## DCPI 1970/2008

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1970 OF 2008

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##### BETWEEN

CHAN KIN MAN Plaintiff

### and

CHEUK SIU TONG Defendant

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Coram : Her Honour Judge Mimmie Chan in Court

Dates of hearing : 9 & 12 October, 2009

Date of handing down Judgment : 16 November, 2009

# JUDGMENT

**Background**

1. Mr. Chan was driving his light goods vehicle ("**Van**") along Kam Sheung Road ("**the** **Road**") at Pat Heung in the New Territories, in the direction of Yuen Long. One lane of the Road led to Yuen Long, and the opposite lane led from Yuen Long to Sheung Shui. As he was approaching lamppost U8390, Mr. Chan's Van hit Mr. Cheuk who was crossing the Road. Both Mr. Chan and Mr. Cheuk sustained injuries as a result of the accident.
2. Mr. Chan commenced these proceedings against Mr. Cheuk to recover damages, on the basis that the accident was caused by Mr. Cheuk 's negligence, in suddenly walking onto the Road from the pavement, without paying attention to the traffic and the presence of the Van. Mr. Cheuk denies that he was negligent, and counterclaims for damages sustained by him in the accident, which he says was caused by Mr. Chan's negligence in failing to pay due care and attention to Mr. Cheuk 's presence on the Road, in failing to give warning to Mr. Cheuk of the approach of the Van, in driving too fast, and in failing to slow down or stop in time to avoid the collision.

**The issues**

1. The issues for determination at trial are :
   1. whether the accident was caused by Mr. Cheuk's negligence ;
   2. whether the accident was caused in any way by the negligence on the part of Mr. Chan;
   3. the amount of damages for which Mr. Cheuk may be liable to Mr. Chan; and
   4. if the accident was caused in any way by Mr. Chan's negligence, the amount of damages for which Mr. Chan may be liable to Mr. Cheuk.

**Whether the accident was caused by Mr. Cheuk 's negligence**

1. According to Mr. Chan, at about 7:12 pm on 14 March 2007, he was driving the Van along the Road at a speed of about 30 to 40 km towards Yuen Long. When he was approaching Shek Wu Tong Village, he saw Mr. Cheuk on the pavement to his left about 10 m away, walking in the same direction towards Yuen Long. According to Mr. Chan, Mr. Cheuk had made no indication of wanting to cross the road. However, when Mr. Chan's Van approached lamppost U8390 and when Mr. Cheuk was about 1 m away, Mr. Cheuk suddenly stepped from the pavement and strode onto the road. Mr. Chan claims that he applied his brakes immediately, but could not stop in time. The nearside front part of the Van hit Mr. Cheung's right arm.
2. According to Mr. Chan, Mr. Cheuk had not looked in the direction of the Van at all before he stepped onto the Road. Mr. Chan claims that from what he could see of the position of Mr. Cheuk's hand as he stepped onto the Road, he thought that Mr. Cheuk was holding a telephone to his ear. According to Mr. Chan, he did not have time to sound his horn before stopping the Van.
3. I find Mr. Chan to be a credible witness. His evidence was simple, and despite being challenged by Mr. Cheuk, I can find nothing inherently improbable or inconsistent in the evidence which he has given as to the circumstances of the accident.
4. In comparison, I find Mr. Cheuk's evidence to be contrived.
5. In the Statement which he had given to the police on 19 April 2007, Mr. Cheuk initially claimed that whilst on the pavement, he had at first looked to his right, seeing that there was no traffic for a distance of 50 m, and then looked to his left, when he saw a public light bus approaching from the left in the opposite lane of the Road about 100 m away. Mr. Cheuk claims that he was still on the pavement at this time. After 3 or 4 seconds, he looked to his right again and at the same time took a few steps, whereupon he was hit on the right arm and right knee by the Van.
6. Mr. Cheuk was prosecuted for negligently endangering the safety of himself as a pedestrian. His conviction was overturned on appeal.
7. In his witness statement made for the purpose of these proceedings on 5 February 2009, Mr. Cheuk claims that after he had exited from Shek Wu Tong Village, he had stood on the pavement and looked to his right, and had seen that there was no approaching traffic in the direction towards Yuen Long. Mr. Cheuk claims that he then took 2 to 3 steps, before he looked to his left and saw in the opposite carriageway a public light bus approaching at high speed. Mr. Cheuk claims that he stopped, and stood in the middle of the Road, to let the public light bus pass. He then looked back to his right, and discovered that Mr. Chan's Van was already on his right. His right arm was hit, he spinned, and fell onto the road. He then got up, and slowly walked back on to the pavement.
8. In Court, Mr. Cheung's testimony was that the account of the accident which was given in his statement to the police and which was signed by him is in fact inaccurate and misleading. In his testimony in Court, Mr. Cheuk claims that when he was on the pavement, he had in fact looked to his left first, and had seen that there was no traffic to his left, before looking right to check for the condition of the traffic going towards Yuen Long. He then walked forward for 2 to 3 steps, before looking to his left again, and saw the public light bus. When asked about the inconsistencies in his police statement, in which he had stated that he was still on the pavement when he saw the public light bus approaching, Mr. Cheuk gave the excuse at one stage that the pavement and the Road were at the same level, and that he was not able to distinguish clearly in the dark whether he had stepped out onto the Road. Mr. Cheuk appeared at the end to accept that the witness statement which he signed on 5 February 2009 correctly describes the sequence of events, and that he was standing in the middle of the Road near the centre dividing line just before he was hit.
9. Although Mr. Cheuk suggests that he was hit by the offside of Mr. Chan's Van, the photographs of the damaged Van, the photographs taken by the police after the accident and the sketch plan made by the police are all consistent with Mr. Chan's claim that the left side of the Van had hit the right side of Mr. Cheuk's body. He was clearly on the left side of the Road, and not in the centre near the dividing white double lines, when he was hit. I find Mr. Cheuk's evidence as to the alleged points of collision, his different accounts of the accident and his changing evidence on how he had checked the traffic before stepping onto the Road to be all contrived in an attempt to shift the blame for the collision on Mr. Chan.
10. Whether or not Mr. Cheuk was using the telephone before he crossed the road, the evidence shows that he had not taken any care before walking out from the pavement. It is improbable that if he had indeed checked the condition of the traffic to his right, he would not have been able to see the Van until it hit him on the right arm.
11. I find that the accident was caused by the negligence of Mr. Cheuk, in failing to take due care and attention before he crossed the Road.

**Whether the accident was caused in any way by the negligence on the part of Mr. Chan**

1. I accept Mr. Chan 's evidence that he was driving at a reasonable speed at the material time. There is no evidence to contradict this. Nor is there any evidence of busy traffic or of the presence of other pedestrians on the Road. On the question of whether Mr. Chan was negligent in failing to anticipate Mr. Cheuk stepping out onto the Road from the pavement, I adopt the test stated by Lord Dunedin in *Fardon v. Harcourt - Rivington* (1932) 146 LT 391, at page 392 :

"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. The relevant authorities on cases involving collisions between pedestrians and drivers of motor vehicles were helpfully reviewed by Deputy High Court Judge Gill in *Lee Sau Fong v. To Choi Tak* HCPI 1013 /2004, unreported, 17 February 2006. The test is not that the driver should be the absolutely careful driver, but simply a reasonably careful driver. I can add very little to Rogers VP’s summary of the position in the case of *Ho Hing Yuen v. Lee Wai Kai*, unreported, HCPI 58 of 2003:

"But unfortunately, if pedestrians choose to run across the road, they take, literally, their life in their own hands; worse still if they do so without looking."

1. I accept Mr. Chan 's evidence that when he first saw Mr. Cheuk, he was walking on the pavement and had not shown any sign that he was about to cross the Road, such as stopping on the side of the pavement. I respectfully agree with Deputy High Court Judge Longley in the case of *Yiu Yuet Chi v. Yick Kai Cheung & Anr*., unreported, HCPI 291 of 2006, 2 January 2008, that a driver is not obliged to sound his horn or slow down to a crawl on the off chance that an adult pedestrian who has shown no sign of doing so, might act dangerously and walk into the path of his vehicle.
2. In the circumstances of a pedestrian stepping out onto the road in the path of a vehicle, the driver of the vehicle is not negligent in failing to sound his horn (*Moore (An Infant) v. Poyner* (1974) RTR 127), as he would be focusing instead on applying the brakes and steering away from the pedestrian.
3. I find therefore that Mr. Cheuk has failed to prove any negligence on the part of Mr. Chan.

**The amount of damages for which Mr. Cheuk may be liable**

1. Mr. Chan was aged 25 at the time of the accident in 2007. From the medical evidence, it appears that Mr. Chan sustained sprain injuries to the neck and back as a result of the collision. He was given 4 days sick leave. X-rays of the cervical and lumbar spine were normal. It is clear from the medical report of Dr. Kong that Mr. Chan's injuries are not serious. No future operation or treatment is required. Dr. Kong is of the opinion that Mr. Chan can resume his occupation as a driver, with only a mild degree of inconvenience and reasonable reduction of working efficiency because of the mild stiffness in his neck and back. Dr. Kong considers that Mr. Chan 's social activities should not be unduly affected.
2. I consider that Mr. Chan’s injuries are more compatible with the injuries suffered by the plaintiffs in *Chan Siu Youn v. Ng Kam Man* HCPI 533/1999, unreported 28 July 2000; *Wong Kin Hung v. Chan Wai Ming* DCPI 1223/2006, unreported 16 February 2007; *Chan Chun Wa v. Wong Chiu Yuen Andrew* DCPI 235/2007, unreported 22 November 2007; and *Lai Ka Yin v. Chan Yiu Kei* DCPI 453/2008, unreported 7 January 2009. A reasonable award for PSLA in respect of Mr. Chan's minor injury is **$50,000**.
3. The parties agree that Mr. Chan's pre-trial loss of earnings are **$25,000.** Special damages have also been agreed at **$26,581**.
4. I am not satisfied, on the evidence, that there is any substantial or real risk that Mr. Chan would lose his job as a result of his disability. I am not prepared to make any award for loss of earning capacity.
5. Accordingly, the total award is as follows :

PSLA $50,000.00

Pre-trial loss of earnings $25,000.00

Special damages $ 26,581.00

Total: **$101,581.00**

**Conclusion**

1. I award to Mr. Chan the total sum of $101,581, with interest on general damages at 2% p.a. from the date of service of the Writ to the date of judgment, and interest on special damages at half judgment rate from the date of the accident to the date of judgment. I will make an order nisi that Mr. Cheuk is to pay to Mr. Chan the costs of the action, to be taxed if not agreed, with certificate for Counsel.
2. Mr. Cheuk's counterclaim is dismissed, with costs to Mr. Chan, with certificate for Counsel.

(Mimmie Chan)

District Judge

*Mr. Chase Poon, instructed by Messrs. Fongs, for the Plaintiff*

*The Defendant in person*