DCPI 163/2018

[2021] HKDC 835

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO.163 OF 2018

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BETWEEN

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| MOK WAI PONG HENRY | Plaintiff |
| and |  |
| CHU YAM CHEUNG  SIMFUL LIMITED | 1st Defendant  2nd Defendant |

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| Coram: | His Honour Judge Harold Leong in Court |
| Date of Hearing:  Date of Judgment: | 19-20 April 2021  14 July 2021 |

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JUDGMENT

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1. This is personal injury claim involving a road traffic accident which happened at a roundabout on 17 March 2015. The plaintiff was the driver of a taxi (the “Taxi”) which was hit from behind by a minibus (the “Minibus”) driven by the 1st defendant. Both liability and quantum are contested.

*Liability*

1. The accident happened in the Tam Kon Shan Interchange roundabout (the “Roundabout”) which was a 3 lane roundabout. For ease of reference, I would refer to the lanes within the Roundabout as the “Inner Lane”, the “Middle Lane” and the “Outer Lane”.
2. Further, for the ease of reference, I would designate the following entries and exits of the Roundabout with reference to a map (such as exhibit P1) as follows:
   1. 4 o’clock position: entry to Roundabout from Tsing Tsuen Road
   2. 6 o’clock position: exit from Roundabout to Fung Shue Wo Road
   3. 7 o’clock position: entry to Roundabout from Fung Shue Wo Road
   4. 8 o’clock position: exit from Roundabout to Tsing Yi North Coastal Road
   5. 9 o’clock position: entry to Roundabout from Tsing Yi North Coastal Road
3. It is not in dispute that the Minibus was already in the Roundabout before the Taxi entered the Roundabout from Fung Shue Wo Road, or the 7 o’clock position of the Roundabout.
4. The Taxi has a forward facing video camera and a 17 second video with time registered as 07:45:58 to 07:46:15 has been submitted as agreed evidence in court.
5. As pointed out by counsels for both parties, the video showed the following events which are not disputed:
   1. 07:46:05 The Taxi arrived at the entry to the Roundabout and slowed (but did not stop) to allow a yellow van crossing in front (the “Yellow Van”) and exiting the Roundabout at the next exit (the 8 o’clock positon of the Roundabout) which was the ramp to enter Tsing Yi North Coastal Road.
   2. 07:46:07 The Taxi accelerated out into the Outer Lane of the Roundabout.
   3. 07:46:09 The Taxi started to merge into the Middle Lane of the Roundabout which was completed around 07:46:11. The Plaintiff admitted that he did not put on his indicator for this maneuver.
   4. 07:46:09 (which is exactly the same time as the Taxi started the merging, a lorry can be seen coming down the ramp (the “Lorry”) from Tsing Yi North Coastal Road, the 9 o’clock position of the Roundabout).
   5. 07:46:10 The Lorry did not stop and entered the Roundabout.
   6. 07:46:11 - 07:46:12 The Lorry crossed the Outer Lane and starting to enter the Middle Lane in a seemingly collision course with the Taxi.
   7. 07:46:13 – 07:46:14 The Taxi sounded its horn and braked to a stop. The Lorry veered left just in time back towards the Outer Lane (but part of the right side of the Lorry was clearly in the Middle Lane before it veered left) and continued on its way without stopping.
   8. 07:46:15 The Taxi was hit in the back by the Minibus.
6. The plaintiff gave evidence in court that when he slowed at the entry, he had looked to his right and only saw the Yellow Van and no other car, so he accelerated and entered the Outer Lane.
7. The plaintiff also explained that although he did not indicate when he merged into the Middle Lane, he did check both the rear and the right side mirrors and even look behind his right shoulders.
8. However, in his police statement which was made on 22 April 2015, or a little more than 1 month after the accident (Trial Bundle D, page 226), the plaintiff only stated that he checked his rear mirror.
9. Under the cross-examination, the plaintiff claimed that he saw the Lorry before he changed lane, although this was inconsistent with his police statement which he admitted that he merged onto the Middle Lane for 3-4 seconds and suddenly saw the Lorry coming out (Trial Bundle D, page 227).
10. The 1st defendant claimed that he was in the Middle Lane and the Taxi cut in front of him, so he had to brake. But the distance was close so when the Taxi suddenly braked to a stop, he tried to turn left and brake, but he could not avoid the collision with the rear of the Taxi. The cause of the accident, according to the 1st defendant, was that the Taxi had cut into the Middle Lane in front of the Minibus at such close distance that when the Taxi then suddenly braked to a stop, the Minibus could not be stopped in time.
11. The 1st defendant’s evidence was also problematic: he claimed that he saw the Lorry stopping at the exit before he saw the Taxi changing lane. It was clear from the video that the Lorry never stopped. Further, the 1st defendant never mentioned that he had brake twice in his police statement which was given on 8 May 2015 which was less than 2 months after the accident.
12. It is of note that after the police investigation, neither party was charged with any offence.
13. Further, it is clear that this accident happened in a matter of seconds and *“it would be impossible to expect any witness to talk with accuracy in terms of feet, seconds, distance or time…There is inevitably a degree of reconstruction.”* (*Seagroatt J in Chan Hwai Yan, an infant suing by her sister and next friend Chan Hoi Yan v Cheng Yip Chi* HCPI 510/2000).
14. I would make a further observation that, in this case, short of being a professional racing driver with all the computer telemetries recording every driving input, I cannot see how any witness would have any reasonably accurate recollection of every braking, accelerating or steering input to a vehicle (or indeed which mirror or part of the road he was observing) at any particular time. There would a lot of “reconstructed” memory which, of course, would likely be self-serving.
15. As such, objective evidence would likely be more reliable under the circumstances.
16. A crucial area of dispute was whether the Minibus was in the Middle Lane prior to the accident (which would support the defence that the Taxi cut in front of the Minibus), or whether the Minibus had been in the Inner Lane and was making its own progress of merging into the Middle Lane (which might show that the 1st defendant might be liable by bringing the Minibus into a close and unsafe distance behind the Taxi).
17. The 1st defendant claimed that when he entered the Roundabout, he could not be on the Inner Lane because there was a car there.

*The post-accident photographs*

1. However, there appears to be some evidence that may support the latter scenario:
   1. The post-accident photographs at Trial Bundle B pages 133, 136, 137 appear to show that the front wheel of the Minibus was straight and not turned to the left.
   2. The photographs at Trial Bundle B pages 131, 136 and 137 (and the police diagram on Trial Bundle D, page 245) also show that part of the right rear overhang of the Minibus was over the Inner Lane.
   3. The skid mark of the right rear tyre of the Minibus shown in the photographs at Trial Bundle B pages 131, 132 and 137 appears to show that the beginning of the mark was right on the lane marker between the Inner and Middle Lane.
   4. Further, the direction of travel of the Minibus shown from the rear on the photograph at Trial Bundle B page 130 appeared to show that the Minibus was merging from the Inner Lane to the Middle Lane.
2. However, there was no road traffic accident expert evidence before the court so I must be careful in trying to interpret such evidence.
3. Firstly, I note that the Minibus was in a clockwise right-turning Roundabout so naturally, one would expect the steering wheel be turned to the right. As such, any attempt to turn left to avoid the Taxi would involve the driver unwinding the wheel first so if the accident occurred then, the front wheel might be roughly at the straight position. As such, the front wheel looking to be straight would not be conclusive evidence for either scenario: the driver could have been in the process of changing from Inner Lane to Middle Lane, or, equally, the driver might have been unwinding the steering to turn left to try to avoid the Taxi.
4. Secondly, it is clear that the substantial part of the Minibus was within the Middle Lane in the photographs. The skid mark was also just on the lane marker and it was not in the Inner Lane. The Minibus might have taken some last ditch avoidance manoeuver so I have to be careful not to extrapolate its original direction of travel from the post-accident photographs alone without any expert input.
5. In other words, I would consider these evidence rather inconclusive.

*The video at 07:46:01 – 07:46:02*

1. The most important piece of evidence, in my assessment, is from the video at 07:46:01 – 07:46:02 (which, curiously, was not picked up by either counsels).
2. If one looks to the right of the video frame at this time register (which was the direction that the plaintiff claimed that he was looking and, of course, the direction a prudent driver should be looking), one can have a short (but very crucial!) glimpse towards entry down the ramp from Tsing Tsuen Road at the 4 o’clock position of the Roundabout. This was the prior entry before the entry to be taken by the Taxi.
3. One can see that there was a double-decker bus on the Outer Lane about to take the exit for Fung Shue Wo Road (at the 6 o’clock position). More importantly, one can already see a minibus which was clearly travelling in the Middle Lane, and also a yellow van in the Inner Lane. They were roughly level at an early stage but the yellow van appeared to be faster and overtaking the minibus.
4. This view towards the 4 o’clock entry of the Roundabout disappeared (as this was a video from a *forward* facing camera) as the Taxi turned to the left for the entry to the Roundabout. However, a reasonable and prudent driver should still be looking to the *right* towards the oncoming traffic in the Roundabout and not just forward at this point. At 07:46:07, the Yellow Van would appear crossing the front of the Taxi, travelling at some speed and at the same time cutting from the Middle Lane to the Outer Lane to exit the Roundabout at 8 o’clock position towards Tsing Yi North Coastal Road (as previously stated).
5. Although the yellow van seen around 07:46:02 momentarily disappeared from the video (for about 5 seconds), this had to be the Yellow Van given that there was no other entry to the Roundabout between the 4 o’clock and the Taxi’s 6 o’clock positions. This is verifiable by checking the video and also the map (exhibit P1).
6. Similarly, we can safely assume that the minibus in the Middle Lane we can see at 07:46:01 – 07:46:02 is the Minibus driven by the 1st defendant. Again, there were no further entries into the Roundabout before the accident occurred and no other minibuses could be seen. Further, the proximity of the Yellow Van to the minibus also support that this was the Minibus.
7. Summing up all these from the video, it is reasonable to deduce that, at around 07:46:01 – 07:46:02, the Yellow Van was in the Outer Lane and roughly level with the Minibus on the Middle Lane at around the 4 o’clock position in the Roundabout. However, the Yellow Van was travelling at a faster speed which enabled it to overtake the Minibus in the Middle Lane so that it could cut from the Inner Lane to the Middle Lane and then the Outer Lane to make the exit at 8 o’clock at 07:46:07.
8. This is the crucial evidence: if we can already see the Minibus by looking to the right at 07:46:01 – 07:46:02, there was no reason why the plaintiff could not see it had he made a reasonable and proper look to his right, and he should have done so well before entering the Roundabout some 3 seconds later at 07:46:05. Given that the Minibus appeared level with the Yellow Van at 07:46:01, it could not have been that far behind 4 seconds later and certainly would have been observable by a careful driver.
9. The Minibus was clearly in the Middle Lane at 07:46:01 – 07:46:02 because the Inner Lane was occupied by the yellow van. This supported the 1st defendant’s evidence. There is no evidence to suggest why the 1st defendant (being clearly in a slower vehicle) would have merged into the Inner Lane (the fast lane) after being passed by the Yellow Van and then cut back into the Middle Lane, all within a matter of about 10 seconds. On balance, I would find that the Minibus would have continued to travel in the Middle Lane as the 1st defendant claimed.
10. When the plaintiff entered the Roundabout, one may speculate that he either did not look properly and failed to notice the Minibus (because, perhaps, he was distracted by the Yellow Van), or that he actually saw both vehicles and had aimed for the gap between the faster Yellow Van and the slower Minibus.
11. In either case, the accident could have been prevented if the plaintiff had stayed in the Outer Lane. But, for reasons he never properly explained, the plaintiff decided to merge into the Middle Lane without any using any indicator. As such, the Taxi had cut in front of the Minibus in the Middle Lane but worst, without any indicator, the 1st defendant was not forewarned of this manoeuver. This would likely give less time for the 1st defendant to slow down to attempt to keep a safe distance from the Taxi.
12. I would seriously doubt that the plaintiff had taken any proper lookout before this manoeuver, let alone checking two of his mirrors and looking over his right shoulder as he claimed. If he had done so, he should have spotted the Minibus: given that we could already see the Minibus at level with the Yellow Van at 07:46:01 – 07:46:02 at the Roundabout, the Minibus could not be too far behind at 07:46:09 and certainly observable before the Taxi made this manoeuver.
13. Alternatively, one may speculate that when entering the Roundabout, the plaintiff has observed and knew where the Minibus was, and knowing it was going slower than the Yellow Van, he aimed for the gap between the two and estimated that he had the acceleration and speed to safely cut into the Middle Lane in front of the Minibus.
14. The plaintiff might well have gotten away with such a manoeuvre had he been able to keep at a faster speed than the Minibus. But, as it happened, the sudden entry of the Lorry (and the plaintiff’s observation of the metal debris on the ground in front of the Taxi) meant that he needed to brake to a stop suddenly and the Minibus could not avoid hitting the back of the Taxi.
15. In conclusion, I would accept the 1st defendant’s case that the Taxi has cut into his lane without indicating and then suddenly stopped, so he could not brake (or veer away) in time to avoid hitting the Taxi.
16. As such, I find that the plaintiff has failed to prove his case that the accident was caused (wholly or partly) by the negligence of the 1st defendant.

*Quantum*

1. For the sake of completeness, I would also assess quantum.

*Pain, suffering and Loss of Amenities*

1. After the accident, the plaintiff was sent to Princess Margaret Hospital for back injury. There was mild tenderness over right lower back with no fracture on X-ray. The plaintiff was discharged with pain-killers and given 3 days of sick leave.
2. Three days later, the plaintiff attended a private hospital, St. Teresa’s Hospital, complaining of continued back pain etc. Physical examination again revealed tenderness etc. but no neurological deficits. He was admitted for 5 days. X-ray showed no fracture and MRI showed various pre-existing spinal degeneration. The diagnosis was “sprained back” and he was treated with pain killers and physiotherapy.
3. According to the Joint Medical Report, the plaintiff still claimed to have various residual symptoms like low back pain and numbness etc., and some disabilities in carrying weight. However, the experts could not detect any objective signs like muscle spasm or wasting. Although simulation tests were negative, there was a discrepancy in the straight leg raising tests between supine and sitting positions.
4. One expert, Dr. Wong Kwok Shing, Patrick, opined that *“in view of…degeneration over L5/S1 level, he is expected to have lower back symptoms and some lower limb numbness from time to time even in the absence of the traffic accident”* and *“his current residual low back pain and thigh numbness are likely to be contributed by a combination of the traffic accident and his pre-existing lumbar spine degeneration”*. The other expert, Dr. Chan Sai Keung, did not raise any dispute to this.
5. The plaintiff claimed HK$150,000 under this head.
6. Having considered various cases presented by both counsels, including *Tse Tsz Keung Poco v Chan Yick Chun* *and Anor* HCPI 214/2009, *Yip Mau Kei v Wong Kam Tim* DCPI 1905/2013, *Wu Kin Ho v Wong Kong Hop Kenneth* [2018] HKDC 526 and *Diu Chun Ming v Li Man Ha Judy* [2019] HKDC 1161, I think the appropriate award should be HK$100,000 in this case.

*Pre-trial income*

1. The plaintiff claimed that he earned as “net turnover per shift” about HK$1,000 in his Revised Statement of Damages. And since he worked 26 days a month, he claimed HK$26,000 as his monthly per-accident income.
2. As stated in his opening submission, the plaintiff would only be claiming the loss of earnings during the 101 days of sick leave from March to June 2015. This would come to HK$67,333.
3. The plaintiff did not adduce any specific documents to support his claim for pre-trial income except the TAVA application form (Trial Bundle E1 pages 269 – 273). However, this stated that his income per day was HK$500.
4. During the trial, the plaintiff confirmed his signatures and also his awareness and understanding of the warnings of criminal prosecution (if, e.g. false information was provided deliberately etc.) on the TAVA application form (Trial Bundle E1 page 272).
5. When cross-examined on this apparent discrepancy, the plaintiff claimed that when filling in the TAVA application form, he was told be give “an approximate” by the relevant official, so he put down HK$500. He claimed that his income was very variable and this was the income for a bad day. He then claimed that the income for his worst day could be HK$300. At other points of time, he claimed he could earn well over HK$1,000 so HK$1,000 should the average, and then later he claimed HK$700 could be taken as the average.
6. I seriously question the credibility of the plaintiff. Even if his income was very variable, I could not see how he could not come up with an average sum, especially in view of his evidence that he has been a taxi driver for about 15 years prior to the accident. Also, I failed to see why when asked to give an approximate figure, the plaintiff would give the income figure for a bad day. It simply does not make sense.
7. I would therefore find HK$500 as the likely average daily income for the plaintiff so his claim under this head should be HK$500 x 101 = HK$50,500.

*Future loss of earning*

1. As stated in the plaintiff’s opening submission, this head of claim was abandoned.

*Special damages*

1. The claim for reimbursement of medical expenses and travelling expenses were agreed at HK$27,272 and HK$350 respectively.
2. As for the claim for tonic food, I would allow HK$3,000.

*Total award*

1. The total award in quantum should therefore be **HK$181,122** *if* 100% negligence is found.

*Order*

1. Accordingly, I would order that the plaintiff’s claim be dismissed with costs of the action awarded to the 1st and 2nd defendants to be taxed if not agreed, with certificate for counsel. The plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations.

(Harold Leong)

District Judge

Mr. Lewis C.M. Law, instructed by M/s Fung, Wong, Ng & Lam LLP Solicitors, for the plaintiff

Ms. Margaret Chan, instructed by M/s Tsang Chan & Woo Solicitors & Notaries, for the 1st and 2nd defendants