#### DCPI1288/2007

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 1288 OF 2007

BETWEEN

LI CHI LAP Plaintiff

and

TAM MAN KUEN (譚民權) 1st Defendant

YEUNG CHUNG ON (楊仲安) 2nd Defendant

##### Before: Her Honour Judge H C Wong in Court

Dates of Hearing: 17-18 December 2008

Date of Delivery of Judgment: 19 December 2008

## J U D G M E N T

1. The plaintiff claims against the two defendants for damages suffered as a result of a traffic accident on 19 August 2004 at 2236 hours on Tai Po Road, near Kowloon Reservoir. The 2nd defendant is absent at the trial and the hearing was conducted in his absence.
2. The accident took place near chain 5.5 at a part of Tai Po Road where there were two lanes travelling in the southbound direction to Kowloon, and one lane in the northbound direction to Shatin separated by double white lines. The plaintiff was travelling in the direction of Shatin, following his friends in two separate cars ahead of him. He was driving car registration number KJ 3171.
3. The 2nd defendant was driving his BMW M3, registration number HM 871 in the direction of Shatin. As he came up behind the plaintiff’s car, he was seen overtaking the plaintiff’s car and his two friends’ cars in front of the plaintiff by crossing the double white lines into the fast lane of the southbound traffic.
4. The 1st defendant is a taxi driver driving his taxi on the fast lane on the southbound direction at the same stretch of the road at the time. In order to avoid colliding with the 2nd defendant’s BMW, which he notified had moved into his lane to overtake the cars on the northbound lane, he immediately swerved his car to the left into the slow lane and then swerved right to avoid hitting the side of the hill on the left. He lost control of the car and it collided with the plaintiff’s car after crossing the double white lines.
5. The 2nd defendant was charged and convicted of dangerous driving at Shatin Magistracy on 23 December 2005. On 12 January 2006, he was sentenced to 240 hours of community service and disqualified from driving for 12 months. See page 117 of the bundle.

Issue on Liability

1. It is quite clear that the accident was primarily caused by the 2nd defendant overtaking the plaintiff’s car and his two friends’ cars on a stretch of Tai Po Road where overtaking is not permitted. He did so by driving into the fast lane of the traffic going in the opposite direction. His action caused the 1st defendant to take evasive action and swerved his taxi first to the left into the slow lane, then to his right, crashing into the plaintiff’s car.
2. The prime culprit must be the 2nd defendant. The question so far as the 1st defendant is concerned is whether the action taken by him resulting in his taxi crashing into the plaintiff’s car, injuring the plaintiff, afforded him a full defence against the plaintiff’s claim against him.

Findings

1. The plaintiff’s counsel, Mr Wong, submitted that the defendant had contributed to the accident because:

(a) he chose to drive on the fast lane even though he was not overtaking and there was no traffic on the slow lane at the time;

(b) he saw the 2nd defendant’s BMW crossing into his lane from the opposite direction when it was 10 car-lengths away. His evasive action was inadequate to avoid the collision because he first swerved to his left into the slow lane, then he decided to swerve to his right to avoid hitting the hillside on the left of the slow lane. He then crashed into the plaintiff’s car in the northbound direction on his right;

(c) he admitted he failed to slow down his car or stopped his car because he did not want the car to topple over.

1. Mr Wong therefore submitted the 1st defendant had failed to take adequate measures to avoid the accident.
2. After hearing both the plaintiff, Mr Li, and the defendant Mr Tam’s evidence and reading their witness statements and police statements, I am satisfied that the 1st defendant could have avoided the collision if he was not driving on the fast lane at the time. I have been referred to the judgment of Deputy High Court Judge Muttrie in the case of *Chung Wing Yan v Cheung Tak Fai Alex* HCPI660 of 2004 (the date of judgment: 7 November 2005) where in paragraph 20, he said:

“Driving in the fourth lane when not overtaking is contrary to the road users’ code. Failure to observe a provision of the code may be relied on as tending to establish or negative civil liability. Such driving may be negligent.”

He then went on to say later in the paragraph:

“Driving in the fourth lane when not overtaking will not of itself cause an accident and has nothing to do with whether or not a driver loses control at a normal speed.”

1. The question here in this case is: if Mr Tam was driving at a normal speed - and in this case, 50 kilometres per hour on the fast lane - could he have lost control of the car? In the circumstances of this case, if he was travelling on the fast lane at a normal speed and if in the agony of the moment to avoid a collision, he swerved to the slow lane and crashed into a car which was travelling on the slow lane, the collision would be understandable. But in this case, there was no car in the slow lane. He failed to apply the brakes and continued to swerve to the left then swerved back to the right before crashing into the plaintiff who was travelling in the opposite direction.
2. I am of the view that he would have lessened the impact of the crash. Even though he may not have been able to avoid the crash altogether had he applied his brakes to stop or slow down his car. I fail to comprehend the logic of his explanation when he gave the reason for his failing to brake was he did not want the car to topple over. A car travelling at the speed of 50 kilometres per hour would not usually topple over even if he braked suddenly and swerved left as he did. A car travelling at a higher speed may well do so, depending on the speed the car was travelling in.
3. As it is not his evidence that he was driving at a speed exceeding 50 kilometres an hour at the time, there is no reason why the defendant should not slow down his car by braking as soon as he saw the BMW travelling on his lane from the opposite direction.
4. I agree with Judge Muttrie’s observation that travelling on the fast lane at a normal speed by itself is not an offence or by itself negligent action; however, as a prudent driver, the evasive action taken by the 1st defendant could have been better.
5. I conclude that Mr Tam has contributed to his crashing into Mr Li when he swerved right into the plaintiff who was travelling in the opposite direction. I assess his contribution and apportionment at 20 per cent.

Quantum

1. The plaintiff sustained two lacerations on his right forehead and abrasions with bruise on his face. He received sutures for the two lacerations. He was discharged from the hospital 17 hours after admission. On page 5 of the joint medical report prepared by Drs Lau and Lam in February 2008, they found two mature, well-healed scars of 1 cm and 1.5 cm on the plaintiff’s right forehead and less obvious mature scars over his right face. The plaintiff, Mr Li, complained he occasionally experienced pain over the right forehead at a frequency of once or twice a month, each lasting a few hours. He would need a rest during these attacks. He also told the two doctors that he suffered from pain over the right side of his neck two or four weeks after the accident. The pain would occur once a month for a duration of half a day. He would need a rest during these attacks.
2. Dr Lam, the orthopaedic surgeon appointed by the defendant, was sceptical of these complaints of the plaintiff because these complaints were not recorded in any of the plaintiff’s medical reports after the accident while Dr Lau, appointed by the plaintiff, considered that the neck pain could have been caused by a whiplash injury to his neck suffered at the collision. Dr Lau, however, did not think it was a serious injury from the symptoms described by the plaintiff. In his opinion, the symptoms were probably worsened and prolonged by his early return and continuation to work as a hairstylist.
3. As to the headache, Dr Lau considered the plaintiff’s complaint to be out of proportion to the injury and could not be explained because his facial injuries would have recovered within one to two weeks. As there was no history of trauma, the plaintiff’s complaint could not be explained medically.
4. Both doctors considered the plaintiff would not need any further treatments for his facial injuries. Dr Lau, however, considered that the plaintiff would benefit from a course of four weeks’ medication and physiotherapy for his neck pain. In Dr Lau’s opinion, the plaintiff has suffered some degree of decreased efficiency at work due to the residual pain or intermittent pain in his head and neck. In his opinion, the plaintiff should have four to six weeks of sick leave for his neck injury.
5. Dr Lau further assessed the plaintiff to have suffered from 2 per cent permanent impairment of the whole person (1 per cent for the head injury, and 1 per cent for the neck), while Dr Lam considered Mr Li had fully recovered and suffered no permanent impairment.

PSLA

1. I was referred to the case of *Chan Tsz Sing* where the Court of Appeal increased the victim’s compensation under this head from $30,000 to $70,000. The victim in that case suffered from multiple abrasion scars on the forehead which were irregular in contour. In addition, there was an obvious scar measuring 5 x 25 millimetres immediately below the right eyebrow with irregular surface and margin, elevated and more pigmented than the adjacent skin. The cosmetic impairment was assessed by the defendant’s doctor at 5 per cent (see paragraphs 5 and 8 on pages 2 and 3 of the judgment of Stone J of 31 January 2005).
2. I have examined the plaintiff’s scars during the trial. The two scars on the right forehead were concealed by his hair. It is possible he had intentionally covered his forehead because of their existence. I find they were not too unsightly, and because they were just below his hairline on his forehead, they could be concealed by his hair. The right face abrasion scars were very faint and not quite noticeable even at close proximity. Therefore, the facial scars in the present case differ from the prominent scars suffered by the plaintiff in Chan Chi Sing’s case.
3. On the other hand, Mr Li’s headaches and neck pain is an additional factor to be taken into account. Though Dr Lam had dismissed their existence, Dr Lau held a different opinion. Mr Li gave evidence in court and he mentioned that since the accident, the frequency of headaches had increased. The neck pain, on the other hand, only occurred two to four weeks after the accident.
4. I am able to conclude from his evidence that he had been an occasional sufferer of headaches even before the accident, but they have become more frequent after the accident. The neck pain was a direct result of the accident. I accept that could well happen after a traffic accident of this kind. Dr Lau considered that the neck muscle must have been hurt at the time of the accident. It is generally known as a whiplash injury.
5. It was not in Dr Lau’s opinion a serious case of whiplash. Nevertheless, Mr Li’s neck pain was considered to be genuine. I accept Dr Lau’s view and opinion that the plaintiff would benefit from a course of physiotherapy. However, the plaintiff did not seem to trust western medicine, claiming that he had sought Chinese herbalist cures after his discharge from the hospital. It is unlikely, therefore, that he would undergo a course of physiotherapy treatments as recommended by Dr Lau.
6. Under PSLA, from the facial injuries, the pain he suffered and the residual headaches and neck pain, I would award the sum of $60,000 under this head.

Special Damages

1. The sum of 61,500 has been agreed. It is therefore so awarded.

Loss of Earnings

1. In Dr Lau’s opinion, it is reasonable for Mr Li to take four to six weeks of sick leave. As Mr Li failed to seek treatment for his neck, leading to recurring neck pain later on, I would be inclined to allow him six weeks of sick leave, during which time he could have been put in a better state than the two weeks he actually took. The amount based on his then salary of $8,000 per month would come to $10,000.

Loss of Earning Capacity

1. Mr Li claimed that because of his headaches and neck pain, he had to rest more often and therefore would suffer from a loss of income or had suffered from a loss of income. He asked for 12 months of loss of earning capacity. From the evidence, I gather he had suffered no loss of employment since the accident. He is only suffering from a loss of income. I am prepared to award him for loss of earning capacity equivalent of three months of his pre-accident salary. This should cover any retraining period for jobs should he wish to do so in future. The amount of the award is therefore $24,000.

Future Medical Expenses

1. The plaintiff did not seem to trust western medicine since he defaulted follow-up treatments and claimed he had turned to Chinese herbal cures instead. It is unlikely he would take up a course of physiotherapy treatments recommended by Dr Lau. In the circumstances, I agree he will require painkillers for his discomfort with the occasional visit to the herbalist. I would allow $2,500 he asked for in his revised statement of damages.

Summary

1. PSLA: $60,000

Special damages: $61,500

Pre-trial loss of earnings: $10,000

Loss of earning capacity: $24,000

Future medical expenses: $2,500

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Total $158,000

Interests

1. 2 per cent interest per annum on PSLA from the date of writ to the date of judgment; half judgment interest on special damages and pre‑trial loss of earnings, to be paid from the date of accident to the date of judgment and thereafter at full judgment rate.
2. The apportionment between the 1st and 2nd defendants is 20 per cent to be paid by the 1st defendant and 80 per cent to be paid by the 2nd defendant.

Costs

1. I would award costs to the plaintiff, to be borne by the 1st and 2nd defendants.

(Discussion re certificate for counsel and costs)

1. With certificate for counsel. The 2nd Defendant to pay 80% of 1st Defendant’s costs with certificate for counsel.

# (H C Wong)

# District Court Judge

Mr Martin Wong, instructed by W H Chik & Co., for the Plaintiff

Mr Patrick Lim, instructed by Kenneth C C Man & Co., for the 1st Defendant

2nd Defendant, in person, absent