**DCPI 2076/2007 &**

**DCPI 1521/2008**

**(Consolidated)**

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO.2076 OF 2007**

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BETWEEN

|  |  |
| --- | --- |
| LEUNG KWOK LUNG | 1st Plaintiff |
| WONG HIN TAT WILLIAM | 2nd Plaintiff |

and

|  |  |
| --- | --- |
| LING WAI | Defendant |

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**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO.1521 OF 2008**

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BETWEEN

|  |  |
| --- | --- |
| LEUNG KWOK LUNG | 1st Plaintiff |
| WONG HIN TAT WILLIAM | 2nd Plaintiff |

and

|  |  |
| --- | --- |
| LAM JOYCE ALICIA, (lately a minor but now of full age) | Defendant |

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(Consolidated pursuant to the Order made by Master K. Lo on 24 November 2008)

**Coram: Deputy District Judge Alfred H H Chan in Open Court**

**Date of Hearing: 9 February 2010**

**Date of Handing Down of Judgment: 14 April 2010**

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JUDGMENT

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**Introduction**

1. The claims in the trial of this consolidated action arose out of a traffic accident on 13 July 2005 in which a motorcycle collided against the door of a stationary taxi which was opened by one of the passengers in the taxi. The 1st Plaintiff was the driver of the motorcycle, with the 2nd Plaintiff, Mr. Wong, on the passenger seat. The Defendant in the First Action was the driver of the taxi, and the Defendant in the Second Action, Miss Lam, was the passenger who opened the door of the taxi.
2. The actions were consolidated on 24 November 2008. Sometime thereafter, the 2nd Plaintiff was adjudged bankrupt and he failed to obtain consent from the Official Receiver to the continuation of the actions, as a result of which his actions were dismissed. Shortly before the trial, by consent summons the 1st Plaintiff discontinued the First Action against the taxi driver. At the beginning of the trial, I also gave leave to the taxi driver to discontinue his Notice of Contribution and Indemnity against the Defendant in the Second Action, and also dismissed Miss Lam’s Notice of Contribution and Indemnity against the taxi driver in default of her appearance. So what is left in this set of proceedings is the 1st Plaintiff’s claim against Miss Lam in the Second Action, DCPI 1521/2008. For the sake of simplicity, I will in this Judgment refer to the 1st Plaintiff as “the Plaintiff”, and to Miss Lam as “the Defendant”.
3. The Defendant was born on 22 October 1990. She was aged 14 (almost 15) at the time of the accident, and was still a minor when the writ against her was issued, being sued by her mother and next friend. After she became of age, she adopted these proceedings in her own right and thereafter began to act in person. Since then she has not taken part in the proceedings, and was absent at the trial.

**The Accident**

1. The only witness called was the Plaintiff himself. He was on lifeguard duty on that day at Repulse Bay. During the lunch break, he took his colleague Mr Wong, the 2nd Plaintiff, who was also a lifeguard, on his motorcycle to go to Admiralty. On their way back, they arrived on Beach Road at Repulse Bay, a road with one-way traffic, when the Plaintiff saw ahead of him a taxi stopped in the middle of the road. To the left of the taxi was a row of public light buses parked by the side of the road. With the public light buses there and the taxi next to them, there was only a space of about 2 to 3 feet between the taxi and the offside pavement. He stopped the motorcycle and waited for the taxi to move. After about 10 seconds, the taxi was still not moving. He then started the motorcycle to overtake the taxi from the offside of the taxi, driving at 20 to 30 kph. When he got to the side of the taxi, the offside rear door of the taxi suddenly opened in the way of the motorcycle. There was not enough time to brake or avoid a collision. The Plaintiff and his passenger were both thrown off the motorcycle, suffering a number of injuries.

**Injuries**

1. Three medical reports from Ruttonjee & Tang Shiu Kin Hospital have been produced on behalf of the Plaintiff, covering his treatment in the aftermath of the accident. The Plaintiff was born on 26 April 1976. He was 29 at the time of the accident and is now 33. After the collision, he was taken to hospital, and was diagnosed with a fracture of the left tibia, contusion of the left hip and left knee, spraining of the right wrist and multiple abrasions. On 15 July 2005, for his fractured leg he was put on a cast which was removed on 25 July and replaced by a brace. He was discharged on 27 July. He was last seen at the clinic of the hospital on 22 September 2005, when he still had a mild pain in his left tibia and left knee. X-ray showed that the fracture was healing. He received physiotherapy treatment until December 2005. He was given sick leave to 2 December 2005, a total of 143 days. He was able to return to work as a lifeguard afterwards.

**Present Complaints**

1. The Plaintiff complains that he still suffers from persistent pain and numbness in his left tibia, reduced mobility, associated weakness and stiffness, stress and frustration. He cannot carry heavy objects, squat, stand or walk for too long, and needs his colleagues at work to help him if he needs to lug lifeboats along the beach. Before the accident, he enjoyed a very active and sportive life, taking part in many marathon and long-distance swimming competitions and events, and has produced a large number of certificates attesting to his completion of the distances and the performance times for the various races and events. His performance has now declined substantially and he has lost much of the incentive to compete as he did before.

**Liability**

1. The Plaintiff’s case against the Defendant is in negligence, in essence that the Defendant failed to take reasonable care in checking the traffic conditions before she opened the door on the offside of the taxi. Although the Defendant did not attend trial, a Defence had been filed on her behalf (when she was still legally represented) in which she denies liability and also alleges contributory negligence on the part of the Plaintiff, particulars of which include overtaking the taxi in an inappropriate manner, driving too close to the taxi, failing to keep a proper lookout, driving at an excessive speed and so on. The Defendant being absent, no evidence was adduced on her behalf. However, it is still incumbent on the court to decide the issues on the basis of the evidence available.
2. I have considered the age of the Defendant at the time of the accident. She was about 3 months short of 15 years of age, but I am satisfied that a person of that age in a busy metropolis like Hong Kong will have acquired sufficient experience and knowledge to appreciate the need to pay heed to surrounding traffic conditions as a road user, so that the Defendant did owe a duty of care to fellow road users.
3. Miss Choy, of the Plaintiff’s Solicitors, refers to some of the statements made by the police by the parties and witnesses, from which it appears that the Defendant and her friends wanted the taxi to stop outside a 7-Eleven outlet on the left-hand side of Beach Road, but because of the row of public light buses parked by the roadside, the taxi had to stop to the right of the light buses. Hence the position of the taxi in the middle of the road as found by the Plaintiff. Miss Choy submits that the Defendant was at fault in failing to check that it was safe to open the door when the taxi was stopped in that position of the carriageway. She relies on a passage in *Charlesworth & Percy on Negligence* (9th ed) at para 9-261 which cites the case of *Brown v Roberts* [1963] 2 All ER 263. Although the issue in that case was whether a passenger, who carelessly opened a door towards the pavement thereby injuring a pedestrian, was a “user” of the vehicle for the purpose of motor insurance legislation, it does serve as an example of a finding of negligence in a similar situation.
4. Although the taxi was stopped not far from the pavement (about 2 to 3 feet according to the Plaintiff), it was still in the middle of the carriageway and it was all the more important for the Defendant as a passenger to check both vehicular and pedestrian traffic conditions to her right before she opened the door. I find that she must have failed to do so and was therefore negligent, thereby causing the accident.

**Contributory Negligence**

1. On the issue of contributory negligence raised in the Defence, it is not inconceivable that a road user, whether a driver, cyclist or pedestrian, may have contributed to an accident triggered by the opening of a door of another vehicle. While a road user is not bound to anticipate “folly in all its forms” on the part of other users, it is also common experience that many do not behave with reasonable care: see dicta of Lord Uthwatt in *London Passenger Transport Board v Upson* [1949] AC 155 at 173. Each case will depend on its own particular facts, including the conditions of the road where the accident takes place, how users are expected to behave at the site, where the offending vehicle is parked, and whether the injured road user could have reasonably expected the door to open, the speed of the oncoming vehicle, and so on. See *Burridge v Airwork Ltd* [2004] EWCA Civ 459.
2. Had the trial been properly contested, some of these matters would have been highly relevant, such as the speed of the motorcycle and whether the Plaintiff could have foreseen the possibility of passengers alighting from the taxi from the offside. However, the Defendant having been absent from the trial, these matters have not been thoroughly explored forensically, and I need say no more about them. The burden is on the Defendant to establish contributory negligence on the balance of probabilities, and she has failed to discharge that burden. I therefore find on the evidence available that the Defendant was solely responsible for the accident and the Plaintiff’s injuries.

**Quantum**

**PSLA**

1. Miss Choy has cited a number of precedents on PSLA awards for injuries and disabilities that fall short of the “serious injury” category, which is the case of the Plaintiff, and submits that the court should award $260,000 for PSLA. They include *Lau Kin Wai Danny v Chan Wai Sang* (unrep, HCPI 1007/2000, 6 January 2002, Deputy Judge M. H. Lam), *Wong Ka Pang James v Wong Chun Wang* (unrep, HCPI 644/1998, 19 October 1999, Registrar C. Chan), *Lee Sze Wai v Law Chi Kin* (unrep, DCPI 44/2001, 10 May 2002, Deputy District Judge R. Yu), *Lee Ka Yuen v Hung Shing Environmental Recycle Limited* (unrep, DCPI 835/2005, 19 June 2008, HH Judge Mimmie Chan), and *Yeung Por v Attorney General* (unrep, HCPI 586/1996, 20 January 1997, P. Chan J).
2. The medical reports show that the main injury suffered by the Plaintiff was the fractured left tibia, or shin bone. Treatment was by way of a cast which was removed after 10 days but replaced with a brace. By 22 September 2005, the fracture was already healing and the hospital clinic did not regard further visits by the Plaintiff necessary. Thereafter, the Plaintiff continued with his physiotherapy treatment until early December 2005. The injury has healed well, with certain residual complaints, but the Plaintiff was fit enough to return to work as a lifeguard, and continues to do so, albeit with certain limitations. Having looked at the cases cited by Miss Choy, I consider the injury and disability suffered by the Plaintiff closer to the first three cases referred to above, in which awards of $150,000 were made. I do accept that the Plaintiff, being still at a relatively young age, has suffered loss of amenities due to his reduced capacity to participate in the sporting events he used to enjoy. In these circumstances, I consider an award of $180,000 for PSLA appropriate.

**Pre-Trial Loss of Earnings**

1. The Plaintiff was given sick leave and out of work for 143 days. I accept the Plaintiff’s evidence of his earnings, supported by his tax returns and demands for the 3 years ending 31 March 2005 before the accident. This gives an average monthly earnings of $15,547. His pre-trial loss of earnings (including MPF) is therefore $15,547 x 143/30 x 1.05 = $77,813.

**Loss of Earning Capacity**

1. The Plaintiff also claims an award for loss of earning capacity on the ground that he will be at a disadvantage in the labour market with his current limitations caused by the injury, such as longer periods of unemployment in between jobs. Miss Choy’s suggestion of a figure based on 12 months of lost earnings is however excessive given the Plaintiff’s present condition which is largely satisfactory. I would make an award based on 3 months of lost earnings, i.e. $46,641.

**Special Damages**

1. I also allow the Plaintiff’s claims for medical and travelling expenses in the sums of $2,380 and $1,280 respectively, totalling $3,660. However I will not allow his claim of $5,000 for nourishing food for which there are no receipts and for which there is no evidence of how the amount is calculated.

**Summary of Awards**

1. The awards for damages are summarised below:

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| --- | --- |
| PSLA | $180,000 |
| Pre-Trial Loss of Earnings | $77,813 |
| Loss of Earning Capacity | $46,641 |
| Special Damages | $3,660 |

1. The awards for PSLA and loss of earning capacity will carry interest at 2% per annum from the date of the writ to the date of judgment and thereafter at the judgment rate. The awards for pre-trial loss of earnings and special damages will carry interest at half the judgment rate from the date of the accident to the date of judgment and thereafter at the judgment rate. I also order the Defendant to pay the costs of this action to be taxed if not agreed.

Alfred H H Chan

Deputy District Judge

Miss Choy Mun Kie of B. Mak & Co, for the Plaintiff

Defendant absent