# DCPI 1920/2006

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1920 OF 2006

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BETWEEN

## CHAN KAM PUI Plaintiff

### and

WONG SIU HUNG 1st Defendant

KA WAI MOTORS LTD 2nd Defendant

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Coram : His Honour Judge Stanley Chan in Court

Dates of Hearing : 26th and 27th June 2007

Date of Handing down Judgment : 28 September 2007

**JUDGMENT**

This is a claim against Wong Siu Hung (D1) for personal injuries sustained by the Plaintiff in a motor vehicle accident that occurred on 16 October 2004. D1 did not dispute the liability but contested that the Plaintiff should be 50% liable for the accident. It is noted that D1 was charged with and pleaded guilty to the traffic offences, contrary to s.38(1) of the Road Traffic Ordinance Cap 374 and Reg.50 of the Road Traffic (Public Service Vehicles) Regulations Cap 374D. On 21 February 2005, D1 was fined $1,500. On 30 March 2007, the Plaintiff indicated to the legal representative of D2 that the action against D2 would be discontinued. Leave to discontinue the action against D2 was eventually sought and granted under Order 21 during the proceedings.

## The accident

2. The Plaintiff had about 3 years experience as a motorcyclist at the time of the accident. At about 7:00 pm on 16 October 2004, the Plaintiff was driving a motor cycle bearing registration number KK8219 while D1 was driving a public light bus (‘PLB’) with the registration number LN 6039. At that time, D1 was driving in the 2nd lane of Tung Yan Street (同仁街) towards Kwun Tong Road (see the sketch plan as exhibited as P-1). Tung Yan Street is for single traffic and has 2 lanes. The 2nd lane will lead to a right turn while the 1st lane left. There is a junction near the bus terminal of Yue Man Square (裕民坊) which leads to Tung Yan Street. There is a ‘Give Way’ road sign for drivers at the junction if they want to proceed to Tung Yan Street from the junction.

3. At the material time, D1 stopped the PLB behind a red mini-bus near the junction in the 2nd lane, awaiting the traffic light to turn green. D1 intended to turn right. While the PLB was stationary, the Plaintiff drove his motorcycle from the junction and squeezed into the space between the PLB and the bus in front thereof. The Plaintiff stopped across the front of the PLB in the 2nd lane of Tung Yan Street and intended to proceed to the 1st lane of the street. Apparently, D1 did not pay much attention to the Plaintiff and hence collided with the left hand side of the Plaintiff’s motorcycle when D1 started the PLB. It caused damage to the motorcycle and the Plaintiff sustained injuries therefrom.

4. The Plaintiff was admitted to the United Christian Hospital (‘UCH’). On examination, the Plaintiff sustained tenderness, swelling and bruising over the lateral side of his left ankle. There was a laceration over the medial side of his left ankle. The Plaintiff was discharged from UCH with oral analgesics. He was granted sick leave from 16 October 2004 to 19 October 2004. Thereafter, the Plaintiff had to pay regular visits to UCH. Further sick leave was granted on and off from October 2004 to November 2004. A total of 41 days sick leave was granted. Basically there is no dispute as to the medical history and the period of sick leave.

5. On examination, Dr PC Lee (D1’s expert), Specialist in Orthopaedics and Traumatology, found that the Plaintiff suffers from 1% impairment of the whole person based on the mild residual stiffness and pain in the left ankle (at p.164 of the Bundle). Dr Peter PS Ko, the Plaintiff’s Orthopaedic expert, however diagnosed that the Plaintiff is suffering from 4% whole person impairment relating to his left ankle injury (at p.158 of the Bundle).

6. As regards damages, the following items of expenses are agreed as listed out in the Amended Agreed Facts dated 27 June 2007:

(a) Cost of repairing the motorcycle $6,235

(b) Travelling expenses $770

(c) Medical expenses $607

(d) Tonic food expenses $1,000

## Injuries

7. The Plaintiff’s left ankle was trapped between the bumper of the PLB and his motorcycle for about 1 to 2 minutes. On examination, the Plaintiff was found to have crushed left leg injury with tenderness and swelling at lateral side of left ankle with bruising and laceration wound over the medial side of the left ankle. X-ray of the ankle, leg and knee showed no fracture. The Plaintiff had several follow-up treatment for his left ankle injury at UCH. Later the Plaintiff had further follow-up treatment as an outpatient at a Kwun Tong clinic. The period of his sick leave was agreed.

8. The Plaintiff complained of left ankle stiffness and that affected his jumping activities. He could manage his activities of daily living without any problem. The Plaintiff had to take taxi to go to the hospital or clinic for follow-up treatment. He also went to see bonesetter several times.

9. The Plaintiff worked as a contract project worker for the Agriculture, Fisheries and Conservation Department (‘AFCD’). His duty involved heavy manual labour. He was required to lift heavy weight objects and to climb up and down trees and ladders. The Plaintiff had resumed the original post with AFCD but he needed to have some modification during performance of his normal duties. He also needed to pair with another partner to perform the job. The Plaintiff has a wage of $6,000 per month. The Plaintiff used to play football and to run.

**The issue of Contributory Negligence**

10. D1 has admitted that he is liable for the accident. The court has to decide to what extent, if any, the Plaintiff was contributory negligent in this accident. Counsel for the Plaintiff submits that, at most, the Plaintiff was liable between 10% to 25%. That said, the Plaintiff alleges that first of all D1 was solely to blame for the accident as D1 should have noticed the presence of the Plaintiff who was driving or inching through the narrow space between the PLB and the mini-bus in its front. D1’s view was blocked by several destination indicators placed at the windscreen (see photos at p.133).

11. The Plaintiff gave evidence in court. He narrated how the accident occurred. There is no dispute that the Plaintiff drove out from the junction when seeing that the traffic was stationary. He moved slowly and inched his way through the narrow gap between vehicles. There were vehicles in both lanes of Tung Yan Street. When asked, the Plaintiff said that he did not press the horn. D1 was not attentive when he started the PLB. Apparently D1 did not expect the Plaintiff and the motorcycle was in front of his PLB.

12. It is accepted that D1 did have a duty to other road users when he started to move. The PLB of course is higher than the motorcycle which gave the driver of the PLB the advantage of a good view of the traffic. It was said that the height of the motorcycle KK 8219, together with the Plaintiff sitting thereon, would be 1,700mm from the ground to the head of the Plaintiff (at p.228 of the Bundle). There is no dispute that when the Plaintiff was inching his way from the junction to the 2nd lane of Tung Yan Street through the gaps in front of the PLB, the traffic was stationary. Had D1 been paying more attention to what was in front of the PLB, there is no doubt that the accident could be avoided. D1’s view was partly blocked by the destination indicators at the windscreen of the PLB.

13. That said, it does not mean that the Plaintiff had no part to play in avoiding the accident. The Plaintiff was moving his motorcycle in between 2 large vehicles. The Plaintiff said that at that time, D1 was lowering his head to tidy up the sundries and was not looking at him. The Plaintiff said he did not honk the horn as he thought D1 could see him. It was getting dark at that time. The Plaintiff knew that it would be dangerous to manoeuvre into the narrow gap of 2 vehicles. Under cross examination, the Plaintiff agreed that the accident was partly attributed to his negligence.

14. In my judgment, although the Plaintiff may not under a duty to honk the horn as submitted by Counsel for the Plaintiff, it does not prohibit the Plaintiff to take a precautionary measure to protect his safety or to avoid accident. This is particularly so when the Plaintiff knew that D1 was not paying attention to him at the material time. The Plaintiff should not take it for granted that D1 knew or paid attention to his presence. The Plaintiff, as a road user, has to make sure that he would not put himself into jeopardy. Honking horn and/or making hand signal is just common measure to alert other road users. That, in my view, also explains why motorcyclists are required under the law to turn on the headlight whenever they are driving the motorcycle.

15. Based on the above reasons, I find that the Plaintiff was contributory negligent in this accident. Counsel for the Plaintiff submitted that the Plaintiff should be liable for up to 25% at the most. The Defendant said the figure should be 50%. I find that it would be prudent for the Plaintiff to honk the horn to warn drivers of other vehicles, in particular, those large vehicles even though the traffic was stationary at the material time. The Plaintiff should not assume other drivers to safeguard his safety, particularly, when the Plaintiff knew that D1 was not paying attention to him. The Plaintiff was anxious to move from the junction to the 2nd lane and then the 1st lane of Tung Yan Street in order to make a left turn. He was driving a small motorcycle and inherently was in a potentially hazardous position. The sky was getting dark which was further to his disadvantage. The Plaintiff should have honked the horn and/or gave additional hand signals. All these factors point to the need that the Plaintiff should take extra caution to avoid accident.

16. In these circumstances, I find the Plaintiff was 30% contributory negligent.

## Quantum

17. Dr Ko, the expert from the Plaintiff, assessed the Plaintiff to have suffered 4% whole person impairment (p.158 of the Bundle). Dr Lee, who was appointed by D1, considered that the Plaintiff was suffering from 1% impairment of the whole person (p.164 of the Bundle). Dr Lee was of the opinion that the Plaintiff should be able to return to his full time duty of a project worker with AFCD and there should not be any significant loss of work efficiency.

18. Four items (viz cost of repair, medical expense, travelling expense and tonic food) totalled $8,612 have been agreed. The Revised Statement of Damages (‘RSD’) dated 23 April 2007 can be found at pp.40 to 44 of the Bundle.

**Pain, Suffering and Loss of Amenities (‘PSLA’)**

19. The Plaintiff in the RSD suggested the figure of $200,000 under this limb. The figure was revised to $100,000 when the Plaintiff’s case closed. The Defendant submitted that the appropriate award under this head should be in the range of $50,000 to $70,000.

20. In *Cheung Man Fu v Great Vantage Development Limited*, DCPI 1165 of 2005, the claimant who had sprained his ankle was assessed to suffer 2% permanent impairment to the whole person. The PSLA awarded was $80,000. In *Wong Wai Hung v Loo Kin and another*, DCPI 643 of 2006, the Plaintiff in that case suffered right ankle injury as a result of a motor accident. The permanent impairment was assessed to be 1.5% and the claimant was awarded $80,000 for PSLA. There is no guideline for awarding the sum of PSLA as each case depends on its own set of facts.

21. Given the fact that the Plaintiff in the present case was assessed to be at 1% to 4% total impairment to the whole person and to be in line with the previous cases, I award $100,000 to the Plaintiff under PSLA.

## Loss of earning capacity

22. Although the Plaintiff was not classified as a civil servant, he was and is being employed by AFCD as a contract worker. He has resumed his original employment even though his performance has been impaired to some extent and his duties have to be modified.

23. In *Chan Wai Tong v Li Ping Sum* [1985] HKLR 176 at 183-B, the Judicial Committee of the Privy Council ruled that:

“A claim for loss of future earning capacity usually arises where the claimant is in employment at the time when the claim falls to be evaluated. The claim is to cover the risk that, at some future date during the claimant’s working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk … . Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. … Evidence will also be generally required in order to show how far the claimant’s earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment.”

To this end, the principles stated in *Moeliker v A Reyolle & Co. Ltd.* [1977] 1 WLR 132 were relevant. In Moeliker, the Court said:-

“The consideration of this head of damages should be made in two stages. 1. Is there a ‘substantial’ or ‘real’ risk that a plaintiff will lose his present job at some time before the estimated end of his working life? 2. If there is (but not otherwise), the court must assess and quantify the present value of the risk of the financial damage which the plaintiff will suffer if that risk materialises, having regard to the degree of the risk, the time when it may materialise, and the factors, both favourable and unfavourable, which in a particular case will, or may, affect the plaintiff’s chances of getting a job at all, or an equally well paid job.”

24. In the present case, the nature of the Plaintiff’s employment required manual labour, and apparently injury of his left ankle would put the Plaintiff at a disadvantage in the relevant labour market. I am of the view that the Plaintiff was and is fortunate to have the government as his employer, even though his job is not as secured as those civil servants under permanent establishments. Sick leave was granted and the Plaintiff has been carrying on with his pre-accident employment up till the present proceedings. That said, there is always a real and substantial risk for the Plaintiff to lose his job with AFCD as it is not difficult for the Plaintiff’s employer to find a replacement worker. In these circumstances, I would award a sum of $50,000 under this head.

## Pre-Trial loss of earnings

25. The Plaintiff does not claim any pre-trial loss of earnings.

## Order

26. The award is itemised as follows:

1. PSLA $100,000

2. Loss of earning capacity $50,000

3. Special damages:

(a) Cost of repairing the motorcycle $6,235

(b) Travelling expenses $770

(c) Medical expenses $607

(d) Tonic food expenses $1,000

Total $158,612

As I find the Plaintiff 30% contributory negligent, the net sum to be awarded to the Plaintiff is $111,028.40.

## Interests

27. There shall be interest on general damages at 2% per annum from the date of writ to the date of Judgment, and on special damages at half of the judgment rate from the date of the accident to the date of Judgment.

## Costs

28. Costs had been incurred by D2. A draft Notice of discontinuance has been sent to D2’s legal representative on 30 March 2007 (p.230 of the Bundle). It showed the intention of the Plaintiff to discontinue the action against D2. As such, I find that costs, if any, incurred thereafter would not be necessary. In the circumstances, I order the Plaintiff to pay D2’s costs of the action up to 30 March 2007, to be taxed if not agreed.

29. In view of the 30% contributory negligence on the part of the Plaintiff, there will be a Costs Order nisi that D1 pays 2/3 of the costs of the action to the Plaintiff, to be taxed if not agreed, with certificate for Counsel. Such Costs Order nisi is to be made absolute 14 days after the handing down of the Judgment.

Signed

( Stanley Chan )

District Judge

Representation:

Mr. Andrew Leung instructed by Messrs. Chan & Chan for the Plaintiff.

Mr. Peter Wong Ting Kwong instructed by Messrs. C.K. Tang & Co. for the Defendants.