DCPI 44/2009

IN THE DISTRICT COURT OF THE

HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 44 OF 2009

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BETWEEN

CHEUNG YUET HAR Plaintiff

and

FORCE TEAM LIMITED trading as

HOI TIN (ASIA) HARBOUR RESTAURANT Defendant

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

Coram: His Hon Judge Leung in court

Date of hearing: 4-5 January 2010

Date of judgment: 24 February 2010

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

1. The Defendant restaurant occupies the whole of the 2nd Floor of a building at Lockhart Road, Wanchai (“**the Restaurant**”). A lift serves the Restaurant exclusively and stops only on the Ground Floor of the building and the Restaurant on the 2nd Floor. At about 3:30 pm on 21 October 2007, the 72-year-old Plaintiff (“**Cheung**”) has just had her tea at the Restaurant. Upon entering the lift on the 2nd Floor, she slipped and fell. For her injury, Cheung commenced this action for damages against the Restaurant.
2. The following issues are in dispute:
   1. how the accident happened;
   2. whether the Restaurant was in breach of its duty towards Cheung;
   3. whether it was Cheung who was negligent in causing or contributing to her accident; and
   4. the issue of quantum.

**How the accident happened**

1. As to how the accident happened, the following sub-issues are in dispute:
   1. whether Cheung slipped and fell upon entering the lift;
   2. whether the floor surface of the lift was at the time slippery; and
   3. what caused the slippery condition.

*Whether Cheung slipped and fell upon entering the lift*

1. Cheung was clear that it was upon entering the lift when she slipped and lost balance. She fell with her buttock landing on the floor of the lift. She called **Tse** as a witness. Tse was the front counter receptionist on the 2nd Floor at the time of the accident. She was very much an independent witness. She witnessed the accident and came to help Cheung. Her evidence as to how Cheung fell corroborated that of Cheung.
2. Miss Seto for the Restaurant submitted that Cheung’s evidence differed from her pleaded case and statement. She emphasized that Cheung’s pleaded case was that she fell near the entrance of the lift, not inside the lift as she explained in court.
3. In my view, the apparent discrepancy in the descriptions of where Cheung fell is not real or substantial. Properly understood, Cheung’s case, according to the pleading and statements as a whole, is consistently that the accident occurred when she was entering the lift. This was when she slipped and fell.
4. As a result of the accident, Cheung suffered a fractured neck of the left femur. According to the orthopaedic experts engaged on behalf of the parties, such condition was consistent with the mode of the injury that Cheung described.
5. I accept the evidence adduced on behalf of Cheung. I find that upon entering the lift, Cheung slipped and fell onto the floor of the lift and was injured.

*Whether the floor surface of the lift was at the time slippery*

1. Cheung was clear in her evidence that it was the slippery floor of the lift that caused her to slip and fall. As a result of the fall, she found that her hands, pants and lower rear part of her upper garment got wet after the fall. She discovered that it was some oily liquid on the floor of the lift. Afterwards, a male staff of the Restaurant also came to clean the floor of the lift.
2. According to Tse, when she came to help Cheung, she too noticed that part of Cheung’s clothes was wet. She saw oily wetness on the floor of the lift which had to be mopped and cleaned by table cloth. She confirmed that a male manager surnamed Tam also came to help clean the floor of the lift.
3. The Restaurant called its manager, **Chow**, as a witness. His evidence will be assessed below. For the time being, it suffices to say that Tse did not witness the accident. According to him, he used the lift at about 3 pm on the day of the accident to leave the Restaurant. He said the floor of the lift was not wet or slippery then. Nor was it wet or slippery when he returned to the Restaurant at about 4 pm. But his such evidence, even if true, does not really contradict what Cheung and Tse said about the condition of the floor of the lift at the time of the accident, which was between 3 pm and 4 pm.
4. There seemed to be dispute as to whether the floor surface of the lift was made of marble and whether the wet and oily condition was extensive or not. In my view, these do not matter. Looking at the photographs of the interior of the lift, I would not be surprised that that traces of water or oily liquid were already enough to render the floor of the lift slippery.
5. I accept the evidence of Cheung and Tse and find that it was the wet and oily and thus slippery floor of the lift that caused Cheung to slip and fall.

*What caused the wet and oily and thus slippery condition*

1. The weather on the day of the accident was fine. The possibility of rainwater brought into the lift from outside could be safely ruled out. There was no eyewitness of how the floor of the lift came to be wet and oily in the first place on the day of the accident. But it was suggested on behalf of Cheung that this was likely the result of the use of the lift by the people making deliveries to the Restaurant prior to the accident.
2. Though there is a staircase on the Ground Floor leading to the Restaurant, Chow did not dispute that majority of the patrons would use the lift and the Restaurant’s suppliers also made use of the lift for making deliveries to the Restaurant. These deliveries included the necessary foodstuff and cooking ingredients. Live fish would also be delivered as the Restaurant keeps a fish tank. The floor of the lift could therefore become wet and slippery as a result of these deliveries.
3. According to Chow, the Restaurant always requested its suppliers to make deliveries after 4pm. Tse was apparently aware of that. However there is no evidence whether the suppliers did strictly adhere to the specified delivery time. Chow too could not rule out that the suppliers would make deliveries at some other times of the day before 4 pm.
4. Tse indeed observed that there have been occasions prior to the day of the accident on which deliveries were seen made to the Restaurant before 4 pm. She has also witnessed that the floor of the lift became wet and oily after the people have used the lift for making deliveries to the Restaurant.
5. On the day of the accident, Tse did not see such deliveries to the Restaurant prior to the accident. However Tse did not keep constant attention to the lift lobby and had to retreat to the inner part of the Restaurant from time to time during her duty. She simply could not rule out the possibility of such deliveries prior to the accident.
6. Chow stated that no one made use of the lift to make delivery to the Restaurant during the period between noon and 3 pm on the day of the accident. But he was not responsible for accepting deliveries to the Restaurant. There was also no record of the deliveries made on the day of the accident or at all. He was therefore not in a position to tell whether there was any delivery during the hour when he was not in the Restaurant and when the accident happened.
7. Considering the above as well as the nature and the extent of the wet and oily condition of the floor of the lift at the time of the accident, I can see why Mr Yip felt compelled to draw the inference that the wet and slippery condition must have been the result of some deliveries made prior to the accident.
8. I am satisfied that deliveries to the Restaurant were in fact made without adherence to the time specified by the Restaurant. It is arguable whether there is sufficient evidence in support of the finding or inference that it was some specific delivery made before the accident that rendered the floor of the lift slippery. But this, in my view, does not affect Cheung’s claim.
9. The fact was that this was the Restaurant’s exclusive lift invariably used by the patrons and deliverymen throughout the day. The fact that the floor of the lift could get wet and/or oily and therefore slippery at any time during the day was known or reasonably foreseeable. In my view, this sufficed to cast on the Restaurant the duty to take reasonable step to prevent such potential danger that could exist at any time of the day.

**Whether the Restaurant was in breach**

1. There is no real dispute as to the duty of the Restaurant generally and specifically under the Occupier’s Liability Ordinance, Cap.313 (“**OLO**”). Essentially, the Restaurant was expected to take reasonable care to ensure that its patrons would be reasonably safe in using the lift. Mr Yip submitted that the Restaurant should exercise a reasonable degree of care and vigilance commensurate with the need to abate the risk and danger attendant upon the lift bearing in mind that it was the only lift used by almost all patrons as well as deliverymen. In view of what I said above, I agree with him.
2. Various aspects of the Restaurant’s system were under scrutiny. First, Chow stated that the Restaurant has engaged professional cleaning contractor to carry out cleaning or replacement of the carpets placed at various parts of the Restaurant. According to him, the Restaurant also employed 4 cleaning workers responsible for cleaning the various parts of the Restaurant, including the lift, every 2 hours. The Restaurant occupies an area of about 5,000 square feet.
3. Chow recalled that none of the cleaning workers was on leave and the cleaning was carried out as scheduled on the day of the accident. There was instruction to the managers and staff to ensure that the Restaurant was clean. Nevertheless, he admitted that there was no way he would know if the cleaning workers had been slack about their duties. The fact was that there was no record or timesheet recording the alleged regular cleaning at intervals.
4. The front counter on the 2nd Floor was facing the lift. Tse, who was positioned there, observed that the floor of the lift would be cleaned once in the morning and once before 6 pm daily. She did not notice cleaning of the floor of the lift at regular intervals during the day as Chow alleged. Specific parts would be cleaned if discovered to be dirty or upon report by the patrons.
5. I accept Tse’s evidence. I doubt what Chow said about the system of cleaning of the lift at regular intervals during the day and its effectiveness.
6. Secondly, it is in dispute whether the Restaurant has put up any sign to warn the patrons against the danger of slippery floor. According to Chow, there was one such sign bearing Chinese characters 「小心地滑」 (or “Beware of Slippery Floor”) affixed on the wall next to the lift on the 2nd Floor. The photographs did not depict the existence of such a warning sign on the wall at least at the time when the photographs were taken (in 2008). Chow explained that the sign happened to have been detached from the wall then.
7. I am not impressed by Chow’s evidence in this respect. Cheung did not see such a sign at the time of the accident. Tse was certain that there was no such sign then either. But even assuming that such a sign was on the wall as alleged, I do not consider that it would have helped Cheung. Even without regard to the fact that Cheung happened to be illiterate, I find that the sign being placed among a group of other signs and stickers could hardly serve the purpose of a conspicuous and effective warning. More importantly, anyone reading the sign would hardly understand this to a warning about the possibly slippery floor inside the lift (as well).
8. I bear in mind that Cheung was a fairly regular patron of the Restaurant. According to her, she went to the Restaurant about 2 to 3 times a week. She admitted having seen drops of water on the floor of the lift on previous occasions. The circumstances surrounding how she came to see them on those occasions were not further explored during the trial. Nevertheless, I do not agree with Miss Seto that Cheung should somehow be fixed with notice of the danger of slippery floor inside the lift. Cheung explained that it did not occur to her that the floor of the lift would be like that on the day of the accident.
9. More importantly, I do not agree that the Restaurant could be absolved from its duty to take reasonable steps to prevent or to eliminate the danger from existing in the first place. This could have been achieved by simply placing an anti-slippery mat inside the lift. There is no excuse for the failure to do so, if one compares the risk of accident explained above and the ease of doing that. I do not accept Chow’s suggestion that a mat inside the lift could flip over and cause some other danger to the users of the lift instead.
10. The fact that the Restaurant subsequently put in place such an anti-slippery mat right at the lift lobby on the 2nd Floor (as depicted in the photographs taken in 2008) suggests that this could have been done. Chow explained that the mat was placed there in case of rain. But when asked why the Restaurant found it necessary to put such a mat at the lift lobby but none inside the lift, Chow answered that the mat at the lobby (which bears the word “Welcome”) was partly for the purpose of welcoming patrons. The answer was simply surprising.
11. Considering all the circumstances, I conclude that the Restaurant has failed its duty of reasonable care generally and specifically as the occupier of the lift. Liability of the Restaurant is established.

**Contributory negligence**

1. It was submitted on behalf of the Restaurant that Cheung has failed to pay attention to the floor condition when entering the lift. Reference was also made to the fact that another patron managed to enter the lift uneventfully before Cheung did at the time.
2. In my view, the court should be slow in attributing blame to the innocent party for failing to avoid an accident as a result of the danger created as a result of the party at fault. I agree with Mr Yip that in the present case, the age and circumstances of Cheung should also be relevant considerations. Cheung said she only managed to look at the floor of the lift briefly but not clearly when entering the lift. She walked at an ordinary pace. Tse confirmed that. I accept their evidence in this respect. There is no evidence of Cheung conducting herself in any extraordinary manner or in obvious disregard of her own safety when she approached and entered the lift. I find no contributory negligence on the part of Cheung.

**Quantum**

1. As a result of the accident, Cheung was sent to the hospital by an ambulance. She suffered from fracture neck of left femur. After surgery, she was given a course of physiotherapy. She has been hospitalised for a month. She still complained about residual left hip and thigh pain as well as lower limb weakness.
2. Cheung attended the joint examination by Dr Fu Wai Kee (engaged on behalf of the Restaurant) and Dr Wong Lok Yan (engaged on her behalf) on 29 May 2009. The orthopaedic experts produced their joint report on 23 July 2009.
3. The experts agreed that Cheung has pre-existing osteoporosis. While Dr Fu found it difficult to apportion her current impairment being the result of the pre-existing condition and the result of the accident, Dr Wong opined that it was the fracture that caused her current disability. The fracture was the result of the accident. I agree with Dr Wong in this respect.
4. The experts basically agreed with each other in other respects. The treatment that Cheung received was appropriate and no further treatment was recommended. She has achieved maximal medical improvement by now. The on-and-off lower limb pain might require treatment. The experts recommended further care and medication.
5. The lower limb weakness and stiffness would persist. Cheung would need walking aid for outdoor walking. Indeed she walks with a cane. She would have difficulty in prolonged walking and wearing socks. She could not perform heavy household duties. Cheung should be independent in daily life activities, except for the need for assistance in walking, squatting and bending down.
6. Dr Fu and Dr Wong respectively assessed Cheung’s permanent impairment to be 6% and 8% of the whole person.

*Pain suffering and loss of amenities*

1. Mr Yip referred to *Lau Tsz Wan v Caltex Oil Hong Kong Ltd* DCPI 140/2001 (8 December 2004); *Yeung Yuk Yiu v Cheung Tung Ho* HCPI 573/2004 (17 February 2006); and *Lai Kwan Ming v Lee Yin Hing* HCPI 765/2000 (11 October 2001). He submitted that HK$250,000 should be awarded. The plaintiffs in these cases were younger than Cheung and their circumstances did not appear to be more serious than those of Cheung.
2. Miss Seto referred to *Chan Kun v Tsuen Wan New Cambridge Nursing Home Ltd & Anor* [2006] 2 HKLRD 623. Miss Seto submitted that an appropriate award should be HK$170,000 in the present case. The 82-year-old plaintiff in *Chan Kun* was already bed-bound prior to the injury in question. The court made clear that the award of HK$150,000 would have compensated for the pain and suffering rather than any loss of amenities of the plaintiff.
3. Considering the age and circumstances of Cheung, I find that HK$250,000 is a fair and reasonable award for her pain and suffering as well as loss of amenities.

*Special damages*

1. During the trial, parties agreed on the following items of claim:
   1. Hospital and medical expenses HK$4,475
   2. Nourishing food HK$4,500
   3. Travelling expenses HK$ 750
   4. Employment of domestic helper nil
   5. Further medical treatment HK$1,000
2. The remaining items in dispute are expenses on: (1) elderly care centre; and (2) foot massage.
3. Upon discharge from the hospital, Cheung was admitted to an elderly care centre. She has stayed there for a month. The expenses incurred were HK$7,656. Primarily, if Cheung had been in need of further in-patient treatment, the hospital should not have certified that she was fit to be discharged. As mentioned above, she was discharged after a month’s hospitalisation.
4. According to Cheung, her family that felt unable to take care of her in her condition then and therefore checked her into the elderly care centre. Neither the arrangement nor the establishment was recommended by the treating doctors. No treatment was designed to be performed by elderly centre on Cheung during her stay. In fact, she was checked out of the elderly centre one month later mainly because of financial consideration.
5. I am not satisfied that it is reasonable to make the Restaurant bear such expenses as if they were the natural or probable consequence of the tort.
6. Cheung claims damages for her expenses incurred on foot massage at the rate of HK$256 per visit a week for 2 years. There is no evidence of recommendation of foot massage by the doctors on top of the physiotherapy already offered to her. Cheung explained that she could no longer bend his body to her feet. The massage helped clean her feet. It also helped her blood circulation and eased the residual pain.
7. I bear in mind the principles governing whether and how the expenses incurred by a patient of the Chinese origin on unconventional treatments such as bone setting would be allowed. I am prepared to accept that it was reasonable for Cheung to seek such foot massage treatment. But the intensity and duration of such treatment went far beyond what is reasonable. I allow one quarter of the amount claimed or a sum of HK$6,656.
8. The total special damages allowed is HK$(4,475 + 4,500 + 750 + 1,000 + 6,656) = HK$17,381.

**Summary**

1. Cheung is entitled to damages as follows:

PSLA HK$250,000

Special damages HK$ 17,381

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Total: HK$267,381

1. Interest on general damages (for PSLA) shall run at 2% per annum from the date of writ to today. Interest on the special damages (excluding the cost of future medical treatment) shall run at half judgment rate from the date of accident to today. Interest from today until full payment shall run at the judgment rate.

**Order**

1. Judgment is entered against the Restaurant in the sum of HK$267,381 with interest as aforesaid. I make a nisi order that the Restaurant shall pay Cheung her costs of this action, including any costs reserved. Costs shall be taxed, if not agreed. For clarity, I certify the engagement of counsel. In the absence of application regarding costs within 14 days, the nisi order shall become absolute.

Simon Leung

District Judge

Mr Timmy YIP instructed by Messrs Simon Wong & Co for the Plaintiff

Miss Kay SETO instructed by Messrs Kok & Ha for the Defendant