#### DCPI1804/2007

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1804 OF 2007

BETWEEN

LEUNG SZE MAN Plaintiff

and

CHUN KING HOI 1st Defendant

MOTOR INSURERS’ BUREAU 2nd Defendant

OF HONG KONG

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

Date of Hearing: 22 July 2008

Date of Delivery of Judgment: 23 July 2008

## J U D G M E N T

1. The Plaintiff, Miss Leung, is a friend of the 1st Defendant, Mr Chun. On 18 May 2006 at around 8.30 pm, she was a pillion passenger on Mr Chun’s motorcycle, ET1131 “the motorcycle” - travelling in the direction of Tsuen Wan from Sham Shui Po.
2. At about 8.57 pm when they were on Texaco Road before the junction with Wing Tak Street, they were involved in an accident resulting in Miss Leung sustaining injuries to her right elbow, her back, left cheek and fractures to her left foot. She claims against the 1st Defendant, Mr Chun. The Motor Insurers’ Bureau, MIB, had joined in as the 2nd Defendant.
3. The parties have agreed on the quantum of damages, inclusive of interest, at $250.000. I am asked to determine the issue of liability.

The Plaintiff’s Case

1. The Plaintiff, Miss Leung’s evidence was that the motorcycle was approaching lamppost FC0477 on Texaco Road, travelling on the left slow lane, when she suddenly saw emerging from her right, the fast lane, a motorcar cutting in front of Mr Chun’s motorcycle on the slow lane. Mr Chun braked immediately and lost control of the motorcycle causing it to topple to the right throwing her onto the road. As a result she sustained multiple abrasions to her person and fractures to her left foot.
2. In Miss Leung’s Statement of Claim, she pleaded that Mr Chun was negligent and that he had braked and stopped suddenly and negligently, had failed to stop, to slow down, to swerve or to control the motorcycle properly to avoid the accident, failed to react prudently, driving the motorcycle at an excessive speed and failed to exercise due care, pay attention or consider the other users on the road including his passenger.
3. At the trial, Mr Wong, counsel for Miss Leung, conceded that he is no longer relying on res ipsa loquitur. In any event, Mr Chun did give evidence at the hearing in his own defence.

The 1st Defendant’s Case

1. Mr Chun’s evidence at the hearing was that his motorcycle was in good operational order that day. He was driving at the speed of 40 kilometres per hour on Texaco Road which has a speed limit of 50 kilometres per hour. As he approached the light control junction with Wing Tak Street near lamppost FC0477, he noticed suddenly a dark colour private vehicle cutting in front of his motorcycle from the fast lane without any prior warning. He braked suddenly to avoid a collision. As a result, the motorcycle lost control and balance and toppled over, throwing him and his passenger, Miss Leung, onto the road. Both of them sustained injuries. The private vehicle did not stop and had continued onward on Texaco Road ahead. Mr Chun called the police for assistance. Mr Chun blamed the private vehicle for the accident. He claimed that had it not been the private vehicle cutting into his lane right in front of him suddenly, the accident would not have happened.

Issues in Dispute

1. The court has been asked to determine:
2. if the 1st Defendant was negligent in his driving; was he
   1. driving too fast under the circumstances or
   2. was the unknown private vehicle to blame by suddenly cutting in front of Mr Chun’s motorcycle, thus causing Mr Chun’s motorcycle to lose balance and control;

(B) if the 1st Defendant is found not to be negligent, the 2nd Defendant, the MIB, will compensate the Plaintiff, Miss Leung, for her loss and damage.

Analysis

A whether Mr Chun was negligent, was he driving too fast and did he fail to control his vehicle in such a way to avoid the accident?

1. Mr Chun admitted he was travelling at 40 kilometres an hour, which was below the speed limit on Texaco Road. Miss Leung’s estimation of the speed of Mr Chun’s motorcycle was identical to Mr Chun’s.
2. During cross-examination by Mr Wong, however, Mr Chun admitted he did not look at the speedometer when he was travelling on Texaco Road and that he had only estimated the speed he was travelling. He also claimed the unknown private vehicle was travelling at 60 kilometres per hour, which both he and Miss Leung admitted to be an estimate.
3. Counsel for the MIB, Mr Gidwani, however, questioned that if there was an unknown private vehicle cutting into Mr Chun’s lane in front of him, it must have been travelling at a much higher speed to be invisible to Mr Chun until it was abreast with his motorcycle on the fast lane before suddenly cut in front of him.
4. Mr Gidwani further queried the identical references to the speed of the motorcycle and the motorcar given by Mr Chun and Miss Leung. They admitted in court that they did and have discussed the accident before the trial. What I find to be most perplexing is why this unknown private vehicle should cut into Mr Chun’s lane just before the traffic lights at the junction with Wing Tak Street when it had no intention to turn left into Wing Tak Street but had proceeded, according to Miss Leung and Mr Chun, directly ahead on Texaco Road after the lights and after causing havoc to the motorcycle driven by Mr Chun. As the registration number and driver of this mysterious dark colour private vehicle is unknown, the reasons for his conduct shall never be revealed.
5. Mr Gidwani submitted that it is possible that this vehicle had never existed because the way Mr Chun described this vehicle and its action is neither logical nor reasonable. A further factor that led Mr Gidwani to his suspicion that the private car did not exist was that Miss Leung failed to tell the doctors at the Yan Chai Hospital there was an unknown car cutting in front of Mr Chun’s motorcycle causing the accident to take place. What she told the doctors at Yan Chai Hospital was that the accident was caused by a burst tyre (see page 246 of the bundle).
6. When Miss Leung was cross-examined on this aspect, she admitted she did not report the incident of the burst tyre to the police in her police statement or in her witness statement to court. She claimed, however, that the tyre was indeed found to be burst after the accident. This is consistent with Mr Chun’s admission that after the accident he found the tyre of the motorcycle had burst when he picked it up at the scene.
7. I have heard both Miss Leung and Mr Chun’s evidence in court. I have also read their witness statements and their police statements. In a police statement from SPC478, Mr Law Chi-hung, who had arrived at the scene of the accident in less than 10 minutes after the accident, Mr Chun was said to have reportedly told the police officer the following, “Suddenly, a dark colour private car cut from the second lane to the first lane. Thus, I had to steer to the left to avoid collision. At that time, the front of the vehicle got out of control, fell to the right and landed onto the ground.” This account is from an independent police officer who repeated what Mr Chun had told him within minutes of the accident. It is an accurate record of what Mr Chun said to the police officer shortly after the accident.
8. After considering all the evidence and the witness statements, I believe what happened at the time was probably that Mr Chun, when travelling on Texaco Road, saw the green lights at the Wing Tak Street junction as he approached the junction on his motorcycle. He did not slow down as he was anxious to pass the junction while the lights were still in his favour. He did not notice a motorcar had come from behind on the fast lane until it came close onto his right side on the fast lane. He thought it was cutting in front of him, so he braked or steered suddenly. This action of sudden stopping or attempting to steer left caused the motorcycle to lose balance and topple over, throwing its passengers off the bike.
9. Mr Chan, counsel for the 1st Defendant, submitted that Mr Chun was not negligent because he had reacted to a motorist who had cut into his lane suddenly. Though Mr Chun might not have done the best to avoid the fall, it was the best and most logical thing for him to do to prevent a collision.
10. Mr Chan referred to the case of *Wong Man Kit Michel v Wong Fong Woon*, HCA283 of 1985, a judgment of Deputy Judge Saied (as he then was) where, in page 7 of his judgment he held:

“It is trite to say that the actions of someone placed in a situation of danger like the defendant are not to be judged with the benefit of hindsight to see whether what he did was the best way to extricate himself. The law does not require drivers to exhibit ‘perfect nerve and presence of mind, enabling him to do the best thing possible.’”

He then cited what Lord Hailsham said in *Swaddling v Cooper* (1931) AC 1 and 9:

“Mere failure to avoid the collision by taking some extraordinary precaution does not in itself constitute negligence. The plaintiff has no right to complain if in the agony of the collision of the defendant fails to take some step which might have prevented a collision unless that step is one which a reasonably careful man would fairly be expected to take in the circumstances.”

I have absolutely no doubt of the wisdom expressed in the two aforesaid judgments. However, one has to look at the facts in each individual case to see if the situation is the same.

1. In the present case, even though Mr Chun might have done the best thing he could do in reaction to a fast-moving car cutting and approaching his lane, as he perceived it. The issue is, whether he had paid sufficient attention to the traffic before he saw the motorcar abreast with his motorcycle on the fast lane.
2. The section of Texaco Road shown on the plan produced in Exhibit D1 is a smooth, straight road, albeit with a slight bend but not a sharp one. Mr Chun should have been able to see with his rear or side mirror, or if he had turned his head round, the traffic behind him. Even though the mysterious car might have been travelling at 60 kilometres per hour, it would take some time for it to drive up and to overtake Mr Chun’s motorcycle.
3. I am not convinced that Mr Chun was only travelling at 40 kilometres an hour. In court and in his witness statement, he admitted he had only estimated the motorcycle’s speed at 40 kph. Neither am I convinced that a motorcar moving directly on Texaco Road which had no intention to turn left into Wing Tak Street, would cut into the slow lane right in front of a motorcycle immediately before a light control junction when this slow lane allows traffic to turn left into Wing Tak Street. It is illogical for a motorist to switch from the fast lane to a slow lane if its intention was to go straight on the Texaco Road.
4. I find Mr Chun to have been negligent in failing to take regard of the other road users, namely, the motor vehicle moving on the fast lane behind him. He should have seen the motorcar long before he noticed it on the fast lane abreast of his motorcycle and he should have taken precautionary measures by slowing down his motorcycle in time and to steer slowly to avoid a collision rather than do what he did by braking suddenly thus disabling the front steering mechanism of his motorcycle and causing the motorcycle to topple over when he was travelling at speed. A prudent motorist would have slowed down before a road junction even though the traffic lights were in his favour, even though the speed limit of that road was set at 50 kilometres per hour.
5. For the reasons aforesaid, I find Mr Chun to be negligent and liable to compensate Miss Leung’s loss and damages. Costs to follow the event and the Plaintiff’s costs should be borne by the 1st Defendant, to be taxed if not agreed with certificate for counsel.

(Discussion re costs)

1. The 2nd Defendant, that is the MIB, represented by Mr Gidwani, asks for costs in these proceedings for taking part. I am grateful to counsel for taking me through the correspondences and authorities on the subject and correspondence that shows the background to the MIB being joined by consent of the parties on 23 October 2007.
2. It is correct that the notification to the MIB was initiated by the Plaintiff’s solicitor. This was because of the 1st Defendant’s defence putting the blame on the untraced vehicle completely.
3. I agree the MIB was correctly joined as the 2nd Defendant given the circumstances of the 1st Defendant’s defence, because should the 1st Defendant succeed in his defence, the MIB would be liable to pay the Plaintiff. For this reason, it is only correct and logical to make the 1st Defendant liable for the MIB’s costs in these proceedings when the Plaintiff succeeded against the 1st Defendant. It is not the Plaintiff’s fault for notifying the 2nd Defendant and allowing the 2nd Defendant to be joined and I do not see why the Plaintiff should be penalised.
4. Therefore, the 2nd Defendant’s costs should be borne by the 1st Defendant, to be taxed if not agreed, with certificate for counsel.

# (H C Wong)

# District Court Judge

Mr Wong Chi-kwong, instructed by Messrs Chan & Chan, for the Plaintiff

Mr Samuel Chan, instructed by Y T Chan & Co., for the 1st Defendant

Mr V Gidwani, instructed by Messrs Deacons, for the 2nd Defendant