DCPI 1478/2005

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1478 OF 2005

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BETWEEN:

CHAU KA MING Plaintiff

and

LEE WAI KONG also known as

LEE WAI KONG RONALD Defendant

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Coram : HH Judge Lok in Court

Date of hearing: 11 & 12 December 2006

Date of handing down of Judgment: 12 January 2007

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JUDGMENT

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1. This case arises out of a traffic accident on 18 January 2004 near the junction of Tak Wah Street and Ham Tin Street in Tsuen Wan, New Territories.
2. The Plaintiff’s case is a simple one. At the time of the accident, he was working as a part-time worker for a sushi shop responsible for delivering talk-away orders to the customers. At about 3:50 pm on the day of the accident, he was driving a motorcycle with the registration number KB 735 (“the Motorcycle”) along the slow lane of Tak Wah Street to deliver food for his customers. There were two lanes in that part of Tak Wah Street and the Plaintiff’s lane was in fact the nearside first lane. On his left, there was a public light bus station (“the PLB Station”). The traffic by that time was heavy and it was raining. Shortly before the accident, he slowed down the Motorcycle to about 5 km. per hour because of the traffic. By that time, he was in the middle part of his lane, and he extended his legs with a view to steady the Motorcycle which was traveling very slowly by that time. Just at that moment, a taxi, which was driven by the Defendant with the registration number JV 1735, hit him on his right leg, and as a result he had to swerve the Motorcycle to his left. He lost his balance and the Motorcycle struck on the right side of a public light bus with the registration number KY 7801 (“the PLB”) which was parked at the PLB Station.
3. The Defence case is also a simple one. At the time of the accident, the Defendant was driving the Taxi with a passenger on board at the slow lane of Tak Wah Street. He had to stop the Taxi because of the traffic ahead, and the PLB was on his left parking at the PLB Station. The was a gap of about 1 to 1.5 metres wide between the two vehicles. At that time, the Plaintiff drove the Motorcycle in the narrow space between the PLB and the Taxi. Suddenly, the Plaintiff lost the balance by himself and struck on the right side of the PLB. According to the Defendant, the Taxi was stationary at all time.
4. As a result of the accident, the Plaintiff was charged with the offence of careless driving, but he was acquitted after a trial in the Magistrates’ Court (“the Related Criminal Proceedings”).
5. Both the Plaintiff and the Defendant testified in the trial in support of their respective cases. Having considered their testimony, I am of the view that there are two crucial matters in my assessment of the evidence: the first one relates to the damage found in the Motorcycle and the positions of the two vehicles after the accident as shown in the photographs taken by the police officer, and the second one is about the injury of the Plaintiff as shown in the medical reports.
6. For the first issue, the photographs taken by the police officer show that the left side of the Motorcycle rested on the right side of the PLB in a more or less parallel position. Although there might be damage in the front part of the Motorcycle, it was clear that the storage compartment in the rear of the Motorcycle was damaged. To me, these facts are not consistent with the Plaintiff’s case. According to the oral testimony of the Plaintiff, the Motorcycle was in the middle part of the lane when he was hit by the Taxi. After the collision, he swerved the Motorcycle to the left and hit the side of the PLB. If that was indeed the case, the Motorcycle should have hit the PLB at an angle. With the left front part of the Motorcycle hitting the PLB, there should not have been any damage to the storage compartment at the rear of the Motorcycle and the whole left side of the Motorcycle would not have rested on the side of the PLB in a more or less parallel position. One may perhaps argue that the Plaintiff might have first swerved to the left at an angle, and somewhat latter he managed to maneuver the Motorcycle so that the latter was parallel to the side of the PLB, and it was only at that particular moment that the Motorcycle fell on the side of the PLB causing damage both to the front and the back. However according to the Plaintiff, the Motorcycle was traveling very slowly prior to the alleged collision, and the collision was relatively a minor one. In such circumstances, how could there be so many maneuvers on the part of the Motorcycle after the minor collision? One must bear in mind that there was still some distance between the middle part of the lane and the PLB Station and the Motorcycle was nearly stationary at the time, and so in my judgment, it was not possible for the Motorcycle to have traveled for so long after the alleged collision. Hence, I accept the Defence case that the Motorcycle was actually traveling in the narrow space between the Taxi and the PLB prior to the accident, and that was why the whole left side of the Motorcycle rested on the right side of the PLB after the Plaintiff lost his balance and toppled over.
7. Mr. A. Cheung, counsel for the Plaintiff, submits that the Plaintiff might have made a mistake about his actual position at the time of the alleged collision, and the Motorcycle might be near the left side of the slow lane before the collision occurred. In such case, it was still possible for the whole left side of the Motorcycle to have hit the right side of the PLB at the time of the accident. However, the position of the Motorcycle shortly before the alleged collision is a crucial matter in this case. It is the Defence case that the Taxi was stationary at all time, and the Plaintiff drove the Motorcycle in the narrow space which was near the left side of the slow lane. Hence if the Plaintiff was traveling near the left side of the lane, it actually supports the Defence case. The Plaintiff was therefore very careful in his evidence, and it was clear in his testimony that he was traveling at the middle part of the lane before the alleged collision. In such case, I do not accept that the Plaintiff has made a genuine mistake in this regard.
8. Apart from the damage found in the Motorcycle, the positions of both vehicles as shown in the photographs also support the Defence case that the Plaintiff was driving the Motorcycle in the narrow space between the Taxi and the PLB at the material time. In the trial, the Plaintiff drew a sketch showing that at the time of the alleged collision, the Taxi was somewhere between the first and the second lane at an angle. In such case, how could the Taxi be in the position as shown in the photographs after the accident? The Plaintiff testified that the Defendant had moved the Taxi after the alleged collision. If it were the truth, it would have been a very clever move on the part of the Defendant, involving moving the Taxi in the proper position in the lane and perhaps reversing the Taxi to such a position. However according to my observation of the Defendant, he was a simple professional driver and I do not believe that he had the sophistication to make such a well-thought plan within that short period of time.
9. On the other hand, the medical reports of the Plaintiff show that he suffered tenderness and some bruises in the right ankle and leg during the accident, which is a fact that supports the Plaintiff’s case that he had been hit on his leg. However, I take the view that the injury of the Plaintiff is not conclusive about the cause of the accident. In fact, the injury of the Plaintiff in his right leg was very minor and it was quite possible for him to have sustained such injury in some other ways, for example when he tried to get out of the Motorcycle after it fell on the side of the PLB. Hence, balancing these two factors, I find that the positions of the vehicles after the accident and the points of damage of the Motorcycle should carry more weight in my assessment of the evidence. I therefore find that, on the balance of probabilities, the accident happened in the way as described by the Defendant.
10. Both the Plaintiff and the Defendant have been cross-examined on the apparent inconsistencies between the evidence given by them in the court and the previous statements given by them either in the witness statements or in the Related Criminal Proceedings. However, I find that such apparent inconsistencies are not material ones which would affect my assessment of the evidence. In particular, it is stated in the transcripts of the Related Criminal Proceedings that the Defendant was unable to remember the type of vehicle that was in front of him at the time of the accident, and that he had entered the junction of Tak Wah Street and Ham Tin Street without paying any attention to the traffic. I do have the benefit of looking at the relevant parts of the transcripts. It was clear that, in cross-examining the Defendant, the Plaintiff did not, on a number of occasions, let the Defendant to finish his answer before asking the next question. In such case, the cross-examination was very much a chaotic exchange between two lay persons and it would be quite misleading to read just one or two answers out of context. In the trial, the Plaintiff explained that he only could not recall the registration number of the vehicle in front of him at the time of the accident, but he was definitely certain that that vehicle was a lorry. I accept the Defendant’s explanation in this regard and I do not find that his creditability is in any way affected by such immaterial inconsistencies.
11. Based on the aforesaid reasoning, I find in favour of the Defendant on the issue of liability. As the Taxi was stationary at the material time, the accident was caused solely by the negligence of the Plaintiff himself.

*Quantum*

1. In case this matter goes elsewhere and different views prevail, I go on to consider the issue of quantum.
2. The Plaintiff was 30 years old at the time of the accident and is now 33 years old. After the accident, he was sent to Yan Chai Hospital for treatment. Upon physical examination, the Plaintiff was found to have tenderness over his right knee, neck and lower back. X-ray examination revealed that the Plaintiff did have decreased lordosis of the cervical spine, but it is not certain whether such injury was caused by the accident itself. The Plaintiff was treated with analgesic injection and balm and he was discharged on the same day. Subsequently, he experienced persistent pain in his neck and he continued to seek treatments in hospitals and outpatient clinics. He was granted sick leave at various intervals from the day of the accident to 30 March 2005.
3. His current complaints are persistent pain and stiffness in the neck, lower back pain and weakness of the right lower limb. According to the medical experts engaged by the parties, the pain and stiffness are probably caused by the soft tissue injury of the cervical and lumbar spine. The Plaintiff suffered another injury on 10 June 2005 when he was working as a waiter in a restaurant. According to the Plaintiff, this second accident aggregates the pain suffered by him. It is common ground that in assessing the quantum of the Plaintiff’s claim in the present case, the court would ignore the injury of the second accident.
4. Due to the stress and anxiety arising from the charge in the Related Criminal Proceedings, the Plaintiff sought treatments from East Kowloon Psychiatric Clinic 3 times in the period from August to October 2004. He was found to have suffered from adjustment disorder with anxiety symptoms which was the result of the Related Criminal Proceedings rather than the accident itself. The Plaintiff accepts that the court can ignore the psychiatric injury in assessing the quantum of his claim.

*(i) Pain, suffering and loss of amenities (“PSLA”)*

1. Mr. A. Cheung refers me to a number of authorities including *Ali Shoukat v. Hang Seng Bank Ltd,* unreported, HCPI No. 3 of 2003 (decision of Suffiad J. on 23 June 2004), *Limbu Man Bahadur v. Tsang Chan Fai and Anr.*, unreported,HCPI No. 486 of 2003 (decision of Recorder Kwok, S.C. on 29 July 2004), *Ho Bing Cheung v Lam Yin Tuk t/a Ocean Fast Food & Ors.,* unreported, DCPI No. 66 of 2004 (decision of HH Judge CB Chan on 3 December 2004), *Tam Kwok Man v KMB,* unreported, HCPI No. 755 of 2001 (decision of Beeson J. on 11 July 2003) and *Lung Kwong Ying v So Sai Lo & Ors.,* unreported, HCPI No. 206 of 2001 (decision of Seagroatt J. on 1 August 2002). All these cases involve back injury, and awards in the region of $150,000 to $250,000 were made as damages for PSLA. However, the pain suffered by the Plaintiff in the present case is less serious involving no fracture and the pain aggregated by the second accident should be ignored for the present assessment exercise, hence I follow the case of *Tam Kwok Man* and assess the damages for PSLA in the sum of $150,000.
2. *Pre-trial loss of earnings*
3. From May 1999 to September 2003, the Plaintiff worked as a reporter for a newspapers earning about $10,000 to $12,000 a month. He was laid off on 31 August 2003. In October and November 2003, he worked as a part-time courier. Starting from 20 December 2003, the Plaintiff worked as a part-time delivery worker for a sushi ship earning about $30 per hour plus commissions of $ 5 per delivery order. The monthly salary, excluding the tips from customers, was about $5,500, and this amount is supported by the payment record of the Plaintiff covering the period from 20 December 2003 to 18 January 2004 which was the date of the accident. In addition, the Plaintiff was often paid tips from his customers, and he estimates the monthly amount of the tips was $2,000. It is the Plaintiff’s evidence that, but for the accident, he would have been given a permanent post in the new sushi branch shop near the end of January 2004, and he would have earned a basic monthly salary of about $8,500 plus commissions of $5 per delivery order, making a total of about $10,000 a month.
4. Although I find against the Plaintiff on the issue of liability, there is nothing for me to doubt his evidence about the earnings as a causal delivery worker for the sushi shop and the prospect of obtaining a permanent job. However, my only reservation is the length of time that the Plaintiff says that he was unable to work after the accident. According to the Plaintiff’s medical expert, the period of about 15 months of sick leave granted by the treating doctors is reasonable. On the other hand, the Defendant’s medical expert is of the view that the sick leave period should not be more than 6 months. In my judgment, the Plaintiff’s injury is relatively minor and there is no reason why he could not have worked at an earlier time. Hence instead of allowing the Plaintiff to claim for the total loss of earnings up to 30 March 2005, I only allow him to claim for loss of earnings up to 31 October 2004, which was about 9 months after the accident. The Plaintiff’s pre-trial loss of earning can therefore be assessed as follows:

(i) from 18 January 2004 to 31 January 2004

$7,500 x 14/31 month = $3,387

(ii) from 1 February 2004 to 31 October 2004

$10,000 x 9 months = $90,000

1. loss of Mandatory Provident Fund relating to pre-trial loss of earning:

($3,387 + $90,000) x 5% = $4,669

Total loss of pre-trial earning: $98,056

*(iii) Loss of earning capacity*

1. The Plaintiff is not claiming any damages for future loss of earnings.
2. For loss of earning capacity, the Plaintiff claims a sum of $50,000. However, the Plaintiff’s injury is relatively minor. According to the joint medical report, the Plaintiff may experience pain from time to time, and he may have to take some rest after working for a period of time to relieve the pain. According to Dr. Lam Kwong Chin, the Defendant’s expert, as the work of a delivery worker is not a strenuous one, the Plaintiff should be able to work as such in full capacity, and the adverse effect of the injury on his working performance should be minimal. I accept this observation, and I do not find there is a real risk that the Plaintiff will suffer financial damages in the future because of any disadvantages in the labour market. Hence, no award for loss of earning capacity is made in the present case.
3. *Other special damages*
4. The Plaintiff’s claim for medical expenses in the sum of $4,100 is not disputed. The Plaintiff has not provided any breakdowns for the calculation of traveling expenses and tonic food expenses. Hence, I only make conventional awards of $2,000 and $3,000 for such expenses respectively.
5. Based on the aforesaid, if the Plaintiff is able to establish liability on the part of the Defendant, the quantum of his claim is assessed as follows:

(i) PLSA : $150,000

(ii) Pre-trial loss of earnings : $98,056

(iii) Medical expenses : $4,100

(iv) Traveling expenses : $2,000

(v) Tonic food expenses : $3,000

$257,156

Less employees’ compensation payment: $119,998.5

Total : $137,157.5

1. In view of my findings on the issue on liability, the Plaintiff’s claim is dismissed. I also make an order *nisi* for the costs of the action in favour of the Defendant with certificate for counsel, and such order shall be made absolute 14 days after the handing down of this judgment.

(David Lok)

District Judge

Mr. Anthony Cheung, instructed by Messrs. Huen & Partners, for the Plaintiff

Mr. Lawrence Cheung, instructed by the Messrs. Kenneth C. C. Man & Co., for the Defendant