## DCPI 41/2013

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 41 OF 2013

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BETWEEN

KWAN KAI WU Plaintiff

and

LAM PUI SHAN 1st Defendant

HARVEST SUNNY LIMITED 2nd Defendant

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Before: Deputy District Judge Amy Chan in Court

Dates of Hearing: 11 and 13 August 2014

Date of Judgment: 12 September 2014

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JUDGMENT

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*BACKGROUND*

1. On 12 January 2010 at about 4:29 pm, the plaintiff was driving a motorcycle bearing registration no HM 5606 (“the Motorcycle”) southbound along La Salle Road. At the same time, the 1st defendant was driving a private car bearing registration no PAN (“the Private Car”) exiting the car park of the Beverly Villas (“the Estate”) intending to turn right into the northbound of La Salle Road. A collision occurred between the right front part of the Private Car and the front part of the Motorcycle on the yellow box road marking (“the yellow box”). The plaintiff was injured in the accident.
2. The Private Car is owned by the 2nd defendant.
3. The plaintiff now sues both defendants for the personal injury sustained and damage to his Motorcycle arising from the alleged negligence of the 1st defendant.
4. As a result of the accident, the 1st defendant was charged with an offence of “careless driving”. She was acquitted after trial in the magistrates’ court.

*THE ISSUES*

1. The core issues that need to be resolved in this case are:-
2. how the accident happened;
3. whether the accident was caused by the 1st defendant’s negligence;
4. whether the accident was caused by the plaintiff’s own negligence; and
5. the amount of damages the plaintiff is entitled to if he is able to establish the liability.

*LIABILITY*

1. The facts which give rise to the action are uncomplicated. It turns on the credibility of the witnesses, namely the plaintiff and the 1st defendant. In assessing witness’ credibility, the court should consider the totality of their evidence against any documentary evidence.

*The plaintiff’s evidence*

1. The plaintiff drove his Motorcycle and turned into La Salle Road southbound from Nga Tsin Wai Road. The traffic on the stretch of La Salle Road southbound was smooth. Before the collision happened, no car was in front of him. He accepted that there are a taxi stand and a public light bus stop before and after the car park exit respectively.
2. When the plaintiff was near to the yellow box, he saw the Private Car stopped on the pavement next to the exit of the car park. A taxi stopped at the northbound signalling and intending to turn right into the Estate. The plaintiff kept moving his Motorcycle. Suddenly, the 1st defendant drove the Private Car and moved from the pavement next to the car park and got into the yellow box junction. The front part of the Private Car rammed into the front part of the Motorcycle.
3. The defendants cross-examined the plaintiff intensively of what the plaintiff had said during the criminal trial in the magistracy. In gist, the plaintiff testified in the magistrates’ court that he was driving at 30km/h on the southbound of La Salle Road. At the same time, the Private Car dashed out from the car park of the Estate at a speed of 5 to 6 km/h. Prior to the accident, both vehicles had moved a distance of 1 to 2 private car space. The plaintiff applied the brake immediately and his speed reduced to 10km/h. However, he could not brake in time to avoid the collision.
4. In the present hearing, the plaintiff testified that when he saw the Private Car stopped on the pavement before the exit of the car park, he was about ten motorcycle length away. He estimated it was about 60 feet (6ft x10). The defendants clarified if that distance equivalent to two private cars’ space. The plaintiff said it should be 4 to 6 private cars’ space. In fact, the Private Car only travelled for a private car’s space and then it blocked the road.
5. The plaintiff said he did not pay attention to the signal of the traffic light in front of him when he was near the yellow box. He denied to the defendants’ suggestion that the Motorcycle weaved between the vehicles on La Salle Road. He reiterated that there was no vehicle in front of him.

*The defendants’ evidence*

1. At the material time, the 1st defendant drove her Private Car leaving the car park of the Estate. She claimed the traffic on La Salle Road was busy. She intended to make a right turn onto the northbound of La Salle Road. She first stopped the Private Car on the pavement at the exit of the car park to observe the traffic. When the traffic light governing the intersection of La Salle Road and Boundary Street on her right was red, the yellow box was clear. At the same time, a taxi driver, who was originally waiting behind the yellow box marking on the northbound La Salle Road, waved his hand to the 1st defendant signalling that it was safe for her to leave the Estate. She checked the traffic on the southbound lane again and drove the Private Car at 5 to 10km/h onto the La Salle Road. The 1st defendant stopped on the yellow box and checked the road condition of the northbound lane. At this juncture of time, the Private Car was hit at its offside by the Motorcycle. The 1st defendant did not see how the accident occurred.

*DISCUSSION*

*(a) The traffic condition*

1. The accident happened on La Salle Road at 4:30 pm on a Tuesday afternoon. There are schools, a taxi stand and a public light bus stop in the vicinity of the scene. It is in the urban area with residential buildings nearby. I reject the plaintiff’s assertion that the road was clear when he turned into La Salle Road southbound from Nga Tsin Wai Road with no vehicle in front of him. In fact, the plaintiff agreed that La Salle Road is a busy road in the criminal trial. On probability, I prefer 1st defendant’s evidence that the road was busy. I accept that the 1st defendant waited for about 20 to 30 seconds on the pavement until the traffic light on her right side at Junction Road turning red before she could move onto La Salle Road southbound.

*(b) The plaintiff’s estimation of speed and distance*

1. Mr Chen for the plaintiff urged the court not to place too much emphasis of the plaintiff’s account of the speed and distance between the two vehicles. They were only the plaintiff’s estimation. He submitted that it is wrong to treat them as exact figures.
2. I would not attach a lot of weight to the evidence of the plaintiff about the distance between the respective vehicles. To be fair to the plaintiff, it was very difficult for the plaintiff to give reliable assessment about the distances when he was driving the Motorcycle at some speed by the time. According to the plaintiff, he estimated that speed of the Private Car was 5 to 6km/h. The figures may not be accurate. But at least it reflected from the plaintiff’s point of view, the speed of the Private Car was not excessive. It travelled slowly.
3. It is obvious that the plaintiff gave different accounts on the distance when he saw the Private Car stopping on the pavement. In the present trial, he testified the distance of the Motorcycle from the Private was 4 to 6 private cars’ space. The distance that he gave in the magistracy was 1 to 2 private cars’ space. In my view, it is obviously an attempt by the plaintiff to make his assertion sounds more logical. It reflects that he would tailor his evidence to suit his circumstances. Such discrepancies highlighted the unreliability of his evidence. It clearly undermined his veracity.

*(c) Whether the accident was caused by the 1st defendant’s negligence*

1. Both the plaintiff and the 1st defendant had testified in support of their respective cases. Having considered their testimony, I find that the positions of the two vehicles after the accident shown in the photographs taken by the police are pertinent in my assessment of the evidence. As depicted in the photographs, the whole Private Car had entered into the yellow box and occupied almost the whole of the southbound lane. On the other hand, the Motorcycle just reached the rim of the yellow box with two third of its body still lying outside the yellow box. In my view, the stopping positions of the vehicles are not consistent with the plaintiff’s case. The plaintiff alleged that the Private Car suddenly driven out from the pavement at a slow speed onto the La Salle Road that caused the collision. If that was the case, the collision should have occurred somewhere in the middle part of the southbound lane with part of the Private Car remained on the pavement. I find that the photos supported the defendants’ version of the case. I therefore find that it was the Private Car which entered into the yellow box first. I accept that the 1st defendant stopped the Private Car in the yellow box checking the traffic on the northbound lane then the collision happened.
2. The 1st defendant stated that she observed the traffic of the southbound of La Salle Road before she drove onto the yellow box. It was not pleaded nor stated on her witness statement. However, the 1st defendant had given a statement to the police on 25 January 2010 shortly after the accident. It recorded down: “At that time, the taxi driver waved to me. I looked to the right again. I saw there was no car and I drove out to the yellow box.” I accept that the 1st defendant did observe the southbound traffic before she drove onto the road. It should not be considered as a recent fabrication or invention made by her during her testimony in the trial. It did not in my view affect the credibility of the 1st defendant on this issue.
3. Mr Chen submitted that the 1st defendant’s evidence that the four vehicles on her right side had stopped behind the yellow box before she drove onto the La Salle Road is contrary to her previous statement to the police (see §18) which stated there was no car on her right. I do not agree. I notice that the 1st defendant did mention in the same statement that the cars stopped for the traffic light at the junction of the road. Her meaning must be the cars had stopped for the traffic light and there was no car approaching on her right. In my view, Mr Chen must read the whole statement in order to establish the true meaning.
4. The southbound lane is wide enough for two vehicles to travel at the same time. I find that there were about four vehicles stopped behind the yellow box. The plaintiff admitted that he did not pay attention to the traffic light ahead of him. I find that the plaintiff failed to keep a proper lookout of the traffic condition when going through these four vehicles and ended up colliding with the stationary Private Car in the yellow box at the time.
5. On balance, I prefer the evidence of the 1st defendant who gave accounts that was generally consistent and was unshaken in cross-examination on the core issues. The same could not be said of the plaintiff whose evidence I find to be inherently inconsistent and unreliable.
6. I find that there is nothing inherently improbable in the defendants’ case. Where there are inconsistencies between the plaintiff’s evidence and that of the 1st defendant, I prefer the evidence of the 1st defendant.
7. Based on the aforesaid reasoning, I find that the plaintiff has failed to establish any negligence on the part of the 1st defendant and the 2nd defendant for the accident resulting in the injuries sustained by him.
8. According to the Road Users’ Code, drivers should not enter the yellow box unless exit is clear. I posed the question to Mr Chen during final submission as to whether the plaintiff, being on the main road, needed to obey the yellow box marking. Mr Chen replied in the affirmative that the yellow box applies equally to the main road users.
9. I find that it was the Private Car which entered the yellow box completely before the Motorcycle reached the rim of the yellow box. The plaintiff’s breach of the Road Users' Code in entering the yellow box marking without waiting for the clearance, and his failure to heed the presence of the Private Car was negligent.
10. Based on the aforesaid reasons, I find the accident was caused solely by the negligence of the plaintiff.
11. For completeness, I go on to consider the issue of quantum.

*QUANTUM*

*Pain, suffering and loss of amenities (“PSLA”)*

1. The plaintiff was born on 18 July 1955. At the time of the accident, he was aged 54. He is 57 years old now. Soon after the accident, he was treated in A&E Department of Queen Elizabeth Hospital (“the QEH”). He was hit by the bike handle during the accident. His general condition was good. Examination showed tenderness over chest wall. X-ray of chest and rib showed no fracture. The clinical diagnosis was chest wall injury. He was treated and discharged with analgesic. He was given 3 days sick leave (12 to 14 January 2010). Permanent disability was unlikely.
2. The plaintiff further sought treatment from Chinese medical doctor between13 January 2010 to 25 February 2010. He was found to have 9cm x 12 cm bruise on his chest. He was unable to raise his left hand. He was diagnosed as rib and stoma injuries. No sick leave certificate was issued.
3. Mr Chen for the plaintiff argued that in the circumstances, the appropriate award of PSLA should be $60,000. Miss Lee for the defendants contended that the PSLA award should be $2,000. Having taken into accounts of the plaintiff’s injuries and the comparable cases, I am of the opinion that the PSLA should be $20,000.

*Pre-trial loss of earning*

1. The plaintiff is a sole-proprietor working as a locksmith. He produced his tax returns for year 2008/2009 and 2009/2010. The assessable profits for these two years were reported to be about $316,000. His business yielded more than $26,000 per month. He now based his calculation for $21,000 per month.
2. Being a sole-proprietor, the plaintiff did not request the sick leave certificate from the Chinese doctor. He was unable to work for the period he sought treatment form the Chinese doctor. He claimed damages for $21,000/30 x 45 days = $31,500 under this head.
3. Miss Lee contended that the extra 42 days of sick leave for his visit to the Chinese doctor during 15 January 2010 to 25 February 2010 is not supported by sick leave certificate. The plaintiff admitted in court that the duration of sick leave was decided by himself but no by the doctor. It is unreasonable for the plaintiff to claim any loss during this self-claimed period of sick leave.
4. I accept that the plaintiff sought treatment from the Chinese doctor. However, given the mild nature of the injury, I am not convinced he is entitled to the sick leave covering the whole period he sought treatment. I am of the view that an award for loss of earning capacity is appropriate in the circumstances and the amount is $21,000 (1 month’s salary).

# *Loss of earning capacity*

1. The approach I take under this head is set out in *Moeliker v A Reyrolle and Co Ltd* [1977] 1 WLR 132, 141:-

“Where a plaintiff is in work at the date of the trial, the first question on this head of damage is: what is the risk that he will, at some time before the end of his working life, lose that job and be thrown on the labour market? I think the question is whether this is a ‘substantial’ risk or is it a ‘speculative’ or ‘fanciful’ risk … If the court comes to the conclusion that there is no ‘substantial’ or ‘real’ risk of the Plaintiff’s losing his present job in the rest of his working life, no damages will be recoverable under this head.”

1. The plaintiff therefore has to satisfy the court of two matters before any award under this head can be made: first, that there is a real risk that he will lose his job and; if yes, that he would be at a disadvantage in finding another such job.
2. Miss Lee for defendants pointed out that the medical certificate issued by QEH indicated that there was no residual injury and permanent disability is unlikely as a result of the injury. The plaintiff failed to prove any impairment of work efficiency as a result of the accident and hence should not be entitled to claim under this head.
3. Moreover, the plaintiff has been the sole proprietor since the set up of his business in 1993. He has been self-employed for over 15 years prior to the accident. There could be no loss of future earning capacity and the plaintiff is not entitled to claim any loss of future earning capacity.
4. Miss Lee relied on *Chan Lung Hing v Ng Kam Man*, HCPI 405/2012, Master K Lo agreed that a plaintiff who had been self-employed prior to the accident is not entitled to any award under loss of future earning capacity.
5. Mr Chen submitted that the plaintiff has been working as a locksmith. The nature of his job naturally requires concentration and steadiness. If the court accepts the medical evidence of the Chinese doctor that the plaintiff could not use his right hand with force and that prolonged working would make him feel tired, an award under this head should be made. The amount suggested is 2 months of his salary, i.e. at $42,000.
6. The plaintiff indicated that he felt painful on his left hand after the accident and he was unable to raise his left hand. However, there is no finding of “cannot raise (either) hand” after the examination at the QEH. In the medical report prepared by the Chinese doctor, it was recorded as his right hand. I view his injury on his hand with skepticism.
7. I make no award under this head.

*SPECIAL DAMAGES*

*Medical treatments, tonic food and travelling expenses*

1. The medical fees of QEH in the sum of HK$100 were agreed.
2. As discussed above, the plaintiff claimed HK$4,000 for 20 visits for treatments from the Chinese doctor, but I am not prepared to accept he attended or reasonably required so many visits.
3. The plaintiff also claimed HK$2,000 for tonic food, but there was no evidence before me (documentary or otherwise) as to what tonic food was purchased or consumed. Same applies to the travelling expenses. Following *Yu Ki v Chin Kit* *Lam* [1981] HKLR 419 and judging from the mild nature of the plaintiff’s injuries, I would allow a global sum of HK$5,000 for the plaintiff’s medical treatments, tonic food and travelling expenses.

*Loss of the motorcycle*

1. Mr Chen for the plaintiff contended that as a result of the accident, the Motorcycle was scraped. The total repair costs were reported at $19,960. The Motor Survey Report (“the Report”) stated that “the total repair cost is estimated by the garage to exceed the vehicle’s pre-accident market value.” The Report stated that the Motorcycle was made in 1996. The pre-accident market value ranges from $5,000 to $6,000. Mr Chen submitted that it was reasonable for the plaintiff not to repair the damaged Motorcycle and to treat that as a total loss. The plaintiff has incurred the expenses and damages as follows:-
2. the preparation fee for the Report - $750
3. purchase price of a second hand motorcycle - $8,764
4. towing Fee - $485
5. scrap value - $500
6. Miss Lee for the defendants contended that the plaintiff failed to prove that any or all the items of damages listed by the garage were caused by the accident. Moreover, the plaintiff also failed to justify the treatment of the Motorcycle as a total loss and that the purchase of a second hand motorcycle was needed as a result of the accident. The plaintiff should not be entitled to claim for the purchase price of the second hand motorcycle.
7. I accept Miss Lee’s submission. There is no evidence before me of when and for how much that the plaintiff bought the Motorcycle; how long he had been using it; was it with any existing mechanical problems and so on. I have reservation if the total loss of the Motorcycle was a real and actual loss as a result of the accident.
8. From the photos showing the Motorcycle after the collision, the obvious damage was the front fairing. Taking into account that the collision was minor, I find it did not amount to a total loss. I do not accept it requires the extensive repair work as suggested by the garage.
9. The Report was prepared after the Motorcycle was scrapped. Its finding was made on the basis of the photos produced by the plaintiff. It claimed to have made a finding that the brake and the steering were operative without actually checking it mechanically. It stated that the engine number and the odometer reading being not visible. But it could relate the chassis number as SF30AF-1003123 of the Motorcycle. I find the Report totally unreliable.
10. In fact, the plaintiff confirmed under cross-examination that his decision of buying this second hand vehicle was not based on the recommendation of the Report. He instructed the surveyor on 21 March 2011 which was more than one year after he bought the second hand vehicle.
11. In *McGregor on Damages*, 19th ed (2014) at § 10-002 on page 349 stated as follows:-

“…… [Where] it is clear that some substantial loss has been incurred, the fact that an assessment is difficult because of the nature of the damage is no reason for awarding no damages or merely nominal damages. As Vaughan Williams L.J. put it in *Chaplin v Hicks*, the leading case on the issue of certainty: “The fact that damages cannot be assessed with certainty does not relieve the wrongdoer of the necessity of paying damages.” Indeed if absolute certainty were required as to the precise amount of loss that the claimant had suffered, no damages would be recovered at all in the great number of cases. ……”

1. I am prepared to award HK$2,000 as damages for repair of the Motorcycle and the related expenses.
2. Based on the aforesaid, if the plaintiff is able to establish liability against the defendants, the quantum of his claim that I would have allowed will be as follows:-
3. PSLA $20,000
4. Pre-trial loss of earnings $21,000
5. Medical, travelling and tonic food

expenses $5,000

1. Damages for the Motorcycle $2,000

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$48,000

1. In view of my findings on the issue on liability, the plaintiff’s claim is hereby dismissed. I also make an order nisi for the costs of the action in favour of the 1st defendant and 2nd defendant with certificate for counsel, and such order shall be made absolute 14 days after the handing down of this judgment.
2. Lastly, I thank counsel for their helpful submissions.

( Amy Chan )

Deputy District Judge

Mr Vincent Chen, instructed by Henry Chiu and Partners, for the plaintiff

Mr Cindy Lee, instructed by Ivan Tang & Co, for the 1st and 2nd defendant