## DCPI 1221 /2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1221 OF 2009

--------------------

##### BETWEEN

|  |  |
| --- | --- |
| CHOW WING KING | Plaintiff |
| and |  |
| CHAN SUET YEE | Defendant |
|  |  |

--------------------

Coram: Acting Chief District Judge S. T. Poon in Court

Date of Hearing: 8th , 9th & 10th March 2011

Date of Handing Down Judgment: 16th May 2011

JUDGMENT

**Background**

1. The Plaintiff was injured in a traffic accident happened on 9 May 2006 when he was driving along the San Tin Highway heading Yuen Long. The Defendant was the driver of another vehicle involved. They gave totally different versions as to what happened.
2. There was no prosecution brought against either of them for traffic offence.
3. As a result of the accident, both vehicles[[1]](#footnote-1) were damaged so badly that had to be disposed of on a total loss basis. In this action, the Plaintiff claims for his personal injuries and the Defendant counterclaims damages for the loss of his vehicle.

1. The accident happened at around 2:51 a.m. The speed limit of the relevant section of the highway is 100km/h.

The Plaintiff’s version

1. The Plaintiff is a young man born in 1982. He gave evidence that on the relevant day, he drove his father’s vehicle from Tai Po via San Tin Highway to Yuen Long. On board the vehicle was also his then girlfriend Miss Yam.
2. When they were at about Lok Ma Chau, the Plaintiff was travelling along the 3rd lane at a speed of around 100km/h. He then saw the Defendant’s vehicle at about 20 metres in front of him travelling on the middle lane. In front of the Defendant’s vehicle was a container truck.
3. When the head of the Plaintiff’s vehicle approached the rear of the Defendant’s vehicle, the Defendant’s vehicle suddenly swerved right to the 3rd lane. In order to avoid collision, the Plaintiff immediately swerved right causing his vehicle to come into contact with the concrete divider of the highway, slid forward along it, and finally came to a halt.
4. The impact triggered the airbag of the Plaintiff’s vehicle to come out which blocked his vision and he could not see what happened to the Defendant’s vehicle. The Defendant’s vehicle was later found to be stationed on the 1st lane in a position perpendicular to the lane, with the head of the vehicle pointing to the left.

The Defendant’s version

1. The Defendant is a business man of 45 years old. On the date in question, he had dinner together with his friend Mr. Cheung in Guangzhou, Mainland. The Defendant consumed 1 bottle of beer during the dinner. After the dinner at around 11 p.m., they took public transport to a car park in Lok Ma Chau where the Defendant had parked his vehicle. The Defendant then drove himself and Mr. Cheung back home to Sheung Wan via San Tin Highway.
2. The Defendant entered San Tin Highway from the Lok Ma Chau roundabout and when he entered the highway, he noticed a container truck travelling on the 2nd lane about 100 m in front of him. As he intended to overtake the truck, he turned on the right indicator lights and checked the traffic behind with the back and side mirrors. He saw no oncoming traffic at least 200 to 300 m from behind and turned his head to check the right blind spot. He found out that it was safe to change his lane and he swerved his vehicle to the 3rd lane. After he changed into the 3rd lane, he noticed from the back mirror the Plaintiff’s vehicle approaching very fast which was at a distance of about 10 m behind his vehicle. The Plaintiff’s vehicle then suddenly swerved to the 2nd lane where the container truck was travelling and was in a close distance of 1 to 2 m behind the truck. The Plaintiff’s vehicle then swerved immediately back to the 3rd lane and as a result, the offside front corner of it collided with the nearside body of the Defendant’s vehicle. Because of the impact, the Defendant’s vehicle was pushed and hit against the concrete divider, slid across the carriageway and finally stopped on the 1st lane.

Evidence

1. Both parties were subject to extensive cross-examinations by counsel for their respective opponent. After hearing their evidence and considering all the other evidence before me, I have no hesitation to reject the evidence of the Plaintiff and accept that the version given by the Defendant is true.
2. A few days after the accident, the police had taken statements from the parties and also Miss Yam, Mr. Cheung and a person named Yip Tak Fat who was at the time of the accident driving a vehicle behind the Plaintiff, witnessing the whole accident. This Mr. Yip was an acquaintance, if not a friend, of the Plaintiff.
3. Surprisingly, Miss Yam and Mr. Yip were not called to give evidence. In their statements to the police, they basically confirmed the version given by the Plaintiff. In Mr. Yip’s statement, he even gave an account of what happened to the Defendant’s vehicle after the accident[[2]](#footnote-2), a part that had not been provided for in the Plaintiff’s own evidence. Curiously, Mr. Yip stated that at the time of the accident, he did not know that the Plaintiff was involved. He only learnt about this after 2 or 3 days when he ran into the Plaintiff on the street and chatted with him.
4. The Plaintiff did not give any reasonable explanation for not calling the witnesses to give evidence. In cross-examination, he gave a totally different version from that of Mr. Yip as to whether Mr. Yip knew about his involvement in the accident. He said that he and Mr. Yip were actually travelling together to Yuen Long at the time, albeit in different vehicles. When asked about the inconsistency, the Plaintiff simply said Mr. Yip must have made a mistake.
5. Mr. Yip was the one who called the police after the accident. But he did not wait there for the police. When he gave his statement to the police, he lied about why he was there. In the preparation of this litigation, the Plaintiff must have read Mr. Yip’s statement and hence, must have noticed about the lie. Why did he not clarify with Mr. Yip? There must be something behind that the Plaintiff and Mr. Yip chose to conceal about. Besides, the Plaintiff said the last time he met Mr. Yip was about 1 month ago. However, according to his solicitors, Mr. Yip could not be reached for service of the subpoena to attend trial. Furthermore, Mr. Yip was not asked to make any witness statement for the purpose of this action although the Plaintiff said he did ask Mr. Yip to be a witness for him.
6. The Plaintiff gave a witness statement to the police. In the statement, the police asked him to explain why he told the police previously, soon after the accident, that his speed was 110 to 120 km per hour whereas at the time of giving his statement he changed to say that his speed was 100 km per hour. As recorded in the statement, the Plaintiff answered, on one hand, that as he did not read the speedometer at the time, he might have made an inaccurate estimate, but on the other hand, that after he passed Lok Ma Chau, he knew that there would be police radar check and he noticed that his speed was below 100 km per hour. Quite obviously, this is devoid of logic.
7. When cross-examined by Ms. Tsui, counsel for the Defendant, the Plaintiff simply denied having ever told the police that he had travelled at a speed of 110 to 120 km per hour. When he was pushed further, he even suggested that the answer recorded on his police statement was not from him but provided by the police. As observed, the Plaintiff kept on throwing out new allegations in order to explain what was unexplainable in his existing evidence.
8. Another example is the Plaintiff’s evidence regarding his earnings before the accident. The Plaintiff only disclosed his bank statements upon an unless order being given by the PI Master. At trial, the Plaintiff was asked as to why he was being reluctant in producing his income proof notwithstanding repeated requests from the Defendant. He answered that he was not informed of the directions of the court for disclosure of documents.
9. In his oral evidence, the Plaintiff said that he received his salaries in cash but could not identify from the entries on the account statements those representing receipts of his salaries. There were quite a number of deposits into the account which, according to the Plaintiff, were not his salaries. At first, he could not explain what those entries represent but later he came up with an explanation that he had lent the account to his friends for collection of money as his friend did not have a Hong Kong Bank account. However, when asked further, he could not identify the corresponding entries that show the withdrawal of money for repayment of the money to his friend.
10. In my view, the Plaintiff is not an honest witness and his evidence is totally unreliable.
11. On the contrary, the Defendant gave straight forward answers in his evidence and was unshaken under cross-examination.
12. Mr. Kwok, counsel for the Plaintiff, used the estimates of time, in seconds, given by the Defendant in his evidence to do a physical calculation of the Plaintiff’s speed[[3]](#footnote-3) and suggested that the Defendant’s evidence was incredible. With respect, as I have pointed out to Mr. Kwok in his final submission, this kind of calculation cannot be helpful as a minute deviation of the estimates will result in a considerable difference in the outcome.
13. Mr. Kwok had also attempted to do a forensic analysis on the damages of the Defendant’s vehicle. He submitted that if the Defendant’s vehicle was crashed in the way described by the Defendant, it could not have damaged like it was. Again, I am unconvinced by Mr. Kwok’s submission in that it was unaided by any expert’s evidence and based solely on speculations.
14. In fact, some damages on the Defendant’s vehicle were consistent with the Defendant’s version but could not be explained by the Plaintiff’s evidence. The left side of the Defendant’s vehicle was damaged from the middle part to the rear. This is consistent with the fact that there was an impact occurred between the two vehicles as described by the Defendant and Mr. Cheung. However, it remained unexplained why the left side of the Defendant’s vehicle was damaged if there was no impact occurred between the two vehicles as alleged by the Plaintiff. Being aware of this lacuna in the Plaintiff’s evidence, Mr. Kwok boldly suggested a scenario that the Defendant’s vehicle must have collided with the container truck in front after he realized that the Plaintiff’s vehicle was in the 3rd lane and steered back to the 2nd lane. I must say that this was only a desperate attempt to try saving the shortcoming of the Plaintiff’s evidence which was not supported by a trace of evidence. I rejected Mr. Kwok’s suggestion right away.
15. The Defendant’s evidence was supported by Mr. Cheung who has no personal interest in the matter. Although he is a friend of the Defendant, he impressed me that he understood his legal duty to give true evidence and I can see no reason to doubt his integrity.
16. I note that there was a slight difference between Mr. Cheung’s and the Defendant’s evidence as to whether the Defendant’s vehicle had spun[[4]](#footnote-4) after colliding with the Plaintiff’s vehicle. I do not think this can affect the credibility of their evidence as it would be unrealistic to expect two persons to give a perfectly equal account on the details of a traffic accident of this nature in which they were involved.
17. I find as facts that the accident happened as described by the Defendant.
18. In reaching this finding, I note also that the Defendant had consumed alcohol that night and the concentration of alcohol in his breath was found to be just below[[5]](#footnote-5) the legal limit for driving in a breath test by the police at scene. However, there was no sign in the evidence of the Defendant’s manner of driving being influenced in any way by alcohol.
19. In the circumstances, I find the Plaintiff being negligent in driving too fast and failed to keep a proper look out to the traffic condition that caused the accident and hence, the damages to the Defendant’s vehicle.

**Quantum**

1. As supported by the surveyor’s report submitted by the Defendant, I find the then market value of the Defendant’s vehicle was HK$75,000. I also find that the amount of HK$2,000 for surveyor’s fees was reasonably incurred. After deduction of the salvage value of HK$1,500, the damages suffered by the Defendant should be HK$75,500.
2. Concerning the assessment of damages suffered by the Plaintiff, as I have found against him on liability, it becomes academic. For completeness, if I were to assess the damages to be awarded to the Plaintiff, assuming that he was successful on liability, I would reject his claims on loss of earnings and loss of earning capacity as I find that the Plaintiff adduced no reliable evidence on his earnings for consideration.
3. For PSLA, the Plaintiff sustained multiple contusions, multiple lacerations over face, body and head and chest wall injuries. Radiograph of lumber spine showed anterior wedge collapse at L1/L2. Sick leave was granted for 6 months. The Plaintiff received joint examination by Dr. Johnson Lam and Dr. Danny Choi. On examination, he was found to be able to (i) walk with a normal gait; (ii) stand and walk on tip-toe; (iii) perform heel standing and walking; (iv) stand only on either leg; and (v) squat fully with no difficulty. Both experts opined that the Plaintiff has exaggerated his conditions.
4. Counsel submitted quite a number of authorities for my consideration on damages for PSLA which I do not propose to list out here. In my opinion, the injuries suffered by the Plaintiff were less serious than that of those cases. In particular, I considered the award to the Plaintiff under this head should be less than the awards in ***Tsang Tsun Keung v Ko Wang International Trading Limited*** [[6]](#footnote-6) and ***Tang Wing Pui v Hon Pui Ling[[7]](#footnote-7).*** The appropriate award should be HK$150,000.

1. For special damages, the Defendant accepted that the medical expenses and travelling expenses were HK$980 and HK$180 respectively. There was no receipt produced for purchase of tonic food and an amount of HK$1,000 would be reasonable in view of the Plaintiff’s injuries.

Order

1. The Plaintiff’s claims are dismissed. Judgment is entered in favour of the Defendant against the Plaintiff.
2. The Plaintiff is to pay the Defendant the amount of HK$75,500 with interest thereon at Judgment rate from the date of writ until payment.
3. There be an order nisi that costs of the original action and counterclaim are to the Defendant to be taxed if not agreed. This order nisi will become absolute after 14 days unless any party applies to vary within the time.

Signed

(S. T. Poon)

Acting Chief District Judge

Mr. Tim Kwok instructed by Messrs Yeong & Co for the Plaintiff.

Ms. Jennifer Tsui instructed by Messrs Winnie Leung & Co for the Defendant.

1. The Plaintiff drove a 1998 Subaru Impreza and the Defendant a 1999 Toyota Previa 7-Seater. [↑](#footnote-ref-1)
2. To the effect that the Defendant’s vehicle then dashed to the 1st lane after some trembling in its tail. [↑](#footnote-ref-2)
3. 224km/h. [↑](#footnote-ref-3)
4. In Punti “打白鴿轉”. [↑](#footnote-ref-4)
5. 21µg/100ml. [↑](#footnote-ref-5)
6. HCPI373/2009, 3rd December 2010. [↑](#footnote-ref-6)
7. HCPI364/2001, 9th November 2005. [↑](#footnote-ref-7)