#### DCPI 1218/2016 & DCPI 2598/2016

(Heard Together)

[2019] HKDC 445

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 1218 OF 2016

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BETWEEN

WONG KA LAI Plaintiff

and

LAU WAI LAM 1st Defendant

WONG LOK PIU 2nd Defendant

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**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2598 OF 2016

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BETWEEN

LAU WAI LAM（劉偉林） Plaintiff

and

WONG LOK PIU（王樂彪） Defendant

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Before: Deputy District Judge K. C. Hui in Court

Dates of Hearing: 18-21 December 2018

Date of Judgment: 17 April 2019

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JUDGMENT

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*INTRODUCTION*

1. These two personal injuries actions arise out of the same motor vehicle accident that occurred on 30 January 2014 (the “Accident”). By the Order of Master S H Lee dated 21 May 2018, these two actions were ordered to be tried together, but the trial for DCPI 2598/2016 will be on liability only.
2. The plaintiff in DCPI 1218/2016 (“P”) was born on 26 November 1980. At the time of the Accident, she was 33 years old. The Accident happened on 30 January 2014 at about 11:40 pm at an Eastbound lane at the Island Eastern Corridor.
3. At the time of the Accident:-
4. P was a pillion passenger on a motorcycle with registration number PM8481 (the “MC”) driven by the 1st defendant in DCPI  1218/2016 (“D1”).
5. The 2nd defendant in DCPI 1218/2016 (“D2”) was driving a light goods vehicle with registration number LB4132 (the “LGV”). The LGV was a 5.5 tonnes Izusu.
6. The MC and the LGV collided near lamppost 48389 at the Island Eastern Corridor.

*(A) P and D1’s case*

1. It is P’s and D1’s case that before the Accident occurred, the MC was travelling along the right-most Eastbound lane at the Island Eastern Corridor (the “Fast Lane”), and the LGV was travelling along the 2nd lane from the right (the “Slow Lane”), ie the lane to the left of the Fast Lane.
2. When the MC approached near lamppost 48389, the LGV approached from the Slow Lane and cut into the Fast Lane.
3. D1 braked the MC immediately. At this point, there is a slight difference between P’s evidence and D1’s evidence. P’s evidence is that after the MC braked, it wobbled and as a result, P fell to the ground and became unconscious. According to P’s oral evidence, she fell to the ground before any collision. However, according to D1’s evidence, he tried to brake the MC but could not prevent the MC from colliding with the right rear side of the LGV as it cut into the Fast Lane. The MC was then hooked onto the LGV, at which point P fell from the MC to the ground. As for him, D1’s evidence is that he and the MC was dragged by the LGV for about 5 seconds before they fell to the ground.
4. According to D1, the LGV continued to travel for some distance after the collision before stopping.

*(B) D2’s case*

1. D2’s case is that before the Accident, he drove the LGV from Chai Wan to Central. At all times on the Island Eastern Corridor, he was travelling along the Fast Lane. At the time of the Accident he looked around and to the front and back of the LGV and did not see any vehicles. D2 then heard a “bang” noise, and he slowed down the LGV and turned on the hazard warning lights, until it came to a complete halt.
2. D2 does not dispute that the MC collided with the LGV, and that the right rear side of the LGV was damaged. But D2’s case is that he did not cut any lanes in the manner as described by P. He said that if he indeed cut from the Slow Lane to the Fast Lane, the right middle part, instead of the right rear part, of the LGV would be damaged.

*(C) The claims*

1. P claims that both D1 and D2 were negligent in driving and handling their respective vehicles, and commenced DCPI 1218/2016 to claim compensation for personal injuries. Both D1 and D2 deny that they were negligent.
2. D1 then commenced DCPI 2598/2016 against D2 for driving the LGV negligently, claiming damages for personal injuries. D2 denies that he was negligent.

*(D) Issues for trial*

1. In view of the above factual background, I will determine the following issues in this judgment:-
2. First, whether D1 and/or D2 were negligent in driving their respective vehicles at the time of the Accident. Logically, my findings on this issue will determine the liability of both actions:-
3. If I find that none of D1 and D2 were negligent, then both actions ought to be dismissed.
4. If I find that only D1 was negligent, I ought to enter judgment against D1, but dismiss the claim against D2, in DCPI 1218/2016. The claim in DCPI 2598/2016 also ought to be dismissed.
5. If I find that only D2 was negligent, I ought to enter judgment against D2, but dismiss the claim against D1, in DCPI 1218/2016. I also ought to enter judgment against D2 in DCPI 2598/2016.
6. If I find that both D1 and D2 are negligent, I ought to enter judgment against D1 and D2 in DCPI 1218/2016, possibly with apportionment of their respective liabilities. I also ought to enter judgment against D2 in DCPI 2598/2016 with the appropriate reduction of liability.
7. Second, whether the injuries sustained by P were caused by the negligence of D1 and/or D2.
8. Third, if I enter judgment in favour of P in DCPI  1218/2016, I need to assess the damages payable to P.
9. Since DCPI 2598/2016 is a split trial, if I enter judgment against D2 in DCPI 2598/2016, I will direct the quantum of damages to be assessed.

*LIABILITY: WERE D1/D2 NEGLIGENT?*

1. The parties’ respective cases have already been briefly outlined above.
2. To recall, P and D1’s case is that the MC was driving along the Fast Lane, while the LGV was driving along to Slow Lane. At the time of the Accident the LGV was cutting from the Slow Lane into the Fast Lane. The implication of these alleged facts is that the LGV suddenly cut into the Fast Lane without realizing that the MC was there. As the LGV cut into the Fast Lane suddenly, there was not enough time or distance for the MC to brake in order to avoid a collision. This indeed is D1’s complaint against D2.
3. On the other hand, D2’s case is that at all times, he was driving the LGV along the Fast Lane until he heard the MC collided with the rear part of the LGV. The implication of these alleged facts is that D1 was driving the MC too fast, approached the LGV at the Fast Lane from behind, and collided with the rear part of the LGV.

*(A) Did the LGV cut from the Slow Lane to the Fast Lane?*

1. It is not disputed that after the Accident, the position of the LGV was at the Fast Lane. Its right-rear part was damaged, including the right taillights.
2. Therefore, the LGV was either travelling along the Fast Lane at all material times (as D2 contends), or it did cut from the Slow Lane to the Fast Lane some time before and during the Accident (as P and D1 contend). I will first resolve this factual dispute, as my findings in this regard have important implications on the issue of liability.
3. P stated in her Witness Statement that at the time of the Accident, the MC was travelling along the Fast Lane. When the MC approached near lamppost 48389, she noticed the LGV travelling along the Slow Lane, on her left. The LGV then started to cut from the Slow Lane to the Left Lane.
4. During D1’s cross-examination, P confirmed again that she was sure that the MC was all along travelling on the Fast Lane, and when she first saw the LGV, it was travelling along the Slow Lane. D2 did not put to her during cross-examination that the LGV was not travelling on the Slow Lane at the time of the Accident. Instead, the cross-examination focused on whether D1 was driving the MC too fast.
5. As for D1’s oral evidence given during cross-examination by D2, he said that he was driving the MC at a speed of 70 km/h at the time of the Accident. Again, it was not put to him by D2 that the LGV was not travelling on the Slow Lane at the time of the Accident. The focus of the cross-examination was again on whether D1 was driving considerably faster than the speed limit. Given P’s case as stated above, P understandably did not challenge the fact that the LGV was travelling along the Slow Lane when her counsel cross-examined D1.
6. Both P’s and D1’s evidence that the LGV was travelling along the Slow Lane while the MC was travelling along the Fast Lane shortly before and/or at the time of the Accident was unshaken. Moreover, on this issue, P is a relatively neutral party. P sues both D1 and D2 for negligence, and has no reason to give evidence in favour of one defendant over the other.
7. Turing to D2’s evidence, he stated in his witness statement that he was all along travelling along the Fast Lane. He explained that he chose to drive on the Fast Lane as he could arrive at his destination sooner and directly, and he could see the bend in the front and the road condition clearly. At the material time, he did look around the surroundings and the traffic condition in his front and back, but did not see any vehicles, until he heard a “bang”, ie when the MC collided with the rear of his LGV.
8. I find that there are a number of unsatisfactory aspects regarding D2’s evidence:-
9. First, during cross-examination by D1, D2 admitted that when a vehicle approaches the LGV from behind, he would be able to see that vehicle. In the present case, if the LGV was all along travelling along the Fast Lane, and the MC approached the LGV from behind, D2 should be able to see the MC approaching the LGV. Yet, D2’s evidence is that despite checking for the road conditions around the LGV, he did not see any vehicles, until he heard a “bang” (ie until the MC collided with the LGV from behind). D2 was unable to explain why he did not or could not see the MC approaching from behind.
10. Second, it is not disputed that at the time of the Accident, the road surface was dry and lighting conditions were good. There is no reason why D2 did not or could not see the MC approaching from behind.
11. Third, during cross-examination by D1 and P, D2 said that at the material time, he was driving the LGV at a speed of 50-55 km/h, despite knowing that the speed limit was 70 km/h. As D2 is a very experienced driver, he should know that the Fast Lane was used only for overtaking cars on the Slow Lane, and that if he drives considerable below the speed limit on the Fast Lane, he would be obstructing the Fast Lane. Given D2’s driving experience, the size of the LGV and the speed at which it was travelling, I find it unlikely that D2 would drive the LGV at the Fast Lane for the whole journey along the Island Eastern Corridor as he contends.
12. Furthermore, I am not convinced by the reasons given by D2 for using the Fast Lane. It is not disputed that at the time of the Accident, the road conditions were good and the road was well-lit. I do not see how travelling on the Fast Lane would have any advantage over travelling on the Slow Lane in terms of “seeing the bend in front of the road and the road conditions”, as contended by D2.
13. For the reasons stated above, on this factual issue, I prefer the evidence of P and D1 over that of D2. I find that shortly before the Accident, the LGV was travelling along the Slow Lane, and the MC was travelling along the Fast Lane. I also find that at the time of the Accident, the LGV was cutting from the Slow Lane to the Fast Lane.

*(B) Were D1 and/or D2 negligent in driving their respective vehicles?*

1. Having made the findings above, I proceed to consider the central issue of the trial – whether D1 and/or D2 were negligent in driving their respective vehicles when the Accident happened.
2. The natural starting point is to consider P’s evidence. Unfortunately, her evidence does not shed light on what happened when the two vehicles collided. In P’s Witness Statement, she said that as the LGV cut from the Slow Lane to the Fast Lane, D1 braked the MC, as a result of which P fell off the MC. During cross-examination, P further said that the braking of the MC caused it to wobble, and caused her to fell off the MC onto the ground. P said that this happened before the collision. After she fell onto the ground, she lost consciousness. When she woke up, she found herself having abrasions over all four limbs. Furthermore, P could not recall the speed of the MC before she fell onto the ground.
3. In short, P was unable to inform the court what happened at the moment when the two vehicles collided.
4. That leaves D1’s evidence against D2’s.
5. Given the findings made in paragraph 26 above, I reject D2’s case that the MC approached from behind in the Fast Lane and collided with the LGV because the MC was being driven too fast.
6. That leaves the question of whether I should accept D1’s case. I already made a factual finding above that the LGV was cutting from the Slow Lane to the Fast Lane at the time of the Accident. D1’s case, as stated in paragraph 16 above, is that the LGV cut towards the Fast Lane suddenly without realizing the position of the MC. As a result, the MC could not brake fast enough to avoid colliding with the rear part of the LGV. P’s case is that both D1 and D2 were at fault. In relation to D2, P’s complaint is largely similar to D1’s case. In relation D1, P’s main complaint is that D1 failed to manage or control the MC properly so as to avoid abrupt changes of the traffic condition (namely, the sudden change of lane of the LGV).
7. Both P and D2 asserted in submissions that (i) there was not enough time or distance for the MC to brake to avoid a collision, and (ii) the braking caused the wobbling of the MC which was forceful enough to cause P to fell off the MC shows that MC was travelling too fast. However, I do not think that (i) and/or (ii) above were necessary the result of the MC travelling too fast. Whether or not the MC could brake in time to avoid a collision depends on the relative position of the LGV and the MC as the LGV cut into the Fast Lane and travelled towards the MC. If the LGV cut into the Fast Lane suddenly at a position very close to the MC, it may well be that even if the MC was not travelling fast, it would be forced to brake abruptly, and even then the collision might not be avoided.
8. It was also argued that if the collision occurred at the time when the LGV was cutting to the Fast Lane, it would be the right middle part of the LGV, rather than the right rear part of the LGV that would collide with the front of the MC. Again, I do not accept that this is necessarily the case. It is not improbable that after the MC braked and slowed down, it collided with the rear part of the LGV (rather than the middle part) as the LGV cut into the Fast Lane from the Slow Lane.
9. To resolve this factual issue, I find it useful to go back to P’s evidence of what happened before she fell off the MC onto the ground. To recall, her evidence, as stated in her Witness Statement, is that when the MC was near lamppost 48389, she saw the LGV on her left appearing on the left lane on her front left, and cutting into the 1st right lane. During cross-examination by D1, she said that when she first saw the LGV, it appeared within her natural line of sight, and popped up from her left-hand side. Then, the LGV approached the lane where she was in, ie the Fast Lane.
10. As I said in paragraph 23 above, on the issue of whether D1 and/or D2 should be responsible for the Accident, there was no motive or incentive for P not to tell the truth or to give evidence in favour of one defendant over another. In fact, it would do P’s case no good if P gave evidence in favour of one defendant over another, as this might possibly risk P’s case being dismissed as against one defendant. I therefore accept P’s account of the incident set out in paragraph 35 above.
11. On the basis of P’s evidence summarized above, I find that there was a moment when the LGV’s position was to the immediate front-left of the MC on the road, with the LGV on the Slow Lane and the MC on the Fast Lane. I find that at this particular moment, the LGV was very close to and at the front-left of the MC, as P’s “natural line of sight” as a pillion passenger (as opposed to the driver) of the MC, was likely to be close to her vicinity. Her forward eye-sight would be at least partially blocked by the driver. It was after this moment that the LGV started to cut from the Slow Lane to the Fast Lane. The collision ensued.
12. If this is what happened, I find that what is more likely to have happened is that the LGV cut from the Slow Lane to the Fast Lane without realizing that the MC was on the Fast Lane at a position immediately to the LGV’s back-right side. If the driver of the LGV realized that the MC was immediately to the LGV’s back-right side, he would not have cut to the Fast Lane at that moment, but would either overtake the MC or slow down the LGV before cutting to the Fast Lane, so as to avoid colliding with the MC.
13. D1’s evidence is consistent with P’s evidence ins this regard. During cross-examination by P, his evidence is that when he first saw the LGV, it was travelling far ahead of him on the Slow Lane. As the MC was travelling faster than the LGV along the Fast Lane, the MC caught up with the LGV. When asked specifically about how far the LGV’s taillight was from the MC when the LGV started to cut into the Fast Lane, D1 answered that the distance was very close, less than 1m, and the LGV was right in front of the MC. I accept D1’s evidence on this issue as it is consistent with P’s evidence.
14. Although as mentioned above, there is a slight difference between the evidence of P and D1 regarding when P fell from the MC onto the ground (P’s evidence is that she fell off the MC before the collision, while D1’s evidence is that P fell off the MC after the collision), I do not think that this difference in evidence deters me from accepting P’s and D1’s evidence regarding the position of the LGV relative to the MC right before the LGV cut from the Slow Lane to the Fast Lane. After all, after the LGV started to cut lanes, the collision and the Accident that ensued took place in a matter of seconds. D1 was looking forwards and no doubt his attention was fully diverted to trying to avoid colliding with the LGV. Therefore, it is not surprising that P’s and D1’s account of what happened during the collision might be slightly different. What is important, however, is the position of the LGV and the MC before the LGV started to cut lanes (and before the collision). In this regard, I have no reason to doubt the reliability of P’s and D1’s recollection of the facts.
15. As for D2’s evidence, I do not find it useful in resolving this issue, as he maintained that the MC approached the LGV from behind and collided with the LGV. I have already rejected his case above.
16. I acknowledge that there is a possibility, as P suggested, that as the LGV cut from the Slow Lane to the Fast Lane, the MC approached too fast from behind in the Fast Lane, could not brake in time, and collided with the LGV. P argues that in this scenario, both D1 and D2 would be at fault, as D2 would have underestimated the speed at which the MC approached the LGV from behind, and D1 would have driven the MC too fast.
17. However, it is to be noted that the MC collided with the rear left part of the LGV at the Fast Lane (there was no evidence that the MC has ever entered the Slow Lane). If the MC travelled too fast from behind and collided with the rear right part of the LGV at the Fast Lane, there would not be a moment when the LGV’s position was to the immediate front-left of the MC on the road, with the LGV on the Slow Lane and the MC on the Fast Lane (as a found at paragraph 37 above). The MC approaching fast from behind would have rammed right into the rear part of the LGV on the Fast Lane. The scenario suggested in paragraph 42 above does not sit well with my finding in paragraph 37 above. It also does not sit well with my finding that the LGV started to cut from the Slow Lane to the Fast Lane after the LGV appeared at the immediate front-left of the MC on the road.
18. For the reasons above, I conclude that D2 was negligent at the time of the Accident in driving the LGV, as he cut from the Slow Lane to the Fast Lane without realizing the existence and position of the MC on the Fast Lane, and failed to stop entering the Fast Lane to avoid the MC colliding with the LGV.
19. As for D1, given the analysis in paragraph 43 above, there is no evidence that he has driven the MC negligently. As I found above, the LGV was at a position to the immediate front-left of the MC at the time when the LGV started to cut from the Slow Lane to the Fast Lane. Given that the LGV was very close to the MC when the LGV started to cut lanes, I find that the LGV’s movement was too sudden, and its position too close, for D1 to manoeuvre the MC in a way to prevent a collision. In other words, I find that it is the negligence of D2 in handling the LGV that caused the Accident.
20. P raised further arguments to persuade the court that D1’s driving of the MC was also negligent:-
21. First, P argues that under cross-examination, there was an unqualified admission from D1 that he was driving at a speed which did not enable him to brake on time to avoid the collision. In my judgment, it is a neutral point because if the LGV’s cutting of lanes was indeed too sudden and at a place too close to the MC, of course the MC could not brake in time to avoid the collision. However, it does not mean that the MC was travelling too fast, or at an inappropriate speed. After all, before the Accident occurred, the LGV and the MC were on different lanes.
22. Second, P says that D1 failed to balance and keep his MC under control at the time of the accident, particularly when he failed to brake the MC completely to avoid the collision and the swinging off of P from the pillion. This point can similarly be answered by my analysis in (a) above.
23. Third, D1 testified that he initially tried to swerve the MC to the left to avoid the collision. P says it is unreasonable, as D2 was cutting into the Fast Lane from the left: D1’s swerving to the left would only increase the chance of collision. However, it is my finding in paragraph 45 above that the LGV’s cutting of lanes was too sudden and at a place too close to the MC, such that it was difficult for D1 to manoeuvre the MC in a way to prevent a collision. I do not think that the collision could have been prevented even if D1 did not initially tried to swerve to the left.
24. Fourth, P relied on other circumstantial evidence, such as D1’s allegedly poor track record of repeated speeding offence, and a number of previous motorcycle accidents. These circumstantial evidence dwarfed into insignificance given my findings in paragraphs 42- 45 above.
25. Lastly, P argues that as D1 was carrying a pillion passenger, it was more difficult to balance and to brake in emergency. As such, D1 should have driven the MC at a slower speed and should have kept a proper distance from the tail of the LGV. Again, I have difficulty in accepting this argument. Before the Accident occurred, the LGV and the MC were travelling on different lanes. Before the Accident, D1 had no prior warning that the LGV would cut to the Fast Lane. He could not have anticipated the LGV’s sudden change of lanes. It is asking too much of reasonable drivers if they were to slow down their vehicles on a highway to avoid having to drive next to the vehicle on another lane.
26. P has referred to a number of authorities, and seeks to demonstrate that for these “lane cutting cases”, the driver of the vehicle on both lanes were found to be liable. As a matter of principle, I do not think it is useful to refer to these cases, as each case depends on its own facts. This can be illustrated from the cases cited by P:-
27. In *Yeung Pan Nam v Personal Representative of Tong Yu Tat, Anthony & Ors* CACV 95/2015 (unreported, 10 May 2016), a motorcyclist cut from the left lane to the right lane on a section of Electric Road, necessitating a bus approaching from behind on the right lane to brake abruptly. A passenger on the bus was seriously injured as a result of the abrupt braking of the bus. It was held that both the motorcyclist and the bus driver were negligent. P relied on the trial judge’s finding that the bus driver should have “realised that there was a real, not fanciful, possibility that the Motorcycle may cut lane at any time”.

However, it should be noted that the trial judge also found that when the motorcycle tried to cut to the right lane, the bus driver should have seen the motorcycle’s right indicator light, and that the motorcycle was slowly approaching the right lane. Furthermore, there was a red traffic light not far ahead from the vehicles, which necessitated both the motorcycle and the bus to completely stop before the light. In the present case, there is no dispute that the LGV did not turn on any indicator lights. Also, the LGV and the MC were travelling on a highway with no traffic lights ahead. In the circumstances, before the LGV started to cut from the Slow Lane to the Fast Lane, it cannot be said that D1 should have “realised that there was a real, not fanciful, possibility that the [LGV] may cut lane at any time”.

1. In *Chung Chun Man v Chow Wai Kin* HCPI 713/2004 (unreported, 21 June 2005), two private cars collided on the Island Eastern Corridor when one car tried to cut from the middle lane to the right lane. It was held that both drivers failed to keep a proper lookout of the other car. But in relation to the driver driving the car approaching from behind on the right lane, the trial judge held that he should have seen the other car’s turn indicator signal, and that that other car who cut lanes was moving gently into the right lane.

In the present case, as mentioned above, the LGV did not turn on any indicator light when it cut from the Slow Lane to the Fast Lane. Furthermore, my findings above is that because the LGV was already very close to the MC at the time when the LGV started to cut into the Fast Lane, it cannot be said that D1 should have realised that the LGV was moving slowly to the Fast Lane.

1. In *Leung Sze Man v Chun King Hoi* DCPI 1804/2007 (unreported, 23 July 2008), the trial judge’s findings were that:-

“[The 1st defendant], when travelling on Texaco Road, saw the green lights at the Wing Tak Street junction as he approached the junction on his motorcycle. He did not slow down as he was anxious to pass the junction while the lights were still in his favour. He did not notice a motorcar had come from behind on the fast lane until it came close onto his right side on the fast lane. He thought it was cutting in front of him, so he braked or steered suddenly. This action of sudden stopping or attempting to steer left caused the motorcycle to lose balance and topple over, throwing its passengers off the bike.”

The 1st defendant in that case was found to be negligent on the basis that he did not pay sufficient attention to the traffic around him, namely the motorcar coming from behind. This led him to suddenly brake or steer his motorcycle, causing injury to the plaintiff. But in the present case, I have accepted D1’s evidence that he already noticed the LGV on the Slow Lane when he was driving the MC along the Fast Lane, approaching from behind. It was the sudden change of lane of the LGV at a position very close to the MC that cause the collision. The facts of the present case are materially different.

1. For the reasons aforesaid, I find that D2 was negligent in driving the LGV, but no negligence on the part of D1. As such, under DCPI 1218/2016, only D1, but not D2, is liable to compensate P’s loss and damage. As for DCPI 2598/2016, D2 is liable to compensate D1’s loss and damage.
2. I will now proceed to assess the quantum of damages suffered by P. As mentioned above, there are two issues, namely causation of quantification, and I can deal with them together below.

*QUANTUM OF DAMAGES SUFFERED BY P*

1. After the Accident, P was taken by ambulance to the Accident and Emergency Department of the Pamela Youde Nethersole Eastern Hospital (“PYEH”) for treatment. She was noted to suffer from short term memory loss, headache, neck pain and pain at four limbs. She had to be resuscitated by the Trauma Team and was admitted to the Surgical Ward for treatment. The Surgical Unit’s report states that P had multiple abrasions over four limbs. Plain CT scans of the brain, cervical spine and contrast CT scans of thorax, abdomen and pelvis showed no intracranial, thoracic or intraabdominal injury. P was also assessed by the Ear, Nose and Throat surgeon, but no intervention was necessary. P remained clinically stable and was referred to the Government Outpatient Clinic (“GOC”) for wound dressing. P was hospitalised for 1 day in the PYEH.
2. Medical records for the period between the date of the Accident and 18 November 2014 in relation to P’s medical consultations and treatments were produced to the court.
3. P was jointly examined on 15 June 2017 by Dr Ko Put Shui Peter (“P’s Expert”) and Dr Baldwin Chan (“Ds’ Expert”). The doctors set out their findings and opinion in the joint medical report dated 28 August 2017 (the “Joint Medical Report”).

*(A) P’s previous and subsequent injuries*

1. It is not disputed that before the Accident, on 7 May 2013, P suffered from another accident (the “2013 Accident”) while she as a back-seat passenger of a motorbike. A taxi hit the motorbike from behind and she fell onto the ground.
2. Unfortunately, after the Accident, on 2 January 2015, P suffered from another accident (the “2015 Accident”). This time, she was the driver of a motor cycle. A private car reversed and hit her at the front of her motor cycle.
3. When cross-examined by D2, P gave evidence that she had yet another accident in July 2017. This time, she was driving a motorbike and she accidentally slipped and fell onto the ground.
4. P suffered injuries as a result of all the aforesaid accidents. Obviously, there is a real issue of causation – what injuries P has suffered, and is still suffering, as a result of the Accident? I shall deal with this issue in the later part of this judgment.

*(B) The Joint Medical Report*

1. During the joint medical examination, P complained of the following which she claimed started after the Accident:-
2. Continuous pain over the neck and both upper trapezius and shoulder region, with daily occurrence;
3. Continuous pain and stiffness over both wrists (left side more than the right side);
4. Continuous pain over left hip/buttock, which radiated to the left lateral thigh;
5. Continuous mild low back pain.
6. During general examination, the doctors found that P was able to sit for 40-50 minutes and get up from the chair normally. She was able to walk with a normal gait without any walking aids. Single leg standing, tiptoe standing/walking, heel standing/walking were all found to be stable. P was also able to do a full squat, and get up without any support. Her range of neck motion for lateral flexion for either side was 25 degrees, and for rotation for either side was 45 degrees.
7. On examination of P’s neck, she was found to have mild tenderness at the lower half of her midline cervical spine, right and left upper shoulder and trapezius diffuse tenderness, but not tenderness over the left and right para-cervical area. There was no muscle spasm and no tightness. Glenohumeral joint and shoulder for both sides were found to be normal and have similar range. There was no complaint of pain on shoulder movement.
8. On the examination of upper limbs, P complained of mild tenderness at the dorsal ulnar and volar ulnar at the left wrist. Otherwise there was no tenderness. There were also some scars indicating healed injuries. There was no muscle asymmetry and no muscle wasting.
9. On the examination of the back, there was diffuse low back pain in the lower lumbar and para lower lumbar region. Extension and right/left lateral flexion of the back was found to be limited by lower back pain. There was no muscle spasm, tightness, scar, deformity and swelling.
10. On the examination of the lower limbs, there were scars which showed healed injuries. There was mild tenderness on the left knee scar. There was also mild tenderness at the left knee lateral joint-line, left hip, and left posterior buttock area. In addition, P complained of left hip pain on external rotation and abduction of the thigh.
11. Radiological examination of the cervical spine, lumbar spine, pelvis and hips showed no significant adverse findings.
12. Unfortunately, there was little that the experts can agree to, namely the diagnoses for the Accident, including increase in neck pain, 4 limbs pain, low back pain, mood problem (due to relationship with boyfriend) and multiple bodily region contusion/sprain injury (including right heel, left ankle, left wrist, left shoulder and left knee).
13. The experts, however, differed on a number of issues, which mainly relate to causation. P’s counsel has helpfully summarised the difference in the opinion of the experts, which I set out below.

| P’s Expert (Dr Ko) | Ds’ Expert (Dr Chan) |
| --- | --- |
| P appeared to have sustained more severe injury in multiple bodily regions after the Accident. | It was impossible to differentiate which site of pain was caused by which particular accidents. |
| It was beyond reasonable doubt that P had more serious injury after the Accident. | It was impossible to differentiate which site of pain was caused by which particular accidents. |
| The neck pain should have also been contributed by the 2013 Accident. | Residual neck pain was already present after the 2013 Accident.  The Accident could have increased her neck pain intensity temporarily.  The Accident did not cause increase of her neck pain or aggravate the pain. |
| The pain in other regions were solely caused and contributed by the Accident. | There was no well-established causal relationship between the injury and the Accident. |
| P can resume and enjoy motorcycle and car racing with probably mild impairment of her driving tolerance, competitiveness and aggressiveness. | P has already demonstrated she could return to motorcycle riding after the Accident and did not suffer any disadvantage. |
| P should have minimally to mild impairment of her work efficiency and work effectiveness. | P will not suffer any disadvantage at getting employed. |
| Whole person impartment:-  Residual neck pain: 1%  Residual low back pain: 1%  Total: 2% | Whole person impartment: 0% |
| Loss of earning capacity: 2%-3% | Loss of earning capacity: 0% |

*(C) What injuries to P did the Accident cause?*

1. It is clear (and there is no dispute) that as a result of the Accident, P suffered from multiple abrasion over her four limbs, as recorded in the report from the Surgical Unit of PYEH dated 10 August 2015 [D/176]. This was likely caused by her falling off the MC onto the ground as a result of the Accident.
2. The same report issued by the PYEH also states that there was no intracranial, thoracic or intraabdominal injury.
3. A major issue between the parties is whether P suffered neck injury as a result of the Accident. There is no dispute that before the Accident, the 2013 Accident also caused P injury in the neck. The issue is whether the Accident caused additional injuries to the neck. In this regard, I cannot accept Ds’ Expert’s view that there is no evidence to suggest that P’s neck pain increased after the Accident:-
4. The Ambulance Record at [F/279] records the physical state of P at a time shortly after the Accident. Consistent with the PYEH Surgical Unit report, this Ambulance Record records that P suffered from abrasion on all 4 limbs. More importantly, it records that P suffered from “Neck Injury, BOTH HAND BOTH KNEE” (underlined supplied). Either the first responders observed that P suffered from neck injury, or P complained to them that she suffered from neck injury. It is thus more likely than not that the Accident caused P neck injury.
5. The medical records of Anne Black GOPC for the consultation on 24 February 2014 and 3 March 2014 [F/278] also state that P complained of neck pain. These records also refer to the Accident.
6. The medical records of Shau Kei Wan GOPC for the consultation on 12 and 19 March 2014 [F/277] state that P complained of “stiff neck”. The record for the consultation on 17 April 2014 [F/277] stated “still neck pain” and “still pain and tenderness at base of neck”, and “minimal neck movement”.
7. The medical report issued by the Shau Kei Wan GPOC later 29 June 2015 [C/172] also states that the Accident resulted in P’s “short term memory loss, headache, neck pain and 4 limbs pain” (underline supplied). It also states that P first attended the GPOC for “residual neck and back pain”.
8. The medical report issued by the Cheung Sha Wan GPOC [C/174] also states that P visited the clinic for “residual left knee, left ankle, left heel and left neck pain” after the Accident.
9. D1 took issue with the medical report issued by the Anne Black GPOC [C/173], which states that P attended that clinic on a number of occasions both before and after the Accident. Presumably, the visits before the Accident were for the 2013 Accident, and the two visits after the Accident were for the Accident. This report states that P had symptoms including neck pain. Since this report does not state whether P complained of neck pain before, or after, of both before and after, the Accident, I do not find it useful in determining whether the Accident caused P neck injury.
10. However, given the evidence set out in paragraph 68 above, I find that P suffered from neck pain after the Accident. Given the circumstances of the Accident, especially the way in which P fell from the MC to the ground, I find that more likely than not, the Accident caused additional injuries to P’s neck (even if P also suffered from neck injury from the 2013 Accident). I respectfully differ from Ds’ Expert who ruled out the possibility of additional injury to the neck resulting from the Accident.
11. I can deal with the issues of whether the Accident caused P back/hip and/or wrist pain quickly. In the medical records/reports set out above, only some but not all mentioned P’s complain of “back pain” and “hand pain”. It seems that the main complaint by P was neck pain rather than the other aforementioned areas. Considering the circumstances of the Accident, I find that P suffered from only mild back and hand pain as a result of the Accident. Indeed, during cross-examination by D1, P said that her injuries at the limbs and back were mild.
12. To conclude, I find that the Accident caused P the following:-
13. Abrasion and/or contusion on all 4 limbs;
14. Increase neck pain;
15. Mild back and hand pain.
16. D1 however submits that any injuries caused by the Accident to P were not very serious. Apart from the fact that there were no signs of internal or structural injuries upon the CT scans performed by PYEH on the night of the Accident, D1 relied on the medical reports/records, which show that P has defaulted her orthopaedic and physiotherapy treatment for a number of times. This was not disputed by P during cross-examination. Her explanation was that she did not trust the doctors treating her, and sometimes if she did not feel well, she would not go to the treatment. I am unable to accept P’s explanation. I agree with D1’s submission that this suggests that by March/April (when P started to default treatment appointments), P was of the view that her injuries arising from the Accident was not serious enough to warrant continued medical treatment.
17. I am also mindful of the fact that P did resume driving motorcycles again before the 2015 Accident (P cannot recall exactly when). As D1’s counsel suggested, in order to safely control a motorcycle, one needs to have agile hand and wrist movements, as well as good neck and back motion in order to keep a proper lookout and good balance. If P was confident enough to drive a motorcycle again, by then, any pain resulting from the Accident would have largely subsided.
18. In short, I find that by late June 2014 (ie at the expiry of P’s sick leave period) at the latest, P’s abrasion/contusion injuries have healed, and her bodily pain had largely subsided. Any residual pain that P still complained of after June 2014 is likely of a mild and minor degree only.

*(D) Pain, Suffering and Loss of Amenities (“PSLA”)*

1. In her Closing Submissions, P submitted that an award of HK$200,000 should be made under this head of damages. The following authorities were cited:-
2. *Lam Kei Fung v The Incorporated Owners of Yue Tin Court & Ors* DCPI 1237/2005 (unreported, 2 April 2018);
3. *Muhammad Saddiq v Cheung Chi Keung* HCPI 1018/2006 (unreported, 8 April 2008)
4. *Khan Shafiq v Cheng Hip Ming* DCPI 1378/2007 (unreported, 2 May 2008)
5. *Wong Yun Chiu v Union Printing Company Limited* HCPI 282/2009 (unreported, 29 July 2011)
6. *Li Tat Chuen v Yip Wing Chuen Jacky* HCPI 581/2011 (unreported, 23 October 2014)
7. *Chui Wai Kam Michelle v Gillspie John Thomas* DCPI 1696/2014 (unreported, 12 May 2016)
8. *Ko Hoi Seung Korin v Liu Kwok Keung* HCPI 1206/2014 (unreported, 12 August 2016).
9. On the other hand, D1 submits that PSLA should not be more than HK$50,000. As for D2, in his Opening Submissions, he cited the following authorities in support of its contention that a sum of HK$90,000–120,000 should be awarded for PSLA.
10. *Fan Jian Hui v Chan Hak Man and Anor* DCPI  2095/2008 (unreported, 1 June 2009)
11. *Chan Kai Sing v Yip Cheung Shing & Anor* HCPI  505/2011 (unreported, 21 October 2014)
12. *Li Ting Fai v Woo Chi Keung* DCPI 807/2007 (unreported, 18 January 2008)
13. As a general point, my view is that the cases cited by P tend to involve more serious injuries than P. For example:-
14. The plaintiff in *Lam Kei Fung* suffered from back pain and he needed to walk with a quadripod when he was discharged from hospital. He underwent 11 months of physiotherapy thereafter.
15. The plaintiff in *Muhammad Saddiq* suffered from a whiplash injury to his neck as well as a sprained back. He also suffered from slight degenerative changes to the lumbar region as a result of the accident.
16. The plaintiff in *Li Tat Chuen* suffered from a neck sprain requiring 9 months of treatment.
17. The plaintiff in *Chui Wai Kam Michelle* suffered from soft tissue injury to her neck, and the right cubital tunnel syndrome, which caused her pain and numbness in her right upper limb.
18. On the other hand, I do find that the authorities cited by D2 involve injuries which are less serious than those suffered by P.
19. In *Fan Jian Hui*, the plaintiff suffered from tenderness over neck and both lower legs, as well as minor head injury. He had residual neck pain, and the range of movement of his neck was reduced.
20. In *Chan Kai Sing*, the trial judge found that the accident was “minor” and “resulted in only the slightest of injury to the plaintiff who had a serious pre-existing condition at the time of the accident which was at a very advanced stage and that the injury that he sustained from this accident would have had little if any effect on his pre-existing condition”.
21. In *Li Ting Fai*, the judge found that the plaintiff suffered from mild whiplash neck injury affecting soft tissue only.
22. In the present case, P fell from the MC travelling at a speed onto the ground. She suffered abrasion/contusion injuries over all 4 limbs, as well as injuries to the neck, and mild injuries to the hand and back. It should also be remembered that she was required to be resuscitated. On the other hand, I have also found that after June 2014, her bodily pain should have largely subsided, as she no longer required (and has in fact defaulted) orthopaedic and physiotherapy treatment, and was able to drive motorcycles again.
23. Taking into account the circumstances of the present case, and accounting for inflation of prices, I am of the view that an appropriate amount of damages for PSLA is HK$150,000.

*(E) Pre-trial loss of earnings*

1. There is no disagreement between P’s Exert and Ds’ Expert [D/204] that the period of sick leave granted is appropriate and reasonable and should be adopted. I adopt the experts’ opinion. There were 89 days of sick leave.
2. However, what is at issue is the pre-trial income of P during the sick-leave period. It is not in dispute that for a period of 6 months prior to the Accident, P was unemployed. According to the IRD records [F/291], P’s previous job before the Accident was with Apex Wealth Limited, from 11 January 2013 to 31 May 2013.
3. It is incumbent upon P to prove that but for the Accident, she would have earned income during the sick leave period from the date of the Accident to June 2014. I agree with D1’s submission that there is a gap in her employment. At the time of the Accident, P had been unemployed for about half a year. I cannot assume that more likely than not, from 31 January to 27 June 2014 (ie the sick leave period), P would earn an income that is equivalent to what she had earned 6 months ago at her previous job at Apex Wealth Limited.
4. In oral evidence, P alleged that about a month before the Accident, she had succeeded in getting a job offer, and that her supposedly new job was due to commence shortly after the date of the Accident. I have difficulty in accepting P’s evidence. Even though it was argued on P’s behalf that she did say during the joint medical examination (on 15 June 2017) that “she already had been employed by a company with a job of salesperson but had not started working yet” [D/183], P was unable to explain why the same was not stated in the Revised Statement of Damages dated 22 January 2018. By this time, P had had full opportunity to supplement her case to plead such a material fact, but she did not. Instead, she pleaded at [A/74] that “she did try to apply for jobs and attend interviews before the captioned accident on 30th January 2014”. In my view, if P did really succeed in securing a job offer, there is no reason why she only pleaded that she applied for jobs and attended interviews, but did not plead a successful job offer, in the Revised Statement of Damages.
5. In any event, even if I accept that there was such a job offer, I agree with D1’s submissions that P failed to adduce evidence on the income of her new job. P had not even stated what her supposed salary would be when she gave oral evidence. In this regard, and noting the Court of Appeal’s decision in *Yuen Macie v Yeung Ying Kit* (unreported, 14 March 2018) at §44-45, there is no evidence before me to form the basis of any findings regarding the income that P would have earned but for the Accident.
6. As for the pre-trial loss of earnings claimed for the period between 27 June 2014 (ie the end of the sick leave period) and 31 December 2014 (the day before the 2015 Accident), I am also unable to award any damages:-
7. First, the supposed monthly income that P claims for this period is also based on her monthly salary for her previous job at Apex Wealth Limited. For the same reasons above, P is unable to prove that more likely than not, P would have earned the same salary for this period but for the Accident.
8. Second, I have already made factual findings above that by the end of June, P’s abrasion/contusion injuries have healed, and her bodily pain had largely subsided. Any residual pain that P still complained of after June 2014 is likely of a mild and minor degree only. I find that after June 2014, any injuries resulting from the Accident would no longer render P unable to work. My finding is further supported by the fact that according to the IRD records [F/291], after June 2014, P did manage to find and work 3 jobs, namely Kong Leading Limited (from 7 July to 9 July 2014), Grove Company Limited (21 July to 31 October 2014) and Pure International (HK) Limited (from 3 November 2014 to 31 March 2015).
9. To conclude, no sums under this head of damages will be awarded.

*(F) Loss of Earning Capacity*

1. The parties do not differ on the well-established legal principles laid down in the Hong Kong Court of Appeal decision of *Yu Kok Wing v Lee Tim Loi* [2001] 2 HKLRD 306 at 311-312 (citing *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132) that to make an award on loss of earning capacity, the Court has to be satisfied that:-
2. The plaintiff is under a substantial or real risk of losing his present job during the rest of his working life; and
3. The plaintiff would be at a disadvantage because of his disability to compete with others in getting a job in the labour market.
4. I have already made factual findings above on P’s injuries suffered as a result of the Accident, especially the fact that any residual bodily pain is likely to be minor and mild only. My findings are consistent with the view of both P’s Expert and Ds’ Expert stated in §11.4 of the Joint Medical Report [D/203-204].
5. Given my findings above, I do not accept P’s evidence that she switched jobs in the period from July 2014 to December 2015 because her injuries rendered her unable to cope with the job responsibilities. I accept D1’s argument that P had a tendency to switch jobs out of her own volition rather than due to her injuries. My finding is fortified by the reason given by P during cross-examination for leaving employment with Grove Company Limited. P said that it was because the working time was too long, and it was too early for her such that sometimes she would feel pain and tired, and when she overslept she could not go to work. It seems to me from this answer that the true reason that P left the employment is that she was not happy with the long and early working hours of the job, rather than the injuries that she suffered as a result of the Accident.
6. As such, I do not agree with P’s Expert’s view in the Joint Medical Report on the % of whole body impairment and % loss of earning capacity.
7. Given the above findings, I am not persuaded that P can pass even the first hurdle of the test laid down in *Moeliker v A Reyrolle & Co Ltd*.

*(G) Special damages*

1. P claims medical expenses of HK$1,994. Supporting documents were provided. None of the defendants took issue with them. I will allow this head of damage.
2. As for the claim for tonic food (HK$5,000) and travelling expenses (HK$5,000), it is trite that such claims have to be supported by evidence. P, however, were not able to provide any supporting documents. Taking a broad-brush approach, I will allow a nominal amount of HK$1,000 for each of these items.

*(H) Summary of assessment of damages*

1. In summary, I award the following sums to P:-

Pain, suffering and loss of amenities (PSLA) HK$150,000

Special damages HK$3,994

\_\_\_\_\_\_\_\_\_\_

Total: HK$153,994

1. I also award interest on the amount of awarded PSLA at 2% from the date of the Writ (ie 13 June 2016) to the date of this judgment; and on the amount of the awarded special damages at half judgment rate from the date of the Accident (ie 30 January 2014) to the date of this judgment.

*COSTS*

1. In DCPI 1218/2016, I enter judgment in favour of P, but concluded that P’s case is only successful against D2 but not D1. P should be awarded the costs of this action.
2. Issues arise as between the costs of D1 and D2. Since D1 is not found to be negligent, should D1 nonetheless be responsible for payment of P’s costs (jointly and severally with D2)? Further, should D2 also pay for D1’s costs of defending the action?
3. Since D1 succeeds in defending DCPI 1218/2016, he should not be ordered to pay P’s costs. A fair costs order is that P’s costs of this action be paid by D2 only.
4. As for D1’s costs of defending DCPI 1218/2016, the question is whether a *Sanderson* costs order should be made. The relevant principles are set out by Bharwaney J in *Fung Chun Man v Hospital Authority* [2012] 1 HKC 531 at §5-6:-
5. The court must, in each case, determine whether or not it was reasonable for the plaintiff to proceed against the successful defendant. If it was, the unsuccessful defendant may be ordered to pay the successful defendant’s costs, either directly, via a *Sanderson* order, or indirectly, via a *Bullock* order.
6. “If the facts are such that it is reasonable to join them both and reasonable to be in a state of uncertainty as to which of the two is the really guilty one, then it is part of the reasonable costs of the action that the costs of the action which you have launched against one of those defendants, and who has succeeded in defending himself, should be borne by the man who is to blame.” (citing *Besterman v British Motor Cab Co Ltd* [1914] 3 KB 181 at 187)
7. The classic case where a *Sanderson* or *Bullock* order is made is where the unsuccessful defendant blames the successful defendant and causes the plaintiff either to join the successful defendant or to continue the proceedings against the successful defendant. However, even absent such circumstances, it may be reasonable for the plaintiff to join the successful defendant, in cases where the plaintiff is faced with a denial of liability by the unsuccessful defendant and the real risk that the unsuccessful defendant may either be absolved from liability or unable to satisfy any judgment that may be obtained against him. In such circumstances, if the plaintiff is in possession of evidence that can implicate the successful defendant, evidence that is neither tenuous nor speculative nor far-fetched, it would be reasonable for the plaintiff to join or to proceed against the successful defendant and the court, at the conclusion of such a case, may, in the exercise of its discretion over costs, make a *Sanderson* or *Bullock* order.
8. In the present case, P was a pillion passenger of the MC. She was not driving the MC. She did not have control of the MC nor the LGV. Given how the Accident happened in the present case, I accept that P was faced with a real uncertainty whether it was D1, or D2, or both D1 and D2 that was/were negligent and that caused her personal injuries. All three possibilities were equally plausible, requiring the court’s determination after hearing oral evidence from all parties. This is especially so when throughout the proceedings, both D1 and D2’s position was that there were not negligent, and that the other defendant was totally responsible for the Accident.
9. In the circumstances, I am of the view that it is not unreasonable for P to join D1 as a defendant and proceed against him in DCPI 1218/2016. As such, I consider it fair that a *Sanderson* order be made, requiring D2 (but not P) to pay D1’s costs of defending DCPI 1218/2016.
10. As for the costs in DCPI 2598/2016, costs should follow the event, ie D2 shall pay the costs of D1.

*CONCLUSION*

1. I make the following orders in DCPI 1218/2016:-
2. Judgment be entered in favour of P against D2 in the sum of HK$153,994, together with interest on the amount of awarded PSLA at 2% from the date of the Writ (ie 13 June 2016) to the date of this judgment; and on the amount of the awarded special damages at half judgment rate from the date of the Accident (ie 30 January 2014) to the date of this judgment.
3. P’s claim against D1 be dismissed.
4. There be an order *nisi* that:-
5. D2 shall pay each of P and D1 their respective costs of this action together with certificate for one counsel, which costs are to be taxed if not agreed.
6. There be no order as to costs between P and D1.
7. I make the following orders in DCPI 2598/2016:-
8. Interlocutory judgment on liability be entered in favour of D1 against D2 for damages to be assessed.
9. There be a costs order *nisi* that D2 shall pay D1 his costs of this action together with certificate for one counsel, which costs are to be taxed if not agreed.
10. The above costs orders *nisi* shall become absolute in 14 days unless before then, any parties apply to the Court to vary them.
11. Lastly, I thank counsel for all parties for their helpful assistance to the court.

( K. C. Hui )

Deputy District Judge

DCPI 1218/2016

Mr Felix Ng & Mr Edward Cheung, instructed by Chan & Chan, for the plaintiff

Mr Ashok Sakhrani, instructed by Munros, assigned by the Director of Legal Aid, for the 1st defendant

Mr John Wright, instructed by Yip & Partners, for the 2nd defendant

DCPI 2598/2016

Mr Ashok Sakhrani, instructed by Munros, assigned by the Director of Legal Aid, for the plaintiff

Mr John Wright, instructed by Yip & Partners, for the defendant