#### DCPI 1093/2005

**IN THE DISTRICT COURT OF THE**

### **HONG KONG SPECIAL ADMINISTRATIVE REGION**

#### PERSONAL INJURIES ACTION NO. 1093 OF 2005

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| **BETWEEN** | **LAM CHOR MUN,**  **a minor by her next friend**  **LAM PIK KAM** | Plaintiff |
|  | **and** |  |
|  | **HO TIN WAH** | **1st Defendant** |
|  | **YEUNG SHING FAT** | **2nd Defendant** |

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##### Coram: Deputy District Judge R. Cheung in Court

**Dates of Hearing: 5th and 6th February 2007**

**Date of Handing down Judgment: 14th March 2007**

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**JUDGMENT**

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1. This is a personal injury claim by the minor Plaintiff suing by her next friend against the 1st Defendant who was the driver of a light goods vehicle registration no. CV1383 ("the Van") and the 2nd Defendant who was the owner of the Van. The accident took place on 17 August 2002 at about 2 p.m. on an access road inside a covered bus terminal in the vicinity of Fu Tai Estate in Yuen Long. The Plaintiff was knocked down by the Van and sustained injuries. A long process of treatment ensured. There was no complete recovery.

2. The sketch exhibited as P1 and the photographs at Part D of the Trial Bundle from pages D111 to D131 (hereinafter "D111 to D131", mutatis mutandis) are illustrative of the location of the accident. The undisputed evidence is that one has to first make a right turn along that access road before one comes to a straight stretch of the access road which extended for some lengths. The accident in question took place on this stretch of the road.

3. On the left side of this stretch of road is a minibus stop area in a rectangular shape. The front end of the minibus stop area is marked by a top line which ran perpendicular to the road. The right side of the minibus area is marked by a side line which ran parallel to the road. On the right side of this stretch of road is a sizeable pedestrian area. There were kerbs on either side of this stretch of the road. There is undisputed evidence from DW1 that after he made a right turn, he travelled for about 6-7 vehicle lengths along this stretch of the road before the accident occurred. The traffic was in one direction only. The speed limit there was 50 kilometres per hour ("kph").

4. It is not in dispute that there was sufficient lighting at the location of the accident although some of the photographs presented as evidence were taken with the camera pointing to the light source and convey the wrong impression that the area was somewhat dim.

5. At a distance beyond the top line of the minibus stop area, the access road turned to the right again and made a loop around the central pedestrian area. A driver is not bound to make this right turn. If one proceeds further ahead without turning right, one will come to the entrance of the car parking lot of Fu Tai Estate. There is undisputed evidence that entry into the car parking lot was controlled by an electronically operated drop bar and one has to stop in front of it.

6. It is also not in dispute that at the time of the accident, a minibus was parked at the front end of the minibus stop area picking up passengers. It is also not in dispute that the Plaintiff was trying to cross the access road from the front of the stationary minibus towards the central pedestrian area. She was heading for the mall entrance of Fu Tai Estate which was somewhere beyond. It is not in dispute that the place where PW1 tried to cross the road was a place that pedestrians often used to cross the road and this fact was known to the 1st Defendant.

7. The main although not the only dispute is whether the Plaintiff had run out or had simply walked out from behind the stationary minibus. The Defendant has taken issue on both liability and quantum.

Witnesses

8. The Plaintiff herself testified as PW1. The driver of the stationary minibus has given a witness statement to the police but was not called as a witness. The 1st Defendant testified as DW1. The 2nd Defendant has not testified.

The speed of the Van

9. DW1 had given a witness statement to the police on 26 August 2002 in which he said that at about the time of the accident, he was driving at the speed of about 30 kph towards the entrance to the car parking lot of Fu Tai Estate when he saw that in front of him a stationary minibus was picking up passengers. There was nothing in the witness statement to indicate how far the Van was behind the stationary minibus when DW1 was driving it at about 30 kph. As noted earlier, the undisputed evidence before me is that there was a stretch of straight road which DW1 had to cover before he would proceed up to the stationary minibus, which was parked on the left hand side of the road. While proceeding forward along that straight stretch of road the minibus was of course within DW1's view.

10. DW1 had prepared another witness statement for these proceedings on 21 March 2006. In effect, in this subsequent witness statement DW1 said that after making the right turn he came to the straight stretch of road, he was proceeding at the speed of 15 kph and that he had maintained this speed until he came to be abreast with the stationary minibus.

11. In Court, DW1 testified to the effect that when he made the right turn to come to the stretch of straight road he was driving at about 30 kph, that being his usual speed when he came to that location. After making that right turn, he had covered a distance of about 6-7 vehicle lengths along the straight stretch of that access road before the accident occurred. He was decelerating during that time. DW1 said that he had to slow down the Van in order to stop before the drop bar at the entrance of the car park of Fu Tai Estate. He said he was unable to tell the speed of the Van immediately before the accident.

12. DW1 testified to the effect that he had not been looking at his speedometer prior to the accident. I accept that. Drivers do not look at their speedometers all the time and there was no good reason why DW1 should be paying particular attention to his speedometer at that stretch of the road. I take that even for experienced professional drivers, speed estimates are at best rough estimates. I do not consider that I should attribute to the speed estimates given by DW1 an artificial precision that they do not deserve. On the other hand, I should not be simply ignoring these speed estimates. DW1 was an experienced driver. All circumstances considered, I think that it is correct for me to find that DW1 was driving at about 30 kph when he made the right turn and that he had slowed down the Van somewhat before the accident as he was preparing to stop before the drop bar at the entrance of the car parking lot of Fu Tai Estate at some distance ahead. As to precisely how slow it was, I am unable to make a finding but I consider that it is improbable that the speed of the Van was at a crawling speed. From the photographs that are put in evidence, there is still some distance between the top line of the minibus stop area to the drop bar at the entrance of the car parking lot, a distance long enough for the Van to gradually slow down even if it were going at 30 kph, in order to come to a full halt in front of the drop bar.

PW1: how far beyond the minibus?

13. On 30 September 2002, PW1 gave her witness statement to the police and she said in the witness statement that she had proceeded beyond the off-side of the stationary minibus for about two steps when she turned her head to the right to check if there was any oncoming traffic. She said she saw the Van coming up on her right hand side and she immediately turned to go back. However, her left foot was caught by the left front wheel of the Van and she was dragged forward for a few metres before it came to a stop.

14. PW1 prepared a witness statement for these proceedings on 8 December 2006. In a broad sense, she maintained the same version of facts as to what happened at the time of the accident. In effect, she said that upon her notice of the Van coming up, she tried to turn to go back but she had not been able to make a full turn before she was hit. I note that PW1 has been more consistent with her version of facts than DW1.

15. Under cross-examination, PW1 demonstrated to show that she had made a 90 degree clockwise turn of her body while remaining on the same spot, to clarify how she had reacted to the approaching Van, before she was hit.

16. There is dispute as to the pace of PW1. Suggestions were made that she was running out from behind the stationary minibus, which PW1 denied. Her evidence was that 17 August 2002 was a school holiday (summer holiday). She had been to the library and was going home after that. She lived in Fu Tai Estate and was familiar with the location. She had no reason to be in a hurry at the time and she did not run. I accept that.

17. There was also dispute as to whether PW1 had turned as she had demonstrated. However, although DW1 did not say that he saw PW1 making any turn of her body before the Van knocked her down, he did not say for sure that PW1 had not made any turn. In his testimony, DW1 gave evidence to the effect that as soon as he was aware of PW1, the Van then hit PW1, allowing no or little time for him to react.

18. PW1 is not the most impressive witness that one may have come across in Court trials but certainly she is not a blatant and deliberate liar. I accept that not every answer that she had given under cross-examination is truthful. I accept that PW1 was about 142 cm in height at the time of the accident and the minibus would have obstructed her view of the oncoming traffic. It was quite reasonably suggested to her that she could have stopped before proceeding beyond the off-side of the stationary minibus and poked her head out to check if there was oncoming traffic before going forward. Her answer is something like "*the minibus was blocking my view and so I could not see"*. That, of course, is not a fully frank and honest answer. But in an overall sense, my impression is that PW1 had been doing her best to give an account of what had happened in a manner that is as accurate and unexaggerated as a girl of her age could possibly manage to present. Her reluctance to admit her careless action in emerging into the traffic without first checking if it was safe to do so, appears to me to be more in the nature of an unconscious display of defence mechanism at work at the back of her mind rather than a conscious and deliberate cover-up and shifting of the blame on DW1 - for how would a clever witness bent on deceiving the Court seek to show that a person cannot first check the traffic in such a situation?

19. I accept therefore, that PW1 had indeed been walking at normal pace for about two steps forward beyond the off-side of the stationary minibus when she turned her head to the right and saw the Van coming up towards her. She tried to turn to go back and in doing so had turned her body clockwise for about 90 degrees. Then, she was hit by the Van.

20. Again, it would be too artificial and unrealistic to make very precise findings on how far beyond the off-side of the stationary minibus PW1 had walked up to before she stopped to turn back or how many seconds had elapsed from her emerging from the off-side of the minibus before she was hit by the Van. That said, I am not supposed to throw common sense out of the window in making findings of facts. I think it is correct for me to find that it took about 2-3 seconds for PW1 to complete the above actions and that she had stopped at about 1 metre beyond the off-side of the stationary minibus when she was hit. Of this, more will be said later.

Final Resting Position of the Van

21. The undisputed evidence before me is that the Van had remained at where it had stopped after the accident until the arrival of the police.

22. Exhibit P1 is relevant concerning the final resting position of the Van. On the face of it, it is a sketch plan drawn by a police constable on 17 August 2002 at about 2:35 p.m., shortly after the accident. It shows a rough plan of the location of the accident in question. Apparently, some measurements were taken and noted on the sketch. I am not prepared to find that the entire sketch was drawn to scale but I find it probable that the measurements noted on the sketch are accurate.

23. The sketch Exhibit P1 may be viewed together with the photographs at D111 to D131. The photographs at D111 to D114 were taken shortly after the accident whereas the photographs at D115 to D131 were taken much later, on 24 September 2002. FP1 on the sketch is the sign post with a minibus icon shown in the photograph at D126A. The sign post stood at the top line of the minibus stop area, which was in a long rectangular shape. The sketch designates the minibus sign post as "FP1". Further ahead of the minibus stop area is another sign post with the letter "P", see the photograph at D125B. The sketch designates the "P" sign post as "FP2". The sketch does not show the distance between FP1 and FP2. However, it designates the Van as "V1" and goes on to supply the following measurements: the near side rear corner of the Van is 4.6 metres from FP1 and 7.6 metres from FP2, whereas the near side front corner of the Van is 7.8 metres from FP1 and 4.6 metres from FP2. The dimensions of the Van were given as 4.8 metres long and 1.8 metres wide. People who are good at geometry may be able to work out precisely how far beyond the top line of the minibus stop area was the final resting position of the Van after the accident. I would make no pretence that I can make such calculations but I do not consider such calculations to be essential either. I take it to be probable that the Van had stopped somewhere in the middle between the minibus sign post and the "P" sign post but a bit more towards the front. The photographs at D112 to D114 show the final resting position of the Van. Although photographic depiction of distance is imprecise and there is always a risk of distortion in perception when objects are viewed at an angle, I am prepared to find that the rear of the Van had proceeded beyond the top line of the minibus stop area for at least 2 metres if not more. That means the front of the Van was at least about 6.8 metres beyond the front line of the minibus stop area when it came to a full halt after the accident.

When and Where DW1 first saw PW1?

24. The Road Users' Code shows that if one is driving at 40 kph, then the stopping distance would be 20 metres made up by 10 metres of thinking distance and another 10 metres of braking distance. However, the Road Users' Code is silent as to the thinking distance and braking distance of vehicles travelling at speeds below 40 kph. I bear in mind that a vehicle that is travelling at a speed of 30 kph will cover about 8.33 metres per second, at 25 kph about 6.94 metres per second, at 20 kph about 5.56 metres per second, at 15 kph about 4.17 metres per second, at 10 kph about 2.78 metres per second and at 5 kph about 1.39 metres per second.

25. I bear in mind that there is undisputed evidence that the front of the stationary minibus was not or beyond the top line of the minibus stop area as there was a need to make space for pedestrians to cross the road in front of it. The photograph at D130A shows that immediately beyond the top line of the minibus stop area, there is a stretch of railings on the pavement so that pedestrians could not cross the road there. As to precisely how far behind the top line of the minibus bus area was the front of the stationary minibus, I am unable to make any precise finding.

26. I accept from the sketch Exhibit P1 that the width of the minibus stop area is 2.6 metres and that the measurement from the side line of the minibus stop to the pavement on the other side of the road is 4.3 metres. I am prepared to find that a reasonably careful driver proceeding towards the stationary minibus along the road in question at the time of the accident should be able to see PW1 emerging from there some time before he came to be abreast with the stationary minibus. Indeed, such a driver should be able to see PW1 even before PW1 had proceeded beyond the off-side of the stationary minibus. As to precisely at which position such a driver would be able to see PW1 coming out from behind the stationary minibus, the evidence does not permit me to make any precise finding.

27. I am unable to make very precise findings as to how many seconds (or fractions of a second) have elapsed from the time PW1 should have been visible to DW1 before the Van actually hit her. However, I am prepared to find that it was more than 2-3 seconds for the simple reason that I have found PW1 had taken that long to walk 2-3 steps beyond the off-side of the stationary minibus and made that 90 degree turn of her body before she was hit.

Too close to the left?

28. There is no evidence as to the dimensions of the stationary minibus. It probably was bigger in size than the Van but certainly not as wide as the minibus stop area which was 2.6 metres in width. The road in question was (2.6 metres + 4.3 metres =) 6.9 metres wide from the pavement on one side to the other, as appears in the sketch P1. There is no evidence that DW1 had swerved the Van to the right to avoid the accident. The photographs at D113 which show the final resting position of the Van also show that it was more or less parallel with the road and resting in the middle between the side line of the minibus stop area (that is, if the side line is notionally extended forward) to its left and the pavement to its right. From these photographs I would also infer that the near side of the Van was about 1 metre away from the side line of the minibus stop area prior to the accident. In other words, given the width of the Van was 1.8 metres and that the remaining width of the road was 4.3 metres from the side line of the minibus stop area to the pavement on the other side of the road, the off-side of the Van would be about 1.5 metres from the pavement to its right immediately before the accident. That said, it is probable that the off-side of the stationary minibus in question was not on the side line of the minibus stop area but somewhere inside. I do not think it is open for me to find that the Van was travelling too close to the stationary minibus at the time of the accident.

Want of due attention?

29. In Court, DW1 was emphatic that he was heading towards the drop bar at the entrance of the car parking lot of Fu Tai Estate before the accident and that was the reason why he was slowing down the Van before it came up to the stationary minibus. That was the sole reason he gave for slowing down the Van. It was only on repeated questioning that DW1 said that he had slowed down the Van also because he was approaching the front of the minibus stop area where pedestrians used to cross the road. I am skeptical of this.

30. DW1 was familiar with the area and it was within his knowledge that people used to cross the road at the front of the minibus stop area. He was aware of the stationary minibus ahead of him picking up passengers at the time of the accident. Should he have been more watchful of pedestrians coming out from the front of the stationary minibus? He said in his testimony that he had not been focusing his attention on the situation at the front of the minibus. When asked why it was so he did not give any satisfactory explanation. It was only in re-examination that DW1 referred to the possibility of pedestrians also crossing the road from his right and that the oval shaped pillars on the right hand side of the road would likely obstruct his view of pedestrians behind them, see for example the photographs at D113 and D116. In other words, his case is that it was necessary and reasonable for him to also pay attention to what might emerge from behind the oval shaped pillars to his right. I would also view this with some skeptism.

31. DW1 is not a patient with a tunnel vision. He could have both the left and right within his view as he was approaching the stationary minibus until he got very close to it. If the effect of his evidence is that he was focusing attention to the drop bar area ahead of him, nonetheless he could still have the situation at the front of the stationary minibus within his view even if his focus was not there. However, his evidence is that there was no or too little time for him to react once he became aware of the presence of PW1. I think in the circumstances it is correct for me to find that DW1 had a momentary lapse of attention and that he had not been paying due attention to the front of the stationary minibus as a reasonably careful driver should.

Failure to swerve?

32. There is no evidence before me that DW1 had even attempted to take any action to avoid hitting PW1. I find that he had not. There is no evidence that there were other pedestrians ahead of the Van to its right. There is nothing to suggest that it was unsafe or impracticable for DW1 to swerve to the right. The Plaintiff has indeed pleaded this point. Paragraph 4(f) of the Statement of Claim avers that the 1st Defendant was negligent in *"failing to ……… otherwise so to manage and control the Vehicle as to avoid the accident".* I find that a reasonably careful driver should have swerved to the right in the circumstances. DW1 had failed to do so.

Causation?

33. Did DW1 cause the accident?

34. I do not think the doctrine of *Res Ipsa Loquitur* will assist the Plaintiff. There is no room for the operation of this inferential mode of reasoning in the context of the present case so as to shift the burden of proof on the 1st and 2nd Defendants.

35. I think it is up to the Plaintiff to establish that had DW1 paid proper attention to the situation in front of the stationary minibus or taken avoidance action by swerving to the right, the accident could have been avoided. In other words, it is nonetheless a "but for" test.

36. In DW1's witness statement to the police, his evidence is that PW1 had run out from behind the stationary minibus and he had to abruptly apply his brake. This happened when the Van was almost abreast with the stationary minibus. In his subsequent witness statement he also said that PW1 had rushed out. This is not my finding. As said earlier, my finding is that PW1 had walked at her normal pace. She was a young girl at the time 142 cm in height. She had time to make a 90 degree turn before she was hit. I have found that it took 2-3 seconds for PW1 to complete such actions.

37. In the circumstances, although I am unable to find the precise speed of the Van at the moment of the accident nor precisely how many seconds had elapsed from the time PW1 became visible to DW1 to the time the Van hit her, nor precisely at which spot the sighting of PW1 should have occurred, I still think that it is correct for me to find that the negligence of DW1 had caused the accident. It is probable that had he paid due attention, he would have seen PW1 earlier than he actually did, and there would have been sufficient time for him to swerve to the right to avoid hitting PW1. A reasonably careful driver would have done that. It is not in dispute that it was the left front corner of the Van that hit PW1. A slight swerve to the right could have avoided it. It is also possible that DW1 could have braked in time to avoid hitting PW1 even without swerving to the right although I am unable to find that it is probably so.

Moore v. Poyner (1975) RTR 127

38. Every case turns on its own facts. I am fully aware of that. The facts of **Moore v. Poyner** are not on all fours with the present case. Nonetheless, the principles adumbrated therein are apposite and I would quote the dictum of Buckley LJ as follows: *"I think that one must test his duty of care not by reference to what the plaintiff actually did but by what sort of conduct by any child, at any moment of time, the defendant ought reasonably to have anticipated, and to consider what course of action he would have had to take if he was going to make quite certain that no accident would occur"*.

39. I would find that the 1st Defendant had been in breach of his duty of care towards the Plaintiff.

Vicarious Liability

40. Admission was made in the Defence filed that the 2nd Defendant was the owner of the Van at the time of the accident. I would find the 2nd Defendant vicariously liable for the tort committed by 1st Defendant: **Rambarran v. Gurrucharran (1970) 1 All E.R. 749** applied.

Contributory Negligence

41. The Plaintiff is not without blame. There can be no doubt that the Plaintiff was negligent on the facts of this case. *"The test of what is contributory negligence is the same in the case of a child as of an adult. The test is modified only to the extent that the degree of care to be expected must be proportionate to the age of the child"* see **Charlesworth & Percy on Negligence, 11th edition, para 3-38**.

42. The Plaintiff was 12 1/2 years old at the time of the accident. She candidly admitted that she had been taught by her parents of the need to check the traffic condition on the road before emerging from behind stationary vehicles and she said she used to do so before the accident on other occasions.

43. Various authorities have been cited to me on the percentage of apportionment. As each case turns on its own facts, I do not find them particularly helpful and would propose not to refer to them here.

44. In all the circumstances, I consider it fair that the Plaintiff should share 40% of the blame for the accident and the 1st and 2nd Defendants 60%.

Quantum Matters

45. The Plaintiff was born in Mainland China on 16 February 1990. She came to Hong Kong at the age of 2 or 5 - the difference is not that material. She lived with her parents and two sisters. Her father was a construction site worker. She was well prior to the accident and did not have any major illness or injury. She liked to play volleyball and badminton as her leisure activities. She was a Primary 6 student at the time of the accident. She has migrated to the United States in July 2006. She has been in Grade 9 under the U.S. education system since 2006 and that is the equivalent of Form 3 here. She is now resident in the United States.

Injuries and course of treatment etc.

46. The recovery process of the Plaintiff had been a long and tortuous one. She lost consciousness for a while after the accident and was admitted to the Tuen Mun Hospital. Physical examination showed that she had a small patch of bruise over her occiput. Abrasions were found over her left arm and right ankle. She suffered dirty crushing injury over her left dorsal foot with loss of skin, exposure of tendon and bones. Fracture of her left distal tibia and fibula and compound fracture of her left 4th and 5th metatarsal bones were found.

47. The Plaintiff then developed generalised tonic clonic convulsion and was later admitted into the Orthopaedic Ward of the Tuen Mun Hospital.

48. Emergency operation was done on 17 August 2002 for debridement of the wound and close reduction and internal fixation of her left distal left tibia and fibula.

49. On 19 August 2002, a second operation was done for debridement and reduction and fixation of the toe fractures.

50. On 26 August 2002, a third operation was done for wound debridement and skin grafting.

51. Wound infection then developed after the third operation and her condition only improved after two further operations for debridement and skin grafting and removal of the implants.

52. The Plaintiff was discharged from the hospital to go home on 29 October 2002. She resumed her schooling and studied in Form 1 in November 2002.

53. After her discharge from the hospital, the Plaintiff had to attend physiotherapy, occupational therapy and orthopaedic clinic on a regular basis. She had received at least 13 sessions of occupational therapy treatment. She had 12 sessions of physiotherapy at the Tuen Mun Hospital from 31 October 2002 to 13 February 2003. She also had management of her scar condition with pressure garment provided by the occupational therapists at the Tuen Mun Hospital from 12 November 2002. She wore the pressure garment until she was re-admitted into Tuen Mun Hospital on 10 December 2004.

54. In December 2004, the Plaintiff was re-admitted into the Tuen Mun Hospital. Excision of the scar over the dorsum of her left foot was followed by skin grafting taken from both groins on 10 December 2004. She was then discharged to go home about 1 week afterwards and was required to attend wound dressing daily.

55. Due to the infection of the skin grafted area in her left foot, she was admitted into the Tuen Mun Hospital in January 2005. Debridement of the wound over her left foot was done and she was discharged to go home in about 2 weeks. She had regular wound dressing as outpatient till her wound was healed. Her last Orthopaedic visit was made in September 2005.

56. The Plaintiff stopped her schooling thereafter as the mother of the Plaintiff was worried that she would develop further complications should she continue to go to school.

57. As noted earlier, in July 2006, the Plaintiff migrated to the United States with her family members.

58. It is not in dispute that the Plaintiff had the following scarring on her body: (1) 14 cm surgical scar at her right groin; (2) 17 cm surgical scar at her left groin; (3) 17 x 17 skin donor site scar at left buttock, pale and not hypertrophic; (4) 13 x 3 cm abrasion scar at left shin; (5) 4 cm laceration scar at left shin; and (6) 10 x 6 cm skin grafted site scar over dorsum of foot, hypertrophic at distal half, with local tenderness. I accept such to be facts.

59. There is no serious dispute that the Plaintiff had residual pain in her left knee, residual pain in her left foot with prolonged walking and standing, stiffness of the toes on her left foot and deformity of the 4th toe on her left foot. I accept these to be facts.

60. In Court, the Plaintiff confirmed that the injuries rendered her unable to run for any long distance without feeling pain in her left foot. If she continued walking or standing for 10 minutes, there would be pain to her left foot. The pain was also felt when the weather changed. Her evidence is to the effect that she used to lead a more active life but she was less active after the accident. She also mentioned that she had to give up the idea of attending dancing classes and participating in the swimming gala of her school.

61. Of the scarring and deformity of her toe, the Plaintiff testified to the effect that she was afraid of wearing sandals, shorts or short skirts. She also could not wear pointed shoes. I accept that the Plaintiff would feel embarrassed to show the scars and her deformed toe to others. This is going to stay with her for life.

The Medical Reports

62. A number of medical reports have been put in evidence. These include, inter alia, (1) a 1st medical report by Dr. Lau Hoi Kuen ("Dr. Lau"), an orthopaedic specialist, on an examination he conducted on the Plaintiff on 23 September 2004; (2) Dr. Lau's 2nd report on an examination conducted on 7 April 2005; (3) Dr. Lau's 3rd report on an examination conducted on 1 June 2006; (4) a medical report by Dr. Lam Kwong Chin ("Dr. Lam"), also an orthopaedic specialist, on an examination conducted on 8 March 2006; (5) a medical report by Dr. Yu Yuk Ling ("Dr. Yu"), a neurologist, on an examination conducted on 1 March 2005; and (6) a medical report by Dr. Edmund K.W. Woo ("Dr. Woo"), also a neurologist, on an examination conducted on 6 January 2006.

63. Dr. Yu's report commented inter alia that the Plaintiff was suffering from post-concussional syndrome ("PCS"). He opined that most patients with PCS would achieve maximum recovery within 6 months of the head injury. Since it was already 30 months from the date of the accident that Dr. Yu examined the Plaintiff, Dr. Yu is of the opinion that her PCS would be permanent. He assessed the Plaintiff's permanent impairment of the whole person to be 2%. Dr. Yu had regard to the school reports of the Plaintiff and opined that the syndrome *"does not appear to have significant adverse effect on her school performance".*

64. Dr. Woo's report made inter alia the following comments:

*"2. As a result of the head injury, she has residual headache and absent-mindedness, consistent with the diagnosis of a very mild post-concussional syndrome. Now that more than 3 years have elapsed since the injury, further significant improvement in her neurological functions is not expected. The post-concussional syndrome accounts for at most a 1% impairment of the whole person………"*

*"3. From the head injury perspective, there should not be any limitation on her future employment potential."*

65. I do not consider the difference of 1% impairment at the maximum or 2% in the assessments made by Dr. Yu and Dr. Woo to be of such materiality as to require the difference to be resolved. In other aspects, the assessments made by Dr. Yu and Dr. Woo are essentially not in conflict.

66. I have attached little weight on the first two reports by Dr. Lau. In his 2nd report, he opined that the Plaintiff's left foot injury was far from the stage of maximal medical improvement and he suggested that the Plaintiff's condition be re-assessed one year later, hence the 3rd report. That said, these reports do speak to the long and painful path to recovery that the Plaintiff has gone through.

67. Dr. Lau in his 3rd report has commented inter alia as follows:

*"(5) "Miss Lam will have permanent limitation in her ability to work, stand and run. This will affect her future selection of work. Jobs that require her to wear high heeled and pointed lady shoes, walking or standing for a long period of time, involving frequent climbing of stairs and squatting are to be avoided."*

*"(6) The unsightly scars and deformity of the toes of Miss Lam's left foot will definitely cause her problem in social life. It is certainly reasonable for her to try to hide the ugly scars and deformity of her left foot."*

*"(7) I assess Miss Lam to have suffered 10% of whole person impairment from the injury to her left foot."*

68. I have attached little weight to Dr. Lau's comment about the 10% impairment of the Plaintiff. It is not of much assistance on the question of quantification of damages. Dr. Lau has not given the basis of his such assessment.

69. Dr. Lam has in his report commented inter alia as follows:

*"17. Though Ms. Lam has limitation in toe extension, this should not affect her weight bearing capacity, as walking or running depends mainly on the pushing off capacity, i.e. the ankle and toe flexors action, which was not affected."*

*"22. The foot injury should be minimal effect on her social or sports activities."*

70. Dr. Lam commented that the Plaintiff should be encouraged to accept her scars and not to feel inferior about it. He also opined that even if the Plaintiff were to quit schooling, she could still undertake manual jobs like waitress, salesgirl, receptionists or the like. He also opined that the Plaintiff's foot injury should have minimal effect on her social or sports activities. Dr. Lam has not made any comment on the percentage of impairment of the whole person of the Plaintiff.

71. It would appear that insofar as physical findings are concerned, the reports of Dr. Lau and Dr. Lam are essentially not in conflict. Their differences arise from the evaluations that they have made in relation to the likely impact of the Plaintiff's physical condition on her. On their such evaluations, I have some reservations as to whether they have gone beyond the proper province of their expertise. That said, I in general would prefer the "evaluations" made by Dr. Lau over those made by Dr. Lam. It would be ideal if a girl having ugly scars on her body through proper counselling learn to realize that her self-worth is not dependent on her looks as Dr. Lam has put it, but it is natural and reasonable for a girl in the position of the Plaintiff to feel embarrassed about the ugly scars and her deformed foot. Dr. Lam has not adequately addressed the symptoms of residual pain experienced by the Plaintiff. He certainly has not opined that the Plaintiff was faking such pain. It is not at all clear to me what Dr. Lam meant by saying that the effect of the injury on the Plaintiff's social or sports activities should be minimal. I consider it more likely than not that the Plaintiff's social life and leisure/sports activities were materially and adversely affected.

72. If the Plaintiff's injuries are to be classified in accordance with the categories set out in **Lee Ting Lam v. Leung Kam Ming, CACV11/1980, 30 May 1980**, I would consider that it falls within the lower end of the *"Serious Injury"* category therein, which includes *"……those cases where the injury leaves a disability which mars general activities and enjoyment of life, but allows reasonable mobility to the victim, for example, the loss of a limb replaced by a satisfactory artificial device, or bad fractures leaving recurrent pain……."*

Pain, Suffering & Loss of Amenities

73. Counsels on both sides have submitted authorities on the question of quantum. Again, as each case is to be decided on its own facts, I do not propose to cite or discuss any of the authorities that I have been referred to in this Judgment. The Plaintiff's case is that she should be entitled to damages for *pain, suffering and loss of amenities* in the sum of $600,000. The 1st and 2nd Defendants contended that $200,000 to $300,000 is a reasonable amount.

74. I consider, having had reference to what was said in **Lawati Bhawani Bikram v. Ting Kau Contractors Joint Venture, CACV 3/2002, 25 September 2002**, that an award of $420,000 would be the appropriate amount of damages under this head.

Loss of Earning Capacity

75. The Plaintiff is of course not yet in gainful employment. She had performed well in school after the accident. I accept that her future career prospects is more likely to hinge on how well she gets ahead academically than on her physical impairment or condition resulting from her injuries. I am aware that in **Man Kwok Ngai v. Fong Hok Wang & Another, HCPI 1033/2001, 26 March 2003,** Hon. Seagroatt J. had declined to make an award of damages for loss of earning capacity on the ground that it was too speculative. I think, however, the Plaintiff's residual pain in her left foot and knee would nonetheless result in some impairment of her earning capacity. Everything else being equal, an employer would naturally prefer a worker without such impairment than one with it. I think a sum of $30,000 is within the range of awards that has been made under this head in the past and it is also a fair and reasonable amount.

76. The Defence has pleaded of the need to take account of the Plaintiff's liability to pay tax in accordance with the Inland Revenue Ordinance, in respect of the Plaintiff's loss of earnings. This point was not pursued in the final submissions. The Plaintiff's loss of earning capacity is not exactly the same as her future loss of earnings. In any event, it is probable that the Plaintiff will be subject to U.S. tax, not Hong Kong. I am unable to take judicial notice of U.S. tax matters. No such evidence is before me. I do not consider that I need to make any adjustment to the Plaintiff's damages under this head on account of the incidence of tax.

Medical Expenses

77. The 1st and 2nd Defendants are in agreement with the medical expenses incurred being quantified as $11,900.

Travelling Expenses

78. The 1st and 2nd Defendants have conceded an award of $4,000 to be reasonable. There is a lack of documentary proof. PW1 has not sought to justify the full amount of her claim under this head in her evidence. I consider the sum of $4,000 to be reasonable.

Tonic Food

79. The Defendant conceded $2,000 only. Although there is a lack of documentary proof, the long and tortuous process of the Plaintiff's recovery rather impressed upon me that a sum of $5,000 as tonic food is not excessive but rather quite reasonable. I would award $5,000 under this head.

Cost of care and attention

80. The Plaintiff's case is that a female relative of her mother ("the auntie") had come to visit her when she was hospitalised for about 2 months and 12 days up to 29 October 2002 after the accident. The auntie brought her tonic food during lunch on a daily basis. The auntie would stay for a while to chat with her to keep her company. The auntie also brought her books to read. The Plaintiff's parents would come to visit her after work but not in the daytime. The Plaintiff was however unclear about the financial arrangements behind the auntie's visits. The law does allows for damages to be recovered under this head: **Donnelly v. Joyce (1974) QB 454**. I find that such care and attention were reasonable and necessary for the Plaintiff's recovery. As to quantum there is a lack of concrete evidence but such services must be of some monetary value. I consider an amount of $3,000 to be fair in all the circumstances.

Summary

81. The total award will therefore be made up of the following:

PSLA $420,000

Loss of earning capacity $30,000

Medical expenses $11,900

Travelling expenses $4,000

Tonic Food $5,000

Cost of care and attention $3,000

The total is $473,900.

82. As the Plaintiff herself is to share 40% of the blame, she will get only under the head of PSLA the sum of ($420,000 x 60% =) $252,000.

83. As for the other items of damages, the Plaintiff will get ($473,900 - $420,000 = $53,900) x 60% = $32,340.

Orders

84. Regard must be had to Section 19A of the Legal Aid Ordinance and Order 80 Rule 12(3) of the Rules of District Court, the Plaintiff being a minor on legal aid.

85. (1) Subject to the First Charge of the Director of Legal Aid, the 1st and 2nd Defendants do jointly pay the Plaintiff the sum of $252,000 together with interest thereon at the rate of 2% per annum from the date of the service of the Writ to the date of Judgment and thereafter at the Court's Judgment rate until payment.

(2) Subject to the First Charge of the Director of Legal Aid, the 1st and 2nd Defendants do jointly pay the Plaintiff the sum of $32,340 together with interest thereon at half Judgment rate from 17 August 2002 being the date of the accident to the date of Judgment and thereafter at the Court's Judgment rate until payment.

(3) The above sums are to be paid into Court within 21 days. Such sums are to be invested and dealt with or otherwise disposed of at the discretion of the Registrar of the District Court for the benefit or maintenance of the minor Plaintiff until she attains the age of 18, when the remaining balance to her credit, if any, shall be paid out to her forthwith.

(4) There be liberty to apply.

(5) There be an Order Nisi that the 1st and 2nd Defendants do jointly pay the Plaintiff's costs of this action on a common fund basis to be taxed if not agreed. Unless there is an application to vary the same, this Order Nisi shall become absolute in 14 days.

(6) The Plaintiff's own costs be taxed in accordance with Legal Aid Regulations.

(7) For the avoidance of doubt, there be Certificate for Counsel.

# (R. Cheung)

Deputy District Judge

**Representation:**

Mr. Simon H.W. Lam, instructed by Messrs. Andrew Chan & Co. (assigned by D.L.A.), for the Plaintiff

Miss Selena Lau, instructed by Messrs. T.S. Tong & Co., for the 1st and 2nd Defendants