#### DCPI101/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 101 OF 2006

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| BETWEEN | CHEUNG CHI KEUNG | Plaintiff |
|  | and |  |
|  | CHIU WING CHUEN | Defendant |

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##### Coram: H H Judge Marlene Ng in Chambers (open to the public)

Date of Hearing: 27th September 2006

Date of Decision: 27th September 2006

Date of Handing Down Reasons for Decision: 29th September 2006

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###### REASONS FOR DECISION

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Accident

1. At about 11:58 am on 2nd August 2003, the Plaintiff as pedestrian crossed the light-controlled crossing along south-bound Gascoigne Road (“Road”) at the junction with Nathan Road (“Crossing”) from the right-side pavement. The Defendant was the driver of a taxi bearing registration number KB1060 (“Taxi”). A collision occurred between the Plaintiff who stepped off the kerb onto the second lane of the Road and the Taxi travelling along such lane (“Accident”). The Plaintiff suffered personal injuries as a result of the Accident.
2. The Plaintiff claimed the Accident was wholly caused by the Defendant’s negligence. He said he checked and saw no traffic. He noticed the “green man” sign and started to cross the Road at a normal pace. The “green man” started to flash when he stepped off the kerb. He continued to check the Road condition and found no traffic. When he stepped out three paces from the kerb, he noticed the Taxi about one taxi-length away coming towards him. He was knocked down by the Taxi.
3. The Plaintiff’s witness, Mr Hung Lin Fat, claimed he crossed the Road ahead of the Plaintiff. When he crossed the Road, the pedestrian traffic light was green. He heard a sound when he reached the pavement on the other side. He turned around and saw there had been a collision between the Taxi and the Plaintiff. The time lapse between Mr Hung noticing the green pedestrian traffic light and the collision was about 8-10 seconds.
4. On the other hand, the Defendant claimed the Accident was wholly caused by the Plaintiff’s negligence. At the time of the Accident, the traffic light was green for vehicular traffic. The Defendant saw a male crossing the Road diagonally, so he slowed down and sounded the horn. The male reached the pavement on the other side. But when the Defendant neared the Crossing, the Plaintiff dashed across the Road from the right-side pavement onto the Taxi’s path against the red pedestrian traffic light. The Defendant braked and swerved left, but could not avoid hitting the Plaintiff.
5. The statements of the Defendant’s witnesses, Mr Morgan Gadd and Mr Pang Kin Man, who were pedestrians waiting to cross the Road and who observed the Accident, essentially corroborated his version of events. They confirmed the pedestrian traffic light was red when the Plaintiff crossed the Road.
6. Mr Hung, Mr Gadd and Mr Pang were independent witnesses. The statements given by the parties to the present proceedings and the independent witnesses to the police were largely consistent with the above summary.

*Pre-existing condition of the Plaintiff*

1. The Statement of Damages filed on 19th January 2006 (ie on the same day as the issuance of the Writ of Summons) disclosed that the Plaintiff suffered from bipolar affective disorder since 2001 when he was injured as a result of a fall at home. “The Plaintiff has since receiving treatment from Yau Ma Tei Psychiatric Centre ……” “The Plaintiff’s mental state was stable at the time before the admission to QEH on 2 August 2003 with a psychiatric follow up interval of 12 weeks.”
2. According to the expert report of Dr Wong See Hoi, the Plaintiff’s orthopaedic expert, made on 18th January 2006 (ie a day before the issuance of the Writ of Summons), the Plaintiff suffered fracture of the left calcaneal bone as a result of the fall in 2001 and received treatment at the Prince of Wales Hospital (“PWH”). He “still attended regular follow-up before [the Accident]. He managed to walk with stick.”

*Injuries and treatment*

1. The Plaintiff claimed he suffered facial laceration and pelvic fracture (ie fracture at left acetabulum and ilium). Open reduction and internal fixation was performed at the Queen Elizabeth Hospital (“QEH”). Subsequent X-ray showed displacement. Skeletal traction of left lower limb was decided with Steinman pin inserted. He was discharged on 8th October 2003 on own request.
2. The Plaintiff attended QEH’s accident and emergency department on the following day due to left hip pain. He was hospitalised with pain decrease on conservative treatment. There was no displacement of the fracture. The Plaintiff was transferred to the Kowloon Hospital (“KH”) on 13th October 2003 for rehabilitation and inpatient physiotherapy, and was referred for occupational therapy and assessment. He was discharged on 30th October 2003. There was residual hip pain, but the Plaintiff could manage to walk unaided or with one elbow crutch. Serial x-ray showed the fracture had healed.
3. During his stay at QEH, the Plaintiff developed instable mood and insomnia. A visiting psychiatrist checked him for (a) mental fitness to give consent for his operation, (b) management of insomnia (arising from the stress of facing the orthopaedic treatment and the hospital environment) and irritability (when his demand for hypnotic was not met) and (c) the finalisation of psychiatric follow up arrangement after discharge. The Plaintiff was calmed with advice and counselling and effort was made by the treating doctors to avoid unnecessary increase of intake of hypnotics.
4. Dr Wong See Hoi’s report noted that according to the Plaintiff, he was referred to the pain clinic of the Alice Ho Miu Ling Nethersole Hospital (“AHMLNH”) in November 2003 and he attended regular follow up even up to the time of Dr Wong See Hoi’s medical examination in November 2005 (but see paragraph 16 below).
5. On 3rd November 2003 the Plaintiff was referred to KH for physiotherapy. He defaulted out-patient physiotherapy and the last attendance was on 12th December 2003. He was referred again from the Department of Health on 22nd April 2004 for left thigh pain, but was discharged from out-patient physiotherapy service on the same day for personal reasons.
6. The Plaintiff was re-admitted to QEH on 3rd March 2005 for left hip pain. He was found to have disturbing and violent behaviour towards himself and ward staff. Psychiatric assessment suggested relapse of maniac disorder. He was transferred to KH for psychiatric care on 4th March 2005.
7. According to Dr Wong See Hoi’s report, the Plaintiff attended regular orthopaedic follow-up at six-month interval even up to the time of Dr Wong See Hoi’s medical examination in November 2005.
8. The Plaintiff suffered from other social stressors including his divorce in May 2004. He was referred to the clinical psychiatrist at the Clinical Psychologist (Pain) Clinic of AHMLNH in April 2005. He defaulted subsequent follow ups arranged for him.

*Medical reports, medical notes and records, and expert medical reports*

1. Dr Wong See Hoi’s report referred to a bundle of medical records. Ms E Chan, solicitor for the Plaintiff, confirmed they were *post*-Accident medical records. Dr Wong See Hoi was not shown any medical notes and records or medical reports in relation to the Plaintiff’s pre-existing left ankle injury and bipolar affective disorder.
2. On 9th February 2006, the Defendant’s solicitors wrote to the Plaintiff’s solicitors for *inter alia* (a) confirmation as to the nature of the fall accident in 2001 and the injuries sustained and treatment received by the Plaintiff, and (b) disclosure of the names of the treating doctors/clinics/ hospitals as well as all medical notes and records in relation to the treatments received. The Defendant’s solicitors also proposed medical examination of the Plaintiff by their orthopaedic expert Dr Lam Kwong Chin on 9th May 2006.
3. On 17th February 2001, the Plaintiff’s solicitors wrote to the Defendant’s solicitors to confirm the Plaintiff’s availability to attend the proposed medical examination and to say they would reply by separate cover in relation to the fall injury in 2001.
4. In fact, the Plaintiff’s solicitors wrote to government hospitals on 24th February 2006 to bespeak copies of the medical notes and records in relation to the Plaintiff’s treatment for the ankle injury and psychiatric problem following the fall in 2001. The Plaintiff’s solicitors only received the medical notes and records on 17th and 19th June 2006.
5. However, the Plaintiff’s solicitors made no attempt to alert the Defendant’s solicitors that they had applied for copies of the aforesaid medical notes and records, which were yet to be received. Instead, they allowed the Plaintiff to attend examination by Dr Lam Kwong Chin on 9th May 2006 without the benefit of such medical notes and records. Even more strangely, they instructed a clinical psychologist, Professor David Ho, to examine the Plaintiff on 6th April 2006 and to render a psychological report on 10th April 2006 without the benefit of such medical notes and records.
6. Such further medical notes and records in relation to the fall injury in 2001 were only discovered in Plaintiff’s Supplemental List of Documents and Second Supplemental List of Documents filed on 23rd June and 4th July 2006 respectively, by which time the expert reports of Professor David Ho and Dr Lam Kwong Chin had already been completed.
7. Ms A Chan, solicitor for the Defendant, prepared a helpful chronology of the medical notes and records in relation to the treatment of the Plaintiff’s fall injury in 2001. Although Ms E Chan did not have the opportunity to cross-check the particular dates in the chronology, she was prepared to accept that the events described in the chronology happened during the period from mid-2001 to just before the Accident in 2003. What is obvious from the chronology is that the Plaintiff (a) received clinical psychologist and psychiatric assessment as well as treatment shortly after the fall injury in 2001 and (b) suffered from left ankle fracture/pain and attended regular follow up treatment even up to 21st July 2003 (ie 12 days before the Accident).
8. There is also no dispute that the medical notes and records in relation to the Plaintiff’s fall injury in 2001 as disclosed in the Plaintiff’s Supplemental and Second Supplemental List of Documents were incomplete. The medical notes and records of the Plaintiff’s hospitalisation at PWH from 30th June to 13th July 2001 and at the Cheshire Home (other than the discharge summary) and of the Plaintiff’s psychiatric treatment at the Yau Ma Tei Psychiatric Centre were still not available. Ms E Chan confirmed that the Plaintiff’s solicitors had yet to bespeak copies of such records.
9. It is unclear how long it would take to obtain copies of such outstanding medical notes and records. But if the experience of the Plaintiff’s solicitors in seeking copies of the medical notes and records disclosed in the Plaintiff’s Supplemental and Second Supplemental List of Documents were any guide, it could possibly be another four months or thereabouts before the full set of notes and records would be available.

*Present application*

1. The Plaintiff commenced the present proceedings on 19th January 2006. The Defence was filed on 24th January 2006. At the first Checklist Review (“CLR”) hearing on 6th June 2006, the Defendant applied for a split trial on the issues of liability and quantum. Master Levy gave directions that the parties do exchange and lodge witness statements as to fact within 28 days and adjourned the CLR hearing.
2. At the second CLR hearing on 27th July 2006, the Defendant again applied for a split trial on the issues of liability and quantum. Master Levy adjourned such issue for argument before a judge in chambers, which hearing came before me on 27th September 2006.
3. At the hearing, I made the following directions :
4. there be a split trial on the issues of liability and quantum for the present proceedings;
5. the trial on liability be set down in the running list not to be warned before 10th October 2006 with an estimated time of three days;
6. there be liberty to apply;
7. the Plaintiff do pay the Defendant costs of the application for split trial, including costs of the hearing before Master Levy on 27th July 2006 and the hearing before me on 27th September 2006, to be taxed if not agreed.
8. I informed the parties that I would hand down my reasons for decision in due course, and this I now do.

*The law*

1. There is no dispute over the legal principles. Under Order 33 rule 4 of the Rules of the District Court, the court has discretion to order separate trials on different issues or separate trials on liability and quantum. In exercising its discretion, the court has regard to the following two principles (which are sometimes conflicting) :
2. the general rule that all issues on the same case, eg liability and quantum, are to be tried together at the same time;
3. the need for case management and expeditious disposal of litigation which requires a court to identify whether important issues can be put forward for a speedy resolution.

At the end of the day, the question whether the general rule may be departed from is a consideration of whether it is “just and convenient” to do so. I refer to *Wincheer Investments Ltd v Lobley Co Ltd* HCA8145/ 1992, Findlay J (unreported, 23rd February 1995) where the learned judge said :

“…… by ‘just’, I mean fair to both sides, without one side or the other gaining an undue advantage by a separation, and by ‘convenient’, I mean convenient to both sides and advantageous from the point of view of costs.”

*Clear demarcation of the issues*

1. I have no hesitation in concluding that there is clear demarcation of the issues of liability and quantum in the present proceedings.
2. The question of liability is straightforward and simple. There is no overlap of witnesses on the issues of liability and quantum save for the Plaintiff. The Defendant and the other three independent witnesses will only deal with the question of liability. On the other hand, the medical experts will deal solely deal with the question of quantum.
3. Ms E Chan tried to suggest that the Plaintiff’s pre-existing psychiatric condition had an impact on the Accident. I accept that that in the Plaintiff’s statement to the police, when the interviewer queried why he told the police after the Accident that he ran onto the Road without paying attention to the traffic and the traffic light, the Plaintiff said “當時我神志不清，我本身有精神病”.
4. The short answer to Ms E Chan’s submission is several-fold. First, it is not pleaded in the Plaintiff’s pleadings that the Plaintiff’s pre-existing psychiatric condition had any impact on his actions at the time of the Accident. Secondly, bipolar affective disorder is a psychosomatic illness. There is no expert medical evidence before me (and indeed no application to adduce expert medical evidence on liability) to suggest such illness would have an impact on the Plaintiff’s actions at the time of the Accident. On the contrary, according to the medical report of KH’s Dr Desmond Nguyen dated 21st January 2005, “[the Plaintiff’s] mental state was stable at the time before the admission to QEH on 2 August 2003 …… He was also reported by his wife to be mentally stable around the time of admission with good sleep, appetite and mood state.” Thirdly, other than saying he had emotional problems since he commenced his dispensary business, the Plaintiff did not refer to his pre-existing psychiatric condition at all in his witness statement.
5. In the circumstances, I am unable to draw any assistance from *Chan Yin Na v Union Medical Centre Limited* HCPI804&805/2003, Suffiad J (unreported, 27th April 2006) cited by Ms E Chan where the issues of liability and quantum are plainly connected. In that case the plaintiff suffered from post partum depression (with a history of suicidal attempt and suicidal thought) and was admitted to the hospital. The plaintiff was not prevented from leaving the ward on the morning of 10th October 2000. She went down the podium of the hospital and jumped down from there. As a result she suffered injuries and was rendered paraplegic. Plainly the question whether the defendants were negligent turned on their standard of management during the plaintiff’s stay with the hospital when they well knew she was already suffering from a psychiatric condition with suicidal ideation. As the learned judge said, “[that] being the case, it is not difficult to visualize that there could well be an overlap in the evidence dealing with her psychiatric condition relating to both the issues of liability and quantum”. Such background is a far cry from the facts of the present proceedings.

*Just and convenient*

1. There is no dispute that at the material time the Plaintiff was crossing the Road at the Crossing and that he was hit by the Taxi travelling on the second lane. The real issues are (a) the colour of the traffic lights for vehicular and pedestrian traffic at the material time, (b) whether the Plaintiff had kept appropriate observation and/or taken appropriate precautions before and when crossing the Road, (c) whether the Defendant was speeding and/or travelling against the traffic lights, and (d) whether the Defendant had kept a proper lookout and taken appropriate measures to avoid the Accident.
2. Here, the Defendant’s case is buttressed by witness statements of two independent witnesses who will give evidence on his behalf. There is also no prosecution against the Defendant in relation to his manner of driving at the time of the Accident. Although it is inappropriate and unnecessary for me to form any view on the merits of the case, it would be fair to say that the Defendant has a reasonable chance of success on the issue of liability, so a split trial for an early determination of such issue cannot necessarily be said to be a mere exercise in time and costs.
3. If there is a split trial on liability, the parties are ready to proceed immediately with the trial on liability. Ms E Chan submitted that the Plaintiff might need to subpoena the relevant staff of the Transport Department to prove (a) whether the controlling traffic lights at the scene on 2nd August 2003 were in working order and/or (b) the time lapse between changes of traffic lights. Indeed, a chart on such information provided by the Transport Department was already disclosed to the Defendant’s solicitors. Ms A Chan fairly indicated that upon further consideration such evidence might possibly be agreed. In my view, even if such evidence cannot be agreed, *viva voce* evidence in this respect will not be lengthy.
4. On the other hand, the issue of quantum is a far cry from being ready. Dr Wong See Hoi opined that the Accident was the main contributing cause of the Plaintiff’s persistent hip complaints including hip pain and stiffness that affected prolonged walking/standing and required the use of one crutch for long distance travel. He further opined that the significant muscle wasting was probably due to disuse atrophy during the prolonged immobolisation and decrease in usage due to pain.
5. Dr Lam Kwong Chin was of the view that part of the Plaintiff’s limping gait, unsteadiness and muscle wasting were due to the pre-existing ankle fracture. Furthermore, he opined that the Plaintiff’s restriction in daily activities could also be considered as pre-existing to the hip injury.
6. The divergent views of the experts plainly show that the pre-existing ankle fracture has a prominent role to play in the assessment of quantum. It will therefore be necessary to obtain the full set of relevant medical notes and records for Dr Wong See Hoi and Dr Lam Kwong Chin to consider the effect of the pre-existing condition on the *post-*Accident injuries and disabilities and to prepare supplemental joint or separate reports.
7. The Plaintiff also suffered from pre-existing psychiatric condition. The Plaintiff relied on the expert report of Professor David Ho to suggest that the Accident had significantly aggravated the severity of his bipolar affective disorder, pain and marital difficulties. Although it is doubtful whether expert directions will in due course be granted for adducing expert evidence of a clinical psychologist to opine on psychosomatic illness (see *Cheung Yuen Fan Sally v Hong Kong University of Science & Technology* HCPI106/2003, Master Kwan (unreported, 13th March 2006)), I shall for present purposes assume such evidence is relevant and can be adduced.
8. The Defendant has not yet instructed any expert psychiatrist or clinical psychologist. It is premature to do so when the full set of medical records relating to the Plaintiff’s pre-existing psychiatric condition is not yet available. Yet such medical notes and records are highly pertinent for the Defendant’s expert to assess the apportionment of *pre-*Accident and *post-*Accident psychiatric disabilities.
9. Ms E Chan in her written submissions argued that the Plaintiff’s case on quantum was ready for trial. However, Professor David Ho did not have sight of the medical notes and records in relation to the Plaintiff’s pre-existing psychiatric condition when he rendered his report. The guiding criteria for the admissibility of expert medical evidence are necessity, relevance and probative value (see *Chan Kwok Ming v Hitachi Service Co Ltd* HCPI322/2002 referred to in *Arfan Muhammed v MPS Engineering Limited & anor* HCPI457/2003, Deputy High Court Judge Muttrie J (unreported, 30th June 2005)). It is questionable whether Professor David Ho’s report is probative on the issues of causation of loss and apportionment of the *pre-*Accident and *post-*Accident psychiatric condition/disabilities when he had not even sighted relevant medical notes and records. In any event, even if such report is admissible (on which I form no definitive view), it is not difficult to envisage that even the Plaintiff may have need of a supplemental expert psychological report.
10. Plainly, the above efforts will require time and costs for both parties when the liability issue can be determined fairly quickly. Ms E Chan submitted that even a trial on liability would require five days, which would not come on before mid-2007. She explained that the estimation of two days for trial on both liability and quantum in the Plaintiff’s Checklist Statement dated 22nd September 2006 was a typographical error.
11. In my view, a genuine estimate for a trial on liability in the present proceedings will be three days. Although there are five factual witnesses, the Accident happened over a very narrow time window and I cannot envisage *viva voce* evidence to be lengthy. On this basis, the trial on liability is fit to be set down in running list and can be warned for hearing almost immediately.
12. In all probability, the trial on liability can be completed even before the outstanding medical notes and records on the Plaintiff’s pre-existing injuries and treatment can be obtained from the government hospitals. Ms A Chan estimated that the preparation of further or supplemental expert reports would take another 6 to 9 months. In light of the experience of the Plaintiff’s solicitors in getting some of the medical notes and records at the beginning of this year, such estimate is not unrealistic. The present expert reports of Dr Wong See Hoi and Dr Lam Kwong Chin give a flavour of the disputed expert medical opinion on the causation of loss and on the apportionment of *pre-*Accident and *post-*Accident disabilities. There is a possibility (not unreasonable in light of the presently available information) that the medical experts may have to be called to give evidence. In such circumstances, another two days may be required to hear evidence on quantum, so a joint trial on liability and quantum will have to be put on the fixture list and likely only be heard close to the end of the year 2007.
13. Ms A Chan reminded me that the Accident happened three years ago and the evidence on liability depended very much on the recollection of the various witnesses. In my view, it is to the benefit of both parties for such evidence to be heard and the issue on liability to be tried as soon as possible since memory may fade with time. Mr Gadd is an American citizen on a working visa to teach at various universities in Hong Kong. It is uncertain when he will leave Hong Kong. Mr Pang is a businessman who returns to and leaves Hong Kong from time to time. Any further delay for the trial on liability increases the risk of the parties losing contact with the independent witnesses.
14. Looking at all the circumstances, it is fair and convenient for both parties to have the trial on liability heard and determined before the assessment of quantum. The issue on liability involves a straightforward single event, but the quantum issues are of greater complexity covering the Plaintiff’s pre-existing orthopaedic and psychiatric conditions. More importantly, to proceed now with the trial on liability will not cause any delay since time is still required to ready the case on quantum. Indeed, to delay the trial on liability may lead to potential prejudice in terms of memory loss and risk of non-availability of the independent witnesses.
15. Ms A Chan expressed concern over the Plaintiff’s means. She pointed out that he had been unemployed for some time and was not legally aided. In such circumstances, it was said to be beneficial to both parties to deal with the issue of liability first in order to contain costs. Ms A Chan submitted that the Plaintiff also refused to disclose his source of funds for making the present claim, including engaging experts and instructing solicitors, so it was doubtful whether the Plaintiff would be good for costs should the Defendant succeed in defending the claim. However, I find it unnecessary to form any view on these contentions in coming to my conclusions. The circumstances of the present proceedings are sufficient to justify a split trial without delving into considerations of the Plaintiff’s ability to bear legal costs.

Costs

1. The Defendant succeeded in his application for a split trial, and I see no reason to depart from the usual order that costs follow event.

# (Marlene Ng)

District Court Judge

Representation:

Ms E Chan of Messrs Huen & Partners for the Plaintiff.

Ms A Chan of Messrs Y T Chan & Co for the Defendant.