## DCPI 1732/2009

**IN THE DISTRICT COURT OF THE**

**HONG KONG SPECIAL ADMINISTRATIVE REGION**

PERSONAL INJURIES ACTION NO. 1732 OF 2009

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| BETWEEN | BHANA, ANGELA MARY | Plaintiff |
|  | and |  |
|  | OCEAN APEX TRADING LIMITED | Defendant |

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Coram : Her Honour Judge Mimmie Chan in Court

Date of hearing : 6 July, 2010

Date of handing down Judgment : 6 August, 2010

# JUDGMENT

**Background**

1. The Plaintiff, Ms. Bhana, then 69 of age, was shopping one evening in the "Maple" boutique at ground floor, 68 Johnston Road, Wanchai ("**Shop**"). It was a busy shop. Ms. Bhana was looking at garments hung upon racks on one side of the wall. As she stood in front of a mirror with an item of clothing in her hand, she took one step back from the mirror or the wall, and as she did so, her leg caught the leg of a shop assistant who was walking right behind her, causing both to trip. Ms. Bhana fell as a result, fracturing her left radius at the left wrist. These proceedings are instituted by Ms. Bhana against the Defendant ("**Ocean**") as operator of the Shop for damages, on the basis of its negligence and for breach of its duty of care owed to Ms. Bhana as a visitor to the Shop.

**Issues**

1. The issues on liability for determination at trial are:
   1. Did Ms. Bhana fall as a result of any negligence on the part of Ocean?
   2. Did Ms. Bhana fall as a result of any contributory negligence on her own part?
2. The quantum of damages, should liability be found, is agreed.

**Did Ms. Bhana fall as a result of any negligence on the part of Ocean?**

1. The circumstances of Ms. Bhana's fall were captured on camera by the CCTV system installed within the Shop. Time was thus saved on evidence and arguments as to how Ms. Bhana had fallen.
2. All references to the Shop in the following paragraphs of this Judgment are confined to the ground floor level of the Shop only, where the accident occurred.
3. It can be seen from the CCTV footage that at the material time, Ms. Bhana was standing with her back to the aisle or passageway leading to the cashier counter of the Shop. Ms. Bhana was standing at a short distance from the cashier counter to her right. She was browsing through garments which were hung on racks attached to the wall, taking garments from the racks and looking into the mirror on the wall to see the effect of the garments on herself. There was another mobile rack behind Ms. Bhana on which items of clothing were hung. According to Ocean, there was a distance of approximately 53 inches between the racks against the wall and the mobile racks on the other side of the aisle opposite the wall. As the racks were on both sides of the aisle, it would mean that 2 customers might stand in the aisle with their backs to each other, looking at items on the racks on different sides of the aisle. From the CCTV footage, it would appear that the aisle where the accident took place would have *just* enough room for that.
4. It was approximately 7:32 pm in the evening of 12 January 2007 when the accident took place, and the Shop was busy. Customers were waiting at the cashier counter to pay for items of purchase, and staff members were busy dealing with purchasers at the counter. Two young ladies who appeared to be sales assistants in the Shop walked past behind Ms. Bhana at different times on their way to, and from, the cashier counter in the short interval of time before the accident. The first sales assistant went past Ms. Bhana without incident. At about the same time as the second sales assistant, identified to be Miss Wang ("**Wang**"), was passing by Ms. Bhana on her way to the cashier counter, Ms. Bhana took one step back from the mirror. As she did so, one of Ms. Bhana's legs caught Wang's leg as Wang had just walked past Ms. Bhana. They both tripped, Ms. Bhana fell to the ground on the left, and broke her left wrist in the process.
5. I consider that the circumstances of Ms. Bhana's fall are largely consistent with the description set out in paragraph 2 of the Statement of Claim. Even if it can be argued by the most pedantic lawyer that Wang had not "bumped into" Ms. Bhana as so described in the Statement of Claim, I totally fail to see how Ocean can be said to be prejudiced in any way by the precise words used in the pleading, when the CCTV footage was in Ocean's possession from day one, and it was easily demonstrable to Ocean how the accident had occurred. Nor can I see, in this case, how the conduct of the Defence could have been different, whether Wang had "bumped into" Ms. Bhana, or Wang's trailing leg had caught Ms. Bhana's right or left leg as Wang was walking by and had passed Ms. Bhana, causing them to have body contact and to fall.
6. I agree that Ms. Bhana cannot be criticized as untruthful, for not being able to accurately describe how she fell. Wang was walking behind her, and Ms. Bhana did not see how she was tripped, and when or how precisely she came into contact with Wang, or how it led to her fall. The key question is whether Ocean had been negligent or in breach of its duty to Ms. Bhana as a visitor to the Shop and had caused her to fall in the way which she did.
7. According to the Statement of Claim, Ocean had failed to ensure the safety of visitors in the Shop, had failed to take adequate precautions to ensure that there was a free passageway in the shop so that visitors are free from danger, and that Ocean had caused or permitted its employees and agents to rush around the Shop to create a danger to visitors. All these allegations are denied by Ocean.
8. Ocean admits that it was the occupier of the Shop premises at the material time, although it claims that it was not then the registered owner of the Shop. It denies that it should be vicariously liable for Wang's conduct, without making any admission that Wang was its employee. Ocean further denies that the Occupiers Liability Ordinance ("**Ordinance**") is applicable to the present case.

***Legal principles***

1. It cannot be disputed that the duty of care to visitors is not an absolute duty. The law is succinctly summarized in the Judgment of Megaw LJ in *Ward v. Tesco Stores Ltd.* [1976] 1 WLR 810 at page 815, which passage was quoted by Mayo VP in *Cheung Wai Mei v. The Excelsior Hotel (Hong Kong) Ltd.* CACV 38/2000, 22 November 2000. :

"It is for the plaintiff to show that there has occurred an event which is unusual and which, in the absence of explanation, is more consistent with fault on the part of the defendants than the absence of fault … When the plaintiff has established that, the defendants can still escape from liability. They could escape from liability if they could show that the accident must have happened, or even on balance of probability would have been likely to have happened, even if there had been in existence a proper and adequate system in relation to the circumstances, to provide for the safety of customers. But if the defendants wish to put forward such a case, it is for them to show that, on balance of probability, either by evidence or by inference from the evidence that is given or is not given, this accident would have been at least equally likely to have happened despite a proper system designed to give reasonable protection for customers."

1. There is therefore no question of a guarantee of safety for visitors. What is required is for an occupier to have in place a proper and adequate system to provide for the safety of its visitors. Section 3 of the Ordinance provides that an occupier of the premises owes a common duty of care, to take such care as in all the circumstances of the case is reasonable to see that the visitor will be reasonably safe in using the premises for the purposes for which he is invited or permitted by the occupier to be there. Section 2 of the Ordinance expressly provides that the rules enacted by s. 3 of the Ordinance shall have effect to regulate the duty which an occupier of premises owes to its visitors in respect of dangers due to the state of the premises ***or to things done or omitted to be done on them***.
2. Ms. Bhana and other visitors to the Shop were clearly invited or permitted by Ocean to be there in the Shop to browse and to purchase items on display in the Shop. Clearly, the Ordinance has application to Ocean's operation and management of the Shop, should "dangers" arise due to things done or omitted to be done on the premises. The "dangers" need not be confined to the state or condition of the premises, but can be the result of the manner of operation and management of the premises.

***Application to the facts of the accident***

1. Considering the entirety of the evidence in this case, including the fact that the Shop is busy, with many garments displayed on racks which were placed not far from each other and on both sides of the aisles, I consider that Ocean, its servants and agents had fallen short of their duty to take reasonable care of visitors to the Shop like Ms. Bhana.
2. As operator of a retail shop business, it must have been reasonably foreseeable that potential customers would be standing in the aisles of the Shop to look through items of clothing displayed on the racks. It is reasonably foreseeable, in view of the layout of the Shop, that potential customers would be standing close to each other, perhaps with their backs to each other, when they are looking at items displayed on racks standing on both sides of the narrow aisles. Particularly at the location of Ms. Bhana's accident, it is reasonably foreseeable that a customer would stand in the aisle in question, and in front of the mirror which was placed on or against the wall facing the aisle. The occupier and operator of the Shop should take such care as is reasonable in these circumstances to see that the customers using the aisles between the rack of clothes would be reasonably safe.
3. Ocean, its servants and agents should foresee that collision or body contact between customers using the aisles, and collision or body contact between customers and sales assistants (and other staff) present on the premises and using the aisles, is very likely - in view of the way in which the racks are placed, the limited space available for movement on the aisle, and the traffic of people within the Shop. This is particularly so in respect of the aisle in question where the accident took place, firstly because it led directly to the cashier counter a short distance away, and further because of the presence of the mirror which was placed on the wall facing the aisle. It is reasonably foreseeable that potential customers looking through items of clothing displayed on the racks along the wall and along the aisle in question would stand in front of and near to the mirror, and hover around the mirror, for the most obvious reasons.
4. Hence, sales personnel and staff at the Shop should take care when walking up and down the aisles, and the aisle where the accident took place in particular, to avoid body contact and collision with customers standing in front of the racks. They are familiar with the layout of the Shop, and the location of mirrors near the racks, to appreciate the possibility of customers standing near the racks and the mirrors, and moving about the racks and around the mirrors, and the probability of hitting against these customers and accidents occurring as a result.
5. It can be seen from the CCTV footage that Wang was at the material time walking briskly down the aisle behind Ms. Bhana, on her way to the cashier counter, and holding items in her hands. If she had paid due care to either slow down on approaching Ms. Bhana, or to avoid walking close to Ms. Bhana and to appreciate the possibility of Ms. Bhana stepping back from the mirror before which she was standing, Ms. Bhana's leg as she stepped back would not have caught Wang's trailing leg as the latter walked past. I consider that as between customers browsing at the Shop and sales personnel working in the Shop, it is reasonable to expect sales personnel to give way to customers and to pay more attention to the presence of customers and their activities within the Shop. Amongst other things, sales personnel and the operators or managers of the Shop are more familiar with the Shop and should know that the space between the racks and the clothes on the racks are limited. As can be seen from the CCTV footage, I agree with Mr. Wright that the other sales assistant who had walked down the aisle did so at a more cautious pace and in a more careful manner, when compared to Wang, and hence she was able to avoid any mishap.
6. In considering whether Ocean is in breach of its duty, the factors to be taken into consideration by the Court include the degree of likelihood of harm, the severity of the harm, and the cost of precautions (*Clerk & Lindsell on Torts,* Nineteenth Edition, para 8-132 to para 8-138). The learned author quoted Lord Dunedin's words in the case *Fardon v. Harcourt-Rivington* (1932) 146 L.T. 391, 392:

"People must guard against reasonable probabilities, but they are not bound to guard against fantastic possibilities."

1. Bearing in mind (as I have explained in paragraphs 16 - 20) the high degree of likelihood that harm may occur in the event of customers bumping against each other or into sales personnel using the aisles between the racks of clothes in the Shop, I do not agree that the costs and practicability of overcoming the risks of injury would be outweighed by such risks. The operator of the Shop can have wider aisles between the racks of clothes, but if they do not wish to do so, they will have to adopt other means or measures to ensure that their sales personnel would not collide into or hit against customers, and otherwise to prevent slips and falls between the aisles.
2. Ocean asserts that Ms. Bhana has failed to adduce any evidence that Wang was Ocean's employee at the material time. On the evidence available and from the CCTV footages, it is clear that Wang was at the material time working as a sales assistant within the Shop, or otherwise authorized to take items to and work at the cashier counter in the Shop. I see no basis for Ocean to deny that if Wang was negligent in causing Ms. Bhana to fall, Ocean should be vicariously liable for the acts of its employee or authorized agent.
3. Mr. Wright, Counsel for Ms. Bhana, referred in his submissions to the Mediation Certificate filed on behalf of Ocean, which referred to Ms. Bhana stepping backward and kicking Ocean's "*employee*". Statements made in mediation certificates should only be considered on the question of costs, so I have not taken this into consideration in determining whether Wang was an employee of Ocean. In my opinion, there is sufficient evidence for me to conclude that Wang was either Ocean's employee or its authorized agent.

**Did Ms. Bhana fall as a result of any contributory negligence on her own part?**

1. Ms. Bhana claims that she had been to the Shop. She accepted that it was a popular shop, and on the evening in question, she could see that there were a number of customers in the Shop, with some waiting at the sales counter. Although she was concentrating on the garment which she had in her hand and on her reflection in the mirror, Ms. Bhana claims that she did not think to look behind her when she stepped back from the mirror, as she said she felt safe and did not think that there would be an accident in the Shop.
2. Bearing in mind the fact that the racks of clothes in the Shop were close to each other, and that it was a busy shop, I consider that Ms. Bhana should have looked before she stepped back from the wall and the mirror, to ensure that she would not collide with anyone passing behind her down the aisle. I consider that she was in the circumstances of the case partly to blame for the accident. I will apportion 15% of the liability to Ms. Bhana's contributory negligence in this case.

**Conclusion**

1. On the evidence available in this case, I conclude that Ocean, its servants and agents had failed to discharge its common law duty of care, and its duty under the Ordinance to take all reasonable precautions to ensure that visitors to the Shop will be reasonably safe in using the premises of the Shop for the purposes for which such visitors are invited or permitted to be there. Wang had failed to take adequate care when using the aisle in question to avoid walking too close to Ms. Bhana, or to observe or heed her presence in front of the mirror, and Ocean is vicariously liable for Wang's negligence. Ocean should be 85% liable for Ms. Bhana's damages, with interest.

1. I will further make an order nisi that the costs of the action be paid by Ocean to Ms. Bhana, with certificate for counsel, to be taxed if not agreed.

(Mimmie Chan)

District Judge

*Mr. John Wright, instructed by Messrs. John M. Pickavant & Co. for the Plaintiff*

*Mr. Dennis Law, instructed by Messrs. Clyde & Co. for the Defendant*