#### DCPI1617/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1617 OF 2006

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| BETWEEN | LO WING KWONG | Plaintiff |
|  | and |  |
|  | WONG KA WAI RUBY | Defendant |

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##### Coram: H H Judge Marlene Ng in Court

Dates of Hearing: 14th and 15th August 2007

Date of Judgment: 18th December 2007

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###### JUDGMENT

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I. Introduction

1. On 11th September 2003, the Plaintiff was a probationary motorcyclist who purchased a second-hand motorcycle bearing registration no.JK9585 (“Motorcycle”) about 2 weeks earlier. At about 7:52pm that day, he drove the Motorcycle and the Defendant drove a private car bearing registration no.KC3903 (“Car”) along Jockey Club Road. Although there was dispute as to whether the Car was directly behind the Motorcycle or whether it was behind a white goods van (“Van”) or another private car following the Motorcycle, it was agreed the Motorcycle and Car travelled on the slip road (“Slip Road”) that curved down from the elevated Jockey Club Road to a give-way lane (“Give-way Lane”) that tapered off towards an end point (“End Point”) to merge into the first lane of Taipo-bound Fanling Highway (“1st Lane”). A collision occurred between the rear part of the Motorcycle and the front part of the Car (“Accident”), and the Plaintiff was thrown to the ground thereby suffering personal injuries. An ambulance came to take the Plaintiff to North District Hospital (“NDH”) for medical treatment.
2. Police officer(s) came to the scene of the Accident (“Scene”), and at about 8:10pm PC53399 Lee Chung Fai (“PC53399”) of the traffic accident investigation division took a written statement from the Defendant (“D’s 1st Police Statement”) at the Scene. At about 8:30pm at NDH, the Plaintiff gave a verbal account of the Accident (“P’s Police Account”) to PC53399 who recorded it in the police investigation report (“Police Report”). On 29th and 30th September 2003, PC53399 took witness statements from the Defendant and Plaintiff respectively (“D’s 2nd Police Statement” and “P’s Police Statement”).

*II. Issues on liability*

1. There was no dispute that whilst on the Give-way Lane both the Motorcycle and Car switched on the right indicator lights with a view to cut into the 1st Lane. According to the Plaintiff, he checked the Motorcycle’s wing mirror and saw the Car cut into the 1st Lane before slowing down and stopping on the Give-way Lane to cope with the traffic. But the Car suddenly swerved back to the Give-way Lane to avoid a heavy truck (“Truck”) coming from behind on the 1st Lane, and hit the Motorcycle that had stopped for a few seconds.
2. Mr T K Wong, counsel for the Defendant, conceded the Defendant’s driving was negligent, but submitted there was 50% contributory negligence on the part of the Plaintiff in abruptly stopping the Motorcycle without prior signal/warning or due regard to the traffic behind and when the vehicles in front had already cut into the 1st Lane.
3. But the Defendant’s primary contention was the Plaintiff was debarred from maintaining the present claim on the ground that it had been compromised/settled pursuant to the parties’ oral settlement agreement made on 29th September 2003 whereby the Defendant agreed to pay a compensation sum of HK$8,500.00 (“Settlement Sum”) to the Plaintiff that covered both vehicle damage and personal injuries in relation to the Accident. Upon the Defendant’s payment of the Settlement Sum to the Plaintiff on the same day, they gave written mutual general releases to each other (ie “不再追討任何責任”) (“P’s and D’s Notes”).
4. The Plaintiff claimed the settlement agreement was limited to compensation for vehicle damage to the Motorcycle, so on the first day of trial Mr C W Wong, counsel for the Plaintiff, abandoned the Plaintiff’s pleaded claims for total loss of the Motorcycle, towing charges and motor surveyor’s fees. But the Plaintiff insisted there was no discussion or compromise concerning his personal injuries arising out of the Accident.
5. Thus the issues on liability were as follows :
6. whether the oral settlement agreement between the parties made on 29th September 2003 comprised compensation for personal injuries as well as for vehicle damage;
7. if not, whether the Plaintiff was liable for contributory negligence in respect of the Accident.
8. It was suggested that if I ruled in favour of the Defendant on issue (a), the Plaintiff was under a unilateral mistake since he was unaware of his legal right to claim compensation for his personal injuries. But the Plaintiff did not plead or apply to amend his pleadings to plead any alternative case of unilateral mistake rendering the settlement agreement void, so this point was not open to him. But in any event, I find below that the Plaintiff knew of his right to claim compensation for personal injuries. Further, unilateral mistake as to the terms of the settlement agreement could only be set up if the mistake were known to the other party (see *Chitty on Contracts* 29th ed (2004) Vol.1 para.5-063 at pp.403-404), but there was no such evidential basis in the present case.

*III. Overview of witnesses’ credibility*

1. In light of the aforesaid issues on liability, much turns on the credibility of the witnesses, ie the parties and PC53399. In assessing witnesses’ credibility, the court should consider the totality of their evidence against the documentary evidence, inferences based on inherent improbabilities and/or undisputed facts (see the principles set out by Chung J at paragraph 12 of *Star Glory Investment Ltd v Kai Tua (H.K.) Technology Ltd & ors* HCA3523/2002 (unreported, 13th August 2005)).
2. On balance I prefer the evidence of the Defendant and PC53399 when considered against the police photographs and police sketch of the Scene (“Photographs and Sketch”), the Police Report, D’s 1st and 2nd Police Statements, P’s Police Statement, P’s and D’s Notes, and the motor survey report of the Motorcycle dated 29th September 2003. The Defendant and PC53399 (whom I regard as an independent witness) gave accounts that were generally consistent with the documentary evidence, and were unshaken in cross-examination on the core issues. The same could not be said for the Plaintiff whose evidence (which I do not hesitate to reject) was inherently inconsistent and unreliable.

*IV. Liability*

*(a) Undisputed facts*

1. The following matters were not disputed :
2. The speed limit of Fanling Highway was 100kph.
3. The Plaintiff received tertiary education and was a diploma graduate. At the time of the Accident, he was almost 31 years old and employed by the Hong Kong Standards & Testing Centre Limited (“Employer”) as a technical officer. He lived in Fanling and was familiar with Fanling Highway.
4. At the time of the Accident, the Defendant had 5-6 years’ driving experience and was a full-time student of a Project Yi Jin commercial course. The Defendant regularly drove past the Scene to her father’s home in Fanling for dinner.
5. The parties did not know each other prior to the Accident.
6. At the time of the Accident, PC53399 had been a police officer for 10 years, and had worked in the traffic accident investigation division since 1999.

*(b) Sequence of vehicles*

1. The circumstances of the Accident fell within a small compass, yet the Plaintiff gave 3 very different accounts. According to the Plaintiff’s witness statement dated 14th March 2007 (“P’s Witness Statement”), the Car was directly behind the Motorcycle on the Slip Road and Give-way Lane. In P’s Police Account as recorded in the Police Report, the Plaintiff claimed the Car followed a private car that was behind the Motorcycle. But the Plaintiff gave *viva voce* evidence that the Van was directly behind the Motorcycle and he did not notice or pay attention to the Car. PC53399 confirmed (and I accept) the Plaintiff never mentioned the Van to him. The above inherent inconsistencies clearly undermined the Plaintiff’s veracity.
2. I prefer the Defendant’s evidence that there were 2-3 vehicles behind the Car, which was about 1 private car length directly behind the Motorcycle as she negotiated the curve of the Slip Road and along the Give-way Lane.

*(c) Accident*

1. According to P’s Witness Statement, the Plaintiff checked the Motorcycle’s wing mirror and *saw the Car cut into the 1st Lane*. But the Plaintiff gave *viva voce* evidence that he allowed sufficient room for the Van (and other vehicles behind the Van) to overtake him, and he actually saw the Van cut into the 1st Lane ahead of the Truck but *did not notice the Car*.
2. The Plaintiff gave evidence that at the same time he noticed the Truck (with trailer) sounding horn and coming nosily from behind at high speed on the 1st Lane. He thought it would pass quickly, but the noise disconcerted him and he dared not follow other vehicles ahead of the Motorcycle into the 1st Lane. Still the Truck did not reach level with him, so he slowed down the Motorcycle, which was on the Give-way Lane about 5-10 metres before the End Point and about half a private car length away from the broken white line separating the Give-way Lane and 1st Lane (“Line”). After the Motorcycle had stopped for a few seconds, the Truck passed the Motorcycle on the 1st Lane and the Accident occurred.
3. Apart from the aforesaid differing versions of the Car or Van (without noticing the Car) cutting into the 1st Lane (see paragraph 14 above), the Plaintiff gave a third version of the Accident to PC53399 in P’s Police Account as recorded in the Police Report, ie “…… 去到意外地點(支路口)時，因[the 1st Lane]後方有車駛，所以停下，*而後面的一架私家車已駛出了[the 1st Lane]，而再後面的是[the Car]*，見[the Car]亦都扭出[the 1st Lane]，突然再扭番入支路，車尾被[the Car]車頭撞倒，並車頭向左擺，之後向右跌低地下受傷” (my emphasis). This contradicted the Plaintiff’s other 2 versions in that (a) a private car (and not the Van or Car) was directly behind the Motorcycle and (b) he saw 2 vehicles (ie the private car and the Car) instead of 1 vehicle (ie the Van or the Car) cut into the 1st Lane. I find the Plaintiff’s conflicting assertions unreliable and prefer the Defendant’s evidence.
4. The Defendant claimed she was not ready to cut into the 1st Lane when the vehicles in front of the Motorcycle did so. She slowed down from 20-30kph to about 20kph for the Motorcycle to cut into the 1st Lane. The Motorcycle slowed down almost to a stop and the distance between the Motorcycle and Car reduced to less than 1 private car length. When the Defendant became conscious (意識) of the Motorcycle accelerating to cut into the 1st Lane, she also accelerated to follow suit.
5. I find on balance the Car followed the Motorcycle closely, but neither party noticed the oncoming Truck when they started to cut into the 1st Lane (otherwise they would not have done so along a high speed highway). As the Defendant admitted, she assumed it would not be unsafe to cut into the 1st Lane since (a) both vehicles accelerated at the same time and (b) if the Motorcycle could cut into the 1st Lane so could the Car. Despite her denial, I find the Defendant did rely on the Motorcycle in proceeding to cut into the 1st Lane.
6. I further find that as both parties started to cut into the 1st Lane, they were alerted to the presence of the Truck by the sounding of horn from behind. On checking the mirror, the Defendant noticed the Truck about 7-8 private car lengths behind and travelling quite fast on the 1st Lane. She was afraid the Truck would hit the Car or come close to hitting the Car if she continued into the 1st Lane. I find both parties reacted by swerving the Motorcycle (a small part of which was in the 1st Lane) and the Car (half of its front part was in the 1st Lane) back to the Give-way Lane. By that time, the distance between the Motorcycle and Car had shortened to half a motorcycle length.
7. I further find that after swerving back into the Give-way Lane, the Motorcycle slowed down and stopped without signal or warning rather than easing forward along the Give-way Lane that tapered towards the End Point. The Defendant was paying attention to the Truck behind on the 1st Lane, and when she turned her attention back to the front 1-2 seconds later, the collision was already upon her and she was unable to stop the Car in time. In my view, that was why the Defendant said she did not pay attention to the Motorcycle swerving back to the Give-way Lane in the following account of the Accident she gave to PC53399 at the Scene at about 8:10pm and as recorded in the Police Report (“D’s Police Account”) :

“當時與[the Motorcycle]一同*準備切出*[the 1st Lane]，當一出少少[the 1st Lane]，[the 1st Lane]後方有[the Truck]駛來及響按，於是扭左入番支路口，*無留意[the Motorcycle]亦同時扭左入番支路*，所以收掣不及，車頭撞向[the Motorcycle]車尾” (my emphasis)

and in D’s 1st Police Statement also made at the Scene :

“…… 當去到出公路路口時，我同前面[the Motorcycle]都一同*準備駛出*[the 1st Lane]，但[the 1st Lane]後面有[the Truck]突然響按，所以就扭去入番支路，*一時無為意[the Motorcycle]都係扭番左入支路*，所以收語切制，車頭撞咗落[the Motorcycle]車尾 ……” (my emphasis).

1. It was suggested that the Defendant gave 2 inconsistent versions of the Accident because D’s Police Account, D’s 1st Police Statement and the Defendant’s witness statement dated 26th February 2007 (“D’s Witness Statement”) (ie “當我打了右燈，及*正想準備轉線之際*，在[the 1st Lane]的後方遠處有[the Truck]響“按”之情況下，突然停下來。因此，我所駕駛的[the Car]收掣不及，車頭與[the Motorcycle]的車尾發生碰撞 ……” (my emphasis)) merely stated she was about to but had not yet cut lanes at the time of the Accident. I disagree and note that D’s Police Account made very shortly after the Accident confirmed the Car “出少少[the 1st Lane]”. I see no reason to doubt this immediate account by the Defendant at the Scene.
2. Next, it was pointed out that D’s Police Account and D’s 1st Police Statement failed to mention the Motorcycle came to an abrupt stop, which was first raised in D’s Witness Statement and reiterated in her evidence. I do not find such difference material. Given the very short distance of half a motorcycle length between the Motorcycle and Car and the greater horsepower of the Car, the collision would have been inevitable when the oncoming Truck gave the Defendant a start and she instinctively swerved back into the Give-way Lane without noticing the Motorcycle that swerved back as well.

*(d) Post-Accident at the Scene*

1. The Motorcycle fell down on its right side so its rear part and right side were damaged. Since the Car had traversed the Line before swerving back to the Give-way Lane, part of it was on the Give-way Lane and part of it remained in the 1st Lane. The left front part of the Car was damaged, and there was broken glass on the ground.
2. According to P’s Witness Statement, the Plaintiff was thrown forward to land on his right elbow and buttock. He was conscious, but his right elbow bled immediately and both his right elbow and buttock felt painful. But when the Plaintiff gave *viva voce* evidence, he said he was thrown forward and “黑一黑” (but he did not know for how long). He further admitted P’s Witness Statement was not quite accurate since he only later realised he was injured with a bleeding right elbow. Such discrepancies again diminished the Plaintiff’s overall credibility.
3. After alighting from the Car, the Defendant was concerned that the Plaintiff might be hurt and asked whether he needed medical treatment. The Defendant said (and I accept) the Plaintiff checked himself for injuries and told her he was able to walk so “冇乜大礙”. Nevertheless, the Defendant advised him to report to the police and have a medical examination. The Plaintiff claimed he suggested to the Defendant that she move the Car back to the Give-way Lane, and she did so whilst he made a report to the police *via* his mobile telephone. He did not call for an ambulance, but one arrived shortly to take him to NDH before arrival of the police.
4. The above was contrary to P’s Witness Statement which stated (a) the Plaintiff believed it was the Defendant who reported the Accident to the Police, and (b) he never had any conversation with the Defendant after the Accident up to the arrival of the ambulance/police, which allegations the Plaintiff acknowledged to be erroneous when he gave evidence. Such discrepancies again undermined the Plaintiff’s veracity.
5. When PC53399 arrived at the Scene, he drew the Sketch depicting the positions of the Motorcycle and Car, but by that time the Car had been moved back to the Give-way Lane. As part of his preliminary investigations, PC53399 took D’s Police Account and D’s 1st Police Statement at the Scene. Then the Defendant left.

*(e) NDH*

1. Mr T K Wong submitted that the Plaintiff’s exaggeration of his mild injuries reflected the overall unreliability of his evidence, so I propose to briefly review the evidence on the Plaintiff’s injuries.
2. According to the medical report by NDH’s Dr Cheng Sze Ting Stella dated 2nd April 2006 (“NDH Report”), the Plaintiff’s symptoms were “[motorcyclist] hit by a car, sustained right elbow & low back injury”. The right elbow injury was an abrasion wound. Physical examination did not reveal any fracture and no x-ray was taken. I agree this was a mild injury.
3. The Plaintiff gave evidence that he told the medical personnel he had pain at his low back just above the coccyx but not any buttock pain. First, the Plaintiff said he landed on his buttock and it was his buttock that felt painful. Secondly, when the Plaintiff was referred to the triage nurse’s notes of “TA at 2005, motor-cycle driver, hit by private car, HIØ, ® elbow A/W, *buttock pain+*” (my emphasis), he changed to say he could not remember whether he told the medical personnel he had buttock pain. Thirdly, his evidence was at odds with the NDH Report which noted “back non-tender”, and when this was put to him he changed to say he could not remember what he told the medical personnel. He even added (a) he did not know (and therefore might not have told the medical personnel) that his back was hurt, and (b) he might have told the doctor he had some discomfort rather than pain when his back was examined, but plainly these 2 assertions did not sit well together.
4. In my view, although the provisional diagnosis in the NDH Report was merely “right elbow injury”, I bear in mind the Plaintiff was thrown forward by the collision to land on his elbow and buttock, so I accept he would have some pain in his buttock/low back area. But the way the Plaintiff gave evidence showed he was not above embroidering his case.
5. The Plaintiff was given wound dressing and analgesic by NDH before discharge. He claimed he was worried about losing his job because the Employer dismissed several employees in 2003 for redundancy, so he did not return to NDH for daily wound dressing or ask for any sick leave. In my view, irrespective of the Plaintiff’s motives or protestations, the medical personnel did not consider sick leave was required for proper recovery from what appeared to be mild injuries.
6. The Plaintiff believed (but was not sure) he met a police officer at NDH. He claimed such police officer merely brought him the damaged Motorcycle but did not ask him how the Accident happened, and he did not give any detailed account of the Accident to such police officer. But when confronted with P’s Police Account, the Plaintiff shied away to say he was unsure whether he described the Accident to the police officer at NDH. I prefer PC53399’s evidence that he verbally asked the Plaintiff how the Accident happened and recorded what the Plaintiff told him as P’s Police Account in the Police Report.

*(f) Return to work*

1. The day of the Accident (ie Thursday) was followed by a public holiday (ie Mid-Autumn Festival) and the weekend, so the Plaintiff only returned to work on 15th September 2003 (ie Monday). But P’s Witness Statement asserted he returned to work on the day following the Accident (ie 12th September 2003), which the Plaintiff admitted was erroneous when he gave evidence. Such discrepancy highlighted the unreliability of the Plaintiff’s evidence.

*(g) Insurance*

1. The Plaintiff reported the Accident to the motor insurer’s insurance agent. A motor survey was done with a view to claim compensation for vehicle damage. In my view, this showed that even quite shortly after the Accident the Plaintiff was preparing for a claim against the Defendant.
2. The Plaintiff claimed that his enquiries with his younger brother and friends (who were car drivers) and with the insurance agent revealed possible recovery of compensation for vehicle damage but not for personal injuries. Further, he was not familiar with and therefore did not ask the insurance agent about possible claim for compensation for his personal injuries. Although he previously read media reports on traffic accidents and associated court cases, they were not detailed accounts. In short, the Plaintiff claimed he had no idea he could claim compensation for personal injuries against the Defendant.
3. I reject the Plaintiff’s alleged ignorance. He received tertiary education and worked for a number of years. He was quick off the mark in liaising with the insurance agent to prepare his claim for vehicle damage to the Motorcycle. He made enquiries with friends and family. With a bleeding right elbow and pain in his elbow and back/buttock, his injuries were evidently not latent. He received medical treatment at NDH, and (as seen below) self-applied ointment to the injured elbow and intended to seek bonesetter treatment when the elbow wound healed. If (as the Plaintiff claimed) he considered himself a victim of the Accident and the Defendant liable for damage to the Motorcycle, there was no common sense reason why he would not also blame his personal injuries arising from the Accident on the Defendant’s “fault”. Common sense bolstered by the media reports he admittedly read would have led him to believe he could claim for compensation for personal injuries caused by the Defendant’s “fault” or at the very least he would have made enquiries with the insurance agent and others as to whether he could maintain such claim. In light of the above analysis and his overall unreliability, I reject the Plaintiff’s claimed ignorance.

*(h) Bonesetter treatment*

1. Since the Plaintiff was able to manage without returning to NDH for the recommended daily dressing (even during the public holidays immediately following the Accident), I am of the view the elbow abrasion was relatively minor. The Plaintiff also agreed his low back was not too painful (ie no pain during walking) and the pain subsided without much residual effect after about 3-4 weeks.
2. The Plaintiff claimed his right elbow was still swollen and painful when he returned to work, and the range of movement limited, so his colleagues recommended him to seek bonesetter treatment from 陳氏祖傳(跌打)骨傷科醫館 (“Bonesetter”) in Taipo. He believed Chinese medicine was more effective in reducing swelling and managing soft tissue injury, so he visited the Bonesetter for his right elbow injury (but not for his back pain) when he got off work. He did not receive bonesetter treatment that day as there was still some discharge from his elbow wound, but was told to return in a month’s time (ie upon healing of the abrasion wound). In the meantime, the Plaintiff applied ointment and/or rolled boiled eggs to reduce his elbow swelling. The Plaintiff said that when the wound healed his right elbow was still painful, so he sought treatment from the Bonesetter not less than 20 times (at 1-2 times *per* week) over a half-year period at HK$200.00 *per* visit.
3. Mr T K Wong submitted that such alleged treatment was nothing but a bare assertion unsupported by documentary evidence and weakened by the Plaintiff’s conflicting evidence. In P’s Witness Statement, the Plaintiff claimed he did not know he had to (and therefore did not) retain receipts from the Bonesetter. But when he gave evidence, the Plaintiff said he did not request for and the Bonesetter did not issue to him any receipt. This added a further dimension of unreliability to the Plaintiff’s evidence.
4. I am prepared to accept the Plaintiff sought bonesetter treatment from the Bonesetter, but given the mild nature of the elbow injury I am not convinced he attended about 20 times over a half year period. Significantly, even after the Plaintiff had legal representation and commenced the present proceedings to claim *inter alia* for his bonesetter expenses (ie about HK$4,000.00), he did not ask the Bonesetter (who still carried on his bonesetter practice in Taipo) for confirmation of his visits/expenses, but was content to say he would attempt to seek such confirmation if necessary when he gave evidence at trial. There was no persuasive explanation why no such attempt was made earlier.

*(i) Police Report and Notice of Intended Prosecution (“Notice”)*

1. I now deal with the police investigation as part of the background to the settlement agreement. PC53399 classified the Accident as a “頭撞尾” traffic accident associated with cutting lanes. He fairly acknowledged that since D’s Police Account and D’s 1st Police Statement stated the Defendant did not pay attention to the Motorcycle swerving back into the Give-way Lane, she might be prosecuted for traffic offence(s), but without a cautioned statement there was insufficient evidence at that stage to institute any such prosecution.
2. PC53399 explained that when he input data from his preliminary investigations into the police computer system, the system required him to tentatively identify a more culpable involved driver. He said he would do so on the basis of available information, observations at the scene and accounts by the drivers, but hastened to clarify that such status might change entirely upon further investigation and/or review by senior police officers. In respect of the Accident, upon review of P’s and D’s Police Accounts, P’s 1st Police Statement, the Sketch and his observations of the Scene, PC53399 thought (a) vehicles would normally cut into the 1st Lane after moving 1-2 private car lengths into the Give-way Lane and not close to the End Point, and (b) on a preliminary basis the Defendant was more culpable since the Accident was an “頭撞尾” traffic accident.
3. PC53399 prepared the Police Report except for the last 2 entries for 12th October 2003. The Plaintiff received the Notice in mid-September 2003 informing him *inter alia* that question was being considered of instituting a prosecution against him under 1 or more of sections 36, 37, 38 and 41 of the Road Traffic Ordinance Cap.374 (ie causing death by dangerous driving, dangerous driving, careless driving and driving in excess of the speed limit). It was standard police procedure to issue a Notice to all drivers involved in a traffic accident, so the Defendant would have received such Notice as well.
4. I am not convinced the Plaintiff was perplexed upon receipt of the Notice. As I have found (see paragraphs 17-20 above), the Motorcycle also swerved partly into and then out of the 1st Lane before stopping without warning/signal on the Give-way Lane. In such circumstances, the Plaintiff could not have been unaware that his manner of driving also contributed to the Accident. I find the Notice did colour his considerations in coming to the settlement agreement discussed below.

*(j) Settlement agreement*

*(1) Defendant’s visit to the Police Station*

1. The Defendant went to Sheung Shui Police Station (“Police Station”) on 29th September 2003 to meet PC53399 who proposed to take her statement. Since the parties previously gave different accounts of the Accident, PC53399 decided to take an ordinary witness statement (and not a cautioned statement) from the Defendant.
2. In the course of doing so, the Defendant asked PC53399 whether she could privately settle with and have the contact telephone number of the driver of the Motorcycle. Since the police could not release such personal data without the Plaintiff’s consent, the Defendant asked PC53399 to check whether the Plaintiff would give consent. Pursuant to the Defendant’s request, PC53399 contacted the Plaintiff who agreed to release his mobile telephone number to the Defendant.

*(2) Defendant’s case*

1. After obtaining the Plaintiff’s mobile telephone number, the Defendant called the Plaintiff. She indicated she wished to negotiate a private settlement with him since the Accident was not a serious one and it would save them the trouble of giving statements to the police and/or attending court to give evidence. The Plaintiff was agreeable.
2. The Defendant claimed that during the telephone discussion she asked the Plaintiff whether he suffered personal injuries. He replied he only had abrasion of the arm that was “沒有大礙”. The Defendant said she could not afford to pay substantial compensation since she was a full-time student and had paid HK$8,000.00 for repairs for the Car. She asked the Plaintiff to propose a sum to see if she could afford it. The Plaintiff said he (a) had spent HK$10,000.00 odd (and he had the relevant receipts) to acquire the Motorcycle which was beyond repair but acknowledged there would be some depreciation, and (b) should receive some “湯藥費” for his injuries, so he asked for a sum of HK$10,000.00. She counter-proposed HK$8,000.00 which the Plaintiff rejected. She increased the offer to HK$8,500.00 and the Plaintiff immediately accepted. They made an appointment to meet after 5:00pm at a carpark near the ground floor of Fortune Plaza, Taipo (“Carpark”).
3. I prefer and accept the Defendant’s evidence that both parties knew the settlement negotiations and agreement (see the above paragraph) comprised compensation for vehicle damage to the Motorcycle as well as “湯藥費” for the Plaintiff’s personal injuries although there was no apportionment between these 2 heads.
4. Mr C W Wong submitted that the factual matrix of the present case objectively supported the conclusion that the Accident was caused by the Defendant’s negligence, so when she was asked to give a statement to the police she was (a) scared that her negligent driving caused vehicle damage to the Motorcycle and (b) keen to settle with the Plaintiff to avoid the real likelihood of police prosecution.
5. The Defendant fairly conceded at trial that she was 50%-60% liable for causing the Accident. But she claimed that on 29th September 2003 she was thinking it was too troublesome to attend court in respect of the Accident rather than in terms of her liability.
6. Whilst I accept the Defendant knew (as she fairly conceded) her driving was negligent, I am not persuaded she was or she thought she was the only one to be blamed for the Accident. Consistent with my findings, I accept the Defendant knew (a) her driving fell below the standard of a reasonable driver even though she was not the only one to be blamed, (b) there was a risk of prosecution against her (and I accept PC53399’s evidence that a Notice had been sent to her alerting to such possibility), (c) giving a statement to the police and attending court in future could be troublesome, (d) the Motorcycle was damaged, and (e) the Plaintiff was injured and taken to hospital for medical treatment.
7. I find it was a combination of the above matters that motivated the Defendant to seek out the Plaintiff for settlement negotiations. I am not convinced she only had vehicle damage in mind; even at the Scene she was concerned whether the Plaintiff was hurt. The Defendant was plainly looking for means to bring finality to the Accident. I am persuaded she had both vehicle damage and personal injuries in mind, and she expressly referred to both matters when she discussed with the Plaintiff over the telephone.

*(3) Plaintiff’s case*

1. The Plaintiff agreed the Defendant called him on 29th September 2003. I reject P’s Witness Statement stating that he was surprised the Defendant had his mobile telephone number. Both the Defendant and PC53399 confirmed (and I accept) the latter called the Plaintiff and obtained his consent to release his mobile telephone number to the Defendant. Indeed, when the Plaintiff gave evidence, he shied away by saying he could not remember whether any police officer telephoned him, which underlined the unreliability of his assertions.
2. The Plaintiff claimed that during his telephone conversation with the Defendant, she asked him about the damage to the Motorcycle and the amount of compensation for such damage. The Plaintiff said the Motorcycle was beyond repair and asked for HK$12,000.00 (ie the price of HK$9,000.00 he paid for the Motorcycle, insurance charges of HK$2,200.00 and miscellaneous registration, towing, motor survey and “回收” charges). The Defendant counter-offered HK$7,000.00. There was no dispute that the parties eventually agreed to the Settlement Sum and to meet at the Carpark after work for payment/collection of the same.
3. Mr C W Wong submitted that bearing in mind the Motorcycle was newly purchased and the expenses associated thereto were newly incurred, it would have been more likely for the Plaintiff to demand for HK$12,000.00 rather than HK$10,000.00. I disagree. In light of my factual findings in paragraphs 17-20 above, I have no hesitation in concluding that the Plaintiff’s manner of driving (ie swerving partly into and then out of the 1st Lane without due regard for the oncoming Truck that was travelling quite fast on the 1st Lane, and then stopping on the Give-way Lane without warning/signal and without easing forward to make allowance for traffic behind) also contributed to the Accident, and the Plaintiff knew he would not have been able to demand full reimbursement of the price of the Motorcycle and associated expenses.
4. The Plaintiff’s case was further weakened by discrepancies in his evidence as to what transpired during the telephone discussion. P’s Witness Statement stated that “[the Defendant]向本人表示法律程序非常複雜，該意外的誰是誰非很難定奪，[the Defendant]更向本人指出如果事件搞上法庭，[the Defendant]會指控[the Accident]是由本人不小心駕駛造成，本人有機會是[the Accident]的被告，並有機會因此留有案底”. But when the Plaintiff gave *viva voce* evidence, he said there was no mention of police investigation during the telephone conversation with the Defendant and P’s Witness Statement was incorrect. I find the Plaintiff failed to tell the court the truth in respect of his telephone conversation with the Defendant, and reject his assertion that they never discussed or reached settlement in relation to compensation for his personal injuries.
5. Further, the Plaintiff admitted he knew what “湯藥費” meant, and his injuries were still painful at that time. Although he had not started his bonesetter treatments yet, he visited the Bonesetter on the first day he returned to work, so even on his case he knew the cost and expected commencement of the bonesetter treatment. I find the matter of his personal injuries was discussed between the parties. Indeed, the Plaintiff’s explanation otherwise wavered uncertainly between (a) having thought about his loss and damages for personal injuries but feeling unable to claim for the same, and (b) not knowing he had a right to claim for such loss and damages until March 2006 when he had legal advice. Such uncertainty obviously weakened his stance.
6. Looking at the totality of the evidence, the relevant factual matrix, and overall unreliability of the Plaintiff’s evidence, I find on balance the parties made an oral settlement agreement over the telephone for the Defendant to pay the Settlement Sum to the Plaintiff in full and final settlement of any compensation claim arising out of the Accident that comprised *inter alia* vehicle damage to the Motorcycle as well as loss and damage for the Plaintiff’s personal injuries.

*(k) D’s 2nd Police Statement*

1. After the Defendant hanged up, she returned to tell PC53399 she had made a private settlement with the Plaintiff. She gave D’s 2nd Police Statement to PC53399 stating “因為係意外之後，我已經同對方司機私下和解了，所以唔想再講意外經過，我亦唔會追究對方及上庭作供”. PC53399 gave her a copy of D’s 2nd Police Statement and she left.

*(l) Meeting at the Carpark*

1. In the late afternoon on the same day, the Defendant and a friend drove to the Carpark and were later joined by the Plaintiff. The Plaintiff claimed they did not discuss the compensation or police investigation. On the other hand, the Defendant claimed she again asked the Plaintiff (a) about the Motorcycle (and he confirmed it was beyond repair) and (b) whether he suffered personal injuries as a result of the Accident (and he said “沒有任何大礙”). The Plaintiff also asked her whether the Car had been repaired and when she repeated what she told him over the telephone he commented the repairs were expensive. The Defendant said it was a burden for her to pay HK$8,000.00 for repairs for the Car and HK$8,500.00 to him as compensation to which remark the Plaintiff did not give any reply.
2. On balance I prefer the Defendant’s evidence. This was the occasion when the parties met for the first time after they reached the settlement agreement. I find it improbable they said nothing about the compensation and just went about payment and receipt of the Settlement Sum, especially when it was agreed that the Defendant suggested both parties execute mutual releases to confirm the settlement. I find the parties must have touched on the purpose of the compensation and mutual releases. I therefore accept the Defendant made clear the Settlement Sum was for all loss and damages arising from the Accident that were inclusive of vehicle damage and personal injuries. I find the Plaintiff’s allegation that the Defendant did not give any particular reason for requiring the mutual releases (even though he suspected they were acknowledgments of the settlement agreement) implausible.
3. I accept that the Defendant told the Plaintiff “雖然你對我說你身體無大礙，亦不需要再去醫院作檢查，但為免你將來再追討我，在你收取我的賠償時，我會在收據上，寫明你不再追討任何責任，這樣你認為可以嗎?” and that the Plaintiff nodded his agreement and said “可以”. The Defendant took out pen/paper and gave the Settlement Sum in cash to the Plaintiff.
4. There was no dispute that the Defendant wrote (and gave to the Plaintiff) D’s Note (except that the Plaintiff filled out his own name and identity card number) as follows :

“本人[name of the Defendant] ID No #[identity card number]現支付港幣$8,500-正給予[name of the Plaintiff] ID No#[identity card number]有關於~~9月~~2003年9月11日的交通意外作為賠償金額，並且大家不再追討任何責任。

[signature of the Defendant]”

1. When the Defendant requested the Plaintiff to write/sign P’s Note to acknowledge he received the Settlement Sum, the Plaintiff alleged he did not know how, so she suggested that he copy D’s Note but change “支付” to “收取”. The Plaintiff then wrote/signed (and gave to the Defendant) P’s Note as follows :

“本人[name of the Plaintiff] ID #[identity card number]現收[deleted character]取[name of the Defendant] ID #[identity card number]港幣$8,500-作為賠償。有關於2003年9月11日的交通意外不再追討任何責任。

[signature of the Plaintiff]

2003-9-29”

1. The Plaintiff claimed the Defendant told him P’s Note was to “確認本人收取[the Settlement Sum]作為有關[the Motorcycle]的賠償費用，不再追討任何責任”. In light of my findings in relation to nature, scope and contents of the oral settlement agreement between the parties and the overall unreliability of the Plaintiff’s evidence, I prefer the Defendant’s explanation that there was no need to specify personal injuries in P’s and D’s Notes which contained express confirmation of “不追究任何責任”. In light of the oral settlement agreement between the parties, the characters “任何” plainly comprised liability for both vehicle damage and personal injuries, and the phrase “不追究任何責任” was a release of *any* liability in relation to the Accident. The Plaintiff’s alleged subjective understanding that the release concerning “任何責任” in P’s Note (ie “有關於[the Accident]不再追討任何責任” ) was restricted to liability for vehicle damage was not in line with my findings in respect of the settlement agreement or with the plain meaning of P’s Note. I also disagree the Plaintiff did not specify vehicle damage in P’s Note because he was asked to copy D’s Note and only change “支付” to “收取”. After all, as the Plaintiff conceded under cross-examination, the wording of P’s Note was not an exact replica of D’s Note (ie “有關於[the Accident]作為賠償金額，並且大家不再追討任何責任”), and he used *his own* slightly different wording in P’s Note to express the release.
2. I do not accept the Plaintiff’s excuse that he did not pay careful attention to the wording of P’s Note because he thought it was for the Defendant’s and not his protection. P’s Note was a very brief and simple document. The Plaintiff, who received tertiary education, wrote it himself. Had he intended to limit his release to cover liability for vehicle damage only, I believe he would have made that abundantly clear in P’s Note by giving a release in a more limited form than “不追究任何責任”. I find he knew and agreed he would not make any future claim for compensation for his personal injuries against the Defendant.
3. In my view, such interpretation was consistent with the parties’ intention to wipe the slate clean and achieve finality in the matter. By the time of meeting at the Carpark, the Defendant had declined to give any substantive statement to the police and she was looking forward to final settlement with the Plaintiff, so she was no longer worried about police prosecution. As seen in paragraph 74 below, the Plaintiff also had no interest in making any further claim.
4. In coming to the above conclusion, I have borne in mind the case of *Arrale v Costain Civil Engineering Ltd* [1976] 1 Lloyd’s Rep 98 cited by Mr C W Wong, which turned on different facts. The plaintiff in that case was injured in Dubai which had a statutory provision for workman’s compensation. The defendants paid the plaintiff the full amount payable under such statute and the plaintiff signed a receipt accepting the sum in full satisfaction and discharge of “all claims in respect of personal injury” in respect of the accident. The plaintiff later claimed for common law damages for negligence against the defendants. The English Court of Appeal construed the release so that it did not debar the plaintiff from bringing the common law claim. It was held that a proper reading of the receipt signed by the plaintiff did not show any evidence of a true accord and satisfaction of his common law claim, but only his workman’s compensation claim.
5. In that case, Lord Denning MR upheld the general rule that when a contract was reduced into writing evidence of previous negotiations was not admissible in order to construe it, and that the court in construing the written contract had to determine the common intention of the parties by reference to the document itself. But the present case was concerned with an oral settlement agreement that, as I have found, comprised compensation for both vehicle damage and personal injuries.
6. Lord Denning MR (but not other members of the court) in *Arrale* further suggested there was no consideration for the alleged compromise of the common law claim since there was no true accord and satisfaction of such claim :

“…… We should now ask: Was there a true accod and satisfaction? I adhere to what I said on this subject in *D. & C. Builders v. Rees*, [1966] 1 Q.B. 617. Applying the principle then stated, I would say that, if there was a true accord and satisfaction, that is to say, if [the plaintiff], with full knowledge of his rights, freely and voluntarily agreed to accept the one sum in discharge of all his claims, then he would not be permitted to pursue a claim at common law. But in this case there is no evidence of a true accord at all. No one explained to [the plaintiff] that he might have a claim at common law. No one gave a thought to it. So there can have been no agreement to release it. There being no true accord, he is not barred from pursuing his claim at common law.”

1. It was on the basis of the aforesaid passage that Mr C W Wong asked me to interpret P’s and D’s Notes (ie the mutual releases) on the basis of the parties’ subjective intent. But even such approach (which I disagree) would not have helped the Plaintiff given my findings that he knew and the parties discussed/accepted the compromise comprised compensation for personal injuries as well. But *Arrale* must now be read in light of *Bank of Credit and Commerce International SA v Ali & others* [2002] 1 AC 251 which case has been cited with approval by the Court of Final Appeal in *Ying Ho Co Ltd & others v Secretary for Justice* (2004) 7 HKCFAR 333, 407-408. In *Ali*, the House of Lords held that in dealing with the emergence of an unsuspected claim after the execution of a general release, the question was whether the context in which the general release was given was apt to cut down the apparently all-embracing scope of the words of the release (*per* Lord Nicholls of Birkenhead at pp.264-265). The contemporary view was that no special rule of construction applied to a release, which was to be construed in the same way as any other contract, the question being the intention of the parties ascertained *objectively* in the context of the circumstances in which the release had been entered into (see also Foskett, *The Law and Practice of Compromise* 6th ed (2005), para.5-23 at pp.90-91). Coming back to the present case, P’s and D’s Notes read objectively in the matrix of facts as I have found plainly reflected the parties’ wish to wipe the slate clean by preventing further disputes in future over the Accident which comprised both vehicle damage and personal injuries.

*(m) P’s Police Statement*

1. After reaching the settlement agreement with the Defendant by telephone on 29th September 2003, the Plaintiff received a telephone call from the police requesting him to attend the Police Station on the following day to give a statement. He attended the Police Station as requested, but by that time he had received the Settlement Sum and did not wish to make any further claim. PC53399 took an ordinary witness statement and not a cautioned statement from the Plaintiff.
2. According to P’s Witness Statement, PC5324 took a statement from him in the report room. I disagree because P’s Police Statement (as confirmed by PC53399’s evidence) on its face showed it was taken by PC53399. P’s Police Statement read as follows :

“我喺意外前駕駛[the Motorcycle]沿[Jockey Club Road]駛落[Fanling Highway]向大埔方向。至意外地點時，[the Motorcycle]同[the Car]發生碰撞，意外中右手受傷被送[NDH]，即日出院無病假，至於意外過程我唔想講喇 –

① 問：點解你唔想講呢?

① 答: 因為我哋都係認識，而且都私下和解咗，所以晤想多講，亦唔會追究對方及出庭作供。

② 問: 你有無補充?

② 答: 無。”

1. According to the P’s Witness Statement, “本人將[the Accident]的發生經過*詳細地*向該名警員披露，並由該名警員筆錄” (my emphasis). This was flatly denied by PC53399. I see no reason to disbelieve PC53399 bearing in mind the Plaintiff’s intention not to make any further claim. Indeed, the Plaintiff in re-examination attempted to resile from his stance in P’s Witness Statement by saying he only roughly described how the Accident happened in 6-7 sentences which was more like having a chat with the police officer. I find the Plaintiff’s evidence unreliable.
2. The Plaintiff next claimed the police officer asked him “是否曾收取[the Defendant]該款項作為和解有關[the Motorcycle]的費用”, and he confirmed receipt of the same. When the police officer asked him whether he would “追究責任”, the Plaintiff said he would not. The Plaintiff claimed that after listening to his description of the Accident and knowing that (a) he had received the Settlement Sum, (b) the matter was settled and (c) he would not make further claim, the police officer told him the police would not further investigate the matter or institute prosecution. P’s Witness Statement went on to say the police officer told him “如本人堅持要追討，本人更有機會成為[the Accident]之被告人，更向本人表示法律程序複雜，需時很久，本人更必須出庭作供” (but I note that when the Plaintiff gave evidence he said he did not have a deep impression of such representations by the police officer).
3. P’s Witness Statement stated that the police officer “自行草擬了一份口供 [ie P’s Police Statement]，並要求本人簽署作實”. The Plaintiff did not read P’s Police Statement in detail, but he was concerned that it did not contain his description of how the Accident happened. He asked the police officer who told him there was no need to mention how the Accident happened because he had received the Settlement Sum as compensation for vehicle damage. The police officer told him not to worry and asked him to complete the statement as soon as possible to close the case. The Plaintiff claimed he then signed P’s Police Statement and left the Police Station.
4. I reject the Plaintiff’s case set out in paragraphs 77 and 78 above and prefer PC53399’s evidence that when he told the Plaintiff he intended to take a statement from him, the Plaintiff said he had privately settled with the Defendant. So when he asked the Plaintiff how the Accident happened, the Plaintiff only stated briefly he was driving the Motorcycle and had a collision at the Scene but declined to give any details. When he asked the Plaintiff why he was reluctant to do so, the Plaintiff explained he had privately settled the matter with the Defendant and they knew each other. So PC53399 wrote down what the Plaintiff said in P’s Police Statement. When he finished, the Plaintiff read the statement and PC53399 read it to him. The Plaintiff then signed the statement and PC53399 made a photocopy for him before he left.
5. I reject the Plaintiff’s claim that PC53399 failed to record his description of how the Accident happened. Having reached the settlement agreement with the Defendant and received the Settlement Sum, he admittedly had no wish to make any further claim, so there was no reason for him to give a full description of the Accident to PC53399 or be worried about any omission of such description in his statement. Had he given such description (which I disagree), there was no reason for PC53399 not to record the same or to make up a false reason that the Plaintiff did not wish to provide such description. Although the Plaintiff claimed the police officer “自行草擬” P’s Police Statement and attributed the contents to him when it was not the case, he quite strangely accepted in re-examination that the police officer did not in any way act unfairly towards him.
6. There was also no reason for the Plaintiff not to insist on a proper record since he was given an opportunity to read the very brief P’s Police Statement as evident by the following stamp on the face of the statement :

“這份中文口供，共一頁紙，每一頁均由本人簽署，並已由本人閱讀過，由PC53399用中文向本人覆讀，本人獲告知本人可隨意作任何修改，更正或增補。”

Although the Plaintiff claimed the police officer only read the statement aloud to him as he wrote it down, and did not read the same to him after it was finished, he did not protest despite (a) the above stamp on the face of the statement when he signed the same, and (b) having received a copy of such statement.

1. It was true that the parties did not know each other prior to the Accident. The Plaintiff claimed he did not tell the police officer “因為我地都係認識” in P’s Witness Statement, which showed that the contents of such statement were written by the police officer. Yet, even on the Plaintiff’s own case, he did not complain when the police officer read the statement aloud as he wrote the same. Given the brevity of the statement, I am unable to accept the Plaintiff’s weak excuse that he did not pay detailed attention at the time. I find the Plaintiff told the police officer he had settled the matter with the Defendant and “因為我地都係認識” to close the matter. I also bear in mind that PC53399’s evidence in this respect was corroborated by the entries made by the police sergeant on 12th October 2003 in the Police Report (see paragraph 83 below).

*(n) Liaison with police sergeant*

1. Since both parties refused to provide details about the Accident, PC53399 submitted the Police Report to his seniors and recommended that no further police action be taken. PC53399 said that following standard police procedure for TAPI (traffic accident personal injury) cases, a police sergeant contacted the Plaintiff in his capacity as the injured person and not as driver to verify that he did not wish to pursue the matter (which the Plaintiff could not remember) and the police sergeant made the following entry in the Police Report for 9:05am on 12th October 2003 :

“SGT21796致電聯絡[the Plaintiff]，他表示在今次事件中已私下自願與對方和解，因為彼此認識，對今次事件不會追究，亦無任何投訴。[signature]”.

1. On 22nd October 2003, the police wrote to the Plaintiff advising him that police investigation into the Accident had been completed and no further action was contemplated due to insufficient evidence against either party.

*(o) Summary*

1. In the circumstances, I find on balance that the Plaintiff’s present claim for loss and damages for personal injuries had been compromised and settled pursuant to the oral settlement agreement made between the parties on 29th September 2003 and the Defendant’s payment of the Settlement Sum to the Plaintiff pursuant thereto, and the Plaintiff was debarred from reviving the present claim by reason of such settlement agreement and the release in P’s Note that comprised vehicle damage as well as personal injuries. This being a complete defence, the Plaintiff’s claim is dismissed.
2. But if I am wrong, for completeness I find the Accident was caused by the negligent driving of both parties (see paragraphs 17-20 and 57 above) and there was 40% contributory negligence on the part of the Plaintiff. Although I have rejected the Plaintiff’s case, my conclusions on liability were largely on the Defendant’s case on the principles set out by the Court of Final Appeal in *Poon Hau Kei v Hsin Chong Construction Co Ltd, Taylor Woodrow International Ltd Joint Venture* [2004] 2 HKLRD 442.

V. Quantum

*(a) Medical treatment*

1. According to the joint expert medical report of Dr Au Ka Kau (Plaintiff’s expert) and Dr James Kong (Defendant’s expert) dated 20th March 2007, the Plaintiff complained of right elbow pain caused by exertion like carrying objects, and such pain occurred about once a week each time lasting 5 minutes. He also complained of low back pain lasting 3-4 weeks after the Accident. Although the Plaintiff mentioned to the medical experts he had 2 episodes of back pain in September 2004 and March 2006 when he sought bonesetter treatment he could not identify any exacerbating factor for the onset of back pain. He confirmed there was no back pain at the time of the medical examination.
2. Both medical experts agreed the abrasion injury to the right elbow resulted in a residual 3.5cm x 1.5cm scar that was non-pigmented, non-tender and non-hypertrophic. There was no adhesion of the scar. Dr Kong accepted there was some soft tissue residual pain after the right elbow contusion that was of a mild to moderate degree. Both experts considered the simple soft tissue injury to the back to be mild. Dr Au considered the 2 episodes of back pain in 2004 and 2006 to be unrelated to the Accident. Dr Kong considered the whole person impairment was 3% (2% for right elbow residual pain and 1% for mild lower back discomfort).
3. The Plaintiff said his work involved calibrating apparatus/ equipment and preparing documents, so it was mainly a sedentary job with occasional need to handle objects up to 20kgs. Upon exertion in moving heavy objects, he would have pulling discomfort and pain. However, there was a slight difference in opinion between Dr Au and Dr Kong as to his work capacity. Dr Au was of the view that the Plaintiff could return to his pre-Accident job with no limitation whilst Dr Kong opined that there would be a mild reduction in work capacity and efficiency since elbow pain and back discomfort might be aggravated by exertion.

*(b) Pain, suffering and loss of amenities*

1. Mr C W Wong submitted that the Plaintiff’s injuries fell below the “serious” category, but taking into account inflation the award for pain, suffering and loss of amenities should be in the region of HK$100,000.00 to HK$130,000.00.
2. I have carefully considered the following cases cited by Mr C W Wong which involved much more serious injuries (including fractures, open reduction and fixation, immobilisation, physiotherapy and follow-up treatment, muscle wasting etc), which were not relevant to the circumstances of the present case :
3. *Gurung Netra Bahadur v Hip Hing Construction Co Ltd* [2002] 3 HKLRD K13;
4. *Lau Chi Man v Kowloon Canton Railway Corp* [2006] 3 HKLRD 38; and
5. *Tsang Hin Cheung v Ng Kit Yeung & another* HCPI956/2003, Beeson J (unreported, 3rd January 2005).
6. Mr T K Wong did not cite any authority, but submitted that an appropriate award would be HK$5,000.00. Bearing in mind the mild nature of the injuries, the medical and bonesetter treatments received, the occasional residual discomfort and the resulting scar, which were substantially less serious than the injuries and disabilities suffered by the plaintiffs in the cases cited by Mr C W Wong, I am of the view that HK$80,000.00 would be an appropriate award under this head.

(c) Loss of earning capacity

1. The Plaintiff claimed he earned HK$12,500.00 *per* month at the time of the Accident. Some time afterwards, he was promoted to senior technical officer and was still employed as such at the time of trial. In fact he received pay rises twice as evident from the tax returns for assessment years of 2004/2005 and 2005/2006.
2. The Plaintiff claimed he had the following work-related difficulties : (a) his work efficiency would be affected by residual pain, tenderness and stiffness over his right elbow and low back, and (b) he could not lift heavy objects. I am not persuaded the Plaintiff had any continuous residual pain, tenderness and stiffness over his right elbow and low back. I find he only had mild discomfort and pain upon exertion. It is also not correct to say he could not lift heavy objects. There was no suggestion he required help to move heavy apparatus/equipment. Rather he said he had to grab the heavy object and use force from his waist to lift the same. I find the Plaintiff only had some mild reduction in work efficiency in respect of lifting of heavy objects.
3. The Plaintiff claimed he would suffer a handicap in the labour market in that the types of jobs he would be capable of performing would be limited and in the event he lost his job he would have greater difficulty in finding a new job with same or similar remuneration. Mr C W Wong submitted that a lump sum of HK$100,000.00 would be an appropriate award for loss of earning capacity. On the other hand, Mr T K Wong submitted that the Plaintiff did not suffer any disadvantage in the labour market and hence no award should be made under this head.
4. The tax returns showed that the Plaintiff had been working for the Employer since 2001 if not earlier. Since the Accident, despite his mild reduction in efficiency, there was no deterioration in the quality of the Plaintiff’s work. There was also no suggestion that his condition would deteriorate so that it would further reduce his work efficiency. On the other hand, the Plaintiff was promoted and had 2 pay rises.
5. However, I note that during the difficult times in 2003 the Employer dismissed some employees for redundancy. Hence, it could not be said the Plaintiff’s current employment was fully secure with negligible risk of losing his job. I accept there is a risk that at some future time during his working life the Plaintiff might lose his employment, but such risk is small, and given that his job required only occasional lifting of heavy objects and he only had mild residual discomfort on exertion, the adverse effect of his disability on his earning capacity is mild. Following *Moeliker v Reyrolle & Co. Ltd* [1977] 1 WLR 132 and *Chan Wai-tong & another v Li Ping-sum* [1985] 1 HKLR 176, I award HK$30,000.00 under this head.

*(d) Special damages*

1. The medical fees of NDH in the sum of HK$100.00 were agreed. As discussed above, the Plaintiff claimed HK$4,000.00 for 20 visits for bonesetter treatments, but I am not prepared to accept he attended or reasonably required so many visits (see paragraph 41 above). The Plaintiff also claimed HK$5,000.00 for tonic food, but there was no evidence before me (documentary or otherwise) as to what tonic food was purchased or consumed. Following *Yu Ki v Chin Kit* *Lam* [1981] HKLR 419 and judging from the mild nature of the Plaintiff’s injuries, I would allow a global sum of HK$3,000.00 for the Plaintiff’s bonesetter treatments, tonic food and ointment.
2. In light of my findings in relation to the bonesetter treatments and the fact that the back pain was resolved in 3-4 weeks after the Accident, the Plaintiff could reasonably have taken public transport for attending bonesetter treatments. In such circumstances, I award a sum of HK$500.00 for travelling expenses.
3. The Plaintiff claimed other miscellaneous items such as vitamins, painkillers and ointment/embrocation expenses in the total sum of HK$5,000.00. The Plaintiff claimed he had to take painkillers or apply massage ointment/medication occasionally to relieve the pain. However, the elbow pain only occurred once a week for 5 minutes each time and the back discomfort only occurred on occasional exertion. There was no medical support for therapeutic consumption of vitamins and painkillers. The joint expert medical report recommended physiotherapy exercises rather than vitamins or analgesics. I am, however, prepared to accept the Plaintiff self-applied ointment to his right elbow at the initial stage of the injury, but I have taken this into account in my award in paragraph 98 above.

(e) Summary

1. In the circumstances, the quantum of loss and damages are as follows :

|  |  |  |
| --- | --- | --- |
|  |  | HK$ |
| (a) | Pain, suffering and loss of amenities | 80,000.00 |
| (b) | Medical expenses | 100.00 |
| (c) | Bonesetter treatments, tonic food and ointment | 3,000.00 |
| (d) | Loss of earning capacity | 30,000.00 |
|  |  | 113,100.00 |
|  | (less contributory negligence) | (45,240.00) |
|  | Total : | 67,860.00 |

VI. Conclusion

1. I therefore dismiss the Plaintiff’s claim against the Defendant. There is no reason why costs should not follow event. I grant a costs order *nisi* that the Plaintiff do pay the Defendant costs of the action (including all costs reserved, if any) to be taxed if not agreed with certificate for counsel. There be legal aid taxation for the Plaintiff’s own costs.

# (Marlene Ng)

District Court Judge

Representation:

Mr C W Wong instructed by Messrs Fong Chan & Lee for the Plaintiff.

Mr T K Wong instructed by Messrs Paul C K Tang & Co for the Defendant.