## DCPI 2275/2017

[2021] HKDC 938

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURY ACTION NO 2275 OF 2017

BETWEEN

CHAN TSZ ON Plaintiff

and

MA CHI SHING 1st Defendant

GUNAWAN-INDRA 2nd Defendant

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Before: Deputy District Judge Tony Ko in court

Date of Hearing: 23-25 March 2021

Date of Judgment: 16 August 2021

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JUDGMENT

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*INTRODUCTION*

1. The plaintiff’s claim arose out of a traffic accident on 11 June 2016 involving 2 vehicles, *viz* a light goods vehicle bearing registration number NG 8379 (“P’s Vehicle”) and a truck bearing registration number TV 3593 (“D2’s Vehicle”).
2. At the material time, the plaintiff was the driver of P’s Vehicle (which was registered in the name of the plaintiff’s wife) and the 1st defendant was the driver of D2’s Vehicle (which was registered in the name of the 2nd defendant).
3. It is not disputed that at around 8:10 am on 11 June 2016, the plaintiff was driving P’s Vehicle along the 2nd left lane of Hoi Shing Road, Tsuen Wan, towards the Chai Wan Kok Street direction, and the 1st defendant was driving D2’s Vehicle along the 1st left lane of the same road. While P’s Vehicle was passing D2’s Vehicle, the left side of P’s Vehicle came into contact with the right front of D2’s Vehicle (“Accident”).
4. The photos taken right after the Accident showed that the right front corner of D2’s Vehicle had crossed into the 2nd left lane. It can also be observed that the left side bumper and left head lamp of P’s Vehicle were scratched, its left front mirror was dislocated, and part of its left front body behind the bumper was slightly dented. D2’s Vehicle was damaged as well, with the right side of its bumper bent forward.

*THE PARTIES’ CASE*

1. The plaintiff’s case can be summarised as follows:-
2. The plaintiff was 31 years old at the time of the Accident and he was a self-employed cargo van driver earning around $1,500 per day.
3. The Accident was caused by the 1st defendant’s negligence in driving D2’s Vehicle.
4. As the 2nd defendant was the registered owner of D2’s Vehicle and the 1st defendant was driving as the agent and/or servant of the 2nd defendant, the 2nd defendant is vicariously liable for the negligence of the 1st defendant.
5. As a result of the Accident, the plaintiff suffered neck pain, which increases with change of weather, rotation, prolonged shoulder elevation and sitting, or keeping neck still in one posture. The plaintiff has to take medicine to relieve the neck pain occasionally. Due to the neck pain, the plaintiff suffered from insomnia. The Plaintiff claims under four heads of damages:-
6. Pain, suffering and loss of amenities (“PSLA”) was originally claimed in the in the sum of $350,000 in the Revised Statement of Damages. In the plaintiff’s opening submissions, it was submitted that the proper award for PSLA should be between HK$120,000 and HK$150,000.
7. Pre-trial loss of earnings, calculated on the basis of the daily earning of HK$1,500 and the sick leave certificates granted covering a period of 202 days (11 June 2016 to 1 August 2016, and 3 August 2016 to 30 December 2016), ie HK$1,500 x 202 = $303,000.
8. Loss of earning capacity, in the sum of HK$150,000.
9. Special damages in the sum of HK$33,200.
10. The 1st defendant admits the he should be responsible for the Accident. In fact, the 1st defendant pleaded guilty to the charge of careless driving on 6 December 2016, and was fined HK$1,000. In pleading guilty, the 1st defendant also agreed to the brief facts of the case as prepared by the prosecution. In the agreed brief facts, it was stated that at the time of the Accident, the 1st defendant suddenly cut from the 1st left lane of Hoi Shing Road to the 2nd left lane of Hoi Shing Road.
11. It is the 1st defendant’s case that he was employed by the 2nd defendant as a part-time driver for a daily wage of HK$600. At the time of the Accident, he had already been working on and off for the 2nd defendant for more than 4 months.
12. The 2nd defendant admits that he was the registered owner of D2’s Vehicle, and was the sole proprietor of a business named Cahaya Makmur Trading, which engaged in the delivery of Indonesian products.
13. The 2nd defendant’s case is that on the day of the Accident, it was only the first time that he had met the 1st defendant. According to the 2nd defendant, the 1st defendant responded to an advertisement placed through the Labour Department, and came to show his driving skills with a view to gaining an employment with the 2nd defendant. The 2nd defendant therefore gave the 1st defendant the car key to D2’s Vehicle for a “driving test”. The 2nd defendant denies that he was the employer of the 1st defendant.
14. The 2nd defendant also alleges at paragraph 5 of his homemade Amended Defence that “The accident is a factor of heavy rain and negligence of both drivers”, thereby raising the issue of contributory negligence on the part of the Plaintiff. In the 2nd defendant’s Answer to the Plaintiff’s Revised Statement of Damages, the daily earning of the plaintiff was disputed. It was said that an earning of HK$650 per day was reasonable. Further, it was pleaded that “there were no victims injured” and “it is easy to get Doctors recommendation for sick leave”.

*ISSUES*

1. The following issues are to be decided by the court:-
2. Whether the 1st defendant was negligent in driving D2’s Vehicle and caused the Accident?
3. Whether the 2nd defendant was vicariously liable for the 1st defendant’s negligence in driving D2’s Vehicle?
4. Whether the plaintiff was contributorily negligent?
5. If liability is established, what is the quantum of damages to be awarded to the plaintiff?

*NEGLIGENCE OF THE 1ST DEFENDANT*

1. The 1st defendant frankly admitted that he was negligent in driving D2’s Vehicle. In particular, he admitted in cross-examination that he did not perform a shoulder check before cutting into the 2nd left lane. He also pleaded guilty to the charge of careless driving.
2. The 1st defendant’s conviction upon his guilty plea is admissible under s 62 of the Evidence Ordinance, Cap 8 to prove that he has committed the offence of careless driving. Further, the 1st defendant’s own admissions made in these proceedings also point clearly to his negligence. It is also clear that the Accident was caused by the 1st defendant’s negligence – the Accident would not have occurred but for the 1st defendant suddenly crossing into the 2nd left lane without first checking adequately the traffic on the 2nd left lane.
3. Liability is therefore established against 1st defendant.

*VICARIOUS LIABILITY OF THE 2ND DEFENDANT*

1. The 1st defendant and the 2nd defendant gave completely different accounts as to whether there was an employment relationship between them.
2. The crux of the issue is whether the 1st defendant was undertaking a “driving test” (as the 2nd defendant alleges), or whether he was employed to work for the 2nd defendant at the time of the Accident (as the 1st defendant alleges).
3. According to the 2nd defendant:-
4. He was on D2’s Vehicle in order to observe the 1st defendant’s driving ability.
5. After the Accident the Police was called, and arrived at the scene. After the Police left, the “driving test” continued despite the Accident. The “driving test” lasted for around 3 hours.
6. During the “driving test”, both defendants were in D2’s Vehicle, which was driven by the 1st defendant from Tsuen Wan to Sha Tin, and then back to Tsuen Wan. The 1st defendant was adamant that no work was performed and they went to Sha Tin not to deliver any goods, but merely to allow an opportunity for the 1st defendant to demonstrate his driving ability.
7. The defendants talked about the Accident during the trip, and the 1st defendant felt very troubled by it. The 2nd defendant, however, tried to comfort the 1st defendant, and said that it was the plaintiff’s own fault that caused the accident, so the 1st defendant did not need not worry about it.
8. After the defendants returned to Tsuen Wan, the 2nd defendant did not consider the 1st defendant to be suitable for the job, as the 1st defendant did not know his way around Hong Kong. The 2nd defendant said that the 1st defendant had to rely on the digital map application a lot.
9. The 2nd defendant then gave the 1st defendant HK$600, as he felt sorry for the 1st defendant for getting distressed by the Accident.
10. According to the 1st defendant, he was a casual worker of the 2nd defendant. In the morning of the day in question, the 1st defendant went to the car park to get D2’s Vehicle, and after exiting the car park the Accident occurred. He said that the 2nd defendant was not in D2’s Vehicle when the Accident occurred, but only arrived some time afterwards. After the Accident, the 1st defendant continued to work according to the 2nd defendant’s instructions. After work, the 2nd defendant gave HK$600 to the 1st defendant as his daily wage.
11. After considering all the evidence and submissions, I find the 1st defendant’s account to be more credible than the 2nd defendant’s. I highlight the following matters in particular.
12. Firstly, it is inherently improbable that it would have taken as long as 3 hours and a trip to Sha Tin and back, if the genuine arrangement was for the 1st defendant to have a test drive, and for the 2nd defendant to assess the 1st defendant’s driving ability.
13. Secondly, the fact that HK$600 was given to the 1st defendant is more consistent with the fact that the 1st defendant was working for the 2nd defendant, rather than being on a test drive.
14. Thirdly, the 1st defendant is a straightforward witness who answers questions directly. On the other hand, the 2nd defendant was evasive, often refusing to answer straightforward questions put to him directly. In coming to this view, I have taken into consideration the fact that the 2nd defendant was testifying through an interpreter.
15. Fourthly, it was recorded in the witness statement of PC 12431 made on 6 August 2016 that the 2nd defendant had informed the police that the 1st defendant was his part-time employee.
16. For these reasons, I find that the 2nd defendant to be vicariously liable for the 1st defendant’s negligence.
17. For completeness sake, it is noted that the plaintiff has relied on Chong *Ngan Seng v China Harbour Engineering Co Ltd* [2013] 2 HKLRD 223 to suggest that the 2nd defendant should be held vicariously liable for the negligence of the 1st defendant, even in the absence of any employer-employee relationship, as the 2nd defendant had authorised or requested the 1st defendant to drive D2’s Vehicle in order to carry out a task or duty delegated to the 1st defendant, performed under the control of the 2nd defendant. However, as I have found that the 1st defendant was working as an employee of the 2nd defendant at the time of the Accident, there is no need to deal with this line of argument.

*CONTRIBUTORY NEGLIGENCE*

1. The plaintiff relied on the case of *Leung Chun Tung v Siu Wai Cheong* HCPI 883/1995, 19 December 1997 to suggest that as the plaintiff was driving within the speed limit of 50 km/hr, he was not contributorily negligent. However, in approaching the question of contributory negligence, one should bear in mind what Kwan JA (as she then was) said in *Yau Kam Ching v Cheung Shun Kau* HCMP 1339/2014, unreported, 15 August 2014 (at paragraph 14):-

“…whether a driver is negligent or not is fact specific, and any decision applying the general standard to particular facts is unlikely to produce a precedent. As stated by Sir John Donaldson, MR in *Kite v Nolan* [1983] RTR 253 at 256D to E: ‘The doctrine of precedent applies to principles and not to the application of principles to particular facts with the possible exception of a case in which the facts are wholly identical, which is extremely unlikely in most circumstances.’”

1. In the present case, it is clear that D2’s Vehicle had already crossed into the 2nd left lane when the two vehicles came into contact, and it was P’s Vehicle which came from behind during the collision. This is well borne out by the photos showing the scratch marks on the front left side bumper of P’s Vehicle and the front right side bumper of Ds’ Vehicle, which had been bent forward. Further, it is noteworthy that, as depicted in the post-Accident photographs, by the time both vehicle stopped, around a quarter of the body of P’s Vehicle had already passed D2’s Vehicle. This suggests that P’s Vehicle did not stop in time to avoid the collision, which is consistent with the relative high speed that P’s Vehicle was travelling at, as shall be elaborated below.
2. It is the plaintiff’s evidence that he was driving at around 30-40km/hr along the 2nd left lane of Hoi Shing Road, which has 2 lanes. It is also the unchallenged evidence of the 2nd defendant that D2’s Vehicle was being driven on the 1st left lane at the low speed of around 10 km/hr. It must be borne in mind that the evidence shows that Hoi Shing Road was a busy road within an industrial area, where vehicles were parked on both lanes for loading and unloading. Further, it is common ground that it was raining at the material time.
3. The plaintiff’s evidence is that it was when P’s Vehicle reached about the front of D2’s Vehicle that D2’s Vehicle suddenly moved and crossed into the 2nd left lane. According to the 1st defendant, he checked the right mirror (without performing a shoulder check) before proceeding to move D2’s Vehicle from the 1st left lane to the 2nd left lane, but did not see P’s Vehicle. It was therefore his impression that P’s Vehicle had approached from behind at a relatively high speed. That was why after the Accident he and the plaintiff had an argument at the scene as to who was at fault. I accept the 1st defendant’s account as being truthful and reliable.
4. It was suggested by the plaintiff’s counsel that P’s Vehicle might have been at the “blind spot” of D2’s Vehicle when the 2nd defendant checked the mirror. However, when the plaintiff testified, he did not refer to any alleged “blind spot”.
5. In the circumstances, I find the plaintiff to have fallen below the standard of a reasonable driver in driving at 30-40km/hr, even though that was below the speed limit of 50 km/hr. I also find the plaintiff to have contributed in causing the Accident by travelling at an excessive speed. I take the view that had the plaintiff been driving prudently, it is more likely than not that the Accident could have been avoided, given the low speed D2’s Vehicle was travelling at.
6. I consider that the Accident was a result partly of the plaintiff’s own fault and partly of the 1st defendant’s fault, and they are both equally blameworthy. Having regard to the plaintiff’s share in responsibility, it is just and equitable that any damages to be awarded to the plaintiff should be reduced by 50%.

*QUANTUM*

1. The plaintiff claims under four heads of damages, *viz*:-
2. PSLA
3. Pre-trial loss of earnings.
4. Loss of earning capacity.
5. Special damages.
6. The plaintiff was born on 13 August 1984. At the time of the Accident, he was 31 years old and was self-employed as a van driver. He alleges that he was earning around HK$1,500 per day.
7. After the Accident early in the morning, the plaintiff allegedly parked P’s Vehicle back home, and only attended the A&E department of Caritas Medical Centre later in the afternoon. It was recorded in the medical report prepared by the Caritas Medical Centre that:-
8. The plaintiff attended the A&E department at 18:13 on 11 June 2016.
9. The plaintiff met with the Accident at 8 am on the same day and he had neck sprain, with no head injury. There was no loss of consciousness and no limb weakness or numbness.
10. There was no local tenderness , and the range of movement of the neck was normal.
11. X-ray cervical spine showed no fracture.
12. The plaintiff was discharged with analgesics, and sick leave from 11 June 2016 to 12 June 2016 was granted.
13. The plaintiff had undergone a total of 17 physiotherapy sessions from 16 August 2016 to 14 December 2016 at the Tuen Mun Hospital. The plaintiff also visited The Tin Shui Wai (Tin Yip Road) Community Health Centre for treatments for around 20 times from 13 June 2016 to 16 December 2016. A total of 202 days of sick leave were granted to the plaintiff.
14. According to the plaintiff, as a result of the Accident, he is suffering from neck pain, which increases with change of weather, rotation, prolonged shoulder elevation and sitting, or keeping the neck still in one posture. He also says that he has to take medicine to relief the neck pain, which causes him insomnia occasionally.
15. The 2nd defendant challenges the alleged injury and conditions of the plaintiff. He submitted that the Accident involved only a minor collision, and the plaintiff should not have suffered the injury and conditions alleged.
16. On the issue of quantum, the plaintiff’s evidence is most unsatisfactory. A number of the plaintiff’s allegations do not sit well with the documentary evidence.
17. In paragraph 5 of the plaintiff’s witness statement, it was said that after the accident the he felt paint to his neck, and he went to the A&E department of the Caritas Medical Centre in the afternoon because of severe pain to his neck.
18. However, according to the medical report prepared by the Caritas Medical Centre dated 28 February 2017, it was recorded that “[the plaintiff] had neck sprain” but “There was no local tenderness” and “Range of movement of neck was normal”.
19. In paragraph 8 of the plaintiff’s witness statement, it was said that after 17 physiotherapy sessions, he felt that his backpain began to improve, and the Tuen Mun Hospital stopped his physiotherapy and instructed the plaintiff to exercise his neck on his own at home.
20. However, in the Physiotherapy Report prepared by Tuen Mun Hospital, it was recorded that the plaintiff defaulted follow up after 14 December 2016.
21. In paragraph 12 of the plaintiff’s witness statement, it was said that the plaintiff still felt pain to his neck at the time of the witness statement (31 July 2018), and he sometimes had to take painkillers as he could not fall asleep at night due to his neck pain. This, however, was not documented in the medical reports produced.
22. Having considered all the evidence, I come to the view that the plaintiff’s injury and condition is not as serious as he alleged. In particular, in the Physiotherapy Report prepared by the Tuen Mun Hospital, it was noted in relation to the last physiotherapy session the plaintiff attended on 14 December 2016 (after which the plaintiff defaulted) that *“ROM of neck flexion, bilateral side flexion and rotation to bilateral side were of full range with no pain. ROM of neck extension was of full range with mild left side pain.”*, and there was an overall improvement of 90%.

*PSLA*

1. The pleaded claim for PSLA was in the sum of $350,000 in the Revised Statement of Damages.
2. In the plaintiff’s opening, it was submitted that an award between $120,000 and 150,000 is appropriate. The following cases were referred to by the plaintiff:-
   1. *Tai Yuk Wong v Chong Kwok Fung & Anor* DCPI 1405/2005, 8 March 2006, in which the plaintiff suffered a whiplash injury to his neck. He had persistent neck pain and weakness on his upper limbs for about a year and sick leave was granted for about 2 years. The court awarded HK$150,000 for PSLA.
   2. *Tsang Ho Sang v Sunbase Environmental Hygiene Ltd* DCPI 1422/2013, 7 December 2015, in which the plaintiff suffered tenderness over his left neck, left shoulder and left buttock as he was thrown out of a van. He suffered from neck pain and limited range of movement. 4 months of sick leave was considered appropriate by the court, and PSLA was awarded at $150,000.
   3. *Ko Hoi Seung Korin v Liu Kwok Keung* HCPI 1206/2014, 12 August 2016, in which the plaintiff suffered mild tenderness over her neck as a result of a traffic accident. Physical examination revealed tenderness and soft tissue swelling over the lower cervical spine region, neck range of motion limited by pain and paraspinal muscle spasm. PSLA of $140,000 was awarded.
   4. *Tong Yuk Tai v NEP Holdings International (HK) Limited & Anor* DCPI 1121/2014, 11 December 2015, in which the plaintiff suffered from persistent neck pain, tenderness and reduced range of motion as a result of a road traffic accident. The plaintiff was granted 186 days of sick leave. PSLA of $120,000 was awarded.
   5. *Kwan Wing Leung v Fung Chi Leung & Anor* DCPI 2489/2013, 24 July 2014, in which the plaintiff was injured in a traffic accident and suffered persistent pain on the neck, upper back and right arm, with range of movement of his neck limited by pain. 4.5 months of sick leave was accepted by the court as appropriate, and PSLA of $120,000 was awarded.
   6. *Chan Lung Hing v Ng Kam Man* HCPI 405/2021, 20 June 2014, in which the plaintiff suffered neck and back pain as a result of a road traffic accident. Tenderness over posterior neck and back and range of movement of his neck was reduced to half. PSLA in the sum of $120,000 was awarded.
   7. *So Kim Lung v Lee Pak Wai* HCPI 494/2010, 1 November 2012, in which the plaintiff suffered from neck pain and lower back pain and mild tenderness on the lower spines region. Range of neck and back movement was reduced. The court held that sick leave of 6 months was appropriate, and PSLA was awarded in the sum of $120,000.
3. I consider the plaintiff’s injury to be significantly less serious than these cases, particularly in view of the matters set out in paragraphs 35-36 above.
4. In the circumstances, I consider PSLA in the sum of $80,000 to be appropriate.

*Pre-trial loss of earnings*

1. The plaintiff alleges that he was earning an average of $1,500 per day as a self-employed van driver. The claim for pre-trial loss of earnings was therefore claimed at $1,500 x 202 days (sick leave) = $303,000.
2. The 2nd defendant disputes that, and says that the plaintiff’s earning would be around $650 per day.
3. In order to support the plaintiff’s claim of his earning, the plaintiff’s tax return dated 12 June 2016 (the day after the Accident) filed with the Inland Revenue Department was produced. The plaintiff declared in the tax return that he was self-employed as a driver for the period from 1 September 2015 to 31 March 2016, with a total income of $162,000. The average monthly income declared was therefore $162,000 / 7 months = $23,143. I consider this to be the more reliable and reasonable figure to be adopted in calculating the plaintiff’s per-trial loss of earnings.
4. The treating doctors granted a total of 202 days of sick leave. However, as the Court of Appeal noted in *Tam Fu Yip Fip v Sincere Engineering & Trading Co Ltd* [2008] 5 HKLRD 210 at paragraphs 17-18, the court is not bound by the sick leave certificates issued by the treating doctors and is free to evaluate the period of appropriate sick leave in light of all the available evidence. Having considered all the evidence, I find the reasonable period of sick leave to be 3 months.
5. The plaintiff’s pre-trial loss of earnings is therefore $23,143 x 3 months = $69,429

*Loss of earning capacity*

1. Loss of earning capacity was claimed at $150,000, calculated as 4 months of the plaintiff’s income at $1,500 per day (for 26 days a month).
2. As noted above, I shall adopt $23,143 as the appropriate figure for the plaintiff’s monthly income. Further, I consider an award of around 1 month of the plaintiff’s average income to be appropriate under this head.
3. I shall therefore assess damages at the lump sum of $24,000 for loss of earning capacity.

*Special damages*

1. The plaintiff claims under 4 items of special damages:-
2. Medical expenses of $3,200.
3. Travelling expenses of $3,000.
4. Repair costs of P’s Vehicle at $23,200.
5. Fee for the survey report of P’s Vehicle at $800.
6. Tonic food/nourishment/medication at $3,000.
7. In my view the following sums should be awarded for special damages:-
8. The claim for medical expenses is supported by the relevant receipts and is allowed at $3,200.
9. In relation to the claim for travelling expenses, as no receipt has been referred to the court, I shall assess a reasonable sum of $1,000 for the trips to hospitals.
10. Repair costs was assessed at $16,940 by the surveyor, which is a reasonable sum in the court’s view and an award shall be made in that sum.
11. Surveyor’s fee of $800 is also reasonable and shall be allowed.
12. As no receipt has been referred to the court for tonic food/nourishment/medication, and the plaintiff has not established any need for such extra expenses over and above the medical expenses already awarded, no award is made for this item.
13. In summary, special damages is awarded in the total sum of $21,940.

*CONCLUSION*

1. Taking into account my finding that the plaintiff is 50% contributory negligent, the 1st and 2nd defendants shall be jointly and severally liable to the plaintiff for damages in the total sum of $97,685, as follows:-
   1. PSLA in the sum of $80,000 x 50% = $40,000
   2. Pre-trial loss of earnings of $69,429 x 50% = $34,715
   3. Loss of earning capacity of $24,000 x 50% = $12,000
   4. Special damages of $21,940 x 50% = $10,970
2. I award interest on general damages for PSLA at 2% per annum from the date of service of the writ up to the date of judgment, and interest on pre-trial loss of earnings and special damages at half Judgment Rate from the date of the Accident up to the date of judgment.
3. I also make an order *nisi* that the 1st and 2nd defendants shall be jointly and severally liable to the plaintiff for the costs of the action, to be taxed if not agreed.
4. I thank Mr Tse, the 1st defendant and the 2nd defendant for their assistance.
5. I direct the Court Interpreter to attend the handing down of this judgment for interpreting it into *punti* to the 1st defendant, if so required.

( Tony Ko )

Deputy District Judge

Mr Marco S P Tse, instructed by Au & Associates, for the plaintiff

The 1st defendant was not represented and was acting in person

The 2nd defendant was not represented and was acting in person