*much reduced degree of mobility*" analogous to an amputated leg injury, or that would leave her a condition requiring regular treatment for the rest of her life. Hence, I find the plaintiff's assertion that her injuries fall into the "substantial injuries" category is not borne out by the evidence produced by her in this case.

70. Mr Lam, the plaintiff's counsel, in his closing submissions seems to concede that her injuries should fall within the "serious injuries" category. As defined in *Lee Ting Lam*, such category covers "*cases where the injury leaves a disability which mars general activities and enjoyment of life, but allows reasonable mobility to the victim, for example, the loss of a limb replaced by a satisfactory artificial device, or bad fractures leaving recurrent pain.*"

71. I find that the plaintiff's injuries do not fall within the "serious injures" category at all. I agree with Mr Wong for the defendant that at best they only come close to but outside the bottom end of such category.

72. In *Ng Yun Ting v. Chan Man Wai Raymond* [2021] HKDC 576, the plaintiff sustained multiple injuries whilst he was driving a motorcycle and colliding with the vehicle of the defendant. The plaintiff

received more than 7 surgeries. He was granted sick leave for a total of 616 days. Single orthopaedic expert opined that the plaintiff suffered from thoracic aortic dissection, ascending colon serosal tear, liver/spleen contusion, bilateral hemopneumothorax, left eye contusion with zygomatic arch fracture, pelvic fracture, left femur open fracture, right tibia / fibula open fracture with right knee ligament injury, compartment syndrome with residual contracture of muscle and then stiffness of ankle, nerve damage leading to numbness of right sole, and left upper limb brachial plexus and radial nerve palsy. The expert found that the plaintiff still had small abscess of right knee and laxity of right knee. The prognosis of the plaintiff's injury was fair and his overall function would be satisfactory with adjustment. The overall impairment of the whole person was assessed at 20-21%. PSLA was awarded at HK\$600,000.

73. In *Kot Yik Kam v. Kwok Kam Hung and Another*, unreported, (HCPI 292/2004; 1.2.2005), the plaintiff was hit by a lorry and suffered multiple fractures that involved: (i) closed fracture shaft of right ulna bone; (ii) closed fracture left distal radius; (iii) open fracture at the shaft of right tibia and fibula; (iv) closed fracture right medial malleolus; (v) skull fracture at the right temporal region with haematoma in the right temporal lobe and right subarachnoid haemorrhage. She received 4 courses of surgical treatments. She complained that she felt pain in her knee and leg, could not run or jump, nor could she stand for a prolonged period of time. She also complained that she cannot carry heavy objects. A Cheung J (as the CJ then was) held that the case fell short of the serious injury category. PSLA was awarded at HK\$400,000 in 2005.

74. In *Ngan Pik Ha v. Wong Sau Lai* [2005] 4 HKLRD 1, the plaintiff met a traffic accident and suffered a fractured right wrist, a fractured right hip and a fractured dislocation of a number of metatarsals in her right foot. She underwent a closed reduction and dynamic hip screw in respect of the fractured hip, and closed reduction, K-wire fixation and fasciotomy of the right foot. Having regard to the trauma of the accident, the number of operations, the length of time she was in hospital, the lack of mobility thereafter, the on-going pain and the residual permanent disability, DHCJ Gill regarded the injuries suffered by the plaintiff as being such that the award should be below but in sight of the lower end of the band for an injury categorized as a serious injury. PSLA was awarded at HK\$420,000 in 2005.

75. Mr Lam for the plaintiff agrees that *Ng Yun Ting* and *Kot Yik Kam* would be good examples for the Court to consider as appropriate award for PSLA. He however submits that *Ngan Pik Ha*, on the other hand, should not be taken into account as he considers that the plaintiff in the present case suffered more injuries than the victim in that case.

76. The plaintiff also invites the Court to consider the following cases in making the PSLA award: -

- (a) *Li Wan Choi v. Choi Wan Hing and Anor*, unreported, HCPI 1200/1998 (Master de Souza; 14.4.2000). The plaintiff had multiple injuries, including subtrochanteric fracture of left femur, fractures of tibia and pelvis. He was hospitalised for around 4 months and could walk with a walking stick. There was some

muscle wasting of the plaintiff's left lower limb, who also had discernible limitation of movement in his left hip. He would need a rest after prolonged sitting and standing. The PSLA award was at HK\$550,000.

- (b) *Leung Yiu Sheung v. Pa Ling Logistics Co. Ltd.* [2019] HKDC 546. The plaintiff suffered from fractures of left tibia and fibula and soft tissue contusion to both his shoulders. After operation, X-ray showed the fractures were healed with mild deformity. The overall recovery was reasonably satisfactory. The plaintiff should be able to resume his pre-accident duties with reduced efficiency. He would have residual stiffness over his left knee and residual pain over his shoulders, which would hinder his lifting and carrying ability. The PSLA award was at HK\$450,000.

77. The plaintiff further invites the Court to consider the following:-

- (a) The experts agreed that the plaintiff sustained the following injuries⁶:-
- (i) fractured left wrist;
 - (ii) fractured right wrist, complicated by ruptured right thumb extensor tendon;
 - (iii) open-book type fractured pelvis;

⁶ [C/136/11(11.1)]

- (iv) laceration of urinary bladder;
- (v) small serosal tear;
- (vi) fractured left tibial plateau; and
- (vii) fractured sacroccoccyx.

(b) The plaintiff underwent multiple operations on 5 days;

(c) Even Dr Ko agreed that the plaintiff would have some residual disabilities; and

(d) The plaintiff could no longer enjoy the leisure activities as frequently as she used to.

78. Mr Lam cited *Leung Yiu Sheung* to show that the plaintiff suffered a more serious injury than the victim in that case even though he conceded that the plaintiff had made a good recovery.

79. The plaintiff submits that the plaintiff's condition warrants a PSLA award between HK\$600,000 and HK\$750,000.

80. In my judgment, the injuries suffered by the victims in the cases cited by Mr Wong for the defendant are more akin to the injuries sustained by the plaintiff in the Accident and therefore the awards made for PSLA in those cases are of more comparable value. Having taken into account of the excellent recovery of the plaintiff; the minimal impact the injuries have on the plaintiff's daily life and activities; the satisfactory job performance and good prospects of her jobs since the Accident; and that the multiple injuries (although very serious at the time) have not in any

way affected any of her body functions at all, I consider that an appropriate award for PSLA in this case would be at HK\$500,000.

Loss of earnings

81. At the time of the Accident, the plaintiff was working as a part-time ‘operation assistant’ at Deliveroo, the well-known food delivery platform. The records show that she was remunerated on an hourly rather than monthly basis. The plaintiff claims that she earned HK\$18,750 per month prior to the Accident, which was calculated on the basis of HK\$75 x 10 hours per day x 25 days.

82. Mr Wong, the defendant’s counsel, however observes that:-

(1) According to the Inland Revenue Department’s record, the plaintiff earned a total of HK\$26,136 from 5 October 2016 to 31 December 2016 before she resigned on 31 December 2016; and

(2) According to her MPF contribution record, the plaintiff earned the following amount in the relevant periods:

1/10/2016 – 31/10/2016	HK\$9,702
1/11/2016 – 30/11/2016	HK\$10,780
1/12/2016 – 30/12/2016	HK\$5,654.11

83. Hence, the defendant disputes her alleged earnings and puts the plaintiff to strict proof of her alleged monthly income of HK\$18,750 at the time of the Accident.

84. The plaintiff claims that she has resumed working in late July 2017 and therefore had a sick leave of around 231 days, which was roughly equals to 8 months.

85. In relation to the plaintiff's earnings at the time of the Accident, while the defendant relied on the MPF contribution record, Mr Lam submits that the records had not taken into account of the delivery work that the plaintiff had done for her employer on top of her clerical duties. Hence, the plaintiff submits that her average monthly salary in relation to the 'clerical work' at Deliveroo would be at HK\$10,241 [HK\$(9,702 + 10,780)/2]. However, on top of that, she was able to earn additional income for her 'delivery work'.

86. Mr Lam further submits that the plaintiff was able to provide a "concrete version" in her oral evidence about the details of her delivery work, such as her working hours and the fact that she was paid by cash. The plaintiff in her evidence testified that she did not keep any records on her "delivery work" and neither did her employer Deliveroo. However, she could not explain why Deliveroo had not contributed to the MPF in relation to the income derived from her delivery work. Given the fact that most of the delivery workers are engaged by the various food delivery platform as self-employed "independent contractors", the plaintiff submits that the plaintiff did provide a reasonable explanation and invites the Court to accept the same.

87. I do not accept the plaintiff's explanations on the part of her income which was not supported by any documentary evidence. First, her alleged income derived from her delivery duties was never mentioned by her until the present proceedings. For example, the defendant highlighted the fact that the plaintiff did not mention to the experts in the JMR that she had performed delivery duties for her employer before the Accident. She only mentioned about her clerical duties. I do not accept the plaintiff's explanation that the experts had misunderstood her when she was asked about her duties after resuming working for Deliveroo. In my view, they are both experienced orthopaedic surgeons and well respected experts in the field. Her employment history was taken by them in a mythological and logical manner. I simply do not see how both experts would have missed or misunderstood this simple fact had the plaintiff mentioned such delivery duties (which are very different from the sedentary nature of her clerical duties) to them. In particular, I do not accept the plaintiff's allegation that she had never told the experts that she had worked for Deliveroo for about 4-5 months only. I do not see how the experts would have made up this if that did not come from the plaintiff.

88. In my opinion, there is also no reason why the plaintiff could not have been able to obtain the records of her employment with Deliveroo as a "delivery worker" even if she had been engaged as a self-employed "independent contractor" and that no MPF contributions were made by Deliveroo on this "part" of her employment.

89. In any event, as the plaintiff has acknowledged herself, even her own oral evidence did not fully support the plaintiff's claim of a

monthly income of HK\$18,750 as stated in the revised statement of damages. Mr Lam tries to persuade the Court that she could work between 1800 hours and 2300 hours (i.e. 5 hours) each day and at HK\$75 per hour and for 11–12 days per month. This means that as a delivery worker, which is on top of her clerical duties as an “operation assistant”, she may be able to earn as much as HK\$4,500 ($\text{HK\$}75 \times 5 \times 12$) more each month on top of her monthly salary shown in the IRD and MPF records.

90. On this basis, Mr Lam invites the Court to accept that the plaintiff may earn HK\$14,741 ($\text{HK\$}10,241 + \$4,500$) at the time of the Accident.

91. I reject the plaintiff’s submission on her alleged extra income earned through the delivery work. Not only were they not supported by any payment slips or records, they had never been mentioned to anyone including the experts when the plaintiff had the opportunities to do so. I do not accept her evidence at all. It is difficult to imagine that, besides working on her full-time job as an operation assistant during normal office hours, the plaintiff would have the energy or stamina to work 5 hours a day and 11-12 days a month as a delivery worker. I do not accept her evidence nor her counsel’s submission on this matter.

92. The plaintiff was granted sick leave from 2 December 2016 to 21 July 2017 (232 days) and she returned to work upon the expiry of her sick leave. Hence, the plaintiff claims 232 days of loss of income. 2 December 2016 was the date of the Accident, which happened at 2139 hours in the evening (and was after her working hours). Mr Wong therefore submits that there should not be any loss on that day. Subject to

that, the defendant agrees to the full loss for 231 days calculated based on the plaintiff's average monthly earnings at the time of the Accident:

$$\$10,780 \times 231/30 \times 1.05 = \$87,156$$

93. I consider the above calculations of the defendant as reasonable and would grant a loss of earnings at HK\$87,156 had the plaintiff succeeded on liability in this case.

94. As to the claim of partial loss of \$5,000 since 2 August 2017 until her expected retirement age of 65, I agree with the defendant's submissions that such claim entirely lacks any evidential basis. The figure of \$5,000 is also entirely speculative. I would reject such claim.

95. I further agree with Mr Wong's submission that the indisputable facts in this case are that the plaintiff has managed to return to her pre-accident job in mid-July 2017 after satisfactory recovery, and she was able to earn more than what she did prior to the Accident. She got promoted, switched jobs and performed reasonably well in her career, earning more money each time when she changed her job. These are all supported by her income records from her various employers since she returned to work after the Accident.

96. The most recent payroll record in the trial bundle is one for April 2022 from 'Chope'. She worked as an 'Assistant Manager' there, earning \$34,505.68 for that month.

97. Since mid-2021, the plaintiff also solely owned a business called “*Happy Sage Home*” at a shop in Stanley selling homeware products. She operated the shop herself. I assume that she must be able to earn more as a self-employed owner of a small business than that as an employee. Otherwise, there is no incentive for her to make such change.

98. Thus, there is simply no evidential basis for the Court to award any monthly loss of HK\$5,000 as suggested by the plaintiff’s counsel.

Loss of earning capacity

99. As to the claim of loss of earning capacity, I find that the plaintiff has failed to prove that she will suffer any real and substantial risk of losing her job or suffer any handicap in the open labour market. Although she may have mild residual symptoms, I am of the view that those symptoms do not cause such risk and handicap.

100. The orthopaedic experts are largely in agreement on this issue. Dr Ko for the defendant considers that the residues from the injuries had imparted probably minimal to mild impairment to her work efficiency and effectiveness. Dr Ip Kai Yuen for the plaintiff opines that the plaintiff could work as the “pre-injury status”, but she needed to adjust her working habit during work, such as to get up and walk around after sitting for an hour, or to take a rest for a while after writing for 15-20 minutes. I accept the defendant’s submissions that these are the things that a normal office worker could do. Being a self-employed shop / business owner now, the

plaintiff certainly has the freedom to move about or to take rest whenever she likes.

101. In my judgment, there is simply no evidential basis for a loss of earning capacity claim in this case. I refuse to make such an award.

Other special damages

102. Medical and travelling expenses respectively at HK\$16,110 and HK\$2,500 are agreed.

103. Although the tonic food expenses at HK\$2,500 are not agreed, I consider that as reasonable and should be allowed in light of the initially rather serious multiple injuries suffered by the plaintiff.

104. Thus, the total pre-trial expenses I would award in this case will be at HK\$21,110.

Summary of calculations

105. Had I find in favour of the plaintiff on liability, the damages that I would have awarded in this case will be as follows:-

(1) PSLA	HK\$500,000
(2) Pre-trial loss of earnings and MPF	HK\$87,156
(3) Post-trial loss of earnings and MPF	Nil
(4) Loss of earning capacity	Nil
(5) Pre-trial expenses	HK\$21,110
<hr/>	
Total	HK\$608,266

CONCLUSION

106. In conclusion, I will dismiss the plaintiff's claim with costs in favour of the defendant in this case.

107. Had I find in favour of the plaintiff on liability, the damages I would have awarded would be at HK\$608,266 plus interest.

Costs

108. Costs will follow the event. The plaintiff who has failed to establish her case must pay the costs of the defendant in this action.

109. During the trial when the plaintiff gave her evidence, it has become apparent to me that it was the plaintiff who has insisted to pursue this case despite of the fact that she realized that her present allegations regarding the Accident were totally unsubstantiated by any documentary

evidence and in fact was in direct contradiction of the contemporaneous records. I am sure that she must have been properly advised on such matters by her legal advisors. In an answer to the Court, she said she was fully aware of the legal as well as costs consequences if she were to lose the case. Yet she was adamant to proceed with it despite the lack of any credible documentary or contemporaneous evidence. To take a case to Court for trial is her substantive right as a litigant and the Court is not going to deprive “her day in court”. However, that does not mean the defendant should pay any costs not recoverable on taxation for her ill-conceived and futile exercise.

110. While I do not find the plaintiff a totally dishonest witness, her claim is simply lack of any evidential foundation. In my view, it should not have been pursued in the first place, given her conviction of careless driving and a dire lack of any credible evidence for making those allegations contained in the statement of claim and in her evidence in Court. In my view, it was a completely wasteful and futile exercise which has led not only to a waste of time and costs on both sides but of course a waste of the very scarce judicial resources.

111. In the circumstances, I do not see why the plaintiff should not pay the costs of the defendant on an indemnity basis. I so make such an order that the plaintiff to pay the costs of the defendant in this action on an indemnity basis, such costs to be taxed if not agreed with certificate for counsel.

112. I shall make the above costs order on a *nisi* basis. In the absence of any application by the parties within 14 days after handing down of this judgment, the *nisi* order on costs will become absolute.

Written Opening not prepared by counsel appearing before the Court

113. At the beginning of this judgment, I mentioned the fact that a peculiar feature in this case is the fact that P's Opening was not prepared by Mr Lam, the counsel who has appeared for the plaintiff at the trial. Instead, it was prepared by Mr Jackson Poon of counsel: (see §15 above).

114. I find such practice extremely unsatisfactory and troubling.

115. For a simple 2-day PI traffic case, both the PI master in charge of the case and the parties must have been satisfied that the case is simple and straightforward enough for it to be placed on the running list. They must be satisfied that the case can be dealt with by any competent counsel with short notice. There is in my view simply no good reason why the plaintiff's solicitors have to engage a counsel to prepare a written opening in advance (even if that counsel might have advised on the liability, quantum and evidence in the case before), particularly when the same counsel may not be able to represent the plaintiff at the trial, as happened in this case.

116. At the beginning of the trial of this case, there were a number of questions the Court had asked the plaintiff's counsel in relation to some of the very bold (and in the Court's view unfounded) submissions made in the 22-page P's Opening which were not supported by any contemporaneous records or evidence. Yet Mr Lam was not able to provide

any satisfactory answers nor was he able to assist the Court on such matters. He repeatedly told the Court that he was not the counsel who had drafted P's Opening.

117. To me, that is not only unhelpful but totally defeats the purpose of having a written opening where the Court tries to understand the issues as identified by the plaintiff and the basis of the plaintiff's claim (both legal and factual) prior to the commencement of the trial. However, with respect to Mr Lam, I did not receive much help from him as he was not able to "justify" some of the very bold (and unfounded) assertions made in P's Opening by Mr Poon. In other words, he was trying to hide behind the excuse that P's Opening was not written by him. Yet, that was the only written opening the plaintiff had presented to the Court and the one that Mr Lam happily and willingly adopted in full without any amendments or qualifications at the beginning of the trial.

118. As set out in the timeline in the opening paragraphs of this judgment⁷, the Court would, as far as possible, allow at least 1 to 2 full working days for the parties to prepare the written opening in cases which have been placed on the running list in the District Court prior to the case being warned for trial. In my own experience, this would be more than sufficient time for any counsel, whether experienced in PI cases or not, to prepare such a written opening. In my judgment, there is absolutely no need for a plaintiff solicitor to engage a counsel to prepare a written opening in advance unless the counsel is definitely able to represent the plaintiff at trial. If for any reason, whether due to other professional engagements or personal reasons, that particular counsel cannot represent

⁷ See §§2-8 above

his or her lay client at the trial, then such written opening prepared in advance should not be used or adopted by the counsel who subsequently appears for the plaintiff at the trial at all. Otherwise, it will cause more confusions and distractions rather than providing assistance to the Court. In my view, such practice should not be encouraged or condoned in our courts at all.

119. In my view, counsel who appears at the trial should not assume that the Court will accept any written opening prepared by another counsel unless he or she is fully conversant with the contents of the submissions and able to provide full assistance to the Court. Failing to do so may lead to unnecessary adjournment of the trial and possible wasted costs order to be made against the solicitor or counsel involved.

120. Further, the parties should not expect that any written opening prepared by counsel in advance and who has not appeared at the trial will be able to recover any costs in preparing such opening on taxation. In my judgment, it is the responsibility of the counsel who appears at the trial to make sure that the written opening is prepared and drafted by him/her and signed in his/her own name only. As counsel, they should rely on their own work and not work drafted or done by other counsel. As counsel, they should stand ready to provide full assistance and justify the contents to the opening they rely on to the Court and should not hide behind the lame excuse that the written opening was prepared by another counsel.

121. Had the plaintiff succeeded in this case, I would have disallowed the costs of the preparation of P's Opening which was not drafted by the counsel who appeared at the trial totally. In future, I would also ask the PI masters or taxing masters in the District Court to look out

for such unhelpful and unwarranted practice and would ask them to consider disallowing costs of such written opening prepared in advance by counsel who subsequently are not able to appear for his / her client at the trial for any reason.

(Andrew SY Li)
District Judge

Mr Lam Ho Yan, Mike, instructed by Yu Sun Yau Mak & Lawyers, for the plaintiff

Mr Simon Wong, instructed by Hastings & Co., for the defendant