#### DCPI692/2004

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 692 OF 2004

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| BETWEEN | MOK KA YIN (a minor) by SEI WAI LAN (his mother and next friend) | Plaintiff |
|  | and |  |
|  | TSANG HING ON, the administrator of TSANG HIN KAU (deceased) | Defendant |

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##### Coram: Her Honour District Judge Marlene Ng in Court

Dates of Hearing: 16th and 17th April, 2007

Date of Handing Down Judgment: 12th June, 2007

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JUDGMENT

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###### I. Introduction

1. The Plaintiff is 15 years old. On 3rd March 2003, he was a 10 year-old Primary Five student of St Joseph’s Anglo-Chinese Primary School (“St Joseph’s”) afternoon class.
2. O King Road (“Road”) was a two-lane two-way road leading to and from Ocean Shores with a speed limit of 50kph. The Lam Tin bound lane ran uphill before a downhill stretch (“Down Slope”) ending in a big right bend (“Right Bend”) near to lamppost TK023 (“Lamppost”). On 3rd March 2003 at about 11:50am, the Plaintiff together with five other St Joseph’s (afternoon class) students were on board a school private light bus bearing registration no.DK8577 (“Nanny Van”) driven by Mr Tsang Hin Kau (“Deceased”) along the Road towards Lam Tin. When the Nanny Van reached the vicinity of the Lamppost, it ran out of control and mounted onto the nearside pavement. Its offside front rammed into the Lamppost and its body swung back to hit the wall on the nearside pavement (“Accident”). The Plaintiff suffered personal injuries and the Deceased was fatally injured.

*II. Plaintiff’s case*

1. The Plaintiff claimed the Accident was caused by the Deceased’s negligence and breach of statutory duty, and relied on the doctrine of *res ipsa loquitur*.
2. The Plaintiff claimed the Deceased’s driving fell below the standard of a reasonable or prudent driver in that he *inter alia* drove too fast in the circumstances and without due care and attention, failed to keep proper/adequate lookout or heed the Road conditions, failed to control the Nanny Van and negotiate the Right Bend properly and/or failed to take action to avoid the collision or stop the Nanny Van before such collision. The Plaintiff also claimed the Accident was caused by the Deceased’s breach of regulation 7A(3)(b) of the Road Traffic (Safety Equipment) Regulations Cap.374F (“Regulations”).
3. The Plaintiff no longer relied on any breach by the Deceased of (a) the common duty of care in failing to provide suitable seat belt for the Plaintiff and/or to ensure he wore seat belt whilst on board the Nanny Van, or (b) the statutory duty under regulation 7A(1) of the Regulations.

*III. Defendant’s defence*

1. The Defendant (the Deceased’s son) claimed the Deceased was disabled by a sudden heart attack and/or loss of consciousness immediately before the Accident, which was the result of an involuntary act or act of God. The Defendant abandoned reliance on the defence of automatism.

*IV. Quantum*

1. On the first day of trial, I approved the agreed quantum of damages (inclusive of interest) of HK$348,000.00 subject to the contest on liability.

*V. Witnesses*

1. The Plaintiff, the Defendant and the Deceased’s son-in-law and business partner Mr Shek Chi Hung (“Mr Shek”) gave evidence. They all gave statements to the police in March 2003.
2. In his final submissions, Mr Wong, counsel for the Plaintiff, emphasised that various aspects of the Plaintiff’s direct evidence was not contradicted or challenged by countervailing evidence from the Defendant. But witnesses’ credibility does not turn on the fortuity of having eyewitnesses at the trial. In assessing witnesses’ credibility, the court should consider the totality of their evidence against the documentary evidence, inferences based on inherent improbabilities and/or undisputed facts (see the principles set out by Chung J at paragraph 12 of *Star Glory Investment Ltd v Kai Tua (H.K.) Technology Ltd & ors* HCA3523/2002 (unreported, 13th August 2005)).
3. Notwithstanding their close familial relationship with the Deceased, I find the Defendant and Mr Shek transparently honest and reliable. There is no reason to doubt the Defendant’s evidence about the Deceased’s daily life. Mr Shek’s evidence was spontaneous, straightforward and cogent. He was also honest about the Nanny Van not having any licence for carrying kindergarten students at the material time (see paragraph 25 below).
4. I remind myself the Plaintiff is 15 years old at the trial and only 10 at the time of the Accident. Even so, he appears to be a smart young man quick on the uptake as to the purport of questions put to him at trial. As seen below, I am not persuaded certain aspects of his evidence are reliable.

*VI. Alleged breach of statutory duty*

1. Section 7A(3)(b) of the Regulations provides *inter alia* that :

“no person shall drive a private light bus …… when there is *in the specified passenger’s seat or middle front seat* of the private light bus …… a passenger over 2 years of age but under the age of 15 years who is not securely fastened to his seat by means of a seat belt, if any, provided for his seat ……” (my emphasis)

1. There is no dispute that (a) the Nanny Van was a light bus within the meaning of the Regulations, (b) there was no specified passenger’s seat or middle front seat on the Nanny Van, and (c) the Plaintiff did not fasten any seat belt whilst on board the Nanny Van on the day of the Accident. Since the Plaintiff did not sit *in* any specified passenger’s seat or middle front seat, the situation was outside the remit of section 7A(3)(b) of the Regulations. There was no breach of statutory duty on the part of the Deceased.

*VII. Res ipsa loquitur*

1. For the maxim *res ipsa loquitur* to apply there must be reasonable evidence of negligence. But where the thing is shown to be under the management of the defendant and the accident is such that in the ordinary course of things does not happen if those who have the management use proper care, it affords reasonable evidence, in the absence of explanation by the defendant, that the accident arose from want of care (see *Scott v The London and St Katherine Docks Company* (1865) 3 H&C 596, 667).
2. Ms Lee, counsel for the Defendant, conceded the maxim was applicable here. In the normal course of things, a vehicle driven with proper care and attention would not have mounted onto the pavement, rammed into a lamppost and hit a wall.
3. But the convenient label of *res ipsa loquitur* represents a rule of evidence and states no principle of law. In *Ng Chun-pui & ors v Lee Chuen-tat & anor* [1988] 2 HKLR 425, 427, the Privy Council held as follows :

“…… If the defendant adduces no evidence there is nothing to rebut the inference of negligence and the plaintiff will have proved his case. But if the defendant does adduce evidence that evidence must be evaluated to see if it is reasonable to draw the inference of negligence from the mere fact of the accident. Loosely speaking this may be referred to as a burden on the defendant to show he was not negligent, but that only means that faced with a *prima facie* case of negligence the defendant will be found negligent unless he produces evidence that is capable of rebutting the *prima facie* case. …… it is the duty of the judge to examine all the evidence at the end of the case and decide whether on the facts he finds to have been proved and on the inferences he is prepared to draw he is satisfied that negligence has been established. ……”

1. *Clerk & Lindsell on Torts* 19th ed (2006) para.8-155 at pp.499 and *Ng Chun-pui*’s case (supra) emphasise that the burden of proof does not shift to the defendant and remains at the end of the case as it was at the beginning upon the plaintiff to prove that his injury was caused by the negligence of the defendant.
2. So if the defendant proves an equally plausible explanation for the accident or shows a way in which the accident may have occurred without negligence, the cogency of the fact of the accident itself disappears and the claimant will have to establish his case by positive evidence which he is unlikely to be able to do. As to what amounts to a plausible explanation, Brooke LJ in *Widdowson v Newgate Meat Corporation & ors* The Times 4th December 1997 (Lexis-Nexis electronic transcript) said as follows :

“…… *a plausible explanation is what the law requires if a defendant is to escape liability in such circumstances* (…… In Clerk & Lindsell on Torts (17 edition) para 7-180, the editor observes that *the defendant cannot hope to redress the balance merely by putting up theoretical possibilities: “his assertion must have some colour of probability about it”*)” (my emphasis)

1. In summary, the relevance of the doctrine of *res ipsa loquitur* is as follows (see also *John Ratcliffe v Plymouth & Torbay Health Authority & anor* [1998] EWCA Civ 2000) :
2. The maxim applies where the plaintiff relies on the “res” (ie the thing itself) to raise the inference of negligence.
3. The position at the close of the plaintiff’s case may be that the judge will be entitled to infer negligence on the defendant’s part unless the defendant adduces evidence which discharges this inference.
4. This evidence may be to the effect that there is a plausible explanation (not a theoretically or remotely possible one) of what may have happened which does not connote any negligence on the defendant’s part, but the defendant does not have to prove that his explanation is more likely to be correct than any other. If the plaintiff has no other evidence of negligence to rely on, his claim will then fail.
5. Alternatively, the defendant’s evidence may satisfy the judge on the balance of probabilities that he did exercise proper care. If the judge makes such finding, the *prima facie* inference of negligence is rebutted and the plaintiff’s claim will fail.
6. With these principles in mind, I now turn to the facts of the present case.

*VIII. Findings of fact : Accident*

*(a) Deceased’s occupation*

1. The Deceased was a retired person. He together with Mr Shek and Mr Fong Ho teamed up to provide school private light bus service for students studying at St Joseph’s, Chun Tok Primary School (“Chun Kok”), Man Kiu Association Primary School (“Man Kiu”) and Kwun Tong Community Centre Kindergarten (“KT Kindergarten”). Each of them drove a school private light bus.
2. The Defendant was about 59 years old when he started to drive the Nanny Van in/about August 2000. He worked 5½ days a week and about 6½ hours per day. I accept Mr Shek’s evidence that the Deceased did not complain the work was too heavy. I find the Deceased did not have work pressure.
3. The Deceased also had no financial pressure. He lent HK$100,000.00 to Mr Shek to purchase the Nanny Van. He earned about HK$3,000.00 a month for his own personal use.

*(b) School private light bus service*

1. Mr Shek managed the school private light bus service. The three school buses including the Nanny Van were registered in his name. He applied for the relevant licences and was responsible for vehicle repair and maintenance. He planned the school bus routes and made pick-up and drop-off arrangements with the parents of student passengers. He was responsible for telephoning the parents if student passengers refused to wear seat belts. On the other hand, the Deceased was essentially a school private light bus driver.
2. The passenger service licence for the Nanny Van issued on 24th March 2003 did not authorise Mr Shek to operate a school private light bus service for carriage ofstudents to and from KT Kindergarten, but I accept the Deceased was unaware of such restriction since Mr Shek made the arrangements. Such breach of licence had no bearing on the Accident.

*(c) Bus nanny*

1. Mr Shek employed Madam Shek Siu Fong (“Madam Shek”) as bus nanny for the Nanny Van. But he would not employ any substitute bus nanny on her off days. Kindergarten student passengers had to be accompanied by an adult, so the Deceased’s wife (“Widow”) would act as bus nanny on such occasions.
2. The Plaintiff said quite often there was no bus nanny on board the Nanny Van. But this was not mentioned in his witness statement, supplemental witness statement or statement to the police, and was contradicted by Tsang Chun Yip’s (a fellow student passenger) statement to the police that a bus nanny would normally accompany them. I do not accept the Plaintiff’s evidence. In any event, it was not mandatory to have a bus nanny to accompany primary school student passengers, so her absence at the time of the Accident was immaterial to the question of liability.

*(d) Deceased’s usual work schedule*

1. The Deceased lived with the Widow and the Defendant at Kai Yip Estate. At about 6:00am he would walk 10 minutes to Ping Shek to collect the Nanny Van. He would pick up two students at 6:35am and let them off at Chun Tok. Then he would pick up eight students in Lam Tin and Yau Tong and let them off at St Joseph’s (morning class) before 7:15am. At 7:45am he would collect six students in Sau Mau Ping and Ngau Tau Kok and arrive at Man Kiu (whole-day class) at 8:05am. After that, he would pick up four to five kindergarten students in Kwun Tong and then meet Mr Shek at the carpark outside Kwun Tong Community Centre at about 8:30am. Mr Shek would escort those kindergarten students to KT Kindergarten.
2. The Deceased would drive the Nanny Van back to Ping Shek carpark and return home after 9:00am to rest until about 10:30am. At about 11:00am, the Deceased would again collect the Nanny Van. From about 11:25am-11:30am onwards, he would pick up eight St Joseph’s (afternoon class) students and arrive at the school at about 12:15pm-12:20pm. St Joseph’s required the Nanny Van to arrive before 12:35pm.
3. The Deceased would park the Nanny Van at St Joseph’s and rest until 12:45am. When St Joseph’s morning class ended, the student passengers would board the Nanny Van by 12:55pm. The Deceased would drop them off in Lam Tin on a 35-minute trip ending at about 1:25pm-1:30pm.
4. The Deceased would arrive at Man Kiu at about 1:45pm. After parking the Nanny Van on the street, he would have lunch and rest until school ended at 3:15pm at Man Kiu. After dropping off Man Kiu’s student passengers, the Deceased would pick up student passengers from KT Kindergarten at about 4:30pm and drop them off. He would return home at about 7:00pm.
5. I disagree the Deceased’s morning schedule was unreasonably busy and tight. There was time to rest between 9:00am and 10:30am. Although the schools required the school bus service to be punctual, there was insufficient evidence to suggest the morning schedule put such undue pressure on the Deceased that he had to drive at high speed. Further, according to the morning schedule, the Nanny Van would usually reach St Joseph’s 15-20 minutes before the time required by the school. There was no reason for the Deceased to drive at high speed to pick up student passengers for St Joseph’s afternoon class.
6. Mr Shek also said that after the student passengers for the coming school term were confirmed at about the end of July each year, he would plan the Nanny Van’s school bus routes, and then he and the Deceased would test drive them to work out the pick-up or drop-off time for each student passenger. I find on balance they would have factored sufficient driving time for such routes for the Nanny Van.

*(e) Accident*

1. On the day of the Accident, the Defendant saw the Deceased leave for work at about 6:00am. At about 8:35am, Mr Shek met the Deceased at the carpark outside Kwun Tong Community Centre and escorted the kindergarten student passengers to KT Kindergarten. The Deceased chatted with Mr Shek and said one of the students was very well-behaved that day.
2. The Widow told the Defendant that the Deceased returned home at about 9:00am to rest and have some food. The Deceased self-administered blood test (see paragraph 60 below), which showed normal result. But the Widow was unsure whether the Deceased took his medication (see paragraph 60 below) before he left home later in the morning.
3. The Deceased drove the Nanny Van to pick up the St Joseph’s (afternoon class) student passengers. There was no bus nanny on board because Madam Shek was on sick leave. Between 11:30am and the time of the Accident, the Deceased picked up six students (including the Plaintiff). The Plaintiff sat on the offside fourth row seat near to the central aisle behind the driver. The other five students occupied the following seats : (a) the two offside second row seats behind the driver (Tsang Chun Yip and Clinton Chang), (b) the offside fourth row seat near to the window next to the Plaintiff behind the driver (Wong Kwan Lun), (c) the seat closest to the door on the nearside bench which had no seat belt (Fung Sin Wing), and (d) the nearside rear seat which had no seat belt (Lui Kei Ching).
4. The Deceased then drove along the Road towards Lam Tin with a view to pick up some more students. The Nanny Van came down the Down Slope. It did not swerve, brake or decelerate (as confirmed by Fung Sin Wing, the Plaintiff and Mr Chan Tsz Wiu Andy (“Mr Chan”), a contractor carrying out construction work at the crest of the Down Slope near to lamppost TK030 (“Crest”)) despite the Right Bend. Then the Accident happened.
5. Some student passengers (including the Plaintiff) were thrown forward and suffered personal injuries. The Deceased was trapped in the driver’s seat. He could not move and had no response. The Plaintiff and other injured students were eventually sent to hospital.

*IX. Findings of fact : seat belts*

1. In light of the matters in paragraph 5 above and the conclusion in paragraph 13 above, the wearing of seat belt or otherwise is no longer a live issue. However, both counsel submitted the relevant evidence was reflective of witnesses’ credibility, so I will deal with this briefly.
2. At the material time, only one passenger, namely, Primary One student Wong Kwan Lun, wore a seat belt. The Plaintiff claimed that Wong Kwan Lun being small in size could fasten his seat belt without adjusting its length (which had been pre-adjusted to fit kindergarten student). The Plaintiff could not remember whether at that time he had been taught to wear a passenger seat belt, but he knew how to adjust its length. Even so, he did not fasten his seat belt because it did not fit him. The Plaintiff claimed that the seat belts of the Nanny Van had been pre-adjusted to fit kindergarten students. He further claimed that far from encouraging primary school student passengers to fasten seat belts, the Deceased scolded them and did not allow them to adjust the length of the seat belts. He told them not to use the pre-adjusted seat belts as it would be too troublesome to re-adjust their length for kindergarten student passengers afterwards. But the Plaintiff could not remember when the Deceased said this.
3. In my view, the Plaintiff’s explanation did not have a convincing ring. First, the passenger seats of the Nanny Van were originally not equipped with seat belts since they were not mandatory. In about August 2002, Mr Shek installed two-pointed seat belts for 10 out of 16 passenger seats (a) to provide better safety for the student passengers and (b) to enhance competitiveness in the market for school private light bus service. Given such intentions, there was no plausible reason for Mr Shek and in turn the Deceased to prohibit use of the seat belts.
4. Secondly, there is no sensible reason why the youngest primary school student passenger Wong Kwan Lun would dare disobey the Deceased’s prohibition against using seat belts when more senior primary school student passengers (such as the Plaintiff) did not. Although the Plaintiff said Wong Kwan Lun did not have to adjust the length of his seat belt, it still does not explain why he would defy the Deceased’s instructions.
5. Thirdly, the Nanny Van only carried four to five kindergarten student passengers and a bus nanny (whether Madam Shek or the Widow) would always be on hand to fasten their seat belts. So it would not have been a problem to adjust the length of the seat belts for a few kindergarten student passengers.
6. Interestingly, the Plaintiff never complained to his mother that he was prohibited from using seat belts on board the Nanny Van although he told his mother the Deceased drove at a fast speed. No satisfactory explanation was given.
7. On balance I prefer Mr Shek’s evidence that after the seat belts were installed, the driver and bus nanny would teach every new primary school student passenger how to use and to adjust the length of the seat belt, and would encourage them to wear seat belts. Whenever Mr Shek acted as substitute bus nanny on board the Nanny Van (which was not often and which only happened when the student passengers of his own school bus had a day off school), he would also encourage the primary school student passengers to fasten seat belts.
8. I accept Mr Shek did not instruct the Deceased (a) to only allow kindergarten student passengers wear seat belts, (b) to pre-adjust the length of the seat belts to fit kindergarten student passengers only and/or (b) to prohibit primary school student passengers from using the seat belts and/or adjusting their length.
9. Mr Shek said (and I accept) some primary school student passengers, especially the senior ones, did not like wearing (and would not wear) seat belts and the junior ones would emulate them. Mr Shek had personal experience of watching primary school student passengers unfastening seat belts after being teased by others. He said the driver would continue to drive even if any primary school student passenger failed to wear seat belt. But he asked the Deceased to pay attention to and give him the names of those primary school student passengers who refused to fasten seat belts, and he would telephone their parents to urge them to teach their children to fasten seat belts. Mr Shek frankly admitted he might not have telephoned the parents of all such student passengers.
10. I see nothing of concern in Mr Shek’s approach. It was not mandatory to install or wear seat belts or even to have a bus nanny on board the Nanny Van at the material time. In my view, it was not negligent for the Deceased to continue to drive when not all primary school student passengers had fastened their seat belts. It would be too onerous for the Deceased to stop the Nanny Van, alight from his driver’s seat and go to the passenger compartment to help the primary school student passengers fasten seat belts before continuing to drive.
11. Further, Mr Shek could not be faulted for teaching, encouraging and expecting the primary school student passengers (in contra-distinction to the younger kindergarten student passengers) to fasten seat belts themselves. He carefully buttressed such arrangements by pleas to parents to teach their children to wear set belts. His frank admission that he might not have telephoned the parents of all student passengers who refused to wear seat belts was not reflective of the Deceased’s negligence. I disagree with Mr Wong’s submission that the Deceased tried to shift the blame on the Plaintiff by his own wrong.
12. In my view, the above assessment of evidence does not aid the Plaintiff’s case, but lends credibility to Mr Shek’s evidence.

*X. Alleged negligence of the Deceased*

*(a) Law*

1. As stated in paragraph 6 above, the Defendant claimed the Deceased was disabled by a sudden heart attack and/or loss of consciousness immediately before the Accident.
2. In *Mansfield v Weetabix Ltd* [1997] PIQR 526, a van driven by the defendant left the road, crashed into a shop and injured the plaintiff. At the time of the accident, although the defendant retained a degree of control over his limbs, his ability to drive properly was impaired due to hypoglycaemia (ie excessive low blood concentration) of which he was unaware. The English Court of Appeal held that a driver who became unable to control a vehicle would not be liable for damages caused by his loss of control if he was unaware of the disabling condition (whether sudden or gradual) from which he was suffering. Insofar as *Roberts v Ramsbottom* [1980] 1 WLR 823 and *Attorney General’s Reference (No.2 of 1992)* [1994] QB 91 said otherwise, they were overruled (see p.528 and *Clerk & Lindsell on Torts* (supra at para.5-59 at pp.285-286)).
3. To rebut the “res” raised by the circumstances of the Accident, the Defendant had to show *inter alia* :
4. a plausible case that at the time of the Accident the Deceased was suffering from a sudden heart attack and/or loss of consciousness that impaired his ability to drive;
5. he was unaware of such disabling condition.
6. I disagree with Mr Wong’s submission that the Defendant had to prove on balance of probabilities that no fault of the Deceased was involved on the basis of his pleaded case of sudden heart attack and/or loss of consciousness before he could rebut the inference of negligence arising from the “res”. The burden of proof did not shift to the Defendant (see paragraph 17 above). Further, to rebut the “res”, all that was required was for the Defendant to show an equally plausible case of sudden heart attack and/or loss of consciousness. He did not have to prove that such explanation was more likely to be correct than any other (see paragraph 19(c) above). I refer to the legal principles set out in paragraphs 14-19 above.

*(b) Unfit to drive*

1. I find the Defendant has provided plausible explanation that the Deceased was unfit to drive due to his medical condition which resulted in loss of or an impaired level of consciousness.

*(1) Deceased’s health prior to the Accident*

1. The Deceased led a regular life. He went to bed and woke up early, and in his leisure time he would take tea, go shopping and hang out with friends. He had no particular hobby and did not particularly exercise, but he did not have any drinking habit. The Deceased was a smoker for over forty years, but quitted smoking about six months (Defendant’s witness statement) or three months (Defendant’s statement to the police) before his death.
2. The Deceased’s hearing and eyesight were good. He had never been hospitalised. Mr Shek’s and the Defendant’s impression was that the Deceased all along was in good mental health and condition. Since the Deceased started to drive the Nanny Van, he never asked for sick leave.
3. On 22nd December 2002, in view of the Deceased’s age (ie about 61 years old), his family arranged a medical check up (including an assessment for diabetic complications) for him at Qualigenics Diabetes Centre (“QDC”), Prince of Wales Hospital. On 3rd January 2003, Mr Shek accompanied the Deceased to obtain the report (“QDC Report”). The Deceased’s electrocardiogram showed no abnormality, but he had mild diabetes with reasonable glycaemic control.
4. Dr Peter Tong (“Dr Tong”) of QDC explained it was important for diabetic patients to undergo complication assessment because they generally had more cardiovascular risk factors that would lead to coronary heart disease. Such risk factors should be identified and dealt with accordingly.
5. Dr Tong told the Deceased he had to take medication regularly and self-administer blood test. Gliclazide and metformin were prescribed for treatment and control of his diabetes. Lipid lowering agent was started for hyperlipidaemia, and anti-hypertensive medication was prescribed for hypertension. Advice on cessation of smoking or cutting down the number of cigarettes smoked was given to the Deceased since smoking would in general further exaggerate the process of atherosclerosis, which was common amongst diabetic patients. Advice on lifestyle modification and on compliance with drug treatment was also given to the Deceased to improve control of his diabetic disease.
6. The QDC Report remarked there were no microvascular complications. Dr Tong and QDC took the view there was no reason to suggest the Deceased was not fit for driving or any advice against driving was deemed necessary.
7. After issue of the QDC Report, the Deceased’s family bought equipment for him to self-administer blood test. To the Defendant’s knowledge, the Deceased collected his medication from QDC, took his medication and self-administered blood test regularly.
8. The QDC Report recommended repeat complication screening in one year. The Deceased died before his next scheduled appointment with QDC on 1st April 2003.

*(2) No suicidal tendency*

1. The Deceased was an optimistic person. He did not contract any enmity or have any recent disputes with others. I am persuaded he did not have any suicidal tendency at the time of the Accident.
2. Medically, the Deceased’s diabetes was mild and under control by regular medication and monitoring. He followed doctor’s recommendation and quitted smoking. His family was caring and supportive – they arranged his medical check up at QDC and bought equipment for him to self-administer blood test.
3. Financially, the Deceased had no pressure (see paragraph 23 above). He was retired and did not owe any debts. His income from driving the Nanny Van was his to spend, and he had spare money to lend to Mr Shek. I have also found in paragraph 22 above that his work did not impose any pressure on him.

*(3) Circumstances of the Accident*

1. Since the Deceased did not have any suicidal tendency, it is difficult to reconcile the following objective circumstances of the Accident with the Plaintiff’s allegation that the Deceased was fit to drive and had full control of the Nanny Van :
2. The Nanny Van only suffered accident damage and mechanical defect was ruled out.
3. There were no extrinsic factors that would have interfered with the Deceased’s driving or caused the collision.
4. The Nanny Van left two tyre prints behind it on the kerbside. There were no skid or brake marks found at the scene, which tallied with the observations by some student passengers and Mr Chan that the Nanny Van came down the Down Slope with no deceleration, change of direction and/or swerving/avoidance action.
5. The offside front of the Nanny Van (ie the driver’s seat) took the first blow of the collision by ramming into the Lamppost. The Deceased was killed almost immediately as evidenced by the fact that he had no pulse or breathing at the scene and was certified dead before arrival at the hospital.
6. The photographs showed the Right Bend to be a big wide bend visible after passing the Crest. The Down Slope was a straight stretch that had a visibility of 100m. The police sketch showed there was a right bend sign and a no overtaking sign on the nearside pavement about 88m and 51m respectively before the location of the Accident. In my view, a driver coming down the Down Slope who was mentally alert, in control of his vehicle and not wishful of killing himself could not have missed the existence of the Right Bend or failed to react in some way. This was especially so for the Deceased who drove along the Down Slope and Right Bend every workday.
7. Mr Wong submitted that the matters discussed in paragraphs 67-68 above speak of negligent driving that showed scant regard for the Road conditions. However, as explained in paragraph 16 above, the convenient label of *res ipsa loquitur* represents a rule of evidence and states no principle of law. “[The claimant] merely proves a result [ie a set of circumstances that calls for rebuttal from the defendant], not any particular act or omission producing the result” (see *Clerk & Lindsell on Torts* (supra at para.8-151 at pp.496-497)). In my view, it is inconceivable that the Deceased if he had his full faculties and was in control of the Nanny Van to have directly ploughed himself into the Lamppost without making any attempt to save himself, bearing in mind also that he was an experienced driver responsible for a busload of schoolchildren.
8. The above analysis and the factual matters discussed below lend weight to the Defendant’s explanation that some medical condition must have impaired the Deceased’s ability to drive at the material time. I next turn to analysis of the Deceased’s posture shortly before the Accident, which also supports this conclusion.

*(4) Posture of the Deceased*

1. Of the six student passengers on board the Nanny Van at the time of the Accident, Tsang Chun Yip and Wong Kwan Lun did not pay attention to the Deceased. Clinton Chang said the Deceased was driving in the usual manner. Lui Kei Ching noted the Deceased was facing the front as he drove. Fung Sin Wing said she felt the speed accelerate as the Nanny Van went down the Down Slope, but she did not pay particular attention to the Deceased (who had his back to her) and only saw him facing the front with both hands on the steering wheel.
2. The Plaintiff in his statement to the police said as follows :

“…… 我只覺得我地架車係駛了到撞車之前嘅斜路頂開始落斜時就開始加快，比平時快小小，我見當時司機曾叔叔正常咁坐係司機位揸車，佢面向前，我只睇到佢背面，而*佢係落斜時上身只小小傾前*，但頭仍正常面向前揸車，而*撞車之前嘅一刻我望司機曾叔叔就見佢伏咗係軚盤上*，跟住就撞車 ……” (my emphasis)

1. But when the Plaintiff (who confessed to have taken a look at the Deceased but did not pay attention to him all the time) gave evidence, he said differently. He said that although he could see the motions of the Deceased’s shoulders/arms in driving the Nanny Van, he did not know the Deceased’s mental condition because the Deceased as usual sat up straight and faced the front. When the Nanny Van started to go down the Down Slope, the Deceased’s upper body had not started to bend forward (向前傾). The Plaintiff told the police officer the Deceased’s body bent forward (向前傾) just before the Accident, but the police officer wrote down “撞車之前嘅一刻我望司機曾叔叔就見佢伏咗係軚盤上”. The Plaintiff denied the Deceased slumped across the steering wheel and insisted he did not so tell the police officer.
2. The Plaintiff claimed that when he told the police officer the Deceased’s body bent forward (向前傾), the police officer asked him whether the Deceased slumped across the steering wheel (伏係軚盤上). But the Plaintiff later said the police officer did not try to clarify with him what he meant by the Deceased’s body bending forward (向前傾).
3. At one stage the Plaintiff said he did not know the difference between the Deceased’s body bending forward and slumping across the steering wheel and thought they were the same or almost the same, so he did not correct the police officer. At another stage he said he knew there was some difference between the two (“大概知道分別”), but did not realise the difference was so substantial.
4. Mr Wong submitted that bearing in mind the Plaintiff was then a 10 year-old child in a police station, his “uncontradicted” evidence at trial that he did not understand the difference between bending forward and slumping across the steering wheel was understandable.
5. However, I find the Plaintiff’s evidence in this respect inherently unreliable. First, the Plaintiff claimed he appreciated the difference between “伏係軚盤上” and “向前傾” by the time he gave evidence, namely, that the former meant the body was slumped across and touching the steering wheel, but the latter meant the body was bent forward at an angle without touching the steering wheel. However, he insisted nobody taught him such difference and there was no special reason why he came to understand the difference.
6. Secondly, the Plaintiff admitted he then knew what “趴係到” (colloquial way of saying “伏係到”) meant, but tried to brush this aside by claiming he did not know what “伏係到” meant or that “趴係到” and “伏係到” were the same.
7. Thirdly, the Plaintiff in his evidence offered another explanation for the phrase “撞車之前嘅一刻我 …… 見佢伏咗係軚盤上” found in his statement to the police which was somewhat different from the explanation in paragraphs 74-75 above, namely, he thought the police officer understood what he meant when he told the police officer the Deceased’s body bent forward (向前傾).
8. Fourthly, although the Plaintiff’s mother was with him when he gave his statement to the police, she did not point out the difference between what he said and what the police officer wrote down. If the difference between the two was apparently clear to the 15 year-old Plaintiff without being taught, it should have been obvious to his mother as well as to the police officer who took his statement in March 2003.
9. Fifthly and more importantly, the Plaintiff agreed (a) the events were fresher in his mind when he gave his statement to the police than at the trial, (b) no one forced him to tell the police officer anything he did not wish to say, and (c) he had read his statement to the police or it was read back to him and he agreed the contents were accurate without any need for amendment. Indeed, the so-called “errors” in the Plaintiff’s statement to the police was not even touched upon in his witness statement or supplemental witness statement, and was only raised when he gave evidence.
10. Sixthly, it is evident from the Plaintiff’s statement to the police that in recording what he said the police officer drew a distinction between two different postures of the Deceased by the phrases “佢落斜時上身只小小傾前” and “佢伏咗係軚盤上”. Looking at the totality of the evidence, I find the Plaintiff must have told the police officer these two different postures. There was no reason for the police officer to make them up. The Plaintiff’s evidence at the trial in this respect is unreliable.
11. On balance, I find that before reaching the Crest the Deceased sat up straight in his driver’s seat and faced the front. As the Nanny Van started to go down the Down Slope, his upper body started to bend forward. Just before the Accident the Deceased’s body was slumped across the steering wheel. Such behaviour is inconsistent with that of a driver who was fully alert and in control of the vehicle, but is consistent with the Defendant’s case that the Plaintiff suffered from and was disabled by a sudden heart attack and/or loss of consciousness immediately before the Accident. I now turn to the medical evidence.

*(5) Expert medial evidence*

1. The Defendant adduced expert medical reports from a cardiologist Dr Chen Wai-Hong (“Dr Chen”) whilst the Plaintiff relied on those of Professor C R Kumana (“Prof Kumana”), an expert in internal medicine with emphasis in clinical pharmacology and therapeutics. Prof Kumana explained he also specialised in cardiology in the course of his career and retained an interest in cardiology and cardiovascular clinical pharmacology.

*(6) Cause of death*

1. The autopsy report dated 5th March 2005 (“Autopsy Report”) prepared by Dr Cheung Ka-Wai (“Dr Cheung”) stated that the cause of death shown by the post-mortem appeared to be haemothorax (direct cause) and traumatic rupture of heart (intervening antecedent cause).
2. Both Dr Chen and Prof Kumana agreed the Deceased’s immediate cause of death was cardiac rupture, a well-recognised complication of blunt trauma to the chest. The Accident resulted in rib fracture (ie blunt chest trauma) and injury to the cardiac chamber(s) (ie cardiac rupture) causing bleeding into the pleural cavities.
3. Mr Wong submitted the Autopsy Report did not say the Deceased had any heart attack. But one must bear in mind the purpose of an autopsy was to ascertain the cause of death, and here the cause of death is clear. Dr Cheung in her letter to the Plaintiff’s solicitors dated 10th March 2006 (“Dr Cheung’s Letter”) said it was beyond the scope of the autopsy to say whether or not the Deceased actually suffered a sudden heart attack just before the Accident due to his medical condition. The Plaintiff’s expert Prof Kumana also said (and Dr Chen agreed) traumatic cardiac rupture was almost certainly the cause of death, so there was no need to invoke any other secondary mechanism such as impending heart attack.

*(7) Sudden heart attack*

1. Dr Cheung’s autopsy findings in relation to the Deceased’s pericardium, heart and blood vessels were as follows :

“…… Heart: …… Left anterior descending coronary artery showed 75% atheromatous occlusion 2 cm from the origin. Left circumflex branch was small and was mildly atheromatous. Right coronary artery showed 60% stenosis by atheroma 1 cm from the origin. Heart muscles showed no lesions other than those around the rupture site. Microscopic examination did not reveal any evidence of acute myocardial infarction. Valves unremarkable. Aorta atheromatous.”

1. Dr Cheung made clear in the Autopsy Report that the possibility of the Deceased having suffered a sudden heart attack at the time of the Accident could not be excluded :

“1. …… the heart of the deceased also showed pathological changes of coronary occlusion by atheroma, which could have resulted in an acute heart attack at any time. Because an acute heart attack might not produce pathologically identifiable changes especially during the initial several hours, the absence of recent myocardial infarct in this case did not exclude the possibility that the deceased had suffered from a sudden heart attack while he was driving the school bus.

2. Gliclazide detected in the blood at a therapeutic level was for treatment of diabetes mellitus.”

1. Dr Cheung’s Letter confirmed that the possibility of a sudden heart attack before the Accident could not be excluded as it might require the Deceased to survive at least 6-12 hours after the heart attack for recognised histological changes to develop. She further opined that the finding of high grade stenosis with atherosclerosis in the coronary arteries was *per se* well-known as capable of causing sudden heart attack at any time.
2. Prof Kumana opined that since macroscopic and microscopic examination of the heart during the post-mortem yielded no evidence of acute myocardial infarction (ie no anatomical suggestion of typical acute ischaemic heart muscle death or necrosis) and no thrombotic occlusion (ie complete blockage by a blood clot) in any of the Deceased’s coronary arteries, the Deceased *by definition* did not suffer any acute myocardial infarction. It therefore appears that his opinion was based on (a) no pathological changes to the heart and (b) no complete occlusion of the coronary arteries.
3. But in respect of (a), Prof Kumana did not address the point raised by Dr Cheung and also by Dr Chen that gross alteration of heart muscle was difficult to identify until at least 6-12 hours had elapsed following onset of heart attack (see *Brauwald’s Heart Disease* 7th ed, a textbook of cardiovascular medicine cited by Dr Chen, p.1145). Dr Chen said even with the use of special techniques, heart muscle damage could only be discerned after 2-3 hours. This meant that the Deceased’s immediate death after the Accident robbed any possible pathological evidence of heart attack. I prefer the opinion of Dr Cheung and Dr Chen that the absence of pathological changes to the Deceased’s heart did not rule out the existence of a sudden heart attack just before the Accident.
4. In respect of (b), Dr Cheung said high grade stenosis with atherosclerosis in the coronary arteries was *per se* well-known as capable of causing sudden heart attack at any time. Dr Chen also said that in view of the severe obstruction of the two coronary arteries (ie evidence of coronary heart disease), it was possible for the Deceased to have an acute heart attack with loss of consciousness prior to the Accident. He explained that profuse bleeding could still occur after a heart attack that caused death almost instantaneously.
5. Dr Chen added that the absence of clot in the coronary arteries did not rule out heart attack. He explained there was a type of heart attack that occurred without visible clot and that typically happened in the presence of severely narrowed coronary arteries as seen in the autopsy (see *Brauwald’s Heart Disease* (supra) which suggested that infarction does not necessarily require complete occlusion of the coronary artery(ies)). I prefer Dr Cheung’s and Dr Chen’s opinion that the possibility of acute heart attack existed despite the absence of thrombotic occlusion.
6. Given the autopsy findings that evidenced coronary heart disease, I accept Dr Cheung’s view that a sudden heart attack could have happened at any time and Dr Chen’s opinion that such acute heart attack before the onset of the Accident could have led to loss of consciousness. In light of the medical opinion supported by the above factual matrix, I find this a plausible explanation that had a colour of probability for the absence of control of the Nanny Van and the eventual collision.

*(8) Hypoglycaemia*

1. Both Prof Kumana and Dr Chen agreed that diabetic patients treated with glucose-lowering drugs were at risk of hypoglycaemia. At the time of the Accident, the Deceased was taking gliclazide which was a newly prescribed (ie for less than three months) oral anti-diabetic medication.
2. Prof Kumana said gliclazide could give rise to hypoglycaemia especially if the patient missed out on or ate less breakfast than usual, or vomited which he had imbibed or exercised more than usual. Both medical experts said hypoglycaemic episodes could give rise to acute reactions manifesting as excitement, acute loss of consciousness and even as a fit. Since the medication was newly prescribed, it was possible the Deceased might not have recognised the onset of early symptoms of hypoglycaemia (eg sweating, excitement, anxiety and tremor) and might not have taken avoiding action (eg taking sugar) in time.
3. Both medical experts agreed it was possible a hypoglycaemic episode might have occurred just before the Accident which caused the Deceased to lose control of and crash the Nanny Van. Based on such agreed opinion, the above factual matrix and the autopsy finding that gliclazide was detected at therapeutic level, I find it a plausible explanation that the Deceased suffered a sudden hypoglycaemic episode causing loss of or impaired level of consciousness just before the Accident.

*(9) Arrhythmia or abnormal heart rhythm*

1. According to Dr Tong of QDC, the Deceased had at least four coronary heart disease risk factors, ie diabetes, smoking, abnormal blood lipids and hypertension (high blood pressure). The post-mortem confirmed coronary artery abnormalities. Both medical experts agreed arrhythmia could occur in patients with coronary heart disease. Prof Kumana said although the Deceased might not have experienced overt cardiac symptoms (see paragraphs 111-114 below), he could well have had an episode of abnormal cardiac rhythm. Extremely fast or slow heart rates could have ensued and given rise to altered state of and/or loss of consciousness resulting in the Accident.
2. Dr Chen agreed that arrhythmias could occur in patients with coronary heart disease and were especially common in the setting of acute heart attack. One type of arrhythmia was causing half of the deaths within one hour of onset of acute heart attack. The Deceased had severe coronary artery disease evidenced by the post-mortem and it was possible acute heart attack might have occurred causing development of abnormal heart rhythm that could lead to loss of consciousness.
3. Given the above factual matrix and the agreed expert medical opinion that it was possible the Deceased suffered from arrhythmia, I accept sudden arrhythmia leading to loss of or impaired level of consciousness just before the Accident was a plausible explanation that had the colour of probability for the Deceased’s absence of control of the Nanny Van and the eventual collision.

*(10) Plaintiff’s arguments*

1. First, Mr Wong argued that the Defendant carried the evidential burden to prove his pleaded case of sudden heart attack and/or loss of consciousness immediately before the Accident on the balance of probabilities, and the Defendant failed to prove the same by cogent evidence. The medical expert opinion only identified speculative possibilities that could not be equated to medical findings. There was no pathological evidence of recent myocardial infarction and there was no mention of excessive low blood sugar concentration in the Autopsy Report. Further, the Deceased had some food when he returned home after 9:00am on the day of the Accident and he self-administered blood test with normal result.
2. I fear the above submission fell into error on the law. I need go no further than the legal principles in paragraphs 14-19 above which made clear the burden does not shift to the Defendant. To rebut the “res”, the Defendant had to (a) show an equally possible explanation for the Accident without any need to establish that such explanation was more likely to be correct than any other, or (b) even if there were no explanation, show a way in which the Accident might have occurred without negligence (see *Ludgate v Lovett* [1969] 1 WLR 1016, 1018-1019, *per* Harman LJ). It did not matter there were several plausible explanations so long as they or some of them had the colour of probability. The Defendant was not required to prove on balance how the Accident actually happened.
3. The medical experts could not pinpoint the exact medical condition that caused the Accident (Prof Kumana) or the relative likelihood of the aforesaid medical conditions that might have happened to the Deceased (Dr Chen). But despite disagreement over whether the Deceased might have suffered acute heart attack, they both agreed it was possible the Deceased experienced hypoglycaemic reaction or abnormal cardiac rhythm.
4. I disagree the medical reasons offered by the experts were merely theoretical possibilities. Here, both medical experts had to deal with medical possibility rather than medical finding of acute heart attack because the Deceased’s immediate death destroyed any opportunity to acquire relevant pathological evidence. In light of Dr Cheung’s and Dr Chen’s opinion which I have accepted (see paragraph 95 above), I am unable to attach any great weight to the absence of morphological evidence of any heart attack. Further, it is necessary to consider all relevant facts and circumstances instead of just this factor in determining whether the “res” had been displaced.
5. In my view, given the autopsy findings of severe occlusion of coronary arteries, coronary heart disease and gliclizade taken for therapeutic purpose as well as the factual matrix discussed above, the Defendant’s medical conditions strongly supported the contention that the explanations proffered by the medical experts were plausible and/or had the colour of probability.
6. I am also unable to place substantial weight on the fact that excessive low blood sugar concentration was not mentioned in the Autopsy Report. There is no medical evidence before me it was medically possible for excessive low blood sugar concentration to be ascertained or that Dr Cheung looked for the same at the post-mortem. After all, the cause of death was clear in this case (see paragraphs 85-87 above). As Prof Kumana said, there was no reason to invoke other secondary mechanism for identifying the cause of death. In any event, gliclizade was found in the Deceased’s blood at therapeutic level during the autopsy. More importantly, neither Prof Kumana nor Dr Chen (both of whom had reviewed the relevant medical background of the Deceased) suggested it was impossible for the Deceased to have had a hypoglycaemic episode; on the contrary, they agreed it was a possibility.
7. Secondly, Mr Wong criticised Dr Chen’s expert report for starting off with an assumption that the Deceased apparently had loss of consciousness before onset of the Accident, then going on to look for a medical reason to justify the assumption and eventually coming up with the possibilities of heart attack and loss of consciousness. Mr Wong submitted there was no factual basis for such assumption and “even Dr. Chen could not tell what happened to the Deceased, namely hypoglycaemia, heart attack or abnormal heart rhythm …… Dr. Chen’s said opinion is no more than mere speculation.”
8. Again, such argument fell into error on the law and I repeat paragraph 103 above. In fact Dr Chen came to his view “[from] all the available evidence” after he had “gone through the documents” provided to him. From the primary documents (both medical and factual) that would have been put to both medical experts, the Deceased’s behaviour (if he were mentally alert and in control of the Nanny Van at the time of the Accident) would have been unreasonable and inexplicable (see paragraphs 67-83 above). There was no apparent effort to follow the Right Bend, brake or take any avoidance action. I find Dr Chen approached the primary medical and factual matters with good common sense, and it is not correct to say he premised his opinion on a hypothetical assumption. Instead, he explored the medical issues and came to a firm opinion (seconded by Prof Kumana) *inter alia* that medically speaking it was possible the Deceased had hypoglycaemic episode and/or arrhythmia which could lead to loss of or impaired level of consciousness before onset of the Accident. I reject Mr Wong’s criticism of Dr Chen’s expert opinion.

*(c) Unawareness of the disabling condition*

1. Leggatt LJ in *Mansfield*’s case (supra at p.529) said as follows :

“…… A person like [the defendant’s] very rare condition commonly does not appreciate that his ability is impaired, and he is no exception. Although by the time of trial [the defendant] was dead, and there was no direct evidence of his actual state of awareness, the judge held that he “would not have continued to drive if he had appreciated and was conscious that his ability was impaired”. Of course if he had known that it was, he would have been negligent in continuing to drive despite his knowledge of his ability. So also if he ought to have known that he was subject to a condition that rendered him unfit to drive : *Waugh v James K Allan Ltd* [1964] 2 Lloyd’s Rep. 1.”

So the Defendant has to establish on balance the Deceased did not know of his disabling condition (see *Lin Chun Yuen and anor v Kwong Kam Chuen and anor* HCPI783/2001, Seagroatt J (unreported, 29th November 2002) and *Waugh*’s case (supra)).

1. The Defendant and Mr Shek did not hear of the Deceased suffering from any heart attack, angina (cardiac pain), sudden loss of consciousness or sudden dizziness, which suggested that the Deceased’s coronary or cardiac condition was asymptomatic.
2. On the day of the Accident, the Deceased’s mental condition was good when he started work in the morning (according to the Defendant) and when he was at the carpark outside Kwun Tong Community Centre (according to Mr Shek).
3. The Deceased’s resting electrocardiogram done on 22nd December 2002 about two months prior to the Accident was within normal limits. Both medical experts and Dr Tong of QDC agreed the Deceased did not manifest overt coronary heart disease features in December 2002 and there was no reason to surmise any acute worsening of his asymptomatic heart disease between December 2002 and the date of the Accident. The medical experts also agreed that diabetic patients (such as the Deceased) had an increased risk of coronary artery or ischaemic heart disease. But when they did have such disease, they were less likely to have angina even when having heart attack due to (it was believed) neuropathy, which was a known complication of diabetes.
4. In the circumstances, I agree with the conclusion of both medical experts that there was no reason to infer the Deceased must have been aware he had heart disease at the time of the Accident or he was in a position to anticipate the possible altered state of consciousness that might have caused the Accident. In short, the Defendant was unaware of any disabling condition(s).

*(e) Rebutting the “res”*

1. In my view, even though there was no direct evidence of the Deceased’s actual state of unawareness, the Defendant has put forward plausible explanation(s) that just before the Accident the Deceased suffered from loss of or impaired level of consciousness due to sudden heart attack, hypoglycaemia and/or arrhythmia of which he had no knowledge but which impaired his ability to drive and caused the Accident. In the circumstances, the “res” is displaced. Even so, the court still has to examine all the evidence and decide whether on the facts and inferences the Plaintiff had on balance established the Deceased was negligent.

*(1) Deceased’s driving skills*

1. As far as the Defendant knew, the Deceased had over thirty years’ driving experience. When Mr Shek was teaching the Deceased the school bus routes whilst the Deceased drove a school private light bus, he found (and I accept) the Deceased drove safely and well. The bus did not lurch forward when the Deceased braked.
2. As far as Mr Shek knew, the Deceased drove the Nanny Van in a safe manner. When Mr Shek acted as substitute nanny on board the Nanny Van (see paragraph 45 above), he was able to observe the Deceased’s manner of driving and found (which I accept) that the Deceased did not drive at a fast speed. Further, the Deceased never had an accident with the Nanny Van for at least two years during which the Plaintiff was a student passenger. There was also no evidence that the parents of the Nanny Van’s student passengers ever complained of any unsafe or careless driving on the part of the Deceased.
3. Mr Shek said the Deceased drove at the speed limit of 50kph or 70kph (whichever was applicable). I disagree that this meant he drove too fast. There is no evidence that he exceeded the speed limit or that the usual road conditions required a driver to drive substantially below the speed limit. I am unable to accept the bald assertion (without consideration of the road conditions) that a school private light bus driven at the speed limit was necessarily too fast.
4. I am also not persuaded by the Plaintiff’s evidence that the Deceased generally drove quite fast, “都幾剒吓，即係好震” (ie the Nanny Van was quite shaky) and that he had actually complained about the same to his mother. Strangely, there was no evidence his mother took any action or made any complaint to Mr Shek or the Deceased. Further, although the Plaintiff stated in his statement to the police that the speed of the Nanny Van accelerated when it started to go down the Down Slope, he did not tell the police officer the speed of the Nanny Van was quite fast on the day of the Accident or generally. The Plaintiff’s mother also did not mention the same. The Plaintiff blamed the police officer for not asking him about such matter, but the same police officer took statements from other student passengers and some of their statements (see paragraph 122 below) referred to the speed of the Nanny Van. I find it improbable that the police officer did not have the matter of the Nanny Van’s speed in mind when he took the statement from the Plaintiff. I am not persuaded the Deceased usually drove quite fast, but even if he did there is no sufficient evidence that the speed was *too fast* in the circumstances on the day of the Accident (see paragraph 125 below).
5. As far as the Defendant knew, the Deceased was prosecuted only once for a traffic offence. The Defendant had an impression of the Widow telling him it was a minor traffic offence that happened ten odd years ago. However, police investigation revealed the Deceased had one “speeding” and one “careless driving” traffic conviction record in 2001 and 2002 respectively. I accept on balance the Defendant and Mr Shek were unaware of the same.
6. For present purposes, I am prepared to accept that the Deceased committed a minor traffic offence many years ago and one “speeding” and one “careless driving” traffic offence in 2001 and 2002 respectively. However, the circumstances and/or gravity of such traffic offences are unknown and there is no evidence the latter two traffic offences were associated with the Nanny Van. These offences must be viewed against the fact that the Deceased had been a driver for over thirty years. Although I have taken these traffic offences into consideration, I am unable to say they were of probative value in suggesting that the Deceased drove too fast or negligently at the time of the Accident.

*(2) Speed of the Nanny Van at the time of the Accident*

1. Tsang Chun Yip said he did not feel the Nanny Van was travelling at a fast speed before the Accident. Lui Kei Ching said the same. Fung Sin Wing said the speed was ordinary, but felt it accelerated when the Nanny Van went down the Down Slope, which was corroborated by the Plaintiff’s statement to the police that “我上車之後就如常開車去接其他同學 …… 我只覺得我地架車係駛了到撞車之前嘅斜路頂開始落斜時就開始加快，比平時快小小” (which the Plaintiff confirmed as correct).
2. The Plaintiff later said the speed of the Nanny Van was quite fast on the day of the Accident, which I on balance do not accept (see paragraph 119 above). More significantly, although the Plaintiff’s pleadings averred that the Deceased was driving too fast in the circumstances, he did not say so in his witness statement and supplemental witness statement made in 2004 and 2007 respectively. The Plaintiff said the person who took such statements from him did not ask him, but I find that improbable in light of the Plaintiff’s pleadings.
3. Mr Wong placed emphasis on Mr Chan’s statement to the police dated 18th March 2003 which stated “該車[ie the Nanny Van]比一般車嘅車速快” and after going past his position at the Crest it went straight down the Down Slope, but I approach such evidence with some caution :
4. Apart from the Plaintiff, none of the other eye-witnesses (including Mr Chan) gave *viva voce* evidence or was subject to cross-examination.
5. There might be a difference in perception because the student passengers were on board the Nanny Van and Mr Chan was an observer on the street.
6. Although Mr Chan was an adult and the student passengers on board the Nanny Van were minor children, the latter were not ignorant or insensible to differences in speed. Fung Sin Wing and the Plaintiff were able to distinguish between ordinary speed and acceleration of speed before and after the Nanny Van started to go down the Down Slope.
7. There was no evidence how long Mr Chan kept the Nanny Van under observation before it went past his position to go down the Down Slope. But the student passengers had been on board the Nanny Van for some time.
8. Although Mr Chan said the Nanny Van was faster than other vehicles, there is no cogent evidence of how much faster the Nanny Van was when compared with the other vehicles.
9. There is no evidence that the Deceased exceeded the speed limit.
10. All along the Plaintiff did not complain the Deceased drove at a fast speed (see paragraph 119 above). When he gave his statement to the police, he only said the Deceased drove in the usual manner and the Nanny Van was a little faster than usual when it started to go down the Down Slope.
11. Taking the above matters into consideration, I am not persuaded the Deceased drove the Nanny Van at a speed that was *too fast* in the circumstances, especially when the Down Slope section of the Road was straight with clear visibility and no traffic in front or behind the Nanny Van or even on the opposite carriageway. In any event, I do not accept it was “a speed faster than those of other vehicles” that caused the Accident.
12. Mr Wong suggested the Deceased might have slumped across the steering wheel in reaction to an impending collision. I find it unlikely that a seasoned driver like the Deceased would not instinctively react to an impending collision by swerving, braking or taking some other avoidance action and would instead bend forward to slump across the steering wheel to meet the impact head on.
13. I also reject Mr Wong’s submission that the Deceased was conscious and in control of the Nanny Van up to the very last moment before the collision, but the Nanny Van was travelling so fast (at the speed limit of 50kph or higher) and without deceleration that the collision was inevitable. There is no cogent evidence that the Deceased was fully conscious until the very last moment before impact.
14. I find that the Deceased drove in his usual speed that was not too fast in the circumstances, but after passing the Crest his upper body bent forward and the speed of the Nanny Van accelerated. He did not take any avoidance action and slumped across the steering wheel just before the Accident. Such factual matrix correlated well with the expert medical evidence that the Deceased could have had sudden heart attack, hypoglycaemic episode or arrhythmia leading to loss of or impaired level of conscious as the Nanny Van came down the Down Slope and such medical condition(s) could have impaired his control of Nanny Van thus causing the Accident.
15. I find it unsurprising that the student passengers thought the Deceased was driving as usual. With his back to them and his hands on the steering wheel, they might have thought he was still driving the Nanny Van as it coasted down the straight section of the Down Slope that did not require obvious manipulation of the steering wheel.

*(f) Act of God*

1. In such circumstances, the Plaintiff has failed to discharge his burden in establishing on balance that the Accident was due to the negligence of the Deceased. Indeed, on the above analysis of the evidence I am prepared to go further and find on balance that the Accident was an inevitable accident or act of God as described by Slesser LJ in *Ryan v Youngs* [1938] 1 All ER 522, 524-525 :

“…… An apparently healthy, apparently competent man, in charge of a competent machine, is suddenly struck down, and that is a matter which nobody can reasonably anticipate. Certainly it is not the case of there being upon the highway a thing in its nature so dangerous that there is a duty upon the owner to control it, because this vehicle was not in its nature dangerous, when properly driven, and there was no reason to expect that the man would not drive it properly. It is a case of a vehicle, apparently safe …… being placed upon the highway, and being made unsafe through the unforeseen death of the driver, brought about by an act of God. ……”

*XI. Conclusion*

1. The Plaintiff’s claim is therefore dismissed. There is no reason why costs should not follow event. I therefore make a costs order *nisi* that the Plaintiff do pay the Defendant’s costs of the action (including all costs reserved, if any) to be taxed if not agreed with certificate for counsel. The Plaintiff’s own costs shall be taxed in accordance with Legal Aid Regulations.

Signed

# (Marlene Ng)

District Court Judge

Representation:

Mr Joeson Wong instructed by Messrs Cheng Yeung & Co for the Plaintiff

Ms Christina Lee instructed by Messrs Philip K H Wong, Kennedy Y H Wong & Co for the Defendant