## DCPI 1059/2007

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1059 OF 2007

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##### BETWEEN

CHAU CHI WAH Plaintiff

and

WONG KWOK MING Defendant

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Coram : Deputy District Judge J. Ko in Court

Dates of Hearing : 11 & 12 March 2008

Date of Handing Down Judgment : 18 April 2008

JUDGMENT

1. This trial is concerned with the collision between the motorcycle driven by the Plaintiff and the public light bus (“PLB”) driven by the Defendant at the junction of Pik Wan Road and a minor road leading to Kwong Tin Estate Bus Terminus (hereinafter called “the Minor Road”) sometime after noon on 24th September 2006.
2. The Plaintiff is claiming against the Defendant for loss and damage caused by the Defendant’s negligence. The Defendant denies liability and counterclaims for loss and damage as a result of the Plaintiff’s negligence.

## Liability

1. Pik Wan Road is a dual carriageway with one lane in each direction. There are “give way” sign and road markings at the material junction obliging traffic emerging from the Minor Road to give way to traffic traveling on Pik Wan Road.
2. The Plaintiff’s motorcycle was traveling southbound along Pik Wan Road towards Yau Tong when the Defendant’s PLB emerged from the Minor Road and cut across southbound Pik Wan Road in order to turn onto northbound Pik Wan Road.
3. According to the Defendant, he did stop at the junction to observe the traffic condition before emerging. There were two PLBs traveling on southbound Pik Wan Road and the first one had just begun turning onto the Minor Road. There was no traffic on northbound Pik Wan Road. The Defendant then drove forward, making a right turn onto northbound Pik Wan Road. As he was aligning his PLB with northbound Pik Wan Road, he saw the Plaintiff’s motorcycle traveling at high speed on southbound Pik Wan Road close to the central dividing line trying to overtake the second PLB in front of it. The Plaintiff lost control of his motorcycle and fell. The motorcycle skidded towards and eventually collided with the Defendant’s PLB. It is the Defendant’s case that the collision was caused by the Plaintiff overtaking the PLB at an excessive speed and losing control of his motorcycle.
4. I do not find the Defendant’s testimony credible.

(a) The Defendant is unable to maintain a consistent account of how the collision happened. He was adamant that the Plaintiff’s motorcycle was all along behind the second PLB. When he was asked about the positions of the Plaintiff’s motorcycle and the second PLB when he first noticed the Plaintiff’s motorcycle, he estimated the Plaintiff’s motorcycle to be about 7 m away and the second PLB to be about 3-PLB lengths (or 15 m) from his PLB. If that was the case, the Plaintiff’s motorcycle could not have been behind the second PLB. When he was re-examined on this point, the Defendant changed his evidence and said that the second PLB should only be one odd PLB length from him (i.e. 5 m) when he first noticed the Plaintiff’s motorcycle, thus putting the Plaintiff’s motorcycle behind the second PLB.

(b) After the collision, the Defendant was charged with the offence of careless driving. He pleaded guilty before the Magistrate and was convicted of the offence. According to the brief facts he admitted, the Defendant had failed to pay attention to the Plaintiff’s motorcycle which was traveling on southbound Pik Wan Road before his PLB emerged from the Minor Road.

The Defendant tries to explain at the trial that he pleaded guilty with a view to save costs and time. But this is inconsistent with his testimony that his employer would not have deducted $2,000 from his salary had he not been convicted of careless driving.

During cross-examination, the Defendant was asked whether he still agreed with the brief facts he had admitted in the Magistracy. The only matter in the brief facts he now disputes is the statement that the road surface was dry at the time of the collision. He does not dispute the fact that he failed to pay attention to the Plaintiff’s motorcycle.

1. According to the Plaintiff, there was only one PLB in front of him along Pik Wan Road. Upon reaching the junction, the preceding PLB turned left. The Plaintiff slowed down his motorcycle to less than 30 kph. His distance from the preceding PLB was then shortened to about 2-3 m. When the preceding PLB had almost completed its turn, the Plaintiff saw the Defendant’s PLB suddenly emerging from the junction cutting across his path. The Plaintiff braked abruptly to avoid a collision causing his motorcycle to fall sideways. It then span and skidded at an angle towards the Defendant’s PLB and eventually collided with it. It is the Plaintiff’s case that the collision was caused by the Defendant failing to give way at the junction.
2. The Defendant’s counsel seeks to discredit the Plaintiff’s case in his final submission. However, none of his submissions, whether considered individually or collectively, has caused me to doubt the Plaintiff’s testimony.

(a) Exhibit 1 is a sketch drawn by the police officer attending the scene, marked with the positions of the Plaintiff’s motorcycle and the Defendant’s PLB after the collision. The Plaintiff was invited to mark on the exhibit the location of his motorcycle when he first saw the Defendant’s PLB. Based on the relative position of the vehicles on Exhibit 1, the Defendant’s counsel submits that the collision could not have occurred in the way depicted by the Plaintiff as the Plaintiff’s motorcycle, given its forward motion, could not have skidded backward to collide with the Defendant’s PLB.

In my view, Exhibit 1 is meant to be a crude representation of the layout of the scene only. One must be careful not to read too much into the sketch. First, the sketch was not drawn to scale, as the police officer had crossed out the scale. Secondly, it is clear from the way the Plaintiff represented his motorcycle on the sketch that he did not quite adopt the scale used by the police officer. He marked his motorcycle with a rectangle which is almost as large as the rectangle used by the police officer to represent the Defendant’s PLB. It is therefore unsafe to draw any conclusion solely based on the relative position of items marked by different persons on Exhibit 1.

The Defendant confirms the Plaintiff’s testimony that the motorcycle fell sideways and skidded towards his PLB. In those circumstances, I accept that the motorcycle span and skidded not directly forward but at an angle towards the Defendant’s PLB as testified by the Plaintiff.

(b) The submission that the Plaintiff’s motorcycle was traveling too fast and/or too close to the preceding PLB is not supported by evidence. I do not find the calculation of the hypothetical stopping distance helpful in the circumstances of this case. The fact that the Plaintiff was able to slow down to enable the preceding PLB to turn onto the Minor Road is evidence that it was travelling safely behind the preceding PLB.

(c) The Defendant’s counsel then submits that if the Plaintiff could stop in time to avoid a collision with the preceding PLB had the preceding PLB suddenly stopped, the Plaintiff could not have collided with the Defendant’s PLB which emerged from a point further away. This submission has failed to take into account the fact that the collision between the Plaintiff’s motorcycle and the Defendant’s PLB did not happen in a straight line, as the Defendant’s PLB was making a right turn.

(d) The Defendant’s counsel also submits that the fact that the Plaintiff’s motorcycle skidded and span towards the Defendant’s PLB shows that the Plaintiff was negligent in failing to properly control his motorcycle. I do not agree. The Plaintiff was merely reacting to the Defendant’s PLB sudden emergence into his path and trying to avoid a collision.

1. I therefore accept the Plaintiff’s case and find that the collision happened in the way testified by the Plaintiff. The Defendant was negligent in failing to give way to the Plaintiff’s motorcycle before emerging from the junction.

## Quantum

1. The parties are agreeable to the following damages:

|  |  |
| --- | --- |
| Medical expenses | $4,460 |
| Traveling expenses | $220 |
| Detention and survey fees | $1,235 |
| Damage to the Plaintiff’s shirt and trousers | $500 |
| Repair of the Plaintiff’s Rolex wristwatch | $5,770 |
| Tolling fee | $700 |
| Pre-trial loss of earnings | $663 |

1. The Plaintiff has withdrawn his claim on:

(a) parking fee; and

(b) insurance charges.

1. The parties continue to dispute the following heads of damages:

(a) pain, suffering and loss of amenities;

(b) loss of earning capacity;

(c) the value of the Plaintiff’s motorcycle on a total loss basis; and

(d) tonic food.

(a) PSLA

1. The Plaintiff was admitted to the Accident and Emergency Department of United Christian Hospital (“UCH”) after the collision. Physical examination revealed multiple contusions with superficial abrasions over the bilateral upper limbs and right lower limb. There was no signs of bruising or haematoma over the head. There were no sensory deficit and x-ray confirmed good alignment of the vertebrae with no fractures. All four limbs had full range of movement and there were no signs of any joints injury. The Plaintiff was discharged with oral analgesic.
2. The Plaintiff sought treatment from a general practitioner for neck pain before returning to UCH for further treatment of right shoulder pain.
3. On 26th October 2006, the Plaintiff consulted Dr. Pang Kin Wah, an orthopaedic surgeon, for right shoulder pain especially when lifting objects above shoulder height. Examination revealed impingement and painful-arc signs and Dr. Pang diagnosed the Plaintiff’s injury to be rotator cuff tendinitis of the right shoulder.
4. The Plaintiff was assessed by Dr. Richard Poon, a specialist in Orthopaedics and Traumatology, on 27th February 2007. Dr. Poon noted that the Plaintiff had initially sustained multiple abrasions to both hands and the right lower limb, mild neck sprain, and soft tissue injury to the right shoulder. The multiple abrasions had recovered fully. The neck symptoms had subsided and remained asymptomatic, apart from persistent mild pain and tenderness in the right trapezius muscle. Soft tissue injury to the right shoulder had caused a mild tendinitis of the rotator cuff and had given rise to painful arc syndrome and restricted motion in the right shoulder.
5. Dr. Poon observed that the bulk of the symptoms from the painful arc had since subsided. There was only minimal discomfort and feeling of a click at the subacromial space when the arm was raised to horizontal level, mild residual tenderness at the supraspinatus insertion on the great tuberosity, and about 30 degrees loss of end range right shoulder flexion. The persistent symptoms in the right shoulder had led to slight decrease in the right upper limb power and loss of muscle in the right forearm.
6. It is Dr. Poon’s opinion that the loss in muscle bulk and power in the right upper limb can be restored with proper exercise. The range of right shoulder flexion should continue to improve although full restoration is unlikely. Any residual loss of flexion is functionally not significant. The click and the mild residual tenderness are likely to persist. There is an increased risk of recurrent symptoms from the supraspinatus tendinitis such as painful arc in future, which is likely to be triggered off by overuse of the right shoulder or another soft tissue injury. Dr. Poon assessed the expected residual symptoms and loss of end range right shoulder flexion to be 1% impairment of the whole person.
7. The Plaintiff was 31 years old at the time of the accident and has been a chef by profession. Notwithstanding the sick leave given, he returned to work about a week after the accident. He initially took on light duties but has since returned to full duty.
8. The Plaintiff’s counsel relies on *Wong Ping Shing*, DCPI 156/2006, 26/6/06 (Deputy District Judge Charles Wong); *Hui Kai Mei Mildred*, DCPI 1056/2004, 7/7/06 (Deputy District Judge Wesley Wong); *Chan Wai-leung*, DCPI 166/2001, 8/10/01 (HH Judge Carlson); and *Iau Kau Ih*, HCPI 130/2001, 16/7/02 (Deputy High Court Judge B Yu) and suggests an award of $180,000. On the other hand, the Defendant’s counsel relies on *Chan Chun Wa*, DCPI 235/2007, 22/11/07 (HH Judge HC Wong) and the cases cited therein and suggests an award of a few tens of thousands of dollars for PSLA.
9. It is clear from the medical evidence adduced that the injuries suffered by the Plaintiff as a result of the collision was relatively minor. The Plaintiff was not hospitalized. The mild neck sprain subsided and the multiple abrasions over his hands and right lower limb recovered after a short while. I accept that the Plaintiff suffered soft tissue injury to the right shoulder. There was a certain degree of pain associated with the injury and the movement of the shoulder was restricted. According to Dr. Poon, minimal discomfort and feeling of a click at the subacromial space when the arm is raised to horizontal level, and mild residual tenderness at the supraspinatus insertion on the great tuberosity are likely to persist. The residual loss of flexion is functionally not significant.
10. I consider that the severity of the injuries sustained by the Plaintiff is less serious than the injuries sustained by the plaintiffs in *Wong Ping Shing* and *Hui Kai Mei Mildred*. Taking everything into consideration, I consider an award of $100,000 for PSLA to be appropriate.

(b) Loss of earning capacity

1. An award for loss of earning capacity is intended to cover risks that at some future date during the Plaintiff’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market.
2. Dr. Poon is of the opinion that there is an increased risk of recurrent symptoms from the supraspinatus tendinitis such as painful arc in the future. This can be triggered off by overuse of the right shoulder. Given the nature of the Plaintiff’s work as a chef, the risk is real. Considering the Plaintiff’s age, the nature of his work, the degree of handicap, I consider that an award of $32,000 to be appropriate under this head. This represents about two months of the Plaintiff’s monthly salary at the time of the accident.

(c) Value of the Plaintiff’s motorcycle on a total loss basis

1. Both parties accept that the Plaintiff’s motorcycle was damaged beyond economic repair. The Plaintiff’s surveyor estimated the pre-accident market value of the motorcycle to be $42,000-$43,000, whilst the Defendant’s surveyor valued the motorcycle at $35,000.
2. The Plaintiff purchased the motorcycle brand new less than a year ago at the cost of $47,800. Given the newness of the Plaintiff’s motorcycle, I accept the Plaintiff’s surveyor estimation and find that the value of the Plaintiff’s motorcycle should be $42,500.

(d) Tonic food

1. The Plaintiff is claiming $5,000 for tonic food.  According to him, his girlfriend’s mother spent the amount on tonic food for him over the course of one month. No receipt was produced. There is also no evidence as to what was bought and the advisability of such tonic food. The Plaintiff only alleges in re-examination that his girlfriend’s mother bought the tonic food on his account and he had to repay her.
2. Although the courts are usually prepared to award a reasonable amount for tonic food depending on the circumstances of each case, I do not consider such award appropriate in this case having regard to the relatively minor injuries sustained by the Plaintiff and the above considerations.

## Conclusion

1. For the above reasons, I find the Defendant liable to the Plaintiff and the Plaintiff is entitled to the following damages:

|  |  |  |
| --- | --- | --- |
| PSLA |  | $100,000 |
| Loss of earning capacity |  | $32,000 |
| Pre-trial loss of earnings |  | $663 |
| Special damages |  |  |
| - Medical expenses | $4,460 |  |
| - Traveling expenses | $220 |  |
| - Detention and survey fees | $1,235 |  |
| - Damage to the Plaintiff’s shirt and trousers | $500 |  |
| - Repair of the Plaintiff’s Rolex wristwatch | $5,770 |  |
| - Tolling fee | $700 |  |
| - Value of the Plaintiff’s motorcycle | $42,500 | $55,385 |
| Total |  | $188,048 |

1. I have rejected the Defendant’s version of event. There is nothing to support the contention that the Plaintiff was also negligent. The Defendant’s counterclaim is dismissed.
2. Interest will be awarded at 2% p.a. on general damages from the date of the writ.  Interest on other special damages will be awarded at half the judgment rate from the date of the incident.  The Plaintiff’s solicitors are directed to calculate the amount of interest to be included in the judgment.
3. There will also be a costs order *nisi* that the Defendant should pay the Plaintiff’s costs of this action, to be taxed if not agreed with certificate for counsel.  Unless an application has been made to vary the costs order *nisi*, the order shall become absolute 14 days after the judgment is handed down.

( J. Ko )

Deputy District Judge

Ms. Elizabeth YANG instructed by Messrs. Au-Yeung, Cheng, Ho & Tin for the Plaintiff.

Mr. Selwyn SO instructed by Messrs. W.H. Chik & Co. for the Defendant.