## DCPI 759/2010

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 759 OF 2010

--------------------

|  |  |  |
| --- | --- | --- |
| BETWEEN | HEUNG KWUN HUNG | Plaintiff |
|  | and |  |
|  | SO WAI TIM | 1st Defendant |
|  | HONG KONG & CHINA TRANSPORTATION CONSULTANTS LIMITED | 2nd Defendant(Discontinued) |
|  |  |  |
|  |  |  |

---------------------

Coram : Deputy District Judge Grace Chan in Chambers (open to public)

Date of hearing : 3 October 2011

Date of handing down decision : 7 October 2011

# DECISION

***Introduction***

1. This is an appeal by the 1st Defendant against the decision of Master J. Chow made on 20th July 2011 in respect of the 1st Defendant’s application for an order for specific discovery under Order 24 rule 7 of the Rules of District Court (“RDC”) *before* defence is filed.
2. This action concerns a traffic accident which took place on 1st June 2007. But the discovery sought is in relation to a traffic accident happened on 15th July 2007.
3. The learned Master refused to order specific discovery in respect of documents listed as items (a) to (d) and (g) specified in the Schedule annexed hereto. She, however, allowed specific discovery in respect of items (e) and (f) in the Schedule, which are documents relate mainly to the question of quantum. No appeal has been made on items (e) and (f).
4. During the hearing before me, Mr. Sakhrani for the 1st Defendant confirms that the 1st Defendant now abandons its application for items (c) and (d) in the Schedule. He would trim down his request in respect of item (g), in that he would now ask for an affirmation of the Plaintiff to confirm whether there exist any pre-action demand letters, and letters evidencing without prejudice negotiations and/or agreement (“amended item (g)”). This appeal thus concerns only:
   1. item (a), being statements made by the Plaintiff to the police;
   2. item (b), being the statements made by the other witnesses to the police including the statements made by the investigating police officers of the Schedule; and
   3. amended item (g), being the affirmation of the Plaintiff described in this paragraph.

***Background***

1. This is a personal injuries action involving a rear-end traffic accident. The Plaintiff was driving his car around midnight of 1st June 2007. When he was left-turning from Nathan Road southbound into Pitt Street, he saw three pedestrians about to cross the road ahead of him. He stopped immediately to give way. The 1st Defendant could not stop his public light bus in time and hit into the rear of the Plaintiff’s car (“**the Subject Accident**”). As a result, the Plaintiff sustained neck injury.
2. The 1st Defendant was charged with, and on his own plead, convicted of careless driving in relation to the Subject Accident.
3. During later exchange of correspondences between the parties and from the documents disclosed by the Plaintiff to the 1st Defendant, it was revealed that within a period of 6 months between 12th January 2007 and 15th July 2007, the Plaintiff met altogether 3 traffic accidents as follows:-
4. On 12th January 2007 (“**the Prior Accident**”);
5. On 1st June 2007, i.e. the Subject Accident;
6. On 15th July 2007 (“**the Subsequent Accident**”).
7. The Plaintiff has, on the 1st Defendant’s request, already disclosed some documents relating to the Prior Accident. The police statement(s) made by the Plaintiff revealed that the Prior Accident happened in a similar manner as the Subject Accident, i.e. when the Plaintiff was driving from a main road into a side road, the Plaintiff had to stop to give way to some pedestrians crossing the road ahead of him. At that juncture, the Plaintiff was hit by the vehicle from behind.
8. From the medical notes of Dr. Wong Shu Kai disclosed by the Plaintiff to the 1st Defendant, the 1st Defendant came to know, for the first time, that the Plaintiff met the Subsequent Accident 1.5 months after the Subject Accident. The 1st Defendant also came to know that the Subsequent Accident occurred *during* the sick leave period of the Subject Accident. Dr. Wong’s medical notes also revealed that the injuries suffered by the Plaintiff in the Subject and Subsequent Accidents are alike, being neck injury.

***Legal principles***

1. Being an appeal, I deal with the matter as a rehearing of the application which led to the Order of the learned Master under appeal. And I am not bound by the decision of the learned Master in any respects.
2. It is trite law that a party may apply for an order requiring any other party to make an affidavit stating whether any document or any class of document specified or described in the application is or has at any time been in his possession, custody or power, when he parted with it and what has become of it (see *Order 24 rule 7 of the RDC*).
3. But if the court is satisfied that discovery is not necessary, or not necessary at that stage of the cause or matter, it may dismiss or adjourn the application, and shall in any case refuse to make such an order if and so far as it is of opinion that discovery is not necessary either for disposing fairly of the cause or matter or for saving costs (see *Order 24 rule 8 of the RDC*).
4. There is *no* jurisdiction to make an order under Order 24 rule 7 for the production of documents *unless* (a) there is sufficient evidence that documents exist which the other party has not disclosed; (b) the document or documents relate to matters in issue in the action; (c) there is sufficient evidence that the document is in the possession, custody or power of the other party. When it is established that those three prerequisites for jurisdiction do exist, the court has a discretion whether or not to order disclosure (See *Hong Kong Civil Procedures* 2011 Vol. 1 para. 24/7/1 at pp. 548).
5. Further, if specific discovery is sought *before* close of pleadings, the applying party must show exceptional circumstances. In *Wong Hon Wai v The Secretary of Justice*, unrep., HCPI 664 of 2009, Master Marlene Ng has provided a very clear and comprehensive analysis on the legal principles for specific discovery before a statement of claim is filed and served [the same principles should apply to specific discovery before defence is filed and served]. The learned Master states in para. 25 as follows:-

“There is jurisdiction to order specific discovery even before service of the statement of claim, but the making of such an order generally calls for definition of the issues. Such order should not normally be made and the practice is to refuse discovery before close of pleadings *save in exceptional circumstances* because until at least a statement of claim has been delivered the court can seldom know what the matters in question in the action are. It is generally inexpedient and unnecessary to order discovery until the issues have been defined by the pleadings (see *Hong Kong Civil Procedure 2011* Vol.1 paras. 24/3/5 and 24/7/1 at pp.529 and 549).” (emphasis added)

1. It is also stated in *Hong Kong Civil Procedure 2011* Vol.1 para. 24/7/1 at p. 549 the following:-

“Specific discovery before defence may be ordered where it is *nearly certain that a defence of a particular nature* will be raised and the discovery sought would *enable the defendant to plead with particularity* rather than by an initial bare denial.” (emphasis added)

1. In view of the legal principles set out in the preceding paragraphs, the 1st Defendant must show to me, in so far as this appeal is concerned, that the documents requested for are (1) within the Plaintiff’s power to disclose; are (2) relevant to matters in issue; and (3) there are “exceptional circumstances” in this case and 1st Defendant has a nearly certain defence so that I should order discovery at this stage (instead of waiting until close of pleadings when automatic discovery will take place ) to enable the him to plead his defence with particularity.

***The 1st Defendant’s argument***

1. Quite unlike the argument put forward by the 1st Defendant before the learned Master, which focused on fraud and malingering on the part of the Plaintiff, Mr. Sahkraini for the 1st Defendant puts forward an argument of “similar facts evidence”.
2. His argument runs like this: I do not have to consider if the 1st Defendant would run a defence of fraud or not, for the 1st Defendant will run a nearly certain defence of negligence and contributory negligence on the part of the Plaintiff (“**the Negligence Defence**”) (this is without prejudice to the possible defence of fraud). And on this Negligence Defence alone, the 1st Defendant is entitled to items (a) and (b) because such documents, if disclosed, will enable the 1st Defendant to plead the Negligence Defence with particularity, e.g. whether the Plaintiff demonstrated an unsafe habit of stopping his car suddenly and without warning. The 1st Defendant also needs the amended item (g) to decide if a plead of giving credit in respect of the damages received by the Plaintiff in the Subsequent Accident should be made in the defence.
3. Mr. Sahkrani refers me to *Yu Kai Ming v Wing Lee Scaffolding Works Company Limited*, unrep., HCPI 1107/2002, citing Lord Bingham in *O’Brien v Chief Constable of South Wales Police* [2005] UKHL26, and *R v Ross* 121 Can Crim Case 284 in support to his argument that evidence of similar facts previous as well as similar facts subsequent should be adduced.
4. He further adds that the learned Master has found “exceptional circumstances” on the documents relating to quantum. The same rational should have been extended to the documents on liability.

***The Plaintiff’s argument***

1. It is submitted by Ms. Yang for the Plaintiff that the purpose of the 1st Defendant’s application is to see if it can make out a defence of fraud. But there is not any satisfactory evidence of fraud here. She argues that the relatively short period of driving experience of the Plaintiff (he had only ½ year of driving experience at the time of the Prior Accident) would make it factually implausible for the Plaintiff to engineer the said 3 traffic accidents for the purpose of exaggerated claims.
2. She further submits that the 1st Defendant has not demonstrated “exceptional circumstances” or a nearly certain defence in order to trigger off an order for discovery before defence is filed. The whole exercise is a fishing expedition of the 1st Defendant. She relies on *Bank of India v Godindram Narindas Sadhwani*, unrep., HCA 4939 of 1983 and *HKFE Clearing Corp Ltd v Yicko Futures Ltd* [2006] 2 HKC 23 to support her argument.
3. She also refers to *Wong Hon Wai* (supra) quoting *Re the Estate of Ng Chan Wah*, HCAP 5/2003 in which Chu J (as she then was) pronounced that:

“… It is not the purpose of discovery to give the plaintiff [or in the present case, the defendant] an opportunity to hunt around the documents in the hope that they will reveal some improprieties on the defendant’s part or will provide information for them to pursue more enquiries.”

1. As to whether the documents sought are within the Plaintiff’s power to disclose, Ms. Yang concedes that the police statement of the Plaintiff (item (a)) is within the Plaintiff’s possession and power to disclose. But the Plaintiff does not have power to disclose the police statements of the other witnesses (item (b)), as the police is unwilling to disclose the same to the Plaintiff unless a written consent from the respective statement maker(s) is provided.

***Specific Discovery***

1. I turn now to deal with each item of discovery.

Item (a) statements made by the Plaintiff to the police &

Item (b) statements made by the other witnesses to the police including the statements made by the investigating police officers

1. Since both items of documents are of similar nature, I shall deal with them altogether.
2. I am of the view that both items of documents are within the Plaintiff’s power to disclose. No explanation is required on why item (a) is within the Plaintiff’s power to disclose, as this is the Plaintiff’s own police statement.
3. I do not agree with Ms. Yang for the Plaintiff that item (b) is not within the Plaintiff’s power to disclose. Since the case of *Lily Tse Lai Yin & Ors v The Incorporated Owners of Albert House and Ors*, HCPI 828/1997, the law has become clear that remedying a civil wrong falls within the ambit of Section 58 (1) (d) of Personal Data (Privacy) Ordinance, Cap. 486. Thus the Plaintiff should be able to make a data access request to the police for item (b) and obtain the documents. In this sense, item (b) must be within the Plaintiff’s power to disclose.
4. The crust of Mr. Sakhrani’s submission relates similar facts evidence to the Negligence Defence, but not to fraud (at least not at this stage). What Mr. Sakhrani is essentially saying is this: the 1st Defendant requires the information of how the Subsequent Accident happened in order to plead, with particularity, negligence and contributory negligence of the Plaintiff in the Subject Accident.
5. Although Mr. Sakhrani has submitted to me a very tempting argument, I have to say that I am not persuaded by him. I think the argument of similar facts evidence does not sit well with the Negligence Defence.
6. In my view, similar facts evidence goes to show one’s intention or knowledge of a risk rather than pure negligence. If the 1st Defendant’s argument at this stage before me is to relate similar facts evidence to the Negligence Defence *only*, I then cannot see how the police statements relating to the Subsequent Accident are relevant and necessary at this stage for the purpose of pleading the Negligence Defence. They would be relevant if the 1st Defendant wants to make some allegation on the intention and knowledge of the Plaintiff of a particular risk in any or all of these traffic accidents. But this is not (or at least not yet) the argument of the 1st Defendant before me in this appeal.
7. That being the case, I must say, with respect, that the argument of the 1st Defendant on the similar facts evidence is a red herring. It is, in a true sense, a fishing expedition to see if an allegation of intentional act(s) (as opposed to negligent act(s)) and/or fraud on the part of the Plaintiff can be made out.
8. If I was wrong on the above analysis, I take the view that the particulars of the Plaintiff’s negligence/contributory negligence are already well within the own knowledge of the 1st Defendant. In paragraph 28 of the Affidavit of Chan Miu Lan Anita filed on 4th April 2011, the 1st Defendant has clearly set out his case and alleged negligence of some degree, if not all, on the part of the Plaintiff :

“… *the Plaintiff suddenly cut from the 2nd lane into the 1st Defendant’s 1st lane* of Nathan Road and then immediately turned left into Pitt Street when the *Plaintiff stopped the P’s [Plaintiff’s] car abruptly without prior warning* and knew that the 1st Defendant would be unable to stop the D’s [Defendant’s] PLB in time.” (emphasis added)

1. The 1st Defendant does not require, at least not at this stage, to know how the Subsequent Accident took place in order to plead the Negligence Defence with particularity.

1. I therefore refuse to order discovery of items (a) and (b).

Amended Item (g) affirmation of the Plaintiff to confirm whether there exist any pre-action demand letters, and letters evidencing without prejudice negotiations and/or agreement

1. The submission made on behalf of the 1st Defendant does not focus too much on this amended item (g).
2. In any event, I do not think that this item of document is necessary for the 1st Defendant to plead its defence on quantum with particularity at this stage. The 1st Defendant can simply plead giving credit to damages, *if any*, received by the Plaintiff arising out of the Subsequent Accident. I cannot see how such drafting would make the 1st Defendant in breach of the underlying principles of the Civil Justice Reform and/or Order 18 of the RDC.
3. Besides, the Plaintiff’s solicitors have already by way of the affidavit of Lee Ka Chun Peter (as the handling solicitor of this action) deposed that the Plaintiff has not made any claim in respect of the Subsequent Accident. It does not seem to me that the 1st Defendant is challenging the truthfulness of this affidavit.
4. In any event, the same can be dealt with by way of interrogatories after close of pleadings.
5. The discovery of amended item (g) is thus refused pursuant to *Order 24 rule 8 of the RDC*.

***Costs***

1. In the hearing, I have asked parties to make initial submission on costs. Mr. Sahkrani says that costs should follow the event. Ms. Yang does not seem to object to this. Both agree that there should be summary assessment of costs by me.

***Conclusion***

1. Due the matters aforesaid, I shall dismiss the appeal against the Order made by Master J. Chow dated 20th July 2011.
2. I shall make a costs nisito the effect that the Plaintiff do have costs of the appeal.
3. If no application is made to vary the costs order nisi within 14 days from today, the said costs order nisi will be made absolute. The following directions will then apply:-
4. the Plaintiff do within 7 days from the date of the costs order absolute lodge and serve statement of costs;
5. the 1st Defendant do within 7 days thereafter lodge and serve summary of objections;
6. In lieu of agreement on the amount of costs between parties, the Plaintiff do within 21 days from the date of the costs order absolute fix a date with the Listing Clerk for summary assessment of costs to be heard before me in chambers (open to the public) with 30 minutes reserved.

(Grace Chan)

Deputy District Judge

*Ms. Elizabeth Yang, instructed by Messrs. Au Yeung, Cheng, Ho & Tin, solicitors for the Plaintiff*

*Mr. Ashok K. Sakhrani, instructed by Messrs. Y. T. Chan & Co., solicitors for the 1st Defendant*

**Schedeule**

In respect of the traffic accident on 15th July 2007 in which the Plaintiff was injured:-

1. The statements made by the Plaintiff to the Police.
2. The statements made by the other witnesses to the Police including the statements made by the investigating police officer.
3. The sketch plan of the scene of the accident.
4. The photographs of the scene of the accident,
5. All the sick leave certificates issued to the Plaintiff.
6. The medical reports and medical notes in relation to the consultation for medical treatments for neck and back pain or discomfort from 15 July 2007 up to date.
7. The documents setting out the particulars of the claim or quantification of damages in relation to the claim for damages including but not limited to the pre-action demand letters, without prejudice negotiation of settlement and court documents.