#### DCPI 508/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 508 OF 2012

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BETWEEN

HUSSAIN BASHARAT Plaintiff

and

曾慶裕 1st Defendant

TSANG KWOK KEUNG 2nd Defendant

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##### Before: Deputy District Judge L C Cheng in Court

Date of Hearing: 27-28 and 30 April 2015

Date of Judgment: 1 June 2015

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JUDGMENT

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*Introduction*

1. The plaintiff’s claim is for damages for personal injury, loss and damage arising out of the negligent driving of a mini bus driven by the 1st defendant on 24 September 2010. The 2nd defendant was the owner of the mini bus.
2. Interlocutory judgment was entered against the 1st defendant on 16 September 2014. Having read the affirmation of Mr Mok, legal executive of the solicitors firm acting for the plaintiff, I am satisfied that the plaintiff had properly informed the 1st defendant of the trial dates. I therefore decide to proceed this trial in his absence.

*The accident*

1. At about 1:26 am on 24 September 2010, the plaintiff got on the mini bus. When he intended to walk towards the rear seat, he lost his balance and fell on the floor. He therefore sustained injury.

*The issue of trial*

1. At the beginning of the trial, Mr Lai, solicitor for the plaintiff, confirmed that he would not pursue the case against the 2nd defendant on the basis that the 2nd defendant had failed to take out the necessary insurance policy.
2. Accordingly, there are only 3 issues of trial:-
3. Was the 2nd defendant vicariously liable for the negligent driving of the 1st defendant?
4. Was the plaintiff contributory negligent? and
5. The quantum of damages.

*Plaintiff’s case*

1. The plaintiff testified that on 24 September 2010, he got on the mini bus driven by the 1st defendant. He intended to take the seat at back row and at that juncture, the 1st defendant suddenly started the mini bus. He lost his balance and fell down. As a result, he sustained injury to his right elbow, right shoulder and back.

*2nd defendant’s case*

1. The 2nd defendant testified that he was not in Hong Kong on the accident day and was not aware of the accident at that time. He admitted that he was the registered owner of the mini bus. He would drive the mini bus from 3:00 am to 3:00 pm either by himself or his substitute driver. The 1st defendant would drive the mini bus between 3:00 pm to 3:00 am pursuant to a contract.

*Issue 1 : vicarious liability*

1. The 2nd defendant, being the registered owner of the mini bus, was prima facie vicariously liable for the negligent act of the driver, namely the 1st defendant (see *Chong Ngan Seng v China Harbour Engineering Co Ltd* [2013] 2 HKLRD 223).
2. Ms Siu, counsel for the 2nd defendant, did not dispute that the 1st defendant was negligent but submitted that the relationship between the 1st and 2nd defendants was neither an employer and employee, nor a principal and agent.
3. The 2nd defendant testified in court that he had rented the mini bus to the 1st defendant at $600 per day for about 9 years. In support of his contention, he produced a copy of a leasing agreement.
4. Mr Lai commented the overall credibility of the 2nd defendant. He submitted that it is hard to believe that the 2nd defendant did not adjust the rent for 9 years. Further, he doubted how the 2nd defendant could rent the mini bus, which was manufactured in 2004, to the 1st defendant in 2003.
5. There is no evidence in court about the market rent of a mini bus for the relevant period. However, there were too many considerations for the 2nd defendant to adjust the rent of his mini bus. A long and stable relationship with the driver was apparently one of them. I therefore do not find it unreasonable for the 2nd defendant not to adjust the rent over the years.
6. In the witness statement, the 2nd defendant stated that he had rented the mini bus to the 1st defendant since 2003. According to the documentary evidence, the mini bus was manufactured in 2004. When he was cross-examined in this aspect, he explained that he had an old mini bus rented to the 1st defendant in 2003 and upon purchase of a new one in 2004, he rented it to the 1st defendant. His explanation is reasonable.
7. Having heard the 2nd defendant in court, I accepted his evidence. Although he was not well educated, he would give answer directly. He was unshaken throughout the trial. Although the leasing agreement was undated and did not specify the amount of the rent, I do not find it strange or unreasonable in view of the education level of the 2nd defendant. Taking all the evidence into account, I accept the 2nd defendant was an honest and reliable witness. He had a contract with the 1st defendant for leasing the mini bus.
8. Mr Lai also submitted that the leasing agreement is not a genuine leasing agreement but instead an employment or an agency agreement in substance. In particular, he pinpointed that clause 1, 2 and 6 of the leasing agreement allowed the 2nd defendant some control over the mini bus. Clause 4 and 5 capped the liability of the 1st defendant at $30,000 respectively for repair cost and additional insurance charges due to traffic accident. He submitted that the 2nd defendant had retained control of the mini bus.
9. I accept that the leasing agreement allowed the 2nd defendant a certain degree of control over the repair and maintenance of the mini bus. Also, the 1st defendant was not contractually free to find a substitute driver. Besides, the leasing agreement prohibited the 1st defendant from driving the mini bus during inclement weather, carrying out illegal activities and using unauthorized oil. However, I find that these prohibitions aimed at protecting the mini bus owner instead of controlling the driver in doing his business. Taking all the evidence into account, the 2nd defendant only retained the control over how the mini bus was to be used but not how the 1st defendant operated his own business. The 2nd defendant had no share of the profit generated by the 1st defendant. I do not find that the 1st defendant was acting as an agent for the 2nd defendant.
10. The leasing agreement specifically stated that the 1st and 2nd defendants were not employer and employee. The law of what constitute that kind of relationship is clear : see *Poon Chau Nam v Yim Siu Cheung* [2007] 1 HKLRD 951. The 2nd defendant never admits that he was the employer of the 1st defendant. I find no evidence to support that the 1st defendant was an employee of the 2nd defendant at the time of the accident.
11. Taking all evidence into account, I find that the 2nd defendant had rented the mini bus to the 1st defendant, who was operating his own business. Accordingly, the 1st defendant was neither an agent nor a servant for the 2nd defendant. In the circumstance, the 2nd defendant was not liable in this case.

*Issue 2 : contributory negligent*

1. In light of my decision, it is academic to consider if the plaintiff was contributory negligent. I shall deal with that for the sake of completeness.
2. Ms Siu submitted that the plaintiff was negligent. She relied upon the police case details report dated 24 September 2010, which did not mention anything about sudden starting or high speed of the mini bus. Rather, the report stated that :

“the [plaintiff] ran from the front seat to the rear seat”

1. However, the police was apparently not inside the mini bus at the material time. There was no evidence to explain why the police stated that the plaintiff was running. I do not think that that piece of hearsay evidence is sufficient to substantiate any contributory negligent on the part of the plaintiff. Therefore, I find no contributory negligent in this case.

*Issue 3 : Quantum of damages*

1. The plaintiff came from Pakistan and entered Hong Kong in 2007. He then applied for the refugee status and started staying in Hong Kong. He was not allowed to work.
2. After the accident, he was admitted to the A&E department of Queen Elizabeth Hospital and was diagnosed to sustain injury to his right elbow, back and right shoulder. Afterwards, he got pain and reduced range of movement over his right shoulder and elbow. He received 14 sessions of physiotherapy. He was granted sick leave from 24 September 2010 to 25 October 2010, 28 October 2010 to 11 January 2011, 8 March 2011 to 30 June 2011 and 16 April 2011.
3. The medical evidence supports that he sustained soft tissues sprain and contusion to his right shoulder, right elbow and lower back. The tenderness and pain over his lower back and right shoulder would not resolve completely. When the plaintiff gave evidence in court, he still complained that after a prolonged sitting for about 2 hours, he was painful.
4. Mr Lai submitted that $100,000 is a reasonable sum for PSLA and cited 3 cases in support : *Chow Ka Kat v Yiu Hsing Development Ltd,* HCPI 495/2010; *Mahmood Tariq v Kinway Engineering Ltd & others* HCPI 149/2006; *Chu Chin Wang Geroge v Wong Wai Man formerly trading as Sakura Japanese Restaurant,* DCPI 1316/2008.
5. Ms Siu submitted that a reasonable sum of PSLA is within the range of $50,000 and $70,000 and cited 2 cases in support : *Fu Chuen Sing v Ryan (HK) Limited*, DPCI 2135/2009; *譚惠安 對 陳力恆 and Tsun Tai Stationary Manufactory Limited*, DCPI 465/2009.
6. Each case must be decided on its own fact. Considering the authorities cited and having regard to the medical condition of the plaintiff, I find that a fair and reasonable amount of PSLA should be $100,000.
7. Based on the decision in *Abu Bakkr Shiddik v Elahi Manzor & Yavar Ali*, DCPI 1204/2010,Mr Lai agreed that the plaintiff would not make any claim for the loss of earnings.
8. Since the plaintiff was not allowed to work in Hong Kong, Mr Lai conceded that it would be difficult to anticipate what kind of work the plaintiff might take up in future and accordingly would not make any claim for loss of future earnings.
9. In the circumstance, I will not award any pre-trial loss of earnings, future loss of earnings and loss of earning capacity in this case.
10. The plaintiff was not required to pay for medical expenses by reason of his status. No award under this heading will be allowed.
11. In the absence of receipt and justification for the expenses of tonic food, I will not allow any award under this heading.
12. The plaintiff was residing at Sham Shui Po district and was required to travel to Queen Elizabeth Hospital for each medical attendance. Mr Lai and Ms Siu had helpfully worked out that the total traveling expenses would be $220. I agree that is a reasonable sum.
13. In summary, the plaintiff is entitled to the following compensation against the 1st defendant:-

HK$

(A) PSLA $100,000

(B) Pre-trial loss of earnings nil

(C) Loss of earning capacity nil

(D) Future loss of earnings nil

(E) Special damages $220

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Total : $100,220

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*Interest*

1. There will be interest on general damages at 2% per annum from date of writ to the date of this assessment and on special damages at half judgment rate from date of accident to the date of this assessment.

*Costs*

1. Costs follows event. There will be an order *nisi* against the 1st defendant to pay costs of this action to the plaintiff to be taxed if not agreed. As between the plaintiff and the 2nd defendant, an order *nisi* that the plaintiff do pay cost to the 2nd defendant to be taxed if not agreed with certificate for counsel. The plaintiff’s own costs be taxed with the Legal Aid Regulation. The order *nisi* for costs shall become absolute 14 days after today unless a party has applied to the court for varying the order.

# (L C Cheng)

Deputy District Judge

Mr Lai Man Chun Anthony, of M.C.A. Lai & Co for the plaintiff

The 1st defendant was not represented and did not appear

Miss Siu Rachael Suk Yu, instructed by Lim & Lok for the 2nd defendant