IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 39 OF 2001

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| BETWEEN | Chiu Pan Mong (a minor) suing by his Father and next friend Chiu Man-kong | Plaintiff |
|  | and |  |
|  | Tam Tak-kong | Defendant |

Coram: H H Judge Carlson in Court

Dates of

Hearing: 2 & 3 January 2002

Present: Mr Ashok Sakhrani, instructed by Desmond

Wong,Angus Tse & Co., assigned by the Legal

Aid Department, for the Plaintiff

Mr Paul Lam, instructed by Messrs Tang & So, for the Defendant

Date of

Judgment: 7 January 2002

Present: Mr A Tse, of Desmond Wong, Angus Tse & Co., assigned by the Legal Aid Department, for the Plaintiff

Mr R Kwong, instructed by Messrs Tang & So, for the Defendant

J U D G M E N T

1. This is a running down action in which the Plaintiff, who was then aged 11, was hit by a medium lorry owned and driven by the Defendant as he was crossing Pei Ho Street, North Kowloon, at just after midday on 7 November 1998. As a result, he sustained very serious injuries to his left leg to which I will need to make further reference presently. He now sues, by his father as next friend, for damages for personal injury, pain and suffering and loss of amenity, as well as damages for other consequential losses.
2. The facts which give rise to the action are uncomplicated. I can do no better than to refer to a plan prepared by a police officer, page 101, which shows the locus. The Plaintiff, who had finished his schoolday, was making his way to a tutorial school in Sham Shui Po. He emerged from a shopping arcade in Pei Ho Street with a view to crossing the road in order to take a PLB from a nearby stop to get to his tutorial which was to start at 12.30 pm. Looking at the plan across its width, the Plaintiff was crossing Pei Ho Street from right to left. He stepped into the road between a parked car to his right and a goods van to his left and as he got to about halfway across the road, he was hit by the Defendant’s vehicle which had just turned right into Pei Ho Street from Un Chau Street which runs across the entire width of the bottom part of the plan.
3. The aftermath of the accident is shown in a series of colour photographs from pages 104 to 106. The bottom photograph on page 105 shows bloodstains which would appear to indicate the point of impact.
4. Put shortly, the Plaintiff’s case is that the Defendant was driving too quickly in all the circumstances, so that he was unable to take evasive action to avoid the collision, either by braking effectively and/or steering away from the Plaintiff. This, against the background that he should have known that Pei Ho Street, and its surrounding area, would have been busy and crowded with vehicular traffic and pedestrians, including children and young persons, some of whom may have wished to cross the road, and that not all pedestrians who do so take sufficient precautions to ensure that it is safe before stepping out into the road.
5. The Defendant’s response to that is that the Plaintiff, who had crossed from behind a van did so without warning and without seeing whether there was any approaching traffic, had moved out when his lorry was so close to the point of impact that he simply had no chance to avoid the accident, notwithstanding the modest speed that he was travelling at. And so this is how the issue is joined.
6. From that, I now turn to the evidence which is brief and which can be summarised shortly. I should first relate that the Defendant was prosecuted for careless driving but was acquitted by the Magistrate.
7. The Plaintiff first called a Mrs Yu. She was taken out of order because she is unwell. As will become apparent, she is a most important witness because she purports to speak to the Defendant’s speed just before the collision. She and her husband had been walking down Pei Ho Street towards its junction with Un Chau Street. The sketch plan at page 87 indicates what she is saying. At that moment, the Defendant drove in Pei Ho Street, having rounded the corner from Un Chau Street. She says he passed them at a distance of about a metre from where they stood on the road, so that she and her husband stepped back onto the pavement.
8. As to speed, she initially told me that she could not tell: “It seemed a bit fast.” Later, after she explained that she had ridden motorcycles regularly for almost 10 years, she said that the Defendant’s speed was “very fast for the bend.” Pages 88 to 91 is her police statement which she gave some days after the incident and which she has adopted as part of her evidence in the trial. As to speed she describes it as “turning very fast” from Un Chau Street and also as travelling “at a very high speed and so I stepped back one step to avoid it.” Later, the officer who took her statement asked her to amplify on what she had said about the lorry’s speed and she answered that she could not say how fast it was.

That is her evidence to which I must return in due course.

1. The Plaintiff’s evidence is as follows:

He adopted his witness statement at page 52. He says, as I have already related, that he stepped out into the road between the van and a car. He accepts that he did not look to see whether there was any approaching traffic. The only precaution that he appears to have taken was to try and listen for traffic. He could not hear any, so he emerged from behind the van - in his witness statement, paragraph 6, page 54 - he says “for two to three steps” and was hit by the lorry. At paragraph 7, he says that he had walked past the van for about two to three seconds before he was knocked down.

1. These attempts to time such an occurrence are, of course, extremely difficult, but that sort of time does not really tally with his previous statement that he moved out two or three steps before he was hit. Given the measurements which I need to refer to shortly, even two or three seconds, which is hardly a long time, is almost certainly longer than the period of time that it took him to walk out from behind the van until he was hit by the lorry. He says that he walked normally and that he did not run or “dash out”. He did not see the lorry approach. That is all that he can say that is material to the issue of liability.
2. Mr Paul Lam, for the Defendant, has cross-examined him with a view to showing that he must have been in a hurry to get to his tutorial which was to start in 20 minutes and that it is likely that he was running across the road, that being the Defendant’s evidence.
3. My view of this evidence is that he was probably hurrying across the road as people would do, particularly where they are not crossing at a designated zebra crossing or traffic light controlled crossing point. That is all that I can say about the manner in which the Plaintiff was trying to cross the road. It was at a speed somewhat less than a run, but certainly more quickly than a leisurely amble.
4. The Defendant says that he entered Pei Ho Street by turning right from the right-hand lane of Un Chau Street. The police plan at page 101 shows this very clearly. He says that before doing so, he had to wait at the red traffic light there to turn green before he could move off. He pulled away in second gear rather than bottom gear, which I must say struck me as a little unusual, but he says that this is normal with a lorry so as to avoid over-revving the engine. He then drove on round the corner. His speed was modest. Firstly, it was a bend; secondly, his lorry’s capacity to accelerate quickly was limited, and thirdly, he was in no particular hurry. He had to get to Sha Tin for a non-urgent private appointment.
5. His witness statement, which he also adopted as part of his evidence, starts at page 71A. As he turned, he puts his speed at between 20 to 30 kilometres per hour. He had wished to turn into the right-hand lane of Pei Ho Street but as he turned, he saw that the white van was partly obstructing the carriageway and so he made his way towards the left-hand lane. The crucial part of his witness statement is in these terms (see paragraphs 8, 9 and 10 at page 71B. Paragraph 8:

“When my vehicle completed turned into the left lane and reached a position where my car almost side by side with the white goods vehicle, a child suddenly dashed out from the gap between the front of the white goods vehicle and the rear of the private vehicle.”

Paragraph 9:

“I immediately braked and swerved left but the right side of my vehicle still hit the child.”

Paragraph 10:

“When I first saw the child, he/she was only about

2 metres away from my vehicle.”

1. After the impact, the Plaintiff’s leg must have become trapped under the front offside wheel of the lorry. The Defendant had to roll back about a foot to release the Plaintiff who was then removed to hospital. He was cross-examined by Mr Ashok Sakhrani for the Plaintiff, on the basis that he must have first seen the Plaintiff as soon as he turned into Pei Ho Street and before he had completed his turn, which he denies. He was then asked this:

“Q. Did you not consider that pedestrians may have been obstructed by parked vehicles?

A. It did not occur to me.”

It was put to him that he was driving too fast so that he allowed himself insufficient time to brake and deal with this foreseeable emergency. He denied that he had been driving too quickly.

1. Before coming to my conclusions on this evidence, I should also make reference to some dimensions or measurements, which are agreed. Each lane of Pei Ho Street is 3.5 metres wide. The Defendant’s vehicle is 6.3 metres long and 1.9 metres wide. From the plan at page 101, it can be seen that the front nearside of the lorry came to rest 11.3 metres from the traffic sign pole at the mouth of Pei Ho Street which from the scale on the plan is about 3 metres from the actual corner of Un Chau and Pei Ho Street. From that, I get that the front of the lorry had travelled about 14.3 metres into Pei Ho Street to which one must add another 1 foot or so because the Plaintiff says that he reversed that distance to release the Plaintiff from under his front offside wheel. The point of impact, therefore, is about 14.6 metres into Pei Ho Street.
2. I have not been told the width of the white van behind which the Plaintiff emerged, but I do get a fairly reliable, if fortuitous impression of its width relative to the right-hand lane of Pei Ho Street from photo No. 2 on page 68 which was taken when a white van happened to be parked in the approximate place where the van had been parked on the occasion of the accident. There are other views of it on page 69 and page 70. Although angles from photographs can be deceptive, it is pretty clear that more than half of the right‑hand lane would have been obstructed by the van. One must add to the width of the van a gap between the pavement and the offside of the van. I assume that the van was somewhat narrower than the 1.9 metres of the Defendant’s lorry, but piecing together all the information that I do have, I am prepared to find that the distance from the outer (nearside) edge of the van to the “halfway line” of Pei Ho Street which is 3.5 metres wide on each lane, would be between 1.5 to 1.7 metres. So this is the sort of distance that the Plaintiff would have walked and been visible to the Defendant up to the moment of the collision.
3. Mr Sakhrani, in the course of a very helpful and persuasive final speech, has sought to reason backwards from the available evidence of the aftermath of the collision that had the Defendant been driving at an appropriate speed for the circumstances that he found himself in, he would have been in a position to avoid hitting the Plaintiff.
4. He starts with Mrs Yu’s evidence that the lorry was travelling a little too fast for comfort as it came round the bend (to paraphrase what I understand she was saying). And then he refers to skid marks left by the lorry (see pages 105 and 106 which shows the skid marks running for the length of the lorry).
5. In actions of this sort, the court usually discourages “expert” reports that attempt to reconstruct the course of an accident because the judge is usually perfectly capable of deciding this on the basis of all the evidence before him. It is possible to arrive at some fairly reliable assessment of speed by measuring skid marks, the weight of the vehicle, the efficiency of its brakes, the gradient of the road and so forth.
6. The solicitors in this matter, presumably sensitive to the court’s likely reaction to an application to call this sort of expert evidence, agreed not to ask for a direction that such expert testimony be allowed. It is easier to be wise after the event, but ironically, I suspect that on this occasion such an application may have been favourably received.
7. Doing his best without such evidence, Mr Sakhrani submits that the length of the skid marks which run for most of the length of the Defendant’s lorry, which is 6.3 metres long, must indicate the sort of distance that the lorry was under braking, to which one must add “thinking time”, before the brakes were applied.
8. To this extent, Mr Sakhrani must be right, but where the evidence is silent, I am not able nor prepared to fill in the gaps (that could only be speculation) and this relates to the distance that the lorry travelled after the Defendant first saw the Plaintiff but before he realised the danger and started to brake. Of course, the maximum distance would be 14.6 metres, which is the distance from the point of impact to the junction of Un Chau Street. It must therefore be somewhere between 6 metres or so (the length of the skid marks) and 14.6 metres to the junction.
9. The other feature is that the Plaintiff had walked about 1.7 metres past the van to get to the point of impact, which really would not take very long.
10. What all this demonstrates is that it is quite impossible to arrive at anything like a precise speed for the lorry just before the Defendant would have seen the child. Mr Sakhrani, by *ex post facto* reasoning, says that when one puts down one’s “markers”, as he described them, the most significant of which I have drawn attention to, the conclusion is that the speed was too fast in all the circumstances. The Defendant should have realised the foreseeable danger of an inattentive pedestrian trying to cross the road there and gone more slowly and had he done so he would have stopped in time.
11. As it is, it is likely that had the Plaintiff been a further foot or so down Pei Ho Street, the Defendant would have just about stopped in time. Mr Sakhrani gets this from the fact that the lorry did not carry the Plaintiff further down the road or drive over him beyond the limited extent that the front nearside wheel had done.
12. From all of this, Mr Sakhrani also suggests that given these facts, it is more likely than not that the Plaintiff had not stopped at a red light at Un Chau Street but that he had travelled unrestrained through a green light, which accounts for Mrs Yu’s explanation for his uncomfortable speed round the corner.
13. As to this feature of the case, which is really the starting point, the Defendant told the police when he was interviewed by them shortly after the accident that he had stopped at a red traffic light. This, he has maintained before me.
14. Mrs Yu’s evidence is to be accorded respect because she is neutral in the matter and a motorcyclist, but impressions as to speed are both highly subjective and prone to error. She was about 1 metre from the vehicle and this of itself would tend to exaggerate the impression of speed. Ordinary human experience tells us that the further away one is from a moving vehicle, the more dispassionate the opinion is likely to be as to its speed.
15. I therefore accept the Defendant’s evidence that he had stopped at a red light. That means that from a standing start, driving a sluggish vehicle such as a lorry which needed to go through a 90 degree turn almost immediately afterwards, the scope for getting up any meaningful speed would have been severely restricted. This view on this part of the evidence must therefore inform what follows.
16. This lorry then travelled a total of 14.6 metres to impact, about 6 metres of which was under severe braking. As I have already indicated, one must add to those 6 metres an additional distance for pre-braking thinking time. I have attempted to consider all the evidence in as much detail as the known measurements will properly allow but within that detail the matter falls to be resolved on the basis of a broad impression of the evidence as a whole.
17. Clearly, these circumstances are not like those in the case of Moore and Poyner [1975] RTR 127, where the child ran out into the road behind a coach when the defendant had almost drawn up level to the coach. In this case, the Plaintiff must have first emerged when the Defendant’s vehicle was at least 6 metres (the length of the skid marks) from the point of impact. To this I need to add an additional distance for thinking time of no more than 8 metres (the length of travel to impact from Un Chau Street being 14.6 metres).
18. Are these distances suggestive of an unsafe or inappropriate speed in all the circumstances?

It is for the Plaintiff to demonstrate this on a balance of probabilities. There is no direct evidence of the Defendant’s pre-braking speed. For what it is worth, the Defendant says that he had got up to 20 to 30 kilometres an hour, which is by no means excessive when taken in isolation and well inside the 50 kilometre per hour speed limit. This speed of 20 to 30 kilometres an hour is of course only an estimate by the Defendant. He was not looking at his speedometer at the time.

1. Ultimately, these are matters of degree and in a finely balanced case where I am bound to say that my view has wavered during my consideration of the evidence, I have come to the conclusion that the Plaintiff has, albeit narrowly, failed to carry the persuasive burden of showing negligence on the part of the Defendant.
2. The Plaintiff emerged from behind the van without warning. He was in view for a distance of about 1.7 metres. The Plaintiff confirms this by saying that he walked a few steps before he was struck. The measurements amply confirm this. I do not consider that the Defendant’s failure to stop within the length of his own lorry (the skid marks are about 6 metres long) plus some thinking time, can properly characterise his driving as a failure of his duty of care in these circumstances. The totality of the evidence is not suggestive of a speed that was excessive or inappropriate in all the circumstances.
3. Whilst the factual situation is not as clear-cut in the Defendant’s favour as it was in Moore v Poyner supra., it is always a question of fact and degree in every individual case which the court must carefully weigh up. A line is there, often difficult to discern, beyond which negligence is established.
4. On these facts, the Plaintiff has failed to show that this line has been crossed. The action must therefore stand dismissed with the consequence that there must be judgment for the Defendant.
5. This is yet another of these hard cases where due to momentary inadvertence, a young person who has sustained a nasty and disfiguring injury to his left leg must, under the present state of the law, remain uncompensated. I regret that this should be so.
6. The parties have agreed damages, subject to liability, which I have been asked to approve in the event that I found negligence subject to any discount for contributory negligence. In case there is an appeal I will deal with both issues, albeit briefly.
7. As to contributory negligence, had I found the Defendant guilty of negligence, I would have discounted the Plaintiff’s award by 60 per cent. Had the Defendant been older, I would have discounted 75 per cent. What he did was extremely ill-advised. He crossed a busy road at a point where there were no facilities for pedestrians to cross. It should be observed that the junction nearby has such facilities from where he should have crossed. To make matters worse, he crossed from behind a van, on his own account, without looking for approaching traffic. All he did was to listen, a rather meaningless precaution on a busy, noisy street where it is difficult to discern the direction from which traffic noise is coming. This all therefore justifies the substantial discount.
8. As to quantum, I would have approved the awards for the father’s loss of earnings of $3,500; the special damages of $7,965 and the award of $125,000 for loss of earning capacity. Nevertheless, I would have had some difficulty approving $365,000 for pain and suffering and loss of amenity.
9. Mr Sakhrani who has advised the Plaintiff on this matter and who has conducted his case with his customary skill and tenacity, has shown me some comparables in support of accepting $365,000. None of these cases really properly addresses this ghastly disfigurement of the Plaintiff’s left leg. I appreciate it is covered up by trousers and could be covered up with long socks to the knee when playing sport, but not the case when swimming.
10. In expressing this view, I have of course had the advantage of seeing the injury. I appreciate it is not particularly physically disabling, although there will be a permanent weakness of some sort.
11. I have also had regard to the fact that no two judges are likely to agree precisely on this sort of matter which makes counsel’s task more difficult. Nevertheless - and this can be no criticism of Mr Sakhrani nor of those instructing him - my view is that quantum under this head of damage would have been in the order of $430,000, as originally pleaded, with the result that I would not have been disposed to approve $365,000 which would have left the parties with the task of contesting the matter in the usual way or agreeing some figure substantially closer to $430,000.
12. This of course is all entirely hypothetical having regard to my judgment, but I express these views to assist in the event of an appeal.
13. Costs must follow the event. Costs will therefore be to the Defendant.
14. There will be Legal Aid taxation of the Plaintiff’s costs and there must also be certificate for counsel. This order for costs will be an order nisi in the usual way.

Ian Carlson

District Court Judge