DCPI272/2001

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 272 OF 2001

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BETWEEN

LO SING NGO, a minor, suing by her Plaintiff

mother and next friend NG YIM FONG

and

LAU SUI LUNG 1st Defendant

LAU SUI CHING 2nd Defendant

and

LEE WAI LING Third Party

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Coram : Deputy Judge Charles T.C. Wong in Court

Date of Hearing : 22 and 23 July 2002

Date of Judgment : 12 August 2002

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# JUDGMENT

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1. On 24 April 1999 at approximately 1:07 p.m., the Plaintiff then aged 9, a primary 4 student after alighting from a nanny van which picked her up after school, was hit by a dump truck when crossing Sha Tau Kok Road westbound near Hak Pai Chai Tsuen, Fanling, New Territories. As a result of the accident, the Plaintiff suffered from multiple injuries. Her head injury has resulted in bleeding from her right ear and right facial nerve palsy. Orthopaedicwise, the Plaintiff suffers fracture shaft of the right femur. She was left with scars over her right thigh. She had recovered well from the right facial nerve palsy. Fortunately, she had general apparent good recovery to her right leg fracture, and the accident had no apparent adverse effect on her academic performances.

2. The Plaintiff claims against the driver and the owner of the dump truck (the Defendants). The Defendants had in turn taken out third party proceedings against the driver of the nanny van.

3. The Defendants have settled the Plaintiff’s claim and proceeded with the third party action to seek contribution or indemnity from the third party.

4. The settled sum of $250,000 was approved by court.

5. The third party does not seek to challenge the settled sum of $250,000. The only issue before me is liability.

## Background

6. After school, the Plaintiff was carried home in a nanny van driven by the third party. The van stopped in a prohibited zone immediately in front of a set of traffic control pedestrian crossing along the first lane of Sha Tau Kok Road westbound near Hak Pai Chai Tsuen. When the Plaintiff crossed the said road in front of the van and reaching the second lane she was struck by the dump truck travelling on the second lane driven by the 1st Defendant.

The Defendants’ Case Against the Third Party

7. The 1st Defendant contends that in allowing the Plaintiff to alight from the nanny van at a prohibited zone creates a dangerous situation. In that the view of on-coming traffic from the second lane would be obstructed by the stationary nanny van. Further, the pedestrian’s view towards the on-coming traffic from the second lane would also be obstructed by the stationary nanny van.

8. Further, by operation of the nanny van the third party had a duty of care towards the child passengers on the van to ensure their safety throughout the journey. The third party in the circumstances of this case had failed to discharge that duty by failure to warn and supervise the Plaintiff.

## The Third Party’s Defence

9. The third party states that before the Plaintiff was allowed to alight from the nanny van, the third party warned her that she should watch out for traffic, not to cross the road when the traffic light for the pedestrian is red, press the switch control for the pedestrian light and wait for the pedestrian lights to change to green before crossing.

10. The third party also pleaded that her eyesight followed the Plaintiff after she alighted from the van. When the third party noticed that the Plaintiff did not stop before the pedestrian crossing and did not press the switch control of the pedestrian traffic light but stepped on to the road, the third party waived her hand at the Plaintiff and shouted loudly to warn the Plaintiff not to cross the road.

The Third Party’s Case Against the Defendants

11. The third party pleaded that the accident was caused by the negligence of the Defendants, in that the 1st Defendant was driving too fast in the circumstance. The 1st Defendant had failed to observe the warning sign displayed at the rear of the nanny van. Failure to sound the horn of the dump truck or give any sufficient warning to the Plaintiff as to the presence of the approaching dump truck and failure to slow down.

12. The Plaintiff was not called by either party to give evidence. The Plaintiff’s statement to the Police was admitted. The 1st Defendant gave evidence for the defence.

The 1st Defendant’s evidence

13. The 1st Defendant states that he had 20 years of driving experience. By the time of accident, he had been driving heavy dump truck for 2 years. The speed limit for the section of road was 50 km/h. When the 1st Defendant reached approximately 20 to 25 meters from the pedestrian crossing in issue, he saw a yellow van stationary on the first lane. There was no signal light on and the van stopped just in front of the traffic lights controlled pedestrian crossing in the restricted area. That yellow van was later known to be the third party’s van.

14. When the 1st Defendant saw the van he decelerated and reduced his speed from 50 km/h to 45 km/h.

15. When he almost reached the front of the van, the 1st Defendant suddenly saw a young girl running out from in the front of the van on his left towards his right and was about 1 metre from the front of the dump truck. The young girl was not looking in his direction but straight ahead. As soon as he saw the young girl, he immediately applied his brakes but she was too close and the 1st Defendant was not able to stop in time. The middle front of the dump truck hit the right side of the young girl. When the dump truck came to a stop, he saw that the girl was thrown about 1 metre in front of his vehicle. He immediately got out of the vehicle and went to the girl to check her condition and called the police.

16. The 1st Defendant states that he was not able to swerve to avoid hitting the girl due to there being a concrete barrier on the right. He further states that the traffic light was in favour of the westbound traffic. He also states that when he was approaching the pedestrian crossing, he saw that the traffic lights controlling the pedestrian was red.

17. In cross-examination whilst the 1st Defendant disagreed that there were 4 to 5 primary schools in that vicinity, he agreed that in that section there were a number of nanny vans. The 1st Defendant was familiar with the section of road and agreed that when seeing a nanny van would mean possibilities of school children in the vicinity.

18. The 1st Defendant states that although he saw the yellow van at approximately 20-25 km/h, he did not know that it was a nanny van. He nevertheless agrees that the photograph does show a right triangle at the rear of the van. The 1st Defendant states that he did not notice the triangle despite seeing the stationary van. He nevertheless accepts that a nanny van normally does carry that triangular sign.

19. The 1st Defendant also states that although he noticed the stationary van, he did not know what it was doing there.

20. At one stage of examination, the 1st Defendant disagreed that his view towards the pedestrian pavement on the left was blocked by the stationary van. He states that the driver seat of the dump truck was higher than the top of the van and he had a better view of the pedestrian. Upon further examination, he agreed that part of his view towards the front of the van may be blocked by the stationary van and he was not able to see clearly.

21. The 1st Defendant accepts that the purpose of his decelerating from 50 to 45 km/h was to enable him to react in case of emergency and can stop in time.

22. The 1st Defendant states that the hazard lights of the van was not on prior to the accident. The purpose of his checking the lights governing the pedestrians on his left, he explains, was a natural reaction of his to take a look when approaching the pedestrian crossing.

The Third Party’s Evidence

23. It is the third party’s case that she usually drops off the Plaintiff at the other side of the road after a U-turn. This is the practice of Mondays to Fridays. On Saturdays she would drive pass the westbound pedestrian crossing and let the Plaintiff get off by the lay-by approximately 5 yards beyond the westbound pedestrian crossing. She states that she had asked for the permission of the parent of the Plaintiff to allow her to drop her off at the lay-by on Saturdays.

24. On the day of accident, it was a Saturday and the third party originally intended to drop the Plaintiff off as usual at the lay-by. However there was a government lorry parked there, so she decided to park the van in front of the pedestrian crossing so that she could watch the Plaintiff cross the road.

25. She admits that it was dangerous to let off the Plaintiff at a prohibited zone immediately in front of the traffic control pedestrian crossing. However, on Saturdays there were many students on the van and it would take another 30 – 45 minutes for her to finish dropping off other students before she could turn back to the eastbound let off the Plaintiff on the other side of the road.

26. After she stopped the van, it is her case that she specifically watched the road condition so as to make sure that the Plaintiff would be safe when alighting. She found that the whole section of the road from where she was to the section of road behind where it turned was clear, there was no other car in sight. The distance from the van to the turn was 280 meters as she had subsequently measured it with her solicitors.

27. The traffic light for vehicles was green. She opened the door and let the Plaintiff alight. In the meantime, she warned her in the usual manner to watch the traffic and not to cross the road if the traffic light for pedestrian was red.

28. She further states that the Plaintiff was a quiet and smart girl who listened to others. In the past on Saturdays, the Plaintiff would only cross the road when the traffic light for the pedestrian was green and she would press the control button for the lights and wait on the roadside when the light was red for pedestrian. It was on this occasion, the Plaintiff did not wait for the lights to turn green and rushed out of the road approximately 2 to 3 metres from the van. When she rushed out onto the road it was at this time that the third party noticed the dump truck approaching from her right. She then shouted and yelled at the Plaintiff but it was already too late and she was hit by the dump truck.

29. She estimates the dump truck to be travelling at a speed of not less than 80 km/h.

30. In examination the third party states that she had turned on the hazard lights when having stopped the van. She states that she looked at the offside wing mirror to observe on-coming traffic from behind. She was able to see approximately 280 metres and saw that there were no vehicle.

31. In support of her case that she was not able to stop at the lay-by, the third party states that apart from there being a government lorry, there were railings along the front part of the lay-by. She states that these railings were movable railings apparently set up by workers at the construction site nearby. There was therefore simply no room for her to park the van at the lay-by.

The Plaintiff’s Statement to the Police

32. The Plaintiff states that the van stopped in front of the pedestrian crossing. At that time there were other students on the van. After getting off the van, there was a metal railing. She then walked along the sidewalk and then circled round the metal railing and walked back onto the pavement towards the pedestrian crossing. She pressed once on the traffic light button and she states ‘I saw in the middle of the stopping island opposing me, on the right hand side there wasn’t any pedestrian’s crossing light was on green with the human shape doll lights.’ This part of her police statement is rather confusing as it is difficult to make much sense out of it. But when reading on, ‘but I did not know when did that green coloured human shape doll was on, that is at that time I did not stop on the pavement and I was walking across, and I see that on the slow lane the doll light on the slow lane, and the nanny’s car which I took before was still parking there, I was then running across Sha Tau Kok Road towards my home, and I could not see whether there was any car(s) on the fast lane on my right hand side, hence the nanny’s car was blocking my view, at the time when I was running across the road along the pedestrian crossing line, suddenly I felt being hit by something else, after I did not know what was happening, I did not know how long did I run out before I was hit by something when I became a little bit conscious, I was on the ambulance already ……’ The English translation was not a certified translation which may also be a factor adding to the confusion.

## Finding of Fact

## The third party’s liability

33. It emerged in evidence that the third party had only one shift of picking up students after school. That being the case unlike Mondays to Fridays where she would in any event have to do a U-turn eastbound and drop the Plaintiff off at the eastbound lane, on Saturdays there was no need for her to do a return trip on the eastbound. I find that the third party had made the request to the Plaintiff’s parents to allow her to drop off the Plaintiff on the westbound on Saturdays. Prior to the date of the accident, she had dropped off the Plaintiff on the westbound for approximately 6 to 7 times.

34. It is common ground that the nanny van stopped at the inner lane westbound immediately in front of the traffic light controlled pedestrian crossing. It is also common ground that this area was within the prohibited zone. The speed limit for this part of the road is 50 km/h. It is a straight road and it is accepted that vehicles do travel on this part of the road at a high speed.

35. The third party was the owner and driver of the nanny van. The nanny van was run by the third party, it was not a school van. She picked up students from various schools. On Saturday, by letting off the Plaintiff on the westbound, it would save the third party from a returned trip to the eastbound.

36. The reason given by the third party as to why she had dropped off the Plaintiff in front of the pedestrian crossing as opposed to dropping her off at the lay-by was because there were railings and a government lorry parked at the lay-by. She states that the photograph does not show the position of the railings where she first saw them when she was in front of the pedestrian crossing. The third party gives evidence to the effect that the railings were moved by her after the accident to the side of the road near the kerb of the pavement next to the lay-by. She states that she moved the railing in order to allow the van to move into the lay-by after the accident.

37. On this issue, the 1st Defendant states that the third party had not come down from the van after the accident until the police arrived. Nor has there been any government lorry as suggested by the third party. Having considered the photographs, taking into account the position of the railings as appearing on the photographs which is on the pavement blocking off some construction materials. From the positions of the railings which were placed in such a neat way, it is more likely that it was intended to block off the man-hole where the side is under construction so as to avoid pedestrian from walking onto the unfinished minor construction work around the man-hole. The location of the minor construction work was on the pavement a few feet away from the kerb, it would not have served any useful purpose for the railings to be placed on the yellow line of the road as described by the third party.

38. Further, assuming there had been railings on the road, based on the third party’s own case, the government lorry drove off after the accident. There would have been sufficient space for the van to drive into the lay-by. There was no need for the third party to get off the van to remove the railings. I reject the third party’s evidence that she got off the van and tried to see if the Plaintiff was alright. This she did not mention in her witness statement or in her statement to the police. From the way the railings are placed as appearing in the photographs, I find that it is more likely that railings were already in that position prior to the accident. It follows that I reject the third party’s contention that there were railings along the yellow line leading to the lay-by.

39. I also reject the third party’s evidence that the railings were subsequently moved by her and then by construction workers.

40. Even had there been a government lorry parked at the lay-by, I find that there still would have been sufficient space for the van to drive into the lay-by. Alternatively, the third party could have waited for the government lorry to drive off before moving into the lay-by.

41. From the photographs, at approximately 15 metres east of the westbound pedestrian crossing there was a side pavement with distinct red patch. I find that the third party could have driven onto this red patch side road for the Plaintiff to alight. There would have been sufficient space for the van to drive onto that part of the road. Had the Plaintiff been let off at that part of the road, she would have been fully exposed to the on-coming traffic before she crossed the road. Further her view would not have been blocked by the nanny van.

42. Having considered the photographs, I find that the spot immediately after the pedestrian crossing but before entering the lay-by was a spot which the third party could have let off the Plaintiff. Although this spot would not be as desirable as the lay-by or the red patch pavement, but even if there had been railings on the front of the lay-by, I failed to see why the third party could not have let off the Plaintiff immediately after passing the pedestrian crossing. This part would at least be less dangerous as the spot immediately in front of the pedestrian crossing as the Plaintiff would be exposed to on-coming traffic and her view of the westbound on-coming traffic would not be blocked by the nanny van.

43. It follows that I find that there were at least 3 alternative safer spots where the third party could have let off the Plaintiff on the westbound road. I reject the third party’s contention that she had no other option and was forced to drop off the Plaintiff immediately in front of the pedestrian crossing.

44. I find that by letting the Plaintiff off at the spot immediately in front of the pedestrian crossing, the third party had created a dangerous situation. There was no nanny in the van and the Plaintiff was only aged 9 at the time of the accident. The third party in the circumstances had a high duty of care when letting the Plaintiff off at a dangerous spot unaccompanied and unsupervised. The third party ought to have constantly checked with the on-coming traffic. Since she realized that the lights were in favour of the on-coming vehicles and had she constantly checked her rear mirror, taking into account the long straight road, she should have noticed the dump truck approaching from a distance.

45. Further, when she first noticed the Plaintiff stepping onto the road without pressing the traffic light button she ought to have taking appropriate steps to warn the Plaintiff. After taking into account the photographs of the van after the accident, where it shows that the driver’s seat windows were shut, I reject the third party’s contention that the side window was open at the time of accident. I find that the third party waiving and yelling inside the van was not an effective way of warning the Plaintiff. I find that the more effective way of warning the Plaintiff in the circumstances was to sound the horn of the van. This step could have been taken out by the third party easily and effectively in light of the third party’s evidence that she was observing the Plaintiff throughout. I find that the third party could have taken effective measure to prevent the accident but failed to do so.

46. Accordingly, I find the third party negligent in dropping off the Plaintiff at the dangerous spot and failure to sound her horn to warn the Plaintiff.

The 1st Defendant’s liability

47. I now turn to the case of the 1st Defendant. The third party uses 7 seconds as the basis of calculation to work out the time when the Plaintiff got off the van to the time when she was hit. She estimated the speed of the dump truck to be at 80 km/h. The third party also relied on the sketch where there are lengthy tyre marks. Having considered the sketch and the evidence of the third party, I am of the view that there is insufficient evidence before me to make out the case of excessive speed of the dump truck at the time of the accident. The estimation of 7 seconds is in conflict with the third party’s evidence that after the Plaintiff alighted it was within a very short time that she ran out. So short that the third party was not able to react. From my observation of the third party’s demeanour in giving evidence, I find her evidence unreliable. I am left in doubt as to whether the third party had checked her right rear wing mirror when she first stopped or at all. It follows that the basis of her calculation of 7 seconds is also unreliable.

48. The 1st Defendant states that he was driving at the speed of 50 km/h at the outer lane westbound. He states that there were no vehicles in front of the dump truck when he was travelling along the westbound. He originally states that he first saw a van at the distance of 20 to 25 metres from the van. He later accepted that since there were no vehicle in front of him he was able to see the van at the distance of 50 to 100 metres. He was able to see the green light in the dump truck’s favour at the distance of 50 to 100 metres from the pedestrian crossing.

49. He states that although he noticed the van, he did not know why the van was stationary nor did he realise that it was a nanny van. He states that he did not notice the triangle at the rear of the van. The 1st Defendant states that when he was approaching the pedestrian crossing, he slowed down his dump truck from 50 km/h to 45 km/h and when he was closer to the pedestrian crossing he checked with the set of lights governing the pedestrian on his left and noticed that the lights were in red. The 1st Defendant also states that he did not figure out whether the stationary van was a light goods vehicle or a passenger carrying van. He states that he had a good view from his driver’s seat of the dump truck which was position in a higher level than average vehicles. He was in the position to look over and beyond the top of the van.

50. From the photographs of the rear of the van, there is a distinct triangle printed at the centre. It is accepted by the 1st Defendant that this is a sign which nanny van normally carries. From the third party’s description of the sign, it is a sign of a private light bus carrying students. The purpose of this sign is to alert other drivers as to there being children inside the vehicle. From the side of the van there is a purple stripe circling around the sided body of the van. On the purple stripe it is marked “Bus for students”. I find that had the 1st Defendant paid a proper look out as to this van which he had noticed from a distance, he ought to have noticed the triangular sign and the purple stripe.

51. That part of the road being a straight road and without vehicle in front of the dump truck, I find that had the 1st Defendant paid proper attention to this van he ought to have had no difficulties in concluding that this was a passenger carrying van as opposed to a light goods van.

52. Had the 1st Defendant addressed his mind to the fact this van was stationary in front of the pedestrian crossing despite there being a green light in the van’s favour, he ought to have little difficulty in coming to the view that the stopping of the van ought to have had something to do with the pedestrian crossing. There were only two possibilities open to the reason for the van stopping at that spot. (1) The van broke down awaiting for repair. Or (2) the van was letting off passengers. As to possibility (1), the 1st Defendant states that there were no hazard lights on. At least in the 1st Defendant’s mind, there was nothing to suggest that the van had broken down. This leaves only possibility (2). From a distance of 50 to 100 metres, I find that there was ample time for the 1st Defendant to observe the van and come to a view that there was a real prospect of the van letting off passengers.

53. I also take into account the fact that on that day there were a number of children on the van. The Plaintiff in her police statement also states that there were other students on the van. With the un-obstructed view of the 1st Defendant when approaching the set of traffic lights, had he paid a proper look out he would have had no difficulty in seeing that there were other students inside the van. I find that the 1st Defendant must have appreciated some risks of the traffic ahead due to the stationary van and this is why he had slow down from 50 to 45 and had checked the lights for the pedestrian.

54. I find that a reasonable driver in the circumstances of this case when approaching the pedestrian crossing ought to have concluded that there was a nanny van on the near side letting off school children. I find that the 1st Defendant had failed to take a proper lookout to traffic conditions ahead. There was a real and apparent risk of emerging children. A reasonable driver should have watched out for child pedestrians as they may not obey traffic signals. In the circumstances, a reasonable driver ought to have approached with caution.

55. In the case of the 1st Defendant, he ought to have taken out even more care, as due to the heavy weight of the dump truck the stopping distance required would be longer than an average vehicle. Further, the potential injury or damage that may be caused by a dump truck is likely to be more severe than an average vehicle. It follows that when faced with these circumstances, the 1st Defendant should have taken out steps within his control to prevent knocking down emerging school children.

56. I have taken into account the case of ***Kong Chung Hing & Anor* v *Lam King Ho & Anor (Administrators of the Estate of So Ping Yim, deceased) [1992] 1 HKC 104***, and the test laid down in ***Ng Ching Hung v Lau Shun Hing CA No. 182 of 1990, unreported***. I am satisfied that the circumstances of this case requires a reasonable driver to have sounded the horn when approaching.

57. Since the 1st Defendant’s view towards the pavement and the part of the pedestrian crossing in front of the van was obstructed by the stationary van, I find that in the circumstances apart from slowing down to a reasonable speed to enable the driver to react to emerging pedestrian(s), the 1st Defendant ought to have warned prospective emerging pedestrian by sounding his horn. The sounding of the horn of the dump truck from a distance away from the pedestrian crossing could have alerted the Plaintiff as to the existence of the approaching dump truck. This may have avoided the accident. After all, this is what horns are designed for, to alert other road users when in anticipation of danger. I therefore find the 1st Defendant also liable for the accident.

## Apportionment

58. I find that the third party could have been in better control of the situation and was in a better position to prevent the accident. I further find that the third party had created the dangerous situation. I therefore find the third party to be mainly liable for the accident. Doing the best in the circumstances, I apportion 1/3 liability against the Defendants and 2/3 against the third party.

59. The third party shall indemnify the Defendants 2/3 of the settlement sum of the main action.

60. The third party shall also contribute 2/3 to the Plaintiff’s costs and the Defendants’ own costs in the main action. These costs to be taxed if not agreed.

61. I also make a cost order nisi that the third party pay the Defendants cost of the third party proceedings with certificate for Counsel. Costs to be taxed if not agreed.

Charles T.C. Wong

Deputy District Judge

Mr. Ashok K. Sakhrani instructed by Messrs. Fok & Johnson for the Defendants

Mr. Bernard Yuen instructed by Messrs. Day & Chan for the Third Party