#### DCPI 1134/2009

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1134 OF 2009

BETWEEN

LUNG SIU WING Plaintiff

and

LO WAI MING 1st Defendant

NG TAI SHING 2nd Defendant

TUGU INSURANCE COMPANY 3rd Defendant

LIMITED

##### Before: Her Honour Judge H C Wong in Court

Dates of Hearing: 22-23 December 2009

Date of Delivery of Judgment: 24 December 2009

## J U D G M E N T

1. The plaintiff claims against the defendants for damages and loss suffered due to the traffic accident on 16 February 2007 at Fuk Hang Tsuen Road near Castle Peak in Tuen Mun.
2. The 1st and 2nd defendants have failed to file a defence. Consequently, an interlocutory judgment was entered against them on 22 June 2009.
3. Before judgment in default was entered against the 1st and 2nd defendants, the 3rd defendant obtained an order to join in the action as the insurer concerned. The order was granted by Master K Lo on 27 April 2009, with leave to defend the action including the issue of liability and quantum on its own behalf, with permission to exercise all the same rights as those available to the 1st and 2nd defendants (The order can be found on page 14 of the bundle, paragraph 3). The 3rd defendant filed a defence on liability on 29 May 2009.
4. At the hearing, Mr Poon, counsel for the plaintiff, submitted that the 3rd defendant should not be allowed to dispute liability in the proceedings since judgment against the 1st and 2nd defendants have been entered on 22 June 2009. He further submitted that the 3rd defendant has to meet the assessed judgment sum as the insurer and that the hearing should be limited to assessment of damages.
5. Miss Lau, counsel for the 3rd defendant, relied on the order of Master K Lo and maintained the 3rd defendant, as the insurer, is entitled to dispute liability and in any event, she relied further on the 3rd defendant’s pleaded defence of contributory negligence. She referred to the locus of the insurer under Section 10 of the Motor Vehicles Insurance (Third Party Risks) Ordinance, Cap. 272 and Clause 3 of the Domestic Agreement of 1 February 1981 between the Motor Insurers’ Bureau of Hong Kong and the authorised motor insurers.
6. Section 10 of the Motor Vehicles Insurances (Third Party Risks) Ordinance provides the following:-

“Duty of insurers to satisfy judgements against persons insured in respect of third party risks

(1) If, after a certificate of insurance has been issued under section 6(3) in favour of the person by whom a policy has been effected, judgement in respect of any such liability as is required to be covered by a policy under section 6(1)(b) being a liability covered by the items of the policy as obtained against any person insured by the policy, then, notwithstanding that the insurer may be entitled to avoid or cancel, or may have avoided or cancelled the policy, the insurer, shall, subject to the provisions of this section, pay to the persons entitled to the benefit of the judgment any sum payable thereunder in respect of the liability, including any amount payable in respect of costs and any sum payable in respect of interest on that sum by virtue of any law relating to interest on judgements.”

1. The Motor Vehicles Insurance (Third Party Risks) Ordinance Section 10 adopted Section 39 of the English 1930 Act. From my research, I find at Chapter 20 of Colinvaux’s Law of Insurance, 8th edition, page 732, paragraph 20-76, the following passage:-

“Accordingly, unless the insurers defend the proceedings by the exercise of their contractual rights of defence or subrogation rights, there is a danger that the third party will obtain a default judgment against the assured: it was held in Rees v Mabco (102) Limited that the insurers faced with a default judgment have no right to seek to overturn it and they are confined to contesting liability based upon the binding effect or terms of the policy itself. Alternatively, if insurers do opt to conduct the defence on the part of the assured, there is some, albeit weak, authority for the proposition that any judgment against the assured estops the insurers from relying upon policy defences. Insurers can avoid this danger by seeking permission to be joined to the proceedings in their own name, despite for all practical purposes being represented albeit by using the assured’s name, and then pleading the policy terms in those proceedings.”

1. In Hong Kong, it is not uncommon to find the insurer had applied to join in a PI action, when there is a dispute under the insurance policy over the assured’s failure to comply with the conditions laid down in the policy. In the present case, the 3rd defendant had done so, no doubt, to protect its interests due to the effect of Section 10 of the Motor Vehicles Insurance (Third Party Risks) Ordinance and Clause 3 of the Domestic Agreement of 1 February 1981 between the Motor Insurers’ Bureau of Hong Kong and the authorised motor insurers, and further, probably due to the fact that the 1st and 2nd defendants were not legally represented in this case.
2. At the trial of this action, the 2nd defendant did not show up, the 1st defendant, however, appeared at the trial in spite of his default in filing a defence.
3. The court has a discretion to allow a third party, such as, the insurer, to join in the action, the same right the plaintiff has to join in the insurer as a co-defendant. In the present case, the order of Master K Lo of 27 April 2009 was very wide, it allowed the 3rd defendant to defend the action with the same right on liability and quantum as the 1st and 2nd defendants. Consequently, interlocutory judgment was entered against the 1st and 2nd defendants subsequent to the 3rd defendant’s joining in the action, the judgment was against the 1st and 2nd defendants only and made after the 3rd defendant had filed a defence on liability. The issue of liability so far as the 3rd defendant is concerned, is still alive.
4. However, as the 3rd defendant had failed to adduce any evidence from the 1st or 2nd defendant or from any eye witnesses, the 3rd defendant’s defence is handicapped by the lack of direct evidence on liability. Miss Lau informed the court at the hearing that the 3rd defendant is not disputing liability, it is only claiming contributory negligence against the plaintiff who failed to keep a proper look-out or take sufficient care at the time of the accident.
5. I turn now to the issue of liability.

The Accident

1. It is the plaintiff’s case that he was hit by the nearside wing mirror of the 2nd defendant’s private vehicle, registration number HC5952, driven by the 1st defendant as it passed by the lay-by when the plaintiff was closing the passenger door of the van parked on the lay-by on Fuk Hang Tsuen Road in Tuen Mun near lamppost BD1838, on 16 February 2007 at about 1755 hours.
2. The plaintiff claimed he was knocked on the back, the impact was so strong that he toppled over, injuring his lower back, his left forearm and right foot. He denied he was standing outside the lay-by after he alighted from the van or that he was bending over to pack the work tools inside the car or that his back-side was jutting outside the lay-by.
3. It is the 3rd defendant’s case that the plaintiff was either packing work tools which were inside the van and that he was bending his upper body with his back protruding into the road or, alternatively, he was standing outside the lay-by while he was closing the passenger door at the time of the collision, thus the nearside wing mirror came into contact with the back of the plaintiff as the 1st and 2nd defendants’ vehicle drove passed the lay-by.

Analysis

1. The 3rd defendant relied on the police statements, the Magistrate Court hearing transcript at the trial of the 2nd defendant’s careless driving summons and the Form 2 filed by the plaintiff’s employer to the Labour Department on 26 February 2007 (page 143 of the bundle).
2. The Form 2 description of the accident by the plaintiff’s employer indicated the plaintiff was collecting or packing tools for the work to be performed after he alighted from the van. He was cross-examined vigorously at the Magistrate Court hearing by counsel for the 2nd defendant on this aspect. He denied he was packing or collecting tools when he was knocked down by the defendant’s vehicle. However, he admitted at that hearing, he had to step back a little as he was closing the passenger door and that was the time he was knocked down. At the hearing of the present action, the plaintiff, Mr Lung, admitted he was closing the door when he was knocked down, he maintained his body was inside the lay-by and that his body was at an angle to the car.
3. Miss Lau in her cross-examination of Mr Lung put to him that he had informed the police officer after he was taken to Tuen Mun Hospital he was packing the work tools when he was knocked down. Mr Lung however, denied he did so.
4. It is not disputed that in a case where the defendant was convicted of careless driving, a prima facie case on liability is established, the burden is then shifted to the defence to show the defendant was not negligent on the balance of probabilities. I refer to Lord Denning’s dictum in *Stupple v Royal Insurance Company Limited* [1971] 1 QB 50, on Section 11 of the Civil Evidence Act, which is equivalent of Section 62 of the Evidence Ordinance in Hong Kong, I accept that it should be followed. He held:-

“The Act does not merely shift the evidential burden as it is called. It shifts the legal burden of proof …. Take a running down case where a plaintiff claims damages for negligent driving by the defendant. If the defendant has not been convicted, the legal burden is on the plaintiff throughout. But if the defendant has been convicted of careless driving, the legal burden is shifted. It is on the defendant himself. At the end of the day, if the judge is left in doubt, the defendant fails because the defendant has not discharged the legal burden which is upon him. The burden is, no doubt, the civil burden. He must show, on the balance of probabilities that he was not negligent but he must show it nevertheless. Otherwise, he loses by the very force of conviction.”

1. Mr Justice Cheung applied the same dictum in the case of *Lau Ka Po v Man Cheuk Ming* HCPI584/1996. He said, after referring to Lord Denning’s dictum:-

“In my opinion therefore, the weight to be given to a previous conviction is essentially for the judge at the civil trial. Just as he has to evaluate the oral evidence of a witness, so he should evaluate the probative force of a conviction. If the defendant should succeed in throwing doubt on the conviction, the plaintiff can rely, in answer, on the conviction itself; and he can supplement it, if he thinks it desirable, by producing (under the hearsay sections) the evidence given by the prosecution witnesses in the criminal trial or if he wishes, he can call them again. At the end of the civil case, the judge must ask himself whether the defendant has succeeded in overthrowing the conviction. If not, the conviction stands and proves the case.”

1. The burden therefore is on the defence to prove on a balance of probabilities that the plaintiff was packing tools with his backside protruding onto the road or he was closing the door with part of his back outside the lay-by when he was knocked down by the wing mirror of the defendant’s car.
2. It is unfortunate that the 3rd defendant failed to adduce evidence from either the 1st defendant or the 2nd defendant who were at the scene when the accident took place to show that the plaintiff, Mr Lung, had contributed to the accident. At the Magistrate Court hearing, a police officer and the plaintiff gave evidence, the defendants did not give evidence and the 2nd defendant was duly convicted of careless driving.
3. The 3rd defendant suffered from the handicap of lack of supporting evidence from the defence. The court is left to speculate if the plaintiff, Mr Lung, had his backside protruding onto the road or if he was bending into the car to pack the tools or if he was closing the door with part of his body protruding onto the road when he was knocked down.
4. On one hand, the employer’s description in the Form 2 suggested he was packing tools when he was hit, on the other hand, at the Magistrate Court hearing, it was put to him he was closing the door and had stepped back to close the door when he was hit, and that by the stepping back action, he had put part of his right side into the road, thus putting himself in the line of collision.
5. I looked at the police statement of the 2nd defendant, he admitted he had swerved his car to the direction of the lay-by to avoid a taxi on the other lane. However, since there is no evidence from him, one can only speculate whether in trying to avoid the taxi on the other lane and swerving close to the lay-by, he failed to notice and neglected to avoid colliding with Mr Lung.
6. From the pictures of the scene taken by the police just after the accident (pages 140 to 143), the van was parked well inside the lay-by with sufficient space for passengers to alight from the back passenger door. As there was no passenger door behind the driver seat on the nearside of the van and the van was parked at the lay-by facing the oncoming traffic, the plaintiff had no choice but to alight from the off side passenger door. I find it is quite unlikely that he was bending forward into the van when he was knocked down on his lower back by the wing mirror of the defendant’s vehicle. According to the record of Findings of Accident and Emergency Department of Tuen Mun Hospital on the night of the accident, it revealed a 4 to 5 cm laceration was found over the right lower back of Mr Lung, it was not on the right buttock, as suggested by the joint medical report.
7. The Accident and Emergency Department doctors also illustrated on the sketches of the clinic records found at pages 185 and 218 of the bundle, they also recorded in writing that the location of the laceration was ‘right lower back’. The location of the laceration suggested the point of impact where the wing mirror of the defendant’s car hit Mr Lung. Given the point of contact was in the lower back and not on the buttock of Mr Lung, it tends to suggest the plaintiff was not bending into the van when he was knocked down.
8. On the suggestion that he was stepping back into the road when he was hit, the plaintiff claimed his body was at an angle to the van when he was closing the passenger door but he was still well inside the lay-by boundary. The passenger door of the van was a sliding door, so even if Mr Lung had to step back to close it, he could not have stepped too far back in the process. In any event, all these suggestions were in the realm of speculations. Other than Mr Lung, there were no witnesses of fact of the accident on behalf of the defendant in this trial.
9. I am not satisfied that the 3rd defendant had proved on a balance of probabilities that Mr Lung had contributed to the accident by stepping onto the road. I therefore find the defendant’s defence of contributory negligence not proved.

Quantum

1. The plaintiff suffered from a 4 cm laceration over his right lower back, bruised and tenderness over his left forearm and fracture over his right 4th metatarsal bone on his right foot. He received 7 stitches at the suture of the 4 cm laceration, a short cast on his right foot. He had to walk with the aid of two crutches until the cast was removed 2 months later. He then received physiotherapy treatments.
2. The joint medical report of Drs Wong See-hoi and Wong Kwok-shing Patrick of 9 June 2009 indicated Mr Lung had resumed work on a part-time basis up to the time of the medical examination though his sick leave expired on 8 June 2007. They also recorded that he, Mr Lung, did not work the month previous to the medical examination due to right foot and back pain.
3. Mr Lung complained he suffered from pain after prolonged walking, he would also experience cramps in his right foot every two to three days, and right back soreness and discomfort after sitting for two to three hours. The two doctors considered the medical treatments Mr Lung received was appropriate and standard. They both agreed Mr Lung had reached maximum medical improvement, the prognosis was said to be good. Dr S H Wong believed Mr Lung would continue to experience persistent right foot pain after prolonged walking and ladder climbing and that his back and buttock soreness was probably due to soft tissue inflammation. Dr Patrick Wong on the other hand considered the right foot pain after walking to be mild or would be mild, that his right buttock inflammation is unlikely to be significantly symptomatic after adequate healing. This, however, is somewhat contrary to his assessment that Mr Lung had reached maximum medical improvement, it tends to suggest that Mr Lung would have to seek medical attention for his pain from time to time and for the buttock inflammation to heal. This is 2½ years after the accident.
4. Dr S H Wong assessed Mr Lung suffered from a 3% whole person impairment on the right fourth metatarsal fracture and 2% for his back contusion injury, while Dr Patrick Wong attributed 1% on the right toe fracture and no permanent impairment on the back contusion. The MAB assessment of loss of earning capacity due to the right foot, left forearm and back injuries resulting in residual right foot pain and residual right back pain and scar was 1.25%. It also certified his sick leave between 16 February 2007 to 8 June 2007. Both Dr Wongs agreed the sick leave to be reasonable.
5. As to Mr Lung’s future working capacity, Dr S H Wong believed he would be able to resume his pre-accident work but with mild reduction in efficiency and capacity due to the fracture on his right toe, he would have difficulty in balancing on the ladder when he had to exert his body weight onto his right foot. He assessed that he would suffer from pain after prolonged standing or working, while Dr Patrick Wong believed the reduction in work efficiency to be minimal.

PSLA

1. Mr Lung was in a cast for his right toe fracture for two months. He was relying on two crutches to walk during those two months. He was then put on physiotherapy treatments. He claimed he still suffered pain when he walked and stood for a prolonged period of time. He suffered a 4 cm laceration on his right lower back which continued to cause him pain from time to time particularly after sitting for two to three hours. He was given 112 days of sick leave, after which, he had only returned to part-time employment and it is to be noted that the month previous to the medical examination in 2009 he was not working due to the pain on his back and his foot.

1. I have been referred to a number of authorities by Mr Poon and Miss Lau. The cases referred to be are, (1) *To Ying Wa v Cargo-land (Warehouse) Development Limited* HCPI441/2000 (An assessment by Master De Souza on 22 January 2001) where the plaintiff suffered fractures in both the fourth and fifth metatarsals on the right foot, the award was $200,000. The plaintiff was given 77 days sick leave and assessed to suffer from 1% permanent impairment of the person; (2) The case of *Chow Tai Loi v Leung Kam Hung* HCPI320/2002, Master Jeffries awarded $225,000 to the plaintiff who suffered from fractures on the second and the base of the first metatarsals on the left foot with minor injuries to his chest. The plaintiff there was assessed with a 2% impairment of the whole person.
2. Miss Lau referred to the case of *Yeung Kin Chung v Hong Kong Scafform Suppliers Limited and another* DCPI1332/2005. It is my assessment on 2 July 2007. The plaintiff suffered from fracture to the base of his fifth metatarsal and was assessed to suffer from 1% impairment of the whole person and 2% loss of earning capacity, he was awarded with $180,000 on PSLA. The second case is *Sin Fu Yau v Cheung Kwok Leung Keith and others* DCPI 1081/2005, a judgment made on 20 April 2007. The plaintiff was awarded $160,000 for a fracture to the base proximal phalanx of the left first toe and a crack to the base of the distal phalanx.
3. After due consideration of the authorities, I assessed that with the nature of the plaintiff’s injuries on three parts of his person, the duration of his healing process and the pain and cramps he continued to suffer from on his back and foot, and the loss of enjoyment of his sporting activities, the PLSA award should be $200,000.

Pre-trial Loss of Earnings

1. The plaintiff asked for 112 days of sick leave period payment which the 3rd defendant readily accepted to be reasonable, a sum of $61,152, I award the sum to the plaintiff.

Loss of Earning Capacity

1. The plaintiff, Mr Lung, is not a highly educated person, he studied up to the second year in secondary school in China before he came to Hong Kong, it is doubtful if he could retain his pre-accident job. In future, should he lose his present job, he would probably be suitable for light duties employment. On the other hand, he is not asking for loss of future earnings, he is merely asking for loss of earning capacity even though he admitted in court that he is in fact suffering from a reduced income since the accident due to his disability of not able to climb up ladders, his intermittent pain and cramps on his back and foot. On that basis, I award to him six months pre-accident salary to enable him to be retrained should he lose his present job. This is in the sum of $93,600.

Special Damages

1. The defence did not dispute the special damages of medical expenses, bonesetter fees and travelling expenses, the total sum comes to $3,390. The sum on tonic food of $10,000 the plaintiff asked for is without support of receipts or medical advice. I find it to be excessive, I award the sum of $3,000 under this claim.

Summary

(1) PSLA : $200,000

(2) Loss of pre-trial earnings : $ 61,152

(3) Loss of earning capacity and MPF : $ 93,600

(4) Special damages ($3,390 and $3,000) : $ 6,390

$361,142

Less Employees’ Compensation $ 58,552

###### Total $302,590

Interests

1. There will be interests on the special damages from the date of accident to the date of judgment at half judgment rate. Interests on the PSLA at 2% per annum from the date of writ to the date of judgment and at judgment rate until full payment.

Costs

1. The costs of this case should be borne by all three defendants. However, as the judgment against the 1st and 2nd defendants was entered in June 2009 and they did not take an active part after judgment was entered - the 1st defendant appeared but did not contest the quantum actively, the 2nd defendant never appeared in court. So far as they are concerned, the assessment of damages could have completed in a one day hearing. Therefore, the costs the 1st and 2nd defendants should bear is costs up to the entry of judgment. As to the costs of assessment of damages, they shall bear one-third each for the first day of hearing. As the 3rd defendant disputed both liability and quantum actively, the 3rd defendant shall bear one-third costs of the first day hearing and the remaining costs of the trial and the action after the 3rd defendant joined into the action. I further order costs to be taxed if not agreed with certificate for counsel.

# (H C Wong)

# District Court Judge

Mr Jackson Poon, instructed by Messrs Huen & Partners, for the Plaintiff

1st Defendant, in person, absent on 24 December 2009 but present on 22 to 23 December 2009

2nd Defendant, in person, absent

Ms Julia Lau, instructed by T S Tong & Co., for the 3rd Defendant