**DCPI2647/2007**

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 2647 OF 2007

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BETWEEN

TAM WAI CHUN Plaintiff

and

CHOI SUI KWONG Defendant

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

Coram: Deputy District Judge Frederick HF Chan (Open Court)

Dates of hearing: 2nd and 3rd October 2008

Date of handing down the judgment: 6th October 2008

**JUDGMENT**

***The locality?***

1. This is a running-down action. The locus of the road traffic accident could be described as follows: Kwok Shui Road which was close to the Tai Wo Hau Mass Transit Railway (“*MTR*”) Station was a two-way road. One way which was up-slope was east-bound towards Kowloon and the other way which was down-slope was west-bound towards the New Territories. The speed limit of the Kwok Shui Road was 50km/h.

***The pedestrian and the driver?***

1. There is no dispute that on 7th January 2005 (“*the Date of Accident*”), at about 8:46 a.m. in the morning, the Plaintiff was knocked down by the front of a Toyota AE110 Raepek with registration no. HT8545 (“*HT8545*”) on the down-slope lane of the Kwok Shui Road west-bound towards the New Territories. At the material time, the Plaintiff was right in the course of crossing the Kwok Shui Road as she wanted to go to the opposite pavement to take the MTR train to work when the accident happened (“*the Accident*”).
2. It is also agreed that at the material time, the HT8545 was driven by the Defendant and owned by the Defendant’s employer, Centurion Facility Co. Ltd. The weather on the Date of Accident was fine and the road surface of the Kwok Shui Road was dry.
3. After the Accident, the Plaintiff’s left leg was injured and she was sent by an ambulance to the Yan Chai Hospital for treatment. Later, it was confirmed that her injuries included left knee contusion and fracture of the fibula head and medial condyle of the left leg.

***Jaywalking conviction?***

1. A police investigation into the Accident ensued. On 18th February 2005, the Plaintiff was summonsed to appear before the Tsuen Wan Magistracies in Case No. TWS2941/2005 (“***the Summons***”) for an offence contrary to section 48 of the **Road Traffic Ordinance** (Cap. 374) which stipulates that:

“A pedestrian who in using any road … negligently endangers his own safety or that of any other person, commits an offence and is liable to a fine of $500”.

1. For the purpose of the Summons, the police prepared a set of Brief Facts which extracted the admissions made by the Plaintiff when she made a cautioned statement to Senior Police Constable 22925 in respect of the offence on 15th January 2005 between 11:35 p.m. and 12:20 p.m. In her cautioned statement, she confessed that she came out into the Kwok Shui Road behind a stationary bus and did not pay a proper look-out when crossing the Kwok Shui Road and did not notice the approaching HT8545 before she was knocked down.
2. The particulars of the Summons stated that the Plaintiff had on the Date of Accident at 8:47 a.m. near Lamp Post No. 1539 at Kwok Shui Road, as a pedestrian of a road, negligently endangered her own safety. On 28th April 2005, the Plaintiff signed and issued a letter of mitigation to plead guilty to the Summons. In her manuscripts Chinese, she said in mitigation that on the Date of Accident, she did not feel very well and had, in the previous night, taken some medications for flu. In the morning of the Date of Accident, she woke and felt tired and found herself to be late for work. As she was eager to keep her attendance record unblemished, she therefore took a taxi but thought it would be wiser to take the MTR train to work so as to avoid a possible congestion. So she alighted from the taxi and walked to the Tai Wo Hau MTR Station. She was not familiar with the locality of the Accident and was knocked down by HT8545. She was remorseful and promised that it would never happen again and prayed for leniency from the court.
3. Upon her written guilty plea and mitigations, she was convicted and fined HK$200 for that offence which is, in common parlance, jaywalking (“*the Conviction*”). Section 62 of the **Evidence Ordinance** (Cap. 8) (“*EO*”) provides that:

“(1) ***In any civil proceedings the fact that a person has been convicted*** of an offence by or before any court in Hong Kong shall … be evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that he committed that offence, whether he was so convicted upon a guilty plea of guilty or otherwise …

(2) In any civil proceedings in which by virtue of this section a person is prove to have been convicted of an offence by or before any court in Hong Kong –

(a) he shall be taken to have committed that offence, unless the contrary is proved; and

(b) without prejudice to the reception of any other admissible evidence for the purpose of identifying the facts on which the conviction was based, the contents of any document which is admissible as evidence of the conviction, and the contents of the information, complaint … or charge on which the person in question was convicted, shall be admissible in evidence for that purpose” (my emphasis).

1. In the recent decision of **Lee Ting Yeung v. Yeung Chung On**, DCCJ. 1939/2006, unreported, 25th September 2008 and in the context of a defendant driver’s conviction for dangerous driving contrary to section 37(1) of the **Road Traffic Ordinance** (Cap. 374), I had the opportunity of dealing with the evidential effect of such a conviction in a civil trial and I held, at pp. 5-6, that:

“13. On liability, the Plaintiff sought to rely on the Conviction as evidence of the Defendant’s negligent driving. Pursuant to the provisions of Order 18 rule 7A of the **Rules of the District Court** (Cap. 336, sub. Leg.), it was pleaded in the statement of claim dated 20th April 2006 that the Conviction was relevant to the Plaintiff’s allegations of negligent driving against the Defendant ... At trial, the Plaintiff adduced the transcripts and witness statements in relation to the Conviction for consideration. To err on the safe side, the Plaintiff’s statement of claim also placed reliance on the legal doctrine of *res ipsa loquitor* or “the thing speaks for itself”.

14. In this regard, I would refer to **Chiu Shung Lam v. Tang Chi Sum Terence & Others**, DCCJ2673/2002, unreported, 12th June 2003. There, the plaintiff alleged that the negligent driving of the five defendants caused loss to his taxi. The plaintiff also relied on the convictions of some of the defendants for careless driving and resort was placed in the pleadings on *res ipsa loquitor*.

15. Deputy District Judge Marlene Ng (as H. H. Judge M. Ng then was) held that when the factual circumstances were known, any reliance on the doctrine would be misconceived and akin to overegging the pudding. She said at p. 8:

“39. … It is trite that if the circumstances of the incident are known and evidence in respect of the same is to be adduced, the court must examine all the evidence at the end of the case and decide whether on the facts and inferences the court finds that negligence has been established. The burden remains throughout on the party alleging negligence … to prove that the damage was caused by the negligence of the alleged parties … I draw no assistance from this principle in the present case as the factual matrix of the chain collision was covered in detail by evidence from the parties”.

16. On the relevance and evidential effect of the convictions of the respective defendants for careless driving in relation to the chain collisions, the learned Deputy Judge observed as follows at p. 9:

“Normally, the effect of a conviction of careless driving shifts the burden of proof to the person convicted to show that he was not negligent. In *Stupple v. Royal Insurance Co. Ltd.* [1971] 1 QB 50, in considering section 11 of the Civil Evidence Act (the equivalent of section 62 of the Evidence Ordinance Cap. 8), Lord Denning at pp. 72-73 said (as approved in *Lau Ka Po v. Man Cheuk Ming & Others*, HCPI584/1996, Cheung J. (unreported, 10th March 1997):

“… The Act does not merely shift the evidential burden, as it is called. It shifts the legal burden of proof … Take a running-down case where a plaintiff claims for negligent driving by the defendant. If the defendant has not been convicted, the legal burden is on the plaintiff throughout. But if the defendant has been convicted of careless driving, the legal burden is shifted. It is on the defendant himself. At the end of the day, if the judge is left in doubt the defendant fails because the defendant has not discharged the legal burden which is upon him. The burden is, no doubt, the civil burden. He must show, on the balance of probabilities, the he was not negligent: …

But he must show it nevertheless. Otherwise, he loses by the very force of the conviction …

In my opinion, therefore, the weight to be given to a previous conviction is essentially for the judge at the civil trial. Just as he has to evaluate the oral evidence of a witness, so he should evaluate the probative force of a conviction.

If the defendant should succeed in throwing doubt on the conviction, the plaintiff can rely, in answer, on the conviction itself, and he can supplement it, if he thinks it desirable, by producing (under the hearsay sections) the evidence given by the prosecution witnesses in the criminal trial, or if he wishes, he can call them again. At the end of the civil case, the judge must ask itself whether the defendant has succeeded in overcoming the conviction. If not, the conviction stands and proves the case” ...”.

1. It is also worthwhile referring to the English Court of Appeal decision of **Stupple v. Royal Insurance Ltd.** [1971] 1 QB 50 (“*the Stupple’s Case*”). The facts were neatly set out in the head-note:

“On September 27, 1963, a gang of robbers waylaid a bullion van and stole £87,300. In March, 1964, the plaintiff, S., was convicted of armed robbery and sentenced to 15 years imprisonment. The main evidence against him was of the finding by the police of over £1,050 in banknotes in his flat four days after the robbery. The banknotes were subsequently claimed by both the plaintiffs, S. and his wife, and by the defendants, the insurance company who had paid £87,300 to the bank whose van had been robbed. In July, 1964, magistrates made an order under the Police (Property) Act, 1897, that £985 out of the £1,050 should be paid to the defendants. In January, 1965, the plaintiffs started separate proceedings claiming against the defendants £755 and £230 as belonging to them respectively. The defendants counterclaimed against S. that as a participant in the robbery he owed them their net loss of £84,908. The two cases were tried together and S. sought to show that he was not guilty of the robbery”.

1. After an 8-day trial, Mr. Justice Paull dismissed the plaintiff’s claim and allowed the defendant’s counterclaim. The plaintiff took the case to the English Court of Appeal where he failed. Lord Denning, the Master of the Rolls, added at p. 72:

“In any case, what weight is to be given to the criminal conviction? This must depend on the circumstances. Take a plea of guilty. Sometimes a defendant pleads guilty in error: or in a minor offence he may plead guilty to save time and expense, or to avoid some embarrassing fact coming out. Afterwards, in the civil action, he can, I think, explain how he came to plead guilty”.

1. Lord Justice Winn agreed and said at p. 75:

“The effect of proof of the conviction under this subsection is, as my Lord, the Master of the Rolls, has said, to shift the “legal” burden of proof in respect of B.’s act or alleged act from A., who would otherwise have to prove it to make good his claim, to B., who must disprove it to avoid the presumption of his having committed the offence prevailing. Once the conviction has been proved the task of the court, instead of being, as would otherwise be the case, to decide whether A., has successfully shown on a balance of probability B. did the act, becomes to decide whether B. has successfully shown that, on a balance of probability, he did *not* do the act”.

1. The *Stupple’s* Case was an example where the plaintiff’s conviction featured in the subsequent civil trial. Generally speaking, where a plaintiff is alleging that he or she was injured by a defendant’s negligent driving of a motor vehicle, the burden of proof lies on the plaintiff to prove (on the balance of probabilities) that was indeed the case. If the defendant was convicted of careless or dangerous driving because of the accident, the burden then shifts to the defendant to prove he was not negligent. As the saying goes: what is sauce for goose must be the sauce for the gander. It is clear that *when* it was the plaintiff who was convicted of an offence in respect of an incident, the defendant would be equally entitled to rely on section 62 EO.
2. Here, the Conviction clearly falls square within section 62 EO. Following the case law referred to above, the Plaintiff in the present case does and must bear the *further* legal burden to prove that:

“Her injuries suffered were *not* caused by her negligence when using the Kwok Shui Road on the Date of Accident when the Accident happened”.

1. In Mr. Lam’s opening, he was at pains to disclaim any attempts by the Plaintiff to challenge or explain away the Conviction itself and its factual basis. In the Defence filed on 28th March 2008, the Defendant pleaded that:

“… The Defendant will rely on the said prosecution and conviction as evidence that the accident was caused by the Plaintiff’s own negligence”.

***Recusal application?***

1. When the trial was about to commence before me on 2nd October 2008, most surprisingly, Mr. Lam (the Plaintiff’s counsel) made an application of recusal because I have drawn the parties’ attention to a number of relevant cases[[1]](#footnote-1), a reasonable observer in the court-room may consider that there was a reasonable risk of apparent bias on my part. He argued that the case law referred to by me might cause me to make findings of fact against the Plaintiff. At the time when Mr. Lam was on his feet making the recusal application, I did not even have his written opening. I told him categorically that I was *not* biased against any of the parties. Undaunted, Mr. Lam insisted with the recusal application.

1. At the hearing, I firmly dismissed the recusal application with costs (with a certificate for counsel) and had given my oral reasons for doing so. I do not wish to rehash my reasons save to point out that:
2. It is trite law that an allegation of reasonable suspicion of apparent bias on the part of the tribunal hearing the case is a very *serious* allegation and could only be advanced by an advocate when he or she is satisfied that application for recusal is founded on good and reasonable grounds;
3. the client’s instructions *per se* to make such an application of recusal would not be sufficient;
4. There were simply no grounds for support the recusal application in the present case;
5. I would respectfully adopt what was said by Sir Thomas Bingham MR (as he then was) in **Arab Monetary Fund v. Hashim & Others** (unreported, 4th May 1993, Lexis Transcript), English Court of Appeal (Sir Thomas Bingham MR, Stuart-Smith and Beldam LJJ.), at pp. 4-5:

“Just as an inference of apparent bias is not to be lightly drawn, so such a charge is not to be lightly made. That remains true even where, as here, any suggestion of actual bias is expressly disclaimed. Cases may unhappily arise in which evidence of bias or apparent bias is so clear that an application for the discharge of removal of a judge is justified. ***But such an application is never justified simply by the instructions of the client. Counsel’s duty to the court and to the wider interests of justice in our judgment requires that he should not lend himself to making such an application unless he is conscientiously satisfied that there is material upon which he can properly do so*** …

In some jurisdictions the forensic tradition is that judges sit mute, listening to advocates without interruption, asking no question, voicing no opinion, until they break their silence to give judgment. That is a perfectly respectable tradition, but it is not ours” (my emphasis);

1. Regrettably, Mr. Lam chose to make the application when there were simply no proper grounds, whether factual or legal, to permit him to do so.

***Liability?***

1. In Mr. Lam’s opening, he conceded that the Plaintiff was negligent in the Accident but the Defendant should be held liable and he agreed that the contributory negligence of the Plaintiff should be between *25-50%*. It is the Defendant’s case that the Defendant should not be liable at all and alternatively, the contributory negligence of the Plaintiff should be *75%*. The battle-lines were thus drawn.
2. On liability, both parties agreed that the determinative issue for me to decide was:

“Who was negligent, the Plaintiff or the Defendant?”

***The Plaintiff’s evidence***

1. The Plaintiff testified before me. In summary, she testified that:

* On the Date of Accident, she was going to work and took a taxi. She alighted from the near-side of the taxi on the east-bound Kwok Shui Road as she wanted to cross the Kwok Shui Road to the Tai Woo Hau MTR Station;
* The taxi stopped behind a double-decker bus at the bus-stop to pick up and unload passengers (“*the Double-decker Bus*”);
* She stood on the east-bound Kwok Shui Road traffic lane at 3 feet from the rear offside end of the Double-decker Bus;
* She looked to her right to see if there was any traffic coming from the east-bound Kwok Shui Road and did not see any;
* She then looked at her left to look at the west-bound Kwok Shui Road;
* She admitted that because the Double-decker Bus was still stationary and not leaving, her view of the west-bound Kwok Shui Road was blocked;
* According to her estimation, the blockage by the Double-decker Bus left her with a restricted view of an 8-feet sighting range of the west-bound Kwok Shui Road;
* Within the said 8-feet range of sight of the west-bound Kwok Shui Road, she did not observe any vehicular traffic;
* She also observed that the parts of west-bound Kwok Shui Road which were right opposite and in front of her were without any vehicular traffic;
* There and then, she proceeded to cross from the east-bound Kwok Shui Road into the west-bound Kwok Shui Road;
* She said that when she was on the west-bound Kwok Shui Road, the HT8545 collided with her left leg and she fell to the ground;
* She said she could not remember which side of the frontal parts of HT8545 came into collision with her left leg but she maintained that the HT8545’s head-lights caused her to fell to the ground;
* She frankly admitted that she was not very good with directions and sometimes she confused left with right;
* She conceded that she was careless and agreed with the suggestion put to her by Mr. Gidwani (for the Defendant) that it would be more prudent and safe for her to do the following maneuver:

“After alighting from the taxi, she should stand on the pavement abutting the east-bound of the Kwok Shui Road and wait for the Double-decker Bus to depart and then try to cross to the opposite side of the Kwok Shui Road”.

1. She was thoroughly cross-examined by Mr. Gidwani (counsel for the Defendant) and various passages from her previous cautioned statement and witness statement were put to her to show the discrepancies and inconsistencies between her written statements and *viva voce* evidence.
2. The Defendant called no evidence at trial. I am of the view that the Plaintiff was not shaken by the cross-examinations and her evidence was credible *save* on one aspect, namely, the Plaintiff was adamant that whilst her vision was blocked by the Double-decker Bus, she insisted that the drivers of the vehicles travelling west-bound on the Kwok Shui Road would have a clear view and should have seen her. I reject this piece of evidence as entirely *incredible*. The Double-decker Bus must have blocked the views of both the Plaintiff and the Defendant who was driving the HT8545 and heading west-bound Kwok Shui Road.
3. Having carefully observed her giving evidence in the witness box and after considering the inherent probabilities of her evidence against the evidential backdrop (including her previous witness statement in the present proceedings, the cautioned statement and the sketch she provided to the police), I generally accept her evidence and would make the following findings of fact on the balance of probabilities:
4. The Plaintiff took a taxi and alighted from the near-side of it on the east-bound Kwok Shui Road as she wanted to walk across to reach the Tai Wo Hau MTR Station which was on the opposite side of the Kwok Shui Road;
5. She was in a hurry;
6. The taxi stopped behind a Double-decker Bus which was stopping at the bus-stop to pick up and unload passengers;
7. She stood on the east-bound Kwok Shui Road traffic lane at 3 feet behind the offside end of the Double-decker Bus;
8. Without waiting for the Double-decker Bus to leave the bus-stop, she looked to her *right* first to see if there was any traffic coming from the east-bound Kwok Shui Road towards her and did not see any vehicular traffic;
9. She *then* turned *left* to look at the west-bound carriageway of the Kwok Shui Road;
10. Because the Double-decker Bus was still stationary, her view of the opposite and west-bound lane of the Kwok Shui Road was blocked by it;
11. The blockage by the Double-decker Bus left her only with an 8-feet range of sights of the west-bound lane of the Kwok Shui Road when she was standing 3 feet behind the off-side of the Double-decker Bus;
12. The stationary Double-decker Bus *also* blocked the view of the Defendant when the HT8545 was approaching along the west-bound Kwok Shui Road;
13. Within that viewing precinct of the 8-feet of the west-bound lane of the Kwok Shui Road, the Plaintiff did not observe any vehicular traffic;
14. The areas of the west-bound Kwok Shui Road which were right opposite and in front of her were without any vehicular traffic;
15. There and then, she proceeded to cross from her position on the east-bound lane of the Kwok Shui Road (which was 3 feet behind the offside of the double-decker bus) into the west-bound lane of the Kwok Shui Road;
16. She walked across the Kwok Shui Road with a quickened pace;
17. When she was *on* the west-bound lane of the Kwok Shui Road, the HT8545 collided with her left leg and she fell to the ground;
18. The frontal parts of the HT8545 came into collision with her left leg and she was injured.

*Speed of HT8545?*

1. In view of my findings of fact, the Plaintiff could not rely on the doctrine of *res ipsa loquitor*. On the speed of the HT8545, I do not have the benefits of direct oral testimonies from the Defendant as he did not testify. However, on the basis of hearsay evidence (i.e. the witness statement dated 15th January 2005 provided by the Defendant to the police) and after applying section 49 of the **Evidence Ordinance** (Cap. 8), I am satisfied that the HT8545 was travelling at gear D with 40 to 45km/h. The Plaintiff has not adduced any evidence to challenge the speed of 40-45 km/h. and I found as a fact that that was indeed the speed which the HT8545 was travelling when the Defendant saw the Plaintiff coming out from the rear of the Double-decker bus to cross the Kwok Shui Road. I found as a fact that when HT8545 was travelling at 40-45 km/h, it was an appropriate and reasonable speed for the west-bound lane of the Kwok Shui Road on the Date of Accident.
2. Mr. Gidwani for the Defendant relied on the Road User’s Code to illustrate that for a car which was travelling at 40-45 km/h, the stopping distance would be 20 meters. He also submitted that in terms of the 8-feet mentioned by the Plaintiff, the HT8575 (if travelling at 40 km/h) would only require a split of a second to cover it!
3. On the basis of the above findings of fact made by me, was the Defendant negligent in causing the personal injury of the Plaintiff? Mr. Lam said the answer is yes and Mr. Gidwani contended that the answer should be no.

***The law?***

1. Various cases on the issue of liability of a driver were cited to me and with respect to counsel, I would seek to highlight the following decisions which encapsulated the applicable general principles:
2. In **Lai Ho Chuen (a minor) suing by his mother and next friend Chow Suk Fan v. Hung Ling Yung**, DCPI1127/2006, unreported, 30th April 2008, His Honor Judge C. M. Leung cogently summarized the case law in England and the HKSAR as follows at pp. 8-10:

“25. Both counsel referred to *Fardon v Harcourt-Rivington* (1932) 146 LT 391 where 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 at 30 mph, the speed limit of the road. In order to stop spontaneously to avoid the collision, he would have had to slow down to something like 5 mph when he passed the front of the coach. The court of appeal referred to *Fardon* (above) and found (at 133B-134A) 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 mentioned above. Browne LJ (at 134D-F) summed it up as follows:

“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. The above was referred to 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. The same considerations were referred to in the subsequent cases of *Kong Chung Ching v Lam King Ho* [1992] 1 HKC 104 and *Ho Hing Yuen by his father and next friend Ho Hon Kaim v Lee Wai Kai*, HCPI 58/2003, 31 May 2004. Different facts of the cases led to different conclusions. In *Kong Chung Ching*, 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. But in *Ho Hing Yuen*, 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.
3. 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.”;
4. In the English Court of Appeal decision of **Moore v. Poyner** [1975] RTR 127, Mr. Justice MacKenna also observed at p. 134:

“In the ordinary way a driver need not guard against the risk of an unseen pedestrian stepping on to the road from behind a stationary vehicle”;

1. In **Lee Sau Fong v. To Choi Tak**, HCPI1013/2004, Deputy High Court Judge Gill said eloquently at pp. 6-8:

“The Authorities

Regrettably collisions between pedestrians and motor vehicles are all too common and almost inevitably the pedestrian comes off second best.

A number of authorities were presented to me by both counsel. Most concerned pedestrians unexpectedly leaving the safety of the pavement and rushing out onto the road and into the path of a car. Often the pedestrian is hidden from view by parked cars until he emerges between two; often the victim is a child who may have climbed out of a bus. In these sorts of cases, the driver has more often than not no sighting of the victim until too late, so that the issue of negligence is whether or not he should have anticipated a pedestrian acting in this way.

Of course whether there is negligence in these or in any given case must depend on the particular circumstances of the case, and each has its own circumstances.

One test was stated thus:

“***If the possibility of the danger emerging is reasonably apparent, then to take no precaution 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***”

*per* Lord Dunedin in Fardon v Harcourt – Rivington (1932) 146 LT 391, at page 392.

The case of *James v Alger* (unreported) is of assistance. At first instance, a taxi-driver whose taxi struck and killed one of two boys who darted out in front of him was found liable in negligence. The boys were on a pedestrian crossing controlled by lights; the lights were against the boys and in favour of the driver. On appeal, the finding was reversed. Parker L.J. said near the conclusion of his judgment:

“In my judgment, it is putting a burden which is out of all bounds of reasonableness upon a motorist if it is to be said that, proceeding along this road he must so drive that if there are children on the pavement and they choose to dart out on to the pedestrian crossing, albeit that the lights are against them and in favour of the traffic, he can avoid that accident. It would involve any driver who saw any children within possible reach of a crossing slowing down to five miles per hour, so that if at the last moment they chose to dart out he would be able to avoid them. In my judgment the standard of reasonable care does not involve that.

….

Regrettably, I come to the conclusion that there was simply no evidence upon which the learned judge could properly have held that this defendant was liable, and therefore I would allow this appeal.”

In another unreported case *Barlow v Entwistle*, before the English Court of Appeal, Roache L.J. said, in allowing the appeal in favour of the driver, that the test was not that the driver should be the absolutely careful driver, but simply a reasonably careful driver.

A Hong Kong case was put before me: *Ho Hing Yuen v Lee Wai Kai*, unreported, HCPI 58 of 2003. In that case, the victim pedestrian had emerged into the carriageway from between a bus and a coach into the path of a car driven by the defendant. The defendant was found to have been driving at below but not much below the legal limit of 50 kph. There was not much moving vehicular traffic and not many pedestrians either. The judge at first instance found there was no negligence.

This decision was upheld on appeal albeit by a majority. The minority view was that the driver was 20% to blame.

But Rogers VP stated:

“In my view, the matter is quite simple. I entirely agree with the judge below. I cannot see that, given the road condition and given the time of day and the absence of other road users, the defendant was travelling other than in a careful manner. ***He was in third gear; he was travelling at a very reasonable speed for that sort of a road, which was a divided dual carriageway road, admittedly with buses there. 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.***” (my emphasis).

1. On the basis of the foregoing, I proceed to determine the liability of the Defendant in the present case. In my view, the Defendant was *not* liable to the Plaintiff. In the light of the findings of fact made by me as above, the Plaintiff was indeed negligent in not ensuring that she could see the vehicular traffic of the west-bound carriageway of the Kwok Shui Road. She walked out from the rear end of the Double-decker Bus right into the west-bound Kwok Shui Road *without* looking again to see whether there was traffic coming towards her. According to the Plaintiff’s own evidence (which I have accepted), she was standing at a distance of 3 feet behind the offside rear end of the Double-decker Bus. She did know and realize that her vision of the west-bound Kwok Shui Road was restricted and she only had an 8-feet precinct to observe the vehicular traffic. Her restricted view of the west-bound Kwok Shui Road meant that she had no proper look-out for the traffic which came from west-bound Kwok Shui Road. I conclude that she had failed to maintain a proper look-out.
2. I found her way of walking across the Kwok Shui Road on the Date of Accident to be negligent and was indeed the cause of the Accident.
3. In terms of arithmetic, the HT8545 was travelling at a speed of 40-45 km/h., and would have used a fraction of a second to cover the distance of 8-feet[[2]](#footnote-2). The Plaintiff did not give herself sufficient time and space to observe the west-bound traffic on the Kwok Shui Road. In his witness statement to the police dated 15th January 2005, the Defendant said his view was blocked by the Double-decker Bus and when he saw the Plaintiff, she was *walking* out of the rear end of the Double-decker Bus. I attach full weight to this piece of hearsay evidence of the Defendant and found that was indeed the case. I further hold that the Defendant could have done nothing to avoid the Accident. It was an unavoidable accident.
4. Mr. Lam for the Plaintiff argued that the Defendant should have slowed down to 15-20 km/h as the Defendant should have noticed that the HT8545 was approaching a bus-stop and there were railings on the pavement abutting the east-bound Kwok Shui Road. He contended that upon noticing those features of the locality, the Defendant should have decelerated from 40-45 km/h to 15-25 km/h. I find this argument unsound and reject it. I note that the length of the Double-decker bus was 10 meters[[3]](#footnote-3), when the HT8545 was travelling at 40-45 km/h, it would require about 1 second to run the distance of 10 meters. Mr. Lam accepted that the Defendant’s view was also blocked by the Double-decker Bus. In the circumstances, there was simply insufficient time and stopping distance for the Defendant to stop the HT8545 in time to avoid colliding with the Plaintiff.
5. It is the argument of Mr. Lam that the spacing between the railings on the pavements of the Kwok Shui Road should have alerted the Defendant of the additional risks that there might be pedestrians walking or running across the Kwok Shui Road. When he failed to take heed of those risks, the argument runs, the Defendant was negligent. This argument is not supported by the Plaintiff’s evidence. It is not the testimonies of the Plaintiff that on the Date of Accident and at the time of the Accident, there were pedestrians walking over the Kwok Shui Road. In this regard, I would also refer to **Fung Tat Hin v. Yu Kwan Wang**, CACV59/2004, unreported, 10th December 2004, Court of Appeal (Cheung, Yuen JJA and Chung J.) where Madam Justice Yuen JA said appositely at pp. 10-11:

“原審法官的裁斷指，朱女士與原告人當時正在橫過一條繁忙的道路。該處有 5 條行車線，**而道路兩旁則設有欄杆，防止行人橫過馬路。於該道路兩旁所設的欄杆，有一處空位，但該空位只是讓乘客上落巴士時使用，而並非讓行人橫過馬路**。距離該處僅 20 米的地方，則有行人過路線。

行人企圖橫過一條有 5 條行車線的繁忙道路（而該處明顯是禁止行人橫過馬路的）是一種極爲不負責任（幾乎可説是接近自毀）的行爲，**法庭不能合理地要求其他道路使用者駕駛時須預期行人會這般魯莽地橫過馬路**。

被告人在審訊被盤問時同意他曾‘在筲箕灣一帶’見過行人違反交通規則橫過馬路（謄本第 138 頁K-N行），但每位駕駛者無論在哪一帶、於任何時間、及任何交通情況下，都必定曾經看見行人違反交通規則橫過馬路。因此，被告人這證供想落是對本案無關，亦沒有任何價值。無論如何，被告人的證供是他曾見過行人違反交通規則橫過馬路，‘尤其是東大街’（謄本第 138 頁 K-N 行），但這並非意外發生的地點。意外發生在有 5 條行車線，兩旁有欄杆防止行人過馬路的筲箕灣道。因此，**該證供沒有使被告人於本意外發生前須要肩負起比正常更重的謹慎責任** ” (emphasis added).

1. As mentioned earlier, the stopping distance[[4]](#footnote-4) of the HT8575 which was travelling at 40 km/h would be 20 meters. I fail to see how the Defendant could have braked and stopped the HT8545 in time (within the time-frame of 1 second and the distance of 10 meters) to avoid colliding with the Plaintiff.
2. Further, with the admission of the Plaintiff to the effect that the Double-decker Bus had blocked the Defendant’s sights and view, the Plaintiff’s argument that, in the circumstances of the present case, the Defendant should have seen her earlier to avoid the subsequent collision was factually impossible. I reject that argument.

***No Liability?***

1. On the issue of liability, I would hold that:
2. The Accident was caused by the Plaintiff’s negligence in the Accident;
3. The Plaintiff has failed to prove that the Accident was not caused by her negligence on the Date of Accident;
4. The Plaintiff has failed to prove that the Accident was caused by the Defendant’s negligence;
5. The Defendant is not liable to the Plaintiff in respect of the Accident.

***75% Contributory negligence?***

1. Assuming that the Defendant was liable to the Plaintiff and it was the Defendant’s negligent driving of the HT8545 which caused the Accident, I would have no hesitation to hold that the contributory negligence of the Plaintiff should be ***75%***. In making that assessment, I have considered in full the circumstances of the present case and granted that each case is different from the other but I derived considerable assistance from the analysis provided by His Honor Judge C. M. Leung in **Lai Ho Chuen v. Hung Ling Yung**, DCPI1127/2006, unreported, 30th April (see: §32). Similarly, the Plaintiff was an educated adult with working experience when she met the Accident.

***Pain, suffering and loss of amenities (“PSLA”)?***

1. The medical conditions of the Plaintiff were sufficiently set out in the joint medical report dated 3rd June 2008 prepared by Dr. Henry Ho and Dr. Peter Tio. On the issue of PSLA, I emphasized the following aspects:

* At the Date of Accident, she was 26 and she is now 30;
* As a result of the Accident, the Plaintiff suffered left knee injury and was hospitalized for a few days in the Yan Chai Hospital under the care of its Department of Orthopaedics and Traumatology;
* She was subsequently put on a knee brace and received physiotherapy;
* It is her evidence that her left knee still hurts and it affected her amenities in that she could no longer resumed playing some sports, including volleyball, badminton and basketball;
* She still feels the pain in her left leg which, according to Drs. Tio and Ho, was in the range of 0-8/10;
* Both doctors opined that she has reached the “maximal medical improvement”.

1. Mr. Lam argued that in the circumstances, the appropriate award of PSLA should be HK$220,000 and he cited several cases for me to consider. Mr. Gidwani contended that the PSLA award should be HK$80,000. I am of the view that when all the circumstances of the Plaintiff and the comparable cases are taken into account, her PSLA should be **HK$80,000**.

***Loss of earning capacity?***

1. At the Date of Accident, the Plaintiff was working as an assistant to the director of a lightings’ company. She said that employment yielded HK$7,500 per month and she would have to travel to the Mainland China to visit the factory. She would sometimes hand-carry some samples of the lamps and lights back to Hong Kong. Those samples were heavy and caused her to feel pain in her left knee. She also had to climb up and down stairs and again the left knee injury would cause her to feel pain.
2. As to her present employment with a monthly salary of HK$9,000, she said she sometimes has to climb to heights to fetch things and in exhibitions she had to render assistance in decorating. Her left knee would cause her pain.
3. I am of the view that an award for loss of earning capacity is appropriate in the circumstances and the amount of **HK$15,000** (or 2 months’ wages of her previous employment) is reasonable and appropriate.

***Bone setters and tonic food?***

1. It is appropriate to consider the heads of bone setters’ fees and tonic food together as the Plaintiff’s evidence was that she approached 3 Chinese medicine doctors for treatments and prescriptions of Chinese herbal medicines.
2. The Plaintiff testified that she had, 1 month after the Date of Accident, visited 3 Chinese medicine practitioners[[5]](#footnote-5). She frankly admitted that she did not ask any of them for receipts in respect of the fees she paid to them. She insisted, however, that the treatments received from them benefited her tremendously and she owed her present ability to walk to the efforts of them. She said that she was prescribed with and consumed soups made of Chinese herbal medicines.
3. Doing the best I can in the circumstances and bearing in mind the absence of written receipts to support the bone setters’ fees and tonic food, I would make an award of **HK$2,500** to the Plaintiff.

***Quantum – a summary?***

1. In all, a summary of the quantum of damages appears as follows:

**Add:**

1. PSLA: HK$80,000
2. Pre-trial loss of earnings: HK$3,150[[6]](#footnote-6)
3. Loss of earning capacity: HK$15,000
4. Bone setters & tonic food: HK$2,500
5. Medical expenses: HK$1,684[[7]](#footnote-7)
6. Travelling expenses: HK$750[[8]](#footnote-8)

Sub-total: HK$103,084

**Less:** 75% contributory negligence:

Total: **HK$25,771**

**Add:**

Interest

1. Interest of 2% per annum on general damages from the date of the service of the writ to the date of judgment;
2. Interest on loss of earnings and the special damages at half judgment rate from the Date of Accident to the date of judgment.

***Orders?***

1. In all, I would make an order that the Plaintiff’s case be dismissed in its entirety with an order *nisi* on costs that the costs of the present action be to the Defendant, such costs be taxed if not agreed on the District Court scale. I would also confirm that the present case is fit for counsel’s attendance and a certificate for counsel is, therefore, granted.
2. Before I depart from this case, I would like to express my sincere thanks to Mr. Gidwani for his detailed written submissions and cogent oral speeches.

Frederick HF Chan

Deputy District Judge

Representations:

Mr. Simon H. W. Lam instructed by Messrs. Andrew Chan & Co. for the Plaintiff;

Mr. Victor T. Gidwani instructed by Messrs. Deacons for the Defendant.

1. **Lai Ho Chuen v. Hung Ling Yung**, DCPI127/2006, unreported, 30th April 2008, H. H. Judge Leung, **Moore v. Poyner** [1975] RTR 127 which laid down the famous test of “apparent risks” vis-à-vis a driver, **Stupple v. Royal Insurance Co. Ltd.** [1971] 1 QB 50, which dealt with the evidential effect of a person’s criminal conviction; **Fung Tat Hin v. Yu Kwan Wang**, DCPI32/2003, unreported, 15th December 2003 where H. H. Judge L. Chan distinguished **Moore v. Poyner** (ibid.) and held the defendant liable; **Fung Tat Hin v. Yu Kwan Wan**, CACV59/2004 where H. H. Judge L. Chan’s judgment in DCPI32/2003was overturned by the Court of Appeal on 10th December 2004 (Yuen JA and Chung J. agreeing, Cheung JA. dissenting). [↑](#footnote-ref-1)
2. Both counsel agreed that if the HT8545 was travelling at 40km/h, it required 0.2 second to cover the 8 feet. If it was travelling at 45 km/h, it would require only 0.19 second to span the 8 feet. [↑](#footnote-ref-2)
3. This measurement was accepted by both parties. [↑](#footnote-ref-3)
4. The stopping distance is the aggregate of the thinking distance and braking distance. [↑](#footnote-ref-4)
5. The Plaintiff said that 2 of them were licensed and registered Chinese medicine practitioners in the HKSAR. [↑](#footnote-ref-5)
6. This figure for the Plaintiff’s loss of earnings was agreed by the Defendant. [↑](#footnote-ref-6)
7. This item was agreed by the Defendant. [↑](#footnote-ref-7)
8. This sum was agreed by the Defendant. [↑](#footnote-ref-8)