## DCPI 463/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 463 OF 2008

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##### BETWEEN

LAU SUM LONG IVAN an infant suing by Plaintiff

### his mother and next friend KAN LAI YEE

### and

TANG PAK CHUEN (鄧百尊) Defendant

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Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 22 - 23 October, 2008

Date of handing down Judgment : 3 December, 2008

# JUDGMENT

**Background**

1. Little Ivan, aged 9 years 8 months, was walking along Pratas Street in Shamshuipo with his mother's aunt, on his way to school. It was just before noon on 11 April 2006. Just as he reached the junction of Pratas Street and Po On Road, Ivan saw that his school shuttlebus had arrived at Po On Road. He walked on ahead of his mother's aunt to make sure that it was his bus. After he had turned into Po On Road and had walked on for a short distance, Ivan was able to confirm that it was indeed his school shuttlebus. There were public light buses and other vehicles parked along both sides of Po On Road. According to Ivan, he stepped out onto the road from the pavement, between a public light bus and a taxi which was parked along the pavement. He then stopped and looked on both sides of the road to check the traffic. There were many vehicles, and after they had passed, Ivan crossed the road. He said that he did not run, and walked slowly across. When he reached the white dividing line in the middle of the road, Ivan said that he stopped again, and looked to both sides. He did not see any vehicle, and so proceeded to cross the road. It was only after he had started to cross that he heard a noise, and looking left, he saw a taxi. According to Ivan, he had nearly reached the pavement on the other side of Po On Road, and so he walked faster in an attempt to reach the pavement and avoid the taxi. He was not able to run fast enough, and was hit by the central front part of the taxi. He sustained injuries to his teeth and knees.
2. These proceedings are instituted against the driver of the taxi, Mr. Tang, for compensation. By way of defence, Mr. Tang claims that the accident was caused solely or contributed to by Ivan's negligence in failing to take reasonable care of his own safety when crossing the road.

**The issues**

1. The issues for determination at trial are :
   1. whether the accident was caused in any way by the negligence on the part of Ivan;
   2. whether the accident was caused by Mr. Tang's negligence; and
   3. the amount of damages for which Mr. Tang may be liable.

**Whether the accident was caused in any way by the negligence on the part of Ivan**

1. Mr. Tang claims that he was driving his taxi along Po On Road at approximately 25 kph. There were vehicles parked on both sides of the road. Mr. Tang claims that after he had passed the safety island just after the junction of Pratas Street and Po On Road, he saw a public light bus coming towards him on the opposite lane. According to Mr. Tang, there were no vehicles in front of his taxi. Just as the front of the public light bus on the opposite lane was at the same level as the front of his taxi, Mr. Tang saw Ivan for the first time as he ran out from behind the public light bus. According to Mr. Tang, the suddenness with which Ivan appeared did not give him time either to sound his horn or to stop his taxi in time to avoid hitting the child. Mr. Tang claims that he was driving at a reasonable speed, and that the accident was caused solely by Ivan having run out from behind the public light bus in the middle of the road.
2. It is not in dispute between the parties that the mere fact of Ivan being a child does not prevent a finding of contributory negligence, the test of which is the same in the case of a child as of an adult. The crucial points are the child's age and understanding, and the test of contributory negligence is modified only to the extent that the degree of care to be expected must be proportioned to the age of the child, which is a matter of fact for decision on the evidence in the particular case.
3. In determining the question of whether Ivan can be said to have been negligent, I bear in mind the following words of the author of Clerk & Lindsell on Torts (para. 3-53 on page 182) which provide useful guidance:

"In considering whether a child has taken reasonable care for his own safety regard must be had to the age of the child, the circumstances of the case and the knowledge by the particular child of the dangers to which the defendant's negligence has exposed him. In *Gough v. Thorne*, Lord Denning M.R. said that a very young child cannot be guilty of contributory negligence; an older child may be, but it depends on the circumstances. A judge should only find a child guilty of contributory negligence if he or she is of such an age as reasonably to be expected to take precautions for his or her own safety. This is not an entirely subjective test, because the question is whether an "ordinary child " of the claimant's age could be expected to have done any more than the claimant, and an ordinary child is neither a "paragon of prudence" nor "scatter-brained". Theoretically, there is no age below which, as a matter of law, it can be said that a child cannot be guilty of contributory negligence, but in practice it is unreasonable to exact a high standard."

1. After hearing Ivan's evidence, I have come to the view that he understands the importance of taking precautions on the road. He emphasized on a number of occasions that when he paused to cross the stretches of the road, he had looked both to his left and to his right to check for oncoming traffic. He claims that when he was standing at the center dividing line, there were no vehicles, but to be safe, he had still taken a look to confirm that there was no traffic, before crossing.
2. Although Ivan repeatedly said in evidence that he had not run across the road, I consider from his evidence that he was anxious to get to his shuttlebus, when he saw that it had already arrived and had stopped on one side of Po On Road. He had walked on ahead of his mother's aunt as soon as he had seen the shuttlebus when he was at the road junction. He mentioned that someone had pointed out before that he was late for the bus, and he did not want to be late again.
3. Ivan's evidence in Court was that when he stopped at the central dividing line, he had not seen any car coming from the left. When he did see Mr. Tang's taxi, Ivan said that he was already near to the pavement on the other side and therefore started to run, but was hit.
4. Although it is Ivan's evidence that he had almost reached the pavement on the other side of the road when he was hit, this is not supported by the evidence. As can be seen from the sketch plan prepared by the police, the collision occurred near the central dividing line of the road, rather than near the pavement. It is also not in dispute that Ivan was hit by the centre portion of the front part of Mr. Tang's taxi.
5. According to the police investigation report, Ivan had told the investigating officer shortly after the accident that he had run out onto the road from Po On Road, and was hit when he had run to the opposite lane of the road. Ivan has no recollection of this account to the police.
6. Mr. Tang's evidence is that he was driving at 25 kph at the material time, which is a reasonable speed for the stretch of the road in question. If Ivan's evidence is true, that there were no vehicles on his left when he had stopped at the central dividing line of the road and looked, Ivan could not have ***not*** seen the taxi.
7. Considering the entirety of the evidence, and even bearing in mind the standard of care to be expected from an ordinary child of 9 years 8 months, I consider that the accident was partly caused by Ivan's lack of care. He was in a hurry to cross the road to the shuttlebus, and even if he had indeed paused at the central dividing line, he had failed to take a proper look at the condition of the traffic on his left before he crossed. If he had looked as carefully as he claimed, or if he had been as prudent as he claimed, he should have been able to see the taxi before it was near enough to hit him.
8. Further, Ivan must have been familiar with the stretch of the road in question since it was where he took his shuttlebus to school every day. He should then have known that there was a safety island at the road junction, and that he could cross the road there. He did not do so because, he said, he wanted to walk on further to see if the shuttlebus which had stopped was indeed his, before crossing. If Ivan had chosen to cross the road at the safety island, it would have been much safer for him if he had to pause before crossing to the opposite lane. It would also have been possible for drivers of passing vehicles to have spotted Ivan as he waited to cross the road. Mr. Tang's evidence is that he was not able to see Ivan standing at the central dividing line behind the public light bus.

**Whether the accident was caused by Mr. Tang's negligence**

1. It is the duty of the driver of a vehicle to keep a good lookout (para.9-224, Charlesworth & Percy on Negligence). A driver will be held negligent if he fails to notice in time that the actions of another person has created a potential danger. He must look out for other traffic, which is or may be expected to be on the road, whether in front of him, behind him or alongside him, especially at crossroads, junctions and bends. When there are pedestrians about, the driver must be ready in case they step out from a street refuge or a footpath, or from behind a vehicle or other obstruction and also be prepared for children, knowing that they may be expected to run suddenly on to the road. When passing a standing vehicle or other obstruction, which prevents a clear view of oncoming traffic or pedestrians, care should be taken and a good lookout kept.
2. I accept that Mr. Tang was driving his taxi at a reasonable speed. There is no evidence that the accident occurred in an area where there are schools, or playgrounds, or where children are usually expected. However, Mr. Tang was near a junction, and he accepts that there were vehicles parked on both sides of On Po Road. He should have been alert and have kept a particularly good lookout in the circumstances. He claims that his view was obstructed by the mini light bus traveling on the opposite lane. He also claims that because Ivan had run out suddenly from behind the mini light bus, he was not able to stop in time.
3. According to Ivan's evidence, when he first saw Mr. Tang's taxi, it was near the convenience store across from the safety island. Giving some leeway to the child's judgment of distance, Mr. Tang's taxi may have been nearer to Ivan than as he described when it was first spotted, but if Mr. Tang had kept a more vigilant lookout, he should have been able to see Ivan on the road and should have been able to stop his taxi in time. On the evidence, I consider that either Mr. Tang had failed to keep a sufficiently proper lookout, or he must have been driving faster than the 25 kph he described.
4. I have considered the authorities cited, including the decisions referred to in the Judgment of H. H. Judge H. C. Wong in the case of *Aqsa Rana (a minor suing by Mukhtar, Muhammad her next friend and father) v. Tsui Luk Pui*, DCPI 68 of 2007. It can be seen from these authorities that apart from 2 cases in which children aged under 4 were considered to be 0% contributorily negligent, children aged between 5 years 4 months and 12 have been held to be 20% to 100% liable in negligence for suddenly running out or appearing on the road. Naturally, it all depends on the circumstances of the case. On the facts of this case, I consider that the proper apportionment of blame between Ivan and Mr. Tang in all the circumstances should be 60% and 40% respectively.

**The amount of damages for which Mr. Tang may be liable**

1. As a result of the accident, Ivan lost one tooth. It is claimed that he has to undergo future treatment in the years to come. Considering the decisions in *Pang Wai Hung v. MPC Express Services Company* PI 1093 of 1995, unreported, 14 May 1996, and *So Sau Man v. Leung Ming Kwong* DCPI 376 of 2005 unreported 18 October 2005, I consider that a reasonable award for pain and suffering is **$70,000**.
2. In respect of the expenses for future treatment, Ivan's mother claims a sum of $52,000. According to the estimate given by Dr. Wong, the costs for the treatment recommended are $65,000. According to the estimate of Dr. Tseung, the expenses for the treatment required are $88,000. I will allow the median sum of **$76,000**. I also allow a sum of **$1,450** in respect of the other special damages claimed.
3. The total award accordingly comes to $147,450. Allowing for Ivan's contributory negligence, the award is **$58,980**.

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1. There will be interest on the award of general damages at the rate of 2% per annum from the date of the service of the Writ to the date of judgment, and on the award of all special damages at half the judgment rate from the date of the accident to the date of judgment.

23. I will further make an order nisi that the costs of the action are to be paid by Mr. Tang, to be taxed if not agreed, with certificate for counsel. Madam Kan's own costs are to be taxed in accordance with the Legal Aid Regulations.

(Mimmie Chan)

District Judge

*Ms. Rebecca Lee, instructed by Messrs. Fan Wong & Tso (assigned by D.L.A.) for the Plaintiff*

*Mr. Matthew Tse, instructed by Messrs. Kenneth C.C. Man & Co. for the Defendant*