DCPI 1845 OF 2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO. 1845 OF 2008**

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BWTWEEN

LAM LING LEONG Plaintiff

and

KWOK PANG CHE Defendant

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Coram : H. H. Judge YUNG in Court

Dates of Hearing : 2nd & 3rd December, 2009

# Date of Handing

Down of Judgment : 8th February 2010

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## J U D G M E N T

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1. This case arises from a collision between two bicycles on a cycleway. At the time the weather was fine and the road condition was good. From all circumstances of the case, the collision must have been caused by the negligence of either or both cyclists. Each is blaming the other for the collision.
2. The cycleway was clearly marked into two lanes, one for each direction. The collision occurred at the junction of the cycleway with a slip road on the left. Photographs showed that there were a keep-left traffic sign and that metal barriers stood in the middle of the cycleway at the beginning of the junction. These features did not appear in various sketches made after the accident. Counsels did not base their respective case on these features and made no reference to them. These features would be most relevant and obviously could have affected adversely the Plaintiff’s case. In these circumstances, I believe these safety features were most probably was put there only after the accident with a view to prevent similar collisions.
3. The Plaintiff was riding his bicycle in the lane for the opposite direction with intent to overtake the slower moving bicycles on the left lane. He rammed into the rear wheel of the Defendant’s bicycle when he was making a right turn into the slip road. Clearly the Defendant cut across the path of the Plaintiff’s vehicle. He said he looked into the rear mirror before making the right turn. Looking into the mirror, he might have done, but clearly he did not look carefully. If he did, he could not have noticed the proximity of the Plaintiff. In any event I do not see any excuse for not turning his head to look. He had not taken a longer look at the rear view mirror to make sure that it covered the full view of the traffic behind. If he was not sure it did, he should turn his head to look behind to make sure. He said he did not know at the time that the Plaintiff’s vehicle had collided with his but he felt the shaking of his bicycle. There could only be one explanation. Namely, before his bicycle shook, he had not noticed the Plaintiff’s bicycle. A cyclist making a right turn like what the Defendant did is likely to cut into the path of a up coming bicycle. This should be obvious to a reasonable cyclist using the cycleway. A reasonable cyclist will check to make sure he would not in fact cut into the path of another bicycle. The Defendant failed to notice that the Plaintiff’s bicycle was coming up fast from behind and in that he was negligent. He was slowing down for a while preparing for the right turn and there is a realistic probability that some cyclists might want to overtake him. If he assumed there would not be any cyclist overtaking him from his right side, he would also be negligent in making the right turn as he did.
4. I find the Defendant negligent. The defence contended that even if he was negligent, the collision was not caused by his negligence but by the negligence of the Plaintiff. This issue can be conveniently dealt with together with the issue of contributory negligence of the Plaintiff.
5. The Defence sought to impute a certain degree of negligence into the fact that the Plaintiff was overtaking in the wrong lane and at the junction. If the collision had taken place in an ordinary road between two motor vehicles, the defence argument would be quite forceful. I have queried Mr. Kwok whether the collision should be looked at as if it had taken place in an ordinary road for motor vehicles. His answer was a loud and clear ‘No’. Thought he did not elaborate his objection to this approach, I agree with him. One should look at the obvious difference of a cycleway and an ordinary road for motor vehicles. As Mr. Lo, counsel for the Defendant, said the cycleway was for the use of all types of cyclists, not just for training. The cycleway was not just built for people to commune. One of the purposes was to let cyclist to cycle in an environment safe from the hazard of motor traffic. It is legitimate for cyclist to train and sport in the cycleway. Of course they have to take reasonable care just the same. Given the special purpose of the cycleway, I do not think that overtaking in the opposite lane in the junction is inherently dangerous, or that the cyclist doing that is ipso facto negligent. The negligence, if any, on the part of the Plaintiff should be determined on two matters. One is proper look out and evasive actions he should but failed to take.
6. The Plaintiff was travelling in wrong lane, there was no traffic in travelling in the opposit direction. Also there was no traffic emerging from the slip road. Under theses circumstances, his overtaking at the junction by itself was no evidence of negligence.
7. The Defendant could not have made a sharp right angle turn. No cyclist could. The Plaintiff on his attention being drawn to this fact, he admitted that the Defendant did not make a right angle turn. The fact must be that the Defendant must have arced his way before aligning his bicycle to the direction of the slip road and at right angle to the length of the cycle way. This is consistent with the sketch drawn by the Plaintiff in his statement dated 23rd December when he came to recollect the incident. In a later statement to the police in January he confirmed that the incident occurred as illustrated in the sketch. Of course the sketch must be looked at together with the verbal descriptions by the Plaintiff. It helps to illustrate the verbal version. The statements throw doubts on the Plaintiff’s version. He claimed his front wheel had come up to the rear wheel of the Defendant when the Defendant made a sharp right turn. The evidence showed that the collision took place when the Defendant had crossed a large part of the lane and had come very near the edge of the cycleway. All evidence suggested he had completed his right turn manoeuvre and was heading straight into the slip road. The Plaintiff could only say that the Defendant turned sharply and he braked to avoid the collision but failed. The Plaintiff had the perception that the Defendant made almost a right angle sharp turn for a reason. I find the Plaintiff had not noticed the Defendant when the Defendant was curving his path which was necessary for making the right turn. Before commencing the right turn, the Defendant said he slowed down. This was reasonable. The Plaintiff did not and was not in a position to contradict this as he did not notice clearly the manoeuvre. If the Plaintiff had paid a proper look out, he would have noticed the manoeuvre, slowing down and curving. Had he noticed that he should have realised that the Defendant was making a right turn as there was a slip road on the right. The lateral distance between the two bicycles I found was quite wide He should have ample opportunity to take note of the Defendant curving path. Having said that I noted that the Defendant did not give any hand signal. This factor would excuse the Plaintiff’s blame substantially. In all circumstances of the case, I find that the accident was caused by the Defendant’s negligence and contributed to by the Plaintiff who I find did not pay a proper look out. The share of blame of the Plaintiff should be 10%.
8. The defence disputes the damages for pain, suffer and loss of amenities, other items of damages are agreed at $80,000. The Plaintiff is 17. He suffered very minor head injury from which he had fully recovered after receiving conservative treatment. The other injuries are laceration and abrasion of skin on various parts of his body and a loose tooth. He was hospitalised for treatment for 9 days for treatment. The permanent impairment was only from skin lacerations and abrasions. Medical Experts assessed the cosmetic disability at 3% of a whole person. The facial scars might not be ugly by themselves. But they spoiled the face which many others would have considered handsome. These scars might become less noticeable but I do not believe they would have become totally unnoticeable. It is only common experience they might take years to become less noticeable if at all. The other scars are on his body and limbs. It is true they caused less cosmetic impairment as the defence argued that they could be covered up by clothing. Again these scars would be necessarily exposed when the Plaintiff was taking part in recreation activities which require baring those parts, say sun bathing, swimming. I have been referred to a number of cases. In ***Chan Tsz sing v Lo Ching Pong and anor***  CACV 176/2004 the victim suffered multiple abrasions and lacerations on the forehead and eyebrow and the residual injuries were wholly cosmetic. The Court of Appeal revised upwards the award from $30,000 to $70,000. Mr. Justice Stone, in giving court’s reasons for allowing the Appeal, at P.6 par 24 said, “ Absent any guide from the case law this instance is very much a matter of instinctive feel, and after some reflection, I would award the sum of $70,000”. I have to rely on the instinctive feel in this case as the cases cited to me are not comparable. The present injury suffered by the Plaintiff was similar but much more serious that the victim in the above case. Mr. Lo submitted that using that case along with another case as a guide the award should be between $100,000 and $150,000. I have noticed the cosmetic effect of the facial scars and have seen in photographs the positions of the others. My instinctive feel is that Mr. Kwok is not entirely wrong to argue that the case was below but close to the category “serious injury”. Looking at all the circumstances of the case, my instinctive feel dictates that an award should be one of $250,000. This is the award I make.
9. I enter judgment for the Plaintiff for total sum of $297,000 ($330,000 x 0.9) with usual interest. I make an order nisi for costs in favour of the Plaintiff with certificate for counsel.

(Y.W. YUNG)

District Judge

Mr. Tim Kwok instructed by M/S Yeong & Co. Assigned by D.L.A. for the Plaintiff.

Mr. Anthony Lo instructed by M/S LCP for the Defendant.