DCPI268/2004

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES NO. 268 OF 2004

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BETWEEN

LEE NGA LAI (a minor) by her mother Plaintiff

and next friend, FUNG TIN SAU

and

KONG MAN PUI 1st Defendant

SECRETARY FOR JUSTICE sued 2nd Defendant

on behalf of HONG KONG POLICE FORCE

and

NG SI YU 1st Third Party

LEE TIN CHI 2nd Third Party

(discontinued)

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Before: Her Honour District Court Judge Marlene Ng in Court

Date of Hearing: 19th June, 2006

Date of Handing Down Judgment: 14th July, 2006

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JUDGMENT

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###### I. Introduction

1. The Plaintiff is a young girl of 12 years. She was 7 years old and a primary two student at the time of the accident referred to below.
2. The 1st Defendant is a retired police officer. He was a serving senior police constable employed by the 2nd Defendant and attached to the Transport Section of Ta Kwu Leng Police Station (the “Station”) at the time of the accident referred to below. He had 30 years of driving experience with a clear driving record. He held a driving licence for government vehicles since 1971.
3. The 1st Third Party was the driver of a student service public light bus or nanny bus bearing registration number KC2906 (the “Nanny Bus”).
4. At about 11:10am or 11:20am on 30th January 2002, the 1st Defendant was driving a police vehicle owned by the 2nd Defendant bearing registration mark AM8216 (the “Police Car”) in the course of his employment. There was a collision between the Police Car and the Plaintiff at Ping Che Road (the “Road”) near Tong Fong Road (the “Location”) when she was crossing the Road (the “Accident”). The Plaintiff suffered personal injuries and loss/damages.
5. The Plaintiff claimed the Accident was caused by the negligence of the 1st Defendant. On the other hand, the 1st and 2nd Defendants claimed the 1st Defendant had paid due care and regard to the safety of other road users and had kept constant and proper lookout at all material times. Further/alternatively, the 1st and 2nd Defendants claimed the Accident was caused wholly or contributed by the 1st Third Party and/or the Plaintiff.
6. The 1st and 2nd Defendants issued third party proceedings against the 1st Third Party and the 2nd Third Party (the Plaintiff’s father) to claim for indemnity/contribution against the Plaintiff’s claim and the costs of the action on the ground that the Accident was caused wholly or contributed by them. Subsequently, the 1st and 2nd Defendants discontinued their claim against the 2nd Third Party.
7. The 1st Third Party denied liability and claimed the Accident was caused wholly or contributed by (a) the Plaintiff, (b) the 1st Defendant and/or (c) the parent(s)/guardian(s) of the Plaintiff (collectively, the “Parent(s)”).
8. By the Order of H H Judge H C Wong dated 10th June 2006, the Plaintiff’s claim against the 1st and 2nd Defendants was compromised pursuant to a Tomlin order. It was ordered that all further proceedings be stayed upon the terms contained in the Schedule thereto, which provided *inter alia* that (a) on a without admission of liability basis the 1st and 2nd Defendants do pay the Plaintiff and there be leave to the Plaintiff to accept the sum of HK$300,000.00 (the “Settlement Sum”) in full and final settlement and (b) the 1st and 2nd Defendants do pay the Plaintiff costs of this action, including costs of the application for approval for settlement, on a common fund basis, to be taxed if not agreed (the “Costs Provision”).
9. The present trial only concerned the third party proceedings between the 1st and 2nd Defendants and the 1st Third Party. At first the 1st Third Party was legally represented, but since 6th December 2005 he acted in person. The 1st Third Party was absent at the trial. The 1st and 2nd Defendants called 3 witnesses, namely, the 1st Defendant, Mr Ng Wing Sun (“Mr Ng”) and Mr Leung Chi Ming (“Mr Leung”). Mr Ng and Mr Leung are serving police officers who were attached at the Station at the material time. I granted leave for their witness statements to stand as part of their evidence-in-chief.

*II. Location*

1. The Road was a straight undivided two-way road with one lane bound for Fanling (the “Lane”) and other lane bound for Ta Kwu Leng (the “Opposite Lane”) and an intermittent central white line separated the lanes. The speed limit was 50kph. At or near to the Location there was flat grassland on either side of the Road that gave unobstructed view for the drivers. As shown in the sketch drawn by Mr Leung and annexed to his statement to the police, there was a piece of muddy ground (泥地) abutting the Lane at the Location (the “Muddy Ground”). Tong Fong Road joined the Lane at a spot just ahead of the Location. Another side road leading to Lee Uk Tsuen joined the Opposite Lane near to the Location. The Lane ended at the Ping Che Police Post. All vehicles and pedestrians had to stop at the Ping Che Police Post unless they were licensed to enter into the restricted area beyond.

*III. Liability*

*(1) Plaintiff’s case*

1. For reason(s) unknown to this court, Ms Yiu, counsel for the 1st and 2nd Defendants, decided not to call the minor Plaintiff to give evidence. So in relation to the Plaintiff’s version of the Accident, all the court was left with was her statement to the police on 6th February 2002 given in the presence of her mother.
2. The Plaintiff came to live in Hong Kong at the end of 1995. On 30th January 2002 she was a student at Ta Kwu Leng 嶺英公立學校 and lived with her grandmother and aunt at Lee Uk Tsuen. On the day of the Accident school finished at 11:10am since it was school examination day. After school the Plaintiff went home by the Nanny Bus driven by the 1st Third Party. There was no escort on the Nanny Bus that day.
3. Traffic was light. When the Nanny Bus reached the Location, it stopped to let the Plaintiff and her schoolmate 蔡智明 (the “Boy”) alight. The Boy walked home to Tong Fong Tsuen. Mr Chan Pak Kin (“Mr Chan”), the traffic police officer who investigated the Accident, later spoke with the Boy who confirmed he followed the Plaintiff to alight from the Nanny Bus and then walked towards Tong Fong Tsuen.
4. The Plaintiff ran across the Road in front of the Nanny Bus to get home. When she reached about the middle of the Road, she was hit by the Police Car from the right. The Plaintiff had no recollection of what happened afterwards until she was already at the North District Hospital (the “Hospital”). According to Mr Chan, the Boy saw the Plaintiff cross the Road but did not witness the Accident. He had his back to the Road as he walked towards Tong Fong Tsuen.
5. Normally the Plaintiff would take the Nanny Bus from school to the Location. After alighting from the Nanny Bus she would walk home alone unaccompanied by any adult.

*(2) 1st and 2nd Defendants’ case*

1. The 1st Defendant gave a statement to the police dated 20th February 2002. Mr Leung and Mr Ng gave statements to the police on 8th and 22nd March 2002 respectively.
2. On 30th January 2002, the Plaintiff was the duty driver responsible for driving the Police Car. Mr Leung was on patrol duty with another police officer at the Ping Che Police Post. Mr Ng was on duty with 4 other police officers at the Sha Ling Police Post.
3. At about 11:00am, the 1st Defendant drove the Police Car to pick up Mr Ng, another police constable and a woman police constable at the Sha Ling Police Post to return to the Station for lunch. Mr Ng sat at the front passenger seat and the other police constables sat at the back. The 1st Defendant drove to the Lo Wu Police Post to pick up 3 more police officers to return to the Station for lunch. These 3 police officers sat the back. The 1st Defendant drove the Police Car along the Lane at 40kph (according to the 1st Defendant) or 30-40kph (according to Mr Ng) with 5-6 passengers towards the Ping Che Police Post to pick up other police officers for lunch. At that time, the weather was fine, the road surface was dry and traffic was light.
4. In the pleadings of the 1st and 2nd Defendants and in the 1st Defendant’s witness statement, the 1st Defendant claimed that at a distance of about 150m prior to reaching the Location, he saw a stationary “private light goods vehicle” ahead on the nearside of the Lane near Tong Fong Tsuen with its hazard lights switched on. But in his police notebook entry made at 11:24am shortly after the Accident and in his statement to the police (the accuracy of which the 1st Defendant confirmed in the course of his evidence), the 1st Defendant referred to the stationary vehicle as “校巴 P/Bus” and “保母車(後知為KC2906)” respectively.
5. When the 1st Defendant gave evidence he said he saw at first glance the stationary vehicle was a “客運私家小巴” or “載客輕型小巴” because of the circular passenger service licence plate in red with black lettering issued by the Transport Department (the “Red Plate”) displayed at the rear window of the Nanny Bus. He also confirmed that a row of white-coloured seats were visable at the rear window of the Nanny Bus. The 1st Defendant said the reference to “private light goods vehicle” in his witness statement was an error.
6. As regards the reference to “保母車(後知為KC2906)” in his statement to the police, the 1st Defendant accepted the characters within the brackets were subsequent acquired knowledge. He insisted he did not realise the stationary Nanny Bus was a nanny bus until after the Accident. He agreed he did not put such information within the brackets as part of his subsequent acquired knowledge.
7. In his witness statement, Mr Ng said when the Police Car reached the Location, he saw a stationary “輕型小巴 (車牌編號後知為KC2906)” about 30-40m ahead on the Lane with the hazard lights switched on. But in his statement to the police (the accuracy of which Mr Ng confirmed in the course of his evidence), Mr Ng referred to the stationary vehicle as “保母車(後知為KC2906)”. He agreed that he put his subsequent acquired knowledge within brackets, but insisted he only knew the stationary Nanny Bus was a nanny bus after the Accident.
8. The 1st Defendant claimed he looked out of the window of the Police Car to check for the presence of other road users ahead of him and on both lanes of the Road. There was no on-coming traffic or stationary vehicle on the Opposite Lane or any vehicle behind the Police Car. There was also no pedestrian on either side of or crossing the Road.
9. The 1st Defendant did not notice any student or children or passenger other than the driver (ie the 1st Third Party) inside the stationary Nanny Bus ahead. There was no sign from the 1st Third Party to indicate he was letting passengers alight from the Nanny Bus. The 1st Defendant said in his witness statement that it appeared to him the 1st Third Party was waiting for passengers from Tong Fong Tsuen to board the Nanny Bus.
10. However, when he gave evidence, the 1st Defendant said he knew the passenger door was on the left side of the stationary Nanny Bus, which was outside his line of vision. Further, he knew that since the stationary Nanny Bus was a passenger service light bus and it had stopped on the Lane with the hazard lights switched on, there was a possibility that passengers would alight from the stationary Nanny Bus.
11. On the other hand, Mr Leung, who at the time of the Accident stood on the Road outside the Ping Che Police Post about 25-30m away from the Location facing the direction of Ta Kwu Leng, said he saw a stationary “保母車” (ie the Nanny Bus) at the Location. He saw several children (according to his statement to the police, there were 2 children, ie the Plaintiff and the Boy) alighting from the Nanny Bus. In his witness statement, Mr Leung said he also heard the sound of children chasing and playing (“亦聽到小童們互相追逐嬉戲的聲音”). When he gave evidence, Mr Leung clarified there were at least 4 children playing at the Muddy Ground near the Nanny Bus.
12. When the Police Car was about 40m (according to the 1st Defendant) or 3-4 Police Car lengths (according to Mr Ng) behind the Nanny Bus, the 1st Defendant reduced speed to 15-20kph (according to the 1st Defendant) or about 20-30kph (according to Mr Leung) and turned on the Police Car’s right-turning indicator with a view to overtake the Nanny Bus. He then steered the Police Car slowly to the right into the Opposite Lane. He claimed he duly observed and kept on observing the traffic condition of the Road whilst driving carefully past the stationary Nanny Bus. There was no traffic sign or road-markings forbidding drivers to overtake stationary vehicles at the Location.
13. When the Police Car was nearly abreast with the Nanny Bus, the 1st Defendant and Mr Ng saw the Plaintiff and another child behind her (the “Child”) (both in school sportswear uniform) suddenly ran quickly and diagonally across the Road from left to right in front of the Nanny Bus into the path of the Police Car. Mr Ng said the Plaintiff dashed across the Road without first checking the traffic from either direction. When the 1st Defendant first saw the Plaintiff and the Child, they were already at the middle of the Road about 2 feet (or less than 1m) in front of the Police Car. When Mr Ng first saw the Plaintiff, she was almost at the central white line and quite close to the left front of the Police Car.
14. But Mr Leung said that when the Police Car was almost abreast the Nanny Bus, he only saw the Plaintiff dash diagonally onto the Road in front of the Nanny Bus and run towards the side road leading to Lee Uk Tsuen Road. He did not see the Child dashing across the Road and there was nothing to block his observation of the Location. But he also said the Plaintiff did not check there was no traffic from either direction prior to crossing the Road.
15. The 1st Defendant immediately applied the brake but since the Plaintiff dashed to the middle of the Road (ie the central white line) and the distance between the Plaintiff and the Police Car was too short, the nearside front fender of the Police Car hit the Plaintiff’s right leg and she fell onto the Lane. The Police Car stopped immediately on the Opposite Lane. The Nanny Bus was still stationary on the Lane.
16. The 1st Defendant and other police officers alighted and two woman police constables looked after the Plaintiff. The 1st Defendant said the Plaintiff cried out in pain, but Mr Ng said she fainted and only regained consciousness after he gave emergency treatment. The Accident was reported via police radio and other police officers came to the scene. Mr Leung remained on duty at the Ping Che Police Post. Later the ambulance came to transport the Plaintiff to the Hospital.
17. After the Accident, the 1st Defendant and Mr Ng did not see where the Child went. Mr Leung noted the children playing at the Muddy Ground had dispersed after the Accident, but he did not know where they went. The 1st Defendant claimed he found out after the Accident there were at least 10 students on board the Nanny Bus.
18. Mr Cheung Cheung Lam was a traffic police officer who arrived at the Location after the Accident. In his statement to the police on 7th February 2002, he said the 1st Defendant told him at the scene that he saw “小巴” (ie the Nanny Bus) to the left with the hazard lights switched on, so he turned on the right-turning indicator light. He was travelling at 40kph. He then saw 2 black shadows dashed from left to right. So he immediately braked, but the left front of the Police Car still slightly hit the Plaintiff.

*(3) 1st Third Party’s case*

1. The 1st Third Party gave a statement to the police on 9th February 2002. He said that as arranged by his company, the Plaintiff was usually collected from school by another driver. But the 1st Third Party would drive her home on school examination days and had done so for about 2 years.
2. The 1st Third Party said he was driving the Nanny Bus on the Lane at about 11:15am on 30th January 2002. He had picked up about 14 students from 嶺英公立學校 to take them home. The escort was sick that day, so there was no escort on the Nanny Bus. When he reached the Location, he switched on the hazard lights and travelled for about 2 Nanny Bus lengths before stopping to open the door for 2 schoolchildren (ie the Plaintiff and the Boy) to alight. After alighting, the Boy walked towards Tong Fong Tsuen. There was no adult to collect the Plaintiff that day. In fact, usually no one would come to pick up the Plaintiff. Only occasionally would the Plaintiff’s grandmother come to pick her up.
3. After alighting, the Plaintiff crossed the Road diagonally in front of the Nanny Bus in quick steps (she did not run) but without checking the traffic. When the Plaintiff reached the middle of the Road, the Police Car overtook the Nanny Bus from the right. The left front of the Police Car hit the Plaintiff who fell down. The Police Car travelled for 1 Police Car length and stopped. The police officers alighted to see to the Plaintiff. The 1st Third Party telephoned to inform the Plaintiff’s family. Later the ambulance came to take the Plaintiff to the Hospital.
4. The Accident took place about 8-10 seconds after the 1st Third Party stopped the Nanny Bus. He said the speed of the Police Car was not high. It was about 40-50kph.

*(4) Findings*

1. Ms Yiu submitted that (a) the Plaintiff, (b) the 1st and 2nd Defendants and (c) the 1st Third Party all contributed to the Accident and their liability was several and not joint. She suggested that the apportionment of liability should be 35% for the 1st and 2nd Defendants, 35% for the 1st Third Party and 30% for the Plaintiff. If the Parent(s) contributed to the Accident, their share should be 5% out of the Plaintiff’s 30% share of the total liability. The 1st and 2nd Defendants sought indemnity and/or contribution against the 1st Third Party for 35% of (a) the Settlement Sum, (b) their liability for the Plaintiff’s costs under the Costs Provision and (c) their own costs in the main proceedings between them and the Plaintiff.
2. According to the Passenger Service Licence issued on 22nd June 2001 by the Commissioner for Transport for the Nanny Bus (the “Licence”), the 1st Third Party was authorised to operate a “public bus service”. According to the Passenger Service Licence Conditions (the “Conditions”) annexed thereto, the Nanny Bus was classified as “Public Bus” and was permitted for “Non-scheduled Services – A03, A08”. There is no explanation as to what “A03, A08” meant.
3. Section 2 of the Road Traffic Ordinance Cap.374 (the “Ordinance”) defined (a) “public bus” as “a bus, other than any private bus, which is used or intended for use for hire or reward” and (b) “public light bus” as “a light bus, other than any private light bus, which is used or intended for use for hire or reward”. Paragraph (二) of the Explanatory Notes (the “Notes”) attached to the Conditions suggested that public light bus service included *inter alia* student service.
4. Since the Nanny Bus was licensed as a public bus, it is different from a “school private light bus” defined under section 2 of the Ordinance as “a light bus used or intended for use primarily for the carriage of persons who are the students of an educational institution …… persons accompanying or in charge of such students …… to or from the institution, whether or not for hire or reward ……” (see section 27(3) of the Ordinance) or a student service under a private bus service (see section 27(5) of the Ordinance).
5. One of the 1st and 2nd Defendants’ main contentions is that the 1st Defendant did not realise that the Nanny Bus was a nanny bus at the time of the Accident by reason of the 1st Third Party’s breach of his statutory obligations and of the Conditions.
6. First, the 1st and 2nd Defendants pleaded that the 1st Third Party was in breach of condition no.4 of the Conditions (“Condition 4”) and regulation 78B of the Road Traffic (Construction and Maintenance of Vehicles) Regulations Cap.374A (the “Regulations”) in failing to display any signboard bearing the words “CAUTION CHILDREN 小心學童” (white words on red background) (the “Signboard”) or “STUDENT SERVICE” (black words on yellow board) at the rear inner window of the Nanny Bus or on its windscreen whilst the student transport service was in operation at the material time.
7. Condition 4 provided that “[a] sign indicating the type of non-scheduled public bus service that is approved under this licence and being operated by the bus at that time shall be prominently displayed on the windscreen or the front indicator of the bus at all time while service is in operation …… (Please refer to paragraph 2 of the [Notes] attached)” (my emphasis). Paragraph (二) of the Notes provided that “有關提供非專線公共巴士服務時，展示服務種類的標誌所遵照的準則 :- …… (ii) 該標誌必須展示在檔風玻璃上或在巴士前面的路線指示牌，並須能夠由巴士前面清楚見到。(iii) 該標誌必須依照下列式樣用黃色底黑色正楷中文及英文字寫清楚標明提供的服務種類 : [學生服務 STUDENT SERVICE] (iv) 如該標誌是展示在檔風玻璃上，其位置必須不妨碍司機視綫，適當位置應為在檔風玻璃的中上部分，該標誌的尺碼應約為十二厘米乘三十厘米。……”
8. In my view, the sign under Condition 4 is clearly referable to the “STUDENT SERVICE” sign in paragraph (二) of the Notes. Both Condition 4 and paragraph (二) of the Notes specified that the “STUDENT SERVICE” sign should be displayed at the front of the Nanny Bus. The distant photographic shots of the front of the Nanny Bus did not evidence such alleged breach. I am not persuaded that the 1st and 2nd Defendants have satisfactorily established on balance the claimed breach of Condition 4. But whether the 1st Third Party complied with Condition 4 is irrelevant because the Police Car approached from behind the Nanny Bus and the 1st Defendant was not able to observe the windscreen or front indicator of the Nanny Bus at all.
9. Regulation 78B of the Regulations provided that “[every] bus that is used for carriage to or from an educational institution of the students of the institution, whether or not for hire or reward, shall bear in or on the back of the vehicle, in such manner as is clearly visible rearwards, a signboard of the colour, design and dimensions set out in the diagram in the Fourteenth Schedule [ie the Signboard]”. There is no doubt a student service was in operation at the time of the Accident, but the Nanny Bus did not display the Signboard at its rear. In my view, the purpose of the Signboard at the back of a nanny bus is to alert other road users that schoolchildren are on board and they should take special care. In my view, the 1st Third Party was negligent in failing to comply with regulation 78B of the Regulations. However, as seen below, such negligence would not prevent the 1st Defendant from realising there were children in the vicinity and/or on board the Nanny Bus had he kept a reasonable and proper lookout.
10. There is no evidence to support the 1st Third Party’s pleaded defence that the Signboard was mounted on the rear inner window of the Nanny Bus when the 1st Third Party performed a routine check in the morning of the date of the Accident.
11. Secondly, the 1st Defendant claimed the Nanny Bus looked like a tour bus for passengers and did not resemble a school bus which usually had a yellow body and a continuous horizontal purple stripe with the words “SCHOOL PRIVATE LIGHT BUS 學校私家小巴”. Regulation 51 of the Regulations provided not only for the size and specification of such colour scheme applicable to a *school private light bus* but also for the requirement that such bus should bear a triangular sign of an adult accompanying a child (see the diagram in the Thirteenth Schedule of the Regulations) (the “Sign”) against the background of the purple stripe.
12. I am not persuaded by the 1st Third Party’s pleaded defence that the 1st Defendant knew or should have known that the Nanny Bus was a school bus carrying students in that it had a continuous horizontal purple stripe on its outside which was the same as or similar to the statutory requirement. In my view, it is patent from the available photographs that the colour scheme of the Nanny Bus (ie white colour with a blue/purple stripe, but without the words “SCHOOL PRIVATE LIGHT BUS 學校私家小巴” on the blue/purple stripe) was markedly different from the statutory requirement.
13. But I consider the Nanny Bus did not have to comply with the colour scheme and requirements under regulation 51 of the Regulations since it was a public bus operating a student service and not a school private light bus. In any event, I am not persuaded the colour scheme is significant since the absence of such colour scheme does not mean the Nanny Bus did not carry schoolchildren. The 1st and 2nd Defendants produced photographs of 2 nanny buses with the Signboard affixed at the rear window. One of them was blue in colour with continuous white stripe and the other was white in colour with continuous blue stripe. The 1st Defendant confirmed he knew not all nanny buses that carried schoolchildren were necessarily coloured yellow and purple.
14. Thirdly, the 1st and 2nd Defendants claimed the 1st Third Party was in breach of Condition no.5 (“Condition 5”) in that he failed to provide an escort on the Nanny Bus which was operating a student transport service at the material time. They claimed the role of an escort was to assist/guide the schoolchildren (including the Plaintiff) to alight from the Nanny Bus and to safely cross the Road. The 1st Defendant added that an escort would have issued appropriate warnings to the Plaintiff and the Child when they attempted to cross the Road. The 1st Third Party in his pleadings denied the escort had such role.
15. Condition 5 stated that “[student] service for kindergarten or primary students operated by buses specified in this licence, whether by the licensee or by another person under a contract of hire, shall be subject to the provision of escort while the service is in operation. (Please refer to paragraph 3 of the [Notes] attached.)” It is not disputed that the 1st Third Party was in breach of Condition 5 in that there was no escort on the Nanny Bus at the time of the Accident. However, whilst I accept the role of an escort was to assist/guide the schoolchildren on board to properly alight from the Nanny Bus carefully, I am not persuaded it was normally the escort’s duty to ensure the schoolchildren transported by the nanny bus would cross the Road safely. Such role was not referred to in paragraph (三) of the Notes, which sets out “跟車保母的定義及其責任”.
16. The 1st Third Party claimed the escort was sick on the day of the Accident, but in my view he should have arranged for a replacement escort. In running a student service for young schoolchildren, the 1st Third Party should have arrangements in place for such exigencies. In the absence of an escort, it was incumbent on the 1st Third Party to adopt a high duty of care when letting the Plaintiff off the Nanny Bus at the Location.
17. Fourthly, the 1st and 2nd Defendants further claimed that in breach of Condition 5 read together with paragraph (三) of the Notes, the 1st Third Party failed to ensure the Plaintiff was regularly collected by her Parent(s) after alighting from the Nanny Bus on her homeward journey and/or to terminate the student service for the Plaintiff upon repeated failure of the Parent(s) in collecting her on her homeward journey. Paragraph (三)(v) of the Notes provided *inter alia* that the escort “應點齊學童人數，確保學童安會抵達學校，以及在回程時由家長/監護人接回”.
18. Again, I am not persuaded the escort had a duty to ensure or guarantee a schoolchild carried by a nanny bus would be collected by his/her parent(s) or guardian(s). Such duty would be overly onerous. However, given that (a) the Plaintiff was only aged 7 years at the time of the Accident, (b) there was no escort on board the Nanny Bus who could see to the Plaintiff being properly dropped off and who could warn her of precautions against the perils of the road where the Parent(s) were not there to collect her, and (c) the 1st Third Party knew she would cross the Road unaccompanied by any adult, in the circumstances the 1st Third Party had a high duty of care when he let her off the Nanny Bus unsupervised.
19. In my view, the 1st Third Party should have continued to check for oncoming traffic and for traffic on the Opposite Lane. Had he constantly checked the rear-view mirror, he would have noticed the Police Car since the Road behind was long and straight. The 1st Third Party would have realised the Plaintiff’s view of oncoming traffic on the Lane would have been blocked by the Nanny Bus to her right and *vice versa* the driver of the Police Car would not have been able to see the Plaintiff. There were 8-10 seconds from the time the 1st Third Party stopped the Nanny Bus till the Accident, so there was sufficient time for him to observe and take effective warning measure. In such circumstances, the 1st Third Party should have sounded the horn to warn the Plaintiff and/or the driver of the Police Car of the imminent hazard.
20. As regards the liability of the 1st Defendant, he managed to stop the Police car shortly beyond the place of the Accident, so I accept he was driving at a moderate speed. However, I am not persuaded he kept a proper lookout. On the facts, I find his assertions as to nature of the Nanny Bus unreliable. His evidence wavered from a nanny bus to a passenger service vehicle and then to a goods vehicle. Mr Ng’s evidence also wavered unreliably between a nanny bus and a light bus. In my view, the Red Plate on the Nanny Bus made it quite clear the Nanny Bus must at the very least be a passenger service vehicle and could not have been a goods vehicle. Although Mr Leung looked at the Nanny Bus from the opposite direction, he had no difficulty in recognising it as a nanny bus. Another aspect of the uncertain (and hence unreliable) lookout was the 1st Defendant’s and Mr Ng’s observation of the Child behind the Plaintiff whereas Mr Leung, who had a clear unobstructed view of the front of the Nanny Bus, said only the Plaintiff crossed the Road. The 1st Third Party who necessarily had a clear and close view of the front of the Nanny Bus also did not refer to the Child.
21. Further, the 1st Defendant’s observation was also suspect in that he claimed there were (a) no pedestrians at the Location and (b) no student, children or passenger other than the driver inside the Nanny Bus.
22. In respect of (a), Mr Leung, the Plaintiff, the 1st Third Party and Mr Chan (who spoke with the Boy) all confirmed the presence of the Boy walking towards Tong Fong Tsuen at the material time. Mr Leung saw at least 4 children chasing and playing at the Muddy Ground. Although Mr Leung’s observation was from the Ping Che Police Post, the photographs revealed there was nothing to obscure the 1st Defendant’s observation of the Location and the Muddy Ground even when he was 150m away. His failure to spot the children suggested lack of reasonable and proper lookout.
23. In respect of (b), the 1st Defendant’s evidence was not that he could not see inside the Nanny Bus but he observed there was no passenger inside the vehicle. However, the 1st Defendant admitted there were at least 10 schoolchildren in the Nanny Bus after the Accident. In fact, there should have been 12 because the 1st Third Party said he collected 14 students from the school and 2 of them (ie the Plaintiff and the Boy) alighted from the Nanny Bus at the Location.
24. Obviously, if there had been a Signboard or Sign at the rear of the Nanny Bus, the 1st Defendant would have immediately realised schoolchildren might be about. But, in my view, even if he did not realise the Nanny Bus was a nanny bus prior to the Accident (although I find such assertion unreliable), had he kept a proper lookout, he would have observed there were children on the Nanny Bus and children playing at the Muddy Ground in the vicinity of the Nanny Bus. He admitted that with the stationary Nanny Bus (a passenger service vehicle) and its hazard lights switched on, there was a real prospect that passengers would be alighting even though he could not see the passenger door. He also knew he could not see what was happening in front of the Nanny Bus. Had the 1st Defendant been keeping a proper lookout, from a combination of the above factual matrix he would have foreseen the risk that children (whether on the Muddy Ground or from the Nanny Bus) might do something silly.
25. In the ordinary way, when a driver overtakes another car on a straight road there is no need to sound the horn before overtaking if he has given reasonable clearance. Motorists are only expected to be reasonably prudent, but a very high standard of caution is required if they are driving near a group of young children. If the 1st Defendant had kept a proper and reasonable lookout, the aforesaid factual matrix would have put him on enquiry as to what the Nanny Bus and the children were doing at the Location. The 1st Defendant knew there was a village on either side of the Road, ie Tong Fong Tsuen and Lee Uk Tsuen, so there was likelihood that pedestrian children might cross the Road. I find that before overtaking the Nanny Bus a reasonably careful driver in the circumstances would have taken the precaution of sounding the horn and covering his brakes in anticipation of children running out. The precaution the 1st Defendant took of slowing down and putting on the right-turning indicator light was insufficient to discharge his duty as a driver approaching the situation. Had he seen the children in the Nanny Bus and/or at the Muddy Ground and taken appropriate warning measure, the Accident would probably have been prevented.
26. The Plaintiff was only 7 years old at the time of the Accident. The degree a minor plaintiff is capable of contributory negligence is a question of fact. However, a court should only find a child guilty of contributory negligence if he is of an age expected to take precautions for his own safety and he is found guilty of blame. It should be remembered that a child does not have the road sense and experience of adults and the court should not attach liability to a child unless he is blameworthy.
27. Since the Plaintiff was not called as a witness, the court is handicapped in its assessment of the above considerations. It is unclear whether she was capable of the mental process of looking beyond for other traffic. On the other hand, there is evidence she had been crossing the Road after alighting from the nanny bus unaccompanied and unsupervised (save when she was occasionally picked up by her grandmother) for 2 years, so she could not have failed to notice that the Road was a dual carriageway. Mr Ng, Mr Leung and the 1st Third Party all said the Plaintiff did not on the day of the Accident check the traffic from either direction. But from her position after alighting from the Nanny Bus or when she was in front of the Nanny Bus, she would have a clear vision of the traffic coming from the Opposite Lane and there was none at the material time. As regards oncoming traffic from her right, the single Lane was blocked by the Nanny Bus. In my view, the Plaintiff at her tender age should not be judged too harshly for failing to consider the possibility of an overtaking vehicle coming from behind the Nanny Bus or to consider the alternative way of crossing behind the Nanny Bus.
28. The 1st Third Party pleaded that the Parent(s) had expressly and/or impliedly agreed with the 1st Third Party that the 1st Third Party should allow the Plaintiff to alight from the Nanny Bus and go home alone even if no one came to collect the Plaintiff, but there is no evidence to support such averments. There is no evidence before me and I should not speculate as to why the Parent(s) did not collect the Plaintiff from the Nanny Bus. There is no basis for finding that the Parent(s)’ failure to do so was negligent.

*(5) Apportionment of liability*

1. Doing the best in the circumstances, I apportion 10%, 30% and 60% in respect of the Plaintiff’s, the 1st Third Party’s and the 1st and 2nd Defendants’ liability in respect of the Accident.
2. Ms Yiu asked me to draw analogy from the case of *Lo Sing Ngo, a minor, suing by her mother and next friend Ng Yim Fong v Lau Sui Lung and anor (Defendants) and Lee Wai Ling (Third Party)* DCPI272/2001, Deputy Judge Charles T C Wong (unreported, 12th August 2002). In that case, the plaintiff child was hit by a dump truck travelling on the 2nd lane when she crossed the road in front of a nanny van after alighting from it. The defendants settled the plaintiff’s claim and proceeded with the third party action against the third party driver of the nanny van for indemnity or contribution. In that case, the learned judge apportioned ⅓ liability against the defendants and ⅔ liability against the third party. There was no suggestion that the plaintiff child was contributorily negligent.
3. But *Lo Sing Ngo* case is factually different. First, the learned judge found that the third party dropped off the plaintiff on the inner lane in front of a pedestrian crossing in a prohibited zone for the third party’s convenience (ie to save her a return trip). The third party could have dropped the plaintiff off at 3 safer spots, namely, a lay-by, a side pavement with a red patch or a spot immediately after the pedestrian crossing before entering the lay-by. In the present case, there was no suggestion that the 1st Third Party, which had to stop before the Ping Che Police Post, could have stopped at any other safer spot. There was also no pedestrian crossing at the Location.
4. Secondly, the learned judge in *Lo Sing Ngo* case noted the traffic lights were in favour of on-coming traffic, so there could be approaching cars on the 2nd lane. But in the present case, the Nanny Bus blocked the whole Lane and the Police Car was not travelling on its own lane but was overtaking the Nanny Bus from behind. There were also no traffic lights at the Location.
5. Thirdly, the learned judge in *Lo Sing* Ngo case found that the nanny bus had the distinct triangular Sign normally carried by a nanny van and a continuous purple stripe on the body of the nanny bus. Here, the Nanny Bus did not have the triangular Sign or the purple stripe.
6. In the present case, it is therefore incumbent on the 1st Defendant as the driver of the overtaking vehicle to take special precaution in the presence of children, which he should have observed had he been keeping a reasonable and proper lookout. In my view, it was the 1st Defendant rather than the 1st Third Party who created the situation of danger and therefore should be mainly responsible for the Accident.

*IV. Quantum*

*(1) Treatment and disabilities*

1. On admission to the Hospital, the Plaintiff was conscious and complained of pain at her right leg and right eye. There was an open wound of 3cm exposing the underlying bone at her right tibia. X-ray showed that both her right tibia and fibula were fractured. The Plaintiff also suffered facial injuries, including a 3cm laceration wound below the right ear, a 1cm laceration on the chin, abrasion with swelling on her right face, and bruise and swelling at the right infra-orbital area or right eyelid.
2. Emergency operation was done to clean the leg wound and fix the tibial facture with an external fixator. Subsequently wound debridement operation was done and a ring external fixator was applied to immobolise the tibial facture.
3. The Plaintiff was discharged on 19th February 2002 and attended follow-up treatment at the Hospital’s clinic. The skin wounds healed with no loosening of the fixator. In early March 2002 the post-traumatic swelling at the right calf was much subsided. On 21st March 2002 the Plaintiff could manage non-weight bearing walking exercise well. She was readmitted for removal of the ring fixator in April 2002 and a brace was given to her. Weight bearing exercise commenced and she was discharged on the same day.
4. On 16th May 2002 the Plaintiff could walk with an antalgic gait. Hypertrophic scar was noticed. The tibial facture had healed and the bracing was stopped. By 27th June 2002 the Plaintiff could walk normally with no obvious lower limb length inequality. The motion ranges of knees and ankles were symmetrical. Pressure garment for the hypertrophic scar was continued. The Plaintiff was then able to resume school. Follow-up on 19th December 2002 showed she could walk normally. She was next followed-up in June 2003 with no further treatment, but was scheduled for routine yearly follow-up.
5. According to Dr David Cheng, the Plaintiff’s orthopaedic expert, and Dr Poon Kai Ming, the 1st and 2nd Defendants’ orthopaedic expert, the Plaintiff told them she attended school regularly and achieved good academic result. She also attended physical education lessons at school normally and played volley ball games, gymnastics exercises, and other activity with no problem in physical education lessons. The orthopaedic experts agreed the leg fracture had healed well with good function and morphology. There was no deficit of leg length and good function of the bone and adjacent joints of the right lower limb. The vague sporadic episodic pain seemed unrelated to the injury. The Plaintiff had no permanent orthopaedic impairment from her right leg injury.
6. Dr Poon Kai Ming added that the right eye and orbital soft tissue injury healed with no complaint or any recognisable scar. The sick leave recommendation of 5 months from the date of her injury to end of June 2002 was reasonable and justified. However, the medical certificates covered a sick leave period from 30th January to 9th October 2002.
7. Dr Otto Au and Dr Ian Nicholson, the Plaintiff’s and the 1st and 2nd Defendants’ respective plastic surgery specialist, noted the Plaintiff had the following scars :
   1. right ear lobe : faint fine pale horizontal linear scar measuring 10x1mm causing a small notch at the rim;
   2. neck behind and below the ear lobe : noticeable raised thickened resolving hypertrophic scar measuring 25x8mm that was partially concealed by the lobule and the lie of the Plaintiff’s hair;
   3. right lower leg : Dr Au said there were about 15 scars of various sizes distributed along the anterior and lateral surface of the leg with the largest (55x20mm) on the dorsal surface of the junction between the lower leg and foot. Dr Nicholson agreed there were 2 pale flat areas of scars (22x10mm and 30x10mm) on the anterior and lateral aspect of the lower right leg as well as multiple faintly hypertrophic puncture scars where the external fixators were inserted. He said there was a noticeable ugly scar that was slightly pigmented as well as raised and thickened. Both experts agreed it was mildly hypertrophic.

Dr Poon said the other minor facial abrasions and tiny lacerations healed with no scars and no consequences.

1. Dr Nicholson noted that the Plaintiff was given pressure garment therapy on the right leg in an endeavour to control excessive scar formation. She wore pressure garments for about 4 months. She was also given a gel to apply to the scar on her right ear. Dr Nicholson assessed her degree of permanent cosmetic disability at 2% with or without further treatment.
2. Dr Au said the Plaintiff had adjusted to her injuries well, but the scars would be permanent. Some of the moderately pigmented scars would improve over time. He assessed the cosmetic disability to be 7% of the whole person.

*(2) Pain, suffering and loss of amenities*

1. The Plaintiff was hospitalised for 21 days and underwent 3 operations. She was only able to walk properly in June 2002. She had to wear pressure garments for about 4 months. A certain extent of physical suffering was unavoidable. Dr Poon was of the view that sick leave up to June 2002 was reasonable. Her actual sick leave period was until September 2002 when she resumed school, but it is common knowledge that the intervening months were summer vacation for schoolchildren.
2. In her final submissions, Ms Yiu informed the court that the 1st and 2nd Defendants preferred the opinion of their own experts. Although there were quite a few permanent and obvious scars, Dr Poon’s report showed the Plaintiff to be a resilient child. There was no social rejection, self-isolation or teasing by her peers at the school in respect of the cosmetic result. Dr Au also agreed the Plaintiff adapted well to her deformities.
3. I have looked at the pictures of the scars annexed to Dr Nicholson’s expert report. Although there was permanent cosmetic disability, the scars were not offensive. There was no itching or pain, and no evidence that the scars will become increasingly uncomfortable as she grows up. In particular, the scar on the ear and the scar behind and below the ear lobe were not readily noticeable. Both Drs Cheng and Poon also said the latter scar was not very conspicuous. Dr Nicholson said the mildly hypertrophic ankle scar should become pale and flatter in the course of time. I agree with Dr Poon that it was not resentful, but it would remain obvious unless covered by a sock, long pants or long skirt. Although Dr Nicholson noted the Plaintiff did complain of the appearance of the scars on the right ear and below the ear, and she concealed the scar on her right leg with her sock or in the water when she went swimming or by not wearing sandals in the summer, I am not persuaded the scars will cause great embarrassment or damage to the Plaintiff’s body image in her daily living.
4. In the 1st and 2nd Defendants’ Answer to the Plaintiff’s Revised Statement of Damages, it was pleaded that the Plaintiff’s claim under this head should not exceed HK$100,000.00. At the trial before me, Ms Yiu suggested HK$350,000.00 would be an appropriate award under this head. She relied on the case of *Ho Tze Ho (an infant suing by his mother and next friend Chin Shui Ying) v Chui Chung Wah and anor* DCPI994/2004, H H Judge Wong (unreported, 8th June 2005). In that case the injured child (10 years old at the time of trial) had transient loss of consciousness after the accident and suffered a closed fracture of the left tibia and fibula with multiple abrasions on both knees, left leg, left forefoot, lip and chin. Debridement of the leg and foot wounds was done and close reduction of the facture with long leg dynacast was applied. He was hospitalised for 12 days and had undergone 8 follow-up treatments. He received 11 sessions of physiotherapy and 4 sessions of occupational therapy. The injuries left him with a number of conspicuous, thickened, hyperpigmented and hypertropic scars on his left foot.
5. The learned judge found that the child had healed without residual disabilities save for the fact that the overall length of the left lower limb was longer than the right by 1cm and the left ankle planer flexion was slightly less than the right side by 5-10°. The learned judge found that “[it] is most unlikely that the very mild tilting and slight leg-discrepancy will be remodelled and adjusted during further growth.” There was also complaint of itchiness and numbness over the left foot scar. The learned judge assessed the award for pain, suffering and loss of amenities to be HK$350,000.00.
6. In the present case, the Plaintiff had perfect healing in respect of the leg injury with no leg-length discrepancy and no tilting. There was also no numbness or itchiness over the scars. There was no functional impairment and the Plaintiff had adjusted well to the cosmetic deformities. In the circumstances, an appropriate award under this head is HK$260,000.00.

*(3) Future medical expenses*

1. Dr Au opined that the notching in the Plaintiff’s right ear lobe and the scars might be improved by (a) laser treatment, (b) injection to the ankle scar and (c) surgery to correct the notching of the ear lobe and the scar in the neck.
2. Dr Nicholson opined that any attempt to improve on the scar on the ear to correct the slight notch could easily lead to a more hypertrophic scar despite the use of a scar prevention earring post-operatively. As the scar below and behind the ear was not readily noticeable, he opined that the risks inherent in excising the hypertrophic scar and producing an even larger hypertrophic scar did not justify surgery. Treatment if indicated would be intralesional cortisone injection to make the scars flatter and expedite resolution, but this involved pain and discomfort and the minor Plaintiff might not tolerate it. Dr Nicholson doubted if laser treatment could significantly lessen the degree of permanent cosmetic disability.
3. Since Ms Yiu preferred the opinion of the 1st and 2nd Defendants’ medical experts, I am not persuaded the surgery and laser treatment recommended by Dr Au is appropriate or reasonable. There is also no evidence from the Plaintiff or the Parent(s) that such further treatment will be considered or performed for the Plaintiff’s cosmetic disability.

*(4) Loss of earning capacity*

1. According to Dr Poon, the functional status of the Plaintiff’s right leg does not impose any restriction on her future career development. Dr Au opined there would be limited impairment to the Plaintiff’s future career. She might not be able to have a career as a model which would require her to bare her feet, or any profession that required wearing short pants or short skirt.
2. In the 1st and 2nd Defendants’ Answer to the Plaintiff’s Revised Statement of Damages, they averred that “the issue whether the cosmetic effects of the minor Plaintiff’s scars will affect her future life or theoretical career as a model, actress or other jobs is very individualized and highly speculative. …… the Defendants say that there should be no award on the minor Plaintiff’s loss of earning capacity.”
3. But at the trial before me, Ms Yiu suggested that a lump sum of HK$50,000.00 should be awarded under this head. She again relied on *Ho Tze Ho* (supra). As recognised by the learned judge in that case, it is difficult to ascertain what sort of work a minor child will be engaged in when he grows up and what sort of job that requires the baring of the foot. The risk of future loss of employment is minimal but no doubt some professions (eg fashion modelling) that may require exposure of the foot may be closed to the Plaintiff. In *Ho Tze Ho* (supra), the learned judge in assessing an award for loss of earning capacity was affected by the residual disabilities suffered by the minor child as set out in paragraph 85 above. Such considerations are absent in the present case and I consider a lump sum award of HK$30,000.00 reasonable in the circumstances.

*(5) Pre-trial loss of earnings/care and attention and loss of mandatory provident fund contribution suffered by the Plaintiff’s father*

1. In the Plaintiff’s Revised Statement of Damages, it was suggested that the Plaintiff’s father (who used to work as a cook) quitted his job to take care of the Plaintiff after she was discharged from the Hospital. Although there is documentary evidence before me of the previous earnings of the Plaintiff’s father and the previous mandatory fund contributions made by his employer, the 1st and 2nd Defendants did not call either the Plaintiff or the Plaintiff’s father as witness. There is simply no evidence before me that the Plaintiff’s father quitted his job to take care of the Plaintiff as a result of the Accident. I disallow these heads of claim.

*(6) Special damages*

1. According to the available Hospital receipts, the Plaintiff incurred HK$544.00 (30th January to 14th February 2002) and HK$136.00 (15th to 18th February 2002) for hospitalisation charges, HK$330.00 (20th to 28th February 2002) for home visits, and HK$88.00 (6th and 21st March 2002) for follow-up treatments. The total medical expenses were HK$1,098.00.
2. For travelling expenses, the 1st and 2nd Defendants relied on taxi fare receipts for the period from 2nd February to 21st March 2002 in the sum of HK$643.90. The Plaintiff was still hospitalised for the period up to 19th February 2002, but I accept that given her young age it is reasonable and appropriate for her family/relatives to visit her at the Hospital. For the taxi fares to and from the Hospital for follow-up treatment after the Plaintiff was discharged, they were reasonable in light of her leg injury.
3. Ms Yiu referred to the claim for tonic food in the Plaintiff’s Revised Statement of Damages, but there is simply no evidence before me that the Plaintiff had taken any tonic food. I disallow this head of claim.

*(7) Interest*

1. Ms Yiu submitted that (a) interest should be calculated on general damages at 2% pa from the date of writ (ie 31st March 2004) to the notional date of trial, say, 19th June 2006, and (b) interest on special damages at half judgment rate (ie 5.355% pa) from the date of the Accident (ie 30th January 2002) to the notional date of trial, say, 19th June 2006.
2. I see no reason why interest should be calculated up to the notional date of trial when the main proceedings between the Plaintiff and the 1st and 2nd Defendants were actually compromised by the Order of H H Judge H C Wong on 10th June 2006. Interest should at best be calculated up to that date. In the circumstances, interest on general damages is HK$260,000.00 x 2% pa x (26.33 months ÷ 12) = HK$11,409.67 and interest on special damages is (HK$1,098.00 + HK$643.90) x 5.355% pa x (52.33 months ÷ 12) = HK$406.77.

*V. Conclusion*

1. The total assessed award for the Plaintiff’s loss and damages is as follows :

|  |  |  |
| --- | --- | --- |
|  |  | HK$ |
| (a) | Pain, suffering and loss of amenities | 260,000.00 |
| (b) | Loss of earning capacity | 30,000.00 |
| (c) | Special damages | 1,741.90 |
| (d) | Interest on general damages | 11,409.67 |
| (e) | Interest on special damages | 406.77 |
|  | Total | 303,558.34 |

1. In the circumstances, the Settlement Sum of HK$300,000.00 is reasonable. Pursuant to the aforesaid findings on the apportionment of liability, I find that the 1st Third Party is liable to indemnify the 1st and 2nd Defendants for 30% of the Settlement Sum, 30% of the amount the 1st and 2nd Defendants had to pay the Plaintiff in respect of the Costs Provision and 30% of the 1st and 2nd Defendants’ own costs in the main proceedings between them and the Plaintiff (to be taxed if not agreed). I therefore give judgment in favour of the 1st and 2nd Defendants against the 1st Third Party for the aforesaid sums.
2. There is no reason why costs should not follow event. I therefore grant a costs order *nisi* that costs of the 1st and 2nd Defendants’ third party proceedings against the 1st Third Party (including all costs reserved if any) be paid by 1st Third Party to the 1st and 2nd Defendants to be taxed if not agreed. The case is a straightforward one and I do not see the need for counsel’s involvement. There shall be no certificate for counsel.

(Marlene Ng)

District Court Judge

Ms Eliza Yiu instructed by the Department of Justice for the 1st and 2nd Defendants.

The 1st Third Party in person and absent.