###### DCPI 522/2012

### IN THE DISTRICT COURT OF THE

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO 522 OF 2012

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##### BETWEEN

YAU KAM CHING Plaintiff

and

CHEUNG SHUN KAU Defendant

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Before: His Honour Judge Alex Lee in Chambers

Dates of Hearing: 22 May 2014

Date of handing down Reasons for Ruling: 06 June 2014

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REASONS FOR RULING

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*Introduction*

1. On 22 May 2014, I dismissed the defendant’s application for leave to appeal and said that the reasons would be handed down. This I now do.
2. The case was about a traffic accident happened on 28 April 2009 in which the plaintiff was knocked down by the taxi driven by the defendant when she was crossing Kiu Kiang Street in Sham Shui Po from the right side of the road. The evidence was as stated in my judgment dated 17 March 2014 which I will not repeat.
3. This court found that the defendant had driven at a speed which was excessive in all the circumstances, albeit it was below the speed limit. It was also found that had the defendant slowed down when he entered the relevant portion of the road so that it could have stopped a couple of metres earlier, the accident would probably have been avoided. At least, it is probable that the plaintiff’s injury would not have been as serious as it was. This court found that the defendant was negligent in causing the accident and that his share of the liability was 30%.

*The draft grounds of appeal*

1. By a summons filed on 11 April 2014, the defendant sought leave from this court to appeal against the finding that he was negligent. The draft grounds of appeal are lengthy and detail. In brief, they boil down to the following complaints:-
2. this court applied the wrong test and approach and was thus wrong in law in holding the defendant negligent by failing to approach the issue on the basis of the degree of possibility of the danger emerging, ie, the degree of possibility of the plaintiff emerging from the gap of parked vehicles at the moment that she did;
3. this court erred in holding that the defendant saw the plaintiff emerging from the gap between two rows of parked vehicles and applied the brake when he was still some distance away from the point of collision;
4. this court erred in holding that had the defendant slowed down when entering the relevant portion of the road he could have stopped a couple of metres earlier and avoid the accident; and
5. this court erred in holding that had the defendant slowed down when entering the relevant portion of the road, it is probable that the plaintiff’s injury would have been as serious as it was.

Based on the above, the defendant intends to seek an order from the Court of Appeal that the plaintiff’s claim be dismissed with costs.

*The test*

1. The test for granting leave to appeal is well-known and not in dispute.  It is for the applicant to show that the appeal has a reasonable prospect of success or that there is some other reason in the interests of justice that the appeal should be heard: see s 63A(2) of the District Court Ordinance.  A “reasonable prospect of success” means that there is an arguable case such that the chance of success is more than “fanciful” but without having to be “probable”: see *Wing Tat Haberdashery Company Limited v Elegance Development &* *Industrial Co Limited* [2011] 5 HKC 474, 476B-C; and also *Ma Bik Yung v Ko Chuen* [2009] 3 HKC 359, 360H-I, 361A-C.

*Consideration*

1. Both Mr Wong for the defendant/applicant and Ms Lee for the plaintiff/respondent had prepared written submissions before the hearing of the application. To both of them I am greatly indebted.

*As to ground (1): whether the right test for negligence was applied*

1. The classic definition of negligence is as stated in *Charlesworth &* *Percy on Negligence*, 12th edition, at §7-02, where the learned authors quote the following well-known passage from *Blyth v Birmingham Waterworks* (1856) 11 Ex 781:-

“Negligence is the omission to do something which a reasonable man, guided upon these considerations which ordinarily regulate the conduct of human affairs, would do, or doing something which a prudent and reasonable man would not do.”

1. In the oft-quoted case of *Fardon v Harcourt-Rivington* [1982] All ER 81, 83C-D, which Mr Wong relied upon, the English Court of Appeal said:-

“The root of this liability is negligence, and *what is negligence depends on the facts with which you have to deal*. If the possibility of the danger emerging is reasonably apparent, then to take no precautions is negligence; but if the possibility of danger emerging is only a mere possibility which would never occur to the mind of a reasonable man, then there is no negligence in not having taken extraordinary precautions.” (Emphasis supplied)

It is, however, clear from the above passage that whether a particular risk is reasonably apparent is a fact-specific question depending on all the circumstances of the case in question. Insofar as the test is concerning, it is that of the reasonable man. Viewing in this light, I do not read *Moore v Poyner* (1975) RTR 127 as laying down any inflexible rule that a driver could never be found negligent for knocking down a pedestrian who came out in front of a parked vehicle. What Brown LJ said in that case (at 134D-F) was that:-

“In general, it seems to me quite clear that it is not negligent for the driver of a car, who is driving *at a reasonable speed*, not to slow down, or not to sound his horn, when passing a vehicle parked on his near side, whether that vehicle is a coach, or a lorry or a car. Any sort of vehicle parked on the near side must to some extent mask a driver’s view of anybody who might come out in front of it; but it seems to me that it would be putting an impossible burden on drivers to say that they must slow down or sound their horn, or both, every time they pass a parked vehicle.” (Emphasis supplied)

The above passage, which was applied in *Yip Yung Cheung v Tsim Chi Ming* (DCPI 1406/2009),had been fully considered in the judgment of this Court.[[1]](#footnote-1) Again, what “a reasonable speed” is in a given set of circumstances is always a case-specific question. As regards Mr Wong’s heavy reliance on *Yip Yung Cheung v Tsim Chi Ming* which he submitted was factually very similar to the present case, it has to be pointed out that its evidence was very different. For example, there was an important finding in that case that the Light Bus was very close to the pedestrian when he emerged between parked vehicles.[[2]](#footnote-2) However, there was no such finding in this case. To the contrary, there was evidence in the present case of the skid marks and blood stain which allowed a reasonable inference to be drawn as to when the defendant applied the brake and where the collision took place. Such evidence was notably absent in *Yip Yung Cheung’s* case. Lastly, the traffic condition, namely the width of the road concerned, was also different.

1. With respect, it is plainly not arguable that this court had approached the issue of negligence by way of “reverse logic” or had failed to approach the issue of liability by an assessment of the attendant risks. This court had considered and applied the relevant case authorities.[[3]](#footnote-3) Beside, this court was also acutely alive of the danger of finding a driver negligent just because the accident had happened. This was why the court reminded itself that:-[[4]](#footnote-4)

“I recognize that the defendant was not obliged to have adopted a snail’s pace such that there could have been no possibility of a pedestrian dashing out at any moment in front of him and his being unable to stop without striking her.  I also remind myself the observations of Laws LJ made in the case of *Ahanonu v Southeast London Kent Bus Company* [2008] EWCA Civ 274, at paragraph 23:-

“There is sometimes a danger in cases of negligence that the court may evaluate the standard of care owed by the defendant by reference to fine considerations elicited in the leisure of the court room, perhaps with the liberal use of hindsight. The obligation thus constructed can look more like a guarantee of the claimant's safety than a duty to take reasonable care.””

1. That the defendant had driven at an excessive speed in the circumstances was a finding arrived at after consideration of all the evidence and the relevant legal principles.[[5]](#footnote-5) In particular, weight was given to the defendant’s admission in cross-examination that he was aware of the risk of pedestrians emerging from between parked vehicles and his acceptance that one had to be careful when driving through that portion of the road because of the possibility of people walking out.[[6]](#footnote-6) The court found that the risk was real one which could not reasonably be ignored.[[7]](#footnote-7) There was also the defendant’s evidence that the width of the road was so reduced by parked vehicles that it could only permit one vehicle to pass through, leaving a narrow margin of one to two feet on either side.
2. Lastly, this court had not mixed up the “but-for” in respect of causation with the reasonable man test for negligence, as Mr Wong seems to suggest in submission. Paragraphs 36 and 37 have to be read as a whole. The finding that the driver was driving too fast was reached at paragraph 36(c) of the Judgment. On the other hand, the import of paragraph 36(d) was that the defendant’s speed was a contributing cause to the accident and the resulting injuries of the plaintiff. Paragraph 37 summed up the above findings by concluding that “the defendant was negligent in causing the accident”.

*As to ground (2): when defendant applied the brake*

1. There can be no dispute that the total stopping distance of a moving vehicle consists of the thinking distance and the braking distance and that skid marks only represent the latter. As the defendant was originally travelling at about 30 km per hour, that would mean that he was then moving at about 8.33 metres per second before the brake was applied. After the brake was applied, the tyres left brake marks of 7.2 metres. Immediately after the taxi had halted, it was found that the plaintiff’s leg was trapped by its front right wheel so that the defendant had to reverse the taxi for 3 feet in order to release her. There was only one blood stain shown in the sketch drawn by PC 54011, the investigating police officer. There was no dispute that the position of the blood stain showed he position where the plaintiff was lying immediately after the accident. The plaintiff’s evidence, which was not in dispute, was that she became unconscious immediately after she was knocked down.
2. With respect, Ms Lee made the valid point that if the momentum of the taxi was such that even rubber tyres left marks on the road, what type and degree of injuries would that momentum have caused to human flesh had the plaintiff been dragged for a distance as long as 7.2 metres, especially when she was unconscious? Moreover, there was not a trail of blood left on the road but only a blood stain at the position where the plaintiff eventually lay. There was also the fact that the plaintiff’s leg had not been rolled over by the front wheel of the taxi but was just trapped under it. Judging from all these, this court found that the reasonable and probable inference was that the defendant had applied the brake before he hit the plaintiff and that the position of the collision had to be very close to where the plaintiff was lying. As regards the total stopping distance, given that there had to be a thinking distance, that the taxi was travelling at 8.33 meter a second before braking and that the skid marks were 7.2 metres long, it follows that the defendant must have seen the plaintiff when he was still some distance away from the point of collision. Even if one generously assumes that the defendant only took a split second to react, the total stopping distance would still be more than 10 metres.
3. This court had taken into account the dent mark on the right wing of the taxi.[[8]](#footnote-8) However, it had to be borne in mind that the dent mark was below the right wind mirror and was not far away from right front wheel. There was no evidence showing which part of the plaintiff’s body had come into contact with the taxi. It might be that after the plaintiff was hit, her body was pushed or dragged forward a little bit by the force of the collision, so that when the taxi eventually came to a halt her leg was just trapped under its right front wheel. In any event, this court had taken the view that the position of the dent mark did not weaken the strong inference drawn from the other evidence that the defendant had applied the brake when he was some distance away from the point of collision.
4. Whilst there may only be a short time between the plaintiff emerging from the gap and her being hit, this could not affect the above analysis of the total stopping distance. This was because the whole incident could have happened in a matter of seconds.
5. It has to be borne in mind that the point is not whether other courts would have made the same finding as this court did, but whether the finding in question is one which this court was entitled to make. Bearing in mind that the plaintiff’s civil standard of proof is only that of the balance of probabilities, the finding is one which this court, as the tribunal of fact, was fully entitled to make after a consideration of all the evidence.

*As to grounds (3) & (4): whether the accident could have been avoided and whether the plaintiff’s injury could have been less serious*

1. These two grounds can be conveniently deal with together. With the greatest respect, this court is unable to see any valid complaint in either of these grounds.
2. As discussed above, this court did not arrive at its findings by way of reverse logic. This court had reminded itself that to require drivers to slow down or sound their horn or both every time they passed a parked vehicle would be putting an impossible burden on them. This court had also noted that if a pedestrian suddenly steps from the footpath on to a crossing, just as a vehicle is about to enter the same area, so that the driver is given no chance of avoiding a collision, then provided that all reasonable care has been taken by the driver, having regard in particular to the fact that the crossing is present, the driver could possibly avoid all responsibility. This court had noted that a driver is not required to slow down to a snail’s pace, lest the pedestrian elect without warning to step off the refuge when the vehicle was within a foot or two of him.[[9]](#footnote-9)
3. It was this court’s finding that had the defendant slowed down when entering the relevant portion of the road so that it could have stopped a couple of metres earlier, the accident could probably have been avoided. Implicit in this finding was that the finding that the point of the collision was very close to the position where the plaintiff was lying. Therefore, had the defendant managed to stop a couple of metres earlier, it is probable that the collision could have been avoided. Taking into account the fact that the relevant portion of the road was a busy street in Sham Shui Po, that the defendant was aware of the risk of the pedestrians emerging from between parked vehicles, that the defendant knew that his view was blocked and that the width of the road was so reduced by parked vehicles which it could barely permit one vehicle to pass through, this court found as a fact that the defendant chose to drive a speed which took too long for him to stop in time and was thus excessive in all the circumstances.
4. Furthermore, had the defendant’s speed been lower, the force with which the plaintiff was hit would be less. It simply accords with common sense that the plaintiff’s injury would probably have been less serious as it was. In any event, this is a passing comment which does not affect the issue as to whether the defendant was negligent. So long as the plaintiff’s injuries were caused by the defendant’s negligence, the defendant would be liable.

*Conclusion*

1. To conclude, the defendant’s proposed grounds of appeal, whether taken individually or collectively, do not give rise to a reasonable prospect of success in case of an appeal. Also, this court is unable to see any reason in the interests of justice that the proposed appeal should be heard.

*Order*

1. For the above reasons, the defendant’s application for leave is dismissed.
2. This court has already ordered on 22 May 2014 that the defendant’s pay the plaintiff’s costs of this application (with certificate for counsel), to be taxed if not agreed and that the plaintiff’s own costs be taxed in accordance with legal aid regulations.

( Alex Lee )

District Judge

Miss Lee Wan Wah Christina, instructed by Or & Partners, assigned by the Director of Legal Aid, for the plaintiff

Mr Martin Wong, instructed by Deacons, for the defendant

1. Para 32, Judgment [↑](#footnote-ref-1)
2. See *Yip Yung Cheung v Tsim Chi Ming*, ante. at para 14 [↑](#footnote-ref-2)
3. Para 32, Judgment [↑](#footnote-ref-3)
4. Para 35, Judgment [↑](#footnote-ref-4)
5. See para 28-38, Judgment [↑](#footnote-ref-5)
6. See also para 15, Judgment. The defendant had not been re-examined on this point. [↑](#footnote-ref-6)
7. Para 36(a). It would be too narrow a reading as if the Court was there only referring to the risk of “people emerging from the right trying to get to he parked vehicles”. The sub-paragraph begins with, “The defendant was aware of the risk of pedestrians emerging from between parked vehicles.” [↑](#footnote-ref-7)
8. Para 31, Judgment [↑](#footnote-ref-8)
9. Para 32, Judgment [↑](#footnote-ref-9)