## DCPI 798/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 798 OF 2008

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##### BETWEEN

CHAN LAI PO Plaintiff

### and

AU WAI KIT Defendant

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Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 15 - 16 July, 2009

Date of handing down Judgment : 13 August, 2009

# JUDGMENT

**Background**

1. Mdm. Chan was carrying out street cleaning duties on Kam Tin Road in the New Territories on 17 April 2005. At about 9:30 am., she was knocked down by a vehicle driven by Mr. Au in the direction of Tai Po. As a result of the accident, Mdm. Chan suffered multiple injuries, including dislocation of the left acromio-clavicular joint, tenderness at her left shoulder and left hip, a fractured left fibula, ptosis and phthalmoplegia of the left eye and injury to the left parietal region of her scalp. She was hospitalized for 6 days, and received sick leave of a total of 914 days. These proceedings are instituted by Mdm. Chan against Mr. Au for recovery of damages.
2. By way of defence, Mr. Au denies that he was negligent in his driving. Further and alternatively, Mr. Au claims that the accident was caused wholly or materially contributed to by Mdm. Chan's negligence in failing to keep a proper lookout when she crossed the road, by suddenly crossing the road without any prior indication of her intention to do so, by running out onto the road, and by crossing the road at the time when it was unsafe for her to do so.

**The issues**

1. The issues for determination at trial are :
   1. whether the accident was caused in any way by the negligence on the part of Mdm. Chan;
   2. whether the accident was caused by Mr. Au's negligence; and
   3. the amount of damages for which Mr. Au may be liable.

**Whether the accident was caused in any way by the negligence on the part of Mdm. Chan**

1. Mdm. Chan has been employed by the Food and Environmental Hygiene Department ("**FEHD**") as a cleaning worker since 1998. At the time of the accident in April 2005, she had been working in the vicinity of the scene of the accident for about 3 years. Her duties include sweeping the pavement and the sides of the road, collecting garbage from the garbage bins, and collecting bags of rubbish left on the pavement. Her daily working hours were from 7:30 am to 4 pm. On the day of the accident, as it was a Sunday, Mdm. Chan claims that she was only required to sweep one side of Kam Tin Road. She was required however to collect the bags of rubbish from both sides of the road, to put them in a trolley, and to take the rubbish bags to the garbage collection points.
2. In her witness statement filed in these proceedings, Mdm. Chan claims that she did not have a clear recollection of the events of the accident as a result of the collision. However, Mdm. Chan disagreed with Mr. Au 's account of the accident, to the effect that she had rushed out onto the road.
3. Mdm. Chan had made 4 statements to the police. In her first statement made on 29 April 2005, Mdm. Chan claimed that after the accident, she was unable to recall anything about the accident. The police took a cautioned statement from her for "pedestrian negligently endangering her own safety". Mdm. Chan maintained in the statement that she had no recollection of how the accident had happened, only that she was doing cleaning work at the material time.
4. On 17 August 2005, Mdm. Chan made a third statement to the police. She stated that she was crossing Kam Tin Road at the relevant time when she was hit by the car.
5. On 18 August 2005, Mdm. Chan made a final statement to the police in which she clarified that whilst she was working at the material time of the accident, there was no need for her to cross the road. She could not recall how the accident happened.
6. I consider that the evidence given by Mdm. Chan to the police as to the circumstances of the accident is totally unreliable. She was clearly apprehensive of being charged with an offence, and was hence evasive as to how the collision had occurred. It was suggested that Mdm. Chan was suffering from amnesia as a result of the accident, and hence could not recall details of the accident. In court, however, Mdm. Chan emphasized that it was ***not*** that she had no recollection of the collision. Rather, she stressed that she had not seen Mr. Au 's car at all before she was hit. She accepted that her work required her to cross the road, in order to collect the bags of rubbish on the other side of the road where she was cleaning the pavement and the side of the road.
7. Although Mdm. Chan insisted that she had not seen Mr. Au 's car before the collision, she maintained in the course of her cross-examination that she had looked to both sides of the road before she had crossed. She maintained that she had not run out onto the road, saying that there was no need for her to do so. Her evidence is that she was looking ahead when she crossed, and she did not stand at the center of the road to look at both sides before proceeding.
8. Mr. Au claims that he was driving his car along Kam Tin Road at approximately 40 kph. The speed limit at the location was 50 kph. He claims that there was a vehicle traveling in front of his car, and that a bus was traveling behind his car. Mr. Au 's evidence is that when he was about 10 m and 2 car-lengths away from the scene of the accident, Mdm. Chan dashed out onto the road in quick steps from his right side. He had immediately braked, but was not able to stop the car in time. Mr. Au claims that he had not seen Mdm. Chan waiting at the pavement to cross the road. When he first saw Mdm. Chan, she was looking to her right and had already stepped out onto the road. It is Mr. Au 's case that the suddenness with which Mdm. Chan appeared did not give him time either to sound his horn or to stop his car in time to avoid hitting Mdm. Chan.
9. There is no evidence to contradict, and no basis for me to doubt, Mr. Au 's evidence that he was traveling at 40 kph at the material time. It is also clear from the evidence that Mdm. Chan was hit on Mr. Au's side of the two-lane carriageway of Kam Tin Road. Mdm. Chan repeated in evidence that there was no necessity for her to rush out onto the road. Even taking into consideration the fact that Mr. Au accepted in cross-examination that the distance between Mdm. Chan and his car could be slightly greater than 10 m when he first saw her, I consider from the entirety of the evidence that the only reason why Mdm. Chan had not seen Mr. Au 's car is that she had not in fact looked to her left before commencing to cross the road. It is also apparent from Mdm. Chan's evidence that she had not paused at the center of the carriageway to check the traffic on her left before proceeding to cross to the other side of the road. If she had in fact looked to her left, there is no reason why she could ***not*** have seen Mr. Au's car approaching.
10. Considering the entirety of the evidence, I consider that the accident was caused substantially by Mdm. Chan's lack of care. She had not checked the condition of the traffic on her left before commencing to cross the road, and she had failed to pause at the central dividing line or to look to her left, before she continued to cross to the other side. If she had looked to her left at any time, she should have been able to see Mr. Au 's car before it was near enough to hit her.

**Whether the accident was caused by Mr. Tang's negligence**

1. I accept Mr. Au 's evidence that he was driving his car at a reasonable speed. The stretch of the road was approaching a roundabout, and a driver at Mr. Au’s location would be slowing down. Mr. Au claims that he had not seen Mdm. Chan on the side of the road before the accident, and that when he first saw her, she had already stepped out onto the opposite carriageway and was proceeding to cross to Mr. Au 's side of the road. It was suggested that the spot where Mdm. Chan had stepped off the pavement was shady under a tree, and that one could not see the pavement at that location so clearly. Although the location of the accident was near a bus stop, the evidence suggests that it was a relatively quiet spot, and there is no evidence that there were pedestrians waiting on either side of the pavement.
2. Mr. Au accepts that it was only his estimate that Mdm. Chan was about 10 m away when he first saw her, and that the actual distance may be slightly more. However, I accept that if he was driving at 40 kph, the overall shortest possible stopping distance would be 20 m, according to the Road Users' Code. I do not consider that he could be faulted for not sounding his horn in the short period of time in which he had to react, and to stop his car. I accept his evidence that he had braked immediately, but that the car could not be stopped in time to avoid the collision.
3. Nevertheless, it is the duty of the driver of a vehicle to keep a good lookout (para.9-224, Charlesworth & Percy on Negligence). A driver will be held negligent if he fails to notice in time that the actions of another person has created a potential danger. When there are pedestrians about, the driver must be ready in case they step out from a street refuge or a footpath, or from behind a vehicle or other obstruction.
4. On the evidence, I consider that the accident was partly caused by Mr. Au 's lack of care. If Mr. Au had maintained a proper and sufficient lookout, he could have noticed Mdm. Chan on the side of the road where she was working, and before she commenced to cross the road. Mr. Au accepted that if he had made a point of looking, he would have seen Mdm. Chan on the side of the road, despite the shade.
5. I have considered the authorities cited by counsel. Needless to say, each case has to be decided on its own merits. On the facts of this case, I consider that the proper apportionment of blame between Mdm. Chan and Mr. Au in all the circumstances should be 75% and 25% respectively.

**The amount of damages for which Mr. Au may be liable**

1. It is not seriously disputed that Mdm. Chan sustained serious injuries as a result of the unfortunate accident. She complains of headache, dizziness and nausea, and has been diagnosed to have suffered from post-concussion syndrome. The neurological experts estimate that Mdm. Chan suffers permanent impairment of the whole person, at 5% according to Mdm. Chan 's expert, and at 3% according to Mr. Au 's expert.
2. Further, Mdm. Chan complained of intermittent left shoulder pain, weakness and stiffness of the left shoulder, and a decreased range of left shoulder movement. She also complains of continuous low back pain. It is claimed that her shoulder and back pain affected her performance in doing heavy lifting and other manual work. Mr. Au’s medical expert considers that Mdm. Chan has made good recovery from her shoulder and leg injury.
3. As a result of the head injury caused by the accident, Mdm. Chan suffers from left traumatic 3rd nerve palsy. She has double vision and photophobia. Further, there are restricted extra-ocular movements of her left eye. Based solely on the condition of her eye, Mdm. Chan 's expert considered that the level of permanent impairment of the whole person is 34%, based on 30% impairment of the whole visual system.
4. Considering the decisions cited by Counsel, I consider that a reasonable award for Mdm. Chan 's pain and suffering is **$500,000**.
5. The parties agree that Mdm. Chan's pre-trial loss of earnings are **$340,160.33**.
6. Mdm. Chan was 49 years old at the time of the accident, and is aged 53 now. She resumed her duties with FEHD upon the expiry of her sick leave on 16 October 2007. As a result of her injury, she was transferred to indoor duty, where she has been working until now. On the evidence, I am not satisfied that there is any substantial or real risk that she would lose her job. I therefore make no award in respect of any loss of earning capacity.
7. Mr. Au does not dispute Mdm. Chan 's claims for medical expenses of **$994**, and for bonesetter fees of **$3,000**. I am not prepared to make any further award, over and above the sum of **$15,000** for Mdm. Chan's traveling and medical expenses incurred in China, and the sum of **$10,000** for tonic food, which amounts I consider to be reasonable.
8. Mr. Au has also agreed Mdm. Chan's future medical expenses of **$1,360**.
9. Accordingly, the total award is as follows :

PSLA $500,000.00

Pre-trial loss of earnings $340,160.33

Special damages $ 28,994.00

Future expenses $ 1,360.00

Total: **$870,514.33**

*Less* 75%

contributory negligence: **$217,628.58**

1. However, an amount of $565,655.04 was already received by Mdm. Chan for employees compensation. After giving credit for this amount, no monetary judgment will result. Mdm. Chan 's action should accordingly be dismissed.
2. I have no alternative but to make an order nisi that the costs of the action are to follow the event, and be paid by Mdm. Chan to Mr. Au, to be taxed if not agreed, with certificate for counsel. Mdm Chan's own costs are to be taxed in accordance with the Legal Aid Regulations.

(Mimmie Chan)

District Judge

*Mr. Jackson Poon, instructed by Messrs. Huen & Partners (assigned by the DLA) for the Plaintiff*

*Mr. Patrick Lim, instructed by Messrs. Kenneth C.C. Man & Co. for the Defendant*