## DCPI 291/2011

**IN THE DISTRICT COURT OF THE**

# HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO 291 OF 2011

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BETWEEN

WONG YUK CHUEN Plaintiff

and

THE LINK MANAGEMENT LIMITED Defendant

and

LAW TUNG YAU Third Party

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Coram: Deputy District Judge Wilson Chan in Court

Dates of Hearing: 29 May 2012 to 1 June 2012 and 27 June 2012

Date of Judgment: 25 July 2012

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# JUDGMENT

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*INTRODUCTION*

1. These proceedings arose from a slip and fall accident that the plaintiff suffered near the third party’s seafood stall on 30 March 2010 at the Lei Tung Market, Lei Tung Estate, Ap Lei Chau, Hong Kong (the “Market”). The claim by the plaintiff against the defendant was settled through mediation shortly before this trial. The defendant now seeks an indemnity and/or contribution from the third party.

*BACKGROUND*

1. The defendant is and was at all material times the manager of the Market responsible for the management of the same. At the material time, the third party was the tenant of stall No 61 of the Market (the “Stall”) and operated thereat a seafood stall. Diagonally across the Stall was stall No 82, which was also a seafood stall selling mostly live seafood.
2. It is common ground between the defendant and the third party that the accident happened at about 7:30 pm on 30 March 2010. At that time, the plaintiff, a 57-year old lady, was buying foodstuff inside the Market. While she was walking near the Stall, she slipped and fell, and as a result sustained personal injuries.
3. The plaintiff sustained a fracture of the right distal radius with intra-articular involvement and dorsal angulation. Surgery was performed on 1 April 2010. The plaintiff continued to suffer pain in her wrist even after rehabilitation therapy. Sick leave was for 136 days. She has persistent weakness of her right wrist. Her pleaded claim was for HK$307,280. The plaintiff’s claim was settled in mediation for HK$180,000.
4. In the third party’s written opening, the third party stated that he did not dispute the defendant’s liability for the plaintiff’s claim, and the third party accepted HK$180,000 as the quantum of damages which the defendant was liable for the plaintiff’s claim in the main action. In other words, there was no dispute on quantum at this trial.

*DEFENDANT’S CASE AGAINST THE THIRD PARTY*

1. The defendant’s primary case (as pleaded in its Defence) is that immediately before the accident in question, someone from the third party’s stall poured water onto the floor causing it to be wet and slippery. This was allegedly witnessed by a cleaner, one Tsoi Tak Ming (“Mr Tsoi”), who was employed by the defendant’s cleaning sub-contractor (a contemporaneous record was made of this in an incident report dated 30 March 2010 (the “Incident Report”) signed by Mr Tsoi).
2. As to the defendant’s “alternate” case, it is that the third party failed to take any or any reasonable steps to ensure that the accident scene was dry and clean and free from hazards and so contributed to the slippery condition of the corridor by the side of the Stall (the Third Party Notice adopted the plaintiff’s allegations of negligence at paragraphs 6 and 7 of the Statement of Claim).
3. Accordingly , in order to prove its case, the defendant has to prove, on the balance of probabilities, that (a) the third party had poured water immediately before the accident on the material part of the floor where the plaintiff slipped and fell and/or (b) the third party had failed to take any reasonable steps to ensure that that part of the floor was dry and clean and free from hazards; that such act and/or omission amounts to negligence on the part of the third party and caused the accident to happen.

*THE THIRD PARTY’S CASE*

1. The third party denies that he, or his workers, had poured any water or ice as that alleged, or had caused the accident in any event.
2. It is also the third party’s case that the accident was solely caused by the negligence on the part of the defendant as that pleaded in paragraphs 6 and 7 of the Statement of Claim. In particular, the accident was caused by the wet floor together with worn floor tiles and insufficient warning of slippery floor to visitors.

*ANALYSIS OF EVIDENCE*

*On the defendant’s primary case*

1. On the defendant’s primary case, the defendant relies heavily on the Incident Report prepared by Mr Tsoi. Mr Mak Yun Sum (“Mr Mak”), an assistant property officer under the employ of the defendant who gave evidence at trial, was not present at the scene of the accident. Mr Mak did not witness the happening of the accident.

1. Mr Ernest Koo, counsel acting for the third party at trial, submitted in his written closing, and I agree, that there are various problems concerning the Incident Report.
   1. The allegation made in the Incident Report is self-serving, it was obviously made with the view to avoid the liability of the defendant and its cleaning sub-contractor.
   2. The Incident Report was not signed by Mr Mak, or his superior Mr Lee, who were supposed to have signed the Incident Report upon having read the same.
   3. Mr Mak alleged that when the Incident Report was written he was told by Mr Tsoi various information regarding the happening of the accident, which was set out in paragraphs 26 to 28 of his witness statement (adopted as part of his examination-in-chief). Nevertheless, the content of the Incident Report was very different and lacked most of the information purportedly set out in paragraphs 26 to 28 of Mr Mak’s witness statement. There is no explanation provided by the defendant as to why both Mr Mak and Mr Lee permitted the record in the Incident Report to be so lacking and insufficient.
   4. More importantly, according to the staff attendance record produced by the defendant, which was verified by Mr Mak, Mr Tsoi ought to have been off duty by 4:30 pm on 30 March 2010, ie around 3 hours before the happening of the accident. It is therefore inherently improbable for Mr Tsoi to have witnessed the accident as alleged.
   5. Mr Mak in his evidence sought to give an explanation for this. According to Mr Mak, Mr Tsoi worked as Foreman 2 in the morning shift and Foreman 1 in the night shift, in two different names. Mr Mak alleged that Mr Tsoi worked in his real name (or the name as that appeared on his HKID card) for the morning shift, and worked in another name of “Tsoi Wun Jun” for the night shift. This rather strange explanation is, to put it as its lowest, hard to accept. It cries out for an explanation from Mr Tsoi himself.
2. Unfortunately, Mr Tsoi was not called by the defendant to give evidence at trial. In fact, according to the defendant’s case, Mr Tsoi and his colleague, one Lai Ming Kee (“Mr Lai”) were present at the scene when the accident happened. Yet, neither of them was called to give evidence.
3. Mr Mak, in his evidence, sought to offer an explanation by saying that during a causal chat with Mr Tsoi, he was told by Mr Tsoi that the cleaning company (Mr Tsoi’s employer) did not want him to give evidence in court, and that during another casual chat with Mr Lai, Mr Mak was told by Mr Lai that he was scared to give evidence in court. In my view, these are definitely not satisfactory or credible explanations for the absence of Mr Tsoi and Mr Lai, both of whom are key witnesses in this case. There is nothing to prevent Mr Tsoi or Mr Lai from being subpoenaed by the defendant to give evidence at this trial.
4. In the context of the failure by a defendant to call a key witness to give evidence at trial, Brooke LJ in *Wisniewski v Central Manchester Health Authority* [1998] P.I.Q.R. P324 (CA) held as follows at P340:-

“From this line of authority I derive the following principles in the context of the present case:

* 1. In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.
  2. If a court is willing to draw such inferences, they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.
  3. There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.
  4. If the reason for the witness’s absence or silence satisfies the court, then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified”.

1. In the present case, in the absence of any credible or satisfactory explanation, I will draw an adverse inference against the defendant from the absence of Mr Tsoi and Mr Lai who might be expected to have material evidence to give on crucial issues in this trial. For the foregoing reasons, I reject the defendant’s primary case on a balance of probabilities.

*On the defendant’s “alternate” case*

1. On the defendant’s alternate case, the defendant relies on inferences which the defendant submitted should be reasonably drawn from various facts established at trial.
2. It is common ground between the parties that mere “wetness” of the Market’s floor did not make the floor slippery. The third party’s case is that the wet floor together with worn floor tiles made the surface slippery.
3. On the other hand, the defendant’s case is that the floor only became slippery in the presence of “unusual substances”, as described by Mr Ashok Sakhrani, counsel acting for the defendant. It was the evidence of Mr Mak that when there was a large quantity of water and/or broken pieces of ice and/or fish scales and/or fish discards, the floor would become slippery. These would be unusual substances.
4. The defendant relies on various photographs (for example, the ones at page 701 of the trial bundle) to indicate that probably a significant volume of water was used to wash the floor of the Stall and this flowed into the corridor. The defendant seeks to draw the inference that a water hose was used to wash down the Stall at cleaning time, creating large amounts of water on the corridor.
5. The defendant also adduced evidence that in June 2010 and again in September 2010, it was discovered by security staff that the third party allowed water, broken ice and fish scales to accumulate on the corridor in front of and around his stall. Complaint letters were sent. The letters complained of (a) the pouring of water onto the corridor causing wet and slippery conditions; (b) allowing fish scales to accumulate outside the Stall causing slipperiness and unsanitary conditions. These letters of complaint were never challenged by the third party at the time.
6. The defendant also adduced into evidence a set of 4 photographs taken by Mr Li Pui Yin (“Mr Li”). Mr Li was a security guard at the Lei Tung market. He gave evidence to identify the time and location of the photographs taken. Mr Li confirmed that the photographs were taken on 30 May 2012 at around 7:05 pm. They were photographs of the third party’s stall. He identified the white spots in the photographs near the drains in front of the Stall as broken pieces of ice and fish scales.
7. The defendant also relies on the evidence of the third party, given under cross-examination, that he did not do any risk assessment for his stall, even though they handled water in large quantities and ice, which might cause hazards to users of the Market. The third party appeared not to know what a system of cleaning was.
8. From the foregoing, the defendant invites the court to draw an inference that the third party has engaged in unsafe practices so that it was the “not uncommon” practice of the third party to allow the said unusual substances to be present on the corridor in the immediate proximity of the Stall before the accident. The defendant invites the court to draw the inference that the third party allowed water to escape from the Stall onto the corridor during cleaning time, and that there were pieces of broken ice and fish scales which rendered the floor to be slippery. The defendant further invites the court to draw the inference that but for these negligent acts of the third party, the plaintiff would not have suffered the accident.
9. I think the problem of the defendant’s alternate case is that the defendant is seeking to build its case on inferences, when it could have adduced direct evidence from the plaintiff herself.
10. Clearly, the plaintiff is someone who might be expected to have material evidence to give on these important issues. For example, the plaintiff could have been asked to give evidence as to the exact location where she slipped and fell: was it just beyond the Stall, or did the accident happen at a location more towards half-way between the Stall and stall No 82? More importantly, the plaintiff could have been asked to give direct evidence on the cause of the accident. Did she slip on the wet and worn out floor tiles (which was the plaintiff’s case as pleaded in paragraph 3 of the Statement of Claim), or did she slip on a puddle of water, broken pieces of ice, fish scales and/or fish discards (which is the inference that the defendant is seeking to draw)?
11. Again, as in the case of Mr Tsoi and Mr Lai, the defendant has provided no credible or satisfactory explanation for the absence of the plaintiff as a witness. The plaintiff had given an undertaking to provide all reasonable assistance to the defendant, including attending court to give evidence at this trial, in the Consent Order dated 24 May 2012 which was made in full and final settlement of the plaintiff’s claim against the defendant. The defendant has not provided any explanation as to why the plaintiff was not called as a witness.
12. In the circumstances, I will again draw an adverse inference against the defendant from the defendant’s election not to call the plaintiff as a witness, the plaintiff being someone who might be expected to have material evidence to give on the issue of causation. Accordingly, I would also reject the defendant’s alternate case on a balance of probabilities.

*CONCLUSION AND ORDER*

1. For the foregoing reasons, I would dismiss the defendant’s claim against the third party in the third party proceedings.
2. The third party shall have the costs of the third party proceedings against the defendant, including any costs reserved (if any). Such costs shall be taxed, if not agreed, with certificate for counsel.
3. The above order as to costs is nisi and shall become absolute in the absence of any application within 14 days to vary the same.
4. Lastly, I thank counsel on both sides for their helpful assistance in this matter.

( Wilson Chan )

Deputy District Judge

Mr Ashok K Sakhrani, instructed by Messrs Winnie Leung & Co for the defendant

Mr Ernest Koo, instructed by Messrs Cheung & Liu for the third party