## DCPI 475 /2006

IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 475 OF 2006

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##### BETWEEN

YIP KWAN CHEUNG 1st Plaintiff

YIP KWAN CHEUNG AND YIP WAI YUEN 2nd Plaintiff

trading as TAI HING OPTICAL COMPANY

### and

CHIM HONG WING Defendant

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Coram: Deputy District Judge W.C. Li in Court

Date of Trial: 12th – 14th February 2007

Date of Handing Down Judgment: 26th February 2007

JUDGMENT

1. The Plaintiffs claimed against the Defendant for damages for negligence arising out of a road traffic accident on 15 July 2002 at about 9.20 p.m. when the Defendant driving his private car, registration No. JU 860, (a Toyota Land Cruiser) crashed into the Plaintiffs’ shop at Lai Chi Kok Road injuring the 1st Plaintiff who had then closed shop and was working inside, and also caused extensive damage to the properties of the Plaintiffs.
2. The Defendant was driving under the influence of alcohol with 43 micrograms of alcohol in 100 millilitres of breath (prescribed legal limit was 22 micrograms of alcohol in 100 millilitres of breath). A subsequent blood sample taken from the Defendant found that he had 89 milligrams of alcohol in 100 millitres of blood (prescribed legal limit was 50 milligrams per 100 millitres of blood). The Defendant was charged and pleaded guilty to “Drink Driving” and was fined $7,000 and disqualified from driving for 10 months at North Kowloon Magistracy on 2 September 2002. The Brief Facts and sketch of the case showed that he had crashed into 4-5 metres of the central railings of the safety island along west bound Lai Chi Kok Road before he veered away and traveled quite a distance before crashing into the Plaintiffs’ shop. The fact that the Defendant had crashed into the central railings and veered along the road and crashed into a shop before being able to control and bring his car to a halt amply showed that he had failed to exercise due care and attention whilst driving, and he must have traveled at a fast speed, a speed that rendered him unable to keep his vehicle under his control. He was also negligent to be drink driving at the time of the accident. The Defendant’s allegation that he was trying to avoid a vehicle that had suddenly changed lanes did not in any way exonerate his liability for negligence.
3. The Defendant had contested both liability and quantum. He admitted liability only during the trial and consented to judgment entered against him in favour of the Plaintiffs on liability. The trial therefore continued on assessment of damages to be awarded to the Plaintiffs. The admission of liability by the Defendant was a correct decision as the Defendant obviously had no defence on liability at all. However he should have admitted liability at the early stage of litigation and the case being set down for assessment of damages only. Costs and time had been wasted by the Defendant’s own unwise and belated decision.
4. The 1st Plaintiff was 51 when the accident occurred in 2002. He had worked in the optometry industry for over 40 years. He and his father were the partners of the 2nd Plaintiff. The 1st Plaintiff had a history of palpitation and artial fibrillation of his heart since around 1999-2000. He was receiving medical treatment when this accident occurred in July 2002. It would not require much imagination to see the horror of a motor vehicle crashing into the Plaintiffs’ shop when the 1st Plaintiff was inside, shattering the glass show cases and damaging the roller shutter gate at the front and destroying a large number of glasses/glass frames, and equipments in the optometry shop. Photographs showing the extensive damage caused were exhibited to the court. The 1st Plaintiff was cut on the forehead by broken glass, the 3 cm wound was sutured with 5 stitches at the hospital and left a scar, and the 1st Plaintiff was also struck on the leg by debris and suffered bruising. The impact of this sudden catastrophe would have been worse for the 1st Plaintiff if he had actually seen the Defendant’s vehicle coming at him. He was treated at the Caritas Hospital and discharged on the same day. He did not suffer palpitation at the time of the accident. On 19 July 2002, he attended Caritas Hospital again due to dizziness. According to the Medical Report of Caritas Hospital dated May 3 2005, the diagnosis was post-head injury dizziness and patient was “reassured and discharged”. It could be seen from this medical record that the 1st Plaintiff was in need of help as early as 4 days after the accident when it was expressly noted by his attending doctor that the patient had to be reassured before discharge.
5. Since the accident, the 1st Plaintiff developed post-traumatic stress disorder that was manifested in the form of nightmares, flashbacks, fear of road traffic, irritability, social anxiety, poor sleep, absent-mindedness and withdrawal. He had attended 9 sessions of the out patient service of the Caritas Clinical Psychology Department from 18 November 2002 to 10 June 2003. He had a fear that he should not work in the shop after 11.00 p.m. albeit the time of the accident was not 11.00 p.m. but around 9.20 p.m. His outlook in life had also changed after the accident. He used to work very hard and he had been treated for overworking or fatigue before, sometimes working up to 1.00 a.m. in the shop. After the accident, he considered himself lucky to be alive and he changed his routine by stopped working long hours, due to his heart condition, the post-traumatic stress and the change in his general outlook in life.
6. For the 1st Plaintiff’s heart condition, Dr. Kum Chi Chiu of the Prince of Wales Hospital in his medical report dated 20 May 2005 disclosed that the 1st Plaintiff suffered recurrent attacks of atrial fibrillation and was poorly controlled by medications, and eventually radio frequency ablation was carried out in August 11 2004 and by March 2005, the 1st Plaintiff’s heart condition was under control and needed no further medication. The cause of the heart problem was idiopathic and unlikely to be caused by external physical injury. However stress might have precipitated the palpitation attacks. Dr. Kum certified 9 days of sick leave but there might be other sick leave certificates issued by hand and not recorded by case notes and computerized records.
7. The 1st Plaintiff was also examined by his psychiatrist, Dr. Mak Ki Yan and also by the Defendant’s psychiatrist, Dr. Lo Chun Wai. Dr. Mak listed out all the factors in his assessment of the 1st Plaintiff’s psychiatric disabilities and assuming all the information given by the 1st Plaintiff were true, he found that the psychosocial disabilities of the 1st Plaintiff amounted to 16% disability of the total person. He did not detect evidence of malingering. His clinical opinion was that the 1st Plaintiff was suffering from a partially treated post-traumatic stress disorder with symptoms of anxiety and depression. As for permanency of the psychiatric disabilities, he saw some improvement after the 1st Plaintiff had psychological treatment by Dr. Wu but despite such improvement, the 1st Plaintiff condition would fluctuate under stress. Dr. Mak further said that psychiatric disorders were prone to relapse if continued treatment were not given to the 1st Plaintiff especially in view of his age and personality. He opined that further active psychiatric treatment for 6-12 months would be needed with $1,000 to $2,000 per session in the private sector. As the 1st Plaintiff’s condition would fluctuate with his mental condition, Dr. Mak gave a discount of 25% of the disability functional score. That took the assessment of the 1st Plaintiff disability down to 12%. In calculating the total disability, Dr. Mak considered that the 1st Plaintiff has a 50% permanency of his disabilities, and he would give a final assessed figure of **6%** disability of the 1st Plaintiff loss of earning capacity, by multiplying the 12% psychiatric disabilities with the 50% permanency. Dr. Lo on the other hand examined the 1st Plaintiff and also interviewed his wife. He concluded that a full diagnostic criteria of post-traumatic stress disorder might not have been fulfilled and he commented that Dr. Wu only stated that the 1st Plaintiff had features of post-traumatic stress disorder, and Dr. Wu did not actually make a diagnosis of the same. Dr. Lo also queried whether the WHO Disability Assessment Schedule (1988) was a suitable scale to evaluate the disability of a person suffering from post-traumatic stress disorder. His view was that the WHO Disability Assessment Schedule was designed to test the social functioning of a disabled person. No question was directed to the symptoms of post-traumatic stress disorder and its aftermath, hence it was difficult to say that the disabilities were directly related to the alleged injury and alleged trauma. He also queried that after 9 clinical psychological sessions, the 1st Plaintiff had made some improvement, maybe because his symptoms were mild, whether the 1st Plaintiff would benefit from further treatment 2 years (or more) after the trauma. On the degree of permanent psychiatric impairment, Dr. Lo agreed that the accident on 15 July 2002 might have made an impact on the 1st Plaintiff. However his view was that the 1st Plaintiff’s stress had been adequately dealt with and further psychiatric/psychological treatments were not required. He considered the degree of permanent psychiatric impairment to be very mild and assessed it to be in the region of 1%.
8. Having had the benefit of reading the expert reports of Dr. Kum Chi-chiu, Dr. Kitty Wu, the Clinical psychologist, and the 2 psychiatrists, Dr. Mak and Dr. Lo, I am satisfied that the accident on 15 July 2002 had made a disabling impact on the psychological and psychiatric health of the 1st Plaintiff. The 1st Plaintiff had made some improvement and no further attendance of clinical psychological session after June 2003 was noted. His heart condition also required no further medication after March 2005. However his psychiatric conditions remained a concern although his symptoms appeared to be “mild”. I do not favour the 1% assessment given by Dr. Lo for the Defendant. I consider Dr. Mak’s assessment of 6% to be more realistic given the probable relapse of the 1st Plaintiff’s psychiatric condition, his age and his personality. The trauma of this traffic accident to a man of normal disposition and health might not have a permanent effect. However, I do accept that for the 1st Plaintiff, he has suffered post-traumatic stress disorders. I would accept Dr. Mak’s assessment of 6% disability which I accept to be a fair evaluation that had given allowances for fluctuation and the degree of permanency of the 1st Plaintiff’s mental conditions.

Assessment of Quantum for 1st Plaintiff

1. For Pain and Suffering & Loss of Amenities (“PSLA”), Counsel for the 1st Plaintiff assessed that the general damages under this head should be in the region of HK$300,000.00. The degree of seriousness of the 1st Plaintiff’s disabilities was argued that it should be graded at the lower end of the serious injury category as understood in the case of *Lee Ting Lam v. Leung Kam Ming* (1980) HKLR 657*.* Two cases were submitted for comparison. In *Joan Carol Boivin v Wong King Yin & Anr.* HCPI 195/2000*,* the injured person suffered 5% disability from orthopaedic injury and also suffered post-traumatic stress disorder, post-concussional syndrome and depressive disorder. $475,000.00 was considered reasonable and awarded for PSLA. In *Hung Chor Chuen v Pang Koon Wai & others* HCPI 294/2003*,* the Plaintiff claimed damages for post-traumatic stress disorder. Deputy High Court Judge Fung, as he then was, did not accept that the Plaintiff ceased driving because of the post-traumatic stress disorder, the Plaintiff did suffer some symptoms of post-traumatic stress disorder but was able to resume driving and his former employment and $250,000.00 was awarded. The Defendant here on the other hand argued that $75,000.00 was adequate for PSLA in the case of the 1st Plaintiff. The 1st Plaintiff suffered post-traumatic stress disorder and also suffered laceration to his forehead. He was able to resume his trade and work after the accident. The Defendant’s figure of $75,000.00 is far too low and appeared not to take into account the post-traumatic stress disorder suffered by the 1st Plaintiff. On the other hand, I also do not agree that the 1st Plaintiff would fall within the lower end of the serious injury category. I think an award of $250,000.00 on PSLA would be reasonable and this is the figure I will award.
2. On Loss of Earning Capacity, the 1st Plaintiff claimed a lump sum of $50,000.00. The Defendant argued that the 1st Plaintiff had been able to resume his work and as he had suffered no loss of earning capacity, there should be no compensation under this head. Loss of earning capacity refers to the plaintiff’s handicap as an existing disability by reference to what may happen in the future, it is speculative in nature, and it is necessarily a consideration of the risk and chances in the circumstances of the case. $50,000 is a reasonable amount to be taken in the case of the 1st Plaintiff here and I will award $50,000 for Loss of Earning Capacity.
3. For Future Medical Expenses, I find it is reasonable to anticipate that the 1st Plaintiff will require continued psychiatric treatment in the future for a period of 6-12 months or estimated to be 10 sessions of about $2,000 per session. I will also allow the claim of $20,000 under this head.
4. As for the other Special Damages claimed by the 1st Plaintiff, there were medical expenses of $3,000, tonic food of $5,120 and traveling expenses of $1,000. These were for expenses reasonably incurred and I will also allow these amounts in full.

Assessment of Quantum for the 2nd Plaintiff

1. The 2nd Plaintiff had suffered loss of business and property due to the negligence of the Defendant. For Loss of Business, there was a period of 3 weeks when the 2nd Plaintiff had to close for repair after the accident. The profit for each week for the relevant period was $15,000. This was calculated in accordance with the profit and loss figures for the months of this period. Under this head, I would allow an amount of $45,000.00.
2. The following Special Damages were incurred as a direct consequence of the accident: (1) for refurbishment, $110,000.00; (2) machinery repairs and replacement: $161,600.00 and a further $10,500.00 for 30 days of temporary hiring of machinery; (3) plastic signage replaced at $11,350.00; costs for security and the security system: $4,650.00; furniture and equipment at $11,328.00; (4) a new roller shutter and painting work at $10,800.00 ($1500 taken off as some painting costs appeared to have been duplicated); (5) damages to customers’ goods at $4,766.00; (6) loss of personal property valued at $3,230.00; and (7) miscellaneous damaged items at $4,586.90. These amounts were actually and reasonably incurred as a direct consequence of the traffic accident caused by the Defendant. These amounts are therefore allowed in computing that 2nd Plaintiff’s losses.
3. Further Special Damages were claimed for 747 pairs of broken glasses/frames, and for the salaries of 2 replacement workers for 100 days when the 1st Plaintiff attended medical care. Adjusters for both the Plaintiffs and the Defendant had examined the broken glasses/frames. The Plaintiffs’ Claims Adjuster made quite a huge cut in the value of these broken glasses and frames and made a valuation of about 30% of the claimed value. Some of the glasses were not backed up with invoices. These were the cheaper frames and were purchased by the Plaintiffs from salesmen who came to their shop. No receipt for these purchases were produced or shown by the Plaintiffs. The profit for this type of glasses and frames were smaller compared to those with brand names. The Plaintiffs’ Adjuster made an assessment of $172,863.74 for these damaged goods. The Plaintiffs accepted this assessment. The Defendant’s Adjuster found more than 747 pairs of glasses (789 pairs found) and could only identify 513 pairs of glasses. The Defendant found this suspicious and queried the actual number of damaged glasses/frames. The Plaintiffs had kept all damaged glasses and brought them to court to be viewed. Some were scratched. The scratched ones were no longer sellable and the Plaintiffs had their reputation to keep. The Plaintiffs were also quite happy to give these glasses to the Defendant if the Defendant wanted to resell them for some nominal value. The Plaintiffs estimated the costs of these damaged glasses/frames should be about 40% of the claimed value. They claimed $204,400.00 (40% of $511,0002.00) against the Defendant. The amount of $172,863.74 valued by the Plaintiffs’ Adjuster was approximately 34% of the claimed value. I should think this was a reasonable figure for the purpose of the Plaintiffs’ claim in this action, given that part of these glasses/frames were not supported by any receipts or sale invoices. I would therefore adopt this figure and award this amount as the special damage for the damaged glasses/frames. For the 2 replacement workers, there was no record kept of their attendances. The only reference was the amount of $38,000.00 claimed by the Plaintiffs for payment of wages to employees for the year of 2003 in its trading account. There was a period when the shop was closed for 3 weeks for renovation. I did not find evidence that the 1st Plaintiff had attended the doctors on 100 occasions. The 2 replacement workers were actually relatives of the Plaintiffs. I should think half of that amount should be allowed in the Plaintiffs’ claims as there were times that the 1st Plaintiff was unwell and needed help in the shop. I will therefore allow an amount of $19,000.00 under this claim.
4. The Defendant had also argued that a sum of $427,501.87 received by the 2nd Plaintiff from their insurers, Paofoong Insurance Company (HK) Limited on 9 May 2003 under an insurance policy, should be deducted from the damages awarded in favour of the plaintiffs. I noted Para. 35-123 (Page 1239) of **McGregor on Damages** 17 edition that reads as follow:

“as early as 1974 it was decided in **Bradburn v G.W. Ry** that, where the claimant had taken out accident insurance, the monies received by him under the insurance policy were not to be taken into account in assessing the damages for the injury in respect of which he had been paid the insurance moneys. This decision has withstood time and is solidly endorsed at House of Lords level by **Parry v Cleaver**, not only by the majority who relied upon it by analogy but also by the minority who sought to distinguish it, and more recently by Lord Bridge speaking for the whole House in **Hussain v New Taplow Paper Mills** and in **Hodgson v Trapp**, and by Lord Templeman similarly in **Smoker v London Fire Authority**. The matter is clearly now incontrovertible. The argument in favour of non deduction is that, even if in the result the claimant may be compensated beyond his loss, he had paid for the accident insurance with his own moneys, and the fruit of this thrift and foresight should in fairness enure to his and not to the defendant’s advantage.”

The Defendant’s argument therefore could not be sustained and it is not fair for the Defendant to have the benefit of the 2nd Plaintiff’s insurance policy. In any event, counsel for the Plaintiffs have shown the Defendant a letter from the 2nd Plaintiff’s insurers that they purported to hold an interest in the present claim. I would therefore decline to deduct any insurance monies paid to the Plaintiffs from the damages the Defendant has to pay to the Plaintiffs.

1. In summary, the Defendant is liable to pay the 1st Plaintiff (1) $250,000.00 for PSLA; (2) $50,000.00 for Loss of Earning Capacity; (3) $20,000.00 for Future Medical Expenses; and (4) Special Damages for medical expenses, tonic food and traveling expenses totaling $9,120.00. It adds up to a total of **$329,120.00**. As for the 2nd Plaintiff, the Defendant is liable to pay (1) Loss of Business in the sum of $45,000.00; and (2) Special Damages totaling $524,674.64; these for refurbishment ($110,000.00), machinery repairs and replacement, and for hiring expenses ($$161,600.00 & $10,500.00), plastic signage ($11,350.00), security and security system ($4,650.00), furniture & equipment ($11,328.00), replacement of roller shutter & painting work ($10,800.00), damages to customers’ goods ($4,766.00), damages to personal properties ($3,230.00), miscellaneous damages ($4,586.90), damages glasses/frames ($172,863.74) and wages for temporary help/employee ($19,000.00). In total, it amounted to **$569,674.64**.
2. Judgment is therefore given against the Defendant in favour of the 1st Plaintiff for the sum of **$329,120.00**, and judgment against the Defendant in favour of the 2nd Plaintiff for the sum of **$569,674.64**. Interest is awarded on PSLA for the 1st Plaintiff at 2% p.a. from 12 July 2005 (date of Writ) to the date of handing down of this judgment, and interest is also awarded on the loss of business and the special damages for the Plaintiffs at half judgment rate from 15 July 2002, i.e. the date of the accident, to the date of handing down of this judgment. Interest at judgment rate is also ordered to be payable by the Defendant on the judgment sums awarded to the Plaintiffs from the date of handing down of this judgment to the date of full satisfaction by the Defendant to the Plaintiffs. I also order the Defendant to pay the Plaintiffs’ costs of this action, to be taxed if not agreed, with certificate for counsel.

( W.C. Li )

Deputy District Judge

Representation:

Mr. Kenny Lin instructed by Messrs B. Mak & Co. for 1st and 2nd Plaintiffs

The Defendant not legally represented appeared in person.