#### DCPI 1223 / 2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1223 OF 2006

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| BETWEEN | WONG Kin Hung | Plaintiff |
|  | and |  |
|  | CHAN Wai Ming | Defendant |

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##### Coram: Deputy Judge A. B. bin Wahab

##### Date of Hearing: 16 & 17 January 2007

Date of Handing Down Judgment: 16 February 2007

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JUDGMENT

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1. This is a claim for damages for personal injuries arising out of an incident that occurred on 19 May 2004 around 5.30 a.m.(“the Incident”). The Incident involved the taxi driven by the Plaintiff (“the taxi”) and the private car driven by the Defendant (“the private car”). It is beyond dispute that the front of the private car hit the taxi near its offside rear passenger door. The impact caused the taxi to topple over and stand on its onside. The private car then swung to the right
2. Both liability and quantum are in dispute. Regarding the former, the bone of contention is whether it was the Plaintiff or the Defendant who jumped the traffic red-light.
3. My finding is that it was the Defendant who did so. I find it negligent his going through this red-light and driving into the taxi. I do not see any contributory negligence on the part of the Plaintiff.
4. The awards I make on quantum are:

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| a) | Pain, suffering and loss of amenities | $70,000 |
| b) | Pre-trial loss of earnings | 26,000 |
| c) | Future loss of earnings | nil |
| d) | Loss of earning capacity | nil |
| e) | Out of pocket expenses | 5,000 |
|  |  | $101,000 |

1. Pre-judgment interest is awarded thus: interest on damages for pain, suffering and loss of amenities at 2% per annum from the date of service of Writ. Interest on damages for pre-trial loss of earnings and out of pocket expenses at ½ judgment rate from date of the Incident i.e. 19 May 2004.
2. Interest is awarded at judgment rate on the total sum of $101,000 from the date of handing down this judgment until payment.
3. I make an order nisi that costs be to the Plaintiff, to be taxed if not agreed, with certificate for Counsel.
4. In the following paragraphs I state the reasons for my judgment.

Plaintiff’s case

1. The Plaintiff was near the end of his 13-hour shift of plying for hire in the taxi. He was driving northbound along the 2nd lane of the 3 lanes in the 1-way Tai Hong Street. He was going to refuel the taxi for the driver of the next shift. As he approached the junction with Hong Cheung Street, the Plaintiff observed that traffic lights were green in his favour. He entered the intersection at a speed of about 40 kilometres per hour. Before he knew what was happening, the private car drove into the taxi from the right. The taxi was hit near the rear passenger door. The taxi toppled over and ended up standing on its onside.

Defendant’s case

1. The Defendant was at home sleeping when at around 4 a.m. he received a telephone call from the girl he was then courting (“the girl’). The girl had been spending time at a friend’s place and wanted the Defendant to pick her up for home in Tsing Yi.
2. The Defendant drove the private car and collected the girl. The Defendant then drove along Hong Cheung Street westbound. The traffic lights were green in his favour at the junction with Tai Hong Street. The private car entered the intersection maintaining a speed of about 50 kilometres per hour. The Defendant then saw the taxi approaching from the left at a distance of some 3 to 4 vehicle-space (presumably a bit in front but to his left). The Defendant immediately braked hard. The taxi did not slow down, sound its horn, or take any evasive action. The 2 vehicles came into contact. The impact was so powerful that the taxi turned to stand on its onside and the private car swung to the right.
3. The girl was disconcerted by the Incident. This was particularly so when the Plaintiff, who was trapped in the taxi, started using foul language. The Defendant suggested and did accompany the girl home to Tsing Yi. The private car was left at the scene. The Defendant later went to a friend’s place at Tai Koo Shing to rest. It was about 12 noon when the Defendant made a report at Shaukeiwan Police Station.

###### Matters considered

1. In the course of evidence, the Plaintiff mentioned that:
2. he had looked at 3 sets of traffic lights (in a triangular formation) that gave him the green signal;
3. the Defendant smelt of alcohol, did not seem to be of clear mind, could hardly open his eyes and could only murmur when speaking;
4. when he entered the intersection, there were 3 to 4 vehicles stopped before the traffic lights at eastbound Hong Cheung Street (meaning that the lights for westbound Hong Cheung Road where the Defendant was driving must have been red) and
5. traffic lights at that junction controlled a number of highway lanes and that when the traffic lights changed (presumably from green to amber) he would immediately stop.
6. All such matters cannot be found in the witness statements the Plaintiff made to the police on 29 May and 25 July 2004 or in the witness statement the Plaintiff made for purposes of this trial.
7. Regarding paragraph 13 a) the Plaintiff explained that when he mentioned to the police that traffic lights were green for himself and red for the Defendant, he had in mind and was meaning to explain about the 3 sets of traffic lights though he did not say it in so many words. The Plaintiff explained he had mentioned matters in paragraphs 13 b) and c) to the police but what he said was not recorded. In relation to paragraph 13 b), the police told him that the driver of the private car had left the scene after the Incident. In relation to paragraph 13 c), the police told him that the other vehicles had all departed and their drivers could not be located to give evidence. Hence, such information from the Plaintiff was/ would not be recorded. In relation to all these 4 matters, the Plaintiff also explained that he thought the statement to the police (presumably the one on 29 May) gave nearly the complete picture and that nothing much was missing. He therefore signed the statement.
8. It is not unusual to find the evidence of a witness containing more details than what was said or recorded in previous statements made. The Court has to decide whether the witness is, as Defence described, putting a gloss on his evidence or that there is really no cause for concern. I accepted the Plaintiff’s explanations. I found no cause for concern.
9. Defence Counsel pointed out that the Revised Statement of Damages pleaded the Plaintiff as working 26 days per month and earning a daily average net income of $600. The Plaintiff’s evidence, however, was that he worked 28 days per month and earned a daily average net income of between $500 and $600. I will simply say that I find nothing of concern here. This will not be the last time when evidence and pleadings do not marry. In relation to the number of days worked, I note that in the Joint Medical Report of 25 April 2006 (“Joint Medical Report”), it was already stated that the Plaintiff worked 28 days a month (Trial Bundle page 89 to 102, at page 90). This information must have proceeded from the Plaintiff. The Revised Statement of Damages was dated later, in August of the same year.
10. In his statement to the police made on 22 May 2004, the Defendant alleged that it was the front of the taxi that hit the (front left-side of the) private car. Due to this and the fact that the taxi was travelling fast, the private car was pushed to the right. By adopting this statement in evidence, the Defendant again asserted the same.
11. A surveyor’s report in relation to the taxi was produced by consent (Trial Bundle page 129 to 142.) This report and, in particular, the attached photographs showed clearly that there was no damage to the front end of the taxi. Under cross-examination, the Defendant was ready to concede that it could have been the private car hitting the taxi and not the other way round. I find as a fact that it was the private car that drove into the taxi. That does not, however, necessarily lead to the conclusion of negligence on the part of the Defendant.
12. As I understand Defence case, the Defendant was fit to drive that morning and was driving carefully. Given such circumstances, I consider that the Defendant could not have got it wrong as to which car it was that hit the other one. I consider what the Defendant said in his statement on this aspect an attempt to play down his role and, indeed, to pass the fault onto the Plaintiff.
13. Whilst I am willing to accept that the girl must have been disconcerted by what had happened, only if the Defendant were a fool would he leave the scene before police arrival. It was after all quite a serious incident with the taxi standing on its side and the Plaintiff trapped inside. I am certain that the Defendant is not a fool. It was the Defendant’s evidence that he was the one who made the suggestion to take the girl home and then proceeded to do so. Counsel for the Plaintiff suggested that the Defendant so acted because he had something to hide (about the Incident). I agree. This was not simply a case of error of judgment. I note further that the Defendant later went to another friend’s home “to rest” before proceeding to the police.
14. I accept the evidence of the Plaintiff on matters stated in paragraph 13 b) above. Due to the state he was in, the Defendant purposely delayed contact with the police. It is true that the private car was left at the scene and, the Defendant being the registered owner, could be traced. This, however, would take time. In any event, the Defendant was not going to further drive the private car because he saw something dripping from its front and thought it dangerous to drive.
15. The Defendant’s evidence was that he was travelling at around 50 kilometres per hour. The Plaintiff was going at about 50 or 60 kilometres per hour. The Defendant first saw the taxi at a distance of 3 to 4 vehicles’ length/ distance. The Defendant immediately braked hard. The Plaintiff did not slow down. I consider both vehicles as not really going fast. Given such circumstances depicted by the Defendant, I consider it improbable that the taxi would end up standing on its side and the private car would swing to the right because of the collision.
16. Considering matters stated in paragraphs 18 to 23 above, I find the Defendant disingenuous. He is not worthy of belief.
17. I considered the evidence of the Plaintiff, particularly in the light of criticisms made by Defence Counsel. I considered further that when the Plaintiff was asked in Court to highlight the stop-line for his section of Tai Hong Street, he did so in blue on page 76 of the Trial Bundle. This was clearly wrong. He later highlighted the relevant part in green. I was satisfied that he had merely misunderstood the sketch on page 76 and made a mistake when first highlighting t. In assessing the Plaintiff’s evidence on liability, I also took into account what I considered unsatisfactory aspects of his evidence on quantum (as to which see below). In fact, I found the Plaintiff exaggerating his injuries and damages suffered. Be that as it may, I accept the Plaintiff’s evidence on how the Incident occurred. I find that the traffic lights were green for the Plaintiff and red for the Defendant when their respective vehicles entered the same intersection.
18. Flowerbeds with plants in Hong Cheung Street (highlighted in pink on page 76 of the Trial Bundle) blocked the Plaintiff’s view of what might approach from his right along that street. The red box drawn in about the centre of the sketch on the same page indicated where the Plaintiff was when he first sensed or thought something was coming from the right. I find that this was really the first available point where the Plaintiff had the opportunity to observe traffic from that direction. It was shortly thereafter that the private car drove into the taxi. There was really nothing the Plaintiff could reasonably have done to avoid being bumped into. I do not think the Plaintiff can be faulted for not braking, swerving or sounding his horn. I note that the Plaintiff did ease off on the gas pedal. I find the Defendant fully liable for the Incident.
19. Lest there be any misunderstanding, I should state these my following views:
20. the fact that the Defendant was to some extent under the influence of alcohol does not necessarily mean that he was the one who went through a red traffic light or that he was negligent in driving;
21. the fact that the Defendant was summonsed for and convicted of “failing to stop after an accident” and “failing to report to the police the accident as soon as reasonably practicable” contrary to provisions of the Road Traffic Ordinance, Cap. 374 (Trial Bundle page 111 to 118) do not go towards proving negligence on his part and
22. the fact that the police did not see fit to charge the Defendant for careless driving and their reasons therefore are not relevant.

###### Injuries of the Plaintiff

1. Regarding injuries suffered by the Plaintiff and, in particular, the effect of those injuries on him, there is a divergence between the Plaintiff’s evidence (Trial Bundle page 63 to 65) and the available medical evidence. I prefer and accept the medical evidence. The Joint Medical Report was co-authored by a Dr. Au and a Dr. Lam. Where the views of the 2 doctors varied and save as indicated herein, I prefer and accept the views of Dr. Lam.
2. At the time of the Incident, the Plaintiff was aged 40. The Plaintiff attended the Accident and Emergency Department of Pamela Youde Nethersole Eastern Hospital (“PYNEH”) at 6.05 a.m. the same day. He was conscious. “There were tender areas over right side of head, neck and right leg. Haematoma was noted over right side of head. X-rays of head, neck, chest and right leg showed no fracture. He was discharged after observation. He was followed up on 26 May 2004, 2 June 2004, 9 June 2004 and 16 June 2004. There was gradual improvement in his condition. Sick leave from19 May 2004 to 23 June 2004 inclusive was granted” (Medical Report at Trial Bundle page 86, “Medical Report”).
3. The Plaintiff attended PYNEH on 25 November 2004 for neck sprain. Sick leave was granted to the next day. He had no further treatment afterwards (Joint Medical Report at Trial Bundle page 91).
4. In order to prepare the Joint Medical Report, Dr. Au and Dr. Lam together examined the Plaintiff on 11 April 2006. On that occasion, the Plaintiff complained of:
5. 1-2 episodes of aching discomfort over the left side of his neck every day. The ache followed such activities as reading for 15 minutes and driving for 5 hours. It eased after resting for an hour;
6. right-sided headache, associated with his neck pain;
7. 2-3 episodes of low back pain per week, each lasting for 15 minutes. The pain was caused by prolonged sitting for a few hours and was relieved with resting and
8. pain over upper tibia of right knee when he lay on his left side. The pain lasted 1-2 minutes and woke him up 3-4 nights per month.
9. On examination of the Plaintiff’s head, the 2 doctors found mild tenderness over the right temporal region.
10. Certain degenerative changes were found in the Plaintiff’s neck. However, both doctors agreed “these are pre-existing and not caused by the captioned accident” (i.e. the Incident). Dr. Au held the opinion that the neck pain was compatible with soft tissue injury sustained during the Incident. Dr. Lam said the Plaintiff “only had a minor head and neck injury…The injuries should have recovered within a short time.” I understood Dr. Lam to agree that the neck pain complained of by the Plaintiff was caused by the Incident.
11. Whilst degenerative changes to the lumbar spine were noted, both doctors agreed these were pre-existing and not related to the Incident. Dr. Au considered the back pain complained of by the Plaintiff compatible with “concomitant injury to his back” sustained during the Incident. Dr. Lam noted that back pain was not mentioned in the Medical Report (I should add that back pain is also not mentioned in any of the relevant medical certificates at Trial Bundle page 119 to 124). Dr. Lam went on to say that the back pain should be a combined result of the Plaintiff’s degenerative spine and his current work as a gardener (the Plaintiff found work as a gardener around January 2005. This work was in addition to his driving a taxi now and then). None of the documents from the hospital indicated the Plaintiff suffering from or was treated for back pain or injury to the waist. If there were such injury or treatment, one would have expected some mention of it. I prefer the view of Dr. Lam.
12. Upon examination, the Plaintiff was found to have a “normal gait. Other than the tenderness over the tibial tuberosity on the right knee, no other abnormality was detected.” Both doctors agreed that “(T)he right leg had a simple contusion only, which should have recovered already. The present right knee complaints are rather vague and could not be explained. The right leg injury carries no permanent impairment” (Trial Bundle page 100). I find that injury to the Plaintiff’s right leg (due to the Incident) was nothing more serious than a simple contusion.
13. Regarding further treatment, Dr. Au recommended 30 sessions of physiotherapy. This would take 6 weeks to complete and would cost $10,000 if done in the private sector. Dr. Au was of the view that after the recommended physiotherapy treatment, the Plaintiff should be able to return to his pre-accident occupation as a taxi-driver, though some reduction in efficiency was likely. Dr. Lam was of the view that the Plaintiff only suffered very minor injuries and that he should have recovered within a short time even without “aggressive treatment”. He felt the Plaintiff’s condition should have stabilized long ago and that there was no need for further treatment. Dr. Lam was of the view that the Plaintiff could return to working as a professional driver in full capacity (Trial Bundle page 101).
14. Dr. Au said that 4 months would have been a reasonable sick leave period for the Plaintiff. Dr. Lam said that the Plaintiff “was only given sick leave to 23 June 2004, and he could return to work afterwards, without asking for further sick leave. This is the best evidence he could work at that stage” (Trial Bundle page 102). Dr. Lam seemed to think that simply because the Plaintiff did not apply for further sick leave, it meant that he was fit to resume work. I do not share Dr. Lam’s views on this. The Plaintiff was at all material times a self-employed person. He did not need to obtain sick leave to justify to an employer his absence from work. In any event, the fact that a person did not apply for or get sick leave does not necessarily mean fitness for work or the ability to work at full capacity as before.
15. My interpretation of the views of both doctors is that the neck pain and concomitant headache should have already ceased. Dr. Au considered 4 months a reasonable sick leave period. I took that to mean that the neck pain and headache would have dissipated by the end of that period after the Incident. Dr. Lam felt that the Plaintiff should have recovered within a short time of the Incident. I took to mean shorter than Dr. Au’s 4 months.
16. I think when Dr. Au mentioned the 4-month period, he took into account the “back pain” factor (see paragraph 33 above). I tend to think that Dr. Lam’s view of a shorter period of recovery took into account the fact that the Plaintiff did not apply for further sick leave (see paragraph 36 above). Trying to strike the proper balance, I find that the neck pain and headache ceased 2 months after the Incident.
17. To sum up, I find the injuries suffered by the Plaintiff and their effect on him as follows:
18. as stated in paragraphs 29 and 30 above;
19. as stated in paragraph 31 a) and b) above. The neck pain and related headache, however, ceased 2 months after the Incident and
20. the right leg near the knee suffered a simple contusion.

###### Pain, suffering and loss of amenities

1. I was referred to the cases of Anil Jhuremalani v Rodelio O. Fajada and another, DCPI 134/2001; Limbu Ramesh v Chu Fung Man, HCPI 192/2005 and Fung Yuet Hing v Mok Sun and another, DCPI 1706/2005. The plaintiffs in those cases suffered more serious injuries than the Plaintiff here. I do not find them helpful.
2. I find Chan Siu Youn v Ng Kam Man and others, HCPI 533/1999, nearer the mark. The plaintiff there sustained a sprain neck injury in a traffic accident. He was hospitalized the same day and treated with physiotherapy, neck collar and analgesic. He was discharged 2 days later. The plaintiff suffered neck pain and received another 3 months of physiotherapy. Some but not complete recovery was achieved. The plaintiff attended Orthopaedics Department for follow-up treatment lasting more than a year. The plaintiff still suffered from intermittent residual neck pain. The plaintiff worked as an interior decorator. He found it difficult to perform long hours of overhead ceiling work due to neck pain on prolonged neck extension. The learned Recorder considered an award of $100,000 reasonable.
3. I consider an award here of $70,000 to be within the bounds of reasonableness though perhaps erring on the generous side.

Pre-trial loss of earnings; future loss of earnings; loss of earning capacity

1. I refer to my findings in paragraphs 39 and 40 above. I make no award for future loss of earnings or loss of earning capacity.
2. Regarding pre-trial loss of earnings, I will make an award for 2 months. There was dispute over the amount of net income to be applied to the calculation. The Plaintiff’s evidence was that he drove a 12- or 13-hour shift and that he worked 28 days per month. His average daily net income was $500 to $600. Defence produced statistics prepared by a Motor Transport Workers General Union Taxi Driver Branch (“the Union”) on net income of taxi-drivers for the period January 2003 to

January 2005. The statistics showed, inter alia, that the approximate daily net income per shift of 8 to 9 hours for Urban taxis in the year 2004 was $310 for May as well as July, and $330 for June. It is beyond dispute that the Plaintiff drove an Urban taxi.

1. It must be readily appreciated that the statistics can only provide approximate average figures. The number of taxi-drivers who provided information for compiling the statistics is not known. There is nothing to indicate the mechanism, if any, to verify information received. I question the weight that one can give to such statistics.
2. I accept that the Plaintiff is not a member of the Union. I also accept that the Plaintiff worked 12- or 13-hour shifts. Assuming that the increased work-hours mean a proportional increase in net income (e.g. 2 hours worked yields income of $10, 4 hours worked therefore yields income of $20), one can see that the difference between the average daily net income figure/s relied on by the Defence and the lower figure of $500 put forward by the Plaintiff is only around $40.
3. The Plaintiff has not produced any document to indicate his income (or expenses) as a taxi-driver. I found the Plaintiff had exaggerated his injuries and damages suffered. I am only willing to adopt $500 as the average daily net income for the Plaintiff. The Plaintiff is a married man with 2 children aged 9 and 16 (see, for example, Trial Bundle page 89). He worked long overnight shifts. I do not believe he will only spare 2 whole days for his family each month. I will calculate

pre-trial loss of earnings on the basis that the Plaintiff worked 26 days per month i.e. 52 days for 2 months.

1. The amount of pre-trial loss of earnings will thus be $26,000 ($500 x 52 days).

###### Out of pocket expenses

1. This was agreed at $5,000.
2. I will end by dealing with 2 further matters.
3. First, the Joint Medical Report mentioned the Plaintiff seeking treatment from bonesetters for left leg problem (Trial Bundle page 91). On the evidence before me, this left leg problem cannot be spawned by the Incident (see paragraph 29 to 31 above).
4. Second, I find that the Plaintiff failed to mitigate his loss. Though the burden of proving failure to so mitigate rested on the Defence, I thought the Plaintiff’s own evidence amply demonstrated this.
5. The Plaintiff complained that his neck pain and attendant headache/ dizziness prevented him from driving a taxi full time as before. However, he did not seek any further medical assistance after 25 November 2004 (see paragraph 30 above). His explanation was that when he went to PYNEH, he was given the same medication and ointments each time. I understood the Plaintiff was saying that such

medication and ointments were not effective. I also understood the Plaintiff to mean that he did not seek medical treatment from doctors in the private sector because he was apprehensive of the cost.

1. The Plaintiff did not inform anyone at the government hospital that he thought the treatment he was receiving was ineffective. According to the Plaintiff, he earned a monthly net income of some $14,000 to $16,000 ($500/$600 per day, 28 days per month). I think it lies ill in his mouth to say that he feared the cost of treatment in the private sector. This is particularly so when there is no evidence that he ever tried to enquire about such treatment. I consider that the Plaintiff just adopted a laid-back attitude. He acted most unreasonably in not pursuing further or alternative medical treatment. I note that even Dr. Au considered the Plaintiff’s ailments from the Incident (back pain included) could be effectively treated within a short period and at a cost that I thought would be within the means of the Plaintiff (see paragraphs 33, 36 to 38 above).
2. The evidence from the Plaintiff himself also indicated only superficial effort to secure alternative employment for the pre-trial period of some 2.5 years.
3. Even if I were to make awards for loss of future earnings or loss of earning capacity, or my award for pre-trial loss of earnings should be increased, I would have reduced such awards/ increase to token amounts to reflect the Plaintiff’s failure to mitigate loss.

# (Abu B. bin Wahab)

Deputy District Judge

Representation:

Mr. CHEUNG T.Y. Ivan, instructed by Messrs Francis Kong & Co.,

for the Plaintiff.

Mr. Sakhrani, Ashok, instructed by Simon C.W. Yung & Co.,

for the Defendant.