IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 146 OF 2001

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| BETWEEN | Choi Fuk-tai | Plaintiff |
|  | and |  |
|  | Chan Yip | Defendant |

Coram: H H Judge Carlson in Court

Dates of Hearing: 13 June 2001, 14 June 2001

Date of Judgment: 18 June 2001

Present: Mr D Brettell, of Messrs Erving Brettell, assigned by the Legal Aid Department, for the Plaintiff

Mr Timmy Yip, instructed by Messrs Tsang, Chan & Wong, for the Defendant

J U D G M E N T

1. This is a claim by the plaintiff for damages for personal injury, pain and suffering and for other relatively modest items of special damage, the quantum of which has been agreed, subject to liability, in the global sum of $138,360 exclusive of interest which the parties will agree having regard to the different rates applicable for general and special damages.
2. The action is a straightforward one. The plaintiff is a 56 year old housewife. On 21 January 2000 at about 7.10 am, she was standing on the kerb at a traffic-light controlled pedestrian crossing at Kai Tin Road, Kam Tin, Kowloon, outside the Kai Tin Shopping Arcade waiting to cross to the far side of the road. The defendant, who is 63 years old, was driving a 16 seater public light bus registration No. ER 3833. The lights turned green for traffic and as he moved off behind two other vehicles, it is said on behalf of the plaintiff that he drove so close to the nearside kerb that the front nearside of his vehicle struck the plaintiff’s right wrist and lower forearm causing a fracture of the ulna. At the time she had been holding an umbrella in her right hand. The allegation, therefore, is that it was negligent of the defendant to have driven so close to the kerb at a time when there were a number of pedestrians waiting there to cross the road and by doing so, it was clearly foreseeable that an incident of this sort would have occurred and with these consequences.
3. The defendant’s case is that he did not drive as close to the kerb as is alleged by the plaintiff. Without trying to be precise about it, he says that he drove in his usual manner, close to the centre of the carriageway, 2 to 3 feet from the kerb. The road at this point is 14 feet across and the PLB is 6 feet 5 inches wide. As he drove up to where the plaintiff was standing, he noticed that she was holding an umbrella which was held in a vertical position, pointing to the ground. When he drove level with her there was no impact, but as he drove on he heard a sound. One of his passengers told him that the lady’s umbrella had come into contact with the side of his bus, close to the door, and so he stopped. He is unable to say how this occurred and what or which part of the plaintiff came into contact with his vehicle.
4. These are the respective cases. It is necessary to recount the evidence in a little more detail in order to decide how this incident occurred. I shall set out the facts as I find them. Where there is a dispute on the evidence, I shall indicate why I have resolved the dispute in the way that I have.
5. There is a plan of this section of Kai Tin Road at page 52 of the main bundle. There are also photographs at pages 53 and 54. The plaintiff was standing at the end of a line of pedestrians who were standing close to the edge of the kerb, in other words at the far end of these persons as the PLB approached. With her left hand, she held onto the end of the railings that are visible in the photographs at page 53. In her right hand she held the umbrella pointing vertically down. Its tip was resting on the ground. It was about 3 feet long, perhaps a little less than that. The defendant approached the pedestrian crossing at about 10 kilometres an hour, which is a modest speed. In any event, there is no allegation that he was driving at an excessive speed. He had moved off when the light had changed to green for traffic and he was behind two other vehicles as he did so. As he approached the place where the plaintiff was standing, the defendant saw her and that she was carrying her umbrella in the way that I have already described.
6. I am satisfied that he did not drive as close to the kerb as the plaintiff has suggested. She says that his nearside wheels must have gone onto or even over the yellow parking lines shown at page 53. I prefer the defendant’s account that he was 2 to 3 feet away from the kerb. I will give my reasons for coming to this view presently. I am also satisfied that the defendant is right and the plaintiff is wrong about the point of contact between the PLB and the plaintiff. She says that she was struck by the front nearside corner of the vehicle. He says the sound of the impact was further back, close to the door. I am also satisfied that the impact was the result of the plaintiff, perhaps unconsciously or inadvertently, but in the circumstances, carelessly raising her umbrella from the perpendicular, causing it to strike the side of the PLB so that the force of the impact jolted her hand with the result that her wrist was fractured.
7. As to the vehicle’s proximity to the kerb, I have no doubt that had the defendant driven as close as the plaintiff has suggested, this would have produced a reaction from the line of other pedestrians on the kerb by their stepping back smartly. The plaintiff has not suggested that anything of this sort occurred. Further, there would have been no reason for this experienced driver to go as close as this lady has suggested. He has driven this route on countless occasions over many years. He says that he always steers a course down the centre. At 14 feet, the carriageway does not afford a lot of clearance either side of a 6 feet 5 inch vehicle and I am impressed by the fact that the defendant has not attempted to exaggerate his case by saying that he kept to the offside of the road or anything of that sort. He accepts that if anything, he was slightly closer to the nearside than to the offside.
8. These features of the evidence are then corroborated by what the plaintiff herself told the policeman who interviewed her although she says that the officer had not properly recorded what she told him and if anything, he pressed her into making a statement when she did, rather than wait for her to be treated before he interviewed her.
9. In her witness statement to PC3445 (page 57) which was taken at the United Christian Hospital just over an hour after the accident, the plaintiff is alleged to have told the officer as follows: “At that time I was standing by the side of the pavement and holding an umbrella, then there was a van coming from my right side, maybe because my umbrella protruded onto the road and the left front part of the van struck my umbrella when it was coming and then I sprained my right hand.” Then officer then put these questions:

“Q. Which part of your body was hit by the van?

A. The van hit the umbrella I was holding, so caused me to sprain my right hand.

Q. Was your umbrella protruding out onto the pavement?

A. I am not sure whether it was protruding onto the pavement or not, maybe it had.”

1. That of course is contrary to her pleaded case and to her evidence in the trial. Perhaps a little surprisingly, PC3445 was called on behalf of the plaintiff to give this evidence, although it was contrary to her case, and to produce the plan and give general evidence of his post-accident investigation. The officer told me that he had not taken sides in this matter and he viewed the plaintiff as an important witness who could tell him what had happened. He did not accept the proposition that he had suggested to her, that her umbrella had come into contact with the PLB, and he also said that she appeared to be fit to be interviewed following his arrival at the hospital. He did not interview the defendant until the following day, which he did under caution (see page 72). The account given to him by the defendant is consistent with what the plaintiff told the officer and accords with the defendant’s evidence to the court. This consistency by the defendant is a matter that I take into account in assessing his credibility as a witness.
2. The plaintiff, having been sent her witness statement by the police, then returned to the police station with her daughters and provided another statement which she says is the proper account of what happened. The officer who had taken her original statement felt that his investigations were now over and he declined to take another statement from her, but he let her remain at the police station where, with the assistance of one of her daughters, she provided another statement explaining or perhaps, more accurately, decrying the contents of that earlier statement and recording a version which now accords with her pleaded case and what she has given in evidence in the trial.
3. I am afraid that I have come to the conclusion that this lady, having originally given a truthful account in her first statement, then having seen that statement, decided to contradict it so that it might better serve her interests in any future proceedings. I am perfectly satisfied that when she gave that first statement, although no doubt in some pain and discomfort, she was in a fit state to provide that statement to an officer who had no axe to grind in the matter and who merely wished to record her version of the accident.
4. In pressing his client’s case, Mr Brettell who has dealt with the matter with moderation and therefore very persuasively, has drawn attention to the fact that the PLB had no signs of damage. He says that this is more consistent with the plaintiff’s hand coming into contact with the vehicle rather than with her umbrella which might be expected to have left a scratch mark. Whilst that is a fair point to make, it is not suggested that the contact between the vehicle and the umbrella was especially severe which might have left some sign of damage. The impression I have is that of a glancing contact sufficient to bend the wrist which could well leave no trace on the bodywork of the PLB. Mr Brettell’s other well made point concerns the medical findings which show a displaced fracture of the distal ulna (see page 43). From that he submits that it is much more likely that the impact which caused such a displaced fracture would be more consistent with a direct blow to the hand and wrist than the indirect force of having the wrist ‘turned’ as it was holding the umbrella. In the absence of direct medical evidence in the trial as to the sort of forces required to cause this sort of injury, I am content to find that the sudden force caused by a glancing blow to the umbrella would have been sufficient to fracture what is after all a small bone and I am reinforced in that view by all the other evidence in the case which I have felt able to accept for the reasons that I have given.
5. I therefore reject the plaintiff’s evidence as to how this injury occurred and I also find that the vehicle was driven no closer than between 2 and 3 feet from the kerb, which is further away than the plaintiff is suggesting and so I am against her on this part of her evidence as well.
6. I must now decide where these findings leave the plaintiff’s case.
7. Firstly, she has failed to prove her pleaded case. She has failed to show that she was injured in the way that she has alleged. That must be sufficient to resolve the action in the defendant’s favour. In any event, even if one puts aside these considerations, I am satisfied that on the facts as found by me the defendant is not to be held to have driven negligently in the circumstances. He drove slowly, and in a case where there was not much clearance either side of his PLB, at an appropriate distance from the nearside kerb. The plaintiff’s injuries were caused entirely by her inadvertent and, I am afraid, careless raising of her umbrella before the defendant’s PLB had got past her with the result that it struck the vehicle, jolting the umbrella and her wrist, causing this unpleasant injury.
8. The claim must stand dismissed and there must be judgment for the defendant.

Ian Carlson

District Court Judge

I/we certify that to the best of my/our ability and skill, the foregoing is a true transcript of the audio recording of the above proceedings.

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Lavina Daswani

20 June 2001