DCPI 1406/2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1406 OF 2009

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BETWEEN

YIP YUNG CHEUNG Plaintiff

and

TSIM CHI MING Defendant

\_\_\_\_\_\_\_\_\_\_\_\_

Coram: His Hon Judge Leung in court

Date of hearing: 24 August 2010

Date of judgment: 12 November 2010

**J U D G M E N T**

1. For injuries sustained in a traffic accident on 30 June 2007, **Yip**, the Plaintiff, claims damages against **Tsim**, the Defendant. The quantum is agreed between the parties, subject to the trial on liability.

**The accident**

1. At about 7:09 am on the day in question, Yip was walking along the pavement of Hang On Road (“**the Road**”), Sau Mau Ping, Kowloon. Tsim was driving a public light bus (“**the Light Bus**”) along the Road towards the junction with Luen On Street at the speed of 40 kph with no passenger on board. It was raining at the time of the accident. In fact, according to the Observatory’s record, the rainfall amount on that day reached a record high.
2. Both sides of the Road were then parked with vehicles. Yip emerged between the parked vehicles to cross the Road. In the course of that, Yip collided with the Light Bus. The collision created a slight dent at the left front of the Light Bus just above the left headlights. The photographs of the Road taken soon after the accident depict both the condition of the Road and the dent on the Light Bus.
3. The above facts are not in dispute. The major dispute lies in the manner in which Yip crossed the Road on the one hand; and the manner in which Tsim controlled the Light Bus on the other hand. Yip’s pleaded case against Tsim focuses on the speed of the Light Bus; the lookout of Tsim; the warning of the approach of the Light Bus; and the control of the Light Bus to avoid the collision.

**How Yip crossed the Road**

1. According to Tsim, he paid attention to the condition of the Road when he was driving. When his sight moved from his right to the left, he noticed a person dashed out between the parked vehicles with his head down and hands up apparently to shield his head from the rain. Tsim applied the brake but could not avoid hitting him. That person, of course, was Yip. Tsim gave a similar account of the accident to the police in July 2009.
2. According to Yip’s statement to the police one week after the accident, he had stopped and watched out for the traffic condition to his right *briefly for less than a second* before emerging between the vehicles and walking out. After taking *2 to 3 steps*, he was hit by the Light Bus.
3. More than a month later, Yip contacted the police and sought to correct his previous statement. First, he stated that he actually looked out for *at least* 2 seconds before he walked out. Second, he had taken *at least* 5 to 6 steps before he was hit by the Light Bus. He described his previous statement as unclear; and attributed that to his then physical condition.
4. Another 27 months later, Yip made his statement for the purpose of this trial. Yip stated that he had stood between 2 parked vehicles and watched out for the traffic condition to his right. He noticed no vehicle approaching within 10 metres to his right. After taking *3 to 5 steps*, his back was hit by the Light Bus.
5. In court, Yip said he took a brief look (or in his words “望一望”) to the traffic condition to his right for *a second*. He managed to see about 10 metres away. He heard no vehicle approach. He also demonstrated how he raised his hand to cover his head from the rain when he walked out to the Road.
6. Whether and, if yes, how attentive Yip was in checking out the traffic condition before he walked out to the Road is so crucial in the circumstances of the present case that discrepancy in his account in this respect at different points of time mentioned above should not be ruled as immaterial too lightly.
7. In evaluating the parties’ evidence in this respect, some other facts are relevant. Yip said in court that at the material time, he was on his way to work. Due to the rain, he wanted to head back home for the umbrella. This was also how he answered Tsim when they were awaiting the ambulance after the accident. Tsim’s question to Yip was why he appeared from where he did in such heavy rain. Tsim was obviously surprised by Yip’s sudden appearance behind the parked vehicles, not the fact that he was walking in the rain.
8. In court, Yip admitted such conversation with Tsim while they were awaiting the ambulance. However, as to Tsim’s statement to the police that Yip said that he was anxious to return home at the time and therefore dashed out to the Road, Yip dismissed that as nonsense (or in his words “無聊”). Yip explained that he was due to start work only at 8 am that day.
9. Objectively, the weather was so bad that Yip found it necessary to head back home to get the umbrella before resuming his journey to report duty at 8:00 am. Judging from the photographs, I find that Yip started to be in the rain once he left the pavement. He obviously tried to not to get wet. Indeed he used his hand or hands to cover his head from the rain. I would not be surprised if he tried not to stay in the rain. I doubt whether he had actually stopped for long enough to take a proper lookout between the parked vehicles before setting foot onto the Road.
10. I also do not find Yip’s evidence in respect of the exact part of the front of the Light Bus that hit him to be reliable. Judging from the circumstances including the dent on the Light Bus as depicted in the photographs, I find that the Light Bus had to be very close to Yip when he emerged between the parked vehicles.
11. Had he taken a proper lookout before setting foot onto to the Road, he should have noticed the Light Bus coming along a relatively straight stretch of road. Seeing the witnesses testify and considering the evidence, I am convinced that Yip was in a hurry. I am not convinced that Yip had really stopped and watched out for the traffic as he said before emerging between the parked vehicles onto the Road.

**Tsim’s control of the Light Bus**

1. Miss Yang for Yip placed much emphasis on the speed of the Light Bus. I am sceptical about Tsim’s suggestion in court that the speed of the Light Bus might be lower than 40 kph at the time of the collision. However I find his evidence to be credible in that he was about to reduce his speed when approaching the end of the Road, because he would have had to stop and to give way at the junction before entering Luen On Street.
2. Miss Yang submitted that in the heavy rain, the visibility must have been compromised. A reasonably prudent driver ought to have reduced its speed to ensure sufficient reaction time and distance in case of an emergency. Therefore, though within the speed limit, Tsim was nevertheless driving at an excessive speed in the circumstances. In my view, the analysis puts the cart before the horse.
3. In *Fardon v Harcourt-Rivington* (1932) 146 LT 391, the court of appeal said (at 392):

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

1. In *Moore v Poyner* (1975) RTR 127, the defendant was aware that children were in the habit of playing in the residential area and there was a large coach parked on the nearside of the road. The unseen 6-year-old child ran into the road in front of the coach and was struck by the vehicle driven by the defendant. The defendant was driving within the speed limit of the road. The court of appeal found that the likelihood of a child running into the path of the defendant’s car at the precise moment at which he was passing the coach was so slight that it was not a matter which the defendant ought to have considered to require him to slow down to such an extent as to be able to avoid a collision. Browne LJ (at 134D-F) summed up the following principle:

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

1. In *Ng Ching Hung v Lau Shun Hing*, CACV 182/1990, 27 March 1991 (at pp.5-6), the court of appeal held that the mere existence of a possibility that a passenger, stepping down from a maxi cab which has stopped to allow him to alight, might then immediately attempt to cross the road was not the real issue. The issue was whether the driver in all the circumstances, including that possibility, acted with reasonable care. The court considered the suggestion that the driver should immediately have sounded his horn or moderated his speed, given that possibility, to be too heavy a burden on the driver.
2. In *Kong Chung Ching v Lam King Ho* [1992] 1 HKC 104, the plaintiff was actually seen standing on the kerbside of the road some 20 to 30 feet away before he rushed into the road when the defendant’s van was some 8 to 10 feet away. The defendant was liable for failing to take extraordinary precaution.
3. In *Ho Hing Yuen by his father and next friend Ho Hon Kaim v Lee Wai Kai*, HCPI 58/2003, 31 May 2004, the court reiterated (at paras.31-32; 41) that to say that a reasonable and competent driver was expected to guard against pedestrians running out, as opposed to emerging, from between parked vehicles would be to put the duty of care far too high on a driver. The appeal on the speed issue was dismissed: see CACV 258/2004, 10 May 2005.
4. In *Lai Ho Chuen v Hung Ling Yung*, DCPI 1127/2006 (30 April 2008), I rehearsed the principles and discussion in the above English and local cases. There a child ran out from behind a light bus into the path of the taxi that the defendant was driving. The driver was aware that pedestrians might cross the street in which he was driving along. But there was no evidence that immediately prior to the accident, there were actually pedestrians doing that. I found that the taxi driver could not have been alerted to the possibility of children running out in front of the light bus by the pavement. The defendant was not reasonably expected to sound the horn when passing by the light bus. The taxi was not reasonably expected to further slow down when passing the light bus.
5. Miss Yang cited *Lau Chung Nam v Au Wai Man* [2004] 1 HKLRD 57 in support. In that case, the plaintiff was found to have crossed the road without properly checking the traffic condition. The defendant was driving within the speed limit. But the rain was so heavy that visibility was compromised to the extent of not more than one and a half car’s length. By the time when the defendant driver saw the plaintiff, his car was already too close to the plaintiff to avoid the collision.
6. *Lau Chung Nam* is not a case involving a driver not seeing a pedestrian dash out of a pavement through parked vehicles. Further, the defendant driver there was actually charged with and convicted of careless driving as a result of the accident. That case is distinguishable from the present case.
7. In the present case, Tsim admitted in court that he saw pedestrians on the pavement. He accepted the possibility that pedestrians might appear from the behind the parked vehicles. But even Yip confirmed that there was no pedestrian actually on the Road when the accident happened. There is also no evidence that Tsim saw or should have seen pedestrians emerged onto the Road from the pavement between the parked vehicles prior to the accident.
8. In court, Yip also confirmed that the parked vehicle to his right where he emerged was a lorry similar to the one (coloured yellow) depicted in the photographs. It is a big lorry similar in height to the Light Bus. Whilst Tsim managed to see pedestrians on the pavement on his way along the Road, I am not convinced that he could really see anyone behind such a lorry until passing by that point where Yip emerged.
9. A driver has many things to look at in order to drive safely, and if for a split second he does not observe the movement at a particular spot, it cannot be said that he has failed to keep a proper lookout: see *James v Alger*, unrep, 6 March 1986 (CA), per Parker LJ. I endorsed that remark by Parker LJ in *Lai Ho Chuen* (above) at para.29.
10. Each case is to be decided according to its own facts. In the circumstances of the present case, I find that a pedestrian appearing out of the parked vehicles all of a sudden at the precise moment was a mere possibility. A driver is not reasonably expected to take precautionary measures such as sounding the horn or reducing the speed when passing by the parked vehicles along the Road because of such possibility. When Yip walked out to the Road, the Light Bus was already too close for Tsim to do anything to avoid the collision. In the circumstances of this case, I am not satisfied that Tsim should be to blame.

**Conclusion**

1. Liability is not proved. But assuming that liability might somehow be established, Yip would still have been the main author of the accident. I would have held him responsible to an extent of not less than 75%: see my comment in *Lai Ho Chuen* (above) at para.32.

**Order**

1. The claim is dismissed. Yip shall pay Tsim’s costs of the action, including any costs reserved. Costs shall be taxed, if not agreed. For the avoidance of doubt, I certify the engagement of certificate. In the absence of application within 14 days to vary, the costs order shall become absolute. Yip’s own costs shall be taxed in accordance with legal aid regulations.

Simon Leung

District Judge

Miss Elizabeth YANG instructed by Messrs Au-Yeung, Cheng, Ho & Tin for the Plaintiff upon the assignment of the Director of Legal Aid

Mr Patrick LIM instructed by Messrs Kenneth C C Man & Co for the Defendant