DCPI 1158/2005

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

#### PERSONAL INJURIES ACTION NO. 1158 OF 2005

# BETWEEN

## CHAN WAI NGA, an infant by LAM YUK LIN, Plaintiff

## her mother and next friend

### and

TAM CHI WAI 1st Defendant

###### KUNG SHUK HA also known as 2nd Defendant

KUNG SHUK HA FANNY

# Coram: Deputy District Judge Anthony Chow in Court

Dates of Hearing: 26th & 27th June 2006

Date of Handing down Judgment: 4th July 2006

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### JUDGMENT

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1. This is a claim for damages due to personal injury, loss and damages sustained by the infant plaintiff Chan Wai-Nga (“Wai-Nga”) on 26/7/2003.

Agreed Facts:

2. On 26/7/2003, a group of 18 persons, including colleagues, their spouses, children and several domestic helpers went on a boat trip. The participants included two-year-old Wai-Nga, her parents, their domestic helper, Ms. Sevillejo, the defendants and their eight-year-old son Tam Shu San (“Bon Bon”).

3. The group stopped at Sha Kiu Seafood Restaurant, High Island, Sai Kung for lunch.

4. To facilitate ordering of food, one of the organizers of the trip, Sandra Lam, suggested all adult sit in one table, with all children and the 2 domestic helpers, sit in another table.

5. Originally, Wai-Nga’s parents were sitting with her, but upon Sandra Lam’s suggestion, her parents moved to the next table, leaving Wai-Nga under the care of Ms. Sevillejo.

6. The waiter left a tall plastic jug of liquid on a turntable on top of the children’s table.

7. Bon Bon turned the turntable, the jug toppled, sending scalding hot tea onto Wai-Nga.

8. Wai-Nga suffered scalds to her right trunk, right upper limb, right lower limb, a small area of her left thigh and left forearm, all together equal to about 15 percent of her body surface area. Approximately 11% of Wai-Nga’s body suffered second degree burns.

The medical evidence:

9. Wai-Nga was treated with dressing and analgesics. Pressure garment therapy, physiotherapy and occupational therapy were also instituted.

10. Wai-Nga was examined by Dr. Ian H. Nicolson, a plastic surgeon. In his report dated 19/4/2005, Dr. Nicolson opined that although the scars were all well healed, soft and pliable, the plaintiff has permanent cosmetic disability due to colour discrepancy which is accentuated by mild hyperpigmentation of the junctional area between normal skin and pale scald scars. Although the scars will improve over the years, this will be limited. Laser treatment may expedite the improvement but Dr. Nicholson did not recommend it for Wai-Nga because she was diagnosed with Childhood Emotional Disorder, because laser treatments cannot eliminate the scars, but may focus Wai-Nga’s attention to the scars.

11. The plaintiff also received treatment at Yaumatei Child Psychiatric Centre for generalized anxiety, increased arousal and irritability after the accident. Although there was an initial diagnosis of Childhood Emotional Disorder by Dr. S.L. Kwong, Dr. Anita Leung, a registered psychologist, later reported that the accident does not appear to have a lasting psychological impact on Wai-Nga, however, as she grows up, she may become conscious of the scars and bother by them and therefore laser treatment should be provided to her when she wants the treatment.

12. Dr. Leung also recommended counselling sessions for Wai-Nga’s mother to alleviate the mother’s parental stress as well as providing guidance on effective parenting so as to facilitate positive development in Wai-Nga.

The claim:

13. Wai-Nga claims the following damages:

Pain, suffering and loss of amenities HK$500,000

Future laser treatment HK$49,000

Expenses and special damages HK$17,082

Interest and costs

14. There are 2 separate issues in this matter: liability and quantum. For oblivious reasons, I will deal with liability first.

The plaintiff’s case on liability:

15. The defendants failed to properly supervise Bon Bon at the relevant time. The first defendant admitted at the time of the accident, he was in the kitchen helping to order food and left the care and supervision of Bon Bon with his wife, the second defendant.

16. The second defendant did not testify and there is no evidence what care or supervision she rendered to Bon Bon at the time of the accident.

17. The turntable is a source of temptation to small children and it is reasonably foreseeable that they will play with it. The presence of a jug of water, which may contain hot tea, made playing with the turntable a potential danger.

18. It is reasonably foreseeable that young children have mischievous tendencies and reasonably prudent parent would not leave an 8-year-old boy alone at a table.

19. Unless the defendants were accompanying Bon Bon, they had failed in their duties as parents to properly supervise him and in the alternative, have failed to stop Bon Bon from playing with the turntable or to instruct him not to play with the turntable when there is inherent risk that the jug on the turntable may contain hot liquid.

The defendants’ case on liability:

20. There was no evidence that the first defendant was negligent. At the time of the accident, he left Bon Bon at the care of his wife, the second defendant.

21. Bon Bon has always been a well-behaved boy, with no history of meddling or propensity to meddle. Under the circumstances, it was not reasonable to expect Bon Bon would turn the turntable and topple the jug. There was nothing to supervise, as Bon Bon was old enough not to require constant supervision.

The Law:

22. The claim is based on negligence, negligence not of Bon Bon, but of his parents. As in all negligence claims, the plaintiff has a burden of proving; (1) the defendants owed the plaintiff a duty of care; (2) the defendants breached that duty of care; and (3) it is foreseeable that the plaintiff would suffer damages as a result of the defendants’ breach; and (4) the plaintiff did suffer damages.

23. There is no dispute that Wai-Nga suffered damages, but there is no settled law on what duty is owed by a parent to a third party.

24. The law in respect to a parent’s responsibility to third parties for damages done by their children is stated in Clerk & Lindsell On Torts, 19th ed. at para 8-173, as follows:

“There is no general duty arising simply from parenthood to prevent a child from causing damage to third parties and a parent is not vicariously liable for his child. Rather, any duty must be based on the particular responsibility of the parent for the kind of damage caused by the child. …”

25. A brief canvass of relevant cases reveals the following:

A parent giving the child a dangerous object or allow him to use it, is liable to damages to a third party. *Newton v Edgerley* [1959] 1 W.L.R. 1031.

The harmful potential of the object is only one factor to be considered. If the parent took care to warn the child of the danger and received his assurance that he would use it safely, the parent is not liable when the child subsequently misused the object. *Smith v Leurs* (1945) 70 C.L.R. 256 and *Donaldson v Mc Niven* [1952] 2 All E. R. 691

A parent will be held liable, if he failed to give proper instruction or warning to his son about the use of candles. *Jauffur v Akhbar*, The Times February 10, 1984.

The age of the child is also one factor to be considered. A father was held not liable for damages done by his 17-year-old daughter’s dog, as she was considered old enough to exercise control over the dog. *North v Wood* [1914] 1 K.B. 629

Not all children are presumed mischievous. *Hatfiled v Pearson* (1957) 6 D.L.R. (2d) 593. Unless the child had shown an unusual propensity to meddle, the parent is not held responsible when he had given instruction to his son not to use a rifle in the house.

26. In *Eichmanis (Litigation guardian of) v. Prystay (Children’s Lawyer for)* [2004] O.J. No. 1382; 2004 ON.C. Lexis 1323, the Ontario Court of Appeal quoting Professor Linden’s seminal work *Canadian Tort Law*, 7th ed. (Markham: Butterworths, 2001) described the nature of a parent’s duty of care as follows:

“The [parent’s] duty [of care] is to supervise and control the activities of the child and, in doing so, to use reasonable care to prevent foreseeable damage to others. The extent of the duty varies with the age of the child.”

27. Quoting Professor G.H.L. Fridman’s *The Law of Torts in Canada*, 2n. ed (Toronto: Carswell, 2002) at 388, the Ontario Court of Appeal in *Eichmanis* further stated:

“ ‘Foreseeability is a key component in assessing whether the care was reasonable in the circumstance.’... The standard of care must take into account any evidence of whether the parents were aware of any dangerous activities or propensity on the part of the child and whether, knowing of this possibility, failed to take reasonable steps to avoid its manifestation.”

28. Miss Tsang, counsel for the plaintiff, also pointed to *Carmarthenshire County Council v. Lewis* [1955] 1 All E.R. 565 as authority that lack of constant supervision of a child was negligence. Mr. Chong, counsel for the defendants, pointed to the same case as authority that it was not. In view of the diverse view, I think this case warrants a closer examination.

29. In *Carmarthenshire*, a four-year-old boy attending a nursery school under the management of the county council strayed from the premises onto a public highway and the plaintiff’s husband, who was driving a lorry, struck a telegraph post in avoiding the child, was killed. In both the trial court and the Court of Appeal, the defendant was held liable because the schoolmistress, Ms. Morgan, was negligent in leaving the four-year-old boy alone and attended to the injuries of another child.

30. On appeal, the House of Lord dismissed the appeal on the ground that the council was negligent for not having measures in place to prevent the child from leaving the school premises and getting on to the public highway, but by a majority of three (Lords Oaksey, Goddard and Tucker) held that Ms. Morgan leaving the 4-year-old boy alone for 10 minutes, to attend to another child was not negligent. Lord Tucker wrote:

“My Lords, on this issue I agree with my noble and learned friends, Lords Oaksey and Goddard, that the evidence disclosed no negligence on the part of Ms. Morgan. It is easy after the event to think of several things she might have done which would have avoided the accident which resulted from her absence, but the question is whether her failure to take such action ***in the circumstances which existed*** amounted to negligence. For myself, I have no hesitation in holding that Miss Morgan was not shown to have been guilty of any negligence and that no responsibility for the death of the decease man attached to her.” (Emphasis added.)

31. To summarize the cases, there is no general duty on a parent to keep a child under constant supervision. The duty of a parent is to exercise a reasonable degree of supervision and control over the child, in view of any foreseeable danger in the activities the child was involved in at the relevant time, taking into account that particular child’s propensity to meddle.

Application:

32. There was much argument on: Whether Bon Bon was standing or seating at the time he turned the turntable? Whether he turned with force or not? Whether tableware was set up or not? All are in my opinion irrelevant, since parties agreed the act that caused the jug to topple was Bon Bon’s turning of the turntable. The main issue on liability is: Whether the defendants exercised a reasonable degree of supervision and control over Bon Bon, in view of any foreseeable danger in the circumstances at the relevant time?

33. Parties agreed that turning the turntable on its own was not dangerous. It was the jug of scalding tea placed on the turntable that made it dangerous.

34. The defendants did not place the jug there, and there was no evidence they knew or should have known a jug containing scalding hot tea had been placed on the table.

35. There is also no evidence that the defendants knew or should have known the jug was placed on the turntable instead of on the table, where the danger of toppling was substantially lower.

36. So far as the plaintiff’s allegation that the defendants should be aware of rural restaurants’ practice to place a jug of hot tea for patrons to wash their tableware, there is no evidence that the defendants often went to rural restaurants and was aware of this practice.

37. Furthermore, it is common sense that hot tea is served in a metal or ceramic teapot not a plastic jug. Ms. Sevillejo’s evidence that hot tea is always served in non-transparent, covered jugs and cold water is always served in clear and open jugs is mere speculation, without any evidence or support.

38. There is no evidence that the defendants were aware that the plastic jug, placed on the turntable on that day, contained tea hot enough to cause serious burn and should be on the look out for this danger. The defendants had no knowledge of the danger.

39. The evidence simply did not show the defendants were aware that Bon Bon and the turntable presented a dangerous situation.

40. Bon Bon was eight years old at the time of the accident. He was independent and had been in restaurant before. The evidence also showed that he was well behaved and had no aggressive temperament. There was no particular reason for the defendants to be on the alert that he may act in any manner that may endanger someone else.

41. Miss Tsang argued that the *Jauffur* case stands for the proposition that in addition to proper control, a parent has a duty to warn or instruct his children.

42. In *Jaffur,* the father knew there was a dangerous object, the candles, within reach of his son and failed to give warning or instructions to him. Here, there is no evidence that the defendant knew there was anything dangerous around. How could the defendants be required to instruct or warn Bon Bon, when they were not aware of any dangerous object around him?

43. The first defendant left Bon Bon to the care of his mother, the second defendant, when he helped in ordering food for the group. His action cannot be viewed as negligence, even by the strictest of standard.

44. Whilst there is no evidence where was the second defendant when the accident occurred, but the agreed fact was she was the first to arrive giving first aid to Wai-Nga after the accident. We can safely assume that she was in the same vicinity as Bon Bon, either seating at the adult table or standing nearby when the accident occurred.

45. Bon Bon was an independent 8-year-old boy, well behaved and had no aggressive temperament; there was no evidence that the defendants could have foreseen any danger or special circumstances. I find it was reasonable for the second defendant not to keep Bon Bon under close and constant supervision. Requiring the same under these circumstances would be imposing an impossible task on parents.

46. As I have ruled the defendants not liable, there is no need for me to consider quantum.

47. I have great sympathy for Wai-Nga and her parents, the injury she suffered was horrible and must have been very painful to both child and parents, but under the circumstances of this case, I cannot find the defendants liable for her injuries.

48. Orders:

(1) Claim is dismissed.

(2) Costs to the defendants, to be taxed if not agreed, with certificate for counsel.

(3) The plaintiff’s own costs be taxed in accordance with legal aid regulations.

(Anthony Chow)

Deputy District Judge

Miss Alice Tsang, instructed by M/s Peter K.H. Wong & Co. (assigned by DLA) for the Plaintiff.

Mr. Patrick Chong, instructed by M/s Yuen & Partners for the Defendants.