## DCPI 1808/2015

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 1808 OF 2015

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##### BETWEEN

MOY NGAIN GYI Plaintiff

and

LEUNG CHI KUEN 1st Defendant

MTR CORPORATION LIMITED 2nd Defendant

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Before: His Honour Judge Andrew Li in Court

Date of Hearing: 22 and 23 May 2017

Date of Judgment: 23 June 2017

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JUDGMENT ON LIABILITY

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*INTRODUCTION*

1. This is a personal injury claim brought by the plaintiff against the defendants following an accident happened on 27 September 2012 when the plaintiff was travelling as a passenger on board of a bus operated by the 2nd defendant and driven by the 1st defendant.
2. Originally this case was set down for trial on both the issues of liability and quantum. However, due to some technicality, only the issue of liability was dealt with at the trial, leaving the issue of quantum to be assessed.

*BACKGROUND*

1. The plaintiff was a 68-year-old lady at the time of the accident.
2. On 27 September 2012, at or about 6:00 pm, the plaintiff boarded a single-deck bus at the bus terminus at Tin Shui Estate, Tin Shui Wai, New Territories (“the Terminus”). The bus was a route K74 bus bearing registration number GN5032 (“the Bus”).

1. Soon after the plaintiff had boarded the Bus, the Bus moved off from the Terminus. Before the plaintiff was able to sit down, the 1st defendant applied the brake abruptly allegedly in an attempt to avoid hitting a cyclist who suddenly appeared in front of the Bus. The sudden motion of the Bus caused the plaintiff to lose her balance resulting in her left knee and lower leg hitting against the railings. She sustained fracture of the left tibia and other injuries to her left leg as a result.

*Findings of fact*

1. The following are the findings of fact I have made in this case after hearing the evidence of the plaintiff and the 1st defendant, who are the only two witnesses called to testify at the trial.
2. I find the plaintiff as an honest and reliable witness. She was able to recall vividly most of what happened in the accident and what has been stated in her witness statement filed for the present proceedings. I find as a fact that on the day of the accident, she was travelling with her son and granddaughter and they all boarded the Bus at the Terminus. She was the last person to board the Bus. Soon after she had boarded the Bus and before she was able to find a seat to sit down, the 1st defendant drove off from the Terminus. She used both of her hands to grab hold of the railings on both sides in order to move inside the carriage. At that time, she was not holding any other objects in her hands and her handbag was slung over her shoulder.
3. The plaintiff was intending to join her granddaughter, who by this stage had already sat down on an aisle seat on her left. The plaintiff intended to move into the window seat next to her granddaughter. After letting go of her right hand and with her left hand still holding onto the hanging support above, the 1st defendant suddenly applied the brake, causing the plaintiff to lose her balance. Her left leg hit the railings and she sustained injuries as a result.
4. At the time, the plaintiff did not know the reason which had caused the sudden braking earlier. However, soon after the accident, she heard from the 1st defendant that he had to brake abruptly in order to avoid hitting a cyclist.
5. The plaintiff mentioned that there were a lot of bicycles parked at the Terminus as well as at the Light Rail Transit (“LRT”) station close by. Prior to the accident, she had often seen people riding bicycles around and across the Terminus, as well as people pushing their bicycles across it.
6. Comparing with the plaintiff, I find the 1st defendant a less reliable and straightforward witness. While I do not think the 1st defendant necessarily is being dishonest, his evidence has clearly contradicted his previous accounts given to the police and to his own lawyers in several material aspects. Most significantly, the 1st defendant at the end of this cross-examination by the plaintiff’s counsel, admits that had he paid sufficient attention to the traffic condition, he would have noticed the approaching bicycle and did not have to brake so abruptly. I shall discuss his evidence in greater detail below.

*DISCUSSION*

*Issues to be decided*

1. At the closing of the evidence, it has become clear that there are only 2 issues which the court has to decide in this case:-
2. whether the 1st defendant has failed to keep a proper lookout while driving within the Terminus;
3. whether the 1st defendant has failed to ensure the plaintiff had already been properly seated before driving off the Bus.
4. I shall discuss these 2 different issues as well as the evidence associated with them in the ensuring paragraphs.

*(1) Whether the 1st defendant has failed to keep a proper lookout*

1. In order to answer this question, one must first understand the layout of the Terminus.
2. The Terminus is situated in the midst of a large public housing estate in Tin Shui Wai. It is a wide open space with several bays/lay-bys for buses to pull in and wait for/pick up passengers. Route K74 is a circular route which uses one of the outer bays. From the driver’s position, after moving out from the designated bay, the driver would have a totally unobstructed and wide-open view in front of him. There is also sufficient space for two buses to travel abreast with each other at where the Route 74 bay is located. Just a few metres in front of the bay, there is a well-defined pedestrian crossing which is marked with yellow lines on the ground running from left to right (“the Yellow Lines Crossing”). A less well-defined but equally obvious pedestrian crossing situates about 10 meters in front of the Yellow Lines Crossing, running parallel to it. This wider crossing starts from the far left hand side of the road (from the bus driver’s perspective) outside the boundaries of the Terminus, on the lane which is reserved for ordinary traffic. It extends all the way to the other side of the Terminus to the right of the bus driver. The crossing is well defined by a concaved pavement by the kerbside (presumably designed for the convenience of wheelchair users or pedestrians with walking disabilities). An island separated the first lane of the road and the rest of the Terminus (“the Concaved Crossing).
3. It is not disputed that there are bicycle paths running along both sides of the road immediately outside the vicinity of the Terminus. It is also not disputed that at the LRT station, many bicycles were parked and chained to the railings outside the station. There were also a few bicycles chained to the railings at or around the Terminus. It has been accepted by the 1st defendant in evidence that a lot of the residents of the nearby estates would ride their bicycles through the Terminus in order to reach to or exit from the LRT station. It is also not in dispute that pedestrians would be making use of the Concaved Crossing to walk across the Terminus from and to the LRT station. Further, it is not disputed that cyclists riding bicycles would sometimes come out of the opening of the Concaved Crossing on the left hand side of the road and would ride across the road towards the other side of the Terminus. In short, it is a busy bus terminus with a lot of pedestrians either riding on their bicycles or walking on or around the 2 crossings.
4. When giving evidence in court, the 1st defendant stated that when he drove the Bus out of the Terminus, he was driving at 10 km/hr. He later accelerated to 15 km/hr when he passed the Yellow Lines Crossing. It has not been suggested by the plaintiff’s counsel that such speed was excessive or inappropriate in anyway in the circumstances. I would respectfully agree with such observation.
5. In his witness statement, the 1st defendant stated that when he first saw the middle aged woman, she was riding on her bicycle from the left front of the Bus to the right. However, when he gave his evidence in court, the 1st defendant changed his evidence and stated that the cyclist had already stopped under the “No Entry Sign” on the island (separating the first lane of the road and the Terminus) when he first saw her. He noticed that while the cyclist was still on the bicycle, her right foot was stepping on the kerbside. Apparently the 1st defendant formed the impression that the cyclist had stopped by the kerbside and was not going to move. He was going to give way to her. However, she suddenly dashed forward hence causing him to brake abruptly.
6. During cross-examination, when confronted with such glaring difference in his evidence regarding the position of the lady cyclist when he first noticed her, after pausing for about 10 seconds, the 1st defendant answered that: *“After I crossed the yellow pedestrians crossing, I saw her. She stopped there with one leg on the kerbside”*. When asked by the court of why he had made no mention of the fact that lady cyclist had stopped by the kerbside before riding across the front of his bus, the defendant could not give a satisfactory answer other than saying that he has more time to think about the matter while in court. He could not however explain why during the 4½ years in between the accident and the court hearing, he had not mentioned this version to anybody.
7. In passing, I would like to add that the 1st defendant’s account as contained in his witness statement has been corroborated by the evidence of an independent witness who was travelling at the front portion of the Bus at the time. In his witness statement to the police, this witness stated that the cyclist had dashed out about 2-3 meters in front of the Bus from left to right without stopping at all. He made no mention of the cyclist having stopped at the kerbside on the island.
8. I have no hesitation in rejecting the 1st defendant’s evidence given in court in this aspect of the case. I do not believe that when he first saw the lady cyclist, she had already stopped on the island of the Concaved Crossing with one foot stepping on the kerbside. If that was the case, I am sure that he would have mentioned this either to the police or to his lawyers prior to giving his evidence in court. In my judgment, it is more likely that accident happened in the way as described by him in his witness statement, ie he only saw the lady cyclist riding her bicycle across the front of the Bus from left to right when the distance between the two was very close. In order to avoid the accident, he had no alternative but to apply the brake immediately.
9. That being the case, it begs the question of why the 1st defendant could not have noticed the cyclist earlier?
10. In my judgment, the answer probably lies in an answer given by the 1st defendant himself. Under cross-examination, the 1st defendant stated that from the driving cabin, he would only pay attention to objects within the area of the Bus’s “*Big Screen*” (「大銀幕」). In other words, he was not paying attention to objects outside the immediate area of his windscreen. From the photographs produced at trial, it is clear that the 1st defendant would have an unobstructed view for at least 30 to 40 metres in front of him -- on both his left and right. He would be able to see any pedestrians or bicycles coming from his left all the way from the opening of the Concaved Crossing on the first lane; to the island in the middle and all the way across from the front of the Bus to the right hand side of the Terminus where the Concaved Crossing ends. In my judgment, there is simply no reason why the 1st defendant could not have seen the lady cyclist much earlier had he kept a proper lookout to the traffic condition around him. This is particularly so when he was fully aware that there would be pedestrians and cyclists crossing the Terminus from different directions on a regular basis.
11. Had he kept a proper lookout, then in my judgment, he would no doubt be able to spot the cyclist much earlier and therefore would be able to either slow down the Bus or to sound the horn to warn the cyclist of his approach or to do both. He did not have to apply the brake in an abrupt manner as he did during the accident.
12. In fact, the 1st defendant in his last answer during cross-examination has exactly agreed to this proposition made by the plaintiff’s counsel. The 1st defendant agrees that the accident happened because he did not keep a proper lookout at the junction to see if any bicycle would come out. He agrees that had he kept a proper lookout, then he did not need to brake abruptly.
13. Before I leave this matter, I would like to add that I do not agree with the defence counsel’s submission that the 1st defendant’s duty to (a) keep a proper lookout; (b) to drive the Bus with care and attention; and (c) to observe and heed the approach bicycle in time to avoid braking abruptly, are duties owed to the unknown cyclist and other road users only and not to the plaintiff who was travelling as a passenger on the Bus. In my view, this clearly cannot be the case as the bus driver’s duty to keep a proper lookout, to drive the Bus with care and attention, etc. are duties owed to all road users including the passengers who were travelling on his Bus at the time. In my view, there cannot be any artificial division amongst the different classes of persons of whom such duties are owed, decided only by whether they happened to be outside or inside the Bus at the time.
14. In the aforesaid premises, I find the 1st defendant has failed to keep a proper lookout for the traffic condition around him, particularly the lady cyclist who was riding across the Terminus at the time. I find that it was such failure which has led to the abrupt braking of the Bus. I therefore find the 1st defendant negligent for causing the accident.

*(2) 1st defendant’s failure to ensure the plaintiff had properly seated down before driving off*

1. As a matter of law, I do not consider that a bus driver owes a duty to wait for all his passengers to find a seat to sit down first before driving off his bus from a bus stop or terminus. There are plenty of authorities to support this proposition.
2. In *Fletcher v United Counties Omnibus Co Ltd* [1998] PIQR 154, the English Court of Appeal cited the South Australian case of *Azzopardi v State Transport Authority* [1982] 30 SASR 434 where Simon Brown LJ quoted the following leading judgment of Chief Justice King:

“I do not think, however, that a bus driver’s duty to exercise reasonable care for the safety of his passengers requires that he wait until they are seated before putting the bus in motion. It is common experience that passenger buses move off from bus stops while passengers are making their way to their seats. There are, as the judge observed, ‘the exigencies of timetables’. If executed with ordinary smoothness, the manoeuvre presents no problem to passengers. Most passengers cope with the movement of the bus simply by positioning their feet and balancing, perhaps place a hand on a seat or other handhold as the movement of the bus is felt. The occasional passenger may feel the need to grasp a handhold securely. In ordinary experience passengers do not fall *if the bus is driven with ordinary care and skill*. It seems to me that in the absence of some indication that a particular passenger is specially vulnerable or of some other special factor, the bus driver is not required to wait until all passengers are seated or have otherwise stationed themselves. Nevertheless the decision of a bus driver to move off before all passengers are seated or have otherwise taken up a stationary position in the bus, places and obligation on him to ensure *that the manner of the movement of the bus is not such as to constitute a danger to the passengers*.” (emphasis added)

1. In *Gardner v United Counties Omnibus Co Ltd* [1996] CLY 4477, where is 78-year-old passenger who was travelling from one of the defendant’s buses fell off from her seat and sustained injuries when the bus had to travel around a number of bends. At the time of the accident, the claimant was sitting with her husband and had not been properly seated. The accident happened when she was thrown from her seat while the bus was negotiating one of the bends. In dismissing the claim, the court said that it will place an impossible burden on the defendant if the bus drivers owed a duty to ensure that the passenger did not sit inappropriately and if the driver had to check the passengers were properly seated and were properly safeguarding themselves before a journey commenced.
2. Similar findings have been made in the English case of *Philips-Turner v Reading Transport Ltd* [2000] CLY 4207 where the court held that the bus driver did not owe a duty to wait for all passengers to be seated where safety supports are provided. However, it has been held also that different considerations may apply where a passenger is elderly or infirm. In that case, the claimant was a fit and healthy 63-year-old who could not be described as vulnerable. The court found that the accident occurred because the claimant failed to hold onto the support. The claim was dismissed. Similar findings had been made in the case of *Glarvey v Arriva North West Ltd* [2002] CLY 3263.
3. The rule that a higher duty is owed to vulnerable passengers was upheld in the local case of *Sum Shu Lam v Poon Pak Shing & Anor,* unrep., HCPI 89/1997 (Deputy Judge McMahon; 11.11.1999) where the learned judge cited the case of *Fletcher v United Counties Omnibus Co Ltd, supra* and held that:-

“… there may be occasions when special passengers, such as those who are elderly or infirm or are encumbered by luggage, require special care to be taken by a bus driver but I do not think that a passenger carrying plastic bags on a Hong Kong bus would be one so “encumbered by luggage” as to require any care by the driver above that to drive the bus *smoothly and without abnormal or sudden movement*…”. (emphasis added)

1. In this case, although the plaintiff could be described as elderly in age (she was 68 years old at the time of accident), according to her own witness statement, she was “fit and healthy” prior to the accident. In fact, save from walking with a limp (which was caused by the injuries sustained in the accident), the plaintiff appeared to be perfectly healthy and normal to me for a lady of her age when she came to give evidence in court. I agree with the defence counsel’s submission that there was no evidence to indicate the plaintiff was either infirm or may be vulnerable at the time of the accident which would require the bus driver’s special care and attention. Further, if she was “infirm, vulnerable or encumbered with things”, then no doubt her family who was travelling with her would have helped her to get on board of the Bus and would not have let her to be the last person to be seated. In this regard, I accept the 1st defendant’s evidence that he would normally pay special attention to those passengers who need to use the walking aids and/or carry a trolley.
2. Further, I cannot accept the plaintiff’s submission that just because the plaintiff was using an Octopus card with concessionary rate (which would emit a different sound when carrying out a transaction), the 1st defendant should have paid special attention to the plaintiff. There are many passengers who pay concessionary rates when travelling on public transport for different reasons. It would create an impossible burden for any bus driver to try to distinguish such passengers and to decide whether he has to take special care and attention on them every time.
3. In my judgment, save from her appearance as a lady in her 60s, there was nothing unusual about the plaintiff which would have alerted the 1st defendant to pay special attention to her and to make sure she was properly seated before driving off the Bus from the Terminus. I do not find that the 1st defendant owed the plaintiff or in fact any other passengers travelling on the Bus a duty to make sure that they are all seated before moving off the Bus from the Terminus. His duty was to drive the Bus “smoothly, without abnormal and sudden movement” only.
4. Besides, looking at the photographs produced by the defendants in the trial bundle, the Bus was equipped with adequate handrails and safety supports which the plaintiff could have made use of (and indeed made use of). As Simon Brown LJ stated in *Fletchers v United Counties Omnibus Co Ltd,* *supra*:

“Really it seems to me no more than a matter of common sense to recognize that drivers of public buses cannot sensibly be expected to wait for boarding passenger to take their seats … before they can properly drive away the bus from the stop. Of course bus companies and bus drivers must take steps to ensure the reasonable safety of their passengers but, as it seems to me, *that duty is satisfied by the provision within all these public buses of appropriate safety support.*” (emphasis added)

1. In addition, I also find the fact of the present case comparable to those in *Phillips-Turner v Reading Transport Ltd, supra* where the claimant was injured as she was making her way to the far end long seat between the entry and the exit doors, as the bus moved off. Her claim was dismissed as the court held that the bus driver did not owe a duty to wait for all passengers to be seated where safety supports are provided. The claimant was said to be a fit and healthy 63-year-old who could not be described as vulnerable and the accident occurred because the claimant failed to hold onto the supports. I agree with the defence counsel’s submission that the plaintiff could also be described as a fit and healthy 68-year-old who could not be described as vulnerable in our case. However, as I have found above, the negligence of the driver lies not so much on moving off the Bus without waiting for the plaintiff to sit down, but in his failure to keep a proper lookout to the traffic ahead of him which could have avoided an abruptly braking in the first place.
2. In this regard, I consider the case of *Lee Pui Mei v Wan Chi Chiu & Anor*, unreported, HCPI 814/1998 (Seagroatt J; 5 November 1999), relied on by the plaintiff, can be distinguished on the ground that it must have been decided on the unique facts of that case (perhaps due to the fact that she was elderly *and carrying a bag*) as it was not in line with the authorities which I have cited above from both local and overseas.
3. In the above circumstances, I do not find anything wrong with the 1st defendant in driving off the Bus from the Terminus before the plaintiff was able to sit down properly. Thus, in so far as the plaintiff relies on this limb as act of negligence against the 1st defendant, her claim must fail.

*Contributory negligence*

1. As to the question of contributory negligence, I do not consider there should be any on the part of the plaintiff. As a passenger, who was walking slowly to her seat while the Bus was in motion, the plaintiff did what she could in holding onto the railings and supports provided. It is not her fault that she had to let go her right hand when she changed position in order to get into her seat. She certainly did not expect the Bus would brake abruptly while she was doing so. It has been put to her during cross-examination that she should have taken the first seat available on the Bus when she got on it. In my view, there was nothing wrong for her to choose the seat beside her granddaughter situated towards the end of the Bus. She had no duty to sit on the first available seat. She was being very careful at all times by holding to the railings and supports.
2. In the circumstances, I do not find any contributory negligence on the part of the plaintiff in this case.

*CONCLUSION*

1. In conclusion, based on the aforementioned matters, I find the 1st defendant negligent in causing the accident for failing to keep a proper lookout and thus causing the unnecessary and abrupt braking which in turn caused the plaintiff’s injuries. I find the 2nd defendant vicariously liable in its capacity as the 1st defendant’s employer.
2. In the premises, I find the defendants 100% liable for causing the accident with no contributory negligence on the part of the plaintiff. Hence, judgment on liability will be entered against the 1st and the 2nd defendants in this case, leaving quantum to be assessed.
3. Costs will follow the event. I hereby make an order nisi that the defendants shall pay the plaintiff’s costs of the action up to and including the trial on liability, such costs to be taxed if not agreed with certificate for counsel. The plaintiff’s own costs to be taxed in accordance with the legal aid regulations. The order will be made absolute in the absence of any application from the parties within 14 days to vary the same.
4. Lastly, I would like to thank counsel on both sides for their helpful assistance.

( Andrew SY Li )

District Judge

Mr Simon Ho, instructed by ONC Lawyers, assigned by the Director of Legal Aid, for the plaintiff

Miss Percy Yue, instructed by Deacons, for the 1st and 2nd defendants