## DCPI 2685/2017

[2021] HKDC 684

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2685 OF 2017

--------------------------

BETWEEN

CHING KWONG FAT Plaintiff

and

FUNG DIN CHUNG RICKIE 1st Defendant

SILVER HORIZON HOLDINGS LIMITED 2nd Defendant

-------------------------

Coram: His Honour Judge H. Au-Yeung in Court

Dates of Hearing: 12 May 2021 and 27 May 2021

Date of Judgment: 7 June 2021

--------------------------

JUDGMENT

--------------------------

*BACKGROUND*

1. This is the trial in respect of the plaintiff’s claim herein arising from a traffic accident which happened on 23 April 2016 (**“the Accident”**).
2. At the beginning of the trial, Mr Wong informed the court that the defendants would no longer dispute that the 1st defendant was negligent. However, they maintained that there was contributory negligence on the part of the plaintiff which led to the Accident.
3. As far as quantum is concerned, parties had reached agreement on special damages (subject to the defendants’ argument on contributory negligence) as follows:

|  |  |
| --- | --- |
| **Heads of damages** | **Amount** |
|  |  |
| Medical expenses | $795 |
| Travelling expenses | $1,000 |
| Tonic food | $5,000 |
| Forfeiture of taxi deposit | $5,000 |

1. The only outstanding issues on quantum are:
   * 1. The appropriate amount of damages on PSLA;
     2. The appropriate discount which the court should apply on the damages of PSLA to reflect the pre-existing conditions of the plaintiff; and
     3. The amount of pre-trial loss of earnings.

*CONTRIBUTORY NEGLIGENCE*

*The Accident*

1. At the material time:
   * 1. the plaintiff was the driver of a taxi (**“the Taxi”**);
     2. the 1st defendant was the driver of a private car (**“the Car”**), and the 2nd defendant was the registered owner of the Car;
     3. the plaintiff was driving the Taxi along the left-most lane of the roundabout of Tsuen Tsing Interchange (**“the Roundabout”**);
     4. the 1st defendant was driving the Car along the second left lane of Texaco Road Side Road towards the Roundabout.
2. While the Taxi was approaching the meeting point of Texaco Road Side Road and the Roundabout, the Car entered the Roundabout, and appeared in front of the Taxi. The plaintiff then swerved the Taxi to his right in an effort to avoid any collision, but in vain.
3. While admitting that the 1st defendant was negligent, Mr Wong contended that the plaintiff should also be blamed for his failure to avoid the collision.
4. Before I go into the particular points made by Mr Wong, I would set out the general principles applicable to contributory negligence first.

*The legal principles*

1. Mr Wong for the defendants has referred this court to the case of *Jones v. Livox Quarries Limited* [1952] 2 Q.B 608, in which Denning L.J. had the following to say:

“Although contributory negligence does not depend on a duty of care, it does depend on foreseeability. Just as actionable negligence requires the foreseeability of harm to others, so contributory negligence requires the foreseeability of harm to oneself. A person is guilty of contributory negligence if he ought reasonably to have foreseen that, if he did not act as a reasonable, prudent man, he might be hurt himself; and in his reckonings he must take into account the possibility of others being careless.

Once negligence is proved, then no matter whether it is actionable negligence or contributory negligence, the person who is guilty of it must bear his proper share of responsibility for the consequences. The consequences do not depend on foreseeability, but on causation. The question in every case is: What faults were there which caused the damage? Was his fault one of them? The necessity of causation is shown by the word ‘result’ in section 1(1) of the Act of 1945, and it was accepted by this court in *Davies v. Swan Motor Co. (Swansea) Ltd* [1949] 2 KB 291.

There is no clear guidance to be found in the books about causation. All that can be said is that causes are different from the circumstances in which, or on which, they operate. The line between the two depends on the facts of each case. It is a matter of common sense more than anything else…

In my opinion, however, foreseeability is not the decisive test of causation. It is often a relevant factor, but it is not decisive…” (at pages 615 – 616)

1. In the course of his argument, Mr Wong has also referred this court to a number of authorities in which the question of contributory negligence was considered in the context of different traffic accidents. However, one must bear in mind what Kwan JA (as she then was) reminded us in the case of *Yau Kam Ching v Cheung Shun Kau* (HCMP 1339/2014, unreported, 15 August 2014):

“…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.’” (at paragraph 14)

*What exactly happened*

1. There were initially some disagreements between the parties as to some of the details of how the Accident happened. Fortunately, the Accident was captured by a car-camera installed on another vehicle which was travelling behind the Taxi[[1]](#footnote-1), and as a result, those disputes could be put to rest.
2. Taking into account those parts of the plaintiff’s evidence which were unchallenged and the said video footage of the Accident, I find that the Accident happened in the following way:
   * 1. At the material time, the plaintiff was driving the Taxi along the left-most lane of the Roundabout at the speed of around 35km/h;
     2. As aforesaid, the 1st defendant was driving the Car along the second left lane of Texaco Road Side Road towards the Roundabout. Contrary to what the plaintiff alleged in the Statement of Claim and in his witness statement, the Car did stop before the give-way line before entering the Roundabout;
     3. The Car suddenly entered the Roundabout very slowly and appeared around 3 to 4 metres in front of the Taxi;
     4. In order to avoid collision with the Car, the plaintiff swerved the Taxi to his right;
     5. Contrary to what the plaintiff alleged in his witness statement, he actually did not apply his brake when he saw that the Car was entering the Roundabout, but only did so sometime after the collision.

*The defendants’ allegations against the plaintiff*

1. In his written closing submissions, Mr Wong summarised what he said could be seen from the video footage. The relevant parts are reproduced below:

|  |  |
| --- | --- |
| “10:48:01 | Taxi appeared at the left of the white van in the middle of the frame |
| 10:48:02 | Taxi (blocked in the captured screen as it was in the front of the white van) was able to view (open to front) the waiting line where the Car was waiting to drive out on the road (the pole near the waiting line shows, clear view at frame 10:48:08)  No slowing down of Taxi and continued to drive at 35km/h |
| 10:48:03 | Taxi (blocked in the captured screen as it was in the front of the white van) was travelling and there was (open to front) full view of Car and the black van to the Car’s left ready to drive into the road in front  No slowing down and continued to drive at 35km/h |
| 10:48:04 | Taxi continued to have full view that Car and the black van were on the move. Car passed the pole and indicative that it was entering into the lane the Taxi was on  No slowing down. No braking. |
| 10:48:05 | Taxi with full view that Car had moved out of the waiting line. The black van to the left of the Car had already moved past the Car at least for half a car length  No slowing down. No braking |
| 10:48:06 | Car had moved out of the waiting line and was in front of the Taxi.  No slowing down. No braking. |
| 10:48:07 | Taxi swerved to the right side of the Car and there was a collision where the left front/side of the Taxi collided with the right side of the Car  No slowing down. No braking.” |

1. When considering whether the plaintiff should also be blamed for the Accident, Mr Wong for the defendants has invited this court to take the following matters into account:
   * 1. The plaintiff did see the Car stopping before the give-way line of Texaco Road;
     2. The plaintiff maintained that he was travelling at the speed of 35km/h and he did not slow down at all;
     3. The plaintiff did see the Car and others were mounting onto the lane the Taxi was on whilst approaching the give-way line;
     4. The plaintiff was well aware that the Car was entering the Roundabout, but he chose not to sound the horn;
     5. The plaintiff had made a decision not to or failed to brake when the Car was on the left-most lane of the Roundabout whilst the Taxi was behind it;
     6. It was the Taxi which collided with the Car when it was trying to avoid it from behind;
     7. The 1st defendant was driving the Car slowly into the Roundabout at the material time;
     8. After the collision, the Taxi continued to move forward and stopped at the lane to its right. Another taxi on the said lane braked and was able to avoid collision with the Taxi;
     9. The plaintiff’s physical condition at the time of the Accident.
2. The allegations raised by the defendants may be grouped under different sub-headings, and I will deal with them one by one below.

*Failing to keep a proper lookout*

1. Mr Wong alleged that the plaintiff had at least 5 seconds in “noting the position of the Car and its probable intent to drive out of the waiting line with other vehicles”[[2]](#footnote-2). He came to the figure of “5 seconds” by counting from the time when, he submitted, the plaintiff should have seen that the Car was waiting before the give-way line (10:48:02) and the time when the Taxi collided with the Car (10:48:07).
2. I do not think the reference points of time adopted by Mr Wong were appropriate.
3. As far as the starting time (10:48:02) is concerned, I am of the view that while it is easy for Mr Wong to say, when he watched the video clip knowing what had happened at the material time, that the plaintiff should have noticed the existence of the Car, we must bear in mind that the plaintiff was driving the Taxi in a roundabout, rather than along a straight road. That means it was more difficult for the plaintiff to look far ahead. Considering the situation by standing in the plaintiff’s shoes, I am of the view that it would be more reasonable to require the plaintiff to notice the existence of the Car sometime after 10:48:03 (that is, around the time when the Taxi passed the Texaco Road exit).
4. For the ending time, I do not think we should count until the time when the Taxi collided with the Car. We should only count up to the time when the Car entered the Roundabout which was between 10:48:05 and 10:48:06, because that was the time when the plaintiff should react in a reasonable way.
5. In other words, the plaintiff only had less than 3 seconds to note the position of the Car.
6. Mr Wong argued that the plaintiff must have failed to keep a proper lookout because it was the plaintiff’s pleaded case, which was supported by his witness statement exchanged for this action, that the 1st defendant did not stop the Car before the give-way line at all, but it has now been shown by the video footage that the 1st defendant had in fact stopped completely before the give-way line (the plaintiff also accepted that to be the case when he was cross-examined in court). It was said that the failure on the part of the plaintiff to note the Car’s complete stop must show that he had not paid proper attention to the Car.
7. There were indeed conflicting versions given by the plaintiff on whether the 1st defendant had stopped the Car before the give-way line.
8. However, I note that in the plaintiff’s witness statement given to the Police on 10 May 2016 (which was only slightly more than 2 weeks after the Accident), he stated that the 1st defendant did stop the Car before the give-way line before entering the Roundabout. There is no evidence adduced as to why the plaintiff had pleaded in the Statement of Claim as well as stated in his witness statement otherwise. Mr Wong suspected that the pleaded matters in the Statement of Claim were taken from the Brief Facts of the related Careless Driving case against the 1st defendant[[3]](#footnote-3), which the 1st defendant admitted upon his guilty plea to the charge of “Careless Driving” on 4 October 2016.
9. I would accept what the plaintiff told the Police on 10 May 2016 that he had indeed noticed that the Car had stopped before the give-way line, because that was said shortly after the Accident. When the plaintiff was cross-examined on this matter in court, he had also quickly pointed out that what he stated in his witness statement in this regard was incorrect. The plaintiff was not further cross-examined on why he had given a different version of event in his pleading and witness statement, and I am not going to speculate why. What is important is that if I accept the plaintiff’s evidence that he did notice the Car having stopped before the give-way line, then the defendants’ argument in this regard falls away.
10. Mr Wong then argued that the plaintiff had failed to pay attention to the Car by referring to the fact that he had failed to stop the taxi in time to avoid the collision. As I will explain below, I am of the view that the plaintiff could not have stopped the Taxi in time to avoid the collision even if, as suggested by the defendants, he had applied his brake. This argument is therefore rejected.
11. By reasons of the above, I am not satisfied that the plaintiff had failed to keep a proper lookout at the material time.

*Failing to brake*

1. It is now indisputable that the plaintiff did not apply the brake when he saw the Car coming out to the Roundabout, because according to the video footage, the brake lights of the Taxi were never on, until around 10:48:10 (which was after the collision). He said he was very confused at the time because the Car just came out suddenly. All he did was to swerve the Taxi to the right.
2. The question is whether the plaintiff should be held contributorily negligent for failing to apply his brake.
3. According to the plaintiff’s evidence, when the Car entered the Roundabout in front of him, it was just around 3 to 4 metres away from the Taxi. Mr Wong confirmed during closing submission that this evidence was not challenged.
4. According to the Road Users’ Code (**“Code”**) produced by Mr Wong, the shortest stopping distance of a car travelling at 40km/hr is 20 metres (10 metres thinking distance[[4]](#footnote-4) + 10 metres actual braking distance[[5]](#footnote-5)). The Taxi was travelling at 35km/h at the material time. The Code does not say what the stopping distance should be for a vehicle travelling at such a speed, but I do not think it would be substantially shorter than 20 metres, and in any event, it would not be as short as 3 to 4 metres. In other words, even if the plaintiff had applied his brake, he could not have stopped the Taxi in time to avoid the collision.
5. Mr Wong then submitted that the Taxi should have but had never slowed down.
6. The plaintiff told the court (and it was not disputed) that he was travelling at 35km/h at the material time. I have watched the video footage, and I do not consider that he was going at an excessive speed in the light of the traffic condition at the time. Although the plaintiff should have seen that there were vehicles waiting before the Texaco Road Side Road give-way line to enter the Roundabout, I do not think it is reasonable for the law to require the plaintiff to travel at a speed which was so slow that it could brake in time even if a very careless driver, like the 1st defendant, would suddenly enter the Roundabout most unexpectedly, and when it was so close to the approaching traffic (i.e. the Taxi).
7. Mr Wong then invited the Court to take into account the fact that there was another taxi (**“the Other Taxi”**) which could stop in time and avoid hitting the back of the Taxi which, after the collision, stopped in the middle of the road. With respect, this argument cannot assist the defendants’ case at all because the position of the Other Taxi was totally different:
   * 1. When the Car suddenly entered the Roundabout and appeared right in front of the Taxi on the leftmost lane of the Roundabout, the Other Taxi was still on the rightmost lane (separated by a middle lane). In other words, the driver of the Other Taxi had had adequate time to react;
     2. When the Other taxi was switching to the middle lane, the Taxi was in the course of swerving to the right and eventually switched to the middle lane as well for the purpose of avoiding the Car. When the Taxi moved to the middle lane, it was still much more than 3 to 4 metres away from the Other Taxi.
8. Mr Wong also submitted that it is also necessary to consider the fact that the Car was driving slowly into the Roundabout at the material time. In my view, this fact cannot assist the defendants either. In the circumstances of the present case, the fact that the Car entered the Roundabout as slow as it was actually made it even more dangerous for the Taxi, because, as I mentioned above, it was impossible for the Taxi to stop in time to avoid the collision.
9. Lastly, Mr Wong submitted that if the plaintiff had applied his brake, then at least the impact of the collision would be reduced, and in such a case the plaintiff should still share 20% of the blame.
10. As aforesaid, even if the plaintiff had applied his brake, the collision was unavoidable. Furthermore, given the very limited distance between the Car and the Taxi at the material time, and taking into account there is bound to be a “thinking distance” for the plaintiff to react upon seeing the Car entering the Roundabout, I am of the view that the impact which could have been reduced, if any, would be minimal.
11. I would therefore reject this argument.

*Failing to sound the horn*

1. During cross-examination, Mr Wong did attempt to ask the plaintiff about his failure to sound the horn at the material time. This line of cross-examination was objected by Mr Sham, who pointed out that “failure to sound the horn” was not one of the particulars pleaded in the Defence. As a result, Mr Wong had withdrawn this line of cross-examination.
2. However, in his closing submission, Mr Wong argued that the court can and should take “omission to sound a horn” into account when determining whether the plaintiff was negligent. He relied on paragraphs 11-258 and 11-260 of *Charlesworth & Percy on Negligence* (14th edition, 2018). In paragraph 11-258 thereof the learned authors stated that:

“…The omission to sound a horn or a bell is ‘a collateral fact only, and not an independent act of negligence’; by itself it is not evidence of negligence, although it may be taken into account, with other circumstances, in determining whether the driver or rider was negligent.”

1. With greatest respect, it is a very unfair approach to adopt. Needless to say, the failure on the defendants’ part to plead this specifically in the Defence renders it most unfair to the plaintiff if the defendants are allowed to take this point. Furthermore, given Mr Wong’s clear indication that he would withdraw his questions on the sounding of horn, I do not think it is up to Mr Wong to ambush the plaintiff at the closing submission stage.
2. Moreover, no matter whether “omission to sound a horn” is just “a collateral fact” or “an independent act of negligence”, if the court is to take this matter into account, in my view, the court should also consider the reason why the plaintiff failed to sound the horn. However, by reason of Mr Wong’s withdrawal of the question at the trial, Mr Sham had found it unnecessary to re-examine the plaintiff on this area.
3. In any event, even if the defendants are allowed to take this point, I would have no hesitation in rejecting it anyway. It must be borne in mind that at the material time, the plaintiff was given only very limited time to react. He was trying his best to swerve the Taxi so as to avoid collision with the Car. He should not be blamed even if he did not sound his horn during that very short time.

*Failing to drive in good physical condition*

1. Mr Wong invited the court to take into account the fact that the plaintiff worked for 16 – 18 hours a day, and for 30 days a month. He pointed out that the plaintiff was already 65 years old at the material time, and that he had just recovered from another injury shortly before the Accident. It was therefore submitted that “there is a likelihood that the plaintiff was still taking analgesic and attending physiotherapy treatments prior to the Accident for his persistent neck stiffness and right upper limb numbness”[[6]](#footnote-6).
2. This line of submission may be dealt with quickly.
3. I accept the plaintiff’s explanation that he had had adequate rest even though he was driving on “special shift” (which means “day and night shift”, by which he had the use of the taxi for 24 hours). I am not prepared to infer that the plaintiff was not in good physical condition at the material time.
4. Further, as aforesaid, since the Car only entered the Roundabout when the Taxi was really close to it, there was no way that the Taxi could avoid the collision.
5. The defendants have failed to establish that the Accident was partly contributed to by the physical condition of the plaintiff.
6. The defendants’ argument is therefore rejected.

*Failing to stop after the Accident*

1. From the video footage, it can be seen that the Taxi had continued to move forward after the collision and only stopped at some distance away. Mr Wong submitted that this shows the momentum of the Taxi at the material time.
2. In my view, given my finding that the Taxi’s speed of 35km/h was not excessive, the fact that the Taxi did not stop right after the Accident is neither here nor there. The Taxi’s momentum after the collision is also irrelevant.

*Conclusion on contributory negligence*

1. To conclude, I am not satisfied that the plaintiff was contributory negligent in causing the Accident.

*PSLA*

*Injuries and treatment*

1. After the accident, the plaintiff was admitted into Yan Chai Hospital. He had head and neck injuries. He had loss of consciousness and vomited after the Accident and complained of both upper limbs numbness.
2. Examination at the hospital revealed that:
   * 1. The plaintiff was fully conscious;
     2. His cranial nerve was grossly normal;
     3. His 4 limbs power was graded at 4 out of 5;
     4. He had tenderness over mild cervical spine;
     5. X-ray neck and CT brain showed that there was no obvious traumatic lesion.
3. Spinal board and neck collar were applied. The plaintiff was admitted into the Orthopaedic Ward of Yan Chai Hospital, and was discharged on the following day on 24 April 2016, with outpatient physiotherapy and orthopaedic assessment.
4. The plaintiff then had a stroke on 17 September 2016 with right side hemiparesis. By the time of the stroke, he was still on sick leave which was given by reason of the injuries allegedly suffered in the Accident.

*Joint expert report*

1. For the purpose of this trial, the plaintiff had been assessed by Dr. Law Yee Cheong Wally (the plaintiff’s expert) and Dr. Tsoi Chi Wah Danny (the defendants’ expert).
2. The experts agreed that the plaintiff’s diagnosis was:
   * 1. Soft tissue injury to the neck due to the Accident;
     2. Pre-existing cervical injuries and spondylosis;
     3. Stroke with right hemiplegia, which was unrelated to the Accident.

*Discussion*

1. As there is no dispute that the stroke which the plaintiff suffered in September 2016 was unrelated to the Accident, I will totally disregard the plaintiff’s disability caused by the stroke.
2. Mr Sham for the plaintiff has referred this court to *Choi Sun Hong v China Harbour Enterprise Constructions Ltd. & Another* (HCPI 1084/2007, unreported, 20 January 2010), *Au Yeung Miu Sum v Tsang Kwong Wai & Another* (HCPI 244/2001, unreported, 21 March 2003) and *Tang Chi Keung v Mung Ka Wai* [2018] HKCFI 1685 and submitted that the appropriate amount for the damages for PSLA should be between $320,000 and $330,000.
3. On the other hand, Mr Wong for the defendants submitted that the court should take into account the authorities of *Siu Leung Shang Peter v Chung Wai Ming* (HCPI 43/2006, unreported, 16 March 2007), *Lai Ka Yin v Chan Yiu Kei* (DCPI 453/2008, unreported, 7 January 2009) and *Fan Jian Hui v Chan Hak Man & Another* (DCPI 2095/2008, unreported, 16 June 2009) and that only $30,000 should be awarded as damages for PSLA.
4. The injuries suffered by the plaintiff by reason of the Accident were relatively minor. It seems to me that the injuries of the plaintiff in the present case were more similar to those suffered by the plaintiffs in the authorities quoted by Mr Wong than those quoted by Mr Sham. Having said that, I am of the view that the figure of $30,000 suggested by Mr Wong is too low. Subject to my ruling below on discount, I hold that the appropriate amount of damages for PSLA should be **$80,000**.

*PRE-EXISTING CONDITION*

1. It is undisputed between the parties that because of the plaintiff’s pre-existing conditions, the damages for PSLA (and only such damages) should be discounted. Mr Sham suggested 20% discount whereas Mr Wong proposed 50% discount.
2. The plaintiff had had various injuries to his neck because of traffic accidents, in 2000, 2004, 2009 and 2015 respectively.
3. According to Dr Tsoi, MRI taken in May 2010 showed that there was narrowing of intervertebral foramina with probable nerve root compression. Another MRI done on 5 October 2015 revealed that there were degenerative changes with possible right C5 nerve root compression. Dr Law did not disagree, and he also held the view that there was pre-existing cervical spondylosis.
4. It was also Dr Tsoi’s view that the plaintiff would have been affected by the pre-existing degenerative spine at any time in any event. Dr Law did not express any view on this matter. Mr Sham accepted that in such a case, Dr Law should be taken to be accepting Dr Tsoi’s view.
5. Mr Wong has referred me to the Decision in *Yu Wai Kan v Law Cho Tai* (HCPI 62/2010, unreported, 11 May 2011), in which the principles governing the issue of causation and quantification of loss in a case where there were pre-existing conditions on the part of the claimant had been summarised as follows:

“(a) The burden is on the plaintiff to establish on the balance of probabilities that the accident caused or materially contributed to the loss and damages he has sustained (see *CMY v Tam Siu Wing* [2008] 4 HKLRD 604, 613).

(b) The law’s approach to causation is pragmatic where there are several concurrent factors operating to cause injury (see *Lee Kin-kai, a patient by his father and next friend Li Wah v Ocean Tramping Co Ltd t/a Ocean Tramping Workshop* [1991] 2 HKLR 232, 236). A material contribution to the outcome is sufficient to impose liability for that outcome. A contribution which does not fall within the exception *de minimus non curat lex* must be material; and a cause is sufficient, it does not need to be the sole cause (see *CMY* at p.612).

(c) Causation is essentially a matter for the judge and not for the doctors. The judge will be assisted by the medical evidence but is not bound by it; he is not confined to those matters which the doctors may individually have picked out in their consulting rooms. It is important to bear in mind that law and medicine apply different standards. In law, there is a causal connection if it is shown on the balance of probabilities that the accident is a substantially contributing cause of the injury. On the other hand, the doctors practice the science of aetiology and look for ‘clinical cause’ or ‘irrefragable chain of causation’ which is to be proved beyond reasonable doubt or beyond any doubt (see *Lee Kin-kai, a patient by his father and next friend Li Wah* at pp.235-236, *Lee Sau Keung v Maxcredit Engineering Ltd & anor* [2004] 1 HKC 434, 450, and *Ansar Mohammad v Global Legend Transportation Limited* CACV 162/2010 (unreported, 24 March 2011) at para.22(2)).

(d) The wrongdoer must take his victim as he finds him so that the wrongdoer remains liable even though the severity or extent of the damage has been increased due to the victim’s *pre-*existing weakness or susceptibility to harm. This ‘thin skull’ rule (see *Charlesworth & Percy on Negligence* 12th ed para.5-26 at p.350) extends to ‘eggshell personality’ (see *Charlesworth & Percy on Negligence* 12th ed paras.5-31 – 5-33 at pp.351-352, *Lam Wing Ming v Dragages et Trauvaux Publics (HK) Ltd & anor* HCPI 1090/1995, Master A Chung (as he then was) (unreported, 21 July 1998) at paras.14-17, *CMY* at pp.610-613 and *Page v Smith* [1995] 2 All ER 736). Thus, if the primary victim has a *pre-*existing propensity to depression or psychiatric illness which is activated or re-activated by physical injury caused by the wrongdoer’s negligence, the wrongdoer cannot escape liability for the loss caused by the activated or re-activated depression even in rare or aggravated form by pleading lack of foreseeability once the relevant duty of care is established and personal injury of some kind is reasonably foreseeable.

(e) When considering the effect of a *pre-*existing condition on an award of damages, there are 3 possible scenarios. The first is where the plaintiff is almost certain to have gone through life unaffected by the condition, and the defendant will be liable for all damage caused. The second is where there is a strong possibility that some other event or natural progression of the condition will have brought about the plaintiff’s present state, so it will be necessary to assess the degree of the possibility in deciding what reduction is appropriate in the same way as it is necessary to assess the effect of other vicissitudes of life that may abbreviate the plaintiff’s working life or lifespan and thus abridge his loss. The third is where this will certainly have occurred at some stage in any event so that clearly an allowance has to be made but the extent of which depends on the evidence as to when the precipitating event will have occurred (see *Chan Kam Hoi v Dragages et Trauvaux Publics* [1998] 4 HKC 523, 527).

(f) Where a *pre-*existing condition is likely to lead to disability and loss in the absence of the injury for which the plaintiff is entitled to recover, the usual method of assessing the recoverable loss is to take account of the risks by an appropriate assessment of general damages. Past loss of earnings may also be reduced if the risks during the years concerned are sufficiently high. For future loss of earnings, a reduced multiplier is usually the most accurate way of giving effect to the findings on the medical evidence, especially when a plaintiff’s working life is likely to be limited by a *pre-*existing condition (see *Chan Kam Hoi* at p.529 and *Cheung Fat Tim v Wong Siu Ming trading as Kee Construction Company & anor* HCA 5079/1991, Findlay J (unreported, 17 January 1995)).

(g) The principles in (e)-(f) above have been developed by the courts to give the plaintiff reasonable compensation in order to achieve *restitutio in integrum*, which is the key objective in awarding loss caused by negligence.”

1. In the plaintiff’s evidence, despite previous neck injuries, he had already totally recovered by the time of the Accident. Although Mr Wong queried whether this was true, I accept the plaintiff’s evidence in this regard. If he had not recovered, I suppose he would have continued with his sick leave. However, he decided to resume his work on 22 March 2016 upon the expiry of his sick leave on 21 March 2016.
2. I am aware of the plaintiff’s evidence that he was in need of money at the material time. It may therefore be argued that he had resumed his work even though he had not totally recovered. However, I accept the plaintiff’s evidence that he had been working on “special shift” since 22 March 2016 up to the date of the Accident. It is therefore more probable than not that he had totally recovered, otherwise he would not be able to work for such long hours with his neck pain. It was also more likely that he would have chosen to work in either day shift or night shift rather than special shift had he not totally recovered.
3. While the expert evidence is that the plaintiff would have been affected by the pre-existing degenerative spine at any time in any event, there is no evidence that he would have been affected very shortly after his recovery in early 2016.
4. In the circumstances, I accept Mr Sham’s submission that only a discount of 20% should be applied to the damages for PSLA.
5. The amount of damages for PSLA should therefore be assessed at **$64,000** ($80,000 x 80%).

*PRE-TRIAL LOSS OF EARNINGS*

1. There are two issues under this head, namely, (1) the plaintiff’s monthly income; and (2) the period of pre-trial loss of earnings which should be counted.

*Monthly income*

1. It is the plaintiff’s evidence that he had been operating on “special shift”, which means that he had the use of the taxi round the clock. He told the court that, at the material time, he worked for 14 to 16 hours per day, and for 30 days a month. He said he was earning around $1,000 net per day, and therefore his monthly income was around $30,000.
2. Mr Wong challenged such evidence by relying on the Legislative Council Paper No.CB (4)618/18-19(07) which suggested that the monthly earnings of a single rentee-driver in the urban area of Hong Kong in the period between 2nd quarter of 2016 and 1st quarter of 2017 was around $17,563. However, as Mr Wong fairly accepted, this figure was not reflecting the income of a driver who, like the plaintiff, was driving on “special shift” for 30 days a month. The probative value of such a piece of evidence is therefore limited.
3. Mr Wong also questioned the value of the letter of the Transport Department dated 30 June 2020 (which was produced by the plaintiff), in which it was stated that the average daily net income per taxi in 2016 was $1,230. He submitted that it is unknown how “income” was defined, and there is no explanation on how many drivers were operating the taxi in question.
4. With respect, I do not think Mr Wong’s queries are necessary. I think, on the face of the said letter, the meaning is clear. It simply means what it says: average daily net income per taxi.
5. Furthermore, the figures appearing in the said letter of the Transport Department are only average figures. As the plaintiff has given his evidence on his actual monthly earnings, he does not have to rely on such average figures at all.
6. The plaintiff explained that he was in need of money at the material time, and therefore he had worked very hard upon his recovery. That explains why he had worked for 14-16 hours daily and for 30 days a month at the material time. As pointed out by Mr Sham, Mr Wong has not challenged the plaintiff’s evidence in this regard during cross-examination.
7. There is no reason why I should not accept the plaintiff’s evidence on his earnings.
8. I therefore accept that, at the time of the Accident, he was earning $1,000 per day, and his monthly earning was $30,000.

*Sick leave period*

1. Dr Tsoi’s view is that:

“sick leave up to three months should be adequate for such relatively minor soft tissue injuries. The alleged slow progress is more related to the pre-existing degeneration.”[[7]](#footnote-7)

1. Mr Sham submitted that what Dr. Tsoi meant was that if the plaintiff had not suffered from pre-existing degenerative spine, he would have recovered in 3 months.
2. Mr Wong did not agree with Mr. Sham’s interpretation, and suggested that the “slow progress” must mean only the 3 months’ period.
3. It must be borne in mind that as a matter of fact, the plaintiff was still on sick leave by the time when he suffered from stroke on 17 September 2016, and that it was opined by Dr Law that the sick leave given by the treating doctors was appropriate and necessary. Viewed in such light, I think Mr Sham’s interpretation of Dr Tsoi’s opinion is more reasonable. The “alleged slow progress” referred to by Dr Tsoi must be in relation to the sick leave which was more than 3 months.
4. Mr Sham argued that the thin skull rule should apply, and Mr Wong has not argued otherwise.
5. In the circumstances, I agree that reasonable sick leave should be up to the date when the plaintiff suffered from stroke, that is, 17 September 2016.

*Calculation of pre-trial loss of earnings*

1. Pre-trial loss of earning is therefore assessed at **$144,000** ($1,000 x 144 days).

*SUMMARY OF DAMAGES AND INTEREST*

1. I set out the amount of damages awarded together with those items which had been agreed between the parties in the table below:

|  |  |
| --- | --- |
| **Heads of damages** | **Amount** |
| PSLA | $64,000 |
| Pre-trial loss of earnings | $144,000 |
| Medical expenses | $795 |
| Travelling expenses | $1,000 |
| Tonic food | $5,000 |
| Forfeiture of taxi deposit | $5,000 |
| Total: | $219,795 |

1. I make the following orders on interest:
   * 1. interest on special damages at half judgment rate from the date of the Accident up to the date of this Judgment;
     2. interest on PSLA at 2% per annum from the date of service of the writ of summons up to the date of this Judgment.

*COSTS*

1. I make a cost order *nisi* that the defendants shall bear the costs of the plaintiff (including all costs reserved, if any), with certificate for counsel, to be taxed if not agreed. The plaintiff’s own costs shall be taxed in accordance with the Legal Aid Regulations.
2. The above order *nisi* shall become absolute in the absence of application to vary (which shall be made by letter, if any) within 14 days hereof. Any application to vary the costs order *nisi* shall, with the consent of the parties[[8]](#footnote-8), be dealt with on papers.

( H. Au-Yeung )

District Judge

Mr Walker Sham, instructed by Au Yeung, Cheng, Ho & Tin, for the plaintiff

Mr Wong Chao-wai Brian, instructed by Simon Cheung & Co, for the 1st and 2nd defendants

1. The Taxi and that vehicle were separated by a white van – see the summary of video footage in paragraph 13 [↑](#footnote-ref-1)
2. Paragraph 25 of the defendants’ closing submissions [↑](#footnote-ref-2)
3. The Brief Fact stated that: “…當被告駛至交界讓線位時，未有停車…” [↑](#footnote-ref-3)
4. The distance the vehicle travels after the driver has seen the danger and before the brakes are on. [↑](#footnote-ref-4)
5. The distance the vehicle travels after the brakes have been put on before stopping [↑](#footnote-ref-5)
6. Paragraph 22 of the defendants’ closing submissions [↑](#footnote-ref-6)
7. Paragraph 66 of the Joint Expert Report dated 2 July 2019 [↑](#footnote-ref-7)
8. Consent of the parties has been given at the trial [↑](#footnote-ref-8)