#### DCPI352/2008

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 352 OF 2008

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| BETWEEN | TANG KWAN YEE | Plaintiff |
|  | and |  |
|  | LUO XING WEN  THE MOTOR TRANSPORT COMPANY OF GUANGDONG AND HONG KONG LTD | 1st Defendant  2nd Defendant |

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

Date of Hearing: 10th June 2008

Date of Handing Down Decision: 2nd July 2008

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###### DECISION

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I. Introduction

1. On 28th July 2006 the Plaintiff drove a private vehicle bearing registration no.KG8234 (“Car”) along the opposite lane of Castle Peak Road (Sha Tin section) towards Lok Ma Chau Interchange whilst the 1st Defendant drove a coach bearing registration no.FV8309 (“Coach”) along the 1st lane of Castle Peak Road (Sha Tin section) towards Yuen Long. The 2nd Defendant was the registered owner of the Coach.
2. The Plaintiff claimed that as she drove out of Tung Wing On Road into Lok Ma Chau Interchange, the 1st Defendant failed to obey the “left turn only” road marking on the 1st lane of Castle Peak Road and so negligently drove the Coach that its offside front bumper collided with the nearside front body of the Car (“Accident”).
3. The Plaintiff claimed damages for her personal injuries sustained as a result of the Accident (“Plaintiff’s PI Claim”), which she alleged was caused by the negligence of the 1st Defendant for whom the 2nd Defendant was vicariously liable.

*II. Summons*

1. On 18th March 2008, the 1st and 2nd Defendants issued a Summons (“Summons”) pursuant to Order 18 rule 19 of the Rules of the District Court to strike out the Plaintiff’s Statement of Claim on the ground that it was vexatious and/or an abuse of process of the court, and in the meantime to stay all further proceedings in the present action until further order.

*III. Undisputed facts*

1. The following facts as evident from the affidavit evidence filed by the parties are not in dispute for the purpose of the Summons.
2. Mr Cheung Chi Keung (“Mr Cheung”) is the Plaintiff’s husband and a passenger on board the Car at the time of the Accident. He also sustained personal injuries as a result of the Accident.
3. On 31st March 2007, the Plaintiff’s solicitors Messrs Alan Wong & Co (“AWC”) issued pre-action letters on behalf of the Plaintiff and Mr Cheung in relation to the Accident. In the pre-action letters issued on behalf of the Plaintiff (“Pre-Action Letters”), it was asserted that (a) the Coach collided with the Car due to the negligence of the 1st Defendant for which the 2nd Defendant was vicariously liable and (b) the Plaintiff “sustained injuries” as a result. The Pre-Action Letters referred to medical certificates and medical reports, described the Plaintiff’s injuries as neck injury, and gave particulars of the Plaintiff’s sick leave between 28th July 2006 and 22nd March 2007. It was claimed that “[as] a result of the injury, [the Plaintiff] suffered permanent disability and could not perform satisfactorily in her previous work condition.”
4. On 9th May 2007, AWC on behalf of Mr Cheung commenced DCPI No.942/2007 (“Previous Action”) to claim against the 1st and 2nd Defendants for damages for personal injuries he sustained as a result of the Accident (“Cheung’s PI Claim”).
5. On 5th June 2007, Messrs Y C Lee, Pang & Kwok (“LPK”) on behalf of the 1st and 2nd Defendants commenced third party proceedings against the Plaintiff as third party in the Previous Action (“TP Proceedings”) to seek indemnity/contribution in respect of Cheung’s PI Claim on the ground that the Accident was caused wholly or contributed to by the negligence of the Plaintiff.
6. On the same day, the 1st and 2nd Defendants filed a Defence in the Previous Action denying negligence and alleging *inter alia* that the Accident was caused wholly or contributed to by the negligence of the Plaintiff.
7. On 15th June 2007, the Plaintiff acting in person filed notice of intention to defend the TP Proceedings.
8. On 16th June 2007, Messrs Winnie Leung & Co (“WLC”) went on record to act for the Plaintiff in the TP Proceedings and/or Previous Action.
9. On 8th August 2007, the Plaintiff as third party filed her Third Party Defence and Counterclaim denying negligence and alleging *inter alia* that the Car was damaged as a result of the Accident that was caused by the negligence of the 1st Defendant. The Plaintiff counterclaimed against the 1st and 2nd Defendants for repair costs and vehicle search fee incurred as a result of damage to the Car in the total sum of HK$31,051.20 (“Plaintiff’s Property Claim”).
10. The Plaintiff did not in her Third Party Defence and Counterclaim plead that she sustained personal injuries as a result of the Accident and she did not raise the Plaintiff’s PI Claim by way of counterclaim against the 1st and 2nd Defendants.
11. On 10th October 2007, the parties to the Previous Action exchanged their respective witness statements. The Plaintiff’s witness statement dated 7th October 2007 described the circumstances of the Accident, the property damage to the Car and consequent loss/damages, but did not refer to any personal injuries sustained as a result of the Accident.
12. On or about 19th December 2007, the 1st and 2nd Defendants through LPK proposed to settle the TP Proceedings on the following terms :
13. the 1st and 2nd Defendants on one part and the Plaintiff (as third party) on the other part shall discontinue their respective claim and counterclaim against each other;
14. there be no order as to costs between the 1st and 2nd Defendants and the Plaintiff as third party.
15. On the same day, WLC on behalf of the Plaintiff declined such proposal, but indicated they would be prepared to advise the Plaintiff to resolve the matter upon the 1st and 2nd Defendants paying (a) the sum of HK$31,051.20 inclusive of interest “in settlement of her claim”, and (b) 50% of the Plaintiff’s costs in the TP Proceedings.
16. On 20th December 2007, the 1st and 2nd Defendants through LPK advised they had already settled the main proceedings in the Previous Action with Mr Cheung upon paying him the sum of HK$170,000.00 with costs to be taxed if not agreed. LPK urged the Plaintiff to re-consider the above proposal, but the Plaintiff through WLC declined.
17. On or about 28th December 2007, the 1st and 2nd Defendants through LPK made a revised settlement proposal by offering to pay a sum of HK$40,000.00 to the Plaintiff as third party in full and final settlement of (a) the Plaintiff’s Property Claim, (b) the Plaintiff’s claim for costs and disbursements in the TP Proceedings, and (c) the Plaintiff’s intended common law claim for damages for personal injuries she sustained as a result of the Accident (if any).
18. On or about the same day, WLC on behalf of the Plaintiff declined such proposal, but indicated they would be prepared to advise the Plaintiff to accept a lump sum of HK$70,000.00 in full and final settlement of the Plaintiff’s Property Claim and costs of the TP Proceedings.
19. On 31st December 2007, the 1st and 2nd Defendants through LPK made a further revised settlement proposal by offering to pay the Plaintiff a sum of HK$31,051.20 with costs of the TP Proceedings in full and final settlement of the Plaintiff’s Property Claim and all other claims (if any) arising out of the Accident. LPK also enclosed a draft Consent Order to such effect.
20. On or about the same day, the Plaintiff replied that she was only agreeable to settling the Plaintiff’s Property Claim for the sum of HK$31,051.20 with costs. The 1st and 2nd Defendants eventually agreed to such proposal.
21. WLC revised the draft Consent Order *inter alia* as follows, and returned the same to LPK under cover of a letter dated 31st December 2007 :

“2. Without making any admission of liability, the 1st and 2nd Defendants do pay to the Third Party a sum of HK$31,051.20 (“the Settlement Sum”) in full and final settlement of the Third Party’s counterclaim herein against the 1st and 2nd Defendants ~~and all other claims (if any)~~ arising out of the accident occurred on 28th July 2006 within 28 days from the date hereof;”

1. By a Consent Order filed on 8th January 2008, the 1st and 2nd Defendants agreed to discontinue their claim against the Plaintiff as third party and to pay her a sum of HK$31,051.20 in full and final settlement of her third party counterclaim in the Previous Action (ie the Plaintiff’s Property Claim) with costs.
2. On or about 11th January 2008, at the request of AWC (as solicitors for Mr Cheung in the Previous Action) by letter dated 9th January 2008, LPK (now known as Messrs Y C Lee, Pang, Kwok & Ip (“LPKI”)) provided a copy of the Consent Order filed on 8th January 2008 to AWC.
3. On or about 12th January 2008, AWC as solicitors for the Plaintiff sent a draft quantification of the intended Plaintiff’s PI Claim to the insurer of the 1st and 2nd Defendants (“Insurer”).
4. On or about 4th February 2008, on the Insurer’s instructions LPKI replied to say that the Plaintiff was estopped from making such claim which should have been included in the Previous Action. But by a letter dated 5th February 2008 AWC disagreed with such view.
5. On 18th February 2008, AWC on behalf of the Plaintiff commenced the present action against the 1st and 2nd Defendants.

*IV. 1st and 2nd Defendants’ case*

1. The 1st and 2nd Defendants claimed that the Plaintiff’s PI Claim herein (a) was substantially the same as the Plaintiff’s cause of action in the TP Proceedings, (b) involved the same subject matter as in the Previous Action, (c) could have been raised in the Previous Action, and/or (d) together with her cause of action in the TP Proceedings were substantially the same as Cheung’s PI Claim in the Previous Action. Consequently, the 1st and 2nd Defendants argued that the Plaintiff should have brought the Plaintiff’s PI Claim in the Previous Action either by (i) joining the Previous Action as a co-plaintiff or (ii) pleading the Plaintiff’s PI Claim by way of counterclaim in the TP Proceedings.
2. The 1st and 2nd Defendants submitted that in failing to take either step (i) or (ii) above and in only counterclaiming for the Plaintiff’s Property Claim in the TP Proceedings, the Plaintiff should not be allowed to re-open the same subject matter of litigation “in respect of matters which might have been brought forward as the subject in contest” in the Previous Action.
3. It was further suggested that the Plaintiff did not have any legitimate or good reason for not bringing the Plaintiff’s PI Claim in the Previous Action. First, the 1st and 2nd Defendants had invited the Plaintiff to settle the Plaintiff’s PI Claim (if any) together with her third party counterclaim (ie the Plaintiff’s Property Claim) in the Previous Action. Secondly, the Plaintiff’s PI Claim was ready to be pleaded or included in the Previous Action when the Previous Action was commenced on 9th May 2007 or when she filed her Third Party Defence and Counterclaim on 8th August 2007 as evident by the following :
4. the Pre-Action Letters and those issued on behalf of Mr Cheung suggested that the Plaintiff intended to bring the Plaintiff’s PI Claim at the same time as Mr Cheung’s PI Claim;
5. AWC acted for the Plaintiff and Mr Cheung in issuing the pre-action letters and AWC now acts for the Plaintiff in the present action;
6. the Plaintiff was the sole and key civilian witness in the magistracy court proceedings concluded on 8th January 2007 in which the 1st Defendant was convicted of careless driving in respect of the Accident;
7. the Plaintiff would have been a key (and possibly sole) witness in the Previous Action;
8. the Plaintiff all along had full capacity and knowledge for her to proceed with the Plaintiff’s PI Claim in the Previous Action;
9. the Pre-Action Letters noted the Plaintiff’s physical condition which appeared to have been stabilised;
10. the Schedule of Medical Reports filed on 18th February 2008 for the present action revealed that the physical/medical condition of the Plaintiff was more or less the same as at 31st March 2007 since nothing further was disclosed beyond her condition as set out in the Pre-Action Letters;
11. according to the Pre-Action Letters, the sick leave granted to the Plaintiff expired on 22nd March 2007;
12. according to the Schedule of Medical Reports, there were no further medical reports suggesting any further sick leave after 22nd March 2007;
13. according to the Statement of Damages filed in the present action, the Plaintiff claimed pre-trial partial loss of earnings from 23rd March 2007 onwards, which meant her physical condition would have been stabilised since 22nd March 2007.
14. The sick leave certificates issued by Dr Peter Tio and POH’s 24-Hour Clinic were exhibited to the Plaintiff’s last affirmation filed on 28th May 2007 rather than to her 2 earlier affirmations filed in opposition of the Summons. The 1st and 2nd Defendants argued that the Plaintiff’s conduct in withholding such evidence until the last affirmation showed that such evidence did not constitute a genuine ground for opposing the Summons.
15. Further, since the Plaintiff did not appear to have received any further medical treatment after such sick leave certificates were issued in May 2007, it was argued that in any event the Plaintiff should have included the Plaintiff’s PI Claim in her counterclaim in the TP Proceedings. The Statement of Damages in the present action also showed the Plaintiff’s condition had stablised well before her filing of the Third Party Defence and Counterclaim in the Previous Action.
16. The 1st and 2nd Defendants went further to submit that even if the Plaintiff’s condition had not been stabilised and she had not known the full extent of her loss of earnings, the Plaintiff could still have included the Plaintiff’s PI Claim in the Previous Action and then revise her claim for damages by filing a Revised Statement of Damages in due course.
17. The 1st and 2nd Defendants argued there was no justification for not including the Plaintiff’s PI Claim in the Previous Action. In choosing not to make or settle such claim in the Previous Action, but subsequently commencing the present action, the Plaintiff acted oppressively against the 1st and 2nd Defendants and/or such conduct amounted to an abuse of process of the court.

*V. Plaintiff’s case*

1. The cause of action in the Previous Action was Cheung’s PI Claim, which was separate and distinct from the Plaintiff’s PI Claim in the present action. Further, the parties elected not to deal with the Plaintiff’s PI Claim in the settlement of the TP Proceedings.
2. The Plaintiff further claimed that when the Previous Action commenced on 9th May 2007 her physical condition was not yet stabilised. She continued to experience persistent neck pain thereafter and consulted private doctor (ie Dr Peter Tio) and public medical institution (ie POH’s 24-Hour Clinic). Dr Tio granted her sick leave from 26th April to 10th May 2007. On 16th and 29th May 2007, she consulted POH’s 24-Hour Clinic due to persistent neck pain and was granted 2 days’ sick leave on each occasion.
3. Further, the Plaintiff claimed that as a result of persistent neck pain, she was unable to work as before and suffered partial loss of earnings. However, she did not know the full extent of her disability/ incapacity and was unable to estimate her “average” loss of monthly earnings until her condition and its effect on her work were stabilised. Hence, she was not in a position to put forward the Plaintiff’s PI Claim as at 9th May or 8th August 2007. But she included the Plaintiff’s Property Claim in her Third Party Defence and Counterclaim in the Previous Action because such loss had been incurred, quantified and finalised in 2006.

*VI. Principles on striking out*

1. “It is only in plain and obvious cases that the court should exercise its summary powers to strike out …… any pleading under [Order 18 rule 19(1)(d)]. ……It is for the party seeking to strike out …… pleading to demonstrate that the case is a plain and obvious one in which the other party’s claim is bound to fail ……” (see *Hong Kong Civil Procedure 2008* Vol.1 para.18/19/4 at p.347). “The power to stay or dismiss an action under the inherent jurisdiction of the court on the ground that it is obviously frivolous or vexatious is discretionary …… A judicial discretion must be used as to what proceedings are vexatious; for the court must not prevent a suitor from exercising his undoubted rights on any vague or indefinite principle …… The jurisdiction will only be exercised in exceptional circumstances ……” (see *Hong Kong Civil Procedure 2008* Vol.1 para.18/19/13 at p.353).

*VII. Henderson principle*

1. *Res judicata* in the narrow sense prevents re-litigating in subsequent proceedings issues adjudicated by a court of competent jurisdiction in previous proceedings. *Res judicata* in the wider sense formulated by Wigram WC in *Henderson v Henderson* (1843) 3 Hare 100, 115-116 was as follows :

“…… when a given matter becomes the subject of litigation in, and of adjudication by, a court of competent jurisdiction, the Court requires the parties to that litigation to bring forward their whole case, and will not (except under special circumstances) permit the same parties to open the same subject of litigation in respect of matter which might have been brought forward as part of the subject in contest, but which was not brought forward, only because they have, from negligence, inadvertence, or even accident, omitted part of their case …… The plea of *res judicata* applies, except in special cases …… to every point which properly belonged to the subject litigation, and which the parties, exercising reasonable diligence, might have brought forward at the time ……”

1. Counsel for the Plaintiff, Ms Pinto, and counsel for the 1st and 2nd Defendants, Mr Wong, had no quarrel over the legal principles in relation to the rule in *Henderson* that emerged from the authorities nor with the summary of such principles in paras.46-50 of my judgment in *Wong Yu Cho Rolly trading as The Hong Kong Museum of Stone Sculpture & Asian Art v Lam Kwok Man* DCCJ5422/2006 (unreported, 31st January 2007).
2. Given the consensus on matters of law, I will only repeat the synopsis in para.50 of my judgment in *Wong Yu Cho Rolly* as follows :

“The principles in relation to the rule in *Henderson* that emerge from the above authorities can be summarised as follows :

* 1. It is a serious matter to dismiss an action for abuse of process, but if abuse is revealed the court has a duty to do so.
  2. The categories of abuse are not closed.
  3. There is public interest in finality in litigation and in a party not being vexed twice in the same matter, which is reinforced by the current emphasis on efficiency and economy in the conduct of litigation.
  4. The bringing of a claim or the raising of the defence in later action may, without more, amount to an abuse if the court is satisfied that the claim or defence should have been raised in the earlier action if it is to be raised at all.
  5. But the mere fact of successive actions raising issues that could have been raised in the earlier action does not show they should have been so as to render the raising of such issues in the later action necessarily an abuse.
  6. The decision as to whether there is abuse depends upon the circumstances of the particular case and the court should adopt a broad merits-based approach.
  7. It is not necessary to establish any additional element (eg collateral attack or some dishonesty), but if there is one it is an obvious factor for finding abuse.
  8. The court will rarely find the later action is an abuse of process unless it involves unjust harassment or oppression.
  9. There may be special circumstances that permit re-opening the same subject of litigation which could have been brought in the earlier action.
  10. The onus is on the party asserting abuse to show that further litigation will in the particular circumstances amount to an abuse of process.”

*VIII. Different causes of action*

1. To start off, there is a general entitlement to re-litigate the same issues between different parties unless abuse of process can be shown by the party seeking to strike out the later claim. Great caution must be exercised before shutting out a party from putting forward his case on the ground of abuse of process.
2. Mr Wong submitted that the Plaintiff’s PI Claim was substantially the same as the Plaintiff’s Property Claim in the TP Proceedings, and both causes of action were substantially the same as Cheung’s PI Claim. However, I have no hesitation in concluding that all 3 causes of action are different.
3. According to the formulation of “cause of action” by Diplock LJ in *Letang v Cooper* [1965] 1 QB 232, 242-243 and Millett LJ in *Paragon Finance plc v DB Thakerar & Co (a firm)* [1999] 1 All ER 400, 405 (see Hong Kong Civil Procedure 2008 Vol.1 para.15/1/2 at p.221), I do not see how the facts pertaining to the Plaintiff’s personal injuries allegedly caused by the 1st Defendant’s negligence are material to be proved (a) to entitle Mr Cheung to succeed in obtaining a legal remedy against the 1st and 2nd Defendants in respect of his claim for damages for his own personal injuries or (b) to entitle the Plaintiff to succeed in obtaining a legal remedy against the 1st and 2nd Defendants in respect of her claim for property damage to the Car.
4. In respect of (a) above, Mr Wong was unable to cite any authority or legal principle that requires A to bring his own separate claim based on his own rights against C in the same action commenced by B in respect of his claim based on his own rights against C even though both claims arise from the same factual matrix. In the end, Mr Wong conceded that the Plaintiff’s PI Claim and Cheung’s PI Claim are separate causes of action.
5. In my view, even assuming that the Plaintiff could have litigated the Plaintiff’s PI Claim as a co-plaintiff in the Previous Action, failure to do so does not amount to an abuse of process. In support, I refer to *Tang Kin Wah v Cheng Choy Kam Chee Connie & anor* [2002] 1 HKC 552. In that case, a private car driven by the 2nd defendant (and owned by the 1st defendant) collided with a motorcycle driven by the plaintiff and on which the plaintiff’s wife was a pillon passenger. The plaintiff’s wife commenced proceedings against the 1st and 2nd defendants for damages for personal injuries. The 1st and 2nd defendants commenced third party proceedings against the plaintiff. The plaintiff’s wife withdrew her claim against the 1st defendant who withdrew her third party claim against the plaintiff. Later settlement was reached between the plaintiff’s wife and the 2nd defendant and between the 2nd defendant and the plaintiff in the third party proceedings. The plaintiff then commenced a new action against the 1st and 2nd defendants for personal injuries he suffered in the collision. Suffiad J found that the plaintiff’s later claim did not go to the root of the earlier proceedings :

“16. …… the cause of action in …… the earlier proceedings …… was the claim for damages by [the plaintiff’s wife] for the injuries sustained by her in the collision. That is a separate and distinct cause of action than the present claim by [the plaintiff] for damages resulting from the injuries sustained by him in the collision. Accepting that both causes of action of [the plaintiff’s wife] and [the plaintiff] arose out of the same collision on the same facts, nevertheless, they remain separate and distinct causes of action.

……

18. Lastly, I do agree that the present claim by [the plaintiff] could have been litigated in [the earlier proceedings] either by way of a counterclaim in the third party proceedings or even by way of fourth party proceedings. However, failure to do so in the earlier proceedings and/or the bringing of the present proceedings do not, in my view, amount to an abuse of process in the way that it is understood in the *Yat Tung* case ……”

1. The above propositions are also reflected in *C (A Minor) v Hackney London Borough Council* [1996] 1 WLR 789, a case referred to in *Johnson v Gore Wood & Co (a firm)* [2002] 2 AC 1, 26-27, *per* Lord Bingham. In that case, the minor plaintiff lived in a house of which her mother was tenant. She claimed to have suffered personal injuries caused by the borough council’s negligence and breach of statutory duty. Her mother previously made a similar claim which had been the subject of a consent order. The borough council applied to set aside the judgment in favour of the plaintiff and to strike out her claim. It was held *inter alia* that the plaintiff’s claim was not barred merely because her mother’s claim had been satisfied and the plaintiff’s claim could more conveniently have been litigated at the same time. Simon Brown LJ said at p.793 that :

“In my judgment, it is an impossible argument, one that stretches the bounds of the doctrine beyond breaking point. If it were right, it would be right equally in the context of a road accident case where mother and infant child are both injured by the defendant’s negligence. Mother sues and recovers judgment. Is it to be said that her child is thereby barred from making any subsequent claim? Such would be to my mind a novel and insupportable suggestion.”

1. In respect of (b) above, again notwithstanding the similar factual background pleaded in both the Plaintiff’s PI Claim and the Plaintiff’s Property Claim, they are also different causes of action. In this respect, I have referred counsel to the following authorities :
   * 1. *Brunsden v Humphrey* [1881-5] All ER Rep 357;
     2. *Davidson v North Down Quarries Limited* [1988] NI 214;
     3. *Talbot v Berkshire County Council* [1994] QB 290.
2. In *Brunsden*, a majority decision of the English Court of Appeal, the plaintiff sued the defendant for damage to his cab in a collision caused by the negligence of the defendant’s servant and recovered damages. He subsequently sued for personal injuries sustained in the same collision. The English Court of Appeal held by majority that the aforesaid claims for damages for property damage and for personal injuries constituted 2 distinct causes of action, so the earlier judgment was no bar to the subsequent action.
3. Sir Baliol Brett MR at p.360 held that the cause of action for the earlier action was the negligent driving that caused appreciable injury to the cab, and evidence as to the personal injury was irrelevant. Injury to person was a different right for which the cause of action was the negligent driving and the injury to the plaintiff’s right to have his person unmolested.
4. Bowen LJ held that according to the popular use of language the defendant’s servant had done only 1 act (ie driving a vehicle negligently), but 2 separate kinds of injury were inflicted and 2 wrongs done. The mere negligent driving in itself if accompanied by no injury to the plaintiff or no injury to the cab was not actionable at all. Both causes of action might be said to be founded on 1 act of the defendant’s servant, but they were not on that account identical causes of action.
5. *Brunsden* was approved by Lord Pearce in *Cartledge v E Jopling & Sons Ltd* [1963] AC 758, but was not followed in the United States and Canada. Although Griffiths LJ in *Buckland v Palmer* [1984] 3 All ER 554, 559 confessed he always had difficulty in following the majority in *Brunsden*, he took “it to be settled by the decision of this court in [*Brunsden*] that if as a result of a car accident a plaintiff suffers both personal injury and damage to his car he has two distinct causes of action, one for his personal injuries and the other for damage to his property”.
6. Then more than 100 years later, Nicholson J in *Davidson* endorsed *Brunsden*. In the latter case, the plaintiff suffered personal injuries and damage to his motor car in an accident. Proceedings against the defendants in respect of the plaintiff’s personal injuries were settled without a hearing. Later, the plaintiff commenced proceedings against the defendants in respect of the car damage. It was held that both of the plaintiff’s claims, whilst arising from the same set of facts, gave rise to 2 causes of action and so there was no bar to the later action. In any event, the plaintiff’s first action was settled on a basis which excluded the claim for damage to the car.
7. Nicholson J reviewed the authorities and decided to follow *Brunsden* because he considered it was rightly decided. He observed there would obviously be cases where on the facts the causes of action completely overlapped, but he did not consider the causes of action merged. In his view, the existence or standard of duty owed might vary from case to case as between injury to person, injury to personal property and injury to real property.
8. Upon considering the above authorities, Mr Wong in the course of his oral submissions accepted that as a matter of law a personal injury claim and a personal property claim arising from the same set of facts gave rise to 2 causes of action.
9. In fairness, I should mention that Stuart-Smith LJ in *Talbot* at p.296 said that “[had] *Henderson’s* case, 3 Hare 100 been cited, the decision [in *Brunsden*] might have been different.” Mann LJ also said at pp.300-301 that had the principle in *Henderson* been referred to the court in *Brunsden*, “then perhaps Lord Coleridge C.J. might not have found himself in the unfortunate position of having to dissent from Brett M.R. and Bowen L.J.”
10. However, I accept Ms Pinto’s submission that such observations went to the question whether the majority decision in *Brunsden* that *res judicata* through cause of action estoppel did not apply could have been different if the majority had considered not just cause of action estoppel but also *res judicata* in the wider sense (ie the *Henderson* principle). Such observations do not concern the majority’s view that the 2 causes of action were different.

IX. Abuse of process?

1. Even though the causes of action are different, I must go on to consider whether the rule in *Henderson* is applicable. After all, the principle underlying abuse of process is capable of applying so as to bar a claim by a person whether he is or is not a party to the previous litigation.
2. The principle also applies to an earlier litigation that results in a compromise. The issue in every case is whether, applying a broad merits-based approach, the claimant’s conduct was in all the circumstances an abuse of process (see *Johnson* at p.32 *per* Lord Bingham and at p.59 *per* Lord Millett). Lord Millett said that “[where earlier proceedings are settled] it is necessary to protect the integrity of the settlement and to prevent the defendant from being misled into believing that he was achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding.”
3. In this respect, Mr Wong submitted that :
4. the Plaintiff’s PI Claim was ready to be pleaded either at the commencement of the Previous Action on 9th May 2007 or latest at the time of the filing of the Third Party Defence and Counterclaim in the TP Proceedings on 8th August 2007, or, to put it in another way, the Plaintiff’s PI Claim *could have been brought* on 9th May or 8th August 2007;
5. the Plaintiff *should have brought* the Plaintiff’s PI Claim on 9th May or 8th August 2007;
6. there were no *special justification* or legitimate/good reason for the Plaintiff not to bring the Plaintiff’s PI Claim on 9th May or 8th August 2007;
7. the Plaintiff’s conduct in deliberately or consciously failing to include the Plaintiff’s PI Claim in the Previous Action and/or TP Proceedings, in adopting a wait-and-see attitude as to the outcome of the Previous Action by Mr Cheung, and in subsequently bringing the present action amounted to unjust harassment and oppression against the 1st and 2nd Defendants.

*(a) 9th May 2007 – commencement of the Previous Action*

1. I can easily deal with the position as at the commencement of the Previous Action on 9th May 2007. Mr Wong argued that since the Plaintiff and Mr Cheung are husband and wife retaining the same solicitors (ie AWC as evident from the pre-action letters), they could have saved resources by commencing their personal injury and property damage claims arising from the Accident at the same time. For the reasons set out in paragraphs 43-48 above, I cannot see how the Plaintiff in failing to commence her own separate personal injury claim together with her husband’s personal injury claim amounts to an abuse of process.
2. I also do not regard the husband and wife relationship or any potential saving of litigation resources as between the Plaintiff and Mr Cheung as material to considering whether separate litigation for pursuing their separate claims amounts to *inter partes* abuse and harassment against the 1st and 2nd Defendants. After all, it is not beyond contemplation that a single accident may cause personal injuries to persons who are perfect strangers to one another, eg injured passengers in a road collision between the public bus they were travelling on and another vehicle. The tortfeasor can hardly complain if these strangers do not pursue their own separate personal injury claims in the same litigation. I do not see any material difference, legally speaking, when a married couple is involved instead of strangers.
3. But even if the Plaintiff *could have* commenced legal action for the Plaintiff’s PI Claim on 9th May 2007 (see paragraph 65 below), I am not satisfied that the Plaintiff *should have* made (or it is an abuse of process for the Plaintiff not to have made) her claim together with Cheung’s PI Claim. *Barrett v Universal Island Records Ltd & ors* [2006] EWHC 1009 (Ch) (15th May 2006) concerns *inter alia* a claim by 2 brothers A and B for a share of certain income from C. B died and A brought the claim on behalf of B’s estate of which he was administrator as well as on his own behalf. One of the defences raised was that A had compromised his claim in settlement of previous litigation, and it was an abuse of process for him to bring new proceedings either on his own behalf or on behalf of B’s estate. Lewison J said at p.198 as follows :

“…… In addition it seems to me that different considerations apply to a case in which the complaint is that someone ought to have been added as a claimant [in the earlier proceedings] from those that apply where the complaint is that someone ought to have been added as a defendant. In the latter case the claimant has the choice whom to sue. A person's consent is not required in order to join him in proceedings as a defendant. But a person's consent is required before he can become a claimant. In my judgment in such circumstances it is too great a leap to proceed from the proposition that because [B’s estate], in theory, could have brought a claim to the conclusion that it should have.”

*(b) 8th August 2007 – filing the Plaintiff’s counterclaim in the TP Proceedings*

1. In my view, the Plaintiff could have brought the Plaintiff’s PI Claim together with the Plaintiff’s Property Claim when she filed her Third Party Defence and Counterclaim in the TP Proceedings. As early as in March 2007, the Pre-Action Letters revealed that the Plaintiff was aware that (a) she had suffered personal injuries, (b) she had made the link between the Accident and her injuries, and (c) she knew she suffered from disability and work incapacity.
2. Mr Wong submitted that by reason of the matters set out in paragraph 31 above, the Plaintiff’s PI Claim *could have been* pleaded and therefore *should have been* included in the Plaintiff’s counterclaim in the TP Proceedings. Further, by reason of the matters set out in paragraphs 32-35 above, there was no justification (ie *no* *special circumstances*) for the Plaintiff not to so include the Plaintiff’s PI Claim in the TP Proceedings.
3. In so formulating his argument, Mr Wong drew assistance from *Yat Tung Investment Co Ltd v Dao Heng Bank Ltd* [1975] AC 581, 590, where Lord Kilbrandon said that :

“But there is a wider sense in which the doctrine may be appealed to, so that it becomes an abuse of process to raise in subsequent proceedings which *could and therefore should have been litigated in earlier proceedings*. …… The shutting out of a ‘subject of litigation’ – a power which no court should exercise but after a scrupulous examination of all the circumstances – is limited to cases where reasonable diligence would have caused a matter to be earlier raised; moreover, although negligence, inadvertence or even accident will not suffice to excuse, nevertheless *‘special circumstances’ are reserved in case justice should be found to require the non-application of the rule*.” (my emphasis)

1. Mr Wong did not cite *Talbot* in his written submissions although LPKI did rely on such authority in their letter of 4th February 2008 to AWC (see paragraph 27 above).
2. In *Talbot*, the passenger sued the driver for personal injuries as a result of a motor accident. The driver’s insurer, without notice to the driver, made a third party claim against the county council claiming contribution as joint tortfeasor but did not include any claim for the driver’s own injuries. The driver learnt of the third party claim only after expiry of the limitation period. The passenger succeeded at trial with damages apportioned between the driver and the county council. The driver then sued the county council to recover damages for his own injuries.
3. Stuart-Smith LJ applied the *Yat Tung* formulation of the *Henderson* doctrine to the facts of the case at p.298 as follows :

“ There can be no doubt that the plaintiff’s personal injury claim *could have been brought* at the time of [the passenger’s] action. It could have been included in the original third party notice issued against the council ……; it could have been started by separate writ and consolidated with or ordered to be tried with the [passenger’s] action …… the third party proceedings could have been amended at any time before trial and perhaps even during trial to include such a claim, notwithstanding that it was statute-barred, since it arose out of the same or substantially the same facts as the cause of action in respect of which relief was already claimed, namely, contribution or indemnity in respect of [the passenger’s] claim …… *In my opinion, if it was to be pursued, it should have been so brought*.

……

Are there special circumstances which require that the rule should not apply in this case? ……

With all respect to the judge *I do not agree that these amount to special circumstances*. The mere fact that a party is precluded by the rule from advancing a claim will inevitably involve some injustice to him, if it is or may be a good claim; but that cannot of itself amount to a special circumstance, since otherwise the rule would never have any application. ……” (my emphasis)

1. I also referred counsel to *Wain v F Sherwood & Sons Transport Ltd* The Times 16 July 1998. In that case, the plaintiff’s van was struck from the rear by a lorry in September 1993. He was badly shaken but he did not then think he suffered from any lasting personal injury. He told his insurers at the outset that he had not suffered personal injury. By March 1994 he suffered from back pain, which became acute by the end of 1994. He issued a claim for damage to his van and final judgment was entered after trial in March 1995. In February 1997, he commenced action for his personal injuries arising from the same road accident.
2. It was found that the plaintiff was aware he suffered significant personal injury and that he had made the link between the injury and the road accident at the time when the earlier action was tried and determined. The decision not to make the personal injury claim in the earlier action was based on counsel’s advice, but non-actionable legal adviser error was incapable of constituting special circumstances so as to justify the court in refusing to apply the principle in *Henderson*.
3. Chadwick LJ followed *Yat Tung* and *Talbot*, and held that the principle was invoked whenever a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue was relevant one of the parties sought to reopen that issue (unless there were special circumstances for refusing to apply the principle).
4. But recently our Court of Appeal in *Ngai Few Fung v Cheung Kwai Heung* [2008] 2 HKC 111 endorsed the explanation and refinement of the *Henderson* principle in *Johnson*. Lord Bingham in *Johnson* said at p.31 as follows :

“…… It is, however, wrong to hold that because a matter could have been raised in earlier proceedings it should have been so as to render the raising of it in later proceedings necessarily abusive. That is to adopt too dogmatic an approach to what should in my opinion be a broad, merits-based judgment which takes account of the public and private interests involved and also takes account of all the facts of the case, focusing attention on the crucial question whether, in all the circumstances, a party is misusing or abusing the process of the court by seeking to raise before it the issue which could have been raised before. …… While the result may often be the same, it is in my view preferable to ask whether in all the circumstances a party’s conduct is an abuse than to ask whether the conduct is an abuse and then, if it is, to ask whether the abuse is excused or justified by special circumstances. ……”

Lord Millett echoed the above at p.59 as follows :

“…… It is one thing to refuse to allow a party to relitigate a question which has already been decided; it is quite another to deny him the opportunity of litigating for the first time a question which has not previously been adjudicated upon. This latter (though not the former) is prima facie a denial of the citizen’s right of access to the court …… In so far as the so-called rule in *Henderson v Henderson* suggests there is a presumption against the bringing of successive actions, I consider that it is a distortion of the true position. The burden should always rest upon the defendant to establish that it is oppressive or an abuse of process for him to be subjected to the second action.”

1. In *Ngai Few Fung*, Cheung JA following *Johnson* in rejecting the “dogmatic” approach and at pp.117-118 said as follows :

“21. …… I do not regard, for the purpose of precedent, the law is crystallised by and remains static after *Yat Tung* and that the Hong Kong Courts should not pay heed to the subsequent cases after *Yat Tung*.

22. The Privy Council in *Brisbane City Council* has identified that the true basis of the *Henderson* or *Yat Tung* principle is based on abuse of process. That being the true basis of the principle then one can see immediately that it is not permissible to adopt a mechanistic approach by simply saying that since the cause of action could have been raised in earlier proceedings then it should have been raised so that the subsequent raising of those issues in the later proceedings will necessarily become abusive.”

1. I agree with Ms Pinto that the “mechanistic approach” adopted in both *Talbot* and *Wain*, which were decided before *Johnson*, would have to be revisited in light of *Johnson* and *Ngai Few Fung*. Indeed, in the *post-Johnson* decision of *Ulster Bank Ltd v Fisher & Fisher (a firm)* [1999] NI 68, Girvan J questioned whether *Talbot* was correctly decided and doubted whether the width of that decision could be supported.
2. I also referred counsel to *McNally v McWilliams & anor* [2001] NI 106, a personal injury case also decided after *Johnson*. In that case, the plaintiff passenger in a motor car driven by her husband was involved in a collision with a car driven by the 1st defendant. The plaintiff’s husband died whilst the plaintiff suffered personal injuries, loss and damages. The 1st defendant sued the estate of the plaintiff’s husband claiming damages for personal injuries, loss and damage sustained by reason of his alleged negligence, whilst the plaintiff as her husband’s personal representative and sole dependant sued the 1st defendant for damages on behalf of his estate, for herself as sole dependant and for bereavement. The 1st defendant’s action was stayed on terms whilst the plaintiff’s action was settled. From early on all parties appreciated that the plaintiff had a claim for her own personal injuries and consequential loss and damages as a result of the accident. Although such claim could have been brought at the same time as the above 2 actions, her advisers decided to await the outcome of the 2 actions and rejected the contention by the solicitors for the deceased’s insurers that any subsequent claim by her would be barred by estoppel.
3. Sheil J discussed the relevant authorities and said that much of the case law must now be looked at in light of *Johnson*. The plaintiff considered her late husband was not to blame for the accident, so in the circumstances it had not been unreasonable for her and her legal advisers to await the outcome of the 1st and 2nd actions before instituting her own personal claim in the 3rd action. So the 3rd claim did not amount to any abuse of process.
4. In the course of oral submissions, Mr Wong agreed that the test of whether there was abuse should be a broad, merits-based judgment which took into account all the facts of the case with focus on whether the party concerned is misusing or abusing the court’s process by seeking to raise an issue which could have been raised before. Given such concession, I am not persuaded that I should approach the matter in the formulation set out in paragraph 66 above. It is with the above-mentioned principles in mind that I now turn to the circumstances of the present case.
5. I have found that the Plaintiff’s PI Claim could have been brought at the same time as her counterclaim in the TP Proceedings, but it does not (a) necessarily follow that it should have been so brought or (b) of itself demonstrate the course the Plaintiff took is necessarily an abuse of process. The onus falls on the 1st and 2nd Defendants.
6. In respect of the Plaintiff’s personal injuries, the bulk of her sick leave expired on 22nd March 2007. But she sought further medical treatment in April/May 2007, and received some further sick leave which expired on 29th May 2007. Mr Wong asked me to be sceptical about such sick leave allegedly granted pursuant to medical consultations in April/May 2007 in light of their late disclosure in the Plaintiff’s last affirmation and of the fact that the Plaintiff claimed for *post*-Accident partial loss of earnings as from 23rd March 2007.
7. However, I note these medical consultations and consequent sick leave in April/May 2007 were made before commencement of the TP Proceedings on 5th June 2007, ie before the Plaintiff had any idea she would become embroiled in the Previous Action, and the sick leave certificates were actually exhibited to the Plaintiff’s last affirmation. There is insufficient evidence before me to conclude they were not genuine. The tenor of the evidence suggested that after the bulk of the sick leave period expired in March 2007, the Plaintiff still required on-and-off medical treatment in April/May 2007.
8. There is no dispute that for the purpose of this application the Plaintiff was a self-employed nanny car driver. She was off work during her bulk sick leave period, and I agree with Ms Pinto’s submission that inevitably her business would have declined. Whilst it is true to say that the Plaintiff did not seek further medical treatment after May 2007, I accept she would have to ease back into her *pre*-Accident work before she could realistically ascertain the extent her physical/medical condition would affect her work, her *post*-Accident earnings and her earning capacity. When AWC issued a draft quantification of the intended Plaintiff’s PI Claim to the Insurer in January 2008, the Plaintiff would at best have returned to work for about 9 months (ie from late March 2007 to mid-January 2008). Without contrary evidence before me, I do not consider that to be an unreasonable period (particularly in the context of self-employment) for an injured person to undergo work conditioning for reaching a stabilised *post*-Accident level of work capacity and/or average earnings. I am unable to conclude on the affidavit evidence that the Plaintiff had a readily quantified case but deliberately adopted a wait-and-see attitude.
9. Despite the fact that loss of earnings and loss of earning capacity constituted a large portion of the Plaintiff’s PI Claim, the 1st and 2nd Defendants argued that even if the Plaintiff did not know the full extent of such loss, she could and should have included her personal injury claim in her counterclaim in the TP Proceedings and then if necessary revise her claim for damages in due course by a Revised Statement of Damages. I am not satisfied that the Plaintiff *should* have done so, particularly bearing in mind that an unrealistic claim that is amended in the course of litigation may draw adverse criticism.
10. In the circumstances, I cannot say that in only proceeding with the Plaintiff’s Property Claim (which was already quantified in 2006) in the TP Proceedings and then proceeding with the Plaintiff’s PI Claim separately and subsequently, it amounts to an abuse of process on the part of the Plaintiff.
11. Further, there can be no suggestion that the 1st and 2nd Defendants were unaware of the Plaintiff’s PI Claim all along or that the 1st and 2nd Defendants assumed the settlement of the TP Proceedings was a compromise of the entirety of the Plaintiff’s claims arising from the Accident.
12. In fact, very early on before commencement of the Previous Action, AWC had already alerted the 1st and 2nd Defendants of the Plaintiff’s PI Claim by the Pre-Action Letters. The correspondence between LKP and WLC in relation to the settlement negotiations concerning the TP Proceedings (see paragraphs 16-24 above) made it abundantly clear that :
13. the 1st and 2nd Defendants knew the Plaintiff had a potential personal injury claim arising from the Accident in the wings;
14. the 1st and 2nd Defendants initially wished to have an overall compromise of both the Plaintiff’s Property Claim as well as the Plaintiff’s potential personal injury claim;
15. the Plaintiff consistently refused to compromise her potential personal injury claim;
16. the 1st and 2nd Defendants ultimately agreed to restricting the compromise to the TP Proceedings and the Plaintiff’s Property Claim;
17. the agreed settlement sum was precisely the same amount in terms of dollars and cents as the pleaded monetary sum claimed under the Plaintiff’s Property Claim in the TP Proceedings (ie HK$31,051.20);
18. to the knowledge of both parties, the Plaintiff’s potential personal injury was specifically carved out of the compromise.
19. In my view, the above clearly showed that at the time of the compromise of the TP Proceedings, the 1st and 2nd Defendants well knew that the Plaintiff’s potential personal injury claim (to which they were alerted by way of the Pre-Action Letters) was still outstanding and not settled. There was no indication or reservation by the 1st and 2nd Defendants that any future litigation based on the Plaintiff’s PI Claim will be met with a striking out application. Rather, the 1st and 2nd Defendants simply surrendered to the Plaintiff’s insistence that the compromise would be limited to the Plaintiff’s Property Claim and, more importantly, would not cover the Plaintiff’s PI Claim.
20. In *Talbot*, Stuart-Smith LJ regarded as a special circumstance *inter alia* that a party might not have known of the claim at the time of the earlier action so that his conduct of the negotiations and proceedings might have been different had it faced both claims at the same time (pp.299-300). But here the 1st and 2nd Defendants were all along aware that the Plaintiff’s PI Claim was in the wings. In the words of Lord Millett (see paragraph 60 above), the 1st and 2nd Defendants were not “misled into believing that [they were] achieving a complete settlement of the matter in dispute when an unsuspected part remained outstanding”.
21. There is some similarity to the situation in *McNally* where all parties realised in the course of the 2 earlier proceedings which were eventually stayed on terms and settled respectively that the plaintiff had her own personal injury claim. But in the course of the earlier litigation in *McNally*, solicitors for the 1st and 2nd defendants referred the plaintiff’s solicitors to *Talbot* and warned that the plaintiff’s personal injury claim should be litigated at the same time as the earlier litigation and in default thereof any subsequent claim by the plaintiff would be barred by estoppel. Despite such warning (which went much further than what the 1st and 2nd Defendants did in the TP Proceedings), it was held on the facts in *McNally* that the subsequent action did not constitute abuse because the plaintiff as an innocent passenger would in any event recover damages against her deceased’s husband estate and/or the 1st defendant, and it was not unreasonable for her to await the outcome of the earlier litigation before proceeding with her own claim when she believed her deceased husband was not to be blamed for the accident.
22. Bearing in mind that there is no presumption that a claim which could have been brought in earlier proceedings should have been so brought so as to render the later claim necessarily abusive, and upon assessing the question of abuse or no-abuse by making a broad merits-based judgment by considering all the circumstances. I do not agree that the 1st and 2nd Defendants were harassed twice by the TP Proceedings and the present action, and I am not satisfied there is any abuse of process by the Plaintiff in commencing the present action. There is no manifest unfairness for the 1st and 2nd Defendants to defend the claim.

X. Conclusion

1. The Summons is dismissed. There is no reason why costs should not follow event. I therefore grant a costs order *nisi* that the 1st and 2nd Defendants do pay costs of the Summons (including all costs reserved if any) to the Plaintiff to be taxed if not agreed with certificate for counsel.

# (Marlene Ng)

District Court Judge

Representation:

Ms Josephine Pinto instructed by Messrs Alan Wong & Co for the Plaintiff.

Mr Christopher Wong instructed by Messrs Y C Lee, Pang, Kwok & Ip for the 1st and 2nd Defendants.