###### DCPI 1700/2016

###### [2018] HKDC 1172

### IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1700 OF 2016

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##### BETWEEN

LAW SZE CHUN (羅仕珍) Plaintiff

and

LI MIE CHUN (李買進) Defendant

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Before: Deputy District Judge K C Chan in Court

Date of Hearing: 12-13 September 2018

Date of Judgment: 21 September 2018

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JUDGMENT

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1. This is the trial of a personal injuries action in which the defendant disputes liability and quantum.

*Parties’ respective account on how the accident happened*

1. The accident occurred at about 2:25 pm on 14 November 2013. The weather was sunny and the road was dry at the time.
2. At the time of the accident, the plaintiff was aged 73. Her account, as given in her witness statement, which stands as evidence in chief, is this.
3. On that day she left her home at Fung Yi Street to shop. She turned left from Fung Yi Street and walked along the pavement at the right side of Mok Cheong Street towards Kowloon City. She stopped at the junction of Mok Cheong Street and Lung To Street intending to cross Lung To Street. She looked left and saw a private car (later known to be driven by the defendant (“D’s Car”)) approaching along Lung To Street and then stopped to a stand-still at the junction. She waited a short while and D’s Car remained stationary. She then stepped out from the pavement to cross Lung To Street. She walked slowly as she was aged. She then saw the driver’s head turn left and D’s Car started to move. The right front bumper of D’s Car hit her left leg. She fell on the ground. D’s Car then stopped. The defendant then alighted. She felt pain. She could not stand up and was helped by others to sit on the curb. A passer-by then called the police and an ambulance arrived shortly which took her to the hospital.
4. The defendant was aged 55 at the time of the accident. His account, as given in his witness statement, which also stands as evidence in chief, is this.
5. He was then driving D’s Car along Lung To Street intending to turn right into Mok Cheong Street. He saw there were sundry items placed on the side of Lung To Street at the junction such that the view to Mok Cheong Street would be blocked. He therefore stopped D’s Car about 2 feet beyond the double broken white lines “give way” road markings so that he could have a clear look at the traffic coming from his left on Mok Cheong Street. After he stopped there, he pulled the hand brake and waited. He then looked left and right. Suddenly, he saw an old woman (later known as the plaintiff) sat on the ground. He did not see how the plaintiff came to be on the ground. He maintained that before the incident he had not moved D’s Car nor was there any impact. He alighted from D’s Car to take a look at the plaintiff. He said the plaintiff repeatedly demanded monetary compensation at the scene. His case in gist is that the plaintiff manufactured the incident to extort monetary compensation from him.

*Oral and other evidence, discussion and findings*

1. The following are not disputed:-
2. The subject junction is a “T” shape junction. Both Lung To Street and Mok Cheong Street are one way streets. Mok Cheong Street consists of 2 lanes with traffic running from Kowloon City towards the direction of Kowloon City Ferry Pier. Lung To Street consists of one lane with traffic running towards and merging with Mok Cheong Street.
3. There were at the time (and still are) the “give way” road markings at the end of Lung To Street at the junction consisting of 2 broken parallel white lines and a triangle indicating that the Lung To Street was the minor street. The Road Users’ Code published by the Transport Department[[1]](#footnote-1) states that such road markings indicate that the vehicles on the minor road must give way at the lines to traffic on the major road and to pedestrians crossing or waiting to cross the minor road.
4. Shortly after the accident, the police arrived at the scene and took 6 photographs[[2]](#footnote-2) of the scene of the accident depicting D’s Car at the junction (“Police Photographs”).
5. D’s Car has not been moved from the time the defendant alighted it until the police took the Police Photographs.
6. The plaintiff has lived in her present home for over 20 years with her family. Her husband had passed away and her other son moved out such that at the time of the accident and also presently she has been living with the remaining son and has been well supported by him. She has not applied, and has no need of applying, for public assistance.
7. One of the important differences between the parties’ accounts is this : the plaintiff says that the defendant did initially stop D’s Car to a stand-still and then shortly afterwards he moved it out and then the accident occurred; while the defendant says that when he approached the junction he initially stopped D’s Car at a spot two feet beyond the broken lines and since then has not moved the car before the police arrived.
8. The reason given by the defendant for initially stopping at the said spot was that while he was approaching the junction, he observed there were sundry items being placed on Lung To Street which obstructed his view to the traffic.
9. A closer look at the Police Photographs, however, reveals that there were no such sundry items present on Lung To Street or elsewhere at the vicinity of the junction.
10. When cross-examined, the defendant points at a small rectangular pillar-like object (of about 4 to 5 feet high) depicted at the far upper right corner of one of the Police Photographs[[3]](#footnote-3) as being the “sundry items” obstructing his view which he says he observed while approaching the junction. Looking at that photograph, and the defendant admits, the said object was situated on Mok Cheong Street near the curbside, and not on Lung To Street, and was situated at a distance close to the junction at the next street (Kowloon City Road).
11. Judging from the scene as depicted by the Police Photographs and the size and location of the said object, I find it totally incredible that the defendant could have observed the said object while driving along Lung To Street before he reached the subject junction, or that the said object blocked his view to the oncoming traffic on Mok Cheong Street.
12. Moreover, the defendant clearly stated that “由於龍圖街左邊路旁近木廠街擺放大量雜物，阻礙我觀察木廠街行車線……” in the statement he gave to the police and signed by him on 29 November 2013 (“D’s Police Statement”). The same statement was repeated verbatim in paragraph 4 of his witness statement. That statement, by any fair reading, said that the sundry items were situated on Lung To Street near Mok Cheong Street, and not on Mok Cheong Street. When questioned, he explains, in my view very disingenuously, that the statement in fact means that the sundry items were on Mok Cheong Street, and that the word “近” was mistakenly included. I do not accept the defendant’s said explanation.
13. I find it incredible and do not accept the defendant’s account that he initially stopped D’s Car 2 feet beyond, instead of behind, the broken white lines because his view was obstructed at the said junction.
14. In oral evidence the defendant also says that he distinctly remembers that after stopping D’s Car at the junction, he has turned his head and looked first to his left, then to his right, and then to his left again and then to his right again, and then he looked forward and saw the plaintiff on the ground right in front of the right side of the front bumper. However, in D’s Police Statement, there contains no such description of him turning his head left and then right, not to mention doing so twice, to check the traffic or the vicinity. When questioned, while he admits that the above are important details, he cannot give any explanation as to why they were not set out in D’s Police Statement.
15. According to the defendant, he first ever saw the plaintiff was the time when she has already fallen on the ground in front of the bumper of D’s Car. When asked why, having turned his head to the left and right twice to look (according to him), he failed to observe the plaintiff approaching, the defendant explains that he is now certain that there was some object or objects blocking his view from her approach. This allegation that there was an object blocking the plaintiff’s approach from his view was not mentioned at all in D’s Police Statement or his witness statement. When questioned, he admits that this is an important detail and again cannot give any explanation as to why such important detail was not at all mentioned in D’s Police Statement or in his witness statement.
16. I find the defendant’s evidence on having taken the said measures to check the traffic and his vicinity and his evidence that his view to the approach of the plaintiff then was blocked by some object or objects totally incredible and I reject them.
17. I have also observed closely the defendant’s demeanours when giving evidence. I am distinctly unimpressed.
18. In all, I find the defendant an untruthful and unreliable witness.
19. On the other hand, I am impressed by the plaintiff’s evidence. Her account of the events given orally is consistent with that given in her witness statement, which remains unshaken by cross-examination. She may be said to be less than spontaneous in answering questions put to her. I find that it was so firstly because she has slight hearing problems and secondly because her mind often wonders about and remains on the subject of the last question (which is understandable because of her old age) and it has taken her time to switch and comprehend.
20. In sum, I find the plaintiff to be a truthful and reliable witness. I accept the account of events given by the plaintiff and reject the account given by the defendant.
21. Particularly, I reject as totally without basis and unmeritorious the defendant’s suggestion that the plaintiff manufactured the whole incident to extort monetary compensation from him. Bearing in mind her age and also her background as set out in paragraph 7(5) above, I find it very improbable that she would afflict onto herself such serious injury to her left knee to stage an incident to extort money.
22. I need to mention that in oral testimony and by looking at the Police Photographs, the plaintiff further says that when D’s Car first stopped at the junction, it stopped immediately behind the broken white lines, which is a matter not specifically mentioned in her witness statement. I accept her such evidence and so find.
23. In the premises, I find that the defendant has initially stopped D’s Car to a stand-still behind the broken white lines on Lung To Street at the subject junction. D’s Car remained stationary there for a short while. The plaintiff was then standing on the pavement to the right of D’s Car waiting to cross Lung To Street. Having waited and seeing that D’s Car was not moving, the plaintiff stepped out of the pavement and started crossing Lung To Street. Negligently and failing to keep a proper look out, the defendant did not heed her presence or give way to her and moved out D’s Car to turn right, thereby D’s Car hit and injured the plaintiff.
24. I find the defendant liable.

*No contributory negligence*

1. The defendant contends that the plaintiff is contributory negligent at 25%.
2. It is said that the plaintiff has crossed the front of D’s Car having observed the defendant was looking away by turning his head to the left. It is further submitted that as a reasonable pedestrian, the plaintiff would anticipate that the defendant was preparing to turn right and “*the plaintiff should have waited until after she was sure that the defendant saw her or [*she should*] simply let [*D’s Car*] pass [*before she crossed*]*”.
3. I find that the plaintiff was not contributorily negligent, for the following reasons.
4. Firstly, it is the plaintiff’s evidence, which I accept, that after she has stood on the pavement and waited for a short while and seeing that D’s Car remained stationary, the plaintiff stepped out of the pavement to cross Lung To Street. And it was whilst doing so, and not before, that she saw the driver’s head turn left and D’s Car started to move. Therefore, it is not the scenario, as the defendant now says, that the plaintiff decided to cross Lung To Road despite having observed that the defendant was turning his head left.
5. Secondly, one must bear in mind that the distance between where the plaintiff stood and waited and the front right side of D’s Car was very short. The plaintiff said the distance was about the length of her arm. From the Police Photographs, it can be seen that the distance was about or slightly more than one meter. That distance would have been covered by perhaps two steps of the plaintiff. Thus, at that point in time after she had already stepped out of the pavement and begun walking, in my view and bearing in mind her old age and slow movement, there was little she could have done to avert the collision. In other words, the contributory negligence claim also fails on causation.
6. I must also reject, with respect, the defendant’s submission that to fulfil her duty of care, “*the plaintiff should have waited until she was sure that the defendant saw her*”. The defendant is unable to proffer any authority in support of this submission. Generally, a pedestrian’s duty to ensure his safety by paying heed should be a duty to pay heed to the traffic and vehicles, and not to whether a driver sees him, which is an impractical and unreasonable and in many situations even an impossible task to achieve for the pedestrian – for instance, when a driver sits high up in a huge truck such that he is beyond the sight of the pedestrian standing on the pavement, or when the view of the pedestrian to the driver of the car in the middle lane is blocked by the vehicle that is stopped on the lane near him.
7. In my view and in the circumstances, the plaintiff has fulfilled her duty of care by stopping on the pavement, waited and only stepped out to cross after she has observed D’s Car stopped to a stand-still and remained so.
8. I also do not accept the suggestion that the plaintiff ought to have waited until D’s Car pass before she crossed, as it should have been the defendant that should have given way.

*Injury, treatment and the plaintiff‘s present complaints*

1. The plaintiff was attended by the Department of Accident and Emergency of Queen Elizabeth Hospital (“QEH”). On examination, it was found that her left knee was swollen with tenderness, abrasion and bruises over it. X-ray of her left knee was unremarkable. She was treated, discharged and referred to QEH’s Emergency follow-up clinic. She was attended to there until 25 April 2014, with continuous sick leave given by them until 8 May 2014.
2. The plaintiff was referred to and began physiotherapy on 10 December 2013. She dutifully attended a total of 29 sessions without fail until she was discharged on 29 April 2014. The physiotherapy progress reports showed that the swelling over her left knee persisted with pain and despite treatment, there was only an overall improvement of 40% at the time of her discharge.
3. For the first 6 months after the accident, the plaintiff said she could not walk and has to be wheel-chaired. Afterwards, she could walk, but only very slowly and not for long.
4. Presently, she cannot squat, she often feels pain in her left knee, even at night which affects her sleep. Unlike before the accident, she now hardly goes out alone. The tasks of purchasing ingredients for making meals and other shopping, hitherto performed by her, are now taken care of by his son.

*The Joint Expert Report*

1. Dr Wong See Hoi acted as the expert for the plaintiff and Dr Baldwin Chan acted as the expert for the defendant. They jointly examined the plaintiff on 19 October 2017 and compiled a joint expert report dated 13 November 2017.
2. Both experts diagnosed the plaintiff as suffering from soft tissue injury to the left knee.
3. They found that the plaintiff can now walk in a slow pace with foot dragging and cannot walk tip-toe or squat or perform single leg stand with left leg.
4. Examination by both experts showed that besides tenderness over lateral aspect of left knee, there was no effusion and no ligament laxity detected; and range of movement of the left knee was reduced, limited by pain; while muscle power of the left knee was reduced but with no lower limb muscle wastage detected.
5. Both experts agreed that the plaintiff has reached maximal medical improvement and would continue to suffer from residual pain in her left knee with weakness. She is expected to have left knee pain particularly on exertion like prolonged walking, squatting and walking up and down stairs. Both experts agreed that the sick leave given by the follow up clinic of QEH up to 8 May 2014 is reasonable.
6. Both experts opined that the plaintiff has bilateral knee degeneration compatible with her age and that her present condition was contributed to by such degeneration.

*Pain, suffering and loss of amenities*

1. In view of the fact that the pre-existing knee degeneration contributed to the plaintiff’s present condition, there would be a matter of applying a discount to all future loss, including the loss of amenities, which I will deal with in due course.
2. I will first assess this PSLA award as if there were no such discount.
3. The plaintiff’s injuries, their treatment, present conditions and residual ailments have been set out above. I also bear in mind the pain she suffered upon exertion when she has to climb up and down 5 floors of steps on each of the 36 occasions she went out for follow-ups and treatments.
4. In the Revised Statement of Damages (“RSOD”), the plaintiff claimed HK$500,000 for PSLA. At trial, the plaintiff revises it downwards to HK$220,000.
5. The plaintiff cites as comparable the cases of *Rai Jun Prasad v Pacific Crown Security*[[4]](#footnote-4)and *Ho Kar Chee v Tam Kwong Man*[[5]](#footnote-5) in which the plaintiff was awarded respectively HK$150,000 and HK$100,000 for PSLA in relation to knee injuries with residual mild pain. The defendant cites the same *Ho Kar Chee* case, *Tam Wai Chun v Chor Sui Kwong*[[6]](#footnote-6), *Chan Chun Fat v Fortress Glory Engineering Ltd*[[7]](#footnote-7) and a few others to advocate an award within the range of HK$80,000 to HK$100,000.
6. Thus, the ranges of award from the comparables cited by both parties indeed are not that far apart.
7. The plaintiff submits that the plaintiff’s injury and condition are worst that those in these cases.
8. The plaintiff also relies heavily on *Sin Sau Mui v Yuen Sai Kwong*[[8]](#footnote-8) to advocate for a substantially higher award. In that case the learned Registrar Betts cited and agreed with the sentiments expressed by Sachs LJ in *Frank v Cox* (1967) 111 SJ, Kemp & Kemp para 3-003 where the learned Lord Justice observed:-

“…when one has a person in advancing years, in some respect, an impairment of movement may perhaps be more serious than it is with discomfort, pain and impairment of movement. But it is important to bear in mind that as one advances in life, one’s pleasures and activities particularly do become more limited and any substantial impairment in the limited amount of activity and movement which a person can undertake, in my view, becomes all the more serious on that account.”

1. There, the learned Registrar awarded HK$200,000 for PSLA to the plaintiff who was 67 years old at the time of the accident. She suffered from a displaced Colles’ fracture of her right wrist, which was treated by close reduction and a plaster cast for 3 months, which resulted in permanent disabilities including deformity of the right wrist with weakness and pain in her right hand and tenderness over the wrist joint space. The plaintiff submits that the award was comparatively high considering the extent of the injuries and disabilities and the fact that it was made in 1996; and that it was so because of the giving effect to the said sentiments. The plaintiff urges me to give effect to the said sentiments in a similar manner, which then would justify an award of HK$220,000 for PSLA in the present case.
2. The defendant does not dispute these sentiments but submits that since admittedly the plaintiff prior to the accident did not have regular leisure activities or sports and was not particularly out-going, therefore even considering these sentiments, the increase in the award should be minimal.
3. Evidently, how much more serious the same impairment of movement may affect the enjoyment of life of an elderly as opposed to one who is younger must be a matter of degree; and assessing the same to a large extent an imprecise exercise.
4. I do however take into account that the main activity every day for her was going out to the market to buy food so that she could prepare a good meal for her working son to return home to enjoy together with her. The plaintiff also says that before the accident she would occasionally go out to the park nearby. Both of these activities she basically cannot enjoy now because she finds it difficult to climb up and down the 5 floors of stairs because of pain and weakness and also the fear of falling. Therefore, I will give due recognition to these sentiments.
5. In the round, I consider it appropriate and reasonable an award of HK$180,000 for PSLA before the below discount.
6. Both expert opined that but for the accident, there is a strong possibility that some other event or natural progression of the degenerative condition would have brought about the plaintiff’s present state in about 10 years’ time. It is common ground that therefore a discount should be applied (*Chan Kam Hoi v Dragages et Travaux Publics*[[9]](#footnote-9)).
7. The matter in dispute is the amount of discount. Dr Wong apportioned 60% of the cause to the accident and therefore opined a discount of 40%, while Dr Chan “would suggest” that the accident has contributed to 10% of her residual pain and therefore opined a discount of 90%.
8. I have no hesitation in preferring the opinion of Dr Wong over that of Dr Chan. It is not disputed by the defendant that while there was pre-existing degeneration, the plaintiff’s left knee was totally asymptomatic before the accident. Thus and in my view, it would be obviously inadequate to attribute a mere 10% to the acceleration to the present of a condition which otherwise would only likely surface within the next 10 years.
9. I note that the experts are asked to “*apportion the impact of pre-existing condition and of the accident complained of on the plaintiff’s present condition*”[[10]](#footnote-10) . There was no issue as to the apportionment of the pain and suffering she suffered from the accident to the time when she reached maximal medical improvement. Bearing in mind that such component in the PSLA award is not so apportioned and adopting Dr Wong’s opinion, I think the fair amount of an overall discount for the PSLA award should be 30%.
10. Applying that discount to HK$180,000, I award to the plaintiff PSLA in the sum of HK$126,000.

*No loss of income*

1. As the plaintiff was not gainfully employed, there is no claim for loss of income.

*Compensation for care*

1. In paragraph 17 of the RSOD, the plaintiff claims a total sum of HK$67,680 to compensate

“*a. the Plaintiff’s son having to take 36 half-days off from his employment and thereby foregoing part of his salary to accompany the plaintiff to medical treatment, from November 2013 to April 2014, totalling HK$31,680; and*

*b. household expenses … totalling HK$36,000*.”

1. At trial, it becomes evident that the claim for these 2 sums would fail for want of proof, and the plaintiff does not contest otherwise. The plaintiff then makes a claim, as general damages, for compensation for care rendered to the plaintiff pre-trial and to be rendered post-trial. Upon objection, I rule that the plaintiff is confined by the RSOD to claim only such general damages covering the period originally pleaded, namely, a period of 6 months from November 2013 to April 2014.
2. The plaintiff then claims as such the sum of HK$1,000 each month for that 6 months totalling HK$6,000, as the value of care gratuitously provided by the plaintiff’s son in accompanying the plaintiff in the above said 36 occasions for medical follow-ups and treatments within the period, citing *Lai Pui Ling v Ho Chi Keung*[[11]](#footnote-11) in which the learned Godfrey Lam J made a similar award.
3. The defendant, quite rightly in my view, accepts that such care is reasonable and necessary. He also does not contest the quantum in the event I hold in favour of liability. He however submits that no award should be made as the son would have provided the care in any event out of filial love for the plaintiff, as Dillion LJ observed in *Mills and Another v B.R. Engineering Ltd*[[12]](#footnote-12):-

“In principle it must be, in my judgment, a matter for an award only in recompense for care by the relative well beyond call of duty for special needs of the sufferer.”

1. It is clear that in that period, the plaintiff’s son has been buying the ingredients and cooking meals for the plaintiff and himself and doing other household chores - tasks that were performed by the plaintiff before the accident. He has also taken care of her in various other ways. On top of that, which is the subject matter of this claim, he took another 36 half days in that period to accompany her to medical follow-ups and treatments. In my view, the care provided in the 36 half days was care given that the son otherwise would not have but for the injury caused by the accident. I would allow the HK$6,000 claimed under this head.

*Special damages*

1. The parties have agreed to a sum of HK$6,380 for the claim for special damages covering medical and travelling expenses and costs of tonic food. I so award.

*Future medical expenses*

1. Both experts agreed that the plaintiff was suffering from residual pain and weakness in her left knee which would persist, especially upon exertion. The plaintiff’s home, in which she has lived for over 20 years, is on the 5th floor of a building which has no lifts. So, certain amount of exertion during her daily life would be expected. In her oral evidence which I accept, she says she often needs pain killers and has to put on pain relief tapes around her left knee. The plaintiff claims, and in the circumstances I think it reasonable to award, future medical expenses to cater for this pain on a need basis.
2. Doing the best I can and making discounts for her own degeneration and accelerated receipt, I think the amount advocates by the defendant as the upper limit at HK$10,000 is reasonable and I so award.

*Summary of awards, interest and disposition*

1. I therefore award to the plaintiff:-

PSLA HK$126,000

Compensation for care HK$6,000

Special damages HK$6,380

Future medical expenses HK$10,000

Total: HK$148,380

1. I award interest on general damages at 2% per annum from the date of writ to the date of judgment, on special damages at half judgment rate from the date of accident to the date of judgment, then on all sums at judgment rate then after until full payment.
2. I make a costs order nisi that costs of this action be to the plaintiff with certificate for counsel to be taxed if not agreed, and the plaintiff’s own costs be taxed in accordance with the Legal Aid Regulations. This costs order will become absolute unless an application by summons to vary the same is made within 14 days.
3. It remains for me to thank counsel for their assistance to the court.

(K C Chan)

Deputy District Judge

Mr Y L Cheung, instructed by Ho, Tse, Wai & Partners, assigned by the Director of Legal Aid, for the plaintiff

Mr. Raymond Lau, instructed by Yip & Partners, for the defendant

1. Under the section entitled “Stop and Give Way Junctions” [↑](#footnote-ref-1)
2. At pp 121 and 122 of Trial Bundle [↑](#footnote-ref-2)
3. Marked ( ) at p.122 of Trial Bundle [↑](#footnote-ref-3)
4. [2018] HKCFI 1086 [↑](#footnote-ref-4)
5. HCPI 439/2007, unreported, 17 December 2012 [↑](#footnote-ref-5)
6. DCPI 2647/2007, unreported [↑](#footnote-ref-6)
7. HCPI 832/2013 [↑](#footnote-ref-7)
8. HCA 11319/1993, unreported, 4 November 1996, Registrar Betts [↑](#footnote-ref-8)
9. [1998] 2 HKLRD 958 [↑](#footnote-ref-9)
10. Para 1, Order of Master Michelle Soong made on 14 March 2018 [↑](#footnote-ref-10)
11. [2016] HKLRD 329 [↑](#footnote-ref-11)
12. 1 P.I.Q.R. Q130, May 6, 1992 at Q137 [↑](#footnote-ref-12)