#### DCPI 1981/2006

IN THE DISTRICT COURT OF THE

### HONG KONG SPECIAL ADMINISTRATIVE REGION

#### PERSONAL INJURIES ACTION NO. 1981 OF 2006

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| BETWEEN | TSE PARC KI, a minor by her father and next friend,  TSE WAH YUEN JOSEPH | Plaintiff |
|  | and |  |
|  | ATLANTIC TEAM LIMITED trading as  LE BEAUMONT LANGUAGE CENTRE | Defendant |

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##### Coram: Deputy District Judge J. Ko in Court

Dates of Hearing: 3rd and 4th December 2007

Date of Handing down Judgment: 11th December 2007

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JUDGMENT

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1. Parc-ki was 2 and 1/2 years old when she was enrolled in a 12-lesson Spanish program offered by the Defendant at its language centre in Admiralty.

2. The Defendant’s language centre offered programs in various languages to infants and children. The Defendant assigned a Spanish lady called Ms. Sonia Visaltella (“Sonia”) as Parc-ki’s teacher.

3. On 1st December 2005, Parc-ki was taken by her mother to the Defendant’s language centre to attend the Spanish program as usual. Whilst at the Defendant’s language centre, Parc-ki suffered personal injuries when her right middle finger was crushed by a closing door.

4. Parc-ki, through her next friend and father, brought this action against the Defendant claiming damages for the personal injuries suffered by Parc-ki.

5. The Defendant contests both liability and quantum. The issues in this case can be summarized as follows:

a. How did the accident happen?

b. Whether the Defendant is liable for the personal injuries suffered by Parc-ki?

c. If the Defendant is liable, what is the amount of compensation payable to the Plaintiff?

How did the accident happen?

6. Parc-ki is now about 4 and 1/2 years old. Given her age, it is understandable that she has not testified at trial.

7. Parc-ki’s parents were not present when the accident happened. According to Parc-ki’s mother, she was told what had happened when she returned to the Defendant’s language centre after the accident. Tony and Emily (who were both staff at the Defendant’s language centre) told her that Parc-ki had wanted to use the toilet during the lesson and left the classroom. As Parc-ki was trying to put on her shoes at the doorway, Sonia slammed the classroom door. Parc-ki’s right middle finger was caught by the door and was crushed.

8. The Defendant put forward a very different version of events in its Amended Defence. The Defendant says that the Spanish program had already finished when the accident happened. Parc-ki had left the classroom and was no longer under the care of Sonia. As Parc-ki’s parents were late to receive Parc-ki, she had to put on the shoes herself. When she lifted up one leg to put on her shoe, she lost balance and stretched her hands backward towards the doorway. Shortly before that, Sonia had just given a gentle push to close the classroom door. Parc-ki’s right middle finger was therefore caught by the closing door and was crushed.

9. Mr. Chow Tung-shan (“Mr. Chow”), the director representing the Defendant at the trial, was not present when the accident happened. The Defendant’s centre manager Mr. Tony Chiu (“Tony”) was, however, present and claimed to have witnessed the accident. According to Tony, he was sitting at the front desk directly opposite the classroom in which Parc-ki attended the Spanish program. By the time of the accident, the Spanish program had finished and Parc-ki had left the classroom. Parc-ki was trying to put on her shoes when the Defendant’s front desk staff called Emily went over to help. When Emily raised Parc-ki’s leg to put on the shoes whilst Parc-ki was still standing, Parc-ki lost balance and scrambled for support. Parc-ki’s right middle finger was then crushed by the classroom door Sonia was closing. According to Tony, Sonia did look out of the classroom to ensure that no one was in harm’s way before closing the door.

10. I do not find Tony’s account of the accident reliable. The Defendant had been directed on 6th March, 7th June and 28th June 2007 to serve Tony’s witness statement on the Plaintiff in preparation of trial. However, the Defendant failed to comply with these directions. The Defendant only submitted Tony’s witness statement on the first day of trial before calling Tony to testify.

11. Tony’s witness statement is dated 3rd December 2007. The accident happened 2 years ago. The Defendant did not make an earlier attempt to seek a more contemporaneous account from Tony on what had happened notwithstanding the directions given. At the trial, Tony was adamant as to those facts which are beneficial to the defence (for example, the Spanish program had already ended, Sonia had checked before closing the door, and Parc-ki’s injuries were minor) but was unable to recall other matters. More importantly, there are aspects of Tony’s testimony which I find unreliable or contradictory to other indisputable evidence.

12. It is common ground that the accident happened at about 3 pm. The defence is premised upon the fact that the Spanish program had already finished by then so much so that Parc-ki was no longer under the care of Sonia. The timing of the accident is therefore crucial to the defence as the Defendant tries to argue that Sonia’s responsibility ended once Parc-ki had left the classroom. The Defendant even goes on to criticize Parc-ki’s parents for not being punctual to receive Parc-ki after class. However, the Defendant’s case (as alleged by Tony) is contradicted by the timetable issued by the Defendant for the Spanish program. According to this timetable, the program ran from 3 to 4:30 p.m.. When taxed with this discrepancy, Tony was unable to offer any explanation initially and later claims that the timing for the lesson might have changed. This has never been mentioned before, whether in the pleadings or in Tony’s witness statement. In my view, this is simply incredible.

13. Tony also says he was at the front desk directly opposite the classroom in which Parc-ki attended her Spanish program. He says he would always keep an eye on students to make sure that every one of the children would be attended by an adult. On the day in question, he saw Parc-ki emerging from the classroom and Emily moving forward to assist her. He also saw Sonia looking outside of the classroom to check before gently closing the door. He was then alerted to the accident when he heard Emily’s scream. In my view, this aspect of Tony’s testimony is also unreliable. If he really saw the whole sequence of events from the moment Parc-ki emerged from the classroom, he did not have to wait until Emily’s scream before realizing something had gone wrong. He would have witnessed Emily dislodging Parc-ki and Parc-ki trying to find balance against a closing door. He could even have shouted to warn Emily and Sonia to avoid the accident!

14. In addition, Tony tries to play down the injury by claiming that Parc-ki only suffered a blackened finger with her nail tilted upwards and there was no dripping of blood. This aspect of Tony’s testimony is contradicted by the evidence of Dr. Lo Wing-kee of Queen Mary Hospital who observed bleeding from the nail bed, and the photographs of the injured finger taken at the hospital. If Parc-ki only had suffered minor injury, there was no reason why Tony should make a 999 emergency call after the accident.

15. Two different versions of events have been put forward by the parties. I find the Defendant’s version unreliable for the above reasons. On the other hand, the Plaintiff’s version is not based on direct evidence but on hearsay evidence. Be that as it may, there is nothing for me to cast doubt on the testimony of Parc-ki’s mother as to what she was told. It is only reasonable for the Defendant’s staff to report to her when she attended the Defendant’s language centre after the accident. Tony and Emily were clearly on duty at the time. Indeed, Tony admits having spoken to Parc-ki’s mother after the accident although he now claims to have forgotten what was said to her. The Defendant has also put much emphasis on the impossibility of Sonia “slamming” the door. In my view, it matters not whether the door was slammed shut or closed gently. This is a figure of speech and a matter of perception. There is really no dispute that Parc-ki’s finger was indeed caught by the door that was closed by Sonia. What matters is whether Sonia had done what was required of her as Parc-ki’s teacher in the circumstances of this case to ensure the safety of Parc-ki. This will be discussed further below.

16. In the premises, I find the Plaintiff’s version of what happened more believable.

Whether the Defendant is liable for the personal injuries suffered by Parc-ki?

17. There is a positive duty on schoolteachers to protect their students’ well-being. The duty of a schoolteacher has been said to be to take such care of his pupils as a reasonably careful father would take of the children of the family. It is a schoolteacher’s duty to take all reasonable and proper steps, bearing in mind the known propensities of children, to prevent any of his pupils from suffering injury, whether from inanimate objects, from the actions of their fellow pupils, or from a combination of both. What things are likely to injure pupils is a question of degree, depending on the nature of the thing and the age of the pupils. A schoolteacher is also under a duty to exercise supervision over pupils whilst they are on the school premises. The amount of supervision required depends on the age of the pupils and what they are doing at the material time, but no teacher could reasonably be expected to keep a close watch on each child every minute of the day, unless there is some reason to be alerted or put on inquiry. Given the level of responsibility, the standard of care is high, although not expressed as any more than should be reasonably expected in the circumstances. See *Charlesworth & Percy on Negligence*, 11th edition (2006), §§8-179 to 8-193.

18. It is common ground that students at the Defendant’s language centre had to remove their shoes before entering a classroom. The shoes were placed at the corridor outside the classroom. It was reasonably foreseeable that students entering or leaving a classroom would have to remove or put on their shoes. A reasonably careful father would have taken care to ensure that his children have completed the process or are well clear of the doorway before closing the door. This is all the more so as the Defendant’s language centre was supposedly for infants and children as young as Parc-ki.

19. The Defendant operated the language centre and Sonia was assigned by the Defendant to run that program. In my view, the positive duty put on schoolteachers to protect their students’ well-being applies equally to Sonia. On the day in question, Sonia closed the door knowing full well that Parc-ki was still trying to put on her shoes at the doorway. Sonia was negligent in failing to ensure that Parc-ki had put on her shoes or was otherwise well clear of the doorway before closing the door. Whether the door was slammed shut or closed gently is beside the point. The Defendant as the provider of the Spanish program relied on Sonia to run the program in order to earn the course fees. In my view, the tortious act of Sonia was so closely connected with her employment with the Defendant that it would be fair and just to hold the Defendant vicariously liable.

20. The Defendant tries to argue that Sonia was not its employee but an independent contractor – a mere service provider to organize playgroups in Spanish as and when there is a demand. It is alleged that the Defendant had no control over her activities. It is said that Sonia was paid at the end of each visit and the Defendant had no control over her availability in the following week. This allegation is contradicted by the program timetable which promised parents a 12-lesson program, and the payment vouchers which evidence monthly payments from the Defendant to Sonia between September 2005 and February 2006. At the trial, Mr. Chow and Tony refuse to elaborate on the relationship between the Defendant and Sonia after being reminded of their right against self-incrimination and the fact that Sonia might not be legally employable in Hong Kong at the time. In the end, there is simply nothing to support the defence that Sonia was not an employee of the Defendant.

21. In the premises, I find the Defendant liable for the personal injuries suffered by Parc-ki.

22. In fact, had I accepted the Defendant’s version of what transpired, I would still find the Defendant liable. By lifting Parc-ki’s leg at the doorway whilst Parc-ki was standing and against a closing door, Emily was clearly negligent. Emily could have led Parc-ki away from the doorway or seated Parc-ki before helping her to put on her shoes. Emily was an employee of the Defendant and the Defendant should therefore be vicariously liable.

# What is the amount of compensation payable to Plaintiff?

23. After the accident, Parc-ki was taken to the Accident and Emergency Department of Queen Mary Hospital. Physical examination by Dr. Lo Wing-kee showed avulsed nail and bleeding from the nail bed in the right middle finger. X-ray showed a chip fracture in the distal phalanx.

24. Parc-ki was then transferred to Hong Kong Sanitorium & Hospital for treatment by Dr. Chan Chi-king. Upon examination under general anaesthesia, Dr. Chan found Parc-ki’s right middle finger crushed over the nail with 2/3 of the volar skin intact. Dr. Chan removed the damaged nail and closed the laceration wound with 5 “O” vincryl. It was uneventful after the operation. The wound was dressed daily and Parc-ki was discharged home on 3rd December 2005.

25. Parc-ki attended follow-up treatment on 5th, 7th and 12th December 2005. Dr. Chan opined in his medical report dated 24th February 2006 that Parc-ki’s right middle finger would gradually heal-up. According to Parc-ki’s mother, it took 8 months for Parc-ki to get over from being conscious of the injury. Thankfully, there is nothing to suggest that Parc-ki has suffered any permanent disability.

26. According to the Revised Statement of Damages, the Plaintiff is claiming the following damages:

* 1. $150,000 for PSLA
  2. $50,000 for future loss of earnings / loss of opportunity
  3. $50,000 for loss of earning capacity / handicap in the labour market
  4. $2,064.79 for re-imbursement of the unused portion of the course fee
  5. $49,169 for medical expenses at Hong Kong Sanitorium & Hospital
  6. $1,560 for medical expenses paid to Dr. Chan
  7. $2,000 for tonic food
  8. $70 for taxi fare

27. The Plaintiff’s counsel fairly concedes the claim for “future loss of earnings / loss of opportunity” and the claim for “loss of earning capacity / handicap in the labour market”. In any event, I do not think such an award is justified given the fact that Parc-ki has not suffered any disability that would affect her future earning capacity.

28. As to the claim for damages for PSLA, the Plaintiff’s counsel (who did not settle the Revised Statement of Damages) relies on *Singh Jagdeep v. VSC Engineering Products Company Limited*, DCPI 391/2005 and *Yu Pau Yau v. Co-Ray Design & Construction Limited*, DCPI 864/2006 and now suggests a figure of $50,000 to $100,000.

29. In *Jagdeep*, the plaintiff’s left hand was hit by a broken disc from an electric disc cutter machine. He suffered abrasion over the left dorsal part of his hand. Fingers’ movement and sensation were otherwise normal and there was no fracture. Sick leave was granted for a total of 16 days. The learned judge found that the plaintiff had suffered a ½ cm abrasion with minimal pain and suffering and awarded $30,000 for PSLA in June 2005. I find Parc-ki’s injury slightly more serious than that suffered by the plaintiff in *Jagdeep*.

30. In *Yu Pau Yau*, the plaintiff’s left index finger was cut by the spinning blade of an electric trimmer machine. Physical examination at the hospital revealed a complete cut of the flexor digitorum profundus tendon, a complete cut of the radial and ulna digital nerve, and a complete cut of the ulna slip of the flexor digitorum superficialis. There was also a 50% cut of the radial slip of the flexor digitorum superficalis. Over 2 months’ sick leave was granted. The learned judge assessed PSLA at $200,000. I do not find *Yu Pau Yau* helpful as the plaintiff there had suffered personal injuries far more serious than Parc-ki.

31. The Defendant alleges in its Amended Defence that Dr. Chan had said at the hospital that there would be a lost of senses once the finger was cracked. What the Defendant tries to suggest is that everything happened so quickly that there was no time for Parc-ki to feel any pain. There is no such reference in Dr. Chan’s medical report dated 24th February 2006. The Defendant has not called Dr. Chan or adduced any medical evidence to support this contention. The medical reports and the photographs reveal not a trivial injury. I am not prepared to accept the Defendant’s contention without proper medical evidence.

32. Taking everything into consideration, I consider that an award of $40,000 for PSLA is justified.

33. In relation to medical expenses, the Defendant alleges in its Amended Defence that Parc-ki should have mitigated loss by having the operation at Queen Mary Hospital. At the trial, it is Mr. Chow’s own evidence that he had agreed to send Parc-ki to Hong Kong Sanatorium & Hospital so as to provide the best medical treatment to her. It is now too late for the Defendant to go back on its promise.

34. It is then alleged by the Defendant that Parc-ki should have received treatment in the 2nd class ward (as opposed to the 1st class ward) at Hong Kong Sanatorium & Hospital in order to mitigate loss. Mr. Chow testifies that he had requested Parc-ki’s father so to do when the difference of the charges were explained to them at the hospital. Parc-ki’s father denies having had such conversation with Mr. Chow.

35. It is common ground that Mr. Chow has paid a deposit of $25,000 to the Hong Kong Sanatorium & Hospital to defray Parc-ki’s future medical expenses. It is unclear from Mr. Chow’s testimony whether the alleged conversation happened before or after he had paid the deposit. If it happened before that and he did not agree to put Parc-ki in the 1st class ward, there is no reason why he should paid the deposit. If it happened after he had paid the deposit, there is no reason why the Defendant should omitted to raise this issue earlier when the Defendant was still legally represented. In any event, I find Mr. Chow’s agreement to provide the best medical treatment to Parc-ki and the payment of deposit of $25,000 by Mr. Chow more consistent with Parc-ki’s father’s testimony.

36. Other than the issues discussed above, Mr. Chow confirms that the Defendant has no further challenge on the claims highlighted in paragraphs 26(d) to (h) above. In fact, Mr. Chow says the Defendant would have refunded the unused portion of the course fee to the Plaintiff had the Plaintiff approached the Defendant for reimbursement. On the other hand, I agree with the Plaintiff that credit should be given to the $25,000 paid by Mr. Chow.

37. Interest will be awarded at 2% p.a. on general damages for PSLA from the date of the writ. Interest on the re-imbursement should be at 11% p.a. from the date of the writ. Interest on other special damages will be awarded at 5.5% p.a. from the date of the accident.

Conclusion

38. The Defendant is liable to the Plaintiff for the personal injuries suffered by Parc-ki. There will be judgment in favour of the Plaintiff and against Defendant in the sum of $76,924 calculated as follows:

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| PSLA | $40,000 |
| Interest on PSLA | $907 |
| Re-imbursement of course fee | $2,065 |
| Interest on re-imbursement | $258 |
| Special damages | $52,799 |
| Interest on special damages | $5,895 |
| Sub-total | $101,924 |
| Less: Deposit paid by Mr. Chow | ($25,000) |
| Total | $76,924 |

39. There will also be a costs order *nisi* that the Defendant should pay the Plaintiff costs of this action, to be taxed if not agreed with certificate for counsel. Unless an application has been made to vary the costs order *nisi*, the order shall become absolute 14 days after the judgment is handed down.

40. As the facts of this case reveal that the Defendant might have committed a criminal offence in employing Sonia who was not legally employable in Hong Kong at the time, the case is referred to the Department of Justice through the Registrar for investigation.

# (J. Ko)

Deputy District Judge

Representation:

Mr. C.K. Wong, instructed by Messrs. Chau & Associates, for the Plaintiff

Defendant: appearing in person