# DCPI 372/2001

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

**PERSONAL INJURIES ACTION NO.372 OF 2001**

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**BETWEEN**

**WONG MOON TONG, the administrator Plaintiff**

**of the estate of WONG KA HANG, deceased**

**and**

**WAH FAI TRACTORS SERVICE CO LTD 1st Defendant**

**TSE KWOK CHIU 2nd Defendant**

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Coram: Deputy District Judge T. So in Court

Dates of Trial: 19th and 20th November 2002

Date of Handing Down Reasons for Judgment: 11th February 2003

**Reasons for Judgment**

1. On 20th November 2002 I gave judgment for the Plaintiff in this case. I now give reasons for the Judgment.

BACKGROUND

2. On the 8th January 1999 a road traffic accident occurred on the Hung Shui Kiu Section of Castle Peak Road. In that accident a 10-year old boy, Wong Ka Hang (“the Deceased”) was killed. The accident involved a bicycle which belonged to the Deceased and a medium goods vehicle bearing registration no.ED4156 (“the Vehicle”). The Vehicle was owned by Wah Fai Tractors Service Co Ltd, the 1st Defendant and was at the time of the accident driven by Tse Kwok Chiu, the 2nd Defendant.

3. A Writ of Summons together with Statement of Claim attached was issued on 6th December 2001 by the Plaintiff, who is the father of the Deceased and who sues as the administrator of the estate of the Deceased. The Plaintiff claims that the accident was caused by the negligent driving of the 2nd Defendant. On 7th January 2002 a Defence was filed by the 1st and 2nd Defendants denying that the 2nd Defendant was negligent. The Defendants also say that the accident was caused solely or materially contributed to by the negligence of the Deceased.

4. At the trial, the Plaintiff was represented by Counsel Mr Carl Yuen and the 1st and 2nd Defendants were represented by Counsel Mr Simon Leung. Mr Leung very helpfully accepted on behalf of the Defendants that in the event that the 2nd Defendant is found liable for negligence the 1st Defendant would also be vicariously liable.

EVIDENCE NOT DISPUTED

5. The parties also confirmed that most of the evidence contained in the Trial Bundle are agreed. Those evidence that are agreed and relevant to the dispute are set out below.

Page No. in the

Date the Trial Bundle

(a) Copy Medical report on the Deceased 23/1/1999 92

prepared by Dr Ching Wei Ming of

Tuen Mun Hospital

(b) Copy Autopsy Report prepared by undated 93

Dr Khin Khin Sein

(c) Copy Statement of Mak Chung Hung, 9/2/1999 94-99

Scientific Evidence Officer

(d) Copy Statement of Dr Yung Wai Kuen, 5/5/1999 100-102

Tommy, Forensic Scientist

(e) Copy of the MVE Accident report 11/1/1999 103-106

of the Vehicle

(f) Copy of the MVE Accident report of 11/1/1999 107-108

the bicycle

(g) Copy Police Sketch Plan 7/2/1999 125

(h) Colour copies of 20 photographs undated 126-135

taken by the police

6. In Dr Khin’s Autopsy Report, it shows the cause of death of the Deceased to be multiple injuries. It also shows particulars of the extent of injuries sustained by the Deceased as follows:-

**Marks of violence and/or identification** : Patchy abrasions on right front of

forehead, face and limbs.

Comminuted fractures of left hip.

**Skull** : Comminuted fractures of vault and base of skull.

**Brain, meninges etc. :** Dura ruptured at multiple sites. Multiple lacerations of

brain.

**Thoracic cavity :** ... Fractures of left and right 2nd – 6th ribs in front.

**Lungs :** Showed multiple tears

**Liver :** Showed multiple tears

**Spleen :** Showed multiple tears

**Kidneys**: Showed multiple tears

7. In Mr Mak Chung Hung’s statement, he set out his findings of his scientific examination of the Vehicle and the Deceased’s bicycle. The conclusion of his statement shows that the disturbance marks on various regions of the underside of the Vehicle could have been associated with the scratches on the nearside bodywork of the bicycle.

8. The statement of Dr Yung Wai Kuen shows the forensic examinations of fibres and paints taken both from the Deceased’s clothings and bicycle and the Vehicle. The result of the examinations shows:-

(a) there were physical contacts between the Deceased’s dark blue school jacket and the front bumper of the Vehicle; and

(b) there were physical contacts between the Deceased’s bicycle and the underneath front part of the Vehicle.

9. The Police Sketch Plan shows the location where the accident occurred. It shows the Tuen Mun Bound Hung Shui Kiu section of the Castle Peak Road. This is a 2-laned carriageway. It also shows the location of Hung Shui Kiu Shell Petroleum Station. Between the Petrol Station and Castle Peak Road, there were a pavement and a cycle track running horizontally to Castle Peak Road. It also shows a scratched mark stretching from the slow lane of Castle Peak Road right opposite to the exit of the Petrol Station to the fast lane where the bicycle, the Deceased’s school jacket, his knapsack and some blood stains were found.

THE IMPACT

10. Based on the above evidence, which is not disputed, I have no difficulty in finding, that there was an impact between the front bumper of the Vehicle and the Deceased and that the Deceased and his bicycle were then dragged underneath the Vehicle, from the slow lane of the road to the fast lane, where blood stains and objects were found.

WHERE DID THE IMPACT OCCUR?

11. There is however no eyewitness evidence as to where exactly was the point of impact. The possibilities are the road, the pavement and the cycle track.

12. The Plaintiff’s case is that the Deceased was going to school at the time of the accident. He would cycle to the Light Railway Transit Station (“LRT”) and then take the LRT to school leaving his bicycle at the LRT Station. The Plaintiff’s evidence was that the Deceased rode to the LRT Station every day. The scene of the accident was between the Plaintiff’s home and the LRT Station. The Deceased would approach the petrol station from the west towards the east. In other words he would have approached the petrol station from the left hand side of a driver exiting from the Shell Petrol Station.

13. The Plaintiff’s case is that the Deceased had started going to school by himself by bicycle for about half a year by the time of the accident. He was taught to ride according to the Road Users’ Code, never on the road itself and to follow cycle track all the time. The Deceased was especially told to pay extra attention when he approached the entrances and the exits to the petrol stations along Castle Peak Road. The parents were satisfied that the Deceased was a good and safe cyclist who understood the dangers posed by traffic. The Deceased was a careful cyclist, having never been involved in any untoward occasion on his bicycle before this accident; furthermore, the Plaintiff and his wife could see the Deceased as he left for school from their balcony. It was the Plaintiff’s evidence that he himself had watched the Deceased from his balcony four to five times, and each time his son had ridden his bicycle on the cycle track. The Plaintiff also said that the Deceased’s mother, a full-time housewife, frequently looked out of the balcony and watched her son riding on the cycle track. There is no evidence to suggest that on the day when the accident occurred the Deceased rode his bicycle in any other less careful manner than he normally did.

14. I accordingly find that the impact could not have occurred on the road for it is highly improbable that the Deceased would stray onto the road on the day of the accident so as to ride against the traffic as he was taught to, and had been seen previously, riding on the cycle track only.

15. Mr Yuen submitted that the point of impact was more likely to be on the cycle track as that was closer to the road surface (and the location of the blood stain etc) than the pavement plus the fact that the Deceased had always been taught by his parents to use cycle paths all the times. He submitted that it is unlikely that the impact was on the pavement for in those circumstances one might have expected to find blood or marks on the cycle track.

16. Mr Leung however submitted that the point of impact was not on the cycle track but on the pavement. He submitted that at the material time the Deceased was travelling along the pavement rather than the cycle track. He said that is because the cycle track only started from the left far side of the stone poles so the Deceased when coming from the west would not have been on the cycle track anyway.

17. Having considered all the background evidence and on balance of probability, I find that it is more probable that the point of impact was on the cycle track rather than on the pavement. This is because of the location of the blood stain, the Deceased’s school jacket and knapsack, the scratched mark which started from the middle of the slow lane, and that the Deceased had been taught to ride on cycle track only, all suggested the impact should have been on the cycle track. For if the point of impact were to be on the pavement the blood stain and the Deceased’s objects should have been located closer to the cycle track and the scratched mark on the road should have started from the cycle track rather than from the slow lane of the road.

18. The next issue that I have to decide is whether the impact between the Deceased and the Vehicle was caused by the negligence of the Deceased or the 2nd Defendant.

NEGLIGENCE OF THE DECEASED?

19. Given that I have found that the impact occurred on the cycle track, I do not think that the accident could have been caused by the negligence of the Deceased. The reason is that between the cycle track and the exit from the petrol station there is a pavement. Had the 2nd Defendant emerged from exit of the petrol station, the Deceased would have no difficulty in heeding the Vehicle and avoided the impact when he came approaching the exit on the cycle track. This is particularly so as the Plaintiff’s evidence was that the Deceased was told by his parents to pay extra attention when he approached the entrances and exits to the petrol station along Castle Peak Road. The Defendants claim that the accident was caused or contributed to by the negligence of the Deceased must therefore fail.

BLIND SPOT

20. Could it be the case that the 2nd Defendant would not have been able to avoid the accident in any case because of the “Blind Spot” effect? On the “Blind Spot” effect, Mr Yu Chak Man, a policeman of 21 years’ standing, gave evidence for the Plaintiff and described the photographs on page 126 of the Bundle. These photos were taken from the driver’s position. They show that the driver would have had to use the convex mirror on the nearside of his vehicle in order to see an object 20 centimetres in front of the bumper of his vehicle. He went on to explain the photograph on page 67 as the “blind spot” from the driver’s position. Anyone sitting in the driver’s seat would not be able to see the bicycle and its rider if they were at a point within one metre of the front left corner of the driver’s cab. The Defendants’ case does not really dispute the existence of the “blind spot”. During the cross-examination of the 2nd Defendant, he further accepted that when driving other HGV or MGV tractors, there were blind spots from the driver’s view. With respect to the photograph on page 67 of the Bundle, the 2nd Defendant readily agreed that there would be no blind spot effect if the vehicles were moving. When the 2nd Defendant was asked whether it is the normal way to eliminate the effect of the blind spot by the driver leaving his seat, reach out to the left hand side passenger seat and look at the position of the blind spot. The 2nd Defendant replied in the affirmative.

21. Mr Leung submits that it is probable that as the Deceased approached the exit of the petrol station he failed to detect the emergence of the Vehicle because the fences had obstructed his view and when he approached the exit and saw the emergence of the Vehicle he was frightened and fell off his bicycle. At that point in time there was a contact made between the Deceased and the front bumper of the Vehicle. Mr Leung submitted that there is no evidence to show the posture of the Deceased at the time whilst he was in front of the Vehicle. It is probable, Mr Leung submits, that because of the Deceased’s particular location and posture at that particular time he was within the “blind spot” distance which render the 2nd Defendant not seeing the Deceased.

22. In my judgment I do not think the Deceased would have fallen within the “blind spot” distance, i.e. within one metre from the Vehicle when the Vehicle emerged from the exit of the petrol station. The 2nd Defendant should have no difficulty seeing the Deceased coming from his left on the cycle track when he emerged from the exit. The distance between them must have exceeded one metre i.e. the “blind spot” distance bearing in mind that there is a pavement in between them.

23. So was the accident caused by the negligence of the 2nd Defendant? The 2nd Defendant gave evidence that he had more than thirty years’ driving experience and had been driving multi goods vehicle and heavy goods vehicle for one to two years. In particular, he had been employed by the 1st Defendant and had been driving the same vehicle for three to four months prior to the accident. He also said that at any one time he drives different kind of vehicles ranging from private cars, public light bus, taxis, heavy to medium sizes lorries all of which he has licence to drive. He has driven on this road regularly and is familiar with the scene of the accident.

24. The 2nd Defendant was asked to mark the position of the Vehicle on the Sketch Plan. He did so, indicating the front most part of his lorry was square on the word “exit” on the sketch (i.e. becoming page 125A of the Bundle). He further marked a photograph on page 128A to state his location before he drove out of the petrol station. When asked about any obstacles to a clear view of the road ahead, he answered in the negative, and went further to state that if he stopped earlier (deeper in the petrol station), his view of the pavement and cycle track would be obstructed by the fencing. Therefore he had to stop beyond the fencing to get a clear view.

25. In his evidence he also described the procedures he took before exiting the petrol station on the day when the accident occurred. He stated that the entire road was clear of motor vehicles, both to his left and to his right. He claimed that the whole process of repeatedly looking to his right, his left and ahead, and checking all his mirrors, took eight to nine seconds. When asked by Mr Yuen, Counsel for the Plaintiff he added that when he was looking around at the exit he had pulled the handbrake. In other words his vehicle was stationary for that period of time.

26. When asked about the positions of the Deceased’s bicycle, school jacket and knapsack in the fast lane of Castle Peak Road, he agreed that these objects were left in the path of the Vehicle. He stated that these objects were not on the road when he emerged from the petrol station. He said he did not see the Deceased at the exit of the petrol station when he checked the traffic condition around him. He also did not see the Deceased when and during his turning his vehicle left into the fast lane of the road. He only saw the Deceased’s bicycle lying on the fast lane opposite to the exit of the petrol station when he looked at his right wing mirrors after turned left into the fast lane of the road and after having straightened the Vehicle and had travelled for about 50 metres.

FINDINGS

27. In my view it is doubtful that the 2nd Defendant had ever stopped at the exit of the petrol station for if he had he could have seen the Deceased. I also find it difficult to accept that he was stationary for 8 to 9 seconds at the exit of the petrol station but did not see the Deceased. This is because it is the 2nd Defendant’s own evidence that there was no traffic on the road at the time. If he could see that there were no oncoming cars from his right, it would be unreasonable for him to wait for nearly ten seconds when he had a clear stretch of road. There was no reason for him to wait at all. With a clear view of a vehicle-less road, it is unlikely that the 2nd Defendant would draw to a complete stop, especially with his handbrake on as he claims.

28. As there was not much traffic on the road at the time and that the traffic was only coming from his right when he exited from the petrol station, I find that it is more probable that when he was exiting he must have paid more attention to his right-hand side of the traffic to check that there was no traffic coming towards him, rather than to have looked at his right and left for 8 to 9 seconds as he claims. I also find it more probable that instead of drawing the Vehicle to a complete stop he must have left the exit slowly looking towards his right only and because of that he failed to see the Deceased who was cycling towards him from his left. As a result he ran over the Deceased without noticing it.

29. It is accordingly my finding that the 2nd Defendant was negligent for he did not keep a proper lookout at the time when he exited the petrol station. As a result he hit the Deceased on the cycle track opposite to the exit of the petrol station, dragging the Deceased, together with his bicycle, underneath the Vehicle across the road from the slow lane to the fast lane, until some 50 metres down on the fast lane when he finally noticed the accident after he has straightened up the Vehicle.

30. No explanation was given by the 2nd Defendant in his evidence nor by Mr Leung in his submission as to how and why, after the impact, the 2nd Defendant could have dragged the Deceased and a bicycle underneath the Vehicle for such a long distance without noticing it. In my judgment that in itself was negligence on the part of the 2nd Defendant. Had he discovered it earlier and stopped his vehicle he would have at least minimised the injuries afflicted on the Deceased which in turn might not have caused the death of the Deceased.

QUANTUM OF DAMAGES

31. The amount of damages was agreed, which I awarded, at HK$255,552.87, and comprise of:-

(a) The bereavement/loss of society HK$150,000.00

(b) Funeral expenses and other special damages HK$50,290.00

(c) Interest for funeral and other special damages

at half judgment rate calculated at 4.063%

per annum HK$7,934.75

(d) Interest on the bereavement/loss of society

at judgment rate at 8.125% HK$47,328.12

Total: HK$255,552.87

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COSTS

32. Mr Leung, on behalf of the Defendants, did not object to costs follow the event. I therefore also ordered costs of this action be to the Plaintiff, to be taxed, if not agreed.

33. As for the basis on which the Plaintiff’s costs is to be taxed, I wish to clarify that it is to be taxed on party and party basis. I have seen the Plaintiff’s solicitors’ letter to the Court dated 16th January 2003 and the Defendants’ solicitors’ letter dated 21st January 2003 but do not see any reason why the above order should be changed.

(T. SO)

Deputy District Judge

Mr Carl H. Yuen instructed by Messrs Jessie Chu & Co for the Plaintiff

Mr Simon Leung instructed by Messrs Hastings & Co for the 1st and 2nd Defendants