# DCPI 1921/2016

[2021] HKDC 340

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO. 1921 OF 2016

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BETWEEN

SO KAM (蘇金) Plaintiff

and

GUILDFORD LIMITED 1st Defendant

CHENG YIU FAI (鄭耀輝) 2nd Defendant

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##### Before: His Honour Judge Andrew Li in Court

Date of Trial: 21-23 December 2020

Date of Judgment: 22 March 2021

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JUDGMENT

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*INTRODUCTION*

1. This is a case involved a simple collision between a motorcycle bearing registration number RV7046 (“the MC”) driven by the plaintiff (“P”) and a taxi bearing registration number GK2690 (“the Taxi”) driven by the 2nd defendant (“D2”). It happened on 27 September 2014 at or around 8:17 pm on Garden Road, Mid-level (“the Accident”).
2. At the time of the Accident, P was driving the MC in the course of his employment as a food delivery worker. D2 had hired the Taxi as a self-employed driver from the 1st defendant (“D1”) which was the registered owner of the Taxi. D2 was therefore not an employee or agent of D1 at the time of the Accident.
3. Both the issues of liability and quantum are being contested by D1 & D2 (“collectively as “Ds”).

*BACKGROUND*

*P’s case*

1. P’s case is that, at the time of the Accident, he was riding his MC “at a scene near Robinson Road towards North at the junction of Garden Road, Hong Kong”, which has been defined by P under the indorsement of claim (“the IoC”) and the statement of claim (“the SoC”) as “the Scene”. When he arrived at “the Scene”, he was “hit or collided against” by the Taxi which was driven by D2. As a result, P was injured and the MC was damaged: see §1 of the IoC and §4(1) to (4) of the SoC.
2. The exact same allegations (without any change of wording) have been repeated in his witness statement dated 23 April 2018 (“the WS”). However, the WS was only filed for the purpose of the present proceedings on 14 July 2020.
3. The above could be described as the “sum total” of P’s case as contained in the IoC, the SoC and the WS as there was no mention of other material facts like, for example, on which lane the MC and the Taxi was travelling; at what speed the MC and the Taxi were travelling prior to and at the time of the Accident; which part of the MC was “hit or collided against” by the Taxi; which part of the MC or the Taxi was damaged; and on which lane the Accident was supposed to have happened.
4. P did not elaborate anything further on his WS in evidence-in-chief. He simply adopted the contents of the WS as his evidence. The rest of his “case” only emerged as a result of cross-examination by Ds’ counsel during the trial.
5. Under cross-examination, P admitted that, just before the Accident happened, his MC was travelling on the 1st lane and the Taxi was travelling on the 2nd lane on Garden Road. When asked by Ds’ counsel when was the first time that he had seen the Taxi, P answered that it was “at the time when he was injured”.
6. He maintained that his speed was only at 20 km/h at the time despite the fact that he had told the police in his police statement that it was at 20-30 km/h. He obviously was not able to tell the speed of the Taxi as he had not seen it prior to the Accident.
7. While the road condition was good and dry, P did not agree that the particular stretch of Garden Road where the Accident took place was well lit. He stated under cross-examination that there was only “fog / yellow light” there and it was “dimmer” than other parts of Garden Road. This is again different from what he had told the police before regarding the condition of “the Scene”. He said it was “well-lit”.
8. He further “extremely disagreed” with the suggestion of Ds’ counsel that where the Accident happened, it was on a straight stretch of road. This is despite of the fact that the scratch marks left on the road suggest otherwise.
9. Despite the fact that he claimed to have been travelling at a “low speed” and was paying attention to the traffic condition around him, he admitted that he was not able to notice the Taxi before the Accident. He claimed that he did not drive out to the 2nd lane where the Taxi was at any time. He also denied that at any time he had tried to move onto the 2nd lane. Yet he was not able to tell on which lane did the Accident occur.
10. During cross-examination, P also disowned some of the material contents of the police statement which incidentally was made more than a month after the Accident on 30 October 2014 when P went to report the matter to the police. He even went as far as saying that the signatures appeared in some of the pages of the police statement did not belong to him. However, he could not give any plausible explanation as to who would sign those pages in his police statement.
11. One very important matter which P had stated in the police statement is when he was asked by the investigating officer of when was the first time he saw the Taxi, his answer was “*After* the Accident” (「意外之後」). This is very different from what he had told the court during cross-examination. Either way, it is clear that he did not notice the Taxi at all until the moment when the collision occurred.
12. Unsurprisingly, the police did not charge D2 with any traffic offence based on P’s complaints.
13. P referred to the scratch marks on the 1st lane of the road in the photographs he had produced to the police. He claimed that they were caused by the collision when the right side of his MC was hit by the Taxi (although he was not sure which part of his MC was hit) and when his MC fell to the left. He admitted that after the Accident both he and the MC fell on the 1st lane.
14. P’s counsel submitted that, if P’s case is accepted, then it supports an inference that the Taxi was “travelling across the line of separation between the 1st and 2nd left lanes before it collided with dividing line of between the 1st and 2nd lanes before it collided into (the MC)”. Hence, he submits that “it can also be readily inferred that D2 was not keeping a proper lookout of the vehicles and failed to keep sufficient distance from (the MC).”
15. P’s counsel submitted that there was no contributory negligence on the part of P since he was all along moving on the same lane.

*D2’s case*

1. D2 testified that before the Accident, he was driving downhill on the left 2nd lane on Garden Road. He was on his way to Admiralty. At the same time, the MC was travelling on the 1st lane of Garden Road. D2 stated that the Taxi and the MC had a car speed of about 30-40 km/h.

1. Prior to the Accident and while both vehicles were travelling downhill from Robinson Road, D2 noticed that the MC was travelling on his left and was on the 1st lane. When both vehicles were negotiating the bend, he noticed that the MC started to lean right and drive into the 2nd lane, which was the lane the Taxi was travelling on. D2 stated that he then slowed down the Taxi but the MC still hit the left side mirror of the Taxi. D2 testified that all along he was driving in front of the MC before the Accident and it was the MC which had crashed into the Taxi. After the collision, the MC fell to the left hand side of the Taxi. He managed to brake and stop the Taxi on the 2nd lane with its front very close to the plastic bollards on the double white lines dividing the uphill and downhill traffic, several metres downhill from the point of collusion.
2. After the Accident, D2 said he saw P stood up so he went to check if he had sustained any injuries. D2 pointed out to P that by turning right and cut into the 2nd lane, P had caused the Accident.
3. D2 also asked if P wished to call the police. However, P did not respond. As the Taxi only had sustained very minor defects, he decided not to report the matter to the police.

*D1’s case*

1. D1’s case is that it is not vicariously liable for the Accident. It referred to the hire agreement between D1 and South China Motors Company (“SCMC”) dated 5 May 2014. Clause 4 of the hire agreement stated that SCMC was responsible for all the necessary payments for fuels, parking and penalty imposed under the Road Traffic Ordinance, Cap 374. D1 says that there was no employment relationship existed between D1 and D2. SCMC had only hired the taxi from D1. In turn, SCMC rented it out to D2 as a self-employed driver.

*DISCUSSION*

1. The parties in this case do not dispute the fact that the Accident happened. Their dispute is purely on who had caused the collision.

*P’s pleaded case*

1. P’s pleaded case as shown in the SoC is that when P arrived “the Scene” of the Accident, the MC was “hit and/or collided against by the Taxi which was driven and/or controlled by (D2) for (D1), i.e. the registered owner of the Taxi”: see §4(2) of the SoC.
2. Further, P alleges that D2 had “failed to pay attention to and/or heed the present (sic) of (P) and the (MC) and had allowed the Taxi to collide and /or hit against (P) and damaged the (MC)”: see §4(3) of SoC.
3. Under the heading of “Particular of Negligence” in the SoC, P claims that D2 (i) had failed to pay due care and attention to the traffic condition at the scene of the Accident; (ii) had failed to obey road marking governing the traffic direction at the scene; (iii) had failed to stop the Taxi in time in avoiding the Accident; (iv) had failed to swerve the Taxi to avoid the Accident; (v) driving too fast in the circumstances; (vi) driving too close to the MC; (vii) had failed to brake or slow down or swerve the Taxi to avoid the Accident; (viii) had failed to stop or slow down or control the Taxi to avoid the happening of the Accident; and (ix) had failed to keep any or any proper lookout or to have any or any sufficient regard to the presence of P and the MC and allowed the Taxi to collide with and hit against P and the MC thereby causing injuries to P and damage to the MC: see §5 of the SoC.
4. I would like to make a note here that while the cause of action identified and pleaded under the SoC is one based on negligence, up to that point, P was not able to say how the Accident occurred. In other words, there was no particulars provided to support how P will able to complete the cause of action pleaded against Ds under the SoC.

*Evidence in support of P’s case*

1. Purely by looking at P’s police statement and the WS (ie without considering the evidence P gave in Court), it is quite apparent that the contents of these 2 documents do not support his pleaded case at all. The evidence he had given in Court only reinforced the strong initial suspicion that he did not have any arguable case to start with.
2. To begin with, P in both the WS and the police statement has not been able to state any of the following materials facts which he will need in order to establish his case against D2: (i) which lane the MC was travelling on prior to the Accident; (ii) which lane the Taxi was travelling on prior to the Accident; (iii) what speed the Taxi was travelling at both prior to and at the time of the Accident; (iv) whether P had changed lane to travel at all prior to the collision; (v) if so, when did he change from the 1st lane to the 2nd lane on Garden Road after emerging from the Robinson Road junction (as he must do so in order to travel down to Wanchai); and (vi) why he could not notice the Taxi until he was allegedly hit by it.
3. Without those material facts, I simply do not see how P and his solicitors[[1]](#footnote-1) thought they would have a reasonable cause of action against Ds and how they would be in a positon to establish liability against Ds at the trial at all.
4. Thus, purely by judging from the contents of the WS and the police statement, I find there was insufficient evidence pointing to any negligence and/or breach of other relevant duties on the part of Ds. This was the case at the time of issuing of the proceedings; after the discovery of documents; and after the exchange of witness statements. However, that did not seem to deter P and his solicitors from pushing the case all the way to trial, hoping that either Ds or their insurers would somehow cave in to their hopeless claim or somehow a miracle would happen during the trial.

*Evidence given by P at the trial*

1. The evidence given by P at the trial only confirms that he did not have a case against Ds at all.
2. I find P as a most unreliable and untrustworthy witness. He was evasive, uncooperative and hesitant when giving evidence. He was often in an elated mood as if he were on some illicit substance during cross-examination. Then he would fall in some long periods of silence when making replies to some of the questions put to him by Ds’ counsel. In many material aspects of the case, his oral evidence was totally inconsistent with the available documentary and/or contemporaneous evidence, like photographs taken by P and D2 immediately after the Accident and also the WS and the police statement. Most of all, in my view, his evidence simply defies logic or common sense. His account of the Accident was just inherently improbable. I have no hesitation to reject the evidence he gave at the trial.
3. One of the most bizarre things about P’s oral evidence is that he tried to disown parts of the police statement which he had attached to the WS and relied on as part of his case against Ds during the trial. He first denied some of the signatures appeared on several pages of the police statements in fact was his own. He then tried to disown the contents of those pages which are not to his favour. He could not however offer any plausible explanation as to who would try to forge his signatures on those pages. Yet strangely and belatedly, he tried to change his evidence again at the later part of the cross-examination by saying that he might have been mistaken about the authenticity of the signatures. He did so by the uncanny excuse of saying that the copied pages in the police statement were blurred and unclear when they were in fact perfectly legible.
4. However, at the end of the day, it is not his manner or appearance which I find incredible but the substance of his evidence.

1. First and foremost, it is clear that P did not notice the presence of the Taxi at all until the very moment the MC hit the Taxi. Under cross examination, he admitted that prior to the Accident, his MC was travelling on the 1st lane while the Taxi was travelling on the 2nd lane. He further admitted that he first saw the Taxi when he was injured. Yet he was not able to say – or rather unwilling to say – on which lane did the collision take place.
2. I find the MC must be on the 2nd lane when the Accident happened for the following reasons.
3. It is quite clear that from the photos taken by P and D2 immediately after the Accident that the Taxi ended up on the 2nd lane with a few metres down from where the collision had taken place. The front of the Taxi was very close to the plastic bollards on the double white lines which separate the uphill and downhill traffic on Garden Road. This strongly suggests that D2 had been travelling on the 2nd lane before the Accident happened. This is also consistent with D2’s evidence that he was on his way downhill to Admiralty where he was hoping to pick up some passengers.
4. Further, P was on his way to Wanchai to deliver some takeaways to his employer’s customer on Ship Street. In order to do so, P had to cut into the 2nd lane from the 1st lane which he admitted he was then travelling on. On the other hand, once D2 was on the 2nd lane, he had no reason to cut back to the 1st lane as it would only lead to the direction of Central. Also, if D2 was to change lane from the 2nd lane to the 1st lane when the Accident happened, I would expect that the Taxi would be either close to the left of the 2nd lane or on the 1st lane itself with the front of the taxi pointing towards the 1st lane’s direction rather than towards the centre of the road on the 2nd lane. Thus, in my judgment, it is inherently more probable that P was trying to merge the MC from the 1st lane onto the 2nd lane when the Accident happened.
5. In addition, as admitted by P, the main damage to his MC was to the left of the “large frame” and the only “damage” to the Taxi was to the left wing mirror which was folded up in the Accident. There was no other damage caused to the Taxi. In my view, the damage to the left main frame of the MC and the scratch marks left on the 1st lane of the road are consistent with the force of the impact between the 2 vehicles which would bounce the MC off to its left before it fell onto the road. The scratch marks, as admitted by P, were caused by the big “carry box” fixed at the back of the MC. The clips which were used to attach the delivery orders on the MC had also been found on the 1st lane. This is consistent with the fact that the MC ended up on the 1st lane after the Accident.
6. In my judgment, all the above contemporaneous evidence is consistent with the fact that a collision between the right side of the MC and the left wing mirror of the Taxi took place. It happened when P drove his MC into the 2nd lane from the 1st lane without first checking if it was safe for him to do so first.
7. Second, during the trial, P was not able to give any evidence at all to say: (i) where was the Taxi prior to the Accident; (ii) which lane was it travelling on before the Accident; (iii) what speed it was travelling on; (iv) why he was not able to notice the Taxi if he was riding his MC in a normal manner; (v) how the Taxi could have been able to swerve in order to avoid the Accident. All these are matters that P has to prove at the trial in order to make good of his case and complete his cause of action. Yet, P has failed to do so.
8. Third, it is not disputed that P had failed to report the matter to the police immediately after the Accident. It was not until more than a month after the Accident that he reported the matter to the police. His excuse that he was scared after the Accident does not explain why he would decide to do so some 5 weeks later.
9. During cross-examination, P also claimed that his phone was broken during the Accident and therefore he could not call the police. But when asked why he could then able to take the photographs of the respective vehicles after the Accident, he then changed his evidence to say that he had another phone with him which was provided by his employer. This is not something which P had mentioned in the WS or the police statement. I am not convinced by P’s evidence on this at all. The more likely reason I find why he had failed to report the matter to the police immediately is because P was fully aware that he was the one who had caused the Accident. He knew very well that the Accident was not due to the fault of D2 at all.
10. In his police statement, P mentioned there was a camera installed on the MC and it was functioning properly at the time of the Accident. He said he would produce the video recording to the police as evidence. But P had not done so. P also did not produce the video recording at the trial. Such footage, if existed, would certainly assist P to prove his case, if the Accident did indeed happen in the way as he had described it in the police statement. The fact that he did not do so lead me to draw the inference that the video might not be helpful to support P’s case at all.
11. All in all, P’s case is just plainly unbelievable.

*Evidence given by D2 at the trial*

1. In contrast to P’s evidence, D2 on the other hand was able to give a cogent and logical account of what had taken place during the Accident at the trial.
2. At the material time of the Accident, D2 said the Taxi was travelling downhill on the 2nd lane of Garden Road. The MC was travelling on his left on the 1st lane. They were both travelling at 30-40 km/h at the time of the Accident. D2 had noticed the presence of the MC at the junction of Robinson Road and Garden Road where the “Give Way” sign was situated at. P was travelling behind the Taxi at that time.
3. When the 2 vehicles were negotiating the bend on Garden Road, he noticed that the MC started to drive into the 2nd lane. D2 then steered to the right and tried to slow down the Taxi. However, the MC still hit the left side wing mirror of the Taxi. D2 managed to stop the Taxi a few metres downhill towards the central dividing line close to the plastic bollards. When he came out of the Taxi, he saw the MC was lying across the dividing lines between the 1st and 2nd lanes. D2 helped P to put the MC to an upright position and place it at a positon near to the kerbside.
4. The Taxi was not damaged in any material way. Only the left wing mirror was forced into a “folded position”. D2 only had to flip back to its original position after the Accident. As it was not his fault, he did not report the matter to the police.
5. D2’s oral evidence is completely consistent with the contents of his police statement dated 19 December 2014 which was made after P had complained the matter to the police.
6. I find D2’s account entirely consistent with the layout of the road; the damage caused to the respective vehicles, the position of the scratch marks left by the MC on the 1st lane of the road; and the end up positions of both vehicles after the Accident.

*Conclusion on liability*

1. Based on the above analysis, I come to the only logical conclusion that the Taxi did not crash into the MC in the Accident. In my judgment, it is beyond any shadow of doubt that it was P who had driven the MC into the path of the Taxi when he changed lane without first ascertaining whether it was safe to do so. D2 took reasonable care to avoid the MC by steering right, decelerated and finally stopped on the left 2nd lane when he saw the MC was cutting into his lane. There was no negligence and no breach of any duties on the part of D2. I find the Accident was caused entirely by the negligent driving of P.

1. As for D1, I find there was no vicarious liability on its part. The hire agreement clearly shows that there was no employment relationship between D1 and D2. No vicarious liability issue arose. Not an ounce of evidence was produced by P to even to remotely suggest that such a relationship had ever existed. P’s case against D1 must fail. In fact, in my view, it should not have been brought against D1 in the first place.
2. Hence, I come to the inevitable conclusion that both D1 and D2 were not liable to P for the Accident.
3. P’s case is hereby dismissed.

*Quantum*

1. In the extremely unlikely event that I am wrong on the issue of liability in this case and for the sake of completeness, I shall briefly deal with the issue of quantum here.
2. P suffered from contusions, abrasions and/or sprain injuries of his knees and lower limbs as a result of the Accident. He was sent to A&E of Queen Mary Hospital on the day of the Accident. He was treated with antibiotic and painkiller. He was granted sick leave from 27 September 2014 to 14 December 2015.
3. He complained of persistent pain and stiffness with signs of wound infection. It also allegedly caused him psychiatric or psychological sufferings. He claimed to have reduced active range of movement of his knees. P also claimed to have lost his pre-accident work and the associated earnings.
4. P was referred to the plastic surgery clinic for scar management due to the prolonged symptoms. He complained persistent pain, weakness and stiffness even after receiving treatments. P still allegedly suffers from persisted residual occasional pain of both of his injured lower limbs and knees.

*Pain Suffering and Loss of Amenities (“PSLA”)*

1. In assessing damages for PSLA, I shall take into consideration of P’s injuries, his alleged disabilities, medical condition and loss of amenities and suffering for assessment of award.
2. The experts in parties’ Joint Medical Report dated 2 September 2019 (“the Joint Medical Report”) agreed the diagnosis of P as ‘bilateral knee contusions’.
3. They agreed P did not require further operations or treatments.
4. P claims a sum of $280,000 for PSLA. Mr Leo Wong, counsel for P, relied on the following cases for making this claim: *Leung Yiu Sheung v Pa Ling Logistics Co Ltd* (2019) HKDC 546; *Sukhdeep Singh v Chow Kin Hung & Another* (unreported, HCPI 202/2010, 21 September 2011); *Chum Hok Ching & Another v Chung Lai Ching* (unreported, DCPI 887/2011, 10 January 2014); *Tong Siu Wai v Poon Wing Fu* (2012) 5 HKLRD 407; and *Yip Leung Hoi v Tin Wo Engineering Co Ltd & Others* (unreported, HCPI 1026/2004, 29 March 2007).
5. D2 submits that the damages for PSLA should be at no more than $80,000. Ms Ann Lui for Ds relied on the following cases: *Lo Yim Fong v Ho Po Yin* (unreported, DCPI 654/ 2010, 4 July 2011); *Wong Wai Hong v Loo Kin* (unreported, DCPI 643/2006, 30 March 2007); *Li Cheuk Lam v Chung Sun Tai* (unreported, HCPI 1102/2015, 13 October 2017) and *Cheung Sau Lin v Tsui Wah Efford Management Limited* (unreported, HCPI 505/2017, 9 August 2019).
6. I find that P has recovered well from the minor contusions sustained by him in the Accident. They were superficial injuries which would not have any lasting effects. P is fit to resume his pre-accident work in full capacity and the injuries would not have any impacts on his daily activities. In my judgment, damages for PSLA, if granted, would be at no more than $80,000.

*Pre-trial loss of earning and MPF*

1. In the Joint Medical Report, Dr Kong Kam Fu James for P opines that sick leave granted from 27 September 2014 to 11 December 2015 by the treating doctors at the public hospitals was reasonable. Dr Ho Ching Lun Henry opines that a reasonable sick leave in this case should not be more than 4 weeks.
2. I opine that a reasonable sick leave period, given the relatively minor nature of the injuries in this case, should be at no more than 1.5 months.
3. Form 2 filed by P’s then employer indicates that before the Accident, his basic salary was at $14,500 and other commissions added up to $2,685. His average monthly salary during the 12 months before the Accident is at $17,131.54. So the loss of earnings in this case will be at $17,131.54 x 1.5 = $25,697.31.
4. MPF for this case will be at $17,131.54 x 1.5 x 5% = HK$1,284.87.
5. Hence, the pre-trial loss of earnings I would assess resulting from the Accident would be at $26,982.

*Future loss of earnings and loss of earning capacity (“LOEC”)*

1. Both experts agreed that P’s social activities should not be affected.
2. Dr Kong opines that P should be able to resume his previous occupation as a food delivery worker with mild degree of reduction of working efficiency and endurance.
3. Dr Ho opines that P could resume to his pre-accident job as a courier/food delivery worker at full capacity.
4. Dr Kong opines that 3.5% of LOEC while Dr Ho opines that 0.5% of LOEC to be reasonable.
5. I am of the view that P has not suffered from any LOEC given the fact that he only suffered from minor superficial injuries in the Accident. He clearly is not entitled to any future loss of earnings resulting from the Accident as he has been able to return to his pre-accident job as a food delivery worker albeit with other employers/platforms. In any event, Mr Wong has indicated in his opening submissions that he is not going to pursue this head of claim at the trial.

*Special damages*

1. P claims $8,000 for medical expenses; $6,000 for tonic food and $3,500 for travelling expenses for attending medical treatments. Hence, he claims a total of $17,500 as special damages resulting from the Accident.
2. The above expenses claimed were not supported by receipts. Even if P succeeds on liability, I am of the view that a nominal sum of no more than $2,000 should be granted as special damages in this case.

*Summary on quantum*

1. Thus, even if P were to succeed on the issue of liability, the total damages I would award in this case would be at no more than $108,982 ($80,000 + $26,982 + $2,000).
2. As P had already received a sum of $194,311.82 as employees’ compensation from his then employer in relation to the same Accident, he would not have been entitled to receive any damages in the present proceedings even if he were to succeed on liability in the present case.

*Costs*

1. Costs will normally follow the event. In this case where I have dismissed P’s claim, normally P will be expected to pay the costs of Ds.
2. However, this is, in my judgment, not a normal case at all.
3. As stated, I consider there was insufficient evidence for P to commence a case against Ds based on P’s police statement and on the contemporaneous evidence like photographs and sketches. His case had not been improved by the contents of the WS he made in the present proceedings as it merely repeated the contents of his police statement. There was no criminal conviction for P to rely on as D2 had never been charged by the police for any traffic offence resulting from the Accident. D2’s police statement also does not give anything which P can rely on to assist him to establish his case.
4. Thus, this is not a case of P’s words against D2’s words about how the Accident occurred. If one were to evaluate P’s case objectively, purely based on his police statement and D2’s police statement, together with the photographs taken by the parties at the scene immediately after the Accident and later the WS he made in the proceedings, it would not be difficult, in my view, for any trained lawyer to determine that they did not even come close to prove any of the “particulars of negligence” pleaded in the SoC in order to complete the cause of action pleaded against Ds.

*Applications for legal aid*

1. P mentioned during the trial upon the Court’s enquiry that he had applied for legal aid and was at one stage granted legal aid to cover this common law action. Indeed, Mr Wong informed the Court that legal aid was granted to P in September 2015.
2. However, a search of the court files in both of this action and in the related employees’ compensation (“EC”) case, ie DCEC 1999/2015, which was issued against his then employer, revealed that indeed a legal aid certificate was granted to him by the Director of Legal Aid (“the DLA”) on 7 September 2015[[2]](#footnote-2). However, as the reference suggests, that was for P to commence EC proceedings against his former employer. It has nothing to do with the present personal injuries (“PI”) case. In any event, that legal aid certificate was discharged on 1 December 2016. However, that somehow did not deter P’s solicitors to file a copy of the same legal aid certificate in the present proceedings at the same time of issuing of the general endorsement of writ on 13 September 2016, giving the impression that P’s claim in these proceedings had been covered by legal aid. Curiously, in the general endorsement of writ itself, P gave a different legal aid reference number at the top of the document[[3]](#footnote-3). A search of the court files could not locate a copy of that certificate. The record shows that this certificate, if existed at all, had never been filed with the Court in the present proceedings.
3. On 20 February 2017, P’s solicitors wrote to one of the PI masters informing her that they had filed a notice to act for P on 29 December 2016 after the legal aid certificate was purportedly discharged in the PI action. It is however not at all clear which legal aid certificate P’s solicitors were referring to as none had been issued for the PI action by the DLA by that date, at least none could be found in the court files.
4. The record also reveals that P had on 13 December 2019 did tried one more time to apply for legal aid in the EC proceedings. However, that application was refused by the DLA on 10 July 2020.[[4]](#footnote-4)
5. Other than that, P had, on 17 January 2020, which was more than 3 years after the issue of the writ and when the case was already at an advanced stage of case management by the PI masters, applied for legal aid again in the PI action. Again, this application was refused and a notice of refusal was issued by the DLA on 10 July 2020.[[5]](#footnote-5)

1. I therefore do not understand why P said during his evidence that legal aid was originally granted to him but was discharged later. The record shows that no legal aid had ever been granted to him in the PI action. Even if it was granted, it was discharged latest by December 2016 as mentioned by P’s solicitors in their letter to the PI master.
2. In my view, if his legal aid application was refused or discharged, it certainly would not be on the ground of means as P told the Court that he had no money at all and in fact was in debts. It is most likely that the DLA did not think P’s case had any merits at all after examining the available evidence.

1. Be that as it may, as was disclosed by P during the trial, P did not have to pay any money upfront to fund this piece of litigation. All he had to pay for was for the negligible costs of providing photocopies of several documents and printing a few colour photographs. With the financial assistance of his solicitors, he went through the whole trial. It was his solicitors who had paid for his medical expert and counsel’s fees. In other words, he has no stake in this piece of litigation at all. All he had to do was to turn up to Court and state his case, no matter how far-fetched and how hopeless his case was. He told the Court that if he were to lose the case, he would repay his solicitors and Ds by instalments with his few part-time food delivery jobs. As to how he could do so with his very modest income and heavy family responsibilities, I find it difficult to fathom. It is obvious to me that Ds will never able to recover their costs of the proceedings, including the costs of the trial, from P.

*Any reasonable cause of action in this case?*

1. In the leading case of *Winnie Lo v HKSAR* (2012) 15 HKCFAR 16, which deals with the common law offence of maintenance and champerty, the Court of Final Appeal (“CFA”) has made it clear that “it is not maintenance or champerty for a solicitor to agree to act in litigation without charge. Nor is it unlawful for the solicitor to agree to act for less than his ordinary charges or on terms that he will merely be reimbursed his disbursements”: see §§106-107 at p53.

1. Indeed, Lord Russell of Killowen LCJ in *Ladd v London Road Car Co* [1900] LT 80 considered “laudable” solicitors who accepted *bona fide* cases taking the chance whether they would ultimately be paid:

“In reference to the subject of speculative actions generally, I think it right to say, on the part of the profession and the class of persons who were litigants in such cases, that it was perfectly consistent with the highest honour to take up a speculative action in this sense – *viz*, that if a solicitor heard of an injury to a client and honestly took pains to inform himself whether there was a *bona fide* cause of action, it was consistent with the honour of the profession that the solicitor should take up the action. It would be an evil thing if there were no solicitors to take up such cases, because there was in this country no machinery by which the wrongs of the humbler classes could be vindicated. Law was an expensive luxury, and justice would very often not be done if there were no professional men to take up their cases and take the chance of ultimate payment; *but this was on the supposition that the solicitor had honestly satisfied himself by careful inquiry that an honest case existed*.” [emphasis added]

1. The CFA also cited the Australian High Court’s case in *Clyne v New South Wales Bar Association* (1960) 104 CLR 186 where it was held that “this applies equally to cases where the solicitor takes on the burden of paying the client’s disbursements in the hope of recovering the costs and disbursements from the other side, *subject to the cause of action or defence being reasonable* and the absence of champerty.” [emphasis added]
2. The CFA at §109 cited the following passage below from *Clyne, supra*:

“…And it seems to be established that a solicitor may with perfect propriety act for a client who has no means, and expend his own money in payment of counsel’s fees and other outgoings, although he has no prospect of being paid either fees or outgoings except by virtue of a judgment or order against the other party to the proceedings. This, however, is subject to two conditions. *One is that he has considered the case and believes that his client has a reasonable cause of action* *or defence as the case may be.* And the other is that he must not in any case bargain with his client for an interest in the subject-matter of litigation, or (what is in substance the same thing) for remuneration proportionate to the amount which may be recovered by his client in a proceeding….”. [emphasis added]

1. From the above cases, I have elicited the following principles which I consider will apply in this case:
2. In principle, it is not objectionable for a solicitor to pay for the disbursements, including counsel fees or medical expert’s charges, on behalf of his client in a case;
3. It does not amount to the offence of champerty or maintenance when a solicitor does so;
4. On the contrary, the Court considers that it is laudable and something to be praised for lawyers to take on *bona fide* cases on behalf of their clients;
5. However, the burden is on the solicitor who takes on such cases to first make careful enquiry and satisfy himself that an honest case existed or that there is at least a reasonable cause of action or defence; and
6. That he cannot bargain with his client for an interest in the subject-matter of litigation or for remuneration proportionate to the amount which may be recovered by his client in the proceedings.
7. In addition, I would like to make the following observations which I consider would apply in particular in a PI action:

1. Such duty to make enquiry and satisfy himself that his client has a reasonable cause of action or defence must be a continuing one. It is incumbent upon the solicitor in charge to review the case from time to time, in particular at different important stages of the proceedings, like at the issue of the writ/serving of the statement of claim; close of pleadings; at the end of discovery; and after the exchange of witness statements, to ensure the cause of action pleaded is supported by objective and credible evidence and that it can still be maintained with a reasonable prospect of success;
2. It is against both the letters and the spirit of the Civil Justice Reform to allow unmeritorious claims, no matter whether they are funded by a solicitor on behalf of his client or litigant who is acting in person, to proliferate;
3. It is also against public policy to permit a solicitor to pursue a hopeless case on behalf of his client where he either does not believe that there is any reasonable cause of action or defence or reckless as to whether there is such reasonable cause of action or defence;
4. To allow a solicitor or litigant to do so will often lead to the defendant or his insurer not able to recover any costs against the impecunious litigant at all as often the solicitor who funded the litigation will cease to act for his client after the trial and before the judgment is handed down, leaving the plaintiff to face the bills of the successful defendant;
5. The defendant or his insurers often will not able to recover any costs against the impecunious plaintiff as in most cases he simply does not have the means to pay the successful party’s costs;
6. At the end of the day, the successful party’s costs will likely be borne by the general public in the form of increased premiums for employers (in industrial accident cases) and for motorists (in traffic accident cases); and
7. It will also lead to the wasting of the limited judicial resources when a court will have to hear a case that contains no or very little merits at all.

*Whether P’s solicitors should be made to pay for the costs of Ds?*

1. As I have found in this case, P really did not have any reasonable cause of action against Ds right from the start of the proceedings. In my judgment, his police statement did not really provide him with the foundation he needed in order to commence a PI action against Ds. His case had not been improved at all by the time of completion of discovery and exchange of witness statements. In short, he has a hopeless case against Ds.
2. In my view, this case should have never been brought by P’s solicitors on behalf of P in the first place. In any event, latest by the time of completion of discovery when P’s solicitors would have the chance to read D2’s police statement, it must have become apparent to P’s solicitors that P would not be able to establish his cause of action at the trial. If that was not apparent enough, then surely by the time of exchange of the witness statements, there could be no doubt that P would not be in a position to prove his case at trial.
3. I have no problem to accept solicitors acting on *pro bono* basis for his clients or even to expend his own money to pay for disbursements like medical expert or counsel fees in a case where he knows he has no prospects in being repaid by his client except by virtue of a judgment or order against the other party. However, as stated in *Clyne, supra*, he must do so after he has considered the case and believes that his client has a reasonable cause of action.
4. The fact that his client is not qualified or has been rejected legal aid on merits ground is always a good indicator that the case has very little merits or that there is no reasonable cause of action or defence.
5. In the past few years, I have noticed a huge surge in such cases in the PI field where a plaintiff who has little prospect of success will be assisted by his solicitors to take on cases where either the plaintiff refuses to apply for legal aid or where legal aid has been refused. They would take it all the way to trial or very close to trial, only to find that they could not prove their case in court at all. Almost in all of these cases, the plaintiffs will be from a lower income group who will certainly qualify to apply for legal aid due to their limited income and disposable assets, but will not do so either because they do not wish to or there are very little merits in their case. As a standard practice these days, the PI masters will at the early case management stage ask the plaintiffs’ solicitors to put on record if they have advised their clients on the availability of legal aid and the reason(s) why legal aid was not applied, almost inevitability the response given by such plaintiffs through their solicitors is that their clients have been advised of their rights but decided not to apply for legal aid.
6. While it is noble of a plaintiff’s solicitor to be generous to his client for not charging his client or even by paying upfront for all his disbursements, in my view, he must do so only after making reasonable investigations into the merits of the case and holds a genuine belief that his client has a reasonable cause of action against the defendant. He cannot, like in our present case, simply blindly pursue a hopeless case on behalf of his client when the primary evidence does not even support the case he has pleaded on behalf of his client. Otherwise, at the end of the day, it is the general public who will end up paying for the successful party’s legal costs by paying higher insurance premiums.

*Wasted Costs Order*

1. Under O 62, r 8 of the Rules of the District Court, Cap 336H(“RDC”), a Court is empowered to make, whether on its own motion or on application,a wasted costs order against a legal representative, if:

“(a) the legal representative, whether personally or through his employee or agent, has caused a party to incur wasted costs as defined in section 53(5) of the [District Court] Ordinance; and

(b) it is just in all the circumstances to order the legal representative to compensate the party for the whole or part of those costs.”

1. Under O 62 r 8B of RDC, it states that:

“(1) The Court shall consider whether to make a wasted costs order in 2 stages—

1. in the first stage, the Court must be satisfied that—
2. it has before it evidence or other material which, if unanswered, would be likely to lead to a wasted costs order being made; and
3. the wasted costs proceedings are justified notwithstanding the likely costs involved; and

(b) in the second stage (even if the Court is satisfied under subparagraph (a)), the Court shall consider, after giving the legal representative an opportunity to give reasons why the Court should not make a wasted costs order, whether it is appropriate to make the order in accordance with rule 8.”

1. I am of the view that there must be a case to make solicitors who decide to pursue a hopeless case on behalf of a litigant to pay for the costs of the successful defendant when it is apparent that the plaintiff is not in a positon to pay those costs as P in this case: See *In the matter of Labour Buildings Limited (勞工大廈股份有限公司) (“the Company”)* (unreported, CACV 37/2010, 26 April 2010), per Rogers VP at §§7-8.
2. Pursuant to O 62, r 8A of the RDC and Practice Directions 14.5, on this court’s own motion, I would direct P’s solicitors to show cause within 28 days (with copy to Ds) as to why the costs of Ds in this action should not be borne by them personally and on an indemnity basis, including certificate for counsel.
3. I would also direct that Ds be given the opportunity to respond to any submissions to be made by P’s solicitors on the proposed wasted costs order within 21 days thereafter as ultimately they will be the party going to be affected the most.

*CONCLUSION*

1. In conclusion, P’s claim is dismissed with costs in favour of Ds.
2. I make a direction under O 62, r 8A of the RDC to direct P’s solicitors to show cause as to why this court should not make a wasted costs order against them.

( Andrew SY Li )

District Judge

Mr Leo Wong, instructed by Messrs Cap Chan & Co, for the plaintiff

Ms Ann Lui, instructed by Messrs Mayer Brown, for the 1st and 2nd defendants

1. I have not included P’s counsel here as Mr Wong had only come into the case a couple of days prior to the commencement of the trial which was placed on the running list and warned for trial just before the weekend before the case commenced on Monday, 21 December 2020. [↑](#footnote-ref-1)
2. Under LA/ECC/15736/2015(S01) [↑](#footnote-ref-2)
3. LA/RD/15177/2015(S01) [↑](#footnote-ref-3)
4. See Memorandum of Notification dated 13 September 2019 and Memorandum of Notification that a party has been refused Legal Aid dated 10 July 2020 under LA/ECC/16840/2019 (AS01) [↑](#footnote-ref-4)
5. See Memorandum of Notification dated 17 January 2020 and Memorandum of Notification that a party has been refused Legal Aid under LA/RD/15408/2019 (AS01) [↑](#footnote-ref-5)