

HONG KONG / JUDGMENT

CHEUNG LEE MAN v. CHAN WAI WING

COURT

Court of Appeal

DECIDED

11 January 2007

CASE / FILE NUMBER

CACV179/2006

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bjbj cacv 179/2006 in the high court of the hong kong special administrative region court of appeal civil appeal no. 179 of 2006 (on appeal from HCPI NO. 760 of 2004) BETWEEN CHEUNG LEE MAN Plaintiff CHAN WAI WING Defendant Before: Hon Rogers VP, Le Pichon JA and Barma J in Court Date of Hearing: 21 December 2006 Date of Handing Down Judgment: 11 January 2007 J U D G M E N T Hon Rogers VP: This was an appeal from a judgment of Deputy High Court Judge Gill given on 8 March 2006. The action before the judge was a claim by the plaintiff for damages suffered as a result of a traffic accident which had occurred on the morning of Saturday 20 October 2001. At the conclusion of the hearing of this appeal, judgment was reserved which we now give.

Background

The plaintiff was riding a motor scooter. He was travelling from North Point to where he worked in the New Territories. The accident occurred at the entrance to the Hung Hom Cross Harbour Tunnel. The plaintiff's motor scooter was given a glancing blow which was sufficient to unbalance the plaintiff. His ankle was broken and the judge found that he was permanently, albeit mildly, partially disabled as a result of his injuries. The accident occurred when the plaintiff was very close to the entrance of the Tunnel and travelling in the outside portion of the nearside lane. He was at a point where the three lanes leading to the Tunnel merge into two. Just beyond that part, that is closer to the entrance of the Tunnel, there is a portion just before the entrance to the Tunnel where there are only two lanes but traffic can move from one lane to the other before entering the Tunnel where there are double white lines. The plaintiff's motor scooter was hit by the offside rear of the defendant's Toyota motorcar. The defendant was an off-duty police constable. At the time of the accident he intended to move from the nearside lane and travel through the Tunnel in the offside lane. It was in the course of that manoeuvre that his offside rear wheel arch and passenger door brushed against the nearside of the plaintiff's scooter's front wheel. There were some slight scratches on the Toyota where it had been in contact with the scooter. The judge found that there were scratches on the nearside body panel of the scooter which were consistent with a nudge from the car. Immediately after the impact the scooter kept upright for a short time, it then wobbled and then fell on its side causing the plaintiff's injuries.

The Toyota came to a halt at the entrance of the offside lane with its front immediately alongside or straddling the double white lines. There was one independent witness, Mr Lam, who was a bus driver. His bus had been in the third, i.e. the outside, lane and had moved to the second lane but had come to a halt because the driver had to wait for traffic to allow an opening so that the bus could travel in the nearside lane. The judge found that the bus was about 1 bus lengths short of the entrance to the Tunnel. The judge said that the speed of the Toyota immediately before the collision could not have been as slow as 10 Kph as the defendant had said. That would appear to be consistent with where the vehicle had come to a halt after the accident. The judge also accepted the plaintiff's evidence that he had been travelling at about 40 Kph and had not been tailgating any of the cars. One of the features of the case was that the evidence of both the plaintiff and the defendant was that they had not seen the other vehicle prior to the collision. The defendant had seen the bus which had halted and he said that he had then slowed to about 10 Kph or less prior to starting to move out to the offside lane. The plaintiff, on the other hand, said that he had not even seen the bus. The judge's conclusion was that the plaintiff had not been tailgating and that he had not been driving recklessly or dangerously. He said at paragraphs 46 to 49: 46. .. A motor scooter is highly manoeuvrable given its compact size and small wheels. But it is also less stable having but two small wheels as against four bigger ones. There was no direct evidence of that but it is common knowledge of which I take judicial notice. And Mr Cheung's habit was to avoid the greasy middle of the lane so as not to exacerbate that comparative lack of stability.

47. He may well have been concentrating on the path immediately ahead; after all, he was not about to change lanes. In these circumstances, it is quite possible that he could have had only a momentary impression of the Toyota if it was coming up to him just before impact. It is harder to justify his not seeing the bus, which was stationary and ahead. Perhaps he simply did not register its presence because it was not a risk. But in any event that is not a matter going to causation.
48. In the circumstances, I am satisfied that Mr Chan in failing to keep a proper lookout before attempting the manoeuvre of changing lanes was negligent and caused the collision, and is thus liable for the consequences in damages.
49. On the other hand, I find it not established that Mr Cheung contributed in anyway. This appeal On this appeal, Mr Hemmings, who appeared on behalf of the defendant both in this court and below, submitted that the judge's findings could not be reconciled with the evidence of the bus driver, Mr Lam, whose evidence the judge had accepted. Mr Lam had said that he had brought his bus to a halt to allow the traffic on the nearside lane to clear and then he went on: A. I saw a private car and a motorcycle approaching on my left lane and then they went past me and went into the second right lane of the Tunnel. .. The offside rear of the private car collided with the wheel of the scooter and the scooter swerved several times. Then it fell on to the ground. . Q. Now, I know it's very difficult to recollect after so long but can you tell us how long after - - or was there any time at all from the moment you saw the two vehicles and the moment of the collision? Was it almost immediately after you

saw the two vehicles or what? A. After the vehicle passed me in front of me, two or three seconds later the collision happened. Q. Yes. Sorry. I just wanted to mark down your position. Can I see your sketch again? Mr Bharwaney: I m so sorry, madam clerk. Thank you. Q. Could you tell us what sort of speed the private car was travelling at when you first saw it and at the time of the collision? A. Almost 40 kilometres. Q. Did he have any indication lights on? A. I did not notice. Q. And you said that you saw the private car and motorcycle. What was the location of the motorcycle in relation to the private car? COURT: At what point? Q. When you first saw it. A. The motorcycle was following the private car at a close distance. A. The rear of the vehicle was abreast of the front of the motorcycle. (Tr. p 61I-62Q) The judge recorded this evidence in paragraph 30 of his judgment. Although, as the judge said, Mr Lam had what was in effect a ringside seat, it would appear from his evidence that he first saw the vehicles when they were approaching and then passing the bus but, as the judge recorded in paragraph 34 of his judgment, the difficulty was that Mr Lam was unable to address the relative positions of the vehicles up to the time they arrived alongside the bus. One thing which Mr Lam said was that he considered that immediately prior to the accident the view of the motor scooter would have been visible in the car s wing mirror and he did not think it would have been in a blind spot. Mr Chan, the driver of the motorcar, was an unsatisfactory witness. The judge referred to a statement that Mr Chan had made to the policeman who attended the site of the accident. That statement had been to the effect that the motor scooter had come in from the outside lane. The judge said that that demonstrated that the defendant was capable of making up a version on the spot which clearly did not happen. However the judge did not consider that Mr Chan was driving at a reckless speed, although he did not accept that in the moments before the collision the speed of the motorcar had been 10 Kph or less. Although the judge did not say so specifically he thus appears to have accepted that on approaching the Tunnel Mr Chan had seen the bus stop and that he slowed down as he came up to the bus and then decided to drive through the Tunnel in the offside lane as the bus was effectively blocking off the lane. In those circumstances, the accident is understandable to the extent that if both the motorcar and the motor scooter had previously been travelling at about 40 Kph and even if there had been a reasonable distance between them but the motorcar then slowed down as it approached the bus, the motor scooter would thus come up to the rear of the motorcar. If that be correct there can be no doubt that the judge was correct in saying in paragraph 48: In the circumstances, I am satisfied that Mr Chan in failing to keep a proper lookout before attempting the manoeuvre of changing lanes was negligent and caused the collision, and is thus liable for the consequences in damages. The question then arises as to whether the plaintiff contributed to the accident by failing to keep a proper lookout. He was asked how it was that he did not see the car. He said: It suddenly attacked me as a gust of wind. How could I notice it? At that time I was focused on controlling my motor scooter. I was focused on maintaining balance. (Tr. p 26 Q) He then went on to explain that in order to avoid the grease and oil which might be on the centre part of the lane he tended to drive his motor scooter towards the right-hand side of the nearside lane. He continued: Since I was not very slow, that is, my speed was around 40 kilometres per hour, since the double white lines were

pretty close he had to accelerate. When he accelerated he came across me and then I felt a gust of wind so I swerved a bit and then he hit me. He was straddling across the double white lines. He had not yet passed the double white lines. He was straddling the double white lines at the entrance of the tunnel. (Tr. p 27T-28B) This has to be understood in the context of the plaintiff not having seen the defendant's car. The defendant's car must have slowed down until its rear wheel was level with the front wheel of the plaintiff's motor scooter and then the car must have cut across the path of the plaintiff's scooter in the short space between the bus and the entrance to the Tunnel. The only scope for contributory negligence on the part of the plaintiff would have been failing to notice the course that the car was taking and to anticipate that the driver would wish to go into the offside lane. The judge clearly considered the question of contributory negligence. The decision of a judge as to contributory negligence and the amount thereof is treated as a finding of fact. An appellate court will not disturb a finding of fact unless it is satisfied that that finding was wrong or unsustainable. Whereas, it is possible that another court might have come to a different conclusion I do not consider that the circumstances exist here where the finding of fact can be overturned. Furthermore, I would also add that given the circumstances of the accident, I do not consider that it would be possible to attribute more than a minimal amount of contributory negligence to the plaintiff and, again, an appellate court is unlikely to interfere with the percentage of contributory negligence held against the plaintiff unless it considers that there is a significant discrepancy. Appeal as to quantum Only one aspect of the award was criticised. The judge awarded a figure of \$120,000 in respect of loss of earning capacity. He did that on the basis of six months loss of earnings. He said that he accepted that figure as being reasonable. It was accepted on both sides that an award of this nature is in respect of a disadvantage which the plaintiff may have in securing further employment should he at some time in the future lose his current employment. Such an award is there to compensate for the plaintiff's loss of competitive advantage in the open labour market. In short it was said that on the basis that the plaintiff would be an insurance salesman there was no reason to suppose that he would be more likely than any other insurance salesmen to lose his job nor would he find it any more difficult as a result of what was said to be the very minor residual effects of his ankle injury. Although, it is true, that the judge did not analyse fully as to why he considered that the plaintiff would be at a disadvantage in the labour market, his description of the plaintiff's injuries does explain his approach. He said at paragraph 64 that the plaintiff had complained of pain in his right leg to the ankle and tenderness and pain in his back. The plaintiff said that he had difficulty in walking, standing and sitting and suffered from sleep deprivation. The judge clearly accepted that the injury to the plaintiff's ankle hampered the plaintiff and prevented him from driving safely but he did not accept the lower back pain of which the plaintiff complained was a result of the injuries. He therefore discounted the low back pain as being a consequence of the accident. The judge did pay heed, however, to the mild psychiatric impairment although he considered it was a temporary condition. In those circumstances although it would have been preferable if the judge had been more explicit as to why he considered that the plaintiff was at a disadvantage in the labour market, I consider that circumstances existed such that justified

the holding and therefore would not disturb the award in this respect. Clearly a person who is under some physical disability is at a disadvantage. Lack of mobility can hamper a person s effectiveness. I would therefore dismiss this appeal with an order nisi of costs in favour of the plaintiff. Hon Le Pichon JA: I agree. Hon Barma J: I agree. (Anthony Rogers) Vice-President (Doreen Le Pichon) Justice of Appeal (Aarif Barma) Judge of the Court of First Instance Mr Mohan Bharwaney, instructed by Messrs Winnie Leung & Co., for the Plaintiff/ Respondent Mr John Hemmings, instructed by Messrs Massie & Clement, for the Defendant/ Appellant PAGE - A B C D E F G H I J K L M N O P Q R S T U V 1udk 1udk 2QX[2QX[2QX[2QX[H; < jFen & 6" ABC-Final (fair)1.dot setup Microsoft Word 9.0 +\$-5 Title Source Erica Microsoft Word Document MSWordDoc Word.Document.8

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