#### DCPI2289/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2289 OF 2008

BETWEEN

CHAN YUK KING Plaintiff

and

TUNG CHUN Defendant

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

Dates of Hearing: 21 and 24 September 2010

Date of Delivery of Judgment: 24 September 2010

## J U D G M E N T

1. The plaintiff claimed against the defendant for injuries sustained at an accident on 14 December 2005 at 5.35 pm at Wang Kwun Road, close to the junction with Lam Wah Street in Kowloon Bay, Kowloon.

The Plaintiff’s Case

1. The plaintiff, Miss Chan, was a pedestrian walking along Wang Kwun Road in the direction of Lam Wah Street after a meeting with a client in the area. She stopped at the pavement when she received a telephone call on her mobile phone. While she was talking on the phone, she looked to her left and then to her right. She saw a taxi about 20-30 metres away. She looked at her left-hand side again at Wang Kwun Road before stepping on to the road from the pavement. After walking about 3-4 steps, she was hit on her right arm by the front part of a taxi, KV5987 driven by the defendant, heading south on Wang Kwun Road towards the junction with Lam Wah Street. The plaintiff, Miss Chan, after the collision, fell backwards and fell on to the ground landing on her buttocks. The impact resulted in severe pain over her buttocks and her back. The police was called and the ambulance summoned.
2. She was taken to the United Christian Hospital by the ambulance after the accident. She was discharged on the same day after conservative treatment and painkillers prescribed. She re‑admitted herself at the Accident & Emergency Department of the Queen Mary Hospital the day after the accident because of persistent pain over the coccygeal region. X-ray performed at the hospital shown there was a fracture of the coccyx. She received manipulation of the sacrococcygeal fracture under local anaesthesia at the Department of Orthopaedics & Traumatology of the Queen Mary Hospital. She was discharged after 2-3 days in the hospital. However, she sought further treatment at St Paul’s Hospital between 21 and 22 December 2005, due to increased pain. She was followed up at the Queen Mary Hospital and by Dr James Lam at the Centre for Orthopaedic Surgery. She also received physiotherapy treatment first at the Centre for Orthopaedic Surgery and later at the Ruttonjee and Tang Shiu Kin Hospitals which took place from April to July 2006.

The Defence Case

1. The defendant is a driver with 30 years’ driving experience. He became a professional taxi driver about 3 years before the accident, before then he had been a lorry driver for a few years.
2. He claimed he was driving at 20 kilometres per hour along Wang Kwun Road when he saw the plaintiff, Miss Chan, walking along the pedestrian pavement on Wang Kwun Road towards the Lam Wah Street junction. He said he saw her talking on her mobile phone. As he drove past her, he suddenly noticed a dark shadow rushing out from the payment into the road next to his taxi. He braked and found Miss Chan had fallen on the ground. He got out of his taxi and found a few pedestrians had already come up to help Miss Chan to get up from the ground. After the police arrived, he told the police what had happened. He also gave a police a statement a few days later. After the police completed investigation of the accident, no charges were laid against him.
3. It is the defence’s case that the plaintiff had failed to keep a proper lookout or regard to the traffic on the road when she crossed Wang Kwun Road, and that she had contributed wholly or materially to the accident.

Issues on Liability

1. The issues are:

(1) whether the defendant was negligent and liable for causing the accident; and

(2) whether the plaintiff contributed wholly or partly to the accident.

Analysis

1. The evidence of the plaintiff, Miss Chan, was she had stopped at the pavement, looked to her left, then looked to her right and looked again to her left before she crossed the road. She said she did notice the defendant’s taxi when she was looking to her right. She saw the taxi was travelling down the road, it was about 20 to 30 metres from her. She then looked to her left before crossing the road diagonally. However, after 3-4 steps she was knocked down by the defendant’s taxi. She claimed the point of collision was the left front part of the taxi against her right forearm.
2. The defendant, Mr Tung, on the other hand, claimed that Miss Chan had rushed out of the road as the front part of his taxi had just passed her. He claimed the point of collision between the plaintiff and his taxi was the left passenger door, just behind the wing mirror.
3. According to the policeman’s sketch plan of the scene after the accident at page E282 of the bundle, the plaintiff, Miss Chan, marked as ‘V’ (meaning “the victim”), was located at the middle of the left side of the taxi. Mr Tung was cross‑examined on the proximity of his taxi to the pedestrian pavement, he disagreed it was 1.4 feet at the front end and 1.23 feet at the rear end from the pedestrian pavement. He claimed his taxi was travelling about 3 feet from the pavement. He also said in the policeman’s sketch, his taxi was in the middle of the road, therefore it cannot be 1.3 or 1.4 feet from the pedestrian pavement when his car was located at the middle of the lane.
4. Mr Tung was further cross-examined on his own sketch which he drew at the time he gave a statement to the police at the police station (page E285 of the bundle). He was apparently asked to draw the position of the plaintiff when he first saw her and then the point of collision with his taxi. He claimed the sketch was not to scale and he insisted the plaintiff was not on the road. He claimed she was walking on the pedestrian pavement towards Lam Wah Street when he first noticed her and there were 4-5 pedestrians walking on the pavement down Lam Wah Street at the time.
5. According to Mr Tung’s police statement at page E283 of the bundle, lines 4-5 at paragraph 3, he said the plaintiff was walking close to the kerb of the pedestrian pavement towards Lam Wah Street. Similar description appeared at paragraph 2 of his witness statement filed for the purposes of this trial at page C64 of the bundle. There he said the plaintiff was talking on her mobile phone while she was walking on the pedestrian pavement.
6. From the evidence adduced by both the plaintiff and the defendant, and judging from the police statements made by them and the policeman and the police sketch plan, I am satisfied when Miss Chan decided to cross the road she was talking on her mobile phone and her attention was divided because of that. Thus, even though she did notice the defendant’s taxi travelling down the road towards her, and even though she noticed it was about 20-30 metres from her, she failed to heed the distance between the taxi and herself before she crossed the road. This shows there was a lack of judgment on her part in regard to her own safety, even though the car was travelling at a relatively slow speed.
7. A car travelling at 20 kilometres per hour cannot be said to be travelling at a fast speed, this was the speed Mr Tung said he was travelling. However, when the distance was 20-30 metres from Miss Chan, it would take only a few seconds, 4-5 seconds to be exact, for the car to drive up to where Miss Chan was. Probably because Miss Chan notified the taxi was not travelling at a high speed, she decided to begin crossing the road. When she did so, she obviously wrongly estimated that she could cross the road before the taxi came up to her. She admitted she had her back to the taxi as she was crossing the road diagonally looking only to her left, watching the traffic coming from her left. Consequently, within 4-5 seconds from the time she first saw the defendant’s taxi she collided with the taxi, it was within 3-4 steps after she descended from the pavement. On the other hand, the defendant, Mr Tung, as the driver of the taxi - a professional driver - should have kept a proper lookout for pedestrians crossing the road. He should also have kept a proper lookout for pedestrians who were not paying full attention to the traffic on the road, such as Miss Chan, whom he noticed was talking on her phone.
8. I am not convinced that on the police sketch, the police had used the imperial measurement. Judging from the location of the defendant’s taxi on the sketch, it was situated at the middle of the lane, the measurement marked on the sketch plan of 1.4 and 1.23 (in Chinese, “尺”) should be metric measurement. “尺”, in Chinese, can mean the imperial ‘foot’ or the metric ‘metre’. Further, the sketch plan was drawn on grid paper that had a scale of 1:200. I agree with Mr Wong who submitted the measurement of 5 mm equals to 1 metre on the sketch paper. Based on the aforesaid, I accept Mr Tung’s evidence that his taxi was about 3 imperial feet, which is approximately 1 metre, from the pedestrian pavement when he drove past Miss Chan. This tallies with the measurement marked down by the policeman after the accident of 1.4 to 1.23 metres from the pavement. I also accept that the taxi collided with Miss Chan’s arm just behind the wing mirror, for the front of the taxi would be too low to come into contact with Miss Chan’s right arm with which she was holding her mobile phone. She admitted to be right-hand dominant and she would have her right hand next to her head, with her elbow at around the area just above her waist. This indicated the taxi had just passed her when she collided with the area behind the wing mirror on the passenger door side of the taxi.
9. It follows that Miss Chan, based on the analysis of the scene, the description in the police statements and the police sketch, had contributed to the accident. In my assessment, her contribution is more than 50%. I assess her contributory negligence to be 75% and that she is 75% liable due to her failure to watch out for the traffic coming from her right. She failed to keep a proper lookout when she, instead of looking to her right first then to her left and the right again, as all primary students are taught for the type of traffic system we have in Hong Kong. Maybe in the mainland one would look at the left then the right and left again, in Hong Kong, we drive on a different side of the road.
10. She also crossed the road diagonally, meaning she had her back to the traffic coming from her right, furthermore, she was talking on her mobile phone at the same time. Had she looked at the traffic on her right immediately before she crossed, she would have noticed the defendant’s taxi approaching close to her, she would have stopped crossing the road and thus could have avoided the accident. The defendant, on the other hand, is to a certain extent liable for his failure to watch out for pedestrians on the road, therefore he is liable to the extent of 25%.

Quantum

1. The plaintiff’s injury was described by the Queen Mary Hospital’s Department of Orthopaedics & Traumatology as tenderness over the sacrococcygeal region. X-rays showed there was acute angulation at the sacrococcygeal junction. She was treated conservatively and underwent physiotherapy treatments both at the Ruttonjee and Tang Shiu Kin Hospitals and the Centre for Orthopaedic Surgery. She was followed up by doctors at the Queen Mary Hospital until 8 September 2006. She also received treatment privately at St Paul’s Hospital and the Centre for Orthopaedic Surgery after the accident until October 2007. She claimed she suffered from pain over her back and buttocks. The MRI scan taken on 18 March 2006 showed she had an S4 fracture(i.e. of the sacral segment). She had 13 physiotherapy sessions between 25 April 2006 and 18 July 2006 at the Ruttonjee and Tang Shiu Kin Hospitals. She defaulted after that and failed to attend a course of primus training which was to take place on 21 July 2006. The physiotherapist, Mr C S Yeung, reported that she benefited from the physiotherapy treatments and had a subjective improvement of 70% on 19 May 2006. According to Mr Yeung’s report, she fell from the stairs on 2 July 2006, causing her increased back pain, but there was still a 70% subjective improvement of her condition.
2. Her current problem and current complaint is that she still had pain and tenderness with stiffness over her back and buttocks particularly with changes of the weather. She also complained that there would be pain after she walked for prolonged periods or sat for a prolonged period of time. It also happened when she carried heavy weights. She used to take painkillers and she would go for acupuncture treatments to relieve the pain. She would also used a soft cushion when the pain occurred. She claimed she would feel tired easily and her sleep had been disturbed, further, she would feel nervous crossing a busy road. She alleged that she no longer played tennis or badminton which she used to play once a week. She claimed she had also stopped hiking and ballroom dancing after the accident. On the advice of her doctor to take up more exercise, she had resumed swimming.
3. She claimed she was told the injury to the coccygeal region would affect child-bearing. She therefore did not get pregnant again after the accident, even though she had intended to have a child with her present husband before the accident. Her income had increased after the accident, but she claimed she could have earned even more but for the accident. She claimed she felt tired and lack of energy after the accident which affected her performance as a sales and marketing manager.

Pain, Suffering and Loss of Amenities

1. The joint medical report of Drs Chien and Lam dated 31 March 2010 indicated that the plaintiff’s MRI and x-ray showed she had suffered from contusion with fracture of S4 or an acute traumatic angulation of the sacrococcygeal junction. As the sacrum and coccyx have no mobile intervertebral discs or spinal roots, even with a fracture of the region there would be no lower limb pain, numbness or weaknesses. Both doctors agreed the plaintiff had received standard treatments and they were appropriate and the treatment progress was satisfactory. They also agreed if she had back pain, it should be of minor in nature.
2. Dr Lam commented that the chronicity, intensity and diffused involvement of Miss Chan’s current complaints are out of proportion to a sacrococcygeal contusion sustained 4 years ago, even if there was a fracture. While Dr Chien considered the traumatic injury to the sacrococcygeal area could cause persistent pain from prolonged sitting, particularly if there was a facture. Both doctors agreed she had reached maximum medical improvement stage and can resume her pre-accident occupation. They further agreed a well-healed fracture at the sacrum would not give contra-indication or complication for pregnancy and childbirth. Dr Lam assessed Miss Chan’s loss of earning capacity or impairment of the whole person to be 2%, while Dr Chien suggested a 5% impairment of the whole person and loss of earning capacity. Dr Lam commented that this type of injury would heal in 1-3 months, seldom leaving a disability. He said a 3-month sick leave period would be appropriate, while Dr Chien thought the sick leave period granted by her doctor was appropriate.
3. At the joint examination and interview with Drs Chien and Lam on 22 March 2010, Miss Chan told the two doctors she had off and on low back pain 3-4 times a week, particularly when she sat for over 1½ hours or walked for over 1½ hours, when she lifted weight, rose from a squatting position, wore high heel shoes and engaged in sports such as tennis and badminton. After resting for 1 hour the pain would subside. She had stopped taking painkillers by the time she was interviewed by the two doctors. She claimed her back muscle was stiff and her sleep was affected occasionally and she would get emotionally upset more frequently, causing her headaches. She was observed by the doctors to have sat without distress, risen smoothly from her chair, walked normally unaided and stood on either leg with stability. She had also walked on tiptoes and on her heels, squatted fully and risen without support. The doctors examined her back and found no superficial tenderness or stress over the sacroiliac joint or paraspinal muscle spasm.
4. Mr Wong, counsel for the defendant, relied on two cases. In the case of *Lauw Ka Fong v Best City Limited,* HCPI436/2004, where the plaintiff sustained lower back sprain, subluxation of the coccyx, linear fracture at S1 and fine cortical fracture at S3 of the sacrum, with persistent residual pain, Suffiad J awarded the plaintiff under PSLA the sum of $300,000. In the case of *Chan Kwei Duen v East Country Co. Ltd. t/a Gold River Vietnamese Food Shop*, DCPI 665/2005, the plaintiff, who suffered from severe low back pain, partial posterior dislocation of coccyx and mild spondylosis at C5 and C6 was awarded $200,000 under PSLA. Mr Wong submitted in the present case an award under PSLA of $200,000 to be appropriate.
5. Mr Lai, counsel for Miss Chan, on the other hand, referred to the cases of *Ahmed Masood v Chung Kau Engineering Co. Ltd,* DCPI517 of 2003, where Judge Ng awarded $130,000 to the plaintiff, who sustained mild back sprain at a fall at the construction site where he worked. The medical expert assessed the plaintiff to have suffered from 2-3% of impairment to the whole person. In the case of *Woo Wai Kuen v Li Siu Keung t/a as Alex’s Kitchen*, DCPI309/2001, Deputy Judge Yu awarded the sum of $150,000 to the plaintiff who suffered a crack fracture to the sacrum with no displacement, leading to persistent pain at the lower back and sacral region. She also complained of experiencing numbness of both big toes and that she could not lie flat on her back. In the doctor’s assessment, she suffered 5% impairment of the whole person.
6. From the discomfort and pain described by Miss Chan in the present case, based on the two medical expert opinions of Dr Chien and Dr Lam, considering the authorities referred to me my assessment of the appropriate pain, suffering and loss of amenities award is $140,000.

Pre-trial Loss of Earnings

1. Miss Chan returned to her work part-time 3 months after the accident and resumed full-time work on 16 July 2006. According to the medical expert report, including Miss Chan’s own doctor, Dr James Lam, the physiotherapist, Mr Yeung and the Queen Mary Hospital reports, Miss Chan had recovered 70% by May 2006, 5 months after the accident. She had also dropped out of the course of physiotherapy suggested by the Ruttonjee and Tang Shiu Kin Hospitals physiotherapist in July 2006. This indicated she was well enough to resume full-time work and she did. For this reason, I consider 5 months’ sick leave to be an appropriate period. Her fall on 2 July 2006 and the later tennis accident were unfortunate but they were unrelated to the incident in this case, though these might have affected her general health condition and her back condition. The defendant accepted the 0.25 months’ leave certified by Dr Chien for the period of 8 December 2006 to 14 December 2006. For this reason, I will adopt the same.
2. Based on her average monthly income at the time of the accident of $21,212.50, which was calculated as an average income for the 12 months previous to the accident, the loss including MPF is:

$21,212.50 x 5.25 x 1.05 = $116,934.

Loss of Earning Capacity

1. Miss Chan returned to her previous employment after her sick leave. She has been similarly employed up to the date of the trial. Her income had increased during the four years since she resumed full-time work with the same employer. She told the court that her job now is more demanding because it involved more travelling to the mainland due to the relocation of the offices of the toy factories which are her customers. These are changes due to the economic environment and Miss Chan has adapted to the work environment changes. It is commendable that she has been coping with the changes to her job and has tried hard to cope with changes to her job. She claimed that she had expected before the accident to work up to the age of 60, but the accident had rendered it impossible.
2. I do not think the change of Miss Chan’s working environment due to changes in the economy in Hong Kong should be taken into account when one assesses the loss of a claimant to a traffic accident, because these changes are not caused by the accident. The fact that Miss Chan is earning more than before the accident testifies to the fact that she is hard-working and able to cope with the work well. As there is no danger of her losing her present job, I do not think I should make an award under the head of loss of working capacity.

Medical Expenses and Travelling

1. Under medical expenses, Miss Chan produced receipts in support of the medical care and treatments she received in the sum of approximately $20,722, but her claim for medical expenses is $31,232. I agree sometimes not all receipts are retrievable but some support must be given to the actual expenditure for such recovery. In this case, I will make an allowance in the sum of $25,000.

Travelling Expenses

1. Miss Chan claimed $4,000 for medical visits travelling expenses. The defence accepted this sum. I consider this sum of $4,000 to be reasonably incurred and I allow it in full.

Tonic Foods

1. There are no receipts produced for the $2,000 claimed. This sum is not challenged by the defence. I consider $2,000 for the type of injury and pain suffered by Miss Chan to be a reasonable sum and I allow it.

Medical Aid

1. The claim of $300 is accepted by the defendant and I find this sum is negligible and reasonable.
2. The total sum assessed under this head of medical expenses and miscellaneous expenses is as follows:

(1) Medical treatment : $ 25,000

(2) Travelling expenses : $ 4,000

(3) Tonic foods : $ 2,000

(4) Medical aid : $ 300

\_\_\_\_\_\_\_\_

: $ 31,300

\_\_\_\_\_\_\_\_

Interest

1. The usual interest for general damages is 2% per annum from the date of the writ to the date of judgment, i.e. from 28 October 2008 to 24 September 2010. I will for the present purpose and ease of calculations allow 23 months:

$140,000 x 2% x 23/12 = $5,367

1. The interest on pre-trial loss is based on half judgment rate from the date of accident to the date of judgment i.e. at 4% from 14 December 2005 to 24 September 2010 (57.3 months). The calculation is:

$(116,934 + 31,300) x 4% x 57.3/12 = $28,312.70

1. I will round it up to $28,313.

Summary

(1) PSLA : $140,000.00

(2) Loss of pre-trial earnings : $116,934.00

(3) Medical and other expenses : $ 31,300.00

(4) Interest $5,367 + $28,313 : $ 33,680.00

\_\_\_\_\_\_\_\_\_\_\_

: $321,914.00

Less contributory negligence 75% : $241,435.50

\_\_\_\_\_\_\_\_\_\_\_

25% compensation : $ 80,478.50

\_\_\_\_\_\_\_\_\_\_\_

1. As this sum is smaller than the workman’s compensation that Miss Chan received, I shall leave the calculation to the parties to work out what the difference should be.

(Submissions on costs)

1. The plaintiff shall bear 75% of the defendant’s costs, costs to be taxed if not agreed with counsel’s certificates.

# (H C Wong)

# District Court Judge

Mr Alex Lai, instructed by Messrs Hon & Co., for the Plaintiff

Mr Martin Wong, instructed by Messrs Deacons, for the Defendant