# DCPI 214/2021

[2023] HKDC 370

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 214 OF 2021

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BETWEEN

CHEUNG KA MAN Plaintiff

and

WONG YU HUEN Defendant

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##### Before: His Honour Judge Andrew Li in Chambers (paper disposal)

Date of Hearing: 7 November 2022

Date of plaintiff’s affirmation: 2 December 2022

Date of defendant’s affirmation: 20 December 2022

Date of handing down decision: 17 March 2023

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DECISION

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*INTRODUCTION*

1. This is a decision in relation to the direction I made at the end of the hearing on the first day of trial of the above action whereby I requested the plaintiff’s solicitor to show cause as to why he should not personally be made liable to bear the costs of the action.
2. This was a running list case which had been warned for trial before me on 7 November 2022. 2 days had been reserved for the trial. I dismissed the plaintiff’s action, on the court’s own motion, after the plaintiff’s counsel had, half way through his opening submissions, applied to discontinue the action.
3. Having heard counsel’s submissions on costs, I directed the plaintiff’s handling solicitor to show cause as to why he should not be held personally liable for the costs wasted as a result of the aborted trial.
4. This decision is in relation to whether the plaintiff’s solicitor in charge of the case should be made liable to pay those costs in the circumstances. If so, the summarily assessed amount.

*BACKGROUND*

1. This is a simple and straightforward personal injury (“PI”) claim arose out of a minor motor collision. The plaintiff was a housewife / part-time kindergarten teacher who was the driver of a BMW private car bearing registration number JC 3616 (“P’s Vehicle”) and the defendant, a construction worker, was the owner and driver of an Audi private car bearing registration number TT 9728 (“D’s Vehicle”).
2. At around 8:20 pm on 2 October 2018, the plaintiff was driving P’s Vehicle emerging from Victory Avenue (which is a side street) onto Waterloo Road (which is the main road). The plaintiff’s final destination on that day required her to merge onto the 3rd lane of the northbound Waterloo Road which has a total of 4 lanes. In order to do so, the plaintiff would have to enter a “yellow criss-cross lined box junction”, which is commonly referred to as a “box junction” or “yellow box” (“the Yellow Box”), that covered the 1st and 2nd lane of the northbound Waterloo Road with the length extending a little bit beyond the width of the exit of Victory Avenue only. In other words, she had to traverse onto the Yellow Box and cross over the yellow markings covering the 1st and 2nd lane in order to merge into the main road’s traffic on the 3rd lane of Waterloo Road[[1]](#footnote-1).
3. While emerging from the 2nd lane onto the 3rd lane, P’s car collided with D’s Vehicle which was travelling on the 3rd lane of northbound Waterloo Road (“the 1st Accident”).
4. As a result of the 1st Accident, the plaintiff allegedly sustained “multiple injuries to her head, neck, four limbs with stress disorder.”[[2]](#footnote-2)

*CASE HISTORY*

1. Before discussing the parties’ respective case, I would like to set out the case history to this action which climaxed with the abrupt decision of the plaintiff’s counsel Mr Patrick Lim (“Mr Lim”) in discontinuing the case half way through his opening submissions and before he called the plaintiff to give evidence in the witness box.

*The writ, statement of claim and treating doctors’ reports*

1. The writ of summons was issued and the statement of claim (“SOC”) & statement of damages (“SOD”) in this case were filed on 25 January 2021 in which the plaintiff claims damages against the defendant for alleged negligent driving and breach of statutory duty.
2. In accordance with the requirements of Practice Direction (“PD”) 18.1, 2 treating doctors’ medical reports within the meaning of the Rules of the District Court (“RDC”), Order 18, rule 12(1C) were served at the same time with the SOC. They are: (i) Dr So Chun Kit of the Accident & Emergency Department (“A&E”) of Queen Elizabeth Hospital (“QEH”) dated 23 November 2018; and (ii) Dr Wong Kwok Kin (“Dr Wong”), a specialist in orthopaedic and traumatology (“O&T”) in private practice dated 15 November 2018 (“Dr Wong’s Report”).

*The plaintiff’s failure to disclose about a second accident happened to her on 15 November 2018*

1. It is important to note at this juncture that nowhere in the SOC or the SOD filed by the plaintiff in this case that she or her solicitors had ever mentioned about a second traffic accident which occurred to her on 15 November 2018, ie within around 6 weeks from the 1st Accident (“the 2nd Accident”). In the 2nd Accident, she apparently had suffered from very similar if not identical injuries, ie a whiplash. On that occasion, she had consulted Dr Wong for the injuries sustained by her in that accident also. It is also important to note here that sick leaves were given to the plaintiff by Dr Wong covering the period from 2 October 2018 to 18 July 2019 on a continuous basis. It was not clear by reading those sick leave certificates as to whether they covered the injuries resulting from the 1st Accident or the 2nd Accident or both. Nonetheless, these are the sick leaves relied on by the plaintiff and her solicitors to claim for her loss and damages throughout the present proceedings and apparently for the 2nd Accident also when they negotiated with the insurer’s legal representatives of the other vehicle for a settlement.
2. Further, in the list of documents filed by the plaintiff on 12 March 2021, none of the documents disclosed by the plaintiff has mentioned anything about the 2nd Accident.
3. In addition, the plaintiff has never mentioned anything about the 2nd Accident in her witness statement filed in the present proceedings, including the injuries she had sustained and the subsequent settlement she has managed to reach with the insurer’s solicitors of the other vehicle, without having the need to issue separate proceedings for the same.
4. It was not until 10 August 2021 when the defendant’s solicitors wrote to the plaintiff’s solicitors asking for an updated report from Dr Wong that they had found out for the first time from Dr Wong’s that in fact the plaintiff had met with the 2nd Accident on 15 November 2018, which of course was slightly over 6 weeks after the occurrence of the 1st Accident only. That updated report was dated 12 October 2021 (“Dr Wong’s Updated Report”).
5. Dr Wong’s Updated Report is very significant in that, not only it has revealed that the plaintiff had sustained similar if not identical injuries to her neck, shoulders and back in the 2nd Accident, Dr Wong also stated unequivocally that the injuries sustained by her were more serious in the 2nd Accident when compared with those in the 1st Accident.
6. I think it will only be fair for me to cite Dr Wong’s Updated Report in full here in order to give a comprehensive picture of the injuries sustained by the plaintiff in the 2 separate accidents as reported and opined by her own treating doctor:-

“12 October 2021

Updated Medical Report

Re: CHEUNG Ka Man F/43

HKID No: PXXXXXX(0)

I first saw the abovenamed patient on 4 October 2018. The history given was that the car she was driving was stationary and was hit accidentally on the side by another car on 2 October 2018. After the accident she attended the Accident and Emergency Department of Queen Elizabeth Hospital and X-rays were taken. She was told there was no bony injury.

When I saw her on 4 October 2018 she complained of the following:

Neck, right shoulder region and right upper back pain

Headache

Right upper limb pain and numbness

Right knee pain

Flashbacks of the accident

Physical examination revealed tenderness and muscle spasm of her neck, shoulder regions and upper back. Neck and right shoulder movements were painful.

Tenderness and spasm were present in her right upper arm. There were tenderness and bruising over her right knee.

She was diagnosed to be suffering from the following:

Whiplash injury of neck with radiculopathy

Sprained back

Sprained right upper arm

Contusion right knee

Stress disorder

She was treated with medication and physiotherapy. Pain and numbness of right upper limb subsided followed by right knee pain. Headache, pain in the neck, shoulder region and upper back also improved. When she was seen on 3 November 2018 she had slight pain in her right upper back, mild neck stiffness and occasional headache. She still had residual neck and shoulder region pain. Mentally she still had distressing memories of the accident. She had recurrent upsetting thoughts about it and also flashbacks of it. She could not sleep well and had bad dreams frequently. She was told to return in two weeks for follow up.

***Unfortunately, on 15 November 2018 (two days before the scheduled follow-up date) she had another traffic accident.*** The car of which she was the driver was stationary. The car in front reversed and hit her car. After the accident she attended the Accident and Emergency department of Queen Elizabeth Hospital.

When I saw her on 16 November 2018 she complained of the following:

Pain in neck and both shoulder regions

Pain in fingers of both hands

Numbness of fingers of left hand

Slight low back pain

Physical examination revealed tenderness and muscle spasm of neck and both shoulder regions. Neck and shoulder movements were painful. Light-touch sensation was impaired in her left fifth finger. She was afraid of moving her low back. There was muscle spasm of her low back.

***Prior to the second accident, from 3 November 2018 to 15 November 2018, her condition was static.*** ***After the second accident her neck and shoulder regions condition had become worse.***

***She was diagnosed as suffering from soft tissue injury of neck and back due to accident.*** She was treated with medication and physiotherapy in my clinic. She was also referred to Warren and Partners Physiotherapy Centre for more intensive physiotherapy.

She returned on 22 November 2018 for follow-up. Pain over neck, shoulder regions and fingers improved. There was no more numbness. She started to develop more severe low back pain on 17 November 2018. On examination neck and shoulder movements were still painful. There were less tenderness and muscle spasm in the above regions. Light-touch sensation was normal. Low back movements caused low back pain. Tenderness and muscle spasm were present in the low back. There was no positive neurological sign. She was treated with medication and physiotherapy.

She was seen again on 29 November 2018. She felt much better over her neck and shoulder regions. There was slight pain in her upper back. ***Low back pain had become worse since 23 November 2018.*** It was present even at rest. Mentally she was very depressed and still had frightful memory of the accidents. On examination neck and low back movements were painful. Tenderness and muscle spasm were present in the low back. There was no positive neurological sign. She was treated with medication and advised to have physiotherapy.

She came back again for follow-up on 13 December 2018. She told me she had had six sessions of physiotherapy at Warren and Partners Physiotherapy Centre, there was no neck pain. Occasional pain was felt in her upper back. Low back pain had deteriorated. There was dullache sensation felt over left leg. On examination, neck movements were pain free. Low back movements were painful. Straight leg raising test to 60 degrees caused low back pain. Tenderness and muscle spasm were present in the low back. No positive neurological signs were detected. She was treated with medication and advised to continue physiotherapy.

The next follow-up was on 27 December 2018. Neck pain was absent but upper back pain was present. Low back pain was still bad. Physical examination revealed that low back movements produced pain. Low back tenderness and muscle spasm were still present. She was treated with medication and advised to continue physiotherapy.

***From 10 January 2019 to 5 July 2019 she returned regularly for follow-up.*** During this period the neck and shoulder regions had improved. There was little neck and shoulder regions pain but muscle spasm was still present. Upper back had also improved. Low back pain persisted. At first there was low back pain even at rest. After a few months there was no more rest pain. Instead pain occurred during back movements and after sitting, standing or walking for a short time. Sometimes there was pain at night in her sleep. She could not stand for more than one hour. It affected adversely her daily activities and her ability to work. Mentally she still had occasional unpleasant memory of the accidents.

I last saw her on 5 July 2019. She complained of low back pain. Pain was present in her sleep and on getting up in the morning. On examination low back movements produced pain. There was tenderness in the low back. Spasm was found in the low back muscles. She was given medication and advised to have physiotherapy.

***Throughout the whole period from 16 November 2018 to July 2019 she was treated with medication and physiotherapy.*** Medication consisted of anti-inflammatory drugs, analgesics, antacids and muscle-relaxants. Physiotherapy was performed both in my clinic (microwave, short-wave diathermy and ultrasound) and at Warren and Partners Physiotherapy Centre.

MRI lumbar spine was performed on 7 March 2019 which showed annulus tear at L4/5 and L5/S1 levels.

***Sick-leave was given as follows***:

6 October 2018 to 17 November 2018 inclusive

***15 November 2018 to 21 November 2018 inclusive*** (given by Queen Elizabeth Hospital)

***22 November 2018 to 18 July 2019 inclusive***

As the patient has not come back to see me after 5 July 2019, I have no knowledge of her present condition.

[signed]

Dr Wong Kwok Kin

M.B.B.S. (H.K.) F.R.C.S. (EDIN.) D. PHYS. MED. (LONDON)

F.H.K.C.O.S. F.H.K.A.M. (ORTHOPAEDIC SURGERY)”

[emphasis added]

1. For the record, Dr Wong’s Updated Report dated 12 October 2021 was only disclosed to the defendant’s solicitors on 20 October 2021 and was received by them on 21 October 2021.
2. It is clear that the defendant did not know about the 2nd Accident until Dr Wong’s Updated Report was sent to them. As in their letter dated 26 October 2021 to the plaintiff they had registered their surprise in the following manner:-

“We are surprised to note from the said updated medical report by Dr. Wong that your client had another traffic accident on 15th November 2018 (“the second accident”). According to Dr. Wong, the second accident happened when “*The car of which she was the driver was stationary. The car in front reversed and hit her car.*” After the second accident, your client attended the Accident and Emergency Department of Queen Elizabeth Hospital for treatment.” [emphasis appeared in original text]

1. Resulting from the revelation contained in Dr Wong’s Updated Report, the defendant’s solicitors requested the plaintiff’s solicitors to provide them with all the *“relevant police investigation documents pertaining to the second accident and the medical notes and records and medical report of the Plaintiff concerning her diagnosis and treatment for the second accident for our information”*: See the defendant’s letter to the plaintiff dated 26 October 2021.
2. In the same letter, the defendant requested the plaintiff’s solicitors to disclose whether the plaintiff had made any personal injury claim against any party in relation to the 2nd Accident. If so, the plaintiff was asked to disclose the details of the same to them.
3. Further, based on the comment contained in Dr Wong’s Updated Report that the plaintiff’s condition *“had become worse”* after the 2nd Accident, the defendant also sought discovery of the relevant documents and information in relation to the 2nd Accident from the plaintiff’s solicitors. They also considered that it was necessary to inform the 2 orthopaedic experts to immediately withhold from finalizing their joint report pending of those information and documents pertaining to the 2nd Accident.
4. On the same day, ie 26 October 2021, the plaintiff’s solicitors replied by disclosing to the defendant: (i) the police documents; (ii) medical reports and records of QEH; and (iii) ambulance journey record in relation to the 2nd Accident. They also informed the defendant at the same time that *“the common law claim regarding the second accident has been settled at the pre-action stage. No joint medial expect report has been prepared.”*
5. In part of the police documents disclosed, unlike the defendant in our present case who has not been charged by the Police for any traffic offences, it has been revealed that the driver of the other vehicle involved in the 2nd Accident had been charged with and was convicted of the offence of careless driving. He was fined a sum of HK$1,300.
6. In the record of A&E of QEH, it has been reported that P’s Vehicle was at a stationary positon when the other vehicle reversed uphill into her vehicle and hit her. She suffered *“neck whiplash-type injury”* and her neck pain had increased. It was also remarked by the doctor at the A&E of QEH that there was bilateral UL (upper limb) numbness of the C8 / ulnar area with *“pre-existing pain+ due to RTA 2/10/18) still on physio”.* The X-ray of the C-spine found “*kyphosis alignment was similar to the 3 October 2018 film”.* The provisional diagnosis made was *“sprain neck ?neurapraxia”.*
7. Upon seeing the discovery on the documents in relation to the 2nd Accident that was still not complete, on 28 October 2021, the defendant asked the plaintiff to discover the plaintiff’s “*pre-action letter to the tortfeasor and all the documents concerning settlement”* regarding the 2nd Accident.
8. The discovery of those documents were made a few days later by the plaintiff’s solicitors on 2 November 2021.
9. In the disclosed pre-action letters to the insurer, driver and owner of the other vehicle in relation to the 2nd Accident which were all dated 9 October 2019, the plaintiff’s solicitors had apparently failed to mention anything about the 1st Accident. More importantly, they had failed to mention to the insurer and/or owner and driver of the other vehicle involved in the 2nd Accident that the plaintiff had suffered from very similar if not identical injuries in the earlier accident, ie the 1st Accident. They merely described the injuries of the plaintiff suffered in the 2nd Accident in very general terms as *“neck pain and bilateral upper limb numbness.”*
10. Some without prejudice negotiations obviously had taken place between the solicitors representing the insurer and the plaintiff’s solicitors as one would expect in a PI case. However, the plaintiff’s solicitors had failed to disclose the without prejudice correspondence between the parties during that negotiating process under their letter dated 2 November 2019 to the defendant. The only without prejudice letter disclosed by the plaintiff’s solicitors was one dated 27 May 2021 to the insurer’s solicitors Messrs ONC Lawyers (“ONC”) in which the plaintiff rejected an earlier offer from ONC. They stated that “(S)olely for the purposes of procuring an early settlement, our client is prepared to accept **HK$200,000 (inclusive of damages, interest and our costs and disbursements)** in full and final settlement of the claim herein.” [emphasis appeared in original text]. A duly signed discharge form at the above proposed settlement sum of the same date was enclosed with that letter from the plaintiff’s solicitors. It is to be noted here that the solicitor who had witnessed the signing of that discharge form by the plaintiff was one Mr Rocky Yung Pun Lok (“Mr Yung”) as an official stamp containing his full name had been affixed next to his signature.
11. ONC accepted the above offer from the plaintiff and paid the HK$200,000 to the plaintiff through her solicitors on 16 June 2021.
12. However, significantly, up to this stage, the plaintiff still refused to make discovery of the without prejudice correspondence between her solicitors and ONC. It was only upon further request from the defendant’s solicitors in the present action on 3 November 2021 that the plaintiff’s solicitors were willing to and did eventually provide the defendant with copies of their letters dated 21 January 2021 and 7 June 2021 to ONC which set out the plaintiff’s claims in relation to the 2nd Accident.
13. The without prejudice letter dated 21 January 2021 to ONC set out fully the plaintiff’s claim in relation to the 2nd Accident. In order to be fair to the plaintiff, I would reproduce the entire contents of that letter hereinbelow:-

**“**Dear Sirs,

**Intended Common Law Claim**

**Accident to Cheung Ka Man on 15.11.2018**

We refer to your letter of 30 October 2019.

As requested, we set out below a quantification of our client’s claim:-

**Particulars of Injuries, Treatment & Disabilities**

As a result of the accident, our client was immediately sent by ambulance to the Accident & Emergency Department of Queen Elizabeth Hospital ("QEH"). Physical examination revealed tenderness on the back of her neck. She suffered from neck pain and bilateral upper limb numbness and weakness.

**Pain, Suffering and Loss of Amenities (PSLA)**

Our client was aged 40 (Date of Birth: 27 December 1977) at the time of the accident. Due to the injuries sustained in the accident, she suffered serious injuries, leading to pain, suffering and disability. She has since been suffering residual disabilities causing difficulties and inconvenience to her daily activities and livelihood. Additionally, the injuries have caused our client to undertake prolonged medical and physiotherapy treatments.

In view of the above, we are of the view that our client would be awarded not less than **HK$600,000.00** for her pain, suffering and loss of amenities.

**Loss of Earning Capacity**

At the time of the accident, our client was employed as a Kindergarten teacher and she was paid around HK$16,803.25 per month on average. As a result of the accident, our client was given sick leave continuously from 15 November 2018 to 18 July 2019. Our client has suffered and is at risk of further partial future loss of earnings due to the persistent pain and permanent disability arising out from the accident. She would also definitely suffer a reduced efficiency in work performance and would face a handicap in the labour market due to her injuries and the consequential residual effects (e.g. persistent neck and back pain, stiffness, numbness and discomfort rendering her unable to sustain prolonged hours of sitting and/or standing),

Therefore, for her loss of earning capacity, she claims a lump sum of HK$201,639.00 (HK$16,803.25 x 12 months).

**Other Special Damages**

|  |  |
| --- | --- |
| Medical Expenses | HK$2,000.00 |
| Travelling expenses | HK$8,000.00 |
| Tonic Food | HK$2,000.00 |
| **Total:** | **HK$12,000.00** |

**Summary**

|  |  |
| --- | --- |
| PSLA | HK$600,000.00 |
| Loss of Earning Capacity | HK$201,639.00 |
| Special Damages | HK$12,000.00 |
| Interest | to be assessed |
| **Total:** | **HK$813,639.00** |

Please note that our client has not applied for TAVAS. Solely for the purposes of procuring an early settlement, our client is now willing to accept a round sum of HK$800,000.00 plus costs. We enclose a copy set of the supporting documents for your perusal.

Please let us have your reply within 14 days whether or not you would accept the same, failing which the above offer shall lapse automatically and we shall commence legal proceedings against your client without further notice.

Nothing herein shall be binding on our client unless and until a formal settlement agreement has been reached between the parties. We reserve all our client's rights to revise the claim as and when necessary.

Yours faithfully,

[signed]

B. Mak & Co.”

[emphasis appeared in original text]

*THE TRIAL*

*The plaintiff’s refusal to include the documents disclosed / discovered in relation to the 2nd Accident in the trial bundle*

1. As said, the trial of the present case took place before me on 7 November 2022. It was a running list case.

1. Pursuant to the Order of Master Matthew Leung dated 3 May 2022, this action was to be set down for trial before a bilingual judge in the running list, not to be warned before 1 November 2022 with an estimated length of 2 days by using the trial bundle agreed by the parties. Further, pursuant to the said Order, the plaintiff was given leave to file and serve the application to set down for trial on or before 30 September 2022.
2. The notice to set down the case for trial was filed by the plaintiff’s solicitors on 7 September 2022.

1. The case was duly placed on the warned list of the District Court on 2 November 2022, with a notice that it would be warned for trial before a judge during the week commencing on 7 November 2022.
2. On Wednesday, 2 November 2022, the notice of trial was issued by the listing office of the District Court to the parties, informing them that the trial of the case will take place before me on Monday, 7 November 2022 with 8 November 2022 reserved.
3. On the same day, this court issued directions to the parties to lodge their opening submissions and list of authorities on or before 4:00 pm on Friday, 4 November 2022.
4. On Thursday, 3 November 2022, at 11:29 am, the plaintiff lodged the trial bundle in this case with the court (which consisted of 2 separate box files, viz. Trial Bundle (A) and Trial Bundle (B)) (“the Trial Bundle”). They served the Trial Bundle on the defendant on the same day.
5. The Trial Bundle however did not contain all the latest documents disclosed by the parties since the last checklist review hearing before Master Matthew Leung on 3 May 2022. In particular, the plaintiff refused to enclose the correspondence between the parties in relation to the injuries sustained by her in the 2nd Accident and her claim in relation to the 2nd Accident.
6. This necessitated the defendant to prepare a separate bundle which was labelled as the “Defendant’s Trial Bundle” (“D’s Bundle”) that mainly contained the above documents. It was lodged with the court on Friday, 4 November 2022 at 3:32 pm and served on the plaintiff in the same afternoon.
7. Apparently what happened was that the plaintiff’s solicitors had first failed to disclose the documents in relation to the police investigations into the 1st Accident and also the correspondence between the parties in relation to the 2nd Accident; after they did, they then refused to enclose them in the Trial Bundle. This can be seen in the letter from the defendant’s solicitors to them on 24 October 2022. In the letter dated 3 November 2022, the defendant’s solicitors complained to the plaintiff’s solicitors that they had adopted the old trial bundle index dated 24 May 2022, instead of preparing the trial bundle based on the revised trial bundle index (“the Revised Index”) agreed and signed by the parties dated 5 August 2022. They asked for an explanation as to why the plaintiff’s solicitors did not adopt the Revised Index but prepared the Trial Bundle according to the old agreed bundle index instead: See defendant’s letters to the plaintiff dated 1 & 3 November 2022.
8. The plaintiff’s reply on 3 November 2022 was a rather “curious” one. Again, without being accused of quoting them out of context, I would reproduce the entire contents of that letter here:-

“Dear Sirs,

**DCPI No. 214 of 2021**

**Accident to Cheung Ka Man on 02.10.2018**

We refer to your letters of 1 and 3 November 2022.

Pursuant to paragraph 6 of the Order dated 3 May 2022, the parties have already agreed and signed on the contents of the trial bundle which was duly filed in Court on 24 May 2022. Accordingly, we have already prepared the trial bundle using the said agreed trial bundle index dated 24 May 2022.

***The parties shall use this agreed trial bundle* *unless leave has been sought from the Court to amend and add/remove any documents therein. Please confirm if you have obtained leave.***

We are complying with the Court Order. You may report to Court as you wish.

We reserve the right to produce a copy of this letter to Court at appropriate opportunity.

Yours faithfully,

[signed]

B. Mak & Co.”

[emphasis added]

1. It is not clear where the plaintiff’s solicitors have got the idea from that inclusion of relevant and already discovered documents in the trial bundle need to have leave of the court. Nonetheless, the plaintiff’s refusal to include the already disclosed / discovered documents in the Trial Bundle caused the defendant’s handling solicitor to prepare an affirmation to enclose the above correspondence: See affirmation of Wu Yaqing (“Ms Wu”), the defendant’s handling solicitor, filed on 4 November 2022.
2. In the letter from the defendant to the plaintiff dated 4 November 2022 (which was enclosed as part of the correspondence included under the cover of the letter faxed to the court at 7:03 pm on 5 November 2022), the defendant has rightly taken the view that *“no leave from the Court is necessary when both parties have already agreed to include the documents (which are relevant and of probative value in the Trial Bundle”.* They further cited §180 of PD 18.1 where it stated *“(W)here all the parties are legally represented, if a party fails or refuses to agree or cooperate in respect of the trial bundle without justification and if such failure or refusal results in any wastage of costs, that party may be visited with costs sanctions irrespective of whether or not it is the party who succeeds at trial.”* They expressly reserved their client’s right to seek all costs wasted as a result.

1. The plaintiff’s solicitors replied to the above letter on 4 November 2022 which was marked “URGENT” in the following manner:-

“Dear Sirs,

**DCPI No. 214 of 2021**

**Accident to Cheung Ka Man on 02.10.2018**

1. Trial is on 7th November 2022.
2. On 1st and 3rd November 2022, without leave you request us to suddenly amend the trial bundle and revert to you on the same day.
3. Then after such request, 3 days before trial, today you are still serving pleadings on us, namely, 2nd Supplemental List of Documents.
4. With utmost respect, your above actions are very last minute and at the "eleventh hour".
5. Having said the above, we are not objecting that the documents be included in the "Amended Trial Bundle", but the Court must be informed of the same, as the Court's Trial Bundle would otherwise be different.
6. In these circumstances, we propose that before the trial, Counsels for both parties sit down and agree on the pagination of the "new documents" and present the same to the Court. This would be the sensible way to go about it to ensure accurate pagination.
7. Having said the above, since you are seeking leave to adduce these documents, please prepare enough copies for ALL PARTIES.

We reserve the right to produce a copy of this letter to Court at appropriate opportunity.

Yours faithfully,

[signed]

B.Mak & Co.”

1. On Saturday, 5 November 2022, the defendant faxed a letter to the court at 7:03 pm (which was obviously outside the court’s normal operation hours) informing the court that, subject to the court’s approval, the parties had agreed to include D’s Bundle in the Trial Bundle and were working on the pagination of the “Revised Trial Bundle” (“the Revised Trial Bundle”) before the trial. They also enclosed copies of the correspondence between the parties on 4 & 5 November 2022 in relation to the dispute on why the plaintiff had objected to include mainly documents in relation to the 2nd Accident which I have set out above.

*Events which took place on the first day of trial*

1. At the beginning of the first day of trial on 7 November 2022, the plaintiff through her counsel Mr Lim informed the court that the Trial Bundle had finally been agreed by the parties and the plaintiff no longer insisted on the defendant having a separate D’s Bundle for the purpose of the trial.
2. I asked Mr Lim who was the handling solicitor of the plaintiff’s case in the plaintiff’s firm and was told that the handling solicitor was Mr Rocky Yung (“Mr Yung”)[[3]](#footnote-3). I asked Mr Lim to take instructions from the handling solicitor of why those documents contained in D’s Bundle could not have been included in the Trial Bundle and how did his solicitor’s conduct help to achieve the underlying objectives of the Civil Justice Reform (“CJR”). Mr Lim asked for time to take instructions from his solicitor.
3. When Mr Lim returned to court 10 minutes later with his instructing solicitor and lay client, he apologized on behalf of his solicitors for not dealing with the bundle earlier. He also wanted to hand up a letter to the court which was the same letter sent by the defendant to the court by fax on Saturday, 5 November 2022.
4. It appears that Mr Lim was not aware of the fact that the court had already received the letter by fax from the defendant’s solicitors on 5 November 2022 explaining the situation. Upon the court’s invitation for him to read and digest the contents of that letter and the correspondence attached to it, Mr Lim asked for more time to do so. Before the court adjourned the matter, he was asked by the court to find out from his instructing solicitors how their conduct in preparing the trial bundle would fit into the requirements of §§178-180 of PD18.1. I also requested the plaintiff’s solicitors to re-compile the documents and placed them in the different sections they belonged to rather than simply adding them at the back of the Trial Bundle by way of an additional section as suggested by Mr Lim.
5. When Mr Lim returned to the court room after a short adjournment with his instructing solicitor and lay client, instead of agreeing to re-compile the Trial Bundle, he accused the defendant for adding “new documents” in D’s Bundle during that morning.
6. When pointed out by the court that the defendant’s “new documents” added that morning only consisted of only 1 page while the documents refused to be included by the plaintiff in the Trial Bundle consisted of 117 pages, Mr Lim then tried to explain why in their view *“the force of the impact (in the 2nd Accident) was a lot smaller than the first one”.* But he admitted that the failure to disclose those documents was *“a mistake”* because he admitted that they had to *“disclose everything.”*
7. When asked by the court how would the matters complained of by the defendant in relation to the agreement to the inclusion of the documents in the Trial Bundle comply with §§175-180 of PD 18.1, Mr Lim quite rightly conceded that he was *“not going to defend that”.* By that I took it that Mr Lim was prepared to concede that those relevant sections of PD 18.1 do not require the parties to obtain leave from the court to include the disclosed and updated documents into the Trial Bundle. It merely requires cooperation between the parties and exercise of common sense, not being unnecessary obstructive and difficult, let alone citing the wrong practice and procedures.
8. In any event, the court adjourned the trial at 10:56 am to 2:30 pm in order to allow the plaintiff’s solicitors time to re-compile the documents in D’s Bundle into a new Revised Trial Bundle.
9. I should like to make a note at this juncture that, as Mr Gary Chung (“Mr Chung”) for the defendant has pointed out, the plaintiff had also failed to make discovery of an important statement prepared by WPC 24319 Choi Sin-Lee dated 6 November 2018. She was the investigating officer of the 1st Accident. The statement contained a detailed account of the plaintiff’s initial reaction and explanation as to the cause of the 1st Accident immediately after it had happened which is a clearly relevant and discoverable document. However, the plaintiff chose not to disclose it. This is despite the expressed confirmation by the plaintiff’s letter dated 12 October 2022 to the defendant that she had disclosed all documents obtained from the Police.
10. It was only due to the diligence of the young handling solicitor at the defendant’s firm, namely Ms Wu, that, “for the sake of prudence”, they made enquiry with the Police again and the Police then supplied them with that statement on 13 October 2022. I think the defendant’s solicitors have been very restrained to put on record to say that *“(W)e are surprised to note that why your client has not disclosed or been in possession of the same.”*: See letter from the defendant’s solicitors to the plaintiff’s solicitors dated 24 October 2022. I should also add here that no reply or explanation has been received by the defendant from the plaintiff of the failure in disclosing this very important document to date.

*The plaintiff solicitor’s failure to disclose the husband and wife relationship between him and his client*

1. It was just before the adjournment of the trial to commence in the afternoon and at around 10:38 am that Mr Chung, the defendant’s counsel, has specifically drew the court’s attention to a document contained in the Trial Bundle[[4]](#footnote-4), which is a tax return for individuals issued by the Inland Revenue Department for the Year of 2015/2016, where under the column of “personal particulars” the plaintiff stated the name of her spouse as “MR. YUNG, PUN LOK ROCKY”. Mr Chung wanted to know if this person is the same solicitor who is handling the case on behalf of the plaintiff in the present case who bears the same name.

1. Mr Lim replied immediately by saying that *“we don’t deny that”* and confirmed that the plaintiff’s handling solicitor Mr Yung was in fact *“the plaintiff’s spouse”*, a fact which was not known either to the defendant nor to the court up to this point.
2. I shall return to this matter under my findings below.
3. When Mr Lim and the plaintiff’s legal team returned to court at 2:30 pm to resume the case, which was after they had re-arranged the documents and re-complied the Trial Bundle in accordance with the requirements of PD 18.1, Mr Lim said they have no submissions to make and would not show cause when asked by the court why the plaintiff’s handling solicitor should not be made liable to pay for the wasted costs personally and on an indemnity basis for the adjournment.

1. The court therefore made an order to direct the plaintiff’s solicitors Mr Yung to pay the wasted costs as a result of the non-compliance of PD 18.1 in relation to the inclusion of the additional documents discovered since the Order of Master Matthew Leung dated 3 May 2022, such costs to be paid on an indemnity basis and to be summarily assessed by the court at the end of the case. The wasted costs would include the costs of the morning hearing spent in dealing with the issue, with certificate for one counsel.

*The defendant’s car camera record*

1. I would like to pause here to briefly explain how the accidental late discovery of the defendant’s car camera record (and hence the absence of it) might have influenced the decision of the plaintiff to proceed with the case all the way to trial.
2. As explained in the defendant’s opening submissions prepared by Mr Chung, a DVD video footage of D’s Vehicle camera capturing the happening of the 1st Accident was disclosed by the defendant by way of supplemental list of documents dated 19 October 2022. The defendant’s discovery of the car camera footage was made pursuant to a request made by the plaintiff by letter dated 7 October 2022 whereby the plaintiff’s solicitors stated in the letter that they had noted from the enlarged photos and video of D’s Vehicle that he had a car camera on his windscreen at the material time. In reply thereof, the defendant in their letter dated 24 October 2022 stated that the discovery of the video footage was duly made upon their request.
3. There seems to be an innocent explanation for the late discovery of D’s Vehicle car camera footage as provided by Mr Chung in the morning of the trial just before the court adjourned to allow the plaintiff’s solicitors to re-compile the trial bundle.
4. According to Mr Chung, what happened was that at the scene of the 1st Accident, the police officer who was doing the investigation had watched the video footage through the monitor of the car camera of D’s Vehicle. The defendant then brought the memory card home to try to download the video but was unsuccessful. Hence, he just left the memory card at home and did not pass it to his solicitors during the discovery process as he thought it was defective. It was not until the plaintiff’s solicitors made the request of discovery on 7 October 2022, which of course was less than a month before the case was placed on the running list, that the defendant made discovery of the D’s Vehicle car camera video footage under their supplemental list of document s dated 19 October 2022.
5. Mr Lim and the plaintiff’s solicitors seemed to have accepted the defendant’s explanation above at the trial. At least they did not dispute the above account given by Mr Chung.

*The plaintiff’s arguments during the opening submissions*

1. Mr Lim and his instructing solicitors returned to court in the afternoon with the re-compiled Trial Bundle.
2. He formally opened his case at 2:46 pm by relying on the written submissions he had prepared for the trial which was lodged with the court on Friday, 4 November 2022 and the 2 car cameras’ video footages.
3. In his written opening, Mr Lim had the following to say in regards to the Yellow Box:-

“14. The defence alleges that the Plaintiff had entered to yellow box and remained stationary there, in breach of the Road Users’ Code. The breach of traffic regulations does not automatically give rise to liability (see *Phillips v. Britannia Hygienic Laundry Co.*[1923] 1 KB 539). At p.548 McCardie J. held, *“It is not without interest to refer to the Highway Act, 1835, which contains many provisions as to vehicular traffic, e.g., s.78, which provides that a person driving a vehicle shall keep on the left side of the road. So far as I know, it has not been held that a mere breach of such, or the like, regulation ipso facto gives a cause of action for damage.”*

15. At § 11-212 of *Charlesworth & Percy on Negligence 15th ed*, the learned authors stated, *“It follows that, usually, a failure to observe the provisions of the Code is prima facie evidence of negligence* ***but the Code should not be treated as a statute and a breach of the Code does not necessarily indicate negligence****”.* At § 11-213 it stated, *“For instance, it is unlikely that it would be regarded as evidence of negligence for a pedestrian on a footpath to walk next to the kerb with his back to the traffic (para.1).* ***Also there is some reluctance to make findings of contributory negligence against pedestrians who walk on the "wrong” side of the road, thereby not facing oncoming traffic, even when the only pavement was to the other side of the road ; or where the pedestrian was not wearing or carrying anything white, light-coloured or reflective****. Compliance with the provisions of the "Highway Code” does not necessarily absolve a person of negligence.”* (**Emphasis added**)

16. By way of illustration of the proposition that a breach of the Road Users’ Code does not necessarily indicate negligence an example is *Chan Kam Sum v. Ho Cheung Shing and anr.* unrep., (HCPI 828 of 1999, 25 July 2000). In that case the Plaintiff was knocked down by a minibus. Where he crossed the road was not a place designed for pedestrians to do so. In fact, on one side of the road an iron railing was erected along the kerbside intended to prevent pedestrians from doing so. The opening of the railing on the other side was apparently intended for the bus-stop there, that is, to enable people to get on and off buses. However, the testimony of the factual witnesses for both sides was that that was a place frequently used by pedestrians to cross the road. The defence admitted negligence but alleged contributory negligence. Chung J. at § 10(1) of the judgment stated that the defence submission to justify a finding of contributory negligence, *“…. must have rested on these assumptions: (1) failure to use a place intended for pedestrians to cross the road, and/or (2) crossing a road at a place not intended for such purpose,* ***would per se be contributory negligence*** *(emphasis added). The validity of these assumptions would in turn have to depend on the nature and extent of the duty of a pedestrian in law when he crosses a road”.* The Court rejected the defence argument of contributory negligence and found the defendant fully liable.

17. In the circumstances, a mere breach of the Road Users’ Code does NOT automatically give rise to contributory negligence.”

[emphasis appeared in original text]

1. In the court’s view, which was clearly conveyed to the plaintiff’s counsel at the outset of the case, the main issues in this case on liability are: who has priority in such situation and who should give way to whom? The sub-issues would include 3 things, namely, (i) what is the correct “etiquette” in using the Yellow Box; (ii) when are vehicles allowed to enter the Yellow Box; and (iii) once enter the Yellow Box, who has priority.
2. Mr Lim agreed with the court’s above definitions on the matters that need to be determined on the issue on liability.
3. Mr Lim also referred the court to Regulations 10(1) of the Road Traffic (Traffic Control) Regulations, Cap 374G (“RTR”) during his opening submission where it states:-

“10.Box junctions

1. Subject to subregulations (2) and (3), no person shall drive a vehicle into a box junction unless he will be immediately able to drive the vehicle wholly out of the box junction.
2. …..

(3) Subregulation (1) also does not apply to a vehicle driven into a box junction marked in accordance with Figure No. 514 in Schedule 2 if—

(a) where the box junction is on a left-driving road, the vehicle—

(i) is driven from a traffic lane marked with a right turn directional arrow of the type shown in Figure No. 509 in Schedule 2 to a position where the vehicle can conveniently wait to make a right turn; and

(ii) is prevented from being driven out of the box junction by other stationary vehicles in or near the box junction waiting to complete a right turn, or by vehicles moving in the opposite direction; or

(b) where the box junction is on a right-driving road, the vehicle—

(i) is driven from a traffic lane marked with a left turn directional arrow of the type shown in Figure No. 509 in Schedule 2 to a position where the vehicle can conveniently wait to make a left turn; and

(ii) is prevented from being driven out of the box junction by other stationary vehicles in or near the box junction waiting to complete a left turn, or by vehicles moving in the opposite direction. (L.N. 63 of 2017)”

1. In essence, Mr Lim conceded that sub-section (3)(a)(i) and (ii) do not apply in our case. However, Mr Lim took a very narrow and technical interpretation of Reg 10(1) and submitted that   
   *“…what the regulation provides is that you won’t block the way of other traffic if they can move.*

*……*

*Now, in a crossroad junction, if it’s -- the traffic is crossing at a right angle, if you go into the yellow box and you cannot leave because of traffic on the other side of the road, then you would be impeding the movement of traffic coming from the other direction if -- when the light change to green for those traffic.*

*……*

*Now, in this case -- now, here, when all the traffic is stationary, if traffic from Victory Avenue and 1st and 2nd lane of Waterloo Road Northbound before reaching the yellow box, if everybody complies with the law, then they would all wait there, right?”*

1. The court did not agree with the views expressed by Mr Lim on his interpretation of the regulation. What followed was what I would describe as a “lively” exchange of views between the bench and the bar of whether the plaintiff had priority in entering the Yellow Box and/or the 3rd lane of Waterloo Road when clearly D’s Vehicle as well as a taxi travelling in front of it were still occupying it and moving forward.
2. I do not wish to go into the details of those discussions here as those matters have now become the subject matter of an intended appeal brought by the plaintiff on the “judgment” I supposed to have given on that day. A summons for leave to appeal against the “judgment”, which of course was based on the concession by the plaintiff by way of discontinuance half way through her counsel’s opening submission (but was however dismissed by the court), will be dealt with by me at a hearing now scheduled on 28 March 2023.
3. What I would like to say however at this stage is that such discussions between the bench and the bar are not uncommon in a PI case in my experience (whether as counsel or as a judge) when the court is trying to understand the basis of a claimant’s case, in particular when it questions the legal and/or the factual basis on which the claim is founded on. What is important to bear in mind is that such exchange of views was done *before* the parties call their witnesses to give evidence in the witness box and not during the taking of the evidence. Of course, Mr Lim who, as a very experienced counsel of over 40 years who specializes in PI cases at the Bar, is no stranger to that.
4. In any event, towards the end of the dialogue between the bench and the bar, Mr Lim conceded that he was not saying that the plaintiff *“got priority in the main road”*.
5. Mr Lim then went on to deal very briefly with the issue of quantum in his opening, in which he specifically referred me to the PSLA claim he had revised in his written opening, which was from the original pleaded sum of HK$650,000 under the revised statement of damages (“RSOD”) to a sum of *“no less than $120,000”* in his opening submissions. Mr Lim specifically stated in his written opening that *“(C)ounsel does not ask for the sum set forth in the RSOD [A/74].”* He relied on 5 decided cases which show similar type of whiplash injury as the plaintiff had sustained resulting from the 1st and 2nd Accidents to support that amount. In other words, the plaintiff is claiming less than 20% of what she had pleaded and maintained throughout these proceedings until the day her counsel took over the case and until her counsel’s opening submissions was lodged with the court on the Friday before the first date of the trial on the following Monday. I will come back to this matter under my findings later.
6. Then at about 3:32 pm, which was about 40 minutes after Mr Lim has opened his case, quite out of the blue and without any advanced notice, Mr Lim suddenly informed the court that he would like the court to stand down the case for 10 minutes for the purpose of him to take instructions on the “further conduct” of the case.
7. As Mr Chung for the defendant has no objection, the court acceded to the plaintiff’s request.
8. When Mr Lim returned to court with his instructing solicitor (Mr Yung) and lay client (the plaintiff) at 3:42 pm, he informed the court that he has instructions to *“concede to discontinue the claim and concede to judgment brought by the defendant and the counterclaim with costs to the defendant, to be taxed if not agreed.”*
9. Mr Chung said in principle he has no objection but would like to apply for costs on an indemnity basis.
10. I then indicated to the parties that the Court would like to receive written submissions from both sides on the issue of costs as I was thinking of writing a decision on the wasted costs in this case.
11. I stood down the case for 10-15 minutes for the parties to come up with a proposed timetable and draft directions for lodging those written submissions on costs.
12. When Mr Lim came back to the court room with his solicitor and lay client at 4:02 pm, when asked by the court why his solicitors should not show cause and why they should not be made personally liable for the wasted costs in this case, Mr Lim’s reply was that if the solicitors agreed to pay those costs, there is no need for them to show cause.
13. However, I reminded Mr Lim that the costs he referred to were those conceded by his solicitors in the morning for the failure to compile the Trial Bundle for the hearing.
14. Mr Lim at this juncture then informed the court that he was instructed that it was the plaintiff who had insisted to take the case to trial.
15. The court’s response to that assertion is that this sounded “particularly hollow” when the plaintiff is the handling solicitor’s spouse, and when that relationship had deliberately been concealed to both the defendant and the court by the plaintiff’s solicitors and was not disclosed until the defendant’s counsel asked for a confirmation in open court on the first day of trial.
16. At this point, I referred Mr Lim to 2 recent judgments / decisions of this court, namely, *So Kam v Guildford Ltd & Anor* [2021] 2 HKLRD 319 and *Shahid Muhammad v Kowloon Motor Bus Co (1933) Ltd* [2022] HKDC 1122 and [2022] HKDC 1410. In particular, I emphasized the fact that, as an officer of the court, the duties owed by the plaintiff’s handling solicitor to the court are very different from those owed by a lay client like the plaintiff.
17. Mr Lim repeated his instructions that the plaintiff was prepared to concede to the costs and was willing to give an undertaking to pay them on an indemnity basis.
18. However, the court considered this was a wholly different issue in that whether the plaintiff was willing to give an undertaking to pay the costs or not should not prevent the court to look into why this case had not been stopped / discontinued much earlier and why the solicitor in charge of the case should not be made liable for bearing any wasted costs in this case.
19. I adjourned the matter shortly in order to write out the directions and brief reasons for my decision in my chambers.
20. When I returned to the court room at 4:59 pm, I asked Mr Lim if there is a difference between discontinuing of a case and the dismissal of a case. Mr Lim has very fairly pointed out that discontinuance would require the leave of the court while the court could dismiss a case either on application from the parties or on its own motion[[5]](#footnote-5).
21. I said to Mr Lim that in that case I am minded to dismiss the case instead of giving leave to the plaintiff to discontinue.
22. Both Mr Lim and Mr Chung expressed no view on this.

*The Ruling and Order made by the Court on 7 November 2022*

1. The following was the decision and the directions I made at the end of the hearing on 7 November 2022 which were read out to the parties at 5:29 pm:-

“On the first day of trial, after wasting half a day in allowing the Plaintiff’s solicitors to re-compile the agreed trial bundle according to PD18.1, P’s counsel was able to open his case at 2:46 pm.

However, during the discussion between the Bench and the Plaintiff’s counsel on the issue of liability and the law and regulations pertaining to it, Mr Lim asked the court at 3:32 pm to stand down the case in order to allow him to have 10 minutes to take instructions regarding “further conduct” of the case.

The Court stood down the case at 3:42 pm for 10 minutes for the purpose of allowing Mr Lim to do so.

When Mr Lim and the parties returned to the Court at 3:42 pm, Mr Lim informed the Court that he has instructions to discontinue with the action and conceded to judgment to the counter-claim brought by the defendant against the plaintiff, with costs to be taxed if not agreed.

Mr Chung for the Defendant said that in principle he has no objection to such concession except for the basis of the costs which he would like to have submissions on.

I therefore further stood down the case for the parties to discuss on the timeframe / timetable of making such written submissions to the court so as to allow the court to make a decision by way of paper disposal.

After another 10-15 minutes of adjournment and when the parties returned to the court, Mr Lim informed the Court that his client, ie the Plaintiff, would be willing to bear the costs on an indemnity basis. Mr Lim would also like to put on record that she is willing to give an undertaking to pay for the costs on an indemnity basis.

The Court takes the view that this case should not have been brought in the first place or even if brought should have been discontinued by the Plaintiff, upon reviewing the car cam evidence, weeks if not months prior to the trial.

The fact that Mr Lim who is a very experienced and well respected PI counsel would advise his client and solicitors to discontinue the action half way through his opening submissions and before he calls his client to give evidence, strongly suggests to me that he himself does not believe that his client has much of a case on liability at all.

Given such circumstances, the Court takes the view that it is more appropriate for the case to be dismissed rather than to give leave for P to discontinue the action on the first day of the trial.

I hereby make an order that the Plaintiff’s claim herein be dismissed with costs on an indemnity basis to be awarded to the Defendant.

Hence, there will be judgment of HK$76,437 be entered against the plaintiff on the counterclaim with interest at 1% above HSBC's best lending rate from the date of paying of repairs on 8 October 2018 up to the date of judgment and thereafter at judgment rate, ie today and thereafter at judgment rate.

The Court further takes the view that there should be an enquiry upon the Court’s own motion under Order 62, rule 8A of the RDC of why the solicitor in charge of this case, whom the Court has found out only this morning during the Defendant’s submissions that he is the husband of the Plaintiff in this case, should not be made personally liable for the costs of the action, including the costs of the hearing today, and that such costs should be summarily assessed by this Court and to be paid by the solicitor involved on an indemnity basis and forthwith.

Hence, I would, pursuant to O 62, R 8A of the RDC and PD 14.5, on this Court’s own motion, direct the solicitor in charge of this case, namely Mr Rocky Yung, of P’s solicitors, to show cause within 28 days (with copy to the Defendant) as to why the costs of Defendant in this action, save for those which had already been ordered by the Court and agreed to be borne by them this afternoon out of the non-compliance of the PD in relation to the compiling of the agreed trial bundle, should not be borne by him personally and on an indemnity basis, including certificate for counsel and for such costs to be assessed by this Court by way of paper disposal.

I would also direct that the defendant be given the opportunity to respond to any submissions to be made by P’s solicitors on the proposed wasted costs order within 21 days thereafter as ultimately they are the party going to be affected the most by this last minute concession. The Defendant’s solicitors also to lodge their statement of costs at the same time when lodging their reply submissions, with copy served on Plaintiff. P’ solicitors do file and serve a list of objections within 14 days thereafter and the court will make the summary assessment on costs by way of paper disposal.

I also order the hearing tomorrow, i.e. 8 November 2022 at 9:30 am be vacated.”

*The plaintiff solicitor’s submissions*

1. Pursuant to my directions, the plaintiff’s handling solicitor Mr Yung has filed an affirmation but did not give any reason as to why he considered that he should not bear the costs of the action personally and on an indemnity basis. Instead, he tried to argue why he *“(T)o this date, I still believe the case on liability and quantum are both strong”.* I find this rather ironic as this is a case which he had chosen to abandon / discontinue on behalf of his wife and through their counsel half way through his opening submissions.
2. Anyway, the following is the substance of his “showing of cause” as contained in his affirmation filed on 2 December 2022:-

“1. I am a Senior Consultant of Messrs. B. Mak & Co., Solicitors and the handling solicitor for the Plaintiff herein. The facts deposed to herein are true to the best of my knowledge, information and belief save where otherwise stated.

2. I have been ordered by His Honour Judge Andrew Li under paragraph 3 of his Judgment/Decision (pending Court’s approval) to show cause within 28 days with copy to the Defendant as to why the costs of this action should not be borne by me personally and on indemnity basis, including Certificate for one Counsel and the proposed wasted costs order.

3. To this date, I still believe the case on liability and quantum are both strong.

4. Dealing first with liability, the Defendant in his Police Statement dated 20th October 2018 specifically admits fault (copy annexed hereto as “YRPL-1”).

5. He states “同時我留意到對方架車亦開車駛入我車前面，跟住我收掣唔切就撞到對方右車頭沙板位置”.

6. The car camera footages of the accident annexed hereto as “YRPL-2” are consistent with the said Police statement. These videos show the Plaintiff’s vehicle was partially inside the Defendant’s lane for at least 13 seconds before the collision albeit in a yellow box. The fact that the Plaintiff’s vehicle was in a yellow box does not give the Defendant the right to crash into it especially when the Defendant acknowledged the presence of the Plaintiff’s vehicle as per the said Police Statement. Yet, the Defendant still crashed into the Plaintiff’s vehicle. In the circumstances, my view to date is that liability is strong for this case.

7. On the issue of quantum, as per Counsel, Mr. Patrick Lim’s Opening Submissions, annexed hereto as “YRPL-3”, the Plaintiff’s claim for her neck and back is for $120,000 plus special damages. Since the chassis of the Audi was damaged as per the Defendant’s Survey Report dated 22nd October 2018 annexed hereto as “YRPL-4”, the collision must have been strong. Otherwise only the bumper, fender or bonnet would be damaged. Moreover, the point of impact was exactly the Plaintiff’s driver’s side. Hence her neck and back must have sustained strong impact as the photos in “YRPL-4” also show substantial damage to the Defendant’s vehicle. I therefore submit that the claim on quantum is reasonable and achievable if the trial had continued. In fact, in the exchange between bench and bar on 7 November 2022, the Court agreed that an award of $120,000 for PSLA would be an appropriate award.

8. Before taking the case to trial, the Plaintiff also obtained written and oral advice from Counsel, Mr. Patrick Lim on inter alia 10, 19, 24, 28 October 2022. Without going into specifics, I solemnly affirm Counsel’s advice is that both liability and quantum are strong. Based on Counsel’s advice, I recommended the Plaintiff to go to trial.

9. Notwithstanding the above, for reasons protected by privilege, my client’s instructions were to discontinue the claim on 7 November 2022.

10. In view of the above, I humbly submit I have not committed any act which warrants a wasted costs order and costs of this action to be borne by me personally and on an indemnity basis including Certificate for one Counsel.

1. The defendant’s solicitors take a “neutral stance” on the issue of whether Mr Yung should bear the costs of the action personally but disagree with the plaintiff’s solicitor assertion that the plaintiff had a strong case on liability and quantum. Ms Wu, the handling solicitor at the defendant’s firm, in her affirmation dated 21 December 2022, has, *inter alia*, brought to the court’s attention the following matters which of course was not privy to the court during the hearing of the trial:-

“**Defendant’s Invitation to the Plaintiff to Discontinue the Claim and Admit Liability to the Counterclaim**

26. In respect of the captioned matter, the Plaintiff’s Solicitors wrote to us on 8th September 2021, inviting the Defendant to admit liability. A copy of the said letter is produced and shown to me marked Exhibit “WY-6”.

27. In answering to the abovesaid letter of the Plaintiff’s Solicitors, CY have also written to the Plaintiff’s Solicitors on 28th September 2021, stating the following:-

1. Disagreed with the Plaintiff’s Solicitors that the Defendant shall admit liability to the Plaintiff’s claim;
2. Invited the Plaintiff to discontinue her claim; and
3. Invited the Plaintiff to admit liability to the Defendant’s counterclaim; or invited the Plaintiff to make a reasonable offer in respect of the Defendant’s counterclaim.

28. A copy of the said letter of CY is now produced and shown to me marked Exhibit “WY-7“. I crave leave to draw the Court’s attention to the fact that at the time of the said letter of CY, the Plaintiff was still yet to disclose the occurrence of the 2nd Accident and the Plaintiff’s injuries sustained therefrom. The 2nd Accident was only revealed on or about 20th October 2021 when the Plaintiff disclosed the updated medical report compiled by Dr. Wong Kwok Kin upon CY’s request. That led to our chain of enquiries relating to the 2nd Accident, and only under such circumstances, documents relating to the 2nd Accident were disclosed by the Plaintiff in a piecemeal manner. By that time, the Joint Orthopaedic Examination had already been conducted by the parties’ orthopaedic experts. Revision of Joint Instructions to medical experts was also necessitated as a result.

29. However, up to the date of the trial scheduled for 7th November 2022, the Plaintiff did not mention anything about the 2nd Accident in the pleadings and her witness statement.

30. In order to give the Court a clear picture on the circumstances leading to the discovery of the 2nd Accident, I have compiled a paginated, chronological bundle of correspondences which is now produced and shown to me marked “WY-8”.

**Others**

31. To assist the Court, I crave leave to further draw the Court’s attention to the followings:-

32. Firstly, in RY’s Affirmation (paragraph 8), it was stated that written and oral advice had been obtained from the Plaintiff’s Counsel on “inter alia 10, 19, 24, 28 October 2022”. On the other hand, according to the audio disc that we obtained from the Plaintiff’s solicitors recording the proceedings on 7th November 2022, exchange between the Court and the Plaintiff’s Counsel (shortly after the Court started discussing with the Plaintiff’s Counsel on the issue of quantum and the Plaintiff’s reduction of PSLA to $120,000) were as follows:-

*“Court: What was the evidence that stage? When did you come into picture?*

*Plaintiff’s Counsel: Last week.”*

33. Secondly, it was stated in RY’s Affirmation (paragraph 8), that RY relied on Counsel’s advice and recommended the Plaintiff to go to trial. Relevant exchange between the Court and the Plaintiff’s Counsel (immediately before the Court referred to the decision in So Kam and the recent decision relating to a KMB case (as per the audio disc recording the proceedings), are quoted as follows:-

*“Court: Am I not entitled to ask solicitors to show cause?*

*Plaintiff’s Counsel: If solicitors agree to pay, then if he concedes to that, what’s the point to ask him to show cause?*

*Court: No, because what you told me you didn’t say “solicitors agree to pay”, you said “we concede to pay indemnity costs”.*

*Plaintiff’s Counsel: No, my concession was … this morning.*

*Court: That was to deal with the bundles, I’m talking about the whole action now, which you have conceded the whole action, which is different.*

*Plaintiff’s Counsel: Well, but I’m instructed it was the Plaintiff who insisted to take the case to trial.”*

**Conclusion**

34. The Defendant opts to take a neutral stance in respect of whether RY shall be made personally liable for costs of the whole action, including those incurred on 7th November 2022. Nevertheless, I made the above reply to RY’s Affirmation to assist the Court, and also because there are several areas in RY’s Affirmation which I do not agree.”

*FINDINGS OF THE COURT*

1. Let me start with my findings by saying that this is by far the worst case I have come across in my 10 years sitting on the bench of how a solicitor, who is supposed to be an officer of the court, had deliberately and consciously tried to hide a second accident from the court and from his opponents (in both claims). Further, he tried to grossly inflate his client’s claim to such an extent that it renders the whole exercise of pleadings and/or setting out a “without prejudice” claim to his opponent rather superfluous and meaningless. In addition, he had failed to make proper discovery of documents in relation to the other accident both in the present claim and the other claim resulting from the 2nd Accident. Last but not the least, he tried to hide the husband and wife relationship between him and the plaintiff from his opponent and the court when his financial interest may be at stake.
2. I shall discuss my findings under the following separate headings in this case.
3. *Deliberate and conscious efforts on the part of the plaintiff’s solicitor to hide the 2nd Accident from the court and the defendant*
4. Judging from the history of this case, there is no doubt in my mind that there was a deliberate and conscious effort on the part of the plaintiff’s handling solicitor in trying to hide the 2nd Accident from the defendant and the court in this case. Likewise, I also find that there was such a deliberate and conscious effort on the part of the plaintiff’s solicitor to hide the 1st Accident from ONC, ie the solicitors who acted for the insurer of the driver of the other vehicle in the 2nd Accident.
5. First of all, as Ms Wu from the defendant’s solicitors in her affirmation has stated, *“up to the date of the trial scheduled for 7th November 2022, the plaintiff did not mention anything about the 2nd Accident in the pleadings and her witness statement”*: See §29 of Wu Yaqing’s affirmation filed on 20 December 2022.
6. Since the 2 accidents happened within about 6 weeks from each other, I simply cannot imagine when the plaintiff’s solicitor issued the writ and filed the SOC & SOD in January 2021 in this case, he would not have in mind the 2nd Accident, in particular the very pertinent fact that the injuries sustained by his wife in the 2nd Accident were very similar if not identical to those sustained by her in the 1st Accident. Yet, he had, in my judgment, deliberately chosen not to mention this in the SOD which was filed on 25 January 2021 and later in the RSOD which was filed on 6 January 2022.
7. In the SOD as well as the RSOD, the plaintiff’s solicitor had pleaded the following as the “particulars of injuries, treatment and disabilities” sustained by the plaintiff in the 1st Accident:-

“2.1 As a result of the subject accident on 2nd October 2018 (the “Accident”), the Plaintiff suffered multiple injuries to her head, neck, four limbs with stress disorder and attended the Accident & Emergency Department of Queen Elizabeth Hospital (“QEH”) for treatment shortly after the Accident. The provisional diagnosis was neck and back sprain injury as a result of the Accident.

2.2 The hospital's physical examination revealed diffuse pain and tenderness of her right upper limb and back. X-Ray examination showed no fracture in her right humerus, right forearm, cervical & lumbar spine. She was treated and discharged.

2.3 From 4th October 2018 onwards, the Plaintiff attended the private clinic of Dr. Wong Kwok Kin for further treatment. Physical examination revealed tenderness and muscle spasm of her neck, shoulder regions and upper back. Neck and right shoulder movements were painful. Tenderness and spasm were present in her right upper arm. There was tenderness and bruising over her right knee. She was diagnosed with whiplash injury of neck with radiculopathy, sprained back, sprained right upper arm, contusion of her right knee and stress disorder. She was treated with medication and physiotherapy. Sick leave was granted.

2.4 As a result of the Plaintiff's injuries, she suffered and is still suffering from:

(a) Persistent pain, tenderness, numbness and fatigue over her right upper back and neck region;

(b) Such pain is aggravated by stress, changing weather, prolonged hours of standing and sitting;

(c) Reduced range of movement due to persistent right upper back and neck pain, for example, inability to stretch her body fully;

(d) Poor sleep and anxiety affected by right upper back and neck pain and or numbness. The Plaintiff is often awakened in the middle of her sleep, unable to feel her right upper back and neck region or in great pain;

(e) Inability to engage in recreational activities, i.e. swimming and hiking, she had often enjoyed before the Accident; and

(f) Frequent flashbacks of the scene of the Accident.

2.5 As a result of the Accident, sick leave was granted to the Plaintiff from 2nd October 2018 until 18th July 2019 (which may be continuous).”

1. I note in particular of the plea above that the plaintiff had been attending the private clinic of Dr Wong since 4 October 2018 but without mentioning the very important fact that she had done so since 16 November 2018 for the more serious injuries (as opined by Dr Wong) sustained in the 2nd Accident.

1. What is even more disturbing is the fact that the allegations of injuries contained in the SOD and RSOD are almost identical to that contained in the without prejudice letter dated 21 January 2021 to ONC in relation to the 2nd Accident (referred to in §32 above). As an experienced solicitor of over 20 years and senior consultant of a firm which specializes in PI litigation, Mr Yung cannot in my view claim that he had forgotten about what he had set out just 4 days earlier in the without prejudice letter to ONC when he drafted the SOD which was filed on 25 January 2021. In my judgment, he also cannot claim that his client had not told him about the other accident as his client is his wife. Further, in my judgment, Mr Yung also cannot say that he did not know about the other case or accident as he was the handling solicitor in the plaintiff’s firm in both cases. It is not a case where a dishonest client has instructed 2 separate firms of solicitors to pursue 2 separate claims at the same time as we sometimes find in our courts. It is also not a case where 2 different solicitors in the same firm were handling 2 separate claims at the same time for the same client where they can claim that their left hand does not know what their right hand is doing.
2. I find Mr Yung knew exactly what he was doing. I find he was trying to recover double amount of quantum out of the miseries of the injuries suffered by his wife in the 2 separate accidents when the injuries were similar if not identical and the sick leaves given by Dr Wong had substantially overlapped with each other (save for the period between the 1st and 2nd Accidents from 2 October 2018 to 15 November 2018).
3. Based on the above objective evidence, I find Mr Yung has deliberately tried to mislead the court (and the defendant) into thinking that all the plaintiff’s injuries, treatments and disabilities pleaded in the SOC and RSOD were all resulted from one single accident, ie the 1st Accident when he knew very well that they were not.
4. §1.03 of ‘*The Hong Kong Solicitors’ Guide to Professional Conduct*’ Vol 1 (“*The Law Society’s Guide*”) states: “A solicitor is an Officer of the Court (see sections 3(2) of the Legal Practitioners Ordinance (Cap.159)), and should conduct himself appropriately.”
5. In the ‘Commentary’ that follows, it goes on to say “As an Officer of the Court, proper standards of behaviour whether in his practice or in his independent business activities are required of a solicitor as a member of an honorable profession.”
6. In ‘*The Professional Conduct of Lawyers in Hong Kong*’ (Michael Wilkinson & Michael Sandor; Lexis Nexis), (*“The Professional Conduct of Lawyers in Hong Kong”*), the authors of this leading text in Hong Kong explain what it means as an “Officer of the Court” in the following terms in [1055]-[1081] of XIII 259:-

“It is clear, therefore, that solicitors, whether practising or not, are officers of the Court and certain high standards are required of them whether in their practice or their private lives. These duties are summarised in the following paragraphs.

The continuing duty of counsel and solicitors in not misleading the court is continuing by lawyers on both sides to the court. In *SNE Engineering co Ltd v Hsin Chong Construction co Ltd* [2015] 6 HKC 583, [2015] 4 HKLRD 517 (CA), the Court of Appeal held that if there is an introduction of a new document and reliance on it, that party introducing the said document is equally responsible for introducing such new evidence and its consequences especially where the introduction of such evidence was unanticipated. Counsel and solicitor of the other party are entitled to a fair contest of the document and the court would not be placed in a position to find that there was any misleading of the document's status.”

1. I find Mr Yung had failed in his duties as an officer of the court, to deal with the 2 claims in an honest and honourable manner.
2. *Totally inflated and grossly exaggerated the PSLA Claims*
3. In my view, a few salient matters stood out from the contents of the without prejudice letter sent by the plaintiff’s solicitors to ONC dated 21 January 2021 in relation to the 2nd Accident. They included:
4. The fact that the plaintiff’s solicitors had obviously deliberately and consciously chosen not to mention anything about the 1st Accident which happened only 6 weeks earlier;
5. They had failed to mention anything about the very similar if not identical injuries sustained by her in the 1st Accident;
6. Nothing was mentioned about the “pre-existing condition” sustained by her in the 1st Accident;
7. The plaintiff claims to have suffered from *“serious injuries, leading to pain, suffering and disability”* in the 2nd Accident;
8. She also claims that she has *“since been suffering from residual disabilities causing difficulties and inconvenience; to her daily activities and livelihood”*;
9. Additionally, she claims that the injuries have caused her to *“undertake prolonged medical and physiotherapy treatments”* without mentioning anything about the medical treatments she had received for the 1st Accident nor how much of the medical and physiotherapy treatments she had received after 15 November 2018 were related to the 1st Accident and how much of them were related to the 2nd Accident; and
10. The plaintiff claims that the pain, suffering and loss of amenities (“PSLA”) award she *“would be awarded not less than HK$600,000”.*
11. The awards for PSLA awards as defined in *Lee Ting Lam v Leung Kam Ming* [1980] HKLR 657 have been updated in *Ng Tat Kuen v Tam Che Fu* [2019] HKCFI 1191 (3 May 2019; Bharwaney J):-

|  |  |
| --- | --- |
| **Injuries** | **Damages** |
| Serious | $530,000.00 - $715,000.00 |
| Substantial | $715,000.00 - $875,000.00 |
| Gross disability | $875,000.00 - $1,325,000.00 |
| Disaster | $1,325,000.00 and up |

1. The above level of damages need to be further adjusted by the rate of inflation at the levels according to the Consumer Price Index published by the Census and Statistics Department which for 2018, 2019, 2010, 2021 and 2022 were respectively at 2.4%, 2.9%, 0.3%, 2.4% and 2%:-

|  |  |
| --- | --- |
| **Injuries** | **Damages** |
| Serious | $585,000.00 - $789,000.00 |
| Substantial | $789,000.00 - $966,000.00 |
| Gross disability | $966,000.00 - $1,463,000.00 |
| Disaster | $1,463,000.00 and up |

1. As the without prejudice letter setting out the plaintiff’s claim was dated 21 January 2021, thus the award for “serious injury” category at that time would be somewhere between HK$560,000 and HK$755,000 only, after taking into account of the inflation in 2018, 2019 and 2020 at the above levels:

|  |  |
| --- | --- |
| **Injuries** | **Damages** |
| Serious | $560,000.00 - $755,500.00 |
| Substantial | $755,500.00 - $924,500.00 |
| Gross disability | $924,500.00 - $1,400,000.00 |
| Disaster | $1,400,000.00 and up |

1. As is well known, “serious injury” category has been defined in *Lee Ting Nam, supra,* as:-

*“It covers those 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*”.

1. “Substantial injury” has been defined as:-

“*This category extends to 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*”.

1. “Gross disability” has been defined as:-

“*This comprises injuries which leave the victim with very restricted mobility or cause serious mental disability or behavioral changes. This bracket includes paraplegics who, particularly if young, can expect to be placed at the upper at the upper end of the bracket*”.

1. “Disaster” category has been defined as:-

“*This is where the victim requires constant care and attention and is incapable of ever leading or appreciating an independent adult life. This bracket includes tetraplegics and those reduced to “living cabbages” or left with the mental age of very young children*”.

1. By any stretch of imagination, we know that the plaintiff’s injuries, whether resulting from the 2nd Accident alone, or combining with those sustained by her in the 1st Accident, do not even come anywhere close to the above definition under the “serious injury” category.
2. However, the plaintiff’s handling solicitor when setting out his wife’s claim in the without prejudice letter in January 2021 saw fit to pitch her injuries resulting from the 2nd Accident alone in the middle of the “serious injury” category at HK$600,000. But at the end of the day, he and the plaintiff were willing to accept a substantially lower sum at HK$200,000 (which very significantly in this context of this case was inclusive of *“both general and special damages, interest, costs and disbursements”* as stated in the letter of acceptance of the offer) in full and final settlement of the 2nd Accident when liability was not in issue at all.
3. What is perhaps more alarming if one views this with the fact that the plaintiff has originally pleaded a sum of HK$600,000 as PSLA award under its SOD dated 25 January 2021 in the present proceedings (when the writ was first issued and served with the SOC) which was then revised upwards to a sum of HK$650,000 in the RSOD dated 6 January 2022.
4. In other words, what Mr Yung is effectively claiming – without the driver or the insurer or their solicitors of the other vehicle in the 1st Accident or the 2nd Accident knowing – that the “combined” effects of his wife’s injuries sustained in the 2 accidents would entitle her to claim HK$1,350,000 as PSLA awards alone.
5. Any PI lawyer know that this amount would by definition place her injuries in the top end of the “gross disability” or bottom end of the “disaster” injury category as defined in *Lee Ting Nam.*
6. I find there is simply no basis -- whether legal, factual or medical -- for the plaintiff in making those wholly unrealistic and grossly exaggerated claims at all. At most, as Mr Lim has conceded in his opening submissions, the likely PSLA award that the plaintiff will be able to recover from the injuries sustained by her in the 1st Accident if she succeeds on liability is around HK$120,000 only. I am of the view that even combining the very similar if not identical injuries sustained by her in the 2nd Accident (which was opined by Dr Wong as worse than those sustained by her in the 1st Accident), the PSLA award one is talking about for *both* accidents will be in the region of HK$150,000 to HK$200,000 only. The fact that Mr Yung was prepared to accept a sum of HK$200,000 in full and final settlement as damages on his wife’s behalf for the 2nd Accident (which sum includes both general and special damages, interests, costs and disbursements) really speaks for itself.
7. In my experience, while it is not uncommon for a claimant or his/her solicitor or counsel to pitch his/her claims, including the PSLA award, in the pleadings a bit higher in order to give them room for negotiations or maneuver during without prejudice negotiations in a PI case, to pitch it at a level 5 times more than the likely recoverable amount (or almost 10 times when the 2 separate PSLA claims made were put together) is almost unheard of. I certainly have not come across such situation in my over 35 years’ experience in dealing with PI litigation in Hong Kong.
8. In my judgment, the only reason of making such cynical, grossly unrealistic and baseless claims for PSLA award in the 2 cases is due to greed and greed alone. Otherwise, I cannot think of any other good reason why an experienced PI solicitor would choose to do that.
9. The problem of grossly inflating such claims on PSLA is that it would not help to achieve the underlying objectives of the CJR which solicitors, as officers of the court, are under a duty to further and to promote: See Order 1A, r3 of the RDC. It will also prevent the defendant or his insurer or its legal advisers to able to properly gauge a meaningful response or make a sanctioned payment in court. It will only lead to unnecessary wastage of costs, time and efforts for all parties concerned and wasting of the limited judicial resources.
10. *Failure to make proper discovery of documents in relation to the 2nd Accident in the present proceedings*
11. It has also been said that in civil cases, the courts have imposed an unusually high duty upon solicitors as officers of the court in respect of their duty to assist in the discovery process: See [404] of XI 67A of *The Professional Conduct of Lawyers in Hong Kong*; and also *Woods v Martins Bank Ltd* [1959] 1 QB 55 and *Rockwell Machine Tool Co Ltd v EP Barrus (Concessionaries) Ltd* [1968 1 WLR 693 at 694.
12. Such duties to make full discovery will include the duty to check that no relevant documents have been omitted by the client in complying with his duty to make discovery: see *Myers v Elman* [1940] AC 282 (HL) at 322.
13. It is also the solicitor’s duty to ensure that full discovery is made in good time before the trial.
14. In this case, judging from the history and events set out above, it is clear to me that had it not been for the “accidental” discovery of the 2nd Accident when the defendant’s solicitors asked for an update of Dr Wong’s Report, the plaintiff’s solicitors had no intention to disclose or make discovery of any documents in relation to the 2nd Accident at all. Even when they did so, it was done in a piecemeal fashion and in a most reluctant manner. The last minute attempts to stop the defendant to include those discovered documents in the 2nd Accident in the Trial Bundle based on some absurd grounds is another illustration of how low the plaintiff’s solicitor was prepared to go in order to stop the court from seeing those documents at the trial.
15. In my view, there is a clear breach of such a duty to the court on the part of the plaintiff’s solicitors in making full and timely discovery of the documents in relation to the 2nd Accident in this case.
16. *Failing to disclose the husband and wife relationship*

1. Let me start by saying that as far as I am aware, there exists no rule to prohibit a solicitor to act for his spouse, whether in a civil or in a criminal case.
2. In the case of *Chan Wai Shan v Ocean Park Corporation* [2009] I-IKCU 1775 at §3, Yam J stated the following:-

“However, as admittedly by the defence, there is no rule or code of conduct that a solicitor cannot act for his or her spouse. This code of conduct for solicitors, as far as I understand, is different from the code of conduct for barristers. A counsel is not allowed to act for his close relatives, say his spouse, children, his parents, brothers and sisters because it would affect his independency. The reason why we have a divided profession is because the Bar has been considered as an independent body which is not instructed directly by its lay client but solicitors instead.”

1. However, it has been clearly stated in *The Law Society’s Guide* that a solicitor must not place himself in a position where his own interests conflict or are likely to conflict with his duty to his client: See *Solicitors’ Guide to Professional Conduct Vol.1* §7.02 where it states:-

“A solicitor must act in the best interest of his client and he must not put himself in a position where his own interests conflict or are likely to conflict with his duty to his client, quasi-client or potential client.”

1. Commentary 2 of that passage provided that:-

“2. A solicitor must also consider whether any family or other personal or emotional relationship, office, appointment or shareholding which he has may inhibit his ability to advise his client properly and impartially.”

1. In this case, I think it is clear that his relationship with the plaintiff and any financial interest that he may have in the case, whether by way of damages going to be received by his wife or costs to be received by him in his capacity as solicitor in the case, may have inhibit his ability to advise his client/wife properly and impartially.
2. Although not required by the rules, I think it is always a good policy and/or practice for a solicitor to think carefully before he/she decides whether it is prudent for him/her to act for his/her spouse or partner, particularly in a PI case where personal injury and monetory issues are involved. If he/she does so, I think it would be wise for them to disclose such a relationship to his opponent and/or to the court.

*CONCLUSION*

1. In conclusion, based on the objective evidence unfolded in this case, with much regret, I find:-
2. The plaintiff’s handling solicitor Mr Yung has deliberately and consciously tried to hide the 2nd Accident from the defendant and the court in this case;
3. He has also deliberately and consciously tried to hide the 1st Accident to the driver, insurer and the solicitors who acted for them in the 2nd Accident when he set out the claim to them during the without prejudice negotiations for the settlement;
4. In doing so, he has misled the court and his opponents into thinking that all the injuries suffered by his wife was resulted from one single accident only (rather than the combination of 2 accidents);
5. He has made totally inflated and grossly exaggerated claims on PSLA in both cases when he knew very well that the plaintiff’s injuries, whether suffered in the individual accident or combining the injuries in both accidents together, do not come anywhere close to them, thus rendering any meaningful response by the defendants in both cases impossible;
6. He has deliberately and consciously made a duplicated/double claim for the very similar if not identical injuries sustained by his wife in the 2 accidents when he knew that the combined injuries would not come anywhere close to the top end of the “gross disability” or bottom end of the “disaster” categories;
7. He has failed to make discovery or any proper and/or timely discovery of the documents in relation to the 2nd Accident in the present proceedings;
8. He has failed to disclose or discover any documents in relation to the 1st Accident when he set out the claim to the solicitors representing the defendant in the 2nd Accident during the negotiation process; and
9. He has failed to disclose the close relationship between him and the plaintiff to the court or his opponents which relationship may affect his judgement or financial interest.

*Costs*

1. Regrettably, based on the above findings, I come to the conclusion that this whole action was founded out of greed and dishonesty. Had the plaintiff’s solicitor acted honestly and according to the law, I am sure that this matter would have been able to be disposed of without going to trial. Therefore, I find the costs of whole action was wasted as a result of the conduct of the plaintiff’s handling solicitor. Since he still refuses to accept any responsibility when given the opportunity to show cause, I will have to assume that he still thinks that he had done nothing wrong in this case. And as the defendant takes a neutral stance on this matter, the court will have to make its own decision on the wasted costs in this case.
2. Based on my findings above, I consider that the plaintiff’s solicitor has failed to show cause of why he should not be made personally liable and pay for the costs of this action, including (i) the costs wasted as a result of the non-compliance of PD 18.1 in regard of the preparation of the Trail Bundle in this case; (ii) costs of the action; and (iii) costs of the counterclaim, on an indemnity basis and to be paid forthwith. I so order that he shall be made personally liable for those costs and pay them on an indemnity basis, such costs to be summarily assessed by this court and to be paid forthwith.
3. Having studied carefully the 3 separate statements of costs for the above 3 different set of costs lodged by the defendant’s solicitors and the 3 statements of objections lodged by the plaintiff prepared by a law costs draftsman, I would hereby summarily assess the above costs respectively at HK$90,000, HK$690,000 and HK$20,000, making such costs to be payable by the plaintiff’s solicitor to the defendant at a total sum of HK$800,000.
4. I further order that the summarily assessed costs to be paid by Mr Yung personally and within 14 days from the handing down of this decision.

*FOLLOW-UP ACTIONS TO BE TAKEN*

1. As said, this is by far the worst case I have come across in my career as a judge of how a solicitor had misconducted himself in a case. I am going to direct my clerk to send a copy of this decision, together with the transcript of the proceedings of the hearing on 7 November 2022, to The Law Society of Hong Kong, for them to investigate into whether any breach of professional conduct under the ‘*The Law Society’s Guide*’ might have been committed by the plaintiff’s solicitor in the circumstances of this case.
2. If my findings above are right (of which I have no reason to think why they are not), then such appalling conduct on the part of an officer of the court must be stopped in our profession, in particular in PI litigation, in order to preserve the integrity of our system and to maintain the rule of law.
3. Lastly, this case reminds me of a famous passage of Lord Denning in *Gouriet v Union of Post Office Workers and Others* [1977] 2 WLR 310 at 331: “To every subject in this land, no matter how powerful, I would use Thomas Fuller’s words over 300 years ago: “Be you ever so high, the law is above you.”
4. I hope this case will act as a reminder for all of us who are in authority in the legal profession, whether as solicitors, counsel or judges, that we are all under the law and nobody is above it.

( Andrew SY Li )

District Judge

Mr Patrick D Lim, instructed by Messrs B Mak & Co., for the plaintiff

Mr Gary Chung Ka Hong, instructed by Messrs Cheng, Yeung & Co, for the defendant

1. See Police sketch at [A/195-6]. [↑](#footnote-ref-1)
2. See statement of claim at §3(d) at [A/8]. [↑](#footnote-ref-2)
3. For the record, I had never come across Mr Yung nor heard of his name in my professional life at all, whether when I was in private practice or while sitting on the Bench. [↑](#footnote-ref-3)
4. See [B/214]. [↑](#footnote-ref-4)
5. For a comprehensive review of the law and authorities on the difference between the discontinuance and dismissal of an action, see the recent case of *Chiu Kei Leung (趙基樑) v Chui Deon Yau Han (徐*幼*嫻) & MTR Corporation Limited (香港鐵路有限公司)* [2023] HKDC 134; DCCJ 5510 of 2018. (3 February 2023; HH Judge Jonathan Wong). [↑](#footnote-ref-5)