## DCPI 2489/2013

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 2489 OF 2013

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##### BETWEEN

KWAN WING LEUNG Plaintiff

### and

FUNG CHI LEUNG 1st Defendant

MENTEX ENGINEERING LIMITED 2nd Defendant

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Before : Deputy District Judge Anthony Chow in Court

Dates of Hearing : 3, 4 and 7 July 2014

Date of Judgment : 24 July 2014

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JUDGMENT

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*Background*

1. This is a personal injury claim arising from a vehicular accident. The plaintiff, driver of a taxi license plate number FU9882 (the “Taxi”), claims against the 1st defendant (the “D1”), the driver of light goods vehicle license plate number MM8793 (the “LGV”) and the 2nd defendant (the “D2”), owner of the LGV and the D1’s employer.

*The plaintiff’s case*

1. On 11.8.2010, the plaintiff was driving the Taxi along the northeast bound lane of Wang Yip Street West. Upon reaching the junction of Hong Yip Street, a junction controlled by a give-way sign and road marking on the Hong Yip Street side, D1 driving the LVG suddenly emerged into the junction and cut into the path of the Taxi.
2. Due to the short distance, the plaintiff was unable to stop the Taxi in time and collided into the LGV.
3. On 25.10.2010, D1 pleaded guilty to and was convicted of the offence of careless driving due to this accident.
4. The collision was caused by the negligence of D1 and, as his employer D2 is vicariously liable for D1’s negligence.

*The injuries*

1. The plaintiff was 66 years old at the time of the accident. Immediately after the collision, he felt pain over his neck and upper back and was brought to Pok Oi Hospital. He was then transferred to the Department of Orthopaedic & Traumatology of Tuen Mun Hospital. The plaintiff was discharged on 14.8.2010.
2. The plaintiff was given 10 physiotherapy treatment sessions in Pok Oi Hospital between 11.10.2010 and 13.12.2010.
3. In about February 2011, the plaintiff found his pain in the neck radiated down to his right arm. He consulted private practitioners as well as Department of Orthopaedic and Traumatology of Tuen Mun Hospital. No significant improvement shown despite intensive care and medication.
4. The plaintiff again complaint of deterioration of neck pain in August 2011.
5. At present, the plaintiff still complains of the following:-
6. Persistent pain on neck and upper back;
7. Persistent pain on right arm;
8. Range of rotation of neck limited by pain;
9. Sitting tolerance limited to 30 minutes;
10. Right hand carrying capacity limited to 3 pounds;
11. Psychological effects such as anxiety over future career problems; and
12. The prospect of a vigorous, contended and happy life has been seriously diminished after the accident.

*The claim*

1. The plaintiff therefore claims:-

Pain, suffering and loss of amenities of life $300,000

Pre-trial loss of earnings 445,000

Post-trial loss of earnings 173,000

Loss of earning capacity 50,000

Special Damages 13,400

Total $982,280

*The defendants’ case*

1. Irrespective of the fact that the D1 was convicted of careless driving, the defendants alleged that the accident was caused solely by the negligence of the plaintiff.
2. In the alternative, the defendants alleged that the plaintiff was contributory negligent in the cause of the accident.

1. The defendants also disputed the quantum of the plaintiff’s claim for damages. The defendants alleged the plaintiff’s damages should be as follows:-

Pain, suffering and loss of amenities of life $100,000

Pre-trial loss of earnings 36,000

Post-trial loss of earnings 0

Loss of earning capacity 0

Special Damages 8,747

Total $141,747

*The disputes*

1. There are two main disputes between the parties: liability and quantum.

*D1’s liability*

1. On liability, Mr Ernest Ng, counsel for the defendants, submits that there are two sub-issues:-
   1. The manner in which the collision occurred; and

(2) Whether D1 should be found liable for the collision and whether the plaintiff should be found contributory negligent.

*The law*

1. It is not disputed that D1 was convicted of a charge of careless driving due to this accident. Section 62 (2) (a) of the Evidence Ordinance places the burden on D1 to prove he did not cause the accident.
2. Section 62 of the Evidence Ordinance Cap 8, Laws of Hong Kong states:-

“(1) In any civil proceedings the fact that a person has been convicted of an offence by or before any court in Hong Kong shall, subject to subsection (3), be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a plea of guilty or otherwise and whether or not he is a party to the civil proceedings; but no conviction other than a subsisting one shall be admissible in evidence by virtue of this section. (Amended 37 of 1984 s 11)

(2) In any civil proceedings in which by virtue of this section a person is proved to have been convicted of an offence by or before any court in Hong Kong- (Amended 37 of 1984 s. 11)

1. he shall be taken to have committed that offence, unless the contrary is proved; and
2. without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint, indictment or charge on which the person in question was convicted, shall be admissible in evidence for that purpose.

(3) …”

*D1’s negligence*

1. Mr Ng, in his closing submission, argued that because of the Brief Summary of Facts in D1’s careless driving charge described one version and the plaintiff gave two additional but different versions on how the two vehicles collided, there is insufficient evidence for me to find D1 negligent.
2. First, in the Brief Summary of Facts and the statement of claim, the collision was described as: “due to the short distance, the plaintiff could not brake and stop the Taxi in time and the off side front part of the Taxi had collided with the nearside rear body of the LVG.”
3. Second, in his witness statement, the plaintiff stated: “本人的的士車頭先與貨van的左邊車車頭轆位置碰撞…貨van的車頭再撞向本人的的士的右邊車身.”
4. Third, in the re-examination, the plaintiff stated the damage to the right rear door of the Taxi was caused by impact with the left rear body of the LGV.
5. Mr Ng submitted in *Lee Hang Kuen (the administratrix of the estate of Yim Ngo Ho, deceased) v Chan Hong trading as Chan Hong Kee & Another* HCPI 548 of 2002, the court held once there is a conviction, the facts of the conviction must be taken as proven, unless the contrary is proved.
6. Here, because the plaintiff gave two different versions of how the two vehicles collided, both versions are again different from the version in the Brief Summary of Facts, therefore the contrary has been proved and there is no reliable evidence for this court to find the D1 negligent.
7. I am afraid in concentrating his submissions on how the two vehicles collided, Mr Ng has completely missed the real issue on liability.
8. In *Lee Hang Kuen*, Deputy High Court Judge Muttrie (as he then was) stated:-

“The effect of the (section 62(2)) of the Evidence Ordinance is that, once there is a conviction, the person is taken to have committed the offence unless the contrary is proved. This means that **the facts on which the conviction is based** are taken as proved, unless the contrary is proved.” (Emphasis added)

1. The intersection of Wang Yip Street West and Hong Yip Street was controlled by a “Give way” sign on the Hong Yip Street side.
2. The May 2000 edition of the Road Users’ Code, published by the Transport Department, has this to say for drivers approaching “Give way” signs:-

“The ‘Give way’ sign and road markings- **you must give way** at the line to traffic on the major road. Stop if necessary. Give way to pedestrians crossing or waiting to cross the minor road.” (Emphasis added)

1. Although the Road Users’ Code was not submitted into evidence, all drivers are required to know its content and if necessary, I take judicial notice of the same.
2. When approaching a Give-way sign a driver, driving along a side road, is required to give way to traffic going on the main road. Here, Hong Yip Street was the side road and Wang Yip Street West was the main road. Thus, when D1’s LGV was approaching the intersection, he was required to give way to the Taxi, which was traveling on the main road.
3. In the Brief Summary of Facts of D1’s careless driving conviction, it was stated:-

“ Shortly before 1445 hours on 2010-08-11, PW1’s Taxi FU9882 was travelling along the northeast bound lane of Wang Yip Street West and upon reaching the junction of Hong Yip Street near lamppost No. H2082, Yuen Long, Deft’s Light Goods Vehicle (LGV) MM8793, which was travelling along northwest bound lane of Hong Yip Street, **suddenly emerged from the side road** in order to continue travelling along Hong Yip Street, and had **cut into the path of PW1’s Taxi**….” (Emphasis added)

1. Accordingly, D1’s careless driving conviction was based on his failure to give way, by “suddenly emerged from the side road” and “cutting into the path of the Taxi”. Which part of the LGV collided with which part of the Taxi and in what sequence is not the facts on which D1’s conviction was based.
2. Mr Ng also argued that the word: “suddenly” was equivocal, meaning D1 could have stopped at the Give way sign.
3. The problem with this argument is D1 was required to give way to the Taxi, merely stopping at the Give way sign is not sufficient.
4. In any event, D1 testified that when stopped at the Give way sign for 3 seconds, he did not see any traffic on Wang Yip Street West. Then after he emerged into the intersection. When he was in the intersection, he first saw the Taxi and within 1 or 2 seconds the two vehicles collided.
5. D1 also testified when he stopped at the Give way sign, he had 1000 feet unimpeded view on Wang Yip Street West.
6. If D1 was telling the truth, it will mean the Taxi had to travel 1000 feet within 2 seconds. Mr Stephen Fong, counsel for the plaintiff, calculated that will mean the Taxi was travelling at :-

(1000x 0.0003048) x 3600/2 hours = 548.64 km/hr

(1 foot equals 0.0003048 km and there are 3600 seconds in an hour)

1. Either the plaintiff had a world speed record taxi or D1 did not see the Taxi that was already traveling on Wang Yip Street West. The only logical explanation must be, D1 failed to give way to the Taxi because he simply did not see it.
2. That is sufficient evidence for me to find D1 was negligent. In any event, the careless driving conviction meant the burden of prove is on D1 and he has failed to satisfy this burden.

*D2’s liability*

1. D2 being D1’s employer, at the time of the accident, is jointly and severally liable for D1’s negligent act.

*Plaintiff’s contributory negligence*

1. As to contributory negligence, Mr Ng referred me to *Lang v London Transport Executive & Another* [1959] 1WLR 1168, in support of his proposition that the plaintiff was also negligent because he failed to take precaution that D1 may emerge from Hong Yip Street.
2. In *Lang* a collision occurred at a road junction between a bus and a motor-cycle, as result the motor-cyclist was killed. The bus was travelling along a major road at a speed of not more than 20 miles an hour approaching a junction with a minor road. The driver of the bus had seen some cyclist on the minor road and had said in evidence that he knew from experience anything could happen when approaching a side road on a main road. The motor-cyclist did not slow at a “Slow. Major Road Ahead” sign on the minor road and rode straight out into the major road and the collision occurred at the crossing.
3. In holding the driver of the bus negligent, Havers J. held:-

“The question, therefore, I have to consider in this case is: Was the possibility of danger reasonably apparent? The defendant White said he had seen the movement of cyclists in South Lane, so that he knew there were some cyclists approaching the main road from South Lane. He said in cross-examination, that he was aware, from his experience, that sometimes persons would suddenly emerge from a side road even when it was not prudent to do so. Sometimes children did the same thing. I think, therefore, that he was under a duty to take precautions against that possibility. He ought, as he approached South Lane, to have looked at the traffic in South Lane to see whether the deceased was still moving at 20 miles an hour and obviously intending to cross, or whether he was slowing down and going to wait for the traffic in the major road. If he had looked, in my view, the possibility of danger occurring would have been reasonably apparent to him....”

1. In other words, the bus driver in *Lang* was found negligent based on the fact that the possibility of danger was reasonably apparent to him because he knew there was some cyclist approaching the intersection from the side road and he may suddenly emerge from there.
2. In this case, if I believe D1’s testimony and he stopped at the intersection for 3 seconds before entering the intersection, having observed the LGV had stopped at the intersection, there is no reason for the plaintiff to anticipate that upon seeing the approaching Taxi, D1 would nevertheless proceed into the intersection when it was clearly dangerous to do so. The danger was therefore not reasonably apparent to the plaintiff.
3. If I believe the plaintiff’s evidence that he was 10 feet away from the intersection when he first saw the LGV emerging without stopping and it was too late for the plaintiff to stop. The danger was again not reasonably apparent to the plaintiff.
4. Based on either the plaintiff’s or the D1’s evidence, the possibility of danger was never reasonably apparent to the plaintiff. I therefore find no contributory negligence.

*Quantum*

*The Experts’ Opinion*

1. In the joint medical report, both experts agreed that the plaintiff suffered soft tissue injury of the neck from a sprain injury in the accident.
2. The experts also agree that the plaintiff has reached maximal medical improvement and no further investigation or intervention is needed.
3. Whilst Dr Chak opines that the plaintiff’s neck soreness was solely caused by the collision. Dr Lee opines that the x-rays taken on the day of admission after the injury already showed pre-existing degeneration of the cervical spine. Although the plaintiff reported no pre-existing neck pain, due to the plaintiff’s age and work as a taxi driver, there is a high likelihood that he would develop neck pain within 3 to 5 years.
4. Both experts agree that although the plaintiff suffers from mild neck soreness, he can resume his work as a taxi driver.
5. Dr Chak concluded that the plaintiff will require more frequent rest and his work hours may decrease and assessed a 3% reduction of earning capacity.
6. Dr Lee on the other hand opined that the impairment of work efficiency is mild and only occurs when the plaintiff had to lift luggage for his clients. The plaintiff should not require additional rest period than other taxi drivers and assessed a 1% reduction of earning capacity.

*PSLA*

1. Mr Fong relied on 4 cases as comparable for the claim of $300,000 for PSLA.
2. In *Yu Wai Kan v Law Cho Tai,* HCPI 62 of 2010, the plaintiff suffered psychiatric disabilities in addition to soft tissue “whiplash injury”.
3. HH Judge Marlene Ng (seating as Master of the High Court) held the defendant liable to the plaintiff for both soft tissue injury and psychiatric disabilities and awarded the plaintiff PSLA in the sum of $320,000.
4. Although the psychiatric disabilities were due partly to a pre-existing by-polar condition, HH Judge Ng held:-

“Adopting a common sense approach, it is highly arguable that the Accident is an effective cause of the plaintiff’s post-Accident psychiatric disabilities. The defendant must take the plaintiff as he finds him, and is not relieved of responsibility for the symptoms caused or increased by his particular susceptibility.”

1. In *Law Yau Keung v Chu Sai Chuen*, HCPI 846/2011, Master Roy Yu found the plaintiff in that case suffered from mild soft tissue injury and after the accident, mild PTSD and awarded $150,000 for PSLA.
2. In *Tai Yuk Wong v Chong Kwok Fung & others*, DCPI 1405/2005, HH Judge Yuen (as she then was) found the plaintiff in that case suffering from residual mild neck and shoulder pain; and had to give up his skiing activity as a result of his injuries. An awarded of $150,000 for PSLA was given.
3. In *So Kim Lung v Lee Pak Wai*, HCPI 494/2010, in a case where the plaintiff suffered minor injury to soft tissues on his lower back and neck, with a residual mild pain and ach at the neck and lower back, Master J. Wong awarded the plaintiff $120,000 for PSLA.
4. Mr Ng also relied on four cases for his proposition that PSLA should be less than $100,000.
5. In *Cheng Wai Hung v Kwok Fuk Kwan James*, DCPI 2032/2007, a case where the plaintiff suffered a sprained neck, HH Judge Chow awarded $80,000 as compensation for PSLA.
6. In *Li Ting Fai v Woo Chi Keung*, DCPI 807/2007, where the plaintiff was found to be suffering from not a serious case of whiplash injury of the neck, Deputy District Judge K. Lo (as she then was) awarded $90,000 for PSLA.
7. In *Wong Kin Hung v Chan Wai Ming*, DCPI 1223/2006, a case where the plaintiff suffered from minor soft tissue injuries, Deputy District Judge A.B. bin Wahab awarded the plaintiff $70,000 for PSLA.
8. In *Fan Jian Hui v Chan Hak Man and another*, DCPI 2095/2008, HH Judge Chow awarded the plaintiff $60,000 as PSLA.
9. *Yu Wai Kan* is clearlynot comparable, because the plaintiff here did not suffer from any psychiatric disabilities as a result of the accident.
10. *Law Yau Keung* is also incomparable, because the plaintiff did not suffer from PTSD.
11. *Tai Yuk Wong* is not comparable because the plaintiff did not have to give up any recreational activity as a result of the injury.
12. After carefully considering the other cases, the plaintiff’s advance age at the time of the accident and comparing the plaintiff’s injury with those suffered by the plaintiffs in the other five cases, I would award $120,000 under PSLA.

*Pre-trial loss of earnings*

1. The plaintiff alleged at the time of the accident, he was earning an income of $15,000 per month. The plaintiff however, has no evidence to support this allegation.
2. The plaintiff was a self-employed taxi driver. He received all of his income in cash. He gave all of it to his wife for family expenses, keeping a small amount for his daily use. He kept a bank account only for the purpose of paying his taxi rentals.
3. Mr Ng argued that the without documentary evidence in support, I should not believe the plaintiff.
4. Although there is no direct evidence in support of the plaintiff’s income, there are however indirect evidence.
5. First, there are the taxi rental receipts that shows the plaintiff rented a taxi for “special shift”, meaning for both the day and night shifts. This clearly supports the plaintiff’s submission that he worked as a taxi driver before the accident.
6. Second, and this is only from my own observation and anecdotal information I gain from daily news reports, $15,000 per month is an amount that is fair and reasonable for someone who works 12 hours a day driving a taxi in Hong Kong.
7. I therefore accept the plaintiff’s pre-accident income was $15,000 per month.

*The sick leave period*

1. Mr Fong submits that the proper sick leave period should be 23 months; and Mr Ng submits it should only be 4 ½ months.
2. In the joint expert report, Dr Chak opines that for this type of injury, a sick leave period of 1 year is reasonable. Dr Lee on the other hand opines that because after 10 physiotherapy sessions, the plaintiff claimed his condition had improved and then failed to follow up on further physiotherapy, his sick leave should be up to the end of December 2010*.*
3. The plaintiff’s claim of 23 months sick leave is considered by both experts as excessive, I therefore reject the 23 months sick leave claim. The issue is should I accept Dr Chak or Dr Lee’s opinion?
4. A careful review of the medical certificate reveals that after the accident, the plaintiff received continuous sick leave for neck pain from 11.8.2010 until 9.12.2010.
5. Thereafter sick leave stopped and did not start again until 24.2.2011 to 5.7.2011, where the reason for the sick leave changed to right wrist pain.
6. Both experts agreed that the plaintiff’s elbow, wrist, leg stiffness and pain at the sole are not related to the injury suffered in the accident and therefore this period of sick leave cannot be included.
7. It is not until 30.8.2011 that the sick leave was started again for neck pain. This time the sick leave continued to 11.7.2012.
8. What happened on 9.12.2010 for the sick leave to stop? A look at the consultation summary dated the same day reveals the plaintiff told the government medical officer he was “pain free”.
9. In the next consultation summary dated 24/2/2011, the government medical officer also noted the plaintiff reported there was “no more neck pain”.
10. In the consultation summary dated 21.4.2011, the government medical officer reported the plaintiff stated: “neck pain much resolved now complain of right wrist pain”.
11. In the consultation report dated 30.8.2011, for no apparent reason, the plaintiff complain there was continued neck pain since August 2010.
12. Although the plaintiff denied telling the medical officers he was “pain free” on 9.12.2010 or there was “no more neck pain” on 24/2/1011, I find it difficult to believe different government medical officers will falsify medical records, when there is no possible motive for them to do so.
13. Having considered all of the above, I find Dr Lee’s opinion supported by the consultation summaries and I find the appropriate sick leave period should be 4 1/2 months or $15,000 x 4.5 = $67,500.

*Pre and post-trial loss of income*

1. On reduction of earning capacity, the experts differ. Dr Chak concluded that the plaintiff will require more frequent rest and his work hours may decrease and assessed a 3% reduction of earning capacity.
2. Dr Lee on the other hand opined that the impairment of work efficiency is mild and only occurs when the plaintiff had to lift luggage for his clients. The plaintiff should not require additional rest period than other taxi drivers and assessed a 1% reduction of earning capacity.
3. Both experts agree that although the plaintiff suffers from mild neck soreness, he can resume his work as a taxi driver; however, the plaintiff did not return to work.
4. Irrespective of not having returned to work, the plaintiff nevertheless, claims there was a 1/3 notional reduction of his earning capacity and claims $5,000 loss of pre-trial income for 22 months and 22 days.
5. The plaintiff also alleged he intended to work until he is 76 years old and due to his old age, prepared to accept a monthly reduction of $3,000 or 20% reduction of earning capacity.
6. These claims are plainly wrong. Unlike a normal employee who must work during work hours assigned by his employer, the plaintiff was a self-employed taxi driver, who rented a taxi for the full day and as a result, unlike taxi drivers who rent only the day or night shift, the plaintiff can set his own work hours.
7. The plaintiff testified that before the accident, his work hours were: 6:30 am to 12:00, then he would take a half-hour for lunch; he would start again at 12:30pm, work until 2:00 pm; then he would rest from 2:00 pm to 5:00 pm; he would work from 5:00 pm to 8:00 pm; from 8:00 pm to 9:00 pm he would have dinner and rest at home; he would then work from 9:00 pm to mid night.
8. Accordingly, prior to the accident, the plaintiff was already taking 3 rest periods totaling 4 ½ hours per day. In the event he needs additional rest, there is nothing to prevent the plaintiff to adjust his rest periods as required, with no reduction to his income.
9. But all of these are academic, because irrespective of the plaintiff’s stated wish to work until 76, he chooses not to return to work after the expiry of the original sick leave period on 9.12.2010, when he reported to the medical officer on the same day he was “pain free”.
10. There are only two possible explanations for the plaintiff’s decision not to return to work after 9.12.2010: (1) he decided to retire from the work force; or (2) he was malingering and hoping for a large pay-off from the defendants.
11. Either way, considering the fact that the experts agreed the plaintiff’s impairment of work efficiency is very low; the plaintiff has full control over his rest period if he decided to return to work; the plaintiff choose to stop working even though he reported on 9.12.2010 he was pain free; and both experts consider him fit to return to work, I find after 9.12.2010 the plaintiff suffered no further loss of income as a result of his injury.

*Loss of MPF*

1. The plaintiff was a self employed taxi driver and under cross-examination admitted he has never enrolled in any MPF scheme. There was no MPF and consequently no loss of MPF.

*Special damages*

1. The defendant agreed to the plaintiff’s claim for $6,347 as medical expenses and $400 for travelling expenses.
2. The only disputed item is $5,000 for tonic food. Mr Fong submitted the tonic food in question was chicken soup. Mr Ng argued that $5,000 for chicken soup was excessive and suggested a figure of $2,000.
3. In view of the fact that there is no receipt or any other evidence in support of this item of claim, I accept Mr Ng’s submission that $2,000 is a more reasonable figure.

*Orders*

1. I make the following awards to the plaintiff:-

PSLA $120,000

Loss of earning (sick leave) $67,500

Special damages $8,747

$196,247

1. I order that the defendants do pay, jointly and severally, the sum of $196,247 to the plaintiff, with interest: on $76,247 at half judgment rate from the day of the accident until the day of this judgment; on $120,000 at 2% per annum from the day of filing of this claim until the day of this judgment; and on $196,247 from the day of handing down of this judgment until full payment is received.

*Costs*

1. I make an order nisi, to be made absolute in 14 days, that the defendants do pay the plaintiff, jointly and severally, costs of this action, to be taxed, if not agreed, with certificate for counsel.
2. The plaintiff’s own costs be taxed in accordance with Legal Aid regulations.

( Anthony Chow )

Deputy District Judge

Mr Stephen Fong, instructed by Wong, Kwan & Co, for the plaintiff

Mr Ernest CY Ng, instructed by Cheung Wong & Associates, for the defendants