DCPI 203/2001

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 203 OF 2001

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BETWEEN

LAM CHIU Plaintiff

and

POON TAT HING 1st Defendant

YUNG CHI WO 2nd Defendant

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Coram: Deputy Judge R. Yu in Court

Dates of Hearing: 14th, 15th and 18th March 2002

Date of Handing Down of Judgment: 11th April 2002

# **JUDGMENT**

## The Background

1. On 15th September 2000 at about 4:30 p.m., the Plaintiff was driving a public bus JK8840 (“the Bus”) along Po Lam Road, Tseung Kwan O, westbound upslope. When coming near Ma Yau Tong Village, the Bus collided with a medium goods vehicle AG2778 (“the Lorry”) driven by the 1st Defendant. As a result, the Plaintiff suffered injuries.
2. After the said accident, Police investigated and prosecuted the 1st Defendant for careless driving. He pleaded guilty and was convicted at San Po Kong Magistracy. A brief fact was read out to the 1st Defendant before he was convicted and the 1st Defendant admitted those facts before the learned Magistrate. The summons and brief fact appear at page C-23 to C-24 of the Bundle.
3. The Plaintiff brings this action to recover damages against the 1st Defendant contending that the accident was caused by the negligence of the 1st Defendant. The 2nd Defendant is at the material time the employer of the 1st Defendant and the Plaintiff contends that he should be vicariously liable for the negligent act of the 1st Defendant.
4. The 1st Defendant denies that he was negligent and/or caused the accident. He contends that the Plaintiff was negligent in driving the Bus against the tail of the Lorry. He also explains that he pleaded guilty to the charge of careless driving simply to save trouble and expense. The 2nd Defendant does not deny the vicarious liability, if the 1st Defendant was negligent.

### The Plaintiff’s case on Liability

1. The Plaintiff used to be a driver for the Kowloon Motor Bus Company (1933) Ltd. He retired on 28th May 1999 and worked as a school bus driver starting from 10th October 1999. On the date of accident, he was driving the Bus carrying some students home. At about 4:30 p.m., he drove along Po Lam Road, Tseung Kwan O, westbound going upslope in the second lane. He was then travelling at about 30 Kmph.
2. The Plaintiff said he traveled along this part of the road very often and he was familiar with the traffic condition. He knew that sometimes lorries would come out from the godown or construction site next to the road. Therefore, he always traveled along the second lane.
3. When reaching Ma Yau Tong Village, the Plaintiff saw the Lorry stopped at the entrance of Po Wah Godown. The rear of the Lorry protruded out onto the first lane of the road, taking up about 1/3 of that lane. The Plaintiff kept driving in the second lane. When the Bus was about 1 meter away from the Lorry, the Lorry suddenly reversed and hit the left front of the Bus. The Plaintiff swerved the Bus and moved onto the opposite lane and stopped on the pavement. The final position of the Bus appears in a photograph no.3 at page C-26 of the Bundle.
4. The Plaintiff suffered injury and he was helped to come down the Bus by someone. His spectacles were broken. He looked across the road and found that the position of the Lorry was not the same. It had moved inward. When asked to look at the photographs at page C-25, the Plaintiff said the position was not the same as when he first saw the Lorry. He said the position of the Lorry when he first saw it was as shown in his sketch provided to the Police appearing at page C-21 of the Bundle.
5. When being cross-examined on this sketch, the Plaintiff agreed that the Bus collided with the right end of the Lorry. He also said that when the Lorry backed to collide with the Bus, the Lorry was not backing straight as he indicated on the sketch. It had turned.

### The Defendants’ case on Liability

1. The 1st Defendant said that on the day of the accident, he was driving the Lorry along Po Lam Road eastbound going downslope. He was to go to Po Wah Godown to collect some goods for delivery to Wanchai. He drove into the empty space immediately outside the entrance of the Godown. The Lorry was not protruding onto the road at this moment. His assistant went to open the door of the Godown. The 1st Defendant intended to back the Lorry into the Godown. So he started to back the Lorry onto Po Lam Road in order to be in a position to back the Lorry into the Godown. His assistant did not keep a watch out or provide signal for him while he backed the Lorry.
2. The Lorry was moving at the speed of about 5 Kmph. When the rear of the Lorry was about 2 feet onto the first lane of Po Lam Road, the 1st Defendant saw the Bus coming up the first lane of Po Lam Road. So he stopped the Lorry completely to let the Bus pass by. But he did not keep an eye on the Bus. After about 5 seconds, he heard a loud noise and on investigation, he found that the Bus had run to the opposite lane of Po Lam Road. But he did not know how the Bus ran into the Lorry, as he was not watching the Bus before the collision.
3. The 1st Defendant said when he began to back the Lorry, he was in a position to see a distance of 60 meters down Po Lam Road. There was no vehicle coming. And after the accident, he had not moved the Lorry.
4. When he was cross-examined on the guilty plea, the 1st Defendant admitted that the brief facts had been interpreted to him and he admitted the same to the learned Magistrate. He agreed with Counsel for the Plaintiff that the brief facts was accurate. Later, he explained that he wanted to tell the truth at this trial.

### My Findings on Liability

1. The effect of a conviction of careless driving shifts the burden of proof to the 1st Defendant to show that he was not negligent. A famous ruling by Lord Denning deals with this point. In *Stupple v. Royal Insurance Co.* *Ltd.* [1971] 1 QB 50, His Lordship ruled on s.11 of the Civil Evidence Act (the equivalent of s.62 of the Evidence Ordinance):-

The Act does not merely shift the evidential burden, as it is called. It shifts the legal burden of proof. … Take a running-down case where a plaintiff claims damages for negligent driving by the defendant. If the defendant has not been convicted, the legal burden is on the plaintiff throughout. But if the defendant has been convicted of careless driving, the legal burden is shifted. It is on the defendant himself. At the end of the day, if the judge is left in doubt the defendant fails because the defendant has not discharged the legal burden which is upon him. The burden is, no doubt, the civil burden. He must show, on the balance of probabilities, that he was not negligent: …But he must show it nevertheless. Otherwise he loses by the very force of the conviction.

In any case, what weight is to be given to the criminal convictions? This must depend on the circumstances. Take a plea of guilty. Sometimes a defendant pleads guilty in error: or in a minor offence he may plead guilty to save time and expense, or to avoid some embarrassing fact coming out. Afterwards, in the civil action, he can, I think, explain how he came to plead guilty.

In my opinion, therefore, the weight to be given to a previous conviction is essentially for the judge at the civil trial. Just as he has to evaluate the oral evidence of a witness, so he should evaluate the probative force of a conviction.

If the defendant should succeed in throwing doubt on the conviction, the plaintiff can rely, in answer, on the conviction itself, and he can supplement it, if he thinks it desirable, by producing (under the hearsay sections) the evidence given by the prosecution witnesses in the criminal trial, or if he wishes, he can call them again. At the end of the civil case, the judge must ask himself whether the defendant has succeeded in overthrowing the conviction. If not, the conviction stands and proves the case.

1. This ruling is adopted by Mr. Justice Cheung in *Lau Ka Po v. Man Cheuk Ming and other* HCPI584 of 1996.
2. It is a fact that the 1st Defendant pleaded guilty to the charge of careless driving. The burden is on the 1st Defendant to prove on the balance of probability that he was not negligent.
3. The 1st Defendant denies that he was negligent. The 1st Defendant further said that the accident took place at the first lane. Counsel for the Defendants submitted that according to the sketch prepared by the Police after the accident at page C-22 of the Bundle, some broken glass was found on the first lane of Po Lam Road. There was no glass fragment on the second lane. Some other broken glass could be found on the opposite lane. Counsel submitted that this tally with the 1st Defendant’s evidence that the collision took place at the first lane.
4. Counsel for the Defendants submitted that the Plaintiff is claiming damages as a result of an accident that took place at the second lane. If I do not believe that the accident took place at the second lane, the Plaintiff’s case fails.
5. The fact admitted by the 1st Defendant for the conviction of careless driving say, inter alia, that the Plaintiff traveled along the second lane and the Lorry was stopped at the entrance of Po Wah Godown. The Lorry protruded out onto the first land of Po Lam Road. When the Bus was getting close to the Lorry, the 1st Defendant suddenly reversed the Lorry northerly by cutting across the Plaintiff’s carriageway. But in doing so, the 1st Defendant failed to pay due care and attention to the approach of the Bus.
6. At cross-examination, the 1st Defendant agreed that the admitted fact is true. He later said he wanted to tell the truth in this action. He is swerving in his evidence. I do not find that he is a credible witness. On conviction, the 1st Defendant would lose 5 points. Being a professional driver, he should be concerned with his record. And if he is willing to spend days in this trial, which he said he had nothing to lose, then it is more reasonable to expect him to defend himself as he would save the 5 points if he succeeds. I do not find his explanation for pleading guilty to the charge credible.
7. I believe the evidence of the Plaintiff. He was heavily cross-examined by the Counsel for the Defendants, and his evidence remains intact. It was put to him that in answering the investigation by the Police, he particularly mentioned that he used to drive in the second lane, when he had not been asked why he used the second lane. It is submitted that he boaster his case, which I do not agree. The answer is not unusual. If the Plaintiff needs to tell a lie, whether the collision took place at the first lane or the second lane makes no difference.
8. Counsel for the Defendants also pointed out that the Plaintiff’s sketch on the path of how the Lorry moved could not be right. The Plaintiff agreed and said the Lorry had turned. It is a mistake but I do not find it affecting his memory of how the accident took place, or his credibility. The collision took place in fraction of a second. Some mistakes in the details are not going to affect the reliability of his evidence.
9. I found the Plaintiff proved on balance of probability that the accident took place in the second lane of Po Lam Road. As I do not find his explanation for the guilty plea credible, the burden is on the 1st Defendant to prove that he is not negligent. As I have found that he is not credible, he does not satisfy me that he was not negligent. In conclusion, the 1st Defendant was negligent and had caused the accident as described by the Plaintiff.
10. Further and the alternative, backing into the highway is a dangerous act when one is driving a vehicle of considerable length. The Lorry was a medium goods vehicle of 9 meter long. And he had to back with the traffic coming from the left side of the vehicle. There was no assistant to watch and give signal for the 1st Defendant. He must have been negligent in causing the collision.

### The Plaintiff’s case on Quantum

1. The Plaintiff was born on 28th May 1938. He used to work for the Kowloon Motor Bus Company (1933) Limited as a bus driver. He retired on 28th May 1999. Before the accident, he worked as a school bus driver earning $7,600.00 a month. It is not disputed that a school bus driver is paid for 10½ months a year. For the remaining of 1½ months, he may choose to work or not. If he does not work, he would not be paid. For July and August 2000, the Plaintiff had no pay leave.
2. The Plaintiff sustained injury to his neck and head. He was hospitalised for 14 days and he had to attend follow up treatment. He also received about 50 sessions of bonesetter treatment from a Mr. Wong to relieve his pain on his neck. There is no evidence on the qualification of this bonesetter or whether his service is necessary or suitable.
3. The Plaintiff was given sick leave certificate from the day of accident until 3rd April 2002. He was not paid any sickness allowance by his employer.
4. Five medical reports are produced. The three medical reports from the Hospital Authority are agreed (page D-1 to D-5 of the Bundle). One medical expert, Dr. Lau Man Tsang (“PW2”), was called by the Plaintiff.
5. PW2 produced his report at page D6-12. In conclusion, he said the Plaintiff has persistent neck pain and residual neurological deficit in his upper limbs. Despite the complaints, there was no wasting of the muscle of the right upper limb. He has an 8% impairment of the whole person. In his opinion, the Plaintiff will have difficulties in returning to driving because of his residual neck pain. If the Plaintiff intends to work, he has to change his occupation to jobs like messenger, car-park attendant or deliveryman for takeaway food orders.
6. The Defendants had produced a video tape on the activity of the Plaintiff. Having viewed the tape, PW2 opined that the Plaintiff has some improvement. He re-assessed the impairment of the whole person from 8% to 5%.
7. The 1st Defendant did not call any expert evidence. His supplemental report appears at page D13-14.

### My Findings on Quantum

### Pain, Suffering and Loss of Amenities

1. The Plaintiff relied upon the case of *Chiu Wing Sze Karby v. Chan Ying Wai and other* HCPI 616 of 1999. In that case, the plaintiff was admitted to hospital after the accident and was discharged. She was later readmitted and hospitalised for 10 days. She complained of continuing pain in the neck with occasional numbness of the right hand, and pain in the right gluteal region after walking for 5 minutes. She suffered 5% impairment of the whole person. On PSLA, she was awarded $100,000 for the whiplash and $50,000 for the lumbar injury.
2. Relying on this case, Counsel for the Plaintiff submitted that the neck pain of the Plaintiff is more serious, and submitted a sum of $150,000 should be awarded. And for the numbness of the left limb, another sum of $70,000 should be awarded.
3. I do not agree that the injury of the Plaintiff is more serious in this case. Having considered the medical report, I concluded that a sum of $120,000 should be awarded.

### Pre-trial Loss of Earnings

1. The Plaintiff claims a loss of 18 months wages. His wage was agreed at $7,600 per month.
2. But it is the evidence of the Plaintiff that he intended to work until the end of that school year, which I take it to be 15th July 2001. Then he would start his own business. I have no evidence on his income from the new business. But it is reasonable to infer that one would not start his business if the income would be less. I would therefore use $7,600 to assess his income.
3. There is submission that I should only award 10½ months income for each year. But it is the evidence of the Plaintiff that if he worked, he could get paid. It is also not disputed that in the preceding summer, he went on holiday and did not work. To be fair, it is a reasonable inference that the Plaintiff would go on no pay leave for ½ month.
4. Counsel for the Defendants also submitted that in view of the age of the Plaintiff, his poor eye sight, and economy of Hong Kong, it is not likely that the Plaintiff could be employed after the end of the school year 2000-2001. These are pure speculations and I am not persuaded.

1. In conclusion, I award loss of wages for 17 ½ months at $133,000.

### Loss of Future Earnings

1. On the loss of future earnings, Counsel for the Plaintiff submitted that since the Plaintiff intends to work until 70 years of age, a multiplier of 2 should be appropriate. He also submitted that $7,600 should be used, which I allow on the reason I give hereinbefore.
2. Counsel for the Defendants submitted that there should not be any loss of future earnings as it is likely that the Plaintiff would not be engaged beyond 15th July 2001.
3. After all, the Plaintiff is a retired person. And he agreed that he had an operation with his eye. I find that 1 year would be reasonable. I therefore award damages for loss of future earning at $87,400 (using 11½ months’ income in calculating the income for one year on the reason I give hereinbefore.)

## Other Loss

1. On the claim for bonesetter and tonic food, there is no evidence that they are advisable and suitable. I am only prepared, following the judgment of *Yu Ki v. Chin Kit Lam* [1981]HKLR 419 to award a nominal sum of $4,000.
2. Loss of Mandatory Provident Fund would be from 1st December 2000 to 15th March 2002. I deduct ½ month of no pay leave. The award should be $5,700.
3. The special damages on items 6(a), (b) and (d) are agreed and I award by consent damages assessed at $3,604.
4. All general damages shall carry interest from the date of writ until judgment at 2% per annum and thereafter at judgment rate until payment. All special damages shall carry interest at 4.91% per annum from the date of accident until judgment and thereafter at judgment rate until payment. I would also give an order nisi for costs to the Plaintiff with certificate for counsel to be taxed if not agreed and the Plaintiff’s own costs to be taxed in accordance with the Legal Aid Regulations. The order nisi shall be made absolute within 14 days from today.

(R. Yu)

Deputy District Judge

Mr. Timothy Y. C. LING, instructed by Director of Legal Aid, for the Plaintiff.

Mr. Patrick LIM, instructed by Messrs. Krishnan & Tsang, for the 1st and 2nd Defendants.