DCPI 2272 OF 2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO. 2272 OF 2008**

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BWTWEEN

TSANG MEI LUEN Plaintiff

and

YIP WAI BIU Defendant

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Coram : H. H. Judge YUNG

Dates of Hearing : 17th , 18th , 30th September, 2009 & 5th October 2009.

# Date of Handing

Down of Judgment :15th December 2009

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## J U D G M E N T

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### The Collision

1. This is a running down case. While crossing a road, the Plaintiff was hit by a private car driven by the Defendant. By these proceedings the Plaintiff is seeking damages for the negligent driving of the Defendant.
2. The only witnesses to the accident are the parties themselves. Their respective versions are different. Whichever version is correct, the collision occurred within a matter of seconds, if not splits of seconds, after they discovered the presence of one and another, and for that matter they realised the impact was going to be imminent. The Plaintiff gave evidence that she continued crossing the road believing she would beat the Defendant to it. She had the impression that the car was changing its direction to follow her, otherwise she would not have been hit. She was adamant that she had already gone at least one step beyond the central division line. Indeed the Defendant had changed its direction on seeing the Defendant. He maintained he applied his break and swerved a bit to the right attempting to avoid the Plaintiff who, according to him, emerged all of suddenly behind a vehicle alongside the road. Despite his manoeuvre, the left front of his car hit the Plaintiff sending her off the ground to land on the bonnet shattering the windscreen.
3. Ms Loh, counsel for the Plaintiff, attempted very hard theorizing in minute details how the accident occurred. She was over-ambitious. She was not assisted by any expert. The necessary evidence was for a forensic expert to reconstruct the accident is simplly lacking. What Ms Loh could rely on is the estimates given by the two witnesses about distance, speed, position of the car at particular instants. I find all these estimates are unreliable even for the use of an expert, not to mention by a lay person. Not surprisingly and without her fault, the gallant effort of Ms Loh is doomed to fail. Nonetheless the negligence or contributory negligence , if any at all, of the respective parties, in all cases, could be established without resolving every minute detail of the complete chain of events, as Ms Loh was so concerned about

Parties Are the Only Witnesses—their credibility

1. The Plaintiff gave very straight forward evidence about the accident but was shaken in cross-examination in many aspects. This might in part due to her apparent difficulty at times in understanding the layout of the location as depicted in various photographs displayed on a large screen in court. Those qualities of the photographs were good and anyone familiar with the scene would have no difficulty of understanding it by reference to the location of the bus-stop and the parking/service lanes on the left side. Contradictions and confusions she showed was a result of her desire to exonerate herself. One obvious of such attempt is that she kept repeating the point that she was already on step away from the central dividing line into the opposite carriageway. She laboured under the belief that once she had crossed the central dividing line, she was blameless. Coincidentally, this is also the main theme of her counsel’s argument for no-contributory-negligence. The accident was a traumatic event. She could not have any good memory of the details. Nor could she actually have or have any good perception of the details at the time, given the whole incident took place within such short span of time. In particular her estimation of the distance and the speed of the car cannot be relied on.
2. In his witness statement and evidence-in-chief the Defendant gave quite a detailed and coherent account of the accident. His ability so to do should not be surprising, he being an experienced policeman and having had training for advanced driving skill. His better demeanour and more effective delivery of evidence than the Plaintiff’s is to be expected and is not necessarily an indication that he is more credible.
3. The Defendant was cross-examined at length, especially on his general failure to stop to avoid the collision. At one stage the Defendant appeared to be wavering on the question of his response he made on noticing the Plaintiff. This was more apparent than real. The Defendant was confused with the meaning of the word “stop” by which he understood to mean applying the brake. When Ms Loh used the words ‘stop the car’ she meant ‘having brought the car to a standstill’. The Defendant was not shaken in cross-examination. He readily admitted matters to his disadvantage. Most noticeably, he was driving quite close to the stationary vehicle. Clearly he knew he would be criticised on that, and yet he had no hesitation to admit it. I find he was an honest witness. Nonetheless his evidence cannot be accepted in its entirety. Regard must be made to the fact that his perception in an emergency could be difficult as it was in the Plaintiff’s case. For this reason, estimation he gave, though honestly done, might not be reliable.

### The Plaintiff Emerging From the Truck

1. It is not in dispute that the Plaintiff emerged from the front of a stationary truck. The Plaintiff alleged she had looked and saw that there was no vehicle coming. She only noticed the coming of the car when she was about to reach the middle of the road. The Defendant’s version was more probable in that she suddenly emerged from behind the front of the stationary truck. First of all she had to cross a service lane before reaching the stationary truck. While walking up to the truck, she would probably check the traffic of the road she was about to cross very soon. That time she did not see the car of the Defendant or other cars. Unfortunately she did not check again before stepping out of the truck. The drizzles at the time played a part hurrying her to cross the road. . I find that she did not stop to check the traffic right before she stepped out of the stationary truck.

### Evasive Action to Avoid the Collision Justified

1. I accepted the evidence of the Defendant that be took evasive action immediately, by applying the brake and swerving a bit to the right into the carriageway. It has been suggested that he was negligent because he could not the stop the car immediately. It was unrealistic to suggest that a driver could bring his car to a complete stop immediately. Reaction time and breaking distance did not appear to be considered by Ms Loh. Further there is simply no factual basis to support this argument.
2. Another suggestion is that if he had not swerved to the right, the collision could have been avoided and therefore he was negligent. It is trite law that a party, through no fault of its own was put in a emergency situation, cannot be criticised minutely of the reaction it made to avoid a collision. In the present case, it would be unreasonable for the Defendant to swerve to the left. Anyway the defence does not suggest he should swerve to the left. Ms Loh argued that he should not have swerved to the right. It is easy to suggest a course of action as a matter of hindsight. No one can reasonably expect that the Plaintiff would quicken her steps to cross the road. As a matter of hindsight she would not have been hit at all if she stopped or retreated immediately. I do not think both parties can be blamed for the reaction they respectively took on seeing each other’s presence.
3. The Plaintiff was exaggerating her evidence when she said she was one step beyond the central dividing line. Looking at the circumstances of the case, it made no real difference whether the Plaintiff had one foot beyond the dividing line. The impact was close to the dividing line. I accept the evidence of the Defendant that the Plaintiff continued to cross the road but slightly at an angle. This was in fact consistent with the impression of the Plaintiff. She said she continued to cross the road but the car was following her and the car was travelling fast.

### Conduct of Parties Before Reacting to the Emergency Determining Negligence

1. The crucial matter of this case is the conduct of the parties before they became aware of the situation. The Plaintiff was clearly negligent. She should not have emerged from the stationary vehicle without ensuing the traffic was clear.
2. The Defendant had just come out of the slight bend when he entered the stretch of the road where the collision occurred. The traffic condition was light. The probability for pedestrians to cross the road to the bus stop was realistic. Likewise, no reasonable drive could safely ignore the probability for pedestrian to emerge from the stationary vehicle. With whatever speed the Defendant was doing, a reasonable driver should have kept a proper and safe distance from the side of these stationary vehicles. The Defendant was driving very close to the side of the truck. This would inhibit the opportunity of observing the emerging careless pedestrian. The carriageways in both directions were quite wide, he could have kept a much greater distance from the side of truck. Had he done so he would have noticed the Plaintiff earlier and at a greater distance. I find that the Defendant was negligent.
3. The Defendant was driving impeccably apart from the fault mentioned above. By contrast the Plaintiff failed miserably to take care of her own safety. It might have been a momentary lapse for her prompted by the rain but it would not reduce her share of blame. I find her two third to blame.

### Injuries and Treatment

1. The Plaintiff was about 50 at the time of the accident, a housewife taking care of all household chores of a family of five and her sick husband.
2. From the accident she had collapsed fractures of lumbar spine at L1 and L4, fracture of her right shoulder, and some other minor injuries. She was treated with a corset, a sling arm and physiotherapy. No operation was needed or performed. Her recovery is good.

### Pain and Suffering

1. I find the Plaintiff exaggerated her suffering in court. The pain is not as frequent as serious as she described in court. I find she could do household chores as before albeit more slowly.
2. Each counsel cited a different set of case. One set with injury and suffering much more serious than the present case, and the other verges on irrelevancy. Making appropriate discount of the awards for the cases cited on behalf of the Plaintiff, I am of the view that $200,000 is the appropriate award for pain and suffering.

### Loss of Service

1. Though she is able to perform the pre-accident household chores, an award should be made to reflect the difficulty she had in performing these chores. I am of the view that a sum of $50,000 would be reasonable.

Bonesetter’s fees and related expenses incurred in China.

1. I do not believe the Plaintiff’s evidence about her treatment in China or that she had incurred the bone setters’ fees in Hong Kong as alleged. However I believe she resorted to bone setters at some stage. A sum of $1500 would be more than reasonable in view of her unsatisfactory state of evidence.

### Total Award

1. The other items have been agreed at $3,700. The total award is therefore $ 84,567 [ ($200,000+$50,000+$3700)÷3] with usual interest. An order nisi for costs be made in favour of the Plaintiff with certificate for counsel and there be an order for legal aid taxation for the Plaintiff’s own costs.

(H. H. Judge YUNG)

District Judge

Ms. Phillis Loh instructed by M/S Cheng, Yeung & Co. Assigned by D.L.A.

for the Plaintiff.

Mr. Kamlesh Sadhwani instructed by M/S Lee & So for the Defendant.