DCPI 2082/2011

**IN THE HIGH COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 2082 OF 2011

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BETWEEN

LUI LAI WING（雷厲榮） Plaintiff

and

FONG CHI SING（方志成） 1st Defendant

HO SIU YAM（何兆欽） 2nd Defendant

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Before: Deputy District Judge Victor Dawes in Court

Date of Hearing: 28-30 November 2012

Date of Judgment: 30 November 2012

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J U D G M E N T

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***A. Background***

1. On 5 June 2010 at around 8:10 pm, the plaintiff was driving a motorcycle (registration number NS 9150) (the “Motorcycle”) along Cherry Road (westbound) near the junction with Hoi Wan Road, Kowloon. At the same time, the 1st defendant was driving a light goods vehicle (registration number NJ 7512) (the “LGV”) along Cherry Road in the same direction as the Motorcycle. At the material time, the weather was good and the road surface was dry with sufficient lighting and normal traffic flow.
2. A collision occurred between the 2 vehicles. The plaintiff now claims damages for personal injuries arising from the alleged negligence of the 1st defendant.
3. The present proceedings were commenced against both the 1st defendant and the 2nd defendant (the owner of the LGV). The claim against the 2nd defendant was discontinued before this trial.

***B. Liability***

1. Although the precise location of the collision is in dispute, it is common ground that this took place on Cherry Road near the junction with Hoi Wang Road. The relevant parts of Cherry Road had 5 lanes. A sketch prepared by the police showing the roads in question and the positions of the Motorcycle and the LGV after the collision is reproduced as an attachment to this judgment (the “Sketch”).

*B1. The plaintiff’s claim*

1. In short, the plaintiff’s pleaded case is that:
   1. He was driving the Motorcycle along Cherry Road on the 5th lane (counting from the left). At the same time, the 1st defendant was driving the LGV along the 4th lane (also counting from the left) on the same road.
   2. The LGV suddenly cut into the 5th lane which resulted in a collision between the 2 vehicles. The plaintiff was trapped underneath the LGV and was dragged for a short period of time before coming to a stop.
2. In his witness statement, the plaintiff explained that there were 2 sets of traffic lights on the relevant parts of Cherry Road. The 2 sets of traffic lights were about 40 meters apart. Further:
   1. After he drove past the 1st set of traffic lights, he noticed the LGV on the 4th lane. The 2 vehicles were side-by-side and were moving at about 25km per hour.
   2. When the plaintiff began to turn right towards the Tai Kwok Tsui direction (ie turning right), the LGV suddenly turned into the 5th lane without any warning or indication. As a result, the LGV collided into the Motorcycle.
   3. The plaintiff then lost balance and he was trapped underneath the LGV and was dragged for a certain distance before coming to a stop. Thereafter, 2 to 3 people helped moved the LGV and the Motorcycle to rescue him.

*B2. The 1st defendant’s case*

1. The pleaded case of the 1st defendant is that:
   1. He was driving the LGV along the 5th lane of Cherry Road towards the junction with Hoi Wang Road. There was a female passenger sitting in the left front seat next to him.
   2. Upon reaching the said junction, the 1st defendant stopped at the traffic lights. The LGV started moving again after the lights turned green. When he emerged into the junction and turned right into another part of Cherry Road (northbound), the Motorcycle crashed into the right side of the LGV.
   3. He immediately applied his brakes but the plaintiff fell from the Motorcycle and was trapped underneath the LGV. The Motorcycle was dragged forward by the LGV for 2 or 3 seconds before the LGV came to a complete halt.
2. The 1st defendant’s witness statement confirmed his pleaded case. In addition, the 1st defendant also called the passenger on the LGV (ie a Ms Kwan) as a witness in these proceedings. In her witness statement, Ms Kwan confirmed the 1st defendant’s case. Most importantly, Ms Kwan confirmed that the LGV was already travelling along the 5th lane of Cherry Road before the collision and the LGV did not cut into the 5th lane from the 4th lane when the collision took place.

***C. Discussion on Liability***

1. In light of the plaintiff’s allegation, the most important issue is whether the LGV was travelling on the 4th lane and collided into the Motorcycle by cutting into the 5th lane. The plaintiff’s case will have to be rejected if the LGV was already travelling on the 5th lane of Cherry Road before the collision.
2. I began my analysis by considering the Sketch prepared by the police and the relative positions of the LGV and the Motorcycle after the accident. Considering the positions of the 2 vehicles and the description of the accident by the 3 protagonists as contained in their witness statements, I formed an initial impression that the description by the plaintiff was more probable. There was no suggestion that the LGV came to an abrupt stop when the collision took place and it was (according to the 1st defendant) already travelling on the 5th lane at a relatively slow speed. On the 1st defendant’s case, the cause of the collision is unclear. In other words, the cause of the collision put forward by the plaintiff is inherently more probable.
3. However, this is only the beginning of the analysis. I came to a very different view after having the opportunity of considering transcripts of the criminal prosecution of the 1st defendant and the viva voce evidence given by the 3 witnesses. It is common ground that the 1st defendant was charged with careless driving but was acquitted after trial. The plaintiff appeared as prosecution witness and Ms Kwan also gave evidence for the defence. The 1st defendant elected not to give evidence himself in the criminal proceedings. The transcript of their testimonies featured heavily when the plaintiff was cross-examined in this trial.
4. In short, the conclusion that I formed after considering all the evidence before me is that the plaintiff’s case should be rejected. There are considerable inconsistencies between the evidence given in the criminal proceedings, his witness statements and the answers given by him when he was cross-examined before me. In contrast, the evidence given by the 1st defendant and Ms Kwan were straightforward and coherent. Ms Kwan’s evidence was particularly useful and impressive. She is an independent witness as she only met the 1st defendant for the first time on the day of the accident. I am of the view that the evidence given by the 1st defendant and Ms Kwan is far more reliable as compared to the evidence given by the plaintiff and are to be preferred.

*C1. The plaintiff’s evidence*

1. As I have already stated, there were significant inconsistencies in the evidence given by the plaintiff. A few examples are highlighted below.
2. Firstly, in his witness statement, the plaintiff suggested that he first noticed the LGV after the 1st set of traffic lights on Cherry Road when he was travelling on the 5th lane and the LGV was on the 4th lane. During cross-examination, he explained that he first saw the LGV before the 1st set of traffic lights. The LGV had stopped in front of the 1st set of traffic lights and when the Motorcycle reached the traffic lights, the lights turned green and the 2 vehicles continued travelling along the road together.
3. Secondly, the evidence given by the plaintiff as to the location of the collision is also far from satisfactory. In his witness statement, the plaintiff suggested that the 2 vehicles collided after he had turned right towards the Tai Kwok Tsui direction (ie northbound Cherry Road). However, during his examination-in-chief, Mr Poon (counsel for the plaintiff) had invited the plaintiff to mark the point of collision on the Sketch. The area indicated by the plaintiff was before the right turn (ie before the 2nd set of traffic lights). The aforesaid versions are also inconsistent with what he described when he gave evidence before the magistrate in the criminal proceedings where he alleged that the 2 vehicles collided immediately after the 1st set of traffic lights.
4. Thirdly, it is also unclear as to whether the LGV had accelerated before swerving into the Motorcycle as alleged. When asked by the prosecutor in the magistracy, he claimed that the acceleration was gradual. When cross-examined before me, he was asked whether the acceleration was sudden or gradual and he claimed that he was not sure. When shown the transcript of the criminal proceedings, he said that he did not know.
5. Finally, the plaintiff’s evidence on whether he was familiar with the road in question is also completely inconsistent. When giving evidence in the magistracy, he suggested that he was familiar with the area as he used the same road after work everyday. This was denied by him when he gave evidence before me when he suggested that he was not familiar with the road. When I clarified this issue with him, he suggested that he did not use the road everyday but he would use Cherry Road if he was heading home immediately after work.
6. A number of other inconsistencies in the plaintiff’s evidence have been highlighted when he was cross-examined. They are also helpfully summarized by Ms Chung (for the 1st defendant) in a table (Annex 1) attached to his written closing submissions. I have taken them into account in considering the credibility of the plaintiff.
7. When the inconsistencies were pointed out, the plaintiff maintained that the description given by him when cross-examined before me was what had in fact happened. Further, he attempted to justify the discrepancies by suggesting that: (i) he was giving evidence under the influence of medication in the magistracy and his memory was affected by the medication; and (ii) he had difficulty understanding his own witness statements given his low level of education. However, he was embarrassed by this and did not want to reveal this to his solicitors. This was why he stated at the outset of his witness statements that he was able to read and write Chinese and did not seek any help when he was asked to review his own statements. This resulted in mistakes in his witness statements that he was unable to pick up.
8. I am unable to accept the explanations given by the plaintiff for the following reasons:
   1. In both his counsel’s opening and his evidence-in-chief, he attempted to explain a so-called “inadvertent mistake” made by him when giving evidence in the magistracy. There was no suggestion, until he was cross-examined, that he was affected by medication at any point of time.
   2. There is no suggestion in the medical evidence before me that there was ever any complaint or diagnosis of memory impairment.
   3. Further, the plaintiff also demonstrated during the course of his evidence that he was able to understand a lot of the Chinese characters in his statements. More importantly, the incident in question is a straightforward traffic accident and he should have no difficulty in giving an accurate account despite his level of education.

I am therefore unable to accept that his education level and his alleged inability to understand the statements justified the poor quality of his evidence.

*C2. Evidence of the 1st defendant and Ms Kwan*

1. The 1st defendant’s evidence is straightforward and convincing. He was able to describe what had happened with sufficient precision. Another important consideration is that his case has all along been very consistent. The evidence given by him before me is consistent with what he told a police officer on the day of the accident and this has been recorded in a statement made by the police officer. Although there was a minor amendment to his pleaded case, this did not affect the overall veracity of his case.
2. Ms Kwan’s evidence is particularly important. As I have explained, she is completely independent. She was able to recall during this trial what had happened without exaggeration. What is crucial is that she was able to recall that the LGV was already on the 5th lane before the collision and that it did not cut into the 5th lane from the 4th. She was sure that the vehicle was on the 5th lane because she was familiar with Cherry Road as she used the same road for a number of times during that period. She explained that the LGV had turned right into Cherry Road and was already on the 5th lane before the collision. Likewise, Ms Kwan had also informed the police officer handling the accident on the day that the LGV was already on the 5th lane before the collision and this was recorded in the officer’s statement.
3. I accept the evidence of 1st defendant and Ms Kwan as to how the accident had occurred.
4. Mr Poon made a number of points when cross-examining the 1st defendant and Ms Kwan:
   1. Mr Poon suggested that if the Motorcycle had crashed into the LGV from behind (as alleged by the 1st defendant), the Motorcycle would have “bounced off” rather than become trapped underneath the LGV. In this regard, the 1st defendant explained that immediately after the collision, he tried swerved to the right and wanted to pull the LGV to the side of the road. This might explain why the plaintiff was trapped under the LGV. This also provides an explanation for the positions of the 2 vehicles after the accident.
   2. Further, it was accepted by the 1st defendant that: (i) as he was allegedly travelling on the 5th lane, the distance between the LGV and the side of the road was very narrow and no more than 2-3 feet; (ii) there was no vehicle on the 4th lane at the time. Mr Poon therefore suggested that it was inconceivable that the plaintiff would try to overtake the LGV by making use of the space to the right of the LGV rather than cutting into the 4th lane.
5. I have taken the aforesaid points on board when considering the inherent probability of the plaintiff’s case. They are valid points to make and support my initial impression of the case. However, they do not affect the conclusion I reached after taking all the evidence into account.
6. Mr Poon also submitted that the discrepancies in the evidence given by the plaintiff are minor and was the result of his low level of education and difficulty in reading Chinese. I disagree. I am of the view that the discrepancies are sufficiently serious to affect the credibility of the plaintiff’s evidence.
7. Finally, I should emphasise the fact that the 1st defendant was acquitted in the magistracy is a matter that I have taken into consideration but this is not significant. I have had the opportunity of hearing viva voce evidence and to form my own assessment of the witnesses. The inherent probability and my assessment of the 3 witnesses are the main considerations.
8. For the above reasons, I find that the plaintiff has failed to establish any negligence on the part of the 1st defendant for the accident resulting in the injuries sustained by him.

***D. Quantum***

1. Had I found the 1st defendant liable to the plaintiff, I would have dealt with the question of quantum as follows.
2. In terms of the injuries sustained:
   1. The diagnosis of the plaintiff’s orthopedic injuries has been agreed by the experts in the joint report prepared by Dr Wong See Hoi and Dr Chun Siu Yeung. They include: (a) soft tissue injury to the back; and (b) lateral femoral cutaneous nerve injury to the left thigh.
   2. The plaintiff had ceased all treatments since September 2011. By the date of the joint examination by the experts, the decreased sensation over the anterolateral aspect of his left thigh had improved by 80%.
   3. According to the plaintiff’s expert (Dr Wong), the residual symptoms should be some discomfort on prolonged sitting whilst driving as well as impaired endurance on prolonged walking and standing. Despite a suggestion by the plaintiff of lower limb weakness, the medical evidence before me suggested that “his lower limb power and sensation were intact”. See Report dated 22 February 2012 by Dr Sheung Kei Tak of Yan Chai Hospital.
   4. On the psychiatric aspect, the plaintiff attended the Psychiatric clinic of West Kowloon Psychiatric Centre with complaint of fearful, recurrent dreams of the scene in question, poor sleep, irritability, poor concentration and loss of interest in sex. The diagnosis was post-traumatic stress disorder. He was given medication and had follow ups treatments on 27 October 2010 and 24 November 2010.
   5. Both experts agreed that the plaintiff would be able to resume his pre-accident job. He has resumed working as a driver of private cars since 1 October 2011 and is earning HK$12,000 per month.

*D1. PSLA*

1. The plaintiff claims HK$300,000 under this head.
2. Ms Poon referred me to a number of authorities and argued that the injuries are similar. They include: *Luk Shu Keung v Kwok Chi Shing* (HCPI 848 of 2005, unreported, 28 February 2011), *CMY v Tam Siu Wing* [2008] 4 HKLRD 604, *Lo Siu Ning v. Chan Kai Hing & Anor*. (HCPI 301 of 2004, unreported, 31 August 2007) and *Au Yeung Miu Sum v Tsang Kwong Wai & Anor.* (HCPI 244 of 2001, unreported, 21 March 2003). The PSLA awarded was between HK$250,000 and HK$400,000.
3. Mr Chung contended that an appropriate award should be HK$150,000. He also pointed to the fact that there was a finding by Dr Chun that there is a healed previous fracture at L1. By reason of such pre-existing injury, Dr Chun opined that even in the absence of the accident in question, it was almost certain that the plaintiff would not go through his life unaffected by it. Some other events in his life would bring about the present symptoms in any event. This point was not contradicted by Dr Wong. Mr Chung argued that this would probably bring the plaintiff into the 2nd or 3rd category set out in *Chan Kam Hoi v. Dragages et Travaux Publics* [1998] 2 HKLRD 958 and he suggested a reduction in the award of PSLA to HK$120,000.
4. I agree that the PSLA claimed is on the high side in light of the injury sustained. In my judgment, an award of HK$200,000 would be appropriate. I also accept that there should be a reduction as a result of the pre-existing injury and a further reduction of HK$30,000 is appropriate. This would result in an award of **HK$170,000**.

*D2. Pre-trial loss of earnings*

1. There is no dispute that the plaintiff’s pre-accident income was HK$12,000 per month. It is also agreed that as disclosed by the sick leave certificates, the plaintiff was granted 300 days of sick leave. The plaintiff however claims sick leave of 462 days, including days between the relevant certificates. He argued that he was unable to secure employment between the sick leave periods which were short and intermittent.
2. I do not accept that the plaintiff was unable to work at all in the periods not covered by the sick leave certificates. No explanation has been offered by him in his evidence as to what efforts he made in those periods. There was also a big gap between 28 January 2011 and 17 June 2011 with no explanation whatsoever. I would have been prepared to allow the days covered by the sick leave certificates only (ie 300 days) and award a total sum of **HK$126,000** (ie HK$12,000/30 x 300 x 1.05 (MPF)).

*D3. Loss of Earning Capacity*

1. The plaintiff claims that as a result of the injuries, he suffered from a reduction in work capacity and efficiency. It is said that he will suffer from a disadvantage in the labour market. Dr Wong opined that there will be residual discomfort over his sacrum and left thigh numbness. He made no comment on the degree of the reduction in work efficiency and capacity. Dr Chun, however, regarded the discomfort as mild.
2. The plaintiff claims a sum representing 12 months of income and the 1st defendant argues that an appropriate award is 3 months. I am of the view that the impact of the accident on the loss of earning capacity is not as significant as what the plaintiff has alleged and would have awarded him a sum equivalent to 4 months, ie HK$12,000 x 4 = **HK$48,000**.

*D4. Special Damage*

1. The parties managed to reach agreement under this head. The sum is **HK$17,441**.

*D5. Summary*

1. For the above reasons, the total damages I would have awarded to the plaintiff are as follows:

PSLA HK$170,000

Pre-trial loss of earnings HK$126,000

Loss of earning capacity HK$48,000

Special Damages HK$17,441

Total: **HK$361,441**

1. If liability had been established, special damages would have carried interest at half judgment rate from the date of the accident to the date of judgment (and thereafter at judgment rate). The award of PSLA would have carried interest at the rate of 2% per annum from the date of the writ to the date of judgment (and thereafter at judgment rate).

**E. Conclusion**

1. For the above reasons, the action is dismissed. I shall now hear the parties on costs.

( Victor Dawes )

Deputy District Judge

Mr Jackson Poon instructed by Kenneth Poon & Co, Solicitors for the plaintiff

Mr Gary K H Chung instructed by Winnie Leung & Co for the 1st defendant