#### DCPI 522/2012

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 522 OF 2012

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BETWEEN

YAU KAM CHING Plaintiff

and

CHEUNG SHUN KAU Defendant

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##### Before: His Honour Judge Alex Lee in Court

Date of Hearing: 26 November and 20 December 2013, 13 and 14 February 2014

Date of Judgment: 17 March 2014

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JUDGMENT

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*INTRODUCTION*

1. This is the plaintiff’s claim for damages in relation to the injuries she sustained from the traffic accident happened on 28 April 2009 when she was knocked down by the taxi driven by the defendant.

*THE ISSUES*

1. After the accident, neither the plaintiff nor the defendant was prosecuted by the police. The defendant disputes both liability and quantum.
2. The issues are:-
3. whether the defendant was negligent in causing the accident;
4. if so, whether the plaintiff was guilty of contributory negligence and if so, to what extent; and
5. as to quantum, subject to the issue of liability, whether:-
6. the plaintiff suffers any loss of earning capacity;
7. there should be any compensation for post sick leave loss of earnings; and
8. whether the post-trial (medical) expenses, if any, should be calculated on the basis that the plaintiff obtain treatment from the private sector.

*THE ACCIDENT*

1. The accident took place in Kiu Kiang Street near its junction with Un Chau Street, Sham Shui Po, Kowloon. On 28 April 2009, the plaintiff commenced her employment with Man Fat Restaurant (“Man Fat”) as a waitress. Man Fat had a total of 3 shops on both sides of the road, namely Shop A on the right (North West) and Shops B and C on the left (South East). At about 5 pm when it was the plaintiff’s meal time, she walked from Shop B on the left and crossed the road to the opposite Shop A to obtain a bowl. At the time, there were two rows of vehicles doubly parked outside Shop A. The plaintiff said that after obtaining the bowl, she walked through the gap between two vehicles parked outside Shop A, stopped for a while and looked to her left and right. Seeing that there was no vehicle coming, she stepped forward intending to return to Shop B. However, after she had taken two steps, a taxi suddenly arrived on her left and knocked her down. She lost consciousness immediately. Before that, she had not heard any horn sounding. She said that she did not know where the taxi came from, but she believed that it had travelled along Un Chau Street before turning left into Kiu Kiang Street at a fast speed before the collision. As a result of the accident, she suffered a 5 cm scalp laceration wound over occiput, degloved injury over left ankle on the medial side, a laceration wound over left leg and fracture of left distal tibia and fibula.
2. The defendant, however, denied that he had travelled along Un Chau Street. He said he had picked up two passengers at the junction of Castle Peak Road and Kiu Kiang Street and was heading for Mong Kok. He said he stopped beside Precious Blood Hospital and his taxi was the first car in front of the traffic light. Whilst he was waiting for the traffic signal to change, there were no vehicles on either of his sides. When the traffic light changed in his favour, he drove through Un Chau Street at about 20 to 30 km per hour and cut to the right in order to enter the relevant portion of Kiu Kiang Street. He noticed that there were vehicles parked on both sides of the road, resulting in a narrow passage permitting one vehicle only, leaving a margin of about one or two feet on either side. All of a sudden, a black shadow emerged from his right and almost at the same time something hit the off-side of the taxi. After the taxi had ground to a halt, he got off and found that the right front wheel was pressing on the plaintiff’s leg. Therefore, he reversed the taxi for about 3 feet to release her. At the time, people who had parked their vehicles illegally nearby rushed out and drove their vehicles away.
3. Senior Police Constable 54011 (then PC 54011, “the Police Officer”), who was called by the defence, was the investigating officer of the accident. He arrived at the scene at about 1805 hours. He found that there were recent dent marks on the right front wing of the taxi and that the mudflap of its right front wheel was also damaged. He took photographs and measurements of the scene. He found that there was also a skid mark of about 7.2 m on the road. Based on that, he estimated that the speed of the defendant’s taxi before the accident was about 30 km/h. Later on the same day, the Police Officer took a cautioned statement from the defendant. On 12 May 2009, he visited the plaintiff at Caritas Hospital where she recounted the incident to him and gave him a written consent for the release of her medical records. On 7 June 2009, he took a witness statement from the plaintiff at her home.

*The plaintiff’s account*

1. I bear in mind that the burden of proof is on the plaintiff to show that the defendant was negligent in causing the accident and that the standard of proof is one of balance of probabilities. I would like to begin by dealing with certain factual issues in relation to the plaintiff’s evidence.
2. First of all, as I have noted above, the plaintiff did not in fact know from which direction the taxi came except that it hit her on her left. It is only her speculation that the taxi had travelled along Un Chau Street before turning left into Kiu Kiang Street. This speculation, if true, may explain to a certain extent why she had failed to notice the approach of the taxi. However, I have no difficulties rejecting this speculation of the plaintiff. There is the direct evidence of the defendant, which I accept, that he had picked two passengers at the junction between Castle Peak Road and Kiu Kiang Road, that he had stopped at the traffic light outside Precious Blood Hospital and that he was heading towards Mong Kok at the time. What the defendant said is consistent with the version he gave under caution to the police on the day of the accident. Moreover, the skid mark suggests that the taxi could not have travelled very fast. I accept the defendant’s evidence that he was driving at about 30 km/h immediately prior to the accident.
3. Second, the traffic of that portion of Kiu Kiang Street is only one way. In the normal course of event, any traffic should only have come from the plaintiff’s left when she was crossing the road from the right side to the left. Therefore, the plaintiff should have paid more attention to her left. However, it appears from her evidence that she had not done so. What she said was that she had looked to the left and to the right.[[1]](#footnote-1) She did not say that she had looked to the left again before crossing. Her evidence in court goes no further.[[2]](#footnote-2) Moreover, it is apparent that the plaintiff was unfamiliar with the location. The date of the incident was the first day she worked for Man Fat. Besides, she had difficulties matching her evidence with the scene photograph. Despite much prompting, she still wrongly identified which side Shop A was located. [[3]](#footnote-3) There is some doubt therefore as to whether she actually knew which way the traffic would come. However, I take heed that the ambiguity as to whether the plaintiff had looked to the left again should not given undue weight and it is just one of the factors to be taken into account together with all the other evidence in determining the manner in which the plaintiff crossed the road at the material time.
4. Third, as can be seen from the photograph Exhibit D3, Kiu Kiang Street was a straight road. If the plaintiff had, as she said, stopped to check the traffic after exiting from the gap between two parked vehicles, then she should be able to see not just 2 to 3 car-lengths.[[4]](#footnote-4) Judging from Exhibit D3, the plaintiff should have been able to see as far as Precious Blood Hospital and beyond.
5. Fourth, there is no dispute that there were at the material time some motorcycles parked on the left side of Kiu Kiang Street opposite Shop A. The plaintiff said in court there were only two such motorcycles. On the other hand, the defendant said that there were about 8 to 10 motorcycles and where they were parked were in fact parking spaces. Based on the scene photographs taken by the Police shortly after accident, I accept the defendant’s evidence in this regard.
6. What is important, however, is whether, apart from the motorcycles there were also other vehicles parked on the left which further reduced the space available within the relevant portion of the road. As to this, the plaintiff does not have a positive case one way or the other. The point has not been covered by the plaintiff’s statement which she adopted as part of her evidence in-chief.[[5]](#footnote-5) In fact, she did not even mention the presence of parked motorcycles in her witness statement. That was only added in her oral evidence.
7. On the other hand, the defendant said in his statement, which he adopted as his evidence in-chief, that “behind” the motorcycles, there were also one or two vehicles parked on the left side of the road. There are some ambiguities with the word “behind”, namely whether it means that the vehicles, if any, were parked at a position which was closer to the final spot where the taxi stopped or whether they were parked at a position beyond the final spot and was closer to Fuk Wing Street. If it were the latter, then it would strengthen the plaintiff’s case that the defendant had driven too close to the right when there were more space on the left for him to manoeuvre. However, in cross-examination the defendant clarified what he meant by saying that the vehicles were parked outside the entrance of Tack Ching Primary School and were thus closer to Un Chau Street. He also marked the position of the vehicles on the scene photograph taken by the Police.[[6]](#footnote-6) Therefore, his evidence was that there were one or two vehicles parked on the left side of the road before the point of collision when he was approaching. I note that what the defendant testified in court was consistent with his statement to the Police under caution and the sketch he drawn for police investigation.[[7]](#footnote-7)
8. In the circumstances, I accept what the defendant said that at the material time there were vehicles parked on both sides of Kiu Kiang Street in such a way which resulted in a narrow passage barely permitting one vehicle. I therefore reject the submission of Mr Lau for the plaintiff that the defendant should have swerved to the left to avoid the accident.
9. Fifth, there is no dispute that there were two rows of vehicles parked on the right side of the road outside Shop A and that the plaintiff had exited from the gap between two such parked vehicles prior to the accident. However, the plaintiff did not say specifically either in her statement or in her oral evidence what types of vehicles they were, although in the sketch attached to her statement all the vehicles parked on the right were marked as “private vehicles”.[[8]](#footnote-8) She was not cross-examined on this point. On the other hand, the defendant said in both his statement and in his oral evidence that the vehicles parked on the right consisted of private vehicles as well as goods vehicles. That was consistent with what he said in his cautioned statement.[[9]](#footnote-9) Similarly, this part of his evidence was not contradicted in cross-examination. Not only this, Mr Lau for the plaintiff, by relying on the defendant’s witness statement,[[10]](#footnote-10) put to him that “especially because of there were goods vehicles, and there would be people walking out, one had to be careful when driving through that portion of the road.”[[11]](#footnote-11) To this, the defendant agreed. It seems therefore that Mr Lau accepted that there were goods vehicles as well as private vehicles parked on the right side of the road. Given the unsatisfactory state of the plaintiff’s evidence and the fact that the burden of proof is on her, I reject the markings in her sketch that the vehicles parked on the right of the road were all private vehicles. On the other hand, I accept the evidence of the defendant that there were both private vehicles and goods vehicles.
10. Sixth, in view of the dent mark (which the Police Officer said was recent) and the damaged front mudflap, I find as a fact that that part of the taxi which came in contact with the plaintiff was its right front wing. She was not hit by the front bumper.
11. Seventh, there is an issue as to whether the plaintiff had stopped before stepping out and how far, if at all, the plaintiff had looked at both sides before she stepped out from the gap between two parked vehicles. In this regard, the plaintiff had given different and inconsistent versions:
12. In her police statement dated 7 June 2009 which was her first written account of the accident, she said that for the sake of convenience she had not used the pedestrian crossings at either Un Chau Street or Fuk Wing Street. She said that she walked through the gap between two parked vehicles at a normal pace and did not stop to check the traffic. She said that she looked to the left and the right, each for a distance of about 2 to 3 metres. Seeing that there were no vehicles, she continued to walk forward without stopping. After having taken 2 to 3 steps, she was knocked down.[[12]](#footnote-12) She added by way of supplement at the end of that statement that she had been careless in crossing the road. She said that she had just looked within the 2 to 3 metres and had not checked clearly whether there were vehicles beyond. She asked the Police not to prosecute her for having crossed the road carelessly.[[13]](#footnote-13)
13. In her witness statement dated 3 October 2012 which she prepared for this trial, although the plaintiff said that she had stopped after emerging from the gap of two parked vehicles and then looked to about her before stepping forward, she did not mention how far she had looked on either side.[[14]](#footnote-14) She did not say anything about her police statement.
14. In court, she supplemented her witness statement by adding that she had looked about 2 to 3 car-lengths[[15]](#footnote-15) to the left and also 2 to 3 car-lengths to the right before stepping out. As regards her police statement, she said that she had not used the word “metre”（米）as she did not understand what it was. She said that she had not admitted to the Police Officer of having been careless in crossing the road. She said that she was forced to sign on the police statement because the Police Officer threatened her that if she refused to sign, she would be prosecuted for crossing the road carelessly. Under cross-examination, she denied that the Police Officer had gone to see her when she was in the hospital. She denied having told the Police Officer in the hospital that after exiting from the gap between vehicles, she simply glanced at the left from the corner of her eye and seeing that there was no vehicle within that distance, she walked straight forward without stopping, but was knocked down immediately after she had just stepped out.[[16]](#footnote-16) She denied that she had given consent to the Police Officer in the hospital for the release of medical records for investigation.
15. It was because of the allegations of the plaintiff which she revealed for the first time in examination-in-chief that the defence applied for an adjournment so as to obtain a statement from the Police Officer with a view to call him to rebut the plaintiff’s allegations. Having heard submissions from both sides, I granted the adjournment sought.
16. The Police Officer gave evidence rebutting the allegations the plaintiff made against him. He also testified that he had gone to the hospital to see the plaintiff on 12 May 2009 and obtained from her a written consent,[[17]](#footnote-17) which was signed by her in his presence, for the release of her medical report.
17. I am fully alive to the criticisms leveled against the Police Officer in cross-examination by Mr Lau:-
18. He had made many mistakes in his written works, examples of which include the following:-
19. he wrongly put down “O/S/F” and “O/S/R”[[18]](#footnote-18) in the sketch of the scene[[19]](#footnote-19) he made when he should have put down “FP1” and “FP2”;[[20]](#footnote-20)
20. in the pro forma “Declaration” attached to the police statement of the plaintiff, he wrongly omitted to cross out (i) the reference to the sketch; and (ii) the paragraph saying that the plaintiff had received copy of her statement when those parts were not applicable.[[21]](#footnote-21)
21. He could no longer remember whether the plaintiff had used the word “metre”（米）.
22. It would seem odd for the plaintiff to have asked not to be prosecuted for having crossed the road carelessly if that the Police Officer had not mentioned that possibility to the plaintiff.
23. In the cautioned statement of the defendant made on 28 April 2009, there were sentences apparently attributable to the defendant but were deleted. If those deleted sentences had in fact been made by the defendant, it may support the plaintiff’s case that the defendant’s taxi had travelled along Un Chau Street before turning into Kiu Kiang Street and that the defendant had seen the plaintiff before the accident but was unable to stop the taxi in time.
24. Having considered all the evidence and observed the witnesses giving evidence in court, I make the following findings:-
25. the fact that the Police Officer was careless about his written work does not cause me to doubt his honesty as a witness;
26. I accept that the plaintiff may not have used the word “metre”（米）when she was recounting the incident to the Police Officer. However, I accept that it is probable that he told her that a door was about 2 metres in height so that the plaintiff might use this as a yardstick when referring to distances. I accept his explanation that he had written what was in effect meant by the plaintiff;
27. I do not consider it odd that the plaintiff would have asked the Police Officer not to prosecute her even though he had not mentioned that possibility to her. If the plaintiff thought that she was in the wrong, it was possible that she would be concerned and that she would plead for a chance;
28. I accept the evidence of the defendant and the Police Officer that the sentences deleted from the defendant’s cautioned statement were there due to the Police Officer’s misunderstanding what the defendant had told him during the interviewed and that the final version accurately represented what the defendant had meant during the interview. In any event, the defendant had not adopted the deleted sentences as his statement and it would be speculative to try to draw any inference from the sentences which had been deleted;
29. I find that the plaintiff told the Police Officer in Caritas Hospital on 12 May 2009 what he said she did; and
30. I find the plaintiff to be not credible when she said that the Police Officer had not gone to the hospital to see her at all and in particular that she had never given consent to the Police Officer for the release of her medical records. What she said is plainly contradicted by the written consent produced by the Police Officer. I find that the plaintiff denied the hospital visit by the Police Officer on 12 May 2009 because she recognized the devastating effect of what she had told him on that occasion which was later reproduced in her police statement.
31. Bearing in mind that the plaintiff’s burden of proof, in view of the vastly inconsistent versions which the plaintiff had given on different occasions about the accident, I find that the plaintiff has failed to satisfy me that at the material time she had stopped to check the traffic condition before crossing the road. Instead, given that she had not noticed the taxi before the accident, I find that it was more probable than not that she had failed to stop to check the traffic condition before crossing.
32. Similarly, as to how far the plaintiff had looked to her left to check, I am unable to accept her evidence in court that she had looked 2 to 3 car-lengths away even on a balance of probabilities. As I have said, this important piece of information was absence from the statement she prepared for this case. In her earlier accounts, the distance she described varied from about 5 metres (as she told the Police Officer in Caritas Hospital) to about 2 to 3 metres (as she said in her police statement).
33. On the other hand, there is evidence which justifies the inference that the plaintiff had not properly checked the traffic before crossing the road. As mentioned earlier, Kiu Kiang Street was a straight road. According to the plaintiff, she had already exited from the gap between two parked vehicles. If she had in fact looked to her left before crossing, there was no reason for her not to have noticed that the taxi was approaching. This is so, especially in view of the objective evidence (the skid mark) indicating that the taxi could not have travelled very fast. There is no evidence that her vision had been obstructed. Moreover, the accident occurred at about 5 pm in the afternoon. On a normal day in April, there should still be sufficient daylight. The fact that she failed to notice that the taxi was coming, in my view, points strongly to the conclusion that she had not properly checked the traffic condition before crossing the road. Based on all of the above, I find as a fact that the plaintiff had not properly, if at all, looked out for any oncoming traffic before the accident.
34. Lastly, I accept that the defendant had not sounded the horn before the accident. The plaintiff said she did not hear any horn sounding and the defendant did not say that he had.

*The defendant’s liability*

1. Mr Lau in his closing speech submitted that the defendant was negligent in that (i) he had driven to close to the right side of the road; and (ii) he had driven too fast in all the circumstances so that he was unable to stop in time.
2. I have already given reasons why I do not accept Mr Lau’s submission on (i) that the accident occurred because the defendant had driven too close to the right. I find that the defendant was unable to give it a wide berth to the right because there was no more space for him to manoeuvre on the left side of the road.
3. In relation to submission (ii), even though I reject the plaintiff’s evidence, this is not the be-all and end-all of the case. I note that it has always been part of the plaintiff’s pleaded case that the defendant had driven too fast.[[22]](#footnote-22) The defendant may still be liable for negligence if his manner of driving (and in particular his speed) is a cause, though not necessarily the sole cause, of the accident which resulted in the plaintiff’s injuries: see *Hale v Hante & Dorset Motor Services Ltd & Anor* [1947] 2 All ER 628.
4. I note that the defendant had driven at a speed well below the prescribed speed limit. Nevertheless, this is not conclusive, for the Road Users Code provides:

Never drive so fast that you cannot stop well within the distance which you can see to be clear. Go much more slowly if the road is wet or if there is fog or mist. Do not brake sharply except in an emergency.

You must obey the speed limits for the road and for your vehicle. A speed limit is the maximum speed allowed. It does not mean that it is safe to drive at that speed -- always take into account all the conditions prevailing at the time.

30. The defendant said that he applied the brake immediately after he heard the “Bang” sound, that is, after the collision. I am, however, unable to accept this part of his evidence. It is well-known that stopping distance of a vehicle consists of thinking distance and braking distance. The skid mark left on the road by a vehicle only represents the latter. At 30 km/h, the taxi was moving at about 8.33 metres a second. Therefore, even assuming that it only took a fraction of a second for the defendant to react, the taxi would have already moved a few metres forward before he could apply the brake. It is not in disputed is that the plaintiff had not been run over by the taxi but only that her left leg was trapped by the front wheel. In my view, whilst the degloved injuries of the plaintiff’s left ankle was compatible with her being “dragged” for some distance, it would be most improbable that she had been, as Mr Wong seemed to suggest, dragged for as long as 7.2 metres or even more before the taxi eventually stopped. Otherwise, one would expect that the plaintiff would have suffered much more extensive and serious injuries than she did.

31. Judging from the skid mark left on the road and the dent marks on the right front wing of the taxi, I find that the reasonable inference is that the defendant saw the plaintiff emerging and applied the brake when he was still some distance away from the point of collision, but he was unable to stop in time so that the taxi still came in contact with the plaintiff at its right front wing and when it eventually stopped its right front wheel pressed on the plaintiff’s left leg.

32. As regards the applicable legal principles, I remind myself that to require drivers to slow down or sound their horn or both every time they pass a parked vehicle would be putting an impossible burden on them: *Moore v Poyner* (1975) RTR 127, at 134D-F. I note the comments of the learned editors of *Charlesworth & Percy on Negligence*, 12th edition, at §10-275, citing *Chisholm v London Passenger Transport Board* [1939] 1 KB 426, that if a pedestrian suddenly steps from the footpath on to a crossing, just as a vehicle is about to enter the same area, so that the driver is given no chance of avoiding a collision, then provided that all reasonable care has been taken by the driver, having regard in particular to the fact that the crossing is present, the driver could possibly avoid all responsibility. I also bear in mind what was said in *Wilkinson v Chetham-Strode* [1940] 1 KB 309, at 317, that traffic would be gravely impeded if every driver of a vehicle approaching a crossing, who had to pass within a yard or two of a refuge with a pedestrian on it, had to slow down to snail’s pace, lest the pedestrian elect without warning to step off the refuge when the vehicle was within a foot or two of him.

33. In the present case, the plaintiff attempted to cross the road without using a pedestrian crossing and at a point where she did not have precedence over the defendant. This puts her in a less favourable position to a pedestrian who did, as it is held in *Snow v Giddins* (1969) 113 Sol Jo 229 that a pedestrian who elected not to use a crossing took upon himself a higher standard of care. In this regard, Mr Lau, however, relied on the following holding of Chung J in *Li Chu Ying v Ho Cheung Shing* [2000] 4 HKC 250:-

“A pedestrian could cross a highway, wherever he chose to do so, provided that he took reasonable care for his own safety. He was not obliged to cross over at an adjacent light-controlled crossing only. Furthermore, as he was entitled to assume that users of vehicles on the road would drive lawfully, observing road signs and signals, he owed no duty to a motorist who was speeding beyond the limits or had crossed a red light.”

34. With respect, *Li Chu Ying’s* case does not assist the plaintiff. Whether or not a driver is negligent is a fact-specific question: *Kite v Nolan* [1983] RTR 253. Apart from the fact that the plaintiff had not used a light-controlled pedestrian crossing as shown in Exhibit D3, the present case bears little factual resemblance to *Li Chu Ying v Ho Cheung Shing*. Furthermore, there was no speeding or violation of traffic light by the defendant.

35. I recognize that the defendant was not obliged to have adopted a snail’s pace such that there could have been no possibility of a pedestrian dashing out at any moment in front of him and his being unable to stop without striking her. I also remind myself the observations of Laws LJ made in the case of *Ahononu v Southeast Ldondon Kent Bus Company* [2008] EWCA Civ 274, at paragraph 23,

“There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care.”

1. In my judgment the defendant had driven at an excessive speed in all the circumstances. My reasons are as follows:
2. The defendant was aware of the risk of pedestrians emerging from between parked vehicles. He frankly agreed in cross-examination that one had to be careful when driving through that portion of the road because of the possibility of people emerging from the right trying to get to the parked vehicles. Given that the scene was a busy street in Sham Shui Po with restaurants on both sides, I find that the risk was a real one which cannot reasonably be ignored. Also, the defendant was aware that his vision of the pavement on the right was obstructed by the double parking consisting of both private vehicles and goods vehicles;
3. The defendant’s evidence, which I have accepted, was that the width of the road was so reduced by vehicles parked on both sides that he would not be able to swerve to the left in case of emergency;
4. In view of (a) and (b) above, he still chose to drive at a speed which would have taken him 10 metres or even more to bring the taxi to a halt. In my judgment, that was too long a stopping distance in all the circumstances.
5. The fact that the taxi was hit at its right front wing and that eventually only the plaintiff’s left leg was trapped by its front right wheel shows that if the defendant had slowed down when entering the relevant portion of the road so that it could have stopped a couple of metres earlier, the accident could probably have been avoided. At least, it is probable that the plaintiff’s injury would not have been as serious as it was.

37. Based on the above, I find that the plaintiff has proved that the defendant was negligent in causing the accident.

38. For the sake of completeness, I should add that I do not consider the fact that the defendant had failed to sound the horn as significant. This is because if I was correct that the defendant was only able to see the plaintiff at a distance of about 10 odd metres when she exited from between parked vehicles, then probably the sounding of the horn would not have avoided the impact, as it would require a reaction by the plaintiff. The plaintiff’s evidence was that she had just made two steps forwards before she was struck. That would not give the plaintiff sufficient time to react to the horn: compared with *Ehrari (A Child) v Curry* [2007] RTR 42.

*Contributory negligence*

1. I remind myself that the burden of proving contributory negligence is on the defendant: see *Charlesworth & Percy*, ante, at §4-12.
2. In the present case, I find that the plaintiff had unreasonably failed to take care of her own safety and her failure to take care was a contributory cause of the accident. My reasons are as follows:
3. the plaintiff’s admission that she had exited from between two parked vehicles. Although there is no direct evidence as to what types of the vehicles they were, I accept the evidence of the defendant that there were good vehicles and private vehicles parked on the right. In any event, the undisputed fact that there was double parking on the right, coupled with the relatively small stature of the plaintiff, would made it difficult for her to be visible to the defendant; and
4. my finding that she had failed to stop and to properly check the traffic condition before crossing.
5. In my judgment, the plaintiff’s negligence was a major contributing cause of the accident in that she moved suddenly into the defendant’s path. I have regard to the following case authorities:

(a) In *Maynard & Anor v Rogers* [1970] RTR 392, a pedestrian was held two-third to blame for having stepped on to an uncontrolled pedestrian crossing [which gave foot-passengers precedence over vehicles on the crossing] without looking about her where she was struck from her right and injured by a motor car on a wide and straight road with an unobstructed view shortly after midnight.

(b) In *Sahakian v McDonnell* [2008] RTR 19, the claimant sought to cross a city road, busy with shoppers, parked cars and traffic, on foot on a weekday lunchtime. She hurried into the road from behind a parked car, over which she should have been clearly visible to motorists driving along the road. The driver, having driven slowly as she crossed a raised speed table, situated about 40m from the point where the claimant was crossing, then increased her speed to 30 mph and collided with the claimant. The claimant suffered severe head injuries. It was held that had the defendant been travelling at an appropriate speed, and paying sufficient heed to the pedestrians, she should have appreciated that the claimant was going to cross her path and would have had time to brake, reducing the impact speed such that there was a strong probability that the claimant's serious head injury would have been avoided; and that, although the claimant did not see the driver’s car in time or at all and her actions were a significant cause of the collision, given the destructive disparity between a car and a pedestrian, responsibility for the claimant's serious head injury should be apportioned equally between the parties.

(c) In *Paramasivan v Wicks* [2013] EWCA Civ 262, W had been driving his car southbound on a suburban road at dusk on a July evening. The road had one lane in either direction. Ahead of him to his right, across the northbound lane, a layby or parking space and a paved area, was a small parade of shops. P, who was then a 13-year-old boy, had been in a group of seven to eight boys of similar age congregating outside the shops. Suddenly, and without warning, P had run away across the paved area and parking bay, between parked cars and across the northbound carriageway into the front offside of Ws car. P suffered injury and claimed damages from W. The trial judge apportioned responsibility equally between the parties. On appeal, it was held that P was old enough to understand roads. He had created the hazard by doing something entirely unexpected and careless. W's only fault had been failing to respond as he should have done in the briefest of moments. In those circumstances, P was 75 per cent contributorily negligent and W's liability was 25 per cent.

42. Whilst it is not possible to find a case authority the facts of which are identical to the present one, in my view, the responsibility of the plaintiff is higher than the claimants in *Maynard & Anor v Rogers* and *Sahakian v McDonnell*. Having considered the case authorities above, doing the best I can, in my judgment the plaintiff in the present case is 70% responsible for the accident.

*CONCLUSION ON LIABILITY*

1. Based on the above, subject to the above finding of the plaintiff’s contributory negligence, I find for the plaintiff in her claim against the defendant.

*QUANTUM*

1. I proceed to deal with the quantum of the plaintiff’s claim as follows.

*Medical evidence*

1. The plaintiff was aged 47 at the time of the accident and is now aged 51 turning to 52.
2. After the accident, the plaintiff was admitted to the Accident and Emergency Department of Caritas Medical Centre (“CMC”) for examination and treatment. She was found to have a 5 cm scalp laceration wound over occiput and degloved injury over left ankle on the medial side. The diagnosis was acute open fracture of left leg and head injury.[[23]](#footnote-23)
3. On 28 April 2009, the plaintiff was admitted to the Department of Orthopaedics & Traumatology of CMC. X-ray showed fracture left distal tibia and fibula and fracture left medial malleolus. CT brain scan showed small amount of left parietal traumatic subarachnoid haemorrhage. Another CT brain scan was done on 29 April 2009 which showed resolving hemorrhage. An operation was performed on the same day to deal with the scalp wound, the fracture and the degloved wound. Repeated wound debridement and skin grafting was done on 7 May 2009. X-ray of left lower limb showed satisfactory alignment after the operation. She was discharged on 22 May 2009.[[24]](#footnote-24)
4. The plaintiff was followed up in the outpatient clinic of CMC. She was able to walk unaided without much pain on 26 February 2010. The range of motion of left knee was full.[[25]](#footnote-25) X-ray revealed that the fractures of left tibia and left ankle medial malleolus showed progressive healing. She was last seen in that clinic on 17 September 2010. At that time, she could walk unaided with tolerance for a few hours. Residual ankle stiffness persisted and there was residual foot pain. Occupational therapy for vocational training was arranged but he plaintiff declined to attend.[[26]](#footnote-26)
5. The plaintiff was granted sick leaves from 28 April 2009 to 28 May 2010. Then on 23 September 2012, she was admitted to CMC again for cellulitis of left foot. On that occasion, she was granted sick leave from 23 September 2012 to 10 October 2012.
6. In a review of the Medical Assessment Board, she was assessed to suffer a 4% loss of earning capacity on 4 November 2010.
7. There was a joint expert report prepared by Dr Wong Wai Kwong, Jack for the plaintiff and Dr Lam Kwong Chin for the defendant dated 28 December 2012.[[27]](#footnote-27) The experts agreed on the following:-
8. the plaintiff probably could have a faster recovery if she had followed the advice for rehabilitation therapy. However, the long-term prognosis should not be affected;[[28]](#footnote-28)
9. her head injury had recovered leaving no residue;[[29]](#footnote-29)
10. she was walking in a normal gait unaided, with mild limitation on squatting;[[30]](#footnote-30)
11. X-ray showed that the fractures had healed. The ankle joint space is narrowed;[[31]](#footnote-31)
12. she has reached maximal medical improvement;[[32]](#footnote-32)
13. she should be able to continue with her pre-injury job as a restaurant waitress. Dr Wong said that she suffers from a moderate reduction in her working capacity, efficiency and endurance. She should rest at regular intervals to relief pain and to prevent rapid deterioration of joint degeneration. Dr Lam said the residual ankle systems would party affect her working efficiency and endurance, but he adverse effect is a mild one;[[33]](#footnote-33) and
14. the duration of sick leave by the Orthopaedic Clinic till 28 May 2010 was appropriate.[[34]](#footnote-34)
15. The experts, however, disagree as to the course of future treatment. Dr Wong opines that to avoid possible complications, the implants should be and can be removed now. The charge for the surgery is about $60,000 for semi-private patients in a private hospital. The plaintiff would need another two months to recover from the surgery. Dr Wong also opines that the plaintiff needs intermittent symptomatic treatment for pain afterwards and the costs is estimated to be $10,000 a year. On the other hand, Dr Lam opines that further treatment is not required. In this regard, according to the plaintiff’s oral evidence, the treating doctors made no recommendation to her as to whether the implant should be removed, saying that it was up to her.
16. As to the plaintiff’s impairment, Dr Wong put the figures at 6% of whole person and 8% for loss of earning capacity. On the other hand, Dr Lam said it is 4% of the whole person and 4% of earning capacity.

*Pain, suffering and loss of amenities*

1. It is accepted by the defence that the pleaded claim of $350,000 is reasonable, as the plaintiff’s injuries fall within the “substantial injury” category as defined in the case of *Lee Ting Lam & Anor v Leung Shu Wing* [1980] HKLR 657 as modified in *Chan Pui Ki v Leung On* [1996] 2 HKLR 401 and subject to inflation. I agree that $350,000 is reasonable in the circumstances.

*Pre-trial loss of earnings*

1. At the time of the accident, the plaintiff worked as a waitress earning $7,500 a month. This is not in dispute.
2. The experts agreed on the reasonableness of the sick leave period from 28 April 2009 to 28 May 2010. They were aware of the subsequent sick leave period from 23 September 2012 to 10 October 2010,[[35]](#footnote-35) but they did not comment on its appropriateness at all. In the circumstances, I would allow the sick leave from 28 April 2009 to 28 May 2010 only.
3. According to the *Quarterly Report of Wage an Payroll Statistics*, as at March 2010 female workers at Chinese restaurants on average earned $8,073 a month. Therefore the mean of the plaintiff’s notional income during the sick leave period should be:-

($7,500 + 8,073) ÷ 2 = $7,787 (nearest dollar)

The total loss of income during the sick leave period (including MPF) would be:-

$7,787 x 396/30 x 1.05 = $107,928 (nearest dollar)

1. As to the time after sick leave, I note that according to the records of the Inland Revenue Department (“IRD”),[[36]](#footnote-36) the plaintiff resumed employment almost immediately after the sick leave had come to an end:-
2. between 1.6.2010 and 15.12.2011 (6½ months) for Bright Ford Holdings Limited earning a total of $54,510 (i.e., $8,386 a month); and
3. between 24.12.2011 and 31.3.2011 (3¼ months) for Strong Elite Limited, earning a total of $32,972 (ie $10,145 a month)
4. According to the plaintiff’s evidence in court, she worked for these two companies also as a full-time waitress. The above employed was neither disclosed in her witness statement prepared for this trial[[37]](#footnote-37) nor the Revised Statement of Claims filed on her behalf.[[38]](#footnote-38) Furthermore, it can be seen from the latter that the plaintiff even claims for loss of income for the periods during which she was gainfully employed by the two companies. Attached to the Revised Statement of Claims was the Statement of Truth signed by the plaintiff.[[39]](#footnote-39) Moreover, she was reported to have told the experts that she worked as a part-time waitress or saleslady since **late-2011** (original highlighting).[[40]](#footnote-40) It is apparent, therefore, that neither her solicitors nor the experts had been told by her about these two employments.
5. Mr Lau submitted that it would be asking too much of the plaintiff to recall every employer who employed her since the expiry of the sick leave on 28 May 2010. With respect, I am unable to accept this submission, given that the two employments in question were the first two she obtained immediately after the long sick leave and their respective lengths, it is in my view improbable for her to have forgotten them. The inference I draw is that she deliberately concealed the employments from her solicitors and the experts in order to enhance her claims.
6. What is telling from the two employments is not only that the plaintiff could obtain employment immediately after the sick leave, but also that she was able to earn more than she did prior to the accident.
7. Whilst the IRD shows that after March 2011, the plaintiff’s employment has become irregular and intermittent, in view of the opinion of the experts that the plaintiff should be able to continue with her pre-injury job as a restaurant waitress and the fact that she had in fact resumed working immediately after the sick leave, I draw the inference that it was her own free choice not to work on a regular and full time basis. As such, I disallow any further claim for loss of earnings during the pre-trial period.

*Loss of earning capacity*

1. I remind myself that the opinions of the experts in this regard are for reference only and are not binding on the court. The claim is to cover the risk, which has to be “substantial” or “real”, 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. In *Chan Wai Tong & Anor v Li Ping Sum* [1985] HKLR 176, the Privy Council said,

“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. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimant's age and the nature of 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. Loss of an arm or a leg will have a much more serious effect upon the earning capacity of a labourer than on that of an accountant. In the present case there is no evidence at all on these matters.”

See also *Tang Shau Tsan v Wealthy Construction Company Limited*, CACV 58/2000, see also *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132; and *Chan Chi Shing v Tsang Fook Metal Engineering & Anor*, CACV 238/1999.

1. In the present case, the plaintiff has worked as a waitress on a casual basis ever since she came to Hong Kong for settlement in 1987.[[41]](#footnote-41) She is now 51. I note what the plaintiff said in court that she chose to work as a substituted waitress in order to have more freedom so that whenever she was in pain, she could decide whether or not to work at any time without the trouble of seeking leave. I also note that the IRD records show that her employment pattern after March 2011 has not been regular. However, I accept the submission of Mr Wong that work volatility is the nature of her job as a substitute waitress and that the causal link between her disabilities and going between jobs is not established. I take into account what the experts about her working capacity and prognosis. However, I accept the evidence of Dr Lam for the defence that whilst the residual ankle symptoms would partly affect her working efficiency and endurance, the adverse effect is a mild one. I also take into account the fact that she was able to obtain full time employment immediately after her sick leave and earned more than what she did before the accident. In all the circumstances, I am not satisfied that the plaintiff has established a “substantial” or “real” risk for the purpose of this head of claim.

*Post-trial loss of earning*

1. The plaintiff gives very limited information about this head of claim in her statement. She only said that she can now work only about 4 to 5 hours a day for $200 to $250 and make about $4,000 to $5,000 a month.[[42]](#footnote-42) However, the figure of $4,000 to $5,000 a month is not all reliable:-
2. the figure she gave in her evidence in-chief was initially $7,000 to $8,000 a month;
3. when she was referred by her counsel to her statement, her changed by saying that it should $5,000 odd;
4. when pressed by the court which figure was the correct one, she changed again and said that she earned about $6,000 to $7,000 a month; and
5. there is, however, no logical reason as to why she cannot earn at least as much as she did immediately after her sick leave, there being no evidence to show that her medical condition has changed for the worse since June 2010.
6. As aforesaid, it is my finding that it is her own free choice not to work on a regular and full time basis. I would not allow this head of claim.

*Pre-trial expenses*

1. This is agreed at $4,477.

*Post-trial expenses*

1. This head is claimed solely on the basis of Dr Wong’s recommendation and the costs (about $60,000) are estimated on the basis of the plaintiff receiving further treatment in the private sector.[[43]](#footnote-43)
2. Based on the evidence before me, I am not satisfied that the surgery proposed by Dr Wong is necessary. Moreover, I agree with Dr Lam that should the plaintiff want the removal of the implant or further follow-up, she should have the treatment by her attending doctor at CMC. That would be more appropriate for the sake of medical continuity. There is nothing to suggest that the treatment the plaintiff has received so far at CMC is in any way inadequate. I see no reason why the plaintiff should insist on any future treatment from the private sector.
3. For the reasons above, I would disallow this head of claim.

*Credit for employees’ compensation*

1. Both sides agree that credit should be given to the employees compensation ($122,777) awarded to the plaintiff: see s 25(1)(a) of the Employees’ Compensation Ordinance, Cap 282.

*CONCLUSION ON QUANTUM*

72. In summary, the damages of the plaintiff are as follows:

PSLA $350,000

Pre-trial loss of earnings $107,928

Pre-trial expenses $ 4,477

$462,405

Less

70% for contributory negligence ($323,684)

Employees’ Compensation ($122,777) Total: **$ 15,944**

*Interest*

73. I order that there be interest on PSLA running from the date of the writ to the date of this judgment at 2% per annum. I also order that there be interest on special damages from the date of the accident to the date of this judgment at half the judgment rate.

*Costs*

74. I order that the plaintiff pay in any event the defendant’s costs for the adjournment and the subsequent mention as a result of the adjournment, with counsel certificate, to be taxed if not agreed. This is because the adjournment could have been avoided if the plaintiff had indicated before trial that she would dispute what was said in her police statement.

75. Subject to the above, I make an order *nisi* that the defendant pay the plaintiff’s costs, with counsel certificate, to be taxed if not agreed and that the plaintiff’s own costs be taxed in accordance with legal aid regulations.

# ( Alex Lee )

# District Judge

Mr Lau Wai Man, Raymond, instructed by Or & partners, assigned by the Director of Legal Aid, for the plaintiff

Mr Martin Wong, instructed by Deacons, for the defendant

1. P 110, Trial Bundle:

   “本人(拿?)着碗子，穿過車與車之間的空位後，向左右兩邊望了望，没有車駛來後，便向前過馬路， …” [↑](#footnote-ref-1)
2. The plaintiff said in examination-in-chief, “企定望，望一望，左右邊都望，望到冇車，跟住我 就行，望對面行囉，突然間架車就撞埋嚟喇，即係撞到昏迷，係呀，昏迷喺個地下呀，仲唔知人事喇" [↑](#footnote-ref-2)
3. See Exhibit P1 in which she marked Shop A wrongly on the left side of the photograph when it should be on the right. [↑](#footnote-ref-3)
4. There is evidence from the defendant that a taxi is about 4.7 m in length. Therefore, 2 to 3 car-lengths would be about 10 to 15 m. [↑](#footnote-ref-4)
5. I note that in her statement to the police dated 7 June 2009, at p 157, Trial Bundle, she said that there was a row of vehicles (一行車輛) parked on the other side. That seems to support the defence case. However, the plaintiff had not adopted her police statement and she disputed the accuracy of it. See the discussion below about the plaintiff’s police statement. [↑](#footnote-ref-5)
6. Exhibit D5, p 368 of the Trial Bundle, the top photograph. [↑](#footnote-ref-6)
7. Exhibit D2, p 165A of the Trial Bundle. [↑](#footnote-ref-7)
8. “私家車”, p 116 [↑](#footnote-ref-8)
9. p 164, Answer 10. [↑](#footnote-ref-9)
10. p 119, paragraph 4: “右邊有兩行車，有貨車，亦有私家車，…” [↑](#footnote-ref-10)
11. Mr Lau put to the defendant,“尤其是D貨車，有D人可能行出路面，所以我地都要小心D 架，去果段路既時候?” [↑](#footnote-ref-11)
12. p 157, Trial Bundle:

    “我由車與車之間的空位行出馬路，… 但當時我並不跑步，只係正常步行，但就没有停步觀察。我由車頭行近馬路通道(九江街)時，只係用向左右兩邊望了一望，見到左右兩邊大約2-3米內的路面没有車，就繼續向前行出馬路，無停步。但當我行出了二步至兩步就立即被車撞倒。” [↑](#footnote-ref-12)
13. p 158, Trial Bundle:

    “意外後，我覺得當日過馬路有不小心，並没有觀察九江街左邊的馬路至元州街口一段是否有車。當時只係望2-3米內，最遠少少就無睇清楚是否有車。我而家希望警方不要控告我不小心橫過馬路。” [↑](#footnote-ref-13)
14. p 110, Trial Bundle:

    “… 穿過車與車之間的空位後，向左右邊望了望，没有車駛來後，便向前過馬路，行了大概兩步後，突然有一輛車，後知是的士JU8165（“該的士”），快速地從本人左邊駛來，撞倒我。我被撞跌在地上，而且昏迷。” [↑](#footnote-ref-14)
15. 兩至三個車位 [↑](#footnote-ref-15)
16. p 125C, Trial Bundle. According to the Police Officer, the plaintiff told him at the hospital the following:-

    “並表示意外前上址九江街有三行車，右邊二行，左邊一行，當時她由右邊向左邊橫過，由車罅中行出來，只係眼尾望過左邊約5米範圍內無車，就不停步向前直出橫過馬路，但一行出就被撞到，之後曾經昏迷過。” [↑](#footnote-ref-16)
17. Exhibit D4 [↑](#footnote-ref-17)
18. Respectively standing for “off-side front” and “off-side rear”. [↑](#footnote-ref-18)
19. p 156, Trial Bundle [↑](#footnote-ref-19)
20. Respectively standing for “fixed point 1” and “fixed point 2” which were reference points for taking measurements. [↑](#footnote-ref-20)
21. p 160, Trial Bundle [↑](#footnote-ref-21)
22. See , para 6(a), the Statement of Claim, at p 30, Trial Bundle. This is to contrast with the situation in *Poon Hau Kei v Hsin Chong C1onstruction Co Ltd & Anor* (2004) 7 HKCFAR 148. [↑](#footnote-ref-22)
23. p 126, Trial Bundle [↑](#footnote-ref-23)
24. p 127, Trial Bundle [↑](#footnote-ref-24)
25. ibid [↑](#footnote-ref-25)
26. p 128, Trial Bundle [↑](#footnote-ref-26)
27. p 131, Trial Bundle [↑](#footnote-ref-27)
28. p 142, para 52, Trial Bundle [↑](#footnote-ref-28)
29. p 143, para 56, Trial Bundle [↑](#footnote-ref-29)
30. p 143, para 60, Trial Bundle [↑](#footnote-ref-30)
31. p 144, para 61, Trial Bundle [↑](#footnote-ref-31)
32. p 145, para 69 & 70, Trial Bundle [↑](#footnote-ref-32)
33. pp 144-145, para 65-68, Trial Bundle [↑](#footnote-ref-33)
34. p 146, para 77, Trial Bundle [↑](#footnote-ref-34)
35. p 137, para 28, Trial Bundle [↑](#footnote-ref-35)
36. p 351, Trial Bundle [↑](#footnote-ref-36)
37. p 160, Trial Bundle, dated 3 October 2012 [↑](#footnote-ref-37)
38. p 47, Trial Bundle, dated 21 March 2013 [↑](#footnote-ref-38)
39. p 63, Trial Bundle [↑](#footnote-ref-39)
40. p 145, para 72, Trial Bundle [↑](#footnote-ref-40)
41. See her witness statement, p 107, para 4, Trial Bundle [↑](#footnote-ref-41)
42. p 114, para 17, Trial Bundle [↑](#footnote-ref-42)
43. pp 144-145, para 66-67, Trial Bundle [↑](#footnote-ref-43)