DCPI 1230/2019

[2021] HKDC 205

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1230 OF 2019

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BETWEEN

CHAN TAT YAN Plaintiff

and

LO YIN YEE 1st Defendant

ZURICH INSURANCE COMPANY LTD 2nd Defendant

and

CHAN KWING SHING Third Party

\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_

Before: Master Matthew Leung in Court

Date of Hearing: 16 February 2021

Date of the 2nd Defendant’s Supplemental Submissions: 17 February 2021

Date of Assessment of Damages: 19 March 2021

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| ASSESSMENT OF DAMAGES |

**Background of the proceedings**

1. By a Writ of Summons issued in the Court of First Instance dated 8 September 2017, the Plaintiff claimed against the 1st Defendant (then the only Defendant) for damages for personal injury as a result of a traffic accident caused by the negligent driving on the 1st Defendant’s part in respect of a private vehicle RX 6081 (“**the Vehicle**”) on 25 July 2015 at Castle Peak Road, New Territories.
2. By an Order of Master Roy Yu dated 19 September 2018, leave was granted to the insurer to be joined as the 2nd Defendant in these proceedings.
3. On 22 October 2018, the 2nd Defendant issued a Notice of Contribution and/or Indemnity against the 1st Defendant, and also issued a Third Party Notice against the registered owner of the Vehicle.
4. The case was subsequently transferred to the District Court by an Order dated 25 March 2019. Leave be granted by the District Court on 10 June 2019 to the Plaintiff to accept the sanctioned payments in the total sum of HK$400,000 paid into Court by the 2nd Defendant in full and final settlement of the Plaintiff’s claim.
5. By an Order of Master Peony Wong dated 4 November 2019, interlocutory judgment in the Contribution and Indemnity Proceedings was entered against the 1st Defendant in favour of the 2nd Defendant leaving damages to be assessed. Further, interlocutory judgment in the Third Party Proceedings was entered against the Third Party in favour of the 2nd Defendant leaving damages to be assessed.
6. This is the assessment of damages pursuant to the said Interlocutory Judgments.
7. On 9 September 2020, the Court set down this action for assessment of damages for 16 February 2021. On 30 October 2020, the Plaintiff issued the Notice of Appointment for Assessment of Damages. The Notice was served on the 1st Defendant and the Third Party on 6 November 2020. Affirmation of service was filed on 17 November 2020. The Court had also on 4 November 2020 sent notices of hearing for the assessment of damages to the 1st Defendant and to the Third Party respectively.
8. The 1st Defendant was present at the assessment hearing. She raised no objection to the assessment hearing being conducted in punti language while the Judgment shall be written in English. At the beginning of the assessment hearing, I explained to the 1st Defendant about the procedure of the assessment hearing, including her right to cross examine the witness called by the 2nd Defendant and the right to make final submissions.
9. The Third Party did not attend the assessment hearing. I was satisfied that notice of the assessment hearing had been duly served on the Third Party, and it was his choice not to attend the assessment hearing. I proceeded with the assessment of damages in this case in the absence of the Third Party.

**The 1st Defendant’s case**

1. The Plaintiff and the 1st Defendant were respectively a passenger and the driver of the Vehicle on 25 July 2015. At about 4:30 a.m. on that day, while the 1st Defendant was driving the Vehicle along Castle Peak Road, an unknown private car overtook the Vehicle but the 1st Defendant, in the course of avoiding collision with the car, lost control of the Vehicle and bumped into the crash barrier on a roundabout.
2. The 1st Defendant was convicted of the offence of driving a motor vehicle with alcohol concentration in breath exceeding the prescribed limit. The 2nd Defendant claimed that the accident was solely caused by the negligence of the 1st Defendant.
3. Moreover, the 2nd Defendant claimed against the Third Party, who was the owner of the Vehicle, for an indemnity under the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap 272, and the relevant clauses of the insurance policy.
4. The 2nd Defendant relied on sections 3 and 4 of the Civil Liability (Contribution) Ordinance, Cap. 377 for an indemnity or contribution against the 1st Defendant and the Third Party. The 2nd Defendant further relied on the contractual indemnity given by the Third Party in the Private Motor Car Insurance Policy dated 17 April 2015 and section 10 of the Motor Vehicles Insurance (Third Party Risks) Ordinance.
5. The Plaintiff’s claim and costs were settled by the 2nd Defendant in the respective sums of $400,000 and $180,000 and the 2nd Defendant incurred legal costs in the sum of $160,000 in defending the Plaintiff’s claim. The 2nd Defendant claims against the 1st Defendant and against the Third Party for indemnity at a total sum of $740,000 (i.e. $400,000 + $180,000 + $160,000) with interest.

**The Law**

1. Section 3(1) of the Civil Liability (Contribution) Ordinance, Cap. 377 (“**the Ordinance**”), stipulates that any person liable in respect of any damage suffered by another person may recover contribution from any other person liable in respect of the same damage (whether jointly with him or otherwise).
2. Section 3(4) of the Ordinance provides that a person who has made or agreed to make any payment in *bona fide* settlement or compromise of any claim made against him in respect of any damage shall be entitled to recover contribution without regard to whether or not he himself is or ever was liable in respect of the damage, provided that he would have been liable assuming that the factual basis of the claim against him could be established.
3. Section 3(5) provides that on assessing any contribution under that section, the court shall disregard any part of the payment in respect of which the contribution is sought which appears to the court to be excessive.
4. Section 4(1) provides, *inter alia*, that in any proceedings for contribution under section 3, the amount of the contribution recoverable from any person shall be such as may be found by the court to be just and equitable having regard to the extent of that person’s responsibility for the damage in question.
5. Further, the relevant common law principles in assessing the 2nd Defendant’s damages in the present context can be found in paragraph 21-057 of McGregor on Damages, 21st edn, which stated, *inter alia*, as follows:

“(a) Settlements. Where the now claimant has made a payment by way of settlement of a claim brought against them, they can recover this amount as damages from the now defendant provided that the settlement represented a reasonable figure.  ***Biggin v Permanite***, which established this and that a settlement was a relevant consideration, is the leading case. At the time when ***Biggin*** was decided, over 60 years ago, settlements of damages claims were not so common but now that they are practically the order of the day, there has been a number of first-instance decisions on the matter around the turn of the century, some of which have relied heavily on ***Biggin***.  Recovery of the amount paid out in settlement was allowed in ***General Feeds Inc Panama v Slobodna Plovidba Yugoslavia***, the court holding that it was for the claimant to prove that the fact and the amount of settlement were reasonable in all the circumstances.  Similarly, in ***Ascon Contracting Ltd v Alfred McAlpine Construction Isle of Man Ltd*** main contractors claiming from their subcontractors the amount in liquidated damages they had paid their employer were required to show that such payment had been made in reasonable settlement of the employer’s claim.  In ***Contigroup Companies Inc v Glencore AG***, where there was delay in delivery of goods sold, the amount paid in settlement was held to be reasonable and therefore recoverable. ***Siemens Building Technologies FE Ltd v Supershield Ltd*** takes us to the Court of Appeal where ***Biggin*** again made its inevitable appearance and again the amount paid in settlement was held to be recoverable as reasonable.”

**The Plaintiff’s injury**

1. The Plaintiff was aged 37 at the time of the accident (25 July 2015). After the car accident, he was sent to the A&E Department of Yan Chai Hospital for treatment. Medical examination revealed that the Plaintiff suffered from tenderness over his right upper arm, right chest and right lower leg. Radiological examination revealed fracture of the shaft of his right humerus. Tramadol injection was given and he was admitted to the orthopaedic ward of the Hospital.
2. The Plaintiff was hospitalized for 3 days and was referred to occupational therapy for the application of right humeral brace.
3. The Plaintiff was admitted to St Teresa’s Hospital on 8 August 2015 for open reduction and plating. Due to persistent neck pain, he received follow up medical treatment from private doctor between 20 August 2015 and 13 August 2016.
4. The Plaintiff relied upon the medical expert evidence from Dr Fu Wai Kee in the Main Action. Dr Fu commented that the Plaintiff’s condition was compatible with the diagnosis of fracture of the shaft of right humerus and it should be due to the accident. The Plaintiff sustained right leg abrasion injury and chest contusion. Dr Fu took the view that the sick leave granted to the Plaintiff from 25 July 2015 to 9 September 2016 was appropriate and the permanent impairment suffered by the Plaintiff should be 3%.
5. In the Revised Statement of Damages, the Plaintiff claimed the following:

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| 1. | PSLA | $350,000 |
| 2. | Pre-Trial Loss of Earnings | $1,376,667 |
| 3. | Loss of Earning Capacity | $300,000 |
| 4. | Future Medical Expenses | $300,000 |
| 5. | Special damages | $143,176 |
|  | **Total** | **$2,469,843** |

**Was the Settlement Reasonable?**

1. In assessing the loss and damage of the 2nd Defendant, this Court is not strictly bound by the settlement sum but do retain the discretion to disallow any excessive amount.
2. The 2nd Defendant called one witness, i.e. Mr 盧俊諾, a staff member of the Claims Department of the 2nd Defendant to confirm the settlement payment.  No cross examination was made by the 1st Defendant. Since the evidence of the witness is not contested, I accept his evidence and find that there is no evidence to suggest that the settlement is not *bona fide*.   The remaining question is whether the settled amount is reasonable.

**PSLA**

1. The Plaintiff claimed a sum of $350,000 under this head. Counsel for the 2nd Defendant referred me to the following cases on PSLA.
2. In ***Lam Kit Hong v Paramatta Estate Management Ltd***, DCPI 2165/2007 (unreported, 23 July 2009), the plaintiff suffered from fracture of the shaft of the right humerus and deformation of the right arm as a result of a slip and fall accident. Open reduction and internal fixation was performed and he had been granted 68 days of sick leave. PSLA was awarded at HK$230,000. Counsel for the 2nd Defendant submitted that the figure would be adjusted upward to HK$300,000 in the year 2019.
3. In ***Lau Tsz Ha v Chui Sang Choy***, HCPI 489/2006 (unreported, 9 March 2010), the plaintiff suffered from fracture with displacement of upper end of humerus at right shoulder after a traffic accident. Sick leave of 6 months was granted. PSLA was assessed at HK$250,000 (about HK$300,000 as at 2019 as submitted by the 2nd Defendant).
4. In ***Ng Wing Kwong v Tam Chi Wing t/a Wing Fung Engineering Co & Another*** [2019] HKDC 1154, the plaintiff fell down from a ladder sustaining fracture of right humerus. Sick leave of 12 months was granted. PSLA was assessed at $300,000.
5. After due consideration of the authorities, and having considered, *inter alia*, the nature and the seriousness of the Plaintiff's injuries, the duration of his healing process, and the permanent impairment he suffered, I am satisfied that a sum of $300,000 as damages for PSLA should be reasonable.

**Pre-trial loss of earnings**

1. The Plaintiff alleged that he was a businessman and a program host, and his income depended on the funeral services business. He claimed that his monthly income was about HK$100,000.
2. The 2nd Defendant argue that the Plaintiff failed to disclose any license under the Undertakers of Burials Regulations or any licence showing that he was entitled to carry out funeral service. The Tax Assessment Notice dated 18 January 2017 showed that the Plaintiff’s income for the financial year 2015/16 was HK$415,308 and the provisional tax in the financial year 2016/17 was assessed at HK$36,162. The 2nd Defendant would assess the pre-trial loss on the basis of the Tax Assessment Notice instead of the Plaintiff’s allegation that he could earn HK$100,000 per month.
3. There was no dispute that the Plaintiff was granted sick leave of a total of 413 days, which was considered to be acceptable by the orthopaedic expert, Dr Fu, in the Main Action. The 2nd Defendant assessed that the pre-trial loss of earnings would be

($415,308 – $36,162) x 1.05 x 413/365 = $450,456.61.

1. I consider that the 2nd Defendant’s assessment of the Plaintiff’s pre-trial loss to be reasonable.

**Loss of earning capacity and future medical expenses**

1. The 2nd Defendant submitted that there was no evidence to support the Plaintiff’s claim and no award should be allowed. I agree.

**Special damages**

1. The Plaintiff claimed the following as special damages:

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| (a) | Medical expenses | HK$76,176 |
| (b) | Travelling expenses | HK$7,000 |
| (c) | Tonic food | HK$60,000 |

1. The 2nd Defendant submitted that the medical expenses were supported by documentary evidence and there was little room to contest the reasonableness of the medical expenses claimed.
2. Having considered all the evidence before me, I am satisfied that the medical expenses were supported by documentary evidence and should be allowed in full.
3. Despite the lack of receipts for the travelling expenses, the Plaintiff produced a total of 14 sick leave certificates and medical records of Yan Chai Hospital and St. Teresa’s Hospital. For the travelling expenses incurred for the follow-up treatment and consultation in private sector, I consider that a total sum of $5,000 should be reasonable.
4. The court may award a reasonable sum for tonic food even no documentary proof has been produced: see ***Tang Yuet Yi, a minor by Tiu Kwai King v Leung Man Chow*** [2018] HKDC 985. In the absence of any receipts, I consider that a reasonable amount to represent tonic food in the Plaintiff’s case should be no more than HK$4,000.
5. Hence, the total amount of special damages should be: $76,176 + $5,000 + $4,000 = $85,176.

**Contributory negligence**

1. It was pleaded by the 1st Defendant in her Defence filed on 8 December 2017 that the Plaintiff had failed to wear seatbelt and that he knew and ought to have known that the 1st Defendant’s ability to drive was seriously impaired by alcohol.
2. The 2nd Defendant submitted that the allegation of contributory negligence could not be established by evidence.
3. First, the 2nd Defendant argued that there was evidence to show that the Plaintiff did wear seat belt at the material time. Counsel for the 2nd Defendant referred me to the Medical Report made by Dr Fu Wai Kee dated 26 September 2018 which stated, *inter alia*, that the Plaintiff told Dr Fu that he was wearing a seat belt when the car collided into the crash barrier. Further, the Discharge Summary made by Yan Chai Hospital dated 28 July 2015 showed that the Plaintiff did inform the hospital staff that he was wearing a seat belt. Although those evidence was in fact from the Plaintiff himself, and could be regarded as self-induced, I note that there was no expert evidence from Dr Fu to the effect that the Plaintiff’s injury was inconsistent with his own contention that he was wearing seat belt. I agree that the allegation of contributory negligence due to the Plaintiff’s failure of wearing a seat belt might not be established.
4. The 1st Defendant also pleaded that the Plaintiff should have known that the 1st Defendant had consumed alcohol. The 2nd Defendant argued that unless the 1st Defendant gave evidence at the trial, the 2nd Defendant was not in a position to put any positive case against the Plaintiff. However, in my view, that issue could be determined by considering all the available evidence, including the Plaintiff’s own admitted facts, whether in his pleaded case and in the Police Statement.
5. The 1st Defendant’s pleaded case was that around 12 a.m. on 25 July 2015, the Plaintiff, the 1st Defendant and one Mr Lee went to consume alcohol in Tsuen Wan. They played various games and consumed alcohol until 4 a.m. Notwithstanding that, the Plaintiff directed the 1st Defendant to drive him home thereafter.
6. The Plaintiff’s Police Statement dated 18 September 2015 stated that at around 10 pm the Plaintiff allowed the 1st Defendant to drive the Vehicle and they went to Tsuen Wan together for dinner. At around 3:30 a.m. on 25 July 2015, the 1st Defendant drove the Plaintiff home because the Plaintiff had consumed alcohol. The Plaintiff thought that the 1st Defendant did not consume any alcohol. Against this background, I am of the view that the Plaintiff’s mere allegation that he thought the 1st Defendant did not consume any alcohol could not be supported by evidence. The Plaintiff’s contributory negligence could be established by inference from circumstantial evidence.
7. The facts of the present case are similar to that of ***Chan Ah Kau v Ng Tin Tai***, HCPI 33/2000 (unreported, 1 February 2001)[[1]](#footnote-1). In that case, the plaintiff, the defendant and two other friends visited bars in Wanchai area and there all four of them had consumed a number of alcoholic drinks until about 6:00 a.m. the following morning. All of them got into the defendant’s car with the defendant driving. The defendant's car crashed through the pedestrian railing, mounted the pavement, knocked down a lamp post, crashed into a telephone booth and came to rest after hitting the front of a shop. As a result of that crash, the plaintiff suffered severe head injuries. The court, after considering the cases of ***Owens v Brimmell*** [1977] 1 QB 859 and ***Morton v Knight*** [1990] 2 Qd R 419, decided that the plaintiff’s own contributory negligence should be assessed at 20%.
8. Adopting the same principle, it is reasonable that the Plaintiff’s own contributory negligence in the present case be assessed at 20%.

**Summary**

1. In view of the above, and taking into account the Plaintiff’s contributory negligence, the total amount of damages should be: ($300,000 + $450,456.61 + $85,176) x 80% = $668,506.
2. I am satisfied that the settlement sum of $400,000 is reasonable in the circumstances.

**Recovery of legal costs**

1. It was held in ***Chan Chung Leung v DHL Express (HK) Ltd***, DCPI 1759/2010 (unreported, 6 January 2010) that the indemnity would include the amount of legal fees which a defendant had to pay to its own lawyers to deal with the plaintiff's claim: see also ***So Wing Kwong v Cheng Chi Kwong*** [1999] 3 HKLRD 689. Accordingly, the extent of the indemnity should include the reasonable costs paid by the 2nd Defendant to the Plaintiff and the 2nd Defendant’s own costs in defending the action.
2. The 2nd Defendant and the Plaintiff agreed to settle the Plaintiff’s legal costs at $180,000, comprising profit costs of $148,100 and disbursement of $31,900.
3. The issue is whether the defence and the amount of costs are reasonable. The 2nd Defendant had put up a defence in the Main Action arguing *inter alia* that the Plaintiff failed to wear a seat belt, and that the Plaintiff ought to have known that the 1st Defendant was intoxicated by alcohol. I do not think it was unreasonable for the 2nd Defendant to put up such a defence at the initial stage. The Main Action was settled after the filing of the Answer to the Revised Statement of Damages. Witness statements have been exchanged and expert medical report was compiled. I note that no counsel was retained and a single expert was instructed. I am satisfied that the costs of $180,000 is reasonable.
4. In respect of the 2nd Defendant’s own costs, the relevant fee notes were produced. I note that the costs in relation to the contribution proceedings and the third party proceedings were included in the fee notes. Those costs were not incurred in defending the Plaintiff’s action and should not be recovered under this item. Counsel for the 2nd Defendant also conceded at the assessment hearing that those items should be taken out from the bill. Further, I note that on the 2nd Defendant’s part, no counsel fee or expert fee was incurred in defending the Plaintiff’s claim. Having considered all the circumstances, I am of the view that the costs of $100,000 is reasonable.

**Conclusion**

1. The 2nd Defendant’s damages are therefore assessed at $680,000 (i.e. $400,000 + $180,000 + $100,000).
2. The 2nd Defendant shall be entitled to interest on the settlement sum of $400,000 at half of the judgment rate from the date of the Notice of Contribution and Indemnity and/or Third Party Notice to the date hereof and thereafter at judgment rate until payment. Interest on the legal costs of $180,000 and $100,000 at half of the judgment rate from the respective dates of payments by the 2nd Defendant to the date hereof and thereafter at judgment rate until payment.
3. There be a costs order *nisi* that the 2nd Defendant shall also be entitled to the costs of the assessment with certificate for counsel, and such costs shall be taxed if not agreed.
4. Should the 1st Defendant require translation of this judgment into Chinese language, she can contact my clerk to arrange an appointment for a court interpreter to verbally translate this judgment to her at the District Court at a mutually convenient time.

(Matthew Leung)

Master of the District Court

The 1st Defendant appeared in person

Mr Leon Ho, instructed by Yu & Associates, for the 2nd Defendant

The Third Party is not represented and did not appear

1. The defendant in that case lodged an appeal against the judgment under CACV 556/2001, but the issue of contributory negligence was not challenged. [↑](#footnote-ref-1)