# DCPI 527/2020

[2022] HKDC 1122

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 527 OF 2020

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BETWEEN

SHAHID MUHAMMAD Plaintiff

and

THE KOWLOON MOTOR BUS CO (1933) LTD Defendant

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##### Before: His Honour Judge Andrew Li in Court

Date of Hearing: 15 August 2022

Date of Decision: 15 August 2022

Date of handing down Reasons for Decision: 14 October 2022

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REASONS FOR DECISION

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*INTRODUCTION*

1. On the first day of trial of this action on 15 August 2022, the plaintiff decided not to turn up to prove his case, allegedly on the ground that he was having a fever, therefore could not come to court to give evidence. He and his solicitors were fully expecting the court would adjourn the trial for the sake of his convenience.
2. After hearing counsel for the plaintiff, Mr Oscar Tam’s (“Mr Tam”) submissions, which were based on the instructions he had obtained from his instructing solicitors and his lay client during the short adjournments the court gave him during the trial, I decided to dismiss the plaintiff’s claim and made an order that the plaintiff to bear the costs of the action, including the costs of the aborted trial. I further made an order, pursuant to Order 62 rule 8A of the Rules of the District Court (“RDC”) and Practice Direction 14.5, to request the principal from the plaintiff’s solicitors, namely, Mr D Mohnani, to show cause within 28 days as to why he should not be made personally liable to bear the costs of the action on an indemnity basis and to be paid forthwith.
3. Although I have given some brief reasons for my decision at the end of the hearing on that day, I said I would provide the detailed reasons for my decision in due course. Here are those reasons.

*BACKGROUND*

1. This is one of those simple personal injury (“PI”) cases which is commonly found in the District Court. In this case, at the material time of the accident, the plaintiff, Mr Shahid Muhammad, was a passenger of a double decker bus on Route 11C bearing a registration number UU4207 (“the Bus”).
2. The Bus belonged to the defendant, namely, the Kowloon Motor Bus Co (1933) Ltd (“KMB”), which is one of the main public franchised bus companies in Hong Kong. The driver of the Bus, one Mr Yin Tak Keung (“the Driver”), was at all times driving the Bus in the course of his employment with the defendant.
3. On 7 September 2019, at around 4:50 pm, while the plaintiff was travelling as a passenger and descending the staircase from the upper deck of the Bus, the plaintiff alleges that the Driver suddenly braked abruptly without good reasons, causing him to slip and fall down the staircase to the lower deck. The plaintiff allegedly was preparing to get off at a stop near Tsui Ping Estate in Sau Mau Ping. As a result of the fall, it is alleged that the plaintiff has suffered from multiple injuries to his left elbow, left shoulder, left hip, left knee and back (“the Accident”).
4. Before the defence was filed by the defendant, the plaintiff provided further and better particulars (“F&BP”) on the allegations contained in §3 of his statement of claim (“SoC”) where the plaintiff has pleaded, *inter alia*, that *“the driver suddenly braked the Bus and the plaintiff slipped and fell down the stairs to the lower deck.”*
5. The plaintiff’s answer to the above F&BP request was that as the plaintiff was *“walking down the steps, he slipped from the third or fourth step from the top to the landing between the two flights of stairs.”* He further answered that, after the fall, he had *“landed on his backside.”* In addition, in the same answer to the F&BP, the plaintiff stated that, before the Driver braked, he was *“holding onto the handrail on his left side.”* Lastly, he also gave the answer that, he was wearing “*black leather loafers with a rubber sole on the day of the accident.”* The above F&BP were provided by the plaintiff to the defendant on 29 April 2020.
6. In the defence filed by the defendant on 11 May 2020, save from admitting that the plaintiff was a passenger of the Bus at the date/time of the Accident, the defendant has specifically denied that the Driver had suddenly caused an abrupt braking of the Bus. Instead, it avers that, at the time of the Accident, the Bus was moving slowly and steadily. Further, the defendant avers that there was a number of passengers going down the staircase of the Bus at the time and no other passengers had complained of any sudden braking. Thus, the defendant claims that “*if the Accident did occur (which is not admitted by it), it says it was wholly caused or contributed to by the plaintiff’s own negligence.*” In particular, the defendant alleges that the plaintiff had failed to hold onto the handrail tightly; misplaced his step while walking down the stairs; failed to watch his step; and failed to keep his own balance.
7. As to the plaintiff’s alleged injuries; loss and damage; entitlement to interest; and other reliefs stated in the SoC, they were all denied by the defendant.
8. In a rather unusual step taken by the plaintiff in a simple PI case, the plaintiff’s solicitors had, on 26 May 2020, served a reply to the defendant’s defence whereby the plaintiff joins issue with the defendant on the defence save where it consisted of admissions. In particular, the plaintiff avers that, prior to the Accident, the Bus was not moving slowly and steadily. Furthermore, the plaintiff avers that the driver of the Bus *“braked very suddenly”*. In addition, the plaintiff in the reply specifically avers that, *“at the time of that accident, there were no other passengers going down the staircase in front of the plaintiff.”*  The plaintiff further claims that *“there was only one other passenger behind him who was the person travelling together with him at the time.”* Lastly, in the reply, he also claims *“the approach of the doctrine of res ipsa loquitur”* applies in this case.

*Procedural history of the case*

1. This simple PI case then took on a rather “uneventful” case management path in which one of the PI masters of the District Court made a total of 7 separate orders between August 2020 and November 2021 before he finally ordered the case to be set down for trial. Incidentally, I note that all 7 orders were made by way of joint applications/consent summonses by solicitors on both sides. In essence, the parties had asked for repeated adjournments in order to allow the plaintiff to prepare the case to go to trial.
2. Eventually, they led to the Order of Master Matthew Leung dated 10 November 2021 whereby, upon the joint application of the solicitors on both sides by way of a consent summons filed by them on the previous day, the case was set down for trial before a bilingual judge in the running list not to be warned before 30 March 2022, with an estimated length of 3 days. Further, it has been ordered by the master that the plaintiff should file and serve the application to set the case down for trial by 14 February 2022.
3. However, the case was not set down by the plaintiff’s solicitors by 14 February 2022. In fact, the plaintiff’s solicitors have failed to set down the case for trial all together.
4. Instead, the case was eventually set down by the defendant’s solicitors for trial on 12 May 2022.
5. After the case was placed on the running list on 5 August 2022, it was warned for trial on 15 August 2022 (with 16 & 19 August 2022 reserved) before me.
6. As the plaintiff is a local resident who has originally come from Pakistan, an Urdu interpreter was supposed to be arranged by the plaintiff’s solicitors to attend the trial for the purpose of assisting the plaintiff to give evidence in his own language. As per the usual requirement of the court, the plaintiff’s solicitors were supposed to confirm the service of the freelance Urdu interpreter with the registry of the District Court at least 7 days before the trial. This is necessary as the plaintiff’s solicitors are ultimately responsible for paying the freelance interpreter’s fees. However, in the week prior to the commencement of the trial, my clerk was informed by the interpreters’ office of the court that the plaintiff’s solicitors had declined to confirm such service despite repeated reminders from them.
7. As a result, on 11 August 2022, I issued the following directions by letter to the plaintiff’s solicitors: -

“The plaintiff’s solicitors are directed to confirm with the assigned freelance interpreter and the court as to whether they would appoint him or her to be the plaintiff’s Urdu/English interpreter in this case as soon as possible, and in any event no later than 12:00 noon on Friday, 12 August 2022, failing of which the court will assign a freelance interpreter for the plaintiff without referring further to the parties.”

*Events which occurred on the first day of trial*

1. On the first day of trial on 15 August 2022, the plaintiff instructed counsel Mr Tam to represent him while the defendant was represented by Miss Ann Lui (“Ms Lui”) who appeared together with Mr Raymond Tsang.
2. Just before the commencement of the trial at 9:30 am on that day, I had been informed by my clerk that the freelance interpreter who was supposed to have been arranged by the plaintiff’s solicitors did not turn up in court. I therefore asked my clerk to make enquiries with the interpreters’ office. While waiting for the reply from the interpreters’ office, just 5 minutes before the commencement of the trial at 9:30 am, the plaintiff’s counsel produced a copy of a purported “sick leave certificate” signed by one Dr So Chun Pong (“Dr So”) dated 13 August 2022. To be more precise, was a printed version of a photo image of the sick leave certificate downloaded from a mobile phone or email (“the 1st Sick Leave Certificate”). I refused to look at the document on the basis that this court is not in the practice of looking at new documents “thrust down the throat” of the court just a few minutes before the commencement of a hearing. I asked my clerk to return it to the plaintiff’s counsel and asked him to make any application in open court.
3. At the commencement of the trial at 9:30 am, I informed the parties that as the freelance Urdu interpreter had not arrived yet, I asked my clerk to make enquiries with the interpreters’ office. While we were waiting for their reply, I asked the plaintiffs’ counsel to open his case.
4. At this junction, Mr Tam tried to produce this “screen shot” copy of the 1st Sick Leave Certificate to the court where Dr So had apparently given 3 days of sick leave to the plaintiff on Saturday, 13 August 2022, namely, 2 days prior to the commencement of the trial. The sick leave given would have covered the first day of trial. According to Mr Tam, the plaintiff claims to have suffered from “fever” and the 1st Sick Leave Certificate was supposed to support this allegation. Mr Tam mentioned to the court that, according to the government policy and the then Covid protocol of the Judiciary, a person who is suffering from “fever” cannot enter the court building and therefore the plaintiff was not able to attend court on that day.
5. I immediately pointed out to Mr Tam that that was not what the 1st Sick Leave Certificate had stated as Dr So only certified that the plaintiff was suffering from “*flu syndrome*” (sic). I take it that when Dr So stated “*flu syndrome*”, he meant to say the plaintiff was suffering from “flu symptoms”. I pointed out to Mr Tam that nowhere in the 1st Sick Leave Certificate mentioned the fact that the plaintiff was suffering from any “fever” as claimed by him at all, least did it state that the fever, if any, had continued until the third day after the 1st Sick Leave Certificate was issued to him on Saturday, 13 August 2022.
6. I therefore demanded to see the original of the 1st Sick Leave Certificate. At this point, I was told by Mr Tam that the plaintiff’s solicitors did not have the original copy of the document. I was told that it would be on its way to the court while the proceedings were taking place.
7. Upon the court’s further enquiry, Mr Tam also informed the court that his instructing solicitors first found out about the plaintiff’s alleged “fever” at round 11 am on Saturday, 13 August 2022.
8. As to why his instructing solicitors had not tried to obtain the original copy of the 1st Sick Leave Certificate from the plaintiff between Saturday and the first day of trial on Monday, the only explanation given to the court by Mr Tam was that his instructing solicitors had contacted the plaintiff on Saturday by telephone and had requested the plaintiff to provide the original copy of the 1st Sick Leave Certificate. Upon the court’s further enquiry as to why that could not have been obtained before the first day of trial, the answer given was that plaintiff *“was not willing to see anybody”*.
9. While this dialogue was taking place between the bench and the bar, a message from the interpreters’ office came back to my clerk informing her that apparently the plaintiff’s handling solicitor, i.e. the principal of the plaintiff’s firm, had “WhatsApped” to the freelance interpreter and informed him that he did not need to turn up to the court on the first day of trial. According to the message sent, *“the plaintiff would not appear as the plaintiff will have to pay for the interpreter’s expenses”*. That message was received by the freelance interpreter in the early hours of Sunday morning, ie at 0349 hours on 14 August 2022.
10. When asked why his instructing solicitors chose to send such WhatsApp message to the freelance interpreter when there was a clear direction from the court to assign such an interpreter to appear in court on the first day of trial in the event that the plaintiff’s solicitors have failed to do so, Mr Tam could only inform the court that his instructions were that his solicitors had in an earlier message sent to the interpreter informing him that *“the plaintiff is sick and won’t be attending court tomorrow, it is anticipated that the trial won’t happened (sic) and your attendance is not required.”*
11. The freelance interpreter’s reply was: *“OKOK”*. Then at 0934 hours on the day of trial, the plaintiff’s handling solicitor sent a second message to the interpreter saying that: *“If required, I will keep you informed. Just be standby (sic).”* And the freelance interpreter’s answer was pertinent when he answered: *“????” “Is there any trial or not?”*.
12. In other words, what the principal of the plaintiff’s solicitors did was, in complete defiance of the court’s order/direction to ask the interpreter not to turn up to court on the first day of trial just because he thought that the court would likely grant leave to the plaintiff to adjourn the trial on the alleged ground that he was “sick”. I told Mr Tam that this does not only display a completely arrogant and disrespectful attitude on the part of the plaintiff’s solicitors towards the court, I consider in fact it was bordering on contempt.

*History of setting down the case for trial*

1. Upon further enquiries, it is to be noted that the history of setting down this case for trial was also an unusual one. Generally speaking, a plaintiff who has initiated a claim would be keen to pursue his claim against a defendant and would prosecute the action with reasonable diligence. Thus, a claimant in a PI case would usually be the party who would be keen to set down the case once the PI master certified that the case is ready to go to trial. However, in this case, the history reveals that both the plaintiff and his solicitors had been dragging their feet almost from the moment the PI master gave them leave to set down the case for trial.
2. For example, despite the order given by Master Matthew Leung on 10 November 2021 to allow this action be set down for trial before a bilingual judge in the running list not to be warned before 30 March 2022, the plaintiff and his solicitors had failed to file such an application by the specified deadline under the order which fell on 14 February 2022.
3. In a letter dated 25 February 2022, the defendant’s solicitors reported to the master that the plaintiff had failed to comply with the order dated 10November 2021 in that he had failed to file and serve the application to set down the case for trial by 14 February 2022 (in breach of §7 of the Order); and failed to inform the master within 3 days when the case was not set down on time (in breach of §9 of the same Order).
4. Despite the defendant’s solicitors having written to the plaintiff’s solicitors on 16 February 2022 asking them if they had applied to set down the case for trial, they had not received any reply from them. Therefore, the defendant sought leave from the PI master for the defendant to set down the action for trial, upon the plaintiff’s default in doing so. The defendant further asked the master’s leave to file and serve the application to set down the case for trial within 7 days.
5. Master Matthew Leung did give the chance for the plaintiff’s solicitors to make submission in respect of the defendant’s letter dated 25 February 2022.
6. On 8 March 2022, the plaintiff’s solicitors wrote to the court purportedly, tried to explain the reasons for the non-compliance of the order in applying for setting down the case for trial. In the letter, they wrote:-

*“to inform the parties that as we had a case where some of our staff tested positive for Covid-19, we had no option but to close the office for the substantial period of time to ensure that all our staff tested negative before returning to work. Furthermore, we had to carry out deep cleaning and sanitizing of the office premises. For these reasons we were unable to comply with paragraph 7 of the order dated 10 November 2021.”*

1. However, no particulars were given as to when some of their staff had been tested positive and when did they have to close the office and for how long. There was also no notice to be given as to how long did the alleged *“deep cleaning and sanitizing of the office premises”* took and when did they return to work in the office, I notice that the letter contained no apology for their failure in complying with the court order. Most importantly, there was no explanation as to why the court was not informed about this until the defendant’s letter dated 25 February 2022 was sent to the court. There was also no explanation as to why such letter could not be sent by the case handler when “working from home” which a lot of legal practitioners did during the height of the “Fifth Wave” of the pandemic.
2. I do not find the reasons given by the plaintiff’s solicitors as stated in their letter dated 8 March 2022 convincing at all. I am not surprised therefore that the master shared the same view. In his Order dated 16 March 2022, Master Matthew Leung ordered that, upon the application of the solicitors for the defendant by their letter dated 25 February 2022 and upon reading the letter of the solicitors for the plaintiff dated 8 March 2022, *inter alia*, that the action be set down for trial in the running list not to be warned before 1 August 2022. In other words, a 4-month delay had been caused by the plaintiff’s failure in complying with the master’s previous order to apply to set down the case for trial.
3. In the same Order, Master Matthew Leung gave an extension of time to the plaintiff to file and serve the application to set down the case for trial on or before 29 April 2022. In the event that the plaintiff fails to comply with that direction, he further granted leave to the defendant to file and serve the application to set down on or before 13 May 2022. Under the same Order, the master also demanded the plaintiff’s solicitors to provide a written explanation to the court on the following matters: (i) the exact period of time of closure of the office due to the positive case for Covid-19; and (ii) why the solicitors for the plaintiff took no step to inform the court of the closure until the directions made by the court on 3 March 2022. The master also made an order *nisi* that the plaintiff to pay the costs of the application to the defendant, such costs to be taxed if not agreed in any event. Further, the solicitors for the plaintiff were asked to show cause within 14 days as to why such costs should not be borne by the plaintiff’s solicitors personally: (see §§6 and 7 of Master Matthew Leung’s Order dated 16 March 2022).
4. It was only on 6 April 2022 that the plaintiff’s solicitors had belatedly purported to provide details of the dates requested by the master. However, there were still no explanations as to why the case handler could not work remotely from the office and able to operate as much as they could during the mentioned period. In any event, despite this letter of so-called “explanations” provided to Master Matthew Leung, the plaintiff and his solicitors still failed to make an application to set down the case for trial before the deadline given by the master. Instead, it was the defendant’s solicitors who have set down the case on 12 May 2022, asking the case not to be warned before 1 August 2022, with an estimated time of 3 days.

*The plaintiff’s failure to show up in court on the date of the trial to prove his case*

1. Having read all the papers contained in the trial bundle prior to the commencement of the trial and in particular having watched the high definition footages of the closed circuit television (“CCTV”) recordings from the cameras installed at various positions (both inside and outside) on the Bus, it is as clear as day from night to me that: (i) that was no sudden braking of the Bus when the Driver was approaching the bus stop; (ii) there was a number of passengers both walking in front of and behind the plaintiff descending from the upper deck to the lower deck by making use of the staircase inside the Bus with no incident or difficulty at all; (iii) the plaintiff had failed to grab hold of the bright yellow colour handrails installed on both sides of the staircase; and (iv) he had missed the second step at the top of the staircase on his way down, therefore fell a few steps and landed on his buttocks towards the bottom of the staircase.
2. In my judgment, anybody, whether a qualified lawyer or a layman, who has the opportunity to watch these high definition CCTV footages would inevitably come to the following conclusions as I did: (i) there was no sudden or abrupt braking or even slowing down of the Bus when the Driver was approaching the bus stop; and (ii) the plaintiff slipped and fell on the stairs of the Bus due to his own failure in grabbing hold of the handrails and had missed the first couple of steps of the staircase, causing him to fall down the stairs and landed on his buttocks.
3. When I expressed my above views on the merits of this case to the plaintiff’s counsel, Mr Tam, who is a very junior counsel who has just come out of practice at the Bar, has very fairly and appropriately informed the court that he was not the person who had been advising the plaintiff on the merits of this case. In fact, he was only instructed to conduct the trial on 4 August 2022, which was less than 10 days before the commencement of the trial. Further, despite the fact that he had not been asked to advise on the merits of the case, he had very *“clearly and unambiguously”* advised the plaintiff and his solicitors as to the lack of merits in this case. However, according to Mr Tam, in spite of that, he was instructed to proceed with the case and to appear at the trial.

1. Mr Tam then requested the court to stand down the case for an hour for him to take instructions on 3 specific matters that were raised by the court and wanted to have answers on before proceeding with the trial. I only allowed Mr Tam half an hour for that purpose as I was keen to proceed with the trial and not to waste more of the parties’ time and the limited judicial resources.
2. When Mr Tam and his instructing solicitor returned to court about half an hour later, he wanted to have further time for the parties to *“come up with some proposed directions”*. I flatly rejected such proposal as I was not going to allow the parties to waste the precious time of the court on the first day of the trial for any “without prejudice” negotiations when that should had been taken place long before the commencement of the trial, if not before the case was set down.
3. However, there were 3 matters which Mr Tam was able to take instructions on and provide answers to the court after the short adjournment.
4. The first one was in relation to the plaintiff’s failure to attend the trial on that day. According to him, the plaintiff refused to answer any calls from his instructing solicitor during the half hour adjournment. He was told by his instructing solicitor, Mr Mohnani, that he had repeatedly demanded the plaintiff come to court immediately unless he was tested “Covid positive”. Mr Tam was told by his solicitor that the plaintiff’s reply was that: “*he is unwell and is unable to come.*” In other words, he was not claiming that he was suffering from any “fever” nor had he been tested “Covid positive” which would disenable him to come to court on that day. Apparently, the first phone call with his instructing solicitor had lasted for 5 minutes. A second try to convince him to come to court by the plaintiff’s solicitors only lasted for “39 seconds” with the plaintiff cutting off the line and ended the call abruptly without agreeing to come to court at all. After the second call, apparently the plaintiff’s handling solicitor had repeatedly tried to call the plaintiff again on the telephone but none of these calls were picked up by the plaintiff.
5. The second matter which Mr Tam had taken instructions on was in relation to the 1st Sick Leave Certificate. He was told that despite his solicitors had made the demand for the plaintiff to bring to court both the original of the 1st Sick Leave Certificate and another one dated on the same day of trial which was dated 15 August 2022[[1]](#footnote-1) (“the 2nd Sick Leave Certificate”), the plaintiff had refused and/or was unable to provide any other supporting documents and/or medical notes or records to support the fact that he actually was suffering from any “fever” on that day. For example, there was no temperature record contained in both the 1st and 2nd Sick Leave Certificates nor was that any other medical records produced by the plaintiff which would show that he was actually suffered from any “fever” as contrast to some unspecified “flu symptoms”. In other words, the allegation of “fever” was merely a bare assertion on the part of the plaintiff with no independent objective evidence like medical notes or records verified by the treating doctor in support. Obviously, if the plaintiff was really suffering from a genuine fever, he would not have been able to enter the court’s building if his temperature was above a certain level. The fact that he was not willing to even come to court suggests to me that his so-called “fever” could not be genuine at all.
6. The third matter that Mr Tam was able to obtain instructions on was in relation to the freelance interpreter’s service. Mr Tam says that the plaintiff’s solicitors now *“understand and accept the court’s questions and directions”*. However, when I told Mr Tam that the plaintiff’s solicitors had effectively overruled the court’s direction in relation to the interpreter’s attendance at the trial, Mr Tam’s instructions are that *“never in their mind to be contemptuous or close to it”* nor was that their intention to “*override*” the court’s direction in regard to the freelance interpreter’s service on the first day of trial. The plaintiff’s solicitors via Mr Tam had tendered their “*sincere apologies*” to the court.
7. Thus, the long and short of Mr Tam’s summary of his instructions are that the plaintiff was not prepared to come to court to give evidence of his own case on the first day of trial. I indicated to Mr Tam and his solicitors that I was not prepared to adjourn the case just because the plaintiff and his solicitors had decided that the court was going to adjourn the trial due to the alleged “fever” the plaintiff had suffered since “2 days” prior to the trial. That being the case, I stood down the case for Mr Tam to take instructions from his solicitors as to how to proceed with the case on that day in the light of the decision of *So Kam v* [*Guildford Ltd* [2021] 2 HKLRD 3](https://www.google.com.hk/search?q=Guildford+Ltd+%5B2021%5D+2+HKLRD+301&spell=1&sa=X&ved=2ahUKEwi12tjijZP6AhXHhlYBHZJHD74QkeECKAB6BAgBEEE)19 which was a case decided by me back in March 2021 (a copy of which was provided to the parties before I stood down the case for them to read). I asked Mr Tam to specifically consider what would be his solicitors and lay client’s position regarding the issue of the costs if we could not proceed with the trial on that day.
8. By the time when Mr Tam returned to court at 12:00 noon, he produced 2 original copies of the 1st and 2nd Sick Leave Certificates, including the 1st Sick Leave Certificate dated 13 August 2022 and the 2nd Sick Leave Certificate dated 15 August 2022. There was however still no temperature record nor was there any medical notes attached to them. In my opinion, what is most curious about these 2 sick leave certificates was the fact that a total of 7 days had been given by the same doctor, for the plaintiff alleged “*flu syndrome*” (sic) in support of the sick leaves given. There was no temperature record nor was the word “fever” was ever mentioned in those certificates.
9. When asked by the court what should we do with the trial, Mr Tam stated that his instructions from his solicitors were that the plaintiff has given instructions to them to “*discontinue with the action*” and he was asked to inform the court accordingly.
10. When asked by the court of what would be the plaintiff’s position on all the costs wasted as a result of the actions of the plaintiff’s and his solicitors in this case, Mr Tam very fairly conceded that he had no instructions to oppose a general costs order in this action and this matter would be up to the court’s decision. When further asked by the court as to what he and his solicitors who now had read the decision of *So Kam* would submit in relation to a proposed costs order against the plaintiff’s solicitors to bear the costs personally, Mr Tam quite gallantly tried to defend his solicitors by saying that although the writ and the SoC were taken out in March 2020 for the Accident which happened in September 2019, he has been told by his instructing solicitors that they had only received the CCTV record of the Bus on 4 November 2020 only. By that time, according to Mr Tam, the SoC, statement of damages (“SoD”) and the answer to the F&BP had already been filed. His instructions were that upon reviewing of the CCTV records of the Bus on 4 November 2020, which is about 8 months after the same SoC had been served, they had advised the client and the client’s instructions were for them to proceed with the case. That period lasted for 1 year and 9 months. Allegedly, his solicitors had advised the plaintiff to discontinue the action. However, when asked what steps they had taken to do so, Mr Tam could not provide an answer. Certainly, the court’s record shows that no application for ceasing to act had been taken out by the plaintiff’s solicitors prior to the case being set down for trial by the defendant, nor was there any such application up to the date of trial.

*The defendant’s stance*

1. Ms Lui who represents the defendant at the trial disputes the timeline reported by Mr Tam based on the instructions given to him by his solicitors.
2. Ms Lui has very methodically and compressively set out the timeline of the case according to the defendant as follows.
3. The starting point of course was the date of the Accident which was on 7 September 2019. Then on 12 October 2019, which was about a month after the day of accident, one Mr Kwok Man Kit from KMB, explained to the police in a statement of how he had prepared the CCTV footages and provided copies to the police.
4. Ms Lui then handed up 2 letters exchanged between the parties, the first one was dated 9 December 2019 where the plaintiff’s solicitors wrote to KMB the following: -

“As requested by you, we attach herewith the following documents/information for your further handling: -

1. We have written to the police to provide us with the documents requested by you. We shall furnish you with a copy when we receive the same from the police;
2. A copy of our client’s Hong Kong identity card;
3. A copy of our client’s TAVA application;
4. Our client is still seeking active treatment and our client’s latest sick leave certificates is attached;
5. We confirm that our client did meet with an accident in the past on 16th April 2009;
6. We confirm that during his previous accident our client suffered from lower back tenderness. However our client had recovered from this injury and has no pre-exiting injuries or medical conditions;
7. We confirm our client is educated up to High School level. He speaks some English and Cantonese but is not fluent. He is unable to read or write English or Chinese properly. Our client is fluent in Urdu;
8. We confirm that our client was not in the course of employment at the time of the accident;
9. A copy of our client’s bank passbook showing his pre-accident earnings;
10. We confirm that our client has not returned to work since the accident as he is still on sick leave, and
11. Copies of our client’s medical reports, sick leave certificates not previously included.”
12. The second letter was dated 26 February 2020 also from the plaintiff’s solicitors where they requested for “*copies of some witness statements obtained from the police*”. Ms Lui’s instructions are that Mr Kwok’s witness statement to the police was included in the reply letter and therefore the plaintiff and his solicitors would have been able to view the CCTV records and footages which had been provided by the defendant to the Police. In any event, in my view, as the plaintiff’s solicitors could easily have made further investigations or asked for copies of the CCTV records from the defendant if they wished to do so, there was simply no reason why they could not have obtained them from KMB or the defendant’s solicitors. Had the plaintiff or his solicitors done that, there is no doubt in my mind that they would have been able to see that the Accident could not have been caused by the negligence of the defendant or the Driver as observed by me above. Unless the plaintiff’s solicitors did not bother to discover the CCTV records or worse still, if they had discovered the records but did not review those CCTV footages, otherwise I simply do not see how any trained lawyers in their right mind would advise their client to commence or continued with these proceedings. Yet, this was exactly what had happened in this case.
13. In any event, the CCTV recordings were disclosed under the defendant’s list of documents filed on 28 September 2020. Therefore, the plaintiff and his solicitors would have had ample of opportunities to ask for copies of those records and to review before continuing with the action.
14. Based on the above, Ms Lui submits that the costs of this action should be borne by the plaintiff’s solicitors and on an indemnity basis, including a certificate for counsel. She also asks that such wasted costs to be paid forthwith.
15. Lastly, Ms Lui asks for a dismissal of the action rather than an order of discontinuance of the action as suggested by the plaintiff’s solicitors via Mr Tam.
16. At the end of the hearing, I made the following order: -
17. This action be dismissed;
18. The plaintiff do pay the defendant its costs of this action on full indemnity basis, with certificate for counsel, such costs will be summarily assessed by the Court by way of paper disposal and to be paid forthwith;
19. The plaintiff’s solicitors, namely the principal Mr D Mohnani of Messrs Mohnani & Associates, do within 28 days from the date of this order show cause, by way of filing an affirmation together with supporting documents and to lodge a written submissions, as to why the costs of the defendant in this action should not be borne by him personally and on an indemnity basis with certificate for counsel and to be paid forthwith (the “Proposed Wasted Costs Order”), with copies served on the defendant;
20. Within 21 days thereafter, the defendant’s solicitors do respond to any aforesaid submissions/affirmations on the Proposed Wasted Costs Order by way of written submissions and affirmation with copies served on the plaintiff;
21. Within 14 days thereafter, the plaintiff’s solicitors do file an affirmation in reply (if so advised) with copy served on the defendant; and
22. No further submissions or affirmation shall be filed or served by the parties without leave of the court.

*Summary of Reasons for decision*

1. I think the reasons for my decision must be apparent from the history of the case which I have set out in detail above. However, for the sake of clarity, I would summarize them under the following headings.

1. *Solicitors duty of not to pursue an unmeritorious claim on behalf of their clients*
2. First, in my judgment, a party who pursues a claim (usually the plaintiff in a PI case), is under a duty to prosecute the case with reasonable diligence on his part. He or those advising him must satisfy themselves that they have at least a reasonably arguable case before embarking on issuing a writ and serving a statement of claim on the defendant(s) in the case. This will inevitably involve exercise of due diligence on the part of the claimant’s solicitors who have to undertake to do the preliminary investigations into whether there are any basic merits in the case. The legal advisors cannot, in my view, blindly and in a wholesale fashion, accept what his client tells or instructs them. In a motor traffic accident case these days, where high definition CCTV recordings/footages from dash/car cameras installed in both private and public vehicles (as in this case) or in public/private premises or public transport (as in cases which occurred on busy junctions or roads or MTR carriages or stations), have become more commonly used and readily available, there is in my opinion no reason why a solicitor in charge of the case cannot or should not be able to obtain those footages prior to the issue of the proceedings in order to advise his or her clients the merits of the case.
3. In my judgment, as an officer of the court, the solicitor’s owes a duty to the court of not to pursue an unmeritorious claim on behalf of his client when the objective, unambiguous and unequivocal evidence, for example in the form of high definition CCTV recordings, has clearly indicated that the accident did not and could not have happened in the way as “instructed” by the plaintiff (as in our case).

1. In this case, the history shows that the plaintiff’s solicitors had obtained the CCTV footages from KMB long before the present proceedings were issued. If they had not done so, the evidence shows that they could have at least done that prior to the issue of the writ as they were available to them. In any event, they could have viewed them latest when they were discovered as part of the documents in the present proceedings under the lists of documents. As stated, had the plaintiff’s solicitors been bothered to watch those footages, the only inevitable conclusion which they can draw (and indeed anyone can draw in my view) is that the Accident did not happen in the way as “instructed” to them or described by the plaintiff in the SoC. In my opinion, this is not one of those cases where it is the words of one witness against another where the court has to make some factual findings without the benefit of any objective and unequivocal evidence. In this case, the evidence which shows that the Accident did not happen anywhere close to the plaintiff’s description is “loud and clear”. There is simply no room for any doubts at all.
2. In my view, in a case like this, when a solicitor who chooses to blindly proceed with the case purportedly pursuant to his client’s “instructions” should be answerable to the court as to why they, as officers of the court, should not be personally made responsible for any wasted costs as a result of the aborted hearing or dismissed claim. In my judgment, they cannot hide behind the cloak of their clients by saying they are merely acting upon their clients’ instructions. In my experience acting as the PI Judge in the District Court since September 2020, most of the plaintiffs in PI cases these days are not covered by legal aid. They usually come from either lower or middle income groups (as the plaintiff did in this case) who could not in the ordinary course of events able to afford the expensive legal fees in our jurisdiction without the assistant of legal aid.
3. As I have stated in a couple of my previous judgments, I have no problem in accepting the fact that a solicitor acts generously by not charging their clients fees upfront (ie by asking them to put costs on account) or even willing to pay for disbursements like expert reports and counsel fees on their client’s behalf (which I understand are very common practice these days), what they cannot do in my view is to blindly follow their clients’ “instructions” by pursing a completely hopeless case on their behalf without going through the objective evidence like the CCTV records as in this case. If they do so, they will do so at their own perils and run the risks of bearing any wasted costs personally as a result. They cannot at the end of the day try to claim protection of pursuing the case based on their client’s instructions. The reason simply is that their lay clients are not legally trained and would not be able to objectively assess the evidence like CCTV footages while the solicitors can. In my view, this is similar to the duty of solicitors, as officers of the court, in carefully going through their client’s discovery to make sure that there are no omissions as recently held by the Court of Appeal in *Lai Hon Tim v Lai Tsz Nang Wilson* [2022] HKCA 382 (Cheung, G Lam, Chow JJA; 9 March 2022). Similar to the sentiments expressed by the Court of Appeal at the end of the judgment in that case, I am of the view that solicitors should be aware that “dereliction of this duty is both a matter of professional conduct and a matter that can be visited with costs sanctions.”: see §72 of *Lai Hon Tim, supra*.
4. *The court does not accept sick leave certificates at its face value*
5. Secondly, I think it is clear from the discussions appeared in the above passages that, this court, or any court in our jurisdiction dare I say, would not accept a “sick leave certificate” produced by a party at its face value.
6. In my opinion, both the 1st and 2nd Sick Leave Certificates produced by the plaintiff via his instructing solicitors are highly suspicious. Not only the certificates did not state the very condition which plaintiff claimed allegedly had prevented him from attending the first day of the trial, namely, a fever, but they had failed to give details/reasons as to why the *“flu syndrome”* (sic) would have warranted a total sick leaves of 7 days altogether.
7. From the history of this case, it is abundantly clear to me that the plaintiff and his solicitors had been dragging their feet and refused and/or reluctant to set down the case for trial despite the several reminders from the PI master as well as the defendant to do so. I find that the plaintiff and his solicitors must know or should have known that his case based on the allegations pleaded in the SoC is simply unsustainable in the light of the CCTV recordings. Given such unequivocal evidence, perhaps it was not surprising that the plaintiff would try to make up any excuses of not attending the trial.
8. It is common knowledge that it is not difficult for a person to obtain a sick leave certificate from a medical practitioner in Hong Kong. This can easily be obtained based on some vague and subjective complaints like “flu symptoms”, “back pain” or “depression”. A doctor, due to the trust in a doctor and patient relationship, will inevitably take the words of the patients for granted and would always be prepared to give the benefit of the doubt to his/her patients. Not so with the court I am afraid.
9. Under Order 25, rule 1B of the RDC, the dates fixed for a management conference, a pre-trial review and the trial of a case are considered as “milestone dates”, they are not to be varied or moved or vacated or changed or adjourned without a party showing “exceptional circumstances”: see §25/1B/1 of the Hong Kong Civil Procedure 2022 Vol 1 at p739. Hence, a party who applies to adjourn or vacate such “milestone dates” not only bears the burden of demonstrating to the court of such “exceptional circumstances”, persuasive and credible evidence must be put forward in order to establish this.
10. In my judgment, a party who on the first day of the trial or at any subsequent dates of the trial or at any of the “milestone dates” hearings wishes to rely on a “sick leave certificate” to vacate or adjourn the trial, cannot expect the court will accept the document at its face value. He or his solicitors must be prepared to provide cogent and concrete evidence like medical notes and records or a detailed letter from his treating doctor to show his physical or mental condition are serious enough to prevent him from attending the hearing. We all know that in a city like Hong Kong which is renowned for its hardworking population and well esteemed work ethics, a common cold or influenza would not normally prevent a person to attend work. I do not see how a similar condition like the “fever” alleged by the plaintiff (which is unsupported by any medical evidence) should entitle him to think that he can excuse himself from attending the trial without leave of the court.
11. Of course what is extremely suspicious of this case is that the plaintiff’s solicitors would very presumptuously and prematurely assume that the court would grant the adjournment of the trial just because their client, ie the plaintiff, had produced a copy of a purported sick leave certificate to them more than 2 days prior to the trial as they had sent a message to the freelance interpreter in the early hours of Sunday, 14 August 2022 at 0349 hours asking him of not to turn up at the trial. In my judgment, this move shows that the plaintiff (and his solicitors) had no intention to turn up to the trial on the first day as he could not have known whether his fever would continue 2 days later.
12. I therefore would reject the plaintiff’s purported attempts to make use of the 2 Sick Leave Certificates as “evidence” to show that the plaintiff could not attend the trial on the first day.
13. *The plaintiff’s solicitors defiling the court’s direction in relation to the freelance interpreter’s attendance at trial*
14. I regard this as an extremely serious misconduct on the part of an officer of the court. The plaintiff’s solicitors not only had ignored the repeated requests from the interpreters’ office to confirm the service of the freelance Urdu interpreters (which the plaintiff has to pay for), in a blatant defiance of the court’s directions issued on 11 August 2022, the plaintiff’s solicitors would made a deliberate and conscious effort to ask the freelance interpreter of not to turn up in court in the first day of trial purportedly based solely on the allegation from his client that he was not well.
15. As I said to Mr Tam during the hearing, I regard this not only demonstrated a disrespectful and arrogant attitude on the part of the plaintiff’s solicitors, it borders on a contempt of court as they had openly defiled the clear directions given by the court. In my judgment, this is totally unacceptable behaviour on the part of a qualified solicitor and on this ground alone the solicitor concerned should be made personally liable for the aborted trial as he knew very well that the trial would not be able to proceed on that day without an Urdu interpreter.
16. For the reasons stated above, I made the decision which I did at the hearing on 15 August 2022.

( Andrew SY Li )

District Judge

Mr Oscar Tam, instructed by Mohnani & Associates, for the plaintiff

Ms Ann Lui leading Mr Raymond Tsang, instructed by Hastings & Co, for the defendant

1. As to how the plaintiff was able to obtain such a sick leave certificate on 15 August 2022 before the commencement of trial at 9:30 am, it has not been explained by the plaintiff’s counsel or solicitors at the trial. Hence, it is very doubtful if the certificate is genuine at all. [↑](#footnote-ref-1)