#### DCPI 1276/ 2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

PERSONAL INJURIES ACTION NO. 1276 OF 2006

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| BETWEEN | LAM LAI KAM | Plaintiff |
|  | and |  |
|  | DELUXE CHAMPION DEVELOPMENT LIMITED trading as VIKING SEAFOOD RESTAURANT | Defendant |

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##### Coram: Deputy District Judge Abu B. bin Wahab

Date of Hearing: 12 and 13 June 2007

Date of Decision: 22 August 2007

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JUDGMENT

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1. The Plaintiff claims damages for personal injuries suffered in the course of carrying out work as a waitress for the Defendant. She gave evidence herself. No other witnesses were called on her behalf. The Defendant called 2 witnesses neither of whom witnessed what had allegedly happened.

2. Having heard all the evidence in the case, I am not satisfied that the Plaintiff told me the truth as to how she was injured that morning in question or the effect on her of injuries suffered. Though the standard of proof is only on the balance of probabilities, I find the Plaintiff not up to the mark. I dismiss the claim. I make an order nisi that all costs of the Defendant in this case be paid by the Plaintiff with certificate for Counsel. I now proceed to explain my decision.

1. The prima donna in this case is apparently a contraption commonly known as “Lazy Susan”. The Lazy Susan provides a rotating surface and is often placed on large dining tables for the convenience of seated diners. Dishes of food would be placed on such a surface (or on a bigger plate or tray placed on top of such surface) and rotated round for the diners’ selection. Lazy Susans can, of course, be of different designs and be made of different materials. (At one point, Counsel for the Plaintiff referred to such contraption as a “dumb waiter”. I hope I will not be accused of sciolism when I say that “dumb waiter” was the appropriate term until the early 1900’s. At any rate, “dumb waiter” is nowadays used to refer to a lift or elevator for transporting items like food or crockery between floors of a house/ building.)

4. It is clear that the Plaintiff is an experienced waitress. Prior to working for the Defendant, she had already worked as a waitress from 1996 to 1998. From July to December 2003, she worked for the Defendant. In April 2004, she rejoined the Defendant. The Plaintiff was responsible to serve and look after a number of tables. Her work included clearing the table of used crockery, removing the Lazy Susan from the tabletop and then changing the tablecloth.

1. The Plaintiff’s case is that she was injured whilst carrying out her duties at the Defendant’s restaurant (“the Restaurant”) at around 10 a.m. on 13 June 2004. She was injured when removing a Lazy Susan from the table just vacated by some 10 to 12 diners.

It is also the Plaintiff’s case that the Lazy Susan she was removing consisted of 2 plates or discs one bigger than the other. The plates were joined together but in such a way that the bigger plate could rotate on the smaller one. The smaller plate (“Base Plate”) was the base or stand for the Lazy Susan. The bigger plate was the top plate (“Top Plate”) that provided a rotating surface. A large piece of glass was put on top of the Top Plate and food would be put on this piece of glass. The Lazy Susan the Plaintiff was removing weighed some 10 pounds and the Top Plate had a coating of plastic or rubber (“Coating”). It was similar to Exhibit D1 except that the one the Plaintiff handled a) was a bit heavier, b) had a Coating that was softer, c) areas of the Coating had peeled off with the result that metallic parts of the Top Plate were exposed and d) did not have voids near the edge in the Top Plate (which, I have no doubt, acted as handholds. These voids/ handholds were referred to as “handles” or “ears” during trial).

1. The Incident – Plaintiff’s version in evidence

As I understood the Plaintiff’s evidence, she stood facing the Lazy Susan that was on the table. She used her right hand to hold the edge of the Lazy Susan furthest from her body and her left hand to hold the edge closest to her. Her right hand grasped part of the Coating that had remained on the surface of the Top Plate. The Plaintiff lifted the Lazy Susan off the table with both hands and held it in front of her body at about waist level. She released her left hand that was then supporting the Lazy Susan. Before she knew it, the Lazy Susan slipped from her right hand and she was left holding that bit of the Coating she had earlier grasped in her right hand. The Lazy Susan landed on her right foot and thus injured her. (This version of the Plaintiff given in evidence will be referred to hereinafter as the “Evidence Version”.)

7. The Evidence Version is to be contrasted with that given by the Plaintiff in her witness statement (“the Statement Version”). The Statement Version is as follows:

“3.2 There was a large piece of glass on the spinning disk and I, first of all, removed the large piece of glass and thereafter I intended to clear and clean the spinning disk under that large piece of glass. The spinning disk weighed about 10 lbs and was made of iron and it had plastic surroundings as its interior so that it would be more convenient for my colleague to have it cleared. As I was ready to clear the spinning disk, I lifted the spinning disk with my right hand and supported it with my left hand; as I was taking the spinning disk away from the dining table, all of a sudden, the plastic interior of the spinning disk broke causing my hands to slip off resulting in the spinning disk having landed on my right foot and I could feel pain right away…”

(Trial Bundle pages B13 and 14.)

1. The Plaintiff explained in evidence that the “plastic interior” in the Statement Version meant that part of the Coating that had remained on the Top Plate.
2. One would have thought it a simple exercise to express the Evidence Version in the Plaintiff’s witness statement. Instead, we find the rather abstruse Statement Version. I accept, grudgingly though, that the Statement Version may be read to contain information consistent with the Evidence Version and I must say that Counsel for the Plaintiff made a valiant effort to marry the two. I note, however, the absence of mention in the Statement Version of 2 very important features viz. the Plaintiff released her left hand and the Plaintiff was left holding a bit of the Coating in her right hand. The release of the left hand is important because but for its release, the Lazy Susan in all probabilities would not have dropped. The holding of a bit of the Coating in the right hand is important because, as I understand it, the gravamen of the Plaintiff’s case is that the Defendant provided defective equipment. There is no explanation as to why these features were not mentioned in the Statement Version. I should add that the Statement Version gave the impression that the Plaintiff was holding the Lazy Susan in both hands when it somehow fell onto her foot.

Counsel for the Defendant criticised the Plaintiff for giving 3 different versions of how she was hurt. I have already dealt with 2 of them viz. the Evidence Version and the Statement Version. The 3rd version was to the effect that as the Plaintiff was holding the Top Plate in her right hand, the Base Plate somehow detached itself and dropped onto the Plaintiff’s foot. Having gone through the evidence again, I am willing to accept (again grudgingly) that the Plaintiff did not express herself too clearly earlier on in evidence and that she never meant to indicate dislodging of the Base Plate.

10. Why did the Plaintiff release her left hand that was supporting the Lazy Susan? The Plaintiff never explained this. Counsel for the Plaintiff mentioned in his opening that this was part of the process of putting down/ away the Lazy Susan. Counsel of course cannot give evidence on behalf of his Client. In any event, the Plaintiff’s evidence was that the Lazy Susan was around her waist level when she removed her left hand to her side. Why would she release support for the Lazy Susan at such a height? One must bear in mind that it weighed some 10 pounds and the Plaintiff certainly gave the impression that it was quite heavy as far as she was concerned. Why would the Plaintiff want to put the Lazy Susan on the floor in front of the dining table that she had then to change the tablecloth and set it up with a fresh set of crockery? Would not the Lazy Susan be in her way? Was she going to reposition herself to continue her work at the table? Was she minded to roll the Lazy Susan along the ground to one side before returning to set up the table again? All these questions remain unanswered.

11. The Plaintiff’s evidence was that the Lazy Susan she handled did not have handholds and that a piece of glass would be placed on top for the service of food (see paragraph 5 above). The 1st witness for the Defence never worked at the Restaurant. He worked at the headquarters or office of the Defendant company. Much of the evidence he gave was based on what he was told by others and also his limited role in overseeing the transfer of usable items from the Restaurant (on its closure) to other restaurants. I do not think his evidence is of assistance in this case. The 2nd witness for the Defendant (“DW2”) was a waiter at the Restaurant from 1999 and worked his way up to becoming Supervisor. He was Supervisor on the material day and the floor where the Plaintiff worked was personally supervised by him. It is clear that DW2 attended the Restaurant day in and day out (days off excepted). I am satisfied that he knows the modus operandi of the Restaurant and the equipment used. DW2 is no longer working at the Restaurant or with the Defendant company. I observed him giving evidence and have no doubt that he was trying his best to relate accurately and truthfully what he knows. DW2 told me that Lazy Susans used at the Restaurant were of 2 types only: one type was in the form of just a ring (on which a tabletop would be put) and the other type being that produced as Exhibit D1 i.e. with handholds. DW2 also told me that the Restaurant used plastic tabletops for putting on Lazy Susans because they were lighter in weight. I was impressed when DW2 declined to say the Plaintiff lied in asserting that Lazy Susans at the Restaurant did not have handholds. I was also impressed when DW2 readily admitted that Lazy Susans of the second type were sometimes cracked and the coating peeled off. I did not find DW2 tendentious in favour of the Defendant when giving evidence. I accepted his evidence as true and correct. In short and quite contrary to the evidence of the Plaintiff, I find that the Lazy Susan handled by the Plaintiff on the morning in question was like Exhibit D1 with handholds and a plastic tabletop (not a glass one) would be placed on the Top Plate.

12. The Plaintiff was examined by Dr. HO Ho Pak, Henry on 23 January 2006. She was examined by Dr. TSOI Chi-Wah, Danny about a year later on 22 January 2007. The Plaintiff disagreed with the findings and opinion of Dr. TSOI which, to put it simply, was that the Plaintiff had fully recovered and could continue with “her pre-injury job as a restaurant waitress in full capacity”. The Plaintiff’s evidence was that she still suffered from pain in her right foot and that her condition when she saw Dr. TSOI and when she gave evidence remained about the same as when she was examined by Dr. HO.

13. I provide herein excerpts of the medical reports of both Dr. HO and Dr. TSOI.

14. Dr. HO’s medical report is found at Trial Bundle pages C8 to C18. The relevant parts read:

“ Present Condition

* Madam Lam complains of right foot pain after prolonged walking for more than an hour. There is also pain if she wears tight shoes as well as during change of weather.
* She is not able to squat or mob the floor as this will aggravate her right foot pain…
* She found difficulties working as a waitress after injury as prolong standing and walking cause pain and fatigue over her right leg…
* She also complains of numbness over her right foot after prolong sitting…
* She has stop (sic) playing badminton after the injury due to pain over her right foot…

Residual problems

1. Madam Lam complains of residual pain and numbness over the right foot. On examination there is tenderness over the dorsum of the right mid-foot. There is reduced range of motion of the right ankle and weakness over the right big toe. There is also slight calf wasting noted on the right side…
2. Madam Lam’s condition has stabilized. No further significant improvement is to be expected. Some residual right foot pain, toe weakness and ankle stiffness is likely to persist…
3. Madam Lam should be able to resume her pre-injury work as a waitress with some job modification. She should avoid prolong standing and should therefore take short break between work. She should avoid overtime work and should also avoid lifting too heavy objects…”

15. Dr. TSOI’s medical report is found at Trial Bundle pages C19 to 26. The relevant parts read:

“ **PRESENT PROBLEMS**

…

1. The overall condition is better than when she was assessed by Dr. Ho one year ago…

**PHYSICAL EXAMINATIONS**

***1. General Condition:***

1.1 In good health.

1.2 Walked with normal gait.

1.3 Able to perform tiptoe and heel walking.

1.4 Good balance when standing with single leg.

1.5 Could squat down fully.

1.6 Minimal wasting of right calf muscle…

***III. PRESENT CONDITION:***

* 1. …Madam Lam has recovered very satisfactorily and only complained of residual discomfort on prolonged walking for more than two hours.
  2. Upon physical examination, her right ankle and foot were in good condition. The ankle and all toes enjoyed full range of motion and strength was preserved. There was no more soft tissue swelling. In fact the exact tender spot could not be located.
  3. The ankle stiffness and wasting of right calf observed by Dr. Henry Ho one year ago had subsided completely.
  4. The condition is very satisfactorily (sic) is (sic) much better than that described by Dr. Ho.

***IV. Plan of Treatment and Prognosis:***

…

* 1. Development of complication or recurrence of symptom is not expected.
  2. The overall prognosis excellent.

***V. Permanent Impairment:***

The residual soreness, if any, incurs not more than 1% permanent impairment of whole person.

***VI. Working Capacity:***

1. Madam Lam is absolutely fit to resume her pre-injury job as a restaurant waitress in full capacity.
2. She is also fit to continue her present job as a canteen worker.
3. Her future employability is unlikely to be affected…

16. Dr. TSOI had reference to Dr. HO’s medical report (and other medical reports) when he examined the Plaintiff. He was well aware that the examination was with a view to assessing damages for personal injuries. I do not see any reason for Dr. TSOI to be partisan to either the Plaintiff or the Defendant. If the Plaintiff still suffered pain or had mentioned this to Dr. TSOI, I am sure Dr. TSOI would have recorded this in his medical report. If the condition of the Plaintiff remained about that as when she was examined by Dr. HO, I am sure Dr. TSOI would have so stated. I accept the findings and opinion of Dr. TSOI. I find the Plaintiff exaggerated her injuries (or the effect on her of those injuries) when she gave evidence before me.

17. Counsel for the Plaintiff said that even Dr. TSOI mentioned “not more than 1% permanent impairment of whole person” (see paragraph 15 above). Hence, Counsel submitted that there was residual impairment in the Plaintiff. Those words of Dr. TSOI must be read in the context of his whole report. Indeed, the relevant words are “The residual soreness, ***if any***, incurs not more than 1% permanent impairment of whole person” (emphasis added). I consider that Dr. TSOI stated this out of utmost caution. I think he intended to say no more than that impairment, if any, was de minimis.

18. For reasons mentioned herein, I arrived at the decision stated in paragraph 2 above. I see no point in continuing to assess damages as if liability has been proved.

# (Abu B. bin Wahab)

Deputy District Judge

Representation:

Mr. Christopher Mumford S.C. instructed by Messrs. K. Y. Woo & Co. for the Plaintiff

Mr. Joeson K. Y. Wong instructed by Messrs. Day & Chan for the Defendant