DCPI 1331/2019

[2021] HKDC 1323

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1331 OF 2019

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BETWEEN

TAM KAN CHIU Plaintiff

and

LAU TSZ MAN 1st Defendant

CITYBUS LIMITED 2nd Defendant

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Before: Master Matthew Leung in Chambers (Open to Public)

Date of Hearing: 19 October 2021

Date of Decision: 1 November 2021

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| D E C I S I O N |

1. This is the Plaintiff’s application for leave to amend the Statement of Claim and to adduce expert evidence on liability.

**Background of the case**

1. The Plaintiff claims against the Defendants for damages for personal injuries suffered by him on 15 August 2016 when he was crossing Nam On Street from north to south and was knocked down by a bus driven by the 1st Defendant while the 2nd Defendant was the registered owner of the Bus (“**the Accident**”). The Plaintiff was sent to hospital for treatment after the Accident and was found to have right leg, right ankle and right big toe severely injured. He alleges that the Accident was caused by the negligence of the 1st Defendant while the 2nd Defendant should be vicariously liable.
2. The Defendants deny that the Accident was caused by the negligence of either of them. It was pleaded in the Defence, *inter alia*, that Nam On Street was a double carriageway and the road surface was narrow. The bus was 12 meters long, and when the bus was turning left from Nam On Lane into Nam On Street, the front part of the bus must be at the entrance position of Nam On Street straddling on the double white line at the road centre for turning left, otherwise the bus did not have enough place to turn left. At the time when the bus was turning left from Nam On Lane into Nam On Street, it was driven at the speed of below 10 km/hr. The Defendants further pleaded that the Plaintiff was negligent in failing to stand or stopped on the pavement.
3. In this case, no eye-witness was able to tell how the Plaintiff was knocked down by the bus. The Plaintiff lost consciousness after the impact and could not tell the exact mechanism of how he was knocked down. The 1st Defendant stated in his Witness Statement that when the whole bus was driven into Nam On Street and the bus had been driven straight, he suddenly heard a “bang” sound at the nearside rear of the bus and it seemed that something collided with the body of the bus. He got off the bus and saw the Plaintiff lying at the nearside rear axle of the bus. He did not notice how the Accident took place.

**Procedural history**

1. The present action was initially commenced in the Court of First Instance on 22 October 2018. By the Order of Master Roy Yu dated 1 April 2019 which was made upon the Consent Summons, the action was transferred to the District Court and the parties agreed that no expert evidence on liability shall be adduced in this Action. The parties were directed to exchange witness statements and to obtain medical expert report on quantum within the specified time limits provided in the Order.
2. By another Order made by Master B Mak on 11 October 2019, extension of time was granted to the parties to exchange witness statements and to obtain medical expert report. The Joint Orthopaedic Expert Report was eventually filed on 30 June 2020. The Revised Statement of Damages and the Answer were respectively filed on 4 September 2020 and 5 November 2020.

**The Amendment Summons**

1. The Plaintiff filed a Summons dated 30 March 2021 (“**the Amendment Summons**”) to seek leave to amend the Statement of Claim in the manner as shown in red as per copy annexed thereto.
2. The Defendants raised no objection to the proposed amendment except paragraph 4(p) which related to the allegation that the 2nd Defendant failed to conduct proper Swept Paths Analysis before deploying buses to take the route of rounding the bending path from Nam On Lane to Nam On Street.
3. It is unnecessary for the present purpose to repeat all the proposed amendments. Suffice it for me to mention the following which related to the Plaintiff’s application to adduce expert evidence on liability. In the Amended Statement of Claim, the Plaintiff proposes to add the particulars of negligence of the 1st Defendant including:
4. Failing to steer and control the bus properly when making a turn from Nam On Lane to Nam On Street,
5. Failing to utilize the extra room for turning from Nam On Lane to Nam On Street,
6. Failing to manoeuvre and turn the bus in such a way to avoid the nearside body of the bus coming too close to the kerb and/or pavement and/or endangering the pedestrian standing thereon,
7. Failing to manoeuvre and turn the bus in such a way to avoid encroaching the bus on the kerb or the pavement and/or the endangering pedestrians standing thereon.
8. The proposed amendments also include the addition of the following the particulars of negligence of the 2nd Defendant:
9. Failing to provide proper training and instructions to the 1st Defendant on how to manoeuvre the turning of the bus,
10. Failing to conduct proper swept paths analysis before deploying buses to take the route of rounding the bending path from Nam On Lane to Nam On Street.

**The Expert Summons**

1. By another Summons dated 13 April 2021 (“**Expert Summons**”), the Plaintiff seeks leave to rely on expert report on liability.
2. The Plaintiff argues that neither the Plaintiff himself nor the 1st Defendant could tell exactly how the Plaintiff ended up lying on the ground with his right leg severely injured. The video recording of the bus did not show how the Accident happened. No independent witness can be found. The sketch made by the Police after the Accident was not on scale. However, given the available evidence, the Plaintiff suggests *prima facie* that the bus had come from the Plaintiff’s right side, and so it was the right side of the Plaintiff’s body coming into contact with the nearside body of the bus. Probably he was then pushed to fall to his left by the resultant impact. The front wheel of the twin rear wheels had rolled over the Plaintiff’s right leg before the bus was stopped.
3. The Plaintiff submits that the expert could use his special knowledge such as Swept Path Analysis to help the court to find out how the turning bus knocked against the Plaintiff. The expert could also make more precise measurements by reference to the bus, the pavement, the railing and the camera recording.
4. The Plaintiff submits that the Swept Path Analysis is useful to reconstruct the Accident. The Swept Path Analysis, as submitted by the Plaintiff, refers to the analysis of the way a vehicle moves. One calculates and measures the exact path a vehicle takes when that vehicle does not move in a straight line but turns for instance. The definition of the term is the envelope swept out by the sides of the vehicle body or any other part of the structure of the vehicle (the word envelope is a mathematic term meaning a line or curve tangent to each line or curve of a given family).
5. The Plaintiff further submits that the expert could assist the Court on the following issues as set out in paragraph 3 of the Expert Summons:
6. A Swept Path Analysis, in that, an analysis of the path of the bus in negotiating a left turn from Nam On Lane to Nam On Street,
7. Had any part of the bus come into contact with the Plaintiff, and if so, which part of the bus,
8. What are the likely events leading the Plaintiff to lie on the ground with his right leg rolled over by the wheel of the bus,
9. For buses to negotiate a left turn from Nam On Lane to Nam On Street, what is the maneuvering space required to avoid any part of the bus encroaching on the pavement or kerb and/or the endangering pedestrians standing thereon.
10. The Defendants argue that the Court could draw any conclusion as to the collision point between the Plaintiff and the bus by considering the factual evidence including the car camera recording of the bus, the sketch and the photographs. Further, there is no evidence that the bus had reached the pavement when it turned left, because the guardrails installed right next to the pedestrian crossing gap of Nam On Street had not been damaged.

**Legal principles**

1. At the substantive hearing, Mr Alex Y. H. Lai, counsel for the Plaintiff, and Mr Victor Gidwani, counsel for the Defendants, did not have much quarrel as to the legal principles involved in this case. In considering whether leave should be granted to adduce expert evidence on liability, the starting point must be whether expert evidence is required for the just resolution of the issues before the court, and the criteria of relevance, necessity and probative value should be considered.
2. Expert evidence must be relevant in the sense that it is helpful to the court in arriving its decision on one or more issues to be resolved. If the court can make an informed decision on any issue in the case justly without the aid of such expert evidence, then the court may regard such expert evidence as not useful and should not be adduced.
3. The following three questions should be asked before deciding to allow expert evidence:
4. how cogent the proposed expert evidence will be;
5. how helpful it will be in resolving any of the issues in the case;
6. how much it will cost and the relationship of that cost to the sums at stake.
7. In para 12 of the judgment in ***Shenzhen Futaihong Precision Industry Co Ltd v BYD Co Ltd*** [2019] 2 HKC 175, the Court of Appeal emphasized that the court will not give directions for expert evidence to be adduced simply on the basis that the court cannot rule out a possibility of such evidence being relevant and helpful. If the applicant for expert directions fails to persuade the court on relevance and necessity of such evidence, the application should be dismissed.
8. The principles governing amendment of pleadings are set out in ***Shenzhen Futaihong Precision Industry Co Ltd v BYD Company Ltd*** (unrep., HCA 2114/2007, 18 July 2016), *per* Ng J at §15:
9. It is a guiding principle of cardinal importance on the question of amendment that generally speaking, all such amendments ought to be made for the purpose of determining the real question in controversy between the parties to any proceedings or of correcting any defect or error in any proceedings.
10. Leave is readily granted to amend before trial unless it can be shown that the new claim based on the proposed amendment is bound to fail. While the court is entitled to have regard to the merits of the case, it should only do so when the merits are readily apparent, and are so apparent as not to require prolonged investigation.
11. If the proposed amendments are bound to fail, no leave to amend should be granted. In this regard, the court will take the applicant's proposed pleaded case to the highest.
12. Absent any real prejudice, an application for amendment, albeit late, must be decided upon the general principle that a court of law seeks to adjudicate on the real issues and disputes between the parties and, if possible, technical and procedural rules should not stand in the way of allowing the parties to raise their real claims or defences before the court for adjudication.
13. Where prejudice is claimed, the burden is on the party opposing the amendment to show prejudice. There is no injustice to the opposing party if he can be compensated by appropriate orders as to costs.
14. Lastly, in giving effect to the underlying objectives of the Rules of the High Court, the court shall always recognize that the primary aim in exercising the powers of the court is to "secure the just resolution of disputes in accordance with the substantive rights of the parties".

**Discussions**

1. I will deal with the Amendment Summons first. As mentioned before, the Defendants raised no objection to the proposed amendments except paragraph 4(p) which related to the Swept Paths Analysis.
2. Mr Gidwani argued in his Written Submissions on behalf of the Defendants that the Swept Path Analysis was pleaded as an opening to adduce expert evidence on liability on the same. Nevertheless, para 4(p) of the proposed Amended Statement of Claim stated that the 2nd Defendant failed to conduct proper swept path analysis before deploying buses to take the route of rounding the bending path from Nam On lane to Nam On Street en route to the Shau Kei Wan Bus Terminal. That is a question of fact and should be independent of the Plaintiff’s application for leave to adduce expert evidence on liability.
3. After clarification, Mr Gidwani confirmed to the Court at the substantive hearing that the Defendants raised no objection to the entire proposed amendments to the Plaintiff’s Statement of Claim.
4. In view of the above, the Amendment Summons shall be allowed.
5. I now turn to the Expert Summons.
6. Paragraph 3 of the Expert Summons sets out the four proposed issues or matters to be canvassed by the liability expert. §3(i) relates to the Swept Path Analysis, in which, as submitted by the Plaintiff, the expert will reconstruct the swept path of the bus by various objective evidence, including the physical dimensions and locations of the road and the road markings, the actual dimension and specification of the bus, and the video footage which captured the relative position of the bus, the road markings, the kerbs and the guardrails. §3(iv) relates to the manoeuvrings space required by the bus to avoid any part of the bus encroaching on the pavement or kerb. The two subparagraphs could be dealt with together.
7. It would be convenient for me to mention the layout of the road in question first.
8. In fact, paragraph 2C of the proposed Amended Statement of Claim set out the layout and the traffic conditions of the intersection. According to the Plaintiff’s pleaded case, Nam On Street is running from East to West and is a dual carriageway divided by double white lines. The lane on the north side was for eastbound traffic and is a BUS ONLY lane while the opposite lane is for westbound traffic. Each lane is about 3.7 meters wide.
9. The traffic on Nam On Lane is southbound, before reaching the intersection, there are two lanes (separated by white lane lines), likewise beyond the intersection for traffic to Shau Kei Wan Road. The stretch of Nam On Lane at the intersection is a wide single lane which provides more room for long vehicles including buses to turn left to the BUS ONLY lane of Nam On Street.
10. Pedestrians reaching the intersection may either cross Nam On Lane at a gap for crossing (Point A) to the West, or they may cross Nam On Street at another gap for crossing (Point B) to the south. The road along Point A and Point B is a bending path, the pedestrian pavement along Point A and Point B is erected with guardrails along the edge of the kerb. There is no evidence to suggest that the guardrails were damaged as a result of the Accident.
11. The stretch of the westbound lane of Nam On Street near the intersection is marked with “Yellow Box”. The stretch of Nam On Lane at the intersection is a wide single lane. The design provides more room for long vehicles to turn from Nam On Lane to Nam On Street.
12. Car cameras were installed on the bus and the video footages could show what happened at the front, at the rear and outside the Exit Door at the nearside of the bus, through the respective glass windows and doors. At the substantive hearing, the parties handed up various coloured copies of the photographs at the scene which were taken immediately after the Accident. The video footage of the car camera of the bus was also played at the hearing.
13. The video footages, whether showing the front, the rear or the Exit Door of the bus, could not capture any accident. It was believed that the Accident happened at the rear wheels of the bus. In fact, the Plaintiff was found lying on the ground with his right leg in the space between the front and the rear of the twin rear wheels of the bus.
14. Mr Lai submits that the Swept Path Analysis could show the actual path of the bus in negotiating a left turn from Nam On Lane to Nam On Street. It would assist the court to determine whether the bus has encroached on the pavement or whether the bus was too close to the kerb thereby endangering the pedestrians. Further, the Analysis could also show whether the space on the offside of the bus should have been fully utilized especially when there was no pedestrian at the right side pavement at the time when the bus was taking a left turn.
15. Mr Lai emphasizes that there was no eye-witnesses to the Accident and the proposed liability expert would consider objective materials rather than the witnesses’ partisan accounts to make the report.
16. In my judgment, first, the mere non-availability of eye-witnesses does not necessarily mean that liability expert should automatically be engaged. One still has to consider whether the expert evidence is relevant and necessary in the particular circumstances, and how the proposed expert evidence could assist the court.
17. Having considered all the evidence and submissions of the parties, I am of the view that the cogency and the probative value of the proposed Swept Path Analysis is in serious doubt because of the following reasons:
18. Mr Lai submits that in conducting the Swept Path Analysis, the expert will compare the specification of the bus and the actual physical dimensions of the road and the pavement at the present time. However, as the expert did not personally witness the Accident, and there is no evidence to suggest that the actual layout of the road and the pavement had not been changed ever since the date of the Accident, the comparison with reference to the measurement of the road and the pavement *at the present time* would be of no probative value.
19. Apart from the actual physical dimensions of the pavement and the road, the road markings would also be considered in reconstructing the actual path of the bus. That creates the same problem because one has to make sure that the road markings had not been changed since August 2016 in order to secure a meaningful comparison. No evidence has been placed before me to that effect.
20. Moreover, the comparison would be made by viewing the road markings as shown in the video footage and the actual markings on the road at the present time. The video footage showed that it was raining at the time of the Accident and the bus was moving. In the circumstances, whether the comparison could be accurate and of probative value is in serious doubt.
21. As I see it, the real issue in this case whether there is any negligence on the part of the 1st Defendant when he manoeuvred and turned the bus from Nam On Lane to Nam On Street with reference to the *actual positions* of the pedestrians standing on the left side of the pavement. The positions of the pedestrians, including that of the Plaintiff, is a question of fact to be determined by the trial judge while expert evidence is not necessary in the circumstances.
22. As mentioned above, the relevant video footage was played at the substantive hearing and the coloured photos were handed up for consideration. Having considered all the evidence presently available, I find that there is sufficient objective evidence to enable the trial judge to determine whether, in negotiating a left turn, the bus should have been driven closer to the right side of the pavement in order to avoid the collision, or whether the bus was being driven too close to the left side of the pavement, thereby endangering the pedestrians. As held in ***Liddell v Middleton*** (1996) PIQR 36, “an expert is only qualified to give expert evidence on a relevant matter, if his knowledge and expertise relate to a matter which is outside the knowledge and experience of a layman.” The question of whether the driver should have driven the bus closer to the right side of the pavement, and whether it was too close to the left side there and then, is a question of fact which is within the knowledge and experience of a layman. No expert evidence is required.
23. In the circumstances, to answer the questions in para 19(a) and (b) above, I am not persuaded that the proposed expert evidence and the Swept Path Analysis will be cogent and helpful enough to assist the court in resolving any of the issues in the case. I am of the view that expert evidence will not be necessary where on the proven facts of the present case the trial judge can form his own conclusions without the assistance of an expert.
24. From case management point of view, it has been agreed by the parties and the agreement was endorsed by the Court by the Order dated 1 April 2019 that no expert evidence on liability shall be adduced in this Action. There was a sudden change of mind on the Plaintiff’s part when the Expert Summons was taken out on 13 April 2021 to seek leave to rely on expert report on liability. By that time, the case is almost ready for setting down. Having considered the progress of the action and the proportionality of costs to be incurred for engaging an expert to conduct the Swept Path Analysis, I consider that it would not be appropriate to grant leave to do that.
25. §3(ii) and (iii) of the Expert Summons can be dealt with together.
26. The Plaintiff initially submitted that the expert could assist the court to determine which part of the bus come into contact with the Plaintiff and what were the likely events leading the Plaintiff to lie on the ground with his right leg rolled over by the wheels of the bus. At the substantive hearing, I asked Mr Lai how the expert could determine the actual position of the Plaintiff before he was knocked down, and if the expert could not tell the Plaintiff’s position by any scientific means, how he could reconstruct the cause of the Accident. Mr Lai admitted that he was unable to make any further submissions on this issue, and eventually, he abandoned §3(ii) and (iii) altogether.
27. For these reasons, the Expert Summons must be dismissed.

**Costs**

1. Basically, costs should follow the event. As the Expert Summons is dismissed, the costs should be paid by the Plaintiff to the Defendants.
2. The costs of and occasioned by the Amendment Summons should be also be paid by the Plaintiff.
3. On the other hand, should the Defendants have indicated their agreement to the Amendment Summons at an earlier stage, part of the costs of the hearing can be saved. Having considered the time spent in the substantive hearing, I order that 2/3 of the costs of the hearing on 19 October 2021 should be paid by the Plaintiff to the Defendants with certificate for counsel.

**Conclusion**

1. I hereby make an order in the following terms:
2. Notwithstanding paragraph 2 of the Order made by Master Matthew Leung dated 13 January 2021, the Plaintiff do have leave to amend the Statement of Claim filed on 22 October 2018 in the manner as shown in red as per copy annexed to the Summons dated 30 March 2021.
3. The Plaintiff shall file and serve the Amended Statement of Claim within 14 days from the date hereof.
4. The 1st and 2nd Defendants shall file and serve the Amended Defence within 28 days thereafter.
5. The Plaintiff do have leave to file and serve his Reply, if any, within 28 days thereafter.
6. The Plaintiff’s Summons dated 13 April 2021 be dismissed.
7. There be costs order *nisi* that:
8. The costs of and occasioned by the Plaintiff’s Summons dated 30 March 2021 be paid by the Plaintiff to the 1st and 2nd Defendants in any event,
9. The costs of the Plaintiff’s Summons dated 13 April 2021 be paid by the Plaintiff to the 1st and 2nd Defendants in any event,
10. 2/3 of the costs of the hearing on 19 October 2021 be paid by the Plaintiff to the 1st and 2nd Defendants in any event with certificate for counsel,
11. The Plaintiff’s own costs be taxed in accordance with Legal Aid Regulations.
12. Checklist Review Hearing shall be heard on 14 February 2022 at 10:00 a.m. in Court No. 17 for further case management directions.
13. Liberty to apply.
14. I thank counsel for their able assistance.

(Matthew Leung)

Master of the District Court

Mr Alex Y. H. Lai, counsel instructed by Messrs Au Yeung, Chan & Ho, assigned by the Director of Legal Aid, for the Plaintiff

Mr Victor Gidwani, counsel instructed by Messrs Waller Ma Huang & Yeung, for the 1st and 2nd Defendants