#### DCPI 2711/2013

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO 2711 OF 2013

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BETWEEN

WONG SIU PUI Plaintiff

and

LAU TAK CHI Defendant

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##### Before: His Honour Judge Alex Lee in Court

Dates of Hearing: 10, 11, 14 – 16 September and 23 October 2015

Date of Judgment: 31 December 2015

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JUDGMENT

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*INTRODUCTION*

1. This is the plaintiff’s claim for personal injury against the defendant resulting from a traffic accident which, the plaintiff says, was caused by the defendant’s negligent driving. The defendant disputes both liability and quantum.
2. The accident occurred at about 11:30 pm on 21 October 2011 on Ching Cheung Road near Caritas Medical Centre in Sham Shui Po. The collision, which took place on the third (outermost) lane of the road westbound, was between the plaintiff’s motor cycle (a scooter) and the defendant’s medium goods vehicle (“mgv”). Each party put the blame on the other for the accident. Subsequently, only the defendant was charged by the police for careless driving but he was acquitted after trial. The records of the criminal proceedings, together with the statements, photographs and sketches taken by the police, are included as part of the trial bundle for the present civil claim.

*THE ISSUES*

1. In view of the different accounts given by the plaintiff and the defendant respectively, as far as the liability is concerned, the major issues are as follows:-
2. Was the accident caused, as the plaintiff asserts, by the defendant tailgating him, driving too fast in the circumstances and failing to stop in time? Or, was it the case, as the defendant asserts, that it was he who had cut into the third lane first and that the accident was caused by the plaintiff subsequently cutting sharply into the same lane without giving any warning or paying proper regard to the mgv and then decelerated suddenly, allowing him no time to avoid the collision?
3. Depending on the findings as to how the accident occurred, has it been shown that the defendant was negligent in what he did or failed to do?
4. If the answer to (ii) is in the affirmative, did the plaintiff contribute in any way to the accident and if so, to what extent?[[1]](#footnote-1)
5. There is no dispute that the plaintiff suffered injuries as a result of the accident. Subject to the issue of liability, in relation to quantum the issues are as follows:-
6. What should the amount of the general damages be?
7. Whether the plaintiff had suffered any compensable loss relating to his four-month sick leave when he had already been paid in full by his employer (the government) for that period?
8. Whether he should be compensated for any loss of earning capacity?

*THE ISSUES ON LIABILITY*

*(i) How the accident happened*

*Evidence*

1. On the issue of liability, there is the plaintiff’s own evidence on the one hand and that of the defendant and his employer Mr Au (the front seat passenger of the mgv) on the other. All the three witnesses adopted their respective witness statements as their evidence-in-chief and supplemented them with oral evidence in court.
2. The evidence of the plaintiff, in summary, is as follows. He was at the time riding the scooter from Shatin to the accident location through the Lion Rock Tunnel, intending to return home in Tuen Mun. Before the accident, he had been travelling on the second (middle) lane at about 60 km/h. Ahead of him were an engineering vehicle（工程車）and a trawler[[2]](#footnote-2), the distance between the latter two was about a car length. Seeing that the said two vehicles were moving at only about 20 to 30 km/h and that there was no traffic on his right, he decided to overtake them by cutting into the third lane. When he was on the third lane and approaching the engineering vehicle, much to his apprehension the latter moved close to the dividing line between the second lane and the third lane. He sounded the horn and reduced his speed to about 50 km/h. Seeing that the driver of the engineering vehicle signalled him to pass, he accelerated to 60 km/h again and overtook both the engineering vehicle and the trawler. When the engineering vehicle and the trawler were already some distance away, he intended to cut back into the second lane. However, he then perceived a “black shadow” following him and heard some noise from behind. He found that it was the mgv approaching. He was too frightened to react by either speeding off or cutting to the left. Shortly after, the scooter was hit at the rear. He fell and rolled on the ground. When he eventually stopped, he found himself sitting with his back leaning against the stone divider in the middle of the road and was unable to stand up. The place where he was sitting was about 10 metres away from the rear of the mgv. His case is that when the collision occurred his scooter was still travelling in the middle of the third lane. It is also his case that the scooter was hit by the middle of the front bumper of the mgv. Later, he saw the defendant and Mr Au walking towards him from the mgv. He asked them who the driver was and why he hit him. He did not hear either the defendant or Mr Au blaming him for the accident. Subsequently, he was admitted to the hospital.
3. The evidence of the defendant, in summary, is as follows. He was driving the mgv going from Kowloon Bay to the airport and his employer Mr Au was sitting on the front passenger seat. Before the accident, he was doing 60 km/h on the second lane of Ching Cheung Road. He saw the plaintiff’s scooter following the two slow vehicles emerging from the nearside lane (the first lane) to the second lane and the three vehicles were then doing about 40 to 50 km/h. The reason why the three aforesaid vehicles had to change to the second lane was that the first lane ahead was blocked by two vehicles with flashing arrow signs（箭咀車）[[3]](#footnote-3). Therefore, he slowed down to a similar speed as theirs and maintained a space of about a car length from the scooter. Having followed the scooter for about 8 seconds and seeing that the latter had no intention to overtake the vehicles in front, he then accelerated to 60 km/h and at the same time cut into the third lane. However, when the mgv had about 90% of its body inside the third lane, the plaintiff’s scooter without any warning or signal cut sharply in his front and then decelerated. The defendant immediately braked and steered to the right, but the left front bumper of the mgv still collided with the right side of the scooter. As a result, the plaintiff fell off between the third and the second lanes. When the scooter was entering the third lane, its speed was about the same as the mgv. When the plaintiff decelerated, the scooter had not yet totally entered the third lane. It was the defendant’s case that had the plaintiff not decelerated after cutting, the collision would not have happened. The defendant disagreed that he was tailgating the plaintiff and attempting to force the latter to let him pass. After the accident, the defendant asked the plaintiff, “Why did you cut lane and not put the indicator on?” The plaintiff did not reply. He then said, “You cut into the third lane and brake again”. The plaintiff also did not respond.
4. The defence witness Mr Au said that after the accident he went to the rear of the mgv and saw that the plaintiff was some distance away from the mgv crawling slowly toward the stone divider. The plaintiff asked him, “Why your vehicle hit me?” He replied, “Why were you so carelessly cutting lane?” As regards the cause of the accident, in summary, Mr Au said that the mgv was originally doing about 60 km/h on the second lane when he first noticed the trawler and the engineering vehicle coming from behind on the first lane. The two aforesaid vehicles had moved fast, overtook the mgv and cut in whilst the mgv slowed down to about 55 km/h. The mgv had followed the engineering vehicle on the second lane for just a while before it started to cut into the third lane with a view to overtake the engineering vehicle and the trawler. That was when the space between the mgv and the engineering vehicle was less than 15m. It was only then that he noticed that the scooter was following the engineering vehicle on the second lane. He was not clear about ever seeing the scooter cutting from the first lane. Both the engineering vehicle and the scooter were travelling faster than the mgv. After the mgv had moved on the third lane for about the distance between two lamp posts, the scooter suddenly and without any warning cut into that lane and then reduced its speed, with its brake light flashed once. The mgv also braked and steered to the right but was unable to avoid the collision, having the corner of its bumper hit the tail of the scooter. Had the scooter not braked after entering the third lane, the accident would not have happened.

*Assessment of the plaintiff’s evidence*

1. There are a number of difficulties with the evidence of the plaintiff. Firstly, he had given different versions on material aspects of the incident. Examples include the following:-
2. What steps had he taken before cutting from the second lane into the third lane?

* In his police statement[[4]](#footnote-4), he mentioned only that he had checked the rear-view mirror before cutting. At the criminal trial[[5]](#footnote-5) he testified in-chief, however, that he had turned on the right indicator and performed a shoulder check before looking at the mirror. In the witness statement which he prepared for this trial[[6]](#footnote-6) he mentioned the turning on of the right indicator and the checking of the rear-view mirror but missed out the shoulder check. In his top-up evidence in-chief, however, he added the shoulder check again. Bearing in mind that the plaintiff had been extensively cross-examined by Mr Pun[[7]](#footnote-7) at the criminal trial on this issue, one would expect the plaintiff to appreciate that the defence is alleging that he had cut into the third lane negligently and without warning to the defendant. Therefore, it is difficult to understand why the plaintiff would still have missed out the shoulder check in his witness statement if he in fact had performed one.
* His explanation that his solicitors had simply copied his police statement is, in my view, not satisfactory. First, the police statement contains no reference to the turning of the right indicator but his witness statement does. Secondly, the plaintiff mentioned in his witness statement but not in the police statement that the driver of the engineering vehicle had looked at him before signalling him to pass. Therefore, the witness statement, which was prepared almost three years after the police statement, actually contains more details and is not just a replica of the latter.

1. Where was his position when the engineering vehicle came close to the third lane?

* This issue has some significance because the plaintiff accepted that he had once reduced his speed whilst travelling on the third lane. It is the plaintiff’s case that he did that as a consequence of him being alerted by the seeming approach of the engineering vehicle on his left. In both the police statement and the witness statement, he said that the seeming approach of the engineering vehicle happened at the time when the two vehicles were abreast（平排）with each other. He said that he responded by sounding the horn and reducing his speed. He said also that he accelerated again after the driver of the engineering vehicle had signalled him to pass by waving hand[[8]](#footnote-8). Furthermore, he added in the witness statement that the driver had looked at him through the window before waving hand[[9]](#footnote-9). However, in his top-up evidence-in-chief, he said that the horn was sounded when he was still one to two car lengths behind the engineering vehicle and that he had eye contact with the driver when he was about half a car length behind the engineering vehicle. That is different from his written accounts.
* The above discrepancies apart, there is an added difficulty with the version he gave in the police statement and the witness statement. The plaintiff said that he had to change lane because the engineering vehicle and the trawler had been moving very slowly on the second lane. He put their speed at about 20 to 30 km/h. His own speed, however, was estimated to be a bit more than 60 km/h. Therefore, the difference in speed would be about 35 to 40 km/h. With that speed difference, if the scooter was already abreast with the engineering vehicle when the latter came close to the third lane, the scooter would have overtaken it in a split second. Even taken into account what the plaintiff said that he had reduced his speed to about 50 km/h after having sounded the horn, the scooter would still move much faster than the engineering vehicle so that it is unlikely that there could be sufficient time for him to have eye contact with the driver and to see the latter waving hand.

1. Did the movement of the engineering vehicle (or any other vehicle) have anything to do with the accident?

* It has been the plaintiff’s case that the movement of the engineering vehicle had nothing to do with the accident. He said also that there was a time gap between the moment when he first heard the strange noise from behind and the subsequent collision. In the criminal trial, he estimated the time gap to be less than 8 seconds[[10]](#footnote-10). If that was true, then he would have already outdistanced the engineering vehicle and the trawler when the collision with the mgv occurred, as according to him his speed was 30 to 40 km/h faster than the former two vehicles.
* However, at the criminal trial, when he was asked by the prosecutor whether he had already overtaken the engineering vehicle when he first notice the “shadow” (which turned out to be the mgv) behind him, he said that he did not noticed it[[11]](#footnote-11). This is to contrast with his evidence at the present trial (which was given 2 years after the criminal trial) that he had passed not only the engineering vehicle but also the trawler  [[12]](#footnote-12). Why is it that his recollection of the incident now has become clearer than 2 years before?
* The above discrepancies apart, more importantly his case (about his reduction of speed had nothing to do with the subsequent collision) appears to be contradictory to the very first account which he gave to the police officer who arrived at the scene shortly after the accident. According to the police officer, the plaintiff had told him that he (the plaintiff) was hit from behind by the mgv, as he had reduced his speed to avoid an unknown vehicle which had cut from the second lane into the third lane[[13]](#footnote-13). I note that the plaintiff had described to the police officer that the unknown vehicle was a private car. That is to contrast with his description of the engineering vehicle as a pickup truck with two flashing lights installed on its roof. Nevertheless, the point is that his very first account of the accident was that he was hit from behind because he had reduced speed to avoid the vehicle in his front.

1. Secondly, there are a number of inherent improbabilities in the plaintiff’s account of the accident:-
2. If the plaintiff had, as he said, checked the traffic behind before cutting into the third lane, then why was it that he had failed to notice the mgv? Where did the mgv come from?
3. He said that he had been travelling for some time on the third lane before he was hit by the mgv. If that were true, as mentioned above by then he would have already outdistanced the trawler and the engineering vehicle. The plaintiff’s evidence is that there were no vehicles in front of the trawler on the second lane. As such, whether or not he had already been in the process of cutting from the third lane back into the second lane, the simple way for him to avoid collision with the mgv was either to cut back to the second lane immediately or to speed off. The plaintiff’s explanation that he was at the time too shock to react is, in my view, hard to believe. According to him, he had a driving licence since 1984 and had been driving ever since. Therefore, by the time of the accident, he had already got more than 25 years of driving experience. As such, if there was a time gap of almost 8 seconds between the time he first noticed the “black shadow” and the collision, there should be sufficient time for him to respond to the situation.
4. He said that he was travelling in the middle of the third lane so did the mgv. He said that his scooter was hit at the rear. He said that after the accident, the plaintiff found himself some distance behind the mgv, leaning against the stone divider on the right of the lane. According to the sketch prepared by the police[[14]](#footnote-14) (and there is no dispute) the third lane was only 3.4 metre wide. On the other hand, the mgv was nearly 3 metres in width and it almost occupied the whole width of the lane[[15]](#footnote-15). If the accident happened in the way as described by him, then it would be difficult to imagine how the plaintiff could have managed to avoid being run over by the mgv and ended up being where he was.
5. Judging from the photographs[[16]](#footnote-16) and the evidence of the police officers who were tasked to investigate the accident, there was no damage to the rear luggage frame[[17]](#footnote-17). This is not supportive of the plaintiff’s account that the scooter was hit at the rear. It is noted that the height of the bumper of the mgv and that of the rear rack of the scooter are similar. If the scooter was hit directly by the mgv from behind, one would expect some serious or at least obvious damage to the rear rack. It is also note worthy that there was no damage to the front registration number plate of the mgv.
6. Thirdly, the plaintiff agreed under cross-examination that he was myopic and astigmatic, both of which to the degree of about 1 dioptre. He also admitted that he had not worn any corrective glasses at the time of the accident as required by his driving licence. Besides, he has hearing problem, a fact which is clearly shown (and the plaintiff admitted) during the course of his testimony. There were many occasions when he did not hear questions from counsel and the bench. In these regards, I note that the accident occurred late at night and when the plaintiff was wearing a helmet of a type which covered his ears[[18]](#footnote-18). Although this does not impact upon his credibility as witness, I have reservation whether his evidence on distance and position and generally what he saw at the relevant time is reliable at all. Based on common sense and experience, I find it more likely than not that his impaired eye-sight would have affected his observation and assessment of the traffic condition, especially in case of an emergency which occurred late at night, even with the presence of street lights. Had it been otherwise, there would not be any need for the condition on his driving licence that he should wear collective glasses. Therefore, even assuming that the plaintiff had, as he said, checked the mirror before cutting into the third lane, I have reservation whether he could see the images in the mirror clearly.

*Assessment of the defence evidence*

1. As regards the defendant, I am alive to the fact that his evidence is not entirely satisfactory. I am also alive to the various inconsistencies as outlined in the written submission of Mr Chang[[19]](#footnote-19), counsel for the plaintiff, the most notable one being his failure to mention in his cautioned statement to the police[[20]](#footnote-20) what he now says was the major cause of the collision, namely that the plaintiff had decelerated suddenly upon cutting in. However, I note also that he had said in the same document that whilst he was cutting into the third lane, the plaintiff suddenly also cut in when there was less than a car length between the left front of the mgv and the scooter, causing him (the defendant) to immediately brake and steer to the right to try to avoid collision without success. Contrary to his present defence, the defendant had said under caution that the plaintiff had not braked whilst cutting and that the brake light of the scooter had not been turned on. The defendant was unable to explain under caution, if the speeds of the mgv and the scooter were similar and the scooter had not decelerated, how there could be a collision between the two. Besides, there are other areas of discrepancy in his oral evidence in court, especially those about the relative speeds and positions of the mgv and the scooter at various points of time. I do not propose to discuss them in details. It suffices for me to say that I have taken them all into consideration.
2. As regards the defence witness Mr Au, even Mr Pun, counsel for the defendant, concedes that his evidence is “unhelpful”[[21]](#footnote-21). In fact, it is plain that Mr Au’s oral evidence in court is confusing and not reliable in many aspects. To take a few examples, in his witness statement he said that when he first saw the trawler and the engineering vehicle, they were travelling on the first lane and followed by the scooter, all of them being some distance away ahead of the mgv. In cross-examination, however, he said that the trawler and the engineering vehicle had come from behind, overtaken the mgv and cut from the first lane into the second lane. That, it is noted, is contradictory to the evidence of the plaintiff and the defendant, as both of them testified that the low speed of the vehicles in their front was the reason for the scooter and the mgv to change lane. Moreover, bearing in mind that the trawler was loaded with heavy equipment and that it was escorted by the engineering vehicle, it is most unlikely that it would be travelling very fast. In re-examination, he retracted this part of his evidence. Secondly, he said that he could not tell the distance between the mgv and the scooter. He said that he only noticed the scooter after the mgv had cut from the second lane into the third lane and he did not see how the scooter ended up lying in front of the mgv. Thirdly, he had mentioned in both his police statement and his witness statement that during the trip from Kowloon Bay to the Airport, he was sitting beside the defendant and eating. A reasonable reading of his statements is that he was still eating when the accident occurred. Despite his oral evidence in court to the contrary, I found that it is more likely than not that he was in fact eating when the accident occurred and that he had not paid attention to the traffic condition.

*Findings of liability*

1. I bear in mind that the burden of proof is on the plaintiff and that the standard of proof is only that of balance of probabilities. Because of the relatively low standard of proof in civil cases generally, it is permissible for the tribunal of fact to make a finding if it prefers the evidence of one witness to the other.
2. Having considered all the evidence as a whole and also taking into account the long lapse of time between the accident and the present trial, I am generally unable to accept that the accident occurred in the way as the plaintiff described. Subject to one exception, his evidence is in my assessment not reliable. In particular, I am unable to accept that:-
3. he had turned on his right indicator or had performed a shoulder check before cutting into the third lane;
4. he had already travelled for a while on the third lane before he first noticed the mgv; and
5. his scooter was in the middle of the third lane when the collision occurred.

The exception which I have mentioned is his evidence that he had reduced his speed upon cutting into the third lane with a view to avoid collision. I find as a fact that the plaintiff had indeed reduced his speed upon cutting in. I accept this particular part of his evidence firstly because it has always been a consistent component in his various accounts from beginning to end, even though there are some discrepancies as to (i) what he was trying to avoid hitting, an unknown private vehicle or the engineering vehicle; and (ii) whether his reduction in speed was a cause to the accident. Secondly, it is in my view an admission against his self-interest and therefore is more likely to be true. Thirdly, if his reduction of speed was already “history” and not relevant one would rhetorically why was it that he told the police officer at the scene that it was the cause? And why was it that he mentioned it in all his subsequent versions?

1. As regards the defendant, despite the fact that his evidence is not entirely satisfactory, I find that certain material aspects of his testimony are supported by independent evidence:-
2. That the plaintiff had at one stage decelerated when he was on the third lane. The plaintiff admitted this but contended in his later accounts that the deceleration had not contributed to the accident. In this regard, I have taken into account the failure of the defendant to mention this point in his cautioned interview and the other criticisms levelled at his evidence by Mr Chang.
3. That the speed of the mgv was about 60 km/h immediately prior to the collision, but that he immediately braked and steered to the right upon the plaintiff cutting in. First, as to the speed of the mgv, there is little dispute that it would be around about 60 km/h. Mr Cheng did not challenge this point in cross-examination. Secondly, based on the sketch prepared by the police[[22]](#footnote-22), there was debris on the third lane at about 11m behind the rear of the mgv [[23]](#footnote-23). Probably the place where the debris was found would be about the location of the impact. The length of the mgv, according to the undisputed evidence of Mr Au the owner, is 8 to 9m. From the above data, it can be inferred that the mgv had moved on for about 20m after the collision before it finally came to a halt. According to the Road User Guide, for a vehicle of that speed, it would take about 35 metres for it to stop[[24]](#footnote-24). Therefore, the circumstantial evidence supports the defendant’s evidence that he had already applied the brake before the collision. Lastly, the scene photographs showed that the right side of the mgv was touching the stone divider[[25]](#footnote-25). Therefore, it supports the defendant’s evidence that he had steered to the right.
4. That only about 90% of the mgv was inside the third lane when the scooter cut in. The scene photographs strongly indicated that the defendant had steered to the right before the collision. However, if the mgv had been travelling in the middle of the third lane as the plaintiff alleged at 60 km/h or even more, given the width of the mgv, even if the defendant had steered just slightly to the right, the off-side front of the mgv would have bumped against the stone divider resulting in serious damage to both the mgv and the stone divider. Therefore, the inherent probability is that the mgv had, as the defendant said, not yet fully entered the third lane when he steered right to avoid collision, so that when the mgv eventually stopped its right side was merely touching the stone divider without causing any damage.
5. That the scooter had not fully entered the third lane. As discussed above, in my view the fact that the plaintiff had not been run over by the mgv strongly supports the defendant’s evidence that the scooter was not in the middle of the third lane but was closer to the second lane on the left at the time of the collision. Even the plaintiff said in his examination-in-chief that after the collision the scooter was pushed to the left. The circumstantial evidence, in my view, supports the defendant’s evidence to the effect that the scooter and the mgv had not been aligned at the point of the collision. From the above evidence, it is in my view more likely than not that the scooter was still in the course of cutting into or had just came inside the third lane so that it was closer to the left rather than the middle of the third lane.
6. Based on all of the above, I prefer the evidence of the defendant to that of the plaintiff. I have also considered the evidence of Mr Au. I find that the fact that I attach no weight to Mr Au’s evidence does not affect my assessment of the evidence of the defendant. In particular, I find as a fact that:-
7. the defendant had changed lane before the plaintiff did;
8. the plaintiff had not given any prior warnings to other people (including the defendant) about his intention to cut into the third lane;
9. when the plaintiff cut in, most of the body of the mgv had already been inside the third lane and there was less than a car length between the rear of the scooter and the front of the mgv; and
10. the plaintiff had decelerated almost immediately upon cutting in, giving the defendant virtually no time to avoid the accident.

*(ii) Was the defendant negligent?*

1. Although I have made certain factual findings adverse to the plaintiff, this is not the be all and end all of the issue of the defendant’s liability. It is because the defendant admitted that before he cut into the third lane, he was conscious of the possibility of the scooter cutting out at any time due to the very slow speed of the engineering vehicle and the trawler. Besides, the mgv was close to the scooter when the defendant started to accelerate and attempt to overtake. Despite the above, the defendant admitted that he had not sounded the horn or flashed the headlight to warn the plaintiff or tried to enlarge the distance between the mgv and the scooter. Can it be said, therefore, that the defendant was negligent in the circumstances and that his negligence, if any, contributed to the accident?
2. In his answer to the court, the defendant said that during the 8 to 10 seconds during which the mgv was following the scooter on the second lane, the distance between the two vehicles was maintained at about one-car length. It was only after seeing that the plaintiff had given no indication to pull out that the defendant accelerated and changed lane with a view to overtake.
3. Having considered the evidence as a whole, I do not think that the defendant was negligent in not giving any warning to the plaintiff that he intended to cut into the third lane. First, based on common experience, it is not common in Hong Kong for a driver to warn vehicles in his front that he intended to cut into adjacent lane. The warning is primarily given to the vehicles behind. Therefore, I agree with the defendant’s evidence that if he had either sounded his horn or flashed the highlights in the circumstances of the present case, he might have given the plaintiff a wrong signal that the plaintiff was driving too slowly. Secondly, it was the plaintiff’s duty to check the traffic behind carefully and give proper warning before he changed lane. It is my finding that the plaintiff had failed to do both of these; otherwise, the defendant would not have changed lane or accelerated.
4. Moreover, as regards the defendant’s acceleration, it is his evidence, which I accept, that it happened when he was cutting lane. In other words, the mgv was accelerating towards its right rather than its front. His was not a sport car but a lorry, so it would take a bit of time for the mgv to pick up speed. In the circumstances, I do not think that a reasonable and competent driver would have foreseen any danger in the defendant’s acceleration. Furthermore, there was not any inflexible rule that the defendant had to allow the distance between his vehicle and the vehicle in his direct front to be enlarged before he could cut into the adjacent lane. Lastly, it was the defendant’s evidence, which I accept, that the plaintiff’s speed was similar to his immediately before the collision so that had the plaintiff not decelerated the accident would not have happened.
5. Based on the above, I find that there is not sufficient basis to find that the defendant had been negligent or that the accident was caused by the defendant’s negligence. To the contrary, I find that the accident was caused solely by the plaintiff cutting in sharply without proper regard to the traffic behind him and then decelerated suddenly.

*(iii) Contributory negligence*

1. In view of the findings above, the issue of contributory negligence does not arise.

*CONCLUSION ON LIABILITY*

1. Based on the findings above, the plaintiff’s claim against the defendant is dismissed.

*THE ISSUES ON QUANTUM*

1. For the sake of completeness, just in case I were wrong on the issue of liability, I shall also deal with the issue of quantum.
2. Subject to the issue of liability, the parties have agreed on the following heads of damages:-

Medical and hospitalization expenses $4,826.00

Travelling expenses and tonic food $5,000.00

Damaged scooter and survey $11,965.00

Waste of education fee $1,740.00

1. The only disputes on quantum are about the amount for pain, suffering and loss of amenities (PSLA) and whether the plaintiff is entitled to any pre-trial loss of earnings and loss of earning capacity.

*Evidence*

1. The plaintiff was aged 49 at the time of the accident and is now aged 54. He is and was an automobile technician employed on government contract. His monthly salary was $14,155.
2. After the accident, he was hospitalised for about a week and was discharged on 28 October 2011. He was granted sick leave from 21 October 2011 to 29 February 2012 which was a little bit over 4 months. He was given full paid sick leave by the Government. He returned to his previous work with the Government in March 2012. According to the plaintiff’s evidence in court, there has been no significant change in the kind of jobs assigned to him by his superior[[26]](#footnote-26). His employment contract with the Government has also been renewed.
3. The plaintiff had complained of bilateral shoulder pain. X-ray of his shoulder revealed no fracture and he was treated conservatively with physiotherapy. He still complains of residual disabilities in the shoulder, back, right hand and left foot. He says that the disabilities affect his working capacity and efficiency in lifting and carrying and physical tolerance.
4. The plaintiff says that he can handle all of his activities of daily living alone. He could go outdoors and took public transportation alone. He has not driven his scooter after the accident because he is afraid of similar accident.
5. The medical evidence regarding his injury has been helpfully set out in the plaintiff’s written closing submission[[27]](#footnote-27). In brief, the plaintiff suffered, among other things, fracture distal phalanx of his left big toe. To this, K-wire fixation was performed. In the course of the operation it was found that his second toe also suffered soft distal interphalangeal joint subluxation and K-wire to which was also applied.
6. The Physiotherapy report[[28]](#footnote-28) says that the plaintiff was diagnosed of “back pain” on 29 August 2011 (which was before the accident) and was referred for physiotherapy.
7. The medical experts agree that the plaintiff’s back problem was a pre-existing condition which was aggravated by the injury[[29]](#footnote-29). At the time of the joint examination by the experts (24 June 2014), it was found that there was tenderness elicited over L3/4 midline. Extension of back was mildly limited and the plaintiff complained of pain on side flexion. There was no muscle spasm or obvious feature of lower limb neurological deficit detected.[[30]](#footnote-30)
8. The major differences in opinions between the experts are twofold:-
9. The plaintiff complained of back pain during the O&T follow up on 5 December 2011 (which was about one month and a half after the accident) with X-ray performed on 9 January 2012 (which was about two and a half months after the accident). The X-ray revealed fractured transverse processes of L3 and L4. Dr Wong for the plaintiff opined that the fracture occurred within a reasonable time frame and is compatible with the mechanism of injury. Dr Kwok for the defendant, however, does not agree because of the absence of any complaints of pain and tenderness over the lumbar pain area during the time of the plaintiff hospital admission.
10. Dr Wong for the plaintiff estimated the plaintiff’s impairment for the whole person is 7-10% and the loss of earning capacity to be 7-8%, whilst Dr Kwok for the defendant put both figures at 2%.

The experts, however, agree that the plaintiff is able to resume his pre-injury work as an automobile repairer[[31]](#footnote-31).

1. Apart from the injury to his toes, there were also some superficial penis and scrotum lacerations caused by the accident. However, the lacerations have since been healed.
2. The effect of the opinions of the medical experts is that the plaintiff has recovered well and that his daily living is likely to be unaffected.

*Assessment of the medical evidence*

1. The plaintiff accepted that he had received physiotherapy for his back and that the back pain had been with him for 2 to 3 years before the accident. The medical records show that after the accident he only complained of back pain on 5 December 2011. In view of the above, I prefer the evidence of Dr Kwok to that of Dr Wong that if the left transverse process fracture of L3 and L4 had taken place during the accident, there should have been pain and tenderness over the lumber pain area during the time of the plaintiff’s stay in the hospital. I also accept Dr Kwok’s evidence that it was in any event a minor fracture and by the time of the joint examination by the expert, it had healed without consequence. I find therefore that the plaintiff has failed to discharge his burden of proving that the transverse process fracture of L3 and L4 was caused by the accident.
2. In view of the fact that the plaintiff is capable of returning to his former work as an automobile technician without significant limitation and can manage his daily living with difficulties, I am of the view that the estimates given by Dr Wong for the plaintiff’s impairment and loss of earning capacity are on the high side. I accept Dr Kwok’s evidence that the two figures are both at about 2%.
3. In the light of the expert medical evidence, following the approach adopted by the Court of Appeal in *Chan Kam Hoi v Dragages et Travaux Publics*[[32]](#footnote-32)*,* some discount has to be made to any award of damages, given the pre-existing state of the plaintiff’s spine which had already been causing him pain prior to the accident. In my view, a 50% discount would be appropriate in the present case as far as the back problem is concerned.

*(i) PSLA*

1. Based on the evidence before the court, having regard to the comparables provided by Mr Chang and Mr Pun, including but not limited to *Lee Ka Kuen v Hung Shing Environmental Recycle Ltd*[[33]](#footnote-33); and *Tsang Ching Fei v Mo King Guo[[34]](#footnote-34)*, and also having taken into account the discount for his pre-existing back condition and the effect of inflation over the years, in my view the appropriate amount of damages under this head would be $200,000.

*(ii) Pre-trial loss of income and MPF contribution*

1. With the greatest respect to Mr Chang, his reliance on *Parry v Cleaver*[[35]](#footnote-35)*,* which is a case on non-deductibility of pension from damages, is misconceived. Also, in my view there is no true analogy between insurance money and employment benefit (of which paid sick leave is one) as contended by him. It suffices for me to deal with Mr Chang’s submission on this point by quoting the following passage from *McGregor on Damages*[[36]](#footnote-36)*:-*

“It is fully accepted today that, where an injured claimant continues to be paid his wages by his employer as of right, or part of his wages, and whether under the name of sick pay or otherwise, these sums fall to be deducted from the damages for loss of earnings.”

The learned author cited *Hussain v New Taplow Paper Mills[[37]](#footnote-37)* in support of the above proposition.

1. In my judgment, the plaintiff had not suffered any compensable loss under this head. Firstly, he had fully paid by the Government for the sick leave period. Secondly, the plaintiff has adduced no evidence to show that he has suffered any actual or real financial loss as a result of him having to utilize his sick leave entitlement previously accumulated for the injury he sustained. Thirdly, according to the plaintiff’s evidence in court he has since accumulated further sick leave entitlement under the terms of his employment contract[[38]](#footnote-38).
2. In the circumstances, I would disallow the claim under this head.

*(iii) Loss of earning capacity*

1. In a well-known passage in *Moeliker v Reyrolle*[[39]](#footnote-39),it is said,

“This head of damage generally only 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. It is a different head of damages from an actual loss of future earnings which can already be proved at the time of the trial.”

1. The above passage was approved by the Privy Council in *Chan Wai Tong & Anor v Li Ping Sum*[[40]](#footnote-40) where it said,

“A claim for loss of future earning capacity usually arises where the claimant is in employment at the time when the claim falls to be evaluated. The claim is to cover the risk that, at some future date during the claimant's working life, he will lose his employment and will then suffer financial loss because of his disadvantage in the labour market. The Court has to evaluate the present value of that future risk-see *Moeliker v. A. Reyrolle & Co. Limited* [1977] 1 WLR 132, 140 where Browne, L.J. dealt fully with this matter. Evidence is therefore required in order to prove the extent, if any, of the risk that the claimant will at some future time during his working life lose his employment. If he is, and has been for many years, in secure employment with a public authority the risk may be negligible. In other cases the degree of risk may vary almost infinitely, depending on inter alia the claimant's age and the nature of his employment. Evidence will also be generally required in order to show how far the claimant's earning capacity would be adversely affected by his disability. This will depend largely on the nature of his employment.”

1. In the present case, apart from the plaintiff’s assertion, there is no evidence before the court on the risk, if any, that the plaintiff will risk at some future time during his working life losing his employment. To the contrary, the evidence is that the plaintiff is in the employ of the government, albeit on contract, and that his employment has been renewed. The Occupational Therapy Report also says that “his performance was ascended to be matched with his previous job without significant aberration”[[41]](#footnote-41). Therefore, there is every reason to believe that in the ordinary course of event the plaintiff will be able to stay in his present employment until he has reached the normal retirement age.
2. In the circumstances, I would reject this head of claim as well.

*Conclusion on quantum*

1. Therefore, if I were wrong on the issue of liability, the plaintiff’s damages would be as follows:-

General damages

PSLA $200,000.00

Special damages

Medical and hospitalization expenses $4,826.00

Travelling expenses and tonic food $5,000.00

Damaged scooter and survey $11,965.00

Waste of education fee $1,740.00

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Total: $223,531.00

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1. There would also be interest on general damages at 2% per annum from the date of service of the writ and interest on special damages at 4% per annum from the date of accident.

*CONCLUSION*

1. The plaintiff’s claim against the defendant is dismissed.
2. Following the general rule that costs should follow the event, I make an order nisi that the plaintiff is to pay the defendant’s costs in this action, to be taxed if not agreed.

# ( Alex Lee )

# District Judge

Mr Geoffrey P Chang, instructed by Mandy Wan & Co, for the plaintiff

Mr Chase Pun, instructed by Cheung Chan & Chung, for the defendant

1. Contributory negligence has been pleaded by the defendant. See para 4 of Defence, at p 41, Bundle A. [↑](#footnote-ref-1)
2. There is no dispute that the engineering vehicle had two flashing lights installed on its roof and that it was escorting the trawler. There is also no dispute that the trawler was loaded with a truck-mounted crane（吊臂車）. [↑](#footnote-ref-2)
3. See the police scene photographs at pp 137 & 138, Bundle B. [↑](#footnote-ref-3)
4. Dated 12.11.2011, at p 113, Bundle B [↑](#footnote-ref-4)
5. Dated 11.5.2012, at p 147, Bundle B [↑](#footnote-ref-5)
6. Dated 11.9.2014, at p 102, Bundle A [↑](#footnote-ref-6)
7. Mr Pun also represented the defendant at the criminal trial. [↑](#footnote-ref-7)
8. p 113, Bundle B. [↑](#footnote-ref-8)
9. p 102, Bundle A, at para 4. [↑](#footnote-ref-9)
10. pp 150J, 151J-K, 152F-O & 170N, Bundle B. [↑](#footnote-ref-10)
11. p 151J, Bundle B. [↑](#footnote-ref-11)
12. The plaintiff said, and there is no dispute, that the trawler was about 40 feet (app. 12m) long. He also said that the distance between the trawler and the engineering vehicle was only about one car length (which, he agreed, was about 4 to 5m). [↑](#footnote-ref-12)
13. pp 169A-Q, 180S-181G. See also the statement of PC 6269 at p129, Bundle B. [↑](#footnote-ref-13)
14. p 133, Bundle B [↑](#footnote-ref-14)
15. See the scene photos at p 134, Bundle B [↑](#footnote-ref-15)
16. See p 67, Bundle B. [↑](#footnote-ref-16)
17. See the evidence of PC6269 at p180P and the evidence of PC 52299 at p 186 I-N, Bundle B. See also the photo of the scooter at p 136, Bundle B. [↑](#footnote-ref-17)
18. For a photograph of the helmet, see p 68, Bundle B. [↑](#footnote-ref-18)
19. Dated 16.10.2015. [↑](#footnote-ref-19)
20. Dated 17.11.2011, at p 117, Bundle B. [↑](#footnote-ref-20)
21. See defendant’s closing submissions, dated 16.10.2015, at para 31. [↑](#footnote-ref-21)
22. p 133, Bundle B [↑](#footnote-ref-22)
23. Probably from the tail light of the scooter. See the photos at p 138, Bundle B. [↑](#footnote-ref-23)
24. The 35m included the thinking distance (15m) and the brake distance (20m). [↑](#footnote-ref-24)
25. See the photos at p 137, Bundle B. [↑](#footnote-ref-25)
26. See also the Occupational Therapy Report, dated 13.12.2014 at p 80, Bundle A [↑](#footnote-ref-26)
27. See plaintiff’s closing submissions, para 11-18G [↑](#footnote-ref-27)
28. At p 76, Bundle A. [↑](#footnote-ref-28)
29. ibid, para 40-44 of the Joint Expert Report, pp 94-95, Bundle A. [↑](#footnote-ref-29)
30. ibid, para 51. [↑](#footnote-ref-30)
31. ibid, para 56-59. [↑](#footnote-ref-31)
32. [1998] 2 HKLRD 958 [↑](#footnote-ref-32)
33. DCPI 835/2005 [↑](#footnote-ref-33)
34. DCPI 2135/2006 [↑](#footnote-ref-34)
35. [1970] AC 1 [↑](#footnote-ref-35)
36. 19th edition of the work, at para 38-150. [↑](#footnote-ref-36)
37. [1988] AC 514. [↑](#footnote-ref-37)
38. It is a term of his employment contract at Clause 10 (p 86, Bundle B) that he can accumulate 4 paid sick leave after a month’s work and a maximum paid sick leave entitlement of 120 days. [↑](#footnote-ref-38)
39. [1977] 1 WLR 132, at 140A-C [↑](#footnote-ref-39)
40. [1985] HKLR 176 [↑](#footnote-ref-40)
41. P 80 Bundle A [↑](#footnote-ref-41)