## DCPI 1937/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1937 OF 2008

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| BETWEEN | LAM CHI SANG | Plaintiff |
|  | and |  |
|  | MO YAN KEUNG | 1st Defendant |
|  | MO YAN MAN and MO YAN KEUNG trading as  YAN FAT MOTOR CONDITION ENG | 2nd Defendant |

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Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 2 & 6 December, 2010

Date of handing down Judgment : 19 January, 2011

# JUDGMENT

**Background**

1. The Plaintiff, Mr. Lam, was injured when he was standing on the pavement outside the garage operated by the Defendants ("**Garage**"), and the private car GT 978 ("**Vehicle**") which Mr. Lam had left at the Garage slid out from within the Garage onto the pavement, causing Mr. Lam to be trapped between the Vehicle and another private car KP 609 ("**Car**") which was parked on the road outside the Garage. Mr. Lam had driven the Vehicle to the Garage for minor maintenance works to be carried out to the Vehicle on behalf of Mr. Lam's customer. The Car belonged to Mr. Lam, and was driven to the Garage by Mr. Lam's colleague, Mr. Kwan.
2. As a result of the accident, Mr. Lam sustained soft tissue injury to his left knee, fracture of the left fibular head and a torn lateral meniscus.
3. Mr. Lam claims that the Vehicle had slid down from within the Garage to the pavement as a result of the negligent driving or handling of the Vehicle by the 1st Defendant ("**Keung**"). He claims (in paragraph 2 (d) of the Amended Statement of Claim) that Keung was the person who was the driver of the Vehicle, or the last person who was in control of the Vehicle, shortly before the accident, and (according to his evidence and paragraph 4 of the Amended Statement of Claim) that Keung had left the Vehicle unattended whilst in the "Drive" gear without the hand brake having been applied, thus causing it to slide forward.
4. In defence, Keung denies that he had driven the Vehicle. According to Keung's evidence, he had not gone inside the Vehicle at all, and it was Mr. Lam who had driven the Vehicle into the Garage.
5. The parties agree that if the Defendants are to be held 100% liable for the injuries caused to Mr. Lam, damages should be in the sum of $310,000 inclusive of interest. In issue is whether the Defendants are liable in negligence and/ or as occupier of the Garage owned and managed by them and to which Mr. Lam was a visitor.

**Who had last driven the Vehicle?**

1. From the evidence and on the basis of the pleadings, it appears that the issue turns on my factual finding on whether it was Mr. Lam, or Keung, who had last driven the Vehicle.
2. According to Mr. Lam, he drove the Vehicle to the Garage for the purpose of depositing it with the Defendants to carry out minor maintenance work for his customer. He was asked by Keung to park the Vehicle into the Garage. Mr. Lam did so and on his evidence, he took the ignition key and put it on the dashboard before alighting from the Vehicle. Mr. Lam's evidence is that Keung then said to him that he had not parked the Vehicle well enough, and Mr. Lam then told Keung to park the Vehicle again himself. Mr. Lam told Keung where the key was, and Mr. Lam's evidence is that Keung put a plastic cover on the driver's seat, and then got into the Vehicle.
3. According to Mr. Lam's evidence, Keung then parked the Vehicle in another position within the Garage, without having to drive the Vehicle out onto the pavement or the road. Mr. Lam spoke to Keung about the work to be done to the Vehicle, but Keung asked Mr. Lam to telephone his brother ("**Man**"), the other partner and Defendant named in these proceedings.
4. Mr. Lam claims that he then walked out onto the pavement to speak to Man on the telephone, and in the course of speaking to Man, he saw the Vehicle sliding out from the Garage, with no one in the driving seat. Instinctively, he put his hands on the bonnet or the front part of the Vehicle in an attempt to stop it, but the Vehicle pushed him towards the Car which had been parked by the side of the road behind Mr. Lam. Eventually, Mr. Lam's legs were trapped between the front of the Vehicle and the side of the Car.
5. According to Mr. Lam, Keung then came out from the Garage, and apologized to him, saying that he had left the Vehicle in the "Drive" gear. Mr. Kwan bid Keung to move the Vehicle out of the way, whereupon Keung reversed the Vehicle back into the Garage, and Mr. Kwan helped Mr. Lam to sit down to rest.
6. On Keung's part, he claims that it was Mr. Lam who had parked the Vehicle inside the Garage. He denies that he had moved the position of the Vehicle, or had re-parked the Vehicle again, as Mr. Lam alleges. According to Keung's evidence, he and Mr. Lam were both on the pavement outside the Garage when they spoke on the works to be carried out, and Keung asked Mr. Lam to telephone Man. On Keung's evidence, he then went to the Vehicle, and opened the door to the driver's seat "to inspect its interior condition". He saw that the interior of the Vehicle was very clean and laid with white carpet. Keung explained that as his body and clothes were full of dirt and engine oil, he closed the car door and went to fetch newspaper and a cover to cover the interior of the Vehicle.
7. According to Keung, it was when he was about two or three steps away from the Vehicle that he heard someone shout, and turning around, he saw that the Vehicle had slid out onto the pavement and was moving towards Mr. Lam and the road. Keung had to go inside the Vehicle to stop and reverse the Vehicle.
8. Mr. Kwan, who had driven Mr. Lam's Car to the Garage and had parked the Car outside, also gave evidence. According to Mr. Kwan, he had followed Mr. Lam to the Garage in the Car, and he saw Mr. Lam reverse the Vehicle into the Garage. After Mr. Kwan had parked and alighted from the Car, he saw Keung inside the Vehicle in discussion with Mr. Lam standing outside the Vehicle. Mr. Kwan then saw Mr. Lam walk out onto the pavement and use his mobile telephone. Mr. Kwan then walked away, with the intention of going to purchase some cigarettes, but after walking only a few steps, he heard someone shouting. Turning around, he saw the Vehicle sliding towards the road, hitting Mr. Lam and pushing him towards the Car. According to Mr. Kwan, the door to the driver's seat was open but there was no one in the Vehicle.
9. Mr. Kwan told Keung to reverse the Vehicle, and Keung got into the Vehicle to reverse it. According to Mr. Kwan, Keung indicated that he had forgotten to put the Vehicle in the "Neutral" gear, but had left it in the "Drive" gear instead.
10. Having carefully considered the evidence, I accept Mr. Lam's claim that Keung had moved or re-parked the Vehicle after Mr. Lam had done so. Although there are slight inconsistencies in Mr. Lam's narration of the events, I accept that the accident had happened suddenly in the short interval from the time when Mr. Lam parked the Vehicle within the Garage, informed Keung of the 2 simple items of work to be carried out, told Keung he could park the Vehicle again, and then made the telephone call to Man, before Mr. Lam saw the Vehicle approaching him and the Car. In the normal course, it would be impossible for any witness to recall the exact sequence and details of events which take place within a short period of time. Overall, however, I find Mr. Lam's evidence on the events leading to the accident to be consistent and credible.
11. Notwithstanding the submissions made by Counsel for the Defendants, I do not regard it as incredible that Mr. Lam would not pursue any claim against the Defendants for the damage to his Car, if the accident had been caused by the Defendants' fault. According to Mr. Lam, he had been on friendly terms with the Defendants, and until he discovered the full extent of his injuries, Mr. Lam had initially thought that the matter was not serious.
12. Importantly, Mr. Lam's evidence is corroborated by Mr. Kwan's evidence. Mr. Kwan's answers were direct and candid when he was cross-examined on the small inconsistencies between his testimony and the statement he made to the police shortly after the accident on 16 September 2005. He accepted that he only saw Keung in the driver's seat, and had not seen him drive the Vehicle before the accident. I consider that this is likely to be so, and that Mr. Kwan might not have been able to see Keung moving the position of the Vehicle inside the Garage, as Mr. Kwan had stopped and parked the Car outside the Garage on the pavement after Mr. Lam had reversed the Vehicle into the Garage. Whether or not Mr. Kwan had seen Keung driving, Keung's evidence that he had not been inside the Vehicle at all is contradicted by Mr. Kwan.
13. Moreover, Mr. Kwan's evidence supports Mr. Lam's evidence that Keung had apologized to Mr. Lam immediately after the accident, saying that he had left the Vehicle in the "Drive" gear. If Keung had not moved the Vehicle in any way, and that the Vehicle had slid as a result of Mr. Lam's own fault in failing to apply the handbrake (as is pleaded in the Defence), or not leaving the Vehicle in the "Neutral" or "Park" gear, I see no reason why Keung should apologize for the accident.
14. I find therefore that Keung was the last person in control of the Vehicle, and that he had left the Vehicle in such a way that it was able to move and slide out of the Garage. Whether the Vehicle had moved as a result of the handbrake not having been properly applied, or the Vehicle being left in the "Drive" or "Neutral" gear, or the key being left on in the ignition, makes no material difference. Leaving the car unattended and in a position to move constitutes negligence on Keung's part. It likewise constitutes breach by Keung of his duty as occupier of the Garage to Mr. Lam, a visitor.
15. It has not been disputed that Man is jointly liable for any negligence on the part of Keung.

**Whether Mr. Lam is to be blamed in any way for the accident**

1. The Defendants claim that Mr. Lam's act of trying to stop the Vehicle, instead of moving out of its way, constitutes a *novus actus interveniens*.
2. According to Mr. Lam's evidence on cross-examination, it was a matter of 10 to 20 seconds from the time he first heard someone shout and he turned around to see the Vehicle moving towards him without a driver, to the moment of his impact with the Vehicle. He was by then standing about 1 foot to 2 feet from the Car. Instinctively, he held out his hands to stop the Vehicle. There is nothing in the evidence to suggest that the Vehicle was moving otherwise than sliding slowly towards Mr. Lam.
3. In a moment of emergency, I consider that it was not totally unreasonable for Mr. Lam to have reacted in the way he did, and his act of stretching out his hands to stop the Vehicle cannot be said to be "disproportionate to the necessities of (his) situation" (*Sayers v. Harlow* *UDC* [1958] 1 W.L.R. 623, *Charlesworth & Percy on Negligence* para 6-76).
4. Nor am I satisfied, on the evidence that the Vehicle's impact with Mr. Lam took place within seconds, that Mr. Lam can be said to be contributorily negligent.

**Conclusion**

1. I find that the Defendants are liable to Mr. Lam, and award the agreed sum of $310,000 to Mr. Lam, which amount is inclusive of interest.

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

(Mimmie Chan)

District Judge

*Mr. Ching Wan Fung, instructed by Messrs. Cheung & Yip, for the Plaintiff*

*Mr. Meyrick Wong, instructed by Messrs. Ivan Tang & Co. for the Defendants*