DCPI 1658/2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1658 OF 2009

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BETWEEN

SZE HA KAM CARLY Plaintiff

and

CHUM CHI ON Defendant

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

Coram: His Hon Judge Leung in court

Date of hearing: 19 August 2010

Date of judgment: 3 September 2010

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

1. At about 11:00 am on 21 September 2007, **Sze**, the Plaintiff, was on board the public light bus driven by **Chum**, the Defendant, along Lai Chi Kok Road. On the way, an unknown vehicle cut into the front of the light bus. This caused a collision between the 2 vehicles and the light bus to lose control. The light bus was damaged and 3 passengers including Sze were injured as a result. The unknown vehicle got away and was never traced.
2. Sze now claims against Chum for negligence in causing the accident. Quantum of damages has been agreed, leaving the issue of liability for trial.

**The accident**

1. Lai Chi Kok Road is a dual carriageway in opposite directions separated by a central iron fence. The relevant section of the road southbound consists of 3 lanes running perpendicular to Yen Chow Street. At the junction with Yen Chow Street, the vehicles in the inner lane on the left could turn left into Yen Chow Street while those in the 2nd lane in the middle and the 3rd lane on the right could maintain their courses straight ahead.
2. It was a fine day. Chum was driving the light bus along the 3rd lane of Lai Chi Kok Road southbound for Kwun Tong. To his right was the iron divider fence of the road. The unknown dark coloured vehicle cut from the 2nd lane into the front of the light bus at high speed. Chum reacted by applying the brake but the collision was not avoided. The offside front of the unknown vehicle collided with the nearside front of the light bus. Chum lost control of the light bus and its offside front collided with the road divider to its right before it came to a halt on the road.
3. According to the statement of the police, the sketches of the scene and the photographs taken after the accident, a whole length of 10.5 metres the divider fence was bent as a result. The front bumper of the light bus fell off. The offside front tyre went flat. The nearside front of the light bus was damaged.
4. I find the above to be the facts.

**The dispute**

1. The pleaded case of Sze is that the accident was caused solely by the negligence of Chum. But in her statement, she attributed the occurrence of the accident to the negligence of both the driver of the unknown vehicle and Chum.

1. By pleading, Chum contends that the accident was caused solely by the negligence of the driver of the unknown vehicle. In the emergency created by the unknown vehicle, Chum was forced to brake and to swerve abruptly, but was unable to avoid a collision. He lost control of the light bus and collided with the divider fence. He has therefore exercised reasonable care in the circumstances.

**How Chum reacted to the emergency**

1. Unless the driver reacted in a way which did not show the alertness, skill and judgment reasonably be expected of him, he cannot be found liable for negligence: see *Chung Wing Yan v Cheung Tak Fai Alex*, HCPI 660/2004 (7 November 2005).
2. The actions of someone placed in a situation of danger are not to be judged with the benefit of hindsight to see whether what he did was the best way to extricate himself. The law does not require driver to exhibit perfect nerve and presence of mind, enabling him to do the best thing possible. It does not expect men to be more than ordinary men: see *Wong Man Kit Michael v Wong Fong Woon*, HCA 283/1985 (21 December 1988).
3. It happens that the circumstances of the present case are somehow similar to those, including the emergency situation, in *Ng Chun Pui & Anor v Lee Chuen Tat & Anor* [1988] RTR 298. The following report of the Privy Council’s judgment is self-explanatory:

“The evidence led by the defendants shows clearly that the coach was proceeding along a straight stretch of the road possibly a little in excess of the speed limit of 40 miles per hour. But the speed of the coach is not alleged to be one of the elements of negligence and I am not particularly concerned with that. The coach was travelling in fast or outer lane and in that lane there was other traffic about two coach lengths ahead of it. In the inner lane there was a vehicle about 10 to 20 feet ahead and between that vehicle and the coach there was a blue car travelling a little faster than the coach. Suddenly that blue car, which did not subsequently stop and has not been traced, cut into the fast lane some six to eight feet ahead of the coach. That was clearly a very dangerous manoeuvre and the first defendant reacted to it by braking and swerving a little to his right. The coach then skidded across the central reservation, as I have said, colliding with the public light bus.” (at 300G-J)

“Not only did the judge mislead himself by assuming that there was a legal burden on the defendants to disprove negligence but he has also failed to give effect to those authorities which establish that a defendant placed in a position of peril and emergency must not be judged by too critical a standard when he acts on the spur of the moment to avoid an accident.” (at 302D-E)

“The Court of Appeal rightly rejected the judge’s approach and appreciated that once the first defendant’s explanation of the accident was accepted his driving had to be judged in the light of the emergency in which he had been placed by the driver of the untraced blue car. **There was nothing to criticise in the driving of the first defendant before the emergency arose and when the emergency arose**, the Court of Appeal said:

‘At the time he was attempting to extricate himself, his coach and his passengers from a situation which appeared to him – and we would interpose that the judge obviously accepted him as truthful man – as a situation of extreme danger. The consequences of his action were in fact unfortunate, but that should not be laid at his door. He did what he any careful driver would instinctively have done in the circumstances, and we are satisfied that he acted with the alertness, skill and judgment which could reasonably have been expected. Even if he did react slightly more than he should have done, slightly more than was strictly necessary, we are not satisfied that a lesser reaction would not have produced much the same result.’

This approach by the Court of Appeal to the facts of this case cannot be faulted.” (at 302F-K) [*Emphasis added*]

1. Mr Wong for Chum submitted that the circumstances in the present case were more perilous that those in *Ng Chun Pui*. For instance, the unknown vehicle in the present case sped up from behind to cut into the front of the light bus. It cut into the front of the light bus in an apparently more aggressive manner in terms of the distance from the light bus and the angle of cutting in. I agree with Mr Wong’s observation.
2. I do not find that Chum should be criticised for having handled the emergency badly or losing control of the light bus. Further, it was not the loss of control of the light bus that caused Sze her injuries. According to her, it was upon the light bus braking to avoid the collision that caused her to fall off her seat and thus her injuries. The braking of the light bus in response to the emergency, if not reasonably expected, should hardly be subject to criticism.

**Prior to the accident**

1. Besides the manner in which Chum reacted to the emergency situation created by the unknown vehicle, Chum was allegedly negligent in the manner of driving the light bus immediately before the emergency arose. In this respect, the allegations relate to on his choice of lane, speed and lookout.

*The choice of lane*

1. Mr Gidwani argued that the 3rd lane, being the fast lane, was not the proper lane for Chum to take except for overtaking.
2. As mentioned above, the 1st lane to the left of the road meets the junction with Yen Chow Street when one would turn left. There was no suggestion that Chum had to take that turning at the time. He confirmed that he was then driving straight ahead without having to turn at the junction. Therefore the 2nd and the 3rd lanes would be his choice of lanes in the direction that he was heading for.
3. In court, Chum explained that he chose the 3rd lane also to avoid possible obstruction on the way caused by vehicles seeking to park for unloading by the pavement to the left. This was his observation during his about 10 months of experience as a light bus driver along this route.
4. In my view, there is no issue of legitimacy or propriety in Chum’s choice of lane at the time. It may perhaps be said that if Chum had not driven the light bus in the 3rd lane at the material time, he would not have been in the way of the unknown vehicle that cut into his front; and the accident would not have happened. But this is not a reasonable argument at all.

*The speed*

1. According to Chum, he was driving at the speed limit of 50 kph at the time. Mr Gidwani suggested that it might be faster than that; and that made Chum less capable of reacting to the emergency situation by avoiding the collision.
2. Like *Ng Chun Pui*, the speed of the light bus in the present case is not alleged to be one of the particulars of negligence. As expected, Mr Gidwani sought to resort to include this as part of the pleaded allegation that Chum drove the light bus “*without due care and attention or without reasonable consideration of other road users, in particular the Plaintiff*” (para.3(g) of the statement of claim). In my view, this would be stretching the general allegation too widely, and probably unfairly, to encompass allegations that are expected to be specifically pleaded.
3. In any event, it is noted that in *Ng Chun Pui*, the court accepted the evidence that the coach there was travelling at possibly a little in excess of the speed limit; yet found the coach driver not liable. Is there evidence in the present case to suggest that?
4. Sze gave evidence as to her impression about what she described as the ‘normal speed’ and the speed of the light bus at the time. But she does not drive. She also mentioned about holding onto the window rail inside the light bus apparently to signify her feeling of the high speed of the light bus. But by that, she seemed to be referring to the times when the light bus had to be driven closer to the pavement to pick up passengers. I would not be surprised if such manoeuvre would cause a passenger on board to take care by holding onto the window rail. But at the material time, the light bus was travelling along the straight stretch of the road.
5. Chum confirmed that there was a speed monitor inside the light bus. But there was no evidence from any passenger on board of the reading on the monitor prior to or during the accident.
6. Mr Gidwani referred to the brake mark on the road and the section of the divider fence damaged as a result of the accident. But one cannot readily draw a conclusion that these were the results of the light bus travelling in excess of, rather than within, the speed limit.
7. In short, the evidence falls short of proving that Chum was driving in excess of the speed limit immediately prior to the accident. On balance, I accept Sze’s evidence in respect of his speed at the material time.
8. Of course, whether the speed was excessive depends on the circumstances of the case, not merely the speed limit. Considering that Chum was driving legitimately along the fast lane of the road within the speed limit, I think the question is whether the speed was nevertheless excessive in the light of the other circumstances.
9. Mr Gidwani submitted that Chum should have reasonably foreseen vehicles cutting into his lane and he should have seen the unknown vehicle before it cut into his front. Chum should have lowered his speed, in view of that.

*Proper lookout*

1. This turned out to be the major issue that Mr Gidwani argued about during the trial.
2. According to Chum, there was no vehicle in his front at the material time. Nor was there vehicle travelling side by side in the 2nd lane with his light bus. He suddenly saw a dark shadow rushed up from behind and cut into his front. He estimated its speed to be about 70 kph. He only managed to see that it was a blue Mercedes Benz. He applied the brake but was not able to avoid that vehicle. He then lost control of the light bus. The collision caused the front bumper of the light bus to fall off. Such evidence was not effectively contradicted.
3. Mr Gidwani’s main criticism was that Chum failed to keep a proper lookout for vehicles possibly cutting into his front. He submitted that so long as it was reasonably foreseeable that the other drivers might cut into the light bus’s front, the duty on the part of Chum to take care arose irrespective of the exact manner in which the cutting in might take place. Chum actually accepted in his evidence that a reasonable driver ought to contemplate the possibility of other drivers cutting in. He had the experience of other vehicle cutting into his front before.
4. Insofar as the existence of the duty of care to cope with the possibility of other vehicles on the road cutting in is concerned, I agree. I do not think the Mr Wong for Chum disagreed. But the issue is whether Chum was in breach of his duty. The answer does depend on the actual circumstances of the present case.
5. Chum accepted that he could see the condition of the 2nd lane through the left side mirror. He did not know where the unknown vehicle came from. The moment he saw it was when it cut in. According to Sze, when she suddenly saw the unknown vehicle, it was already cutting in from the left at high speed. She did not say where the vehicle originally was. Chum accepted the possibility that the unknown vehicle could have been seen in the left side mirror earlier. Mr Gidwani therefore criticised Chum for failing to keep a proper lookout through the left side mirror *at all material times*.
6. There was supposedly a point of time when the unknown vehicle could have been seen from the left side mirror of the light bus. As mentioned above, Chum fairly accepted that. But the key is whether Chum had reason to anticipate the emergency situation in the present case, even assuming that he could have seen the unknown vehicle at certain point prior to its cutting into his front.
7. Unlike what happened in *Ng Chun Pui*, where the blue car was actually seen ahead of the coach suddenly cut in at 6 to 8 feet in front of the coach, the unknown vehicle in the present case cut in such a close angle from the left at high speed that left inadequate room to avoid collision. This was overt aggressive driving. Though Chum accepted that vehicles might cut into his lane, he said he never experienced or expected that drivers would cut in so closely as the unknown vehicle did in the present case. I accept that.
8. Mr Gidwani referred to the fact the unknown vehicle sped up. Had Chum seen that, he should have been alerted. But in the absence of other evidence tending to show what the driver of that vehicle did or did not do, the speeding up of the vehicle per se was not an indication of intention to cut into the light bus’s front. In particular, both the 2nd and the 3rd lanes run straight ahead in the same direction. Chum’s unchallenged evidence was that there was no vehicle in his front. He gave evidence that there was nothing that caused him to feel or to suspect that the vehicle might suddenly cut in like that. I accept that too.

*Conclusion*

1. There is no doubt that the accident was brought about by the dangerous and aggressive manner in which the unknown vehicle was driven at the time. This caused the emergency situation to which Chum reacted as a reasonably careful driver would do.
2. I find that the alleged basis for holding Chum liable for not foreseeing and preparing for the cutting in of the unknown vehicle is too harsh to be reasonable in the circumstances of this case. It is not proved that Chum was negligent in his manner of driving the light bus prior to and when the emergency situation arose. As found above, he was not negligent in reacting to the emergency. Liability is therefore not established.

**Order**

1. The action is dismissed with costs, including any costs reserved, to Chum. Costs shall be taxed, if not agreed. For the avoidance of doubt, I certify the engagement of counsel. Unless application to vary the costs order is made within 14 days, the costs order shall become absolute.

Simon Leung

District Judge

Mr Victor GIDWANI instructed by Messrs Chan & Chan for the Plaintiff

Mr Martin WONG instructed by Messrs Kenneth C C Man & Co for the Defendant