#### DCPI2012/2008

### IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

## PERSONAL INJURIES ACTION NO. 2012 OF 2008

BETWEEN

YIP YUEN NENG SHIRLEY Plaintiff

and

LEE SZE WAI Defendant

trading as 蝦碌美食

##### Before: HH Judge Leung in Chambers (Open to the public)

Date of Hearing: 28 September 2009

Date of Decision: 28 September 2009

## D E C I S I O N

1. On 21 August 2009 I handed the judgment in this personal injury case. I gave judgment in favour of Yip, the Plaintiff, against Lee, the Defendant, for damages in the sum of $218,010 with interests and costs.
2. As summarized in the judgment, there were the following five issues: (1) how the accident happened; (2) whether Lee is liable as the occupier; (3) whether Lee is liable in negligence; (4) whether Yip was contributorily negligent; and (5) the quantum of damages.
3. I do not repeat this court’s judgment in respect of each of these issues. It suffices for me to say that there is now no challenge against this court’s findings in respect of issues 1, 2, and 4. The intended appeal put forward by the Defendant focuses on issues 3 and 5.
4. The test of whether leave to appeal should be granted comes from section 63A of the District Court Ordinance. Essentially, the court will have to consider whether the proposed appeal has reasonable prospect of success or whether for other reasons of justice the matter should be heard by the appellate court.

*Proposed appeal ground no. 1*

1. Lee argues that this court somehow made some unacknowledged turn of reasoning, as described in her counsel’s written submissions, or had flaw in the reasoning in finding that she is liable in negligence. The argument seems to be that this court has failed to find the existence of duty of care.
2. In my view, such reading of this court’s judgment is most questionable. This court was acutely aware of the need to find both the existence of the duty of care and its breach before liability and negligence could be said to be established. See paragraph 17 of the judgment. After considering the evidence, this court stated in paragraph 22 of the judgment that in the court’s view, attending to the customers’ request to use toilet facility must be part of the business concern of the restaurant. There was sufficient proximity between the restauranteur and Yip to give rise to the duty on the part of the restauranteur to see that Yip would be reasonably safe in following such direction to the toilet facility and to use it. The duty arose even assuming that this was an isolated occasion. The real question is whether Lee was in breach of such duty.
3. But in today’s hearing, Mr Lau for Lee apparently changed the stance by submitting that in fact what Lee is seeking to challenge is not really whether the court has found the existence of duty of care but really the court’s finding as to the standard of such duty of care. I fail to see how it could be argued that Lee has discharged her duty of reasonable care when admittedly no step had been taken to see that her guests would be reasonably safe in following the instruction to the toilet facility and to use it at the backyard. For that, one can see paragraphs 8 and paragraphs 23 to 26 of the judgment.

###### Proposed appeal ground no. 2

1. Lee seeks to argue that Yip has not pleaded that she was to be vicariously liable for the conduct of her waitress at the time.
2. If the suggestion is that she should not be so liable, then I am really surprised that no such pleading point or suggestion has ever been made until now. This was notwithstanding Lee’s clear notice of the allegation and evidence adduced on behalf of Yip as to how the accident happened. The fact was that Lee admitted the existence of such a waitress serving at the restaurant at the material time. There is also no challenge against this court’s findings that the waitress did what she did at the time. For this, one can see paragraphs 3 to 10 of the judgment.
3. There was no suggestion by Lee or her counsel at the trial, or even now, that the waitress was for any reason outside the course of her employment then. So the duty of care was at all material times on Lee although it was the waitress who served the customers including Yip at that time.
4. In my view, appeal on this ground is most unfair and most important of all unmeritorious.
5. During today’s hearing, I also gave an example of what happens if a restaurant in a shopping mall does not have its own toilet and has to entertain the guests by instructing the guests to make use of the toilets provided by the shopping mall. I do not intend to repeat the analysis that I have explained.

###### Proposed appeal ground no. 3

1. The argument is really that I did not give any or proper weight to the medical expert’s opinion in reaching the figure for the award for PSLA.
2. Insofar as the consideration of the medical expert’s opinion is concerned, I fail to see how such challenge could be mounted. One could read paragraphs 32 to 35 of the judgment.
3. Insofar as the amount awarded is concerned, the award made is actually half the amount submitted on behalf of Yip. In this regard, counsel for Lee during the trial merely plucked a figure in the air and submitted no case for the purpose of comparison with the circumstances of the present case.
4. Considering the circumstances of this case as well as the proposed ground of appeal, I do not consider appealing on such a ground has any reasonable prospect of success. I am not convinced that the appellate court will find sufficient reason to disturb this court’s finding in this regard.

###### Conclusion

1. In the conclusion, leave to appeal would have to be refused.

(Discussion re costs)

1. Application for leave to appeal is dismissed with costs to the plaintiff, to be taxed if not agreed.

# (Simon Leung)

# District Judge

Miss Florence Leung, of Messrs Yip, Tse & Tang, for the Plaintiff

Mr Lawrence Lau, instructed by Messrs Holman Fenwick Willan, for the Defendant