# DCPI 2374/2018

[2022] HKDC 1266

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

# PERSONAL INJURIES ACTION NO 2374 OF 2018

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BETWEEN

THOMAS FISKER HANSEN 1st Plaintiff

DORTHE FISKER HANSEN 2nd Plaintiff

and

TANG WAI KEUNG 1st Defendant

DIAMOND ELECTRONICS HONG KONG

COMPANY LIMITED 2nd Defendant

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Coram: Deputy District Judge B Mak in Court

Date of Hearing: 4-5 & 7 July 2022

Date of Judgment: 3 November 2022

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JUDGMENT

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*Introduction*

1. This action arose out of a traffic accident happened on 28 October 2013 at about 11.25 pm at Salisbury Road while the 1st and 2nd plaintiffs were travelling as passengers in a taxi and were injured.
2. At the commencement of the trial, Mr Brian Wong, counsel for the 1st and 2nd defendants, informed this court that the 1st defendant would not dispute liability whereas the 2nd defendant would put the plaintiff to strict proof on liability.

*The plaintiffs’ case against the 2nd defendant*

1. The plaintiffs say that the 2nd defendant was the owner of the private car bearing registration No KY9532 which was at the time of the accident driven by the 1st defendant as its employee.
2. Under cross-examination, the 1st defendant said he was employed by the 2nd defendant as driver and that at the time of the accident, he was working for the 2nd defendant and was on over-time work.
3. In the premises, the 2nd defendant, as the employer of the 1st defendant, is liable for the act of negligent driving of the 1st defendant which caused the accident: see *Clerk & Lindsell on Torts*, 23rd Ed at 6-28.

*Contributory negligence of the 1st plaintiff*

1. In the re-amended consolidated defence, the defendants pleaded contributory negligence on the part of the 1st plaintiff in that he had failed to wear a seat belt and had engaged himself in much travelling after the accident so as to cause the resulting tenderness to his injury.
2. The English authority of *Froom v Butcher* [1976] 1 QB 286 at 292 held that in determining whether the plaintiff had been guilty of contributory negligence, the question was not what was the cause of the accident but what was the cause of the damage. In seat belt cases, the damage is caused in part by the bad driving of the defendant, and in part by the failure of the plaintiff to wear seat belt. If the plaintiff was to blame in not wearing a seat belt, the damage is in part the result of his own fault. He must bear some share in the responsibility for the damage, and his damages fall to be reduced to such extent as the court thinks just and equitable.
3. The principle was adopted by the Court of Appeal in *Ho Wing Cheung v Liu Siu Fun and another*, CACV 96/1979, 30/4/1980, unreported, adding (at page 7) that it should be applied only to such injuries, and the consequences therefrom, as could have been prevented by the wearing of a seat belt.
4. It is common ground that the 1st plaintiff was not wearing a seat belt at the time of the accident. However, no evidence was called on the effect of the lack of seat belt on the injury sustained by the 1st plaintiff.
5. Mr Brian Wong, counsel for the defendants, submitted that the failure to wear a seat belt in itself open the passenger to a greater risk or greater harm. The 1st plaintiff should be responsible for his failure to take care of himself.
6. In my view, both *Froom* *(supra)* and *Ho Wing Cheung (supra)* firmly held that contributory negligence only applies to the injuries that could have been prevented if the plaintiff had taken certain protective measure which he had failed to do so. In other words, there must be a causal link between the injury or injuries and the failure on the part of the plaintiff to take certain protective measure. It does not follow that contributory negligence would come into play automatically upon the finding that the plaintiff had failed to take any protective measure.
7. In order to establish contributory negligence on the part of the 1st plaintiff, therefore, evidence on the effect of the failure to wear a seat belt on the injury sustained by him is required. With respect, I do not accept Mr Wong’s submission that the fact of not wearing a seat belt thereby exposing himself to a greater risk is enough to hold the 1st plaintiff responsible in part.
8. Accordingly, I reject the defendants’ plea of contributory negligence against the 1st plaintiff.
9. Mr Wong made no submission to support the defendants’ claim of contributory negligence by reason that the 1st plaintiff had engaged himself in much travelling after the accident. In any event, such plea is unsustainable for the obvious reason such act of the 1st plaintiff, if any, only took place after the accident.

*Pre-existing condition of the 1st plaintiff*

1. The 1st plaintiff was jointly examined by Dr Wong See Hoi and Dr Hung Siu Lun Tony on 25 November 2016 whereby a joint medical report dated 22 December 2016 was complied.
2. Mr Wong referred to paragraphs 24-25, 29 and 33 of the joint report and submitted that the 1st plaintiff had a pre-existing condition on his neck, upper back and right rib before the accident. The extent of the residue effect of the soft tissue injury sustained at the accident was contributed by the pre-existing condition of the neck and chest. Mr Wong urged this court to reduce the award on PSLA by 30%.
3. Dr Wong did not share Dr Hung’s opinion. He took the view that it was beyond the scope of the assessment. He further opined that based on the information provided, the diagnosis was soft tissue injury to the neck and right chest and the mechanism of the accident was compatible with the injury.
4. The opinion of Dr Hung requires further analysis.
5. Dr Hung noted from the chiropractor record that the 1st plaintiff first visited a chiropractor on 8 January 2013, ie 10 months before the accident. A chest X-ray on the right side was taken. Dr Hung opined that it was for the purpose investigating the cause of pain. Furthermore, in the first visit after the accident, ie on 1 November 2013, it was recorded that “… Sustained no immediate complaints, but now has tenderness in the neck and thoracic pain as before.”. This suggested that the 1st plaintiff had a prior pain condition before the accident.
6. The note of the chiropractor made on 1 November 2013 did suggest that the 1st plaintiff had tenderness in the neck and thoracic pain before the accident. Tenderness is pain or discomfort when an affected area is touched. It is not the same as the pain that a patient perceives without touching. Apparently, the chiropractor was investigating the cause of the 1st plaintiff’s symptom on 8 January 2013 by the taking of X-ray of his right chest. In the entry dated 1 November 2013, the diagnosis was recorded as “biomechanical dysfunction with muscular compensations”. It is, however, unclear if the said diagnosis was referring to the tenderness and pain of the 1st plaintiff before the accident or the injury caused by the accident or a combination of both.
7. At paragraph 29 of the joint report, Mr Hung said the following:-

“If Mr. Hansen had a pre-existing condition of myofascial pain before the subject accident, the persistent treatment after he returned to Denmark would have been mainly due to his pre-existing condition rather than the accident on 28 October 2013.”

1. Dr Hung was assuming that if the 1st plaintiff had a pre-existing condition of myofascial pain, the treatment that he received after the accident would be mainly for the prior pain and not that was caused by the accident.
2. However, at paragraph 33, Dr Hung made the following findings:-

“ … The myofascial pain, which caused him persistent symptom and worsened after exertion such as frequent travel, is due to his pre-existing problem, likely to be psychosomatic in origin. This has no relation with the accident on 28 October 2013.”

1. It appears that such findings were founded on an assumption that he had made at paragraph 29.
2. It may be said that the 1st plaintiff did have tenderness in the neck and thoracic pain prior to the accident, there is no evidence as to the severity of the pre-existing condition. Dr Hung has not given reason for holding the opinion that the myofascial pain was wholly due to his pre-existing problem and has nothing to do with the accident. In any event, Dr Hung has not given opinion on the scenario the 1st plaintiff has fallen into according to *Chan Kam Hoi v Dragages et Travaux Publics* [1998] 2 HKLRD 958.
3. Therefore, I do not accept that the award on PSLA should be reduced by reason of the prior tenderness in the neck and thoracic pain of the 1st plaintiff.

*Pre-existing condition of the 2nd plaintiff*

1. In the answer to revised statement of damages, the defendants said that Dr Hung opined that the 2nd plaintiff likely to have pre-existing degenerative changes of the cervical spine.
2. No submission on the question was however made by Mr Wong.
3. In any event, Dr Hung only mentioned in passing that the 2nd plaintiff was likely to have degenerative changes of her cervical spine at C6/C7 level at the time of the accident but did not say that this has any relevance to her soft tissue injury of the neck.

*Pain, suffering and loss of amenities*

1. Both Dr Wong and Dr Hung were of the opinion that the 1st plaintiff had suffered soft tissue injury to the neck and the right chest. They were also of the view that treatment of this kind of injury would normally need a few months (Dr Wong’s opinion) or 2 to 3 weeks (Dr Hung’s opinion). Dr Wong opined that the 1st plaintiff has reached the stage of maximal medical improvement and the prognosis is fair to good whereas Dr Hung opined that the prognosis is excellent. Dr Wong assessed the whole person impairment (“WPI”) at 1-2% for the soft tissue neck and 2% for the soft tissue right chest. Dr Hung assessed the WPI at 0-0.05%.
2. Dr Wong diagnosed that the 2nd plaintiff had suffered soft tissue injury (musculo-tendinous) of the right side of neck and trapezius whereas Dr Hung opined that she suffered from soft tissue injury of the neck. She did not receive any treatment of the injury. Dr Wong was of the opinion that the lack of adequate treatment might account for her persistent residual symptoms of pain over the right side of the neck and right scapula up to the head etc. Dr Wong opined that the 2nd plaintiff has reached maximal medical improvement and the prognosis is fair to good. Dr Hung opined that the residual disability of neck problem should be minimal and only occasional. The prognosis in general should be good. Dr Wong assessed the WPI at 2-3% whereas Dr Hung at 1%.
3. Mr Richard Yip and Mr James Lung, counsel for the plaintiffs, submitted that the plaintiffs’ injuries are comparable to the plaintiffs in *Ko Hoi Seung Korin v Liu Kwok Keung*, HCPI 1206/2014, 12/8/2016, unreported, and *Lam Ka Wah v Fan Kin Shing* [2022] HKDC 298. Taking into account of inflation, they submitted that each plaintiff should be award $200,000 on PSLA.
4. Mr Wong cited *Siu Leung Shang Peter v Chung Wai Ming*, HCPI 43/2006, 16/3/2007, unreported, *Lai Ka Yin v Chan Yiu Kei*, DCPI 453/2008, 7/1/2009, unreported, *Fan Jian Hui v Chan Hak Man*, DCPI 2095/2008, 16/6/2009, unreported, *Li Kam Wah v Ng Ying Tuen*, DCPI 386/2001, 9/8/2002, unreported, and submitted that the award on PSLA for the 1st plaintiff should be no more than $100,000 and no more than $60,000 for the 2nd plaintiff.
5. In my view, the injuries sustained by the 1st and 2nd plaintiffs were somewhere between the plaintiff in *Ko Hoi Seung Korin (supra)* and the plaintiff in *Lai Ka Yin (supra)*. In *Ko Hoi Seung Korin*, the plaintiff sustained whiplash injury causing a sprained neck with soft tissue (paraspinal and trapezius muscles) involvement. An award of $140,000 was given. In *Lai Ka Yin*, the plaintiff suffered from soft tissue injury of the neck and soft tissue injury of the back in which an award of $50,000 was made.
6. Considering the similar nature of the injuries of the 2 plaintiffs, I would award $100,000 on PSLA for each of them.

*Loss of earning capacity*

1. This head of damage arises where a plaintiff is at the time of the trial in employment, but there is a risk that he may lose this employment at some time in the future, and may then, as a result of his injury, be at a disadvantage in getting another job or an equally well paid job: see the speech of Lord Browne, LJ in *Moeliker v A Reyrolle & Co Ltd* [1977] 1 WLR 132 at p140B.

*The 1st plaintiff*

1. It is submitted on behalf of the 1st plaintiff that he is still suffering from the residual symptoms of the accident. He anticipated that he would be required to resume the past travelling pattern after Covid-19. He might lose his job because of his inability to travel frequently.
2. In his evidence-in-chief, the 1st plaintiff said as a result of the accident, he had persistent back pain and neck pain when travelling by plane. Before the accident, he travelled once in 2 weeks and spent 100 to 150 days on travelling per year. After the accident, it would be very hard for him to resume the same pattern of travelling. If he does not travel to other countries, it is highly likely that he would lose his job and income. He has to rely on painkiller to relieve the pain.
3. Under cross-examination, the 1st plaintiff said that he had lower back pain before the accident. Both Dr Wong and Dr Hung were of the opinion that the treatment of the injury sustained by the 1st plaintiff due to the accident would normally need a few weeks (Dr Hung’s opinion) or a few months (Dr Wong’s opinion). By logical inference, the chiropractic treatment he received thereafter was more likely than not due to the pain in his lower back. So is the discomfort he felt after travelling or prolonged sitting for more than hours. Both doctors were of the view that he should be able to resume his pre-injury work.
4. In such circumstances, I do not accept that the 1st plaintiff is still suffering from the residual symptoms of the accident. I do not see any risk that he may lose his job due to the injury caused by the accident.
5. Under cross-examination, the 1st plaintiff agreed that he was able to resume to his pre-accident job without any reduction of income. As such, he is not returning to his pre-accident employment with added vulnerability as the learned judge found for the plaintiff in *Gurung Bhaktak Bahadur v Green Valley Landfill Ltd*, HCPI 333/2009, 28/1/2011, unreported.
6. Accordingly, I do not find that the claim of loss of earning capacity of the 1st plaintiff is made out.

*The 2nd plaintiff*

1. In respect of the 2nd plaintiff, it is submitted that she is still suffering from the residual symptoms of the accident. As around 33% of her working time was cleaning work, she will run the risk of losing her employment and suffer a handicap in the open labour market.
2. The 2nd plaintiff attended Laegerne Skovbrynet’s clinic after her return to Denmark. However, no treatment of any kind was given to her. She resumed her pre-accident job as a cleaner in a hotel without sick leave.
3. Dr Wong opined that the accident caused soft tissue injury (musculo-tendinous) to right side of neck and trapezius of the 2nd plaintiff. The lack of adequate treatment might account for her persistent residue symptoms. The localized pain around the right side of her neck and trapezius was compatible with mild inflammation over the injured musculo-tendinous structure.
4. At the trial, the 2nd plaintiff said she is now a supervisor of cleaning lady. As she is now assuming management level duties, she does not do cleaning work as much as before. She approximately does 10 to 12 hours of cleaning work per week which is about 33% of her working time.
5. It seems to me that the 2nd plaintiff’s job was not affected by the injury. Since the accident, she was even promoted to supervisory level whereby she is only spending one third of her working hours on cleaning work. There is no indication that her job is at risk by reason of the injury.
6. With the advancement of her job position, it is highly unlikely that she will suffer a disadvantage in the labour market. In any event, according to Dr Wong, her persistent symptoms were due to the lack of treatment upon her return to Denmark. Even if she would have difficulty in getting another job due to the persistent symptoms, she only has herself to blame.
7. Therefore, I do not find that the claim of loss of earning capacity of the 2nd plaintiff is made out.

*Special damages and post-trial expenses*

1. The parties have agreed to the following special damages:-

1st plaintiff 2nd plaintiff

Medical expenses $6,000 $1,139

Tonic food expenses $5,000 $5,000

Travelling expenses $11,500 $43,428

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Total: $22,500 $49,567

1. The parties also agreed the post-trial expenses at $10,000 for the 1st plaintiff and at $5,000 for the 2nd plaintiff.

*Summary of the award*

1. In summary, I award the following damages in favour of the 1st and 2nd plaintiffs:-

1st plaintiff 2nd plaintiff

PSLA $100,000 $100,000

Medical expenses $6,000 $1,139

Tonic food expenses $5,000 $5,000

Travelling expenses $11,500 $43,428

Post-trial expenses $10,000 $5,000

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Total: $132,500 $154,567

*Interest*

1. Interest on PSLA shall run at 2% per annum from the date of writ to the date of judgment and thereafter at judgment rate until payment.
2. Interest on special damages shall run at half judgment rate from the date of accident to the date of judgment and thereafter at judgment rate until payment.

*Costs*

1. I make a costs order *nisi* that the 1st and 2nd defendants shall pay the 1st and 2nd plaintiffs the costs of this action (including all costs reserved) with certificate for one counsel, to be taxed if not agreed.
2. Unless an application is made by summons for variation within 14 days from the date of this judgment, the costs order *nisi* shall become absolute.

( Brian Mak )

Deputy District Judge

Mr Richard Yip leading Mr James Lung, instructed by Or & Partners for the 1st and 2nd plaintiffs

Mr Wong Chao Wai, Brian, instructed by Simon Si & Co, for the 1st and 2nd defendants