#### DCPI 1470/2007

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1470 OF 2007

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| BETWEEN | LEUNG SZE NOK, a minor  by next friend LEUNG YUEN FAT | Plaintiff |
|  | and |  |
|  | TSUEN WAN PROPERTIES LIMITED  trading as  RIVIERA ICE CHALET | Defendant |

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##### Coram: Deputy District Judge Raymond Tsui in chambers (open to the public)

Date of Hearing: 21st April 2009

Date of Handing Down Decision: 22nd May 2009

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###### DECISION

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1. This is an application by the Defendant by a summons (the “Summons”) dated and filed on 5th September 2008 under Order 26 of the Rules of the District Court for leave to serve on the Plaintiff interrogatories attached thereto (the “Interrogatories”).

Background

1. An accident happened on 4th February 2006 to the Plaintiff who was aged about 9 at that time. She now sues by her next friend Mr Leung Yuen Fat, her father (“Mr Leung”).
2. The pleaded case of the Plaintiff is that the accident happened at the premises situate at 3/F, Riviera Plaza, 28 Wing Shun Street, Tsuen Wan which were operated by the Defendant as an ice skating rink (the “Skating Rink”) and that the Defendant was the occupier of the Skating Rink within the meaning of the Occupiers Liability Ordinance, Cap. 314.
3. In addition to operating the Skating Rink, the Defendant also provided coaches to give skating lessons to children. The Plaintiff was one of the children who had been receiving skating lessons from the coaches of the Defendant.
4. On 4th February 2006 at about 9 a.m., Ms Samantha Ho (“Ms Ho”) of the Defendant was conducting the Plaintiff’s private skating lesson. Paragraph 3 of the Statement of Claim reads as follows:

“3. (1) On 4th February 2006, at or about 9 a.m., the Defendant’s Samantha Ho was conducting the [Plaintiff’s] private lesson in the Defendant’s said premises;

(2) In the course of the lesson, Samantha Ho instructed the [Plaintiff] to follow behind her leading in front to teach, demonstrate and carry out a skating manoeuvre known as “左腳飛機”;

(3) The [Plaintiff] accordingly pursuant to instruction and direction followed behind Samantha Ho in the manoeuvre when the [Plaintiff] felt blood flowing down her head.”

1. The principle of *res ipsa loquitur* is also pleaded.
2. The Plaintiff was sent to hospital after the accident. Open depressed fracture of skull vault with cerebral contusion and epidural haematoma was confirmed. Craniotomy operation was required.
3. The accident was alleged to have been caused by the negligence and/or breach of statutory duty of the Defendant and/or its agents or servants. Particulars of the negligence and/or breaches of statutory duties are set out in the Statement of Claim. It is sufficient for me to say that those particulars do not set out how the accident happened.
4. Witness statements were exchanged. Discovery was also completed. There were CCTV tapes for the Skating Rink for the material times. According to Mr Anthony Gomes, the manager of the Skating Rink and who would be one of the witnesses of the Defendant, the images of the CCTV cameras were recorded in sequential manner. He had viewed the tapes and found that the accident was not recorded in the tapes which were then erased.
5. The Plaintiff also filed a very short witness statement. She said in the witness statement the translation of which is set out in full as follows:

“1. At that time, I was taking an ice skating lesson and SAMANTHA was my coach.

2. At that time, only SAMANTHA and I were there. She taught and demonstrated to me the manoeuvre of left leg forward arabesque. She glided a few steps and I followed her manoeuvre.

3. She was ahead of me and I was behind her.

4. Suddenly, I had the kind of painful feeling that my abdomen was hit by something. And then, I found my head bleeding.

5. I held my abdomen. My coach and another coach at the rink carried me away from the rink and laid me down on a bench. And then, ambulancemen took me to hospital.”

1. Mr Leung filed a witness statement. He was not at the Skating Rink when the accident happened. But attached to his witness statement is a chronology of events starting from the date of the accident. Paragraph 5 of the entry on 10th April records the following:

“ … [the Plaintiff] was very frightened at that time, but she can remember that her head did not hit the ice surface and she did not feel cold on the head. [The Plaintiff] thinks that she may have been kicked by her coach (SAMANTHA HO) when SAMANTHA was raising or lowering her foot. The Plaintiff also thinks that it was not possible that she could have been kicked by her own skate …”

1. It should be noted that the above extract from Mr Leung’s witness statement does not appear in the witness statement of the Plaintiff. Insofar as Mr Leung repeats what the Plaintiff thinks and remembers, the same is hearsay evidence. It could further be gathered from the witness statements filed on behalf of the Plaintiff that there is no direct evidence from all the Plaintiff’s witnesses as to how the accident actually happened.
2. Ms Ho also filed her witness statement for the Defendant. The relevant parts are extracted below:

“3. As I was demonstrating *right* leg forward arabesque, I heard a scream behind me. Therefore, I turned round to have a look behind me. And, I saw that the Plaintiff knelt down on the ice. Hence, I immediately went to the Plaintiff to see her condition. I saw that the Plaintiff knelt down on the ice surface with her hands holding her abdomen. At that time, I thought that the Plaintiff might be having a stomach ache. Therefore, Vincent … and I immediately carried the Plaintiff in our arms to the skate changing area of the said Rink and laid her down there. It was at that time that we found that the left side of the Plaintiff’s head was bleeding … *(italics added)*

…

9. During the accident, I was gliding at a low to medium speed and was at a distance of more than 3 metres from the Plaintiff. While I was demonstrating right leg forward arabesque to the Plaintiff, my left leg which I extended backward and raised or the blade of my left skate did not come into contact with the Plaintiff or anything. If my left leg or the blade of my left skate had come into contact with anything (including the Plaintiff), I must have sensed that. With the Plaintiff’s skating skills, she should not have any difficulty at all in following my gliding speed at that time. Therefore, I believe that the plaintiff lost her balance and fell down while imitating the right leg forward arabesque which I was demonstrating.”

1. The only witness that allegedly had witnessed the accident is Mr Yau Wing Shing who was one of the coaches of the Defendant. He is a witness of the Defendant. He says in his witness statement:

“2 … At that time, I saw that SAMANTHA was demonstrating a series of manoeuvres to [the Plaintiff] … And, the Plaintiff was following SAMANTHA at a distance of about 10 feet, observing and imitating. Whilst SAMANTHA was demonstrating the manoeuvre of right leg forward arabesque to the Plaintiff and the Plaintiff was imitating the same manoeuvre, I saw that the Plaintiff fell down on the ice surface. Having seen the situation, I immediately told SAMANTHA about it and went forward to have a look at the Plaintiff’s condition. And, I saw that the left side of the Plaintiff’s head was bleeding. Therefore, SAMANTHA and I immediately carried the Plaintiff in our arms to the skate changing area of the said Rink and laid her down there and then called an ambulance …”

1. The paramount principles in relation to an application under Order 26 of the Rules of the District Court are that leave would only be granted “to such only of the interrogatories as it considers necessary either for disposing fairly of the cause or matter or for saving costs…”.
2. In deciding whether to give leave, the court shall “take into account any offer made by the party to be interrogated or to give particulars, make admission or produce documents relating to any matter in question.” (underling added) I note that there was no offer made by the Plaintiff.
3. A minor amendment to paragraph (2A) of Order 26 rule 1 was introduced under the Civil Justice Reform which took effect on 2nd April 2009 in that the words “or to give” underlined above were replaced by the words “to give”. Both Ms Liu, solicitor appearing for the Plaintiff, and Mr Tam, solicitor appearing for the Defendant, agreed that the amendment did not alter the legal position. I agree. It appears that on a true and proper construction, the word “or” was redundant in the pre-amended version of the rule.
4. In Ascoba Company Limited v SAFCO Express Services (HK) Limited (DCCJ No. 6161/2003, 3rd August 2005), HH Judge Ng had succinctly set out in paragraphs 18 to 20 of the Judgement the principles relating to administration of interrogatories. Ms Liu and Mr Tam did not dispute the principles applicable. I respectfully adopt in this application the same principles as set out by HH Judge Ng.
5. Attached to the Summons are eight interrogatories. At the hearing, Mr Tam informed the court that he would not pursue Interrogatories No. 7 and No. 8 to avoid unnecessary argument.
6. The general thrust of the argument of Mr Tam was that as the pleadings and the witness statements filed by the Plaintiff now stood, the Defendant was totally in the dark as to what the case of the Plaintiff was in relation to how and under what circumstances the accident happened. Mr Tam argued that the Plaintiff even had not pleaded which part of the Plaintiff’s body was hit. From the witness statement of the Plaintiff, it appeared that the Plaintiff was suggesting that the Plaintiff’s abdomen was hurt. Yet it was her head that was bleeding.
7. Mr Tam also argued that the Defendant was entitled to know the case it had to meet. He further pointed out that the only way the Defendant could guess the Plaintiff’s possible case was from the alleged conversation between the Plaintiff and Mr Leung as shown from the extract from Mr Leung’s witness statement above.
8. In reply, Ms Liu argued that the Plaintiff was at the material time in the care of Ms Ho and the Plaintiff was following what she was instructed to do. The Plaintiff had set out all she knew about the accident. The dispute was whether Ms Ho was demonstrating right or left arabesque. She also pointed out that the various medical reports had recorded injury to the left parietal region of the Plaintiff.
9. Ms Liu also drew my attention to the joint medical report of Dr Brian Chao and Dr Woo in which Dr Chao reported that the Plaintiff told him that she had stooped but not fallen and that she could not recall any impact to her head but notice blood dripping from her scalp. Dr Chao further ventured to suggest that “[f]rom the shape of the injured area, best described as a hole in her skull without a linear crack, it seems more likely that this was inflicted by a small sharp or sharpish object than a fall on to a flat surface.” He further suggested that from the measurements jointly taken, it was “possible for the skate of an adult to have inflicted the wound if the adult dropped her foot and [the Plaintiff] had got close to her.” Dr Chao also noted that from the experiment jointly carried out by the two doctors, the Plaintiff could not have inflicted the injury on herself with her own skate. Dr Woo confined his opinions to the medical conditions of the Plaintiff and made no comment on the possible cause of the accident.
10. The observations of Dr Chao are, of course, not conclusive and are subject to the weight to be accorded to them at the trial.
11. Ms Liu argued that the Plaintiff had already set out all she knew and that the witness statement of the Plaintiff and the various medical reports could help the court to draw an inference that the accident was caused by the negligence of Ms Ho. Ms Liu also pointed out that as a result of the witness statement of Mr Yau Wing Shing, the Defendant in fact knew better than the Plaintiff did.
12. In reply, Mr Tam pointed out some inconsistencies in the evidence of the Plaintiff. For example, the report of the A&E Department of Yan Chai Hospital shows that the injury was at the back of the head and thus the Plaintiff could not sustain such injury if both the Plaintiff and Ms Ho were doing the manoeuvre of forward arabesque. He also pointed out that if it was the case of the Plaintiff that she did not know what actually happened, there was no such evidence from the Plaintiff.
13. Mr Tam cited Tam Chun Pui v Hip Hing Engineering (Macau) Co Ltd & Ors (DCEC No. 628/2006, 14th December 2006) in support. In Tam Chun Pui, the applicant sustained injury when he was installing anti-heating plates when one of the plates suddenly fell down and hit his left wrist. Particulars of the accident were not given in the Application or the witness statement. The respondents applied for leave to serve interrogatories which were related to the circumstances of the alleged accident. The applicant objected on the ground that the interrogatories were not relevant to the proceedings, the reason being that the interrogatories were directed to fault of the parties and that liability under the Employees’ Compensation Ordinance was not fault-based. HH Judge Ng ruled that the interrogatories were not necessarily directed to the issue of fault and that they were equally concerned with the issue of whether there was an accident and if so whether it arose out of and in the course of employment. They might thus form a step in resolving the question of liability. The interrogatories were allowed. The interrogatories, however, were not set out in the Judgement. It is trite law that objection against interrogatory must be judged in the context of the particular interrogatory and all the surrounding circumstances. As such, I do not think that the case Tam Chun Pui could be of much help to Mr Tam.
14. Mr Tam cited Hui Sui Hop v Ng Chiu Construction Co & Anr (CACV No. 108/1994, 16th November 1994) for the proposition that where a party fails to apply to set aside the interrogatories, they ought to be answered. Mr Tam acknowledged that the principle did not apply in the present case as Order 26 under the Rules of the High Court and Order 26 under the Rules of the District Court were different. He said that the Defendant had been co-operative in providing information to the Plaintiff. He suggested that since the Plaintiff had failed to disclose material information, the court could draw an analogy between Hui Sui Hop and the present case.
15. But a close reading of the judgement of Hui Sui Hop reveals that the proposition was premised on the fact that the interrogatories were proper (see paragraphs 11 and 12 of the judgement). In this application, however, whether the Interrogatories were proper was in dispute.
16. In any event, I do not see any analogy between these two cases. Whether the parties had been cooperative is neither here nor there. The ultimate consideration is always whether the interrogatories fall within the established principles.
17. Against these backgrounds and arguments, I proceed to examine the Interrogatories.

Interrogatory 1

1. Interrogatory 1 is in the following terms:

“Please describe with details, when, where and how Leung Sze Nok told her father Mr Leung Yuen Fat that she believed that it was her coach Samantha Ho Sum Yee (“Samantha Ho”) who hit her head when Samantha Ho raised or lowered her leg.”

1. This Interrogatory relates to the chronology attached to the witness statement of Mr Leung mentioned above.
2. I do not see how this Interrogatory is relevant to any issue save that relating to the credibility of the Plaintiff. Mr Tam suggested that if the Plaintiff could tell her father, she could say so in her witness statement. This is clearly an attack on her credibility. It is not the case where the Plaintiff has chosen not to disclose their case but she has chosen, for her own reasons, to introduce the evidence through Mr Leung. It is a matter of weight to be accorded to such evidence. In any event, such matters could be elicited during cross-examination of the witnesses without the Defendant being caught by surprise. I do not see any prejudice being caused to the Defendant. I would not allow Interrogatory 1.

Interrogatory 2

1. Interrogatory 2, which is a follow-up question on Interrogatory 1, is in the following terms:

“Please state on what basis with reference to any facts or evidence relied upon by Leung Sze Nok such belief was held.”

1. Strictly speaking, there is no direct evidence from the Plaintiff that she did hold this belief. The only evidence in this respect is that of Mr Leung who was told by the Plaintiff that she had such belief. Leaving that aside, the basis of the belief of the Plaintiff is a matter of evidence and cross-examination which again goes to the credibility of the Plaintiff. I would not allow this Interrogatory.

Interrogatory 3

1. This Interrogatory is in the following terms:

“Please describe with particularity what the posture of “left-leg aeroplane’ (左腳飛機) composed of.”

1. This Interrogatory clearly relates paragraph 2 of the witness statement of the Plaintiff and paragraph 3(2) of the Statement of Claim. Such being the case, the Defendant could have served a request for further and better particulars on the Statement of Claim on the Plaintiff.
2. I note that the information sought does not relate to how the accident happened. Thus the argument of Ms Liu that the Plaintiff did not know how the accident happened does not apply. Instead, the Interrogatory relates to the issue how the Plaintiff understood the manoeuvre of “left-leg aeroplane” was to be performed. This would show the posture of the Plaintiff at the material time as she was, as pleaded in the Statement of Claim, following the instructions to perform the manoeuvre. This may shed some light on how the accident happened.
3. One of the arguments against allowing this Interrogatory was that it should have been a subject matter of a request for further and better particulars. Mr Tam argued that to go back and prepare a request for further and better particulars would only increase costs. That may be true. But that does not detract from the fact that the information sought should have been in the form of a request for further and better particulars. In my view, the real test should be whether the Interrogatory is necessary either for fairly disposing of the cause or the matter or for save costs.
4. As far as this Interrogatory 3 is concerned, I am satisfied that a litigious purpose could be served in that the Defendant would be in a better position to understand what the probable posture of the Plaintiff was at the material time which would in turn have some bearing on the issue of liability. I would allow Interrogatory 3.

Interrogatory 4

1. Interrogatory 4 is in the following terms:

“Please state the distance between Samantha Ho and Leung Sze Nok before Samantha Ho demonstrated “left-leg aeroplane” (左腳飛機) and the distance between Samantha Ho and Leung Sze Nok when Leung Sze Nok started to follow Samantha Ho from behind.”

1. This Interrogatory relates to paragraphs 3(2)and 3(3) of the Statement of Claim and paragraphs 2 and 3 of the witness statement of the Plaintiff.
2. Paragraph 26/4/12 of Hong Kong Civil Procedure 2009 reads as follows:

“ … Where the plaintiff is suing for damages for personal injuries sustained at work, an interrogatory seeking an admission by the defendant as to where the plaintiff was standing when he was injured will not usually be allowed. This applies especially when the answer is peculiarly within the plaintiff’s knowledge and not the defendant’s. In a running-down action, interrogatories will not usually be ordered as to facts relevant to the issue of negligence --- e.g. how far the plaintiff was when the defendant first saw him, what steps the defendant took to avoid him, at what speed the defendant was driving…”

1. The above extract covers this Interrogatory which should not be allowed.
2. In support of his application, Mr Tam cited Griebart v Morris [1920] 1 KB 659 in which the plaintiff was hit by an omnibus. She could not locate any witnesses and she was so seriously injured that she might not be able to give a full account of the position when the accident happened. She thus applied for leave to administer the interrogatories on, *inter alia*, the relative positions of the parties. Leave was granted on appeal by the Court of Appeal.
3. Scrutton LJ commented at p. 666:

“The result is that there is a right to interrogate in order to obtain an admission if the interrogatory is considered necessary for disposing fairly of the action. In the present case the plaintiff, in the absence of witnesses on her behalf who saw the accident, desires to obtain admissions of fact from the defendant as to which she on account of the sudden nature of the occurrence and of the serious injuries which she sustained cannot herself give any satisfactory evidence.”

1. I would regard Griebart v Morris as an exception to the general rule because of its special circumstances. The requesting party in Griebart v Morris was the plaintiff who bore the burden of proof. The circumstances were such that the defendant was the only party who could give the requested information. It would be unfair to the plaintiff if she were to be denied the information.
2. Our case is different. As could be gathered from the witness statements for the Defendant, Mr Yau Wing Shing saw the accident. Ms Ho says in her witness statement that she did not sense that her leg or the blade of the skate had come into contact with the Plaintiff. The burden of proof was on the Plaintiff, not the Defendant, to prove that the accident did happen. There is no unfairness to the Defendant if this Interrogatory is disallowed. I would not allow this Interrogatory 4.

Interrogatory 5

1. Interrogatory 5 is in the following terms:

“Please state in details whether Leung Sze Nok had fallen onto the ice surface at the moment when:- (1) she felt painful at her abdomen like being hit by something; and/or (2) she found that her head was bleeding.”

1. This Interrogatory relates to paragraph 4 of the witness statement of the Plaintiff. I note that there is no mention either in the Statement of Claim or the witness statements of the Plaintiff and her witnesses that the Plaintiff had fallen onto the surface of the Skating Rink at the time of the accident. As such, there is simply no basis for this Interrogatory. Furthermore, as I see it, the only purpose of this Interrogatory is to attack the credibility of the Plaintiff which could be attained in cross-examination. I would not allow Interrogatory 5.

Interrogatory 6

1. Interrogatory 6 is in the following terms:

“Please describe in details the full circumstances and sequence of events leading up to the alleged accident and injury to Leung Sze Nok from the stage when she started following Samantha Ho from behind to practise “left leg aeroplane” until she felt painful at her abdomen and found her head bleeding.”

1. This Interrogatory relates to paragraph 3(3) of the Statement of Claim and paragraph 4 of the witness statement of the Plaintiff. Mr Tam suggested that these two paragraphs were inconsistent. Interrogatory 6 should be allowed so that the Defendant would know which version the Plaintiff would rely on at the trial.
2. I express no views on whether these two paragraphs are inconsistent. But it is clear that the purpose of this Interrogatory is to pin down the case of the Plaintiff. There is nothing wrong with this. But if there are already two inconsistent versions, this Interrogatory would not be necessary as it is an attack on the credibility of the Plaintiff and would only increase costs. It should also be noted that the Plaintiff has set out the events leading to the injury. They may not be sufficient from the Defendant’s perspective. But I think further information could be elicited during cross-examination and I do not see any prejudice being caused to the Defendant.
3. In any event, the extract from paragraph 26/4/12 of Hong Kong Civil Procedure 2009 mentioned above when Interrogatory 4 is discussed also covers this Interrogatory.
4. I would not allow Interrogatory 6.
5. Both Ms Liu and Mr Tam agreed that Order 80 rule 9 applied to the present case so that Mr Leung, the next friend of the Plaintiff, could make an affirmation to answer Interrogatory 3.
6. The Orders I shall make are as follows:

(a) Leave is granted to the Defendant to serve on the Plaintiff Interrogatory 3 attached to the Summons;

(b) Service of Interrogatory 3 on the Plaintiff be dispensed with;

(c) Mr Leung Yuen Fat, being the next friend of the Plaintiff, shall file and serve an Answer to Interrogatory 3 by way of affirmation within 28 days from the date hereof;

(d) Out of the six Interrogatories, the Plaintiff has successfully defended five. In the circumstances, she has substantially won the application. The fair cost order should be the Defendant shall pay 5/6 of the costs of the Summons to the Plaintiff, to be taxed if not agreed. This shall be the cost order nisi and shall become absolute in 14 days;

(e) the Plaintiff’s own costs be taxed according to Legal Aid Regulations.

# (Raymond Tsui)

Deputy District Judge

Representation:

Ms Alison Liu of Messrs Bough & Co., assigned by the Director of Legal Aid, for the Plaintiff.

Mr. Wilson Tam Wai Kay of Messrs W. K. To & Co. for the Defendant.