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HCPI 1216/2003

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**IN THE HIGH COURT OF THE
HONG KONG SPECIAL ADMINISTRATIVE REGION**

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COURT OF FIRST INSTANCE

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PERSONAL INJURIES ACTION NO.1216 OF 2003

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BETWEEN

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PAUL WILLIAM HALLORAN

Plaintiff

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and

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TSANG MING SANG

1st Defendant

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KWOK LEUNG

2nd Defendant

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Before : Deputy High Court Judge Poon in Chambers

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Date of Hearing : 9 June 2004

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Date of Handing Down Decision : 21 July 2004

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DECISION

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1. This is an appeal by the defendants against the order of Master Kwan dated 31 March 2004 whereby she refused their application for leave to adduce expert evidence on liability.

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ACCIDENT

2. This action arose out of a traffic accident that took place at 16:23 hours on 6 November 2002 at Choi Yuen Road, Sheung Shui, involving a taxi (KG2867) and a motorcycle (JF3685). At the point where the accident occurred, Choi Yuen Road is a three-lane, two-way, straight road, separated by a double white line with a speed limit of 50km/hr.

3. The 1st defendant was then driving the taxi along Choi Yuen Road in a north-westerly direction towards Po Chek Wu Road. The plaintiff was riding the motorcycle in the opposite direction along Choi Yuen Road in a south-westerly direction towards Pak Wo Road. Intending to join the taxi stand outside Sheung Shui KCR station, the 1st defendant turned right, crossed the double white line and drove into the plaintiff's path. As a result, a collision occurred.

THE PLAINTIFF'S INJURY

4. The plaintiff suffered multiple severe injuries, including brain damage. He was hospitalised in the Prince of Wales Hospital until 18 December 2002 and continued to receive treatment as an inpatient at the Union Hospital. On 4 January 2003, he was flown to Australia where he was admitted to the Princess Alexandra Brain Injury Rehabilitation Unit in Brisbane, Queensland. He remained there as inpatient for one month and thereafter attended as an outpatient.

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CONVICTION

5. The 1st defendant was subsequently prosecuted for the offence of careless driving. On 28 April 2003, he appeared before the magistrate in the Fanling Magistracy. According the brief facts read out before the magistrate and admitted by the defendant, “the accident was brought about by the inattentive manner of the defendant who had failed to ensure traffic clearance on the opposite lane before turning his vehicle thereto”. On his own plea of guilty, the defendant was convicted as charged and was fined HK\$1,500.

CLAIMS

6. On 6 November 2003, the plaintiff, a pilot with Cathay Pacific Airways, commenced the present action against the 1st defendant for negligence and the 2nd defendant, the taxi owner. He claimed for no less than AUD\$35,000 and HK\$37 million.

DEFENCE

7. In the defence filed on 3 December 2003, the defendants denied that the accident was caused by the 1st defendant’s negligence as alleged. They further alleged that it was caused or contributed to by the negligence on the part of the plaintiff by reason of, *inter alia*, failure to ride the motorcycle with a dipped headlamp during daylight hours and driving the motorcycle at a speed which was excessive in the circumstances.

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WITNESS STATEMENTS

8. Pursuant to directions, the parties have already filed their witness statements with the court.

(1) The plaintiff's statement

9. In his statement dated 29 April 2004, the plaintiff said that he received his driver's licence in Australia when he was 16. He could and did drive motorcycles and cars. In Hong Kong, he drove a motorcycle not as a means of transport but purely for pleasure, which he enjoyed. It was his practice to have the headlight on when he drove. Because of the brain damage, he could not remember anything about the accident or how it happened.

10. The accident was eye-witnessed by three pedestrians in the vicinity, Mr Leung Kai Ming, Mr Wong Wing Ming and Mr Wong Chun Hung. Their witness statements are summarised below.

(2) Mr Leung's statement

11. Mr Leung and his wife were walking on the pedestrian walkway to the Sheung Shui KCR Station. When he was at Choi Yuen Road about four to five meters near the accident spot, he suddenly heard a very long vehicle braking sound. He looked at that direction and saw that the 1st defendant taxi had just begun to turn right from the second lane of Choi Yeun Road into the taxi station at the opposite bound lane. At the same time, the plaintiff applied the brakes and collided head first with the taxi's left front side passenger door. The braking sound lasted for about two seconds from the moment he heard it until the collision. He was

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certain that the braking sound came from the plaintiff’s motorcycle. The taxi did not immediately stop and continued to turn right into the taxi entrance before stopping.

12. Mr Leung did not pay attention as to whether the 1st defendant had turned on his right turn signal indicator or he had looked at the conditions ahead of him prior to his turning right. But Mr Leung saw that the 1st defendant’s face was looking towards the taxi station entrance when he was turning right and he did not look at the traffic conditions in the Po Shek Wu Road direction.

13. Mr Leung did not pay attention as to whether the motorcycle’s headlights were on, either. But according to him, the speed of motorcycle at the time was not fast. It was very slow.

(3) *Mr W.M. Wong’s statement*

14. Mr W.M. Wong was walking along the pedestrian walkway to the Sheung Shui KCR Station. When he had walked up to a distance of about 50 feet from the accident location, he noticed the plaintiff’s motorcycle driving on the right side heading towards Yuk Po Court. Its speed was very steady, not fast, kind of going for a leisurely drive. From Mr W.M. Wong’s own extensive driving experience, he estimated that its speed was about under 40km/h. He continued to walk on a straight path thereafter. About 10 seconds later, he heard a “bang” sound. He then saw the motorcycle lying on the ground and the 1st defendant’s taxi horizontally drive to the vehicle lane towards Yuk Po Court direction, in

A front of the motorcycle. Mr W.M. Wong did not see how the collision
 B took place. A B

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 D (4) *Mr C.H. Wong's statement* C D

E 15. Mr C.H. Wong was walking with a few friends on the
 F pedestrian walkway (adjacent to the vehicle lane heading towards Yuk Po
 G Court) to the Sheung Shui KCR Station. When he was about 25 feet from
 H the accident location, he was the plaintiff's motorcycle on the right side
 I pass by, heading in the direction of Yuk Po Court. At the same time, he
 J saw the 1st defendant's taxi on the opposite side of the lane begin to turn
 K right into taxi station. Once the taxi passed the double white lines, the
 L front part of the motorcycle collided with the nearside front of passenger
 M door of the taxi. The taxi did not switch on its right turn indicator light.
 At the time, the traffic was light and there was no obstructions obstructing
 the 1st defendant's looking ahead at the traffic conditions of the opposite
 lane. Mr C.H. Wong was not aware of the motorcycle's speed but
 thought that it was a little faster than normal. L M

N (5) *The defendant's statement* N

O 16. In his witness statement, the defendant had this to say : O

P "8. As I reached the scene of the accident, I looked towards the
 Q oncoming traffic and saw a vehicle a long way away from
 R me. The vehicle seemed to be a small vehicle but it did
 not have its lights on. It was travelling along the opposite
 lane of Choi Yuen Road towards me. I cannot say how
 fast the vehicle was moving but it did not appear to be
 driving very fast. P Q R

S 9. At that time my taxi was moving at a speed of about 20 kph.
 T I estimated that the approaching vehicle was far away
 enough for me to safely drive the taxi across the opposite
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B	lane without stopping. If I had thought that the vehicle was too close to me, I would not have turned straight across the opposite lane. I would have stopped and allowed the approaching vehicle to pass if it was too close to my taxi.	B
C		C
D	10. I turned on the right-turn indicator before I made the right-turn. I did not stop the taxi but immediately turned right and moved into the opposite lane and intended to drive into the taxi stand.	D
E		E
F	11. When I was driving the taxi across the opposite lane, I suddenly heard a loud noise from my left-hand side. I therefore applied the brakes of the taxi and the taxi stopped a short distance away from the place where the collision occurred.	F
G		G
H	12. I got off from my taxi and saw that a motorcycle (later known JF 3685) was lying horizontally on Choi Yuen Road with its left side on the road surface. The driver of the motorcycle was lying on the ground. I telephoned the police immediately.	H
I		I
J	13. After the accident, I noticed that there was damage to the nearside front fender, the nearside front door and the nearside doorsill of the taxi.	J
K		K
L	14. I was later charged with 'Careless Driving' as a result of the accident, and I pleaded 'guilty' to the charge.	L
M		M
N	15. I did not see the motorcycle before the accident. The only vehicle I saw was approaching a very long distance away from me. When I was interviewed by the police, I was asked to estimate the distance by using double decker buses. I was asked how many double decker bus lengths away the vehicle was and I said it could have been at least 4 to 6 double decker bus lengths away. I did not see the Plaintiff's motorcycle before the accident. It could have come out of Choi Yuen Estate or the carpark by the Sheung Shui station or it could have overtaken the vehicle that I had seen.	N
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Q	16. I do not believe that the Plaintiff's motorcycle headlight was on before the accident. If the motorcycle headlight had been on, it would have been easier for me to see the motorcycle because both sides of that stretch of road were lined with trees. It would also have been easier for me judge the speed that the motorcycle was travelling at and also the distance that the motorcycle was away from my taxi."	Q
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THE EXPERT’S REPORTS

17. The defendants have engaged Professor Murray Mackay, a motor accident reconstruction expert to prepare various reports which they sought to adduce on the issue of liability. They intended to rely on the reports to support their allegations that the plaintiff failed to pave proper regard to the circumstances of Choi Yuen Road and by implication was driving too fast for the conditions (“the Speed Point”); and that the plaintiff had failed to illuminate his motorcycle headlamp, any by implication, thereby made it difficult for the 1st defendant to judge the motorcycle’s speed and the separation distance between the motorcycle and his taxi (“the Illumination Point”).

18. I do not propose to set out in detail these reports. Suffice to say that I have already considered them carefully. I only wish to make two points. In respect of the Illumination Point, Professor Mackay sought to deal with whether the headlight of the plaintiff’s motorcycle was “in fact” on. Mr Jones, counsel for the defendants, rightly conceded that this part of his reports is inadmissible. In respect of the Speed Point, Professor Mackay took into account of a number of technical factors, including the tyre marks of the motorcycle on the road and the braking coefficient. He came to a range of 40km/h to 60km/h.

THE LAW

19. As noted above, the learned master refused the defendants’ leave to adduce the expert’s reports. Now that the defendants appeal, it falls upon me to determine, by way of rehearing, whether leave should be so granted.

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20. I first remind myself of the applicable legal principles.

21. The court has an inherent jurisdiction to exclude expert evidence which is irrelevant, inadmissible or speculative.

22. In road accident cases, the law in relation to when expert evidence on liability may be admissible has been succinctly set out by the English Court of Appeal in *Liddle v. Middleton* [1996] PIQR P36 relevant, which has been followed in Hong Kong. The relevant passage of the judgment is at P42-P43 where Stuart Smith LJ said :

“... In some cases expert evidence is both necessary and desirable in road traffic cases to assist the judge in reaching his or her primary findings of fact. Examples of such cases include those where there are no witnesses capable of describing what happened, and deductions may have to be made from such circumstantial evidence as there may be at the scene, or where deductions are to be drawn from the position of vehicles after the accident, marks on the road, or damage to the vehicles, as to the speed of a vehicle, or the relative positions of the parties in the moments leading up to the impact.

In such cases the function of the expert is to furnish the judge with the necessary scientific criteria and assistance based upon his special skill and experience not possessed by ordinary laymen to enable the judge to interpret the factual evidence of the marks on the road, the damage or whatever it may be. What he is not entitled to do is to say in effect ‘I have considered the statements and/or evidence of the eyewitnesses in this case and I conclude from their evidence that the defendant was going at a certain speed, or that he could have seen the plaintiff at a certain point’. These are facts for the trial judge to find based on the evidence that he accepts and such inferences as he draws from the primary facts found. Still less is the expert entitled to say that in his opinion the defendant should have sounded his horn, seen the plaintiff before he did or taken avoiding action and that in taking some action or failing to take some other action, a party was guilty of negligence. These are matters for the court, on which the experts’ opinion is wholly irrelevant and therefore inadmissible...”

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He then gave a warning at P43-P44 :

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“ There has been a regrettable tendency in recent years in personal injury cases, both road traffic and industrial accidents, for parties to enlist the services of experts whether they are necessary or not. When they are not necessary, they simply add to the already high cost of litigation and the length of the trial. In industrial accidents an expert may well be needed to explain complicated machinery or to give evidence of practice and safety procedure. But in road traffic accidents it is the exception rather than the rule that expert witnesses are required...”

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I now turn to consider if Professor Mackay’s reports are admissible.

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WHETHER EXPERT EVIDENCE ADMISSIBLE

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23. Mr Jones accepted that he had to first persuade me that the present case falls within the exception to the ordinary traffic accident cases. He cited three main reasons in support.

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24. The first reason is that the present case is not a simple or usual collision because it involves a motorcycle and a car. With respect, I disagree. It is a simple collision case. Contrary to Mr Jones’s submissions, the courts have extensive experience in dealing with traffic accidents involving a motorcycle and a car.

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25. The second reason is that the speed and illumination of the motorcycle prior to the collision are highly relevant matters. The illumination and speed of the vehicles involved in the accident are almost relevant in all cases. I fail to see how they would constitute an exception. Mr Jones referred to Professor Mackay’s point that according to its specification, the plaintiff’s motorcycle did not have a light circuit that automatically switched on the headlights when the engine was started.

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However, it should be noted that it is not the plaintiff's case that his motorcycle's headlight was switched on automatically when the engine was on. He only said that he used to drive with the headlight on. In any event, whether the headlight was on is a matter for the judge. As to speed, I will deal with in the next paragraph.

26. The third reason is that technical matters such as braking coefficients, vehicle load, skid mark interpretation and so forth are all relevant and probative and are outside the knowledge and experience of a layman and the court. These matters are mainly pertinent to the Speed Point. These matters may be of valuable assistance if there are no eye-witnesses. But we do have three independent eye-witnesses. The court can derive assistance from them as to the circumstances leading to the accident, in particular, the approximate speed of the plaintiff's motorcycle at the time. Mr W.M. Wong is able to say that it was at about 40km/h. Mr Leung said it was slow while Mr C.H. Wong said it was faster than normal. No doubt their evidence will be further canvassed at trial. With the assistance of their evidence and that of the 1st defendant, the court should have no difficulty in making a finding on the approximate speed of the plaintiff's motorcycle prior to the accident. The court does not need expert's assistance on technical matters in determining the Speed Point.

CONCLUSION

27. In my view, the expert reports that the defendants sought to adduce are clearly inadmissible. The learned master was correct in

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refusing leave. I, too, will refuse leave. This appeal is therefore dismissed with costs against the defendants, to be taxed if not agreed.

(J. Poon)
Deputy High Court Judge

Mr Nicholas Pirie, instructed by Messrs Haldanes, for the Plaintiff

Mr Douglas Jones, instructed by Messrs Hoosenally & Neo,
for the 1st and 2nd Defendants