## DCPI 680/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 680 OF 2008

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| BETWEEN | TANG HOI PING | Plaintiff |
|  | and |  |
|  | WONG CHI HO | Defendant |

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Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 26 & 27 February, 2009

Date of handing down Judgment : 25 March, 2009

# JUDGMENT

**Background**

1. On 2 August 2006, the Plaintiff, Mr. Tang, was at a pedestrian crossing near the junction of Castle Peak Road and Yat Sun Street in Yuen Long. It was 2 p.m., and the traffic at this stretch of Castle Peak Road was very heavy. There were two lanes of one-way traffic westbound. The inner left lane turned into Yat Sun Street after the pedestrian crossing. There was also a bus stop on the inner left lane a short distance before the pedestrian crossing. There was a system of traffic lights just before the pedestrian crossing, one set for directing the traffic of vehicles, and one set for directing pedestrians at the crossing.
2. It is Mr. Tang's claim that when the traffic light for pedestrians turned green, he crossed the road at the pedestrian crossing, and when he was about half way across the road, he was hit by a private vehicle which was driven by the Defendant, Mr. Wong. Mr. Tang was injured as a result, and these proceedings are instituted by Mr. Tang against Mr. Wong for compensation.
3. By way of defence, Mr. Wong claims that he was driving his vehicle along the outer lane at a speed of 30 to 40 km an hour, and that the traffic light was green in his favour when he was approaching the pedestrian crossing. Mr. Wong claims that Mr. Tang had crossed the road when the traffic light was against him, and when it was unsafe for him to do so. As evidence that the accident was caused by Mr. Tang's own negligence, Mr. Wong relies on a warning letter sent by the police to Mr. Tang, dated 25 September 2006, for crossing the road carelessly.

**The issues**

1. The issues for determination at trial are :
   1. whether the accident was caused by Mr. Wong's negligence;
   2. whether the accident was caused by Mr. Tang's own negligence; and
   3. the amount of damages for which Mr. Wong may be liable.

**Whether the accident was caused by Mr. Wong's negligence**

1. It is Mr. Tang's evidence that he had seen that the pedestrian light was green, before he crossed the road. Mr. Tang admits that he had not noticed whether the traffic light for vehicles, which light pointed to the direction of the vehicles on his right, was green. However, his evidence is that a private car had already stopped on the inner lane of the road before the pedestrian crossing and the lights.
2. According to Mr. Tang, Mr. Wong's private car suddenly appeared at high speed on his right, and he was hit by what appeared to him to be the front wheel of the vehicle. Mr. Tang also claims that after he was hit, Mr. Wong's vehicle continued to drive forward for a distance past the pedestrian crossing, before it stopped, and then backed, and then turned into Yat Sun Street before stopping altogether.
3. Mr. Tang was taken to the hospital in Mr. Wong's vehicle, where Mr. Tang made a report to the police and received treatment for his fractured right foot.
4. A statement was made by Mr. Wong to the police on 26 August 2006, about 3 weeks after the accident. Mr. Wong claims in the statement that when he was about 20 m in front of the traffic lights, he saw that the light was green. There were no vehicles in front of Mr. Wong's car. According to Mr. Wong, when he was at the pedestrian crossing, the green light was still green in his favor, the traffic on the outer lane was still clear, but there was a private car which had stopped on the inner lane to his left and in front of the traffic lights. When Mr. Wong's vehicle drove past the pedestrian crossing, he heard a bump from the left rear of his car. He looked at his left rear mirror and applied the brakes. At the same time, he saw a man (who allegedly was Mr. Tang) with his hands near the door next to the left passenger seat at the back of his car. According to Mr. Wong, Mr. Tang stopped suddenly and slipped, and then stood up and ran towards the pavement on Mr. Wong's left. Mr. Wong claims that he then drove his car to Yat Sun Street and parked there. When he approached Mr. Tang, he claims that Mr. Tang told him that the left rear wheel of Mr. Wong's car had hit his left foot. According to Mr. Wong, the door next to the left passenger seat was slightly dented.
5. Mr. Wong claims in his statement to the police that at the material time, only Mr. Tang was crossing the road, and there were other pedestrians standing on the pavement. Mr. Wong further claims that he had not seen Mr. Tang before he ran out from the pavement. Mr. Wong claims that Mr. Tang had informed him after the accident that Mr. Tang was mistaken as to the pedestrian light, and thought that the green light was on when he saw that the vehicle had stopped at the inner lane. According to Mr. Wong, the vehicle had stopped at the inner lane as it was waiting to turn left into Yat Sun Street, because there was traffic congestion at Yat Sun Street. A sketch was made by Mr. Wong to illustrate the course of the accident.
6. Mr. Wong signed a witness statement in these proceedings on 27 November 2008, repeating what he had stated to the police. It was filed on 3 December 2008.
7. Mr. Wong was not called to give evidence at the trial. Counsel who appeared for Mr. Wong explained that Mr. Wong could not be located or contacted to give evidence. Since Mr. Wong has not been called to prove the facts stated by examination and cross-examination, I should not give any regard to his witness statement.
8. A Hearsay Notice was filed shortly before trial, in respect of both Mr. Wong's statement to the police and his witness statement filed in these proceedings. Clearly, Mr. Wong’s evidence as to the circumstances of the accident are highly controversial, being directly at odds with Mr. Tang's account of the accident. It is essential to test Mr. Wong's case and to assess his credibility with cross-examination, but he was absent at trial.
9. Although Mr. Wong's police statement and witness statement filed in these proceedings are admissible by virtue of s.47(1) of the Evidence Ordinance, the weight to be attached to these documents is extremely limited in my judgment, bearing in mind Mr. Wong's absence in court for cross- examination, and bearing in mind the factors outlined in s.49(2) of the Evidence Ordinance. I accept the submissions made by Counsel for Mr. Tang that: (1) it would have been reasonable and practicable for Mr. Wong to have been called as a witness in these proceedings; (2) the police statement, on which the witness statement was entirely based, was made about 3 weeks after the date of the accident instead of contemporaneously; (3) the statements contained multiple hearsay in relation to what Mr. Tang had allegedly told Mr. Wong (that Mr. Tang was mistaken as to the pedestrian green light); and (4) Mr. Wong had a personal interest to claim that the traffic light was in his favor when he failed to stop at the pedestrian crossing, to avoid any prosecution against Mr. Wong as well as any liability towards Mr. Tang in respect of Mr. Tang's injury.
10. Mr. Wong's essential defence is that the traffic light was green in his favor, disputing Mr. Tang's claim that the pedestrian traffic light was green which led Mr. Tang to step onto the pedestrian crossing and to cross the road. Although Mr. Tang's evidence was challenged in cross-examination, he was unshaken as to the existence of the traffic lights for pedestrians. The photographs taken at the site which support Mr. Tang's evidence finally led to Counsel for Mr. Wong withdrawing his challenges in this respect.
11. Mr. Wong's assertion that the traffic light was green in his favor is contradicted by the fact that, as he admits and points out in his statements, the private car in the inner left lane had stopped at the pedestrian crossing. Mr. Wong explains this by saying that the private car had stopped not because of the red traffic light, but in order to wait to turn into Yat Sun Street, as there was traffic congestion at the junction of Castle Peak Road and Yat Sun Street.
12. Mr. Tang's evidence is that the private car had stopped before the pedestrian crossing, because the traffic light was red. As the photographs of the site show, there is no "yellow box" marked after the pedestrian crossing at the junction of Yat Sun Street. If the traffic light had been green, Mr. Tang claims that the private car would have crossed the pedestrian crossing, even if the driver of the private car had intended to turn left into Yat Sun Street. On Mr. Tang's evidence, there was sufficient room for the private car to have stopped after the pedestrian crossing and before turning into Yat Sun Street. Mr. Tang claims that Yat Sun Street was sufficiently wide enough to accommodate 3 vehicles, and that even if there had been traffic congestion as Mr. Wong claims, the private car would have room to turn into Yat Sun Street, or to stop further down Castle Peak Road, at the bend of the road before turning into Yat Sun Street. Photographs taken at the site support Mr. Tang's contention as to the width of Yat Sun Street, and the space between the pedestrian crossing and the bend for turning into Yat Sun Street. Mr. Tang's evidence is that it was improbable for the driver of the private car to have stopped in front of the pedestrian crossing for the purpose only of turning into, or waiting to turn into, Yat Sun Street.
13. I accept Mr. Tang's evidence in relation to the vehicle which had stopped in front of the pedestrian crossing, particularly since Mr. Wong was not in court to explain and justify his contention. I do not find Mr. Wong's evidence to be either credible, or reliable in the absence of cross-examination. The evidence that the private car on the inner lane had stopped in front of the pedestrian crossing contradicts Mr. Wong's assertion that the traffic light for vehicles was green at the material time.
14. On the evidence before the Court, I find on a balance of probabilities that the traffic light for vehicles along Castle Peak Road was red at the material time, and that Mr. Wong was negligent in failing to stop at the traffic lights before the pedestrian crossing, or in failing to keep a proper lookout for the presence of pedestrians crossing the road when he failed to stop before the pedestrian crossing. As Mr. Wong admits in his statements, he only saw Mr. Tang after his vehicle had nearly passed Mr. Tang, when Mr. Tang had his hands near the door to the left passenger seat at the back of his vehicle.
15. Further, I accept the submissions of Counsel for Mr. Tang that even if the traffic light was green in favor of Mr. Wong, it does not mean that Mr. Wong can disregard the presence of pedestrians, or to lower his standard of care (*Lee Hon Cheung v. Chan Tang Kai Lan & Ors.* HCA 4522/1991 unrep., 30 October 1995; *Au Cheung v. Choi Lai-fun* [1979] HKLR 543). If Mr. Wong had given proper attention to the condition of the road, he could not have failed to see Mr. Tang crossing the road in front of Mr. Wong's vehicle, and should have been able to stop this vehicle in time to avoid hitting Mr. Tang.
16. The evidence is that the pedestrian crossing was at a busy part of Castle Peak Road, with pedestrians waiting to cross the road, at a busy time of the day. There was a Light Rail Train station just across the pedestrian crossing. There was a bus stop just in front of the pedestrian crossing. There was another set of traffic lights 30 feet ahead further down Castle Peak Road.
17. According to the Road Users' Code, drivers should drive carefully and slowly when pedestrians are about, particularly in crowded streets, or when a bus stop is seen. Drivers should generally be on the lookout for pedestrians stepping onto the road suddenly, particularly where bus stops or transport terminals are nearby.
18. According to Mr. Wong, he had applied his brakes at the same time when he saw Mr. Tang with his hands on his vehicle. However, Mr. Tang's evidence is that Mr. Wong's vehicle only stopped after it had completely gone past the pedestrian crossing, before the vehicle was reversed and then turned into Yat Sun Street. This suggests that Mr. Wong's vehicle was traveling too fast, and that Mr. Wong had not paid adequate attention which prevented him from stopping his vehicle in time to avoid hitting Mr. Tang.
19. Since Mr. Wong was not in court to be cross-examined, I reject his evidence that he was informed by Mr. Tang after the accident that Mr. Tang had mistaken the pedestrian traffic light to be green in his favor. Mr. Tang denies having ever made such a statement to Mr. Wong.
20. Counsel for Mr. Wong relies on the fact that when he was given the opportunity to do so, Mr. Tang never gave to the police his version of the circumstances of the accident. Mr. Tang explains that this was because he was cautioned, before being asked by the police to make a statement, that he might be prosecuted for carelessly crossing the road. He was so cautioned on 8 September 2006, after Mr. Wong had given his statement to the police on 26 August 2006, to the effect that the traffic light was green in Mr. Wong's favor and that Mr. Tang had said to Mr. Wong that Mr. Tang was mistaken as to the fact that the pedestrian light was green in Mr. Tang's favor.
21. I accept Mr. Tang's explanation in relation to his concerns after having been given a caution. I am satisfied that no adverse inference should be drawn against Mr. Tang in the circumstances of this case by virtue only of his maintaining silence when interviewed by the police. Since the warning letter issued by the police to Mr. Tang on 25 September 2006 was based only on the facts related by Mr. Wong, without hearing Mr. Tang's version, I give very little weight to the warning letter.
22. On the contrary, I consider that by virtue of the failure to call Mr. Wong to give material evidence on the key issues in dispute in these proceedings, I am entitled to draw adverse inferences against Mr. Wong, to strengthen the evidence adduced by Mr. Tang or to weaken the evidence sought to be adduced by Mr. Wong.
23. I accept that there is nothing inherently improbable in Mr. Tang's case. Where there are inconsistencies between Mr. Tang's evidence and that of Mr. Wong, I prefer the evidence of Mr. Tang.

**Whether the accident was caused by Mr. Tang's own negligence**

1. There is no evidence that Mr. Tang had walked unexpectedly out from the pavement onto the pedestrian crossing. Mr. Tang claims that he had checked the traffic before he stepped onto the pedestrian crossing, and he had seen that the pedestrian light was green. I find no evidence to support any claim of contributory negligence on Mr. Tang's part.

**The amount of damages for which Mr. Wong may be liable**

1. Mr. Tang, aged 40 at the time of the accident, sustained fracture of his right distal fibula as a result of the accident. He was hospitalized for 2 days, and was on a cast for about 50 days. Mr. Tang was granted a total of 174 days of sick leave. Considering the decisions in *Leung See Ning Clara v. Shun Tak Property Management Ltd.* DCPI 625/2003, unreported 2004 January 2005, and *Chan Yiu Ping v. Mok Yuk Kwong & Ors.* HCPI 92/1998 3 July 2000, I consider that a reasonable award for pain and suffering is **$250,000**.
2. Mr. Tang worked as a cook in his own restaurant. As a result of the accident, Mr. Tang suffers from residual pain in his right foot, which aggravates after long periods of standing and walking. This is accepted in the joint medical report, as the doctors concluded that although Mr. Tang was fit to resume his occupation as a chef, there would be reduced standing tolerance.
3. According to Mr. Tang's own evidence, he tried to resume his work in his own restaurant for 10 days, but was not able to continue after his right ankle became too tired. Mr. Tang can now only work as a waiter in his restaurant. He therefore claims by way of damages the expenses he incurred for having to hire a replacement cook at $500 per day during the period when he was on sick leave. I accept his evidence and his calculations of $500 x 174 x 1.05, giving a total of **$91,350**.
4. Since Mr. Tang owns his own restaurant, I do not accept that there is evidence of any real or substantial risk of his losing his employment or income from the restaurant, as a result of the accident. I do not make any award for loss of earning capacity.
5. With regard to Mr. Tang's claim for special damages, I allow the medical expenses and traveling expenses as agreed, in the sum of **$1,260**. I will only allow a further sum of **$1,000** for tonic foods.
6. The total award accordingly comes to **$343,610**. There will be interest on the award of $250,000 at the rate of 2% per annum from the date of the service of the Writ to the date of judgment, and on the award of all special damages at half the judgment rate from the date of the accident to the date of judgment.

1. I will further make an order nisi that the costs of the action are to be paid by Mr. Wong, to be taxed if not agreed, with certificate for counsel.

(Mimmie Chan)

District Judge

*Mr. Simon Lam, instructed by Messrs. Andrew Chan & Co. for the Plaintiff*

*Mr. Victor Gidwani, instructed by Messrs. Deacons for the Defendant*